

# Lessons from the Gender Equality Movement: Using Title IX To Foster Inclusive Masculinities in Men's Sport

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## Introduction

In the summer of 2015, in a move many would have regarded as unthinkable even five years earlier, the United States Supreme Court decided four consolidated cases that, in one fell swoop, conferred a constitutional right to same-sex partners to fully participate in the revered (and heretofore so jealously defended) institution of marriage.<sup>1</sup> Of course, the “one fell swoop” characterization is deceptive, since the Court’s ruling cannot be understood as representing a discrete cultural moment that appeared out of nowhere. On the contrary, decades of struggle, legal strategizing, movement building, and one-step forward, two-step backward reform preceded it.<sup>2</sup> By the time the Court took up the case, *Obergefell v. Hodges*, its outcome was hardly unexpected, and the stage was set for broad public acceptance of marriage equality.<sup>3</sup>

In my home state of Pennsylvania, the watershed moment occurred a year prior, when then-Governor Tom Corbett, a conservative Republican, decided not to appeal a federal court decision holding the state’s restrictive marriage law unconstitutional.<sup>4</sup> The Governor’s decision meant that the lower court ruling was the last word on marriage equality throughout the Commonwealth, in effect recognizing the legal validity of same-sex marriage in Pennsylvania.<sup>5</sup> At the time of the Governor’s decision, however, it was hardly a foregone conclusion that the Supreme Court would affirm the lower court’s ruling.

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1. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

2. See Jane Schacter, *What Marriage Equality Can Tell Us About Popular Constitutionalism*, 52 HOUS. L. REV. 1147, 1154–62 (2015) (tracing the history of the political and legal struggle for marriage equality).

3. See *id.* at 1162–64.

4. See *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014).

5. See *id.*

Less a reflection of legal futility, the Governor's decision to not appeal was based more on a political judgment that the winds of public opinion had irreversibly shifted.<sup>6</sup> As a political judgment, his decision spoke volumes about how much American culture had changed, even in a state with an otherwise deplorable record on LGBT rights.<sup>7</sup>

There is no denying that the past decade has been marked by major shifts in cultural norms and the majoritarian attitude about sexual orientation and LGBT rights. This was perhaps best reflected in the White House tweet "#LoveWins,"<sup>8</sup> in response to the Supreme Court marriage equality ruling and the largely favorable public response to it.<sup>9</sup> To be sure, there were some naysayers who sided with the dissenters on the Court,<sup>10</sup> along with a few highly publicized acts of civil disobedience,<sup>11</sup> but the overwhelming public reaction struck a celebratory chord.<sup>12</sup>

Although I began this Article on a hopeful note for LGBT equality, I do not want to exaggerate the movement's wins or to posit a simplistic, linear trajectory of progress toward LGBT rights. Rather, I want to draw a contrast. At a time when

6. See Trip Gabriel, *Pennsylvania Governor Won't Fight Ruling That Allows Gay Marriage*, N.Y. TIMES (May 21, 2014), [http://www.nytimes.com/2014/05/22/us/pennsylvania-governor-will-not-appeal-same-sex-marriage-ruling.html?\\_r=0](http://www.nytimes.com/2014/05/22/us/pennsylvania-governor-will-not-appeal-same-sex-marriage-ruling.html?_r=0) (noting that public opinion in Pennsylvania favored same-sex marriage and that the Governor was facing a tough election bid against a Democratic challenger).

7. Pennsylvania is among a shrinking group of states that lacks any state-wide statutory ban on discrimination based on sexual orientation. *Non-Discrimination Laws: State by State Information*, ACLU, <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map> (last visited June 1, 2016). Proposed legislation to amend the Pennsylvania Human Relations Act to add sexual orientation and gender identity as protected classes has repeatedly been introduced in the General Assembly, to no avail. See Mark Pesto, *Pending Legislation Could Broaden LGBT Rights in Pennsylvania*, PITT NEWS (Aug. 30, 2015), <http://pittnews.com/60672/news/pending-legislation-could-broaden-lgbt-rights-in-pennsylvania/>.

8. The White House (@WhiteHouse), TWITTER (June 26, 2015, 7:20 AM), <https://twitter.com/whitehouse/status/614438061817114624>.

9. See Robert Barnes, *Supreme Court Rules Gay Couples Nationwide Have a Right To Marry*, WASH. POST (June 26, 2015), [https://www.washingtonpost.com/politics/gay-marriage-and-other-major-rulings-at-the-supreme-court/2015/06/25/ef75a120-1b6d-11e5-bd7f-4611a60dd8e5\\_story.html](https://www.washingtonpost.com/politics/gay-marriage-and-other-major-rulings-at-the-supreme-court/2015/06/25/ef75a120-1b6d-11e5-bd7f-4611a60dd8e5_story.html).

10. See Amanda Shaw, *Rainbow-Lit White House Sparks Social Media Controversy*, FOX CAROLINA (July 24, 2015, 10:45 AM), <http://www.foxcarolina.com/story/29421689/rainbow-lit-white-house-sparks-social-media-controversy>.

11. See, e.g., John Culhane, *Kim Davis Is No Rosa Parks*, POLITICO (Sept. 8, 2015), <http://www.politico.com/magazine/story/2015/09/kim-davis-is-no-rosa-parks-213127> ("The Kentucky clerk's confusion over the rule of law can be traced back to Justices Scalia, Thomas, Alito and—most of all—Chief Justice Roberts.").

12. See Barnes, *supra* note 9.

marriage equality has been won,<sup>13</sup> when popular television shows portray sympathetic accounts of transgender characters,<sup>14</sup> and when gay and lesbian people can finally openly serve in the U.S. military,<sup>15</sup> the institution of sport—and particularly men’s sport—stands as an outlier. Understanding sport’s resistance to these societal shifts requires attention to sport’s relationship to masculinity and the practices that construct and reinforce rigidly hierarchical masculinities among men.

Although my focus in this Article is on men’s sport, I do not mean to suggest that homophobia has been eradicated on the women’s side of the game. After all, it was not so long ago that Penn State’s women’s basketball coach, Renee Portland, was famously taken to task in a Title IX lawsuit brought by a former player for having a “no lesbians” policy on the team.<sup>16</sup> Rather, in focusing on men’s athletics in this Article, I want to explore how homophobia and exclusion function distinctively in men’s sport. To illustrate, consider the problem of “negative recruiting”: when coaches cast aspersions of homosexuality on a competitor’s team as a tool to recruit athletes to the coach’s own team.<sup>17</sup> Negative recruiting is a tool of homophobia in the women’s game.<sup>18</sup> An ESPN survey of Division-I women’s basketball players found that over half had experienced negative recruiting in the college recruiting process.<sup>19</sup> This tactic not only excludes and marginalizes lesbian players, but it also hurts employment opportunities in coaching for women, whether gay or straight—

13. *Id.*

14. Both the award-winning Amazon series *Transparent* and the popular Netflix series *Orange Is the New Black* feature transwomen as central characters. See Curtis M. Wong, *GLADD Trans Images on TV Report Finds Portrayals of Transgender Characters Are Improving Slowly*, HUFFINGTON POST (Feb. 2, 2016, 12:13 PM), [http://www.huffingtonpost.com/2014/11/19/glaad-trans-images-on-tv\\_n\\_6185720.html](http://www.huffingtonpost.com/2014/11/19/glaad-trans-images-on-tv_n_6185720.html). But see Whitney Friedlander, *TV Still Lacking in Racially Diverse LGBT Characters, According to GLADD Report*, VARIETY (Oct. 27, 2015, 3:00 AM), <http://variety.com/2015/tv/news/tv-lacking-in-racially-diverse-lgbt-characters-according-to-glaad-report-1201627292/> (“It’s still a [W]hite man’s world for LGBT characters on scripted series but diversification is improving, according to GLADD’s annual ‘Where We Are on TV’ report.”).

15. See Carl Hulse, *Senate Repeals Ban Against Openly Gay Military Personnel*, N.Y. TIMES (Dec. 18, 2010), [http://www.nytimes.com/2010/12/19/us/politics/19cong.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/12/19/us/politics/19cong.html?pagewanted=all&_r=0).

16. For an insightful discussion of the facts of the case, the settlement, and the broader issues of anti-lesbian bias in women’s sport and its intersection with race and class, see Kristine E. Newhall & Erin E. Buzuvis, (*e*)*Racing Jennifer Harris: Sexuality and Race, Law and Discourse*, in Harris v. Portland, 32 J. SPORT & SOC. ISSUES 345 (2008).

17. See Luke Cyphers & Kate Fagan, *Unhealthy Climate*, ESPN MAG. (Feb. 7, 2011), <http://espn.go.com/ncw/news/story?page=Mag15unhealthyclimate>.

18. *See id.*

19. *See id.*

especially for women who are not married to men.<sup>20</sup> Male coaches and heterosexual married women may be able to successfully insinuate that their own team has wholesome family values (code words for “no lesbians”), with the implication that another team does not.<sup>21</sup> Contrast this with men’s athletics, where this kind of negative recruiting does not exist. There is no anticipation of homosexuality within the men’s game to exploit: The men—and they are virtually all men—coaching men’s sports are presumptively straight, as are the male athletes on the team.<sup>22</sup> Thus, the attribution of a gay identity to competing men’s teams does not culturally compute; it lacks the bogeyman scare power that such an insinuation has in the women’s game.<sup>23</sup>

The force of this observation—that homophobia, while it exists in both men’s and women’s sports, is on a different footing in the men’s game—is further illustrated by recent reactions to out male and female celebrity athletes. For an example, one can look to the media’s treatment of Abby Wombach, one of the greatest professional soccer players (male or female) of all time.<sup>24</sup> Wombach’s marriage to her wife and the couple’s public appearances, including a televised kiss after winning the Women’s World Cup, posed no threat to either her playing career or her power as a sports celebrity.<sup>25</sup> Contrast this with the experience of

20. See Deborah L. Brake, *Discrimination Inward and Upward: Lessons on Law and Social Inequality from the Troubling Case of Women Coaches*, 2 IND. J.L. & SOC. INEQ. 1, 14 (2013).

21. See Cyphers & Fagan, *supra* note 17.

22. See Deborah Brake, *Sport and Masculinity: The Promise and Limits of Title IX*, in *MASCULINITIES AND THE LAW* (Frank Rudy Cooper & Ann C. McGinley eds., 2012). An exception to this assumption exists for men who participate in the few men’s sports that lurk in the shadows of a questionable sexuality—those that do not conform to traditional masculinity, such as figure skating. However, most men’s sports—and virtually all of those sports that are offered in educational institutions—are characterized by speed, strength, and contact and are not judged by aesthetic standards; these sports culturally code as masculine and give rise to a presumptive heterosexuality in the sport’s very identity. See Marie Hardin & Jennifer D. Greer, *The Influence of Gender-Role Socialization, Media Use and Sports Participation on Perceptions of Gender-Appropriate Sports*, 32 J. SPORT BEHAV. 207, 209, 221 (2009).

23. See Vikki Krane, *Gendered Social Dynamics in Sport*, in *GROUP DYNAMICS IN EXERCISE AND SPORT PSYCHOLOGY: CONTEMPORARY THEMES* 159, 167 (Mark R. Beauchamp & Mark A. Eys eds., 2007) (“Because female athletes are thought by some people to contradict ideal femininity, they are often stereotyped as lesbian. . . . Alternatively and stereotypically, it often is considered inconceivable that masculine males can be gay; thus it is assumed that gay males do not exist in sport (a patently inaccurate precept).”).

24. Laken Litman, *Barack Obama Declares Abby Wambach the Greatest of All Time*, USA TODAY (Dec. 16, 2015, 3:54 PM), <http://ftw.usatoday.com/2015/12/barack-obama-declares-abby-wambach-the-greatest-of-all-time>.

25. See Alissa Greenberg, *Abby Wambach Kissing Her Wife After Winning the World Cup Will Warm Your Heart*, TIME (July 6, 2015), <http://time.com/>

Michael Sam, the talented defensive end who was All-American and the Southeastern Conference Defensive Player of the Year while a senior at the University of Missouri.<sup>26</sup> Sam came out as gay before going into the National Football League (NFL) draft,<sup>27</sup> prompting a frenzy of speculation about how his identity as a gay athlete would affect his chances in the NFL draft and his ability to succeed in the league.<sup>28</sup>

The presence of a gay male athlete is culturally startling and anxiety-producing in men's sports because of sport's deep connections to normative heterosexual masculinity. While social norms have shifted enough in women's sports to broaden the range of femininity that is culturally valued for girls and women (within limits), the range of acceptable masculinity in men's sports remains distinctively narrow.<sup>29</sup> For the most part, the all-male athletic world does not fully accept, much less embrace, the inclusion of gay, bisexual, queer, or questioning athletes in elite men's sports.

This Article will discuss the challenge of LGBT inclusion in sport by drawing on insights from masculinities studies to consider how Title IX of the Education Amendments of 1972<sup>30</sup> might intervene to incentivize the development of more inclusive masculinities—that is, masculinities that do not privilege heteronormativity—in men's sports. After summarizing some of the core tenets of the field of masculinities studies and briefly surveying sport's historic role as a potent institution for constructing masculinity,<sup>31</sup> the Article will discuss three practices that police the boundaries of normative masculinity in men's

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3946226/abby-wambach-womens-soccer-world-cup-wife-kiss-lgbt-gay-marriage/.

26. Ralph D. Russo, *Missouri All-American Defensive End Michael Sam Announces He Is Gay*, NCAA (Feb. 10, 2014, 9:58 AM), <http://www.ncaa.com/news/football/article/2014-02-10/missouri-all-american-defensive-end-michael-sam-announces-he-gay>.

27. *See id.*

28. *See* Lisa A. Mazzie, *Michael Sam and the NFL Locker Room: How Masculinities Theory Explains the Way We View Gay Athletes*, 25 MARQ. SPORTS L. REV. 129 (2014). Sam was ultimately drafted by the St. Louis Rams—the first time an openly gay football player had been drafted into the NFL. Nick Wagoner, *Michael Sam: 'Overwhelmed' by Pick*, ESPN (May 12, 2014), [http://espn.go.com/nfl/draft2014/story/\\_id/10913755/2014-nfl-draft-michael-sam-drafted-st-louis-rams-seventh-round](http://espn.go.com/nfl/draft2014/story/_id/10913755/2014-nfl-draft-michael-sam-drafted-st-louis-rams-seventh-round). *See also* Holly Yan & Dave Alsup, *NFL Draft: Reactions Heat Up After Michael Sam Kisses Boyfriend on TV*, CNN (May 13, 2014), <http://www.cnn.com/2014/05/12/us/michael-sam-nfl-kiss-reaction/>.

29. *Cf.* BARRIE THORNE, GENDER PLAY: GIRLS AND BOYS IN SCHOOL 115–18 (1999) (observing that while the “tomboy” label has lost its power to punish athletic girls and is more likely to be understood as a compliment, boys still live in fear of being called a “sissy,” “fag,” or “queer” in the locker room and on the field).

30. 20 U.S.C. § 1681 (2015).

31. *See infra* Part I.

sports: (1) anti-gay harassment; (2) sexual assault and exploitation of women; and (3) the hazing of male teammates, which often involves anti-gay and sexually explicit language and actions without regard to the actual or perceived sexual orientation of the recipients.<sup>32</sup> While these three practices are usually considered to be distinct and unrelated, this Article will argue that they are actually interrelated and reinforce each other.<sup>33</sup> The Article will then consider how the federal statute that prohibits sex discrimination in school-affiliated sports programs, Title IX, applies to these practices.<sup>34</sup> In recent years, stronger applications of Title IX have coincided with increased social activism surrounding the issues of LGBT rights and campus sexual assault.<sup>35</sup> There has been relatively less student-led activism to change the norms of sports that give rise to hazing practices, an area where Title IX's application has been more uneven.<sup>36</sup> Nevertheless, developments in Title IX's interpretation and application hold promise for interrupting the masculinizing practices in men's sports that are antithetical to the goal of inclusion.<sup>37</sup>

## I. A Brief Primer on Masculinities (with Attention to Masculinities and Sport)

The study of gender has been greatly enriched by the past two decades' work developing an interdisciplinary field of masculinities studies. Drawing on a diverse array of disciplines, including sociology, social psychology, anthropology, cultural studies, and critical theory, the study of masculinities has more recently brought its insights to critical legal theory, including feminist theory and queer theory.<sup>38</sup> Increasingly, scholars and advocates are recognizing that gender equality projects of all stripes require attention to masculinities, as well as to how law constructs, reinforces, or intervenes in the creation of certain masculinities in relation to others.<sup>39</sup>

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32. See *infra* Parts II, III.A, III.B, III.C.

33. See *infra* Part III.D.

34. See *infra* Part III.D.

35. See *infra* Part III.D.

36. See *infra* Part III.D.

37. See *infra* Part III.D.

38. See, e.g., Nancy E. Dowd, Nancy Levit & Ann C. McGinley, *Feminist Legal Theory Meets Masculinities Theory*, in *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH* 25 (Frank Rudy Cooper & Ann C. McGinley eds., 2012).

39. In recent years, the subject of law and masculinities has had extensive coverage in law review symposia. See, e.g., Symposium, *Feminist Perspectives in Masculinities Symposium*, 33 HARV. J.L. & GENDER 415 (2010); Symposium, *Men, Masculinities, and Law: A Symposium on Multidimensional Masculinities Theory*,

While this is not the place for a comprehensive introduction to masculinities studies, this Section will summarize a few foundational precepts from the field that are useful for thinking about law's engagement with LGBT inequality and exclusion in sport. First, masculinity (which is like femininity in this respect) is a social construction; it is not innate or biological.<sup>40</sup> Men—by which I mean to signify persons born with characteristics that register medically and culturally as “male”—are not born with masculinity.<sup>41</sup> Rather, masculinity is socially and culturally constructed through men's performances of gender as they go through their lives.<sup>42</sup> Because masculinity is constructed, it must be earned. Moreover, because it can be lost or compromised, it must be proven and re-proven, again and again.<sup>43</sup>

As a social construct, masculinity is neither homogenous nor equally available to all men.<sup>44</sup> A multiplicity of identities interact with masculinity—including race, class, and sexual orientation.<sup>45</sup> Masculinity is also shaped by institutional and situational factors<sup>46</sup>: What codes as masculinity in a fire department is not the same as how masculinity is perceived in a Wall Street firm. The multiplicity of masculinities—the idea that there is no singular masculinity, no one way of being (or of being culturally understood as) a man—is so central to the field that the moniker is plural: it is called “masculinities” studies, rather than the study of “masculinity.”<sup>47</sup>

While there is no singular masculinity, the foundational understanding in the field is that there are hierarchies of masculinities that privilege one masculinity over all others.<sup>48</sup> An early and influential masculinities scholar, R.W. Connell, coined the term “hegemonic masculinity” to refer to the dominant, idealized masculinity that sits at the top of the hierarchy, over and

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13 NEV. L.J. 315 (2013). It has also caught the attention of book publishers. *See, e.g.*, RICHARD COLLIER, *ESSAYS ON LAW, MEN AND MASCULINITIES* (2006); NANCY DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* (2010); *MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH* (Frank Rudy Cooper & Ann C. McGinley eds., 2012).

40. *See* Dowd, Levit & McGinley, *supra* note 38, at 34.

41. *See id.*

42. *See id.* at 25.

43. *See id.* at 28.

44. *See id.* at 35.

45. *Id.*

46. *See id.* at 28.

47. *See* Athena Mutua, *The Multidimensional Turn*, in *MASCULINITIES AND THE LAW*, *supra* note 39, at 84–85.

48. *See* Dowd, Levit & McGinley, *supra* note 38, at 35.

above other, marginalized masculinities.<sup>49</sup> Connell defined hegemonic masculinity as “the culturally idealized form of the masculine character that emphasizes the connection between masculinity, toughness, and orientation toward competition and subservience of women.”<sup>50</sup> In addition to asserting male dominance over women, a key feature of hegemonic masculinity is that it enforces dominance over other, less “masculine” men.<sup>51</sup> Among the masculinities that are most subordinated by hegemonic masculinity are gay, bisexual, transgender, queer, or questioning masculinities.<sup>52</sup> Indeed, heterosexism and homophobia are thought to be defining features of hegemonic masculinity.<sup>53</sup> Although the theory of hegemonic masculinity has recently been attacked by some masculinities scholars for being too totalizing a theory and for not responding to changes in gender practices, it remains a central part of the canon of masculinities studies.<sup>54</sup>

An important nuance in theorizing hegemonic masculinity is the emphasis on hegemonic masculinity as performative.<sup>55</sup> That is, adherence to hegemonic masculinity does not emanate from one’s social identity as a straight man, a White man, a working class man, or from any other status.<sup>56</sup> Rather, it is attained through conformity to the ideals of hegemonic masculinity and by avoiding being identified as having a marginalized, subordinated masculinity.<sup>57</sup> Eric Anderson’s theory of “orthodox masculinity”—a term which he prefers over “hegemonic masculinity”—captures this view: that hegemonic masculinity attains dominance by

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49. R.W. CONNELL, *MASCULINITIES* (1995) [hereinafter CONNELL, *MASCULINITIES*].

50. R.W. CONNELL, *GENDER AND POWER: SOCIETY, THE PERSON AND SEXUAL POLITICS* 250 (1987).

51. See Dowd, Levit & McGinley, *supra* note 38, at 35 (“In relation to hegemonic masculinity, there are subordinate masculinities, and subversive masculinities.”).

52. See *id.*

53. Jennifer J. Waldron et al., *Duct Tape, Icy Hot and Paddles: Narratives of Initiation onto U.S. Male Sport Teams*, 16 *SPORT, EDUC. & SOC’Y* 111, 112 (2011) (“[H]eterosexuality, heterosexism and homonegativism are cornerstones of hegemonic masculinity, which is constructed by subordinating femininities and marginalized masculinities or creating ‘othered’ and unaccepted behavioral patterns.” (citations omitted)).

54. See, e.g., Phyllis L. Baker & Douglas R. Hotek, *Grappling with Gender: Explaining Masculinities and Gender in the Bodies, Performances, and Emotions of Scholastic Wrestlers*, 1 *J. FEMINIST SCHOLARSHIP* 49, 49–51, 60–61 (2011) (discussing the theory and critiques of hegemonic masculinity).

55. See Eric Anderson, “*I Used To Think Women Were Weak*”: *Orthodox Masculinity, Gender Segregation, and Sport*, 23 *SOC. F.* 257, 265–67 (2008) [hereinafter Anderson, *Orthodox Masculinity*].

56. See *id.*

57. See *id.*



inducing conformity to its ideals.<sup>58</sup> Orthodox masculinity pressures men to act in alignment with favored masculine norms, which are not set in stone, but are historically and institutionally contingent.<sup>59</sup>

The power of hegemonic masculinity to subordinate masculinities that fail to live up to these ideals is anxiety-producing for men.<sup>60</sup> Hegemonic masculinity is an aspirational ideal; it is not a standard that most men can live up to. Most men never attain this ideal, and the few who do must continually remain vigilant, lest they lose it.<sup>61</sup> It is elusive and precarious, and yet, while most men do not measure up to the hegemonic ideal, there is a power, a gender privilege, that comes with being a man and claiming conformity to orthodox masculinity.<sup>62</sup>

Attaining hegemonic masculinity is elusive partly because it is clearer and more forceful in its negative admonitions than in any positive prescriptions for how to achieve it. As elaborated by masculinities scholars, hegemonic masculinity's most critical commands are to not be "feminine" and to not be "gay."<sup>63</sup> The centrality of these admonitions prompted Michael Kimmel to describe masculinity as "the flight from the feminine."<sup>64</sup>

In these proscriptions—to not be "feminine," to not be "gay"—the sexual subordination of women is inextricably linked with the subordination of homosexuality. Hegemonic masculinity requires men to prove their masculinity by having sex with women.<sup>65</sup> By doing so, a man's goal is not so much to prove his masculinity to women, but to prove it to other men.<sup>66</sup> By flaunting their sexual experiences with women, men can prove their heterosexuality to

58. *See id.* at 261–62.

59. *See* Eric Anderson, *Updating the Outcome: Gay Athletes, Straight Teams, and Coming Out in Educationally Based Sports Teams*, 25 GENDER & SOC'Y 250, 251–53 (2011) [hereinafter Anderson, *Updating the Outcome*].

60. *See* Joseph Vandello et al., *Precarious Manhood*, 95 J. PERSONALITY & SOC. PSYCH. 1325, 1326 (2008).

61. *Id.*

62. *See* Waldron et al., *supra* note 53, at 112–13 ("Although hegemonic masculinity is the defining gender performance for White Euro-American, heterosexual and able-bodied men, most men do not actually epitomize it. Yet, the majority of men gain societal power and privilege through approximation of idealized masculine behaviors.").

63. *See* Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame and Silence in the Construction of Gender Identity*, in FEMINISM & MASCULINITIES 182, 185 (Peter Murphy ed., 2004).

64. *See id.*

65. *Id.*

66. *Id.* at 186.

other men and can disassociate themselves from homosexuality.<sup>67</sup>

Men can also conform to hegemonic masculinity's directive to not be "gay" by participating in homophobic practices that disparage homosexuality.<sup>68</sup> Kimmel describes homophobia as a way for men to prove their masculinity to other men, in response to anxiety about being perceived by other men as insufficiently masculine.<sup>69</sup> Anxiety about attaining and maintaining masculinity can induce men to engage in hyper-masculine performances as a way to align themselves with the ideals of hegemonic masculinity.<sup>70</sup>

Of the many institutional settings in which masculinity is constructed, sport has a singular influence in inculcating the ideals of hegemonic masculinity among its participants. There is a distinct body of work in sport and gender studies exploring masculinities in connection with male sports participation.<sup>71</sup> It is a well-accepted part of the canon of sport and masculinities studies that sport is a particularly masculinizing institution and that hegemonic masculinity is a fixture in the culture of men's sports.<sup>72</sup> Such works demonstrate that the range of masculinities permissible under orthodox masculinity are particularly narrow in the sport setting and that the influence of hegemonic masculinity is particularly powerful.<sup>73</sup>

The physicality of sport, with its emphasis on physical strength; aggressiveness; competition; and endurance, including enduring pain and discomfort—all of which are qualities associated with being masculine—makes sport an ideal proving ground for masculinity.<sup>74</sup> Scholars of sport and gender have identified "an ideology in sport that is not simply about strength or superiority, but about domination, and more specifically about the

67. *Id.*

68. *Id.* at 188–89.

69. *Id.*

70. *See, e.g.,* CONNELL, *MASCULINITIES*, *supra* note 49, at 78.

71. Michael Messner is one of the foundational scholars in the field of sport and masculinities. *See* MICHAEL A. MESSNER, *IT'S ALL FOR THE KIDS: GENDER, FAMILIES, AND YOUTH SPORTS* (Naomi Schneider ed., 2009); MICHAEL A. MESSNER, *POWER AT PLAY: SPORTS AND THE PROBLEM OF MASCULINITY* (Lauren Bryan ed., 1992).

72. *See, e.g.,* Waldron et al., *supra* note 53, at 112 ("In male sport settings, hegemonic masculinity often is the foundation for team identities and acceptance of the sport ethic.").

73. *Id.* at 113 ("Although multiple and alternative masculinities exist [e.g., working-class masculinity, Black masculinity, metrosexuality], within sport a very narrow conception of masculinity is privileged—one that marginalizes not being feminine or gay and that reveres muscularity and strength.").

74. *See* Nancy Theberge, *Sport and Women's Empowerment*, 10 *WOMEN'S STUD. INT'L F.* 387, 388 (1987).

domination of women by men.”<sup>75</sup> Under the logic of hegemonic masculinity, the subordination of women and the subordination of homosexuality are seamlessly connected. This plays out in sport settings in myriad ways, but nowhere is it more pervasive than in the prevalence of misogynistic and homophobic talk among male athletes.<sup>76</sup> As Timothy Curry found in his groundbreaking 1991 study of male locker rooms, gender-specific insults by coaches and by other male athletes commonly conflate the loss of masculinity with femininity and with homosexuality.<sup>77</sup> The resiliency of such practices was brought home to me recently, when a close friend and colleague observed her son’s soccer coach berating his players for playing “too womanly.”<sup>78</sup>

The history of sport’s introduction into United States schools confirms sport’s place as a key masculinizing institution through which boys become men. With the industrial revolution’s shift from men working farming and home-based occupations to their working in wage-labor, the U.S. economic and social structure went from being predominantly agrarian to being capitalistic and industrial.<sup>79</sup> As men left their homes and farms for paid wage work, boys were left under the care and supervision of women—mothers and teachers—for the vast majority of the day.<sup>80</sup> In this

milieu, concerns arose about the feminization of boys.<sup>81</sup> Sports were introduced into the schools as an antidote to this feminization: to teach boys to become men.<sup>82</sup>

The all-male setting of boys’ and men’s sports contributes to this outsized role for hegemonic masculinity.<sup>83</sup> Title IX’s general prohibition on sex-based exclusion in education programs and activities makes an exception for competitive sports in which

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75. *Id.* at 389.

76. Timothy Jon Curry, *Fraternal Bonding in the Locker Room: A Profeminist Analysis of Talk About Competition and Women*, 8 SOC. SPORT J. 119, 133 (1991).

77. *Id.*; see CONNELL, MASCULINITIES, *supra* note 49, at 79.

78. Joanna L. Grossman & Deborah L. Brake, *Playing Too ‘Womanly’ and the Problem of Masculinity in Sport*, VERDICT (Sept. 17, 2013), <https://verdict.justia.com/2013/09/17/playing-too-womanly-and-the-problem-of-masculinity-in-sport>.

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

80. MICHAEL S. KIMMEL, *THE POLITICS OF MANHOOD: PROFEMINIST MEN RESPOND TO THE MYTHOPOETIC MEN’S MOVEMENT* 32 (1995).

81. Deborah L. Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J. L. REFORM 13, 92 (2001).

82. *See id.*

83. *See* Waldron et al., *supra* note 53, at 112.

selection is based on competitive skill and for contact sports for which a major purpose or reality is bodily contact.<sup>84</sup> As a result, the vast majority of interscholastic and intercollegiate sports opportunities are offered separately for male and female athletes. The all-male enclave of men's sports creates an environment ripe for hegemonic masculinity to take hold: All-male settings tend to be more homophobic and to promote masculine performances that denigrate homosexuality and flaunt sexual conquests of women.<sup>85</sup> A recent study by Eric Anderson also showed the converse of this trend: Moving male athletes from all-male sport settings to gender-integrated sport settings reduced their performances of hegemonic masculinity.<sup>86</sup>

The physical intimacy of the sport setting accentuates the urgency to conform to the ideals of hegemonic masculinity.<sup>87</sup> The close contact between men in sports, both on the field and in the locker room, heightens the imperative placed on boys and men to prove that they are not gay.<sup>88</sup>

Another feature of sport that contributes to the rigidity of hegemonic masculinity is the emphasis on conformity that pervades athletic culture. In team sports especially, team loyalty and values trump individual demands.<sup>89</sup> Those who fail to conform to orthodox masculinity are punished for violating team norms.<sup>90</sup> More than most social settings, athletics more totally consumes the lives of its participants both on and off the field.<sup>91</sup> This conformity is reproduced in the selection of coaches, who typically over conform to the norms of the team and of male sports culture.<sup>92</sup>

For all these reasons, the imperatives of orthodox masculinity in men's sports—in particular, the emphatic imperative to not be “gay”—have made sport a particularly perilous place for gay men.<sup>93</sup> This imperative of hegemonic masculinity is especially unforgiving for men participating in those institutionally most-valued of men's sports—typically football and basketball, and sometimes hockey and other contact sports—and

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84. 34 C.F.R. § 106.41 (2012).

85. Waldron et al., *supra* note 53, at 112.

86. Anderson, *Orthodox Masculinity*, *supra* note 55, at 258 (presenting a study of former male football players who joined a co-ed cheerleading team).

87. Curry, *supra* note 76, at 130.

88. *Id.*; see PRONGER, *supra* note 79, at 4.

89. See Waldron et al., *supra* note 53, at 112.

90. *Id.* at 113.

91. See Anderson, *Updating the Outcome*, *supra* note 59, at 250–51.

92. See *id.* at 258.

93. *Id.* at 250–51.

for the athletes who progress to the highest and most elite levels of sport.<sup>94</sup>

The imperative not to be “gay” extends to doing anything that would challenge or resist that imperative. As Curry concluded in his ethnographic study of male locker rooms, “[n]ot only is being homosexual forbidden, but tolerance of homosexuality is theoretically off limits as well.”<sup>95</sup> This dynamic was evident in the very incident that prompted this Symposium, the reaction to NFL player Chris Kluwe when he spoke out in favor of marriage equality.<sup>96</sup> Sport and gender scholars could have predicted that, notwithstanding increased popular support for same-sex marriage, the public embrace of a key marker of LGBT equality by a professional football player would not be well-received in the rarefied environment of elite men’s sports.

So far, this discussion reflects the canon of sport and masculinities studies that emphasizes the centrality of homophobia to the hegemonic masculinity that rules men’s sports and to sport’s resistance to change. It is part of the established wisdom of sport and gender scholars that hegemonic masculinity is deeply entrenched in sport and that sport has been less adaptive than other societal institutions in responding to changes in the levels of sexism and homophobia in society.<sup>97</sup>

Against this background, important new work by masculinities scholars has called for revisiting this established wisdom. Some masculinities scholars have documented a decline in homophobia in men’s sports settings alongside an increasingly inclusive environment for openly gay male athletes on intercollegiate sports teams.<sup>98</sup> Prominently within such work, Eric Anderson has found important differences between a study he did with openly gay male college athletes in 2002<sup>99</sup> and a similar study he conducted in 2010.<sup>100</sup> While the 2002 study concluded that only the most athletically successful individuals—that is, the best

94. *Id.*

95. Curry, *supra* note 76, at 130.

96. Chuck Schilken, *Ex-Vikings Punter Chris Kluwe: I Was Fired by a Bigot and Two Cowards*, L.A. TIMES (Jan. 2, 2014), <http://articles.latimes.com/2014/jan/02/sports/la-sp-sn-vikings-chris-kluwe-20140102>.

97. Anderson, *Updating the Outcome*, *supra* note 59, at 263.

98. See, e.g., Adi Adams, “Josh Wears Pink Cleats”: *Inclusive Masculinity on the Soccer Field*, 58 J. HOMOSEXUALITY 579 (2011) (finding dominant norms favoring inclusive masculinity rather than hegemonic masculinity in a study of a men’s soccer team at a Midwestern liberal arts college).

99. Eric Anderson, *Openly Gay Athletes: Contesting Hegemonic Masculinity in a Homophobic Environment*, 16 GENDER & SOC’Y 860 (2002) [hereinafter Anderson, *Openly Gay Athletes*].

100. Anderson, *Updating the Outcome*, *supra* note 59.

athletes on the team—had sufficiently “high masculine capital” to come out, the athletes interviewed in 2010 had a diverse range of athletic abilities and were not, for the most part, the best athletes on their teams.<sup>101</sup> Moreover, while the 2002 study involved gay athletes participating predominantly in individual sports such as swimming, running, and tennis,<sup>102</sup> the 2010 study found gay athletes who were out in team sports too, including in contact sports like hockey, football, and wrestling.<sup>103</sup> Notably, Anderson had an easier time locating openly gay intercollegiate athletes in 2010 than in 2002.<sup>104</sup> His research makes a persuasive case for retheorizing hegemonic masculinity to allow for the possibility that, as homophobia declines in the broader culture, the hierarchy of masculinities will also change so that hegemonic masculinity becomes disentangled from homophobia, and no single masculinity will dominate over others.<sup>105</sup> He argues that, as homophobia has declined in the broader culture, sport has become more open to “inclusive masculinities”—that is, masculinities that are not constructed as oppositional to homosexuality or to other subordinated masculinities, thereby making sport a more welcoming place for gay athletes.<sup>106</sup>

This recently documented shift in the culture of men’s sports toward a more inclusive environment for gay male athletes is encouraging and important. But in my view, its importance lies not so much with what it tells us about whether homophobia is actually waning in men’s sports or whether increasing numbers of male athletes are coming out and receiving a more welcoming reception when they do. Such changes may well be underway, but the studies are limited in terms of what can be inferred about any reduction in the levels of homophobia in men’s sports. As Anderson acknowledges, both of his studies involved small sample sizes and little racial and class diversity among the subjects, and they surveyed only those athletes who self-identified as gay and were out on their teams.<sup>107</sup> Those parameters left out many gay athletes whose experiences would not have been representative of the subjects interviewed.

So, while this research may or may not harken the demise of

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101. *Id.* at 251.

102. Anderson, *Openly Gay Athletes*, *supra* note 99, at 865.

103. Anderson, *Updating the Outcome*, *supra* note 59, at 264.

104. *Id.* at 255–57.

105. Anderson, *Openly Gay Athletes*, *supra* note 99, at 873–75.

106. See Eric Anderson, *The Rise and Fall of Western Homophobia*, 1 J. FEMINIST SCHOLARSHIP 80, 89–90 (2011).

107. Anderson, *Openly Gay Athletes*, *supra* note 100, at 864; Anderson, *Updating the Outcome*, *supra* note 59, at 255.

homophobia in men's sport, its fundamental importance is to show the susceptibility of hegemonic masculinity to change.<sup>108</sup> At times, the sport and gender literature asserts such a strong connection between sport and hegemonic masculinity that it reads as if men's sport were inherently marked by a hegemonic masculinity that subordinates nonconforming men—including, and especially, gay men. This has been the case historically in the United States, but is it inherently so? Anderson's work importantly suggests that it has *not*, particularly because his two studies drew subjects from a similar demographic and used similar research methods.<sup>109</sup> If hegemonic masculinity in sport is not inherent, but is historically contingent, then there must be opportunities to resist and transform it. Likewise, if hegemonic masculinity in sport is historically contingent and not fixed, then there must be discernable practices that sustain and enforce it. The next Section turns to some of those practices in order to preface the final Section's analysis of how law might intervene to interrupt them.

## II. Examining Three Hetero-Masculinizing Practices in Men's Sports

Hegemonic masculinity in sport is enforced and maintained in numerous subtle and not-so-subtle ways. This Section hones in on three such practices that, at least in their extreme forms, Title IX might realistically police. These practices are variations on hyper-masculine performances that create a hostile environment for gay athletes: anti-gay harassment of athletes, the sexual assault and abuse of women by male athletes, and sexualized and anti-gay hazing practices among athletes. Although these behaviors are usually regarded as distinct and unrelated, they are actually interrelated and reinforce each other. Together, they enforce an orthodox masculinity in men's sports that is hostile to gay athletes. Curbing these toxic practices and sensitizing educational institutions will proactively establish more welcoming educational environments and will prevent such practices which would help pave the way for athletic cultures that are more

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108. Work by researchers studying masculinities in organizations have demonstrated that hegemonic masculinity in the workplace is also vulnerable to change and can be dislodged by shifting institutional priorities and incentives. See Robin J. Ely & Debra E. Meyerson, *Unmasking Manly Men: The Organizational Reconstruction of Men's Identity*, 2006 ACAD. MGMT. PROC. J1-J6 (studying masculinities among men working on an offshore oil rig).

109. Anderson, *Openly Gay Athletes*, *supra* note 100, at 864; Anderson, *Updating the Outcome*, *supra* note 59, at 255.

amenable to inclusive masculinities.

The first practice mentioned, anti-gay harassment of athletes, quite obviously supports and furthers hegemonic masculinity and subordinates non-conforming masculinities. One feature of such harassment that may not be obvious is that it targets athletes who self-identify as gay or who are perceived as gay—regardless of their actual sexual orientation—because they are in some way less “masculine.” Social markers of homosexuality can come from a wide range of characteristics and perceptions which have little or nothing to do with a person’s actual sexual orientation.<sup>110</sup> Anti-gay harassment subordinates the masculinity of the target while bolstering masculinity of the aggressors, and it supports hegemonic masculinity, whether or not the target is gay. Because many markers of gender nonconformity might tag a man as “gay” and make him a target of anti-gay abuse, this practice forces boys and men into a narrow range of masculine behaviors and performances in order to avoid it.

A second practice that both supports hegemonic masculinity and subordinates gay men in sport is the sexual subordination of women by male athletes. Sexual assault is an extreme form of this, but it includes other forms of sexual degradation of women as well, such as objectifying and demeaning locker room talk, sexual harassment, sexual exploitation, and conforming to or contributing to peer pressure to have sex with women, regardless of a woman’s desire or consent.<sup>111</sup> In all-male settings rife with hegemonic masculinity, men may seek to prove their masculinity to one another by acting out sexual aggression toward women.<sup>112</sup> At its most extreme, this practice can take the form of gang rape.<sup>113</sup>

Title IX case law contains numerous examples of sexually degrading and abusive behaviors directed toward women, performed by and in front of male athletes in men’s sports

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110. See, e.g., *Davis v. Carmel Clay Schs.*, No. 1:11-cv-00771-SEB-MJD, 2013 WL 5487340, at \*1 (S.D. Ind. Sept. 30, 2013) (describing how plaintiff, a freshman manager of a boys’ basketball team, was subjected to sexually explicit, anti-gay harassment, even though he was unsure of why his harassers perceived him as gay, but suggesting it may have been because of his “habits and proclivities”); *Theno v. Tonganoxie Unified Sch. Dist.* No. 464, 394 F. Supp. 2d 1299, 1306 (D. Kan. 2005) (describing how male plaintiff was subjected to anti-gay abuse and harassment by members of the boys’ basketball team, who singled him out because he participated in martial arts, wore an earring, and had an unusual hairstyle).

111. See Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 693 (1999) (discussing male sexual conquests of women regardless of their consent as a mode of proving masculinity to other men).

112. See *id.* at 673–74.

113. See Ann Scales, *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, 15 MICH. J. GENDER & L. 205, 259 (2009).



settings.<sup>114</sup> The fact patterns vary greatly, but include sexual objectification, degrading comments, and explicit and unwelcome sexual overtures toward women.<sup>115</sup> Sometimes the women are themselves participants in male sports settings, such as team managers,<sup>116</sup> athletes,<sup>117</sup> or reporters.<sup>118</sup> Sometimes the women are outsiders but are treated as inducements or rewards for male athletic participation.<sup>119</sup> The most extreme cases involve sexual assault of women by male athletes, including gang rapes in which multiple male athletes have sex with the same woman in front of each other.<sup>120</sup>

The problem of campus sexual assault has received renewed attention recently, and rightly so, as reports continue to document disturbingly high levels of sexual assault experienced by women at colleges and universities.<sup>121</sup> This has shed light on how male-only sports raise the risk that men will engage in sexual assaults.<sup>122</sup>

114. For example, a female graduate student and football manager sued her school after she was humiliated and embarrassed by sexually explicit comments and insults made by football team members, and alleged that she was removed from her position after complaining. *See Summa v. Hofstra Univ.*, 708 F.3d 115 (2d Cir. 2013). In another case, a female football player reported similar tactics by her male teammates, which resulted in a sexually hostile environment that drove her off the team. *See Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1183 (10th Cir. 2007) (discussing the university's notice of the sexual harassment of Katie Hnida by her teammates); Scales, *supra* note 113, at 214–15 (discussing the harassment of Hnida).

115. *See, e.g., Summa*, 708 F.3d at 120 (“[P]layers made comments regarding [the female team manager’s] boyfriend, including that she should engage in sexual relations with him on the bus and that she should sit with another player if she wanted to be with a ‘real man,’ asserted that women should not be managers because they don’t know anything about sports, and made remarks relating to [plaintiff’s] use of the bathroom on the team bus.”).

116. *See, e.g., id.* (describing hostility experienced by a female football team manager).

117. *See, e.g., Simpson*, 500 F.3d at 1183 (describing harassment of a female place kicker).

118. The precarious position of female reporters in the locker room was on full display in the treatment of sports reporter Lisa Olson by the New England Patriots. *See* Lisa Disch & Mary Jo Kane, *When a Looker Is Really a Bitch: Sport and the Heterosexual Matrix*, in *READING SPORT: CRITICAL ESSAYS ON POWER AND REPRESENTATION* 108 (Susan Birrell & Mary G. McDonald eds., 2000).

119. *See, e.g., Simpson*, 500 F.3d at 1173 (describing how female student “Ambassadors,” who were used to recruit men to the football team, were sexually assaulted).

120. *See Williams v. Bd. of Regents*, 477 F.3d 1282, 1288–89 (11th Cir. 2007); *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 132 F.3d 949, 953 (4th Cir. 1997). As Ann Scales has observed, one-third of perpetrators of gang rapes involving college students are intercollegiate athletes, despite the small number of athletes in the overall student body. Scales, *supra* note 113, at 252.

121. *See* WHITE HOUSE, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT (2014), <https://www.notalone.gov/assets/report.pdf>.

122. *See* Scales, *supra* note 113, at 208 (discussing the connection between

However, campus sexual assault is generally discussed as a problem of sex inequality—of the inequality between the predominantly male sexual aggressors and the predominantly female victims (or survivors).<sup>123</sup> And so it is. But it should also be recognized as a form of hegemonic masculinity that subordinates nonconforming masculinities in addition to subordinating women. The problem of campus sexual assault of women by men is typically not understood or discussed as related to anti-gay harassment and a resulting anti-gay climate, but these practices actually act to reinforce each other and are interconnected as they relate to hegemonic masculinity in sport.

The display of sexually aggressive behavior toward women simultaneously reinforces the dominance of hetero-masculinity and the subordination of homosexuality and marginalized masculinities. For example, in a study of male locker room talk, Curry found homophobic talk, talk about women as sex objects, and expressions of hostility toward women to be seamlessly interwoven.<sup>124</sup> The anti-gay, anti-woman, and sexually objectifying talk all served the same ends: to establish a man's heterosexual bona fides and to demonstrate his masculinity to other men.<sup>125</sup> Moreover, the inter-relation works in the other direction as well: Hegemonic masculinity in men's sports and the suppression of homosexuality and marginalized masculinities promotes and encourages a climate that supports the sexual assault of women by men.<sup>126</sup>

Hazing, the third practice discussed in this Section, often receives less attention than the first two, and it is less likely to be viewed as part of the constellation of practices that secure hegemonic masculinity in sport. And yet, hazing among male athletes can also create a homophobic and hostile environment that enforces orthodox masculinity.<sup>127</sup> Sexualized, aggressive displays of dominance over other men establish the masculinity of the higher-status men who inflict these practices, while setting

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athletics and sexual assault as the "open secret" that everyone knows but desires not to know).

123. See, e.g., Elizabeth A. Armstrong, Laura Hamilton & Brian Sweeny, *Sexual Assault on Campus: A Multilevel, Integrative Approach to Party Rape*, 53 SOC. PROBS. 483, 484 (2006) ("Continued high rates of sexual assault can be viewed as a case of the reproduction of gender inequality . . .").

124. Curry, *supra* note 76, at 128.

125. *Id.*

126. See Anderson, *Updating the Outcome*, *supra* note 59, at 252; Curry, *supra* note 76, at 127–32.

127. See Ian Rivers, *Bullying, Homophobia and Transphobia in Sport: At What Cost Discrimination?*, in ELITE CHILD ATHLETE WELFARE: INTERNATIONAL PERSPECTIVES 80, 81–83 (Celia H. Brackenridge & Daniel Rhind eds., 2010).

masculine norms for the group.<sup>128</sup> The terms commonly used for such practices, “hazing,” or the more innocuous sounding “horseplay,” do not capture the gendered dimension of how it functions as a masculinizing practice for the participants.

While there is no universally agreed-upon definition of hazing, a common theme is that the targets (initiates) must endure the ritualized use of degrading practices in order to prove to higher-status members that they are worthy of group membership.<sup>129</sup> Hazing is sometimes imposed only on new group members as a rite of passage for group membership; other times, higher-status group members repeatedly inflict hazing on subordinates in order to continually establish and reassert the masculinity of the perpetrators and of the group as a whole.<sup>130</sup> Its use in sport is intricately bound up with hegemonic masculinity.<sup>131</sup> As sport scholars Jay Johnson and Margery Holman have explained, “[t]raditional male sport subcultures tend to place a considerable amount of pressure on participants to conform to masculinist values and beliefs. Hazing is one of the processes through which this is achieved.”<sup>132</sup>

The specific acts involved in hazing may be the same as those used in the masculinizing practices described above, in that they often include anti-gay language and actions in addition to sexual assault and other sexually abusive conduct.<sup>133</sup> However, unlike anti-gay harassment, hazing does not specifically single out targets who are perceived as gay or gender nonconforming.<sup>134</sup> The point of hazing is not to punish departures from orthodox masculinity, but to inculcate a certain masculine ethos in the

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128. *Id.*

129. See KerriLynn Stone, *Lessons from the Dolphins/Richie Incognito Saga*, 14 NEV. L.J. 723, 749 (2014) (“Hazing has been defined as ‘an activity that a high-status member orders other members to engage in or suggests that they engage in that in some way humbles a newcomer who lacks the power to resist, because he or she wants to gain admission into a group.’”).

130. A close cousin of hazing, bullying, also may involve sexually explicit and degrading practices, but it functions differently in relation to masculinity. As Ann McGinley has explained, in bullying, dominant group members select a weak outcast upon whom to inflict degrading practices; they do not seek to bring the bullied subject into the group, but they instead act to stigmatize and exclude that person. See Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment “Because of Sex,”* 79 U. COLO. L. REV. 1151, 1161 (2008) [hereinafter McGinley, *Creating Masculine Identities*]. Anti-gay harassment is a form of bullying where the target is singled out for his actual or perceived sexual orientation. See *id.* at 1219–27.

131. See Jay Johnson & Margery Holman, *Gender and Hazing: The Same but Different*, 80 J. PHYSICAL EDUC., RECREATION & DANCE 6, 6 (2013).

132. *Id.*

133. See Waldron et al., *supra* note 53, at 113.

134. Johnson & Holman, *supra* note 131, at 6.

group to enforce orthodoxy.<sup>135</sup> The members of the group who impose hazing rituals on others construct their own masculinity in the process.<sup>136</sup> Ann McGinley has explained that the purpose of hazing in the workplace “is to establish the masculine credentials of the group and to assure that the newcomer adheres to these masculine norms.”<sup>137</sup> As McGinley points out, this process of creating a unified masculine group identity through hazing bears some resemblance to Peggy Sanday’s account of how participation in gang rape solidifies the masculine bonds between the men involved: The perpetrators perform masculinity for each other, using a woman as the vehicle for its expression.<sup>138</sup>

At the same time, depending on how it is endured, hazing may also end up masculinizing the subordinated group members on whom it is inflicted. While it initially feminizes the targets and masculinizes the perpetrators,<sup>139</sup> hazing may ultimately masculinize the targets *if* they appropriately endure it and are inducted into the culture of the group. At a minimum, this requires not violating group solidarity by going outside the group to challenge or report the hazing.<sup>140</sup> Speaking out, resisting, or challenging the behaviors would be an affront to the dominant norms of the group.<sup>141</sup> Through acquiescence and subservience, the initiates prove that they will conform to the norms of the group and will go to extraordinary lengths to preserve its unity.<sup>142</sup> By enduring hazing, the newly initiated members earn the right to subsequently impose similarly degrading practices on future initiates.<sup>143</sup> In this way, hazing functions as a rite of masculinization to solidify the dominant values of the group.

There is some risk, though, that the men subjected to hazing may not be able to win back their masculinity after being “feminized” by the process.<sup>144</sup> To succeed in being “masculinized” by the ritual, the initiate must “take it like a man”<sup>145</sup>—failing to do

135. *Id.*

136. *Id.* at 7.

137. McGinley, *Creating Masculine Identities*, *supra* note 130, at 1228.

138. *Id.* at 1184–86, 1228.

139. See Susan P. Stuart, *Warriors, Machismo, and Jock Straps: Sexually Exploitative Athletic Hazing and Title IX in the Public School Locker Room*, 35 W. NEW ENG. L. REV. 374 (2013).

140. See *id.* at 389.

141. See *id.* at 389–90.

142. McGinley, *Creating Masculine Identities*, *supra* note 130, at 1186, 1228.

143. Waldron et al., *supra* note 53, at 120.

144. *Id.* at 113 (“As a ritual, hazing distinguishes team members from the outsiders and it tests new team members to ‘weed out those unworthy of membership.’” (citations omitted)).

145. See *Seamons v. Snow*, 84 F.3d 1126, 1231 (10th Cir. 1996).

so “feminizes” him, making him vulnerable to further harassment and abuse.<sup>146</sup> One way a hazing victim can be “feminized” is by reporting the conduct to outside authorities.<sup>147</sup> By doing so, the hazing recipient is marked as nonconforming and in violation of the orthodox masculinity of the group.<sup>148</sup> In an example of this dynamic from Title IX case law, a male high-school football player, an underclassman, was, for initiation, hazed by a group of senior members of the team who forcibly stripped him naked, tied him with a towel to a towel rack in the locker room, and humiliated him by bringing his former girlfriend into the locker room to see him in that vulnerable position.<sup>149</sup> When he reported the culpable students to school officials,<sup>150</sup> he was subjected to anti-gay epithets

and other abuse because he “should have taken it like a man.”<sup>151</sup> In other words, his act of reporting the incident “feminized” him in relation to his male peers, leaving him vulnerable to punishment.

The narrow range of masculinity-preserving responses can be tricky for the hazing initiate to navigate. Sometimes “taking it like a man” requires fighting back, lest a hazing victim is “feminized” by too much subservience and acquiescence.<sup>152</sup> McGinley’s analysis of masculinities in the scandalous hazing which took place on the Miami Dolphins football team between Richard Incognito and Jonathan Martin illustrates this risk.<sup>153</sup> Martin, an offensive lineman, was subjected to lewd and sexually explicit abusive behaviors by Richard Incognito and several other teammates.<sup>154</sup> Martin, a heterosexual African-American player, was subjected to a gauntlet of abuse by the White Incognito, which included homophobic insults and sexually graphic comments about Martin’s mother and sister.<sup>155</sup> Other African-American players also teased Martin for not being “[B]lack enough.”<sup>156</sup> While it was not immediately obvious why Martin’s teammates subjected him

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146. *Id.* at 1233.

147. *See id.*

148. *See id.*

149. *Id.* at 1230.

150. *Id.* at 1229.

151. *Id.* at 1231.

152. *See id.* at 1233.

153. *See* Ann C. McGinley, *Title VII at Fifty Years: A Symposium*, 14 NEV. L.J. 661, 667–68 (2014) [hereinafter McGinley, *Title VII at Fifty Years*]; Stone, *supra* note 129.

154. Stone, *supra* note 129, at 734.

155. *Id.*

156. *Id.* at 740. This insult reveals that masculinity is not performed independent of race.

to this abuse, McGinley contends that his abusers marked him as a shy, reserved, Stanford graduate—an African-American intellectual who did not conform to the dominant standard of Black masculinity expected on the team.<sup>157</sup> The harassment intensified when Martin did not fight back.<sup>158</sup> Martin's efforts to avoid conflict and his perceived passivity prompted another African-American teammate to call him a "bitch."<sup>159</sup> One trainer who laughed along with the "hijinks" pulled Martin aside and told him to stand up for himself.<sup>160</sup> Martin's failure to fight back "like a man" "feminized" him and left him vulnerable to more abuse.<sup>161</sup> Martin eventually quit the team, and he suffered emotional distress.<sup>162</sup> But it is far from clear that fighting back would have ended Martin's predicament—sometimes fighting back or otherwise resisting hazing only escalates the situation.<sup>163</sup>

Fundamentally, the hegemonic masculinity enforced by hazing is predicated on the subordination of homosexuality.<sup>164</sup> Even when the targets of hazing are not selected for being (or for being perceived as) gay, hazing functions as a heterosexualizing process that is antithetical to inclusion.<sup>165</sup> Like the sexual assault of women and anti-gay harassment, hazing reinforces the hetero-masculine identities of its participants. As Jennifer Waldron explains, "[f]orcing [male] players into sexually submissive roles feminizes and emasculates rookies while also marginalizing gay males."<sup>166</sup> The genderization and sexualization of roles are common to hazing in male sports and serve to establish heterosexual team norms as a key part of the group's

157. *Id.*

158. *Id.* at 746.

159. *Id.* at 750 (citing THEODORE V. WELLS ET AL., PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, REPORT TO THE NATIONAL FOOTBALL LEAGUE CONCERNING ISSUES OF WORKPLACE CONDUCT AT THE MIAMI DOLPHINS (2014), <http://workplacebullying.org/multi/pdf/PaulWeissReport.pdf>).

160. *Id.*

161. *Id.* at 736.

162. *Id.* at 730; see Adam H. Beasley, *Miami Dolphins' Richie Incognito, Mike Pouncey and John Jerry Implicated in Wells Report*, MIAMI HERALD (Feb. 15, 2014, 12:00 AM), <http://www.miamiherald.com/sports/nfl/miami-dolphins/article1960362.html>.

163. See Waldron et al., *supra* note 53, at 121 (reporting narratives of male athletes who experienced hazing, and observing that "the athletes who resisted hazing explicitly were not embraced within the inner circle of the team. Instead, they were at best ostracized and ignored or, more disconcerting, targeted for more excessive hazing").

164. See Stuart, *supra* note 130, at 396–97.

165. See Johnson & Holman, *supra* note 131, at 8 ("Hazing is not an exercise of inclusion but rather one of exclusion and power.").

166. Waldron et al., *supra* note 53, at 113.

masculinity.<sup>167</sup>

Much of the abuse inflicted through hazing has explicitly anti-gay overtones.<sup>168</sup> A fixture of hazing practices in men's sports is to require the male athletes being hazed to engage in homoerotic activities and simulations of gay male sexual activity.<sup>169</sup> In some instances, the abuse goes beyond simulation and actually subjects initiates to forcible sexual activity.<sup>170</sup> In the process, the recipients of these practices are degraded and humiliated—effectively punished for being forced to perform gender-transgressive acts.<sup>171</sup> The power of the hazing ritual thus depends on the subordination and degradation of homosexuality.<sup>172</sup> By surviving and enduring this punishment, the men establish their conformity with heterosexual norms.<sup>173</sup>

Hazing also reinforces the norms of hegemonic masculinity that underlie sexually abusive practices toward women.<sup>174</sup> By imposing sexually explicit hazing practices on lower-status men, the perpetrators establish their own sexual dominance and “masculinize” themselves.<sup>175</sup> As with other sexually abusive practices, including gang rape, men perform these acts to prove their masculinity to other men and to situate themselves at the top of a sexual hierarchy.<sup>176</sup> It is not unusual for women to be sexually objectified and denigrated in the course of the sexualized hazing of men.<sup>177</sup>

167. Johnson & Holman, *supra* note 131, at 7.

168. Eric Anderson et al., *Male Team Sport Hazing Initiations in a Culture of Decreasing Homophobia*, 27 J. ADOLESCENT RES. 427, 427–28 (2012).

169. *See id.* at 431 (“[S]ame-sex sexual activities serve the purpose of feminizing and homosexualizing recruits to establish and reaffirm their position at the bottom of the team’s heteromasculine hierarchy.” (citation omitted)).

170. *See* Anthony Nicodemo, *How Society’s Addiction to Masculinity Has Led to Sexual Hazing Between Men*, OUTSPORTS (Oct. 14, 2014, 11:34 AM), <http://www.outsports.com/2014/10/14/6977209/sayreville-hazing-masculinity-football> (describing a recent hazing incident at a New Jersey high school in which four football players were forcibly held down and anally penetrated by their teammates’ fingers).

171. Johnson & Holman, *supra* note 131, at 7 (“The heterosexualization of . . . initiations serves to excise the demons of homosexuality, and to convey to the membership acceptable practice and comportment within the culture of the team.”).

172. *Id.* (“[I]f homosexuality were acceptable within the sporting culture, the initiation would not have the intended degrading effect.”).

173. Waldron et al., *supra* note 53, at 113 (“Surviving hazing reinforces that one is tough as well as confirms athletes’ heterosexuality.”).

174. *See* Stuart, *supra* note 130, at 397–99.

175. *See* Anderson et al., *supra* note 168, at 428.

176. *See* Helen Jefferson Lenskyj, *What’s Sex Got To Do with It? Analysing the Sex and Violence Agenda in Sport Hazing Practices*, in MAKING THE TEAM: INSIDE THE WORLD OF SPORT INITIATIONS AND HAZING 83, 86–87 (Jay Johnson & Margery Holman eds., 2004).

177. McGinley, *Creating Masculine Identities*, *supra* note 130, at 1184–85.

One complication of situating hazing as a practice of hegemonic masculinity in men's sports is that hazing is a practice that also occurs, if less frequently, in girls' and women's sports. Female athletes are subjected to hazing rituals and inflict them on other women.<sup>178</sup> In fact, sport and gender researchers have noted a recent uptick in women taking part in hazing rituals on athletic teams, which the researchers attribute to both the growing alignment of women's sports with the traditionally masculine world of men's sports and the absence of longstanding women's sporting traditions.<sup>179</sup>

But if the hazing practices men perform in relation to other men are a masculinizing practice, how can this be reconciled with the performance of similar behaviors by women? A skeptic might argue that the fact that women sometimes engage in the same hazing behaviors as men proves that hazing is not a masculinizing practice or a gendered phenomenon at all. Such an argument rests on a formalistic understanding of gender discrimination that insists on sex-based differential treatment and/or sex-based differential harm. However, this view is too simplistic and cannot account for the more complex ways that social practices construct hegemonic masculinity and reinforce gender inequality. One implication of the fact that masculinity is a social, rather than a biologically determined, construction is that women can perform masculinity too.<sup>180</sup> In highly masculine environments, such as sports and blue-collar jobs, women may gain social advantages from performing masculinity.<sup>181</sup> Women as well as men can internalize masculine norms and perform masculinity in order to prove that they belong in masculine institutions.<sup>182</sup> Such practices, when performed by women, violate cultural stereotypes about women as being nurturing and cooperative.<sup>183</sup> Because they defy cultural expectations for women's behavior, female-initiated hazing incidents spark a frenzy of media hype and public consternation over the fact that women would engage in such behavior.<sup>184</sup>

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178. Johnson & Holman, *supra* note 131, at 6.

179. *Id.* (noting and explaining an observable "shift toward masculinist hazing practices" in women's sports).

180. See Anderson, *Orthodox Masculinity*, *supra* note 55, at 275.

181. McGinley, *Creating Masculine Identities*, *supra* note 130, at 1166–67.

182. See *id.* at 1192 (explaining that when hazing becomes "associated with the definition of work," women engage in it too).

183. See *id.* at 1174–83.

184. See Rick Maese, *UMBC Women's Lacrosse Case Shows Hazing Going Online*, WASH. POST (Mar. 18, 2015), [https://www.washingtonpost.com/sports/colleges/umbc-womens-lacrosse-case-shows-hazing-going-online/2015/03/18/3adcd3f8-cda9-11e4-8730-4f473416e759\\_story.html](https://www.washingtonpost.com/sports/colleges/umbc-womens-lacrosse-case-shows-hazing-going-online/2015/03/18/3adcd3f8-cda9-11e4-8730-4f473416e759_story.html).



Such was the reaction when hazing was discovered to have taken place on the women's softball team at St. Joseph's College.<sup>185</sup> A freshman on the team claimed that, at the beginning of the season, upper class teammates assigned new players sexually explicit and humiliating nicknames and subjected them to a week of sexually abusive hazing rituals, including requiring the new players to engage in and watch simulated sex with their teammates, perform a sexually lewd dance, drink alcohol, and answer humiliating questions about past sexual experiences.<sup>186</sup> After a student reported the events to the administration, administrators suspended the team for the three games remaining in the season.<sup>187</sup> However, when the next season started, the hazing began anew.<sup>188</sup> One of the players who had been subjected to the initial hazing episodes filed a Title IX suit, claiming that the short suspension amounted to deliberate indifference in response to known sexual harassment.<sup>189</sup> The case, which is pending in U.S. district court, joins the ranks of other publicized examples of female-initiated hazing rituals in which women force other women to endure sexualized and humiliating punishments as a rite of passage.<sup>190</sup>

The performance of hazing rituals by women does not sever or weaken the connections between hazing and hegemonic masculinity. Even when performed by women, sexually explicit hazing rituals serve to subjugate and discipline subjects who are constructed as "feminine" (here, the female victims) and to solidify the dominant position of hegemonic masculine values.<sup>191</sup> Just as women can discriminate against other women, women can perform

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185. Susan Snyder, *Lawsuit: St. Joe's Softball Rookies Forced To Drink, Simulate Sex*, PHILLY (May 21, 2015, 5:47 PM), [http://www.philly.com/philly/blogs/campus\\_inq/Disturbing-allegations-in-St-Joes-hazing-lawsuit.html](http://www.philly.com/philly/blogs/campus_inq/Disturbing-allegations-in-St-Joes-hazing-lawsuit.html).

186. *Lawsuit Alleges Sexual Hazing on St. Joseph's Softball Team*, ESPN (May 20, 2015), [http://espn.go.com/college-sports/story/\\_/id/12922508/lawsuit-alleges-sexual-hazing-st-joseph-university-softball-team](http://espn.go.com/college-sports/story/_/id/12922508/lawsuit-alleges-sexual-hazing-st-joseph-university-softball-team).

187. Susan Snyder, *St. Joe's Suspends Softball Team Play Amid Hazing Investigation*, PHILLY (May 1, 2015, 1:23 PM), [http://www.philly.com/philly/blogs/campus\\_inq/St-Joes-suspends-softball-team-amid-hazing-investigation.html](http://www.philly.com/philly/blogs/campus_inq/St-Joes-suspends-softball-team-amid-hazing-investigation.html).

188. *Id.*

189. *Id.*

190. See Nan Stein, *A Rising Pandemic of Sexual Violence in Elementary and Secondary Schools: Locating a Secret Problem*, 12 DUKE J. GENDER L. & POL'Y 33, 41 (2005) (discussing a highly publicized incident in which a group of senior girls about to graduate from a suburban Chicago high school inflicted punishing rituals on a group of junior girls, which included physical beatings and sexually degrading and misogynistic language, in front of a group of senior boys who videotaped the events).

191. *Id.*; see also Johnson & Holman, *supra* note 131, at 7 ("The use of demeaning, provocative, 'slut-like' clothing by female initiates . . . is intended to debase and humiliate the novitiate by exaggerating female sexuality.").

hegemonic masculinity.<sup>192</sup> Nor does it disrupt the cultural understanding of gender as binary to see women performing masculinity; the women who practice hazing are culturally understood to be gender anomalies, whereas men practicing hazing are normalized (“boys will be boys”). In other words, hazing within women’s sports is not gender-bending; it is complicit with misogyny, not disruptive of it.<sup>193</sup>

Although anti-gay harassment, sexual exploitation of women, and hazing are three identifiably distinct practices, they share a common relationship to hegemonic masculinity. They all are simultaneously the product of the power of hegemonic masculinity in sports and reinforce its hold over male athletic culture. They are instruments in the same toolkit of masculinizing practices that construct and reinforce hegemonic masculinity’s core imperative: Do not be “gay.” Making sport more inclusive requires interrupting these practices.

### **III. Legal Interventions: Using Title IX To Interrupt Sport’s Hetero-Masculinizing Practices and Make Room for Inclusive Masculinities**

Lest this Section raise unrealistic expectations, I want to make clear at the outset that Title IX is not going to solve the problem of non-inclusion in sport. While the law plays a role in shaping the institutional environments in which masculinities take shape, its ability to transform masculinities in sport is limited by two constraints. First, legal interventions alone rarely, if ever, succeed in shifting social norms; legal strategies are most effective where social norms are already in flux. Second, prevailing interpretations of sex discrimination laws, including of Title IX, treat gender as a fixed identity construct residing in the subject of legal protection. Such an interpretation interferes with the ability of anti-discrimination laws to regulate the social practices that construct gender. Both these constraints help explain why Title IX’s interventions have so far been more successful at challenging the first two types of masculinizing practices discussed above, anti-gay harassment and sexual assault, but more uneven in challenging hazing as sex discrimination.

And yet, Title IX may still be helpful to police the outer

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192. See Krane, *supra* note 23, at 164–65.

193. See Johnson & Holman, *supra* note 131, at 7 (“[Female athletes] who adopt male hazing practices that emphasize the sexualization and subordination of other females . . . contribute to the entrenchment of male hegemony in the sport culture.”).

bounds of masculinizing practices and to make educational institutions more attentive to the conditions that tend to facilitate these practices in their programs. Perhaps the most promising use of Title IX to change the culture of masculinity in sport is to develop the retaliation claim to create more space to encourage resistance to the masculinizing practices that make sport a hostile place for gay athletes. Even if courts fail to recognize the underlying gender practices themselves as a form of sex discrimination prohibited by Title IX, courts should hold that institutional acquiescence in the punishment of persons who challenge such practices is a form of retaliation prohibited by Title IX.

#### A. *Anti-Gay Harassment*

Increasingly, sex discrimination law is recognizing the impossibility of separating discriminatory treatment and harassment triggered by a person's sex from that triggered by a person's sexual orientation.<sup>194</sup> Specifically, courts and the Department of Education Office for Civil Rights (OCR) have interpreted Title IX to prohibit the intentional harassment of students, including student-athletes, because of their perceived sexual orientations.<sup>195</sup> While the linkages between sex and sexual orientation have not always been obvious to courts, Title IX case law has now developed to the point where anti-gay bias directed at a person who is perceived to be gay is likely to be understood as a reaction to that person's perceived gender nonconformity.<sup>196</sup> Courts have come to recognize anti-gay harassment that targets students who are perceived—whether correctly or incorrectly—to be gay as a species of gender stereotyping, and, therefore, potentially actionable under Title IX.<sup>197</sup>

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194. See, e.g., *L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ.*, 381 N.J. Super. 465, 486 (App. Div. 2005).

195. See Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. Office for Civil Rights, to Colleague (Oct. 26, 2010) [hereinafter Letter from Russlynn Ali], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

196. See Devi M. Rao, *Gender Identity Discrimination Is Sex Discrimination: Protecting Transgender Students from Bullying and Harassment Using Title IX*, 28 WIS. J.L. GENDER & SOC'Y 245, 246 (2013).

197. See, e.g., *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1308 (D. Kan. 2005) (denying defendant school district's motion for judgment as a matter of law in male student's Title IX claim alleging anti-gay and sexual harassment by members of the school basketball team); *Doe v. Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d 809, 839 (S.D. Iowa 2004) (finding for plaintiff, a high school football player and wrestler who was subjected to severe anti-gay harassment, on his motion for a preliminary injunction in a Title IX sexual harassment lawsuit).

This evolution has taken place over the course of several decades as part of a broader legal trend. Over time, sex discrimination law has evolved from imposing a categorical distinction between sex and sexual orientation discrimination to a more realistic understanding of these as overlapping forms of discrimination.<sup>198</sup> Beginning in the late 1970s, courts considered cases of adverse employment actions that were motivated by anti-gay bias. In these cases, courts sought to draw a crisp line separating discrimination motivated by the plaintiff's sex from discrimination motivated by the plaintiff's sexual orientation.<sup>199</sup> From the beginning, this line was messy. And in 1989, with the decision in *Price Waterhouse v. Hopkins*, the coherence of the distinction collapsed entirely as the Supreme Court embraced an expansive view of gender stereotyping.<sup>200</sup> The Court's admonition that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group" became hopelessly difficult to square with the crisp line that courts had previously asserted existed between sex and sexual orientation discrimination.<sup>201</sup>

Because anti-gay bias is integrally connected to sex-based expectations about "real men" and "real women" and their sexual preferences, courts struggled mightily, but unsuccessfully, to find principled ways to hold the line.<sup>202</sup> The result was a mess of unpalatable distinctions attempting to reconcile the law's gender-stereotyping principles with courts' understanding that the statutory ban on sex discrimination did not encompass sexual orientation discrimination.<sup>203</sup> For example, some courts found that harassment targeting a man for being gay was actionable as sex discrimination only if he could show that his harassers perceived him as "feminine" in addition to perceiving him as "gay."<sup>204</sup> Under

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198. *E.g.*, *Theno*, 394 F. Supp. 2d at 1299; *Doe*, 316 F. Supp. 2d at 809.

199. *See, e.g.*, *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 331 (9th Cir. 1979) (rejecting plaintiffs' attempt to "bootstrap" a claim of sexual orientation discrimination to a claim of sex-based discrimination under Title VII); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 937 (5th Cir. 1979) (holding that sexual orientation discrimination is not actionable under Title VII).

200. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989).

201. *Id.* at 251.

202. *See, e.g.*, *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1064 (7th Cir. 2003) (finding that plaintiff did not have an actionable claim under Title VII for sexually explicit anti-gay harassment because plaintiff did not prove that he was singled out because of nonconformity with gender stereotypes).

203. *See, e.g., id.*

204. *See, e.g., id.*; *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1086–87 (7th Cir. 2000) (holding plaintiff failed to show sufficient evidence that he was discriminated against for his sex, an actionable claim, rather than his sexuality, a non-actionable claim).

this reasoning, a gay man who was perceived as “masculine” could not sue for sexual harassment, whereas a gay man who was perceived as “feminine” might be able to prevail in a Title VII suit involving a challenge to factually indistinguishable conduct.<sup>205</sup> Because these courts insisted that litigants articulate gender nonconformity distinct from sexual orientation as the basis for a sex discrimination claim, a man who was not gay had a better chance of successfully suing for sexually explicit, anti-gay harassment than a gay man who was subjected to identical conduct.<sup>206</sup> Desperation to reconcile these principles produced even odder divides, including one court’s ruling that sex stereotyping claims must allege discriminatory conduct reacting to the plaintiff’s behavior at work, and not merely the plaintiff’s sex life outside of work.<sup>207</sup>

However, courts and government agencies that enforce sex discrimination laws are increasingly recognizing the futility of these distinctions. In 2015, the Equal Employment Opportunity Commission (EEOC) announced that the agency would henceforth view discrimination on the basis of employee sexual orientation (whether actual or perceived) as a form of sex-based discrimination prohibited by Title VII.<sup>208</sup> In its decision, the EEOC proclaimed that an allegation of discrimination based on “sexual orientation is necessarily an allegation of sex discrimination under Title VII.”<sup>209</sup> The EEOC explained its position in part by observing that sexual orientation cannot be understood and that bias on this basis cannot be given effect without reference to an individual’s sex.<sup>210</sup> Additionally, the agency borrowed from race discrimination law under Title VII, which recognizes discrimination against persons in interracial relationships (e.g., those married to someone of a different race or who have multiracial children) as a form of race-based discrimination, and analogized this line of precedents to

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205. *See, e.g., Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (holding that a male plaintiff who was singled out and subjected to anti-gay, sexually explicit harassment by co-workers because of perceived femininity established actionable conduct under Title VII).

206. *Compare Schmidding v. Tnemec Co.*, 187 F.3d 862, 865 (8th Cir. 1999) (allowing a heterosexual male plaintiff who was “falsely labeled . . . as homosexual in an effort to debase his masculinity” to proceed with a claim alleging sexually explicit anti-gay harassment under Title VII), *with Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001) (finding that sexually explicit, anti-gay harassment of a gay male plaintiff was not actionable under Title VII).

207. *See Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 765–66 (6th Cir. 2006).

208. *Baldwin v. Foxx*, EEOC Appeal No. 0120133080 (July 15, 2015), 2015 WL 4397641.

209. *Id.* at 6.

210. *Id.* at 5.

individuals who enter into relationships with persons of the same sex.<sup>211</sup> Finally, the agency explained that sexual orientation discrimination functions as a form of gender stereotyping, similar to that prohibited in the *Price Waterhouse* decision, because it necessarily punishes an individual for gender nonconformity.<sup>212</sup>

It is too soon to say whether the courts in Title VII cases will fall in line with the EEOC's position and give up the game of parsing a line between sex and sexual orientation discrimination. However, Title IX case law shows that courts have long been more circumspect about the usefulness or feasibility of discerning such a line and that they have more uniformly treated sexually explicit, anti-gay harassment as a form of sex discrimination in violation of Title IX.<sup>213</sup> Perhaps this is because, in cases involving anti-gay harassment between students, perceptions of sexual orientation are all the more inextricable from perceptions about gender nonconformity.<sup>214</sup> The trend toward recognizing anti-gay harassment of students as a form of sex-based discrimination under Title IX has accelerated in recent years. In 2010, the OCR issued a "Dear Colleague" letter addressing bullying and discrimination.<sup>215</sup> The letter provided an example of students harassing another student because he was gay, and identified this as a type of gender stereotyping prohibited by Title IX.<sup>216</sup> OCR explained that when a student is bullied for being gay, it is a form of sex-based harassment since his peers' perception of him as gender nonconforming was the trigger for the harassment.<sup>217</sup> OCR's rulings in its enforcement actions have accorded with this

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211. *Id.* at 8.

212. *Id.* at 9.

213. *See, e.g., Doe v. Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d 809, 833 (S.D. Iowa 2004) (finding that a male high school student who was subjected to harassment based on his "perceived sexual orientation" could bring a claim for sexual harassment under Title IX); *Schroeder ex rel. Schroederv. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869, 875–76 (N.D. Ohio 2003) (finding that a male student who was subjected to verbal and physical harassment after his peers learned that his brother was gay and after he spoke out on gay issues could bring a Title IX sexual harassment claim); *Doe v. Bellefonte Area Sch. Dist.*, No. 4:CV-02-1463, 2003 U.S. Dist. LEXIS 25841, at \*22–26 (M.D. Pa. Sept. 29, 2003) (finding that a reasonable fact-finder could conclude that a male student's claim for anti-gay, sexually explicit harassment "was sufficient to trigger liability under Title IX") (dismissed on other grounds).

214. The very first article I published as a law professor, over fifteen years ago, argued for a broader approach to gender stereotyping and anti-gay sexual harassment under Title IX, pressing this distinction. *See* Deborah L. Brake, *The Cruellest of the Gender Police*, 1 GEO. J. GENDER & L. 37 (1999).

215. Letter from Russlynn Ali, *supra* note 195.

216. *Id.* at 7–8.

217. *Id.*

interpretation.<sup>218</sup>

Recent court decisions have taken the position that anti-gay harassment can be a form of sex discrimination under Title IX, even without any additional proof of gender stereotyping.<sup>219</sup> A recent case from the Fifth Circuit Court of Appeals exemplifies the trend of inferring gender stereotyping from sexually explicit, anti-gay harassment directed against a student who was perceived as gay.<sup>220</sup> The case was brought by the parents of a thirteen-year-old middle school boy who was severely harassed by members of the school football team.<sup>221</sup> The boy endured a campaign of vicious verbal and physical harassment, which included an incident in which the harassers stripped him naked, tied him up, and placed him in a trash can, and then posted a video of the incident on YouTube.<sup>222</sup> Throughout the incident, the harassers taunted him with anti-gay epithets, calling him “fag,” “queer,” and “homo.”<sup>223</sup> Tragically, after the video incident, the boy committed suicide.<sup>224</sup> The Fifth Circuit reversed a lower court ruling granting the school district’s motion to dismiss.<sup>225</sup> The appellate court found the assaults necessarily occurred “because of sex” due to their sexually explicit nature.<sup>226</sup> A concurring judge explained the “because of sex” link in more detail, recognizing that what happened was a form of gender stereotyping because the boy was singled out and abused for not being “masculine” enough.<sup>227</sup> It was not clear from the concurrence how, exactly, the plaintiff failed to conform to gender expectations,<sup>228</sup> but it may have been inferred from the fact

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218. *See, e.g.*, *Complainant v. Tehachapi Unified Sch. Dist.*, No. 09-11-1031, at 14 (O.C.R. 2009) (finding for complainant in a case alleging relentless anti-gay name calling and physical and sexual abuse, which culminated in the student’s suicide, where the student was harassed for “failure to act as some of his peers believed a boy should act”); *L.W. v. Toms River Reg’l Schs. Bd. of Educ.*, No. CRT 8535-01, 2004 WL 1070073, at \*4–6 (N.J. Admin. Ct. Apr. 26, 2004) (finding that allegations of harassment, including constant teasing, name-calling, and physical abuse, because of perceived sexual orientation, stated a claim for sexual harassment under Title IX).

219. *Carmichael v. Galbraith*, 574 F. App’x 286 (5th Cir. 2014).

220. *Id.*

221. *Id.* at 287.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 290.

226. *Id.*

227. *Id.* at 292–94 (Dennis, J., concurring).

228. *Id.*

that the harassers unleashed an anti-gay tirade against him.<sup>229</sup>

A recent case in the Central District of California went even further, ruling that discrimination based on sexual orientation is necessarily a form of sex discrimination under Title IX.<sup>230</sup> In that case, two female basketball players transferred from another university and sought to join their new university's basketball team.<sup>231</sup> They alleged that the coach and other staff members barred them from the team because they believed the new students were lesbians and were involved in a sexual relationship with each other.<sup>232</sup> The women sued the university under Title IX, and the university moved to dismiss the complaint for failure to state a claim, arguing that the alleged discrimination based on sexual orientation was not covered by Title IX.<sup>233</sup> The appellate court affirmed the lower court's rejection of this argument, calling the asserted line between sexual orientation and sex discrimination "artificial and illusory," and ruling that discrimination based on sexual orientation is a type of sex discrimination and is covered by Title IX.<sup>234</sup> The court further explained that a plaintiff does not need to prove his or her actual sexual orientation;<sup>235</sup> rather, it noted that courts should not and need not turn a sex discrimination case into "a broad inquisition into the personal sexual history of the victim."<sup>236</sup> Since each of the plaintiffs alleged that she would have been treated differently if she had been dating a man instead of a woman, both women "stated a straightforward claim of sex discrimination under Title IX . . . ."<sup>237</sup>

The interpretation of Title IX as encompassing anti-gay bias as a form of gender bias puts pressure on educational institutions to address instances of anti-gay harassment when they see it in their environments. Although the standard for institutional

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229. *See id.*

230. *Videckis v. Pepperdine Univ.*, No. 15-00298, 2015 WL 8916764 (C.D. Cal. Dec. 15, 2015).

231. *Id.* at \*1.

232. *Id.*

233. *Id.* at \*4.

234. *Id.* at \*5 ("[T]he line between discrimination based on gender stereotyping and discrimination based on orientation . . . is illusory and artificial and . . . sexual orientation discrimination is not a category distinct from sex or gender discrimination.").

235. *Id.*

236. *Id.* at \*6.

237. *Id.* at \*8; *see also* *Estate of Brown v. Ogletree*, Civ. No. 11-cv-1491, 2012 WL 591190 (S.D. Tex. Feb. 21, 2012) (finding that sexually explicit, anti-gay harassment of a male student was actionable under Title IX where harassers perceived him to be gay).



liability under Title IX in lawsuits seeking damages is exceedingly high—requiring actual knowledge and deliberate indifference—the legal pressure on schools is not limited to the fear of paying damages.<sup>238</sup> OCR applies a more lenient standard of institutional accountability, requiring educational institutions to respond promptly and appropriately to address sex discrimination, including sexual harassment, in their programs where the school knew or should have known about it, lest the school be found in violation of Title IX and risk losing federal funds.<sup>239</sup> While OCR has never actually terminated federal funding for noncompliance,<sup>240</sup> no school would welcome the negative publicity of being found in violation of Title IX.

The legal incentives Title IX places on educational institutions to address and prevent harassment of LGBT students should help spark an overhaul of the culture of homophobia in men's athletic programs. Many of the cases involving claims of anti-gay harassment in educational settings involve either athletes as alleged harassers or take place in men's locker rooms.<sup>241</sup> That is not to say that the law will reach the more subtle iterations of anti-gay bias in male sport venues, such as shunning gay teammates or hetero-normative conversations that cue gay athletes to stay closeted.<sup>242</sup> Actionable harassment under Title IX requires conduct that is severe and pervasive enough to effectively block access to equal educational opportunity.<sup>243</sup> The more subtle forms of anti-gay harassment will fly under the law's radar. Nevertheless, concern about the risk of legal liability and administrative enforcement actions should prompt educational institutions to proactively prevent and address anti-gay bias within their athletic programs. Title IX's increasingly strong approach to anti-gay harassment both reflects and reinforces the shifting cultural norms in support of LGBT inclusion in society and in sports.

### *B. Sexual Assault and Exploitation of Women by Male*

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238. See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 656–57 (1999).

239. See, e.g., U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001) [hereinafter OCR, REVISED SEXUAL HARASSMENT GUIDANCE], <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

240. See *id.* at 15 (“[B]ecause a school will have the opportunity to take reasonable corrective action before OCR issues a formal finding of violation, a school does not risk losing its Federal funding solely because discrimination occurred.”).

241. See *Stuart*, *supra* note 139, at 380–81.

242. See *id.* at 397.

243. See *Davis*, 526 U.S. at 676.

*Athletes*

One of the most high profile and controversial developments in Title IX law has been the OCR's increased role in addressing the problem of campus sexual assault. In recent years, through increasingly specific interpretive guidance and a higher prioritization on enforcement, OCR has taken a more interventionist stance in monitoring institutional responses to reports of sexual assault among students.<sup>244</sup> In 2011, the law's surveillance in this area accelerated, when OCR issued a "Dear Colleague Letter" (DCL) clarifying institutions' obligations for responding to hostile campus environments created by sexual assault.<sup>245</sup> These detailed specifications coincided with the agency's articulation of campus sexual assault as a priority area for investigating complaints and conducting compliance reviews.<sup>246</sup> In January 2014, the White House released a prominent report on campus sexual assault, titled *You Are Not Alone*, which further raised the profile of this issue as a civil rights and sex equality matter.<sup>247</sup> Since then, OCR has maintained a growing and well-publicized list of colleges and universities under investigation for Title IX violations for their improper handling of campus sexual assaults.<sup>248</sup> As it has resolved these cases, OCR has publicized its letters of findings and made them available on its website.<sup>249</sup> This has created an emerging "common law" of prohibitions and obligations for educational institutions in their handling of reports of sexual assault among students.

This increased enforcement both reflects and reinforces the intensified advocacy surrounding campus sexual assault in recent years.<sup>250</sup> Student activism has led the charge, mobilized by a litany of incidents in which colleges and universities have

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244. See U.S. DEPT. OF EDUC., OFFICE FOR CIVIL RIGHTS, PROTECTING CIVIL RIGHTS, ADVANCING EQUITY: REPORT TO THE PRESIDENT AND SECRETARY OF EDUCATION 29–31 (2015) [hereinafter OCR, PROTECTING CIVIL RIGHTS], <http://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf> (summarizing recent OCR enforcement activities).

245. Letter from Russlynn Ali, *supra* note 195.

246. See *id.*

247. WHITE HOUSE, *supra* note 121.

248. U.S. Dept. of Educ., *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations* (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations>.

249. OCR, PROTECTING CIVIL RIGHTS, *supra* note 244, at 11.

250. See Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940 (2016) [hereinafter Anderson, *Campus Sexual Assault Adjudication*].

mishandled sexual assault allegations.<sup>251</sup> As advocacy groups and researchers have put more resources into this issue, new studies and reports have emerged highlighting the extent of the problem. A survey of Association of American Universities member schools released in the fall of 2015 found that 23% of female

undergraduates and more than 5% of male undergraduates had experienced nonconsensual intercourse or sexual contact involving physical force or incapacitation.<sup>252</sup>

The 2015 release of the documentary film *The Hunting Ground* further raised public consciousness about this issue and stoked student activism.<sup>253</sup> The film documents how a pair of self-identified sexual assault survivors were politicized by how their institutions handled their complaints and how they were moved to take collective action to help other women caught in the bureaucratic aftermath of campus sexual assaults.<sup>254</sup> The film is hard-hitting in its coverage of many of the universities accused of insufficiently protecting students from sexual assault and of tipping the balance of their disciplinary processes in favor of assailants.<sup>255</sup> Not surprisingly, the film ignited controversy among college and university officials, with some charging that it crossed the line from journalism to advocacy and gave only one side of a more complex story.<sup>256</sup> Despite the controversy, the film has succeeded in raising public scrutiny of institutions and publicizing the educational harms students experience from sexual assaults and from inadequate institutional responses to them.<sup>257</sup>

Even before the recent surge of student activism and the increased enforcement activities of the executive branch, cases involving campus sexual assault have gone from a trickle to a tributary in the courts, with mixed results. Many cases with facts egregious enough to support a damages action have involved

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251. See KNOW YOUR IX, <http://knowyourix.org>.

252. David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, WESTAT iii, 57 tbl.3-2, 59 tbl.3-4 (2015), [https://www.aau.edu/uploadedFiles/AAU\\_Publications/AAU\\_Reports/Sexual\\_Assault\\_Campus\\_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf](https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf).

253. David Folenflik, *CNN's "The Hunting Ground" Scrutinized for Portrayal of Campus Sexual Assault*, NPR (Nov. 23, 2015, 7:39 PM), <http://www.npr.org/2015/11/23/457139758/cnns-the-hunting-ground-scrutinized-for-portrayal-of-campus-sexual-assault>.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

athletes as the alleged assailants. An exhaustive discussion of these cases is beyond the scope of this article, but some of the more prominent cases illustrate the trend. A particularly egregious example of an athletic culture steeped in expectations of unfettered sexual access to women was the backdrop for a lawsuit against the University of Colorado Boulder.<sup>258</sup> The school had a tradition of supplying female student "ambassadors" to male football recruits brought to campus through the recruiting program.<sup>259</sup> The unstated job description of the ambassadors was to show the recruits a good time, with the implicit expectation of providing sex.<sup>260</sup> On one of these visits, a group of football players and recruits visiting the campus gang raped two female students.<sup>261</sup> The women sued the University for violating Title IX.<sup>262</sup> A lower court ruled for the University on the grounds that the case failed to satisfy the actual notice and deliberate indifference standard,<sup>263</sup> but the Tenth Circuit reversed.<sup>264</sup> The appellate court found that the University's longstanding knowledge of the ambassador program and of the excessive use of alcohol in the recruiting program, when considered alongside specific warnings from local law enforcement about sexual misconduct and abuse in the football program, sufficed to show that the University knew that sexual assault was a likely occurrence in the program and that its failure to supervise the recruits amounted to deliberate indifference.<sup>265</sup>

A gang rape by athletes was at the center of another high-profile case at the University of Georgia.<sup>266</sup> Here too, the plaintiff succeeded in clearing the hurdle of actual notice and deliberate indifference.<sup>267</sup> Three athletes, two basketball players and one football player, put into action a plan to "run[] a train" on a female student in a student dorm room.<sup>268</sup> The district court found insufficient fault on the part of the University to support a Title IX claim, but the Eleventh Circuit reversed.<sup>269</sup> The appellate court

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

259. *Id.* at 1173.

260. *Id.*

261. *Id.* at 1180.

262. *Id.* at 1174.

263. *Id.*

264. *Id.*

265. *Id.* at 1184.

266. *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282 (11th Cir. 2007).

267. *Id.* at 1295.

268. *Id.* at 1289.

269. *Id.* at 1303.

relied on University officials' prior knowledge of sexual assaults and harassment by the basketball player who led the gang rape and its decision to recruit him despite this knowledge.<sup>270</sup> The court also found the University's response to the gang rape to be deliberately indifferent, since the University waited eight months

after receiving the police report to conduct a disciplinary investigation and, even then, failed to meaningfully sanction the assailants.<sup>271</sup>

Fact patterns involving allegations of sexual assault by prominent athletes, followed by insufficient institutional responses, continue to work their way through the courts. In August of 2015, a federal district court in Florida denied a motion made by Florida State University (FSU) to dismiss a Title IX lawsuit brought by a woman who claimed that the University delayed and distorted its judicial misconduct process to protect the high-profile quarterback whom she accused of sexually assaulting her.<sup>272</sup> According to her complaint, FSU did not initiate an investigation until eleven months after having actual notice of the allegations.<sup>273</sup> In another recent and high-profile incident, although no Title IX lawsuit has resulted, four Vanderbilt football players were criminally charged with raping an unconscious female student.<sup>274</sup> So far, two of the men have been found guilty.<sup>275</sup> The circumstances are eerily similar to the Colorado case; for example, the Vanderbilt football coach had asked the woman who was gang raped to get "fifteen pretty girls" together to help recruit prospective football players.<sup>276</sup> And the reported cases

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270. *Id.* at 1296–97.

271. *Id.* at 1296; *see also* C.S. v. S. Columbia Area Sch. Dist., 2012 U.S. Dist. LEXIS 188133 (M.D. Pa. Nov. 19, 2012) (rejecting a school district's motion to dismiss a Title IX lawsuit by a female student who was gang raped by two star athletes).

272. *Kinsman v. Fla. State Univ. Bd. of Trs.*, No. 4:15-cv-00235, at 15 (N.D. Fla. Aug. 12, 2015) (order denying motion to dismiss); Rachel Axon, *Judge Denies Florida State's Motion To Dismiss Title IX Lawsuit from Jameis Winston's Accuser*, USA TODAY (Aug. 12, 2015, 12:25 PM), <http://www.usatoday.com/story/sports/nfl/buccaneers/2015/08/12/florida-state-jameis-winston-erica-kinsman-denies-dismissal/31531205/>.

273. Complaint and Demand for Jury Trial at 4, *Kinsman*, No. 4:15-cv-00235 (Jan. 7, 2015).

274. Sara Ganim, *Vanderbilt Rape Case Evidence Is Missing, Case Should Be Tossed, Defense Says*, CNN (May 2, 2014, 1:54 PM), <http://www.cnn.com/2014/05/02/us/vanderbilt-football-rape-case/>.

275. Stacey Barchenger, *Cory Batey Found Guilty of Aggravated Rape in Retrial*, TENNESSEAN (Apr. 9, 2016, 9:24 PM), <http://www.tennessean.com/story/news/crime/2016/04/09/jury-cory-batey-guilty-vanderbilt-rape-retrial/82769934/>.

276. *See* Ganim, *supra* note 274; *cf.* *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1173–74 (10th Cir. 2007) (describing how the University of Colorado Boulder

and OCR complaints involving alleged sexual assaults by athletes continue to mount.<sup>277</sup>

Primarily because of the high standard for institutional liability in lawsuits seeking damages—actual notice and deliberate indifference—these lawsuits do not always succeed. For example, in one case involving alleged sexual assault by three basketball players, *Doe v. University of the Pacific*, the plaintiff's Title IX case was dismissed for failure to establish both that the university had the requisite knowledge and that it acted with deliberate indifference.<sup>278</sup> The plaintiff cited the university's knowledge of a prior campus rape that may have involved one of her assailants as proof that the university had actual knowledge of the risk posed to students by the assailant's continued presence on campus.<sup>279</sup> However, the court held that because the identity of the assailant in the prior rape had never been conclusively established, the plaintiff failed to prove actual knowledge.<sup>280</sup> In addition, the court rejected the plaintiff's argument that the university's failure to expel two of the assailants amounted to deliberate indifference.<sup>281</sup> The court reasoned that, since the men were punished, and since Title IX does not entitle a complainant to any particular remedy or disciplinary measure, the plaintiff had failed to state a claim upon which relief could be granted.<sup>282</sup> The insensitivity of the administrators who handled the plaintiff's complaint can be seen in a statement by the Vice President for Student Affairs, which effectively claimed that the accused basketball players were very popular and did not need to force anyone to have sex with them.<sup>283</sup> However, according to the court, this did not prove that the university's response was deliberately indifferent.<sup>284</sup>

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allegedly asked attractive female students to help recruit football players, leading to a similar attack on one of those "ambassadors").

277. See, e.g., *B.E. v. Mount Hope High Sch.*, 2:11-cv-00679, 2012 U.S. Dist. LEXIS 116126, at \*31–32 (S.D. W. Va. Aug. 17, 2012) (denying a motion to dismiss a female cheerleader's Title IX sexual harassment case in which she alleged that she was raped by several athletes and that the school was on notice of the athletes' predatory behavior toward female students); *S.S. v. Alexander*, 117 P.3d 728, 745 (Wash. 2008) (reinstating the Title IX claim of the female equipment manager of a football team, which alleged that she was raped by a team member); OCR, PROTECTING CIVIL RIGHTS, *supra* note 244, at 29–31 (documenting OCR investigations and decisions).

278. *Doe v. Univ. of the Pac.*, No. Civ. S-09-764 FCD/KJN, 2010 WL 5135360, at \*18 (E.D. Cal. Dec. 8, 2010), *aff'd* 467 F. App'x 685 (9th Cir. 2012).

279. *Id.* at \*12.

280. *Id.*

281. *Id.* at \*13–15.

282. *Id.*

283. *Id.* at \*5 n.9.

284. *Id.*

Cases like *University of the Pacific* support Scales's assessment that "the judicially-articulated standards for institutional liability are incredibly high, and . . . the remedies are much too limited."<sup>285</sup> In addition to the challenges posed by the actual notice and deliberate indifference standard, Scales has highlighted other barriers to using Title IX to transform the culture of campus sexual assault, including the difficulties caused by the role played by insurance companies in insulating universities from the costs of these cases, the struggle to obtain meaningful injunctive relief, and the inordinate challenges students must face to find attorneys and to procure the resources necessary to successfully sue their universities.<sup>286</sup> Scales concluded that, because of these barriers, universities have nothing to fear from Title IX.<sup>287</sup> But Scales drew this conclusion before the enhanced enforcement activities of OCR put institutions under greater pressure to avoid finding themselves on the embarrassing, well-publicized list of schools under investigation.<sup>288</sup> This pressure has prompted significant pushback, and critics now allege that the pendulum has swung too far in the opposite direction, resulting in unfairness to students accused of sexual harassment.<sup>289</sup>

In addition to the growing body of case law and the increase in OCR enforcement activities, student activism is also pressuring universities to do more to change the culture of sexual assault on campus, and, in particular, in athletics programs.<sup>290</sup> Colleges and

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285. Ann Scales, *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, 15 MICH. J. GENDER & L. 205, 236 (2008).

286. *Id.* at 235–38.

287. *Id.* at 241.

288. Press Release, U.S. Dep't of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix>; see Tyler Kingkade, *124 Colleges, 40 School Districts Under Investigation for Handling of Sexual Assault* (July 24, 2015, 2:06 PM), [http://www.huffingtonpost.com/entry/schools-investigation-sexual-assault\\_us\\_55b19b43e4b0074ba5a40b77](http://www.huffingtonpost.com/entry/schools-investigation-sexual-assault_us_55b19b43e4b0074ba5a40b77).

289. For an excellent analysis of the politics and pushback on campus sexual assault, see Anderson, *Campus Sexual Assault Adjudication*, *supra* note 250. Another perspective can be seen in the open letter written by twenty-eight Harvard Law School faculty members on the subject of campus sexual assault. Elizabeth Bartholet et al., Opinion, *Rethink Harvard's Sexual Harassment Policy*, BOST. GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUWMnqbM/story.html>.

290. See, e.g., *A Progress Report on Morehouse's Response to Sexual Violence*, MOREHOUSE COLL. (Mar. 8, 2016), <http://www.morehouse.edu/newscenter/a-progress-report-on-morehouse-response-to-sexual-violence>; Anita Wadwani, *How a University of Tennessee Insider Turned on a Program She Once Loved*, TENNESSEAN (Mar. 1, 2016, 11:43 PM), <http://www.tennessean.com/story/news/investigations/>

universities are increasingly targeting athletic departments in their sexual violence prevention programs.<sup>291</sup> The NCAA recently issued a report about sexual violence and athletics with recommendations for preventing and responding to sexual violence related to athletics.<sup>292</sup> The troubling fact patterns emerging from the case law also prompted the Southeastern Conference to adopt a new rule barring its member schools from permitting athletes who are disciplined for sexual misconduct to transfer to other athletic programs.<sup>293</sup>

The renewed attention on sexual assault and heightened enforcement pressure from OCR is prompting colleges and universities to take sexual assault claims more seriously than they have in the past.<sup>294</sup> To the extent that this is more than mere window dressing and that these efforts have the effect of actually changing the culture and expectations of entitlement to sex that prevail in some men's sports settings, the norms supporting hegemonic masculinity will weaken. Of course, it takes more than deterring sexual assault to create a climate that is respectful toward women, and toward the men who respect women. But eliminating the most extreme forms of male subordination of women will help make space for men to resist team norms that tolerate and encourage the sexual abuse and exploitation of women. Such a development would not only change sport for the benefit of women—it would also make sport a less hostile place for inclusive masculinities.

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2016/02/27/former-tennessee-official-now-taking-beloved-university/80616272; see also Josh Logue, *The Next Ann Coulter: He Believes College Rape Culture Is a Myth, He Started a Scholarship for White Men, and His Popularity Is Growing*, INSIDE HIGHER ED (Feb. 19, 2016), [https://www.insidehighered.com/news/2016/02/19/student-protests-and-university-cancellations-follow-milo-yiannopoulos-speaking-tour?utm\\_source=slate&utm\\_medium=referral&utm\\_term=partner](https://www.insidehighered.com/news/2016/02/19/student-protests-and-university-cancellations-follow-milo-yiannopoulos-speaking-tour?utm_source=slate&utm_medium=referral&utm_term=partner) (highlighting the debate over free speech and student protest centered around the sexual assault discussion).

291. See, e.g., *Preventing Sexual Assault a Focus in New Academic Year*, STANFORD (Sept. 18, 2014), <http://news.stanford.edu/news/2014/september/sexual-assault-prevention-091814.html>.

292. See DEBORAH WILSON ET AL., NAT'L COLLEGIATE ATHLETIC ASS'N, ATHLETICS' ROLE IN SUPPORT OF HEALTHY AND SAFE CAMPUSES (2014), <https://www.ncaa.org/sites/default/files/Sexual-Violence-Prevention.pdf>.

293. David Ching, *SEC: Schools Can't Take Transfers with Serious Misconduct Past*, ESPN (May 30, 2015), [http://espn.go.com/college-football/story/\\_/id/12977228/sec-adopts-proposal-prevents-transfer-students-histories-domestic-violence-sexual-assault](http://espn.go.com/college-football/story/_/id/12977228/sec-adopts-proposal-prevents-transfer-students-histories-domestic-violence-sexual-assault).

294. See Jodi S. Cohen & Stacy St. Clair, *Federal Authorities Investigating Sexual Violence Complaints at Several Area Colleges*, CHI. TRIB. (Mar. 1, 2016, 6:17 PM), <http://www.chicagotribune.com/news/local/breaking/ct-universities-sexual-violence-investigations-20160301-story.html>.



### C. *Hazing in Men's Sports*

Title IX has been less successful in reaching those masculinizing practices that involve harassment and abuse that are *not* triggered by the target's sex or sexual orientation. As discussed above, hazing is a practice that performs and constructs hegemonic masculinity, both in the individuals involved and in the identity of the group, but it does not single out its targets based on sex or sexual orientation.<sup>295</sup> As a result, courts have been more resistant to understanding hazing as a form of sex-based discrimination.<sup>296</sup> When courts address this type of sexualized harassing and abusive behavior, they are more likely to dismiss it as "horseplay," instead of sexual harassment that occurs because of the target's sex.<sup>297</sup> The distinction between actionable sexual harassment and "horseplay" was advanced in the Supreme Court's opinion in its first and only same-sex sexual harassment case, *Oncale v. Sundowner Offshore Services, Inc.*<sup>298</sup> In that case, a lower court ruled that sexual harassment between persons of the same sex could never violate Title VII.<sup>299</sup> The Supreme Court reversed, but cautioned lower courts not to "mistake ordinary socializing" such as "male-on-male horseplay" for actionable sexual harassment.<sup>300</sup>

Some lower courts have followed this line in Title IX cases, distinguishing same-sex hazing, even when highly sexual in nature, from actionable sexual harassment. In one of the early cases drawing this line, *Seamons v. Snow*, the Tenth Circuit failed to see the gender stereotyping present in school officials' punitive responses to a freshman football player's complaint that his teammates humiliated him by stripping him naked, taping him to a towel rack, and bringing in a girl he had dated to see him in that position.<sup>301</sup> The football coach, who dismissed these actions as

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295. See *supra* Part II.

296. See, e.g., *Seamons v. Snow*, 84 F.3d 1226, 1233 (10th Cir. 1996) (rejecting a plaintiff's claim that hazing violated Title IX).

297. See *id.*

298. 523 U.S. 75 (1998) (addressing harassment in the context of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)).

299. *Oncale v. Sundowner Offshore Servs., Inc.*, Civ. A. No. 94-1483, 1995 WL 133349, at \*1, \*2 (E.D. La. Mar. 24, 1995) ("[T]his Court is compelled to find that Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers."), *aff'd*, 83 F.3d 118 (5th Cir. 1996), *rev'd*, 523 U.S. 75 (1998).

300. *Oncale*, 523 U.S. at 81; see McGinley, *Creating Masculine Identities*, *supra* note 130, at 1228 (critiquing Title VII cases that draw a line between "hazing" or "horseplay" and sexual harassment, and noting that "[t]he use of sexualized behavior is common in hazing and horseplay, and it is used to accomplish the goal of masculinizing the group").

301. *Seamons v. Snow*, 84 F.3d 1226, 1230–31 (10th Cir. 1996).

“hazing” and “pranks” because “boys will be boys,” tried to make the plaintiff apologize to the team for getting the football program in trouble with the administration.<sup>302</sup> When the victim refused to apologize, the coach dismissed him from the team, but he permitted the five players who assaulted him to play in the next game.<sup>303</sup> As punishment for the assault, the school district cancelled the final game of the season, but the entire school community blamed the football player who had been assaulted for “squealing.”<sup>304</sup> School officials did nothing to help, saying “he should [have taken] it like a man . . . .”<sup>305</sup> The principal suggested he leave the school to escape the hostile environment—which he did, transferring to a school in a distant county.<sup>306</sup> Despite the gender dynamics that pervaded the hazing incident and the school’s response, the court refused to see any connection to gender, claiming that “[t]he qualities defendants were promoting, team loyalty and toughness, are not uniquely male.”<sup>307</sup> To support its conclusion, the court noted that there was evidence of hazing in the women’s athletic program that had not been addressed.<sup>308</sup> Accordingly, the court ruled that neither the initial incident nor the school’s response to it could be shown to have occurred because of the plaintiff’s sex.<sup>309</sup>

A more recent example of a lower court decision tracking this line of reasoning is *Patterson v. Hudson Area Schools*, in which a boy was targeted for vicious anti-gay and sexual harassment and abuse.<sup>310</sup> The anti-gay verbal abuse and name-calling began when the plaintiff was in the sixth grade and continued into his freshman year of high school, when he was assaulted in the locker room in a sexually explicit manner by two boys after a junior varsity baseball practice.<sup>311</sup> The court classified the abuse as bullying rather than sexual harassment, finding it not actionable under Title IX because there was no evidence that the locker room assault and earlier harassment were actually prompted by the

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302. *Id.* at 1230.

303. *Id.*

304. *Id.*

305. *Id.* at 1233.

306. *Id.* at 1234.

307. *Id.* at 1233.

308. *Id.*

309. *Id.*

310. *Patterson v. Hudson Area Schs.*, 724 F. Supp. 2d 682, 684–86 (E.D. Mich. 2010).

311. *Id.* at 688. One boy blocked the exit to the locker room while another boy, naked, climbed on top of the plaintiff and rubbed his penis and scrotum against the boy’s neck and face. *Id.*

boy's gender or sexual orientation.<sup>312</sup> The court described the behavior in the locker room as "an offensive, sexual touching" that was "unbelievably stupid, cruel[,] and hurtful to Plaintiff," but found that it was "typical of middle school and high school behavior" and did not amount to harassment occurring because of the plaintiff's sex.<sup>313</sup> The plaintiff argued that he was singled out for abuse because he did not conform to male stereotypes lauding "the aggressive male football player and wrestler" as the masculine ideal; the court responded by stating that Title IX does not protect against discrimination based on a person's "social status."<sup>314</sup>

The line drawn in these cases is similar to that suggested by OCR's guidance on bullying.<sup>315</sup> In its guidelines, OCR gave an example of a hypothetical boy who is singled out for harassment by his peers for being gay.<sup>316</sup> Importantly, OCR used this example to illustrate that harassment because of gender nonconformity is a violation of Title IX.<sup>317</sup> OCR did not provide any examples where sexually explicit, anti-gay harassment targeted students who conformed to gender stereotypes.<sup>318</sup> Thus, one can infer that anti-gay harassment is covered by Title IX only when the target is singled out for being, or being perceived to be, gay.

Some lower courts, however, have viewed such fact patterns involving sexually explicit hazing practices as actionable under Title IX, albeit with little reasoning about how the conduct meets the law's requirement of discrimination because of the person's sex. For example, in *Mathis v. Wayne County Board of Education*, a lower court recognized the validity of a Title IX claim based on the sexually explicit and abusive practices directed toward two seventh grade boys while they were members of their school basketball team.<sup>319</sup> The plaintiffs claimed that they were subjected to a series of humiliating acts in the locker room after

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312. *Id.* at 694.

313. *Id.* at 693.

314. *Id.* at 694; *accord* Wolfe v. Fayetteville Sch. Dist., 648 F.3d 860, 868 (8th Cir. 2011) (rejecting a Title IX claim by a male student alleging sexual, anti-gay harassment because the facts did not show that the plaintiff was perceived to be gay or that he did not conform to gender stereotypes); A.E. v. Harrisburg Sch. Dist. No. 7, No. 6:11-cv-6255-TC, 2012 WL 4794314, at \*1, \*2 (D. Or. Oct. 9, 2012) (rejecting a Title IX sexual harassment claim alleging anti-gay harassment where the plaintiff was not actually perceived as being gay).

315. Letter from Russlynn Ali, *supra* note 215.

316. *Id.* at 7.

317. *Id.* at 7–8.

318. *See id.* at 6–8.

319. *Mathis v. Wayne Cty. Bd. of Educ.*, 782 F. Supp. 2d 542, 551 (M.D. Tenn. 2011).

basketball practice, including “lights out” episodes in which the eighth graders would turn off the lights in the locker room and begin “humping” and gyrating on seventh graders.<sup>320</sup> On one occasion, one of the plaintiffs was challenged to do a “blindfolded sit-up,” during which another student pressed his naked rear end into the plaintiff’s face at the moment that he sat up.<sup>321</sup> During another incident in the locker room, older students forcibly restrained the other plaintiff and inserted a marker into his rectum.<sup>322</sup> Despite being subjected to anti-gay name-calling both during and after these incidents, there was no indication that either of the plaintiffs was gay, or that any of the harassers perceived them to be gay.<sup>323</sup> Similar harassing acts were directed at other seventh graders on the team.<sup>324</sup> Nevertheless, this court found that the plaintiffs had “presented credible evidence that they were subjected to months of ongoing harassment of a sexual nature,” and allowed the Title IX claim to proceed.<sup>325</sup>

The sexual nature of the acts was also enough for another court to view sexually abusive hazing as a violation of Title IX. In *Roe v. Gustine Unified School District*, another case of sexualized hazing by older athletes toward their younger teammates, incoming freshmen were targeted for abuse at a summer football camp.<sup>326</sup> The plaintiff was held down and assaulted at the camp by upperclassman who penetrated him anally with an air pump.<sup>327</sup> Rejecting the school district’s argument that the conduct amounted to hazing and not sexual harassment, the court found “the homophobic language used by the perpetrators appears to be part of a larger constellation of sexually-based conduct, which included assaulting Plaintiff with an air hose, exposing their genitalia, and grabbing his bare buttocks in the shower,” and that the allegations created a material issue as to whether “the conduct at issue relate[s] to gender.”<sup>328</sup> The court appeared to accept that the sexual nature of what happened was why it was actionable under Title IX, observing that the facts could show that the plaintiff was singled out because of both age (class standing) and

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320. *Id.* at 545.

321. *Id.* at 546.

322. *Id.*

323. *Id.* at 544–46.

324. *Id.* at 552.

325. *Id.* at 549, 551.

326. *Roe v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1012–15 (E.D. Cal. 2009).

327. *Id.* at 1013–14.

328. *Id.* at 1027.

gender, and that the two are not mutually exclusive.<sup>329</sup>

As illustrated by these two cases, there is some room for applying Title IX to reach sexually explicit, anti-gay hazing practices between athletes. However, the law's approach is uneven, with some courts missing the gender dynamic entirely and instead finding the conduct outside the realm of the statute.<sup>330</sup> Even those courts that do apply Title IX to such practices fall back on the sexually explicit content of the behavior rather than analyzing the role that gender plays in masculinizing the harassers and feminizing the targets.<sup>331</sup> In general, the legal framework is better at handling discrimination claims where the target of discrimination is understood to have a fixed identity status that triggered the discrimination. Title IX falters, as some courts apply it, when confronted with claims that involve gender practices that are relational, where the masculinity of the harasser and the target are being constructed and tested through the interaction.

And yet, masculinities are being constructed in all three of the gender practices discussed in this Article, including in the first two, where the courts are more likely to see the harassers as simply reacting to the identity of the target as gay or as female (or as both). There too, the harassing and assaultive behaviors perform hegemonic masculinity in a dynamic where gender is relational, not fixed. In grappling with all of these cases, the legal regime fundamentally fails to recognize the core similarities between the anti-gay harassment of persons perceived to be gay, the sexual harassment and assault of women, and sexualized, anti-gay hazing practices among men. They are all performative and function toward the same end of constructing and solidifying hegemonic masculinity in sport, and they are all antithetical to the development of inclusive masculinities.

#### **IV. Using Title IX to Remedy Retaliation for Opposing Hetero-Masculinizing Practices in Sport**

For Title IX to reach the above practices, such practices must be understood as discrimination because of the sex of the person

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329. *Id.* at 1026; *accord* Doe v. Brimfield Grade Sch., 552 F. Supp. 2d 816, 820 (C.D. Ill. 2008) (allegations of “sac stabbing”—the grabbing, twisting, and hitting of testicles—by male basketball players could support a Title IX sexual harassment claim).

330. *See, e.g.*, Corral v. UNO Charter Sch. Network, Inc., No. 10-CV-03379, 2013 WL 1855824, at \*1, \*5 (N.D. Ill. May 1, 2013) (rejecting the application of Title IX in *Brimfield Grade Sch.*, 522 F. Supp. 2d 816).

331. *See Brimfield Grade Sch.*, 552 F. Supp. 2d at 820.

harmed.<sup>332</sup> While that works much of the time, courts do not always understand masculinizing practices as gender-based, as the above discussion illustrates.<sup>333</sup> In addition, there is an alternative approach to actions under Title IX that would not limit claims to status-based discrimination, but that would also protect persons who oppose gender discriminatory conduct. This legal theory—retaliation—might have the most impact in disrupting the masculinizing practices that make men's sports so resistant to inclusion. When athletes speak out and report other team members' abusive practices, it violates the norms of masculinity these practices reinforce and will likely trigger punishment by teammates and others in the educational community. Strong protection from retaliation is crucial to support those persons who are hurt or troubled by anti-gay and misogynistic abuses in order for them to find the courage to speak out.

A landmark Supreme Court decision from 2005 opened up the possibility for using Title IX to protect the channels of communication for reporting and challenging gender discrimination and anti-inclusive practices in sports. In *Jackson v. Birmingham Board of Education*, the Court interpreted Title IX's ban on sex-based discrimination to implicitly encompass protection from retaliation for opposing discrimination that violates the statute.<sup>334</sup> In that case, a high school girls' basketball coach was removed from his position after complaining about unequal and discriminatory treatment of the boys' and girls' basketball programs.<sup>335</sup> He sued the school district for retaliation under Title IX.<sup>336</sup> Writing for the majority, Justice O'Connor reasoned that retaliation for complaining about sex discrimination is itself a form of sex-based discrimination.<sup>337</sup>

Although the Court's ruling is unassailably correct, its rationale is under-theorized, since retaliation claims have never depended on proving the illegality of the underlying conduct as a prerequisite to a successful suit for retaliation.<sup>338</sup> The Court's reasoning in *Jackson* does not fully explain why, as the majority

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332. See 20 U.S.C. § 1861(a) (2012); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005).

333. See *supra* Part III.C.

334. *Jackson*, 544 U.S. at 183–84.

335. *Id.* at 171–72.

336. *Id.* at 172.

337. *Id.* at 183–84.

338. Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 51–67 (2005) (elaborating on this critique, and developing a theory of retaliation based on a broader understanding of sex discrimination as the maintenance of gender privilege) [hereinafter Brake, *Retaliation*].

insists, retaliation is an extension of the very sex discrimination that the statute prohibits.<sup>339</sup> As a result, some uncertainty about the scope of the Title IX retaliation claim remains.

Nevertheless, opposition to the practices discussed above, followed by punishment for challenging them, fits comfortably with the *Jackson* theory of retaliation as, itself, a form of sex discrimination. The core purpose of the masculinizing practices discussed above and of retaliation for challenging them is to enforce complicity with hegemonic masculinity. Reporting and challenging anti-gay harassment, sexual assault and exploitation of women, and hazing are all acts of resistance to hegemonic masculinity, and defy demands for conformity to masculine norms. Complicity with hazing, harassment, and abuse is enforced by the very norms of masculinity promoted by those practices.<sup>340</sup> Whether those masculinizing practices have power to enforce hegemonic masculinity depends on whether individuals comply with the “code of silence.”<sup>341</sup> Closing ranks is a core part of the code of masculinity that these gender performative practices instill.<sup>342</sup> Punishing refusals to abide by the code of silence surrounding these practices is thus a product of the same norms of masculinity that these practices embody.

The pressure toward complicity and closing ranks is particularly intense for athletes on a team where these abuses occur. But non-team members who challenge these practices risk retaliation too. The recent surge in student activism challenging campus cultures of sexual assault, for example, has prompted intense pushback and retaliation against complainants who report sexual assault.<sup>343</sup> There have been many examples of this dynamic in recent months.<sup>344</sup> One of the more well-publicized of these was the campaign at Columbia University smearing the credibility of a woman who filed a sexual assault charge against a fellow student.<sup>345</sup> The woman began carrying a mattress around campus to protest the university’s failure to take any disciplinary action against the accused male student, who had also been accused of sexually assaulting three other women.<sup>346</sup> In response

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339. *Id.* at 51.

340. Waldron et al., *supra* note 53, at 113–14.

341. *Id.* at 113.

342. *Id.* at 120–21.

343. See *It’s Safer To Be Quiet*, TITLE IX BLOG (May 22, 2015), <http://title-ix.blogspot.com/2015/05/its-safer-to-be-quiet-cultures-of.html>.

344. *Id.*

345. *Id.*

346. *Id.*

to her activism, posters began to appear around campus calling her a “Pretty Little Liar.”<sup>347</sup> Such harassment can target anyone who, instead of remaining complicit, speaks out against sexual abuse, even if that person is not the complainant. Just such an incident occurred at Stanford University, when a woman who had been at a fraternity party cooperated in the University’s investigation of sexual harassment at the fraternity—an investigation which she did not initiate—by telling University investigators, who approached her for information, what she saw and heard.<sup>348</sup> Her name was leaked, and members and supporters of the fraternity vilified her for her role in getting the fraternity in trouble.<sup>349</sup> These kinds of incidents have a chilling effect on the willingness of others to come forward and speak out against sexual assault and campus climates that tolerate it.<sup>350</sup> Similar dynamics of punishment and silencing play out when anti-gay harassment and hazing practices are challenged and resisted in defiance of team norms.

The beauty of the retaliation claim, at least in theory, is that, even if courts take a more narrow view of the scope of sex discrimination law and the practices that violate it, courts can still protect persons who oppose discriminatory practices under the law’s retaliation provisions. Although the *Jackson* decision did not define the precise contours of the Title IX retaliation claim, it implicitly endorsed the principle—which is a fixture in Title VII retaliation actions—that a retaliation plaintiff need not prove an underlying violation of discrimination law in order to succeed.<sup>351</sup> The standard that governs Title VII discrimination claims is that a retaliation plaintiff must have an objectively reasonable belief that the complained-of conduct was discriminatory and in violation of the law.<sup>352</sup> Requiring any greater degree of certainty would make

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347. *Id.*

348. *Id.*

349. Tess Bloch-Horowitz, *On Living in Fear of Telling the Truth: My Experience with SAE, Retaliation, and Title IX*, STAN. DAILY (May 20, 2015), <http://www.stanforddaily.com/2015/05/20/on-living-in-fear-of-telling-the-truth-my-experience-with-sae-retaliation-and-title-ix/>.

350. For an account of why one woman chose to stay anonymous in handling her own experience of sexual assault, see *I Am Not a Pretty Little Liar*, JEZEBEL (May 21, 2015), <http://jezebel.com/i-am-not-a-pretty-little-liar-1705996719>.

351. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005). Notably, the majority did not require the plaintiff to prove that the school had in fact discriminated on the basis of gender in violation of Title IX in its treatment of the girls’ basketball team, nor did it refute the accurate statement in Justice Thomas’s dissent that existing law does not require retaliation plaintiffs to prove that their underlying discrimination complaints were meritorious. *Jackson*, 544 U.S. at 194 (Thomas, J., dissenting).

352. See *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001).



the retaliation claim of little value to most persons, since they could not know in advance whether a court would find that the complained-of conduct actually violated the law. The reasonable belief doctrine is meant to close such a loophole, which would leave complainants unprotected if their view of the facts and the law turned out to not match that of the court reviewing the retaliation claim.<sup>353</sup>

Of course, just how well this works in reality depends on what counts as a “reasonable” perception of discrimination and how strictly that standard is policed. Unfortunately, in the years since the Supreme Court articulated the Title VII reasonable belief doctrine in 2001, many lower courts have interpreted reasonableness very strictly indeed, using judicial interpretations of discrimination law to set a low ceiling on “reasonableness.”<sup>354</sup> Using this reasoning, some courts have ruled that complaints about sexual orientation discrimination are unprotected by Title VII because the statute does not apply to sexual orientation discrimination; thus, according to these courts, it is objectively unreasonable to believe otherwise.<sup>355</sup>

I have been hammering away at this kind of constricted application of the reasonable belief doctrine for more than ten years now.<sup>356</sup> Thankfully, there are some signs that the confines of

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353. Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 530, 534 (2003).

354. *Id.* at 530.

355. *See, e.g.*, *Larson v. United Air Lines*, 482 F. App'x 344 (10th Cir. 2012); *Gilbert v. Country Music Ass'n*, 432 F. App'x 516 (6th Cir. 2011); *Hamn v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058 (7th Cir. 2003); *Hamner v. St. Vincent Hosp. & Health Care Ctr.*, 224 F.3d 701 (7th Cir. 2001); *Higgins v. New Balance Athletic*, 194 F.3d 252 (1st Cir. 1999). *But see* *Martin v. N.Y. State Dept. of Corr. Servs.*, 224 F. Supp. 2d 434 (S.D.N.Y. 2002) (finding that it was not unreasonable for the plaintiff to perceive sexual orientation discrimination as a type of sex discrimination).

356. *See* Deborah Brake & Joanna Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 913–32 (2007) (critiquing the conflict created by the reasonable belief doctrine, which punishes employees for complaining too soon, with the pressures at the front-end of Title VII's reporting requirements, which require prompt complaining); Brake, *Retaliation*, *supra* note 338, at 86–103 (critiquing a judge's use of simplistic and judicially centered accounts of discrimination to exclude other perspectives); Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. 115, 136–57 (2014) (identifying and critiquing the disconnect between the reasonable belief doctrine and the approach to discrimination complaints taken by employers' internal nondiscrimination policies); Deborah L. Brake, *Tortifying Retaliation: Protected Activity at the Intersection of Fault, Duty, and Causation*, 75 OHIO ST. L.J. 1375, 1383–91 (2014) (contrasting courts' use of their own judicial perspectives to measure reasonableness in the reasonable belief doctrine with their more nuanced, contextualized approach to reasonableness in tort law).

this doctrine may be loosening somewhat. In a 2015 decision,<sup>357</sup> the Fourth Circuit overruled one of the most outrageous of the reasonable belief decisions, *Jordan v. Alternative Resources Corp.*<sup>358</sup> In *Jordan*, the court had held that an employee's complaint about a blatantly racist outburst by a coworker in the company breakroom was not predicated on an objectively reasonable belief in discrimination since it consisted of a single incident, in contrast to the severe or pervasive conduct required for actionable racial harassment.<sup>359</sup> But the Fourth Circuit's 2015 decision in *Boyer-Liberto v. Fontainebleau Corp.* recognized the conflict between such a strict approach and discrimination law's purpose of protecting complainants who come forward to challenge conduct that is on its way to creating a discriminatory and hostile environment.<sup>360</sup> In addition, two recent federal court decisions have recognized the reasonableness of perceiving discrimination based on sexual orientation as also simultaneously based on sex, thereby placing persons who oppose such conduct within the ambit of Title VII's protection from retaliation.<sup>361</sup>

While the Supreme Court has not decisively ruled on this issue, Title IX retaliation claims appear to be governed by the same reasonable belief doctrine as Title VII. Thus, here too the reasonable belief doctrine should be applied in such a way as to take into account the perspective and knowledge of a reasonable person in the position of the complainant. When the complainant is a student, the issue of perspective is particularly important. Holding students to the judiciary's understanding of the scope of discrimination law would leave them radically under-protected from retaliation. Students, even more than employees, should not be penalized for acting on an incomplete or incorrect understanding of the scope of Title IX.<sup>362</sup> Where there are reasonable arguments connecting the complained-of misconduct to

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357. *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264 (4th Cir. 2015) (en banc).

358. 458 F.3d 332 (4th Cir. 2006).

359. *Id.* at 343.

360. *Boyer-Liberto*, 786 F.3d at 268–69; *see also* *Summa v. Hofstra*, 708 F.3d 115, 126 (2d Cir. 2012) (“As to the assertion that no reasonable person could believe a single incident amounted to a Title VII violation, we disagree.”).

361. *See* Erin E. Buzuvis, *A Reasonable Belief: In Support of LGBT Plaintiffs’ Title VII Retaliation Claims*, 91 DENV. U. L. REV. 929 (2014) (discussing cases and arguing for a more expansive approach to reasonableness in reckoning with retaliation claims predicated on underlying opposition to discrimination related to sexual orientation).

362. *See* DEBORAH L. BRAKE, *GETTING IN THE GAME: TITLE IX AND THE WOMEN’S SPORTS REVOLUTION* 193–96 (2010) (arguing for an interpretation of Title IX’s retaliation protection that diverges from Title VII’s strict approach to the reasonable belief doctrine).

gender hierarchy and gender exclusion—as there are for anti-gay harassment, sexual assault, and sexually explicit hazing—persons who are brave enough to challenge such practices should be afforded the law’s full protection from retaliation.

An important feature of retaliation law is that it protects not just the immediate victims of discrimination, but also other persons, including bystanders, who challenge discriminatory practices on someone else’s behalf.<sup>363</sup> In the *Jackson* case, the plaintiff was the coach of the team and lost his coaching job after standing up for the gender equality rights of his female basketball players.<sup>364</sup> The Court rejected the school board’s argument that a Title IX retaliation claim, at most, protects only complaints by those persons who themselves have been subjected to discrimination.<sup>365</sup> The Court’s broader understanding of retaliation facilitates opposition to discrimination by allies as well as victims. It also corresponds to the reality that the harms of discrimination are diffuse and do not end with the immediate target of discriminatory conduct; persons other than the target may object to, and experience harm from, the kinds of masculinizing practices that enforce hegemonic masculinity and anti-gay exclusion in sports.<sup>366</sup>

The catalyst for this symposium—Chris Kluwe’s experiences in the NFL after speaking out in favor of marriage equality—illustrates the importance of allies in challenging inequality and the importance of protecting the voices of those who speak out against inequalities that exclude and subordinate others. Broadening protection from retaliation beyond the immediate targets of discrimination was a necessary step toward realizing Title IX’s potential to disrupt the practices that enforce inequality and exclusion in sport.<sup>367</sup>

While there is much that is positive in how Title IX retaliation law has developed, some hurdles remain that could prevent the law from making a difference in this area. In addition to lingering uncertainty over the scope of the reasonable belief doctrine, there is also uncertainty over the governing standard for proving causation in a Title IX retaliation claim. The Supreme Court recently decided that issue under Title VII, ruling that to

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363. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005).

364. See *id.* at 171–72.

365. *Id.* at 179.

366. Cf. Noah Zatz, *Beyond the Zero Sum Game*, 77 IND. L.J. 63 (2002) (discussing the relational harms of discrimination and harms to third persons).

367. See generally Brake, *Retaliation*, *supra* note 338, at 74–76 (discussing the importance of retaliation law in fostering social bonds and collective action by allies as well as the targets of discrimination).

prove retaliation, a plaintiff must prove that the retaliatory motive was a “determinative influence” in the adverse decision.<sup>368</sup> In other words, it must have been the “but-for” cause of the harm: but for the plaintiff’s protected activity, the adverse action would not have occurred.<sup>369</sup> In selecting this standard under Title VII, the Court rejected the more flexible and provable “motivating factor” standard that applies to Title VII discrimination claims, under which a plaintiff may prevail by proving that the discriminatory motive was a motivating factor in the adverse decision.<sup>370</sup> However, the Court’s Title VII ruling should not necessarily resolve the question under Title IX retaliation law, since that decision was grounded in certain aspects of Title VII’s text and structure that are not present in Title IX.<sup>371</sup> Lower courts have noted that this remains an open question under Title IX.<sup>372</sup> How this issue ultimately gets resolved may make a difference in Title IX’s ability to adequately protect persons who oppose discrimination, since human motivation is typically too messy to demonstrate by proof of clear-cut, but-for causation. Retaliatory motives often coexist with other motivations, making such claims more factually complex than the standard interpretation of but-for causation allows.

Another complication is that much of the retaliation likely to ensue when an athlete or other student opposes anti-gay harassment, sexual assault, or hazing is likely to come from other students—especially the athletes who engage in these practices, their friends, and their supporters. Title IX’s protection from retaliation should be expansive enough to reach retaliatory peer harassment and should require institutions to address it, but the exact contours of a retaliation claim are somewhat unsettled in how such a claim applies to peer retaliatory harassment. Under Title VII, an employer may be liable for its failure to take reasonable corrective action to address retaliatory harassment by coworkers once the employer knew or should have known about the harassment.<sup>373</sup> Unless it takes corrective action under such

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368. *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2526–28 (2013).

369. *See id.*

370. *Id.*

371. *Id.* at 2529 (discussing Congress’s 1991 amendments to Title VII, which added the motivating factor framework to Title VII’s main anti-discrimination provision, but not to its distinct retaliation provision).

372. *Minnis v. Bd. of Supervisors of L.S.U.*, 620 F. App’x 215, 222 (5th Cir. 2015).

373. *See Hawkins v. Annheuser-Busch, Inc.*, 517 F.3d 321 (6th Cir. 2008); *Moore v. City of Philadelphia*, 461 F.3d 331 (3d Cir. 2006). For a stricter approach to Title VII liability for coworker retaliation, see *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644 (5th Cir. 2012) (restricting Title VII liability for coworker retaliation to those coworker actions that are conducted in furtherance of the employer’s

circumstances, an employer is at fault for failing to take reasonable steps to ensure a non-retaliatory environment.<sup>374</sup> In order to place an obligation on the employer to respond, this type of claim requires a showing that the employer had either actual or constructive notice.<sup>375</sup> It is not yet clear, however, that Title IX will follow this path. For other kinds of harassment (e.g., sexual harassment), the Title IX standard for institutional liability in a lawsuit for damages is the much tougher actual notice and deliberate indifference standard.<sup>376</sup> The reasoning of the Court in the sexual harassment cases adopting this standard suggests that this higher standard would likely also apply to a lawsuit alleging retaliatory peer harassment. On the other hand, as discussed above, this standard does not bind OCR in its enforcement proceedings since OCR already gives notice to recipients before taking punitive action.<sup>377</sup> In the context of sexual harassment, OCR has determined that the liability standard that the Court adopted for damages actions does not apply to OCR enforcement.<sup>378</sup> If that interpretation extends to enforcement actions alleging peer retaliation, then the threat of OCR enforcement may be sufficient to put pressure on institutions to act responsively. They may, therefore, act to prevent and correct the hostile environment created by retaliatory peer harassment against persons who oppose the kind of discriminatory practices discussed in this Article.

A final hurdle is that, regardless of whether the retaliation is from peers or authority figures, the harm inflicted must be severe enough to meet the required threshold for adversity in order for retaliation to be actionable under Title IX.<sup>379</sup> Here too, there is some uncertainty as to what Title IX requires. In a Title VII retaliation claim, the Supreme Court has set the threshold standard for actionable retaliation at the level of severity that would likely chill a reasonable person from complaining.<sup>380</sup> Commentators have since critiqued lower courts' applications of this standard, demonstrating that courts' impressions of the kinds

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business).

374. See *Hawkins*, 517 F.3d at 332.

375. Elana Olson, *Beyond the Scope of Employer Liability: Employer Failure To Address Retaliation by Co-Workers After Title VII Protected Activity*, 7 WM. & MARY J. WOMEN & L. 239 (2000).

376. Brake, *Retaliation*, *supra* note 338, at 51–67.

377. See OCR, REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 239, at ii.

378. See *id.*

379. See Sandra F. Sperino, *Retaliation and the Reasonable Person*, 67 FLA. L. REV. 2031 (2015).

380. *Burlington N. & Sante Fe Ry. Co. v. White*, 548 U.S. 53, 54 (2006).

of actions that would likely deter a reasonable person from complaining are markedly different from employees' own perceptions of what would deter them from complaining.<sup>381</sup> For student complainants, there is an even greater risk that courts will over-estimate students' abilities to withstand retaliatory pressure and come forward. Because of team insularity and the totalizing culture of sports, athletes are particularly vulnerable to such pressure from coaches and teammates such that even seemingly modest retaliatory actions may have the intended effect of silencing dissent.<sup>382</sup>

Even with strong legal protection from retaliation, Title IX will only protect people who muster the courage to speak out about discriminatory practices. It is not enough to feel troubled or uncomfortable by such practices. Title IX's protection from retaliation covers only those persons who take action and complain, either formally or informally, about practices that are reasonably viewed as gender discrimination.<sup>383</sup> Taking that step remains an extraordinarily difficult thing to do, given the dynamics of athletics and campus life. Nonetheless, a strong retaliation claim might help create space for courageous acts of resistance against hegemonic masculinity in sports and might thereby promote the cause of inclusion.

## Conclusion

Changes in popular attitudes about homosexuality and the resulting expansion of LGBT rights might indicate that even sport—the ultimate bastion of hegemonic masculinity—may be on the cusp of deep cultural change. The development of sex discrimination law to address harassment based on sexual orientation may, in part, reflect the influence of these trends. This Article has shown that Title IX is poised to take a greater role in addressing the gendered harms experienced by men in athletics, thereby widening the path toward inclusion in this setting. This would also be a welcome development for women's equality. Too often Title IX is viewed as a zero-sum game of men vs. women.

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381. See Sperino, *supra* note 379.

382. See J. Chadwick Schnee, *Wrestling with Retaliation: Pinning Down the Burlington "Dissuading" Standard Under Title IX*, 17 SPORTS L.J. 223, 235–42 (2010) (discussing factors that make student-athletes particularly vulnerable to retaliation).

383. See Letter from Seth M. Galanter, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. Office of Civil Rights, to Colleague (Apr. 24, 2013), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201304.html> (describing Title IX protections against retaliation for bringing forward "concerns about civil rights problems" and complaining "to a school," formally or informally).

Greater understanding and recognition of the masculinizing practices that subordinate men will help further gender equality for both men and women.

To be sure, eliminating the practices of hegemonic masculinity discussed in this Article—anti-gay harassment, sexual assault, and hazing—will not alone establish sport as an inclusive institution. Hastening the absence of these hegemonic practices from men's sporting cultures is hardly the same thing as creating a positive and welcoming environment for gay, bisexual, queer, and questioning athletes. Nevertheless, targeting the most extreme masculinizing practices may be the most productive role law can play in furthering social change. By checking the outer limits of hegemonic practices in sport, and protecting the voices of those who oppose them, Title IX could help expand the space for inclusive masculinities to develop and flourish.

