

Valparaiso University
ValpoScholar

Law Faculty Publications

Law Faculty Presentations and Publications

2013

Warriors, Machismo, and Jockstraps: Sexually Exploitative Athletic Hazing and Title IX in the Public School Locker Room

Susan P. Stuart

Valparaiso University School of Law

Follow this and additional works at: http://scholar.valpo.edu/law_fac_pubs



Part of the [Constitutional Law Commons](#)

Recommended Citation

Susan P. Stuart, *Warriors, Machismo, and Jockstraps: Sexually Exploitative Athletic Hazing and Title IX in the Public School Locker Room*, 35 W. New Eng. L. Rev. 374 (2013).

This Article is brought to you for free and open access by the Law Faculty Presentations and Publications at ValpoScholar. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.

WARRIORS, MACHISMO, AND JOCKSTRAPS: SEXUALLY EXPLOITATIVE ATHLETIC HAZING AND TITLE IX IN THE PUBLIC SCHOOL LOCKER ROOM

SUSAN P. STUART*

ABSTRACT

Sexually exploitative athletic hazing on boys' athletic teams is an increasingly frequent feature in the news. The physical and psychological abuse of younger team members by those who are more senior is not just humiliating but dangerous. Indeed, some athletes are charged with crimes that are committed during hazing activities. More to the point, the features of sexually exploitative hazing have all the earmarks of sexual harassment when team leaders use sexual assaults to keep younger members in their place by feminizing them or otherwise challenging their ability to conform to a hegemonic masculine sports stereotype. Athletic hazing's part in maintaining that hegemonic masculinity is often an outgrowth of a "tradition" and is therefore "rationally" perceived as a rite of passage to this admired masculinity. However, athletic hazing is not rational. It is not an initiation rite because junior members are already members of the team. Instead, athletic hazing is explicitly about team self-governance, and sexually exploitative hazing is a potent tool to create a team hierarchy through fear and intimidation.

Given the indicia of sexual harassment in such hazing, Title IX litigation has proved an important remedy for individual boys who are brave enough to challenge the sports culture when they can no longer endure the physical and emotional abuse. But litigation is reactive, not pro-active, and Title IX's better use may be in shaping systemic remedies in the locker room through either injunctive relief or investigation by the Office of Civil Rights. Schools have to take

* Professor of Law, Valparaiso University School of Law; B.A. DePauw University; M.Ed. Valparaiso University; J.D. Indiana University Robert H. McKinney School of Law. Many thanks to my long-suffering research assistants who assisted me through the years on this project: Colleen Clemons, Emily Calwell France, Adam Miller, William Horvath, and Shay Hughes.

institutional responsibility for creating the culture that allows hazing to thrive in an inherently educational function. Thus, the cure for hazing is to make the adults in the building accountable for their devotion to an unattainable hegemonic sports masculinity and for their abdication of team governance to teenagers.

INTRODUCTION

Nearly seven years ago, I wrote a law review article on litigating a peer sexual harassment case in the public schools.¹ Although only six years had passed after the United States Supreme Court handed down *Davis v. Monroe County Board of Education*,² I could generalize that Title IX might not be the most efficacious remedy for peer sexual harassment. But among my unspoken observations was that boys seemed to have greater success than girls in those cases, under either Title IX³ or § 1983.⁴ Although the number of publicly available cases for boys was small, boys procedurally prevailed in nearly three-quarters of their cases⁵ in contrast to the girls' success rate at fewer than half.⁶ I

1. Susan P. Stuart, *Jack & Jill Go to Court: Litigating a Peer Sexual Harassment Case Under Title IX*, 29 AM. J. TRIAL ADVOC. 243 (2005).

2. 526 U.S. 629 (1999).

3. "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2006).

4. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (2006).

5. See *Doe v. Bellefonte Area Sch. Dist.*, 106 Fed. Appx. 798 (3d Cir. 2004) (granting school district's motion for summary judgment under Title IX); *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996) (granting school district's motion to dismiss for plaintiff's failure to prove the harassment was based on sex under Title IX); *Nabozny v. Podlesney*, 92 F.3d 446 (7th Cir. 1996) (denying in part and granting in part school district's motion for summary judgment under § 1983); *Theno v. Tonganoxi Unified Sch. Dist.*, 377 F. Supp. 2d 952 (D. Kan. 2005) (denying school district's motion for summary judgment under Title IX); *Doe v. Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d 809 (S.D. Iowa 2004) (denying plaintiff's motion for preliminary injunction but noting plaintiff had demonstrated some likelihood of success under Title IX); *Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869 (N.D. Ohio 2003) (denying school board's motion for summary judgment under Title IX); *Snelling v. Fall Mt. Reg'l Sch. Dist.*, No. CIV.99-448-JD, 2001 WL 276975 (D.N.H. Mar. 12, 2001) (denying school board's motion for summary judgment under Title IX); *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001) (denying school district's motion to dismiss under Title IX); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165 (N.D. Cal. 2000) (denying school board's motion for judgment on the pleadings under Title IX); *Montgomery v. Indep. Sch. Dist.* No. 709, 109 F. Supp. 2d 1081 (D. Minn. 2000) (denying school board's motion for summary judgment under Title IX); *Doe v. Sabine Parish Sch. Bd.*, 24 F. Supp. 2d 655 (W.D.

was curious about why boys were more likely to prevail, so my loyal research assistants continued to update the public school peer sexual harassment cases. In those ensuing seven years, the publicly available cases reveal that boys brought an additional fifteen cases with nearly the same success rate.⁷

The reason for boys' continued success under Title IX is fairly apparent from a crude analysis of the facts: because so many cases involved physical or sexual assault,⁸ I could therefore pretty well conclude that boys were bringing more egregious facts to court and were enduring—either voluntarily or involuntarily—significantly worse harassment than girls. But another characteristic drew my eye, and that was the number of times male-on-male sexual harassment occurred in conjunction with sports. From that, I concluded that sexual harassment might play a significant role in boys' athletic hazing and vice versa.

Part of the underlying pathology of sexually exploitative athletic hazing is directly connected with the dominance of sports in our culture. To the extent that we grant cultural authority and leadership to public school sports, athletes are the standard for a hegemonic masculinity, not

La. 1998) (plaintiff voluntarily dismissed complaint, which included claim under Title IX).

6. Analyses of results in all the cases are available from the author.

7. *Wolfe v. Fayetteville*, Ark. Sch. Dist., 648 F.3d 860 (8th Cir. 2011) (affirming jury verdict in favor of school district on Title IX); *Patterson v. Hudson Area Sch.*, 551 F.3d 438 (6th Cir. 2009) (denying school district's motion for summary judgment under Title IX); *Porto v. Tewksbury*, 488 F.3d 67 (1st Cir. 2007) (granting school district's motion for judgment as a matter of law under Title IX); *Mathis v. Wayne Co. Bd. of Educ.*, 782 F. Supp. 2d 542 (M.D. Tenn. 2011) (denying school district's motion for summary judgment under Title IX and granting school district's motion for summary judgment under Title IX); *J.B. v. Mead Sch. Dist. No. 354*, CV-08-2233EFS, 2010 WL 5173164 (E.D. Wash. Dec. 10, 2010) (granting school district's motion for summary judgment under Title IX and § 1983); *Doe v. Allentown Sch. Dist.*, No. 06-CV-1926, 2009 WL 536671 (E.D. Pa. Mar. 2, 2009) (granting plaintiffs leave to amend their complaint under § 1983); *Rove v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008 (E.D. Cal. 2009) (denying school district's motion for summary judgment under Title IX); *Halvorson v. Ind. Sch. Dist. No. 1-007 of Okla. Cnty.*, CIV-07-1363-M, 2008 WL 5101285 (Nov. 26, 2008) (granting school district's motion for summary judgment as to Title IX but denying as to § 1983); *Finch v. Texarkana Sch. Dist. No. 7*, 557 F. Supp. 2d 976 (W.D. Ark. 2008) (denying motion for summary judgment under § 1983); *Doe v. Upper St. Clair Sch. Dist.*, No. 08-0910, 2008 U.S. Dist. Lexis 90649 (W.D. Pa. Nov. 9, 2008) (granting school district's motion to dismiss § 1983 claim as foreclosed by plaintiff's Title IX claim); *Martin v. Swartz Creek Cmty. Sch.*, 419 F. Supp. 2d 967 (E.D. Mich. 2006) (denying school district's motion for summary judgment under Title IX); *Bashus v. Plattsmouth Cmty. Sch. Dist.*, No. 8:06CV300, 2006 WL 2226338 (D. Neb. Aug. 3, 2006) (denying school district's motion to dismiss under Title IX); *Michelle M. v. Dunsmuir Joint Sch. Dist.*, No. 2:04-CV-2411-MCE-PAN, 2006 WL 2927485 (E.D. Cal. Oct. 12, 2006) (denying school district's motion for summary judgment under Title IX); *L.W. v. Toms River Reg'l Sch. Bd. of Educ.*, 915 A.2d 535 (N.J. 2007) (remanding after school district's appeal of adverse administrative decision under state discrimination law pursuant to Title IX principles).

8. See generally cases cited *supra* notes 5 and 7.

just for the team, but even for the community. Hazing's part in maintaining that hegemonic masculinity is often an outgrowth of a "tradition" and is therefore "rationally" perceived as a rite of passage to this admired masculinity, not unlike socio-cultural rites of passage: new members are "initiated" to the team, and the tradition is handed down to keep the hegemonic masculinity in place. In cultural traditions, sexualized acts or feats of sexuality are required to meet a society's expectations of taking the next step to manhood. So in that respect, perhaps sexually abusive behavior in athletic hazing is a not an unexpected trend.

But athletic hazing is not rational. It is not an initiation rite because rookies have already become members of the team. Nascent research suggests, instead, that athletic hazing is explicitly about team self-governance, primarily through humiliation.⁹ Thus, sexually exploitative hazing has more to do with an extension of physically abusive hazing designed to humiliate younger and often smaller team members and to keep them in their place. The way to do that, in the framework of the hegemonic masculinity, is to treat those younger team members as if they are not fully masculinized, but rather feminized. The younger team members are thus treated as if they do not conform to gender stereotypes and cannot conform until they become either peripheral to the hazing or perpetrators themselves. Given that foundation, any kind of abusive hazing in a male, homosocial sports organization could be sexual harassment under Title IX.¹⁰

Title IX sexual harassment claims could become a potent weapon in cleaning up a lot of athletic hazing problems for boys. The same systemic solutions to stop sexual harassment in the locker room will necessarily have an impact on all abusive hazing: if a coach has to supervise all locker room activities, all activities in the locker room will be supervised. And the "ick" factor invoked by sexually exploitative hazing may be just enough to draw attention to public school athletic hazing in particular, and perhaps to sexual harassment in an institution generally. But the onus will have to be on the adults in the building. Disciplinary actions against individual students will not clean up this mess. Pervasive systems of self-governance will always have some new adolescent willing to step into the breach and to take up the mantle of the tradition. That, of course, begs the question of how adolescents came to be in charge of team governance to begin with. Public school athletic teams are an educational function of the school district, run by and paid

9. See *infra* text accompanying notes 122-127.

10. 20 U.S.C. § 1681 (2006).

for by the school district, so under what circumstances did the adults abdicate to teenagers their own leadership and supervisory responsibilities over both team governance and their athletes' masculinity?

Part I of this Article will present some general background, primarily from media reports, about male-on-male abuse that has caused social scientists to take seriously the recent increase in sexually exploitative hazing on public school sports teams. Part II will then examine the social science literature focusing on athletic hazing in general and on this trend in particular. From this literature, the reductive analysis of the lawyer can glean the primitive dynamics of athletic hazing and the role that sexually exploitative hazing plays in a Title IX framework, especially where that dynamic suggests this behavior is about both power over members of the same gender and gender stereotyping. Part III.A will examine the current Title IX cases in which sports played a part in the sexual harassment of the male plaintiffs and extrapolate improvements to new plaintiffs' cases. And Part III.B will opine that Title IX can play a role in making systemic changes to the behavior of the adults in the school, either when investigated by the Office of Civil Rights or when a plaintiff seeks injunctive relief. Without changes in adult behavior, sexually exploitative hazing will damage more and more of our children. Title IX may well assure that more of our boys are given access to sports programs without fear of abuse and humiliation.

I. THE MEDIA REPORTS: "I READ THE NEWS TODAY, OH BOY"¹¹

Sex and sports have become an increasingly volatile and titillating combination. The thesis formulation of this Article was motivated in no small part by the national scrutiny drawn to recent sexual assaults involving Division I college athletic programs. In particular, these assaults highlighted the seeming inability of high-profile sports programs to control their sexually predatory athletes and coaches. In 2010, a St. Mary's College student committed suicide a week after accusing a University of Notre Dame football player of sexual battery.¹²

11. THE BEATLES, *A Day in the Life*, on SGT. PEPPER'S LONELY HEARTS CLUB BAND (Capitol Records 2002) (1967).

12. Stacy St. Clair & Todd Lighty, *University Closes Painful Chapters over Sex-Attack Reports, Deadly Fall*, CHI. TRIB., July 3, 2011, at A6. Shortly after her accusations, a friend of the alleged attacker texted the victim, "warning her against 'messing with Notre Dame football.'" *Id.* Not too long after her death, her "family privately began raising questions about the campus Police Department's perceived reluctance to gather evidence, the lack of transparency in the investigation and a 15-day delay in interviewing the accused." *Id.*

Shortly thereafter, female students accused five Marquette University athletes of sexually attacking them.¹³ Then the media exploded with the allegations that a former Penn State University assistant football coach had sexually abused children and that the university had failed to report the abuse.¹⁴ These were not hazing incidents. However, these events do underscore our increasing social “tolerance” for sexual abuse in sports in general, and by athletes in particular, because of the manner in which we revere sports.¹⁵ That tolerance may go some way to also explaining why sexual harassment is on the rise in high schools generally¹⁶ and in high school athletic teams particularly.¹⁷

13. Ryan Haggerty, Todd Lighty, & Stacy St. Clair, *One Woman’s Lonely Stand at Marquette*, CHI. TRIB., Oct. 28, 2011, at A1, A13; Don Walker, *MU Athletic Director Resigns Amid Allegations Fallout*, J. SENTINEL (Milwaukee), June 30, 2011, <http://www.jsonline.com/sports/goldeneagles/124829839.html>. All five athletes were disciplined under the university’s disciplinary and athletic codes of conduct but continued to compete. Haggerty, *supra*, at A13. “Marquette administrators clearly thought the law was that you protect your (athletes) if they’re having a good year,” said . . . a lawyer for one of the women.” Haggerty, *supra*, at A13; *see also* Todd Lighty, Stacy St. Clair, & Jodi S. Cohen, *Arrests, Convictions Rare in College Cases*, CHI. TRIB., June 17, 2011 at A1, A10:

The survey of six [universities] in Illinois and Indiana found that police investigated 171 reported sex crimes since fall 2005, with 12 resulting in arrests and four in convictions. Only one of the convictions stemmed from a student-on-student attack, the most common type of assault. The rate of arrests and convictions is far below the average for rapes reported nationally. The trend leaves an untold number of college women feeling betrayed and vulnerable, believing that their allegations are not taken seriously Society [unfortunately] compounds the problem with antiquated views about what constitutes a sex crime and who commits it The public—and therefore potential jurors—is generally comfortable with the idea of convicting a masked rapist jumping out of a dark alley. It’s harder . . . to convict a clean-cut college student of assaulting a classmate after a night of drinking.

Id.

14. Mark Wogenrich, *Shameful End: Paterno Fired*, CHI. TRIB., Nov. 10, 2011, § 4.

15. *See, e.g.*, CELIA H. BRACKENRIDGE, *SPOILSPORTS: UNDERSTANDING AND PREVENTING SEXUAL EXPLOITATION IN SPORT* 15-18, 22-23 (Routledge 2001) (stating sexual exploitation of athletes by coaches winked at for years until a couple of high-profile scandals engaged the British swim team and Canadian hockey). “Particularly evident from research reports across a number of countries is the manner in which certain aspects of the culture of competitive sport provide an environment that facilitates, rather than inhibits, the occurrence of sexual abuse in sport.” Trisha Leahy, *Working with Adult Athlete Survivors of Sexual Abuse*, in *ROUTLEDGE HANDBOOK OF APPLIED SPORT PSYCHOLOGY: A COMPREHENSIVE GUIDE FOR STUDENTS AND PRACTITIONERS* 304 (Stephanie J. Hanrahan & Mark B. Andersen ed., 2010).

16. CATHERINE HILL & HOLLY KEARL, *CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL* (AAUW 2011); *see also* Jenny Anderson, *National Study Finds Widespread Sexual Harassment of Students in Grades 7 to 12*, N.Y. TIMES (Nov. 7, 2011), <http://www.nytimes.com/2011/11/07/education/widespread-sexual-harassment-in-grades-7-to-12-found-in-study.html>.

17. *See Myths About Sexual Abuse in Sports*, MOMSTEAM.COM (Aug. 7, 2010), <http://www.momsteam.com/print/3113>.

Early documented hazing incidents involved “special mentoring relationships that required servitude, kidnapping, and sexual favors.”¹⁸ Even Plato noted what might have been hazing-like events when he “commented on the savagery of young boys.”¹⁹ By the 1700s, hazing was a college tradition in the United States.²⁰ Today, hazing is common in college fraternities and sororities, certain professions, the military, and sports at all levels.²¹ The first known high school hazing event in the United States has been traced to a Lima, Ohio high school,²² but now it has thoroughly invaded high schools. A 2000 national study reported that an astounding 48% of students surveyed had been hazed in high school, with 43% reporting humiliation, 29% reporting illegal hazing, and 22% reporting dangerous hazing.²³ The extrapolated results of the study estimated that more than 800,000 high school athletes are hazed each year.²⁴ The 2008 National Study on Student Hazing surveyed more than 11,000 post-secondary students’ high school hazing experiences with comparable results of 47% having been hazed in high school, with boys more likely to be hazed than girls.²⁵ Furthermore, male students are more at risk for *dangerous* hazing, particularly from athletic teams.²⁶

Researchers are alarmed at the recent uptick in both the physical and sexual abuse that is invading high school sports teams²⁷ and are

18. SUSAN LIPKINS, PREVENTING HAZING: HOW PARENTS, TEACHERS, AND COACHES CAN STOP THE VIOLENCE, HARASSMENT, AND HUMILIATION 3 (Jossey-Bass 2006).

19. Hank Nuwer, *A Chronology of Hazing Events*, in THE HAZING READER xxv (Hank Nuwer ed., 2004).

20. LIPKINS, *supra* note 18 at 4.

21. Hank Nuwer, *Introduction: Exterminating the Frat Rats*, in THE HAZING READER *supra* note 19, at xiv.

22. Hank Nuwer, *High School Hazing—1905-2012*, HAZING WATCH (last updated Sept. 9, 2012) <http://hazing.hanknuwer.com/hs2.html> [hereinafter *High School Hazing*].

23. Elizabeth Meyer, *Hazing and High School—Gendered Rites of Group Membership*, PSYCHOLOGY TODAY (Jan. 15, 2010) <http://www.psychologytoday.com/blog/gender-and-schooling/201001/hazing-and-high-school-gendered-rites-group-membership>.

24. Tom Weir, *Hazing Issue Rears Ugly Head Across USA*, USA TODAY, Dec. 9, 2003, at 1C, available at http://usatoday.com/sports/preps/2003-12-09-hazing_x.htm.

25. Mary Madden & Elizabeth Allan, *Summary: Hazing in View: High School Students at Risk 1*, available at http://www.hazingstudy.org/publications/hs_hazing_summary.pdf. The same survey revealed that “55% of college students involved in clubs, teams, and other extra-curricular organizations are hazed.” NAT’L COLLABORATIVE FOR HAZING RES. & PREVENTION, NATIONAL AGENDA FOR HAZING PREVENTION IN EDUCATION 1 (Nov. 2010), available at http://www.hazingstudy.org/publications/National_Agenda_Hazing_Prevention.pdf [hereinafter NAT’L AGENDA].

26. Meyer, *supra* note 23. “Gendered analyses of these behaviours indicate that violent hazing is an attempt by the older members of a group to assert their dominance over newer members by using humiliation as a tool.” *Id.*

27. Sandra L. Kirby & Glen Wintrup, *Running the Gauntlet: An Examination of Initiation/Hazing and Sexual Abuse in Sport*, 8 J. SEXUAL AGGRESSION 49, 50 (2002); see

starting to focus on the characteristics and causes of the phenomenon.²⁸ But it does not take too many keystrokes to retrieve an alarming number of news articles detailing hazing activities gone the way of criminal sexual abuse. One of the more horrific incidents occurred at football training camp for W.C. Mepham High School on Long Island, when varsity football players sodomized three freshman players with broomsticks, pine cones, and golf balls, “allegedly rubbed [with] heat-producing mineral ice.”²⁹ “The assailants allegedly brought the broomsticks used in the attacks to the camp with them, as well as stereos that some have reported were used to muffle the sound of the attacks.”³⁰ The pattern of upperclassmen abusing younger players has played out in similar reports in the media: a plastic bottle was shoved up an athlete’s rectum to initiate him onto the junior varsity team; older athletes forced a sophomore teammate to shove his finger into another sophomore’s rectum; a fifteen-year-old wrestler was sodomized by teammates with a broom handle; another young athlete—with a learning disability—was welcomed to the team by being sodomized with a plastic knife.³¹

Just referencing my own small state of Indiana revealed the following very recent reports: a seventeen-year-old basketball player at Hebron High School reported that teammates played “sword-fighting” with their penises and that one hazing ritual required older players to hold another player down and force him to lick another’s anus.³² Carmel High School, in an affluent community near Indianapolis, expelled four senior basketball players for incidents occurring in the locker room and on a bus filled with freshman players returning from a high school

generally NAT’L AGENDA, *supra* note 25, at 1-2; Linda Starr, *Hazing: Not Just a College Problem Anymore*, EDUC. WORLD http://www.educationworld.com/a_issues/issues123.shtml (last updated Nov. 4, 2011).

28. See, e.g., Jennifer J. Waldron & Christopher L. Kowalski, *Crossing the Line: Rites of Passage, Team Aspects, and Ambiguity of Hazing*, 80 RES. Q. FOR EXERCISE & SPORT 291, 291 (2009); Weir, *supra* note 24, at 1C.

29. Robert Kolker, *Out of Bounds*, NEW YORK MAGAZINE (Oct. 27, 2003) http://nymag.com/nymetro/news/features/n_9391/.

30. Laura L. Finley & Peter S. Finley, *They’re Just as Sadistic as Any Group of Boys! A Content Analysis of News Coverage of Sport-Related Hazing Incidents in High Schools*, 14 J. CRIM. JUST. & POPULAR CULTURE 197, 204 (2007).

31. And the list goes on. Hank Nuwer, *25 Bad Hazing Incidents*, HANKNUWER.COM, <http://hazing.hanknuwer.com/bad.html> (last visited May 28, 2013); see also Nuwer, *High School Hazing*, *supra* note 22; Scott R. Rosner & R. Brian Crow, *Institutional Liability for Hazing in Interscholastic Sports*, 39 HOUS. L. REV. 275, 279-81 (2002).

32. Jerry Davich, *Hebron Parents Allege Sexual Harassment at High School*, POST-TRIB. (Nov. 19, 2011, 10:34 PM) <http://posttrib.suntimes.com/news/davich/8857778-452/jerry-davich-hebron-parents-allege-sexual-harassment-at-high-school.html>. Additional allegations suggested the “popular varsity jocks” regularly terrorized other students with the “scorpion,” shoving their fingers up other students’ anuses. *Id.*

basketball game. The local grand jury handed down indictments for criminal recklessness and battery.³³ In northern Indiana, five members of the Mishawaka High School wrestling team sexually assaulted a fourteen-year-old teammate in a hazing incident “described as ‘a strong-arm sodomy using a blunt object such as a hammer or club.’”³⁴ In tiny Delphi, the parent of a freshman football player reported that two varsity players came up behind him in the locker room and restrained him while a third varsity player rubbed his genitals against the freshman’s back.³⁵ Castle High School suspended varsity soccer players for “inappropriate touching” while hazing younger team members.³⁶ Even younger, Greensburg Junior High School basketball players engaged in a hazing ritual that required one player be held down while another sat on him—either nude or in underwear—and hit the restrained player’s face with his genitalia.³⁷

Just within the three or four months prior to the final draft of this Article, the media had more of the same all over the country. In December 2011, a game of keep-away between four football players and another teammate ended with the latter having to shove a pencil up his own rectum.³⁸ In January 2012, police investigated an incident in which

33. Carol Slater, *Carmel, Indiana Teens Charged in High School Assault Case*, YAHOO! VOICES (May 21, 2010), <http://voices.yahoo.com/carmel-indiana-teens-charged-high-school-assault-6049608.html?cat=8>.

34. Rachel Glaser, *Hazing a Problem before Sexual Assault at MHS*, ABC57 NEWS, <http://www.abc57.com/home/top-stories/Hazing-a-problem-before-sexual-assault-at-MHS-135804393.html?m=y> (last visited May 28, 2013).

35. Alex Deiro & Patsy Schmidt, *Father Alleges Delphi HS Football Players Sexually Harassed Son*, WLFI (Sept. 14, 2010), <http://www.wlfi.com/dpp/news/local/father-alleges-delphi-hs-football-players-sexually-harrassed-son>. The Delphi school superintendent characterized the act as an “attempted wedgie” and determined “[t]here was no evidence of any sexual intent or sexual behavior whatsoever.” Alex Deiro & Patsy Schmidt, *Delphi Superintendent: Alleged Sexual Hazing Was “Attempted Wedgie,”* WLFI (Dec. 1, 2010), <http://www.wlfi.com/dpp/news/local/delphi-superintendent-hazing-was-attempted-wedgie>.

36. Michael Chesney, *Castle Soccer Team Suspended*, TRISTATEHOMEPAGE.COM (Oct. 17, 2008), http://tristatehomepage.com/fulltext?nxd_id=32521.

37. Adam Huening, *Schools Investigating Sexual ‘Hazing’ at Junior High*, GREENSBURG DAILY NEWS (Feb. 12, 2009), <http://greensburgdailynews.com/local/x212455070/Schools-Investigating-Sexual-Hazing-At-Junior-High>. The hazing might have gone unreported except a staff member overheard a conversation that raised concerns. During the ensuing investigation, a student reluctantly came forward. The school superintendent interpreted the lingering silence as evidence that the events were blown out of proportion: “‘Boys won’t be personally damaged (by this),’ he said. ‘If (the victims) were so emotionally affected, then why has it taken so long for us to find out?’” *Id.*

38. *Students Charged in Campus Sex Assault Incident*, ABC10NEWS (Oct. 28, 2011), <http://www.10news.com/news/students-charged-in-campus-sex-assault-incident>; Cameron Smith, *Hazing Incident Leads to Sexual Assault Charges in San Diego*, RIVALSHIGH (Dec. 2, 2011), http://rivals.yahoo.com/highschool/blog/prep_rally/post/hazing-incident-leads-to-sex

a nude basketball player exiting the shower was filmed by a teammate with his cell phone and the video was sent out to other viewers.³⁹ That same month, an investigation into a basketball hazing ritual known as “G-ing” was turned over to police as a potential sex crime, a ritual that was intended to “rough up” younger players and entailed stripping them nude and either punching them in the groin or shoving a finger or other object up their anuses.⁴⁰ And a seventeen-year-old basketball player was recently charged with sexual assault, battery, and lewdness for an assault against a fourteen-year-old during a team hazing incident.⁴¹ Plato’s “savagery of young boys” has now gone beyond sexual favors to sexual abuse.

II. SEXUALLY EXPLOITATIVE ATHLETIC HAZING: “BOY, YOU’RE GONNA CARRY THAT WEIGHT, CARRY THAT WEIGHT A LONG TIME”⁴²

The emerging social science literature is developing theories of causation and motivation for sexually and physically abusive hazing on male high school athletic teams.⁴³ Sexually exploitative hazing may be just one part of the entirety of the abuse endured by high school boys, but the increase in sexual assaults has particularly grabbed the attention of the theorists, just as it has the public imagination. Therefore, the place of sexually exploitative hazing within the general schema of athletic hazing for boys is crucial. Two theories of rational behavior

ual-assault-charges-in-san-diego?urn=highschool,wp9372.

39. Max Roll, *Police Investigating Incident Involving Henderson County High School Basketball Team*, EVANSVILLE COURIER & PRESS (Jan. 30, 2012), <http://m.courierpress.com/news/2012/jan/30/police-investigating-hazing-allegation-henderson-c/>.

40. Jerry Ulmer, *Sex Crimes Unit Takes Up Grant High School Case*, OREGONLIVE.COM (Jan. 31, 2012), http://www.oregonlive.com/sports/index.ssf/2012/01/sex_crimes_unite_takes_up_grant.html.

41. Adrian Arambulo, *Student Charged in Hazing Is Under House Arrest*, 8 NEWS NOW, <http://www.8newsnow.com/story/4672478/student-charged-in-hazing-is-under-house-arrest> (last visited May 28, 2013).

42. THE BEATLES, *Carry that Weight, on ABBEY ROAD* (EMI Records Ltd. 2009) (1967).

43. Theorists opine that hazing is distinguishable from bullying because a bully intends to hurt a particular victim while hazing requires a group: hazers, the hazed, and the bystanders. An organized team sport provides such a group dynamic whereby hazers—perhaps self-delegated bullies—act on behalf of the group. See, e.g., LIPKINS, *supra* note 18, at 18-19. “Sport bullying” has been identified as a bullying subset related specifically to athletes. Leslee A. Fisher & Lars Dzikus, *Bullying and Hazing in Sport Teams*, in ROUTLEDGE HANDBOOK OF APPLIED SPORT PSYCHOLOGY: A COMPREHENSIVE GUIDE FOR STUDENTS AND PRACTITIONERS 355, 537 (Stephanie J. Hanrahan & Mark B. Andersen ed., 2010). Coach Bob Knight’s treatment of his players has been described as “strategic assertive bullying” whereby one can experience a short-term increase in production and weed out under-performing players. *Id.* at 358.

have been identified: athletic hazing builds team cohesion and/or is an initiation ritual. The participants themselves, however, use athletic hazing to maintain the power hierarchy on the team whereby the older members keep the younger members in line. Unpacking the real dynamic is the only way to figure out how to find solutions for sexually exploitative hazing and requires an examination into the more specific sociological and psychological explanations for athletic hazing in the first place.

As a starting point, one must first examine the “locus” of athletic hazing, *i.e.* the mechanics of team membership. First, one must remember that the individuals who are hazed are already members of the team, selected on an equal basis by parties—usually the coaches—in positions superior to even the senior members themselves.⁴⁴ Through either try-outs or some other process of application, new members have already hurdled the entry phase, and they are no longer candidates for membership. Whatever merits are required for team membership, the new members have already proved them. Perhaps the new members’ exact roles on the team itself have not been clearly defined yet—including position, playing time, and starting status—but the qualifications to fill those roles have already been objectively adjudged within a preordained selection process. Confusing matters further is that athletic hazing does not always confine itself to one team. Rather, inter-team hazing occurs when the varsity team hazes the junior varsity or the junior varsity team hazes the freshmen. Last, within any athletic program regime—intra-team, inter-team, or simply between specific individuals—is the tension inherently created when the new members are the internal competition against the older members. Talented freshmen can be promoted to the varsity ranks, displacing older members; talented sophomores and juniors can take team positions from seniors; and talented rookies may supplant an older teammate from competing at all in a particular individual event. These decisions, too, are generally out of the hands of the older members of the team. Instead, they are made by coaches for the good of the team record, and they are contingent on the talent of the players. Rather than a “family” of like-minded individuals, teams are about “antagonistic cooperation.”⁴⁵

44. “[T]eam membership is technically granted *before* initiations take place, as the selection process for members occurs through try-outs and is decided by coaches and/or senior team members.” Jay Johnson, *Through the Liminal: A Comparative Analysis of Communitas and Rites of Passage in Sport Hazing and Initiations*, 36 CANADIAN J. SOC. 199, 208 (2011).

45. MICHAEL A. MESSNER, POWER AT PLAY: SPORTS AND THE PROBLEM OF MASCULINITY 88-91 (1992) [hereinafter POWER AT PLAY]. Hazing’s role in an atmosphere of antagonistic cooperation may be perceived as a method of opening the “pressure valve” of

Given those innate understandings, one must grapple with the role of athletic hazing as either having rational importance to the team or being an irrational form of team governance.

One common—and rational—justification for hazing is that it builds team unity, or team cohesion, and thereby improves team performance.⁴⁶ However, a recent study determined that hazing has no positive correlation to team cohesion.⁴⁷ When researchers administered a series of questionnaires to 167 male and female college athletes, they discovered that the athletes' self-identified “negative” hazing—abuse, self-abuse, degradation, abuse of others—did not create team cohesion.⁴⁸ Instead, it “was negatively correlated with task attraction and integration, and [was] unrelated to social attraction and integration [Furthermore, h]azing was associated with lower levels of task cohesiveness, and was unrelated to social cohesiveness.”⁴⁹ Even self-reported “acceptable” hazing activities—rated higher for social cohesiveness—had no correlation with team building.⁵⁰

If any cohesion is achieved, it is within smaller team units: (1) the hazingees as victims and (2) the hazers as perpetrators.⁵¹ In addition, the hazingees—who are already members of the team—see less benefit and attraction to the activity⁵² and feel anger and frustration with the hazers.⁵³ These smaller cohesive groups tend to change the *team* dynamic because now there are different groups with different loyalties and smaller spheres of social cohesion.⁵⁴ Furthermore, hazing tends to

the intra-squad competition in order to gain the “respect” of senior players, but that respect remains contingent on the vagaries of cutthroat competition. *Id.* at 88-89.

46. Judy L. Van Raalte et al., *The Relationship Between Hazing and Team Cohesion*, 30 J. SPORT BEHAV. 491, 494 (2007). Research reveals that there is a moderate to large positive correlation: good team cohesion will lead to good team. *Id.* at 494.

47. *Id.* at 504.

48. *Id.* at 491, 502.

49. *Id.* at 502-03.

50. *Id.* at 503. Oddly, athletes ranked coerced deviant behavior—such as simulating or engaging in sex acts—as “acceptable” hazing. *Id.* at 500, 502.

51. LIPKINS, *supra* note 18, at 15-16.

The unifying principle of the ceremony is a contestable notion as the “bonding” occurs among the hazers abusing the hazingees, and provides the promise of fulfillment with the knowledge and instruction that the subsequent year will provide them with the opportunity to recapture their masculine identity, ascend the power hierarchy, and achieve the status of initiator.

Johnson, *supra* note 44, at 223.

52. Van Raalte et al., *supra* note 46, at 495.

53. LIPKINS, *supra* note 18, at 16, 17. More than anything, the victims saw no choice in being hazed and no salvation from the abuse. Waldron & Kowalski, *supra* note 28, at 297, 299.

54. This dynamic has been noted in military hazing where “small-group bonding can

create mistrust of team leadership “because you feel the hostility and the grudges that build with being forced to do something.”⁵⁵ A team community cannot be formed “when individuals feel violated, harassed, or disparate to other members of the group”:⁵⁶ “I don’t know how you would ever be really close and friends with someone who degraded you, I wouldn’t be able to do it.”⁵⁷

Instead of team community, hazing promotes uniformity, which is not the same thing as unity:

These rites are quite successful at breeding conformity, subservience, and discipline that, while defeating the “community” intent of initiation, perpetuate the myth of cohesion. Further, excessive physical or mental demands on a new member cause fractured units within the larger group and sabotage the development of a truly unified membership.⁵⁸

The only appearance of “team” bonding is the code of silence over hazing incidents, especially when they are dangerous.⁵⁹ However, that “bonding” is illusory because team members are closing ranks out of fear of detection or of retaliation within each of the disparate groups: perpetrators, victims, and bystanders who did not intervene.⁶⁰ The code of silence is not team bonding and not a substitute for hazing’s negative impact on group unity and team performance.⁶¹

The other common—and rational—justification for athletic hazing is its function as an initiation⁶² or as “a rite of passage wherein youths, neophytes, or rookies are taken through traditional practices by more senior members in order to initiate them into the next stage of their

foster and maintain inappropriate norms Group bonding can pose a threat to legitimate authority or undermine discipline when the group becomes more important than anything else, including the army.” Donna Winslow, *Rites of Passage and Group Bonding in the Canadian Airborne*, in *THE HAZING READER*, *supra* note 19, at 147, 165-66.

55. Johnson, *supra* note 44, at 216; *see also* Waldron & Kowalski, *supra* note 28, at 298.

56. Johnson, *supra* note 44, at 217.

57. Waldron & Kowalski, *supra* note 28, at 298.

58. Johnson, *supra* note 44, at 220.

59. LIPKINS, *supra* note 18, at 16.

60. *Id.* at 23. One study of college student-athletes revealed that 40% of them would not report hazing. Rosner & Crow, *supra* note 31, at 279. Some athletes describe hazing as a positive, social bonding experience and believe that the worse the hazing, the greater the commitment to the team and interdependency with teammates. Eric Anderson et al., *Male Team Sport Hazing Initiations in a Culture of Decreasing Homophobia*, *J. ADOLESCENT RES.*, July 4, 2011, at 4, *available at* <http://www.ericandersonphd.com/journal-articles.php>.

61. Eric Anderson et al., *supra* note 60, at 4. The consequence of breaking the code of silence is a second round of hazing. LIPKINS, *supra* note 18, 135-42.

62. *E.g.*, Kirby & Wintrup, *supra* note 27, at 49.

cultural, religious, academic, or athletic lives.”⁶³ As a general function of male initiatory rites, males “court” other males so as to be seen in the company of “high-status males defined by their community as attractive rather than with the contrary”.⁶⁴

One of the functions of the initiation ceremonies is, in these terms, the insurance of “fit,” or consonance, between the males already in a group and the newcomers to it. A group of men is pleased with itself and with its status and quality. To affirm to its members and to outsiders that recruits are worthy of membership, a process of initiation is contrived which involves stringent ordeals to test the courage and endurance of initiates. This proves or disproves their suitability and keenness to join.⁶⁵

Thus, initiation is entry-level admission to the group based on qualifications that the group has determined. However, young members have already qualified for the group, making a “different” initiation seem somewhat redundant, unless the initiatory function is to a subgroup on the team.

Similarly, a rite of passage is intended to be a “transformative” experience.⁶⁶ It is intended to signify full membership into society, often entailing abusive and barbaric rituals.⁶⁷ Modern male rites of passage have the central theme of changing the subject’s identity in a “destruction/creation” cycle that constitutes the death of one identity with the rebirth into another, typically characterized as transforming from childhood to adulthood.⁶⁸ Such rites of passage may have three stages: “*separation, transition (liminality), and incorporation.*”⁶⁹ In

63. Fisher & Dzikus, *supra* note 43, at 357.

64. Lionel Tiger, *Males Courting Males*, in *THE HAZING READER*, *supra* note 19, at 14.

65. *Id.*

66. Johnson, *supra* note 44, at 203.

67. *Id.*

68. *Id.* at 204.

69. *Id.* The separation, or preinitiation anxiety, stage is the period of severing the individual from his previous identity, perhaps by bestowing a new name (“rookie,” “pledge,” “recruit”) or by physical separation during which the individual is told what will happen in the upcoming initiation ceremony. *Id.* The second phase—“liminal/transition, or hazing”—entails the actual ritual conducted by the “elders” by which the individual’s previous identity dies, and all the initiates are homogenized to suppress their individuality. *Id.* at 204-05. This transition, or hazing, stage is the period in which the initiate is “invested with knowledge about the culture [he is] entering.” *Id.* at 205. “Hazing, tests of fortitude, scarification, genital mutilation, circumcision, the changing of names, and/or violence against or by the initiate all signal the values, behaviours, and hierarchy of the society.” *Id.* The final, or integration/incorporation, phase occurs after the individual has successfully performed or endured the liminal (hazing) stage when the individual is formally welcomed as a member of the society, usually adulthood. *Id.*

athletic hazing, these “three phases can be thought of as preinitiation anxiety, initiation/hazing experience, and (temporary) membership.”⁷⁰ But because rookies are already a member of the team—and at the collegiate level, may have been recruited in an exchange for scholarship money—the intentional “tradition” of systemic hazing begs the question of “initiation” or “rite of passage” to what?

There is a more reductive legal analysis of the evidence that reduces the explanation for hazing as much less rational than team cohesion and initiation. This reductive analysis is particularly salient when one recalls that athletic hazing in the public schools is administered by children, some as young as sixth graders.⁷¹ Rational and theoretical underpinnings for an initiation or ritual function in hazing, even if valid, arise from what we know about the history of hazing in the military, in fraternal organizations, and in secret societies.⁷² The individuals who impose hazing or rites of passage in these activities may be mature enough to articulate an abstract reason for what they are doing, whether we like that reason or not. Athletic hazing at any level, but particularly at the high school level, does not have that level of articulation. Indeed, what we know of athletic hazing and its harms sounds more like *Lord of the Flies*⁷³ than a Marine boot camp. Although adults may rationalize athletic hazing on a more abstract level, the participants have a messier and perhaps more “social” view. At the

70. *Id.* at 206. In a fully articulated rite of passage at the collegiate level, these phases play out as follows:

First, rookies are invited to events and, in a way, forewarned that some testing will occur. The invitation alone can be anxiety-producing. Second, rookies are welcomed to the events, often with coaches present Third, a list or gauntlet of events is prepared for the rookies to complete. Successful completion of the trial means that rookies meet the initial standards for belonging to the team. Fourth, a reintegration or true welcoming of the rookies as full team members is conducted and “damages are repaired.” At this time, athletes are expected to express enthusiasm for the team. Ideally, new initiates are now expected to trust their new peers, to understand the limits of their own capabilities, and to have confidence because they have proved themselves to the team. Next, the dome of silence is dragged firmly into place over all, keeping the events secret and the damages hidden from the public eye.

Kirby & Wintrup, *supra* note 27, at 56 (footnotes omitted). *But see* Elizabeth J. Allan & Gennaro DeAngelis, *Hazing, Masculinity, and Collision Sports: (Un)Becoming Heroes*, in MAKING THE TEAM: INSIDE THE WORLD OF SPORT INITIATIONS AND HAZING [hereinafter MAKING THE TEAM] 61, 63 (Jay Johnson & Margery Holman eds., 2004) (“Initiations do not by definition involve hazing practices.”).

71. Jeffrey C. Gershel et al., *Hazing of Suburban Middle School and High School Athletes*, 32 J. ADOLESCENT HEALTH 333, 335 (2003).

72. *See supra* text accompanying notes 19-22.

73. WILLIAM GOLDING, *LORD OF THE FLIES* (Penguin Books 2003) (1954).

high school level, in particular, hazing resembles an immature effort at self-governance. Perhaps the most apt characterization is that hazing is “an entry ritual by the rookie contingency to mark their membership and identity within the team structure”⁷⁴—maybe even a type of group bullying⁷⁵—to coerce rookies to become part of the team family and thereby part of the team’s tradition and legacy.⁷⁶

Hazing’s social function is to create a “community” or “family” in order to build team solidarity.⁷⁷ “[A]thletes often describe their ‘need’ to have an initiation ceremony as a team bonding experience that marks the group as a ‘team’ and its members as ‘teammates’ for the first time.”⁷⁸ But unlike the prospects of promoting team performance, athletes are more likely to articulate the social aspects of team membership.⁷⁹ Athletes articulate that hazing is endured in order to be accepted⁸⁰ or respected⁸¹ and that doing so shows an athlete’s dedication to the team as well as to the other members.⁸² Hence, the more primal motivation for undergoing hazing is the need to belong to a group: “[a]ll organizations need new members to continue, and new members need a sense of belonging.”⁸³ In sports, the athlete wants to distinguish himself as a member of a particular team⁸⁴ and the more popular, the better.⁸⁵

74. Johnson, *supra* note 44, at 199.

75. Fisher & Dzikus, *supra* note 43, at 357; Kirby & Wintrup, *supra* note 27, at 51-52; see also David Plummer, *Sportophobia: Why Do Some Men Avoid Sport?*, 30 J. SPORT & SOC. ISSUES 122, 127 (2006) (“[T]here is evidence of a close association between bullies and team sports.”). See generally Christina Salmivalli et al., *Bullying as a Group Process: Participant Roles and Their Relations to Social Status Within the Group*, 22 AGGRESSIVE BEHAV. 1 (1996) (research on bullying as a social phenomenon in Finnish sixth-graders).

76. Kirby & Wintrup, *supra* note 27, at 52.

77. Johnson, *supra* note 44, at 213; MESSNER, POWER AT PLAY, *supra* note 45, at 86-87.

78. Johnson, *supra* note 44, at 207.

79. Waldron & Kowalski, *supra* note 28, at 297. “Hazing is considered part of athletes’ socialization.” *Id.* at 291.

80. *Id.* at 298.

81. Jennifer J. Waldron et al., *Duct Tape, Icy Hot & Paddles: Narratives of Initiation onto US Male Sport Teams*, 16 SPORT, EDUC. & SOC’Y 111, 117 (2011).

Mostly everybody just took it in as group bonding. It’s a major issue of acceptance.

As a freshman, if you allow a senior to have their way with you—whether it’s paddling you or whatever it is—then they’re gonna have respect for you. I mean if they haze you, it actually showed that they liked you.

Id.

82. Waldron & Kowalski, *supra* note 28, at 298.

83. Johnson, *supra* note 44, at 220.

84. “[T]he articulated desire for membership . . . is the paramount tenet for . . . team[] . . . cultures.” *Id.* at 201 (emphasis omitted).

85. Waldron & Kowalski, *supra* note 28, at 296.

Thus, athletes view their own identity as part and parcel of the team's tradition and being identified with a particular team becomes a competition in and of itself: "[y]ou need to be able to come together and say that we are united around this experience. It is what makes us unique from everyone else. You have to differentiate your team."⁸⁶ The sadder plight for undergoing hazing is the need to belong as an individual, that hazing makes friends:

Usually the people that did the hazing were the hot shots of the team—you know, the big players, the star players, or whatnot. And since they don't really know you as a freshman, once you get hazed, then you could hang out with them After being hazed, then they're your friends.⁸⁷

Even if athletes' "need" for hazing is social, its implementation has a hierarchical paradigm, a form of team self-governance rather than of social cohesion. Maintaining the hierarchy of veterans versus rookies is important in order to establish superiority or a pecking order.⁸⁸ Seniors and varsity players are the hazers while the freshman or junior varsity players are the hazingees.⁸⁹ Hazing will keep the rookies in their place: "[q]uite often, first year players come into the team community with an aggrandized sense of their worth and place within the team, an attitude that can rankle the senior players."⁹⁰ Thus, the hierarchical implementation of the team "bonding" experience establishes clear-cut outlines so that

[t]he activities are not consensual amongst peers but, rather, are between the rookies who have no positional power and the veterans who have positional authority and may also have the institutional stamp of approval, the support of the tradition, and a significant opportunity to make the lives of the rookies miserable in the longer run.⁹¹

86. Johnson, *supra* note 44, at 211.

87. Waldron et al., *supra* note 81, at 117-18.

88. Waldron & Kowalski, *supra* note 28, at 292, 297; Waldron et al., *supra* note 81, at 117.

89. LIPKINS, *supra* note 18, at 15.

90. Johnson, *supra* note 44, at 212.

91. Kirby & Wintrup, *supra* note 27, at 58. Although this hierarchical self-governance has a presumption of hazing all rookies, certain rookies may have different hazing experiences than others based on indicia of individual and team protection. Waldron & Kowalski, *supra* note 28, at 296. "These factors included ability level, physical size, presence of an older sibling, and personal leadership." *Id.* But those factors are not necessarily in play when a rookie's skill level challenges the competitive (rather than social) team hierarchy. "[R]ookies who are highly skilled may disrupt the power structure of the team and would receive more

Thus, the hierarchical paradigm for hazing is about power:

Through sport, males learn that power is well defined. For example, coaches have it and players do not; athletes have it and non-athletes do not; seniors have it and others do not; males have it and females do not. Power gives people the right to do as they please, to expect privilege that is not readily available to others. It is important to exert this power over others so they, too, may learn the chain of command and learn how to assume the power when their turn comes.⁹²

Hazing helps maintain the power-balance in the team hierarchy by emphasizing the superior position of the veterans compared to the inferior position of the rookies.⁹³ However, “this hierarchy creates resentment between the rookies . . . and the veterans.”⁹⁴ Only one thing keeps this power structure in place and, indeed, perpetuates hazing as a lasting team “tradition”—the desire to attain a sense of masculinity.

The problem, of course, is that the construct of masculinity imposed in public school athletic hazing comes from other adolescents. Team leaders are seventeen and eighteen years old and have the “responsibility” of the hierarchy in and self-governance of the team. In the absence of any articulable masculine role model or rules of governance, they rely on tradition⁹⁵ to inform their leadership duties and responsibilities. But the tradition did not arise on its own; it has its source in the social expectation and acceptance of the sport ethic that makes sports culturally distinct.

The sport ethic, or tradition, has four distinct “values: making sacrifices for the game, striving for distinction, playing through pain, and refusing to accept limitation in pursuit of winning.”⁹⁶ Contemporary

severe abuse to force them to abide by the chain of command on the team.” *Id.* at 297. On the other hand, “I think that if you are a starting freshman, you don’t get hazed as much as maybe nonstarters do because you don’t want to upset a starting player on your team.” *Id.* at 296. Hazing is thus as much about irrational motivations as intimidation and jealousy. *Id.*

92. Margery Holman, *A Search for a Theoretical Understanding of Hazing Practices in Athletics*, in *MAKING THE TEAM*, *supra* note 70, at 50, 52.

93. *Id.* at 53-54.

94. Johnson, *supra* note 44, at 215.

95. Waldron & Kowalski, *supra* note 28, at 297. “[Adolescent] boys’ understandings of masculinity approximate[] the hegemonic form, as they stress[] physical and moral strength, seductive power, heterosexuality, control over one’s own emotions, leadership, and masculine display.” Suzanne Laberge & Mathieu Albert, *Conceptions of Masculinity and Gender Transgressions in Sport Among Adolescent Boys*, in *MASCULINITIES, GENDER RELATIONS, AND SPORT* 195, 200 (Jim McKay et al. eds., 2000). Those understandings also largely marginalize “men who [do] not possess their masculine ideals.” *Id.* at 201.

96. Waldron & Kowalski, *supra* note 28, at 292.

culture and social adulation imbue male sports teams with nearly the same ethic as military boot camp.⁹⁷ “[A]thletes are expected to pay the price thought necessary for victory; playing with pain, taking risks, challenging limits; overconforming to rigid and sometimes exploitative team norms; obeying orders; and sacrificing other social and academic endeavors.”⁹⁸ In general, hazing is an integral part of this sport ethic as a way to distinguish team members from outsiders.⁹⁹ And, insofar as sports are tantamount to war, rookies must endure the rituals that pertain thereto.¹⁰⁰ Individually, the hazed rookie demonstrates that he will take one for the team, that he is dedicated to the team, and that he is worthy of membership in the team community.¹⁰¹

But underneath it all, the sport ethic is a proxy for a hegemonic masculinity.¹⁰² “[D]ominant expectations of heterosexual masculinity have long dictated that ‘real men’ should be tough, aggressive, courageous, and able to withstand pain.”¹⁰³ A hegemonic masculinity may not be the most common pattern in any particular region or community, but it is an aspirational masculinity that has social or cultural authority at any particular time and place.¹⁰⁴ A traditional hegemonic masculinity has been described as a social construct—touted by media, corporate culture, and political power—that defines “real

97. Kirby & Wintrup, *supra* note 27, at 61. “Coaches, parents, teammates, fans, and the media sustain this value system by reinforcing athletes’ observance of the sport ethic and, consequently create structural legitimacy for values, attitudes, and behaviors inherent in the power and performance model of sport.” Waldron & Kowalski, *supra* note 28, at 292.

98. Eric Anderson et al., *supra* note 60, at 3 (citations omitted).

99. Waldron & Kowalski, *supra* note 28, at 292.

100. Kirby & Wintrup, *supra* note 27, at 60-61.

101. Waldron & Kowalski, *supra* note 28, at 292.

102. Waldron et al., *supra* note 81, at 112-13.

In male sport settings, hegemonic masculinity often is the foundation for team identities and acceptance of the sport ethic. Hegemonic masculinity refers to the dominant or privileged form of masculinity [C]ommon characteristics of hegemonic masculinity include being aggressive, independent, dominant, competitive and athletically gifted. Further, heterosexuality, heterosexism and homonegativism are cornerstones of hegemonic masculinity, which is constructed by subordinating femininities and marginalized masculinities or creating ‘othered’ and unaccepted behavioral patterns [M]ost men do not actually epitomize it. Yet, the majority of men gain societal power and privilege through approximation of idealized masculine behaviors.

Id. at 112-13 (citations omitted).

103. Eric Anderson et al., *supra* note 60, at 2. Professional athletes, in particular, may symbolize a hegemonic masculinity. R. W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 GENDER & SOC’Y 829, 846 (2005).

104. Connell & Messerschmidt, *supra* note 103, at 846. “Cultural consent, discursive centrality, institutionalization, and the marginalization or delegitimation of alternatives are widely documented features of socially dominant masculinities.” *Id.*

men” by metaphor: “[n]o sissy stuff”; “[b]e a big wheel”; “[b]e a sturdy oak”; and “[g]ive ‘em hell.”¹⁰⁵ Local masculinities can be “constructed in the arenas of face-to-face interaction of families, organizations, and immediate communities.”¹⁰⁶ In the context of sport, “successful participation . . . often is a salient hegemonic masculine practice in this particular local setting,”¹⁰⁷ especially as proof of men’s superiority over women.¹⁰⁸ And in schools, sport is one of the primary vortices for the development of masculinity, particularly when the broader cultural authority reveres sports.¹⁰⁹

As a consequence, hazing itself is a construct of and “often is grounded in [this] hegemonic masculinity [W]ithin sport a very narrow conception of masculinity is privileged—one that marginalizes [] being feminine or gay and that reveres muscularity and strength. Surviving hazing reinforces that one is tough as well as confirms athletes’ heterosexuality.”¹¹⁰ And “the presence of an admired, dominant pattern puts pressure on all boys, whether or not they match the pattern—and most, of course, do not.”¹¹¹ For athletes, submission to hazing is conformity to a hegemonic masculinity that emphasizes winning as a pre-condition to acceptance,¹¹² and “in order to be winners, they must construct relationships with others . . . that are consistent with the competitive and hierarchical values and structure of the sports world.”¹¹³

Sexual exploitation is a natural consequence of athletic hazing because it is both a means of establishing one’s masculine bona fides and a successful tool for maintaining the power structure through the humiliation of the less powerful members of the team. Hazing as a construct of proving one’s masculinity is based on the notion that

105. Luoluo Hong, *Toward a Transformed Approach to Prevention: Breaking the Link Between Masculinity and Violence*, 48 J. AM. C. HEALTH 269, 271 (2000) (quoting THE FORTY-NINE PERCENT MAJORITY: THE MALE SEX ROLE (Robert Brannon & Deborah S. David eds., 1976)).

106. Connell & Messerschmidt, *supra* note 103, at 849.

107. *Id.* at 850 (citation omitted).

108. MICHAL A. MESSNER, *OUT OF PLAY: CRITICAL ESSAYS ON GENDER AND SPORT* 93 (2007).

109. Raewyn Connell, *Masculinity Construction and Sports in Boys’ Education: A Framework for Thinking about the Issue*, 13 SPORTS, EDUC. & SOC’Y 131, 137 (2008) [hereinafter Connell, *Masculinity Construction*].

110. Waldron et al., *supra* note 81, at 113 (citations omitted).

111. Connell, *Masculinity Construction*, *supra* note 109, at 133 (citations omitted).

112. Michael Messner, *Boyhood, Organized Sports, and the Construction of Masculinities*, 18 J. CONTEMP. ETHNOGRAPHY 416, 431-32 (1990).

113. *Id.* at 439.

“[s]port is a strong representation of patriarchy, where males dominate in every meaningful aspect.”¹¹⁴ Furthermore, the hegemonic masculinity of sport has traditionally “ordain[ed] . . . a particular kind of homophobic and sexist masculinity.”¹¹⁵ As a consequence, “heterosexual men go to great lengths to avoid being perceived as gay”¹¹⁶ or feminine.¹¹⁷ Thus, in a homosocial organization like an athletic team, the rituals to prove one’s masculinity are necessarily same-gendered and are designed to “allay any of the team’s concerns about some rookies’ masculinity or sexuality.”¹¹⁸ “[H]omeroetic hazing [also] has traditionally served the purpose of closing down future same-sex sexual behaviors.”¹¹⁹ The sexually exploitative rituals themselves have the reckless quality inherently prized in the sport ethic, making them *ipso facto* expressions of that masculine standard.¹²⁰ And insofar as the recognition of a hegemonic masculinity presupposes a hierarchy with other masculinities,¹²¹ then those who have not yet been hazed have not reached the standard exemplified by the hazers. Rookies can only prove their “manhood” by passing the tests of sexually exploitative hazing and being hazers in the following years.

Perhaps more important is sexually exploitative hazing’s role in ensuring the team’s hierarchy and power structure.¹²² The threat of violence is part of any dominant-subordinate power structure: “[t]echniques of subordination, which convey a message that violence can take a variety of forms, are employed to secure existing power structures.”¹²³ Indeed, “[s]ome form of pain and/or violence usually accompanies initiation rituals and has a robust but poorly understood effect of creating a sense of belonging among initiates who experience it together.”¹²⁴ Societal rites of passage often involve gendered physical ordeals, such as scarification or genital mutilation, including

114. Holman, *supra* note 92, at 52. “Hazing also supports men’s interests in controlling public space and in dominating women.” Kirby & Wintrup, *supra* note 27, at 61.

115. Eric Anderson et al., *supra* note 60, at 2 (citations omitted).

116. *Id.* at 6.

117. “[B]eing like a woman can jeopardize [athletes’] social standing and reputation.” Kirby & Wintrup, *supra* note 27, at 61.

118. *Id.* See also Eric Anderson et al., *supra* note 60, at 3.

119. Eric Anderson et al., *supra* note 60, at 5 (citation omitted).

120. Waldron et al., *supra* note 81, at 113.

121. Connell & Messerschmidt, *supra* note 103, at 846.

122. Holman, *supra* note 92, at 53.

123. *Id.* at 51. “The motivation for sexual abuse in [hazing] is not sexual gratification but the achievement of power through the humiliation of others.” BRACKENRIDGE, *supra* note 15, at 91.

124. Johnson, *supra* note 44, at 206.

circumcision.¹²⁵ Sexually exploitative hazing is the logical extension of physically abusive hazing run amok.¹²⁶ Athletic hazing usually stops short of genital mutilation, but still often involves the public exposure of genitalia as a condition of membership to the team. “Genital shaving, sexualized games, and sodomy are . . . common hazing practices invoked by teams as dramatic displays that mark the movement of initiates from the status of nonmember to member.”¹²⁷ Thus, sexually exploitative hazing overlaps with the agenda of violence of team hazing through sexual degradation; sexual assault; and physical humiliation with sexual overtones.¹²⁸ “In showing ‘who’s the boss’, team leaders reif[y] characteristics of . . . masculinity and feminize[] or dominate[] less powerful team members.”¹²⁹

Sexually exploitative hazing is the abuse of the power wielded by the older members to emasculate and humiliate¹³⁰ the rookies to keep them in their place. “Humiliation plays an important part in obedience training and may be manifested through physical, sexual or psychological denigration.”¹³¹ Sexually exploitative hazing targets rookies who are in no position to resist, sexualizes them, and then diminishes their masculinity and their sexual identity simply because they are rookies.¹³² Thus,

same-sex sexual activities serve the purpose of feminizing and homosexualizing recruits to establish and reaffirm their position at the bottom of the team’s heteromale hierarchy. At its most extreme, several episodes of anal rape (usually with objects) have been reported in hazing episodes. Somewhat more frequently, recruits are sometimes required to masturbate and ejaculate on a cracker, with the last member to ejaculate being made to eat it. However, the most frequent types of sexually related hazing practices come through mock sexual behaviors: same-sex kissing, nakedness, and consuming alcohol off of other men’s bodies.¹³³

125. *Id.*

126. Waldron et al., *supra* note 81, at 113.

127. Johnson, *supra* note 44, at 206 (citation omitted).

128. Helen Jefferson Lenskyj, *What’s Sex Got to Do with It?: Analysing the Sex + Violence Agenda in Sport Hazing Practices*, in MAKING THE TEAM, *supra* note 70, at 83, 86-87.

129. Waldron et al., *supra* note 81, at 120.

130. *Id.* at 119; Johnson, *supra* note 44, at 221. “The motivation for sexual abuse in such interactions is not sexual gratification but the achievement of power through the humiliation of others.” BRACKENRIDGE, *supra* note 15, at 91.

131. BRACKENRIDGE, *supra* note 15, at 91.

132. Kirby & Wintrup, *supra* note 27, at 51.

133. Eric Anderson et al., *supra* note 60, at 5 (citation omitted).

Sexually exploitative hazing also serves to perpetuate the power structure by subjecting rookies to acts that are too degrading and humiliating to report.¹³⁴ Acceptance of their place in the power structure and of the inevitability of the hazing creates a deviant overconformity to the sport ethic, especially “to continually endorse their athletic identity and garner the respect and acceptance of their teammates.”¹³⁵ And hence is a tradition born, not of masculinity but of humiliation.

“[H]azing is largely about sexuality . . . [by] making someone submissive to prove your own masculinity Forcing players into sexually submissive roles feminizes and emasculates rookies while also marginalizing gay males.”¹³⁶ But there are also the characteristics of gang rape inherent in males watching other males involved in sexual activity, wherein the primary characteristics are a “manifestation of status, hostility, control, and dominance.”¹³⁷ There is nothing remotely team-building or educational in such activities. They persist because team self-governance is left to adolescents without any sense of proportion or even appropriate masculine norms. They will only stop when faced with the intentional intervention of school authorities rather than the benign neglect that currently prevails. If the adults do not become more intentional about halting these abusive acts, Title IX will become an increasingly frequent and potent remedy to stop the tradition.

III. TITLE IX, SEXUALLY EXPLOITATIVE HAZING, AND THE PUBLIC SCHOOLS: “YOU TELL ME IT’S THE INSTITUTION”¹³⁸

School employees typically have no duty to protect students; the extent of their duty is to supervise.¹³⁹ The duty to supervise only requires the direct attention of a reasonably prudent person.¹⁴⁰ Tort liability will inure only “where there is a causal connection between the lack of supervision and the accident that could have been avoided by the exercise of the required degree of supervision.”¹⁴¹ An educational

134. Johnson, *supra* note 44, at 221.

135. Waldron & Kowalski, *supra* note 28, at 299; Waldron et al., *supra* note 81, at 112.

136. Waldron et al., *supra* note 81, at 113 (internal quotations and citations omitted).

137. Lenskyj, *supra* note 128, at 92.

138. THE BEATLES, *Revolution, on WHITE ALBUM* (EMI Records 2009) (1968).

139. Stuart, *supra* note 1, at 274. “Although charged with the highest degree of care toward children placed in their custody, supervisors at schools are not absolute insurers of the children’s safety and cannot be expected or required to prevent them from falling or striking each other during normal childhood play.” *Glankler v. Rapides Parish Sch. Bd.*, 610 So. 2d 1020, 1029 (La. Ct. App. 1992).

140. *Johnson v. Sch. Dist. of Millard*, 573 N.W.2d 116, 119-20 (Neb. 1998).

141. *Glankler*, 610 So. 2d at 1030.

supervisor cannot be expected to be prepared for every eventuality that might take place in the classroom, particularly when the act is unexpected or when a student breaks the chain of causation.¹⁴² The acts of other students may break the chain of causation, but only if those acts are unforeseeable.¹⁴³

Similar constraints govern coaches: a coach must exercise his duty to supervise “with the level of care of an ordinary prudent person under the same or similar circumstances.”¹⁴⁴ That duty extends to the locker room in preparation for or after practice.¹⁴⁵ Because establishing tort liability against a school district can be rather problematic,¹⁴⁶ recognizing that the duty exists is crucial for linking what coaches and school officials fundamentally know about hazing and the direct connection between their absence of supervision and harm to their players. Knowing what is common knowledge about athletic hazing—its foreseeability—transforms coaches’ failure to supervise from benign neglect to an active ingredient in enabling hazing to occur. Hazing is a team activity that does not usually take place on the field or in the arena; instead it breeds and grows when areas of team activities are “private” or unsupervised, such as team buses, locker rooms, overnight accommodations, and parents’ or coaches’ homes.¹⁴⁷ A wink and a nod are enough for hazing to grow and perhaps ordain its inevitability. Thus, the failure to take action to ensure against such a foreseeable harm is arguably an institutional indifference that Title IX prohibits, in both its litigation and systemic remedies.

A. *Title IX as Litigation Strategy*

A student’s private right of action against a public school for peer-on-peer sexual harassment under Title IX is governed by *Davis v. Monroe County Board of Education*.¹⁴⁸ In that case, the Supreme Court provided that public school districts will be liable to students sexually harassed by other students “where they are deliberately indifferent to

142. *Johnson*, 573 N.W.2d at 120.

143. *Simonetti v. Sch. Dist. of Phila.*, 454 A.2d 1038, 1039 (Pa. Super. Ct. 1982).

144. *Beckett v. Clinton Prairie Sch. Corp.*, 504 N.E.2d 552, 554 (Ind. 1987); see *Yanero v. Davis*, 65 S.W.3d 510, 529 (Ky. 2001); *Prejean v. E. Baton Rouge Parish Sch. Bd.*, 729 So.2d 686, 689 (La. Ct. App. 1999).

145. *Podgorski v. Pizzoferrato*, No. CV075010288, 2009 WL 3739409, at *5 (Conn. Super. Ct. Oct 7, 2009).

146. Marc Edelman, *How to Prevent High School Hazing: A Legal, Ethical and Social Primer*, 81 N.D. L. REV. 309, 319-21 (2005).

147. *E.g.*, Kirby & Wintrup, *supra* note 27, at 56.

148. 526 U.S. 629 (1999).

sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”¹⁴⁹ Actionable harassment is determined by the constellation of circumstances that surround the gender-oriented conduct, including the students’ expectations, relationships, and ages, and the number of students involved.¹⁵⁰ Mere “age-appropriate” student behavior—teasing, pushing, shoving, and the like—will not rise to the level of proof required by the objective standard imposed by the Court.¹⁵¹ In addition, a student must show that the harassment was on the “basis of sex.”¹⁵² Behavior with sexual overtones is not absolutely necessary to prove sexual harassment under Title IX,¹⁵³ but such behavior crosses the obvious objective hurdles and includes “rape, fondling, other forms of molestation, lewd remarks and acts, sexually oriented touching, and even challenges to gender roles of masculinity.”¹⁵⁴ The student must then show that the behavior denied him access to educational benefits, which may include either exclusion from an activity or an adverse psychological reaction.¹⁵⁵

To be liable for damages, a school district must have actual knowledge of the harassment, which is often attributable to the knowledge of a school employee who has the power to stop the abuse.¹⁵⁶ After gaining that knowledge, the school district is liable under Title IX if it acts with deliberate indifference, or if its response or failure to respond “is clearly unreasonable in light of the known circumstances.”¹⁵⁷

To date, eleven Title IX cases from the public schools exist in the intersection of sexual harassment and athletics, all involving males. Although a couple of the cases involved a hostile environment

149. *Id.* at 650.

150. *Id.* at 651.

151. *Id.* at 651-52.

152. Stuart, *supra* note 1, at 263. Title IX is framed on stopping harassment on the “basis of sex,” rather than “because of sex” as required under Title VII. Thus, gender-targeted harassment, and not just sexually suggestive behavior, has proved sufficient to proceed under Title IX. *Id.*

153. Dear Colleague Letter from Russlynn Ali, Assistant Secretary of Education for Civil Rights at 3 n. 9 (Apr. 4, 2011) available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> [hereinafter *Ali Letter*].

154. *Id.*

155. Stuart, *supra* note 1, at 271-73.

156. *Id.* at 274. *But see Id.* at 273-74; Halvorson v. Indep. Sch. Dist. No. I-007, 2008 WL 5101285, at *2 (Nov. 26, 2008) (confusing the corrective authority over teachers for teacher-on-student sexual harassment with the corrective authority over students in peer-on-peer sexual harassment).

157. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999).

perpetrated by both genders, they also included male-on-male harassment. The analysis of same-sex sexual harassment under Title IX is driven in part by *Oncale v. Sundown Offshore Services, Inc.*¹⁵⁸ In *Oncale*, the Court outlined three basic scenarios in which same-sex sexual harassment under Title VII might be proved: sexual desire; hostility to that gender; and discrimination between genders.¹⁵⁹ Cases under Title IX have also adopted gender stereotyping as evidence of harassment on the basis of sex.¹⁶⁰

In the following cases, the connection with athletic hazing is more apparent than in others, but the importance of sports and their significance in light of sexual harassment are striking in nearly all the cases. They factually demonstrate several things: the severity and pervasiveness of the sexually abusive behavior; the explicit “motivation” for the abuse based on gender-stereotyping; the significance of the sport ethic, or masculine hegemony, in both the perpetrators’ behavior and the school districts’ indifference to student complaints; and the actual knowledge, and even participation, of coaches.

One must also review these cases with the added knowledge that sexually exploitative behavior is rife in athletic hazing. It is not “boys will be boys” but a deliberate effort to humiliate younger players to maintain a team hierarchy. The adoption of such team hierarchy in boys’ athletics has everything to do with establishing a masculine identity for the older players and an either feminine or effeminate identity for the younger players, or gender-stereotyping. Athletic hazing is therefore truly on the basis of sex. It is a power dynamic based on the “tradition” of masculinity that inherently is sexual and can only play out with boys.

1. Being Jock Is a Man’s World

In two cases, the athletic masculine persona played out to marginalize male students who were not perceived as fitting the hegemonic masculinity, either through sexual orientation or gender stereotyping, by students involved in intramural sports and by a school administrator.

In *Montgomery v. Independent School District No. 709*,¹⁶¹ some of

158. 523 U.S. 75 (1998); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 963-64 (D. Kan. 2005).

159. *Oncale*, 523 U.S. at 80-81.

160. See, e.g., *Theno*, 377 F. Supp. 2d at 964-65; *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090-93 (D. Minn. 2000).

161. 109 F. Supp. 2d 1081 (D. Minn. 2000).

the male perpetrators who systemically harassed Jesse Montgomery participated in intramural sports, thereby preventing him from participating himself.¹⁶² The gravamen of Jesse's Title IX complaint was a litany of continuing and unrelenting abuse because of his perceived sexual orientation¹⁶³ and "also because he did not meet their stereotyped expectations of masculinity."¹⁶⁴ Among the numerous physical assaults he claimed to have endured from other boys, Jesse stated that they groped his genital area, grabbed his buttocks, asked to see him naked after physical education class, grasped their own genitalia, and simulated sexual stimulation and intercourse, all while other students watched.¹⁶⁵ In denying the school district's motion for summary judgment, the court accepted Jesse's gender-stereotyping claim.¹⁶⁶ Furthermore, the court described the perpetrators' acts directed at Jesse as "explicitly sexual[,] . . . constitut[ing] more than ordinary juvenile bullying, and are sufficiently severe, when viewed in totality with his allegations of extraordinarily frequent and pervasive verbal abuse, to create an 'intimidating, hostile, or offensive' educational environment."¹⁶⁷

Although only tangentially related to sports, *Schroeder v. Maumee Board of Education*¹⁶⁸ is emblematic of the power of athletics to act as a masculine stereotype. When Matthew Schroeder was in fourth grade, he became a gay-rights activist after discovering his brother was gay.¹⁶⁹ Matthew's advocacy led school administrators, teachers, and fellow students to believe he too was gay. For the next three years, many of Matthew's classmates verbally and physically abused him.¹⁷⁰ When he was in sixth grade, he sought assistance from his principal, who replied, "[Y]ou can learn to like girls. Go out for the football team."¹⁷¹ The trial court ultimately denied the school district's motion for summary judgment on Matthew's Title IX complaint because, among other things, school officials imposed discipline "for calling girls 'lesbian' and 'slut'" but not for calling Matthew "'fag' and 'queer.'"¹⁷²

162. *Id.* at 1085.

163. *Id.* at 1084.

164. *Id.* at 1090. Jesse's harassment began in kindergarten. *Id.*

165. *Id.* at 1084-85.

166. *Id.* at 1092-93.

167. *Id.* at 1094.

168. 296 F. Supp. 2d 869 (N.D. Ohio 2003).

169. *Id.* at 871.

170. *Id.*

171. *Id.* (citation omitted).

172. *Id.* at 879.

2. The Team Piles on

In some instances, the environment throughout a school was hostile to a plaintiff for either sexual orientation or gender-stereotyping. However, the behavior of an athletic team was symptomatic of the overall harassing atmosphere. Furthermore, coaches were aware of what was going on but failed to intervene.

Hoping to return to a safe school environment so he could graduate with his class at Perry High School, John Doe moved for a preliminary injunction based, in part, on a Title IX claim.¹⁷³ Although a member of both the football and wrestling teams, he was harassed for his perceived sexual orientation, and he asserted that the school district failed to provide him a safe learning environment.¹⁷⁴ Anti-gay and homophobic comments had followed Doe everywhere, including his cell phone greeting screen upon which a wrestling teammate had typed “Huge Homo.”¹⁷⁵ That teammate was disciplined, but his discipline was later reduced from a three-day to a two-hour suspension and from two to one suspension from wrestling competitions.¹⁷⁶ Despite the team suspension, the perpetrator was allowed to ride the team bus where his abuse of Doe continued.¹⁷⁷ At that same meet, another wrestler’s parent berated Doe for causing the suspension.¹⁷⁸ Doe endured similar verbal and physical abuse from other teammates.¹⁷⁹ One such incident came to the attention of an assistant wrestling coach when a teammate urinated on Doe in the shower.¹⁸⁰ The assistant coach insisted that the boys were only engaged in “horseplay” and gave them a “dressing down.”¹⁸¹ Doe eventually quit the wrestling team¹⁸² and left school to be tutored at home where he felt safer.¹⁸³ Although the trial court determined that the public interest would not be served by a preliminary injunction,¹⁸⁴ it concluded that Doe’s Title IX claim showed a likelihood of success on

173. Doe v. Perry Cmty. Sch. Dist., 316 F. Supp. 2d 809, 812 (S.D. Iowa 2004).

174. *Id.* at 814, 815.

175. *Id.* at 815-16.

176. *Id.* at 816 n.3.

177. *Id.*

178. *Id.*

179. *Id.* at 816.

180. *Id.* at 816 n.6.

181. *Id.*

182. *Id.* at 819.

183. *Id.* at 817, 819. The harassment exacerbated Doe’s stress, anxieties, and suicidal ideation. *Id.* at 817.

184. *Id.* at 839.

the merits.¹⁸⁵

Male gender-stereotyping problems followed Dylan Theno throughout the school hallways until he dropped out of school during his junior year.¹⁸⁶ Dylan's harassment started in seventh grade when a handful of boys called him "faggot," apparently to be "cool,"¹⁸⁷ but it reached an entirely different level of abuse when the boys started "a rumor that Dylan had been caught masturbating in [a] school bathroom."¹⁸⁸ Thereafter, students called him "gay," "fag," "jack-offboy," and "flamer."¹⁸⁹ By eighth grade, Dylan was subjected to occasional comments, but matters escalated when basketball teammates began to harass him.¹⁹⁰ One teammate stopped the harassment when he was threatened with being kicked off the team, only to resume after the season ended.¹⁹¹ However, another teammate picked up the gauntlet and "shouted, 'Way to go, queer Theno'" during a game when Dylan missed a shot.¹⁹²

In ninth grade, the harassment moved to physical education class and had now been going on for more than two years and was now increasingly incessant.¹⁹³ When he started high school, Dylan was pretty much left alone until February, when he experienced problems in strength training class where the masturbation rumor came back to haunt him.¹⁹⁴ By his junior year, Dylan finally had had enough, suffering stomach problems and eventually receiving psychiatric treatment for post-traumatic stress disorder, avoidant personality disorder, depression, and anxiety disorder.¹⁹⁵ On the school district's motion for summary judgment as to Dylan's Title IX complaint, the trial court determined that "a rational trier of fact could infer that [Dylan] was harassed because he failed to satisfy his peers' stereotyped expectations for his gender because the primary objective of [Dylan's] harassers appears to have been to disparage his perceived lack of masculinity."¹⁹⁶

185. *Id.* at 834.

186. *Theno v. Tonganoxie Unified Sch. Dist.*, 377 F. Supp. 2d 952, 954 (D. Kan. 2005). Dylan opted to get his General Education Diploma rather than endure the relentless harassment he suffered from other males at school. *Id.*

187. *Id.* at 955. Dylan is actually heterosexual. *Id.* at 964.

188. *Id.* at 955-56.

189. *Id.*

190. *Id.* at 957.

191. *Id.*

192. *Id.*

193. *Id.* at 957-58.

194. *Id.* at 958.

195. *Id.* at 968.

196. *Id.* at 965.

DP suffered from an emotional impairment and endured nearly daily harassment beginning in seventh grade,¹⁹⁷ when peers called him “gay,” “fag,” and “man boobs,” and pushed him around in the hallways.¹⁹⁸ The abuse abated in eighth grade when DP was placed in a learning resource room,¹⁹⁹ but it returned in ninth grade, finally culminating in a sexual assault by a baseball teammate, LP, in the locker room after junior varsity practice. “LP stripped naked, forced DP into a corner, jumped on DP’s shoulders, and rubbed his penis and scrotum on DP’s neck and face” while a classmate blocked DP’s escape.²⁰⁰ DP reported the assault to his brother, coach of the junior varsity team, while his parents told the school principal during the next-day’s doubleheader.²⁰¹ The school district suspended the attacker for the rest of the school year but allowed him to attend the annual spring banquet, at which the principal admonished DP’s brother “to shake [LP’s] hand as [he] would other players and to act like nothing happened.”²⁰² Also after the attack, the varsity baseball coach called a meeting—which DP attended—with both junior varsity and varsity teams and advised the players “that they should not joke around with boys who can’t take a man joke.”²⁰³ DP was “psychologically unable to set foot into a Hudson school building” after his freshman year²⁰⁴ and brought suit under Title IX.²⁰⁵ The Sixth Circuit reversed the trial court’s ruling for the school district on the deliberate indifference element, instead determining there were genuine issues of material fact that the school district’s discipline against individual students was ineffective and culminated in the sexual assault.²⁰⁶

In a contrary Title IX ruling, a school district was deemed to have had no actual knowledge of the harassment because the coaches did not

197. *Patterson v. Hudson Area Sch.*, No. 05-74439, 2007 WL 4201137, at *1 (E.D. Mich. Nov. 28, 2007), *rev’d* 551 F.3d 438 (6th Cir. 2009).

198. *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 439-40 (6th Cir. 2008).

199. *Id.* at 441.

200. *Id.* at 442.

201. *Id.*

202. *Id.* at 443.

203. *Id.* (internal citation omitted). DP’s attacker was charged with criminal sexual conduct and assault with intent to commit a felony, eventually pleading guilty to disorderly conduct. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 448-49. “Hudson’s success with individual students did not prevent the overall and continuing harassment of DP, a fact of which Hudson was fully aware, and thus Hudson’s isolated success with individual perpetrators cannot shield Hudson from liability as a matter of law.” *Id.* at 449 (citation omitted).

have authority to institute corrective measures.²⁰⁷ In that case, James Halvorson “suffered sexually oriented assaults, battery, and harassment” at the hands of another student.²⁰⁸ The harassment eventually required emergency medical treatment after one such attack in the school weight room knocked James unconscious.²⁰⁹ James had complained about the harassment directly to his coaches.²¹⁰ In what seems to be an obvious misreading of precedent, the court found that the school district had not bestowed authority upon coaches to take corrective steps and granted the district’s motion for summary judgment on the element of actual knowledge.²¹¹ James, however, was allowed to proceed on his § 1983 claim that the school district’s custom and practice created a buffer from liability by failing to adequately train its coaches to bring harassment complaints to the school board’s attention,²¹² especially because it was already defending another peer sexual harassment suit.²¹³

3. Hazing as a Team Sport

These final five cases are “pure” athletic hazing cases. Except for the first—which pre-dated the *Davis* decision—the boys prevailed. In all four cases, the hazing was quite obviously sexually deviant. The coaches knew of the hazing in all five cases and directly participated in at least two of them. The saddest hallmark of two of them, however, is the success of the hierarchical humiliation on some of the victims: they did not see the abuse as deviant; rather, they had accepted over-conformity to the sport ethic as an acceptable response to team hazing.²¹⁴

The first published case of male-on-male student sexual harassment under Title IX was an athletic hazing case.²¹⁵ Brian Seamons was a member of the Sky View High School football team.²¹⁶ At the time of the incident, he was leaving the shower naked when five of his upper-class teammates grabbed him and used adhesive tape to bind him to a towel bar and to bind up his genitals.²¹⁷ One teammate then brought a

207. Halvorson v. Indep. Sch. Dist. No I-007, No. CIV-07-1363-M, 2008 WL 5101285, at *2 (W.D. Okla. Nov. 26, 2008).

208. *Id.* at *1.

209. *Id.*

210. *Id.* at *2.

211. *Id.*

212. *Id.* at *4.

213. *Id.*

214. Mathis v. Wayne Cnty Bd. of Educ., 782 F. Supp. 2d 542 (M.D. Tenn. 2011).

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

216. *Id.* at 1230.

217. *Id.*

girl whom Brian had dated into the locker room to join the spectacle.²¹⁸ Brian reported the incident to the school administration and the football coach, with the ultimate result that the school district cancelled the season's final game in the state playoffs.²¹⁹ In an incident of "second" hazing,²²⁰ the football coach characterized the attack as a rite of passage for membership on the team—"boys will be boys"—and accused Brian of betraying the team.²²¹ As a consequence, the five teammates who had committed the assault were allowed to play in the game following the attack while Brian was kicked off the team for refusing to apologize.²²² Thereafter, the poisonous atmosphere at the school forced Brian to transfer to another school.²²³ Brian's Title IX complaint alleged that this hostile environment signaled that he had to conform to a "macho male stereotype" after being criticized for not taking the abuse "like a man," but he did not complain of the actual attack.²²⁴ The trial court granted and the appellate court affirmed the dismissal of Brian's complaint because he had failed "to allege any facts that would suggest he was subject[] to unwelcome sexual advances or requests for sexual favors, or that sex was used to contribute to a hostile environment for him."²²⁵

Given that his case pre-dated the Supreme Court's decision in *Davis*, Brian's complaint was probably doomed from the start. Equally problematic was his failure to plead the act of hazing as actionable sexual harassment.²²⁶ Nearly as disturbing, however, was the court's tolerance of the hazing incident as an "accepted" method of promoting team loyalty and toughness.²²⁷ Rather than suffering "based on sex," Brian had suffered because he had "betrayed" the team.²²⁸

The Snelling brothers' Title IX case was more successful, not the least because coaches were directly involved in the hazing, in no small part by their favoritism to players residing in one community over another.²²⁹ And the Snellings did not live in the favored community.²³⁰

218. *Id.*

219. *Id.*

220. LIPKINS, *supra* note 18, at 135-40.

221. *Seamons*, 84 F.3d at 1230.

222. *Id.*

223. *Id.*

224. *Id.* at 1232.

225. *Id.* at 1233.

226. *Id.* at 1231.

227. *Id.* at 1233. As a consequence, Brian could not prove discrimination on the basis of gender, either. *Id.*

228. *Id.* Brian was able to proceed on his First Amendment freedom of speech claim. *Id.* at 1237-38.

229. *Snelling v. Fall Mountain Reg'l Sch. Dist.*, No. CIV. 99-448-JD, 2001 WL

The elder Snelling, Derek, joined the freshman basketball team, but he soon discovered that a clique of players from the other community did not like him.²³¹ One of those players reported—falsely—that Derek had taken a shower with another boy and had experienced an erection.²³² Thereafter, Derek was called “Stiffy” all the way through his high school graduation ceremony.²³³ The same clique taunted him with homosexual epithets and comments, all in the presence of the coaches,²³⁴ who favored these players.²³⁵ When Derek complained to the principal of the coaches’ harsher treatment toward him, he was told that being “mean” was a part of growing up and that he would just have to accept it.²³⁶

The younger Joel Snelling started high school the next year by which time Derek was experiencing physical abuse from teammates.²³⁷ Joel also played basketball but did not experience his brother’s difficulties until his sophomore year when students named him “Little Stiffy.”²³⁸ The abuse got worse after both Joel and Derek brought weight vests to wear during practice to improve their leaping ability. Derek complained to the principal when one of the coaches referred to the vests as “bras,”²³⁹ but the coach denied the incident and was corroborated by members of the clique.²⁴⁰ Derek’s physical abuse from teammates got worse. One incident sent him to the hospital for headache, blurry vision, and dizziness.²⁴¹ Coaches who were present during the attacks did not intervene.²⁴² In January of Derek’s senior year, he witnessed the team captain assault another team member.²⁴³ A fourth team member threatened to kill Derek if he told the administrators but was never disciplined.²⁴⁴

276975, at *1 (D.N.H. Mar. 21, 2001).

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at *1, *3. He was subjected to other malicious name-calling: “fag,” “jew boy,” and “homo.” *Id.*

234. *Id.* at *1.

235. *Id.* at *2.

236. *Id.*

237. *Id.*

238. *Id.* Joel was also called “fag boy.” *Id.* After another member of the team cursed at Joel and his father, Joel was forced to apologize because the other boy was a coach’s son. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at *3.

244. *Id.*

The Snelling boys' Title IX claim rested on "sex-based stereotypes of masculinity."²⁴⁵ Not only was the claim actionable, but the court asserted that the undisputed facts proved "both wide-spread peer harassment and . . . harassment by coaches"²⁴⁶ and that telling a high school boy to just accept the acts as a part of growing up was deliberate indifference.²⁴⁷

Locker rooms are necessarily the scene of sexually exploitative behavior for athletic teams, such as the sexual harassment of freshman football player Brandon Bashus by varsity player, senior Jacob Schippert.²⁴⁸ Schippert already enjoyed a reputation for instilling fear in freshman football players because of his threatening and inappropriate behavior in and out of the locker room.²⁴⁹ One day after practice, Schippert exposed his genitals and touched Brandon in an offensive manner, scaring and humiliating him.²⁵⁰ Contrary to school policy, no coaches or other supervisory personnel were in the locker room.²⁵¹ Brandon's Title IX complaint survived dismissal because the school district was aware of Schippert's propensities.²⁵²

More systemic athletic hazing in a middle-school basketball program also successfully supported a Title IX case, although the plaintiffs were unsuccessful on their failure-to-train claim under § 1983.²⁵³ In *Mathis v. Wayne County Board of Education*,²⁵⁴ the basketball team at Waynesboro Middle School included both seventh- and eighth-graders.²⁵⁵ Two seventh-grade basketball players sued under Title IX for harassing locker room behavior by eight-graders both before and after practices when they were typically unsupervised.²⁵⁶ In the

245. *Id.* at *4.

246. *Id.* at *5.

247. *Id.* at *6-7.

248. *Bashus v. Plattsmouth Cmty. Sch. Dist.*, No. 8:06CV300, 2006 WL 2226338, at *2 (D. Neb. Aug. 3, 2006).

249. *Id.*

250. *Id.*

251. *Id.* at *3.

252. *Id.* at *4-5.

253. *Mathis v. Wayne Cnty Bd. of Educ.*, 782 F. Supp. 2d 542, 522 (M.D. Tenn. 2011). Plaintiffs' § 1983 failure-to-train claim failed for lack of an underlying § 1983 violation. *Id.*

254. *Id.* at 544.

255. *Id.*

256. *Id.* at 544-45.

When [the coach] arrived in the gym area, he would generally briefly stop by the locker room to obtain any equipment and make sure that the students were basically ready to begin practice [He] was a relatively infrequent presence in the locker room *after* practice, only coming in there "every once in a while" and for very brief periods such that "he was never really in there." [The coach] concedes that he was

absence of supervision, the locker room devolved into chaos—a “wild, insane, crazy environment”—where eighth-graders typically picked on the seventh-graders.²⁵⁷ One “prank” was initiated when an eighth-grader shouted “lights out!” and the eighth-graders “hump[ed]” seventh-graders in the dark.²⁵⁸ Another such “prank,” called the “blindfolded sit-up,” was relayed by the coach himself although he told the players not to do it: the eighth-grade challenger dared a seventh-grader to do the “impossible,” a sit-up while blind-folded.²⁵⁹ When the seventh-grader took the dare, the challenger would “have placed his (usually naked) rear end so that the person performing the sit-up hit[] the rear end with his face.”²⁶⁰ More serious incidents included an eighth-grader’s attempt to shove a pencil up a seventh-grader’s rectum²⁶¹ and three eighth-graders’ restraining a seventh-grader while a fourth eighth-grader shoved a magic marker in his rectum.²⁶² The four eighth-graders involved in the forcible sodomy with the marker were slapped with an in-school suspension for hazing and suspended from the basketball team until January 1, but on appeal of their suspensions, the school board voted unanimously to reinstate the four boys to the team, retroactive to December 1.²⁶³

The seventh-grade players vacillated in their attitudes toward this hazing: the marker incident was no “big deal”;²⁶⁴ the hazing was but a series of practical jokes,²⁶⁵ “pranks” committed by older players on younger players. However, they also conceded they were scared and intimidated by the eighth-graders.²⁶⁶ The plaintiffs’ parents eventually removed their sons from the middle school, but not before one endured teammates’ blame for the team’s woes after the marker incident.²⁶⁷

Plaintiffs survived the school district’s motion for summary judgment as to their Title IX count, highlighting the coach’s behavior.²⁶⁸

not entirely comfortable staying in the locker room while his players were changing (students generally did not shower in the locker room, however), but that he checked in more frequently than [witnesses] indicated.

Id. (citation omitted).

257. *Id.* at 545.

258. *Id.*

259. *Id.*

260. *Id.* at 545.

261. *Id.*

262. *Id.* at 546.

263. *Id.* at 547.

264. *Id.* at 546.

265. *Id.*

266. *Id.*

267. *Id.* at 548.

268. *Id.* at 551.

The coach expressed “shock” at the sexual misconduct in the locker room, but characterized it as “horseplay.”²⁶⁹ But the court emphasized his failure to address what had to be apparent to him:

[The coach] arguably, if inadvertently, encouraged this misconduct by giving his players the idea of the blindfolded sit-up and by the fact that [he] appears to have consistently “looked the other way” rather than facing the problem, that is, not entering the locker room after practice to supervise his players, even after seeing one attempted blindfolded sit-up, hearing of the “pencil incident,” and knowing that other assorted “horseplay” was ongoing.²⁷⁰

The stars similarly aligned for the plaintiff in *Roe v. Gustine Unified School District*.²⁷¹ Freshman John Roe attended a three-day football camp sponsored by Gustine High School (GHS), where he was sexually assaulted by upper-class teammates, two of whom had already been reprimanded for behavioral problems.²⁷² Sixty GHS football players attended the football camp held on the premises of Liberty High School (LHS).²⁷³ The GHS players spent two nights in the LHS gym.²⁷⁴ Coaches from both schools were responsible for supervision on the field while the GHS coaches had the additional supervisory responsibilities for their own players off the field, during breaks and meals, and overnight.²⁷⁵ During the camp, four upperclassmen assaulted or attempted to assault fifteen players, one of whom was the plaintiff,²⁷⁶ although one such attack was thwarted by the GHS head coach who saw the preliminary restraint of a freshman and verbally reprimanded the upperclassmen to stop their “horseplay.”²⁷⁷

Plaintiff’s assault occurred on the second day when the four upperclassmen chased him into a locker room, held him down, inserted an air pump into his rectum, and pumped air into his rectum for a few seconds.²⁷⁸ Afterwards, one of the attackers took off his clothes and

269. *Id.* at 548.

270. *Id.* at 551. *See also* Mathis v. Wayne Cnty. Bd. of Educ., 2012 WL 3608598 (6th Cir. Aug. 23, 2012) (affirming \$100,000 jury verdict against the school board).

271. 678 F. Supp. 2d 1008 (E.D. Cal. 2009).

272. *Id.* at 1012.

273. *Id.*

274. *Id.* at 1013.

275. *Id.* “[T]he football camp was sponsored and promoted by Gustine High School, its football coaches and administrators, was a core part of Gustine High’s football program, and was under the supervision of Gustine High teachers and/or football coaches.” *Id.* at 1025.

276. *Id.* at 1013.

277. *Id.* at 1015.

278. *Id.*

entered the shower where the plaintiff was cornered.²⁷⁹ The older player grabbed the plaintiff's buttocks and called him a homosexual.²⁸⁰ Thereafter, the upperclassmen hurled homosexual epithets at the plaintiff, causing his teammates to believe he was gay.²⁸¹ Furthermore, three of the upperclassmen exposed their genitalia to GHS teammates both on and off the field, and one repeatedly hit teammates in the heads and faces with his penis.²⁸² The plaintiff eventually withdrew from GHS as a consequence of the hazing.²⁸³

One of the school district's summary judgment strategies in response to the plaintiff's Title IX claim was to argue that the hazing was age-related, not gender-related,²⁸⁴ and that what occurred was "horseplay" and "kids being kids."²⁸⁵ The head coach averred there was nothing "sexual" in the behavior, but "childish behavior" warranting only a verbal reprimand.²⁸⁶ The trial court, however, determined that the age and gender evidence were not mutually exclusive and that the constellation of the events was sexually based.²⁸⁷ As to the knowledge element, the trial court held that

[t]he case law reveals no requirement that the appropriate district officials observe prior acts of a sexual nature against Plaintiff himself to establish "actual knowledge" under Title IX; rather the test is whether the appropriate official possessed enough knowledge of the harassment that he or she reasonably could have responded with remedial measures to address the kind of harassment upon which plaintiff's legal claim is based.²⁸⁸

In addition, the head coach was an "appropriate person" with authority to control and remedy the harassment as the "administrative proxy" for the school district: he was the head varsity football coach, a teacher employed by the school district, and head of the summer football camp for GHS.²⁸⁹ The plaintiff, therefore, moved past the summary

279. *Id.* at 1014.

280. *Id.* The same night as the plaintiff's attack, the coaches watched while the players engaged in a pillow fight in the gym—an annual ritual—during which some players were hurt by heavy objects hidden in the pillows. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* at 1027.

284. *Id.* at 1026.

285. *Id.* at 1031.

286. *Id.*

287. *Id.* at 1026-27.

288. *Id.* at 1030.

289. *Id.* at 1034.

judgment phase.²⁹⁰

Based on the foregoing, Title IX can be a potent litigation tool when suing a school district for the harms caused by athletic hazing. Except for the antediluvian attitude of the court in *Seamons v. Snow*, courts seem willing to entertain these cases and rule favorably for plaintiffs.²⁹¹ The evidence in these cases bears all the badges of the team hierarchy running amok with little or no adult supervision and even adult participation. The attacks on younger team members are not just sexually exploitative but sexually abusive; they reveal sexual deviance as a tool for power in the hierarchy. And insofar as athletic hazing is part of a team “tradition,” it is pervasive as a matter of law. The courts also seem to be leaning toward attributing “enough knowledge” to coaches rather than actual knowledge of events—“boys will be boys” and the failure to supervise now suggest enough knowledge to hold schools responsible.

If there are hurdles to a private right of action, they might be the athletes themselves, their acceptance of the hazing as some kind of “macho” ritual, and their concomitant refusal to report hazing under the code of silence and to incur the inherent risks of a second hazing. Surely such humiliation denies athletes whole-hearted participation in an educational opportunity. Instead, athletes are held hostage to an adolescent vision and version of masculinity and an unbridled system of hierarchical abuse, sometimes with the cooperation and collaboration of the adults. And that is just sad.

B. *Title IX as Systemic Remedy*

Title IX offers not just a reactive litigation solution to athletic hazing, but also offers pro-active systemic remedies.²⁹² These systemic remedies are injunctive relief and administrative enforcement by the Office of Civil Rights (OCR) in the U.S. Department of Education, whereby federal funding may be withdrawn or the matter may be referred to the Department of Justice.²⁹³ Such remedies have a different framework of proof that makes it easier for a victim to get relief.²⁹⁴ “If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its

290. *Id.* at 1045.

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

292. *Ali Letter*, *supra* note 153, at 16.

293. *Id.*

294. *Id.* at 4.

recurrence, and address its effects.”²⁹⁵ A school need not have actual knowledge nor must it act with deliberate indifference.²⁹⁶

As a preventive measure, Title IX and its regulations require that schools establish some basic administrative procedures to deal with peer sexual harassment: they must “[d]isseminate a notice of nondiscrimination”; they must appoint a Title IX coordinator; and they must establish grievance procedures to handle student harassment complaints.²⁹⁷ For purposes of boys’ athletic hazing, school district grievance procedures must be better attuned to the sexual deviancy that occurs in the locker room. First, the Title IX officer needs a complete education on the laws of sexual assault and sexual deviancy when males are the victims in that jurisdiction. These are crimes, not mere boyhood pranks—forcing a finger up a boy’s rectum is sodomy, and even a “wedgie” is a nonconsensual touching. And long-gone should be the notion that boys should have to suffer greater harms than girls. Second, the Title IX officer needs a thorough grounding on sexual harassment as it relates to boys. The notion that “sexual desire” must be the motivation for sexual harassment of boys must be rooted out. Just as sexual abuse power motivates some rapes,²⁹⁸ so too are the acts perpetrated on young boys. In addition, the gender-stereotyping that motivates this hazing for purposes of humiliating male athletes is sexual harassment under the law. Third, and related to the first two, is the responsibility for the receipt of evidence from a male victim. Once the victim has reported the sexual abuse, it is not a mere matter of trying to find out the “whole” story by asking team members and the coach for corroboration or contradiction. Instead, the first question is whether adults were present at the location. The absence of supervision creates a rebuttable presumption of the truth of the victim’s story, corroborated by other victims. Insofar as rapes can be tried based only on the victim’s testimony, the Title IX officer must understand the profound import of a male victim’s coming forward about what has happened to him. Last, in those school districts where a particular sport has a particular hegemony, the impartiality of the Title IX officer might be questioned. As a consequence, athletic conferences might want to consider pooling their Title IX officers to parcel them out to member school districts.

In addition to the administrative process for victim complaints, the

295. *Id.*

296. *Id.* at 4 n.12.

297. *Id.* at 6.

298. See generally Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147 (2011).

OCR recommends preventive education programs as follows: “(1) orientation programs for new students, faculty, staff, and employees; (2) training for students who serve as advisors in residence halls; (3) training for student athletes and coaches; and (4) school assemblies and ‘back to school nights.’”²⁹⁹ These education programs should be designed to inform of both the school’s policies and the very nature of sexual harassment and violence. The programs should also include educational resources for administrators, faculty, coaches, and students.³⁰⁰ Specially designed materials should be disseminated to employee handbooks and student activity handbooks, including those for sports.³⁰¹ All school employees must report sexual harassment, but the OCR stresses that students must be educated that sexual violence is a matter of safety and encouraged to report themselves to the appropriate authorities.³⁰² Therein lies the rub with athletic hazing.

An educational program that relies on students reporting athletic hazing flies in the very face of the dynamic. The code of silence forbids reporting, and it is the rare young adolescent who can or will ignore that code, regardless of the humiliation. Second, breaking the code of silence will often precipitate ancillary hazing after the report; a school district that cannot control athletic hazing will not be trusted by a young athlete to control the fall-out from other students and parents. Third, athletes believe that hazing is not sexual harassment, especially when their “friends” and “family” are doing it. Last, and a recursive analysis of hazing itself, the smaller group—the team—will protect itself to the detriment of the whole school where loyalty is everything.³⁰³

To break the “tradition” of hazing, we cannot rely on the athletes to do it themselves. That asks a lot of young adolescents, especially in communities where sports are the primary mode of entertainment and star athletes are gods. As a consequence, the adults must be responsible and must be held accountable for not supervising and for explicitly or implicitly allowing hazing to continue. Athletic hazing succeeds because adolescents have been delegated the responsibility of team self-governance and establishing a masculine identity. Understanding that dynamic reveals that adolescents are ill-equipped for those

299. *Ali Letter*, *supra* note 153, at 14.

300. *Id.* at 15.

301. *Id.*

302. *Id.*

303. “A strong group can . . . foster and maintain inappropriate norms. In addition, by assuring anonymity through norms of the group, it can facilitate acts of subversion and defiance, since the group will ‘circle the wagon’ to protect individual members from . . . authority.” Winslow, *supra* note 54, at 166.

responsibilities and that adults are irresponsible for thinking otherwise.

William Golding described the theme of *Lord of the Flies* as “an attempt to trace the defects of society back to the defects of human nature. The moral is that the shape of a society must depend on the ethical nature of the individual and not on any political system however apparently logical or respectable.”³⁰⁴ Although not as grim in results as *Lord of the Flies*, athletic hazing—reliant as it is on establishing a team self-governance by adolescent boys—is not unlike the tribal organizations of Ralph, Piggy, and Jack.³⁰⁵ Regardless of how one attempts to ascribe some rational basis for the roots of athletic hazing, the perpetrators themselves are the ones who actually define what is going on: humiliation and hierarchy.

Organized school sports are the natural breeding ground for these problems insofar as schools are a prominent site of masculinity formation: as agency and as setting.³⁰⁶ A school athletic program for boys has been described as a “vortex” of masculinity by blending “power, symbolization, and emotion in a particularly potent combination.”³⁰⁷ Although the hierarchy may be explicit in hazing practices for athletic teams, implicit is that the hierarchy must also fulfill and sustain a masculine identity. Today, the dynamics of sports, misbehavior, and masculine identity are difficult for adults to uncouple, given their admiration for sports stars. Imagine how hard that is for adolescent boys, especially unsupervised adolescent boys who are left to their own devices, to establish a hierarchy that, to them, has come to be imbued with a test of masculinity.

Without adult supervision and more responsible masculine role models, adolescent self-governance on a team has more of the characteristics of a street gang than of “organized” sports. Substitute the word “team” into the following description:

Street gangs can be defined as groups of youths and young adults with varying degrees of cohesion and structure, who have regular contact with one another, ways of identifying their group, and rules of behavior within the system. Gangs serve numerous functions for their members, including providing a source of status,

304. E.L. Epstein, *Notes on Lord of the Flies*, in WILLIAM GOLDING, *LORD OF THE FLIES* 287, 290 (50th Anniversary ed., Berkley Pub. Co. 2003) (internal quotations omitted).

305. See generally, GOLDING, *supra* note 73.

306. R. W. Connell, *Teaching the Boys: New Research on Masculinity, and Gender Strategies for Schools*, 98 TCHRS. C. REC. 206, 212 (1996).

307. *Id.* at 217.

identity, cohesion, self-esteem, and a sense of belonging.³⁰⁸

Just as with athletic teams, street gang hierarchies are organized according to experience and age and broken down into three categories of “leaders, peripheral members, and recruits.”³⁰⁹ Criminality or violence is a compelling criterion for defining a gang.³¹⁰ They have selective memberships and codes of secrecy with initiation rites for prospective members.³¹¹ For instance,

[t]he initiation process usually entails a physical beating by several other gang members. The beating must be endured without complaint and without fighting back. The slightest whimper or other expressed signs of pain could result in rejection of membership. The initiation process can be considered a prerequisite to weed out the weak and uncommitted.³¹²

Without delving too deeply into the pathology of street gangs, one is still left with the uncomfortable analogy to an unsupervised sports team that is organized by an educational institution.

The default of adult supervision is apparent to the athletes. This is especially true for any athletes who have been sexually abused. Rightly or wrongly, they perceive that others knew or suspected the abuse but did nothing to stop it.³¹³ A recent study of college athletes indicated that a majority believed their coaches allowed hazing.³¹⁴ Some athletes recounted that their coaches not only probably encouraged hazing, but singled out those athletes to haze.³¹⁵ Coaches with a hands-off

308. Nikki M. Ruble & William L. Turner, *A Systemic Analysis of the Dynamics and Organization of Urban Street Gangs*, 28 AM. J. FAM. THERAPY 117, 117-18 (2000) (citations omitted).

309. *Id.* at 121 (citation omitted).

310. Jane Wood & Emma Alleyne, *Street Gang Theory and Research: Where Are We Now and Where Do We Go from Here?*, 15 AGGRESSION & VIOLENT BEHAV. 100, 102 (2010).

311. Ruble & Turner, *supra* note 308, at 124.

312. *Id.* at 124-25.

313. See Leahy, *supra* note 15, at 305.

Athletes' experiences of the bystander effect point to the apparent lack of systemically sanctioned accountability in relation to the power of the coach-perpetrator that allowed the abuse to continue for many years unchallenged by other adults in the system. These bystanders included coaching, sport psychology, and other support staff or volunteers who were not as senior in the competitive sport hierarchy as the perpetrator.

Id.

314. Christopher Kowalski & Jennifer Waldron, *Looking the Other Way: Athletes' Perceptions of Coaches' Responses to Hazing*, 5 INT'L J. SPORTS SCI. & COACHING 87, 96 (2010). Others believed their coaches allowed hazing but with limits. *Id.*

315. *Id.* at 97.

leadership style might have actually been unaware of the hazing, but athletes still felt less willing to complain about hazing to such coaches.³¹⁶ Despite statutes, increased awareness, and educational programs to prevent hazing, it is clear that just targeting the athletes is not the solution.

The literature is replete with suggestions for coaches and schools to implement student training programs and alternative “positive” team-building experiences.³¹⁷ In particular, “athletic administrators and coaches should help athletes to create team identities centered on pro-social behaviors and productive achievement strategies.”³¹⁸ These are a start, but not enough in isolation. Coaches and school administrators must also be intentional about breaking up the groups within the team itself through small and targeted norming interventions to change the behavior³¹⁹ and intentionally involving the athletes’ parents³²⁰ in those discussions. “Teachable” moments about the vulnerability of their own children can help parents understand their own role in breaking the tradition and the code of silence. Indeed, parents need to be assured that if they report hazing, their child will be protected.³²¹ Targeted and intentional interventions may also destroy the street-gang dynamic that otherwise pervades athletic teams. Yet hazing also persists because it is a tradition.

Breaking the “tradition” of hazing must focus more on school officials, especially the coaches. First of all are the objective trappings of a coach’s authority. For example, formal policies must be drawn up for coaches and made conditions of continued employment under their extracurricular coaching contracts. Those policies must hold coaches responsible for failing to supervise, especially when all the evidence points to lack of supervision as a breeding ground for hazing. Football camps and other off-campus collective activities must have appropriate adult supervision so that no athletes are required to fend for themselves.

The supervision of the team raises the question of the responsibility for team activities that occur outside of the “formal” auspices of the sport, like parties and events in which the team gets together as a team,

316. *Id.* at 98.

317. Brian Crow et al., *Anti-Hazing Strategies for Coaches and Administrators*, 17 PROQUEST EDUC. J. 13, 14 (2004); Fisher & Dzikus, *supra* note 43, at 359-61; Waldron & Kowalski, *supra* note 28, at 300-01. See generally LIPKINS, *supra* note 18.

318. Waldron et al., *supra* note 81, at 122 (citation omitted).

319. *Id.*

320. See Fisher & Dzikus, *supra* note 43, at 361 (holding seminars and workshops for parents).

321. LIPKINS, *supra* note 18, at 94-97.

sometimes for the express purpose of hazing. From the perspective of the athletes who are being hazed at these events, they see no distinction between locations of hazing. To them the function is the same, the establishment of team hierarchy. So long as hazing is the natural consequence of the delegation of “authority” to team leaders to maintain the team hierarchy, then it suggests that coaches and school districts remain responsible for that delegation. The acquiescence to that continued delegation of self-governance then is not “tradition” but ratification of that delegation. All activities of the team *qua* team are the direct responsibility of the coach as team leader. The coach is at the head of the hierarchy, and he has the innate authority to dictate what activities the team will engage in.

School officials in general and coaches in particular have to take direct responsibility for the behavior of their athletes as part of the educational program of the school district. Assuming an attitude of helplessness toward hazing is an inappropriate response to a directed activity funded by the school district and governed by the school board.³²² Rather than skepticism about the efficacy of training programs for their athletes,³²³ they need to find strategies and alternatives that work, including direct discipline. Coaches were hired to undertake the responsibility of supervising their players. They therefore have the power and the duty to undo the self-governance of older team members and effect their responsibilities for supervision. Team captains must lose their positions, if not team membership, when hazing is reported. Trust in older team members is earned, not the prize at the end of a rite of passage. The pervasiveness of team hazing requires discipline that has an impact on the team, not just on individual perpetrators.

Then there are the subjective trappings by which coaches must better equip themselves for their responsibility to their athletes. Coaches should be required to do something more than attend training seminars on athletic hazing. They must learn to improve their own communication skills and to improve their coaching techniques, to “become critically reflective practitioners who examine their own behaviors.”³²⁴ Coaches must restructure their programs when ineffective and focus on their responsibilities to the young athletes themselves, not just the sport.³²⁵ They must be aware of the duties that accompany their leadership position and their role in establishing an appropriate

322. See Kowalski & Waldron, *supra* note 314, at 89.

323. *Id.*

324. Fisher & Dzikus, *supra* note 43, at 361.

325. *Id.*

masculinity for individuals, not some hegemonic ideal that none of their players can attain. But they must also understand that their cultural authority in the community cannot be abused for the “good” of the team or of the sport at the expense of any individual child. Concern about increasing their workload³²⁶ is a self-indulgence, not a reason.

Last, coaches—and many school administrators—need to face their own hazing experiences and/or attitudes to hazing. Hazing is humiliating. Humiliation is harmful. Many, if not all, coaches were athletes themselves. Consequently, odds are high that they themselves were involved in hazing: in the absence of any evidence that they themselves refused to be hazed, then they experienced humiliation; even if not a perpetrator, they were a victim or bystander. If they themselves did not rebel, then they hardly have the moral authority or the moral fiber to suggest that a young athlete should stand up for himself against the team. That is not a healthy emotional experience under any circumstances, but reaching back to their “survival” days to suggest that “boys will be boys” and that hazing is necessary for team unity is deviant overconformity of the worst kind. When this occurs under the supervision of a coach or school administrator, he is allowing it to happen to children half his age or younger. When did these rites of passage involve human sacrifice?

Their own experience should also inform them—intelligently—that a young athlete will not stand up for himself because he cannot. An adult allowing an adolescent tradition so that everybody can have the opportunity to do so—simply because that adult “survived it”—is a pretty aberrant pathology. That makes hazing not a “tradition” but a cycle of abuse. That cycle only ends when all coaches, but especially those who have been hazed, see “training films” of interviews of these young survivors or receive counseling from a sports psychologist. And the coach who protects the program on “behalf” of the community in the face of hazing accusations is not brave; he is being hazed himself.

Until the “tradition” of hazing is broken at the source, the tradition continues. Title IX’s systemic remedies and the potential loss of federal funds must be an aggressive approach to making the adults in the building responsible. Handing out pamphlets and showing videos to teenage athletes assumes a masculinity and moral responsibility they do not have. That is why they haze! If the adults in the building assume that masculine role and are held accountable for their legal duty to supervise, then athletes might actually have real role models to follow

326. Kowalski & Waldron, *supra* note 321, at 89.

instead of the deviant masculinity that is the inevitable result of continued hazing.

CONCLUSION: “WE ALL WANT TO CHANGE THE WORLD”³²⁷

Getting to the “cultural” roots of why athletic hazing has devolved into sexually exploitative behavior in the locker room is a task this Article cannot possibly address. The genuine “acceptance” of such deviant behavior as an initiation ritual or rite of passage for young high school—and even middle school—athletes is nearly incomprehensible from the perspective of both logic and evidence. It does not promote bonding on a team, and its effect is to humiliate these athletes. However, if one keeps in mind the irrationality of the adolescent actors, then we can come closer to pinpointing the purpose for athletic hazing: hierarchy through hazing. Sexually exploitative hazing serves the hierarchy by using one particular weapon, domination of weaker members of the team by treating them as if they are not masculine. Hence, sexually exploitative hazing is sexual harassment under Title IX, by its very nature.

The only way to break the tradition of hazing is to make the adults in the building responsible for the behavior. They *must* do what they imply any young athlete *should* do, and that is to confront the beast and stop it. They cannot expect a fourteen-year-old boy to be braver than they are. Traditional modes of educating athletes and parents are a start, but to kill the tradition in its tracks will require more intentional behavior from the top of the hierarchy. If adolescent boys are emulating a hegemonic masculinity that accepts that kind of behavior, then the adults in the building must change the hegemonic masculinity.

Title IX provides the tools for forcing that behavior to change through either private money damages or systemic enforcement. School districts are risk-averse so one good case or one systemic enforcement action should be the talk of the next few years’ conferences for coaches, school administrators, and school lawyers. Leaving it up to the poor children is an onerous task and one that has grave community risks. However, a sexually exploitative hazing case has the “ick” factor going for it, and perhaps the “humiliation” of more school districts being sued is the answer.

In the larger scheme of things, the community response may be one of the biggest motivators for change by forcing the issue into a “political” solution. To the extent the community understands that its

327. THE BEATLES, *Revolution, on WHITE ALBUM* (EMI Records 2009) (1968).

athletes are engaging in this behavior, then perhaps it will better highlight the sexual harassment that commonly occurs throughout the hallways of a particular institution. As the athletes go so goes the rest of the student body. In *Vernonia School District 47J v. Acton*,³²⁸ a small community that was dependent upon high school sports for its entertainment found itself at the “mercy” of the high school athletes who embraced and glorified illegal drug usage, leading to a near total breakdown in school discipline.³²⁹ As a consequence, the community came together to create a solution, random drug testing of the athletes.³³⁰ Part of the Supreme Court’s analysis in upholding the drug testing was the role model function of its athletes: “curing” the athletes would deter drug-using behavior in the rest of the school.³³¹ Perhaps a systemic “cure” administered by the adult leaders in the building and in the community will lead to less sexual harassment throughout the institution.

328. 515 U.S. 646 (1995).

329. *Id.* at 648-49.

330. *Id.* at 649-50.

331. *Id.* at 663. The facts also point to the potency and cultural hegemony of athletic teams to a community, with the unfortunate consequence that the Supreme Court carved out a constitutional exception to the Fourth Amendment for student random drug testing, a solution that was doomed from the start. *See generally* Susan P. Stuart, *When the Cure Is Worse Than the Disease: Student Random Drug Testing and its Empirical Failure*, 44 VAL. U. L. REV. 1055 (2010).