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Beyond the Basketball Court: How Brittney Griner's *In My Skin* Illustrates Title IX's Failure to Protect LGBT Athletes at Religious Institutions

Leslie C. Griffin†

Unlike schoolteachers, janitors, coaches, food-service directors, organists, and other workers, professional athletes usually command center stage in society. Their successes and failures loom larger than life. Sometimes their prominent lives highlight themes hidden from public discussion or neglected by the majority. Professional basketball player Brittney Griner's autobiography does just that, by illuminating how "religious freedom" can undermine equality, especially LGBT equality.¹

In her book, *In My Skin*, Griner recounts her experience developing into a top hoops player while confronting prejudice as a lesbian athlete.² Griner explains that criticism of her personal life started early, as her own father repeatedly told her it was unacceptable for her to be "dating girls" and to be open about her sexual identity.³ He warned her that college scholarships would be jeopardized if schools knew she was a lesbian.⁴

Concerned about her father's remarks, Griner checked with Baylor University women's basketball coach Kim Mulkey before signing her letter of intent, texting Mulkey: "I'm gay. I hope that's not a problem."⁵ Mulkey responded: "Big Girl, I don't care what you are. You can be black, white, blue, purple, whatever. As long as you come here and do what you need to do and hoop, I don't care."⁶ In telling this story, Griner astutely points out that Mulkey's answer signaled discomfort with her LGBT status:

†. William S. Boyd Professor of Law, UNLV Boyd School of Law. I am grateful to Professor June C. Carbone and the editors and staff of *Law and Inequality: A Journal of Theory and Practice* for inviting me to participate in this symposium. Kelsey Stegall and Katherine Frank provided valuable research assistance.

1. See BRITTNEY GRINER, *IN MY SKIN: MY LIFE ON AND OFF THE BASKETBALL COURT* 113–15 (2014) (describing Baylor University's policy against homosexuality).

2. GRINER, *supra* note 1.

3. *Id.* at 66.

4. *Id.* at 72.

5. *Id.* at 65.

6. *Id.*

“Being gay is a real thing; nobody is blue or purple unless they’re choking to death.”⁷

During the recruiting process, no one at Baylor, a Baptist university, informed Griner of the school’s policy against homosexuality.⁸ It was only after Griner arrived at Baylor that Mulkey repeatedly told her to hide her sexual identity—to “keep [her] business behind closed doors.”⁹ No public dating.¹⁰ No tweets about sexuality.¹¹ By enforcing those rules, Baylor could enjoy a national championship obtained through Griner’s efforts¹² while maintaining its anti-LGBT Christian identity. As Griner explains:

The more I think about it, the more I feel like the people who run the school want it both ways: they want to keep the policy, so they can keep selling themselves as a Christian university, but they are more than happy to benefit from the success of their gay athletes. That is, as long as those gay athletes don’t talk about being gay.¹³

Griner’s situation is representative not just of lesbian athletes, but of LGBT individuals generally. Religious universities, colleges, schools, and hospitals have long had it both ways: profiting from the presence of LGBT employees, students, members, and athletes, as long as they stayed in the institution’s imposed closet.¹⁴

The growth of the LGBT civil rights movement¹⁵ and the

7. *Id.*

8. *Id.* at 113–16. Baylor’s policy reads:

[Baylor] University affirms the biblical understanding of sexuality as a gift from God. Christian churches across the ages and around the world have affirmed purity in singleness and fidelity in marriage between a man and a woman as the biblical norm. Temptations to deviate from this norm include both heterosexual sex outside of marriage and homosexual behavior. It is thus expected that Baylor students will not participate in advocacy groups which promote understandings of sexuality that are contrary to biblical teaching.

Statement on Human Sexuality, BAYLOR UNIV. (Oct. 2, 2009), http://www.baylor.edu/student_policies/index.php?id=32295.

9. This is the title of what is, in my opinion, the best chapter of Griner’s book. GRINER, *supra* note 1, at 101, 112, 150.

10. *Id.* at 150.

11. *Id.* at 108–09.

12. Mechelle Voepel, *Brittney Griner Wins Her First Title*, ESPN (Apr. 4, 2012), http://espn.go.com/womens-college-basketball/tournament/2012/story/_id/7773651/women-final-four-2012-brittney-griner-wins-first-title (“[Griner’s] 26 points, 13 rebounds and 5 blocked shots [in the championship game] capped off Baylor’s 40–0 campaign and put her firmly in the spotlight . . .”).

13. *Id.* at 115.

14. *See id.* at 115–16.

15. *See* Mark Z. Barabak, *Gays May Have the Fastest of All Civil Rights Movements*, L.A. TIMES (May 20, 2012), <http://articles.latimes.com/2012/may/20/>

movement's victory on marriage equality,¹⁶ however, have pried open the religious closet's door. Today, just like Griner, many LGBT individuals in religious institutions want to live openly "in their own skin."¹⁷ And marriage, especially, is a public statement about identity¹⁸ that makes the religious closet impossible to enforce.

LGBT civil rights and marriage equality have perplexed many religious institutions that prefer the hidden status that Baylor required of Griner. Some have reacted by ridding their sports teams of openly gay and lesbian players. For example, two lesbian basketball players at Pepperdine University, which is associated with the Churches of Christ, filed a lawsuit alleging they were "forced off the women's basketball team, had their scholarships revoked, and withdrew from the school" because of their sexual orientation.¹⁹ According to athletes Haley Videckis and Layana White, their coach told the team "lesbianism was a big concern for him and for women's basketball, that it was a reason why teams lose, and that it would not be tolerated on the team."²⁰ Suspecting that Videckis and White were lesbians and were dating each other, school officials conducted an extended investigation into their private lives.²¹ An assistant coach asked the two numerous questions about their sexual lives: if they were lesbians, if they slept together, if they pushed their beds together to sleep, and so forth.²²

In these athletes' cases, state and federal laws provide some possible recourse. For example, the privacy protections in the California Constitution²³ apply to private employers like Pepperdine.²⁴ In addition, both the California Education Code²⁵

nation/la-na-gay-rights-movement-20120521.

16. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

17. See, e.g., Kathryn Joyce, *LGBT Christian College Students Fight for a Voice*, DAILY BEAST (Feb. 10, 2016), <http://www.thedailybeast.com/articles/2014/02/14/lgbt-christian-college-students-fight-for-a-voice.html> (describing LGBT students who protest religious institutions that penalize students for embracing their LGBT identities).

18. Cf. *Obergefell*, 135 S. Ct. at 2596 ("[M]any persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken.").

19. *Videckis v. Pepperdine Univ.*, 100 F. Supp. 3d 927, 929–32 (C.D. Cal. 2015).

20. *Id.* at 930.

21. *Id.*

22. *Id.*

23. CAL. CONST. art. I, § 1.

24. See *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 641 (Cal. 1994).

25. See CAL. EDUC. CODE §§ 220, 66251, 66270 (West 2012).

and Title IX of the Education Amendments of 1972 (Title IX)²⁶ prohibit sex discrimination by educational institutions receiving financial assistance from the government.²⁷ Like many universities, Pepperdine receives both state and federal funding.²⁸ Videckis and White thus could win their lawsuit by alleging invasion of their privacy under the California Constitution and harassment and sexual orientation discrimination under both the California Education Code and Title IX.²⁹

The California Constitution and these state and federal statutes reflect the legal and moral ideals that every citizen's privacy should be protected—no matter where he or she works or goes to school—and that every individual's equality depends on government money not being used to fund discrimination.³⁰ Indeed, “Congress enacted Title IX with the twin objectives of avoiding the use of federal resources to support discriminatory practices and providing individual citizens effective protection against those practices.”³¹ Lurking in the California Education Code³² and Title IX,³³ however, are religious exemptions that threaten equality: provisions that exempt educational institutions “controlled by a religious organization if the application [of the

26. 20 U.S.C. § 1681(a) (2012) (“No person in the United States shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .”).

27. California law explicitly protects against discrimination on the basis of sexual orientation, while Title IX prohibits sex discrimination but does not mention sexual orientation discrimination. Compare 20 U.S.C. § 1681(a), with CAL. EDUC. CODE § 220. However, the district court in *Videckis* concluded that, in the athletes' case, sexual orientation discrimination could be construed as unlawful sex or gender discrimination under Title IX and allowed the Title IX claim to proceed. *Videckis v. Pepperdine Univ.*, No. 2:15-cv-00298 DDP (JCx), 2015 WL 8916764, at *1 (C.D. Cal. Dec. 15, 2015) (citation omitted).

28. See, e.g., *Federal/State Assistance*, PEPP. UNIV., <http://seaver.pepperdine.edu/admission/financial-aid/undergraduate/types/federal-state.htm> (last visited Mar. 22, 2016) (stating that state and federal financial assistance is available for student tuition).

29. *Videckis v. Pepperdine Univ.*, 100 F. Supp. 3d 927, 934–35, 937 (C.D. Cal. 2015). The court declined to decide whether the university's conduct constituted a serious invasion of privacy under the California Constitution. *Id.* at 934–35. In addition, the court held that the plaintiffs' claims were not impermissibly vague and that they had alleged the necessary elements under the California Education Code. *Id.* (citing CAL. EDUC. CODE §§ 220, 66251, 66270). The court further held that an implied private right of action existed under Title IX and gave plaintiffs leave to amend their complaint to fully allege the elements of a Title IX claim. *Id.* at 937.

30. *Videckis*, 2015 WL 8916764, at *5 (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998)).

31. *Id.* (citation omitted).

32. CAL. EDUC. CODE § 221.

33. 20 U.S.C. § 1681(a)(3) (2012).

law] would not be consistent with the religious tenets of such organization.”³⁴

In order to receive such exemptions, religious organizations must file an application with the U.S. Department of Education Office of Civil Rights (OCR) that identifies the specific conflict between Title IX and the organization’s religious tenets.³⁵ LGBT equality has prompted a dramatic recent increase in the number of exemption requests to the OCR, with many Christian schools citing the Bible as contradictory to nondiscriminatory treatment of LGBT individuals.³⁶ For example, after a transgender student at George Fox University requested university housing with a member of the sex with which he identifies, the school asked for³⁷ and received an exemption from the regulation prohibiting discrimination on the basis of gender identity in housing, restrooms, locker rooms, and athletics.³⁸ Anderson University received an exemption from Title IX’s provisions “to the extent that they prohibit discrimination on the basis of marital status, sex outside of marriage, sexual orientation, gender identity, pregnancy, or abortion”³⁹ The requested exemptions may apply broadly to admissions, employment policies, housing, and athletics.⁴⁰

Since 2014, thirty-six schools have asked for a variety of Title IX exemptions regarding LGBT students and employees,⁴¹ and one

34. CAL. EDUC. CODE § 221; see 20 U.S.C. § 1681(a)(3).

35. 34 C.F.R. § 106.12 (2015); see Amanda Bryk, *Title IX Giveth and the Religious Exemption Taketh Away: How the Religious Exemption Eviscerates the Protection Afforded Transgender Students Under Title IX*, 37 CARDOZO L. REV. 751, 777 (2015).

36. See Bryk, *supra* note 35, at 780 (noting Simpson University’s view that “God created man and woman as two distinct sexes and, therefore, that any tampering with one’s assigned sex at birth is a sin” that the university could not support).

37. Letter from Dr. Robin Baker, President, George Fox Univ., to Catherine Lhamon, Assistant Sec’y, U.S. Dep’t of Educ. (Mar. 31, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/simpson-university-request-10072013.pdf>.

38. Reply letter from Catherine Lhamon, Assistant Sec’y, U.S. Dep’t of Educ., to Dr. Robin Baker, President, George Fox Univ. (May 23, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/simpson-university-response-05232014.pdf>.

39. Howard Friedman, *DOE Exemptions from Title IX for Religious Colleges Is Growing*, RELIGION CLAUSE (Dec. 17, 2015), <http://religionclause.blogspot.com/2015/12/doe-exemptions-from-title-ix-for.html>.

40. Bryk, *supra* note 35, at 780–81.

41. Andy Birkey, *Dozens of Christian Schools Win Title IX Waivers to Ban LGBT Students*, COLUMN (Dec. 1, 2015), <http://thecolu.mn/21270/dozens-christian->

has asked for an exemption aimed at women who get pregnant outside marriage.⁴² More specifically:

The Department of Education has granted a waiver to 27 religious colleges and universities in 17 states over the last 18 months. The total enrollment of these schools tops 80,000 students, and nearly \$130 million in federal research grants and student aid flowed to these institutions of higher learning in 2014. Those waivers are coming in at a rapid clip, and another 9 are pending as of August 2015. Though they span the United States, almost all are in the South or West.⁴³

The exemption requestors list includes no sports powerhouses.⁴⁴ And although the University of Mary Hardin-Baylor (originally Baylor Female College) is listed,⁴⁵ the Baylor University for which Griner won a national championship is not. Pepperdine University has not requested an exemption. But if Pepperdine were exempt, Videckis and White would lose their legal claim against the school.⁴⁶ If they wanted to play basketball, they would be forced outside their skin and into the school's closet just as Griner was at Baylor. That is the conflict between religious exemptions and equality: "While Title IX seeks to protect students against all forms of sex discrimination, the religious exemption threatens the achievement of this goal."⁴⁷ It allows discrimination *with government funding*, promoting religious freedom at the expense of equality.

An alternative to putting athletes in the closet or dismissing them from the team is for religious organizations to welcome "out" LGBT athletes. The University of Notre Dame, a Roman Catholic school, for example, launched a public relations campaign featuring a video with two openly gay athletes and its athletic director explaining: "[T]he university values LGBTQ students in the Notre Dame community."⁴⁸ Football coach Brian Kelly was quoted as saying that "Notre Dame 'is about embracing diversity' even though 'that doesn't necessarily mean we agree with

schools-win-title-ix-waivers-ban-lgbt-students.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*; *Our History*, UNIV. MARY HARDEN-BAYLOR, <http://about.umhb.edu/our-history> (last visited Mar. 11, 2016).

46. Such an exemption would remove Videckis' and White's standing to sue, because their claims are based on the fact that Pepperdine is an educational institution subject to provisions of Title IX. See Third Amended Complaint for Damages at 28–29, 31, 33, *Videckis v. Pepperdine Univ.*, No. 2:15-cv-00298-DDP (JCx) (C.D. Cal. Dec. 15, 2015) (No. 31), 2015 WL 8916764.

47. Bryk, *supra* note 35, at 785.

48. You Can Play Project, *You Can Play—Notre Dame*, YOUTUBE (May 7, 2014), <http://www.youtube.com/watch?v=LAckRY6qjBk>.

homosexuality.”⁴⁹

Notre Dame’s action was surprising in the context of the broader Catholic world, where numerous LGBT schoolteachers across the country have been fired after their marriages were revealed in newspaper announcements, parents’ obituaries, and mortgage applications—or by unhappy community members who reported same-sex marriages to school authorities.⁵⁰ What is more, a heterosexual assistant principal of a Catholic high school in Ohio was fired after he announced his support for same-sex marriage on Facebook.⁵¹ At the same time, Notre Dame has been a lead plaintiff in suits requesting a religious exemption from the Affordable Care Act’s contraceptive mandate.⁵²

These contradictions suggest that, for now, the Notre Dame athletes’ equality may be safer than everyone else’s at the school. When Notre Dame’s home state, Indiana, adopted a statute that would have allowed businesses to refuse services to LGBT customers, the sports world erupted in protest.⁵³ Numerous business and sports leaders criticized the law and threatened to move their businesses from Indiana: Backlash came from the NCAA, which is based in Indianapolis;⁵⁴ from Jim Irsay, the owner of the Indianapolis Colts;⁵⁵ and, in Griner’s sport, from the NBA, WNBA, Indiana Pacers, and Indiana Freedom.⁵⁶ The Indiana professional basketball teams issued a statement criticizing the Indiana law: “The game of basketball is grounded in long established principles of inclusion and mutual respect. . . . We will continue to ensure that all fans, players and employees feel

49. David Gibson, *Notre Dame Signals Welcome to Gay Athletes in New Campaign*, WASH. POST (May 8, 2014), https://www.washingtonpost.com/national/religion/notre-dame-signals-welcome-to-gay-athletes-in-new-campaign/2014/05/08/5a15494a-d6eb-11e3-8f7d-7786660fff7c_story.html.

50. See, e.g., Chris Brennan, *Firing of Teacher in Same-Sex Marriage Roils Catholic School*, PHILA. INQUIRER (July 9, 2015), http://articles.philly.com/2015-07-09/news/64210670_1_catholic-school-gay-marriage-ken-gavin (reporting that a “well-respected director of religious education” was fired by a private Catholic school after parents of at least two students complained about her same-sex marriage to the school and to the Archdiocese of Philadelphia).

51. Leslie C. Griffin, *Tuesday’s Top Ten Teachers*, HAMILTON & GRIFFIN ON RIGHTS (June 23, 2014), <http://hamilton-griffin.com/tuesdays-top-ten-teachers/>.

52. See *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 607–11 (7th Cir. 2015) (outlining Notre Dame’s attempts to obtain a religious exemption).

53. Jordan Fischer, *Pacers, Fever, NBA and WNBA Respond to RFRA*, RTV6 (Mar. 28, 2015, 7:12 PM), <http://www.theindychannel.com/news/local-news/pacers-fever-nba-and-wnba-respond-to-rfra>.

54. Jack Linshi, *What You Need to Know About Indiana’s Controversial Religious Objections Law*, TIME (Mar. 30, 2015, 12:36 PM), <http://time.com/3762656/indiana-religious-objections-law>.

55. *Id.*

56. Fischer, *supra* note 53.

welcome at all NBA and WNBA events in Indiana and elsewhere.”⁵⁷

Religious schools like Notre Dame and Baylor would likely have trouble recruiting top stars like Griner if they openly defended the religious exemption route to bar LGBT athletes from their profitable football and basketball teams. From Griner’s experience, we should learn that equality also demands that non-athletes—students, teachers, customers, and employees—should be able to enjoy similar protection from religious exemption regimes that allow “discrimination on the basis of marital status, sex outside of marriage, sexual orientation, gender identity, pregnancy, or abortion.”⁵⁸ Griner undoubtedly understands the need for women’s, as well as LGBT, equality; she eloquently describes how women players are “judged by a different standard, as if there’s something wrong with us if we lose our temper during the heat of competition,” and she expresses her strong belief in empowering women.⁵⁹

After following Griner through her difficult upbringing, it is encouraging to watch her “love the freedom of being a pro.”⁶⁰ In the professional sports world, agents and teams wanted to work with Griner “because of who [she is], not in spite of it.”⁶¹ Finally free to be who she is, she can devote her time to becoming a better athlete and partner, instead of worrying about how to comply with other people’s and institutions’ norms.⁶²

To the end, Baylor remains an essential part of Griner’s story. When, post-graduation, Griner met with her former coach for an attempted reconciliation, Mulkey told Griner to “set things right” at Baylor because her inexcusable comments about Baylor and homosexuality made the school look bad.⁶³ Griner resisted Mulkey’s invitation:

To make things right with school executives, I would have to accept their idea of what God believes. I would have to apologize for being me. Kim seemed to imply that I had betrayed Baylor, but whose Baylor did I betray exactly? Because my Baylor is made up of all the great friends I met in Waco, and the teammates I won a national championship with, and the fans who were cheering for me at the

57. *Id.*

58. Friedman, *supra* note 39.

59. GRINER, *supra* note 1, at 173, 180.

60. *Id.* at 186.

61. *Id.* at 180.

62. *Id.*

63. *Id.* at 213.

Homecoming game.⁶⁴

That is how equality works. Griner's open identity likely empowered numerous fans, athletes, and students to admire a lesbian athlete as a normal part of life and to appreciate her right to equality and dignity. Similar movements for empowerment and acceptance are taking place in religious and non-religious institutions across the country.⁶⁵ However, equality is impossible when religious institutions either impose a closet on their athletes, students, and employees, or receive a legal entitlement from the government to discriminate against them.

Griner's life thus teaches a lesson about equality that has importance far beyond the basketball court.

64. *Id.* at 213–14.

65. See Jim Buzinski, *73 LGBT Athletes Who Came Out Since the Last National Coming Out Day*, OUTSPORTS (Oct. 9, 2015, 12:27 AM), <http://www.outsports.com/2015/10/9/9477055/72-lgbt-athletes-who-came-out-since-last-national-coming-out-day>.