

THE INVISIBLE PREGNANT ATHLETE AND THE PROMISE OF TITLE IX

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“I’m a mom, I’m a better student, I’m a better athlete, I’m a better teammate. I don’t know. I’m just at peace. And I feel grateful for everything.”

– Fantasia Goodwin, Syracuse University student¹

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¹ Donna Ditota, *Two New Roles: Fantasia Goodwin’s a Mom Now and the First Sub off the Syracuse Bench*, THE POST-STANDARD (Syracuse, N.Y.), Jan. 24, 2008, at C4 [hereinafter Ditota, *Two New Roles*].

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I. INTRODUCTION

In April of 2007, Fantasia Goodwin, a Syracuse University junior, gave birth to a healthy baby girl.² The event would have been unlikely to generate media coverage but for the fact that, two months earlier, Fantasia was competing on the university's varsity women's basketball team, successfully hiding her pregnancy from her coaches and teammates.³ At the time, Syracuse had no written policy on athletes who become pregnant and followed a practice of banning pregnant athletes from practicing or competing in contact sports.⁴ Fantasia hid her pregnancy from everyone around her and managed to play basketball into her seventh month.⁵ When she finally told her coach on the night before the final game of the season, he told her to sit out the game and see a doctor.⁶ Fantasia gave birth several weeks later.⁷ After taking five months off from basketball, Fantasia was back in the game the following season, shifting from a starter to an off-the-bench substitute, but still averaging nearly fourteen points a game.⁸ She hopes to play professional basketball overseas after graduating from college.⁹ As of January 2008, she was on track to graduate in May of 2008.¹⁰

The stories of athletes hiding their pregnancies so that they can continue playing college sports have surfaced sporadically over the years. In 2003, a women's basketball player at the University of Louisville competed on the team until she was eight months pregnant, all the while keeping her pregnancy secret from her coaches and teammates.¹¹ Hiding a pregnancy in

² Zach Schonbrun, *Year in Sports: Fantasia Goodwin Speaks About Pregnancy*, THE DAILY ORANGE (Syracuse Univ.), Apr. 25, 2007, available at <http://media.www.dailyorange.com/media/storage/paper522/news/2007/04/25/Sports/Year-In.Sports.Fantasia.Goodwin.Speaks.About.Pregnancy-2878171.shtml> [hereinafter Schonbrun, *Year in Sports*].

³ *Id.*

⁴ Donna Ditota, *SU Basketball Player Gave Birth Last Week*, THE POST-STANDARD (Syracuse, N.Y.), Apr. 25, 2007, at D1.

⁵ Schonbrun, *Year in Sports*, *supra* note 2.

⁶ *Id.* Zach Schonbrun, *A Delicate Line: As the NCAA Reviews its Guidelines on Pregnant Athletes, Syracuse Clarifies its Policy Putting it in Writing*, THE DAILY ORANGE (Syracuse Univ.), Oct. 2, 2007, available at <http://media.www.dailyorange.com/media/storage/paper522/news/2007/10/02/Sports/A.Delicate.Line-3004506.shtml> [hereinafter Schonbrun, *A Delicate Line*].

⁷ Schonbrun, *Year in Sports*, *supra* note 2.

⁸ Ditota, *Two New Roles*, *supra* note 1, at C1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ 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. OF HIGHER EDUC., May 26, 2006, at A41.

the third trimester is no simple feat, though it is surely made easier by the baggy clothes basketball players wear. For most women, at least by the third trimester, pregnancy is anything but invisible. Until quite recently, however, the plight of pregnant college athletes has been entirely absent from the discourse about sex equality in sports.¹²

There is no data on the number of athletes who become pregnant during their intercollegiate athletic careers.¹³ All indications are, however, that the few stories of pregnant athletes that make their way into news reports represent only a fraction of those that occur.¹⁴ Many women who play college sports and become pregnant are likely to drop out of sports, or even drop out of college entirely, while staying silent about their reasons.¹⁵ Others choose to terminate the pregnancy, often for a mix of reasons, but perhaps primarily out of a fear of losing a critical athletic scholarship and the chance to attend college.¹⁶ As the examples above indicate, some athletes hide their pregnancy as long as possible while continuing to compete out of fear of losing their scholarships if the pregnancy is discovered.¹⁷

The choices pregnant athletes confront have been complicated by both the lack of university policies addressing the issue and by universities' discriminatory practices, such as the withdrawal of athletic scholarships from athletes who become pregnant.¹⁸ Elizabeth Sorenson, a Wright State University nursing professor who has studied college and university policies on

¹² For example, none of the many symposia on Title IX published in law reviews in recent years addresses the issue of pregnant athletes. See Symposium, *Title IX: Women, Athletics and the Law*, 3 MARGINS: MD. L.J. ON RACE, RELIGION, GENDER & CLASS 209 (2003); Symposium, *Title IX at Thirty*, 14 MARQ. SPORTS L. REV. 1 (2003); Symposium, *Competing in the 21st Century: Title IX, Gender Equity, and Athletics*, 34 MICH. J.L. REFORM 1 (2000–2001); Symposium, *Gender & Sports: Setting a Course for College Athletics*, 3 DUKE J. GENDER L. & POL'Y 1 (1996); Symposium, *Issues Facing College Athletics*, 5 KAN. J.L. & PUB. POL'Y 55 (1996); Symposium, *Gender Equity in College Athletics: An Analysis of Title IX*, 2 VILL. SPORTS & ENT. L.J. 1 (1995).

¹³ Colloquy, *Live Discussions: Sidelined by Pregnancy*, CHRON. OF HIGHER EDUC. (May 25, 2006), available at <http://chronicle.com/colloquy/2006/05/pregnancy/> ("There are no research studies on pregnant intercollegiate athletes, although if you search the internet you'll find lots of anecdotal stories.").

¹⁴ Rainey, *supra* note 11, at A41 ("It is hard to know how many college athletes become pregnant every year. Many college officials say the number is low, but no one keeps such statistics. Athletes and athletics officials agree, however, that pregnancies happen more often than most people realize.").

¹⁵ See *id.*; *Live Discussions: Sidelined by Pregnancy*, *supra* note 13.

¹⁶ See Rainey, *supra* note 11, at A41; Schonbrun, *A Delicate Line*, *supra* note 6; Gary Shelton, *Playdates for Mom*, ST. PETERSBURG TIMES (Fla.), May 13, 2007, available at <http://pqasb.pqarchiver.com/sptimes/access/1270024091.html?dids=1270024091:1270024091&FMT=FT&FMTS=ABS:FT&date=May+13%2C+2007&author=GARY+SHELTON&pub=St.+Petersburg+Times&edition=&startpage=1.C&desc=Playdates+for+Mom>.

¹⁷ See Rainey, *supra* note 11, at A41; see also Shelton, *supra* note 16.

¹⁸ Rainey, *supra* note 11, at A41–42 (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/>.

pregnant athletes,¹⁹ found that only a handful of educational institutions had written policies on pregnant athletes.²⁰ Lacking policies that govern the treatment of pregnant athletes, many colleges and universities have responded with ad hoc, poorly conceived approaches that effectively punish athletes for becoming pregnant.²¹

Despite evidence of discrimination against pregnant athletes, the past three and a half decades of experience with Title IX have generated no legal precedents or enforcement activities addressing the needs of pregnant athletes.²² The patchwork of news stories over the years about college athletes who become pregnant reveals just one publicized case in which a female athlete brought a lawsuit against her school alleging discrimination on the basis of pregnancy. In 2003, a Sacred Heart University basketball player alleged that she was asked to leave the team after her pregnancy became known.²³ According to the player, the coach told her that the pregnancy would be a “distraction” to the team.²⁴ After the university denied the player’s request for “medical redshirt” status, typically given to injured ath-

¹⁹ Silverstein, *supra* note 18.

²⁰ Rainey, *supra* note 11, at A41 (reporting that many colleges and universities lack such policies). Elizabeth Sorenson’s involvement in this issue began after a Wright State athlete became pregnant in 2001 and lost her scholarship. *Id.* The athletic director subsequently asked Professor Sorenson, a faculty athletics representative, to investigate how other schools handle pregnant athletes and develop guidelines for how Wright State should handle such situations. *Id.* Professor Sorenson has since become a leading national expert on university policies regarding pregnant athletes and a strong advocate for adopting protective policies. *Id.*; see also Brad Wolverton, *NCAA to Review Pregnancy Guidelines*, *CHRON. OF HIGHER EDUC.*, June 8, 2007, at A35 (reporting that only about fifty institutions have written policies addressing pregnancy among athletes); Schonbrun, *Year in Sports*, *supra* note 2 (quoting figures from Professor Sorenson suggesting that only four percent of colleges and universities have written policies covering athletes who become pregnant).

²¹ See Rainey, *supra* note 11, at A41–42 (describing instances where athletes lost their scholarships after becoming pregnant at schools with no written policies on pregnant athletes, and noting that absent written policies, decisions about how to respond are typically left to the individual coach).

²² Title IX of the Education Amendments of 1972 is a federal statute that bans sex-based discrimination in education programs or activities receiving federal funds. 20 U.S.C. §1681 (2000). It has been the primary source of legal rights for challenging sex discrimination in intercollegiate athletics. See generally LINDA JEAN CARPENTER & R. VIVIAN ACOSTA, *TITLE IX*, 3–26 (2005) (providing a general background on the law’s statutory and regulatory requirements).

²³ Complaint, *Brady v. Sacred Heart Univ.*, No. 3:03 Civ. 514 (D. Conn. Mar. 24, 2003), available at http://www.womenslawproject.org/pages/issue_education.htm; Press Release, Sacred Heart Univ. and Tara Brady (Oct. 21, 2003), available at http://www.womenslawproject.org/pages/issue_education.htm; see also Joanna Grossman, *A New Lawsuit by a Female Athlete Tests Title IX’s Protection Against Pregnancy Discrimination*, *FINDLAW*, May 6, 2003, available at <http://writ.news.findlaw.com/grossman/20030506.html> (describing a case filed by a female athlete at Sacred Heart University alleging that the university denied her “medical redshirt” status and revoked her scholarship when she became pregnant); *Ex-PG Basketball Player Wins Settlement*, *WOMEN IN HIGHER EDUC.*, Dec. 2003, at 3–4; *Connecticut: Pregnant Athlete Files Discrimination Suit*, *OFF OUR BACKS*, May–June 2003, at 6.

²⁴ Rainey, *supra* note 11, at A42.

letes to enable them to retain their athletic scholarships, she met with the university's athletic director and its Title IX compliance officer.²⁵ These officials promised to reinstate her scholarship and allow her to resume participation on the team after having she gave birth.²⁶ Nonetheless, the coach continued to shun her when she returned from maternity leave and excluded her from participating in team activities.²⁷ The player subsequently left the university and filed a Title IX suit alleging pregnancy discrimination.²⁸ The case eventually settled out of court with no reported decision and on undisclosed terms.²⁹

The lack of significant public attention to pregnant athletes, and the absence of legal authority addressing their rights, changed within the span of a few short months in 2007.³⁰ A widely-viewed ESPN program, "Outside the Lines," devoted an episode entitled "Pregnant Pause" to exposing the hardships confronting pregnant college athletes.³¹ The program, which first aired on May 13, 2007 and was rebroadcast several times, generated a heightened level of attention to the challenges facing pregnant athletes. The show was largely critical of how educational institutions and the National Collegiate Athletic Association ("NCAA") handled the issue, highlighting widespread discriminatory practices by colleges and universities and the failure of the NCAA to proactively address the issue.³² The program exposed blatant discrimination against pregnant athletes: the outright withdrawal of athletic scholarships because of pregnancy; the requirement that an athlete who becomes pregnant "earn back" her scholarship by proving she can return to competition after having the baby, with the risk of losing the scholarship if a more promising athlete comes along; and even the requirement that female athletes sign contracts when they join the team promising not to get pregnant and agreeing to forfeit their athletic scholarships if they do.³³

Most importantly, the show humanized the issue, exposing the challenges pregnant athletes face and the possibly tragic consequences when colleges fail to respond to their needs. The program included stories of women who lost athletic scholarships and the opportunity for a college education,

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*; Ben Gose, *Sacred Heart U. Settles Pregnancy Suit*, CHRON. OF HIGHER EDUC., Nov. 7, 2003, at A43.

³⁰ Rachel Blount, *Colleges Need Education About Pregnant Athletes; Despite Title IX Protection, Some Schools Still Threaten to Pull Scholarships from Women*, STAR TRIBUNE, June 19, 2007, at C1 ("The issue [of how schools treat pregnant athletes] came to broad attention last month, when ESPN reported that seven Clemson athletes had abortions because they feared their scholarships would be rescinded.")

³¹ *Outside the Lines: Pregnant Pause* (ESPN television broadcast May 13, 2007); see also *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).

³² *Outside the Lines: Pregnant Pause* (ESPN television broadcast May 13, 2007).

³³ *Id.*

women who had their babies and overcame significant obstacles to return to sports competition, and women who terminated their pregnancies in order to retain their athletic scholarships as a needed gateway to a college education.³⁴ By including the latter set of stories, the show caught the attention of anti-abortion advocates,³⁵ who might not otherwise concern themselves with gender discrimination in sports. The program thus raised the consciousness of a diverse range of interest groups and was especially effective in exposing the injustice of, and the Title IX issues raised by, the treatment of pregnant athletes.³⁶

The program generated a firestorm of controversy over how colleges treat athletes who become pregnant. Much of the public reaction was sympathetic to the pregnant athletes' stories and critical of schools for placing young women in the untenable position of having to decide whether to terminate or hide a pregnancy in order to keep the athletic scholarships that allowed them to attend college.³⁷ Some responses expressed sympathy for both the pregnant athletes and their coaches, who must balance the goals of maintaining team competitiveness and maximizing the impact of athletic scholarship dollars with the desire to take care of their athletes in a time of crisis.³⁸

³⁴ *Id.*

³⁵ See, e.g., Press Release, Care Net, *Care Net Applauds NCAA's Review of Policies for Pregnant Student Athletes, Announces Launch of Campus Initiative*, June 1, 2007, available at <http://christiannewswire.com/news/481883297.html>; see also Karen Swallow Prior, Editorial, *Scholarship Policies Pressure Young Women*, RICH. TIMES DISPATCH, June 16, 2007, available at <http://pqasb.pqarchiver.com/timesdispatch/results.html?st=basic&QryTxt=Scholarship+Policies+Pressure+Young+Women> (providing the perspective of a "pro-life post-feminist" expressing "revulsion" at the college policies terminating pregnant athletes' scholarships that often lead females to obtain abortions, as reported by ESPN); see also Tom Strode, *Life Digest: Athletes Get No Aid for Pregnancy*, BAPTIST PRESS, May 30, 2007, available at <http://baptistpress.com/bpnews.asp?id=25741> (highlighting the abortion issue in the stories about pregnant athletes and the risk of losing scholarships).

³⁶ After the program aired, the Women's Sports Foundation revised its position paper on the treatment of pregnant athletes to more clearly protect pregnant college athletes and their scholarships. See 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 Apr. 16, 2008).

³⁷ See, e.g., Caroline Gwaltney, *Female Athletes Sometimes Forced into Heartbreaking Decisions*, THE CRIMSON WHITE (Univ. of Ala.), Oct. 29, 2007, available at <http://media.www.cw.ua.edu/media/storage/paper959/news/2007/10/29/Sports/Female.Athletes.Sometimes.Forced.Into.Heartbreaking.Decisions-3061182.shtml>; Blount, *supra* note 30, at C1 ("the [NCAA Committee on Women's Athletics] should urge member schools to follow the path of compassion and support, not to mention the law as spelled out by Title IX."); Prior, *supra* note 35 (criticizing colleges for not supporting pregnant athletes).

³⁸ See, e.g., Matt Calkins, *An Athlete's Pregnancy May Affect Scholarship*, THE PRESS-ENTERPRISE (Riverside, Cal.), May 26, 2007, available at http://www.pe.com/sports/college/breakout/stories/PE_Sports_Local_D_calkins_column_26.4007c82.html (providing a mostly sympathetic response to the athletes who become pregnant and emphasizing their need for support, but acknowledging the limited resources of universities in paying for athletic scholarships). For additional perspectives on the issue, see, for

In the wake of this publicity, the Department of Education's Office for Civil Rights ("OCR"), the primary federal agency charged with enforcing Title IX, responded swiftly and forcefully by issuing a "Dear Colleague" letter sent to federally funded colleges and universities nationwide. It detailed the obligations of colleges and universities toward pregnant athletes under Title IX.³⁹ As explained in greater depth below, the letter adopts a strongly rights-protective position on the treatment of pregnant athletes.⁴⁰ For an agency that is frequently under fire from sex equality advocates for lagging in enforcement activity and backtracking on longstanding interpretations of Title IX, the OCR's response was remarkably strong.⁴¹

More recently, the publicity resulting from the ESPN program prompted the NCAA to change its Division I rules to explicitly prohibit institutions from rescinding an athlete's scholarship on the basis of pregnancy.⁴² Although the NCAA has long protected the scholarships of injured athletes,⁴³ this was the first time the NCAA explicitly protected the scholar-

example, Posting of Josh Centor to Double-a Zone blog, http://www.doubleazone.com/2007/05/should_female_studentathletes.html (May 15, 2007).

³⁹ Dear Colleague Letter from Stephanie Monroe, Office of the Assistant Sec'y, Office for Civil Rights, Dep't of Educ., June 25, 2007, available at <http://www.ed.gov/about/offices/list/ocr/letters/colleague-20070625.html> [hereinafter OCR Letter].

⁴⁰ See discussion *infra* Part III.B.

⁴¹ See, e.g., Erin E. Buzuvis, *Survey Says . . . A Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821, 827 (2006) (criticizing the 2005 OCR Policy Guidance as a radical retrenchment from longstanding and more rights-protective policy interpretations); Julie A. Davies & Lisa M. Bohon, *Re-Imagining Public Enforcement of Title IX*, 2007 B.Y.U. EDUC. & L.J. 25, 51-54 (2007) (summarizing criticisms of OCR as a rights-enforcing agency); Sudha Setty, *Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement*, 32 COLUM. J.L. & SOC. PROBS. 331 (1999) (criticizing OCR's Title IX enforcement activity and proposing its reorganization).

⁴² See Edward Lewis, *NCAA Adopts New Rule Protecting Pregnancy*, THE DAILY AZTEC, Jan. 23, 2008, available at <http://media.www.thedailyaztec.com/media/storage/paper741/news/2008/01/23/Sports/Ncaa-Adopts.New.Rule.Protecting.Pregnancy-3162347.shtml>; Rhiannon Potkey, *Pregnant Athletes Get Scholarship Protection*, THE SALT LAKE TRIBUNE, Jan. 23, 2008, available at <http://media.www.thedailyaztec.com/media/storage/paper741/news/2008/01/23/Sports/Ncaa-Adopts.New.Rule.Protecting.Pregnancy-3162347.shtml>. See also *Most Pregnant Athletes Face Uncertainty*, 16 WOMEN IN HIGHER EDUC. 4, July 1, 2007 (reporting that "NCAA President Myles Brand asked the association's Committee on Women's Athletics to review the NCAA's policies for pregnant athletes in response to an ESPN report on athletes having abortions in order to retain their scholarships at Clemson University SC."); see also Rainey, *supra* note 11, at A42 (reporting that as recently as 2006, the NCAA refused to change its policies to address pregnant athletes).

⁴³ See Nat'l Coll. Athletic Ass'n., 2007-2008 NCAA Operating Bylaws, Art. 15, § 3.4.3, NCAA Division I Manual, available at http://grfx.cstv.com/photos/schools/stan/genrel/auto_pdf/2007-08_d1_manual.pdf [hereinafter NCAA Operating Bylaws] ("Institutional financial aid based in any degree on athletics ability may not be increased, decreased, or cancelled during the period of its award . . . [b]ecause of an injury that prevents the recipient from participating in athletics."); see also *id.* §3.2.2:

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

ships of pregnant athletes, who were previously vulnerable due to the failure of the NCAA rules to mention pregnancy as a prohibited basis for terminating a scholarship, especially since the NCAA rules did explicitly mention pregnancy as a basis for extending an athlete's eligibility.⁴⁴ The newly adopted Division I rule specifically adds pregnancy to the list of prohibited reasons for revoking or reducing an athletic scholarship, although the new rule does not guarantee the athletes automatic renewal of their scholarships for the following year.⁴⁵

The past year's events mark a significant shift in public attention to and support for athletes who become pregnant. The OCR's strong interpretation of Title IX in this area is a significant victory in the broader struggle for sex equality in sports. And yet, understanding these events as a Title IX success story requires a deeper analysis. This Article explores a number of important questions raised by the recently supportive popular and legal response to the plight of pregnant athletes.

Part II examines why this issue remained buried for so long, especially in light of its importance to the female athletes affected and the broader sex equality issues it raises. Until this year, the treatment of pregnant athletes was largely absent from sex equality conversations, even among Title IX supporters.⁴⁶ This section of the Article explores three reasons for the neglect of pregnancy as a Title IX issue in sports. First, sport is a pervasively masculine institution that is constructed around men's needs. Finding space for pregnant athletes in such an institution is challenging, especially because the case for sex equality in sports has been built upon the similarities between male and female athletes, while pregnancy represents an undeniable sex difference. Second, women's reproductive abilities have historically been used as an excuse to exclude women from sports. Ideologies about women's reproductive roles pose a conflict between pregnancy and athleticism that is reinforced by dominant notions of pregnancy as passive and inactive. Third, ideologies of gender and race have long combined to stigmatize young women who have children outside of marriage and in precarious financial circumstances. A common response to women who become

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.

⁴⁴ *Id.* Art. 14, §2.1.3 (allowing member institutions the option of granting a one-year extension of eligibility to a "female student-athlete for reasons of pregnancy").

⁴⁵ Lewis, *supra* note 42.

⁴⁶ See, e.g., Potkey, *supra* note 42 (noting that "[t]he issue of protecting pregnant athletes came to the forefront after an ESPN report that seven athletes at Clemson University had abortions rather than risk losing their scholarship"); Lois Elfman, *NCAA Committee Addresses the Issue of Pregnancy in Student-Athletes*, DIVERSE ISSUES IN HIGHER EDUC., Aug. 23, 2007, at 21 (reporting that the NCAA Committee on Women's Athletics undertook a review of the treatment of female athletes in July 2007, in response to the ESPN story about pregnant athletes); Schonbrun, *A Delicate Line*, *supra* note 6 (reporting that 2007 was the first year that pregnancy was discussed at the annual Big East meeting of senior female administrators).

pregnant under such circumstances is to blame them for having irresponsible sex, rather than to extend them rights or entitlements. These considerations make the recent attention to, and support for, pregnant athletes all the more remarkable.

Part III of this Article examines Title IX's treatment of pregnant athletes. Title IX takes an unusual approach to pregnancy, melding a comparative equal treatment standard with a less common accommodation mandate. The resulting amalgam draws from both the "equal treatment" and "special treatment" models of equality to provide strong protection for athletes who become pregnant. In so doing, Title IX's approach avoids the pitfalls of the worst aspects of the equal treatment model, which would allow pregnant students to be treated "as badly" as other athletes who are temporarily unable to compete. At the same time, it mitigates the limitations of the special treatment model in that it "normalizes" pregnancy by comparing it to other medical conditions that might interfere with athletic competition. The result is a pragmatic framework that, while far from perfect, provides potentially strong protection from discrimination for college athletes who become pregnant.

Finally, Part IV considers what lessons might be drawn from the supportive public and legal response that followed the ESPN program. For the most part, the extension of strong Title IX rights to pregnant athletes suggests cause for optimism about the ability of sports to accommodate women and the ability of Title IX to influence and respond to cultural shifts that support sex equality in sports more broadly. Pregnant athletes were able to rise above the limiting ideologies that have kept them on the sidelines for so long. And yet, this "success story" is more complex than it first appears. This part of the Article identifies and explores several limitations in Title IX's ability to promote progressive social change on this and related issues of sex equality in sports.

II. THE NEGLECT OF PREGNANCY AS A SEX EQUALITY ISSUE IN SPORTS

The question of how law should respond to women who become pregnant, and whether to specially accommodate their condition or treat them the same as some other specified group, features prominently in virtually every area of sex equality analysis. In debates over women's equality in the workplace, it has been the defining issue for the development of and debate over various models of equality in feminist legal theory.⁴⁷ Yet in sports, the issue has been all but absent, relegated to the rare, occasional story of an athlete who becomes pregnant and faces the challenge of balancing motherhood

⁴⁷ See generally MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY, 39–44 (Aspen Publishers, 2d ed. 2003) (discussing the debate among feminists over how to treat pregnancy and the debate over "equal treatment" and "special treatment" as models of equality).

with continued participation in sports.⁴⁸ Mostly, media descriptions have framed these as simple “success” stories with no social critique: a WNBA player, for example, returns to the game in full force after taking leave to have a baby.⁴⁹ Until the ESPN program on pregnant athletes aired, the challenges facing pregnant athletes were not widely viewed as an important problem.⁵⁰ Because of the importance of pregnancy to sex equality in other areas of law, and in light of the sustained attention Title IX has brought to sex equality in sports in particular over the past thirty-five years, the long-standing invisibility of pregnancy as an issue of sex equality in sports deserves further exploration.

A. *The Significance of Pregnancy in Sports*

The dearth of attention to this issue is not for its lack of importance or resonance in the arena of sports. On the contrary, the question of how to treat pregnant athletes exposes a central and unresolved issue in the discourse about sex equality in sports more broadly: whether sports, a social institution designed for and still largely populated and controlled by men, can or should accommodate women to the extent that they differ from men.⁵¹ Pregnancy poses this question so starkly because it is the quintessential sex difference. There is always some risk that a young female athlete will become pregnant, a condition no male athlete will ever personally experience.

The dominant model of competitive sports is designed around the ideal of a non-pregnant body. This ideal is socially constructed to meet the needs of men.⁵² One could imagine a model of sports constructed for women from the outset that would build in space for athletes to become pregnant without marking them as deviant or unwelcome. A more participatory model of sports might place a higher value on the joy of movement and the educa-

⁴⁸ See, e.g., Debra Pickett, *The League Should be Doing Something to Help Us: The Women's Soccer League Had Nannies in Each City*, CHI. SUN TIMES, Aug. 13, 2006.

⁴⁹ See, e.g., *Motherhood: a WNBA Reality*, USA TODAY, July 12, 2003, available at http://www.usatoday.com/sports/basketball/wnba/2003-07-12-wnba-moms_x.htm.

⁵⁰ See *supra* notes 12 and 48 and accompanying text.

⁵¹ For critical discussion of whether it is possible to pursue a feminist agenda through sport, see Varda Burstyn, *THE RITES OF MEN: MANHOOD, POLITICS, AND THE CULTURE OF SPORT* 267 (1999) (warning that the celebration of sport, even women's sports, furthers the cultural devaluation of the “feminine,” and arguing that “[t]he unquestioning emulation of hypermasculinity by women does not constitute ‘androgyny’ or ‘gender neutrality,’ but rather the triumph of hypermasculinism.”); Jennifer Hargreaves, *HEROINES OF SPORT: THE POLITICS OF DIFFERENCE AND IDENTITY* 3 (2000) (“[W]hat is often forgotten is that the fierce concern for equality [in sport] props up the violence, corruption, commercialization, and exploitation that plague men's sports.”). The struggle for control over women's sports between the NCAA and the former Association for Intercollegiate Athletics for Women also reflected an ideological battle over whether the existing men's sports structure could adequately accommodate women's distinct needs and interests. See Welch Suggs, *A PLACE ON THE TEAM: THE TRIUMPH AND TRAGEDY OF TITLE IX* 45–65 (2005).

⁵² See *infra* note 55 and accompanying text.

tional and physical benefits of activity, without an exclusive focus on winning.⁵³ In such a model, modifications might be incorporated into the game to allow pregnant athletes to continue participating, much like some sports tailor the rules of competition to an athlete's weight or skill level. Pregnancy is not an unhealthy condition, and exercise and physical activity are generally recommended for healthy pregnant women, absent complications.⁵⁴ It is because the dominant model of sports is built around men's needs that fitting pregnant athletes into the current model of sports is so difficult. The effort to make room for pregnant athletes in sports calls into question the place of female athletes generally, as well as the purposes of having sports in our educational institutions. It raises a perennial question confronting advocates of sex equality in sports: how can sports—historically and presently constructed to fit men's bodies and men's lives—fit the needs of women?

B. *Explaining the Neglect*

One reason for the neglect of issues facing pregnant athletes is the continuing strength of the masculine construction of sport itself.⁵⁵ The juxtaposition of "pregnancy" and "athlete" is jarring because the dominant image of an athlete is a man, such that "athlete" requires the preceding modifier, "female," in order to signal the presence of a woman in that role.⁵⁶ The cultural acceptance of female athletes, to the extent it has developed, has largely depended on a strategy of highlighting the similarities shared by all successful athletes: their skill, dedication, strength, discipline, agility, and tenacity.⁵⁷ Confronting the reality of a pregnant athlete highlights the one irrepressible difference between men's and women's bodies and eclipses the

⁵³ Cf. HARGREAVES, *supra* note 51, at 4 (describing models of sport tied to the women's health movement, such as 'Race for the Cure' and other events, in which "competitive individualism is replaced by a shared culture of caring and ethical lifestyle").

⁵⁴ See, e.g., Kristin Reimers Kardel, *Effects of Intense Training During and After Pregnancy in Top-Level Athletes*, 15 SCANDINAVIAN J. OF MED. & SCI. IN SPORTS 79 (2005); Am. Coll. of Obstetricians and Gynecologists, *2002 ACOG Guidelines for Exercise During Pregnancy and Postpartum*, available at <http://www.fitfor2.com/images/ACOG.doc>.

⁵⁵ See SUSAN WARE, TITLE IX: A BRIEF HISTORY WITH DOCUMENTS 8–9 (2007) (describing the historic role of sports as a "male preserve"); Mariah Burton Nelson, *Stronger Women*, in EQUAL PLAY: TITLE IX AND SOCIAL CHANGE 171 (Nancy Hogshead-Makar & Andrew Zimbalist eds., 2007) (describing the cultural role that sports plays in defining masculinity among men); Nick Trujillo, *Hegemonic Masculinity on the Mound: Media Representations of Nolan Ryan and American Sports Culture*, in READING SPORT: CRITICAL ESSAYS ON POWER AND REPRESENTATION 14, 15–17 (Susan Birrell & Mary G. McDonald eds., 2000) (providing a theoretical account of how sport participates in constructing hegemonic masculinity).

⁵⁶ See Deborah L. Brake, *The Struggle for Sex Equality in Sports and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM. 13, 110–11 (2000–2001) (discussing the use of female modifiers and the gendered use of team names in sports).

⁵⁷ Cf. Ware, *supra* note 55, at 9 (explaining that popular beliefs about inherent differences between women's and men's bodies historically functioned to exclude women from sports).

similarities. Ignoring pregnancy helps preserve the analogy between male and female athletes and hence protects the cultural legitimacy of female athletes.

A second explanation for the neglect of the plight of pregnant athletes is found in the role that pregnancy and maternity have played in excluding women from sports altogether. Historically, women's exclusion from sports was explicitly justified and rationalized by the widely held belief that women's sports participation was incompatible with, and potentially threatening to, women's reproductive roles.⁵⁸ Although the most overt and extreme incantations of this ideology have long been rejected, remnants of the thesis that sports and maternity are incompatible persist. The notion that an athlete who becomes pregnant should lose her sports privileges reflects deeply ingrained cultural concerns that sports participation will compromise women's reproductive health and the wellbeing of future children.

Dominant conceptions of pregnancy reinforce beliefs about the incompatibility of pregnancy and athleticism. Feminist philosopher Iris Marion Young has described how physical passivity is projected onto pregnancy, notwithstanding the very active experience of the pregnant subject herself. As Young explains:

In classical art, this "aura" surrounding motherhood depicts repose. The dominant culture projects pregnancy as a time of quiet waiting. We refer to the woman as "expecting," as though this new life were flying in from another planet and she sat in her rocking chair by the window, occasionally moving the curtain aside to see whether the ship is coming. The image of uneventful waiting associated with pregnancy reveals clearly how much the discourse of pregnancy leaves out the subjectivity of the woman. From the point of view of others, pregnancy is primarily a time of waiting and watching, when nothing happens.⁵⁹

Consistent with this limiting view of pregnancy, reactions to female athletes who become pregnant are often shaped by a mindset that places pregnancy in a class by itself, viewed as utterly incapacitating and incompatible with the status of being an athlete in a way that other temporary physical conditions are not.⁶⁰ The longstanding and quiet acquiescence in pregnant

⁵⁸ For in-depth discussions on how ideologies about reproduction and maternity shaped women's sports participation, see generally MARY A. BOUTILIER & LUCINDA SAN GIOVANNI, *THE SPORTING WOMAN* 42–288 (1983); SUSAN K. CAHN, *COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH-CENTURY WOMEN'S SPORT* (1994); MARY JO FESTLE, *PLAYING NICE: POLITICS AND APOLOGIES IN WOMEN'S SPORTS* (1996); JENNIFER HARGREAVES, *SPORTING FEMALES: CRITICAL ISSUES IN THE HISTORY AND SOCIOLOGY OF WOMEN'S SPORTS* (1994).

⁵⁹ IRIS MARION YOUNG, *ON FEMALE BODY EXPERIENCE: 'THROWING LIKE A GIRL' AND OTHER ESSAYS* 54 (2005).

⁶⁰ See, e.g., Women's Sports Foundation, *supra* note 36 (noting stereotypes about the level of physical activity appropriate for pregnant women); Shelton, *supra* note 16 (quot-

athletes' exclusion from sports reflects the continuing potency of traditional ideas about the incompatibility of sports with women's maternal functions.

A third reason for the neglect of pregnancy as a sex equality issue in sports is the continuing strength of contemporary discourses that stigmatize and blame women for "irresponsible reproduction."⁶¹ These discourses draw on deeply ingrained cultural understandings of "the problem" of teen pregnancy and "illegitimate" births that are fueled by ideologies of both gender and race. Law professor Linda McClain has identified three separate strands of thought in popular discourse about "individual responsibility" and procreation, which she argues conflates and pathologizes unwed motherhood, teenage motherhood, and motherhood coupled with financial dependency (especially so-called "welfare moms").⁶²

The amalgamation of these three conditions and the framing of them as a "social problem" rests on implicit assumptions about gender and race.⁶³ For example, the "problem" of unwed motherhood is understood as a problem of women who have children outside of marriage rather than the problem of married women with children who divorce. Women of color are overrepresented in the first group, while white women figure more prominently in the latter.⁶⁴ Motherhood outside of patriarchal family arrangements

ing WNBA player and mother of two Taj McWilliams-Franklin, about reactions to her as a mother and athlete: "It's not the norm. People don't want to admit that sports and motherhood go hand in hand, particularly in basketball where our bodies take such a pounding.").

⁶¹ This term is borrowed from Linda McClain. Linda C. McClain, *Irresponsible Reproduction*, 47 HASTINGS L.J. 339 (1996). Although her use of this term largely focuses on debates over welfare "reform" and abortion, I also find it helpful in thinking about cultural reactions to college athletes who become pregnant.

⁶² McClain offers a powerful critique of these discourses. First, pathologizing unwed, young mothers is counterproductive because, to the extent that outcomes are worse for this group, women could benefit from greater economic support and are further disadvantaged by the lack of it. *Id.* at 416–17. Second, the discourses either ignore male irresponsibility completely or blame women for not "taming" their men, drawing on racial stereotypes of black male and female sexuality. *Id.* at 387, 422. Third, by condemning poor women for having children they cannot support, the irresponsible reproduction discourse ignores the extent to which all American families benefit from tax credits, subsidies, and other support. *Id.* at 415. And finally, pathologizing young, unwed mothers ignores the constraints young women face, treating them as full agents in regard to their sexuality and reproduction without attention to social context. *Id.* at 359, 384–85, 428–30, 437.

⁶³ See *id.* at 379 ("Even when the rhetoric does not overtly use racial terms, it may aim particularly at the 'dependency and irresponsible reproduction' of people of color, especially African Americans."); see also Nancy Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 26 (1995) (criticizing discourses that stigmatize single parent families and contending that such negative portrayals "hide implicit stories of race and gender that reek of oppression").

⁶⁴ McClain, *supra* note 61, at 379–80:

The fact that a higher percentage of African-American women are single parents because of nonmarital births than because of divorce, and that a higher percentage of white women become single parents by divorce or separation than by nonmarital births, may also contribute to why 'illegitimacy' is more readily associated with welfare dependency, pathology, and social crisis than is divorce.

represents a challenge to patriarchal ideologies about the centrality of male heads of households.⁶⁵ This dimension of the “problem” intersects with the other two dimensions McClain identifies—motherhood at a young age and financial dependency—because both of these conditions also typically involve the absence of a male provider in the household.⁶⁶

Racial images and stereotypes depicting moral licentiousness and financial irresponsibility as special problems for women of color and poor women also contribute to pathologizing teen pregnancy.⁶⁷ The stereotype of the pregnant teen depicts an inner city black youth, despite the fact that there are more white teenage mothers.⁶⁸ An ethnographic study by Anthropology professor Wendy Luttrell reveals how teen pregnancy has been socially constructed as a racial and class problem.⁶⁹ Taken together, dominant cultural discourses of race, gender, and class detract from popular sympathy for young, unmarried women who become pregnant without the means to financially support their babies. In the dominant discourse about irresponsible reproduction, rights and entitlements for young women are disparaged as part of the problem, contributing to a society that enables young, morally deficient women to make irresponsible procreative choices.⁷⁰

A college athlete who becomes pregnant will likely embody each of the three “problematic” aspects of motherhood identified by McClain. She is likely to be unmarried, young, and financially insecure, especially if she is dependent on her athletic scholarship to gain access to college, since she is unlikely to find financially secure work without a college degree. Given the power of the cultural discourses that pathologize motherhood for women who are young, unmarried, and financially dependent, the lack of public attention to or concern for pregnant athletes is not surprising. The issues facing pregnant athletes likely do not resonate with the interests of many Title IX supporters, especially suburban soccer moms and dads who may not see any connection to their daughters’ lives or sports opportunities.⁷¹

The three explanations discussed above go a long way toward explaining the longstanding submergence of pregnancy in sports as an individualized, isolated problem outside of mainstream conversations about Title IX

Id.

⁶⁵ *Id.* at 385–95.

⁶⁶ See *supra* note 62 and accompanying text.

⁶⁷ See WANDA S. PILLOW, *UNFIT SUBJECTS: EDUCATIONAL POLICY AND THE TEEN MOTHER* 35 (2004).

⁶⁸ Cf. Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 *AM. U. J. GENDER & L.* 1, 25–28 (1993) (explaining that the stereotype of the poor unmarried welfare mother is black, even if the majority of unmarried women on welfare are white).

⁶⁹ WENDY LUTTRELL, *PREGNANT BODIES, FERTILE MINDS: GENDER, RACE, AND THE SCHOOLING OF PREGNANT TEENS* (Routledge 2003).

⁷⁰ See McClain, *supra* note 61, at 364.

⁷¹ For an example of Title IX support motivated by parents’ concern for their daughters’ opportunities, see Harvey Araton, *Proud Fathers Cheering Title IX*, *N.Y. TIMES*, July 17, 2003, at D4.

and sex equality for girls and women. First, pregnancy is incompatible with the male model of sports, and strategies for extending the benefits of sports to female athletes depend on analogizing athletes' similarities. Second, highlighting the problems faced by pregnant athletes dredges up longstanding ideologies about the incompatibility of women's sports participation with women's maternal functions. And third, cultural discourses pathologizing unwed, young mothers who lack financial resources frame pregnant college athletes as irresponsible, promiscuous young women, and discourage the extension of sympathy or rights, which might encourage irresponsible reproduction by other young women. Together, these explanations suggest that the issues facing pregnant athletes will continue to remain outside the popular discourse on sex equality in sports and that pregnant athletes will remain unlikely candidates for public support or the extension of rights. However, the recent media attention to the plight of the pregnant athlete resulted in one of the quickest and strongest Title IX enforcement responses in recent years. The next section examines that response, which requires an understanding of Title IX's substantive approach to pregnancy discrimination.

III. TITLE IX'S RESPONSE: STRADDLING THE EQUAL TREATMENT/SPECIAL TREATMENT DIVIDE

A. *The Statute and Regulations*

Title IX's statutory ban on sex discrimination makes no reference to either pregnancy or athletics. Like other major federal antidiscrimination statutes, the key language simply bans discrimination on the basis of sex, leaving to interpretation important questions about the meaning of discrimination and the scope of the protected class characteristic.⁷² In 1975, three years after the passage of Title IX, the Department of Health, Education, and Welfare, the federal agency then charged with enforcing Title IX, promulgated detailed regulations.⁷³ These regulations include specific provisions governing both pregnancy and athletics, but the provisions are separate and make no explicit interconnection.

The regulations governing athletics require equal athletic opportunity in three major areas: participation opportunities, the allocation of athletic

⁷² The pertinent language states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2000).

⁷³ For the regulations in their current form, see 34 C.F.R. § 106 (2007). For a description of the events leading up to, and immediately following, the agency's issuance of the proposed regulations, see Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL'Y 51, 54-56 (1996).

scholarships, and the treatment of male and female athletes.⁷⁴ Despite providing detailed guidance for measuring Title IX compliance in athletic programs generally, the athletics regulations do not specifically address the treatment of athletes who become pregnant.

The sole source of protection from discrimination on the basis of pregnancy in the regulations is found in a separate regulation addressing pregnancy and related conditions.⁷⁵ Because of the paucity of case law analyzing pregnancy discrimination under Title IX,⁷⁶ the text of the regulation is the main source of authority for discerning the rights of pregnant athletes. The

⁷⁴ See 34 C.F.R. § 106.41(a) (2007) (“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient [of federal funding]”); *id.* § 106.37(c) (requiring institutions that award athletic scholarships to provide “reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics”); *id.* § 106.41(c) (listing ten factors to consider in evaluating the equal treatment of male and female athletes); see also Brake, *supra* note 56, at 46–48 (describing the Title IX framework for measuring compliance in intercollegiate athletics).

⁷⁵ 34 C.F.R. § 106.40 (2007). The regulation states, in pertinent part:

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student’s pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

...

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student’s physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

Id. § 106.40(b). Portions of the regulation governing separate educational programs for pregnant students, 34 C.F.R. § 106.40(b)(3) (2007), and medical and hospital benefits, 34 C.F.R. § 106.40(b)(4) (2007), are omitted from the above excerpt.

⁷⁶ The only reported decisions applying Title IX to discrimination against pregnant students have involved the exclusion of students from National Honor Society membership on “character” grounds because the student has become pregnant outside of marriage. Courts have struggled with whether such a “character” justification amounts to discrimination on the basis of pregnancy, in light of the utter lack of visibility of such “character” deficits in men who father children out of wedlock. Compare *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3d Cir. 1990) (holding that exclusion of pregnant student from National Honor Society membership was not necessarily sex discrimination) with *Chipman v. Grant County Sch. Dist.*, 30 F. Supp. 2d 975 (E.D. Ky. 1998) (granting preliminary injunction because plaintiff was likely to succeed on the merits in showing that exclusion of pregnant girls from National Honor Society membership was discrimination based on sex).

regulation's approach to pregnancy, unusual in discrimination law, combines elements of both a "special treatment" accommodation model, which provides absolute protection for pregnancy regardless of how other conditions are treated, and an "equal treatment" comparative model, which analogizes pregnancy to other medical conditions and requires equivalent treatment.⁷⁷ The first part of the regulation imposes a general ban on pregnancy discrimination without choosing between the equal treatment and special treatment models or defining what is meant by discrimination on the basis of pregnancy.⁷⁸ Subsequent sections of the regulation are more specific and reflect the influence of both the equal treatment and special treatment models. Some of these provisions espouse an equal treatment standard, basing the treatment of pregnant students on that afforded to students with other medical conditions.⁷⁹ In one important provision, however, the regulation adopts an absolute accommodation requirement that pregnant students be given a reasonably necessary medical leave, followed by reinstatement at the same status, regardless of what leave is provided to students with other medical conditions.⁸⁰ Thus, the regulation incorporates both equal treatment and special treatment approaches in the prohibition on pregnancy discrimination.

⁷⁷ Other federal statutes addressing pregnancy and maternity in an equality framework take an equal treatment approach to defining discrimination rights. The Pregnancy Discrimination Act ("PDA"), which amended Title VII to recognize pregnancy discrimination as a form of sex discrimination, requires employers to treat pregnancy and related conditions the same as other temporary disabilities. 42 U.S.C. § 2000e-(k) (2000). Likewise, the Family and Medical Leave Act groups pregnancy with other medical reasons for taking a leave, and treats motherhood the same as other kinds of caretaking arrangements in a gender-neutral framework. 29 U.S.C. §§ 2601, 2612 (2000). Apart from Title IX, the only small nod to a special treatment approach for pregnancy in federal antidiscrimination law is the allowance under Title VII and the PDA for employers to voluntarily decide to specially accommodate pregnancy apart from other disabilities, to a limited extent. *See* Cal. Fed. Sav. & Loan Ass'n. v. Guerra, 479 U.S. 272 (1987) (construing Title VII and the PDA to permit state laws requiring limited accommodations tailored to the physically disabling aspects of pregnancy, even if such accommodations are not required for employees with other physically disabling conditions).

⁷⁸ 34 C.F.R. § 106.40(b)(1) (2007).

A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

Id.

⁷⁹ 34 C.F.R. § 106.40(b)(2) (2007) (physician certification requirements); *id.* § 106.40(b)(4):

A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

Id.

⁸⁰ 34 C.F.R. § 106.40(b)(5) (2007):

As noted above, however, the regulation does not specifically address *athletes* who become pregnant.

For decades, this regulation stood as the sole authority for arguments seeking to protect pregnant athletes from discrimination. The absence of case law applying this regulation to the athletics context, combined with the absence of any specific reference to athletics in connection with pregnancy in the regulations,⁸¹ left room for colleges and universities to argue that Title IX's regulatory prohibition on pregnancy discrimination was never intended to apply to intercollegiate athletics, but was adopted with other kinds of programs in mind in which student participation is not so dependent on physical exertion. However, any such argument would have to account for the broad language of the pregnancy regulation, which refers to extracurricular activities generally, even if not to athletics in particular.⁸² The significant and substantial attention given to intercollegiate athletics in the promulgation of the regulations, and the fact that the regulation on intercollegiate athletics immediately follows the regulation on pregnancy, should cast doubt on any assertion that the enforcing agency did not expect intercollegiate athletics to fall under the purview of "extracurricular activities" in the pregnancy regulation. Nevertheless, the absence of additional authority or precedents left enough uncertainty that the recent OCR letter, which forcefully applies the Title IX regulation on pregnancy discrimination to the intercollegiate athletics setting, marks an important step forward.

B. *The 2007 OCR Letter and the Rights of Pregnant Athletes*

Less than two months after the ESPN program first aired, OCR issued a "Dear Colleague" letter to federal funding recipients around the country expressing its concern "over recent media reports regarding the current or past practice of some postsecondary institutions to terminate scholarships of female athletes on the basis of pregnancy and the impact that this has had on female athletic participation."⁸³ The letter relies heavily on the Title IX pregnancy regulation and applies it forcefully to intercollegiate athletics without any hesitation about whether the regulation fully applies in this setting.⁸⁴ In the letter, OCR applied both the equal treatment comparative ap-

In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

Id.

⁸¹ See 34 C.F.R. § 106.40(b) (2007).

⁸² See *supra* note 78.

⁸³ See OCR Letter, *supra* note 39.

⁸⁴ *Id.*

proach and the special treatment accommodation approach to equality reflected in the regulation, adopting the most rights-protective version of each.

The letter invokes the equal treatment standard to require schools to apply the same medical certification requirements to pregnant students that they apply to students with other medical conditions.⁸⁵ This directive mirrors the language in the pregnancy regulation about physician's certifications.⁸⁶ The next sentence in the letter takes a slightly stronger position than the specific language of the regulation, stating the comparative standard in more general terms: "In fact, the *Title IX* regulation instructs recipients to treat pregnancy or childbirth in the same manner and under the same policies as any temporary physical disability."⁸⁷ The equal treatment principle in the regulation might have been read more narrowly as limited to the two specific provisions in which it is mentioned: the physician's certification requirement and the extension of health plan benefits. By interpreting the regulation to encompass a broader, more general comparative standard than the two specific practices mentioned in the regulation, OCR forbade institutions from treating pregnant athletes worse in any respect than athletes with other medical conditions.

The OCR letter also requires institutions to specially accommodate a student-athlete's pregnancy, a position that is also grounded in the pregnancy regulation. The agency's forceful statement that an institution may not terminate or reduce an athletic scholarship because of an athlete's pregnancy is not tied to the institution's treatment of athletes with other medical conditions.⁸⁸ Instead, OCR's interpretation of Title IX would bar a university from terminating the scholarship of a pregnant athlete even if it would take such measures for other physically impaired athletes.⁸⁹ The Title IX regulation's requirement of a reasonably necessary medical leave provides support for

⁸⁵ *Id.* ("Although pregnant students may be required to obtain a physician's certification of fitness to continue in the regular education program or activity, a recipient may do so only if it requires such a certification from all students for other physical or emotional conditions requiring the attention of a physician.") (citing 34 C.F.R. §106.40(b)(2) (2007)).

⁸⁶ 34 C.F.R. § 106.40(b)(2) (2007).

⁸⁷ OCR Letter, *supra* note 39 (citing 34 C.F.R. § 106.40(b)(4) (2007)).

⁸⁸ *Id.* ("I want to reiterate that terminating or reducing financial assistance on the basis of pregnancy or a related condition is prohibited under *Title IX*."). A ban on excluding pregnant students from extracurricular activities is also phrased in absolute terms. *See id.* (prohibiting recipients from "excluding students from participating in a recipient's program or activity, including extracurricular activities and athletics, on the basis of the student's pregnancy or a related condition . . ."). However, this language mirrors the general prohibition of pregnancy discrimination in 34 C.F.R. § 106.40(b)(1) (2007), which begs the question of whether the nondiscrimination standard is comparative, and therefore dependent on how other medical conditions are treated, or absolute, without regard to how other students with medical conditions are treated. As a result, it is not a strong endorsement of the absolute accommodation model.

⁸⁹ As noted above, however, NCAA rules forbid the termination of athletic financial assistance because a student is injured or, after the recent rule change, becomes pregnant. *See supra* notes 42–45 and accompanying text.

this interpretation.⁹⁰ Since being a scholarship athlete is part of the “status” a student holds prior to taking a medical leave for pregnancy, a school may not terminate that student’s athletic scholarship because of an actual or anticipated medically necessary leave for pregnancy or childbirth.⁹¹ Finally, the OCR letter also condemns the practice of requiring female athletes to sign contracts not to get pregnant, although it is not clear if it does so in absolute or comparative terms.⁹²

Together, these absolute and comparative requirements provide strong protection for the pregnant athlete’s right to keep her athletic scholarship. The letter establishes an absolute ban on terminating an athlete’s scholarship for reasons of pregnancy regardless of how other athletes are treated.⁹³ At the same time, the comparative principle also operates to bar schools from withdrawing athletic scholarships from pregnant athletes if athletes with other medical conditions may keep their scholarships.⁹⁴

The right of an athlete who becomes pregnant to have her athletic scholarship renewed for the following year is somewhat more complicated.

⁹⁰ See 34 C.F.R. § 106.40(b)(5) (2007).

⁹¹ *Id.*

In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student’s physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

Id.

⁹² *Id.* (“Subjecting only students of one sex to additional or different requirements, such as requiring female athletes to sign athletic contracts listing pregnancy as an infraction, . . . is also prohibited under *Title IX*.”). Although this prohibition is phrased in terms of an additional requirement not imposed on other students, indicating a comparative standard, it is not clear exactly who the proper comparators would be—students with other medical conditions or students who engage in certain disapproved of-behaviors. Arguably, requiring students to sign contracts not to get pregnant is inherently differential treatment, since there is no condition that imposes the same set of choices and preconditions on men, regardless of what promises other students might be forced to make in a contract. In my view, this practice should be regarded as discriminatory under both the equal treatment and special treatment models.

⁹³ See *supra* note 84 and accompanying text.

⁹⁴ Since NCAA rules have long prohibited member schools from withdrawing scholarships from injured athletes, Title IX’s comparative standard would bar schools from withdrawing scholarships because of an athlete’s pregnancy even if the NCAA had not recently changed its rules to cover pregnant athletes. NCAA Operating Bylaws, *supra* note 43, Art. 15, § 3.2.2:

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.

See also *id.* § 3.4.3 (“Institutional financial aid based in any degree on athletics ability may not be increased, decreased, or cancelled during the period of the award . . . [b]ecause of an injury that prevents the recipient from participating in athletics.”).

NCAA rules limit athletic scholarships to fixed one-year terms, with discretionary renewal in subsequent years.⁹⁵ Consequently, the regulation's absolute requirement to restore a pregnant athlete to the same status she held before taking a medical leave may not create an absolute right to have the scholarship renewed for the following year because the student's pre-pregnancy status did not require automatic annual renewals. However, the comparative standard may still protect a pregnant athlete from a college's refusal to renew her scholarship for the year following her pregnancy. In practice, although NCAA rules make scholarship renewals discretionary, institutions often renew athletic scholarships for athletes who become injured, as long as they remain a part of the team and, where possible, work with coaches and trainers to rehabilitate their injuries.⁹⁶ If rehabilitation is not possible for the coming year, institutions often find alternative ways for athletes to serve their team.⁹⁷ Under the comparative standard adopted in the OCR Letter and supported by the Title IX regulation, if a university renews the scholarships of athletes with other medical conditions that hinder their game performance or require extended recovery, Title IX requires it to extend the same treatment to pregnant students.⁹⁸

In addition to protecting athletic scholarships, OCR's interpretation of Title IX also protects a pregnant student's right to participate on the team. The comparative standard requires schools to let a pregnant athlete participate in sports as long as her doctor certifies that she is medically able to do so, and requires that any physician certification requirements be applied equally to all students with medical conditions.⁹⁹ Once a pregnant student's doctor determines that she is no longer able to play, the accommodation

⁹⁵ *Id.* § 02.7 ("An athletics grant-in-aid shall not be awarded in excess of one academic year.").

⁹⁶ The NCAA's changes to its rules governing pregnant athletes did not limit member discretion in deciding whether to renew athletic scholarships for athletes who become pregnant. Lewis, *supra* note 42.

⁹⁷ See, e.g., Jacob May, *Injured Athletes Take on New Roles — As Coaches*, OREGON DAILY EMERALD, Nov. 21, 2007, available at <http://media.www.dailyemerald.com/media/storage/paper859/news/2007/11/21/Gameday/Injured.Athletes.Take.On.New.Roles.As.Coaches-3113331.shtml> (noting that injured Oregon football players with no remaining seasons of eligibility serve as assistant coaches); see also Nat'l. Coll. Athletic Ass'n., 2007–2008 NCAA Operating Bylaws, Art. 11 § 01.14, NCAA Division I Manual, available at http://grfx.cstv.com/photos/schools/stan/genrel/auto_pdf/2007-08_d1_manual.pdf (ruling that allows injured athletes to serve team as unpaid assistant coaches on scholarship); see also Chip Brown, *Notable*, DALLAS MORNING NEWS, Feb. 8, 2007, at 6C, available at 2007 WLNR 2479574.

⁹⁸ See OCR Letter, *supra* note 39.

⁹⁹ At some point in the pregnancy, a student's doctor is likely to recommend that she avoid athletic competition for medical reasons, although the point in time at which this occurs is likely to vary based on the particular sport and the health of the individual. Rainey, *supra* note 11, at A42 ("Depending on the sport, pregnant athletes are allowed to continue training and competing up to fourteen weeks into the pregnancy with a doctor's approval."); see *Live Discussions: Sideline by Pregnancy*, *supra* note 13 (stating that after the fourteen-week mark, much depends on the particular sport and the individual's state of health).

requirement entitles her to a medical leave with an accompanying right to reinstatement at the same status.

In all other respects, pregnant students and those recovering from pregnancy must be treated as well as students with other medical conditions. For example, pregnant students are entitled to receive the same level of privacy for their medical condition, the same level of assistance and rehabilitation to return to game-shape, and the same accommodations that are provided to students with other medical conditions.¹⁰⁰ Such entitlements depend on the institution's practices toward students with other medical conditions.

The comparative and absolute rights set forth in the OCR letter should enable an athlete who becomes pregnant to continue her college athletic career, with an interruption for a medical leave, while keeping her athletic scholarship. The "vigorous enforcement" of these rights, as promised in the OCR letter, should eliminate the discriminatory practices identified in the ESPN broadcast.¹⁰¹

C. *On Having it Both Ways: Equal Treatment and Special Treatment*

By including both accommodation rights, independent of how other students are treated, and comparative rights, treating pregnant students as well as other temporarily disabled students, Title IX straddles the equal treatment/special treatment divide that has characterized so much of the discourse surrounding discrimination law's treatment of pregnancy. Feminists have often struggled with whether to analyze pregnancy under a special treatment model, requiring extra accommodation of pregnancy, or an equal treatment model, requiring pregnancy to be treated as well (or as badly) as some comparable condition.¹⁰² As explained below, pregnancy is the quintessential "dilemma of difference" in that choosing either side is problematic for women.¹⁰³

A special treatment approach is problematic because it stigmatizes women as different from the norm and in need of accommodation because of this difference. The special treatment approach highlights the uniqueness of pregnancy and risks reinforcing a social construction of motherhood that relegates other aspects of women's lives to the sidelines. Emphasizing women's unique roles in reproduction creates the danger that men's roles in fathering children, including their social roles as parents, will be framed as different and less important than women's roles. This distinction can back-

¹⁰⁰ See generally 34 C.F.R. § 106.40 (2000).

¹⁰¹ OCR Letter, *supra* note 39 ("I am committed to the vigorous enforcement of *Title IX* and to ensuring equal opportunities in education to all students.")

¹⁰² See generally KATHARINE T. BARTLETT & DEBORAH L. RHODE, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 222 (4th ed. 2006) (describing the feminist split over equal treatment and special treatment approaches to pregnancy discrimination).

¹⁰³ See CHAMALLAS, *supra* note 47, at 88–89 (discussing the "dilemma of difference" and the intractability of pregnancy-related sex inequality through either equal treatment or special treatment).

fire if women are seen primarily as child bearers and mothers when their maternal role is highlighted, rather than as workers, students, or athletes. Extending special treatment to pregnant women signals that they would not fit into sports otherwise, implicitly locating the problem of lack of fit with the distinctively female condition of pregnancy.

The comparative approach is also flawed. By equating pregnancy with other temporary disabilities, the comparative approach medicalizes pregnancy, obscuring its social and relational dimensions. The social and relational aspects of pregnancy are characterized by pervasive gender disparities in power that are not systematically present in the conditions that produce other temporary disabilities.¹⁰⁴ Only women become pregnant from sexual intercourse and the social conditions under which women have sex do not ensure that women have full agency over whether they become pregnant.¹⁰⁵ Comparing pregnancy to other temporary disabilities misses the gendered dimension of the social conditions and relationships that result in pregnancies. It also leaves out the distinctively gendered social implications that follow pregnancy, including the burdens of motherhood and the impact on women's identities. The comparison to injuries and other physical impairments constructs the central experience of pregnancy as one of physical changes that do not substantially differ from those that men or nonpregnant women might experience. This view of pregnancy carves out one aspect of the pregnancy experience from others and responds to it as if the defining experience of pregnancy could be understood in largely gender-neutral, medical terms of physical limitations and medical treatment.

The comparative model distorts even the physical aspect of pregnancy by analogizing pregnancy to sickness or bodily weakness. By equating pregnancy with temporary disabilities, the comparative model focuses on the disabling rather than the enabling physical features of pregnancy. The wonderment of the pregnant body, the heightened awareness of the body that many pregnant women experience,¹⁰⁶ and the anticipation that accompanies the bodily transformation are lost in the comparison. Instead, pregnancy becomes a physical weakness to be treated and recovered from.¹⁰⁷

¹⁰⁴ See Cornelia T. L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 943 (2007) (describing the unequal social conditions under which women get pregnant and engage in sexual relationships); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights*, 56 EMORY L.J. 815, 817–19 (2007) (elaborating a sex equality perspective on reproduction that emphasizes the social as well as physical dimensions of women's reproductive lives).

¹⁰⁵ See, e.g., McClain, *supra* note 61, at 425–30 (discussing the limited agency of young women in controlling their reproductive lives).

¹⁰⁶ See YOUNG, *supra* note 59, at 51–53 (discussing some of the positive aspects of pregnant embodiment).

¹⁰⁷ See *id.* at 55–61 (describing how the Western medical approach to pregnancy alienates women from their experience of pregnancy and treats it as a disorder to be cured).

The core difficulty with any equality framework is that, in far-reaching and deeply gendered ways, pregnancy affects only women, and there is no analogous comparison group that includes men. Unless the institution of sport is radically transformed in such a way that pregnancy is no longer relevant to sports participation,¹⁰⁸ a sex equality framework requires some judgment about how to address pregnancy. Given these limitations, Title IX's refusal to choose between an equal treatment and special treatment approach has significant advantages. Both the equal treatment and special treatment models are problematic, but perhaps both together are better than either one in isolation. Title IX's approach to pregnant athletes melds the equal treatment and special treatment models to mitigate the downsides of each. In the dialogue between the models, the complexity of pregnancy emerges and each model responds to the downfalls of the other.

The absolute protection of a pregnant athlete's scholarship risks stigmatizing the pregnant athlete as a "special needs" case or a drain on the team. However, the presence of the comparative model reminds us that sports should be broad enough to care for human needs. The comparative standard makes an analogy to injury in a way that normalizes and humanizes the pregnancy; thus, the pregnant athlete on scholarship is less likely to feel stigmatized if ill or injured athletes also retain their scholarships while they recuperate.¹⁰⁹ In this way, the presence of the comparative standard tempers the disadvantages of the special treatment model by reducing the stigma of "specialness" and serving as a reminder that accommodations are often made for students who need them.

At the same time, the comparative model artificially reduces pregnancy to a narrow physical dimension so that it can be analogized to a temporary disability. This poses the risk that the nonphysical dimensions of pregnancy will be ignored and that the level of treatment given to injured students will be insufficient to enable pregnant students to fully participate in and benefit from sports. Title IX's inclusion of absolute rights under the special treatment model tempers these risks to some extent by guaranteeing that pregnant students have a right to medical leave with full reinstatement at the conclu-

¹⁰⁸ As mentioned above, this is certainly within the realm of possibility, at least in theory. The current structure of competitive sport is neither natural nor foreordained, but built around men's bodies and men's needs. A different structure and role for sport in our schools might well accommodate women's pregnant bodies with no specific accommodations or changes necessary. See generally MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990) (arguing that the solution to the dilemma of difference is to restructure the institution to change the reference point by which difference is defined). Following Minow's approach, under a radically different model of sport, pregnancy might no longer register as "difference" or a problem to be confronted. However, today's highly competitive model of elite intercollegiate athletes is unlikely to change so radically in the foreseeable future.

¹⁰⁹ See *Live Discussions: Sidelined by Pregnancy*, *supra* note 13 (quoting Elizabeth Sorenson: "What happens when an athlete gets sick? What does the team do then? They help the individual through the tough time, and make a plan for [how] the individual's contribution can be returned to the way it was when she was recruited.").

sion of the leave and to stay on scholarship, no matter how other medical conditions are treated.¹¹⁰ By refusing to condense pregnancy into a physically limiting dimension, the special treatment model invites greater attention to the ways in which pregnancy is unlike temporary disabilities, such as knee injuries or ankle sprains, and promotes further discussion of how sports accommodate the experiences of pregnant athletes, both during and after pregnancy. Pregnancy implicates women's identities, life courses, and relationships to others in ways that knee injuries and ankle sprains do not, and there is value in having an approach to equality that recognizes the uniqueness of pregnancy.

The result of Title IX's approach to pregnant athletes is an amalgam of the equal treatment and special treatment models that is far from perfect. It still leaves the current structure of sports largely intact, while framing the problem as how to find a place in sport for women who become pregnant. But in a world where radical change to the current structure of intercollegiate sports is unlikely, Title IX has crafted a pragmatic and surprisingly effective response.¹¹¹

D. *Legal Hurdles to Using Title IX to Protect Pregnant Athletes*

Despite its force, the OCR letter will not end all counterarguments to the use of Title IX to protect pregnant athletes from discrimination. The most likely legal objection will be to challenge the validity of the pregnancy regulation itself for allegedly exceeding the scope of the statute. This argument would rely on and extend the Supreme Court's decision in *Alexander v. Sandoval*, which held that regulations reaching disparate impact discrimination to enforce Title VI of the Civil Rights Act of 1964 do not provide a private right of action for damages to enforce those regulations.¹¹² The decision rested on the Court's earlier case law interpreting Title VI, which bans race discrimination in federally-funded programs, to reach no farther than the Constitution's proscription on race discrimination under the Equal Protection Clause of the Fourteenth Amendment.¹¹³ In *Sandoval*, the Court reasoned that, since Title VI itself does not reach disparate impact discrimination, the Title VI regulations prohibiting disparate impact discrimination do not support an implied private right of action to enforce them.¹¹⁴ By analogy, the argument for invalidating Title IX's pregnancy regulation would contend that Title IX, like Title VI, extends no further than the reach

¹¹⁰ See *supra* notes 77–80 and accompanying text.

¹¹¹ See generally Deborah L. Brake, *Title IX as Pragmatic Feminism*, 55 CLEV. ST. L. REV. 513 (2008) (contending that Title IX is an example of pragmatic feminism, drawing from all the major feminist theories of equality at different doctrinal points).

¹¹² 532 U.S. 275 (2001).

¹¹³ *Id.* at 280–81 (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 272 (1978) and *Guardians Ass'n. v. Civil Serv. Comm'n of New York City*, 463 U.S. 582, 610–11 (1983)).

¹¹⁴ *Id.*

of the Equal Protection Clause, and because discrimination based on pregnancy is not encompassed by the constitutional ban on sex discrimination, the Title IX pregnancy regulation exceeds the scope of the statute.¹¹⁵

Despite providing a likely objection to using Title IX's pregnancy regulation to protect pregnant athletes, this line of argument should not interfere with the enforcement of the rights promised by the OCR "Dear Colleague" letter. The argument's underlying premises are weak as applied to Title IX, which has long been understood to encompass protections from sex discrimination that extend well beyond the limits of equal protection doctrine.¹¹⁶ The different constitutional status of race and sex discrimination at the time that Title VI and Title IX were enacted highlights the limits of the analogy between the two statutes. While it may make sense to conclude that Congress intended to incorporate the equal protection standard for race discrimination in passing Title VI, it makes little sense to attribute a similar intent to incorporate the Constitution's treatment of sex discrimination into Title IX. In 1972, when Congress enacted Title IX, the constitutional boundaries of sex discrimination were very much in flux.¹¹⁷ The Court did not even settle upon the current intermediate scrutiny standard for sex discrimination until 1976.¹¹⁸ In 1972, the constitutional standard was the more lenient rational basis test.¹¹⁹

With respect to pregnancy in particular, it would make little sense to conclude that Congress intended to incorporate the Constitution's treatment of pregnancy discrimination into the statute's ban on sex discrimination. The Court did not issue its landmark and highly criticized decision refusing to recognize pregnancy discrimination as a form of sex discrimination for pur-

¹¹⁵ See *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that a disability benefits program that compensated workers for lost work due to virtually all medical conditions and temporary disabilities except for normal pregnancy did not discriminate against women on the basis of sex under the Equal Protection Clause). *Geduldig* was briefly replicated in Title VII law, but its extension to Title VII was quickly overturned by Congress in the Pregnancy Discrimination Act, which amended Title VII to define discrimination because of sex to include discrimination on the basis of pregnancy. See *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act, 42 U.S.C. § 2000e-(k) (2000). *Geduldig*, however, as a decision interpreting the Constitution, cannot be overturned by an Act of Congress and remains valid as precedent, notwithstanding the barrage of criticism it has generated. See, e.g., Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 983 (1984) (noting that criticizing *Geduldig* has become "a cottage industry").

¹¹⁶ See, e.g., David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217 (2005) (arguing that Title IX's substantive protection from sex discrimination exceeds that of the Equal Protection Clause).

¹¹⁷ Cf. Katherine Connor & Ellen J. Vargyas, *The Legal Implications of Gender Bias in Standardized Testing*, 7 BERKELEY WOMEN'S L.J. 13, 44 (1992) (using similar reasoning to argue that Title IX did not incorporate constitutional standards for sex discrimination).

¹¹⁸ See *Craig v. Boren*, 429 U.S. 190 (1976) (striking down sex-based classification for purchasing low-alcohol beer as not substantially related to an important government interest).

¹¹⁹ See *Reed v. Reed*, 404 U.S. 71 (1971) (striking down sex-based classification in Idaho law selecting executors of a deceased relative's estate as irrational).

poses of constitutional law until 1974, two years after Congress enacted Title IX.¹²⁰ The Court made a similar ruling two years later in a statutory decision interpreting Title VII.¹²¹ In response, Congress acted swiftly to enact the Pregnancy Discrimination Act, rejecting the Court's approach to pregnancy and expressing its view that Title VII's broad ban on sex discrimination encompassed discrimination based on pregnancy.¹²² This history casts doubt on the credibility of the claim that Congress intended to limit Title IX to the Constitution's coverage of sex discrimination, and pregnancy discrimination in particular. In light of this history, the analogy to Title VI and the *Sandoval* decision should not undermine the recent OCR interpretation applying the Title IX regulations to protect pregnant athletes.¹²³

* * *

Although it is too soon to document the effect of the OCR letter, it may well reduce the noncompliance problems documented in the ESPN broadcast by heightening institutional awareness of what Title IX requires and sending the implicit message that the agency has the political will to enforce these requirements. At the same time, the ESPN program and subsequent publicity raised public awareness and the awareness of athletes themselves about what Title IX requires. Translating rights into reality requires persons willing and able to assert their rights and legal authorities willing to enforce them. The aftermath of the ESPN program, and especially the OCR letter, makes it more likely that both sets of participants in this process will perform these functions. In that respect, the media attention and the OCR letter both tell a notable success story about the mobilization of law to support and further social change.

IV. THE LIMITS OF SUCCESS AND THE CHALLENGES THAT REMAIN

As described earlier, the conflation of ideologies linking sports and masculinity, the historic use of women's maternal roles and reproductive functions to limit women's participation in sports, and the prevalence of discourses decrying "irresponsible" reproduction by young, unwed women

¹²⁰ *Geduldig v. Aiello*, 417 U.S. 484 (1974).

¹²¹ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976) (holding that an employer's disability benefits plan did not violate Title VII because of its failure to cover pregnancy-related disabilities, absent any indication that the exclusion of pregnancy disability benefits was a pretext for discriminating against women).

¹²² Pregnancy Discrimination Act, 42 U.S.C. § 2000e-(k) (2000).

¹²³ Importantly, even if courts were receptive to the *Sandoval* argument and rejected a student's private right of action to enforce the regulation's protections for pregnant athletes, the OCR would still have the authority to enforce the regulation. *Sandoval* only limited the ability of private individuals to sue in court; it did not question the power of a federal agency to enforce its own regulations, even if they exceeded the scope of the statute. See *Sandoval*, 532 U.S. at 281–82 (assuming that the Title VI disparate impact regulations are valid, but ruling that they may not be enforced through a private right of action).

who are financially unable to support their babies make pregnant athletes unlikely candidates for a success story about mobilizing legal rights. Further examination of this unexpected success, however, reveals the complexity in viewing this outcome as a total “success” after all, exposing both the extent and limits of the gains Title IX has made in securing the cultural acceptance and embrace of female athletes.

This section first considers how pregnant athletes were able to overcome the ideologies and discourses discussed in Part II that might have continued to marginalize their concerns. The success of this group of athletes in securing strong nondiscrimination rights reflects both the progress and limitations of Title IX in enhancing women’s opportunities in sports. The remainder of this section then considers several reasons for skepticism about Title IX’s ability to succeed in making substantial progress toward sex equality in sports through the extension of rights to pregnant athletes. First, the commercial model of elite sports leaves little room for incorporating and emphasizing students’ needs where they conflict with the competitive goals of intercollegiate athletics. Second, the focus on accommodating pregnant athletes and protecting them from discrimination obscures men’s procreative responsibility. Male athletes engage in procreative behavior with very little accountability and no conflict with their athletic careers. In focusing on pregnancy as a sex equality issue for female athletes, it is important not to lose sight of how sport reinforces gender hierarchies through the construction of male athletes’ sexual privilege. Third, OCR’s strong interpretation of the rights of pregnant athletes will likely have very little impact on high school athletes who become pregnant. Title IX has had little success in translating pregnant high school students’ rights to equal educational opportunity into reality. Finally, whether the OCR letter actually results in any gains for pregnant athletes will depend on the athletes’ awareness of their rights and their resolve to enforce them. Without concerted education efforts on this issue, the OCR letter may make little difference in the lives of women whose college athletic careers are interrupted by pregnancy.

A. *Escaping the “Irresponsible Reproduction” Discourses: Title IX’s Mixed Legacy*

In the recent controversy over pregnant college athletes, the discourses that typically function to withhold rights and benefits from young, unwed, financially dependent women were drowned out by the outcry of support for and consternation about the treatment of this group of young women.¹²⁴ Certainly, the inclusion of stories about athletes who had abortions in order to keep their scholarships helped put the issue on the map by raising the concerns of anti-abortion advocates and broadening the range of voices support-

¹²⁴ See *supra* notes 36–38 and accompanying text.

ing greater Title IX enforcement on this issue.¹²⁵ However, the abortion issue, alone, does not explain the success of the campaign for stronger legal enforcement. In other settings, withholding financial support from women who have births deemed “irresponsible” also places many women in the position of feeling pressured to have an abortion to avoid the stigma and financial burdens attached to motherhood under such circumstances.¹²⁶ As Linda McClain points out, the discourse on irresponsible reproduction contains these tensions within itself, dictating both that it is irresponsible for women to have children out of marriage when they are not financially self-sufficient and that it is irresponsible and immoral for women to abort a pregnancy under any circumstances.¹²⁷ In the context of the debate over “welfare reform” caps, for example, concerns that such pressures would cause women to have abortions did not result in the easing of hardships or the extension of greater rights to women.¹²⁸ While the inclusion of the abortion issue may have helped broaden public sympathy on this issue, the strength of the support for pregnant athletes has more to do with Title IX’s impact on the cultural support for women in sports—both the successes and the limitations of Title IX’s legacy thus far.

The past three and a half decades of experience with Title IX have marked massive shifts in the prevailing societal views about the place of women in sports and the cultural status of female athletes.¹²⁹ Although this success has been neither fast nor easy, and there is still much more work to be done, female college athletes today have a greatly enhanced stature thanks largely to Title IX.¹³⁰ As more female athletes participate in college sports, demonstrating the skills, determination, and discipline that it takes to be a successful athlete, cultural respect for women who are athletes has grown by leaps and bounds.¹³¹ While male athletes still dominate the sports pages and the media spotlight, outstanding female athletes are less likely to be ignored, and their success translates into a greater appreciation for female athletes at all levels of sport.¹³² On an individual level, many parents now

¹²⁵ See *supra* note 35.

¹²⁶ McClain, *supra* note 61, at 403–06 (describing unsuccessful efforts to oppose certain provisions of Congress’ “welfare reform” law because of their likely effect on encouraging abortion).

¹²⁷ *Id.* at 396–401.

¹²⁸ *Id.*

¹²⁹ See, e.g., Deborah L. Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 15–18 (2001) (surveying developments in women’s sports since Title IX’s passage and the accompanying shifts in societal support for female athletes).

¹³⁰ See, e.g., Nancy Hogshead-Makar & Andrew Zimbalist, *Introduction to EQUAL PLAY: TITLE IX AND SOCIAL CHANGE*, *supra* note 55, at 2, 2 (noting the remarkable growth in female sports participation that has followed Title IX, and the progress that remains).

¹³¹ See CARPENTER & ACOSTA, *supra* note 22, at 165–66 (discussing the television advertisements that Nike ran in 1995 with the theme “if you let me play sports,” and the advertisements’ reflection of society’s growing appreciation for female athletes).

¹³² See, e.g., Lucy Danziger, *Conclusion: A Seismic Shift in the Culture*, in NIKE IS A GODDESS: THE HISTORY OF WOMEN IN SPORTS 315, 317 (Lissa Smith, ed. 1998) (“What

have daughters who play sports and are more likely to view the increasing numbers of female college athletes as a positive development for their own daughters, even when the expansion of women's athletic participation opportunities means cutting back on men's programs.¹³³

In this climate of respect for female athletes, the negative discourses about maternal irresponsibility that so often blame young, unmarried women for having children without the means to support them did not materialize. In the predominantly supportive reaction to pregnant athletes after the ESPN program, as evidenced by the OCR and NCAA responses, pregnant athletes were treated as worthy recipients of rights. The supportive responses treated losing an athletic scholarship as too high a price to pay for an unplanned pregnancy by women who were otherwise models of discipline, hard work, and determination, and not as a termination of a subsidy that might otherwise encourage irresponsible behavior. Title IX's success in raising the cultural esteem of female athletes played an important role in the sympathies generated by the stories of pregnant athletes.¹³⁴

At the same time that Title IX has raised the social status of female athletes, it has also made inroads in breaking the link between sports and masculinity, which has traditionally rendered women outsiders in sport. The ideologies about women's maternal roles that have been used to keep women out of sports have been relegated to the dustbin, at least when such ideologies are expressed overtly. These limiting ideologies now have less power to deny pregnant athletes their rightful status as athletes.

Title IX's success in shifting cultural norms played an important role in shaping a landscape that was favorable to the stronger legal enforcement of the rights of pregnant athletes. However, law's relationship to social change is complicated, and the mobilization of legal rights rarely strikes a clear and unbroken path toward promoting sex equality. In this instance, too, considering Title IX's success in raising the cultural prestige of female college athletes, and how it shaped the response to pregnant athletes, also reveals some of the limitations of that success.

happens among talented sportswomen at the elite levels makes its way into the culture.”); Mary Jo Kane, *Media Coverage of the Post Title IX Female Athlete: A Feminist Analysis of Sport, Gender, and Power*, 3 DUKE J. GENDER L. & POL'Y 95, 99–117 (1996) (discussing post-Title IX changes in the cultural acceptance of and support for female athletes, but also the differential media coverage of male and female athletes).

¹³³ Cf. WARE, *supra* note 55, at 18 (reporting a 2000 public opinion poll that found that 79 percent of respondents approved of Title IX, and 76 percent approved of cutting back men's programs to ensure equivalent opportunities for women).

¹³⁴ In contrast to the public support for pregnant athletes in response to the ESPN program, culminating in the OCR Letter and the NCAA decision to change its rules to protect pregnant athletes, a public education campaign by supporters of pregnant high school students barred from admission to school honors societies generated no such public outcry and no changes to public policy. See PILLOW, *supra* note 67, at 69–71 (2004) (describing the ACLU's public education campaign to raise awareness of the exclusion of pregnant girls from the National Honor Society). In my view, the issues facing pregnant athletes resonated with the public and generated quick corrective responses precisely because the women affected were college athletes.

One complication in the Title IX success story described so far is that the recent reactions to the stories of pregnant college athletes were not significantly shaped by the racial images and stereotypes that have drained sympathy from young, unwed, financially insecure pregnant women in other contexts.¹³⁵ While the heightened cultural status of female athletes partly explains this phenomenon, so may the fact that white women have been the primary beneficiaries of Title IX's application to college sports.¹³⁶ Critical race feminists have rightly criticized Title IX's legacy for disproportionately benefiting white women rather than women of color.¹³⁷ The fact that most of the litigation and enforcement activity surrounding Title IX has occurred at the college level has meant that women of color, who are disproportionately denied access to college opportunities, are largely left out of the law's primary enforcement activity.¹³⁸ The barriers to attending college fall disproportionately on women and girls of color, who often lack many of the privileges that make college more accessible to white women.¹³⁹ By applying most forcefully at the college level, Title IX has left largely on the sidelines the many women and girls who will not make it that far in their educational careers. Even for women who make it to college, the growth in women's college sports that Title IX has spurred has often involved the addition of sports disproportionately played by white women, such as crew, soccer, field hockey, tennis, golf, and other "suburban" sport offerings that fewer young women of color have the opportunity to play.¹⁴⁰

¹³⁵ See *supra* notes 62–70 and accompanying text.

¹³⁶ See Welch Suggs, *Title IX Has Done Little for Minority Female Athletes—Because of Socioeconomic and Cultural Factors, and Indifference*, CHRON. OF HIGHER EDUC., Nov. 30, 2001, at A35–37; WARE, *supra* note 55, at 17 (reporting that many of the increased sports opportunities resulting from increased Title IX enforcement were in "White-girl sports" that are more likely to be played in suburban high schools or private clubs with few minority participants); Women's Sports Foundation, *Title IX and Race in Intercollegiate Sport*, in WARE, *supra* note 55, at 136, 137 (noting that women of color are 24 percent of the female students enrolled at NCAA institutions, but only 14.8 percent of the female students who play intercollegiate athletics at those institutions).

¹³⁷ See, e.g., Tonya M. Evans, Comment, *In the Title IX Race Toward Gender Equity, the Black Female Athlete Is Left to Finish Last*, 42 HOW. L.J. 105, 107 (1998); Alfred Dennis Mathewson, *Black Women, Gender Equity and the Function at the Junction*, 6 MARQ. SPORTS L.J. 239, 241–53 (1996); Marilyn V. Yarbrough, *A Sporting Chance: The Intersection of Race and Gender*, 38 S. TEX. L. REV. 1029, 1033–38 (1997).

¹³⁸ See, e.g., Jocelyn Samuels, *How Faulty Premises Affected the Work of the Commission on Opportunity in Athletics and Why Title IX Protections are Still Needed to Ensure Equal Opportunity in Athletics*, 3 MARGINS 233, 255 (2003) (arguing that the absence of mandatory data collection at the high school level makes Title IX enforcement difficult in the area of interscholastic sports); Suzanne Sangree, *The Secretary's Commission on Opportunity in Athletics Squandered its Opportunity to Understand Commercial Collegiate Sports: Why They Eliminate Minor Men's Sports and Prevent Title IX From Achieving Full Gender Equality*, 3 MARGINS 257, 278 (2003) (noting that "there has been little Title IX enforcement activity to date" in high school sports programs).

¹³⁹ N.A.A.C.P. *Seeks to Limit Use of College Board Tests*, N.Y. TIMES, Nov. 21, 1999, § 1, at 39.

¹⁴⁰ See SUGGS, *supra* note 51, at 180–82.

Although women of color, and black women in particular, do participate in intercollegiate sports in significant numbers, female college athletes are not linked with African American women or other women of color in the popular mindset the way that welfare recipients and pregnant teenagers often are, regardless of the actual racial diversity within those groups.¹⁴¹ For example, an African American woman who attends college and plays college sports already has, according to the racialized ideology that stigmatizes black motherhood, distanced herself from the stereotypes at the heart of that ideology.¹⁴² Thus, although the stories in the ESPN program showed African American and white college athletes who had become pregnant, much like the actual racial diversity in the stories of welfare recipients and pregnant teens, the college sports setting was more resistant to the kinds of racial stereotypes and racial linkages that have drained popular sympathy for young pregnant women in these other settings. The ability of pregnant college athletes to avoid the tarnished identities of other young, unmarried, and financially needy mothers partly reflects Title IX's implicit acceptance of a "white privilege" in sports by applying a sex equality lens that ignores issues of racial justice, even as it also reflects the law's successes in enhancing the cultural prestige of female athletes.

B. The Commercial Model of Elite Intercollegiate Athletics and Its Resistance to Change

Title IX's success in extending rights to pregnant athletes is limited by the failure of this or any other Title IX enforcement action to make serious inroads on the predominant model of sports that values winning at all costs and treats athletes as commodities that add value to sports programs rather than as students and human beings who can benefit from sports.¹⁴³ The requirement that schools keep pregnant athletes on scholarships is in tension with a system that relies heavily on athletic scholarships to maximize team competitiveness and rewards coaches for their win-loss records rather than their ability to instill the benefits of sports participation in their athletes.¹⁴⁴ A coach who must keep a pregnant athlete on scholarship while that athlete is unable to play may suffer a disadvantage when competing against teams

¹⁴¹ See generally PILLLOW, *supra* note 67, at 43 (discussing public perceptions of pregnant teenagers); McClain, *supra* note 61, at 379 (discussing stereotypes of welfare mothers).

¹⁴² See generally Women's Sports Foundation, *supra* note 136, at 136, 138 (stating that women of color are only 14.8 percent of female athletes at NCAA institutions); Wanda Pillow, *Teen Pregnancy and Education: Politics of Knowledge, Research, and Practice*, 20 EDUC. POL'Y 59, 72 (2006) (describing stereotypes of black teen mothers).

¹⁴³ See WARE, *supra* note 55, at 25–27 (discussing Title IX's failure to fundamentally shift or reorient the values of sports away from the commercial model of elite men's sports).

¹⁴⁴ See *id.* at 26 (discussing the enormous pressure on intercollegiate athletic coaches to win).

with their full complement of scholarship athletes on the field. The conflict for coaches and institutions between compliance with the law and maximizing competitive strength may create an uncomfortable situation for the pregnant athlete who feels that she is a drain on the team.

The extension of Title IX rights to pregnant athletes exposes deeper problems with overlaying a set of sex equality rights on a system of college sports that is highly commercialized and often exploitative toward the athletes who should benefit from sports.¹⁴⁵ Title IX has not made a dent in the commercialized, win-at-all cost model of college sports, as exemplified by the ongoing arms race of expenditures on men's so-called "revenue producing" sports, notwithstanding the continuing existence of stark disparities in spending on men's and women's athletic programs.¹⁴⁶ The premise behind the sex equality mandate of Title IX is that sports benefit athletes and those benefits should be shared equally.¹⁴⁷ The premise behind the commercial model of college sports is that athletes are commodities that benefit institutions.¹⁴⁸ The values of Title IX have often clashed with the values of the commercial model of sports, and Title IX enforcement has lagged as a result.¹⁴⁹ The commercial model drives the win-at-all cost, hypercompetitive environment of college sports today, and athletes' wellbeing is often lost in the shuffle.¹⁵⁰ The dilemmas created by forcing schools to retain pregnant students as scholarship athletes—clearly the correct result according to the values of Title IX and the wellbeing of student-athletes—are thus familiar ones. This clash of values is likely to create resistance and resentment toward a pregnant athlete who is perceived as a burden on the team and as taking the scholarship of a talented athlete who might otherwise replace her.

¹⁴⁵ See *id.* (discussing the exploitation of student-athletes in elite intercollegiate sports programs).

¹⁴⁶ See Gary R. Roberts, *Reducing the Commercialization of Intercollegiate Athletics*, in EQUAL PLAY: TITLE IX AND SOCIAL CHANGE, *supra* note 55, at 119–27 (criticizing the athletics arms race and commercialized excess of college sports and making suggestions for reform); Andrew Zimbalist, *What to Do about Title IX*, in EQUAL PLAY: TITLE IX AND SOCIAL CHANGE, *supra* note 55, at 239–42 (discussing the arms race of skyrocketing expenditures in intercollegiate athletics).

¹⁴⁷ See Brian Porto, *Completing the Revolution: Title IX as Catalyst for an Alternative Model of College Sports*, 8 SETON HALL J. SPORT L. 351, 383–411 (1998) (analyzing the consequences of the commercial model of college sports and advocating a participation-based model more consistent with Title IX).

¹⁴⁸ See *Who Profits From College Sports?*, WALL ST. J., Oct. 13, 2006, at W13 (reporting that congressional hearings about the tax-exempt status of the NCAA questioned whether the commercialized nature of college sports still serves educational goals).

¹⁴⁹ See John C. Weistart, *Can Gender Equity Find a Place in Commercialized College Sports?*, 3 DUKE J. GENDER L. & POL'Y. 191, 224–25 (1996) (concluding that the commercial nature of college sports creates a strong bias against women's sports, which Title IX has yet to overcome).

¹⁵⁰ See James L. Shulman & William G. Bowen, *Female Athletes and the Game of Life*, in TITLE IX: A BRIEF HISTORY WITH DOCUMENTS, *supra* note 55, at 131, 131–36 (documenting the gap between commercialized intercollegiate sports and educational values).

On a more optimistic note, perhaps the recent attention to the challenges facing pregnant athletes will catalyze a broader conversation about how well college sports serve the needs of our student-athletes, male and female. The dramatic stories of these young women should remind us of how powerfully sports can affect young people's lives, in both positive and negative ways, and how vulnerable students are to the decisions and judgments of those who govern these opportunities. A serious conversation about how well college sports programs serve the educational and, more broadly, the human needs of student-athletes is long overdue.

C. The Missing Link: Male Athletes' Responsibility

The success in framing the treatment of pregnant athletes as a sex discrimination issue is clouded by Title IX's utter lack of success in changing the norms of privileged hetero-masculinity that pervade men's intercollegiate sports. In college sports today, the male athlete who engages in behavior that is likely to produce a child is anything but exceptional or deviant, and his reproductive activity does not jeopardize his place in sports.¹⁵¹ Not only has Title IX failed to change these norms, but there is a risk that framing the treatment of pregnant athletes as a "women's issue" further entrenches the norm of male athletic privilege as encompassing an entitlement to carefree and costless sexual relationships with women. One downside of the special treatment approach to pregnancy, which is reflected to some extent in Title IX's treatment of this issue, is that it treats pregnancy as an exceptional and uniquely female concern. Since pregnancy and parenting are often conflated in law and culture, the accommodation of pregnancy in sex-specific terms applicable only to women risks eclipsing men's responsibility for sexual activity and entrenching male sexual privilege. There is a similar risk in an equal treatment approach that treats pregnancy as an exclusively medical issue. Since male reproduction does not have the same physical effects on men, the male role in fathering children is left out of the equation.

Butler v. NCAA, a federal district court case, illustrates this concern.¹⁵² Eric Butler played football at the University of Kansas ("KU") and requested an extra year of athletic eligibility after having taken time off to help care for his infant daughter.¹⁵³ Under NCAA rules, students have five years of athletic eligibility to participate in NCAA-sanctioned programs, starting

¹⁵¹ Although fatherhood among male college athletes is an under-examined topic in the literature on elite men's sports, at least one commentator has noted the prevalence of fathers among elite college athletes. See Michael Sokolove, *Football is a Sucker's Game*, in *EQUAL PLAY: TITLE IX AND SOCIAL CHANGE*, *supra* note 55, at 286, 299 (reporting that of the 105 football players on the University of South Florida's team, about 30 are fathers, with many of them having produced multiple children).

¹⁵² *Butler v. NCAA*, No. 06-2319-KHV, 2006 U.S. Dist. LEXIS 61632, at *1 (D. Kan. Aug. 15, 2006).

¹⁵³ See generally Sarah McCarthy, Comment, *The Legal and Social Implications of the NCAA's "Pregnancy Exception"—Does the NCAA Discriminate Against Male Stu-*

from the time they matriculate.¹⁵⁴ The NCAA may grant a waiver “for reasons that are beyond the control of the student-athlete or the institution, which deprive the student-athlete of the opportunity to participate for more than one season in his/her [respective] sport within the five-year period.”¹⁵⁵ In addition to this general waiver, the NCAA rules also permit a specific one-year extension of eligibility to a “female student-athlete for reasons of pregnancy.”¹⁵⁶ With Butler’s eligibility about to expire, KU petitioned the NCAA on his behalf, requesting a one-year extension under the general hardship exception due to his decision to take time out to provide financial support and care for his daughter.¹⁵⁷ The NCAA denied the initial request and a subsequent request for reconsideration.¹⁵⁸ Butler sued the NCAA alleging that the organization’s willingness to extend eligibility for reasons of pregnancy, but not for a father’s time spent caring for his child, discriminated on the basis of sex in violation of Title IX.¹⁵⁹

The district court denied Butler’s request for a preliminary injunction requiring the NCAA to grant him the requested extension, reasoning that Butler had failed to show a likelihood of prevailing on the merits.¹⁶⁰ The court did not take issue with his assertion that “if he were a female, he would be able to take advantage of the pregnancy exception” and secure the extension.¹⁶¹ Instead, the court accepted the NCAA’s argument that the pregnancy exception responded to the uniquely female condition of pregnancy and did not include parenting or caretaking.¹⁶² The court thus interpreted Title IX to permit a special treatment approach to pregnancy in sports, without any equal treatment standard entitling Butler to a comparable extension for his role in caring for an infant he fathered.

dent-Athletes?, 14 VILL. SPORTS & ENT. L.J. 327 (2007) (giving a detailed description of the facts of the *Butler* case).

¹⁵⁴ The rule allows for four seasons of competition within five calendar years. NCAA Operating Bylaws, *supra* note 43, Art. 14, § 2.1.1.

¹⁵⁵ Nat’l Coll. Athletic Ass’n., 2007–2008 NCAA Administrative Bylaws, Art. 30, § 6.1, NCAA Division 1 Manual, *available at* http://grfx.cstv.com/photos/schools/stan/genrel/auto_pdf/2007-08_d1_manual.pdf

¹⁵⁶ *Id.* Art. 14, § 2.1.3. This rule gives member schools the option of granting a one-year extension to a female athlete who becomes pregnant. *Id.*

¹⁵⁷ *Butler*, 2006 U.S. Dist. LEXIS 61632, at *5–*6.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at *1–*6.

¹⁶⁰ *Id.* at *8–*10.

¹⁶¹ *Id.* at *8.

¹⁶² *Id.* Curiously, the court did not address the thorny question of whether the NCAA is a “recipient” of federal funds so as to be accountable under Title IX. *See* NCAA v. Smith, 525 U.S. 459 (1999) (holding receipt of dues from member institutions not sufficient to bring the NCAA under Title IX, but declining to decide whether the exercise of “controlling authority” over recipient members might make the NCAA itself a “recipient” for purposes of Title IX). For various perspectives on whether the NCAA should be obligated to comply with Title IX, see Stephanie M. Greene, *Regulating the NCAA: Making the Calls under the Sherman Act and Title IX*, 52 ME. L. REV. 81 (2000); Thomas M. Rowland, *Level the Playing Field: The NCAA Should Be Subject to Title IX*, 7 SPORTS LAW J. 143 (2000); Isaac Ruiz, *National Collegiate Athletic Association v. Smith: Must the NCAA Play by the Rules*, 26 J.C. & U.L. 119 (1999).

The court's approach showcases the dangers of a special treatment approach to pregnancy. The cryptic reasoning in the court's opinion implicitly conflates pregnancy with motherhood, since the one-year extension exceeds the amount of time typically required to accommodate the physically disabling period of pregnancy and childbirth.¹⁶³ By granting a one-year eligibility extension to pregnant athletes, the rule necessarily gives women extra time both to recover from pregnancy and childbirth and to accommodate a subsequent, time-consuming maternal role. By treating pregnancy and motherhood as specifically female accommodations, the NCAA rule effectively penalizes male athletes who accept responsibility for fatherhood and take time from their athletic careers to help support and raise a baby that they helped bring into the world. The NCAA's refusal to accommodate the rare football player who interrupts his athletic career for responsible fathering only encourages the already abundant cultural norms in men's sports that promote a careless male heterosexuality that entitles male athletes to unlimited and costless sex with women.¹⁶⁴ Male privilege in sports often lets male athletes "off the hook" for the consequences of their sexual behavior, especially for male athletes in highly-valued sports such as football and basketball.¹⁶⁵ This NCAA rule only exacerbates the problem by making a male athlete's decision to take responsibility for a child that he fathered very costly to his future participation in sports.

The court's decision is incorrect under the Title IX regulations, which prohibit sex-differential rules regarding parental status. The Title IX regulation addressing pregnancy includes a provision stating, "[a] recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex."¹⁶⁶ By accommodating the parenting leave of female athletes who give birth, but not of male athletes who father children, the NCAA rule treats male and

¹⁶³ See McCarthy, *supra* note 153, at 355–57 (explaining the disconnect between the NCAA rule and the accommodation of pregnancy, as opposed to parenthood).

¹⁶⁴ See Brake, *supra* note 56, at 92–107 (2001) (discussing how educational institutions contribute to male athletes' expectations of unhindered sexual access to women); see also Diane Rosenfeld and Baine Kerr, Comments from the *Harvard Journal of Law & Gender* Conference *Changing Social Norms? Title IX and Legal Activism*, 31 HARV. J.L. & GENDER 380–82, 385–86 (2008) (discussing the Simpson case and how sexual assault is a particular problem in the sports world).

¹⁶⁵ A number of recent cases against universities involve claims of officials "looking the other way" when elite male athletes sexually abuse women. See, e.g., *Simpson v. Univ. of Colo. 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*, 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); see also Christopher M. Parent, *Personal Fouls: How Sexual Assault by Football Players Is Exposing Universities to Title IX Liability*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 617, 618–22 (2003) (summarizing incidents involving alleged sexual assaults by football players).

¹⁶⁶ 34 C.F.R. § 106.40(a) (2007).

female athletes' parental status differently. The court's neglect of this part of the regulation may have stemmed from its emphasis on the unique physical dimension of pregnancy, at the expense of the social and relational dimensions of having a child. Correctly construed, Title IX should provide a remedy to male athletes in this situation.

Perhaps part of the court's confusion is attributable to its difficulty in separating the distinctly female condition of pregnancy from the caretaking that follows the birth of a child. Both the equal treatment and special treatment approaches to pregnant athletes may have the unintended consequence of contributing to that confusion. The special accommodation of pregnancy fortifies prevailing norms that sexual activity leading to procreation is a "women's problem" and contributes to the eclipse of male responsibility. This message reinforces the male sexual privilege that is linked to male athletic status. The equal treatment model for pregnancy, too, by focusing on the physical dimension of pregnancy, implicitly leaves men's roles in procreation out of the picture altogether.

The conflation of pregnancy and parenthood, however, will not be sorted out by tweaking the equality models that apply to pregnancy. The important lesson is that in focusing on pregnant athletes and how best to secure their place in sports, we should take care not to legitimize a model of sports that encourages male athletes to take no responsibility for their procreative behavior. Ideally, greater attention to the conflicts facing pregnant athletes in sport might lead to broader conversations about the relationship between male sexuality and men's sports participation. The history of Title IX's minimal influence on the norms of male athletes' sexuality, however, makes this hope seem like a long shot.

D. Pregnant High School Athletes

Thus far, this Article has focused on the successes and limitations of Title IX as applied to college sports and the recent success in recognizing the Title IX rights of pregnant intercollegiate athletes. At the high school level, it is more difficult to find cause for optimism. Although the Title IX regulation governing pregnancy applies to high schools as well as colleges, the strongest protection detailed in the OCR letter, the prohibition on withdrawing athletic scholarships, will have no application to high school sports because high school athletes do not receive athletic scholarships. In general, the problems facing pregnant athletes at the high school level are less amenable to Title IX solutions. The biggest problem pregnant high school athletes face is the same one that pregnant high school students face more broadly: staying in school. Most girls who become pregnant while attending elementary or secondary school drop out of school altogether.¹⁶⁷

¹⁶⁷ See PILLOW, *supra* note 67, at 123 (2004) (50 percent of girls who become pregnant while attending school will drop out); Brittany Ducker, *Chalk Talk: Overcoming the*

Pregnant high school students face tremendous challenges securing needed services and accommodations at their home schools and retaining access to the educational programs and offerings available to them before they became pregnant.¹⁶⁸ Title IX has largely failed to solve this set of problems.

On paper, the Title IX regulation grants pregnant students the right to stay in their regular school programs, with a concomitant right to a reasonably necessary medical leave without penalty.¹⁶⁹ If a separate school or educational program for pregnant or parenting students is available, it must be offered on a completely voluntary basis and must be comparable in its academic offerings.¹⁷⁰ Pregnant students who choose to remain in their home schools must be provided with the same accommodations available to other students with medical needs, such as bathroom breaks, use of an elevator, and opportunities to complete make-up assignments for medical absences.¹⁷¹

However, the realities of pregnant students' experiences in school are often far removed from these promises. No case law addresses the rights and remedies of pregnant students and young mothers with respect to their treatment in school, except a few cases challenging their exclusion from national honors societies, which had mixed success.¹⁷² Given the paucity of legal challenges brought by pregnant and parenting students to their treatment in school, the realization of rights in this area depends primarily on school officials' knowledge and interpretation of Title IX requirements, which often leave much to be desired.¹⁷³

Separate programming for pregnant and parenting students, where it exists, is neither completely voluntary nor academically comparable.¹⁷⁴ Although written policies no longer require pregnant girls to leave their regular school programs and attend separate schools for pregnant girls and young mothers, informally school counselors, teachers, and principals continue to channel pregnant girls into such programs.¹⁷⁵ Before New York City re-

Hurdles: Title IX and Equal Educational Attainment for Pregnant and Parenting Students, 36 J.L. & EDUC. 445, 445 (2007) ("After giving birth, a teenager has a 59 percent chance of subsequently dropping out of school.").

¹⁶⁸ PILLOW, *supra* note 67, at 123–35.

¹⁶⁹ 34 C.F.R. § 106.40(b)(3), (5) (2007).

¹⁷⁰ 34 C.F.R. § 106.40(b)(3) (2007).

¹⁷¹ Pillow, *supra* note 67, at 90–92.

¹⁷² See *Cazares v. Barber*, 959 F.2d 753 (9th Cir. 1992); *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3d Cir. 1990); *Wort v. Vierling*, 778 F.2d 1233 (7th Cir. 1985); *Chipman v. Grant County Sch. Dist.*, 30 F. Supp. 2d 975 (E.D. Ky. 1998).

¹⁷³ Amber Hausenfluck, Comment, *A Pregnant Teenager's Right to Education in Texas*, 9 SCHOLAR 151, 183 (2006) (describing a roundtable discussion with three counselors at an alternative school in Austin, Texas, in which the counselors admitted that they were unaware of Title IX's requirements with respect to pregnant students).

¹⁷⁴ See PILLOW, *supra* note 67, at 88–92, 129–35 (discussing problems of both voluntariness and comparability of separate educational programs for pregnant and mothering students).

¹⁷⁵ Hausenfluck, *supra* note 173, at 169–73 (describing instances of school officials in Texas pressuring pregnant girls to leave mainstream schools); Tamara S. Ling, Note, *Lifting Voices: Towards Equal Education for Pregnant and Parenting Students in New York City*, 29 FORDHAM URB. L.J. 2387, 2405–07 (2002).

cently decided to close its “P-Schools” for pregnant students,¹⁷⁶ a survey of pregnant and parenting youth in the New York City foster care system found that twenty-two percent stated that they were “forced” to change schools due to their pregnancies.¹⁷⁷ Even if school administrators permit pregnant students to remain in mainstream schools, their refusal to modify policies or requirements to meet the needs of pregnant students may leave those students with little option but to transfer to a separate school.¹⁷⁸ The provision of specially tailored educational and social services within separate “pregnancy” schools has effectively let mainstream schools off the hook, facilitating their failure to tailor programs, policies or services to this group of students.¹⁷⁹ Where separate educational programs do exist, although they may be preferable to dropping out of school entirely, they lack the full range of academic offerings provided in mainstream schools, are less rigorous in the programs they do offer, and offer virtually no extracurricular activities unless focused on some aspect of pregnancy or parenting.¹⁸⁰

For those pregnant students who overcome these obstacles and manage to stay in their home schools, Title IX promises the right to continue participating in sports, including a reasonably necessary medical leave and the right to return to the same status they had before the leave began.¹⁸¹ It is doubtful, however, that Title IX will live up to this promise. Pregnant high school students, even more so than college students, are unlikely to be aware of their rights or to be able to marshal the resources of trusted adults to help enforce them. Without an existing athletic scholarship immediately at stake, a pregnant athlete may have trouble convincing herself or others around her that staying active in her sport is a priority.

Gaps in schooling due to pregnancy are likely to make continued sports participation even more difficult. The documentary film, “The Heart of the Game,” tells the story of Darnelia Russell, an African American high school student whose hopes of winning a college basketball scholarship and being

¹⁷⁶ Julie Bosman, *Schools for Pregnant Girls, Relic of 1960s New York, Will Close*, N.Y. TIMES, May 24, 2007, at A1.

¹⁷⁷ Ling, *supra* note 175, at 2389. See also Hausenfluck, *supra* note 173, at 183 (describing a study in which interns pretending to be pregnant teens called school officials and were refused enrollment in mainstream schools).

¹⁷⁸ Hausenfluck, *supra* note 173, at 174–75 (describing Texas schools’ refusals to make accommodations for pregnant students that are routinely made for other disabled or medically impaired students); Ling, *supra* note 175, at 2408–09 (describing the refusal of mainstream New York City public schools to make accommodations for pregnant students, including by sending homework home for missed absences due to pregnancy or to provide any services or assistance to pregnant students).

¹⁷⁹ Hausenfluck, *supra* note 173, at 172; Ling, *supra* note 175, at 2390.

¹⁸⁰ Hausenfluck, *supra* note 173, at 176–78 (describing lack of extracurricular programs and weak academic offerings in separate schools, and the difficulties students face in seeking to participate in programs in their mainstream schools that are not offered in the separate school); Ling, *supra* note 175, at 2404 (noting that the only extracurricular activity in one New York City pregnancy school was a “Mommy and Me” program in which mothers play with their children).

¹⁸¹ See *supra* notes 75, 79, 86–91 and accompanying text.

the first person in her family to attend college were thwarted when she became pregnant and decided to carry her pregnancy to term.¹⁸² The film illustrates the difficulties that high school female athletes confront in attempting to resume an athletic career that is interrupted by pregnancy and childbirth. Although Russell's coach and teammates were extremely supportive of her decision to play in this instance, the state high school athletic association refused her request for an extension of her athletic eligibility under the association's "hardship" waiver.¹⁸³ Apparently, the association viewed Russell's pregnancy as a result of her "choice" rather than as a hardship outside of her control.¹⁸⁴ Although Russell prevailed in a legal challenge to the association's ruling, the controversy did not generate a reported decision and the association ultimately dropped its appeal.¹⁸⁵ There is no legal precedent on Title IX's application to the refusal of a high school athletic association to extend an athlete's eligibility due to pregnancy. Few athletes are likely to have the support of their coach and teammates necessary to sustain such a legal challenge. Russell was ultimately able to complete her high school athletic career with great success, but the many college recruitment overtures she received before becoming pregnant never materialized into a college scholarship once her pregnancy and childbirth became public.¹⁸⁶ The film dramatically shows how even a highly accomplished high school athlete with extraordinary support from her coach and team can have her athletic career irreparably sidelined by pregnancy and childbirth. It is hard to imagine how stronger Title IX enforcement could have made a difference in this athlete's trajectory, or that of high school athletes more generally.

E. Turning Rights into Reality: The Need for Greater Awareness

The ability of pregnant athletes to realize Title IX's promised protection from discrimination will depend on these students' knowledge of their rights and their willingness to assert them. College students who confront an unplanned pregnancy are likely to be in crisis and overwhelmed with the decisions and responsibilities facing them. A young woman who finds herself in such a situation may well withdraw from many persons in her life, including her coach and teammates. If a pregnant athlete simply stops going to practice and quits the team instead of requesting a medical leave that would enable her to stay on the team and keep her scholarship, Title IX is unlikely to help her if she later changes her mind. Under NCAA rules, a school may

¹⁸² THE HEART OF THE GAME (Miramax Home Entertainment 2006).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Craig Smith, "The Heart of the Game" is a Winning Documentary; Roosevelt Girls' Basketball Takes Film World by Storm, THE SEATTLE TIMES, May 9, 2006, available at <http://archives.seattletimes.nwsourc.com/cgi-bin/texis.cgi/web/vortex/display?slug=smitty09&date=20060509>.

¹⁸⁶ THE HEART OF THE GAME, *supra* note 182.

revoke an athlete's scholarship if the student voluntarily quits the team.¹⁸⁷ Since this rule applies to all athletes who voluntarily withdraw from their team for any reason, there is likely to be no legal recourse against a school that invokes this rule to withdraw the scholarship of a pregnant athlete who voluntarily quits the team, even if her pregnancy was the primary reason for quitting.¹⁸⁸ Neither Title IX's accommodation mandate nor its comparative equal treatment requirement would provide any relief in this situation. Since pregnant athletes may not know of their rights under Title IX, they may be likely to quietly withdraw, unaware that doing so will forfeit their right to stay on the team and retain their athletic scholarship.¹⁸⁹ The shame and embarrassment many women continue to experience over an unplanned pregnancy may make such outcomes more likely than the vigorous assertion of Title IX rights. Translating OCR's forceful statement of rights will require, at a minimum, a concerted campaign to educate female athletes about their rights in the event of pregnancy. Without such an effort, this forceful statement of rights will remain unrealized.

V. CONCLUSION

For too long, colleges and universities have treated being an athlete and being pregnant as incompatible identities. But as more women join the ranks of athletes, pregnancy among athletes will become less and less unusual. The past year's events have cast important light on the sex equality issues raised when a college athlete becomes pregnant. After a blitz of media attention generated by an ESPN report on pregnant athletes and the discrimination they have faced from their colleges and universities, both the Office for Civil Rights and the NCAA took swift corrective measures. The OCR letter sent to colleges and universities in June 2007 takes a strongly rights-protective stance, interpreting Title IX to bar colleges from withdrawing athletic scholarships because of an athlete's pregnancy and requiring

¹⁸⁷ Nat'l. Coll. Athletic Ass'n, 2007–2008 NCAA Operating Bylaws, Art. 15 § 3.4.1(d), NCAA Division 1 Manual, available at http://grfx.cstv.com/photos/schools/stan/genrel/auto_pdf/2007-08_d1_manual.pdf (providing that an athlete's financial aid may be reduced or canceled if the athlete "voluntarily withdraws from a sport at any time for personal reasons").

¹⁸⁸ See Rainey, *supra* note 11, at A41.

¹⁸⁹ See, e.g., Schonbrun, *A Delicate Line*, *supra* note 6 (reporting results of survey of female athletes at Syracuse University finding that most were unaware of their university's recently adopted policy on pregnant athletes and did not know of their right to keep their athletic scholarships if they became pregnant); Staff Editorial, *SU Athletes Must Know Pregnancy Policy*, DAILY ORANGE, Oct. 2, 2007, available at <http://media.www.dailyorange.com/media/storage/paper522/news/2007/10/02/Opinion/Su.Athletes.Must.Know.Pregnancy.Policy-3004882.shtml> (urging Syracuse University to take additional steps to make female athletes aware of their rights in connection with pregnancy). Cf. PILLOW, *supra* note 67, at 62 ("I have found that few education students and personnel, as well as the teen mothers I have interviewed, know that under Title IX pregnant and mothering students have the right to equal educational opportunity.").

them to treat pregnant athletes on par with athletes with other medical conditions.

This Article has argued that Title IX's approach to pregnancy represents an unusually effective model for a sex discrimination law. By combining an equal treatment approach that requires pregnancy to be treated like other medical conditions with an accommodation mandate that entitles pregnant students to a reasonably necessary medical leave while keeping their athletic scholarships, Title IX plays both sides of the equal treatment/special treatment debate. Although no single approach can escape the "dilemma of difference," as much feminist theory demonstrates, Title IX's pragmatic approach generates a dialogue between the two models in which each mitigates the dangers of the other.¹⁹⁰ While the accommodation of pregnancy risks stigmatizing a pregnant athlete as a "special needs" case and a drain on the team, the comparative approach reveals the extent to which sports programs accommodate other human needs, serving to normalize pregnancy and reduce the stigma of specially accommodating it. But the comparative approach alone fails to account for the extent to which pregnancy is not like other medical conditions in its social, relational and even physical dimensions. By supplementing the comparative approach with an accommodation requirement for pregnancy, Title IX is better able to account for the ways in which pregnancy uniquely affects women's lives. While far from perfect, Title IX's blend of equal treatment and special treatment approaches to pregnancy discrimination avoids the worst pitfalls of either model in isolation, while providing meaningful protection from discrimination to athletes who become pregnant.

In many respects, the past year's attention to the issues facing pregnant athletes, culminating in the strong interpretation of Title IX adopted by OCR, mark an important step forward in the progress toward gender equality in sports. In only a few months' time, the high-profile report exposing discrimination against pregnant athletes mobilized sufficient public support for pregnant athletes to overcome the inertia and neglect that has long left this issue on the sidelines of gender equity discussions. The responses from the OCR and the NCAA extending protection to this group of student-athletes are in large measure a reflection of Title IX's success in raising the cultural esteem for female athletes. Because of this success, pregnant athletes escaped the stigmatizing discourses that typically vilify young, unwed financially insecure women who become pregnant. Instead of portraying these student-athletes as a group of morally deficient, overly fertile young women at risk of long-term financial dependence, public reaction was highly sympathetic and urged stronger protection of the athletes' rights.

There is a less optimistic subplot to this success story too. The discourses that stigmatize young, unwed motherhood typically draw upon

¹⁹⁰ See *supra* notes 103–111 (discussing the dilemma of difference as it applies to pregnancy and Title IX's response).

thinly veiled racially coded ideologies that reserve the greatest stigma for poor, young, unmarried women of color. Understanding the success of Title IX also requires attention to how issues of race affect perceptions of pregnant athletes.¹⁹¹ Women of color have not benefited as much as white women from the growth of new college sports opportunities in the post-Title IX era, although they surely have shared many of the benefits of improvements in the treatment of and esteem for female athletes. Title IX, as a single-axis law that addresses sex equality in isolation from racial justice, has not targeted white privilege in sports, and white women are disproportionately represented among female intercollegiate athletes.¹⁹² Although female athletes, pregnant or not, include women from many racial and ethnic backgrounds, pregnant athletes as a group were not linked in the public mindset with women of color the way young, pregnant women often are when they are perceived as undeserving. The success in mobilizing support for extending Title IX protections to pregnant athletes may have something to do with the ability of female college athletes to escape racially coded messages that stigmatize some mothers more than others. In this subplot, white privilege and racial injustice share some of the explanatory force behind the public support for stronger Title IX enforcement, and not just progressive social change in the form of enhanced public support for female athletes.

In assessing the recent gains for pregnant athletes and the broader cause of gender equality in sports, this Article sounds several notes of caution. First, the rights of pregnant athletes are imposed on a highly competitive, commercialized model of sports in which athletes' well-being often falls by the wayside. In this model, a pregnant athlete may feel like a burden to her coach and her team. Making room for pregnancy within sport ultimately requires a deeper look at how athletic programs serve the human needs of students – a much larger agenda, though one fully consistent with the broader interests of Title IX. Second, the focus on accommodating pregnant athletes in sport leaves male procreative responsibility out of the picture, subtly reinforcing an athletic culture that assumes male athletes have no responsibility, and face no conflict in their sports careers, as a result of fathering children. Title IX has yet to make serious inroads into the privilege that accompanies male athletic status. And finally, it is not clear that the gains

¹⁹¹ Cf. Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991).

The way I try to understand the interconnection of all forms of subordination is through a method I call 'ask the other question.' When I see something that looks racist, I ask, 'Where is the patriarchy in this?' When I see something that looks sexist, I ask, 'Where is the heterosexism in this?' When I see something that looks homophobic, I ask, 'Where are the class interests in this?' Working in coalition forces us to look for both the obvious and non-obvious relationships of domination, helping us to realize that no form of subordination ever stands alone.

¹⁹² See WARE, *supra* note 55, at 136, 137 (noting that women of color are 24 percent of the female students enrolled at NCAA institutions, but only 14.8 percent of the female students who play intercollegiate athletics at those institutions).

for pregnant college athletes in the strengthened commitment to Title IX enforcement will have any real-world effects for pregnant high school athletes. Their particular challenges have been largely resilient to Title IX's approach, with many pregnant high school students failing to receive the support they need to stay in school, much less in sports. Title IX's failure to secure meaningful equal educational opportunity for pregnant high school students suggests little reason for optimism that the newfound commitment to the rights of pregnant athletes will translate to the world of high school sports.

In sum, pregnancy has long been neglected as a sex equality issue in sports. Pregnant athletes' recent victories with OCR and the NCAA, and in the court of public opinion, are significant for their impact on the lives of athletes who become pregnant, and for the broader issues they raise about Title IX's legacy in securing meaningful equality for women in sports.