



WLS CLE Series

1: History of Title IX

Women's Law Section

February 4, 2022

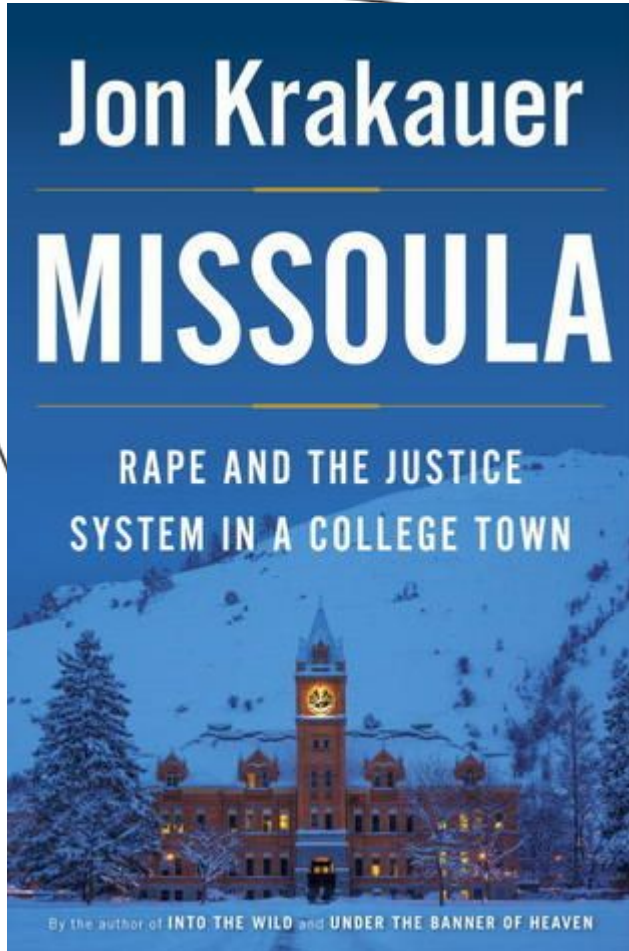


Presenter:

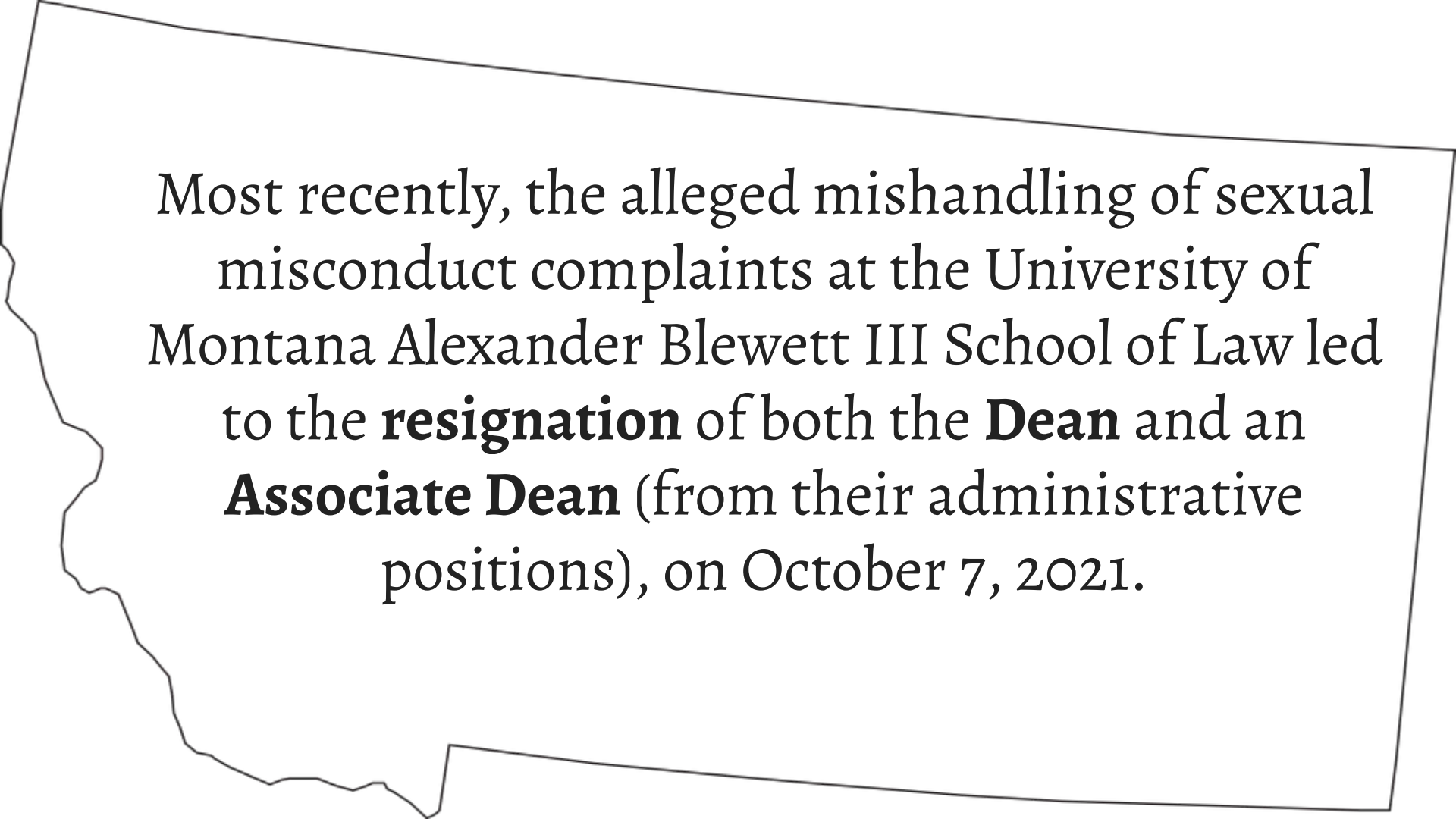
Prof. Diane J. Klein, J.D., LL.M.

dianeklein66@gmail.com

www.dianejklein.com



Montana has faced some significant challenges around handling allegations of sexual misconduct in the educational setting.



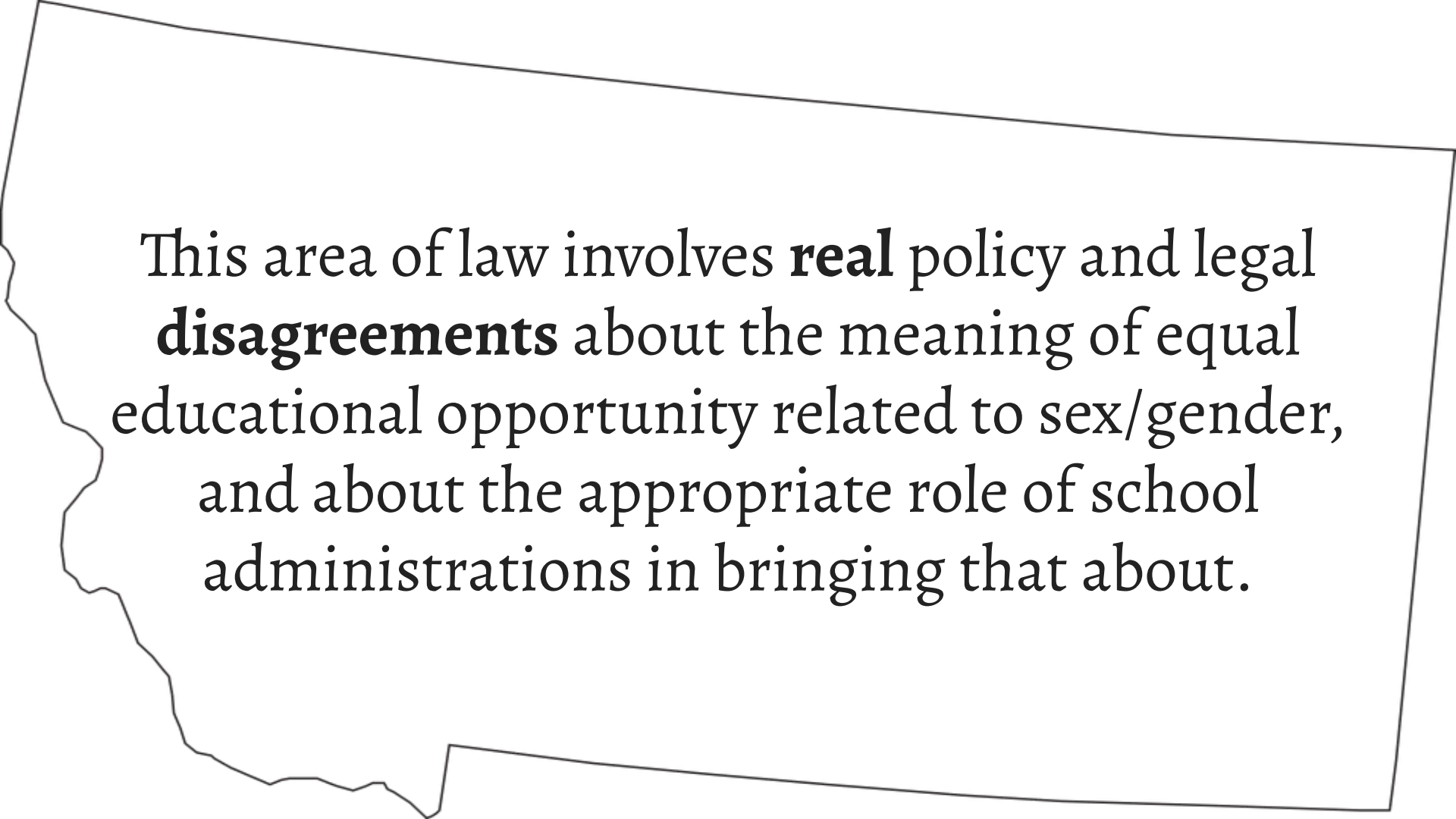
Most recently, the alleged mishandling of sexual misconduct complaints at the University of Montana Alexander Blewett III School of Law led to the **resignation** of both the **Dean** and an **Associate Dean** (from their administrative positions), on October 7, 2021.



Former Dean Paul Kirgis
Former Associate Dean of Students Sally Weaver

The image features a black outline of the state of Montana, which serves as a background for the text. The outline is simple and follows the geographical shape of the state, including its northern, southern, and eastern borders, as well as the irregular western border.

But the University of Montana is far from **alone** in facing very serious challenges where Title IX compliance and enforcement are concerned.

A hand-drawn speech bubble with a black outline and a white fill. The bubble has a jagged, irregular left edge and a small tail pointing downwards and to the left. Inside the bubble, there is a paragraph of text in a black serif font. The text is centered and reads: "This area of law involves **real** policy and legal **disagreements** about the meaning of equal educational opportunity related to sex/gender, and about the appropriate role of school administrations in bringing that about." The word "real" is in a standard weight, while "disagreements" is in a bold weight.

This area of law involves **real** policy and legal **disagreements** about the meaning of equal educational opportunity related to sex/gender, and about the appropriate role of school administrations in bringing that about.



Learning objectives for today:

1. Key historical developments in Title IX
2. Primary areas of Title IX coverage
3. Current status of “political football” areas



KNOW	WONDER	LEARN
What do you know about Title IX?	What do you wonder about Title IX?	What have you learned about Title IX?

What does Title IX cover?

Sports

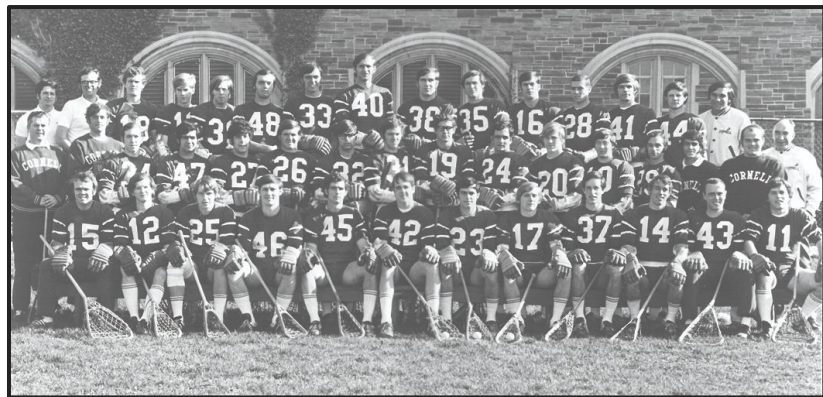
Sexual discrimination/misconduct

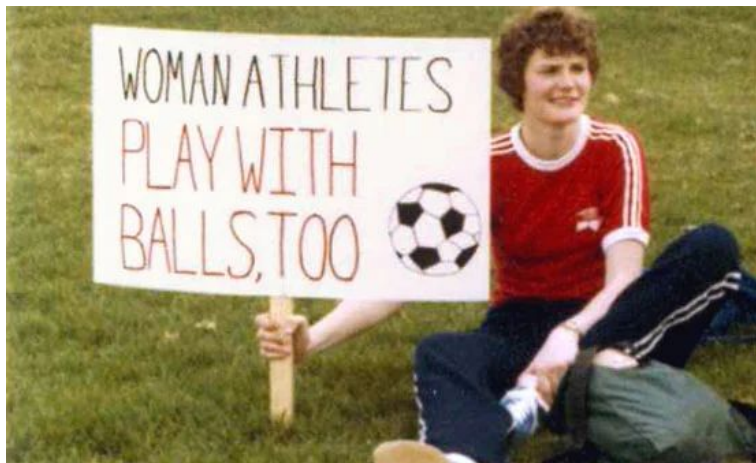
- Before Title IX, few opportunities existed for female athletes.
- The National Collegiate Athletic Association (NCAA) was created in 1906 to format and enforce rules in men's football
- It became the ruling body of college athletics
- It offered **no athletic scholarships** for women and held **no championships** for women's teams.
- Facilities, supplies and funding were lacking.





- By 1972 there were just **30,000 women** participating in NCAA sports, compared to **170,000 men**.





- June 23, 1972: Title IX is enacted

Title IX prohibits federally funded educational institutions from discriminating against students or employees based on sex.

It begins: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

Rep. Patsy Mink (D-HI), the first woman of color elected to Congress, was the primary sponsor.





- June 23, 1972: Title IX is enacted

Title IX prohibits federally funded educational institutions from discriminating against students or employees based on sex.

As a result of Title IX, any school that receives any federal money from the elementary to university level—in short, nearly all schools—must provide fair and equal treatment of the sexes in all areas, including athletics.

Sex/gender
antidiscrimination

Title IX

Title VII

Equal Protection/
Intermediate Scrutiny



ADMISSIONS

- *Cannon v. University of Chicago*, 441 U. S. 677 (1979)

The Supreme Court held that Title IX is enforceable through an implied private right of action. Cannon alleged exclusion from medical schools on the basis of her gender.

ADMISSIONS

- *Tingley-Kelley v. Univ. of Penn*, 677 F.Supp.2d 764 (E.D. Pa. 2010)

A case alleging the exclusion of a mother of two young children from vet school survives summary judgment, with direct evidence of discrimination.

- Dec. 11, 1979: **“Intercollegiate Athletics Policy Interpretation”**

- The Dept of Education sets out a **three-part test** OCR uses as part of determining whether an institution is in compliance with Title IX. Meeting **one** is sufficient.
 - (1) The number of male and female athletes is **substantially proportionate** to their respective enrollments; **or**
 - (2) The institution has a history and continuing practice of **expanding participation** opportunities responsive to the developing interests and abilities of the underrepresented sex; **or**
 - (3) The institution is **fully and effectively accommodating** the interests and abilities of the underrepresented sex.



- **May 4, 1980**

The U.S. Department of Education (ED) begins operating after its creation a year earlier and is given oversight of Title IX through the Office for Civil Rights (OCR).



- February 28, 1984: *Grove City College v. Bell*

Grove City College v. Bell held that Title IX only applies to specific programs that receive federal funds - such as a school's office of student financial aid. Under this interpretation, athletic departments are not necessarily covered.

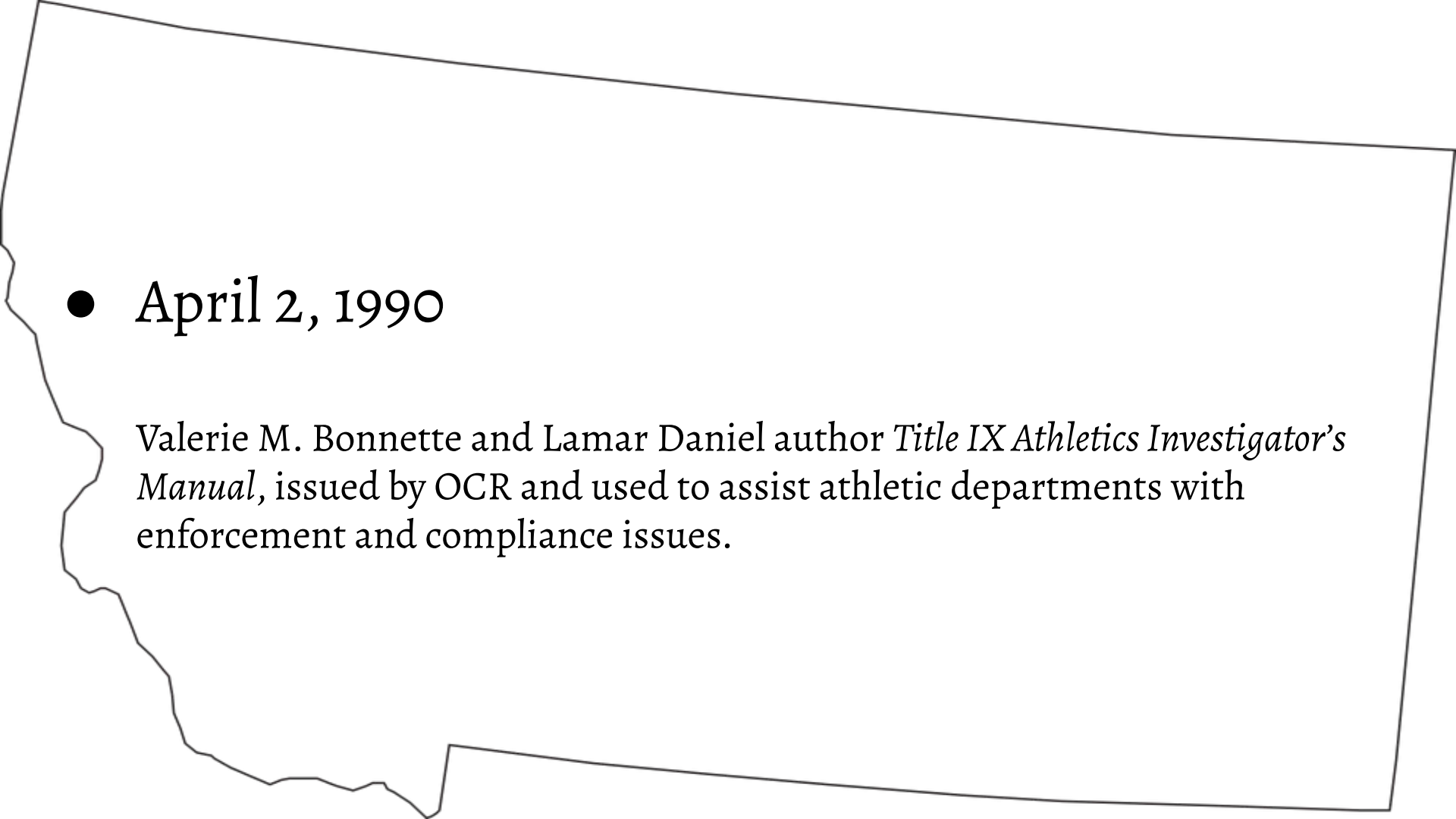
- March 22, 1988: Civil Rights Restoration Act of 1987



Over the veto of Pres. Reagan, Congress reversed *Grove City v. Bell*, restoring Title IX's institution-wide coverage. If **any** program or activity in an educational institution receives federal funds, **all** of the institution's programs and activities must comply with Title IX.

- September 6, 1988: *Haffer v. Temple University*, 678 F. Supp. 517 (1987)

Plaintiff female athletes' case survives MSJ. The court addresses interlocking Equal Protection, state civil rights law, and Title IX issues. The opinion gives new, stronger direction to athletic departments regarding their budgets, scholarships, and participation rates of male and female athletes.



- April 2, 1990

Valerie M. Bonnette and Lamar Daniel author *Title IX Athletics Investigator's Manual*, issued by OCR and used to assist athletic departments with enforcement and compliance issues.

- February 26, 1992: *Franklin v. Gwinnett County Public Schools*

Christine Franklin was a 10th grader who was sexually harrassed and assaulted, over years, by a teacher, Andrew Hill. The school and district did nothing, and allowed him to resign and ended the investigation. In a unanimous opinion, the Supreme Court ruled that monetary damages, not just injunctive relief, are available for violations of Title IX.

- **March 1992**

Shortly after the *Franklin* decision, the NCAA published a landmark gender equity study of its Division I member institutions, finding significant discrepancies in participation rates and funding between women's and men's athletic programs. It also showed that only 1% of men's teams have female head coaches, and fewer than 50% of women's teams do, and that male/female salary discrepancies are significant in almost all instances.

- **October 20, 1994**

Sponsored by Sen. Carol Moseley Braun (S. 1468) and Rep. Cardiss Collins (H.R. 921) a year earlier, the Equity in Athletics Disclosure Act (EADA) is officially enacted. It requires that any co-educational institution of higher learning that participates in any federal student financial aid program and that sponsors an intercollegiate athletics program must **disclose** certain information concerning its athletics program. Annual reports are due beginning October 1, 1996.

- January 16, 1996

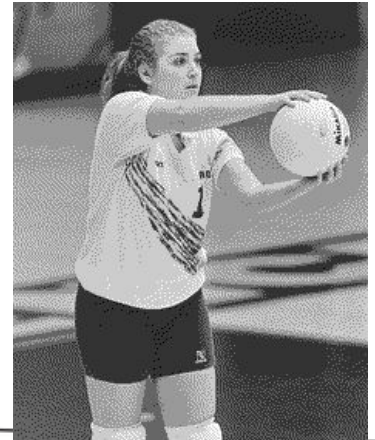
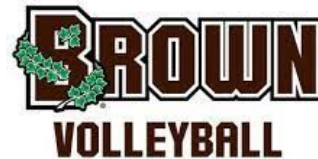
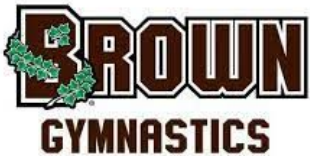
OCR issues a clarification of the three-prong test, allowing institutions to choose any one of three independent tests to demonstrate that they are effectively accommodating the participation needs of the underrepresented sex.

- October 1, 1996

All institutions of higher education must make available to all who inquire specific information on their intercollegiate athletics department, as required by the EADA.

- November 21, 1996: *Cohen v. Brown University*

A federal appeals court held that Brown University violated Title IX when it demoted women's gymnastics and volleyball from university-funded to donor-funded varsity sports. Brown argued that it did not violate Title IX because women are less interested in sports than men. Both the district court and the court of appeals reject Brown's argument. Many of the arguments offered by Brown are similar to those relied upon by colleges and universities all over the country.





- 2020

Trial Lawyers for Public Justice and other counsel continued to monitor the consent decree for the next 20 years.

In May 2020, Brown University violated the consent decree by eliminating several women's sports teams while devoting a disproportionate share of the school's athletic resources to male athletes. Public Justice went back into court on behalf of the class, asking the Court to hold Brown liable for violating the decree. Brown settled in December 2020, reinstating two of the eliminated teams (equestrian and fencing) and allow Plaintiffs to continue to enforce the decree for several more years.

- July 23, 1998

OCR issues a Dear Colleague letter clarifying that a college or university's total athletic scholarship budget must mirror the institution's percentage of athletes of each gender, within 1%. If men are 60% of [a school's] athletes, OCR would expect that the men's athletic scholarship budget would be within 59%-61% of the total scholarship budget for all athletes, after controlling for legitimate nondiscriminatory reasons for any larger disparity.

- February 20, 2001: *Brentwood v. TN Secondary School AA*

The Supreme Court holds that a high school athletic association is a “state actor” and thus subject to the Constitution. The Equal Protection Clause of the 14th Amendment applies to athletic associations in gender equity suits.

- December 17, 2001: *Communities for Equity v. MI HS AA*, 178 F. Supp. 2d 805 (2001)

The WD MI holds the state athletic association liable under Title IX, the Equal Protection Clause, and Michigan state law for discriminating against girls by forcing six girls’ sports teams, but no boys’ teams, to compete in nontraditional and/or disadvantageous seasons.

- March 17, 2005

ED issues “Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test – Part Three,” significantly weakening Title IX. Schools can now simply send out an email survey to their female students, asking them what additional sports they might have the interest and ability in playing. And if the survey responses do not show enough interest or ability, they do not have to add any sports—and are presumed in compliance with Title IX.

- April 20, 2010

ED issues a policy guidance which rescinds the aforementioned “Additional Clarification” and all related documents, including the recommended survey.



The Obama Administration took a robust and vigorous approach to the use of Title IX to address sexual misconduct on campus.

April 4, 2011: ED issues a policy guidance which makes clear that Title IX's protections against sexual harassment and sexual violence apply to all students, including athletes. It addresses athletics departments and requires schools to use the same procedures to resolve sexual violence complaints whether they student athletes or other students.

April 24, 2013: OCR issues a Dear Colleague letter reminding schools and institutions that retaliation is a violation of federal law.

June 25, 2013: OCR issues a Dear Colleague letter related to improving graduation rates of student-parents at secondary schools and postsecondary institutions, stresses that student-parents must be allowed to return to all academic and extracurricular activities.

May 14, 2014: OCR issues a Dear Colleague letter that reiterates to public charter schools that they are subject to the same federal civil rights laws, regulations and guidance that apply to other public schools.

April 24, 2015: OCR issues a Dear Colleague letter to remind school districts, colleges and universities that if they receive federal financial assistance, they must assign at least one employee as their Title IX coordinator.

- May 13, 2016

ED and DOJ issue guidance on protecting transgender students under Title IX. The prohibition of sex discrimination encompasses discrimination based on a student's gender identity, including transgender status. Schools are permitted to operate sex-segregated athletic teams, but they cannot adopt requirements that are based on stereotypes about differences between transgender students and cisgender students. This interpretation allows age-appropriate, tailored requirements that are based on current medical research about the impact of student participation on competitive fairness and physical safety.

- February 22, 2017

OCR rescinds Title IX guidance on transgender students.



- September 22, 2017

OCR withdraws policy guidance issued on April 4, 2011, which had clarified that Title IX's procedures and protections against sexual harassment and sexual violence apply to all students, including athletes. However, this withdrawal has since been rescinded.





- *August 14, 2020*

Secretary of Education Betsy DeVos enacts several changes to Title IX regarding sexual harassment and misconduct, especially grievance process. Some believe these changes threaten to discourage reporting by survivors and stretch schools' resources.

Key changes

- **Live** hearings for sexual misconduct grievances in higher education
- Apply a presumption of innocence, and use **either** a preponderance or clear and convincing evidence standard (and use the same standard for all formal sexual harassment complaints)
- OCR rescinds guidance on public charter schools and the requirement that schools have a designated Title IX coordinator (issued in 2014 and 2015)



- **January 20, 2021**

President Joe Biden releases Executive Order 13988, “Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation,” which states, “All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.” According to the order, laws that prohibit sex discrimination, including Title IX, “prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.”



- March 8, 2021

President Biden releases Executive Order 14021, “Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity.” It states the Biden Administration’s objective to guarantee to all students “an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity,” citing Title IX as applicable governing law.

- June 16, 2021

SUPREME COURT OF THE UNITED STATES

Syllabus

BOSTOCK v. CLAYTON COUNTY, GEORGIA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

No. 17–1618. Argued October 8, 2019—Decided June 15, 2020*

In each of these cases, an employer allegedly fired a long-time employee simply for being homosexual or transgender. Clayton County, Georgia, fired Gerald Bostock for conduct “unbecoming” a county employee shortly after he began participating in a gay recreational softball league. Altitude Express fired Donald Zarda days after he mentioned



Relying on the 2020 Supreme Court case of *Bostock v. Clayton County* (extending Title VII to LGBT people), and the Memo from U.S. DOJ Civil Rights Division, Principal Deputy AAG for Civil Rights Pam Karlan to Federal Agency Civil Rights Directors and General Counsels regarding Application of *Bostock* to Title IX, the Department of Ed interprets Title IX’s prohibition on discrimination “on the basis of sex” to encompass discrimination on the basis of sexual orientation and gender identity.



Questions? Comments?
Suggestions for our remaining sessions?

Please contact me at:
dianeklein66@gmail.com

Sources/To Learn More

[University of Iowa History of Title IX \(1972-1996\)](#)

[Federal Register Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of](#)

[Bostock v. Clayton County](#)

[1992 Gender Equity Study](#)

[Equity in Athletics Disclosure Act](#)

[Montana EADA Data](#)

[NASPA Title IX Background Brief \(Sexual Assault on Campus\)](#)

[Executive Order 13988, “Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation” \(January 8, 2021\)](#)

[Executive Order 14021, “Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity \(March 8, 2021\)](#)

[Memorandum from Principal Deputy Assistant Attorney General for Civil Rights Pamela S. Karlan to Federal Agency Civil Rights Directors and General Counsels regarding Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972 \(Mar. 26, 2021\)](#)