

ARIZONA STATE SPORTS AND ENTERTAINMENT LAW JOURNAL

VOLUME 11

FALL 2021

ISSUE 1



SANDRA DAY O'CONNOR COLLEGE OF LAW
ARIZONA STATE UNIVERSITY
111 EAST TAYLOR STREET
PHOENIX, ARIZONA 85004

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ABDICATING NEUTRALITY: TURNING AGGRESSORS INTO VICTIMS

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INTRODUCTION

“Boormeester was a member of the USC football team, who kicked the game-winning field goal for USC at the 2017 Rose Bowl.”¹ This was the California Court of Appeal for the Second Appellate District’s (“the Court”) opening line in *Boormeester v.*

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¹ *Boormeester v. Carry*, 49 Cal. App. 5th 682, 687 (2020), *depublished by* 472 P.3d 1062 (Cal. 2020).

Carry, a case brought by a football player at the University of Southern California (“USC”) who was expelled for engaging in intimate partner violence, violating USC’s misconduct policies.²

In 2015, public outrage sparked after Brock Turner was sentenced to six months jail time after sexually assaulting an unconscious woman behind a dumpster at Stanford University and attempting to flee when caught.³ Turner ended up serving only three months jail time, even though one of his charges carried a three-year minimum.⁴ Both the judge and the media made a point to emphasize the fact that Turner was a prominent member of the Stanford swimming team, recognizing his achievements in the sport.⁵ The judge justified sentencing Turner to a miniscule portion of the fourteen-year sentence he could have imposed because of the potential impact a tough sentence could have on the accomplished athlete’s life.⁶

In 2020, the Court showed a pattern adopting the same mentality, by focusing on the accused’s athletic abilities. In the *Boermeester* case, and in similar cases involving gender-based violence on university campuses, the Court implicitly promoted a sex-discriminatory culture of hypermasculinity.⁷

This article analyzes *Boermeester v. Carry*, and the Court’s other decisions in campus gender-based violence cases involving male athletes and concludes the decisions are being influenced by the Court’s approval of sex-discriminatory hypermasculine sports cultures. Part I of this article provides a case overview and analysis of the Court’s decision. Part II discusses hypermasculinity characteristics as well as hypermasculine sports cultures and explains how these characteristics can lead to sex discrimination,

² *Id.* at 693-94.

³ Lynn Neary, *Victim of Brock Turner Sexual Assault Reveals Her Identity*, NPR (Sept. 4, 2019, 4:44 PM), <https://www.npr.org/2019/09/04/757626939/victim-of-brock-turner-sexual-assault-reveals-her-identity>.

⁴ The American Lawyer, *Inside the Brock Turner Sentencing Memos*, LAW.COM (June 10, 2016), https://plus.lexis.com/document/t/?pdmfid=1530671&crd=1cb41f6c-02e3-4406-97a2-439fc0f1c319&pddocfullpath=%2Fshared%2Fdocument%2Flegalnews%2Furn%3AcontentItem%3A5K7B-DTB1-JBM3-R0R2-00000-00&pdcontentcomponentid=7599&pdteaserkey=&pdslpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&comp=zt4k&earg=sr0&prid=11eb3c81-0d0f-4089-bda0-1a76c2ecb2c6.

⁵ Neary, *supra* note 3.

⁶ *Id.*

⁷ See *Doe v. Allee*, 242 Cal. Rptr. 3d 109 (Cal. Ct. App. 2019); *Doe v. Univ. of S. Cali.*, 200 Cal. Rptr. 3d 851 (Cal. Ct. App. 2016).

including gender-based violence. Part III explains how the Court's decisions on campus gender-based violence cases promote a sex-discriminatory culture of hypermasculinity by excusing gender-based violence committed by hypermasculine college athletes and by ignoring or minimizing the sex-discriminatory harm done to their victims. Finally, this article urges the California Supreme Court to overturn the Court's decision in *Boermeester v. Carry*, because its legally irrelevant lionization of hypermasculine male athletic culture in the case has led it to make a discriminatory decision rife with gender bias.

I. BOERMEESTER V. CARRY

A. THE INCIDENT

In the early morning hours on January 21, 2017, Zoe Katz, an accomplished USC tennis team member, picked up her boyfriend, Matthew Boermeester, a popular member of the school's football team, from a party.⁸ When the couple went back to Katz's home and took her dog, Ziggy, into the back alley, an intoxicated Boermeester began to yell at Katz about letting Ziggy off leash.⁹ When Katz refused, Boermeester grabbed her by her hair and said, "drop the fucking leash."¹⁰ Boermeester tightened his grip on her hair until she dropped the leash out of pain; then, he grabbed her by the neck and pushed her up against a concrete wall.¹¹

Katz's three neighbors came outside to check on the commotion that woke them up; they tried to convince Katz to spend the night away from Boermeester, but she refused, blaming Boermeester's intoxication for his actions.¹² Later that night, Katz texted one of the neighbors saying, "I am safe. Thanks for looking out for me."¹³

⁸ *Boermeester v. Carry*, 49 Cal. App. 5th 682, 687 (2020), *depublished by* 472 P.3d 1062 (Cal. 2020).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 687-92.

¹³ *Id.* at 692.

The next day, Katz's neighbors reported the incident and the Title IX¹⁴ office launched an investigation.¹⁵ In her first interview with the investigator, Katz recapped the story above and stated she was in a "bad situation" with Boormeester, but she wished to remain anonymous throughout the investigation.¹⁶ Katz chose to exercise her option of an "avoidance of contact" order ("AOC order") because she was scared of Boormeester.¹⁷

One week after Katz's interview with the Title IX investigator, the case began to receive significant media attention due to Boormeester's status on the football team.¹⁸ Katz recanted her initial interview statement and came forward on the social media platform Twitter to publicly unmask herself as the alleged victim and to deny the reports.¹⁹ Katz reached out to the witnesses and her other friends pleading they refrain from participating in the investigation because she did not want to see Boormeester punished, nor did she want to negatively impact his potential NFL career.²⁰ Although Katz recanted her statement, the case was at a point where the Title IX investigator was obliged to move forward.²¹

B. WITNESS STATEMENTS AND EVIDENCE

Each neighbor who witnessed the incident provided statements about what they saw that night in interviews with the Title IX investigator.²² Each neighbor's statement corroborated Katz's original version of the incident from her first interview with the Title IX investigator.²³ Additionally, there was video footage, although somewhat fuzzy, from Katz's housing complex.²⁴ The recording

¹⁴ "Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in education programs and activities that receive federal financial assistance. Title IX states 'No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.'" Title IX is enforced by the Office of Civil Rights within the Department of Education. *Sex Discrimination: Overview of the Law*, OFF. FOR C.R. (Aug. 20, 2021), <https://www2.ed.gov/about/offices/list/ocr/sexoverview.html>.

¹⁵ *Boormeester v. Carry*, 49 Cal. App. 5th 682, 687 (2020), *depublished by* 472 P.3d 1062 (Cal. 2020).

¹⁶ *Id.* at 688.

¹⁷ *Id.*

¹⁸ *Id.* at 689.

¹⁹ *Id.*

²⁰ *Id.* at 689-92.

²¹ *Id.* at 688.

²² *Id.* at 689-92.

²³ *See id.* at 691-92.

²⁴ *Id.* at 693.

showed Boormeester and Katz pushing each other, Boormeester grabbing her by some portion of her upper body, and the pair going out of view when Boormeester pushed her up against the wall.²⁵

Finally, the investigator spoke with Katz's friends and Boormeester's ex-girlfriend of nearly three years.²⁶ Katz confided in her friends when Boormeester gave her bruises on other previous occasions.²⁷ Boormeester's ex-girlfriend stated there were numerous times when she and Boormeester would be "goofing around" and Boormeester would take it too far by putting his hands around her neck.²⁸ His ex-girlfriend also recalled two instances when Boormeester shoved her during an argument.²⁹

C. USC'S RESPONSE

After providing notice to Boormeester that he was being investigated for violating USC's sexual misconduct policy by engaging in intimate partner violence, USC placed him on a temporary suspension.³⁰ Boormeester was directed to not be in contact with Katz until further notice due to the AOC order.³¹

The Title IX investigator interviewed Boormeester, and he confirmed the facts of the incident as Katz described them but said he did not intend to harm her.³² Boormeester added he and Katz sometimes put their hands on each other's necks during sex and the neighbors likely just misinterpreted how the pair interacts.³³

About two weeks after his interview, Boormeester was notified he was being investigated for violating the AOC order.³⁴ He denied contacting Katz;³⁵ however, text messages between Katz and a friend indicated Katz and Boormeester were likely in contact while the AOC order was in place.³⁶

After evaluating all of the evidence and interviews, the Title IX investigator determined Boormeester violated USC's sexual misconduct policy by engaging in intimate partner violence, and

²⁵ *Id.*

²⁶ *Id.* at 692-93.

²⁷ *Id.* at 692.

²⁸ *Id.* at 692-93.

²⁹ *Id.* at 693.

³⁰ *Id.* at 688.

³¹ *Id.*

³² *Id.* at 690.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 690-91.

³⁶ *Id.* at 692.

violated the AOC order.³⁷ Accordingly, the investigator passed along the findings to the Misconduct Sanctioning Panel, which concluded expulsion was the appropriate punishment.³⁸

Boermeester appealed the panel's decision to the Vice President of Student Affairs.³⁹ The Vice President had an Appellate Panel review the decision of the Sanctioning Panel.⁴⁰ The Appellate Panel recommended a two-year suspension, but the Vice President was not required to accept the Panel's recommendation and decided to affirm the expulsion.⁴¹

D. ANALYSIS OF COURT DECISION

After his expulsion was affirmed, Boermeester filed a writ of administrative mandate⁴² to set aside the expulsion.⁴³ The Superior Court of Los Angeles County denied the writ,⁴⁴ finding substantial evidence supported Boermeester's expulsion.⁴⁵

On appeal, for the first time, Boermeester claimed he was denied the opportunity to cross-examine key witnesses at a live, in-person hearing, violating his right to fair procedure.⁴⁶ As Justice Wiley's dissent notes, neither Boermeester nor his lawyer raised this objection during the USC disciplinary proceedings.⁴⁷ This is likely because Boermeester and his lawyer recognized that cross-

³⁷ *Id.* at 693.

³⁸ *Id.*

³⁹ *Id.* at 693-94.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² A writ of mandate, otherwise referred to as "writ of *mandamus*" is where the appealing party (here, Boermeester) asks the court to instruct or force a lower court or administrator to carry out an official action. *Mandamus*, L. INFO. INST., <https://www.law.cornell.edu/wex/mandamus> (last visited Nov. 30, 2020). In California, there are two types of mandamus: (1) ordinary mandate, where the court compels agencies to perform ministerial acts, CAL. CODE CIV. PROC. § 1084, and (2) administrative mandate is used to review the validity of an administrative decision made in a required hearing, CAL. CODE CIV. PROC. § 1094. Here, Boermeester is seeking an administrative mandate. *See generally* Boermeester v. Carry, 49 Cal. App. 5th 682 (2020), *depublished by* 472 P.3d 1062 (Cal. 2020).

⁴³ *Boermeester*, 49 Cal. App. 5th at 694; *see* CAL. CIV. PROC. CODE § 1094.5 (statute providing for setting aside of expulsion).

⁴⁴ *Boermeester*, 49 Cal. App. 5th at 694.

⁴⁵ *Id.* at 714.

⁴⁶ *Id.* at 703 (indicating Boermeester failed to raise the issue in his administrative appeal); *id.* at 698 (citing *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 130 (Cal Ct. App. 2019)).

⁴⁷ *Boermeester*, 49 Cal. App. 5th at 715.

examining Katz and the witnesses would only give them the opportunity to strengthen their credibility by recounting the incident as it happened, just as they did in their interviews with the Title IX investigator prior to Katz recanting.⁴⁸

Even though Boormeester chose to forego objecting to the lack of live cross-examination in the USC disciplinary proceedings, the Court nonetheless agreed with Boormeester, holding a university must provide cross-examination of witnesses in order to comply with fair procedure.⁴⁹ The decision to require these procedures reveals the Court's gender-biased attitude towards cases involving gender-based violence.⁵⁰ Although the Court insists on procedures likely to harm victims, it does not do the same regarding procedures intended to protect victims.

1. THE COURT IMPLEMENTS PROCEDURES THAT ONLY PROTECT ASSAILANTS, NOT VICTIMS

Professor Michelle J. Anderson explains how federal rape shield laws were passed with the intention of protecting victims' privacy and leaving their past sexual history out of the courtroom.⁵¹ Particularly, proponents of the federal rape shield laws wanted to protect women who previously had consensual sex, generally with husbands or boyfriends – like Katz – and who would likely feel embarrassed and/or degraded having their sexual history brought into the courtroom.⁵²

⁴⁸ *Id.* at 715-17.

⁴⁹ *Id.* at 705 (citing *Doe v. Occidental College*, 252 Cal. Rptr. 3d 646, 659 (Cal. Ct. App. 2019); *Allee*, 242 Cal. Rptr. 3d at 113).

⁵⁰ See Brief for the California Women's Law Center et al. as Amici Curiae Supporting Petitioner, *Boormeester v. Carry* 49 Cal. App. 5th 682 (2020) (No. S263180) at 2.

⁵¹ Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 86-94 (2002). Michelle J. Anderson is currently serving as the President of Brooklyn College. She is a leading scholar in rape and sexual assault law. She received a J.D. from Yale Law School where she was recognized for her academic achievement and served as an editor for the Yale Law Journal. After law school, she clerked for Judge William A. Norris on the United States Court of Appeals for the Ninth Circuit. She then earned her LL.M. in Advocacy while working at the Georgetown University Law Center. In 2014, she received the New York City Bar Association's Diversity and Inclusion Champion Award. PRESIDENT ANDERSON'S BIOGRAPHY, BROOK. COLL., <https://www.brooklyn.cuny.edu/web/about/administration/president/anderson.php> (last visited Nov. 30, 2020).

⁵² Anderson, *supra* note 51, at 94.

By requiring strict due-process-like procedures protecting the assailant, and allowing the avoidance of court-like procedures intended to protect victims, the Court implies it does not care that Katz's private sexual history, particularly her history with Boormeester, will be put on trial, all under the guise of establishing fair procedure. By requiring procedures protecting aggressors and allowing the avoidance of procedures intended to protect victims in cases involving sexual and domestic violence where gender bias already exists,⁵³ the Court is creating a significant risk for sex-discriminatory processes involving cases of campus gender-based violence.

Even if the Court were to require procedures intended to protect victims, the victims are still at a disadvantage to their aggressor. Professor Anderson points out the rape shield laws have ultimately failed to protect the victims they are intended to protect because of the exceptions created.⁵⁴ In criminal cases, three exceptions allow for the admission of evidence regarding a victim's sexual history or sexual predisposition: (1) if it is offered to prove someone other than the defendant was the source of the semen, injury, or other physical evidence; (2) specific instances of the victim's sexual behavior with the defendant when offered to prove consent, and (3) when exclusion of such evidence would violate the defendant's constitutional rights.⁵⁵

Professor Anderson notes how the second exception is especially detrimental to the purpose of the rape shield laws because it invites biased inferences about the temporal constraints of a victim's consent.⁵⁶ The exception allows courts to infer that because the victim and defendant previously engaged in consensual sex, the victim's credibility as to the claimed non-consensual encounter should be more heavily scrutinized;⁵⁷ putting the victim on trial, rather than the defendant.

Research from the National Institute of Justice shows how this exception creates gender bias under the guise of intending to protect

⁵³ Nearly two-thirds of victims aged eighteen to twenty-nine had a prior relationship with their assailant, and women are almost six times more likely to be victims of sexual violence than men. PATRICIA TJADEN & NANCY THOENNES, NAT'L. INST. OF JUST., U.S. DEPT. OF JUST., PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM NATIONAL VIOLENCE AGAINST WOMEN SURVEY 27 (1998).

⁵⁴ *Id.*

⁵⁵ FED. R. EVID. 412.

⁵⁶ Anderson, *supra* note 51, at 70.

⁵⁷ *Id.* at 121-22.

women and their privacy.⁵⁸ Thus, even if the Court required USC to implement into its disciplinary hearings procedures identical to those required by the rape shield laws, it still would have contributed to the gender-bias in sexual violence cases, just with a facially neutral intent. Instead, the Court is picking and choosing which procedures for USC to adopt, showing its own gender-biased attitude towards cases of campus sexual violence.

2. *APPLYING THIS “PICK AND CHOOSE” PERSPECTIVE TO THE COURT’S REASONING*

The Court justified requiring a live hearing with cross examination when the credibility of witnesses is at issue;⁵⁹ however, no facts regarding Boormeester’s conduct that night were disputed by Boormeester, Katz, or the witnesses.⁶⁰ In his dissent, Justice Wiley pointed out that part of Katz’s initial statements, overlooked by the majority, explained Boormeester’s conduct during a previous semester where she allowed him to live in her apartment rent free.⁶¹

He told her when she could speak and when she was too close to him. He used physical abuse when she did not obey. He poked and hit her, causing bruising. He told her to shut up. He kicked her when she got too close. He took her by the neck to “freeze her” when he wanted to stop her. . . He told her she was stupid and a lousy tennis player. . . He never apologized or took responsibility [and] [w]hen she asked if he would feel bad or sorry if he hurt her, he said no, because she brought it on herself.⁶²

Justice Wiley also regarded Katz’s recanting of the above statements as less credible than the initial statements themselves because of the propensity for victims of intimate partner violence to recant and change their story to protect the aggressor.⁶³ A separate

⁵⁸ Among victims aged 18-29, two-thirds had a prior relationship with their offender. NAT’L INST. OF JUST., VICTIMS & PERPETRATORS (Oct. 26, 2010), <https://nij.ojp.gov/topics/articles/victims-and-perpetrators>.

⁵⁹ Boormeester v. Carry, 49 Cal. App. 5th 682, 703 (2020), *depublished* by 472 P.3d 1062 (Cal. 2020) (citing Doe v. Allee, 242 Cal. Rptr. 3d 109, 136 (Cal. Ct. App. 2019)).

⁶⁰ See *id.* at 706-07.

⁶¹ *Id.* at 712.

⁶² *Id.*

⁶³ *Id.* at 711.

2011 study found victims tended to recant when contact between the abuser and the victim sparks feelings of blame in the victim, the victim feels lonely or isolated, and when the victim becomes sympathetic to the abuser.⁶⁴ Katz's actions of asking her friends not to cooperate with the investigation and expressing concerns Boormeester was being unfairly punished indicated that she sympathized with Boormeester and may have felt like she was partially to blame. She told the investigator she wanted to end the investigation because she still cared about Boormeester, and she must have recognized following through with the investigation would end their relationship. Also, although the opinion is silent on what Boormeester and Katz discussed when he violated the AOC order, a reasonable person might assume they discussed the investigation, and Katz may have been convinced she was partially to blame for the abuse (even though that is inaccurate).

Justice Wiley also pointed out USC's procedures were more than fair to Boormeester, providing four layers of review in determining he violated USC's misconduct policy by engaging in intimate partner violence.⁶⁵ The first layer was the extensive investigation conducted by the Title IX investigator.⁶⁶ The second layer was the separate Misconduct Sanctioning Panel.⁶⁷ The third layer was the Appellate Panel.⁶⁸ The fourth and final layer of review was USC's Vice President for Student Affairs, who ultimately affirmed Boormeester's expulsion.⁶⁹ Justice Wiley concluded USC's process was careful and fair, and the case was straightforward.⁷⁰ He also noted throughout the process, USC accommodated Boormeester and his lawyer on multiple occasions.⁷¹

Indeed, Justice Wiley points out the Court's majority opinion constructed a defense regarding unfair procedures in an effort to protect Boormeester, shifting the focus between the students to such a degree the "aggressor emerges as the victim."⁷² The opinion overlooked Boormeester's history of intimate partner violence in an effort to make this particular incident appear as a one-time occurrence for which he should not be held accountable. Thus, the

⁶⁴ See Amy E. Bonomi et al., "Meet Me at the Hill Where We Used to Park": *Interpersonal Processes Associated with Victim Recantation*, 73 J. SOC. SCI. & MED. 1054, 1056-60 (2011).

⁶⁵ *Boormeester*, 49 Cal. App. 5th at 713 (Wiley, J., dissenting).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 714.

⁷⁰ *Id.*

⁷¹ *Id.* at 715.

⁷² *Id.* at 709.

reader easily forgets that the real issue at hand is that Boormeester inflicted violence and pain on Katz. This sort of manipulation has the effect of aggrandizing a dangerous culture of hypermasculinity.

II. BACKGROUND ON HYPERMASCULINITY, SPORTS, AND GENDER-BASED VIOLENCE

A. MASCULINITY AND HYPERMASCULINITY

From a young age, boys are taught the meaning of masculinity through different facets of everyday life, such as educational settings, sports, and social interaction.⁷³ Nearly everything boys learn about “being a man” revolves around their respective levels of strength, performance in public competition, and dominance over both women and other men.⁷⁴ “Masculinities scholars have identified the ideal traits of traditional masculinity as heterosexual, aggressive, active, sports-obsessed, competitive, and stoic.”⁷⁵

Professor Nancy Chi Cantalupo points out male insecurity about not being masculine enough in comparison to other men around them creates a near obsession with constantly building up one’s “manliness” in the eyes of other men.⁷⁶ These dynamics lead some men to overcompensate through various behaviors, including violence.⁷⁷ Scholars refer to this overcompensation as

⁷³ See Nancy Chi Cantalupo, *Masculinity & Title IX: Bullying and Sexual Harassment of Boys in the American Liberal State*, 73 MD. L. REV. 887, 967 (2014).

⁷⁴ See MICHAEL A. MESSNER, *TAKING THE FIELD: WOMEN, MEN AND SPORTS* 27, 41 (2002).

⁷⁵ Cantalupo, *supra* note 73, at 904 (citing David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135, 153 (2009)); DAVID SADKER, MYRA SADKER & KAREN ZITTELMAN, *STILL FAILING AT FAIRNESS: HOW GENDER BIAS CHEATS GIRLS AND BOYS IN SCHOOL AND WHAT WE CAN DO ABOUT IT* 125-26 (2009).

⁷⁶ Nancy Chi Cantalupo is an Associate Professor at California Western School of Law. Professor Cantalupo is a nationally recognized scholar and expert on Title IX, sexual harassment, and gender-based violence in education. Her past positions include Assistant Dean for Clinical Programs at Georgetown Law, Associate Vice President for Equity, Inclusion & Violence Prevention at a higher education professional association, Research Fellow with the Victim Rights Law Center, and attorney with Drinker Biddle & Reath LLP. She has also consulted with President Obama’s White House Task Force to Protect Students from Sexual Assault. See Cantalupo, *supra* note 73, at 906-07.

⁷⁷ *Id.* at 907.

“hypermasculinity.”⁷⁸ Boiled down, hypermasculinity is an intensified form of traditional masculinity, and increases the likelihood for men to engage in violence.⁷⁹ It is used as a mechanism to ease male insecurity and is connected to a lack of empathy.⁸⁰ Dr. Michael Messner clarifies a common misconception when talking about male-violence; he states the phrasing “male-violence” itself is skewed to lead readers to believe the propensity for violence is a biological uniformity among men, but in reality, similar to masculinity, violence is learned.⁸¹

Professor Cantalupo points out another key factor in the hierarchy of masculinity: not being a woman.⁸² This resonates in the competition men have amongst themselves, which is why homophobic and other slurs that gender men as women are used as mechanisms for boys to prop themselves up as more masculine over other men.⁸³ Men also try to affirm their masculinity over other men by equating the others to women.⁸⁴ By placing women in a position of inferiority, men feel able to use women as objects in an attempt to heighten their image of masculinity.⁸⁵ Men face a constant test to prove their own traits of masculinity, and because of this consistent pressure to conform to the standards of masculinity, the result is a hypermasculine performance.⁸⁶

The propensity to engage in sexual violence is heightened in social settings involving hypermasculine performance because

⁷⁸ Hypermasculinity is defined as a particularly strong form of traditional masculinity. *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 908.

⁸¹ Michael A. Messner, *When Bodies Are Weapons: Masculinity and Violence in Sport*, 25 INT’L REV. FOR SOC. SPORT 203, 205 (1990). Dr. Messner is currently serving as a Professor of Sociology and Gender Studies at the University of Southern California. His research has focused into four categories: (1) gender and sport; (2) sports media; (3) men, feminism, and politics; and (4) war and peace. He has authored several books and chapters and was in the first generation of scholars to study men’s lives within women’s and gender studies. *Michael Messner: Home*, MICHAEL MESSNER, <http://www.michaelmessner.org/> (last visited Nov. 30, 2020).

⁸² Cantalupo, *supra* note 73, at 905.

⁸³ *Id.* (citing Michael Kimmel, *Men, Masculinity, and the Rape Culture*, in TRANSFORMING RAPE CULTURE 139, 142 (Emilie Buchwald, Pamela R. Fletcher & Martha Roth, eds., revised ed. 2005)).

⁸⁴ *Id.*

⁸⁵ See MESSNER, *supra* note 74, at 33-37; Cantalupo, *supra* note 73, at 910.

⁸⁶ Cantalupo, *supra* note 73, at 907.

sexual conquests are often used as a form of currency to increase one's own masculinity.⁸⁷

Masculinity contributes to the common gendered stereotypes generalizing both men and women. Such stereotypes include traditional societal constructs and views of family and relationships.⁸⁸ The hypermasculine behavior of having an extreme need to dominate others, and a readiness to resort to violence makes these stereotyped relationships extremely vulnerable to intimate partner violence.⁸⁹ These relationships are where men expect and are expected to achieve respect and control, and there is a connection linking stereotyped beliefs about family and relationships with a tolerance for intimate partner violence.⁹⁰

Intimate partner violence is a common form of obtaining dominance over ones' partner.⁹¹ The violence may be another form of overcompensation when men feel they are lacking masculine dominance amongst their peers or in other aspects of their lives. Emotional and physical abuse are commonly seen as forms of domestic abuse.⁹² Emotional abuse is inflicted by making the woman feel bad about herself, putting her down, and calling her names.⁹³ Justice Wiley unequivocally states in his dissenting opinion that the *Boormeester* case shows "substantial evidence [of] a textbook domestic violence case."⁹⁴ As noted above, Boormeester displayed a history of attempts to physically and emotionally abuse Katz in an effort to assert his dominance over her.⁹⁵

Although these gendered stereotypes also create significant challenges for male victims of domestic violence,⁹⁶ the conclusion overlooks the fact women are almost twice as likely to experience

⁸⁷ *Id.* at 908.

⁸⁸ Melissa L. Breger, *Reforming by Re-Norming: How the Legal System Has the Potential to Change a Toxic Culture of Domestic Violence*, 44 J. LEGIS. 170, 179 (2017).

⁸⁹ *See id.* at 179-80.

⁹⁰ *Id.* at 180.

⁹¹ Domestic Abuse Intervention Project, *Power and Control Wheel*, NAT'L CTR. ON DOMESTIC AND SEXUAL VIOLENCE, <http://www.ncdsv.org/images/powercontrolwheelnoshading.pdf>.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Boormeester v. Carry*, 49 Cal. App. 5th 682, 709 (2020), *depublished by* 472 P.3d 1062 (Cal. 2020) (Wiley, J., dissenting).

⁹⁵ *See id.* at 712.

⁹⁶ *See* Donald G. Dutton & Katherine R. White, *Male Victims of Domestic Violence*, 2 NEW MALE STUDIES: INT'L J., 2013, at 5.

severe intimate partner violence.⁹⁷ Men already feel a constant need to compete with other men in order to prove themselves, and this craving for domination is exacerbated in settings where such domination is glorified.⁹⁸

B. HYPERMASCULINITY AND SPORTS

Hypermasculinity is very common in sports – especially in more physical sports – because boys learn success is achieved through being the strongest or most aggressive player.⁹⁹ By deeming the aggressiveness or violence of male athletes in these sports as a positive factor that raises their status on the hierarchy, men’s athletics promotes the exertion of hypermasculinity. This encouragement sets a tone of acceptance of the resulting violence, even when the violence seeps outside of the boundaries of the sport. Anthony F. Green acknowledges sports can be a good outlet for anger and found varsity athletes (such as Boormeester) have a better ability to control their anger than non-varsity athletes.¹⁰⁰ While Green’s conclusion suggests a sports outlet positively influences the expression of anger, the data also lends support that varsity sports players may be more prone to angry outbursts.¹⁰¹ Thus, the common phrase of using sports to “take it all out on the field” is inaccurate.

As Professor Deborah Brake explains, one consequence of this acceptance is diminished public outrage when, for example, professional football players, boxers, or basketball players engage

⁹⁷ *Statistics*, NAT’L COAL. AGAINST DOMESTIC VIOLENCE, <https://www.ncadv.org/statistics#:~:text=1%201%20in%203%20women%20and%201%20in,partner.%20Data%20is%20unavailable%20on%20male%20victims.%201> (last visited Jan. 2, 2020).

⁹⁸ See Breger, *supra* note 88, at 178.

⁹⁹ See MESSNER, *supra* note 74, at 50-51.

¹⁰⁰ Anthony F. Greene et al., *Anger and Sports Participation*, 72 PSYCHOL. REPS., Apr. 1993, at 523.

¹⁰¹ *Id.* at 528.

in sexual or domestic violence.¹⁰² The public stage of these sports is centered on strength, competition, and aggression. The participating athletes are deemed as the most masculine and provided more leeway for “flagrant promiscuity,”¹⁰³ referring to how athletes in the most masculine sports are generally accustomed to being surrounded by women who idolize them, and therefore have greater difficulty in understanding when a woman says “no” to sexual contact.¹⁰⁴

The facts show Boermeester experienced this same inability to compartmentalize his violent behaviors within the boundaries of football when he attempted to justify his abusive conduct with his ex-girlfriend as mere “horseplay” and his similar conduct with Katz as sexual foreplay.¹⁰⁵ Looking back to Brock Turner, the judge and the media encouraged the same desensitized approach for a male athlete in even a nonviolent sport that is not considered the most masculine, showing how society and courts alike have placed an unreasonable amount of importance on the accused’s athletic capabilities.

Dr. Messner describes a “triad of violence” that has been weaved into the culture of male athletics; the triad being: (1) violence against women, (2) violence against other men, and (3)

¹⁰² See Deborah L. Brake, *Sport and Masculinity: The Promise and Limits of Title IX*, in *MASCULINITIES AND LAW: A MULTIDIMENSIONAL APPROACH* 201, 218 (Frank Rudy Cooper ed. 2012). Professor Brake is a graduate of Harvard Law School, where she earned the distinction of *magna cum laude*. She is currently serving as the Associate Dean for Research and Faculty Development at the University of Pittsburgh School of Law. Before joining the University of Pittsburgh faculty, she was senior counsel at the National Women’s Law Center in Washington, D.C. She is a nationally recognized scholar on gender equality and the law, with expertise in Title IX and athletics, sexual harassment and sexual violence, employment discrimination, pregnancy discrimination, and retaliation. She has co-authored multiple books and has published several articles in law review journals across the country. Her work has been cited twice in the United States Supreme Court. *Deborah Brake: Biography*, UNIV. OF PITTSBURGH SCH. L., <https://www.law.pitt.edu/people/deborah-brake#:~:text=She%20is%20a%20graduate%20of%20Harvard%20Law%20School%20and%20Stanford%20University.&text=Before%20joinin%20the%20faculty%20of,cum%20laude%2C%20and%20Stanford%20University> (last visited Nov. 30, 2020).

¹⁰³ Brake, *supra* note 102, at 212.

¹⁰⁴ See *id.*

¹⁰⁵ Boermeester v. Carry, 49 Cal. App. 5th 682, 687-88 (2020), *depublished* by 472 P.3d 1062 (Cal. 2020).

violence against themselves.¹⁰⁶ In isolation, each segment of the triad reads as a negative factor, but the foundations of sport and masculinity have warped these violent qualities into factors that male athletes use to boost their own image of masculinity.¹⁰⁷

The glorification of aggression and violence in men's athletics by the media further encourages engaging in hypermasculine conduct because the attention centers around athletes' abilities to inflict and receive violence. This is portrayed through media reports from popular channels like the Entertainment and Sports Programming Network ("ESPN"), where entire segments dedicated to the "best hits" land a place in the weekly highlight reels.¹⁰⁸ Stated in a simple, yet alarming way: more violence equals more fame. A likely result is that some athletes are not only engaging in the normal levels of aggression and violence associated with their respective sports, but instead are striving to be as aggressive and violent as possible to instill fear, assert their masculinity, and be glorified and idolized by the public media.

In addition, voyeurism¹⁰⁹ is used as a social bonding experience, especially when considering building the team environment and culture of loyalty among male athletic teams.¹¹⁰ This loyalty heavily emphasizes a culture of silence because trust is an important factor for a team to have success, and teammates count on one another to not betray the team by telling outsiders about these "bonding experiences." Voyeurism also contributes to the male suppression of empathy because sexual interaction and activity becomes a less intimate experience for boys.¹¹¹ It is also a prime example of the masculine tendency to dehumanize women and treat them as objects.

Like the hypermasculine culture, men's athletics also encourages and promotes the suppression of empathy for oneself, which in turn, spills over into these athletes not only suppressing their own empathy, but also lacking empathic considerations for others, especially women.¹¹² Research shows a lack of empathy has

¹⁰⁶ MESSNER, *supra* note 74, at 30.

¹⁰⁷ Brake, *supra* note 102, at 218.

¹⁰⁸ E.g., *Roman Reigns Ranks College Football's Biggest Hits*, ESPN, https://www.espn.com/video/clip/_id/18546580 (last visited Nov. 30, 2020).

¹⁰⁹ Voyeurism is where one male engages in sexual activity with a woman while other men watch. MESSNER, *supra* note 74, at 31-32.

¹¹⁰ *Id.* at 38-42; Cantalupo, *supra* note 73, at 909.

¹¹¹ MESSNER, *supra* note 74, at 33.

¹¹² See Messner, *supra* note 81, at 212.

significant connection to a male's propensity to engage in violent behavior.¹¹³

C. HYPERMASCULINITY, SPORTS, AND GENDER-BASED VIOLENCE

Hypermasculine behaviors are known to exacerbate the violence and aggression connected to lacking empathy.¹¹⁴ Preliminary research studies of empathic deficits indicate a heightened propensity to engage in physical violence in batterers who "have difficulty identifying with the perspective of others and have a poor ability to tolerate negative emotions."¹¹⁵ The importance of not being a woman or even manifesting feminine qualities, contributes to a suppression of empathy, especially towards women. This is because boys are encouraged to not only detach from their mothers at an extremely young age but also to dehumanize and objectify women.¹¹⁶

Pairing male insecurity with a learned and encouraged lack of empathy also results in what has been coined "The Big Impossible," representing how the pressure society puts on men, and the pressure men put on themselves to be more masculine than their male peers leads most of them to feel like they can never measure up to this imaginary standard of masculinity.¹¹⁷ This leads to a hypermasculine overcompensation.

Male difficulties with empathy arise from what scholars refer to as "The Boy Code." This code views emotion and empathy as feminine and encourages young boys to emotionally distance themselves from their mothers at extremely young ages in order to suppress both.¹¹⁸ Scholars have also referred to the lack of empathy resulting from disconnecting young boys from their mothers as a

¹¹³ Eva-Maria Seidel et al., *Empathic Competencies in Violent Offenders*, 210 PSYCHIATRY RES. 1168 (2013); Christmas N. Covell, Matthew T. Huss & Jennifer Langhinrichsen-Rohling, *Empathic Deficits Among Male Batterers: A Multidimensional Approach*, 22 J. FAM. VIOL. 165 (2007); David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73 (2002).

¹¹⁴ See Cantalupo, *supra* note 73, at 905-07.

¹¹⁵ Covell, *supra* note 113, at 172.

¹¹⁶ See Cantalupo, *supra* note 73, at 906; see also Messner, *supra* note 81 at 208, 212.

¹¹⁷ Cantalupo, *supra* note 73, at 906 (citing NANCY E. DOWD, THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE 41 (2010)).

¹¹⁸ *Id.*

lack of emotional literacy.¹¹⁹ Emotional literacy is the ability to identify and understand the emotional content of things like facial expressions and tone of voice.¹²⁰

Studies show a connection between the propensity to engage in gender-based violence and a lack of empathy.¹²¹ A 2002 study of rapists who have escaped accountability but are incarcerated for other reasons discovered that hypermasculinity and lack of empathy were common characteristics among the rapists.¹²² This study also found the majority of undetected rapists also committed other acts of interpersonal violence, such as battery.¹²³ Although this is a self-report study, perpetrators tend to underreport violent behavior.¹²⁴

A 2013 study of violent offenders and their associated empathic deficits, found violent offenders displayed a lower ability to recognize emotion in others.¹²⁵ Particularly, fear and disgust were the emotions where the violent offenders showed a larger deficit in recognition as compared to the control group.¹²⁶ Additionally, Dr. Messner suggests the propensity of male athletes to engage in violence against themselves contributes to men's lack of empathy, and their heightened ability to erase the emotional connection associated with pain.¹²⁷ For example, "sucking it up" when injured and continuing to play.

Perceiving women as objects further inhibits male ability to identify with the perspective of women and creates a lack of empathy towards women.¹²⁸ The "team" athletics environment contributes to the propensity to engage in violence against women. Combining a lack of empathy towards oneself with a team philosophy emphasizing loyalty leads to a culture of silence, where team members who are not the ones engaging in the violence do not speak out against the teammates who are.¹²⁹ The team environment

¹¹⁹ Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J. L. GENDER & SOC'Y 201, 219 (2008).

¹²⁰ *Id.*

¹²¹ Seidel et al., *supra* note 113; Covell, *supra* note 113; Lisak & Miller, *supra* note 113.

¹²² Other common characteristics identified were high levels of anger at women, the need to dominate women, and psychopathy and antisocial traits. Lisak & Miller, *supra* note 113, at 73.

¹²³ *Id.* at 80.

¹²⁴ Covell, *supra* note 113, at 168.

¹²⁵ Seidel et al., *supra* note 113, at 1179.

¹²⁶ *Id.*

¹²⁷ MESSNER, *supra* note 74, at 37-38.

¹²⁸ *Id.*

¹²⁹ *Id.* at 38-39 (discussing voyeurism as a mechanism for social bonding amongst men and as a method of objectifying women).

impacts how male athletes view and treat women. For example, in situations involving voyeurism or even hearing about how their teammates assaulted or abused a woman, passive silence reinforces the dehumanization and objectification of women as acceptable and deserved.¹³⁰

Although Dr. Messner describes each prong of the triad of violence in isolation, the combination of violence against themselves and against other men suggests an increased propensity for men, especially male athletes, to engage in violence against women.¹³¹ This increased propensity is a result of the suppression of empathy, particularly in athletes who are taught to ignore pain and therefore have difficulty identifying or understanding the pain of others, and an inability to turn off the hypermasculine violent mentality that is encouraged on the field.¹³² Dr. Messner interviewed several professional athletes who described their difficulties in stepping off the field and returning to a civilized mentality.¹³³ One interview with a professional football player explained the violent environment of the games carried over into the players' personal lives, resulting in abuse of their spouses.¹³⁴

Resorting to hypermasculine acts of violence, especially gender-based violence, is a way for boys to ease their own insecurities of failing to be the most masculine in the room.¹³⁵ Combining the insecurities about lacking masculine qualities, a hypermasculine overcompensation to ease such insecurity, and a belief in women's inferiority is likely why gender-based violence is a common result. Especially in settings such as collegiate athletics where hypermasculinity occurs at high rates, studies found the risk of sexual violence is increased at schools with top division athletic programs as compared to schools with lower division athletics or no athletics at all.¹³⁶ The inability to compartmentalize violent behaviors within the boundaries of sport, paired with a lack of

¹³⁰ *Id.* at 33-35.

¹³¹ *Id.* at 37-40.

¹³² *See id.* at 39-40.

¹³³ *Id.*

¹³⁴ *Id.* at 40.

¹³⁵ *See* Cantalupo, *supra* note 73, at 907.

¹³⁶ "[R]eports of sexual violence were higher on campuses with National Collegiate Athletic Association (NCAA) Division I athletic programs [such as USC] as compared to Division II, III and campuses with no athletics." Jacquelyn D. Wiersma-Mosley & Kristen N. Jozkowski, *A Brief Report of Sexual Violence Among Universities with NCAA Division I Athletic Programs*, BEHAV. SCI. J. U.S. NAT'L LIBR. MED. (Feb. 4, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC 6406521/>.

empathy, creates a lopsided gender vulnerability for women on these university campuses. This vulnerability is ignored when the Court chooses to focus on the violent offender's glorified athletic status or abilities.

III. THE CALIFORNIA COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT'S APPROVAL AND PROMOTION OF SEX-DISCRIMINATORY HYPERMASCULINITY

In *Boormeester*, the Court's focus on legally irrelevant facts regarding the accused's prowess as an athlete shows the Court shares Boormeester's hypermasculine attitudes, especially as they are connected to football. Recall, the Court begins its opinion stating, "Boormeester was a member of the USC football team, who kicked the game-winning field goal for USC at the 2017 Rose Bowl,"¹³⁷ but fails to address evidence of Boormeester's history of intimate partner violence against Katz and his ex-girlfriend. The Court's focus on irrelevant facts related to Boormeester's athletic success while refusing to acknowledge ample facts pointing to his gender-based abuse of multiple female intimate partners clearly justifies Justice Wiley's characterization that the "aggressor emerges as the victim."¹³⁸

Likewise, the Court ignores Boormeester's blatant lack of empathy and its consequences for Katz in terms of the violent and aggressive manner of Boormeester's attack on her. Indeed, nowhere in the record does Boormeester state he is sorry or remorseful that he caused her pain on the evening resulting in his expulsion from USC. Boormeester's lack of empathy is also evident in Katz's description of their relationship, during which he abused her repeatedly but never acknowledged it or apologized.

This is not the only case where the Court has limited its focus to the accused assailant's athletic status while ignoring or dismissing the sex-discriminatory harm he caused to women victims. In fact, in multiple cases involving accused USC football players, the Court has repeatedly pointed out a male-accused student's status on the football team, even though that fact is completely irrelevant to its analysis of the legal question before the Court: whether or not the student received fair procedure.¹³⁹

¹³⁷ *Boormeester v. Carry*, 49 Cal. App. 5th 682, 687 (2020), *depublished by* 472 P.3d 1062 (Cal. 2020).

¹³⁸ *Id.* at 709.

¹³⁹ *Id.* at 687; *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 116 (Cal. Ct. App. 2019); *Doe v. Univ. of S. Cali.*, 200 Cal. Rptr. 3d 851, 856 (Cal. Ct. App. 2016).

USC happens to be a very football-centric school, where football players are treated like superstars, on and off campus. USC also has significant gender discrepancies in campus sexual violence.¹⁴⁰ Sexual assault and sexual misconduct surveys conducted at USC in 2019 show thirty-one percent of undergraduate women reported experiencing nonconsensual sexual contact by physical force or inability to consent since entering USC, compared to about ten percent of undergraduate men.¹⁴¹ The study showed undergraduate women are being raped at a rate almost four times higher than undergraduate men.¹⁴²

The overall discrepancy in nonconsensual sexual contact at USC shows about thirty-seven percent of undergraduate women experience it as compared to about thirteen percent of undergraduate men.¹⁴³ The study also indicates undergraduate women at USC are over two times more likely to be the victim of intimate partner violence as compared to undergraduate men.¹⁴⁴ This research shows women at USC are already more vulnerable to gender-based violence. Pairing these results with the hypermasculine culture of male athletics exposes an increased risk for gender-based violence on campuses like USC.

However, the Court's opinions in these USC cases not only fail to criticize, but also focus on the accused assailant's roles as USC football players. These opinions glorify the culture of hypermasculinity associated with the sport, which also exists at USC. Uncoincidentally, football is one of the top sports that propels men who excel in the sport to the top of the hierarchy of masculinity.¹⁴⁵ Lauding their positions on the football team while minimizing the sexually aggressive culture of football and USC shows the gender-biased and sex-discriminatory attitude of the Court.

In *Doe v. Allee* ("Allee"), a case in which the Court began its opinion by noting Doe, accused of sexual assault, was attending USC on a football scholarship.¹⁴⁶ Various aspects of the Court's own restatement of the case in favor of the accused student shows an inherent bias. First, whereas the Court discussed in detail about

¹⁴⁰ See DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT: THE UNIVERSITY OF SOUTHERN CALIFORNIA (Sept. 16, 2019).

¹⁴¹ *Id.* at 18.

¹⁴² *Id.* at 19.

¹⁴³ *Id.* at 29.

¹⁴⁴ *Id.* at 34.

¹⁴⁵ Brake, *supra* note 102, at 5.

¹⁴⁶ *Allee*, 242 Cal. Rptr. 3d at 116.

how the victim, Roe, was drinking, smoking marijuana, and became “cross-faded”¹⁴⁷ on the night of the incident,¹⁴⁸ it was not until nearly ten pages into the opinion when the Court notes Doe, the accused assailant, was “not sober” on the night of the incident.¹⁴⁹

Second, in its introduction of the dispute about whether Doe and Roe engaged in consensual sexual intercourse, the Court frequently manipulates its word choice.¹⁵⁰ This manipulation expresses and builds sympathy for the accused while expressing skepticism of the victim, saying, “Doe *believed* the encounter was consensual. Roe *claimed* it was not.”¹⁵¹

Third and related, the Court’s recounting of the facts endeavors to picture the accused assailant as sympathetic as possible, minimizing the victim’s injuries and the accused assailant’s aggression.¹⁵² For instance, the Court failed to acknowledge, and by its silence, seemed to approve of, Doe dismissing the bruises he had left on Roe’s arms, legs, and chest as inconsequential. Similarly, in its restatement of Doe’s factual claims, the Court implies that, rather than experiencing a sexual assault, Roe was enjoying herself during the incident with Doe.¹⁵³ The Court describes Roe’s actions as portraying pleasure, while downplaying Doe’s aggressive conduct during the encounter.¹⁵⁴ Even where Doe either attempted to be untruthful or genuinely mixed up his story, the Court distracted from this by including a needless statement that Doe thought Roe’s story of the incident was “crazy”.¹⁵⁵

Fourth, the Court expresses concern for the accused assailants, but not the victim’s, future. For example, the Court refuses to declare Doe’s claims as moot, even though Doe had been convicted of other crimes and was not eligible to return to USC, because of the Court’s concern about the impact that being labeled a sex offender by a university could have on Doe’s life.¹⁵⁶ Thus, the Court

¹⁴⁷ A colloquial term describing when an individual is intoxicated and high on marijuana at the same time.

¹⁴⁸ *Allee*, 242 Cal. Rptr. at 116.

¹⁴⁹ *Id.* at 122.

¹⁵⁰ *Id.* at 116 (emphasis added).

¹⁵¹ *Id.*

¹⁵² *See id.*

¹⁵³ *See id.* at 116, 123.

¹⁵⁴ *See id.*

¹⁵⁵ *Id.* at 120. In Doe’s initial statement, he stated he used a condom during the sexual encounter with Roe, but after the Title IX investigator pointed out the differences in his and Roe’s stories, he changed his story and said he did not wear a condom. *Id.* at 116.

¹⁵⁶ *Id.* at 128. Additionally, universities cannot and do not have sex offender registries, and usually the cases are kept confidential. *Id.*

repeatedly shows a biased attitude in favor of the accused assailant, reasoning, and borderline sympathizing with his claims, and showing great concern for him, but not for the victim.

In contrast, rather than treating Roe's concern, that her position at the school as an athletic trainer could be jeopardized if she were thought to be having consensual sex with a member of the football team, as legitimate, the Court signals its agreement with Doe's defense – Roe lied about being assaulted to protect her job. Moreover, at no point does the Court acknowledge Doe would similarly have an incentive to lie to avoid suspension or expulsion and lose his football scholarship.

In another case, *Doe v. University of Southern California*, the Court again makes sure to specify that the accused, John, was a member of the USC football team.¹⁵⁷ On the night in question, John and the victim, Jane, had consensual sex.¹⁵⁸ However, during a portion of their sexual encounter, other men, without Jane's consent, also began performing violent sexual acts on Jane.¹⁵⁹ All the men, including John, did not stop until Jane started crying, and when she did John immediately left the room.¹⁶⁰

Although John's initial sexual encounter with Jane was consensual, he was suspended by the Appellate Panel for violating USC's misconduct policy by encouraging and permitting the other men to slap Jane during the nonconsensual encounter, and for endangering Jane by leaving her alone in the room with the other men.¹⁶¹ The trial court found there was substantial evidence to support the finding that John violated USC policy by encouraging and permitting the other men to slap Jane, but did not find substantial evidence as to endangering Jane.¹⁶²

In this case, the Court criticizes University policy by determining the notice of the Student Code of Conduct violations to John was not specific enough to be fair procedure.¹⁶³ In its determination of whether substantial evidence existed to show if John violated the policy prohibiting "encouraging or permitting others to engage in misconduct"¹⁶⁴ the Court highlights John's

¹⁵⁷ *Doe v. Univ. of S. Cali.*, 200 Cal. Rptr. 3d 851, 856 (Cal. Ct. App. 2016).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 855.

¹⁶² *Id.*

¹⁶³ *Id.* at 868.

¹⁶⁴ *Id.* at 874.

versions of the incident.¹⁶⁵ The Court found John's version to be clear and unequivocal evidence, while casting doubt upon Jane's version because at times in her interviews she was unclear or was mixed up about which men slapped her and which men said degrading things to her (even though they did so from behind her).¹⁶⁶ Whereas in *Allee*, the Court overlooked Doe's complete misstatement of a portion of what occurred on the night in question.¹⁶⁷ Thus, the Court is implicitly creating a sex-discriminatory double-standard for victims and aggressors regarding the accuracy or clarity of their account of what happened.

Similar to the gender-bias created by the exceptions to the rape shield laws, the Court is showing its biased attitude favoring John by accepting his statements as factual and solid, simply because he and Jane had a prior consensual encounter. John essentially engaged in a form of voyeurism, and the Court has ignored the objectification Jane experienced that night. Although John's actions, in this case, are not centralized around aggression, they demonstrate the associated lack of empathy towards Jane. Even though Jane was crying and giving obvious cues as to her emotion, John still had no issue with leaving her in the room, showing a disconnect from empathic considerations. John's status on the football team was enough for the Court to construct another defense under the guise of fair procedure in an attempt to mask its concern for protecting yet another member of the USC football team.

In focusing on the athletic status of these accused assailants, the Court is signaling it agrees with the hypermasculine attitudes glorified by sports cultures like football and has adopted the sex-discriminatory biases of those cultures when deciding gender-based violence cases. Although the Court vaguely recognized the athletic status of the victims, the Court failed to use that status to overlook the gender-biased presumptions about victims of gender-based violence, as it did for the aggressors in these cases.

When combined with other indications of gender-bias found in these campus sexual assault cases, the Court's ultimate conclusions about procedural unfairness towards these accused assailants must be viewed skeptically. Cumulatively, these cases suggest the Court has abdicated its position of neutrality and is making judicial decisions based on its approval of sex-discriminatory hypermasculine sports cultures.

¹⁶⁵ *Id.* at 875.

¹⁶⁶ *Id.*

¹⁶⁷ *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 116 (Cal. Ct. App. 2019).

IV. CONCLUSION

The Court's glorification of hypermasculine sports cultures is leading to sex-discriminatory decision making in these campus gender-based violence cases. The procedure-based defenses the Court is creating solely for those accused of gender-based violence risk inscribing gender-bias into California law. Therefore, the California Supreme Court should overturn the *Boermeester* decision. Overturning the decision will also give the Court the opportunity it needs to recognize and correct the inherent gender-biased attitude it embraces when deciding cases related to campus gender-based violence. The Court needs to be reminded who the real victims of these cases are, and overturning the decision can do just that.