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## Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes

Ann Scales

*University of North Carolina-Chapel Hill School of Law*

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STUDENT GLADIATORS AND SEXUAL ASSAULT: A  
NEW ANALYSIS OF LIABILITY FOR INJURIES  
INFLICTED BY COLLEGE ATHLETES

*Ann Scales\**

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\* Visiting Professor of Law, University of North Carolina-Chapel Hill School of Law; Professor of Law, University of Denver College of Law. Thanks to those who provided research assistance and support, specifically Mathew Shechter, Diane Burkhardt, and Dean Beto Juárez. I'm grateful to Baine Kerr and Kimberly Hult, plaintiff's lawyers in *Simpson v. University of Colorado* for discussions about that struggle (for disclosure purposes, the author participated as a consultant to plaintiff's lawyers at the appellate level). I also appreciate close readings and suggestions from Jane Caputi, Lissa Broome, Jane Aiken, and participants in the Duke University Law School 2008 Summer Workshops, particularly Paul Haagen and Robert Mosteller. Finally, I am indebted to the editors of the *Michigan Journal of Gender & Law* for their extraordinary efforts. Ben McJunkin, especially, picked up the ball when I was medically unable to carry it, and brought it home.

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## INTRODUCTION

In forty years of conversations with educators working at institutions that participate in NCAA Division I-A<sup>1</sup> athletics, I have heard one metaphor over and over again: big-time sports are the tail that wags the academic dog.<sup>2</sup> But the controversy came well before I became aware of it, and before the advent of the National Collegiate Athletic Association, and it had everything to do with football.

By the turn of the twentieth century, the Harvard faculty had voted on numerous occasions to abolish football,<sup>3</sup> to no effect. When the venerable Charles W. Eliot, by then President of Harvard for three and a half decades, was asked in 1905 to “call a conference [of colleges] to

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1. The National Collegiate Athletic Association classifies member institutions by the number of teams fielded, the number of contests per season, and the number of participants in sports. Division I institutions, for example, must sponsor at least seven sports for men and seven sports for women (or six sports for men and eight sports for women). Among institutions that sponsor football, Division I-A universities are now called “Football Bowl Subdivision” schools and must meet both minimum fan attendance and minimum player financial aid standards. <http://www.ncaa.org/wps/ncaa?ContentID=418> (last visited Nov. 20, 2008).
  2. The conversation started early for me as my father was the President of Wake Forest University from 1967–83, a member of the athletically high-powered Atlantic Coast Conference.
  3. Ronald A. Smith, *Harvard and Columbia and a Reconsideration of the 1905–06 Football Crisis*, 8 J. SPORT HISTORY 5, 10 (1981).

either reform or ban football,” he promptly declined, stating that administrators “certainly cannot reform football, and I doubt if by themselves they can abolish it.”<sup>4</sup> Stanford and the University of California did abolish football from 1906–19 and 1906–15, respectively, replacing it with rugby, until war and market pressures forced them to return to football.<sup>5</sup> When University of Michigan President James Burrill Angell, in an effort to restore the integrity of college football, persuaded other colleges to form a new league with Michigan, in 1906 legendary Michigan football coach Fielding Yost went over the President’s head to the Board of Trustees and got them to restore the status quo.<sup>6</sup>

Thus have academics historically thrown up their hands, and that has been the eventual response to date of most faculties and administrations faced with the excesses of intercollegiate athletic programs—at least those in NCAA Division I-A—in the ensuing century. Educators’ objections to intercollegiate athletics (particularly football) have been many. The concerns expressed a century ago—brutality, professionalization, commercialization, moral corruption, dilution of education, and usurpation of academic control of the university—persist today. In the last century, they have been exponentially magnified.<sup>7</sup>

This Article will focus, however, on an issue that was probably not on the minds of 19th century educators, nor primarily on the minds of

4. *Id.* at 13.

5. Roberta J. Park, *From Football to Rugby—and Back, 1906–1919: The University of California—Stanford University Response to the “Football Crisis of 1905”*, 11 J. SPORT HISTORY 5, 27–28, 36 (1984).

6. JAMES J. DUDERSTADT, INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT’S PERSPECTIVE 232–33 (2003). It seems integral to the hegemony of football for such football coaches always to be described as “legendary.” See *infra* text accompanying note 212.

7. There is an immense recent literature on the conflict between sports and academic goals. See e.g., WILLIAM G. BOWEN & SARAH A. LEVIN, RECLAIMING THE GAME: COLLEGE SPORTS AND INSTITUTIONAL VALUES (2003); WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 297–319 (1995) (authored by the Director of the National Collegiate Athletic Association from 1951–66); DUDERSTADT, *supra* note 6, at 189–204; JAMES L. SHULMAN & WILLIAM G. BOWEN, THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES (2001); RICK TELANDER, THE HUNDRED YARD LIE: THE CORRUPTION OF COLLEGE FOOTBALL AND WHAT WE CAN DO TO STOP IT (1996); JOHN R. THELIN, GAMES COLLEGE PLAY: SCANDAL AND REFORM IN INTERCOLLEGIATE ATHLETICS 24–27, 182–83, 200 (1994)). Perhaps most significant is the ongoing work of the Knight Foundation Commission on Intercollegiate Athletics, founded in 1991 by a distinguished group of academic administrators and other experts to consider ways of corralling the threats to education posed by big-time intercollegiate athletics. See Knight Commission on Intercollegiate Athletics, [www.knightcommission.org](http://www.knightcommission.org).

the legions of present-day academic critics of intercollegiate sports. Namely, this Article explores the ways in which big-time athletics—particularly football—normalize and encourage harms to women, including educational and sexual harms. My theses depend upon acknowledging certain open secrets about college football: that it is a celebration of male physical supremacy (measured by male standards); that it is something that society lets males do and have as their sport, for reasons both good and bad; that football *worship* by both men and women<sup>8</sup> is weirdly and widely accepted in spite of the huge costs of football; and that football has a darkly gendered underside that deserves serious consideration.

I emphasize three notions right up front. First, I do not advocate the abolition of intercollegiate football. Rather, I present an analysis that will, I hope, assist lawyers and courts to participate constructively in the widely-shared goal of bringing football into balance with universities' larger educational mission.

Second, perhaps I am old-fashioned, but I believe in that larger educational mission. The university is sacred space to me, and my understanding of its mission is informed by classical notions of what it would mean to teach young people to thrive. "Thriving" is of course a contested concept, but it means, at least, freedom from narrowness, from mental calcification, from the urge to violence, and, in Virginia Woolf's immortal phrase, freedom from unreal loyalties.<sup>9</sup> My discussions of Aristotle and Woolf later in this Article are integrally connected to my understanding of the university's "duty."

Third, central to my project is an understanding of the concept of the "open secret." The idea, much discussed in contemporary philosophy and literary criticism, entails socially organized ignorance. And the interests that are protected by maintaining that ignorance always include avoiding accountability. Domestic violence, for example, is a paradigmatic example of an open secret. The data—the hideous statistics, the predictable patterns, and the devastating results—are open secrets, but they have not supplanted the preferred narrative that every incident of domestic violence is still an isolated incident, and they have not caused governments to make preventing domestic violence a top priority.<sup>10</sup>

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8. See, e.g., Camille Paglia, *Gridiron Feminism: Why Women Should Love Football*, WALL ST. J., Sept. 1, 2000, available at [www.opinionjournal.com/forms/printThis.html?id=65000205](http://www.opinionjournal.com/forms/printThis.html?id=65000205) ("Football . . . [is] the religion of my brand of Amazon feminism.").

9. See VIRGINIA WOOLF, *THREE GUINEAS* 79 (1966).

10. I believe I saw every debate among the 2008 Democratic presidential candidates, and I don't believe domestic violence was even mentioned. If it was mentioned, eliminating it was not a part of anyone's platform. It seemed impolite to bring it up.

Literary critic Eve Kosofsky Sedgwick, in her groundbreaking work on the closet in which gay and lesbian people have lived and do live, suggested the following as the “core grammar” of the open secret:

Don't ask. You shouldn't know. It didn't happen; it doesn't make any difference; it didn't mean anything; it doesn't have interpretive consequences. Stop asking just here; stop asking just now; we know in advance the kind of difference that could be made by the invocation of *this* difference; it makes no difference; it doesn't *mean*.<sup>11</sup>

In discussing this Article pre-publication, I've encountered the problems of the open secret again and again. “These really are isolated incidents.” “The social science data prove nothing.” “Football is just another example of how entrenched systems of power work—what else is new?” “You sound too shrill.” “Violence will always be with us.” Well-meaning people, including feminist activists, have warned me off the project. “Your life will change.” “You'll inevitably be perceived as attacking a sacred cow, are you ready for that?”<sup>12</sup> “You'll never be taken seriously again.” Recounting these comments are not complaints on my part, just statements of awareness, and admonitions that we avoid the familiar pitfalls of open secrets.

This Article is ultimately about what lawyers and courts can do. I argue simply that sexual abuse of women by football players—sometimes encouraged through the excesses of university football programs—is unacceptable, and that every available avenue of relief must be refigured and deployed in order to stop it. I conclude that, at the very least, a civil action under a state constitutional equality guarantee could bring the issues into much sharper relief.

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11. EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 53 (1990).

12. Though I have not spoken with Professor Buzuvis, I was chilled by the account of the siege following her mild challenge to team practices at a Division I school. At an open faculty meeting, Buzuvis questioned whether there was a gender equality problem in the University of Iowa's decision to maintain a pink locker room for visiting opponents in the new football stadium. She was thereafter subject to intense personal attack, including, for example, an anonymous e-mail stating, “I'd love to lay you down and cock-stab you in the ovaries.” Erin E. Buzuvis, *Reading the Pink Locker Room: On Football Culture and Title IX*, 14 *WM. & MARY J. WOMEN & L.* 1, 6 n.27 (2007).

## I. THE CONTEXT

### A. Incidents and Cases

*You know how it is in college . . . You come into my room, you already know what's going on.*

—Tony Cole, former University of Georgia basketball player, charged with aggravated assault with intent to rape<sup>13</sup>

*Somebody may knock on the door, a cute girl knocks on the door. What do you do?*

“Legendary” Penn State football coach Joe Paterno, commenting on the suspension of Florida State linebacker A.J. Nicholson before the 2006 Orange Bowl because of sexual assault allegations<sup>14</sup>

### 1. News Stories

- November 2007: An Oklahoma State linebacker was dismissed from the team six days after he pled guilty to sexual assault of a twelve-year-old girl. The linebacker was allowed to keep his athletic scholarship and remain in school.<sup>15</sup>
- July 2007: After the university's own investigation, Villanova rescinded the admission of three incoming freshman

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13. Christopher Flores, *When Athletes Are Accused: Colleges Try to Strike Balance Between Condemning Criminal Behavior and Giving Second Chances*, CHRON. HIGHER EDUC., Apr. 19, 2002, at A39.

14. Mike Lopresti, *Paterno's Gaffe is No Firing Offense*, [http://www.usatoday.com/sports/columnist/lopresti/2006-01-09-lopresti-paterno\\_x.htm](http://www.usatoday.com/sports/columnist/lopresti/2006-01-09-lopresti-paterno_x.htm) (last visited January 9, 2006) (advising National Organization of Women—“hypersensitive types who spend more time scrutinizing speech and thought than an FBI wiretap”—not to go after a winning football coach).

15. Jeff Latzkeap, *Linebacker Chris Collins Dismissed from Oklahoma State Football Team*, <http://www.comcast.net/sports/articles/cfb/2007/11/08/Oklahoma.St-Collins/> (last visited Nov. 14, 2007).

football players who were under investigation by local police for the sexual assault of a female Villanova student.<sup>16</sup>

- April 2007: A University of Minnesota cornerback was charged with criminal sexual conduct in the alleged rape of an eighteen-year-old woman near campus. Three other football players were suspects in the case. All four were suspended from the football team.<sup>17</sup>
- April 2006: The University of Southern California's backup quarterback was temporarily suspended from the team pending police investigation of his arrest for sexually assaulting a nineteen-year-old USC student.<sup>18</sup>
- December 2005: Florida State football coach Bobby Bowden forbade a starting linebacker from playing in the Orange Bowl after the linebacker allegedly assaulted a woman in the hotel where the team was staying. There was no immediate arrest in the case. The linebacker's status had been at issue earlier in the season because of two other incidents; he was not suspended for either.<sup>19</sup>
- January 2004: The Kansas State quarterback was accused of sexually assaulting a Kansas State alumna the day before the Fiesta Bowl at the team hotel. At the last minute, Coach Bill Snyder—in whose hands the decision solely rested—allowed the player to participate in the bowl game. Kansas State lost the Fiesta Bowl to Ohio State.<sup>20</sup> The Maricopa County, Arizona prosecutor eventually declined to press charges against the player.<sup>21</sup>

16. Associated Press, *Nova Expels Three Involved Alleged [sic] Assault*, available at <http://www.sportingnews.com/yourturn/viewtopic.php?t=245719> (last visited July 26, 2007).
17. Associated Press, *CB Dominic Jones Released From Jail on \$25,000 Bail*, available at <http://sports.espn.go.com/nfl/news/story?id=2940070> (last visited July 17, 2007).
18. Associated Press, *USC Suspends Sanchez After Sexual Assault Arrest*, ESPN, April 27, 2006, available at <http://sports.espn.go.com/espn/print?id=2423430&type=story> (April 27, 2006).
19. Steve Ellis, *Florida State's Nicholson Accused of Sexual Assault*, TALLAHASSEE DEMOCRAT, Dec. 29, 2005, available at [http://www.usatoday.com/sports/college/football/acc/2005-12-29-fsu-nicholson\\_x.htm](http://www.usatoday.com/sports/college/football/acc/2005-12-29-fsu-nicholson_x.htm). It was this incident that gave rise to "legendary" Coach Joe Paterno's "gaffe," quoted as an epigraph to this section.
20. Jason Whitlock, *Snyder's Power Must Be Checked*, KANSAS CITY STAR, Jan. 3, 2004, at D1.
21. Associated Press, *Prosecutors Won't Press Charges Against Roberson*, USA TODAY, Jan. 8, 2004, available at [http://www.usatoday.com/sports/college/football/big12/2004-01-09-roberson-cleared\\_x.htm](http://www.usatoday.com/sports/college/football/big12/2004-01-09-roberson-cleared_x.htm) (the prosecutor said that Roberson "could not have known" that the 22-year old woman who accused him did not consent).



- 2004: Four separate women filed suit against the University of Washington for alleged sexual assaults perpetrated by football players.<sup>22</sup>
- January 2002: A defensive tackle at the University of Mississippi was arrested and charged with sexual battery. He was suspended from the team indefinitely.<sup>23</sup> After transferring and playing at Murray State University, the defensive tackle pled to the lesser charge of simple assault.<sup>24</sup>

## 2. Legal Dimensions: The Colorado Football Gang Rape Case

Other than one of the remarkable quotes at the beginning of this section, which came from a college basketball player, and a later discussion of the Duke Lacrosse debacle, this Article focuses on examples from college football. Undoubtedly, sexual assaults and alleged sexual assaults are associated (though, in general, to lesser extents) with other college sports. There is no strictly empirical reason for my focus on football, except that football is the college sport *de facto* reserved for men.<sup>25</sup>

More importantly, I find the history of U.S. collegiate football, described in Section II.D, *infra*, to be an extraordinary subtextual history of American masculinity. My focus is driven by the militaristic, hyper-masculine mystique of football.<sup>26</sup>

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22. Steve Miletich et al., *2 Women Sue Former Player, UW, Alleging Sex Assaults*, SEATTLE TIMES, Feb. 28, 2004, at ROP News.

23. Flores, *supra* note 13.

24. Emery Carrington, *Charges Lowered for Former UM Player*, DAILY MISSISSIPPIAN, Apr. 16, 2003, available at <http://www.thedmonline.com/2.2838/1.125942>.

25. My research indicates that only three women have played Division I football. That does not stop women from playing the game. There are two professional full-contact football leagues for women in the United States, comprising 80 teams and about 3,000 players. However, the athletes have to pay to play, while otherwise holding down their day jobs, and have to practice and play at always varying locations. As one player said, "What we'd like is to make a living at this . . . . Boys and men have no idea how lucky they are to have this just handed to them. It breaks my heart." Sophia Hollander, *Taking Aim at Gender Barriers in a Full-Contact Sport*, N.Y. TIMES, May 13, 2008, at D2.

26. The late great comedian George Carlin famously compared the pastoral sport of baseball with the militaristic sport of football. George Carlin, *Baseball and Football*, [www.baseball-almanac.com/humor7.shtml](http://www.baseball-almanac.com/humor7.shtml). Here are some of the great lines:

Returning to the legal dimension, my primary example is *Simpson v. University of Colorado*,<sup>27</sup> a case involving a gang-rape that implicated not only football players, but also football team recruits. Ms. Simpson was a CU student. She and her roommates elected to have a “girls’ night in” at her apartment. One roommate, who was also a “tutor” for the CU football team, arranged for a group of football players and recruits—during an official recruiting visit to Boulder—to come over after the guys had already been partying. About twenty did so. Simpson knew none of the recruits or players who visited her apartment. Allegedly, after Simpson went to sleep in her room, she was vaginally and orally raped by five of the men. Simultaneously, three men harassed and assaulted a second plaintiff, Ms. Gilmore. After Simpson and Gilmore went public with

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“Baseball is played on a diamond, in a park. The baseball park!  
Football is played on a gridiron, in a stadium, sometimes called Soldier Field or War Memorial Stadium.”

“In football you wear a helmet.  
In baseball you wear a cap.”

“Football is concerned with downs—what down is it?  
Baseball is concerned with ups—who’s up?”

“In football you receive a penalty.  
In baseball you make an error.”

“Baseball has the seventh inning stretch.  
Football has the two minute warning.”

“Baseball has no time limit: we don’t know when it’s gonna end—might have extra innings.  
Football is rigidly timed, and it will end even if we’ve got to go to sudden death.”

And finally, the objectives of the two games are completely different:

“In football the object is for the quarterback, also known as the field general, to be on target with his aerial assault, riddling the defense by hitting his receivers with deadly accuracy in spite of the blitz, even if he has to use the shotgun. With short bullet passes and long bombs, he marches his troops into enemy territory, balancing this aerial assault with a sustained ground attack that punches holes in the forward wall of the enemy’s defensive line.

In baseball the object is to go home! And to be safe!—I hope I’ll be safe at home!”

27. *Simpson v. Univ. of Colo.*, 372 F. Supp. 2d 1229 (D. Colo. 2005), *rev’d*, 500 F. 3d 1170 (10th Cir. 2007).

their account, they faced hostility and threats on campus. Gilmore left Colorado for a year; Simpson dropped out of college altogether.<sup>28</sup>

Allegedly, head football Coach Gary Barnett (and coaches before him) had long refused to change recruiting practices that included unsupervised hard partying with student hosts, citing “recruiting disadvantage.” He opposed a zero tolerance policy for sex and alcohol on recruiting visits. In addition to the sorts of drunken parties described by the plaintiffs, the football program indirectly paid for or tolerated strip shows, lap dances, and prostitutes for recruits.<sup>29</sup>

According to the plaintiffs, over a period of four years there had been a number of rapes, sexual assaults, and incidents of sexual harassment by football players that Coach Barnett and the football program had known about and had either ignored or had tried to cover up. One nineteen-year-old female trainer for the football team was raped by a team member and reported the rape to the police. Coach Barnett called her to his office, and, while he did not question the fact of the rape, told her that if she pursued the charges he would “back his player 100%” and that her “life would change.”<sup>30</sup> On another occasion, Coach Barnett pressured the campus police to drop a sexual assault investigation of football players.<sup>31</sup>

Paradigmatic of the Colorado football program, and Coach Barnett’s stewardship of it, is the story of Katie Hnida. Hnida was recruited by Barnett’s predecessor as a walk-on place kicker for the otherwise all-male football team. Barnett was coach by the time she got to Boulder, and he set the tone for most of the treatment she received. Her father complained both to the coach and the Athletic Director about the constant sexual harassment of her by other players. After the 2001 gang-rapes became public, Ms. Hnida felt compelled to come forward about being raped by another player on the team.<sup>32</sup>

28. Appellants’ Opening Brief (Redacted), at 18–19, *Simpson v. Univ. of Colo.*, No. 06-1184 (10th Cir. Aug. 18, 2006).

29. *Id.* at 15, 18, 25.

30. Appellants’ Opening Brief, *supra* note 28, at 18.

31. Appellants’ Reply Brief (Redacted) at 12, *Simpson v. Univ. of Colo.*, No. 06-1184 (10th Cir. Dec. 18, 2006).

32. KATIE HNIDA, *STILL KICKING: MY JOURNEYS AS THE FIRST WOMAN TO PLAY DIVISION I COLLEGE FOOTBALL* 247–64 (2006). While Ms. Hnida’s father had complained about acts of sexual harassment against her, she didn’t report the rape because she felt that it would get her kicked off the team. In any case, after a miserable time at CU, and an interim at other schools, in 2002 Ms. Hnida transferred to the University of New Mexico, where she played on the football team and received “an immensely different reception.” *Id.* at 216. She went on to become the first woman to score in a NCAA Division I football game. *Id.* at 244. While I applaud Ms. Hnida’s courage, I have no opinion about whether gender integration of college foot-

When Ms. Hnida went public, Coach Barnett became a bit of a loose cannon. At a news conference concerning the entire football gang-rape scandal and Ms. Hnida's report of rape, he said: "It was obvious that Katie was not that good. She was awful, OK? You know what guys do? They respect your ability . . . Well, Katie was a girl, and not only was she a girl, she was terrible, OK, and there is no other way to say it."<sup>33</sup> "No other way to say" what? Could it have been that, when Coach Barnett found a girl on his football team, it followed logically to him that anything she had to say was a lie, and even if it wasn't a lie, it didn't matter?<sup>34</sup>

Katie Hnida was only a potential witness; the plaintiffs were the alleged victims of the December 2001 gang rape. Their sole cause of action was Title IX of the Education Amendments of 1972, which prohibits sex discrimination on the part of educational institutions that receive federal funds. The District Court granted summary judgment to the University of Colorado,<sup>35</sup> in a remarkable football-protective opinion (discussed *infra*.) The plaintiffs appealed, and oral argument was heard by the Tenth Circuit Court of Appeals on May 7, 2007. In a quick turn-around, the Court of Appeals reversed on September 6, 2007, holding

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ball teams is a worthy goal. *But see* B. Glenn George, *Fifty Fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L.J. 1107, 1145-59 (2002) (arguing for gender parity on all collegiate teams, including football).

33. Bill Pennington, *Colorado Puts Football Coach on Leave*, N.Y. TIMES, Feb. 19, 2004, at D1. In a remarkable Congressional Hearing in the midst of the CU revelations, Congresswoman Janice D. Schakowsky argued that Coach Barnett's comments about Katie Hnida were sufficient to disqualify him from the administrative leave with pay that he had received during the internal investigation:

[T]hink of substituting the word "girl" for "black." [sic] Would we for a minute tolerate that person to go on paid administrative leave? . . . [W]e should be serious about this remark, which I think goes beyond everything, has crossed a line where if we are serious we have to say no, this person cannot lead. He has disqualified himself.

*College Recruiting: Are Student Athletes Being Protected?: Hearing Before the Subcommittee on Commerce, Trade, and Consumer Protection of the Committee on Energy and Commerce*, 108th Cong. 50 (2004) (statement of Rep. Janice D. Schakowsky, Member, H. Comm. On Energy and Commerce).

34. Toward making that inference, consider this. Just prior to the news conference, Coach Barnett e-mailed then-Colorado Athletic Director, Dick Tharp: "How aggressive shoould [sic] I be re; Katie . . . sexual conquests by her etc." HNIDA, *supra* note 32, at 255; also attached to Special Committee on Athletics Reform, Boulder Faculty Assembly, *A Proposal for Reform of Intercollegiate Athletics at the University of Colorado at Boulder* (May 4, 2004) (copy on file with author). Given that Ms. Hnida was not suing CU, and that there had never been any controversy about Ms. Hnida's private life, it appears that Coach Barnett was willing to invent a "slut defense" to Ms. Hnida's evidence.
35. *Simpson v. Univ. of Colo.*, 372 F. Supp. 2d 1229 (D. Colo. 2005).

that the evidence presented at summary judgment surely presented genuine issues of material fact on Title IX standards.<sup>36</sup>

The University of Colorado wisely decided against applying for *certiorari*,<sup>37</sup> and, instead of airing its laundry at trial, settled with the two plaintiffs on December 5, 2007 for a combined amount of \$2,850,000.<sup>38</sup> On the same day, former Coach Barnett expressed his dismay that the suit had held a great university “hostage” for so long.<sup>39</sup> Mr. Barnett did not mention that the amounts paid to the plaintiffs were less than the University paid to him—\$3,000,000—to buy him out of his coaching contract at the end of the 2005 season,<sup>40</sup> a buy-out that was more about losing football games than it was about sexual abuse in his football program.<sup>41</sup>

The *Simpson* decision, and a handful of other recent favorable Title IX decisions (and settlements), may cause universities slowly to re-think the relationships of central administrations to athletic departments. It will be a hard slog for them, however, because of the power of athletic departments.<sup>42</sup> In the meantime, there are many flaws in Title IX that

36. *Simpson v. Univ. of Colo.*, 500 F.3d 1170 (10th Cir. 2007).

37. Just weeks before the CU settlement, the United States Supreme Court had denied certiorari in a case involving similar questions about proof in Title IX sexual harassment claims. *Jennings v. Univ. of N.C.*, 482 F. 3d 686 (4th Cir. 2007) (en banc), cert. denied 127 S. Ct. 247 (2007). In that matter, a UNC-Chapel Hill female soccer player brought suit alleging that the team’s head coach, Anson Dorrance, had created a hostile environment by sexually harassing his players. As in *Simpson*, the District Court granted summary judgment for the University, but the appellate court reversed, holding, *inter alia*, that a jury could find “the incidents were not isolated incidents, but were part of an abusive pattern that instilled fear and dread.” 482 F.3d at 698. Rather than go to trial as scheduled in April 2008, UNC settled that matter for \$385,000, with an apology from the coach, and a review of its sexual harassment policy by an outside expert. Brad Wolverton, *U. of North Carolina Settles Sex-Harassment Suit Against Coach*, CHRON. HIGHER EDUC., <http://chronicle.com/daily/2008/01/1231n.htm> (last visited Jan. 15, 2008).

38. Sara Burnett & Kevin Vaughn, *CU Makes \$2.85M Vow for Change; Barnett Responds*, ROCKY MOUNTAIN NEWS, Dec.6, 2007. The settlement funds came entirely from insurance. The University had already spent \$3,000,000 on outside counsel, including \$1,000,000 from general university funds. *Id.*

39. Statement from Gary Barnett, Dec. 5, 2007, on Gary Barnett: The Official Website, [www.garybarnettfoundation.org](http://www.garybarnettfoundation.org), available at <http://web.archive.org/web/20071215024642/http://www.garybarnettfoundation.org/>.

40. Lee Jenkins, *Losses Do to Barnett What Colorado Scandal Couldn't*, N.Y. TIMES, Dec. 9, 2005, at D6.

41. *Id.* In addition, Barnett had been given a one-year suspension—with pay—in response to the investigation of the football program.

42. See, e.g., Associated Press, *College Football: Spurrier Issues Threat to South Carolina*, SEATTLE TIMES, Aug. 7, 2007, at C5 (describing football coach’s threat to quit because university admissions committee refused to admit two recruited athletes who satisfied minimum NCAA standards).

make *Simpson* something of a hollow victory. What I describe are the legal fortifications around college football and the devaluation of its victims. In order to understand what is going on here, and what might be done about it, we need to take a brief look at the history of college football.

### *B. American College Football*

College football is a truly American institution. It is a paradigm product of a “recreational ideology”<sup>43</sup> that tracks gender anxieties in the United States, particularly since the Civil War. There are unique features of U.S. intercollegiate athletics, and football in particular, that underlie my approach.<sup>44</sup> First, what in the U.S. we call “football” is of course distinguished from what the rest of the world calls “football,” and we call “soccer.” This game—which is itself a fascinating study in “American exceptionalism”<sup>45</sup>—was invented on U.S. college campuses. Second, as has often been noted, the United States is the only country in the world where intercollegiate athletics are so thoroughly part of and funded by universities.<sup>46</sup> Because of the massive scale and gender apartheid

43. See ELLIOTT J. GORN & WARREN GOLDSTEIN, *A BRIEF HISTORY OF AMERICAN SPORTS* 6 (Univ. Ill. Press 2004).

44. My approach begins with my affection for college football. I grew up in a small Oklahoma town. Both my parents and many family members attended the University of Oklahoma. When I was little, my father took me to OU football games, and I still recall the thrill of being dressed in a red jumpsuit on cool fall days and belting out “Oklahoma”—let’s face it, the best state song ever—in a chorus of about 60,000 people (the capacity of Oklahoma Memorial Stadium is now much greater). The story goes that Rogers and Hammerstein could have written that musical about any Midwestern state, but none other had such a musical name. Oklahoma—a Choctaw word meaning “land of the red man.” Where the wind comes sweeping down the plain!

45. ANDREI S. MARKOVITZ & STEVEN L. HELLERMAN, *OFFSIDE: SOCCER AND AMERICAN EXCEPTIONALISM* 70 (Princeton Univ. Press 2001). The original notion of “American exceptionalism,” which has been the subject of scholarly study for over a century, concerns the absence of any European-style socialism or social democracy as a systematically important force in American politics. *Id.* at 7.

46. *Id.* at 42. Other countries now have organized intercollegiate athletics, though small compared to the U.S. behemoth. See the links to intercollegiate governing bodies in England, Ireland, Australia, Canada, New Zealand, and the Philippines at [www.dmoz.org/Sports/College\\_and\\_University/Goverinig\\_Bodies/desc.html](http://www.dmoz.org/Sports/College_and_University/Goverinig_Bodies/desc.html). Of course, sports in general are extraordinary in the U.S. in several important ways. “In their institutional presence and their culture, American sports are like American education and American religion: independent of the state, market driven, and ultimately subject to few, if any, regulating bodies outside those of their own creation.” MARKOVITZ & HELLERMAN, *supra* note 45, at 46.

represented by football, it is a particularly telling lens through which to view the priorities of many institutions of higher education. Third, while there is an ostensible multi-layered system of control, the fact is that those layers combine to produce a symphony of no control, particularly when it comes to injuries done to women. Though no one has a clear claim to inventing the game,<sup>47</sup> U.S. college football has a deeply elite pedigree. From the early 19th century, the students at the all male Ivy League universities were playing both soccer and rugby.<sup>48</sup> Rules for those two games had not really been set in the U.S., and variations emerged. Harvard students had developed a hybrid of the kicking game and the hands-on game, known then as “the Boston game.” During these decades, and until the turn of the century, the games and rule-evolution were all under student control. Football in several forms became an Ivy League mania after the Civil War. By the 1870’s, the colleges were hot for intercollegiate competition, which required standardized rules for standardized games. After the war, representatives from the Ivy League colleges met to do just that. But Harvard didn’t show up.

Most historians consider this meeting the critical moment in the invention of American football. The other schools would have pushed for a more soccer-like game. Harvard would have nothing but “the Boston game.” Harvard’s hold-out provoked the Ivy League to adopt the Boston game as the intercollegiate model. Thereafter, the schools participated in a general evolution toward increased violence in what had become known as “American football.” The emergence of the sport was characterized by an ideology of raw aggression and free-for-all violence.<sup>49</sup>

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47. People have been kicking roundish objects around at least since people have been writing down their observations of what other people did. For example, in 1620, English colonists found Native Americans playing “pasuckquakkohowog,” translatable as “they gather to play football,” a game performed by entire villages on playing surfaces often a mile long. *Id.* at 69. It is very likely, however, that the recreational ideology of such activities—probably conscious purification rituals—was rather different from modern-day football. See GORN AND GOLDSTEIN, *supra* note 43, at 5.

48. See ALLEN GUTTMANN, FROM RITUAL TO RECORD: THE NATURE OF MODERN SPORT 127–28 (1978). The story is that rugby came into being in 1823 at Rugby School in Warwickshire, England (memorialized there by a plaque) when William Webb Ellis picked up the soccer ball and ran with it, “in bold defiance of the rules.” *Id.* at 127.

49. The embrace of aggression was consistent with a history of “blood-sports,” from cockfighting to rat-baiting to dog-fighting, that were associated with masculinity in the United States from colonial times. As sports historians Elliott Gorn and Warren Goldstein note:

In their very violence and competitiveness, sports united men with displays of masculine power. The swagger of a man who played in bloody football games, or even the strut of one who, with a large wager, identified himself

The Victorian era brought significant changes in recreational ideology. Early Victorians opposed virtually all recreational activities (from horse racing to boating to storytelling) on moral grounds, and their notion of manly virtue was not infused with primal aggression. But the growing sports culture and commercialization of sports in the United States, aided by steam-powered printing, telegraphy, and the penny press, proved irrepressible.<sup>50</sup> A journalistic backlash mocked Victorian sentimentality, boxing became the most popular spectator sport, and there arose a bachelor subculture of extreme sports violence, defined by contravention of law and custom. Professors Gorn and Goldstein describe an urban underground of thousands of young men who migrated among various venues to engage in bare-knuckled fighting, ending when a man simply couldn't continue.<sup>51</sup>

This divided front of masculinity could not continue. Before the Civil War, Victorian men began to articulate their own recreational ideology, what Gorn and Goldstein call the ideology of "muscular Christians and brawny Brahmins."<sup>52</sup> Their emphasis on proper sports, properly played by proper men, built a conception of masculinity that emphasized competitiveness, teamwork, and control over their environment. These muscular Christians and brawny Brahmins could create what they viewed as inevitable military and industrial might.<sup>53</sup> But it was after the Civil War—"in the belief that conflict between individuals, classes, and nations lay at the heart of human existence"—that the present ideology of sports came into being.<sup>54</sup> It was then that college football saved American masculine honor.

Sports as "the moral equivalent of war" became a popular notion by the 1890's.<sup>55</sup> "Athletics offered an opportunity for young men to get

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with a particular fighting cock, were emblems of manhood that excluded women, children, the elderly . . . Extravagant risks, unflinching bloodiness, competition bordering on madness—these were at the core of the sporting life. Sports helped define the terms of admission to male groups, valorized particular male traits of masculine virility, and thereby devalued all that was womanly and feminine.

GORN & GOLDSTEIN, *supra* note 43, at 15, 28.

50. *See id.* at 59–67.

51. *Id.* at 71–72. In short, Gorn and Goldstein describe a real historical antecedent to the novel *Fight Club*, and to the 1999 cult classic movie by the same name, that has provoked much discussion about misogyny and the worship of anarchic violence. *See generally* CHUCK PALAHNIUK, *FIGHT CLUB* (1996); *FIGHT CLUB* (20th Cent. Fox 1999).

52. GORN & GOLDSTEIN, *supra* note 43, at 81.

53. *Id.* at 88.

54. *Id.* at 99.

55. *Id.* at 140.



their first taste of glory, and for older men to renew the tingle of heroic combat."<sup>56</sup> The football stadium at Harvard, "Soldiers' Field," was named for Harvardians killed in the Civil War.<sup>57</sup> Oliver Wendell Holmes, Jr., in his 1895 speech at Harvard, explicitly endorsed the possibility of filling existential emptiness with a "Soldier's Faith" (the title of his speech), with "obedience to blindly accepted duty." With no battles at hand, Holmes argued that rugged sports could be an adequate substitute, a means to feel "the passion of life at its top."<sup>58</sup>

With this reconstructed sports ideology—an ideology compatible with patriotism and the emerging industrial economy—dangerous sports became the means of American male renewal. Though women were beginning to play a few organized sports at the college level, *spectator* sports became a largely male-segregated space, a site for worship of virile heroes. "What, after all, was left to do after the wilderness was tamed, fortunes made, and rebellions put down?"<sup>59</sup>

In the meantime, though Harvard had won the day on the original form of American football, it was Yale that built college football into the juggernaut that we know today. Walter Camp, associated with Yale football from 1876–1909 (first as a player and finally as head coach), has become known as the "father of college football."<sup>60</sup> Under his leadership, the scrimmage was established, downs became the standardized measurement of progress, and ever-more violent means of blocking and tackling were normalized.<sup>61</sup> During Camp's association with college football, his teams lost only fourteen games, a record that has never come close to being matched.<sup>62</sup>

But the legendary Camp was most successful as a propagandist for football. Most dramatically, he was the man who rescued college football in the "crisis year," 1905. With increasing violence in the sport, casualties also increased. President Theodore Roosevelt—surely the butchest of

56. *Id.*

57. Oliver Wendell Holmes, Jr., *The Soldier's Faith*, (May 30, 1895) in RICHARD POSNER, *THE ESSENTIAL HOLMES* (1992), available at <http://www.harvardregiment.org/holmesfa.htm>.

58. *Id.* It is said that this speech was instrumental in persuading President Theodore Roosevelt to nominate Holmes to the United States Supreme Court. *The Soldier's Faith*, <http://www.harvardregiment.org/holmesfa.htm> (1998).

59. GORN & GOLDSTEIN, *supra* note 43, at 145, 143.

60. *Id.* at 153, 156.

61. *Id.* at 155.

62. *Id.* at 156. Camp was also a clockmaker, and was obsessed with the mathematics of football. He bureaucratized the game, and the present preoccupation with football statistics leads directly back to Walter Camp. He modeled his teams on the standards of industrial production, based on the work of reformers such as Frederick Winslow Taylor. *Id.* at 159–61.

U.S. Presidents—had become so disgusted with the sport that he threatened federal action to reform or abolish it (the story goes that the President had seen photographs of the body of a Swarthmore player who had been beaten to a bloody pulp). Roosevelt called representatives of several colleges to the White House to confer about what should be done. Camp is credited with striking the mild compromise that Roosevelt accepted.<sup>63</sup> There are various accounts of how the “crisis” went down, but everyone agrees that it resulted in only modest reforms, rule consolidation, and the promise of self-regulation. The self-regulation compromise led to the establishment in 1910 of what we now know as the National Collegiate Athletic Association.<sup>64</sup>

There is no shortage of literature on how football became America’s most popular sport in the late 20th Century. Having begun it, the Ivy League pulled out of the athletic arms race early on. Large state universities quickly emerged as the major competitors for dominance (along with some notably consistent private contenders, such as Notre Dame). That shift, commensurate with enormous state and federal investments in “land-grant” universities, is not only part of a narrative about the democratization of education and the provision of loci for regional and local allegiances. It is also a forgetting of elite origins, yet another miracle of transferring loyalties from the elite to the masses.

For my purposes, the next crucial chapter in the history of college football was the enactment of Title IX in 1972. The import of that statute<sup>65</sup> is to prohibit sex discrimination in educational programs receiving federal funds, a group of programs that includes almost all colleges in the United States. Sports were not primarily on the minds of the Congress that enacted Title IX, but they quickly emerged as a huge issue. Intense lobbying by the NCAA, among other groups, sought to exclude intercollegiate sports, particularly football, from coverage under Title IX’s requirement of equality in educational programs. Most famously, in 1974, Senator John Tower introduced amendments that attempted, first, to exempt all intercollegiate athletics from Title IX’s coverage, and then, to exempt revenue-producing sports. The exemptions did not pass. The winning strategy was the Javits Amendment, which passed the buck to the Secretary of Health, Education and Welfare to prepare

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63. *Id.* at 157–58.

64. *Id.* at 105, 131–65.

65. 20 U.S.C. §§ 1681–1688 (2008). The primary command is as follows: “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).

implementing regulations for intercollegiate athletics with “reasonable provisions considering the nature of particular sports.”<sup>66</sup>

Those regulations made college football possible within the law. They allow colleges to offer sex-segregated teams when the sports involved were “contact sports.” There is no accompanying obligation for institutions to offer a team in those sports for the other sex or to allow for the other sex to try out for the sex-segregated teams in the “contact sports.”<sup>67</sup>

There have been several subsequent efforts, specifically by the College Football Association and the American Football Coaches Association, to get special legal treatment for their sport under Title IX. In 1994–95, those efforts were supported by then-Representative Dennis Hastert, a former high-school wrestling and football coach who later became Speaker of the House, who said that, “[f]ootball is unique . . . . I do not want to take on a national shrine.”<sup>68</sup> Those efforts failed.

Recently, President George W. Bush and a Republican-controlled Congress initiated a review of Title IX. Many suspected that the intent was to dismantle Title IX, but the effort did not get very far. The Commission to Review Title IX, as a political matter, could not be comprised merely of opponents. It included prominent female athletes and other pro-Title IX experts. The Commission’s report came out in favor of retaining almost all existing aspects of Title IX<sup>69</sup>—the successes of Title IX for women athletes were just too spectacular.

## II. WHAT DOESN’T WORK

This Article is about efforts to insulate college football from the rule of law, one way or another. Those efforts have contributed to mak-

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66. Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974). For excellent histories of Title IX, see ELLEN J. VARGYAS, *BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX* (1994); Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 SETON HALL J. SPORT L. 391 (1997); and Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL’Y 51 (1996).

67. 34 C.F.R. § 106.41(a)–(b) (2000). “For the purpose of this section, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.”

68. Alexander Wolff & Richard O’Brien, eds., *Scorecard: The Third Sex*, SPORTS ILLUSTRATED 15 (Feb. 6, 1995) (quoting Dennis Hastert (R-Ill.)).

69. U.S. Department of Education, Secretary of Education’s Commission on Opportunity in Athletics, *Open to All: Title IX at Thirty*, (Feb. 28, 2003) available at <http://www.ed.gov/about/bdscomm/list/athletics/title9report.pdf>.

ing football the hegemonic sport in a “hegemonic sports culture.” By the latter term, borrowed from Professor Andrei Markovitz, I mean a culture that understands itself through sports that very few actually play. Much is at stake, particularly as it is possible that “love of, loyalty for, and identification with one’s team remains arguably the only emotional constant in one’s life (particularly for men).”<sup>70</sup> On the collegiate level, it could be seen as an affirmative action program for the devotees (because of such disproportionate resources devoted to it).<sup>71</sup> It is not analyzed as such; instead it has been treated as inevitable, as part of nature, as something without which U.S. higher education would be unimaginable.

What would it take to stop violence by male college athletes against women? From a U.S. legal point of view, there are essentially four avenues of relief. They are NCAA remedies,<sup>72</sup> criminal justice remedies, athletic department and university remedies, and civil litigation remedies.

### *A. The National Collegiate Athletic Association*

There are several organizations that govern college athletics, but the National Collegiate Athletic Association is by far the largest and most powerful. The NCAA has a range of powerful and unilaterally imposed remedies for violations of its extraordinarily detailed rules. These penalties range from giving public warnings, to removing individual player eligibility for one or more seasons, to reducing the number of athletic scholarships an institution may award for one or more seasons, to prohibiting bowl eligibility for one or more seasons, to blocking television broadcast access, to what those in the business call the “death penalty”—excluding an institution’s team from association play for one or more seasons.<sup>73</sup>

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70. MARKOVITZ & HELLERMAN, *supra* note 45, at 10–11, 18.

71. For example, in 2006, the University of Colorado at Boulder fielded 17 teams (including both men’s and women’s teams), yet 26% of the athletes were football players, and 59% of athletic operating expenses went to the football team. Report of the University of Colorado pursuant to the Equity in Athletics Disclosure Act, <http://ope.ed.gov/athletics/Index.aspx> (follow “Get data for one institution” hyperlink and search for “University of Colorado at Boulder”).

72. For simplicity’s sake, I have not separated inter-conference and intra-conference remedies out from NCAA remedies. My investigation has not revealed any rules proposed by any athletic conference to control sexual assault that are bolder than anything yet proposed by the NCAA.

73. The “death penalty” is imposed when a school’s athletic department commits serious infractions while already on probation. The NCAA has only imposed the modern “death penalty” once, against the Southern Methodist University football program

No educational institution has to be part of the NCAA, nor part of any particular division of the NCAA. As the above litany of powers indicates, however, it is hazardous for a sports-heavy institution to thwart the NCAA. But membership is a something of a Faustian bargain. Division IA membership in particular requires significant resources in the form of athletic department and faculty participation in Association committees and on-campus compliance systems. NCAA membership takes—or at least seems to take—significant athletic governance out of faculty hands, and many educators wonder what membership actually provides in return.

Whereas the origins of the NCAA were largely rooted in concerns about the brutality of football,<sup>74</sup> the NCAA has increasingly concerned itself with the industry of collegiate athletics: making and distributing (in large part, to itself) the enormous revenues young bodies at play can generate. To make the wheels of the industry turn, the NCAA expends enormous effort to regulate competition, to keep it plausibly fair from season to season by establishing levels of membership, numbers of scholarships, recruitment policies, and even academic standards, again, to an enormously detailed degree. The faculty and administrators who distrust the “self-regulation” of college athletics by the NCAA can be forgiven their skepticism. There is much about the NCAA that makes it look like a trade organization for coaches and athletic directors, regulating competition for the sake of business, rather than for the benefit of athletes or for any larger educational goals, normalizing pronouncements notwithstanding.<sup>75</sup>

My distrust is informed by the fact that the NCAA has no rules prohibiting either sexual harassment or sexual assault by college athletes, nor any remedies against athletes, or more importantly, against institutions when athletic programs present risks of sexual misconduct. Thus, the NCAA did not investigate either the December 2001 events or any or the prior allegations of sexual harassment and assault against the University of Colorado football program.<sup>76</sup> Since the Colorado meltdown,

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for failing to discover and then failing to prevent cash payments by “boosters” to football players. As a result, SMU lost fifty-five scholarship positions, was banned from bowl games and television in 1988 and 1989, and was precluded from hiring a full complement of assistant coaches. Because of these disabilities, SMU elected to cancel the 1987–88 seasons. See Kate Hairopoulos, *Orsini: SMU Close to Turning Corner*, DALLAS MORNING NEWS (Feb. 25, 2007).

74. See *supra* text accompanying notes 63–64.

75. GORN & GOLDSTEIN, *supra* note 43, at 230–31.

76. That is not to say that the NCAA is entirely ignoring the excesses of the CU athletic department. Recently, the NCAA punished CU for giving too much and/or better food to non-elite athletes. According to NCAA rules, non-scholarship athletes (“walk-

the NCAA has adopted stricter rules for recruiting trips, but nothing for sexual assault as such.<sup>77</sup> The new *recruitment* rules have to do with an unfair (and incidentally illegal) *competitive* advantage that an institution might get by providing booze, drugs, and lap-dancers to a hot prospect. Sexual assault falls within an area that the NCAA apparently feels to be outside its jurisdiction.

As explained above, the NCAA has extraordinary powers, so if it had rules against sexual assault, they would be highly significant. The association's failure to have such rules should cause close examination of that central conceit of college athletics, the "student-athlete." The entire structure of intercollegiate athletics operates on the notion of amateurism, by which the real money-makers—the athletes—do not get paid other than by scholarships. Scholarships include room and board, sometimes in handsome packages, but in essence mean free tuition to a university. In theory, the athletes are there, first and foremost, to learn.

Parenthetically, referring back to my old-fashioned ideas about the educational mission of universities, I have a broad vision of what college athletes have the opportunity to learn. They can learn physical discipline, and the mental acuity it brings, at a level most people cannot imagine. They can learn the intellectual lessons of teamwork and strategy—lessons that others may have brought into high theory but

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ons") pay more for meal plans than ordinary students. Colorado allowed 133 walk-ons in six athletic programs to eat at the "training table"—the exclusive and copious trough for scholarship athletes—for five years without paying the increased fee. The University will pay a fine of \$100,000, will be on probation for two years, and will lose one football scholarship a year for three years. Joel A. Erickson, *CU Fined \$100,000 For Undercharging Athletes*, DENVER POST (June 21, 2007).

77. The NCAA bylaws require member schools to develop their own policies prohibiting the use of drugs, alcohol, sex, and gambling for recruiting purposes and restricting unchaperoned activities for recruits. *Division I Management Council Endorses New Rules for Recruiting Student Athletes*, available at <http://www.ncaa.org/wps/ncaa?ContentID=10119> (July 20, 2004). They are substantially the same changes in recruiting that President Elizabeth Hoffman of the University of Colorado system imposed after the football scandal broke. *Preliminary Action Plan for the Reorganization and Oversight of Intercollegiate Athletics*, available at [www.colorado.edu/news/statements/athletics/reforms/reforms.html](http://www.colorado.edu/news/statements/athletics/reforms/reforms.html) (May 27, 2004). ("Recruits already are prohibited from using alcohol or drugs. They also are specifically prohibited from attending private parties or entering bars or strip clubs."). The recruitment rules were finalized in slightly amended form in June of 2006. *University of Colorado at Boulder Policy on Recruitment of Prospective Student-Athletes*, available at [http://www.cubuffs.com/pdf4/81977.pdf?DB\\_OEM\\_ID=600](http://www.cubuffs.com/pdf4/81977.pdf?DB_OEM_ID=600) (under "Recruitment Policy"). In spite of accomplishing these changes, President Hoffmann resigned the university presidency, in large part because of the football fiasco. Kevin Vaughan, Todd Hartman, & John C. Ensslin, *Hoffman Steps Down From CU Presidency 'My Role as the Leader of the University Has Become an Issue'*, ROCKY MOUNTAIN NEWS, Mar. 8, 2005, at 4A.

may have never experienced themselves. Athletes may have moments of transcendence that will take them outside of Plato's cave. All of that and the academic curriculum are available to them. There are so many opportunities to escape narrowness and the urge to violence and unreal loyalties, but only if the athletes themselves are not used and abused. Further in this parenthetical meditation, though the NCAA's duties don't extend to other students, when the athletes' educational experiences are twisted as they are in the current system, to the extent that athlete sexual violence becomes protected by institutions, all students' educational opportunities are potentially thwarted.

I do not address any of this cynically, and I greatly admire those athletes who achieve academically, given the astonishing burdens of team participation. But everyone knows that big-time sports teams at big-time sports universities struggle perpetually with the academic eligibility of recruits and team members. The NCAA has always been a central site of that struggle, and is undertaking a more ambitious program to deal with it.

In 2004, the NCAA established the "Academic Progress Rate" system. The rates are highly indexed according to many factors, and the detailed rules are still being tinkered with. Basically, though, the NCAA will assert its powers when academic standards are not met for four classes of actors: recruits (with respect to initial eligibility for scholarships), present student-athletes (with respect to continued scholarship and/or playing eligibility), transferring student-athletes, and most importantly, educational institutions whose scholarship athletes do not *collectively* maintain certain academic standards over a period of time. The penalties are the same as those the NCAA may impose for other rule infractions: everything from public notice to, in "extreme cases," dissociation from the NCAA.<sup>78</sup> Two hundred or so mild penalties have been imposed against institutions under this new system, a vast majority of them against men's sports programs.<sup>79</sup>

Why not, along with an "Academic Progress Rate," a "Violence Prevention Index" imposed by the NCAA? Such an initiative would amount to facing the correspondence between athletics in general and violence in athletics as an unconstrained competitive good. It would require embracing the educational values in big-time athletics—of which there are many—and perhaps putting those values above "win-

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78. NCAA Board of Directors Adopts Landmark Academic Reform Package, (Apr. 29, 2004), *available at* <http://www.ncaa.org/releases/divi/2004/2004042901d1.htm>.

79. Academic Reform—Penalty Lists, (2007–2008), *available at* <http://www.ncaa.org/wps/ncaa?ContentID=3694> (*penalties organized according to severity, institution, and specific sports*).

ning,” or even re-defining what “winning” is. The “student-athlete” is not a man who rapes and gets away with it.

### *B. The Criminal Justice System*

The criminal justice system is the proverbial red herring in much of this debate. Women in or around colleges cannot depend on it. Allegations of rape or sexual assault against college athletes seldom result in prosecution, for the same reason that 98% of reported rapes in general aren't prosecuted: the defendant has at least semi-cordially met the victim before the crime.

That is the acquaintance rape problem. It is the reason no sex crimes were charged against the athletes at the University of Colorado. The Boulder County District Attorney declined to press sexual assault charges against the football players and recruits due to the “many difficulties frequently encountered in prosecutions of acquaintance rape.”<sup>80</sup> It didn't matter that the alleged rapists didn't actually know the victims; the alleged rapists had been invited into the victims' apartment (though not by the victims themselves). That is the seemingly intractable story—she wanted it or might have wanted it, and she can't prove that she didn't.

But the criminal justice system has an enormous impact upon how colleges and the public view alleged violence by college athletes. The important thing that universities and the public seem unable to keep in mind is that crimes require proof beyond a reasonable doubt. Eligibility decisions in college sports, and sponsorship decisions by universities, carry no such burden. The NCAA carries minimum academic and conduct standards for athletes, and institutions and particular athletic programs can impose much more stringent standards on athletes if they choose to. But institutions need clarity and consistency in their policies for dealing with criminal charges against student-athletes. As it is,

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80. Keith Coffman, *CU Players Avoid Rape Charges*, DENVER POST (Apr. 28, 2002) (quoting Boulder County District Attorney Mary Keenan). Instead, the four CU players faced a felony charge of contribution to the delinquency of a minor (for giving alcohol and marijuana to the recruits). Two of the players pled guilty to lesser charges and were given a deferred sentence of 18 months in addition to 36 hours of community service. Owen S. Good, *Four Booked in Wild Welcome for CU Recruits*, ROCKY MOUNTAIN NEWS (May 1, 2002). In 2004, then Colorado Governor Bill Owens appointed then state Attorney General (now United States Senator) Ken Salazar to serve as a special prosecutor to examine all of the recruiting scandal evidence. After several months of review, Mr. Salazar declined to file any new charges. Kevin Vaughan, *No CU Charges: Salazar Cites Evidence Concerns, Reluctance of Women to Proceed*, ROCKY MOUNTAIN NEWS, May 12, 2004, at 4A.



university policies allow enormous—too much—discretion to universities if criminal charges have been filed. And such policies are wildly inconsistent across universities.<sup>81</sup>

The Mike Nifong/Duke Lacrosse story looms large here. In 2006, some white members of Duke University's male lacrosse team hired a female African-American stripper to entertain them at a private residence where several of the players lived. She alleged that they raped her. The University cancelled the team's season and fired the coach.<sup>82</sup> Then Durham County District Attorney Mike Nifong got indictments against three lacrosse players. Eventually, the charges were dropped for lack of evidence. It turned out that the prosecutor had withheld exculpatory evidence from the defense and lied to the court about it. He also had made inflammatory statements to the press. Though many North Carolinians adopted a wait-and-see attitude,<sup>83</sup> several groups in various sub-communities took extreme positions on both sides of the case from the outset. When the prosecution's lack of evidence and wrongdoing became clear,<sup>84</sup> not only were the cases dismissed but, after publicly apologizing,

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81. Under the code of student conduct at CU, engaging in non-consensual sexual behavior requires a minimum sanction of suspension, "unless specific and significant mitigating factors are present." Office of Judicial Affairs, Univ. of Colo. at Boulder, Student Conduct Code Policies and Procedures 2006–2007, § G(4) (Aug. 21, 2006). Investigations and proceedings may be stayed pending criminal proceedings at the discretion of the "conduct officer" in charge. *Id.* § C(3). By contrast, the Arizona State University policy requires automatic suspension for athletes charged with felonies, but prior to any charge, allows the Athletic Director to preliminarily suspend an athlete when there is reasonable cause to believe a felony was committed. Gil B. Fried, *Illegal Moves Off-the-Field: University Liability for Illegal Acts of Student Athletes*, 7 SETON HALL J. SPORT L. 69, 93 (1997).
  82. Due to the hardship inflicted on the team after cancellation of the 2006 season, the Duke lacrosse program applied to the NCAA for an extra year of eligibility for some of its players. When the NCAA granted eligibility to five fifth-year seniors, Duke became the overwhelming favorite to win the NCAA Division I lacrosse championship. Pete Thamel, *For Duke, Extra Year of Players' Eligibility Makes a Difference*, N.Y. TIMES, May 10, 2008. Though Duke made it to the final four, the team lost to Johns Hopkins in the semi-finals, and Hopkins lost to Syracuse in the championship game. Jim Clark & Rich Thompson, *NCAA Lacrosse Championship Notebook*, BOSTON HERALD, May 27, 2008.
  83. See, e.g., Hal Crowther, *Sympathy for the Devils?*, INDEP. (Raleigh, N.C.) June 23, 2006, at 22, 23 ("At this stage, decency dictates a perfect neutrality about who may be telling the truth.").
  84. Professor Robert Mosteller has provided a careful statement of the case and an analysis of all the legal issues involved as of 2007. Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identification: A Fundamental Failure to "Do Justice,"* 76 FORDHAM L. REV. 1337 (2007).

the DA was disbarred,<sup>85</sup> spent a night in jail for contempt of court, and now faces massive civil liability<sup>86</sup> and possible criminal indictment.<sup>87</sup>

To have been in North Carolina for any part of that saga, as I was, is to have had a sense that the former DA was taking the brunt of multiple harms, frustrations, and anxieties.<sup>88</sup> Unhappily, too many other District Attorneys around the country have overstated their cases before the press, or failed to turn over exculpatory evidence, or lied to a court, or “pandered” on the bases of race or class to secure re-election. It would be wonderful if the Nifong case prompted greater national vigilance in such matters. In the meantime, Nifong’s demise had more than a whiff

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85. For a clear-headed analysis of Mr. Nifong’s many unethical acts, see Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008).
86. The three originally accused players have sued ten defendants, including Nifong and the City of Durham, under multiple civil rights causes of action. Matt Dees & Joseph Neff, *Civil Suit in Lacrosse Case Filed*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 6, 2007. The day that his answer was due, Nifong filed for Chapter 7 bankruptcy, and in January of 2008 the judge ordered Nifong dropped from the civil suit pending disposition of the bankruptcy proceeding. The next month, a bankruptcy administrator filed a statement indicating that Nifong was not financially eligible and that his filing should be “presumed to be an abuse” of the bankruptcy option. As of this writing, the bankruptcy matter has not been resolved. Anne Blythe, *Administrator: Nifong Too Rich for Bankruptcy*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 19, 2008. In the “piling on” department, now thirty-eight former Duke lacrosse players who were *not* indicted have filed suit against Duke University, its president, and twenty-seven other defendants. Nifong is not yet a defendant, pending resolution of the bankruptcy matter. These thirty-eight former players’ claims are for emotional distress caused by the entire saga. Anne Blythe & Barbara Barrett, *38-Player Lacrosse Suite Gets Fanfare: The Group’s Action Against Duke is Laid Out in the Nation’s Capital with Major Exposure*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 22, 2008.
87. See, e.g., Joseph Kennedy, *Prosecuting the Prosecutor: Did the DA in the Duke Lacrosse Case Commit a Crime?*, SLATE, Apr. 13, 2007, <http://www.slate.com/id/2164061/>. As of this writing, no state criminal charges have been brought, but the federal Department of Justice has declined to proceed. Associated Press, *North Carolina: U.S. Will Not Investigate Nifong*, N.Y. TIMES, Dec. 6, 2007, at A28.
88. A number of well publicized and widely sold books recount Mr. Nifong’s misdeeds and the Duke community’s “political correctness” in painful detail. See, e.g., NADER BAYDOUN & R. STEPHANIE GOOD, *A RUSH TO INJUSTICE: HOW POWER, PREJUDICE, RACISM, AND POLITICAL CORRECTNESS OVERSHADOWED TRUTH AND JUSTICE IN THE DUKE LACROSSE RAPE CASE* (2007); STUART TAYLOR & KC JOHNSON, *UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE* (2007); DON YAEGER WITH MIKE PRESSLER, *IT’S NOT ABOUT THE TRUTH: THE UNTOLD STORY OF THE DUKE LACROSSE CASE AND THE LIVES IT SHATTERED* (2007).

of piling on. As the New York Times put it, "Mr. Nifong's punishment has assumed a severity rare in cases of prosecutorial misconduct."<sup>89</sup>

I abhor prosecutorial misconduct, and I do not blame the Duke players for wanting to vindicate their reputations and recoup their attorneys' fees. I've despaired because the Duke lacrosse case has had a regressive effect in the discourse about sexual assault, turning against feminists who care about and work against sexual assault by athletes. Journalist Kathleen Parker called it "Feminism's Shame," claiming that Nifong's wrongdoing may have "set the stage" for actual guilty parties to walk free. As an illustration, Ms. Parker describes a case subsequent to the Duke case, in which an alleged rape by a college baseball player of an intoxicated 17-year old which resulted in no charges being filed. Ms. Parker said that, "[t]o any sane mind, a drunk, semi-conscious girl on the receiving end of sexual intercourse doesn't sound like consensual sex, yet the Santa Clara County district attorney decided not to pursue charges."<sup>90</sup>

Whoa. Victims of rape who have been drinking are, as a consistent matter of fact, presumed to have consented. And the majority of rape victims already didn't report well before Mike Nifong ever thought of going to law school. I can't imagine why *feminists* should be ashamed of that. What Ms. Parker might more accurately have said is that prosecutors will hesitate even more in the future to bring charges against college athletes, particularly those at elite universities such as Duke, because they run the risk of being "Nifonged."

Before the Nifong meltdown, Duke had settled for an undisclosed amount with the three players who had been indicted.<sup>91</sup> The university's decisions in the lacrosse case will be debated for years to come. What seems clear is that when Duke found itself in that volatile situation, it had no clear policies to follow, and no reliable guidelines for how it should interact with the criminal justice system. Many universities are still clueless about what to do when faced with allegations of sexual assault by athletes.<sup>92</sup>

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89. Shalia Dewan, *Duke Prosecutor Jailed; Students Seek Settlement*, N.Y. TIMES, Sept. 8, 2007, at A8. See also David Feige, *One-Off Offing: Why You Won't See a Disbarment like Mike Nifong's Again*, SLATE, June 28, 2007, <http://www.slate.com/id/2168680/> ("[T]he drama leaves prosecutorial misconduct commonplace, unseen, uncorrected, and unpunished . . . Nifong is a scapegoat.")

90. Kathleen Parker, *Nifong's Legacy, Feminism's Shame*, CHI. TRIB., June 20, 2007, at 21.

91. Dewan, *supra* note 89.

92. See David Moltz, *Do They Ever Learn?*, INSIDE HIGHER ED, July 28, 2008, <http://www.insidehighered.com/news/2008/07/28/harassment>.

The NCAA could help in formulating university policies, but failing that, universities have to come to grips with what they are going to do when athletes—or any other students—are accused of sexual assault. It *must not matter* whether or not criminal charges are filed. The criminal justice system is a separate system. Duke overreacted. CU underreacted. Universities must take serious internal measures to protect women from sexual harms. Universities should not let themselves be caught up in, nor should they hide behind, the vicissitudes of the criminal law system.

### *C. Athletic Department and Institutional Discipline*

As noted above, despite sexual assault by athletes being much in the news, many Division I-A institutions do not have specific policies regarding those behaviors.<sup>93</sup> In addition, as the reader can discern from the newspaper accounts at the beginning of this Article, institutions have widely varying responses to alleged sexual misbehavior by athletes.

Not surprisingly, institutions that have endured notorious instances of sexual assault by athletes are more likely to have developed formal policies to deal with such situations. For example, Virginia Tech's policy contains mandatory ongoing education programs for athletes, continual feedback on the program, suspensions for athletes upon being charged with an offense, due process and appeals protections, and clear guidelines for aligning the athletic program with the general Virginia Tech Code of Student Conduct.<sup>94</sup> Of course, Virginia Tech was forced into taking action after making a mess of a football gang-rape case that ended up doing immeasurable harm to the cause of women in search of remedies for sexual violence against them.

I'm speaking here of the decision of the United States Supreme Court in *United States v. Morrison*,<sup>95</sup> which by a five-four vote invalidated the provision of the Violence Against Women Act that provided a federal civil action for victims of sexual violence.<sup>96</sup> The matter originated

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93. Richard M. Southall, *Good Start, The Bad, and Much Better: Three NCAA Intercollegiate Athletic Department Policy Responses to Criminal Behavior by College Athletes*, 11 J. LEGAL ASPECTS OF SPORTS 269, 270 (2001).

94. *See id.* at 278–79.

95. *United States v. Morrison*, 529 U.S. 606 (2000) (Congress lacked power under either Commerce Clause or section 5 of the Fourteenth Amendment to enact civil rights provision).

96. For a powerful indictment of the decision and analysis of its implications, *see* Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135 (2000).

when a female Virginia Tech student was raped multiple times by two Virginia Tech football players. The plaintiff did not report the rapes to the police; nor did the university. At university hearings on the matter, however, one of the players, Mr. Morrison, admitted to having sex with her against her will.<sup>97</sup> The university suspended him for two semesters. Thereafter, in a tale of lack of clarity in policy and probable manipulation by “legendary” football coach, Frank Beamer, the charge against Morrison was reduced to “using abusive language.” The sanction was changed to suspension *after* graduation, and Morrison came back to Virginia Tech on a full athletic scholarship. In the meantime, the plaintiff had already left Virginia Tech out of fear for her own safety.<sup>98</sup> It was only when she read in a newspaper that the sanctions against Morrison had been effectively reversed that she decided to sue the two rapists and the University on VAWA grounds. The rest, as they say, is history. After the controversy, Virginia Tech adopted a fairly responsible policy (all things being relative) regarding sexual assault by athletes. It was the least they could do.

Consider, by contrast, the headstrong policies of the University of Nebraska. Nebraska, like the University of Colorado, is a “Big XII” athletic power. The NU athletic department developed a handbook for student athletes that, in its 2000 version, codifies more than one rape myth:

Be careful, especially if you have been drinking, that you do not misread signals. Trouble has often occurred when a woman has remained alone with several men after a drinking party. While some may feel that this shows poor judgment on the woman’s part, it certainly does not justify rape.<sup>99</sup>

This provision in the football handbook apparently was developed during the reign of Tom Osborne, who had been the “legendary” coach of the Nebraska football team from 1973–97. After coaching, Osborne served three terms as the Representative from Nebraska’s 3rd Congressional District (2001–07). While in Congress, he was asked to testify at the Congressional hearing called in response to the CU revelations.<sup>100</sup> Osborne “wasn’t real excited” to be there, but he went out of his way to

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97. *Brzonkala v. Virginia Polytechnic Institute*, 132 F.3d 949, 955 (4th Cir. 1997).

98. *Brzonkala*, 132 F.3d at 954–56.

99. University of Nebraska 2000 AD publication p.2, quoted in Southall, *supra* note 93, at 276. Professor Southall compares the Nebraska handbook overall to that of other universities and calls it “a stark example of bad policy.” *Id.*

100. *Congressional Hearing*, *supra* note 33 (testimony of Tom Osborne (R.-Neb.)).

explain why misbehaviors in recruiting trips for all colleges were “isolated instances.”<sup>101</sup>

Congressman and former Coach Osborne urged Congress not to get involved in the problems of sexual assault and NCAA governance. His reasoning is worth savoring: “*It would be like having the Washington Redskins come in here and write tax policy*, I mean, you just don’t understand it. You know, you have to be there to know what to do.”<sup>102</sup>

Coach Osborne knew what to do. For example, he allowed Lawrence Philips to play at the University of Nebraska from 1993–96 despite a history of sexual assault and domestic violence. While at Nebraska, Philips brutally beat his girlfriend and dragged her down a flight of stairs. Because Coach Osborne had free reign in disciplining his players—without any interference from those meddling Congresspersons or advocates for women—he allowed Philips to continue to play for the team. As Coach Osborne put it:

*Lawrence and I have agreed on what happened*, and there’s no question—I wouldn’t call it a beating—but he certainly did inflict some damage to the young lady . . . . It wasn’t a difficult decision for me to make [to reinstate Philips] . . . . It’s like going for two points against Miami in ‘83. It was something I didn’t have to think about.<sup>103</sup>

Tom Osborne is not the only coach who has elevated football over harm to women, and is surely not the only coach who thinks he can agree with his player about “what happened” and have that be the end of it.

A major issue here is athletic department control versus institutional control. Generally, athletic departments want to keep the matter as close to the vest as possible. That’s generally a terrible way to deal with sexual assault, as athletic departments are most keenly invested in doing whatever it takes to keep players on the field. At CU, on the same day that the Boulder County District Attorney announced that no criminal sexual assault charges would be filed against the Colorado football players for the 2001 incidents, then-head coach Gary Barnett said

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101. *Id.* at 15–18.

102. *Id.* at 19 (emphasis added).

103. Christopher M. Parent, *Personal Fouls: How Sexual Assault by Football Players is Exposing Universities to Title IX Liability*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 617, 647–48. In the quote, Osborne refers to his decision to go for a two-point conversion against the University of Miami in the 1984 Orange Bowl. The failure to complete the conversion cost Nebraska the game. Michael Wilbon, *Nebraska Falls 31–30 on Day of Upsets*, WASH. POST (Jan. 2, 1984), at D1.

that the matter would be handled internally. The four players did violate team standards, he said, and would be disciplined.<sup>104</sup> One player was suspended for one game during the subsequent football season, four lost their athletic scholarships for one semester,<sup>105</sup> and all were allowed to play in the Fiesta bowl in the month following the December 2001 events.<sup>106</sup>

A few football coaches have seen that too much disciplinary power in their hands is not good for them or their programs. But institutions don't really want the disciplinary power either. When winning is everything, neither coaches nor their athletic departments—nor really, their institutions, so long as disciplinary rules are discretionary—should be entrusted with deciding how to deal with sexual violence by athletes as athletes. The simple answer is that there should be no exceptions for athletes from any rules of student conduct.

#### *D. Title IX of the Education Amendments of 1972*

Title IX prohibits educational institutions that receive federal funds from engaging in sex discrimination.<sup>107</sup> This federal statute has been the focus of much debate in the athletic context, particularly on two fronts. First, it is falsely blamed for reducing athletic opportunities for men.<sup>108</sup> Second, there is much ado about how to measure student interest in athletics under the three-part test for Title IX athletic compliance developed by the Department of Education.<sup>109</sup> I do not address those problems in this Article. Nor will I address the fraught history of Title IX, except as necessary.

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104. Keith Coffman, *CU Players Avoid Rape Charges*, DENVER POST, Apr. 28, 2002, at B1. It never became clear exactly which team standards the players violated.

105. Noted in Congressional Hearing, *supra* note 33.

106. Flores, *supra* note 13. The University of Oregon beat the University of Colorado in the 2002 Fiesta Bowl by a score of 38–16. Joe Drape, *Oregon States Case for Share of Title*, N.Y. TIMES, Jan. 2, 2002, at D1.

107. See *supra* notes 65–66 and accompanying text.

108. See, e.g., Frank Deford, *Annual Title IX Ax Is About to Fall on Men's Sports*, SI.COM, May 2, 2007, [http://sportsillustrated.cnn.com/2007/writers/frank\\_deford/05/02/title.ix/index.html](http://sportsillustrated.cnn.com/2007/writers/frank_deford/05/02/title.ix/index.html). But see Nancy Hogshead-Makar & Daniel R. Marburger, *Is Title IX Really to Blame for the Decline in Intercollegiate Men's Nonrevenue Sports?*, 14 MARQ. SPORTS L.J. 65 (2003); Bill Pennington, *Expectations Lose to Reality of Sports Scholarships*, N.Y. TIMES, Mar. 10, 2008 at A1 (only 2% of high school athletes get any sort of athletic scholarships in college, and only those in “glamour sports” of football and basketball can expect to get anything close to a full ride).

109. See B. Glenn George, *Fifty/Fifty: Ending Segregation in School Sports*, 63 OHIO ST. L.J. 1107, 1113–21 (2002).

In the sexual assault context, Title IX provides a tempting cause of action for three big reasons. First, sexual harassment (of which sexual assault is a subset) is already judicially accepted as a form of sex discrimination for which institutions *may be* financially liable. Second, a conceivable punishment for violation of Title IX is the termination of federal funding. It has never happened, but it is legally conceivable, and without federal funding, most educational institutions would cease to exist. The termination of federal funding is thus the mythical Damocles' sword in the arsenal. Third, a judicial victory under Title IX allows the plaintiff to recover attorneys' fees and costs, potentially very large sums that may not be recoverable under other causes of action. The problems are that the judicially-articulated standards for institutional liability are incredibly high, and that the remedies are much too limited.

### 1. Title IX Standards for Institutional Liability

Most of the legal doctrines that inform the idea of sex discrimination in the Title IX educational context were first developed under Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment. Our feminist heroines—clients and lawyers and scholars alike—first had to get the courts to recognize that sexual harassment was a matter of sex discrimination in the employment context, and to recognize that such discrimination occurred not only when there was a *quid pro quo* (for example, when keeping one's job depending on having sex with one's boss), but when one's working environment was poisoned by the oppressive sexualization of it.

The latter sort of discrimination came to be called "hostile working environment" discrimination, and the United States Supreme Court agreed in 1986 that it could be unlawful sex discrimination.<sup>110</sup> That was only 22 years after Congress enacted Title VII (these things take time). Title VII and Title IX were not on exactly parallel interpretive tracks, but the courts did recognize that sexual harassment, including "hostile educational environment" situations, should be actionable as sex discrimination in education under Title IX.

The next effort was to get the courts to recognize that collective entities, as well as individuals, could have liability as sexual harassers. In the Title VII context, of course, that meant employers. In the Title IX context, it meant educational institutions that receive federal funds. The liability of the "higher-ups" is important for two obvious reasons. First, when a plaintiff suffers damages, the individual harasser (particularly

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110. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).



when that person is a co-worker or a non-owner supervisor in the Title VII context or a co-teacher, staff member, teacher, or co-student in the Title IX context) is far less likely to have the resources to pay the damages (because far less likely to be suitably insured). Second, and usually of more importance, the judgment will have more social impact when rendered against the collective actors, because employers and institutions are generally in a position to do something about the harassment. (And if they don't do something immediately, their insurance companies will eventually force them to.)<sup>111</sup>

In the glacial-movement-of-the-law department, it took only thirty-four years from the enactment of Title VII of the Civil Rights Act of 1964 for the Supreme Court to decide under what circumstances an employer should be held liable for harassment of a worker by her supervisor. In 1998, the Court said that an employer need not have specific knowledge of the harassment. The employer will not be liable, however, if the employer can show, as affirmative defenses, either that it had adequate policies and procedures to protect against or remedy the harassment, or that the employee unreasonably failed to avail herself of those policies or procedures.<sup>112</sup> No one who has litigated in the sexual harassment field thinks the Title VII standard for employer liability is perfect, but notice two important features. First, as a general matter, the employer needs to expect that harassment will occur in the workplace and protect against it. Second, once the matter gets to court, the burden is on the employer to show why it should not be liable.

In the same year that the Supreme Court decided the standard for employer liability for sexual harassment under Title VII, it also decided the standard for educational institutional liability under Title IX. In contrast to Title VII, the Court made the standard for proving institutional liability under Title IX much higher. In *Gebser v. Lago Vista Independent School District*,<sup>113</sup> by a five-to-four vote, the Court held that schools are not liable for sexual harassment of a student by a teacher unless school officials actually knew of the harassment and acted with "deliberate indifference" to it.

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111. Ann Scales, *Nooky Nation: On Tort Law and Other Arguments from Nature*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 307 (CATHARINE A. MACKINNON & REVA B. SIEGEL, EDS., 2004). For example, the settlement in *Simpson v. Univ. of Colo.*, 160 F. Supp. 2d 1033, and approximately \$2,000,000 in University attorneys' fees, were paid by insurers.

112. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998).

113. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

A year later, in *Davis v. Monroe County Board of Education*,<sup>114</sup> the Court made the standard even more difficult. In the context of student-on-student harassment, the five Justice majority reinforced the “deliberate indifference” to known harassment standard, and held further that the school could be liable only where it exercises substantial control over the harasser and the context where the harassment occurs. Further, courts should not expect administrators to “purg[e] their schools of actionable peer harassment,” and “should refrain from second-guessing [administrators’] disciplinary decisions.”<sup>115</sup>

In contrast to the Title VII standard for employer liability, there are two critical things to notice about the Title IX standard. First, it is the harassed woman’s burden to show that officials at the educational institution actually knew of her harassment and acted with deliberate indifference to it, a behemoth task not just as a matter of trial production, but also because of the subjectivity of the Supreme Court’s test. Second, as Justice Stevens noted in dissent in *Gebser*, it is now *all about plausible deniability*: “So long as [institutions] can insulate themselves from knowledge about this sort of conduct, they can claim immunity from damages liability.”<sup>116</sup>

Why should employees receive more protection from sexual harassment than students? According to Justice O’Connor writing for the majority in *Gebser*, the difference between Title VII and Title IX is that the former is a legal command that covers most employers without their having to buy-in, whereas the latter is a “contract” between taxpayers and recipient educational institutions, whereby the latter would not engage in sex discrimination in exchange for federal funding. The Court declared that contract law required that the institution know that it was in breach before it could be subject to penalties, hence, the actual knowledge and deliberate indifference standards.<sup>117</sup>

In dissent in *Gebser*, Justice Stevens described an entirely different vision. If the purpose of Title IX is to eliminate sex discrimination in education, surely the standard should be *at least as strict* as the standard imposed against employers. Employers, particularly insofar as anyone believes in neo-liberal-law-and-economics ideas, operate in the free market. They can do what they want so long as they do not discriminate within narrow legalistic limits. On the other hand, we *pay* educational institutions *to end sex discrimination in education*. Justice Stevens noted that a Title IX recipient undertakes a duty that “constitutes an affirmative

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114. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

115. *Davis*, 526 U.S. at 648.

116. *Gebser*, 524 U.S. at 300–01 (Stevens, J., dissenting).

117. *Gebser*, 524 U.S. at 286–89.

undertaking that is more significant than a mere promise to obey the law.”<sup>118</sup> That does not necessarily require a strict liability standard, but it surely requires more than what the majority allowed—legally insulated unknowing.

*Gebser* and *Davis* can be understood as federal permission to keep male supremacy in the curriculum. A “see-no-evil, hear-no-evil” attitude, which was already the point-of-view of the educational institutions, became enshrined as an almost infallible legal strategy.<sup>119</sup> Add these factors: infallible legal strategy + “acquaintance rape can’t be proved” prosecutorial default position + “boys will be boys” hard-wiring defense to rape + historical pandering to and overprotection of football teams. The result is an hermetic seal on the open secrets of football. Those secrets keep working because we never say them out loud.<sup>120</sup>

## 2. Dizzy Doctrines Regarding Title IX Remedies

Title IX is terribly confused regarding the availability of injunctive relief to an individual plaintiff. This is problematic, apparently, only in sexual harassment / sexual assault Title IX cases.<sup>121</sup> In some of those cases, federal courts have denied plaintiffs access to injunctive relief, but have done so without clear reasoning. I surmise, however, that it stems from spiraling confusion about the role of federal agency enforcement in Title IX matters.

Recall that Title IX obligations are triggered by educational institutions’ acceptance of federal funds. The ultimate punishment for Title IX violations is the termination of federal funding. Only the Department of Education can cut off those funds, but it has never done so in the history of Title IX. An individual complainant can file a complaint with the Office of Civil Rights of the Department of Education, but it is difficult to imagine why she would bother. Not only has the Education Department never cut off funds, the OCR has never even referred any Title IX case to the Department of Justice for enforcement.<sup>122</sup>

118. *Gebser*, 524 U.S. at 297 (Stevens, J., dissenting).

119. Deborah L. Rhode, *Sex in Schools: Who’s Minding the Adults?*, in MACKINNON & SIEGEL, *supra* note 111, at 298.

120. First two rules of fight club: (1) don’t talk about fight club; (2) don’t talk about fight club. PALAHNIUK, *supra* note 51, at 48–49.

121. Thus, in a situation involving a university’s unlawful discontinuation of a women’s softball team, the Tenth Circuit referred simply to defendant’s “continuing violation of Title IX” for the proposition that monetary relief would be inadequate. *Roberts v. Colo. Bd. of Agric.*, 998 F.2d 824, 833 (10th Cir. 1993).

122. 4 OFFICE OF CIVIL RIGHTS EVALUATION, U.S. COMM’N ON CIVIL RIGHTS, TEN-YEAR CHECK-UP: HAVE FEDERAL AGENCIES RESPONDED TO CIVIL RIGHTS RECOMMENDA-

It is unsurprising that the Office for Civil Rights has done so little. In its investigation, the OCR *has to find areas of noncompliance with the laws* before any further steps are taken, and the next step is mere negotiation with the recipient for a voluntary resolution.<sup>123</sup> Of course, post-*Gebser*, the standards for non-compliance with Title IX—actual knowledge of sexual harassment and deliberate indifference—are incredibly high, so it is difficult to imagine that the OCR would ever now find non-compliance or exact anything more from recipients other than a promise to do better.

Here's the dizzying part: in *Gebser* itself, the majority was thinking about the cut-off of federal funds to justify its contract model in setting such a high standard for institutional liability in cases brought by individuals. But no individual can accomplish the cut-off of federal funds. It was up to Justice Stevens in dissent to point out the screwy order of remedies. The individual plaintiff has an enormous burden because she cannot accomplish what only the Office for Civil Rights can do and which it has never done.<sup>124</sup>

This confusion has resulted in an inability for individual plaintiffs to get injunctive relief in Title IX cases. Thus, in a case brought by a female student alleging sexual harassment by a professor, the Southern District of Iowa relied largely on the confusion about the role of the Office of Civil Rights of the Department of Education. Since the OCR regulations provide that there be an opportunity for "voluntary compliance" in the administrative enforcement process, the court believed that an opportunity for voluntary compliance should also be available when an *individual* sought equitable remedies.<sup>125</sup>

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TIONS?, 29 (2004), <http://www.usccr.gov/pubs/10yr04/10yr04.pdf>. The Department of Education practically admits that it is not going to do very much. The OCR report to Congress states that "[d]uring FY 2005, OCR continued using an investigative approach that stresses full investigation of complaints." OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., ANNUAL REPORT TO CONGRESS: FISCAL YEAR 2005 (2005), <http://www.ed.gov/print/about/reports/annual/ocr/annrpt2005/report.html>.

I don't know who writes these things, or why they don't have proofreaders, but the truth shines through: OCR investigates but doesn't meaningfully enforce. Title IX complainants understand that they are not going to get much administrative relief: in 2005, only 6% of complaints filed with the OCR involved sex discrimination, and that was true in 2004 as well. *Id.* For 2004, *see* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., ANNUAL REPORT TO CONGRESS: FISCAL YEAR 2004 (2004), <http://www.ed.gov/print/about/reports/annual/ocr/annrpt2004/report.html>.

123. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., ANNUAL REPORT TO CONGRESS: FISCAL YEAR 2005 (2005), <http://www.ed.gov/print/about/reports/annual/ocr/annrpt2005/report.html>.

124. *Gebser*, 524 U.S. at 303–04 (Stevens, J., dissenting).

125. *Frederick v. Simpson Coll.*, 160 F. Supp. 2d 1033, 1035–37 (S.D. Iowa 2001).

Confusing the matter further, the federal judge in Iowa stated that additional support for denial of injunctive relief to the plaintiff could be found in the federal doctrine of standing. Though the situation “may be capable of repetition yet evading review” (which I thought to be a mootness doctrine), the plaintiff had left the college but had not indicated that she was returning. Therefore, there was no further potential harm to *her*, and she could not show that the injunctive relief could remedy any harm to her, therefore she had no standing to seek injunctive relief.<sup>126</sup>

The Eleventh Circuit has embraced this reasoning in a case that is otherwise among the handful that have recently provided some hope to female victims of athlete violence. In *Williams v. Regents of the University of Georgia*,<sup>127</sup> the plaintiff alleged that she had consensual sex with Georgia basketball player Tony Cole (quoted at the beginning of section II.A., *infra*) in his room. Unbeknownst to her, per prior arrangement, Georgia football player Brandon Williams was hiding in Cole’s closet. After the consensual sex, Williams emerged and raped the plaintiff. While that was happening, Cole was on the phone to another basketball player and another football player, advising them to come over because they were “running a train”—a slang expression for gang rape—on the plaintiff.<sup>128</sup>

The District Court granted summary judgment to the University of Georgia on plaintiff’s Title IX claim. The Eleventh Circuit reversed the summary judgment, but affirmed the District Court’s holding that injunctive relief should not be available to the plaintiff. According to the Court of Appeals, the plaintiff lacked “standing to pursue injunctive relief because the threat of future harm to [her] *and other students* is merely conjectural.”<sup>129</sup> Can that possibly be so if a plaintiff has already proven the institution’s “deliberate indifference” to a hostile and violent educational environment?

The Title IX cases tending toward a “doctrine” that injunctive relief should not be available to individual plaintiffs in sex abuse matters seems particularly wrong-headed in light of both the substance and difficulty of showing Title IX liability in the first place. If, in order to get any sort of relief, one has to prove that the institution had *actual* knowledge of a risk and showed *deliberate indifference* to it, it seems that, as a matter of course, a judgment should contain orders requiring the insti-

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126. *Frederick*, 160 F. Supp. 2d at 1037.

127. *Williams*, 477 F.3d 1282 (11th Cir. 2007).

128. *Williams*, 477 F.3d at 1288.

129. *Williams*, 477 F.3d at 1302–03 (emphasis added).

tution not only to cease and desist, but to be advised of specific judicially-enforceable risks to it should it fail to do better.

In summary, Title IX standards for both liability and remedial options encourage institutional irresponsibility. Those standards are why I discourage clients from relying on Title IX alone, or, in most cases, at all.

### III. THE RELATION BETWEEN BIG-TIME SPORTS AND SEXUAL VIOLENCE

As I have discussed at length in prior publications, conventional legal notions of “causation” are a pit of pointlessness in many legal situations,<sup>130</sup> and seem interminably vicious traps for claims on behalf of women.<sup>131</sup> This legal situation is no exception. Discussions of harm to women have always, in my experience, proceeded in a familiar spirit of radical unaccountability. Thus, I surmise that the default position in most conversations about sports violence is, even if sports don’t *diffuse* aggressiveness,<sup>132</sup> surely athlete-rapists are just a few bad apples and the incidents are “isolated.”

No intelligent person could claim that male college athletes inevitably become rapists. Such a silly notion, however, is not at all the point. The questions are how some collegiate athletic programs, as presently organized, encourage sexual violence, and how educational institutions fail *as* educational institutions in allowing that to happen.

#### *A. The Stilted Causal View*

Some courts seem to believe that in order to satisfy the first part of the test for institutional liability for sexual abuse under Title IX—that there was a known risk of which the university was actually aware—a plaintiff needs to come close to proving an absolute 18th century Newtonian cause-and-effect relationship between sports and sexual assault.

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130. ANN SCALES, *LEGAL FEMINISM: ACTIVISM, LAWYERING, AND LEGAL THEORY* 47–62 (2006) (discussing federal courts’ wholesale invention of causal criteria in toxic tort cases).

131. Ann Scales, “*Nobody Broke It: It Just Broke: Causation as an Instrument of Obfuscation and Oppression*,” in DAVID ENGEL & MICHAEL McCANN, EDs., *FAULT LINES: TORT LAW AND CULTURAL PRACTICE* (2008) (discussing manipulation of causal analysis in pharmaceutical litigation on behalf of women).

132. See discussion of the catharsis theory *infra* notes 274–287 and accompanying text.

### 1. Example: District Court in *Simpson v. University of Colorado*

As explained above, before settlement of the University of Colorado football gang-rape case, the 10th Circuit had reversed summary judgment in favor of the University. But the 10th Circuit did not give explicit direction on the meaning of causation, and used the concept of causation in an off-handed way.<sup>133</sup> Though the Colorado case will not go to trial, other similar cases will surely be filed, and some of them may go to trial. For that reason, it is instructive to scrutinize the District Court's reasoning in the *Simpson* case.

At the trial court level in *Simpson*, Judge Blackburn agreed with the plaintiff that the risk could be presented by a group of harassers (football players and football recruits) rather than by individuals.<sup>134</sup> However, the court talked about the connection between the sports program and sexual assault in a fashion that was both causally naive and hugely insulting to athletes. In the course of the opinion granting summary judgment to the defendant, the court stated that the university must have had actual notice that “most or all football players and most or all recruits involved in the CU football recruiting program presented a risk of sexual assault against female CU students who might come into contact with these players and recruits.”<sup>135</sup>

That never has been and cannot be the test. Even the District Court in the University of Colorado case didn't believe it, and that is among the many indicia that the District Court's *real* holding was that “no law can stand in the way of winning football games.” The court rejects its own requirement that football teams and recruits be shown to be universally dangerous. As the court put it, “[t]he more a risk becomes generalized, the more that risk is likely to fall outside of the narrowly circumscribed scope of Title IX liability.”<sup>136</sup> Hold on. Risk must always be focused to some extent in order to be linguistically intelligible (as opposed to, “something bad might happen, I don't know what”). The reader discerns the problem here. The plaintiff needed to show both the universality and the non-universality of the risk from the football program at the University of Colorado.

There are many logical contradictions in the opinion, and it is also paradigmatic of a problem that many commentators have observed for

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133. *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1174–75 (10th Cir. 2007) (plaintiffs alleged that the assaults “were the natural, perhaps inevitable, result of an officially sanctioned but unsupervised effort to show recruits a ‘good time.’”).

134. *Simpson v. Univ. of Colo. Boulder*, 372 F. Supp. 2d 1229 (D. Colo. 2005).

135. *Simpson*, 372 F. Supp. 2d at 1240 (emphasis added).

136. *Simpson*, 372 F. Supp. 2d at 1236.

many years about sexual harassment litigation. It seems that in such litigation, it doesn't really matter what any plaintiff shows. *Every incident is an isolated incident.* In the summary judgment record in the CU case, there were at least seven incidents of sexual assault involving football players over four years. There had been extraordinary attempts on the part of the football program to protect the players and intimidate women into shutting up. Even with that information on the record, the court parsed every piece of evidence in championship style, winnowing the record down to what it thought were only three pieces of evidence that could possibly be relevant to prove actual notice to the University. The court concluded: "Even when considered together, however, these three incidents do not combine into a constellation of relevant events to provide sufficient notice of the particular risk to sustain Title IX liability."<sup>137</sup>

Remember, the Tenth Circuit decision simply reversed summary judgment in the *Simpson* matter. The case settled, so it will not be tried. In some future case, however, decisions must be made about what evidence to admit, and how to instruct the jury about how to consider that evidence in order to meet a more coherent legal standard.

## 2. Thinking More Coherently

So what of the connection between college football and sexual assault? One researcher found that male student-athletes were three times more likely than female student-athletes to have engaged in any violent conduct off the field.<sup>138</sup> Another found a statistically significant relationship between athletic participation and sexual aggression on a large university campus.<sup>139</sup> Yet another study found a higher percentage of athletes using force to get women to engage in sex.<sup>140</sup> While one study showed athletes disproportionately represented in reports of sexual assault, abuse, and intimidation, another found that to be true only for

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137. *Simpson*, 372 F. Supp. 2d at 1241.

138. See Howard L. Nixon II, *Gender, Sport, and Aggressive Behavior Outside Sport*, 21 J. SPORT SOC. ISSUES 379, 384 (1997).

139. Mary P. Koss & John A. Gaines, *The Prediction of Sexual Aggression by Alcohol Use, Athletic Participation, and Fraternity Affiliation*, 8 J. INTERPERSONAL VIOLENCE 94 (1993).

140. Scot B. Boeringer, *Influences of Fraternity Membership, Athletics, and Male Living Arrangements on Sexual Aggression*, 2 VIOLENCE AGAINST WOMEN 134, 141-43 (1996).



athletes engaged in “contact” sports, namely football, hockey, and basketball.<sup>141</sup>

The social science debate about the connection between male student-athletes and sexual violence has a long and complex history, and I do not attempt to resolve that debate here. What I mean to emphasize is that *no study will ever resolve the issue* if the issue is misunderstood as whether male intercollegiate sports always present risks of harm to women. Inevitably, a finding of a rape-supportive culture within a specific athletic program will depend upon other factors, such as coaching influences, peer support for negative attitudes toward women, and institutional tolerance for athletic excess.<sup>142</sup> Moreover, a perfect research project cannot be designed. It would be methodologically impossible—not to mention unethical—simply to turn an infinite number of male athletes (trained and privileged under the present system) loose and perpetually to maintain surveillance of them to see whether and how many women they rape and how much damage they do to those women’s lives.

Social science studies will always be indeterminate. In social science research, samples will inevitably be small, parameters of study will inevitably be open to challenge, and inferences will inevitably have to be drawn. Each of the studies cited above came from different university or college settings, and no one is saying that all athletic programs are breeding grounds for rape.<sup>143</sup> For example, a recent study by Professors Dave Smith and Sally Stewart concluded that collegiate athletes do not have a greater propensity than non-athletes to commit sexual assault.<sup>144</sup> Their conclusion was nuanced; it was only that any direct connection between sports and sexual violence is an oversimplification.<sup>145</sup> No intelligent person could disagree.

But consider the limitations of their study and the inferences leading to their conclusion. First, their study involved male undergraduates at an English university, leading me—by no means a social scientist—to

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141. Compare M.P. Fritner & L. Rubinson, *Acquaintance Rape: The Influence of Alcohol, Fraternity Membership, and Sports Team Membership*, 19 J. OF SEX. ED. & THERAPY 272 (1993) with Todd W. Crosset et al., *Male Student-Athletes Reported for Sexual Assault: Survey of Campus Police Departments and Judicial Affairs*, 19 J. SPORT & SOC. ISSUES 126 (1995).

142. Todd Crosset, *Male Athletes’ Violence Against Women: A Critical Assessment of the Athletic Affiliation, Violence Against Women Debate*, 51 QUEST 244, 250–54 (1999).

143. See Peggy Reeves Sanday, *Rape-Prone Versus Rape-Free Campus Cultures*, 2 VIOLENCE AGAINST WOMEN 191 (1996).

144. Dave Smith & Sally Stewart, *Sexual Aggression and Sports Participation*, 26 J. SPORT BEHAV. 384, 384 (2003).

145. *Id.* at 392.

wonder how relevant their results were to U.S. college football, given the “American exceptionalism” arguably applicable to that sport.<sup>146</sup>

Moreover, the inferences were highly suggestive. First, they agreed with prior studies showing that men who hold “rape-supportive beliefs” and who are hostile toward women are more likely to commit rape.<sup>147</sup> Second, they agreed with prior studies that men who are more competitive and “win-oriented” are likely to be more sexually aggressive toward women. “The common dominator here may well be the need to dominate . . .”<sup>148</sup> Their conclusion was simply that, because so many men exhibit these negative attitudes, it is not rigorous to say that sports *participants* are more likely to act on them. What the English researchers did not attempt to study was how sports programs, particularly some big-time U.S. collegiate sports, may contribute to (1) rape-supportive beliefs, (2) hostility toward women, and (3) the need to dominate, and not only on the part of participants in those sports, but on the part of those who consume them.

The way lawyers are trained to look at “causation” is simplistic in a number of ways. In these sexual assault situations, lawyers’ instinct is to rely on something called “mental intermediation.” That is the issue, for better or worse, in criminal prosecutions in satisfying various intent requirements. When it comes to broader civil rights concerns, however, does anyone actually question whether people ever act on their attitudes and beliefs? Does individual “intent” matter, in most situations? In the educational context, the question should be what responsibility institutions have to develop attitudes and beliefs that reduce violence, or at least to refrain from encouraging attitudes and beliefs that increase violence.

Lawyers and judges must not be captured by a never-ending social science debate about the nature and scope of the risk in general. The legal command is sex equality. If a particular sports program presents a risk of harm, the legal problem is to measure the value of that athletic program (as is) compared against the alternatives that protect women’s equality, whether that is conceived as educational opportunity, bodily integrity, the right to be free from fear, or the right to have pride in our own accomplishments. There may even be civilization beyond big-time football as-it-is.

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146. See text accompanying notes 45–48.

147. Smith & Steward, *supra* note 144, at 392.

148. *Id.* These authors’ results showed that male athletes’ attitudes in the “win-oriented” (need to dominate) category were significantly higher than among non-athletes. *Id.* at 390.

*B. A Serious Public Health Analysis of Sports and Violence*

*[T]he most dangerous men on earth are those who are afraid that they are wimps.*

—James Gilligan, M.D.<sup>149</sup>

The increased risk of sexual violence presented by intercollegiate sports is not a simple matter of cause and effect. It is a matter of a culture that forgives and even encourages certain sorts of violence, particularly sexual violence against women committed by male sports figures. It is a matter of history and culture and philosophy and psychology and all the other enterprises that institutions of higher learning are supposed to care about.

Many people with whom I have spoken about this Article just shake their heads. They have come to the conclusion that our species is inherently self-destructive. Often they think that the males among us are inherently violent, and that if it weren't violent sports and warfare, activities that societies allocate largely to males for whatever reasons, society would invent other similar activities *just as something to do* in our suicidal rush to annihilation. Bone-crushing and soul-crushing are the activities our species has proven best adapted for. These people were all reiterating what I call the "Loser Species" thesis. Ecocide, racial supremacy, male supremacy, colonialism, radical capitalism, susceptibility to divide-and-conquer fear-based strategies and all other forms of self-hatred are also symptoms of the "Loser Species" thesis.

To capitulate to that, however, is itself a form of false consciousness. If we can put one foot in front of another, we can think about this further and what to do about it. Educators often speak of their mission as providing students with the resources to thrive. That Aristotelian goal, to teach to thrive, seems self-evidently to include providing resources by which to conclude that ours is not necessarily a Loser Species, by which the learner can have an incentive to carry on in constructive ways. It also seems self-evident that education, in addition to providing those resources, should identify and minimize reinforcement of the norms that lead to the Loses Species conclusion.

To that end, I've found an invaluable resource in *Violence: Reflections on a National Epidemic* by Dr. James Gilligan. His experience is vast and dramatic. He directed the Center for the Study of Violence at Harvard Medical School, was the former medical director of the

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149. JAMES GILLIGAN, *VIOLENCE: REFLECTIONS ON A NATIONAL EPIDEMIC* 66 (1997).

Bridgewater State Hospital (for the “criminally insane”), and was director of mental health for the Massachusetts prison system. Dr. Gilligan’s reports are both familiar and shocking. Among his numerous patients are those who sought manhood by throwing off all rules, by destroying all social context, by giving the finger to organized society, by killing and raping and dismembering anyone who had any hope of living in the same world with them, men whose victims were themselves and each other, as well as women and children.

Dr. Gilligan presents what he calls a “public health” approach to decreasing violence. In the first instance, Dr. Gilligan urges us not to fall for the “Loser Species” thesis. Not only is it self defeating, but, he believes, it is something that we’ve been sold at a very high cost. In his book, Dr. Gilligan systematically dismantles various theories of aggression. First, that it is inherently instinctual,<sup>150</sup> second, that it is genetic,<sup>151</sup> third, that it is about brain structure or brain damage,<sup>152</sup> and, fourth, importantly, that it is about rampant testosterone.<sup>153</sup>

For Gilligan, “all violence is an attempt to achieve justice, or what the violent person perceives as justice.”<sup>154</sup> Violence is not “insane” from the point of view of the violent. There is always a logic behind it. But the logic is dictated by “an intolerable condition of human shame and rage.”<sup>155</sup> To think sensibly about violence, Dr. Gilligan urges, we must realize that “people feel incomparably more alarmed by a threat to the psyche or the soul or the self than they are by a threat to the body.”<sup>156</sup>

Dr. Gilligan argues that the powers-that-be have no real interest in reducing violence in society. So long as violence is pervasive, populations will remain afraid, will remain divided and conquered, and will look to oppressive and infantilizing leaders to keep us safe. In short, Gilligan describes the hegemonic power of violence. He identifies eleven policies that serve to maintain that hegemony:

1. Punishing more and more people (criminals) more and more harshly. . . .
2. *Outlawing those drugs that inhibit violence . . . while legalizing and advertising those that stimulate violence and cause physical injury and death . . . .*

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150. *Id.* at 210–14.

151. *Id.* at 214–16.

152. *Id.* at 217–18.

153. *Id.* at 221–23.

154. *Id.* at 11.

155. *Id.* at 55.

156. *Id.* at 96.

3. Manipulating the tax laws and other economic policies so as to increase the disparity income and wealth between the rich and the poor . . . .
4. *Depriving the poor of access to education . . . .*
5. *Perpetuating the caste divisions of society that usually fall along racial lines . . . .*
6. *Exposing the public to entertainment that glorifies violence and holds it out as a source of pride, honor, and masculine self-esteem.*
7. Making lethal weapons easily available to the general public.
8. *Maximizing the polarization and asymmetry of the social roles of men and women. Nothing stimulates crime and violence more than the division of males and females into the roles of violence object and sex object, respectively.*
9. *Encouraging the prejudice against homosexuality . . . .*
10. Perpetuating and legitimizing the exposure of children and youth to violence such as corporal discipline in school and at home . . . .
11. Regulating the economy so as to ensure that unemployment will never be abolished . . . .<sup>157</sup>

Obviously, all of these admonitions are interconnected. Nonetheless, I have put six in italics because they stand out as characteristics that have special relevance to the culture of big-time college football. I will combine these into four sub-categories, as means to analyze the ways that college football contributes to violence, particularly sexual violence.

In using Dr. Gilligan's themes, I would emphasize three central aspects of his approach, as I understand it. He describes his list from the point of view of those who wish to maintain power by cynical means, ideological in origin and brutal in implementation. This violence-maintaining structure would not be simple to dismantle. Moreover, he does not say that violence would be eliminated by *undoing* one or more of eleven policies on his list. Finally, no one has to agree that these eleven policies are consciously or even unconsciously held by powerful people and institutions. But I believe Dr. Gilligan would agree, and I hope the reader agrees, that undoing any parts at any time could not hurt in pursuit of a less violent society.

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157. *Id.* at 187–89 (emphases added).

## 1. Encouragement of Alcohol Abuse

Though there is not a one-to-one relationship between alcohol over-consumption and violent behavior, many studies correlate the two. Much alcohol-related violence is situational; destructive behavior follows alcohol use where it is culturally expected to follow alcohol use.<sup>158</sup>

The relationship between college sports and alcohol is aptly encapsulated in the title of a book by Professor Murray Sperber called *Beer and Circus*.<sup>159</sup> Professor Sperber's primary thesis is that too many universities have invested in big-time sports and graduate education (or at least in the salaries and research of superstars in the professoriate) while letting undergraduate education languish. His title is adapted from the ancient poet Juvenal, who used the term "bread and circus" to describe how Roman emperors distracted the populace from governmental failures by providing cheap food and riveting gladiatorial contests.<sup>160</sup>

Those ancient tail-gating parties are replicated every fall Saturday afternoon in Boulder and similar sites of football frenzy. Alcohol was deeply implicated in the CU football gang rapes in 2001, in a pattern that is paradigmatic of how alcohol increases the risks of sexual assault.<sup>161</sup> In recent years (particularly since Congress had coaxed every state to raise the drinking age to 21 as of 1987<sup>162</sup>), universities have attempted to crack down on campus drinking, but the party schools still lose a student or two each year to alcohol poisoning, and the prohibitions have resulted primarily in a "lively hide-and-seek game with the authorities."<sup>163</sup> University bookstores still sell shot-glasses and beer mugs sporting the school logo; most universities still allow boozy tail-gaiters at football games; some sell alcohol at athletic events, and still entertain important alumni and boosters with alcohol in skyboxes at the games or on patios at Presidents' houses.

158. *Id.* at 219. While there are complicating factors, alcohol is the one drug that is systematically shown to correlate with increased levels of violence. Illegal psychoactive drugs that are also addictive are most likely to correlate with violence during periods of users' withdrawal. For illegal psychoactive drugs in general, it is the illegal market (and the "war" on that market) that produces violence, not the pharmacology. *Id.* at 220.

159. MURRAY SPERBER, *BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION* (2000).

160. *Id.* at xiv.

161. Sarah E. Ullman et al., *Alcohol and Sexual Assault in a National Sample of College Women*, 14 J. OF INTERPERSONAL VIOLENCE 603 (1999).

162. Sperber, *supra* note 159, at 19.

163. *Id.*

As Professor Sperber says:

Big-time [sports] U's, for all of their current pronouncements about curtailing student drinking, will never allow their schools and the surrounding areas to become dry. Officials of these universities know that if their institutions become deserts without alcoholic irrigation, this terrain would not sustain undergraduate student life.<sup>164</sup>

Alcohol marketers figured out in the 1980s that young men who go to college develop intense brand loyalty in those years, and that team loyalty strongly reinforces brand loyalty. Some universities, perpetually strapped for cash and even strapped for students when the baby boomers got enough education, got a little cozy with the alcohol industry, allowing advertising on campus, association of school mascots with brands, etc. Though the "party school" appellation has become anathema to admissions offices, some schools, at least for a while, came to relish their emerging reputations as "good time" campuses.<sup>165</sup>

That train is hard to stop. I for one would not want to prohibit college students from enjoying their beer on football weekends. Rather, the idea is to get at the larger phenomena that connect football to sexual violence—here, what Dr. Gilligan called the cultural expectations of violence following alcohol consumption, and later, the expectations that such violence will be sexual in nature.

## 2. Exploitation of Race and Poverty

Legal commentary focusing specifically on racism in college sports is relatively recent. Professor Linda Greene wrote one of the earliest pieces in 1984.<sup>166</sup> Since then, a group of scholars has pressed the issue, though they generally agree that it is under-theorized.<sup>167</sup> "The Myth of the Superspade: The Persistence of Racism in College Athletics,"<sup>168</sup> by Professor Timothy Davis, remains one of the most comprehensive treatments of the myriad subtle ways that racism pervades college sports

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164. *Id.* at 157.

165. *Id.* at 49–52.

166. Linda S. Greene, *The New NCAA Rules of the Game: Academic Integrity or Racism?*, 28 ST. LOUIS U. L.J. 101 (1984).

167. See Timothy Davis, *Teaching Sports and the Law: The Relevance of Race*, 1 VA. J. SPORTS & L. 250 (1999) (providing a comprehensive bibliography as of that time).

168. Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615 (1995).

in the post-integration era.<sup>169</sup> Professor Davis's title refers to the stereotypes that have adhered to African-American athletes, those that assume physical superiority while implying (and sometimes actually expressing) intellectual inferiority.<sup>170</sup> The resulting harms include:

subtle racism evidenced in different treatment during recruitment; poor academic advice; harsh discipline; positional segregation on the playing field and social segregation off it; blame for ills for which they are not responsible. Then there are the complaints of overt racism . . . . In short, the perpetuation of stereotypes, incorporated into a dominant ideology, continues to harm black student-athletes academically, athletically, economically, socially, and psychologically.<sup>171</sup>

The scholars who study racism in college sports emphasize that, in the athletic arms race, most coaches promise recruits (and their parents) the world, but will abandon those promises should the recruits fail to perform in their first season up to the coaches' expectations. The promises include inroads to professional athletic careers and even, in the first instance, an education. Lots of those promises, however, turn out to be empty.<sup>172</sup> Those for whom such promises fail are disproportionately African-American males.<sup>173</sup>

Available data indicate that African-American athletes are disproportionately involved in NCAA rules violations scandals and in off-field "anti-social behavior[s]."<sup>174</sup> In the sexual assault incidents discussed in this Article, African-American male athletes were disproportionately involved.<sup>175</sup> In light of the other major premises of this Article—particularly given institutional efforts to cover up at least some sexual assaults—it is extremely difficult to know whether athletes of

169. Professor Davis also describes the formal and informal methods used to segregate college teams on the basis of race prior to World War II. *Id.* at 624–34.

170. *Id.* at 644–51.

171. *Id.* at 659. See generally RICHARD E. LAPCHICK, *FIVE MINUTES TO MIDNIGHT: RACE AND SPORT IN THE 1990s* (1991).

172. Richard Salgado, *A Fiduciary Duty to Teach Those Who Don't Want to Learn: The Potentially Dangerous Oxymoron of "College Sports,"* 17 SETON HALL J. SPORTS & ENT. L. 135, 158–62 (2007).

173. *Id.* at 144–48, 154–56.

174. Davis, *supra* note 168, at 667; Timothy Davis, *An Absence of Good Faith: Defining A University's Educational Obligation to Student-Athletes,* 28 HOUS. L. REV. 743, 759 (1991).

175. All of the alleged assailants in the *Simpson* case were African-American (as was one of the alleged victims). E-mail from Kimberly M. Hult, Counsel for plaintiffs (Mar. 17, 2008).



color have in general been more likely to participate in assaults,<sup>176</sup> or are just more likely to be busted for such behaviors, or more likely to have allegations against them publicized, or all of the above.

This is a complex set of issues. In studying the history of sports in the United States, I see the ways that athletics have been both gates of opportunity for people of color (though far less often than imagined by some white people) and entrenched sites for the perpetual, and increasingly complex, reproduction of racist notions. Professor Todd Crosset, who was among the social science pioneers in demonstrating the hyper-masculinity of sports in this country, has written a devastating piece about the racism inherent in the *Simpson* case. Relying on documents in evidence in that case, Crosset shows how the University of Colorado, in an “attempt to stabilize the institution, . . . promoted a particular racial framing of the incident.”<sup>177</sup> Professor Crosset demonstrates how the university, in a desperate defensive position, at once posited the football stadium as “white space,”<sup>178</sup> while at the same time it conjured the image of the falsely accused black men in order to deflect attention from institutional responsibility.<sup>179</sup>

The “Atticus Finch” trope<sup>180</sup> deployed by the University of Colorado, however, is not a simple one. Race and sex and sexual orientation (in addition to other presumed immutable characteristics) are differentially deployed by those who hope to gain rhetorical advantage.

It is an old and painful dispute among those with multiple group-based identities, and many of us are guilty of making unfair comparisons among social situations. One legal commentator, for example, has argued that the November 2004 brawl among fans and professional

176. I hope it goes without saying that I do not believe that men of color are more likely, anytime or anywhere, to commit sexual assaults. I do see, however, why behaviors of athletes of color may stand out in the context of majority-white educational institutions. Big-time athletes are put on a pedestal, but are often isolated from university life. Many studies suggest that such athletes feel both isolated and beyond the rules that apply to others. When some of those athletes are recruited as athletic performers, particularly when recruited from socio-economic circumstances that are not immersed in the assimilative norms of mostly white universities, it is not surprising that their behaviors do not conform to some university expectations and/or get intense attention when they do not. I do not think that has anything to do with race, whatever that might mean, but with social facts of racism.

177. Todd Crosset, *Capturing Racism: An Analysis of Racial Projects Within the Lisa Simpson v. University of Colorado Football Rape Case*, 24 INT'L J. HIST. OF SPORT 172, 173 (2007).

178. *Id.* at 180. “From their perch high above Folsom Field, white donor/fans can simultaneously admire black men and hold them in judgement [sic], confirming for themselves both their superiority and their colour-blindness.” *Id.* at 184.

179. *Id.* at 188–189.

180. That is the position of the “benevolent, intellectual, principled white.” *Id.* at 185.

basketball players at a Detroit Pistons game<sup>181</sup> had been cast by the media in the most racist possible light. In his introduction, the author asked readers to understand that the African-American players were seen against an imagined background of criminal activities, which he described as follows:

Imagine a laundry list of felonies, misdemeanors and personal indiscretions. *Begin with some obviously significant offenses* like murder or large-scale drug distribution, then pepper the list with collateral offenses like individual drug use, obstruction of justice or perjury. Throw in theft, assault, and the possession of unlicensed firearms. Include some *relatively minor offenses* like excessive traffic tickets and adultery, but be sure to *remember spousal abuse, statutory rape and rape. Add being five minutes late for work.*<sup>182</sup>

While it is hard to disagree that much media coverage of the brawl in Detroit was racist, and though the author does not focus on sex crimes in the rest of the article, this was a jarring cascade of offenses in what the author seemed to regard in decreasing order of seriousness.

Actual allegations of sexual misconduct against African-American male athletes have demonstrated the “under-theorization” of the problem. I happened to be in Chicago on the day that boxer Mike Tyson was sentenced to six years in prison for rape.<sup>183</sup> I was astonished on that day that Chicagoans of all conceivable sorts felt the need to talk to me about it. Each of them wanted me—a perfect stranger—to assure them that the verdict was wrong, that Mike was the victim, and that regardless of the jury verdict in Indiana, he *just couldn't have done it.*<sup>184</sup> I ended up hiding in my hotel room.

181. Associated Press, *Pistons' and Pacers' Brawl Spills Into Crowd*, N.Y. TIMES, Nov. 20, 2004, at D1.

182. Jeffrey A. Williams, *Flagrant Foul: Racism in "The Ron Artest Fight,"* 13 UCLA ENT. L. REV. 55 (2005) (footnotes omitted) (emphasis added).

183. E.R. Shipp, *Tyson Found Guilty on 3 Counts As Indianapolis Rape Trial Ends*, N.Y. TIMES, Feb. 11, 1992, at A1. I do not know why the reaction in Chicago was so strong, as Mr. Tyson's home town is Brooklyn, N.Y. Perhaps it was because the rape and conviction had occurred in neighboring Indiana, and of course, Chicago is nuts for sports. Mr. Tyson served half of the sentence. Ira Berkow, *After Three Years in Prison, Tyson Gains His Freedom*, N.Y. TIMES, Mar. 26, 1995 .

184. I was also living in Colorado for the entirety of the Kobe Bryant incident. Rape charges against Mr. Bryant were dropped after the presiding judge made a ruling, controversial under the Colorado Rape Shield statute, that certain evidence of the alleged victim's sexual history would be admissible. Tom Kenworthy & Patrick O'Driscoll, *Judge Dismisses Bryant Rape Case*, USA TODAY, Sept. 1, 2004. I witnessed a frenzy of public

Professor Kevin Brown published a provocative essay about the Tyson situation,<sup>185</sup> reporting conversations with other African-American males in Indiana about it. His non-scientific findings identified what he called “two dominant beliefs in African-American culture.” First is that African-Americans, and particularly African-American males, cannot get fair treatment in the U.S. criminal justice system. Second is that the fight against racism needs to trump the fight against sexism, even when practiced against African-American women.<sup>186</sup>

In his second announced “dominant belief,” Professor Brown has dived into the roughest possible seas, politically speaking. He evokes what I have elsewhere described and denounced as the “oppression sweepstakes,” a divide-and-conquer strategy that keeps much from being accomplished.<sup>187</sup> I don’t purport to be an expert on African-American culture, but I am an expert on divide-and-conquer problems, on several different levels. The divide-and-conquer problem cannot be resolved by data or debate. I take the exploitation of male (and female<sup>188</sup>) athletes of color to be a fact, as I take the epidemic of athlete violence against women to be a fact. Again, the discussion must be understood, I contend, within Dr. Gilligan’s analysis of the factors that fuel violence. Dismantling of racial caste systems in sports (and in higher education overall) is one necessary ingredient in any serious formula for reducing sports violence.

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support for Mr. Bryant, particularly on talk-radio outlets. He just couldn’t have done it, conclusively proven by the fact that the alleged victim went voluntarily to his hotel room. Contrary to fondly-held belief, the controversy didn’t hurt Mr. Bryant’s career. Indeed, the opposite may be true. See NBA.com, Lakers’ Bryant Ends Season Atop NBA’s Most Popular Jersey List, June 11, 2007, [http://www.nba.com/news/popularjerseys\\_070611.html](http://www.nba.com/news/popularjerseys_070611.html).

185. Kevin Brown, *The Social Construction of a Rape Victim: Stories of African-American Males About the Rape of Desiree Washington*, 1992 U. ILL. L. REV. 997.
186. *Id.* at 1000–02. The rape victim in the Mike Tyson case was an African-American woman.
187. Ann Scales, *Avoiding Constitutional Depression: Bad Attitudes and the Fate of Butler*, 7 CAN. J. WOMEN & L. 349 (1994), reprinted in *FEMINISM AND PORNOGRAPHY* (DRUCILLA CORNELL & THERESA BRENNAN, EDs., 2000).
188. See, e.g., Alfred Dennis Mathewson, *Black Women, Gender Equity, and the Function at the Junction*, 6 MARQ. SPORTS L.J. 239 (1996).

### 3. Enforcement of Prejudice against Homosexuality

*A professional football player's working environment is not severely or pervasively abusive . . . if the coach smacks him on the buttocks as he heads onto the field.*

—Antonin Scalia<sup>189</sup>

In the United States, sports have long been a way to make homoerotic feelings acceptable, for men and women alike. One source reports that until Yale went coed in the 1970s, swimmers at the university pool were required to swim nude.<sup>190</sup> The reader can imagine for herself the point of that, as well as the point of Justice Scalia's completely gratuitous admonition that fanny-patting by coaches cannot constitute sexual harassment in NFL employment.

Mariah Burton Nelson suggests that boys fall in love with spectator sports "as an integral part of falling in love with the masculine privilege that their fathers symbolize."<sup>191</sup> In my experience, little boys don't have to have fathers to have powerful incentives to embrace masculine privilege, and violent sports are the most ubiquitous conduit. Nelson is quite right, though, that in the rest of life, women are hard to factor out of boys' lives. It is in those violent sports, particularly hockey and American football, that "male spectators can participate in an illusion of male superiority. They can root for men, for male power and might."<sup>192</sup>

In football, both men and women get to worship male bodies. Women have plenty of opportunities and incentives to do that in other contexts, but men do not. There are at least two things going on. One is that traditional masculinity in the U.S. defines men as strong and unfeeling. Sports provide an opportunity for men to have very strong feelings about men. In addition, "[s]ome of what men seem to feel is turned on . . . . The occasional appearance of women [as cheerleaders] legitimizes the turn-on of sports, distracting fans from the uncomfortable

189. *Oncle v. Sundowner Offshore Serv. Inc.*, 523 U.S. 75, 81 (1998). Justice Scalia was writing for a unanimous Supreme Court holding that same-sex sexual harassment, in a case involving an all-male work crew on an offshore oil rig, could be actionable under Title VII. Justice Scalia just felt he had to add that the highest court in the land could not have meant to include professional football within the analysis!

190. GORN & GORDSTEIN, *supra* note 43, at 163.

191. MARIAH BURTON NELSON, *THE STRONGER WOMEN GET, THE MORE MEN LOVE FOOTBALL: SEXISM AND THE AMERICAN CULTURE OF SPORTS* 106 (1994).

192. *Id.* at 107.

fact of male athletes' erotic appeal . . . . Men who love football love men."<sup>193</sup>

It would be a beautiful thing for men to love other men, including erotically, whether in person or from afar as in the football context, if some men didn't kill other men for being public about it. Or if some Supreme Court Justices didn't consistently vote against the well-being of gay people while gratuitously enshrining football fanny-patting as immune from the rule of law. It is a twisted situation when the love of one's own gender cannot be expressed unless expressed in the context of violence.

As Professor Sanday detailed in her groundbreaking study of gang-rape, the male bond as presently constituted in some campus institutions appears fundamentally to require the perpetual and aggressive expression of homophobia.<sup>194</sup> Timothy Jon Curry, in his study of locker-room behavior among men on campuses, points out that one's place on the team is never completely secure; there is constant competition among teammates to prove who is most worthy. Worthiness includes constant maintenance of the gender bond, and that requires "doing gender through homophobic talk," performances that allow teammates "to reaffirm to themselves and others that their sexual preferences remained within the boundaries of the bond."<sup>195</sup>

At the end of the day, it is not meaningful to separate the vilification of homosexuality from the next set of concerns regarding the treatment of women. These are part of the dialectics of gender. As Professor Curry puts it, "'real men' are defined by what they are *not* (women and homosexuals)."<sup>196</sup>

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193. *Id.* at 115–18. Half of the cheerleaders on collegiate squads are now male. They tend to be big and strong and extraordinarily athletic. I am not calling them gay, God forbid, but having them there, I think, adds to the gender homage, in that football—like the other most violent sports in American history—are thoroughly homoerotic. *See, e.g.,* GORN & GOLDSTEIN, *supra* note 43, at 73–74. *See also infra* text accompanying notes 212–14. I suppose NFL teams, as a matter of sheer economics, cannot afford to have male cheerleaders. That product cannot endure a whiff of the queer.

194. *See generally* PEGGY REEVES SANDAY, *FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS* (1990).

195. Timothy Jon Curry, *Fraternal Bonding in the Locker Room: A Profeminist Analysis of Talk About Competition and Women*, 8 *SOC. OF SPORT J.* 119, 129–30 (1991).

196. *Id.* at 129 (emphasis in original).

#### 4. Glorification of Violence as a Source of Masculine Self-Esteem and Maximization of the Asymmetry of Gender

As noted above, Dr. Gilligan believes that structures of masculine self-esteem and separation from femininity are the major sources of violence in society. While he weaves race, class, education, and substance-abuse into his discussion, he keeps coming back to the theme of gender (including homophobia). In this, Dr. Gilligan is not an essentialist, but an empiricist.<sup>197</sup> He's done the field work. He reports that it is men who are most often violent, and it is their gender anxiety that makes them violent. In discussing football, it is impossible to separate out the glorification of violence as a source of masculine self-esteem and the maximization of gender difference (just as it is impossible to separate out fear of homosexuality), because they come together so seamlessly in that sport.

Indeed, colleges that field football teams are funding a weekly gender festival during the season. During this expensive and gaudy ritual, both male actors (primarily as players, but also as the most visible fans—when they strip and paint their bodies) and female actors (primarily as sexy cheerleaders) wear elaborate costumes and perform elaborate dances that reenact hugely exaggerated gender roles. The men enact a fake war.<sup>198</sup> The women enact a near-hysterical celebration of the war. The cardinal rule is that the women do not participate in the war.

People enjoy the rituals of football as escapes from the daily grind, but the ritualized aspects bear examination. Gilligan states that the two basic characteristics of ritual are repetition and theatrical exaggeration.<sup>199</sup> Consider just one aspect of the theater—the costumes—by comparison to a delightful excerpt from Virginia Woolf. Without describing the underlying case, Woolf quotes the remarks of someone named “Mr. Justice MacCardie” regarding the case of someone named “Mrs. Frankau”: “Women cannot be expected to renounce an essential feature of femininity or to abandon one of nature’s solaces for a constant and insuperable physical handicap . . . . In matters of dress women often remain children to the end.”<sup>200</sup>

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197. The distinction is itself contested. In this case, I’m willing to give the empiricist privilege to Dr. Gilligan, given his vast experience on what has actually motivated violent men.

198. Fiction writer Don DeLillo has derided the comparison of football and warfare as a cliché. DON DELILLO, *END ZONE* 164 (Penquin Books 1986) (1972). However, just because it is a cliché does not mean that it is not true. Recall that when the War in Iraq (2003–present) was first compared to Vietnam, that, too, was derided as a cliché.

199. GILLIGAN, *supra* note 149, at 78.

200. WOOLF, *supra* note 9, at 150 n.16.

Woolf's commentary is priceless:

The Judge who thus dictated was wearing a scarlet robe, an ermine cape, and a vast wig of artificial curls. [This situation] raises two questions: how often must an act be performed before it becomes traditional, and therefore venerable; and what degree of social prestige causes blindness to the remarkable nature of one's own clothes? Singularity of dress, when not associated with high office, seldom escapes ridicule.<sup>201</sup>

Leaving aside those male fans who strip to the waist and paint their bodies, the uniforms of football players surely have numerous functional features—but, please. “Functional” is a contested concept (every aspect of judges' dress was thought functional in Woolf's time), and it must be admitted that much of the function of football dress is ritualistic—for the purposes of theater and intimidation. Those are *some* shiny tight pants.

And what of the female cheerleader outfits?<sup>202</sup> These extraordinary athletes (who face a statistical risk of serious physical injury as great as football players themselves) work without the protective functional features of prescribed football player attire. On another level, of course, their dress is very “functional” to advertise their job as sex objects.

Dr. Gilligan's second criterion for ritualistic behavior is repetition. Every September, I am astonished by how the culture of the United States is re-invigorated (re-masculinized?) at the beginning of the football season. The season start is something almost magical on many college campuses. I do not begrudge fans their enjoyment of football, but I am sometimes afraid of the intensity of the magic. Dr. Gilligan reported that when men feel threatened as men, they often find it necessary to intensify their masculinity “through the introduction of magic.”<sup>203</sup> It is this aspect of football to which I referred earlier when I spoke of the apparent necessity to speak of winning college football

201. *Id.*

202. Cheerleading was originally a male student activity, but not an athletic one. They roamed the sidelines at football games attempting to organize fans. World War II required that females take over the job. The hypersexualization of the female cheerleader coincided, not surprisingly, with the advent of Title IX. Bryan Curtis, *Cheerleaders: What To Do About Them*, SLATE, Apr. 1, 2005, <http://www.slate.com/id/2116060>. Today, approximately half of high-school and college cheerleaders are male, but those men do not wear skimpy clothes or provide the “honey shots” on television. See NATALIE GUICE ADAMS & PAMELA J. BETTIS, *CHEERLEADER!: AN AMERICAN ICON* (2002).

203. GILLIGAN, *supra* note 149, at 85.

coaches as “legendary.” In a sport otherwise obsessed with statistics and documentation, it has always seemed odd to label these men with a word referring, typically, to that which is not verifiable. I think this is just one example of how the hegemony of football works: it is infused with the power of myth, even with the power of the sacred.

Virginia Woolf also suggested that Mister Justice McCardie’s lack of fear of ridicule in wearing his silly outfit must owe largely to “the hypnotic power of dominance.”<sup>204</sup> She directs us back to the importance of shame and ridicule as sources of violence. Dr. Gilligan tells us that “respect” for something—even if it is respect arising out of an unreal loyalty—is what men desperately crave. His patients’ narratives were loaded with the language of “disrespect.”<sup>205</sup> In Gilligan’s experience, disrespect is irrefutably associated with being dominated, which is irrefutably associated with being shameful about something.

In Dr. Gilligan’s view, there are three pre-conditions to violence perpetrated by men. First, “the most carefully guarded secret held by violent men” is that they feel ashamed “over matters that are so trivial that their very triviality makes it even more shameful to feel ashamed about them.”<sup>206</sup> We know what these are: everything from slow growth to high academic performance to acne to small penis size to (merely) having emotions to every other of a million unfair and destructive things that society has placed on the list of unmanly attributes. Second, when men don’t have or can’t get the resources to dissipate their shame, violence is provided to them as an outlet.<sup>207</sup> Third, violent people, usually men, do not develop the emotional resources, stimulated by shame, that inhibit the violent impulses.<sup>208</sup>

Recall here that the event at issue in the University of Colorado case was an alleged *gang rape*. Some studies show that, while male athletes are a small proportion of college students, up to a third of the perpetrators of gang rapes on or around campuses are male athletes.<sup>209</sup> The campus gang rape phenomenon has been understood as a set of discourses, rituals, ideologies, and practices that make some male

204. WOOLF, *supra* note 9, at 150 n.16.

205. GILLIGAN, *supra* note 149, at 105.

206. *Id.* at 111–12.

207. *Id.* at 112.

208. *Id.* at 114. Moreover, ritualized degradation ceremonies intensify the effects of shame, *id.* at 152, particularly the sorts of degradation ceremonies associated with military induction, prison admission, fraternity hazing, and athletic team practices.

209. Chris S. O’Sullivan, *Acquaintance Gang Rape on Campus*, in *ACQUAINTANCE RAPE: THE HIDDEN CRIME* 140, 144 (Andrea Parrot & Laurie Bechhofer eds., 1991); *See also* J.K. ERHART & BERNICE SANDLER, *CAMPUS GANG RAPE: PARTY GAMES, ASSOCIATION OF AMERICAN COLLEGES, PROJECT ON THE STATUS AND EDUCATION OF WOMEN* (1985).



environments—usually high-status groups who are convinced or need perpetually to be convinced of their own invulnerability—rape-prone.<sup>210</sup> As noted in Section IV.A *infra*, the social science data do not purport to implicate all exclusively male environments, and much depends in a given environment on other factors—in football programs, particularly upon the attitudes and practices of coaches. The engine of the gang rape, however, appears to be peer support. Professor Sanday argues that “rape prone attitudes and behavior on American campuses are adopted by insecure young men who bond through homophobia and ‘getting sex.’ The homoeroticism of their bonding leads them to display their masculinity through heterosexist displays of sexual performance.”<sup>211</sup>

In gang-rape, friends’ approval of the means of positioning the woman for sex (usually by getting her drunk) is important,<sup>212</sup> and leadership is important.<sup>213</sup> But the key seems always to be the men doing it for each other, to prove their masculinity for each other. Watching is imperative.

Again, Tim Curry’s study of locker room behavior—conducted at two big-time Midwestern sports universities—corresponds with that model. Curry’s research added to this public debate about athlete violence important considerations of how young male athlete’s insecurities are compounded by uncertainty about their place on the team and status within the team hierarchy. Intercollegiate participation is a crucible of anxiety.<sup>214</sup> So much time is devoted to the team that athletes can have few extra-athletic involvements.<sup>215</sup> The bond with the team requires constant maintenance and depends fundamentally on “doing gender” in accepted ways.<sup>216</sup>

As discussed previously, one aspect of approved gender performance is aggressive homophobia. The other set of approved gender performances includes the sexual objectification of women (including the reduction of women to their body parts), braggadocio about sexual conquests, and competition among athletes to see who can express the most negative attitudes toward women.<sup>217</sup> In Curry’s observations of football

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210. See Sanday, *supra* note 194.

211. Sanday, *supra* note 143, at 194.

212. See *id.* at 195, 198.

213. See generally Louise E. Porter & Laurence J. Alison, *A Partially Ordered Scale of Influence in Violent Group Behavior: An Example from Gang Rape*, 32 SMALL GROUP RES. 475 (2001) (examining the role of leadership in gang rape).

214. Curry, *supra* note 195, at 119, 127, 132.

215. *Id.* at 125.

216. *Id.* at 120.

217. *Id.* at 128–29.

locker rooms, these “are stage performances usually requiring an audience of more than one, and may be told to no one in particular.”<sup>218</sup>

Generally, athletic glory is short-lived. The higher men climb on the athletic success ladder, the more emotionally injured they will be when it topples. In many cases, and with generally worse consequences for athletes of color and socio-economically disadvantaged athletes, the sudden deprivation of athletics as a source of self-esteem will wreak havoc in men’s lives. For many, that change will not improve their opinions of women or lessen their grasping toward masculinity.<sup>219</sup> They *were* somebody, and now they are nobody. Another source of shame.

Earlier in this Article I suggested that Roman gladiators were the forefathers of U.S. collegiate football players.<sup>220</sup> The comparison is particularly apt because, in general, the gladiators were slaves, there to be used up by their owners in service to the Empire. In football, few high school athletes will play in college. Few collegians will play professionally. Few professionals will make enough money to sustain themselves and their families for life. Society will have used them up, while certain other interests will have made fortunes from them.

The economy of gender discloses a huge gap between assets and debits. In abandoning male athletes—at least in some programs—to training in hypermasculinity, universities allow those young men to be used up. In the wake of the male athletes’ commodification and expenditure, the same universities reinforce the centuries’ old views of women that have allowed women to be turned into things, as well, but usually with more grievous consequences.

#### IV. WHAT MIGHT HELP: A STATE CONSTITUTIONAL CHALLENGE

Some more powerful remedy is needed for victims of male-athlete violence. Some powerful stimulus is needed that will expose the supposed inevitability of college football-as-it-is, and that will consider the ways that intercollegiate sports teach women-loathing. It would not be a matter of male-bashing or abolishing the game that so many love. It would rather be an opportunity for bringing football back into balance with the educational mission at a state university—a mission, I contend, that should include teaching sex equality.

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218. *Id.* at 128.

219. Messner, *supra* note 195, at 108–48.

220. See *supra* text accompanying notes 160–62.

In the CU football gang-rape case, there could have been any number of civil causes of action.<sup>221</sup> In my opinion, the most powerful civil litigation remedy may have been (or may be, in some future case) the Colorado State Equal Rights Amendment.<sup>222</sup>

Importantly, I do not wish to confine the analysis in this Article to what could have transpired or might transpire in Colorado. I am among the many lawyers who have internalized Justice Brennan's admonition that state constitutional provisions have been undervalued and under-used.<sup>223</sup> Given the right clients and the right lawyers, I truly believe that *any* state constitution could provide more relief to sexual assault victims of athletes at state universities<sup>224</sup> than federal law presently does. Some states are more generous than others in embracing their fundamental federalist opportunities to interpret their state constitutions to provide broader rights than those provided by the federal constitution. There surely is a trend toward independence among state courts in light of the tightening of individual rights in the federal courts. And I would be proud to be among the lawyers to institute such a trend in any state that has not yet done so.

It surely makes things easier, in the hypothetical case I will propose, if a state constitution has an Equal Rights Amendment, or some other explicit prohibition of sex discrimination. Things would be easier still if such a prohibition has already been interpreted to be stronger than the prohibition on sex discrimination as interpreted under the federal equal protection clause. Presently, twenty-two states have explicit prohibitions on sex discrimination in their state constitutions, or in other interpretations of their state constitutions.<sup>225</sup>

221. See, e.g., Robin Miller, *Cause of Action Under State Law Against Public School for Sexual Harassment of Student by School Personnel or Other Student*, 13 CAUSES OF ACTION 2D 1 (2006); Fried, *supra* note 81, at 77–91.

222. COLO. CONST. art. II., § 29 (“Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex.”). An extraordinarily useful survey of state ERAs and similar provisions is Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201 (2005).

223. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

224. Actually, the litigation I propose would not be confined to state universities, as several state Equal Rights Amendments do not have explicit “state action” requirements or have limited “state action” requirements. LA. CONST. art. I, § 3; MONT. CONST. art. II, §§ 4, 28; R.I. CONST. art. I, § 2; PA. CONST. art. I; see also *Imboden v. Chowns Communications*, 182 F. Supp. 2d 433 (E.D. Pa. 2002). A number of other state ERA’s have “open-textured” and uninterpreted language on the state action issue. Wharton, *supra* note 222, at 1229–37.

225. As Professor Wharton notes, *supra* note 222, sixteen states have what we might call “traditional” Equal Rights Amendments. See ALASKA CONST. art I, § 3; COLO.

I do not accept the criticism that a state-by-state approach is insufficient to change societal norms. If any state Supreme Court were to affirm the issuance of the sort of injunction I propose, every football program in the nation would instantly pay attention. This is a very different situation from same-sex marriage, for example. The state-by-state approach there has evolved from historical circumstance, and depends to an unintended degree (I believe) on how sister states will treat marriages from Massachusetts and California.

I truly believe that any state can get there regarding athletic norms. Nonetheless, I will proceed to analyze the hypothetical case under the Colorado State Equal Rights Amendment<sup>226</sup> for three reasons. First, the Colorado ERA is relatively un-interpreted, as is the case with most state ERA's and/or equal protection clauses (as applied to sex discrimination).

CONST. art. II, § 29; CONN. CONST. art. I, § 20; HAW. CONST. art. I, § 21; ILL. CONST. art. I, § 18; MD. CONST. art. I, § 3; MASS. CONST. pt. I, art. 1; MONT. CONST. art. II, § 4; N.H. CONST. pt. I, art. 2; N.M. CONST. art. II, § 1; PA. CONST. art. I, § 28; TEX. CONST. art. I, § 3a; VA. CONST. art. I, § 11; UTAH CONST., art. IV, § 1; WASH. CONST. art. XXXI, § 1; WYO. CONST. art. I, § 2. An additional four states, Florida, Iowa, Rhode Island, and Louisiana, have constitutional prohibitions on sex discrimination that are limited in various ways. § 7; *See* FLA. CONST. art. I, § 2; IOWA CONST. art. I, §§ 1, 6; LA. CONST. art. I, § 3; R.I. CONST. art. I, § 2. In addition, since 1879, California has had a provision in its constitution that prohibits sex discrimination in employment. CAL. CONST. art. I, § 8. Perhaps more importantly in California, sex has been a "suspect classification" for equal protection purposes under the state constitution since 1971. *Sail'er Inn v. Kirby*, 95 Cal. Rptr. 329, 339–41 (1971). In addition, the New Jersey Constitution guarantees natural and inalienable rights to all "persons," defines "person" as meaning both sexes, and the New Jersey Supreme Court has interpreted this provision to be a prohibition on sex discrimination. N.J. CONST. art. I, para. 1, art. X, para. 4.

226. I recognize that constitutional litigation in Colorado is a risky business, as that state constitution is one of the most easily and most often amended. *See* COLO. CONST. art. 5, § 1, ¶¶ 2–3 (providing that initiatives and referenda may be placed upon ballots by petitions signed by 5% of the number of voters cast for Secretary of State in the last election). For comparisons among Colorado and other states, see K.K. DuVivier, *Out of the Bottle: The Genie of Direct Democracy*, 70 ALB. L. REV. 1045 (2007); K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221 (2005). Amendment 2, the anti-gay amendment invalidated by the United States Supreme Court is the most infamous example of Colorado's constitutional fickleness. *See Romer v. Evans*, 517 U.S. 620 (1996). The litigation that I model in this Article would be fundamentally different from *Romer*, in that it would include no federal constitutional cause of action. The federal equal protection claim was necessary in *Romer* because the people of Colorado had amended the state constitution, so no state constitutional cause of action could trump that vote. If the Colorado Supreme Court ruled in favor of a plaintiff in the case I hypothesize, there could be a statewide campaign to amend the state constitution to exempt state university football from coverage of the state Equal Rights Amendment. That would be interesting. If such a state constitutional amendment passed, then the doctrines of *Romer v. Evans* would come into play.

Any state court could adopt the analysis I propose. Second, my primary example is *Simpson v. University of Colorado*.<sup>227</sup> I was around for the uproar; I counseled students through their hurt and outrage; I worked with plaintiff Lisa Simpson's lawyers on their appellate argument. Third, there is real potential in states like Colorado. Among other things, as is also true in many state constitutions, there are several pockets of "unique" language—language not appearing in the federal constitution—in the Colorado state constitution. In addition to the state ERA, the Colorado State Constitution contains an "Inalienable Rights" clause, that guarantees among other things the right of "seeking and obtaining . . . safety and happiness."<sup>228</sup> It also includes a guarantee of a "thorough and uniform system of free public schools" for residents "between the ages of six and twenty-one years."<sup>229</sup>

Focusing on our hypothetical case, if the facts were the same as those in *Simpson v. University of Colorado*, the first difference is that we, as hypothetical plaintiffs' attorneys, would reject the federal Title IX cause of action in favor of a claim based on the Colorado state Equal Rights Amendment. In her complaint and in discovery, the plaintiff would have identified specific practices and policies of the football program, the athletic department, and the university that caused or allowed her sexual assault to occur. The plaintiff would be seeking damages, but she would also be seeking an injunction that would respond specifically to improving those practices and policies, in order to prevent recurrence of such sexual assaults. Importantly for the rest of this Article, much of the litigation would be consumed with proof of the connections between those policies and practices—that is, the governance of the football team—and the *purposes* of the football team. That is, under a state ERA challenge, the burden would be squarely on the university to justify the way football works for it (if it does).

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227. Another example, *Jennings v. City of Stillwater*, is an excellent demonstration of the inadequacy of federal law, and will be discussed in Part IV.B.1.

228. COLO. CONST. art. II, § 3. The Colorado Inalienable Rights clause had its heyday in the federal constitutional protective era of freedom of contract. DALE A. OESTERLE & RICHARD B. COLLINS, *THE COLORADO STATE CONSTITUTION: A REFERENCE GUIDE* 33 (2002). The Colorado Constitution does not contain an equal protection clause; rather, the guarantee of equal protection has been judicially inferred to emanate from the state constitutional guarantee of due process.

229. COLO. CONST. art. 9, § 2. Though the education clause is litigated almost exclusively in the context of local school district funding, no case says the clause has no application to higher education. The word "thorough" might apply to an obligation to reduce violence and to teach gender literacy. At the least, this clause suggests that the Colorado constitution focuses on education more seriously than does the federal constitution.

### A. Preliminary Doctrines

As discussed in Section III.D *supra*, federal courts in Title IX sexual assault cases have gotten bollixed up about plaintiffs' standing. That has been particularly so where plaintiffs seek injunctive relief, and I will have more to say about that in Section V.D *infra*. In the meantime, Colorado law has been clearer than federal law about the preliminary doctrines that would be relevant in the case I hypothesize, particularly the doctrines of standing and mootness.

Colorado cases consistently say that state courts are not bound by the strictures of Article III of the United States Constitution.<sup>230</sup> The standing inquiry is not co-extensive with the federal inquiry; the Colorado doctrine is more expansive than the federal doctrine.<sup>231</sup> Colorado courts have wisely not extended standing doctrine to the question of whether all parts of a judicially-imposed remedy will provide relief to a particular individual plaintiff in the future. Rather, the Colorado inquiry has only two parts: (1) whether the plaintiff was injured in fact; and (2) whether the injury was to a legally protected interest.<sup>232</sup> Thus, a plaintiff in the hypothesized gang-rape situation would have standing in a Colorado court to assert a violation of the Colorado Equal Rights Amendment. She was injured by the rape; her freedom from rape is legally protected, in the educational and in all other contexts; as a student, she was legally entitled to adequate governance of the football team and adequate protection by university officials.

Colorado cases are also mercifully clear about the difference between standing and mootness. Colorado has specifically announced that injuries to students are a paradigmatic example of cases that are not moot because they are "capable of repetition yet evading review." Students graduate. However, pre-trial procedures, trials themselves, and appeals processes take time. It should not be necessary for other students to initiate and litigate other cases in order for an on-going illegality to be remedied.<sup>233</sup> Even when the underlying legality has allegedly been voluntarily remedied by the defendants, the matter should not necessarily be dismissed as moot, and that is particularly so when the underlying matter

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230. *Wimberly v. Ertenberg*, 570 P.2d 535 (Colo. 1977). Standing is still a state *constitutional* requirement. *Id.*

231. *Grossman v. Dean*, 80 P.3d 952, 959 (Colo. Ct. App. 2003).

232. *Maurer v. Young Life*, 779 P.2d 1317, 1323 (Colo. 1989); *accord Durdin v. Cheyenne Mountain Bank*, 98 P.3d 899, 902 (Colo. Ct. App. 2004), *cert. denied*, 204 Colo. Lexis 752 (Oct. 4, 2004).

233. *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1102 (Colo. 1998).

is of great public importance,<sup>234</sup> as I assume the allegation of a state funded “rape culture” at a flagship university would be.

Every state constitution has room to move on these preliminary doctrines. If plaintiffs have to litigate them preliminarily to achieving substantive changes in constitutional sex law, that is what plaintiffs will have to do.

### *B. Interpretation of State Prohibitions on Sex Discrimination*

Most state ERA's and comparable constitutional provisions are relatively un-interpreted. The Colorado Equal Rights Amendment is no exception, and it stands ready for a test of real seriousness. Unsurprisingly, most cases decided under the Colorado ERA (as in other states)<sup>235</sup> so far have involved simple “formal equality” problems, where a law or practice on its face has differentiated between men and women. These cases did not require too much vision. For example, a gender-specific statutory regime, since repealed, provided that biological mothers had a certain period of years to establish paternity of a child, but that a biological father had no standing to establish his own paternity while the biological mother was married to another. The Colorado Supreme Court held that the ERA required that the claiming biological father have the same time for judicial access as the biological mother.<sup>236</sup> Most other Colorado ERA cases are of similar (at least what seems to us now) logical simplicity.<sup>237</sup>

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234. *Grossman*, 80 P.3d at 960.

235. JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES* §§ 3–12 (3rd ed. 2000).

236. *R. McG. and C.W. v. J.W. and W.W.*, 615 P.2d 666 (Colo. 1980) (en banc). The state's justification for the regime was an interest in promoting the stability of existing family units. *Id.* at 670. In what was a harbinger of feminist debates then-emerging and continuing today, then-Justice Jean Dubofsky (who was also lead counsel for plaintiffs in *Romer v. Evans*) stated in a special concurrence: “I believe that the legislature may give preference in paternity proceedings to a mother's family unit in which the child resides without running afoul of constitutional guarantees of equal protection. Usually, no one questions the identity of the mother because of the mother's pregnancy and delivery of the child. Paternity is not as easy to determine.” According to Justice Dubofsky, the defect lay in the conclusive presumption against a putative father's attempt to establish paternity. *Id.*

237. *In re Matter of the Estate of Musso*, 932 P.2d 853 (Colo. Ct. App. 1997) (ERA prohibits application of the common law presumption that a husband solely owns all household goods); *In re Marriage of Trask*, 580 P.2d 825 (Colo. Ct. App.), *cert. denied* (Jul. 3, 1978) (ERA does not prohibit trial court from awarding attorneys' fees to wife in dissolution action, nor require an order that the pregnant wife have to get a job); *In re Marriage of Franks*, 542 P.2d 845 (Colo. 1975) (in a case brought by a

There are two other Colorado cases interpreting the state ERA that are more germane to the cause of action that I model in this Article.<sup>238</sup> First is *People v. Salinas*,<sup>239</sup> which in 1976 upheld a conviction of a man pursuant to a statutory rape statute which was then sex-specific. The defendant had sexual intercourse with two sisters, ages 12 and 17. At the time, the Colorado statute provided that “[a]ny male who has sexual intercourse with a female not his spouse commits rape, if . . . the female is less than sixteen years old and the offender is a least two years older than the female.”<sup>240</sup> The defendant appealed *inter alia* on ERA grounds. The Colorado Supreme Court ruled that the statute did not violate the ERA.

As noted, the Colorado Legislature has since amended the law to make it sex neutral. Also, at the time, that holding was consistent with Federal Equal Protection doctrine.<sup>241</sup> What I want to note is this language: “[The ERA] prohibits unequal treatment based exclusively on the circumstance of sex, social stereotypes connected with gender, and culturally induced dissimilarities.”<sup>242</sup> These words express a deeply feminist understanding of equality theory. It is not just about stilted lists of “real” differences en route to a finding of “similar situation.” Equality can be about physical differences, but is more often about socially constructed institutions of femininity and masculinity, more about power than

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husband seeking to avoid divorce, the court held that Colorado’s “no-fault” divorce regime does not violate ERA, nor guarantee of due process of law, nor protection against impairment of contracts, nor prohibition on slavery).

238. There is a third case that could have been germane, *Duong v. County of Arapahoe*, 837 P.2d 226 (Colo. Ct. App.), *cert. denied* (Oct. 13, 1992), because I believe domestic violence is a matter of sex discrimination. In that tragic case, a husband murdered his estranged wife in the county courthouse just prior to a hearing about the dissolution of their marriage. He had previously threatened violence against her, there was a restraining order in effect, and the judge in the dissolution proceeding had ordered extra security for her. The security just hadn’t shown up in time. Her children lost their civil case against the county largely on grounds of the federal due process doctrine, recently and woefully reiterated by the U.S. Supreme Court in a case out of Colorado, that a mother in possession of a domestic violence protective order had no constitutional right that it actually be enforced, *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005). In that case, the plaintiff’s ex-husband killed their three little girls while in violation of the order. Counsel in *Duong* did not make the record for an ERA challenge, 837 P.2d at 230, so I will not discuss the *Duong* case further in this context.
239. *People v. Salinas*, 551 P.2d 703 (Colo. 1976) (en banc).
240. *Salinas*, 551 P.2d at 705 n.2. In 1975, probably in response to ratification of the state ERA, the legislature amended the statute to prohibit both males and females from engaging in sexual intercourse with persons less than fifteen years old. *Id.* at 705 n.3, (citing Colo. Rev. Stat. 18-3-403(1)(e)).
241. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981).
242. *Salinas*, 551 P.2d at 706 (emphasis added).



about logic. If Colorado sticks with the quoted language and embraces the implications, that state is way ahead of all federal and most state courts in enforcing the constitutional command of sex equality.

The second case is one of the most important decisions of any state Supreme Court in the equality arena. In *Colorado Civil Rights Commission v. Travelers Insurance Co.*, the Colorado Supreme Court in 1988 upheld a decision of the state Civil Rights Commission that for an insurer and employer to exclude the medical expenses of “normal pregnancy” in a group health insurance policy was sex discrimination.<sup>243</sup> This case is extraordinary both because of its relatively early vintage and its refusal, in the pregnancy context, to rely on shallow federal equality theory.

The decision was primarily based upon the Colorado discrimination statute that prohibits sex discrimination in the terms and conditions of employment. To hold that the state statute covered pregnancy discrimination, however, the Court had to reject the reasoning of the United States Supreme Court that neither the Equal Protection Clause of the 14th Amendment to the United States Constitution<sup>244</sup> nor Title VII of the Civil Rights Act of 1964<sup>245</sup> prohibited discrimination on the basis of pregnancy.

In *Travelers*, the Colorado Supreme Court acted with common sense and in accord with its authority as the ultimate interpreter of Colorado statutes and constitutional provisions. The Court took on the U.S. Supreme Court’s prior cynicism (with due regard to how Congress had reversed one of that Court’s decisions by amending Title VII), and put the prior illogic in logical perspective: “The argument that such a plan did not discriminate because all pregnant people are treated alike is refuted by the plan’s inherently discriminatory designation of the recipient class—the exclusion of all women from reimbursement for the costs of treatment of a physiological condition affecting only women.”<sup>246</sup>

The logic being corrected, the Colorado Supreme Court went on to write these important words:

Reliance on [the federal decision] is particularly inappropriate as a means of interpreting the provisions of [the Colorado

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243. *Travelers*, 759 P.2d 1358 (Colo. 1988) (*en banc*).

244. *Geduldig v. Aiello*, 417 U.S. 484 (1974); *accord* *Bray v. Alexandria Women’s Clinic*, 506 U.S. 264 (1993).

245. *General Electric v. Gilbert*, 429 U.S. 125 (1976). Congress reacted almost immediately to reverse the Supreme Court’s interpretation of Title VII by enacting the Pregnancy Discrimination Act of 1978. For a fuller analysis of the chain of events, see Ann Scales, *Towards a Feminist Jurisprudence*, 56 *IND. L. J.* 375 (1981).

246. *Travelers*, 759 P.2d at 1363.

anti-discrimination statute] in light of the fact that Colorado constitutional provisions provide additional prohibitions against sex discrimination not present in the United States Constitution . . . [The state ERA] prohibits unequal treatment based solely on circumstances of sex . . . and requires that legislative classifications based exclusively on sexual status receive the closest judicial scrutiny . . . The Equal Rights Amendment necessarily guides us in interpreting the requirements of [the statute].<sup>247</sup>

Note three aspects of this paragraph. *First*, Colorado has declared its independence from cramped federal notions of equality, which is made easier when the state constitution contains unique language. *Second*, the Court required the highest level of judicial scrutiny in ERA cases, whereas, of course, the federal courts require only “intermediate scrutiny” of sex discrimination claims brought under the federal Equal Protection clause. *Third*, the Court shows determination in making the ERA real when it says that the ERA “necessarily” guides it in interpretation of state statutes. This last item is a big deal because it is commonplace for other courts to interpret statutes deferentially when no constitutional questions are necessarily raised. There was no constitutional question in *Travelers*: rather, the Colorado Court expressed a *purposive* understanding of its job. It saw that because the voters have commanded sex equality, the Court is obliged to make it happen throughout Colorado law.

### 1. Rejecting Federal Law

*[I]magine a world in which there is no federal law.*

—Jennifer Friesen<sup>248</sup>

It is axiomatic that state courts, in interpreting their own constitutions are not bound by federal interpretations of similar provisions in the federal constitution. Federal constitutional provisions and interpretations provide only the “floor” beneath which state interpretations cannot fall. The Colorado Supreme Court has not been shy about declaring its independence from federal law.

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247. *Travelers*, 759 P.2d at 1363 (citations omitted).

248. FRIESEN, *supra* note 235, at 61.

As an example of the mean parsimony of federal constitutional law, consider another case out of the “Big XII” conference, *Jennings v. City of Stillwater*.<sup>249</sup> Ms. Jennings was allegedly gang-raped by four Oklahoma State University football players at a party in November of 1999. She admitted that she was intoxicated and that she may have consented to sex with one of the football players. She insisted, however, that she most certainly would not have consented to having sex with all four of them at the same time.<sup>250</sup>

Ms. Jennings sued the local police department for lax investigation of a criminal complaint against football players *because* they were football players.<sup>251</sup> The investigating officer—extraordinarily named Detective Buzzard—was a 1994 OSU graduate who had had an athletic scholarship. His cousin was OSU’s director of media relations. Though Buzzard interviewed the four football players separately, he may have allowed them to meet together before the interviews, and he never again questioned them. When he interviewed Ms. Jennings, he told her that “numerous people,” who turned out to be the football players themselves, contradicted her account. Detective Buzzard convinced Ms. Jennings to sign a “waiver of prosecution.”<sup>252</sup>

In his deposition, Detective Buzzard testified that he had never used a waiver of prosecution form in any of the other fifty rape investigations in which he had been involved, *none of which involved OSU athletes*.<sup>253</sup> There were a number of other failures to follow up on investigative leads, all of which privileged the football players’ unrecorded and perhaps previously agreed-upon accounts to Detective Buzzard. The local District Attorney declined to prosecute the athletes on any charges, based upon Detective Buzzard’s “work.”

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249. *Jennings v. City of Stillwater*, 383 F.3d 1199 (10th Cir. 2004).

250. *Jennings*, 383 F.3d at 1202.

251. Ms. Jennings settled her civil claims against the players and against Oklahoma State University. *Id.* at 1205. Otherwise, she might have had a statutory Title IX claim that would allow her to allege a “hostile educational environment” against the university, a claim that nominally does not require a showing of “intentional” sex discrimination. Of course, as explained *supra*, though the idea of a “hostile environment” claim in Title VII sexual harassment law coalesced around the point of view of the harassed, thus requiring no showing of intention on the point of view of the harasser, the U.S. Supreme Court in the Title IX context turned that completely around, requiring that the plaintiff show actual knowledge and deliberate indifference on the part of the institutional defendant, a requirement of showing intent if ever there were one.

252. Ms. Jennings retracted the “waiver of prosecution,” but signed a similar document later because of fear of the media and an unwillingness to meet her attackers in court. *Jennings*, 383 F.3d at 1202.

253. *Jennings*, 383 F.3d at 1200–01.

Ms. Jennings brought suit against the Stillwater, Oklahoma, police department on three federal theories: deprivation of procedural due process, denial of access to the courts, and deprivation of equal protection on account of sex. The district court granted summary judgment to the police department, and the Tenth Circuit affirmed.<sup>254</sup>

Here, I would like to address only Ms. Jennings' equal protection claim. Under present federal law, it could not be a "sex discrimination" claim. She could not claim that the police department investigated rapes of men but not rapes of women. Her claim was that the department gave special treatment to college athletes in the way it investigated *this* rape. This is the trap of "similar situation" in U.S. constitutional equality doctrine. The only relevant classification she could point to was "rape suspects who are OSU athletes" versus "rape suspects who are not OSU athletes." Under federal law, she was doomed.<sup>255</sup> Even if she could have gotten the federal court to acknowledge that distinction, only "rational relationship" scrutiny would have applied, and the police department could have invented innumerable reasons for treating this case differently.

Ms. Jennings and her lawyers, however, could not even get the panel of the Tenth Circuit to acknowledge that important distinction—between rape by athletes and rape by non-athletes. Instead, the Tenth Circuit panel went out of its way to call Ms. Jennings a slut. Look at what this panel *did* consider as the relevant points of comparison:

Nowhere in the over 550 pages of evidence submitted by Plaintiff to the district court does she supply *any* information regarding the allegedly similarly situated rape victims. What were the relative strengths of those cases? In how many was the victim's consent a central issue? Did other victims admit to being drunk? Did the rapes occur in a party setting? Did any other victim state that she would have trouble identifying the perpetrators? Were the other cases serial rapes where the victim admitted that she would have probably consented to sex with at least one of the suspects?<sup>256</sup>

As if the local authorities would have just have given up all those facts in civil discovery (particularly given privacy issues involved). As if the facts demanded were directly relevant to the claim of unequal preferential

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254. *Jennings*, 383 F.3d at 1200–01.

255. *Jennings*, 383 F. 3d at 1210.

256. *Jennings*, 383 F.3d at 1215 (emphasis in original).

treatment for football players, when the department had already admitted differential treatment by its investigator. Remember, the *Jennings* opinion resulted from a summary judgment motion. As a civil procedure teacher, I must add that this case was a disgraceful abuse of F.R.C.P. Rule 56.

Federal constitutional notions of “equality” allow this sort of stuff to go on. State courts can do much better.

## 2. Is it Sex Discrimination?

Ordinarily, in order for any state’s gender-protective constitutional provisions to apply, the plaintiff must show that the actions complained of constitute a denial or abridgement of rights “on account of sex.” In federal equal protection law, sex discrimination has generally been understood as a logical—almost mathematical concept—to wit, a requirement that what happened to this woman would not and even could not have happened if she had been a man.<sup>257</sup>

Rejecting cramped notions of federal constitutional law, state courts are free to understand big-time collegiate football as a deeply gendered institution. They are free to name specific policies and practices as sex discriminatory, if the evidence shows that a specific policy or practice is an instance of *unequal treatment based exclusively on the circumstance of sex, sexual stereotypes connected with gender, and culturally induced dissimilarities*, prohibited, for example, by the Colorado state Equal Rights Amendment.<sup>258</sup>

As a legal matter, such a recognition would entail at least one additional step beyond what Colorado has already actually held. In

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257. In the federal statutory context, that formalistic understanding of equality does not apply, not only because civil rights statutes (with the exception of Title IX) carry modes of proof by “disproportionate impact” without a showing of intention to discriminate, but also because even the United States Supreme Court is beginning to get feminist jurisprudence. In *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998), a unanimous Court allowed that a man could state a Title VII sexual harassment claim when he had worked in an all-male environment (there, an off-shore oil rig), without having to prove that either he or his harassers were gay. It was not the biological fact of his sex, nor any actual overtures for sexual conduct, but the *demeaning sexualized gendering* of the working environment that constituted the sex discrimination, of which sexual harassment is simply a subset. It didn’t matter that the co-workers might have treated a female roughneck the same way. It was about feminizing the plaintiff because of the co-workers’ needed to masculinize themselves. Unstated by the United States Supreme Court, but necessarily implied, is that there are gendered institutions and practices that produce unlawful sex discriminatory results, harmful to women as women and harmful to men as men, and harmful to gender equality.

258. See *People v. Salinas*, 551 P.2d 703 (Colo. 1976) (en banc).

*Travelers*, the Colorado State Supreme Court might be said simply to have rejected some silly logic. In that case, it said that discrimination on the basis of pregnancy by necessity entailed sex discrimination, because only women can get pregnant.

Of course, that “unique physical characteristics” stuff is not what is going on in the football situation. Rather, a case would typically be brought regarding a policy of protecting football players from investigation of or punishment for sexual offenses. Of course, the risks imposed by such a policy *could* befall male victims. It would be, however, relatively easy to prove that those risks fell hugely disproportionately on women.

Defense counsel in such a case would strenuously urge the state court to follow federal equal protection law, and require a showing of intent to discriminate (that is, in addition to “disproportionate impact,” no matter how great), in order to state a claim of sex discrimination.<sup>259</sup> But of course state courts are not bound by federal interpretations of the equal protection clause in interpreting their state constitutions’ clauses. Indeed, at least three states have expressly held that “disproportionate impact” on one sex is enough to state a claim under their respective ERA’s.<sup>260</sup>

I would not leave it at that. The risks presented are not about stilted logic, nor about statistics. They are about deeply gendered currents in institutions of violence. If the open secret isn’t exposed, the court will not see that football can be a special institution of enforced masculinity. Thus, in addition to introducing historical, sociological, and psychological evidence about the origins and effects of football, I would introduce evidence and make arguments about what *genderization* is and does, and how sexual assault is a key ingredient in that potent brew.<sup>261</sup> It is only there that the *raison d’être* of anti-discrimination law is illuminated. It is only there that a court could realize the full potential of a prior pronouncement that the state ERA

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259. *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 269 (1979) (upholding Massachusetts veterans’ preference in civil service statute against Equal Protection challenge even though it benefited an “overwhelmingly male class”).

260. Those states are Pennsylvania, Massachusetts, and Washington. *Cf. Snider v. Thornburgh*, 436 A.2d 593 (Pa. 1981); *Buchanan v. Dir. Div. Emp. Sec.*, 471 N.E.2d 345 (Mass. 1984) (acknowledging but not applying disproportionate impact theory); *State v. Brayman*, 751 P.2d 294, 303–05 (Wash. 1988) (*en banc*).

261. Here I would be taking a page out of the *Oncale* book, *supra* note 189. See particularly Brief for National Organization of Male Sexual Victimization et al as Amic Curiae Supporting Petitioner, *Oncale v. Sundowner Offshore Servs.*, 253 U.S. 75, 81 (1998) (authored by Catharine A. MacKinnon, available at 8 UCLA WOMEN’S L.J. 9 (1997)).

prohibited "*sexual stereotypes connected with gender, and culturally induced dissimilarities.*"

### *C. Applying the State Constitutional Provisions*

Assuming a court has found football policies and practices to be forms of sex discrimination, the next steps would be for the institutional defendant to attempt to justify the policies or practices of the football program which have been identified as risky. The state interests in having those practices and policies would be connected through the notion that the "big-time" football in general, that the resources devoted to the football program, and that the specific practices and policies of the football program and university are all necessary to that specific university's educational mission.

No one contends that a university exists solely for the life of the mind. The propriety in the curriculum of "physical education," a term that came into political currency with the Presidency of John Kennedy, is not a matter of dispute among educators. In the broadest sense, physical education is not just about health, but about the joy of physical competence, and the intellectual, emotional, and spiritual empowerment that comes with that. Excellence in athletics can bring something like transcendence to an individual, as many athletes attest. Since women have historically been denied the training in educational institutions that get them to such a level, it is marvelous that Title IX's command of equal educational opportunities extends to athletics.

That basic notion of physical education doesn't apply to football, however, because, though the rosters are disproportionately large compared to other college sports, the real numbers of students who can get to that level are disproportionately very small.<sup>262</sup> Organized football at the level of Division I-A college play—and even at many high schools—requires such expenditures and physical minima per player, that it is extraordinarily unlikely that anyone's son will ever play it. This is one characteristic by which we can designate college football a "hegemonic" sport. There are proportionately few players; most are followers, watchers, internalizers of the spectacle. Thus, university justifications for having big-time football cannot proceed from the point

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262. Only 6 or 7% of high school football players every play in college. Roughly 8% of all draft-eligible college football and basketball players are drafted by the pros, and only 2% ever sign a professional contract. MICHAEL A. MESSNER, *POWER AT PLAY: SPORTS AND THE PROBLEM OF MASCULINITY* 45 (1992).

of view of physical education. The university justification must proceed from the point of view of what football does for the university.

As noted before, the Colorado Supreme Court has stated that strict scrutiny applies to challenges under the state Equal Rights Amendment, as a majority of state courts interpreting their ERA's have done.<sup>263</sup> I have attempted to imagine the "compelling state interests" that the state would introduce in defense of the football program as it is. There could be other interests, but I believe they boil down to some version of these three. Because none of those interests actually holds water as "compelling," I will not devote a separate section in this Article to whether or not any such state interest could meet the second part of the strict scrutiny test, that is, whether the football program as it is the least drastic alternative to achieve those state interests.

### 1. The State Interest in Revenue Production

Though no one denies that football is infernally expensive,<sup>264</sup> defenders of big-time football offer that on balance it is a "revenue producer" for the university, or at least that it is subsidizing other sports. That position is usually wrong. Some football programs are profitable, but most big-time college football programs require universities to cannibalize general university funds to make up for football deficits. And most universities cook the books to make football look profitable. It is often done by putting police protection and parking for games, general department utilities and maintenance, and, most importantly, debt service on athletic facilities on the university's tab, and then by "zeroing out" the athletic department budget at the end of each fiscal year.<sup>265</sup>

Far more importantly, the profit discussion is constitutionally irrelevant. In traditional universities, both public and private, no individual departments are expected to make money. In the football situation, however, profit-making is presented as a defense to sex discrimination. Under the constitutional challenge that I propose, this popular defense would have to be explicated further. First, the

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263. Wharton, *supra* note 222, at 1239–47.

264. For example, when sometime football power Wisconsin played in the Rose Bowl in 1999, it got a total of \$1.8 million in television royalties and other fees, but the school had almost \$2.1 in expenses, including a traveling party of 832 people to the game. SPERBER, *supra* note 159, at 222. Professor Sperber reports that, in the year he published his book, even the mighty Michigan football program ran a deficit. *Id.* at 220.

265. SPERBER, *supra* note 159 at 220–22.



institution would have the burden to convince a court that profit should ever be a defense to educational discrimination, i.e. that the profit was so fundamental to the educational mission as to constitute a “compelling” interest. Second, the institution would have the burden of showing that its football program *actually* makes money, with close attention given to university budgetary strategies. Third, the institution would have the burden of showing that the funding defense is the “least drastic alternative”—that the institution has no other means whatsoever to accomplish its educational (or even athletic) goals. I do not think it would be factually possible for any university to meet that burden.

## 2. The State Interest in Group Cohesion: Something to Cheer and Talk About

Unquestionably, big-time college sports induce a sort of cohesion. I admitted early in this Article about being a thrilled kid at Oklahoma football games. Several family members who live in Oklahoma still attend the games, and enjoy them as gargantuan social occasions. Other than seeing old friends, however, what were we thrilled about? What are we doing there? I think the interest in group cohesion breaks down, more or less, into a spectrum of interests, some very positive and some not so positive, that would come into a full discussion of the role of football in college life.

First, football can be a beautiful thing to observe. Like any physical feats well-executed by talented athletes, it can be breathtaking in its power, speed, grace, and of course, well-coordinated plans. These guys are good. But the collective experience of football isn't primarily about the planning and kinetic amazement, any more than “Playboy” is about the interviews.

Second, more importantly, is something clumped under the rubric of “school pride.” When it is time for the big game, students bond together among themselves and with the larger community of faculty, administrators, alumni, and sometimes troubling, the “boosters.”<sup>266</sup> Under this theory, they all have fun together and scream their heads off in a collective demonstration of school spirit. It is not altogether clear what this actually means for these various groups.

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266. Part of the bonding, of course, is to give students and alumni something to talk to each other about. It sometimes strikes me as an example of Kurt Vonnegut's invented category, the “granfalloon,” “a seeming team that [is] meaningless in terms of the ways God gets things done.” KURT VONNEGUT, *CAT'S CRADLE* 91 (2006) (1963).

As I explained at length above, the gendered nature of football itself is a bizarre and potentially destructive message to male and female fans and athletes alike.<sup>267</sup> More generally, Professor Sperber's research indicates that students are veritably schizophrenic about their big-time sports teams. They are sophisticated and cynical about what really goes on. They resent the special treatment given to (and particularly special admission standards for) athletes, resent as well the special treatment given to alums and donors when the students themselves can't get tickets to athletic events. But those same students go nuts for their teams, at least while those teams are winning. At what point, Professor Sperber asks, does this student "double-think" turn into an inability to distinguish between reality and fantasy?<sup>268</sup> I would put the problem more specifically: big-time sports are a very direct lesson to students that institutions can purport to do one thing, but actually do something very different. Not exactly the best civics curriculum.

In addition, students and others should also inquire into how much they are being manipulated by big-time spectator sports. Early in the political philosophy fundamental to the American Republic, Adam Smith extolled sports as a mechanism to check the power of fanatical religious sects.<sup>269</sup> From those political philosophies through neo-Marxist accounts of sport, theorists have postulated that sports siphon off political discontent that might otherwise lead to serious challenges to the status quo.<sup>270</sup> An important criticism of college sports is to the same effect: big time sports detract from the fact that many

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267. The gendered aspect of fandom is described in NICK HORNBY, *FEVER PITCH* 22–23 (1992), about the author's lifelong obsession with the U.K. football (soccer) club Arsenal. In a narrative of relative joylessness, Hornby embraces the great benefit of instant camaraderie with other males:

And yes, I am aware of the downside of this wonderful facility that men have: they become repressed, they fail in their relationships with women, their conversation is trivial and boorish, they find themselves unable to express their emotional needs, they cannot relate to their children, and they die lonely and miserable. But, you know, what the hell? If you can walk into a school full of eight hundred boys, most of them older, all of them bigger, without feeling intimidated, simply because you have a spare Jimmy Husband [soccer trading card] in your blazer pocket, then it seems like a trade-off worth making.

*Id.* That trade-off may turn sour in the long run. MESSNER, *supra* note 262.

268. SPERBER, *supra* note 159, at 241–43.

269. GORN & GOLDSTEIN, *supra* note 43, at 13.

270. *Id.*; T.R. Young, *The Sociology of Sport: Structural Marxist and Cultural Marxist Approaches*, 29 *SOCIOLOGICAL PERSPECTIVES* 3 (1996).

universities have consistently diverted resources away from undergraduate education.<sup>271</sup>

Finally, there are downsides to the screaming crowds. For all that universities do to put a happy face on the enterprise, football games can be very scary. There is loss of individuality in a group endeavor; there is that moment when the group becomes a collective being. Both of these can be good things. But the group can also become a monster. An unthinking thing. A thing that becomes sure of its own invincibility.

We like to think that the violence that can emerge from the monster morph is confined to the horrific soccer riots of the last decade or so.<sup>272</sup> But it isn't. It is also the thing that causes increased sexual assaults and property damages after The Big Game at many U.S. colleges—enhanced when the home team wins.<sup>273</sup> A blind faith in invincibility is the stuff of historic tragedies, and it has to be learned somewhere. Discerning the difference between courage and recklessness (that Aristotle urged as a fundamental virtue) must be one of the primary aims of education.

Under a state constitutional strict scrutiny standard, this state interest in providing something to cheer and talk about must be compelling. In the largest possible sense, of course it is. Student engagement in their educational experience means everything. But, keeping in mind that the burden is on the defendant to show that the compelling interest cannot be achieved in a less discriminatory way, this interest, as well, will fail to pass constitutional muster. Providing students something to cheer and talk about could be accomplished by far less risky athletic endeavors, not to mention by providing a first-rate education.

### 3. The State Interest in Catharsis

I suspect that, at some level, conventional wisdom always falls back on the idea that big-time college sports are otherwise harmless

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271. SPERBER, *supra* note 159.

272. See generally STEVE FROSDICK, FOOTBALL HOOLIGANISM (2005).

273. Miranda Hitti, *Sports Fan Violence Follows Victory: When Favored Team Wins, Sports Fan Violence Rises*, WEBMD MEDICAL NEWS (March 30, 2005), <http://men.webmd.com/news/20050330/sports-fan-violence-follows-victory>; see also JERRY M. LEWIS, SPORTS FAN VIOLENCE IN NORTH AMERICA 85–104 (2007); JOHN H. KERR, RETHINKING AGGRESSION AND VIOLENCE IN SPORT 94–113 (2004).

amusements<sup>274</sup> that allow young people who are otherwise busy getting educated to “let off steam.” Education is about socialization and discipline, so this argument goes, about learning conformity Monday through Friday. Football weekends are when players and students (and alumni and boosters) converge to let their hair down to express emotions and perform behaviors that they may be unable to express and perform at other times.

The *catharsis* argument should be of particular interest to institutions of higher learning, given its classical pedigree. Plato and Aristotle disagreed about the effects of imitative spectacle (writing specifically about poetry, comedy and tragedy). Plato decried the corrupting effect of all *imitation* of human experience on consumers, regardless of the greatness of the imitators. For the great idealist Plato, life was a journey from illusion to reality, and every imitation of life increased the difficulty of the journey. Depictions of cruel acts, for example, were diversions and temptations to cruelty.<sup>275</sup>

Aristotle, on the other hand, wrote that viewing tragic plays (structured imitations of acts of cruelty, violence, and despair) could have a purgative effect:

Tragedy is an imitation of an action that is serious, complete, and possessing magnitude; in embellished language, each kind of which is used separately in the different parts; in the mode of action and not narrated; and effecting through pity and fear [what we call] the *catharsis* of such emotions.<sup>276</sup>

Though Aristotle promised to explain the concept of *catharsis*, he never systematically did so. Scholars disagree about what the concept means in the larger context of his philosophy—of particular relevance here, to his philosophy of the education of responsible citizens.

I am not a classicist, but understand the disagreement as one about thick and thicker versions of *catharsis*. The less-thick version would hold that it appears to be only the “relief that comes from giving way to the emotions in an intense emotional experience . . . a temporary psychological effect without moral consequences.”<sup>277</sup> In the thicker version, scholars focus on the specificity of the emotions pity

274. George Will, *April: Please Come Soon*, NEWSWEEK, Mar. 27, 2006, at 68 (referring to NCAA “March Madness” basketball tournament as part of “public stock of harmless pleasure”).

275. 10 PLATO, THE REPUBLIC § 605 (Allan Bloom, trans., 1968) (380 B.C.); SISSELA BOK, MAYHEM: VIOLENCE AS PUBLIC ENTERTAINMENT 40–41. (1998).

276. ARISTOTLE, THE POETICS § 1449b (James Hutton trans, 1982) (335 B.C.).

277. *Id.* at 89 (notes by translator).

and fear,<sup>278</sup> and the “proper purgation” of them.<sup>279</sup> In this view, *catharsis* is a “schooling of the emotions and a deepening of one’s understanding of human nature and of the paradoxes relating to the role of violence in human life.”<sup>280</sup> It is a moral experience available only to those mature enough to confront it.<sup>281</sup> In my view, that version of *catharsis* is fundamental to education in citizenship and mature moral life.

Note, however, in neither view is *catharsis* the gruel-thin, essentially liberal notion implied by the phrase “letting off steam.” For Aristotle, expressing emotion is not expression of emotion for expression’s sake, willy-nilly. Unlike some contemporary civil libertarians, Aristotle did not say that all expressions are inevitable, so we should give up on their content and frequency. As another classical scholar noted, the Athenians would not indulge in a daily diet of imitative spectacle lest they suffer “emotional dysentery.”<sup>282</sup>

I’ll admit it: at no point in his complete works does Aristotle ever mention American college football.<sup>283</sup> I apologize to classical scholars who regard the leap from tragic theater to American football as illegitimate on its face. I focus on the concept of *catharsis* because, as above, I believe some watered-down version of it has been the primary justification for big-time intercollegiate sports. And thus, I am in agreement with Sissela Bok who, writing about the perpetual diet of violence fed to young people by the U.S. media (in sports as well as

278. “Let fear, then, be a kind of pain or disturbance resulting from the imagination of impending danger, either destructive or painful.” ARISTOTLE, *THE ART OF RHETORIC* § 1382a (H.C. Lawson-Tancred trans., 1991) (4th cen. B.C.). “Let pity then, be a certain pain occasioned by an apparently destructive evil or pain’s occurring to one who does not deserve it.” *Id.* § 1385b. Note that these definitions require the capacity to make complex judgments, among other things, of what is impending, what is danger, what is pain, what is evil, and what it is to deserve or not to deserve evil or pain.

279. ARISTOTLE, *THE POETICS*, Chapter 6, 1449b, tr. S.H. Butcher, in WALTER JACKSON BATE, *CRITICISM: THE MAJOR TEXTS* 22 (1970).

280. BOK, *supra* note 275, at 43.

281. *Id.*

282. ARISTOTLE, *POETICS* xiii, tr. W. Hamilton Frye (1973) (translator’s introduction) (quoted in BOK, *supra* note 275, at 167 n. 72).

283. Aristotle warns of the dangers of over-athleticism in education (with a jab at Sparta):

Nobility of character, rather than ferocity of temper, should take pride of place. . . . To let youth run wild in savage pursuits, and to leave them untrained in the disciplines they really need, is really to degrade them into vulgarity. It is to make them serve the statesman’s purpose in one respect, and one only; and even there, as our argument shows, it is to make them of less service than those who have been differently trained.

ARISTOTLE, *THE POLITICS* § 1338b9 (Ernest Barker trans., 1995) (4th cen. B.C.).

other entertainment packaging), insists that we take a closer look at the effects of that diet.

Every part of the “letting off steam” argument is demonstrably false. For one thing, it implies that excessive expressions and performances on football weekends are somehow reduced at other times. Teachers at the big-time universities are fully aware, however, of the phenomenon of the “perpetual weekend.” Students miss classes and/or are hungover through each day of each athletic season.

More importantly, the “letting of steam” argument accepts the Freudian premise that violence is instinctual and unavoidable: it is inherent within our species and must be discharged periodically. The instinct theory of aggression is a hotly contested, now highly nuanced debate. In any case it seems both irresponsible and dangerous for educational institutions implicitly to accept it in defense of athletics. First, it promotes the idea that one way to prevent violence is to expose people to non-lethal alternatives to criminal or military violence, such as football.<sup>284</sup> There are no data I have found to support such a view. In one cross-cultural study on the subject, Professor Richard Sipes found that societies that played the most combative, physically violent games also engaged in the most warfare. The forms of violence reinforce each other.<sup>285</sup> Moreover, the instinct theory enables those who wish to escape responsibility, and discourages education for those who might be helped by recognizing that their violent expressions are a cover for unacknowledged and unmet needs.<sup>286</sup> Finally, the evidence to date overwhelmingly suggests that the theory is simply untrue. Football doesn’t reduce violence. As noted sports historian Allen Guttmann put it, with obvious regret:

It is a great pity that the catharsis theory is invalid. There is some evidence to indicate that the players themselves are less aggressive after the game than before the kickoff, an effect which may result mostly from the enormous amount of energy expended during the actual encounter, but there is a rare consensus among psychologists apropos of the alleged catharsis experienced by the spectators.<sup>287</sup>

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284. GILLIGAN, *supra* note 149, at 212.

285. *Id.*; see also Richard G. Sipes, *War, Sports and Aggression: An Empirical Test of Two Rival Theories*, 75 *AM. ANTHROPOLOGIST* 64 (1973).

286. GILLIGAN, *supra* note 149, at 213.

287. GUTTMANN, *supra* note 48, at 131, 180–81 (citing studies agreeing that catharsis theory is invalid).

It is a pity indeed that the catharsis theory is invalid, that our species has not developed some reliable way to stop itself from aggressive behavior. If the catharsis theory held any water as a theory, and football could be shown by the state to be a reliable conduit for its realization, it would surely be a compelling state interest. As it is, the state interest is illusory.

Again, I need not go into the second part of the constitutional test—whether there is any less drastic alternative to achieving this state interest—because illusory state interests cannot even rationally be advanced by any state practice.

#### *D. Realistic Remedies*

If a court were to entertain this serious ERA challenge, the most difficult question would not be whether big-time football “as is” violates the state ERA. The real challenge for the plaintiffs would be convincing the court to do something serious about it.

Unless a plaintiff in a sexual harassment case—even in a sexual assault case—suffers serious medical injuries, her consequential damages awards are not likely to be large.<sup>288</sup> In any case, in my experience, plaintiffs are not primarily concerned about money, nor even about retribution. They want something done about what happened to them, so that it doesn’t happen to other women. Monetary deterrence is fine, but serious injunctive relief is the as-yet unachieved litigation goal.

In Section III.D, *supra*, I described what appears to be an emerging doctrine in Title IX sexual assault cases, that individual plaintiffs cannot seek injunctive relief. A state court in a suitable state constitutional action would not have to confront those difficulties. Rather, the questions would be the usual ones. First, is injunctive relief appropriate, and second, what should the specific terms of the injunction be?

Judges and lawyers in the U.S. have too-long and rather thoughtlessly relied upon the centuries-old rule that injunctive relief should be available only when legal remedies are “inadequate.”<sup>289</sup> For some sorts of injuries, damages are *always* inadequate. The deprivation of a civil

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288. One study of damages awarded in sexual harassment cases in the employment context concludes that there is a “high degree of randomness in both compensatory and punitive awards,” and found that the median total award was only \$105,000. Cass R. Sunstein & Judy M. Shih, *Damages in Sexual Harassment Cases*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW*, *supra* note 119, at 337.

289. See generally OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978); DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* (1991); Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990).

right is the classic example of an irreparable injury<sup>290</sup> for which compensatory damages are inadequate. In such cases, injunctions regularly issue, whether or not there is an accompanying claim for damages. As Professor Douglas Laycock notes, “[w]hat defense lawyer would argue [the absence of] irreparable injury in *Brown v. Board of Education*, *Reynolds v. Sims*, or a prison conditions case?”<sup>291</sup> Students will graduate and most prisoners will complete their terms. Are their constitutional interests not worth vindicating in the meantime? And why would any or all systematic risks of sexual and educational harms to women be less compelling than school desegregation, legislative apportionment, or prison conditions?

When it comes to issuing a meaningful injunction limiting any part of a football program, I think that the real obstacle would be courts’ thorough acculturation within our hegemonic sports culture. In such cases, as Professor Laycock says, it could be that “courts prefer legal remedies because they are less effective—not because they are adequate, but *because they are inadequate*.”<sup>292</sup> That is what seems to be happening in those Title IX sexual abuse cases where federal courts say plaintiffs cannot seek injunctions.

The overarching principle is that injunctions must be sufficiently precise to enable those subject to it to conform their conduct to its requirements.<sup>293</sup> Indeed, much of the clamor against injunctive relief in general has been based on the argument that it requires courts to “make predictions about the future, and these judgments are widely assumed to be treacherous, fraught with error.”<sup>294</sup>

That argument is exaggerated, because the injunction is designed to prevent a future harm, “conditioned upon a showing that there is a probability (of some indeterminate magnitude) of that future wrong’s occurring.”<sup>295</sup> The proposed terms of any injunction simply present informational problems. In the case I hypothesize, the plaintiff would

290. That was one reason—that equality is priceless—why I’ve argued that sexual harassment law should not be conflated with tort law. Scales, *supra* note 96, at 307.

291. Laycock, *supra* note 289, at 702.

292. *Id.* at 743 (emphasis added).

293. Fiss, *supra* note 289, at 80. Colorado law intones the usual admonition that equity will not intervene when legal remedies are adequate, an admonition that seems to be applied primarily with respect to preliminary injunctive relief. *See, e.g.*, *Am. Investors Life Ins. Co. v. Green Shield Plan*, 358 P.2d 473, 476 (Colo. 1961); *Brennan v. Monson*, 50 P.2d 534, 536 (Colo. 1935); *McLean v. Farmers Highline Canal & Reservoir Co.*, 98 P. 16, 20–21 (Colo. 1908). On the other hand, Colorado recognizes trial courts’ wide discretion to allow injunctive relief in diverse circumstances. *See, e.g.*, *Colo. Springs Bd. of Realtors, Inc. v. State*, 780 P.2d 494, 498 (Colo. 1989).

294. Fiss, *supra* note 289, at 80.

295. *Id.* at 81.



already have to have shown some specific aspects of a football program that led to her harm, and that threaten to present similar harms in the future. The remedy needs to put women in the place they would have occupied in the absence of unconstitutional sex discrimination.

For example, in her original Title IX complaint, the plaintiff in *Simpson v. University of Colorado* sought broad injunctive relief. She originally requested an order that CU undertake programs:

(1) instituting and enforcing a comprehensive sexual harassment policy, with the assistance of outside experts, and *enforcing* a comprehensive sexual harassment policy that encompasses the Athletic Department and the football program, and includes procedures for effective reporting of sexual harassment incidents, effective and immediate crisis response, and expanded victim assistance and protection; (2) adopting binding and *enforceable* rules and regulations for its football recruiting program that include, without limitation, curfews on recruits and their student hosts; non-student adult supervision at all recruiting events, parties, or other gatherings; sexual harassment training for players; student host training and education; distribution of written policies to visiting recruits stating prohibited activities and conduct and the *consequences* for violations; (3) adoption of a ‘zero tolerance policy’ under which there will be expedited proceedings and *punishment proportional to the offense* for violations of sexual harassment and recruiting policies; and (4) an annual, independent review by the Chancellor’s office, with the participation of outside reviewers, of Athletic Department compliance with the sexual harassment and recruiting policies.<sup>296</sup>

The eventual settlement<sup>297</sup> provided far less: (1) for the appointment of a “Title IX Advisor” for a five-year term, whose recommendations would be considered “in good faith” by the University; (2) for clarification to the community about how to contact him/her; and (3) for the appointment during an undisclosed term of a “mutually agreed upon person” to serve as an independent advisor on Title IX compliance. Again, that person’s recommendations are for

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296. Amended Complaint, *supra* note 27. Prayer for Relief, ¶ B (emphasis added).

297. In fairness, however, we should keep in mind that the University had “voluntary” amended some of its recruiting policies well prior to settlement of the lawsuit. *See supra* notes 77 and 81.

consideration only. This last may be most significant, as the mutually agreed-upon person is Professor Nancy Hogshead-Makar, a three-time Olympic medalist and expert in Title IX law.<sup>298</sup>

Missing, most obviously, are *guarantees* to adopt new rules, provisions for *enforceability* of the rules, and glaringly, the matters plaintiff had requested in the third paragraph of her injunctive prayer: zero-tolerance policy for sexual harassment, and expedited proceedings and proportional punishment for same. That's where the teeth are, in forcing universities immediately to get offending players off the field. Perhaps Professor Hogshead-Makar can make that happen. All power to her.

In litigation of injunctive relief, a court would undoubtedly first ask a defendant university to propose a compliance plan. It seems absolutely critical in such cases that a court's willingness to use injunctive power should be proportionate to the university's demonstrated history of recalcitrance and deceit. Consider the CU case. There was ample proof of years of resistance to reforming the football program to protect women's safety, of athletic department cover-ups of sexual misconduct by football players, and of the imposition of minimal punishments for serious allegations of sexual assault by players.<sup>299</sup> Moreover, with echoes of Mike Nifong's conduct in the Duke lacrosse case, counsel for the university engaged in what appears to be a grievous course of withholding evidence during the resultant litigation.<sup>300</sup> In such circumstances, courts fashioning injunctive relief should be less

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298. Allison Sherry, *Critic of CU Hired to Guide Title IX Effort: The Respected Expert Will Help Ensure That Women Are Safe from Violence and Discrimination*, DENVER POST, Mar. 11., 2008, at A1. Professor Hogshead-Makar has also been hired by the University of North Carolina-Chapel Hill to advise on Title IX compliance after settlement of the recent case concerning the behavior of the women's soccer coach. *Id.* Among Professor Hogshead-Makar's academic works in the area, see *A Critique of Tilting the Playing Field: Schools, Sports, Sex and Title IX*, 13 UCLA WOMEN'S L.J. 101 (2003) (reviewing JESSICA GAVORA, *TILTING THE PLAYING FIELD: SCHOOLS, SPORTS, SEX AND TITLE IX* (2002)); *Is Title IX Really to Blame for the Decline in Intercollegiate Men's Nonrevenue Sports?*, 14 MARQ. SPORTS REV. 65 (2003) (with Daniel R. Marburger); *Intercollegiate Athletics' Unique Environments for Sexual Harassment Claims: Balancing the Realities of Athletics with Preventing Potential Claims*, 13 MARQ. SPORTS REV. 173 (2003) (with Sheldon Eliot Steinbach).

299. See *supra* text accompanying notes 29–41.

300. During discovery and even after summary judgment, CU concealed evidence of sexual assaults by football players of two female trainers and one female "ambassador." Appellants' Opening Brief [Redacted], *supra* note 28, at 32–33; During a hearing on a Motion to Compel this evidence, counsel for the University lied about having it. *Id.* at 35. It is difficult to imagine what evidence could be more directly probative of the Title IX standards of "actual knowledge" of and "deliberate indifference" to the risks presented by football players.

willing to grant leeway to the university in proposing, and particularly in proposing to *self-monitor*, a compliance plan.

Facing a recalcitrant institution, a judge might get its attention by ordering the dismissal of coaches and athletic department officials, suspending the football program temporarily, or requiring dissociation of the football program from the NCAA. Indeed, the court could use any of the remedies that the NCAA could use—that organization has no legal monopoly on the sorts of interventions that athletic programs have come to understand.<sup>301</sup>

In any and all cases, the injunction has to be more than cosmetic, more than appointing experts whose recommendations may or may not be followed. Again assuming the facts, insofar as they are known, of the CU case, the underlying problem is the structure and governance of the football program. Shouldn't an injunction in some sense aim to defuse the hyper-masculinization of the football team, beyond prohibitions of rape in a code of student conduct manual and an hour-long seminar on date rape? I believe there are three essential changes that are well within a court's power to order.

First, the injunction must focus on non-discretionary *enforcement* of policies against sexual harassment and assault. For example, as discussed in Section III.B. *supra*, university policies must be consistent regarding both criminal charges and the absence of criminal charges. Ideally, the policy should be that if a player is accused of sexual harassment or assault, but that person is not indicted, there should nonetheless be an independent university investigation to determine compliance with the university sexual harassment code. If that person is indicted, he should be suspended from play pending trial. If he enters a guilty plea or a no contest plea or is convicted, he should be expelled. If he is acquitted, he should be reinstated. There must be very little room for university discretion in applying such rules, and they have to be made tamper-proof.

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301. In addition, if a university's governing body were to take some similar dramatic measures, a court would probably back it up. See *Sigma Chi Fraternity v. Regents of the Univ. of Colo.*, 258 F. Supp. 515 (D. Colo. 1966). In that matter, the Regents put the fraternity on probation—suspending rushing and pledging privileges—due to the CU chapter's failure to condemn the racially discriminatory policy of the national organization. Interestingly, Sigma Chi raised a mootness challenge because the CU chapter had sent a letter terminating its national affiliation; the court rejected that argument. *Id.* at 522–24. The court went on to uphold the Regents' power to discipline Sigma Chi, and cited with approval a case where a Board had abolished a fraternity altogether. *Id.* at 526–27.

Second, that enforcement—including decisions about players can participate in upcoming games—must be taken out of the hands of coaches and athletic directors.

Third, coaching responsibilities need to be reexamined, and contracts configured—even by court order—to vest responsibility for player sexual misconduct. There is no such thing as a standardized college coaching contract. Colleges utilize a wide variety of approaches in describing their abilities to fire a coach “for cause.”<sup>302</sup> For example, Gary Barnett’s CU contract had a relatively narrow set of “for cause” definitions. The contract would have expired on July 31, 2007. When CU wanted to get rid of Barnett at the end of the 2005 season, the only relevant contractual “for cause” term was to fire Barnett for “[a]ny conduct of Coach Barnett during the term of this agreement that leads to his conviction under any criminal statute or for moral turpitude.”<sup>303</sup> Loose drafting problems did not help when CU claimed it was firing Barnett for cause, and Barnett claimed CU was in breach of contract. In such situations, coaches seem more willing than universities to air the dirty laundry in court.<sup>304</sup> Thus, CU paid Barnett \$3,000,000 in exchange for his agreement not to file a breach of contract suit.<sup>305</sup>

A few college contracts presently provide bonuses to coaches when their players don’t get in trouble. Might a court order a university to institute a contractual floor for coaching responsibility? Serious training and supervision of players with regard to sexual assault could be one such provision.<sup>306</sup> And surely, coaches could be contractually

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302. Martin J. Greenberg, *Termination of College Coaching Contracts: When Does Adequate Cause Exist to Terminate Exist and Who Determines Its Existence?*, 17 MARQ. SPORTS L. REV. 197, 255 (2006).

303. Amended and Restated Employment Agreement between Gary Barnett and the University of Colorado, ¶ 21(b)(ii) (Mar. 18, 2003) (on file with author).

304. Greenberg, *supra* note 302, at 256. As an illustration of this principle, Mr. Greenberg describes the matter of the former CU coach, Rick Neuheisel, and his separation from the University of Washington football program for having participated in an NCAA “March Madness” office pool, in violation of NCAA rules. Mr. Neuheisel subsequently received \$4.7 million in settlement. College coaching contracts typically do not provide that coaches will be let go for losing. *Id.* at 231–35.

305. Settlement and Release of Claims between Gary Barnett and the University of Colorado, ¶¶ 6, 10 (Jan. 24, 2006) (on file with author).

306. When pushed to explain why football programs don’t have more rigorous sexual assault rules, it is typical for football apologists to say that those are disciplinary problems that have no direct effect on the game. For example, a former National Football League employee assistant program director stated that, “[g]ambling and drug [disciplinary] policies were instituted because they have a direct and detrimental effect on the game itself . . . . But this domestic violence thing is different. It’s a society thing and there are laws that govern it.” Bill Brubaker, *Violence in Football Extends Off Field*, WASH. POST, Nov. 13, 1994, at A1. Never mind that drugs and gambling are

bound by a provision that they will be fired for cover-ups or interfering in investigations of sexual assault. I see that constitutional challenges would be raised, but courts have all manner of ways to make it happen.

### CONCLUSION

Most plaintiffs' civil rights lawyers rejoiced, at least momentarily, upon hearing that the University of Colorado settled with the women who had brought the Title IX claim against the University for the sexually-assaultive behavior of its football team and recruits. The pattern was so familiar. The University got summary judgment. After strenuous efforts on the parts of many lawyers, a federal appellate court was convinced that maybe, somehow, there could be some facts in dispute on which a jury could shed light, even when a great college football team's reputation was at stake.

The University decided not to go to trial. There was a lot of evidence that it could not risk becoming public. But of course, in settlement, the University denied all liability, sealed all that evidence, and probably won the public relations war. The plaintiff walked away with some public acknowledgment, a paper victory, and a few bucks (including pennies on the dollar for her paid attorneys, as opposed to the University's outside counsel, who apparently received \$3,000,000). Every civil rights lawyer knows what I'm talking about.

Perhaps Title IX law is changing, but only in allowing plaintiffs to get past summary judgment, after expensive discovery and pre-trial motions stages. Very few plaintiffs will have the resources to get that far, particularly given the Title IX burden on the plaintiff to show the subjective indifference of institutions to risks of sexual assault. The damages paid and defense attorneys' fees expended while dragging plaintiffs out past summary judgment and appeal are chicken-feed, meaningless compared to the University's allegiance to big-time sports. Moreover, Title IX plaintiffs cannot, to date, achieve significant injunctive relief against educational institutions, or at least not injunctive relief that will matter over the long run. Universities have nothing, really, to fear from Title IX.

Neither the NCAA nor member institutions, under present circumstances, will provide much help. Plaintiffs in these situations should engage state constitutional provisions that prohibit sex dis-

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"society things" and there are many laws that govern them. In any case, if serious sexual assault policies really wouldn't affect the game, why not have them?

crimination in order to seek serious and specific injunctions against the universities, athletic departments, coaches, and programs that present risks of harms to women. State constitutional provisions are an underused resource. A challenge under some such provisions would take the issues out of the realms of half-baked stock arguments and stilted legal categories, possibly even to examine what equality actually can mean in the university setting. ❧

