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**Forging the Path Forward: Critical Conversations from Title IX:  
History, Legacy, and Controversy**

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## INTRODUCTION: FORGING THE PATH FORWARD: CRITICAL CONVERSATIONS FROM *TITLE IX: HISTORY, LEGACY, AND CONTROVERSY*

Valorie K. Vojdik\*

Forty-five years ago, Title IX of the Education Amendments of 1972 was enacted, prohibiting discrimination on the basis of sex in any federally funded education program or activity.<sup>1</sup> With a few specific exceptions, it applies broadly to all aspects of such programs or activities, including school admission policies, classes, athletics, scholarships, student services, and counseling.<sup>2</sup> It also mandates access to a safe educational environment free from sexual harassment and assault.<sup>3</sup> At the time of its adoption, many colleges refused to admit women, employed quotas to limit their enrollment, and denied admission to certain programs of study based solely on sex.<sup>4</sup> Title IX has eliminated such facial barriers and provided a critical tool in expanding access to educational opportunities to all students, regardless of their sex or gender identity.

Title IX's promises and challenges are the focus of the March 2017 interdisciplinary conference, *Title IX: History, Legacy, and Controversy*, co-sponsored by the *Tennessee Journal of Race, Gender, and Social Justice*, the University of Tennessee College of Law, and Law Women. The conference was inspired by the legacy of Lady Vols Coach, Pat Summitt. For over forty years, Summitt coached the Lady Vols, the women's basketball team at the University of Tennessee. She was known as "the most winningest coach" in basketball, leading her team to over 1,000 victories, the most of any basketball team, male or female.<sup>5</sup> In 2012, President Obama awarded Coach Summitt the Presidential Medal of Freedom, recognizing her outstanding leadership. Her legacy, Obama declared, "is measured much more by the generations of young women and men who admitted Pat's intense competitiveness and character, and as a result found in themselves the confidence to practice hard, play harder, and live with courage on and off the court."<sup>6</sup>

Coach Summitt illustrates both the promise and the challenge of Title IX. Since its adoption, Title IX has led to a "revolution in sport" which resulted in a tremendous increase in the number of females participating in high school and

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<sup>1</sup> 20 U.S.C. § 1681, *et seq.*

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> U.S. DEP'T OF JUSTICE, EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX 2-4 (2012), available at <https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf>

<sup>5</sup> Jessica Bliss, *Remembering Pat Summitt: Joan Cronan Shares Her Story*, THE TENNESSEAN, (July 13, 2016), <http://www.tennessean.com/story/sports/2016/07/13/remembering-pat-summitt-joan-cronan-shares-her-story/86964800/>

<sup>6</sup> *Obama: Pat Summitt Was A Role Model for My Daughters*, USA TODAY, (June 28, 2016), <https://www.usatoday.com/story/news/politics/theoval/2016/06/28/obama-pat-summitt-role-model-my-daughters/86466624/>.

college athletics.<sup>7</sup> Yet despite the gains, critical challenges remain. The number of female head coaches in college athletics is at a record low, and female athletes in college “remain underrepresented and underfunded.”<sup>8</sup>

Title IX advocates have done tremendous work expanding the reach of Title IX to address sexual harassment and LGBTQ discrimination, yet resistance and backlash continue. As Deborah Brake aptly observes, Title IX “has been a flashpoint for the gender culture wars, frequently triggering backlash as advocates and activists have found success using the law to contest the traditional gender norms that limit women’s opportunities.”<sup>9</sup> While the Obama administration deployed Title IX to address discrimination against LGBTQ students and student victims of campus sexual assault, President Trump recently rescinded agency guidance requiring schools to provide equal access to bathrooms for transgender students and could attempt to rescind the recent sexual assault guidelines as well.<sup>10</sup>

Dedicated to exploring the promise and challenges of Title IX, this conference brought together twenty-five presenters and moderators, along with an audience of over 100 law professors, lawyers, judges, and Title IX administrators. Panels discussed some of the most fascinating and challenging aspects of Title IX in the post-Trump era, including the use of Title IX to address campus sexual assault, discrimination against girls of color in school discipline and other educational contexts, equal access for LGBTQ and intersex students, current issues in athletics, and media coverage of Title IX. The *Tennessee Journal of Race, Gender, and Social Justice* has dedicated two volumes to publishing papers from the conference.

The articles in this first volume demonstrate the potential of Title IX to address multiple forms of gender discrimination and subordination. Each author explores current challenges and offers promising new theoretical, legal, and regulatory approaches to fully realize the potential of Title IX. These include: (1) reconceptualizing sex and gender discrimination as rooted in gendered institutions, practices, and cultures, as explained by Deborah Brake in the context of campus sexual assault; (2) incorporating intersectionality and social justice feminist approaches to enable Title IX to recognize and address how gender, race, sexual orientation, and other forms of subordination intersect to harm particular groups, as illustrated by Erin Buzuvis and Verna Williams; and (3) reframing Title IX’s regulations regarding athletic scholarships using a holistic approach

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<sup>7</sup> Amy Wilson, *The Status of Women in Intercollegiate Athletics as Title IX Turns 40*, NCAA PUBLICATIONS 5-6 (2012), <http://ncaapublications.com/p-4289-the-status-of-women-in-intercollegiate-athletics-as-title-ix-turns-40-june-2012.aspx> (since adoption of Title IX, girls’ participation in high school athletics has increased nearly 1000% and NCAA-sponsored athletic opportunities for women have tripled); see also Erin E. Buzuvis, *Symposium: Introduction: The Fortieth Anniversary of Title IX*, 35 W. NEW ENG. L. REV. 319, 320 (2013).

<sup>8</sup> Deborah L. Brake, *Back to Basics: Excavating the Sex Discrimination Roots of Campus Sexual Assault*, 6 TENN. J. RACE GENDER & SOC. JUST. 7, 12 (2017); Barbara Osborne, *Failing to Fund Fairly: Title IX Athletics Scholarships Compliance*, 6 TENN. J. RACE GENDER & SOC. JUST. 83, 84 (2017).

<sup>9</sup> Brake, *supra* note 8, at 16.

<sup>10</sup> See Brake, *supra* note 8, at 16.

that assesses specific requirements in light of their overall impact on the opportunities and benefits to female athletes, as outlined by Barbara Osborne.

Deborah Brake, the keynote speaker for the conference, examines the current controversy over the use of Title IX to address campus sexual assault in *Back to Basics: Excavating the Sex Discrimination Roots of Campus Sexual Assault*.<sup>11</sup> In this groundbreaking article, Brake reconstructs the theoretical understanding of campus sexual assault as sex discrimination prohibited under Title IX, reconceptualizing sexual assault as the product of gendered institutions and a form of gender subordination.

The 2011 guidance documents issued by the U.S. Department of Education and its Office of Civil Rights (OCR), Brake observes, address inadequate institutional responses to campus sexual assault, requiring institutions to create a procedural system to address and prevent sexual assault. While Brake applauds the OCR framework as consistent with “substantive equality and an institutional account of gender discrimination,” she argues that OCR fails to explain how institutional practices toward campus sexual assault constitute prohibited sex discrimination.<sup>12</sup> While courts have recognized that rape and sexual assault are forms of prohibited sex discrimination under Title IX, Brake argues that courts have relied on a thin, formalistic understanding of sex discrimination that focuses on the individual interaction between the perpetrator and the subject. Under this judicial account, sexual assault is a form of sexual harassment because the perpetrator would not have targeted the female subject but for her sex. Brake argues that this account narrowly focuses on the sexual orientation/desire of the perpetrator and the sex of the victim/subject, imposing liability on the educational institution only when it had actual notice of the assault and failed to act.<sup>13</sup>

Rejecting this simplistic account, Brake offers a more substantive foundational account that shifts the focus to the socially constructed and gendered institutional practices and cultures that promote assault and discourage redress. Drawing on feminist dominance theories and sociological theories of gender and power, Brake illuminates the multiple ways in which campus sexual assault is a product of gendered institutional structures and cultures.<sup>14</sup> For example, certain campus settings, such as fraternities and men’s sports teams, are often marked by a high belief in rape myths and traditional gender roles that create a “rape-supportive environment.”<sup>15</sup> Weak institutional responses to sexual assault on campus, Brake explains, help normalize and perpetuate the prevalence of assault and deter complaints, reinforcing gender inequality.<sup>16</sup>

Focusing on the role of educational institutions in facilitating sexual assault and the subordination of women, Brake argues, is necessary to open opportunities for women in leadership under Title IX. Her reconceptualization of

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<sup>11</sup> Brake, *supra* note 8

<sup>12</sup> Brake, *supra* note 8, at 25.

<sup>13</sup> Brake, *supra* note 8, at 25.

<sup>14</sup> Brake, *supra* note 8, at 26-29.

<sup>15</sup> Brake, *supra* note 8, at 32.

<sup>16</sup> Brake, *supra* note 8, at 34.

“why” and “how” campus sexual assault constitutes prohibited sex discrimination makes a substantial contribution to Title IX jurisprudence and to feminist legal theory in general.

In *Coaches in Court: Legal Challenges to Sex Discrimination in College Athletics*, Erin Buzuvis similarly explores the impact of social constructions of athletic coaching as masculinized power.<sup>17</sup> The presence of female coaches as leaders in the “highly visible and consumed context of sports,” Buzuvis explains, has the potential to “mitigate” gender stereotypes that block women from leadership positions in business, law, and politics.<sup>18</sup> The number of women as head coaches in college sports is at an all-time low, however, and forty percent of female coaches report experiencing sex discrimination at work.<sup>19</sup>

Like Brake, Buzuvis argues that discrimination against female coaches is about gender and power, rooted in cultural beliefs that leadership and competency are masculine attributes.<sup>20</sup> Female coaches are often subject to double standards and disciplined or terminated for allegedly “aggressive” behavior that is tolerated or praised in male coaches.<sup>21</sup> Buzuvis argues that sex discrimination against female coaches also intersects with discrimination based on other identity categories such as age, sexual orientation, and race. She outlines various arguments to challenge such discrimination under Title IX, Title VII, and other federal and state laws, including laws prohibiting retaliation for reporting discrimination.

Verna L. Williams similarly focuses on the need for an intersectional analysis under Title IX to address discriminatory school discipline of Black girls.<sup>22</sup> In 2014, the U.S. Department of Education and Department of Justice issued a “Dear Colleague” letter documenting racial discrimination in school discipline.<sup>23</sup> Williams argues that the letter framed the issue as a problem of race discrimination, ignoring the role of gender discrimination against Black girls and the possibility of using Title IX to redress the harm from the school-to-prison pipeline.<sup>24</sup> Framing school discipline as solely a problem of race discrimination, Williams argues, ignores the experiences of Black girls who are disproportionately subject to school discipline as compared to their white or Latina counterparts.<sup>25</sup> The erasure of gender discrimination, Williams argues, is not anomalous; policymakers continue to foreground the experiences of Black men in purporting to address racial subordination.

To make gender visible, Williams uses methods of social justice feminism to examine the interrelationship of subordination based on race, gender, and other

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<sup>17</sup> Erin Buzuvis, *Coaches in Court: Legal Challenges to Sex Discrimination in College Athletics*, 6 TENN. J. RACE GENDER & SOC. JUST. 41 (2017).

<sup>18</sup> Buzuvis, *supra* note 17, at 44.

<sup>19</sup> Buzuvis, *supra* note 17, at 52.

<sup>20</sup> Buzuvis, *supra* note 17, at 44.

<sup>21</sup> Buzuvis, *supra* note 17, at 53.

<sup>22</sup> Verna L. Williams, *Title IX and Discriminatory School Discipline*, 6 TENN. J. RACE GENDER & SOC. JUST. 67 (2017).

<sup>23</sup> Williams, *supra* note 22, at 68.

<sup>24</sup> Williams, *supra* note 22, at 68.

<sup>25</sup> Williams, *supra* note 22, at 75.

characteristics such as class, that render Black girls vulnerable to arbitrary discipline. Data show that schools typically suspend Black girls for minor infractions (e.g. gum chewing) and that the punishment imposed on Black girls is rooted in implicit gender and racial bias.<sup>26</sup> School administrators often perceive Black girls as not conforming to traditional notions of femininity, describing them as “overly aggressive,” “angry,” “hostile,” and “hypersexualized.”<sup>27</sup> When Black girls misbehave, Williams explains, they are punished not only for misconduct, but also for transgressing traditional feminine norms.<sup>28</sup> This issue, Williams argues, requires an intersectional approach that develops solutions informed by the affected communities. Williams offers examples of innovative efforts by Black Lives Matter, the African American Policy Forum, and others to identify the problem and explore how to use Title IX as a remedy.

In *Failure to Fund Fairly: Title IX Athletics Scholarships Compliance*, Barbara Osborne critically analyzes the failure of the antidiscrimination provisions of Title IX to eliminate disparities in female athletic participation and funding at NCAA Division I and II institutions.<sup>29</sup> Title IX regulations require institutions to provide funding proportionate to the participation of male and female athletes.<sup>30</sup> While the regulation appears equitable, Osborne argues that it focuses too narrowly on scholarship dollars and should be considered holistically in light of the Title IX’s nondiscrimination requirement.<sup>31</sup> Division I and II institutions have not provided equal participation opportunities for men and women.<sup>32</sup> By focusing on actual participation rates, the scholarship regulation functions to reduce the availability of scholarship dollars for women by approximately \$257 million, thereby denying access to educational opportunities.<sup>33</sup> Osborne also explores other reasons for noncompliance, suggesting *inter alia* that the regulations be revised to integrate participation opportunities into the formula to better achieve the purposes of Title IX.

Each of these authors illustrate the need to dismantle institutionalized and intersectional forms of discrimination that impede our ability to fully realize the goals of Title IX. This discussion will continue in the next volume of the *Tennessee Journal of Race, Gender, and Social Justice*, as additional authors engage in this critically important conversation.

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<sup>26</sup> Williams, *supra* note 22, at 75.

<sup>27</sup> Williams, *supra* note 22, at 75.

<sup>28</sup> Williams, *supra* note 22, at 76.

<sup>29</sup> Osborne, *supra* note 8, at 84.

<sup>30</sup> Osborne, *supra* note 8, at 84.

<sup>31</sup> Osborne, *supra* note 8, at 102.

<sup>32</sup> Osborne, *supra* note 8, at 86.

<sup>33</sup> Osborne, *supra* note 8, at 102.

