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# YOU'LL NEVER WORK (OR PLAY) HERE AGAIN: A LINGERING QUESTION IN TITLE IX RETALIATION CLAIMS BROUGHT BY COACHES AND ATHLETES AFTER *JACKSON V. BIRMINGHAM BOARD OF EDUCATION*

BRIAN L. PORTO\*

## I. INTRODUCTION

Like many promising forty-year-olds, Title IX has already realized some significant achievements but has more to accomplish if it is to live up to its enormous potential.<sup>1</sup> Regarding the achievements to date, various commentaries have described the social revolution to which Title IX has contributed mightily during the past four decades, especially the increased athletic-participation opportunities for girls and women.<sup>2</sup> The *New York Times* recently sent its readers a charming postcard from that revolution, namely, a story about the homecoming queen at a Michigan high school who doubles as the place-kicker on her school's football team, which would have been unthinkable when her grandparents were in high school.<sup>3</sup> Still, hurdles remain to be cleared, not the least of which is an unfortunate tendency among schools and colleges to retaliate against whistleblowers who complain about the unequal treatment of male and female athletes.

Perhaps the best known Title IX whistleblower in the United States is Roderick Jackson, the coach of a girls' basketball team in Birmingham, Alabama, whose players had to practice in "an old, unheated gymnasium on a nonregulation-size court with bent rims," while their male counterparts

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1. Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681-88 (2012).

2. See, e.g., Brian L. Porto, *Halfway Home: An Update on Title IX and College Sports*, 34 VT. B.J. & L. DIG. 28, 28 (2008) (noting that the number of women playing varsity sports in college had increased from less than 30,000 to more than 180,000 since 1972 and that the percentage of female varsity athletes at American colleges and universities had increased to 45); see also NAT'L WOMEN'S LAW CTR., BARRIERS TO FAIR PLAY 1 (2007), available at <http://www.nwlc.org/sites/default/files/pdfs/barrierstofairplay.pdf> (citing similar statistics).

3. Micheline Maynard, *Even in a Locker Room Apart, an Undeniable Leap of Progress*, N.Y. TIMES, Oct. 9, 2011, at SP12.

enjoyed the benefits of a new, heated gym.<sup>4</sup> The girls were also forced to make do with less gym time, defective equipment, inequitable travel arrangements, and the absence of amenities such as an ice machine for supplying ice packs.<sup>5</sup> Coach Jackson complained to the athletic director and the principal, but the only change that occurred was Jackson's loss of his coaching job, although he kept his teaching position at the school.<sup>6</sup> His efforts were ultimately rewarded, though, when the U.S. Supreme Court held in *Jackson v. Birmingham Board of Education* that "the private right of action implied by Title IX encompasses claims of retaliation . . . [when] the funding recipient [i.e., school or college] retaliates against an individual because he [or she] has complained about sex discrimination."<sup>7</sup>

The *Jackson* decision has had a major impact on Title IX jurisprudence by extending the statute's reach to whistleblowers who suffer retaliation for demanding gender equity in interscholastic and intercollegiate athletic programs. After *Jackson*, these individuals have a legal recourse that they lacked before 2005.<sup>8</sup> Nevertheless, although *Jackson* has surely empowered whistleblowers, it has hardly ended retaliation against them, as several recent cases against a California university illustrate. California State University, Fresno (Fresno State) "fired women's volleyball coach Lindy Vivas in 2004 and women's basketball coach Stacy Johnson-Klein in 2005, after each woman complained about inequitable treatment of female athletes" by the Fresno State athletic department.<sup>9</sup>

In the Vivas case, the athletic director claimed that Coach Vivas was fired for failing to meet performance clauses in her contract. No such clauses existed in the employment contract of any other Fresno State coach, and the clauses only entered Vivas' contract after she asked for a long-term contract in 2003, having by then coached at Fresno State for twelve years.<sup>10</sup> Moreover, one strains to imagine what performance clause Vivas could possibly have failed to meet because her career winning percentage was 0.612, she was a three-time Western Athletic Conference Coach of the Year, her teams had appeared in a postseason tournament six times, and the academic performance

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4. DEBORAH L. BRAKE, GETTING IN THE GAME: TITLE IX AND THE WOMEN'S SPORTS REVOLUTION 192 (2010).

5. *Id.*

6. *Id.*

7. 544 U.S. 167, 171 (2005).

8. Porto, *supra* note 2, at 32.

9. *Id.*

10. Jill Lieber Steeg, "Hard Time" for Vivas During Tenure at Fresno State, USA TODAY, May 13, 2008, [www.usatoday.com/sports/college/2008-05-12-titleix-vivas\\_N.htm](http://www.usatoday.com/sports/college/2008-05-12-titleix-vivas_N.htm).

of her players was exemplary.<sup>11</sup> Under these circumstances, Vivas' answer to the question of why she was fired rings true. "The bottom line," she said, referring to her superiors in the athletic department, "is they did not like women who supported equity . . . . It always came down to that."<sup>12</sup> The jury in Vivas' lawsuit against Fresno State agreed, awarding her a \$5.85 million verdict in July 2007.<sup>13</sup>

The Johnson-Klein case was more complicated than the Vivas case; Fresno State argued that it fired Johnson-Klein because she had obtained pain medication from one of her players and lied to university officials about having done so.<sup>14</sup> Still, a jury awarded Johnson-Klein \$19.1 million, which a judge reduced to \$6.6 million in damages and \$2.5 million in legal fees.<sup>15</sup> The university appealed, but in June 2008, while the appeal was pending, the parties settled for \$9 million.<sup>16</sup>

In yet another case originating at Fresno State, the university, in October 2007, paid former Associate Athletic Director Diane Milutinovich \$3.5 million to settle her lawsuit, which she had filed in 2004, alleging that her reassignment from the athletic department, where she had been the senior women's athletic administrator for twenty-one years, to the student union had been "retaliation for her advocacy of equal treatment for female athletes."<sup>17</sup>

The Fresno State cases may paint an unduly positive picture for Title IX advocates because they reflect only the circumstances in which a coach or athletic administrator challenged retaliation by filing a lawsuit. On the other hand, a study by the National Women's Law Center (NWLC) concluded that "[c]oaches fear retaliation if they complain [about Title IX violations], so the burden typically falls on students and their parents to protest discrimination."<sup>18</sup>

NWLC studied 416 Title IX athletics complaints filed with or prepared by

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11. *Id.*

12. *Id.*

13. Sara Lipka, *Fresno State Grapples with a Spate of Sex-Discrimination Claims*, CHRON. HIGHER EDUC., Aug. 3, 2007, available at <http://chronicle.com/article/Fresno-State-Grapples-With-a/5794>.

14. Jill Lieber Steeg, *Disputes Reflect Continuing Tension over Title IX*, USA TODAY, May 13, 2008, at 1A.

15. Porto, *supra* note 2, at 32.

16. See *Stacy Johnson-Klein Resurfaces*, ERRATIC MAGIC (July 17, 2008, 10:20 PM), <http://www.erraticmagic.com/2008/07/stacy-johnson-klein-resurfaces.html>.

17. George Hostetter, *Fresno State Suit is Settled for \$3.5M: Multinovich's Deal Resolves Her Sexual Discrimination Case Against the University*, FRESNO BEE, Oct. 23, 2007, available at <http://www.fresnobee.com/2007/10/12/162548/fresno-state-suit-is-settled-for.html>.

18. NAT'L WOMEN'S LAW CTR., *supra* note 2, at 2.

the federal Department of Education's Office for Civil Rights (OCR), which is responsible for enforcing Title IX, between January 1, 2002, and December 31, 2006.<sup>19</sup> It found that, although coaches have greater access to information than their athletes and are often in the best position to identify and challenge discrimination, they filed fewer than eight percent (32 of 416) of the complaints made within the period of the study.<sup>20</sup> Yet, sixteen of the thirty-two complaints by coaches, or fifty percent, "alleged retaliation in addition to other forms of discrimination against [themselves] and their female athletes."<sup>21</sup> The form of discrimination against female athletes most often alleged was inequitable treatment. Of the 416 complaints studied, females filed 375, of which 269 (almost 60%) alleged inequitable treatment of girls' or women's teams regarding equipment, supplies, scheduling, financial support, facilities, coaching, medical assistance, or publicity.<sup>22</sup> Nearly thirty percent of the complaints filed by females alleged a lack of athletic participation opportunities for female students.<sup>23</sup>

The Fresno State cases and the NWLC study show that many inequities remain for girls and women in interscholastic and intercollegiate athletics. Under these circumstances, coaches and athletes will continue to lodge complaints and, presumably, suffer retaliation as a result. In this environment, it is important to know how broadly post-*Jackson* courts will interpret existing law to facilitate successful Title IX-based retaliation actions by coaches and athletes. Specifically, Title IX advocates wish to know if the law will protect from retaliation a complainant who mistakenly contends that his or her institution has violated Title IX.<sup>24</sup> This Article will discuss alternative answers to that question and will offer an answer of its own.

Part II will discuss the Supreme Court's decision and its reasoning in *Jackson*. Part III will present the evidence for a continuing problem, after *Jackson*, of retaliation against coaches who challenge their institutions' alleged noncompliance with Title IX. Part IV will turn to the question noted above, addressing both the problems inherent in trying to answer it and the alternative answers that various scholars have offered. Part V will recommend using either a contextual reasonableness or a good faith standard, instead of the existing reasonable belief standard, to determine whether a plaintiff in a Title IX retaliation action honestly thought the underlying conduct originally

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19. *Id.* at 1.

20. *Id.* at 2.

21. *Id.*

22. *Id.* at 3-4.

23. *Id.* at 4.

24. BRAKE, *supra* note 4, at 193.

complained of was unlawful. Either recommended alternative reflects the youth and lack of legal sophistication of many Title IX complainants, and the remedial purpose of Title IX, better than the reasonable belief standard does. Part VI will conclude that the fortieth anniversary of Title IX provides a wonderful opportunity to adopt a broad rule of interpretation designed to protect from retaliation well-intentioned, but mistaken, Title IX complainants.

## II. THE JACKSON DECISION

Roderick Jackson sued the Birmingham School Board, alleging that it had retaliated against him, in violation of Title IX, for complaining about sex discrimination in the athletic program at the high school where he coached.<sup>25</sup> At issue in *Jackson* was “whether the implied private right of action in Title IX encompasses claims of retaliation.”<sup>26</sup> The five-member Court majority (O’Connor, Stevens, Souter, Ginsburg, and Breyer) held that “it does where the funding recipient retaliates against an individual because he has complained about sex discrimination.”<sup>27</sup>

Justice O’Connor, writing for the majority, noted that Jackson’s team had not received funding or access to equipment and facilities that was comparable to what the school’s male athletes enjoyed, to the point that Jackson found it difficult to coach his team properly.<sup>28</sup> His complaints to supervisors, including the athletic director at his school, who was also the boys’ basketball coach, went unanswered but not unpunished.<sup>29</sup> In return for his complaints, Jackson began to receive negative work evaluations, and he was ultimately fired as a coach.<sup>30</sup>

When Jackson filed suit, the district court granted the school board’s motion to dismiss, and the U.S. Court of Appeals for the Eleventh Circuit affirmed.<sup>31</sup> According to the appellate court, Title IX did not create a private right of action encompassing retaliation, and, even if it did, Jackson would not have been entitled to relief because, not having suffered sex discrimination, he was not within the class of persons whom the statute protected.<sup>32</sup>

The Supreme Court reversed, as Justice O’Connor observed that Title IX swept broadly in prohibiting funding recipients from subjecting any person to

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25. *Jackson*, 544 U.S. at 171.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 171–72.

30. *Id.* at 172.

31. *Id.*

32. *Id.*

“‘discrimination’ ‘on the basis of sex.’”<sup>33</sup> In her view, “Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination [under Title IX].”<sup>34</sup> “Retaliation,” she added, “is, by definition, an intentional act.”<sup>35</sup> It is discrimination because it subjects the complaining party to differential treatment, and it “is discrimination ‘on the basis of sex’ because it is an intentional response to . . . an allegation of sex discrimination.”<sup>36</sup>

In support of this view, Justice O’Connor noted that Congress has often construed the term “discrimination” broadly within the Title IX context, which the Eleventh Circuit ignored in holding that the statute does not prohibit retaliation because it does not mention retaliation.<sup>37</sup> After all, O’Connor pointed out, Title IX does not mention sexual harassment either, but the Court has held that sexual harassment is intentional discrimination to which the private right of action under Title IX extends.<sup>38</sup> Indeed, she reasoned, Congress did not identify any specific discriminatory practices in Title IX; therefore, its failure to mention retaliation “does not tell us anything about whether it intended that practice to be covered.”<sup>39</sup>

Furthermore, O’Connor opined, Congress enacted Title IX just three years after the Court decided *Sullivan v. Little Hunting Park, Inc.*,<sup>40</sup> which held that 42 U.S.C. § 1982, a statute prohibiting racial discrimination in buying, leasing, and selling real and personal property, also prohibited retaliation against a white man who had leased real property to a black man.<sup>41</sup> Under those circumstances, she continued, it was reasonable to presume that Congress was familiar with the *Sullivan* decision when it enacted Title IX and that lawmakers expected courts to interpret Title IX in conformity with *Sullivan*.<sup>42</sup> Thus, the Supreme Court majority rejected the Birmingham School Board’s argument that the private right of action in Title IX does not extend to actions for retaliation.

The majority also rejected the school board’s contention that even if Title IX applied to retaliation actions, it would not apply to Roderick Jackson’s

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33. *Id.* at 173 (quoting 20 U.S.C. § 1681 (2005)).

34. *Id.*

35. *Id.* at 173–74.

36. *Id.* at 174.

37. *Id.*

38. *Id.* (citing *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 74–75 (1992)).

39. *Id.* at 175.

40. 396 U.S. 229 (1969).

41. *Jackson*, 544 U.S. at 176.

42. *Id.*

action because he was, at most, an “indirect victim” of sex discrimination.<sup>43</sup> Justice O’Connor answered this argument by observing, once again, that Title IX is broadly worded, and, more precisely, that it does not require that the victim of retaliation also be the victim of the sex discrimination that prompted both the retaliation and the lawsuit.<sup>44</sup> For the school board’s interpretation to be correct, she reasoned, the statute would have had to state that “no person shall be subjected to discrimination on the basis of *such individual’s* sex.”<sup>45</sup> Because it did not so state, and because the broad interpretation of “on the basis of sex” captured the spirit of the *Sullivan* decision, the Court concluded that Roderick Jackson was within the class of persons whom Congress envisioned bringing retaliation actions under Title IX’s auspices.<sup>46</sup>

Finally, Justice O’Connor added, if Title IX were construed so as to preclude actions for retaliation, “individuals who witness discrimination would be loathe to report it, and all manner of Title IX violations might go unremedied as a result.”<sup>47</sup> “Indeed,” she emphasized, “if retaliation were not prohibited, Title IX’s enforcement scheme would unravel.”<sup>48</sup> Besides, she concluded, “teachers and coaches such as Jackson are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators.”<sup>49</sup>

Thus, the *Jackson* majority held that the implied private right of action in Title IX encompassed actions for retaliation in addition to actions alleging sex discrimination. The Court held further that Title IX protected not only victims of sex discrimination but also persons who suffered retaliation after complaining about sex discrimination against others.<sup>50</sup>

Justice Thomas, joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Scalia, countered that both of the majority’s conclusions were incorrect. First, he observed, Title IX does not protect victims of retaliation because “retaliatory conduct is not discrimination on the basis of sex” within the meaning of Title IX.<sup>51</sup> Second, he argued, “the natural meaning of the phrase ‘on the basis of sex’ is on the basis of the plaintiff’s sex, not the sex of

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43. *Id.* at 179.

44. *Id.*

45. *Id.* (emphasis in original).

46. *Id.* at 179–80.

47. *Id.* at 180.

48. *Id.*

49. *Id.* at 181.

50. *Id.* at 174.

51. *Id.* at 184 (Thomas, J., dissenting).



[someone else].”<sup>52</sup>

In Justice Thomas’ view, Title IX did not protect Roderick Jackson’s retaliation claim because that claim was unrelated to actual sex discrimination.<sup>53</sup> Instead, Thomas noted, Jackson alleged “that he suffered reprisal because he complained about sex discrimination, not that the sex discrimination underlying his complaint [had actually] occurred.”<sup>54</sup> Under these circumstances, Justice Thomas reasoned, retaliation cannot be discrimination on the basis of sex “because a retaliation claim may succeed where no sex discrimination ever took place.”<sup>55</sup>

Moreover, if Congress had intended Title IX to extend to retaliation claims, it would have included in that statute a separate provision addressing retaliation, as it did in Title VII of the 1964 Civil Rights Act<sup>56</sup> (by prohibiting employment discrimination on the basis of race, gender, and national origin), the Americans with Disabilities Act (ADA),<sup>57</sup> and the Age Discrimination in Employment Act (ADEA).<sup>58</sup> According to Justice Thomas, the presence of a retaliation provision in Title VII, the ADA, and the ADEA plainly indicates that “when Congress intends to include a prohibition against retaliation in a statute, it does so.”<sup>59</sup> Thus, he concluded, Congress did not intend that Title IX would extend to actions seeking to recover damages for retaliation.<sup>60</sup>

Furthermore, Justice Thomas argued, even if Title IX extended to retaliation actions, it would not benefit Roderick Jackson because he had not suffered sex discrimination. In Thomas’ view, discrimination “on the basis of sex” means discrimination on the basis of the claimant’s sex, as Congress made clear in Title VII with respect to discrimination against pregnant women<sup>61</sup> and as the Court consistently held in lawsuits alleging sex discrimination.<sup>62</sup> But, in this case, Jackson did not claim that his own sex was responsible for his superiors’ decision to relieve him of his coaching duties.<sup>63</sup> Therefore, Justice Thomas concluded, the plain language of Title IX,

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52. *Id.* at 185.

53. *Id.* at 186–87.

54. *Id.* at 187.

55. *Id.* at 188.

56. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (2012).

57. Americans with Disabilities Act of 1990, 42 U.S.C. § 12203(a) (2012).

58. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(d) (2012).

59. *Jackson*, 544 U.S. at 190 (Thomas, J., dissenting).

60. *See id.* at 196.

61. *Id.* at 185 (citing 42 U.S.C. § 2000e(k) (2005)).

62. *Id.* at 186 (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993); *United States v. Burke*, 504 U.S. 229, 239 (1992); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986)).

63. *Id.* at 186.

prohibiting discrimination “on the basis of sex,” did not encompass retaliation as Roderick Jackson experienced it.<sup>64</sup>

Justice O’Connor’s view prevailed in the *Jackson* case, though, extending the statute’s reach beyond the direct victims of sex discrimination to whistleblowers challenging sex discrimination against others in sports.<sup>65</sup> In so doing, Professor Deborah Brake has noted, *Jackson* made all Americans stakeholders in the enterprise of social equality and encouraged them to pursue it by “ground[ing] Title IX’s protection from retaliation in what people do to challenge gender inequality and not in their status as women or as athletes.”<sup>66</sup>

### III. SEX DISCRIMINATION AND RETALIATION IN INTERSCHOLASTIC AND INTERCOLLEGIATE SPORTS: THE POST-*JACKSON* LANDSCAPE

*Jackson*’s protection for Title IX whistleblowers has come not a moment too soon because ample evidence exists that sex discrimination, and retaliation for complaining about such discrimination, remain common in both school and college sports. Recall that the NWLC studied 416 athletics complaints filed with or prepared by OCR between January 1, 2002, and December 31, 2006.<sup>67</sup> Female athletes filed 375, or 90%, of those complaints; 2.9 million female K–12 students generated 317 of them, while 170,526 women playing college sports produced 58 complaints.<sup>68</sup> The authors of the NWLC study hypothesized that the significantly higher rate of complaints generated by the college women “likely reflects high school students’ lack of knowledge about Title IX and their rights under the law.”<sup>69</sup>

The complaints filed by females, consisting of both K–12 students and college students, most often alleged inequitable treatment of girls’ or women’s teams.<sup>70</sup> An illustrative example is the athletic program at Holt High School in Tuscaloosa, Alabama, which the NWLC study examined in May 2005. Comparisons of (1) the boys’ baseball team and the girls’ softball team and (2) the boys’ and girls’ basketball teams demonstrated the problem. The baseball team played on a newly upgraded field, complete with renovated dugouts, a bullpen, and a batting cage, while the softball team used a field and batting cage that were inadequately maintained and lacked a bullpen, admissions gate,

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64. *Id.* at 187.

65. Porto, *supra* note 2, at 32.

66. BRAKE, *supra* note 4, at 201.

67. NAT’L WOMEN’S LAW CTR., *supra* note 2, at 1.

68. *Id.* at 3–4.

69. *Id.* at 2.

70. *Id.* at 3–4.

and freestanding concession stand.<sup>71</sup> The baseball team enjoyed a locker room with heat, air conditioning, and plumbing, but the softball team was forced to use a locker room that lacked all those amenities.<sup>72</sup> The baseball team wore new game uniforms provided by the school, which also provided the boys' practice uniforms, whereas each softball player had to purchase her own game uniform at a cost of approximately \$150, and the school furnished no practice uniforms either.<sup>73</sup> The baseball players also benefited from newer equipment, while the softball players had to make do with older equipment, including a "catcher's helmet that presented a safety hazard because it did not fit the team's catcher."<sup>74</sup>

Similar inequities existed between the boys' and girls' basketball teams. The boys' team had a locker room that was separate from the locker room used by the boys' physical education classes, while the girls' team shared a locker room with the volleyball team and the girls' physical education classes.<sup>75</sup> The boys' team wore matching home and away uniforms, with warm-up pants, and received gym bags in which to carry their uniforms, but the girls wore mismatched uniforms.<sup>76</sup> The boys' team always had a driver to transport it to away games, but the girls missed some away games because no bus driver was available.<sup>77</sup> Furthermore, some girls' teams at Holt had to start their competitive seasons later than other area teams because their head coaches doubled as assistant coaches for boys' sports.<sup>78</sup> And when not enough athletic trainers were available to attend the competitions of all Holt teams on a particular day, the boys' teams got first priority.<sup>79</sup>

In contrast, at the college level, complaints to OCR about sex discrimination against women in sports were more evenly divided between allegations of inequitable treatment (40 of 105 or 38%) and lack of participation opportunities (25 of 105 or 24%), respectively.<sup>80</sup> The sports most frequently identified as receiving inequitable treatment were softball and women's soccer.<sup>81</sup> The category of inequitable treatment most often identified

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71. *Id.* at 6.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 9–10.

81. *Id.* at 9.

in complaints by both K–12 and college students was the facilities where they practiced and competed.<sup>82</sup>

Discrimination was not the only unhappy circumstance revealed by the NWLC study, though. The study also noted that during the relevant time period, OCR received twenty-four complaints of retaliation against K–12 students (fourteen) or coaches (ten) who had advocated for their teams.<sup>83</sup> Half of the K–12 coaches who filed complaints with OCR alleged that their schools had retaliated against them for their advocacy on behalf of their teams.<sup>84</sup> Moreover, coaches filed thirty-two of the total complaints (K–12 and college) that the NWLC studied, half of which alleged retaliation against the complaining coach in addition to discrimination against female athletes.<sup>85</sup> And about fourteen percent of the allegations against colleges for violating Title IX charged that an institution had retaliated against persons who protested sex discrimination in sports.<sup>86</sup> The complaining parties in these instances were evenly divided between students and coaches.<sup>87</sup>

The NWLC study offers powerful statistical evidence of continuing discrimination and retaliation related to girls' and women's sports. But individual cases often provide more vivid illustrations than statistical data can of the emotional pain and derailed careers that can result from blowing the whistle on sex discrimination in sports. No clearer examples of those tragic consequences exist than the cases originating at Fresno State beginning in 2001.

During much of the 1990s, Fresno State's athletic department was under scrutiny by OCR after an investigation unearthed numerous Title IX violations, including large disparities between male and female athletes in participation opportunities and inequitable treatment of women's teams.<sup>88</sup> Under pressure to comply with Title IX, Fresno State agreed to implement a Corrective Action Plan designed to increase the support for and enhance the status of its women's sports.<sup>89</sup> Nevertheless, in 2001, Associate Athletic Director Diane Milutinovich complained internally about the athletic

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82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 4.

86. *Id.* at 11.

87. *Id.*

88. Erin E. Buzuvis, *Sidelined: Title IX Retaliation Cases and Women's Leadership in College Athletics*, 17 DUKE J. GENDER L. & POL'Y 1, 10 (2010).

89. *Id.*

department falling short of its obligations under the plan.<sup>90</sup> Later, in a complaint to OCR, she noted the university's failure to increase the percentage of female athletes, which the plan required, the athletic department's reluctance to devote resources to women's sports, compensation disparities between coaches of men's and women's teams, and the denial of "tier one" (most-favored) status to women's sports in violation of the plan.<sup>91</sup> Shortly thereafter, the new athletic director, Scott Johnson, announced a departmental reorganization that eliminated Milutinovich's position, resulting in her transfer to a job at the student union.<sup>92</sup>

Volleyball coach Lindy Vivas also raised the athletic director's ire by complaining about the inequitable treatment of women athletes at Fresno State. Specifically, Vivas filed a complaint with OCR, contesting the department's hesitance to elevate volleyball to a tier-one sport.<sup>93</sup> She also filed a grievance with the university's human resources department challenging disparities in the lengths of the employment contracts for male and female coaches.<sup>94</sup> After being fired in 2004, Vivas, like Diane Milutinovich, sued the university, alleging that her termination was in retaliation for having blown the whistle on sex discrimination in the athletic department.<sup>95</sup>

As if the Milutinovich and Vivas lawsuits were not enough soap opera for one athletic department, a few months after Vivas was fired, the university placed on administrative leave and later fired women's basketball coach Stacy Johnson-Klein.<sup>96</sup> Like Milutinovich and Vivas before her, Johnson-Klein sued Fresno State, alleging that her termination was in retaliation for her complaints about a lack of gender equity in the athletic department.<sup>97</sup> Diane Milutinovich settled her lawsuit with the university in October 2007 for \$3.5 million, but both the Vivas and Johnson-Klein cases went to trial.<sup>98</sup> After a three-week trial in the summer of 2007, a jury awarded Vivas \$5.85 million, which the judge later reduced to \$4.52 million—to that point the largest amount ever awarded in a Title IX case.<sup>99</sup> The jury believed Vivas' claims that she was terminated for advocating gender equity, especially, holding the

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90. *Id.* at 10–11.

91. *Id.* at 11.

92. *Id.*; *see also* Hostetter, *supra* note 17.

93. Buzuvis, *supra* note 88, at 11.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 12.

99. *Id.* at 12–13.

athletic department to its promise to elevate the status of volleyball and move the team's games from a gymnasium to the university's arena and recommending multi-year contracts for successful, long-serving female coaches.<sup>100</sup> The jury also agreed with Vivas that her termination amounted not only to retaliation but to direct discrimination based on her sex and her perceived sexual orientation as a lesbian.<sup>101</sup> Presumably, Johnson-Klein's testimony on Vivas' behalf about the athletic director's plans to "get rid of lesbians in the athletic department" in favor of "female coaches who were straight and attractive" helped the jury find in Vivas' favor.<sup>102</sup>

Johnson-Klein's own case produced a two-month trial.<sup>103</sup> She presented evidence suggesting that the Fresno State athletic director had initiated an investigation of her to find a reason to fire her and that the investigation had begun shortly after she had threatened to file a complaint with OCR concerning the treatment of her team by the athletic department.<sup>104</sup> Johnson-Klein admitted to having made a "poor decision" in asking a player for the pain medication Vicadin, but she also showed that she was the victim of a sexist double standard in that regard because the university had paid Ray Lopes, its former men's basketball coach, \$200,000 to buy out his contract after learning that he had helped his players conceal positive drug test results.<sup>105</sup> Finally, Johnson-Klein presented evidence showing that being "straight and attractive" was as much of a burden as a benefit because her movie-star looks had caused her to experience harassment (unwanted touching, solicitations, etc.) from a male colleague on numerous occasions.<sup>106</sup> The jury awarded her \$19.1 million, which the trial court reduced to \$6.6 million, plus costs and attorney's fees.<sup>107</sup> The university appealed, but, in June 2008, the parties settled, as the university agreed to withdraw its appeal and pay Johnson-Klein \$9 million over twenty years.<sup>108</sup>

The results of the NWLC study and the retaliation actions litigated after the *Jackson* decision, such as those filed by the former Fresno State employees, make clear that, despite *Jackson*, girls and women continue to experience inequitable treatment, double standards, homophobia, and sexual

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100. *Id.* at 12.

101. *Id.*

102. *Id.*

103. *Id.* at 13.

104. *Id.*

105. *Id.* at 13–14.

106. *Id.* at 14.

107. *Id.*

108. *Id.*

harassment in interscholastic and intercollegiate sports.<sup>109</sup> The retaliation actions, in particular, have also alerted judges and juries to these continuing violations of Title IX.<sup>110</sup> Moreover, these actions have produced favorable results for plaintiffs largely because proving retaliation is often easier than proving the underlying discriminatory conduct that preceded the retaliation.<sup>111</sup> Still, those results have come mostly from settlements and jury verdicts instead of a clear body of law regarding retaliation claims under Title IX. Consequently, the lingering question raised by *Jackson*, which Professor Deborah Brake raised in her 2010 book—namely, whether the law will protect from retaliation a complainant who mistakenly contends that his or her institution has violated Title IX—remains unanswered.<sup>112</sup> Part IV will discuss the various approaches to answering this question that recent scholarship has suggested.

#### IV. SUGGESTED ANSWERS TO A LINGERING QUESTION

The question whether Title IX will protect the mistaken complainant from retaliation has arisen from the Supreme Court's unstated assumption in *Jackson* that the conduct prompting Roderick Jackson's complaint was unlawful.<sup>113</sup> In the Court's view, retaliation is a form of unlawful discrimination; hence, Title IX prohibits it as an extension of the underlying discrimination.<sup>114</sup> This reasoning is problematic, though, as Professor Brake has pointed out, because it suggests that Title IX protects from retaliation only those complainants who suffered from retaliation after correctly identifying unlawful discrimination at their respective institutions.<sup>115</sup> If Title IX was to protect only such complainants, it would diverge dramatically from the prevailing interpretation of Title VII of the 1964 Civil Rights Act, to which courts customarily look for guidance in construing retaliation claims based on

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109. *Id.* at 38.

110. *See id.*

111. *Id.* at 39.

112. BRAKE, *supra* note 4, at 193–96. Professor Brake also identified two other lingering questions after *Jackson*, namely, (1) what kinds of punishments qualify as “retaliation” under Title IX, and (2) whether Title IX can protect a coach or athlete against retaliation by an institution other than the one the coach or athlete originally accused of discrimination. The latter can also be stated to ask whether Title IX can protect a coach or athlete who claims that another institution refused to hire him or denied her an athletic scholarship in retaliation for having blown the whistle on the original institution. Because of space limitations, this Article will not address these two questions. *Id.* at 196, 198.

113. *Id.* at 192.

114. *Id.* at 193.

115. *Id.*

Title IX.<sup>116</sup> That is because Title VII does not require complainants to correctly identify unlawful discrimination in order to be protected against retaliation; instead, it requires them to have a “reasonable belief” that the conduct they oppose amounts to discrimination.<sup>117</sup>

Unlike Title IX, Title VII includes an antiretaliation provision, which prohibits an employer from punishing an employee who has either opposed an unlawful employment practice (the “opposition clause”) or participated in any manner in an investigation, proceeding, or hearing under Title VII (the “participation clause”).<sup>118</sup> Since the Supreme Court’s per curiam decision in *Clark County School District v. Breeden*,<sup>119</sup> courts have required plaintiffs who bring Title VII retaliation actions under the opposition clause to show a “reasonable belief” that the underlying employer conduct about which they complained was unlawful discrimination.<sup>120</sup> At first blush, this appears to be a generous standard for the plaintiff, who may be able to prevail on the retaliation issue even if the jury concludes that the underlying conduct of which the plaintiff complained was not unlawful discrimination.<sup>121</sup>

But recent scholarship reveals that some lower courts have construed the reasonable belief standard to implicitly require that the plaintiff-employee report actual violations of law.<sup>122</sup> One commentator cites, as an example, *Jordan v. Alternative Resources Corp.*,<sup>123</sup> which held that Title VII did not protect from retaliation by the employer an employee who reported a coworker’s use of a racial slur because no employee could have reasonably believed that the one-time use of a racial slur was unlawful discrimination.<sup>124</sup> Similarly, in her recent book, Professor Brake argues that courts have become increasingly strict in interpreting the reasonable belief standard, leaving unprotected from retaliation employees whose “knowledge of the law does not match that of the courts.”<sup>125</sup> She cites, as examples, decisions rejecting retaliation claims brought by gay, lesbian, and transgendered plaintiffs because the Title VII precedents distinguish sex discrimination, which the statute

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116. *Id.*; see also *Burch v. Regents of the Univ. of Cal.*, 433 F. Supp. 2d 1110 (E.D. Cal. 2006).

117. BRAKE, *supra* note 4, at 193.

118. Brianne J. Gorod, *Rejecting “Reasonableness”: A New Look at Title VII’s Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469, 1481–82 (2007) (citing 42 U.S.C. §2000e-3(a)).

119. 532 U.S. 268, 269 (2001).

120. Richard Moberly, *The Supreme Court’s Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 388 n.67 (2010).

121. Gorod, *supra* note 118, at 1483–84.

122. Moberly, *supra* note 120, at 448.

123. 458 F.3d 332 (4th Cir. 2006).

124. Moberly, *supra* note 120, at 449.

125. BRAKE, *supra* note 4, at 193.



explicitly covers, from sexual orientation discrimination, which it does not.<sup>126</sup>

In this legal environment, Professor Brake continues, Title IX retaliation claims brought by students are especially vulnerable to rejection by courts. For example, a student may perceive disparate treatment of boys' and girls' teams in the same sport as a Title IX violation, even though less visible practices favoring a girls' team in another sport offset the disparate treatment in the sport that is the subject of a complaint.<sup>127</sup> In other words, the law measures Title IX compliance by an overall comparison of the male and female athletic programs at an institution, not by a sport-by-sport comparison, a circumstance that a student complainant may be unaware.<sup>128</sup> Similarly, a student or coach who suffered retaliation after complaining about unequal funding for girls' and boys' sports could be left without legal protection under a strict interpretation of the reasonable belief standard because Title IX does not require financial parity between male and female teams.<sup>129</sup> Presumably, a court could conclude that the plaintiff's belief to the contrary was unreasonable.<sup>130</sup>

According to Professor Brake, applying such a strict interpretation of the reasonable belief standard would be a mistake, not only because it would deny protection from retaliation to athletes and their coaches but also because that standard developed as a limitation only under the opposition clause of Title VII, which applies exclusively to employees' internal complaints about discrimination.<sup>131</sup> The strict interpretation has not traditionally applied to actions brought under the participation clause of Title VII because courts have read that clause to, in Professor Brake's words, "provide stronger legal protection that does not depend on the merits of the underlying discrimination claim."<sup>132</sup> Moreover, unlike Title VII, Title IX lacks any express provision on retaliation and any clause suggesting more limited protection for retaliation under some circumstances than others.<sup>133</sup> Thus, Professor Brake concludes, courts should construe Title IX to "provide the same level of protection from retaliation regardless of whether the person complains internally to school officials or files a formal complaint with the Office for Civil Rights or a

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126. *Id.* at 193–94 (citing *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000)).

127. *Id.* at 194–95.

128. *Id.* at 195.

129. *See id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

court.”<sup>134</sup>

This conclusion leaves open the question of what standard should replace the reasonable belief standard in guiding judicial gate-keeping concerning Title IX retaliation claims. For her part, Professor Brake offers what might be called a “good faith” standard. She writes, “Anyone who, in good faith, challenges what he or she believes to be sex discrimination in sports should be protected from retaliation under Title IX. Otherwise, standing up for Title IX—a risky thing to do under the best of circumstances—could become a risk not worth taking.”<sup>135</sup>

Professor Brake’s recommended standard in Title IX retaliation cases is similar to the standard recommended by recent commentaries concerning Title VII retaliation cases. One such commentary observes that courts would “promot[e] respect for the integrity of the rule of law” more effectively by omitting an objective reasonableness requirement from the employee’s belief that the employer has engaged in unlawful discrimination.<sup>136</sup> The commentary argues that instead of expecting fast-food workers (who may also be high school athletes) to apply the objective reasonableness test, the law of retaliation should “protect employees who speak in good faith, who do not willfully abuse a reporting system or act with malice, or who repeatedly bring the same complaint for the same alleged act.”<sup>137</sup> A second Title VII commentary arguing for a good faith standard asserts that Title VII should protect an employee from retaliation unless the employer could show that the employee had lodged a complaint in bad faith.<sup>138</sup>

Professor Richard Moberly has suggested a conceptual structure within which to house the various good faith alternatives identified above. That structure is what Professor Moberly calls the “Antiretaliation Principle,” which, he maintains, “focuses on the notion that protecting employees from retaliation will enhance the enforcement of the nation’s laws.”<sup>139</sup> In his view, the Supreme Court’s retaliation jurisprudence involving statutory interpretation during the past fifty years (including *Jackson*) has conveyed a clear message that “employees play an important role in enforcing statutory laws and the Court will provide employees broad protection from retaliation in

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134. *Id.* at 195–96.

135. *Id.* at 196.

136. R. George Wright, *Retaliation and the Rule of Law in Today’s Workplace*, 44 CREIGHTON L. REV. 749, 756 (2011).

137. *Id.* at 757.

138. Gorod, *supra* note 118, at 1474.

139. Moberly, *supra* note 120, at 378.

order to enhance enforcement of those laws.”<sup>140</sup> According to Professor Moberly, the majority opinion in *Jackson* explicitly adopted the Antiretaliation Principle when it stated that unless retaliation is prohibited, the enforcement scheme for Title IX will “unravel.”<sup>141</sup>

Viewed in this way, the *Jackson* decision fits neatly into the Supreme Court’s retaliation jurisprudence, which focuses on protecting employees from retaliation so that they will be encouraged to report illegal conduct. The Court assumes that employees’ reports will aid law enforcement by alerting authorities to unlawful discrimination, thereby deterring employer violations.<sup>142</sup> In keeping with this emphasis on facilitating law enforcement, Professor Moberly recommends replacing the current reasonable belief standard with a more relaxed version that would “simply encourage employees to come forward with information that a reasonable person with their knowledge and educational experience would believe to be a violation of the law.”<sup>143</sup> “Society would be better off,” he concludes, “with knowledgeable decision[-]makers determining whether the disclosed, questionable conduct violates the law *after* an employee’s report, instead of lay employees trying to determine legality *before* they report.”<sup>144</sup>

Thus, as the foregoing discussion has shown, the reasonable belief standard used in Title VII cases is neither the only nor, necessarily, the best one for judging whether the plaintiff in a Title IX retaliation action genuinely thought he or she was blowing the whistle on unlawful conduct when lodging a complaint about perceived sex discrimination. Part V of this Article will offer alternative standards that are more compatible with Title IX and the Supreme Court’s retaliation jurisprudence.

#### V. A “CONTEXTUAL REASONABLENESS” OR GOOD FAITH STANDARD SHOULD APPLY IN TITLE IX RETALIATION CASES

Courts should reject the reasonable belief standard in Title IX retaliation cases for three reasons. First, it does not fit the interscholastic or intercollegiate sports context from whence Title IX claims arise because the presumptive complainants, like the fast-food workers alluded to earlier, may not understand what is and what is not unlawful discrimination under the statute. The athletes are young and likely to be unsophisticated in legal

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140. *Id.* at 392; *see, e.g.*, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *Crawford v. Metro. Gov’t*, 555 U.S. 271 (2009).

141. Moberly, *supra* note 120, at 422 (quoting *Jackson*, 544 U.S. at 180).

142. *Id.* at 430.

143. *Id.* at 451.

144. *Id.* at 449 (emphasis added).

matters; hence, they may well overreact to perceived inequities that do not amount to unlawful discrimination. They may also be eager to earn or to retain athletic scholarships or playing time, leaving them vulnerable to retaliation by a coach or athletic director. Coaches, too, may be unsophisticated about legal issues affecting the games they teach, especially when young and inexperienced; under these circumstances, coaches, like athletes, who challenge conduct they think is unlawful could well be subject to retaliation. Unfortunately for these coaches and athletes, the reasonable belief standard in Title VII retaliation law does not take into account the subjective circumstances of the complainant in determining whether that person acted reasonably in challenging the complained-of conduct.<sup>145</sup> Instead, the view of “reasonableness” that customarily governs is that of one who knows the law—namely, the judge.<sup>146</sup>

Second, the reasonable belief standard is out of step with the *Jackson* decision’s embrace of Professor Moberly’s Antiretaliation Principle. That principle aims to encourage employers to obey the law; therefore, any standard that courts adopt after *Jackson* should deter unlawful discrimination in interscholastic and intercollegiate sports. But a standard that measures the reasonableness of a high school athlete’s belief in the unlawfulness of certain conduct by the sensibilities of a middle-aged judge is more likely to deter complaints by young athletes than unlawful discrimination by schools and colleges. Indeed, if a school or college retaliates against an athlete with impunity, as is predictable under a strict reasonable belief standard, that athlete will be unlikely ever to complain again, as will her teammates. Thus, in the wake of *Jackson*, courts should adopt a standard that is more sensitive to the age, maturity levels, and legal sophistication of high school and college athletes than the existing reasonable belief standard.

Third, the reasonable belief standard does not coincide with the Supreme Court’s broad reading of Title IX in *Jackson* or with the canon of statutory construction stating that courts should construe remedial statutes, such as Title IX, broadly so as to provide plaintiffs with the best opportunity to obtain relief for the injuries they have suffered. After all, in *Jackson*, the majority did not require the plaintiff to show that the defendant school had actually discriminated against his players in violation of Title IX.<sup>147</sup> And it construed the statute’s prohibition against discrimination “on the basis of sex” to include retaliation against a coach who complains about sex discrimination suffered by

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145. Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 99 (2005).

146. *Id.*

147. *Id.* at 85.

his or her athletes.<sup>148</sup>

That reading of Title IX is consistent with the longstanding canon of statutory construction stating that a “remedial statute should be liberally construed in order to effectuate the remedial purpose for which it was enacted.”<sup>149</sup> A liberal construction is ordinarily one that applies the statutory principle to more subjects or more circumstances than would be the case under a strict construction.<sup>150</sup> A court may interpret a remedial statute to apply in circumstances not specifically considered by the legislature “so long as those circumstances are within the ambit of the [statute’s] purposes,” and the court should give the terms used in the statute the most extensive meaning to which they are reasonably susceptible.<sup>151</sup> Common examples of remedial statutes are auto insurance legislation, which is liberally construed to give the broadest protection possible to accident victims, consumer fraud legislation, and whistleblowers’ protection acts.<sup>152</sup>

The *Jackson* Court implicitly acknowledged that Title IX is a remedial statute when it observed that “[i]f retaliation were not prohibited, Title IX’s enforcement scheme would unravel,” thereby subverting the statutory purpose of rectifying discrimination against girls and women in schools and colleges.<sup>153</sup> Moreover, in litigation during the 1990s between college women and their institution regarding athletic participation opportunities, the U.S. Court of Appeals for the First Circuit observed that “Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women’s interests and abilities.”<sup>154</sup> Thus, the remedial nature of Title IX warrants giving its terms the broadest meaning to which they are reasonably susceptible.

Considering the limitations of the reasonable belief standard and the remedial purpose of Title IX, courts should replace that standard with one that is more compatible with the statutory purpose. Accordingly, Title IX should protect from retaliation even the plaintiff who mistakenly identifies underlying

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148. *Jackson*, 544 U.S. at 179.

149. NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 60:1 (7th ed. 2008).

150. *Id.*

151. *Id.* § 60:2.

152. *Id.* § 60:1; *see, e.g.*, *Shallal v. Catholic Soc. Servs. of Wayne Cnty*, 566 N.W.2d 571 (Mich. 1997) (noting that the Whistleblowers’ Protection Act prohibits future employer reprisals against whistleblowing-employees in order to encourage employees to report violations of law).

153. *Jackson*, 544 U.S. at 180.

154. *Cohen v. Brown Univ.*, 101 F.3d 155, 179 (1st Cir. 1996); *see also* Brian L. Porto, *Completing the Revolution: Title IX as Catalyst for an Alternative Model of College Sports*, 8 SETON HALL J. SPORTS L. 351, 372–73 (1998).

institutional conduct as unlawful by using, at a minimum, Professor Moberly's suggested standard, which might be called "contextual reasonableness." It would ask whether a reasonable person with the plaintiff's knowledge and educational experience would believe that the conduct complained of was unlawful.<sup>155</sup> Better yet, Title IX should protect this plaintiff unless the defendant institution can show that the plaintiff complained in bad faith, that is, deceitfully or with a reckless disregard for the truth.<sup>156</sup> The latter standard is preferable because it is less likely than the former to be diluted by judicial notions of what a high school or college athlete should know about the law. Still, either alternative would more accurately reflect the athletic context in which Title IX retaliation claims arise and the broad remedial purpose of Title IX than does the reasonable belief standard currently in effect.

## VI. CONCLUSION

Despite representing a big step forward in the evolution of Title IX jurisprudence, *Jackson v. Birmingham Board of Education* did not indicate how much protection from retaliation Title IX provides if the underlying conduct prompting the complaint was lawful. Presumably, courts will answer this question by using the reasonable belief standard of Title VII, which only protects the plaintiff who has an objectively reasonable belief that the conduct complained of is unlawful. But this standard is inappropriate for the sports context, in which many potential plaintiffs are young and unsophisticated about the law. It is also contrary to the Supreme Court's historic concern for law enforcement and to the principle that courts should construe remedial statutes, such as Title IX, liberally. Therefore, in Title IX retaliation cases, when the conduct complained of is lawful, courts should reject the reasonable belief standard and protect the plaintiff if either (1) a reasonable person with the plaintiff's knowledge and educational experience would believe that the conduct was unlawful or (2) the defendant cannot show that the plaintiff acted in bad faith. Either alternative would be more compatible than the reasonable belief standard is with interscholastic and intercollegiate sports and with the remedial purpose of Title IX. The fortieth anniversary of the enactment of Title IX presents a wonderful opportunity for courts to adopt a new standard.

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155. Moberly, *supra* note 120, at 450.

156. Gorod, *supra* note 118, at 1474; Wright, *supra* note 136, at 757.