

The Secretary's Commission on Athletic Opportunity Squandered Its Opportunity: Commercial College Sports and Why Title IX Cannot Achieve Full Gender Equality or Prevent the Elimination of Minor Men's Teams by Suzanne Sangree¹

Introduction

The Department of Education recently announced that it would not revise the regulations which apply Title IX to athletics,² thus rejecting the recommendations of its Commission on Opportunity in Athletics.³ The Commission's recommendations would have drastically undercut Title IX's efficacy and established a Bush Administration model for turning civil rights protections on their heads. Fortunately, the Administration heeded the public critique of the Commission's recommendations and retreated from its previously stated intention to implement them. Instead, it reiterated its support for the principles of gender equality embodied in Title IX. We thus narrowly averted a civil rights disaster. The great shame however, is that a year of

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² Title IX of the Education Amendments of 1972 guarantees 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." Pub. L. No. 93-380, 88 Stat. 484, 612 (1974)(codified at 20 U.S.C. Secs. 1681-88 (2002)). The statute itself does not mention its specific application to athletics, but its regulations do. 34 C.F.R. Sec. 106.41; Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (1979).

³ Frank Litsky, Bush Administration Decides Title IX Should Stay as It Is, New York Times (July 12, 2003) B15; Gerald Reynolds, Assistant Secretary for Civil Rights, "Dear Colleague" letter to colleges and high schools (July 11, 2003).

On June 27, 2002, United States Secretary of Education Rod Paige created the Secretary's Commission on Opportunity in Athletics, the first federal advisory panel to study Title IX. "The purpose of the 15 member Commission was to collect information, analyze issues, and obtain broad public input directed at improving the application of current federal standards for measuring equal opportunity for men and women and boys and girls to participate in athletics under Title IX." Secretary Paige's Commission on Opportunity in Athletics, *Open to All Title IX at Thirty* (February 28, 2003)(hereinafter "*Open to All*") at 2.

expert study and public hearings concerning athletics and Title IX yielded so little insight. An unusual opportunity was squandered for understanding and addressing how Title IX's efficacy is limited, and how its impact is distorted, by the multi-million dollar commercial enterprises of men's football and basketball which dominate collegiate athletics.⁴

Declining this opportunity, the Commission's work on Opportunity in Athletics instead continued the long-standing tradition of blaming shrinking opportunities in athletics for men on Title IX. The reality is that the burgeoning arms race in football and men's basketball is the cause. While the actual number of men participating in collegiate athletics has steadily increased during the thirty years of Title IX's tenure, men's opportunities have become increasingly restricted to fewer and fewer sports. Thus, men's athletic opportunities are shrinking in the sense that the diversity of their opportunities is shrinking. While there are numerically vastly more varsity collegiate slots for men now than thirty years ago when Title IX was enacted,⁵ these slots are increasingly concentrated in football, and to a lesser extent basketball, baseball and soccer. The so called men's minor sports—wrestling, gymnastics, swimming, tennis, golf, track, cross-country, fencing—have been steadily eliminated.⁶ Secretary Paige's Commission collected

⁴As explained more fully in Part 2, the standards for the commercialization of college sports are set by a handful of Division I athletic programs. "Division I" is a designation of the National Collegiate Athletic Association (NCAA). To obtain this designation, "member institutions have to sponsor at least seven sports for men and seven for women (or six for men and eight for women) with two team sports for each gender. . . . Schools that have football are classified as Div. I-A or I-AA. . . . Div. I-A teams have to meet minimum [spectator] attendance requirements [All] Div. I schools must meet minimum financial aid awards for their athletics program, and there are maximum financial aid awards for each sport that a Div. I school cannot exceed." NCAA Online, www.ncaa.org/about/div_criteria.html (visited July 30, 2003).

⁵ For support for this entire paragraph see nn 72 through 76 and accompanying text.

⁶ Government Accounting Office, *Four-Year Colleges' Experiences Adding and Discontinuing Teams*, March 2001 GAO-01-297 at 11; Welch Suggs, *Cutting the Field, As colleges eliminate teams, the lessons athletes learn are losing out to commercial interests*, *The Chronicle of Higher Education* (June 6, 2003).

voluminous, often heart wrenching, testimony from male athletes, their parents and coaches, adversely affected by these eliminations.⁷ But the Commission paid scant attention to the cause of men's team cuts. Instead it relied upon the fuel of the witnesses' emotional message to fire an attack on Title IX.

The Commission issued its February 2003 report⁸ recommending substantial revisions in the regulations which apply Title IX's guarantee of gender equality in education to athletics in federally funded schools. These amendments to the Title IX regulations would have vastly undercut gender equity in athletics, most significantly by diluting the substantial proportionality test for compliance with Title IX.⁹ Moreover, by imposing upon female athletes the burden of proving first that interest in equality exists, before any protections can be invoked,¹⁰ civil rights protections would have been turned on their heads. Thus these regulatory amendments would set a far reaching and dangerous precedent. By undercutting gender equality in athletics, the result of the Commission's recommendations would have been to reduce athletic opportunities for women; by ignoring the true cause of the shrinking diversity of opportunities for men, the Commission's recommendations would not, correspondingly have increased or diversified opportunities for men. Secretary Paige's Commission on Opportunity in Athletics, despite its name, thus failed to do anything but recommend further restrictions on opportunity in athletics for men and women.

⁷ See *Open to All*, *supra* n. 3 at 8-11, 19.

⁸ *Id.*

⁹ *Infra* nn. 77 through 103, and accompanying text.

¹⁰ There is a private right of action for money damages for violations of Title IX. See *Franklin v. Gwinnett County*

This article begins with a brief review of the legislative history of Title IX and its implementing regulations, revealing that from its inception, the guarantee of gender equality was to be realized within the context of the status quo ante of men's commercial collegiate football and basketball. Part Two of the article examines the "Arms Race." That is, the economics and driving philosophy of Division I football and men's basketball which require the concentration of resources in those sports.¹¹ Part Three provides a case study in the experience of West Virginia University, a member of the Big East Conference of NCAA Division I, where one women's team and four minor men's teams were recently eliminated as part of a long term plan to increase the revenues produced by the football and men's basketball programs. Part Four, "The Title IX Scapegoat" looks at the tendency to blame Title IX for men's team cuts, in media reports of cuts and in Secretary Paige's Commission, and concludes that the blame is mislaid. Part Five of the article suggests reforms which would genuinely expand athletic opportunities for men and women. Most of these ideas have been bandied about and substantially disregarded for years. The financial interests of the decision makers dictate that such reforms will not be adopted. It is no mystery that the Commission also failed to examine the adverse effects of the arms race on minor men's sports and gender equality, or to consider any of these reforms, because its

Public Schools, 503 U.S. 60 (1992).

¹¹ Not all Division I schools are equal when it comes to commercialization. The Division I men's basketball league, the Patriot League, for example, stands out as "The Last Amateurs" in an increasingly professionalized environment. *See generally*, John Feinstein, *The Last Amateurs: Playing for Glory and Honor in Division I College Basketball* (2001). For teams in the Patriot League, several of which do not even grant athletic scholarships, playing against the big boys like University of Miami or Notre Dame, is a replay of David and Goliath. For simplicity sake, this article refers to Division I schools generally and does not make distinctions among them. The reality is that the most professionalized Division I schools with the biggest budgets, set the standard for all of Division I. This standard trickles down to Division II, and even to high school sports as well. *See* James Duderstadt, *Intercollegiate Athletics and the American University* (2000) at 141; NCAA Online, www.ncaa.org/about/div_criteria.html (Division II teams often compete against Division I teams since they are required to play at least 50% of their games against Div. II, or I-A or I-AA opponents).

membership was heavily dominated by representatives of Division I schools invested in perpetuating the arms race. Alternatively, Part Five suggests that universities should reclaim their academic missions, and sell off the major commercial college football and men's basketball teams. They effectively operate as unpaid farm teams to the professional leagues now, so let them shed the charade that they are not, and operate openly and more efficiently and effectively, as the businesses which they are. University spin offs of hospitals and medical complexes from their medical schools during the 1980's provide instructive models. The article concludes that Secretary Paige was wise to reject the Commission's recommendations that Title IX's regulations be revised to dilute the substantial proportionality requirement or to shift the burden of proof to plaintiffs to establish women's interest in equality prior to invoking the guarantee of gender equality. These civil rights protections have not caused men's teams to be cut; eliminating them would only undermine gender equality, and cause more women's teams to be cut, along with minor men's teams, as schools scramble to fuel the ever burgeoning demands of mega-bucks commercial football and men's basketball. However, if he is serious about addressing the problems his Commission revealed, and in enforcing Title IX, then he has much more work to do. He could begin by appointing another commission to study the commercialization of college sports and to make recommendations for how the federal government can encourage a return to amateur college athletics. Such a return is key to enabling gender equality and to diversifying athletic opportunities for men.

1. Title IX Never Attempted to Alter Men's Football or Basketball

When Title IX was enacted in 1972, guaranteeing gender equality in federally supported educational institutions, its sponsors and opponents had barely considered its application to

athletics. It was intended to end the systematic discrimination against women in higher education, the quotas limiting the numbers of women in colleges and universities, the higher standards for admission women applicants faced, and the near total exclusion of women from graduate schools and the professions.¹² Athletics was scarcely mentioned in Title IX's legislative history, and then easily dismissed, as if unworthy of Congressional floor time.¹³ But soon after enactment, women's advocates began to push for Title IX to apply to school athletics.¹⁴ By 1973 the federal government showed signs that it would adopt this application.¹⁵ Previously uninvolved in Title IX politics, the National Collegiate Athletic Association (NCAA) responded by allocating major lobbying resources to the objective of insulating collegiate athletics, specifically men's football and basketball programs, from gender equity requirements. Walter Byers, then NCAA executive director, was quoted in the *Washington Post* in 1973 saying, Title

12 See generally, *Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. On Educ. and Labor, 91st Cong. (1971)*(These were hearings on the precursor bill, which sought to amend Title VI to include gender as a prohibited basis for discrimination in federally supported education. This bill failed but similar gender protections were enacted in the next Congressional session as independent legislation: Title IX) As documented in sponsor Representative Green's opening remarks, "women in the United States constitute only 9 percent of all full professors, 8 percent of all scientists, 6.7 percent of all physicians, 3.5 percent of all lawyers, and 1 percent of engineers." *Id.* at 2. Women admitted to undergraduate schools were "'restricted to those who are especially well qualified.'" *Id.* at 3 (internal citation omitted). For example, she explained, "[i]n the State of Virginia, I am advised, during a three year period, 21,000 women were turned down for college entrance, while not one male student was rejected." *Id.*

13 117 Cong. Rec. 30,407(1971)(statement of Sen. Bayh) (During the brief floor debate on the earlier, identical, 1971 version of Title IX, Sen. Bayh assured Senator Dominick, "I do not read this . . . [to] mandate[] the desegregation of football fields.").

14 See *Hearings on the Tower Amendment, 1975, Senate Subcommittee on Education of the Committee on Labor and Public Welfare 95 (1975)*(statement of Peggy Burke, President Elect of AIAW)("Since November 1973, when a representative of the National Collegiate Athletic Association attended the first AIAW Delegate Assembly, and learned that Title IX covered athletics, I have read and heard countless statements as to how offering women an equal opportunity in athletics was going to destroy men's athletic programs.")

15 *Sex Discrimination Regulations, Hearings before the House Subcommittee on Post Secondary Education of the Committee on Education and Labor, 94th Cong. 1st Sess. 438 (1975), at 438* (statement of Caspar W. Weinberger, Sec. of Dept. of Health Education and Welfare)(explaining that even before 1974, HEW took the position that Title IX covered athletics because it was directly modeled after Title VI which did cover athletics.).

IX stood for the "possible doom of intercollegiate athletics."¹⁶ A year later an observer noted, "[t]he NCAA is frank to admit the tremendous lobbying effort they have been making to have athletics removed from [Title IX] because they feel they cannot exist with the present interpretation."¹⁷

The NCAA found a ready ally in Senator Tower from Texas, who proposed several amendments to Title IX in 1974 and early 1975 to exempt all athletics from the guarantee of gender equality in Title IX. Failing that, Tower offered an amendment to exempt "any intercollegiate activity insofar as such activity provides to the institutions gross receipts or donations required by such institutions to support that activity."¹⁸ This amendment sought to exempt the so-called revenue producing sports¹⁹ –i.e. men's football and basketball. These and similar efforts eventually succeeded in inserting the contact sports exemption into the regulations to implement Title IX in athletic programs, thus preventing even qualified, skilled, experienced female athletes from the opportunity to compete with men based upon ability in most sports.²⁰ However, efforts to exclude college football and basketball from Title IX's overall enforcement structure failed.

Caspar Weinberger, Secretary of Health, Education and Welfare, the federal agency responsible for issuing the Title IX athletic regulations, sought to assuage fears that Title IX

16 Linda Jean Carpenter, "The Impact of Title IX on Women's Intercollegiate Sports," in *Government and Sport: The Public Policy Issues* 63 (Arthur T. Johnson & James H. Prey eds. 1985)(*quoting* Washington Post (1973)).

17 *Id.* at 64 (quoting Carole E. Gordon, Memo. to AIAW Executive Bd. 2-4 (Mar. 20, 1974)).

18 120 Cong. Rec. 15,322 (1974); 121 Cong. Rec. 29,791-95 (1975); see generally, Suzanne Sangree, Title IX and the Contact Sports Exemption: Gender Stereotypes and a Civil Rights Statute, 32 Conn. L. Rev. 381, 414 (2000).

19 *Infra* Part 2 for an explanation of the economics of Division I football and basketball.

would mean the end of college football and basketball. In 1975, when announcing the athletic regulations which explicitly exempted contact sports, Secretary Weinberger explained,

With regard to athletics...Let's look first at what the regulation does not require because there seems to be a substantial misunderstanding about that. . . [I]t does not require women to play football with men; . . . it will not result in the dissolution of athletic programs for men . . . and it does not mean the NCAA will be dissolved and will have to fire all of its highly vocal staff.²¹

Weinberger's reassurances point to precisely the problem that we now confront: Title IX did nothing to alter the commercialization of college men's basketball and football, sports which in Division I schools have grown to be multi-billion dollar entertainment industries operating off the backs of academic institutions. In effect, Division I football and basketball teams function as unpaid farm teams for the professional leagues. To make matters worse, these farm teams are engaged in what has commonly been referred to as an "arms race."²² The resulting financial pressures squeeze out other men's sports and vastly circumscribe what Title IX can accomplish. From the beginning of Title IX there has been a gentleman's agreement not to examine the trees, so it has been impossible to see the forest.

2. The Arms Race

Escalating expenditures on men's basketball and football programs is fueled by a circular logic. Revenue depends upon winning: fans do not fill the stands for losing teams; losing teams do not get into the most lucrative tournaments or bowls and they do not bring home winner's purses; losing teams do not get the proceeds from big television contracts.²³ Revenue depends

20 See generally, Sangree, supra n. 18

21 Sex Discrimination Regulations, supra n. 15 at 438-39 (1975)(Statement of Caspar Weinberger, Sec. of the Dept. of Health, Educ. and Welfare).

22 E.g., Open to All, supra n. 7 at 25, 35.

upon winning, so winning is everything, and the prevailing philosophy is that if you spend more, you win more. As a general matter, expenses always increase to outstrip revenues generated.²⁴ Winning teams can justify lavish renovations to stadiums, lavish training facilities, huge coaching staffs, head coach remuneration that rivals NBA and NFL coach salaries,²⁵ first class travel and accommodations for men's teams on the road, country club dormitories and gourmet eateries at home.²⁶ Losing schools can justify these same expenses by explaining that if they want to play like the big boys, they must spend like the big boys. One must invest in order to build toward a winning team.²⁷ Once one school builds luxury sky boxes in its football stadium, all the competing schools soon follow.²⁸

Contrary to the prevalent myth that men's revenue producing sports actually produce net revenue, the arms race is financially draining the host universities.²⁹ When Division I teams have good years and are winning tournament purses and filling their stadiums, they "make money." But they generally spend what they earn in good years in the prevailing philosophy that spending more equals winning more, and winning is everything. In off years, and in most years for most

23 James J. Duderstadt, *Intercollegiate Athletics and the American University: A University President's Perspective* 74-75 (2000).

24 *Id.* at 146.

25 *Id.* at 156.

26 *Id.* at 141-44.

27 E.g., *supra* notes 51 through 58 and accompanying text; Derek Bok, *Universities in the Marketplace The Commercialization of Higher Education*, at 38-39 (2003).

28 Murray Sperber, *College Sports Inc.* (1990) at 133.

29 Derek Bok refers to this myth as "The Chimera of Profitability." Bok, *supra* n. 27 at 38.

schools, men's football and basketball do not break even.³⁰ Most teams usually run deficits but they do not need to plan for these deficits in any traditional business planning sense of the word because the university is there for a bail out.³¹

Even in good years some of these winning Division I schools (clearly no more than 10 to 15 percent of football/ basketball programs) can be shown not to be breaking even, if one uses traditional accounting methods and factor in the cost of construction and maintenance of stadiums and other infrastructure.³² Some schools now do pay for debt servicing out of athletic revenues, but many do not.³³ The costs of athletes' scholarships are often recorded at in-state tuition rates, when most recruited athletes are from out-of-state.³⁴ Some coaches' salaries and other personnel who support teams, tutors for example, come out of general university operating expenses not the expenses of the team they service.³⁵

Disregarding the ten to fifteen percent of Division I schools in which football and men's basketball are self-supporting, it is clear that the vast majority of Division I programs survive by

30 Bok, *supra* n. 27 at 38-39; James L. Shulman & Willam G. Bowen, *The Game of Life: College Sports and Educational Values*, at 257 (2001); Duderstadt, *supra* n. 26 at 141; Murray Sperber, *Beer and Circus* (2000) at 27, 219-229; Andrew Zimbalist, *Unpaid Professionals: Commercialization and Conflict in Big-Time College Sports*, at 29 (1999); Walter Byers, *Unsportsmanlike Conduct: Exploiting College Athletes*, at 340 (1995); NCAA, *Revenues and Expenses of Intercollegiate Athletics Programs* (annual).

31 See, e.g., Ray Glier, *Tulane Football Stays in Division I-A*, *The New York Times*, June 11, 2003 at C23 (Tulane Board of Trustees rejects proposal to drop its Division I-A football team despite athletic department deficit of \$6.7 million dollars and football losses of one million dollars in the past year.); *supra* note 53.

32 See generally, Duderstadt, *supra* n. 23 at 146 (concerning the hidden costs of collegiate athletics).

33 Sperber, *College Sports Inc.* *supra* n. 28 at 131-33.

34 Duderstadt, *supra* n. 26 at 141.

35 *Id.* at 145-46; See generally, Sperber, *College Sports, Inc.* *supra* n. 28 at 92-145.

university subsidy, usually multi-million dollar subsidies.³⁶ In the case of men's basketball and football, the enterprise that is subsidized is commercial, not academic.

Are these big subsidies worthwhile to the universities? I would argue that operating multi-million dollar entertainment industries within nonprofit academic institutions vastly distorts those institutions. Many of the big sports schools develop reputations as "party schools," in which alcohol abuse,³⁷ and rape of female students is prevalent.³⁸ Academics are undermined with doctored admissions standards, gut courses and sham majors,³⁹ and university life becomes organized around what one commentator has termed "Beer and Circus."⁴⁰ The salubrious purposes of college athletics-- to instill a sense of school unity, to provide students with opportunities for healthy exercise, to develop leadership, teamwork and character through team sports,⁴¹ even alumni loyalty⁴² --are all better met by smaller scale athletic programs.⁴³ One does

36 Interview with Mike Parsons, WVU Deputy Director of Athletics, (WVU athletic officials estimate that Rutgers athletics receives from 12 to 14 million dollars annually from its university. UPitt routinely covers its Athletic Department's deficits each year); Sperber, supra n. 35 at 138; Duderstadt, supra n. 23 at 146.

37 Sperber, supra n.30.

38 See *Brozonkala v. Virginia Polytechnic State University*, 935 F. Supp. 779 (W.D. Va. 1996)(female student raped by two varsity football players brought disciplinary charges--the school initially suspended one football player for two semesters but then rescinded the punishment as too severe. The other player was not punished at all.), rev'd, 132 F.3d 949 (4th Cir. 1997), aff'd sub nom, *United States v. Morrison* U.S. (2000). When the university rescinded the athletes' punishment, the female student withdrew from the university. Martha Minow, *Mary Jo Frug's Casebook on Women and the Law*, (2000) at . An undergraduate student on campus at the time, remembers that it was widely thought that the reason the university was unwilling to punish the rapists was because they were football stars. Interview notes on file with author (Interview with Billie Underwood March 8, 2003).

39 Bok, supra n. 27 at 41-46; Id. at 54 ("the saga of big-time athletics reveals that American universities, despite their lofty ideals, are not above sacrificing academic values—even values as basic as admissions standards and the integrity of their courses—in order to make money.").

40 Sperber, supra n. 30.

41 Duderstadt, supra n. 26 at 89; Suggs, supra n. 6.

42 Id. (Former President of University of Michigan explains the alumni loyalty generated by sports spectating

not need huge stadiums, television audiences and an upper caste of semi-professional athletes masquerading as students⁴⁴ to achieve these purposes.

The impact of these huge commercial entertainment industries operating within non-profit educational institutions is to financially drain them, and to greatly distort their culture: student life, the academic enterprise, and most relevant to the present discussion, they distort athletics for non-professional student athletes.

Title IX did not cause these problems. Commercialization, corruption and the distortion of the academic enterprise were decried by the first female professional physical educators in the late 19th Century,⁴⁵ they were documented in their youth by the Carnegie Foundation Commission report in 1929,⁴⁶ and in succeeding commission reports⁴⁷ and articles elsewhere,⁴⁸

almost always results in gifts to sports programs not the university at large or to academic programs; and it is fickle giving coming only on the heels of winning seasons); Bok, *supra* n. 27 at 46-51; see e.g. Welch Suggs, *Oil Magnate Gives Oklahoma State University \$55 Million, Mostly for Sports*, *Chronicle of Higher Education* (March 7, 2003).

43 See, Bok, *supra* n. at 46-51.

44 Suggs, *supra* n. 6 (“Barely half of Division I football players earn their degrees within six years of entering college. . . Only 43% of basketball players do.”).

45 Susan K. Cahn, *Coming on Strong: Gender and Sexuality in Twentieth Century Women’s Sport* at 23 (1994); Donald J. Mrozek, *Sport and American Mentality, 1880-1910*, at 152-53 (1983).

46Carnegie Foundation for the Advancement of Teaching (1929)(a five year comprehensive study of college athletics in the US and Canada concluding recruiting had become corrupt, professionals had replaced amateurs, education was being neglected, and commercialism reigned); see Murray Sperber *Onward to Victory The Crises that Shaped College Sports* (1998) at 30 (1998)(Henry Pritchett, director of the Carnegie Foundation for the Advancement of Higher Education stated: “The question is not so much whether athletics in their present form should be fostered by the university, but how can a university that fosters professional athletics discharge its primary [educational] function.?”).

47American Council on Education and Sanity Code (1952); American Council on Education Report (1979); Murray Sperber, *College Sports Inc.* (1990) at 333-34 (describing a 1983 American Council on Education Presidents’ Proposal recommending that a “Presidents’ Board” take charge of the NCAA and that this board “have authority to veto or modify NCAA rules and to impose new rules of its own design on association member subject to review only by a mail vote of presidents of all member institutions.”); Boyer Commission, *Reinventing Undergraduate Education: A Blueprint for America’s Research Universities* (1998).

48; Wingspread Group, *Higher Expectations for Higher Education* (1993); *Chronicle of Higher Education* 11/9/79; 9/1/82, 9/14/83, 9/28/83, George Vecsey, *NYT* 1/11/84.

most recently in the Knight Foundation reports of 1991 and 2001.⁴⁹ Nor can Title IX fix these problems. It came into enforcement and opened the door for women to develop their athletic talents within the distorted culture of this mega bucks commercialization. Nonetheless, Title IX has proved a ready scapegoat.⁵⁰

3. West Virginia University, 2003: A Case Study

This drama is playing out now at my home school, West Virginia University. When WVU announced in April 2003 that it was cutting four varsity men's teams and one varsity women's team, in order to save six hundred thousand dollars, the lead letter to the editor in the student newspaper the next day blamed Title IX.⁵¹ While Title IX surely played a role in guiding these cuts, the causes of the budget shortfall were the product of escalating costs of football and basketball coupled with diminishing university resources. These economic pressures are typical of those faced by athletic departments across the country. Indeed, WVU provides an enlightening case study.

In the spring of 2002, WVU's Athletic Department completed a review of its sports programs and budget, and issued a plan, the Strategic Direction (SD). The SD compared its

49 Knight Foundation Commission on Intercollegiate Athletics, A Call to Action: Reconnecting College Sports and Higher Education, Final Report of the Knight Foundation Commission on Intercollegiate Athletics, June 2001 (www.knightfdn.org) ("The problems of big-time college sports have grown rather than diminished. The most glaring elements of the problems outlined in this most recent Knight report— academic transgressions, a financial arms race and commercialization— are all evidence of the widening chasm between higher education's ideals and the reality of college football and basketball.")

50 See e.g., Christopher Paul Reuscher, Giving the Bat Back to Casey: Suggestions to Reform Title IX's Inequitable Application to Intercollegiate Athletics, 35 Akron L.Rev. 117 (2001); *infra* nn. 51, 71, 75 and accompanying text.

51 "Where's the equality in WVU sports?" The Daily Athenaeum, April 17, 2003 p. 4; see also, Suggs, *supra* n. 6 (WVU Men's tennis coach Ed Dickson recalled that when he was called into Athletic Director Ed Pastilong's office to be informed his team was being eliminated, "I had five minutes to think about it, so I asked, 'Is this about Title

spending on men's football and basketball to the other fourteen Big East schools against whom it competes and found it was second from the bottom. The SD concluded that to become more competitive, men's football and basketball budgets must be increased significantly. Coaches' salaries should be significantly augmented and facilities upgraded.

The Athletic Department (AD or "Department") then considered possible sources for the recommended increased spending. It noted that other Big East schools receive multi-million dollar subsidies from their host universities.⁵² Since the late 1980's, WVU Athletics had received no university subsidy of its budget, which totaled 27 million dollars for the 2002-03 academic year.⁵³ Notre Dame, a case onto itself, profits from its own television contract and from a five million dollar per year product endorsement contract with Adidas. Such income sources were determined to be unavailable to WVU Athletics. WVU officials also looked at schools outside the Big East. The University of Tennessee, University of Texas and University of Florida each enjoy student enrollments twice the size of WVU permitting general student fees to subsidize their Athletic Departments.

To raise the needed revenue, WVU increased tickets prices. It also sought and obtained approval from the University Board of Governors for bonds to be issued to finance eighteen million dollars of renovations to the Mountaineer Football Stadium and other facilities, with the

IX?").

52 Mike Parsons, Interview (WVU athletic officials estimate that Rutgers athletics receives from 12 to 14 million dollars annually from its university. UPitt routinely covers its Athletic Department's deficits each year.)

53 Interview with Mike Parsons, WVU Deputy Director of Athletics (May 5, 2003)(By the early 1980's WVU Athletics obtained only 6% of its budget from university appropriations. To free itself from university oversight and to assist in its own private fundraising, WVU Athletics decided to forego all university appropriations. During the 1988-89 academic year the university withdrew from the athletic department the 150 to 160 tuition waivers that it had previously used to finance that number of athletic scholarships. From that point on the athletic department became responsible for generating its entire budget.

principal aim of making the revenue generating sports (men's football and basketball) generate more revenue.⁵⁴ But then, in 2003, additional unforeseen financial pressures necessitated further cuts.

Facing a huge deficit in 2003, the state legislature cut appropriations for higher education by 22 million dollars. It projected that an additional 30 million dollars would be cut the following year.⁵⁵ To offset these reductions, the university raised tuition, significantly increasing the AD's scholarship costs.⁵⁶ In addition, the stadium renovations ran into cost overruns necessitating an additional bond issue in April 2003 to cover the new renovation price tag of 24 million dollars.⁵⁷ Some speculated that additional unanticipated salary increases for coaching staff added to the increased costs in 2003.⁵⁸ Indeed, the Department's disclosures indicate that football coach Rich Rodriguez' salary almost doubled from \$405,950 for the 2001-02 year, to

54 WVU athletic officials explained "they must have better facilities to improve the fans' experience and to attract high-caliber coaches and players." "WVU Expands Scope of Mountaineer Field Project New Price Tag for Renovations: 11 Million," Charleston Gazette p.3B (April 2, 2003)(Associate Athletic Director Russ Sharp explained that the new luxury sky lounge in the football stadium for 1.9 million is "not really designed for watching the game. . .It's just an area with a few more amenities."). Just two weeks later, on April 16, 2003, the WVU athletic department announced it was eliminating four varsity men's minor teams, and one woman's team in order to save just shy of \$600, 000. "Five athletic programs cut," The Daily Athenaeum, Thursday April 17, 2003, vol. 115, issue 131, p.1.

55 Bob Hertzal, "9-11,money, Title IX, changing tastes all played part," The Dominion Post, May 4, 2003.

56 Id. The increased AD scholarship costs are projected to be \$2 million over the five year period, 2003-2008. Parsons Interview, *supra* n. 52.

57 The renovation budget is intended to "upgrade WVY sports facilities and increase revenue by offering something extra for fans who are willing to pay more." Eleven million of the 24 total is earmarked for luxury skyboxes and a new score board at the football stadium Id.

58 Bob Hertzal, "Mosser Resigns post WVU Varsity Club president protests cutback," The Dominion Post, April 23, 2003 (The President of the Varsity Club, a booster club of alumni WVU varsity athletes, resigned after the team cuts were announced in April, protesting that the cuts were in part necessitated by a huge bonus to football coach Rich Rodriguez, who recently had renegotiated his contract in exchange for not defecting to a competitor school.).

\$700,400 for the 2002-03 year.⁵⁹ When the men's basketball coach was replaced last year, the salary for that position went from \$282,960 to \$550,000, a 97% increase.⁶⁰

These salary increases are part of a larger trend of shifting more resources to football and men's basketball in response to past losing seasons and dwindling spectator attendance.⁶¹ In 1994, the football budget was 3.4 million dollars, 19 percent of the overall athletic department budget. In 2002 that budget was 5.5 million dollars, or 23 percent of the athletic department budget.⁶² This combination of foreseen and unforeseen expenses created a projected AD annual budget shortfall of \$600,000. All of these are typical financial demands exerted by football and basketball programs on their home schools. These financial pressures are likely to accelerate in the next few years as public universities contend with budget cuts occasioned by state budget deficits,⁶³ and as private universities continue to contend with dwindling endowments and private giving.

59 Id.

60 Id. Both the basketball head coach and the football head coach have higher salaries than the University president. Id.

61 Id. (The 2001-02 men's basketball season was the worst in school history, ". . . 8-20, and the fourth consecutive season when home attendance, which had peaked at 11,384 in 1982, failed to reach 6,500 in the 14,000 seat Coliseum." When young coach Rich Rodriguez took over the football team in that year he produced a losing record of 3-8 and no bowl. In addition to the coaching salary increases noted above, \$100,000 was added to the football team recruitment budget for 2003-04 and \$50,000 for men's basketball.); Suggs, *supra* n. 6 (WVU's Mike Parsons explained, "We need to have a successful football team because football generates significant revenue. . . . If the Athletic Department is going to be self-sufficient, we need a winning team because that means more television appearances, bowl games, better season ticket sales the next year. We want to compete in a lot of different sports. But in this day and age, that takes an increasing amount of resources.").

62 Id. It should also be noted that five coaching positions in the "strength staff" are on the AD books as a separate department. Their combined salaries are \$181,593. Id. One can safely assume that men's basketball and football players benefit from this coaching staff's time, but no part of these expenses appear in the football or basketball budgets.

63 See Louis Uchitelle, *Red Ink in States Beginning to Hurt Economic Recovery*, *New York Times*, (July 28, 2003); Timothy Egan, "States, Facing Budget Shortfalls, Cut the Major and the Mundane," *NYT* April 21, 2003.

Faced with this projected \$600,000 shortfall in 2003, the Department again reviewed its potential for increasing revenues. It concluded that given the demographics of the state and the characteristics of its fan base, it could not further increase ticket prices without reducing attendance and achieving no net revenue gain. With luxury skyboxes already under construction for the football stadium, the Department knew there was no potential for additional revenue there. The shortfall would have to be covered through cost reductions. The Department considered three options. The first was an across-the-Department budget reduction. Because many of the Department's costs, like building maintenance, are fixed costs paid to the university, these cuts would fall heavily upon the salaries of AD administrative staff, the ones making the budget decisions. Understandably this option was rejected. The second option was an across-the-board cut to all team budgets. However, because all sports had already been reduced by five percent in the 2000-2001 academic year, the AD rejected this option fearing that further reductions would fatally cripple teams' abilities to compete, consigning them to mediocrity, especially the teams with small budgets.

The final option which won the day, was to make targeted cuts, eliminating teams based upon their financial impact, their viability and their past and future success. Under this option the Department eliminated the men and women's rifle teams, despite the team winning thirteen NCAA championships in the past fifteen years. Its future as an NCAA championship sport was vulnerable because there remain only forty-three NCAA rifle teams in the United States⁶⁴ and NCAA rules permit the elimination of championship play whenever there are forty or fewer NCAA teams nationwide. Thus in the calculus of cuts, rifle's future viability was questionable,

despite its past success. The Department thus saved 19, 879 dollars.⁶⁵

Similarly, the option three scrutiny resulted in elimination of the men's tennis, men's indoor and outdoor track and field, and the men's cross country teams.⁶⁶

4. The Title IX Scapegoat

It might be true that the entire \$600,000 short fall to finance WVU men's football and basketball could have been made up by eliminating all of the WVU varsity women's teams save cross country.⁶⁷ If Title IX had not been on the books and enforceable through the substantial proportionality test, it is quite likely more women's teams would have been on the chopping block ahead of men's tennis, cross-country, track and field and rifle. But once the women's teams would be eliminated, the football/basketball arms race would likely still require the elimination of "non revenue" men's sports. Indeed, during 1984 to 1988 period when the Supreme Court's decision in *Grove City College v. Bell*⁶⁸ prevented Title IX from applying to athletic programs, colleges and universities cut wrestling teams at a rate almost three times as high as the rate of decline in the next twelve years,⁶⁹ after Title IX's application to athletics was

⁶⁴NCAA Online, www1.ncaa.com/membership/membership_svcs/sponsorssummary (visited July 30, 2003).

⁶⁵Office of Post Secondary Education, U.S. Dept. of Education, West Virginia University Athletics Operating Expenses Per Team, www.ope.ed.gov/athletics/InstDetail.asp (7/31/2003).

⁶⁶ *Id.* (cutting men's indoor track and field saved \$37,792; men's outdoor track and field saved \$26,676; men's cross country saved \$9,633; men's tennis saved \$46,703).

⁶⁷ *Id.* (WVU's total operating expenditures for women's teams are \$620,946 and it spends \$17,653 on women's cross-country).

⁶⁸ 465 U.S. 555 (1984).

⁶⁹ Donna de Varona & Julie Foudy, *Minority Views on the Report of the Commission on Opportunity in Athletics* (Feb. 2003) at 4 (During this period, "the number of NCAA institutions sponsoring men's wrestling teams dropped by 53, from 342 to 289—or approximately 13.3 teams per year. Between 1988 and 2000, that number dropped by 55, from 289 to 234—or approximately 4.6 teams per year.")(citing NCAA, 1982-2001 Sports Sponsorship and

reestablished in the Civil Rights Restoration Act of 1987.⁷⁰

But this reality does not dispel the impression that Title IX is to blame. As wrestling coach J. Robinson explained, “We’ve been fighting with football and basketball for generations now, the women should not get to jump ahead of us in line.”⁷¹ A 2001 Report of the General Accounting Office (GAO) confirms Robinson’s reality, but not his reasoning: 2,648 team slots for male wrestlers were eliminated during the period 1981 to 1999. During the same period, colleges added 7,199 men’s slots for football, as well as, 5,452 for baseball, 1,932 in men’s soccer and 1,552 in men’s basketball: an overall five percent increase in men’s athletic slots.⁷² The increases in football squads alone more than made up for the cuts in all of the other men’s teams combined.⁷³ While women still lag behind men in athletic participation at four year colleges, the GAO reported they made gains from 3.9 percent of women undergraduate students participating in athletics in 1981, to 5.5 percent in 1998-99. During that time period men participating in college athletics remained relatively steady starting and ending the period at 9.3 percent of the male undergraduate population. Clearly, Title IX is not the cause for wrestling slots to be cut. It is that more popular (and more lucrative) men’s sports have been hugely augmented: principally football, but also baseball, soccer and basketball.⁷⁴

Participation Statistics Report, p. 119).

70 Pub. L. No. 100-259, 102 Stat. 28 (1988)(codified at 20 U.S.C. sec. 1687(1988)).

71 Anne Stein, In Sports a New Title Wave of Challenges for Equity, Chicago Tribune, April 25, 2001 at C1 (quoting J. Robinson, wrestling coach at U. Minnesota)

72 GAO Report, supra n. 6 at 10, Table 2.

73 While wrestling lost the greatest number of slots, other men’s sports also lost out: 1,706 outdoor track slots lost; 1,405 tennis slots, 1,022 gymnastics; 943 swimming; 773 fencing; 436 rifle; 282 skiing; cross-country; 129 ice hockey; 95 water polo; and 12 badmitton. *Id.*

In fighting Title IX,⁷⁵ the wrestlers are barking up the wrong tree. Title IX acts to deflect the hatchet from cutting only women's sports to cutting men's as well, but the hatchet is driven by men's football and basketball programs run amok.⁷⁶

Secretary Paige last year appointed the Commission on Opportunity in Athletics and charged it to "improve the effectiveness of Title IX and . . . build upon the extraordinary progress that has resulted from its passage thirty years ago."⁷⁷ But this Commission was heavily dominated by representatives of Division I schools. Ten out of the fifteen commissioners were from NCAA Division I schools, all of which host large men's football and basketball programs.⁷⁸

There were no representatives from Division II or Division III colleges, junior colleges or high school athletic programs,⁷⁹ despite the Commission's Charter requirement that its membership

74 Women's gymnastics has also decreased dramatically during this time period, as well as women's field hockey and fencing. *Id.* at 9, Table 1 (683 women's gymnastics slots eliminated, 229 field hockey, and 171 women's fencing).

75 See e.g., *National Wrestling Coaches Assoc. v. United States Department of Education*, No. 1:02CV00072 EGS (D.C. D.C. 2002)(First Amended Complaint for Declaratory and Injunctive Relief, filed January 2002 seeking invalidation of Title IX regulations which assertedly result in the eliminations of men's teams); Welch Suggs, *Defying Rumors, Bush Administration Defends Status Quo on Title IX*, *Chronicle of Higher Education*, vol. 48, issue 39 (June 7, 2002); cite to John Updike NYT op-ed about cuts to men's wrestling teams.

76 Seventy-two percent of schools adding women's teams, did so without cutting any men's teams. GAO Report, *supra* n. 6 at 14. While about a third of colleges discontinued one or more men's teams, the same number of all categories of four year colleges also added men's teams—all categories except Division I-A schools. Only 3% of schools with big commercial football and basketball teams added men's teams. *Id.* at 16 Table 5. That's because so many additional male athletic slots were created by expanding the size of football squads, not adding men's teams. Duderstadt, *supra* n. 26 at 141 (in the 1960's football coaches pushed through unlimited substitution rules which has stimulated great expansion in the size of football squads. College football developed specialists for essentially every position—offense and defense, blocking, and tackling, kicking and passing. This created a need for additional coaches, to coach each specialty and transformed college football to the professional football paradigm). The proportionality requirement takes the fall as a mandate to cut so called "minor" men's teams when it is the sacrosanctity of football and basketball that is more the cause.

77 Appendix 3: Commission Charter, *The Secretary of Education's Commission on Opportunity in Athletics* at 46, in *Open to All* at Thirty, *supra* n. 22.

78 Birch Bayh, *Don't Tamper with Title IX*, *Baltimore Sun* Feb. 3, 2003 p. 15A.

79 de Varona & Foudy, *Minority Views* *supra* n. 69 at 19.

include people from these constituencies and that the Commission be “fairly balanced.”⁸⁰ It is not surprising therefore that instead of working to “build upon the extraordinary progress that has resulted from Title IX’s passage 30 years ago,” as it was charged to do, the Commission instead sought to fix the “problems” Title IX had encountered in Division I athletic programs, and to move once again toward exempting men’s football and basketball programs from Title IX.

Eight of the Commission’s recommendations would have seriously diluted Title IX’s equality protections and resulted in significantly fewer women and girls participating in sports or receiving college scholarships. Six of them do this by changing the way participation in athletics is counted, thus undermining the substantial proportionality test. The substantial proportionality test was created by the Department of Health Education and Welfare (HEW)⁸¹ in a 1979 Policy Interpretation⁸² issued to clarify how Title IX should apply to athletics. That Policy Interpretation adopted three ways in which schools can demonstrate compliance with Title IX. The first way, referred to as the substantial proportionality test, provides that schools are in compliance so long as “participation opportunities for male and female students are provided in

80 Commission Charter, *supra* n. 77 at 47 (“The members shall include representatives of college, university, and school district officials, such as athletic directors coaches, and other faculty, and representatives of intercollegiate and secondary school athletes; and may include researchers, state and local officials, and other persons with special expertise in intercollegiate and secondary school athletics or issues of equal educational opportunity. The membership of the Commission will be fairly balanced to reflect representation of a wide range of interests and perspectives relating to men’s and women’s (and boys’ and girls’) athletics.”).

⁸¹ In 1979, HEW split into two agencies—the Department of Education, and the Department of Health and Human Services (HHS). The regulations and agency documents originally promulgated by HEW were adopted without change by both HHS and the agency now charged with enforcing Title IX, the Department of Education. See *Cohen v. Brown Univ.*, 101 F.3d 155, 165 n.5 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997).

⁸² Title IX of the Education Amendments of 1972, a Policy Interpretation, Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (1979).

numbers substantially proportionate to their respective enrollments.”⁸³ Like the other compliance methods of the Policy Interpretation, this is a safe harbor: if substantial proportionality is shown, Title IX compliance is established even if there is unmet female interest in additional athletic opportunities or the school has declined to expand female sports programs for years.⁸⁴

Recommendation 12 of the Commission’s report asked the Office for Civil Rights to consider disregarding teams that are not funded with school funds, but with private funds, when calculating whether substantial proportionality exists.⁸⁵ Because of historic and current discrimination against females’ sports participation, it would clearly be men’s teams that would receive the bulk of such private funding. Under this recommendation, schools would be authorized to allow private donors to underwrite male teams, without any corresponding requirement to provide opportunities to females.⁸⁶

An unnumbered proposal in the Secretary’s Commission report, as explained by dissenting Commissioners Donna de Varona and Julie Foudy,⁸⁷

[W]ould direct schools to allocate 50% of their participation opportunities to men and 50% to women regardless of the actual percentage of males and females in the student body, and then authorize schools to fall short of that allocation by 2-3 percentage points.

⁸³ *Id.* at 71,418,5(a)(2). Courts interpreting this requirement have found that gaps of 10.5% and 13.01% between how many athletic opportunities should be afforded women based upon their representation in the student body, and how many actually are, do not constitute substantial proportionality. *Cohen*, 101 F.3d at 163; *Roberts v. Colorado State Bd. Of Agric.*, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993).

⁸⁴ Reference is made here to the other two ways compliance can be established under the Policy Interpretation: that the “school has a history and continuing practice of expanding opportunities for the underrepresented gender; or Even if it is not providing proportionate opportunities, the school is fully and effectively meeting its female students’ interest and ability to participate in sports.” De Varona & Foudy, *Minority Views*, *supra* n. 69 at 5.

⁸⁵ *Open to All at Thirty*, *supra* n. at 36.

⁸⁶ De Varona & Foudy, *Minority Views*, *supra* n. 69 at 17.

⁸⁷ Foudy is perhaps most known for her ecstatic gesture whipping off her shirt after scoring the winning goal in the 2000 Olympics finals. Cite to Newsweek cover photo.

This proposal would, in effect, allow schools to impose a ceiling of 47% of athletic opportunities and scholarships for women. . . . Because women typically comprise 53% of the student body at Division I-A schools, and 49% of the student at the high school level, this proposal will inevitably result in losses from the opportunities to which women and girls would be entitled under current law.⁸⁸

This change alone would have resulted in the loss of 122 million dollars worth of scholarship money for women, 50,000 varsity slots for college women, and 305,000 lost slots for high school girls to play sports.⁸⁹

Recommendation 14 of the Secretary’s Commission sought to allow a “reasonable variance” from substantial proportionality, over and above the two to three percent variance and disregard of schools with majority female students bodies, provided for in the unnumbered proposal described above.⁹⁰

Recommendation 15 of the Secretary’s Commission would have allowed schools to “identify a ‘predetermined number of participants for each team offered by the institution’ and then to count that number of slots as filled – regardless of how many athletes in fact participate on the team.”⁹¹ As the dissenting Commissioners explained, “This proposal would allow schools to artificially inflate the percentage of athletic opportunities they give women by counting opportunities they never actually fill or seek to fill.”⁹²

Recommendation 17 of the Commission’s Report would allow schools to disregard for

⁸⁸ De Varona & Foudy, *Minority Views*, *supra* n. 69 at 15.

⁸⁹ *Id.* at 16.

⁹⁰ *Id.* at 15.

⁹¹ *Id.* at 13 (*quoting Open to All at Thirty*, *supra* n. 7 at 37).

⁹² *Id.* at 13.

purposes of calculating substantial proportionality, athletic opportunities actually provided to men, if the athlete walked on to a team and was not recruited. Because of historic and continuing discrimination, fewer women arrive at college determined to play varsity athletics and women's teams lack the status of men's teams; as a result, women's teams do not attract walk-ons to the extent men's teams do.⁹³ Moreover, "[w]omen's teams often lack the resources to provide for more than the minimum number of athletic slots by the school for the team."⁹⁴ Clearly, adopting this amendment would allow schools to discount many actual athletic opportunities provided to men when calculating whether proportionate opportunities are afforded women.⁹⁵

Recommendation 20 would have allowed schools to disregard its "nontraditional students" when calculating whether substantial proportionality exists.⁹⁶ Because women in the category of nontraditional students, women outnumber men by 37 percent,⁹⁷ this recommendation would have diminished female sports opportunities, while adopting the stereotype that students over 24 years of age, or students of any age who are parents, are not interested in athletics.⁹⁸

Recommendations 18 and 19 would have allowed schools to use "interest surveys" of its

⁹³ *Id.* at 9.

⁹⁴ *Id.*

⁹⁵ *Id.* at 14 (citing Welch Suggs, Getting Ready for the Next Round, *The Chronicle of Higher Education*, Vol. 49, Issue 23, p.A39 (Feb. 14, 2003)(documenting that discounting walk ons would reduce by 32 the number of slots to which women would be entitled under current law in one Division I school)).

⁹⁶ *Open to All at Thirty*, *supra* n. 7 at 39.

⁹⁷ De Varona & Foudy, *Minority Views*, *supra* n. 67 at 14 (citing U.S. Dept. of Ed., Nat'l Center for Ed. Statistics, <http://nces.ed.gov/pubs2022/digest2001/tables/dt174.asp>).

own student body, (Rec. 18), or of high schools students and prospective students, (Rec. 19), to show that it has complied with Title IX.⁹⁹ Because as the First Circuit noted in *Cohen v. Brown University*, “interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience,. . . women’s lower rate of participation in athletics reflects women’s historical lack of opportunities to participate in sports.”¹⁰⁰ These changes could have had the effect of creating an additional, difficult to surmount, plaintiff’s burden of proof in a Title IX lawsuit. Any woman seeking redress for unequal treatment would first have to demonstrate that there was interest in equality, before she could then invoke Title IX’s equality guarantee. Imagine first having to statistically demonstrate that there is interest among African-Americans in admissions to law school, prior to enjoying the racial equality protections of Title VI.¹⁰¹

Had the Commission’s recommendations been enacted in revised regulations, the commercialization of men’s sports and its distortions of the academic enterprise would have remained untouched.¹⁰² But they would have inflicted grave damage to the project of building gender equality, and to civil rights law more generally. In addition, the Commission’s recommendations were designed to “fix” Division I problems, but they would have altered Title IX generally, undercutting Title IX’s efficacy in creating greater gender equity in colleges nationwide, and in high schools where there has been little Title IX enforcement to date.¹⁰³

⁹⁸ *Id.*

⁹⁹ *Id.* at 17.

¹⁰⁰ 101 F.3d at 178-79.

¹⁰¹ Title VI of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000d (2002).

¹⁰² *Infra* n. 105 and accompanying text.

How to Genuinely Expand Athletic Opportunity

One solution to the arms race would be for the NCAA in conjunction with university administrations to impose policies to curb it.¹⁰⁴ Secretary Paige's Committee makes two general recommendations in this direction.¹⁰⁵ More specifically, there could be roster limits for football. Shrink the average 105 man football team to 75 players, and 30 athletic slots (and athletic scholarships) would be freed for men who want to play other sports without increasing the

103 See, e.g., National Women's Law Center, *The Battle for Gender Equity in Athletics in Elementary and Secondary Schools* (May 2002) http://www.nwlc.org/pdg/Battle_June_2002; de Varona & Foudy, *Minority Views*, *supra* n. 69 at 12, 19 (The Office of Civil Rights has refused to exercise its authority to collect data on gender equity in high school sports.); *Open to All at Thirty*, *supra* n. 7 at 28 ("Although there has been some discussion about issues related to Title IX compliance at the high school level, the small amount of such testimony and the expertise of the Commissioners does not allow for extensive findings on how high schools are complying with Title IX."); Sarah Burnett, *Title IX: Why Our School Are Behind*, *Chicago Daily Herald*, (Dec. 1, 2002) (of 41 schools surveyed only one would have met substantial proportionality test); Amy Hetzner, *Review of Title IX May Put Ball in High Schools' Courts*, *Milwaukee J. Sentinel* (Feb. 9, 2003); Kerry White, *"-five years after Title IX, Sexual Bias in K-12 Sports Still Sidelines Girls*, *Education Week* (June 18, 1997); Travis Miller, *Who Is Policing Title IX in Schools?* *Chicago Daily Herald* (Dec. 3, 2002) (Title IX enforcement in high schools is left to individual plaintiffs in the absence of OCR enforcement).

In the absence of federal enforcement, some states have enacted Title IX equivalencies to enforce gender equity in high schools. Florida Educational Equity Act, F.S.A. Sec. 1000.05 (requiring high schools to provide equal opportunities, funding, and resources to male and female athletes.); Mike Fish & David Milliron, *Florida's Fairer Clime*, *Atlanta Const. J.* (Dec. 15, 1999); Georgia Equity in Sports Act, GA ST Sec. 20-2-315 (2000); Mike Fish & David Milliron, *Georgia Treats Girl Athletes Second Class*, *Atlanta Const. J.* (Dec. 12, 1999); Hawaii Equity in athletics; Rules and Implementation, HI ST Sec. 302-464 (2000).

United States Senator Olympia Snowe introduced a bill during the last session of Congress to require collection of gender equity data at the high school level. High School Sports Information Collection Act of 2003, Sen. 282, 108th Cong. Sec. 2 (2003) The Bill was referred to the Senate Committee on Health Education, Labor and Pensions where it languished.

104 Since its inception, the NCAA has adopted several measures to curb the excesses of men's football and basketball. In 1905 President Theodore Roosevelt convened college presidents at the White House to ban the "flying wedge" formation from college football because it had resulted in 24 deaths in 1904 alone. In 1906 the NCAA was founded in order to develop uniform rules to guide college sports. Bok, *supra* n. at 36. For the last ten years the NCAA has required that the university control athletic department product endorsement contracts. The NCAA limits to 85 the number of scholarship players on a football roster. While imposing these and other incremental limits, the NCAA has proven adept at preventing any meaningful curbs on college sports commercialization. See, e.g., Sperber, *supra* n. 30 at 333-340.

105 "Open to All" *supra* n. 7 at Recs. 8 & 13 (Recommendation 8 states: "The Department of Education should encourage educational institutions and national athletic governance organizations to address the issue of reducing excessive expenditures in intercollegiate athletics. Possible areas to explore might include an antitrust exemption for college athletics." Recommendation 13 states: "The Department of Education should encourage the NCAA to review its scholarship and other guidelines to determine if they adequately promote or hinder athletic participation

gender imbalance. (There are only 11 players on the field at any one time so a squad of 75 would allow ample substitutions.) The NCAA could impose a host of other measures to curb commercialization, such as: limit game schedules, eliminate televised tournaments and bowl games, prohibit product endorsements,¹⁰⁶ cap coach salaries, (though this would require an exemption from anti-trust law),¹⁰⁷ require game schedules to accommodate academic schedules, and limit practice and training regimes (now often exceeding 40 hours a week) to reasonable hours allowing students to be students.¹⁰⁸ It would also be advisable to require all scholarships to be need based, and to be administered by the admissions office, thereby eliminating the employer/ employee relationship between college coaches/athletic departments and college athletes. But the NCAA has proven unwilling to adopt any of these measures,¹⁰⁹ in large part because it has a huge financial interest in the commercial college sports entertainment industry it has fostered.¹¹⁰ In addition, the NCAA is essentially a trade organization for Division I coaches

opportunities.”).

106 The University of Michigan Athletic Department copyrighted the block M—and profits handsomely from commercial products marketed on the University’s reputation. Duderstadt, *supra* n. 26 at 92. West Virginia University has copyrighted its logo as well, but the proceeds go to the university, not the athletic department. Interview with Mike Parsons, 5/8/2003. (check where proceeds go, not in notes)

107 cite to anti-trust suit invalidating cap on coaches salaries.

108 Acknowledge the NCAA limit of 20 hour weeks and how it is routinely disregarded and not enforced.

109 Bok, *supra* n. 27 at 39-41.

110 “By the mid 1980s, the NCAA received \$32 million a year from CBS-TV to televise the [men’s basketball] tournament . . . and a few million from ESPN, still doing every game not carried by CBS . . . in 1999 the contract was renegotiated upping the fee [to the NCAA] to \$6 billion for all tourny games through 2013.” NCAA also earns millions in ticket sales to the March Madness playoffs, having moved them to big astrodome facilities. Throughout the 90’s, only 25% of this revenue went back to the participants and their conferences. Many of the first round losers failed to even cover their expenses in travel to the tournament. The remainder stayed in NCAA coffers. Sperber, *supra* n. 30 at 37.

and athletic directors¹¹¹ and will not act against their interests.

The solution is clear. Kick the professional farm leagues out of the university. Sell them as franchises and sell the stadiums and training facilities too. Just like in ice hockey and baseball, there can still be college teams for the true student athletes, but they will be organized on a reasonable scale, with schedules and training regimes compatible with academic life. Those kids who want to go straight to professional sports life, can go there, and get paid for it, and not get caught up in the scandals¹¹² that inevitably emerge from carrying on the charade that they are bona fide students and that they are not entitled to remuneration and do not receive it.¹¹³ Those kids who remain will have the chance to be true student athletes, with schedules that permit them to attend classes and study. By getting the professional athletes out of college athletic programs, athletic slots would be opened up for more students to participate.

The millions, and in some schools, billions, of dollars obtained by selling the franchises of football and basketball teams, and the stadiums and training facilities, can be used to endow the remaining university athletic programs. In schools with failing commercial football and basketball enterprises, for whom the market will not bear millions, some serious reckoning will be in order. In the face of a wave of spin-offs at other schools and in the context of deep university general budget slashing, how will schools continue to justify pumping millions of dollars annually into failing commercial sports enterprises? The lack of clothing on the emperor,

111 Id. at 34.

112 See e.g., Mike Freeman, Pursuit of Victories Presses on Colleges, *New York Times*, (July 13, 2003) Sports Section p. 4; When Values Collide: Clarett Got Unusual Help in Class, *New York Times*, (July 13, 2003) Sports p. 1, 4; Harvey Araton, Men Give Women an Unseemly Model, *New York Times*, April 7, 2003; "Infractions," NCAA Online, www.ncaa.org/releases/infractions/2003061702in.htm (July 31, 2003).

or the lack of net revenue from “revenue producing sports” will become quite embarrassingly obvious.

This might initially sound like an unrealistic proposal, but it is not. We have models from the nationwide trend which began in earnest in the mid 1980's, of universities privatizing their medical facilities in a variety of ways. As is true of the big athletic programs, hospitals and medical complexes proved to have huge fluctuations in earnings from year to year. Traditional business planning often did not happen because the university was always in the backdrop for a bailout in the bust years, so everything could be spent in boon times.¹¹⁴ Moreover, there were huge costs associated with running these medical businesses through state university bureaucracies. Universities responded to the economics of academic medicine by selling off their medical complexes to independent corporate entities. While the medical models will not apply in all of their details, they point the way for sports complex/farm team spin offs.

WVU's deal is typical in that the new hospital entity continues to use the University's name, but it pays the university for such use through a “branding” contract. The universities kept their medical schools and dentistry schools. But all that remains on their books are the faculty salaries and the student tuition. When faculty provide patient care, they do it through a physician association, not the university. Nurses, orderlies, capital improvements, facilities maintenance, malpractice insurance, are all on the books of the hospital corporation, not the university. This encourages better business planning in the hospital. It removes the drain on university resources and disentangles the academic mission from the distortions of commercial enterprise.

113 Jeremy Bloom, Show Us the Money, Op-Ed, *New York Times* (Aug. 1, 2003); Sperber, *supra* n. 47 at 202.

114 Interview with Professor Kevin Outtersen, WVU College of Law (May 5, 2003); *see generally*, Nancy M.

Clearly this model will require major adaptation for university commercial sports. Care will need to be taken to ensure that football and men's basketball are not spun off on the books only as a means of avoiding Title IX accountability. Players on the new pro farm teams should be accorded no special consideration if they apply and enroll as part-time students, who have full-time jobs. Moreover, universities have accommodated the commercial sports enterprises in deep ways.¹¹⁵ To reclaim the integrity of the academic enterprise, selling off the farm teams will need to be accompanied by a far reaching reevaluation of curriculum, admissions, promotion and retention and undergraduate student social life.

The medical center spin off model will not apply whole cloth to athletics. However, it made sense for universities to unload the hospital behemoths and they have largely done it. For many reasons it makes sense to sell off football and men's basketball too. Such a move can be vastly beneficial to the university, economically, culturally and academically.¹¹⁶ It can also solve the problem of elimination of men's non-revenue teams that is caused by the football/ basketball arms race, and which has been mistakenly blamed on Title IX. Ultimately, freedom from commercial sports domination will enable universities to move forward toward gender equity, in athletics and elsewhere.

Kane, *The Financial Health of Academic Medical Centers: An Elusive Subject*, at 14, in *The Future of Academic Medical Centers* (Henry J. Aaron, ed.)(2001).

¹¹⁵ See supra nn. 37 through 42, 85 and accompanying text.

¹¹⁶ Two former university presidents have written eloquently about the difficulty of overcoming vested interests and reclaiming academic values by eliminating the commercialization of big-time sports. Bok, supra n. 27 at 51-54; Duderstadt, supra n. 23 at 263-318. I do not mean to imply that this can happen easily or without struggle. But once the economics of big-time sports and their impact on the culture and integrity of their host schools are more

generally understood, I cannot believe that major change will not occur.