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## Discrimination Inward and Upward: Lessons on Law and Social Inequality from the Troubling Case of Women Coaches

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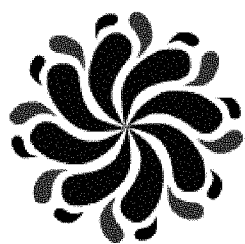
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**Discrimination Inward and Upward:  
Lessons on Law and Social Inequality  
from the Troubling Case of Women Coaches**

Deborah L. Brake\*

The main narrative of Title IX, the 1972 federal law banning sex discrimination in federally funded education programs, including school athletic programs, is one of success in an era when civil rights laws are more often the source of disillusionment than celebration.<sup>1</sup> Title IX may be the most celebrated civil rights statute in America; every major anniversary of the law prompts symposia, news headlines, and “white papers” lauding the statute’s accomplishments.<sup>2</sup> It even has its own clothing company.<sup>3</sup>

The success story line focuses on the law’s effectiveness in expanding athletic opportunities for girls and women.<sup>4</sup> An oft-repeated statistic illustrates just

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1. 20 U.S.C. §§ 1681–88 (2006). For an extended argument highlighting Title IX’s successes in comparison with other sex discrimination laws, see DEBORAH L. BRAKE, *GETTING IN THE GAME: TITLE IX AND THE WOMEN’S SPORTS REVOLUTION* (2010).

2. See, e.g., Nat’l Coal. for Girls and Women in Educ., *Title IX at 40: Working to Ensure Gender Equity in Education* (2012), <http://www.ncwge.org/TitleIX40/TitleIX-print.pdf>.

3. TITLE NINE, <http://www.titlenine.com> (Dec. 15, 2013) (selling women’s clothing, undergarments, shoes, and accessories).

4. Although Title IX covers much more than sports—it bans all forms of discrimination on the basis of sex throughout federally funded education programs—it has received the most attention for its impact on athletics. See LINDA JEAN CARPENTER & R. VIVIAN ACOSTA, *TITLE IX 65* (2004) (“The application of Title IX to athletics has commanded more intense judicial, legislative, and executive branch attention than any other endeavor under its jurisdiction.”); *id.* at 84 (“The most publicized effect of Title IX relates to interscholastic and intercollegiate athletic programs.”). For a broad look at the impact of Title IX on areas outside of athletics, see Nat’l Coal. for Girls and Women in Educ., *supra* note 2.

how much Title IX has changed the culture of girlhood in the United States: the number of girls playing high school varsity sports has gone from the sub-token level of one in twenty-seven in 1971 to nearly one in two today.<sup>5</sup> In a parallel and equally impressive development, the number of intercollegiate female athletes has gone from 16,000 in 1970 to about 200,000 in 2012.<sup>6</sup> The health, social, economic, and cultural implications of this surge in female sports participation are now well documented.<sup>7</sup> Female athletes comprise over 40% of all high school and college athletes.<sup>8</sup> Along with these increases in female sports participation have come enormous, albeit incomplete, gains in the level of benefits and support for female athletes. With these gains in tangible resources, including athletic scholarships, have come enhanced prestige and cultural clout.<sup>9</sup> It is now nearly impossible to watch coverage of the Olympics without hearing glowing references to Title IX from commentators lauding the success of U.S. women athletes, especially in team sports.<sup>10</sup>

However, submerged in this success story is a dissonant subplot. Women coaches have not fared so well in the post-Title IX era. Their story is well known among women's sports advocates and Title IX experts, but garners less attention in popular accounts of Title IX's legacy. As jobs coaching women's sports became more desirable, as a result of increased team funding and a rise in coaching salaries, men started applying for—and getting—jobs coaching girls' and women's sports. Thus, women's share of coaching opportunities in women's sports has dwindled at the same time that women athletes have achieved unparalleled success.

One piece of the situation facing women coaches—and the focal point of this Article—involves a type of bias that does not so neatly or easily register as discrimination, at least not as discrimination law traditionally defines it. Yet, it deserves a closer look, precisely because of its uncomfortable fit and because of what it teaches about the relationship between law and social inequality. The dirty

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5. See BRAKE, *supra* note 1, at 67.

6. R. Vivian Acosta & Linda Jean Carpenter, *Women in Intercollegiate Sport: A Longitudinal, National Study, Thirty-Five Year Update 1977–2012*, at 1 (2012) (unpublished manuscript), <http://acostacarpenter.org/AcostaCarpenter2012.pdf>.

7. See BRAKE, *supra* note 1, at 5–6, for a summary of these benefits.

8. NCAA, *Student-Athlete Participation*, NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 1981–82–2011–12, at 5 (Oct. 2012), <http://www.ncaapublications.com/productdownloads/PR2013.pdf> (male share of NCAA participation at 56.8%); Nat'l Fed'n of State High Sch. Ass'ns, *2011–12 High School Athletics Participation Survey 2* (2012), <http://www.nfhs.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=7496&libID=7517> (based on number of female, male, and total participants for 2011–12, 41.69% of participants were female).

9. See Nat'l Women's Law Ctr., *The Next Generation of Title IX: Athletics* (June 2012), [http://www.nwlc.org/sites/default/files/pdfs/nwlcathletics\\_titleixfactsheet.pdf](http://www.nwlc.org/sites/default/files/pdfs/nwlcathletics_titleixfactsheet.pdf).

10. See BRAKE, *supra* note 1, at 1–2.

little secret of women's sports is that many female athletes, who are the products of a wildly successful feminist law, actually prefer to be coached by men.

Studies of women in coaching find a modest, but robust preference among female athletes for having a male coach.<sup>11</sup> Not all female athletes feel this way, and the experience of actually having a woman as a coach can change this preference. Although as a generalization, the preference stubbornly asserts itself in surveys of female athletes. This is one of several, and likely not the most significant, barriers to women entering and staying in the coaching profession. However, it is a significant problem in its own right, posing an obstacle to women getting hired and proving themselves as coaches if they do. It also presents some difficulties and possibilities for thinking about how to work within discrimination law to address bias against women in leadership positions and in masculine institutions such as athletics.

This Article examines female athletes' preferences for male coaches as a case study for thinking about the relationship between discrimination law and gender bias. The case of female athlete-to-coach bias is counter-paradigmatic to discrimination law on multiple levels. As a manifestation of within-group bias, it runs counter to the usual pattern of an in-group directing bias against an out-group, which is the typical situation that the law recognizes as discrimination. Furthermore, as this bias runs from subordinates upward to superiors, it defies the law's presumption of discrimination as a top-down phenomenon. It also sheds light on the complicated relationship between discrimination law and women's agency, and exposes the law's oversimplification of intersectional and multi-directional bias. This Article explores this example of within-group, bottom-up bias for what it says about the limits of discrimination law and how bias operates within institutions. It argues that bringing to the forefront discrimination law's troubling cases can teach important lessons about the promise and limits of using law to address social inequality.

While sport and coaching are distinctive in certain respects, the phenomenon of same-gender bias against female superiors is, unfortunately, an all too common problem facing women in leadership. Understanding and addressing within-group, contra-power bias is important not just for securing equal opportunities for women coaches, but for opening pathways for women in leadership more generally.

Part I examines the barriers confronting women in coaching, honing in on the relationship between women coaches and female athletes. It looks to social science literature on sport and gender, and social psychology research on women in leadership more generally, to better understand this form of bias and the influences that shape it.

Part II explores the numerous ways in which this example is contrary to the paradigm of discrimination as recognized in anti-discrimination law. The key features discussed are the form that the bias takes, its uncomfortable fit with a

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11. See *infra* text accompanying notes 63–67.

liberal understanding of women's agency, and its intersectional and interdimensional nature. Together, these features explain why woman-to-woman, athlete-to-coach bias presents a challenge to the dominant paradigm of discrimination law.

Part III offers some thoughts about what this example can teach us about social inequality and its relationship to anti-discrimination law. The Article concludes by urging greater attention to counter paradigms, both for critiquing the limits of existing law and for setting a broader agenda beyond legal remedies, for gender justice projects.

#### I. WOMEN COACHES: TROUBLE FOR TITLE IX'S SUCCESS STORY

By now it is a familiar lament among women's sports aficionados that women's share of coaching opportunities has dwindled to a near all-time low in the post-Title IX era. But the full dimensions of this aspect of Title IX's legacy are rarely examined. This Part tells that story, starting with the numerical decline of women in coaching, then surveying the general barriers blocking women's access to coaching jobs, and finally examining female athletes' relationship to women coaches as an important, though often neglected, part of this story.

##### A. *By the Numbers*

Prior to Title IX, well over 90% of coaches in women's intercollegiate athletics were women.<sup>12</sup> However, the percentage of intercollegiate coaches who are women has declined to 42.9% today, and has hovered in the low fortieth percentiles throughout the past decade.<sup>13</sup> This trend does not appear to be tapering off anytime soon. Since 1999, men have been hired in nearly 75% of the job openings in coaching women's intercollegiate sports.<sup>14</sup>

High school numbers are harder to come by since there is no equivalent to the National Collegiate Athletic Association (NCAA) when it comes to national data collection, but the situation for women coaches at the high school level appears to be no better—it may even be worse. In Nebraska, for example, where girls' high school basketball is particularly popular, girls' varsity teams had a woman head coach less than 20% of the time.<sup>15</sup> Additionally, in Minnesota from 2007 to 2008,

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12. Acosta & Carpenter, *supra* note 6, at 17; see also Susan Welch & Lee Sigelman, *Who's Calling the Shots? Women Coaches in Division I Women's Sports*, 88 Soc. Sci. Q. 1415, 1418 n.3 (2007) (explaining the methodology behind the 90% figure and reporting that their "spot check" of that figure found an even higher ratio of nineteen women out of twenty coaches of women's sports in 1972).

13. See Acosta & Carpenter *supra* note 6, at A, 17–18.

14. Welch & Sigelman, *supra* note 12, at 1419.

15. BRAKE, *supra* note 1, at 202.

women made up 17.3% of the head coaches in interscholastic sports (boys and girls combined), and only 15.1% of the coaches in private youth soccer club teams.<sup>16</sup>

Women have not made up for these lost opportunities in the men's game—the share of women coaching men has held steady in the post-Title IX years, hovering between 2-3.5%.<sup>17</sup> Even this low figure is somewhat misleading, since almost all of these jobs are in individual sports where men and women practice under the same coach, such as tennis, track, and swimming.<sup>18</sup> This shuts women out of the highest paying coaching jobs, since coaching salaries in men's athletics average about twice what coaches make in women's sports.<sup>19</sup> The virtual exclusion of women coaches from men's sports likely has a negative effect on women's access to jobs coaching women too, as men have more opportunities to gain coaching experience in both men's and women's sports, and therefore more opportunities to progress up the ranks from an assistant to a head coach.

For both male and female intercollegiate head coaching jobs, women hold just one in every five positions.<sup>20</sup> This steep decline and its persistence are all the more remarkable in light of the ten-fold expansion occurring after Title IX in the numbers of women playing sports, since female athletes *should* form a greatly expanded pool of candidates for coaching jobs.<sup>21</sup> The decline in women's share of coaching jobs also stands out because it runs counter to the trend of women's increasing, albeit slowly, share of leadership positions in other professions over the same time period.<sup>22</sup> Meanwhile, women are working as assistant coaches at substantially higher levels than as head coaches, and their share of assistant coaching positions has not followed the same trajectory of decline.<sup>23</sup> Furthermore, while male athletes express higher levels of intention to become intercollegiate athletics coaches, female athletes express greater interest than men in coaching at the youth and recreational level.<sup>24</sup> Together, these findings suggest that the explanation for the declining percentage of women coaches is not as simple as a lack of interest in

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16. Nicole M. LaVoi, *Occupational Sex Segregation in a Youth Soccer Organization: Females in Positions of Power*, 18 *WOMEN IN SPORT & PHYSICAL ACTIVITY J.* 25, 27, 30 (2009).

17. Acosta & Carpenter, *supra* note 6, at 17.

18. *Id.*

19. Deborah L. Rhode & Christopher J. Walker, *Gender Equity in College Athletics: Women Coaches as a Case Study*, 4 *STAN. J. C.R. & C.L.* 1, 15 (2008).

20. See Kelli Moran-Miller & Lisa Y. Flores, *Where are the Women in Women's Sports? Predictors of Female Athletes' Interest in a Coaching Career*, 82 *RES. Q. FOR EXERCISE & SPORT* 109, 109 (2011).

21. Robert Drago, Lynn Hennighausen, Jacqueline Rogers, Teresa Vescio & Kai Dawn Stauffer, *Final Report for CAGE: The Coaching and Gender Equity Project 3* (Aug. 19, 2005), [www.epi.soe.vt.edu/perspectives/policy\\_news/docs/CAGE.doc](http://www.epi.soe.vt.edu/perspectives/policy_news/docs/CAGE.doc).

22. See Welch & Sigelman, *supra* note 12, at 1415.

23. See Rhode & Walker, *supra* note 19, at 12.

24. Cindra Kamphoff & Diane Gill, *Collegiate Athletes' Perceptions of the Coaching Profession*, 3 *INT'L J. SPORTS SCI. & COACHING* 55, 63 (2008).



coaching per se.

As bad as the picture is when looking at coaching opportunities by gender alone, it is even worse for women of color. Although it is hard to get a clear picture, as the numbers are not always broken down by race and gender, women of color have a disproportionately low share of coaching jobs. In women's college basketball, for example, where African American women comprise 51.5% of the athletes in the game, African American women make up only 11.4% of the coaches.<sup>25</sup> African American men and women together hold just 7.2% of the head coaching jobs for NCAA Division I women's teams, and that number plummets to 4.8% and 3.9% respectively in Divisions II and III.<sup>26</sup> Latinos and Asians fare even worse with just 2.9% and 1.3% respectively of the head coaching jobs in all of women's intercollegiate athletics.<sup>27</sup> White women make up over 90% of the women working full time as intercollegiate coaches.<sup>28</sup> This figure is even more disproportionate for women coaches than it is for men coaches in intercollegiate coaching jobs.<sup>29</sup>

While the numbers themselves tell an important part of the story, a growing body of interdisciplinary research on sport and gender paints a more vivid picture. The next Part turns to that literature.

### *B. Surveying the Barriers Confronting Women in Coaching*

Before examining the bias from female athletes against female coaches, it is important to understand the institutional context facing women in coaching. It is not simply a matter of an intentional decision to avoid hiring women. Sport is an institution that is deeply gendered, and numerous institutional biases compound the difficulties facing women entering the coaching profession.

Research on women in coaching identifies many barriers to equal opportunity, including closed hiring networks, the absence of well-developed standards and qualifications for coaching, a lack of mentoring, anti-lesbian bias and homophobia, and work demands that are incompatible with a balanced life. In addition to the specific ways that the hiring process and the nature of the job favor men, the culture of sport and of coaching are deeply masculinized. Both sport and

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25. Nicole M. LaVoi & Julia K. Dutove, *Barriers and Supports for Female Coaches: An Ecological Model*, 1 *SPORTS COACHING REV.* 17, 18 (2012) (citing Richard Lapchick, Brian Hoff & Christopher Kaiser, *The 2010 Racial and Gender Report Card: College Sport*, INST. FOR DIVERSITY & ETHICS IN SPORT 5–6 (2011), [www.tidesport.org/rgrc/2010/2010\\_college\\_rgrc\\_final.pdf](http://www.tidesport.org/rgrc/2010/2010_college_rgrc_final.pdf)).

26. *Id.* at 17–18.

27. *Id.* at 18.

28. Drago et al., *supra* note 21, at 5.

29. *Id.* at 43 (“Whites are more prevalent among women as compared to men in coaching . . . .”); *id.* at 50 (noting, for comparison, that white men make up 84% of the men holding full-time coaching jobs in intercollegiate sports).

leadership are culturally coded as male, which makes coaching a particularly tough field for women to infiltrate.<sup>30</sup>

One important factor affecting women's opportunities in coaching is the gender structure of sport leadership. The leadership in athletics is overwhelmingly male. Men dominate the ranks of athletic director—especially at the most competitive Division I level where only 8% of the athletic directors are women.<sup>31</sup> Male athletic directors are more likely to hire male coaches, not necessarily out of any conscious intention, but likely due to the informal networks that play a significant role in hiring decisions.<sup>32</sup> In Division III, male athletic directors hire 4.2% fewer women than men as coaches, while in Division I male athletic directors hire 9% fewer women than men as coaches.<sup>33</sup> Conversely, women athletic directors are more likely than male athletic directors to hire women coaches, but very few women make it to the director level.<sup>34</sup> Women are also more likely to be hired if there is at least one highly placed woman in the athletics administration.<sup>35</sup> These figures show that the more male dominated the athletics leadership is, the less likely it is that women will be hired as coaches.

Women's opportunities in coaching also vary by the level of competition and the gender typing of particular sports. In general, women's representation in coaching declines as the ages of athletes rise and/or the level of competition increases.<sup>36</sup> Women's coaching opportunities increase farther down the athletics food chain, and especially in non-elite sports. The proportion of women coaches is highest for athletes in the younger years, in non-scholastic, youth sports, and—at all levels—in sports that are characterized as traditionally feminine.<sup>37</sup> For example, women have a particularly high representation as coaches in sports such as synchronized swimming, gymnastics, figure skating, field hockey, and volleyball—all sports that are traditionally gender typed as “appropriate” for girls.<sup>38</sup> When women do coach, they are significantly more likely than male coaches to coach part time instead of full time.<sup>39</sup> The fact women do better in “softer” coaching

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30. See Leanne Norman, *Bearing the Burden of Doubt: Female Coaches' Experiences of Gender Relations*, 81 RES. Q. FOR EXERCISE & SPORT 506 (2010).

31. Welch & Sigelman, *supra* note 12, at 1424.

32. Norman, *supra* note 30, at 508.

33. Drago et al., *supra* note 21, at 13.

34. See Welch & Sigelman, *supra* note 12, at 1421 (citing research attributing the low numbers of women high school coaches to the absence of women athletic directors).

35. LaVoi & Dutove, *supra* note 25, at 26.

36. LaVoi, *supra* note 16, at 31–33.

37. *Id.* at 27, 31–33.

38. See *id.* at 27; LaVoi & Dutove, *supra* note 25, at 28; see also Rhode & Walker, *supra* note 19, at 13 (giving representation of women head coaches in field hockey by percentage).

39. Drago et al., *supra* note 21, at 40 (noting that around one-third of the men in NCAA coaching and scouting jobs are employed part-time or part-year, but that more than half of the

jobs training younger, less accomplished athletes in traditionally feminine sports, reveals important connections between the gender typing of jobs and women's opportunities in coaching.

The masculine gender typing of both athletics and coaching likely influences how men and women see themselves in these jobs. Sport literature has documented a gender difference in coaches' self-perceptions and their willingness to apply for coaching jobs. Elite-level female coaches with extensive experience are reluctant to apply for coaching jobs unless they possess all of the posted requirements for accreditation and experience, whereas male coaches are much more likely to apply even without possessing such posted requirements as they believe they can make up for a lack of objective credentials with extra ability and charisma.<sup>40</sup> Relatedly, female assistant coaches with the same level of experience are less likely to express an intention to become a head coach compared to male assistant coaches.<sup>41</sup> This intention gap begins even earlier—among college athletes, women are less likely to express an intention to enter intercollegiate coaching.<sup>42</sup>

While this gender gap in intention and application might be pegged as an example of women not “leaning in,”<sup>43</sup> women internalizing the problem in themselves deflects attention from the built-in headwinds women face that are outside their control. The terrain of coaching is not an equal playing field. Between coaches with similar experience and credentials, female coaches are more likely to feel undervalued and underpaid.<sup>44</sup>

Moreover, other evidence suggests that women's own reluctance to enter the coaching profession is not the main reason for their underrepresentation. For example, female athletes are more likely to express plans to go into recreational and youth coaching than male athletes, which suggests that the gap is not for lack of interest or aptitude in coaching itself.<sup>45</sup> While “choice” is sometimes heralded as the reason for the gender gap in coaching—usually in combination with work, family, and life balance considerations—the research on this point does not support this explanation. One important study found, contrary to suggestions that women's choices regarding work and family balance explain their underrepresentation in coaching, that there were no gender differences in how time and family obligations

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women in coaching are in half-time or part-year positions).

40. LaVoi & Dutove, *supra* note 25, at 23 (citing Jeff Greenhill, Chris Auld, Graham Cuskelly & Sue Hooper, *The Impact of Organisational Factors on Career Pathways for Female Coaches*, 12 *SPORT MGMT. REV.* 229 (2009)).

41. *Id.* at 24 (citing Michael Sagas & George B. Cunningham, *Work and Family Conflict Among College Assistant Coaches*, 6 *INT'L J. SPORT MGMT.* 183 (2005)).

42. *See id.* at 23–24.

43. *See* SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* 10 (2013) (noting that male coaches are more likely to apply even when they do not have the required credentials, and using this as an example of women's failure to assert themselves).

44. *See id.*

45. *See* Kamphoff & Gill, *supra* note 24, at 63.

affected college athletes' coaching plans.<sup>46</sup>

Female coaches at all levels of sport believe that athletic administrators perceive female coaches to be less competent than male coaches and that they are more reluctant to hire women.<sup>47</sup> Sport and gender literature validates this perception.<sup>48</sup> There appears to be a systemic undervaluing of women coaches' skills. One study found that female basketball coaches with greater athletic experience were passed over for male coaches with no collegiate playing experience; the women also had more coaching experience and greater educational achievement.<sup>49</sup> Studies such as this support sport sociologist Michael Messner's conclusion that the informal structures of sport exclude women as coaches and render them outsiders in the male-dominated, masculine world of sport.<sup>50</sup>

Specific aspects of the hiring process, particularly the subjectivity of coaching qualifications and the discretionary nature of the hiring decision, open the door to gender bias and make personal connections unduly important.<sup>51</sup> The recruiting process is often informal and highly dependent on personal connections.<sup>52</sup> The "old boys' clubs" are alive and well in sport and are particularly influential in allocating coaching opportunities.<sup>53</sup> Unlike many fields, most coaching jobs lack objective qualifications or professional certification.<sup>54</sup> Sought after skills and qualifications, such as leadership ability, are subjective and informal. Notably, the one major Division I women's sport that has done better for women coaches in

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46. *Id.* at 70; see also C. Bonnie Everhart & Packianathan Chelladurai, *Gender Differences in Preferences for Coaching as an Occupation: The Role of Self-Efficacy, Valence, and Perceived Barriers*, 69 RES. Q. FOR EXERCISE & SPORT 188, 196 (1998) (discussing the findings of a study of male and female intercollegiate athletes' interests in a coaching career, which refuted the "choice" explanation for the low levels of women in coaching).

47. LaVoi & Dutove, *supra* note 25, at 27.

48. See, e.g., *id.* (citations omitted).

49. See George B. Cunningham & Michael Sagas, *The Differential Effects of Human Capital for Male and Female Division I Basketball Coaches*, 73 RES. Q. FOR EXERCISE & SPORT 489, 492–93 (2002).

50. See MICHAEL A. MESSNER, *IT'S ALL FOR THE KIDS: GENDER, FAMILIES, AND YOUTH SPORTS* (2009); see also Michael A. Messner & Suzel Bozada-Deas, *Separating the Men from the Moms: The Making of Adult Gender Segregation in Youth Sports*, 23 GEND. & SOC. 49 (2009).

51. See, e.g., Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474, 474 (2005) (discussing research findings that ambiguity in hiring criteria primes decision makers for stereotyping, which enables them to pick the criteria that selects the preferred candidate and creates a veneer of neutrality that masks bias).

52. Norman, *supra* note 30, at 508; Leanne Norman, *Gendered Homophobia in Sport and Coaching: Understanding the Everyday Experiences of Lesbian Coaches*, 47 INT'L REV. FOR SOC. SPORT 705, 717–18 (2011).

53. LaVoi & Dutove, *supra* note 25, at 25 ("[T]he existence and strength of Old Boys' Clubs was [sic] one of the most frequently cited barriers by female coaches.").

54. See Drago et al., *supra* note 21, at 13–14.

recent years is soccer—the only sport that sets formal licensing requirements for its coaches.<sup>55</sup> The vagaries of the hiring process, loosely defined job qualifications, and informality of hiring networks tend to work in favor of men seeking coaching jobs.<sup>56</sup>

When women do get hired, they have higher rates of attrition from the coaching profession. The women who leave often cite the gender hierarchy of intercollegiate athletics and the lower levels of support for women's programs.<sup>57</sup> Here too, women of color face compounded hurdles that challenge their staying power in the profession.<sup>58</sup> Black female assistant coaches, for example, are more often saddled with lower status and tedious responsibilities, such as being the designated recruiter instead of being given more strategic, higher-status responsibilities that lead to upward mobility.<sup>59</sup>

The work culture for women also takes a toll. Women coaches have to navigate “a complex double bind” in presenting themselves to the team and the outside world.<sup>60</sup> The qualities of effective coaching, and sport itself, are tightly associated with masculinity, and yet culturally, women are still penalized for transgressing gender stereotypes. As two sport scholars put it, women coaches “are left to negotiate conformance to feminine norms while simultaneously demonstrating competence by exhibiting male/masculine behaviors that society upholds as coaching effectiveness.”<sup>61</sup> Not surprisingly then, the “female apologetic” in which athletic women engage in feminized performances to minimize their vulnerability to being masculinized through sport plays out among women coaches too.<sup>62</sup> One of the more visible manifestations of this is the image of the female basketball coach

55. *Id.* at 14, 64 n.24 (noting that of the nine major women's sports in Division I, only soccer, which licenses its coaches through the U.S. Soccer Federation, had an increase in women's share of coaching jobs from 1977–2004).

56. *See id.* at 4–5, 12–14.

57. Cindra S. Kamphoff, *Bargaining with Patriarchy*, 81 RES. Q. FOR EXERCISE & SPORT 360, 365–66 (2010).

58. *See generally* PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA (Gabriella Gutierrez y Muhs, Yolanda Flores Niemann, Carmen G. Gonzalez & Angela P. Harris eds., 2012) (discussing the barriers facing women of color in securing, retaining, and succeeding in leadership positions in higher education).

59. *See* John F. Borland & Jennifer E. Bruening, *Navigating Barriers: A Qualitative Examination of the Under-Representation of Black Females as Head Coaches in Collegiate Basketball*, 13 SPORT MGMT. REV. 407, 409 (2010).

60. LaVoi & Dutove, *supra* note 25, at 28.

61. *Id.*

62. *See* 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, 121 (1996) (discussing the “female apologetic” as a tactic whereby athletic women “overcompensate for their so-called masculine behavior such as sweating and being physically strong and powerful”); Norman, *supra* note 30, at 513 (discussing female coaches' performance of a female apologetic).

running up and down the court in high heels.

Depressing as all of this may be, none of it treads new ground; the barriers to women coaches are well traveled in sport and gender literature. However, there is one piece of the situation facing women coaches that has not received much attention—one that I have always found to be especially troubling. Buried within the gendered structures of sport that set high hurdles for women coaches is a subtle, but stubborn resistance to women coaches from women athletes themselves. The next Part takes up this issue.

*C. A Missing Piece of the Puzzle: Female Athletes' Preferences for Male Coaches*

The above discussion reveals numerous reasons for the drop off in women coaches. In this complex stew of institutional bias, one additional problem confronting women coaches has received less attention. Among the reasons cited by women for not going into coaching or for leaving the profession are: difficult and negative interactions with athletes, including a lack of equal respect for female coaches; and widely known preference for male coaches, especially at the elite varsity levels of sport.<sup>63</sup> A variety of sources confirm the existence of such a preference, although the evidence is somewhat mixed regarding the commonality of the preference. In a recent NCAA survey, 52% of the female student athletes surveyed expressed a preference for having a man as their coach.<sup>64</sup> Similarly, a report for the Coaching and Gender Equity Project (CAGE) — which is funded by the NCAA, the National Association of Collegiate Women Athletics Administrators, and the Commission for Women and Athletics of Pennsylvania State University—found in its focus groups of athletes “a high level of discriminatory or stereotypical attitudes among female athletes, most of whom favored male over female coaches.”<sup>65</sup> Also, in studies of athletes, both male and female athletes express a belief that male coaches are more competent and superior to female coaches.<sup>66</sup> This perception survives despite the absence of any evidence whatsoever that women coaches are actually less qualified

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63. LaVoi & Dutove, *supra* note 25, at 25 (“Negative interactions with athletes was also given as a barrier, which included a lack of respect for female coaches and an open preference for male coaches.”).

64. NCAA, *Perceived Barriers: Gender Equity in College Coaching and Administration*, 2008 PERCEIVED BARRIERS REPORT 7 (Jan. 2009), [www.ncaapublications.com/productdownloads/BAR09.pdf](http://www.ncaapublications.com/productdownloads/BAR09.pdf). The next largest share expressed no preference, followed by a smaller number expressing a preference for a woman coach. *See id.* at 7–8. Only 23% expressed a preference by race. *Id.* at 8.

65. Drago et al., *supra* note 21, at 4.

66. Andrew Manley, Iain Greenlees, Richard Thelwell & Matthew Smith, *Athletes' Use of Reputation and Gender Information when Forming Initial Expectancies of Coaches*, 5 INT'L J. SPORTS SCI. & COACHING 517, 527 (2010).

or competent than male coaches; in fact, most evidence suggests quite the opposite.<sup>67</sup>

Female athletes' preference for a male coach is disconcerting, and yet, on reflection, unsurprising given the gender dynamics of sport. As discussed above, sport is a deeply "gendered institution."<sup>68</sup> Leadership is also strongly gender typed as masculine. Leadership in sport is integrally bound up with a traditional, patriarchal masculinity. Antonio Gramsci's theory of hegemony famously explains how gender relations are perpetuated not so much by the raw exercise of power as by the "consent of the led," procured through ideology.<sup>69</sup> As sport scholar Leanne Norman explains, "The ideology of men being 'better' coaches is manipulated into common sense consciousness, and so even women perceive reality through this thinking."<sup>70</sup> Common narratives portraying men as naturally superior athletes and the rightful leaders of sport contribute to internalized understandings of men as superior coaches, even among female athletes.<sup>71</sup> The low percentage of women in coaching is not just a product of this ideology, but a sustaining force—the absence of women in sport leadership bolsters the associations between coaching and masculinity, showcasing men as the purveyors of excellence in coaching.<sup>72</sup>

The gendering of sport as an institution is central to understanding why women athletes might openly prefer to have a man as their coach. Coaching itself is gender typed as a masculine job. When women take on the role of athletic coach, they step into a role conflict in which the masculine qualities of a coach clash with the gender expectations for women. Women are then penalized for exhibiting behaviors that are identified as masculine. For example, studies find that female athletes object more to being yelled at by a female coach than by a male coach.<sup>73</sup> Some women

67. See, e.g., Willie Burden, Trey Burdette, Drew Zwald, Daniel R. Czech & Tom Buckley, *Evidence That Support Equality: Credential Characteristics of Georgia Female High School Coaches*, 13 *SPORT J.* (2010), <http://www.thesportjournal.org/article/evidence-support-equality-credential-characteristics-georgia-female-high-school-coaches>; Cunningham & Sagas, *supra* note 49; Rhode & Walker, *supra* note 19, at 14, 20–21; cf. Alice H. Eagly, *Female Leadership Advantage and Disadvantage: Resolving the Contradictions*, 31 *PSYCHOL. WOMEN Q.* 1 (2007) (discussing research showing that more people prefer male bosses, notwithstanding the fact that women more often than men have effective leadership styles).

68. See Welch & Sigelman, *supra* note 12, at 1421.

69. See Norman, *supra* note 30, at 507, 509 (applying this theory to better understand gender relations in athletics coaching).

70. *Id.* at 509.

71. See LaVoi & Dutove, *supra* note 25, at 28.

72. See Norman, *supra* note 30, at 716 (explaining that the "invisibility of women in coaching" sustains the ideology of men as superior coaches and negatively affects female coaches' relationship to athletes, as well as citing research finding that "some athletes were uncomfortable or reluctant to be coached by a woman").

73. See, e.g., Daniel Frankl & Donald G. Babbitt III, *Gender Bias: A Study of High School Track & Field Athletes' Perceptions of Hypothetical Male and Female Head Coaches*, 21 *J. SPORT BEHAV.* 396, 406 (1998) (finding in a study of high school track and field athletes that

coaches who sense this compensate by delegating to a male assistant coach the task of delivering bad news or meting out punishments, as a man performing these tasks is more likely to get a better reception than a woman.<sup>74</sup> Male coaches, in contrast, are presumed to be competent and are instantly “more successful in commanding the respect of players by the inherent power of their authority as men.”<sup>75</sup>

Female athletes fighting for respect in the masculine world of sport may also seek out whatever gains in status might accrue from having a male coach, given the associations between masculinity and athletic excellence.<sup>76</sup> As one person interviewed for the CAGE Report explained, “So it’s the viewpoint of . . . [who] do you think [is] more valuable? The women’s head coach or a male coach on a lower level. And right now . . . they think that the male is more valuable coming into our side.”<sup>77</sup> A student athlete quoted in the CAGE Report summed it up even more succinctly by saying, “[T]here’s just something more credible about male coaches.”<sup>78</sup> The ubiquity of male coaches solidifies these connections between masculinity and athletic excellence, which supports the perception that men are superior coaches. Women, by contrast, have to overcome a presumption of doubt when they step into the role of coach, and need to work extra hard to earn athletes’ respect and a perception of competence.<sup>79</sup>

It is not just gender bias acting alone that supports the preference for men. Homophobia against women in sport greatly contributes to the bias against female coaches.<sup>80</sup> Sport and gender scholars use the term “gendered homophobia” for the

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female athletes reacted more negatively to being yelled at or corrected by a female coach than a male coach); *see also* Drago et al., *supra* note 21, at 23 (citing comments to that effect).

74. Robin Wilson, *Where Have All the Women Gone? Even as the Number of Female Players Soars, College Coaching Is Increasingly a Male Domain*, CHRON. HIGHER EDUC. (D.C.), May 4, 2007, at A40.

75. Drago et al., *supra* note 21, at 29.

76. The converse of the masculine prestige that comes from having a male leader also appears to be true—literature on women in leadership suggests that women leaders may gain prestige by supervising men instead of women. For example, some research suggests that female and minority managers gain a credibility boost from supervising male and white workers. *See, e.g.,* C. Elizabeth Hirsh & Sabino Kornrich, *The Context of Discrimination: Workplace Conditions, Institutional Environments, and Sex and Race Discrimination Charges*, 113 AM. J. SOC. 1394, 1419, 1423 (2008) (finding that “the positive effect of female and minority management on reasonable-cause findings [by the EEOC] is strongest in workplaces where females manage male workers and minorities manage white workers,” and suggesting as a possible explanation for this that female and minority managers who complain of discrimination are viewed as more competent and credible if they manage higher-status employees).

77. Drago et al., *supra* note 21, at 22.

78. *Id.* at 31.

79. *See* Norman, *supra* note 30, at 510–13.

80. *Cf.* LaVoi & Dutove, *supra* note 25, at 29 (“Unsurprisingly, female coaches often cite the homophobic climate of sport as the strongest deterrent for entering or remaining in the profession.”).



distinctively anti-lesbian homophobia that hurts women of any sexual orientation who seek leadership positions in sport.<sup>81</sup> Sport is often cited as one of the most hostile institutions toward lesbians and women suspected of being lesbian.<sup>82</sup> Straight women also feel the effects of anti-lesbian bias in sport.<sup>83</sup> The easiest way to bulletproof a team against charges of lesbianism or a lesbian image is to hire a male coach. Scholar and activist Pat Griffin attributes female athletes' preferences for male coaches to "a lethal mix" of sexism and homophobia.<sup>84</sup>

This gendered homophobia in women's sport drives parents, athletes, and administrators to prefer male coaches in order to dispel a stigma of lesbianism from women's sport, especially in more "masculine" team sports.<sup>85</sup> Teams with an unmarried (to a man) female coach are vulnerable to the widespread practice known as "negative recruiting"—whereby the coach of a competing program uses code words like "family values" to distinguish their program from others that might be coached by a lesbian—a phenomenon that reinforces preferences for male coaches.<sup>86</sup> Having a male coach can manage the "image problem" of female sports by deflecting implicit associations with lesbianism. Women cite the homophobic climate in sport as one of the strongest reasons for leaving or not entering the coaching profession.<sup>87</sup>

While the preference for a male coach now stubbornly persists in surveys of athletes, it has been a relatively new development that has taken hold from the time when women's sports became increasingly popular and more strongly integrated into university athletic programs. As recently as the mid-1980s, some studies found no preference by female athletes for a coach of either gender.<sup>88</sup> The preference for a male coach became entrenched in sport literature during the 1990s, as men solidified their majority in the ranks of coaching jobs.<sup>89</sup> Since then, this preference

81. Norman, *supra* note 30, at 705.

82. *Id.* at 706. Estimates put the percentage of women coaches who are lesbian as high as 6%. Drago et al., *supra* note 21, at 5.

83. See Kamphoff, *supra* note 57, at 361 ("all female coaches, particularly if they are single, are at risk of being stereotyped as a lesbian"); LaVoi & Dutove, *supra* note 25, at 29 ("homophobia affects all females regardless of sexual identity").

84. PAT GRIFFIN, *STRONG WOMEN, DEEP CLOSETS: LESBIANS AND HOMOPHOBIA IN SPORT* 84 (1998).

85. Norman, *supra* note 30, at 706–07 (discussing the preference for male coaches as a symptom and expression of homophobia in women's sports).

86. See Amy Sandler, *Perceptions of "Others": The Role of Heterosexism in the Decline of College Women Coaches* (Dec. 2007) (unpublished Ph.D. dissertation, University of Nevada, Las Vegas) (on file with author) (reviewing literature on negative recruiting, reporting results of interviews with coaches confirming the existence of the practice, and detailing how it contributes to the decline of women in coaching jobs).

87. LaVoi & Dutove, *supra* note 25, at 29; Norman, *supra* note 30, at 708.

88. LaVoi & Dutove, *supra* note 25, at 25.

89. See *id.* at 25.

has appeared in numerous studies of athlete preferences.<sup>90</sup> It is especially discernible among female athletes in team sports—more so than in individual sports.<sup>91</sup>

While the preference remains resilient, it is not impervious to athletes' experiences. Female athletes, who have been coached by a woman, do not express the same preference for a male coach as compared to female athletes overall.<sup>92</sup> By contrast, having never had a female coach or only having had a female coach once in an athletic career, heightens the preference for a male coach.<sup>93</sup> The gender preference for a coach can also be neutralized by sharing information about the positive reputation of a specific female coach.<sup>94</sup>

Despite the preference for a male coach, there are significant benefits to women athletes who have a woman as a coach, including an increased likelihood that female athletes will go into coaching themselves.<sup>95</sup> The low levels of women in prestigious coaching positions have negative spillover effects on women as athletes, which deprives them of strong female role models in sport, devalues women's athletic abilities, and fuels gender stereotypes that limit women's athletic opportunities.<sup>96</sup> As sport sociologist Leanne Norman explains, "Associating coaching with masculinity is a hugely powerful barrier to accepting women in sport, both as leaders and athletes."<sup>97</sup>

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90. See, e.g., Melinda Frey, Daniel R. Czech, Rebecca G. Kent & Matthew Johnson, *An Exploration of Female Athletes' Experiences and Perceptions of Male and Female Coaches*, 9 SPORT J. (2006), <http://thesportjournal.org/article/exploration-female-athletes-experiences-and-perceptions-male-and-female-coaches> (finding nine out of twelve participating NCAA female athletes expressed a preference for male coaches); Denise M. Haselwood, A. Barry Joyner, Kevin L. Burke, Chris B. Geyerman, Daniel R. Czech, Barry A. Munkasy & A. Drew Zwald, *Female Athletes' Perceptions of Head Coaches' Communication Competence*, 28 J. SPORT BEHAV. 216 (2005) (discussing a preference for male coaches as "better communicators"); Manley et al., *supra* note 66, at 517.

91. See Frankl & Babbitt, *supra* note 73, at 405.

92. See Stephanie Habif, Judy L. Van Raalte & Allen Cornelius, *Athletes' Attitudes Toward and Preferences for Male and Female Coaches*, 10 WOMEN IN SPORT & PHYSICAL ACTIVITY J. 73 (2001) ("It appears that one of the important factors in reducing gender bias among collegiate athletes may be having the opportunity to play for both male and female coaches."); see also June E. LeDrew & Corinne Zimmerman, *Moving Towards an Acceptance of Females in Coaching*, 51 PHYSICAL EDUCATOR 6 (1994) (finding that female athletes in the study expressed a preference for a male coach, but noting that most did not have experience with a female coach).

93. Drago et al., *supra* note 21, at 31.

94. See Manley et al., *supra* note 66, at 517.

95. LaVoi, *supra* note 16, at 28; LaVoi & Dutove, *supra* note 25, at 24 ("Although many female athletes professed to prefer male coaches, having a female coach increased the likelihood that such athletes would consider coaching as a subsequent viable career option."); Moran-Miller & Flores, *supra* note 20, at 110; see also Everhart & Chelladurai, *supra* note 46, at 193–95 (illustrating that female athletes coached by a woman were more likely to express an interest in coaching themselves).

96. LaVoi, *supra* note 16, at 27–28; Rhode & Walker, *supra* note 19, at 14.

97. Norman, *supra* note 30, at 512.

While the impact of the preference for male coaches on women's coaching opportunities cannot be quantified, it certainly does not help women gain a stronger foothold in the coaching profession. Some people, including a former athletic director, admit that lack of support from female athletes is among the reasons for not hiring a woman coach.<sup>98</sup> Biased expectations about women as coaches can also affect the coach's ability to do the job once hired, and athletes' expectations about their coaches can affect the coach-athlete relationship in ways central to the coach's success.<sup>99</sup> Literature on women in leadership supports this relationship between gender bias and success as perceptions of women as inferior managers and bosses result in a lower level of effectiveness in managing subordinates.<sup>100</sup> This kind of effect on performance is particularly a concern for women coaches—perhaps more so than for women in other leadership positions—since coaches need to recruit the best athletes they can in recruiting for their program, which is directly tied to their success as coaches.<sup>101</sup> As one person interviewed for the CAGE Report put it, “[R]ecruiting [by a female coach is an issue]. Your recruits see a male winning the national title. That has a lot to do with their mindset: ‘Oh, I’m going to go play for a male because they can get it done.’”<sup>102</sup>

The bias against women coaches is a specific iteration of a more general bias against women in leadership positions. Literature from the fields of social psychology and sociology demonstrates gender bias in the resistance to women leaders emanating from their subordinates.<sup>103</sup> Social psychology research posits a theory of role incongruity to explain this bias, where the qualities associated with leadership clash with the qualities associated with femininity.<sup>104</sup> Consistent with this

98. Wilson, *supra* note 74; see also Welch & Sigelman, *supra* note 12, at 1422 (“some have suggested that women athletes themselves prefer to be coached by men and that this preference in turn influences athletic administrators”).

99. Manley et al., *supra* note 66, at 517–18.

100. See Alice H. Eagly, *Achieving Relational Authenticity in Leadership: Does Gender Matter?*, 16 LEADERSHIP Q. 459 (2005); Margaret Madden, *Four Gender Stereotypes of Leaders: Do They Influence Leadership in Higher Education?*, 9 WAGADU 55, 57 (2011); Jeanine L. Prime, Nancy M. Carter & Theresa M. Welbourne, *Women “Take Care,” Men “Take Charge”*: *Managers’ Stereotypic Perceptions of Women and Men Leaders*, 12 PSYCHOLOGIST-MANAGER J. 25 (2009); Kristyn A. Scott & Douglas J. Brown, *Female First, Leader Second? Gender Bias in the Encoding of Leadership Behavior*, 101 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 230, 238–39 (2006).

101. Drago et al., *supra* note 21, at 4, 22–24 (discussing recruiting disadvantages faced by women coaches due to athletes’ preference for a male coach).

102. *Id.* at 22–23 (alteration in original).

103. See Diane M. Martin, *Humor in Middle Management: Women Negotiating the Paradoxes of Organizational Life*, 32 J. APPLIED COMM. RES. 147, 148 (2004) (discussing bias favoring men in management).

104. See, e.g., Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573, 573–76 (2002); Stefanie K. Johnson, Susan Elaine Murphy, Selamawit Zewdie & Rebecca J. Reichard, *The Strong, Sensitive Type: Effects*

theory, polling data shows a plurality of workers express a preference for a male boss over a female boss.<sup>105</sup>

There is an added dimension of woman-to-woman bias here as well. Women are some of the toughest critics of the women seeking leadership roles. Although at one time surveys found higher preferences among men for male bosses, more recent polls find the preference for male bosses to be greater among women than men.<sup>106</sup> A number of studies support this data, finding that women have as much or even greater bias than men do against female leaders.<sup>107</sup> Women may react even more negatively than men to role incongruity by a female boss. One study found that women expressed greater disapproval than men of self-promoting behaviors by women leaders.<sup>108</sup> As an indication of the difficulty women face in rising to leadership positions in women-dominated environments, social scientists studying gender in leadership coined the metaphor of a “glass escalator” to describe the phenomenon of men rising to leadership positions in female-dominated industries

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*of Gender Stereotypes and Leadership Prototypes on the Evaluation of Male and Female Leaders*, 106 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 39, 55–56 (2008). The role incongruity may even cause the hiring criteria to shift when women do meet masculine-typed hiring criteria, which reflects a backlash against women for departing from feminine roles. See Julie E. Phelan, Corinne A. Moss-Racusin & Laurie A. Rudman, *Competent Yet Out in the Cold: Shifting Criteria for Hiring Reflect Backlash Toward Agentic Women*, 32 PSYCHOL. WOMEN Q. 406 (2008).

105. David J. Maume, *Meet the New Boss . . . Same as the Old Boss? Female Supervisors and Subordinate Career Prospects*, 40 SOC. SCI. RES. 287, 289 (2011); see Madden, *supra* note 99, at 58–59.

106. Eagly & Karau, *supra* note 104, at 579.

107. See Kim M. Elsesser & Janet Lever, *Does Gender Bias Against Female Leaders Persist? Quantitative and Qualitative Data from a Large-Scale Survey*, 64 HUM. REL. 1555, 1567–68, 1571–72 (2011) (reporting findings from a study showing a larger percentage of women than men preferred to work for male managers); Rocio Garcia-Retamero & Esther López-Zafra, *Prejudice Against Women in Male-Congential Environments: Perceptions of Gender Role Congruity in Leadership*, 55 SEX ROLES 51, 59 (2006) (reporting findings from a study showing that female subjects showed more prejudice against female leaders than men). The preference may not be wholly irrational; some research finds that under some conditions, men actually benefit more than women from having a female boss. See Maume, *supra* note 105, at 293 (reporting findings that “men who report to female supervisors get significantly more career support, in contrast to the insignificant female supervisor effect among women[.] . . . suggesting that female supervisors pay more attention to male than female subordinates as a way of conforming to organizational expectations in order to advance men’s career prospects”).

108. Eagly & Karau, *supra* note 104, at 584; see also Madeline E. Heilman, Aaron S. Wallen, Daniella Fuchs & Melinda M. Tamkins, *Penalties for Success: Reactions to Women Who Succeed at Male Gender-Typed Tasks*, 89 J. APPLIED PSYCHOL. 416, 426 (2004) (discussing findings of studies showing that female subjects reacted just as negatively as men to female leaders); Prime et al., *supra* note 100, at 44 (discussing research findings that both men and women viewed sex as a predictor of leadership effectiveness, but that women did so more than men).

and organizations.<sup>109</sup>

On the other hand, the preference for men in leadership is not impervious to actual experience; positive experiences with actual female bosses may help counteract prejudices favoring a male boss.<sup>110</sup> However, even when women overcome bias in hiring and manage to succeed as leaders, they often pay a social penalty that may have consequences for their continued success and upward mobility—when women hold masculine-typed jobs, they are disliked for performing competently, and this dislike can interfere with their future success.<sup>111</sup>

The phenomenon of leadership preferences for men, even by other women, reflects a more complex form of bias than discrimination law typically addresses. The bias involved here is not as simple as individuals favoring members of their own social group or acting with animus against another group.<sup>112</sup> The remainder of this Article examines the ways in which this iteration of gender bias upsets several presumptions of discrimination law with the potential to spur productive thinking about law and its relationship to social inequality.

## II. FEMALE ATHLETE-TO-COACH BIAS AS A COUNTER-PARADIGM

Although widely known by those who dwell in the world of women's athletics, the preference for male coaches is rarely part of the conversation about women's unequal opportunities in coaching. Part of the reason for the silence is that it presents a form of gender bias that does not neatly map onto the legal framework for gender discrimination. It is counter on several dimensions to the paradigm of gender discrimination that the law recognizes.

### A. *Within-Group, Bottom-Up Bias*

The dominant frame for thinking about discrimination presumes that bias emanates top-down and from in-group to out-group. The glass ceiling metaphor captures both of these dimensions. The image conjured is usually of a barrier to women's advancement set by men at the top. The case of athlete-coach bias disrupts this paradigm on both scores—it is within-group and flows from the bottom-up.

Discrimination law is designed around the dominant frame. Changing either of these presumptions presents complications. For example, despite research

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109. Eagly, *supra* note 100, at 463.

110. See Elsesser & Lever, *supra* note 107, at 1573–75.

111. See Heilman et al., *supra* note 108 (discussing their findings supporting these conclusions).

112. Cf. Eagly, *supra* note 100, at 463 (“[S]ocial identity theorists assume that members of groups seek to represent their own prototypical characteristics in their leaders. However, group members seek leaders who are prototypical, not necessarily of themselves, but of their shared ideas about the attributes of good leaders.”).

demonstrating that members of subordinated groups hold stereotypical and biased views of their own social group, discrimination law presumes that discrimination is an inter-group phenomenon.<sup>113</sup> This presumption is so strong that Justice Scalia used it to argue against a doctrine that could lead to an inference of discrimination in cases alleging intra-group bias. Writing for the majority in *St. Mary's Honor Center v. Hicks*, Justice Scalia rejected a rule requiring an inference of discrimination from the plaintiff's proof of pretext.<sup>114</sup> He cited the absurdity of finding race discrimination based on the falsity of the employer's explanation in a case where there was a disproportionately high number of minorities in the workplace and the decision maker was of the same minority race as the plaintiff.<sup>115</sup> The unmistakable implication of his argument is that bias is not likely to occur between members of the same protected class. Although the U.S. Supreme Court has been careful not to turn this presumption into a general rule barring liability,<sup>116</sup> lower courts have openly expressed reluctance to infer discrimination between members of the same protected class.<sup>117</sup> Representative of the typical thinking discounting within-group discrimination, one law review article by a federal magistrate judge on the topic of jury instructions in employment discrimination cases matter-of-factly noted that "[a] defendant may argue that an inference of no discrimination should be drawn from the fact that the decisionmaker [sic] is the same race or sex as the plaintiff."<sup>118</sup>

Although there is not an absolute bar to recovery in such cases, allegations of intra-group bias will likely be met with skepticism, both from jurors and from judges. In an insightful law review article discussing the social psychology literature on people's resistance to making attributions of discrimination, Katie Eyer explains that the unequal treatment of a minority group member by another member of that same group is especially unlikely to be attributed to discrimination.<sup>119</sup> When

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113. See Madden, *supra* note 100, at 59 (discussing "internalized oppression" and within-group bias). For an extreme example of intra-group oppression, see Charlene Smith, Nan Palmer & Ramon Guillen, Jr., *Women Enslaving Women*, 21 S. CAL. REV. L. & SOC. JUST. 319 (2012). See also Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2522–23 (1994) (criticizing reluctance in Title VII law to recognize discrimination involving members of the same social group, and discussing the courts' difficulty with same-sex harassment cases as an example of this resistance).

114. 509 U.S. 502 (1993).

115. *Id.* at 513–14.

116. See *Castaneda v. Partida*, 430 U.S. 482, 499 (1977) ("[I]t would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.").

117. See, e.g., *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1471 (11th Cir. 1991); *Taylor v. Proctor & Gamble Dover Wipes*, 184 F. Supp. 2d 402, 413 (D. Del. 2002).

118. Gerrilyn G. Brill, *Instructing the Jury in an Employment Discrimination Case*, 1998 FED. CTS. L. REV. § 4.27 (1998).

119. Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1314–15 (2012).

confronted with such counter-paradigmatic examples of “discrimination,” beliefs in the existence of a meritocratic society are likely to override any perception of bias.<sup>120</sup>

Bottom-up bias is also counter-paradigmatic to discrimination law. For example, in Title VII cases, courts equate causation on the basis of a protected class status with the possession of a discriminatory motive by some higher-up decision maker. The central question in a typical disparate treatment case is whether the decision maker (necessarily a superior to the plaintiff) who took the adverse action acted with a discriminatory intent. Courts’ struggles with the so-called “cat’s paw” cases epitomize the difficulty of retrofitting the law to capture bias from below.<sup>121</sup> One of the thorniest issues in recent Title VII case law is what standard of liability applies when the biased actor is in a subordinate role to the ultimate decision maker—not even a subordinate role to the plaintiff, but just subordinate to the ultimate decision maker. In order to fit such cases to the liability framework of Title VII, courts have required proof that the ultimate decision maker acted under the influence of, or as “the cat’s paw” of, the biased underling.<sup>122</sup>

Even then, one prerequisite to the theory of liability recently endorsed by the U.S. Supreme Court for such cases is that the agent with the discriminatory motive was a supervisor, albeit a lower-level supervisor than the ultimate decision maker.<sup>123</sup> The Court expressed no opinion as to whether this path to liability would work if it were merely a coworker of the plaintiff who held the requisite discriminatory intent.<sup>124</sup> Given the Court’s hesitation about how these rules apply to bias from coworkers, it seems unlikely that bias from the plaintiff’s supervisees would result in employer liability under this framework—at least not unless the bias is consciously tolerated or endorsed by a higher-up agent of the employer.

Under Title VII, actionable discrimination must be traced to an agent of the employer.<sup>125</sup> As the Court’s harassment cases show, vicarious liability—employer

120. *Id.* at 1317–18.

121. See Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431 (2012), for an illuminating discussion of the “cat’s paw” conundrum.

122. *Id.*

123. See *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1194 (2011) (interpreting the Uniformed Services Employment and Reemployment Rights Act).

124. *Id.* at 1194 n.4 (“We express no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision.”). The Court’s statement appears to assume no higher-up knowledge or ratification of the coworker’s discriminatory act. Such knowledge, and an accompanying failure to take corrective action to remediate the discriminatory actions of coworkers, is the prevailing theory of employer liability for coworker harassment, which should apply to harassment by subordinates as well.

125. See 42 U.S.C. § 2000e-2(a) (2006). The statute makes it unlawful for an employer to engage in an unlawful employment action, and defines “employer” to include “any agent” of the employer. *Id.* § 2000e(b).

liability that is based on the discriminatory acts of an agent of the employer—requires such an agent to have formal, supervisory authority over the plaintiff.<sup>126</sup> Absent such a relationship with a discriminatory actor, establishing employer liability requires a direct theory of wrongdoing by the employer. However, other than in the limited realm of harassment cases involving harassment by coworkers and other non-supervisors, the courts have not embraced negligence-type theories of employer liability.<sup>127</sup> And even when plaintiffs do allege negligent responses to harassment by the employer, they have a particularly difficult time prevailing when the alleged harasser is a subordinate who is supervised by the plaintiff.<sup>128</sup> Thus, the liability rules of Title VII are strongly tied to agency principles based on formal lines of authority, with a discriminatory actor/agent of the employer subjecting a subordinate to a discriminatory employment action.

Formal authority, however, is not the only kind of power within an organization, nor the only conduit for discrimination. Literature in organizational dynamics distinguishes “authority,” which emanates from the formal channels and relationships established by the employer, from “power,” which is more diffuse and is not necessarily tied to the formal lines of authority.<sup>129</sup> Some employees with low authority may be very powerful in the organization due to their influence over others, personal characteristics, expertise, value to the organization, or other variables.<sup>130</sup> Women with formal authority in the workplace may be undermined by bias from lower-level supervisees with informal power.<sup>131</sup> But discrimination law

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126. See, e.g., *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).

127. See, e.g., David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993) (arguing for an expansion of discrimination law to encompass negligence as a theory of employer wrongdoing); Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69 (2011) (critiquing the courts’ reliance on frameworks in deciding discrimination cases, and arguing that the rigid adherence to these frameworks has excluded consideration of negligent discrimination as a theory of employer liability). *But cf.* Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1959–60 (2009) (arguing against broader, negligence-based theories of liability for their potential to deepen, rather than eradicate, people’s implicit biases).

128. See Ann Carey Juliano, *Harassing Women with Power: The Case for Including Contra-Power Harassment Within Title VII*, 87 B.U. L. REV. 491, 519–23 (2007) (discussing the ways courts have found to rule against harassment plaintiffs in “contra-power” harassment cases involving harassment by subordinates).

129. See Susan D. Carle, *Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Environment Sexual Harassment Cases*, 13 DUKE J. GENDER L. & POL’Y 85, 104–06 (2006) (discussing this literature).

130. *Id.* at 105.

131. See, e.g., Juliano, *supra* note 128, at 497–503, 523–60 (using literature on power within organizations to argue for judicial acceptance of “contra-power” harassment cases,



rarely captures such inverse-authority cases, since its lens is trained on a higher-up authority figure that acts with discriminatory intent against the plaintiff.

The case of female athlete-coach bias breaks from the paradigm of discrimination law on both of these fronts: it involves bias by women against women, and it is directed from subordinates to a superior. This bias doubly defies the law's presumptions about how discrimination operates within institutions.

### *B. Troubling Women's Agency*

Female athlete-to-coach bias raises another troubling issue for discrimination law that is unsettling to the dominant model. This issue concerns how to approach women's agency, which is often framed in terms of choice, in relation to discrimination law. Typically, discrimination law takes a liberal account of women's agency—it accepts women's choices as authentic and takes a skeptical approach to constraints on those choices. An example of a paradigmatic case is the equal protection challenge to the exclusion of women from the Virginia Military Institute (VMI). In supporting the women who wanted to go to VMI, sex discrimination law functioned as a tool for challenging discriminatory obstacles that interfere with women's choices.<sup>132</sup> Similarly, employment discrimination law targets discrimination against women seeking entrance to nontraditional jobs without questioning their choices. The opposite is also true—employment discrimination law takes an uncritical approach to women's expressed choices *not* to do masculine-typed work.<sup>133</sup> The prevailing approach of discrimination law, as wielded to vindicate women's rights, is to register women's choices as autonomous and worthy of support, with law standing by as a vehicle to vindicate those choices if blocked by discriminatory barriers.

To be clear, I do not mean to suggest that the discriminatory preference for male coaches should itself be conceptualized as a form of women's agency. Interfering with another's chosen path for a discriminatory reason is not the same thing as setting the course for one's own life path. Discrimination law has long rejected the discriminatory preferences of clients and customers as justification for unlawful discrimination.<sup>134</sup> Rather, my objective here is to use the athlete-coach preference as an example that highlights the need to examine how institutional bias

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where the plaintiff is harassed by lower-level workers, while acknowledging that courts lack experience with such cases).

132. See *United States v. Virginia*, 518 U.S. 515 (1996).

133. See, e.g., *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990) (critiquing that case and others like it).

134. See, e.g., *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276–77 (9th Cir. 1981); *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971).

and gender dynamics shape and constrain choice.

The case of the female athlete-to-coach bias forces us to grapple with the complexity of women's agency by looking at it from an unusual angle. To call on discrimination law to intervene here—and to speak of female athlete-to-coach bias as a form of illegitimate, discriminatory bias—exposes female athletes' preferences as biased, inauthentic, and likely a product of a gendered institution. It brings to the surface a question regarding the dilemma of law's relationship to women's agency: when should law effectuate women's choices and when should it debunk them as false consciousness or internalized oppression? As with most starkly framed questions, it depends. Feminist legal theory must continue to do the work of fleshing out the relevant contingencies and the theories for sorting through them.<sup>135</sup>

For feminist legal strategists, choice is a double-edged sword. Both the advocates and detractors of sex equality claims find themselves on alternative sides of the blade. Liberal feminist strategies mostly use the law to validate and support women's choices. When sex discrimination law is invoked to effectuate women's expressed choices, it is usually the advocates on the other side who question women's choices: do they or should they really want to serve in combat, go to VMI, play a contact sport, have an abortion, or get the break-neck job at the top of the corporate ladder? For example, law professor Jill Hasday has detailed a rich history of the use of "mutual benefits" arguments by opponents of equality initiatives to question whether women and people of color *really* know what is good for them.<sup>136</sup> Such arguments posit that the true best interests of the members of these groups are not in line with the position of feminist or minority interest groups. The "regret thesis" in opposition to abortion rights (the argument that women will later regret having an abortion with ensuing psychological harm) and the "stigma" objection to affirmative action are recent examples of these kinds of arguments.<sup>137</sup>

However, the appeal to women's preferences can work in the other direction as well. At times, "listening to what women want" is a strategy deployed to derail sex equality projects. Women's choice to scale back career plans and opt for greater life-work balance is cited in opposition to efforts to identify and challenge the gender pay gap, the glass ceiling, and the maternal wall.<sup>138</sup> Women's participation in the pro-life movement, for instance, is used to undercut sex equality arguments

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135. See Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657 (1997), for a theoretically rich article exploring the tensions in feminist legal theory and in constitutional theory surrounding women's agency.

136. Jill Elaine Hasday, *Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality*, 84 N.Y.U. L. REV. 1464 (2009).

137. *Id.* at 1478, 1491.

138. See, e.g., Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2374–75 (1994) (discussing how the contemporary media emphasizes "women's choice to subordinate their careers to accommodate family obligations" to explain women's occupational status in the workplace).

challenging restrictions on abortion as a form of sex discrimination.<sup>139</sup> For example, not all women oppose abortion, so restrictions on abortion must not amount to sex discrimination against women. In litigation under Title IX brought by student athletes, plaintiffs seeking additional sports for women have had to battle survey evidence purporting to show that women's lower participation rates in athletics reflects women's choices and lower level of interest than men in playing sports rather than discriminatory opportunities.<sup>140</sup> Closer to the focal point of this Article, arguments that women's underrepresentation in coaching reflects sex discrimination are countered by arguments that the low numbers reflect women's choices not to enter such a demanding occupation. Justice Scalia made a similar argument, in a male plaintiff's reverse discrimination challenge to a county affirmative action plan, in explaining women's absences in road construction jobs were a product of their own preferences rather than sex discrimination.<sup>141</sup> In these and other examples, women's choice is offered as a rebuttal to sex equality claims. The response from sex equality advocates is usually to pierce women's asserted preferences or choices as a product of societal and cultural forces, including discrimination.

What is often missing in these battles is a richer, more nuanced discussion of how sex equality law, feminist theory, and advocacy should grapple with the problem of women's agency. When are women's choices authentic and deserving of validation and when are they the product of the very system of gender relations being contested? Alas, this Article does not hold the answers to these deep questions, but I find the example of female athlete-coach bias helpful in thinking about them. For one thing, this particular bias sits at the underside of sex equality's relationship to choice, using feminist legal methods to interrogate and expose women's choices as a product of patriarchal institutions. Examining female athletes' preference for male coaches reveals how the institution of sport and the organization of athletic departments construct gendered understandings of what it means to be a coach and the nature of the athlete-coach relationship. This inquiry leads to a broader examination of the barriers to women in coaching, including the disincentives for women to choose to go into the coaching profession and the gendered position of female athletes in sport. With fewer women in the coaching pipeline, fewer women getting jobs despite being in the pipeline, and evidence showing women coaches are equally, if not more, qualified than their male competitors for coaching jobs, the

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139. See Brief of Feminists for Life of America, Professional Women's Network, et al. as Amici Curiae Supporting Petitioners, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) (No. 90-985).

140. See BRAKE, *supra* note 1, at 77-80 (discussing this argument and the courts' response to it); see also *id.* at 218-22 (discussing the controversy over the now rescinded 2005 Office for Civil Rights Clarification allowing educational institutions to comply with Title IX's test for unequal participation opportunities by disproving the existence of female interest in additional sports through the use of student interest surveys).

141. See *Johnson v. Transp. Agency*, 480 U.S. 616, 658-61 (1986) (Scalia, J., dissenting).

preference takes shape as a stark example of the power of institutions to produce preferences that are the product of institutional bias and discrimination.

In her classic work exploring women's agency in relation to feminist legal theory, Kathryn Abrams elaborated a conception of partial agency to use in thinking about women's choices.<sup>142</sup> Partial agency captures both the power of women to strategically think and act for themselves, and the constraints women's situations impose on them in the process. The concept of partial agency remains helpful in thinking about the vitality and limits of choice. Yet, partial agency cannot, and never purported to, determine when gender justice projects should work to fulfill women's choices, and when they should interrogate or subvert them.

While there is no satisfactory globalizing answer to this problem, female athlete-to-coach bias makes me envision a conception of *embedded agency*, in which women's choices and preferences are embedded within and shaped by the institutions in which they work, live, and play. An institutional model of choice is a counterpoint to the liberal view of choice. However, it is also a more institutionally focused model than a social constructionist one that looks at broader cultural influences.<sup>143</sup> The starting point for thinking about choice is that, like the institutions in which it is embedded, choice is complex, unstable, and changeable over time. Choices and preferences are not stand alone, abstract, or a-contextual; they are made in the context of and shaped by the institutions in which people are situated.

The case study of the female athlete preference offers a reminder of just how powerful institutions are in shaping the preferences of persons within them. In this case, the preference for male coaches was not always there; it emerged after women were integrated into the male-dominant model of sport, under a shared governance structure. The preference is also situational—having experience with female coaches negatively affects the preference for a male coach.

Upon studying the literature on women in sport and women in coaching, it becomes clear that institutional norms, including the win-at-all-cost model of coaching that has become dominant in intercollegiate sport, play an important role in constructing preferences for male coaches. Literature on women in leadership finds that traditionally masculine styles of leadership within organizations promote stereotypical thinking about the gender of leaders.<sup>144</sup> Conversely, novel approaches to leadership, such as placing an emphasis on the need for transformational leaders to promote organizational change in a time of crisis, can reverse the preference

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142. See Kathryn Abrams, *Complex Claimants and Reductive Moral Judgments: New Patterns in the Search for Equality*, 57 U. PITT. L. REV. 337 (1996); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995); see also MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 116–21 (3d ed. 2013) (summarizing this and other legal scholarship by “partial agency feminists”).

143. See, e.g., Higgins, *supra* note 135, at 1697 (elaborating a social constructionist approach to agency that focuses on diffuse, cultural constraints on women's views and preferences).

144. See, e.g., Madden, *supra* note 100, at 57–58.

and, under the right conditions, actually favor women for leadership positions.<sup>145</sup> In addition, the extent to which an institution is highly masculinized also affects gender preferences for leaders. In institutions in which men greatly outnumber women, required tasks are associated with masculinity and the organization is structured hierarchically, creating idealized conceptions of leadership that are highly masculinized.<sup>146</sup> Not surprisingly, bias against female leaders is more likely in jobs that are gender typed as masculine.<sup>147</sup>

In sport, these institutional gender dynamics create a perfect storm for women interlopers—the combination of mostly male leadership, masculine styles of leadership (autocratic and directive coaching styles), and the strong masculine coding of sport itself all create a field that is primed for producing gender bias against women coaches.<sup>148</sup> An institutional approach to choice highlights the ways in which these institutional structures and cultures shape and construct women’s preferences for male coaches.

Gender justice projects would benefit from richer theories of embedded agency. We need tools for distinguishing resistance from co-optation. The institutional forces that construct discriminatory preferences toward others can also distort the choices women make for themselves. Of course, to speak of co-optation carries with it the risk of paternalism and pathologizing women’s voices—“You don’t *really* want a man instead of a woman as coach,” or “You really *should* want to become a coach.”<sup>149</sup> However, taking choice at face value poses even greater risks for gender justice projects. Illuminating the institutional forces that shape both men’s and women’s choice has a better chance of taking the sting out of the ring of paternalism than a more general social-constructionist approach that focuses on broader societal and cultural messages. Interdisciplinary work in social psychology and sociology can help feminist scholars and advocates reveal the underpinnings of choice and the processes by which institutions shape them.

In the midst of dissonant clashes over the meanings of women’s choice in the gender culture wars, the female athlete-to-coach preference stands as a stark example of the power of institutions to shape preferences—all the more so because literature on women coaches shows that they are just as, if not more, qualified to be coaches compared to their male competitors. While discrimination law is fashioned

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145. See Elizabeth R. Brown, Amanda B. Diekmann & Monica C. Schneider, *A Change Will Do Us Good: Threats Diminish Typical Preferences for Male Leaders*, 37 PERSONALITY & SOC. PSYCHOL. BULL. 930 (2011); Gary N. Powell, D. Anthony Butterfield & Kathryn M. Bartol, *Leader Evaluations: A New Female Advantage?*, 23 GENDER IN MGMT: AN INT’L J. 156 (2008).

146. See Madden, *supra* note 100, at 66.

147. See Eagly, *supra* note 67, at 6; Garcia-Retamero & López-Zafra, *supra* note 107, at 51–53, 59.

148. Cf. Eagly, *supra* note 100, at 465–66.

149. See Higgins, *supra* note 135, at 1697 (acknowledging the risks of “pathologizing” women’s internalized views by elaborating the social and cultural forces that constrain them).

to effectuate women's choices when thwarted by discriminatory barriers, this case study is a reminder that we still need feminist tools and legal strategies to critically examine women's choices and what underlies them, not just to ratify them.

### *C. Multi-Dimensional and Multi-Lateral Bias*

A third way in which the athlete-to-coach example runs counter to the law's paradigm of discrimination is in the interconnections it reveals in the workings of bias. Discrimination law presumes that bias takes a form that is both one-dimensional (singling out one protected class for adverse treatment) and unilateral (a one-way vector from perpetrator to victim). Again, female athlete-to-coach bias defies the prototype of discrimination reflected in law.

As discussed above, the gender bias against female coaches is inextricably intertwined with anti-lesbian bias in women's sports. As more than two decades' exposure to legal scholarship led by critical race feminists in the 1990s has demonstrated, this example is in good company with many others involving multiple and intersecting dimensions of bias.<sup>150</sup> At this point, there is an extensive body of legal scholarship demonstrating that one-dimensional models obscure and distort how the intersection of identities matters in understanding and remedying discrimination.<sup>151</sup> Yet, discrimination law continues to proceed from a premise of discrete protected classes as the target of discrimination, and it stumbles badly when it comes to addressing bias at the intersection of gender and sexuality.<sup>152</sup>

The intersection of anti-gay and gender bias here is far from novel. Yet, it is a particularly stark example of the inseparability of gender and anti-gay bias. As elaborated in greater detail above, the gender bias against women coaches is part and parcel of a homophobic anxiety about strong women in sports. Traditional gender norms of femininity create role incongruity for women who excel in sports as athletes and as leaders. In response, sport and gender scholars have identified a "female apologetic" performed by some women in sport to "cover" for their defiance of traditional gender norms by providing reassurance of a heterosexual femininity.<sup>153</sup> The apologetic takes numerous forms, including overcompensating with feminine makeup, hairstyles, and clothes, and even highlighting these performances over athleticism in media portrayals of women in sport. The apologetic responds to the

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150. See CHAMALLAS, *supra* note 142, at 91–111, for a summary of this history and the key intersectional scholarship in this era.

151. *Id.*

152. See, e.g., Zachary A. Kramer, *Some Preliminary Thoughts on Title VII's Intersexions*, 7 GEO. J. GENDER & L. 31 (2006) (critiquing Title VII's approach to cases involving both gender and sexual orientation bias); Zachary A. Kramer, *Three Tales of Female Masculinity*, 13 NEV. L.J. 458 (2013) (discussing the failure of discrimination law to adequately address bias against women that involves both sexism and homophobia).

153. See *supra* text accompanying note 63.

“paradox” that to be good at sport, in a culture infused with gender polarity, is masculinizing.<sup>154</sup> To avoid aspersions of masculinity linked to lesbianism requires compensating with cultural cues that provide proof of femininity. Female athletes’ preference for a male coach is embedded in this context. Having a woman coach, especially a woman whose sexuality is suspect, leaves the team vulnerable to an “image” problem. The image problem in women’s sports is code for the taint of lesbianism. Having a male coach “softens” the image and brings a “wholesome” appeal. It takes the edge off to have elite women athletes who answer to a male coach. In this light, the preference for a man can be viewed as a form of the apologetic, a deflection of anti-lesbian bias that may attach to a woman coach and, by extension, to her team.

While there is no new terrain here, the importance of this project has not lessened in the intervening decades since intersectional scholarship took off. Exploring these intersections remains necessary to correct the rigid and stultifying boundaries of protected classes in discrimination law. The female athlete-to-coach bias is also multi-dimensional in a way that is not often recognized in legal literature on discrimination—it is mutually reinforcing and non-linear. That is, rather than a single vector of bias running from athletes to coaches, the bias that runs from female athletes to coaches both reflects and reinforces gender bias against female athletes themselves.

Discrimination law conceives of bias as a discrete arrow with a singular class of targets. In the eyes of the law, any discrimination against coaches is considered to be separate and distinct from any discrimination against athletes. Tristin Green’s phrase “insular individualism” captures this paradigm, with the assumption of a biased decision maker acting discretely and unilaterally with precision-stroke aim against a target.<sup>155</sup> This presumption infuses discrimination law.

One example is in Title IX’s treatment of pay discrimination against coaches in women’s sports. When coaches of women’s teams receive lower pay than the coaches of men’s teams, as they often do, any possible discrimination claim “belongs” to the coach, not the female athletes. In order for the athletes to challenge the lower salaries paid to their coaches as discriminatory, they would have to show that the lower pay produces tangibly worse coaching. This requirement generally blocks athletes from challenging the discriminatory pay given to women’s athletic coaches, even though the coaches’ pay disparities between men’s and women’s sports reflect and reinforce the lower valuation that schools place on women’s sports and their second-class status.<sup>156</sup>

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154. See Sally R. Ross & Kimberly J. Shinew, *Perspectives of Women College Athletes on Sport and Gender*, 58 *SEX ROLES* 40 (2008).

155. See Tristin K. Green, *Insular Individualism: Employment Discrimination Law After Ledbetter v. Goodyear*, 43 *HARV. C.R.-C.L. L. REV.* 353 (2008).

156. See BRAKE, *supra* note 1, at 205–06 (explaining and critiquing the limits of Title IX in addressing discrimination in coaches’ pay for women’s teams).

A second example comes from retaliation law under Title VII. There is a growing body of case law holding that it is unreasonable for employees to believe that discrimination against a group of non-employees, such as students, clients, customers, or other persons served by the organization, could ever amount to discrimination against employees.<sup>157</sup> As a result, employee complaints about such discriminatory activities are unprotected from retaliation under Title VII. In these cases, decided under the reasonable belief doctrine in Title VII retaliation law, employees allege that they suffered retaliation after complaining about discrimination in the institution's treatment of others. Courts have dismissed such retaliation claims on the ground that discrimination against non-employees is entirely irrelevant to any discrimination that employees might encounter. For example, teachers and other school employees who complain about discrimination against students are ruled "unreasonable" for believing that discrimination against students could create a discriminatory work environment for employees at the school.<sup>158</sup> These cases tightly adhere to the paradigm of discrimination as a unilateral process that runs discretely from one actor to a target class.<sup>159</sup>

Contrary to the law's presumption of unilateral bias, the example of athlete-to-coach bias shows that bias in the real world is not so neat and one-dimensional. There are multiple, intersecting arrows of bias at work here. In the world of women's sports, where the women's game is devalued in comparison to the men's game and athletic excellence is equated with masculinity, female athletes face tremendous pressures. One way of responding to these pressures, and to achieve greater legitimacy as athletes, is to have a male coach.

However, the preference for a male coach does not just reflect discrimination

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157. See, e.g., *Bonn v. City of Omaha*, 623 F.3d 587 (8th Cir. 2010) (plaintiff-employee lacked a reasonable belief that a police department's alleged racial bias against civilians in the community could discriminate against employees of the police department); *Wimmer v. Suffolk Cnty. Police Dep't*, 176 F.3d 125 (2d Cir. 1999) (same); *Crowley v. Prince George's Cnty.*, 890 F.2d 683 (4th Cir. 1989) (same); *Neely v. City of Broken Arrow*, No. 07-CV-0018, 2007 WL 4209073 (N.D. Okla. Nov. 26, 2007) (plaintiff-employee lacked a reasonable belief that firefighters' sexual harassment of members of the public violated Title VII).

158. See, e.g., *Bakhtiari v. Lutz*, 507 F.3d 1132 (8th Cir. 2007) (employee's complaint about perceived discrimination against students was not protected activity under Title VII); *Artis v. Francis Howell N. Band Booster Ass'n*, 161 F.3d 1178 (8th Cir. 1998) (same); *Evans v. Kansas City Mo. Sch. Dist.*, 65 F.3d 98 (8th Cir. 1995) (same); *Lamb-Bowman v. Del. State Univ.*, 152 F. Supp. 2d 553 (D. Del. 2001) (complaint by women's basketball coach about unequal treatment of women's team was not protected activity under Title VII since it did not involve discrimination against employees); *Hill v. Chicago Bd. of Educ.*, No. 02 C 3534, 2004 WL 626147 (N.D. Ill. March 29, 2004) (employee's complaint about perceived discrimination against students was not protected activity under Title VII).

159. See Deborah L. Brake, *Retaliation in an EEO World*, 89 IND. L.J. (forthcoming 2014) for a critique of these cases for failing to recognize the interrelation of bias as it affects employees and the persons served by their organizations.



against female athletes; it also reinscribes it. Discrimination against women coaches and the underrepresentation of women in sport leadership positions reinforces a presumption of male athletic superiority that contributes to the devaluation of women's sports.<sup>160</sup> The lack of women in sport leadership positions contributes to the secondary status of female athletes and has a negative effect on the athletes' own self-perceptions.<sup>161</sup> It also suppresses female athletes' career aspirations in sport—women who are coached by men are less likely to enter sport careers than are women who are coached by women.<sup>162</sup> The preference for a male coach thus contributes to the hostile climate for women in sports, for athletes as well as coaches.

The preference for male coaches complicates Title IX's success story for female athletes, not just by highlighting the plight of a discrete group of women coaches left behind, but by uncovering deep, structural bias remaining against female athletes themselves. The preference reflects the persistence of institutional bias against women in sport and the higher valuation of men in sport, where athletic excellence is equated with maleness. The same masculine values that construct women as less valuable coaches also construct women as less valuable athletes. While at one level, female athletes' desire for a male coach is a strategy to deflect bias by claiming a greater legitimacy for a women's team in an androcentric institution, at a deeper level it simultaneously reinforces the devaluation of women in sport by contributing to the precarious situation for women in coaching.<sup>163</sup> The preceding discussion highlighted three ways in which the athlete-to-coach bias example runs counter to the paradigm of discrimination at the heart of discrimination law: it defies the prototype of discrimination as an in-group-to-out-group, top-down phenomenon;

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160. Cf. Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 755–78 (2001) (articulating a theory of devaluation as a form of bias that discrimination law should address).

161. See LaVoi & Dutove, *supra* note 25, at 18 (“A dearth of female role models in visible positions can lead to many unfavourable outcomes for girls and women, including devaluation of abilities and self-perceptions, failure to realize sport career aspirations and potential, and an inability to challenge or resist negative stereotypes regarding gender and leadership.”) (citations omitted).

162. *Id.* (citing research that found “female athletes who were coached by males are less likely to pursue a career in coaching than females coached by females”) (citation omitted); see also Moran-Miller & Flores, *supra* note 20, at 110 (citing existing research showing a link between women's interest in coaching and experience of having women coaches); *id.* at 115 (interpreting authors' research findings to support the conclusion that “a single positive female coaching role model may positively influence female athletes' perceptions about career possibilities”).

163. See Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895 (2007), for an illuminating discussion of an example of interlocking and mutually-reinforcing within-group bias; namely, support from some African Americans of the National Basketball Association's racist dress code policy as a form of “volunteer discrimination,” in which minority group members “perform” their racial identity in an effort to deflect bias, but end up deepening the structures of bias.

it complicates the liberal view of women's agency reflected in the law; and it reveals the multi-dimensional, non-linear workings of bias within institutions.<sup>164</sup> Each of these departures from the paradigm is important for understanding the complexity of bias and the limits of the existing law's approach. The final Part offers some concluding thoughts on why studying counter-paradigms such as this one is useful for generating insights about law and its relationship to social inequality.

### III. SOME THOUGHTS ON THE USEFULNESS OF COUNTER-PARADIGMS TO GENDER JUSTICE PROJECTS

What is to be gained by bringing to the forefront a counter-paradigm like the athlete-coach bias scrutinized here? I envision two possible benefits, both of which are related. First, calling attention to the gaps between discrimination law and real-world bias can bring a fresh perspective on the need to go beyond the limits of legal claims in pursuing social equality. Second, and relatedly, exposing essentialist notions about discrimination reflected in the law, both in terms of what counts as "discrimination" and how protected classes experience it, may help in identifying and effectively opposing discrimination both through legal and extra-legal channels.

First, counter-paradigms such as this one can provide a corrective to the over-simplified model of discrimination reflected in the law. Single-minded efforts to pierce the glass ceiling by pursuing conscious discrimination from the men at the top, for example, will miss the institutional features that block women's success from the ground up. Fresh perspectives for seeing the complexity of discrimination can help critique the presumption of insular individualism that is so prevalent in law.

Shedding light on the limits of discrimination law and its disconnect with real-world bias is important not just to argue for expanding the set of practices that are actionable under the law (although that may be desirable), but perhaps more importantly to push back against limited popular understandings of what counts as "discrimination." Too often, these understandings are cut short by the narrow limits of the law. People's beliefs about what is fair and just are shaped by their understanding of what is sanctioned by law and the expressive value of law.<sup>165</sup> One

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164. See Chamallas, *supra* note 160, at 778–804, for an extensive and illuminating discussion of biased prototypes. Most analogous to this discussion is Professor Chamallas's discussion of how the prototypical understanding of what counts as a hate crime pushes aside broader understandings of and legal remedies for hate-motivated criminal conduct. *Id.* at 795–801.

165. See Deborah L. Brake, *Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives That Obscure Gender Bias*, 16 COLUM. J. GENDER & L. 679 (2007) (discussing the social psychology of perceiving discrimination, and exploring how the narrow confines of discrimination law obscure people's understandings and perceptions of discrimination).

of the findings from social psychology literature on women in leadership is that perceiving one's judgment to be objective and nondiscriminatory actually makes gender bias more likely.<sup>166</sup> That is, operating under an illusion of objectivity and neutrality is actually worse than having an awareness of being biased.<sup>167</sup> Practices of bias that are outside the reach of discrimination law thus run the risk of contributing to perceptions of a just world, precisely because they fall outside the boundaries of the law's prohibitions. To the extent that discrimination law's blinders contribute to the illusion of neutrality, it is important to expose the existence of complex, institutional bias that eludes the law's grasp.

Just as people should understand that discrimination law leaves much bias and discrimination unregulated, gender justice projects need to go beyond the limits of discrimination law in setting an agenda for social change. Even if more complex forms of bias are not remediable through legal claims, advocates for gender equality should pursue broader strategies for addressing institutional bias against women in leadership.<sup>168</sup> For example, some research suggests bias favoring male leaders can be minimized by highlighting individualized information for particular women, which then makes gender less salient for priming stereotypes.<sup>169</sup> More structural changes would focus on changing masculine structures and norms in institutions.<sup>170</sup> In sport, such structural changes might include replacing the win-at-all cost model of athletics with a more educational approach that emphasizes participation and the educational value of sport—a tall order, to be sure. Rethinking what it means to be a coach—replacing yelling and punishment for not winning with an emphasis on skills building, mentoring, and team building for well-rounded student athletes—could also weaken the connections between coaching and masculinity, thereby destabilizing the preference for male coaches.

The second thing counter-paradigms can do is expose essentialist notions in law about the meaning of discrimination and how protected classes are situated in relation to discrimination. By presenting an alternative to the prototype of discrimination, counter-paradigms open up opportunities for expanding the concept of discrimination to encompass its more complex iterations. The example here demonstrates the fallacy of seeing sex discrimination as simply a zero-sum game of men versus women. It exposes essentialist notions about women, the protected class, and where they stand in relation to sex discrimination. As legal scholarship

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166. See Uhlmann & Cohen, *supra* note 51, at 477.

167. *Id.*

168. See Bartlett, *supra* note 127, at 1960–61, for an example of legal scholarship advocating institutional de-biasing strategies without expanding the boundaries of discrimination law to require them.

169. Madden, *supra* note 100, at 57.

170. See, e.g., *id.* at 70 (discussing models of organizational change that would promote women's access to leadership).

on identity has shown, there are multiple ways of performing identity.<sup>171</sup> One that gets less attention is the performance of women acting in ways that re-inscribe gender bias against other women.

Critiques of essentialism in the treatment of women typically focus on women's differences in experiencing oppression, including exposing how relatively privileged women (white, straight, middle-class, able-bodied) are too often the implicit launching point for elaborating the harms of discrimination.<sup>172</sup> A less-explored side of essentialism is the undifferentiated view of women as victims of gender oppression and not as oppressors. The essentialist problem in sex discrimination law is not just that it obscures the complexity of how women experience oppression. A different kind of essentialist problem is the assumption that if there is sex discrimination then all women would be on the victim side of it.

Discrimination law takes women's accommodation to sexist norms as evidence discounting or undermining the existence of discrimination. For example, proof that other women in the workplace did not find particular behaviors offensive or harassing may undermine a female plaintiff's sexual harassment case.<sup>173</sup> Further, proof that other women have succeeded in the workplace may undermine a plaintiff's claim of sex discrimination in hiring and promotions.<sup>174</sup> In the same vein, using women on trial teams that defend employers in sex discrimination cases is a tried and true tactic of the defense bar, in order to give the court and jury "permission" to deny the existence of sex discrimination, since women are seen defending the employer.<sup>175</sup> Angela Onwuachi-Willig makes a related point in highlighting courts'

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171. See, e.g., Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 701–02 (2001).

172. See Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL'Y 1 (1994) (discussing various strands of essentialism, including "false universalism" in taking the plight of privileged women to stand for all, and "gender imperialism" in assuming gender as the primary axis for understanding women's oppression).

173. See Jane L. Dolcart, *Hostile Environment Harassment: Equality, Objectivity, and the Shaping of Legal Standards*, 43 EMORY L.J. 151, 205 (1994) (criticizing courts' use of a reasonableness standard, in deciding whether sexual harassment is severe or pervasive, and for opening the door to arguments that "[t]he other women in the office were not bothered by the harassment; therefore, the plaintiff is hypersensitive").

174. See MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION* 101–02 (8th ed. 2013), for a concise discussion of how courts consider evidence that other members of the plaintiff's group have succeeded in the workplace. Cf. Abrams, *supra* note 113, at 2521–22 (explaining that the dominant view of discrimination in Title VII law requires that "the employer's judgment—which may posit employment-related incapacity or generalized inferiority (disparate treatment, sexual harassment) or reflect insensitivity to the group's social circumstances (disparate impact)—must be applicable to the group as a whole").

175. See, e.g., PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* 166–69 (1999) (relaying the story of an African American female lawyer who generally did criminal defense work, but was assigned to defend a firm against an employment discrimination charge).

use of testimony by black witnesses against black plaintiffs as evidence to discredit plaintiffs' race discrimination claims.<sup>176</sup>

Outside the courtroom, cooperation by some women with practices challenged by other women as sexist is also used to defeat the credibility of the challengers and validate the challenged practices. When this occurs, the presumption of homogeneity among women in relation to sexism obscures the complexity of bias, making it harder to mobilize resistance. Ignoring the phenomenon of within-group bias operates to protect and preserve gender privilege.

Turning the lens on counter-paradigmatic examples like female athlete-coach bias disrupts the presumptions that enable women's accommodation to sexist norms to defeat claims of gender bias. The female athlete bias is a stark reminder that just because some women accede to sexism (or even practice it) does not mean that sexism does not exist. In the athlete-coach example, women athletes are strategically deploying sexism when responding to gender subordination in sport. It is an example of members of a subordinated group strategically aligning their interests with the dominant group as a tactic to avoid or mitigate the sting of subordination.

In this respect, the female athlete-coach bias is an example of a particular kind of "female masculinity"—women performing a hegemonic masculinity in order to position themselves strategically and advantageously within a system of gender oppression.<sup>177</sup> That some women can take advantage of masculine norms does not erase the gender privilege that men receive from the hierarchical valuation of masculinity over femininity. Nor does it subvert the linkages between men and masculinity, traditionally defined. Rather, women's practices of masculinity can be deployed to stabilize and support gender oppression. In this case, it is a practice that legitimizes the gender binary in sports. When women act the part of "female chauvinist pig," men's practices of sexism gain a veneer of gender neutrality. The male athletic director who avoids hiring a woman coach looks less sexist if the female athletes do not want a woman coach either. Sport thus becomes further linked to masculinity, with athletic competence and superiority defined as male, while evading challenge as a masculinist institution. Exposing the practices of female masculinity is thus crucial to the work of recognizing and questioning the deep structures of masculinity that subordinate women—especially those of women who cannot, or choose not to, strategically side with masculine norms.

Whether or not counter-paradigms spark critiques that actually succeed in broadening the reach of discrimination law, they are useful in challenging limited popular understandings of what counts as discrimination and essentialist notions

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176. Onwuachi-Willig, *supra* note 163, at 1927.

177. *Cf.* Juliet Williams, Comments at Author Meets Reader: Masculinities and the Law at the Law and Society Association Annual Meeting: Power, Privilege, and the Pursuit of Justice: Legal Challenges in Precarious Times (May 31, 2013) (on file with author) (calling for masculinities theorists and feminist scholars to discuss and analyze female masculinity).

of women in relationship to discrimination. If powerful enough, they may help mobilize and broaden the scope of social justice projects. The problem of female athlete-to-coach bias is an issue that has remained off the radar screen of Title IX and gender equity advocates for women in sport. A downside of working in law is that it can too often occupy the field in framing gender equality issues. Exploring counter-paradigms can help correct that limited vision. Here, the example of within-group, upstream bias of female athletes toward female coaches offers a fresh vantage point for rethinking the boundaries of discrimination law and its relationship to gender equality.

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# Unfinished Equality: The Case of Black Boys

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