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When Ignorance is not Bliss: In Search of Racial and Gender Equity in Intercollegiate Athletics

Rodney K. Smith*

I. INTRODUCTION

In popular American parlance, we commonly refer to an athlete as a "jock."¹ The Random House Unabridged Dictionary² notes that the formal

* Professor of Law, Capital University Law School. I am grateful to President Josiah Blackmore and Dean Steven Bahls for a generous summer research stipend that made this Article possible. I am also grateful to the following who read and made thoughtful comments regarding an early draft of this article: Robert N. Davis; Timothy Davis; Rob Guite; Daniel T. Kobil; Robert Justin Lipkin; Matthew J. Mitten; James A.R. Nafziger; Barbara Rook Snyder; Athornia Steele; Carl W. Tobias; N. Douglas Wells; and, the students in my Amateur Sports Law class. I also received fine research assistance, especially with regard to the footnotes, from Christie Woodruff, and secretarial support from Phyllis Cole. Despite able commentary from so many sources, any remaining errors are my own.

1. Comments from several athletes and prominent college administrators are illustrative. In discussing stiffer academic requirements for participation in athletics, Malcolm Christie, an African-American student-athlete, noted that, "We just can't be dumb jocks." Ira Berkow, *Sports of the Times: Goal-line Stand in Learning*, N.Y. TIMES, Nov. 26, 1983, at § 1, page 19, col. 4. Women athletes also refer to themselves as "jocks" on occasion. Summer Sanders, the most successful U.S. swimmer in the 1992 Summer Olympic Games said that one reason many women may not compete in athletics is that they do not "want to look like a jock." Tara Sullivan, *Timeout*, NEWSDAY, Aug. 29, 1993, at 7. Donna Shalala, former Chancellor of the University of Wisconsin and current Secretary of Health and Human Services, points out that she is "not just a jock [because] she collects contemporary paintings and sculptures." Barbara Matusow, *Shalala's Game*, WASHINGTONIAN, March 1994, Feature Section. Other academic administrators also use the term "jock" to refer to athletes and institutions. After the men's soccer team made it to the NCAA finals in 1983, Robert E. Pollack, Dean of Columbia College, stated that, "It's very exciting to be dean of the jock school of the Ivy League." Maureen Dowd, *Soccer Team Gives Lions Chance to Roar*, N.Y. TIMES, Dec. 9, 1983, at B1. Michael Hooker, President of the five-college University of Massachusetts system, in referring to the success of the school's basketball team, noted that, "I'm not trying to build a jock school. I want to create a high-quality academic institution, and athletics is one way to do that." Sam Walker, *UMass Banking on Basketball*, CHRISTIAN SCI. MONITOR, Dec. 5, 1994, at 4. Father Edward Malloy, President of Notre Dame University, once mused that, "Dick Conklin [the University's director of public relations] is scared to death that I've

definition of "jock" is "a jockstrap."³ The informal definition, in turn, is "an athlete."⁴ Using the term "jock" to describe "an athlete" certainly has sexist,⁵ and perhaps even racial,⁶ implications. Given this apparent bias at the popular

become the jock college President." Alex Ward, *Monk Molloy's Notre Dame*, N.Y. TIMES, June 12, 1988, § 6 at 32.

2. The Random House Unabridged Dictionary is cited, because it contains formal and informal (popular cultural) definitions to terms. Neither the Oxford nor Webster's Third New International Dictionary contain the informal definition of "jock."

3. RANDOM HOUSE UNABRIDGED DICTIONARY 1030 (2d ed. 1993). "Jockstrap," in turn, is defined as: "as elasticized belt, a men's undergarment, with a pouch for supporting and protecting genitals, worn especially when participating in athletics. Also called an athletic supporter." *Id.* at 1031. When the term "jockstrap" first began to be used, in 1895-1900, the term "jock" commonly referred to "Jack" or "male." *Id.*

4. *Id.* at 1030. The American Heritage Dictionary also indicates that the "slang" definitions of "jock" are: "a. A male athlete, esp. in college. b. One characterized by excessive concern for machismo." AM. HERITAGE DICTIONARY 689 (2d ed. 1982).

5. Women do not wear "jockstraps." "Jock" is short for "jockstrap," which, in turn, is derived from (or a combination of) "Jock," meaning "Jack" or "male", and strap, referring to an athletics supporter designed to protect the male genitals. That women athletes may today, perhaps unwittingly, refer to themselves as "jocks" does not negate the obvious gender-based distinction inherent in the term.

6. The rise of the term "jock" to describe athletes in our popular culture, with its physiological and sexual connotations, closely coincides with the rise to prominence of athletes of color, particularly African-American male athletes. This coincidence may have racial implications. Professor Timothy Davis notes that:

[A]lthough the specific explanations for the superior performance of African-Americans has changed over time, a consistent trend emerges: the emphasis on physiological attributes. This is not surprising given that the dominant culture is both fascinated and troubled by the dominance of blacks in certain sports. . . . [T]he unwarranted focus on physiological attributes ameliorates for white Americans the troubling aspects of African-American sports dominance.

Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 649 (1995) (citations omitted). Professor Davis goes on to quote Professor Wiggins:

By acknowledging a physiological basis for black superiority [in athletics], whites . . . could more easily maintain the broad range of black character they found acceptable Acknowledgment of physical superiority did nothing to disrupt the feeling among a large segment of the white population that blacks were either docile or savage, faithful or tricky, pathetic or comical, childish or oversexed. . . The notions of hard work, dedication, and sacrifice [known as the Protestant work ethic] were rarely used by white commentators to describe the efforts of [notable black athletes].

Id. at 649-50.

cultural level, it should not be surprising to discover, as discussed in this Article, that racial and gender-based inequity is prevalent in the context of intercollegiate athletics.

While racial and gender-based inequities regularly occur throughout our broader culture,⁷ this Article focuses on their presence in the context of athletics. Part II of this Article examines possible racial and gender implications associated with the common unwillingness, in the academic context, to take seriously the academic skills or values that may attend participation in athletics. Effective efforts to deal with racial and gender-based inequity in the operation of intercollegiate athletics will have to account for the presence of this broader academic ambivalence toward participation in athletics.

Part III, in turn, deals with the existence of racial and gender inequity in athletics generally, and specifically, in intercollegiate athletics at the Division I level.⁸ This section describes the nature and extent of racial and gender inequity in athletics, and demonstrates that efforts to date to remedy racial and gender inequity have been inadequate. It also points out that efforts to address

7. See, e.g., LESLIE BENDER AND DAAN BRAVEMAN, *POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER* 141-345 (1995) for materials depicting the pervasiveness of racial and gender-based discrimination and inequity in contemporary society. See also *RACISM IN COLLEGE ATHLETICS: THE AFRICAN-AMERICAN ATHLETE'S EXPERIENCE* (Dana Brooks & Ronald Althouse eds., 1993), for a collection of essays analyzing the extensiveness of racial discrimination in athletics and proposing strategies for change.

8. National Collegiate Athletic Association (hereinafter "NCAA") member schools compete in one of three divisions. See NCAA CONST. art. 3, § 3.01, *reprinted in NATIONAL COLLEGIATE ATHLETIC ASS'N 1995-96 THE NCAA MANUAL* 7 (1995) [hereinafter *THE NCAA MANUAL*], for a general discussion regarding Divisional membership. This article focuses largely on racial and gender inequity at the Division I level. Schools competing at the Division I level generally provide their student-athletes on scholarship with significant financial assistance typically including room, board, books, tuition, and some grant support. *Id.* at 181-193 (setting forth article 15 of the Bylaws). Men's football and basketball at the Division I level are revenue-producing and often generate a profit, while other sports tend to lose money. For example, the latest figures available indicate that two-thirds of the Division I football and basketball programs produced "profits averaging \$3.9 million and \$1.6 million, respectively." Debra E. Blum, *Sports Programs Continue to Lose Money, Survey Finds*, *THE CHRON. OF HIGHER EDUC.*, Sept. 7, 1994, at A58. The revenue-producing capacity of Division I men's basketball and football has resulted in their playing a significant role in their respective institution's budgeting processes and has led commentators to refer to them as "big-time." Rodney K. Smith, *An Academic Game Plan for Reforming Big-Time Intercollegiate Athletics*, 67 *DENV. U. L. REV.* 213 (1990). As will be shown in this article, it is at this level that racial and gender inequity has the most significant economic implications for athletes.

inequity in one area (e.g., gender equity) often have an adverse impact on the other area (e.g., racial equity).⁹ Efforts to achieve racial and gender equity in intercollegiate athletics must be sensitive to potential adverse ramifications, for equity purposes, elsewhere. This sensitivity must lead to cooperation if meaningful solutions are to be forthcoming.

Part IV examines a number of reform and related efforts designed to enhance racial and gender equity in intercollegiate athletics. In particular, this section addresses litigation and legislative¹⁰ strategies, at the federal, state, associational¹¹ and institutional levels. A summary and call to action is included in the concluding section, Part V.

II. SPORT AND ACADEMIC VALUES AT THE CULTURAL LEVEL

In a culture often preoccupied with sport, it is astounding, as noted by Professors Gorn and Oriard, "that athletics have remained so far beyond the boundary of intellectual discourse, [despite the fact that the] study of sport can take us to the very heart of critical issues in the study of culture and society."¹² Professor Hyland, a philosopher, agrees:

There is a long tradition that calls on the academy, as one of its central tasks, to reflect on and analyze social phenomena that play an important role in a given culture. Thus, there are many varied considerations of the role of politics, religion, music, and the arts by the various disciplines in the academy, certainly including philosophy. Arguably, however, that social phenomenon in American life which has the biggest impact on our culture, yet which receives the least serious attention from our intellectual standard-bearers, is sport and athletics. There seems to be a long-standing prejudice

9. See *infra* at notes 114-127, and accompanying text, for a discussion of how efforts to ensure gender equity at the Division I level often are directed at limiting male participation in sports, including men's football and basketball. By limiting the number of scholarships in men's football and basketball, it becomes easier to provide a similar number of scholarships for women in existing or additional women's sports. Cutting men's football and basketball scholarships, however, has severe racial implications, since many of the male student-athletes being deprived of scholarship assistance are student-athletes of color. Focusing on enhancing the profitability of men's basketball and football, in turn, often has the effect of relegating women's sports to a second-class status, in terms of resource allocations for women's sports and participation opportunities for women student-athletes.

10. The term "legislative" is being used in a broad sense, to include traditional legislation and rulemaking at the administrative level.

11. The associations covered include: accrediting bodies, the NCAA, and athletic conferences.

12. Elliott J. Gorn & Michael Oriard, *Taking Sports Seriously*, THE CHRON. OF HIGHER EDUC., March 24, 1995, at A52.

that however popular a phenomenon sport may be, it is simply not 'serious' enough to be a legitimate subject of intellectual inquiry. That has certainly been one of the long-standing prejudices of professional philosophy.¹³

This failure to study the role of sport in contemporary society may, as Hyland suggests, reflect some prejudice and may have adverse implications for racial and gender equity in athletics. For many academics, the study of sport or participation in athletics is considered to be so trivial as to be beneath serious consideration by the intellectually inclined.

This trivialization of athletics by the academic community, in turn, may further obscure the damage done by racial and gender inequities in athletics at all levels, and may make it more difficult to confront such inequity.¹⁴ If participation in athletics does involve academic skills and values,¹⁵ then the failure to recognize that fact may have significant racial and gender implications.

If we ignore the intellectual component of sport, we trivialize the significance of such participation. Athletes in our most popular, revenue-producing sports¹⁶ are recognized almost entirely for their physical and not for their intellectual prowess. Given that African-American male athletes have come to dominate in many athletic contexts, their participation may be

13. DREW A. HYLAND, *PHILOSOPHY OF SPORT* xiii (1990).

14. Educators at all levels have limited time and resources and, therefore, need to focus on particular subjects. If participation in athletics is not considered to be an important part of the academy, then racial and gender inequity in participation in athletics may want for academic attention, as time and resources are allocated to crises in other areas perceived as being integral parts of the educational enterprise.

15. The terms "skills and values" are used in the same sense that they were used in the MacCrate Report, which perhaps constitutes the most complete analysis of legal education ever undertaken in the United States. TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, STATEMENT OF FUNDAMENTAL LAWYERING SKILLS AND PROFESSIONAL VALUES (ABA, Section of Legal Education and Admission to the Bar, 1992) [commonly referred to as the "MacCrate Report"]. The MacCrate Report breaks down skills and values into ten fundamental skills and four fundamental values for attorneys. The task force recognizes that not all lawyers will possess these attributes equally. In its exposition on "skills and values," the task force "seeks to define the lawyering skills and professional values with which every lawyer should be familiar prior to assuming the full responsibilities of a member of the legal profession." *Id.* at 2.

16. At the broader cultural or societal level, in the United States, the most popular (economically successful) spectator sports include baseball, basketball and football.

particularly devalued in an intellectual sense.¹⁷ This devaluation may itself be a form of racial inequity.¹⁸

The failure to recognize the academic dimension of participation in athletics may have significant gender-related ramifications as well. If there are educational skills and values that can be derived from participation in athletics, the fact that women participate in far fewer numbers¹⁹ has significant implications for women. In being denied equal opportunity to participate in athletics at all levels,²⁰ women may be precluded from having the opportunity of mastering those educational skills and values that may be most effectively learned within the context of athletics. If, on the other hand, there is only limited educational content related to participation in athletics, the harm done to women, while important in the sense that they are precluded from full participation in a form of entertainment, would be less significant, at least in an educational sense.

It is necessary, therefore, to ascertain whether there are educational skills and values that are related to participation in athletics. Those who argue against supporting athletics on the ground that participation lacks significant educational or instructional content rarely offer clearly articulated reasons for their conclusions.²¹ For them, the nonacademic nature of participation in

17. Professor Davis "underscores what Professor Harry Edwards characterized as the three strikes that burden African-American student athletes": 1. "reverberations of the 'dumb jock' caricature, which transcend racial boundaries"; 2. "racial implications of the myth of 'innate black athletic superiority' [or innate physiological advantage]"; and, 3. "the insidiously racist implications of the stereotype of the 'dumb negro' condemned by racial heritage to intellectual inferiority." Davis, *supra* note 6, at 669. Failure to acknowledge the intellectual or academic dimensions of participation in athletics only helps to reinforce these "three strikes," with their racial implications.

18. See *infra* notes 23-36 and accompanying text, for a number of arguments supporting the conclusion that athletics have academic or intellectual content. At a minimum, those arguments should shift the burden of persuasion to those who contend that there is no real academic content in participation in athletics.

19. See *infra* notes 41-43 and accompanying text, for a discussion of the lower participation rates of women in athletics at all levels.

20. It is likely that different academic skills and values maybe learned at different levels of competition or participation. Technical understanding, for example, may be learned more effectively at higher levels of competition. Insuring access, from a learning perspective, may therefore be significant at all levels of competition.

21. For example, when Richard Wagner, Executive Director of the Illinois Board of Higher Education, was presented with a proposal to provide additional tuition waivers for women to participate in intercollegiate athletics, he responded, "[M]y own personal view is that we have a higher priority to use the funds for academic instruction." Andrew Gottesman, *Gender Equity Has Its Price: Do You Pay It?*, CHI. TRIB., June 13, 1995, Sports, at 1. Donald Spencer, President of Western Illinois University, made a similar comment, in the same context: "We've got [sic] the highest

athletics appears to be a given, as a matter of implicit syllogistic reasoning.²²

There are, however, a number of educational skills and values directly related to participation in athletics. At the most direct level, some academics maintain that participation in competitive athletics is analogous to participation on the part of many students in a basic biology class,²³ teaching the student memorization and basic analytical skills. Although it is unlikely that a student in the basic biology class will use what is learned in that class on a daily, or

percentage of money going to classrooms (among state schools), and that's not a commitment that I'm going to back off of now. Whatever we do on Title IX [in the context of athletics] is going to come without additional resources." *Id.* Neither Wagner nor Spencer offered any further explanation for their conclusions that participation in athletics is of little academic value.

22. Their reasoning seems to run as follows: i. athletics is a physical form of entertainment or game; ii. physical games and entertainment are not intellectual (or academic) in any significant sense; therefore, iii. athletics is not intellectual (or academic) in any significant sense.

23. Professor Travaglio has suggested that we should:

[A]sk how intercollegiate athletics compares to other things that we do on campus. How is intercollegiate athletics different from what occurs in the Chemistry Department, or the Dance Department, or what is done by a music major in a performance?

Gregory M. Travaglio, *Values and Schizophrenia in Intercollegiate Athletics*, 20 CAP. U. L. REV. 587, 592 (1991). He offers a partial answer when he notes that:

Last year, as a member of the Faculty Athletic Council at Ohio State, I was privileged to spend a game day with the Ohio State football team. The morning before the game is filled with meetings of various components of the team. The two faculty 'assistant coaches,' of which I was one, were permitted a copy of the playbook to review and were allowed to attend these meetings. As someone who had played some organized football (although not on the collegiate level and not well enough that I like to be reminded of it very often), I must say that these meetings were largely incomprehensible to me. The size and complexity of the playbook was nothing short of astonishing. The terminology, not unique to Ohio State, but, I am told, in general use in collegiate football, was strange and complex. The playbook was daunting, to say the least, and the players' mastery of it was more than impressive. If a mission of the university is to require its students to master a body of complex material in a particular subject area, this is precisely what occurred. This task compared favorably to some of the introductory courses for which I had received college credit for rote memorization of simple facts. I would much rather be in Biology 100 than Football 501.

Id. at 592. Professor Travaglio concludes that, "[t]he point is that to the extent that we decide that intercollegiate athletics constitutes a discipline like others on campus, our decision would go a long way in telling us how to treat it, and thus how to reform what we presently have in place." *Id.* at 593.

even a regular, basis in her employment, the course is nevertheless considered to be of academic worth. The same concept can be applied to a complex football playbook—the athlete learns to analyze how to respond to a unique set of complex situations by memorizing and applying an elaborate set of fundamental rules or plays that are designed to respond to certain situations as they arise. There is much that can be learned in other sports as well. In swimming, for example, swimmers learn to swim faster by breaking down each stroke in a scientific manner.²⁴ By understanding the physics, geometry and hydrodynamics associated with each stroke, a swimmer can apply that learning in a practical (clinical) setting to improve her performance.²⁵

Drawing an analogy to the arts, Donna Lopiano has argued that:

Athletics, like music, art and drama is a performing art. The athletic contest is no different than the theatre or the symphony, albeit the audience appears to be more rabid. . . . Athletics and theater must be, at their heart, laboratory settings where the exceptionally talented student maximizes his or her potential.²⁶

In a related sense, Professor Travaglio inquires: "Why do we give a maximum of ten hours of credit at Ohio State over four years for participation in

24. See, e.g., ERNEST W. MAGLISCHO, SWIMMING EVEN FASTER 296-595 (1993), for materials discussing the scientific nature of swimming. When discussing the butterfly stroke he explains:

The downbeat of the first dolphin kick of the stroke cycle facilitates the outswEEP. That kick, which is made in conjunction with the outswEEP, produces the undulation that pushes the arms out and forward. This action of the kick helps swimmers to overcome their inertia as they change the directions of their hands from in to out between the entry and catch. The change of arm direction from in to out can also be facilitated if the arms are flexed slightly at the elbows when they enter the water. Extending them at the elbows after the arms enter the water will change their direction from in to out so that their inward inertia can be overcome with less disruption of forward velocity. It is not essential for swimmers to flex their elbows during the recovery because the kick provides a means for overcoming the inertia when the hands change directions from in to out. Nevertheless, this change in direction can be completed with less muscular effort if the arms are extended immediately after they enter the water.

Id. at 416.

25. Participation in athletics may, therefore, provide a student with a clinical experience, in which what is learned in physics or geometry might become quite relevant.

26. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PROCEEDINGS OF THE SIXTH SPECIAL CONVENTION 72 (Dallas, Texas, June 29-30, 1987). See also HYLAND, *supra* note 13, at 102-122 (thoughtfully discussing sport as art and aesthetic).

intercollegiate athletics, and allow triple that amount for dance practicum?"²⁷ The analogy between dance and athletics is particularly close in many instances. One senses something artistic in observing an accomplished basketball player "make a move." The analogy raised by Professors Lopiano and Travaglio seems to be strong enough that the burden ought to shift to those who acknowledge that dance has academic value, but contend that participation in athletics does not, to explain why the two are different from an academic perspective.

Others have likened participation in athletics to research. President Kenneth J. Weller has argued that:

A pervasive and logical case can and should be made for athletics programs based on societal objectives [like those that attend support for research]. Like research, athletics can become somewhat autonomous in its organization and can be financed from outside sources, and like research it can and should be respected as an integral part of the mission of an educational institution.²⁸

Unfortunately, President Weller offers little elaboration on this point, and the connection between "research" and "participation in athletics" may be somewhat tenuous. The connection might be stronger if one engaged in more research directly related to sport, however. There are a number of ways in which this might be done: (1) performance itself could be studied in order to determine ways in which an athlete might enhance her abilities, (2) less tangible skills that appear to be learned in the sports context (e.g., leadership and interpersonal skills) might be studied in a more thoughtful manner, and (3) the role of sport in society, including the role of spectators and participants, might be carefully studied. In this sense, intercollegiate athletics is analogous to a valuable laboratory ready to be used for the study of a subject of immense importance in our contemporary society. Student-athletes could benefit greatly from being participants, as opposed to mere subjects, in

27. Travaglio, *supra* note 23, at 592.

28. NATIONAL COLLEGIATE ATHLETIC'S ASSOCIATION, NCAA PRESIDENTS COMMISSION THIRD NATIONAL FORUM 36 (1988). Research is valued, in part because students benefit from participating in a practical project, and in even more significant measure because of the potential social value of the project itself. This, by analogy, is true of participation in athletics at the intercollegiate level, as well. Since students are direct participants, under the instruction of coaches, student-athletes may benefit more from their participation than do research assistants, who play a much more secondary role. The athletic event, like the research project, also arguably provides social benefits. The social benefits include the creation of a sense of common purpose or community and of recognition for the university. *See, e.g., infra* notes 39-40 and accompanying text for a discussion of this benefit.

such studies. For example, teaching physics and other academic subjects with actual examples from sport might bring relevance to the subject matter in ways that would be intellectually captivating to students. If these examples could be demonstrated clinically, in the sporting context, students and athletes alike could observe principles at work.

Professor Hyland has noted that, "sport is a vivid and explicit combination of mental and physical activity. It thus offers a fascinating occasion for reflection on their interaction."²⁹ He adds that, "through participation in athletics many of us are or can be led to a position on the [major philosophical issue of the relationship between mind and body] which rings true to our own lives, and so becomes itself a part of the self-knowledge which it is the office of philosophy to seek."³⁰ This form of self-knowledge is significant and would be emphasized further in an educational sense, if we encouraged student-athletes to reflect on philosophical issues that arise in the sports context. Regrettably, however, present reluctance to characterize sport as an area of academic study apparently has negated the teaching of the philosophical insights that inhere in sport. Participation in athletics provides a largely untapped forum—a clinical opportunity—for the study of many perplexing philosophical, psychological and other issues.³¹ If athletic participation in the intercollegiate context were accorded academic weight or value, at least in a presumptive sense, such study might be legitimized and made a part of our educational process.

In addition to its potential for traditional educational benefit, participation in athletics arguably enhances academic performance in an inherent sense. Allen Guttmann has argued that, "[i]n sport we can discover the euphoric sense of wholeness, autonomy, and potency which is often denied us in the

29. HYLAND, *supra* note 13, at 89. Hyland examines various philosophical and psychological models (dualism, materialism or physicalism, phenomenology, and the Platonic view) in the context of participation in athletics. HYLAND, *supra* note 13, at 89-100. He concludes that,

Sport, combining in such intimacy our mental and physical capabilities, offers a marvelous testing ground for some of the major theories that have been put forward to explain this intimate connection between the mental and the physical in human beings. Does it resolve the problem in favor of one or another theory? Hardly. But it does offer us that arena for asking those questions which can move us toward at least a plausible position on this important issue.

HYLAND, *supra* note 13, at 99.

30. HYLAND, *supra* note 13, at 100-01.

31. The unwillingness to recognize the educational potential of sport has precluded us from taking advantage of the clinical opportunities for teaching philosophy, psychology and other academic subject matter in that context.

dreary rounds of routinized work that are the fate of most men and women.³² With a sense of wholeness, a student-athlete is better equipped to engage in the rigors of academic life. Additionally, participation in athletics also provides a means of dealing with stress and enlivening the mind, reinvigorating one for a return to more formal work and study.³³ There is also evidence that regular physical exercise increases creativity.³⁴

Research clearly indicates that there are significant academic-related benefits that result from participation in a regular regimen of physical exercise. Although research indicates that regular exercise often enhances academic capacity, it does not necessarily support the same conclusion for highly competitive intercollegiate athletics, except insofar as participation at that level provides the student-athlete with a regular exercise regimen. Student-athletes are generally required to engage in regular exercise, however, both in-season and out-of-season and are, therefore, recipients of the academic benefits that attend an enforced regimen of regular exercise.

In addition to providing an inviting base for certain educational and related benefits and instruction in a variety of educational skills, participation in athletics may provide a forum for teaching certain values. Norma V.

32. ALLEN GUTTMANN, FROM RITUAL TO RECORD: THE NATURE OF MODERN SPORTS 157 (1978).

33. Regular workouts can treat people with depression and anxiety. See, e.g., Kevin Cobb, *Beyond Endorphins: The Latest Research on Runner's High*, 8 AMERICAN HEALTH 78, 80 (1989). Robert S. Brown, clinical professor of psychiatric medicine at the University of Virginia has noted that regular exercise has been shown to build self-esteem and fight depression. In an effort to explain this phenomenon, he adds that, "You get more circulation to the brain [during exercise], so you're more likely to have normal recall instead of getting bogged down in unpleasant memories." Stephen Perrine, *The Mind/Body Connection*, MEN'S HEALTH, Sept. 1994, at 62.

34. See Susan Chollar, *The Psychological Benefits of Exercise*, 14 AMERICAN HEALTH 72 (June, 1995). Chollar's article cites the work of Professor Joan Gondola, an exercise psychologist at New York City's Baruch College. Professor Gondola found that, "college students who ran regularly or took aerobic dance classes scored significantly higher on a standard psychological test of creativity than students who hadn't exercised." *Id.* at 74. Professor Kenneth Callen, an associate professor of psychiatry at the Oregon Health Sciences University in Portland agrees: "[f]or some people, the creative thinking that occurs during and after exercise is quite pronounced." Perrine, *supra* note 33, at 62. Referring to two other studies, Perrine adds that:

In a study at Ohio State University, students who participated in aerobics three times a week not only improved their fitness, but also significantly lowered their test anxiety levels in less than two months. In another study, researchers in Kansas found that men who jogged at least 20 minutes a day three times a week were less anxious and expressed less anger, hostility and aggression than nonexercisers.

Perrine, *supra* note 33, at 69.

Cantu, assistant secretary for civil rights in the Justice Department, asserts that, "values we learn from participation in sports [include] teamwork, standards, leadership, discipline, work ethics, self-sacrifice, pride in accomplishment, [and] strength of character."³⁵ A careful examination of each of these values, some of which are controversial, is beyond the scope of this Article. Cantu, however, offers some empirical evidence to support her conclusion that these, or other equally significant skills and values, can be effectively taught in the athletic context. She notes, for example, that, "80 percent of the women who were identified as key leaders in the Fortune 500 companies had sports backgrounds."³⁶ In empirically supporting her assertion that sport teaches skills and values, Cantu stresses that, "according to the Institute for Athletics and Education, girls who participate in sports are three times more likely to graduate from high school, 80 percent less likely to have unwanted pregnancies, and 92 percent less likely to use drugs."³⁷ A study of female student-athletes at California State University, San Bernardino, also found that they had more positive perceptions of themselves than did non-athletic women.³⁸

35. Norma V. Cantu, *Guest Editorial: Athletics Experience Vital to Both Sexes*, THE NCAA NEWS, April 26, 1995, at 4. Not surprisingly, Cantu goes on to argue that women need and desire these values as much as men. President Gordon Gee, of Ohio State University, makes a similar assertion: "athletic competition had its origins in the Greek ideal of education. Apart from intellectual and aesthetic development, physical education and competition were essential to molding character." E. Gordon Gee, *A College Superbowl: The Ultimate Sellout*, N.Y. TIMES, Jan. 1, 1990, at 19. It must be conceded, however, that participation in athletics may do "as much to build characters (see, e.g., Brian Bosworth, Jim McMahon, etc.) as it does to build character." Smith, *supra* note 8, at 221 n.35.

36. Cantu, *supra* note 35, at 4. She adds that 93 percent of women agree that women who participate in sport are better able to compete later in life. Cantu, *supra* note 35, at 12. She also points out that a "federal commission was asked to examine the new demands of the workplace and whether young people would be capable of meeting those demands, [and concludes that], many [of the competencies, skills and qualities noted] relate to those that are often byproducts of athletics participation." Cantu, *supra* note 35, at 4, 12.

37. Cantu, *supra* note 35, at 4. While these figures relate to participation in athletics by young women, and may be attributable to benefits of participation unrelated to any particular academic skill or value, they do indicate that there are clear benefits that may be tied to some skill or value. Cantu, and others can, therefore, argue with some force that the burden of going forward—of presenting evidence—should be shifted to those who assert that there are no educational skills or values attributable to participation in athletics.

38. Gordon Bakoulis Bloch, *Sports and Your Career*, 14 WORKING WOMEN 137 (June 1989).

In addition to academic skills and values that may be learned through participation in athletics, athletics itself may contribute to the building of a sense of community. Ernest Boyer noted that, "big-time sport, collegiate and professional, is becoming the new civil authority in our culture. It draws pride and unifies the community the same way that great cathedrals did in earlier times."³⁹ In our diverse culture, characterized by a wide variety of ethnic, religious, socio-economic and other groups, there may well be no other force quite like sport, in terms of bringing people of diverse backgrounds together in pursuit of a common purpose. People from all walks of life are able to sense some unity of purpose as they gather to participate in or watch competitive athletics.⁴⁰ With growing divisiveness on the basis of ethnic, religious and cultural differences, the capacity of sport to unify may be of increasing significance, particularly if teams are not divided on the basis of race, religion or culture. Deep friendships that transcend such differences are often forged in the crucible of athletic competition. The need for such a sense of connection or community is significant, although the capacity of sport to contribute to connectedness may be discounted by those who refuse to embrace sport as anything more than mere fun and games.

In conclusion, there is substantial evidence that there are academic benefits, skills, and values that are closely related to participation in athletics. The burden, therefore, shifts to academics who oppose this proposition to provide a more substantive response than they have provided to date. They must offer more support for their assertion that participation in athletics is of little or no academic value. Absent such a showing, evidence of racial and gender inequities in sport is all the more disquieting because those inequities may result in unacknowledged academic and career disadvantages.

III. RACIAL AND GENDER-BASED DISCRIMINATION IN ATHLETICS

This section examines racial and gender inequity in athletics by describing the persistent presence of racial and gender-based disparities. This section, in turn, is divided into two subparts: (A) Gender-based Inequity in Athletics, and (B) Racial Inequity in Athletics. While some discussion regarding inequity in athletics at all levels will be included, the focus in each

39. BOYER IN R. LAPCHICK AND J. SLAUGHTER, *THE RULES OF THE GAME: ETHICS IN COLLEGE SPORT* xi (1989). It may be regrettable that people in contemporary culture seem to be drawn to athletic contests instead of cathedrals, but it is evident that they are.

40. The Olympics demonstrates how forcefully this is true at the national level, as we all draw together to support our athletes as they compete against the best athletes from other nations. It is a moment, perhaps like no other in contemporary American culture, when we draw together, united by a common purpose.

subpart will be on discrimination in intercollegiate athletics, particularly at the Division I level.

A. Gender-based Inequity in Athletics

Women have been much less involved in athletics at all levels—as participants, coaches and administrators—than men. The NCAA Gender-Equity Task Force recently reported that, "[c]urrently, more than 3.4 million male [64 percent] and 1.9 million female [36 percent] student-athletes participate at the high school level, compared with 186,045 male [66 percent] and 96,467 female [34 percent] student-athletes in NCAA sports."⁴¹ These participation disparities and the inequity implied by them⁴² are compounded

41. NCAA GENDER-EQUITY TASK FORCE REPORT 4 (1993). During the first decade after passage of Title IX in 1972, "the percentage of girls [participating] in interscholastic [high school] programs rose from 7 percent to 35 percent." Connie M. Thorngren and Barbara S. Eisenbarth, *Games Yet to Be Played: Equity in Sport Leadership*, WOMEN'S EDUC. EQUITY ACT PUBLISHING CENTER DIG., June 1994 at 1.

For the decade from 1977-78, the academic year just before the Title IX mandatory compliance date, to 1986-87, there was a significant increase in the number of women's sports offered (from 5.61 per school to 7.24 per school) and in participation by women in intercollegiate athletics. R. VIVIAN ACOSTA AND LINDA JEAN CARPENTER, *WOMEN IN INTERCOLLEGIATE SPORT: A LONGITUDINAL STUDY—SEVENTEEN YEAR UPDATE 1977-1994*, at 3 (1994).

Since the impressive growth experienced in the first decade after passage of Title IX, however, growth has been much more sporadic. For example, the number of sports offered for women at the intercollegiate level has actually decreased from 7.24 in 1986-87 to 7.22 in 1993-94 (the last figures reported). *Id.* There has actually been growth in participation by women student-athletes since 1990-91, however. In 1990-91, 92,778 (as compared to 84,765 in 1983-1984) women participated in intercollegiate athletics at NCAA member institutions. By 1993-94, 105,532 women were participating (for a net increase in three years of 12,744 [13.7% increase]). During the decade from 1984-85 to 1993-94, the number of men participating in intercollegiate athletics at NCAA member institutions dropped from 201,063 to 189,642, although there was an increase in male participation from 1990-91 to 1993-94 (184,593 to 189,642). *Id.* It is clear, nevertheless, that women continue to participate at much lower rates than men. Additionally, while the percentage of women participating has increased over the past decade, some of that increase has been less a result of actual increased participation, in terms of the total number of women participating, and more a result of decreased or static participation opportunities for male athletes.

42. The disparities in participation imply inequity. While such "inequity" is merely implied at this juncture, the burden should be on those who assert that those disparities are not inequitable by demonstrating that women lack interest in participating in sport and that they have not been socialized to lack interest. The failure to respond in that manner, when presented with the dramatic disparities in

by the fact that women are allocated a smaller portion of resources allocated to athletics than are men. In 1991, for example, women received only 23.9 percent of intercollegiate athletic department budgets, with the remaining 76.1 percent of the budgets going to men's programs.⁴³

These participation and resource disparities are further exacerbated by the fact that there are very few women in athletic administration and coaching.⁴⁴ The average number of women involved in athletic administration is 0.96 per institution [33 percent].⁴⁵ According to 1994 figures, "24.4 percent of

participation in athletics on the part of women, may be characterized as discriminatory in a conscious sense. Put otherwise, once we are aware of unintended harm done by our actions, as socially responsible individuals, we must either justify that harm or forego further actions that would extend or exacerbate it.

43. See NCAA GENDER-EQUITY STUDY, SUMMARY OF RESULTS 29-30 (March 1992) in B. Glenn George, *Who Pays and Who Plays: Defining Equality in Intercollegiate Athletics*, 1995 WISC. L. REV. 647, 652 (1995). The Gender Task Force recommended that:

[I]n support of participation opportunities, institutions should afford equitable treatment for male and female student-athletes in related areas, including, but not limited to: (1) provision of equipment and supplies; (2) scheduling of games and practice times; (3) travel and per diem allowances; (4) coaching and academic support services; (5) assignment and compensation of coaches and tutors; (6) provision of locker rooms, and practice and competitive facilities; (7) provision of medical and training facilities and services; (8) provision of housing and dining facilities and services; (9) publicity, promotions and marketing; (10) recruiting; (11) support services; and (12) admissions and grants-in-aid.

NCAA GENDER EQUITY TASK FORCE REPORT, *supra* note 41, at 5.

44. Connie Thorngren and Barbara Eisenbarth are particularly concerned about these disparities:

Males value sport experience, rightly or wrongly, as a leadership development activity. The stereotype of men as decision makers and leaders is enhanced when impressionable minds see only males in coaching positions.

Thorngren and Eisenbarth, *supra* note 41, at 5. Given these concerns, they counsel that:

Let school districts know that you expect female role models for both boys and girls. . . . A boy's role model is often a coach or an athlete and coaching for males is often a fast track to administration. To continue to allow males to dominate in sport is to continue to allow sexism to dominate in schools.

Thorngren and Eisenbarth, *supra* note 41, at 6.

45. "[T]he average number of females included in the athletic administrative structure [per college or university] . . . has increased from 0.83 in 1992 to 0.96 per school in 1994." ACOSTA AND CARPENTER, *supra* note 41, at 13.

NCAA women's intercollegiate programs still involve *no female* at any level within the administrative structure."⁴⁶ Figures for women involved in coaching are also quite distressing. In 1972, when Title IX was enacted, "90 percent of collegiate coaches of women's programs were female, but by 1990 this percentage had dropped to 47.3 percent, with the major portion of that decline occurring in the first decade."⁴⁷ Virtually no women coach men's teams at any level. These and similar figures led one commentator to observe that, "although there has been an increase in sport participation [by females], there has been a shocking decrease in women's leadership positions, resulting in fewer women coaching, administering, and officiating sport."⁴⁸

These dramatic disparities,⁴⁹ are, in part, historically attributable to systematic exclusion of women from sport and socialization factors that have

46. ACOSTA AND CARPENTER, *supra* note 41, at 12. At the Division I level, only 9.9% of the athletics programs do not have any women in administrative positions. At the Division I level, however, only 1.3 [30%] out of 4.38 administrative positions are held by women.

47. Thorngren and Eisenbarth, *supra* note 41, at 1. By 1994, the percentage of women coaching women's teams had only increased to 49.4%, with only 46.9% of the women's teams at the Division I level being coached by a woman. ACOSTA AND CARPENTER, *supra* note 41, at 8.

48. Chris Shelton, *In Pursuit of Gender Equity*, WOMEN'S EDUC. ACT PUBLISHING CENTER DIGEST, June 1994, at 3.

49. It is possible, of course, that these disparities in participation in competitive athletics at the intercollegiate level may be attributable to a lack of interest. Professor George, for example, has noted that:

The University of Colorado recently agreed to conduct a sports interest survey as part of its Title IX compliance agreement with OCR. The survey was distributed to all freshmen and transfer students during orientation sessions. It listed forty-five sports and asked the respondent to indicate both past participating at the high school level and interest in participation at the university. Men's level of interest in participating at the intercollegiate level was almost twice that of female respondents; the interest levels were fifteen percent and eight percent, respectively. Thus, of the eleven percent who indicated an interest in playing intercollegiate athletics, sixty-eight percent were male and thirty-two percent were female. This correlates with the current group of student athletes, which is sixty-four percent male and thirty-six percent female.

George, *supra* note 49, at 657-58 (citations omitted). Professor George adds, however, that, "The survey also asked about interest at the club and intramural level. Response rates were 30% for men and 21% for women at the club level, and 44% for men and 54% for women at the intramural level." George, *supra* note 49, at 657 n.42.

Professor George recognizes that many factors, including "the knowledge of limited opportunities," may contribute to the different interest levels of women at the University of Colorado. George, *supra* note 49, at 659.

discouraged women from participating in athletics.⁵⁰ Despite the disparities, the Wilson Report recently documented that parents believe participation in athletics is equally important for boys and girls.⁵¹ This lends credence to the above study which concluded that 93 percent of women agree that women who have had the opportunity to participate in sport are better prepared to compete later in life.⁵²

Given that there are significant educational values and skills that are learned through participation in sport,⁵³ our failure as a society to provide equitable participation by females is a cause for alarm. Indeed, it may simply be another means of institutionally precluding women from achieving equity, not just in athletics, but in society as a whole.

Another area for inquiry, in determining the extent of harm caused as a result of lower participation by women in athletics at all levels (as athletes, coaches, administrators and officials), is whether the current largely "separate but equal" nature of women's athletics is defensible.⁵⁴ Before examining justifications for "separating" men's and women's athletics, it must be noted that there never has been any real "equality," in terms of resource allocations.⁵⁵ Thus, it would be more accurate to describe the current phenomenon as "separate but unequal."⁵⁶

50. In speaking of these disparities in participation, Professor Hyland states that: For years and even centuries, women have been systematically excluded from full participation in sport. The evidence for this claim is painfully obvious, from the relatively small participation in sport among women, to the amount of money spent on women's sports, to the extent of press coverage of women's athletics, even to the different ways in which little girls are raised. What is more controversial, again, is the explanation of this phenomenon. Is it straightforwardly the result of sexism in society? That is, is it simply a social phenomenon which, as such, could be overcome in a more just society? Or are there reasons and even justifications for the exclusion of women from full participation in sport?

HYLAND, *supra* note 13, at 16-17.

51. See Wilson Report *discussed in* Thorngren & Eisenbarth, *supra* note 41, at 2.

52. See Cantu, *supra* note 35, at 12.

53. See *supra* at notes 23-36, and accompanying text, for a discussion of the educational skills and values learned through participation in athletics.

54. Karen L. Tokarz, *Separate But Unequal Educational Sports Programs: The Need for a New Theory of Equality*, 1 BERKELEY WOMEN'S L. J. 201 (1985).

55. See *supra* note 43.

56. In this sense, the "separate but equal" doctrine, as applied to women's sports is clearly analogous to the history of the "separate but equal" doctrine in the racial context, where the races were kept separate but there was never any semblance of "equality," in terms of resources allocated. Separation tended to facilitate governmental neglect of racial inequities, at least in terms of resource allocations.

The separation of men and women in athletics is typically justified on the ground that men and women have physiological differences that affect their performance levels in many sporting contexts.⁵⁷ Additionally, proponents of "separate but equal" argue that these physiological differences generally give men an undue advantage in integrated athletic competition⁵⁸ and would, therefore, deprive women of opportunities and discourage them from participating in athletics. At least one author, however, has seriously questioned the underlying empirical basis for this argument favoring the separation of men's and women's athletic programs.⁵⁹ If there are no significant physiological or related reasons that justify separating women and men in most athletic events, additional harm may be done to women when they are separated and denied the opportunity to participate with men.⁶⁰ Even if there are physiological reasons that justify some "separation," those reasons do not justify separating women from participating with men when physiological differences do not impede participation. In addition, the physiological differences argument is inapplicable to coaching and administrative positions.⁶¹ In this regard, the fact that few, if any, women coach competitive male-dominated sports is particularly disturbing.⁶² In

57. Tokarz, *supra* note 54, at 218-19.

58. Tokarz, *supra* note 54, at 218.

59. Tokarz, *supra* note 54, at 218-223.

60. There are a number of cases that deal with the right of women to participate, with men, in traditionally male-dominated sports. Most of these cases permit women to participate in sports traditionally dominated by males, so this problem may be of less significance (i.e., women may have access to equal participation, through litigation). Nevertheless, even if there is some equality of access through litigation, the costs (both emotional and economic) of litigation and the socialization entailed by such separation may raise serious questions that remain unanswered. *See, e.g., Lantz v. Ambach*, 620 F. Supp. 663, 666 (S.D.N.Y. 1985) (enjoining enforcement of a rule prohibiting female participants from trying out for a junior varsity football team) and *Haas v. South Bend Community Sch. Corp.*, 289 N.E.2d 495, 501 (Ind. 1972) (striking a rule denying mixed competition in noncontact sports).

61. To understand and teach (coach) a particular sport, one need not have participated at the most competitive levels in that sport. With the exception of football, women do compete in other higher profile sports (e.g., basketball and baseball) and should be able to coach men as well as women. Indeed, numerous major coaches have not played the sport they are coaching at the most competitive levels. It is also clear that women have the administrative skills necessary to administer athletics programs at all levels. They simply are not being given the opportunity to hone those skills.

62. There is, for example, only one woman currently serving as a head coach of a men's intercollegiate basketball program. Kerri McTiernan coaches the men's team at Kingsborough Community College of the City University of New York. Debra E. Blum, *Trailblazer*, THE CHRON. OF HIGHER EDUC., March 8, 1996, at A35.

studying gender equity issues, therefore, the impact of such a system of "separate" participation in sport must not be disregarded, and solutions proffered must deal with possible adverse implications of such separation.⁶³

B. Racial Discrimination in Athletics

As is the case with gender inequity in athletics, racial inequity is pervasive and historically based. It is also rather subtle at some levels. Because men of color dominate in revenue-producing sports,⁶⁴ for example, there is a superficial appearance of equity. That appearance is misleading.

Racial discrimination in the United States has deep historical roots. Jackie Robinson did not break the "color line" by becoming the first African-American athlete to play professional baseball⁶⁵ until after World War II. At many universities, African-American athletes were not permitted to participate in intercollegiate athletics until after World War II.⁶⁶ Since that time, however, African-American male athletes have come to dominate the major revenue-producing sports in intercollegiate athletics: basketball (65 percent of the participants in Division I basketball in 1994-95 were African-American)⁶⁷ and football (50.7 percent of the participation in Division I football in 1994-95 were African-American).⁶⁸

As Professor Davis notes, however, "the emergence of the black athlete has been restricted primarily to the 'revenue-producing sports.'"⁶⁹ Davis

63. For a discussion of reform and other efforts designed to promote racial and gender equality, *see infra* part IV.

64. *See infra* note 71 and accompanying text.

65. African-American athletes previously played baseball professionally in the "negro leagues." After Jackie Robinson broke the "color line" in baseball, African-American men were provided the opportunity to play professional basketball and football, as well.

66. African-Americans were not permitted to participate in basketball in the Big 10 until after World War II. Many other institutions, particularly in the South, did not permit athletes of color to participate until much later. *See* Davis, *supra* note 6, at 629-635.

67. Bill Brill, *Guest Editorial: Broader Interest Vital for Minorities*, NCAA NEWS, August 16, 1995, at 4.

68. *Id.*

69. Davis, *supra* note 6, at 635. Davis adds:

In those team sports in which 'revenue-production' has come to dominate, the contribution of outstanding African-American athletes to winning championships and holding public interest has opened opportunities to African-Americans in college sports. Sports more closely linked to upper-class patronage and with less spectator interest have been slow to attract and integrate blacks.

concludes that, "[i]ncreased access stemming from self-interest [the need to increase revenues by playing the best athletes] has not, however, resulted in a transformation of the underlying cultural attitudes and values that helped to produce overt discrimination against the African-American college athlete."⁷⁰ The fact that African-American athletes are over-represented in revenue-producing sports and under-represented in other sports does not confirm that there is no discrimination against African-American athletes. Indeed, the differences cry for explanation and raise serious questions about potential exploitation.

Especially in the more profitable Division I context, the fact that African-American athletes dominate in the revenue-producing sports raises concerns that the athletes are being exploited or taken advantage of for financial reasons. With the clear dominance (65 percent) of African-American males in Division I basketball, for example, the current diversion of profits generated from that enterprise to other uses raises serious questions of potential exploitation. It is reported that, in 1994, CBS agreed "to pay \$1.75 billion over the next eight years to broadcast the Division I men's basketball tournament. The contract raises the NCAA's annual television revenues from \$143 million to \$215.6 million."⁷¹ Those revenues, in turn, largely fund the entire operations of the NCAA.⁷² To compound matters, Division I

Id. at 635-36. Donna Lopiano, Executive Director of the Women's Sport Foundation, points out that 92% of black men athletes at the Division I level participate in basketball, football or track. Debra E. Blum, *Competing Equities?*, THE CHRON. OF HIGHER EDUC., May 26, 1995, at A38.

See also JOHN C. PHILLIPS, THE SOCIOLOGY OF SPORT 173-79 (1993). Professor Phillips documents that African-Americans are over-represented in basketball, football, track and field, baseball and boxing. He notes that they are under-represented in swimming and diving, golf, tennis, hockey, volleyball, soccer, skiing and bowling. He also discusses various explanations for this phenomenon and concludes that:

the topic of racial variations in sports participation has been clouded by ideological statements on the one hand. . . . or by simple-minded natural ability ideas on the other. . . . Some social, economic, or environmental factors are operating to produce these variations. Some future sport sociologist will perform a service by uncovering what these factors are.

Id. at 178-79.

70. Davis, *supra* note 3, at 637-38. See also *infra* at 76-78, for a discussion of this phenomenon of providing athletes of color with access to the major revenue-producing sports in intercollegiate athletics.

71. Debra E. Blum, *Athletic Notes*, THE CHRON. HIGHER EDUC., May 19, 1995, at A41. The NCAA has obscured this fact somewhat by combining all sports into a single contract, but it remains clear that the revenues are overwhelmingly generated from broadcasting of the basketball tournament.

72. In 1994, for example, prior to receipt of the major increase in funds generated by the new contract with CBS, it was anticipated that intercollegiate basketball would

basketball also generates significant profits for member institutions, with profits per institution averaging \$1.6 million in 1994.⁷³ While other intercollegiate sports typically operate at a loss, Division I football,⁷⁴ like basketball, tends to be profitable, generating an average profit of \$3.9 million per institution.⁷⁵ The profits generated as a result of the labors of male athletes of color, therefore, largely fund the NCAA and support other predominantly non-minority⁷⁶ sports at the institutional level.⁷⁷ This use of revenues largely generated by male athletes of color for purposes other than supporting the efforts of those minority athletes to obtain an education raises questions of exploitation or, perhaps even, conversion.⁷⁸ Division I football and basketball scholarships and aid have been cut,⁷⁹ for example, as part of an effort to contain costs⁸⁰ and as a means of securing additional resources

generated \$168,240,500—\$153,905,500 in television revenue and \$14,335,000 for the tournament itself—out of a total projected budget for the NCAA of \$203,540,100. Katherine S. Mangan, *Paying for Athletics*, THE CHRON. OF HIGHER EDUC., Sept. 21, 1994, at A43-44. Thus, over 70% of the N.C.A.A.'s entire budget is funded from Division I men's basketball.

73. Debra E. Blum, *Sports Programs Continue to Lose Money, Survey Finds*, THE CHRON. OF HIGHER EDUC., Sept. 7, 1994, at A58.

74. Over 50% of the athletes in Division I football are African-American. See Brill, *supra* at note 67, at 4.

75. *Study: Financial Condition of Major Programs Improved*, NCAA NEWS, August 31, 1994, at 5, 8. It has been reported that perhaps less than 30% of Division I sports programs actually bring in more revenue than they spend with many Division I-A football programs operating at a deficit. *Id.* at 5.

76. Sports such as tennis, golf, rowing, etc., which are largely the enclave of upper-middle class white athletes, are often supported by revenues generated from sports largely dominated by African-American athletes.

77. Professor Matthew Mitten has suggested that antitrust laws should be applied with rigor against the NCAA to cure this "compensation" problem and to protect the market share of athletes. Matthew Mitten, *University Price Competition for Elite Students and Athletes: Illusions and Realities*, 36 SO. TEX. L. REV. 59 (1995).

78. The term conversion is applied to the act of converting another's property to one's own use. While it is not necessarily being argued that student-athletes of color have an action in conversion against the NCAA and member institutions, it is helpful to look at the problem in that light—funds generated by student-athletes of color are being converted to other uses, uses that tend to benefit nonminority students, coaches and administrators.

79. In the last five years, football scholarships and aid at the Division I level have been cut from 90 per institution to 85, and men's basketball scholarships have been cut from 15 to 13. Given the demographics of who plays Division I men's football and basketball, these cuts have a disparate impact on African-American and possibly other student-athletes of color.

80. Rodney K. Smith, *Reforming Intercollegiate Athletics: A Critique of the*

to provide aid to other non-minority student-athletes in non-revenue-producing sports.⁸¹ The disparate impact of these cuts on male student-athletes of color, and their potential access to higher education, is of concern, particularly given that those sports, unlike others, tend to be profitable.

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. This possible lack of access to other sports (*e.g.*, tennis, golf, swimming) on the part of male and female student athletes of color is significant. Donna Lopiano notes that 81 percent of African-American women athletes at the intercollegiate level participate in track or basketball, and concludes that, "[t]he race question—How do you get minority athletes the opportunities to participate in all sports?—is just as important as the gender question."⁸² These disparities imply serious inequities.⁸³

Presidents Commission's Role in the NCAA's Sixth Special Convention, 64 N.D. L. REV. 423, 430-39 (1988) (discussing proposals to reduce the number of men's football and basketball scholarships as a means of cost containment). Those cost containment efforts have also resulted in cutting teacher-coaches in Division I football and basketball.

81. Many advocates of gender equity, for example, favor cutting scholarships in Division I football and basketball, as a means of achieving gender equity. *See infra* notes 114-127 and accompanying text. In effect, they argue that cutting scholarships in those sports will generate dollars to provide increased access for women. They do not, however, acknowledge the racial implications of their recommendations.

82. Blum, *supra* note 69, at A37.

83. Nancy Lieberman-Cline, a former women's collegiate basketball star and Olympian, has argued that African-American women athletes are not being treated equitably and need additional support. Nancy Lieberman-Cline, *African-American Female Athletes Need More Support*, THE DALLAS MORNING NEWS, Sept. 7, 1995, at 2B. In support of her conclusions, Ms. Lieberman-Cline notes:

African-American females . . . are in double jeopardy. Discriminated against because of their race and their gender, they represent less than 5 percent of high school athletes and less than 10 percent of college athletes, according to the most recent figures. African-American women make up less than 5 percent of female college coaches, 2 percent of all college coaches and less than 1 percent of college administrators.

Just as African-American males are underrepresented at quarterback in football, so are African-American females in "control" positions—setter in volleyball, point guard in basketball. African-American women are plentiful in certain sports, such as basketball and track and field, but are nearly invisible in sports such as swimming and golf. There are virtually no African-American women in the officiating ranks, and those few who are head coaches generally are short on assistants, recruiting dollars and other resources.

Even the fact that student-athletes of color tend to be particularly successful in certain sports raises questions of inequity in a more subtle sense. After briefly examining physiological and sociological justifications often asserted to explain the success of African-American athletes in certain sports, Professor Hyland warns that:

We know from bitter experience in the past that claims about the 'natural inferiority' of blacks have been used as a part of the ideological basis for racism and the systematic exclusion of blacks from conventional avenues to social and economic success. Now, ironically, converse hypotheses about the natural superiority of blacks as athletes are being entertained. Many fear that, in the context of a still racist society, arguments about natural differences between races, even if ostensibly pointing to the superiority of blacks, will nevertheless be put in the ideological service of racism. Indeed, there is already some evidence that this fear is warranted. . . . [T]he claim that blacks are 'natural' athletes has ironically been turned against them as implicit or explicit evidence that they do not need to exhibit, and therefore need not be praised for, such virtues as discipline, commitment, and sustained effort for which white athletes are regularly praised.⁸⁴

Professor Davis has raised similar concerns.⁸⁵

Assertions that a distinction exists between academic performance (mental activity) and athletic performance (physical activity) may have serious racial implications, as well. If persons of color dominate major spectator and revenue-producing sports in our society, failing to recognize the mental side of such activities may ultimately be racist. Despite growing evidence to the

[S]omehow we need to create more opportunities for African-American females in sports.

Id.

84. HYLAND, *supra* note 13, at 15. Hyland notes further that:

Another version of this ironic transformation of black athletic superiority into the service of racism plays on the well known dualism of mind and body. Yes, the claim goes, blacks are naturally superior athletes. But the inference drawn from this is that they are therefore probably inferior intellectually. White players, having to overcome their supposedly inferior natural ability, do so, it is suggested, by being 'smart' players, by 'knowing the game' so well, by being 'heady.' The inference is easily (if implicitly) drawn that when black players accomplish the same feats as whites, it is by virtue not of their intelligence but of their 'natural ability.' However absurd the conclusion, it is so often drawn that black athletes, sensitive to these implications, have found themselves moved to deny characterizations of their 'natural' ability ostensibly intended as praise.

Id.

85. See Davis, *supra* note 6, at 649-650.

contrary,⁸⁶ many academics continue to assert that there is little mental or intellectual worth in athletics. This perpetuates the "dumb jock"⁸⁷ stereotype. Athletes, during participation, and after, are therefore viewed as having learned no mental skills that might be of value elsewhere in the workplace. Such an attitude may also contribute to the perpetuation of the present intellectual snobbery regarding sport. This snobbery, in turn, devalues the academic worth of participation in athletics and, in doing so, diminishes the significance of the skills displayed by minority and other athletes.

This devaluation of athletic performance, together with evident racial inequities in terms of participation by minority athletes in all sports, is exacerbated by the fact that very few coaching and administrative positions are held by persons of color. Despite the fact that African-American athletes dominate revenue-producing sports at the Division I level, only 7.81 percent of the coaches and 6.81 percent of the athletics administrators in 1992-93 were African-American.⁸⁸ The number of African-American coaches and administrators is also substantially less than the percentage of African-Americans in the population as a whole, and significantly below the percentage of African-American student-athletes. African-American student-athletes are, as a consequence, deprived of an adequate number of role models, with similar ethnic backgrounds. They are also deprived of significant lifelong employment opportunities.⁸⁹ Furthermore, it is safe to assert that coaches and administrators of color would, as a general matter, be more sensitive to the existence of and the need to address racial inequities in intercollegiate athletics.

IV. ACHIEVING EQUITY THROUGH REFORM

As demonstrated in Part III, there are significant racial and gender inequities in the intercollegiate athletic context. While there has been increasing recognition of the need to deal with issues related to the disparate

86. See text accompanying *supra* notes 23-26, for a discussion of the evidence supporting the proposition that there are significant educational skills and values attributable to participation in athletics.

87. See Davis, *supra* note 6, at 669, for a brief depiction of the "dumb jock caricature."

88. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, THE NCAA MINORITY OPPORTUNITIES AND INTERESTS COMMITTEE'S FOUR-YEAR STUDY OF RACE DEMOGRAPHICS OF MEMBER INSTITUTIONS 2, tables 3 and 10 (1995). These figures, however, are even more disturbing when placed in context. If you delete the historically black institutions in Division I, the number of African-American coaches drops from 7.81% to 4.15% at that level. *Id.* at 2, tables 10 and 11.

89. It is ironic, as well, that opportunities in coaching and administration, with their obvious mental or intellectual side, are limited for athletes of color.

treatment of women in intercollegiate athletics in order to achieve equity,⁹⁰ there has been less recognition of the need to deal with existing racial disparities, which are somewhat more subtle, in order to achieve racial equity.⁹¹ The failure to recognize the need to deal equitably with racial disparities has, in turn, been compounded by proposals for reform that have been offered by some advocates of gender equity and that have serious racial implications.⁹² Additionally, dealing with either racial or gender inequities without confronting underlying cultural or societal factors that contribute to such inequity will likely be ineffectual, resulting in an incomplete solution. Reform efforts intended to bring racial and gender equity to intercollegiate athletics, therefore, should recognize broader cultural factors contributing to existing disparate treatment and the need for interdependent solutions that take race and gender into account in an effort to generate effective reforms designed to bring equity to intercollegiate athletics.

Reform efforts generally are judicial or legislative in nature. The first subpart of Part IV will, therefore, examine judicial strategies designed to achieve racial and gender equity. It will also discuss the limitations of the use of litigation, as an approach to achieve equity. The second subpart has a twofold purpose: (1) to examine governmental legislative efforts at the federal and state levels; and (2) to address efforts by accrediting agencies, the NCAA, athletic conferences, and individual institutions.

A. Equity Through Litigation

In pursuing equity, significant emphasis has been placed on the development of legal doctrine and litigation strategies. In terms of gender equity, much has been written about the use of Title IX⁹³ as a means of requiring institutions to provide equitable treatment to their women student-athletes. Recent efforts to achieve racial equity in athletics, on the other hand,

90. See, e.g., *Keeping Faith with the Student-Athlete: A New Model for Intercollegiate Athletics*, KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS (1991) at v, where the Commission "emphasizes that continued inattention to the requirements of Title IX. . . represents a major strain on institutional integrity."

91. They are more subtle in the sense that they are not directly reflected in lower levels of participation in intercollegiate athletics on the part of student-athletes of color. That subtlety is dispelled, however, by a closer look at the implications of existing racial disparities, as a matter of access to all sports and as a potential source of exploitation related to over-representation in revenue-producing sports.

92. See *supra* notes 76-81, and *infra* notes 114-127 and accompanying text.

93. 20 U.S.C. § 1681(a) (1990). The statute provides, "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. . . ."

have been based less on the Civil Rights Act of 1964 and more on private theories, including actions in contract and tort.⁹⁴ These various efforts warrant elaboration.

1. Gender Equity Through Litigation

While a variety of litigation strategies might be employed to achieve gender equity in intercollegiate athletics,⁹⁵ most current efforts have focused on Title IX of the Civil Rights Act. A number of recent articles have chronicled the historical development of Title IX litigation, as a means of achieving equity in the context of intercollegiate athletics.⁹⁶ One of those commentators notes that, "[w]omen comprised only 15 percent of the intercollegiate athletes before [Title IX was enforced]; by 1984 that number had doubled to 30.8 percent."⁹⁷ Progress largely stalled thereafter, with only a negligible increase in the percentage of women participating in intercollegiate athletics by 1991.⁹⁸ Melody Harris who has been active in overseeing litigation under Title IX since 1991, writes that after a number of years of "virtual paralysis in its application to athletics, Title IX is becoming

94. See, e.g., Davis, *supra* note 6, at 681-697; Michael J. Cozillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 WAYNE L. REV. 1275 (1989); Robert N. Davis, *The Courts and Athletic Scholarships*, 67 N.D. L. REV. 163, 187 (1991).

95. Legal arguments to promote gender equity in athletics might be formulated under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or under state constitutional and statutory authority. See, e.g., Blair v. Washington State Univ., 740 P.2d 1379, 1383 (Wash. 1987) (the Supreme Court of Washington relied on Washington's Equal Rights Amendment and the state's law against discrimination in requiring additional support for women's sports at Washington State University), discussed *infra* at text accompanying notes 173-75.

96. See, e.g., George, *supra* note 43, at 647; Melody Harris, *Hitting 'Em Where it Hurts: Using Title IX Litigation to Bring Gender Equity to Athletics*, 72 DENV. U. L. REV. 57 (1994); Jennifer L. Henderson, *Gender Equity in Intercollegiate Athletics: A Commitment to Fairness*, 5 SETON HALL J. SPORTS LAW 133 (1995); Jill K. Johnson, *Title IX and Intercollegiate Athletics: Current Judicial Interpretations of the Standards for Compliance*, 74 B.U. L. REV. 553 (1994); and Catherine Pieronek, *A Clash of Titans: College Football v. Title IX*, 20 J. COLLEGE & UNIV. LAW 351 (1994).

97. George, *supra* note 43, at 652.

98. "The growth seemed to stall [after 1984]. The NCAA's recent gender equity study found that women remained at 30.9% of the intercollegiate athletes in 1991." George, *supra* note 43, at 652. As noted previously, however, since 1991 there has been another period of growth in terms of increased participation by women student-athletes. See *supra* note 41.

the vehicle for gender equity that Congress intended it to be."⁹⁹ Harris acknowledges that gender inequity in athletics "is still rampant," but nevertheless asserts that, "Title IX litigation, with its potential for money damages and wide-ranging injunctive relief, provides the first real hope for bringing true gender equity to athletics."¹⁰⁰

With a number of successes in the courtroom by women athletes under Title IX,¹⁰¹ the threat of litigation has no doubt served as an added incentive to administrators to seek to achieve gender equity in athletics, in terms of participation, resource allocation, and access to coaching and administrative opportunities and remuneration. The remainder of this section will focus on participation opportunities, but that focus is not intended to discount the significance of efforts in the resource and coaching and administrative access and compensation areas. Title IX can and should be used as a means of dealing with inequities in those areas as well.¹⁰²

99. Harris, *supra* note at 96, at 110.

100. Harris, *supra* note 96, at 110. In *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992) the Supreme Court concluded that "a damages remedy is available for action to enforce Title IX."

101. *See, e.g., Favia v. Indiana University of Pennsylvania*, 812 F. Supp. 578 (W.D. Pa. 1992), *aff'd*, 7 F.3d 332 (3d Cir. 1993) (ordering the university to reinstate women's varsity field hockey and gymnastics); *Roberts v. Colorado State University*, 814 F. Supp. 1507 (D. Colo.), *aff'd in part and rev'd in part sub nom.*, 998 F.3d 824 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993) (ruling that the university failed to comply with Title IX and thereby compelling the university to reinstate its women's varsity fast pitch softball program); *Cohen v. Brown*, 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993) (finding the university in violation of Title IX and requiring the university to provide females with the opportunity to participate in varsity athletics in order to satisfy proportionality). In addition to bringing actions to ensure equitable participation on the part of female student-athletes, women have brought actions to require that resources be allocated more equitably and to require that women coaches be paid equitably when compared with male coaches. *See Tyler v. Howard Univ.*, C.A. No. 91-CA11239 (D.C. Sup. Ct. 1993) (resulting in a \$1.1 million award to the women's basketball coach for Title IX violations including a salary about half that of the men's coach, inadequate office space, inadequate locker room facilities for the female athletes, and insufficient staffing for the women's basketball team).

102. The coaching area is important, because of the need for more women coaches as role models for male and female student-athletes alike. Not surprisingly, given the need for an actual litigant with a grievance, litigation to date has focused on compensation and related issues, rather than focusing on providing additional women with coaching opportunities in the first instance. Administrative opportunities are equally important, for a slightly different reason. With more women administrators, it is likely that there would be more sensitivity to resource and related issues disparately impacting women. Equal distribution of resources, whether in the form of salaries for coaches or basic resources for female student-athletes, is a significant issue;

In order to avoid losing a court battle based on a lack of participation by women student-athletes, administrators must satisfy one of three guidelines relied upon in enforcing Title IX, as set forth by the Office of Civil Rights of the Justice Department:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where numbers of one sex have been and are under-represented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
- (3) Where members of one sex are under-represented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of that sex have been fully and effectively accommodated by the present program.¹⁰³

By proving that any one of these three guidelines or tests has been satisfied, an institution will comply with Title IX.¹⁰⁴ Given the poor record of program expansion in women's athletics over the past decade,¹⁰⁵ and the failure of institutions to initiate in depth interest analyses,¹⁰⁶ the proportionality guideline (number 1 above) is the focus in most Title IX cases.¹⁰⁷ Professor Glenn George argues, however, that institutions may be

but, even more focus needs to be placed on access in the first instance, for coaches and administrative personnel.

103. Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71418 (1979) (codified at 20 U.S.C. § 1681 (1990)).

104. Letter from Norma V. Cantu, Assistant Secretary for Civil Rights, The Office of Civil Rights (Sept. 20, 1995) (on file with author) (explaining the CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST).

105. See *supra* text accompanying note 43.

106. George, *supra* at 43, at 648.

107. It may also be the most common, because it is more susceptible to proof than the others (i.e., it is easier to prove proportionality, as a statistical matter, than it is to prove a history of continuing program expansion or a satisfying of the interests of women athletes).

able to satisfy the interests and abilities guideline, without achieving the same level of numerical equality, as is required under the proportionality test.¹⁰⁸

It is conceivable that the "history and continuing practice of program expansion" guideline might be met in the future as well. After only negligible growth of participation by women in intercollegiate athletics during the 1980s, there has been fairly steady growth during the 1990s.¹⁰⁹ If that growth continues, it may be possible to demonstrate a present history of program expansion, resulting in increased participation by women.¹¹⁰ Additionally,

108. George, *supra* note 43, at 653-56. See also Bridget Belgiovine, *A Helpful Tool, If Used Correctly: Interest Survey Can Aid With Development of Women's Programs*, THE NCAA NEWS, October 16, 1995, at 4.

109. See *supra* note 41, and accompanying text.

110. On September 20, 1995, the Office for Civil Rights of the United States Department of Education issued a CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST [hereinafter "CLARIFICATION"], which clarifies the "history and continuing practice of program expansion," by providing examples that may be easier to comply with in the future. The Clarification sets forth descriptions of three programs that it (OCR) would find to be in compliance with Title IX:

At the inception of its women's program in the mid-1970s, Institution A established seven teams for women. In 1984 it added a women's varsity team at the request of students and coaches. In 1990 it upgraded a women's club sport to varsity team status based on a request by the club members and an NCAA survey that showed a significant increase in girls high school participation in that sport. Institution A is currently implementing a plan to add a varsity women's team in the spring of 1996 that has been identified by a regional study as an emerging women's sport in the region. Based on the addition of these teams, the percentage of women participating in varsity athletics at the institution has increased. OCR would find Institution A in compliance with part two because it has a history of program expansion and is continuing to expand its program for women to meet their developing interests and abilities. . . .

In the mid-1970s, Institution C established five teams for women. In 1979 it added a women's varsity team. In 1984 it upgraded a women's club sport with twenty-five participants to varsity team status. At that time it eliminated a women's varsity team that had eight members. In 1987 and 1989 Institution C added women's varsity teams that were identified by a significant number of its enrolled and incoming female students when surveyed regarding their athletic interests and abilities. During this time it also increased the size of an existing women's team to provide opportunities for women who expressed interest in playing that sport. Within the past year, it added a women's varsity team based on a nationwide survey of the most popular girls high school teams. Based on the addition of these teams, the percentage of women participating in varsity athletics has increased.

if an institution defending against a Title IX claim based on lack of proportionality can combine evidence of a recent commitment to program expansion with an effort to ascertain and meet the interests of women students, it is possible that the Office of Civil Rights and the courts will find that Title IX has been satisfied, particularly given current political and related pressure to weaken Title IX as a means of achieving gender equity.¹¹¹ Professor George has also reluctantly questioned the proportionality guideline on the ground that:

We would never seriously contemplate a rule requiring that enrollment in every class or every major reflect the gender proportions of the student body. We demand instead that all courses and majors be equally available to men and women students.¹¹²

OCR would find Institution C in compliance with part two because it has a history of program expansion and the elimination of the team in 1984 took place within the context of continuing program expansion for the underrepresented sex that is responsive to their developing interests.

Institution D started its women's program in the early 1970s with four teams. It did not add to its women's programs until 1987 when, based on requests of students and coaches, it upgraded a women's club sport to varsity team status and expanded the size of several existing women's teams to accommodate significant expressed interest by students. In 1990 it surveyed its enrolled and incoming female students; based on that survey and a survey of the most popular sports played by women in the region, Institution D agreed to add three new women's teams by 1997. It added a women's team in 1991 and 1994. OCR would find Institution D in compliance with part two.

Id. at 6-7.

Given the history of expansion of women's sports at many institutions—progress in the 1970s followed by little increased participation in the 1980s followed by some increases in participation opportunities in the 1990s—many schools may find that this is a far easier means of complying with Title IX than the proportionality test (part one of the three part test), which countenances very little difference between the percentage of women and men participating. *See, e.g., id.* at 3-4.

111. *See infra* notes 150-55 and accompanying text for a discussion of current legislative efforts to weaken Title IX.

112. George, *supra* note 43, at 654. It may be argued that proportionality is an appropriate test, however, in athletics and other contexts where women appear to have been systematically excluded from participation in the past. Where systematic exclusion has been present, possibly socializing women to avoid participation in athletics, proportionality may be the only guideline that will, in fact, address present problems associated with unequal participation.

Given these concerns, the interest and continuing growth guidelines may become more viable means of defending against a Title IX claim in the future. For the present, however, Title IX disputes typically focus on the issue of whether the institution has provided proportional participation opportunities for women.

The cases seem to indicate that proportional inequities of 10.5 percent, 11.6 percent, and 18 percent will not satisfy the "substantial proportionality" guideline.¹¹³ If a disparity of 10.5 percent—women participating at 44.75 percent and men at 55.25 percent, where enrollment is essentially equal—will not suffice to satisfy the "substantial proportionality" guideline, most current intercollegiate athletic programs could well be in violation of Title IX's guidelines. This conclusion, if accurate, may also contribute to increased efforts by institutions to use the other guidelines—interest and continuing expansion—as means of complying with Title IX.

Current recommendations for satisfying the proportionality test for the purposes of achieving gender equity may also present problems for the purposes of racial equity in intercollegiate athletics. Many proponents of gender equity have recommended that resources be diverted from male sports, in order to increase participation opportunities for women.¹¹⁴ Pressed by proponents of gender equity to provide proportional participation for women, some university presidents and educational administrators have responded by cutting certain male sports either entirely,¹¹⁵ or in part.¹¹⁶ By cutting male

113. See Johnson, *supra* note 96, at 570-580, and Harris, *supra* note 96, at 83-87, for a discussion of the cases. This conclusion is confirmed in the examples set forth in the OCR's Clarification regarding proportionately. See CLARIFICATION, *supra* note 110, at 3-4.

114. Donna Lopiano, the executive director of the women's Sports Foundation, "insists that schools can make better use of the money they have by drastically reducing football scholarship levels and cutting out such perks as hotel stays before home games and finding other ways to spring loose more funding for women's teams." Wendy Parker, *Scholarship Showdown: The Fight Over Title IX*, THE ATLANTA J. AND CONST., May 7, 1995, at E8.

115. See *Kelley v. Board of Trustees*, 832 F. Supp. 237, 244 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995) (decision by the university to eliminate the men's swimming team while not the women's swimming team upheld); *Gonyo v. Drake Univ.*, 837 F. Supp. 989, 996 (S.D. Iowa 1993) (the university's decision to discontinue men's varsity wrestling upheld). These cases demonstrate that elimination of athletic programs (in these cases male athletic programs), rather than expanding programs for women, is an acceptable method of achieving compliance with Title IX.

116. THE NCAA MANUAL § 15.5.4 (basketball) and § 15.5.5 (football), noting that the number of scholarships in football and basketball have recently been reduced in number.

participation opportunities, administrators are able to increase the resources that can be expended to enhance access for women,¹¹⁷ and also lower the number of additional women that have to be provided opportunities to participate in order to achieve proportionality.¹¹⁸ This strategy of cutting men's opportunities, while enhancing opportunities to participate in intercollegiate athletics on the part of women, can, in application, have significant racial implications.

If, as has been suggested, football and basketball scholarships are cut at the Division I level¹¹⁹ in order to increase resources for women's sports, African-American men are disproportionately affected because they are primary recipients of the scholarship aid being cut. For example, when the NCAA cut football scholarships by five per institution and basketball scholarships by two per institution at the Division I level, hundreds of African-American male athletes were effectively deprived of the opportunity to receive the financial assistance necessary for them to attend higher education.¹²⁰ Under more severe proposals which recommend cutting football scholarships from 85 (the current number permitted per institution at the Division I level) to as few as half that number,¹²¹ the impact on athletes of color would be extreme. Furthermore, since football and basketball, two sports dominated by African-American males at the Division I level, produce revenue and are generally profitable,¹²² even efforts to divert current funds generated by those sports to facilitate the effort to achieve gender equity, without decreasing the number of scholarships available to African-American male athletes, may have racial implications. Funds that might be used to provide academic assistance and related support for African-American student-athletes involved in basketball and football may be diverted, with significant academic implications.

Current efforts to add "emerging" women's sports, in order to facilitate increased participation on the part of women, may also disparately impact

117. New, or as the NCAA refers to them, "emerging" sports for women may be added.

118. If the goal is to have women and men both participating at approximately a fifty percent level, there are two ways to achieve the goal: 1. increase the number of women participating; and 2. decrease the number of men participating. In terms of increased opportunities, women student-athletes benefit little from the latter strategy, except insofar as it provides a source of additional funding for women's sports.

119. See Steve Berkowitz, *Black Coaches' Group to Boycott Issues Forum; Scholarship Reductions Among Complaints*, THE WASHINGTON POST, October 13, 1993 at F1.

120. See, Elliott Almond, *Black Coaches Delay Boycott as U.S. Acts*, LOS ANGELES TIMES, January 15, 1994, at C1.

121. Henderson, *supra* note 96, at 159-160.

122. See *supra* note 73.

women student-athletes of color. Emerging women's sports recommended by the NCAA Gender Equity Task Force include "ice hockey, rowing (crew), synchronized swimming, team handball and water polo, and the individual sports [of] archery, badminton, bowling and squash."¹²³ It is unlikely that women athletes of color, many of whom come from poorer urban educational institutions which do not offer those sports, will have the same level of access to the list of emerging sports as other women. Additionally, adding opportunities in certain existing areas (e.g., tennis and golf), other than basketball and track, where 81 percent of African-American women athletes currently participate,¹²⁴ may also have a disparate impact on women of color, because they appear to have less access to those sports than do white women.

Efforts to achieve gender equity, therefore, may undermine efforts to achieve racial equity. It is possible, however, to find ways to achieve gender equity without creating racial inequity. For example, instead of adding sports like synchronized swimming or women's golf, in an effort to increase the number of women participating in intercollegiate athletics, new sports like "women's football,"¹²⁵ which might draw from all segments of society if promoted at the high school level, should be considered.¹²⁶ At any rate, caution should be exercised in promoting sports that may present access problems. For example, swimming or golf should be viewed warily because many students attending poorly funded school districts (often including disproportionate number of students of color) often do not have access to swimming pools and golf courses. Additionally, the source of funds used to achieve equity must be considered. If the funds are largely generated by male student-athletes of color, care must be taken to avoid racial exploitation.¹²⁷

The Black Coaches Association, a group of African-American coaches from Division I institutions, nevertheless, have offered their support for efforts to achieve gender equity,¹²⁸ recognizing a commonality of purpose in efforts

123. NCAA, *ACHIEVING GENDER EQUITY: A BASIC GUIDE TO TITLE IX FOR COLLEGES AND UNIVERSITIES* 51 (1994).

124. *See supra* at 82 and accompanying text.

125. Women's football is sometimes referred to as "powder puff football." While it is unfortunate that this term is used to describe flag football played by women, it does illustrate that the game is one that is currently played, although rarely in a organized competitive sense.

126. Football should also be of appeal, because most institutions already have facilities for football and more women would be permitted to participate than in other individual or limited participation sports of the sort labeled "emerging" by the NCAA.

127. *See supra* notes 73-81. Such efforts may also violate the "contract" that Division I institutions arguably have with their student-athletes in revenue-producing or profitable sports. *See infra* note 132 and accompanying text.

128. Berkowitz, *supra* note 119, at F1.

to achieve gender and racial equity. The caveats contained in the closing sentences of the prior paragraph should not, therefore, be read as opposition to efforts to achieve gender equity as much as they should be read as a call to proponents of gender equity to be sensitive to the racial implications of solutions proffered to achieve gender equity, through litigation or otherwise.

2. Litigation Strategies to Achieve Racial Equity

Unfortunately, efforts to achieve racial equity under the Equal Protection Clause of the Fourteenth Amendment have been largely unavailing in most contexts because the complaining party typically must prove that there was an intent to discriminate on the basis of race.¹²⁹ In the intercollegiate athletics context, where persons of color predominate (at least in a numerical sense),¹³⁰ inequitable treatment is often far more subtle and far less susceptible of proof than in a traditional discrimination suit.¹³¹ Current efforts to achieve racial equity through litigation have focused, therefore, on more attenuated theories,¹³² often grounded in common law.

While constitutional claims based on Equal Protection have been suggested as a means of addressing racial inequities in some contexts in intercollegiate athletics,¹³³ those strategies remain largely ineffectual. As noted above, courts have required a showing of discriminatory intent, and have not allowed plaintiffs to proceed on racially disparate impact theories.¹³⁴ This intent requirement, coupled with the Supreme Court's

129. See JOHN E. NOWAK AND RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 620-636 (5th ed. 1995).

130. See *supra* notes 67-68.

131. The inequity, particularly in terms of treatment of African-American male student-athletes, who dominate revenue-producing sports, often manifests itself less as outright discrimination and more as exploitation or a failure of good faith on the part of the institution.

132. In order to address the inequities associated with exploitation of the male student-athletes in revenue producing sports, for example, courts have considered use of contract (e.g., breach of a covenant of good faith) and tort principles. See, e.g., *Ross v. Creighton Univ.*, 957 F.2d 410 (7th Cir. 1992) (student-athlete raised negligence and contract claims) and *Jackson v. Drake University*, 778 F. Supp. 1490 (S.D. Iowa 1991) (student-athlete raised contract, negligence, negligent misrepresentation, and Section 1981 claims). These cases and other materials are discussed at greater length, *infra* notes 140-44, and accompanying text.

133. See Ray Yasser, *The Black Athletes' Equal Protection Case Against the NCAA's New Academic Standards*, 19 GONZ. L. REV. 83 (1983-84).

134. See *Washington v. Davis*, 426 U.S. 229, 244-45 (1976) (discriminatory intent must be proven).

present unwillingness to permit "affirmative action,"¹³⁵ makes it unlikely that student-athletes of color will be able to address racial inequities of the sort that exist in the intercollegiate athletics context, as described in Part III.(B) of this article, through federal constitutional or related means. Student-athletes of color might, however, turn to state constitutional claims in an effort to remedy racial inequities. State courts may be willing to interpret state constitutional equality and related provisions more liberally than have the federal courts.¹³⁶ Even if state courts are receptive to student-athletes' claims against individual institutions, however, it is unlikely that they would be permitted to bring claims against the NCAA as an entity, in an effort to address Association-wide problems, because the NCAA is not a state actor for constitutional purposes.¹³⁷

Student-athletes of color, therefore, have increasingly turned to contract and tort claims, in order to address inequities related to educational deprivation and exploitation.¹³⁸ Student-athletes have argued that it is educational malpractice when an institution undertakes a duty "to provide [the student-athlete] an atmosphere conducive to academic achievement," but fails to meet that duty.¹³⁹ Courts, however, have been reluctant to recognize a

135. See, e.g., *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978) (holding unconstitutional a medical school's affirmative action plan); *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) (holding minority set-asides for city construction contracts unconstitutional); *Hopwood v. State of Texas*, 1996 WL 120235 (5th Cir. 1996) (holding that race cannot be a factor considered in the admissions process of the University of Texas' Law School).

136. Essentially, a "ratchet" rule applies—state courts may provide more protection of liberty, under state constitutional provisions, than is provided under the federal constitution, but they may not provide protection. State courts might, therefore, provide greater protection to minority athletes under equality provisions in the state constitution. Reverse discrimination—less discrimination against nonminority athletes on the basis of race—concerns, however, might be raised in response to such a decision.

137. See, e.g., *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 465-66 (1988) (holding that the NCAA is not a state actor for constitutional purposes) and *National Collegiate Athletic Ass'n v. Miller*, 795 F. Supp. 1476, 1484-85 (D. Nev. 1992) (holding that the commerce clause precludes a state from enforcing more stringent constitutional standards on the NCAA, on the ground that to do so would deprive the NCAA of the capacity to enforce its rules uniformly).

138. See, e.g., Timothy Davis, *Examining Educational Malpractice Jurisprudence: Should A Cause Of Action Be Created For Student-Athletes?*, 69 DENV. U. L. REV. 57 (1992) [hereinafter *Educational Malpractice*] and Timothy Davis, *An Absence Of Good Faith: Defining A University's Educational Obligation To Student-Athletes*, 28 HOUS. L. REV. 743 (1991) [hereinafter *Absence of Good Faith*].

139. See, e.g., *Jackson v. Drake University*, 778 F. Supp. 1490, 1493 (S.D. Iowa 1991). Professor Davis also argues that, "Improper conduct appears with failing to

negligence or educational malpractice cause of action on the part of an aggrieved student-athlete because, if recognized, such a duty would: (1) "lack a satisfactory standard of care by which to measure the defendant's conduct," (2) "reasonably be expected to result in an enormous amount of litigation involving college athletic programs," (3) "interfere with the internal operations and daily workings of an educational institution," and (4) "challenge the academic freedom" and "autonomous decision-making of the academy itself."¹⁴⁰ Although each of these arguments has its weaknesses, in an analytical sense,¹⁴¹ there are no cases in which student-athletes have succeeded in bringing a claim for educational malpractice.

The contract cause of action, on the other hand, has been somewhat more successful. In *Ross v. Creighton University*,¹⁴² the plaintiff attended

provide sufficient study time or independent and satisfactory counseling and tutoring, with disregarding student-athletes' progress toward education, with channeling student-athletes into classes which lack substantive education[al] merit and with passing student-athletes to higher levels to maintain their academic eligibility." *Davis Educational Malpractice*, *supra* note 138, at 80.

140. *Jackson*, 778 F. Supp. at 1494.

141. In *Jackson*, the court gave four reasons for rejecting the "educational malpractice" claim of a student-athlete. *Id.* The court's arguments may be responded to as follows: (1) Lack of a Standard of Care: Given that recognition of the doctrine could be limited to actions brought by student-athletes in the revenue-producing or profitable intercollegiate sports—basketball and football primarily—the action would be analogous to claims brought in other commercial contexts and would be susceptible to the creation of a standard that could be limited as are standards in other commercial contexts (e.g., medical or legal malpractice). Furthermore, it is arguable that the NCAA and its members have agreed to a basic standard: "athletics competition [is to be] an integral part of a quality educational experience." NCAA CONST. art. 2, § 2.15, *supra* note 8, at 5 (1995); (2) Proliferation of Litigation: Given the limitation of the doctrine to revenue-producing or profitable sports, and the high cost of bringing an action, it is doubtful that there would be an enormous amount of litigation, unless colleges consistently were to engage in egregious conduct relative to the educational progress of their student-athletes; (3) Interference with Internal Operations: The "interference" involved in the educational context would be no more intrusive than the interference involved in a medical malpractice case involving a hospital. (4) Challenge the Autonomous Decision-Making of the Academy: As previously noted the intrusion would be limited, and there is less reason to respect autonomy when the institution is using it as a shield against performing its acknowledged educational or academic function, especially when it benefits from the labor of the student-athlete in a commercial sense.

Professor Davis also argues forcefully that, "colleges and universities exercise dominion and control over the affairs of student-athletes. As such, a quasi-fiduciary relationship is created" *Davis Educational Malpractice*, *supra* note 138, at 94.

142. 957 F.2d 410 (7th Cir. 1992).

Creighton University for four years on an athletic scholarship and left (after acquiring 96 of the 128 credits required to graduate) with the language skills of a fourth grader and the reading skills of a seventh grader. The Court of Appeals for the Seventh Circuit recognized a limited cause of action sounding in contract. The court held that, on remand, the plaintiff could seek to prove that "he was barred from *any* participation in and benefit from the University's academic program without second-guessing the professional judgment of the University faculty on academic matters."¹⁴³

Having to prove that one was precluded from "any" participation in and benefit from an institution's academic program provides limited recourse for plaintiffs like the plaintiff in *Ross*. In effect, plaintiffs must prove that they received no educational benefits, as opposed to having to prove (as is the case under traditional contract law) that the breaching party substantially failed to perform the bargained for exchange.¹⁴⁴

It is not surprising, therefore, that student-athletes seeking to address arguably more attenuated racial inequities of the sort described in this Article have not enjoyed the same level of success as have litigants seeking gender equity through Title IX even though Title IX is considered to be an "appropriate analogue" of Title VII, which deals with racial discrimination.¹⁴⁵ In both contexts, however, litigation as a remedial strategy is of only limited effectiveness.

143. *Id.* at 417 (emphasis added).

144. Professor Davis has argued against this result: "When the conduct of an institution obstructs a student-athlete's access to a meaningful educational opportunity, it evades the spirit of the bargain. This obstruction, coupled with an institution's improper use of its discretion to deny student-athletes the benefits of the contractual relationship, translates into bad faith behavior." *Davis Absence of Good Faith, supra* note 138, at 789.

Professor Davis goes on to argue that actionable deprivations should include: "(1) failing to provide meaningful tutorial and remedial assistance to student-athletes with marginal academic records; (2) providing academic counseling that encourages student-athletes to undertake a program of study to maintain academic eligibility, but which lacks academic merit; (3) failing to provide sufficient study time; (4) failing to monitor a student-athlete's academic performance and progress toward graduation; and (5) diluting academic standards so that a student-athlete can maintain academic eligibility."

Davis Absence of Good Faith, supra note 138, at 789-790 (citation omitted).

145. *See, e.g., Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824 (10th Cir. 1993).

3. Inherent Limitations in Litigation Strategies

In addition to the weakness of the individual legal doctrines that may be used to achieve racial and gender equity in intercollegiate athletics, litigation has inherent limitations as a strategy to achieve equity. Those limitations include the expense and the interstitial nature of judicial decisionmaking.

As a dispute resolution strategy, litigation is costly, both economically and emotionally, and requires resources that are not available to the typical student-athlete. To run its course, litigation involves thousands of dollars, sums well beyond the capacity of a student-athlete to pay. Given that these actions are not susceptible to proof in a class action capacity,¹⁴⁶ high costs are borne by individual litigants and cannot be spread across a class of litigants. Emotional costs are also high when a student-athlete is forced to bring an action based on her own lack of education against her institution and its personnel, including coaches and other administrators. Institutions, with more extensive resource bases, including typically university counsel, are less affected by the resource issue than are student-athletes. But they, too, view litigation with some trepidation, both emotionally and economically.

In legal actions under Title IX, where counsel for the student-athlete may be able to recover costs and attorneys fees, and tort law, where counsel may be willing to agree to a contingency fee contract, the resource issue may be less significant. In other actions, including an action sounding in contract where contingency fee arrangements are rare, however, resource issues may impede the bringing of an action. Resource issues, therefore, may effectively preclude student-athletes from bringing individual actions to address racial and gender inequities in intercollegiate athletics.

These resource issues are further compounded by the fact that relief in litigation is interstitial in nature. In other words, the relief granted resolves a single fact-specific case, at a single institution, in a single jurisdiction. Efforts to achieve equity in any broad sense through litigation, therefore, move ever so slowly¹⁴⁷ from one individual action at a single institution to another similar action elsewhere. Once developed in the crucible of litigation, legal

146. Actions, as illustrated in the Title IX context, are typically brought against individual institutions. *See, e.g.*, Johnson, *supra* note 96, at 554. *But see* Robert C. Farrell, *Title IX or College Football*, 32 HOUS. L. REV. 993, 1026-27 (1995) for a discussion of the settlement reached in a recent suit brought by The National Organization of Women against the California State University System.

147. Another inherent limitation of litigation as a strategy to bring racial and gender equity to intercollegiate athletics is the fact that litigation moves slowly, through its various stages, and on dockets that engender the virtue of patience but do little to bring rapid relief to the litigant. Legal doctrine develops piecemeal and gains coherence, in a policy sense, only over an extended period of time.

doctrine may be used in other contexts and may come to have broader implications.¹⁴⁸ Legal doctrine, which may be applied in other contexts, however, develops slowly and unevenly, and may suffer a quick death at the hands of a legislative body.¹⁴⁹

Given its expense and interstitial nature, therefore, litigation is a weak strategy for bringing racial or gender equity to intercollegiate athletics. Indeed, its major virtue may simply be that it can encourage an important dialogue regarding equity issues, which may ultimately help facilitate meaningful reform at the broader legislative or rulemaking level.

B. Equity Through Legislation and Rulemaking

In examining the achievement of racial and gender equity in intercollegiate athletics through legislation, this section examines legislative activity and rulemaking at four levels: (1) federal, (2) state, (3) associational, and (4) institutional. At the federal level, the focus will be on Congress. At the state level, the focus will be on activity by state legislatures. At the associational level, actions by the NCAA, regional accrediting agencies, and conferences will be examined. Finally, at the institutional level, actions by individual colleges and universities will be addressed.

At each level, the analysis will examine reforms designed to achieve racial and gender equity. Where applicable, the analysis will remain sensitive to the interrelationships between efforts to effectuate equity in each area (gender and race), and will also seek to maintain attentiveness to broader issues related to the role of sport in our broader culture.

1. Legislation and Rulemaking at the Federal Level

a. Gender Equity

Title IX has done more than any other legislation to stimulate a dialogue about issues of gender equity in intercollegiate athletics and to help achieve that equity. That success has bred legislative opposition from the outset, particularly on the ground that gender equity might come at the expense of revenue-producing sports, especially football.¹⁵⁰ Some of the initial

148. With a series of successful suits in the Title IX context, for example, legal doctrine may develop that can be used to bring equity without going through the entire litigation process in all future cases. See *supra* note 140-44. Let it be remembered, however, that the road to such useable doctrine has been slow and uneven, at best.

149. See *infra* Part IV.B.1. of this article for a discussion of how future progress toward equity under Title IX may be in jeopardy at the Congressional level.

150. Catherine Pieronek, *A Clash of Titans: College Football v. Title IX*, 20 J.C.

opposition bred of this apprehension has been recently rekindled,¹⁵¹ as funds generated by revenue-producing sports have been diverted, and scholarships and related support for male student-athletes have been cut, to provide resources to increase gender equity. This resource reallocation has been complicated further by difficult financial times in higher education.

As proponents of gender equity have focused on cuts in Division I football as a means of achieving proportional participation by men and women in intercollegiate athletics,¹⁵² and as other male sports such as wrestling have been cut to help achieve proportional participation in intercollegiate athletics by men and women, opposition to aggressive enforcement of Title IX has intensified. Representative Hastert, for example, successfully pushed for oversight hearings regarding Title IX in the intercollegiate athletics context.¹⁵³ In doing so, he argued that, "Congress should take back control of this process, because the courts are making determinations that bring everything back to proportionality."¹⁵⁴ This pressure elicited a response from Norma Cantu of the Office of Civil Rights, who was quick to respond that colleges may meet any one of the three criteria—not just proportionality.¹⁵⁵

& U.L. 351, 375 (1994).

151. Many supporters of college football have argued that the Office of Civil Rights is ignoring the Javits Amendment to Title IX. They contend that the Javits Amendment was added to the Department of Education's rules on college athletics in 1974 and provides that O.C.R. must make "reasonable provisions considering the nature of particular sports," *quoted in Mike Zapler, Coaches of Major Football Teams Ask Congress to Help Revamp Enforcement of Title IX*, THE CHRON. OF HIGHER EDUC., Jan. 6, 1995, at A44. Donna Lopiano and others disagree asserting that the Javits amendment was intended only to cover equipment and similar costs that differ among sports. *Id.* The courts have tended to agree with the latter argument. *See* case and discussion in RAY YASSER, SPORTS LAW 116-140 (2d ed. 1994).

152. One commentator, who has made this argument, asserts that, "[t]o attain gender equity, Division I football must be reformed. Expenditures and the excess of nonessential departmental items must be controlled. Reducing the size of the football squad is a logical start." Henderson, *supra* note 96, at 159. That author goes on to argue that, given that professional football teams have rosters of only 47 players, it should be possible to cut collegiate rosters, at the Division I level, to 72. Henderson, *supra* note 96, at 160.

153. Debra E. Blum, *House Panel Hears Title IX Debate But Schedules No Further Action*, THE CHRON. OF HIGHER EDUC., May 19, 1995, at A41. The Senate Committee on Commerce, Science, and Transportation was also considering hearings regarding Title IX in the athletics context. *Id.*

154. *Id.*

155. *Id.*

Expressions of discontent persisted, however, as Representatives McKeon and Gunderson wrote to Cantu, indicating that they felt the guidelines evidenced a "lack of clarity" and contributed to "frustration."¹⁵⁶ They added that, "[i]t might obviate the need for a legislative clarification if the Department provided a clear signal as to the parameters of the obligation of colleges and universities to provide equal athletic opportunities."¹⁵⁷ Many coaches of revenue-producing sports have joined the fray, expressing their desire that the Office of Civil Rights adopt a provision that would provide that "eliminating men's sports is not an acceptable way to abide by Title IX."¹⁵⁸ As this controversy heats up,¹⁵⁹ serious issues will have to be resolved, including the racial implications of cuts in revenue-producing sports.¹⁶⁰ Great care and much thoughtfulness, however, are in order. If proponents of Title IX succeed at the expense of racial equity, the victory will be of questionable worth in terms of overall equity. Such a victory might be of only limited worth in yet another sense: if institutions with intercollegiate athletic programs merely cut men's sports, without significantly increasing participation on the part of women as a whole, the net gain to women will be negligible. If, however, opponents of aggressive enforcement of Title IX and gender equity are able to exempt revenue-producing sports, great harm will be done to the effort to ensure equitable participation in intercollegiate athletics by women. Although insuring racial equity often translates into protection for revenue-producing sports, which are largely the enclave of student-athletes of color, one must be careful not to protect those sports at the expense of gender equity. In that regard, it is necessary to find ways of achieving two ends that can often be in conflict—racial and gender equity in Division I intercollegiate athletics.

156. *Sidelines*, THE CHRON. OF HIGHER EDUC., June 9, 1995, at A31.

157. *Id.*

158. Mike Zapler, *Protecting Men's Sports*, THE CHRON. OF HIGHER EDUC., Jan. 6, 1995 at A43-44.

159. In her capacity as Assistant Secretary in charge of the office for Civil Rights of the United States Department of Education, Ms. Cantu recently circulated a letter seeking comments regarding a proposed Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, *supra* note 104. That Clarification was intended to allay concerns by establishing that proportionality is not the only means of satisfying Title IX; but, it has generated more criticism. For example, in its response regarding the content of the Clarification, the National Wrestling Coaches Association asserts that the document merely "[a]ffirms that current OCR policy places tremendous pressure on schools to cap and/or eliminate male sports teams." See *Title IX Ticker*, THE NCAA NEWS, October 30, 1995 at 5.

160. The Clarification does not address the racial implications of Title IX. See CLARIFICATION, *supra* note 110.

With these caveats in mind, it is suggested that Title IX be amended to include a provision that would be designed to protect against potential adverse racial implications of Title IX, but that would not otherwise protect revenue-producing sports. Efforts to add emerging sports under such an amendment, for example, would have to take into account the disparate impact of adding some sports that women athletes of color lack access to, in numbers equal at least to their proportion in society as a whole. Similarly, revenue-producing sports, which are dominated by male athletes of color, would receive additional protection and would not be viewed as a source of potential revenue, without first considering the impact of such cuts on male athletes of color. In a sense, this compromise constitutes the least restrictive means of achieving gender equity without adversely effecting race—revenue-producing sports will be protected, but only to the extent that a suggested diversion of funds can be shown to have a disparate racial impact.

Given that Title IX is in effect an unfunded mandate, with significant racial implications, Congress should also provide some economic inducement to assist in the effort to provide gender equity in sport, at all levels. Indeed, efforts to avoid racial inequities related to enforcement of Title IX, as suggested in the prior paragraph, may be wholly ineffective without funding from nonathletic department sources, since funding from the athletic departments often comes at the expense of revenue-producing sports and the minority student-athletes who predominate in those sports. Arguments against federal funding of the gender equity effort will no doubt abound, as interest groups attack use of federal dollars in this manner; but, given the educational values¹⁶¹ associated with participation in athletics, funds allocated for this purpose would be particularly well spent.¹⁶² A compromise of the sort suggested would offer some protection for men's sports, particularly Division I football and basketball, which are dominated by African-American males, from adverse racial implications associated with gender equity efforts. Such a compromise might also eliminate the current divisiveness between male and female coaches and administrators. The athletics community should be able to form a strong interest group of their own in support of such a compromise. An additional benefit of such an interest group would be obtained if the group focused on the educational value of participation in sport generally, in its effort to support a compromise.¹⁶³

161. See *supra* notes 12-36 and accompanying text for a discussion of those educational values.

162. See *infra* notes 174-184 and accompanying text for a discussion of state efforts to provide such funding for gender equity purposes.

163. See *supra* notes 23-26 and accompanying text for a discussion of those educational values.

United States Olympic Committee Executive Director, Richard Schultz, former Executive Director of the NCAA, recently indicated a desire to work more closely with the NCAA in an effort to enhance grass-roots development of athletes, particularly in some male sports that are currently being threatened for cost containment and gender equity reasons.¹⁶⁴ Given this interest on the part of the United States Olympic Committee to cooperate in assisting the NCAA in its efforts to achieve gender equity without cutting men's sports, and to increase opportunities for potential Olympians, the base of support for efforts to obtain federal funding for such purposes can be expanded beyond supporters in the intercollegiate athletics context. If the various sports constituencies unite, rather than oppose one another, they can be a formidable lobbying force that might, in fact, induce Congress to provide funding to deal with racial and other inequities that result as we seek to ensure gender equity. These cooperative efforts must be encouraged because the net result of such efforts would increase participation opportunities for all male and female student-athletes.

The Equity and Athletics Disclosure Act¹⁶⁵ is another piece of federal

164. *Senate Conducts Hearing on Amateur Sports Act*, THE NCAA NEWS, October 30, 1995, at 1. Schultz noted that,

[w]e will team with the NCAA in the post-Atlanta environment to strengthen endangered collegiate programs in Olympic sports such as men's gymnastics, swimming, track and field, and wrestling. The collegiate programs have been the primary source for our Olympic talent in many of these sports, and we must act swiftly to ensure their longevity. We will team with the NCAA to bolster these programs, perhaps to start others, and to also provide opportunities for our Olympic athletes to utilize the superb training facilities which exist on our college campuses.

Id. Tom McMillen, cochair of the President's Commission on Physical Education echoed comments made by Schultz when he stated that, "Our system is upside down Instead of supporting a broad base of grass-roots opportunities and nurturing those who excel, we spend millions on superstars and leave nothing for our kids." *Id.* at 10. The hearing on the Amateur Sports Act also included a segment regarding Title IX, in which concerns were again expressed regarding inequities for women student-athletes and the threat to men's programs, such as wrestling.

165. Pub. L. No. 103-382, § 360B(b), 108 Stat. 3969 (1994) (codified at 20 U.S.C. § 1092(g)).

This legislation requires coeducational colleges and universities that participate in federal student aid programs and sponsor intercollegiate athletics programs to make available an annual report that provides specific information concerning the opportunities and benefits afforded male and female student-athletes. The required information includes, for each women's team, and any team that includes both males and females, the total number of participants and their gender; total athletics scholarships expenditures (gross and per-student); total number of contests for each

legislation that has been proposed and is intended to prod colleges to comply with Title IX by requiring that institutions provide high school athletes with data regarding gender equity and other related issues that would help potential female student-athletes select an institution.¹⁶⁶ Such legislation would not require the institutions to do anything other than disclose certain information. Disclosure, nevertheless, can be of assistance in at least two significant senses: (1) it can provide women with information with which to judge an institution, and (2) it can force the institution to gather, and, one hopes, reflect upon information designed to stimulate action in terms of gender equity. That Act should be amended, as well, to require disclosure of information regarding opportunities for participation on the part of student-athletes of color.

b. Racial Equity

In addition to the suggestion that Title IX be amended to ensure that issues of racial equity are considered in the effort to achieve gender equity and the recommended "compromise" regarding federal funding for women's athletics, hearings should be held regarding issues of racial equity in intercollegiate athletics. Those hearings should include testimony regarding exploitation and access issues.¹⁶⁷ If those hearings reveal that the NCAA and individual institutions need to address racial equity in intercollegiate athletics, in the form of proposed legislation, then the NCAA may be prompted to act to avoid the imposition of a legislative solution.¹⁶⁸ That legislation might be as broad as to provide for the creation of a commission or agency to oversee both gender and racial equity issues in sport or as limited as a requirement that equity issues be considered in the accreditation process for individual institutions.¹⁶⁹ Congress may adopt legislation of a more

team; per capita operating, recruiting and personnel expenses of the team; the gender and full- or part-time status of the head coach; the number of male and the number of female assistant coaches and full- or part-time status of each; the number of male and the number of female graduate assistant and volunteer assistant coaches; ratio of participants to coaches; the average annual institutional compensation of the head coaches and assistant coaches of men's and of women's teams; and the total annual revenue generated from attendance at athletic contests across all men's and women's teams.

Id.

166. *Sidelines*, THE CHRON. OF HIGHER EDUC., October 5, 1994, at A51.

167. See *supra* text accompanying notes 71-77 for a discussion of these issues.

168. The NCAA and Congress often engage in just such a dance—Congress investigates and proposes and the NCAA responds, in order to do justice and to avoid interference from Congress. Smith, *supra* note 8, at 266-68.

169. See *infra* note 198-231 for a discussion of accreditation and certification.

positive nature from the NCAA's perspective that would exempt the NCAA from antitrust law¹⁷⁰ in exchange for committing to making progress on the racial and gender equity fronts.

In studying racial issues in athletics, Congress should also examine the educational value of sport and the relationship of that value to issues of racial and gender equity. In doing so, Congress might uncover ways in which the broader issues related to sport as a part of our culture contribute to inequity. These issues include the ambivalence regarding the academic value of participation in athletics.¹⁷¹ Accordingly, with encouragement from NCAA Division I institutions (many of which are major research institutions), Congress should provide research funding to help stimulate meaningful exploration of academic issues regarding the role of sport in society.¹⁷²

2. Legislation and Rulemaking at the State Level

a. Gender Equity

The Washington Supreme Court held in *Blair v. Washington State University*¹⁷³ that Washington State University violated the equal rights provision of the Washington Constitution and the Law Against Discrimination, because it failed to treat women equitably in terms of their participation in intercollegiate athletics. After the decision in *Blair*, the state of Washington took a very serious step in the direction of achieving gender equity by providing a significant appropriation for tuition waivers for women student-athletes at state institutions.¹⁷⁴ With these tuition waivers, which may be

170. The NCAA is currently subject to antitrust law. See *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 87 (1983). Congress has occasionally used its baseball exemption from antitrust as a means of maintaining some control over and input in the operation of baseball. A similar carrot could be used to help guide the NCAA toward enhanced racial and gender equity in intercollegiate athletics. Providing an antitrust exemption should be viewed warily, however, since the NCAA might use the exemptions to exploit student-athletes. See, e.g., Mitten, *supra* note 77, at 61.

171. See *supra* text accompanying notes 23-26 for a discussion academic values.

172. Just as Congress provides support for scientific research in other areas, it should provide support to encourage the study of sport in education and in society generally.

173. 740 P.2d 1379 (Wash. 1987); see also discussion at *supra* note 95 and accompanying text.

174. The State of Washington adopted legislation permitting institutions to grant tuition and fee waivers, after approval by the Higher Education Coordinating Board of their plan to achieve gender equity to female athletes. WASH. REV. CODE § 28B.15.460 (1994).

used to provide increased participation opportunities for women in intercollegiate athletics in Washington, state universities have taken significant strides toward providing equitable participation for women in intercollegiate athletics. For example, from the 1989-90 school year to the 1993-94 school year, participation rates of female as compared to male athletes at state universities increased by 11 percent. At two of the schools (Washington State University and Evergreen State), participation by female athletes exceeded 50 percent of all athletes.¹⁷⁵ With pressure applied from the court's decision in *Blair* and tuition waivers from the state, Washington State University and the other state universities in Washington have made significant progress in terms of equity in participation in intercollegiate athletics.

Two other states, Illinois¹⁷⁶ and Louisiana,¹⁷⁷ have followed the example set by Washington and have recently funded tuition waivers designated for the purpose of increasing participation by women in intercollegiate athletics.¹⁷⁸ Having passed 54-2 in the Senate and 117-0 in the House,¹⁷⁹ the tuition waiver bill (S.B. 269) in Illinois was enacted on

175. Participation by female student-athletes, as compared to their male counterparts, at the state institutions in Washington increased as follows:

	<u>1989-90</u>	<u>1993-94</u>	<u>% Increase Women</u> <u>Enrolled</u>
Washington State Univ.	31%	51%	20%
Central Washington Univ.	29%	34%	5%
Evergreen State	49%	52%	3%
Univ. of Washington	33%	42%	9%

It is particularly noteworthy that the most significant progress was made at the two major state universities, The University of Washington and Washington State University, both of which have Division I football and basketball teams. Professor Farrell, however, notes that progress made in terms of proportionality in participation has not translated into anything approximately equality in terms of funding for women's sports. Farrell, *supra* note 146, at 1053-55. (noting that funding has been unequal and that women's participation was buoyed by adding seventy women to the women's crew team.)

176. 1995 Ill. Laws 166 (codified at 110 ILL. COMP. STAT. ANN. 205/9.24 (Smith-Hurd Supp. 1996)).

177. 1995 La. Acts 258 (codified at LA. REV. STAT. ANN. § 17:3351(B)(2)(b) (West Supp. 1996)).

178. Arguments that aid directed enhance participation by female athletes discriminates against male athletes can be countered by pointing out that threatened male participation opportunities (e.g., wrestling or swimming) can be retained precisely because such aid for women athletes is forthcoming. The discrimination argument, however, should serve as a warning to an institution that combines new aid for female-athletes with cuts in male participation opportunities.

179. Gottesman, *supra* note 21, at 1. Gottesman reports, as well, that the bill could provide for as much as five million dollars in waivers statewide.

July 18, 1995 and was signed into law the very next day. It provides that, "[f]or the purpose of attaining gender equity in intercollegiate athletics, public institutions of higher education may grant, in addition to any such amounts previously authorized by the board, tuition waivers in an amount not to exceed 1 percent of all tuition income."¹⁸⁰ The Illinois law also requires that, "[b]efore issuing any such tuition waiver, public institutions of higher education shall place on file with the Board a plan for achieving gender equity in intercollegiate athletics."¹⁸¹ A written explanation of the Illinois law further states that, "[w]ithout assistance, . . . state colleges and universities find themselves with no recourse but to eliminate men's athletics in order to accommodate women's athletics. In some cases, schools have reported that the future of the school's . . . Division I status, or men's football team is in jeopardy."¹⁸²

Louisiana also acted promptly in adopting a house bill which provides for an aggregate of as many as fifty tuition waivers per campus during an academic year for women student-athletes.¹⁸³ Representative Forester, the sponsor of the Louisiana legislation, noted that, "[m]y idea is to support women's athletics by increasing the number of scholarships for women before

180. 1995 Ill. Laws 166 (codified at 110 ILL. COMP. STAT. ANN. 205/9.24 (Smith-Hurd Supp. 1996)).

181. 1995 Ill. Laws 166 (codified at 110 ILL. COMP. STAT. ANN. 205/9.24 (Smith-Hurd Supp. 1996)). The state institutions receiving such tuition waivers, after having formulated a plan, are also required to report to the General Assembly every two years regarding progress in implementing the plan. 1995 Ill. Laws 166 (codified at 110 ILL. COMP. STAT. ANN. 205/9.24 (Smith-Hurd Supp. 1996)).

182. *Sidelines*, *supra* note 156, at A31.

183. H.B. No. 1943 was introduced on March 27, 1995 and was adopted on June 14, 1995. It calls on Boards at respective state institutions to promulgate rules and regulations "as soon as practicable." The bill further provides that:

Such rules and regulations may include the establishment, award, and continuance of tuition waivers to any student for purposes of gender equity who participates in an intercollegiate athletics program and who is pursuing an undergraduate degree provided that the student meets the academic standards and complies with the rules and regulations of the college or university such student is attending relative to requirements for attendance as a full-time student. The tuition waivers may be offered at any campus under the jurisdiction of each management board; however, no management board shall issue more than an aggregate of fifty tuition waivers per campus during an academic year and not more than fifty percent of such tuition waivers shall be issued to out-of-state residents.

1995 La. Acts 258 (codified at LA. REV. STAT. ANN. § 17:3351(B)(2)(b) (West Supp. 1996)).

the federal courts or the NCAA tell them to decrease the number for men's athletics."¹⁸⁴

Interestingly, a significant part of the impetus for these efforts to support gender equity in intercollegiate athletics in Illinois and Louisiana seems to have been the desire to maintain men's athletics, particularly football, while promoting gender equity. The bill garnered support from men and women in the athletics community, however. This strong coalition of support no doubt contributed to the quick passage of each bill.

Despite the quick passage and strong support offered for this legislation, some educators opposed the bills. Richard Wagner, Executive Director of the Illinois Board of Education, for example, stated that he was concerned "about the use of state funds to support intercollegiate athletics. My own view is that we have a higher priority to use the funds for academic instruction."¹⁸⁵ Proponents of the legislation, however, countered that "the classrooms are already functioning, so adding one more chair does not increase expenses."¹⁸⁶ Proponents in Illinois and Louisiana, made up of a strong coalition of supporters for men's and women's athletics, were able to persuade their elected officials that gender equity, in terms of participation in intercollegiate athletics, could be facilitated without cutting men's opportunities and at little additional cost. Few new dollars would have to be expended because the waivers could be funded by merely admitting new students and providing for more spaces in existing classrooms.¹⁸⁷

184. *Sidelines*, *supra* note 156, at A31.

185. Gottesman, *supra* note 21, at 1. That article also notes that, "Skeptics . . . worry that [the bill] places sports above classrooms—and some would rather see partial cuts in men's teams, particularly football, in order to pay for gender equity." Gottesman, *supra* note 21, at 1.

186. Gottesman, *supra* note 21, at 1.

187. The cost of the tuition waivers, therefore, is marginal. Essentially, institutions are being called upon to add a few (in Louisiana, as many as 50) new students, who could simply be absorbed into existing classrooms, without placing much demand on existing resources and with only marginal impact on the overall student-faculty ratio because the institutions typically are quite large. In other words, adding 50 students on a campus of 20,000 constitutes only a .25% increase, which is negligible in terms of computing student-faculty ratios or as a drain on existing resources. Additionally, the only loss to the state came in the form of income foregone that might have been received from the institutions or the athletic department had they been required to pay the tuition into state coffers. Proponents were easily able to persuade legislators that this was a small price to pay to be able to make a significant stride toward gender equity without adversely affecting men's sports, particularly football. Opponents, who were afraid of such a precedent, simply were not able to stimulate sufficient concern to turn the stampede.

Given the success of tuition waiver legislation in helping to bring gender equity in terms of participation by women to intercollegiate athletics in Washington, Illinois and Louisiana, it is likely that similar efforts will be launched in other states. If the early successes in Washington are any indication, these efforts will do more to promote gender equity, at least in terms of participation, than any other efforts currently contemplated. If, as previously suggested,¹⁸⁸ federal funds could be supplied to cover at least marginal costs,¹⁸⁹ significant progress could be made rather quickly in terms of gender equity in participation. The federal government might be lobbied to engage in conditional spending covering marginal costs, as an inducement for states to provide waivers for women without adding new faculty or other related expenses.

The tuition waiver plans, which are designed to promote opportunities for women without cutting men's programs, also have positive implications for men of color who dominate in sports, like football and basketball, that have been targeted for cuts in the number of scholarships. Women of color, however, could be unintentionally harmed by such efforts if additional waivers are used to provide new opportunities for women in "emerging sports," such as synchronized swimming, that have been the exclusive enclave of white, upper-class women. Therefore, tuition waiver legislation should include express protection for women of color, by including language that would require waivers to be used in sports where all women have realistic opportunities to participate. Thus, instead of adding tuition waivers in sports like tennis, synchronized swimming, and golf, institutions would need to add sports that have traditionally provided access for all women, such as track and field.

As progress is made in terms of participation by women student-athletes, new opportunities should be provided for women coaches and administrators. It would be appropriate, therefore, for funding of participation opportunities to be tied in some way to providing access for women to coaching and administrative positions. For example, the Illinois legislation requires submission of a gender equity plan, together with follow-up reports. Those reports should require information regarding access by women to coaching and administrative positions. They should also require information regarding resource issues, including comparative salary data and detailed information

188. *See supra* note 187.

189. *See supra* note 187 for a discussion of marginal costs. Marginal costs are the expenses (e.g., room and board) in addition to the cost of the tuition waiver itself. In one sense, adding tuition waivers at larger institutions have little direct cost because the institution can simply absorb additional students without adding new faculty or other related expenses (e.g., each waiver supply adds one student to an existing class(es)).

regarding resources allocated to women's athletics. Requiring such information should provide fodder for future action and would make the institutions painfully aware of their shortcomings in those areas.

State legislation alone, however, is not enough. Further action, either through litigation under Title IX and state anti-discrimination laws, or through legislative or administrative action at the state or associational and institutional levels,¹⁹⁰ must be taken to ensure that women are provided equity in all areas, not merely in terms of participation opportunities for women student-athletes. Increased participation by women will, however, clearly provide added stimulus for progress in other areas.

A united and cooperative effort by athletic supporters to promote gender equity at the state legislative level may also be beneficial in dealing with the deep cultural ambivalence about the value of sport. In supporting efforts to increase participation for women in athletics, this coalition should strengthen their case by building strong academic arguments in support of athletics. In doing so, they may be able to deflect opposition to their equity efforts from educators who continue to err by asserting that participation in athletics is of little or no academic value.

b. Racial Equity

The previous section notes legislative efforts in the gender equity area, including a recommendation regarding participation for women of color.¹⁹¹ Legislative efforts to deal with the somewhat more subtle racial inequities plaguing male student-athletes of color, described earlier in this Article, have not been forthcoming, however. While this failure to act may be attributable in part to a lack of awareness regarding those issues, such ignorance should dissipate as more information is made available and certainly should no longer absolve those responsible for perpetuating inequities from their failure to act to address those inequities.

There are ways in which legislative efforts could help. Just as Illinois requires a plan for gender equity, institutions should be required to provide detailed plans regarding racial equity. As suggested at the federal level, state legislative committees should initiate hearings to explore issues related to racial equity in athletics. Unfortunately, it is typically the case that racial minorities, like all minorities, often lack sufficient political clout to bring attention to such issues at the legislative level.

One area where issues of gender and racial equity coincide, however, is in the area of coaching and administration. Men of color, like women, have

190. See *infra* at notes 225-28 and 233-35 and accompanying text, for other means of achieving these gender equity goals.

191. See *supra* text accompanying notes 188-190.

not had meaningful access to coaching and administrative positions.¹⁹² Supporters of equity for women should, therefore, form a political coalition with proponents of racial equity, to push for increased access to coaching and administrative opportunities for women and persons of color. The Black Coaches' Association has offered support for equity for women,¹⁹³ and have impliedly invited women to join in their efforts to bring equity to coaching and administration. Women should accept the invitation to form a coalition. Such a coalition could be quite powerful. Just as was the case with the successful efforts to enact tuition waiver legislation in Illinois and Louisiana, women could bring significant numbers to the coalition and the coaches of color could exert pressure related to their involvement in revenue-producing sports. The Black Coaches' Association, for example, was able to bring attention to issues of racial inequity by threatening a walk out at the NCAA basketball tournament, which was ultimately averted through mediation by President Clinton and the Justice Department.¹⁹⁴ Women, with their potential electoral support, and coaches of color, with their special role in the revenue-producing sports, together with men seeking to preserve sports like wrestling could establish a formidable coalition that could force hearings and, perhaps, ultimately legislative action on issues of common concern at the state and federal legislative levels.

In addition to efforts to create racial and gender equity in coaching and athletic administration, issues involving racial equity arise in terms of the treatment of male student-athletes of color, who ultimately create much of the revenue that supports the NCAA and institutional athletic programs at the Division I level.¹⁹⁵ If the academic needs of male student-athletes participating in revenue-producing sports are not addressed, and funds generated by their actions are diverted to other purposes, a strong argument can be made that the student-athletes are being exploited.¹⁹⁶ This exploitation is particularly harmful to student-athletes of color because of their predominance in revenue-producing sports. To avoid such exploitation, states should recognize this special status of some student-athletes as revenue-producers who have a commercial, as well as an academic relationship, with their universities and should legislatively recognize contract and tort causes of action.¹⁹⁷ Additionally, legislative action could be taken to protect against

192. See *infra* notes 204-07 for a discussion of these inequities.

193. See *supra* note 128.

194. Berkowitz, *supra* note 119, at F1.

195. See *supra* notes 69-71.

196. See *supra* notes 72-78.

197. See *supra* notes 139-144 and accompanying text for a discussion of the current status of contract and tort law as a means of dealing with the exploitation of student-athletes of color. See, e.g., *infra* notes 209-212, 217-18, 225-28, and

such exploitation by requiring institutions to account for the use of funds generated by revenue-producing sports dominated by male student-athletes of color. For example, diverting funds from academic support, or failing to provide adequate funding for academic support for student-athletes in revenue-producing sports, would be highly suspect. Finally, legislative hearings should be held to determine the extent of exploitation that exists within state institutions and some legislation requiring disclosure of relevant factual material bearing on exploitation and access issues would be helpful.

3. Legislation and Rulemaking at the Associational Level

If racial and gender equity are to be achieved in the intercollegiate athletic context, it will be necessary for significant action to be taken at the associational level. This section deals with current and prospective actions at the associational level. The major associational entity is, of course, the NCAA; Conferences and accrediting agencies are included in the analysis of this section as well.

a. *The NCAA*

The NCAA is the primary athletic association¹⁹⁸ involved in the governance of intercollegiate athletics at the national level. The NCAA has evidenced some sensitivity to gender and racial equity issues. Efforts have been undertaken to include women and administrators of color as part of the NCAA's governing process. For example, under NCAA rules, women must be included within the membership of the Council,¹⁹⁹ which has significant power,²⁰⁰ and on the Executive Committee,²⁰¹ which exercises substantial

accompanying text, for a discussion of nonlitigation strategies or reforms that might deal with the exploitation issue.

198. There are other associations at the junior college and collegiate level. While concerns similar to those raised in this article often arose in those associations, they are smaller and they are likely to follow the NCAA's lead in the area of gender and racial equity, for legal and practical reasons.

199. The Council is made up of 46 members—22 from Division I, 11 from Division II, and 11 from Division III. See THE NCAA MANUAL, *supra* note 8, § 4.1 at 21. Of that membership, women must constitute at least 12 members—6 women at the Division I level and 3 women at the Division II and III levels, respectively. THE NCAA MANUAL, *supra* note 8, § 4.1 at 21. Of course, 12 members out of 42 (under 30%) is hardly proportional, but it is enough presumably to ensure that women's interests are articulated in the governance process.

200. The duties and responsibilities of the Council are set forth in THE NCAA MANUAL § 4.1.3, which include, but are not limited to: establishing general policy between Conventions, appointing committees, making interpretations, reviewing and

executive authority.²⁰² Other powerful committees and governing entities in the NCAA's hierarchy, however, are not required to include women in their ranks. Those groups include the Administrative Committee and Officers of the Association (the President, Division Vice Presidents, and Secretary-Treasurer),²⁰³ Presidents Commission,²⁰⁴ the Joint Policy Board,²⁰⁵ and significant committees of the Association, including the Committee on infractions and the Committee on Athletics Certification. The current Executive Director of the NCAA, like all of his predecessors, is a white male.

While the membership qualifications for service on the Executive Committee and the Council are relaxed somewhat for persons of color,

approving certain policies and procedures, adopting noncontroversial legislative amendments and administrative regulations, and filling vacancies that occur among officers and committees of the NCAA.

201. The Executive Committee is made up of 14 members, at least 4 of whom must be women. THE NCAA MANUAL, *supra* note 8, § 4.2 at 23.

202. The Executive Committee's duties and responsibilities include but are not limited to: 1. transacting business and administering the affairs of the NCAA; 2. employing an executive director; 3. adopting a budget; 4. adopting regulations for expenditure of Association funds; 5. administering NCAA championships and distributing the income of the association; 6. retaining exclusive authority to establish and revise policies regarding championships and the distribution of revenues to participating institutions; and 5. other adopting regulations not inconsistent with the provisions of the constitution or other bylaws.

203. The Duties and Responsibilities of the officers are set forth in THE NCAA MANUAL § 4.4.3. Women and persons of color have rarely been represented among the officers of the Association.

204. The President's Commission is quite powerful. Their powers include reviewing any activity of the Association, placing any matter of concern of the agenda of any Council meeting or NCAA Convention, commissioning studies, proposing legislation, calling for special meetings of the Association, and approving the appointment of an executive director of the Association. THE NCAA MANUAL, *supra* note 8, § 4.5.3(a)-(h).

See also Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985 (1986) for discussion of the Presidents Commission, their powers, and the exercise of these powers. Specifically, it was noted that, "Today the Presidents Commission clearly is a dominant force in the NCAA." *Id.* at 998. Also, the Presidents Commission sponsored what has been called the "death penalty," a major sanction for repeat, major infractions of NCAA rules. *Id.* at 987-88. Only 7 women (17%) and 9 persons of color (22%) are represented on the Presidents Commission. Report from Stanley D. Johnson, National Collegiate Athletic Association, on NCAA Demographics of Governing Bodies (October 24, 1995) (on file with author).

205. The powers of the Joint Policy Board are set forth in THE NCAA MANUAL, *supra* note 8, § 4.6.2 at 28.

permitting "a full-time athletics administrator who is a member of an ethnic minority" to serve,²⁰⁶ ethnic minorities continue to be under-represented on those and other influential governing entities within the NCAA.²⁰⁷

Thus, despite some efforts to provide opportunities for women, and to a lesser extent, persons of color, a voice in the governance of the NCAA, that voice remains largely muted by virtue of under-representation. This is even true of the Council and the Executive Committee, where some effort has been exerted to permit access for women and ethnic minorities. While the NCAA should be applauded for making overtures to women and ethnic minorities to participate in governance, those overtures should be extended to all policy-making and influential committees and groups within the NCAA hierarchy. Sufficient access must be required in order to help effectuate participation at a more proportionate level.²⁰⁸

The NCAA has also created programs to assist women and ethnic minorities interested in athletic administration.²⁰⁹ Additionally, in some important areas such as certification, the NCAA has demonstrated a concern for equity.²¹⁰ The NCAA has also formed committees or task forces to study equity issues and to recommend legislation.²¹¹

206. See THE NCAA MANUAL, *supra* note 8, § 4.2.2 at 23 (Executive Committee) and § 4.1.2 at 22 (Council).

207. Only six persons of color (14%) are represented on the NCAA Council. Stanley Johnson, *supra* note 204. Two persons of color (14%) are represented on the NCAA Executive Committee and only one (12%) on the NCAA Joint Policy Board. *Id.*

208. Racial and gender inequities at the institutional level have resulted in some schools being placed on a conditional certification status. *Plans for Equity Issues Important Certification*, THE NCAA NEWS, August 30 1995, at 1.

The NCAA should be held to similar standards in terms of evaluating their progress in of the area of gender and racial equity.

209. The NCAA Minorities Opportunities and Interests Committee and the NCAA Committee on Women's Athletics have addressed the issue of opportunities for ethnic minorities and women in intercollegiate athletics, by establishing scholarships for ethnic minorities and women involved in postgraduate study in sports administration.

210. In the Division I certification requirement, *The NCAA Manual* provides for a self-study, which is to be verified and evaluated through external peer review, and which requires coverage of the following issues: "(a) Governance and commitment to rules of compliance; (b) academic integrity; (c) fiscal integrity; and (d) commitment to equity." THE NCAA MANUAL, *supra* note 8, § 6.3.1.1, at 47. Presumably, the commitment to "equity," includes racial and gender equity, while the commitment to "academic integrity" should include examination of whether or not institutions are keeping their part of the academic bargain with their student-athletes, particularly in revenue-producing sports.

211. The Gender Task Force has issued a report, *supra* note 41, as has the NCAA Minority Opportunities and Interests Committee, *supra* note 88.

These efforts demonstrate evidence of good faith on the part of the NCAA. Assuming that such good faith is present, the following recommendations may be acceptable.

Prior to his resignation as Executive Director of the NCAA, Richard Schultz offered his support for the gender equity effort. He stated that, "we have the resources within the NCAA [to help bring gender equity to intercollegiate athletics]."²¹² Unfortunately, Director Schultz did not elaborate, either on what might be done of a concrete nature to assist in the gender equity effort, or on what sources of revenue were available for such purposes.²¹³ This section offers suggestions for reforms, as well as discusses sources of revenue that might be drawn upon for such purposes.

Professor George has recommended that the "NCAA should ground its commitment to Title IX by the use of serious sanctions."²¹⁴ This could be done in concert with the developing certification process. As previously noted,²¹⁵ equity concerns currently are to be included in producing and evaluating the self-study included in the certification process. In the course of the certification process, institutions must provide a plan for improvement and are required to correct identified problems.²¹⁶ Failure to address those problems, which include unresolved "equity" issues, may result in the member institution being placed in a restricted or corresponding membership category, which is tantamount to being placed on probation. This could be a very strong means of promoting gender and racial equity, if used.

212. NCAA GENDER EQUITY TASK FORCE REPORT, *supra* note 41, at 16.

213. The source of revenues is significant, since caution must be counseled if the NCAA is contemplating diverting revenues generated from men's basketball to fund efforts that might exacerbate racial inequities (exploitation) related to the diversion of those funds.

214. George, *supra* note 43, at 32.

215. *See supra* note 210.

216. Section 6.3.1.1.1 of *The NCAA Manual* deals with the Institutional Plan for Improvement and requires that:

Each member institution participating in the program shall develop a formal set of objectives designed to correct any deficiencies in the institution's athletics program, and establish an overall strategy for improving the quality of the institution's athletics program from one self-study to the next. When problems are identified pursuant to the certification process, a member institution shall take corrective action. A member institution that fails to conduct an appropriate self-study or to make an effective effort to correct problems identified pursuant to the certification may be denied certification and ultimately may be placed in restricted and/or corresponding membership classifications.

THE NCAA MANUAL, *supra* note 8, § 6.3.1.1.1 at 47.

Short of using the extreme sanctions that are implied in the certification process, the NCAA could use more traditional sanctions to ensure equity. It could, for example, tie participation in championships to an institution's record regarding equity issues.²¹⁷

The NCAA might also require that all new pieces of legislation within the association be subjected to a racial and gender equity impact statement.²¹⁸ In other words, each new legislative proposal or activity related to the operation of intercollegiate athletics would be subjected to an analysis to determine its impact for racial and gender equity purposes. Such a requirement would keep racial and gender equity issues in the forefront.

The fairly recent creation of a Gender Task Force to study gender equity issues in intercollegiate athletics and the implementation of some of its recommendations, was generally positive. The major defect in the task force's effort, in terms of racial equity, was the promotion of recommended "emerging" women's sports, which are, as an empirical matter, largely the domain of white upper-class women.²¹⁹ It would be worthwhile, nevertheless, to institutionalize the task force by creating a committee to continue to study gender equity issues at the national level and to make legislative recommendations. Even the "emerging" sports concept might be refined in a way to ensure equal access for women of color by considering the addition of a sport like women's football to the list. While women's football does not exist at the high school level, other than on an occasional basis, the NCAA could lead an effort to study how it might be promoted in the future, with the intent of providing significant participation opportunities for all women. Efforts to integrate or expand participation by women of color in the recommended emerging sports should also be promoted.

The NCAA might join with high school athletic associations, and perhaps other academic entities, to form a group to study gender and racial issues as well as the broader issues related to the role of sport in society. The group could, as was the case with the Gender Task Force, be given a charge to study and make recommendations. Racial and gender task forces should be promoted at the institutional level, as well.

217. For example, institutions might be required to make progress in terms of participation by women in their intercollegiate athletics programs. Failure to demonstrate progress would, in turn, result in disqualifying the institution from participating in all championship events.

218. It has been suggested that academic impact statements be required as to each new piece of legislation or activity involving governance of intercollegiate athletics, at the NCAA, conference, or institutional level. See Rodney K. Smith, *Little Ado About Something: Playing Games With The Reform Of Big-Time Intercollegiate Athletics*, 20 CAP. U. L. REV. 567, 581-85 (1991).

219. See *supra* note 82 and 110.

It is clear, however, that virtually all efforts to achieve equity will require additional revenues. The NCAA might help on this front. Many advocates of gender equity argue that funds should be taken from football or other revenue-producing sports.²²⁰ This causes potential problems in terms of racial equity, however, if existing funds are diverted from men's football and basketball at the Division I level. One possible source of new revenues that could be used for racial and gender equity purposes would be the development of a national championship in football. Existing bowls could be played, allowing institutions to keep funds currently generated from the current bowl system. After those bowls, however, a system could be developed to select two or four teams that could compete for a NCAA sanctioned national championship. The new funds generated might, in turn, be divided three ways: for gender equity, for racial equity, and for the conferences and institutions involved.

A serious question is raised by such a championship, however: whether forced cross subsidization of this sort has fairness implications which may result in exploitation of the male student-athletes involved in Division I football. The response could be a guarded "no," if certain precautions are taken. First, players and coaches of color would have to agree to the play-off system, including the distribution of funds related to the play-off. Second, care would have to be taken to ensure that the play-offs did not have an adverse academic impact on the students participating.²²¹ If those concerns could be resolved, the play-off system would provide substantial new revenue that might be used for equity purposes. It might also provide a compromise that would insure that Division I football, as presently constituted, would not be cut to provide additional resources for equity purposes. It might also be possible for additional dollars generated to be used to fund additional scholarships and coaching positions in Division I football.

Male student-athletes of color dominate in the revenue-producing sports and, therefore, have a different status than do other student-athletes, male and female alike. These male student-athletes of color and other student-athletes in the revenue producing sports help to generate funds for their institutions and have a relationship that is more commercial and contractual in nature than the typical student. They agree to play and produce revenues in exchange for

220. See *supra* note 121 and accompanying text.

221. President E. Gordon Gee of The Ohio State University has opposed a championship on academic grounds. E. Gordon Gee, *A College Superbowl: The Ultimate Sellout*, N.Y. TIMES, January 1, 1990, at 19. He did not elaborate, as to how it would adversely impact academics in a serious manner, however. His raising of the issue together with the exploitation issue is appropriate. It, however, should be directly addressed as a part of any proposal for a championship or play-off in intercollegiate football at the Division I level.

a scholarship and an education. It is generally not enough, however, that the institution provide them with the opportunity to attend class; the institution must also take necessary steps to provide the student with an actual education.

Given the commercial aspect of the student-athlete's relationship with his university, many commentators have argued that athletes in the revenue-producing sports should be compensated.²²² It is not, however, a question of whether they are compensated, because the current system does provide them with compensation in the form of a scholarship. Rather, it is a question of the nature and scope of that compensation. Some argue that the athletes are not really students and should, therefore, be compensated monetarily rather than educationally.²²³ This solution, however, is troublesome, because it may itself have racial implications, in that it implies that athletes in revenue-producing sports, which are dominated by athletes of color, are less concerned with an education than are their counterparts in nonrevenue-producing sports.²²⁴ There is no evidence that would indicate that male student-athletes of color are any less committed to education than are other student-athletes. Additionally, the solution of paying athletes monetarily rather than in the form of education may assume that there is no educational value to athletic participation.

Those who argue for more compensation for athletes in revenue-producing sports are correct in one sense, however. To the extent student-

222. Jim Haney, executive director of the National Basketball Association of Basketball Coaches, suggests that, "Basketball student-athletes should share in this [new CBS contract to televise the NCAA Division I men's basketball championship] disbursement directly. . . . It is time to share the wealth with the ones who labor to enrich all our lives." Jim Haney, *Opinions*, NCAA NEWS, January 4, 1995, at 4. Rashard Griffith, star basketball player at the University of Wisconsin, comments that, "I really do feel that athletes should get paid because, after all, we do bring the university millions of dollars in TV games, sellout crowds [and] NCAA tournament bids." Andy Baggot, *Pay for Play: Should College Athletes Share in the Wealth?*, WISCONSIN ST. J., February 12, 1995, at 1A.

223. G.H. Sage has commented that, ". . . [n]ot only are big-time intercollegiate athletic programs a commercial enterprise functioning as part of a cartel and employing athletes, but the programs are operated with employees (athlete) who are being paid slave wages." G.H. Sage, *The College Dilemma of Sport and Leisure: A Sociological Perspective*, SPORT IN CONTEMPORARY SOCIETY 188-195 (D. Stanley Eitzen ed., 1979), reprinted in SPORT AND HIGHER EDUCATION 211 (Donald Chu, et al. eds., 1985).

224. It could be argued, however, that athletes should be compensated, both economically and in the form of educational benefits. As noted throughout this article, however, there is considerable pressure to divert funding from revenue-producing sports. With this pressure, I remain committed that what funds are available should be directed to (paid in the form of) educational benefits.

athletes are being exploited, in that the compensation they receive is inequitable when compared to the benefits received by their universities, a more serious look at compensation issues is in order. Student-athletes in revenue-producing sports may deserve more compensation than their counterparts in nonrevenue-producing sports. That compensation should be in the form of education, however, and not merely in the form of direct monetary compensation.

The NCAA could also help by recognizing that the average student takes approximately six years to graduate and by providing student-athletes in the major revenue-producing sports at the Division I level with six-year scholarships, provided they (and their institutions) can demonstrate progress toward a degree.²²⁵ The cost of such a proposal might be significant,²²⁶ although funds generated from other sources such as a Division I football play-off could help. The costs might be further mitigated by permitting athletes to have five or six years of eligibility in revenue-producing sports.²²⁷ The major problem with this suggestion is that it might effectively limit access at the entry level by athletes of color, because scholarships (85 in football and 13 in basketball) would be spread over six years rather than four or five years²²⁸. In Division I basketball, where the impact would be greatest, schools should be permitted to expand their scholarship limit by 3, from 13 to 16, as used to be the case. In football, there could be an expansion of scholarships back to 90 or 95 from the 85 currently permitted. Such an expansion of scholarships combined with an extension of the term of

225. Students graduating early should be permitted to use their scholarship for graduate purposes.

226. As discussed regarding the tuition waiver plans that are being implemented for gender equity purposes, *infra* notes 187-89, the actual marginal costs may not be as significant as anticipated.

227. This suggestion has some appeal because data suggests that student-athletes perform better in the classroom when they are playing than they do when they are out of season. See HANDBOOK OF RESEARCH ON SPORTS PSYCHOLOGY 578 (Robert N. Singer, et al., eds., 1993). Studies generally have found that varsity athletes have higher grade-point averages and educational aspirations than those not participating on varsity teams. *Id.* at 578. Additionally, Heidi Sticksel, a member of the University of Houston elite volleyball team, has commented that, "Invariably, I had better grades during the season because I knew I couldn't fall behind." Jerry Wizig, *Sticksel a Model as Student, Athlete*, HOUSTON CHRON., April 12, 1995, Sports, at 6.

228. Many student-athletes playing Division I basketball and football receive a scholarship for five years because they are "red-shirted" for a year (i.e., they are permitted to receive their scholarship during a year when they do not play in games but are permitted to practice with the team) without losing one of their four years of actual eligibility.

the scholarship would provide student-athletes with more compensation, in the form of an enhanced educational opportunity.

If that compensation—additional eligibility and additional scholarship limits in Division I basketball and football—were coupled with normal progress and graduation requirements and academic support, it could be of great benefit to the student-athletes in revenue-producing sports. If receipt of the additional year of eligibility were tied to a normal progress toward graduation rule, coaches would have an additional incentive for insuring that student-athletes received an education, and ultimately a degree, in exchange for their services.

The NCAA should also place more emphasis on the "teaching" side of coaching as a means of acknowledging the educational nature of the relationship between the coach and the student-athlete. A first step in this direction would be to refer to coaches as "teacher-coaches," in the *NCAA Manual* and all NCAA materials, just as the NCAA always refers to athletes as *student-athletes*. More study of coaching as teaching should be supported, as well. Finally, institutions should be encouraged, through the self-study and certification process, to evaluate teacher-coaches, just as they currently evaluate teachers in other disciplines as a part of the traditional academic accreditation process.

b. Accrediting Associations

In addition to the certification process designed by the NCAA, there has been some movement on the part of at least one regional accrediting agency to include the athletic program at member institutions in the accrediting process.²²⁹ Commentators have also argued for inclusion of athletic programs in the accrediting process.²³⁰ The benefit to such inclusion is that athletic programs will have to justify their presence on campus on academic grounds. While it is likely that they would be able to do so, it would be beneficial for them to have to focus on academic issues in the delivery of their

229. The Southern Accrediting Agency has been at the forefront in considering athletics in the accreditation process. The association has added criteria for evaluating athletics including, ". . . the need for college presidents to have the authority over athletics and for institutions to monitor closely the financial and academic aspects of their sports programs." Debra E. Blum, *Southern Accrediting Agency Takes a Closer Look at College Sports*, THE CHRON. OF HIGHER EDUC., August 4, 1995, at A26. David Carter, the associate executive director of the accrediting association's Commission of Colleges comments that, ". . . the new rules were meant to call attention to athletics as an important part of accreditation reviews." *Id.*

230. See Smith, *supra* note 8, at 232-236 for discussion about including athletics in the accrediting process.

program. It would also be beneficial because faculty members do not traditionally consider the academic side of athletics, would have to do so and, in the process, could become better informed regarding the academic values associated with participation in athletics. They might also be able to note more connections between their own disciplines and athletics, with interdisciplinary benefits for all concerned.²³¹

If athletics are included in the traditional university-wide accreditation process, the certification process already initiated by the NCAA should not be pre-empted. The certification and accreditation processes should be considered complementary, with neither one trumping the other. This should be possible, much as other programs on campus (*e.g.*, education and law) have separate accreditation or certification bodies, as well as being involved in the campus-wide accreditation process.

If the athletics program is included in the campus-wide accreditation process, gender and race issues should be examined. As noted in this Article, however, those issues may manifest themselves in ways that require special knowledge of the athletics context (*e.g.*, possible exploitation of athletes in the revenue-producing sports). Accreditors will need to be sensitized to the special racial and gender equity problems raised in the intercollegiate athletics context.

c. Conferences

The *NCAA Manual* recognizes conferences as legislative bodies.²³² They are able to legislate in a ratchet-like manner: conferences may not legislate in ways that contravene existing NCAA rules, but they may legislate in ways that augment those rules. In other words, conferences may provide more stringent, but not less stringent, rules than those promulgated by the NCAA. They may also legislate in areas not traditionally covered by the NCAA's governance process.

Conferences have exercised power in the gender area. For example, the Southeastern (SEC) and the Big Ten [sic] Conferences have each promulgated rules to promote gender equity. The SEC has required the addition of new sports for women student-athletes at member institutions,²³³ and the

231. For example, a philosopher might become intrigued with the mind-body questions raised in the athletics context. See *supra* notes 29-30 and accompanying text for a discussion of this issue.

232. Section 3.02.2 provides that: "A legislative body is an athletics conference that develops and maintains rules and regulations governing the athletics programs and activities of its members." THE NCAA MANUAL, *supra* note 8, § 3.02.2 at 7.

233. The SEC's gender-equity plan requires all SEC schools to have a ratio of 60 percent men to 40 percent women in their athletic programs and participate in at least

presidents of the "Big Ten" have required that its member institutions agree to a "Sixty-Forty" plan. The plan mandates that participation and access to scholarships be at a sixty-forty ratio (men to women) by 1997.²³⁴

Conferences should be encouraged to do more to provide racial and gender equity among their member institutions. There is an inherent difficulty in doing so, however. If a conference requires member institutions to expend significant funds to promote gender and racial equity, its member institutions may find themselves less able to compete with institutions that do not have to expend funds for that purpose. It is conceivable, however, that just the opposite will happen—as conferences demonstrate more concern for equity issues, they may be better positioned to recruit athletes concerned with such issues, including athletes of color in the revenue-producing sports, who have themselves experienced the harm of inequity.

Conferences, however, traditionally have not been concerned with reform issues, particularly in the gender and race areas. Thus, while they are a possible source of legislation of the sort proposed throughout this Article, it is doubtful that they will do much to lead in this area.

4. Individual Institutional Action

Under existing NCAA rules, "[t]he control and responsibility for the conduct of intercollegiate athletics shall be exercised by the institution itself and by the conference(s), if any, of which it is a member."²³⁵ This broad

two more women's sports than men's. Scott Rabalais, *Southeastern Conference seeks Gender-Equity Balance*, THE ADVOCATE, October 11, 1994, at 20. This article also mentions the different sports added for women at SEC schools: "[]. This proportion (60/40) will not satisfy the 'proportionately test' of Title IX." See *supra* note 101 and accompanying text. The "Big Ten" should also examine whether the sports added are ones that provide access for women of color.

234. The 60-40 plan is discussed at length in Henderson, *supra* note 96, at 151-52. Henderson goes on to point out that

[t]o increase female participation in the Big Ten by ten percent within the next five years the Big Ten has four strategies: (1) encourage more walk-on participation by females; (2) add more competitive women's sports; (3) reduce the size of men's teams; or (4) eliminate some men's teams.

Henderson, *supra* note 96, at 152. The reduction of men's teams, of course, does little to increase actual opportunities for women student-athletes. Of the strategies suggested by the Big Ten, the most attractive is adding opportunities for women. In that regard, the Big Ten might consider adding women's football, which could provide participation opportunities to all women in a way that synchronized swimming or golf might not. If a well respected conference like the Big Ten were to add women's football, with success, it would no doubt stimulate similar efforts elsewhere.

235. THE NCAA MANUAL, *supra* note 8, § 6.01.1. The provision goes on to note

description of power implies that control over athletics ultimately resides at the institutional level, but it is misleading.

By virtue of their membership in the NCAA and individual conferences, institutions delegate much of their authority to make rules of the sort contemplated by this Article. Additionally, if an institution were to act aggressively in promoting race and gender equity on an individual basis, it could incur costs that might inhibit its ability to compete and that might engender strong opposition on the rest of the campus, on the ground that funds were being diverted from "educational" purposes to "athletics." While such a criticism is suspect, in that it refuses to recognize the educational value of athletics, it can be expected to carry some weight on virtually every campus, particularly in the present era of shrinking resources campus-wide with its attendant territorial (departmental) competition for limited funds.

Thus, while an institution might be able to "make a name for itself" by acting in this area, it is doubtful that much will be done at the individual institutional level. There may be exceptions, however. The University of Iowa has taken significant strides to provide for gender equity in its programs, by committing to a 50/50 ratio (male to female) in its intercollegiate athletics program.²³⁶ Even in instances where institutions have acted, however, the overall effect is fairly minimal because progress is limited to a single institution. Thus, like litigation, the implementation of institutional equality programs have a haphazard impact, and may only last as long as a particular president is in office. Such exercises may be significant in contributing to dialogue (and experimentation) about what ought and what can be done in the area, but they simply do not carry the force of efforts by legislative bodies that have a regional or national scope.

V. CONCLUSION

Much remains to be done to promote racial and gender equity in intercollegiate athletics. Efforts to achieve equity are hindered by broad educational, cultural and significant financial challenges. The very role of sport in society, as well as the role of athletics in the academy, bespeaks ambivalence. Sport is much loved,²³⁷ but the academic value of

that "[a]dministrative control or faculty control, or a combination of the two, shall constitute institutional control." THE NCAA MANUAL, *supra* note 8, § 6.01.1.

236. Buck Turnbull, *Big Ten Will Give Women at Least 40 Percent Share of Athletic Participation*, THE COURIER-JOURNAL, May 14, 1992, at D2.

237. The appetite of Americans for sport, as consumers and participants, appears to be virtually insatiable. For examples, three of the five most watched events in the history of television, worldwide, have been soccer games. Jean Davidson, *World Cup Goal: Net Increase in U.S. Fans*, CHI. TRIB., June 12, 1994, TV Week, at 5. The

participation in athletics continues to be minimized in many quarters. Financial challenges also mandate difficult choices, often seemingly dictating that male sports be cut in order to provide gender equity. These cuts, and even some efforts to create emerging opportunities for women, have implications in terms of racial equity. Within this quagmire, however, changes are possible, changes that would increase both racial and gender equity in intercollegiate athletics.

This Article has described the prevalence of gender and racial inequity in intercollegiate athletics, has acknowledged the educational and institutional impediments that stand in the way of achieving gender and racial equity in intercollegiate athletics, and has offered suggestions at a variety of levels as to how equity might be achieved. I trust that the recommendations made in this Article can help bring equity to intercollegiate athletics. I also acknowledge that some of the recommendations are intended to provoke dialogue, dispel ignorance, and ultimately encourage action. It is time for the effort to begin in earnest.

remaining top-rated events included the 1993 Superbowl. *Id.* During the summer of 1994, two out of every five people on earth (2 billion people) were expected to watch the final match of the World Cup soccer tournament. *Id.* World Series Games five, three, four and six earned spots one through four respectively in the Top 10 shows for the week as determined by Nielsen ratings with NFL Monday Night Football rated ninth. *Tube News; ABC Uses Copes, Jocks to Push Back to Top of Ratings*, AUSTIN AM-STATESMAN, Nov. 1, 1995, at E5. An average of 13.3 million viewers tuned into each game of the 1995 NBA Finals between the Houston Rockets and the Orlando Magic making it the eighth most watched championship match-up in NBA history. *NBA Finals Grow Beyond Stars*, AUSTIN AM-STATESMAN, June 17, 1995, at E10. As evidence of a growing interest in women's sports, women's college basketball had a jump of 93 percent from 1994 in terms of viewership. Richard Lapchick, *Women's Basketball in Hoop Du Jour: Television Ratings Give a Dramatic Boost to the Sport*, THE SPORTING NEWS, Apr. 24, 1995, at 8. This appetite has not led to respect, in an academic sense, however.