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# Title IX as Pragmatic Feminism

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# TITLE IX AS PRAGMATIC FEMINISM

DEBORAH L. BRAKE\*

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## I. INTRODUCTION

As we know from history and the study of law, what looks like legal progress on the surface does not necessarily translate into meaningful social change. Cultural norms are “sticky” and not easily discarded. And yet, neither are they set in stone. As Martha Nussbaum has observed, “[P]eople are not stamped out like coins by the power machine of social convention. They are constrained by social norms, but norms are plural and people are devious.”<sup>1</sup> In the process of navigating the thicket of social norms, law plays a role in helping to create or suppress opportunities for resisting cultural norms, reinforcing certain norms while contesting others.

In the past three-and-a-half decades, Title IX has achieved remarkable success in encouraging and facilitating creative opportunities for resisting traditional gender norms that constrain female athleticism. This success is due in part to Title IX’s creativity in navigating two of the dilemmas that plague feminist strategies for gender equality: the double-bind and the backlash. Title IX has avoided the straitjacket of unifying theory and has taken a more pluralistic and pragmatic approach than most sex discrimination laws.

The exercise of trying to pin down Title IX’s underlying theory brings to mind the well-known parable about the blind men and the elephant. Six blind men grab a different part of the elephant and each confidently pronounces the nature of the beast. The first man touches the elephant’s side and proclaims it a wall; the second man touches the tusk and calls it a spear; the third feels the trunk and announces the animal is a snake; the fourth man reaches for the knee and calls it a tree trunk; the fifth touches the ear and thinks it a fan; and the sixth finds the tail and describes it as

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\*Professor of Law, University of Pittsburgh School of Law. An earlier version of this paper was presented at the conference, “Girls and Women Rock: Celebrating 35 Years of Sport & Title IX,” held in Cleveland, Ohio, March 28-31, 2007. I am grateful to Ellen Staurowsky for the opportunity to present this paper at the conference, and to Kimberly Yuracko for her thoughtful remarks as a commentator on the panel. Many thanks also to Catharine Wells for reading and commenting on an earlier draft. Finally, this article benefited greatly from the research assistance of Christopher Helms.

<sup>1</sup>MARTHA NUSSBAUM, *SEX AND SOCIAL JUSTICE* 14 (1999).

a rope. The parable ends with the summary, “each was partly in the right – and all were in the wrong.”<sup>2</sup>

In similar fashion, Title IX might be described as an example of liberal feminism, special treatment, structuralism, dominance feminism and different voice feminism.<sup>3</sup> It is all of the above, depending on where you look. Like the metaphoric elephant, Title IX’s theoretical “nature” defies simple description. Title IX is a hybrid of theory, representing a pragmatic response to the distinctive ways in which women encounter subordination in sports. Although some critics have taken Title IX to task for theoretical inconsistency,<sup>4</sup> in my view Title IX’s pluralistic approach to theory is one of the law’s major strengths.

This article examines Title IX as an example of a pragmatic approach to theory, and argues that pragmatic feminism is an approach that holds promise for feminists grappling with the complexity of gender oppression. Part II briefly examines pragmatism as an alternative to foundational theory and considers pragmatism’s relationship to feminist legal theory. Part III explores the many forms and iterations of gender subordination in sports. Calls for a consistent, unifying theory of Title IX cannot account for the shifting nature and multiplicity of social and institutional practices that subordinate women in sports. These varied forms of subordination necessitate a nimble approach to theory with enough flexibility to tailor the law’s response to the discriminatory practice targeted, while not locking in a fixed legal approach to other oppressive practices that might be less amenable to the same legal treatment. Part IV turns to the various theoretical frameworks embedded in Title IX and briefly examines some of the strengths and limitations in the doctrine they have generated. This article concludes that, by taking a pragmatic theoretical approach, Title IX has done a better job than most discrimination laws at navigating the double-bind and nudging cultural norms forward to fend off the inevitable backlash.

## II. PRAGMATISM AND ITS PROMISE FOR FEMINIST LEGAL THEORY

The resurgence of academic interest in pragmatism as a theoretical framework in law is largely a response to frustration with, and perhaps fatigue from, the search for

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<sup>2</sup>John Godfrey Saxe, *The Blind Man and the Elephant*, in *POETRY OF AMERICA* 150-152 (George Bell & Sons 1878).

<sup>3</sup>See, e.g., Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 *WM. & MARY L. REV.* 209, 252-53 (1998) (describing the law’s “formal equality” approach to sex equality in sports); Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 *U. MICH. J.L. REFORM* 13, 28-29 (describing as “structuralism, or new structuralism,” Title IX’s “critical approach to differences between men and women and their significance in equality law”); Erin E. Buzuvis, *Survey Says... A Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 *IOWA L. REV.* 821, 825 (2006) (describing Title IX’s theory as a “structuralist equality”); David S. Cohen, *Title IX: Beyond Equal Protection*, 28 *HARV. J.L. & GENDER* 217, 263 (2005) (describing Title IX as going beyond “formal equality” to take a “substantive equality” approach); Jessica E. Jay, *Women’s Participation in Sports: Four Feminist Perspectives*, 7 *TEX. J. WOMEN & L.* 1, 19 (1997) (describing Title IX as “a formal equality law”).

<sup>4</sup>See, e.g., Earl C. Dudley, Jr. & George Rutherglen, *Ironies, Inconsistencies, and Intercollegiate Athletics: Title IX, Title VII, and Statistical Evidence of Discrimination*, 1 *VA. J. SPORTS & L.* 177, 179-80 (1999) (criticizing Title IX as inconsistent with the prevailing theory of discrimination as reflected in Title VII).

a coherent foundational theory of law.<sup>5</sup> Foundational theory strives for a unifying principle that justifies legal intervention and directs, top-down, law's approach to legal problems.<sup>6</sup> Foundational theory seeks legitimacy from its (aspirational) consistency with core principles and rejects result-oriented methods of analysis. Specific legal principles are derived from more general principles of justice through normative reasoning. Counter to foundationalism, pragmatism rejects the possibility of deducing legal rules from *a priori* moral principles and the dichotomy between moral values and "mere" convention.

Pragmatism developed as an alternative to, and critique of, foundational theory. As a philosophical movement, pragmatism originated in the late 19th century and flourished in the first quarter of the 20th century. Today it is understood as a distinctly American philosophical movement, led by major thinkers such as Charles Sanders Peirce, William James, John Dewey and (less officially), Oliver Wendell Holmes.<sup>7</sup> Because it is often defined as a historical movement, the substance of pragmatism is difficult to pin down, in part because pragmatism's intellectual creators diverged significantly in their views, which took many nuanced turns and shifted over time. Nevertheless, the American pragmatists shared a common critique of normative, deductive philosophy and an emphasis on the practical, experiential consequences of a concept.<sup>8</sup> The classical pragmatists rejected dichotomies between theory and action, and emphasized the interrelationships between action, values and knowledge.<sup>9</sup> They valued theory for what it could do, rather than for its abstract coherence or logical purity.

The resurgence of pragmatism in the legal academy in the late 20th and early 21st centuries is generally attributed to the work of Richard Rorty, which draws upon (even as it departs from, in some respects) the classical American pragmatic thinkers.<sup>10</sup> Like the earlier pragmatists, Rorty's work is known for its "attacks on foundationalism, essentialism, and scientism."<sup>11</sup> As Rorty explains, referring to two well-known legal theorists, "[Ronald] Dworkin and [John Hart] Ely want a

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<sup>5</sup>See Susan Haack, *On Legal Pragmatism: Where Does "The Path of the Law" Lead Us?*, 50 AM. J. JURIS. 71, 71 (2005) (citing myriad scholarly books and law review articles embracing pragmatism in recent years).

<sup>6</sup>The sense of foundationalism that I mean to invoke here, in contrasting it with pragmatism, is what Susan Haack describes as a commitment to justifying beliefs (and rules) based on timeless moral values and not mere convention. *Id.* at 104.

<sup>7</sup>*Id.* at 77-79 (discussing the leading American pragmatists and Holmes' place among them).

<sup>8</sup>*Id.* at 75. See also Richard Warner, *Why Pragmatism? The Puzzling Place of Pragmatism in Critical Theory*, 1993 U. ILL. L. REV. 535, 539-40 n.22 (1993) (describing the historic roots of pragmatism).

<sup>9</sup>Warner, *supra* note 8, at 539-540 n.22.

<sup>10</sup>For a sampling of scholarly articles exemplifying this trend, see the articles in *Symposium on the Renaissance of Pragmatism in American Legal Thought*, in 63 S. CAL. L. REV. 1569-1853 (1990), and the selections in *PRAGMATISM IN LAW & SOCIETY* (Michael Brint & William Weaver eds., 1991).

<sup>11</sup>Haack, *supra* note 5, at 75.

distinction between principle and policy, which pragmatists must refuse them.”<sup>12</sup> Whether understood as an extension of classical American pragmatism or a significantly different neo-pragmatist movement,<sup>13</sup> Rorty’s work has had a significant impact on the legal academy and the philosophy of law.<sup>14</sup>

As a framework for legal theory, pragmatism is eclectic and diverse. So much so that one critic of pragmatism’s influence on legal theory, Susan Haack, has described legal pragmatism as “a desperately confusing scholarly mare’s nest.”<sup>15</sup> She criticizes legal scholars who draw on pragmatism to signal a plethora of different ideas, including an aversion to theory, creativity in solving legal problems, a dismissal of meta-theory as a basis for claims about the “truth,” the privileging of concrete over abstract approaches, a critique of formalism, and an attention to context and open dialogue, to name just a few.<sup>16</sup> Similarly, pragmatism’s broad appeal to legal scholars with otherwise irreconcilably divergent positions has caused some critics to question how a theory that appeals to such a discordant group can have any substance at all.<sup>17</sup> If feminists, critical race theorists, and judge and scholar Richard Posner are all relying on pragmatism, they ask, is there any “there” there, or is pragmatism merely a mirror reflecting what each scholar brings to it?

However, pragmatism’s ability to accommodate a number of different ideas and political perspectives should not necessarily be an indictment. Feminist legal theory itself is host to a plurality of different ideas and approaches, yet still has meaning as

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<sup>12</sup>Richard Rorty, *Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1818, n.44 (1990).

<sup>13</sup>Some scholars who study Rorty find him to be more of a relativist than at least some of the classical pragmatists. As Susan Haack explains:

[O]nce Rorty got hold of James, pragmatism took a sharply radical turn: what could be further from Peirce’s observations that the truth ‘is SO, whether you, or I, or anybody believes it is so or not,’ and that ‘every man is fully convinced that there is such a thing as truth, or he would not ask any question’ than Rorty’s cheerful boast that he ‘does not have much use for the notion of ‘objective truth’,’ or his breezy assurance that truth is ‘entirely a matter of solidarity’?

Haack, *supra* note 5, at 77.

<sup>14</sup>See Warner, *supra* note 8, at 540 n.23 (describing Rorty’s influence); Brian Z. Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction*, 41 AM. J. JURIS. 315, 338 (1996) (discussing Rorty’s attack on foundationalism and its influence on legal scholars).

<sup>15</sup>Haack, *supra* note 5, at 74.

<sup>16</sup>*Id.* at 71-73. Legal pragmatism is not so much anti-theory as a call for a reevaluation of how we theorize. It rejects a dichotomy between theory and practice, urging instead an approach to theory that is anchored in the real world, rejects abstraction, and is suitable for changing social life. *Cf. id.* at 85 (offering a similar interpretation of Oliver Wendall Holmes’s approach to legal theory).

<sup>17</sup>See, e.g., Tamanaha, *supra* note 14, at 316 (“The most revealing aspect about this rush to pragmatism is precisely the fact that it can accommodate such divergent positions. Anything which appeals to the entire spectrum of political views must be empty of substance. Pragmatic philosophy, therefore, has little to offer normative legal theory.”).

a framework for legal theory.<sup>18</sup> Like feminism, even though pragmatism serves as an intellectual base for a broad array of possibly diverging ideas, it is still possible to discern some common features of a pragmatist approach.

One notable feature of pragmatism is its embrace of a method of justification that relies on internal norms rather than external “objective” ones. As Richard Warner explains, pragmatism approaches the question, “[w]hat makes the prevailing norms the right ones?” with the recognition that:

[S]uch assessment is always *internal* to the norms in question. We assess how well our norms work by using those very norms. The distinctively pragmatic claim about justification is that there can be no *external* standard of evaluation: our norms of justification neither have nor need a ground outside themselves.<sup>19</sup>

Catharine Wells makes a similar point when she identifies as a core feature of pragmatism the insight that no separable “truth” can serve as a foundation for a wider theory.<sup>20</sup> In other words, to return to the example of Title IX, instead of measuring the worth of the law by its coherence with some external standard of justice, a pragmatist would measure the worth of any particular interpretation of Title IX by evaluating how well it works according to what we take to be the goals of Title IX itself.

A related feature of pragmatism is its rejection of unifying normative theory and the project of deducing specific principles from meta-principles of justice. In this vein, Thomas Grey has described pragmatism’s core feature as “freedom from theory guilt.”<sup>21</sup> Catharine Wells cites Grey’s admonition as an antidote to the legal academy’s obsession with normative theory.<sup>22</sup> Although pragmatism is not anti-theory *per se*, it is skeptical of global theory.<sup>23</sup> As Wells explains, pragmatism frees us from the straightjacket of normative theory, where legal questions have to fit into a systematic agenda, and the push for a “unified theory of the whole world.”<sup>24</sup> In this way, pragmatism is empirical, not epistemological.<sup>25</sup> In other words, the rightness of a theory turns on how it works, not its logical foundations.

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<sup>18</sup>See, e.g., MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 1-14 (2d ed. 2003) (describing the commonalities and diversity of feminist legal theory).

<sup>19</sup>Warner, *supra* note 8, at 541-42; see also *id.* at 544 (describing pragmatism as “characterized by the assertion that the norms of justification actually used in society neither have nor need a ground outside themselves”).

<sup>20</sup>Catharine Pierce Wells, *Why Pragmatism Works for Me*, 74 S. CAL. L. REV. 347 (2000).

<sup>21</sup>Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1569 (1990) (“Pragmatism is freedom from theory-guilt.”).

<sup>22</sup>Wells, *supra* note 20, at 358.

<sup>23</sup>See, e.g., William N. Eskridge, Jr. & Phillip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 323 (1990) (discussing pragmatism’s emphasis on “the concrete situatedness of the interpretive enterprise, which militates against overarching theories”).

<sup>24</sup>Wells, *supra* note 20, at 355.

<sup>25</sup>*Id.*

A third feature of pragmatism is its emphasis on the importance of perspective in making sense of observations.<sup>26</sup> Pragmatism treats knowledge as contingent and the product of a knowledge-seeking community at a particular time. Knowledge does not exist in the abstract, “out there” waiting to be discovered. Perspective is critical in making sense of the world. Since there is no “neutral” perspective, the best we can do is continually strive to challenge and broaden the perspective that we bring to a problem.

Even after identifying core features of pragmatism, there is still a great deal of open space in pragmatism as a legal method. Pragmatism is more of an indictment of a particular kind of normative theorizing than it is a recipe for any specific direction in theorizing. As Catharine Wells, a proponent of pragmatism, acknowledges, “Once one is freed from the demands of global theory, however, it is not quite clear what happens next.”<sup>27</sup>

Pragmatism’s open space has served as a launching point for critics of pragmatism who have chided critical legal theorists, primarily critical race theorists and feminists, for using pragmatism to bolster their substantive agendas. These critics have questioned the use of pragmatism by critical legal theorists, charging that they rely on pragmatism to bring legitimacy to their movement but distort pragmatism in the process.<sup>28</sup> They contend that pragmatism’s rejection of objective moral truth and its agnosticism toward particular substantive values provide no traction for social critiques with a substantive vision of justice, such as critical race theory or feminism.

However, this criticism overlooks the possibility of a dialectical relationship between pragmatism and critical theory, in which each school of thought enriches the other, rather than remaining fixed and constant.<sup>29</sup> For example, feminism’s focus on women’s experience can help ensure that pragmatism lives up to its commitment to the centrality of experience in producing knowledge by making sure that women’s experiences are fully included and incorporated.<sup>30</sup> Similarly, feminism’s commitment to the importance of gender to understanding social, cultural and legal phenomena can help answer the burning question left by pragmatism of which contexts matter in applying its experiential approach to theory.<sup>31</sup> Pragmatism’s

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<sup>26</sup>*Id.*

<sup>27</sup>*Id.* at 358.

<sup>28</sup>*See, e.g.*, Warner, *supra* note 8, at 535-37 (“Pragmatism . . . does not permit any particular conception of justice to be non-relatively privileged over any other” and “yields relativism about truth and justice.”). *See also* Tamanaha, *supra* note 14, at 318 (“[P]ragmatism is of scant benefit to normative legal theory but essential to sociolegal studies.”).

<sup>29</sup>*Cf.* CHARLENE HADDOCK SEIGFRIED, PRAGMATISM AND FEMINISM: REWEAVING THE SOCIAL FABRIC 17 (1996) (“I am convinced that pragmatist theory has resources for feminist theory untapped by other approaches and that feminism, in turn, can uniquely reinvigorate pragmatism.”).

<sup>30</sup>*Id.* at 37 (“Pragmatism needs feminism to carry out its own stated program, since feminists are in the forefront of philosophers addressing the social and political issues that affect women.”).

<sup>31</sup>*Id.* at 39 (“Pragmatist philosophy, for instance, explains why the neglect of context is the besetting fallacy of philosophical thought. Feminism cogently and extensively shows how

agnosticism about the superiority of any particular perspective risks obscuring hidden commitments that in fact privilege a particular perspective. Feminism's insights into the gender dimensions of the illusory "view from nowhere" can help keep pragmatism honest and illuminate the places where various perspectives diverge and where they share common ground.<sup>32</sup> Finally, feminism's substantive commitment to gender justice can help fill the void of substantive values in pragmatism and help pragmatism in its project to seek "recourse to the practices and institutions of everyday life, both to dismantle the social and political structures of oppression and to develop better alternatives."<sup>33</sup> Rather than viewing feminism's appropriation of pragmatist ideas as "distorting" pragmatism, we should recognize the value of mapping the intersections of pragmatism and feminism to facilitate a cross-pollination of ideas, some of which overlap, and some of which challenge and reshape ideas in the other.<sup>34</sup>

As feminism has the potential to enrich pragmatism, so too does pragmatism contain insights valuable to feminist theorizing. Even if pragmatism is largely about method and not itself a foundation for substantive values,<sup>35</sup> feminists have long understood the importance of method. Indeed, a number of feminist legal scholars have found important intersections between pragmatism and feminist legal methods. For example, Margaret Jane Radin describes pragmatism's substantial area of overlap with feminist legal theory as: "a commitment against abstract idealism, transcendence, foundationalism, and atemporal universality; and in favor of immanence, historicity, concreteness, situatedness, contextuality, embeddedness, narrativity of meaning."<sup>36</sup> Pragmatism's rejection of formalism, emphasis on experience, affinity for interdisciplinary work, and understanding of knowledge as situational make it a hospitable intellectual framework for exploring feminist critiques of law and society.

One feature of pragmatism that particularly resonates with feminist scholars is its emphasis on context in any evaluation of the "correctness" of a legal result or moral

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gender, race, class, and sexual preference are crucial parts of context that philosophy has traditionally neglected.").

<sup>32</sup>*Id.* at 10. As Charlene Seigried explains:

In making explicit its own interpretive space, feminism can help to identify the hidden assumptions of pragmatist analyses and to demonstrate the crucial difference between merely acknowledging other perspectives and coming to terms with the consequences of such recognition. This confrontation of a particular perspective with the defense of perspectivism opens the possibility for new insights into the effort to both privilege the unique struggles of women, of different ethnic groups, of the economically deprived, of homosexuals and lesbians, and to affirm a common struggle.

*Id.*

<sup>33</sup>*Id.* at 18.

<sup>34</sup>*Cf. id.* at 16 ("As we appropriate what is valuable in each other's perspective, the distortions in our own perspective, as viewed from theirs, must also be acknowledged, and this recognition will affect the character of what remains.").

<sup>35</sup>Tamanaha, *supra* note 14, at 328 (explaining that pragmatism is "a methodology of inquiry and a theory of truth" that does not itself "present any truths about the world").

<sup>36</sup>Margaret Jane Radin, *The Pragmatist and the Feminist*, in *PRAGMATISM IN LAW & SOCIETY* 127, 134 (Michael Brint & William Weaver eds., 1991).



principle. As Martha Minow and Elizabeth Spellman explain, “A pragmatist casts doubt on the possibility of sovereign reason, removed from historical situations . . . .”<sup>37</sup> Minow and Spellman rearticulate feminism’s and pragmatism’s parallel calls for relentless attention to the importance of context. While some critics have dismissed this call for context as redundant, insisting that we are all always already “in context,”<sup>38</sup> the reality of context does not in itself prevent the errors of abstract theorizing. While pragmatism does not identify which elements of context to emphasize, greater recognition of why and how context matters can draw more attention to, and dialogue about, which contexts matter and why. Feminism’s substantive values and visions for gender equality can help provide answers to such questions.

Another useful feature of pragmatism for feminists is its approach to knowledge as situated, and not simply “objective,” discoverable or already “out there.” Catharine Wells praises pragmatism for its sophisticated understanding of knowledge, as contingent, situated, and relational.<sup>39</sup> Knowledge does not exist apart from the knowledge-seeker. As Wells explains, pragmatism recognizes that “beliefs are not simply efforts to record the truth; they are constitutive of who we are and what we do.”<sup>40</sup> Pragmatism invites a critical approach to consciousness and accepted “truths” that is helpful to feminists: it highlights the importance of social construction in “what we think we know.”<sup>41</sup> Of particular importance to feminist theorizing, pragmatism facilitates the understanding that “‘what works’ is a relative concept” depending on “what are our goals? What is the time frame? And what values must be preserved?”<sup>42</sup> Wells finds this approach to knowledge liberating, rather than nihilistic, and encouraging of creativity. As she explains, “[i]f all knowledge is partial, then we must be eclectic and pluralistic in our appreciation of individual theories.”<sup>43</sup>

This understanding of knowledge as partial and situated can help feminists resist the legal academy’s tendency to insist on theoretical consistency and unifying theory. As Wells explains, the quest for grand theory can be stifling by insisting that you can’t get to X until you have a coherent theory for Y in relation to X. She offers as an example,

the way in which feminist theorists were frequently prevented from discussing gender differences until they offered a theory as to whether such differences were innate or learned. Since questions of nature and nurture are generally unanswerable, the effect of these interruptions was to silence an important set of discussions.<sup>44</sup>

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<sup>37</sup>Martha Minow & Elizabeth Spelman, *In Context*, 63 S. Cal. L. Rev. 1597, 1620 (1990).

<sup>38</sup>Tamanaha, *supra* note 14, at 334-35.

<sup>39</sup>Wells, *supra* note 20, at 349.

<sup>40</sup>*Id.*

<sup>41</sup>*Id.* at 350.

<sup>42</sup>*Id.* at 354.

<sup>43</sup>*Id.* at 358.

<sup>44</sup>*Id.* at 358 n.39.

A similar demand for theoretical coherence has forced feminist theorists to stay stuck in the equal treatment/special treatment debate, refusing feminists the option of picking any approach that cannot be justified across the board or parsed with principled and not merely ad hoc distinctions.

Pragmatism also supports feminism's rejection of a dichotomy between theory and practice and its push for an integrative praxis. Pragmatism rejects dualities, and the pragmatist movement sharply rebuked foundational/normative theorists who treat theory as separate from practical experience. The classical pragmatists predated feminists in using the term "praxis" to call for a synthesizing of theory and action.<sup>45</sup> Pragmatism's refusal to view abstraction as a higher order of thinking, detachable from the concrete, offers support for feminist methods that explore how the particular and concrete shape our understanding of what is just and moral. As Martha Fineman has instructed, "the task of feminists concerned with the law and legal institutions must be to create and explicate feminist methods and theories that explicitly challenge and compete with the existing totalizing nature of grand legal theory."<sup>46</sup>

Perhaps pragmatism's greatest contribution to feminist legal scholarship has been its utility in responding to the double-bind that arises when women challenge their subordination. Margaret Jane Radin, for example, has argued that pragmatism is especially useful for grappling with the double-bind, which materializes wherever there is gender oppression, and sets up a dilemma about how to address it.<sup>47</sup>

One of the classic double-binds that has consumed much feminist energy is the question of how best to respond to gender inequality that is tied to the condition of pregnancy.<sup>48</sup> On the one hand, discrimination against pregnant women might be addressed by requiring employers to treat men and women the same with regard to all physically limiting conditions, so that employers would have to treat pregnancy as comparable to other medical conditions. While this approach might stop employers from singling out pregnancy for uniquely adverse treatment, it does nothing to challenge masculine workplace norms that do not accommodate or account for women's experience of pregnancy and childbearing. An alternative approach might require employers to bend their workplace rules and structures to better fit women's experience of pregnancy, mandating, for example, paid leaves and other workplace accommodations necessary for women to become mothers and still keep their jobs. However, this approach risks further stigmatizing women as different and inferior laborers by making the employment of women more expensive and highlighting women's reproductive activity, marking them as less committed and reliable

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<sup>45</sup>See Haack, *supra* note 5, at 76 ("James stressed the connection between 'pragmatic' and the Greek 'praxis,' 'action,' as contrasted with theory.").

<sup>46</sup>Martha Albertson Fineman, *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* xi, xiii (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991).

<sup>47</sup>Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990). See also Margaret Jane Radin & Frank Michaelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1049-51 (1991) (discussing pragmatism and how it complements feminism).

<sup>48</sup>See CHAMALLAS, *supra* note 18, at 42-44 (discussing the equal treatment versus special treatment debate among feminist legal theorists).

workers.<sup>49</sup> The impossibility of solving the one problem without creating others is known as the double-bind.<sup>50</sup>

Professor Radin explains that pragmatism helps feminists respond to the double-bind by releasing them from the drive to solve it once and for all with a uniform, consistent strategy. The ideal would be to dissolve the dominant conception of gender that produces the double-bind. However, doing this requires greater social empowerment than the dominant conception of gender allows. In order to make progress, Radin argues, we need to work within nonideal conditions to transition toward the ideal. As she explains, “We must look carefully at the nonideal circumstances in each case and decide which horn of the dilemma is better (or less bad), and we must keep re-deciding as time goes on.”<sup>51</sup> This requires feminist strategies that are particular, tailored to the specific problem at hand, and continually reevaluated as social conditions change. Pragmatism reminds us, “There is no general solution; there are only piecemeal, temporary solutions.”<sup>52</sup>

While pragmatism has much to offer feminism, feminists should also be aware of the risks of following a pragmatist approach. One charge leveled against pragmatism that should be of particular concern to feminists is that it invites moral relativism and that its rejection of universal truth obstructs efforts to promote justice. Some feminist scholars sympathetic to pragmatism have responded by pointing out that the very absence of moral absolutes presents an opportunity to strengthen our moral commitments because it necessitates greater attention to how we define our own communities and commitments. Feminist scholar and defender-of-pragmatism Joan Williams begins her answer to the charge of relativism by reminding us that there is no neutral position from which to distill absolute, universal principles.<sup>53</sup> Rather, the perception of moral certainties reflects deeply ingrained, unarticulated beliefs that the community holds about itself. As Williams explains, responding to the assertion of a widely shared belief in an absolute moral position that torture is wrong:

[T]hese certainties reflect not abject truth, but the grammar of what it means to be us. The torture of innocents is wrong because it violates our

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<sup>49</sup>See Radin, *supra* note 47, at 1701 (discussing the double-bind as it applies to the problem of pregnancy).

<sup>50</sup>See CHAMALLAS, *supra* note 18, at 8-10 (discussing the problem of the double-bind); see also Radin, *supra* note 47, at 1700 (“[T]he fact of oppression is what gives rise to the double-bind.”).

<sup>51</sup>See Radin, *supra* note 47, at 1700.

<sup>52</sup>*Id.* at 1701; see also *id.* at 1704 (“The pragmatist solution is to confront each dilemma separately and choose the alternative that will hinder empowerment the least and further it the most. The pragmatist feminist need not seek a general solution that will dictate how to resolve all double-bind issues. Appropriate solutions may all differ, depending on the current stage of women’s empowerment, and how the proposed solution might move the current social conception of gender and our vision of how gender should be reconceived for the future. Indeed, the “same” double-bind may demand a different solution tomorrow from the one we find best today.”).

<sup>53</sup>Joan C. Williams, *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, in PRAGMATISM IN LAW AND SOCIETY 155, 158 (Michael Brint & William Weaver eds., 1991).

culture's celebration of the individual and our sense of the essential dignity and equality of human beings.<sup>54</sup>[CMLaw1]

Professor Williams' response turns the relativism objection into a virtue of pragmatism, by exposing the reality that the process of defining a community's moral commitments is not an exercise of abstract deductive reason but a community-defining act. In Williams' words, "Ethical choices offer not opportunities for appeal to absolutes, but the chance to find out who we are and who we want to be."<sup>55</sup> The articulation and defense of our moral commitments without appeal to "objective" truth "offers us a chance to step back and examine the structure of our form of life, to assess the hidden costs of our ideals."<sup>56</sup> Thus, pragmatism forces us to take responsibility for the reach of our moral commitments, their limits as well as their breadth. As Williams concludes:

Pragmatists should object to the notion of moral absolutes not because we want people to be free to torture or enslave, but because using the language of absolutes lets us evade the troubling fact that our moral choices fall on a continuum on which we set limits far short of our power to intervene.<sup>57</sup>

Thus, Williams makes a strong case that pragmatism's rejection of moral absolutes is not only compatible with feminism, but enriches feminism's commitment to holding communities accountable for the values they select. The rejection of absolutes also promotes a feminist agenda by drawing attention to the importance of perspective in evaluating how well our chosen values work and whom they serve.

The charge of moral relativism leveled against pragmatism is also vulnerable to criticism for its premise that pragmatism invites a conception of truth that is individualistic. However, pragmatism insists upon a collective approach to seeking out truth and knowledge. Hilary Putnam, for example, a leading modern philosopher of pragmatism, dismisses the claim that pragmatism lets each person pick his or her own truth. As he explains:

Some critics even read [William] James—against repeated statements to the contrary, explicit and implicit, in his writing—as holding that if the consequences of believing that *p* are good for *you*, then *p* is "true for you." Let me say once and for all that James never used the notion of "true for me" or "true for you." Truth, he insists, is a notion which presupposes a community, and, like Peirce, he held that the widest possible community,

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<sup>54</sup>*Id.* at 157.

<sup>55</sup>*Id.* at 161.

<sup>56</sup>*Id.*

<sup>57</sup>*Id.* at 163-64; *see also* Wells, *supra* note 20, at 354 ("While pragmatism relieves us of the need for metaphysical justification, it also requires us to become clear about our culture and about our own identities within that culture.").

the community of all persons (and possibly all sentient beings) in the long run, is the relevant one.<sup>58</sup>

Instead of promoting an individualistic conception of truth, pragmatism emphasizes the importance of community in the pragmatist method of truth-seeking, and demands that the truth-seeking community be defined inclusively.<sup>59</sup>

Pragmatism's emphasis on the importance of inclusive communities in the truth-seeking process is particularly helpful to feminists, who have long critiqued the claims of universal knowledge that emerge from communities that are not representative of women's voices. For these reasons, the relativist objection should not persuade feminists to keep their distance from pragmatism.

Another potential drawback to pragmatism is that it leaves itself vulnerable to charges of theoretical inconsistency as part of a backlash against progressive change. A legal strategy that does not fit into a theoretically pure framework might prompt charges of a double-standard or ad hoc instrumentalism that lacks a persuasive foundation. However, my own sense is that theoretical consistency is no more likely to succeed in defusing or preventing a backlash.<sup>60</sup> A backlash reflects a power struggle rather than a search for truth or purity of ideas. Rather than striving for theoretical consistency to fend off the inevitable backlash that accompanies progress toward gender equality, feminists should meet the backlash head-on by seeking to shift the cultural norms that give it life and power.

Having sketched the contours of pragmatism and its promise for feminist legal theory, the remainder of this article will examine Title IX as an example of a pragmatic feminist approach, and evaluate the law through a pragmatist lens. Before considering Title IX's approach to theory and how it works, however, it is important to take stock of the context of the problem the law is addressing since, to a pragmatist, context is everything. The complexity of gender subordination in sports both demonstrates the need for a pragmatic approach and provides crucial detail for considering the effectiveness of Title IX. Pragmatism's exhortation to build legal strategy from the ground up, rather than deducing it from abstract principles of justice, requires that any evaluation of the law's theory be based on an understanding of the social problem of gender inequality in sports.

### III. THE SLIPPERINESS OF SUBORDINATION AND THE MANY FACES OF GENDER OPPRESSION IN SPORTS

Developing a legal theory for addressing gender inequality in sports requires careful study of the historically situated and shifting structures that contribute to the problem. Like other settings characterized by gender subordination, gender inequality in sports is complex and multi-dimensional. A unitary theory of discrimination law may not be advisable when subordination takes many varied and complex forms.

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<sup>58</sup>HILARY PUTNAM, PRAGMATISM: AN OPEN QUESTION 24, n.7 (Blackwell Publishers 1995).

<sup>59</sup>*Id.* at 70-74.

<sup>60</sup>*Cf.* Radin, *supra* note 47, at 1701 ("For a group subject to structures of domination, all roads thought to be progressive can pack a backlash.").

The dominant understanding of “discrimination” is too simplistic to capture the gender inequality that concerns feminists. The legal construct of discrimination usually signifies an individualized harm to a particular person, perpetrated by an individual acting out of conscious bias against the target’s social group. Even individualized bias is much more complicated than this account, which also fails to capture the structural inequality and the institutionalized practices that subordinate women in sports. Rather than use the term discrimination, and its connotation of individualized, willful action, I will use (interchangeably) the terms subordination and oppression.

Gender subordination in sports stems from a complex set of structures and practices with multiple dimensions and supporting ideologies. One framework for thinking about gender subordination in sports comes from Iris Marion Young’s work identifying and describing “five faces of oppression.”<sup>61</sup>[CMLaw2] Although Young’s analysis is centered on social groups in relation to labor markets and employment, much of her discussion has analogues in sport and can help illuminate the complexity of gender subordination in sport.

Young’s first category of oppression is exploitation. She draws on Karl Marx’s theory of capital to explain how exploitation operates to reproduce class domination despite the formal freedom given individuals. To Young, the “central insight” of the concept of exploitation is the “steady process of the transfer of the results of the labor of some people to benefit others.”<sup>62</sup> In other words, “the energies of the have-nots are continuously expended to maintain and augment the power, status and wealth of the haves.”<sup>63</sup> As examples of gender exploitation, Young discusses the structure of the patriarchal family and how the removal of men from caretaking responsibilities results in the exploitation of women’s domestic labor. In addition, women in the workplace disproportionately hold typically “feminine” jobs involving sexual, caretaking or nurturing tasks that enhance the status and comfort of men, while leaving women unnoticed and under-compensated.<sup>64</sup>

Conceptualized as the transfer of labor for the ownership and benefit of others, all athletes might be viewed as exploited to the extent that they are controlled by and add value to their institutions disproportionate to the benefits they themselves receive. Athletic power-house colleges and universities are notorious for exploiting high-performing male athletes (many of whom are men of color and men from lower-class backgrounds) in elite sports, using them to enrich their institutions without ensuring that they receive an adequate education or are prepared for a life after sports.<sup>65</sup> While a few of these athletes manage to find careers in elite

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<sup>61</sup>Iris Marion Young, *Five Faces of Oppression*, in *RETHINKING POWER* 174 (Thomas E. Wartenberg ed., 1992).

<sup>62</sup>*Id.* at 183.

<sup>63</sup>*Id.*

<sup>64</sup>*Id.* at 184.

<sup>65</sup>See, e.g., N. Jeremi Duru, *Friday Night ‘Lite’: How De-Racialization in the Motion Picture Friday Night Lights Disserves the Movement to Eradicate Racial Discrimination from American Sport*, 25 *CARDOZO ARTS & ENT. L. J.* 485, 512-513 (2007) (discussing the commodification and exploitation of black student-athletes); Sarah E. Gohl, *Note: A Lesson in English and Gender: Title IX and the Male Student-Athlete*, 50 *DUKE L. J.* 1123, 1132-42,

professional sports, the majority of them leave college without the skills to succeed in life after their college sports careers end.<sup>66</sup>

Less attention has been given to forms of exploitation that distinctly affect female athletes. “Selling” women’s sports has often entailed the hetero-sexualization of female athletes as a way of generating public support for watching and promoting women’s sports. Marketing strategies for women sports often highlight the athletes’ femininity and sexuality rather than their athletic ability. Sport scholars Leslie Heywood and Shari Dworkin have called this “the babe factor,” referring to the necessity for popular women’s sports teams to have high-profile attractive, feminine athletes in order to gain a following.<sup>67</sup> Female athletes still receive more press for their appearance and sexuality than their athleticism.<sup>68</sup>

In addition, the commodification of elite athletes is not limited to male athletes. Highly competitive college sports programs increasingly commodify female athletes too, valuing them primarily for what they add to the team’s winning record and the marketability of the program. Indeed, female athletes may be especially vulnerable to coaches who place undue pressure on athletes to win at all costs, at great sacrifice to their physical health, academic achievement and social lives.<sup>69</sup> Heyman and Dworkin argue that female athletes who most need sport’s self-esteem boost are the most vulnerable to manipulation and exploitation by coaches, including the minute regulation of their diet, exercise and personal lives, and the pressure to overtrain.<sup>70</sup> The win-at-all cost model of competitive sports may inhibit sports’ potential to empower women.<sup>71</sup>

A second face of oppression Young identifies is marginalization, which she describes as relegating some persons to a marginal position outside the labor market, rendering them unemployed or unemployable. Although Young’s discussion of marginalization focuses on exclusion from the labor market, the concept she

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1146-1150 (2001) (criticizing the exploitation of male student athletes by Division I athletic programs).

<sup>66</sup>See Duru, *supra* note 65, at 512 n.138 (summarizing NCAA data on the extremely low probability of a college student-athlete landing an opportunity to play professional sports).

<sup>67</sup>LESLIE HEYWOOD & SHARI L. DWORKIN, *BUILT TO WIN: THE FEMALE ATHLETE AS CULTURAL ICON* 39 (Toby Miller & M. Ann Hall eds., Univ. of Minn. Press, Sport and Culture Series vol. 5, 2003).

<sup>68</sup>*See id.*

<sup>69</sup>See, e.g., SANDRA KIRBY, ET AL., *THE DOME OF SILENCE: SEXUAL HARASSMENT AND ABUSE IN SPORT* 79 (Brenda Conroy ed., 2000) (discussing study finding a gendered impact on how athletes experience put-downs and insults by coaches: 54.7% of female athletes and 29.1% of male athletes experience put-downs or insults by their coach as serious enough to cause them distress); see also JOAN RYAN, *LITTLE GIRLS IN PRETTY BOXES: THE MAKING AND BREAKING OF ELITE GYMNASTS AND FIGURE SKATERS* 63 (Warner Books 1996) (1995) (discussing a 1992 University of Washington study finding that out of 182 female college athletes, 32% practiced some form of eating disorder, such as vomiting, use of laxatives, diuretics or diet pills, compared to 18% of the general female population).

<sup>70</sup>See HEYWOOD & DWORKIN, *supra* note 67, at 48.

<sup>71</sup>*Id.* at 49.

elaborates is broad enough to encompass exclusion from other socially valued activities as well, including sports.<sup>72</sup>

In sports, women are marginalized when they are excluded from highly valued sports opportunities, relegated to the sidelines (literally, in the case of cheerleading) and limited to less-valued activities. Among the harms of marginalization identified by Young are material deprivation (in the case of sports, the financial resources that accompany participation in sports, including athletic scholarships) and the social and personal harms of feelings of “uselessness, boredom, lack of self-respect.”<sup>73</sup> Through marginalization, women’s exclusion from highly-valued sports opportunities “blocks [their] opportunity to exercise capacities in socially defined and recognized ways.”<sup>74</sup> In other words, limited opportunities in sports deny women of the status and social gains available to men who participate in highly-valued sports.

Marginalization is an important historic and continuing feature of women’s oppression in sports. Although women are no longer barred entirely from competitive school sports, they continue to have access to significantly fewer opportunities and resources in intercollegiate and interscholastic athletics. Women are also effectively excluded from participating in certain male-defined contact sports by Title IX’s contact-sports exception and are denied opportunities that would enable them to develop interests and abilities in such sports.<sup>75</sup> As coaches, women are excluded from the most lucrative and highly-valued coaching positions, coaching men’s teams, and are effectively limited to lower paid and less valued positions coaching women’s teams.<sup>76</sup>

The third face of oppression Young identifies is powerlessness. Young defines this criteria in reference to social status rather than economic class, making a distinction between professionals and nonprofessionals and the status difference this distinction entails. As she explains, “[p]owerlessness . . . describes the lives of people who have little or no work autonomy, exercise little creativity or judgment in their work, have no technical expertise or authority . . . and do not command respect.”<sup>77</sup> She identifies three aspects of status privilege that go along with being a “professional”: (1) having a specialized knowledge that goes along with a person’s progressive development of their abilities and resulting career advancement; (2) having considerable authority over others and day-to-day autonomy; and (3) having a measure of social “respectability” that encourages others to treat you with a “respectful distance or deference.”<sup>78</sup>

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<sup>72</sup>*Cf.* Young, *supra* note 61, at 188 (“Most of this society’s productive and recognized activities take place in contexts of organized social cooperation, and social structures and processes that close persons out of participation in such social cooperation are unjust.”); *id.* at 186 (explaining that some persons are “expelled from useful participation in social life”).

<sup>73</sup>*Id.* at 186; *id.* at 188.

<sup>74</sup>Iris Marion Young, *Five Faces of Oppression*, in *POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER* 73 (Leslie Bender & Daan Braveman eds. 1995).

<sup>75</sup>*See infra* text at notes 113-115.

<sup>76</sup>*See* Brake, *supra* note 3, at 83-92.

<sup>77</sup>Young, *supra* note 74, at 75.

<sup>78</sup>*Id.* at 75-76.



In comparison with men, women are relatively powerless in sports. The professional ranks of sports—the term “professional” being used here to connote the leadership ranks of intercollegiate sports—are largely reserved for men. With few exceptions, men are the leaders, power-brokers, and persons of authority in competitive sports. Men are the vast majority of coaches (and nearly all of them, in jobs coaching male athletes), administrators and directors of athletic programs.<sup>79</sup> The positioning of men as the power-brokers in sport, and the precarious place of women in sport leadership positions, has the effect of silencing the few women in leadership positions who might criticize and seek to change the gender power balance in sports. The few women who rise through the ranks to hold elite positions in sport have to struggle for respect and authority. The overwhelmingly male tilt in the leadership of sports sets a ceiling on the aspirations of female athletes who might otherwise pursue sports-related careers.

Cultural imperialism is the fourth face of oppression identified by Young, differing from the prior three in their focus on people’s material lives. Young describes cultural imperialism as, “the experience of existing in a society whose dominant meanings render the particular perspectives and point of view of one’s own group invisible at the same time as they stereotype one’s group and mark it out as ‘other.’”<sup>80</sup> In cultural imperialism, the dominant group promotes “the universalization of [its] experience and culture and its establishment as the norm.”<sup>81</sup> The subordinate group’s difference from the dominant group “becomes reconstructed as deviance and inferiority.”<sup>82</sup> Young notes that the resulting oppression is “paradoxical” because the outsider group is “both marked out by stereotypes and rendered invisible.”<sup>83</sup> “The stereotype marks and defines the culturally dominated” group, even as the stereotype itself is rendered invisible (and thus difficult to contest) by its very pervasiveness in the dominant culture.<sup>84</sup> At the same time, the experience of being marked as inferior by the dominant group is “internalized . . . at least to the degree that [the oppressed group is] forced to react to the behaviors of others that express or are influenced by those images.”<sup>85</sup> The marking as “other” creates opportunities for connection and solidarity within culturally dominated groups,

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<sup>79</sup>See LINDA JEAN CARPENTER & R. VIVIAN ACOSTA, TITLE IX 174 (2005) (stating that in 2004 women made up 44.1% of the coaches of women’s sports, 2% of the coaches of men’s sports, and 18.8% of the head coaches of all intercollegiate sports combined); *id.* at 175 (stating that in 2004 women directed only 18.5% of women’s athletic programs, with most of those directorships in Division III, while almost one in five athletic departments had no women administrators anywhere in the department).

<sup>80</sup>Young, *supra* note 74, at 77.

<sup>81</sup>*Id.*

<sup>82</sup>*Id.*

<sup>83</sup>*Id.*

<sup>84</sup>*Id.* Thus, as Young explains, “Just as everyone knows that the earth goes around the sun, so everyone knows that gay people are promiscuous, that Indians are alcoholics, and that women are good with children.” *Id.* at 77. The ability to individuate is a privilege of the dominant group. *Id.* For members of the dominant group, “each is whatever he or she wants to be, they are what they do, and by their doings they are judged.” *Id.*

<sup>85</sup>*Id.* at 77-78.

enabling a “double consciousness” where persons within these groups experience their own culture and that which is imposed by the dominant group.

Of the faces of oppression, this one has the clearest application to sports. The marking of women as “other” in sports occurs in myriad ways. The greater institutional value placed on men’s sports is reflected in the allocation of funds. Men’s sports receive vastly disproportionate sums of money, and the most masculine sports are valued the most highly. As scholars of sport sociology have explained, it is no accident that the most “masculine” sports are the ones most highly valued in terms of monetary investment and cultural clout.<sup>86</sup> At a literal level, the gendered naming of sports teams speaks volumes about the culturally subordinate place of women in sports. Only women’s sports require a gender qualifier. The University of Tennessee basketball program, for example, has The Volunteers and The Lady Volunteers. Men’s sports need no gender qualifier; they are, simply, sports.

Finally, the fifth face of oppression is violence, by which Young refers to the systematic and legitimized violence against members of the group which is regarded as unsurprising and often goes unpunished. Here too, there are applications to women in sports. Men’s sports programs often inculcate a culture of masculinity that encourages the sexual exploitation of women, and colleges and universities often trivialize, excuse or ignore sexual abuse by their elite male athletes.<sup>87</sup> Male coaches are also frequent perpetrators of a violent form of male privilege that contributes to the subordination of women in sports.<sup>88</sup>

The five faces of oppression provide a useful framework for considering the many dimensions of gender oppression in sports. They show that many subordinating practices collide and converge to produce gender oppression. To add to the complexity, there is also a temporal dimension to sorting out the various practices that subordinate women. As Reva Siegel’s work demonstrates, subordination is not static or ahistoric.<sup>89</sup> It can take many forms, shifting when

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<sup>86</sup>See, e.g., Brake, *supra* note 3, at 93 & n. 410 (citing literature linking male contact sports to a privileged masculinity).

<sup>87</sup>See *id.* at 92-107 (discussing institutional complicity in male athletes’ sexual violence against women); see also *Simpson v. Univ. of Colorado Boulder*, 500 F.3d 1170 (10th Cir. 2007) (reversing and remanding district court’s dismissal of female students’ Title IX suit involving alleged sexual assaults by football players); *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1291, 1297 (11th Cir. 2007) (reversing dismissal of female student’s sexual harassment claim for gang-rape by football players where university officials recruited players despite knowledge of prior sexual misconduct); Christopher M. Parent, *Personal Fouls: How Sexual Assaults by Football Players Is Exposing Universities to Title IX Liability*, 13 *FORDHAM INTLL. PROP. MEDIA & ENT. L. J.* 617, 618-622 (2003) (summarizing incidents involving alleged sexual assaults by football players).

<sup>88</sup>See, e.g., Brake, *supra* note 3, at 90-91 (discussing the problem of abuse of female athletes by male coaches; *Jennings v. Univ. N.C.*, 482 F.3d 686 (4th Cir. 2007) (reversing district court’s grant of summary judgment on a sexual harassment claim where male soccer coach allegedly verbally harassed female athlete using sexually explicit language); *Baumgardt v. Wausau Sch. Dist. Bd. of Educ.*, 475 F. Supp. 2d 800 (W.D. Wis. 2007) (discussing the sexual abuse of female athlete by her basketball and golf coach).

<sup>89</sup>See Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 *CAL. L. REV.* 77, 107-08 (2000) (hereinafter Siegel, *Discrimination*); Reva Siegel, *Why Equal Protection No Longer Protects:*

necessary to survive challenges and conform to changing circumstances. Siegel explains that when “status regimes” are contested and threatened with illegitimacy, they evolve in response to changing social and legal conditions to assume (temporarily) more stable and less-contested forms. As she explains, “status-enforcing state action has no fixed or transhistorical form, but instead evolves in rule structure and justificatory rhetoric as it is contested.”<sup>90</sup> While the abandonment of the old form creates the appearance of progress, the new form works to preserve inequality through a different guise. Siegel’s work instructs us not to assume that subordination is a fixed social practice, or that the most virulent practices in the past still pose the greatest threat today.<sup>91</sup>

True to Siegel’s theory, the ideologies and practices that have created and sustained women’s exclusion from and inequality within sports have changed considerably over time to keep pace with changing social mores and ideology. The dominant practice used to be official exclusion, justified by concerns about harm to women’s reproductive systems and maternal roles. As women’s roles broadened and the boundaries of what was compatible with motherhood were contested, the ideologies limiting women’s participation in sports shifted to focus more on dominant cultural constructions of femininity. The conflation of sports and masculinity created a conflict whereby women’s participation in sports risked compromising traditional femininity. Women who played sports were at risk of being culturally marked as not sufficiently feminine, “tomboys,” lesbians. This ideology continues in less overt form to limit women’s sports participation, even as the official boundaries of exclusion have loosened considerably.

Today the confining ideology of femininity is contested, and there is much more cultural space for women to play sports and gain status through their participation in sports. Nevertheless, the ideology of gender difference continues to limit women’s full equality in sports. Numerous societal messages promote men’s sports and mark them as privileged (with public funds, stadiums, spectators, and scholarships, for example), while women’s sports are allotted secondary status and a lower level of resources.

Despite massive cultural shifts, traces of the older ideologies still linger and are not wholly without power. Although the overt assertion that women’s sports participation is incompatible with women’s maternal function has long been rejected, remnants of the thesis that sports participation is incompatible with maternity persist. For example, the plight of female athletes who become pregnant has only recently

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*The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1116-19 (1997) (hereinafter Siegel, *Equal Protection*); Reva B. Siegel, “*The Rule of Love*”: *Wife-Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2176, 2178 (1996) (hereinafter Siegel, *Wife-Beating*).

<sup>90</sup>Siegel, *Equal Protection*, *supra* note 89, at 1119.

<sup>91</sup>See generally Siegel, *Discrimination*, *supra* note 89; Siegel, *Equal Protection*, *supra* note 89; Siegel, *Wife-Beating*, *supra* note 89. See also Becker, *supra* note 3, at 261 (“During the 1970s, as it became impermissible to discriminate overtly between women and men in many settings, inequality did not disappear. Prohibited sex-specific versions were replaced by neutral sounding rules tending to support patriarchy in more subtle ways.”).

attracted media attention.<sup>92</sup> Despite clear NCAA rules forbidding colleges and universities from revoking scholarships because of an athlete's injury or physical condition, some universities require female athletes to sign a contract promising not to become pregnant and acknowledging their understanding that their athletic scholarships will be revoked if they do.<sup>93</sup> A number of reported stories have involved pregnant female athletes who lost their scholarships and were excluded from their teams because of their pregnancy.<sup>94</sup> Under NCAA rules, students with other medical conditions or injuries are treated very differently, generally receiving red-shirt status that allows them to keep their scholarships while trainers work with them to rehabilitate their physical condition with the goal of resuming full participation.<sup>95</sup> The very different treatment of pregnant athletes makes for a clear-cut case of pregnancy discrimination that is unlawful under the Title IX regulations.<sup>96</sup>

The widespread and, until recently, unacknowledged discrimination against female athletes who become pregnant reflects the persistence of deeply ingrained, lingering beliefs about the incompatibility of sports participation with maternity. Reactions to female athletes who become pregnant are often driven by stereotyped notions regarding the level of physical activity that is appropriate for pregnant women and by a mindset that places pregnancy in a class by itself, viewing it as utterly incapacitating and incompatible with the status of an athlete in a way that

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<sup>92</sup>See Michael Hiestand, *ESPN Looks at Athletes Who Must Choose Pregnancy or a Scholarship*, USA TODAY, May 11, 2007, at 3C (describing ESPN program examining the treatment of female athletes who become pregnant).

<sup>93</sup>*Outside the Lines: Pregnant Pause* (ESPN television broadcast May 13, 2007).

<sup>94</sup>See, e.g., Joanna Grossman, *A New Lawsuit by a Female Athlete Tests Title IX's Protection Against Pregnancy Discrimination*, FINDLAW, May 6, 2003, <http://writ.corporate.findlaw.com/grossman/20030506.html> (last visited Sept. 26, 2007) (describing a case filed by female athlete at Sacred Heart University alleging that the university denied her "medical redshirt" status and revoked her scholarship when she became pregnant); Amy Rainey, *What Athletes Can Expect When They're Expecting: Many Colleges Are Ill Prepared for Pregnant Athletes and Some Players Suffer as a Result*, CHRON. HIGHER EDUC. (May 26, 2006), available at <http://chronicle.com/weekly/v52/i38/38a04101.htm> (describing several instances of alleged discrimination against pregnant athletes and the failure of universities to adopt policies protecting pregnant athletes); Melissa Silverstein, *Pregnancy is Perilous for Female Basketball Stars*, ALTERNET, June 13, 2006, <http://alternet.org/story/37349/> (last visited Sept. 26, 2007) (discussing difficulties women basketball players face returning to the game after pregnancy). For an excellent documentary film telling the story of a high school athlete who becomes pregnant, see *THE HEART OF THE GAME* (Woody Creek Productions 2005).

<sup>95</sup>See 2006-07 NCAA DIVISION I MANUAL § 15.3.2.2 *Physical Condition of Student-Athlete* (2006) ("Financial aid awarded to a prospective student-athlete may not be conditioned on the recipient reporting in satisfactory physical condition. If a student-athlete has been accepted for admission and awarded financial aid, the institution shall be committed for the term of the original award, even if the student-athlete's physical condition prevents him or her from participating in intercollegiate athletics."); *id.* at § 15.3.4.3 *Reduction or Cancellation Not Permitted* ("Institutional financial aid based in any degree on athletics ability may not be increased, decreased, or canceled during the period of its award...[b]ecause of an injury that prevents the recipient from participating in athletics.").

<sup>96</sup>34 C.F.R. § 106.40(b)(1)-(2), (5) (2000).

other temporary physical conditions and limitations are not.<sup>97</sup> The failure, until recently, to question the exclusion of female athletes who become pregnant reflects the potency of the male model of athleticism, a model that is predicated on the norm of male bodies.

Constraining ideologies of femininity, though greatly weakened by cultural shifts in recent decades, also continue to have power in suppressing and punishing female athleticism. However, like the ideology of women's maternal roles, such ideas operate covertly and are likely to be contested when exposed. For example, the notorious Don Imus comment denigrating the Rutgers's women's basketball team as a bunch of "nappy headed ho's" generated widespread controversy and outrage precisely because it openly traded on older and (at least overly) discarded notions about female athletes having to prove their femininity.<sup>98</sup> Imus' slur against the Rutgers women drew on combined racism and sexism, as highlighted by his contrast with the women athletes on the opposing team, the University of Tennessee, who he said "look cute."<sup>99</sup> The femininity that Imus juxtaposed against female athleticism is an idealized white, middle to upper class femininity, apparently still reachable for athletes with straight, long hair in ponytails. Hence, the Tennessee team was able to retain, in Imus' comparison, a legitimating femininity that the Rutgers team could not.<sup>100</sup> The Rutgers' team's femininity was compromised—they were "ho's"—by their failure to temper their dominating athletic performance with the appropriate markers of an ideal, white, upper-class femininity. Imus' mentioning of their tattoos traded on specific class-based notions of ideal femininity, as his reference to the players' "nappy head[s]" drew on racialized ideals of femininity unattainable by African-American women unable to conform to the light-skinned, straight-haired idealized version by which the athletes were measured.

The Imus comment provoked a firestorm of criticism and a vehement defense of the honor and legitimacy of the Rutgers women, reflecting both a rejection of the old ideology and its continuing power. This cultural lens was powerful enough that Vivian Stringer, the Rutgers' coach, responded to the Imus comment from within the cultural box, reclaiming the femininity and cultural legitimacy of her athletes. Stringer defended her team, saying "They are young ladies of class, distinction. They are articulate. They are gifted. They are God's representatives in every sense of the word."<sup>101</sup> Her response, rehabilitating her players as "ladies" and "articulate,"

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<sup>97</sup>Cf. Women's Sports Foundation, *Issues Related to Pregnancy & Athletic Participation: The Foundation Position*, <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/disc/article.html?record=1145> (last visited Sept. 26, 2007).

<sup>98</sup>See David Carr, *Networks Condemn Remarks By Imus*, THE NEW YORK TIMES, Apr. 7, 2007, at B-7.

<sup>99</sup>See Rachel Blount, *Selling sex & sports isn't working: before Don Imus ever opened his foul mouth, two researchers were showing women's sports gain nothing from marketing the athletes looks*, STAR TRIBUNE (Minneapolis, MN), Apr. 17, 2007, at 1C.

<sup>100</sup>Cf. Bill Ordine et al., *Controversy Steals Shining Moment; Rutgers Team Voices Hurt; Imus' Remarks Speak to Struggle Facing Female Athletes*, BALTIMORE SUN, April 11, 2007, at 1A (quoting one marketing executive as saying, "from a gender perspective, the Tennessee players should be as offended by Imus as the Rutgers players, because he pigeonholed them as 'pretty' girls and didn't mention their athleticism").

<sup>101</sup>*Id.*

reveals the ongoing power of the cultural conflict between sports and white, middle/upper class femininity, even as Stringer rejects its application to her team.<sup>102</sup>

The overwhelmingly negative reaction to the Imus comment, and his ultimate ouster by the network, demonstrates the weakening of the older subordinating ideology that set up a stark conflict between sport and femininity.<sup>103</sup> In this latest culture clash, the Rutgers players were in fact received as “ladies” of class and distinction, while Imus emerged as the cultural outcast. Yet, the very power and injuriousness of the slur shows the resilience, at least covertly, of the ideology that leaves athletic women who do not adequately “prove” their femininity vulnerable to attack.

Elite female athletes and powerful women in sport still face pressures to conspicuously assert their femininity and conform to dominant gender expectations. This pressure is evidenced by countless pictures in sports, including the common sight of women basketball coaches running the sidelines in high heels, professional women basketball players conspicuously and strategically talking to media about their husbands and children to dispel associations between the league and lesbianism, and the publication of pictures of elite female athletes turned out in feminine garb or sexy poses instead of the game-time, sweaty performance shots typical of male athletes.<sup>104</sup>

The weakening of older constraining ideologies centered on maternity and femininity has been accompanied by the upsurge of updated ideologies focused on market-based explanations and assertions of differences, rather than inferiority, between men’s and women’s sports. The current ideologies are less hidden and more potent in rebuffing women’s claims for equal funding and benefits. These newer ideologies are more likely to be overtly invoked to defend a status quo that devalues women’s sports and resists demands for equality.<sup>105</sup>

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<sup>102</sup>*Id.* (statement of a girl’s basketball coach reacting to the Imus controversy and explaining that the balancing act regarding athletics and femininity gets tiresome) (“Whenever we would go to away games...I had them [the female players] dress in a dress or nice pants, and I would too. I wanted them looking feminine and not to be labeled. I think women’s sports is always trying to live that down, and here it goes again.”); *see also id.* (statement of former Baltimore Colts linebacker, Stan White, whose daughter was a high-achieving athlete) (“It’s that old stereotype of women athletes who are good are really more like men. They’re not feminine.”).

<sup>103</sup>However, eight months after being fired by CBS Radio and MSNBC as a result of the Rutgers comments, Don Imus returned to broadcast radio. *See* Paul Farhi, *Don Imus Gingerly Steps Back on Air*, WASH. POST, (Dec. 4, 2007), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/03/AR2007120300368.html> (last visited Jan. 21, 2008).

<sup>104</sup>*Cf.* Ordine, *supra* note 100 (stating one marketing executive who has worked with athletes said that female sports figures are still judged more by their sex appeal than their male counterparts).

<sup>105</sup>*See, e.g.,* Gary R. Roberts, *Evaluating Gender Equity Within the Framework of Intercollegiate Athletics’ Conflicting Value Systems*, 77 TUL. L. REV. 997 (2003) (following the market-based approach and arguing for the accommodation of the financial realities of institutions seeking to maximize football and men’s basketball revenues); JESSICA GAVORA, *TILTING THE PLAYING FIELD: SCHOOLS, SPORTS, SEX AND TITLE IX* 132-47 (2002) (arguing that gender differences in sports interests, not discrimination, explains women’s inequality in sports).

Like the shifting ideologies supporting gender inequality in sports, the practices of subordination are also moving targets. The outright exclusion of women from sport has given way to a structure that gives women a substantial share of sports opportunities, but on a smaller scale and on different terms than men. Half-court women's basketball is long gone, but women's sports are still a distant second in the resources and attention they receive.<sup>106</sup> In both subtle and not-so-subtle ways, women's sports are devalued in comparison to men's sports. The leadership structure of sports remains almost exclusively male and the dominant model of participation and competition was not selected for its fit with women's lives. The exploitation and abuse of women athletes by male athletes and male coaches, and the structuring of athletic programs to value elite competition over all else, often make the experience of playing sports less than empowering for women. Challenges to women's inequality in sports are frequently met with resistance, sometimes taking the form of leveling down men's opportunities and resources in sports rather than increasing them for women. As I have discussed elsewhere, the practice of leveling down replaces overt differential treatment with facially neutral treatment, without necessarily lessening the subordination of the discriminated-against group.<sup>107</sup> As these examples show, and consistent with Siegel's theory of "preservation through transformation," the subordinating practices that reproduce and perpetuate women's inequality in sports continue to evolve over time in response to cultural and legal challenges.

Finally, an understanding of gender oppression in sports is further complicated by the reality that subordinating practices are not fixed and independent of the strategies that address them. The existence of the double-bind gives subordination a shifting, see-saw like quality, tipping the magnitude of the problem in different directions depending on how it is addressed. Much like the problem of pregnancy in the workplace, discussed above, efforts to secure gender equality in sport are complicated by the double-bind. In a world where female athletes are devalued and marginalized, creating separate athletic teams for women risks adding to this marginalization and further subordinating women's sports in relation to men's sports (which, as noted previously, are tellingly referred to simply as "sports").<sup>108</sup> Yet, addressing women's inequality through the creation of gender-neutral sports, and assimilating women into the existing programs designed for men, would risk the virtual exclusion of women from competitive sports, except for a token number of

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<sup>106</sup>See CARPENTER & ACOSTA, *supra* note 77, at 177 (stating that, in 2002, females received only 36% of the operating budget dollars spent in intercollegiate programs).

<sup>107</sup>See Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513 (2004).

<sup>108</sup>See, e.g., Karen L. Tokarz, *Separate But Unequal Educational Sports Programs: The Need for a New Theory of Equality*, 1 BERKELEY WOMEN'S L.J. 201, 239 (1985) ("[S]ex segregation in sports adversely affects women economically, socially, and politically. It excludes women from power, fosters the myth of male supremacy, limits occupational choices for women, perpetuates the sex role stereotype of women as passive and weak, and invalidates the expressive/feminine aspect of sports."); B. Glenn George, *Fifty/Fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L.J. 1107, 1145 (2002) ("This article proposes the elimination of [sex] segregation [in athletic programs]. Separate will almost never be equal, so eliminate separate.").

elite female athletes. Thus, a gender-neutral strategy also threatens to add to the marginalization of women as athletes. A gender-blind approach would help only those women who are most “like” men in their athletic interests and abilities and who are able to succeed in a world of sport structured on men’s terms.

Under the first approach, the gender-differentiation of sports and the marking of gendered teams operates to stigmatize and oppress women; but under the second, the gender-blind approach to equal opportunity also marginalizes and subordinates women. Either strategy risks furthering women’s subordination in sports. The very complexity of gender inequality involves multiple and cross-directional subordinating practices that are resilient and resist unitary solutions.

While the above discussion is by no means a comprehensive analysis of the inequality that women experience in sports, it does suggest the slipperiness of subordinating practices and ideologies. Gender inequality in sports is not produced by a single, one-dimensional practice with a coherent ideology. Our legal theories need to be flexible and adaptable as well. From a pragmatist’s perspective, consistency in legal theory is overrated, and we should focus our talents on crafting multiple, flexible strategies drawing on mid-level theories tailored to the practices and ideologies that are most harmful at any given time.

#### IV. TITLE IX’S PRAGMATIC FEMINISM

Since subordination is multi-dimensional and constantly evolving, no one global theory of equality is sufficiently comprehensive to combat it. Title IX’s more pragmatic mix and match approach to theory holds promise, and may be part of the reason why Title IX has had more success in escaping some of the pitfalls of other discrimination laws. From the beginning, the sense that intercollegiate athletics was a “unique” setting for sex discrimination law allowed for room to experiment and depart from the typical formal equality approach that generally dominates sex discrimination laws.<sup>109</sup> Instead of simply borrowing from Title VII’s approach to workplace discrimination, for example, the promulgation of the Title IX regulations and policies governing athletics involved a more reflective process of asking what works.<sup>110</sup> More so than other discrimination laws, Title IX defies easy characterization in terms of its theoretical underpinnings, drawing from multiple theoretical frameworks.

For example, some aspects of Title IX’s approach to sports correspond to liberal feminism and an equal treatment model, characterized by an approach that seeks equality on the same terms as men, to the extent that women are similarly situated to men.<sup>111</sup> For example, Title IX’s equal treatment standard measures equal athletic opportunity by comparing the benefits accorded to male and female athletes. Under

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<sup>109</sup>See, e.g., *Kelley v. Univ. of Ill.*, 35 F.3d 265, 270 (7th Cir. 1994) (“But Congress itself recognized that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics.”).

<sup>110</sup>See Deborah Brake & Elizabeth Catlin, *Gender & Sports: Setting a Course for College Athletics: The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL’Y 51, 53-57 (1996) (documenting the history of the Title IX regulations and policy guidance).

<sup>111</sup>See CHAMALLAS, *supra* note 18, at 35-38 (discussing liberal or “equality” feminism and its influence on law).



the equal treatment standard, educational institutions must provide equal treatment to female and male athletes with respect to a list of factors, including facilities, scheduling of games and practices, coaching, equipment and uniforms.<sup>112</sup> This is an equal treatment/liberal feminist standard because it does not question the ways in which athletic sports programs are structured based on a male model, or the imbalance in the numbers of men and women who benefit from this model. Instead, it defines equality in terms of the benefits accorded to those women who are similarly situated to men by virtue of their position as athletes.

Likewise, equality with respect to athletic scholarships is also governed by an equal treatment/liberal feminist approach. Female athletes are entitled to an equal opportunity to receive athletic scholarship awards, measured by a standard requiring proportionality in men's and women's scholarship awards compared to their respective sports participation levels.<sup>113</sup> Under this standard, if women are forty percent of the school's intercollegiate athletes, they should receive about forty percent of the school's scholarship dollars. This is a decidedly liberal feminist approach since it does not question the underlying male bias in the structure of sports (i.e., the greater numbers of men who participate) and only requires equality insofar as women are similarly situated to men by virtue of their status as varsity athletes. Like the equal treatment standard, this legal test permits any inequality to be fixed either by reducing the awards to male athletes or increasing the scholarship funds awarded to women, another feature of an equal treatment model.

A third example of how Title IX incorporates a liberal feminist approach is in its limited guarantee of a right to try out for a place on a team in a sport offered only to the other sex.<sup>114</sup> With one important exception, women who do not have access to a sport that is offered to men may try out for a place on the men's team. This is a classic formal equality approach, since only those women who can compete with men on men's terms will benefit from a standard giving them an equal right to try out. An exception to this right limits the reach of the equal treatment standard in this instance, rendering it a particularly anemic example of liberal feminism. The equal try-out right applies only to non-contact sports, and contact sports are defined very broadly.<sup>115</sup> Thus, the legal standard itself defines women and men as not similarly situated for the purposes of competing together in contact sports, a judgment that is premised on stereotyped notions about women's vulnerability and need for protection.<sup>116</sup> In that respect, the contact sports exception makes the right to try-out a very weak version of liberal feminism.

The first two liberal feminist standards require group-based equal treatment (e.g., female athletes overall are entitled to equal benefits and scholarships compared to

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<sup>112</sup>34 C.F.R. § 106.41(c) (2007).

<sup>113</sup>34 C.F.R. § 106.37(c) (2007).

<sup>114</sup>34 C.F.R. § 106.41(b) (2007).

<sup>115</sup>*Id.* (defining contact sports to include "boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact").

<sup>116</sup>For critiques of the contact sports exception, see Jamal Greene, *Hands Off Policy: Equal Protection and the Contact Sports Exception of Title IX*, 11 MICH. J. GENDER & L. 133 (2005); Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381 (2000).

male athletes overall), while the third requires equal treatment on an individual level (an individual female athlete who is sufficiently talented may play on certain men's teams). Both the group-based and individual liberal feminist approaches are assimilationist in that they do not challenge the structure of sports, but seek to secure equal treatment for similarly situated women.

One value of the liberal feminist approach is its power to contest overblown and subordinating notions of difference by asserting women's similarity to men in deserving the same level of scholarship opportunities, sport benefits, and, to a lesser extent, the chance to try out for certain sports.<sup>117</sup> The liberal feminist approach facilitates challenges to the ideology of gender difference by asserting the similarity of male and female athletes and the prominence of an athletic identity first and foremost, without regard to gender. This approach has had some success in increasing the value placed on women's sports and in creating more cultural space for female athleticism by celebrating elite female athletes. Through claims of similarity and the celebration of elite female athletes, female athletes have come closer (although they still remain a distant second) to securing the privileges, status and esteem previously reserved for men in sports. These changed cultural norms in turn have spurred the growth of women's sports by encouraging more women to seek out athletic opportunity and benefit from competitive sports.

A very different theory of equality is reflected in Title IX's test for equal participation opportunities, the locus of the three-part test, the measure of Title IX compliance that has generated the most controversy.<sup>118</sup> The underlying model for this part of Title IX is not liberal feminism, but a more substantive equality approach that seeks to accommodate and value women's differences in sports. The influence of the substantive equality/accommodation model is apparent in several ways. First, the Title IX regulations presume and accommodate gender differences in athletic interests and abilities—without identifying the source or nature of the difference—by permitting athletic teams to be offered separately on the basis of sex if selection is based on competitive skill or the sport offered is a contact sport.<sup>119</sup> Because intercollegiate and interscholastic programs nearly always select athletes on the basis of skill, separate men's and women's sports teams are the norm. The implicit rationale is similar to an affirmative action rationale, justifying the gender-conscious treatment as a way of ensuring meaningful athletic opportunities for women.

The second way in which the equal participation measure reflects substantive equality, and even a different voice approach, is in its refusal to require a mirror imaging of the men's and women's athletic programs. Having allowed for sex-separate teams, one approach to equality would be to require women and men to have identical sport offerings. This would be more of a group-based equal treatment approach, requiring every sport offered for one sex to be offered to the other. The risk of such an approach, of course, is that women's sports programs would not serve women's own sports interests as much as simply mirror the programs selected for and chosen by men. Limiting women to the sports that men play does not

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<sup>117</sup>The claim to similarity reflected in the equal try-out right, however, is weakened by the contact sports assumption, which elevates a rationale of gender difference.

<sup>118</sup>For background on the development of the three-part test and its requirements, see Brake, *supra* note 3, at 46-49.

<sup>119</sup>34 C.F.R. § 106.41(b) (2007).

necessarily meet women's interests in sports if women prefer different sports. Instead of a rigid, formal equality approach premised on gender similarity, the Title IX regulations assume women may have different interests in sports than men, and therefore require schools to equally accommodate those interests. Thus, women's sports programs are supposed to include sports that reflect women's interests, as the men's offerings presumably reflect men's interests. This is akin to a "different voice" approach to equality, in which equality claims are premised on asserted gender difference (wherever it comes from) and the desired outcome is not just identical treatment but the equal valuing of women's distinct perspectives.<sup>120</sup>

The model for participation opportunities, then, is gender-conscious rather than gender-blind. The advantage of such a gender-conscious approach is that it does not premise equal opportunity on women's threshold similarity to men. Instead, it searches for a measure of equality that acknowledges and values gender difference. It creates space for women's sports to exist and develop without necessarily mirroring the opportunities selected for men. The message of honoring and valuing gender difference in sports is somewhat at odds with the message underlying equal treatment claims, which assert that women are similar to men in relevant respects for the purpose of benefiting from sports. Yet both messages hold truth and are valuable in asserting claims of gender equality.

The different voice/substantive equality approach poses its own set of risks, however, primarily that by accommodating and emphasizing women's difference in sports it will reinforce the marginalization and subordination of women in sports.<sup>121</sup> Much of women's second class status in sports is predicated on an ideology of difference and the notion that women's sports are not similar to men's sports with respect to the criteria that go into valuing them, such as marketability and audience appeal. Emphasizing gender difference in sports risks bolstering the notion that women's sports are less valuable than men's sports because they don't match the athleticism, level of competition, or other qualities that generate audience interest in sports. Especially to the extent that different voice approaches fail to identify the source of gender difference, the approach may reinforce notions that gender differences in sport are inherent and that the different valuations of men's and women's sports are natural and unproblematic.

It is at this point that Title IX doctrine becomes quite interesting from a theoretical perspective. The test for measuring Title IX compliance in participation opportunities within the context of sex-separate programs tempers these risks of the different voice approach by setting up a legal framework that critically examines the source of gender difference and holds institutions accountable for the ways in which they construct gender difference in some respects. The three-part test for participation opportunities operates against the backdrop of sex-separate programming in which women's and men's sports offerings frequently diverge. For Title IX to provide any real assurance of equal participation opportunity, some measure of equality had to be developed to ensure that a separate women's sports program, unmoored from men's programming, would offer women sufficient

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<sup>120</sup>See CHAMALLAS, *supra* note 18, at 53-59 (describing different voice or cultural feminism).

<sup>121</sup>*Id.* at 60-62 (discussing the dangers of cultural feminism).

opportunities in the sports they want to participate in. The test developed for this purpose is the so-called three-part test for participation opportunities.

Under this test, schools must comply with any one of three compliance measures by: (1) offering participation opportunities in numbers substantially proportionate to enrollment (for example, if women are fifty percent of the student body, they would have to represent roughly fifty percent of the school's intercollegiate athletes); or (2) demonstrating a continuing history of program expansion that is responsive to the developing interests and abilities of the underrepresented sex; or (3) fully and effectively accommodating the interests and abilities of members of the underrepresented sex through the existing sport offerings.<sup>122</sup> This test has been upheld by courts against many challenges arguing that it discriminates against men, who allegedly are more interested in sports and thus deserving of disproportionate opportunities compared to their enrollment.<sup>123</sup> In rejecting such reverse discrimination challenges, courts have taken a critical approach to gender differences in sports interest, closely examining how educational institutions themselves construct sports interests through their disparate athletic offerings to men and women.<sup>124</sup> The case law takes a decidedly social constructionist approach to gender difference, rejecting wholesale assertions that gender differences in sports interests are innate and justify offering a smaller share of opportunities to women.

Title IX's approach to ensuring women equal participation in sports thus departs from the typical liberal feminist approach in discrimination law, which requires the equal treatment of persons who are already similarly situated, by not tying the equality measure to a prior showing of women's similar interest and ability in sports.<sup>125</sup> It also departs from the different voice model which is generally agnostic toward the source of gender difference. Instead of accepting gender differences in athletic interests as natural or even societal, the rationale behind the three-part test holds institutions accountable for their role in constructing, reinforcing and perpetuating gender differences in interests. Applying this rationale, courts have refused to excuse gender imbalances in athletic opportunities based on gender differences in current interest levels.<sup>126</sup> This critical approach to difference might be called structuralism or substantive equality with a critical approach to difference. It is gender-conscious, focusing on equality of results instead of a formal equality of process, yet it is decidedly social constructionist (with a particular focus on the role of specific institutions rather than society in general) in its understanding of difference. At its best, this approach avoids the pitfalls of liberal feminism, by

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<sup>122</sup>This test comes from a 1979 Policy Interpretation adopted by the former Department of Health, Education and Welfare's Office for Civil Rights (now located in the Department of Education). See SUSAN WARE, *TITLE IX: A BRIEF HISTORY WITH DOCUMENTS* 75-76 (2007).

<sup>123</sup>For a discussion of court decisions applying this test, see Brake, *supra* note 3, at 49-59.

<sup>124</sup>*Id.* at 69-74.

<sup>125</sup>For example, Title VII of the Civil Rights Act of 1964 takes a liberal feminist approach to women's equality at work which fails to account for the different situations of women workers with respect to care work. See Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J. L. REFORM 371 (2001),.

<sup>126</sup>See Brake, *supra* note 3, at 49-59.

eschewing reliance on assertions of sameness to make an equality claim, and avoids the essentialism of the different voice/accommodation model by critically examining the source and implications of asserted difference.

By working on multiple fronts simultaneously, with different theoretical approaches targeting different dimension of inequality, Title IX has had notable success in loosening the cultural norms that constrain and devalue female athleticism. Because women are not shoehorned into programs designed for men, more women develop athletic interests, which both respond to and spur greater opportunities to play. And because women athletes are promised baseline resources and benefits comparable to those given men (at least ideally, although this aspect of Title IX is clearly under-enforced), there are limits to and tools for fighting the marginalization and second-class status that often accompany activities that are feminized by assertions of gender difference. Title IX's amalgam of legal theory thus works simultaneously on the problems of marginalization (the exclusion of women from valued athletic opportunities) and cultural imperialism (the devaluation of female athleticism and the marking of female athletes as "other"), while creating opportunities for resisting the cultural norms that support all the faces of gender oppression in sports.

However, Title IX's success at navigating the double-bind that threatens to undermine efforts to address women's exclusion from and marginalization in sports has not been matched by a comparable level of success in addressing the other faces of oppression. For example, the exploitation of female athletes, in the form of the submergence of women into the existing commercialized and market-driven structure of sports, does not even register as a gender equality problem. Title IX's liberal feminist equal treatment standard takes the male model of commercialized sports as the baseline, without critically examining whether this model works well for women (or many men, for that matter). By using elite male competitive sports as the baseline, Title IX privileges a model of sports that values winning and competitive standing over the joy of playing and the personal benefits of athleticism. Women's teams that do not conform to that model of elite competition are not entitled to equal recognition or any space at all in an athletic program.

A recent district court decision illustrates Title IX's failure to challenge the model of elite competitive sports and the triumph of this model over a more educationally-oriented model of broad-based competition. In this case, the plaintiff, a high school senior who had played volleyball on the school's freshman and junior varsity teams tried out for, but did not make, the school's varsity team.<sup>127</sup> Because the school did not offer any non-varsity opportunities for seniors, and prohibited seniors from playing on the sub-varsity teams, the student alleged that she had an unmet interest in playing volleyball.<sup>128</sup> She alleged that many female students tried out for and were cut from the varsity volleyball team, and that the boys' varsity teams did not make any cuts.<sup>129</sup> She argued that the school denied her equal athletic treatment and failed to accommodate the unmet interest of girls under the three-part test by rejecting a request by her and her teammates to add a fourth (non-varsity)

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<sup>127</sup>*Wieker v. Mesa County Valley Sch. Dist.*, No. 05-cv-806-WYD-CBS, 2007 U.S. Dist. LEXIS 11956 (D. Colo. 2007).

<sup>128</sup>*Id.* at \*2-3.

<sup>129</sup>*Id.* at \*22.

volleyball team.<sup>130</sup> She lost both claims because no such non-varsity opportunities were provided for male seniors.<sup>131</sup> Although the school district failed to provide athletic opportunities to female students substantially proportionate to enrollment, and also failed to comply under prong two of the three-part test, the court found in favor of the school under prong three of the test.<sup>132</sup> The court granted summary judgment to the school district, finding that even if there was enough unmet interest in girls' volleyball to field an additional team, the plaintiff failed to show that a sufficient number of the female students who were cut had the ability to play on a *competitive interscholastic volleyball team*.<sup>133</sup>

The court's decision is unremarkable in its application of existing law under the three-part test, which has been a vehicle for adding women's teams at a comparable competitive level as the men's teams, typically requiring schools to add more varsity sports for women to more closely match the number of varsity opportunities available to men. Yet the decision clearly illustrates Title IX's implicit incorporation of elite competitive sports as the baseline measure of equality. Title IX has not been a vehicle for interrogating how well the elite model of commercialized sport works for women (or men, for that matter), nor for examining the exploitation and commodification of athletes that occurs under that model. Many of the benefits of sports, including improved physical fitness, socialization opportunities and leadership development might be better promoted by a more inclusive model of sports that values widespread participation and enjoyment in sports over elite competition. The different voice model of equality has made no inroads in nudging the hyper-competitive model of sports in the direction of a model of sports that places a higher value on broadly inclusive participation, learning new skills, cooperative teamwork, and the joy of playing.

The commercialization of college and university sports, which sets the stage for the commodification and exploitation of athletes, has also been impervious to pressure from Title IX. Any hopes that an equal treatment standard might "break the bank," ushering in a more reasonable approach to athletic expenditures if they had to be matched for women, have not been realized. Expenditures on men's "major" sports continue to climb through the roof, escalating at shocking rates.<sup>134</sup> At most, Title IX has served as a tool to increase the resources allocated to women's most elite sports, although such resources have still fallen far short of those allocated to men.<sup>135</sup> Title IX's equal treatment standard has not been fully enforced to provide actual equality of treatment to comparable numbers of elite male and female athletes, and it is not clear that, even if it were, this would be the best course for women or for the place of sports in universities more generally. A bigger dose of different voice

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<sup>130</sup>*Id.* at \*11-14.

<sup>131</sup>*Id.* at \*11-12, \*26-27.

<sup>132</sup>*Id.* at \*15-19.

<sup>133</sup>*Id.* at \*26.

<sup>134</sup>*See, e.g.,* Deborah Brake, *Revisiting Title IX's Feminist Legacy: Moving Beyond the Three-Part Test*, 12 AM. U. J. GENDER SOC. POL'Y & L. 453, 469-70 (2004).

<sup>135</sup>*See* CARPENTER & ACOSTA, *supra* note 77, at 177 (stating that for every one new dollar spent on women's sports since 1972, two new dollars have been spent on men's sports).

feminism might be useful to confront the problem of exploitation by questioning the dominant elite model of sports in favor of an approach to sport that would value participation for its educational value, rather than for its marketability.

Gender oppression in the form of powerlessness has also been untouched by Title IX. Title IX, along with other discrimination laws such as Title VII and the Equal Pay Act, takes a gender-neutral approach to employment discrimination against female coaches and administrators that has been utterly anemic in challenging the power structure of intercollegiate athletics.<sup>136</sup> In fact, Title IX may even have contributed to the decline of women in coaching positions that has coincided with the law's tenure, to the extent that it has made positions coaching women athletes more attractive to men by boosting the resources channeled into women's sports.<sup>137</sup> Title IX, like Title VII, suffers in this area for its blind reliance on gender-neutrality, refusing to view the dearth of women in coaching positions as an equality problem as long as the criteria for obtaining powerful positions are themselves gender-neutral. The gender-blind approach ignores the many ways gender shapes sports opportunities. A more gender-conscious approach that considered the opportunities for female athletes to have female role models, mentors and leaders in sports might enable Title IX to have more of an impact in this area. The dearth of women in sport leadership positions only strengthens the cultural connections between sport and masculinity, and further contributes to the institutional construction of gender differences in sports.

Finally, Title IX has been very weak in responding to gender-linked violence and abuse of female athletes. The abuse of female athletes by predominantly male coaches and athletes is a pernicious form of gender oppression in sports.<sup>138</sup> It limits the potential of sports to empower women and acts out a distinctly male form of athletic privilege. Title IX responds with a very weak version of dominance feminism. Unlike liberal feminism and substantive equality/different voice feminism, dominance feminism is not concerned with examining and responding to sex difference, but focuses on raw power as a source of gender inequality.<sup>139</sup> Dominance feminism is particularly concerned with sexual subordination and the privileging of a virulent hetero-masculinity that subordinates women and nonconforming males.<sup>140</sup>

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<sup>136</sup>See Brake, *supra* note 3, at 84, 128-32, for an explanation and critique of how these laws apply to women coaches of women's teams. See also Brake, *supra* note 134, at 459-66.

<sup>137</sup>See CARPENTER & ACOSTA, *supra* note 77, at 173-74 (explaining the decline in women holding coaching positions following the enactment of Title IX).

<sup>138</sup>See 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, 173-79 (2003) (stating that, "[a]lthough concrete statistics on sexual harassment in women's sports are minimal, one comprehensive study on the issue reported that one-fifth of female athletes in Canada have been sexually harassed or abused by their coaches," and discussing the particular characteristics of competitive sports that create special opportunities for the harassment and abuse of female athletes).

<sup>139</sup>See Chamallas, *supra* note 18, at 45-50.

<sup>140</sup>See *id.*, at 45.

Although Title IX draws on dominance feminism to recognize sexual harassment and abuse of female athletes as a form of gender discrimination, it stops far short of providing a meaningful remedy. Title IX's legal standard in this area is even weaker than that under Title VII, both in terms of the standard for institutional liability and the threshold for determining when sexually subordinating conduct rises to the level of actionable harassment. While Title VII draws on agency principles to set the contours of employer liability for sexual harassment, Title IX incorporates a direct liability standard for educational institutions.<sup>141</sup> The Title IX standard requires proof of actual notice of the harassment to a person in a position of authority who responds with deliberate indifference.<sup>142</sup> Courts have construed this standard strictly, such that the liability rules for educational institutions are much more lenient toward schools and universities than they are toward employers.<sup>143</sup>

In addition, the severity and frequency of the conduct required to establish a claim are much tougher under Title IX than under Title VII. Only conduct that is severe, pervasive and objectively so bad as to effectively deny educational benefits will violate Title IX.<sup>144</sup> Like the standard for institutional liability, courts have applied this test strictly.<sup>145</sup> Much harassing conduct that limits the athletic experience of female students and acts out hetero-male privilege by male coaches

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<sup>141</sup>*Compare* Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (Title VII), and Burlington Indus. v. Ellerth, 524 U.S. 742 (1998) (Title VII), with Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (Title IX), and Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) (Title IX).

<sup>142</sup>*See* Gebser, 524 U.S. 274 (1998) (teacher-student harassment); Davis, 526 U.S. 629 (1999) (student-to-student harassment).

<sup>143</sup>*See, e.g.,* Henderson v. Walled Lake Consol. Schs., 2006 FED App. 0426P (6th Cir.) (stating that notice of coaches' improper sexual behavior toward another student was not notice of the hostile environment he created for the plaintiff); Shaposhnikov v. Pacifica Sch. Dist., No. 04-01288, 2006 U.S. Dist. LEXIS 18330 (N.D. Cal. Nov. 16, 2006) (holding that school's ineffectual response to severe, daily harassment of plaintiff did not satisfy deliberate indifference standard because not clearly unreasonable). *See also* Catherine Fisk & Erwin Chemerinsky, *Vicarious Liability Under Title VII, Section 1983 and Title IX*, 7 WM. & MARY BILL RTS. J. 755 (1999) (criticizing the lower level of protection from sexual harassment provided by Title IX's institutional liability rules compared to Title VII); Deborah L. Rhode, *SEX IN SCHOOLS: WHO'S MINDING THE ADULTS? DIRECTIONS IN SEXUAL HARASSMENT LAW* 290, 297 (Catherine A. MacKinnon & Reva B. Siegel eds., 2004) (criticizing Title IX's more difficult liability standard for harassment claims).

<sup>144</sup>*See* Davis, 526 U.S. at 650 (requiring conduct to be "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."

<sup>145</sup>*See, e.g.,* Klemencic v. Ohio State Univ., 10 F. Supp. 2d 911, 915-18 (S.D. Ohio 1998), *aff'd*, 263 F.3d 504 (6th Cir. 2001) (dismissing Title IX sexual harassment claim as not sufficiently severe or pervasive where female athlete who refused coach's sexual advances was denied the opportunity to train with the team). Notably, however, the Fourth Circuit Court of Appeals, sitting *en banc*, recently reversed a panel's decision that a coach's verbal sexual harassment of a female athlete was insufficiently severe or pervasive to state a Title IX claim for a sexually hostile environment. *See* Jennings v. Univ. of North Carolina, 444 F.3d 255 (4th Cir. 2006), *affirmed in part, vacated in part, and remanded* by 482 F.3d 686 (4th Cir. 2007) (*en banc*).



and athletes falls far short of the bar set by courts. For example, one court ruled that verbal taunts directed at a female high school basketball player, which included calling her a “lesbian whore,” did not amount to actionable harassment because the student did not actually quit the basketball team, even though she testified that the harassment made staying on the team “hell” and that she considered quitting.<sup>146</sup>

For Title IX to have any traction in addressing the gender violence and abuse that affects female athletes, its incorporation of the dominance feminism model must be strengthened. Sports will never be an institution equally open to women as long as it remains a place that teaches and protects a virulent hyper-masculinity that subordinates women.

## V. CONCLUSION

Title IX has had its greatest success in addressing the problems of marginalization and cultural imperialism—precisely the areas where the law’s theoretical underpinnings are most eclectic and creative, in keeping with the spirit of pragmatism. Even here, however, Title IX has fallen far short of total success in eradicating these forms of gender oppression. To some extent, the feminist agenda behind Title IX is hindered by one of the risks of pragmatism: a tendency toward complacency in relying on “common sense” instead of critical analysis in envisioning and achieving a just result. Joseph Singer has warned of the danger of complacent pragmatism in the form of raw compromise that lets uncritical “common sense” shape one’s determination of a just result. As an example, Professor Singer criticizes Justice O’Connor’s pragmatism for succumbing to this flaw, and argues that “common sense” often implicitly privileges a more powerful perspective over alternative ones.<sup>147</sup> He cautions that “freedom from theory-guilt” should not mean an abdication of the responsibility to acknowledge and critically examine the value choices behind our decisions.<sup>148</sup>

The contact sports exception is one example of a complacent pragmatism, reflecting an uncritical acceptance of “common sense” understandings that women need protection from physical contact with men in sports. While purporting to be based on the practical realities of gender difference, the contact sports exception incorporates a male perspective on sports that views women as unfit to compete with men in physically strenuous activities. It is incompatible even with the liberal feminism underpinnings of Title IX’s equal treatment standard, and especially so

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<sup>146</sup>*Drews v. Joint Sch. Dist. No. 393*, No. CV04-388-N-EJL, 2006 U.S. Dist. LEXIS 29600 (D. Idaho May 11, 2006).

<sup>147</sup>See Joseph William Singer, Comment, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821, 1830 (1990) (observing that “[c]ommon sense is likely to embody the perspective of majority or dominant groups in society,” and criticizing reliance on common sense that is blind to the dominant perspective’s “complicity in an existing power structure”).

<sup>148</sup>*Id.* at 1830-31 (“Freedom from theory-guilt may mean the recognition that we must take responsibility for the judgments we make, rather than pretending that those judgments can be made for us by applying a determinate and comprehensive theory of justice. But it may also mean the failure to reflect on and acknowledge the actual value choices implicated in those judgments. The former is an aspect of pragmatism generally, while the latter reflects the unattractive aspects of complacent pragmatism.”).

with the critical approach to difference in the structuralism behind the three-part test.<sup>149</sup> To the extent it is related to different voice feminism, it greatly distorts it by denigrating rather than valuing women's athleticism. It smacks of raw political compromise rather than a reflective response to gender oppression in sports.<sup>150</sup>

Another example of complacent pragmatism is the Department of Education's Office for Civil Rights 2005 policy clarification interpreting prong three of the three-part test to permit educational institutions to demonstrate full and effective accommodation through the use of survey instruments measuring the athletic interests of female students.<sup>151</sup> Under the agency's interpretation, a university may survey its female students through email surveys, treating the failure to respond as proof of lack of interest, thereby demonstrating that the institution is already fully meeting its female students' interests in playing sports.<sup>152</sup> As Erin Buzuvis has explained, the survey method of compliance fails to acknowledge the core theory behind the three-part test, that athletic interest is driven by and dependent upon the opportunities provided.<sup>153</sup> The 2005 survey represents a retreat to "common sense" notions that girls and women are less interested in sports, rather than critically examining the social context of how interest develops.

No one approach to legal theory can solve the thorny problems of gender oppression, the double-bind, and the threat of backlash. Despite the risks of complacency in uncritically examining dominant "common sense" perspectives, pragmatism is a promising approach for feminist scholars, with its reminder to be vigilant in tailoring strategies to the full context of oppression and to treat legal theory as a work in progress, while relentlessly attending to changes in the social context. Rather than picking a theoretical approach for its consistency and abstract purity, feminist scholars should treat legal theory as contingent and context-specific, while continually evaluating it for how it serves our feminist agendas.<sup>154</sup> Title IX's

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<sup>149</sup>See Jamal Greene, *Hands Off Policy: Equal Protection and the Contact Sports Exemption of Title IX*, 11 MICH. J. GENDER & L. 133 (2005) (critiquing the contact sports exception as incompatible with liberal feminism); Brake, *supra* note 3, at 139-43 (critiquing the contact sports exception as incompatible with the structuralist approach of the three-part test).

<sup>150</sup>*Cf.* Kelley v. Bd. of Trs., 35 F.3d 265, 270 n.5 (7th Cir. 1994) ("Congress would indeed be surprised to learn that Title IX mandated co-ed football teams.").

<sup>151</sup>Office for Civil Rights, U.S. Dep't of Educ., *Additional Clarification of Intercollegiate Athletic Policy: Three-Part Test—Part Three 1-13* (2005), available at <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.pdf>.

<sup>152</sup>*Id.*

<sup>153</sup>See Erin E. Buzuvis, *Survey Says...A Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821 (2006).

<sup>154</sup>*Cf.* Ruth Anna Putnam, Comment, *Justice in Context*, 63 S. CAL. L. REV. 1797, 1809 (1990) ("Failure to recognize that general rules and principles are working hypotheses, needing to be constantly tested by the way in which they work out in application to concrete situations, explains the otherwise paradoxical fact that the slogans of liberalism of one period often become the bulwarks of reaction in a subsequent era.") (quoting John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924), reprinted in 15 THE MIDDLE WORKS 1889-1924 68 (Jo Ann Boydston ed., 1983)).

mix and match approach to theory provides an interesting model of how a pragmatic feminism might work—albeit, an imperfect one.