

**BARNES V. GORMAN AND MERCER V. DUKE UNIVERSITY:
THE AVAILABILITY OF PUNITIVE DAMAGES IN
TITLE IX LITIGATION**

Punitive damages can often serve to further government's "legitimate interests in punishing unlawful conduct and deterring its repetition."¹ In some civil rights litigation, the Supreme Court has recognized that they can serve to vindicate conduct "which is motivated by evil motive or intent, or . . . involves reckless or callous indifference to the federally protected rights of others."² Over the years, however, the Court's review of punitive damages has both carved out occasional exceptions to the availability of the awards,³ and interjected constitutional constraints on the amounts of awards in other contexts.⁴ In 2002, in *Barnes v. Gorman*,⁵ the Court again found punitive damages unavailable to cure wrongful conduct, this time for actions brought under a section of the Americans with Disabilities Act.⁶ In the wake of *Gorman*, Title IX⁷—Congress's attempt to eliminate gender discrimination in academics—found itself next on the chopping block in the Fourth Circuit in the case of *Mercer v. Duke University*.⁸ When the Court of Appeals for the Fourth Circuit determined that even intentional violations of Title IX cannot give rise to punitive damages,⁹ it wrote another ignominious chapter in the law's divisive judicial legacy. That decision, and the context in which it arose, casts serious doubt on the future availability of punitive damages to remedy even the worst intentional conduct, and has erroneously clumped Title IX into the class of Spending Clause jurisprudence. Not faced with the potential for punitive damages for even their most egregious violations, schools may simply find that paying compensatory damages is cheaper than complying with Title IX.

¹ *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996) (reversing an award of punitive damages as grossly excessive and establishing constitutional parameters for state punitive awards).

² *Smith v. Wade*, 461 U.S. 30, 56 (1983) (holding that punitive damages are available in proper § 1983 actions).

³ *See, e.g., Alden v. Maine*, 527 U.S. 706, 750 (1999) (noting that punitive damages are unavailable under the Fair Labor Standards Act against states); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) (holding a municipality is not liable for punitive damages for the bad faith actions of its officials).

⁴ *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003).

⁵ 536 U.S. 181 (2002).

⁶ 42 U.S.C. § 12132 (2002).

⁷ 20 U.S.C. § 1681 (2002).

⁸ 50 Fed. Appx. 643 (4th Cir. 2002)

⁹ *Id.* at 644.

I

Few pieces of legislation can claim quite the celebrity status of Title IX.¹⁰ Originally codified as part of the Education Act Amendments of 1972 with remarkably little controversy or fanfare—certainly when compared to what it would later enjoy—Title IX provides that “no person 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.”¹¹ In practice Title IX has been scrutinized most heavily for its impact on collegiate athletics,¹² which is not without a degree of irony considering that the original language of the law contains no specific reference to athletics at all.¹³ The controversy at the heart of this scrutiny can briefly be summarized as one where the mandated increased slice of the budgetary pie to women comes at the expense—quite literally—of men. The effects, regardless of one’s perspective of their merits, have been severe. The National Organization of Women reports that today over 150,000 women play college athletics (compared to 32,000 in 1972) and 2.8 million high school girls, or 1 in 2.5, play varsity high school sports (compared to 1 in 27 in 1972).¹⁴ Title IX has so changed the nation’s basic presumptions of gender and sports that to many “the inclusion of sports in the education of young women is currently so normal that it is hard to imagine a different scenario.”¹⁵ Despite these gains, concerns about Title IX’s negative

¹⁰ See Ted Hutton, *Title IX Hits Milestone Under Attack; Political Climate, Angry Male Athletes, Court Cases Cast Chill on 30th Anniversary*, SUN-SENTINEL (Fort Lauderdale, Fla.), Aug. 11, 2002, at 1C. As Professor Epstein has noted, “The provision reads like a sex-blind requirement, but through its administrative extensions it has led to the most coercive federal intervention on the autonomy of all private and public institutions.” Richard A. Epstein, *Skepticism and Freedom: The Intellectual Foundations of Our Constitutional Order*, Address at the National Constitution Center (Mar. 30, 2004), in 6 U. PA. J. CONST. L. 657, 679 (2004).

¹¹ 20 U.S.C. § 1681 (2002).

¹² See Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 MARQ. SPORTS L.J. 11, 20 n.44 (2003) (noting that the vast majority of the nearly 10,000 comments received during the Department of Health, Education, and Welfare’s comment period related to the two out of forty proposals that related to athletics).

¹³ See Thomas A. Cox, *Intercollegiate Athletics and Title IX*, 46 GEO. WASH. L. REV. 34, 36 (1977) (“The legislative history of Title IX provides little indication whether Congress intended the statute to apply to athletic programs.”). In fact, it is important to note that Title IX has been used effectively to combat forms of gender discrimination in other contexts in education beyond athletics, such as teacher-student sexual harassment in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), student-student sexual harassment in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), and gender discriminatory admissions processes in *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

¹⁴ National Organization of Women, *Save Title IX*, at http://www.now.org/issues/ttle_ix/index.html (last visited Apr. 28, 2004).

¹⁵ Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL’Y 51, 52 (1996).

impact on young men still abound, and the number of men's collegiate teams dropped from athletic programs as a result of the legislation continues to grow.¹⁶

Admittedly all of this history, whether one views it as triumphant or disastrous, is more a question of social science and budget allocation than it is a question of law. Title IX's legal catch derives from its nature as more of an aspiration than any sort of affirmative regulation. That is to say that the law contained only a statement about how conduct should be, but provided no enforcement mechanism or review process. Additionally, the law does not even mention from where it derives its constitutional authority. As a result of these characteristics, the litigation produced by Title IX has been both controversial and groundbreaking, and has presented several challenging issues of law.¹⁷ For purposes of this Note, it is relevant to note that the development of Title IX in the early 1970s¹⁸ came in the wake of the Civil Rights legislation that flooded the American political scene in the mid- to late-1960s. To that end, Title IX was patterned significantly after Title VI of the Civil Rights Act of 1964, but not identically.¹⁹ Title IX's sponsor, Senator Birch Bayh, spoke of Title IX as closing a "loophole" in Title VI by protecting against gender discrimination.²⁰

While Title IX declared, in essence, that gender discrimination was to be a thing of the past, it problematically did not provide a

¹⁶ See Erik Brady, *Major Changes Debated for Title IX*, USA TODAY, Dec. 18, 2002, at 1A (citing those who fault Title IX for forcing the elimination of more than 400 men's teams as colleges tried to balance the numbers of male and female athletes). Cf. Welch Suggs, *Budgets Grow as Colleges Seek to Comply With Gender-Equity Rules*, CHRON. HIGHER EDUC., June 21, 2001 ("The 305 colleges that provided data [to the equity survey] in both 1996-97 and 2000-01 indicated that they had added an average of 55 female athletes and 28 male athletes apiece over the four intervening years."), available at <http://chronicle.com/free/v48/i41/41a04101.htm>; *Ups and Downs*, SPORTS ILLUSTRATED, Apr. 12, 2004, at 28 tbl. (depicting gains and losses for men's teams in various collegiate sports from 1981-2002).

¹⁷ See, e.g., *Grove City Coll. v. Bell*, 465 U.S. 555, 563-64 (1984) (holding a college was subject to Title IX, even where students directly received the federal aid in loans and grants, but college was the indirect recipient of that aid); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 290 (2001) (holding that a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools may be regarded as engaging in state action).

¹⁸ For more complete legislative histories on Title IX, see Christopher Paul Reuscher, Comment, *Giving the Bat Back To Casey: Suggestions to Reform Title IX's Inequitable Application to Intercollegiate Athletics*, 35 AKRON L. REV. 117, 119-27 (2001), and Kelly S. Terry, *Franklin v. Gwinnett County Public Schools: Reviving the Presumption of Remedies Under Implied Rights of Action*, 46 ARK. L. REV. 715, 715-18 (1993).

¹⁹ *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694-95 n.16 (1979). In fact, the original House proposal for Title IX was initially phrased as an amendment to Title VI that would have made § 601 of that Title into § 601(a), and would have added the gist of what is now Title IX as § 601(b). *Id.*

²⁰ 118 CONG. REC. 5807 (1972).

procedural mechanism for accomplishing this goal absent universal, voluntary compliance. In *Cannon v. University of Chicago*, the Supreme Court was presented with the question and, despite five separate opinions among the nine Justices, held that Title IX did contain an implied private right of action.²¹ Despite some disagreement on the Court, the *Cannon* holding was, at the very least, consistent with the Court's prior finding of an implied private right of action in Title VI.²² The Court left the question of what remedies might be available in such a suit for another day, which came in *Franklin v. Gwinnett County Public Schools*.²³ Christine Franklin, a former high school student, sought damages from her high school for failing to stop a teacher from harassing her. She sued under Title IX, claiming gender discrimination, seeking money damages from the school district as a result of its conduct.²⁴ The Supreme Court unanimously reversed two lower courts, concluding that a "damage remedy is available for an action brought to enforce Title IX."²⁵ In what would later prove critical for Heather Sue Mercer, the Court did not further explain the "damage remedy" in terms of either compensatory or punitive damages. Nonetheless, it is important to take a closer look at the *Franklin* analysis and its subsequent interpretation.

The Court began by proceeding under the presumption that "all appropriate remedies" are available unless Congress expressly indicates otherwise.²⁶ The Court then attempted to answer the question, as it had in *Cannon*, by looking at the state of the law at the time Title IX was passed.²⁷ The Court found that the prevailing common law presumption dating back to at least the early nineteenth century was that the denial of a remedy served as the "exception rather than the rule."²⁸ Additionally, in the decade immediately preceding the enactment of Title IX, the Court had found implied rights of action in

²¹ *Cannon*, 441 U.S. at 680. Justice Stevens delivered the opinion of the Court, in which Justices Brennan, Stewart, Marshall, and then-Justice Rehnquist joined. Chief Justice Burger concurred in the judgment without opinion. *Id.* at 717. Justice Rehnquist also filed a concurring opinion in which Justice Stewart joined. *Id.* Justice White filed a dissenting opinion joined by Justice Blackmun. *Id.* at 718. Justice Powell filed a dissenting opinion. *Id.* at 730.

²² *Id.* at 697-98.

²³ 503 U.S. 60 (1992).

²⁴ *Franklin v. Gwinnett County Pub. Schs.*, 911 F.2d 617, 619 (11th Cir. 1990).

²⁵ *Franklin*, 503 U.S. at 76.

²⁶ *Id.* (quoting *Davis v. Passman*, 442 U.S. 228, 246-47 (1979)). This was admittedly a point-less exercise because the statute was silent on the existence of a right of action in the first place, so it was necessarily silent as to the available remedies such an action could provide. *Id.* at 71.

²⁷ *Id.* at 71-73.

²⁸ *Id.* at 71 (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 375 (1982)).

six cases, approving remedies of damages in three of them.²⁹ This, in effect, had put Congress on notice of the Court's presumption of implying rights and remedies. The Court furthered this argument by examining the years after *Cannon*, and specifically two congressional amendments to Title IX.³⁰ These amendments provided not only a validation of the holding in *Cannon*, but went further, making "remedies (both at law and in equity) . . . available for such a violation . . . against any public or private entity."³¹ The Court interpreted these amendments as Congress's implied acceptance of the traditional availability of "any appropriate relief for violation of a federal right."³²

The Court then addressed defendant's argument that the normal presumption in favor of all appropriate remedies should not apply because Title IX was enacted pursuant to Congress's Spending Clause power.³³ The Court ultimately deferred deciding the constitutional source of Congress's power in enacting Title IX,³⁴ but briefly addressed the relevance of the point. In *Pennhurst State School and Hospital v. Halderman*, the Court had observed that remedies were limited under Spending Clause statutes for *unintentional* violations.³⁵ The *Franklin* Court refused to extend this logic to *intentional* violations, claiming that the same notice problems for recipients of federal money do not exist where intentional discrimination is alleged.³⁶ The Court further noted that prior holdings had approved monetary

²⁹ *Id.* at 72 (citing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), *Wyandotte Trans. Co. v. United States*, 389 U.S. 191, 207 (1967), *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964)).

³⁰ *Id.* (reviewing the Rehabilitation Act Amendments of 1986, 42 U.S.C. §2000d-7, and the Civil Rights Restoration Act of 1987, 102 Stat. 28).

³¹ *Id.* (quoting 42 U.S.C. §2000d-7(a)(2)).

³² *Id.* at 73. While Congress did not "expressly state the nature of the available remedies, it was also silent as to any limits on remedies." Michael A. Cullers, Comment, *The Availability of Title IX Damages for Employees After Franklin v. Gwinnett County Public Schools*, 45 CASE W. RES. L. REV. 1325, 1330 (1995).

³³ *Id.* at 74. The Spending Clause provides that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

³⁴ *Franklin*, 503 U.S. at 75 n.8 (acknowledging *Franklin*'s argument that Title IX rests on powers derived from § 5 of the Fourteenth Amendment, and deciding that the question need not be answered).

³⁵ 451 U.S. 1, 28-29 (1981) ("In no case . . . have we required a State to provide money to plaintiffs much less required a State to take on such open-ended and potentially burdensome obligations as providing 'appropriate' treatment in the 'least restrictive' environment." (citations omitted)).

³⁶ *Franklin*, 503 U.S. at 75. Simply put, the notice problem is that the money recipient "lacks notice that it will be liable for a monetary award." *Id.*

awards for intentional violations of other Spending Clause statutes.³⁷ Ultimately this intentional/unintentional distinction was justified on the grounds that an intentional wrongdoer does not deserve notice about the consequences of his action because he should not be intentionally violating the law in the first place. After finally rejecting defendant's claim that Title IX remedies should be limited to backpay and prospective relief,³⁸ the Court concluded that a general "damages remedy" was available under actions brought to enforce Title IX.³⁹ The Court did not specify the *type* of damages, but to some commentators, however, the opinion "appear[ed] to sanction both compensatory and punitive damages."⁴⁰ Several lower courts made a similar determination, believing that *Franklin's* damages remedy included both compensatory and punitive damages.⁴¹

II

Throughout the 1990s, in the wake of *Franklin*, the tone of Title IX litigation began to change as federal courts, perhaps most notably in the *Cohen v. Brown University* litigation,⁴² started getting more involved in the administration of schools' athletic departments, forcing gender equity upon non-complying schools.⁴³ All of this left some commentators to question whether compromise was even possible in

³⁷ *Id.* (referencing *Consol. Rail Corp. v. Darrone*, 465 U.S. 624 (1984) (holding unanimously that backpay was a permitted remedy for intentional violations of an employee discrimination statute)).

³⁸ The Court rested this conclusion on the nature of Title IX lawsuits—namely, that in situations where students were bringing suit, backpay was an unavailable remedy. *See id.* at 75–76.

³⁹ *Id.* at 76.

⁴⁰ Jill K. Johnson, Note, *Title IX and Intercollegiate Athletics: Current Judicial Interpretation of the Standards for Compliance*, 74 B.U. L. REV. 553, 556 n.19 (1994); *see also* Cullers, *supra* note 32, at 1339 n.109 ("Since *Franklin* only allowed Title IX damages for intentional discrimination, it is assumed that compensatory and punitive damages would only be available for intentional discrimination against an employee covered by Title IX.").

⁴¹ *See, e.g.*, *Ernst v. W. States Chiropractic Coll.*, 1999 U.S. App. LEXIS 28500, at *2 (9th Cir. 1999) (reinstating a \$150,000 punitive damages judgment in a Title IX lawsuit); *Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1194 (1st Cir. 1994) (interpreting the *Franklin* presumption of a full remedy to allow for [punitive] damages for violations of the implied right of action under a parallel act to Title IX). *But see* *Canty v. Old Rochester Reg'l Sch. Dist.*, 54 F. Supp. 2d 66, 69 (D. Mass. 1999) ("[I]t is unclear whether the *Franklin* Court meant to include punitive damages against municipal entities as part of 'all available remedies.'").

⁴² 809 F. Supp. 978 (D.R.I. 1992) ("*Cohen I*"), *aff'd*, 991 F.2d 888 (1st Cir. 1993) ("*Cohen II*"), *aff'd on remand*, 879 F. Supp. 185 (D.R.I. 1995) ("*Cohen III*"), *aff'd in part, rev'd in part*, 101 F.3d 155 (1st Cir. 1996) ("*Cohen IV*").

⁴³ *See* *Barrett v. W. Chester Univ.*, 2003 WL 22803477, at *16 (E.D. Pa. Nov. 12, 2003) (ordering the University to reinstate its women's gymnastics team); *Cohen I*, 809 F. Supp. at 1001 (granting an injunction reinstating previously eliminated women's teams to varsity status at the school).

the application of Title IX,⁴⁴ and the extremely contentious *Mercer* litigation certainly provided no cause for optimism.

Heather Sue Mercer arrived at Duke in the fall of 1994 as a former all-state kicker at Yorktown Heights High School in New York.⁴⁵ As a high school student, she was featured by *The New York Times* for her kicking ability and interest in pursuing what was traditionally an all-male sport.⁴⁶ At the time, Mercer herself even admitted, "I think it's kind of ridiculous how much attention I'm getting."⁴⁷ After arriving at Duke, her interest in, and attempts to try out for, the varsity football team garnered national attention, and were welcomed by both Head Coach Frank Goldsmith and the university.⁴⁸ Her brightest highlight was kicking the winning field goal in the team's spring scrimmage in 1995.⁴⁹ Somewhere along the way, however, things would go terribly wrong and Mercer was dismissed from the football team later that year.⁵⁰ She graduated from Duke in May of 1998, having already filed a Title IX lawsuit against the university which granted her degree. Coach Goldsmith was fired later that year, following the 1998 football season, although it was his fourth consecutive losing campaign.⁵¹ He would later claim at trial that letting Mercer join the football team was the worst decision of his life.⁵² As the tide for changes in Title IX began to swell in 2002 and 2003,⁵³ the *Mercer* case became a symbol of the struggle for gender equity and equality in athletics.

Mercer's lawsuit was initially dismissed with prejudice by District Judge N. Carlton Tilley.⁵⁴ Because football is a "contact sport" under the Department of Education's implementing regulations,⁵⁵ Judge

⁴⁴ See Andrew A. Ingram, Comment, *Civil Rights: Title IX and College Athletics: Is There a Viable Compromise?*, 48 OKLA. L. REV. 755 (1995) (detailing the history of conflict in gender equity disputes).

⁴⁵ *Mercer v. Duke Univ.*, 190 F.3d 643, 644 (4th Cir. 1999).

⁴⁶ Kate Stone Lombardi, *Somewhere Over the Goal Post a Girl's Dream Lies*, N.Y. TIMES, Sept. 26, 1993, Sunday late ed., § 13WC, at 1.

⁴⁷ *Id.*

⁴⁸ See *Mercer v. Duke Univ.*, 181 F. Supp. 2d 525, 530-32 (M.D.N.C. 2001) (providing a factual background on Mercer's tryouts and attempts to join the team).

⁴⁹ *Id.* at 530.

⁵⁰ *Id.*

⁵¹ Mark Schlabach, *Out with the Old . . . ; . . . In with the New: College Football Coaching Derby*, ATLANTA J. & CONST., Dec. 2, 1998, at E1.

⁵² *Mercer*, 181 F. Supp. 2d at 532.

⁵³ Diana Jean Schemo, *Women's Athletics; Title IX Reformers Keep Men in Mind*, N.Y. TIMES, Feb. 27, 2003, at D1 (discussing a special commission established to review Title IX and submit changes to the Department of Education in 2002 and 2003).

⁵⁴ *Mercer v. Duke Univ.*, 32 F. Supp. 2d 836, 838 (M.D.N.C. 1998).

⁵⁵ 34 C.F.R. § 106.41(b) (1998) provides in pertinent part:

[A] recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport [W]here a recipient operates or sponsors a team in a particular sport for

Tilley reasoned that Duke and Goldsmith had no obligation to allow Mercer, or any female, onto its football team, so it could not be held liable for discrimination.⁵⁶ While contact sports like football are counted in the Title IX calculations of equal funding and total available opportunities for each gender, they are exempted from having to provide equal opportunities for each gender in that particular contact sport.⁵⁷ This determination was consistent with the original intent of Title IX which was that, as Senator Bayh had put it, "We are not requiring that intercollegiate football be desegregated, nor that the men's locker room be desegregated."⁵⁸

On appeal, the Fourth Circuit disagreed, holding that "where a university has allowed a member of the opposite sex to tryout for a single-sex team in a contact sport, the university is . . . subject to Title IX and therefore prohibited from discriminating against that individual on the basis of sex."⁵⁹ This result is somewhat peculiar because it would appear to limit opportunities for women, in direct conflict with Title IX's purpose. For example, had Goldsmith initially refused Mercer a tryout on the *sole* basis of her gender, both he and Duke would have been beyond the reaches of Title IX and within the safe harbor of the Department of Education's implementing regulations.⁶⁰ By allowing Mercer to try out, however, Duke and Goldsmith forfeited their right to rely on the "contact sports" exemption later, and thus became bound by the law.⁶¹ The solution for schools in the future would therefore be to not allow the opportunities for women in the first place, shutting the door at the outset. Such a result appears at odds with Title IX. Mercer's stated goal of using her \$2 million award to finance scholarships for female kickers⁶² (had it been allowed to stand) might have found few possible recipients because of this result.

After the Fourth Circuit's reversal and remand, the case proceeded to trial in the fall of 2000 under District Judge James Beaty in

members of one sex but operates or sponsors no such team for members of the opposite sex . . . the members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include . . . football . . .

Id.

⁵⁶ *Mercer*, 32 F. Supp. 2d at 839.

⁵⁷ 34 C.F.R. § 106.41(b) (1998).

⁵⁸ 117 CONG. REC. 30,407 (1971).

⁵⁹ *Mercer v. Duke Univ.*, 190 F.3d 643, 644 (4th Cir. 1999).

⁶⁰ 34 C.F.R. § 106.41(b) (1998).

⁶¹ The Fourth Circuit felt that this was consistent with Title IX's intent. See *Mercer*, 190 F.3d at 647 ("[T]he reading of the regulation we adopt today . . . ensures that the . . . indisputable congressional intent to prohibit discrimination in all circumstances where such discrimination is unreasonable—for example, where the university itself has voluntarily opened the team in question to members of both sexes—is not frustrated.").

⁶² Jerry Crowe, *Jury Awards Female Kicker \$2 Million*, L.A. TIMES, Oct. 13, 2000, at D14.

Durham, North Carolina. Judge Beaty conducted a bifurcated proceeding on the issues of liability and damages.⁶³ After extensive testimony regarding Mercer's ability relative to the other "walk-on" (i.e., non-scholarship) field goal kickers,⁶⁴ Goldsmith's gender-disparaging remarks,⁶⁵ and the university's failure to intervene,⁶⁶ the jury had had enough. They determined that Goldsmith had discriminated against Mercer on the basis of her gender and that Duke was liable for the discrimination under Title IX. In the separate damages proceeding, the jury awarded Mercer just one dollar in compensatory damages, but \$2 million in punitive damages.⁶⁷

Included in its flurry of post-trial motions,⁶⁸ Duke challenged the availability of punitive damages as a Title IX remedy.⁶⁹ Judge Beaty, looking to the "authority established in *Franklin* . . . and subsequent court rulings," concluded that "punitive damages are available for private rights of action brought pursuant to Title IX."⁷⁰ After a discussion of *Franklin* and the presumption that "all appropriate remedies [are available] unless Congress has expressly indicated otherwise,"⁷¹ Judge Beaty turned to a recent Fourth Circuit opinion. In *Pandazides v. Virginia Board of Education*, that court held that punitive damages were available under a parallel statute to Title IX.⁷² Additionally, a number of other district courts had agreed that the "full

⁶³ *Mercer v. Duke Univ.*, 181 F. Supp. 2d, 525, 535 (M.D.N.C. 2001).

⁶⁴ Evidence was submitted that Mercer was "at least as skillful at place kicking" as another male kicker who was not cut from the team. *Id.* at 537.

⁶⁵ Goldsmith, in a meeting with Mercer and her mother, apparently explained that his daughter had outgrown "little boys' games" and advised Mercer that she should, likewise, "outgrow her interest" in playing football. Goldsmith further recommended that Mercer consider trying out for the cheerleading squad. He commented on "how pretty she was and informed her that when people asked him what she looked like, he compared her to the actress Molly Ringwald." *Id.* at 532.

⁶⁶ There was evidence that both the university's President Nan Keohane and Athletic Director Tom Butters were aware of allegations of gender discrimination but did nothing. *Id.* at 541.

⁶⁷ *Id.*

⁶⁸ Defendants moved for judgment as a matter of law or, in the alternative, a new trial and/or remittitur. Plaintiff filed a motion for attorneys' fees. *Id.* at 529.

⁶⁹ *Id.*

⁷⁰ *Id.* at 544-45.

⁷¹ *Id.* at 544.

⁷² 13 F.3d 823 (4th Cir. 1994) (holding, in light of *Franklin*, that punitive damages are available because they are part of the "full panoply" of remedies). It is noteworthy that the Fourth Circuit felt bound to reverse prior precedent on the question of punitive damages because of the decision in *Franklin*. *Id.* at 830. The statute, section 504 of the Rehabilitation Act of 1973, provided in pertinent part that, "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794 (West. Supp. 1993).

panoply" of *Franklin* included punitive damages.⁷³ Judge Beaty accordingly denied Duke's and Goldsmith's motions, entered judgment for Mercer, and awarded attorneys' fees and costs.⁷⁴

Duke and Goldsmith decided to try their luck again in the Fourth Circuit, claiming the lack of availability of punitive damages in Title IX private actions as their principal argument on appeal.⁷⁵ After oral arguments, the court placed the case in abeyance to await the Supreme Court's decision in *Barnes v. Gorman*,⁷⁶ regarding the availability of punitive damages under the same statute at issue in *Pandazides*.⁷⁷ The *Gorman* opinion in April 2002 thus served as the basis for the Fourth Circuit's short, unreported opinion, in which it held that the "conclusion in *Gorman* that punitive damages are not available under Title VI compels the conclusion that punitive damages are not available for private actions brought to enforce Title IX."⁷⁸ The Fourth Circuit thus vacated the award of punitive damages and remanded the case for reconsideration of the award of \$388,799.83 in fees and expenses to Mercer.⁷⁹ Despite governing precedent that suggested fees would not be appropriate in this case,⁸⁰ the District Court ultimately awarded her attorneys \$349,243.96 earlier this year.⁸¹ In an instant, though, Duke and Goldsmith were financially absolved of the conduct that a jury had determined was egregious enough to warrant a \$2 million punishment. Simply put, it is extremely difficult to reconcile this result with Title IX's purpose and history.

⁷³ *Mercer*, 181 F. Supp. 2d at 545 (citing *Proctor v. Prince George's Hosp. Ctr.*, 32 F. Supp. 2d. 820, 829–30 (D. Md. 1998); *Burns-Vidlak ex rel. Burns v. Chandler*, 980 F. Supp. 1144, 1147 (D. Haw. 1997)).

⁷⁴ *Mercer*, 181 F. Supp. 2d at 553–54.

⁷⁵ *Mercer v. Duke Univ.*, 50 Fed. Appx. 643, 644 (4th Cir. 2002).

⁷⁶ *Barnes v. Gorman*, 536 U.S. 181 (2002).

⁷⁷ *Mercer*, 50 Fed. Appx. at 644.

⁷⁸ *Id.*

⁷⁹ Although the Fourth Circuit did not explicitly refer to the amount, the district court opinion included the calculation, which consisted of \$340,939.50 of attorneys' fees and \$47,860.33 for expenses. See *Mercer*, 181 F. Supp. 2d at 553–54.

⁸⁰ *Mercer* had moved to recover attorneys' fees pursuant to 42 U.S.C. § 1988(b) (2002). *Mercer*, 181 F. Supp. 2d at 553. Under this statute, the court may award "a reasonable attorney's fee as part of the costs" to a "prevailing plaintiff." 42 U.S.C. § 1988(b). The Supreme Court, though, has held that "when a plaintiff recovers only nominal damages . . . the only reasonable fee is usually no fee at all." *Farrar v. Hobby*, 506 U.S. 103, 115 (1992). Justice O'Connor's concurrence in *Farrar*, the decisive vote, would have allowed fees to be awarded only if Mercer could show either the significance of the issue on which she prevailed or the public purpose served in her victory. See *id.* at 121–23 (O'Connor, J., concurring).

⁸¹ *Mercer v. Duke Univ.*, 301 F. Supp. 454, 470 (M.D.N.C. Jan. 22, 2004).

III

Because the Fourth Circuit relied so heavily on the *Gorman* decision,⁸² it is necessary to take a closer look at the case's circumstances and the Supreme Court's analysis. Plaintiff Jeffrey Gorman, a paraplegic, had sued various members of the Kansas City police following an incident in which he was injured due to their failure to make appropriate accommodations for his disability.⁸³ A jury returned a verdict in his favor awarding over \$1 million in compensatory damages and \$1.2 million in punitive damages, and the Eighth Circuit affirmed.⁸⁴ The sole issue before the Supreme Court was the availability of punitive damages pursuant to the provision of the Americans with Disabilities Act under which he brought his action. In an opinion by Justice Scalia, the Court reversed the two lower courts, holding punitive damages to be an unavailable remedy.

The Court based its holding on several factors relevant to the availability of punitive damages in Mercer's Title IX suit. First, the act under which Gorman sued specifically declared that the "remedies, procedures, and rights" of Title VI of the Civil Rights Act of 1964 were to serve as its basis.⁸⁵ Title IX, although frequently interpreted consistently with Title VI,⁸⁶ contains no such express limitation on its available panoply of remedies. So while Title VI was statutorily limited by Congress, Title IX was enacted in the face of Supreme Court precedent providing for the "use of any available remedy to make good the wrong done."⁸⁷ Secondly, and more importantly, the Court's *Gorman* analysis noted that Title VI specifically invokes Congress's power under the Spending Clause, and that this constitutional authority implicates a whole host of contract law concerns.⁸⁸ In contrast, however, Title IX does not expressly acknowledge a constitutional source of authority, and the Supreme Court in *Franklin* had

⁸² See *Mercer*, 50 Fed. Appx. at 644 ("[T]he Supreme Court's conclusion in *Barnes* that punitive damages are not available under Title VI compels the conclusion that punitive damages are not available for private actions brought to enforce Title IX.").

⁸³ *Gorman*, 536 U.S. at 183. The basis of the complaint was as follows: Gorman lacked voluntary control over his lower torso, including his bladder, and was forced to wear a catheter attached to a urine bag around his waist. After getting into an altercation at a nightclub, a police van arrived to take Gorman to the police station. The van was not equipped to handle a wheelchair, and the harness system employed by the police proved ineffective. During the trip, Gorman came loose and fell to the floor of the van, which ruptured his urine bag and injured his shoulder. He has since suffered serious medical problems as a result of that incident. He sued under § 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a). *Id.* at 184.

⁸⁴ *Gorman v. Easley*, 257 F.3d 738 (8th Cir. 2001).

⁸⁵ 92 Stat. 2983.

⁸⁶ See *Cannon*, 441 U.S. at 694-98.

⁸⁷ *Bell v. Hood*, 327 U.S. 678, 684 (1946).

⁸⁸ *Gorman*, 536 U.S. at 186-87.

explicitly left the question open despite Justice Scalia's mischaracterization in *Gorman*.⁸⁹ The Fourth Circuit in *Mercer*, however, ignored this question altogether, refusing to distinguish between Title VI and Title IX, simply saying the two are "interpreted and applied in the same manner."⁹⁰ This interpretation blatantly ignores the differences between the laws discussed above, and flies in the face of scholarship which contends that Congress's ability to legislate against sex discrimination is specifically derived from the Thirteenth and Fourteenth Amendments.⁹¹ If this is in fact the case, there is no justification for binding Title IX to Spending Clause jurisprudence. Congress both explicitly and implicitly used different language in writing the two laws, so any attempt to treat Title VI and Title IX identically appears to be little more than judicial expediency.

However, even if one is to accept that Title IX is appropriately limited by the Court's Spending Clause jurisprudence, the opinions in *Gorman* and *Mercer* still went too far. By rehashing the notice requirement it had seemingly dismissed in *Franklin*, *Gorman* attempted to interject the contract law analogy into the *Franklin* remedy decision.⁹² The analogy is that Spending Clause legislation is predicated on the theory that there is a contract between the government and the recipient regarding the receipt of the money. Because the recipient had no notice that he could face punitive damages for a breach, as the theory goes, he cannot be exposed to liability of that nature. As Justice Scalia stated in *Gorman*,

When a federal-funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires; and that wrong is "made good" when the recipient compensates the Federal Government or a third-party beneficiary (as in this case) for the loss caused by that failure.⁹³

⁸⁹ Compare *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75 n.8 (1992) (noting that the Court "need not decide which power Congress utilized in enacting Title IX"), with *Gorman*, 536 U.S. at 187 (referring to the *Franklin* case as a "private suit[] under Spending Clause legislation").

⁹⁰ *Mercer*, 50 Fed. Appx. at 644.

⁹¹ See generally Emily Calhoun, *The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Sex Discrimination*, 61 MINN. L. REV. 313 (1977) (discussing the authority for sex discrimination legislation under the Fourteenth Amendment).

⁹² See *Leading Cases: I. Constitutional Law: G. Spending Clause*, 116 HARV. L. REV. 312, 312 (2002):

[T]he Court took a potentially significant step toward limiting the reach of Spending Clause legislation The reasoning in *Gorman*, which extends the Court's longstanding analogy between Spending Clause legislation and contracts to the area of remedies, creates new uncertainties about how broadly the Court will apply contract law principles to limit the scope of such legislation.

Id.

⁹³ *Gorman*, 536 U.S. at 189.

This statement, particularly when utilized in the civil rights context, misses the point of government legislation in the first place. Again, the *Mercer* court failed to address this difference between Title VI and Title IX.

The *Gorman* decision, and the Fourth Circuit's subsequent reliance on *Mercer*, fly in the face of other remedies precedent: Just ten years before *Gorman*, the *Franklin* Court willingly reaffirmed the classic presumption of all available remedies unless Congress expressly indicated otherwise.⁹⁴ It is difficult to reconcile the two, even in the face of the contract analogy. Does Duke really need to have notice that it might face a punitive damages award that amounted to just 1% of the federal funding received by the university in the 1997–1998 financial year?⁹⁵ This hardly seems outside the scope of “appropriate relief,”⁹⁶ nor does it appear to be such an extensive unforeseen “liability” in the face of which Duke would have turned down the funding rather than expose itself.⁹⁷

Justice Scalia's attempt in *Gorman* to rely on the basic contract law analogy that “when a court concludes that a recipient has breached its contract, it should enforce the broken promise by protecting the expectation that the recipient would not discriminate,” is unconvincing when applied to Title IX.⁹⁸ The nature of discrimination is inherently different in the educational context than it is in other contexts, such as a workplace environment. Interpreting Title IX exactly like Title VI ignores these differences. Students, and student-athletes especially, can not merely be placed “in as good a position as they would have been had the contract been performed” because they face extreme time constraints.⁹⁹ *Mercer* had been a college graduate for over two years before her claim even went *to trial*; the jury could not merely restore her athletic eligibility. As *Mercer* herself said over a decade ago, “I just thought, wow, football looks like something I would really enjoy. And I do. I love it.”¹⁰⁰ How can any court make someone like this “whole” again when it is clearly impossible? The most *appropriate* “remedy to make good the wrong done” must then be punitive damages.¹⁰¹ Any other remedy falls short of Title IX's

⁹⁴ *Franklin*, 503 U.S. at 69–71.

⁹⁵ *Mercer*, 181 F. Supp. 2d at 551. The actual percentage could be even lower considering that the alleged discrimination took place over a period of more than two years.

⁹⁶ *Franklin*, 503 U.S. at 73.

⁹⁷ *Gorman*, 536 U.S. at 187.

⁹⁸ *Id.* at 189 (quoting *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 633 (1983) (Marshall, J., dissenting)).

⁹⁹ *Id.*

¹⁰⁰ Lombardi, *supra* note 46, at 1.

¹⁰¹ *Bell v. Hood*, 327 U.S. 678, 684 (1946).

purpose, and allows violating institutions to shirk responsibility for their discriminatory conduct.

The Fourth Circuit's decision presents one additional peculiarity. First, the court chose without explanation not to publish its opinion. The immediate effect of this is that the holding will carry no precedential weight in the circuit.¹⁰² In deciding what appeared to be such an easy case for the court after *Gorman*, one can only speculate why the court took this step. Perhaps the Fourth Circuit's opinion can be interpreted as attempting to right the wrong it committed in its first decision interpreting the contact sports exception.¹⁰³ When confronted with the seeming absurdity of the result from the district court trial, the circuit court may have sensed the trouble it had created two years earlier. That a jury could value Mercer's lost playing time and illegally crushed dream at \$1, yet value the reprehensibility of Duke and Goldsmith's conduct at \$2 million, was certainly enough to raise the circuit court's collective eyebrow.

IV

The Fourth Circuit's *Mercer* decision in 2002 contributed to the growing tide pushing to weaken Title IX. The lack of availability of punitive damages in private actions to enforce the law removes a significant threat against non-compliance. To see the effects of this, one needs to look no further than the *Mercer* case. Instead of facing potential damages of \$2 million for its discriminatory conduct, Duke ultimately paid out damages in the sum of \$1.¹⁰⁴ To justify these widely different results on a Spending Clause contract-law notice theory is grossly inadequate. To conveniently treat Title IX as a statutory clone of Title VI is irresponsible, and ignores several important differences in the two laws that warrant separate treatment and judicial interpretation. Title IX's initial and continuing purposes both warrant a more equitable result. The result here completely glosses over the nature of the defendant's conduct, which was intentional here, treating it as no worse than negligent behavior. In *Mercer*, it is hard to see how federal funds are *not* "subsidizing gender bias"¹⁰⁵ when Duke is allowed to escape a bill that a jury felt was an appropriate penalty for its severe misconduct.

¹⁰² See U.S.C.S. CT. APP. 4TH CIR., LOCAL RULE 36(B) (2002) (explaining the effect of unpublished decisions by the court).

¹⁰³ See *Mercer v. Duke Univ.*, 190 F.3d 643, 644 (4th Cir. 1999) (finding Duke could not rely on the "contact sports" safe harbor because it allowed Mercer to try out).

¹⁰⁴ This, of course, does not include the attorneys fees of \$349,243.96 Duke had to pay Mercer, see *Mercer v. Duke Univ.*, 301 F. Supp. 454, 470 (M.D.N.C. Jan. 22, 2004), nor the fees Duke had to pay for its own representation.

¹⁰⁵ Terry, *supra* note 18, at 715–18.

How would the government choose to address some of the problems that have arisen under Title IX? In *Franklin*, the United States filed an amicus brief urging the Court to refuse monetary relief and to reconsider the implied right of action grant in *Cannon*.¹⁰⁶ Such changes would have a potentially devastating effect on Title IX enforcement litigation. Other than a brief foray in 1987, Congress has been far too content to let the judiciary shape Title IX. After *Gorman* and *Mercer*, it is high time for Congress to get off the bench and get into the game. Congress needs to respond to the question of Title IX's constitutional authority, and the remedies that are available in both law and equity. It can no longer rely on the federal courts to clean up a mess it created so many years ago. Admittedly, no reform will allow Heather Sue Mercer to kick a football in a Duke uniform ever again. Nonetheless, her case is a fascinating insight into the important role punitive damages can play in Title IX litigation and casting strong doubt on their future availability.

—Charles L. Rombeau*

¹⁰⁶ Brief of Amicus Curiae United States, *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992) (No. 90-918).

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