

# **Fifty/Fifty: Ending Sex Segregation in School Sports**

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*Title IX is now thirty years old, yet we still struggle to define “sex discrimination” in the context of school sports programs. By continuing to accept the concept of segregation and protecting “contact sports” from female encroachment, we continue to protect this male controlled and dominated aspect of our educational system. Our reward has been a world of “big time” college sports that has far more in common with professional sports than the educational enterprise. These programs frequently undermine and sometimes overwhelm the educational values our schools purport to espouse. We can only gain control of this problem by fundamentally rethinking and restructuring the enterprise. The author proposes the end of sex segregation by requiring that all school sports teams be half female and half male (both in terms of numbers and playing time). To the extent that such a drastic proposal might change the very nature of sports and how they are played, such outcomes may reflect exactly the kind of leadership our schools should be providing.*

## I. INTRODUCTION

The civil rights movement and the women’s movement have spawned decades of debate on the concept of equality. Sometimes the answers have been glaringly obvious; other times they have been elusive. In the early days of these movements, discrimination was often blatant, with jobs reserved for only whites or only men. Such explicit, facial distinctions have all but vanished in the face of constitutional claims (under the equal protection clause of the Fourteenth Amendment<sup>1</sup>) and Title VII<sup>2</sup> mandates (prohibiting race and sex discrimination in employment). One significant exception, however, is sports, where we continue to accept, expect, and even defend sex segregation as the status quo.

Title IX,<sup>3</sup> added in 1972 to a growing list of civil rights statutes, prohibits sex discrimination by any educational institution receiving federal funds—a group encompassing virtually all colleges and universities, as well as most middle/junior highs and high schools. By almost any measure, there has been tremendous progress in women’s sports since 1972—dramatic increases in the number of women playing sports, huge increases in the money invested (albeit starting from almost nothing), and noteworthy increases in popularity of women’s sports (with

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<sup>1</sup> U.S. CONST. amend. XIV.

<sup>2</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-15 (1994).

<sup>3</sup> Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (1994).

the U.S. World Cup women's soccer team and the relative success of professional women's basketball).

Nonetheless, after thirty years, the issue of sex discrimination remains a frustrating puzzle in intercollegiate and secondary school athletics. Two recent lawsuits symbolize much of the problem of sex equality in sports. *Mercer v. Duke University*<sup>4</sup> highlights our continuing legal judgment that women may be excluded from men's sports when there is any plausible argument that they might get hurt. And *Fuhr v. Hazel Park School District*<sup>5</sup> reminds us that there is at least one job (other than military combat<sup>6</sup>) that society implicitly believes women are too incompetent to perform—coaching male athletes.

As frustrating as these stubborn strands of discrimination may be, however, intercollegiate athletics is being poisoned by an even bigger problem—the erosion of academic and financial integrity under the corrupting influences of commercialization and professional sports. Rule violations, low graduation rates, million dollar coaching contracts, broadcast rights, and corporate sponsorships in the big-time programs have all but destroyed any ties between higher education and its high profile sports teams. Whatever educational values we may have once thought imbedded in these athletic endeavors have been buried in the escalating competition for money and exposure. This article suggests that these problems—gender (in)equity and commercialization—are inherently linked.

In defiance of any conceivable educational mission statements, school sports in general, and intercollegiate athletics in particular, broadcast two clear messages: the “important” sports are about men and money. At the intercollegiate level, the best programs are those that attract the biggest television contracts and corporate sponsorships—an elite category defined primarily by football and men's basketball. Should academics stand in the way, they will be compromised or brushed aside altogether. Women athletes effectively get the same treatment. In spite of the growing participation in, support for, and popularity of women's sports, female athletes continue to be left behind in this escalating “arms race.”<sup>7</sup> Evidence is growing of both the enormity of the problem and our apparent inability to address it or even stem the tide. The corruption of high-profile men's sports on the one hand, and the struggle for gender equity on the other hand, define the losing battle between the aspirations of our educational institutions and the world of sports.

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<sup>4</sup> 190 F.3d 643 (4th Cir. 1999).

<sup>5</sup> 131 F. Supp. 2d 947 (E.D. Mich. 2001).

<sup>6</sup> See Kingsley R. Browne, *Women at War: An Evolutionary Perspective*, 49 BUFFALO L. REV. 51 (2001) (arguing that the physical and emotional differences between men and women, and the costs associated with including women in combat, justify women's exclusion).

<sup>7</sup> See JOHN S. & JAMES L. KNIGHT FOUND., A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION 16 (June 2001), available at [http://www.knightfdn.org/default.asp?story=news\\_at\\_knight/special\\_reports/coi\\_athletics.html](http://www.knightfdn.org/default.asp?story=news_at_knight/special_reports/coi_athletics.html) [hereinafter KNIGHT REPORT 2001]; *infra* notes 148–65 and accompanying text.

*Mercer v. Duke University* illustrates that, in the world of school sports, even simple issues of facial or formal equality—treating similarly situated men and women in similar ways—are not so simple after all. Mercer sought a position on the Duke University football team as a walk-on place-kicker, a position she had successfully played on her high school football team. She was permitted to participate in off-season training, and, after kicking the winning field goal in the spring scrimmage, was told by the coach that she had made the team. The coach later changed his mind, however—allegedly fed up with the distraction of the attendant publicity—and removed Mercer from the roster.<sup>8</sup>

Never mind that the coach had *never* cut a male from the Duke football team.<sup>9</sup> Never mind that Mercer apparently was at least as skilled as one or more of the male place-kickers who were permitted to remain on the team. And never mind that the coach suggested Mercer try cheerleading or beauty pageants instead.<sup>10</sup> But Mercer sued, and the jury quickly picked Mercer's team. The jury awarded Mercer \$2 million in punitive damages. Duke University's appeal is pending.

Was *Mercer v. Duke University* a big victory for women in sports? Yes and no. There is a caveat to that hefty verdict that threatens to undermine the dreams of any girl hoping to play football or other sports with the boys: Duke University legally could have refused Mercer any opportunity to try out for the football team *at all*. As explained more fully below, Title IX permits a school to prohibit any woman from competing on a men's team defined as a "contact sport."<sup>11</sup> Duke could have avoided liability by rejecting Mercer's request for a tryout in the first place regardless of her kicking skills—no second-guessing and no Monday morning quarterbacking on how she was, or should have been treated. The happy ending for Mercer thus has an unfortunate potential for backlash. As an institution of higher education, which would you choose—trust the football coach to treat a potential female player equitably or avoid the problem altogether by prohibiting all women from trying out?<sup>12</sup>

Geraldine Fuhr's complaint may cause even more celebration or more squirming among those who follow these issues closely. According to the evidence submitted on summary judgment, Geraldine Fuhr was the varsity coach

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<sup>8</sup> See Welch Suggs, *Will Female Kicker's Legal Victory Reshape Gender Roles in Athletics?*, CHRON. HIGHER EDUC., Oct. 27, 2000, at A53.

<sup>9</sup> Alex Tresniowski et al., *Kicking Up a Storm*, PEOPLE, Oct. 30, 2000, at 69.

<sup>10</sup> Kate Stone Lombardi, *A Victory for a Girl Who Loved to Kick*, N.Y. TIMES, Oct. 22, 2000, § 14 WC, at 5.

<sup>11</sup> See *infra* notes 32–37 and accompanying text.

<sup>12</sup> See generally Suggs, *supra* note 8. One irritated (female) junior college football kicker reported that interest from four-year schools quickly cooled in the aftermath of the *Mercer* verdict. *College Football Spotlight/Week 12; They Need Kick in Pants*, L.A. TIMES, Nov. 12, 2000, at D9 (reporting on an interview with Tonya Butler, a kicker for the Middle Georgia College football team).

for the high school girls' varsity basketball team, a position she had held for ten years. Fuhr had also served nine years as the boys' junior varsity coach and eight years as an assistant to the boys' varsity coach.<sup>13</sup> When the boys' varsity coach resigned, Fuhr applied for the vacancy. Although both the school's principal and athletic director supported Fuhr's application, the school district selected instead the only other applicant for the position—John Barnett, the coach for the ninth-grade boys for only two years.<sup>14</sup> Fuhr sued for employment discrimination and won. The jury awarded her \$445,000—more than double the amount in damages suggested by Fuhr's attorney.<sup>15</sup>

Mercer and Fuhr—a student trying to play with the boys and a coach trying to coach the boys—represent two fundamental and continuing barriers to equality in sports. As long as we continue to believe each is out of place in the role to which she aspires, we are unlikely to move beyond the discrimination that continues to pervade the world of school sports.

But sex equality is hardly the only problem facing school sports in general and intercollegiate athletics in particular. While many would and have argued that there is much remaining to be done to achieve true gender equality in college sports, most would agree that we have been moving in a positive direction and much has been accomplished. In another arena, however, things seem to be getting worse instead of better. Perhaps far more pressing in the world of intercollegiate athletics is the rapidly growing gap between sports and the fundamental goals and aspirations of our educational institutions.

This second (and arguably interrelated) issue—the increasing “professionalization” of intercollegiate athletics—looms large in the world of higher education. At most Division I-A<sup>16</sup> schools, the myth that athletics operate as an integral part of the educational institution was debunked years ago. The alarm was officially sounded in 1991 by the Knight Foundation Commission on Intercollegiate Athletics, a distinguished panel of current and former university officials (and others).<sup>17</sup> The Commission concluded that intercollegiate athletics “threaten to overwhelm the universities in whose name they were established.” In 2001, the Commission reconvened to review its recommendations of 1991 to restore academic and financial integrity to college sports. Sadly, the Commission

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<sup>13</sup> Fuhr v. Sch. Dist. of Hazel Park, 131 F. Supp. 2d 947, 948 (E.D. Mich. 2001).

<sup>14</sup> *Id.* at 949. The school district defended its decision on the grounds that the girls' varsity season overlaps the boys' season by a week. *Id.* at 951.

<sup>15</sup> Matt Helms, *Female Coach Wins Bias Suit*, DETROIT FREE PRESS, Aug. 8, 2001, at 1A.

<sup>16</sup> Division I-A is the highest level of competition sponsored by the National Collegiate Athletic Association (NCAA).

<sup>17</sup> JOHN S. & JAMES L. KNIGHT FOUND., *Keeping Faith with the Student-Athlete: A New Model for Intercollegiate Athletics*, in REPORTS OF THE KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS 14 (1999), available at [http://www.knightfdn.org/default.asp?story=news\\_at\\_knight/special\\_reports/coi\\_athletics.html](http://www.knightfdn.org/default.asp?story=news_at_knight/special_reports/coi_athletics.html) [hereinafter KNIGHT REPORT 1991]; see *infra* notes 140–45 and accompanying text.

reported that “the threat has grown rather than diminished.”<sup>18</sup> “The fallout from having already waited too long to act is all the more reason to persevere. Each passing day compounds the academic corruption and makes the need for curative measures more compelling.”<sup>19</sup>

The Knight Commission pleads with college and university presidents to regain control of a world that now operates virtually independent of any serious academic oversight. The highest profile programs, according to the Commission, already are characterized by “weakened academic and amateurism standards, millionaire coaches and rampant commercialism, all combined increasingly with deplorable sportsmanship and misconduct.”<sup>20</sup> And for those who seek more “academic” support for these conclusions, many of the same findings can be found in the carefully researched work of James Shulman and William Bowen studying athletes over several decades at thirty colleges and universities ranging from Swarthmore to the University of Michigan.<sup>21</sup>

These almost overwhelming problems—money, professionalism, and commercialism on the one hand, and the continuing struggle to define and implement gender equality on the other hand—are inevitably linked. The center of the commercialization problem is football and men’s basketball—the same two sports early opponents of Title IX wanted to protect.<sup>22</sup> With the overwhelming pressure to funnel more and more money and effort into these teams, women’s athletics continue to fight for funding and respect.

Simple solutions rarely resolve complicated problems. A myriad of possibilities has been offered by the Knight Commission, commentators, and scholars to address the issues of gender equity for women student athletes, the relative dearth of women in coaching positions, and the complex factors that threaten the academic and financial integrity of our universities.<sup>23</sup> The Knight Commission surely is correct that only wholesale reform and rethinking of our basic premises have a chance of returning this endeavor to the core of our aspirations for educational institutions. But most of these proposals continue to tinker at the edges of these vast problems rather than striking at the heart by reconstituting the entire enterprise.

This article proposes that educational institutions, from middle schools to universities, reject the fundamental premise of segregation—something we have demanded in virtually every other arena of our society. The “simple” solution

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<sup>18</sup> KNIGHT REPORT 2001, *supra* note 7, at 11.

<sup>19</sup> *Id.* at 22.

<sup>20</sup> *Id.* at 23.

<sup>21</sup> JAMES L. SHULMAN & WILLIAM G. BOWEN, *THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES* (2001); *see infra* notes 166–78 and accompanying text.

<sup>22</sup> *Cf. id.* at 299 (“The number of male football players creates severe issues of gender equity in athletics for schools at every level of play. Colleges such as Haverford that do not play football have a much easier time complying with Title IX.”) (citation omitted).

<sup>23</sup> *See infra* notes 165, 177, 181–84 and accompanying text.

proposed here is the institution of mandatory coed teams in all sports. Here I am proposing “coed” in the most extreme sense—all teams would be half male and half female, with the further requirement that half of the players on the field or court at any given time would also be half women.<sup>24</sup> As discussed more fully below, this single change has the potential of eliminating most gender equity problems (including the contact sports rule), integrating women as respected coaches at all levels, and *perhaps* even diminishing the destructive forces that tie college athletics to professional sports instead of the educational mission of the school.

I have always applauded articles, particularly in this area, that attempt to propose both concrete and realistic solutions.<sup>25</sup> For this reason, my instincts are to shy away from suggestions that seem beyond any hope of consideration or adoption. I thus have reached my conclusions with some reluctance, knowing that the idea of coed college football alone is enough to drive my arguments into the realm of ridicule. But I have also become convinced that only something requiring changes at the core can have any hope of gaining control of the problems that permeate college sports and returning an “extracurricular” activity to its rightful place in our education system.

I should be clear that my concern is school sports (both secondary and intercollegiate) and only school sports. I have no interest in, and am untroubled by any potential impact on, professional sports. My primary issue is athletics in the public arena as a function of our educational system. It is in this environment, rather than the world of money that drives professional sports, that the issues of sex discrimination and the fundamental values of our colleges and universities must be addressed. We should aspire to something more than staying just inside the limits of the law. If our school athletic programs continue to defy instead of reflect the educational mission of their institutions, we have no business playing the game at all.

Part one of this article reviews briefly the history of Title IX, focusing in particular on issues of team segregation by sex, the contact sports rule, and the legal challenges presented in *Mercer*. Part two considers the segregation of coaches, reflected in the *Fuhr* case. Findings of the Knight Commission and the research of Shulman and Bowen are briefly presented in part three. Finally, part

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<sup>24</sup> Individual sports under my proposal (such as track, swimming, tennis, etc.) could continue to match women against women and men against men, as long as there were equal participants in all events and team scores combined both men’s and women’s events to determine the institutional winner of the match or meet. The NCAA currently uses a similar practice in a few sports, such as skiing. *See infra* note 192 and accompanying text.

<sup>25</sup> One commentator suggested, for example, that males be permitted to try out for a spot on a women’s team “where the denial of the sport to males rests on cultural assumptions about the sport’s femininity.” Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 MICH. J.L. REFORM 13, 145 (2000). Although the feminist theoretical basis for such a proposal is a compelling one, it is difficult to visualize (mostly male) athletic directors or NCAA administrators making such abstract decisions.

four explores the alternative of coed sports, examining the legal, practical, and cultural obstacles and benefits of such a proposal.

## II. TITLE IX, SEGREGATED TEAMS AND THE CONTACT SPORTS RULE: SEPARATE BUT (RARELY) EQUAL

### A. Title IX

Most gender discrimination issues in sports have focused on the federal statute passed in 1972 prohibiting sex discrimination in activities controlled by federal fund recipients—better known as “Title IX.”<sup>26</sup> The history of Title IX and its regulations have been reviewed at length by other scholars and are summarized only briefly here.<sup>27</sup> Title IX itself makes no mention of sports, nor was the issue a focus of the debate preceding its enactment. The statute merely prohibits educational institutions receiving federal funds from discriminating “on the basis of sex” in any programs or activities.<sup>28</sup>

Once the potential impact of the legislation on college sports caught the attention of sports enthusiasts and Congress, there was both fear and hope that Title IX might drastically change the nature of sports. The National Collegiate Athletic Association (NCAA)<sup>29</sup> lobbied strenuously to exempt intercollegiate athletics altogether.<sup>30</sup> A compromise amendment proposed by Senator John

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<sup>26</sup> Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (1994).

<sup>27</sup> See, e.g., ELLEN J. VARGYAS, *BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX* (1994); B. Glenn George, *Who Plays and Who Pays: Defining Equality in Intercollegiate Athletics*, 1995 WISC. L. REV. 647 (1995); Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 SETON HALL J. SPORT L. 391 (1997); Diane Heckman, *Woman & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1 (1992).

<sup>28</sup> The applicable text reads: “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 . . . .” 20 U.S.C. § 1681(a) (1994). The act was amended in 1988 (overturning *Grove City College v. Bell*, 465 U.S. 555 (1984)) to clarify that the entire institution and all of its programs are subject to Title IX’s anti-discrimination requirement as long as any program within the institution accepts federal funds. Because most educational institutions, both public and private, receive some federal funding, virtually all colleges and universities and most secondary schools are covered, even though that funding rarely would be going directly to the athletic programs.

<sup>29</sup> The NCAA is the national association of colleges and universities that controls all intercollegiate athletic competition. See <http://ncaa.org>.

<sup>30</sup> Walter Byers, the NCAA executive director at that time, argued that Title IX could be the “possible doom of intercollegiate athletics.” Bart Barnes & N. Scannel, *No Sporting Chance: Girls in the Locker Room*, WASH. POST, May 12, 1974, at 14A, quoted in Linda Jean Carpenter, *The Impact of Title IX on Women’s Intercollegiate Sports*, in GOVERNMENT AND SPORT: THE PUBLIC POLICY ISSUE 62, 63 (Arthur T. Johnson & James H. Frey eds., 1985).

Tower would have exempted from Title IX all “revenue” sports, in effect excluding football and men’s basketball from the statute’s reach. The Tower Amendment failed, however, and Congress could only agree to divert the problem elsewhere. The Javits Amendment that did pass directed the Secretary of Health, Education and Welfare (“HEW”) to prepare implementing regulations for intercollegiate athletics, with “reasonable provisions considering the nature of particular sports.”<sup>31</sup>

### 1. Defining “Separate”

The Javits Amendment resulted in Title IX’s first regulations, proposed by HEW’s Office for Civil Rights (“OCR”) in 1974 and finalized in 1975. Addressing the congressional mandate to consider “the nature of particular sports,” the regulations explicitly permitted the creation of sex segregated sports teams and included the “contact sports” rule at issue in *Mercer v. Duke University*. Section 106.41 of the regulations provides in relevant part:

#### Athletics

(a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) Separate Teams. Notwithstanding the requirement of paragraph (a) of this section, a recipient *may operate or sponsor separate teams for members of each sex* where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, *members of the excluded sex must be allowed to tryout for the team offered unless the sport involved is a contact sport*. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.<sup>32</sup>

Parsing the language, the regulations thus permit separate teams, but require an institution to allow women (as the sex with previously limited opportunities) to try out for the men’s team *if* there is no women’s team in that sport and *if* the sport

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<sup>31</sup> Gender and Athletics Act, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974). The Javits Amendment was part of the Education Amendments of 1974.

<sup>32</sup> 34 C.F.R. § 106.41(a)–(b) (2000) (emphasis omitted) (emphasis added).



is not a “contact sport.”<sup>33</sup> (Non-contact sports would include teams such as swimming, tennis and golf.) In other words, women are barred from men’s “contact” sports altogether with no obligation on the part of the institution to offer a team in that sport for women or to permit women the chance to compete for a spot on the men’s team. The provision does not require the reverse—men cannot demand to try out for the women’s team in a non-contact sport, even if there is no men’s team, because men have not been previously limited in athletic opportunities.<sup>34</sup>

The courts have shown little inclination to question OCR’s definition of “sex discrimination,” and the application of the regulations is usually straightforward. In *Adams v. Baker*,<sup>35</sup> for example, Tiffany Adams sued to obtain a spot on her high school wrestling team. Consistent with Title IX regulations, Adams’ high school had prohibited any girls from participating on the wrestling team. In considering the application of Title IX, the court easily concluded that women could be excluded under the regulations, as wrestling admittedly was a “contact sport.”<sup>36</sup>

## 2. Defining “Equal”

“Separate” was thus established by the first regulations under Title IX (permitting separate teams and protecting the men’s teams from female

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<sup>33</sup> I have assumed that women are the sex whose athletic opportunities previously have been limited, in the language of the statute, but the reverse situation is theoretically possible at an institution that has been exclusively or largely female in the past and thus historically has fielded only women’s teams.

<sup>34</sup> Although one might argue the men in such a setting are being excluded from the particular sport or team in question, courts usually have interpreted the exclusion requirement in a more general way. Compare *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168 (3d Cir. 1993) (debating whether athletic opportunities in general had been limited for boys), and *Mularadelis v. Haldane Cent. Sch. Bd.*, 427 N.Y.S.2d 458 (N.Y. Sup. Ct. 1980) (considering past participation in sports activities overall, not in one particular sport), with *Gomes v. R.I. Interscholastic League*, 469 F. Supp. 659 (D.R.I. 1979) (debating whether adequate opportunities existed for boys to participate in a particular sport).

<sup>35</sup> *Adams ex rel. Adams v. Baker*, 919 F. Supp. 1496, 1503 (D. Kan. 1996).

<sup>36</sup> *Id.* The plaintiff was much more successful in her equal protection argument, however, and the court granted her a preliminary injunction on that basis. *Id.* at 1505. Women excluded from men’s teams have sometimes prevailed under a Fourteenth Amendment argument in spite of Title IX’s limitations. See *infra* notes 76–98 and accompanying text.

Although not an issue with regard to wrestling, litigation sometimes has proceeded on the question of whether a particular sport not specifically listed in the regulations—such as field hockey—can be characterized as a “contact sport.” See, e.g., *Williams*, 998 F.2d 168 (reversing summary judgment for male suing for opportunity to play on female field hockey team, in part because of genuine issue of material fact as to whether field hockey is a “contact sport”); *Kleczek ex rel. Kleczek v. R.I. Interscholastic League*, 768 F. Supp. 951 (D.R.I. 1991) (considering male’s suit for opportunity to play on female field hockey team).

encroachment through the contact sports rule); what about “equal”? In 1971, the year before Title IX was passed, girls represented only 7% of all high school athletes—over 3.5 million boys compared to less than 300,000 girls.<sup>37</sup> The regulations attempted to address this disparity by further requiring “equal athletic opportunity for members of both sexes.”<sup>38</sup> Ten factors are listed for consideration:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.<sup>39</sup>

Many of these factors are concrete. Comparing equipment and travel allowances for the men’s and women’s basketball teams was a relatively easy task under the regulations,<sup>40</sup> although comparing equipment and practice facilities for a volleyball team and a lacrosse team might be less clear-cut. The first factor (addressing the issue of participation opportunities), however, offered far less guidance. How would an institution determine if it “effectively accommodate[s] the interests and abilities of members of both sexes?”<sup>41</sup>

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<sup>37</sup> Nat’l Fed’n of State High School Ass’ns, 2001 High School Participation Totals, at <http://www.nfhs.org/participation/sportspart01.htm> (last visited Oct. 18, 2002) (comparing 294,015 girls with 3,666,917 boys). The numbers for 2000–2001 indicate that girls now represent 42% of the high school athletes—approximately 2.7 million girls compared to 3.9 million boys. *Id.* The NCAA first began tracking participation numbers for intercollegiate athletics by sex in 1984–1985 (a dozen years after Title IX’s enactment and ten years after the regulations). That year almost 300,000 students participated in intercollegiate athletics, with women representing just under a third of the group (although national enrollment figures for four year institutions were almost 50/50). *See* Athletic Participation & Student Enrollment, by Sex, in Four-Year Institutions of Higher Education (August 1994), at <http://bailiwick.lib.uiowa.edu/ge/statistics.htm#300>.

<sup>38</sup> 34 C.F.R. § 106.41(c) (2000).

<sup>39</sup> *Id.*

<sup>40</sup> *See generally* B. Glenn George, *Miles to Go and Promises to Keep: A Case Study in Title IX*, 64 U. COLO. L. REV. 555 (1993) (comparing the budgets of the men’s and women’s basketball teams at the University of Colorado at Boulder for the 1991–1992 season).

<sup>41</sup> 34 C.F.R. § 106.41(c)(1) (2000).

In 1979, the OCR sought to clarify the ambiguity on the participation question by issuing a Policy Interpretation,<sup>42</sup> purporting to explain the regulations it had issued four years earlier. The accommodation requirement of the 1975 regulations was translated into a test offering three alternatives for compliance. First, the institution could offer athletic opportunities “in numbers substantially proportionate to their respective enrollments.”<sup>43</sup> In other words, if 50% of the student body at large is female, 50% of the student athletes should be female. Second, the institution could comply by establishing “a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex.”<sup>44</sup> Third, in an option that does little more than restate the original standard, a school may satisfy Title IX by demonstrating that “the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.”<sup>45</sup>

As a practical matter, these alternatives have been interpreted and applied by the courts in such a way as to leave only the first alternative—proportionality—as a legally viable option. The second alternative (“a history and continuing practice of program expansion”) may have been intended to give some breathing room to those schools that had few women’s teams in the early 1970s, but were working towards expansion. Many schools added women’s teams in the first decade of Title IX but, in the face of tighter budgets, that era of expansion has long since disappeared. Typical are the histories of Brown University and Colorado State University—both high profile defendants in Title IX lawsuits in the 1990s.<sup>46</sup> In each case, the schools in question planned to discontinue both men’s and women’s teams in order to address budget shortfalls—women’s volleyball, women’s gymnastics, men’s golf, and men’s water polo, in *Brown*; women’s softball and men’s baseball in *Colorado State*. Neither Brown nor Colorado State had added a woman’s team since the 1970s (with the exception of women’s track added by Brown in 1982).<sup>47</sup> Not surprisingly, the First Circuit concluded in

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<sup>42</sup> U.S. Dept. of Health, Educ. & Welfare, Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (1979).

<sup>43</sup> *Id.* at 71,418.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> See *Roberts v. Colo. State Univ.*, 814 F. Supp. 1507 (D. Colo.), *aff’d in part and rev’d in part sub nom.*, *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993); *Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992), *aff’d*, 991 F.2d 888 (1st Cir. 1993), *remanded to* 879 F. Supp. 185 (D.R.I. 1995), *aff’d in part and rev’d in part*, 101 F.3d 155 (1st Cir. 1996). *Brown* was a particularly complex and lengthy case. For a more complete discussion of that litigation and the issues raised, see Brake, *supra* note 26, at 50–56.

<sup>47</sup> All of *Brown*’s women’s teams were added between 1971 and 1977, with one exception. *Colo. State Univ.*, 814 F. Supp. at 1514; *Brown Univ.*, 809 F. Supp. at 981. *But see* *Boucher v. Syracuse Univ.*, 164 F.3d 113, 116 (2d Cir. 1999) (describing the history of women’s teams at Syracuse University).

*Brown* that: "The very length of this hiatus suggests something far short of a continuing practice of program expansion."<sup>48</sup>

The third possible alternative for Title IX participation compliance has proved equally unattainable in litigation to date. Most courts have interpreted this option as effectively eliminated by the very fact of a lawsuit. In *Brown* and *Colorado State*, for instance, the gymnasts, volleyball players, and softball players sued to block the elimination of their teams in the proposed cuts. If the plaintiffs are sufficiently interested in playing these sports to litigate for that opportunity, the courts concluded, the schools obviously were not fully accommodating their interests.<sup>49</sup> So far litigants and commentators' efforts to define the third alternative more broadly have been unsuccessful.<sup>50</sup>

Thus, when the women gymnasts, volleyball players, and softball players sued in *Brown* and *Colorado State*, only the first requirement of proportionality remained as a compliance option. The schools had no current plans or recent history of expansion to satisfy the second alternative—on the contrary, the cases were prompted by the schools' decision to eliminate women's teams. The third alternative of accommodating interests was equally unavailable in the face of a lawsuit by the affected athletes seeking to save their respective teams. Only the first alternative, proportionality, remained. Since neither school could establish proportional representation, the federal court enjoined the elimination of any women's teams.

One district court challenged the rationale but not conclusions of *Brown* and *Colorado State*. In *Pederson v. Louisiana State University*,<sup>51</sup> the court held that the "effective accommodation of interests and abilities" remained the benchmark of Title IX compliance, not proportionality. The case in question involved the University's failure to offer fast-pitch softball for women. Although LSU offered

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The University established five of its nine women's varsity teams in 1971—when it first funded women's varsity sports. It dropped one of these sports (fencing) in 1972, and replaced it with field hockey. Crew was added as a women's varsity team in 1977. Three additional women's sports were added to the varsity roster in 1981. After 1981, no new women's varsity team was created by the University until the addition of the varsity soccer team in 1997. Thus, until the filing of this complaint in 1995, fourteen years passed by without the University creating any new women's varsity teams.

*Id.* (citations omitted). The district court in *Boucher* nonetheless found that subsequent efforts to support women's athletics satisfied the second alternative of the three-part test, but the appellate court declined to reach the issue on appeal. *Id.* at 119.

<sup>48</sup> *Cohen v. Brown Univ.*, 991 F.2d 888, 903 (1st Cir. 1993) (emphasis omitted).

<sup>49</sup> *Cf. id.* at 904.

<sup>50</sup> *E.g.*, Julia Lamber, *Gender and Intercollegiate Athletics: Data and Myths*, 34 U. MICH. J.L. REFORM 151 (2001); Brian V. Snow & William E. Thro, *Still on the Sidelines: Developing the Non-Discrimination Paradigm Under Title IX*, 3 DUKE J. GENDER L. & POL'Y 1 (1996).

<sup>51</sup> 912 F. Supp. 892 (M.D. La. 1996), *aff'd in part and rev'd in part*, 213 F.3d 858 (5th Cir. 2000).

no credible evidence of the sports “interests” of its female students (through a survey or otherwise), the court clearly suggested that such evidence might be used to satisfy this burden in other cases.<sup>52</sup> Given the plaintiff’s strong showing of female student interest in softball, and that the school supported a male baseball team, the court agreed that a violation of Title IX had been established.<sup>53</sup>

In a 1996 “Clarification,” OCR attempted one more time to define nondiscrimination in the context of intercollegiate athletics.<sup>54</sup> The Clarification, as described by OCR, was intended as an “elaboration” of the three-part test included in the 1979 Policy Interpretation,<sup>55</sup> which, in turn, had attempted to explain the duty to “effectively accommodate” student interest required by the 1975 regulations.<sup>56</sup> The 1996 Clarification fully embraces the three-part test but seeks to emphasize the alternative nature of the three options. While the proportionality test remains a “safe harbor” of compliance, OCR offers numerous suggestions about how a university might research and monitor female student interest under the third alternative.

OCR may well have been signaling to both schools and the courts that the third alternative of meeting student interest should be considered a more viable option than litigation history would suggest. Arguably none of the circuit cases decided to date would or should have reached a different result under the Clarification. OCR articulates yet another three-part test to evaluate the accommodation of student interest: “(a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team.”<sup>57</sup> These factors strongly suggest that the test could not be satisfied if the school has eliminated a women’s varsity team, as in *Brown* and *Colorado State*; OCR concedes as much.<sup>58</sup> It seems unlikely that potential Title

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<sup>52</sup> *Id.* at 915–16.

<sup>53</sup> *Id.* at 917. Curiously, however, the district court did not find that LSU had engaged in an “intentional” violation of Title IX—a finding reversed on appeal by the Fifth Circuit. *Pederson v. La. State Univ.*, 213 F.3d 858, 879–80 (5th Cir. 2000).

<sup>54</sup> U.S. Dep’t of Educ., Office for Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996), <http://www.ed.gov/offices/OCR/docs/clarific.html> [hereinafter Clarification].

<sup>55</sup> Letter from Norma V. Cantu, Assistant Secretary for Civil Rights, U.S. Dep’t of Educ., at <http://www.ed.gov/offices/OCR/docs/clarific.html> (Jan. 16, 1996); see also Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL’Y 51, 69–73 (1996) (discussing the background of the Clarification).

<sup>56</sup> Taking a step back, one might begin to question how much deference courts should pay to a “clarification” of a “policy interpretation” of a regulation that is now almost three decades old.

<sup>57</sup> Clarification, *supra* note 56, at 10.

<sup>58</sup> *Id.* (“If an institution has recently eliminated a viable team from the intercollegiate program, OCR will find that there is sufficient interest, ability, and available competition to

IX plaintiffs at the intercollegiate level would even consider undertaking the burdens of litigation absent significant athletic abilities, a commitment to their sport, and a realistic possibility of playing competitively. Under such circumstances, and in spite of OCR's assurances, a court may well conclude that the interests of these women are not being effectively accommodated.

Thus, even with the 1996 Clarification, the practicalities of Title IX litigation likely have left most schools with only one safe option—satisfying the proportionality requirement of the first alternative. No court has seriously questioned the authority of the regulations—or, more accurately, the “policy interpretation” of the regulations implementing the statute. In *Brown*, for example, the First Circuit afforded the regulations “controlling weight” and the subsequent policy interpretation “appreciable deference” based on the Javits Amendment’s explicit congressional delegation of “the task of prescribing standards for athletic programs under Title IX.”<sup>59</sup> The appropriateness of proportionality as one definition of “sex discrimination” under Title IX generally is accepted as within the agency’s discretion. In a series of cases typified by *Brown* and *Colorado State*, the federal courts repeatedly have affirmed OCR’s proportionality requirement.<sup>60</sup> *Brown*, *Colorado State* and others have been enjoined from eliminating women’s teams when the percentage of female athletes lags behind the percentage of women in the student body at large.

For those women seeking to protect or create a varsity women’s team, the relatively rigid but simple approach of the proportionality rule has served them well. With minimal evidence—the percentages of male and female students and the percentages of male and female athletes—a plaintiff can quickly (and successfully, in most cases) establish an institution’s lack of compliance under Title IX. But for women like Heather Sue Mercer seeking to challenge the

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sustain an intercollegiate team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists.”).

<sup>59</sup> *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993).

<sup>60</sup> *Id.* at 888; *Roberts v. Colo. State Univ.*, 814 F. Supp. 1507 (D. Colo. 1993); *see also* *Miami Univ. Wrestling Club v. Miami Univ.*, No. 01-3182, 2002 U.S. App. LEXIS 18430 (6th Cir. Aug. 7, 2002) (holding that the 1979 Policy Interpretation is entitled to “controlling weight”); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1047 (8th Cir. 2002) (“We conclude, as did the [*Brown*] court, that the policy interpretation constitutes a reasonable and ‘considered interpretation of the regulation.’ Therefore controlling deference is due it.”); *Boulahanis v. Bd. of Regents*, 198 F.3d 633 (7th Cir. 1999); *Neal v. Bd. of Trs. of Cal. State Univ.*, 198 F.3d 763, 771 (9th Cir. 1999); *Favia v. Ind. Univ. of Pa.*, 812 F. Supp. 578 (W.D. Pa.), *aff’d*, 7 F.3d 332 (3d Cir. 1993); *Kelley v. Bd. of Trs. of Univ. of Ill.*, 832 F. Supp. 237 (C.D. Ill. 1993), *aff’d*, 35 F.3d 265 (7th Cir. 1994); *Gonyo v. Drake Univ.*, 837 F. Supp. 989 (S.D. Iowa 1993).

The 1996 Clarification is the target of an action by the National Wrestling Coaches Association against the Department of Education challenging the de facto “quota” system allegedly imposed by Title IX’s interpretation. *See* Christopher Flores, *Wrestling Coaches Sue Education Department Over Title IX Enforcement*, CHRON. HIGHER EDUC., Feb. 1, 2002, at 39.

underlying premise of segregation, those same regulations present a significant barrier under the contact sports exception.

### B. Heather Sue Mercer v. Duke University

Heather Sue Mercer was an experienced football player when she attempted to join the Duke University team in 1994. As a successful soccer player and runner, Mercer approached the football coach at Yorktown Heights High School (New York) her senior year about trying out as a place kicker. In later news accounts, the coach admitted his skepticism but described taking Mercer out to the football field to see what she could do. Mercer nailed one kick after the next, making twenty in a row even as the coach moved the ball farther and farther from the goalposts. Mercer thus became the first female to play on her school's varsity football team. She scored a field goal and three extra points in her very first game, and the team went on to win the state championship. Mercer was named as the third string All-State kicker in the state of New York.<sup>61</sup>

Mercer enrolled at Duke University as a freshman in 1994. That fall she tried out for the team as a walk-on. Although not added to the team, she became a team manager and participated in conditioning drills in the spring. In April 1995, Mercer was selected by the seniors to play in the spring scrimmage, in which she kicked a game winning field goal. Head Coach Fred Goldsmith told reporters that Mercer had made the team, and Mercer was told the same by the kicking coach, Fred Chatham. The Athletic Department, apparently pleased by the resulting media attention, asked Mercer to participate in a number of interviews.<sup>62</sup>

In the fall of 1995, Mercer was included on the team roster and regularly attended practices, but was not permitted to dress for home games or sit with the team (unlike the other walk-on kickers on the team). Mercer also alleged a number of offensive comments by Coach Goldsmith, "including asking her why she was interested in football, wondering why she did not prefer to participate in beauty pageants rather than football, and suggesting that she sit in the stands with her boyfriend rather than on the sidelines."<sup>63</sup> (At the trial, Coach Goldsmith testified that he did not recall using the terms "beauty pageant" and "cheerleading," but apparently offered no categorical denial.<sup>64</sup>) In the fall of 1996, Coach Goldsmith informed Mercer that she was dropped from the team—

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<sup>61</sup> Lombardi, *supra* note 10.

<sup>62</sup> Mercer v. Duke Univ., 190 F.3d 643, 645 (4th Cir. 1999). In a speech at the University of North Carolina Law School (attended by the author), Mercer's attorney, Burton Craige, indicated that Duke officials admitted in discovery that this was probably the most national media attention ever directed to the Duke football team. Burton Craige, Speech at University of North Carolina Law School (Jan. 30, 2002) [hereinafter Craige Speech].

<sup>63</sup> Craige Speech, *supra* note 64.

<sup>64</sup> Lester Munson, *A Kicker's Tale*, SPORTS ILLUSTRATED FOR WOMEN, Nov./Dec. 2000, at 26, 26.

making Mercer the first player ever cut by Coach Goldsmith or any other Duke football coach.<sup>65</sup>

Although Duke University competes in the highest division (I-A) of NCAA athletics, it is not a school known for its football team. In contrast to the national championship won by the Duke basketball team in 2000–2001, the Duke football team lost every game of the 2000 season. The 1995 and 1996 seasons, when Mercer sought to play, were not much better. Those teams posted records of 3-8 (1-7 in conference games) and 0-11, respectively.<sup>66</sup> Thus, in the year Goldsmith cut Mercer from the team, they literally could not have done any worse. According to evidence presented at trial, the Duke football team had accepted all walk-ons in order for the first-string players to have some competition for practices.<sup>67</sup>

Mercer obtained an attorney and requested an apology from Duke officials. Her overtures were ignored, and she filed suit for sex discrimination under Title IX.<sup>68</sup> Duke initially argued that the claim was barred by the “contact sports” rule. Duke contended that because it had no obligation to permit Mercer the opportunity to try out at all, she had no right to complain about her treatment when Duke voluntarily permitted her an opportunity not legally required. The district court agreed and granted Duke’s motion to dismiss.<sup>69</sup>

On appeal, the Fourth Circuit reversed.<sup>70</sup> The appellate court did not challenge the Title IX regulations that would have allowed Duke to bar Mercer from tryouts. After carefully reviewing the regulatory language and its structure, however, the court concluded that subsection (a) of section 106.41<sup>71</sup> continues to apply as a general baseline anti-discrimination provision. If an institution chooses to permit a woman to try out for a contact sports team, foregoing the exemption permitted in subsection (b), the anti-discrimination requirement of subsection (a) remains in full force. Thus, having agreed to let Mercer try out for the team, Duke was required to treat her in a nondiscriminatory manner. Had Duke denied Mercer a chance to try out at all, that decision would have been protected under the contact sports exemption of section 106.41(b).<sup>72</sup>

Duke University’s summary judgment was reversed, and the case returned to the district court for trial. With a non-discrimination standard firmly in place, the case fit nicely within the traditional discrimination paradigm. The question was

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<sup>65</sup> Mercer v. Duke Univ., 181 F. Supp. 2d 525, 534 (M.D.N.C. 2001).

<sup>66</sup> *All-Time Results*, at <http://goduke.ocsn.com/sports/m-footbl/spec-rel/fbcalltime.html> (last visited Aug. 23, 2002).

<sup>67</sup> Craige Speech, *supra* note 64.

<sup>68</sup> Munson, *supra* note 66.

<sup>69</sup> Mercer v. Duke Univ., 32 F. Supp. 2d 836, 837 (M.D. N.C. 1998).

<sup>70</sup> Mercer v. Duke Univ., 190 F.3d 643 (4th Cir. 1999).

<sup>71</sup> 34 C.F.R. § 106.41(a)–(b) (2000).

<sup>72</sup> See *supra* notes 33–37 and accompanying text.



not whether Mercer was the best kicker on the team (she never claimed she was); the question was whether she was treated as well as similarly situated men—in this case, walk-on kickers.

In just over two hours, the jury returned a verdict of \$1 in actual damages and \$2 million in punitive damages for Mercer. As the jury foreman later described the decision:

She was as good as some of the men, and she was better than one guy . . . but they allowed him to dress out and play on the scout team. You have one woman who is treated differently than all the men. That ain't brain surgery. . . . [I]f you don't want her on the team, don't put her on. And if you do, you have to treat her like anyone else.<sup>73</sup>

### C. Equal Protection

In addition to the case of Heather Sue Mercer, a review of published opinions uncovers fewer than two dozen cases in the last thirty years challenging the denial of participation on a school team because of one's sex<sup>74</sup>—and many do not even address Title IX. To the extent women and sometimes men have had any success in gaining access to segregated teams, that success has been found by eschewing Title IX altogether. Where public institutions are involved, some litigants have avoided the contact sports exemption by relying instead on an equal protection claim under the Fourteenth Amendment<sup>75</sup>—an attack unavailable to Mercer

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<sup>73</sup> Vicki Cheng & John Sullivan, *Jurors Put Aside Issue of Ability*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 14, 2000, at 1A.

<sup>74</sup> An attempt to locate all cases involving this issue yielded twenty cases other than *Mercer*. Twelve of these cases involved girls suing to access junior or high school men's teams. See *O'Connor v. Bd. of Educ. of Sch. Dist. 23*, 449 U.S. 1301 (1980) (seeking injunction to permit junior high girl to try out for the boys' basketball team); *Lavin v. Ill. High Sch. Ass'n Bd. of Educ. of Chicago*, 527 F.2d 58 (7th Cir. 1975) (seeking to enjoin by-law of athletic association prohibiting boys and girls from competing together so plaintiffs could try out for the boys' basketball team); *Morris v. Mich. State Bd. of Educ.*, 472 F.2d 1207 (6th Cir. 1973) (enjoining as a violation of equal protection the application of a Michigan High School Athletic Association rule that barred women from participating on non-contact sports teams with boys); *Brenden v. Indep. Sch. Dist. 742*, 477 F.2d 1292 (8th Cir. 1973) (enjoining as a violation of equal protection a similar Minnesota High School League rule); *Carnes v. Tenn. Secondary Sch. Athletic Ass'n*, 415 F. Supp. 569, 571 (E.D. Tenn. 1976) (granting a preliminary injunction on equal protection grounds to female seeking to join the high school boys' baseball team); see also *infra* note 79 and accompanying text; *infra* note 96 (eight cases involved boys suing to access females' junior or high school teams). While the research is not offered as exhaustive, it is at least representative.

<sup>75</sup> U.S. CONST. amend. XIV; see, e.g., *Adams ex rel. Adams v. Baker*, 919 F. Supp. 1496 (D. Kan. 1996) (involving a prohibition of girls from a high school wrestling team that created an equal protection claim); *Force ex rel. Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020 (W.D. Mo. 1983); *Leffel v. Wis. Interscholastic Athletic Ass'n*, 444 F. Supp. 1117 (E.D.

because Duke University is a private institution, not a public one. These cases typically involve junior or senior high athletes rather than intercollegiate hopefuls.<sup>76</sup>

Carol and Delores Darrin had aspirations of playing football before Heather Sue Mercer was even born. The sisters sued in 1975, along with others, to challenge the regulations of the Washington Interscholastic Athletic Association that prohibited girls from playing high school football.<sup>77</sup> The Supreme Court of Washington agreed that such a gender classification, regardless of the students' abilities, violated the Due Process Clause of the Fourteenth Amendment. An individualized determination of qualifications was required. The court also pointed to the Equal Protection Clauses of both the state and federal constitutions.<sup>78</sup>

In another early case, Pennsylvania's attorney general challenged a by-law of the Pennsylvania Interscholastic Athletic Association (governing both junior and high school athletics) banning girls from competing or even practicing against boys in "any athletic contest."<sup>79</sup> The court found the provision unconstitutional on its face under the Fourteenth Amendment and the Equal Rights Amendment in the Pennsylvania Constitution. Even if the school offered teams for both sexes, the court noted, denying a talented and qualified girl the chance to compete at a

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Wis. 1978) (class action challenging exclusion of girls from boys' contact and non-contact sports teams as a violation of the Fourteenth Amendment); Hoover v. Meikeljohn, 430 F. Supp. 164 (D. Colo. 1977); Packer v. Pa. Interscholastic Athletic Ass'n, 334 A.2d 839 (Pa. Commw. Ct. 1975); Darrin v. Gould, 540 P.2d 882 (Wash. 1975).

<sup>76</sup> Although many claims involving intercollegiate sports have been made against public universities, these cases typically have involved attempts by women athletes to "save" women's teams. See Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993); Roberts v. Colo. State Univ., 814 F. Supp. 1507 (D. Colo.), *aff'd in part and rev'd in part sub nom.* Roberts v. Colo. State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993). Other cases involve attempts to create women's teams. See Boucher v. Syracuse Univ., 164 F.3d 113 (2d Cir. 1999) (seeking to elevate women's lacrosse and softball club teams to varsity status); Kiechel v. Auburn Univ., No. CV-93-V-474-E (M.D. Ala. Apr. 14, 1993) (seeking to elevate women's club team to varsity); Sanders v. Univ. of Tex. at Austin, No. A-92-CA-405 (W.D. Tex. July 1, 1992) (seeking to elevate three women's club teams and one women's intramural team to varsity status, settled on Oct. 24, 1993). These cases are not typically claims of access to existing men's teams. The reason for this may be twofold. First, by college, the "best" men in many sports are likely better than the "best" women in that sport. Thus, the opportunity to "try out" for the men's teams on a merit basis would yield few spots for female athletes. Second, having played segregated sports for most of their lives, many women may be uninterested in playing on a predominately male team even if the opportunity were available. Heather Sue Mercer is thus the exception rather than the rule. Indeed, other than the *Mercer* case, research has not revealed a single other published opinion involving this issue at the college level.

<sup>77</sup> Darrin v. Gould, 540 P.2d 882 (Wash. 1975).

<sup>78</sup> *Id.* at 891-93.

<sup>79</sup> Packer v. Pa. Interscholastic Athletic Ass'n, 334 A.2d 839, 840 (Pa. Commw. Ct. 1975).

potentially higher level on a boys' team could not be justified under notions of equality.<sup>80</sup>

Donna Hoover sued to gain access to the high school boys' soccer team at a time when there was no girls' team offered in that sport.<sup>81</sup> The court agreed that equal protection was at stake and rejected the rationale of the Colorado High School Activities Association that allowing girls to play would expose them to an inordinate risk of injury.<sup>82</sup> Nichole Force was similarly successful in a lawsuit to gain access to her eighth grade junior high football team—the court noted that such gender classifications perpetuate “stereotypic notions” of the proper roles of men and women.<sup>83</sup> More recently, Tiffany Adams successfully sought a preliminary injunction for the right to participate on her high school wrestling team.<sup>84</sup>

The equal protection test applicable in cases of governmental classifications based on sex requires the defendant to justify the exclusion as “substantially related” to an “important governmental objective.”<sup>85</sup> In most of these cases, the school district or athletic association attempted to meet the constitutional challenge by asserting “safety” as the “important governmental objective”

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<sup>80</sup> *Id.* at 842.

<sup>81</sup> Hoover v. Meikeljohn, 430 F. Supp. 164 (D. Colo. 1977).

<sup>82</sup> *Id.* at 169–70.

<sup>83</sup> Force *ex rel.* Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1029 (W.D. Mo. 1983).

<sup>84</sup> Adams *ex rel.* Adams v. Baker, 919 F. Supp. 1496 (D. Kan. 1996). Although Title IX permitted the exclusion under the contact sports exemption, see *supra* notes 33–37 and accompanying text, the court found a likelihood of prevailing on her equal protection argument.

<sup>85</sup> See, e.g., Adams, 919 F. Supp. at 1503 (“A party seeking to uphold a classification based on gender carries the burden of showing an ‘exceedingly persuasive justification’ for the classification. Gender based discrimination is permissible only where the discrimination is ‘substantially related’ to the achievement of ‘important governmental objectives.’”) (citation omitted) (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982); Force, 570 F. Supp. at 1023–24).

The Supreme Court’s most recent pronouncement of the test for sex classifications under the Equal Protection Clause is found in *United States v. Virginia*, 518 U.S. 515 (1996), considering the exclusion of women from the Virginia Military Institute:

To summarize the Court’s current directions for cases of official classification based on gender: Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is “exceedingly persuasive.” The burden of justification is demanding and it rests entirely on the State. The State must show “at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed” are “substantially related to the achievement of those objectives.” The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

*Id.* at 532–33 (citations omitted).

justifying the exclusion of women from men's teams. In other words, they were protecting these girls/women from potential injury that they might suffer from playing "contact" sports with the boys/men.<sup>86</sup> Such claims often were supported by generalized evidence or stereotypes about the size and strength of males versus females.<sup>87</sup> While agreeing that safety might constitute a permissible objective in the abstract, the courts rejected generalizations and assumptions as a basis for excluding these particular females without any individualized assessment of their abilities. As one court concluded, such safety arguments "suggest the very sort of well-meaning but overly 'paternalistic' attitude about females which the Supreme Court has viewed with such concern."<sup>88</sup> The schools rarely made any effort to exclude small or weak males who might also be injured in such competitions, thus undermining their purported concerns for student safety.<sup>89</sup>

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<sup>86</sup> See, e.g., *Adams*, 919 F. Supp. at 1504; *Force*, 570 F. Supp. at 1503; *Leffel v. Wis. Interscholastic Athletic Ass'n*, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978); *Hoover*, 430 F. Supp. at 169; *Carnes v. Tenn. Secondary Sch. Athletic Ass'n*, 415 F. Supp. 569, 571 (E.D. Tenn. 1976); *Packel v. Pa. Interscholastic Athletic Ass'n*, 334 A.2d 839, 843 (Pa. Commw. Ct. 1975); *Darrin v. Gould*, 540 P.2d 882, 892 (Wash. 1975). In *Force*, the school district also argued that the exclusion of girls from the wrestling team would prevent sexual harassment litigation. As with the safety justification, the court agreed that this was an important objective but found no substantial relationship between that goal and excluding girls from the wrestling team. 570 F. Supp. at 1023-24.

<sup>87</sup> See, e.g., *Adams*, 919 F. Supp. at 1500; *Leffel*, 444 F. Supp. at 1122.

<sup>88</sup> *Force*, 570 F. Supp. at 1029; see also *Adams*, 919 F. Supp. at 1504 (quoting *Force*, 570 F. Supp. at 1029); *Carnes*, 415 F. Supp. at 571.

TSSAA's [Tennessee Secondary School Athletic Association] first justification [to protect females from exposure to an unreasonable risk of harm] for its rule is questionable because it may be drawn too imprecisely to accomplish its avowed purpose. In other words, as applied to the facts of the present case, the rule may permit males who are highly prone to injury to play baseball at Central High School, while, at the same time, it may prevent females whose physical fitness would make a risk of physical harm unlikely, from participating in the school's baseball program.

*Id.*

<sup>89</sup> See *Adams*, 919 F. Supp. at 1500; *Force*, 570 F. Supp. at 1020.

In short, the "safety" factor which defendants would utilize to prevent any female from playing eighth grade football—including those who could play safely—is not applied to males at all, even to those who could not play safely. All this tends to suggest the very sort of well-meaning but overly "paternalistic" attitude about females which the Supreme Court has viewed with such concern.

*Id.* at 1029 (citation omitted); *Hoover*, 430 F. Supp. at 169 ("The failure to establish any physical criteria to protect small or weak males from the injurious effects of competition with larger or stronger males destroys the credibility of the reasoning urged in the support of the sex classification."); *Darrin*, 540 P.2d at 892 ("WIAA expressly permitted small, slightly built young boys, prone to injury, to play without proper training to prevent injury."). *But see* *Lafler v. Athletic Bd. of Control*, 536 F. Supp. 104, 106-07 (W.D. Mich. 1982) (denying injunction to permit female boxer to compete in Golden Gloves boxing competition because of

What one might find curious about these cases is that the courts, while accepting these equal protection challenges, generally have not held unconstitutional the contact sports regulation that seemingly authorized the schools and associations in question to exclude these females in the first place. One of the few cases to address the issue is *Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association*.<sup>90</sup> Yellow Springs School District actually encouraged coed teams in middle school. Following tryouts for basketball, two girls were named to the team. Under the Ohio High School Athletic Association (“OHSAA”) rules (governing both middle and high school athletics), however, coed teams were not permitted in any contact sport. The school district sued to enjoin enforcement of the rule as a violation of Title IX. The district court granted summary judgment to the plaintiffs, finding that the rules of the OHSAA constituted “state action” and holding the contact sports regulation unconstitutional.<sup>91</sup> On appeal, the Sixth Circuit held that the district was entitled to an injunction against the enforcement of the OHSAA rule prohibiting coed teams but reversed on the unconstitutionality of the Title IX regulations. The appellate court concluded that the regulation’s language was constitutional because it was only “permissive”—girls were not prohibited by the regulations from competing on boys’ teams.<sup>92</sup>

What about a male who wants to play volleyball or field hockey at a school that only offers females’ teams in these sports?<sup>93</sup> Here equal protection arguments have been less successful, and the schools have found themselves on more secure footing. In this context, the schools have articulated the “important governmental objective” of providing sports opportunities for women. Generalizations about male versus female strength have been accepted more readily as part of the schools’ justification that men would soon dominate the girls’ teams if allowed to try out on a competitive basis.<sup>94</sup> Brian Kleczek, for example, was denied a

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dissimilarities in male and female bodies and the use of body weight as a proxy for strength in boxing).

Equal protection challenges to the proportionality test in the regulations also have been unsuccessful. See *infra* notes 232–33 and accompanying text.

<sup>90</sup> 647 F.2d 651 (6th Cir. 1981).

<sup>91</sup> *Id.* at 652.

<sup>92</sup> *Id.* at 656.

<sup>93</sup> Under Title IX regulations, there is no claim under § 106.41 because segregated teams are permitted and members of the opposite sex may be excluded if the team is “contact sport” or the individual is not a member of the previously excluded sex. See *supra* notes 33–37 and accompanying text. Because boys do not qualify as “the excluded sex” at most institutions, no Title IX cause of action exists.

<sup>94</sup> See, e.g., *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168 (3d Cir. 1993); *Kleczek ex rel. Kleczek v. R.I. Interscholastic*, 768 F. Supp. 951, 957 (D.R.I. 1991) (preliminary injunction to permit boys’ access to girls’ field hockey team denied); *Clark ex rel. Clark v. Ariz. Interscholastic Ass’n*, 695 F.2d 1126, 1131–32 (10th Cir. 1982) (upholding exclusion of males from all female sports teams as serving legitimate state interest); *Petrie v. Ill.*

preliminary injunction granting him access to the field hockey team. The court concluded that encouraging female participation in sports was a "legitimate objective" and the exclusion of males from those teams was substantially related to that objective.<sup>95</sup> A similar result was reached in Trent Petrie's legal bid to play on his high school girls' volleyball team.<sup>96</sup>

#### D. *Explaining the De Jure and De Facto Exclusion of Women From Contact Sports*

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious . . . the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race . . . she has been looked upon in the courts as needing especial care that her rights may be preserved.<sup>97</sup>

United States Supreme Court, 1908

Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the "proper place" of women and their need for special protection.<sup>98</sup>

United States Supreme Court, 1979

In many ways, the contact sports rule is an easy target. What is the rationale

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High Sch., 394 N.E.2d 855, 864 (Ill. App. Ct. 1979) (upholding exclusion of boys from girls' volleyball team); *B.C. v. Bd. of Educ., Cumberland Reg'l Sch. Dist.*, 531 A.2d 1059, 1064-65 (N.J. Super. Ct. App. Div. 1987) (upholding exclusion of males from all female sports teams as serving legitimate state interest); *Mularadelis v. Haldane Cent. Sch. Bd.*, 427 N.Y.S.2d 458, 463-64 (N.Y. App. Div. 1980) (denying equal protection challenge to male seeking to join the girls' high school tennis team). *But see* *Gomes v. R.I. Interscholastic League*, 469 F. Supp. 659 (D.R.I. 1979); *Attorney Gen. v. Mass. Interscholastic Athletic Ass'n*, 393 N.E.2d 284, 296 (Mass. 1979) (invalidating under the state Equal Rights Amendment a rule that prohibited boys from playing on girls' teams).

<sup>95</sup> *Kleczek*, 768 F. Supp. at 956.

<sup>96</sup> *Petrie*, 394 N.E.2d at 862; *cf. Williams*, 998 F.2d at 179-80. The Third Circuit reversed summary judgment and remanded the male plaintiff's suit for a spot on the field hockey team. As to Title IX issues, the court remanded for determination whether field hockey was a "contact sport," which would bar plaintiff's participation. *Id.* at 174. If not a contact sport, the lower court was directed to decide whether athletic opportunities for boys had been limited. *Id.* The court also remanded under the (Pennsylvania) Equal Rights Amendment for determination whether boys would eventually dominate the girls' team if allowed to play. *Id.* at 178.

<sup>97</sup> *Muller v. Oregon*, 208 U.S. 412, 420 (1908) (rejecting a constitutional challenge to an Oregon statute that limited the number of hours per day women were permitted to work in any factory or laundry).

<sup>98</sup> *Orr v. Orr*, 440 U.S. 268, 283 (1979) (holding an Alabama statute requiring only husbands, but not wives, to pay alimony upon divorce unconstitutional).

under any modern notion of discrimination—Title VII and the equal protection doctrine—for not *requiring* that Heather Sue Mercer be given the same opportunity as her male classmates to try out for a position as a place-kicker? While there is little history to explain definitively why the contact sports “exception” was adopted, one can readily imagine at least two possibilities. First, in response to the congressional debate that led to the compromise directive to create the regulations,<sup>99</sup> HEW must have understood the concern that college football and men’s basketball would be damaged or hampered in some way by a nondiscrimination mandate that could divert funds and support from these sports. The contact sports rule could help protect “football as we know (and love) it” from encroachment by females. This assumption is bolstered by the questionable inclusion of basketball in the regulation’s list of “contact sports.” One might argue that basketball can hardly be described as a sport where contact is the “purpose” or “major activity” of the game, as the regulation defines the term.<sup>100</sup> Indeed, excessive contact is against the rules and constitutes a foul.<sup>101</sup> Protectionism might also explain the regulation—drafters and proponents may have been genuinely concerned that girls or women would suffer an unacceptable injury rate if allowed to compete with males in sports where physical contact is regularly expected, if not encouraged.<sup>102</sup>

The notion of protecting traditionally male domains deserves little discussion, particularly in largely public arenas such as secondary schools and universities. The fundamental premise of non-discrimination (and equal protection) is to remove such artificial barriers. Roles reserved for men fifty years ago have long since opened up to women. The issue of injuries may deserve a bit more attention, but not much. If one accepts that the average female is likely to be smaller and weaker than the average male, it may be true that some women are more likely to be injured playing some types of sports with some men. Even if this proposition is subject to proof, however, our definition of discrimination in other arenas has rejected such paternalism. Statutes passed in the first half of the last century to

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<sup>99</sup> See *supra* notes 31–33 and accompanying text.

<sup>100</sup> See 34 C.F.R. § 106.41(b) (2000).

<sup>101</sup> NAT’L COLLEGIATE ATHLETIC ASS’N, NCAA MEN’S AND WOMEN’S BASKETBALL RULES AND INTERPRETATIONS 124 (Marty Benson ed., 2002), *available at* [http://www.ncaa.org/library/rules/2002/2002\\_basketball\\_rules.pdf](http://www.ncaa.org/library/rules/2002/2002_basketball_rules.pdf).

<sup>102</sup> Compare cases cited in *supra* note 88, in which school districts and athletic associations have attempted to justify the exclusion of women from contact sports by safety concerns.

limit women's working hours,<sup>103</sup> and prohibit women from working night shifts,<sup>104</sup> have long since fallen to equal protection challenges.

More recently, in the very context of school sports, courts have routinely upheld equal protection claims in the face of similar arguments about safety and protection. *Twenty-five years ago*, a Colorado federal district court agreed that denying a girl the right to try out for the boys' soccer team (at a time when the schools had no girls' soccer teams) violated our most fundamental notions of equal protection for women:

The defendants in this case have sought to support the exclusionary rule by asserting the state interest in the protection of females from injury in this sport. While the evidence in this case has shown that males as a class tend to have an advantage in strength and speed over females as a class and that a collision between a male and a female would tend to be to the disadvantage of the female, the evidence also shows that the range of differences among individuals of both sexes is greater than the average differences between the sexes. The failure to establish any physical criteria to protect small or weak males from the injurious effects of competition with larger or stronger males destroys the credibility of the reasoning urged in the support of the sex classification.

. . . To deny females equal access to athletics supported by public funds is to permit manipulation of governmental power for a masculine advantage.

Egalitarianism is the philosophical foundation of our political process and the principle which energizes the equal protection clause of the Fourteenth Amendment. The emergence of female interest in an active involvement in all aspects of our society requires abandonment of many historical stereotypes. Any notion that young women are so inherently weak, delicate or physically inadequate that the state must protect them from the folly of participation in vigorous athletics is a cultural anachronism unrelated to reality.<sup>105</sup>

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<sup>103</sup> See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908). *But see* *People ex rel. Hoelderlin v. Kane*, 139 N.Y.S. 350 (N.Y. Sup. Ct. 1913).

<sup>104</sup> Cf. *Coming Glass Works v. Brennan*, 417 U.S. 188 (1974) (considering Equal Pay Act issues resulting from a change in state law that no longer prohibited women from working on the night shift).

<sup>105</sup> *Hoover v. Meiklejohn*, 430 F. Supp. 164, 169 (D. Colo. 1977). The opinion was by Judge Richard Matsch, now chief judge of the Colorado district and the judge who presided over the Timothy McVeigh trial for the Oklahoma City bombing.



Invalidating a rule prohibiting girls from practicing or competing against boys in “any athletic contest,” a Pennsylvania court similarly agreed:

The existence of certain characteristics to a greater degree in one sex does not justify classification by sex rather than by the particular characteristic. If any individual girl is too weak, injury-prone, or unskilled, she may, of course, be excluded from competition on that basis but she cannot be excluded solely because of her sex without regard to her relevant qualifications.”<sup>106</sup>

In a different context, the Supreme Court has explicitly warned that the use of such gender classifications “carry the inherent risk of reinforcing the stereotypes about the ‘proper place’ of women and their need for special protection.”<sup>107</sup>

In employment discrimination law under Title VII, the Supreme Court unequivocally concluded that the employer has no business using sex classifications to substitute its judgment about personal safety for that of the employee’s. In *International Union, UAW v Johnson Controls, Inc.*,<sup>108</sup> the employer banned women from working on a battery assembly line because of the potential exposure to lead and the concern that a developing fetus might be harmed by such exposure. Whether concerned about its own potential liability or the welfare of the employee and her child, or both, the employer was inappropriately discriminating. The Court rejected any consideration other than the employee’s ability to perform the job in question, concluding that the employer’s facially discriminatory policy (applying only to women) could only be justified by Title VII’s narrow “bona fide occupational qualification” (“BFOQ”)<sup>109</sup> defense:

Fertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else. Johnson Controls’ professed moral and ethical concerns about the welfare of the next generation do not suffice to

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<sup>106</sup> *Packel v. Pa. Interscholastic Athletic Ass’n*, 334 A.2d 839, 843 (Pa. Commw. Ct. 1975) (citation omitted); *Clinton v. Nagy*, 411 F. Supp. 1396 (N.D. Ohio 1974); see also *supra* notes 87–91 and accompanying text. *But see Lafler v. Athletic Bd. of Control*, 536 F. Supp. 104 (W.D. Mich. 1982).

[B]oxing uses body weight as a proxy for strength in an attempt to equalize the relative physical capabilities of opposing boxers. The general dissimilarity in body make-up between men as a class and women as a class would jeopardize the use of body weight for this equalizing purpose in a unified male and female competition. Therefore these general class characteristics are relevant to a decision regarding the status of women in boxing, even though they might not be relevant in other sports.

*Id.* at 107.

<sup>107</sup> *Ort v. Ort*, 440 U.S. 268, 283 (1979) (holding unconstitutional an Alabama statute requiring only husbands, but not wives, to pay alimony upon divorce).

<sup>108</sup> 499 U.S. 187 (1991).

<sup>109</sup> 42 U.S.C. § 2000e-2(e) (1994).

establish a BFOQ of female sterility. Decisions about the welfare of future children must be left to the parents who conceive, bear, support and raise them rather than to the employers who hire those parents.<sup>110</sup>

By analogy, a woman's decision to join a football team, and the inherent risks of injury involved, should be no different than a man's decision. She (or her parents, if a minor) should be as free as her male teammates to accept the risks involved.

### III. THE COACHES: SEGREGATION SPREADS

#### A. *Women in Coaching*

Although Title IX regulations include nothing about the sex segregation of coaches, we implicitly have accepted that men are to be coached only by men, yet we have no problem with women being coached by men.<sup>111</sup> Historically, both our teams and our coaches adhered to the sex segregation norms in sports.<sup>112</sup> When Title IX was passed in 1972, women coached over 90% of the college women's teams in existence, few though there were. Title IX, however, brought teams, attention, money, and opportunities into women's sports for the first time. Not surprisingly, the men came too, at least for the rapidly expanding number of coaching positions. By 1987, women were coaching less than 50% of the college women's teams.<sup>113</sup> And this dismaying trend continues, in spite of the increasing number of women's teams. Between 1994 and 1996, for example, 209 women's teams were added at NCAA schools, yet there was a *net loss* of nine female head coaches during that same period.<sup>114</sup> In the last two years, women were hired for

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<sup>110</sup> *Int'l Union*, 499 U.S. at 206.

<sup>111</sup> See generally Annelies Knoppers, *Gender and the Coaching Profession*, in *WOMEN, SPORTS, AND CULTURE* 119 (Susan Birrell & Cheryl Cole eds., 1994); Cathryn L. Claussen, *Title IX and Employment Discrimination in Coaching Intercollegiate Athletics*, 12 U. MIAMI ENT. & SPORTS L. REV. 149 (1995).

<sup>112</sup> For a story about one of the rare exceptions to this generalization, see Rick Lipsey, *It's a Woman's World Too*, *SPORTS ILLUSTRATED*, Dec. 9, 1996, at 92, discussing the experience of Dot Murphy as a receivers' coach for the Hind's Community College football team in Raymond, Mississippi.

<sup>113</sup> R. Vivian Acosta & Linda Jean Carpenter, *Women in Intercollegiate Sport: A Longitudinal Study—Nineteen Year Update 1977–2002*, at [http://www.smith.edu/wsc/women\\_in\\_sport.pdf](http://www.smith.edu/wsc/women_in_sport.pdf) (last visited Sept. 23, 2002) (showing annual percentages of women as coaches for women's teams, dropping from over 90% in 1972 to 44% in 2002); see also Interview by Cheryl Corley with Linda Carpenter, Former Physical Educ. Professor at Brooklyn College (National Public Radio Morning Edition ) (Mar. 27, 2002), available at [http://search1.npr.org/opt/collections/torched/me/data\\_me/seg\\_140640.htm](http://search1.npr.org/opt/collections/torched/me/data_me/seg_140640.htm) [hereinafter Carpenter Interview].

<sup>114</sup> Acosta & Carpenter, *supra* note 115.

only 10% of the available coaching positions for women's teams.<sup>115</sup> In contrast, women fill only 2% of the head coaching positions for men's teams, and most of these are for coed teams, such as cross country and swimming, where a single head coach is hired.<sup>116</sup> No comparable national data are available for middle and high schools, but one study of high schools in Iowa found that men held 98% of the head coaching positions for boys' teams and 73% of the head coaching positions for girls' teams.<sup>117</sup>

Much of the litigation and commentary about women coaches has focused on a related issue—the significant pay disparity between coaches of men's and women's teams.<sup>118</sup> Although this disparity affects male coaches of women's teams as well, women coaches are affected at a significantly higher rate since the women are relegated almost exclusively to the role of coaching women's teams. A recent survey indicates that female coaches and athletic administrators earn, on average, only 62% of the salaries earned by their male counterparts.<sup>119</sup> Disparities between head coaches at large universities with big-time programs can be much greater. At the University of Texas, for example, the average salaries for the head coaches of men's teams in 1998 was \$291,587, compared with the average for the head coaches of women's teams of \$88,219—a difference of 230%.<sup>120</sup> Similarly, at the University of Florida, the disparity was 224%, \$286,274 compared to \$88,325.<sup>121</sup>

Existing discrimination legislation so far has proven unequal to the task of redressing this large gap in compensation. Courts have rejected Equal Pay Act<sup>122</sup> claims because, even within the same sport, the relatively rigid requirement of "equal work" under the statute is not met. In comparing the head coaching

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<sup>115</sup> Carpenter Interview, *supra* note 115.

<sup>116</sup> Acosta & Carpenter, *supra* note 115.

<sup>117</sup> Jeff Oliphant, *Iowa High Schools Athletic Gender-Equity Study Summary of Results* (June 1995), at <http://bailiwick.lib.uiowa.edu/ge/iowastudy/iowahs.html>.

<sup>118</sup> See, e.g., *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313 (9th Cir. 1994) (involving the search of a female head coach of a women's basketball team for a salary matching the salary of the head coach of the men's basketball team); *EEOC v. Madison Cmty. Unit Sch. Dist. No. 12*, 818 F.2d 577 (7th Cir. 1987) (claiming that male coaches were being paid more than female coaches in junior and high schools); Terry W. Dodds, Comment, *Equal Pay in College Coaching: A Summary of Recent Decision*, 24 S. ILL. U. L.J. 319 (2000); Janet Judge et al., *Pay Equity: A Legal and Practical Approach to the Compensation of College Coaches*, 6 SETON HALL J. SPORT L. 549 (1996); Robert Bryce, *Foul Pay*, AUSTIN CHRON., Sept. 26, 2001, <http://www.auschron.com/issues/vol18/issue03/pols.UTcoach.html>; Barbara Osborne & Marilyn V. Yarbrough, *Pay Equity for Coaches and Athletic Administrators: An Element of Title IX?*, 34 U. MICH. J.L. REFORM 231 (2000).

<sup>119</sup> Welch Suggs, *Uneven Progress for Women's Sports*, CHRON. HIGHER EDUC., Apr. 7, 2000, at A52.

<sup>120</sup> Bryce, *supra* note 120.

<sup>121</sup> *Id.*

<sup>122</sup> Equal Pay Act of 1963, 29 U.S.C. § 206 (2000).

positions for the men's and women's basketball team at the University of Southern California, for example, the Ninth Circuit concluded that the head coach of the men's team had greater responsibilities due to the pressure to generate revenue and other demands associated with a higher profile team.<sup>123</sup> With respect to Title VII, the different "market" for the two positions has been accepted as a defense to justify the difference in pay.<sup>124</sup> Although a full discussion of the legal issues surrounding these salary disparities is available elsewhere<sup>125</sup> and beyond the scope of this article, its very existence serves to reinforce the messages of inferiority associated with women and their sports teams.

## B. Geraldine Fuhr v. Hazel Park School District

Geraldine Fuhr apparently enjoys coaching basketball. By 1999, she had accumulated the equivalent of twenty-eight years experience coaching high school players—including sixteen seasons of girls' basketball (ten seasons as the varsity coach) and twelve seasons of boys' basketball (including nine seasons as the junior varsity coach and eight seasons as the assistant varsity coach), not to mention her experience running various basketball tours and tournaments over the years.<sup>126</sup> When the boys' varsity coach of ten years announced his retirement at the end of the 1998–1999 season, Fuhr believed she was more than ready and qualified for that challenge. Her only competition for the position was Barnett, a man with only two years of coaching experience (and a record of 6-36 for the two

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<sup>123</sup> *Stanley*, 13 F.3d at 1321. *But see Brock v. Ga. Southwestern Coll.*, 765 F.2d 1026 (11th Cir. 1985) (finding that male coach of men's basketball had larger budget and responsibility to arrange off-campus games, but female intramural coach had other scheduling and budgetary duties that made the positions "substantially equal" under the Equal Pay Act); *Perdue v. City Univ. of N.Y.*, 13 F. Supp. 2d 326 (E.D.N.Y. 1998) (holding that female coach of women's basketball team successfully compared her duties and responsibilities to those of the male coach of the men's basketball team).

<sup>124</sup> See *Enforcement Guidance: Sex Discrimination in Coaches' Pay*, [Nov. 1997] EEOC Compl. Man. (BNA) No. 230, at N-3489 (Oct. 29, 1997), available at <http://www.eeoc.gov/docs/coaches.html>.

The "marketplace value" defense is not gender-based but rather is based on the employer's consideration of an individual's values in setting wages. Such consideration will qualify as a factor other than sex only if the employer can demonstrate that it has assessed the marketplace value of the particular individual's job-related characteristics, and any salary discrepancy is not based on sex.

*Id.* at N-3495; *cf.* *Am. Fed'n of State, County, & Mun. Employees v. Washington*, 770 F.2d 1401, 1406 (9th Cir. 1985) ("A compensation system that is responsive to supply and demand and other market forces . . . does not constitute a single practice that suffices to support a claim under disparate impact theory.").

<sup>125</sup> See *Dodds*, *supra* note 120; *Judge et al.*, *supra* note 120; *Osborne & Yarbrough*, *supra* note 120; *Enforcement Guidance: Sex Discrimination in Coaches' Pay*, *supra* note 126.

<sup>126</sup> See *Fuhr v. Sch. Dist. of Hazel Park*, 131 F. Supp. 2d 947, 948 (E.D. Mich. 2001).

seasons) with the freshman boys' team. Barnett was hired.<sup>127</sup> Did I mention he was a man?

Fuhr's experience alone would have made an impressive case for a claim of sex discrimination, but it gets better. The selection committee for the new coach was put together by the district-wide athletic director, Dan Grant.<sup>128</sup> Hazelwood High's athletic director—who had supervised both candidates for the position—was put on the committee but then “uninvited” on the day of the interviews.<sup>129</sup> The committee never consulted the former varsity coach, although he also had worked closely with both candidates. The school superintendent, a member of the selection committee, participated fully in Barnett's interview but left the room minutes into Fuhr's interview.<sup>130</sup> Hazelwood's principal, also a member of the committee, supported Fuhr but was outvoted, her opponents citing “unspecified ‘community problems’” despite the principal's disputing this claim.<sup>131</sup>

According to news accounts of the trial, the school district argued several reasons for not offering the varsity coaching position to Fuhr—her record as coach of the girls' varsity team was not compelling, there was a high turnover rate among her assistant coaches, and the school might have a problem finding a new coach for the girls' team if Fuhr left that position.<sup>132</sup> (The reference to Fuhr's record seems particularly odd given that Barnett had two dismal seasons totaling 6-36, while Fuhr's record as the junior varsity and freshmen boys' coach was 86-34.<sup>133</sup>) The district's attorney “accused Fuhr of sexual stereotyping for considering the boys' team a better job opportunity” and argued that hiring Fuhr “would send the school's female athletes the message that the district favor[ed] boys' sports.”<sup>134</sup>

The trial concluded on August 7, 2001, with judgment for the plaintiff. The plaintiff's lawyer's only apparent mistake was her modesty in evaluating her client's claim. Fuhr had suffered no real monetary damages because her stipend as the head coach of the girls' varsity team was the same as the stipend she would have earned as the head coach of the boys' team. Her attorney therefore suggested to the all-female jury of eight that \$200,000 would be an appropriate damage award; the jury evidently disagreed and came back with an award of \$455,000.<sup>135</sup>

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<sup>127</sup> *See id.* at 949.

<sup>128</sup> *Id.* at 948.

<sup>129</sup> *Id.* at 949.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *E.g.*, Hawke Fracassa, *Coach Wins Sex Bias Case*, DETROIT NEWS, August 8, 2001, Sports, at 1; Helms, *supra* note 15.

<sup>133</sup> Fracassa, *supra* note 134.

<sup>134</sup> Helms, *supra* note 15.

<sup>135</sup> *Id.* The trial court recently denied the district's new trial motion and awarded attorneys' fees to Coach Fuhr in the amount of \$100,000. *Attorney Awarded Fees*, YOUR SCH.

Following the jury verdict, the district's attorney continued to defend its hiring decision, reaching back to describe Barnett's successful high school career as a player thirteen years earlier. The attorney's comments perhaps provided some unintended insight and support for the jury's conclusion. If a juror had any doubt about her decision, his remarks may have reassured her that gender stereotyping was indeed at work in the hiring decision. In short, Barnett was considered "one of the boys."

When [Barnett] played he was high school MVP, captain of the team, all-county. He's a hotshot young fireball who is a nice role model for the 17- and 18-year-old boys playing the game . . . . He works out with the guys and seems like the right kind of person for the job.<sup>136</sup>

### C. *Understanding the Exclusion of Women from Coaching*

The dearth of women in coaching might have once been explained by the dearth of female athletes. With so few women competing in high school and college in the 1960s and the 1970s,<sup>137</sup> and surely even fewer contemplating coaching as a viable career option, the number of female applicants in the 1980s and 1990s may have been limited. Research has not uncovered any available source of applicant data that would confirm or refute such an assumption. The NCAA has been tracking sports participation rates by sex since 1981–1982. That year almost one-third of the intercollegiate athletes were female.<sup>138</sup> Seventeen years later one might expect to see a growing number of women in coaching positions, both in absolute numbers and as a percentage of the intercollegiate coaches. Yet the trend seems to be going the other way. Women have made little headway in coaching men's teams, and the influx of men into coaching positions for women's teams threatens their representation in that arena as well.<sup>139</sup>

If women are ever to be considered serious candidates for coaching men's teams, one can hardly imagine a better case than that of Geraldine Fuhr. We regularly see other assistants promoted to head coach when the position is vacated. If Geraldine had been Gerald, is it likely the varsity assistant of sixteen years—supported by both the school's principal and athletic director—would

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& L. (March 13, 2002), at Lexis-Nexis Academic Universe, <http://web.lexis-nexis.com/universe> (on file with author).

<sup>136</sup> Fracassa, *supra* note 134.

<sup>137</sup> In 1971, girls represented only 7% of all high school athletes (comparing 294,015 girls to 3,666,917 boys). NAT'L FED'N OF STATE HIGH SCH. ASS'N, 1999–2000 ATHLETICS PARTICIPATION SURVEY 55, at [http://www.nfhs.org/part\\_survey99-00.htm](http://www.nfhs.org/part_survey99-00.htm) (2000).

<sup>138</sup> See *Year-By-Year Sports Participation*, in NCAA 1982–2001 SPORTS SPONSORSHIP PARTICIPATION REPORT 9, 11–12 (2002), available at [http://www1.ncaa.org/membership/ed\\_outreach/gender\\_equity/index.html](http://www1.ncaa.org/membership/ed_outreach/gender_equity/index.html) (last visited Sept. 23, 2002).

<sup>139</sup> See *supra* notes 115–19 and accompanying text.

have been passed over for a ninth grade coach with two years of experience? If we were looking for more opportunities for women in this area, Hazel Park was presented with a golden opportunity. What would the objection have been to Fuhr's selection *other than the fact that she's a woman*? Is the administration worried that the team parents will complain? Or that the boys will refuse to play for a woman coach?

Concerns about how the players or the parents will react to the hiring of a female coach are easily dismissed under discrimination doctrine. The issue here arises under Title IX and Title VII, both of which would be applicable to Fuhr's claim. Title VII law has long rejected comparable issues of "customer preference" as a defense in employment discrimination.<sup>140</sup> The reaction of white students and their parents to school integration provided no legal defense to the law's requirement that issues of race be removed from the right to a public education. What about the child with AIDS attending the public school?<sup>141</sup> Or the reaction of students and alumni when the courts ended sex segregation at the Citadel?<sup>142</sup>

Intercollegiate athletics' existing salary inequities between coaches of male teams and female teams reinforce the message conveyed by the absence of women coaches for men's teams: women in sports are less qualified and less valued. The message that women coaches are less qualified to coach male teams and that women athletes are less valued as players is used to justify the market decision to pay coaches of female teams, especially female coaches, less money. Few players are likely to understand the legal conclusions about "different jobs" under the Equal Pay Act or "different markets" under Title VII. It is difficult to avoid the conclusion that female players and female sports simply are less important.

While it may be easy to infer stereotyping and discriminatory motives to the Hazel Park School District, few cases will be as clear cut as Fuhr's. Explanations for the broader problem are likely more complex and less patently unlawful.<sup>143</sup> It may well be that the practice of segregated coaching is so ingrained in our sports culture that even a highly qualified female applicant would not bother to apply for a collegiate position coaching men's teams. Male applicants for a coaching position may legitimately claim more experience, given the limited past opportunities for women. Even if these two factors combine to explain the current status of women in coaching, however, they are far from satisfying. On the

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<sup>140</sup> See, e.g., 29 C.F.R. § 1604.2(a)(1)(iii) (2000); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (holding that the preference of male passengers cannot justify hiring only female flight attendants).

<sup>141</sup> See, e.g., *AIDS Victim, 14, Returns to School After Two Years*, TORONTO STAR, Aug. 26, 1986, at A4.

<sup>142</sup> See, e.g., Catherine S. Manegold, *For Citadel, Few Options Except Talk*, N.Y. TIMES, June 27, 1996, at B9.

<sup>143</sup> See generally Knoppers, *supra* note 113, at 120-26 (discussing various factors that may explain the relative lack of women in coaching positions).

contrary, they return us to our starting point of the intractable problems created by a system of sex segregation.

Most boys/men routinely interact with girls/women as classmates and teachers. But this routine experience only serves to highlight girls'/women's exclusion from coaching those same boys/men on the sports fields—reinforcing the conscious and subconscious messages that sports remain a “safe zone” for men. Women need not apply.

#### IV. THE DEMISE OF SCHOOL SPORTS: THE KNIGHT COMMISSION AND *THE GAME OF LIFE*

The original Knight Commission on Intercollegiate Athletics, a group of distinguished past and present university officials,<sup>144</sup> was created by the Knight Foundation in October, 1989, in response to numerous scandals and growing concerns that the world of college athletics “threatened the very integrity of higher education.”<sup>145</sup> Stories of NCAA rule violations (by over half of the Division I-A schools), illegal payments to players (reported by nearly a third of professional football players surveyed about their college experiences), and dismal graduation rates (under 20% for men's basketball at over one third of the Division I-A programs) were rampant.<sup>146</sup> *Time* magazine described the problem as “an obsession with winning and moneymaking that is pervading the noblest ideals of both sports and education in America.”<sup>147</sup> The Commission sought to address these growing problems with a series of recommendations in its March 1991 report.<sup>148</sup> At the heart of its proposals was the Commission's conclusion that university presidents must reassert their leadership and control over athletics

<sup>144</sup> The Commission was co-chaired by William Friday, former president of the University of North Carolina, and Theodore Hesburgh, former president of Notre Dame. A complete list of the Commission members can be found in JOHN S. & JAMES L. KNIGHT FOUND., *A Solid Start: A Report on Reform of Intercollegiate Athletics*, in REPORTS OF THE KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS 47, 54–55 (1999), available at [http://www.knightfdn.org/default.asp?story=news\\_at\\_knight/special\\_reports/coi\\_athletics.html](http://www.knightfdn.org/default.asp?story=news_at_knight/special_reports/coi_athletics.html) [hereinafter KNIGHT REPORT 1992].

<sup>145</sup> JOHN S. & JAMES L. KNIGHT FOUND., REPORTS OF THE KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS 2 (1999), available at [http://www.knightfdn.org/default.asp?story=news\\_at\\_knight/special\\_reports/coi\\_athletics.html](http://www.knightfdn.org/default.asp?story=news_at_knight/special_reports/coi_athletics.html) [hereinafter KNIGHT FOUNDATION REPORTS].

<sup>146</sup> *Id.* at 4.

<sup>147</sup> *Id.* at 3.

<sup>148</sup> *Id.* The original Knight Commission actually published a series of three reports, of which its 1991 report was the first. See KNIGHT REPORT 1991, *supra* note 17; KNIGHT REPORT 1992, *supra* note 146; JOHN S. & JAMES L. KNIGHT FOUND., *A New Beginning for a New Century: Intercollegiate Athletics in the United States*, in REPORTS OF THE KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS 59 (1999), at [http://www.knightfdn.org/news\\_at\\_knight/special\\_reports/KnightCommissionOnIntercollegiateAthletics.pdf](http://www.knightfdn.org/news_at_knight/special_reports/KnightCommissionOnIntercollegiateAthletics.pdf).



in order to regain “academic integrity, financial integrity, and independent certification.”<sup>149</sup> Ten years later, the Commission reconvened to assess higher education’s progress in addressing these problems. In spite of much progress in the implementation of earlier recommendations, however, the Commission could only report that things had gotten worse instead of better.

[T]he Commission is forced to reiterate its earlier conclusion that “at their worst, big-time college athletics appear to have lost their bearings.” Athletics continue to “threaten to overwhelm the universities in whose name they were established.”

Indeed, we must report that the threat has grown rather than diminished. More sweeping measures are imperative to halt the erosion to traditional educational values in college sports.<sup>150</sup>

For anyone who enjoys intercollegiate athletics, the 2001 Knight Commission report is depressing, if not devastating. Although the Commission attempts (largely in vain) to infuse some sense of optimism into its findings, the phrases that linger leave little room for hope: “the condition of big-time college sports has deteriorated”;<sup>151</sup> “more than half the institutions competing at the top level continue to break the rules”;<sup>152</sup> athletics are “rightly characterized as ‘an entertainment industry’ that is not only the antithesis of academic values but is ‘corrosive and corruptive to the academic enterprise’”;<sup>153</sup> “the problem is a prevailing money madness”;<sup>154</sup> “graduation rates for athletes in football and basketball at the top level remain dismally low”;<sup>155</sup> “[a] frantic, money-oriented modus operandi that defies responsibility dominates the structure of big-time football and basketball”;<sup>156</sup> “some thirty college football and men’s basketball coaches are paid a million dollars or more a year”;<sup>157</sup> “the big business of big-time sports all but swamps those values [of higher education]”;<sup>158</sup> “[sports programs] answer not to the traditional standards of higher education but the whims and pressures of the marketplace”;<sup>159</sup> “it is not the integrity of

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<sup>149</sup> KNIGHT FOUNDATION REPORTS, *supra* note 147, at 10.

<sup>150</sup> KNIGHT REPORT 2001, *supra* note 7, at 11.

<sup>151</sup> *Id.* at 12.

<sup>152</sup> *Id.* at 12.

<sup>153</sup> *Id.* at 13.

<sup>154</sup> *Id.* at 14.

<sup>155</sup> *Id.* at 15.

<sup>156</sup> KNIGHT REPORT 2001, *supra* note 7, at 17.

<sup>157</sup> *Id.* at 18.

<sup>158</sup> *Id.* at 21.

<sup>159</sup> *Id.* at 14.

intercollegiate sports that will be held up to question, but the integrity of higher education itself.”<sup>160</sup>

The report proceeds to identify the three major issues of “academic transgressions, a financial arms race, and commercialization” in the “widening chasm between higher education’s ideals and big-time college sports.”<sup>161</sup> Graduation rates are bad and in some cases getting worse. The 970 members of the NCAA brought in over \$3 billion last year—but spent \$4.1 billion.<sup>162</sup> The big programs have sold out at every level—to television, to equipment manufacturers, to the world of professional sports.

The report is depressing and overwhelming. The solutions offered are aspirational—providing student athletes the same rights and responsibilities as other students, requiring institutional oversight and control of athletic department budgets, and wresting control away from television and corporate interests.<sup>163</sup> All are worthy goals, but one is left wondering if these suggestions—arguably only elaborations on the Commission’s 1991 recommendations—can possibly be any more effective than those of ten years ago.

James Shulman and William Bowen, with the Andrew W. Mellon Foundation, offer extensive data to support their own similar findings in *The Game of Life: College Sports and Educational Values*,<sup>164</sup> also published in 2001. In a theme that would be echoed in the Knight Commission report just a few months later, the authors described their studies as being “as much about educational values and the missions of these institutions as it [was] about sports.”<sup>165</sup> The authors’ research involved an in-depth study of thirty public and private institutions at various levels within the NCAA hierarchy (ranging from Division III at the lowest level to Division I-A representing the highest level programs). The study included a wide spectrum from Yale to Miami University (Ohio), from Columbia to Bryn Mawr, from Swarthmore to the University of North Carolina at Chapel Hill.<sup>166</sup>

The findings of Shulman and Bowen cover a broad range of issues in college

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<sup>160</sup> *Id.* at 31.

<sup>161</sup> *Id.* at 14.

<sup>162</sup> KNIGHT REPORT 2001, *supra* note 7, at 17.

<sup>163</sup> *Id.* at 26–29.

<sup>164</sup> SHULMAN & BOWEN, *supra* note 22.

<sup>165</sup> *Id.* at xxviii.

<sup>166</sup> The full list includes eight private Division I-A schools (Duke, Georgetown (basketball only), Northwestern, Rice, Stanford, Tulane, Notre Dame, and Vanderbilt); four public Division I-A schools (Miami (Ohio), Pennsylvania State, University of Michigan, and University of North Carolina); four Division I-AA Ivy League schools (Columbia, Princeton, Pennsylvania, and Yale); three Division III universities (Emory, Tufts, and Washington University in St. Louis); seven Division III coed liberal arts colleges (Denison, Hamilton, Kenyon, Oberlin, Swarthmore, Wesleyan, and Williams); and four Division III women’s colleges (Barnard, Bryn Mawr, Smith and Wellesley). *Id.*

sports, and there is far too much information to be summarized here. Some of the findings are positive. In looking at the careers of intercollegiate athletes after college, for example, the authors report higher earnings for former male athletes compared to their non-athlete peers.<sup>167</sup> Football and men's basketball notwithstanding, most athletes have a very high graduation rate across the wide spectrum of schools and sports studied.<sup>168</sup> But some of the carefully collected data defies many of the myths surrounding college athletics. Reinforcing the conclusions of the Knight Commission, Shulman and Bowen found that most schools in their study lose money in their athletic programs, even at the highest levels. "[I]t is unlikely that any school comes close to covering its full costs if proper allowances are made for the capital-intensive nature of athletics."<sup>169</sup> Only a few of the biggest programs break even, and then only if their teams win consistently.<sup>170</sup> And contrary to popular belief, winning football teams generally do not translate into more generous alumni giving and support.<sup>171</sup>

Whether part of the Ivy League or the Big Ten, schools at all levels of competition are sending the message that athletic talent may be a more efficient road to admission than good grades. Athletes enjoy a substantial statistical admissions advantage. At one *non-scholarship* school studied, male athletes had a 48% greater chance of being admitted than their non-athlete colleagues with similar credentials. Female athletes enjoyed a 53% advantage.<sup>172</sup> And, sadly, even controlling for the differences in pre-college test scores and credentials, athletes generally under-perform as students compared to their non-athlete counterparts.<sup>173</sup>

In conclusion, Shulman and Bowen note the widening gap between the world of intercollegiate athletics and the institutions to which they are only tenuously attached:

A major unifying theme of this study is that an ever larger divide has opened up between two worlds. One is an ever more intense athletics enterprise—with an emphasis on specialized athletic talent, more commercialization, and a set of norms and values that can be seen as constituting a culture of sports. The other is the core teaching-research function of selective colleges and universities, with its own increasing specialization, a charge to promote educational values such as learning for its own sake, and a strong sense of obligation to provide educational opportunity to those who will make the most of it—all in a time when the good of the society is increasingly dependent on the effective development and

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<sup>167</sup> *Id.* at 95–96, 263.

<sup>168</sup> *Id.* at 261.

<sup>169</sup> *Id.* at 267.

<sup>170</sup> SHULMAN & BOWEN, *supra* note 22, at 267.

<sup>171</sup> *Id.* at 266.

<sup>172</sup> *Id.* at 260.

<sup>173</sup> *Id.* at 261–62.

deployment of intellectual capital. This widening athletic-academic divide—its pervasiveness and subtlety – is the core of this book’s message.<sup>174</sup>

Shulman and Bowen offer their own recommendations for change, albeit often in even less concrete terms than the Knight Commission.<sup>175</sup> They seek, however, like the Knight Commission, to “reinvigorate the contribution of intercollegiate athletics to the achievement of educational goals.”<sup>176</sup>

## V. SOLUTIONS

### A. *In Search of Gender Equity*

If we forget the legal parameters for a moment (and further ignore any who feel that certain sports should only be played by members of a particular sex), could we even agree on a perfect sports world in equality terms? Such non-discriminatory utopias are more easily imagined in other arenas—school admission and hiring decisions that are merit-based *and* occur in a world where women and minorities have not been burdened by socialization, economic, and educational disadvantages. Merit-based, gender-blind decisions are unlikely to work as well or at all in sports, even if we could hypothetically remove cultural and economic factors that may limit women’s development and opportunities in sports.

The commentators struggling with these questions have suggested almost every combination imaginable. The contact sports rule, predictably, is a frequent target<sup>177</sup>—its elimination would have given Heather Sue Mercer the right to compete for a spot on the football team. More extensive proposals include opening all teams to both men and women based on “merit” tryouts,<sup>178</sup> creating a

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<sup>174</sup> *Id.* at 268–69.

<sup>175</sup> Shulman and Bowen offer nine propositions for consideration: (1) understanding and addressing the “growing gap between college athletics and educational values;” (2) reducing “blatant abuses” of the rules; (3) decreasing the emphasis on high profile sports; (4) consideration of more “far-reaching modifications” by non-Division I-A schools; (5) eliminating scholarships in the lower profile sports; (6) “‘rebalancing’ the emphasis on athletics outside the big-time programs”; (7) acting in concert to achieve significant change; (8) using Title IX to “rethink the organization and place of college sports” rather than replicating the male model; and (9) establishing “a clear sense of direction and strong leadership from trustees [and] presidents.” *Id.* at 294–307.

<sup>176</sup> SHULMAN & BOWEN, *supra* note 22, at 294.

<sup>177</sup> See, e.g., Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381 (2000); Note, *The Scope of Title IX Protection Gains Yardage as Courts Continue to Tackle the Contact Sports Exception*, 10 SETON HALL J. SPORT L. 415 (2000).

<sup>178</sup> See, e.g., Karen L. Tokarz, *Separate but Unequal Education Sports Programs: The Need for a New Theory of Equality*, 1 BERKELEY WOMEN’S L.J. 201, 244 (1985). Tokarz

model where women athletes would be equally valued in a program that included men's teams, women's teams, and coed teams;<sup>179</sup> adding women's football;<sup>180</sup> treating all sports as "teams" with male and female components (similar to the Olympics);<sup>181</sup> maintaining sex segregated teams, but requiring schools to offer any contact sport requested by a female student; and providing the resources to determine if there is adequate interest to field such a team.<sup>182</sup>

None of the options are particularly satisfying. Eliminating the contact sports rule seems an easy step forward—just not a very big one. The practice has already fallen to equal protection challenges in many school districts at the pre-college level. At a minimum, Heather Sue Mercer and those who follow should have a right to participate in merit-based tryouts for football or baseball or any other sport currently reserved for men. It seems so very little to ask, and so consistent with our understanding of discrimination theory in virtually all other arenas, that the only surprise is that the contact sports exclusion continues to exist at all.

But what seems like an easy answer for football and Mercer raises a number of other complex questions: Would men similarly be permitted to try out for women's teams where no men's team was offered? If so, would there be any limit on the number of spots—to prevent the possibility that men would ultimately come to dominate the women's teams as well and thus diminish athletic opportunities for females?<sup>183</sup> What about a female athlete who would rather play on the men's team than the women's team in the same sport?<sup>184</sup> For example, a highly skilled female soccer or basketball player in middle school might believe that the boys' teams are more competitive—or even want a chance to play on both teams if the seasons do not overlap (as is often true in soccer, where boys'

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recognizes, however, that women's sports opportunities likely would be limited by such a proposal, at least in the short run. To address this concern, her proposal also permits some women-only teams as a form of "affirmative action" for some period of time. *Id.* at 206, 244–45.

<sup>179</sup> Christine A. Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043, 1058 (1987); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1296–97 (1987).

<sup>180</sup> Rodney K. Smith, *Solving the Title IX Conundrum With Women's Football*, 38 S. TEX. L. REV. 1057 (1997).

<sup>181</sup> Marcia Federbush, *An "Olympics" Approach: A More Equitable Approach to Athletics than Title IX Offers*, 34 U. MICH. J.L. REFORM 265, 270 (2001). Federbush further proposes coed teams, "[w]here the sexes can compete on equal footing." *Id.* at 271.

<sup>182</sup> Brake, *supra* note 26, at 140.

<sup>183</sup> See *supra* note 96–98 and accompanying text.

<sup>184</sup> See *O'Connor v. Bd. of Educ. of Sch. Dist. 23*, 449 U.S. 1301, 1303 (1980). A sixth grade female junior high student sued for the chance to try out for the boys' basketball team, even though a girls' team was available. The district court "found that the separate programs offered by the defendants were not in fact equal because Karen's opportunity to compete with persons of substantially lesser skill in the girls' program was not as valuable as the opportunity to compete with those who are of equal or superior skill in the boys' program." *Id.*

soccer may be a fall sport, while women's soccer is a spring sport). Assuming the girls in question are sufficiently skilled to earn these positions on a competitive basis, what is the argument for excluding them?<sup>185</sup>

Moving to "merit" tryouts for all teams would take a step beyond just allowing women to compete on men's contact sports teams. While the proposal has a superficial egalitarian appeal, it has been widely rejected because of the assumption that most teams would end up with few or no women.<sup>186</sup> Generally, the physiological distinctions between men and women will assert themselves by high school and certainly college. While we surely are long past any assumptions about "all" boys being superior athletes compared to "all" girls, it is nonetheless likely that any football, basketball, or track team selected based on competitive tryouts would be largely, if not exclusively, male.<sup>187</sup> So simply supporting one team with open tryouts, even in a large number of sports, would result in far fewer sports opportunities for women. The idea of "tryouts and offering teams on request" also ignores the reality of most big intercollegiate programs. These teams are largely determined in advance through recruiting—not selected from the "pool" of students who might attempt to try out as walk-ons.

What about requiring schools to field both men's and women's teams in any sport offered, including the traditionally "male" sports such as football or wrestling? This would insure that both men and women get the opportunity to play the same games, but avoid the displacement of women by their sometimes bigger and stronger male classmates. But the subtle and not-so-subtle distinctions that currently exist would no doubt continue. We already have both men's and

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<sup>185</sup> *Packel v. Pa. Interscholastic Athletic Ass'n*, 334 A.2d 839, 842 (Pa. Commw. Ct. 1975).

Even where separate teams are offered for boys and girls in the same sport, the most talented girls still may be denied the right to play at that level of competition which their ability might otherwise permit them. For a girl in that position, who has been relegated to the "girls' team," solely because of her sex, "equality under the law" has been denied.

*Id.*

<sup>186</sup> See, e.g., *Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 657–58 (6th Cir. 1981) ("When considering the constitutionality of Title IX and its regulations, a blanket requirement of one team at each age level might result in male dominance of all teams and cause a return to pre-Title IX conditions, a result completely at variance with the statute's purpose."). See also the cases cited at *supra* note 94.

<sup>187</sup> Not all observers agree with this conclusion, however. Jennifer Hargreaves, at the Roehampton Institute in London, has written extensively on the sociology of women's sports. She points to research that women's performance rates in many sports are improving at a significantly higher rate than men's, suggesting that the widely accepted differences in sex may be based more on socialization than biology. See JENNIFER HARGREAVES, *SPORTING FEMALES: CRITICAL ISSUES IN THE HISTORY AND SOCIOLOGY OF WOMEN'S SPORTS* 284–88 (1994). Hargreaves goes on to argue that we define sports in ways that advantage men (i.e., speed and strength) rather than in ways that might advantage women (e.g., flexibility and endurance). *Id.* at 286.

women's basketball, and in most institutions the women's team remains the less favored "stepchild" in a variety of ways.

Most of these proposals for equality, like the efforts of the Knight Commission, ultimately do little more than tinker at the margins, missing the core of the problem. We need to create instead something so different from the current model that it allows athletics to be rejoined with the educational values that should be the driving force behind their place in the institution.

This article proposes the elimination of segregation. Separate will almost never be equal, so eliminate separate. All teams would be half male and half female, including football, baseball, volleyball, field hockey, and every other sport traditionally associated with one sex or the other—a concept not so very different from the current use of proportionality to establish Title IX compliance.<sup>188</sup> The need to regulate playing time would be an obvious problem—otherwise one could readily envision a basketball team of seven girls and seven boys where the girls spend most of their time on the bench. Not only would half the team need to be female, but half of the players on the court or field at any given time must also be equal.<sup>189</sup>

With respect to those sports in which the athletes compete as "individuals," such as wrestling, gymnastics, track, tennis, and swimming, separate men's and women's events or heats could still be offered. The events should be identical for each sex, however, and "team" performance would be determined by combined scoring. A similar model already exists in a few NCAA-sponsored sports, such as skiing and riflery.<sup>190</sup> This model acknowledges that the best men in at least some of the sports are likely to be stronger and faster than the best women. By competing only against other women, the female athletes will have a realistic chance of competing successfully in any individual race or match, thus enjoying the personal satisfaction of winning their own race. Because the school can only succeed with strong competitors who are both male and female, however, the combined scoring also provides incentives for athletes of both sexes to recruit and encourage their teammates.

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<sup>188</sup> See *supra* notes 44–62 and accompanying text. For those schools that are predominantly one sex or the other (e.g., Wellesley, Smith, etc.), the NCAA could continue to sponsor same sex team competitions in separate leagues or divisions. The percentage threshold should be set at a high level, however, as a prerequisite. This would ensure that the vast majority of NCAA competition would involve only coed teams.

<sup>189</sup> Of course, many team sports require an odd number of players on the court or field. In such instances the number of male or female players would not be allowed to outnumber the other sex by more than one person at any given time, e.g., three and two in basketball, six and five in soccer, etc. This approach is not uncommon now in the context of some club sports.

<sup>190</sup> See NAT'L COLLEGIATE ATHLETIC ASS'N, 2002 NCAA MEN'S AND WOMEN'S SKIING RULES 12 (2002), available at [http://www.ncaa.org/library/rules/2002/2002\\_skiing\\_rules.pdf](http://www.ncaa.org/library/rules/2002/2002_skiing_rules.pdf) (last modified May 1, 2002) ("The final score of a team in the meet shall be the sum of the points earned in each of the events.").

Before dismissing this proposal out of hand, consider the possible advantages. Coed teams would ensure equal opportunity in many of the ways that currently elude Title IX enforcement—the quality of coaches, attention from the press and the public, facilities, equipment, practice times, etc. All sports offered would be available to both men and women, and all players within any given sport would be receiving identical benefits (or the lack thereof). Issues would remain about how basketball is treated compared to tennis or track, but the issues would no longer have a gender component. College sports could be redefined as something other than farm teams for the pros and focus instead on the educational values and opportunities that once justified their place in our educational institutions.

### B. *Point—Counterpoint*

Virtually every male (and some females) who has listened to my proposal for mandatory coed athletics has responded with some version of “but you can’t do that” or “it won’t work!” There are, indeed, a number of consequences one might anticipate from implementing such a proposal.

#### 1. *Girls Playing Football?*

Where will a school find girls to play football? Some are already out there, in spite of the current legal and cultural barriers. According to the National Association of State High School Associations, 779 girls played high school football in the fall of 2000, and the National Football League reports that 1.3 million girls competed in its annual Punt, Pass, and Kick competition last year.<sup>191</sup> In fact, a professional women’s football league already exists; the National Women’s Football League was formed in August 2001.<sup>192</sup> Currently the League has grown to twenty-eight teams overall, including expansion teams.<sup>193</sup> Semiprofessional teams are also springing up.<sup>194</sup> The 2002 season championship drew 5,000 fans, and future games will be televised on the new Football Network beginning in 2003.<sup>195</sup>

Underlying the push for increased athletic opportunities for women at the intercollegiate level—even before large numbers of girls participated in school or

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<sup>191</sup> Ned Barnett, *No Game for Sissies: Women’s Team Loves Smashmouth Football*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 4, 2001, at 1C.

<sup>192</sup> See *National Women’s Football League History*, at <http://www.nwflcentral.com/history.cfm> (last visited Oct. 15, 2002).

<sup>193</sup> See *id.*

<sup>194</sup> Barnett, *supra* note 193 (reporting on the Carolina Cougars, a semiprofessional women’s football team out of Kernersville, N.C.).

<sup>195</sup> See *The Football Network, in Multi-Year Pact to Cover National Women’s Football League!*, at <http://www.nwflcentral.com/news.cfm?ID=13&action=spec> (Sept. 5, 2002).



club teams—was the belief that such opportunities would promote interest in athletics among younger girls. Under this theory, the players and skills would develop and catch up to the opportunities available over time:

[T]he creation of additional athletic spots for women would prompt universities to recruit more female athletes, in the long run shifting women's demand curve for sports participation. As more women participated, social norms discouraging women's participation in sports presumably would be further eroded, prompting additional increases in women's participation levels.<sup>196</sup>

Many observers would agree that soccer is the hottest thing going in women's sports, but the number of women playing soccer twenty-five years ago was quite low. Given the growing interest among women in playing football, without such opportunities, it seems just as likely that the same theory could work here. And at the college level, the chance to play football would also mean access to the dozens of scholarships that accompany those positions. With the opportunity to play football comes many of the same benefits (however one may define them) that have prompted boys to play the sport.<sup>197</sup>

What if these assumptions are wrong? When the middle school holds tryouts for football, only three girls show up. If only three girls showed up for tryouts, there would be no football team that year.<sup>198</sup> Or, more likely, as happens now with same sex teams in similar circumstances, those interested in playing would immediately begin recruiting female classmates to join them. The boys simply cannot play or win without the girls. Girls whose passion is volleyball or field hockey may be facing the same challenge in reverse. Their own dreams of athletic achievements are on the line if boys cannot be persuaded to join them.

Because filling the football slots at the college level could be particularly difficult if implemented immediately, a multi-year "phase-in" might be appropriate.<sup>199</sup> For example, coed football teams could be mandated first at the middle/junior high school level. Three years later, the mandate would apply to high schools. Three years after the high school mandate, colleges and universities would be included. This would allow time for girls to become interested in and develop some experience with the game.

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<sup>196</sup> *Neal v. Bd. of Trs. of Cal. State Univ.*, 198 F.3d 763, 768 n.4 (9th Cir. 1999).

<sup>197</sup> The exception to this statement may be the chance to play professional football—an incentive that presumably drives many young male athletes, unrealistic though it may be. I would not expect the nature of professional football to change, thus those opportunities are likely to be more limited for women.

<sup>198</sup> The proposal is too drastic to permit exceptions or opportunities for excuses; indeed, any exceptions might suggest this new sports concept is some version of its predecessor.

<sup>199</sup> Immediate implementation for most other sports should not encounter the same problems.

## 2. *The Women Will Get Hurt*

The issue of potential injuries is of serious concern and may have been at least part of the original justification for the contact sports exemption.<sup>200</sup> It is surely true that the biggest and strongest men now playing college football are generally bigger and stronger than the biggest and strongest women who are likely to be recruited to join them on a coed team. My proposal does not ignore this reality; on the contrary, the mandatory 50/50 ratio required on the field or court is a consequence of it. Adding women to the teams may well increase both the number and severity of injuries in the game.

There are a variety of responses to this concern. First, one could question the legitimacy of such a paternalistic argument. As discussed earlier, such rationales have been soundly rejected in other arenas such as Title VII and equal protection. Surely many women will choose not to play because of the risks involved, just as many men choose not to play. But this is their decision, not the school's or the state's. Women regularly are injured in the sports they now play, but we have not considered eliminating those opportunities as a result. Nor has there been serious consideration of eliminating football in spite of the significant, and occasionally even fatal injuries sustained by the males who now play.<sup>201</sup> While such incidents may spur discussions of safety precautions, the teams have continued to play.

If the number and severity of injuries do increase, we may be encouraged to rethink the game and how it is played. Football is a brutal sport and many of its former stars report that they can barely move as a result.<sup>202</sup> Legendary quarterback Johnny Unitas (Baltimore Colts) was unable to close his once famous right hand around a button, a comb, or a fork.<sup>203</sup> Running-back Earl Campbell (Houston Oilers) at only forty-six is unable to grip with his hands or bend his knees—climbing stairs requires dragging himself using his forearms on the railings.<sup>204</sup> Offensive lineman Joe Jacoby (Washington Redskins) at forty-one is unable to bend over to put on socks or lace up his shoes.<sup>205</sup> According to a 1990 survey of former players commissioned by the National Football League Players Association, *almost two-thirds reported suffering a major injury while playing—*

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<sup>200</sup> See *supra* notes 88, 104 and accompanying text.

<sup>201</sup> See, e.g., Associated Press, *Fatal Injuries Rising in High School Ranks*, RECORD (Chapel Hill, N.C.), April 7, 1987, at DO8 (reporting eleven football-related deaths in 1986); *Football-Related Deaths on Increase, Study Says*, WASH. POST, August 7, 1996, at B2 (reporting nine football related deaths in 1995).

<sup>202</sup> William Nack & Lester Munson, *The Wrecking Yard*, SPORTS ILLUSTRATED, May 7, 2001, at 60.

<sup>203</sup> *Id.* at 66.

<sup>204</sup> *Id.* at 69.

<sup>205</sup> *Id.* at 70.

“major” being defined as any injury requiring surgery or missing at least eight games.<sup>206</sup>

If sports in general and football in particular are deemed a legitimate and valuable part of a school’s educational mission, surely the value of that activity is diminished any time a student is seriously injured. We expect our schools to make their activities as safe as possible in every other arena, and we surely would demand that a school discontinue any extracurricular activity that proved inordinately risky. Protective gear and various rule changes have been added to the game of football over the years to reduce the risks of injury. The rate of catastrophic injuries for high school football players, for example, prompted the rule that now prohibits players from blocking and tackling head-first.<sup>207</sup> If additional rule changes are triggered by coed teams, there is ample precedent.

At the intercollegiate level, some fans may equate less brutal or less physical to less “fun” or enjoyable to watch. The fans’ entertainment preferences should hardly be driving our decisions—that is how much of the problem of professionalism in intercollegiate athletics developed in the first place. If sports are to be re-anchored to the educational mission of the institution, the welfare of the students will be paramount. Any decisions about the rules or nature of the game will be that much easier because our goals will be less conflicted and better grounded in the educational mission that justifies the enterprise.

### 3. *Coed Teams Will Change the Nature of the Sport*

Perhaps the requirement that traditionally male sports be played with half women will ultimately prompt changes in the rules or styles of play—perhaps to lessen the number of injuries, as just discussed, or to take advantage of the physiological strengths (such as flexibility and endurance) that women may bring to the game. As suggested by one commentator,

[M]ost sports have evolved as “men’s sports.” The sports that are most popular—contact sports—are sports that have been developed by men, for men. ... Women on the other hand will be at a natural disadvantage; not because of their biological weakness, but because sports are suited to men’s strength—sports [sic] very purpose is to exploit and exhibit men’s strengths. Thus, men are not more suited for sports, the contact sports are more suited for men. If this is true, then the question is whether we ought to expect women to accommodate themselves to a sport that has been suited for men’s strengths, or whether the sport ought to be accommodated to better suit women’s strengths.<sup>208</sup>

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<sup>206</sup> *Id.* at 62.

<sup>207</sup> *Catastrophic Injuries in Prep Football Drop*, CAPITAL TIMES (Madison, Wis.), May 5, 1993, at 1B.

<sup>208</sup> Dana Robinson, *A League of Their Own: Do Women Want Sex-Segregated Sports?*, 9

As noted earlier, the long-term effects of football injuries are staggering and unacceptable.<sup>209</sup> Fewer injuries would benefit all student athletes, male and female. If adjustments are made in the style of play to limit injuries, accommodate differences, and maximize all players' opportunities to excel, that consequence alone could model some of the educational values the institution purportedly is attempting to emulate.

#### 4. *One Team Per Sport Will Mean Fewer Playing Opportunities*

Another expressed concern may be the potential of fewer playing opportunities for both men and women, thus "hurting" everyone. Such a concern visualizes that an institution would generally offer the same sports now being offered, but each sport would have only one coed team. Thus, half of the men now playing football would lose their positions, half of both men and women basketball players, etc. There are a variety of responses to such a concern, depending on what values are controlling the decisions.

First, it would be possible to maintain the total number of slots for student athletes (although probably reapportioned between men and women, which Title IX theoretically demands in any event). This could be accomplished by some combination of increasing NCAA squad sizes in most sports other than football (e.g., permitting 18 or 20 players for basketball, instead of the thirteen or fifteen currently allowed in men's and women's basketball, respectively<sup>210</sup>) and adding more sports. Even without adding sports, such a proposal may well "save" opportunities for male athletes in non-revenue sports such as wrestling and swimming—sports that are often eliminated in the name of Title IX to increase the proportion of women athletes by reducing the number of male participants.<sup>211</sup>

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J. CONTEMP. LEGAL ISSUES 321, 346 (1998); cf. Ruth Colker, *Rank-Order Physical Abilities Selection Devices for Traditionally Male Occupations as Gender-Based Employment Discrimination*, 19 U.C. DAVIS L. REV. 761, 771 (1986) ("[N]ot only do courts exaggerate the differences between men and women, implying for instance that no woman could run as fast as any man, but they consider only those physical traits traditionally valued by men.").

<sup>209</sup> See *supra* notes 203–08 and accompanying text.

<sup>210</sup> See NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA 2002–03 DIVISION I MANUAL 190–91 (2002), available at [http://www.ncaa.org/library/membership/division\\_i\\_manual/2002-03/A15.pdf](http://www.ncaa.org/library/membership/division_i_manual/2002-03/A15.pdf).

<sup>211</sup> See, e.g., *Miami Univ. Wrestling Club v. Miami Univ.*, No. 01-3182, 2002 U.S. App. LEXIS 18430 (6th Cir. Aug. 7, 2002) (eliminating men's soccer, tennis, and wrestling teams in order to achieve Title IX compliance); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042 (8th Cir. 2002) (involving elimination of men's wrestling to improve women's athletic participation rate); *Boulahanis v. Bd. of Regents*, 198 F.3d 633 (7th Cir. 1999), *cert. denied*, 530 U.S. 1284 (2000) (eliminating men's soccer and wrestling teams); *Kelley v. Bd. of Trs. of Univ. of Ill.*, 832 F. Supp. 237 (D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994) (holding that the elimination of men's, but not women's swimming team is permissible under Title IX); Bill Pennington, *More Men's Teams Benched as Colleges Level the Field*, N.Y. TIMES, May 9, 2002, at A1

The problem evaporates when a school is no longer struggling to balance the large number of men currently on the football squads. Adding sports, however, requires more coaches and facilities and may not be a financially realistic (or wise) option.

Assume that a school is unwilling to add more sports to the roster and the consequence is, indeed, fewer slots for student athletes—particularly male student athletes. Characterizing this as a decision to “take away” positions from the male athletes suggests a false sense of entitlement—the real question is of allocation based on the institution’s educational values. When the cost of the athletic program is examined, the school may well conclude that the money is better spent elsewhere. Even at the Ivy League schools studied by Shulman and Bowen, where sports occupy a much less prominent role than at the Division I-A schools, the institutions spent an average of \$8,000 per year on each athlete, while spending only \$2,000 to \$3,000 each year per student on all other student services combined.<sup>212</sup> In some of the Division I-A programs, universities may spend over \$100,000 *per player* in football alone.<sup>213</sup> Does such disparity make any sense as an investment and allocation of limited resources?

Such findings should convince us that colleges and universities at all levels allocate a disproportionate amount of money to their sports programs. If a consequence of coed sports is fewer teams, fewer athletes, and a reduction in the money spent on intercollegiate athletics, the appropriate description is a reallocation of limited resources directed by the education mission of the institution—replacing the escalating and unjustifiable arms race intercollegiate athletics has become.

But what about the athletes who have lost the chance to play intercollegiate sports due to the reduction in team spots available? Not a single student would be barred from playing football, basketball, or baseball under a regime of coed teams. Virtually all Division I-A schools have extensive intramural programs where all comers are welcome. These students are deprived, not of the chance to play, but of the high-priced accoutrements that money can buy: millionaire coaches, carpeted locker rooms, and the latest in equipment and uniforms, to name a few. But almost anyone has the opportunity to *play*—it is just that the love of the game is no longer what it is all about.

With only half of the current spots open for football and men’s basketball, are the excluded athletes being deprived of their shots at the pros? Professional

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(“Since the passage 30 years ago of the law commonly known as Title IX, more than 170 wrestling programs, 80 men’s tennis teams, 70 men’s gymnastics teams and 45 men’s track teams have been eliminated . . .”); Thomas Stinson, *Dying: Men’s College Gymnastics Title IX Victims*, ATLANTA CONST., Jan. 8, 1995, at F2 (“The 1972 passage of Title IX, improving opportunities for women, began a downward trend for non-revenue-producing men’s teams in many sports.”).

<sup>212</sup> SHULMAN & BOWEN, *supra* note 22, at 275–76.

<sup>213</sup> KNIGHT REPORT 2001, *supra* note 7, at 17.

athletics should not be directing the course of intercollegiate athletics. Indeed, one of the purposes of the proposal is to eliminate, or at least diminish, that link that seems to drive all else in top-level intercollegiate athletics. Even if one were concerned about career opportunities in sports for the best athletes, those individuals should be unaffected by the proposal. As noted by the Knight Commission, *a mere 1–2% of college athletes make it into professional sports.*<sup>214</sup> Those select few who have any hope of playing professionally almost certainly will be included in the spots remaining on coed teams at the college level in any event. Higher education should have little interest in supporting the delusions of the rest. On the contrary, those students are better off understanding sooner rather than later that their dreams of the future should be focused on their education rather than their time on the field.

### *5. Fewer Scholarships Mean Fewer Educational Opportunities*

What about the scholarships that will be lost? Would the move to coed teams, by reducing the total number of athletes, limit the educational opportunities of many talented athletes? Almost any school would welcome more scholarship dollars to distribute. Nothing in the concept of coed sports requires a reduction in institutional financial aid; instead, those now available scholarship dollars may be awarded on some basis other than athletic talent.

If we suspend reality for a moment and consider athletic scholarships as an investment in the education of selected students, the investment has shown a dismally poor return in the high profile sports. As documented by Shulman and Bowen, intercollegiate athletes generally are less academically qualified than their counterparts in the rest of the student body, and the gap is growing, particularly in football and men's basketball.<sup>215</sup> And the graduation rate for those high profile sports is falling. According to the Knight Commission:

The historic vital link between playing field and classroom is all but severed in many institutions. Graduation rates for athletes in football and basketball at the top level remain dismally low—and in some notable cases are falling . . . The most recent NCAA graduation rate report reveals that 48 percent of Division I-A football players and 34 percent of men's basketball players at Division I-A institutions earned degrees.<sup>216</sup>

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<sup>214</sup> *Id.* (“Approximately 1 percent of NCAA men's basketball players and 2 percent of NCAA football players are drafted by NBA or NFL teams—and just being drafted is no assurance of a successful professional career.”).

<sup>215</sup> SHULMAN & BOWEN, *supra* note 22, at 260–62.

<sup>216</sup> KNIGHT REPORT 2001, *supra* note 7, at 15.

Even in the low-profile sports, where graduation rates are higher,<sup>217</sup> the growing trend is that these students under-perform compared to other students, based on their pre-collegiate predictors.<sup>218</sup>

One has difficulty imagining a university continuing, without serious re-examination, any other scholarship program in which only a third to a half of the recipients graduated or consistently performed in the bottom third of the class. If it is, in fact, educational opportunities that concern us, surely these scarce resources are better spent on students more likely to succeed and more likely to graduate.

### 6. *No One Will Watch and Revenues Will Suffer*

Will the fans watch coed sports? If intercollegiate athletic programs were designed to sell tickets and make money, most would have shut down long ago. According to the recent report of the Knight Commission *only about 15% of the top college and university athletic programs operate in the black.*<sup>219</sup> Shulman and Bowen reach a similar conclusion and further hypothesize that “it is unlikely that any school comes closest to covering its full costs if proper allowances are made for the capital-intensive nature of athletics.”<sup>220</sup> All that big money we associate with college sports does not even pay the bills at most institutions, let alone make money for other uses.

The numbers presented by the Knight Commission and Shulman/Bowen represent the entire athletic program budgets, however. Some data would indicate that football and men’s basketball standing alone are profitable enterprises at many schools.<sup>221</sup> Why not then limit our sports programs to only those two sports? Presumably, the answer is that intercollegiate sports programs serve purposes other than making money. Other values are at stake, including gender equity.

Perhaps the fans will be so appalled by the idea of women playing football at all, let alone replacing half the men on the team, that they will cancel their season tickets and refuse to come. Perhaps the television networks will decide not to televise these contests. But both seem unlikely in the long run. If college sports are coed sports, the fans likely will adjust and follow their favorite teams with as much enthusiasm as they did their segregated predecessors. As long as all teams are operating under the same rules, the games should continue to be as exciting and as competitive as always. Our love of sports seems virtually insatiable. If

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<sup>217</sup> See SHULMAN & BOWEN, *supra* note 22, at 261.

<sup>218</sup> *Id.* at 261–62.

<sup>219</sup> KNIGHT REPORT 2001, *supra* note 7, at 16.

<sup>220</sup> SHULMAN & BOWEN, *supra* note 22, at 267 (emphasis added).

<sup>221</sup> See DANIEL L. FULKS, REVENUES AND EXPENSES OF DIVISION I AND II INTERCOLLEGIATE ATHLETICS PROGRAMS: FINANCIAL TRENDS AND RELATIONSHIPS 1999 (2000), available at [http://www.ncaa.org/library/research/i\\_ii\\_rev\\_exp/index.html](http://www.ncaa.org/library/research/i_ii_rev_exp/index.html).

coed teams are what we have, coed teams are what we will watch. Even if this assumption is wrong, however, the fans and the television networks should be our last concern, not the first.

For those who believe that sporting events create a special sense of institutional loyalty that is critical to the students' and the alumni's experience, sporting events will continue to be plentiful. Many of the most prestigious universities in the country have modest athletic enterprises yet manage to attract the brightest students and retain the goodwill of their alumni. As already noted, the connection between institutional fundraising and success in sports is a myth—even winning teams in the biggest programs add nothing to institutional fundraising as a whole.<sup>222</sup>

### 7. Quotas and Equal Protection

The proposal presented is a quota and, on that basis alone, would trigger the objections of some. "Affirmative action" is a highly charged term with the power to polarize opinions in an instant. The concept of restitution for a victim of discrimination has long been understood, if not almost universally accepted. The concept of restitution for non-victims who share the race or sex of prior victims is less easily absorbed. Though much debated in recent years,<sup>223</sup> affirmative action remains a legally authorized option in a number of arenas: a private employer's voluntary decision to overcome the effects of past industry or societal discrimination,<sup>224</sup> a public institution's choice to consider race as a factor in admissions choices,<sup>225</sup> and a court's determination that pervasive and outrageous employment discrimination in the past can only be remedied by temporary hiring

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<sup>222</sup> SHULMAN & BOWEN, *supra* note 22, at 223–26.

[I]n assessing the arguments for and against the large investments in intercollegiate athletics generally thought to be necessary to produce winning teams in the most competitive settings, there is no evidence to suggest that "paybacks" will come in the form of enhanced generosity of alumni/ae. Indeed, one of the more striking finding [sic] derived from this year-by-year analysis is that at the most intensive level of play (NCAA Division [I-A]), winning appears to have had, if anything, a modest *negative* effect on the overall amount of alumni/ae giving.

*Id.*

<sup>223</sup> See *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).

<sup>224</sup> *Johnson v. Transp. Agency* 480 U.S. 616, 619 (1987) (upholding an employer's voluntary affirmative action plan for women in which sex was considered a "plus" factor); *United Steelworkers v. Weber*, 443 U.S. 193, 200 (1979) (upholding an employer's voluntary affirmative action plan which set aside half of the positions in a training program for African-Americans).

<sup>225</sup> *Univ. of Cal. v. Bakke*, 438 U.S. 265, 269–71 (1978). *But see* *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (rejecting "diversity" as a compelling government interest to justify consideration of race in law school admissions).



or promotions quotas.<sup>226</sup> Even apart from such programs, we tacitly understand in any number of settings that race or gender will be quietly considered in the decisions being made in a more generalized striving for diversity.

The hope (if not the legal mandate) is that affirmative action measures are temporary ones—as the educational institutions and workplaces become increasingly diverse, the need for such formal or informal programs will become increasingly unnecessary. The inherently segregated nature of middle/high school and intercollegiate athletics, however, makes that aspiration impossible in this arena. These institutions must choose in advance what sports will be offered for each sex. Unlike almost any other program or opportunity, such as a math course or an engineering program, it is generally impractical simply to offer the positions and see who signs up (at least at the college level).

But a full-scale debate on affirmative action may not be necessary. A simpler response is that Title IX already imposes a quota system as currently interpreted by OCR and the courts. In order to be in full compliance with federal law, a university may be required to match its student athlete slots to the percentage of men and women in the student body. As discussed, this effectively may be the only compliance option available to many schools under the court-enforced OCR regulations.<sup>227</sup> Although some commentators have attempted to dispute the “quota” label, it is hard to avoid under the relatively rigid standards of the proportionality requirement.<sup>228</sup> The coed team quotas proposed here are not much different in theory.

If we already are imposing quotas under Title IX, how has such an interpretation escaped equal protection challenges under the Fourteenth Amendment? An in-depth analysis of the equal protection question is beyond the

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<sup>226</sup> See *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 422 (1986) (“[A] district court may, in appropriate circumstances, order preferential relief benefiting individuals who are not the actual victims of discrimination as a remedy for violation of Title VII.”).

<sup>227</sup> See *supra* notes 44–62 and accompanying text.

<sup>228</sup> See JESSICA GAVORA, *TILTING THE PLAYING FIELD: SCHOOLS, SPORTS, SEX AND TITLE IX* (2002) (attacking stridently the “quota” aspect of Title IX’s regulations); Walter B. Connolly, Jr. & Jeffery D. Adelman, *A University’s Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios*, 71 U. DET. MERCY L. REV. 845, 894–909 (1994); Christa D. Leahy, *The Title Bout: A Critical Review of the Regulation and Enforcement of Title IX in Intercollegiate Athletics*, 24 J.C. & U.L. 489, 489 (1997) (“Title IX has been transformed from a gender-equity mandate into an affirmative action plan, which raises constitutional challenges to enforcement of the statute under the Equal Protection Clause.”); Note, *Taking a Shot at the Title: A Critical Review of Judicial and Administrative Interpretations of Title IX as Applied to Intercollegiate Athletic Programs*, 27 CONN. L. REV. 943, 977 (1995) (criticizing the proportionality test as a “quota system”). Compare Note, *Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression*, 110 HARV. L. REV. 1627, 1639–43 (1997), with Earl C. Dudley, Jr. & George Rutherglen, *Ironies, Inconsistencies, and Intercollegiate Athletics: Title IX, Title VII, and Statistical Evidence of Discrimination*, 1 VA. J. SPORTS & L. 177, 210–25 (1999).

scope of this article and has been provided by others, but some understanding of the issue is indispensable for proceeding with the idea of mandating coed teams.<sup>229</sup>

The equal protection debate in this area is not new. The First and Seventh Circuits rejected equal protection arguments in *Cohen v. Brown University*<sup>230</sup> and *Kelley v. Board of Trustees of the University of Illinois*,<sup>231</sup> respectively, reasoning that Congress has broad powers to address past discrimination. One commentator points out that both of these decisions relied on *Metro Broadcasting v. FCC*,<sup>232</sup> a decision that has since been renounced by the Supreme Court and replaced with *Adarand Constructors v. Pena*.<sup>233</sup> Thus, the argument continues, the underlying authority supporting Title IX quotas no longer exists and the validity of the regulations should be revisited.<sup>234</sup>

The Supreme Court precedent in question, however, dealt only with race and the strict scrutiny standard applicable. To date, the Court has not addressed the issue of sex-based quotas and the applicable intermediate scrutiny standard under the equal protection clause.<sup>235</sup> The current standard for gender classifications, recently reaffirmed by the Supreme Court in *United States v. Virginia*,<sup>236</sup> is "important governmental objectives" and means that are "substantially related" to those objectives. At least one commentator has asked the obvious question of why the exclusion of women was rejected in the educational context but has been accepted on the athletic side of the educational endeavor.<sup>237</sup>

### 8. *Sports as a Meritocracy*

To the extent that sports represents an arena of relatively clear meritocracy in an otherwise complicated society—that is, the strongest, fastest, quickest get the job—the proposal of mandatory coed teams significantly "damages" that

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<sup>229</sup> For discussions of these issues, see Leahy, *supra* note 230, and Robinson, *supra* note 210.

<sup>230</sup> *Cohen v. Brown Univ.*, 991 F.2d 888, 900-01 (1st Cir. 1993).

<sup>231</sup> 35 F.3d 265, 272 (7th Cir. 1994).

<sup>232</sup> 497 U.S. 547 (1990).

<sup>233</sup> 515 U.S. 200 (1995).

<sup>234</sup> See Leahy, *supra* note 230, at 532-33.

<sup>235</sup> *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), is the only Supreme Court case to address a voluntary affirmative action program based on sex. Although a state agency was involved, the Court avoided the constitutional issue because it was not addressed by the parties or the lower courts. The Court thus limited itself to an analysis of the issue under Title VII. *Id.* at 619 n.2.

<sup>236</sup> 518 U.S. 515, 533 (1996); see *supra* note 87 and accompanying text.

<sup>237</sup> See, e.g., Robinson, *supra* note 210, at 333-39 (arguing that constitutional analysis permits segregated sports only if tangible and intangible benefits are equivalent).

value.<sup>238</sup> The strongest, fastest female athlete on the football team likely will be weaker and slower than one or more male football players who would have been “next” in line for the available male positions. But issues of diversity often present such difficult choices.

While the Olympics and professional sports may come close to this ideal of a meritocracy, this value is regularly compromised in intercollegiate athletics. In at least a partial effort to recognize the educational enterprise, the NCAA requires all college athletes to meet minimum academic eligibility requirements both at the time of admission and during the athlete’s college career.<sup>239</sup> Many schools impose additional, higher academic standards in order for a potential athlete to gain admission, in an attempt to bring the admission credentials of the student athletes closer to the admission credentials of other, non-athlete applicants. This “value,” however, is compromised as well. Many schools apparently admit athletes with lower credentials at a significantly higher rate than non-athletes—the “admissions advantage” documented and described by Shulman and Bowen.<sup>240</sup> In other words, non-athlete applicants with better academic records and credentials are being denied admission in order to make room for athletes. Our colleges and universities thus already are engaged in a tug-of-war between aspirations of recruiting the best football team and aspirations of bringing some academic integrity to the process.

Colleges and universities choose to admit students based on a variety of factors, not simply those with the highest test scores. And surely most, if not all, of the administrators and commentators who struggle with these issues would balk at the suggestion of permitting the “best” athletes to play college football regardless of high school records or current academic standings. While we may argue about what it should mean to be a “student athlete,” no one has proposed eliminating the “student” label or requirements altogether as an unnecessary impediment to recruiting the best possible team. Admission to schools of higher education and the chance to play intercollegiate sports at those schools is far from a “merit system,” even as currently operated. The implementation of coed teams may add another layer of complexity (reflecting additional values of our educational system), but it would not be the first.

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<sup>238</sup> The values reflected by sports programs are, of course, far more extensive than meritocracy alone. For a broad-ranging discussion about sports and values, see Texas Law Review’s entire Symposium issue on the subject. Symposium, *Sports Law as a Reflection of Society’s Laws and Values*, 38 S. TEX. L. REV. 999–1173 (1997).

<sup>239</sup> See NAT’L COLLEGIATE ATHLETIC ASS’N, NCAA 2002–03 DIVISION I MANUAL 125 (2002), available at [http://www.ncaa.org/library/membership/division\\_i\\_manual/2002-03/A14.pdf](http://www.ncaa.org/library/membership/division_i_manual/2002-03/A14.pdf).

<sup>240</sup> See SHULMAN & BOWEN, *supra* note 22, at 29–58 (discussing the admission of male athletes), 126–56 (discussing the admission of female athletes).

### 9. *The Issue of Race*

The issues of race, gender equity, and intercollegiate athletics are complicated.<sup>241</sup> When the number of scholarships permitted in men's basketball was cut by the NCAA in an effort to increase the proportionate number of women participants under Title IX, African-American basketball coaches of men's college teams protested the move because it limited opportunities for African-American players (who typically are represented at a disproportionately high rate in men's basketball, as compared to the general student body).<sup>242</sup> Along the same lines, some commentators have argued that the addition of women's teams to satisfy gender equity requirements has only benefited Caucasian women. The kinds of sports being added, such as tennis, golf, and synchronized swimming, are sports in which few African-American women participate.<sup>243</sup> In addition, some of those slots have come from football and men's basketball, disproportionately disadvantaging African-American men.<sup>244</sup>

No doubt athletic scholarships have provided educational opportunities for deserving African-American men and women that would otherwise have been unable to access a college education. Many would agree that institutions of higher education (especially public universities) have a responsibility to promote diversity and provide educational opportunities to the economically disadvantaged of our society, but athletic programs actually may add little to that goal. Shulman and Bowen report that "recruitment of athletes has *no marked effect* on either the socioeconomic composition of these schools or on their racial diversity."<sup>245</sup> Eliminating the athletic programs in that study's group of cohorts

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<sup>241</sup> See Alfred D. Mathewson, *Black Women, Gender Equity and the Function at the Junction*, 6 MARQ. SPORTS L.J. 239 (1996); Marilyn V. Yarbrough, *If You Let Me Play Sports*, 6 MARQ. SPORTS L.J. 229 (1996).

<sup>242</sup> See Steve Berkowitz & Mark Asher, *BCA Delays Boycott; Justice Department Offers to Mediate*, WASH. POST, Jan. 15, 1994, at D1; Steve Berkowitz & Mark Asher, *Black Coaches Cut Talks with NCAA; Support Sought for Possible Boycott*, WASH. POST, Jan. 13, 1994, at D1.

<sup>243</sup> See Rodney K. Smith, *When Ignorance Is Not Bliss: In Search of Racial and Gender Equity in Intercollegiate Athletics*, 61 MO. L. REV. 329, 350 (1996) ("African-American women athletes, like their male counterparts, largely have not gained access to all intercollegiate women's sports and are concentrated in two sports: basketball and track.").

<sup>244</sup> See Walter B. Connolly, Jr. & Jeffery D. Adelman, *A University's Defense to a Title IX Gender Equity in Athletics Lawsuit: Congress Never Intended Gender Equity Based on Student Body Ratios*, 71 U. DET. MERCY L. REV. 845 (1994).

[T]he true beneficiaries of interest and skill determined by enrollment percentages are middle or upper class white women. . . . This benefit comes at the expense of African-American males who are overrepresented in sports such as football and basketball—sports from which funding must be cut to facilitate the new female sports.

*Id.* at 847.

<sup>245</sup> SHULMAN & BOWEN, *supra* note 22, at 261 (emphasis added).

from 1989 would have lowered the number of African-American men at these schools by a mere 1%.<sup>246</sup>

The number of schools involved in the Shulman/Bowen research may well be too small a sample to generalize for the hundreds of colleges and universities with large sports programs. But the Shulman/Bowen conclusion was based on the complete *elimination* of athletic programs. The proposal here may result in fewer total athletes at each institution, but many of the talented African-American male athletes currently participating in Division I-A programs (particularly in football and basketball) likely will be included in those recruited for the coed teams created. In addition, the spots for women on the coed football teams may provide new opportunities for African-American women who now are concentrated in basketball and track.<sup>247</sup> The net impact on diversity thus could be minimal, even at schools where the number of African-American male athletes adds significantly to the diversity of the student body.

There is also something inherently troubling about the concept of “protecting” men’s football in order to promote diversity in higher education. The argument could imply that African-American students can best contribute to an institution by excelling in sports, creating or reinforcing a different kind of stereotype that is just as destructive as the stereotypes attached to female athletes.<sup>248</sup> Nothing in the idea of coed teams prevents a university from continuing efforts to promote diversity and financially support its disadvantaged minority students. Tying these goals to intercollegiate athletics does a disservice to both enterprises.

Scholarships are a critical component in providing meaningful access to higher education, but athletic talent may be a particularly inefficient way to allocate those resources. If the goal is to increase educational opportunities for African-Americans and other minority and economically disadvantaged students, the university’s funds are better spent on those most likely to succeed and graduate—a group not well represented by those playing high profile sports. With academic potential instead of athletic talent as the defining criterion, other minority applicants may be far more deserving of the sometimes lavish support we now provide our high profile male athletes.

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<sup>246</sup> *Id.*

<sup>247</sup> See Smith, *supra* note 245, at 350.

<sup>248</sup> Issues of racism in athletics are beyond the scope of this discussion, but have been explored by others. See Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 *FORDHAM URB. L.J.* 615, 658–78 (1995); Timothy Davis, *Racism in Athletics: Subtle Yet Persistent*, 21 *U. ARK. LITTLE ROCK L. REV.* 881 (1999); Mathewson, *supra* note 235; Smith, *supra* note 245; Yarbrough, *supra* note 243; *supra* notes 239–40.

### C. *Women in Coaching*

While it is tempting to include in the proposal for coed teams a further requirement that half of all coaches be female as well, the legal issues involving employment may be even more complicated. Title VII might permit such a voluntary affirmative action program for a private employer,<sup>249</sup> but public universities would be faced with constitutional questions.<sup>250</sup> Access to employment also raises different issues and concerns, at least for me, than access to a school sports' team as a part of a student's education.

The full integration of women into coaching may be a gradual by-product of coed teams, although not as instantaneous. With half of every team composed of women, the pressure to include women on the coaching staffs seems inevitable and almost immediate. If the men's and women's basketball teams are combined into a single team, the coaching staff presumably will be combined as well, but with half of the coaches losing their positions. Assuming there are both female and male assistant coaches in the pool, for example, schools likely will be looking for some gender balance to work with the new "blended" teams. Identifying qualified female football coaches may take more time, but with half of all the school players female, women should be finding their way into the profession within just one or two generations of players.

Schools may also need to rethink traditional coaching qualifications as the institutions reevaluate the new role of sports. A different kind of team and a different kind of sports environment may well demand a different kind of coach. At the intercollegiate level, any coach who hopes to be successful in the long run must do far more than tolerate his female athletes; such an attitude will send the best female recruits searching for another school. A football coach who chooses to disdain his female players may soon find himself with only half a team.

While the full integration of women into coaching may be a more incremental process, the introduction of coed teams would eliminate immediately issues of salary in equity. Disparities in coaching salaries for men's and women's teams would disappear because there would no longer be segregated teams. No doubt at the intercollegiate level the market for football and basketball coaches likely would continue to outpace the market for coaches of track, swimming, field hockey, and other low profile sports. But these distinctions would no longer include a message to our female athletes about their value relative to their male counterparts. A female basketball player would "benefit" from the higher priced

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<sup>249</sup> See *Johnson v. Transp. Agency*, 480 U.S. 616, 641-42 (1987) (holding that the "[a]gency appropriately took into account [the plaintiff's] sex as one factor in determining that she should be promoted.").

<sup>250</sup> See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986) (holding an affirmative action plan for teachers unconstitutional in light of the absence of convincing evidence of prior discrimination by a governmental entity).

talent of a well-paid basketball coach to the same extent as a male basketball player.

Distinctions in coaching salaries based on the sex of the team represent only a part of the problem, of course. The Knight Commission discusses with dismay the million dollar coaching contracts for the high profile men's teams, and one of the Commission's recommendations is to bring these salaries more in line with the salary structure of the institution.<sup>251</sup> Coed teams may do little to address this issue. Coed sports give us a "fresh" start with a different vision of our athletic programs, however. This new beginning may provide an opportunity to reassess a salary scale that, like much else in high profile intercollegiate athletics, has been driven by the pressure of professional sports. Even if this assumption is overly optimistic, there may be some satisfaction in knowing that we are paying for a different kind of skill. In the long run, the successful coaches may be those who learn to integrate the teams and adjust the game to take advantage of all of their players, rather than forcing women to replicate the existing styles and strategies.

#### *D. Problems of Academic and Financial Integrity*

Even if one finds the idea of coed football ridiculous, it is at least apparent how such a proposal might solve many of the subtle and not-so-subtle issues of gender equity in athletics. Men and women would have the same access to the same sports being played under completely identical conditions. But how would coed teams eliminate the rampant problems of academic and financial integrity identified by the Knight Commission and the Shulman/Bowen research? There may be nothing inherent in the nature of coed versus sex-segregated sports teams that will stop or even slow down these escalating problems in big-time sports. The current quagmire could continue unabated, the proposal simply adding more women to the mix as potential victims or beneficiaries, depending on your perspective.

Proposing coed sports teams as a "cure" for the professionalism and commercialism "diseases" of the high profile sports is, admittedly, speculative at best. There are some grounds for cautious optimism, however. The sports that drive these trends—men's football and men's basketball—will no longer exist. Pressure to replicate the professional teams at the college level may diminish significantly when those teams cease to "look" the same. In adapting to integrate women, the college coaches may well be developing and coaching a different kind of game.

The Knight Commission and Shulman/Bowen agree that intercollegiate athletics are out of control and urge the academic leadership of higher education

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<sup>251</sup> KNIGHT REPORT 2001, *supra* note 7, at 27 ("Consider coaches' compensation in the context of the academic institutions that employ them. Coaches' jobs should be primarily to educate young people. Their compensation should be brought into line with prevailing norms across the institution.").

to take back the responsibility and oversight for these programs.<sup>252</sup> The challenge may be something like stopping a runaway train; the odds of slowing the momentum seem slim without derailing it altogether. The experiences of the last decade should make us pessimistic about expecting change when operating the same programs under the same pressures on the thin hope that our administrators will be able to take charge if only they try harder.

The Knight Commission and the Shulman/Bowen recommendations rely heavily on the ability of academic leaders and administrators to reassert control over the institution's athletic programs. Introducing coed sports could provide the kind of "shock to the system" that demands a fundamental re-evaluation and the catalyst to make such leadership possible. Changing a few rules about eligibility or putting more controls on corporate sponsorships does little to undermine the basic nature of these programs. Coed teams assume, at least in the short run, that fielding the "best" football or basketball team is no longer the goal. If this were the objective, competitive and gender-blind selection would be warranted, and men likely would dominate those teams. Indeed, given the structure and built-in biases of the current system, only men would be selected because only men would be recruited. In big time college sports, the team is chosen long before any tryout opportunities.

Our schools need new goals and a new vision for sports programs—a different way of looking at this particular function *within* the mission of an academic institution. That task will be more attainable if we can begin by altering the very nature of the entity. The drastic and fundamental change proposed here has at least that potential. It is a different "beast" because it challenges our basic assumptions about sports.

## VI. CONCLUSION

Our society has been struggling for over half a century to understand and address the race and sex discrimination that permeates much of our history. There are few opportunities for quick fixes. Title VII has been on the books for almost forty years, yet women and minorities remain behind in salary and access to the best jobs. Our schools were desegregated fifty years ago, yet the quality of education for many of our minority children continues to lag. Progress has, at times, been frustratingly slow on both fronts. School sports, admittedly a small piece of these broader problems, have been relegated to the same slow advances with no real end in sight.

The real travesty of *Mercer v. Duke University* was more than simply Mercer's lost opportunity to play a college sport, or an anachronistic rule about women's acceptable roles. An institution as prestigious as Duke University—

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<sup>252</sup> See KNIGHT REPORT 2001, *supra* note 7, at 26; SHULMAN & BOWEN, *supra* note 22, at 307.



headed by one of the most accomplished women in university administration<sup>253</sup>—should be embarrassed that it was reduced to defending this action. As stated in Duke University's own annual report for 2000–2001, "American higher education is widely admired throughout the world. Private research universities occupy a special place in American higher education, and Duke University ranks in the top echelon of those institutions."<sup>254</sup> As the leader in higher education that it purports to be, the university should be at the forefront of equal opportunity instead of hiding behind archaic notions of sports and women. Coach Fuhr's employer, Hazel Park School District, similarly is teaching its younger students by example and should be aspiring to no less.

Creating coed sports offers a rare opportunity to address issues of discrimination by fundamentally rethinking and reconstituting the way we look at this part of our world. The lessons our students are learning in the examples set by the current system of segregation reinforces the basic message that the girls are not good enough and never will be. This message is far from the inherent truth we have accepted it to be. It is, instead, a byproduct of the way in which we have chosen (or have allowed others) to define the system. Our educational system, as it has in countless other arenas, should be leading the way instead of reinforcing the status quo. Unless our schools can bring to the game the same educational character they bring to their other endeavors, they should not be playing at all.

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<sup>253</sup> Dr. Nannerl O. Koehane has been the president of Duke University since 1993. She has a Ph.D. from Yale University, and has taught at Swarthmore College, the University of Pennsylvania, and Stanford University. Prior to assuming the presidency at Duke, she had been president of Wellesley College since 1981. For more biographical information on Dr. Koehane see <http://www.duke.edu/web/president/Bio.htm> (last visited Aug. 18, 2002).

<sup>254</sup> DUKE UNIV., BUILDING ON EXCELLENCE: THE UNIVERSITY PLAN 4 (2001), available at <http://xena.oit.duke.edu/planning/univupdateII.pdf>.

