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Deborah L. Brake

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GOING OUTSIDE TITLE IX TO KEEP COACH-ATHLETE RELATIONSHIPS IN BOUNDS

DEBORAH L. BRAKE*

Coach-athlete “romances” are the dirty little secrets of sport. No one wants to talk about them. Now and then, a high profile scandal rips through the headlines—as when University of North Carolina’s legendary soccer coach, Anson Dorrance, was accused of sexually harassing his players.¹ On these infrequent occasions, the glare of the media spotlight forces a brief period of introspection about the proper boundaries of the coach-athlete relationship. Even then, it is mostly the extreme allegations that garner attention—conduct clearly identifiable as sexual harassment, especially if it involves a sexual assault. In the case of Coach Dorrance, the complained-of behaviors were verbal and did not involve physical advances;² the notoriety of the case stemmed from the coach’s fame and track record and its addition to a small handful of reported court decisions involving coach-athlete sexual harassment in intercollegiate sports.³ Absent headline-grabbing scandals, however, coach-athlete relationships are rarely examined for their impact on womens sports and athlete well-being. This is largely because they do not come within the ambit of Title IX, which sets the agenda for conversations about gender equity in sport.

This Article takes the occasion of another Title IX anniversary—which typically prompts laudatory pieces on the law’s successes mixed with “promises yet to keep” lists—to argue that, on some issues, Title IX’s prominence has limited our ability to recognize and challenge gender injustice in sports. Title IX looms so large that many issues affecting women in sport, which do not fall within a Title IX framework, are not seen as gender equality issues at all. One area where Title IX’s limitations have contributed to a

* Professor of Law and Distinguished Faculty Scholar, University of Pittsburgh. Many thanks to research assistants Richa Mathur and Sarah Ratzkin, and to Jessie Allen for reading and commenting on an earlier draft.

1. *See generally* Jennings v. Univ. of N.C., 482 F.3d 686 (4th Cir. 2007).

2. *See id.* at 691–94.

3. *See, e.g.*, Klemencic v. Ohio State Univ., 263 F.3d 504 (6th Cir. 2001); Zimmer v. Ashland Univ., 2001 U.S. Dist. LEXIS 15075 (N.D. Ohio, Sept. 5, 2001); Ericson v. Syracuse Univ., 35 F. Supp. 2d 326 (S.D.N.Y. 1999); Turner v. McQuarter, 79 F. Supp. 2d 911 (N.D. Ill. 1999).

myopic response is in coach-athlete relationships—specifically, sexual relationships between coaches and athletes. Title IX reaches only that subset of coach-athlete relationships that cross the line into sexual harassment, an approach that skates around the edges of the problem. By limiting its reach to only unwelcome intimate relationships, Title IX effectively legitimizes all other sexual relationships between athletes and their coaches. This approach ignores the inherent vulnerability in the relationship that makes meaningful consent impossible. Title IX not only under-protects women from sexual conduct in the coach-athlete relationship, it fundamentally misconceives the abuse of power inherent in such relationships. While Title IX deserves praise for opening up access to sport for girls and women, it has had little impact on a sport culture that often works poorly for women (and many men).⁴ When that is the case, not only does Title IX fail to provide a remedy, its prominence in setting the gender equity agenda obstructs recognition of gender injustices it does not capture.

The problem of sexual relationships between coaches and athletes has not escaped commentary in legal scholarship. A handful of articles have taken up this issue, while staying within a Title IX framework to do so. Among them, Rhonda Reaves has discussed the poor fit between Title IX's unwelcomeness requirement and coach-athlete sexual harassment, and has critiqued the win-at-all cost model of coaching that primes athletes for abuse.⁵ She advocates for a more robust application of Title IX to address coach-athlete sexual harassment. And nearly a decade ago in this same journal, Nancy Hogshead-Makar and Sheldon Steinbach urged athletic departments to adopt their own sexual harassment policies, distinct from general university harassment policies, and to include within them a ban on coach-athlete sexual relationships.⁶ Other legal commentators have also focused their attention on coach-athlete sexual harassment and argued for a stronger application of Title

4. The dominant win-at-all cost model of intercollegiate sport is rife with harms to athletes, male and female. The asymmetrical coach-athlete relationship empowers coaches to abuse athletes in sexual and nonsexual ways. Athletes often emerge from this model of sport with a lackluster education, having been forced to overtrain and minimally invest in academics. These harms are "gendered" in the sense that they result from a model of sport designed to serve the interests of the most privileged male athletes and the feeder programs for men's professional sports. The result is a sport culture infused with hyper-masculine norms and a university culture that values sports for what they add to the bottom-line instead of their educational value. Yet because there is no readily available Title IX claim to redress such harms, they rarely register as gender equity concerns.

5. Rhonda Reaves, "There's No Crying in Baseball": *Sports and the Legal and Social Construction of Gender*, 4 J. GENDER RACE & JUST. 283 (2001).

6. Nancy Hogshead-Makar & Sheldon Elliot Steinbach, *Intercollegiate Athletics' Unique Environments for Sexual Harassment Claims: Balancing the Realities of Athletics with Preventing Potential Claims*, 13 MARQ. SPORTS L. REV. 173 (2003).

IX in this setting.⁷ And yet, the past decade has not seen significant progress in changing coach-athlete relationships. Notwithstanding a small amount of Title IX litigation in this area, very few educational institutions go beyond prohibiting sexual harassment in regulating the coach-athlete relationship. Until very recently, the National Collegiate Athletic Association (NCAA) had not taken any action to address coach-athlete intimate relationships.⁸

While I commend commentators' efforts to strengthen Title IX's protections from coach-athlete harassment, I argue that further progress in this area requires moving beyond a Title IX framework to ground policies regulating coach-athlete relationships in the twin pillars of coaching ethics and student welfare. Educational institutions and sport organizations should adopt policies grounded in these values that strictly prohibit sexual and romantic relationships between coaches and athletes. It is a mistake to continue treating these relationships solely as a subspecies of sexual harassment.

A quick note is in order to explain the narrow focus of this piece: coach-athlete relationships in intercollegiate sport. Although coach-athlete sexual abuse occurs in lower levels of education too, criminal law comes into play where the athlete is underage. In addition, Title IX, while still vulnerable to some of the critiques discussed below, is more forgiving in its unwelcomeness requirement as applied to younger athletes in sexual relationships with adults.

My focus is also limited to intercollegiate sports and not amateur sports, even though amateur sports are also marred by coach-athlete sexual exploitation.⁹ Because Title IX does not apply to amateur sports conducted

7. See, e.g., Diane Heckman, *Title IX and Sexual Harassment Claims Involving Educational Athletic Department Employees and Student-Athletes in the Twenty-First Century*, 8 VA. SPORTS & ENT. L.J. 223 (2009); Deanna DeFrancesco, Note, *Jennings v. University of North Carolina at Chapel Hill: Title IX, Intercollegiate Athletics, and Sexual Harassment*, 15 J.L. & POL'Y 1271 (2007); Jesse Mendelson, Note, *Sexual Harassment in Intercollegiate Athletics by Male Coaches of Female Athletes: What it Is, What it Means for the Future, and What the NCAA Should Do*, 9 CARDOZO WOMEN'S L.J. 597 (2003); Annemarie Pinarski, Note, *When Coaches "Cross the Line": Hostile Athletic Environment Sexual Harassment*, 52 RUTGERS L. REV. 911 (2000); Erika Tripp, Comment, *Sexual Harassment in Sports: How "Adequate" is Title IX?*, 14 MARQ. SPORTS L. REV. 233 (2003); cf. Danielle Deak, Comment, *Out of Bounds: How Sexual Abuse of Athletes at the Hands of Their Coaches is Costing the World of Sports Millions*, 9 SETON HALL J. SPORT L. 171 (1999) (youth sports).

8. See Heckman, *supra* note 7, at 230–31 (criticizing the NCAA for not having a blanket prohibition on coach-athlete relationships); Mendelson, *supra* note 7, at 622 (noting that the NCAA's only related pronouncement is a vague general guideline requiring coaches to "act with honesty and sportsmanship" and "represent the honor and dignity of fair play" associated with "wholesome competitive sports"). At the time this article was going to press, the NCAA was on the verge of issuing, and urging its members to adopt, a model policy prohibiting intimate relationships between student-athletes and athletic department personnel. Email from Karen Morrison, NCAA Director of Gender Inclusion Initiatives, to Author (Feb. 1, 2012) (on file with author).

9. See, e.g., Celia Brackenridge et al., *Managing Cases of Abuse in Sport*, 14 CHILD ABUSE REV.

outside the school setting, the law looms less large in setting the boundaries of coach-athlete relationships in amateur sports. Ironically, amateur sport associations, which are free of Title IX's sex discrimination constraints, have gone further in proscribing exploitative relationships between coaches and athletes than colleges and universities, which are governed by Title IX. Amateur sport associations have started down the path of grounding policies on coach-athlete relationships based on principles of coaches' ethics and athlete welfare, and they have not been limited by Title IX in envisioning policy solutions. In contrast, in intercollegiate athletics, where Title IX looms large both as an aspiration and a limitation in thinking about gender equity, most colleges and universities continue to view coach-athlete sexual relationships only as a subspecies of sexual harassment, and therefore, permissible when not unwelcome. Accordingly, my focus here is on coach-athlete relationships in intercollegiate sports.

Part II of this Article examines the problem of coach-athlete sexual relationships. Drawing on research from other disciplines, it argues that such sexual relationships between coaches and athletes are inherently exploitative. Part III examines the limitations of Title IX as applied to this setting, arguing that the law fails to address the exploitation involved in these relationships and serves to occlude recognition of the gender equity concerns such relationships present. Part IV urges looking outside Title IX to formulate policies prohibiting sexual relationships between coaches and athletes, grounded in the ethical responsibility of the coach and the well-being of student-athletes

II. BLURRED BOUNDARIES: ABUSE, EXPLOITATION, AND INTIMACY IN COACH-ATHLETE RELATIONSHIPS

As someone who typically views the challenges facing girls and women in sport through the lens of Title IX, I had not given much thought to coach-athlete relationships except as a sub-category of sexual harassment. I was prompted to rethink this perspective when I heard a talk by Mariah Burton Nelson at the NCAA's annual Gender Equity Forum in the spring of 2011. Nelson spoke movingly about her own experience of being "seduced" by her swimming coach as a young athlete, the impact this experience had on her, and the failure of sport organizations and athletic departments to recognize coach-athlete intimate relationships as a serious problem in sport.¹⁰ She exhorted the

259, 261 (2005) [hereinafter Brackenridge et al., *Managing Cases*] (discussing incident in which a former British Olympic swimming coach was convicted in 1993 of sexually abusing swimmers over a twenty-year period).

10. Mariah Burton Nelson, Exec. Dir., Am. Ass'n for Physical Activity & Recreation, Promises to Keep: Protecting the Student-Athlete Experience, Talk at the NCAA Gender Equity Forum (May 2,

audience to become advocates on this issue and educate their home institutions to recognize the power dynamics that make such relationships harmful to the individual athlete and the team.

When I returned home from the conference, inspired to pursue this issue further, I found substantial, though still nascent, literature on coach-athlete relationships in sport sociology. This research largely confirms Nelson's fundamental points that coach-athlete sexual relationships are a serious problem and that sport organizations and institutions must prohibit such relationships if sport is to become a safe and empowering place for girls and women.

At this stage of the research, there is no clear picture of how often coaches become sexually involved with athletes. Part of the problem is that existing studies measure different things, involve athletes of varying ages and levels of sport, and are conducted in different geographic locations. Many of the studies lump together sexual harassment, sexual abuse, and coach-athlete sexual relationships, without clearly delineating the behaviors and actions that fall into these categories. Some of the studies look for behaviors that are "unwelcome" (which is implicitly suggested by the label "sexual harassment," as discussed below), while others identify specific behaviors without regard to whether they were welcome (e.g., inviting an athlete home, out to dinner, etc.). The studies are wide-ranging geographically, with some of the most comprehensive ones conducted outside the United States.¹¹ Indeed the relative lag in U.S.-based research is itself significant, indicative of an ideology that idealizes coaches and overlooks or minimizes the harmful aspects of sport, especially where the athletes are adults. Despite the limitations of existing research, it supports the conclusion that sexual abuse of athletes by coaches is a serious problem in sport—and, as I argue later, the dynamics of the coach-athlete relationship in intercollegiate sport make any sexual contact between a coach and athlete abusive, regardless of whether it was wanted by the athlete and regardless of whether the athlete is over the age of consent.¹²

2011). The talk further developed themes she had written about previously. MARIAH BURTON NELSON, *THE STRONGER WOMEN GET, THE MORE MEN LOVE FOOTBALL: SEXISM AND THE AMERICAN CULTURE OF SPORTS* 159–94 (1994).

11. Cf. Celia Brackenridge, *Dangerous Sports? Risk, Responsibility and Sex Offending in Sport*, 9(1) *J. SEXUAL AGGRESSION* 3, 9 (2003) [hereinafter Brackenridge, *Dangerous Sports?*] (lamenting the lack of research on the prevalence of sexual abuse in sport in the UK, but noting that research in Canada, Norway and Australia show that "sexual exploitation is a serious issue for sport").

12. Cf. Helen Lenskyj, *Unsafe at Home Base: Women's Experiences of Sexual Harassment in University Sport and Physical Education*, 1(1) *WOMEN SPORT & PHYSICAL ACTIVITY J.* 19 (1992) (describing "sexual liaisons between young female athletes and male coaches" as "commonplace" and "normal," and arguing that such relationships involve an abuse of power).

Piecing together scattered figures from a variety of different studies, Celia Brackenridge, the most-cited and influential researcher on the subject, places the documented prevalence rate for sexual abuse in sport between 2% and 22%.¹³ This wide variance reflects the disparate categories of behaviors that researchers examined in these studies. The difficulty of determining prevalence rates in this area is compounded by the gap between athletes' perceptions of what falls into the categories studied (sexual harassment, for example) and researchers' own understandings of the behaviors that fit the categories. Athletes do not always (or even most of the time) recognize harassing or abusive behavior when they experience it. And even when they do, experiences of harassment and abuse by coaches are underreported and difficult to detect, even in carefully designed studies.¹⁴

Despite the limitations of existing research, it is sufficient to warrant raising the profile of this issue in discussions about the experiences of girls and women in sport. One of the most comprehensive studies of sexual abuse in sport was done in Canada with a survey of that country's Olympic athletes about their experiences in sport.¹⁵ In the study, 22% of the athletes responding reported that they had engaged in sexual intercourse with an authority figure in sport.¹⁶ Nearly 9% of respondents reported experiencing a forcible sexual encounter.¹⁷

Other studies have found lower, but still significant, percentages of athletes who have had sexual interactions with their coaches. One of the few studies in the U.S. examined the experiences of female intercollegiate athletes at a major university.¹⁸ In this study, 20% of the athletes responding reported

13. Celia H. Brackenridge et al., *The Characteristics of Sexual Abuse in Sport: A Multidimensional Scaling Analysis of Events Described in Media Reports*, 6(4) INT'L J. SPORT & EXERCISE PSYCHOL. 385, 388 (2008).

14. Karin A.E. Volkwein et al., *Sexual Harassment in Sport: Perceptions and Experiences of American Female Student-Athletes*, 32 INT'L REV. FOR SOC. SPORT 283, 284 (1997); see also Reaves, *supra* note 5, at 291–92 (detailing reasons to suspect such incidents are underreported, including: fear of reprisal; uncertainty about the proper boundaries of such relationships; inadequate complaint procedures; and the potential inadequacy of legal remedies).

15. SANDRA KIRBY ET AL., *THE DOME OF SILENCE: SEXUAL HARASSMENT AND ABUSE IN SPORT* 82 (2000).

16. *Id.*; see also Gretchen A. Kerr & Ashley E. Stirling, *Child Protection in Sport: Implications of an Athlete-Centered Philosophy*, 60(2) QUEST 307 (2008) (discussing other research in Canada finding sexual abuse in sport to be a significant problem); Jan Toftegaard Stockel, *Athlete Perceptions and Experiences of Sexual Abuse in Intimate Coach-Athlete Relationships*, in ELITE CHILD ATHLETE WELFARE: INTERNATIONAL PERSPECTIVES 93 (Celia H. Brackenridge & Daniel Rhind eds., 2010) (discussing findings of Danish study that almost one in three athletes surveyed reported having experienced an intimate relationship with a coach).

17. KIRBY ET AL., *supra* note 15, at 88–89.

18. See Volkwein et al., *supra* note 14, at 290.

that they experienced behaviors from a coach that took the relationship in a noninstructional and potentially intimate direction, such as an invitation to dinner alone at a restaurant or calling the athlete a pet name.¹⁹ Significantly, especially for the later discussion of unwelcomeness, the vast majority (92%) of the respondents who experienced this kind of attention felt positively about it; only 8% reacted negatively.²⁰ And yet, research clearly identifies noninstructional behavior by a coach—such as driving an athlete home alone, sharing a hotel room, taking an athlete out to dinner or the movies alone, inviting an athlete to the coach’s home, going to parties together, and drinking alcohol together—as a high risk factor for turning the relationship into a sexual one.²¹ The athletes’ positive responses to being singled out for noninstructional attention by the coach speak to the intensity of the coach-athlete bond, and the difficulty of setting boundaries in the relationship.

In this same study, a much smaller percentage of athletes, 2%, reported having been subjected to verbal or physical sexual advances by their coach; all of them reported (after the fact) having felt negatively about these more explicit overtures.²² A similar figure for sexual advances was reported in a study of female athletes in the U.K., where 2.7% of the athletes in the study reported being on the receiving end of sexual behaviors from a coach (pressure to have sex or contact with breast or genital area).²³ A survey of Danish female athletes found somewhat higher prevalence rates of sexual advances from coaches, with 8.5% of the female athletes in the study (from various levels of sport, recreation to elite) having been kissed on the mouth by their coach and 3.4% having been sexually propositioned by the coach with the threat of negative action if they refused.²⁴

Response rates indicating sexually improper behaviors tend to be higher where studies ask about “sexual harassment” instead of asking about specific sexual behaviors. For example, in a study of 660 elite female athletes in Norway, more than half of the athletes surveyed reported that they had experienced one or more forms of sexual harassment in sport (not necessarily

19. *Id.*

20. *Id.*

21. See Sylvie Parent & Guylaine Demers, *Sexual Abuse in Sport: A Model to Prevent and Protect Athletes*, 20 CHILD ABUSE REV. 120 (2011).

22. Volkwein et al., *supra* note 14, at 290.

23. Naomi Fejgin & Ronit Hanegby, *Gender and Cultural Bias in Perceptions of Sexual Harassment in Sport*, 36(4) INT’L REV. FOR SOC. SPORT 459, 460 (2001) (citing findings of research by Tomlinson & Yorganci, 1997).

24. Jan Toftegaard Nielsen, *THE FORBIDDEN ZONE: Intimacy, Sexual Relations and Misconduct in the Relationship Between Coaches and Athletes*, 36(2) INT’L REV. FOR SOC. SPORT 165, 172 (2001).

by a coach); notably, older female athletes were more likely than their younger peers to report that they had been sexually harassed by an authority figure in sport.²⁵ A study of Israeli female athletes found a lower rate of sexual harassment, with 14% saying they had experienced sexual harassment in sport,²⁶ while a Danish study found a prevalence rate somewhere in between, at 25%.²⁷ The likelihood of differences in athletes' perceptions of what constitutes sexual harassment makes it impossible to compare prevalence rates like these across studies as objective indicators of what athletes experience. Nevertheless, the range of findings across all of these studies shows a serious problem for female athletes in sport. Of particular significance to intercollegiate sports, one of the most robust findings in the literature is that the incidence of coach-athlete sexual abuse is higher for elite female athletes than it is for athletes at lower, less competitive levels of sport.²⁸

In arguing for moving beyond Title IX to address coach-athlete sexual relationships, I am not suggesting that gender is irrelevant in this area or seeking to impose a false gender neutrality. This is indeed a gendered problem at many levels. In terms of who is harmed by sexual abuse in sport, it is predominantly, although certainly not entirely, female athletes.²⁹ For example, in the study mentioned above, in which 8.5% of female athletes reported having been kissed on the mouth by a coach, 0% of male athletes reported such an experience.³⁰ And in terms of the coaches engaging in this behavior, it is primarily male coaches who become sexually involved with athletes.³¹ That is not to say that female coaches never have sexual relationships with athletes, nor that male athletes are never the recipients of sexual advances by a coach, male or (more rarely) female. Such things do happen. Indeed, as if we needed a reminder that male athletes can also be sexually abused by a coach, the Penn State scandal, in which an assistant

25. Brackenridge, *Dangerous Sports?*, *supra* note 11, at 9 (citing findings of other researchers).

26. Fejgin & Hanegby, *supra* note 23, at 471–72.

27. Kari Fasting et al., *Consequences of Sexual Harassment in Sport for Female Athletes*, 8(2) J. SEXUAL AGGRESSION 37, 39 (2002) (in study of 250 male and female college athletes, 25% either experienced sexual harassment from a coach or knew someone who had).

28. Brackenridge, *Dangerous Sports?*, *supra* note 11, at 9.

29. *See id.* (citing studies showing higher prevalence rates for female than male athletes).

30. Nielsen, *supra* note 24, at 172; *see also id.* at 173 (noting feedback from nonresponding participants in the survey, especially male athletes, that they thought the questionnaire on sexual harassment/abuse did not apply to them). However, low rates of reporting by male athletes should also be considered in light of the heightened stigma male athletes face when they do report sexual abuse by a coach.

31. *See* Celia Brackenridge, “*He Owned Me Basically...*”: *Women’s Experience of Sexual Abuse in Sport*, 32 INT’L REV. FOR SOC. SPORT 115, 116 (1997) [hereinafter Brackenridge, “*He Owned Me Basically*”].

football coach was charged with sexually molesting underage boys in a mentoring program for over fifteen years, made headlines just as this article was nearing completion. When male athletes—who are coached by men 98% of the time³²—are sexually abused by a coach, the heterosexual presumption in men’s sports contributes to a climate of non-recognition and denial.³³ For boys and men, being involved in sport, either as an athlete or coach, creates a hetero-masculine identity that makes sexual relationships between male athletes and their male coaches all but unthinkable. Still, the coach-athlete sexual relationship in sport is largely, but not exclusively, a problem of male coaches becoming sexually involved with female athletes.³⁴

Beyond the gender of the participants, there are more subtle gender dynamics at play. The style of coaching that is most conducive to forming coach-athlete sexual relationships is more closely associated with male coaches: authoritarian, requiring unquestioning submission to the coach’s authority, and exercising near total control over athletes’ lives.³⁵ According to Brackenridge, having a male coach with an authoritarian coaching style is a high risk factor for coach-athlete sexual abuse.³⁶ Women’s limited opportunities in sport make them especially vulnerable to sexual exploitation by a coach. Women have fewer chances to play competitive sports if they walk away from a relationship with a coach.³⁷ A sport culture that associates athleticism with masculinity also contributes to women’s vulnerability. As Helen Lenskyj explains, cultural messages that stigmatize female athletes as lesbians may deter some women, of whatever sexual orientation, from

32. Linda Jean Carpenter & R. Vivian Acosta, *Women in Intercollegiate Sport: A Longitudinal, National Study Thirty-Three Year Update, 1977–2010*, available at <http://webpages.charter.net/womeninsport/2010pdf%20combined%20final.pdf>.

33. See CELIA H. BRACKENRIDGE, SPOILSPORTS: UNDERSTANDING AND PREVENTING SEXUAL EXPLOITATION IN SPORT 67 (2001) [hereinafter BRACKENRIDGE, SPOILSPORTS].

34. Volkwein et al., *supra* note 14, at 286 (explaining focus on male coach-female athlete sexual abuse, but noting that sexual harassment and abuse in sport are not exclusively targeted at female athletes, nor performed exclusively by male coaches).

35. Lenskyj, *supra* note 12 (citing research showing that male coaches are less likely to adopt a participatory style, and more likely to be authoritarian); Alan Tomlinson & Ilkay Yorganci, *Male Coach/Female Athlete Relations: Gender and Power Relations in Competitive Sport*, 21(2) J. SPORT & SOC. ISSUES 134, 136 (1997) (discussing research on “the authoritarian, exploitative, and sometimes abusive practices that male coaches may adopt in ‘cross-gender coaching relationships’”).

36. BRACKENRIDGE, SPOILSPORTS, *supra* note 33, at 121–22; see also Marianne Cense & Celia Brackenridge, *Temporal and Developmental Risk Factors for Sexual Harassment and Abuse in Sport*, 7(1) EUR. PHYSICAL EDUC. REV. 61 (2001) (citing as risk factors for sexual abuse of athlete by coach: the coach’s authoritarian attitude and exercising control over matters outside of sport).

37. Helen Lenskyj uses this point to argue that, given the opportunity structure for girls and women in sport, it is “highly likely” that any male coach in a sexual relationship with a young female athlete is abusing his power. Lenskyj, *supra* note 12.

rebuffing advances from a male coach out of fear of confirming stereotyped expectations that they are not interested in men.³⁸

The gender balance of power in sport leadership is also part of the gender dynamic of coach-athlete sexual exploitation. The coaching profession is male-dominated, even in women's sports. The percentage of intercollegiate coaching jobs held by women has declined sharply since Title IX was enacted in 1972, which prompted the vast majority of athletic programs to integrate their mens and womens departments into a unified administrative structure. In recent years, the percentage of women coaching college varsity women has hovered in the low 40 percentile range, most recently at 42.6%.³⁹ When both men's teams and women's teams are taken into account, women hold less than 21% of head coaching jobs in intercollegiate sports.⁴⁰ This gender balance of power has wide ramifications for the culture of sport, including the norms and expectations of coach-athlete relationships. Male coaches set the norms for coaching behavior in sports so much so that many female athletes express a preference for male over female coaches.⁴¹ Male coaches have a presumptive authority and legitimacy that contributes to the power imbalance in the coach-athlete relationship, laying the ground rules for unquestioning allegiance to whatever the coach demands.⁴² And male coaches, who make up 57.4% of the head coaches in womens intercollegiate athletics, are typically former athletes themselves, steeped in the milieu of mens locker rooms and a hyper-masculine athletic culture that fosters expectations of easy sexual access to women.⁴³

38. *Id.*

39. Carpenter & Acosta, *supra* note 32.

40. *Id.*

41. Barbara Osborne, *Coaching the Female Athlete*, in *PSYCHOLOGICAL FOUNDATIONS OF SPORT* 428–37 (John M. Silva, III & Diane E. Stevens eds., 2001) (discussing studies showing female athlete preferences for male coaches, and attributing such preferences to cultural expectations of male superiority in sports); Tomlinson & Yorganci, *supra* note 35, at 143 (noting results of one study in which 25% of female athletes responding expressed a preference for a male coach, while only 3% expressed a preference for a female coach; athletes in the study tended to perceive male coaches as more effective than female coaches).

42. *Cf.* Kari Fasting & Celia Brackenridge, *Coaches, Sexual Harassment and Education*, 14(1) *SPORT EDUC. & SOC'Y* 21, 32–33 (2009). As these authors explain:

It is difficult to assess whether feminisation of the coaching profession would lead to a less harassing environment. But, since this environment is so closely linked to hegemonic masculinity, and what are often described as traditional male values, we hypothesise that a transformation of the coaching culture, and associated re-scripting of coach behaviour, might be easier if more female coaches were involved in sport.

Id.

43. Lenskyj, *supra* note 12; Anita M. Moorman & Lisa P. Masteralexis, *An Examination of the*

And yet, while the problem is deeply gendered, it is the relationship and roles of the coach and athlete that are central to the power imbalance that make sexual relationships between coaches and athletes inherently exploitative, more so than the gender of the participants. In competitive sport, especially at the elite level of intercollegiate athletics, coaches have power over athletes' lives far exceeding the mechanics of practicing and competing in a sport. A coach's power over athletes can extend to virtually all aspects of the athlete's life in such ways that clear boundaries are hard to delineate. This near-total control is rarely questioned.⁴⁴ It is especially emblematic of coach-athlete relationships in sport cultures that place a premium on winning over other values, such that the team culture encourages sacrificing the liberty and autonomy of the individual for the "good" of the team (with "good" defined as winning).⁴⁵ In such a relationship, the athlete may not readily perceive when appropriate boundaries have been crossed, much less have the fortitude to protest a coach's overreaching.⁴⁶

The athlete's dependence on the coach has both a material and a psychological aspect. In the most tangible terms, the athlete depends on the coach for a place on the roster, playing time, training and skill-building opportunities, visibility, and references that can lead to professional opportunities; and, in Division I and II programs, scholarships that can mean the difference in being able to afford a college education.⁴⁷ In exercising this power, the coach commonly exerts broad control over an athlete's life, including such areas as physical fitness, diet, weight, sleep patterns, academic habits, and social life.⁴⁸ For intercollegiate athletes, the magnitude of the coach's control will likely exceed that of any other single individual at that athlete's institution. For many, it will exceed the extent of control any individual has ever had over them at any point in their lives, with the exception of their parents.

It is not just the coach's control over the material aspects of the athlete's life that makes the athlete so vulnerable in this relationship. The psychological dimension of the relationship is critical. The coach's role in the athlete's life is unique and more akin to the role of a parent than a typical

Legal Framework Between Title VII and Title IX Sexual Harassment Claims in Athletics and Sport Settings: Emerging Challenges for Athletics Personnel and Sport Managers, 18 J. LEGAL ASPECTS SPORT 1, 6 (2008).

44. Volkwein et al., *supra* note 14, at 285.

45. *Id.*

46. Brackenridge, "He Owned Me Basically," *supra* note 31, at 122-23.

47. Volkwein et al., *supra* note 14, at 284.

48. Tomlinson & Yorganci, *supra* note 35, at 144.

teacher.⁴⁹ For many athletes, the coach assumes a role that is irreplaceable if the athlete is to progress in the sport. For those who have heavily invested in sport at the expense of other relationships in their lives, they can find themselves especially vulnerable to a coach's overreaching. Helen Lenskyj has noted that many young athletes have less experience with romantic relationships than most persons their age because sport has been so central to their lives.⁵⁰ Lacking experience to give them perspective and understanding, and with weak social networks outside of sport, these athletes are ill prepared to negotiate romantic overtures from their coach.

For all these reasons, the coach's status and power largely loom in the athlete's life, so much so that as Celia Brackenridge explains, "to the young athlete, the coach is a kind of god and that godlike status can easily spill over into abusive relationships."⁵¹ Athletes whose self-esteem is intertwined with their athletic identity are especially vulnerable. Fear of losing a "father figure" can make athletes slow to recognize when boundaries have been crossed and resistant to seeing the coach as acting inappropriately.⁵² Even without intimidation or coercion, the coach is well positioned to take advantage of the athlete's vulnerability in developing a sexual relationship.⁵³ The athlete's dependence on the coach makes it enormously difficult for the athlete to control the boundaries of the relationship or speak up to a coach who oversteps.⁵⁴

The extent of control exerted by coaches over athletes in elite levels of sports is likely the reason why the risk of sexual abuse in sport has been found to increase as the level of athletic competition advances. It is the higher levels of sport where the coach exerts the most control over the widest areas of the athlete's life. A similar phenomenon has been found in the workplace. The risk of sexual harassment at work increases in workplaces where the distinction is blurred between the private and public lives of employees.⁵⁵

In addition to the coach's power over athletes, there are distinctive features of sport that make it particularly conducive to developing sexual relationships, with few institutional checks. The nature of competitive sport

49. Osborne, *supra* note 41 (discussing psychological and emotional bond athletes develop with the coach); Parent & Demers, *supra* note 21 (noting breadth of coaches' influence over athletes and their typically unquestioned authority).

50. Lenskyj, *supra* note 12.

51. Tomlinson & Yorganci, *supra* note 35, at 138.

52. Brackenridge, "He Owned Me Basically," *supra* note 31, at 123.

53. Tomlinson & Yorganci, *supra* note 35, at 147.

54. *Id.* at 149.

55. BARBARA A. GUTEK, SEX AND THE WORKPLACE: THE IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN, AND ORGANIZATIONS 115-16 (1985).

provides many opportunities for escalating intimacy between a coach and an athlete. Coaching may properly involve hands-on touching—a coach may need to place his hands on an athlete to demonstrate proper positioning. For the athlete who is accustomed to some physical contact with a coach, it can be difficult to discern when physical contact moves from proper sport-related touching and into a sexual realm. Sport also provides ample opportunities for time with the coach in isolation from an athlete's social support network, enabling the coach to intensify the relationship. Research has identified a number of locations with a high risk of sexual advances by a coach, where coaches take advantage of the athlete's isolation from others, including: at away-games, while giving a massage, while alone in a car with the coach, and while visiting the coach at his home.⁵⁶ Moreover, the sheer amount of time coaches spend with athletes, especially at elite levels of sport, creates opportunities for escalating intimacy. The introduction of sexuality into the relationship is typically gradual, making it less likely to trigger resistance or even be noticed as a progression.⁵⁷

The coach's expansive role in the lives of athletes is accompanied by an unusually low level of institutional control. As long as the coach meets expectations for success (usually defined in terms of win-loss records), the coach has enormous institutional autonomy. Compared to teachers and other educators, coaches conduct their interactions with students with little oversight or assessment.⁵⁸ The recent Penn State scandal, which is still unfolding at the time of this writing, in which former assistant football coach Jerry Sandusky allegedly used his position and access in the Penn State football program to molest numerous boys over a fifteen year period despite multiple eye-witness accounts, is only the latest example of the systematic failure to exercise control over an abusive coach.

The distinctive features of the coach-athlete relationship should call into question whether it is possible for an athlete to freely consent to a sexual relationship with the coach. The potential for either the appearance or reality of a quid pro quo relationship, in which some aspect of the athlete's athletic opportunity depends on her intimate relationship with the coach, is virtually unavoidable.⁵⁹ In an educational setting, the primary concern should always be for the well-being of the athlete. Coach-athlete intimate relationships

56. Brackenridge, *Dangerous Sports?*, *supra* note 11, at 8.

57. Joy D. Bringer et al., *Swimming Coaches' Perceptions of Sexual Exploitation in Sport: A Preliminary Model of Role Conflict and Role Ambiguity*, 20 *SPORT PSYCHOLOGIST* 465, 474 (2006).

58. *Id.* "Coaches differ from school teachers and other helping professionals in that they rarely have formal and regular opportunities for peer or supervisory assessments or self-reflection." *Id.*

59. See Lisa P. Masteralexis, *Sexual Harassment and Athletics: Legal and Policy Implications for Athletic Departments*, 19(2) *J. SPORT & SOC. ISSUES* 141, 150 (1995).

jeopardize athlete well-being.⁶⁰ They also interfere with the sport experiences of the athlete's teammates. Surveys of athletes find high percentages who say that sexual advances by a coach would interfere with their own ability and with the ability of their teammates to compete successfully in their sport.⁶¹ Athletes who become sexually involved with a coach are often unable to get out of the relationship when they want to, and face a choice between continuing an unwanted relationship and jeopardizing their opportunities in sport.⁶²

Despite the power dynamics of the coach-athlete relationship and the harms coach-athlete relationships pose to athletes, there is a troubling disconnect in how coaches view these relationships. The perspective of coaches who become sexually involved with athletes has not been studied as much as that of the athletes. But the research that does exist suggests a lack of awareness by coaches of the deeply problematic construct of consent in coach-athlete sexual relationships. Where the athletes are over the age of consent, coaches seem to be much less troubled by these relationships than they should be. A study of coaches in Denmark found that while 92.9% of them agreed that it was unacceptable for a coach to have an intimate relationship with an athlete under the age of eighteen, two-thirds (66%) of them believed that intimate relationships between coaches and athletes were acceptable if the athlete was eighteen or older.⁶³ In fact, 20% of the coaches who responded to the survey acknowledged having had an intimate relationship with an athlete who was eighteen or older.⁶⁴ Likewise, a study of swimming coaches in England found vastly different opinions about the acceptability of intimate

60. See Brackenridge, "He Owned Me Basically," *supra* note 31, at 122 (discussing the negative consequences athletes experience when they are sexually abused by a coach).

61. BRACKENRIDGE, SPOILSPORTS, *supra* note 33, at 40, 123 (discussing harms of coach-athlete sexual abuse); Nielsen, *supra* note 24, at 172 (in survey of student-athletes in Denmark—sample was 2/3 female and 1/3 male—84.3% agreed that a coach kissing the athlete on the mouth would negatively affect the individual athlete's ability to compete successfully, and 85.7% said it would negatively impact the team's ability to compete successfully); Volkwein et al., *supra* note 14, at 288 (in survey of women playing intercollegiate sports in the U.S., 92% agreed that verbal and sexual advances by the coach would interfere with the individual athlete's ability to successfully compete, and 84% agreed that such behavior would interfere with the team's ability to compete successfully); see also Osborne, *supra* note 41 (discussing harms to the team when a coach becomes sexually involved with an athlete).

62. Nielsen, *supra* note 24, at 179–80 (summarizing research findings that most of the athletes who experienced inappropriate behavior from a coach felt unable to do anything about it).

63. *Id.* at 176. The study did not break down coaches' responses by gender (which would have been interesting), but the sample was predominantly male (83%). *Id.* at 175.

64. *Id.* at 176. The most common explanation given by the coach was that it happened with the athlete's consent. A much lower percentage, 3%, admitted to having had an intimate relationship with an athlete younger than 18. *Id.*

relations between coaches and athletes who were underage (which were uniformly condemned) and athletes who were above the age of consent (which elicited a wide range of opinions).⁶⁵ An Israeli study found a similar gap between the views of coaches and athletes with respect to sexual behavior by a coach. A substantially higher percentage of athletes than coaches found sexual conduct by a coach toward an athlete to be sexual harassment. In the study, 80% of the athletes believed that a coach's proposal for a sexual encounter (absent threats or rewards offered) was harassing, while 62% of the coaches believed this to be harassment.⁶⁶

In addition to coaches' own lax views of sexual relationships with athletes, the research shows that coaches are reluctant to step in when they believe that another coach is involved in an inappropriate relationship with an athlete.⁶⁷ This is consistent with literature suggesting that sport governance structures have failed to take seriously the problem of sexual abuse in sport and have been resistant to policies and prevention efforts to address the problem.⁶⁸

III. THE LIMITS OF TITLE IX

Feminist legal scholars have bemoaned the limits of Title IX in its approach to sexual harassment in education, including athletics.⁶⁹ And yet, Title IX lawyers and advocates keep coming back to the law in the hope that some reform effort will make the law better suited to this problem. While I would never discourage such efforts, I would caution that Title IX must not occupy the field nor so cloud our vision that it eclipses other, nonequality-based tools for getting at the injustices facing girls and women in sport. At times, feminist legal scholars fall victim to the old adage: if your only tool is a hammer, every problem is a nail. I suspect that coach-athlete sexual abuse has not been a prominent issue in gender equity advocacy in sports partly because Title IX is such a poor tool for addressing it.

65. Bringer et al., *supra* note 57, at 467.

66. Fejgin & Hanegby, *supra* note 23, at 469. The gap persisted even where proposals of sexual encounter were accompanied by promises of threats or rewards (90% of the athletes saw this as harassing, but only 72% of the coaches). *Id.*

67. Bringer et al., *supra* note 57, at 467.

68. Parent & Demers, *supra* note 21 (noting, among reasons for resistance, beliefs that the harms of sexual abuse in sport are overblown and fears that highlighting the problem would create an unfavorable impression and shed negative light on a sport program). Fear of false accusations is also a reason why athletic organizations have resisted taking action, although existing literature suggests that the actual incidence of false accusations of coaching abuse is very rare. Brackenridge et al., *Managing Cases*, *supra* note 9, at 266–67.

69. See, e.g., DEBORAH L. BRAKE, GETTING IN THE GAME: TITLE IX AND THE WOMEN'S SPORTS REVOLUTION 206–16 (2010) [hereinafter BRAKE, GETTING IN THE GAME].

Title IX's liability standard for sexual harassment has been widely viewed as problematic ever since the Court adopted it for teacher-student sexual harassment in *Gebser v. Lago Vista Independent School District*.⁷⁰ In this case, the Court limited institutional liability for damages under Title IX to cases where the plaintiff proves that an official with authority over the harasser had actual notice of the harassment and responded with deliberate indifference.⁷¹ As a result, the threshold for institutional liability is much higher for Title IX, which purports to protect students from sexual harassment, than it is for adult employees in the workplace under Title VII.⁷² There is an incentive for an educational institution seeking to avoid Title IX liability to not discover the harassment, which is all too easy if policies and procedures for reporting it are not well known or well designed. Much sexual activity directed at students is hidden from view and would require an affirmative act of reporting it to the proper officials to meet this notice standard. And although the Title IX regulations require covered institutions to have a procedure for handling Title IX grievances and to appoint a Title IX coordinator, the failure to do so does not establish "actual notice," as required by the Court.⁷³ Put bluntly, the actual notice standard is terrible for addressing sexual harassment in education generally, but is especially unhelpful for remedying coach-athlete sexual abuse given the secrecy of such relationships and the norms in sport that weigh on athletes to keep them secret.⁷⁴ Even if the actual notice standard can be met, the deliberate indifference standard poses a further hurdle.⁷⁵

But if the main obstacle to a meaningful Title IX remedy were merely the liability standard, the law might still play a central role here. The actual notice plus deliberate indifference standard does not limit agency enforcement or

70. 524 U.S. 274 (1998).

71. *Id.* at 277.

72. BRAKE, GETTING IN THE GAME, *supra* note 69, at 210–15 (comparing liability standards for sexual harassment claims under Title VII and Title IX).

73. *See Gebser*, 524 U.S. at 291–93 (discussing effect of 34 C.F.R. § 106.8(b)).

74. *See, e.g., Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355 (3d Cir. 2005) (where plaintiff lost a Title IX claim involving a sexual relationship between coach and under-age high school athlete, rejecting plaintiff's argument that "actual notice" can be established by proof of information sufficient to alert the principal to the possibility of the relationship). *Cf. Fasting et al.*, *supra* note 27 (in study of elite female athletes in Norway who had experienced sexual harassment in sport, noting that none of them had complained to an authority figure).

75. *See, e.g., King v. Conroe Indep. Sch. Dist.*, 289 Fed. Appx. 1 (5th Cir. 2007) (in sexual harassment claim based on coach's alleged sexual relationship with eighth grader, holding school did not act with deliberate indifference where principal asked the coach about the relationship and accepted the coach's denial without any further investigation).

injunctive relief, only liability for damages.⁷⁶ And it is not inconceivable that continued criticism might open the door to revisiting the standard at some point down the line, either in Congress or back before the Court. Moreover, some lower courts have taken less strict approaches than others in applying the standard. For example, some courts have allowed actual notice to be met where suspicious circumstances should have put the onus on an official to investigate the nature of a relationship, or where an official had notice of similar kinds of behaviors by the harasser, even if directed at other persons.⁷⁷ However, beyond the liability standard, the larger problem with using Title IX to address coach-athlete sexual abuse is that the sex discrimination framework at the core of Title IX does not capture the crux of the wrong. One of the most problematic aspects of the law's framework as applied to this setting is the requirement that the sexual conduct be unwelcome.

Proof that the sexual behavior was unwelcome is at the heart of the sexual harassment claim. In the Supreme Court's first decision recognizing sexual harassment as a species of sex discrimination—a Title VII case, *Meritor Savings Bank v. Vinson*⁷⁸—the Court emphasized that “[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’”⁷⁹ To meet this requirement, the Court put the onus on the plaintiff to demonstrate “by her conduct” that the sexual behavior was unwelcome, which suggests it must be more than subjectively unwelcome, but also appear as unwelcome to an outside observer.⁸⁰

For sexual harassment in sport, too, including where coach-athlete relationships are involved, the touchstone of a sexual harassment claim is that the athlete did not welcome the coach's advances.⁸¹ While there have been few reported court decisions involving Title IX claims of sexual harassment by a coach in an intercollegiate athletic setting, existing case law confirms that proof of unwelcomeness is crucial. In one of the few reported decisions in this area, a former college athlete alleged that after her eligibility expired, the

76. *Gebser*, 524 U.S. at 292 (holding specific to private right of action for damages).

77. Compare *Williams v. Bd. of Regents of Univ. of Ga.*, 477 F.3d 1282 (11th Cir. 2007) (notice of harasser's sexual misconduct toward other persons at a prior institution could satisfy actual notice requirement), with *Doe ex rel. Doe v. N. Allegheny Sch. Dist.*, No. 2:08cv1383, 2011 WL 3667279 (W.D. Pa. Aug. 22, 2011) (notice of prior sexual misconduct toward others did not meet actual notice requirement for purposes of plaintiff's harassment claim).

78. 477 U.S. 57, 68 (1986).

79. *Id.*

80. *Id.*

81. See, e.g., Nielsen, *supra* note 24, at 167 (“[S]exual harassment always consists of some degree of unwanted sexual attention.”); Tomlinson & Yorganci, *supra* note 35, at 135 (“It is, ultimately, the unwanted and unwelcome nature of the act that confirms the behavior as harassment.”).

coach agreed to continue to coach her and allow her to train with the team in preparation for Olympic tryouts in exchange for serving as a volunteer assistant. But after she refused his overtures for a sexual relationship, she claimed that he changed his mind and refused to coach her or allow her to train with the team. The district court granted the university's motion for summary judgment on the hostile environment claim, finding that much of the conduct alleged "was neither unwelcomed, conduct of a sexual nature, nor hostile."⁸² The court's analysis seemed to merge the unwelcomeness requirement with the requirement that the conduct be severe or pervasive. Rejecting the claim, the court relied on evidence that the plaintiff "enjoyed a good friendship" with the coach during the relevant time period.⁸³ The court also cited Title VII precedent for the principle that two requests for a dating relationship did not create a hostile environment.⁸⁴ In the few reported decisions where athletes have succeeded in court on such claims, the athlete did not enter into a sexual relationship with the coach, so unwelcomeness was not a major hurdle in the case.⁸⁵

Guidance from the Office for Civil Rights (OCR) confirms that unwelcomeness is a key element of a Title IX claim for sexual harassment.⁸⁶ To be unwelcome, the student must have "regarded the conduct as undesirable or offensive."⁸⁷ OCR's official policy guidance on sexual harassment under Title IX acknowledges that the issue of unwelcomeness can be tricky in allegedly consensual sexual relationships with adults because of the power imbalance in such relationships.⁸⁸ However, OCR relies on the age of the student to delineate those relationships in which it will treat sexual overtures by school employees as per se unwelcome. The guidance states that OCR will

82. *Klemencic v. Ohio State Univ.*, 10 F. Supp. 2d 911, 916 (S.D. Ohio 1998).

83. *Id.*

84. *Id.* at 916–17. The plaintiff did not appeal the hostile environment claim, but the Sixth Circuit affirmed the judgment against her on her quid pro quo claim. *Klemencic*, 263 F.3d at 506–07.

85. See *Jennings*, 482 F.3d 686; *Zimmer*, 2001 U.S. Dist. LEXIS 15075; *Ericson*, 35 F. Supp. 2d 326; *Cf. Turner v. McQuarter*, 79 F. Supp. 2d 911 (granting university's motion to dismiss where plaintiff claimed she was coerced into a sexual relationship with her female basketball coach out of fear of losing her scholarship and the opportunity to play on the team; court found lack of actual notice to university officials, despite official records showing that plaintiff and the coach lived at the same address). See also Mendelson, *supra* note 7, at 610–12 (discussing the *Ericson* case).

86. OFFICE FOR CIV. RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (Jan. 2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> ("Sexual harassment is unwelcome conduct of a sexual nature."); *id.* at 7 ("[I]n order for conduct of a sexual nature to be sexual harassment, it must be unwelcome.").

87. *Id.* at 8.

88. *Id.*

never view sexual relationships between school employees and elementary students as welcome for Title IX purposes.⁸⁹ The agency takes a somewhat more tolerant stance toward sexual conduct between school employees and high school students, adopting a presumption that the conduct was unwelcome, but allowing the presumption to be rebutted by proof that the student actually did welcome the sexual conduct.⁹⁰ For post-secondary students, there is no operative presumption. For these students, whether sexual conduct from a college or university employee was welcomed remains a question of fact to be determined by the totality of the circumstances.⁹¹ The degree of influence and control the employee has over the student is listed as one, but only one, factor to consider, and even there, OCR parenthetically adds an emphasis on age, stating that the degree of influence could be affected by the student's age.⁹² Under the OCR guidance, consensual sexual relationships between intercollegiate athletes and coaches will not fall under the definition of sexual harassment.

An educational pamphlet on sexual harassment distributed by OCR further supports this conclusion. The pamphlet gives the following example in response to the question, "Is all physical contact sexual in nature?"

Example: A high school athletic coach hugs a student who makes a goal. This by itself is not considered sexual conduct. However, a coach's hugging of a student could be considered sexual conduct if it is unwelcome and occurs under inappropriate circumstances.⁹³

Although this passage rather unhelpfully conflates the question of whether the conduct was sexual with the question of whether it was welcomed, it reaffirms the agency's position that only sexual conduct that is unwelcome crosses the line into sexual harassment. Sexual overtures from a coach that are welcomed by the athlete would not violate Title IX.

As applied to sexual activity between a coach and an athlete, the law's unwelcomeness requirement is fundamentally at odds with the dynamics of the coach-athlete relationship. The theory underlying unwelcomeness rests on a view of personal autonomy that is belied by the dependency of the athlete in

89. *Id.*

90. *Id.*

91. *Id.* at 8-9.

92. *Id.* at 8.

93. OFFICE FOR CIV. RIGHTS, U.S. DEP'T OF EDUC., SEXUAL HARASSMENT: IT'S NOT ACADEMIC, 4 (Sept. 2008), available at <http://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.html> [hereinafter OCR, IT'S NOT ACADEMIC].

relation to the coach. The unwelcomeness requirement presumes that the athlete possesses an unconstrained agency to determine and articulate her desires in relation to the coach. However, the coach-athlete dynamics discussed above reveal a relationship of trust and dependence that veers far afield from that assumption. The power differential, the psychological dependence, and the blurred boundaries that complicate the ability to perceive when those boundaries shift, all impinge on the athlete's ability to set boundaries in the relationship. These processes work to normalize whatever the coach does in relation to the athlete. To give an example from the sport sociology literature, in one study of female athletes in the U.K., the field researcher observed a male coach who habitually hugged each of his athletes from the rear, with no plausible instructional objective in pressing his body against theirs.⁹⁴ Of special significance to the researcher, none of the female athletes who experienced the coach's "rear hugs" responded as if it was the least bit problematic or anything other than normal.⁹⁵ A prominent theme in the sport sociology research is that athletes are reluctant to perceive behaviors by their coach as sexually harassing even when they might appear as such to outside observers.⁹⁶

The dynamics of coach-athlete relationships make it difficult for the athlete to perceive, much less resist, breaches of boundaries in that relationship. Where boundaries are crossed, athletes engage in coping strategies to suppress recognition of anything inappropriate.⁹⁷ The requirement, first stated in *Meritor Savings Bank*, that unwelcomeness be demonstrated by the victim's conduct,⁹⁸ is particularly ill suited to coach-athlete relationships. It is a hallmark of coach-athlete sexual abuse that when the coach succeeds in drawing an athlete into a sexual relationship, the coach's attention "*appears* to be wanted, unlike sexual harassment, which is definitely *unwanted*."⁹⁹ The predominant model of coaching that gives coaches control over virtually all aspects of athletes' lives makes it particularly difficult for

94. Tomlinson & Yorganci, *supra* note 35, at 146 (specifically noting that "in all the cases of touching by this coach, it could not be remotely conceived as any part of the professional experience or relation").

95. *Id.*

96. *Id.* at 150–51.

97. Cense & Brackenridge, *supra* note 36, at 67–68 (describing the process of coach-athlete "grooming" in which the coach's boundaries of behavior toward the athlete are imperceptibly altered, to procure secrecy and cooperation from the athlete).

98. See generally *Meritor Sav. Bank*, 477 U.S. 57.

99. Brackenridge, "*He Owned Me Basically*," *supra* note 31, at 117; see BRACKENRIDGE, SPOILSPORTS, *supra* note 33, at 36 (explaining that when "grooming" succeeds, the sexual relationships will appear consensual).

athletes, through their conduct, to demonstrate that the coach's advances were unwelcome.¹⁰⁰

In addition to these problems with unwelcomeness, there are other pitfalls to relying on a sexual harassment model to set limits on sexual relationships between coaches and athletes. In all sexual harassment cases, the harassment must be proven to have occurred because of the claimant's sex. The Supreme Court has emphasized that this is a distinct inquiry from whether the conduct takes a sexual form; the complainant herself or himself must have been harmed because of that individual's sex.¹⁰¹ While many theories have been propounded for how and why sexual harassment might harm a woman "because of" her sex, they are susceptible to charges of essentializing the vulnerability to sexual harms as distinctively female. Whether because of opposite-sex, heterosexual desire that causes a male harasser to select a female target, or because the harassment is enforcing gender norms pegged to the sex of the target, the harm must be causally linked to the sex of the complaining subject. For a woman complaining of sexual harassment, the harassment must be linked to her status as a woman. While this is surely plausible, given the gendered power structures in schools, workplaces, and other places where sexual harassment occurs, it sets up a problematic linkage between womanhood and victimhood. This criticism takes shape in popular debates in the form of an argument that sexual harassment claims position women as victims by staking their vulnerability to sexual harassment in their identities as women.¹⁰² These critics object that such claims actually disempower women by articulating their vulnerability as inherent in their femaleness and portraying sex as something uniquely harmful to women rather than a source of pleasure or possible empowerment.¹⁰³

Much scholarship has persuasively defended the sexual harassment claim against these charges.¹⁰⁴ Nevertheless, there is no getting around having to articulate a connection between the sex of the subject and the harm of the harassment to pursue a sexual harassment remedy. In order to fit coach-athlete sexual relationships into the sexual harassment framework, the harm must be

100. See BRACKENRIDGE, SPOILSPORTS, *supra* note 33, at 42 (explaining that many athletes subjected to sexual abuse do not recognize the coach's actions as abusive until much later); *cf. id.* at 121 (discussing findings of study of sexual abuse in Denmark that all of the athletes indicated that the coach "more or less controlled their lives").

101. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

102. See, e.g., MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 124–26 (2d ed. 2003) (discussing "victim feminism" and responses to it).

103. *Id.*

104. See *id.* at 252–54 (summarizing feminist legal scholarship theorizing sexual harassment as a harm that occurs because of the harassed individual's sex).

linked to the sex of the athlete—either in terms of why she was the object of the coach’s desire (which is itself problematic, requiring a desire-based model of harassment linked to the sexual orientation of harasser), or in terms of the harm to the athlete (e.g., that her femaleness contributed to the power imbalance in the relationship, leaving her more vulnerable to the coach’s sexual overtures). While it is possible to connect the sexual relationship to the athlete’s sex in a way that the doctrine recognizes, doing so fails to capture the critical piece of what is abusive and harmful about such relationships. It is not the athlete’s status as a female that makes her relationship with the coach harmful, it is her status as an athlete. Even if the “because of sex” requirement can be made to fit here as a matter of doctrine, it misconceives the crux of the harm. It is the violation of trust in a relationship predicated on dependence and vulnerability that defines the harm, more than the athlete’s sex.

A final limitation of the sexual harassment model is that it treats all unwelcome, sex-based conduct as part of the same category of misconduct. While recognizing that there is a spectrum of behaviors on the severity and pervasiveness scale, the term sexual harassment lumps together sexual comments and jokes into the same category as sexual assault. It treats these behaviors as similar in kind, differing only in their level of severity. This too fails to capture the distinctive harm of the violation of trust in a relationship characterized by dependence and vulnerability. While sexually explicit jokes and demeaning comments about women may offend and cause harm, and are rightly considered a form of sexual harassment, it misses something important to see them on the same plane, and merely at different points on the same spectrum, as a sexual relationship that exploits a position of power. Once again, the sexual harassment claim does not match up with the core harm of coach-athlete sex: the breach of trust and exploitation of vulnerability in a dependent relationship, and not merely the sexually explicit nature of the behavior.¹⁰⁵

Altogether, these limitations—and especially the unwelcomeness requirement—warrant a new approach to coach-athlete relationships. It is not that Title IX should be removed from the toolbox; some sexual relationships between coaches and athletes do involve conduct from the coach that is unwelcome, because of sex, and severe and pervasive in the doctrinal sense of these terms. Where that is the case, Title IX should continue to support a legal remedy. However, many intimate relationships between coaches and athletes

105. Cf. Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147, 152 (2011) (“reject[ing] the premise of sexual harassment law that unwelcome intercourse, as well as gender-based comments, merely constitute different forms of sexual harassment,” and instead arguing for a different legal framework to apply to these different harms).

will not fit a sexual harassment framework. Instead of continuing to view them exclusively through the lens of Title IX, we need new tools for conceptualizing the harm and protecting athletes when boundaries in these relationships are crossed.

IV. FOREGROUNDING ETHICS AND STUDENT WELFARE IN POLICIES ON COACH-ATHLETE RELATIONSHIPS

In recent years, there has been excellent work in feminist legal scholarship that reaches beyond a sex equality framework to ground gender justice claims in normative appeals to universal human values. For example, Martha Fineman has pressed for the recognition of human vulnerability and dependence as universal features of the human condition, and at least as (and likely more) central to the human condition as individual autonomy.¹⁰⁶ The universality of human vulnerability then supports claims on the State to restructure support for the caretaking work so often done by women. To give just one more example, recent work by Reva Siegel foregrounds human dignity as the centerpiece of abortion law and politics, and uses this humanistic value to recalibrate abortion rights law.¹⁰⁷ Such work shows that gender injustice can be an entry point to viewing and understanding a problem, even when solutions are sought outside a sex equality paradigm. In a similar vein, the exploitation of female athletes that occurs in coach-athlete relationships should be recognized as an obstacle to women's equality in sport, even as solutions are sought outside of a gender equality rubric.

Once we move away from Title IX as the overarching framework for protecting girls and women in coach-athlete relationships, what are we left with? One place to start is to rethink the terminology. The limits of the sexual harassment model have prompted some scholars of sport sociology to prefer the term "sexual abuse" to "sexual harassment" in discussing sexual relationships between coaches and athletes. As used by these scholars, sexual abuse encompasses sexual relationships in which consent is procured through what is known in the literature as "grooming."¹⁰⁸ A leading definition of sexual abuse in sport defines it as "'groomed or coerced collaboration in

106. See, e.g., Martha Albertson Fineman, *Grappling with Equality: One Feminist Journey*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* (Martha Albertson Fineman ed., 2011).

107. See, e.g., Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 *YALE L.J.* 1694 (2008).

108. See Fasting & Brackenridge, *supra* note 42, at 22. This is sometimes described as the victim consenting "unwittingly." *Id.* I prefer the "grooming" terminology, which places the focus on the dynamics of the relationship that make consent problematic.

sexual and or genital acts where the victim has been entrapped by the perpetrator,” and distinguishes it from “sexual harassment,” defined as ““unwanted attention on the basis of sex.””¹⁰⁹

The concept of procuring consent through grooming comes closer to describing the dynamics of coach-athlete relationships and the power imbalance in which consent takes place. And yet, it too is problematic insofar as it implies a conscious, active strategy by a coach, and suggests that consent in such relationships is legitimate when not procured through such a conscious process.¹¹⁰ In some instances, the sexual relationship may seem to flow seamlessly from the already-intimate nature of coach-athlete relationships.¹¹¹ The illegitimacy of consent inheres in the dependency of the relationship and should not depend on a conscious, active grooming process by the coach. Therefore, while the term sexual abuse better captures the dynamics of the relationship than sexual harassment, it should be predicated on the understanding that the nature of the coach-athlete relationship itself makes consent to sex problematic in this setting.¹¹²

With this understanding, explaining the harm in terms of sexual abuse provides an entry point into two key concepts: (1) the ethical breach of the coach’s responsibility to athletes, and (2) the prioritization of athlete well-being above all else. These two principles should form the basis for prohibiting coach-athlete sexual relationships in intercollegiate sport as a matter of policy. For the coach, entering into a sexual relationship with an athlete involves an abuse of trust and an exploitation of the athlete’s vulnerability.¹¹³ The harm to the athlete is grounded in this same dynamic, tied to her role as a student-athlete. The goal here is not to tap into the criminal law of sexual abuse in which consent is a critical dividing line in policing sexual relationships between adults. Rather, seeing the harm in terms of sexual abuse foregrounds the professional ethics of the coach and the institutional duty to safeguard the well-being of student-athletes.

109. Volkwein et al., *supra* note 14, at 284 (citing Brackenridge).

110. Nielsen, *supra* note 24, at 169 (describing “a conscious grooming of the family and victim to gain complete trust,” and “a process in which careful selection, systematic preparation, enticement and entrapment takes place at various sports levels”).

111. *Id.* at 170 (“The motivation to engage in a sexual relationship may not even exist on a conscious level when the initial acts toward victim selection and grooming start.”).

112. *Cf.* Buchhandler-Raphael, *supra* note 105, at 209 (advocating further development of the concept of “impaired choices” and a focus on abuse of power in exploiting conditions of inequality within relationships in reforming the criminal law of rape).

113. See N. Joan Hornak & James E. Hornack, *Coach and Player—Ethics and Dangers of Dual Relationships*, 64(5) J. PHYS. EDUC., RECREATION & DANCE 84 (1993) (arguing for an ethics-based approach to the coach-athlete relationship that would avoid the dangers of “dual relationships” in which the coach is friend, counselor, or paramour to the athlete).

In many professional settings involving asymmetrical relationships of trust, sexual relationships are forbidden as a matter of the ethics of the professional and the well-being of persons in their care, without regard to consent. Ethics codes restrict lawyers from having sex with clients,¹¹⁴ clergy from having sex with parishioners,¹¹⁵ doctors and therapists from having sex with patients,¹¹⁶ and judges from having sex with the litigants who appear before them.¹¹⁷ These relationships are too fraught with power imbalances and vulnerability for consent to be meaningfully given. While coaching is not always thought of as a profession like these others, it too is characterized by a duty of care and an imbalance of power—in many respects, more so than these others.¹¹⁸ Like other professions, the rules and standards governing coaches should be designed to safeguard the well-being of persons in their care. This is particularly the case with respect to athletic programs in educational settings, where the athletes are also students in the care of educational institutions.¹¹⁹

Gradually, the world of amateur sport is beginning to recognize that the

114. See MODEL RULES OF PROF'L CONDUCT R. 1.8(j) (2011) (prohibiting attorney-client sexual relationships, even if consensual, unless the relationship predated the existence of the attorney-client relationship).

115. Cf. Bradley J.B. Toben & Kris Helge, *Sexual Misconduct of Clergypersons with Congregants or Parishioners – Civil and Criminal Liabilities and Responsibilities*, J. SOC. WELFARE & FAM. L., (forthcoming) available at <http://www.baylor.edu/content/services/document.php/96096.pdf> (discussing sexual relationships between clergypersons and their parishioners as a breach of ethical duty and discussing possible legal claims against clergy who engage in such conduct).

116. See 266 J.A.M.A. 2741 (1991) (determination by American Medical Association Council on Ethical and Judicial Affairs that it is unethical for physicians to engage in sexual or romantic relationships with their current patients); PRINCIPLES OF MED. ETHICS § 2 (2010) (American Psychiatric Association adopting AMA ethical code in addition to its own ethics applicable to psychiatry, and stating that “[s]exual activity with a current or former patient is unethical.”); ETHICAL PRINCIPLES OF PSYCHOLOGISTS & CODE OF CONDUCT §§ 10.05, 10.08(a) (2010) (American Psychological Association ethical code bars sexual relationships with patients and former patients within two years of termination of professional services); AM. COUNSELING ASS'N CODE OF ETHICS § A.5(a)-(b) (2005) (American Counseling Association bars sexual or romantic relationships with current clients and former clients within five years following the last professional contact).

117. 1-4 JUDICIAL CONDUCT & ETHICS § 4.09, n.29 (citing *In re Gerard*, 631 N.W.2d 271 (Iowa 2001), in which a judge violated judicial ethics code by failing to recuse himself in case where he had a sexual relationship with one of the lawyers appearing before him).

118. Cf. Brackenridge, “*He Owned Me Basically*,” *supra* note 31, at 118–20 (arguing that the dynamics of sport make the team like a “surrogate family,” and equating coach-athlete sexual abuse as the equivalent of incest, and comparing coach’s unquestioned authority to that of a priest over congregation).

119. Cf. *Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E.2d 920 (N.C. Ct. App. 2001) (recognizing a special relationship between a university and its student-athletes to exercise reasonable care to protect student-athletes from harm); *Searles v. Trs. of St. Joseph’s Coll.*, 695 A.2d 1206 (Me. 1997) (holding that college’s duty to exercise reasonable care for its students extended to a basketball player whose coach insisted he continue to play basketball against medical advice).

coach-athlete relationship, properly understood, is incompatible with a sexual relationship. In 2007, the International Olympic Committee (IOC) issued a “Consensus Statement” on sexual harassment and abuse in sport.¹²⁰ The statement warns that power differences between athletes and authority figures in sport create the risk of exploitative sexual relationships, and it admonishes persons in these roles to stay within the boundaries of professional relationships with athletes.¹²¹ It urges sport organizations to develop policies to protect athletes from sexual abuse and harassment.¹²² In recent years, a number of sport organizations have taken up this challenge. The U.S. Olympic Committee’s (USOC) Coaching Ethics Code includes, in addition to a provision on sexual harassment, an ethical standard that coaches should not have sexual or romantic relationships with athletes because “such relationships are likely to impair judgment or be exploitative.”¹²³ The USOC Coaching Ethics Code is not self-enforcing, however, leaving it up to member sport organizations to adopt their own ethics codes.¹²⁴

Some, but not all, national sport governing bodies have acted consistently with the USOC ethical standards to ban sexual relationships between coaches and athletes in their sports. For example, USA Hockey, USA Diving, and USA Badminton all have ethics codes barring coaches from entering into sexual relationships with athletes.¹²⁵ Other sport governing bodies, such as USA Gymnastics and USA Fencing, are more equivocal where the athletes are

120. Press Release, International Olympic Committee, IOC Adopts Consensus Statement on “Sexual Harassment & Abuse in Sport” (Feb. 8, 2007) (on file with author).

121. *Id.*

122. *Id.*

123. U.S. OLYMPIC COMMITTEE COACHING ETHICS CODE §1.14, available at http://assets.usoc.org/assets/documents/attached_file/filename/1906/USOCCoachingEthicsCode.pdf (last visited Feb. 3, 2012); see also *id.* § 3.4 (“Coaches do not engage in sexual intimacies with current athletes”); *id.* § 3.5 (“Coaches do not coach athletes with whom they have engaged in sexual intimacies”); *id.* § 3.6(a) (“Coaches should not engage in sexual intimacies with a former athlete for at least two years after cessation or termination of professional services.”).

124. *Id.* at “Introduction.”

125. See, e.g., COACHING ETHICS CODE, USA HOCKEY, available at http://www.usahockey.com/uploadedFiles/USAHockey/Menu_Coaching_Ethics/2010_Coaching_Ethics_Code_FINAL.PDF (last visited Feb. 3, 2012) (“Coaches will not exploit or have a sexual or intimate relationship with participants”); USA DIVING CODE, USA DIVING, Part II(D), art. 82, §§ 582.4(b)-(d) (June 5, 2008), available at http://usadiving.org/wp-content/uploads/2011/09/PartII_SubpartD_Code_Conduct_Intl_Trips.pdf (“A coach of a collegiate athlete shall not engage in sexual relations with any collegiate athlete they coach, regardless of the athlete’s age.”); USA BADMINTON COACHES CODE OF ETHICS & CONDUCT, USA BADMINTON, Principle II(G), at 2, http://assets.teamusa.org/assets/documents/attached_file/filename/27112/USAB-Code_of_Ethics___Conduct-v.1.4.pdf (last visited Feb. 3, 2012) (prohibiting “sexual abuse” of athletes, “even when an athlete invites or consents” to such involvement).

adults, but still discourage such relationships.¹²⁶ In addition, many, but not all, national coaches' associations have policies forbidding coach-athlete sexual relationships.¹²⁷ While such policies do not always prevent such relationships from forming, they do set a clear ethical standard against coach-athlete relationships that cross the line.¹²⁸

The progress made by amateur sports organizations in recent years in developing policies on coach-athlete relationships has not been matched in intercollegiate athletics. For the most part, colleges and universities do not have clear, definitive bans on intimate relationships between coaches and athletes. Many universities do have general policies prohibiting or discouraging romantic relationships between students and the faculty and staff who supervise them.¹²⁹ Such policies would likely encompass intimate relationships between coaches and athletes even though they are not specifically addressed.¹³⁰ However, these policies vary widely in how they handle consensual faculty-student relationships. A common approach is to

126. See USA GYMNASTICS CODE OF ETHICS, USA GYMNASTICS, art. II, § G, *available at* http://usagym.org/pages/aboutus/pages/code_of_ethics.html (last visited July 29, 2011) (barring coaches from entering into intimate relationships with athletes unless “the capacity and quality of the athlete’s consent to enter that relationship is beyond question”); USFA SEXUAL HARASSMENT POLICY, USA FENCING, *available at* <http://www.rtpnet.org/ncusfa/harrassment.html> (last visited July 29, 2011) (discouraging consensual sexual relationships between coaches and athletes).

127. See, e.g., AM. SWIMMING COACHES ASS’N CODE OF ETHICS STATEMENT, AMERICAN SWIMMING COACHES ASSOCIATION, § C, art. 4, *available at* http://www.swimmingcoach.org/services/code_of_ethics.asp (last visited July 29, 2011) (“[c]oaches of Collegiate age athletes shall not engage in sexual relations with athletes that they coach, even of legal age.”); COACHES CODE OF ETHICS AND CONDUCT, AMERICAN VOLLEYBALL COACHES ASSOCIATION, Principle II(G), *available at* <http://www.avca.org/about/code-of-ethics/> (last visited July 29, 2011) (barring “sexual abuse,” even if the athlete consents to involvement).

128. See Grant Wahl et al., *Passion Plays*, SI VAULT (Sept. 10, 2001), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1023662/1/index.htm>.

129. See ADMIN. POLICY STATEMENT: CONFLICT OF INTEREST IN CASES OF AMOROUS RELATIONSHIPS, UNIV. OF CO. (July 1, 2009), *available at* <https://www.cu.edu/policies/aps/hr/5015.pdf>; IMPROPER RELATIONSHIPS BETWEEN STUDENTS AND EMPLOYEES, HUMAN RESOURCES, UNIV. OF N.C.—CHAPEL HILL, *available at* <http://hr.unc.edu/policies-procedures-guidelines/spa-employee-policies/employee-relations/IMPROPER-RELATIONS> (last visited Aug. 23, 2011); CONSENSUAL RELATIONSHIPS INVOLVING STUDENTS, UNIV. OF IOWA OPERATIONS MANUAL, Part II, Div. I, Chapter 5, 2010, *available at* <http://www.uiowa.edu/~our/opmanual/ii/05.htm>; HUMAN RESOURCES ADMIN. PRACTICE MANUAL: EMPLOYEE RELATIONS—AMOROUS RELATIONSHIPS, UNIV. SYSTEM OF GA. (Jan. 2010), *available at* http://www.usg.edu/hr/manual/amorous_relationships/ (last visited Aug. 22, 2011); Amorous Relationships with Students, DEP’T OF ATHLETICS, UNIV. OF VT., (Oct. 14, 2008), *available at* http://www.uvm.edu/policies/general_html/student_relation.pdf.

130. Cf. Heckman, *supra* note 7, at 230 (mentioning two examples of university policies that would prohibit intimate relationships between coaches and athletes: the University of North Carolina and the University of Colorado; however, both policies are university-wide policies on student-faculty/staff relationships and do not specifically mention athletics).

require the faculty member to disclose the relationship and then recuse himself from supervisory responsibility over that student.¹³¹ While individual faculty members may be fungible enough within an institution to make this approach feasible without harming the educational opportunities of the student, a coach is not. There is no way for a coach to recuse himself of responsibility over an athlete with whom he becomes sexually involved without hurting the athlete or the team. The distinctive nature of the coach-athlete relationship warrants a distinctive policy tailored to the athletics setting.

A small number of colleges and universities have policies within their athletic departments that specifically prohibit amorous relationships between coaches and athletes.¹³² Of these, the University of Vermont's policy is especially promising. It applies to all coaching staff and athletes in the department, sets an expectation that employees will be disciplined for violating the policy, and clearly explains the rationale and procedures for enforcing the policy. For the most part, however, athletic departments have left coach-athlete relationships to the vagaries of general university policy, which may or may not reach them. This policy void is itself a product of the gendered nature of intercollegiate sport, which has been designed with little thought for the interests and needs of women in sport.¹³³

To fill this void, intercollegiate athletic departments should adopt clear policies prohibiting sexual relationships between coaches and athletes, recognizing the conflict such relationships pose to the ethical obligations of the coach and the educational institution's primary responsibility for educating the student-athlete. A model policy from the NCAA on relationships with student-athletes, which was forthcoming at the time this article went to press, could play a constructive role here, much like the NCAA did several years ago in delineating proper responses and treatment for athletes who become pregnant.¹³⁴

131. See Christine Gerdes, *The Case for University Consensual Relationship Policies*, 49 WAYNE L. REV. 1031 (2004) (summarizing various forms of university consensual relationship policies).

132. See, e.g., AMOROUS RELATIONSHIPS, DEPT. OF ATHLETICS, UNIV. OF VT (Dec. 11, 2008), http://www.uvm.edu/policies/general_html/amorous.pdf; UAA AMOROUS RELATIONSHIP POLICY, UNIV. OF FLA. available at http://www.gatorzone.com/compliance/pdf/student_athlete/amorous_relationship.pdf (last visited Aug. 22, 2011); ATHLETICS CODE OF CONDUCT, IND. UNIV. SOUTHEAST ATHLETICS, §§ 3.1.2, 5.1.9 http://www.iusathletics.com/f/Athletics_Code_of_Conduct.php (last visited July 29, 2011).

133. Although as discussed above, and recently evidenced by the Penn State scandal, sexual exploitation by a coach is by no means exclusively a problem for female athletes, the heterosexual presumption in men's sports make such policies appear superfluous as applied to men's sports.

134. See Email from Karen Morrison to Deborah Brake, *supra* note 8 (on file with author). See also Nancy Hogshead-Makar & Elizabeth A. Sorensen, *Pregnant and Parenting Student-Athletes:*

In this effort, Title IX has a role to play, but it is primarily a background role as part of a broader body of legal incentives on universities to avoid the potential litigation that such relationships (or attempts to procure them) might generate. For example, a policy prohibiting coach-athlete amorous relationships could minimize the risk of Title IX problems that could arise if the relationship ends.¹³⁵ It could also protect institutions from claims by other athletes that the coach's sexual relationship with one athlete contributed to a hostile environment (in the form of sexual favoritism) for other athletes.¹³⁶ Even though, as discussed above, Title IX sexual harassment lawsuits are a poor vehicle for policing these relationships, the threat of litigation—under Title IX and other sources of law—could be marshaled to persuade university general counsel to adopt preventive policies, even if such litigation were unlikely to succeed.¹³⁷ Preventive policies can also set the tone for greater professionalism within coach-athlete relationships, which can have positive spillover effects in avoiding other kinds of problems, such as the intrusive, sexually explicit, and inappropriate comments alleged in the Coach Dorrance case.

But while Title IX remains part of the legal background for incentivizing a prohibitory policy grounded in ethics and student welfare, there are advantages to understanding the harm of these relationships as distinct from a sexual harassment model.¹³⁸ Grounding these policies in coaching ethics and student welfare, as opposed to sexual harassment, avoids essentializing sexual harms as distinctively female.¹³⁹ As explained above, to view coach-athlete

Resources and Model Policies, NCAA Gender Equity (2008)

135. See, e.g., OCR, IT'S NOT ACADEMIC, *supra* note 93, at 5 (giving example in which sexual conduct is initially welcomed, but subsequent conduct is unwelcome).

136. Miller v. Dep't of Corr., 30 Cal. Rptr. 3d 797 (Cal. 2005) (while isolated instances of sexual favoritism do not rise to the level of hostile environment sexual harassment, repeat instances may where the message conveyed is that female workers are view by managers as "sexual playthings"); cf. EEOC Guidelines, 45 Fed. Reg. at 74, 676–77 (1980) (suggesting theory for why sexual favoritism may violate Title VII).

137. Cf. Bloomer v. Becker Coll., No. 09-11342-FDS, 2010 WL 3221969 (D. Mass. Aug. 13, 2010) (granting, in part, and denying, in part, summary judgment to college in tort suit brought by student-athlete based equestrian coach's sexual advances and alleged false imprisonment in driving her to his home and hotel room).

138. Cf. BRACKENRIDGE, SPOILSPORTS, *supra* note 33, at 193 ("The gender equity approach has been effective for addressing sex discrimination and constitutional breaches of fairness but is less effective in confronting cultural aspects of exploitation to do with organisation sexuality and predatory sexual abuse.").

139. Cf. Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) (grounding the harm of sexual harassment at work in the gendered structure of the workplace and women's vulnerability within it, and not in an understanding that sexuality is itself distinctively harmful to women).

relationships as sexual harassment, the harm must be because of the athlete's sex, either in terms of the motivation of the harasser or the gendered power dynamic between them. The sexual abuse approach advocated here emphasizes the institutional and relational dimensions of the problem, instead of seeing it as a problem of individual harassers and discriminatory motivations.

Once freed from a sex discrimination framework, it becomes easier to see how both men and women have something to gain from foregrounding the coach-athlete relationship as a mutual relationship of care and trust. The authoritarian model of coaching that requires unquestioning adherence to whatever the coach says and invests the coach with sweeping control over athletes' lives takes a toll on male athletes too.¹⁴⁰ Coaches' abuse can take nonsexual as well as sexual forms.¹⁴¹ A policy-based approach to the proper limits of coach-athlete relationships should spark a broader conversation about the ethical obligations of coaches and the need to prioritize the well-being of all student-athletes. Greater scrutiny of how care and trust are exercised in coach-athlete relationships could improve the dynamics of coach-athlete relationships for all athletes, and prompt educators to become more attuned to the breaches of trust that fail male athletes too.

Prohibiting coach-athlete sexual relationships should be the starting point, not the ending point, of examining the proper boundaries of these relationships and how best to further the education and development of student-athletes. The authoritarian model of coaching is a big risk factor for sexual abuse in sport.¹⁴² The prioritization of win-loss records over student-athlete well-being is another risk factor and is closely related to this model of coaching.¹⁴³ Addressing sexual abuse in sport as a breach of ethics and a violation of the duty of care for student-athletes is a promising starting point for thinking about alternative models of coaching in sport.

140. Tomlinson & Yorganci, *supra* note 35, at 136 ("Male coaches have long been prone to excessive and exaggerated forms of macho self-assertion that belittles and humiliates their athletes, male or female.").

141. Cf. Brackenridge et al., *Managing Cases*, *supra* note 9, at 267, 270 (reporting that data from England's Football Association showed a higher incidence of allegations of emotional abuse, bullying, and physical abuse than allegations of sexual abuse of "football" (American soccer) players, which is a male-dominated sport in England, and that a majority of these alleged victims were male).

142. Tomlinson & Yorganci, *supra* note 35, at 151-52 (urging a restructuring of the coach-athlete relationship to be less autocratic and authoritarian and more participatory, with athletes less vulnerable to abuse).

143. Parent & Demers, *supra* note 21 (citing literature finding these to be risk factors for coach-athlete sexual abuse); see also Brackenridge, "He Owned Me Basically," *supra* note 31, at 120 (discussing accounts of sexually abused athletes who claimed that their organizations knew about the abuse but did nothing because of the coach's winning record).

V. CONCLUSION

This is not an argument for pulling back on Title IX enforcement against coach-athlete sexual harassment. Rather, it is a reminder that the law's sex discrimination framework, while useful in many respects, must not occupy the field in advocacy responses to the injustices confronting girls and women in sport. Addressing gender injustice requires flexible, pragmatic strategies. When it comes to changing the culture of sport, Title IX has left many disappointments. Addressing sexual exploitation in coach-athlete relationships is one such area where we need to see our way clear of Title IX to find better-fitting solutions.