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THE STRUGGLE FOR SEX EQUALITY IN SPORT AND THE THEORY BEHIND TITLE IX†

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Title IX's three-part test for measuring discrimination in the provision of athletic opportunities to male and female students has generated heated controversy in recent years. In this Article, Professor Brake discusses the theoretical underpinnings behind the three-part test and offers a comprehensive justification of this theory as applied to the context of sport. She begins with an analysis of the test's relationship to other areas of sex discrimination law, concluding that, unlike most contexts, Title IX rejects formal equality as its guiding theory, adopting instead an approach that focuses on the institutional structures that subordinate girls and women in sport. The Article then elaborates upon and offers a justification for the theory of equality underlying Title IX's three-part test. To support this theory, the Article surveys existing feminist legal scholarship on sport and identifies a need for an analysis of women's position in sport that goes beyond a debate over assimilation versus accommodation, to analyze how educational institutions participate in the construction of sport as a fundamentally masculine domain. To fill this void, the Article explores in detail the processes through which educational institutions construct the different relationships of men and women to sport, through their control over athletic opportunities and the culture of sport. Finally, Professor Brake takes this theory and applies it to other aspects of Title IX law, advocating specific doctrinal reforms that would make Title IX's overall application to athletics more consistent with the theory articulated in this Article.

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INTRODUCTION

Title IX is a federal statute that prohibits sex discrimination in education programs and activities that receive federal funding.[1]

1. 20 U.S.C. § 1681 (1994). This Article focuses on Title IX because it is the primary legal mechanism that purports to provide redress for discrimination against girls and women in sport. One disadvantage of this focus is that it does not address athletic opportunities outside of education programs, which may offer alternative visions of sport beyond the relatively elite and exclusive opportunities offered through schools and colleges. *See* Susan Birrell & Diana Richter, *Is a Diamond Forever? Feminist Transformations of Sport*, *in* WOMEN, SPORT, AND CULTURE 221, 241–42 (Susan Birrell & Cheryl L. Cole eds., 1990)

Although the statute itself says nothing about athletics, or any other specific type of educational activity, it has precipitated a virtual revolution for girls and women in sports. Title IX has paved the way for significant increases in athletic participation for girls and women at all levels of education. Since the enactment of Title IX, female participation in competitive sports has soared to unprecedented heights. Fewer than 300,000 female students participated in interscholastic athletics in 1971.[2] By 1998–99, that number exceeded 2.6 million, with significant increases in each intervening year.[3] To put these numbers in perspective, since Title IX was enacted, the number of girls playing high school sports has gone from one in twenty-seven, to one in three.[4] Sports participation among even younger girls has also changed dramatically; a 1998 report found that the number of girls ages six to eleven who regularly participate in vigorous sports such as soccer, volleyball, and basketball increased eighty-six percent since 1987, from 2 million to 3.8 million.[5] Women's competitive athletic participation at the college level also has greatly expanded since Title IX was enacted, with the number of female intercollegiate athletes increasing from just below 32,000 in 1971, to nearly 150,000 in 1998–99.[6]

(criticizing feminist scholars in sport for focusing on "dominant" and elite structures of sport at the expense of alternative sport models). Nonetheless, Title IX's central place in the legal response to sex discrimination makes it a critical component in an effort to use the law to secure equality for girls and women in sport. *Cf.* JENNIFER HARGREAVES, SPORTING FEMALES: CRITICAL ISSUES IN THE HISTORY AND SOCIOLOGY OF WOMEN'S SPORTS 55–56 (1994) (noting the importance of education programs in the development of sports for girls and women).

2. National Federation of State High School Associations, *Annual Sports Participation Survey: High School Participation*, Gender Equity in Sports, University of Iowa, *at* http://bailiwick.lib.uiowa.edu/ge/statistics.htm#220 (last modified Aug. 30, 2000) (on file with the *University of Michigan Journal of Law Reform*) [hereinafter Gender Equity in Sports].

3. National Federation of State High School Associations, *Summary of Athletic Participation Totals by School Year, at* http://www.nfhs.org/1999_part_index.htm#year (last visited July 7, 2000) (on file with the *University of Michigan Journal of Law Reform*) (showing the precise number for 1998–99 was 2,652,796).

4. Michael Dobie, *Evening the Score: Women's Wide-Ranging Success as Athletes—From Basketball to Ice Hockey—Is Redefining the World of Sports*, NEWSDAY (New York), July 11, 1999, at A18.

5. John Hanc, *The Games Girls Play*, NEWSDAY (New York), Oct. 26, 1998, at B15.

6. Title IX of the Education Amendments of 1972; A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,419 (Dec. 11, 1979) [hereinafter Policy Interpretation] (listing women's intercollegiate athletics participation in 1971 at 31,852); National Collegiate Athletic Association, *1998–99 Participation Study—Women's Sports, at* http://www.ncaa.org/participation_rates/ (last visited July 9, 2000) (on file with the *University of Michigan Journal of Law Reform*) (showing that 148,803 women participated in 1998–99).

These increased participation numbers alone do not capture the extent to which women's relationship to sport has changed since Title IX's enactment. More female athletes than ever before are competing in traditionally male athletic activities.[7] For example, in 1997–98, there were 779 girls competing on high school football teams, 1,262 on high school baseball teams, and 1,907 on high school wrestling teams.[8] Just fifteen years earlier, in the 1983–84 season, these numbers were 13, 137, and 0, respectively.[9] Girls and women are increasingly making inroads into the terrain of traditionally male sports, including rugby, boxing, judo, wrestling, body-building, stock car driving, weightlifting, and throwing events.[10]

These changes in women's sports have been accompanied by increased status and respect for female athletes and a growing enthusiasm for women's sports in popular culture, fueled by recent public successes of elite female athletes.[11] Women's team sports took center stage in the 1996 Olympics, with U.S. women winning gold medals in basketball, soccer, softball, gymnastics, and synchronized swimming.[12] Women's ice hockey made its Olympic debut in Nagano, Japan in 1998, and the U.S. women's team won the event's first gold medal in a nail-biting victory over the Canadians in the finals.[13] Women's soccer gained new attention in 1999

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7. *See* Mariah Burton Nelson, *Introduction: Who We Might Become*, *in* NIKE IS A GODDESS: THE HISTORY OF WOMEN IN SPORTS, at ix, xvii (Lissa Smith ed., 1998) [hereinafter Nelson, *Who We Might Become*] ("Girls and women are pinning male opponents to wrestling mats, racing horses and cars and yachts alongside their brothers, and playing pro basketball against men. Almost a thousand girls are playing high school football. Women have pitched in college baseball games and kicked in college football games.").

8. Gender Equity in Sports, *supra* note 2.

9. *Id.*

10. *See, e.g.*, HARGREAVES, *supra* note 1, at 281–83; *see also* Harriet Barovick, *Diamonds in the Ring: Boosted by the Daughters of Ali and Frazier, Women's Boxing Is Losing Its Novelty-Act Status and Gaining Real Fans*, TIME, May 1, 2000, at 66 (discussing increasing interest and participation in women's boxing); Shawn Courchesne, *Dupuis' Dream Is on Track; Utilizes Opportunities on Stock Car Circuit*, HARTFORD COURANT, Apr. 27, 2000, at C1 (discussing NASCAR driver Renee Dupuis).

11. *Cf.* Lucy Danziger, *Conclusion: A Seismic Shift in the Culture*, *in* NIKE IS A GODDESS, *supra* note 7, at 315, 317 ("What happens among talented sportswomen at the elite levels makes its way into the culture. It's our version of the trickle-down concept: When women get paid to play basketball in front of 17,000 spectators, the rest of us, contenders in our own world of sports, feel a little bit more legitimate and take our pursuits more seriously.").

12. *See* Nelson, *Who We Might Become*, *supra* note 7, at xvi.

13. *See* Barbara Stewart, *In from the Cold*, *in* NIKE IS A GODDESS, *supra* note 7, at 269, 269–72 (describing the drama of the United States win over Canada in women's ice hockey in the 1998 Olympics).

when the U.S. won the Women's World Cup.[14] In the 2000 Olympics in Sydney, for the first time, women competed in the same number of team sports as men.[15]

Women's professional team sports also have had notable successes in recent years, particularly women's basketball. After several earlier unsuccessful attempts at starting a professional women's basketball league in the United States,[16] women's professional basketball seems to have gained a firm foothold in the sports world. The Women's National Basketball Association (WNBA) started its inaugural season in 1997 with 50 million television viewers tuning in to one of three networks to watch.[17] By the second and third seasons, nearly one million viewers a week watched the WNBA play on national television.[18] Women's soccer and ice hockey hold promise for attaining professional status in the near future.[19] Meanwhile, women's professional tennis has discovered a dynamic and exciting rivalry that has been missing in recent years, with sisters Venus and Serena Williams breathing new life and excitement into the sport while challenging its white, country-club image.[20]

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14. *See 25 Significant Events in Women's Sports*, THE WOMEN'S SPORTS EXPERIENCE, Sept.–Oct. 1999, at 12–13.

15. Women's Sports Foundation, *Significant Events in Women's Sports History Post Title IX History*, *at* http://www.womenssportsfoundation.org/templates/res_center/rclib/results_topics2.html?article=51&record=36 (last visited June 5, 2000) (on file with the *University of Michigan Journal of Law Reform*) (reporting that additional sports for women include modern pentathlon, taekwondo, triathlon, trampoline, water polo, cycling (500 meter track), shooting (ball trap and skeet), synchronized swimming (duo), and weightlifting, and two additional teams in the women's handball and field hockey competitions).

16. *See* DAVID F. SALTER, CRASHING THE OLD BOYS' NETWORK: THE TRAGEDIES AND TRIUMPHS OF GIRLS AND WOMEN IN SPORTS 96 (1996) (discussing previous failed attempts to establish professional women's basketball leagues and stating that these efforts "never had a well-conceived plan of action. Some former leagues have tried gimmicks like lowering the rims, using different colored basketballs, or having the players jaunt around in skin-tight uniforms. . . . No one has been able to identify and market the women's game for what it is: a well-coached, fundamentally sound, team-oriented game. . . .").

17. *History of the WNBA*, *at* http://www.wnba.com/basics/historyof_wnba.html (last visited July 7, 2000) (on file with the *University of Michigan Journal of Law Reform*).

18. *Id.*

19. *See* Donna A. Lopiano, *What's Wrong with This Picture? Am I Missing Something Here?*, THE WOMEN'S SPORTS EXPERIENCE, Mar.–Apr. 2000, at 12 (discussing struggles of women's professional soccer, including pay disparities in men's and women's soccer salaries); Stewart, *supra* note 13, at 288–89 (noting "talk around the NHL of forming a women's professional [ice hockey] league, along the lines of the Women's National Basketball Association").

20. Linda Robertson, *Venus' Victory Recalls the Past, Foreshadows the Future of Tennis*, MIAMI HERALD, July 12, 2000, at 1D; *see also* Grace Lichtenstein, *Net Profits*, *in* NIKE IS A GODDESS, *supra* note 7, at 57, 76–77 (discussing difficulties faced by women's tennis in the 1990s and the potential for the Williams sisters to re-energize the game).

In short, opportunities for female athletes are at an all-time high, and public interest in and support for women's sports has never been greater. The changes in women's sports participation have been accompanied by significant cultural change.[21] Both mothers and fathers typically support their daughters' involvement in sports and are increasingly disturbed by ongoing inequities.[22] Title IX has played a large, if unquantifiable role in this cultural shift and the new opportunities that made it possible.[23]

And yet, as is so often the case with the law's relationship to social change,[24] these successes tell only part of the story.[25] Title IX has not succeeded in ending the long history of discrimination

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21. *See, e.g.*, Anne Driscoll, *Giving Girls a Sporting Chance: Female Athletes Win More Than Points, Researchers Say*, BOSTON GLOBE, Oct. 24, 1999, (Magazine), at 18 (discussing dramatic cultural change affecting girls' and women's sports participation since Title IX was passed); Hanc, *supra* note 5, at B15 (discussing the "fundamental shift in public opinion over the past decade" regarding girls and women in sport).

22. RICHARD W. RILEY & NORMA V. CANTÚ, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., TITLE IX: 25 YEARS OF PROGRESS (1997) [hereinafter 25 YEARS OF PROGRESS] (reporting that eighty-seven percent of parents now feel "that sports are equally important for boys and girls"), *available at* http://www.ed.gov/pubs/TitleIX/title.html; *see also* Mike Fish & David A. Milliron, *Taking on Districts*, ATLANTA J.-CONST., Dec. 16, 1999, at 1G, *available at* http://www.accessatlanta.com/partners/ajc/reports/gender_equity/day5/index.html ("With college scholarships at stake, parents increasingly are insisting [Georgia] high schools address disparities in opportunities that girl athletes receive."); David Hill, *Playing Hardball*, EDUC. WEEK ON WEB (Sept. 4, 1996), *at* http://www.edweek.org/ew/vol-16/01girls.h16 (last visited June 28, 2000) (on file with the *University of Michigan Journal of Law Reform*) (discussing parents' activism in seeking equal athletic opportunities for their daughters in Oklahoma high schools); Kerry A. White, *Fla. Trying to Court Girls for Sports*, EDUC. WEEK ON WEB (Oct. 13, 1999), *at* http://www.edweek.org/ew/ewstory.cfm?slug=07sorts.h19) (last visited June 28, 2000) (on file with the *University of Michigan Journal of Law Reform*) (discussing parents' efforts to improve athletic equity for girls in Florida).

23. *See, e.g.*, Cohen v. Brown Univ., 101 F.3d 155, 188 (1st Cir. 1996) ("One need look no further than the impressive performances of our country's women athletes in the 1996 Olympic Summer Games to see that Title IX has had a dramatic and positive impact on the capabilities of our women athletes, particularly in team sports."); 25 YEARS OF PROGRESS, *supra* note 22 (discussing dramatic changes in women's and girls' sports participation since the enactment of Title IX); Jere Longman, *How the Women Won*, N.Y. TIMES, June 23, 1996, (Magazine), at 23–24 (attributing increased women's participation in the 1996 Olympics to Title IX).

24. To borrow a quote from Wendy Williams, "To say that courts are not and never have been the source of radical social change is an understatement." Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 175 (1982).

25. *See* DEBORAH L. RHODE, SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY 61 (1997) ("[I]ronically, our recent progress obscures the problems that remain. Opportunities for women athletes have improved so dramatically that we no longer notice what chances they are still missing.").

against girls and women in sport.[26] Educational institutions continue to provide many more, and qualitatively distinct, opportunities for male than female athletes at every level of education. Although female athletic participation in high school is at an unprecedented 2.6 million, it still lags far behind the 3.8 million high school males who participate in school sports.[27] Athletic participation at the college level is similarly skewed, with women composing fifty-three percent of undergraduate students nationwide, but only thirty-seven percent of all intercollegiate athletes.[28] Many of the institutional practices that contribute to the disparate participation rates of male and female students have remained outside the reach of Title IX enforcement. At the same time, those aspects of the law that have been forcefully applied—namely, the requirement of nondiscrimination in access to athletic participation opportunities—are under attack.[29]

The primary site of the legal struggle over the situation of women in sport has been the interpretation of Title IX as it relates to the number of opportunities for males and females to

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26. There is some variance in academic writing on this subject in the use of the term "sport" versus "sports." I have opted to use both terms distinctly to signify different meanings, based on my reading of the literature as using "sport" when speaking of sport as a social institution, set in a specific social context, and "sports" as the actually and potentially diverse activities in which people participate. Thus, I discuss men's and women's relationship to "sport," but women's increasing participation in "sports." *See* Pamela J. Creedon, *Women, Media and Sport: Creating and Reflecting Gender Values*, *in* WOMEN, MEDIA AND SPORT: CHALLENGING GENDER VALUES 3, 3 (Pamela J. Creedon ed., 1994) ("I say 'sport' instead of 'sports' because I define *sport* as a cultural institution and *sports* as activities or games that are only one component of the institution of sport."); *cf.* HARGREAVES, *supra* note 1, at 2 ("The term 'sports' is used through the book rather than 'sport' in order to take account of the diverse and non-essentialist nature of the activities."). Compare also Carole Oglesby, *Epilogue to* SPORT, MEN, AND THE GENDER ORDER 243, 243 (Michael A. Messner & Donald F. Sabo eds., 1990), who criticizes scholars of sport for

> us[ing] the word *sport* as if there were one universal meaning to the word, even in a gender context. This usage ignores what I have called sport-for-women, an invention of English and American women physical educators of the late 19th and early 20th centuries. . . . [A] complete sociology of gendered sport must be cognizant of at least two sports—traditional sport and sport-for-women.

27. National Federation of State High School Associations, *1999 Athletic Participation Survey Index*, *at* http://www.nfhs.org/1999_part_index.htm (last visited Aug. 30, 2000) (on file with the *University of Michigan Journal of Law Reform*).

28. Gender Equity in Sports, *supra* note 2.

29. *See, e.g.*, Welch Suggs, *Foes of Title IX Try to Make Equity in College Sports a Campaign Issue*, CHRON. HIGHER EDUC., Feb. 4, 2000, at A55, http://chronicle.com/weekly/v46/i22/22a05501.html.

participate in competitive sport programs.[30] Many supporters of Title IX contend that the law has not done enough to increase women's opportunities to participate in sport.[31] The law's detractors argue that Title IX has gone too far in the other direction and is now mandating affirmative action for female athletes, at the expense of men's opportunities.[32] The debate over Title IX interpretation in this area has acquired a fever pitch in recent years. New advocacy groups have sprung up with the sole or primary purpose of reversing the interpretation of Title IX that has developed over the past twenty-eight years.[33] In addition, several existing conservative advocacy organizations have put the repeal or modification of Title IX's participation standard on their agendas.[34] Men's athletic associations, too, are taking Title IX to task, urging reversal of the law's core provisions.[35] Over the past

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30. *See* Renee Forseth et al., Comment, *Progress in Gender Equity?: An Overview of the History and Future of Title IX of the Education Amendments Act of 1972*, 2 VILL. SPORTS & ENT. L.J. 51, 53 (1995) ("The central issue in most Title IX litigation is whether a university provides equal opportunities for both women and men to participate in intercollegiate athletics.").

31. *Cf.* Sudha Setty, *Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement*, 32 COLUM. J.L. & SOC. PROBS. 331, 355 (1999) (recommending enforcement of Title IX in middle schools and high schools).

32. John Weistart, *Equal Opportunity? Title IX and Intercollegiate Sports*, 16 BROOKINGS REV. 37, 38 (1998) [hereinafter Weistart, *Equal Opportunity?*] ("The particular rhetorical flourish that rallies these groups [that oppose Title IX] is the declaration that present policies under Title IX are 'affirmative action'—a not-so-subtle attempt to push the claims of women for recognition of their athletic aspirations into the swirl of anger that makes racial preferences such a political hot spot.").

33. *See, e.g.*, Americans Against Quotas, *at* http://www.aaq2000.org (last visited Aug. 30, 2000) (urging political involvement to eliminate quotas that encourage colleges to cut wrestling programs); Iowans Against Quotas, *at* http://www.iaq2000.org/purpose.htm (last visited Aug. 30, 2000) (same).

34. *See* Curt A. Levey, *Title IX's Dark Side: Sports Gender Quotas*, USA TODAY, July 12, 1999, at A17 (representing the Center for Individual Rights); *Feminists Blitz College Football Teams*, FEMINIST FOLLIES, Winter 1998, Clare Boothe Luce Policy Institute, *at* http://www.cblpolicyinstitute.org/winter1998.htm (last visited Aug. 30, 2000) (on file with the *University of Michigan Journal of Law Reform*) ("[T]hanks to criticism from groups like the Clare Boothe Luce Policy Institute, a number of groups including the NCAA are asking Congress to look at how they enforce this strange law."); Independent Women's Forum, *Gender Equity and Title IX*, *at* http://www.iwf.org/issues/titleix/index.html (last visited Aug. 30, 2000) (on file with the *University of Michigan Journal of Law Reform*) ("IWF continues to expose the misguided applications and unintended consequences of Title IX.").

35. *See, e.g.*, SALTER, *supra* note 16, at 50–52 (describing College Football Association's efforts to oppose Title IX's three-part test); Weistart, *Equal Opportunity?*, *supra* note 32, at 39 ("A common refrain from coaches in men's wrestling, swimming, and gymnastics teams, all sports that have experienced waning fortunes in recent years, is that Title IX is 'promoting discrimination.'"); Amateur Athletic Union Wrestling, *at* http://www.aauwrestling.org (last visited Aug. 30, 2000) (on file with the *University of Michigan Journal of Law Reform*) (including articles opposing Title IX on the ground that it reduces the number of athletic opportunities for males); Indiana St. Wrestling Assoc. of USA Wrestling, Inc., *at* http://www.iswa.com (last visited Aug. 30, 2000) (on file with the *University of Michigan*

few years, these groups have, with increasing urgency, stepped up their efforts to lobby Congress to amend Title IX and/or to pressure the enforcing agency, the Department of Education Office for Civil Rights (OCR), to retreat from its interpretation of Title IX.[36]

Critics of Title IX blame the law for a perceived demise of men's sports programs and a reduction in opportunities for male athletes.[37] Several legal scholars have taken up this refrain, criticizing Title IX as a law that goes beyond merely requiring an end to discrimination and instead mandating affirmative action for female athletes.[38] Professors Earl Dudley and George Rutherglen,

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Journal of Law Reform) (criticizing Title IX as a quota that eliminates male sport opportunities and urging viewers to sign a petition to abolish the "proportionality rule.").

36. *See, e.g.*, Americans Against Quotas, *supra* note 33 (providing links to members of Congress and encouraging viewers to contact these members and voice their concerns that Title IX is "morally wrong"); Indiana St. Wrestling Assoc. of USA Wrestling, Inc., *supra* note 35 (organizing a petition drive asking the next President to abolish the proportionality rule, culminating in a "million man" march, and listing other organizations opposed to Title IX); Iowans Against Quotas, *supra* note 33 (same as Americans Against Quotas); The Mat, *Title IX Task Force, at* http://www.themat.com/etc/title9/042298.asp (last visited June 3, 2000) (advocating a Congressional bill that would require universities to alert incoming students to any sport program eliminations or reductions); *see also* MARY JO FESTLE, PLAYING NICE: POLITICS AND APOLOGIES IN WOMEN'S SPORTS 279–80 (1996) (discussing conservative Congressional opposition to Title IX).

37. *See, e.g.*, Ira Berkow, *Baseball; The Other Side of Title IX*, N.Y. TIMES, May 19, 1999, at D2 (criticizing so-called "quota" under Title IX for elimination of Providence College baseball team); Craig L. Hymowitz, *Losers on the Level Playing Field; How Men's Sports Got Sacked by Quotas, Bureaucrats and Title IX*, WASH. POST, Sept. 24, 1995, at C05 (criticizing quotas under Title IX that discriminate against male athletes); Levey, *supra* note 34 (criticizing "quota-based" enforcement of Title IX, and claiming that men participate in sports more than women because men are more interested in sports than women); George Will, *Extortion Holds a Nation Hostage*, CHI. SUN-TIMES, Feb. 26, 2000, at 21 (criticizing Title IX as an example of "the New Executive State").

38. *See, e.g.*, Earl Dudley & George Rutherglen, *Ironies, Inconsistencies, and Intercollegiate Athletics: Title IX, Title VII, and Statistical Evidence of Discrimination*, 1 VA. J. SPORTS & L. 177, 179–80 (1999) (arguing that Title IX requires affirmative action for female athletes); Note, *Taking a Shot at the Title: A Critical Review of Judicial and Administrative Interpretations of Title IX as Applied to Intercollegiate Athletic Programs*, 27 CONN. L. REV. 943, 977 (1995) (criticizing Title IX's participation standards as discrimination against males and a "quota system"); *see also* David Aronberg, *Crumbling Foundations: Why Recent Judicial and Legislative Challenges to Title IX May Signal Its Demise*, 47 FLA. L. REV. 741, 762–66 (1995) (criticizing proportionality as not required under Title IX language, and claiming that universities faced with proportionality requirements must cut men's sports because their budgets do not allow for expansion); George A. Davidson & Carla A. Kerr, *Title IX: What is Gender Equity?*, 2 VILL. SPORTS & ENT. L.J. 25, 49 (1995) (criticizing Title IX's three-part test as reverse discrimination against males, and concluding that "[w]hatever merits the proportional to enrollment test may have as a matter of social policy, the test awaits the analytical foundation which would give it legitimacy"); Michael Straubel, *Gender Equity, College Sports, Title IX and Group Rights: A Coaches' View*, 62 BROOK. L. REV. 1039, 1041–42 (1996) (arguing that men are more interested in participating in sports than women and that Title IX should be modified to account for these different interest levels).

for example, argue that Title IX discriminates against men by presuming that men and women have equal levels of interest in participating in sports, and then using that assumption as a baseline for allocating an equal share of male and female athletic opportunities.[39] They contrast this approach with the legal standards that have developed in the workplace where a "qualified labor pool" standard defines discrimination based on women's underrepresentation in certain jobs.[40] The unspoken assumption in these critiques is that the only legitimate interpretation of discrimination law is one that requires the equal treatment of persons who are alike in their athletic interests—a perspective referred to here as formal equality.

While I take issue with the reasoning and conclusions of Title IX's critics, I agree with them in one respect: Title IX's interpretation of discrimination in athletics participation goes beyond the narrow reach of a formal equality standard. Unlike those areas of sex discrimination law that follow a model of formal equality, Title IX's prohibition on discrimination is not so easily derailed by pointing out differences in existing male and female interests.[41] Rather, Title IX holds institutions accountable for their role in constructing and perpetuating such differences.[42] By taking a broader view of discrimination and the myriad of ways in which it plays out, Title IX law avoids some of the pitfalls that have shortened the reach of sex discrimination law in other contexts.

Title IX's contested legal standards have yet to be fully explored by courts or feminist legal scholars. Prevailing court decisions have partially explained their interpretation of Title IX in terms consistent with persuasive scholarly approaches to sex equality, but have stopped short of spelling out the law's theoretical basis or exploring its implications. Feminist legal scholarship has not filled in the theoretical gaps left by the courts, nor has it accorded substantial attention to the further development of legal standards governing sex equality in sports. Notwithstanding several notable and impor-

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39. *See* Dudley & Rutherglen, *supra* note 38, at 195–99.

40. *See id.* at 207–10 (contrasting Title IX standard with the qualified labor pool analysis used in cases decided under Title VII of the Civil Rights Act of 1964).

41. *Cf.* Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1282 (1987) [hereinafter Littleton, *Reconstructing Sexual Equality*] ("In legal analysis, courts routinely find women's 'difference' a sufficient justification for inequality, constructing at the same time a specious 'sameness' when applying phallocentric standards 'equally' to men and women's different reproductive biology or economic position to yield (not surprisingly) unequal results for women."). *See generally* discussion *infra* Part I.A (discussing the theory behind formal equality including the challenges and alternatives to that theory).

42. *See* discussion *infra* at Part II.A.

tant writings, feminist legal scholars have largely ignored Title IX as compared with other applications of discrimination law that affect women's lives.

Existing scholarly discourse on Title IX fails to appreciate the extent to which the law focuses on the institutional structures that suppress and discourage women from expressing and developing their athletic interests and abilities. In this respect, the law reflects strains of feminist legal theory not widely embodied in sex discrimination law. In particular, the three-part test of Title IX compliance is influenced by structuralism, a theoretical approach which emphasizes the need to critically examine the structures and cultures of institutions that differently situate men and women and result in the subordination of women. Only by recognizing and exploring Title IX's theoretical grounding can we adequately explain and justify the interpretation of Title IX that has generated such fierce controversy. At the same time, a better theoretical grounding will provide a firmer basis from which to analyze Title IX's successes and shortcomings as a law that strives to secure sexual equality for girls and women in sports.

This Article explores the theory behind Title IX's standard for measuring equality in athletic participation and examines its implications for further Title IX analysis. In the process, it seeks to better integrate Title IX into feminist legal theory and provide a more complete account of women's inequality in sport and how the law can address it.

Part I of this Article lays the foundation for a theoretical analysis of Title IX by providing an overview of how sex discrimination law generally stands in relation to feminist legal theory. This section contends that the dominant framework of sex discrimination law is one of formal equality, in which the goal of discrimination law is to require identical treatment of men and women when they are similarly situated in relation to the treatment at issue. Alternative feminist perspectives that focus on the structures and practices that create and perpetuate women's subordinate status have had less of an influence on sex discrimination doctrine, although they have made some mark on the development of the law at the margins.

Part II argues that, unlike the dominant strain of sex discrimination law, Title IX's participation test transcends formal equality and focuses instead on the institutional structures that create, perpetuate and reinforce women's different and subordinate place in athletics. This section examines the development of Title IX's participation standard and argues that it reflects a

structuralist theory of equality that makes an institution's role in shaping and contributing to the subordination of women fundamental to a discrimination analysis.

Part III seeks to provide a more complete theoretical justification for Title IX's participation test. This section begins with a discussion of existing feminist legal scholarship on women in sport. It argues that feminist legal scholarship on sport must go beyond a debate over whether equal treatment or asymmetrical treatment will best guarantee sex equality and instead work toward developing the law to reach the institutional practices that masculinize sport and devalue women's sport participation. The remainder of the section offers a detailed account of the role educational institutions play in confining women's sport opportunities and shaping the culture of sport as fundamentally masculine. These practices contribute to the construction of sport itself as a male domain.

Finally, Part IV applies the theory behind Title IX's participation standard and the analysis of how institutions construct and sustain male dominance in sport to advocate doctrinal reform in other aspects of Title IX interpretation. This section argues that the legal standards governing the treatment of female athletes and the institutional practices that police and construct gender boundaries in sport have not kept pace with the courts' understanding of institutional accountability in athletic participation.

I. AN OVERVIEW OF SEX DISCRIMINATION LAW THROUGH THE LENS OF FEMINIST LEGAL THEORY

As even a cursory examination of sex discrimination law shows, Title IX, in its application to athletics, takes an approach to sex equality that is markedly different from the dominant approach reflected in sex discrimination law generally. Title IX's departure from sex discrimination's dominant legal framework is best understood through the lens of feminist legal theory.

A. Formal Equality and Its Discontents

Sex discrimination law is often thought to embrace a conception of equality identified by some feminist legal scholars as formal equality.[43] The guiding principle in formal equality is that men and women should be treated alike if they are similarly situated for purposes of the policy or practice that is being challenged.[44] Scholars and advocates working within this approach emphasize the overriding similarity between the sexes for the purposes of defining access to societal benefits and privileges.[45] Legal challenges premised upon formal equality seek to minimize and destabilize what are typically regarded as "real" sex differences, and to identify and eradicate stereotypes that traditionally have been used to justify discriminatory treatment.[46] The core inquiry is whether the asserted differences between men and women, once stripped of archaic stereotypes and overbroad generalizations, are sufficient to support treating the sexes differently, or are instead

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43. *See, e.g.*, Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL'Y 1, 2–3 (1994). Other feminist legal scholars use different terminology to describe a similar approach to equality. For example, Catharine MacKinnon has described the law's focus on treating similarly situated persons alike as the "sameness/difference" approach. *See* Catharine MacKinnon, *Difference and Dominance: On Sex Discrimination* (1984), *reprinted in* FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 32 (1987) [hereinafter MacKinnon, *Difference and Dominance*]. Ruth Colker has styled this the "anti-differentiation" approach, which she contrasts with anti-subordination. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1003 (1986). Martha Chamallas uses the term "liberal feminism" to describe the approach to equality in which sex differences are minimized to secure equal treatment. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 24–25 (1999). For the purposes of this discussion, I use the term formal equality, without intending to distinguish substantively between these varying perspectives.

44. *See* CHAMALLAS, *supra* note 43, at 57; Bartlett, *supra* note 43, at 2.

45. *See, e.g.*, Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, *in* FEMINIST LEGAL THEORY: FOUNDATIONS 9, 13–20 (D. Kelly Weisberg ed., 1993) (critiquing the use of sex difference to justify the differential treatment of women); Williams, *supra* note 24, at 175.

46. *See* CHAMALLAS, *supra* note 43, at 24, 33–35. Not all feminist theorists view formal equality, or liberal feminism, as premised upon the minimization of relevant sex difference. For example, Martha Nussbaum's brand of liberal feminism combines liberalism's emphasis on the equal worth and dignity of individuals with attention to the social construction of individual preferences that underlie sex differences. *See* MARTHA NUSSBAUM, SEX AND SOCIAL JUSTICE 6–13 (1999). However, as discussed below, the embodiment of formal equality in sex discrimination doctrine typically does not look beneath sex difference to explore its relationship to specific social and institutional structures. *See* discussion *infra* Part I.B.; *see also* NUSSBAUM, *supra*, at 68 (acknowledging that "liberalism has sometimes been taken to require that the law be 'sex-blind,' behaving as if the social reality before us were a neutral starting point," but arguing that liberalism is not monolithic and that the intellectual tradition of liberalism includes thinkers who have rejected a "purely formal notion of equality").

mere remnants of traditional views about the proper place of men and women.[47]

One notable feature of formal equality is its focus on remedying the harm to individuals who are disadvantaged by sex-based criteria. The focus on the individual, rather than on the relative social power of groups, renders men and women fungible for purposes of the legal analysis.[48] Men who are denied advantageous treatment on the basis of an insufficiently supported sex-based classification have as powerful a claim to formal equality under the law as women who have been burdened by sex-based discrimination.[49]

Formal equality is also characterized by its emphasis on same-treatment solutions to sex-based inequality, with a primary emphasis on breaking down the overt and covert use of sex-based stereotypes to limit women's and men's opportunities.[50] The goal of this project is to expose and refute the stereotypes and assumptions underlying the categorical sorting of the men and women by gender, leaving in place gender-neutral structures and institutions.[51]

As is evident from this description of formal equality, one difficulty with this formula is that it only provides relief from inequality where persons are thought to be similarly situated with respect to the treatment at issue.[52] Where persons are viewed as dissimilar in ways defined to be relevant, the framework does not provide a remedy to unequal treatment.

For nearly two decades, critics of formal equality have questioned its capacity to secure meaningful equality for women, and have expressed concern that, in light of the different social and economic power of men and women, formal equality may legiti-

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47. *See* CHAMALLAS, *supra* note 43, at 26.

48. *See id.* at 35.

49. *See, e.g.*, David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQ. 33, 34 (1984) (observing that most winning sex discrimination plaintiffs are men).

50. *See* Bartlett, *supra* note 43, at 2–3; Mary Anne Case, *Symposium: Discrimination and Inequality Emerging Issues: The Very Stereotype the Law Condemns: Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1447–78 (2000) (favoring "sameness" solutions to problems of sex inequality).

51. *See, e.g.*, Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 329–31 (1984–1985); *see also* Deborah L. Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207, 1207–08 (1988).

52. *See* Bartlett, *supra* note 43, at 2; MacKinnon, *Difference and Dominance*, *supra* note 43, at 32–33.

mate or even exacerbate existing inequalities.[53] Feminist legal scholars have proposed, analyzed and debated numerous alternative approaches to equality, with a multiplicity of substantive and strategic variations among them.[54] One widely discussed alternative to formal equality is known as anti-subordination.[55] This approach distinguishes itself from formal equality in several key respects. Unlike formal equality, its core concern is the relative power of social groups, not the differential treatment of individuals.[56] Anti-subordination is as concerned with the perpetuation of existing disadvantages through formally neutral structures as it is with formal barriers to equality.[57] It does not ask whether men and women who are otherwise similarly situated are being treated differently;

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53. *See, e.g.*, Linda J. Krieger & Patricia N. Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U. L. REV. 513, 436–57 (1983); MacKinnon, *Difference and Dominance*, *supra* note 43, at 32–40; Rhode, *supra* note 51, at 1207–08; Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1374–80 (1986); *see also* Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 73 S. CAL. L. REV. (forthcoming 2001) (manuscript at 1–9, on file with author) (discussing the failure of equality law to reach the majority of the manifestations of bias and discrimination in society today). *But see* NUSSBAUM, *supra* note 46, at 55–80 (articulating and defending her version of liberal feminism that accounts for and examines the social construction of preferences). Similar criticisms have been leveled at formal equality approaches to race discrimination. *See, e.g.*, Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–57; *see also* CHAMALLAS, *supra* note 43, at 142 ("Most critical race scholars regard the legal commitment to colorblindness as perpetuating rather than decreasing racial subordination.").

54. *See generally* CHAMALLAS, *supra* note 43 (reviewing and analyzing feminist legal scholarship from the 1970s through the 1990s).

55. *See* Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1191 (1989); Colker, *supra* note 43, at 1028; *see also* CHAMALLAS, *supra* note 43, at 53 (describing this approach as "dominance feminism"); MacKinnon, *Difference and Dominance*, *supra* note 43, at 32, 40 (referring to this as the "dominance approach").

56. *See* CHAMALLAS, *supra* note 43, at 57–58; Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976).

57. *See* Lucinda M. Finley, *Sex-Blind, Separate But Equal, or Anti-Subordination? The Uneasy Legacy of* Plessy v. Ferguson *for Sex and Gender Discrimination*, 12 GA. ST. U. L. REV. 1089, 1123 (1996). Finley describes anti-subordination as an approach to equality that:

> transcends the supposedly oppositional status of the individualistic focus of the similarly situated approach and the countervailing "group-based discrimination" approach, because it can embrace both depending on the context. It also overarches the "sameness-difference" debate in which sex equality jurisprudence has been mired, because it does not put the question in those terms. Thus, it can recognize that sometimes facial distinctions along race or gender lines are subordinating, but sometimes presumed neutrality can be subordinating.

Id.; *see also* ANDREW KOPPELMAN, ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY 57–99 (1996).

rather, the central question is whether the challenged rule or practice perpetuates the subordination of women.[58] Under this approach, the identification of difference in the situations of men and women does not immunize a practice from legal challenge.[59]

The tension between formal equality and anti-subordination theories is particularly evident in their respective approaches to sex difference. Advocates of formal equality minimize difference and argue that men and women are alike for virtually all purposes relevant in law and public policy, and therefore deserve equal treatment. Anti-subordination theorists object to the very framing of the question in terms of difference, contending that power, not difference is at the heart of inequality. Instead of using sex difference as a basis to deny equal treatment, or even accommodating sex difference to avoid disadvantage, anti-subordination theory views difference as beside the point, and the critical issue as dominance.[60]

The controversy surrounding the meaning of sex difference and its role in equality law has received tremendous attention in feminist legal discourse. Feminist scholars have produced a multitude of theories and strategies for approaching real or perceived sex difference in the law.

One strain of feminist legal theory that has emerged from this effort seeks to re-evaluate the meaning of difference so that difference is not turned into social disadvantage. Sometimes called different voice, or cultural or relational feminism, this take on equality focuses less on minimizing sex difference and more on how difference is valued.[61] Cultural or relational feminists seek to embrace and value women's experiences and perspectives equally to those of men.[62]

Feminists working within both relational and anti-subordination approaches have focused on how gender difference is socially constructed.[63] One school of thought, particularly relevant for Title IX

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58. *See* MacKinnon, *Difference and Dominance*, *supra* note 43, at 40–45.
59. *See* CHAMALLAS, *supra* note 43, at 57–58.
60. *See* MacKinnon, *Difference and Dominance*, *supra* note 43, at 40–45.
61. *See* CHAMALLAS, *supra* note 43, at 62, 65.
62. *See* Adelaide H. Villmoare, *Feminist Jurisprudence and Political Vision*, 24 LAW & SOC. INQUIRY 443, 453–54 (1999) (discussing the centrality of Carol Gilligan's research to cultural legal feminism, and surveying the works of feminist legal scholars writing in this tradition, such as Carrie Menkel-Meadow, Robin West, and Ann Scales).
63. *See, e.g.*, MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 50–53 (1990); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 354 (1995) [hereinafter Abrams, *Sex Wars Redux*].

analysis, is loosely identified as structuralism, or new structuralism, and takes a critical approach to differences between men and women and their significance in equality law.[64] It analyzes difference not as inherent, but as constructed through social relationships and institutional practices.[65] The social construction of difference in men's and women's preferences and choices plays a central role in this approach.[66] Scholars working within a structuralist framework emphasize the need to "unpack" women's chosen identities and preferences in order to illuminate the institutional structures that constrain those choices.[67] Structuralist approaches are reluctant to center equality law around the equal valuation of women's preferences when those preferences themselves may be the products of social constraint rather than authentic choices.[68] Instead, a structuralist interpretation of

64. *See* Kathryn Abrams, *Symposium: Discrimination and Inequality Emerging Issues Afterword: Critical Strategy and the Judicial Evasion of Difference*, 85 CORNELL L. REV. 1426, 1437 n.52 [hereinafter Abrams, *Judicial Evasion of Difference*] (defining "post structuralism" as opposed to "structuralism," as "emphasiz[ing] the variety, complexity, and contingency of the discursive influences that shape subject formation"); Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2378–85 (1994) [hereinafter Chamallas, *Structuralist and Cultural Domination Theories*] (discussing "structuralist" approach to analyzing women and the workplace); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1825–26 (1990) (discussing "new structuralism"). Scholars working in a structuralist framework typically draw on sociological research to explain the connections between institutional practices and the construction of preference.

65. MINOW, *supra* note 63, at 50–53; *see also* CHAMALLAS, *supra* note 43, at 180 (explaining that structuralism's focus on "how perceptions of difference originate and are maintained .... has much in common with theories such as Martha Minow's relational approach to difference").

66. *See generally* CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE (1997) (discussing the complexity and contingency of peoples' "choices" and "preferences," and how they are shaped by social norms and law).

67. *See* CHAMALLAS, *supra* note 43, at 174; *see also* Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 AM. U. L. REV. 669, 673, 685–96 (1997) (discussing organizational characteristics of law firms that affect composition of women and minorities in law firms and shape their individual attainment); Rhode, *supra* note 51, at 1216–25 (discussing how workplace structures and unconscious bias constrain individual choice and create inequality).

68. For example, Catharine MacKinnon, whose early work on sexual harassment emphasized how workplace structures facilitate the sexual harassment of women, has questioned the authenticity of women's "different voice," stating that "the damage of sexism is real, and reifying that into difference is an insult to our possibilities." MacKinnon, *Difference and Dominance*, *supra* note 43, at 39; *see also* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 144 (1979).

discrimination law centers the legal analysis on how institutions and organizations construct sex difference and inequality.[69]

One influence of structuralism on feminist legal theory is a more sophisticated understanding of sex difference in men's and women's respective choices, preferences, and life experiences.[70] Unlike formal equality, which implicitly assumes that individuals can achieve equality by accessing gender-neutral opportunities through which they may realize their aspirations, structuralism views women's choices as falling along a continuum between agency and constraint.[71] Viewed through a structuralist lens, women are neither free, unencumbered agents nor passive victims, but choose their identities and life experiences while operating within societal and cultural constraints.[72] This understanding leaves room for individual resistance and social change, while analyzing and addressing the forces that constrain and distort women's choices.[73] Thus, the condition of women has been described in the literature as one of "partial agency."[74]

In addition to analyzing the concrete institutional practices that directly regulate individuals within the institution, structuralist le-

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69. *See* CHAMALLAS, *supra* note 43, at 176–80; Chamallas, *Structuralist and Cultural Domination Theories*, *supra* note 64, at 2384; *see also* Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, *in* APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN'S LIVES 549–70 (D. Kelly Weisberg ed., 1996) (offering a structuralist account of women's inequality in the workplace).

70. *See* Chamallas, *Structuralist and Cultural Domination Theories*, *supra* note 64, at 2382 ("Perhaps the most important contribution of the structuralist approach is its ability to explain difference without naturalizing it."); *see also* Bartlett, *supra* note 43, at 14 (describing the individual as "'constituted' from multiple institutional and ideological forces"); Joan W. Scott, *Deconstructing Equality-Applications of Feminist Legal Theory to Women's Lives*, *in* APPLICATIONS, *supra* note 69, at 611–23.

71. *Cf.* CHAMALLAS, *supra* note 43, at 174 (discussing feminist scholarship deconstructing women's economic choices). Compare also Martha Nussbaum who acknowledges that many economists within the liberal tradition do not closely analyze the meaning of individual preferences. *See* NUSSBAUM, *supra* note 46, at 149. Nonetheless, she argues that:

> [M]ost Utilitarian thinkers recognize that preferences may be distorted by a variety of factors in such a way that they will fail to be the individual's own "true" or "authentic" preferences. And most hold that democratic deliberation must try very hard to separate the "authentic" from the "inauthentic" preferences, basing social choice on the former rather than the latter when this can be done.

Id.

72. *See* CHAMALLAS, *supra* note 43, at 102–06; Rhode, *supra* note 51, at 1214, 1216; Schultz, *supra* note 64, at 1825. Kathryn Abrams labels this approach, which recognizes the complexity and contingency of how human subjects are formed, "post structuralism." Abrams, *Judicial Evasion of Difference*, *supra* note 64, at 1437 n.52.

73. *See* Abrams, *Sex Wars Redux*, *supra* note 63, at 352.

74. *See id.*

gal scholars also have identified a need to examine the cultures and values within institutions to complete the discrimination analysis.[75] By exploring how institutions create and reinforce cultures of domination, the analysis enables a greater understanding of how institutions participate in constructing an ideology of dominance and privilege, as well as in subordinating certain social groups.[76]

Of the theories briefly touched upon here, formal equality is without question the dominant paradigm in sex discrimination doctrine. Alternatives to formal equality have made some mark on sex discrimination law, but their impact has been more limited.

B. Sex Discrimination Law in Feminist Legal Theory

For the most part, sex discrimination doctrine, in both the constitutional and statutory arenas, can be characterized as falling within the umbrella of formal equality.[77] Constitutional law, in particular, draws little from alternative frameworks such as anti-subordination or structuralism.[78] Despite early race discrimination cases in which the Court expressed a suspicion of rules and practices that stigmatize African Americans and perpetuate a social caste, this dicta has never secured a strong foothold in the Court's doctrine.[79] Aside from relying on historical discrimination against a subordinated group to justify applying a higher level of scrutiny, the Court's modern equal protection jurisprudence reflects as its

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75. *See* Chamallas, *Structuralist and Cultural Domination Theories*, *supra* note 64, at 2385–90 (discussing how institutions unconsciously continue to impose majority culture while simultaneously supporting affirmative action).

76. *See id.*

77. *See, e.g.*, CHAMALLAS, *supra* note 43, at 44–45; Bartlett, *supra* note 43, at 2–3; *see also* Rhode, *supra* note 51, at 1207 (noting that the result of legal prohibitions on sex-based discrimination "has been a large measure of equality in formal treatment of the sexes, but a continued disparity in their actual status").

78. *See, e.g.*, Finley, *supra* note 57, at 1091 (arguing that "most sex equality jurisprudence has failed seriously to wrestle with or wholly adopt the anti-subordination or anti-caste principle that is at the heart of Justice Harlan's dissent" in *Plessy v. Ferguson*).

79. *See id.* at 1123 (describing the Court's focus on the stigmatizing practices of segregation and anti-miscegenation laws in *Brown v. Board of Education* and *Loving v. Virginia* as "moments of serious engagement" with anti-subordination analysis); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2422–29 (1994) (criticizing formal equality foundation of equal protection law and advocating an alternative anti-caste principle).

guiding principle the neutral treatment of individuals, consistent with formal equality.[80]

Equal protection as applied to sex-based classifications had its moorings in a formal equality perspective from the beginning.[81] A majority of the Supreme Court first adopted intermediate scrutiny for sex-based classifications in an equal protection challenge to discrimination against men.[82] Although the Court's sex discrimination jurisprudence has contained hints of an anti-subordination analysis, the Court's doctrine has remained squarely within the confines of formal equality. For example, the Court has often justified its protection of men from sex-based classifications with a nodding recognition of the additional group-based harm that such classifications inflict on women.[83] And, the Court's justification for applying a higher level of scrutiny to sex-based classifications in the first instance depended in part on its recognition of the historic discrimination against women as a group.[84] Nevertheless, once the level of equal protection scrutiny was fixed, concerns about the status of women as a group receded into the background, and the

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80. *See* Abrams, *Judicial Evasion of Difference*, *supra* note 64, at 1429–32 (discussing the judicial evasion of group-based analysis in constitutional equal protection law); David Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 954 (1989).

81. *See* CHAMALLAS, *supra* note 43, at 33–35; Case, *supra* note 50, at 1448–52 (discussing the development of constitutional law of sex discrimination as a jurisprudence centered on the elimination of the use of sex as a proxy for some other characteristic).

82. Craig v. Boren, 429 U.S. 190, 210 (1976) (invalidating state statute permitting eighteen to twenty-one-year-old women, but not men, to buy 3.2% beer). Although the Court began its move toward heightened scrutiny in equal protection challenges to sex-based classifications that disadvantaged women, a majority of the Court did not explicitly adopt heightened scrutiny until it was presented with a case of discrimination against males in *Craig v. Boren*. *See id.* at 197–99; *see also* Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion) (applying strict scrutiny to strike down rule requiring female, but not male, service members to prove spousal dependency in order to receive increased military allowance); Reed v. Reed, 404 U.S. 71, 76 (1971) (purporting to apply rational basis to state law favoring males over equally qualified females as administrators of estates, but finding the rule, though "not without some legitimacy," to be insufficiently related to state interest in reducing administrative burdens on probate courts).

83. The Court has done this by explicitly recognizing that sex stereotypes that are, in the first instance, directed against men, nevertheless function as double-edged swords which also negatively affect women. *See, e.g.*, Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729–30 & n.15 (1982); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 143–147 (1980); Califano v. Goldfarb, 430 U.S. 199, 205–07 (1977); Weinberger v. Weisenfeld, 420 U.S. 636, 645 (1975).

84. *See Craig*, 429 U.S. at 199, 202 (recognizing past history of discrimination against women as a justification for applying heightened scrutiny to sex-based classifications); *Frontiero*, 411 U.S. at 684–86 (same); *see also* Colker, *supra* note 43, at 1024–26, 1028 (describing the Court's reliance on historic group-based discrimination to justify heightened scrutiny as an embodiment of the anti-subordination principle).

Court primarily concerned itself with remedying the disadvantageous treatment of individuals because of their sex.[85]

Throughout its equal protection jurisprudence, the Court has emphasized that the equal protection clause protects individuals who have been treated differently because of their sex, and not socially subordinated groups.[86] Thus, the Court treats classifications that disadvantage members of a socially dominant group on the same footing as discrimination against members of a socially subordinate group, even when the purpose of the classification is to remedy past discrimination.[87]

In addition to the focus on the individual, another feature of constitutional sex discrimination law that is consistent with formal equality is its primary concern with the sex-neutral formulation of policies and practices rather than the subordinating impact of such policies and practices on socially disadvantaged groups. Sex-based different treatment, either in the form of a facial sex-based classification or intentional discrimination, is a prerequisite for heightened scrutiny of sex discrimination claims under the equal protection clause.[88] Policies and practices that are formally neutral, however burdensome to women, are beyond the reach of

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85. *See, e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 140–43 (1994) (holding litigant's gender-based peremptory challenges unconstitutional and finding the litigant's rationale to perpetuate gender stereotypes); *see also* Finley, *supra* note 57, at 1125 (discussing *J.E.B.* as a case "locked within a comparative equality framework" because it focuses on whether sex classifications are based on "real" differences or stereotypes, and keeps the focus on "women rather than on the operative male-normed institutions.").

86. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 532 (1996) ("[T]he Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature . . . ."); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 152 (1994) ("The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups . . . .") (Kennedy, J., concurring); Miss. Univ. for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190, 197 (1976) ("[S]tatutory classifications that distinguish between males and females are 'subject to scrutiny under the Equal Protection Clause.'") (quoting Reed v. Reed, 404 U.S. 71, 75 (1971)).

87. *See* Adarand Constructors v. Pena, 515 U.S. 200, 235–36 (1995) (applying strict scrutiny to race-based affirmative action and espousing the need for parity in scrutinizing all race-based classifications); *see also id.* at 247 (Stevens, J., dissenting) (noting anomaly created by majority opinion in that sex-based affirmative action will be analyzed under the intermediate scrutiny standard applied to sex-based discrimination, while race-based affirmative action will have to pass strict scrutiny). *But see* United States v. Virginia, 518 U.S. 515, 533–34 (1996) (distinguishing sex-based classifications that are designed to compensate for women's economic and social disadvantages, which are permissible, from those that disadvantage women based on impermissible sex-based stereotypes, which are constitutionally invalid).

88. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979).

meaningful equal protection review absent proof of an intent to discriminate.[89]

A final feature of constitutional sex discrimination law that is consistent with formal equality is its approach to sex difference. Where sex-based discrimination is at issue, the Supreme Court permits so-called "real differences" between men and women to justify even explicitly sex-based different treatment.[90] The existence of such "real differences," as perceived by the Court, validates the sex-based classification being challenged without regard to whether it perpetuates the subordination of women, and without regard to whether the perceived sex differences themselves stem from social inequality.[91]

Taken together, these features of equal protection doctrine render constitutional law ill-suited at the present time to address the far-reaching inequality experienced by women. The constitutional case that most famously illuminates the limits of formal equality is *Geduldig v. Aiello*,[92] in which the Court engaged in a tortured effort to force pregnancy into terms that formal equality could comprehend.[93] Because men and women are not similarly situated with respect to the capacity to become pregnant, the Court reasoned, a rule that singles out pregnancy for worse treatment than all other medically disabling conditions is sex-neutral.[94] In the Court's view, since no persons, male or female, received pregnancy benefits, the classification merely distin-

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89. *See id.* at 279 (upholding under rational basis review preference for veterans for state civil service jobs despite devastating adverse impact on women's job opportunities where plaintiffs failed to establish that the measure was enacted "because of," rather than "despite," its negative impact on women).

90. *See, e.g.*, Miller v. Albright, 523 U.S. 420, 434–37 (1998); Rostker v. Goldberg, 453 U.S. 57, 76–79 (1981); Michael M. v. Super. Ct. of Sonoma County, 450 U.S. 464, 469 (1981); *see also* Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 922–60 (1983) (criticizing the Court's approach to sex difference in sex discrimination cases).

91. *See, e.g.*, Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 413–28 (1984) (critiquing the Court's use of "real differences" in the *Michael M.* decision from an anti-subordination perspective).

92. 417 U.S. 484 (1974).

93. *See id.* at 492–97; *see also* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 (1984) (noting that criticism of the *Geduldig* decision has become a "cottage industry").

94. *Geduldig*, 417 U.S. at 496–97 n.20. Although the statute technically exempted disabilities resulting from "the individual's court commitment as a dipsomaniac, drug addict, or sexual psychopath," in practice, the only disabling condition exempted from statutory coverage was pregnancy. *Id.* at 499 n.3 (Brennan, J., dissenting). It also covered conditions only or primarily affecting men, "such as prostatectomies, circumcision, hemophilia, and gout." *Id.* at 501 (Brennan, J., dissenting).

guished between pregnant persons and non-pregnant persons.[95] Thus, equal protection was satisfied because the benefits policy treated all non-pregnant persons (male and female) the same.

The impact of this particular embarrassment to the Court's version of formal equality was mediated to some extent by the Pregnancy Discrimination Act (PDA), which amended Title VII of the Civil Rights Act of 1964 to recognize pregnancy discrimination as a form of sex discrimination under the statute.[96] However, even under the PDA, formal equality remains the primary lens through which Title VII evaluates workplace structures that penalize women who become pregnant.[97] The PDA broadened the comparison groups used in *Geduldig*—which placed pregnancy in a class by itself—by defining pregnancy as comparable to other medically disabling conditions.[98] The statute does not set a floor for the level of benefits to be afforded medically disabled persons; it simply requires employers to treat persons disabled by pregnancy the same as persons disabled by other medical conditions. Thus, under the PDA, employers who deny job accommodations and medical leave across the board do not violate the Act when they deny such benefits to pregnant women. Depending on where the employer chooses to set the baseline for accommodating workers' medical problems and family responsibilties, men who choose to have children may not face the same work-family conflict as women who choose to do so.[99]

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95. *Id.* at 496–97 n.20.

96. Pregnancy Discrimination Act (PDA), Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e (1994)).

97. Although, in theory, disparate impact doctrine provides an additional basis for challenging workplace structures that disadvantage pregnant women, in practice, such challenges are difficult to prove. *See* BARBARA ALLEN BABCOCK ET AL., SEX DISCRIMINATION AND THE LAW: HISTORY, PRACTICE, AND THEORY 559–61 (2d ed. 1996). Disparate impact doctrine and its departure from formal equality is discussed *infra*.

98. The PDA added the following language to Title VII:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefits programs, as other persons not so affected but similar in their ability or inability to work. . . .

42 U.S.C. § 2000e (1994).

99. *See* CHAMALLAS, *supra* note 43, at 49; Dowd, *supra* note 69, at 550–55. Although the PDA does not take this approach, formal equality also could be consistent with a substantive standard that raises the level of treatment for the comparison groups. For example, the Family Medical Leave Act guarantees a minimum level of unpaid leave to all workers with certain family and medical justifications. *See* 29 U.S.C. §§ 2601–2654 (1994). However, any

Like equal protection doctrine, statutory law on sex discrimination generally has followed a formal equality course.[100] Courts applying Title VII of the Civil Rights of 1964, the federal law governing sex-based discrimination in the workplace, have often taken an approach to sex difference that draws from formal equality, permitting the socially constructed different situations of men and women to justify rules and practices that disadvantage women.[101]

One example of formal equality's influence on Title VII jurisprudence is *EEOC v. Sears Roebuck & Co.*[102] In *Sears*, the Equal Employment Opportunity Commission (EEOC) used a group-based disparate treatment theory to challenge the relative dearth of women holding higher-paying and higher status sales commission jobs at Sears, compared to the overrepresentation of women in the company's lower-paying non-commission sales jobs.[103] The EEOC argued that the lower share of women in sales commission jobs compared to the proportion of women who applied for all sales jobs at Sears raised an inference of discrimination in hiring for the higher status and more lucrative commission sales jobs.[104]

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substantive guarantee of better treatment must come from an independent normative principle other than the formal equality directive to treat likes alike. *Cf.* Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 284–90 (1987) (upholding a state law that required employers to make special accommodations for pregnancy as consistent with the PDA, even though the PDA itself would permit employers to deny accommodations to all medically disabled workers).

100. *See* CHAMALLAS, *supra* note 43, at 180 (stating that the structuralist approach has not reshaped Title VII doctrine); *id.* at 309–10 (stating that disparate treatment, a formal equality approach, is used most frequently under Title VII); Tracey E. Higgins & Laura A. Rosenbury, *Symposium: Discrimination and Inequality Emerging Issues: Agency, Equality, and Antidiscrimination Law*, 85 CORNELL L. REV. 1194, 1205–13 (2000) (discussing trend in Title VII cases toward group-blindness and formal neutrality).

101. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 336 (1977) (attributing the risk of rape of female prison guards to their "very womanhood," and permitting prison to exclude women from contact positions guarding male inmates based on this risk).

102. 839 F.2d 302 (7th Cir. 1988).

103. *Id.* at 333–34. Between 1973 and 1980, Sears' commission sales jobs paid about twice as much as Sears' non-commission sales jobs. Schultz, *supra* note 64, at 1752 n.5. *See generally* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (providing a general discussion of the requirements for proving group-based disparate treatment claims under Title VII).

104. *Sears*, 839 F.2d at 312. The EEOC presented exhaustive statistical evidence to support this claim, including regression analyses based on information from employment applications of rejected sales applicants and Sears' computerized payroll records from 1973 through 1980. *Id.* The EEOC bolstered its statistical proof with evidence of the subjective nature of Sears' hiring process and testing practices. *Id.* at 331. This evidence included Sears' documents evincing gender-stereotyping in defining the jobs themselves and the employees who hold them. For example, Sears' Retail Testing Manual included a description of an ideal commission salesperson as "active," "has a lot of drive," possesses "considerable vigor," and "likes work which requires physical energy." *Id.* In addition, the EEOC established that Sears used a testing practice that included a "vigor" scale, which

The court rejected the EEOC's argument, finding more persuasive the employer's position that the groups of male and female employees that the EEOC compared were differently situated in their relative levels of interest in holding commission sales jobs.[105] The court credited testimony from Sears managers that women were less interested than men in holding high pressure commission sales jobs involving the sale of durable goods.[106] The court accepted Sears' assertion that differences in the interest and qualifications of potential male and female applicants for the jobs negated any inference of discrimination.[107] The court also faulted the EEOC for failing to put forward anecdotal evidence in the form of testimony of individual women who had been denied access to a commission sales job, despite having interest in the position.[108]

The decision is firmly entrenched within a formal equality framework in several respects. First, the Court's search for

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asked questions more likely to be answered affirmatively by men, such as, "Have you played on a football team?" *Id.* at 332.

105. *See id.* at 319. Sears did not undertake its own regression analysis, or introduce its own statistical evidence to counter that submitted by the EEOC. *Id.* at 312. Rather, Sears based its defense on the lack of interest argument, which it used to undermine the validity of the EEOC's statistical evidence. *Id.*

106. *Id.* at 320. In support of its lack of interest argument, Sears relied on the testimony of Sears store managers, personnel managers, and other store officials; a study based on interviews of women in nontraditional jobs at Sears; national surveys and polls regarding the changing status of women in America; morale surveys of their employees; national labor force data; an analysis of Applicant Interview Guides which attempts to measure differences between men and women; and evidence of its hiring figures, as well as general evidence regarding the characteristics of commission salespersons. *Id.* at 312–13. The appellate court upheld the district court's dismissal of EEOC expert testimony that no significant differences existed between men and women in regard to interests and career aspirations, affirming the District Court's finding that this evidence was "not credible, persuasive or probative." *Id.* at 320–21. The court found Sears' analysis to be "more helpful on the question of differences," finding that there were various reasons for women's lack of interest in commission selling (including increased pressure, and fear or dislike of being perceived as overly competitive), and that commission-based saleswomen were generally less happy in their jobs. *Id.*

107. *See id.* at 334, 340. The EEOC had contended that even with adjustments for differences in men's and women's interest levels, the disparities were still statistically significant. *Id.* at 334. However, the appellate court affirmed the district court's determination that Sears' interest evidence "substantially reduced" the EEOC's alleged disparities. *Id.* at 334–35. The court did not reject the district court's finding that Sears' analysis of the Career Aspiration Questionnaires administered to Sears employees demonstrated that interest alone could not account for the disparities computed under the EEOC's statistical analysis. *Id.* at 337.

108. *Id.* at 310–11. The court stated that such a group of "disappointed witnesses who preferred commission selling but were rebuffed" would have assisted the EEOC in its argument that lack of opportunity, rather than lack of interest, was the explanation for women's underrepresentation in the jobs. *Id.* at 322. However, as Vicki Schultz points out, evidence from individual women who were interested in yet denied commission sales jobs is wholly irrelevant to a group-based disparate treatment claim. *See* Schultz, *supra* note 64, at 1797–98.

individually identifiable victims of discrimination reflects formal equality's focus on the denial of equal treatment to individual men and women. Indeed, the court's focus on individual victims of discrimination is all the more remarkable given that the EEOC brought the case as a systemic disparate treatment case.[109] Second, the court focused on the potential for the differenetial treatment of men and women within a subjective hiring process.[110] The effect of Sears' practices on women was not the issue. Finally, and most significantly for the purposes of this discussion, the relevance of the comparison groups was at the heart of the court's inquiry.[111] Once the court accepted the alleged dissimilarity of male and female employees and the existence of sex difference in worker interest levels, Title VII offered no recourse.[112] Sears' role in shaping the culture and structures in the workplace that may have distorted women's and men's interest in the jobs at issue was not touched upon in the court's analysis.[113]

The Seventh Circuit's approach to sex difference in *EEOC v. Sears* is typical of the formal equality perspective that dominates Title VII doctrine. In Vicki Schultz's study of Title VII cases addressing the lack of interest defense, slightly over half of the decisions ultimately rejected the defense.[114] However, even these more liberal courts operated within a formal equality perspective. They rejected the employer's view that women were not interested in the jobs, but accepted the premise that interest is fully formed independent of workplace structures.[115] Thus, the decisions merely applied formal equality, finding that since men and women were similarly situated for the jobs at issue, Title VII provided a remedy.

In two notable, but ultimately limited, respects, Title VII law has been more receptive than equal protection doctrine to alternative theories of sex equality that go beyond the limits of formal equality. One important exception to the statute's emphasis on formal inequality is the recognition of disparate impact as a form of un-

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109. *See* Schultz, *supra* note 64, at 1797–98.

110. *See Sears*, 839 F.2d at 331–32.

111. *See id.* at 334.

112. *See id.* at 334–35; *see also* CHAMALLAS, *supra* note 43, at 69–71 (discussing *Sears* as a case where different voice feminism backfired, lending credence to arguments that men and women were not sufficiently similar so as to be comparable for Title VII purposes).

113. *See* Schultz, *supra* note 64, at 1804–05 (arguing "that the gendered characteristics Sears ascribed to the commission sales position" signaled to potential employees that such jobs required "masculine" traits).

114. *Id.* at 1776–77.

115. *See id.* at 1785–88.

lawful sex discrimination.[116] Disparate impact doctrine, as opposed to disparate treatment—which focuses on sex-based different treatment—enables women (and men) to challenge sex-neutral rules that have a disproportionate adverse effect on the employment opportunities of persons of one sex.[117] If the plaintiff or plaintiffs can identify a specific employment practice (or, under some circumstances, a group of practices) with a disparate impact on women, the practice will violate Title VII unless the employer justifies it under a business necessity standard.[118]

Disparate impact doctrine departs from formal equality in that it focuses on the harm to social groups rather than solely to individuals, and it recognizes the capacity for facially neutral rules and practices to disadvantage members of a protected group.[119] However, disparate impact, like formal equality, has the potential to become derailed when confronted with sex difference. Proof of disparate impact depends on establishing a disparity by comparing the challenged practice's effect on men and women in relevant comparison groups. Evidentiary battles in disparate impact cases typically center on whether the relevant comparison is men and women in the general population or within a more narrowly constructed labor pool, taking into account relevant qualifications and interest.[120] So constructed, the available labor pool operates as a similarly situated requirement in disparate impact cases: proof of disparity only counts if the men and women compared are otherwise comparable with respect to the jobs at issue.[121] Thus, the

116. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (stating Title VII reaches "not only overt discrimination but also practices that are fair in form, but discriminatory in operation.").

117. *See, e.g.*, Int'l. Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977) (defining disparate treatment as the treatment of "some people less favorably than others because of their [sex]," and disparate impact as "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.").

118. 42 U.S.C. § 2000e-2(k)(1)(A) (2000).

119. See Colker, *supra* note 43, at 1019–20 (viewing disparate impact doctrine under an anti-subordination paradigm).

120. *See, e.g.*, BARBARA J. FLAGG, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW 91 (1998) (noting that key issues in disparate impact challenges "include the choice of comparison groups—e.g., general population versus qualified labor force") (endnote omitted).

121. *See* Dowd, *supra* note 69, at 559 (discussing the failure of disparate impact law to address women's work-family conflict, and observing that the doctrine permits an employer to argue that worker choice, rather than any policy of the employer, caused the disparity); Higgins & Rosenbury, *supra* note 100, at 1205–07 (discussing courts' increasing resistance to disparate impact as a viable theory for proving discrimination, and noting the potential for disputes about the level of interest in the relevant labor pool to defeat a disparate impact claim).

potential for disparate impact doctrine to reach policies and practices that disadvantage women depends on whether the available labor pool is defined in such a way that it does not replicate women's disadvantage in the workplace. If the available labor pool itself has been shaped by institutional bias and workplace structures, the use of that pool in the analysis may hide the discriminatory impact of the challenged practice.[122]

For example, if the EEOC had brought a disparate impact challenge in the *Sears* case, it would have had to demonstrate that a particular employment practice selected a significantly lower share of women than men from the pool of workers interested and able to perform commission sales jobs. If Sears, through its workplace structures and institutional practices, had already suppressed women's level of interest in the labor pool for such jobs, a comparison of the practice's impact on men and women within the "available labor pool" would not capture the full extent of women's disadvantage in the workplace.[123]

When confronted with arguments about sex difference in women's interest and abilities, the potential for disparate impact doctrine to transcend the limits of formal equality depends on the capacity of courts to critically analyze the role of difference and its connection to institutional structures. In some Title VII disparate impact cases, courts have taken a more sophisticated approach to the problem of sex difference and have looked beyond women's lower representation in the available labor pool to see whether the employer participated in constructing that difference. If the court believes that the employer itself has shaped the sex composition of the constructed labor pool, it will not allow the existence of sex difference within that pool to defeat a disparate impact claim. Courts that take such approach adopt a structuralist analysis that critically examines the role employers play in constructing sex difference.

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122. *Cf.* FLAGG, supra note 120, at 94–95 (discussing small sample size of individuals in the workplace affected by the challenged practice as substantial barrier in disparate impact claims); Clark Freshman, *What Ever Happened to Anti-Semitism? How Social Science Theories Identify Discrimination and Promote Coalitions Between "Different" Minorities*, 85 CORNELL L. REV. 313, 339–43 (2000) (discussing the small numbers problem in proving disparate impact discrimination).

123. *See* FLAGG, *supra* note 120, at 96 (discussing problems of proof of disparity in the employer's actual workforce); *see also id.* at 171 n.15 (noting that the Supreme Court has rejected "workforce stratification— overrepresentation of whites in higher job classifications and overrepresentation of nonwhites at lower levels—as a method of proving disparate impact").

An example of a Title VII disparate impact case that more closely resembles a structuralist approach is *Dothard v. Rawlinson*,[124] a case involving a female plaintiff's challenge to a state prison's use of height and weight requirements to screen out employees for certain prison security jobs.[125] The Court permitted the plaintiff to establish disparate impact by showing how the requirements would affect men and women in the general population, rather than using the pool of men and women who actually applied for the positions.[126] The Court reasoned that the height and weight requirements themselves would have the effect of distorting or suppressing the proportion of women in the applicant pool, because women could readily see that they would not meet the employer qualifications and would not apply for the jobs.[127] In such a situation, the employer could not insist on proof of disparate impact within the applicant pool when the employer itself had participated in constructing the sex composition of the applicant pool.[128] By recognizing the employer's role in shaping women's expressed interest in prison guard jobs, the Court did not permit differences in male and female representation in the applicant pool to undermine the plaintiff's case.[129]

Courts have been more inclined to take such a structuralist approach when dealing with objective and quantifiable employment criteria such as height and weight requirements and standardized tests.[130] They have been less likely to critically examine how institutions shape the pool of interested and able employees when dealing with higher level jobs and more complex, subjective

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124. 433 U.S. 321 (1977).

125. *Id.* at 323–24.

126. *Id.* at 330.

127. *Id.*

128. *See id.*

129. Justice White, in a dissenting opinion, viewed the employer's argument more favorably, stating that he was not "convinced that a large percentage of the actual women applicants, or of those who are seriously interested in applying, for prison guard positions would fail to satisfy the height and weight requirements." *Id.* at 348. Like the Court in *Sears*, 839 F.2d 302 (7th Cir. 1988), Justice White did not consider how the prison's structuring of the job and its requirements would affect male and female interest levels. *See* discussion *supra* notes 109–13 and accompanying text.

130. *See* Ramona L. Paetzold & Rafael Gely, *Through the Looking Glass: Can Title VII Help Women and Minorities Shatter the Glass Ceiling?*, 31 HOUS. L. REV. 1517, 1526–49 (1995) (discussing Title VII's failure to enable women to break through the glass ceiling); *cf.* FLAGG, *supra* note 120, at 97 (discussing tendency of courts to find that a challenged practice did not cause the disparate impact if members of the disadvantaged group could have changed their behavior to meet the employer's requirements). *See generally* Daniel Gyebi, *The Civil Rights Act of 1991: Favoring Women and Minorities in Disparate Impact Discrimination Cases Involving High-Level Jobs*, 36 How. L.J. 97 (1993).

decision-making processes.[131] The effectiveness of disparate impact doctrine depends on the ability of courts to critically examine arguments based on sex difference in worker interests and abilities, and to recognize workplace structures that shape and distort women's relationship to the jobs at issue.

Disparate impact doctrine is an important but limited counterpoint to the dominant strain of formal equality in sex discrimination law.[132] Despite its promise for transforming workplaces that disadvantage women, disparate impact law has made less of a mark on sex inequality than one might expect.[133] In addition to the law's potential for insulating institutionally constructed sex difference from disparate impact challenges, disparate impact doctrine contains further obstacles that render it incomplete as an alternative model to formal equality. The requirement that plaintiffs identify a specific practice that caused the disparate impact is a high hurdle for employees faced with complex employment selection processes.[134] Moreover, even if disparate impact is established, the disparity may still be justified if the challenged practice falls within the business necessity defense.[135] For example, if the employer demonstrates that a certain level of experience is necessary to do the job, the employer may require such experience even if structures or cultures within its workplace have limited the capacity of women to obtain such experience. Taken together, these difficulties have meant that disparate impact doctrine has had only a

131. *See* Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 948–50 (1982).

132. *See, e.g.*, Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 335–38 (arguing that the category of cases in which the distinction between disparate impact and disparate treatment proves decisive is quite narrow).

133. *See* John J. Donahue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 989 (1991) (noting that disparate impact cases accounted for less than two percent of federal employment discrimination cases in 1989); Linda Hamilton Kreiger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1162 n.3 (1995) (noting that the vast majority of Title VII challenges are disparate treatment cases).

134. *See* Civil Rights Act of 1991, § 105(a), 105 Stat. 1074 (codified at 42 U.S.C. § 2000e-2(k)(1)(A)(i)-(B(i)) (requiring the complaining party to identify the specific employment practice that causes disparate impact, but providing that a plaintiff may challenge a multi-component process if its elements "are not capable of separation for analysis"); FLAGG, *supra* note 120, at 97 (explaining how this requirement places a high burden on disparate impact plaintiffs).

135. *See* Selmi, *supra* note 132, at 287 n.31 (noting that courts deciding disparate impact cases show a strong willingness to accept employer justifications, so that "disparate impact cases are notoriously difficult to prove and infrequently brought").

limited impact on women's ability to challenge inequality in the workplace.[136]

A second area of sex discrimination law that strays from the boundaries of formal equality is sexual harassment law. Sexual harassment doctrine reflects an amalgam of formal equality and anti-subordination, sharing features of both.[137] The analysis for determining whether the conduct at issue was sexual harassment starts from a formal equality premise. To be actionable, the harassment must occur because of the sex of the target, requiring the plaintiff to demonstrate that she (or he) was singled out for harassment because of her (or his) sex. This requirement is consistent with formal equality, as it focuses on whether the individual who experienced the harassment was treated differently on the basis of his or her sex.[138] However, in applying this standard, courts have not strictly required proof of differential treatment on the basis of sex, and have instead focused on the disadvantageous effect of the harassment on its victims.[139] At least with respect to male-female conduct of a sexual nature, courts typically presume that the harassment occurred because of sex.[140] Thus, although the inquiry into whether the plaintiff was harassed because of her sex fits well within a formal equality framework, the test for sex-based treatment is applied more loosely, focusing on sex-linked disadvantages rather than different treatment. Some courts have even more explicitly drawn on structuralist interpretations to ground

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136. *See* FLAGG, *supra* note 120, at 98 (concluding that while none of the individual hurdles facing disparate impact claimants is insurmountable, "the cumulative effect of these obstacles is significant").

137. *Cf.* CHAMALLAS, *supra* note 43, at 54–55 (discussing roots of sexual harassment in anti-subordination theory, but noting that the courts have never fully accepted this theory); Abrams, *Judicial Evasion of Difference*, *supra* note 64, at 1431 (noting that sexual harassment law under Title VII reflects a "fuller appreciation of group-based difference" and "acknowledges power inequalities between men and women," in contrast to the general "difference evasion" in discrimination law).

138. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (emphasizing that sexual harassment plaintiffs must always demonstrate that the harassing conduct occurred because of their sex).

139. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1716–20 (1998) (demonstrating that courts are much less inclined to find that nonsexual harassment occurred on the basis of the target's sex than they are to find that sexual harassment occurred because of the target's sex).

140. *See, e.g.*, Burlington Indus. v. Ellerth, 524 U.S. 742, 756 (1998) (stating that "[s]exual harassment under Title VII presupposes intentional conduct"); *Oncale*, 523 U.S. at 80 (stating that it is reasonable for courts to presume, in cases involving male-female harassment of a sexual nature, that the conduct occurred because of sex).

the sex-based nature of the harm in employment structures that render women more vulnerable to workplace harassment.[141]

Sexual harassment law transcends the limits of formal equality in another respect as well. The standard for institutional liability for sexual harassment is not the typical formal equality standard. Title VII holds employers liable for sexual harassment—even by persons who are not regarded as agents of the employer—if the employer failed to take reasonably responsive action after receiving notice of the harassment.[142] This standard requires employers to do more than treat all harassment victims the same regardless of their sex, as formal equality would require. Employers cannot successfully argue that they treat men and women alike by ignoring all sexual harassment, regardless of the sex of the victim. Sexual harassment doctrine under Title IX takes a similar approach, although it adopts a more stringent standard for institutional liability, requiring actual notice and deliberate indifference.[143] By focusing on how institutions perpetuate discriminatory cultures, this standard goes beyond formal equality, requiring more than the identical treatment of similarly situated men and women.[144]

Despite important exceptions in the areas of disparate impact doctrine and sexual harassment, alternative approaches to formal equality have not taken root in sex discrimination law on a widespread basis.[145] In light of this picture, one might expect that Title IX would approach sex equality in sport from a formal equality perspective. Yet, the test that has developed for measuring participation opportunities in school athletic programs, and the way

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141. *See* Chamallas, *Structuralist and Cultural Domination Theories*, *supra* note 64, at 2399–2401 (discussing structuralist influences in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), a hostile environment sexual harassment case).

142. *See* Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983); Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982); EEOC—Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(d)-(e) (2000).

143. *See* Davis v. Monroe County Bd. Educ., 526 U.S. 629, 633 (1999).

144. *See* Deborah Brake, *School Liability for Peer Sexual Harassment After* Davis*: Shifting from Intent to Causation in Discrimination Law*, 12 HASTINGS WOMEN'S L.J. (forthcoming 2001) (manuscript on file with author); Deborah Brake, *The Cruelest of the Gender Police: Student-to-Student Sexual Harassment and Anti-Gay Peer Harassment Under Title IX*, 1 GEO. J. GENDER & L. 37, 50–51 (1999) [hereinafter Brake, *The Cruelist of the Gender Police*].

145. *See* Chamallas, *Structuralist and Cultural Domination Theories*, *supra* note 64, at 2371 (stating that while structuralist and cultural domination theories have had some impact on Title VII doctrine, their influences "are still at the margins of Title VII"); Rhode, *supra* note 51, at 1208 ("In part, the difficulty stems from the law's traditional focus on gender differences rather than gender disadvantage. Its primary objective has been to secure similar treatment for those similarly situated; less effort has centered on remedying the structural factors that contribute to women's dissimilar and disadvantaged status.").

courts have applied it, draws more from anti-subordination and structuralist analysis than formal equality. The remainder of this Article attempts to elaborate and justify the theory of equality underlying Title IX and to explore the implications of this theoretical grounding.

II. THE LAW OF TITLE IX: BEYOND FORMAL EQUALITY AND TOWARD A MORE CRITICAL ANALYSIS OF SEX DIFFERENCE

Commentators who have examined Title IX's relationship to feminist theory have generally concluded that Title IX is a liberal feminist law that requires only formal equality.[146] At most, they view Title IX as a slight departure from formal equality because it accommodates sex difference through the authorization of sex-separate teams, thus supplementing formal equality with special treatment in certain circumstances.[147] Although this understanding is consistent with the law's early applications,[148] it does not account for modern developments in Title IX law. In recent years, the case law evaluating Title IX compliance has surpassed the limits of formal equality, most significantly in the approach to sex difference in the area of athletic participation.

The most litigated and contested part of Title IX's application to athletics, and its most notable departure from formal equality, is

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146. Jessica E. Jay, *Women's Participation in Sports: Four Feminist Perspectives*, 7 TEX. J. WOMEN & L. 1, 19 (1997) ("Title IX is a formal equality law, subject to some exceptions which are still based on this model."); *see also* Birrell & Richter, *supra* note 1, at 222–23 (characterizing Title IX as a "liberal" approach to "remedy . . . women's exclusion from sport [that] has merely resulted in incorporation and has failed to accomplish the far-reaching changes in sport some feminists had advocated"); Michael A. Messner & Donald F. Sabo, *Toward a Critical Feminist Reappraisal of Sport, Men, and the Gender Order*, *in* SPORT, MEN, AND THE GENDER ORDER, *supra* note 26 (describing Title IX as "a decidedly liberal initiative," and defining liberal feminism as an approach to equality that stresses sex similarities and the individual's right to equal opportunity); Wendy Olson, *Beyond Title IX: Toward an Agenda for Women and Sports in the 1990's*, 3 YALE J.L. & FEMINISM 105, 116–17 (1990) (analyzing Title IX as based on an "equality" model that uses male sports as the standard); Note, *Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression*, 110 HARV. L. REV. 1627, 1634–35 (1997) (stating that Title IX comes out of a formal equality model, defining equal opportunity as opening up access to male structures).

147. *Cf.* Bartlett, *supra* note 43, at 4–6 (discussing substantive equality as a strain of feminist legal theory in which sex difference is recognized and accommodated through sex-specific treatment).

148. *See* 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, 398 (1997) (discussing Title IX litigation on "cross-over" cases, in which girls or boys attempt to play on a team that is offered to members of the other sex).

the standard for measuring equality in the allocation of athletic participation opportunities.[149] This aspect of Title IX compliance examines whether the number of opportunities provided to male and female athletes discriminates on the basis of sex.[150] The test for measuring discrimination in this area—commonly known as "the three-part test"—comes from the statute's regulations and the interpretations by the agency primarily responsible for enforcing Title IX, the Department of Education Office for Civil Rights (OCR).

A. The Development of Title IX Standards in Athletics and the Three-Part Test

Title IX itself does not specify any standards for identifying sex discrimination in school athletic programs or in any other specific context. The statute's prohibition of sex discrimination is framed generally and comprehensively: "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. . . ."[151]

Title IX's standards governing athletics derive from the regulations and interpretations issued by the federal agency charged with enforcing Title IX, previously the Department of Health, Education and Welfare (HEW), and now the Department of Education (DOE).[152] The Title IX regulations that were issued in 1975 pursuant to congressional authorization remain controlling

149. *See* Anne Bloom, *Financial Disparity as Evidence of Discrimination Under Title IX*, 2 VILL. SPORTS & ENT. L.J. 5, 11 (1995) (noting that most Title IX litigation has focused on the three-part test to increase women's share of athletic participation opportunities); B. Glenn George, *Title IX and the Scholarship Dilemma*, 9 MARQ. SPORTS L.J. 273, 275, 278 (1999) (noting that litigation in the 1990s "focused primarily on the issue of participation rates," and contending that the next wave of Title IX enforcement is focusing on the equitable allocation of athletic scholarships).

150. *See generally* Policy Interpretation, *supra* note 6 (establishing standards for measuring equal accommodation of student interests and abilities in the provision of athletic participation opportunities).

151. 20 U.S.C. § 1681(a) (1994).

152. The former Department of Health, Education and Welfare (HEW) was the primary enforcement agency for Title IX until 1979, when HEW was abolished and the Department of Education assumed primary responsibility for Title IX enforcement. Cohen v. Brown Univ., 991 F.2d 888, 895 (1st Cir. 1993) (discussing history of federal responsibility for Title IX enforcement).

today.[153] These regulations reflect the agency's assessment that equality in this context requires more than an equal right for male and female students to try out for the same teams. Instead of adopting such a classic formal equality stance, the regulations permit schools to offer separate athletic teams for male and female athletes, and set standards for measuring equal opportunity in the context of sex-separate programs.[154]

The resulting set of standards divide Title IX compliance into three main areas, which must be independently evaluated.[155] The three areas are, broadly speaking: participation, scholarships, and the treatment and benefits provided to male and female athletes.[156] Of these, by far the most litigated, and arguably the most important, is participation, which addresses the allocation of opportunities to play competitive sports among male and female students.[157] In the terms used by the regulations, the relevant inquiry asks "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes."[158] Compliance in this area has come to be measured by a three-part test developed by HEW in a Policy

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153. *See id.* (deferring to Title IX regulations and noting the particularly high degree of deference afforded because Congress specifically authorized HEW to prescribe standards for athletics programs). The regulations were the result of a congressional compromise known as the "Javits Amendment," that, in lieu of attempting to exempt revenue-producing sports from Title IX, instructed the agency to issue regulations implementing Title IX, "includ[ing] with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974); *see also* Heckman, *supra* note 148, at 395 (describing the political events leading up to the Title IX regulations).

154. The regulations explicitly permit institutions to provide separate-sex athletic teams "where selection for such teams is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(b) (1999). Because intercollegiate and interscholastic athletic teams are nearly always selected on the basis of competitive skill, these programs are typically provided on a sex-segregated basis.

155. Institutions covered by Title IX must comply with each of these three areas in order to be in compliance with Title IX; they may not "trade off" compliance in one area with a violation in another, or meet two out of three. *See Cohen*, 991 F.2d at 897; Roberts v. Colo. St. Bd. of Agric., 998 F.2d 824, 828 (10th Cir. 1993).

156. *See generally* ELLEN J. VARGYAS, BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX 15–30 (1994) (explaining Title IX athletics framework).

157. *See, e.g.*, George, *supra* note 149, at 275–76 ("The question of participation opportunities understandably took precedent—issues like financial aid, equipment budgets, and practice facilities were irrelevant unless women's teams existed to enjoy those benefits.").

158. 34 C.F.R. § 106.41(c). The other nine factors listed in the regulation for determining "equal athletic opportunity" relate to the treatment of and benefits provided to male and female athletes, which are evaluated separately from the allocation of participation opportunities. *Id.* These factors include the scheduling of games, availability of facilities, coaching, and equipment and uniforms, among others. *Id.*

Interpretation that the agency issued in 1979.[159] Under the three-part test, an institution may comply with Title IX by meeting any one of the following three standards:

> (1) [providing] intercollegiate level participation opportunities for male and female students . . . in numbers substantially proportionate to their respective enrollments; or
>
> (2) show[ing] a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of [the underrepresented] sex; or
>
> (3) demonstrat[ing] that the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program.[160]

Although the test is phrased in terms of intercollegiate athletics, it also applies to other types of athletic programs, including elementary and secondary competitive sports, club sports, and recreational sports.[161]

The test's focus on the situation of the "underrepresented sex" reflects the agency's concern with expanding opportunities for female athletes and avoiding measures of interest that would have the effect of suppressing the growth of women's athletic participation.[162] Throughout the Policy Interpretation, the agency acknowledged that female sports participation has been and continues to be limited by institutional discrimination.[163] The

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159. Policy Interpretation, *supra* note 6, at 71,414. The Policy Interpretation was issued to provide greater clarity in response to university questions after the agency had received nearly 100 complaints alleging discrimination in intercollegiate athletics. *Id.* at 71,413.

160. *Id.* at 71,418. The plaintiff has the burden of proof on prongs one and three of the test; the university has the burden of proof under prong two. *See Cohen*, 991 F.2d at 901–02.

161. Policy Interpretation, *supra* note 6, at 71,413–14 ("This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation. Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate."); *see also* Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265, 274 (6th Cir. 1994) (applying three-part test to Title IX challenge to interscholastic athletic opportunities).

162. Although in theory, "the underrepresented sex" might in some instances refer to males, it was commonly understood that in the context of athletics, this meant women. *See* Policy Interpretation, *supra* note 6, at 71,419 app. A (discussing widespread discrimination against women in intercollegiate athletics).

163. *See id.* at 71,414 (discussing the obligation to effectively accommodate the interests and abilities of male and female students, and stating that "[i]n most cases, this will entail

document states that, in determining student athletic interest, care must be taken to ensure that the measurement of interest does not disadvantage the underrepresented sex.[164] It explicitly recognizes the connection between the athletic interests and abilities that girls and women possess and the presence of discrimination in the opportunities available to them.[165]

Read as a whole, the Policy Interpretation reflects a critical approach to sex difference that does not accept existing differences in male and female interest levels as either inherent or independent of past and present opportunity structures. The test and the rationale behind it mark a departure from formal equality by targeting the structures that have resulted in different levels of athletic interest and participation, rather than accepting male-female difference as a legitimate basis for allocating resources and opportunities. Court decisions applying the three-part test even more clearly articulate this perspective.

B. The Three-Part Test in the Courts

In several significant cases, the courts have elaborated upon the interrelation between institutional structures and the respective situations of men and women in athletics.[166] To date, courts have

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development of athletic programs that substantially expand opportunities for women to participate and compete at all levels"); *id.* at 71,419 ("Participation in intercollegiate sports has historically been emphasized for men but not women. Partially as a consequence of this, participation rates of women are far below those of men.").

164. The Policy Interpretation specifically directs institutions that they may assess student interest and ability:

> [B]y nondiscriminatory methods of their choosing provided. . . . [t]he processes take into account the nationally increasing levels of women's interests and abilities. . .[and] [t]he methods of determining interest and ability do not disadvantage the members of an underrepresented sex. . .[and] [t]he methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.

Id. at 71,417.

165. *See id.* at 71,419 (citing data documenting discrimination against women's athletic programs in the numbers of participation opportunities offered, scholarship dollars, and other benefits provided to female athletes including recruiting and coaching).

166. Title IX is enforceable in court or through the Office for Civil Rights. *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 717 (1979). The substantive standards for evaluating Title IX compliance do not depend on the route of enforcement, although the available remedies and the procedures for complaining vary. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992) (upholding availability of damages remedy under Title IX for private

adopted the three-part test as the governing standard for measuring Title IX compliance in the area of athletics participation, despite challenges to the test's legitimacy.[167] The most significant challenge to the three-part test, and the most comprehensive explanation of the rationale underlying the test, are found in the district court and First Circuit decisions in *Cohen v. Brown University*.[168]

This protracted litigation was initiated by a class of female athletes, including lead plaintiff Amy Cohen, a gymnast who lost her team when Brown eliminated university funding for its varsity women's gymnastics and volleyball teams as part of a budget-cutting plan to reduce athletic expenditures.[169] The case began in 1991 when Brown, facing a budget crunch, demoted the two women's varsity teams to "donor-funded varsity status"—a move that effectively would have ended varsity level competition for the two teams.[170] At the same time, Brown also demoted men's water polo and golf to donor-funded status.[171]

Although at face value, the cuts appeared gender-neutral, the reality is more complex. The elimination of the two women's teams in a program already disproportionately slanted in favor of male athletes exacerbated the situation of female athletes at Brown by further reducing the number of participation opportunities available to them.[172] Moreover, the budgetary impact of the cuts

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cause of action alleging intentional discrimination); Setty, *supra* note 31, at 339–46 (comparing difficulties involved in enforcing Title IX through litigation and through the Office for Civil Rights and urging reforms of OCR to facilitate better Title IX enforcement).

167. Every circuit that has considered the issue has adopted the three-part test as the controlling test for Title IX compliance in the area of athletic participation opportunities. *See* Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993), *remanded to*, 879 F. Supp. 185 (D.R.I. 1995), *aff'd in part and rev'd in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997); Boucher v. Syracuse Univ., 164 F.3d 113, 117 (2d Cir. 1999); Favia v. Ind. Univ. of Pa., 7 F.3d 332, 335–36 (3d Cir. 1993); Pederson v. La. St. Univ., 213 F.3d 858, 879 (5th Cir. 2000); Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265, 274 (6th Cir. 1994); Kelley v. Bd. of Trs., 35 F.3d 265, 268 (7th Cir. 1994); Neal v. Bd. of Trs. of Cal. St. Univs., 198 F.3d 763, 767–68 (9th Cir. 1999); Roberts v. Colo. St. Bd. of Agric., 998 F.2d 824, 828–29 (10th Cir. 1993); *see also* Beasley v. Ala. St. Univ., 966 F. Supp. 1117, 1122 (M.D. Ala. 1997) (explaining Title IX requirements using the three-part test); Bryant v. Colgate Univ., No. 93-CV-1029, 1996 U.S. Dist. LEXIS 8393, at *26–38 (N.D.N.Y. June 11, 1996) (applying the three-part test to decide motion for summary judgment).

168. 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993), *remanded to*, 879 F. Supp. 185 (D.R.I. 1995), *aff'd in part and rev'd in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997).

169. *Brown*, 101 F.3d at 161.

170. *Id.*

171. *Id.*

172. *Id.* at 163 (accepting plaintiffs' contention that, because men retained a disproportionate share of intercollegiate athletic opportunities at Brown both before and after the

was far from neutral. Cutting the women's teams would have resulted in a net savings of $62,000 per year, while the cuts in the men's teams netted only $16,000 per year.[173] The reason for the disparity was that the men's teams had a strong donor base of supportive alumni, and were already primarily funded by donations.[174] The four teams were told that they could continue to play at the varsity level if they could find donations to make up for the lost university funds.[175] While both men's and women's donor-funded teams are at a comparative disadvantage to university-funded teams, the men's donor-funded teams generally enjoy a wider donor base by virtue of having existed for a longer period of time.[176] Thus, the teams were differently situated with respect to the cuts.[177]

In defending the lawsuit, Brown launched a full-scale assault on the three-part test and its underlying philosophy.[178] Brown argued that, by focusing on raising the opportunities available to the underrepresented sex, the three-part test discriminates against male athletes because men as a group are more interested in playing sports than women.[179] As an alternative to the three-part test, Brown proposed measuring the relative levels of interest expressed by men and women in playing intercollegiate sports, and then providing opportunities to both sexes commensurate with their

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demotions, "what appeared to be the even-handed demotions of two men's and two women's teams, in fact, perpetuated Brown's discriminatory treatment of women in the administration of its intercollegiate athletics program").

173. Lynette Labinger, *Title IX and Athletics: A Discussion of* Brown University v. Cohen *by Plaintiffs' Counsel*, 20 WOMEN'S RTS. L. REP. 85, 89 (1998). Interestingly, as a statement of Brown's priorities, the year before Brown cut the four teams in response to budget pressures, it spent $250,000 to buy out and replace its entire football coaching staff mid-contract in the middle of a losing football season. *Id.*; *see also id.* at 95 (estimating that Brown spent "at least $1 million, and probably closer to $2 million, if not more, to defend this case," not including the costs of complying with the settlement and the court order, all to save $80,000 per year by cutting the four teams); John C. Weistart, *Can Gender Equity Find a Place in Commercialized College Sport?*, 3 DUKE J. GENDER L. & POL'Y 191, 220 (1996) [hereinafter Weistart, *Gender Equity*] (noting that at the time of the cuts, Brown spent $4.74 million on varsity sports, and that of this, "three men's sports—football, basketball and hockey—received 42 percent of the available funds").

174. Labinger, *supra* note 173, at 89.

175. *See id.*

176. *See Brown*, 879 F. Supp. at 201 n.30 (citing coach's testimony that women's teams, although they invested the same amount of efforts into fundraising, met with much lower success in the fundraising arena because men typically control household finances and men's teams had many more alumni due to their much longer history at Brown).

177. *Id.*

178. *Id.* at 205.

179. Brown made this argument at all levels and in various forms throughout the protracted litigation. *See* Cohen v. Brown Univ., 809 F. Supp. 978, 987 (D.R.I. 1992), *aff'd*, 991 F.2d 888, 899 (1st Cir. 1993), *remanded to* 879 F. Supp. 185, 204–06 (D.R.I. 1995), *aff'd in part and rev'd in part*, 101 F.3d 155, 169 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997).

relative interest levels.[180] Brown argued that its proposal would treat men and women equally because their expressed interest in athletics would be accommodated to the same extent. For example, if, as Brown argued, twice as many male students than female students were interested in playing intercollegiate sports, Title IX should permit it to maintain approximately twice as many athletic opportunities for male than female athletes.[181]

The First Circuit twice rebuffed Brown's challenge to the three-part test and its proposed alternative, first in affirming the district court's preliminary injunction ordering Brown not to cut the two women's teams,[182] and second in affirming the district court's post-trial decision finding Brown in violation of Title IX.[183] Both First Circuit opinions in the case resoundingly rejected Brown's argument that Title IX should measure equality in participation opportunities based on the actual, expressed interest levels of male and female students.[184]

The First Circuit's second decision in the case, affirming the district court's determination of liability, provides the most comprehensive analysis and defense of the three-part test by a court to date. This decision upheld the district court's ruling, which it made after a trial on the merits in which the relative interest argument was extensively litigated, that Brown failed to comply with each prong of the three-part test.[185] First, Brown failed prong one of the test because the evidence showed that women held a disproportionately low share of Brown's intercollegiate athletic participation opportunities, constituting thirty-eight percent of the school's athletes, compared to fifty-one percent of the student body.[186] Second, Brown failed prong two of the test because it could not show that it had "maintained a continuing practice" of program expansion for women; in fact, other than adding one new

180. *Brown*, 879 F. Supp. at 204.
181. *Id.* at 204 n.40.
182. *See Brown*, 991 F.2d at 907.
183. *See Brown*, 101 F.3d at 187.
184. *See Brown*, 101 F.3d at 174; *Brown*, 991 F.2d at 899.
185. *See Brown*, 879 F. Supp. at 211–13.
186. *Id.* at 211, *aff'd in part and rev'd in part*, 101 F.3d at 166. Because institutions largely control the number of athletic positions available to men and women when they decide to offer single-sex teams, decide what teams to sponsor, and allocate funding and a coaching staff for those teams, the court measured participation opportunities by counting the number of actual participants. *Brown*, 101 F.3d at 164. Brown's argument that there existed a certain number of "unfilled slots" on the women's teams that should be counted as participation opportunities was rejected by the court and refuted by the testimony of Brown's coaches, who stated that they recruited the number of athletes that the team could support. *Id.* at 164, 167; *Brown*, 879 F. Supp. at 202–04.

women's team in the 1980s, Brown had not increased its women's program since the 1970s, when it first launched a women's athletic program at the school.[187] Finally, Brown failed prong three of the test because there were women on campus with sufficient interest and ability to field additional intercollegiate teams not offered at the school.[188]

In its defense, Brown attacked the legitimacy of the three-part test itself.[189] The First Circuit's response to these attacks, and its justification and explanation of the three-part test, constitute the most enduring and far-reaching parts of its opinion. The court first addressed Brown's argument that the test amounted to affirmative action and preferential treatment for female athletes and rebuked Brown for its "persistent invocation of the inflammatory terms 'affirmative action,' 'preference,' and 'quota.'"[190] As the court saw it, "this is not an affirmative action case."[191] Rather, the court explained, the plaintiffs sought neither preferential treatment nor affirmative action, but an end to discrimination.[192]

As the court seemed to recognize, Brown's characterization of the three-part test as an affirmative action requirement stemmed from Brown's constricted view of the meaning of discrimination. Because Brown equated "discrimination" with the formal equality

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187. *Brown*, 879 F. Supp. at 191, *aff'd in part and rev'd in part*, 101 F.3d at 166. In determining program expansion, the court disregarded evidence of contraction in the men's athletic program, holding that program expansion for the underrepresented sex may not be satisfied by reducing the opportunities available to the overrepresented sex. *Id.*; *see also* Labinger, *supra* note 173, at 89 (discussing history of women's athletics at Brown and noting that between 1979 and the time of the lawsuit, Brown added only one women's sport—women's track in 1982).

188. *See Brown*, 879 F. Supp. at 190, *aff'd in part and rev'd in part*, 101 F.3d at 180. The First Circuit noted that:

> [W]hile the question of full and effective accommodation of athletics [sic] interests and abilities is potentially a complicated issue where plaintiffs seek to create a new team or to elevate to varsity status a team that has never competed at the varsity level, no such difficulty is presented here, where plaintiffs seek to reinstate what were successful university-funded teams right up until the moment the teams were demoted.

Brown, 101 F.3d at 180. In addition to the two demoted teams, the plaintiffs also established unmet interest in women's fencing, skiing, and water polo, sports that were not offered at the varsity level. *Id.* at 190, n.16; Labinger, *supra* note 173, at 91–92; *see also* Heckman, *supra* note 148, at 420–21 n.142 (discussing successful litigation brought by female athletes seeking to upgrade club sports to varsity status).

189. *See Brown*, 101 F.3d at 162.

190. *Id.* at 169.

191. *Id.*

192. *Id.* at 170–72. The court also noted that Brown had not demonstrated that the enforcement of Title IX compliance in the case would adversely impact male athletes. *Id.* at 172.

standard of treating similarly situated persons the same, Brown saw the three-part test as going beyond merely ending discrimination and requiring instead the preferential treatment of female athletes.[193] Critics of the three-part test since the *Brown* litigation have continued to attack the three-part test as an affirmative action requirement, sharing *Brown*'s more limited conception of discrimination.[194]

The First Circuit viewed Title IX as ending discrimination rather than requiring affirmative action because it took a more searching approach to the existence of sex difference and its role in a discrimination analysis.[195] The court rejected Brown's implicit assumption that the sex differences that it identified were inherent or natural, and independent of institutional structures. Instead, it found that the differences Brown cited were, to some extent, the product of the very institutional practices that were being challenged.[196] As the court explained:

> Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience. . . .
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> . . . .
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> Thus, there exists the danger that, rather than providing a true measure of women's interest in sports, statistical evidence purporting to reflect women's interest instead provides only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports. . . .We conclude that, even if it can be empirically demonstrated that, at a particular time, women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletics opportunities for women than for men.[197]

The First Circuit's understanding of the connection between opportunity structures and men's and women's interest levels benefited greatly from the district court's findings on the subject in its post-trial decision on the merits.[198] The district court rejected

193. *See id.* at 169.
194. *See, e.g.*, Dudley & Rutherglen, *supra* note 38, at 212.
195. *Brown*, 101 F.3d at 174–80.
196. *See id.* at 178–81.
197. *Id.* at 179–80.
198. *See Brown*, 879 F. Supp. at 206.

each of Brown's proposed measures of male and female interest levels on the grounds that they were not independent of existing differences in opportunities.[199] The court first rejected Brown's use of student surveys to prove women's lower level of athletic interest because any survey of Brown's student body would be distorted by the existing athletic opportunities at Brown.[200] As the court explained, "[w]hat students are present on campus to participate in a survey of interests has already been predetermined through the recruiting practices of the coaches."[201] In addition, the district court rejected Brown's reliance on surveys of applicants to Brown since these measurements also would be influenced by Brown's existing opportunities.[202] Students seriously interested in sports not offered at Brown would be less likely to apply to Brown.[203] Finally, and most significantly, the district court found that no measurement of existing interest levels would be reliably independent of existing opportunity structures.[204] The court concluded that as long as institutions such as Brown allocate a greater share of athletic resources and opportunities to males, the very allocation decisions that are being challenged shape the relative interest of men and women in playing sports.[205]

The First Circuit's appreciation of the interdependence between opportunity structures and interest levels enabled it to hold Brown accountable for the different opportunities that it provided to male and female students. The court believed that accepting Brown's position would be tantamount to letting the university off the hook for differences in interest levels that Brown itself had participated in constructing.[206] Moreover, the court concluded, if Title IX standards were altered to adopt Brown's position, Title IX's potential as an antidiscrimination law would be severely limited.[207] As the court explained, Brown's "relative interests

199. *See id.* at 206–07.

200. *Id.* at 206.

201. *Id.*

202. *Id.* at 206–07.

203. *Id.* at 206

204. *Id.* at 207 (concluding that surveying the relative interest levels of men and women in playing intercollegiate athletics cannot "account for the extent to which opportunities drive interests"). The court cited crew as an example of a sport in which interest commonly develops only after matriculation at college. *Id.*

205. *Id.* (citing testimony of Brown's expert, who, when asked, "Would you agree with the following statement? If Brown provides far more opportunities for women, then maybe the percentage of interested women will rise?" answered, "Sure, I don't see anything wrong with that.").

206. *Brown*, 101 F.3d at 169.

207. *Id.* at 176.

standard would entrench and fix by law the significant gender-based disparity in athletics opportunities found by the district court to exist at Brown."[208] Brown ultimately settled the case and agreed to provide guaranteed levels of funding to women's gymnastics, fencing, skiing, and water polo.[209] The terms of the settlement require Brown to maintain the percentage of female athletes within 3.5% of men's share of participation.[210]

The decisions in *Brown* represent an important step toward a more sophisticated analysis of the meaning and relevance of difference in discrimination law. The approach taken by the district court and the First Circuit represents a significant departure from formal equality in two respects. First, both courts rejected the notion that treating male and female athletes the same, by accommodating their expressed interests to a similar degree, is sufficient under equality law.[211] Second, the courts critically probed the meaning of sex difference in athletic interest, finding that institutions such as Brown were at least in part responsible for constructing men's and women's relative interests in athletics.[212] In doing so, they refused to simply attribute the asserted sex differences to nature or to general societal forces, and instead focused on the ways in which institutions such as Brown shape athletic interest.[213] Taken together, the opinions in the case are a powerful indictment of a formal equality perspective that accepts the existence of sex difference as a basis for limiting the reach of equality law.

Other courts have followed the reasoning of the *Brown* decisions. In a recent opinion, the Fifth Circuit ruled against Louisiana State University (LSU), rejecting LSU's argument that women are less interested in participating in sports than men.[214] The court went so far as to chastise LSU for taking such a position, stating

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208. *Id.* The court concluded that Brown's proposal would have the effect of " 'limiting required program expansion for the underrepresented sex to the status quo level of relative interests.' " *Id.* at 174 (quoting *Brown*, 879 F. Supp. at 209).

209. Labinger, *supra* note 173, at 94. Brown had already agreed to continue to fully fund women's varsity volleyball at the varsity level on the eve of trial in 1994. *Id.* at 91.

210. *Id.* at 94. This margin assumes that Brown does not eliminate any women's teams or add any men's teams without also adding women's teams; otherwise, if Brown alters its program in any way that would reduce either women's absolute number or relative share of athletic opportunities, the permissible disparity drops to 2.25%. *Id.*

211. *See Brown*, 879 F. Supp. at 206–07, *aff'd in part and rev'd in part*, 101 F.3d at 178–79.

212. *See id.*

213. *See Brown*, 101 F.3d at 180 (stating that "the tremendous growth in women's participation in sports since Title IX was enacted disproves Brown's argument that women are less interested in sports for reasons unrelated to lack of opportunity").

214. Pederson v. La. St. Univ., 213 F.3d 858, 878 (5th Cir. 2000).

that, "advancing this argument is remarkable, since of course fewer women participate in sports, given the voluminous evidence that LSU has discriminated against women in refusing to offer them comparable athletic opportunities to those it offers its male students."[215] While other courts have been less explicit in their rationales, they have uniformly applied the three-part test in Title IX challenges to inequality in participation opportunities.[216]

In addition to the arguments made by educational institutions defending their programs from Title IX challenges brought by female athletes, opposition to the three-part test also has come from male athletes whose teams have been cut, arguing that the test discriminates against males. In such cases, male athletes, as plaintiffs, have attacked the three-part test using the same theory as that advocated by Brown: that males are more interested in participating in sports than females and therefore deserve a larger share of athletic opportunities.[217] In this context too, courts have rejected the relative interest argument, emphasizing the importance of context to the determination of interest and the role of institutional structures in differently situating men and women in athletics.[218] Like the courts in *Brown*, courts that have considered reverse discrimination claims by male athletes have rejected a formal equality approach that would treat the claims of male athletes (the overrepresented sex) identically to discrimination claims by female students (the underrepresented sex).[219] Instead, they have recognized that male athletes overall retain a disproportionately large share of the institution's athletic opportunities, even if individual male athletes are denied an opportunity to participate in the sport of their choice.[220]

The Ninth Circuit's decision in *Neal v. Board of Trustees of the California State Universities*[221] is representative of the approach courts have taken in reverse discrimination claims by male

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215. *Id.*

216. *See* cases cited *supra* note 167.

217. *See, e.g.*, Neal v. Bd. of Trs. of Cal. St. Univs., 198 F.3d 763, 768 (9th Cir. 1999); Boulahanis v. Bd. of Regents, Ill. St. Univ., 198 F.3d 633, 637 (7th Cir. 1999); Kelley v. Bd. of Trs. of Univ. of Ill., 35 F.3d 265, 270–72 (7th Cir. 1994); Harper v. Bd. of Regents, Ill. St. Univ., 35 F. Supp. 2d 1118, 1122–23 (C.D. Ill. 1999); Gonyo v. Drake Univ., 879 F. Supp. 1000, 1006 (S.D. Iowa 1995).

218. *See, e.g.*, *Neal*, 198 F.3d at 768–69; *Boulahanis*, 198 F.3d at 638; *Kelley*, 35 F.3d at 269, 272; *Harper*, 35 F. Supp. 2d at 1122; *Gonyo*, 879 F. Supp. at 1004–05.

219. *See, e.g.*, *Neal*, 198 F.3d at 767–69; *Boulahanis*, 198 F.3d at 638; *Kelley*, 35 F.3d at 272; *Harper*, 35 F. Supp. 2d at 1122; *Gonyo*, 879 F. Supp. at 1006.

220. *See Neal*, 198 F.3d at 768; *Boulahanis*, 198 F.3d at 639; *Neal*, 198 F.3d at 768–70; *Kelley*, 35 F.3d at 269; *Harper*, 35 F. Supp. 2d at 1122–23; *Gonyo*, 879 F. Supp. at 1004.

221. 198 F.3d 763 (9th Cir. 1999).

athletes.[222] In *Neal*, the Ninth Circuit rejected a claim brought by male wrestlers whose positions were eliminated when the university decreased the size of its men's athletic teams, as part of a plan to comply with Title IX by raising women's disproportionate share of participation opportunities.[223] Echoing the First Circuit in *Brown*, the Ninth Circuit rejected the claim that men's greater interest in athletics warranted the allocation of a larger percentage of athletic opportunities to male athletes.[224] Calling Title IX a "dynamic statute," the court acknowledged the complex, reciprocal relationship between changing societal expectations and women's interest in sports:

> [W]here society has conditioned women to expect less than their fair share of the athletic opportunities, women's interest in participating in sports will not rise to a par with men's overnight. . . . Title IX has altered women's preferences, making them more interested in sports, and more likely to become student athletes.[225]

But the Ninth Circuit did not limit its insight into the social construction of interest to changes in society generally. Instead, the court, like the courts in *Brown*, recognized the capacity for institutional practices to contribute to the construction of interest levels and, in turn, shape the social norms that influence interest and expectations. The court stated that:

> [T]he creation of additional athletic spots for women would prompt universities to recruit more female athletes, in the long run shifting women's demand curve for sports participation. As more women participated, social norms discouraging women's participation in sports presumably would be further eroded, prompting additional increases in women's participation levels.[226]

The court decisions in this area are consistent with the most recent official guidance by OCR, which continues to stand by the three-part test. In a 1996 policy clarification, the Office for Civil Rights expressed its approval of recent court interpretations of the three-

222. *See* cases cited *supra* note 217.
223. *Neal*, 198 F.3d at 765–66.
224. *See id.* at 767–69.
225. *Id.* at 769.
226. *Id.* at 768 n.4.

part test.[227] In a letter accompanying the policy clarification from Norma Cantu, the Assistant Secretary for Civil Rights, the Department explicitly rejected the charge of critics that the test is a "quota," explaining that in the context of sex-separate athletic opportunities, any test for equality must look at the numbers of opportunities available to men compared to the numbers available to women.[228] The Policy Clarification essentially adopts the reasoning of the First Circuit in *Cohen v. Brown University* and reaffirms the three-part test, while providing a greater level of detail about how to apply the test than had been provided in the Policy Interpretation.

C. Continuing Controversy Over the Three-Part Test

The uniformity of the courts' and OCR's interpretation of the standards for measuring discrimination in the allocation of athletic participation opportunities has resulted in a stable body of law in this area. To date, the Supreme Court has indicated no interest in reviewing these standards,[229] and persistent efforts to amend Title IX or obtain other congressional action disapproving of the three-part test have been unsuccessful.[230]

The consistency of interpretive authority in this area, while reassuring to Title IX supporters, has not quieted the ongoing attacks on Title IX which derive from arguments that the

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227. Office for Civil Rights, U.S. Dep't of Educ., Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, *available at* http://www.ed.gov/offices/OCR/clarific.html (Jan. 16, 1996). The Clarification responded to requests for clarification of the three-part test by critics of the test who professed "confusion" about the test's requirements. *See* 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, 69–73 (1996) (describing the background to the Policy Clarification). The real agenda behind the request was to urge the agency to jettison the existing three-part test for something closer to the standard advocated by Brown University. *Id.*

228. Letter from Norma V. Cantú, Assistant Secretary, Office for Civil Rights U.S. Dep't of Educ. (Jan. 16, 1996), *available at* http://www.ed.gov/offices/OCR/clarific.html (accompanying the Clarification).

229. *See, e.g.*, Boulahanis v. Bd. of Regents of Ill. St. Univ., 198 F.3d 633 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 2762 (2000); Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997); Kelley v. Univ. of Ill., 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995); Roberts v. Colo. St. Bd. of Agric., 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 580 (1993).

230. *See supra* notes 32–40 and accompanying text (discussing recent efforts of Title IX opponents to roll back Title IX's legal standards); *see also* Brake & Catlin, *supra* note 227, at 69–74 (discussing failed efforts to revise Title IX in Congress).

three-part test discriminates against men and mandates affirmative action for women.[231] These critics take measures of existing athletic interest as their baseline and argue that the three-part test discriminates against men because it does not similarly accommodate existing male and female interest levels.[232] Their perspective is that of formal equality: men and women should be treated the same (with an equal allocation of athletic opportunities) only to the extent that they are alike (have the same current level of athletic interest). What the critics fail to appreciate, however, is that the three-part test as applied by the courts and OCR is not moored in a formal equality perspective. The First Circuit, for example, rejected formal equality when it refused to assume that any difference in men's and women's athletic interests is independent of the conditions of inequality that limit women's opportunities in athletics.[233] As the court explained, those who call the test a "quota" fail to acknowledge the extent to which universities themselves determine the gender ratio of their athletic participation.[234] By offering a fixed number of athletic opportunities separately to male and female athletes, and then recruiting male and female athletes to fill those slots, universities predetermine the gender composition of the pool from which they select their athletes.[235] For this reason, the *Brown* court explained, rejecting the three-part test in favor of a standard modelled on a Title VII qualified labor pool analysis that uses the share of men and women currently interested in playing sports as a baseline for setting participation levels, would simply reproduce existing inequality in opportunities.[236]

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231. *See, e.g.*, Dudley & Rutherglen, *supra* note 38, at 212; *see also supra* notes 33–36 (discussing advocacy groups that have mobilized around this issue).

232. *See, e.g.*, Dudley & Rutherglen, *supra* note 38.

233. *Cf.* Rhode, *supra* note 51, at 1211–12 (stating that "[i]t is not self-evident that proportional representation in all employment sectors is the ultimate ideal." However, such "questions about the precise degree of sex-role differentiation in the ideal society" can remain open without ignoring the disadvantages that face women).

234. *Brown*, 101 F.3d at 177.

235. *See id*; *see also* Weistart, *Gender Equity*, *supra* note 173, at 234 ("[M]ost schools in Division I and Division II *create* interest in their programs. They do this by recruiting. Their coaches . . . search out appropriate athletic candidates, who are then cajoled, entreated, and given special considerations solely to induce them to come to school to play sports.").

236. The court explicitly addressed Brown's use of a Title VII analogy to argue for a more narrowly defined athlete pool than the student body as follows:

> [W]hile Title VII "seeks to determine whether gender-neutral job openings have been filled without regard to gender[,] Title IX . . . was designed to address the reality that sports teams, unlike the vast majority of jobs, *do* have official gender

The defense of the three-part test adopted by *Brown* and other court decisions is on solid ground, both theoretically and doctrinally. However, while rejecting formal equality, the courts have not yet explicitly articulated the theory of equality that does underlie the three-part test, nor have they fully explored its implications. Court decisions adopting the three-part test have not looked beyond the disparities in participation opportunities to more fully understand the relationship between how sport programs are structured and the shaping of men's and women's interest in sport.[237] The next section takes a closer look at how institutions construct sex inequality in sport, with the objective of strengthening the legitimacy of the three-part test and further developing the theoretical basis for Title IX's departure from formal equality.

III. UNDERSTANDING TITLE IX THROUGH FEMINIST THEORY AND DEVELOPING A MORE COMPLETE ACCOUNT OF SEX INEQUALITY IN SPORT

A. Existing Feminist Legal Scholarship on Women and Sport: The Search for Equality Beyond Assimilation or Accommodation

In the past two decades, a substantial body of nonlegal scholarship has developed that analyzes sport from a feminist perspective.[238] This literature includes historical, sociological, and political analysis of

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requirements, and this statute accordingly approaches the concept of discrimination differently from Title VII."

. . . .

Accordingly . . . the Title VII concept of the "qualified pool" has no place in a Title IX analysis of equal opportunities for male and female athletes because women are not "qualified" to compete for positions on men's teams, and vice-versa.

Brown, 101 F.3d at 176–77 (citaitons omitted).

237. *See* cases cited *supra* note 167.

238. *See, e.g.*, Messner & Sabo, *Toward a Feminist Reappraisal*, *supra* note 146, at 1, 2 (discussing historic feminist neglect of sports and relatively recent growth of feminist scholarship in this area). For two excellent recent anthologies of feminist writings on sport, see generally WOMEN, SPORT, AND CULTURE, *supra* note 1, and SPORT, MEN, AND THE GENDER ORDER, *supra* note 26. For scholarly textbooks on women in sport, see generally WOMEN AND SPORT: INTERDISCIPLINARY PERSPECTIVES (D. Margaret Costa & Sharon R. Guthrie eds., 1994) and WOMEN IN SPORT: ISSUES AND CONTROVERSIES (Greta L. Cohen ed., 1993).

how sport structures and reinforces gender relations.[239] Feminist analysis of sport explores both the contradictions and conflicts that face female athletes, and how sport constructs and shapes male and female identities.[240] The use of sport to "naturalize" sex difference and perpetuate male dominance is also acknowledged and discussed.[241] Some feminist analyses of sport struggle with the question of how or whether women can transform sport from a male-dominated and socially masculine institution into something more useful for women.[242] Much of this scholarship exposes the institutional processes though which sport itself becomes gendered.

Feminist legal scholarship, however, has not kept pace with the contributions made by sports scholars or with the legal developments under Title IX. Compared to other topical areas, such as employment discrimination, sexual harassment, reproductive issues, sexual exploitation and violence against women, athletics has received relatively little attention by feminist legal scholars. Yet,

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239. *See, e.g.*, MARY A. BOUTILIER & LUCINDA SANGIOVANNI, THE SPORTING WOMAN (1983); SUSAN K. CAHN, COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH-CENTURY WOMEN'S SPORT (1994); FESTLE, *supra* note 36; HARGREAVES, *supra* note 1; HELEN LENSKYJ, OUT OF BOUNDS: WOMEN, SPORT & SEXUALITY (1986); *Creedon*, *supra* note 26.

240. *See, e.g.*, Cheryl L. Cole, *Resisting the Canon: Feminist Cultural Studies, Sport, and Technologies of the Body*, *in* WOMEN, SPORT, AND CULTURE, *supra* note 1, at 5, 6.

241. *See, e.g.*, Lois Bryson, *Challenges to Male Hegemony in Sport*, *in* SPORT, MEN, AND THE GENDER ORDER, *supra* note 26, at 173, 175–176 (discussing how sport constructs a dominant masculinity by supporting the ideology of male physical dominance and "inferiorizing the 'other'"); Paul Willis, *Women in Sport in Ideology*, *in* WOMEN, SPORT, AND CULTURE *supra* note 1, at 34, 41–44 (discussing the power of sport more than other social institutions to naturalize gender difference and reinforce the ideology of male superiority because sport is perceived to be more free and voluntary since it is set apart from the confines of work or family life).

242. *See, e.g.*, MARIAH BURTON NELSON, ARE WE WINNING YET? HOW WOMEN ARE CHANGING SPORTS AND SPORTS ARE CHANGING WOMEN 9 (1991) (discussing the emergence of a "partnership model" of sport and citing RIANE ENSLER, THE CHALICE AND THE BLADE: OUR HISTORY, OUR FUTURE (1987) to observe that "[p]ower is understood not as power-over (power as dominance) but as power-to (power as competence)"); Birrell & Richter, *supra* note 1, at 221–44 (discussing model of sport played by feminist softball players as valuing teamwork, skill, inclusiveness, physicality and cooperation); Nancy Theberge, *Toward a Feminist Alternative of Sport as a Male Preserve*, *in* WOMEN, SPORT, AND CULTURE, *supra* note 1, at 181, 181–92 (proposing the development of sport as a feminist social practice in which sport is an integrated physical and mental process that gives meaning to women's experience and enables them to experience their bodies as powerful); David Whitson, *The Embodiment of Gender: Discipline, Domination and Empowerment*, *in* WOMEN, SPORT, AND CULTURE, *supra* note 1, at 360, 353–71 (discussing the potential for women's empowerment through "mastery play," the development and self-discovery of skills that women can draw on when necessary and enjoy for their own sake); Willis, *supra* note 241, at 44 (urging women to "offer much more strongly their own version of sports reality which undercuts altogether the issues of male supremacy and the standards which measure it," by emphasizing a form of activity that is not competitive and that expresses values of human similarity and individual well-being).

while it is relatively sparse, existing feminist legal scholarship on athletics makes important contributions toward an understanding of women's situation in sport and lays the groundwork for further analysis of Title IX.

A common theme in feminist legal analysis of sport is an emphasis on the need to equally value women's sport perspectives, rather than forcing women to adopt men's athletics as the guiding standard.[243] Professors Catharine MacKinnon and Christine Littleton have both explored this theme and argued for an interpretation of equality law that accepts and values women's distinct athletic perspectives, rather than simply treating men and women the same.[244] Their writings reflect the influence of different voice feminism and its approach to varied masculine and feminine life experiences and values.

Catharine MacKinnon's 1982 essay, *Women, Self-Possession, and Sport* in her book, *Feminism Unmodified*, argues that sport, like other male-dominated institutions, has been used to construct a dominant male sexuality, and that the role of women in sport has been limited by the social meaning of being female.[245] MacKinnon applauds female athleticism for its challenge to dominant notions of femininity, which force on women a passive vulnerability.[246] At the same time, she recognizes and exposes the socially constructed conflict facing female athletes in a society where "[f]emininity has contradicted, [and] masculinity has been consistent with, being athletic."[247] MacKinnon observes that when women participate in sport as athletes, their very assertion of ownership of their bodies provokes hostility by the dominant culture that equates female athleticism with lesbianism and the absence of femininity.[248]

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243. I use the term "women's sport perspectives" here to refer to the ways in which women define, value, and experience sport. It draws from MacKinnon's suggestion that women have "a contribution of perspective" to make in sport that is distinct, "neither a sentimentalization of our oppression as women nor an embrace of the model of the oppressor." Catharine MacKinnon, *Women, Self-Possession, and Sport* (1982), *reprinted in* FEMINISM UNMODIFIED, *supra* note 43, at 123.

244. Christine Littleton, *Equality Across Difference: A Place for Rights Discourse?*, 3 WIS. WOMEN'S L.J. 189, 208–11 (1987) [hereinafter Littleton, *Equality Across Difference*]; Christine A. Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043, 1058–59 (1987) [hereinafter Littleton, *Equality and Feminist Legal Theory*]; Littleton, *Reconstructing Sexual Equality*, *supra* note 41, at 1312–13; MacKinnon, *supra* note 243, at 117–24.

245. MacKinnon, *supra* note 243, at 119.

246. *See id.* at 121 ("For women, when we have engaged in sport . . . it has meant claiming and possessing a physicality that is our own. . . . This physical self-respect and physical presence that women can get from sport is antithetical to femininity. It is our bodies as acting rather than as acted upon.").

247. *Id.* at 120.

248. *Id.* at 122.

MacKinnon's vision of equality in this context would enable women to develop and experience their own distinct physicality through sport. MacKinnon warns against an approach to equality that forces women to "emulat[e] the existing image of the athlete, which has been a male image."[249] Instead, she urges a feminist transformation of sport which recognizes that women "have a distinctive contribution to make to sport that is neither a sentimentalization of our oppression as women nor an embrace of the model of the oppressor."[250] Her analysis of women in sport bears a strong resemblance to "different voice" feminism because it acknowledges and values women's different athletic perspectives.[251] Her analysis in this context is in some tension with the body of her work generally, which views the existence of female perspectives critically as inextricably intertwined with and the product of male dominance.[252]

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249. *Id.* at 119.

250. *Id.* at 123.

251. *See* Note, *Cheering on Women and Girls*, *supra* note 146, at 1628 n.11 (concluding that MacKinnon's discussion of women in sport draws as much from different voice feminism as it does from antisubordination or dominance feminism).

252. A dialogue between Catharine MacKinnon and Carol Gilligan, who is often associated with different voice femininism (see generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982)), illustrates the tension between MacKinnon's views on equality for women in sport and her views on women's subordination generally:

> *MacKinnon*: Power is socially constructed such that if Jake [exemplifying the "male" voice] simply chooses not to listen to Amy [exemplifying the "female" voice], he wins; but if Amy simply chooses not to listen to Jake, she loses. In other words, Jake still wins because that is the system . . . .
>
> *Gilligan*: Your definition of power is his definition.
>
> *MacKinnon*: That is because the society *is* that way, it operates on his definition, and I am trying to change it.
>
> *Gilligan*: To have her definition come in?
>
> *MacKinnon*: That would be part of it, but more to have a definition that she would articulate that she cannot now, because his foot is on her throat.
>
> *Gilligan*: She's saying it.
>
> *MacKinnon*: I know, but she is articulating the feminine. And you are calling it hers. That's what I find infuriating.
>
> *Gilligan*: No, I am saying she is articulating a set of values which are very positive.
>
> *MacKinnon*: Right, and I am saying they are feminine. And calling them hers is infuriating to me because we have never had the power to develop what ours really would be.

Feminist Discourse, Moral Values, and the Law—A Conversation, 34 BUFF. L. REV. 11, 74–75 (1985).

Although MacKinnon traces women's different perspective in sports to social inequality, she does not analyze the social circumstances that have constructed men's and women's existing sport perspectives; her focus instead is on the need to place a higher value on the sport experiences that women have embraced.[253] Nor does she discuss the role that educational institutions—the actors with primary legal responsibility for discrimination against women in sports—play in reinforcing and perpetuating different male and female perspectives on sport. She mentions Title IX only in noting that she grew up in "pre-Title IX America,"[254] and states that Title IX has not eliminated the socially constructed conflict between femininity and athleticism.[255]

Like MacKinnon, Christine Littleton seeks to formulate a vision of equality for women in sport that allows sufficient room for female athletes to construct their own model of athletics and would require this model to be equally valued.[256] She calls her approach "equality as acceptance," and argues that it is preferable to a formal equality, or a "symmetrical" approach that requires equality for women only to the extent that they are already "like" males.[257] Littleton's approach would require institutions to accept and value women's perspectives as much as they value culturally-coded male perspectives, on the theory that "male and female 'differences' must be costless relative to each other."[258] Applied to athletics, Littleton interprets equal acceptance to require equal resources for male and female sports programs, regardless of whether women choose to compete in the same sports as men, and regardless of any differences in male and female participation rates.[259] In order to ensure that women are not disadvantaged due to their asymmetrical position in sport, she suggests that institutions may have to provide equal support for three types of programs: men's sports, women's sports and "genuinely co-ed sports."[260]

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253. *See* MacKinnon, *Women, Self-Possession, and Sport*, *supra* note 243, at 121–22.

254. *Id.* at 117.

255. *Id.* at 122.

256. *See* Littleton, *Reconstructing Sexual Equality*, *supra* note 41, at 1296–97; *see also* Littleton, *Equality Across Difference*, *supra* note 244, at 208–11; Littleton, *Equality and Feminist Legal Theory*, *supra* note 244, 1058–59 (discussing applications of "equality as acceptance", including in the context of athletics).

257. Littleton, *Reconstructing Sexual Equality*, *supra* note 41, at 1285.

258. *Id.* at 1285.

259. *Id.* at 1312–13; *see also* Lyn Lemaire, *Women and Athletics: Toward a Physicality Perspective*, 5 HARV. WOMEN'S L.J. 121, 122 (1982) (arguing for an approach to athletic equity that would revalue women's place in athletics rather than forcing women to assimilate within a male model of athletics).

260. Littleton, *Equality and Feminist Legal Theory*, *supra* note 244, at 1058.

Littleton's project is less concerned with the construction of sport perspectives as male or female and how institutions participate in constructing masculinity and femininity in sport than it is with the values placed on these perspectives.[261] She takes men's and women's existing sport preferences as the legal starting point and requires institutions to equally value them.[262] Once these perspectives become "costless" in relation to one another, she believes that the gendered boundaries of "male" and "female" experience in sport will become more fluid, perhaps ultimately decoding the gender of the experiences themselves, and enabling the development of a more varied spectrum of human sport experiences.[263] Littleton's approach shares the vision of equality expressed by MacKinnon in this context—a vision that recognizes and values women's distinct sport perspectives.[264]

In athletics, as in other areas of feminist concern, there is a tension among feminist scholars about how best to respond to conditions of inequality and the resulting different situations of men and women in society.[265] Contrary to Littleton and MacKinnon, Professor Karen Tokarz has taken a position more in line with formal equality and has argued that women will not achieve equality in athletics until they compete on the same terms

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261. *See* Littleton, *Reconstructing Sexual Equality*, *supra* note 41, at 1313. For example, Littleton acknowledges that her framework would "provide little support" for modifying traditionally male sports, such as football, to accommodate women. *Id.*

262. That is not to say that the equal acceptance model takes as its starting point the premise that sex difference in sport is natural or fixed. Littleton explicitly states that she does not view sex differences as inherent or independent of social interactions. Rather, she explains, "[a]s social facts, differences are created by the interaction of person with person or person with institution; they inhere in the relationship, not in the person." *Id.* at 1297. Littleton's approach thus allows for the linking of sex difference to institutional practices of dominance and exclusion, and, in this respect, is consistent with the more structuralist approach taken in this Article. However, the approach advocated here differs in its emphasis on how institutional practices create, shape, and reinforce—as well as differently value—male and female perspectives in sport.

263. *See id.* at 1332–34.

264. Other feminist commentators writing on women in sport also have focused on the need to redefine sport to better fit with women's experiences. *See, e.g.*, Lemaire, *supra* note 259, at 134–42 (advocating a "physicality" model of sport for women and focusing on the value of athletic participation per se, rather than winning or losing, and contrasting this model with the traditional, combative male model of sport); Olson, *supra* note 146, at 137–46 (criticizing a separate but equal model of athletics that assimilates female athletes into an athletic program that is modeled on men's competitive athletics, and arguing that there must be room for women to develop their own model of sport).

265. *See, e.g.*, CHAMALLAS, *supra* note 43, at 47–53; *see also* Littleton, *Reconstructing Sexual Equality*, *supra* note 41, at 1292–1301 (summarizing feminist debates over symmetrical versus asymmetrical models of equality).

as men.[266] Tokarz criticizes the sex-segregation of athletics as inconsistent with the norms of equality law, and questions the legitimacy of any interpretation of discrimination law that measures equality from the starting point of sex-separation.[267] She argues that sex segregation in athletics, much like "separate but equal" in the context of race, is inherently unequal because its major premise is the inferiority of female athletes as a class.[268] She contends that the harm of sex-segregation in athletics is twofold: female athletes are stigmatized as second-class athletes and, at the same time, sex-segregation reinforces the exclusivity of the male role in sports as aggressive, violent, and combative.[269]

Tokarz's proposal for responding to women's inequality is to eliminate forced sex-segregation in athletics, substituting sex-neutral criteria for sports participation, such as competitive skill and ability, height, weight, or strength.[270] Recognizing that the shift to sex-neutral rules could, at least in the short term, reduce the participation and competitive success of female athletes overall, she would allow for some all-female teams as a form of permissible affirmative action, but limit the discrimination principle to mandating coeducational, merit-based teams.[271] Her proposal thus would mean that all-female teams could exist as a form of affirmative action for an unspecified period of time, but all other athletic programs would have to be open to both sexes on identical terms.[272]

The differences in the approaches taken by Littleton, MacKinnon, and Tokarz reflect ongoing debates within the feminist legal community about how equality law should respond to sex inequality and the asymmetrical positions of women and men in society. Each of these scholars offers important insights into the problem of sex inequality in sport and the implications for Title IX analysis. Littleton and MacKinnon appropriately recognize that any meaningful interpretation of equality must account for women's distinct relationship to sport. Treating men and women under a single standard, for example, by limiting Title IX to a requirement that athletic teams be equally open to both sexes, or equally accommo-

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266. Karen L. Tokarz, *Separate But Unequal Educational Sports Programs: The Need for a New Theory of Equality*, 1 BERKELEY WOMEN'S L.J. 201, 206 (1985).
267. *See id.* at 232–33.
268. *Id.* at 232.
269. *Id.* at 239–40.
270. *Id.* at 244.
271. *See id.* at 206, 244–45.
272. *Id.* at 244–45.

dating men's and women's relative interest in sports, could further marginalize women in sports by fostering the ideology that sports participation should be determined by sex-blind standards. Such a result would serve to naturalize current sex inequality in sport. Moreover, it would force women to conform to a model of sport that they have not chosen, denying them the space and resources to develop their own, distinctive athletic identities and experiences.

Tokarz's approach, while vulnerable to Littleton's and MacKinnon's criticisms of an equality model that would force women to assimilate into structures and institutions designed by and for men, nevertheless raises an important concern: how to disarm the cultural identification of sports as "quintessentially masculine."[273] Tokarz's proposal reflects her concern that the organization of sports by sex perpetuates dichotomous and unequal gender roles by protecting the masculinity of sport while relegating female athleticism to the sidelines.[274]

In the final analysis, neither equal acceptance nor equal treatment through sex-blind standards sufficiently challenges the layers of institutional structures that continue to construct sex inequality in sport. What is missing is a critical analysis of the construction of men's and women's relationship to sport and the inequality that results from it. Equal acceptance of women's athletic choices will not eradicate sex inequality in sport as long as institutions continue to shape and structure those choices.[275] The contention that the gender-coding of men's and women's sport experiences will cease to disadvantage women once those different experiences are rendered "costless" is appealing, but ultimately unpersuasive.[276]

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273. *Id.* at 202.

274. *See id.* at 232–33, 239–40. Tokarz would allow for the existence of separate women's teams to compensate for women's lower level of sports participation, but would do so under the guise of voluntary affirmative action. *Id.* at 244–45. The approach advocated in this Article differs in that it analyzes the structuring of athletic programs, not limited to the provision of sex-separate programs, under a discrimination analysis. As discussed *infra* in Section III.B–C, I view the sex-segregation of athletic teams not as inherently stigmatizing to women, but as dependent on the context. My analysis focuses on the broader ways in which institutions use sex and gender to organize and construct their athletics programs beyond the sex segregation of teams.

275. Littleton's "equality as acceptance" would challenge the overvaluation of what is "male" without distinguishing between the role of society at large and that of specific institutions (such as employers) in coding the perspective at issue as "male." Littleton, *Reconstructing Sexual Equality*, *supra* note 41, at 1312. In contrast, the approach taken in this Article emphasizes how the institutions covered under discrimination laws have contributed to the gender-coding at issue, and argues for greater institutional accountability under the law.

276. *See id.* at 1333–34.

Equally valuing men's and women's sports by requiring parity in concrete measures of support (such as the funding provided to athletic programs) will not put an end to less tangible inequalities in the social and cultural values placed on male and female athletic experiences.[277] Although rendering male and female perspectives "costless" may, in theory, go a long way toward eliminating the forces that direct men and women toward different sport choices, those choices will never be costless in noneconomic terms as long as institutions continue to shape and define sport itself as fundamentally male.

The approach advocated in this Article would embrace equality as acceptance by equally valuing women's athletic experiences, but at the same time, would challenge the construction of what is "masculine" and "feminine" in sport. The equal valuation of women's athletic experiences and the interruption of the institutional practices that construct masculine and feminine sport practices are complementary strategies. The construction of sport as masculine, and the corresponding devaluation of the feminine in sport, are reinforcing and interrelated mechanisms for preserving male dominance in sports. A legally adequate response to these mechanisms must focus more sharply on how institutions both construct and value male and female sport experiences. This approach requires a more complete analysis of how institutions participate in the construction and valuation of masculinity and femininity in sport beyond that recognized by the courts.

B. The Need for a Critical Analysis of How Schools Construct Male and Female Athletic Interests and Experiences

The relationship between institutional practices and the extent and nature of women's athletic interest and experience is complex. It includes, but goes well beyond, the sheer number and proportion of the athletic participation opportunities provided to women—a connection appropriately recognized by the district court and the First Circuit in the *Brown* litigation.[278] Educational institutions discourage and impede the full participation of women in sport in a myriad of ways. The treatment of athletes, the

277. For example, I do not think that the different social status of male football players and female field hockey players would be equalized by providing equal financial and tangible support for both teams.

278. *See* discussion *supra* Part II.B.

allocation of resources, publicity and promotion, the treatment of women's coaches, the gender composition of the athletic administration, and the culture of the athletic program as a whole fundamentally influence both the ability of women to participate meaningfully in athletics and how they choose to participate.[279] Rather than focusing exclusively on early socialization or societal discrimination as immutable factors in shaping women's athletic interest, legal analysis of sex inequality in sport should analyze and expose the role that institutions play in the construction of women's athletic interest and experience. Through this process of "unpacking women's choices," we can better understand the constraints that shape these choices.[280]

The work of Professor Vicki Schultz in analyzing the interplay between employment structures and women's job aspirations has important implications for understanding how educational institutions affect women's athletic interests and sport identities.[281] Schultz's critique challenges the typical assumption made by courts that women's job preferences are formed independent of the structures and cultures of the workplace.[282] She criticizes courts which have found in Title VII cases that work interests are either natural or stem from early socialization, rather than understanding such work interests to reflect institutional practices.[283] According to Schultz, many Title VII courts, including the court in *EEOC v. Sears*,[284] have wrongly attributed women's lower level of participation in nontraditional jobs to a lower level of interest among women in holding such jobs.[285] Even those more liberal judges who suspect that women's underrepresentation in nontraditional jobs is not the result of a lack of interest limit their discrimination analysis to scrutiny of employer policies and practices that exclude women from these jobs.[286] Like more conservative courts, these more liberal judges share the view that women's interests in non-traditional

279. *See* discussion *infra*.

280. *See* CHAMALLAS, *supra* note 43, at 20–21 (using this term to describe the feminist "move" in which feminist scholars investigate the constraints under which women make choices); *see also* discussion *supra* Part II (discussing structuralist influence on the analysis of women's choices in feminist legal scholarship).

281. *See* Schultz, *supra* note 64, at 1824–39.

282. *Id.* at 1750.

283. *Id.*

284. 839 F.2d 302 (7th Cir. 1988).

285. Schultz, *supra* note 64, at 1754. Professor Schultz states that about half the courts to date that have considered the lack of interest argument have accepted it as a justification for women's disadvantaged position in the workplace. *Id.*

286. Schultz, *supra* note 64, at 1790.

jobs are preexistent and independent of the labor market.[287] This stance forces courts to deny the existence of gender difference in worker interest in order to find sex discrimination in a sex-segregated workplace, and enables discrimination law to effectively reach only formal barriers that deny women access to non-traditional work opportunities.[288]

Rather than viewing worker preferences as fixed and autonomous, Schultz argues that women's work interests reflect and respond to the structures and cultures of the workplace.[289] She cites extensive sociological literature demonstrating that, although sex-role socialization does influence job aspirations early in life, women can and do change their job preferences in response to work experiences and opportunities.[290] In particular, women's interest in nontraditional work typically develops only after opportunities become available.[291] Women workers, like other persons, tend to respond realistically to their options.[292] Thus, she argues, Title VII should hold institutions accountable for their role in shaping the disparate levels of interest among men and women, rather than simply allow institutionally-shaped preferences to justify further discrimination against women at work.[293]

Schultz's analysis has great relevance to Title IX's approach to ensuring equal participation opportunities for men and women in sport. Institutional practices that shape men's and women's preferences in sport should be considered in any assessment of Title IX's test for discrimination in the allocation of athletic participation opportunities. As the court in *Brown* recognized, allowing institutions to justify the allocation of fewer opportunities to female athletes on the grounds that girls and women are less interested in sport would enable them to justify an unequal allocation of opportunities based on their own practices that have suppressed female interest.[294]

The *Brown* courts' recognition of the circularity of such an approach and the need to scrutinize closely institutional practices that construct interest represents a structuralist analysis. This analysis finds support in the work of feminist legal theorists such as

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287. *Id.* at 1787.
288. *Id.* at 1792.
289. *Id.* at 1840–41.
290. *Id.* at 1818.
291. *Id.* at 1823.
292. *Id.* at 1825.
293. *Id.* at 1841–42.
294. Cohen v. Brown Univ., 101 F.3d 155, 176 (1st Cir. 1996).

Schultz who recognize and explore the dynamic connections between institutional structures and individual choice. It also finds support in the Supreme Court's recognition in *Dothard v. Rawlinson*[295] that the failure to account for the effect of institutional structures in a discrimination challenge makes for an incomplete analysis.[296] However, the court's analysis in *Brown* exhibited a deeper understanding of the relationship between institutional structures and male and female interest levels than that reflected in the Supreme Court's opinion in *Dothard*. *Dothard*'s structuralism was limited to the fairly obvious recognition that the existence of readily apparent height and weight requirements would distort the composition of the applicant pool, making it an inadequate reference point from which to measure the impact of the requirements on men and women.[297] *Brown*'s more sophisticated approach looked at the disproportionately low number of opportunities allocated to female athletes and acknowledged its effect on suppressing women's interest in sport.[298]

One reason that Title IX courts have been better able than many Title VII courts to discern the connections between women's interests and the institutional structures that shape them is that athletic opportunities are facially sex-segregated in the first instance.[299] Because athletic opportunities are offered separately for male and female students, it has been easier for Title IX courts to see how the disparate allocation of opportunities between men and women affects their respective levels of interest.[300] In contrast, when the lack of interest argument has arisen in the workplace, there typically has not been a facial classification that has provided a ready explanation for how institutional practices may have shaped men's and women's interest levels.[301] However, the existence or

295. 433 U.S. 321, 330 (1977).

296. *See* discussion *supra* Part I.B.

297. *See Dothard*, 433 U.S. at 330.

298. *See supra* notes 198–206 and accompanying text.

299. *See* Dana Robinson, *A League of Their Own: Do Women Want Sex-Segregated Sports?*, 9 J. CONTEMP. LEGAL ISSUES 321, 351 (1998) (noting that completely coed sports, such as chess, sailing, and pool, are a rarity in our culture, and that schools and colleges offer few, if any, of such sports).

300. *Cf.* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 332–34 (1997) (arguing that it has been easier for the Supreme Court to attribute the disadvantaged status of women and minorities to discrimination in contexts where the use of a suspect criteria is overt, such as segregation, affirmative action, and redistricting cases).

301. *See* discussion of *Sears* case *supra* Part I.B; *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499, 510 (1989) (suggesting that there is no reason to expect that a nondiscriminatory setting would produce proportional numbers of white and black contractors,

nonexistence of a facial classification is not instrumental to the structuralist's understanding of the effect that limited opportunity structures have in shaping and suppressing women's interests. Women's opportunities can be limited in innumerable ways even without a facial classification that makes the limitation so readily visible. A structuralist analysis of how institutions shape the interests and experiences of those who operate within them should not be limited to an examination of those structures that facially classify based on sex.

In fact, as discussed below, disparities in the number of sport opportunities assigned to male and female athletes are only the most apparent evidence of the institutional construction of male and female sport preferences.[302] The courts' analysis in *Brown* falls far short of capturing the full extent to which institutions shape and suppress female interest in athletics. The processes that create and reproduce women's inequality in sport are intricate and complex, and they lie deep within the structures of interscholastic and intercollegiate athletic programs. Once again, Schultz's work in the employment context is helpful in explaining the relationship between athletic interest and institutional practices. Schultz identifies two interdynamic structural features of work that discourage women from pursuing nontraditional work and construct work and workers along gendered lines. First, she notes that limitations on the rewards and mobility available for female employees result in lowered expectations in response to blocked opportunities.[303] Second, she points to the male-dominant workplace cultures in traditionally male jobs, including harassment, that signal to women that they are unwelcome and encourage a "proprietary" interest on the part of men in retaining these jobs for themselves.[304]

Both of these processes are at work within interscholastic and intercollegiate athletic programs. First, through the disproportionate allocation of athletic opportunities, as well as the unequal valuation of men's and women's sporting experiences, educational institutions provide opportunities to male and female

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and invalidating Richmond's affirmative action plan on the ground that no inference of past discrimination by the City may be drawn from the underrepresentation of minorities in the construction industry in Richmond); Johnson v. Transp. Agency of Santa Clara County, 480 U.S. 616, 668 (1987) (Scalia, J., dissenting) (suggesting that a lack of interest on the part of women in holding construction jobs is the likely cause of women's underrepresentation in such jobs, and accordingly, disagreeing with the majority ruling upholding a city affirmative action plan to remedy women's underrepresentation in such jobs).

302. *See infra* III.C–D.

303. Schultz, *supra* note 64, at 1827.

304. *Id.* at 1832.

athletes that are very different in quantity and quality.[305] Second, schools, colleges, and universities engage in a number of practices that perpetuate a male culture in sport, signaling to young men and women that sport is masculine and potentially hostile to female athletes.[306] Much as employers perpetuate a culture of maleness in male-dominated jobs and foster men's feelings of entitlement to certain jobs, school athletic programs instill in male athletes a sense of entitlement to their programs. The connections between the structures and cultures of school athletic programs and the relationship of male and female students to sport deserve further exploration in order to fully appreciate the theory underlying Title IX.

C. Opportunity Structures and the Construction of Sex Inequality in Sport

Sociologists who study the workplace have long maintained that workers shape their interests and aspirations in response to the opportunity structures available to them.[307] Economists who study preference-formation also have found that individuals shape their preferences in accord with the set of opportunities they actually have.[308] Not surprisingly, in light of this research, male and female students also appear to adapt their athletic interests and preferences in response to existing opportunity structures.[309]

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305. *See infra* Part III.C.

306. *See infra* Part III.D.

307. *See* Schultz, *supra* note 64, at 1824–32 (citing extensive sociological literature demonstrating that workplace structures, including the allocation of rewards, affect worker aspirations).

308. NUSSBAUM, *supra* note 46, at 151–52 (discussing economic literature of preference-deformation and its interaction with opportunity structures).

309. *See, e.g.*, Haffer v. Temple Univ., 678 F. Supp. 517, 526 (E.D. Pa. 1987) (discussing evidence that the number of students who are interested in competing in intercollegiate athletics is not independent of the money devoted to scholarships, advertising, promotion, and sports information activities); Bloom, *supra* note 149, at 12 (citing United States Commission on Civil Rights' statement in 1980 that the "'relatively less money allocated [to] women's programs' may limit the number of female athletes and 'discourage' participation"); Weistart, *Gender Equity*, *supra* note 173, at 227 (discussing the "sobering" experience of a private school in North Carolina that made a commitment to fund and find competition for any group of students interested in forming an interscholastic team and observing that, "For the last several years, 80 percent of the girls, as well as a similar percentage of the boys, have chosen to participate in interscholastic sports"); White, *supra* note 22 (quoting the response of Florida's director of the education department's equal educational opportunity program to administrators who claim that girls are not interested in playing more sports: "If you add a team with a good, enthusiastic coach, good facilities, and good public-

The courts in *Cohen v. Brown* implicitly recognized the relationship between interest and opportunity when they rejected Brown's assertion that men are more interested in sports participation than women, independent of the opportunities provided by Brown.[310] The core insight in these decisions remains relevant today. Despite steady increases in women's athletic participation, men still retain about sixty percent of intercollegiate athletic opportunities nationwide.[311] But the numbers of opportunities alone do not begin to capture the extent to which opportunity structures and rewards differently situate men and women in sports.[312] As detailed below, educational institutions continue to provide vastly different resources, benefits, and treatment to their male and female athletes.

Despite progress since Title IX's enactment, movement toward equality in the resources, benefits, and opportunities provided to male and female athletes has proceeded slowly.[313] A study by the *Chronicle of Higher Education* of athletics expenditures for 1995–96 found that twenty-five years after Title IX was enacted, NCAA Division I schools awarded only thirty-eight percent of athletic scholarship dollars to women.[314] In 1997, to mark the twenty-fifth anniversary of Title IX, the National Women's Law Center filed complaints with the Office for Civil Rights against twenty-five colleges and universities for sex discrimination in awarding athletic scholarships.[315] The complaints were resolved two and a half years

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ity, [and] if you show that you really mean business, girls will come out. . . . We looked all over the state, and we never found a school that did all of that and still had problems with turnout.").

310. *See* discussion *supra* Part II.B.

311. *See Facts & Figures: Gender Equity: Participation*, CHRON. HIGHER EDUC., *at* http://chronicle.com/stats/genderequity/participation_search.php3 (last visited June 28, 2000) (on file with the *University of Michigan Journal of Law Reform*) (reporting 1998–99 NCAA data showing that women's share of intercollegiate athletic participation as: 42% in Division I; 38.4% in Division II; and 40.6% in Division III).

312. *Cf.* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 26 (1990). Young argues that:

> We may mislead ourselves by the fact that in ordinary language we talk about some people having 'fewer' opportunities than others . . . . Opportunity is a concept of enablement rather than possession; it refers to doing more than having. A person has opportunities if he or she is not constrained from doing things, and lives under the enabling conditions for doing them.

Id.

313. Jim Naughton, *Women in Division I Sports Programs: 'The Glass Is Half-Empty and Half-Full,'* CHRON. HIGHER EDUC., Apr. 11, 1997, at A39.

314. *Id.*

315. Jim Naughton, *Advocacy Group Charges 25 Colleges with Violating Title IX*, CHRON. HIGHER EDUC., June 13, 1997, at A39.

later: eight institutions were found to be in compliance, while the other seventeen schools agreed to provide more scholarship aid to female athletes.[316] More recent reports indicate that female athletes at some institutions continue to receive a lower share of athletic scholarships than their share of athletic participation, indicating that some institutions continue to violate Title IX's scholarship requirements.[317] Given that Title IX's test for compliance in the area of athletic scholarships is quite lenient, requiring only that women's share of scholarships match women's already low participation rates,[318] most institutions probably comply with Title IX in this area. However, because women still have substantially fewer opportunities to play sports at the college level, female athletes receive only forty-two percent of the athletic scholarships awarded to college students.[319] A 1997 study by the NCAA found that the athletic scholarship gap between men and women translates into $142 million less each year for female athletes.[320]

Intercollegiate athletic recruitment and operating budget expenditures in intercollegiate athletics also greatly favor male athletes. In 1998–1999, NCAA Division I institutions spent nearly twice as much recruiting male than female athletes.[321] Recruiters for women's sports at Divisions II and III fared no better than their Division I counterparts; in all three divisions, women's sports re-

316. *Sidelines: Education Dept. Resolves Last of 25 Bias Complaints Filed by Women's Group*, CHRON. HIGHER EDUC., Jan. 21, 2000, at A49.

317. *Athletics Scholarships: Proportions for Female Athletes*, CHRON. HIGHER EDUC., *at* http://chronicle.com/stats/genderequity/scholarship_search.php3 (last visited June 28, 2000) (on file with the *University of Michigan Journal of Law Reform*) (reporting serious inequities at some institutions where female athletes still receive a lower share of athletic scholarships than their participation levels warrant).

318. *See* 34 C.F.R. § 106.37(c) (1999) (requiring "reasonable opportunities" for athletic scholarships for male and female athletes that are proportionate to the numbers of men and women who participate in intercollegiate athletics at that institution). Because the scholarship test is tied to athletic participation, which remains disproportionatetly male, it authorizes colleges to award less scholarship assistance to female athletes than male athletes if women on campus have a lower share of athletic participation. The regulation may, however, permit institutions to spend more resources on athletic scholarships for female athletes as a means to increase their disproportionately lower rate of athletic participation. *See* Gonyo v. Drake Univ., 837 F. Supp. 989, 995, 998 (S.D. Iowa 1993).

319. *Facts & Figures: Gender Equity: Athletic Scholarships: Proportions for Female Athletes*, CHRON. HIGHER EDUC., *at* http://chronicle.com/stats/genderequity/participation (last visited June 28, 2000) (on file with the *University of Michigan Journal of Law Reform*); *see also* Welch Suggs, *Uneven Progress for Women's Sports*, CHRON. HIGHER EDUC., Apr. 7, 2000, at A52, *available at* http://chronicle.com/free/v46/:31/31a05201.html [hereinafter Suggs, *Uneven Progress*].

320. Heckman, *supra* note 148, at 417 n.129 (citing 1997 NCAA Gender Equity Study).

321. Suggs, *Uneven Progress*, supra note 319.

ceive only one-third of total funds spent to recruit new athletes.[322] The same was true for operating expenses in 1998–99: Division I schools spent only 32.8% of their athletic operating budgets on women's sports, spending more than twice as much money on operating expenses for men's sports.[323] Divisions II and III spent a relatively larger share of their athletic budgets on female athletes, but still only awarded them forty percent of the total funds available for operating budgets.[324] Moreover, rather than spending all newly available funds to narrow this gap, colleges and universities have continued to pour vast new sums of money into their men's athletic programs. From 1992–1997, overall operating expenditures for women's intercollegiate athletics grew 89%, compared to a 139% increase in spending for men's intercollegiate athletics.[325] With less money for women's sports come fewer benefits and lower status.[326]

Elementary and secondary schools, like colleges and universities, also provide very different opportunity structures to male and female athletes. As institutions accountable under Title IX for providing nondiscriminatory participation opportunities, their role in constructing male and female interest in sport also deserves scrutiny.

The extent of discrimination in school sports at the high school level and below is more difficult to assess, in part because the disclosure requirements of the Equity in Athletics Disclosure Act and the NCAA only apply to post-secondary institutions.[327] All indications are, however, that these programs exhibit disparities in the

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322. Welch Suggs, *At Smaller Colleges, Women Get Bigger Share of Sports Funds*, CHRON. HIGHER EDUC., Apr. 14, 2000, at A69, *available at* http://chronicle.com/weekly/v46/i32/32a06901.html [hereinafter Suggs, *At Smaller Colleges*].

323. Suggs, *Uneven Progress*, *supra* note 319.

324. Suggs, *At Smaller Colleges*, *supra* note 322.

325. 25 YEARS OF PROGRESS, *supra* note 22.

326. *See, e.g.*, Andrew Zimbalist, *Backlash Against Title IX: An End Run Around Female Athletes*, CHRON. HIGHER EDUC., Mar. 3, 2000, at B9 ("Female athletes still play in inferior facilities, stay in lower-caliber hotels on the road, eat in cheaper restaurants, benefit from smaller promotional budgets, and have fewer assistant coaches."). For an interesting case study comparing the treatment of men's and women's basketball programs at one university, see B. Glenn George, *Miles To Go and Promises to Keep: A Case Study in Title IX*, 64 U. COLO. L. REV. 555, 562–67 (1993) (identifying inequalities in resources spent on women's and men's basketball teams at the University of Colorado in training, equipment, and recruiting budgets, and on coaches' salaries).

327. Equity in Athletics Disclosure Act, Pub. L. No. 103-382 § 360(B), 108 Stat. 3969, 3969–71 (1994).

opportunities provided to male and female athletes similar to those that exist at the post-secondary level.[328]

Recent years have seen a surge in Title IX litigation at the elementary and secondary levels involving sex discrimination against female athletes.[329] Such challenges have questioned disparities in the scheduling of game and practice times, coaching, equipment, facilities, uniforms, publicity and promotions, and allocation of participation opportunities.[330] Female high school students and their parents also have brought Title IX claims against state high school athletic associations for adopting rules and procedures that deny equal sport opportunities to female athletes statewide.[331]

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328. *See, e.g.*, CAHN, *supra* note 239, at 260 (citing evidence that high school girls receive inferior facilities, uniforms, practice schedules, and promotional support).

329. *See* Karen Diegmueller, *Inequities in Girls' Sports Programs in Nebraska Alleged*, EDUC. WEEK ON WEB, Apr. 19. 1995, *at* http://www.edweek.org/ew/vol-14/30title.h14 (on file with the *University of Michigan Journal of Law Reform*) (reporting on lawsuits filed against four Nebraska school districts alleging discrimination against female athletes in participation opportunities, equipment, supplies, uniforms, scheduling, travel, coaching, per diems, locker rooms, cheerleading, band performances, and publicity); *see also* White, *supra* note 22 (discussing OCR compliant alleging dangerous conditions on girls' softball practice field and inequality with boys' teams).

330. *See, e.g.*, Daniels v. School Bd., 985 F. Supp. 1458, 1460–62 (M.D. Fla. 1997) (finding parents of female high school softball players are entitled to a preliminary injunction where school had a state-of-the-art boys' baseball facility and an inferior girls' softball field), *and* 995 F. Supp. 1394, 1397–98 (M.D. Fla. 1997) (rejecting school district's plan for compliance and entering preliminary injunction, pending resolution of additional cases charging district with similar disparities in other district schools); *see also* Diane Heckman, *Title IX's 25th Anniversary: Sex Discrimination in the Gym and Classroom*, 21 NOVA L. REV. 545, 587 (1997) (discussing four Title IX lawsuits brought on behalf of female athletes against school districts in Nebraska); Ray Yasser & Samuel J. Schiller, *Gender Equity in Interscholastic Sports: A Case Study*, 33 TULSA L.J. 273, 286 (1997) (discussing lawsuit and resulting consent decree in Title IX lawsuit on behalf of parents of high school and middle school female students in Owasso, Oklahoma).

331. *E.g.*, Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265, 272 (6th Cir. 1994) (upholding, against a motion to dismiss, plaintiffs' claim that the KHSAA discriminated against girls by refusing to sanction fast-pitch softball), *appeal after remand*, 206 F.3d 685, 696 (6th Cir. 2000) (upholding grant of summary judgment against plaintiffs after association changed its rules and sanctioned fast-pitch softball for girls); Communities for Equity v. Mich. High Sch. Athletic Ass'n, 80 F. Supp. 2d 729, 731, 733, 743–44 (W.D. Mich. 2000) (holding state association subject to Title IX because it exercises controlling authority over federally funded high schools' athletic programs, and denying summary judgment in case alleging discrimination in the allocation of participation opportunities, scheduling of games and sports seasons, provision of athletic facilities, and allocation of resources); Alston v. Va. High Sch. League, Inc., 176 F.R.D. 220, 222–24 (W.D. Va. 1997) (denying motion to dismiss plaintiffs' claim for discrimination in the scheduling of boys' and girls' sport seasons), *motion for class certification denied*, 184 F.R.D. 574, 576 (W.D. Va. 1999); Ridgeway v. Mont. High Sch. Ass'n, 633 F. Supp. 1564 (D. Mont. 1986) (finding that the MHSA discriminated in provision of sports opportunities to female athletes, but refusing to require alignment of girls' basketball and volleyball seasons to correspond to normal college recruiting seasons). Although the Supreme Court recently ruled that an athletic association is not subject to Title IX merely because its member schools receive federal funds, it did not

Studies of gender equity in high school sports continue to find significant disparities in the benefits and status afforded male and female athletes. One particularly thorough investigation of gender equity in Georgia high schools was undertaken recently by the *Atlanta Journal-Constitution.*[332] This series of articles, published in December 1999, concluded that, "gender equity still is not the standard in most Georgia High Schools. Not even close."[333] The report identified major discrepancies in such areas as the opportunity to play interscholastic sports, the provision of coaching for boys' and girls' teams, the scheduling of games and practices, and the competitive and practice facilities provided.[334] In addition, the investigation found significant differences in the level of participation among male and female athletes: sixty-four percent of boys play competitive sports, compared to thirty-six percent of girls.[335] The disparity is all the more striking because these figures included cheerleading as a girls' sport, a practice not endorsed by OCR.[336] The series prompted the Georgia legislature to pass new legislation authorizing a state enforcement agency to take an active role in monitoring gender equity in interscholastic sports in Georgia.[337]

Studies in other states have found similar inequities. A 1994 study of gender equity in athletics in Iowa high schools found that the average operating expenditure for girls' sports was sixty-five percent of what the boys received.[338] A 1992 study of gender equity in interscholastic sports in Minnesota found that "the data does make unequivocally clear that athletic programs for boys and girls are not equal. There are more, and more varied sports offerings

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rule out the possibility that such an association could be subjected to Title IX if it exercised control over the education activities of its federally funded member schools. *See* NCAA v. Smith, 525 U.S. 459, 469–70 (1999).

332. Mike Fish & David A. Milliron, *Georgia High School Sports: Girls Still Come in Second,* ATLANTA J.-CONST., Dec. 12, 1999, at 1A, *available at* http://www.accessatlanta.com/partners/ajc/report/gender_equity/day1/index.html.

333. *Id.*

334. *Id.*

335. *Id.*

336. Mike Fish & David A. Milliron, *Hollow Cheers,* ATLANTA J.-CONST., Dec. 18, 1999, at D1, *available at* http://www.accessatlanta.com/partners/ajc/reports/gender_equity/day7/index.html.

337. *See* Mike Fish & David A. Millron, *Equal Play for Georgia Girls: New Law Puts Teeth in Title IX Rules that Schools Provide Equal Opportunity for Female Athletes,* ATLANTA J.-CONST., Apr. 29, 2000, at 1A.

338. Jeff Oliphant, *Iowa High Schools Athletic Gender-Equity Study Summary of Results,* University of Iowa (June 1995), *at* http://bailiwick.lib.uiowa.edu/ge/iowastudy/iowahs.html (on file with the *University of Michigan Journal of Law Reform*).

for boys, more money spent on boys athletics, and more money spent per participant for boys athletics."[339]

One widespread and well-documented disparity in male and female athletic programs at all levels of education is the amount of money spent on coaching male versus female sports. Data from the intercollegiate level show that salaries for coaches of male sports tend to be substantially higher than the salaries for coaches of female sports.[340] A report by the *Chronicle of Higher Education* for 1998–1999 showed that in NCAA Division I athletic programs, universities spent nearly twice as much on salaries for coaches of their men's teams than they did for their women's teams.[341] In 1998–99, the average Division I men's coach earned twice as much as the average Division I women's coach.[342] Similar disparities were found in the less competitive college athletic programs. Women's coaches received only thirty-two percent of the budget for coaching salaries at Division II schools, and forty percent of the salary budget in Division III.[343] The lower valuation of coaches of female teams cuts across a wide range of sports. A 1997 Gender Equity study by the NCAA found substantial disparities in men's and women's coaching salaries in basketball ($99,283 to $60,603), ice hockey ($64,214 to $25,478), lacrosse ($35,745 to $26,871), rowing ($30,838 to $22,623), soccer ($32,275 to $27,791), and squash ($45,547 to $22,200).[344]

There are also substantial disparities in coaching salaries for male and female teams at the high school level. In Georgia, for

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339. Laurie Priest & Liane M. Summerfield, *Promoting Gender Equity in Middle and Secondary School Sports Programs*, ED367660 ERIC DIG., Apr. 1994, at 1, 3, *available at* http://www.ed.gov/databases/ERIC_Digests/ed367660.html (quoting R.A. Dildine, *A Report to the Minnesota Legislature Concerning Interscholastic Athletic Equity in Minnesota High Schools* (1992)).

340. *See* SALTER, *supra* note 16, at 91 (noting that, in addition to salary disparities, few women's basketball coaches have written, multi-year contracts, unlike their male counterparts coaching men's basketball); *Coaches: Salaries for Division I-A Men's and Women's Coaches (1996–1997)*, University of Iowa, *at* http://bailiwick.lib.uiowa.edu/ge/statistics.htm#Salary Index (last visited May 25, 2000) (on file with the *University of Michigan Journal of Law Reform*) (stating that the median personnel expenditure for women's Division I-A athletics was less than half of the amount spent on Division I-A football alone).

341. Suggs, *Uneven Progress*, *supra* note 319. This amount refers only to base salaries, and not the total compensation packages for men's coaches, which can exceed the base salary many times over. *See* Zimbalist, *supra* note 326 ("Although the base salaries for men's coaches—to which women's coaches' salaries are compared—are normally in the range of $125,000 to $200,000, total compensation packages for men's coaches on the leading teams routinely reach from $700,000 to $1.4 million.").

342. Suggs, *Uneven Progress*, *supra* note 319.

343. Suggs, *At Smaller Colleges*, *supra* note 322.

344. Heckman, *supra* note 148, at 417 n.130.

example, in 1998, boys' teams received $16.4 million of the $22 million spent on high school coaches' salaries, seventy-five percent of the state's salary supplements for coaches, and ninety-five percent of the state's extended pay supplements for coaches, leaving coaches of girls' teams with only $5.6 million of the overall $22 million, twenty-five percent of the state's salary supplements, and five percent of the state's extended pay supplements for coaches.[345] Not surprisingly, boys' sports in Georgia schools have a higher coach-athlete ratio than girls' sports.[346]

All in all, the widespread disparities in the treatment of male and female athletic programs at all levels of education situate men and women (and boys and girls) very differently with respect to the incentives and messages surrounding their participation in sports. The different opportunity structures provided to male and female athletes influence athletic interests, while at the same time they shape the culture of sport and its relation to gender.[347] These opportunity structures construct sport as a realm of male privilege where male athletes are more highly valued than female athletes. The message conveyed by disparities in the treatment and benefits provided to male and female athletes is unmistakable: women's athletics may be gaining increasing attention and support, but men's sports still take center stage.[348] As one court explained, in addressing gender disparities in high school's boys' baseball and girls' softball facilities:

> As with all the differences the Court addresses in this Order, the fact that the boys have a scoreboard and the girls do not sends a clear message to the players, fellow students, teachers and the community at large, that girls' varsity softball is not as worthy as boys' varsity baseball.[349]

The persistence of inequality in the sport opportunities available to male and female athletes reinforces notions of male entitlement and sex difference that further marginalize attempts to reallocate

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345. Fish & Milliron, *supra* note 332.

346. *See id.*

347. *Cf.* ALICE KESSLER-HARRIS, A WOMAN'S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES 8 (1990) ("The wage frames gendered messages; it encourages or inhibits certain forms of behavior; it can reveal a system of meaning that shapes the expectations of men and women and anticipates their struggles over power.").

348. *See, e.g.*, George, *supra* note 326, at 562 (stating that the disparities in the University of Colorado's treatment of its male and female basketball teams "convey a message about the importance of the women's program and the students' contributions to this institution," a message that is "widely understood as a statement of priorities").

349. Daniels v. School Bd., 985 F. Supp. 1458, 1461 (M.D. Fla. 1997).

these opportunities more equitably.[350] As a result, disparities in treatment and support, much like disparities in the number of athletic opportunities, contribute to the construction of interest in sport in a way that is not gender-neutral. In addition, these opportunity structures contribute to a culture in which sport—at least highly valued sport—is defined as male. It is to that broader culture, and the role that institutions play in shaping that culture, that I now turn.

D. Sport Culture and the Masculinization of Sport

The discussion so far has focused on how institutions allocate opportunities and resources between male and female athletes—the numbers of sport opportunities and the benefits and rewards provided to male and female athletes. Although inequities in these areas play an important role in shaping male and female interests and experiences in sport, they are only part of a broader picture. Equally important is the social meaning of male and female sport participation and the culture of sport itself.[351] At the present time, the dominant culture of sport is overwhelmingly masculine.[352]

Educational institutions play a key role in the social processes that construct the cultural meaning of sport and its relationship to masculinity and femininity.[353] Schools, as well as parents, peers, and

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350. *See* Bruce Kidd, *The Men's Cultural Centre: Sports and the Dynamic of Women's Oppression/Men's Repression*, *in* SPORT, MEN, AND THE GENDER ORDER, *supra* note 26, at 31, 36–37.

351. *See* Schultz, *supra* note 64, at 1832–39 (discussing how separate-but-unequal job structures encourage women to reduce their career aspirations and encourage male workers to develop proprietary attitudes toward what they see as "their" jobs); *cf.* YOUNG, *supra* note 312, at 23 (arguing that distributional models alone, which focus on the distribution of benefits and burdens, are inadequate to explain domination and oppression, and that social justice theories must also analyze the institutional context in which unequal distributions take place).

352. *See* YOUNG, *supra* note 312, at 23 (defining culture as "the symbols, images, meanings, habitual comportments, stories, and so on through which people express their experience and communicate with one another").

353. I use the terms "masculinity" and "femininity" to refer to the social construction of gender identities in a patriarchal society, and do not intend to suggest either that these identities are inherent or that they are homogenous. Although there are a wide variety of masculinities and femininities, they are not all socially constructed as equal. In this discussion, "masculinity" is shorthand for "dominant masculinity"/"hegemonic masculinity." *See, e.g.*, Bryson, *supra* note 241, at 173 ("This dominant form of masculinity has been usefully called hegemonic masculinity . . . , and the message it conveys renders inferior not only femininity in all its forms but also nonhegemonic forms of masculinity." (citation omitted)).

I use "femininity" here to refer to the social construction of the qualities and characteristics typically associated with being female. *See* IRIS MARION YOUNG, THROWING LIKE A GIRL AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY 143–44 (1990). As Young explains:

the media, participate in the process of defining the cultural meaning of sport as masculine, producing and reinforcing the social norms that encourage boys and men to play sports in order to develop a masculine identity.[354] The linkage of sport and masculinity, referred to herein as the masculinization of sport, shapes and defines both men's and women's relationship to sports. At the same time that males are encouraged to participate in sport to bolster their masculinity, the establishment of sport as a predominantly male activity calls into question the relationship between female athleticism and femininity.[355]

There are at least three ways that educational institutions participate in the masculinization of sport: (1) through the structuring of sport leadership; (2) through the cultivation of a masculine culture in their sports programs; and (3) by fostering conditions that constrain female athleticism.

1. Male Leadership and the Social Construction of Sport—As social scientists have recognized, leadership structures within institutions play an important role in shaping gender relations within those institutions.[356] Sociological literature describes how the absence of a significant presence of women in institutional leadership roles leads to the phenomenon of "tokenism," in which predominantly male leadership profoundly contributes to the male culture of an institution and creates conditions conducive to gender bias.[357] This

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> I take 'femininity' to designate not a mysterious quality or essence that all women have by virtue of their being biologically female. It is, rather, a set of structures and conditions that delimit the typical *situation* of being a woman in a particular society. . . . This understanding of 'feminine' existence makes it possible to say that some women escape or transcend the typical situation and definition of women in various degrees and respects.

Id.

354. *See, e.g.*, David Whitson, *Sport in the Social Construction of Masculinity*, *in* SPORT, MEN AND THE GENDER ORDER, *supra* note 26, at 19, 22–23.

355. *See* Michael A. Messner, *Masculinities and Athletic Careers: Bonding and Status Differences*, *in* SPORT, MEN, AND THE GENDER ORDER, *supra* note 26, at 97, 106–07.

356. *See* Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 MINN. L. REV. 305, 328–29 (1998) [hereinafter Chamallas, *New Gender Panic*] (citing social science literature demonstrating that the relative absence of women in leadership positions in organizations affects gender relations within those institutions); *see also* Elizabeth Chambliss & Christopher Uggen, *Men and Women of Elite Law Firms: Reevaluating Kanter's Legacy*, 25 LAW & SOC. INQUIRY 41, 61 (2000) (discussing their own empirical research finding that the composition of women and minorities in law firm partnership positions affects the gender and race composition of associates within the firm).

357. *See* Chamallas, *New Gender Panic*, *supra* note 356, at 324–29 (discussing social science literature on "tokenism," where members of the token group are substantially underrepresented and considered as "outsiders," to explain how lack of women in leadership positions increases sex-stereotyping and gender bias in predominantly male-controlled

literature also explains how the dearth of women in leadership positions affects the expectations and aspirations of women who are involved at other levels in those institutions.[358] Although typically focused on the specific context of the workplace, this scholarship has important implications for how sport leadership in educational institutions constructs sport as a male activity and shapes the interests and expectations of male and female athletes.

Ironically, Title IX has had a negative effect on women's opportunities in athletics administration. Before Title IX, women held nearly all of the positions overseeing women's intercollegiate athletic programs.[359] After Title IX was enacted, the vast majority of intercollegiate athletic departments merged from previously separate men's and women's departments into a combined, unitary administrative unit, with the effect of displacing women from control over women's intercollegiate athletics.[360]

Today athletic leadership and governance is overwhelmingly male.[361] A recently released longitudinal study of women in inter-

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institutions); *see also* Annelies Knoppers, *Gender and the Coaching Profession, in* WOMEN, SPORT, AND CULTURE, *supra* note 1, at 119, 128–30 (discussing the existence of "tokenism" in athletic departments and its implications for women in the coaching profession).

358. *Cf.* Chamallas, *Structuralist and Cultural Domination Theories*, *supra* note 64, at 2380–81 (discussing ways in which male-dominant leadership structures in the workplace shape and distort identities and behaviors of employees); Elizabeth Chambliss, *Organizational Determinants of Law Firm Integration*, 46 AM. U. L. REV. 669, 678–91 (1997) (discussing extensive body of literature demonstrating how organizational determinants of the workplace, including upward mobility and leadership structures, construct worker aspirations and achievement).

359. CAHN, *supra* note 239, at 260–61. According to Vivian Acosta and Linda Carpenter, in 1972, over ninety percent of women's intercollegiate athletic programs were directed by a female administrator. R. VIVIAN ACOSTA & LINDA JEAN CARPENTER, WOMEN IN INTERCOLLEGIATE SPORT: A LONGITUDINAL STUDY—TWENTY THREE YEAR UPDATE 1977–2000, at 9 (2000) (on file with author); *see also* Messner & Sabo, *supra* note 146, at 5 (explaining women's loss of control over women's athletic programs in the post-Title IX era as a result of increased budgets and status that enabled women's athletic programs to pose a "challenge to masculine hegemony").

360. *See, e.g.*, CAHN, *supra* note 239, at 260–61 (discussing post-Title IX merger of men's and women's athletic programs and resulting decline of women in athletic administration); Suggs, *Uneven Progress*, *supra* note 319 (noting that only six Division I programs [out of 311] have separate men's and women's athletics departments, and reporting that staff within these women's departments claim that the separation gives them a distinct competitive advantage because they have their own trainers, strength coaches, and publicists, so that their female athletes "never play second fiddle"). For an interesting discussion of the history of the merger of men's and women's athletics departments and the NCAA's role in hastening the diminishing control of women over women's athletics, see FESTLE, *supra* note 36, at 199–227.

361. *See, e.g.*, HARGREAVES, *supra* note 1, at 179 (discussing post-Title IX trend of decreasing presence of women in coaching and leadership positions within athletics); Theberge, *supra* note 242, at 182 (noting that post-Title IX increase in women's athletic

collegiate athletics conducted by Professors Vivian Acosta and Linda Carpenter found that from the level of athletic director on down, including coaches and other athletics jobs, men increasingly hold the positions that oversee competitive sports. As of the year 2000, only 17.4% of women's programs were headed by women.[362] This represents a decrease from 19.4% just since 1998.[363] Women hold only 34% of all intercollegiate athletic administrative positions in women's sports.[364] Even this snapshot may exaggerate the presence of women in athletic leadership, given that most administrative positions held by women in intercollegiate athletics are support staff positions rather than policy-making positions.[365] Twenty-three percent of NCAA women's athletic programs have no women involved in athletics administration.[366] The disproportionately low share of women in other intercollegiate athletic jobs is also notable. In 2000, only 9.5% of sports information directors in NCAA programs were female, and only 25.5% of head athletic trainers were female.[367]

The problem of women's displacement from intercollegiate athletics administration does not appear to be improving. Although the number of athletic administration positions at colleges and universities is increasing, these additional positions have not translated into employment gains for women. Of the 418 new athletic administrative jobs added at NCAA institutions since 1998, women were hired for only forty-five of these positions, less than eleven percent of the total.[368]

A similar phenomenon has occurred with respect to coaching positions. Prior to Title IX, women held over 90% of the jobs coaching female athletes.[369] As of 2000, women held only 45.6% of the head coaching positions for women's intercollegiate athletic

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participation has been accompanied by a decrease in the percentage of women in athletic leadership positions).

362. ACOSTA & CARPENTER, *supra* note 359, at 9. Acosta and Carpenter offer the interesting statistic that there are more female college presidents of Division I-A colleges and universities than there are female athletic directors at these institutions. *Id.*; *see also* SALTER, *supra* note 16, at 66–69 (describing accounts of discrimination faced by women who have become athletic directors).

363. ACOSTA & CARPENTER, *supra* note 359, at 10.

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

teams, the lowest percentage on record.[370] Like the situation with respect to athletic directors, women's share of coaching jobs continues to decline. Of the 524 new coaching positions created for NCAA women's teams in the last two years, women were hired for only 107 of those positions, approximately twenty percent of the total.[371]

The movement of men into positions coaching female athletes has not been matched by an expansion of opportunities for women in jobs coaching men. Women continue to hold less than two percent of the jobs coaching male athletes, as they have for the past three decades.[372] Among the top twenty-five Division I football schools, men hold all of the coaching positions for all men's sports.[373] The few jobs women hold coaching male athletes typically involve coaching sports in which both male and female athletes participate and practice together, such as track and field and swimming.[374] There remains a virtual bar to women coaching male athletes in sports where males and females do not practice together.[375] The operative assumption—that women are not qualified to coach male athletes—speaks volumes about the role of women in sport and the construction of sport itself as a male activity. No similar assumption, that athletes require a coach of the same sex, interferes with the opportunities for men to coach women, even in sports where males have not had extensive intercollegiate opportunities to participate themselves, such as softball and volleyball.[376]

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370. *Id.* In absolute numbers, of the 7,771 NCAA head coaching jobs for women's teams, women hold approximately 3,544 of those jobs. *Id.*

371. *Id.*

372. *Id.*

373. *Top 25 Division I Football Programs* (July 17, 2000) (unpublished chart, on file with author).

374. R. Vivian Acosta & Linda Jean Carpenter, *Women in Intercollegiate Sport: A Longitudinal Study—Nineteen Year Update 1977–1996,* University of Iowa, *at* http://www.bailiwick.lib.uiowa.edu/ge/Acosta/womensp.html (on file with the *University of Michigan Journal of Law Reform*); *see also* Ellen Staurowsky, *Women Coaching Male Athletes, in* SPORT, MEN, AND THE GENDER ORDER, *supra* note 26, at 163; *see also id.* at 165–67 (discussing the sexism and discrimination faced by women who coach male athletes).

375. *See* Diane Heckman, *The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992–93: Defining the 'Equal Opportunity' Standard,* 1994 DETROIT C. L. REV. 953, 1001, 1002 (noting that no lawsuits have yet been brought by women seeking to coach a men's intercollegiate athletics teams, and stating that the virtual absence of women coaching men's teams "goes beyond evidence of a glass ceiling, it is more akin to a bolted and locked door").

376. *See* ACOSTA & CARPENTER, *supra* note 359, at 6. Women are 65.4% of women's softball coaches and 59.6% of women's volleyball coaches, despite the status of these sports as historically female sports. *Id.*

The unwritten rule in athletic departments is that the most highly valued sports—those played by men—must be coached by men.[377]

Although data is less readily available at lower levels of education, the picture of athletic leadership at the high school level also appears to be overwhelmingly male. A statewide study of Iowa high schools found that males were: 98.1% of athletic directors, 81.3% of athletic trainers, 98% percent of head coaches for boys' teams, 72.7% of head coaches for girls' teams, 97.4% of assistant coaches for boys' teams, and 50% of assistant coaches for girls' teams.[378]

As exclusionary as sport leadership structures are to women in general, they are particularly inaccessible when the disadvantages of sex and race are combined. Women of color are in an especially precarious situation in relation to leadership positions in sport. The barriers to women of color in athletic coaching and administrative positions are not well documented.[379] However, by piecing together what data there is, one finds that women of color are substantially worse off than both white women and men of color in sport leadership positions. A survey of all NCAA Division I schools conducted by the *Orange County Register* found that, as of September 1999, African American women held only 1.9% of the head coaching positions for women's sports, and were only 1.4% of Division I athletic directors, assistant or associate athletic directors in college and university programs that included women's athletics.[380] The same study found that white women without previous college coaching experience were thirty times more likely to get a Division I coaching job than African American women with no coaching experience.[381] In Division I women's basketball, only 6.4% of the head coaches are black women.[382] This figure looks especially low when compared to the twenty percent

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377. *See* Heckman, *supra* note 148, at 418 & n.132 (citing 1997 NCAA Gender Equity Study finding that no women coached men's football, baseball, or basketball in Division I schools and an absence of women head coaches in these sports in Divisions II and III).

378. Oliphant, *supra* note 338.

379. *See* Scott M. Reid, *For Black Women, A Coaching Void*, ORANGE COUNTY REG., Dec. 20, 1999, at D1 (noting that the NCAA does not keep track of the number of African American women head coaches and administrators, and that there is a general "inability of African-American women and their advocates to obtain the numerical data to support their argument that they are being denied jobs").

380. Reid, *supra* note 379; *see also* Craig T. Greenlee, *NCAA Report Finds Little Diversity in Sports Administration*, BLACK ISSUES IN HIGHER EDUC., June 22, 2000, at 16, 16 (reporting data from NCAA report that percentage of African American (male and female) athletic directors at Division I schools dropped from 10.1% to 7.5% between 1995 to 1999).

381. Reid, *supra* note 379.

382. Greg Garber, *Progress? Not for Black Women Coaches*, HARTFORD COURANT, Mar. 16, 2000, at C1.

of Division I men's basketball coaches who are African American.[383] Data on Asian American women, Latinas and other women of color in sport leadership positions appear non-existent. There is also a lack of data on women of color in coaching and administrative sport positions at the high school level and below.

The structure of athletic leadership shapes the context in which athletic interests and identities are molded. The disproportionately low presence of women—and women of color in particular—in athletic leadership positions renders them tokens in the world of sports.[384] As tokens, women working in athletics face gender and race bias and stereotyping because white males are defined as the norm in sport leadership.[385] This has implications for female students as well as employees. One implication is that, since the norm of athletic leadership is male, female students are more likely to prefer males as coaches.[386] Because tokenism results in occupational stereotyping, in which competence is linked to maleness, subordinates as well as superiors prefer having men in positions of leadership.[387] This explains why researchers have found that both female and male athletes are more likely to express a preference for male coaches, and perceive them to be more competent than female coaches, even though men who coach females have lower objective qualifications, compared to both women who coach females and to men who coach males.[388] Thus, to the extent that athlete preferences shape hiring decisions, tokenism in sport is self-reinforcing.[389]

The linkage of athletic leadership with maleness also affects female athletes in how they see themselves as athletes and their future role in sport. The absence of women in sport leadership

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383. *See id.*

384. *See* Knoppers, *supra* note 357, at 128–30 (discussing Rosabeth Moss Kanter's analysis of tokenism, and her definition of a ratio of 0.15 or less as "skewed" and one of 0.16 to 0.35 as "tilted;" and stating that, "[I]f all coaches and athletic administrators are included in the total count, then in most athletic departments the gender ratio is probably titled or close to being skewed."); *cf.* Chambliss & Uggen, *supra* note 356, at 62–63 (discussing research showing that the presence of women in leadership positions is more important to the gender inclusiveness of institutions than integration at lower levels).

385. *See* Knoppers, *supra* note 357, at 128–30.

386. *Id.* at 125.

387. *Id.* at 128.

388. *See id.* at 123–24, 125, 128.

389. *See id.* at 125–26 ("Although evaluations by athletes may not always be part of the formal feedback, if any, received by coaches, such negative attitudes toward female coaches may create another gender-related obstacle in their career ladders."). The occupational stereotyping associated with tokenism also perpetuates itself by shaping the gender expectations of the persons who make hiring decisions. *See id.* at 129–30.

positions reinforces stereotypes about girls and women in sport and contributes to the ideology that athletic excellence is male.[390] The conflation of maleness and athletic competence profoundly influences how girls and women perceive their place in sport. As sociologist Ellen Staurowsky explains:

> The underrepresentation of women in coaching and leadership positions speaks to the strength of the connection between sport and gender. There is an underlying assumption that links sport expertise with masculinity and leadership with male superiority. . . . For those participants who are gendered female, there is an automatic devaluation of experience, of achievement, and of self.[391]

In this way, sport leadership structures preserve sport as a male domain for athletes as well as for athletic coaches and administrators.[392]

The constricted role for women in sport leadership positions also shapes the aspirations of female athletes in their future careers. The lower share of female coaches and athletic administrators means that female athletes have fewer role models in sport.[393] The absence of female role models as coaches or administrators places a ceiling on the female athletic experience that limits the female athlete's potential for future involvement in sport.[394] African American athletes in particular have very few, if

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390. *See id.* at 120 ("The absence of women from such [sport leadership] positions may reinforce the gender stereotyping traditionally associated with the sports world and women in general.").

391. Staurowsky, *supra* note 374, at 163.

392. *Cf.* Weistart, *Gender Equity, supra* note 173, at 200–04 (discussing how sport leadership structures have built-in headwinds that resist efforts to attain gender equity in sport and instead preserve existing male-dominant hierarchies).

393. *See* HARGREAVES, *supra* note 1, at 201–02 ("Because male coaches greatly outnumber female coaches (particularly in senior positions), and men are increasingly involved in coaching women's sports, there are very few role models to encourage young women to take up coaching."); Knoppers, *supra* note 357, at 120 (citing research suggesting that the decline of women coaches "could have a detrimental effect on female athletes . . . beyond the technical aspects of coaching," due to the "fewer visible role models for women in sport").

394. Knoppers, *supra* note 357, at 120. Knoppers observes:

> This absence may mean not only that fewer women than men will consider coaching as a career, but also that fewer women will be able to continue their sport involvement once their own college athletic participation is over. In addition, since coaching is the entry-level job for careers in athletics, fewer women will have careers in sport and possibly will miss opportunities for mobility through such involvement.

any, African American women as role models in coaching and administration positions, and receive an especially bleak picture of their future athletic opportunities.[395] Overall, current leadership structures convey to female athletes a message that males in sport do not receive: your chance for a future in sports will be limited by your sex and, if you are a woman of color, also by your race.

The increasing male control over female athletes has another dimension as well: athletics becomes another arena where men exert control over women.[396] Female athletes may be more vulnerable to abuse of the disparate power inherent in the coach-athlete relationship when they are coached by men.[397] The sexual abuse of female athletes by male coaches is gaining increasing recognition as a widespread problem in girls' and women's sports.[398] Some such cases make their way to the courts, although most go unreported and unaddressed.[399] When male coaches and administrators abuse

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Id.

395. *See* Reid, *supra* note 379 (discussing the impact of the absence of African American women coaches and athletic administrators on female athletes and the importance of role models).

396. *See* Elaine Blinde, *Unequal Exchange and Exploitation in College Sport: The Case of the Female Athlete, in* WOMEN, SPORT, AND CULTURE, *supra* note 1, at 135, 144 ("Patterns of interaction between male coaches and female athletes may sometimes parallel the dominant-subordinate roles usually accorded males and females respectively in a patriarchal society.").

397. *See id.* at 142–44 (discussing emotional and psychological exploitation of female athletes by male coaches, and concluding, "it appears that female athletes may be subject to some unique forms of psychological exploitation given the fact that they are frequently (and increasingly) placed under the direction of male coaches.").

398. *See* PAT GRIFFIN, STRONG WOMEN, DEEP CLOSETS: LESBIANS AND HOMOPHOBIA IN SPORT 200 (Becky Lane et al. eds., 1998) (citing recent articles "indicat[ing] that male coaches' sexual involvement with female athletes is a problem that has only recently come to light"); Julie Cart & Theresa Muñoz, *A Touch Too Much—Harassment and More are Possible When Men Coach Women Athletes*, L.A. TIMES, Apr. 2, 1992, at C1 (discussing specific instances of male coaches accused of sexually harassing their female athletes at the undergraduate level); Robin Finn, *Out of Bounds—A Special Report: Growth in Women's Sports Stirs Harassment Issue*, N.Y. TIMES, Mar. 7, 1999, at A1 (reporting recent instances of female athletes accusing male coaches of sexual harassment, and discussing the conditions in sports that are conducive to sexual abuse and harassment of female athletes by male coaches); Marina Pisano, *Insight*, SAN ANTONIO EXPRESS-NEWS, Aug. 4, 1996, at L-1 (" 'Some of the "best" coaches in the country have seduced a succession of their female athletes. We've sexualized little girls. We've eroticized domination.' ").

399. *See, e.g.*, Klemencic v. Ohio St. Univ., No. 96-3851 1997 U.S. App. LEXIS 8117, at *6 (6th Cir. Apr. 17, 1997) (rejecting qualified immunity defense in suit for sexual abuse by assistant coach); Canty v. Old Rochester Reg'l Sch. Dist., 54 F. Supp. 2d 66, 71 (D. Mass. 1999) (rejecting sexual assault claim against public high school coach because assault was not within the scope of employment); Ericson v. Syracuse Univ., 35 F. Supp. 2d 326, 328–29 (S.D.N.Y. 1999) (upholding Title IX claim for sexual harassment of two students by their coach); R.L.R. v. Prague Sch. Dist., 838 F. Supp. 1526, 1530, 1534 (W.D. Okla. 1993) (granting defendant summary judgment in Title IX claim for sexual harassment of female athlete by her male coach); Alexander v. Yale Univ., 459 F. Supp. 1, 3–4 (D. Conn. 1977) (one of female plaintiffs alleged that she stopped serving as team manager for her field

their power over female athletes, it has the potential to transform athletics from a physically and psychologically liberating activity to one that exacerbates women's relative powerlessness in relation to men.[400] While it is important to acknowledge that most men who hold positions of leadership in female sports do not abuse their power over female athletes, and that some women who hold sport leadership positions do, the existing gender dynamics of sport create conditions more favorable to the abuse of male power over female athletes.[401] The lack of a strong institutional response to the problem exacerbates and perpetuates the conditions in sport that contribute to such abuse.[402]

In summary, the male-dominant leadership structures in place in athletic departments shape men's and women's relationship to sport. They do this at the level of athletic culture, by linking sport leadership (and, by extension, competence in sport) with mascu-

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hockey team because of sexual harassment by their male coach); King v. U.S.D. No. 446, No. 59,346, 1987 Kan. App. LEXIS 857, at *13–17 (Kan. Ct. App. Mar. 5, 1987) (rejecting due process claim for sexual assault of a nine-year-old girl by coach); Durham City Bd. of Educ. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 109 N.C. App. 152, 157 (N.C. Ct. App. 1993) (refusing to find a coach accused of raping a student-athlete to be covered under school district's insurance policy because the assault was not within the scope of employment); Scadden v. Wyoming, 732 P.2d 1036, 1054 (Wyo. 1987) (upholding conviction of high school volleyball coach for sexual assault of athlete); *see also* Leslie Heywood, *Despite the Positive Rhetoric About Women's Sports, Female Athletes Face a Culture of Sexual Harassment*, CHRON. HIGHER EDUC., Jan. 8, 1999, at B4 ("[M]any women rightly believe that doing so [reporting abuse by a coach] would bring about reprisals, such as being ostracized by their teammates and coaches, and being given less playing time.").

400. *See* Birrell & Richter, *supra* note 1, at 227–29 (describing feminist-identified softball players' negative experiences with abusive male coaches whom they perceived as replicating unequal societal power structures).

401. *See* Alan Tomlinson & Ilkay Yorganci, *Male Coach/Female Athlete Relations: Gender and Power Relations in Competitive Sport*, 21 J. SPORT & SOC. ISSUES 134, 134 (1997) (reporting results of a study of harassment of female athletes by male coaches, and concluding that, when men coach female athletes, "the power dynamics [of the relationship between coach and athlete] are accentuated, and a perfect climate for exploitation has been created"); Robin Finn, *Harassment a Concern as Women's Sports Grow*, N.Y. TIMES, Mar. 7, 1999, at A1 (discussing increasing reports of sexual harassment of female athletes by male coaches and quoting sociology professor Don Sabo as stating that reports of harassment by female coaches are much less prevalent); Pisano, *supra* note 398, at L-1 (quoting author Mariah Burton Nelson as stating that although "some sexual molestation in sports involves female coaches and male athletes or gay/lesbian cases[,] . . . about 95 percent of the cases occur between older male coaches and young female athletes."); *cf.* GRIFFIN, *supra* note 398, at 58, 191, 201–04 (asserting that, despite images of "lesbian predators" in sports, female athletes statistically are much more likely to be sexually harassed, assaulted, and coerced into sexual relationships with hetereosexual male coaches and athletes, and noting the "double standard" in how institutions respond to male coach-female athlete sexual relationships versus female coach-female athlete sexual relationships).

402. *See* Heywood, *supra* note 399 (discussing problem of sexual harassment and abuse of female athletes by male coaches and lack of adequate response to the problem by educational institutions).

linity, and at the level of experience, by placing female but not male athletes in a situation where their gender is an added vulnerability in a relationship that is already defined by a marked imbalance of power. However, the leadership structures in sport are just the beginning of the analysis of the masculinization of sport. A broader account of sex inequality in sport must look at how institutions shape sexism and male dominance within the culture of sport itself.[403]

2. Linking Sport, Masculinity, and Male Dominance in Male Athletic Culture—Sport and masculinity have been conflated in American culture.[404] Athletic programs in schools originated out of a desire to inculcate masculinity in males.[405] Schools created athletic programs in response to concerns that boys were becoming "femininized" by the increasing absence of fathers from the home during the industrial revolution.[406] Not surprisingly in light of this history, school athletic programs were originally conceived as activities for males only.[407] Likewise, the Olympics were originally premised on an explicit linkage between athleticism and masculinity. The founder of the modern Olympics, Pierre de Coubertin, described the justification for the Olympics in explicitly gendered terms: "The Olympic Games must be reserved for men . . . [W]e must continue to try to achieve the following definition: the solemn and periodic exaltation of male athleticism, with internationalism as a base, loyalty as a means, art for its setting, and female applause as its reward."[408]

Sport continues to serve the social function of teaching masculinity to males. For boys and men, sports participation

403. *Cf.* Chambliss & Uggen, *supra* note 356, at 45 (discussing research suggesting that tokenism in leadership structures alone does not explain gender inequality within institutions and highlighting the need for attention to the broader social and cultural forces that influence the positions of women in organizations).

404. *E.g.*, JIM MCKAY, MANAGING GENDER: AFFIRMATIVE ACTION AND ORGANIZATIONAL POWER IN AUSTRALIAN, CANADIAN, AND NEW ZEALAND SPORT 20 (1997) ("Perhaps no single institution in American culture has influenced our sense of masculinity more than sport.") (internal quotations omitted); Willis, *supra* note 241, at 35–36 ("It is also clear that sport is strongly associated with the male identity, with being popular and having friends. . . . Achievement particularly strengthens male identity; it is assumed that sports success *is* success at being masculine.").

405. *See* Bryson, *supra* note 241, at 176 ("There is clear historical evidence that sport was often promoted with an explicit goal of enhancing masculinity. . . .").

406. *See* BRIAN PRONGER, THE ARENA OF MASCULINITY: SPORTS, HOMOSEXUALITY, AND THE MEANING OF SEX 16–17 (1990).

407. *See* Kidd, *supra* note 350, at 35 ("The men who developed and promoted sports were careful to ensure that only males were masculinized in this way. These developers maintained sports as male preserves by actively discouraging females from participation.").

408. WOMEN IN SPORT, *supra* note 238, at 169.

constructs masculinity by placing a high value on male physical power and by contributing to and celebrating an ideology of masculinity as distinct from, and in opposition, to femininity.[409]

Masculinity is linked with male sport in general, but with certain sports in particular. The more rugged, powerful contact sports are the preferred vehicles through which males prove their masculinity,[410] and not coincidentally, the sports that are often the most valued in school athletic programs in terms of the resources, benefits and prestige that accompany those programs.[411] Sports that require less physical aggression and that combine aestheticism with athletic skill, such as figure skating, diving and gymnastics, are regarded as less masculine, and may even subject their male participants to accusations of femininity or homosexuality.[412]

The social practices surrounding sport often develop a particular type of masculinity that celebrates traditional manhood and emphasizes male dominance and the devaluation of women.[413] For

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409. *See* Whitson, *supra* note 354, at 21–22. Whitson argues that the social construction of masculinity is so important because it does not exist naturally: "If boys simply grew into men and that was that, the efforts described to teach boys how to be men would be redundant. We can suggest, then, that 'becoming a man' is something that boys (and especially adolescent boys) work at." *Id.* at 22. Likewise, the cultural norms that define what it means to be a man are not natural, but "are themselves historical constructs." *Id.*

410. *See* PRONGER, *supra* note 406, at 19–20 (describing hierarchy of masculinity among male sports, and listing boxing, football, and hockey as the "most masculine" because they are the most violent); Donald F. Sabo & Joe Panepinto, *Football Ritual and the Social Reproduction of Masculinity*, *in* SPORT, MEN, AND THE GENDER ORDER, *supra* note 26, at 115, 125 (discussing their research into the relationship between football players and their coaches, and concluding that this relationship serves as "a training ground for hegemonic masculinity"); Whitson, *supra* note 242, at 367. Whitson observes that:

> Body contact games, in particular, have historically naturalized an aggressive way of 'doing masculinity' in which physical domination is legitimated; over time, these confrontative sports have become important masculinizing practices that initiate young males into a hierarchy of gendered identities in which the capacity to dominate is honored and physical power confers social power.

Id.

411. *See* Weistart, *Equal Opportunity?*, *supra* note 32, at 37 ("[O]ne does not become an athletic director in a substantial program without understanding that the revenue sports, which means one or both of the dominant men's sports, come first.").

412. PRONGER, *supra* note 406, at 20, 37–38; *see also* Lorraine Kee Montre, *Gay or Nay? It's Really None of Our Business What Stars' Sexual Preference Is*, ST. LOUIS POST-DISPATCH, Apr. 4, 1992, at 1C (citing Olympic figure skater Christopher Bowman's comments about the perception that male figure skaters are gay and discussing personal harassment he experienced for "performing in a predominantly girls' sport").

413. *See* Whitson, *supra* note 354, at 21–22; *see also* Brian Pronger, *Gay Jocks: A Phenomenology of Gay Men in Athletics*, *in* SPORT, MEN, AND THE GENDER ORDER, *supra* note 26, at 144 ("Masculinity, then, is a strategy for the power relations between men and women; it is a strategy that serves the interests of patriarchal heterosexuality. Athletics, as a sign of masculinity in men, can be an instrument of those power relations.").

many males, sports participation provides an avenue for learning and practicing a dominant masculinity and gaining status as a male by distancing from, and establishing superiority over, females. Much of male sports culture consists of everyday interactions among male athletes and coaches that confirm and reinforce male superiority and privilege, both on the playing field and in social relations.[414] The emphasis on sport as a means of developing a privileged masculinity through physical dominance and aggression creates a culture in which a high value is placed on exercising sexual and physical dominance over women.[415] As the authors of one study exploring the relationship between male athletics and sexual dominance explained, subcultures and societies that "regard qualities such as power, toughness, dominance, aggressiveness, and competitiveness as 'masculine' may breed individuals hostile to women and to qualities associated with 'femininity.' "[416] The male athletic privilege that develops through sports participation often includes an expectation of access to women's bodies as a side benefit of highly developed athletic skills.[417]

Too often the culture of masculinity learned through sport is expressed through the sexual abuse and exploitation of women by male athletes. Male sport culture and its dominant style of masculinity create social conditions that are ripe for the practice of male dominance over women.[418] The connection between male athletic

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414. *Cf.* Chamallas, *New Gender Panic, supra* note 356, at 364 (describing "military culture" as "the complex of attitudes, daily interactions and institutional structures that can give us a clue as to why the military might be so resistant to women and so fearful of feminization.").

415. *See* MICHAEL A. MESSNER & DONALD F. SABO, SEX, VIOLENCE & POWER IN SPORTS: RETHINKING MASCULINITY 87 (1994). The coaching of male athletes teaches them "to take orders, to take pain, to 'take out' opponents, to take the game seriously, to take women, and to take their place on the team." *Id.* Moreover, "[d]ating becomes a sport in itself, and 'scoring,' or having sex with little or no emotional involvement, is a mark of masculine achievement." *Id.* at 38.

416. Neil M. Malamuth et al., *Characteristics of Aggressors Against Women: Testing a Model Using a National Sample of College Students*, 59 J. CONSULTING & CLINICAL PSYCHOL. 670, 671 (1991).

417. *See* MESSNER & SABO, *supra* note 415, at 122, 124 (discussing implications of Magic Johnson's statements upon announcing his HIV-positive status that "scores of beautiful women hang around famous male jocks" and stating that "[m]ale athletes, in contrast [to heterosexual female athletes], are expected to be heterosexually promiscuous"); Robert Lipsyte, *The Emasculation of Sports*, N.Y. TIMES, Apr. 2, 1995, § 6, at 51 ("Potential sports stars—who might bring fame and money to everyone around them—are excused from taking out the trash, from learning to read, from having to ask, 'May I touch you there?' ").

418. *See* MESSNER & SABO, *supra* note 415, at 50 (explaining that a "rape culture" is created in male sports programs where "verbal sparring and bragging about sexual conquests [leads] to actual behavior," with group dynamics encouraging male athletes to treat women "as objects of conquest"); Todd W. Crosset et al., *Male Student-Athletes Reported for Sexual*

participation and the physical and sexual abuse of women is just beginning to receive attention commensurate with the scope of the problem. Numerous studies have begun to document the relatively higher propensity for male student-athletes to sexually assault women.[419]

In its most extreme form, male athletes' expression of sexual dominance over women occurs through gang rape.[420] Other than fraternities, male athletes are more likely than any other social group in college to participate in gang rape.[421] One study of campus gang rapes showed that of the twenty-four gang rapes analyzed, athletes committed approximately thirty-eight percent (or nine).[422] Through gang rape, male athletes solidify bonds with one another by using the woman's body as the object of sexual dominance, while seemingly distancing themselves from the homoerotic implications of a group sexual experience.[423] The culture of masculinity and team insularity plays an important role in establishing the group dynamic that gives rise to such conduct, and in the reluc-

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Assault: A Survey of Campus Police Departments and Judicial Affairs Offices, 19 J. SPORT & SOC. ISSUES 126, 127 (1995) (discussing elements of "rape culture" in athletics as displaying a high level of tolerance for violence, male dominance, and sex segregation).

419. MESSNER & SABO, *supra* note 415, at 33 (reporting one study finding that athletes were involved in approximately one-third of the sexual assaults on campuses in the United States between 1988 and 1991); NELSON, *supra* note 242, at 130 (citing 1986 *Philadelphia Daily News* survey of 350 colleges, finding that male football and basketball players were thirty-eight percent more likely to be implicated in sexual assaults than the average male college student); *see* Crosset et al., *supra* note 418, at 132–33 (finding that male athletes were alleged to be responsible for a disproportionate share of on-campus sexual assaults at Division I schools, and that male football and basketball players accounted for thirty percent of the male athletic population, but sixty-seven percent of the reported assaults by male athletes); *id.* at 51 (citing another study finding that between 1983 and 1986, a college athlete in the United States was reported for sexual assault an average of once every eighteen days); *see also* Howard L. Nixon II, *Gender, Sport and Aggressive Behavior Outside Sport*, 21 J. SPORT & SOC. ISSUES 379, 384, 386, 388 (1997) (reporting results of study on male athletes and violence and concluding that male athletes are more likely than female athletes to engage in physically aggressive acts outside of sports).

420. For an in-depth account of the events and circumstances surrounding a highly publicized gang rape of a mentally retarded adolescent girl by members of a high school football team, and an analysis of the school and community culture which supported the players, see BERNARD LEFKOWITZ, OUR GUYS: THE GLEN RIDGE RAPE AND THE SECRET LIFE OF THE PERFECT SUBURB (1997).

421. MCKAY, *supra* note 404, at 8.

422. Crosset et al., *supra* note 418, at 128, 137 n.1.

423. *See* MESSNER & SABO, *supra* note 415, at 67 (describing the dynamics of gang rape by male athletes, and explaining, "[t]hough she is physically present, the girl or woman, as a thinking, choosing partner, is obliterated. She serves as the conquered object through which the guys have 'sex' with each other."). *See generally* PEGGY REEVES SANDAY, FRATERNITY GANG RAPE (1990) (analyzing the gender dynamics of gang rape).

tance of team members to accept responsibility for the rape or to implicate others.[424]

To the extent that male athletic culture encourages a certain type of masculinity that teaches male superiority and values heterosexual male dominance, it is not a culture that is predetermined by male athletic activity in and of itself.[425] Rather, it is a specific type of athletic culture that is shaped, controlled and fostered by the institutions in which sport takes place. Educational institutions, through their actions and inaction, participate in creating a culture of sport that links athletic participation with hegemonic masculinity.[426] The ways in which educational institutions contribute to this culture take subtle and not so subtle forms.

One of the more direct ways in which schools shape male athletic culture is through the actions of their coaches. Many coaches blatantly convey the message to their male athletes that athletic failure will jeopardize their masculinity.[427] Rebukes from coaches and teammates such as, "You throw like a girl," and more graphic variations on similar themes instill in male athletes the fear that

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424. JEFF BENEDICT, PUBLIC HEROES, PRIVATE FELONS 10–11 (1997) (quoting one player involved in a gang rape as stating, "The peer pressure to perform in front of the guys . . . was the overlapping problem that occurred . . . you get caught up in it. . . . [I]t was hard to say, 'Nah, no,' because . . . [y]ou're gonna be teased about it."); MCKAY, *supra* note 404, at 8 ("Like other tightly-knit competitive male groups . . . sport often produces 'groupthink'—a mind-set that makes men incapable of believing that there is anything wrong with their harassing, abusive, and violent behavior toward women."); *see also* Merrill Melnick, *Male Athletes and Sexual Assault*, 63 J. PHYS EDUC., RECREATION & DANCE 32, 33 (1992) ("The pressure to be one of the boys can turn rape into a team activity.").

425. *See* MESSNER & SABO, *supra* note 415, at 34 ("[N]othing inherent in sports makes athletes especially likely to rape women. Rather, it is the way sports are organized to influence developing masculine identities and male peer groups that leads many male athletes to rape."); *cf.* Mary P. Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. CONSULTING & CLINICAL PSYCHOL. 162, 169 (1987) ("It is difficult to believe that such widespread violence is the responsibility of a small lunatic fringe of psychopathic men. That sexual violence is so pervasive supports the view that the locus of violence against women rests squarely in the middle of what our culture defines as 'normal' interaction between men and women.").

426. *See* HARGREAVES, *supra* note 1, at 151 (acknowledging that girls and boys come to school "with definite ideas about what is appropriate for their respective gender," but that schools "have the potential to modify children's perceptions of gender roles and to challenge sexist behaviour").

427. *See* PRONGER, *supra* note 406, at 26 ("[F]ootball coaches are well known for berating their players with insults: 'ladies,' 'faggots,' 'pansies.'"); Sabo & Panepinto, *supra* note 410, at 120 (describing use of misogyny and homophobia to induce conformity and athletic achievement by male athletes: "One coach hung a bra in a player's locker to signify that player wasn't tough enough. In order to inflame aggression or compliance, coaches called players 'pussies' or 'limp wrists' and told them 'go home and play with your sisters' or 'start wearing silk panties.'").

athletic failure risks a loss of manhood itself.[428] The unmistakable message is, that to protect their masculinity, male athletes must differentiate themselves from girls and women.[429] At the same time, such interactions teach male athletes that femininity is tantamount to failure, with the implication that a female athlete is a contradiction in terms.[430] In this way, masculinity is constructed as oppositional to femininity, and femininity is portrayed as something that must be controlled and suppressed. Sport as a process for masculinizing boys and men relegates the feminine role in sport to one that is subordinate and subject to domination.

In addition to the messages conveyed by coaches, the peer culture within male locker rooms contributes to a culture of male dominance. Male locker rooms, while providing space for male bonding about athletic experiences, often double as a location where values are learned linking masculinity to the sexual exploitation of women.[431] One study analyzing the conversational patterns of male athletes in locker rooms found that "hostile talk about women is blended with jokes and put-downs about classes and each other."[432] The study concluded that locker room conversation among male athletes objectified women through language and jokes, and valued the ability to conquer and control them.[433]

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428. GRIFFIN, *supra* note 398, at 22 ("Male coaches send strong messages about women and about the need for men to avoid being like women when they compare a poor performance by a male athlete to that of a girl (for example, throwing like a girl)."). For an insightful essay on what it means to "throw like a girl," and an explanation of how female athleticism is culturally constructed, see YOUNG, *supra* note 353, at 141–59.

429. *See* PRONGER, *supra* note 406, at 26 ("Coaches demand that their athletes play like men even if they are just boys; it's boys' concern about masculinity that is played upon to motivate more aggressive performances.").

430. *See* Bryson, *supra* note 241, at 173 ("The inferiorising of the 'other' is most frequently implicit, though it is also explicitly and graphically conveyed when, for example, coaches, supporters, and commentators chastise their team for playing like girls or poofters.").

431. *See* Kidd, *supra* note 350, at 42 (describing "the gross sexism and homophobia of that inner sanctum of patriarchy, the locker room", and explaining how the celebration of physical dominance and control on the playing field, when combined with the celebration of the sexual conquest of women in the locker room, can serve as a "training ground for rape"); *see also* Whitson, *supra* note 354, at 26 (showing prevalence of misogynist remarks and discussions of sexual exploitation of women in male athletic culture, and concluding that "[t]he effect is to establish a norm that equates masculinity with domination in male-female relationships.").

432. Timothy Jon Curry, *Fraternal Bonding in the Locker Room: A Profeminist Analysis of Talk About Competition and Women*, 8 SOC. SPORT J. 119, 126 (1991); *see also* Mary Jo Kane & Lisa J. Disch, *Sexual Violence and the Reproduction of Male Power in the Locker Room: The "Lisa Olson Incident"*, 10 SOC. SPORT J. 331, 333 (1993) (discussing the group dynamics of a professional football locker room that led to sexual harassment when a female sportswriter was attempting to conduct an interview).

433. *See* Curry, *supra* note 432, at 129.

Finally, educational institutions shape the culture of male sports in the privileges they extend to male athletes and the ways they respond to the exploitation and abuse of women by male athletes. Male athletic privilege is constructed to include an expectation of increased sexual access to women.[434] At some institutions, this message is conveyed explicitly by the use of attractive women on campus to assist recruiters in attracting elite male athletes.[435] School officials confirm this expectation when they overlook the sexual and physical abuse of women by male athletes.[436] The vast majority of institutions do not have any policy for dealing with misconduct by athletes, leaving athletic directors and men's coaches with a large degree of influence over institutional responses to male athletes' abuse of women.[437] As a result, the institution's response often values the athlete's contributions in sport more highly than the protection of women from abuse.[438] A number of court cases in recent years have illustrated the phenomenon of educational institutions conferring a privilege to exercise sexual dominance as part of the male athletic experience.

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434. *See* MESSNER & SABO, *supra* note 415, at 15 (describing the "stars' world" that institutions cultivate for their highly valued male athletes as "a 'promised land'—full of notoriety, women, sex, and status."); Deborah Reed, *Where's the Penalty Flag? A Call for the NCAA to Promulgate an Eligibility Rule Revoking a Male Student-Athlete's Eligibility to Participate in Intercollegiate Athletics for Committing Violent Acts Against Women*, 21 WOMEN'S RTS. L. REP. 41, 50 (1999) (quoting one sociologist as stating that "the kid going to (a top football school) has been recruited by eighty other schools and has a sense of entitlement . . . and included in that is the view of women as always at one's beck and call").

435. *See* JEFFREY R. BENEDICT, ATHLETES AND ACQUAINTANCE RAPE 14 (1998) ("Highly recruited athletes are exposed to women who are used to entice players to their school. This initial experience with women as a benefit is expanded over the course of a college career. . . .").

436. *See* id. at 13; MESSNER & SABO, *supra* note 415, at 14; *see also* Jeffrey Benedict & Alan Klein, *Arrest and Conviction Rates for Athletes Accused of Sexual Assault*, 14 SOC. SPORT J. 86, 91 (1997) (finding that although male college athletes are more likely to be arrested for sexual assault charge than nonathletes, they are much less likely to be convicted because of the public perception of the victim as a "groupie," and the "larger institutional safety net that is available to athletes accused of criminal behavior . . . [such as] exceptional financial resources and powerful advocates in the form of coaches, agents, lawyers, and pillars of the community").

437. *See Colleges Confront Athlete's Crimes*, USA TODAY, Sept. 18, 1998, at 20C (finding that, of the nation's twenty-five top football schools, only eight have a written policy on how to deal with athlete misconduct, and that of these eight, seven permit the coach and the athletic director to have some role in determining punishment and reinstatement of the athlete); *id.* (finding that, at schools where there is no written policy on athlete misconduct, most coaches and athletic directors have a great deal of discretion in determining the athlete's fate at the institution). The NCAA has no official policy for dealing with sexual abuse by athletes. Reed, *supra* note 434, at 43.

438. *See* Reed, *supra* note 434, at 47–48 (stating that the tendency of coaches and athletic directors is to protect male student athletes who are accused of sexual assault).

In one of the most widely publicized of such cases, *Brzonkala v. Virginia Polytechnic Institute and State University*,[439] Christy Brzonkala sued the University under Title IX for hostile environment sexual harassment based on its response to her allegation that she was gang-raped in a student dormitory by two of the school's football players when she was a freshman at the school.[440] In response to the charges, the University held a disciplinary hearing at which it found one of the accused students guilty of sexual misconduct and insufficient evidence to take disciplinary action against the other accused student.[441] The University disciplinary committee recommended a one-year suspension for the student who was found guilty, a recommendation that was adopted by the Provost.[442] At that point, the University abruptly changed course and decided (on specious grounds) to require a second evidentiary proceeding giving the student who had been found guilty a second chance to prove his innocence.[443] The second proceeding was wrought with procedural irregularities that made it more difficult for Christy Brzonkala to prove her allegations.[444] Nevertheless, at the conclusion of the second hearing, the disciplinary committee again found the student guilty and again recommended a one-year suspension.[445] However, the University inexplicably (and in violation of its own procedures) deferred the one-year suspension until after the accused student graduated, thereby rendering the suspension moot.[446] The only "sanction" imposed was to require the offender to participate in a one-hour sensitivity training session conducted by school officials.[447] Both football players returned to the school after the summer break.[448] Christy Brzonkala never returned; she dropped out of the university, unwilling to face the humiliation of the per-

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439. 935 F. Supp. 779 (W.D. Va. 1996), *rev'd*, 132 F.3d 949 (4th Cir. 1997), *vacated and aff'd en banc*, 169 F.3d 820 (4th Cir. 1999) (vacating the panel decision and affirming the district court decision with respect to the Violence Against Women Act (VAWA) claim only), *aff'd*, 120 S. Ct. 1740 (2000). The following discussion of the facts of the case are based on the allegations of the complaint. Because the case was not fully litigated (it was settled after the Fourth Circuit reversed the district court's dismissal of the complaint), the facts were never adjudicated and remain in dispute.

440. *Brzonkala*, 132 F.3d at 952–53.

441. *Id.* at 954.

442. *Brzonkala*, 935 F. Supp. at 782.

443. *Brzonkala*, 132 F.3d at 954.

444. *Id.*

445. *Id.* at 955.

446. *Id.*

447. *Id.*

448. *Id.*

ceived vindication of her rapists.[449] The case against the university eventually settled for $75,000.[450]

Other cases also have involved the conferral of institutional privilege on male athletes who sexually exploit and abuse women. In *Tanja H. v. Regents of the University of California*,[451] a female student sued the University of California at Berkeley after she was gang-raped by four football players in her dormitory after a party.[452] Unlike Christy Brzonkala, the plaintiff in this case grounded her case on state law, arguing that the University acted negligently in failing to enforce its alcohol policy or otherwise protecting her from the rape—a theory that was rejected by the California Court of Appeals.[453] The case was ultimately settled with an agreement requiring the football players to undergo counseling and perform 40 hours of community service; neither the players' academic nor their athletic status was affected.[454]

In a similar case of male athletic privilege, this time involving an alleged gang-rape by two football players, Sheronne Thorpe sued her University for its response to her report of the rapes.[455] The accused rapists did not deny that the sexual incident had occurred, but claimed that it was consensual.[456] Thorpe alleged that the University never provided her with the student handbook, the code of student conduct, or the school's sexual harassment complaint procedure, and never informed her of her rights in connection with the charges.[457] The only disciplinary action imposed by the school

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449. *Id.*

450. *Settlement in Virginia Tech Rape Case*, WASH. POST, Feb. 26, 2000, at B2. The case also included VAWA claims against the individual attackers. Brzonkala v. Va. Polytechnic and St. Univ., 935 F. Supp. 779, 781 (W.D. Va. 1996) (dismissing Title IX and VAWA claims), *rev'd*, 132 F.3d 949, 953 (4th Cir. 1997) (reinstating Title IX and VAWA claims), *rev'd en banc*, 169 F.3d 820, 830 (4th Cir. 1999) (holding VAWA unconstitutional but not addressing the Title IX claims), *aff'd*, 120 S. Ct. 1740, 1759 (2000) (striking down VAWA as an unconstitutional exercise of Congressional power). The claims against the individual attackers proceeded separately after the case against the University was settled, and were finally dismissed when the Supreme Court held the Act unconstitutional.

451. 278 Cal. Rptr. 918 (Cal. Ct. App. 1991).

452. *Id.* at 919–20.

453. *Id.* at 919.

454. *See UC Women Object to Settlement of Group Rape Case*, L.A. TIMES, Nov. 28, 1986, at 38.

455. Thorpe v. Va. St. Univ., 6 F. Supp. 2d 507, 508–09 (E.D. Va. 1998); *see also Suit is Filed in Rape Case Involving VSU*, RICHMOND TIMES DISPATCH, Dec. 4, 1996, at B3.

456. *Thorpe*, 6 F. Supp. 2d at 509; *see also* BENEDICT, *supra* note 424, at 80 (reporting that the consensual sex defense results in the acquittal of athletes who are tried for gang rape more than seventy-five percent of the time).

457. *Thorpe*, 6 F. Supp. 2d at 509; *see also* John Ritter, *When Schools Act as Courts*, USA TODAY, Feb. 26, 1997, at 3A (reporting that Thorpe stated that VSU officials at first were

was to ban the two accused students from the women's dorm.[458] Thorpe sued the University under Title IX for hostile environment sexual harassment.[459] The University unsuccessfully sought to have the case dismissed on the grounds that it had sovereign immunity from Title IX damages claims under the Eleventh Amendment.[460] The case is still pending as of this writing.

A final example of a case involving institutional acquiescence in a male athlete's sexual abuse of women is *Redmond v. University of Nebraska*.[461] Kathy Redmond, a student at the University of Nebraska, sued her university for sex discrimination under Title IX and state negligence law based on the school's actions in response to her charge that she was raped by a university football player on two separate occasions. Redmond filed charges with university police two weeks before the Orange Bowl in 1993.[462] The county prosecutor did not receive notice of the charges until much later, when it was too late to obtain any physical or medical evidence.[463] Redmond alleged that the University delayed forwarding the charges to the prosecutor, or otherwise responding to them, in order to protect the football player and the image of the team.[464] Reaching a different result than in the *Thorpe* case, a federal district court in Nebraska dismissed Redmond's claims on the ground that the University, as a state actor, was immune from suit in federal court under the Eleventh Amendment.[465] Redmond eventually settled her case against the University for $50,000 after she agreed to drop her lawsuit and not to discuss the case.[466] No university disciplinary action was ever taken against the accused football player.[467]

These cases are not isolated incidents; they reflect a widespread tendency among educational institutions to legitimate and

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sympathetic and promised to take action, but that "they got evasive [and] . . . [a]fter a while they wouldn't take my parents' calls. They just wanted it to go away.").

458. *Thorpe*, 6 F. Supp. 2d at 509. Thorpe reportedly stated, "I feel so betrayed by that school. . . . No one helped me. No one advised me of anything." Ritter, *supra* note 457, at 3A.

459. *Thorpe*, 6 F. Supp. 2d at 508–09.

460. *See id.* at 509, 517.

461. No.4:CV95-3223, 1995 WL 928211 (D. Neb. Dec. 5, 1995); *see also* Rick Ruggles, *Women Stage Protest Outside Husker Game*, OMAHA WORLD HERALD, Oct. 1, 1995, at 12A.

462. *See* BENEDICT, *supra* note 424, at 121.

463. *See id.* at 122.

464. *See id.*; *see also* Lynn Zinser, *Crimes That Draw Few Penalty Flags; Players Escape Punishment for Abusing Women*, CHI. TRIB., Oct. 18, 1998, at C8.

465. *See Redmond*, 1995 WL 928211; *see also* Zinser, *supra* note 464.

466. *See* Zinser, *supra* note 464.

467. *See* BENEDICT, *supra* note 424, at 121.

minimize the sexual exploitation of women by highly valued male athletes. Many more such instances never make it to the courts.[468]

The teaching of male dominance through male athletic culture is not limited to the privileging of male athletes' exercise of dominance over women. As in other social contexts, the culture of male dominance in sport is complex and multi-dimensional;[469] it may be constructed and reinforced through sexual abuse and dominance by males over other males as well as over females.[470] The linkage of sport and masculinity privileges a particular type of heterosexist masculinity that can be furthered by exercising dominance over men whose masculinity is perceived as vulnerable to challenge.[471]

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468. *See, e.g., id.* at 130–34, 142 (discussing many incidents of institutions ignoring or minimizing reports of abuse of women by male athletes, including an incident where a male basketball player was suspended from six games for assaulting his ex-girlfriend, a women's basketball player; the woman lost her athletic scholarship after she reported him); Julie Cart, *Sports Heroes, Social Villains; Aberrant Sexual Conduct By Star Athletes Is Called Result of Lifelong Coddling*, L.A. TIMES, Feb. 2, 1992, at C3 (discussing similar occurrences, including an incident at the University of South Florida where school officials took no action against a male basketball player for more than one year after six different women filed sexual harassment or assault charges against him; the player was finally kicked off the team for a curfew violation); *id.* (discussing University of Maryland incident where men's basketball coach repeatedly called a woman urging her to drop sexual misconduct charges against one of his players); Chris Ison & Paul McEnroe, *'U' Officials Intervened for Athletes; Records Show a Pattern of Alleged Sex Crimes and Assaults by Players That Weren't Referred to Prosecutors*, MINN. STAR TRIB., May 21, 1999, at 1A (discussing reports that athletic officials at the University of Minnesota pressured women to drop charges alleging sexual abuse by male athletes or otherwise intervened in sexual misconduct cases involving their male athletes); Jack McCallum & Kostya Kennedy, *Nebraska's Double Standard*, SPORTS ILLUSTRATED, Apr. 29, 1996, at 17 (discussing incident where male basketball player received a brief suspension from playing for assaulting his ex-girlfriend while she lost her athletic scholarship after reporting him).

469. *See* Messner & Sabo, *supra* note 146, at 12 (discussing R. W. Connell's analysis of gender, and his theory that "at any given historical moment, there are competing masculinities—some hegemonic, some marginalized, and some stigmatized," and his conception of "hegemonic masculinity" as "constructed in relation to various subordinated masculinities as well as in relation to femininities").

470. *See* Messner, *supra* note 355, at 107 (discussing the "gender order" of sport in which "[h]egemonic masculinity (that definition of masculinity that is culturally ascendant) is constructed in relation to various subordinated masculinities as well as in relation to femininities," and how such hierarchies among men "help to construct and legitimize men's overall power and privilege over women"). For a discussion of how sexual dominance by males over males constructs and reinforces male dominance in the workplace, see Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 757–58, 770–71 (1997).

471. *See* HARGREAVES, *supra* note 1, at 145 (discussing sport as ground for celebrating physical differences between males, as well as between males and females, and arguing that the exalting of "hegemonic masculinity over other groups of men . . . is essential to the domination of women") (internal quotations omitted); *see also* Whitson, *supra* note 354, at 19, 26–27 (discussing the "darker side" of all-male sport culture that "demeans and objectifies women, and . . . enforces and reinforces a certain standard of masculinity (i.e., aggressive, dominating, or 'macho') among men," and citing research "suggest[ing] that

Kenneth Karst's discussion of how the ideology of masculinity perpetuates male dominance is instructive:

> The heart of the ideology of masculinity is the belief that power rightfully belongs to the masculine—that is, to those who display the traits traditionally called masculine. This belief has two corollaries. The first is that the gender line must be clearly drawn, and the second is that power is rightfully distributed among the masculine in proportion to their masculinity, as determined not merely by their physical stature or aggressiveness, but more generally by their ability to dominate and to avoid being dominated.[472]

Thus, the exercise of male dominance over other males legitimates a system of power in which the most "masculine" persons have the most power over others.[473] Subordinating others who are perceived as less masculine confers power on those who practice subordination. The result is a hypermasculine culture which is not only hostile to women, but also hostile to those men who do not fit into, or who dare to challenge, the dominant mode of masculinity.[474]

The case of *Seamons v. Snow*[475] illustrates how male sport culture can teach male dominance through the exercise of dominance over other males. The *Seamons* case stemmed from an incident in which a high school football player, Brian Seamons, was assaulted by five of his teammates in the locker room after he came out of the shower.[476] They forced him, naked, onto a horizontal towel rack, bound him onto the rack with adhesive tape, taped his genitals, and brought a girl whom he dated into the locker room to view him, while other teammates watched.[477]

Brian reported the incident to the football coach and other school administrators.[478] These officials not only absolved the football players of any wrongdoing, but blamed Brian for

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sport as a male preserve remains a bastion of reaction, in which traditional masculinity is celebrated and other kinds of masculinity are disparaged and deterred").

472. Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 505 (1991).

473. *See id.* at 506.

474. *See* Catharine MacKinnon, *Brief of Amici Curiae National Organization on Male Sexual Victimization, Inc. et al.*, 8 UCLA WOMEN'S L.J. 9, 17–22 (1997) (analyzing male dominance over other males and arguing that such dominance is integral to the ideology of male dominance over women).

475. 84 F.3d 1226 (10th Cir. 1996).

476. *Id.* at 1230.

477. *Id.*

478. *Id.*

complaining.[479] The football coach brought Brian before the entire team and forced him to apologize for reporting the incident and betraying his teammates.[480] When Brian refused, the coach dismissed Brian from the team, but allowed the five assailants to play in the next game.[481] School officials told Brian that he "should have taken it like a man," and the coach trivialized the incident, saying "boys will be boys."[482] When the incident drew public criticism, the school district announced that it would have to cancel the final game of the season, a playoff game for the state championship, because of Brian's complaint.[483] After the game was cancelled, Brian was harassed and ostracized by his peers so severely that even the principal suggested that Brian transfer to a different school.[484] Brian ultimately took the principal's advice and transferred out of the school district.[485]

Brian sued the school district under Title IX, arguing that its failure to investigate and take disciplinary action in response to the locker room incident created a hostile educational environment on the basis of his sex.[486] Both the district and appellate courts in the case failed to appreciate how the incident discriminated against Brian on the basis of sex.[487] The Tenth Circuit, affirming the district court's dismissal of the Title IX claim, described the school district's actions in gender-neutral terms, insisting that: "[t]he qualities Defendants were promoting, team loyalty and toughness, are not uniquely male. The fact that the coach, and perhaps others, described these qualities as they pertain to his situation in terms of the masculine gender does not convert this into sexual harassment."[488]

The court did not see that the school's reaction was influenced by Brian's gender as a male who objected to the exercise of male dominance in the locker room. Brian lost his male privilege when

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479. *See id.*
480. *Id.*
481. *Id.*
482. *Id.*
483. *Id.*
484. *Id.*
485. *Id.*
486. *See id.*
487. *See* Seamons v. Snow, 864 F. Supp. 1111, 1119–23 (D. Utah 1994) (dismissing Title IX claim, but allowing plaintiff to proceed on First Amendment claims against the coach and school district), *aff'd*, 84 F.3d 1226, 1232 (affirming dismissal of Title IX claim); *see also* Seamons v. Snow, 15 F. Supp. 2d 1150 (D. Utah 1998) (dismissing remaining claims), *rev'd*, 206 F.3d 1021, 1031 (10th Cir. 2000) (reinstating First Amendment claims against both the coach and school district).
488. *Seamons*, 84 F.3d at 1233.

he broke ranks with his teammates and reported the abuse. The coach's rebuke to Brian, "boys will be boys," reveals the gendered meaning of the incident: by reporting his teammates, who were acting in a gender-appropriate fashion, Brian was the one who was not acting like a "boy." Under the rules of the locker room, Brian became a "social female," resulting in the loss of his athletic privilege and his dismissal from the team.[489] The explanation that "boys will be boys" expresses explicitly what the incident expresses implicitly: sexual dominance is what boys do, and sport is sacred ground for doing it.

The courts are just beginning to struggle with the legal issues raised by institutional complicity in sexual abuse by male student-athletes. Where students are abused or harassed by a male student-athlete on the basis of sex, and the school responds with deliberate indifference despite actual notice of the incident, Title IX provides a remedy for sex discrimination to the individual victim.[490] However, in addition to discrimination against the immediate target of the abuse, such cases involve gender bias at another level as well: the institution's actions convey the message that male athletic privilege includes physical and sexual dominance over others. The privilege that is conferred is a privilege that is distinctly male and premised on a dominant masculinity. Christy Brzonkala, an athlete herself, received no protection from the school on the basis of her athletic status. Likewise, Brian Seamons, also an athlete, did not receive any protection from his athletic status because, although biologically male, he did not act consistently with the gendered expectations of being a male athlete. The result in both types of cases is the reaffirmation of a

489. *Id.* at 1230; *see also* Kathryn Abrams, *Complex Claimants and Reductive Moral Judgments: New Patterns in the Search for Equality*, 57 U. PITT. L. REV. 337, 347 (1996) (discussing male-male sexual harassment case as an example where a male was singled out because he "responded to harassment in a socially female manner: he blushed, he stammered, he tried to avoid sexual conversations"); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Femininst Jurisprudence*, 105 YALE L.J. 1, 60–61 (1995) (arguing that sex discrimination law should protect men who are treated adversely because their behavior or identity is associated with femininity).

490. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999) (holding that schools are liable under Title IX for deliberate indifference to known sexual harassment by students but "only for harassment that is 'so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.'"). Despite the court's ruling in *Redmond* that state institutions have Eleventh Amendment immunity from suit under Title IX, see Redmond v. Univ. of Neb., No. 4:CV95-3223, 1995 WL 928211, at *1 (D. Neb. Dec. 5, 1995), the majority of courts have rejected this argument. *See, e.g.*, Pederson v. La. St. Univ., 213 F. 3d 858, 876 (5th Cir. 2000); Franks v. Ky. Sch. for Deaf, 142 F.3d 360, 362–63 (6th Cir. 1998); Doe v. Univ. of Ill., 138 F.3d 653, 659–60 (7th Cir. 1998); Crawford v. Davis, 109 F.3d 1281, 1282–83 (8th Cir. 1997).

male sport culture that binds together sport, masculinity, and male dominance.

The masculine culture of sport described here is not something that needs to be expected or accepted. Sport is socially constructed as masculine; it is not masculine by nature.[491] A primary purpose of this Article is to demonstrate that educational institutions have enormous control over the culture of sport that occurs within them, and thus have the power to reconstruct the masculine culture that they have participated in creating.[492] Research into the problem of sexism and sexual violence in the culture of male sport has produced a number of concrete recommendations that institutions can implement to change the culture of sport.[493]

One way educational institutions can influence sport culture is through their coaches, who have tremendous power and influence over the athletes they coach.[494] Coaches have the ability to change male athletic culture by eliminating their own sexist comments and punishing athletes who make such comments.[495] The tone set by the coach may even affect the practice of sexual dominance by male athletes. One study of male athlete sexual abuse found that the prevalence of reported sexual assaults by athletes changed dramatically in some instances following changes in coaching

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491. *Cf.* Carol Oglesby, *Women and Sport, in* SPORTS, GAMES AND PLAY: SOCIAL AND PSYCHOLOGICAL VIEWPOINTS 129, 143 (1989) (noting that sports involve traditionally feminine characteristics as much as male-associated qualities of achievement, independence, and activity).

492. *See* Timothy Davis & Tonya Parker, *Student-Athlete Sexual Violence Against Women: Defining the Limits of Institutional Responsibility*, 55 WASH. & LEE L. REV. 55, 113 (1998) ("[C]olleges regulate [the] academic performance, course selection, training, practice sessions, diet, attendance at study halls, curfews, and substance abuse [of their athletes].").

493. *See* MCKAY, *supra* note 404, at 148–53 (stating that "[m]en—particularly sports administrators and coaches—have the capacity to eradicate sexism and sexual violence in sport," and listing recommendations identified by researchers for how to go about doing so).

494. *See* PRONGER, *supra* note 406, at 10 ("Many coaches seem like gods to their athletes, almost arbitrarily presiding over their athletic futures. What the coach says goes, even if it has little to do with the athletic enterprise."); Timothy Davis, *Student-Athlete Prospective Economic Interests: Contractual Dimensions*, 19 T. MARSHALL L. REV. 585, 622 (1994) ("[T]he student-athlete's relationship with his or her institution is marked by dominance by institutions over most aspects of his or her college life.").

495. *See* NELSON, *supra* note 242, at 174 (describing experience of one female university coach who had a policy forbidding sexist remarks and who once enforced that policy by kicking a male athlete out of practice; she concluded, "They learn. Now the guys are respectful of the women's team."); Kidd, *supra* note 350, at 41 ("We can start [liberating sports from patriarchal structures of domination] by actively questioning the pervasive masculinist bias in the sports world. The language is rife with words and phrases that unconsciously reinforce the male preserve. . . .").

staffs.[496] The authors of the study concluded that coaches "may have a significant impact on the team's social milieu and thus on athletes' behavior outside of sport."[497]

The reconstruction of sport culture is crucial to transform both men's and women's relationship to sport.[498] The cultivation of sport as a way for males to attain a privileged masculinity plays an important role in shaping male athletic participation.[499] The strength of the masculine ideology of sport—and the use of sport as an avenue for proving one's masculinity—greatly influences the decision of boys and men to play sports.[500] At the same time, it puts girls and women on notice that their place in sport is precarious, influencing their participation as well.[501] The identification of sport with a dominant masculinity has important implications for women in sports. As long as sport is defined as a male domain, and the culture of sport emphasizes the development of a dominant masculinity, sport will continue to be unequal terrain for women.[502]

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496. *See* Crosset et al., *supra* note 418, at 137.

497. *Id.*

498. *Cf.* YOUNG, *supra* note 312, at 23 ("Culture is ubiquitous, but nevertheless deserves distinct consideration in discussions of social justice. The symbolic meanings that people attach to other kinds of people and to actions, gestures, or institutions often significantly affect the social standing of persons and their opportunities.").

499. *See* Messner, *supra* note 355, at 107 (citing and discussing feminist literature "demonstrat[ing] that organized sports give men from all backgrounds a means of status enhancement that is not available to young women").

500. *See id.* at 106 (summarizing research suggesting that "within a social context that is stratified by social class and by race, the choice to pursue or not to pursue an athletic career is explicable as an individual's rational assessment of the available means to achieve a respected masculine identity").

501. *See* Lois Bryson, *Sport and the Maintenance of Masculine Hegemony*, *in* WOMEN, SPORT, AND CULTURE, *supra* note 1, at 47, 50 (discussing "vast store of evidence which provides illustration that sport is traditionally defined in such a way as to engage men rather than women," and concluding that "[s]chool children learn very early the message about the masculinity of sport"); Kerry A. White, *25 Years After Title IX, Sexual Bias in K-12 Sports Still Sidelines Girls*, EDUC. WEEK ON WEB, *at* http://www.edweek.org/ew/vol-16/38titlei.h16 (last visited June 28, 2000) (on file with the *University of Michigan Journal of Law Reform*) (discussing research finding that girls and boys younger than the age of nine show an equal interest in playing sports, and that this begins to change around puberty, when girls respond to messages pervading schools and the media that sports are largely a male domain).

502. *See* GRIFFIN, *supra* note 398, at 16–17 ("The importance of sport in socializing men into traditional masculine gender roles also defines the sport experience for women. Because sport is identified with men and masculinity, women in sport become trespassers in male territory, and their access is limited or blocked entirely.") (citations omitted); HARGREAVES, *supra* note 1, at 171 ("Changes in women's sports cannot happen unilaterally when boys continue to be schooled through sports to accept an aggressive model of masculinity that embodies compulsory heterosexuality, the subordination of women, and the marginalization of gay men."); *cf.* Chamallas, *New Gender Panic*, *supra* note 356, at 366 (citing to scholarship "detailing how informal customs and traditions in the service academies and during basic training construct a hypermasculine environment in which

3. Constraints on Female Athleticism—The conflation of sport and masculinity in the culture of sport leaves women in a compromised position in relation to sport. Historically, athletic participation has conflicted with the dominant cultural meaning of femininity.[503] Female athletes have had some difficulty defining their relationship to sport as a result of the social forces that have constructed sport as a proving ground for masculinity.[504] The perceived conflict between athleticism and femininity is illustrated most graphically in the sex-testing of successful female athletes to make sure that the athlete is biologically female.[505] Although this is not a practice that is used within educational institutions, its continuing existence in other sport arenas, including the Olympics, serves as a graphic reminder of the dominant perception that elite female athletes are culturally suspect.

In recent years, as girls' and women's sports have become more popular, the cultural conflict between athleticism and femininity has become more selective, but it is still present.[506] Its intensity varies in response to what sports female athletes play, how they compete, and how they present their femininity.[507] The pressure to maintain a culturally approved mode of femininity while participating in a masculine institution places female athletes in the

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women are regarded as alien and inferior," and concluding that "[u]nless the job of the soldier is degendered, in the sense that the image of a 'good soldier' is no longer seen as exclusively male, we can expect continued resistance to women in the military, particularly in leadership roles").

503. *See* Willis, *supra* note 241, at 35 ("There is a very important thread in popular consciousness which sees the very presence of women in sport as bizarre.").

504. *See* Cole, *supra* note 240, at 20 ("The female athletic body was and remains suspicious because of both its apparent masculinization and its position as a border case that challenges the normalized feminine and masculine body.").

505. *See, e.g.*, CAHN, *supra* note 239, at 263–64 (discussing International Olympic Committee practice of mandatory chromosome-testing of female Olympic athletes); *id.* at 2 (describing incident where two fathers of athletes on the losing girl's soccer team demanded that the three best players on the winning team undress in the bathroom so that a designated parent could verify that they were girls).

506. *See* Michael A. Messner, *Sports and Male Domination: The Female Athlete as Contested Ideological Terrain*, *in* WOMEN, SPORT, AND CULTURE, *supra* note 1, at 65, 71 (citing a 1985 poll showing that ninety-four percent of the female athletes surveyed did not regard athletic participation as threatening to their femininity, but that fifty-seven percent of these same athletes agreed that "society still forces a choice between being an athlete and being feminine, suggesting that there is still a dynamic tension between traditional prescriptions for femininity and the image presented by active, strong, even muscular women").

507. *See* Willis, *supra* note 241, at 36 ("As the athlete becomes even more outstanding, she marks herself out as even more deviant. Instead of confirming her identity, success can threaten her with a foreign male identity.").

classic "double bind."[508] Participation in sports requires strength, competitiveness, aggression, and drive—qualities culturally defined as masculine—and maintaining traditional femininity requires passivity, vulnerability, softness, and physical weakness—qualities defined by sport culture as unathletic.

Navigating this tension can be tricky. Some female athletes react to this cultural conflict by engaging in efforts to "prove" their cultural femininity (and, by extension, their heterosexuality).[509] Mary Jo Festle has called this reaction "apologetic behavior" designed to mediate role conflict by downplaying the contradiction between a woman's role as an athlete and as a woman.[510] Examples of apologetic behavior include promoting a sexualized or traditionally feminine image, overtly disassociating from lesbianism, preferring male over female coaches, disclaiming any affinity for feminism, and not challenging the prioritization of male over female athletics.[511] The very need for, and existence of, apologetic behavior in turn reinforces the perception of the conflict.

Educational institutions may contribute to and exacerbate the cultural tensions between sport and femininity through the structuring of their athletic programs and the sport cultures they maintain. For many institutions, at the same time that they construct sport as a masculine domain, they actively reinforce women's compromised relationship to sport. This process often involves several overlapping practices, described here as marginalization, containment, and objectification. One or more of these strategies plays a role in shaping women's relationship to sport at many institutions.

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508. *See* CHAMALLAS, *supra* note 43, at 17 (discussing the "double bind" facing women who strive to achieve in predominantly male fields).

509. *See* Kidd, *supra* note 350, at 36 ("Female athletes have also faced inordinate pressures to conform to the heterosexual expectations of most males.") (internal citation omitted).

510. FESTLE, *supra* note 36, at 45.

511. *See, e.g.*, GRIFFIN, *supra* note 398, at 66 (defining "apologetic" response to the "lesbian bogeywoman" in women's sports); Nelson, *Who We Might Become*, *supra* note 7, at xi ("Some female athletes deliberately dissociate themselves from femininism. They assert that their involvement [in sports] changes nothing, that they can compete 'and still be feminine.' These athletes take great pains—and it can hurt—to send reassuring signals to those who would oppose their play. . . . It has been a survival strategy."); Julie Cart, *Lesbian Issue Stirs Discussion; Women's Sports: Fear and Discrimination Are Common As Players Deal With a Perception of Homosexuality*, L.A. TIMES, Apr. 6, 1992, at C1 ("To counter the perception of lesbianism, some female athletes adopt compensatory behavior; they wear makeup while competing, they dress in ultra-feminine clothes when not competing, they talk about their boyfriends, whether they have them or not.").

The marginalization of women's sports occurs at many levels, including the unequal treatment of and benefits provided to female athletes, and the devaluation of female athletes by paying coaches more money to coach male athletes than female athletes. The existence and impact of these practices has been discussed previously.[512] However, marginalization also occurs at the level of sport culture, conveying the message that athletics is, by nature, male, and that women's place in sport is peripheral.

One example of how institutions perpetuate a sport culture that marginalizes female athletes is in the naming of athletic teams. It is common practice for educational institutions to specifically identify the gender of their women's teams through the team name, while employing sex-neutral language to describe their men's teams.[513] The gendered names affixed to girls' and women's teams reflect a cultural fixation with the need to reinforce the femininity and the specialness of what is presented as a distinctly female, modified version of sport.[514] For example, the "Tennessee Lady Volunteers" (women's basketball), juxtaposed with the "Tennessee Volunteers" (men's basketball) reflects the value judgment that the normal baseline for sports is male.[515] The women's team is shown to be an add-on or an after-thought to the school athletics program, as women's teams in fact were historically.[516] As historian Susan Cahn explains:

> The primary status of male sport found expression in common language, too. Women's presence was signaled with references to "women's basketball" or the "ladies golf tour," while the unmodified "basketball" or "golf" presumed the

512. *See* discussion *supra* Part III.D.1–2.

513. *See Lady Nanooks? What's a Women's Team to Do?; Equality of Sexes Vexes When Schools Try Names that Are Gender Benders*, BALT. SUN, Jan. 10, 1999, at 4C ("By the time women were permitted to play intercollegiately, most schools already had team nicknames, and they had been chosen to reflect the characteristics of the men's teams."); Lois Kerschen, *Schoolgirls: Classifications, Roles and Sports*, Women's Sports Foundation, *at* http://208.178.42.127/templates/re. . ._topics2.html?article=61&record=36 (last visited Jan. 21, 2000) (on file with the *University of Michigan Journal of Law Reform*) ("[M]ost of the time, the Cardinals are the men, and the Lady Cardinals are the women.").

514. The practice of gender-differential naming can lead to strangely gendered team names. *See* RHODE, *supra* note 25, at 62 ("Female sporting events often feature zoologically bizarre competitions between beaverettes, lady panthers, and teddy bears."). Of the oddly gendered women's athletic names I have heard, my personal favorite is "The Lady Warriors." *See* Suggs, *At Smaller Colleges*, *supra* note 322, at A69.

515. *See* FESTLE, *supra* note 36, at 52 ("[I]t was not 'basketball'—it was 'girls' basketball.' The word *basketball* connoted boys' basketball, just as *athlete* referred to a male unless otherwise qualified. This was not merely an issue of language but of norms.").

516. *See, e.g.*, CAHN, *supra* note 239, at 222; FESTLE, *supra* note 36, at 52.

> presence of men. Similarly, by itself the supposedly neutral noun "athlete" was in common usage a male term. Female athleticism found acknowledgment only through the modified term "woman athlete." In language as well as practice, women's sport required modification.[517]

The cultural significance of the sex-differentiated naming of athletic teams is not always agreed upon among advocates for women in sport.[518] Female athletes themselves do not always object to the naming of "ladies" or "women's" teams, despite the absence of comparable qualifiers for the men's teams.[519] In part, this may be because female athletes do not want to draw attention to disparities that they view as trivial in the scheme of things, or to be viewed as radical or trouble-makers.[520] Some female athletes may even welcome the special designation as reinforcement that they are feminine in a sport culture that requires female athletes to

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517. CAHN, *supra* note 239, at 222.

518. *See, e.g.*, Amy Moritz, *Sticking Up for the 'Lady'; Gail Maloney's Fight for Women's Sports Has Paralleled the Timeline of Title IX*, BUFF. NEWS, Mar. 27, 2000, at 8S (discussing opposition of coach to changing team name from the "Lady Bengals"); Libby Sander, *Title IX Report Card: Goals, Assists and Fouls for Girls' and Women's Sports: What's In a Name, Anyway?*, THE WOMEN'S SPORTS EXPERIENCE, Oct./Nov. 1999, at 14, 14 (discussing belief of the opponents of a move to strike the prefix "Lady" from female athletic teams that doing so "would actually send the message to female athletes that men's athletic programs are superior, and that women's programs need to fit the mold of men's programs in order to be worthy of recognition"). *But see* Christine Brennan, *Words to the Wise About Unwise Words*, USA TODAY, Mar. 4, 1999, at 3C (urging the NCAA to change the name of the "Final Four" to the "Men's Final Four," and for women's teams to remove the word "Lady" from their school names, and stating that "as the women's game has grown, respect for its presence also should expand. To continue to call the men's tournament the Final Four, implying that it is the be-all and end-all of college hoops as if it's the only game in town, is to reach the heights of institutional arrogance").

519. *See, e.g.*, Kim Ode, *Hey, Lady. . .You'll Have to Leave Now; It's Long Past the Time to Dump the Term as a Nickname for Female Athletic Teams*, MINN. STAR TRIB., June 6, 1999, at 4E (discussing experience with gendered team names at a Wisconsin high school whose athletic director states that female athletes at the school like their team nickname, the "Lady Popes," and do not want to change it).

520. *See, e.g.*, Kerschen, *supra* note 513 (relaying author's conversation with a high-ranking professor in women's athletics at Texas Tech about why their women's teams were called the "Lady Raiders":

> She said that they hated the name and wanted to be called just Raiders or the Raider women's team, but that they were just starting to get some attention from the media because of their national ranking, and they were too afraid of alienating the press by trying to make any demands.

Id.

prove their femininity.[521] Nevertheless, the message is clear: athletes and sports are presumptively male unless otherwise specified.[522]

A related constraint on girls and women in sport is the containment of women's sports to modes of athleticism that are considered culturally appropriate and nonthreatening. The practice of containment occurs when female athletes who push the boundaries of their accepted place in sport too far are met with resistance and hostility.[523] For example, the culture of sport, while it is increasingly tolerant of the presence of women in sport, becomes very hostile to demands for equal resources.[524] Female athletes who provoke the guardians of male sport privilege by vocalizing inequality risk retaliation and retribution.[525] Many female athletes respond by accepting inferior treatment because they recognize the dangers associated with challenging sex inequality in sport in a culture that has not fully reconciled female athleticism with dominant notions of traditional femininity.[526]

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521. *See, e.g.*, Ben Tschann & Mikki Chullino, *Creighton Dissolves Gender Distinctions in Nickname*, THE CREIGHTONIAN, Sept. 25, 1998, at 7 (discussing reaction of female athletes to change in teams name from "Lady Jays" to the "Bluejays," and noting that, although some women athletes were very supportive of the change, others thought that the change was not "a big deal," and even liked the "Lady Jays" because it made them "'a little different'"); *see also* FESTLE, *supra* note 36, at 26 (defining "'hegemonic' norms" as "notions so pervasive and taken for granted that even people oppressed by them do not challenge them" and discussing the importance of retaining one's femininity as such a norm affecting women in athletics).

522. *See* Kerschen, *supra* note 513 (stating that the message of referring to women's teams as "Lady Bulls" or "Rebelettes" is that "sports are for men; women who participate are 'coeds' where 'co' means 'in addition to or as an afterthought to' the real participants who are, of course, men").

523. GRIFFIN, *supra* note 398, at 17 (describing a 1997 incident in which a twelve-year-old female catcher playing in a Babe Ruth baseball league was forced to wear a protective cup to comply with league rules, despite the absence of any medical reason for a girl to wear a protective cup; "[t]his example shows the absurd lengths to which some men will go to try to humiliate a young girl to make sure she knows that she is trespassing on male turf").

524. *See* FESTLE, *supra* note 36, at 185, 359 n.11, 12; *see also* Andrea M. Giampetro-Meyer, *Recognizing and Remedying Individual and Institutional Gender-Based Wage Discrimination in Sport*, 37 AM. BUS. L.J. 343, 353 (2000) (discussing men's historic control over sport, and stating, "Men generally believe they deserve more and better of everything. After all, they are better athletes who provide exciting entertainment. . . . When women 'score' by gaining financial support, men perceive they have lost something that was rightfully theirs.")

525. *See* Lillian Howard Potter, *'Man-Woman': Anti-Gay Peer Harassment of Straight High School Activists*, 1 GEO. J. GENDER & L. 173, 175 (1999) (discussing author's experiences as a student who encountered severe harassment by other students when she raised gender equity concerns about the athletic programs in high schools in Montgomery County, Maryland.).

526. *See* FESTLE, *supra* note 36, at 285, 349 n.119.

A primary mechanism for containment is the lesbian-baiting of women in sport. The "lesbian label" has historically been used to control and regulate women's participation in sport.[527] With recent improvements in the cultural acceptance of women playing sports, the lesbian stigma has become more selective: it targets female athletes whose sport experiences defy the expectations for girls and women in sport. Female athletes who play sports perceived as "feminine" are less at risk for anti-lesbian reactions. Mariah Burton Nelson reports, "Only contact sports, team sports, and traditionally male-dominated sports are rumored to be lesbian havens. . . . Female athletes in traditionally masculine sports challenge social dictates about proper behavior for females; therefore, the reasoning goes, there must be something wrong with them."[528]

The specter of anti-lesbian harassment looms large in the lives of female athletes. As Pat Griffin writes:

> As women's participation in sport has become more acceptable and widespread, norms of femininity have expanded to include athleticism. Lesbians in sport are now more openly targeted within sport and continue to represent the boundary line between acceptable and unacceptable behavior for women. As a result, fear of the lesbian label continues to control women's sport. Fear of the lesbian label ensures that women do not gain control over their sporting experience or develop their physical competence beyond what is acceptable in a sexist culture.[529]

Anti-lesbian policing is not limited to female athletes whose athletic participation itself becomes too "masculine." The power of the lesbian stigma is widely used to enforce the subordinate position of girls and women in sport by punishing resistance to the status quo.[530] Female athletes who advocate for gender equity in

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527. *See, e.g.*, Pat Griffin, *Homophobia in Women's Sports: The Fear that Divides Us*, *in* WOMEN IN SPORT, *supra* note 238, at 193, 194–95.

528. NELSON, *supra* note 242, at 144. Nelson attributes negative charges of lesbianism in women's professional golf and tennis to their professional status, under the reasoning that "[a]ny woman who takes sports seriously, who devotes her life to sports, must be gay," even though these sports have traditionally been considered appropriate activities for women. *Id.* She also notes that male athletes who participate in sports viewed as feminine also face accusations of homosexuality, so that "sports requiring grace and judged on beauty—such as diving, skating, and gymnastics—are rumored to be populated by gay men." *Id.*

529. GRIFFIN, *supra* note 398, at 48–49.

530. *E.g.*, *id.* at 20 ("As long as women's sports are associated with lesbians and lesbians are stigmatized as sexual and social deviants, the lesbian label serves an important social-control function in sport, ensuring that only men have access to the benefits of

sport face the risk of being labeled as lesbians and punished accordingly. One former high school athlete who led a charge for Title IX compliance in the Montgomery County Public Schools offers a poignant account of the harassment she experienced from other students:

> During my senior year of high school, it was impossible for me to walk down the halls of my high school without being called a "dyke," or, my personal favorite, "man-woman." The harassment followed me everywhere—to class, in the parking lot, at the McDonald's at lunch, at the mall, and at parties on the weekend. During every class period, at least one student would interrupt class with some epithet or insult directed toward me. Sadly, teachers did nothing to discourage the conduct.[531]

Educational institutions participate in the practice of containment by permitting lesbian-baiting and anti-lesbian harassment within their athletic programs.[532] When school administrators and employees tolerate such conduct by not intervening to stop the harassment, they contribute to the precarious place of all female athletes in sport, regardless of their sexual orientation.[533]

At some institutions, coaches reinforce an anti-lesbian bias against women in sport. Coaches of female athletes have been known to disclose anti-lesbian views or policies to potential female recruits and their parents in an effort to bolster recruiting.[534] Some

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sport participation and the physical and psychological empowerment available in sport."); Cart, *supra* note 511, at C1 (discussing "profound impact" of widespread homophobia on women athletes and coaches and how it affects their participation in sports).

531. Potter, *supra* note 525, at 175.

532. *See* GRIFFIN, *supra* note 398, at 83 (noting that female athletes, regardless of their sexual orientation, have been subjected to anti-lesbian harassment from coaches, teammates, opposing teams, other students, or fans).

533. *See* Brake, *The Cruelest of the Gender Police*, *supra* note 144, at 100–01 (illustrating the adverse effects of anti-gay harassment on students regardless of their sexual orientation); *see also* Women's Sports Foundation, *Homophobia in Women's Sports*, *at* http://208.178.42.127/templates/re..._topics2.html?article=54&record=39 (last visited Jan. 21, 2000) (on file with the *University of Michigan Journal of Law Reform*) ("Those who feel threatened by Title IX . . . are using fear of exposing women coaches as lesbians to deter them from talking about unequal treatment of female athletes.").

534. *See* FESTLE, *supra* note 36, at xxvii (discussing homophobic recruiting practices of some women's coaches); GRIFFIN, *supra* note 398, at 79. Griffin notes that:

> Penn State coach Renee Portland is not the only coach to prohibit lesbians from her team. Other college coaches also tell athletes and their parents that they will not allow lesbians on their teams. . . . Some coaches follow through by dropping women

schools even engage in "negative recruiting," whereby coaches suggest to potential recruits and/or their parents that a rival program includes a lesbian coach or players.[535]

Many educational institutions allow anti-lesbian bias and bias against women in sport to limit women in coaching and athletic administration positions as well.[536] The lesbian-baiting of female coaches and administrators contributes to the precarious position of women in sport leadership positions. Athletic directors sometimes avoid hiring women, preferring men to coach women's teams in order to "rehabilitate" a women's team that has been "tarnished" with a lesbian reputation.[537] In this way, cultural anxiety about women in sport combines with anti-lesbian bias to displace women from leadership positions in sport.[538]

The final strategy discussed here in connection with the cultural constraints on female athletes is the objectification of women in sport. The tendency to emphasize the sexuality of women in sport reinforces the message that female athletes have something to prove with regard to their femininity. The sexualization of female athletes responds to the cultural tension between athleticism and femininity by highlighting the heterosexual sexuality of girls and women in sport.[539] At the same time, it downplays their athleticism,

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> they discover are lesbians from the roster, limiting their playing time, or ostracizing them.

GRIFFIN, *supra* note 398, at 79.

535. *See* GRIFFIN, *supra* note 398, at 82–83; *Homophobia*, *supra* note 533 (stating it is "not uncommon" for a coach to suggest "to a recruit that the coach of the team at another school she is considering is a lesbian").

536. GRIFFIN, *supra* note 398, at 79 (stating that "[s]ome athletic directors fire women coaches if they suspect that they are lesbians"); NELSON, *supra* note 242, at 152 (quoting Betty Jaynes, the executive director of the Women's Basketball Coaches' Association, as stating, "We're losing women in coaching because they're afraid of being labeled lesbians.").

537. GRIFFIN, *supra* note 398, at 84.

538. *Id.* at 205 (noting that women head coaches may also prefer to hire male assistant coaches to "counteract any lesbian aura that might be associated with an all-women coaching staff").

539. *Cf.* Women's Sports Foundation, *Women's Sports and Sexuality: The Myth and the Reality*, *at* http://208.178.42.127/templates/re. . .topics2.html?article=368&record=39 website (last visited Jan. 21, 2000) (on file with the *University of Michigan Journal of Law Reform*). The Foundation observes that:

> Girls, fearful of being labeled lesbians, choose not to participate in sports and miss out on the physical and mental benefits. Those women who do engage in sports often feel the need to prove their heterosexuality by having unwanted sex or allowing themselves to be portrayed in sexually provocative poses.

Id.

reducing them to a less significant presence in sport.[540] The message is that female athletes must be "feminized" to be made acceptable, and objectified to be rendered nonthreatening. The significance of the female athlete becomes her sexuality, not her strength, stamina, skill, or speed.

Educational institutions, like other seats of culture, can contribute to the objectification of women in sport. One way in which some institutions emphasize the sexuality of their female athletes is through their publicity and promotional materials. At some institutions, female athletes are photographed in feminine, sexualized poses, or dressed up in nonathletic clothes, while male athletes are pictured in action shots in the heat of the game.[541] Such differences in the way schools portray their male and female athletes effectively convey the institution's view of the essential identities of men and women in sport.

One widespread example of institutional reinforcement of the objectification of women in sport is found in the structuring of cheerleading programs. Cheerleaders occupy the quintessentially "feminine" role of standing at the periphery, offering unconditional support for the athletes who play the traditionally masculine role of competing in the primary athletic event.[542] The cultural

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540. For an insightful discussion of the effect of objectification on female athleticism and bodily movement, see YOUNG, *supra* note 353, at 141–56. *See* Willis, *supra* note 241, at 35 (describing sexualization of female athletes as a "useful technique, for if a woman seems to be encroaching too far, and too threateningly, into male sanctuaries, she can be symbolically vapourised and reconstituted as an object, a butt for smutty jokes and complacent elbow nudging").

541. GRIFFIN, *supra* note 398, at 75 (discussing 1987 media guide for Northwestern State University of Louisiana women's basketball team in which the players were posed in sexually suggestive positions wearing their uniforms with *Playboy* bunny ears, with a caption saying "These girls can play, boy" and inviting fans and reporters to watch them play in the "pleasure palace"); Susan Vinella, *What's Wrong with This Picture?; It Spotlights the Woman and Not the Athlete, Critics Say*, DAYTON DAILY NEWS, July 16, 1995, at 1D (discussing media portrayal of female athletes as "vulnerable, sexy and passive women and not as accomplished competitors" and reporting that "[a] look at about two dozen men's and women's basketball media guides on file at the *Dayton Daily News* shows that indeed women were much more likely to be posed in street clothes while men were most often pictured shooting baskets on the court").

542. *See* Laurel R. Davis, *Male Cheerleaders and the Naturalization of Gender*, *in* SPORT, MEN, AND THE GENDER ORDER, *supra* note 26, at 153, 154 [hereinafter Davis, *Male Cheerleaders*] (describing cultural image of cheerleading as a "naturally feminine" activity and describing stereotypes of female cheerleaders as "good looking, sexy, supportive, bouncy, and bubbly"); Jay, *supra* note 146, at 31–32 (discussing cheerleading as a practice that contributes to women's subordination in sport by feminizing the supporting role in sport and naturalizing the view that males are the "real" athletes). In addition to cheering at the games, some cheerleaders perform the female nurturer and support role for male athletes off the field. *See, e.g.*, Potter, *supra* note 525, at 174 (describing role of cheerleaders in Montgomery County Public Schools as "'guardian angels' of the football and boys' basket-

function of cheerleading is to exhibit feminine, sexualized women providing a support and entertainment role in sport. As sociologist Laurel Davis explains:

> [C]heerleading sends messages about what are appropriate activities for females or for females in sport. The female cheerleader represents support for males, especially the male athletes. . . . The place for women in sport is seen as on the sidelines engaged in activities that should not be taken too seriously by the sport community.[543]

The athletes cheered on in the role of competitor tend to be male as well.[544] However, even when the athletes are female, the cultural meaning of cheerleading remains gendered, with cheerleaders serving as a reminder of the seemingly natural, feminine place for females in sport. The presence of cheerleaders at female athletic events has not changed the public perception of cheerleading and sport as differently gendered activities.[545]

The relatively recent integration of males onto cheerleading squads also has not altered the gendered dynamic of cheerleading, nor its contribution to the masculinization of sport and the feminization of the female support-role.[546] Male cheerleaders play a distinct role in cheerleading, engaging in very different physical activities than female cheerleaders, such as tumbling and lifting female cheerleaders, while female cheerleaders peform dancing routines and other activities viewed as more feminine.[547] The male cheerleading role is perceived as helping to show off the female

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ball teams, baking cookies and buying small gifts for the players," without offering such support to the girls' teams).

543. Davis, *Male Cheerleaders*, *supra* note 542, at 155; *see also* LENSKYJ, *supra* note 239, at 101 (discussing significance of female cheerleading in sport, and stating that "[w]hatever the rationale, the presence of attractive, admiring women validates the display of masculinity and machismo on the playing field.").

544. *See, e.g.*, Kerschen, *supra* note 513 (stating that cheerleading squads "cheer for the male teams, but seldom does anyone cheer for the girl's, or women's teams, or give them a pep rally"); Potter, *supra* note 525, at 174 (describing inequities in Montgomery County Public Schools, including that "[c]heerleaders cheered only at boys' games, never girls' ").

545. *See* Laurel R. Davis, *A Postmodern Paradox? Cheerleaders at Women's Sporting Events*, *in* WOMEN, SPORT, AND CULTURE, *supra* note 1, at 149, 150–52 [hereinafter Davis, *A Postmodern Paradox?*].

546. *See id.*

547. *Id.* at 154. Despite their different cheerleading activities, male cheerleaders also face challenges to their masculinity—which also reinforces gender dichotomies in sport. *See id.* at 155–56 (describing common perceptions of male cheerleaders as "feminine" or gay, based on the view that cheerleading is a "feminine" activity).

cheerleaders.[548] With the gender specialization of cheerleading tasks, the presence of male cheerleaders further "feminizes" female cheerleaders and contributes to the differentiation of masculine and feminine identities in sport.[549]

The emphasis on female cheerleaders' physical attractiveness and the culturally feminine display of their athletic skills contains important assumptions not only about the sex of the players and the role of women in sport, but also about the gender of the spectators—and by implication, the gender of sport itself. The primary audience for female cheerleaders is presumed to be male heterosexuals. As Davis explains:

> Not only are cheerleaders seen as female, but spectators are seen as naturally male. The assumption that the male audience is voyeuristically fixated on the female cheerleaders helps to structure the performances and presentation of cheerleaders .... [T]he male view of a cameraman often helps to frame female cheerleaders as erotic objects. This type of camera work objectifies and sexualizes females, and it is based on and reinforces the notion of male voyeurism as natural and heterosexuality as universal for all men.[550]

The existence of cheerleading programs that are structured on the basis of an objectified role for women in sport, at the periphery of the men's game, symbolically conveys important messages about

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548. *Id.* at 157–58 (describing the sexual division of labor on cheerleading teams as reflecting traditional norms of gender).

549. *See* Davis, *Male Cheerleaders*, *supra* note 542, at 153. Davis points out that cheerleading was not always considered "feminine." *Id.* In the 1800s, cheerleading was an all-male activity, and the entry of females in cheerleading during World War I was viewed by many as an intrusion into the male domain of sport. *Id.* However, men dropped out of cheerleading in the 1940s and 50s, as more women became cheerleaders, and by the 1970s cheerleading was considered to be "naturally feminine." *Id.* Males did not reenter cheerleading in significant numbers until the late 1970s. *Id.*; *see also* LENSKYJ, *supra* note 239, at 84 (discussing the transformation of cheerleading from a mostly male event that valued gymnastic performances and deep male voices to an event emphasizing the decorative function of female cheerleaders).

550. Davis, *Male Cheerleaders*, *supra* note 542, at 159 (citations omitted). An example of this type of "camera work" can be found in the movie *American Beauty* where a middle-aged father, played by Kevin Spacey, becomes obsessed with his high school daughter's cheerleading friend (played by Mena Suvari) after watching her perform a cheerleading routine during a male basketball game. AMERICAN BEAUTY (DreamworksSKG 1999). The portrayal of Kevin Spacey's character as a middle-aged father falling for a high school cheerleader was comic, yet sympathetic, as the cheerleader represented the embodiment of idealized, irresistible, and devious sexuality combined with, in the end, a hidden innocence and vulnerability. The storyline played out the cultural image of the female cheerleader as seductress of the male sports spectator.

the gender of sport and the respective roles of men and women within it.

This message is all the more profoundly communicated by those schools that try to count cheerleaders as athletes in an attempt to bolster their measurement of female sports participants under the Title IX three-part test. High schools and colleges are increasingly attempting to count cheerleading as a sport for the purposes of Title IX compliance.[551] So far, OCR has resisted this move, holding fast to its policy determination that cheerleading is not a sport unless its primary activity is interscholastic or intercollegiate competition.[552] Nevertheless, some schools do count cheerleaders as athletes.[553] The decision to provide cheerleading opportunities for girls instead of additional competitive sport opportunities in which female athletes themselves are the central event, compounds the message that the preferred place for girls and women in sport is on the sidelines.

There is a danger that in describing the constraints facing women in sport, the constraints will appear more monolithic and stable than they actually are.[554] In fact, the constraints that shape girls' and women's relationship to sport are not monolithic. Many women of color, in particular, have not had their sport experiences defined by the same cultural conflict that presents traditional femininity as oppositional to athleticism. African American women, for example, have a distinct history in relation to sports; they have not experienced the same "protective" rationale as white girls and women for limiting their athletic

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551. *See* Women's Sports Foundation, Foundation Position Papers, *Addressing the Issue of Drill Team, Cheerleading, Danceline and Band as Varsity Sports*, *at* http://208.178.42.127/templates/action/take/results.html?record=95 (last visited Jan. 28, 2000) (on file with the *University of Michigan Journal of Law Reform*) ("It has come to our attention that there are athletic governance associations, schools and colleges who are attempting to recognize drill team, cheerleading, danceline, marching bands, twirling and similar extracurricular activities as bona fide sports and varsity athletic program offerings in order to comply with Title IX.").

552. Adrienne D. Coles, *School Cheerleading Evolving into a Competitive Activity*, EDUC. WEEK ON WEB, Apr. 26, 2000, *at* http://www.edweek.org/ew/ewstory.cfm?slug=33cheer.h19 (on file with author) (citing to 1995 statement of the Office for Civil Rights that cheerleading is not considered a sport for purposes of Title IX athletics compliance).

553. *See id.*; *see also* Amy Argetsinger, *This Is Cheerleading? 'All Star' Squads Are Doing It for Themselves*, CHARLESTON DAILY MAIL, July 17, 1999, at 1C (noting that Anne Arundel County, Md., like many other school systems, have designated cheerleading as a sport).

554. *Cf.* NUSSBAUM, *supra* note 46, at 14 ("[P]eople are not stamped out like coins by the power machine of social convention. They are constrained by social norms, but norms are plural and people are devious.").

participation.[555] Black women, having been excluded from standards of femininity shaped by white middle class norms, have been less constrained by a conflict between athleticism and femininity.[556]

Perhaps as a consequence of the different cultural meanings of sport for white women and African American women, different sports historically have been emphasized for white women and African American women. This has presented its own barrier to African American female athletes. While white women were channeled into purportedly "feminine" sports such as field hockey and swimming, African American women were playing basketball and competing in track.[557] African American girls and women continue to be channeled into the "black" sports of basketball and track, and are sorely underrepresented in other sports.[558] In addition to the sport-specific cultural constraints faced by African American girls and women, economic barriers also have distorted the athletic participation of African American girls and women, who have been less able to afford the private training and experience necessary to compete in sports where access is expensive.[559] The issue of economic access has been compounded

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555. *See* Cindy Himes Gissendanner, *African-American Women and Competitive Sport, 1920–1960, in* WOMEN, SPORT, AND CULTURE, *supra* note 1, at 88 (discussing history of African American women in sport, and noting that "[t]he African-American woman's experience flew in the face of medical arguments linking physical exertion during menstruation with reproductive malfunction, one of the basic components of the . . . argument against scheduled competitive events for girls and women."); *see also* CAHN, *supra* note 239, at 36–41, 69–70, 110–39 (discussing distinct societal constraints that have shaped African American women's participation in sport).

556. *See* Gissendanner, *supra* note 555, at 88 (arguing that African American women generally adhered to a more active ideal of femininity than their white counterparts); Messner, *supra* note 506, at 71 (citing to literature arguing that "there has never been an apologetic for black women athletes, suggesting that there are cultural differences in the construction of femininities").

557. *See* CAHN, *supra* note 239, at 89, 96–97, 111–12, 129.

558. *See* Alfred Dennis Mathewson, *Black Women, Gender Equity and the Function at the Junction*, 6 MARQ. SPORTS L.J. 239, 257 (1996) (discussing the steering of black female athletes into basketball and track, and away from other sports); *see also* Debra E. Blum, *The Battle for Gender Equity: Some Fear that Steps to Help Female Athletes May Curtail Opportunities for Blacks*, CHRON. HIGHER EDUC., May 26, 1995, *at* http://chronicle.com/che-data/arti. . .s-41.dir/issue-37.dir/37a00101.html (on file with the *University of Michigan Journal of Law Reform*) (last visited June 28, 2000) (citing data showing that eighty-one percent of black female athletes at Division I colleges competed in basketball or track); Kelly Whiteside, *Race in Sports/Wednesday Special/A Ways to Go/Minority Women Have Been Left Out in Title IX Gains*, NEWSDAY (New York), July 1, 1998, at A74 (reporting NCAA data showing that, outside of basketball and track, only five percent of female college athletes receiving aid in 1996 were African American).

559. Marilyn V. Yarbrough, *If You Let Me Play Sports*, 6 MARQ. SPORTS L.J. 229, 235–36 (1996) [hereinafter Yarbrough, *If You Let Me Play Sports*]; *see also* Olson, *supra* note 146, at 129–30 (suggesting that African American women are typecast into only a handful of sports

by discrimination against women of color in arenas where they could develop their athletic skills, such as country clubs and community recreational programs.[560] When schools, colleges, and universities add women's sports without addressing the barriers to full participation by women of color, they contribute to the inequality of women of color in sport.[561]

The constraints facing girls and women of color in sport have just begun to be the subject of critical scholarly analysis.[562] Marilyn Yarbrough, among other scholars, provides a much-needed voice analyzing the barriers facing African American women in sport, who stand in a precarious place at the intersection of race and gender.[563] There is a great need for further research and attention to the distinct constraints facing girls and women of color in sport.[564] The national conversation about sex inequality in sport must include an examination of the athletic experiences of all girls and women, not just those who are at the pinnacle of racial, sexual, and class privilege.[565]

A related danger in discussing the social constraints facing girls and women in sport is that the extent to which many female athletes have transcended these constraints will be obscured.[566]

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for which it is inexpensive to acquire skills and where there is public access to facilities where the sports can be played); Elliott Almond, *Title IX 25 Years Later—Minority Women Worry About Which Sports Get Support*, SEATTLE TIMES, June 22, 1997, at A11 (noting that sports commonly added in the name of gender equity—such as golf, gymnastics, rowing, soccer, tennis, and water polo—favor participants of some means, translating into more opportunities for college women from suburban white neighborhoods).

560. *See* Yarbrough, *If You Let Me Play Sports*, *supra* note 559, at 235–36.

561. *Cf.* Almond, *supra* note 559 (quoting one African American women's track coach as stating, "[w]hite coaches are less inclined to go to the inner-city areas" to recruit athletes in the emerging sports); Whiteside, *supra* note 558 (noting that the "emerging sports" for women designated by the NCAA "are primarily played by whites").

562. *See, e.g.*, Tonya M. Evans, *In the Title IX Race Toward Gender Equity, the Black Female Athlete Is Left to Finish Last: The Lack of Access for the "Invisible Woman"*, 42 HOW. L.J. 105 (1998); Mathewson, *supra* note 558; Yarbrough, *If You Let Me Play Sports*, *supra* note 559.

563. *See* Yarbrough, *If You Let Me Play Sports*, *supra* note 559, at 234–38; Marilyn V. Yarbrough, *Sports Law as a Reflection of Society's Laws and Values: A Sporting Chance: The Intersection of Race and Gender*, 38 S. TEX. L. REV. 1029, 1033 (1997) [hereinafter Yarbrough, *A Sporting Chance*]; *see also* Evans, *supra* note 562, at 105, 107; Mathewson, *supra* note 558, at 241–45.

564. *See, e.g.*, Don Sabo, *Mexican-American Girls and High School Sports*, *at* http://208.178.42.127/templates/re. . ._topics2.html?article=46&record=19 (last visited Jan. 21, 2000) (on file with the *University of Michigan Journal of Law Reform*) (stating that Latina and Asian American female athletes have not been the focus of scholarly investigation).

565. *Cf.* Elise Pettus, *From the Suburbs to the Sports Arenas*, *in* NIKE IS A GODDESS, *supra* note 7, at 245, 265 (noting that girls' soccer "is still primarily a white, middle-class, suburban sport, and efforts are just beginning to bring soccer to kids in inner cities").

566. *See, e.g.*, Bryson, *supra* note 241, at 182 ("[I]t is clear that despite its strongly masculine flavour, sport is not a monolithic institution. As with other sites of social life, the hegemonic position has been continually contested."); Messner, *supra* note 506, at 76

Although the constraints discussed above continue to shape and limit women's relationship to sport, many women have found a place in sport, and increasing numbers of women continue to do so. Female athletes are gaining in popularity and recognition even as they are constrained in their choices and operate within the confines of social structures. As Mariah Burton Nelson wrote in the late 1990s, "At the end of the millennium, it's definitely cool to be athletic. Female athletes know it, and the mainstream culture is catching on."[567]

Sport's role in perpetuating a dominant masculinity is increasingly contested as gender relations within sport are challenged.[568] As more women participate in sport, and their participation becomes more highly valued, sport itself becomes less associated with masculinity, and the culture of sport is subject to change.[569] At the same time, female participants in sport have the potential to experience concrete gains in their own satisfaction and sense of empowerment.[570]

("[G]ender relations, along with their concomitant images of masculinity and femininity, change and develop historically as a result of interactions between men and women within socially structured limits and constraints.").

567. Nelson, *Who We Might Become*, *supra* note 7, at xvii. And yet, she notes, many women athletes "still buy in" to the notion that they need "to prove that they're not unfeminine, meaning not lesbian and not threatening to men." *Id.* at xviii.

568. *See* HARGREAVES, *supra* note 1, at 3 (arguing that the role of sport in producing male domination over women is not straightforward, and that gender relations are reproduced in sport and contested at the same time).

569. *See* GRIFFIN, *supra* note 398, at 17. Griffin argues that:

> Women's presence in sport as serious participants dilutes the importance and exclusivity of sport as a training ground for learning about and accepting traditional male gender roles and the privileges that their adoption confers on (white, heterosexual) men .... If women in sport can be tough minded, competitive, and muscular too, then sport loses its special place in the development of masculinity for men. If women can so easily develop these so-called masculine qualities, then what are the meanings of masculinity and femininity?

Id.; HARGREAVES, *supra* note 1, at 12 (arguing that culture is "a 'lived experience,' constructed and changed through the interaction of men and women who make, resist and transform meanings, values and rules of behaviour").

570. *See* HARGREAVES, *supra* note 1, at 109, 289; *see also* Bryson, *supra* note 241, at 184 ("Although structural change is important, ultimately there is a dimension of oppressive social relationships that must be tackled directly at the personal level.")

IV. IMPLICATIONS FOR TITLE IX DOCTRINE: ENHANCING INSTITUTIONAL ACCOUNTABILITY FOR SEX INEQUALITY IN ATHLETIC OPPORTUNITY AND CULTURE

The above discussion provides a more complete but by no means exhaustive account of the ways in which educational institutions construct men's and women's unequal relationship to sport, beyond that acknowledged by the courts in the *Brown* litigation. Through the level of resources and benefits provided to male and female athletes, the structuring of athletic programs, and the maintenance of a distinctly masculine sport culture, educational institutions play a critical role in the linkage of sport and masculinity. The masculinization of sport, in turn, marginalizes and constrains women's role in sport and, by extension, in society.[571] While Title IX has made notable progress in holding institutions accountable under the three-part test for creating asymmetrical positions for men and women in relation to athletic participation levels, it has not succeeded in making sport an activity that is equally accessible and valuable for male and female students. This section discusses how Title IX doctrine might be reformed to better address the unequal valuation of women's sport experiences and challenge the construction of masculinity and femininity in sport.

A. Securing the Equal Valuation of Women's Sports Under the Treatment and Benefits Standard

The three-part test for equality in athletic participation opportunities, discussed above, has resulted in large numbers of new sport participation opportunities for girls and women. However, Title IX has not succeeded in forcing schools to equally value the male and female sports programs that they offer. As the law has developed, certain disparities in the treatment and valuation of male and female athletics are permissible under Title IX.

Title IX's standards for measuring equality in the treatment of male and female athletes fall short of requiring schools to equally value women's sports. Under the Title IX regulations, disparities in

571. *See* Kidd, *supra* note 350, at 36–37 (linking the effects of disparate sport opportunities for males and females to the perpetuation of sex inequality in society and the reinforcement of the sexual division of labor at home and in the workplace).

funding for men's and women's sports alone do not violate Title IX.[572] Rather, determining compliance in this area requires comparing the factors listed in the regulations and Policy Interpretation to determine whether the programs provide for overall parity.[573] The relevant comparison is program-wide, rather than sport-by-sport, so that disparities in the treatment of individuals sports are permissible if the men's and women's programs overall provide for equal treatment to male and female students.[574] In other words, the key issue is not the amount of money spent on men's and women's sports, but whether that money buys the same quality of treatment for men and women in the sports that they play. This standard has enabled institutions to spend several times the amount of money on more expensive men's athletic programs than they do on women's programs, as indicated by the figures cited previously.[575] These differences in spending alone illustrate the higher value that institutions place on men's sports than women's sports.

In addition to disparities in funding, the law permits disparities in the treatment and benefits provided to men's and women's athletic programs if the disparities result from so-called nondiscriminatory factors.[576] "Nondiscriminatory factors" may include the cost of more expensive equipment, facilities, uniforms, and crowd control for sta-

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572. 34 C.F.R. § 106.41(c) 1999. The regulations hold that:

> Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

Id.

573. The factors listed in the regulation are: equipment and supplies; scheduling of games and practice times; travel and per diems; opportunity to receive coaching and tutoring; assignment and compensation of coaches and tutors; locker rooms and practice and competitive facilities; medical and training facilities and services; housing and dining facilities and services; and publicity. *Id.* These factors are not exhaustive. *Id.* The Policy Interpretation adds recruitment to the list of factors to consider in an equal treatment claim. Policy Interpretation, *supra* note 6, at 71,417(B.4.a).

574. Policy Interpretation, *supra* note 6, at 71,415(B.2). The Policy Interpretation states that the relevant standard is to evaluate the "availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes." *Id.* This standard requires that the programs overall be "equivalent"; "identical benefits, opportunities, or treatment are not required, provided the overall effect of any differences is negligible." *Id.*

575. *See* discussion of resource allocation *supra* Part III.C; *see also* Weistart, *Gender Equity*, *supra* note 173, at 206–07 (estimating that when all actual costs are accounted for, a "Big Time" athletic university spends roughly $13 million on men's football and basketball alone; out of a $20 million budget, all women's sports together receive approximately $2.2 million).

576. Policy Interpretation, *supra* note 6, at 71,415–16 (B.2.a-c).

diums, among other items.[577] The "nondiscriminatory factors" justification is most often invoked to support the higher level of treatment and benefits typically allocated to football programs.[578]

The argument that football is different and warrants special privileges reflects deep-seated resistance to relinquishing male privilege in sport.[579] It persists despite the reality that the vast majority of football programs spend much more money than they generate in revenue.[580] Even for those big-time programs that do bring in revenue, many of the game's excess expenditures are not necessary to produce revenue.[581] To the extent that football programs do produce net revenue, they do so because educational institutions have chosen to invest substantial resources in them to

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577. *Id.* Case law is clear, however, that lack of funds or a desire to save money is not a defense to a Title IX athletics claim. *See, e.g.*, Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 583 (W.D. Pa. 1993), *aff'd*, 7 F.3d 332 (3d Cir. 1993); Cook v. Colgate Univ., 802 F. Supp. 737, 750 (N.D.N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993); Haffer v. Temple Univ., 678 F. Supp. 517, 530 (E.D. Pa. 1987). The source of funds spent on the teams is also irrelevant to the analysis, so it is no defense that the teams with the most benefits receive funding from booster clubs or outside donors. *See, e.g.*, Cohen v. Brown Univ., 809 F. Supp. 978, 996 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993).

578. *See* Policy Interpretation, *supra* note 6, at 71,415–16 (including several references to the "unique demands" of football in discussing possible nondiscriminatory factors that might justify different treatment of men's and women's athletics).

579. *See* FESTLE, *supra* note 36, at xxvi (quoting one athletic administrator's fear of Title IX "emasculating" football); GRIFFIN, *supra* note 398, at 24 (describing incident where female member of high school football team was physically assaulted by her teammates to keep her from playing). *See generally* MARIAH BURTON NELSON, THE STRONGER WOMEN GET, THE MORE MEN LOVE FOOTBALL 123–26 (1994).

580. Weistart, *Gender Equity*, *supra* note 173, at 207–09, 221 & n.101 (stating that when all costs are considered, very few football programs make more money than they spend); *id.* at 219 (acknowledging that football does earn more revenues than any other sport, but stating that "the football deficit is greater than the total cost of all women's sports excluding basketball"); Zimbalist, *supra* note 326, at B9 (stating that "[i]n any given year, only about a dozen of the 973 colleges and universities in the N.C.A.A. have athletics programs that run a true surplus," and referencing the "tangled" accounting practices of college sports).

581. *See* DAVID F. SLATER, CRASHING THE OLD BOYS' NETWORK 54 (1996) (citing excess expenditures in Division I-A football programs, including widespread practices of paying for the team to stay in hotels on nights before home games and flying in recruits for a campus visit when coaches are not interested in them, just to deprive rival schools of the visit); Weistart, *Equal Opportunity?*, *supra* note 32, at 39, 42 (discussing the "athletics arms race" of increasing men's football and basketball expenditures, and proposing NCAA-enforced expenditure caps as a way to curb excess expenditures while increasing the number of teams that are competitive, thus spurring consumer interest); Weistart, *Gender Equity*, *supra* note 173, at 211–14, 250–53 (arguing that even otherwise unbiased athletic directors will fund men's so-called revenue sports over men's and women's non-revenue sports, and that spending caps on the revenue sports would help fund women's sports without reducing either the revenue potential or quality of men's revenue sports); Zimbalist, *supra* note 326, at B9 (discussing "extravagant amounts of money" received by men's football and basketball programs, and noting that such expenditures "soar well beyond what a competitive market would offer").

make them popular. For example, large expenditures for athletic facilities, including expensive stadiums and other infrasturcture that accommodate significant numbers of spectators, reflect long-term institutional investments that have enabled such programs to become popular.[582] Rather than finding support from any intrinsic financial consequences of the game, the sentiment that football should be specially regarded derives much of its power from the premise that it is not a game for women.[583] In this view, it is unthinkable that sports played by women could be compared to football or deserve such prominence.

Title IX has resisted this argument in its most extreme form, as Congress has repeatedly refused to exempt football and other revenue-producing sports from Title IX coverage.[584] Yet, the equal treatment and benefits standard enables football and other major men's sports to retain some special privilege under the guise of nondiscriminatory factors that render the sport "unique."[585] However, nothing about football or any other men's sport necessarily means that women must be relegated to a lesser share of resources for their sports.[586] Women have not had the opportunity to design

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582. SLATER, *supra* note 581, at 53, 57 (discussing institutional investments in men's sports, and noting that Norman May pointed out "sporting events are not intrinsically interesting but are made so"); Weistart, *Gender Equity*, *supra* note 173, at 221 n.101 (stating that revenue sports depend on large taxpayer and institutional investments and the general good will of the university to generate revenue); *see also id.* at 226–27 (discussing reasons to be skeptical of "inherent truths" about the presumed inability of women's sports to become money-makers); Zimbalist, *supra* note 326, at B9 (noting that "[a]ttendance at women's sporting contests is growing every year, as are television ratings" and that "[u]ntil we support women's college sports at similar levels to those of the men—and for as long as a generation—we won't be able to assess their long-run potential").

583. Messner, *supra* note 506, at 70–71 (arguing that "football's primary ideological salience lies in its ability, in the face of women's challenges to male dominance, to symbolically link men of diverse ages and socioeconomic backgrounds," and to identify as "a superior and separate caste").

584. Congress has repeatedly rejected resolutions to exempt revenue-producing sports from Title IX's coverage. *See* discussion of Javits Amendment *supra* note 153.

585. One sports scholar has described the argument that football is unique as an example of "institutionalized sexism," which refers to "the depth of sexism in the daily practice of sport to the extent that it is no longer recognized as such but is instead justified on the basis of factors such as economic and spectator interests." Knoppers, *supra* note 357, at 133. As she explains: "[T]he amount of energy, publicity, and money spent on men's football programs is justified because these programs bring in revenue that purportedly support all the other sports programs. The fact that these football programs involve only men is overlooked or ignored." *Id.*

586. The argument that football is larger than any one women's sport, and therefore should be treated specially, is not compelling. Because Title IX looks at the men's and women's overall athletic programs, rather than engaging in a sport-by-sport comparison, there is no reason why women must play a sport as large as football in order to obtain equal athletic resources. *See* Policy Interpretation, *supra* note 6, at 71,422 (rejecting sport-specific

their own sport opportunities, much less the institutional support to do so in any way that begins to compare to what institutions have invested in football and other men's sports. Title IX's equal treatment standard fails to acknowledge the reality that these so-called nondiscriminatory factors actually mask discriminatory choices in institutional priorities.

The decision to provide more expensive sports for men than for women is itself discriminatory.[587] There are many expensive sports that women may desire to participate in, such as equestrian competitions, rock climbing, water polo, and sailing, among others.[588] Yet institutions generally do not choose to offer such sports, and instead offer less expensive sports for women.[589]

The equal treatment standard should be informed by the theory underlying the three-part test and hold educational institutions accountable for the different situations of male and female athletic programs. To the extent that football and other major men's sports are unique, and therefore in need of greater resources, institutional decisions about how to structure and prioritize their athletics programs have created that very uniqueness. Title IX should not permit educational institutions to respond to the different situations they have created with further discrimination in the treatment and benefits provided to men's and women's athletics.

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approach to Title IX compliance in favor of approach that requires overall equality for the men's and women's programs, and noting that a sport-specific standard could create unequal opportunity by limiting women to equal opportunities only in sports that both men and women play). Moreover, the larger squad size of football reflects institutional decisions about how to structure the game at least as much as the nature of the game itself. *See* Weistart, *Gender Equity*, *supra* note 173, at 214 n.78 (suggesting that football squad sizes are artificially inflated); Zimbalist, *supra* note 326 (same).

587. *See* Weistart, *Gender Equity*, *supra* note 173, at 207 (explaining that while a "Big Time" university spends about $10 million on football, at a rough cost of $100,000 per player, entire women's teams can be funded at a very competitive level for about $200,000–$250,000, and less competitively at $50,000–$100,000).

588. *See, e.g.*, HARGREAVES, *supra* note 1, at 239–40 (arguing that women's sports interests depend on what activities are offered, which tend to be relatively inexpensive; and that when women are offered more costly "subsidized 'tasters' of a less predictable kind," such as rock-climbing and hand-gliding, "the evidence shows that a surprising number tend to take part"); *id.* at 286–87 (discussing lower profile water sports, such as water-polo, canoeing, water-ski racing, and air sports, such as hot air ballooning, handgliding, and parachuting, as activities with substantial female interest that receive little emphasis or funding); Jackie C. Burke, *The Highest Risks for the Boldest of Athletes*, *in* NIKE IS A GODDESS, *supra* note 7, at 199, 217 ("Today the vast majority of participants in most horse sports are women. Girls outnumber boys in the Pony Club by at least ten to one and in the American Horse Shows Association by better than eight to one. . . . Twenty colleges from Stanford to University of Virginia to Cornell to Texas A&M boast of women's polo teams.").

589. *See* Bryson, *supra* note 501, at 53 (noting that "the more costly sports are almost invariably those where males predominate").

Another example of how Title IX permits educational institutions to evade accountability for sex inequality in their athletics programs is the law's response to disparities in the salaries for coaching male and female athletes. The Title IX regulations include the "opportunity to receive coaching" among the factors listed for consideration in determining equality in the area of the treatment and benefits provided to male and female athletes.[590] The unequal salaries provided to the coaches of male and female teams could certainly fall within this factor. However, the current interpretation of equal treatment with respect to coaching is much more limited. Under this interpretation, in order for the payment of lower salaries to the coaches of female athletes to constitute discrimination against female athletes, the lower salary must "deny male and female athletes coaching of equivalent quality, nature, or availability."[591] Thus, female athletes asserting a discrimination claim based on the lower coaching salaries for female athletes must allege that they are receiving a level of coaching that is inferior to that received by male athletes.[592] This interpretation forces female athletes into the awkward position of having to criticize their coach's ability or effort in order to obtain equal resources for their coaches, when the actual performance of the coach often is not the real issue.[593] The standard's limited focus on concrete indicia of the quality of coaching does not capture the nature of the discrimination against the women's sports program that the disparities in coaches' salaries represents.

In theory, the discrimination against female athletes that results from the allocation of lower salaries for coaches in female athletic programs could be redressed in an employment discrimination

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590. 34 C.F.R. § 106.41(c)(4).

591. Policy Interpretation, *supra* note 6, at 71,416 (B.3.e). One court has applied this analysis to reject a female coach's claim for pay discrimination under Title IX. *See* Deli v. U. of Minn., 863 F. Supp. 958, 963 (D. Minn. 1994) ("Because Plaintiff does not claim or provide any evidence to suggest that due to her receipt of a lower salary than that received by coaches of some men's athletic teams, Plaintiff's coaching services were inferior in 'quality, nature or availability' to those provided to the men's teams, she has failed to make out a prima facie claim for violation of Title IX.").

592. *See* Heckman, *supra* note 375, at 1013 (discussing and criticizing OCR's treatment of coaches compensation in its Investigator's Manual, which states that, "if availability and assignment of coaches are equivalent, it is difficult for OCR to assert that the lower compensation for coaches in, for example, the women's program, negatively affects female athletes").

593. *See, e.g., Deli*, 863 F.Supp. at 963 (finding against plaintiff, a women's gymnastics coach, who alleged under Title IX that she provided superior coaching services for less money than the university's men's coaches).

claim by the coach herself (or himself).[594] However, such an approach runs into a quagmire of doctrinal problems. Title IX and its regulations cover employment discrimination, although several courts have refused to allow employees to proceed with discrimination claims directly under Title IX, ruling that Title VII preempts an individual cause of action under Title IX.[595] However, even if coaches may bring pay discrimination claims directly under Title IX, courts will apply the substantive standards that govern such claims under Title VII, which raises additional problems.[596] Title VII challenges brought by coaches of women's teams have been unsuccessful on the grounds that the pay disparity is because of the sex of the students coached, not the sex of the coach herself.[597]

The Equal Pay Act holds somewhat more promise for coaches' pay discrimination claims, in that a violation of the Act is established by proof that a man and a woman perform substantially

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594. *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (upholding Title IX regulations governing discrimination against employees of federally-funded education programs).

595. *See, e.g.*, Lakoski v. James, 66 F.3d 751 (5th Cir. 1995); Cooper v. Gustavus Adolphus Coll., 957 F. Supp. 191 (D. Minn. 1997); Diane Heckman, *Lowrey v. Texas A & M Univ. Systems: Title IX Vis-à-Vis Title VII Sex Discrimination and Retaliation in Educational Employment*, 124 EDUC. L. REP. 753, 755–66 (1998) (discussing case law surrounding Title VII preemption of Title IX employment discrimination claims).

596. *See* Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions, EEOC Notice No. 915.002, n.6 (Oct. 29, 1997), *at* http://www.eeoc.gov/docs/coaches.html (stating that courts apply Title VII standards in analyzing employee Title IX claims for coaches' pay discrimination) [hereinafter EEOC Coaches' Pay Guidance]; *see also* Heckman, *supra* note 375, at 1003 (discussing OCR's 1983 Policy Clarification interpreting Title IX employment discrimination coverage to follow Title VII standard that coaches must establish discrimination based on their own sex, not the sex of the students coached). Title IX discrimination claims by employees provide advantages over Title VII in the procedures and remedies available, not the substantive standards for determining liability. *See id.* at 998–99 (discussing differences between Title VII and Title IX in exhaustion of administrative avenues, statutes of limitations, and caps on damages).

597. *See, e.g.*, EEOC v. Madison Cmty. Unit Sch. Dist. No. 12, 818 F.2d 577, 581–84 (7th Cir. 1987) (rejecting coach's pay discrimination claim because pay differential was based on the sex of the team, not the sex of the coach); Bartges v. Univ. of N.C at Charlotte, 908 F. Supp. 1312, 1328 (W.D.N.C. 1995) (rejecting female coach's Title VII pay discrimination claim on the ground that university's decision to invest differently in its men's and women's athletics programs did not discriminate against the coach on the basis of her sex); Kenneweg v. Hampton Township Sch. Dist., 438 F. Supp. 575, 577 (W.D. Pa. 1977) (rejecting coaches' pay discrimination claim on the ground that the coaches were paid less because of the sex of their teams, not their own sex; *see also Coaches: Salaries for Division I-A Men's and Women's Coaches (1996–1997)*, *at* http://bailiwick.lib.uiowa.edu/ge/statistics.html (last visited May 25, 2000) (on file with the *University of Michigan Journal of Law Reform*) (citing statistics showing that, with the exception of volleyball, the median coaches' compensation for men's teams is consistently higher than for women's teams, regardless of the sex of the coach).

equal work for unequal pay.[598] Thus, a female coach of women's basketball could claim that the higher salary paid to the male coach of men's basketball violated the Act, even though the salary for coaching women's basketball would be the same if a male held the job.[599] However, one difficulty with such a claim in this context is that courts have allowed institutional decisions about how to structure and invest in their men's and women's programs to provide a legitimate basis for paying different salaries to their men's and women's coaches.[600] Institutions have escaped liability under the Equal Pay Act for paying their men's coaches more by showing that men's coaches have more responsibility to bring in fans and produce revenue—reflecting, to some extent, institutional investments in these programs.[601]

A recent EEOC Guidance in this area may improve the potential for legal redress for discrimination in men's and women's coaching salaries under the Equal Pay Act.[602] Unlike previous court decisions interpreting the Act, the Guidance acknowledges that in most athletic programs, the sex of the coach is connected to the sex of the team in that women are virtually excluded from the

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598. *See, e.g.*, Lisa A. Bireline Sarver, *Coaching Contracts Take on the Equal Pay Act: Can (and Should) Female Coaches Tie the Score?*, 28 CREIGHTON L. REV. 885, 890–92 (1995) (describing basic framework of Equal Pay Act claims); Giampetro-Meyer, *supra* note 524, at 372–75 (discussing recent successful Equal Pay Act claims for discrimination in coaching salaries).

599. *See* Sarver, *supra* note 598, at 892–901 (discussing cases involving claims by coaches where courts found that that the Equal Pay Act was violated).

600. *See, e.g.*, Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1321 (9th Cir. 1994) (finding that differences in the responsibilities of the coaching jobs for men's and women's basketball, particularly with respect to public relations and promotional activities, rendered the jobs dissimilar under the Equal Pay Act); *Madison Cmty. Unit Sch. Dist. No. 12*, 818 F.2d at 581 (rejecting Equal Pay Act claim for coaches' pay discrimination); *Bartges*, 908 F. Supp. at 1334 (same); *see also* Stanley v. Univ. of S. Cal., 178 F.3d 1069, 1077 (9th Cir. 1999) (affirming trial court's decision that pay differential in men's and women's basketball coaching jobs did not violate the Equal Pay Act); Deli v. Univ. of Minn., 863 F. Supp. 958, 961 (D. Minn. 1994) (holding that greater spectator attendance, revenue generation, and responsibility for public and media relations are sufficient to show that coaching jobs are not "substantially equal" in Equal Pay Act claim); Sarver, *supra* note 598, at 916 (comparing salaries of University of Nebraska men's and women's basketball coaches, and stating that the greater pressure placed on the men's team to bring in revenue and generate publicity may be a valid basis for denying an Equal Pay Act challenges to the coaches' different salaries).

601. *See, e.g.*, Sarver, *supra* note 598, at 902–13 (discussing cases where coaches' pay discrimination claims have failed under the Equal Pay Act).

602. *See* EEOC Coaches' Pay Guidance, *supra* note 596, at 7. *But see* Weaver v. Ohio St. Univ., 71 F. Supp. 2d 789, 802 (S.D. Ohio 1999) (declining to follow the EEOC Guidance and stating that "such guidelines do not have the effect of agency regulations and are not entitled to deference").

higher paid jobs of coaching male athletes.[603] For this reason, the Guidance takes the position that an institution's decision to invest more in its men's athletics program than its women's program should not be viewed as a justification for a disparity in men's and women's coaching salaries.[604] Nevertheless, the Guidance still allows institutions to justify paying coaches of men's teams more where the pay differential is based on different levels of responsibility or status associated with the men's teams, even if the institution itself has created such differences.[605] Such a result is contrary to the rationale underlying the three-part test, which is appropriately skeptical of the use of differences in men's and women's situations in sport to justify the allocation of greater opportunities to male sports.

One irony of even a successful analysis under the Equal Pay Act is that it would provide no recourse for pay inequity if the coach of the women's teams was a man who was paid less than male coaches of men's teams.[606] Consequently, it creates an incentive for schools to hire men to coach female athletes because they could pay male coaches less than they would have to pay women in the same jobs.[607] Although engaging in hiring discrimination against women for coaching positions would violate Title VII, proving such discrimination is a difficult matter.[608] As a result, under current legal interpretation, increases in the number of successful Equal Pay Act claims may exacerbate the relative absence of women from

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603. *See* EEOC Coaches' Pay Guidance, *supra* note 596, at 7.

604. *See id.* at 21 n.40 (criticizing the *Deli* court for failing to analyze whether women were hired predominantly to coach only female athletes).

605. For example, the EEOC Guidance suggests that no women's coaching job would be comparable to the job of football coach, given the unique size of team, the high number of assistant coaches, and the pressure to raise revenue and maintain a high profile, thereby, exempting football coaching salaries from the requirements of the Equal Pay Act. *Id.* at 5–6. Thus, the Guidance permits decisions about how to structure men's and women's teams to justify paying lower salaries to coaches of the women's teams.

606. *See* EEOC v. Madison Cmty. Unit Sch. Dist. No. 12, 818 F.2d 577, 581 (7th Cir. 1987) ("Suppose that the school district happened to have just male, or just female, coaches and paid coaches more for coaching boys' teams than girls' teams. Men paid less than other men for coaching, or women paid less than other women, could not complain of a violation of the Equal Pay Act.").

607. For example, one school district responded to an EEOC investigation of coaches' pay disparities by appointing more men to coach girls' teams and paying them the same amount as the female coaches had received. *See id.* at 586.

608. *See id.* (holding school district's hiring of more males to coach girls teams after EEOC Equal Pay Act investigation began was not hiring discrimination; "efforts to bring one's conduct into conformity with one's litigating posture are not evidence of willful noncompliance with the law").

leadership positions in athletics and further preserve the male domain of sport leadership.

This doctrinal morass leaves coaches of girls' and women's sports with little effective recourse for their lower salaries. Although such pay disparities clearly reflect a devaluation of women's sports, discrimination law has not been very receptive to such claims.[609] Paying women less to coach women athletes should be recognized as a form of clear-cut disparate treatment against female coaches of women's teams because women are effectively barred from the higher paying jobs coaching males.[610]

However, the clearest instance of disparate treatment discrimination in this context targets the athletes, who are female, rather than the employees who coach women's teams, who are not necessarily female. Wholly apart from the discrimination against coaches themselves, Title IX should recognize disparities in coaches' pay for male and female teams as a form of discrimination against female athletes. The allocation of higher coaching salaries to male teams places a higher valuation on male sports than female sports. The determination that sports programs for girls and women deserve fewer resources than those for men, or that the job of a coach is less demanding when the persons coached are females instead of males, devalues and marginalizes girls and women in sport. The unmistakable message is that coaches of women's teams are valued less than coaches of men's teams because female athletes themselves are valued less than male athletes. This message, combined with other institutional practices that contribute to it, solidifies the male character of sport. For women to equally participate in sport, Title IX must challenge such institutional messages and priorities.

Title IX's failure to stop schools from valuing male sports more highly than female sports is inconsistent with the value judgments

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609. Martha Chamallas identifies this type of discrimination, which has not been adequately addressed under discrimination law, as devaluation. Chamallas, *supra* note 53, at 13. She defines devaluation as the systematic assignment of lower worth to "activities, institutions, injuries, and other 'things,' which are associated with individuals from a disfavored group," in those situations that do not involve clear-cut disparate treatment against a member of a protected class. *Id.* at 13, 33.

610. In this respect, claims for coaches' pay discrimination are on firmer legal ground under current discrimination law than comparable worth claims, in which courts have refused to find the lower valuation of women's work (performed predominantly by women and fewer numbers of men) as a form of unlawful discrimination. *See id.* at 29–32 (discussing the fate of comparable worth in the courts); *see also* EEOC Coaches' Pay Guidance, *supra* note 596, at 11 (recognizing that where women are effectively barred from jobs coaching men, paying coaches of male athletes more than coaches of female athletes discriminates against women coaches).

underlying Title IX's three-part test. This test does not permit institutionally created differences in men's and women's sport experiences to justify continued unequal allocation of men's and women's sport opportunities. In contrast, the law's treatment of disparities in coaching salaries and other resources enables institutions to structure their sport programs in such a manner as to justify paying the coaches of their women's sports less than the coaches of their men's sports, and to allocate greater resources to men's athletic programs generally.

B. De-Linking Sport and Masculinity in the Culture of Sport

The project of fashioning legal doctrine to challenge the gendered construction of sport is one that is daunting at best. Sport and masculinity have become so intertwined in American culture that it is hard to imagine how legal reform could make significant inroads in separating the two. Yet, to the extent that the law reaffirms this connection by reinforcing the exclusivity of sport as a male domain, changing the law is a necessary starting point for the social reconstruction of sport and its relationship to gender.

1. Sex as a Classifier: The Explicit Use of Sex to Organize and Structure Sport—One way that Title IX has operated to solidify the connection between sport and masculinity is to codify gendered divisions in the sports that males and females play. Title IX organizes athletic participation along gendered lines in two respects: first, it approves of separate athletic offerings for males and females, and second, it reinforces gendered notions about which sports males and females should play.

These two aspects of Title IX have very different implications for the construction of masculinity and femininity in relation to sport. The first of these, the allowance for sex-separate athletic programs, is highly contested in terms of its relationship to the masculinization of sport. The second, the gendering of particular sports as male or female, more clearly contributes to the subordination of girls and women in sport.

a. Sex-Separation in Competitive Sport Programs—The decision to allow sex-separate teams was and remains a controversial one. The development of sex-separate athletic teams was initially advocated by women physical education leaders to defend the creation of a

limited sphere of physical education opportunities for girls and women against charges that sport would "masculinize" women.[611] However protectionist and apologetic in its origins, sex-segregation in sport came to be embraced by many women's sports advocates as a way to seek a measure of equality for girls and women in sport while preserving significant opportunities for female athletes to compete.[612]

Around the time Title IX was being considered, women physical education teachers supported a view of equality that would provide comparable teams to a significant number of female athletes, rather than emphasizing competitive sport opportunities for a few token elite female athletes.[613] This approach was ultimately embraced in the Title IX regulations.[614] Title IX's regulations expressly permit schools to offer athletic teams separately by sex where team selection is based on competitive skill or the sport is categorized as a contact sport. Much of Title IX law, including the three-part test for participation opportunities discussed earlier, proceeds from the presumed validity of sex-segregation as an organizing principle for competitive athletic programs.

The relationship between the sex-segregation of competitive sport and the linkage of sport and male dominance is complex and context-dependent.[615] Critics of sex-separation in sport, like proponents of formal equality, argue that Title IX's allowance for sex-segregated teams only solidifies the connection between sport and male dominance.[616] They argue that, similar to segregation in the

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611. *See* CAHN, *supra* note 239, at 24 (discussing history of women in sports and development of "female separatism" as a way to provide moderate sport opportunities "without fear of sexual harm or the taint of masculinity").

612. During early debates over sex equality in sports, feminist groups such as the National Organization for Women (NOW) split from women physical education leaders, with NOW arguing for co-ed teams, and women physical education (PE) teachers and educators pushing for a separate-but-equal approach. FESTLE, *supra* note 36, at 325 n.155.

613. *Id.*

614. 34 C.F.R. § 106.41(b) (1999).

615. *See* HARGREAVES, *supra* note 1, at 29–34, 207–08 (discussing the complexity of the assimilation/segregation debate in sports, in that separatism can increase women's control over their sports, mobilize women to fight for equal resources in sport, and enable women to participate in sport free of male interference and domination, but that it can also recreate social gender divisions and [can] exaggerate sexism by conveying the message that biological sex rather than culture defines athleticism).

616. *See, e.g.*, NELSON, *supra* note 242, at 87 (citing a 1985 Women's Sports Foundation survey showing that women who as children had played sports with boys had a more positive body image as adolescents than women who played sports only with girls, and that women who are most athletic as adults tend to have played mostly with boys or in mixed groups rather than just with girls); Tokarz, *supra* note 266, at 232–33, 239–40 (arguing that sex segregation in sport reinforces the social inferiority of females and stigmatizes female athletics, while reinforcing the exclusive role for males as aggressive, violent, combative).

race context, separate-but-equal is never truly equal because of the social significance of gender.[617] In this view, sex-segregation in sport relegates female athletes to second-class status and affirms the superiority of males in sport.[618] A related argument is that sex-separation bolsters the culture of male dominance in sport by protecting the culture of masculinity on all-male teams.[619]

On the other hand, allowing schools to provide separate athletic teams for female athletes may challenge the linkage between sport and masculinity by enabling female athletes to participate in sport in large numbers and to experience their own athletic power without male interference.[620] The perceived sex neutrality of open teams, where athletes are selected based on "merit," could serve to legitimate male dominance in sports as natural, while reinforcing the notion that few women belong in sport, and even then, only when they can compete on men's terms.[621] A standard requiring

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617. *Cf.* Finley, *supra* note 57, at 1103 (noting the cultural willingness to segregate people by their sex in contexts that would not be viewed as appropriate for racial segregation, including prisons and athletics, and arguing that "[j]ust as with separation along racial lines, separate never really means equal").

618. *See* Jay, *supra* note 146, at 21 (arguing that separating athletic teams by sex sends female athletes messages of inferiority and lowered expectations); Tokarz, *supra* note 266, at 232–33, 239 (arguing that sex-separate teams are premised on stereotypes of female inferiority and harm women psychologically, socially, and occupationally).

619. *See* CAHN, *supra* note 239, at 52–54 (discussing male anxiety over losing to female athletes in mixed-sex competition and the implications for male privilege); Whitson, *supra* note 354, at 27 (citing research suggesting that "homophobia is actively fanned in the single-sex subcultures that have surrounded sport and physical education," and suggesting that this "operates as a constraint that keeps heterosexual people of both sexes within the boundaries of traditional masculinity and femininity"); *cf.* Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 511, 521 (1999) (arguing that the impact on the cultural construction of gender has been ignored in debates over sex-segregation in education, and that separate sex environments may exalt and exaggerate perceived gender differences).

620. *See* Williams v. Sch. Dist., 998 F.2d 168, 175–76 (3d Cir. 1993) (reversing summary judgment for parents of male athlete seeking to play on girls' field hockey team, and noting that if real physical differences exist between the sexes, permitting boys to play on girls' teams could displace girls from the team); Petrie v. Ill. High Sch. Ass'n., 394 N.E.2d 855, 857–63 (Ill. App. Ct. 1979) (upholding classification of athletic competition on the basis of sex on the grounds that it prevented male dominance in games and served state interest in preserving athletic opportunities for girls); B.C. v. Bd. of Educ., 531 A.2d 1059, 1066 (N.J. Super. Ct. App. Div. 1987) (upholding athletic association's regulation prohibiting male participation on female teams as substantially related to the state interest in preventing males from displacing female athletes); *see also* Virginia P. Croudace & Steven A Desmarais, Note, *Where the Boys Are: Can Separate Be Equal in School Sports?*, 58 S. CAL. L. REV. 1425, 1427 (1985).

621. It is unclear and hotly disputed whether the competitive abilities of male and female athletes would even out over time, given equal training, encouragement and sport opportunities, or whether a switch to sex-integrated teams would perpetually disadvantage female athletes. *Compare* HARGREAVES, *supra* note 1, at 284–88 (arguing that sex differences in sport are more social than biological, citing the fact that women's

sex-integrated teams could contribute to an ideology of male athletic superiority and to the perception that men have "earned" their privileged status on the playing field.[622] It also could reinforce the idea that in order for women to have a legitimate place in sport, they must compete with men; that sport participation involving only women lacks value.[623] Indeed, one could even argue that sex-separate teams are required by Title IX to ensure that women have meaningful, rather than token, opportunities to participate in athletics.[624]

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performances are improving at a faster rate than men's, and noting that some physical sex differences give women a competitive advantage in endurance sports), *and* Kidd, *supra* note 350, at 38 (citing research showing that women's athletic records are improving at a faster rate than men's records, suggesting that if women's sport opportunities were equalized, the best females would be competitive with the best male athletes in most sports), *with* Messner, *supra* note 506, at 75 (arguing that average physical differences between the sexes would disadvantage women in cross-sex competition, particularly because the major sports "are organized around the most extreme potentialities of the male body"). Historian Jennifer Hargreaves argues that, rather than asking whether women will ever parallel men's sporting abilities, a question that she contends has become an "obsession" in sport, we should ask why sport is culturally defined in ways that let men display their physical advantages. *See* HARGREAVES, *supra* note 1, at 286 ("If endurance, flexibility, skill, artistry, creativity and timing were accorded higher value, sports would have a very different meaning.").

622. *See, e.g.*, Lemaire, *supra* note 259, at 131–33 (discussing the danger that unisex teams would legitimate male dominance in sport); Messner, *supra* note 506, at 75 (arguing that mixed-sex competition under the guise of "equal opportunity" and liberal feminism "is likely to become a new means of solidifying the ideological hegemony of male superiority" by "provid[ing] support for the ideology of meritocracy while at the same time offering incontrovertible evidence of the 'natural' differences between males and females").

623. *Cf.* Willis, *supra* note 241, at 44. Willis notes that:

> Heroic sports success amongst a few women—without a massive, corresponding ideological battle to change the field of force of meaning—will not lead to greater participation regularly in schools and sports centres by girls and women, nor to a liberation in their sense of gender. A particular notion of masculine standards may, paradoxically, be reproduced and further 'negative' examples of femininity made regularly available.

Id.

624. This issue could have practical significance if Title IX's critics attempt to avoid the obligations of the three-part test by sponsoring open teams, instead of separate men's and women's teams, in which men would retain the lion's share of sport opportunities. *See, e.g.*, Haffer v. Temple Univ., 678 F. Supp. 517, 524 (E.D. Pa. 1987) (acknowledging but rejecting Temple's argument that it offered "open" teams and "women's teams," and that women were free to try out for the "open" teams). The regulations do not require institutions to offer any of their athletic opportunities separately by sex; however, equality in this context may require such an approach if the alternative would allow the de facto exclusion of women from athletic participation opportunities. *Cf.* Cohen v. Brown Univ., 879 F. Supp. 185, 204 (D.R.I. 1995) (stating that, in the context of counting the athletic opportunities available to male and female athletes, "'[a]thletic opportunities' means real opportunities, not illusory ones").

The allowance for sex-separated teams may also broaden the definition of sport by enabling female athletes to participate in their own preferred sports, rather than forcing male and female athletes to compete together in the same sports that have largely been designed and selected by and for males.[625] In addition to having greater control over what sports they play, separate women's sports enable women to experience the power of their bodies without constant comparison with male players or an atmosphere of male dominance.[626]

Whether sex separation in athletics promotes or counters the construction of sport as quintessentially male terrain may well depend on the context in which all-female sport occurs.[627] As women's sports gain increasing attention and appreciation, all-female sports take on a different social meaning. The recent focus on and support for women's Olympic, professional and collegiate sports puts a more positive spin on the social meaning of female sports than has been the case in years past. By providing women space to develop their own sporting preferences and abilities, while publicly demonstrating female competence in sports, the

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625. Some commentators have criticized Title IX's allowance for sex-separate teams on the grounds that, while it allows males and females to compete in separate programs, the law nevertheless measures equal athletic opportunity for women by a male standard. *See, e.g.*, Olson, *supra* note 146, at 116–17; Note, *Cheering on Women and Girls*, *supra* note 146, at 1634–35. Although it is certainly true as an empirical matter that women's sports programs have largely followed the male competitive model, Title IX itself does not dictate how men's and women's sports programs should be organized or structured, except to require that the same quality of treatment and support be provided to both programs. Title IX thus permits a women's program to offer different sports than a men's program and to prioritize different aspects of each program, so long as the men's and women's programs overall provide equal opportunity. While in practice, many women's athletic programs emulate men's programs by creating similar hierarchies within their programs and emphasizing similar aspects of their programs, the law does not require this result.

626. *See* HARGREAVES, *supra* note 1, at 243 (discussing reasons why women choose to participate in sports in all-female environments, including to escape sexism and male dominance, and to benefit from a collective sports experience with other women in an atmosphere where they do not feel threatened or inadequate); NELSON, *supra* note 242, at 89–90 (quoting sport sociologist Susan Birrell, an advocate of sex-segregated sports, as stating that mixed-sex sports would shortchange women because of the "'subtle losses of power the accommodated class suffers when integrated within a structure already defined and run by others'").

627. *See* HARGREAVES, *supra* note 1, at 150 (explaining that the process of assimilation or separation is complex because femininity is not a static condition, but responds to changes in social structures); *cf.* Lemaire, *supra* note 259, at 131–33 (acknowledging that sex-segregation of sports teams is problematic because it reinforces traditional conceptions of women and stigmatizes women's teams, but arguing that separate women's teams may become equal if allowed to develop their own models of competition).

sex-separation of athletics may in the end do more damage to the masculine construction of sport than it does to support it.[628]

b. Title IX's Role in Assigning a Gender to Particular Sports—However one views Title IX's general authorization of sex separation in athletics in connection with the social construction of sport and gender, Title IX's regulation of which sports males and females may play raises a different set of issues. Title IX has permitted schools to channel girls and women into less physically aggressive sports, while emphasizing these sports for boys and men.[629] This gender division constructs particular sporting activities themselves as masculine or feminine.

More specifically, the Title IX regulation governing the right to try out for teams that are otherwise only available to members of one sex contributes to the construction of gendered sport activities.[630] Title IX effectively limits the sports in which male and female athletes compete in a way that conforms to traditional gender expectations. Under the Title IX regulations, if athletic opportunities for one sex have been previously limited (which is true for female students at virtually every educational institution in the United States), members of that sex have a qualified right to try out for a team in a sport that is offered only to the other sex.[631]

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628. *See* Whitson, *supra* note 242, at 363 ("If [Iris Marion] Young is correct [about the empowering potential of women learning to use their bodies actively], the physical empowerment of more women and the entry into sport of greater numbers of women will steadily contribute toward breaking down the masculine connotations of sport itself.").

629. *See id.* at 356 ("Despite the recent expansion of organized sports for girls, *their* sports are often kept less 'physical' than boys', and girls are not encouraged as readily as boys are to push themselves and to really develop their physical skills.").

630. *See* 34 C.F.R. § 106.41(b).

631. The Regulation states:

> [W]here a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport.

Id. The regulation does not allow female athletes to compete on male teams in sports that are offered to female athletes on the theory that the potential "talent drain" from the female teams could reduce the potential for women's sports as a whole to gain credibility and recognition. *See, e.g.*, O'Connor v. Bd. of Educ., 449 U.S. 1301, 1307–08 (1980) (refusing to lift court of appeal's stay of a preliminary injunction requiring school district to allow girl to tryout for boys' basketball team where the school offered a girls' basketball team, and noting that the district court's order could have the effect of hurting girls' sports overall by draining the best players from the girls' program); O'Connor v. Bd. of Educ., 645 F.2d 578, 581–82 (7th Cir. 1981) (reversing and remanding preliminary injunction requiring school to allow female student to try out for the boy's basketball team where the school offered a

The qualification is that the right to try out in a sport offered only to one sex does not exist if that sport is a contact sport.[632] Thus, female athletes have been denied the right to try out for all-male teams in contact sports, even though they have no other opportunities to participate in that sport.[633]

The contact sports exemption greatly restricts the opportunities for female athletes to participate in traditionally male sports. Contact sports are defined broadly under the regulation to include "boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact."[634] A sport may qualify as a contact sport even though the rules of the sport prohibit bodily contact, as long as bodily contact does occur in the sport and is expected to occur.[635] The breadth of the exception leaves few traditionally male sports outside the category of contact sports.

At the same time, the regulation does little to provide women interested in playing a contact sport with a team of their own. OCR has interpreted the regulation governing contact sports to require schools to provide contact sports to members of an excluded sex only if "[t]here is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team."[636] Thus, it is possible that although Title IX does not provide female athletes with the right to play on the boys' or men's team in a contact sport, it may nevertheless require schools to provide female athletes with their own team in that sport. Unfortunately this modest concession is of limited practical significance. Few female athletes

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girls' basketball team on a similar rationale), *remanded to*, 545 F. Supp. 376, 384 (N.D. Ill. 1982) (granting summary judgment for defendants); Yellow Springs Exempted Vill. Sch. Dist. v. Ohio High Sch. Athletic Assoc., 647 F.2d 651, 658 (6th Cir. 1981) (upholding sex-based classification of athletic competition and noting the state's interest in promoting girls' athletics by retaining talented female athletes on girls' teams rather than losing them to boys' teams).

632. *See* 34 C.F.R. § 106.41(b).

633. *See, e.g.*, Barnett v. Tex. Wrestling Ass'n, 16 F. Supp. 2d 690, 694–95 (N.D. Tex. 1998) (dismissing Title IX challenge by two female wrestlers to association rule forbidding female wrestlers to compete against boys in the North Texas Open Wrestling Tournament).

634. 34 U.S.C. § 106.41(b).

635. *See* Williams v. Sch. Dist. of Bethlehem, Pa., 998 F.2d 168, 172–74 (3d Cir. 1993) (holding field hockey may be a contact sport); *see also* Renee Forseth & Walter Toliver, Casenote, *The Unequal Playing Field—Exclusion of Male Athletes from Single-Sex Teams:* Williams v. School District of Bethlehem, Pa., 2 VILL. SPORTS & ENT. L.J. 99, 125 (1995) (noting that the court's broad definition of contact sport may ultimately decrease athletic opportunities for women by preventing female athletes from participating on all-male teams in sports not offered to females).

636. Policy Interpretation, *supra* note 6, at 71,418.

will be able to affirmatively demonstrate enough interest and ability to support a viable team in a contact sport that has not been offered to them since female students at the school would have been denied access to any school-supported competition in that sport. Consequently, OCR's regulatory interpretation does not provide female athletes with an equal opportunity to participate in contact sports.[637] Instead, by denying female athletes the opportunity to develop their skills in traditionally male contact sports, the regulation squelches the development of female athletic interest in those sports and discourages the development of women's contact sports.[638]

An alternative approach that would be more consistent with the rationale underlying the three-part test would require an institution to offer a women's team in a contact sport once requested to do so by a female student at the school, and then provide the resources and opportunities necessary to see if sufficient interest could exist for the sport.

The contact sports exemption locks in place the construction of particular sports as predominantly "masculine" or "feminine," and bolsters the construction of a dominant masculinity in sport. Just as certain jobs have become "gendered" based on the sex of persons who hold them and the sex-stereotyping of the qualifications associated with the job,[639] certain sports also have acquired a "gender."[640] For example, football, ice hockey, baseball,

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637. One women's club team was successful in using this opening to obtain a varsity women's ice hockey team at their institution, which had offered varsity ice hockey to men only. *See* Heckman, *supra* note 148, at 409 & n.85 (discussing settlement in *Bryant v. Colgate Univ.*); *see also* Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 437 (2000) (arguing that it is difficult to establish existing interest and ability to participate in a contact sport when women "have always been denied the opportunity to try the sport and to develop proficiency at it").

638. *See* FESTLE, *supra* note 36, at 171 (discussing Title IX's provision that schools do not have to allow women to play contact sports such as football, boxing, wrestling, rugby, and ice hockey, among other sports, unless there is a demand for an active women's team); *see also* Stewart, *in* NIKE IS A GODDESS, *supra* note 7, at 269, 284 ("From the earliest ages, hockey organizers have encouraged boys and girls to play on separate teams. Since virtually every top notch female player will tell you that she developed her skills playing with boys, that strategy seems designed to limit the overall development of the women's game.").

639. *See* BABCOCK ET AL., *supra* note 97, at 813–14 (discussing sex stereotyping of jobs as requiring masculine or feminine traits based on the distribution of the sex of the workers holding those jobs); Chamallas, *supra* note 53, at 27–29 (describing the process in which jobs become "gendered" and citing to sociological research on the gender stereotyping of jobs).

640. *See* CAHN, *supra* note 239, at 217–18 (discussing how particular sports are constructed as masculine or feminine). The process through which certain sports become "gendered" is complex, involving the combination of gender, race, and class to produce a dominant image and identity associated with that sport. For example, figure skating is con-

and wrestling are perceived to be masculine sports; figure skating, synchronized swimming, field hockey, and gymnastics are perceived as more feminine.[641] The social attribution of a gender to particular sports furthers the construction of different and diametrically opposed masculine and feminine sport identities. When female athletes compete in a "male sport," they challenge the gendered construction of sport itself.[642]

The law's resistance to female athletes' participation in traditionally masculine sports stems from the threat such participation presents to the masculine privilege conferred by such sports. This fear was expressed quite candidly in a 1956 decision by the Oregon Supreme Court addressing the constitutionality of rules excluding women from participating in wrestling.[643] In *State v. Hunter*, a woman was arrested for violating a state law that made it a crime for women to participate in organized wrestling competition.[644] The court upheld the law against the defendant's challenge under the Fourteenth Amendment of the U.S. Constitution and the Oregon Constitution, taking "judicial notice of the physical differences between men and women," and the division of citizens into "'two great classes of men and women.'"[645] The court's explanation of the justification for the law is worth quoting at some length to appreciate better the full flavor of the ideology behind it:

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structed around a certain type of femininity—a femininity that is upper class and typically white. *See, e.g.*, FESTLE, *supra* note 36, at xx–xxi (discussing the cultural meaning of the Nancy Kerrigan/Tonya Harding conflict and the importance of class and role-typing in defining "femininity").

641. *See* CAHN, *supra* note 239, at 97 (describing the development of field hockey as a sport for upper-class women, and noting that because of its exclusively female origins "it remained free from charges of mannishness"); Kidd, *supra* note 350, at 36 (describing historic efforts of sports organizers to "confine females to those sports believed to enhance middle- and upper-class concepts of femininity, such as swimming, tennis, and gymnastics"). The attribution of "gender" to sports is clearly a cultural, rather than a natural phenomenon. *See* CAHN, *supra* note 239 at 85, 98–99 (describing the evolution of basketball from a "feminine" game viewed as "too effete for rugged male athletes" because it was played by women indoors, "protected from the elements and from public scrutiny," to a "masculine" game for men as it became associated with "ruggedness, explosive power, and technical precision").

642. *See* HARGREAVES, *supra* note 1, at 283 (asserting that when women participate in traditionally male sports, they create "an emergent female sports culture which is transforming those conventional definitions" of masculinity and femininity); *cf.* Whitson, *supra* note 354, at 25–26 (contending that the presence of girls on all-male teams disrupts the masculinizing project of sport and threatens the opportunities for men to "rehearse their ties as men and reaffirm their differences from women").

643. State v. Hunter, 300 P.2d 455 (Or. 1956).

644. *Id.* at 456–57.

645. *Id.*

> We believe that we are justified in taking judicial notice of the fact that the membership of the legislative assembly which enacted this statute was predominantly masculine. The fact is important in determining what the legislature might have had in mind with respect to this particular statute. . . . *Obviously it intended that there should be at least one island on the sea of life reserved for man that would be impregnable to the assault of woman.* It had watched her emerge from long tresses and demure ways to bobbed hair and almost complete sophistication; from a creature needing and depending upon protection and chivalry of man to one asserting complete independence. *She had already invaded practically every activity formerly considered suitable and appropriate for men only.* In the field of sports she had taken up, among other games, baseball, basketball, golf, bowling, hockey, long distance swimming, and racing, in all of which she had become more or less proficient, and in some had excelled. In the business and industrial fields as an employee or as an executive, in the professions, in politics, as well as in almost every other line of human endeavor, she had matched her wits and prowess with those of mere man, and, we are frank to concede, in many instances outdone him. *In these circumstances, is it any wonder that the legislative assembly took advantage of the police power of the state in its decision to halt this ever-increasing feminine encroachment upon what for ages had been considered strictly as manly arts and privileges?* Was the Act an unjust and unconstitutional discrimination against woman? Have her civil or political rights been unconstitutionally denied her? Under the circumstances, we think not."[646]

The court's rationale, although no longer expressed in such stark terms, survives as the primary justification for the contact sports exemption. The contact sports exemption marginalizes and stigmatizes female athletes as fragile, delicate, and vulnerable, at the same time that it defines male athleticism as aggressive and physically powerful.[647] The denial of access to contact sports for

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646. *Id.* (emphasis added); *see also* Calzadilla v. Dooley, 29 A.D.2d 152, 157 (N.Y. App. Div. 1968) (rejecting equal protection challenge by female wrestler to state athletic commission rule barring women from wrestling on the ground that "'[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same'") (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1939)).

647. *See* Kidd, *supra* note 350, at 38 (discussing Ontario Hockey Association's refusal to allow thirteen year-old female to compete on an all-male hockey team, despite her success in making the team in a competitive try-out, and attributing the association's stance to male

female athletes conveys the message that when it comes to highly physical sports, women's place is on the sidelines and not on the field.[648] Much like the restriction of women from combat positions in the armed services, the contact sports exception serves to reinforce a traditional, passive femininity in need of male protection, while at the same time preserving the institution's masculine culture.[649] As a facial sex-based classification that relies on gender stereotypes and structures sport programs to conform to traditional notions of dominant masculinity, the contact sports exemption is inconsistent with both the theory underlying the three-part test and the model of formal equality embraced in current interpretation of the Equal Protection Clause.[650]

In practice, potential equal protection challenges for public schools have mitigated the impact of the contact sports exemption in public schools, as courts have granted female athletes the right to try out for all-male teams in contact sports under the equal protection clause.[651] However, since equal protection doctrine applies

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fears of "the profound social and psychological changes that would result if women were understood to be fully competent in the special domain of men").

648. Sometimes this message is expressed explicitly. *See* Richard Rubin, *Female Placekicker Files State Suit Against Duke, Goldsmith*, THE CHRON. (Duke), Jan. 13, 1999, at 3 (reporting that the former football coach [Goldsmith] at Duke told a female place-kicker who wanted to play on the team, "You should have gotten over wanting to play little boy games a long time ago," and suggested that she become a cheerleader instead); *see also* CAHN, *supra* note 239, at 224–25 (stating that "by barring women from strength-building contact sports like wrestling or football, the sports world reaffirms the expectation of female passivity, submissiveness, and frailty—the demeaning aspects of femininity that underlie the aesthetic").

649. *See* Karst, *supra* note 472, at 525, 537 (noting that the ideas underlying the combat exemption are central to the ideology of masculinity); *see also* Sangree, *supra* note 637, at 384 ("It is no accident that contact sports joins the military combat exclusion as the last bastions of facial discrimination.").

650. *See* Leffel v. Wis. Interscholastic Athletic Ass'n, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978) (finding that Title IX's allowance for all-male teams in contact sports that are not offered to females is inconsistent with the equal protection clause). The contact sports exemption has a parallel in the bona fide occupational qualification (BFOQ) defense under Title VII, which permits sex to disqualify employees for certain types of jobs. *See* 42 U.S.C. § 2000e-2(e). *Compare* 29 C.F.R. § 1604.1(a) (1999) (stating that the BFOQ defense is to be narrowly construed), *with* 34 C.F.R. § 106.41(b)(1999) (defining contact sports broadly). *Cf.* Sangree, *supra* note 637, at 411 (stating that Title IX was enacted as a separate law, rather than as an amendment to Title VII, which bars race discrimination in federally funded programs, because the Nixon Administration believed that sex, unlike race, could justify differential treatment in education, especially in athletics). However, unlike Title VII, Title IX codifies an entire class of activities for which sex is a disqualification, with no proof that sex is a necessary qualification for each activity covered).

651. Equal protection doctrine has enabled female athletes to try out for all-male teams in contact sports that are not otherwise available to them. *See, e.g.*, Adams v. Baker, 919 F. Supp. 1496, 1505 (D. Kan. 1996) (upholding female student's claim to try out for male softball team); Saint v. Neb. Sch. Activities Ass'n., 684 F. Supp. 626, 630 (D. Neb. 1988)

only to public and not private institutions, many female athletes are left without meaningful protection from exclusion in contact sports.[652] Moreover, the contact sports exemption remains a powerful contributor to the ideology of male dominance and superiority in sports.[653]

In addition to the contact sports exemption, which effectively excludes female athletes from playing traditionally male sports, Title IX polices the gender of sports by restricting the opportunities for male athletes to play traditionally female sports. Under the Title IX regulations, male athletes seeking to participate on an all-female team in a sport not otherwise available to them have little recourse.[654] Because males historically have not had their athletic opportunities limited on the basis of sex, the regulation does not accord them the right to try out for a team in a sport offered only to females.[655] The different treatment of members of the underrepresented sex from those of the overrepresented sex reflects the same concern underlying the allowance for sex-separated teams generally: a desire to preserve sufficient opportunities for female athletes who may otherwise be displaced by male athletes. However, this regulation presents a dilemma that is somewhat different than that posed by the general allowance for sex-separate teams.

(same); Lantz v. Ambach, 620 F. Supp. 663, 666 (S.D.N.Y. 1985) (upholding female student's claim to try out for male softball team); Force v. Pierce City R-IV Sch. Dist., 570 F. Supp. 1020, 1031–32 (W.D. Mo. 1983) (same).

652. *Cf.* Mercer v. Duke Univ., 190 F.3d 643 (4th Cir. 1999) (holding that a university may exclude members of one sex from a contact sport, but that once it permits a student of the excluded sex to try out for a contact sport, and she makes the team, it can no longer exclude her from equal participation on the team); Abigail Crouse, Comment, *Equal Athletic Opportunity: An Analysis of* Mercer v. Duke University *and a Proposal to Amend the Contact Sport Exception to Title IX*, 84 MINN. L. REV. 1655, 1681–82 (2000) (noting the "perverse incentives" created by the Fourth Circuit's decision in *Mercer* because recipients can avoid Title IX claims for equal participation in contact sports simply by refusing to allow members of the excluded sex to try out for the team).

653. *See* Sangree, *supra* note 637, at 434–35 ("While the underlying motivation of the proponents of the exemption was to protect college football and basketball from female encroachment, the message has been that the 'weaker sex' must be protected from rough play with superior athletic males.").

654. *See, e.g.*, Williams v. Sch. Dist., 998 F.2d 168, 172–76 (3d Cir. 1993) (remanding to lower court for consideration of whether field hockey is a contact sport and whether athletic opportunities for boys in field hockey are limited in case of a boy who was not permitted to play on girls' field hockey team despite absence of boys' field hockey team); Clark v. Ariz. Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1983) (prohibiting boy from playing on girls' volleyball team, even though school did not offer boys' volleyball); *see also* Petrie v. Ill. High Sch. Ass'n, 394 N.E.2d 855, 864 (Ill. App. 1979) (rejecting male high school athlete's equal protection challenge to high school association's rule restricting participation in volleyball to girls only).

655. 34 C.F.R. § 106.41(b).

By enabling schools to offer sports exclusively to female and not male athletes, the regulation participates in the construction of gender for particular sports. Sports that are typically offered to girls and not boys reflect cultural judgments about which sports are appropriately masculine and which are feminine. Softball, for example, was designed to be a "feminized version" of baseball.[656] The regulation's denial of the opportunity for male athletes to participate in traditionally female sports furthers the gender division between the more valued, masculine sports in which males traditionally compete, and the more feminine sports with traditionally female participation.

Male students who seek to participate in traditionally female sports may also represent a challenge to the gender ordering of sports.[657] And yet, the rationale underlying the regulation—preventing the displacement of female athletes from the already limited opportunities for female athletes—is important. The challenge is to degender traditionally masculine and feminine sport without undercutting the opportunities for girls and women to participate in sports. One solution would be to enable males to try out for a team offered only to female students where the denial of the sport to males rests on cultural assumptions about the sport's femininity. The concern for maintaining sufficient numbers of opportunities for female athletes could be addressed under the three-part test by continuing to ensure that the number of actual opportunities available to male and female athletes—regardless of whether they play on single-sex or mixed-sex teams—does not discriminate against female students. Such a solution would meet the goal of bolstering female athletic participation without strictly enforcing the gender composition of sports that have been deemed culturally coded as feminine, and thus inappropriate for male participation. Under this proposal, an athlete's sex would still play a role in the assignment of athletes to teams in sports that are available to both males and females, but exclusion from sports that are available only to athletes of one sex would be subject to challenge. This modification, combined with the elimination of the contact sports exemption, would challenge the construction of masculine and feminine sports.[658] The resulting greater experience with

656. *See* Sangree, *supra* note 637, at 408.

657. *See, e.g.*, LENSKYJ, *supra* note 239, at 57 (noting that the dichotomy of masculine and feminine sports also excludes males from "feminine" sports and casts doubt on their heterosexuality when they do participate in such sports).

658. For a related, though somewhat different proposal, see Dana Robinson, *A League of Their Own: Do Women Want Sex-Segregated Sports?*, 9 J. CONTEMP. LEGAL ISSUES 321, 354–55

mixed-sex teams may help to inform continued debate about the value of sex-separation in athletics more generally.[659]

2. Challenging the Masculine Culture of Sport and Constraints on Female Athleticism—As discussed above, educational institutions engage in a myriad of practices that contribute to the masculinization of sport. In the end, the gendered culture of sport may well prove more central to girls' and women's inequality in sport than the explicit use of sex to structure and organize competitive athletic programs. The construction of sport as an activity premised on gender inequality goes well beyond the allocation of unequal opportunities to male and female athletes. Institutional practices at play in this process include the maintenance of male leadership structures in sport and the protection of a sport culture in which aggressive and even abusive masculinity is encouraged and condoned. At the same time, educational institutions contribute to cultural constraints that marginalize girls and women in sport by projecting a disconnect between traditional femininity and athleticism. This message is symbolized by the use of gender in team names, enforced through the policing of sexual orientation, and furthered by the objectification of girls and women in sport.

Title IX has not yet begun to address the deep institutional structures that link sport with masculinity and subordinate girls and women in sport. Although Title IX's three-part participation test has been successful in recognizing how institutional decisions construct men's and women's relationship to sports, it has not gone beyond an analysis of athletic participation numbers. And yet, the male-dominant leadership structures of athletic programs and the perpetuation of male dominance in the culture of sport have at least as much to do with the structuring of men's and women's relationship to sport as the bare numbers of sport opportunities that institutions provide. In future challenges to the three-part test, such as that launched by Brown University, courts should look beyond the numbers of participation opportunities to un-

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(1998) (advocating a more stringent application of the Fourteenth Amendment to sex-segregation in sports, such that members of either sex could try out for a team offered to the other sex if there were no equivalent team with equal, tangible benefits otherwise available to them).

659. Don Sabo, *Coed Sports: A Call for Needed Research*, Women's Sports Foundation, *at* http://www.womenssportsfoundation.org/templates/res_center/relib/results_topics2html?article=43&record=24 (last visited Nov. 11, 2000) (on file with the *University of Michigan Journal of Law Reform*) (discussing existing research disclosing positive and negative dimensions of coed sports participation and identifying a need for additional research in this area).

cover the many other ways institutions construct male and female interest in sport. This would include an analysis of the broader opportunity and reward structures available to male and female athletes, as well as an inquiry into how the institution constructs the culture of its sport programs. The latter inquiry could be undertaken in the form of expert testimony and broad discovery into the institution's athletic leadership structures and practices that perpetuate male dominance in sport and constrain women in sport, in any of the ways discussed in the previous section.

In addtion, Title IX's standard for equality in the treatment and benefits provided male and female athletes should be modified to reach sexism and male dominance in the culture of athletics. Title IX should hold institutions accountable for sex discrimination when they support a culture of sport that demeans and devalues women and those men who represent a challenge to dominant masculinity. As a starting point, Title IX should ensure that athletic privilege does not include the ability of male athletes to practice sexual dominance. Educational institutions should be held accountable for the construction of male dominance in their sport programs and for its consequences in and beyond the locker rooms and playing fields.

Meaningful protection under Title IX from sex discrimination in sport would encompass the full range of institutional structures that suppress female athletic interest while inflating and privileging sport participation by males. Title IX law does not yet recognize this vision of equality. But the seeds for such a vision can be found in court decisions such as *Cohen v. Brown University*, and a critical approach to sex difference that focuses on how the institutions that are governed by Title IX construct sex inequality in sport.

CONCLUSION

As scholars who study sport have increasingly recognized, women's access to sport, and the societal and personal benefits it brings, can play an important role in furthering women's power and status in life's other arenas.[660] At the same time, the ongoing

660. *See* Bryson, *supra* note 501, at 47 ("For many feminists, sport has, quite rightly, been identified as a supremely male activity, and therefore eschewed, both in practice and as a topic of interest. However, such an attitude cannot be sustained, since if we are to understand the processes of our domination, we ignore sport at our peril."); Messner & Sabo,

inequality of girls and women in sport, and the resilience of male privilege in sport, contributes to male dominance outside of sport.[661] As a result, much is at stake in the contest over the meaning of Title IX as it applies to athletics.

Title IX's detractors and the leaders of the backlash against the struggle for sex equality in sport do not acknowledge the responsibility of educational institutions for creating and perpetuating sport as a male activity that is not equally available or appealing to women. The critics' perspective is that of formal equality—that Title IX should treat male and female athletes the same by similarly accommodating their respective levels of athletic interest. Understanding Title IX as a law that goes beyond the limited perspective of formal equality is an important starting point in answering these objections. The rest of the defense of Title IX lies in a deeper analysis of gender bias in school sport programs than that yet undertaken by the courts.

As argued above, schools, colleges, and universities actively shape and construct male and female athletic interest and experience in sport. In subtle and not so subtle ways, educational institutions create structures of unequal opportunity and cultures of sport that are hostile to women. Title IX law, and in particular, the three-part test, has made important inroads toward holding educational institutions accountable for their role in constructing men's and women's different relationship to sport. To an extent not widely recognized, Title IX courts have avoided some of the most blatant mistakes of sex discrimination law in other contexts, such as adopting an overly simplistic view of sex difference and its relationship to discrimination law. However, Title IX law has not yet applied these insights to capture the full complexity of gender inequality in sport.

A comprehensive theory of Title IX should address the construction of gender differences in male and female athletic interests and experiences and the construction of sport itself as a male-dominant institution. Such a theory would place a higher value on women's current sport activities and interests, and would recognize that providing equal resources and opportuni-

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supra note 146, at 4–5 (reviewing research suggesting that sport plays a role in increasing the empowerment and self-actualization of women and that women's participation in sport challenges the public-private split that continues to privilege men over women).

661. *See* Whitson, *supra* note 354, at 23–24 ("It may be suggested that masculinizing and femininizing practices associated with the body are at the heart of the social construction of masculinity and femininity and that this is precisely why sport matters in the total structure of gender relations.").

ties to male and female athletes is necessary but not sufficient to break down the structures of male dominance in sport. Title IX should strive to enable women to develop and pursue their own interests in sports on equal terms as men, while simultaneously breaking down the institutional constraints that suppress and mold both women's and men's athletic interests to fit a model that is neither intrinsic nor fully chosen.

Daunting as this task is, it is not without cause for hope. Because sport's relationship to masculinity and femininity is socially constructed, there is the potential within sport for resistance and transformation. How men and women (and boys and girls) participate in sports, that is, the practice of sport, affects the structures and cultures within sport. When women (and men) challenge the boundaries of gender expectations in sport, sport's connection to masculinity is weakened. At the same time, as women's sports participation is valued more highly, through increased resources and better treatment, the celebration of sport is less connected to the celebration of masculinity, and sport becomes an activity that is equally valued for both genders. Title IX can play an integral role in this process, if its underlying theory is fully appreciated and applied.