

# STILL ON THE SIDELINES: DEVELOPING THE NON-DISCRIMINATION PARADIGM UNDER TITLE IX

BRIAN A. SNOW\*  
WILLIAM E. THRO\*\*

## I. INTRODUCTION

Despite the promises of equal opportunity for women signalled by the passage of Title IX of the Education Amendments of 1972 (Title IX),<sup>1</sup> little progress in the creditable realization of this goal occurred in intercollegiate

---

\* General Counsel for the Colorado State University System. B.S.B.A. 1962, M.A. 1963, the University of Arkansas; J.D. 1966, Duke University School of Law. As general counsel, Mr. Snow supervised the Title IX litigation surrounding the decision to terminate the men's baseball and women's softball programs at Colorado State University. See *infra* notes 5-7 and accompanying text.

\*\* Assistant Attorney General of Colorado. B.A. 1986, Hanover College; M.A. 1988, the University of Melbourne; J.D. 1990, the University of Virginia School of Law. Mr. Thro served as lead counsel in the Title IX litigation surrounding the decision to terminate the men's baseball and women's softball programs at Colorado State University. See *infra* notes 5-7 and accompanying text.

The views expressed in this Article are those of the authors and do not necessarily represent the views of the Attorney General of Colorado, the Colorado State Board of Agriculture, or the Colorado State University.

The authors gratefully acknowledge the assistance of Judith Schmidt, Roselyn Cutler, Christine Susemihl, James L. Singleton, Melanie McGrath, Loren Montgomery, and Robin Rosenfeld. They also recognize Beverly Ledbetter, Esq., Vice President and General Counsel of Brown University, for her courageous, but so far lonely, effort to establish certainty in the interpretation of Title IX. The authors owe a special debt of gratitude to Ms. Mariah Burton Nelson, whose speeches and writings stimulated the research and review that led to the writing of this Article.

1. Education Amendments of 1972, Pub. L. No. 92-318, Title IX, 86 Stat. 374 (codified as amended in 20 U.S.C. §§ 1681-88 and scattered sections of 29 U.S.C. and 42 U.S.C. (1994)). Initially, it was unclear whether Title IX applied to intercollegiate or interscholastic athletics programs. Notably, in *Grove City College v. Bell*, 465 U.S. 555, 573 (1984), the Supreme Court of the United States held that Title IX did not apply to programs like athletics that do not receive direct financial assistance.

However, Congress then passed the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (codified at 20 U.S.C. §§ 1687-88; 29 U.S.C. §§ 706, 794; 42 U.S.C. §§ 2000d-4a, 6107 (1994)), which became effective on March 22, 1988, superseding *Grove City College* and providing that all aspects of an institution of higher education are covered by Title IX. Thus, since most institutions receive federal funds in some form, by implication, their athletic programs have been subject to Title IX since March 22, 1988. See, e.g., *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993).

or interscholastic athletics between 1972 and 1992.<sup>2</sup> This lack of progress was

---

2. Some commentators attribute part of the past failures of women to achieve greater protection under Title IX to neglect in enforcement actions by the Office for Civil Rights of the United States Department of Education (OCR). Ellen J. Vargyas, as senior counsel of the National Women's Law Center, stated, "there's a gap that has clearly shown up in these court cases that proves to us that the OCR isn't doing what it should and what it can to make sure that institutions are complying with the law." Debra E. Blum, *Civil Rights Office Urged to Heed Results of 2 Recent Sex Bias Cases*, CHRON. HIGHER EDUC. (Washington, D.C.), Sept. 15, 1993, at A40. Moreover, Arthur Bryant, a leading legal advocate for plaintiffs in Title IX actions, stated in 1993 that "there are massive violations of Title IX taking place," and said he believed such violations existed partially because the Department of Education has been lax in enforcement. Andrew Blum, *Athletics In the Court*, NAT'L L.J., Apr. 5, 1993, at 1, 30.

In *Roberts v. Colorado State Univ.*, 814 F. Supp. 1507 (D. Colo. 1993), the defendants emphasized that in 1989 the OCR had advised Colorado State University (CSU) that it had provided "valid, non-discriminatory reasons" for not reaching its participation goals and that the OCR was terminating its monitoring of the institution given its "good faith efforts to increase athletic opportunities for female student athletes." *Id.* at 1516. Nevertheless, after noting "with all due respect" to these conclusions of the then Regional Director of the OCR, the court found that the University had failed to meet the standard of "substantial proportionality." *Id.* The OCR recently announced plans to "beef up" its enforcement actions in intercollegiate athletics. Debra E. Blum, *New Head of Civil-Rights Office Vows to Get Tough on College Sports*, CHRON. HIGHER EDUC. (Washington, D.C.), Sept. 15, 1993, at A39-A40. Others point to historical control of the administration of intercollegiate athletics by men and the dominance of the sport of football. MARIAH B. NELSON, *THE STRONGER WOMEN GET, THE MORE MEN LOVE FOOTBALL* 23 (1994). Whatever the reason, women have largely been underrepresented in intercollegiate athletics. A National Collegiate Athletic Association (NCAA) study conducted in 1991 showed that although undergraduate enrollment was evenly divided, men constituted 69.5% of the participants in intercollegiate athletics and their programs received 70% of athletic scholarship funds, 77% of athletic operating budgets, and 83% of recruiting money. Phyllis L. Howlett & James J. Whalen, *Gender-Equity Task Force Final Report*, NCAA NEWS (Overland Park, Kan.), Aug. 4, 1993, at 14 [hereinafter *Task Force Report*]. Similar issues also existed on the high school level where 3.4 million males then participated in athletics as compared with 1.9 million females. *Id.*

Indeed, a study by the Lyndon B. Johnson School of Public Affairs at the University of Texas concluded that "the OCR has failed to provide effective and adequate enforcement and guidance consistent with the letter and spirit of Title IX." LYNDON B. JOHNSON SCHOOL OF PUBLIC AFFAIRS, *GENDER EQUITY IN INTERCOLLEGIATE ATHLETICS: THE INADEQUACY OF TITLE IX ENFORCEMENT BY THE U.S. OFFICE FOR CIVIL RIGHTS 1* (1993) [hereinafter *JOHNSON STUDY*]. For example, in examining athletic financial assistance, the OCR, through the use of statistical significance tests, has found compliance even though males received far more scholarship dollars. *Id.* at 8. These tests are known as the "z" test and the "t" test:

The "z" test is used to determine whether the difference between the percentage of total aid awarded to athletes of one sex and the percentage of participants of that sex in the athletics program is significant. It may be conducted using the participant and financial aid data from either the men's program or the women's program, but the test need not be conducted for both programs. The "t" test is used to determine whether the difference between the average award to male and female athletes is significant.

Intercollegiate Athletics Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (1979) [hereinafter *Policy Interpretation*], reprinted in VALERIE M. BONNETTE, OFFICE FOR CIVIL RIGHTS OF THE DEPARTMENT OF EDUCATION, *TITLE IX ATHLETICS MANUAL* 153 (1990) [hereinafter *INVESTIGATOR'S MANUAL*], and promulgated in accordance with the regulations of the OCR set forth in 34 C.F.R. §§ 106.37(c), 106.41 (a)-(c) (1995).

Moreover, the Johnson Study found several examples where the OCR had tolerated wide disparities in coaching and publicity. *JOHNSON STUDY* at 8-9. Opportunity to receive

unfortunate.<sup>3</sup> In many ways, most women were still on the sidelines.

However, recent judicial decisions have allowed many, but certainly not all, women to leave the sidelines and enter the playing fields as equals. By virtue of three landmark cases, *Cohen v. Brown*,<sup>4</sup> *Roberts v. Colorado State*

coaching, assignment and compensation of coaches, and publicity are among the areas of supportive resources required under the Athletic Regulations adopted pursuant to Title IX. 34 C.F.R. § 106.41 [hereinafter Athletic Regulations]; see *infra* note 128. In fact, with respect to Colorado State University, the OCR stated:

This office has a genuine respect for the efforts of the University and commends its Title IX Committee and Department of Athletics for the commitment that ultimately achieved compliance with Title IX of the Education Amendments of 1972, 20 U.S.C. [§§] 1681 and 1682, and its implementing regulation, 34 C.F.R. Part 106. Because the University continues to demonstrate good faith efforts to increase athletic opportunities for female student athletes, we are terminating our monitoring procedures effective the date of this letter.

Letter from Gilbert D. Roman, Regional Director of the Office for Civil Rights of the United States Department of Education, to Dr. Philip D. Austin, President of Colorado State University D-3 (March 8, 1989) (on file with the *Duke Journal of Gender Law & Policy*) (emphasis added).

Thus, Colorado State University had reason to believe that its decision to eliminate men's baseball (55 participants) and women's softball (18 participants) would pass legal review. Indeed, since three times as many positions were eliminated for men, the action had the net effect of increasing the percentage of athletes who were female. See Brief of Colorado State Bd. of Agric. at 9-11, *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993) (Nos. 93-1052, 93-1086).

3. This statement and many of the other ideas expressed in this Article may surprise persons who assume that those who have vigorously defended an institution in a Title IX case are not personally committed to the expansion of opportunities, athletic and otherwise, for women. However, such litigation often involves issues of educational autonomy and the need for legal certainty that do not reflect a particular position on gender opportunity. Although the authors strongly defended the actions of the institution in *Roberts*, they firmly believe that

as a matter of public policy, the involvement of young women in intercollegiate and interscholastic athletics should be encouraged to the greatest extent possible. The authors also believe that there are some very real problems with the status quo in intercollegiate and interscholastic athletics and that, as a matter of public policy, certain changes need to be made. However, the authors believe that changes in public policy in the area of intercollegiate and interscholastic athletics should come primarily from the Congress, the state legislatures, the National Collegiate Athletic Association, the Conferences, and the institutions with athletic programs and not from the federal judiciary.

William E. Thro & Brian A. Snow, *Cohen v. Brown and the Future of Intercollegiate and Interscholastic Athletics*, 84 EDUC. L. REP. 611, 614 n.22 (1993). Moreover, as is reflected in this Article, the authors are equally committed to the idea that every person, regardless of gender, should be encouraged and assisted in reaching his or her potential and that all persons are entitled to learn, work, and play in a non-hostile environment.

4. *Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992) (*Brown I*), *aff'd* 991 F.2d 888 (1st Cir. 1993) (*Brown II*) (collectively referred to as *Brown*). On remand, following the affirmance of the grant of the preliminary injunction by the court of appeals, the district court considered the case on its merits and held that Brown University had violated Title IX. *Cohen v. Brown Univ.*, 879 F. Supp. 185 (D.R.I. 1995) (*Brown III*). The court ordered Brown to submit a comprehensive plan for complying with Title IX within 120 days following issuance of its decision. *Brown III*, 879 F. Supp. at 214. Brown responded by submitting a proposal for setting minimum and maximum numbers of participants on men's teams and adding women's junior varsity teams in the sports of soccer, tennis, and basketball. See BROWN UNIVERSITY,

*Board of Agriculture*,<sup>5</sup> and *Favia v. Indiana University of Pennsylvania*,<sup>6</sup> women who are blessed with great athletic ability have earned a mandate for numerical parity with men in intercollegiate athletic programs. In these three cases, federal district courts issued injunctions to prevent post-secondary institutions from eliminating certain women's intercollegiate athletic teams,<sup>7</sup> or reducing them to a lower level status.<sup>8</sup> Every decision was affirmed on appeal.<sup>9</sup> The various courts held that the defendant institutions in each of the three cases had engaged in gender discrimination, prohibited by Title IX,<sup>10</sup> by failing to meet any one of three alternative measures established in the Policy Interpretation.<sup>11</sup> These three measures, which are designed to be

BROWN UNIVERSITY COMPLIANCE PLAN/1995-1996, at 4-5 (July 7, 1995). At the commencement of this proceeding, the University partially settled some of the plaintiffs' claims by agreeing to continue to provide comparable treatment and support to its male and female athletes in such areas as coaching, recruiting, equipment and facilities. Douglas Lederman, *A Key Sports-Equity Case*, CHRON. HIGHER EDUC. (Washington, D.C.), Oct. 5, 1994, at A51.

5. *Roberts v. Colorado State Univ.*, 814 F. Supp. 1507 (D. Colo.) (*Roberts I*), *aff'd in part, rev'd in part sub nom. Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.) (*Roberts II*), *cert. denied*, 114 S. Ct. 580 (1993) (collectively referred to as *Roberts*).

6. *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578 (W.D. Pa.) (*Favia I*), *aff'd* 7 F.3d 332 (3d Cir. 1993) (*Favia II*) (collectively referred to as *Favia*).

7. *Roberts* involved elimination of the women's softball and men's baseball teams at time when the enrollment of the institution was 52.1% men and 47.9% women and the ratio of men to women athletic participants was 64.8% to 35.2%. *Roberts I*, 814 F. Supp. at 1512. However, because of the much larger number of male participants in baseball than women participants in softball, the men's overall participation proportion in athletics was reduced to 62.3% and the women's proportion was increased to 37.7%. *Id.*

*Favia* addressed the termination by the defendant of its women's gymnastics and field hockey teams and its men's soccer and tennis teams. Prior to this programmatic change, approximately 62% of the defendant's athletic participants were male and approximately 38% were female, even though its enrollment ratio by gender was approximately 55% women and 45% men. *Favia I*, at 580. The change resulted in a slight reduction of the percentage of women athletic participants to 36% of the total. *Id.*

8. In *Brown*, the institution demoted two fully funded women's teams, gymnastics and volleyball, and two fully funded men's teams, water polo and golf, from varsity to club status. *Brown III*, 879 F. Supp. at 187. The court found that such action eliminated institutional funding for all four teams, requiring them to be funded by private donors; impeded them from maintaining a level of competitiveness that their abilities would otherwise have permitted; and "stripped" them of certain varsity privileges, such as varsity-level coaching and recruiting, and money for equipment, travel, and post-season competition. *Id.* at 189-90, nn. 7 & 10. Furthermore, the court concluded that even with the inclusion of members of the demoted teams, the participation ratio was 61.87% for male athletes to 38.13% for women athletes at a time when the respective enrollment percentages were 51.14% for women and 48.86% for men. *Id.*, at 192.

9. *Brown* and *Favia* involved preliminary injunctions. *Roberts* involved a permanent injunction. Following the affirmances, *Favia* settled, and *Brown* proceeded to trial where a permanent injunction was entered.

10. Title IX simply provides, in part, that:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (1994).

11. Policy Interpretation, *supra* note 2 at 71, 418; INVESTIGATOR'S MANUAL, *supra* note 2, at 21. The three-pronged test was applied in *Roberts I*, 814 F. Supp. 1507, 1511 (D. Colo. 1993), *Favia I*, 812 F. Supp. 578, 584 (W.D. Pa. 1993), and *Brown I*, 809 F. Supp. 978, 985 (D.R.I.

considered consecutively, attempt to provide for assessment of the opportunity for individuals of both genders to compete in athletic programs by determining:

1. Whether intercollegiate [or interscholastic] level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.
2. Where the members of one sex have been and are underrepresented among intercollegiate [or interscholastic] 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 that sex.
3. Where the members of one sex are underrepresented among intercollegiate [or interscholastic] 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 the members of that sex have been fully and effectively accommodated by the present program.<sup>12</sup>

In determining that the institutions did not meet any of these standards, the federal courts rejected the primary contentions of the defendants that their actions were necessitated by financial and budgetary considerations.<sup>13</sup> In effect, the decisions in these three cases embraced a "numerical parity paradigm" where each gender is entitled to equal representation.<sup>14</sup>

In a fourth case, *Cook v. Colgate University*,<sup>15</sup> the district court took a different approach and focused not on numerical parity, but on whether the treatment was discriminatory.<sup>16</sup> In effect, the *Colgate* court embraced a "non-

1992).

12. Policy Interpretation, *supra* note 2, at 71,418; INVESTIGATOR'S MANUAL, *supra* note 2, at 21.

13. *Roberts I*, 814 F. Supp. at 1518; *Favia I*, 812 F. Supp. at 585; *Brown I*, 809 F. Supp. at 1000.

14. The term "numerical parity paradigm" is entirely the creation of the authors. As explained in more detail *infra* notes 40-59 and accompanying text, the numerical parity paradigm focuses on objective criteria such as number of participants or amount of money spent. It ignores subjective criteria such as how people are treated and whether the environment is hostile.

15. 802 F. Supp 737 (N.D.N.Y. 1992) (*Colgate I*), *vacated*, 992 F.2d 17 (2d Cir. 1993) (*Colgate II*) (collectively referred to as *Colgate*).

16. The court held that *Colgate* had violated Title IX by failing to provide equivalent benefits in athletic opportunities to members of the women's club team. *Colgate I*, 802 F. Supp. at 743; *see also* Policy Interpretation, *supra* note 2, at 71,421. In reaching this conclusion, the court borrowed the three-step "burden shifting" test from two Title VII cases, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252 (1981), which the court termed the "McDonnell-Burdine" standard, *Colgate I*, 802 F. Supp. at 743, requiring (1) that a *prima facie* case of discrimination be established by a plaintiff, (2) that the defendant then come forward with evidence of some legitimate nondiscriminatory reasons for its conduct, and (3) that if the defendant establishes such reasons, the plaintiff must then show that the reasons advanced are "pretextual or a cover-up for a discriminatory decision." *Id.* Using this test as the linchpin of its analysis, the court concluded that the plaintiffs had established a *prima facie* case of gender discrimination under Title IX by showing that the men's team received 50 times as much financial support as the women's team, and that the members of the men's team enjoyed significantly more

discrimination paradigm" where a person cannot be treated differently simply because of his or her gender.<sup>17</sup> However, this decision was later vacated on appeal on mootness grounds due to the graduation of all of the plaintiffs from Colgate.<sup>18</sup> Thus, the appellate courts never addressed the propriety of the district court's embrace of the non-discrimination paradigm.

Unless overturned by Congress or the Supreme Court,<sup>19</sup> the three numerical parity decisions and several settlements of other recent Title IX actions by institutions<sup>20</sup> send a powerful message regarding accountability for women's rights to the athletic administrators of American colleges and universities.<sup>21</sup> Although some litigation in this struggle is still pending,<sup>22</sup> and

---

favorable treatment than the plaintiffs in terms of equipment, locker room facilities, travel arrangements and accommodations, practice times, and coaching. *Id.* at 744-45. The court then concluded that the reasons advanced by the defendant for its refusal to afford varsity status to the women's team, including claims of insufficiency of competition, student interest, ability, and qualified players, were not legitimate non-discriminatory justifications and were pretextual in nature. *Id.* at 745-49.

17. The term "non-discrimination paradigm" is entirely the creation of the authors. As explained in more detail *infra* notes 60-71 and accompanying text, the non-discrimination paradigm focuses on subjective or "holistic" criteria and ensures that there is no overt or covert gender discrimination in either participation opportunities or treatment. It tends to ignore raw numbers such as participation or financial levels.

18. *Colgate II*, 992 F.2d at 19-20.

19. Congress has overturned Supreme Court decisions in the past. For example, Congress passed legislation overturning *Grove City College v. Bell*, 465 U.S. 555 (1984). See *supra* note 1. In addition, several Supreme Court decisions have been overturned by congressionally initiated constitutional amendments. For example, U.S. CONST. amend. XI overruled *Chisholm v. Georgia*, 2 U.S. 419 (1793); U.S. CONST. amend. XIV, §1 overruled *Dred Scott v. Sanford*, 60 U.S. 393 (1856); U.S. CONST. amend. XVI overruled *Pollock v. Farmers Loan & Trust Co.*, 157 U.S. 429 (1895); and U.S. CONST. amend. XXVI, §1 overruled *Oregon v. Mitchell*, 400 U.S. 112 (1970).

20. The most highly publicized settlements involved Auburn University and the University of Texas. Auburn reportedly agreed to add a women's soccer team with fully-funded scholarships, to provide \$400,000 over the succeeding two-year period to soccer and women's athletics generally, and to pay the plaintiffs \$140,000 in damages, costs, and attorneys fees. ELLEN J. VARGYAS, *BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX* 43-44 (1994). Texas agreed to increase the proportion of participation of its varsity women from 23% to 44% by the 1996-97 school year and to assure equitable treatment of its female athletes with regard to scholarships, facilities, and other areas in its intercollegiate athletics program. See *id.* at 44; Office of the Attorney General, State of Texas, *Morales Settles Lawsuit Over Women's Athletics at UT*, July 15, 1993, at 1 (press release) (on file with the *Duke Journal of Gender Law & Policy*).

21. Some of these former adversaries have taken significant actions to assure compliance. For example, in its 1993-94 academic year, Colorado State University, whose governing board was the defendant in *Roberts*, achieved a women's varsity participation rate of 47% compared to a women's full time undergraduate enrollment rate of 48%, leaving a gap of only 1% for achieving absolute numerical parity in terms of the "substantial proportionality" test. Tony Phifer & Renee Carlson, *CSU Reaches Gender Equity in Athletics*, FORT COLLINS COLORADOAN, May 23, 1994, at A1. This test requires that intercollegiate (or interscholastic) level participation opportunities for male and female students be provided in numbers substantially proportionate to their respective enrollments, and constitutes one of the three alternative means for assessing compliance with Title IX under the Athletic Regulations of the OCR. Athletic Regulations, *supra* note 2, § 106.41(c)(1); *infra* note 128. Moreover, the institution has enhanced its services and general program components for women and has voluntarily chosen to construct a women's softball playing facility. In the same year in which it achieved or initiated these gains in gender equity, the University demonstrated the viability of also being able to field a

although many question the courts' embrace of the numerical parity paradigm, especially in light of the Supreme Court's most recent pronouncements on race,<sup>23</sup> the strength of the mandate to date is undeniable.<sup>24</sup> News accounts and scholarly articles have also revealed settlements by the California State University System, Cornell University, the University of New Hampshire, Eastern Kentucky University, the University of Massachusetts at Amherst, the University of Oklahoma, the University of New Mexico, Virginia

successful football team by winning its conference championship for the first time and playing in a major bowl game. In a number of public pronouncements during the course of the *Roberts* litigation, University officials emphasized that the institution's position was based philosophically on two issues: (1) what are the specific legal requirements for intercollegiate athletics under Title IX, and (2) how much flexibility does an institution of higher education have in determining its manner of compliance, or must this decision be made by judicial directive? Tony Balandran, *Softball Teams Bats 1,000*, FORT COLLINS COLORADOAN, Mar. 12, 1993, at A1; Debra E. Blum, *Judge Tells Colorado State to Reinstate Women's Softball*, CHRON. HIGHER EDUC. (Washington, D.C.), Mar. 3, 1993, at A40.

Colorado Attorney General Gale A. Norton, the elected official responsible for defending the governing board in *Roberts I* and *II*, concurred in the need for resolution of these questions. See Jennifer Gavin, *State's Legal Costs Swell*, DENV. POST, Dec. 26, 1993, at 1. See also an editorial in the *Denver Post* written by the President of CSU, Albert C. Yates, *Attorney General Served Colorado Well in CSU Case*, DENV. POST, Mar. 12, 1994. Following *Brown I* and *Roberts II*, the Attorney General assigned members of her staff, including one of the authors, to conduct special briefings for officials of state educational institutions to urge them to comply with the mandates of Title IX. The staff members were also asked by her to provide assistance to such institutions in interpreting and meeting requirements of this law identified in various letters of findings from the OCR.

22. The authors expect that ultimately the United States Supreme Court will be asked to review the *Brown University* decision even though the high court has refused to hear both *Roberts II* and *Kelley v. Board of Trustees*, 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995) (*Kelley*). They also believe that Supreme Court resolution of the issues is essential to assuring that all intercollegiate athletic programs operate under the same parameters. If the athletes prevail, it will be imprudent for institutions to ignore the recent cases. On the other hand, if the institution prevails, advocates of opportunity for women in sports will likely seek legislation to overturn the decision as they did after the *Grove City College* decision.

23. Implicit in the numerical parity paradigm decisions are the beliefs that groups, rather than individuals, are entitled to protection and that it is acceptable to disadvantage the overrepresented gender so as to "atone for previous sins" against the underrepresented gender. However, in the last weeks of its 1994-95 Term, the Supreme Court explicitly rejected the idea that the Equal Protection Clause protects groups, *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2100 (1995), and also rejected the notion that disadvantaging one race to atone for the previous discrimination against another race was acceptable, *id.* at 2114, 2119 (Scalia, J., concurring) (stating that there is no debtor or creditor race); *id.* at 2119 (Thomas, J., concurring) (stating that there is no racial paternalism exception to the Equal Protection Clause); *Miller v. Johnson*, 115 S. Ct. 2475 (1995) (invalidating congressional districts designed to maximize the number of racial minorities elected to Congress). While these cases concerned race and not gender, the application of their principles in the context of Title IX and intercollegiate athletics could cast serious doubt on the continued validity of the numerical parity decisions.

24. See Debra E. Blum, *Civil-Rights Office Urged to Heed Results of 2 Recent Sex-Bias Suits*, CHRON. HIGHER EDUC. (Washington, D.C.), Sept. 15, 1993, at A40, where the author states that "federal courts have taken their swings" at Title IX enforcement and notes that "courts can take several actions that the civil-rights office cannot, including issuing injunctive relief orders and awarding attorney's fees and damages to a plaintiff." *Id.*

Polytechnic Institute and State University, and the College of William and Mary.<sup>25</sup>

Accordingly, women athletes have achieved a major victory in securing the imposition of an affirmative obligation upon educational institutions to find places for them in much larger numbers in their intercollegiate athletics programs.<sup>26</sup> They have also achieved a symbolic conquest of the male athletic establishment and the "old boy" network which have controlled such programs from their inception.<sup>27</sup>

---

25. See VARGYAS, *supra*, note 20, at 42 (discussing the Auburn University and Colorado State University settlements); Jill K. Johnson, *Title IX and Intercollegiate Athletics: Current Judicial Interpretation of the Standards for Compliance*, 74 B.U. L. REV. 553, 589 n.195 (1994) (discussing the Cornell University, University of Oklahoma, William and Mary College, University of New Hampshire, and University of Massachusetts at Amherst settlements); David Barron, *Title IX Battleground*, HOUSTON CHRON., June 27, 1993, at B8 (discussing the New Mexico and Eastern Kentucky settlements); Debra E. Blum, *Virginia Tech Will Add 2 Women's Sports To Settle Suit*, CHRON. HIGHER EDUC. (Washington, D.C.), Feb. 24, 1995, at A40 (discussing the Virginia Polytechnic Institute and State University settlement); Debra E. Blum, *Big Step for Sex Equity*, CHRON. HIGHER EDUC. (Washington, D.C.), Oct. 27, 1993, at A35 (discussing the California State University System settlement); Office of the Attorney General, State of Texas, *Morales Settles Lawsuit Over Women's Athletics at UT*, July 15, 1993, at 1 (press release) (on file with the *Duke Journal of Gender Law & Policy*) (discussing the University of Texas settlement).

26. It is clear that Title IX originally was intended to eliminate discrimination, not to mandate affirmative action. For example, the Title IX statute itself, 20 U.S.C. § 1681(b), provides that Title IX will not be interpreted to require affirmative action to correct an imbalance that may exist between the sexes. While the first proposed regulations, which were published in June of 1974, would have required affirmative action efforts to equalize the numbers of athletic opportunities, the final regulations, which were promulgated in June of 1975, explicitly deleted the requirement for affirmative efforts in the absence of a specific finding of discrimination. Compare 39 Fed. Reg. 22,228, 22,236 (1974) with 45 C.F.R. § 86.38 (1995). In addition, the athletic financial assistance regulation, 34 C.F.R. § 106.37(c) (1995), assumes that the participation rate will be different from the enrollment rate when it provides that scholarship money must be proportional to participation, not enrollment. Moreover, a September 1975 memorandum to college and university presidents made clear that "neither quotas nor fixed percentages are required." Memorandum from the Director of the Office of Civil Rights, Department of Health, Education, and Welfare to College and University Presidents 8 (1975) (on file with the *Duke Journal of Gender Law & Policy*). Furthermore, the proposed policy interpretation, issued in December 1978, emphasized that Title IX did not require an equal number of men and women participants or an equal number of women's sports. 45 C.F.R. § 86.41 (1995). Rather, the interests of the two sexes had to be effectively accommodated. In addition, the 1980 Investigator's Manual stated that Title IX does not require institutions to align enrollment with participation. INVESTIGATOR'S MANUAL, *supra* note 2, at 122. Prior to the recent Title IX litigation, the OCR found several institutions to be in compliance with respect to interests and abilities even in the presence of a large gap between participation and enrollment. In some instances compliance was inferred even though the gap exceeded 21 percentage points. See JOHNSON STUDY, *supra* note 2, at 7.

27. See Joan S. Hult, *The Story of Women's Athletics: Manipulating a Dream 1890-1985*, in WOMEN AND SPORT 83, 100 (D. Margaret Costa & Sharon R. Guthrie eds., 1994); MARIAH B. NELSON, ARE WE WINNING YET?: WOMEN ARE CHANGING SPORTS AND SPORTS ARE CHANGING WOMEN 159 (1991); see also Christine Black & Mary Curtis, *Women in Sports*, BLACK ISSUES IN HIGHER EDUC., Dec. 2, 1993, at 25, which contends that women have a better chance of becoming president of a Division I NCAA institution than becoming its athletic director. This assertion is apparently predicated upon data showing that more women are currently serving as presidents than as athletic directors in such institutions. The article notes that in the prior ten years, women filled only 22% of 812 coaching positions and that as of 1992, less than 24% of

However, despite the achievement of female-male numerical parity<sup>28</sup> in some intercollegiate athletics programs through recent litigation under Title IX, numerous questions remain as to whether an unacceptable atmosphere of both explicit and implicit discrimination<sup>29</sup> continues to haunt intercollegiate athletic programs.<sup>30</sup> *Cohen, Roberts, and Favia*, all of which focus exclusively on numbers of participants, do not meaningfully address these issues.<sup>31</sup>

The purpose of this Article is twofold. First, it questions whether, despite the massive gains realized for participation of elite and exceptional athletes in recent gender-equity cases, many women are still "left on the sidelines" because of judicial failure to address the overall issue of the treatment of women students who wish to participate in some form of athletic competition, such as club and intramural sports.<sup>32</sup> In essence, the courts have ignored most of the issues relating to discrimination and have focused almost exclusively on raw numbers. Moreover, the courts have focused on the rights of groups while ignoring the concerns of individuals.<sup>33</sup> While rec-

college sports operation budgets were allocated to women's sports. During the intense litigation surrounding Title IX, some officials of institutions of higher education with strong football programs discussed possible secession from the NCAA because of their concern over potential rigidity in the definition of gender equity being discussed by a special task force of that body. See Douglas Lederman, *Angry Football Coaches Talk of Leaving NCAA Over Its Sex Equity Proposal*, CHRON. HIGHER EDUC. (Washington, D.C.), June 30, 1993, at A29.

28. For purposes of this Article, the term "parity" means that the same number of opportunities are available to each gender.

29. For purposes of this Article, the term "discrimination" refers to treating persons differently solely because of differences in gender. In other words, it focuses on inclusiveness of non-elite athletes and fairness of treatment for women in intercollegiate sports.

30. As explained *infra* notes 128-46 and accompanying text, female intercollegiate athletes are frequently treated like "second class citizens."

31. As explained *infra* notes 56-59 and accompanying text, the courts chose to focus exclusively on numbers of female intercollegiate athletes.

32. Current litigation relating to compliance in athletics under Title IX has been predicated exclusively on gender equity for the elite and exceptional male and female athletes participating or seeking to participate in intercollegiate programs. See cases cited *supra* notes 4-6. Such athletes comprise less than 6.4% of total enrolled students. Memorandum from Todd Petr, Assistant Director of Research of the NCAA, to Christine Susemihl, Director of Compliance, Athletic Department, Colorado State University 1 (Jan. 30, 1995) (on file with the *Duke Journal of Gender Law & Policy*). Scant judicial and regulatory attention has been given to the need for accommodation of the interest and abilities in athletics of the vast number of remaining students. The specific regulation governing athletics under Title IX provides that "no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient [of federal financial aid]." Athletic Regulations, *supra* note 2, § 106.41(a) (emphasis added).

According to Will Holsbury, Executive Director of the National Intramural & Recreational Sport Association, no reliable data exists for determination of the overall participation by college or university students in intramural or club sports, either in the aggregate or by gender. Letter from Jayleen Heft, Assistant to the General Counsel, Colorado State University, to Brian A. Snow, General Counsel, Colorado State University 1 (Jan. 25, 1995) (on file with the *Duke Journal of Gender Law & Policy*). Therefore, no basis exists for concluding that institutions of higher education are in compliance with Title IX with respect to the vast number of their enrolled students (approximately 93% of the total) who are not participants in intercollegiate athletics.

33. The Supreme Court has emphasized that the Equal Protection Clause protects indi-

ognizing the significance of these cases, we propose that the courts reach beyond the numerical parity paradigm to the broader issues encompassed in the non-discrimination paradigm. If all persons are to be treated as individuals and judged solely on "the content of their character,"<sup>34</sup> and if "everyday people" can live their "lives of dignity and decency,"<sup>35</sup> it is essential that these issues be addressed and resolved.

Second, this Article promulgates a new legal theory, *gender depreciation*, that will permit greater development and enforcement of the ideals of the non-discrimination paradigm in the context of Title IX. Drawing on analogies to recent sexual harassment and discrimination cases under Title VII and Title IX,<sup>36</sup> we call for expansion of existing legal remedies for persons who are depreciated and devalued because of their gender. This expansion is expected to provide new avenues for monetary recovery or injunctive relief with respect to practices which explicitly and implicitly relegate persons to "second class" status simply because of their gender.

These dual purposes are accomplished in five distinct sections. The first section explains in greater detail what is meant by the numerical parity and non-discrimination paradigms. This section also analyzes the various opinions in *Roberts* and *Colgate* as a means of demonstrating the weaknesses of the numerical parity paradigm and the potential strengths of the non-discrimination paradigm. The second section explains the implications of the judiciary's embrace of the numerical parity paradigm. The third section explores the nature of the existing injustices in intercollegiate athletics that have been ignored by the judiciary's embrace of the numerical parity paradigm. The fourth section develops the *gender depreciation* theory by drawing on the current state of the law of sexual harassment and discrimination under Titles VII<sup>37</sup> and IX and the Equal Protection Clause,<sup>38</sup> and suggests a means of applying that theory in litigation. The final section presents some recommendations for the achievement of gender equity in intercollegiate athletics in general and the implementation of the *gender depreciation* theory in particular.<sup>39</sup>

---

viduals, not groups. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2100 (1995).

34. Martin Luther King, Jr., *Address to the Civil Rights March on Washington*, in JIM BISHOP, *THE DAYS OF MARTIN LUTHER KING, JR.* 327-29 (1971).

35. Cornel West, *Malcolm X and Black Rage*, in RACE MATTERS 135, 150 (1994).

36. See *infra*, notes 155-158, 170-174.

37. 42 U.S.C. § 2000e-2.

38. U.S. CONST. amend. XIV, § 1 reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

39. Although the authors' recommendations are confined to the context of intercollegiate athletics, most of the recommendations would be equally applicable in the context of inter-scholastic athletics.

## II. THE DEFINITIONS OF THE NUMERICAL PARITY AND NON-DISCRIMINATION PARADIGMS

With respect to educational programs receiving federal funds,<sup>40</sup> Title IX, on its face, simply mandates that persons be treated equally regardless of gender.<sup>41</sup> However, we have identified two separate and distinct paradigms for implementing this mandate.<sup>42</sup>

On one hand, Title IX is a mandate for a numerical parity paradigm,<sup>43</sup> whereby each gender is proportionately represented in each and every educational program.<sup>44</sup> Implicit in this paradigm is the assumption that one gender must be advantaged, at least on a temporary basis, to overcome prior discrimination against it.<sup>45</sup> This paradigm focuses on objective criteria such as the number of participants.<sup>46</sup> When taken to its logical conclusion, the numerical parity paradigm results in numerical or financial quotas.<sup>47</sup> For example, if the programs are co-educational,<sup>48</sup> then each gender's represen-

40. Title IX expressly applies only to institutions that receive federal funds. 20 U.S.C. § 1681.

41. 20 U.S.C. § 1681(a) reads:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

42. These two paradigms could also be used to implement Title VI or any other mandate which declares that persons shall not be treated differently. For example, the idea of racial quotas or of structuring congressional districts so as to maximize the number of racial minorities elected is an embrace of the numerical parity paradigm. In contrast, the idea of subjecting racial set asides to justification through a strict scrutiny test is an embrace of the non-discrimination paradigm. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2112-14 (1995).

43. As explained *infra* notes 127-28 and accompanying text, the numerical parity paradigm has received the most attention to date.

44. As explained *infra* notes 77-90 and accompanying text, this is precisely the holding of the intercollegiate athletics cases. In other words, if women make up 50% of the total enrolled students, then women must be 50% of the athletes unless valid non-discriminatory reasons can be articulated. Essentially, this is a mandate for a quota. Cf. 20 U.S.C. § 1681(b) (stating that Title IX is not to be construed as mandating a quota).

45. For example, since women were not allowed to have athletic teams for several decades, it is acceptable to cut men's teams while adding women. See *Kelley v. Board of Trustees*, 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995); *Gonyo v. Drake Univ.*, 837 F. Supp. 989 (S.D. Iowa 1993); cf. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2118 (1995) (Scalia, J., concurring) ("[T]here can be no such thing as either a debtor or a creditor race.").

46. In this respect, the parity paradigm is very easy to measure. It is quite simple to count the number of male and female persons in an athletic program or in an academic program. As explained *infra* notes 77-90 and accompanying text, if the numbers are approximate to the respective proportions in enrollment by gender, there is no violation.

47. This is effectively what has happened in the context of intercollegiate athletics. An institution must distribute athletic opportunities to each gender in approximate proportion to each gender's representation in the full time undergraduate student body. If this proportionality is not achieved, then the institution must add sports for the underrepresented gender on a periodic basis until such time as the proportionality is achieved. See *infra* notes 77-90 and accompanying text. In short, there is no question that proportionality must be eventually achieved, the only question is how fast it will be achieved.

48. Under Title IX, the overwhelming majority of educational programs have to be co-educational. However, single sex classes are allowed in physical education, sports involving

tation in a given program<sup>49</sup> must approximate representation in the student body.<sup>50</sup> If the programs are not co-educational,<sup>51</sup> then, logically, each gender should be able to participate in the same number of programs.<sup>52</sup> Similarly, each gender is entitled to have the same amount of teaching resources, both financial and otherwise,<sup>53</sup> devoted to it and its programs.<sup>54</sup> As such, the numerical parity paradigm assumes, at least implicitly, that each gender has the same interests and desires.<sup>55</sup> In the numerical parity paradigm at its

---

bodily contact, and sex education. 45 C.F.R. § 86.34 (c), (e); see also *infra* notes 61–90 and accompanying text.

49. Theoretically, Title IX could be interpreted as mandating a specific parity requirement in every program. Thus, if a university had an aggregate enrollment that was equally divided by gender, each of its academic units, such as engineering, liberal arts, and education could be required to include 50% of their respective students from each gender. If the three-pronged test, *supra* note 16 and accompanying text, of the athletic model was applied and followed, these units could alternatively satisfy Title IX by showing continuing expansion, which would at some future date inevitably require achievement of parity, or it could prove the accommodation of interests and abilities without regard to differences in individual proficiency until full parity was reached. In the latter case, if enrollment by gender were dominant in a particular course, such as, for example, a course entitled Gender Sensitivity for Males, the institution would need to add other courses to meet the interests and abilities of the other gender even if such courses were not among its curriculum priorities. In other words, some academic offerings of the institution would not only be student driven, but gender driven.

50. The athletic decisions hold that Title IX means that each gender's representation in the intercollegiate athletic program should reflect each gender's representation in the student body. *Roberts*, 814 F. Supp. 1507, 1512 (D. Colo.), *aff'd in part, rev'd in part sub nom.* 998 F.2d 824 (10th Cir.), *cert. denied*, 114 S. Ct. 580 (1993); *Favia*, 812 F. Supp. 578, 584–85 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3d. Cir. 1993); *Brown I*, 809 F. Supp. at 987 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993). Thus, the relevant pool for comparison is the institution's student body. Using the same logic, each gender's representation in the student body should reflect such gender's representation in the population to be served by the institution. Thus, if the Georgia Institute of Technology is to serve the people of Georgia and if women make up 50% of the population of Georgia, then women should also make up 50% of the student body at the Georgia Institute of Technology. *But cf.* *Podberesky v. Kirwan*, 38 F.3d 147, 160 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995) (rejecting the notion that a state university should reflect the ethnic composition of the state).

51. As explained *supra* note 48, some programs are not required to be co-educational.

52. In other words, if a school offers three different sex education classes for one gender, it should offer three different sex education classes for the other gender.

Furthermore, since sports generally are single sex, the mandate would be met if each gender had the same number of sports. Interestingly, the courts have unequivocally rejected the notion that the same number of sports constitutes Title IX compliance. *Roberts I*, 814 F. Supp. at 1514 (holding that although Colorado State University offered eight women's sports and seven men's sports, the school still violated Title IX).

53. This concept is reflected in current litigation involving salaries in which coaches of women's athletic teams contend that they should have parity with coaches of men's teams. See, e.g., *Stanley v. University of S. Cal.*, 13 F.3d 1313, 1316–18 (9th Cir. 1994); discussion *infra* note 136.

54. Cf. *Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir. 1994) (determining the educational rights for women in prisons).

55. Some advocates maintain that the assumption is not supported empirically. See, e.g., Defendant's Post-Trial Brief at § V, *Cohen v. Brown Univ.* (U.S. Dist. R.I. 1995) (No. 92-0197-P). Moreover, men and women do not major in academic disciplines such as engineering and education in equal numbers. According to statistics obtained from the the United States Department of Education, National Conference for Education Statistics, in 1992, students receiving

extreme, change is brought about by forcing educational institutions to adopt rigid numerical quotas for each gender and then, if necessary, finding persons of the appropriate gender to fill the quotas.<sup>56</sup> Persons are valued not so much for their individuality as for their membership in a particular gender group.<sup>57</sup> However, because of the numerical parity paradigm's emphasis on rigid goals and quotas,<sup>58</sup> actual change occurs quite rapidly.<sup>59</sup> It is

degrees in engineering were 14% female and 86% male. In education, 79% were female and 21% were male. Therefore, a gender is disproportionately represented in such academic offerings. From 1972 to 1992, the percentage of bachelor's degrees received by women in engineering rose from 1% to 14%; in the physical sciences, from 15% to 33%; and in the biological/life sciences, from 29% to 52%. NATIONAL CTR. FOR EDUC. STAT., DIG. OF EDUC. STAT. (U.S. Dep't of Educ.), October, 1994, at 290, 293, 296.

The parity paradigm sets up a goal that may depend upon reliance upon artificial constructs. If the paradigm were applied generally to academic disciplines, and men, for whatever reason, did not wish to become nurses or occupational therapists in the same proportion as women, educational institutions would encounter difficulty in achieving parity unless they were to turn away otherwise qualified women. Of course, fairness requires that any such analysis take into account whether student choices of programs are made freely or simply reflect developmental patterns in childhood due to societal proscriptions based on inappropriate rigidity in defining gender roles.

56. For example, when taken to its logical conclusion, the parity paradigm would assume that a nursing program consisting of 100 students would have 50 females and 50 males. If the institution had difficulty finding 50 qualified males, it would use affirmative action and scholarships to attract male students. Moreover, the institution would cap female enrollment at 50 and turn away all other females so as avoid disturbing the delicate balance between the genders.

While such bureaucratic rigidity appears to be inconsistent with appropriate academic governance, it may soon be the norm in intercollegiate athletics, particularly in the so-called non-revenue sports. Some institutions, such as Colorado State, are severely limiting the number of male "walk-ons" while actively encouraging an increase in female "walk-ons" as a means of maintaining proportionality. More commonly, institutions are giving the maximum number of scholarships to women in some sports while trimming male scholarships to the bare minimum. See *Kelley*, 832 F. Supp. 237, 239-40 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995); *Gonyo v. Drake Univ.*, 837 F. Supp. 989, 992-93, 995 (S.D. Iowa 1993); see also Debra E. Blum, *Walk-Ons*, CHRON. HIGHER EDUC. (Washington, D.C.), July 14, 1993, at A29 (discussing the futility of using the number of non-scholarship athletes for each gender as a measurement of each gender's interest in sports); Jeremy L. Milk, *Women's Soccer on a Roll*, CHRON. HIGHER EDUC. (Washington, D.C.), Nov. 3, 1993, at A39 (asserting that the need to provide more athletic opportunities for women is one factor contributing to the explosion of intercollegiate women's soccer).

57. Thus, the focus is on group rights rather than individual rights. Cf. AYN RAND, ANTHEM (1946) (describing a society where the worst things are the words "I" and "ego"). But cf. *Wright v. Rockefeller*, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting) ("[H]ere the individual is important, not his race, his creed, or his color.").

58. Rigid goals and quotas can be inherently unfair if persons are excluded from participation in order to meet them. To illustrate, suppose that an institution's student body is 90% non-Hispanic Caucasian and 10% people of color, and the institution mandates that athletic opportunities are to be split on the same ratio. If there are 10 spots on the basketball team and the 10 best basketball players just happen to be African-American, Native American, or Hispanic, would it be fair to cut 9 of the top 10 and add 9 less able non-Hispanic Caucasians in order to meet a quota? When institutions cut participation or reduce teams based on gender, a perception of inherent unfairness is likely to ensue. Cf. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Podberesky v. Kirwan*, 38 F.3d 147 (4th

quite simple to determine what the quota is and to take the appropriate steps to achieve it. There is no need for a careful and subjective evaluation.

On the other hand, Title IX could be a mandate for a non-discrimination paradigm whereby an individual cannot be treated differently simply because of gender.<sup>60</sup> Implicit in this paradigm is the assumption that individuals, regardless of gender, should be treated the same. This paradigm focuses on subjective or "holistic" criteria and ensures that there is no overt or covert gender discrimination in either participation opportunities or treatment.<sup>61</sup> If an industrial arts teacher permits male students in class to peruse photos in magazines that are demeaning to women or allows off-color jokes, females are likely to feel unwelcome in the class. On the other hand, if a home economics teacher makes demeaning remarks about the difficulty which some males have with fine needlework, then men will be reluctant to enroll in the course.<sup>62</sup> If the educational programs are not co-educational,<sup>63</sup> then each gender must have equal access to similar educational programs and must not have to undergo undue hardship in order to participate.<sup>64</sup> Moreover, because of the different ways in which young men and women are socialized,<sup>65</sup> the non-discrimination paradigm may require the offering

Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995). In addition, see *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (denying certiorari on the grounds of mootness), which involved quotas in academic admissions on racial grounds, where Justice Douglas in an opinion dissenting from the decision to deny certiorari, states

[t]he State, however, may not proceed by racial classification to force strict population equivalencies for every group in every occupation, overriding individual preferences. The Equal Protection [C]ause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized.

*Id.* at 342 (Douglas, J., dissenting).

59. For example, after losing its Title IX litigation, Colorado State University rapidly took steps to increase female participation. See Editorial, *CSU Athletics Moved Fast to Achieve Gender Equity*, THE FORT COLLINS COLORADOAN, May 28, 1994, at A14.

60. In the race context, this non-discrimination paradigm is sometimes referred to as the "color-blind" society. See *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting); ANDREW KULL, THE COLOR-BLIND CONSTITUTION 1 (1992).

Recently, the Supreme Court seems to have embraced the non-discrimination paradigm in the race context. See *Miller v. Johnson*, 115 S. Ct. 2475, 2485-86 (1995); *Adarand*, 115 S. Ct. 2097, 2105.

61. Both paradigms would strike down practices that have the effect of excluding one gender from educational opportunities. Thus, if a school has a rule that young women cannot take industrial arts and that young men cannot take home economics, the rule would be invalidated under either paradigm.

62. Such situations are likely to create a "hostile environment," which is a primary basis for finding sexual harassment under Title VII and IX. See *Ellison v. Brady*, 924 F.2d 872, 875 (9th Cir. 1991); cases cited *infra* note 155.

63. As explained *infra* notes 184-85, there are situations where the educational opportunities do not have to be co-educational. See also, *supra* note 48.

64. This point is best illustrated in the prison context. For example, suppose that there are an equal number of male and female prisoners. There are 100 female prisoners who wish to take a course in auto repair and 20 male prisoners who wish to take such a course. Under the non-discrimination paradigm, it would be permissible to offer three sections of the course to the women and one section of the course to the men. In theory, the numerical parity paradigm would require the same number of sections.

65. Since the nineteenth century, various factors have limited women's participation in

of single sex classes<sup>66</sup> or even schools<sup>67</sup> in some instances so that every person can reach his/her potential.<sup>68</sup> Instead of focusing on equality of numbers, the non-discrimination paradigm focuses on equality of experiences. Since the emphasis is on quality of experience, this paradigm would require that the respective coaches and teachers be of equal competence and

competitive sports, including, for example, misunderstandings about women's reproductive health and a Victorian image of women as fragile and passive. See David L. Diles, *Historical Overview of Title IX*, in NAT'L ASS'N OF COLLEGE AND UNIV. ATTORNEYS, A PRACTICAL GUIDE TO TITLE IX: LAW, PRINCIPLES, AND PRACTICES 3, 10-18 (Walter B. Connolly, Jr. ed., 1995); see also Diane L. Gill, *Psychological Perspectives on Women in Sport and Exercise*, in WOMEN AND SPORT 257-58 (D. Margaret Costa & Sharon R. Guthrie eds., 1994). Moreover, the pressures and incentives affecting womens' decisions regarding sports begins at a young age.

As girls move through adolescence, they come under increasing pressure to form a "feminine" identity. Traditional thinking remains pervasive enough to make many girls shy away from competitive sports. For many boys, the dilemma is the opposite: how to achieve a masculine identity without sports. The forces keeping boys in athletics and pushing girls away widen the participation gap long before college enters the picture.

Matt Lorenz, *A Reality-Based Plan for Achieving Gender Equity in College Sports*, CHRON. HIGHER EDUC. (Washington, D.C.), Mar. 2, 1994, at B2.

66. For the most part, policy makers in the public education system in this country have reached the conclusion that single sex public education is a bad idea. Yet, as explained *infra* notes 68-70, for some children, single sex education can be quite beneficial. Thus, the authors would support single sex public education as an option, but not as a requirement. Those who do not wish to participate in single sex schools would have the co-educational option available. If our government is serious about every child reaching his or her full potential, then it has an obligation to make a variety of educational options, including single sex education, available to those who would benefit from such opportunities. See COLO. REV. STAT. §§ 22-30.5-101 to 5-114 (1994) (*repealed by* § 22-30.5-114, S.B. 93-183, § 1, effective July 1, 1998) (setting up "charter schools" where innovative approaches can be pursued); COLO. REV. STAT. §§ 22-36-101 to 36-116 (1994) (allowing any child to attend any public school in the State).

67. If equal facilities are available for both males and females, then single sex public schools should pass judicial review. See *Vorchheimer v. School Dist.*, 532 F.2d 880, 885 (3d Cir. 1976) (allowing an all male public school provided an equal all female facility existed), *aff'd mem. by an equally divided Court*, 430 U.S. 703 (1977). But see Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination*, 105 HARV. L. REV. 1741, 1747-48 (1992) (discussing the criticisms and stereotypical implications of *Vorchheimer*); Deborah L. Rhode, *Association and Assimilation*, 81 NW. U. L. REV. 106, 138 (1986) (asserting that the facilities at issue in *Vorchheimer* were not equal).

Moreover, lest the authors be regarded as endorsing the results in *VMI* and *Citadel*, see *infra* note 186, they wish to state unequivocally that, in their view, it is impossible for an embryonic all-female military academy to offer alternative benefits equal to those available at well established all-male institutions. See *infra* note 186 and accompanying text. One cannot equalize a century and a half of distinguished history overnight. The only way that the military academies could be equal is if they had similar legacies of excellence. A new institution or program simply cannot replicate such a legacy.

68. A variety of different studies conclude that single-sex education is beneficial to female academic achievement. See, e.g., Kristin S. Caplice, *The Case for Public Single Sex Education*, 18 HARV. J.L. & PUB. POL'Y, Fall 1994, at 227, 243; Valerie E. Lee & Anthony S. Byrk, *Effects on Single-Sex Secondary Schools on Student Achievement and Attitudes*, 78 J. EDUC. PSYCH. 381, 381 (1986); Cornelius Riordan, *Public and Catholic Schooling: The Effect of Gender Context Policy*, 93 AM. J. EDUC. 518, 536 (1985); Barbara S. Powell & Arthur G. Powell, *For Girls, Schools of Their Own*, 43 INDEPENDENT SCH. 55, 56-58 (1983); see also Robin Wilson, *For Women Only*, CHRON. HIGHER EDUC. (Washington, D.C.), July 28, 1995, at A17.

experience. As such, it does not assume that men and women will necessarily be equally represented in all activities, but rather assumes that individuals who wish to pursue such activities as athletics, industrial arts, music, physics, competitive dance, rodeo, home economics, or cheerleading will have the opportunity to do so and enjoy them.<sup>69</sup>

In the non-discrimination paradigm, change is brought about by requiring the educational institutions to take action to promote full acceptance of persons who have historically been subordinated because of their gender and to encourage all persons to maximize the use of their particular talents and to pursue their specific interests.<sup>70</sup> Persons are treated as *individuals*, are accorded dignity and respect, and are permitted to meet their personal needs. Because of the non-discrimination paradigm's emphasis on the "marketplace" of desires and respect for individual differences, change is much slower than in the quota-driven numerical parity paradigm.<sup>71</sup>

The differences in the two paradigms can be easily demonstrated by using the fact situation in the athletic cases. The numerical parity paradigm is best exemplified by *Roberts*<sup>72</sup> which arose out of the decision to curtail the athletic program at Colorado State University (CSU) for the 1992-93 season.<sup>73</sup> In 1991-92, CSU offered eight men's sports and nine women's sports.<sup>74</sup> The percentage of intercollegiate athletes who were women was approximately 35% and the percentage of students who were women was approximately 48%.<sup>75</sup> In order to balance the athletic budget and to increase expenditures for scholarships in women's golf, tennis, and track, CSU discontinued the men's baseball program (fifty-five participants in 1991-92) and the women's softball program (eighteen participants in 1991-92). However, all athletic scholarships for the student-athletes in baseball and softball were continued for 1992-93 even though the teams did not exist.

From a lay person's standpoint, the decision to eliminate baseball and softball was not intentionally or unintentionally discriminatory toward women. Since one sport for each gender was eliminated and since women continued to have more sports than men (eight to seven), women were not singled out for special treatment.<sup>76</sup> Moreover, because there were three times as

---

69. Because young women and men are socialized differently, *see* studies cited *supra* note 68, it is not logical to assume that they must have identical interests. However, significant questions remain about the manner in which such socialization occurs and the extent to which it impedes growth and future flexibility in choosing future recreational activities, such as athletics, or performing essential roles, such as child care. *See* Joannie M. Schrof, *The Gender Machine*, U.S. NEWS & WORLD REP., Aug. 2, 1993, at 10.

70. For example, adolescent women would be encouraged to pursue their interests in math and science and their male counterparts would be supported in advancing their interests in art, music, and childhood education.

71. Assuming that men and women have different desires, in some areas substantial change may be impractical.

72. *See supra* notes 2, 5.

73. On June 1, 1992, after much internal discussion and several attempts to find alternative sources of funding, Dr. Albert Yates, President of CSU, accepted the athletic department's recommendation for a reduction of the athletic program. *See* Brief of Colorado State Board of Agriculture, *supra* note 2, at 9.

74. *Roberts I*, 814 F. Supp 1507, 1514 (D. Colo. 1993).

75. *Id.* at 1512.

76. With the reinstatement of softball, Colorado State now has nine women's teams and

many men on the baseball team as there were women on the softball team, a disproportionate number of men, not women, were negatively impacted. Furthermore, the net effect of the cuts was to *increase* the percentage of athletes who were female from 35% to approximately 38%.

When thirteen of the softball players brought suit,<sup>77</sup> the district court and court of appeals focused exclusively on the number of female athletes participating in *intercollegiate athletics*.<sup>78</sup> Throughout the litigation, CSU contended that, if it was in violation of Title IX, it should, as a matter of academic autonomy, be given broad discretion to choose the means for correcting the violation in light of its educational mission and budgetary resources. For example, the violation could have been remedied by meeting the "safe harbor" of "substantial proportionality" through some combination of reinstating softball, adding a women's sport other than softball, cutting a men's sport, or by limiting male participation. The fact that Title IX could have been satisfied by utilization of these three methods other than reinstatement shows the transparency and weakness of the numerical parity paradigm because if such action had been taken, the needs, wishes, interests and abilities of the existing softball players would have not been met. Certainly, had it anticipated how the courts were going to interpret Title IX, CSU could have addressed its budget problem by following one or more of the foregoing non-reinstatement options, eliminated softball, met the "safe harbor" of "substantial proportionality," and been invulnerable to litigation. The non-discrimination paradigm would not have permitted such a result because it would have focused on whether the actions of the institution in abolishing the softball team resulted in unfair treatment of the individual players rather than whether the participation rates of women in the athletic program generally mirrored their institutional enrollment.

Both tribunals in *Roberts* ignored club sports, intramural competitions, and other aspects of the athletic program such as total expenditures, equipment, locker rooms, travel, practice times, coaching, and access to medical care.<sup>79</sup> Both the district court and the court of appeals found that (1) a "gap" of 10.5 percentage points between female enrollment and female participation was not substantially proportionate,<sup>80</sup> (2) the University had not added women's teams<sup>81</sup> in recent years,<sup>82</sup> and (3) the presence of women

seven men's teams.

77. This suit was not a class action.

78. CSU presented evidence on club and intramural participation as well as other aspects of its program.

79. These items are covered by the Athletic Regulations promulgated by the OCR, *supra* note 2.

80. *Roberts I*, 814 F. Supp 1507, 1513 (D. Colo. 1993) (referring to a gap of 10.6 percentage points); *Roberts II*, 998 F.2d 824, 829 (10th Cir. 1993) (referring to a gap of 10.5 percentage points).

81. CSU had added a number of women's teams during the 1970's, but had not added any teams during the 1980's. It had also eliminated many more women's teams than men's teams during both periods. *Roberts I*, 814 F. Supp at 1514.

82. Even though the court in *Roberts II* noted that CSU had fashioned "a women's sports program out of nothing in the 1970s," it chose to focus more on expansion in recent periods, accepting the district court's finding that women's participation opportunities had declined

who wished to play softball and who were capable of doing so meant that all interests and abilities were not being accommodated.<sup>83</sup> Therefore, even though no intentional discrimination was shown<sup>84</sup> CSU was found in violation of Title IX.<sup>85</sup> Accordingly, CSU was ordered to reinstate the softball program.

Similarly in *Brown*<sup>86</sup> and *Favia*,<sup>87</sup> the courts focused exclusively on the number of participants in *intercollegiate athletics*.<sup>88</sup> Concerns about the manner in which individual members on women's teams were treated played no role in the decisions whatsoever.<sup>89</sup> Moreover, the role of club sports and intramural competition, which involved far more women, was never given due recognition by the courts in either case.<sup>90</sup> In sum, the only thing that mattered was the number of female participants relative to the number of male participants. Everything else was irrelevant.

In contrast, the decision in *Colgate I*<sup>91</sup> demonstrates the potential of the non-discrimination paradigm to a large extent. In that decision, the district court engaged in an extensive discussion of how (1) the men's hockey team received fifty times the financial support of the women's team,<sup>92</sup> (2) the men's team was provided with equipment while the women had to purchase their own,<sup>93</sup> (3) the men's locker room was 2,500 square feet and the women's locker room was only 225,<sup>94</sup> (4) the men's team traveled by chartered buses while the women drove themselves,<sup>95</sup> (5) the men's team had access to the best practice times and would frequently bump the women out of a practice slot,<sup>96</sup> (6) the men's team had professional coaches who were high-

steadily in the 1980s. *Roberts II*, 998 F.2d at 830.

83. *Roberts I*, 814 F. Supp at 1517.

84. In *Roberts I*, the court expressly stated that Title IX and its implementing regulations can be violated without a showing of specific intent to discriminate against women by the decision makers for the educational institution, adding, "In other words, good intentions or a misinterpretation of the law does not negate a violation of Title IX." *Roberts I*, 814 F. Supp. at 1518. The Court of Appeals for the Tenth Circuit agreed in *Roberts II*, holding that Title VII, which does not require proof of intent, is "the most appropriate analogue when defining Title IX's substantive standards, including the question of whether 'disparate impact' is sufficient to establish discrimination under Title IX." *Roberts II*, 998 F.2d at 832.

85. See *supra* note 10 and accompanying text.

86. See *supra* note 4.

87. See *supra* note 6.

88. *Brown* involved issues regarding continuance of particular treatment of women's athletics. However, Brown University and the Plaintiffs settled those issues prior to trial on the merits.

89. It appears that the plaintiffs in these cases presented only limited, if any, evidence on these factors. Although one may speculate as to why no evidence was presented, one reason may have been that it is far easier to build a numerical case with statistics than a treatment case with anecdotes. The latter requires far more discovery.

90. For a discussion of the inattention to intramural and club sports in terms of collection of relevant data to determine participation opportunities by gender, see *supra* note 32.

91. See *supra* note 15.

92. *Colgate I*, 802 F. Supp. 737, 744 (N.D.N.Y. 1992).

93. *Id.*

94. *Id.* at 745.

95. *Id.*

96. *Id.*

ly paid while the women's coaches were volunteers who were paid a nominal stipend,<sup>97</sup> and (7) Colgate University had consistently denied the women's requests for varsity status.<sup>98</sup> The University's alleged non-discriminatory reasons for the lack of a sufficient number of women athletes, lack of support by the NCAA, lack of close competition, and lack of student interest were deemed insufficient grounds to justify the disparate treatment of women.<sup>99</sup> Essentially, the district court took the approach of comparing how female hockey players were treated and how male hockey players were treated and then ordered that the disparities in treatment be remedied. Interestingly, the number of participants and the three-prong test were never mentioned. In effect, *Colgate I* rejected the numerical parity paradigm in favor of the non-discrimination paradigm.<sup>100</sup> Unfortunately, the appellate court never had the opportunity to pass on the merits of the district court's adoption of the non-discrimination paradigm.

These decisions demonstrate both the strengths and weaknesses of the two paradigms. Both the numerical parity paradigm cases and *Colgate* resulted in greater opportunities for women to participate in intercollegiate sports. However, *Colgate* viewed access as *only one dimension of the global objectives of fair treatment and elimination of inequality*, which are inherent parts of the non-discrimination paradigm, as contrasted with the numerical parity cases, which made proportional representation the focal point, ignoring its relationship to the broader issue of treatment and satisfaction of the overall needs of women athletes. Consequently, this issue was left to be addressed in other settings. These differences in the conceptual approaches taken by the courts under the respective paradigms may be attributable, at least in part, to the fact that it is far easier to prove a disparity in numbers than it is to prove a disparity in treatment, making the numerical parity paradigm a more effective weapon for assuring equal access. However, the numerical parity cases did little more than establish teams. They did not improve the treatment of individual athletes or improve the environment under which women athletes must practice and compete. In contrast, *Colgate I* provided the desired opportunities to participate while addressing quality issues and took steps to remedy disparities.

### III. THE IMPLICATIONS OF THE JUDICIARY'S EMBRACE OF THE NUMERICAL PARITY PARADIGM

As noted above, in every Title IX intercollegiate athletics case with the exception of *Colgate I*, the federal judiciary has embraced the numerical parity paradigm. The implications of the federal judiciary's adoption of the numerical parity paradigm for the intercollegiate athletic cases are quite clear.<sup>101</sup> First, the opinions hold that a mere deficiency in the accommodation of interests, which is only one of the ten factors articulated in the Athletic Regulations, is sufficient to find a violation of Title IX and, implicitly at

---

97. *Id.*

98. *Id.* at 745-46.

99. *Id.* at 745-49.

100. For a definition of numerical parity, see *supra* note 17.

101. See SQUIRE, SANDERS, & DEMPSEY, *NCAA GUIDE TO TITLE IX AND ATHLETICS* 57 (2d ed. 1990).

least, that strengths in other factors may not be used to contradict a weakness in the accommodation of interests. This is directly contradictory to the OCR's approach of examining all aspects of the athletic program and allowing the strengths in one area to cancel out a weakness in another area<sup>102</sup>.

Moreover, the decisions establish that if any one of the three prongs is met, there is no need to address the other prongs. Therefore, an institution can have a female enrollment rate of fifty percent and a female participation rate of twenty percent and still be in compliance, at least for the present time, because it can demonstrate recent expansion or because all interests and abilities are being accommodated. Ultimately, however, if an institution is going to continue to meet the second part of the test, which requires proof of a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of an under-represented gender it will have to add a new women's sport periodically in order to maintain its history of expansion. Therefore, the institution must eventually achieve substantial proportionality. Similarly, if an institution seeks to continue to meet the third prong of the test, it will have to constantly be adding new sports as interest and ability develops. Consequently, substantial proportionality has been transformed into a quota, something that is expressly prohibited by the statute.<sup>103</sup>

Third, the decisions also make clear that the second prong is satisfied only so long as a university is continually expanding athletic opportunities in an ongoing effort to meet the needs of the under-represented gender and persists in this approach as interest and ability levels in its student body and secondary feeder schools rise. In other words, efforts that were made during the 1970s or early 1980s are irrelevant. What matters is whether those efforts have continued until the 1990s.<sup>104</sup>

Moreover, improvements in the condition of women's sports, such as better facilities or more scholarships, are equally meaningless. Since the typical university or high school added many sports in the 1970's and early 1980's and has not added any in recent years, it is logical to presume that most institutions would fail the second prong as well.<sup>105</sup> Even if an institution does have a history and continuing practice of program expansion, it must continue to add women's sports in the future or run the risk that it will no longer meet the requirements of the second prong. Fourth, the decisions introduce a new and innovative standard for satisfaction of the third prong. The *Brown II* court articulates the standard for the third prong as follows. "If there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an

---

102. See Mary W. Gray, *The Concept of Substantial Proportionality in Title IX Athletics Cases*, 3 DUKE J. GENDER L. & POL'Y 165 (1996).

103. See 20 U.S.C. § 1681(b).

104. A total of 130 Members of Congress have urged that the second prong be clarified so that compliance is achieved if one sport is added, on average, every three years. See *Members of Congress Seek New Policy Interpretation*, NCAA NEWS (Overland Park, Kan.), July 19, 1995, at 2.

105. Ironically, if an institution did nothing in the 1970's and 1980's, but did add teams in the 1990's, it would satisfy the prong.

institution necessarily fails this prong of the test."<sup>106</sup> In other words, if, at present, there are students of an underrepresented gender who want to play a sport and who have the ability to play that sport, the institution must offer the sport regardless of the institution's ability to sustain a team in that sport or the availability of competition. In contrast, the Policy Interpretation explicitly provides that a team is required only when there is (1) interest, (2) ability to play the sport, (3) a likelihood that the team can be sustained for a number of years, and (4) a reasonable expectation of competition within the institution's normal competitive region.<sup>107</sup>

While the differences between these two standards are subtle, they are highly significant and very well could mean the difference between an institution having to add many sports and having to add no sports.<sup>108</sup> Furthermore, by ignoring intramural and club sport programs, the decisions continue the unfortunate emphasis on the small percentage of men and women who are capable of competing in varsity athletics while completely ignoring the overwhelming majority of students who are incapable of or unwilling to play at the intercollegiate level.<sup>109</sup> Under the current Title IX approach, valuable monetary and human resources are being expended to ascertain the gender rights of highly elite athletes with little regard for the gender rights of the vast number of men and women whose physical attributes can best be developed and enhanced through intramural and club sports, and even "pick-up games."<sup>110</sup> Except for the minuscule number of athletes who are capable of playing intercollegiate sports, a vast number of young men and women may never be afforded the valuable lifetime lessons that proponents of sports emphatically exhort in their briefs on both sides in the Title IX cases.

Fifth, the judicial adoption of the numerical parity paradigm may prompt a comprehensive legislative revision of Title IX that effectively wipes out the gains achieved through recent litigation.<sup>111</sup> Those who perceive

106. *Brown II*, 991 F.2d 888, 898 (1st Cir. 1993).

107. Policy Interpretation, *supra* note 2, at 71,417-18.

108. See *supra* notes 101-03 and accompanying text.

109. A large state university may have a student population in excess of 20,000. Yet, based on data obtained from the NCAA as to national averages showing that only 6.3% of enrolled students participate in intercollegiate athletics, memorandum from Todd Petr, Assistant Director of Research of the NCAA, to Christine Susemihl, Director of Compliance, Athletic Department, Colorado State University (Jan. 30, 1995) (on file with *Duke Journal of Gender Law & Policy*), only 1260 students would be involved in such institution's varsity sports programs, leaving 18,740 students to seek other, often uncertain, avenues for pursuing their athletic interests. Most men and women lack either the inherent ability and developed skills, or the necessary interest to become involved in intercollegiate athletics.

110. Apparently, there have been no court cases or actions brought by the OCR focused specifically on Title IX compliance in intramural or club sports. In view of the low percentage of enrolled students who participate in intercollegiate athletics, a serious question arises as to whether programs of educational institutions are in compliance with Title IX in intramural and club sports or whether the right to equal opportunity of a large universe of students is being ignored by advocates and governmental officials responsible for assuring equal opportunity. For a discussion of inaction by the OCR in interscholastic sports, see *infra* note 118 and accompanying text.

111. As with any revolution, there is resistance to the new way from those who perceive

themselves as having the most to lose from the recent decisions emphasizing numerical proportionality will resist the changes and attempt to counter them. For example, the American Football Coaches Association is attempting to persuade Congress<sup>112</sup> to rewrite Title IX so that college football is exempt from the numerical count.<sup>113</sup> If such efforts are successful,<sup>114</sup> it will be relatively easy for institutions to achieve numerical parity without adding sports for women, or slashing non-revenue sports for men.<sup>115</sup> Efforts to revise Title IX may be further supported by the fact that male athletes in minor sports are beginning to protest and litigate the cuts to their programs that have been made to achieve gender equity.<sup>116</sup>

---

themselves as having the most to lose.

112. Members of the Republican party are perhaps less protective of Title IX than their counterparts in the Democratic party; however, the mere fact that both chambers of the Congress are now controlled by the Republicans does not necessarily mean that there will be a comprehensive roll-back of Title IX. Republicans have not yet made revision of Title IX a major priority.

113. *Football Coaches Take Aim at Title IX*, USA TODAY (Arlington, Va.), Jan. 12, 1995, at 4C; John Henderson, *Title IX Battles Rage On: Football Bosses Go on Offensive*, DENV. POST, Jan. 22, 1995, at B1; *The Third Sex*, SPORTS ILLUSTRATED, Feb. 6, 1995, at 15.

114. The authors do not believe that such efforts are necessary. There is no logical reason to believe that college football would be less competitive with smaller squads. Indeed, the exact opposite is true. If the major football powers could not carry a multiple number of former high school superstars at every position, some of the current bench warmers at the major powers would end up starting at the minor football powers. As a result, the minor powers would have stronger teams and the major powers would have weaker teams. Thus, college football would be more competitive.

What is needed is the uniform application of Title IX to all schools. At present, some institutions are abiding by the rules, while others are not, as demonstrated by recent letters of finding of the OCR and published reports. E.g., Letter of Finding from the OCR to Dr. John D. Weity, President, California State University, Fresno (Apr. 6, 1994) (on file with the *Duke Journal of Gender Law & Policy*); Carol Herwig, *Federal Office Gets Tougher with Title IX*, USA TODAY (Arlington, Va.), July 21, 1994, at 7C.

115. For example, if a school has 100 males in football and 100 males in other sports, it has 200 total male athletes. In order to achieve compliance, the school would have to sponsor enough women's sports so that the school could allow 200 female athletes to participate. Yet, if the 100 football players are exempt, the school need only sponsor enough sports to have 100 female athletes. Most institutions have already reached this level or close to it.

116. In two of the three suits filed, male athletes whose sports had been eliminated were not successful in their efforts for reinstatement, primarily because their gender was not underrepresented in athletics at their institutions. See *Kelley*, 832 F. Supp. 237, 241 (C.D. Ill. 1993), *aff'd*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 938 (1995); *Gonyo*, 837 F. Supp. 989, 996 (S.D. Iowa 1993). The third suit, *Caruso v. Broyles*, No. 93-5089 (W.D. Ark. filed May 27, 1993), was settled. See VARYGAS, *supra* note 20, at 37; see also Debra E. Blum, *Men Turn to Federal Anti-Bias Laws to Protect Teams From Chopping Block*, CHRON. HIGHER EDUC. (Washington, D.C.), Aug. 11, 1993 at A33 (discussing Title IX cases brought by males and the concept of proportionality as the benchmark of compliance). While these cases have been unsuccessful thus far, there is always the possibility that courts will accept the theory that Title IX does not sanction the cutting of a men's team in order to improve the percentage of women participants.

In addition, the OCR has agreed to rethink how its enforcement efforts affect non-revenue sports. See Mike Zapler, *Protecting Men's Sports*, CHRON. HIGHER EDUC. (Washington, D.C.), Jan. 6, 1995, at A43.

Moreover, an increased level of animosity between the genders may emerge. See *United Jewish Org. v. Carey*, 430 U.S. 144, 173 (1977) (Brennan, J., concurring) ("[A]n explicit policy

Sixth, there is a great potential for resistance if recent intercollegiate decisions are made applicable to secondary and primary school districts.<sup>117</sup> Although the Title IX regulations concerning athletics clearly apply to interscholastic sports programs,<sup>118</sup> gender participation in these programs is far from substantially proportionate.<sup>119</sup> Yet, school districts,<sup>120</sup> which are financially strapped nationwide, do not have the resources to increase par-

of assignment by race may serve to stimulate our society's latent race consciousness.").

117. The athletic programs of elementary and secondary schools have been largely spared in recent Title IX litigation, which has been primarily directed against institutions of higher education. See cases cited *supra* notes 4-6.

However, at least some school districts realize that they may be subjected to litigation. For example, the Birmingham Public Schools and the Alabama Association of School Boards filed an amicus brief urging the Supreme Court to grant certiorari following the decision in *Roberts II*. See Amicus Curiae Brief of the Birmingham Public Schools and the Alabama Association of School Boards in Support of the Petition for Certiorari, Colorado State Bd. of Agric. v. Roberts, (No. 93-559), *cert. denied*, 114 S. Ct. 580 (1993).

118. The Athletic Regulations clearly require that equal opportunity for both sexes be provided by any recipient of federal aid who "operates or sponsors *interscholastic*, intercollegiate, club or intramural athletics." Athletic Regulations, *supra* note 2, § 106.41(c) (emphasis added); see also VARGYAS, *supra* note 20, at 5 ("Many of the issues raised in connection with competitive athletics are the same at both the secondary and post-secondary levels. For example, the analysis of discrimination in the allocation of participation opportunities and the support and treatment of student-athletes applies to all educational levels.").

The *Investigator's Manual* provides an additional basis for the OCR scrutiny of Title IX compliance in elementary and high school athletic programs by stating that the Policy Interpretation does not mandate the use in interscholastic programs of the overall approach applied in review of intercollegiate athletics. INVESTIGATOR'S MANUAL, *supra* note 2, at 8. The manual also notes that not more than nine of the thirteen "program components" set forth in the Athletic Regulations are likely to occur in interscholastic programs and that complaints in this area are likely to be more narrow in scope than those involving intercollegiate programs. *Id.* Accordingly, although the *Investigator's Manual* devotes an entire section to interscholastic compliance, it eschews overall evaluation of such programs for Title IX compliance and, instead, calls for limitation of the OCR investigations only to those "program components" which have been identified in specific complaints. *Id.* Such a policy seems myopic and ill-conceived in view of the importance of achievement of gender equity in such programs, discussed *infra* notes 147-52. The mere lack of complaints, or the limited nature of those that are received, appears to be a weak basis for constraining the investigatory role of the OCR with respect to interscholastic programs. Compliance by such programs with Title IX is not only intrinsically important, but also has a major impact on the ability of intercollegiate programs to achieve the numerical parity currently demanded by the courts.

119. In the 1993-94 school year more than 3.4 million of the high school athletes were male and 1.9 million were female (co-educational sports not included) even though the high school enrollment of boys and girls is almost equal. See *Task Force Report*, *supra* note 2, at 14. Further, since high schools provide the athletes for intercollegiate programs, parity in participation in interscholastic programs should provide a significant foundation for accelerated compliance with gender equity on the intercollegiate level. Finally, and perhaps most importantly, the formation of attitudes about roles for males and females in athletics are formed in childhood long before entry into college. See generally *supra* notes 65-69 and accompanying text (discussing the non-discrimination paradigm and its focus on equality of experiences in the context of education).

120. The authors are not aware of a single federal program that provides financial assistance to school districts for purposes of meeting their Title IX obligations in the context of interscholastic athletics. Cf. *Grove City College v. Bell*, 465 U.S. 555, 594 n.9 (1983) (Brennan, J., dissenting) (observing that most college athletic departments do not receive federal funds).

ticipation in women's sports.<sup>121</sup> It seems unlikely that school districts will cut educational programs in order to pay for more athletic opportunities for a very small number of women.<sup>122</sup> Rather, it seems far more likely that school districts will simply cut back the male programs or get out of interscholastic sports altogether.<sup>123</sup>

In criticizing the decisions in these cases for failing to address the non-discrimination paradigm, we do not mean to criticize the ultimate results.<sup>124</sup> Clearly, these decisions reaffirm a fundamental principle that each gender is entitled to equal access to intercollegiate athletics. The reaffirmation of this principle is a major victory for women in this and future generations.<sup>125</sup> However, some extraordinarily important issues still exist, and

121. The financial problems faced by school districts are perhaps best illustrated by the fact that there are state constitutional challenges to school finance systems in approximately six states. This litigation, commonly called "school finance litigation," constitutes one of the most significant trends in the law. For an examination of school finance litigation, see generally William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision As a Model*, 35 B.C. L. REV. 597 (1994); William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990); Note, *To Render Them Safe: The Analysis of State Constitutional Provisions In Public School Finance Reform Litigation*, 75 VA. L. REV. 1639 (1989); see also R. CRAIG WOOD, *EDUCATION FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS—AN ANALYSIS OF STRATEGIES* (1993) (discussing education finance distribution formulas and the history of education finance litigation); JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991) (describing his experiences teaching in and visiting schools in various neighborhoods where de facto racial segregation still persists).

122. Although the number of women participating in interscholastic sports has risen dramatically, it still is only a small portion of the total number of women in school. According to the National Federation of State High School Association's 1994 High School Athletics Participation Survey, 2,124,755 females participated in high school athletics in the 1993-94 school year. Aggregate enrollment of female students in high school for that period was 11,102,000.

123. In other words, the number of young men allowed to participate will decline. Therefore, fewer young people will be able to learn the lessons which are inherent in high school sports.

124. However, the authors do criticize the OCR for doing little or nothing to enforce these results at other institutions of higher education. In effect, there appears to be a tilted playing field in which those institutions which have been sued play under a different set of rules than those which have not been sued.

125. Undoubtedly, the day will come when women intercollegiate athletes will play to capacity crowds as frequently as men do. This is already occurring at the University of Colorado where the women's basketball players outdraw their male counterparts. According to the sports information office of the University's athletic department, after this institution made a major commitment to building a championship women's basketball team, its average game attendance, compared to the game attendance averages for the men's team, increased as follows:

Playing Season	University of Colorado Basketball Teams Average Game Attendance	
	Women	Men
91-92	1,558	6,075
92-93	3,473	4,613
93-94	5,167	3,165
94-95	5,538	3,413

these issues are ignored by the numerical parity paradigm and its bureaucratic obsession with sheer numbers, which can be easily manipulated.<sup>126</sup> These issues are explored in the next section.

#### IV. THE NEED FOR A GREATER EMPHASIS ON THE NON-DISCRIMINATION PARADIGM IN THE CONTEXT OF INTERCOLLEGIATE ATHLETICS

Although the bolder elite women athletes have used the numerical parity paradigm to achieve greater numerical parity in intercollegiate athletic programs,<sup>127</sup> scant judicial attention has been given to the non-discrimination paradigm — the equality of treatment afforded to intercollegiate athletes in every “program component” designated by the OCR.<sup>128</sup>

Exploration of issues of discriminatory treatment historically received by women athletes on the intercollegiate level reveals a pattern of depreciating

In addition, all available tickets were sold for each of the two 1995 NCAA Regional Tournament games played by the women’s basketball team against Holy Cross and Southwest Missouri State, on March 16th and March 18th, respectively, at the Coors Events Center on the campus of the University of Colorado. *Id.*

126. To illustrate, an institution could simply cut men’s teams as a means of achieving substantial proportionality. Such a tactic would result in legal compliance, but would not do anything for women.

Moreover, such a tactic implicitly assumes that it is acceptable to inhibit one gender in the process of atoning for previous discrimination against the other gender. Such an assumption would appear to be at odds with the Supreme Court’s recent pronouncements on race. *See* cases cited *supra* note 23.

127. *See* cases cited *supra* notes 4–6.

128. For purposes of the analyses set forth in this Article, the term “equality of treatment,” which refers to the standard of treatment required under the non-discrimination paradigm, *see supra* notes 60–71, is broader than “accommodation of interests and abilities,” 34 C.F.R. § 106.41(c)(1), as that phrase has been addressed judicially in terms of numerical parity. “Equality of treatment” does include the fair and equitable allocation of supportive resources to women by their athletic programs.

In addition to the “accommodation of interests and abilities,” the Athletic Regulations designate nine basic areas in which supportive assistance to men and women must be equal in effect. Athletic Regulations, *supra* note 2, § 106.41(c). These areas are:

- (1) provision of equipment and supplies;
- (2) scheduling of games and practice times;
- (3) travel and per diem allowances;
- (4) opportunity to receive coaching and academic tutoring;
- (5) assignment and compensation of coaches and tutors;
- (6) provision of locker rooms, practice and competitive facilities;
- (7) provision of medical and training facilities and services;
- (8) provision of housing and dining facilities and services;
- (9) publicity.

*Id.*; Policy Interpretation, *supra* note 2, at 71,415. These ten factors, together with athletic scholarships, 34 C.F.R. § 106.37(c); support services (administrative, clerical, and secretarial assistance), *id.* at 71,417; and recruitment of student athletes, Policy Interpretation, *supra* note 2, at 71,417, form the 12 “program components” that, in addition to accommodation of interests and abilities, are assessed by the OCR in determining whether athletic programs comply with Title IX. *Id.* at 71,415–18. *See* Mary W. Gray, *The Concept of Substantial Proportionality in Title IX Athletics Cases*, 3 DUKE J. GENDER L. POL’Y 161 (1996). While these areas have ingredients of the non-discrimination paradigm, they are applied by the OCR so mechanically and bureaucratically that their value is often lost. *See infra* note 146.

the female gender, which may dampen future achievements of numerical parity by educational institutions. So long as male athletes are deemed "princes" while women athletes are treated as "chimney sweeps,"<sup>129</sup> the major intent and objectives of Title IX will never be met.<sup>130</sup> In the past, women athletes, their coaches, and the OCR have voiced strong concerns about the neglect and inattention to the needs of such athletes by universities and colleges in the face of the more favorable advantages given to men,<sup>131</sup> claiming that women athletes are given fewer equipment resources,<sup>132</sup> required

129. See *Colgate I*, 802 F. Supp. 737, 745 (N.D.N.Y. 1992), for application of this colorful illustration to the difference in treatment of men and women ice hockey players.

130. Senator Birch Bayh (D-Ind.) commented at the time of passage of Title IX that the law was to be "a strong and comprehensive measure [that would] provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women." 118 Cong. Rec. 5804 (1972); see also VARGYAS, *supra* note 20, at 6 (discussing the legislative history of Title IX).

131. The women's basketball coach at the College of Mount St. Joseph filed suit in 1993, in district court in Cincinnati, Ohio, claiming that she was demoted because she had complained that men's sports were given a higher priority than women's sports. The suit also alleged that the coach had been protesting since 1990 and had stated in 1991 that the discrepancy between the men's and women's programs "reflects a lack of respect for women's athletics." *College Coach Files Lawsuit*, FORT COLLINS COLORADOAN, Nov. 26, 1993, at D5.

Similar litigation was also instituted by the former women's basketball coach at Baylor University, accusing the institution of discrimination by allowing significant disparities between men's and women's sports in the area of compensation of head coaches. *Bowers v. Baylor Univ.*, 862 F. Supp. 142, 143 (W.D. Tex. 1992).

Furthermore, as discussed in several articles, legal actions based on disparities in pay have been instituted by the women's golf coach at Oklahoma State University, the women's basketball coach at Howard University, and the former women's gymnastics coach at the University of Minnesota, Twin Cities (based upon comparisons with salaries of coaches of men's football, basketball and ice hockey). See Carol Herwig, *Equality of Salary Exception, Not Rule*, USA TODAY (Arlington, Va.), Jan. 25, 1994, at 8C; *Ex-coach Files Suit*, NCAA NEWS (Overland Park, Kan.), Oct. 18, 1993, at 3-11.

132. See B. Glenn George, *Miles to Go and Promises to Keep: A Case Study of Title IX*, 64 U. COLO. L. REV. 555, 562 (1993), which discloses that under the University of Colorado athletic budget for the 1991-92 basketball season, the men's equipment budget was twice as large as that provided for women. In presenting this and other disparities in resources given to the men's and women's basketball team, the author says:

Yet in other areas, the male and female basketball players lead very different lives, at least to the extent we measure those 'sports lives' by institutional expenditures and support. Such differentiations damage the women's program both explicitly and implicitly . . . Implicitly, even when the discrepancies have no direct effect on such tangible items such as uniforms and food, the distinctions in the program convey a message about the importance of the women's program and the students' contributions to this institution. When the women's basketball coach earns a combined salary which is only thirty-eight percent of the combined salary earned by the men's basketball coach, this must be widely understood as a statement of priorities. Athletic department officials would no doubt protest such a characterization, but this is indeed a circumstance in which 'money talks,' and the message is loud and clear.

The University has since expanded its monetary commitment to women's basketball and its coach and produced a championship team that outdraws its male counterparts. See *supra* note 125.

However, although this coach is now paid a salary that is equivalent to that of the coach of the men's basketball team, the men's coach has the following additional incentives

to ride in vans while men travel in buses (or ride in buses while men travel by air),<sup>133</sup> forced by budgetary considerations to stay in lower quality lodging than men on road trips and to "scrimp" on meals,<sup>134</sup> subjected to inadequate responsiveness to their complaints of sexual harassment<sup>135</sup> provided with coaches who are paid much less than their counterparts in charge of men's teams,<sup>136</sup> given fewer assistant coaches than are provided for men's teams, accorded disparate recruiting resources,<sup>137</sup> granted fewer aids such as clerical help, courtesy cars, and film equipment, provided with inferior facilities,<sup>138</sup> are not accorded equivalent uniforms and shoes,<sup>139</sup> and

that are not paid to the women's coach: bonuses of \$10,000 upon receiving a bid to the National Invitational Tournament, \$20,000 for winning the Big Eight championship, and \$20,000 for being invited to the NCAA tournament with increments of \$5,000 for each step to the Final Four and \$10,000 for reaching the title game. *Colorado Coaches See Contrast in Contracts*, USA TODAY (Arlington, Va.), Mar. 23, 1995, at 2C.

133. See *Colgate I*, 802 F. Supp. 737, 745 (N.D.N.Y. 1992).

134. *Id.*; see also George, *supra* note 132, at 563 (citing the dramatic difference in the training table budgets for men's and women's teams).

135. For example, the OCR took Fresno State to task for its handling of a sexual harassment complaint involving the allocation of practice time in its weight room. *California State Univ., Fresno, Title IX Compliance Review*, STATEMENT OF FINDINGS (Office for Civil Rights, Dep't of Educ.) Apr. 6, 1994, at 22-24; Carol Herwig, *Federal Office Gets Tougher with Title IX*, USA TODAY (Arlington, Va.), July 21, 1994 at 7C (discussing statement of findings and letter); *Letter from John E. Palomino, Regional Civil Rights Director, OCR, U.S. Department of Education, to Dr. John D. Welty, President, California State University, Fresno 4 (Apr. 6, 1994) (on file with the Duke Journal of Gender Law & Policy)*; see also MARIAH B. NELSON, *THE STRONGER WOMEN GET, THE MORE MEN LOVE FOOTBALL* 66-69, 127-94 (1991) (regarding sexual harassment of women athletes by spectators, male athletes, and coaches).

136. According to a survey by the Women's Basketball Coaches Association, the average salary for coaches of women's teams at NCAA Division I institutions is \$44,961 as compared to \$75,566 for coaches of men's teams. See Joseph P. Williams, *Lower Pay for Women's Coaches: Refuting Some Common Justifications*, 21 J.C. & U.L. 643, 647 (1995); *Women's Basketball Makes Strides Everywhere, Except In Paychecks*, ROCKY MTN. COLLEGIAN (Denver, Colo.), Mar. 31, 1994 at 1, 12; cf. *Stanley v. University of S. Cal.*, 13 F.3d 1313 (9th Cir. 1994). In this case, the court denied a request for a preliminary injunction by the former coach of the women's basketball team at the University of Southern California, seeking to continue her employment pending the outcome of a suit for damages against the institution for alleged gender and salary discrimination. The claim of discrimination was based on an alleged disparity in compensation of \$66,000 paid to the women's coach and \$130,000 for the men's coach. The plaintiff was replaced when she refused to sign a new contract for \$96,000. In assessing the likelihood of the plaintiff prevailing on the merits, the court held that the women's coach failed to show that her job-related responsibilities, particularly those related to promotion and public relations, were equal to those of the coach of the men's basketball team in light of the much greater revenues produced by the men's team and the job-related pressures and duties placed on its coach to maintain such revenues.

See also George, *supra* note 132, at 564 (1993) (explaining that terms of employment contract for coach of women's team were much less favorable than terms of contract for coach of men's team).

137. See the description by the coach of the women's basketball team at the University of Denver of the "fancy 'DU Basketball'" stationery provided to the men's basketball coach as contrasted with the generic University paper given to her. Bill Briggs, *DU Women's Coach a 'Miserly' Strategist*, DENV. POST, Jan. 9, 1994, at 15A. The article containing this description notes that the institution has increased its women's athletic budget by \$200,000 for new coaches, marketing, recruiting, and travel.

138. For example, during the 1980's one of the authors observed that the Hanover College

bumped by men's teams from practice facilities.<sup>140</sup> Although institutions may have both men's and women's teams, it is clear that women athletes have been subject to "separate and unequal" standards akin to those historically imposed in segregated public schools.<sup>141</sup>

Furthermore, although no reliable objective information is available, it appears that a similar pattern has been pervasive in club, intramural,<sup>142</sup> and interscholastic sports.<sup>143</sup> For example, some state high school associations have declared that women's basketball will be played during non-traditional seasons.<sup>144</sup> The effect of such a position is to relegate young women to second class status.<sup>145</sup> The illustrations of demeaning and disparate treatment set forth above reflect a substantial area of unmet need for respect, empowerment, acceptance, and recognition by women in intercollegiate athletics. Such need is much broader than the "unmet need" reflected in the lack of opportunity to participate in a particular sport, which is embodied in the third prong of the three prong test. This issue of "unmet needs" in terms of overall treatment of a particular gender is not addressed in Title IX or the accompanying regulations except indirectly in terms of the "support factors," which are generally subjected to a quantification test based on objective comparisons, such as equality in numbers of coaches, courtesy cars,

---

women's basketball team practiced and played its games on a floor which was shorter than collegiate standards. In contrast, the men's team had a regulation floor.

139. George, *supra* note 132, at 563.

140. *Colgate I*, 802 F. Supp. 737, 745 (N.D.N.Y. 1992).

141. For a recitation of various examples of discriminatory treatment toward women participating in athletic programs, see VARGYAS, *supra* note 20, at 8 n.20. See also *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (holding that separate educational facilities for white and black children are inherently unequal).

142. See *supra* notes 32, 110.

143. See VARGYAS, *supra* note 20, at 5.

144. See *West Va. ex rel. Lambert v. West Va State Bd. of Educ.*, 447 S.E.2d 901 (W. Va., 1994); see also *Horner v. Kentucky High Sch. Athletic Ass'n.*, 43 F.3d 265 (6th Cir. 1994).

145. Controversy developed among basketball fans at Rocky Mountain High School in Fort Collins, Colorado, because during the recent season the boys' and girls' teams played at about the same time, but in different places. One female player said, "Everybody goes to the boys games, and we don't have the advantage of seeing the guys play. People would come [in the past] to the boys game at halftime of our games, and it was the only time we'd expect fans. I hate it now." D. Bublitz, *Attendance Falling Short at Girls Basketball Games*, FORT COLLINS COLORADOAN, Feb. 6, 1995, at B1.

As another example, Indiana holds its women's high school basketball tournament in February, leaving "March Madness" and "Hoosier Hysteria" to the young men. Telephone Interview with Pat Roy, Assistant Commissioner, Indiana High School Athletics Association (Mar. 24, 1996).

dressing rooms, and shower heads.<sup>146</sup>

---

146. The *Investigator's Manual* contains 102 pages of ponderous instructions, admonitions, and scripted questions, together with a 63 pages of appendices, for use by representatives of the OCR in conducting investigations of intercollegiate athletic programs under Title IX. A high degree of minutia and turgidity is reflected in the material. For example, one instruction requires the investigator to categorize "equipment and supplies," which are to include, but not be limited to "uniforms, other apparel, sport specific equipment and conditioning and weight-training equipment." Moreover, the term "uniforms" is further delineated to include "practice and game uniforms, shoes, rain gear, and warm-up suits," but the investigators are cautioned "do not obtain, review or analyze information on undergarments, e.g., athletic supporters, bras." INVESTIGATOR'S MANUAL, *supra* note 2, at 29. Nevertheless, the OCR investigators have, on at least one occasion, ignored this admonition, and proceeded to count undergarments. Letter from Estelle A. Fishbein, Vice President and General Counsel, Johns Hopkins University, to Robert A. Smallwood, Regional Director of the OCR, at 2 (Feb. 14, 1995) (on file with the *Duke Journal of Gender Law & Policy*) (stating that the OCR investigators spent 4.5 hours counting undergarments).

Indeed, personnel of institutions subjected to such mechanistic reviews encounter intense frustration. In a letter to the Assistant Secretary and General Counsel of the OCR, counsel for an institution that had been subject to such a review noted the following.

From the beginning, we were distressed that the OCR investigators showed that they were unclear as to the proper focus of a Title IX investigation, and that they lacked any in depth knowledge of collegiate sports in general and of specific sports in particular. The questions asked often were ridiculous. Following are examples:

OCR asked the crew coach, "Does the river need dredging?" The University, of course, neither owns the "river" (actually the Baltimore harbor) nor has control over the "river" bed, but in any event it is unclear to me what relevance such a question has to a Title IX investigation!

After touring the facilities and being told that the University has only one track, the OCR investigators asked the men's track coach, "Would you like to have a track with more lanes?" the OCR's sole responsibility in the investigation at hand is to determine whether there is unequal treatment of men and women in the University's sports program, and not to inquire into or comment upon the adequacy of athletic facilities in general.

OCR investigators were told repeatedly that the meal money provided to the player is the *same for each sport*. Nevertheless, the investigators repeatedly asked, "Is the meal money enough?" the OCR's responsibility is to determine whether there is equality of treatment of men and women in the athletic program; and not to reach an opinion as to the sufficiency of meal money in general.

The Sports Information Director explained extensively in two separate interviews that the role of his office is to provide sports information, and *not* sports marketing. Nevertheless, the the OCR investigators asked the Sports Information Director, "What publications do you publish to try to get public interest?"

OCR investigators repeatedly asked coaches and team coaches, "Would more publicity help?" It is unclear what purpose the investigator had in mind that publicity would "help," but in any event the question has no relevance to this Title IX investigation.

V. DEVELOPMENT OF A HOLISTIC STANDARD FOR NON-DISCRIMINATION  
UNDER TITLE IX — THE THEORY OF GENDER DEPRECIATION

The dominant focus in recent litigation on achievement of "substantial proportionality" for measuring compliance with Title IX,<sup>147</sup> though symbolically significant and increasingly meaningful in giving women greater access to intercollegiate athletics, has limited value in redressing the secondary status to which they and their sports have historically been relegated.<sup>148</sup> Essentially, the current jurisprudence is focused on the number of women participating while ignoring issues of discrimination. If such issues are to be addressed, new methodologies of judicial analysis must be developed.

The Gender-Equity Report recently issued by a task force formed by the NCAA<sup>149</sup> was unwilling to rest its definition of gender equity upon the satisfaction of the requirements of the Athletic Regulations. Instead, it stated that

[a]t an institutional level gender equity describes an *environment* in which fair and equitable distribution of overall athletics opportunities, benefits and resources are available to women and men in which student-athletes, coaches and athletic administrators are not subject to *gender-based discrimination*.

*An athletics program can be considered gender equitable when the participants in both the men's and women's sports programs would accept as fair and equitable the overall program of the other gender. No individual should be discriminated against on the basis of gender, institutionally or nationally, in intercollegiate athletics.*<sup>150</sup>

During the tour of the equipment room and obviously intent on finding any discrepancy, if they could, between the equipment provided men and women the OCR asked "Why are the women's basketballs smaller than the men's basketballs?" Of course, the University equipment furnished women athletes is in conformance with the NCAA rule. That rule setting the standard size of basketballs for women is based on the fact that it is best suited to the smaller size of women's hands.

OCR asked the men's tennis coach, "Does the University provide presses for racquets?" The investigator appeared unacquainted with the fact that presses were used only for wooden tennis racquets which have not been in use for at least fifteen years, having been virtually completely supplanted by metal racquets."

Letter from Estelle A. Fishbein, Vice President and General Counsel, Johns Hopkins University, to Norma Cantu, Assistant Secretary, OCR, and Judith Winston, General Counsel, OCR, at 2-3, Dec. 8, 1994 (on file with the *Duke Journal of Gender Law and Policy*).

147. See cases cited *supra* notes 4-6.

148. See the examples of the subordinating and depreciating manner of treatment of women athletes compared to that accorded their male counterparts, discussed *supra* notes 127-41 and accompanying text. In internal institutional proceedings and judicial decisions prior to *Brown I*, equality in terms of absence of discrimination was given more attention than parity. See, e.g., *Haffer v. Temple Univ.*, 678 F. Supp. 517, 530 (E.D. Pa. 1987); *Blair v. Washington State Univ.*, 740 P.2d 1379, 1380-81 (Wash. 1987) (en banc). See generally Edward Branchfield & Melinda Grier, Aiken v. Lieuallen and Peterson v. Oregon State University: *Defining Equity in Athletics*, 8 J.C. & U.L. 369 (1982).

149. *Task Force Report*, *supra* note 2, at 14.

150. *Id.* (emphasis added).

The future enforcement efforts of the OCR in areas other than numerical parity in participation may lead to the objectives identified in the Gender-Equity Report. However, if the pattern of ineffectiveness demonstrated by the OCR over the past twenty year continues,<sup>151</sup> such expectations may well be illusory.<sup>152</sup>

Furthermore, even if the OCR should be inordinately successful in causing institutions to comply with all program components in the Athletic Regulations, including support services,<sup>153</sup> which are "equal in effect,"<sup>154</sup> women athletes may continue to be perceived as lacking honor, absent remedies to assure that they are afforded an environment in which their status as athletes will be respected, and which will ensure that they are not subject to subordination, exploitation, or denigration. A more appropriate remedy will enable women athletes to assert that the atmosphere in which they perform will not (1) be perceived by a reasonable person as hostile or abusive, (2) expose them to disadvantageous terms and conditions vis-à-vis their male counterparts in preparing for and engaging in athletic competition, or (3) alter their practice and playing environment so as to make it more difficult for them to perform as athletes.<sup>155</sup> These factors, which are equivalent to those used in *Harris v. Forklift Systems, Inc.*<sup>156</sup> for defining the components of the "hostile environment" predicate for claims of sexual harassment in employer/employee contexts under Title VII, should provide the foundation for determining whether *gender depreciation* exists in relationships between institutions and their students. However, the standard of *gender depreciation* would not require the factual setting of sexual misconduct or impropriety that has been an implicit prerequisite in most judicial interpretations involving sexual harassment.<sup>157</sup> It would broadly reflect the non-discrimination paradigm by focusing upon whether an institution's actions or inactions with respect to its male or female athletes are based upon a gender animus that impairs persons of either gender from demonstrating and performing their

---

151. For a description of the statements attributed to various persons involved in Title IX litigation on behalf of plaintiffs and the discussion of neglect in enforcement by the OCR, see the Lyndon B. Johnson School report, *supra* note 2.

152. Criticism of the OCR's enforcement efforts is not limited to the athletics context. Indeed, The *Denver Post* observed that the recent record of the OCR "provides one of the best arguments yet for scaling back the budget of this federal agency, if not eliminating it altogether." Editorial, *Office of Civil Rights Produces a Meager Harvest*, DENV. POST, July 20, 1995, at B10.

153. See Policy Interpretation, *supra* note 2.

154. *Id.*

155. See *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 370-71 (1993). In determining whether a "hostile environment" based on gender existed, some pre-*Harris* cases applied a standard based on the perceptions of a "reasonable woman." See *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991); *Spencer v. General Elec. Co.*, 697 F. Supp. 204, 218 (E.D. Va. 1988). However, *Harris* itself applied a "reasonable person" test. Nevertheless, some post-*Harris* cases are continuing to apply a standard that makes reference to gender-related perceptions. See *Spain v. Gallegos*, 26 F.3d 439 (3d Cir. 1994); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459 (9th Cir. 1994).

156. *Harris*, 114 S. Ct. 367, 370-71.

157. See cases cited *supra* note 155.

athletic skills to the best of their abilities. This is the holistic and subjective underpinning for application of the principle of the *gender depreciation*, which if not avoided, would give rise to the injunctive relief and recovery of damages by injured parties. Such a standard could be incorporated into Title IX by judicial interpretation, administrative regulation, or amendment of the statute. A major advantage of the employment of this standard would be to avoid the transparency of current judicial tests embodying the numerical parity paradigm, such as "substantial proportionality,"<sup>158</sup> which focuses solely on numbers of participants by gender in an intercollegiate athletic program, but gives scant attention to whether such participation is meaningful. For example, an institution with impure motives can easily achieve compliance with Title IX by attaining substantial proportionality through the establishment of some women's intercollegiate teams solely because they inherently require or permit large numbers of participants, such as crew in the arid West or ice hockey in the South, which may neither be competitive<sup>159</sup> nor meet the needs of its women students.

An administrative foundation for this proposition exists in at least two key provisions of the overall regulations of the OCR governing compliance with Title IX by athletic programs receiving Federal funds.<sup>160</sup> First, the Athletic Regulations, besides containing the "three-pronged test," which emphasizes numerical parity in participation and has been the centerpiece for recent decisions in Title IX cases in intercollegiate athletics,<sup>161</sup> also include a provision that "[n]o person shall on the basis of sex . . . be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient [of federal aid] . . . ."<sup>162</sup> Secondly, another provision of the Master Regulations,<sup>163</sup> which relates to educational programs and activities<sup>164</sup> (the Activity Regulation), prohibits a recipient of federal aid from engaging in specific discriminatory acts on the basis of gender in

---

158. It must be emphasized that only one of the prongs in the three-pronged test must be satisfied. As discussed in the text accompanied by notes 101-02, *supra*, the only "safe harbor" among these tests is "substantial proportionality."

159. In *Roberts II*, the court reversed a portion of the district court's directives to Colorado State, emphasizing that

Nothing in Title IX requires an institution to create a "top flight" varsity team . . . nor is it within the district court's power, once [the institution] reinstates the softball program with all the incidental benefits of varsity status, "to make sure that they have a good season."

*Roberts II*, 998 F.2d 824, 835 (10th Cir. 1993).

160. 34 C.F.R. § 106 (1995) [hereinafter Master Regulations].

161. See cases cited *supra* note 11.

162. See Athletic Regulations, *supra* note 2, § 106.41(a)-(c); see also discussion *supra* note 128 (discussing ten areas where the Athletic Regulations require equality in effect).

163. See *supra* note 160.

164. Section 106.31 of the Master Regulations covers discrimination based on sex in any academic, extracurricular, research, occupational training, or other education program or activity. Even though the Athletic Regulations specifically cover gender discrimination in physical education or athletic programs, given the breadth of the language of § 106.31 and the lack of any reference to exclusivity of the Athletic Regulations in covering students in intercollegiate athletic programs, no sound basis exists for not applying the said Section to such programs.

providing any "aid, benefit, or service" (Assistance) to a student. Among the particular acts that are forbidden are treating one person differently from another in determining whether such person satisfies any requirement or condition for Assistance, subjecting any person to separate or different rules of behavior or other treatment, and otherwise limiting any person in the enjoyment of any right, privilege, advantage, or opportunity.<sup>165</sup>

Application of such standards to the treatment of athletes in intercollegiate athletics leads to a new legal theory of *gender depreciation*, which is a derivative form of sexual harassment and/or gender discrimination. Under the theory of *gender depreciation*, courts would be forced to examine the entire environment surrounding intercollegiate athletics, and institutions would be forced to explain every instance when men and women were treated differently. Such things as different modes of transportation, different lodging arrangements, and requirements that one gender take inferior practice times or use inferior facilities and/or equipment would not be tolerated.<sup>166</sup> However, such things as differences in equipment expenditures<sup>167</sup> or in overall participation levels might be tolerated.<sup>168</sup> The critical requirement would be that all athletes would be treated the same regardless of gender.<sup>169</sup>

Judicial support for this theory of *gender depreciation* may be found in recent cases sanctioning the application of traditional concepts of Title VII to claims for private damages for discriminatory treatment under Title IX.<sup>170</sup>

165. Arguably, an important determinant of whether an athletic program is engaged in gender discrimination or harassment would rest on an examination of whether it, through the behavior of its coaches and administrators, can reasonably be perceived to give one gender greater opportunities than the other in the development of individual athletic potential; the likelihood of having winning or championship teams; the production of revenue for gender-related sports; engagement in efforts to inculcate greater character, confidence, and self-esteem in players; and the establishment of foundations for earning respect and recognition from others. Such criteria transcend the rigid and mechanical tests applied relative to "program components" in the Athletic Regulations and permit a more holistic and subjective assessment of whether gender depreciation exists in an athletic program. It is also consistent with the "your program, my program" definition of gender-equity in the Task Force Report. See *supra* note 2.

166. As observed *supra* notes 127-44 and accompanying text, there are numerous examples of unequal treatment in women's sports.

167. Obviously, it costs more to outfit a female lacrosse player than a male diver. Thus, there would be a valid reason for spending more on equipment for the women's lacrosse team than for the male swimming and diving team.

168. For example, even though a school offers more sports for women than for men, it still might have more male participants. This is particularly true if one of the male sports is football. Under the numerical paradigm, this is unacceptable.

However, some schools field female volleyball and swimming teams, but do not field male teams in these sports. This is unacceptable under the non-discrimination paradigm.

169. It is possible that a school could "tier" its sports and give preferential treatment to certain teams (i.e. men's basketball and football). However, if a school did this, it would be obligated to give preferential treatment to some women's teams as well.

170. Although gender discrimination has historically been addressed under Title VII, several courts have recently declared that the substantive standards under this provision as to hostile environments involving sex or gender also apply to Title IX. See, e.g., *Roberts II*, 998 F.2d 824, 832 (10th Cir. 1993) (holding that despite the fact that Title IX was explicitly modeled on Title VI, Title VII is "the most appropriate analogue when defining Title IX's substan-

Persuasive analogies involving indifference to or acquiescence in disparate and demeaning treatment of women by athletic departments<sup>171</sup> can be made circumstances leading to judicially determined violations of Title

---

tive standards, including the question of whether 'disparate impact' is sufficient to establish discrimination under Title IX of the Civil Rights Act of 1964") (quoting *Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987)) ; *Lipsett v. University of P.R.*, 864 F.2d 881, 896-97 (1st Cir. 1988) (holding that where student-employee claimed dismissal from residency program was due to sexual harassment, disparate treatment standard of Title VII applied to claims under Title IX); *Ward v. John Hopkins Univ.*, 861 F. Supp. 367, 375 (D. Md. 1994) (holding that Title IX claims by a female employee and a student-employee of the University that a male employee sexually harassed them was "appropriately analyzed under the standards applicable to cases brought under Title VII"); *Patricia H. v. Berkeley Unified Sch. Dist.*, 830 F. Supp. 1288, 1291-93 (N.D. Cal. 1993) (permitting plaintiffs to state a claim under Title IX for hostile environment based on continued presence of teacher who allegedly sexually abused students); *Hastings v. Hancock*, 842 F. Supp. 1315, 1320 (D. Kan. 1993) (denying summary judgment on grounds that Title VII "agency" principles may be applied under Title IX to impose liability upon private, unincorporated institution for alleged sexual harassment of student by employee); *see also* SEX DISCRIMINATION HANDBOOK, (Barbara S. Gamble ed.) (1992); *cf.* *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (holding that Title IX must be given "a sweep as broad as its language" and thus include employment discrimination within its prohibition) (citation omitted); *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp 1560, 1571 (N.D. Cal. 1993) (allowing plaintiffs to state a claim for hostile environment sexual harassment under Title IX for alleged student-to-student harassment, but dismissing action, with leave to amend, based upon plaintiffs' failure to allege the requisite level of intent). Other cases have applied precedents under Title VI in addressing claims under Title IX. *See Cannon v. University of Chicago*, 441 U.S. 677, 696-98, 702-03 (1978). A few cases have assumed that Title IX applies to hostile environment claims without reference to other statutory mandates. *See, e.g., Franklin v. Gwinnett County Pub. Sch.*, 112 S. Ct. 1028 (1992); *Bowers v. Baylor Univ.*, 862 F. Supp. 142 (W.D. Tex. 1994). *But see Brougher v University of Pittsburgh*, 882 F.2d 74, 77-78 (3rd Cir. 1989) (affirming dismissal of action based on statute of limitations and declining consideration of district court's conclusion that Title IX does not permit recognition of claims based on sexually hostile environment). In addition, a more recent district court opinion refused to apply Title IX under a hostile environment assertion where male student was taped to a towel rack by other members of football team, noting that:

Title IX was not intended to create a genderless society in which every act gives rise to a cause of action simply because it affects a male or a female. The remedies under Title IX may tempt creative lawyers to carry the causal link between gender and gender discrimination further than Congress intended.

*Seamons v. Snow*, 864 F. Supp. 1111, 1116, 1118-19 (D. Utah 1994).

171. *See supra* notes 127-44 accompanying text.

IX.<sup>172</sup> Theoretically, in view of the broad language used by courts in sever-

---

172. See *Jeldness v. Pearce*, 30 F.3d 1220, 1228 (9th Cir. 1994) (determining the educational rights under Title IX for women in prisons); *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chicago*, 604 F.2d 1028, 1029-30 (7th Cir. 1979) (discussing the disparity in required workplace attire); *Harrington v. Vandalia-Butler Bd. of Educ.*, 585 F.2d 192, 193-94 (6th Cir. 1978) (discussing the disparity in quality and privacy of office facilities); *Bowers*, 862 F. Supp. at 143 (discussing the disparate allocation of resources to women's basketball program and unequal terms of employment); *Fisher v. Vassar College*, 852 F. Supp. 1193, 1225-30 (S.D.N.Y. 1994) (discussing the denial of tenure, based on "sex-plus" standard applied to married women with family responsibilities).

Furthermore, judicial decisions have imposed upon colleges and universities specific duties of protection over their students, which may also, by analogy, be used to buttress claims of gender depreciation. See *Furek v. University of Del.*, 594 A.2d 506, 522 (Del. 1991); *Mullins v. Pine Manor College*, N.E.2d 331, 337 (Mass. 1983); NELSON, *supra* note 2, at 160 ("The coach and the athlete may spend thirty hours a week together. That's more time than an adolescent will spend with any teacher, friend, or, usually, parent."); RICK TELANDER, *THE HUNDRED YARD LIE: THE CORRUPTION OF COLLEGE FOOTBALL AND WHAT WE CAN DO TO STOP IT* 100 (1989):

So much of what coaches do to their players is done in the name of "discipline," as though the pursuit of that virtue justifies almost anything. "You gotta have discipline to play this game," the coaches say over and over. And it is true that discipline — the control of one's behavior to facilitate efficiency — is important for success in football, but no more so than it is in almost every other endeavor. Any yet this vague thing, "discipline," hangs over every football field, sought after like the Grail, but always slipping through the fingers, just out of reach. And that is because what coaches really want is not discipline but subservience.

Much confusion and uncertainty exists as to whether and to what extent reference can or must be made to other federal statutes, particularly Titles VI and VII, in the substantive interpretation of Title IX. The Supreme Court has stated only that Title IX is "patterned after" Title VI, without making clear whether this means that the interpretation of the former must necessarily follow that of the latter. See *Grove City College v. Bell*, 465 U.S. 555, 566 (1984); *Cannon v. University of Chicago*, 441 U.S. 677, 684 (1979).

Furthermore, documented legislative history of Title IX is both scarce and flimsy. As the *Brown II* court stated, "part of the confusion about the scope of Title IX's coverage and the acceptable avenues of compliance arose from the absence of secondary legislative materials. Congress included no committee report with the final bill and there were apparently only two mentions of intercollegiate athletics during the Congressional debate." *Brown II*, 991 F.2d 888, 893 (1st Cir. 1993). Moreover, the genesis of Title IX continues to be unearthed. See Brief For Amici Curiae American Council on Education, Association of American Universities, National Association of Independent Colleges and Universities, and National Association of State Universities and Land-Grant Colleges, at 13, *Brown University v. Cohen (Brown IV)* (1st Cir. filed June 26, 1995) (No. 95-1417), which includes a new revelation from the legislative history of Title IX showing that Title VII was the basis for the express disclaimer in Title IX that preferential or disparate treatment of one gender was not to be required because of imbalances involving participation of the other gender. See 117 Cong. Rec. 39,261-39,262 (1971).

Moreover, the opinions in *Roberts II* and *Brown II* reflect divided views of the Tenth and First Circuits as to whether Title VII, as construed in judicial and administrative precedents, is a valid referent for interpretation of Title IX. In the former decision, despite its express recognition that Title IX was explicitly modeled on Title VI, the Court declared that Title VII is "the most appropriate analogue when defining Title IX's substantive standards, including the question of when 'disparate impact' is sufficient to establish discrimination under Title IX." *Roberts II*, 988 F.2d 824, 832 (10th Cir. 1992) (quoting *Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987); cf. *Colgate I*, 802 F. Supp. 737, 743 (N.D.N.Y. 1992) (applying the Title VII "disparate impact" standard in a Title IX case in which members of a women's intercollegiate

al recent Title VII cases construing sexual harassment,<sup>173</sup> such athletes may

---

athletic team alleged that they were the subject of gender discrimination under Title IX).

Contrary to the position of the Tenth Circuit in *Roberts II* and the other decisions referenced above, the Court of Appeals for the First Circuit concluded that "excepting perhaps in the employment discrimination context, see *Lipsett v. University of P.R.*, 864 F.2d 881, 897 (1st Cir. 1988) (applying Title VII standards in Title IX case, but explicitly limiting the crossover to the employment context), the Title VII burden-of-proof rules do not apply in Title IX cases." *Brown II*, 991 F.2d 888, 902 (1st Cir. 1993).

Such a view was magnified by the district court in *Brown III* in its decision on the merits following its receipt of the remanded case. In referring to the proper interpretation of Title IX, the court stated flatly that

[c]omparison of Title VII is inapposite, however. Title VII seeks to determine whether gender-neutral job openings have been filled without regard to gender. Title IX, on the other hand, was designed to address the reality that sports teams, unlike the vast majority of jobs, do have official gender requirements, and this statute accordingly approaches the concept of discrimination differently from Title VII.

*Brown III*, 879 F. Supp. 185, 205 (D.R.I. 1995). The indifference of the court to the broader objectives of Title IX with respect to areas of discrimination other than sports teams, see *Brown II*, 991 F.2d at 894, and its assumption that such teams must necessarily have gender requirements is at least puzzling, and at most, disturbing.

The sharp contrast reflected in the respective views of the courts for the First and Tenth Circuits as to the precedential value of Title VII for interpretation and dissection of Title IX graphically illustrates the schism between the numerical paradigm espoused by *Brown II* and *III*, and the non-discrimination paradigm that is inherent in the Title VII burden-shifting standard accepted by the court in *Roberts II*, but which was lost in the morass of the court's application of the "three-pronged test." See *supra* notes 72-85 and accompanying text.

If the courts in *Brown* or *Roberts* had applied the widely-interpreted "McDonnell-Burdine" burden-shifting standard used in *Colgate*, see *supra* note 16, instead of being captivated by the fixed participation formulae embodied in the three-pronged test, which is rooted solely in a policy determination of the OCR, a more flexible and meaningful basis for addressing questions of gender discrimination could have been established. Instead of focusing solely on numbers of players of a particular gender and application of a series of mechanistic tests as to the support services provided to them, the courts in *Brown* and *Roberts* could have creatively applied the burden-shifting standard in a manner consistent with the non-discrimination paradigm, which would have required gender neutrality in the overall administration of an athletic program and its treatment of student athletes.

Such approach might be illustrated by an analogy to the biblical story of Noah. Even assuming that Noah followed his mandate to "bring every sort into the ark, to keep them alive with you . . . [and] they shall be male and female," *Genesis* 6:19 (Revised Standard Version), and had housed them in quarters of equal dimensions and given them equal portions of food while waiting for the waters to subside, would this have been enough to establish a "safe harbor," evidencing the absence of discrimination by Noah against each who journeyed with him? Would not a better test permit those who made the voyage to show that Noah took along some who had little chance of survival simply to satisfy his "participation" directive; to show that Noah had begrudgingly parceled out the equal amounts of food to some, but had enthusiastically given it to others; and to prove that they reasonably perceived that Noah imposed demands on them that he did not impose on certain "favored" species, which impaired their ability to perform their daily assignments on their ark? Moreover, in fairness to Noah, should he not then be permitted to come forward and show appropriate justifications for the actions that allegedly formed the basis for such charges?

Finally, it bears noting that the relationships between students and their coaches are often much stronger and more intense than other student/teacher relationships. See NELSON, *supra* note 2, at 160-62 (1991).

173. One such broad pronouncement discussed the role of sexual behavior in a Title VII

even be able to recover damages for *gender depreciation* even though little or

---

action:

We have never held that sexual harassment or other unequal treatment of an employee or group of employees that occurs because of the sex of the employee must, to be illegal under Title VII, take the form of sexual advances or of other incidents with clearly sexual overtones. And we decline to do so now. Rather, we hold that any harassment or unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment.

*McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985). A more recent case further developed the hostile environment predicate for a Title VII claim, holding:

The predicate acts which support a hostile-environment sexual-harassment claim need not be explicitly sexual in nature . . . . Rather, the key issue "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed . . . ." Hostile-environment sexual harassment is actionable under Title VII, when it is sufficiently patterned or pervasive.

*Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269 (8th Cir. 1993) (citation omitted). The Court of Appeals for the Third Circuit discussed the implications of Title VII for women in the workplace and the legislative intent behind Title VII:

Congress expected that Title VII would result in the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification . . . ." Such an objective can only be achieved if women are allowed to work without being harassed. Women who know that they will be subject to harassment will be deterred from joining the work force or accepting certain jobs. The objective standard protects the employer from the "hypersensitive" employee, but still serves the goal of equal opportunity by removing the walls of discrimination that deprive women of self-respecting employment . . . . To constitute impermissible discrimination, the offensive conduct is not necessarily required to include sexual overtones in every instance or that each incident be sufficiently severe to detrimentally affect a female employee. "Intimidation and hostility toward women because they are women can obviously result from conduct other than sexual advances."

*Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483-85 (3rd Cir. 1990) (citations omitted); see also *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 371 (1993); *Chambers v. American Trans Air, Inc.*, 17 F.3d 998, 1005 (7th Cir. 1994) (dictum). In *Harris*, the Court did not emphasize sexuality in its discussion of a hostile workplace, but instead focused on "hostile and abusive" conduct, stating "the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion or national origin offends Title VII's broad rule of workplace equality." *Harris*, 114 S. Ct. at 371 (emphasis added). The Court also stated, "[s]o long as the environment would reasonably be perceived, as *hostile or abusive* . . . there is no need for it also to be psychologically injurious." *Id.* (emphasis added) (citations omitted). Furthermore, Justice Scalia states, "[t]oday's opinion elaborates that the challenged conduct must be severe or pervasive enough 'to create an *objective hostile or abusive* work environment . . . that a reasonable person would find *hostile and abusive*.'" *Id.* at 372 (Scalia, J., concurring) (emphasis added) (citation omitted). The Court explained that the determination of whether an environment is "hostile" or "abusive" is to be made by looking

no sexual misconduct has been directed against them.<sup>174</sup> The Equal Protec-

---

at all of the circumstances and relevant factors, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employees' work performance." *Id.* at 371 (emphasis added).

174. The legal principle of "hostile environment" in sexual harassment has been interpreted extensively under the prohibitions of Titles VII and IX. Cases under Title VII include *Harris*, 114 S. Ct. 367; *Meritor Sav. Bank v. Vincent*, 477 U.S. 57 (1986); *Carr v. General Motors Corp.*, 32 F.3d 1007 (7th Cir. 1994); *Kopp*, 13 F.3d 264; *Andrews*, 895 F.2d 1469; *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987); *McKinney*, 765 F.2d 1129. For cases under Title IX, see *Franklin*, 112 S. Ct. 1028; *Lipsett*, 864 F.2d 881; *Ward*, 861 F. Supp. 367; *Slaughter v. Wauboonsee Community College*, No. 94-C2525, 1994 WL 663596 (N.D. Ill. Nov. 18, 1994); *Floyd v. Waiters*, 831 F. Supp. 867 (M.D. Ga. 1993); *Patricia H.*, 830 F. Supp. 1280.

Moreover, the definition of sexual harassment under Title IX by reference to holdings under Title VII can be broadened to include nonsexual discrimination based on gender animus. For discussion of inclusion of substantive standards of Title VII in Title IX, see *supra* note 172. Although several courts have found violations of Title IX in sexual discrimination contexts, no cases have been located that impose liability under Title IX for sexual harassment where no allegations of sexual misconduct have been asserted. However, the broad language in Title VII cases and in some recent Title IX decisions suggest that such decisions under such provision may be forthcoming. See, e.g., *Yusuf v. Vassar College*, 35 F.3d 709, 715-16 (2d Cir. 1994) (holding that a student established a claim under Title IX that college discriminated against him because of his gender based on an allegation that he was erroneously found to have harassed his roommate's girlfriend); cf. *Accardi v. Superior Ct.*, 17 Cal. App. 4th 341, 345 (1993) ("Sexual harassment does not necessarily involve sexual conduct. It need not have anything to do with lewd acts, double entendres or sexual advances. Sexual harassment may involve conduct, whether blatant or subtle, that discriminates against a person solely because of that person's sex."). The court went on to find a basis for sexual harassment under a California law similar to Title VII, where petitioner, a female police officer, claimed that following an injury she was excluded from light duty assignments afforded male officers and subjected to the filing of false medical reports claiming she was no longer disabled. The court emphasized that the period in which such alleged actions occurred could not be separated from a "decade-long campaign against her" by a police department, founded upon the department's unwritten policy that law enforcement had traditionally been a man's job and "hence, no women need apply." *Id.* at 350.

The practical effects of the EEOC guidelines have been unfortunate, as courts have shifted the focus of sexual harassment inquiry away from gender and toward sexual conduct as a predicate for a valid claim:

Notwithstanding that the essence of sexual harassment is gender discrimination, the EEOC Guidelines focused on sexuality rather than gender. The EEOC defined sexual harassment as job detriments resulting from [u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. In so doing, the EEOC inadvertently misled some courts into supposing that sex-based harassment must necessarily involve sexual conduct. Hostile environment cases are really much simpler. They present situations that, like *quid pro quo* cases, involve disparate treatment based on an employee's gender. In one common situation, women employees, often in occupations or workplaces traditionally dominated by men, are subjected to hazing behaviors: scorn, ridicule, and verbal abuse from males who resent their presence. The behavior consists of gestures, words, or conduct that may or may not be sexual in content. The sexual content of the conduct may suffice, but it is never necessary, to prove that the conduct is based on sex. Cases involving analogous harassment of racial and ethnic minorities are directly relevant, and establish that harassment on the basis of sex, even if not sexual in content, violates Title VII.

tion Clause of the Fourteenth Amendment<sup>175</sup> also provides judicial support for the right of participants in athletic programs to receive comparable treatment as reflected in the *Harris* standard, and to seek damages under the Civil Rights Act of 1871<sup>176</sup> for *gender depreciation*.<sup>177</sup> Although females and males on the pre-college level have generally been successful in asserting their rights under the Equal Protection Clause to participate on teams of the opposite gender,<sup>178</sup> administrators, regulatory bodies, and conferences involved with intercollegiate athletic programs have universally accepted gender differences in athletic competition<sup>179</sup> by creating separate programs and

BARBARA LINDEMANN & DAVID D. KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT* LAW 30 (1992) (footnotes omitted). *But see Seamons*, 864 F. Supp. 1111, 1117-19 (D. Utah 1994) (dismissing student's claim that alleged locker room hazing incident violated Title IX, because of insufficient proof of an intent to discriminate on the basis of sex); *Herman v. Western Fin. Corp.*, 869 P.2d 696, 703 (Kan. 1994) (finding alleged sexual relationship of plaintiff's supervisor with another employee insufficient to support hostile work environment sexual harassment claim).

For examples of similar judicial restraint in Title VII cases with respect to the sufficiency of claims to establish gender harassment, see *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591 (5th Cir. 1995) (holding anonymous comments in newsletter directed toward female police officer and female officers in general not so frequent, pervasive, or pointedly insulting as to create hostile working environment).

175. U.S. CONST. amend XIV, § 1. For the text of this provision, see *supra* note 38.

176. 40 U.S.C. § 1983 (1994).

177. See *Lipsett*, 864 F.2d 881, 897 (1st Cir. 1988) (holding that the disparate treatment standard of Title VII applies as well to claims arising under the Equal Protection Clause and Title IX).

178. It is not clear whether a commission would have authority to adopt a sex rule for participation in physical activity. If such a rule could be adopted:

[T]he second, and perhaps more difficult question would be whether such a rule was reasonable. In the area of sex-based classifications, the reasonableness issue will normally be raised in terms of the requirements of the Equal Protection Clause of the Fourteenth Amendment. In considering the permissibility of [rules requiring separate participation by gender], it was observed that the courts have generally given little determinative weight to the use of presumptions about the presumed lack of physical ability of females as a class. Accordingly, it was suggested that sex rules would be upheld only where the rule-maker could demonstrate a reasonable factual basis for the reasons offered to justify the use of sex-based classifications.

JOHN C. WEISTART & CYM H. LOWELL, *THE LAW OF SPORTS* § 2.10, at 147-48 (1979); see also *Brenden v. Independent Sch. Dist.*, 477 F.2d 1292, 1298 (8th Cir. 1973) (holding rule prohibiting girls from participating on boys' tennis, cross-country, and running teams is subject to scrutiny under the Fourteenth Amendment); *Hoover v. Meiklejohn*, 430 F. Supp. 164, 169-70 (D. Colo. 1977) (applying balancing test based on importance of the opportunity denied, strength of the state interest involved, and character of the group seeking participation rights through class action, and holding that rule prohibiting female participation violated the Equal Protection Clause). Part of the rationale for these decisions may be based on the fact that no separate teams existed for the girls who sought rights to participate on boys' teams. Courts have not been sympathetic to assertions of rights of boys to play on girls' teams where male teams already existed. See *Mularadelis v. Haldane Cent. Sch. Bd.*, 74 A.D.2d 248, 255-56 (N.Y. App. Div. 1980); *Petrie v. Illinois High Sch. Ass'n*, 394 N.E.2d 855, 864-65 (Ill. App. Ct. 1979); see also ANNIE CLEMENT, *LAW IN SPORT AND PHYSICAL ACTIVITY* 136-142 (1988).

179. Such differences are likely to be attributed simplistically to variance in physical characters, such as absolute size or strength, particularly with respect to "contact sports." However, a more informed and sophisticated analysis of such issue requires evaluation of factors such as inculcation of athletic skills and developmental patterns in childhood and unfounded

teams for men and women.<sup>180</sup> If this formal separation is broadly challenged in intercollegiate athletics, courts may be required to review the legal acceptability in a gender context of the doctrine of "separate, but equal,"<sup>181</sup> most prominently associated with racial segregation in *Plessy v. Ferguson*,<sup>182</sup> which was later repudiated by *Brown v. Board of Education*.<sup>183</sup> The issue has not been squarely addressed by the Supreme Court of the United States.<sup>184</sup>

---

stereotypes of differentiation based on cultural perceptions. See NELSON, *supra* note 2, at 45, 60-63.

180. The rules of the NCAA specifically require minimum numbers of teams for men and women. The number of men's teams may include "mixed teams." A "mixed team" is one on which at least one person of the opposite gender participates. See NATIONAL COLLEGIATE ATHLETIC ASS'N, 1995-96 NCAA MANUAL §§ 20.9.3, 20.9.6. However, no "mixed team" standard is included in determining women's teams. This means that if a male participates on a women's team, such team must be counted as a men's team. However, if a woman participates on a men's team, the converse does not follow in that the team remains as a men's team, since only men's teams may be "mixed." Such rules lead to the perplexing question of whether the involvement of a number of men on women's teams, particularly if no comparable teams existed for their gender, would convert the women's teams to men's teams, causing an institution to fall below its necessary complement of women's teams. Despite adherence to separate gender competition by the NCAA, some college athletes have sought the right to compete on the same teams with members of the opposite gender. See, e.g., *Leffel v. Wisconsin Interscholastic Athletic Ass'n*, 444 F. Supp. 1117, 1119 (E.D. Wisc. 1978).

181. The argument for *separation* of one gender from competition by the other gender has often been based on biological differences with assertions that males are larger, stronger, and faster than women in absolute terms. This argument assumes that current forms of athletic competition, which are largely male-based in origin and development, must necessarily be maintained, and ignores findings that in contextual terms (such as discounting difference in size in making comparisons of performance), the physical capability of females appears to be equal or greater than that of men. See, e.g., Jackie L. Hudson, *It's Mostly a Matter of Metric*, in *WOMEN AND SPORT* 147, 159 (D. Margaret Costa & Sharon R. Guthrie eds., 1994); NELSON, *supra* note 2, at 52-57 (1991). However, even if separation is deemed reasonable and is predicated upon a rational basis, the extension of this argument to maintain that lesser facilities, services, or treatment can lawfully be accorded to women is without merit.

182. 163 U.S. 537 (1896).

183. 347 U.S. 483 (1954).

184. The most recent opportunity for the Court to decide the issue of "separate, but equal" in a gender setting occurred in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), but the Court instead viewed the case as one involving a state having only one single-sex educational institution. *Id.* at 720 n.1. *Hogan* involved a suit under the Equal Protection Clause for injunctive and declaratory relief, as well as monetary damages, by a male who had been denied admission to a nursing school that admitted only females. The Court held for the plaintiff, stating that the state had failed to carry its burden of showing "exceedingly persuasive justification" for its classification based on gender. *Id.* at 724. The Court declared that if a state's objective is to "exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." *Id.* at 725. The Court also rejected the use of gender based classifications for applying "traditional, often inaccurate, assumptions about the proper roles of men and women" and the use of gender as a "proxy for other, more germane bases of classification." *Id.* at 726. The Court reasoned that a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened. *Id.* at 728. However, it found that in sharp contrast to such principle, the State had failed to show that women lacked opportunities to obtain training in nursing or attain positions of leadership in that field, and that rather than compensating for discriminatory barriers faced by women, the school's exclusionary policy tended "to perpetuate the stereotyped view

However, analogous precedents on the subject do exist<sup>185</sup> and the issue has been hotly contested in recent cases involving the admission of women to all-male institutions.<sup>186</sup>

---

of nursing as an exclusively woman's job." *Id.* at 729. The Court also rejected the defendant's attempt to justify its policy on grounds that single-sex educational institutions are specifically exempted from the provisions of Title IX, noting that although the Court gives deference to congressional decisions and classification, neither Congress nor a state can validate a law that denies constitutional rights. *Id.* at 732.

185. See, e.g., *Hogan*, 458 U.S. 718; cf. *Sweatt v. Painter*, 339 U.S. 629, 635-6 (1950) (holding that the Equal Protection Clause of the Fourteenth Amendment limits the power of a state to distinguish between students of different races in professional and graduate education in a state university); *Sipuel v. Board of Regents*, 332 U.S. 631, 632-3 (1948) (rejecting efforts to maintain racial segregation through the operation of separate law schools); *Vorchheimer v. School Dist.*, 532 F.2d 880, 888 (3d Cir. 1976) (holding that where two public single-sex high schools offered equal educational opportunities and attendance was voluntary, admission regulations based on gender classification did not violate the Equal Protection Clause), *aff'd by an equally divided Court*, 430 U.S. 703 (1977).

186. Cases include: *Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993) (*Citadel*) (involving challenges by women applicants to state-supported military colleges having only male students); *United States v. Virginia*, 852 F. Supp. 471 (W.D. Vir. 1994), *aff'd*, 44 F.3d 1229, (4th Cir. 1995) (*VMI II*); *United States v. Virginia*, 766 F. Supp. 1407 (W.D. Vir. 1991), *vacated and remanded*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct 2431 (1993) (*VMI I*) (collectively referred to as *VMI*); cf. *United States v. Fordice*, 105 U.S. 717 (1992) (plaintiffs, including the United States Government, attacked maintenance by the State of Mississippi of an alleged de jure segregated college and university system despite the implementation of race neutral governance policies).

In *VMI I*, the district court disclaimed the adoption of a "separate, but equal" rationale, but nevertheless denied a woman the right of admission to the all-male institution, sanctioning the creation on the campus of a private women's institution of "an all-female program that will achieve substantially similar outcomes in an all-female environment" and finding that a legitimate pedagogical basis existed "for the different means employed to achieve the substantially similar ends." *VMI I*, 852 F. Supp. at 481. In affirming this decision, the court of appeals stated that the justification for the all-male program was not maleness, as distinguished from femaleness, but rather the homogeneity of gender in the processes of the institution, which were related to the essence of its education and training. Such processes were deemed by the court to include an "adversative" method, pitting males against males; "leveling" activities involving an absence of privacy; and physical training, which would require a "dual track program" for women to achieve "equality in effect." *VMI II*, 44 F.3d at 1233. The court noted findings of a special task force that women students would be better served by a program which de-emphasized the military methods associated with adversative processes and, instead, utilized a structured environment emphasizing leadership training. The court concluded by noting the benefits in the single-gender system of the institution and accepted the resultant gender classification as being sufficient if "comparable in substance, but not in form and detail." *Id.* at 1240.

When examined under the reasoning of *Hogan*, 458 U.S. 718, the decision in *VMI II* seems to be poorly reasoned and badly flawed. In grounding its decision on the preservation of an educational objective, which was deemed acceptable only for men and which would be emasculated by the inclusion of women, the court ignored *Hogan's* abhorrence for exclusionary policies based on gender that "exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior" and the use of classifications for applying "traditional, often inaccurate, assumptions about the proper roles of men and women" to perpetuate the stereotyped view of particular activities as being exclusively within the domain of a particular gender. Furthermore, these decisions collide with the holding and emanations of *Fordice*, 105 U.S. 717, 738, which, though based on a "strict scrutiny" analysis, could have included judicial acceptance of a number of justifications for reten-

Although the question of *opportunity to participate* in educational programs, including athletics, has created gender division under Title IX and the federal Equal Protection Clause,<sup>187</sup> both men and women athletes appear to accept general separation by gender in terms of *athletic competition*. However, for such separation to be legally defensible, it must provide for equality of treatment and the absence of *gender depreciation*. As courts have determined that the disparate treatment standard of Title VII applies to Title IX,<sup>188</sup> they have also determined that such standard also applies to claims arising under the Equal Protection Clause.<sup>189</sup> Accordingly, legal remedies

tion of a "separate, but equal" system, grounded on the special value of historically black institutions to persons of a particular race, see *The Blacker the College, the Sweeter the Knowledge?*, J. OF BLACKS IN HIGHER EDUC. (Autumn 1994, No.5) at 49, but it refused to do so. Instead, it held that the exclusionary policies inherent in the dual educational system being examined continued a practice of de jure racial segregation, which, through narrowly applied admissions standards, effectively denied *student choice* to attend particular institutions, resulted in the "unnecessary duplication of programs" and lacked financial soundness. *Fordice*, 505 U.S. at 738.

In a stinging dissent in *VMI II*, Judge Phillips referred to *Hogan* and declared:

I believe that a comparable inquiry here could properly support a like rejection of the various governmental objectives suggested by the Commonwealth—on the basis that they demonstrably are rationalizations compelled by the exigencies of this litigation rather than the actual overriding purpose of the proposed separate-but-equal arrangement. Such an inquiry—looking realistically to the historical record, taking judicial notice of much of relevance that is known to the whole world and of which we are not compelled to feign ignorance and holding the Commonwealth to its appropriate stringent burden of justification would, I believe reveal quite a different purpose. Specifically, I think it would support a confident and fair conclusion that the primary, overriding purpose is not to create a new type of educational opportunity for women, nor to broaden the Commonwealth's educational base for producing a special kind of citizen-soldier leadership, nor to further diversify the Commonwealth's higher education system—though all of these might result serendipitously from the arrangement—but is simply by this means to allow VMI to continue to exclude women in order to preserve its historic character and mission as that is perceived and has been primarily defined in this litigation by VMI and directly affiliated parties.

44 F.3d 1229, 1247 (citations omitted).

Judge Phillips concluded his dissent by comparing the VMI program with the one to be newly developed for women on a separate campus:

[T]he contrast between the two on all the relevant tangible and intangible criteria is so palpable as not to require detailed recitation. *If every good thing projected for the [women's] program is realized in reasonably foreseeable time, it will necessarily be then but a pale shadow of VMI in terms of the great bulk, if not all of those criteria.*

*Id.* at 1250 (emphasis added).

The same court in *Citadel* ordered that the female student be admitted to the Citadel because the institution failed to offer an alternative such as VMI. *Citadel*, 10 F.3d at 233. Following *VMI II*, lawyers for the Citadel were seeking to have the admission rescinded. See Scott Jaschik, *VMI Ruling Buys the Citadel in Its Battle to Remain All-Male*, CHRON. HIGHER EDUC. (Washington, D.C.), Feb. 10, 1995, at A33.

187. U.S. CONST. amend XIV, §1. For the text of this provision, see *supra* note 38.

188. See *Roberts II*, 998 F.2d 824, 832–33 (10th Cir. 1993); *Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987).

189. See *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478–80 (3d Cir. 1990); *Lipsett v. University of P.R.*, 864 F.2d 881, 897 (1st Cir. 1988); see also *Haffer v. Temple Univ.*, 678 F.

for *gender depreciation* can be asserted by intercollegiate athletes under Title IX and the Equal Protection Clause,<sup>190</sup> primarily through assertion of rights for damages under Section 1983,<sup>191</sup> state equal protection clauses,<sup>192</sup> and state gender equality provisions.<sup>193</sup>

#### VI. RECOMMENDATIONS FOR THE ACHIEVEMENT OF GENDER EQUITY IN ATHLETICS AND THE IMPLEMENTATION OF THE THEORY OF GENDER DEPRECIATION

Thus far, this Article has engaged in a critique of the weaknesses of the numerical parity paradigm, espoused the virtues of the non-discrimination paradigm, and sought to develop a legal theory for the implementation of the non-discrimination paradigm. While such an analytical exercise has enormous value simply by virtue of provoking further thought and helping to redefine the parameters of the debate, it does very little from a practical standpoint. It is one thing to describe what is wrong with current policy and what direction public policy should go. It is quite another to actually say how to get to Shambala.<sup>194</sup> This section offers a few brief recommendations for change.<sup>195</sup>

First, the theory of *gender depreciation*, described *supra*, should be incorporated into Title IX. Although such a change ideally would come from congressional action, current caselaw would logically permit extension of the Title VII standard into Title IX.<sup>196</sup> A judicial reinterpretation, however, is

Supp. 517, 530 (E.D. Pa. 1987) (holding that University's interest in obtaining favorable publicity and in generating revenue through intercollegiate sports could not override University women's constitutional right to equal protection of the law); *cf.* *Jeldness v. Pearce*, 30 F.3d 1220, 1231 (9th Cir. 1994) (finding that Title IX analysis under the disparate treatment standard resolved the issues in the case, thus not necessitating addressing of the equal protection claim). The rationale in Title IX cases has strong parallels to equal protection decisions, even though its adoption was based upon the spending power of Congress. *See Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992). Plaintiffs have also been successful in asserting claims for gender discrimination under state equal rights provisions. *See, e.g., Blair v. Washington State Univ.*, 740 P.2d 1379, 1382 (Wash. 1987).

190. U.S. CONST. amend. XIV.

191. 42 U.S.C. § 1983; *see Monroe v. Pape*, 365 U.S. 167, 171 (1961) (holding that any person who, under color of state statute, ordinance, etc., deprives any citizen of his constitutional right guaranteed by the Fourteenth Amendment is liable to the injured party).

192. Most state constitutions contain provisions which have been interpreted as having the same effect as the federal Equal Protection Clause. *See, e.g., Robert F. Williams, Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1197 (1985).

193. Many state constitutions also include a gender equal rights provision. *See, e.g., COLO. CONST.* art. II, § 30. The State of Washington's provision was used to achieve reform of the athletic program at Washington State University. *See Blair*, 740 P.2d at 1383-85.

194. According to many Buddhist traditions, Shambala is a highly enlightened society located somewhere in the Himalayas. *Cf. AYN RAND, ATLAS SHRUGGED* (1957) (describing the existence of such an enlightened culture in the Rocky Mountains of Colorado).

195. The author's recommendations assume that institutions of higher education will want to continue to sponsor intercollegiate athletic programs. Given that athletic programs generally are not self-sustaining, some institutions may not wish to continue to sponsor such programs. This is particularly true of NCAA Division II and III programs.

196. *See supra* notes 172-74 and accompanying text.

problematic.<sup>197</sup> In a democratic society, substantive changes in the law should be the product of action by the elected legislature or executive rule-making, and not by the judiciary.<sup>198</sup> Congress should consider and implement amendments to Title IX which strengthen the law by expressly defining discrimination to include *gender depreciation*.<sup>199</sup> If the original aspirations that underlaid Title IX are ever to be realized, it will be necessary to place more emphasis on the non-discrimination paradigm and the concept of *gender depreciation*, and less emphasis on the numerical parity paradigm.

Second, more emphasis should be placed on the experiences of the vast number of college students (approximately 94% of the total enrolled)<sup>200</sup> who do not play intercollegiate athletics,<sup>201</sup> but who have sufficient interest and ability to play club or intramural sports.<sup>202</sup> Although both Title IX and the Athletic Regulations include club and intramural sports,<sup>203</sup> the focus of the OCR and judicial enforcement has been on the elite varsity athlete.<sup>204</sup> Title IX should be a statute for everyone, not just those who are blessed with outstanding athletic ability. In order to accomplish this objective, it will be necessary for the OCR to change its enforcement approach and to rewrite its current regulations.<sup>205</sup>

Third, it is necessary to redefine the meaning of sports within the Title IX context. To date, the term "sports" has meant participation on a varsity

---

197. Aside from the concerns about the proper role of the judiciary, explained *infra* note 198 and accompanying text, there is also a concern about the time involved to achieve national uniformity. For example, a decision in a court of appeals is binding only on that circuit and it has only persuasive authority in the rest of country. Indeed, despite the magnitude of the recent victories for women athletes, these decisions are binding only in the First, Third, and Tenth Circuits. The issues have yet to be litigated in other circuits.

198. As Judge Learned Hand once observed, "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." LEARNED HAND, *THE BILL OF RIGHTS* 73 (1958).

199. The authors do not believe that such amendment would have to be extensive. A simple statement of a private right of action for *gender depreciation* incorporating the standards of Title VII probably would suffice.

200. While the percentage of high school students who play interscholastic sports is higher, it is still less than a majority. See *supra* note 119 and accompanying text. A 2000 person high school can still only have 12-15 people on the varsity basketball team.

201. Unfortunately, the reform efforts of Congress continue to focus on the elite athlete. For example, 130 Members of Congress have suggested that Title IX be reformed by clarifying the meaning of the second and third prongs of the three prong test. See *Members of Congress Seek New Policy Interpretation*, NCAA NEWS (Overland Park, Kan.), July 19, 1995, at 2. This proposal, however, does nothing to address the needs of the non-elite athlete.

202. Although a higher percentage of the population participates in high school athletics, it is still relatively small. See *supra* notes 119, 200 and accompanying text.

203. See INVESTIGATOR'S MANUAL, *supra* note 2.

204. For example, a review of a relevant Letter of Findings fails to reveal a single instance where the OCR has given significant attention to compliance with Title IX in club and intramural programs, e.g., Letter from John E. Palomino, Regional Civil Rights Director, OCR, U.S. Department of Education, to Dr. John Welty, President, California State University, Fresno 36-37 (Apr. 6, 1994) (on file with the *Duke Journal of Gender Law & Policy*) (investigation conducted only with respect to intercollegiate teams at the University).

205. For a critique of the OCR's past enforcement efforts, see generally the JOHNSON STUDY, *supra* note 2.

team or, to a much lesser extent, on a club or intramural team. Yet, there are thousands of persons who participate as individuals in such sports as running, tennis, racquetball, swimming, golf, weight lifting, and aerobics. Inequities in these areas, such as wide disparities between men's and women's locker rooms in campus recreation centers or in the availability of playing fields, courts, pools, and courses for "pick-up" games and individual activity, are never addressed. It is time to realize that all students who wish to engage in athletic activity are entitled to non-discriminatory treatment just like members of competitive teams. Moreover, although cloaked historically with views that deem them non-participants and see them as symbols of male dominance, contemporary cheerleading and dance teams that compete with teams from other schools include a substantial number of *athletes*. Today's "stunts" and movements in these activities require enormous flexibility, strength, stamina, coordination, and balance, all characteristics that legitimizes them as *sports*, which should be recognized. A person who, because of his or her outstanding gymnastics ability, is given a scholarship to be a cheerleader or a member of a dance team should be treated the same way as a person who, because of his or her ability to shoot a jump shot, is given a basketball scholarship.

Fourth, more emphasis should be placed upon the development of athletic skills at levels below college. Some gender equity advocates maintain that building women's athletic programs on the college level will necessarily encourage the development of skills among girls in elementary, middle, and high school<sup>206</sup>. Although such action is far better than the neglect and indifference that has historically been afforded to women students, a better approach may be to emphasize the development of athletic skills at the elementary, middle, and high school levels. If skills are developed at the lower levels, there will be interest by the time these students reach the top. Moreover, those young people who play at the bottom, but who are not blessed with the skills to play at the top, likely will become the much needed fan base for women's sports and more likely to participate in club and intramural sports.<sup>207</sup>

Fifth, we call for greater emphasis on helping young women in the inner-city develop athletic skills.<sup>208</sup> Many of the women's intercollegiate

206. See, e.g., Janet Justus, *Focus On Intercollegiate Athletics Sports Reform: College Athletics in Flux*, 22 J.C. & U.L. 48, 54 (1995).

207. In other words, the authors believe that young women who play basketball in elementary, middle, and high school, are far more likely to become fans of women's basketball in college than if they never played.

208. A recent newspaper story, Mark Kiszla, *Black Girls Face a Stigma on Blacktops*, DENV. POST, Mar. 9, 1995, at 1D, carried the following introduction, "They might as well post a sign on every basketball court in Denver's inner city: *Go home, girl, you don't belong here.*"

The story related the continuance of a stereotype that black girls are supposed to sit in the stands and cheer as the boys dunk. It pointed out that although Colorado has held a prep tournament for girls' basketball for the past twenty years, no team from the inner-city Prep League has ever won a championship. Moreover, of eight teams in the recent class 5A state quarterfinal, only 11 girls of Afro-American descent were participants. The story discloses that the Colorado example is not a regional anomaly. It notes that according to NCAA statistics, although black males earn 60% of Division I basketball scholarships, black females

sports, such as tennis, golf, field hockey, swimming, synchronized swimming, lacrosse, fencing, crew, and, to a lesser extent, soccer and softball, are simply not played by inner-city youth. Thus, it is virtually impossible for young women in the inner-city to earn a college scholarship for these sports. While young women should have equal athletic opportunities, this equality of opportunities should not be limited to sports usually not available to or played by inner-city youth.

Sixth, an expenditure cap on intercollegiate athletics should be put in place as a means of defusing the increasing polarization between men and women.<sup>209</sup> Under the terms of such an expenditure cap, total athletic expenditures by an institution would be limited to a particular amount.<sup>210</sup> Travel outside of the immediate region would be limited.<sup>211</sup> In addition, there would be minimum and maximum scholarships and expenditures for each sport.<sup>212</sup> Such a cap would assure that all athletes, regardless of their gender and whether their sport was a "revenue" sport, would have similar experiences. Moreover, because it would be impossible for some schools to spend their way to success as currently happens, it is quite likely that college athletics would become more competitive because of the diffusion of talent and equalization of resources. However, because of the vulnerability of such an arrangement to application of the antitrust laws, an appropriate statutory exemption might be required.<sup>213</sup>

Seventh, we propose greater general enforcement of Title IX by the OCR and, at the same time, for the OCR to end its emphasis on the micromanagement of athletic programs. Although there are over 1000 inter-

---

receive only 36% of such grants from comparable women's collegiate teams. Lack of funding for inner city programs is identified as a major source of the problem. *Id.*

209. For example advancing to a bowl game or to the next round of the NCAA tournament should not be a substantial windfall for an institution.

210. The reason for this proposal is quite simple. It is impossible to ignore the reality that most intercollegiate athletic programs are in dire financial straits. As much as institutions would like to simply increase women's sports, the money does not exist. Therefore, unless new revenue sources are found, institutions will have to cut men's sports in order to finance increases in women. Although there are numerous examples of waste in big time college football. According to the National Women's Law Center, only about 10% of the football programs in NCAA Division I-A are self-sustaining. Carol Herwig, *Women Aim to Preserve Title IX*, USA TODAY (Arlington, Va.), Feb. 3, 1995, at 7C. As a practical matter, the cuts are not going to come in football. Rather, the cuts are going to come in the men's non-revenue sports.

211. As exciting as such contests may be, there is no real reason for institutions on one coast to journey to the opposite coast.

212. Without such a provision, institutions could simply emasculate their non-revenue sports in order to fund football.

213. Ironically, application of the federal antitrust laws might impair the generation of increased competition through the imposition of an expense cap. For example, see *National College Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984), where the NCAA's efforts to establish a centralized marketing arrangement for televising college football, which limited the total number of games which could be shown and the number of appearances by any one team, was held to violate such laws. Also, see the superb analysis of this case in WEISTART & LOWELL, *supra* note 177, § 5.12 (1985 Supp.), noting that the court emphasized consumer preference instead of educational goals and focused on the limitations on output by competitors in reaching its decision.

collegiate athletic programs and several thousand high school programs, most institutions have never been subjected to an OCR review. But, when the OCR does review a program, it is obsessed with minute details for an extended period of time rather than going on to another institution.<sup>214</sup> Accordingly, a few institutions are subjected to federal micromanagement while the overwhelming majority continue to ignore the law.

Eighth, the NCAA and the various athletic conferences need to be far more proactive with respect to solving gender equity issues. As a practical matter, the OCR is not able to review every institution. Thus, the athletic conferences and the NCAA must review themselves and must enforce appropriate penalties upon discovering Title IX violations.<sup>215</sup> At present, the NCAA imposes major sanctions for seemingly minor violations of its bureaucratic code, but does nothing when one gender is severely depreciated, or equal access to athletic opportunities denied to athletes of that same gender.<sup>216</sup> Furthermore, athletic personnel at many institutions appear to share the view that nothing needs to be done to further gender equity in athletics until the OCR finds a violation or a suit is instituted. Such an attitude is reprehensible and has no place in the administration of an institution of higher education. The NCAA member institutions should adopt rules to assure compliance with Title IX and make the lack of such compliance subject to ratings of non-acceptability by peer review teams. Furthermore, NCAA members should enact stronger rules barring *sexual harassment and gender discrimination or depreciation* in intercollegiate programs. Violations of such rules would be treated just as seriously as recruiting violations and would call for major sanctions against the offending institution.

Finally, Title IX should be applied, by a change in the law or applicable regulations, to require that the collective sports programs of an institution must provide *all* students equal opportunities in intercollegiate, intramural, and club sports. Furthermore, the law should be interpreted or changed so as to clearly contemplate specific private rights of action, including class

214. The level of detail which must be examined in reviews of athletic programs according to the *Investigator's Manual* shows the preoccupation with minutiae. See *supra* note 147; cases cited *supra* notes 4-6.

215. The NCAA's process of athletic certification is a step in the right direction. However, the certification effort has, thus far, been extremely slow and largely toothless. See *First Round of Certification Decisions Completed*, NCAA NEWS (Overland Park, Kan.), Mar. 18, 1995, at 1.

The athletic certification process is meant to ensure that NCAA Division I member institutions remain compliant with the operating principles and bylaws of the NCAA covering four basic areas - governance and rules compliance, academic integrity, fiscal integrity, and commitment to equity. At least once every five years, each member institution must complete a self-study which is verified and evaluated through external peer review. Decisions regarding certification are made by the Committee on Athletics Certification. *Id.*

216. For example, the NCAA charges an athlete with a year of ineligibility if that athlete plays one play in one game. See NATIONAL COLLEGIATE ATHLETIC ASS'N, 1995-96 NCAA MANUAL § 14.2.4.1. In addition, the NCAA charges an athlete with a year of ineligibility even if the athlete is injured in the first half of the season. *Id.* § 14.2.5(b) Moreover, the NCAA could deny eligibility to a freshman whose high school grades and ACT or SAT test scores exceed minimum standards, but who is 1/2 unit short of a "core course," such as two years in the natural or physical sciences. *Id.* § 14.3.1.3.

actions, and afford a full range of remedies, including damages and/or injunctive relief under Title IX. Such injunctive relief should be available in the case of flagrant violations to halt inequities in an institution's athletic program until the institution obtains a court-approved plan for compliance.<sup>217</sup>

## VII. CONCLUSION

The scope of the recent judicial decisions involving the application of Title IX to intercollegiate athletics is breathtaking.<sup>218</sup> After years of struggle, young women have finally won the right to numerical parity in intercollegiate athletics with their male counterparts.<sup>219</sup> Yet, while these victories are significant,<sup>220</sup> they do little or nothing to address the many examples of discrimination suffered by young women in intercollegiate, club, and intramural athletics.<sup>221</sup> In effect, the recent decisions completely embrace the paradigm of numerical parity while largely ignoring the paradigm of non-discrimination.<sup>222</sup> In order to address problems which have been largely ignored, it is necessary to de-emphasize the numerical parity paradigm and instead emphasize the non-discrimination paradigm. This will involve the further development of a theory of *gender depreciation*.<sup>223</sup>

However, while urging that more attention to the non-discrimination paradigm be paid, it must be re-emphasized that both the numerical parity and the non-discrimination paradigms have their role and are vitally important to the achievement of true gender equity. Without the numerical parity paradigm and its emphasis on representation, there will be very few "symbols" or "role models" for young women. This inspiration is critical. Young people must realize that people like them can succeed and attain positions of authority. However, without the non-discrimination paradigm and its emphasis of equal treatment, it will be impossible for many women to truly succeed. If women are subjected to an environment in which their gender is

---

217. See, e.g., *Roberts II*, 998 F.2d. 824, 833 (10th Cir. 1993).

218. See *supra* notes 4-9 and accompanying text.

219. This statement assumes that the decisions will not be overturned by congressional action or by a Supreme Court decision. As explained *supra* notes 110-15 and accompanying text, there are serious ongoing efforts to overturn these decisions.

220. Moreover, there is evidence that women's sports are being increasingly accepted by mainstream America. See Ailene Voisin, *Getting a Toehold: Female Sports Gaining Exposure, Acceptance in Eyes of America*, ATLANTA J. CONST., Feb. 1, 1995, at C5.

221. See *supra* notes 107-09 and accompanying text.

222. Moreover, in light of the Supreme Court's recent pronouncements on race-based set asides, see, e.g., *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2100 (1995), there is some question as to whether the numerical parity paradigm, with its emphasis on quotas and group rights, will survive.

223. There are current cases which appear to employ theories of gender depreciation. For example, Henri Ann Nelson, a member of Denver's exclusive Cherry Hills Country Club, has filed a complaint with the Colorado Civil Rights Division protesting the fact that men may reserve tee times 48 hours in advance while women may only reserve 24 in advance. Ann Carnahan, *Woman Cries Foul as Men Cry "Fore,"* ROCKY MTN. NEWS (Denver, Colo.), Mar. 14, 1995, at 4A. Similarly, a Colorado school district transferred a male teacher because of allegedly anti-gay remarks and actions perceived to constitute harassment. Mary George, *Longmont Coach Transferred*, DENV. POST, Mar. 10, 1995, at B2.

constantly depreciated, then the role models will never be more than token symbols. The current state of the legal profession illustrates this point.<sup>224</sup> If young women are going to grow up to be successful lawyers, it is important that they have successful role models like Justice Sandra Day O'Connor,<sup>225</sup> Justice Ruth Bader Ginsburg,<sup>226</sup> Attorney General Janet Reno,<sup>227</sup> and others.<sup>228</sup> At the same time, neither young women nor young men will succeed in law if law firms are allowed to continue their traditions of *gender depreciation*.<sup>229</sup>

Therefore, in calling for greater emphasis on the principles of the non-discrimination paradigm, we are not calling for the wholesale abandonment of the numerical parity paradigm. Rather, we are asking advocates and the judiciary to realize that exclusive emphasis on the numerical parity paradigm, which has been the norm to date, will not fully achieve the goals of Title IX.<sup>230</sup> If Title IX is going to be more than the quixotic crusade that it was for twenty years,<sup>231</sup> there must also be an emphasis on the non-discrimination paradigm.

---

224. When Mr. Snow graduated from the Duke University School of Law in 1966, there was only one woman in his class. In contrast, women represented 36% of the graduating class in 1992 and 43% of the graduating class in 1993.

225. In 1981, Justice O'Connor was the first woman to sit on the United States Supreme Court.

226. In addition to her long record as a successful advocate of women's rights, Justice Ginsburg became the second woman to sit on the United States Supreme Court in 1993.

227. In 1993, Ms. Reno became the first woman to serve as United States Attorney General. However, 11 states currently have women as their attorney general, including Colorado, Hawaii, New Jersey, and Utah.

228. Virtually every state has at least one woman on its highest court. One state, Minnesota, has a female majority.

229. For example, many law firms are unsympathetic to child care problems, and require long hours of their employees which can create difficulties in child rearing. While these problems in theory should fall equally on both young men and young women, in practice they disproportionately fall on young women.

230. Indeed, there is evidence that institutions will achieve Title IX compliance by slashing men's sports rather than promoting women. For example, the State University of New York at Albany is dropping three men's sports for 1995-96 in order to comply with Title IX. USA TODAY (Arlington, Va.), Mar. 2, 1995, at 11C. Similarly, the men's basketball coach at Georgia State University claims he was fired because he refused a pay cut designed to bring his salary in line with that of the women's basketball coach. *Sidelines*, CHRON. HIGHER EDUC. (Washington, D.C.), Feb. 10, 1995, at A35.

231. See Alexander Wolff, *The Slow Track*, SPORTS ILLUSTRATED, Sept. 28, 1992, at 52.

