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Emphasizing Torts in Claims of Discrimination Against Black Female Athletes

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In *Black Women, Gender Equity and the Function at the Junction*,[1] I argued that an equality-based legal regime does not provide an adequate remedy for African-American female athletes. Instead I suggested that a tort-based regime may be more appropriate. I did so knowing that gender and racial discrimination are torts and I did not intend to suggest otherwise. They are statutory torts founded upon equality principles. What I intended was to draw more upon the general tort principles involved in an antidiscrimination action. I specifically invoked the notion of using mass tort theories. I wish to sketch a brief but more detailed framework for this proposition in this article. In particular, I want to consider potential challenges brought by African-American females at the collegiate and K-12 levels, which will be based upon Titles VI[2] and IX.[3]

The difficulty that I hope to use tort theory to overcome is that the gender-based antidiscrimination rules of Title IX do not provide adequate recourse for African-American female athletes. Title IX prohibits discrimination against females by educational institutions in the provision of participation opportunities, financial support and other benefits in athletic programs. Although Title IX has increased the availability of opportunities for African-American females, most colleges and universities have attempted to comply with Title IX by adding opportunities for white females and cutting sports for males.[4] African-American female athletes are unlikely to fare any better under antidiscrimination laws prohibiting racial discrimination. It is certainly

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1. Alfred D. Mathewson, *Black Women, Gender Equity and the Function at the Junction*, 6 MARQ. SPORTS L.J. 239 (1996).

2. 42 U.S.C. § 2000d (1994) ("No person in the United States shall, on the ground of race . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

3. 20 U.S.C. §§ 1681-88 (1994). Title IX reads, in pertinent part, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.* § 1681(a).

4. *See* Mathewson, *supra* note 1, at 251.

the case that Title VI, a statute prohibiting racial discrimination by educational institutions, has added few, if any, athletic opportunities for African-American females. In fact, I am not aware of any litigation tackling the discriminatory denial of opportunities and benefits to African-American females in athletic programs on the basis of Title VI.

In *Function at the Junction*, I relied on the pathbreaking works of Professors Kimberle Crenshaw and Angela P. Harris.[5] Both explored the dynamics of the intersection of race and gender albeit with quite different approaches. Crenshaw tended to focus on the wrongful discriminatory acts while Harris focused on damages. There are tortious forces of discrimination in Crenshaw's intersection. Black women are hit by two discrete forces of discrimination separately or in combination, one targeting race and the other, gender. These are not forces of nature; they are the results of actions and inactions by people. Such action and inaction may be intentional, or result from unconscious discrimination and social norms. Some of these actions target individuals or groups because of race or ethnicity; others target gender.

Each force occurring separately produces harm; for example, an individual who is denied a job because of race incurs damages. There are economic damages like lost wages, additional job hunting expenses, and time. There are the noneconomic personal damages like loss of personal dignity, emotional distress and other psychic pain. A woman who is denied a job because she is female incurs similar damages.

Crenshaw identified another force that courts have had great difficulty in sorting out when dealing with discrimination in equality terms. She maintained that there was a separate and discrete force of discrimination directed at African-American women.[6] This force was different from the combination of the racial force and gender forces.

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5. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). For further analyses of intersectionality in the sports setting, see Tonya M. Evans, Comment, *In the Title IX Race Toward Gender Equity, The Black Female Athlete is Left to Finish Last: The Lack of Access for the "Invisible Woman,"* 42 HOW. L.J. 105 (1998); Marilyn V. Yarbrough, *If You Let Me Play Sports*, 6 MARQ. SPORTS L.J. 229 (1996).

6. *See* Crenshaw, *supra* note 5.

In equality law, the distinction is very important because the result of the force must be unequal treatment with members of a comparison group.[7] A black female would have a remedy in the case of combined forces if the result of the conduct was that blacks were treated unequally or women were treated unequally. In the case of the unique force aimed at them, she would not be able to show unequal treatment because of the absence of an appropriate comparison group.

In tort law, the distinction may be less important. A court need only determine that an act was wrongful and then all the foreseeable harm resulting from that conduct would be actionable. Where a party commits more than one wrongful act simultaneously, it is not necessary to determine which act produced what harm as they are concurrent causes of the harm. The unique force against black women is not actionable unless it is wrongful. It seems to me that such a force must necessarily consist of a fusion of the racial and gender discrimination forces both of which independently are wrongful. Wrongfulness is the operative word. Discrimination against black females and not black males or other females is no less wrongful than discrimination against blacks or women in general. Black women are included in two groups that are clearly protected by civil rights laws. The failure to provide a remedy because of the conceptual difficulty of finding an appropriate comparison group would violate the fundamental tort principle that for every wrong, there must be a remedy.

Professor Harris makes the case for damages by focusing on the mixture of physical and experiential elements found in black women. Her analysis does not require the existence of a unique force aimed directly at black women. It is enough in her analysis that black women be hit by only one of the forces. The essential part of her theory is that black women because of their particular characteristics will suffer more in the nature of eggshell plaintiffs. Race, gender, culture and socio-economic circumstances lead to harm greater than that suffered by blacks or women alone. For example, a black woman who is denied a job because of her race and gender may incur greater damages than a black male in the first instance and a white female in

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7. Courts have become more willing to consider black women as an insular and discrete minority. *See, e.g.*, Daniel v. Church's Chicken, 942 F. Supp. 533 (S.D. Ala. 1996) (considering black women as a class although finding that plaintiff failed to show discrimination against that class).

the latter instance. That the noneconomic damages may be higher for the black woman is an intuitive conclusion. She would suffer perhaps twice the psychic harm.

That the economic damages would be greater is also true but less intuitive. The lost wages from a particular employer would be identical. She was denied a job only once. However, the time required to find another job and her job hunting expenses may be higher because fewer employers may be willing to hire her. The marketplace includes employers willing to discriminate on the basis of race, on the basis of gender, and others on the basis of both. A black male would lose out only with the first set of employers and a white woman only with the second, but a black woman would be turned down by all three sets. Since such employers generally do not advertise their discrimination, she must seek jobs from more employers before finding one.

Current gender equity jurisprudence would provide black women a remedy only with respect to harm caused by the first two sets of employers. The damages, however, in either case would be plainly inadequate. Neither the remedy for racial discrimination nor gender discrimination would compensate her for the additional psychic and economic damages. In the job discrimination example above, a black woman would suffer greater psychic harm and economic harm if denied a job for her race or her gender. Her job hunting expenses and time will be high because she still must encounter all three sets of employers plus other categories of employers who would not hire her for other factors in her background, some legitimate, some not.

Regardless of which analysis is used, a remedy for racial discrimination or gender discrimination will not adequately compensate black women for the discrimination they uniquely suffer. That is because the antidiscrimination laws are equality-based which try to provide the same remedy to those affected by the same discriminatory force. It would be inappropriate to award a black woman a greater remedy than a black male or white female denied the same job for wrongful reasons. In many instances, the standard antidiscriminatory approach leaves black women no remedy at all.

I. THE COLLEGE CASE

The participation of African-American females in intercollegiate athletics is disproportionately low.[8] Their numbers in the athletics program would be expected to be substantially disproportionate when compared to the black student body at most colleges and universities, whether an Historically Black Colleges and Universities (HBCU) or an Historically White Institutions (HWI).[9] That lower participation rate would be actionable if caused by a force of discrimination. However, a black female plaintiff may sustain an action under Title IX for gender discrimination against an HBCU without raising intersection questions[10] but if she brought one against an HWI, it invariably would raise such questions.

A black female, like any other female, could bring a cause of action if she can show that a university has denied her participation opportunities because of her gender.[11] She could bring such an action under Title IX where the university fails to comply with any of the three prongs of the test for compliance in the policy interpretation administered by the United States Department of Education.[12] This test looks at women in general, not just black women. The difficulty she would then face is that the university may seek to comply as indicated above, and probably would be allowed to do so, by adding sports that would increase the opportunities for women in general but

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8. *See* Mathewson, *supra* note 1, at 245-52.

9. Black women tend to matriculate in college at higher rates than black men.

10. An action based on the unique force of discrimination against African-American females is theoretically possible at an HBCU. Such an action would pose problems of proof that may be avoided by a claim based on gender alone.

11. This article will be limited to participation opportunities and will not analyze the inequitable allocation of financial aid and other treatment and benefit issues.

12. The then Department of Health, Education and Welfare issued a policy interpretation of Title IX in 1979. 44 Fed. Reg. 71,413 (1979). The interpretation provided a three part test to determine whether a university was satisfying its duty under Title IX to effectively accommodate the athletic interests and abilities of its students. 44 Fed. Reg. 71,417-18. Under the first prong, a university meets the duty if it provides participation opportunities in intercollegiate competition for male and female students in numbers substantially proportionate to the gender composition of the student body. *Id.* at 71,418. A university satisfies the duty under the second prong if it has a history and continuing practice of program expansion for the underrepresented gender. *Id.* If a university does not satisfy the duty under the first or second prong, it may do so under the third prong by fully and effectively accommodating the interests and abilities of the underrepresented gender. *Id.*

not necessarily for her.

It is not necessary to analyze whether an African-American female athlete who was denied an opportunity to participate incurs greater harm than other females. She must resort to a cause of action under which she can request that the university add participation opportunities in a sport in which she has an interest and ability. That cause of action must focus on the university's wrongful acts of discrimination that have harmed her. The university discriminated against her first by limiting the participation opportunities for women and then by offering insufficient participation opportunities in sports in which black women have interest and ability. She nevertheless has been injured by a wrongful act by the university and deserves a remedy.

Her best bet under Title IX would be to make a case for violation under the third prong of the three prong test.[13] That is, she should allege that the university has failed to fully and effectively accommodate the interests and abilities of the underrepresented gender. This test permits plaintiffs to allege a violation of the rights as a subset of the underrepresented gender.[14] The disadvantage is that she must first show inequality between genders. Thus, she would not have a cause of action at an institution like Brown University as long as it is in compliance with the settlement agreement in *Cohen v. Brown University*.[15]

Given that the subset includes the element of race, an African-American female could try to use Title VI. This approach is uncharted territory in college athletics. There is scholarly literature analyzing causes of actions by black athletes challenging NCAA initial eligibility rules.[16] *Cureton v. NCAA*,[17] a case applying those theories, is now pending in the courts and will likely lead to the revision of initial eligibility standards. In *Cureton*, black male and female plaintiffs challenged their exclusion from participation opportunities on the basis of race. Using Title VI specifically for black women

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13. *See supra* note 12.
14. *See supra* note 12.
15. 879 F. Supp. 185, 211-13 (D.R.I. 1995). *See also* Mathewson, *supra* note 1, at 257 n.76.
16. Linda S. Greene, *The New Rules of the Game: Academic Integrity or Racism?*, 28 ST. LOUIS U.L.J. 101 (1984); Kenneth L. Shropshire, *Colorblind Propositions: Race, the SAT, & the NCAA*, 8 STAN. L. & POL'Y REV. 141 (1997).
17. 37 F. Supp. 2d 687 (E.D. Pa. 1999).

would be difficult because of the absence of precedent seeking to compel universities to provide participation opportunities in the same manner as Title IX. Black males obtained participation opportunities as universities increased the number of black students admitted in response to the Civil Rights Movement and antidiscrimination laws like Title VI. However, those opportunities were not obtained through litigation.

A black female would have to show that a force of racial discrimination caused the lack of participation opportunities for her. Her argument would be the same as it was under Title IX. There is a subgroup of blacks for whom the university has chosen not to provide participation opportunities in its athletic programs. The university is not providing the same sports for women that are available to black females at the developmental level.

Such a plaintiff could allege a count based on the combined forces of racial and gender discrimination or the unique force of discrimination against black women. That is, she would allege a claim under a combination of Title IX and Title VI. The reason for the combination is to seek a remedy specifically for black women by showing a wrongful act that targeted them. This is more of a frontier than the use of Title VI or Title IX alone. There is precedent for combining Title IX with another antidiscrimination statute involving black women.[18] Therefore, such an approach should not be viewed as an aberration, even if analytically unwieldy, as they are members of groups protected by each statute.

Gender equity lawsuits are frequently brought as class actions. An action by a class of black females would raise significant issues in the gender-equity context. The difficulty in crafting an appropriate class of African-American female athletes is reflected in consideration of remedies. What types of sports should a university add? There are cases in which courts have refused to certify a class of women athletes from multiple sports on the grounds that their interests conflict so that they can not fairly represent the proposed class.[19] These questions are squarely presented in Professor Harris's warning about the pitfall of

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18. Shuford v. Alabama State Bd. of Educ., 897 F. Supp. 1535 (M.D. Ala. 1995).

19. Beasley v. Alabama State Univ., 996 F. Supp. 1117, 1127 (M.D. Ala. 1997); Bryant v. Colgate Univ., No. 95-CV-620, 1996 WL 328446, at *2 (N.D.N.Y. June 11, 1996); Boucher v. Syracuse Univ., No. 95-CV-1029, 1996 WL 328441, at *2 (N.D.N.Y. June 12, 1996).

the "essential black woman."[20] Middle class black females from suburban areas are likely to have been exposed to many of the same sports that white women are. However, they may not embrace some of those sports even when they have exposure because of the lack of traditions and encouragement. Black women from inner city communities or small rural communities, particularly in the south, may not have access to those sports. Even where there is access, there is the issue of racial stacking.[21] Black females have been steered historically into basketball and track.

Perhaps, the answer lies not in what sports should be added, but cultivating the interest of black women in new sports at the collegiate level who have athletic ability and providing them participation opportunities. This has been the approach of the HBCUs.[22] Professor John C. Weistart offers another radical solution, although he was not proposing it as one specifically for black women.[23] He suggests that the model of one team per sport at a university might be abandoned. Given the existence of stacking, black women would be expected to benefit from an increase in participation opportunities where a university fields more than one basketball team or enlarged its track team.

Monetary damages may be available in private actions to enforce Title VI and Title IX.[24] Although courts have been reluctant

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20. *See* Harris, *supra* note 5.

21. "Stacking involves the assignment of certain individuals to specific athletic positions based on race or ethnicity rather than ability. For African-Americans, stacking historically relegated them to positions" which were thought to require purely physical abilities such as speed and quickness, as opposed to positions which were thought to require thinking and control skills. Timothy Davis, *The Myth of the SuperSpade: The Persistence of Racism in College Athletics,* 22 FORDHAM URB. L.J. 615, 659 (1995). The litigation in *Cohen* began in 1992 when Brown University announced that it was cutting programs for budgetary reasons. It led to four reported opinions. Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992); 991 F.2d 888 (1st Cir. 1993); 879 F. Supp. 185 (D.R.I. 1995); 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1469 (1997).

22. Jim Naughton, *Title IX Poses a Particular Challenge at Predominantly Black Institutions*, CHRON. OF HIGHER EDUC., Feb. 20, 1998, at A55; Paul White, *Consultant Has Harsh Criticism for NSU Athletics but Some Officials Feel the Problems He Points Out Are Overstated*, THE VIRGINIAN-PILOT AND LEDGER-STAR, Oct. 15, 1998, at C1.

23. John C. Weistart, *Can Gender Equity Find a Place in Commercialized College Sports?*, 3 DUKE J. GENDER L. & POL'Y 191, 244-45 (1996).

24. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) (monetary damages are available for intentional discrimination under Title IX); Guardians Ass'n v. Civil Serv. Comm'n of City of New York, 463 U.S. 582 (1983) (monetary damages not available under Title VI for unintentional discrimination). The distinction between intentional and unintentional discrimination adds a conceptual difficulty to an action involving the unique tort of discrimination against African-American females. *See* Daniel v. Church's Chicken, 942 F. Supp. 533 (S.D. Ala. 1996) (allowing a finding of disparate impact by comparing African-American females with all groups).

to award them in Title IX suits, cases involving discrimination against black females in collegiate athletic programs may be more appropriate for such damages, especially in the case of stacking. In *Pedersen v. Louisiana State University*,[25] the court declined to award damages because it did not find an intentional violation. As I indicated above, much data is now available on the availability of sports for black women. A university that fails to consider this issue in developing a gender-equity compliance program, especially if it has a significant black female student body population, will have to explain its intent. The adoption of a program with knowledge of its impact on African-Americans is the heart of the *Cureton* case.

II. THE ACTION AGAINST THE STATE

The discrimination against African-American females may be attributed to state action. The interest and ability of African-American females in specific sports is directly affected by the opportunities available to them at the developmental level. In public schools operated by states, that means athletic opportunities in grades K-12. African-American females may make three basic claims about discrimination against them at this level.[26] First, the state has discriminated against them by limiting the participation opportunities available to females, perhaps giving rise to a claim under Title IX. Second, the state has discriminated against them by limiting participation opportunities and resources in athletic programs in schools with significant African-American student enrollments, perhaps, giving rise to a claim under Title VI or Title IX, or both. Finally, the state has discriminated against them by steering them into a few sports, also giving rise to a claim under Title VI and Title IX.

I also suggested a mass torts approach in *Function at the Junction,* but a global action against a state would probably not get very far in the courts. Mass torts have been frowned upon by the courts,[27] and a class action on behalf of African-American females in

25. 912 F. Supp. 892 (M.D. La. 1996).

26. The state discriminates against them by providing fewer participation opportunities at state supported colleges and universities.

27. Barry F. McNeil & Beth L. Fancsal, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 487 (1996).

grades K-12 enrolled in public schools in a particular state would appear to involve many of the features that make such actions disfavored. A mass tort action is generally used where there are numerous plaintiffs injured by a single wrongful act or in a single incident.[28] As indicated above, there are at least three identifiable acts of discrimination, perhaps affecting three different subsets of African-American females. Moreover, the intersection of race and gender presents similar complications. The three causes of action above present three different classes of African-American females: those harmed by gender discrimination, those harmed by racial discrimination and those harmed by discrimination against African-American females. Consequently, a single class action on behalf of all black female athletes would be unworkable.

There may be additional subsets of African-American females. Some may be differentiated on the same basis as the ones in the collegiate gender-equity class actions above. Black females have interests in different sports. A girl who desires the addition of equestrian sports may not adequately represent one who desires to see more basketball teams. Others may be differentiated by school district. The occurrence of any of the three wrongful discriminatory acts may vary by school district as some districts may offer sports not available in others. Stated in socio-economic terms, black females from affluent areas may have different interests than those from economically disadvantaged areas even though both groups may have been harmed by the same act of discrimination on the part of the state. They may thus sustain different injuries and thus may be required to bring separate actions. Such distinctions do not preclude mass tort actions in this area; they simply require more of them with smaller classes.

In fact, it may be more difficult for black females from affluent areas to show an injury from the force of discrimination against black females than those from economically disadvantaged areas. It is necessary to distinguish between the harm occurring as a result of discriminatory acts at the collegiate level from those at the K-12 level. At the collegiate level, the state would have discriminated against

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28. Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 965 (1993).

black females by not offering sufficient participation opportunities at state institutions in sports in which black females have interest and ability or by adding sports that are more available to white females. Black females from suburban and affluent areas may be more likely to have access to sports like field hockey, golf, ice hockey, lacrosse and water polo, one or more of which may have been added by colleges and universities to comply with Title IX. If a black female had access to those sports at the developmental level, she could not claim to have been harmed as a black female if she attends a state university and she does not make one of those teams. She may be able to claim such harm if the public school had a history of racial stacking. She still may have a claim as a woman for additional sports if the state university is still not in compliance with Title IX. She may have a claim before she attends a state university if the state does not offer sufficient participation opportunities in any of its colleges and universities.

A black female from an economically disadvantaged school district, or any school district for that matter, that offered limited participation opportunities for girls may be able to show the force of discrimination against black women. In those districts, the opportunities for all students including black males, would be limited. Again the claim would be that the state is providing athletic programs in its universities that do not offer sufficient participation opportunities for them. The remedies for both groups, however, would be similar to those where a college or university was sued directly. The state may be required to provide opportunities to able athletes in sports that are new for them.

At the K-12 level, the actions would be different depending on the socio-economic circumstances of school districts. The state is likely to offer black females in economically disadvantaged areas participation opportunities in a narrower range of sports than in more affluent suburban districts. One remedy is to require the state to offer and fund the same range of sports in economically disadvantaged districts as in more affluent districts. States also tend to classify schools within districts by size and offer opportunities accordingly. Black females in smaller schools would have fewer opportunities than those in larger schools. The state could be required to provide the same sports in the smaller schools as provided in the larger schools. The racial demographics of the district or school also play a factor.

The magnitude of the force of discrimination against black females is likely to vary directly with their relative presence in the district or school. This factor would apply in all districts or schools, regardless of size and socio-economic factors. Thus, the state may be required to provide the same sports in districts with significant populations of blacks as are offered in districts where their numbers are relatively insignificant.

The objective of using mass tort actions is to force states which provide developmental opportunities in public schools K-12 to supply more such opportunities for black females so that they have a fair opportunity to reap the benefits of the programs available at the collegiate level and beyond. As shown in *Function at the Junction*, merely increasing opportunities for females is inadequate. At the collegiate level, the Office of Civil Rights requires colleges to consider the sports offered at the developmental level in its primary enrollment area in deciding which sports to add. Perhaps, a state should be subjected to a similar requirement at the K-12 level; the state should offer in each school district those sports that are being offered in its colleges and universities.

Mass tort litigation on behalf of various classes of African-American female athletes appears more of an academic inquiry as no such litigation appears on the horizon. When such lawsuits do occur, they will likely be on a small scale targeting specific school districts. Lawyers may start with classes of African-American females in economically disadvantaged school districts until there has been a sufficient number of cases to mature this mass tort.[29] Similar litigation may be brought on behalf of other females of color. Those cases may not be joined with those for African-American females for the same reasons that mass torts on behalf of African-American females will be difficult.

III. CONCLUSION

African-American female athletes do have a cause of action for the wrongful acts of colleges and universities, school districts and

29. Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1842-44 (1995).

other state agencies in discriminating against them in athletic programs. These wrongful acts deprive African-American females of the benefits of participation in athletics and, accordingly, are actionable under gender and racial discrimination laws. Such acts are actionable even when it is determined that they were directed at African-American females, and not also at females or blacks in general. The development of mass tort class actions while theoretically possible is likely to develop slowly. Mass tort specialists will have the dubious task of crafting classes consisting of something other than the "essential" African-American female. That will require distinguishing between the types of wrongful acts, the socio-economic and other circumstances of the potential plaintiff classes.