Spring 2001

"There's No Crying in Baseball": Sports and the Legal and Social Construction of Gender

Rhonda Reaves
Florida A&M University College of Law, rhonda.reaves@famu.edu

"There's No Crying in Baseball": Sports and the Legal and Social Construction of Gender

Rhonda Reaves[*]

---

* Associate Professor of Law, Loyola Law School, Loyola Marymount University. A version of this Article was presented at the University of Iowa College of Law's Symposium—A Critical Legal Perspective on Entertainment: Sports, Sex and Identity—hosted by the *Journal of Gender, Race & Justice* on October 15-16, 1999. A Loyola Law School Summer Research Grant supported work on this project. I would like to thank William Araiza, Sande Buhai, Robert Chang, Catherine Fisk, Lisalyn Jacobs, Lary Lawrence, Audrey McFarlane, Sherene Razack, Sean Scott, Theodore Seto, and Gary Williams for their thoughtful comments and suggestions on earlier drafts. I would also like to thank Robert Sievers and Petty Tsay for their excellent research assistance and Mark Graham of the *Journal of Gender, Race & Justice* for his editorial assistance.

Dugan: Are you crying?
Player: No.
Dugan: Are you crying?
Player: (Shakes head)
Dugan: Are you crying? There's no crying in baseball. There's no crying in baseball. Roger Hornsby was my manager and he called me a talking pile of pig shit. And that was when my parents drove all the way down from Michigan to see me play the game. And did I cry?
Player: No?
Dugan: No. No. And do you know why?
Player: No.
Dugan: Because there's no crying in baseball. There's no crying in baseball. No crying.
Umpire: What's the matter, Jimmy?
Dugan: She's crying, sir?
. . . .
Umpire: Perhaps you chastised her too vehemently. Good rule of thumb. Treat each of these girls as you would treat your mother.[1]

I. INTRODUCTION

The film, *A League of Their Own*, is based on the All-American Girls Professional Baseball League.[2] Chicago Cubs' owner, Philip K. Wrigley, and other major league baseball club owners started the league in 1943 to replace men's major league baseball, which had been put on hold during the World War II years.[3] Meant as a temporary substitute, the league survived the end of the war and lasted until 1954.[4]

Women's participation in the league, which in some ways paralleled women's participation in the workforce during the war years in previously male-dominated industries, raised questions about proper gender roles.[5] One concern was that women's participation in sports (or in certain jobs) would have the negative effect of masculinizing women. While one response to this concern might have been to exclude women from sports or from certain jobs, the exigencies of the war and the profit motives of the baseball club owners

---

1. A LEAGUE OF THEIR OWN (Columbia Pictures 1992).

2. *Id.*

3. For a history of the All-American Girls Baseball League, see SUSAN K. CAHN, COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH CENTURY WOMEN'S SPORT 140-63 (1994); NIKE IS A GODDESS: THE HISTORY OF WOMEN IN SPORTS 46-49 (Lissa Smith ed., 1988).

4. CAHN, *supra* note 3, at 147.

5. *Id.* at 3.

precluded this response.[6] Given the participation of women in previously male-dominated sectors, the concerns shifted to how the women were to behave, and how they were to be treated. Was their similarity to men to be emphasized? Or their difference?[7]

These questions are encapsulated in *A League of Their Own*.[8] In the film, Tom Hanks plays Jimmy Dugan, an alcoholic former baseball star who manages one of the new women's teams, the Rockford Peaches.[9] In the early games of the season, a barely lucid Dugan pays scant attention to his team. They are not worth his attention because he does not consider them to be legitimate professional athletes. As the Peaches begin to win, Dugan begins to regard them as athletes and takes more of an interest in their success.[10] In the above excerpt, Dugan scolds one of the players, the right fielder, for an error that costs the team the lead. The player is reduced to tears.[11]

Dugan justifies the scolding by pointing out that that was the way he was treated when he was a professional player, and says that if the player wants to be considered a "ballplayer" she must learn to "take it like a man."[12] Dugan's diatribe demonstrates the view that to be taken seriously as an athlete, women must replicate the behaviors prevalent in male-dominated sports. Acceptance of this model leaves no room for women to complain of conditions that are unique to them or disparately affect them because they are women and also athletes.[13] The insistence on sameness might provide opportunities for women, but it comes at a cost. The umpire's response that emphasizes difference, for example, while providing for kinder treatment,

---

6. *Id.* at 148-163.

7. The question of sameness and difference animates much of feminist theory. *See* Anthony Appiah, *The Uncompleted Argument: Du Bois and the Illusion of Race*, *in* "RACE," WRITING, AND DIFFERENCE 21, 25 (Henry Louis Gates, Jr. ed., 1985) (describing "on the one hand, a simple claim to equality, a denial of substantial difference; on the other, a claim to a special message, revaluing the feminine Other not as the helpmeet of sexism, but as the New Woman"). *See also* Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 798 (1989) ("I start out, as have many others, from the deep split among American feminists between "sameness" and "difference.").

8. A LEAGUE OF THEIR OWN, *supra* note 1.

9. *Id.*

10. *Id.*

11. *Id.* While the encounter between Dugan and the right fielder is fictional, the professional women's baseball league featured in the film is based on the true experiences of the league that existed between 1943 and 1954. *Id.*; CAHN, *supra* note 3, at 140-163.

12. A LEAGUE OF THEIR OWN, *supra* note 1.

13. Kimberle Crenshaw observes that while African-American women experience discrimination both because of their gender and because of their race, anti-discrimination laws treat characteristics such as race and gender as separate and distinct. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Anti-racist Politics*, 1989 U. CHI. LEGAL F. 139, 140. She argues that this single-issue approach leads to further marginalization of those caught at this intersection of race and gender. *Id.*

can result in foreclosing opportunities. After all, there are some things that you might not want to let your mother do. Different notions of proper gender roles animate the "sameness" vs. "difference" debate.[14]

Although the All-American Girls Professional Baseball League provided an opportunity to explore the intersection of gender and sports, its early demise in 1954 led to this discussion being put on hold. Today, with the ever-increasing participation of girls and women in sports, it is time to revisit that conversation. While *A League of Their Own* involved professional sports, this Article focuses on sports in the educational context as an important opportunity for legal intervention because of the stronger role that the law plays in this environment. Because the law involves the allocation of resources and the policing of behavior by the government, this discussion prompts us to ask how resources should be allocated and what kinds of behavior should be encouraged and discouraged in promoting gender equity. In particular, the analysis of sports within educational programs offers an opportunity for a critical examination of current models of athletic participation that foster an environment in which harassment often occurs.

In Part II, I examine the role that Title IX has had in increasing the participation of girls and women in sports. This increase has brought attention to the treatment of athletes, both men and women. High-profile accounts of verbal and physical abuse of athletes by coaches and by other athletes have led to a re-examination of coach/athlete and athlete/athlete relations. I examine some of these accounts. In Part III, I focus on sexual harassment as the primary area where law, through Title IX, places constraints on behavior. I focus on harassment as an important situation which causes law and sports to intersect. Law, by defining the negative, helps to shape what can take place in the positive sphere by defining allowable behavior and treatment of athletes. Thus, looking at what is impermissible allows an exploration of what coaches and athletes ought to do to transform our present notion of what constitutes an athlete and how proper gender roles should be defined. In Part IV, I sketch the preliminary contours of how we might manage the sameness/difference debate by imagining new models for athletic behavior.

II. TITLE IX AND PARTICIPATION IN ATHLETICS

Title IX of the Education Amendments of 1972[15] sets forth a seemingly straightforward mandate: "no person . . . shall, on the basis of sex, be excluded from, denied the benefits of, or subject to discrimination under any program" conducted by an educational institution that is the recipient of

14. These gendered models of athletic participation are discussed in Part IV of this Article.

15. 20 U.S.C. § 1681 (1994).

federal financial assistance.[16] Title IX not only changed the educational landscape for female students, it also changed the landscape for female athletes because the "programs" covered by the statute applied to athletic programs as well as to admissions and scholarship programs.[17] After the passage of Title IX, educational institutions were required to equalize athletic opportunities and programs for men and women or risk losing federal funding.[18]

The passage and enforcement of Title IX has provided women with unprecedented opportunities to participate in organized sports at all levels—elementary,[19] high school,[20] and college.[21] Although Title IX only applies to educational institutions, the increase in participation at the high school and college level has created a pool of talent that has gone on to participate in contests like the Olympic games[22] and professional sports.[23] The gold-

---

16. *Id.*

17. *Id.*

18. With respect to athletics, Title IX covers three major areas: financial assistance, accommodation of student interests and abilities, and other athletic benefits and opportunities. Athletic benefits and opportunities include: equipment and supplies, scheduling of games and practice times, travel and per diem allowances, coaching, locker rooms and other facilities, medical and training facilities and services, housing and dining facilities and services, and publicity. Discrimination on the Basis of Sex in Education Programs and Activities Prohibited, 34 C.F.R. § 106.41 (2000). While each team need not get exactly the same services, overall men's programs and women's programs must receive the same level of services, facilities and supplies. KATHRYN M. REITH, PLAYING FAIR: A WOMEN'S SPORTS FOUNDATION GUIDE TO TITLE IX IN HIGH SCHOOL & COLLEGE SPORTS 19 (1999), *available at* http://www.womenssportsfoundation.org/binary-data/WSF_ARTICLE/ pdf_file/ 195.pdf.

19. Participation of girls ages 6-11 in fifteen vigorous sports increased from 2 million in 1987 to 3.8 million in 1998. WOMEN'S SPORTS FOUNDATION, *Women's Sports Facts, in* TITLE IX: AN EDUCATION RESOURCE (1999).

20. In 1971, prior to the passage of Title IX, less than 300,000 girls participated in high school sports nationwide, compared to over 3.6 million male participants in the same year. But, twenty-seven years after the passage of Title IX, female participation at the high school level has grown nine-fold. By 1998, approximately 2.7 million girls and over 3.7 million boys played high school sports. WOMEN'S SPORTS FOUNDATION, WOMEN'S SPORTS FOUNDATION POSITION ON CURRENT TITLE IX ISSUES 1 www.womensportsfoundation.org/templates/res_center/rclib/results_topics.html?record=28 (last visited Jan. 25, 2001) (on file with author).

21. The number of women participating at the college level has doubled since the passage of Title IX. The number of women athletes participating in sports increased from fewer than 50,000 participants in 1971 to over 100,000 in 1997. Male athlete participation increased from over 150,000 in 1971 to approximately 200,000 in 1997. WOMEN'S SPORTS FOUNDATION, PARTICIPATION STATISTICS PACKET (May, 1999) (including annual statistical reports from 1971 to 1997). While men's participation rates increased, the percentage increase for men was less than for women athletes. *Id.*

22. The number of women participating in the Olympics has nearly tripled since the passage of Title IX. More than 3,500 (3,684) girls and women participated in the 1996 Olympics as compared to 1,058 women in the 1972 Olympics. Women made up thirty-four percent of all Olympic participants in 1996. WOMEN'S SPORTS FOUNDATION, *supra* note 21, at 12.

23. Riding the wave of Olympic success from the Atlanta Games, two women's professional basketball leagues were launched—the American Basketball League in 1996 and the

medal-winning women's basketball team in the 2000 Summer Olympics, the hockey team in the 1998 Winter Olympics, and the soccer team in the 1999 World Cup are examples of the spectacular successes of women who came of age in the Title IX era. Even so, increased participation in sports by women is only a partial success.

While Title IX has been successful in getting women "on the playing field," it leaves somewhat unresolved how they should be treated once they get there. Title IX's proclamation of equality is misleading.[24] While mandating formal equality, such as equal training facilities and equal funding,[25] it implicitly presumes that the structure of women's sports is to be

---

Women's National Basketball Association in 1997. *See* Brad Parks, *Not Just an Old Boys' Club; Women's Pro Leagues Make Bid for the Big Time*, WASH. POST, Oct. 20, 1996, at A1, 1996 WL 13427411. The two leagues combined created almost 200 jobs for women basketball players in the United States. Michael Kane, *What's a Woman to Do? Death of One League Again Means Dearth of Pro Options in U.S.*, DENV. POST, Dec. 27, 1998, at C1, 1998 WL 18535265. This number fell dramatically, however, in 1999, after the American Basketball League folded. *Id.* A women's professional softball league began play in 1997. *See* Kelley King, *A Big Hit in Little Cities: A Women's Pro Softball League Has Found Its Niche*, SPORTS ILLUS., Sept. 6, 1999, at R1, 1999 WL 22047576; Parks, *supra*. The Women's United Soccer Association (WUSA), a women's professional soccer league, is scheduled to launch in spring 2001. *See* Peter Brewington, *Women Attack Crowded Field: Games to Begin in Spring 2001 for 8-10 Teams*, USA TODAY, Feb. 16, 2000, at 14C, available at LEXIS Newsfile; Mark Zeigler, *In WUSA, Women's Soccer Turns Pro*, SAN DIEGO TRIB., Feb. 19, 2000, at D1, 2000 WL 13948798. A women's professional football league began play in 2000. *See* Kim Horner, *A Field of Football Dreams: Newly Created League for Women Holds Tryouts at Local Park*, DALLAS MORNING NEWS, Aug. 13, 2000, at 43A, 2000 WL 24851450. Plans for a women's professional ice hockey league are on hold. *See* David Shoalts, *Women's Pro Hockey League Remains a Dream; More Quality Players Needed to Make It Go, Members of Gold-Medal Winning Canadian Team Say*, GLOBE & MAIL, Mar. 16, 1999, at S1.

24. The equality premise in Title IX does not mean that women are allowed to compete equally with or against men in all sports. Title IX permits schools to operate separate teams for men and women where the selection for such teams is based upon competitive skill or the activity involved is a contact sport, such as boxing, wrestling, rugby, ice hockey, football and basketball. For contact sports, the institution need not offer a separate women's team nor allow women to try out for the men's team. Discrimination on the Basis of Sex in Education Programs and Activities Prohibited, 34 C.F.R. 106.41 (2000). The "separate but equal" philosophy adopted in Title IX's implementing regulations sparked a vigorous debate. On the one hand, some argue that the regulations benefit women because if teams were integrated on a gender-neutral basis, the result would be fewer opportunities for women overall, because men would dominate. On the other hand, some argue that the enforced gender line hurts the "extraordinary" woman, the woman fully capable of competing against men, and further that the contact sport exemption itself violates the Equal Protection Clause. *See generally* Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381 (2000) (arguing that the contact sports exception violates Equal Protection); Karen L. Tokarz, *Separate But Unequal Educational Sports Programs: The Need for a New Theory of Equality*, 1 BERKELEY WOMEN'S L.J. 201, 205 (1985) (asserting that sex segregation in athletics violates Equal Protection).

25. Although women's athletic programs have gained ground in garnering a more equitable share of funding, inequities remain. For example, at the major college level women constitute 42% of the athletes. In 1998-99 they received about 40% of athletics-scholarship budgets, 31% of recruiting budgets, 34% of coaching-salary budgets, and 33% of total operating expenses. *See* Welch Suggs, *Uneven Progress for Women's Sports: A Chronicle Survey Finds Gains at Big-Time Football Powers, Struggles at the 'Have-Nots,'* CHRON. HIGHER EDUC., Apr. 7, 2000, at A52. The major college level includes schools in Division I of the National Collegiate Athletic Association (NCAA). The NCAA is a voluntary athletic organization made up of 977 schools classified in three divisions—Division I has 318 schools, Division II has 264, and Division III has 395. NATIONAL

modeled on men's sports.[26] Superimposing a male structure encourages women to replicate behaviors prevalent in male-dominated sports[27] and fails to account for those areas where the experiences of women athletes may deviate from those of their male counterparts, such as vulnerability to sexual harassment.[28]

III. TITLE IX AND SEXUAL HARASSMENT[29] IN ATHLETICS

Sex-based harassment of students is a real and serious problem in education at all levels.[30] I use the term sex-based harassment to allow for a discussion of both the traditional notion of sexual harassment and harassment based on gender. In this section, I will examine sex-based harassment in athletics, the full extent of which is unknown because of underreporting. I will then examine Title IX and will argue that one of the limitations of Title IX is that it borrows too heavily from Title VII

COLLEGIATE ATHLETIC ASSOCIATION, ADMINISTRATION AND GOVERNANCE, *at* http://www.ncaa.org (last visited Jan. 25, 2001).

26. This Article concentrates specifically on the implications of the adoption of the "male model" of athletic participation in women's team sports and more specifically those sports that qualify as contact sports under Title IX's implementing regulations. *See infra* Part IV.C and 34 C.F.R. § 106.41.

27. Hazing, for example, is prevalent in male sports. Hazing is a term used to describe various initiation rites within groups. There is no universally accepted definition of hazing. A 1999 study by Alfred University of hazing rituals on various college campuses defined hazing as "any humiliating or dangerous activity expected of you to join a group regardless of your willingness to participate." ALFRED UNIVERSITY, NATIONAL SURVEY: INITIATION RITES AND ATHLETICS FOR NCAA SPORTS TEAMS 8 (1999), *available at* http://www.alfred.edu/news/html/hazing_study_99.html (last visited Apr. 16, 2001). Females were found almost as likely as males to take part in some form of hazing activities. Females, however, were less likely to participate in the more extreme forms of hazing. *Id.*

28. *See* Celia Brackenridge & Sandra Kirby, *Playing Safe: Assessing the Risk of Sexual Abuse to Elite Child Athletes*, 32 INT'L REV. SOC. SPORT 407, 412 (1997) (stating that female athletes "demonstrat[e] a higher degree of vulnerability" to harassment and abuse, a "higher awareness" of harassment and abuse and a "wider variation in the types of abuse[] they experienced" than males).

29. The terms "sexual abuse" and "sexual harassment" are often used interchangeably. Sociologists suggest that sexual abuse is a more severe form of sexual harassment, that both are "stages along the continuum of sexual violence." *See* Celia Brackenridge, *"He Owned Me Basically . . .": Women's Experience of Sexual Abuse in Sport*, 32 INT'L REV. SOC. SPORT 115, 116-17 (1997) (noting that the line between harassment and abuse is unclear, but suggesting that abuse involves groomed or coerced behavior where the abuser entices or entraps the target of the abuse to the point where the conduct appears to be wanted, while sexual harassment, on the other hand, involves unwanted attention).

30. According to one report, twenty to thirty percent of undergraduate female students are the victims of some form of sexual harassment by at least one of their professors during their undergraduate years. *See*; L. Fitzgerald et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. VOCATIONAL BEHAVIOR 152, 155 (1988) (citing BILLIE WRIGHT DZIECH & LINDA WEINER, THE LECHEROUS PROFESSOR: SEXUAL HARASSMENT ON CAMPUS (1984))(reporting that in a survey of two universities, one-half to two-thirds of undergraduate women reported they had experienced sexual harassment under an expanded definition of harassment which includes sexist remarks and other forms of gender harassment).

jurisprudence and is unable to account fully for the differences between education and employment. Further, I will pay special attention to what qualifies as harassment. The effectiveness of Title IX is further limited by the heavy burden that must be met before an educational institution can be held liable.

A. The Extent of Harassment and the Problem of Underreporting

High-profile sexual harassment allegations against well-known coaches have focused attention on the problem of sexual harassment in sports.[31] University of North Carolina soccer players and Syracuse University tennis players, for example, accused their respective coaches of sexual harassment.[32] In *Jennings v. University of North Carolina*,[33] a University of North Carolina soccer player, Debbie Keller, a former U.S. national team player and a former college player of the year, accused her North Carolina soccer coach Anson Dorrance of inappropriate behavior, including making uninvited sexual comments.[34] Another former North Carolina player, Melissa Jennings, accused Dorrance of creating a hostile environment for her before cutting her from the team.[35] In *Ericson v. Syracuse University*,[36] tennis players at Syracuse University accused their male tennis coach, Jesse Dwire, of inappropriate conduct including unwanted massages, sexist comments and sex-related conversations.[37] Unfortunately, there are no

---

31. For timely discussions of sexual harassment in sports, see Joe Mathews, *Compton Coach Charged With Molesting Player; Courts: Dominguez High Mentor Russell Otis, Who Has Strongly Denied Wrongdoing, Will Plead Not Guilty, His Lawyer Says*, L.A. TIMES, Nov. 18, 2000, at B1, 2000 WL 25919539 (reporting on charges of sexual abuse brought against a "nationally prominent coach of one of Southern California's best high school basketball teams"); RESOLUTION ON THE PREVENTION OF SEXUAL HARASSMENT AND ABUSE OF WOMEN, YOUNG PEOPLE AND CHILDREN IN SPORT, 9TH COUNCIL OF EUROPE CONFERENCE OF MINISTERS RESPONSIBLE FOR SPORT (2000), *at* http://culture.coe.fr/Infocentre/txt/eng/espres00.3.html (resolving to prepare a national policy regarding the problem of sexual abuse in sports and to implement that policy within a specific timetable); Danielle Deak, Comment, *Out of Bounds: How Sexual Abuse of Athletes at the Hands of Their Coaches Is Costing the World of Sports Millions*, 9 SETON HALL J. SPORT L. 171 (1999) (noting that sexual abuse in sports is increasingly prevalent); John T. Wolohan, *Sexual Harassment of Student Athletes and the Law: A Review of the Rights Afforded Students*, 5 SETON HALL J. SPORT L. 339, 340-41 (1995) (noting that sexual harassment suits against coaches are rare, but suggesting athletic administrators can no longer ignore the issue and articulating the basis of sexual harassment between coaches and players).

32. Jennings v. Univ. of N.C., No. 98 C 5261, 1991 WL 301669, at *1 (N.D. Ill. Apr. 30, 1999); Ericson v. Syracuse Univ., 35 F. Supp. 2d 326 (S.D.N.Y. 1999).

33. 1999 WL 301669, at *1.

34. Gary Davidson, *N.C. Soccer Coach Denies Suit Charges*, USA TODAY, Aug. 26, 1998, at 1C, 1998 WL 5734003 (quoting athletic director Dick Batter).

35. *Id.*

36. *Ericson*, 35 F. Supp. at 327.

37. *See* Paul Riede, *Former Players Help Case Against SU Depositions, Accuse Tennis Coach Jesse Dwire of Sexual Harassment, Begun in '78*, HERALD AM., Jan. 24, 1999, at A1, 1999

accurate statistics on the number of athletes who are abused or harassed. Harassment cases involving athletes are a small percentage of the harassment cases filed with the Department of Education, the agency charged with oversight of Title IX compliance.[38] There are also relatively few reported Title IX cases involving allegations of sexual harassment of athletes by coaches.[39]

There are, however, reasons to suspect that incidents of harassment of athletes occur more frequently than are reported.[40] Surveys of athletes and highly publicized media accounts of athletes alleging harassment, such as those described in *Jennings v. University of North Carolina*[41] and *Ericson v.*

WL 4663057 [hereinafter *Former Players*]. A university panel concluded that Dwire violated the school's sexual harassment policy and its discrimination policy. The university's vice president for human resources shortened the panel's recommended two-year suspension without pay to three months. *See Students: Harassment Has Gone Unpunished*, TIMES UNION, Dec. 5, 1997, at C4, 1997 WL 14934092. Syracuse University settled the sexual harassment suit filed by two former Syracuse tennis players. *See* Paul Riede, *SU Tennis Suit Settled: Two Former Players Accused a Coach of Inappropriate Massages*, SYRACUSE HERALD-J., Mar. 26, 1999, at C1, 1999 WL 4674157; John Kekis, *Syracuse Settles Harassment Suit*, AP ONLINE, Mar. 26, 1999, 1999 WL 14515041.

38. According to the Department of Education, from October 1, 1994 through September 30, 1999, 927 sexual harassment claims were filed. Sexual harassment claims constituted 832 of the 927 claims. Females filed 683 of those 832 sexual harassment claims. Athletes filed 544 claims. Female athletes filed only 7 claims of sexual harassment, and one of those claims was for employment-related sexual harassment. In addition, the Office of Civil Rights initiated two sexual harassment investigations of female athletes. Department of Education, Office of Civil Rights, Statistics on Sexual Harassment Claims by Female Athletes Under Title IX (October 11, 2000) (on file with author).

39. *See, e.g.*, Seamons v. Snow, 864 F. Supp. 1111, 1123 (D. Utah 1994) (dismissing Title IX harassment suit against a school district because the alleged facts did not support the claim that actions were motivated by an intent to discriminate because of the victim's sex), *aff'd in part, rev'd in part*, 84 F.3d 1226 (10th Cir. 1996); Brzonkala v. Va. Polytechnic and State Univ., 935 F. Supp. 772, 778 (W.D. Va. 1996) (dismissing Title IX suit against the University because the plaintiff failed to allege facts to support the necessary discriminatory intent based upon sex), *aff'd sub nom.* United States v. Morrison,120 S. Ct. 1740 (2000) (dismissing Violence Against Women (VAWA) claims as unconstitutional because Congress exceeded its powers under the commerce clause and enforcement clause of the 14th Amendment); Seneway v. Canon McMillan Sch. Dist., 969 F. Supp. 325, 336 (1997) (denying motion for summary judgment of Title IX claim against school district because there were genuine issues of material fact); Klemencic v. Ohio State Univ., 10 F. Supp. 2d 911, 921-22 (S.D. Ohio 1998) (granting summary judgment for Ohio State University on Title IX claims because plaintiff failed to present sufficient evidence of a hostile environment and quid pro quo sexual harassment); *Ericson*, 35 F. Supp. at 330-31 (denying the defendant's motion for summary judgment of Title IX claims because the allegations support a claim).

40. In a 1996 survey of American female college students on relations between female athletes and college coaches, twenty percent reported they were subjected to potentially threatening behavior. Eighteen percent experienced derogatory remarks and sexist jokes. Karin A.E. Volkwein et al., *Sexual Harassment in Sport: Perceptions and Experiences of American Female Student-Athletes*, 32 INT'L REV. FOR SOC. SPORT 283, 291 (1997). A 1996 survey of 260 current and retired Canadian Olympic competitors by a Canadian researcher revealed that just under twenty-two percent said they had experienced sexual encounters with authority figures. *See Olympic Officials Address Abuse Involving Athletes*, ATLANTA J. & CONST., Nov. 6, 1997, at 3E (citing the 1996 survey); *see also* Deak, *supra* note 31 at 171-95 (discussing the problem of sexual abuse of athletes and suggesting reforms).

41. No. 98 C 5261, 1999 WL 301669 (N.D. Ill. Apr. 30, 1999).

Syracuse University,[42] add to the weight of the evidence suggesting that the official numbers are under-representative of actual harassment that occurs in these environments.[43] Among the potential reasons for the underreporting are: 1) fear of reprisal;[44] 2) uncertainty about the boundaries of appropriate behavior;[45] and 3) inadequate complaint procedures at the institution where the harassment occurred.[46] And even if more women came forward to allege mistreatment by coaches, it is unclear whether Title IX would provide a remedy for such claims. If the law offered a more viable remedy, the number of women athletes filing harassment claims might well increase.

---

42. 35 F. Supp. 2d 326 (S.D.N.Y. 1999).

43. *See, e.g., supra* notes 37 and 40.

44. Robin Finn, *Public Hugs, Private Harm: Rise in Harassment Cases Accompanies Title IX Victory*, CHI. TRIB., May 26, 1999, at 8, *available at* 1999 WL 2877186 (reporting on research that concludes that statistics on sexual harassment are scarce in part because athletes are afraid to lose their spots on teams).

45. Sociologists Alan Tomlinson and Ilkay Yorganci studied the relationships between male coaches and female athletes in the United Kingdom. *See* Alan Tomlinson & Ilkay Yorganci, *Male Coach/Female Athlete Relations: Gender and Power Relations in Competitive Sport*, 21 J. OF SPORT & SOC. ISSUES 134, 143-44 (1997). Their study suggested that while most of the athletes questioned denied suffering sexual harassment at the hands of their coaches, the behavior the women did acknowledge experiencing might constitute sexual harassment in other contexts. For example, almost one in four of those who denied any knowledge of sexual harassment experienced one or more of the following in relation to their male coach: "demeaning language, verbal intrusion, physical contact, and, much less widespread, fondling and pressure to have sexual intercourse." Fifteen percent of those surveyed reported coaches use of demeaning language though "embarrassing, derogatory remarks; sexual innuendoes; dirty jokes; 6% received an invitation to go out or to engage in social activity; 17% reported incidents of physical touching such as butt-slapping, tickling, hugging; 2% reported incidents of fondling; and less than 1% said they were pressured to have sex." *Id.* at 145-49. In in-depth interviews with eighteen female athletes, ten experienced some form of harassing or potentially harassing behavior by a coach, although not all ten perceived the behavior as potentially harassing. *Id.* at 149. The Tomlinson/Yorganci study then suggests that one reason that few women file these claims is because they do not perceive certain behavior as harassment. *Id.* at 146.

46. *See* WOMEN'S SPORTS FOUNDATION, *Education and Prevention: Sexual Harassment and Unethical Relationships Between Coaches and Athletes, in* PREVENTION OF SEXUAL HARASSMENT IN ATHLETIC SETTINGS: AN EDUCATIONAL RESOURCE KIT FOR ATHLETIC ADMINISTRATORS (1994). Mariah Burton Nelson notes that many athletes do not report abuse because they have been taught not to challenge a coach's authority. "Athletes also don't report abuse because they have been well indoctrinated into male power. 'While one might expect a high level of assertiveness and mental toughness from women who are competitive athletes, there is evidence that the coach's authority, and even psychologically manipulative or abusive behavior, is rarely..... challenged by these women.'" MARIAH BURTON NELSON, THE STRONGER WOMEN GET, THE MORE MEN LOVE FOOTBALL: SEXISM AND THE AMERICAN CULTURE OF SPORTS 186 (1994) (quoting Helen Lenskyj); *see also* C. Eric Gronbech et al., *College Female Athletes and Nonathletes as Survivors of Sexual Harassment*, 71 RES. Q. FOR EXERCISE & SPORT (2000) (concluding that female athletes possess personality traits and physical attributes that differ from their non-athlete peers and are not usually associated with victims). On the other hand, female athletes exhibit more risk-taking behavior and are often in close proximity to male athletes, a group more likely to commit sexual harassment, abuse and assault and are often coached by older men who have great influence on them and potential for harassment. *Id.*

B. The Reach and Limitations of Title IX

The treatment of discrimination under Title IX has borrowed heavily from Title VII of the Civil Rights Act of 1964.[47] There are positive and negative aspects to this association. One advantage is that anti-discrimination principles or legal theories do not have to be reinvented by practitioners or judges when applying the doctrine.[48] One disadvantage is that there are important contextual differences between the educational and employment environments.

Sexual harassment law is a theory of liability developed in the context of employment discrimination under Title VII.[49] In *Meritor v. Vinson*,[50] the Court recognized that harassment in the workplace is a barrier to equality: "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality."[51] Similarly, sexual harassment is a barrier to equal education. Sexual harassment can threaten a student's physical or emotional well-being, influence how well a student does in school and make it difficult for a student to achieve his or her career goals.[52] And, for athletes, sexual harassment negatively impacts athletic performance, their relationships and their self-esteem.[53] While there is little disagreement that sexual harassment has a negative impact upon athletes, there is much disagreement as to what constitutes harassment. The next section examines different conceptions of harassment.

C. Defining Harassment

Sexual harassment can take two forms: quid pro quo[54] or hostile

---

47. Equal Employment Opportunities, Title VII, 42 U.S.C. §§ 2000e-2000e-15 (1994).

48. *See* L. Camille Hebert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819, 819-821 (1997) (arguing that drawing analogies between new or novel legal claims and established legal theories is a method of gaining legitimacy for the new claims).

49. 42 U.S.C. §§ 2000e-2000e-15.

50. 477 U.S. 57 (1986).

51. *Id.* at 67 (quoting Henson v. Dundee, 682 F.2d 897, 902 (1982)).

52. U.S. DEPARTMENT OF EDUCATION, SEXUAL HARASSMENT: IT'S NOT ACADEMIC 1 (1999), *available at* http://www.ed.gov/offices/OCR/docs/ocrshpam.html.

53. Celia Brackenridge & Kari Fasting, *Background Studies on the Problem of Sexual Harassment in Sport, Especially with Regard to Women and Children*, report prepared for 9TH COUNCIL OF EUROPE CONFERENCE OF MINISTERS RESPONSIBLE FOR SPORT (2000), *at* http://culture.coe.rf/sport/conf/eng/msl9.3htm (stating that many female athletes who endure sexual abuse suffer psychological disorders for years afterwards).

54. Quid pro quo was the first theory of sexual harassment to develop. To make out a claim of quid pro quo sexual harassment, the plaintiff must show that a supervisor (meaning someone with at least apparent authority) made an unwelcome demand on the basis of sex and that as a result of refusing the demand, plaintiff suffered, or reasonably feared she would suffer, adverse consequences

environment. [55] The Office of Civil Rights defines quid pro quo harassment as an incident when "a teacher or other employee conditions an educational decision or benefit on the student's submission to unwelcome sexual conduct."[56] Hostile environment sexual harassment is defined as "sexually harassing conduct by an employee, another student, or a third party" "that does not explicitly or implicitly condition a decision or benefit on submission to sexual conduct" and "is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the school's program based on sex."[57]

These definitions borrow heavily from Title VII definitions of quid pro quo and hostile environment sexual harassment in the employment context.[58]

---

if she refused. For example, a supervisor who demands sexual favors in return for a job benefit or to avoid a job detriment would be perpetrating quid pro quo sexual harassment. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57(1986) (alleging that a supervisor coerced plaintiff, an assistant branch manager in a bank, into a sexual relationship); *see also* Nichols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994) (holding that "quid pro quo harassment occurs whenever an individual explicitly or implicitly conditions a job, a job benefit, or the absence of a job detriment upon an employee's acceptance of sexual conduct").

55. Beginning with *Meritor Savings Bank*, the Supreme Court also recognized hostile environment sexual harassment claims under Title VII. *Meritor*, 477 U.S. at 66. This decision expanded the scope of liability to include harassment whether or not it was directly linked to the granting or denial of a job benefit. *Id.* In *Meritor Savings Bank*, the plaintiff, Michelle Vinson, alleged that her supervisor, Sidney Taylor, pressured her into a sexual relationship that lasted for three years. *Id.* at 59-60. Although her advancement at the bank was based on merit, and not based on her relationship with Taylor, and although the harassment ceased a year before her eventual termination, suggesting she suffered no adverse job consequence as a direct result of her refusal, she nevertheless alleged Taylor's conduct contributed to a hostile working environment. *Id.* at 60. The Court held that, to be actionable, sexual harassment must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive environment.'" *Id.* at 67. In order to claim hostile environment harassment, the plaintiff must show the following: 1) that the conduct was unwelcome; 2) that it was based on sex; 3) that it was sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment; and 4) that the employer is liable for the harassment. *Id.* at 67-70.

56. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (Mar. 13, 1997), available at http://www.ed.gov/offices/OCR/sexhar01.html. The report, which contains the policy guidance report issued by the Assistant Secretary for Civil Rights, was published in 1997, before the Supreme Court decision in Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998). In this policy guidance report, the Office of Civil Rights argues that institutions can be vicariously liable for sexual harassment. The Gebser decision, however, rejects the vicarious liability standard for institutional liability for damages under Title IX and establishes an actual notice requirement. *See infra* notes 137, 150-154 and accompanying text. The Revised Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512-01 (Jan. 19, 2001), *available at* http://www.ed.gov/ocr/shguide (last visited Apr. 20, 2001) [hereinafter Revised Sexual Harassment Guidance], incorporates the *Gebser* actual notice requirement into Office of Civil Rights policy.

57. Revised Sexual Harassment Guidance, *supra* note 56.

58. The Equal Employment Opportunity Commission (EEOC), the enforcement agency for Title VII, defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 29 C.F.R. § 1604.11 (1985). The EEOC provides that such unwelcome conduct constitutes sexual harassment when:

(1) submission to such conduct is made either explicitly or implicitly a term or

But unique aspects of athletics, including the special nature of the relationship between coaches and athletes and characteristics of the athletic environment, make Title VII standards an imperfect fit for assessing sexual harassment in athletics under Title IX.[59]

1. "My Coach Says He Loves Me":[60] Sexual Relationships Between Coaches and Athletes

Sexual relationships between coaches and athletes are not a per se violation of Title IX. Only unwelcome sexual conduct violates Title IX. Conduct is unwelcome "if the student did not request or invite it and 'regarded the conduct as undesirable or offensive.'"[61]

"Unwelcomeness" is a concept first developed under Title VII sexual harassment law[62] and imported into Title IX sexual harassment law.[63] The

---

> condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decision affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Id.

59. Both quid pro quo and hostile environment harassment claims are recognized by some courts under Title IX. Although courts universally accept quid pro quo harassment theory under Title IX, they do not uniformly accept hostile environment theory under Title IX. *See, e.g.*, Bougher v. Univ. of Pitt., 713 F. Supp. 139, 145 (W.D. Pa. 1989), *aff'd on other grounds*, 882 F.2d 74, 77 (3d Cir. 1989) (holding that while Title IX reaches quid pro quo claims, it does not permit hostile environment claims). *But cf.* Lipsett v. Univ. of Puerto Rico, 864 F. 2d 881, 896 (1st Cir. 1988) (permitting a Title IX hostile environment claim). The Supreme Court has never expressly held that the substantive provisions of Title VII apply in Title IX cases, but the Court has used language to lend support to this view. In *Franklin v. Gwinnett County Pub. Sch.*, a high school teacher and coach resigned from his position on the condition that all pending sexual harassment claims under Title IX be dropped. 503 U.S. 60, 64 (1992). The student alleging sexual harassment then attempted to recover monetary damages. The Supreme Court concluded that monetary damages are available under Title IX. *Id.* at 76. The Court in *Franklin* referenced Title VII cases in describing the nature of the school's duty to prevent sexual harassment. *Id.* at 75. The Court found that:

> 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' . . . We believe the same rule should apply when a teacher sexually harasses and abuses a student.

Id. [citation omitted]. Lower courts latched onto this language as support for the view that Title VII jurisprudence is the appropriate starting point for defining the limits of sexual harassment under Title IX. *See, e.g.*, Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1292 (N.D. Cal. 1993). The Court in *Patricia H.* described the *Franklin* decision as follows: "While not explicitly addressing the relationship between Title VII analysis and Title IX analysis, however, the Supreme Court . . . turned to Title VII law to explain its ruling on Franklin's harassment claim . . . ." *Id.*

60. NELSON, *supra* note 46, at 159-94 (describing the problem of romantic relationships between coaches and athletes).

61. Revised Sexual Harassment Guidance, *supra* note 56.

62. In *Meritor Savings Bank v. Vinson*, the district court denied relief, concluding that even if the alleged victim and the supervisor engaged in a sexual relationship, that the relationship was voluntary. 477 U.S. 57 (1986). The Supreme Court rejected the district court's conclusion that

Supreme Court in *Meritor Savings Bank v. Vinson* first addressed the issue of unwelcomeness as an element of sexual harassment cases.[64] In that case, the district court concluded that plaintiff Michelle Vinson's sexual relationship with her supervisor was voluntary, which precluded Vinson from maintaining an action for sexual harassment.[65] The Supreme Court affirmed the court of appeals' reversal of the district court, finding that "the fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"[66]

Title VII assumes that consensual sexual relationships do and will develop in the workplace and seeks to distinguish those relationships from harmful harassment.[67] By placing the burden on the alleged victim of sexual harassment to show that the conduct was unwelcome, Title VII further presumes that most relationships are consensual unless the alleged victim can show differently.[68]

The "unwelcomeness" requirement is troublesome when applied to harassment cases under Title IX. The presumption that most sexual relationships are consensual should not necessarily apply in educational athletic situations. The "unwelcomeness" concept presumes that when an advance is made, the recipient is fully empowered to turn it down, and so therefore, there is no harm in the asking. Factors of power, trust, and control that characterize the coach/athlete relationship may remove the possibility of a female athlete freely giving consent to sexual contact.[69]

---

voluntariness was a defense to a claim of sexual harassment, requiring only that the sexual advances were "unwelcome." *Id.* at 68.

63. According to the Office of Civil Rights, conduct is unwelcome "if the student did not request or invite it and 'regarded the conduct as undesirable or offensive.'" Revised Sexual Harassment Guidance, *supra* note 56.

64. *Meritor Savings Bank*, 477 U.S. at 68. For a description of the development of the unwelcomeness doctrines, see Joan S. Weiner, *Understanding Unwelcomeness in Sexual Harassment Law: Its History and Proposal for Reform*, 72 NOTRE DAME L. REV. 621, 624 (1997).

65. *Meritor Savings Bank*, 477 U.S. at 68.

66. *Id.* (quoting 29 C.F.R. §1604.11(a) (1985)).

67. *See* Mary F. Radford, *By Invitation Only: The Proof of Welcomenesss in Sexual Harassment Cases*, 72 N.C. L. REV. 499, 503-5 (1994) (arguing that a requirement that sexual harassment victims prove "unwelcomeness" perpetuates the myth that sexual attention is a normal part of the workplace and that most people are not offended by attention of a sexual nature).

68. *See* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 827-28 (1991) (arguing that the problem with the unwelcomeness requirement is that 1) it focuses on the victim, not the perpetrator; 2) by focusing on unwelcome *conduct* it implies that a verbal rebuff, a polite "no," may not suffice and 3) it makes the victims dress and speech an issue (emphasis added)).

69. *See* PETER RUTTER, SEX IN THE FORBIDDEN ZONE: WHEN MEN IN POWER—THERAPISTS, DOCTORS, CLERGY, TEACHERS AND OTHERS—BETRAY WOMEN'S TRUST 25 (1986) (explaining how men take advantage of the power of their public roles to control women who entrust

The coach, like the workplace supervisor, is an authority figure who exercises a degree of control over a subordinate. But the nature and extent of the control is very different. A workplace supervisor is a colleague. A workplace supervisor's control is generally limited by time and geography (limited to the workplace during business hours). Both the supervisor and the employee are generally adults, so there is not a concern that the age of the employee contributes to the employee's vulnerability.

Coaches, on the other hand, occupy a position of trust and control over athletes. The control of the coach extends to all aspects of the athlete's life–training regimen, diet, even social life.[70] From the athlete's perspective, the relationship is characterized by both emotional and physical dependence. An athlete comes to depend on her coach as the person who holds the key to her athletic success.[71] A coach, for example, offers tangible rewards for good performance, such as team selection, entry into competitions, representative honors and medals, and dispenses punishment, such as withdrawing scholarships or dropping an athlete from the team.[72]

The desire to maintain that relationship renders athletes vulnerable to the introduction of sexual behavior into coach/athlete relationship.[73] Not all romantic relationships between coaches and athletes are built on coercion and abuse,[74] but the nature of the power imbalance between athlete and coach renders athletes vulnerable to such abuse.[75] Age disparities further

---

their confidences to them).

70. Tomlinson & Yorganci, *supra* note 45, at 143-44 (1997) (explaining that in a survey of 137 female track athletes, 59% said their coach influenced their diet or weight, 34% said the coach influenced their sleep and 25% said the coach influenced their social life).

71. *See id.* at 147 (describing the relationship between male coaches and female athletes as one of "dependence and domination").

72. *See* Brackenridge & Fasting, *supra* note 53, at § 1.3.

73. RUTTER, *supra* note 69, at 51. This vulnerability is not limited to coach/athlete relationships but extends to any relationship in which one party exercises undue control or power. Psychiatrist Peter Rutter describes the extraordinary pressure placed on women in these special relationships to accede to a sexual relationship with the men who exercise such power over them.

> Each woman I interviewed who engaged in forbidden-zone sex described the immeasurable *nonsexual* value she felt that relationship had attained before any sexual behavior took place. All of them felt that they acceded to sex as a way of maintaining a relationship that had come to have extraordinary importance in their lives and seemed to them to open up new and boundless possibilities to the future.

Id.

74. There are many contemporary examples of relationships between athletes and current or former coaches. Olympic track star Jackie Joyner-Kersee met her husband Bob Kersee while he was an assistant track coach and she was a basketball player. They married after she graduated from UCLA. *See* MARIAH NELSON, ARE WE WINNING YET? HOW WOMEN ARE CHANGING SPORTS AND SPORTS ARE CHANGING WOMEN 161-162 (1991).

75. Author Mariah Burton Nelson interviewed players, coaches and administrators about the existence of sexual relationships between coaches and athletes. "One swimming coach estimate[d] that two-thirds of the male coaches he knows have been sexually involved with athletes or former athletes." NELSON, *supra* note 46, at 166. Nelson also interviewed "Noel Moran Quilici, a

contribute to an athlete's vulnerability.[76]

Female athletes, who are typically much younger than their coaches, are vulnerable to being enticed into inappropriate sexual relationships with them.[77] For younger athletes, the impropriety of those relationships is beyond question. Indeed, many coaches who engage in such relationships are criminally prosecuted for child abuse.[78] Even for athletes who are above the age of consent, the power imbalance in coach/athlete relationships calls into question whether the relationships are truly consensual.[79] Social

---

former nationally ranked swimmer," who "fell in love with" her coach. *Id.* at 170-71. Quilici described how Mitchell Ivey, her coach, controlled their personal relationship just as he controlled their professional relationship. *Id.* They separated six months after their marriage when she walked in on him and another swimmer being romantically intimate. *Id.* Quilici described her coach's appeal:

> It's such an intense relationship. You travel, you're together all the time. If you're young, and this older man says he loves you . . . He was very, very persuasive and manipulative. I wish I knew then what I know now. I thought I was special to him. I wasn't. I was just another notch in his stick.

Id. Psychiatrist Peter Rutter also argues that most marriages that arise out of a professional relationship fail. RUTTER, *supra* note 69, at 174-77.

76. Most competitive athletes begin training at a young age and reach their peak by their mid- to late-twenties. *See* Jack C. Horn, *The Peak Years: Research on Age at Which Athletes Are at Their Best*, PSYCHOL. TODAY, Dec. 1988, at 62 (reporting the results of research conducted by researchers at the University of Pittsburgh). Analysis of records from track and field, swimming, baseball, tennis, and golf suggests that athletes in these sports tend to peak in their late twenties. *Id.* Swimmers, sprinters, and jumpers peaked in late teens or early twenties, while golfers and baseball players tend to peak in their late twenties and early thirties. *Id.* In track and field, for example, the mean age of winners in the 1,500 meters from 1948-1980 was 24.6 years. *Id.* While the average age increased with the length of the race, runners in longer races (5,000 meter, 10,000 meter, and marathon) peaked at twenty-seven. *Id.* Baseball players tended to peak at age twenty-seven or twenty-eight. Women golfers averaged around 30 years, with men about one year older. *Id.*

77. Celia Brackenridge argues that female athletes are more susceptible to being enticed into an abusive sexual relationship when they have reached a high standard of performance but are just below the elite level, a stage she describes as the "Stage of Imminent Achievement" (SIA). Brackenridge & Kirby, *supra* note 28, at 407-18. Brackenridge further argues that athletes whose SIA coincides with or precedes their age of sexual maturity are at a greater risk of sexual abuse than those whose SIA or peak sport age follow their age of sexual maturity. *Id.*

78. *See, e.g.*, Scadden v. Wyoming, 732 P.2d 1036, 1039 (Wyo. 1987) (involving a high school coach convicted of second-degree assault for having a sexual relationship with a student). The focus on the criminal culpability of individual coaches fails to challenge the sporting culture that permits coaches to prey upon athletes; Finn, *supra* note 44, at 8 (describing the cases of a high school coach accused of harassing a female basketball player and charged with criminal sexual misconduct, and a tennis coach who pled guilty to aggravated sexual assault for involvement in a sexual relationship with an underage tennis player).

79. Whether the harassment takes place between a supervisor and employee, teacher and student, or coach and athlete, the primary concern in all three kinds of relationships is the power disparity between the authority figure and the subordinate, which may contribute to the coerciveness of the relationship. *See* Angela J. Duffy, *Can a Child Say Yes? How the Unwelcomeness Requirement Has Thwarted the Purpose of Title IX*, 27 J.L. & EDUC. 505, 510 (1998) (arguing that forcing students from elementary through high school to prove "unwelcomeness" frustrates the intent of Title IX); Tomlinson & Yorganci, *supra* note 45, at 134. However, the power disparity is greatest between coach and athlete. *Id.* In the education context, the age of the student may contribute to the perceived vulnerability of the student, at least those students who are at or below the age of consent. For older students, the concern about true consent may not be as great. *But see*

scientists recognize the extraordinary power exercised by other types of authority figures over those with whom they enjoy a special relationship.[80] These abuses of trust are viewed as professional ethical violations.[81] The power imbalance in coach/athlete relationships should also be considered a factor in whether the "unwelcomeness" standard is met. The nature of the relationship between coach and athlete should weigh in favor of dispensing with the "unwelcomeness" requirement, or, at the very least, shifting the burden of proving "unwelcomeness" away from the athlete.[82] Unlike in the employment context, sexual relationships between coaches and athletes

---

RUTTER, *supra* note 69, at 29-30 (noting that the important social dynamic between student and professor as well as the psychological dynamic based on underlying dependency issues suggest that relationships between professors and adult female students are nevertheless problematic). While teachers exercise a great deal of control over students during school hours, they tend not to exert the same level of control as coaches have over athletes. For athletes, even relationships between coaches and athletes above the age of consent may raise concerns. *See* Tomlinson & Yorganci, *supra* note 45, at 134-155.

80. For example, psychiatrist Peter Rutter describes sexual relationships between such professionals and their patients or students as a "forbidden zone" relationship. RUTTER, *supra* note 69, at 28. The forbidden zone is a condition of relationship in which sexual behavior is prohibited because a man holds in trust the intimate, wounded, vulnerable, or undeveloped parts of a woman. *Id.* He explains that

> The trust derives from the professional role of the man as doctor, therapist, lawyer, clergy, teacher, or mentor, and it creates an expectation that whatever parts of herself the woman entrusts to him (her property, body, mind, or spirit) must be used solely to advance her interests and will not be used to his advantage, sexual or otherwise. Under these conditions, sexual behavior is always wrong, no matter who initiates it, no matter how willing the participants say they are. In the forbidden zone, the factors of power, trust, and dependency remove the possibility of a woman freely giving consent to sexual contact. Put another way, the dynamics of the forbidden zone can render a woman unable to *withhold* consent. And because the man has the greater power, the responsibility is his to guard the forbidden boundary against sexual contact, no matter how provocative the woman.

Id. See also Sue Rosenberg Zalk, *Men in the Academy: A Psychological Profile of Harassers, in* SEXUAL HARASSMENT ON COLLEGE CAMPUSES: ABUSING THE IVORY POWER 81-113 (Michele A. Paludi ed., 1996) (arguing that the patriarchal structure of many academic institutions as well as the power delegated to the predominantly male faculty create an environment conducive to sexual harassment).

81. For example, ethical rules in many states prohibit sexual relationships between attorneys and clients. *See, e.g.*, Abed Awad, *Attorney-Client Sexual Relations*, 22 J. LEGAL PROF. 131, 131-171 (1998) (surveying state laws prohibiting attorney-client sexual relationships).

82. In its investigations, the Department of Education, Office of Civil Rights (OCR) employs presumptions against "welcomeness" for younger students and employs a factor test for "welcomeness" for older students. If elementary students are involved, the sexual conduct is never considered consensual. In cases involving secondary students, OCR employs a strong presumption against consent. In cases involving post-secondary students, OCR follows the factor test. It looks at:

- The nature of the conduct and the relationship of the school employee to the student, including the degree of influence (which could, at least in part, be affected by the student's age), authority, or control the employee has over the student.
- Whether the student was legally or practically unable to consent to the sexual conduct in question.

Revised Sexual Harassment Guidance, *supra* note 56.

should be presumed to be non-consensual, with the burden placed upon the coach to demonstrate "welcomeness," instead of the current burden on the athlete to prove "unwelcomeness."

While the control and dependence that mark coach/athlete relationships apply to both male and female athletes, female athletes are particularly vulnerable. Women athletes are more likely to be coached by men than male athletes are to be coached by women,[83] creating more opportunities for heterosexual coach/athlete relationships to develop for female athletes than for male athletes.[84] This is not to say that male athletes are never subjected to abuse—they are[85]—or that female coaches do not abuse—they do.[86] Same-sex harassment also occurs, but opposite-sex harassment is still the more common occurrence.[87]

2. Hugs, Kisses, and Other Touches

While the "unwelcomeness" standard can be modified to address the problem of sexual relationships between coaches and athletes,[88] this will not solve the more intractable problem of setting the boundaries of appropriate physical touching between male coaches and female athletes. This is another area in which the experiences of women athletes may deviate from those of their male counterparts. A certain amount of physical touching between coach and athlete is accepted and even considered necessary in many sports.[89] For example, a coach may need to position a player to execute a

---

83. One consequence of the increasing numbers of women and girls playing athletics as a result of Title IX is that it has created numerous coaching opportunities. Men overwhelmingly have filled these positions. While women coached over 90% of women's teams before Title IX was enacted, as of 1996, women held 3,138 of 6,580 positions coaching women's teams, or 47.7%. Women hold only 2% of head coach positions for men's teams within the NCAA. R. VIVIAN ACOSTA & LINDA JEAN CARPENTER, WOMEN IN INTERCOLLEGIATE SPORT: A LONGITUDINAL STUDY – NINETEEN YEAR UPDATE 1977-1996, *at* http://bailiwick.lib.uiowa.edu/ge/acosta/womensp.html (last visited Apr. 7, 2001).

84. *See* Marc Bloom, *When Athletes Are One Sex, and Coaches Are the Other*, N.Y. TIMES, June 13, 1999, §15, at 20; NELSON, *supra* note 74, at 159-74.

85. Professional hockey player Sheldon Kennedy, for example, revealed that he was forced into a sexual relationship with his male junior hockey league coach. *Kennedy Recounts Sexual Abuse from Former Junior Team Coach*, TAMPA TRIB., Jan. 7, 1997, at 1, *available at* LEXIS Newsfile.

86. *See, e.g.*, NELSON, *supra* note 46, at 188 (describing a female swimming coach found guilty of statutory rape after admitting having sex with a boy she coached).

87. *See id* at 188-189.

88. *See supra* text accompanying notes 62-68.

89. *See, e.g.*, Brackenridge & Kirby, *Example 7. Touching, in An Analysis of Codes of Practice for Preventing Sexual Harassment and Abuse to Women and Children in Sport*, *supra* note 53, at Part II, §5.2. (listing various national codes of sporting conduct about appropriate touching of athletes). The Canadian code instructs: "All physical contact between athletes or between personnel and athletes should be for one of the following purposes: [1)] to develop sport skills/techniques[; 2)] to give sport massages[; 3)] to treat an injury." *Id.* But as the *Ericson* case demonstrates, massages in a sports context are not always non-sexual. Ericson v. Syracuse University, 35 F. Supp. 2d 326

defensive move or to demonstrate a new technique. Similarly a hug or a pat on the back to demonstrate approval is not per se inappropriate. But other forms of physical touching, such as massages and slaps on the buttocks, fall within a gray area between appropriate and inappropriate behavior.

In men's sports, such touches between men are presumed non-sexual in nature.[90] Although these types of touches stray into what might be considered private areas and risk potential sexual arousal, male dominated sports operate on a heterosexual presumption.[91] According to this presumption, men are sexually attracted to women, therefore men slapping each other on the butt or submitting to a massage by a male trainer are touches presumed non-sexual in nature.[92]

In *Oncale v. Sundowner Offshore Services, Inc.*,[93] the Supreme Court recognized in dicta that in the context of sport certain types of touching, not permissible in the work environment, may be permissible on the athletic field.[94] Joseph Oncale worked as a "roustabout" on a crew on an oil platform in the Gulf of Mexico.[95] Oncale alleged that on several occasions his co-workers "forcibly subjected [him] to sex-related, humiliating actions."[96] The case involved the application of Title VII sexual harassment law to instances of same-sex harassment.[97] In support of its view that same-sex harassment must be viewed within the social context in which it arises, the Court stated:

> A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads on to the field-even if the same

---

(S.D.N.Y. 1999).

90. *See* BRIAN PRONGER, THE ARENA OF MASCULINITY: SPORTS, HOMOSEXUALITY, AND THE MEANING OF SEX 9 (1990) (describing the effect of the heterosexual presumption on gay male athletes). The operation of this heterosexual presumption impacts gay male athletes as well.

> The body contact of football, hockey, boxing, and water polo, the practice of gymnastic routines, springboard diving, and figure skating, the attention coaches may lavish on their athletes, the exposure of naked sportsmen in locker rooms and showers, all proceed under the assumption that no one involved is aware of the erotic potential of these phenomena, that everyone is heterosexual.

Id.

91. *Id.*

92. *See also* Brian Pronger, *Gay Jocks: A Phenomenology of Gay Men in Athletics, in* SPORT, MEN, AND THE GENDER ORDER: CRITICAL FEMINIST PERSPECTIVES 146-52 (Michael A. Messner & Donald F. Sabo eds., 1990) [hereinafter SPORT, MEN, AND THE GENDER ORDER] (describing gay male strategies for coping in the locker room, including "passing" as straight).

93. 523 U.S. 75 (1998) (holding sex discrimination consisting of same-sex harassment is actionable under Title VII).

94. *Id.* at 81-82.

95. *Id.* at 77.

96. *Id.* "When asked at his deposition why he left Sundowner, Oncale stated: 'I felt that if I didn't leave my job, that I would be raped or forced to have sex.'" *Id.*

97. *Id.* at 79-80.

> behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office.[98]

Therefore, the Court agrees with the presumption that behavior on the playing field is non-sexual.[99]

In contrast, harassment law operates on a presumption of sexual desire.[100] When a male supervisor makes sexual advances toward a female subordinate, harassment law presumes that the attention is sexual in nature. It presumes that the supervisor (who is presumed heterosexual) would not have directed such attention to a man.[101] When the advance takes place between a supervisor and employee of the same sex, the plaintiff generally must make the additional showing that the harassment was directed at him or her because of sex.[102] Further, in order to establish "but for" causation for same-sex harassment, a plaintiff may have to show the alleged harasser was gay.[103]

When touches occur between a male coach and a female athlete, conflicting messages are communicated to both the athlete and the coach—the athletic presumption (non-sexual) and the harassment presumption (sexual). Indeed, one of the allegations raised in *Ericson v. Syracuse University*[104] was that the coach sexually harassed them by giving them massages that were sexual in nature.[105] Title IX has no solution for this problem. The harassment presumption sexualizes male coaches' touching of women athletes. The athletic presumption suggests that such touches are within the realm of appropriate touching.[106] Further, the response to this problem can affect the type of training women receive. A coach may respond to such a concern by not treating female athletes as they would a

---

98. *Oncale*, 523 U.S. at 81.

99. *Id.*

100. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1692-1710 (1998) (arguing that the prevailing paradigm of sexual harassment law is based on a sexual desire-dominance paradigm that presumes that a male supervisor's advances toward a female subordinate are based on sexual desire because the supervisor would not make similar sexual advances toward a man); Katherine M. Franke, *What's Wrong With Sexual Harassment*, 49 STAN. L. REV. 691, 734-35 (1997) (arguing that sexual harassment should not be understood merely as an expression of sexual desire but as an expression of sexism).

101. *See* Franke, *supra* note 100, at 736.

102. *Id.* at 735-37.

103. *Id.* at 736-37.

104. 35 F. Supp. 2d 326 (S.D.N.Y. 1999).

105. *See Former SU Tennis Players Discuss Sexual Harassment Two Players Said Coach Dwire Gave Unwanted Massages*, SYRACUSE HERALD-J., Dec. 5, 1997, 1997 WL 5781451.

106. I realize this is an oversimplification of the problem. In the male context, the touches of a male coach or trainer can cross the line, but the point I make is that the question of where to draw that line between appropriate and inappropriate conduct is important.

male athlete for fear of being accused of sexual harassment.[107] Ironically, the presumptions that operate in harassment law in these situations may impede women's athletic advancement if male coaches treat them differently than male athletes due to concerns about being accused of sexual harassment. On the other hand, the touching of private areas of an athlete's body by a coach does raise legitimate concerns that the touches are for the sexual gratification of the coach rather than related to the improvement of athletic performance.

3. "You Play Like a Girl": Gender-Based Harassment Under Title IX

Mistreatment of athletes does not always take the form of a sexual relationship. Popular coaching techniques often focus on verbal abuse, such as belittling or denigrating a player. Sometimes the belittling can be gendered in nature (e.g., "you play like a girl"). In *Ericson v. Syracuse University*,[108] in addition to claims of unwanted sexual conduct, the athletes also complained about abusive behavior of a non-sexual nature.[109] As part of their evidence supporting the existence of a hostile work environment, the plaintiffs described incidents in which the coach made demeaning comments about women.[110] For example, as part of what apparently was intended as a motivational speech, the coach, Jesse Dwier, said that the name of the Gap clothing brand stands for "Girls Are Pathetic."[111]

The Office of Civil Rights recognizes that gender-based harassment not involving conduct of a sexual nature may violate Title IX, including comments that evidence a general hostility to the presence of women.[112] Comments such as, "You play like a girl," or "You play like a sissy," are an accepted part of sports. When directed at men, they signal that feminine characteristics are incompatible with athletics.[113] Gender-based hostility,

---

107. *See* Todd Taylor, *Men Coaching Women Deal With Pitfalls: Dorrance Case Putting Focus on Gender Issues*, GREENSBORO NEWS & REC., Sept. 4, 1998, *available at* LEXIS News Group File (discussing coaches' strategies to minimize risk of sexual harassment charges, including not meeting alone with female athletes and taking a different psychological approach to coaching women).

108. 35 F. Supp. 2d 326 (S.D.N.Y. 1999).

109. Riede, *Former Players*, *supra* note 37.

110. *Id.*

111. A university hearing panel found that this speech by Dwier was sexist. *Id.*

112. *See* Revised Sexual Harassment Guidance, *supra* note 56.

> Gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond, if it rises to a level that denies or limits a student's ability to participate in or benefit from the educational program.

Id. (citation omitted).

113. NANCY LEVIT, THE GENDER LINE: MEN, WOMEN, AND THE LAW 54 (1998) (arguing that taunts such as "wimp," "pussy," and "faggot" teach boys that being good at sports is connected

then, is a fundamental aspect of the athletic environment. This model of athletic participation (accentuating the masculine by devaluing the feminine) conflicts with the operation of harassment law which seeks to root out such gender stereotypes and break down barriers to women's full participation in society.

4. A Hostile Athletic Environment?

Not all conduct that may be described as harassment will create a hostile environment, only severe or pervasive conduct will suffice.[114] It must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.[115] In other words, the conduct must offend the plaintiff herself and must be sufficiently offensive such that a reasonable person in the plaintiff's position would also take offense.[116] In *Oncale*, the Court described a hostile work environment as follows:

> We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." . . . In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target.[117]

The reason for adopting this contextual framework, according to the Court, is to distinguish harassment from "genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex."[118]

Title VII's reasonableness standard operates imperfectly in the context of athletics. The reasonable person standard sets a community standard of behavior as the norm.[119] Harassment, then, is behavior that deviates from

---

with not being a girl).

114. Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998).

115. *Id.*

116. *Id.* at 81-82.

117. *Id.* at 81.

118. *Id.*

119. Rabidue v. Osceola Ref. Co., 805 F2d 611, 620-622 (6th Cir. 1986). Susan Estrich argues that viewing harassment within its social context is a mistake because the social interaction within the workplace differs from the social interaction that takes place outside the workplace. At work, women are a captive audience.

> But in defining what counts as trivial or "de minimis," many courts have wrongly looked to social interaction outside the workplace as the standard, ignoring not only the "captive audience" nature of the employment context but also the fact that "society" hardly reflects a normative standard which women have had an equal role in shaping.

that norm.[120] Harassment is judged in the social context in which the harassing behavior occurs. But what may be considered "reasonable" in athletics may not be considered "reasonable" in an office environment.[121]

Some coaches consider an aggressive, in-your face style of coaching necessary to motivate athletes.[122] Similarly, some consider hazing and other

---

Estrich, *supra* note 68, at 843 (arguing that in Title VII cases, courts incorrectly assume that the work environment is a neutral construct).

120. *See* Radtke v. Everett, 501 N.W.2d 155, 166-67 (Mich. 1993) (quoting RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1994)) (stating that the reasonable person standard is appropriate because "it enables triers of fact" 'to look to a community standard rather than an individual one).

121. Some employers have argued that the social context of the workplace is relevant to the determination of what constitutes harassment. *See Rabidue*, 805 F.2d at 622 (holding obscenities directed in a workplace against a female plaintiff and sexually oriented posters had a de minimus effect on the work environment when society condones public displays of vulgarity on newsstands and on television), *rev'd on other grounds*, Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); Gross v. Burggraf Const. Co., 53 F.3d 1531, 1538 (10th Cir. 1995). "[W]e must evaluate Gross' claim of gender discrimination in the context of a blue collar environment where crude language is commonly used by male and female employees. Speech that might be offensive or unacceptable in a prep school faculty meeting, or on the floor of Congress, is tolerated in other work environments." *Id.* Viewing harassment in its social context validates the status quo. It has the ironic consequence of affording a person less protection in a more abusive and intolerant work environment. If the work environment typically tolerates abusive language and horseplay, then a plaintiff offended by such behavior presumably will not be able to meet this standard of harassment.

Some courts, however, refuse to consider the aggressiveness of the workplace setting in determining whether there is harassment. In *Smith v. Sheahan*, 189 F.3d 529 (7th Cir. 1999), the plaintiff, a female guard at a county jail claimed she was subjected to hostile work environment harassment when a coworker subjected her to verbal and physical abuse. The district court partially discounted the seriousness of the actions because the plaintiff "voluntarily" stepped into the "aggressive setting" of the jail. *Id.* at 534-35. The appellate court rejected this consideration. *Id.*

> It is true that the severity of the alleged harassment must be assessed in light of the social mores of American workers and workplace culture, but nothing in *Oncale* even hints at the idea that prevailing culture can excuse discriminatory actions. . . . There is no assumption-of-risk defense to charges of workplace discrimination.

Id. (citation omitted).

122. For example, consider the career of Bobby Knight. Bobby Knight, the embattled men's basketball coach at Indian University, lost his job when he taught a freshman student "a lesson in 'manners and civility.'" The student had spotted the basketball coach on campus and said, "Hey, what's up, Knight?" Bob Knight allegedly grabbed the student by the arm and dragged him aside and told the student to show him some respect. Alexander Wolff, *Knight Fall: Bob Knight's Controversial 29-Year Reign at Indiana Came to an Ironic End When He Gave a Student an Unmannerly Lesson in Manners*, SPORTS ILLUSTRATED, Sept. 18, 2000. Bob Knight justified his aggressive tactics after his firing:

> I've maybe done a thousand things in my career to motivate kids—to get them to be better players—to get teams to be better. And athletic competition is not forensic speaking. Athletic competition is tough. Athletic competition is blood and it's sweat and it's guys out there pounding each other. I bet a great percentage of those thousand things I've done would not be something you'd really talk about at a PTA or at a garden party or at the church social.

Audio file: Bobby Knight, at http://www.cnnsi.com/basketball/college/news/2000/03/16/knight_accusation/bobknight3.wav (last visited Apr. 6, 2001). Despite Mr. Knight's extreme tactics, his "style" won him a following as evidence by the reaction to his firing. *See* Wolff, *supra*.

ritualistic behavior to be necessary to build team loyalty and toughness.[123] Viewing sexual harassment law within its social context results in moving the boundaries of acceptable conduct to allow a consideration of the norms of the athletic field.

An illustrative situation is found in *Seamons v. Snow*.[124] Brian Seamons, a high school student, sued his high school, school district, principal, and football coach under Title IX in connection with a locker room hazing incident.[125] As Seamons, a backup quarterback at Sky View High School in Smithfield, Utah, was leaving the shower area, four of his teammates used athletic tape to bind him to a towel rack.[126] A fifth teammate brought a girl Seamons had taken to the homecoming dance into the locker room to witness his humiliation.[127] Seamons and his parents reported the incident to the principal and other school officials, including the football coach, Douglas Snow.[128] Snow, however, brought Seamons before the football team, accused him of betraying the team by bringing the incident to the attention of the administration and told Seamons to apologize to the team. When Seamons refused, Snow dismissed Seamons from the team.[129] In response to the incidents, the school district superintendent cancelled the remainder of the football season.[130] According to Seamons, he was branded as the cause of the premature end of the football season and was subjected to threats and other harassment.[131]

In his complaint, Seamons alleged both sex discrimination and sexual harassment.[132] Seamons theorized that the defendants (the high school, the

---

123. Hazing is an initiation ritual that permits new or potential members to demonstrate commitment to the group. *See* Jamie Bryshun & Kevin Young, *Sport-Related Hazing: An Inquiry Into Male and Female Involvement*, *in* SPORT AND GENDER IN CANADA 269-92 (Philip White and Kevin Young eds., 1999) Initiation rituals occur in many contexts beyond sports. "In many societies and cultures . . . , veteran members of social groups require new members to demonstrate their commitment to the group." In sports, "the values, attitudes, knowledge and behaviors" of the team "are produced and reproduced through ritualized initiations." Hazing is a ritual initiation that depends on degrading, abusing, or endangering the initiate. *See* ALFRED UNIVERSITY, *supra* note 27, at 8.

124. 864 F. Supp. 1111 (N.D. Utah 1994), *aff'd in part, rev'd in part and remanded*, 84 F. 3d 1226 (10th Cir. 1996) (affirming the district court's dismissal of all claims, but reversing and remanding Seamons's First Amendment claim).''

125. 84 F.3d at 1230.

126. 864 F. Supp. at 1115.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Seamons v. Snow, 84 F.3d 1226, 1230 (10th Cir. 1996).

132. *Id.* at 1226. The complaint also alleged violations of 42 U.S.C. § 1983 and 42 U.S.C. § 1985 and violations of various constitutional and civil rights, including a First Amendment free speech claim. *Id.* at 1231. The district court dismissed both of Seamons's federal claims (Title IX

school district, principal, and football coach) were guilty of sex discrimination because they expected him to conform to a macho male stereotype, as evidenced by the suggestion to him that he should have "taken it like a man" and Snow's explanation of the event as "boys will be boys."[133] His complaint, however, was dismissed.[134] The appellate court concluded that such statements furthered the goals of promoting team loyalty and toughness.[135] Seamons's complaint, according to the district court, failed because he was unable to show that he suffered any discriminatory act because of his sex.[136] Thus, as demonstrated by Seamons, the aggressive male model of athletics where harassment is the norm potentially serves as the baseline for a hostile athletic environment.

D. Institutional Responsibility

While Title IX borrows many of the substantive theories of sexual harassment developed under Title VII, one area in which Title IX harassment law diverges from Title VII harassment law is in the standards for institutional liability. Differences in the statutory language have led courts to impose a higher standard of institutional liability under Title IX than under Title VII, making it more difficult for students to hold educational institutions liable for damages for sexual harassment.[137] Title VII, which prohibits sex discrimination in employment, explicitly holds the employer responsible not only for its own actions but also for the acts of its agents.[138] Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of

---

and §§ 1983 and 1985) and declined to exercise pendent jurisdiction over the state claims. *Id.* While the dismissal of Seamons's sex discrimination and sexual harassment claims under Title IX were upheld by the court of appeals, the district court's dismissal of Seamons's First Amendment claim was reversed. *Id.* at 1226.

133. *Id.*

134. *Id.* at 1230.

135. *Seamons*, 864 F. Supp. at 1118; 84 F.3d at 1233.

136. The district court concluded that in order to show that the defendants' acted "on the basis of sex," Seamons must show that the defendants acted with intent. *Seamons*, 864 F. Supp. at 1117-18. The court adopted the intent standard based on precedent derived from Title VI cases, rather than adopting the Title VII standard. *Id.* at 1118.

137. The higher standard of institutional liability, however, does not completely explain the scarcity of reported cases of athletes alleging harassment. In *Gebser v. Lagos Independent School District*, the Court held that a student does not have an implied right of action for damages against a school district for sexual harassment when the school district does not have actual notice of the harassment. *Gebser*, 524 U.S. 274, 290 (1998). Before *Gebser*, lower courts were in conflict over what standard to apply. Even though some lower courts followed a more liberal standard of institutional liability, there were still relatively few harassment filings by athletes. *See supra* text accompanying notes 38-39.

138. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(d) (2001).

such a person . . . ."[139] Title VII holds the employer responsible for acts of its agents within the scope of the agent's duty and in some circumstances for acts outside the scope of the agent's employment.[140] Harassment, for example, is generally considered outside the scope of an agent/employee's duty.[141] The employer is nevertheless liable if it appears that the agent acted with the employer's authority or if the existence of the agency relationship aids the agent in accomplishing his or her nefarious purpose.[142] In *Burlington Industries, Inc. v. Ellerth*, Kimberley Ellerth alleged that her supervisor, Ted Slowik, had subjected her to constant sexual harassment.[143] Ellerth argued that her employer, Burlington Industries, was responsible for the harassment although Ellerth never reported the harassment.[144] The Court concluded that an employer could be vicariously liable for the actions of a supervisor who is aided in his harassment by the existence of the agency relationship.[145]

Title IX, which prohibits sex discrimination by educational institutions, on the other hand, does not contain specific agency language. Title IX defines "educational institution" as "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education."[146] Title IX is silent as to vicarious liability.

Because the definition of an educational institution under Title IX does not have specific agency language,[147] in *Gebser v. Lagos Independent*

---

139. 42 U.S.C. § 2000e(b) (1994).

140. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 802-803 (1998) (agreeing that the RESTATEMENT (SECOND) OF TORTS § 219(2) provides a starting point for employee liability under Title VII and that a supervisor's position may create a greater risk of employee liability because of the employer's greater ability in part to control the actions of its supervisors); *see, e.g.*, Burlington Indus. v. Ellerth, 524 U.S. 742, 758 (1998) (quoting RESTATEMENT (SECOND) OF TORTS § 219(2) cmt. e (1958)) (listing the situations in which an employer may be liable for the torts of an employee acting solely for his or her own purposes).

141. *Faragher*, 524 U.S. at 793-94; *Burlington Indus.*, 524 U.S. at 757.

142. *Faragher*, 524 U.S. at 802; *Burlington Indus.*, 524 U.S. at 758.

143. *Burlington Indus.*, 524 U.S. at 758.

144. *Id.* at 748-49.

145. *Id.* at 765; *see also Faragher*, 524 U.S. at 807 (holding that an employer is vicariously liable for an actionable hostile environment claim created by a supervisor, unless employer can show that the employer exercised reasonable care to prevent and promptly correct the harassment and employee unreasonable failed to take advantage of preventative or corrective opportunities the employer provided).

146. 20 U.S.C. § 1681(c) (1994).

147. Title IX, which is modeled after Title VI of the Civil Rights Act of 1964, is a funding statute. The primary remedy for a Title IX violation is the possible withholding of federal funding. 20 U.S.C. § 1682 (1994). It was originally thought that Title IX did not provide for either a private cause of action for a Title IX violation and further that no damages were available to remedy such a violation. This view changed, however, based on two Supreme Court cases: *Cannon v. Univ. of Chicago*, 411 U.S. 677, 717 (1979), which held that Title IX recognizes an implied private right of

School District[148] and *Davis v. Monroe County Board of Education*,[149] the Court rejected vicarious liability for educational institutions. In *Gebser*, the Court held that an educational institution could not be held vicariously liable for sexual harassment committed by one of its employees, unless a plaintiff can prove the institution had actual notice and deliberately refused to take steps to prevent or correct the harassment.[150]

> *Meritor's* rationale for concluding that agency principles guide the liability inquiry under Title VII rests on an aspect of that statute not found in Title IX: Title VII, in which the prohibition against employment discrimination runs against "an employer," (citation omitted), explicitly defines "employer" to include "any agent," (citation omitted). Title IX contains no comparable reference to an educational institution's "agents," and so does not expressly call for application of agency principles.[151]

Likewise, in *Davis*, a student-on-student sexual harassment case, the Court confirmed that the institution is liable for damages only if it has actual knowledge of the harassment and is deliberately indifferent in responding to the harassment.[152]

"Actual notice" in this context occurs when "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 in the recipient's programs and fails adequately to respond."[153] The knowledge of the harasser himself (i.e., the coach in the case of coach/athlete sexual harassment) is not pertinent to the notice inquiry.[154]

---

action, and *Franklin v. Gwinnet County Pub. Sch.*, 503 U.S. 60, 73-76 (1992), which held that a private plaintiff can collect damages for Title IX violations.

148. 524 U.S. 274 (1998) (holding that a student does not have an implied right of action for damages against a school district for sexual harassment where the school district does not have actual notice of harassment).

149. 526 U.S. 629 (1999) (holding a school district liable for damages in a student-on-student sexual harassment claim).

150. *Gebser*, 524 U.S. at 290-291 (1998). Although *Gebser* limits the private recovery of damages to those situations in which the institutions has actual notice of the harassment, this will not necessarily shield these institutions from all liability. *See* STATEMENT BY U.S. SECRETARY OF EDUCATION RICHARD W. RILEY: ON THE IMPACT ON TITLE IX OF THE U.S. SUPREME COURT'S *GEBSER V. LAGO VISTA* DECISION (July 1, 1998), *at* http://www.ed.gov/PressReleases/07-1998/lago.html (concluding that, while the *Gebser* decision limits the situations where litigants can obtain damages in a private Title IX lawsuit, failure to take steps to prevent sexual harassment nevertheless violates Title IX and may subject an institution to enforcement actions by the Department of Education).

151. *Gebser*, 524 U.S. at 283 (citations omitted).

152. *Davis*, 526 U.S. at 649-650.

153. *Gebser*, 524 U.S. at 290-91.

154. *Id.* (citing RESTATEMENT OF TORTS (SECOND) § 280 for the proposition that where a school district's liability rests on actual notice principles, the knowledge of the wrongdoer himself is

The effect of *Gebser* and *Davis* was to limit educational institution liability, thereby setting the bar higher for plaintiffs to successfully hold institutions liable for damages for sexual harassment.[155] Plaintiffs who cannot meet this higher standard of liability are left without a damages remedy under Title IX and instead must pursue causes of action under alternate theories, such as liability for state actors under § 1983 or state law tort causes of action.[156]

While the limitations of current Title IX jurisprudence could be addressed within the current framework, tinkering with Title IX does not address the deeper questions we could and should be asking about the gender-based assumptions that underlie our current conception of athletics. Part IV, which follows, begins a preliminary inquiry into understanding the legal and social construction of gender in sports. Understanding how law and society shape gender will have an impact on how Title IX can be used to subvert the embedded gender-based hierarchies that perpetuate patriarchy in sport.

IV. MODELS OF ATHLETIC PARTICIPATION

We cannot begin to understand the limitations of harassment law for addressing the problem of mistreatment and abuse of athletes until we understand the models of athletic participation that help foster an environment in which harassment occurs. Currently, the law accepts the "male model" of athletic competition for both sexes. Operation of the male model creates harms that are not cognizable under current harassment law.

A. Defining the Athlete

The term "athlete" refers to one who is "trained or skilled in exercises, games or sports requiring physical strength, agility, or stamina."[157] While

---

not pertinent to the analysis).

155. For a critique of the Court's rejection of the vicarious liability standard in Title IX cases, see Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 758 (1999) (supporting the application of the strict liability standard, which the Court has applied to employers in Title VII cases, to Title IX cases).

156. *See, e.g.*, Turner v. McQuarter, 79 F. Supp. 2d 911, 916 (N.D. Ill. 1999) (holding that university officials were not on notice of sexual harassment under § 1983); Newman v. Obersteller, 915 S.W.2d 198, 199 (Tex. 1996) (affirming a denial of summary judgement for the defendant in a case involving § 1983); Landreneau v. Fruge, 94-553 (La. App. 3 Cir. 6/12/96), 676 So. 2d 701, 704 (La. Ct. App. 1996) (finding the school board not liable because its employee's act of sexual harassment was beyond the scope of employment under state tort law); *see also* Deak, *supra* note 31, at 185, 189-93 (discussing the standard for whether a defendant is acting under "color of state law" in a § 1983 suit). Coaches have also been criminally punished for abusing athletes. *See, e.g.*, Scadden v. Wyoming, 732 P.2d 1036, 1039 (Wyo. 1987) (involving a high school coach convicted of second-degree assault for having a sexual relationship with a student).

157. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 72 (10th ed. 1998); *see also* DAVID

the dictionary definition of the word "athlete" is apparently gender neutral as it does not explicitly reference gender (male or female), models of athletic behavior are based on qualities traditionally associated with men—combativeness, competitiveness, and aggression.[158] The ideal athlete, then, is someone (male or female) who exhibits those characteristics.[159]

Historically, the public considered these athletic traits as exclusively masculine.[160] The rise of organized sport during the nineteenth century was a way to affirm the superiority of American male masculinity.[161] Sport taught a particular view of masculinity—the opposite of what is feminine or womanly.[162] The term "athlete," then, historically referred exclusively to men.

B. The Female Athlete

The advent of women into the realm of sports in the late nineteenth century challenged social views of masculine versus feminine behavior.[163]

PARGMAN, UNDERSTANDING SPORT BEHAVIOR 110 (1998) (defining the term "athlete" as referring to "one who trains and practices with an eye towards success in competition involving large muscle activity").

158. *See generally* MICHAEL A. MESSNER, POWER AT PLAY: SPORTS AND THE PROBLEM OF MASCULINITY (1992) (exploring the traditional union between aggressive masculinity and competitive sport).

159. For centuries, the word "sports" and "athletics" were viewed as synonymous with men and with manly activities and attributes. Sports required strength, speed, power, and a muscular physique; competition in sports required one to be outgoing and aggressive. These traits were traditionally considered to be masculine and "manly." *See* VICTORIA SHERROW, ENCYCLOPEDIA OF WOMEN & SPORTS, at ix (1996).

160. Our contemporary views of masculinity, which are associated with aggressiveness and physical strength, were not always the predominate view. These contemporary views can be traced to the emergence of a new "passionate manhood" in the end of the nineteenth century. It was during this time that ambition, combativeness, competitiveness, and aggression became the standard of "manly" virtues and characteristics associated with "femininity" were considered dangerous and threatening to men. *See generally* E. ANTHONY ROTUNDO, AMERICAN MANHOOD: TRANSFORMATIONS IN MASCULINITY FROM THE REVOLUTION TO THE MODERN ERA (1993) (discussing the persuasiveness of the new masculine virtues of the nineteenth century).

161. *See* David Whitson, *Sport in the Social Construction of Masculinity*, *in* SPORT, MEN, AND THE GENDER ORDER, *supra* note 92, at 19, 21 (arguing that since the middle nineteenth century, sport has played an important part in how masculinity is constructed and how "manliness" (the particular way of being male) has achieved and maintained its privileged position in Western societies). The rise in sport coincides with the many other social and economic changes in American society, social and economic changes that were considered threatening to the traditional ideas of American masculinity. *Id.*; *see also* Todd Crosset, *Masculinity, Sexuality and the Development of Early Modern Sport*, *in* SPORT, MEN, AND THE GENDER ORDER, *supra* note 92, at 45-53 (arguing that sport, along with other social institutions of the mid-nineteenth century, affirmed male superiority, including male sexual superiority).

162. *See* Whitson, *supra* note 161, at 19-29 (arguing that sport "ritualizes aggression and allows it to be linked with competitive achievement and, in turn, with masculinity").

163. As one sociologist describes it, the advent of women in this traditionally male activity forced society to grapple with such questions as:

Sport was not considered an appropriate activity for women.[164] Various justifications were offered for the exclusion of women from sport, including the assertions that sport was too taxing for a woman's frail body[165] or that sport would lead to the masculinization of women.[166] Despite societal resistance, women nevertheless increasingly participated in a wide range of sports.[167] But competing and often contradictory views of female athleticism gave rise to different philosophies about the treatment of women athletes. Some advocated that to be taken seriously as athletes, women should act "just like men."[168] Others, however, counseled that women athletes should develop their own model of athletic participation "different from men."[169] As between the two views, the "same as men" model predominates in contemporary women's sports.[170]

C. The Male Model

First, the male model embodied in the "same as men" approach tolerates and even celebrates coaches who adopt a win-at-all-costs style. Because male coaches tend to have more experience with this style of coaching, it favors male coaches over female coaches.[171] The result is that

---

> Would women engaging in a traditionally male activity become more manlike? What exactly were "manly" and "womanly" qualities, and did they have to be limited to men and women, respectively? And female athleticism was not essentially masculine, did this mean that all gender differences were mutable and not ordained by, and permanently ensconced in, nature?

CAHN, *supra* note 3, at 3.

164. "In 776 B.C., at the first ancient Greek Olympic Games, not only were women banned from competition, but any woman caught watching the games could be thrown to her death from the top of Mount Typaion." SHERROW, *supra* note 159, at ix.

165. Some advocated that women should play sports despite the charges that it would lead to the masculinzation of women, some of these advocates, however, sought to protect the reputation and health of female athletes by devising separate, less physically taxing versions of women's sports. CAHN, *supra* note 3, at 3-4.

166. Historian Susan Cahn notes that advocates of women's sport developed numerous and often competing strategies to cope with the "dissonance between masculine sport and feminine womanhood." *Id.* Some advocates accepted that the "masculinization" of women was an inevitable result of women playing sports, but claimed there was a positive value to the "masculinization" process. It would, for example, contribute to female emancipation. *Id.*

167. *See generally id.* at 7-30 (describing the rise of female athleticism in the late nineteenth and early twentieth century America).

168. *Id.* at 4-5.

169. *Id.*

170. The description of the two models that follow make such an observation obvious. *See infra* Parts IV.C, IV.D.

171. *See* NELSON, *supra* note 46, at 185 (noting that authoritarian coaching styles are adopted in women's sports); *see also* Ellen J. Staurowsky, *Women Coaching Male Athletes, in* SPORT, MEN, AND THE GENDER ORDER, *supra* note 92, at 163-70 (arguing that the under-

many women athletes are coached by men and the cross-gender interaction creates an environment susceptible to sexual harassment.[172] Second, coaches under this male model exert a great deal of power and control over the athletes they train. Because of the nature of the power imbalance between male coaches and athletes, the athletes are vulnerable to the introduction of inappropriate sexual relationships. And, because women are more likely to be coached by men than men are to be coached by women, women are disproportionately harmed by this phenomenon.[173] Third, because the male model is based on a particular view of masculinity defined in opposition to "feminine" characteristics, feminine characteristics of athletes are denegrated, perpetuating the idea that characteristics associated with women are undesirable in sport and further contributing to women's subordination.[174]

Because athletic behavior is based upon models of combativeness and aggression, it is not surprising that certain types of coaching techniques—techniques that foster and reinforce these aggressive traits—are outside the current understanding of harassment law. Traditionally, male athletes have been subjected to aggressive coaching styles that cross the line into abuse. Coaches like Bobby Knight, for example, are known for an "in your face" coaching style.[175] This model of coaching behavior has found its way into women's sports as well. Female coaches like Pat Summit also adopt such aggressive coaching styles.[176] As the *Ericson* case illustrates, there are

---

representation of women in coaching linked to an underlying assumption that sports expertise is linked with male superiority and that male coaches are the embodiment of the masculine athletic ideal and automatically devalue the achievement of women).

172. *See supra* notes 83-84 and Parts III.C.2 and III.C.3.

173. *See supra* Parts III.C.2 and III.C.3.

174. *See supra* Part III.C.3.

175. Bobby Knight, the former coach of the Indiana Hoosiers, is renowned for his short temper, explosive outbursts and general incivility. Reggie Rivers, *Knight Just Doesn't Get It*, DENVER POST, Sept. 14, 2000, at B-11 (describing Knight's antics after his firing). It was not uncommon to see a red-faced coach Knight, nose-to-nose with a player, yelling all manner of obscenities, or tossing a chair to emphasize his displeasure. *Id.* One former player, Neil Reed, alleges that Knight choked him during a 1997 practice. Associated Press, *Knight Abuse Tape Surfaces* (Apr. 12, 2000), http://abcnews.go.com/sections/sports/dailynews/knight000412.html. Another former player, Richard Mandeville told CNN that Knight once "came out" of a bathroom, "pants down to his ankles, and just wiped his ass," showed the players soiled toilet paper, "and said, 'This is how you guys are playing.'" Audio file: Student Athletes Formerly Coached by Bobby Knight, *at* http://sportsillustrated.cnn.com/thenetwork/news/2000/03/14/knight_indiana/toilet.html. Another former player claims to have witnessed Knight punching and slapping players. Associated Press, *supra.* Other notable Knight incidents include throwing a chair during a 1985 game, kicking a player in 1993, and accidentally head-butting a player in 1994. Alan Schmadtke, *A Career on the Brink: Coach Has Often Courted Success, Controversy*, ORLANDO SENTINEL, May 15, 2000, at B1; A Dark Side of Knight: Ex-Hoosiers Speak in CNN/Sports Illustrated Exclusive, *at* http://sportsillustrated.cnn.com/thenetwork/news/2000/03/14/knight_indiana/index.html (Sept. 10, 2000).

176. Pat Summitt is the extremely successful coach of the women's basketball team at the University of Tennessee. Summitt admits that she has often yelled at players to motivate them. "I'm a yeller, and so I yell. My voice gets so hoarse it sounds like tires crunching over gravel." *See* PAT

consequences to adopting this model in women's athletics.[177] *Ericson* challenges not only the boundaries of appropriate physical contact between coaches and players, but also questions the appropriateness of coaching techniques that rely on denigrating and belittling players.[178] Coach Jesse Dwire's misogynistic "motivational" speeches to his female athletes[179] implied that to be athletes they must deny their womanhood. He implied that they could not be both women and athletes. This attitude leads to marginalization of women athletes.

Critical race scholars describe similar phenomena in the context of race and gender discrimination. They have developed a theory of "intersectionality" to describe the harm caused by laws that do not recognize the multiple identities of plaintiffs who experience discrimination based on more than one characteristic.[180] Kimberle Crenshaw, for example, observes that while African-American women experience discrimination both because of their gender and because of their race, anti-discrimination laws treat characteristics such as race and gender as separate and distinct.[181] She argues that this single-issue approach leads to further marginalization of those caught at the intersection of race and gender.[182] Similarly, women athletes are caught at the intersection of their gender and the male model of athleticism. While race and gender are more fundamental personal characteristics than athleticism, the analogy is useful to illustrate the harm that occurs as a result of following the male model.

D. The Female Model

The problems with the male model might suggest that a female model would be more appropriate.[183] This is certainly the view of the umpire in the excerpt from *A League of Their Own*:

> Umpire: Perhaps you chastised her too vehemently. Good rule of thumb. Treat each of these girls as you would treat your mother.[184]

SUMMITT WITH SALLY JENKINS, RAISE THE ROOF: THE INSPIRING INSIDE STORY OF THE TENNESSEE LADY VOLS' UNDEFEATED 1997-98 SEASON 2-4 (1998).

177. Ericson v. Syracuse Univ., 35 F. Supp. 2d 326 (S.D.N.Y. 1999); *see* discussion *infra* Part III.C.3.

178. *Ericson*, 35 F. Supp. at 327-29.

179. Riede, *Former Players*, *supra* note 37.

180. Crenshaw, *supra* note 13, at 139, 140.

181. *Id.*

182. *Id.*

183. Physical education professors Vivian Acosta and Linda Jean Carpenter, for example, argue for a "female" model for intercollegiate sports. *See* Vivian Acosta & Linda Jean Carpenter, *A "Partnership" Model of Sports* (1995), *at* http://www.feminist.org/research/sports8a.html.

184. A LEAGUE OF THEIR OWN, *supra* note 1.

The umpire's comments favor a separate, uniquely female approach to women's athletics. But the issue is whether such an approach would be beneficial or appropriate.

Whether and when women should be treated differently is a proposition often debated within feminist literature.[185] Feminists have approached the definition of women's equality in a few different ways.[186] "Liberal" or "equality" feminists stress the similarities between men and women.[187] They argue for the abolition of gender-based classifications to the extent they are based upon "distorted, inaccurate, irrational, and arbitrary" distinctions based on sex.[188] They suggest that the law should focus on breaking down barriers to women's advancement and that the ultimate goal should be equal opportunity.[189] Title IX seeks to implement this philosophy.[190]

"Cultural" or "difference" feminists argue that ignoring the differences between men and women harms women.[191] Instead, these feminists focus on the ways women differ from men and posit that law must acknowledge these differences.[192] For example, treating women and men equally with respect to reproduction and child-rearing obligations disadvantages women who for sociological and biological reasons disproportionately bear the burden of these responsibilities.[193] But, viewing women as different from men and deserving of special treatment can result in reliance on stereotypes of women that eventually operate to women's disadvantage.[194]

---

185. There are many different schools of feminist theory, including "liberal feminism, cultural feminism, socialist feminism, psychoanalytic feminism, existentialist feminism, radical feminism," and "postmodern feminism." *See* Michael A. Messner & Donald F. Sabo, *Introduction: Toward a Critical Feminist Reappraisal of Sport, Men, and the Gender Order, in* SPORT, MEN, AND THE GENDER ORDER, *supra* note 92, at 3.

186. *Id.*

187. *Id.*

188. CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSE ON LIFE AND LAW 117 (1987).

189. *See* LEVIT, *supra* note 113, at 189-91.

190. Title IX generally follows the equal opportunity model, with one exception. Title IX specifically excludes contact sports from its general guarantee that women will have an equal opportunity to compete in all sports. *See* Mary A. Boutilier & Lucinda F. San Giovanni, *Politics, Public Policy and Title IX: Some Limitations of Liberal Feminism, in* WOMEN, SPORT, AND CULTURE 97-109 (Susan Birrell & Cheryl L. Cole eds., 1994).

191. Crenshaw, *supra* note 13, at 140.

192. *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

193. *See* LEVIT, *supra* note 113, at 191 (highlighting the need for recognizing that men and women have varying needs that justify certain unequal treatment under the law).

194. For example, in *EEOC v. Sears*, Sears successfully argued that women were not discriminated against in obtaining commission sales jobs despite their low numbers in these positions because there was no reason to assume that women and men had similar interest in these positions. EEOC v. Sears, 839 F.2d 302 (7th Cir. 1988). Sears argued that the lack of interest on the part of women reflected a legitimate difference between men and women rather than intentional

Applying difference theory to athletics suggests that techniques that work with male athletes may not work for female athletes.[195] Unlike in men's sports where the male model has always predominated, the male model is a relative newcomer to women's sports. Traditionally, women athletes were considered more sensitive and fragile than men,[196] therefore necessitating a more gentle coaching approach. The legacy of this attitude is that coaching behavior that is perfectly acceptable in men's sports, such as yelling, may not be as acceptable in women's sports.[197] Indeed, coaches of women's teams have been disciplined and even terminated for verbal abuse of their female athletes.[198] In the context of athletics, a less aggressive style of coaching may reap certain benefits in the quality of the athletes' lives; however, use of these more genteel coaching styles are often based on paternalistic concerns that women are unable to withstand a more aggressive style, and this view of women athletes contributes to their marginalization.

E. A New Model

Of course, the difficult question is what approach should be used to coach women athletes. The problem can be approached in two ways. First is the legal approach. One possible reform for Title IX is to expand the definition of harassment to take gender into account.[199] Vicki Schultz, for example, argues that the current approach to defining sexual harassment focuses on whether the harasser sexually desired the victim, but fails to

---

discrimination by Sears. *Id.* The *Sears* case demonstrates how difference theory can be used to mask unequal treatment by reliance on stereotypes about women's interests. Professor Williams argues, for example, that the employer's argument in *Sears* ignored the structural disadvantages that played into the women's choices—for example, the extent to which women subordinate their career choices to support husbands for families. Joan Chalmers Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 303 (1991).

195. Psychologists suggest that competition is a stronger motive for males than for females and that young female athletes place more emphasis on friendship and fun than do their male peers. *See* PARGMAN, *supra* note 157, at 70 (describing the results of psychological studies of male and female athletes).

196. *See generally* MESSNER, *supra* note 158 (discussing the connection between masculinity and sports).

197. Bloom, *supra* note 84 (reporting that aggressive approaches traditionally used with boys do not always work with girls, who mature differently and have a different emotional perspective).

198. *See* Associated Press, *OCU Coach Stanley Will Not Return*, Apr. 24, 2000, 2000 WL 19884219 (describing the suspension and contract non-renewal of a college-level women's basketball coach after an investigation into player complaints of verbal abuse); Associated Press, *MSU Women's Hoop Coaches Fired*, Nov. 1, 1999, 1999 WL 28134753 (describing the termination of two coaches for violations of NCAA rules and for mental abuse of players). I am not saying that it was wrong that they were fired. But they should not have been fired because they were abusive toward women but because they were abusive.

199. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation Of Sex From Gender*, 144 U. PA. L. REV. 1, 1-2 (1995).

adequately respond to those situations where the harassment stems from gender hostility rather than sexual desire.[200] Katherine Franke similarly argues that Title VII focuses on "sex" or biological *classifications* ("male" or "female"), rather than the *characteristics* associated with gender ("masculine" or "feminine").[201] For example, she notes the difficulty encountered by plaintiffs such as gay men or transgendered individuals who are harassed because they do not meet the gender role expectation of the harasser.[202] The expansion of Title IX protections to include gender is an imperfect solution for women athletes because of the operation of the male model of athletic participation, which incorporates a particular view of masculinity within its definition of athlete. Unlike in the workplace where the conduct that constitutes harassment is often peripheral to the work at hand, the non-sexual gendered behavior at issue in some Title IX cases is considered a necessary and important part of the sport.[203]

A more comprehensive solution involves changing attitudes toward sport. This would involve creating a *new* model of athletic participation—changing the definition of athlete and reexamining the goals of athletic competition. But changing the current patterns of behavior in sport presents an even greater challenge.

1. Redefining the "Athlete"

The reason to create and implement new models of athletic behavior is not just to protect women, but to protect athletes, male and female. It has become increasingly apparent that men also suffer under the current model,[204] particularly men who do not play along with stereotypic notions of masculinity, men like Brian Seamons.[205]

What would such a model look like? It would be non-gendered but also take into account differences between individual athletes. "Post-modern" feminists argue that feminist theory must go beyond the "sameness" versus "difference" debate and take into account the multiple identities and

---

200. Schultz, *supra* note 100.

201. Franke, *supra* note 199.

202. LEVIT, *supra* note 113, at 113 ("Courts are virtually uniform in rejecting claims of sexual harassment on the basis of sexual orientation.").

203. *See supra* Parts III.C.3, III.C.4.

204. Feminist scholars have begun to explore the negative effects on men of trying to uphold traditional masculine values. *See generally* SUSAN FALUDI, STIFFED: THE BETRAYAL OF THE AMERICAN MAN 3-47(1999) (tracing the contemporary problems of the American man to the drive to fulfill post-World War II promises of male domination); LEVIT, *supra* note 113, at 105-22 (describing how the operation of masculine norms in society constructs men as tough, stoic, and impervious to pain, requiring men to suffer certain harms, including exclusion from caring and nurturing roles).

205. *See* text accompanying notes 131-136.

viewpoints of women.[206] These multiple identities include such characteristics as race, class and sexual orientation. [207] For example, the failure of Title IX to acknowledge racial differences among athletes has led to concerns that the distinct problems of African-American athletes go unaddressed.[208]

2. Redefining the Relationship Between Athletes and Coaches

Changing attitudes about sport should involve changing our attitudes about coaching. A major task of a coach is as an educator, teaching skills to players. One argument for keeping the status quo is the assertion that current coaching techniques that emphasize punishing athletes through reprimands or shouting are necessary for learning. One form of punishment is where the athlete is punished by having to do or withstand something unpleasant.[209] The punishment may be verbal, such as yelling or reprimanding, or physical, such as demanding the running of extra laps or extra push-ups.[210] The second form of punishment is where the athlete is punished by having something pleasant or positive taken away.[211] For example, the athlete may be benched after a poor play. But psychologists suggest that "punishment is usually not a preferred means of changing behavior because it emphasizes fear."[212]

3. Redefining the Goals

It is unclear, however, whether the aggressive competition model used

---

206. Williams, *supra* note 194, at 302.

207. Angela Harris argues that one of the limitations of feminist theory is its tendency to conceptualize women as a generic whole without considering the unique circumstances of women of color. *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588-589 (1990).

208. *See generally* Alfred Dennis Mathewson, *Emphasizing Torts in Claims of Discrimination Against Black Female Athletes*, 38 WASHBURN L.J. 817 (1999) (arguing that an equality-based legal regime does not provide an adequate remedy for African-American female athletes); *see also* Alfred Dennis Mathewson, *Black Women, Gender Equity and the Function at the Junction*, 6 MARQ. SPORTS L.J. 239, 240-241 (1996) (examining the meaning of gender equity as it applies to black female athletes); *see generally* Marilyn V. Yarbrough, *If You Let Me Play Sports*, 6 MARQ. SPORTS L.J. 229 (1996) (analyzing whether African American females are receiving athletic benefits in equal numbers); see generally Tonya M. Evans, Comment, *In the Title IX Race Toward Gender Equity, The Black Female Athlete is Left to Finish Last: The Lack of Access for the "Invisible Woman,"* 42 HOW. L.J. 105 (1998) (asserting that Title IX benefits white women over African American women).

209. PARGMAN, *supra* note 157, at 28-29.

210. *Id.*

211. *Id.*

212. *Id.*

in most athletics is actually necessary for success.[213] Even if current coaching styles do produce "winners," the question is whether winning at any cost is an appropriate goal, at least at the educational institutions covered by Title IX. The central mission of the educational institutions covered by Title IX is learning. Commercialization of athletics, especially at the college level, drives the win-at-all-costs mentality.[214] Winning, rather than learning, has become the sole focus of many institutions because winning at the college level and increasingly at the high school level means money for the school in the form of television revenues and income from sponsors and to coaches in the form of consulting contracts.[215]

A new athletic model would encourage coaches to use alternative training techniques and to instill in their athletes a different kind of motivation for achievement. If coaches and athletes are not required to win at all costs, then the conditions under which athletes play will receive sufficient scrutiny. No longer could an institution continue to employ an admittedly abusive coach just because of his winning percentage.

V. CONCLUSION

Title VII jurisprudence is far from a perfect fit for Title IX cases. First, it defines the conduct that will constitute harassment too narrowly. Second, it does not adequately take into account the unique nature of the athlete/coach relationship and how it differs from the typical supervisor/employee relationship. Third, to the extent courts apply the "reasonableness" standard from Title VII to Title IX cases, the standard for what is reasonable in athletics tolerates behavior on the playing field that would not be tolerated in the workplace. Currently, while Title VII standards guide many court decisions on Title IX; important differences remain. Under Title IX, courts have a unique opportunity to construct a more protective sexual harassment jurisprudence that need not, and should not, be as limited as it has been under Title VII. For the law to capture the nuances of harassment that women athletes face, it must first challenge the continued adherence to the male model of athletic participation.

---

213. The justification for the aggressive competition model is similar to the justification used in military school cases for their adversarial training methods. Yet, non-adversarial training methods have proven successful. For a description of the use of adversarial and non-adversarial training methods in military school cases, see Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 94-105 (1995).

214. *See* Brian L. Porto, *Completing the Revolution: Title IX as the Catalyst for an Alternative Model of College Sports*, 8 SETON HALL J. SPORT L. 351, 382-418 (1998) (rejecting the "commercial" model of college sports in favor of a participation model).

215. *See, e.g.*, John C. Weistart, *Can Gender Equity Find a Place in Commercialized College Sports?*, 3 DUKE J. GENDER L. & POL'Y 191, 211-12 (1996) (listing examples of expenditures in men's college sports and describing them using Harry Edwards' concept of the "Athletics Arms Race").