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In the Title IX Race Toward Gender Equity, The Black Female Athlete is Left to Finish Last: The Lack of Access for the "Invisible Woman"

Tonya M. Evans
University of New Hampshire School of Law, tonya.evans@law.unh.edu

COMMENT

In the Title IX Race Toward Gender Equity[1], the Black Female Athlete Is Left to Finish Last: The Lack of Access for the "Invisible Woman."[2]

INTRODUCTION

> Although each of us is defined by race and gender, those of us who are neither white nor male often experience invisibility as a result of our dual subordinate status. . . . Black women have been disproportionately located at the lower end of the economic hierarchy and, therefore, have been unable to afford private golf, swimming, or tennis lessons. Overt racial discrimination prevented black women from gaining access to the sports participated in by white women. To the extent that the main thrust of solutions to gender inequity and a lack of adherence to Title IX mandates has been the addition of opportunities in the country club sports or those sports not traditionally accessible to Black women, we lose yet again.[3]

America is undeniably preoccupied with sports. The high level of enthusiasm generated in this country by 'the thrill of victory and the agony of defeat' clearly demonstrates that "[s]ports constitute an im-

1. Alfred Mathewson notes in his essay that "[t]he phrase 'gender equity' was coined to describe efforts to use the law to address the historical imbalance in the treatment of girls and women in athletics in the twentieth century." Alfred Dennis Mathewson, Essay, *Black Women, Gender Equity and the Function at The Junction*, 6 MARQ. SPORTS L.J. 239, 245 (1996).

2. The concept of the "Invisible Woman" can be found in several writings: *See, e.g.*, Marilyn Yarbrough, *If You Let Me Play Sports*, 6 MARQ. SPORTS L.J. 229, 234 (1996) (stating that "[a]lthough each of us is defined by race and gender, those of us who are neither white nor male often experience invisibility as a result of our dual subordinate status"). I chose to address specifically the simultaneous influence of race and gender in the lives of Black female athletes because of my firsthand knowledge and experiences with such discrimination. However, it is conceivable that the arguments raised in this Note could be made similarly by any other women of color, as well as other oppressed women in society (i.e., lesbians, the poor, and the handicapped).

3. Yarbrough, *supra* note 2, at 234-35.

portant cultural phenomena and play a pervasive role in our society."[4] Indeed, sports often serve as an important source of identity for us as participants and fans based on our affiliation with teams, players, schools or simply as individuals.[5]

My life serves as the perfect example of the myriad ways sport can enhance the quality of life and provide numerous opportunities. My participation facilitated an entrance into higher education and taught me commitment, discipline, teamwork and other worthwhile virtues necessary to succeed in life. My parents, both athletes in their day, introduced me to sports very early on. In my elementary school years, I participated in a Saturday morning basketball league at my small, private Quaker school. My parents also introduced me to track, gymnastics, and tennis. My introduction into tennis lead to years of junior tennis tournaments, a tennis scholarship to Northwestern University, and a four-year stint on the professional women's tennis tour. During that time, miraculously, I managed to avoid the pitfalls traditionally associated with "the teenage years." With two practices per day, regular school days and weekends full of various competitions, I simply did not have the time or energy to get into trouble. Athletics has indeed served me well.

As a young Black girl, I had the opportunity to be exposed to both mainstream sports and those in which minorities are traditionally underrepresented. That exposure changed my life for the better because I was able to convert opportunity into success.[6] The advantages I enjoyed as the daughter of a lawyer and a doctor, sadly, are not enjoyed in large numbers within my race: I am the exception not the rule. And without access to all types of sports, I would never have realized and developed my talents in tennis, typically viewed as a country club sport reserved for the white elite.

Just as the world of sport carries innumerable benefits and evinces all that is good within our culture, regretfully, the world of sport also mirrors the ills of the larger society.[7] Of the most prevalent

4. Matthew J. Mitten, *Sports Law as a Reflection of Society's Laws and Values: Forward*, 38 S. TEX. L. REV. 999, 999 (1997).

5. *See id.*

6. *See generally* Elliott Almond, *Title IX 25 Years Later—Minority Women Worry About Which Sports Get Support*, SEATTLE TIMES, June 22, 1997, at A11 (noting that minority leaders seek to integrate sports in which minorities are traditionally underrepresented because, "where there is opportunity for athletes of color, there is success").

7. Wendy Olson, *Beyond Title IX: Toward an Agenda For Women and Sports in the 1990s*, 3 YALE J.L. & FEMINISM 105, 136 (1991) (stating that sport is no different than the larger society

evils are sex and racial discrimination, and the resulting inequities which continue to mar the playing field. However, despite the importance of sport to the larger society and the existence of discrimination therein, "sports has historically not been the subject of serious academic study."[8]

Race and gender inequities are all too prevalent in intercollegiate athletics.[9] The general inequities suffered by all women are compounded in the lives of Black women because of the additional burden of racism. Specifically, Title IX has benefited white women more than Black women.[10] White women attend college in greater numbers than their Black counterparts and "many colleges and universities have complied with Title IX by adding women's sports, such as golf, squash, and tennis, which are played predominantly by white women."[11]

Despite the simultaneous influence of race and gender endured by Black women, the legal remedies for race and gender discrimination are separate.[12] A host of laws exist to address racial inequities. Specifically, racial bias is countered by State and Federal Constitutional claims, the Civil Rights Act of 1964[13] to a small degree, and private causes of action (contract and tort).[14] Additionally, the gen-

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and therefore the same social ills that plague the larger society pervade the world of intercollegiate sports).

8. Mitten, *supra* note 4, at 1000; Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 616 (1995) (noting that "the dearth of scholarship concerning the adverse implications of racism for African-Americans involved in college sport underscores the importance of beginning a candid dialogue on racism in sport").

9. *See* Olson, *supra* note 7, at 136. *See also,* Rodney K. Smith, *When Ignorance Is Not Bliss: In Search of Racial and Gender Equity In Intercollegiate Athletics*, 61 MO. L. REV. 329, 330-31 (1996).

10. *See* Note, *Cheering On Women And Girls In Sports: Using Title IX To Fight Gender Role Oppression*, 110 HARV. L. REV. 1627, 1635 (1997) [hereinafter *Cheering On Women*].

11. *Id. See also* Mitten, *supra* note 4, at 1002 n.5 (citing Yarbrough, *A Sporting Chance: The Intersection of Race and Gender*, 38 S. TEX. L. REV. 1029, 1033 (1997)) ("As an illustration, [Yarbrough] points to the efforts of educational institutions to comply with Title IX by increasing athletic participation opportunities for women by adding 'country club' (golf, tennis, swimming) and 'prep school' (lacrosse, field hockey) sports as well as 'walk-on' sports to attract students already enrolled at the school. Because educationally and economically disadvantaged women (categories which include a significant percentage of African-American women) have not traditionally participated in these sports, African-American women effectively are denied the opportunity to participate in sports within their interests and abilities."); Almond, *supra* note 6, at A11 (noting that "[a]t issue are the kinds of college sports being introduced in the name of gender equity - golf, gymnastics, rowing, soccer, tennis and water polo. In the U.S., these sports usually favor participants of some means. In the racial divide of America, that often translates to mean those from suburban white neighborhoods.").

12. *See* Smith, *supra* note 9, at 353-54.

13. 42 U.S.C. § 2000e (1998).

14. *See* Smith, *supra* note 9, at 353-54.

eral unwillingness of courts to recognize Black women as a separate and distinct class of plaintiff due to their unique "dual disability"[15] at the intersection of race and gender leaves Black women no choice but to "take sides against themselves."[16]

Title IX is the primary vehicle for protection against gender discrimination in the context of federally funded education programs. Title IX, however, only seeks to remedy one class of discrimination: gender, not race. Countless articles deal with the interpretation, historical development, and application of Title IX since 1972, and numerous articles address racism in intercollegiate athletics. However, few deal specifically with the issue of intersectionality and the challenge of current jurisprudence to protect Black female athletes when they are discriminated against based on their gender *and* race simultaneously.

Arthur Mathewson attempts to address the issue in his article *Function At The Junction.*[17] Mathewson "examine[s] the meaning of gender equity for Black women and sketch[es] a general framework for principles to aid the formulation of sports policy on gender equity as it applies to Black women."[18] Mathewson makes an admirable attempt to shed light on the invisibility suffered by Black women as they attempt to "function at the junction" of race and gender. Yet he honestly and rightly notes early in his analysis that he possesses only an ability to intellectualize about the Black woman's challenge; "[he does] not claim to 'get it.'"[19] Accordingly, the story of the Black female athlete needs to be told by a member of the group; one who not only sympathizes but empathizes with the experience of sisters in the pursuit of athletic inclusion.

Part One will outline the statute, regulations, Policy Interpretation and the leading case in Title IX jurisprudence. Part Two will address the Critical Race Theory Doctrine of Intersectionality to demonstrate the importance of recognizing that Black women hold a station in life distinguishable from Black men and white women. Part

15. Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 10 (1989). Scales-Trent states that because of this "dual disability," and its negative legacy . . . "the problems of Black women often go unrecognized." Further, "[b]y creating two separate categories for its major social problems –'the race problem,' and 'the women's issue'— society has ignored the group which stands at the interstices of these two groups, black women in America." *Id.*

16. Yarbrough, *supra* note 2, at 236.

17. Mathewson, *supra* note 1.

18. *Id.* at 241.

19. *Id.* at 242.

Three will chronicle the unique history of Black women in America and in sport, to show that sport is a microcosm of the greater society with the same ills that plague the greater community. Finally, Part Four will examine and compare Title VII jurisprudence and it's recognition of Black women as a separate and distinct class of plaintiff to Title IX jurisprudence.

I. TITLE IX: THE STATUTE, THE REGULATIONS, POLICY INTERPRETATION AND *COHEN V. BROWN UNIVERSITY*

> [Title IX] provides a remedy to black women, but only to the extent they are injured by the force of gender discrimination like that faced by white women. It does not provide a remedy to them to the extent that their participation in competitive athletics is and has been impacted by the force of racial discrimination or the simultaneous action of both forces. Nor does the law of gender equity provide them a remedy to the extent such participation has been impacted by any force of discrimination directed specifically toward Black women.[20]

Title IX of the Education Amendments of 1972[21] is the federal law which prohibits federally funded education programs from discriminating on the basis of sex, including sports programs.[22] Title IX states in pertinent part: "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."[23] Authors Brake and Catlin observed that "Title IX has been the primary vehicle for asserting the right of women and girls to equal opportunity in high school and college athletics, and has played a vital role in opening competitive sports to female athletes over the last [twenty-five] years."[24]

Congress passed Title IX to stifle rampant discrimination on the basis of sex at every level of education.[25] The Department of Health, Education and Welfare ("HEW") subsequently issued its regulations

20. *Id.* at 244-45.
21. 20 U.S.C. §§ 1681-88 (1998).
22. *See* Deborah Brake & Elizabeth Catlin, *Gender & Sports: Setting A Course For College Athletics: The Path Of Most Resistance: The Long Road Toward Gender Equity In Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL'Y 51, 52 (1996).
23. 20 U.S.C. § 1681(a) (1998).
24. Brake & Catlin, *supra* note 22, at 52.
25. *See id.* at 53.

in the summer of 1975.[26] One regulation, codified at 34 C.F.R. § 106.37(c) and § 106.41, addresses athletic programs in particular.[27] Part one of this regulation refers to athletic scholarships offered for "interscholastic or intercollegiate athletics."[28] "The chief goal of this segment of the regulation is to ensure that scholarship monies are awarded in proportion to the number of students of each sex participating in athletic programs."[29] The second part of the regulation speaks more broadly to encompass equal opportunities between the sexes in "'any interscholastic, intercollegiate, club or intramural' athletic program offered by a federally funded institution."[30]

The regulation reads as follows:

> (c) Equal Opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:
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> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
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> (2) The provision of equipment and supplies;
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> (3) Scheduling of games and practice time;
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> (4) Travel and per diem allowance;
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> (5) Opportunity to receive coaching and academic tutoring;
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> (6) Assignment and compensation of coaches and tutors;
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> (7) Provision of locker rooms, practice and competitive facilities;
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> (8) Provision of medical and training facilities and services;
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> (9) Provision of housing and dining facilities and services;
>
> (10) Publicity.
>
> Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute non-compliance with this section, but the Assistant Secretary may consider the failure to

26. *See* 40 Fed. Reg. 24,128 (1998).

27. *See* 34 C.F.R. § 106 (1998).

28. Cohen v. Brown Univ., 809 F.Supp. 978, 983 (D. R.I. 1992) (citing 34 C.F.R. § 106.37(c)) [hereinafter *Cohen* I] *aff'd*, 991 F.2d 888 (1st Cir. 1993) [hereinafter *Cohen* II], 879 F.Supp 185 (D. R.I. 1995) (trial on the merits) [hereinafter *Cohen* III], *aff'd in part, rev'd on other grounds*, 101 F.3d 155 (1st Cir. 1996) (affirming the reasoning and holding of the district court, reversing as to remedy) [hereinafter Cohen IV].

29. *Cohen* I, 809 F. Supp. at 983.

30. *Id.* (citing 34 C.F.R. § 106.41(a)).

provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.[31]

Title IX carried a three year transition period for compliance and during that time HEW's office received nearly 100 complaints of alleged violations.[32] In response, HEW's Office for Civil Rights ("OCR") declared a need to provide post-secondary institutions with "'a framework within which complaints can be resolved and to provide . . . additional guidance on the requirements of compliance with Title IX."[33]

The final Policy Interpretation, issued in 1979, provided a detailed outline of "factors and standards" for courts to use to determine whether a school was in compliance in the area of intercollegiate athletics.[34] Specifically, the Policy Interpretation set out a three-pronged test of compliance and the requirement that a school must satisfy at least one prong in order to be found in compliance with "Title IX's requirement to provide proportionate participation opportunities."[35]

The test set forth in the Policy Interpretation is as follows:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) Where numbers of one sex have been and are under-represented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or

(3) Where members of one sex are under-represented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it

31. 34 C.F.R. § 106.41(c) (1998). The Title IX regulations became effective on July 21, 1975. *Id.*

32. *See* Brake & Catlin, *supra* note 22, at 56 n.30 (citing 34 C.F.R. § 106.41(d) (1995)). Section 106.41 states that, "[a] recipient which operates or sponsors . . . athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation." *Id.*

33. *Id.* at 56 n.31 (citing 44 Fed. Reg. 71,413 (1979)).

34. *See* 44 Fed. Reg. 71,413, 71,414 (1998). "The factors and standards were enumerated for compliance in scholarships, accommodation of interest and abilities, and other program areas such as equipment, travel, tutoring, coaching and recruitment." Brake & Catlin, *supra* note 22, at 56 n.36. Note that the Policy Interpretation does not have the force of law, but serves as the clearest interpretation of the criteria for compliance. *Id.* at 57.

35. *See* Brake & Catlin, *supra* note 22, at 61-62.

> can be demonstrated that the interests and abilities of that sex have been fully and effectively accommodated by the present program.[36]

The stated purpose of the Policy Interpretation is to:

> clarif[y] the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in athletic programs. In particular, this Policy Interpretation provides a means to assess an institution's compliance with the equal opportunity requirements of the regulation which are set forth at [34 C.F.R. § 106.37(c) and § 106.41(c)].[37]

Brake and Catlin explain how the analysis flows from the three-pronged test:

> Under the first prong, the court examines whether athletic participation opportunities are provided to each sex in numbers substantially proportionate to their enrollment. If a school cannot meet this prong, the court then determines whether the school can demonstrate a history and continuing practice of program expansion for the underrepresented sex. If a school fails the second prong, the court finally asks whether the athletic interests and abilities of the underrepresented sex have been fully and effectively accommodated by the school. If the plaintiffs can show that the school also fails on this third prong, then the court must find the school out of compliance with Title IX.[38]

An additional source used to provide information and guidelines to assess compliance is the Clarification Memorandum issued by the Department of Education, on January 16, 1996.[39] That memorandum does not alter the existing standards for compliance but rather it "contains many examples illustrating how institutions may meet each prong of the three-part test and explains how participation opportunities are to be counted under Title IX."[40]

When Congress first passed Title IX, it did not appear to apply to intercollegiate and interscholastic athletics programs.[41] In fact, the Supreme Court held in *Grove City v. Bell* that "Title IX did not apply to programs like athletics that do not receive direct financial assist-

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36. Smith, *supra* note 9, at 356 (citing Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (1979) (codified at 20 U.S.C. § 1681 (1990)).

37. Cohen I, 809 F.Supp. 978, 983 (D. R.I. 1992) (citing 44 Fed. Reg. at 71,415).

38. Brake & Catlin, *supra* note 22, at 62.

39. Cohen IV, 101 F.3d 155, 167 (1st Cir. 1996).

40. *Id.*

41. *See* William E. Thro & Brian A. Snow, *Cohen v. Brown University and the Future of Intercollegiate and Interscholastic Athletics*, 84 Ed. Law Rep. 611, 615 (1993).

ance."[42] However, Congress quickly acted to clarify its intent and passed the Civil Rights Restoration Act of 1987.[43] That Act superseded *Grove City* and held that "all aspects of an institution of higher education are covered by Title IX."[44] The Restoration Act became effective on March 22, 1988, and is applicable to all institutions which receive federal funds for their athletic programs.[45]

Authors Thro and Snow note that Title IX claims generally fall into three categories: (1) "equal treatment' cases such as *Cook v. Colgate University*, where the women athletes and/or their coaches assert that their male counterparts on the same or similar teams are treated better than they are and demand that there be equal treatment"; (2) "'substitution' cases, . . . where women athletes in a particular sport protest a decision to drop their sport in favor of another women's sports [sic]"; and (3) "'affirmative action' cases, . . . where women or men athletes demand that the university add new women's teams or reinstate discontinued women's teams as a means of increasing the percentage of athletes who are women."[46]

One case of particular importance in the gender equity debate is *Cohen v. Brown University*, which falls in the latter category.[47] Because *Cohen* is the first accommodations case to be subjected to appellate review, I will analyze it to show how colleges and universities typically attempt to comply with Title IX and the current judicial response.[48]

The issues in *Cohen v. University* were first presented in *Cohen I* in 1992, by student members of the women's gymnastics and volleyball teams that Brown University ("Brown") demoted as part of a cost-cutting plan. The student-athletes, on behalf of a certified class, filed a class action suit against Brown and its president, alleging Title IX violations. The court in *Cohen I* issued a preliminary injunction which restored the teams to varsity status pending an actual trial on the mer-

42. *Id.* (citing Grove City v. Bell, 465 U.S. 555 (1984)).
43. *Id.* (citing P.L. 100-259, 102 Stat. 28 (1988)).
44. *Id.* (citing 20 U.S.C. § 1685 (1992)).
45. *See id.*
46. *Id.* at 612-13.
47. Cohen I, 809 F.Supp. 978 (D. R.I. 1992) (granting preliminary injunction), *aff'd*, 991 F.2d 888 (1st Cir. 1993), 879 F.Supp 185 (D. R.I. 1995) (trial on the merits), *aff'd in part, rev'd on other grounds*, 101 F.3d 155 (1st Cir. 1996) (affirming the reasoning and holding of the district court, reversing as to remedy). Each of the major court decisions that interpreted Title IX dealt with allegations of discrimination "in the allocation of participation opportunities between male and female athletes," which is the type of discrimination most often alleged. Brake & Catlin, *supra* note 22, at 61.
48. *See* Thro & Snow, *supra* note 41, at 613.

its.[49] Brown appealed and the court in *Cohen II* upheld the lower court preliminary injunction.[50] On remand, the court in *Cohen III* held that Brown violated Title IX, whereupon Brown moved for additional findings of fact and to amend judgment. The court, however, denied the university's motion. Brown timely appealed, and the court in *Cohen IV* upheld the reasoning and holdings of the lower court. The Court did, however, reverse the district court's rejection of Brown's proffered compliance plan and remanded the case to give Brown the opportunity to fashion a new plan.[51]

Brown is a National Collegiate Athletic Association ("NCAA") Division I institution for all sports except football, and accordingly its student-athletes compete at the highest level of intercollegiate athletics.[52] Brown operates a "two-tiered intercollegiate athletics program" based on two types of funding: university-funded and donor-funded varsity teams.[53]

When Brown demoted two women's teams and two men's teams to donor-funded status, plaintiffs filed a suit alleging that at the time of the demotion, men students already enjoyed a disproportionately large share of resources and participation opportunities.[54] Thus, "what appeared to be the even-handed demotions of two men's and two women's teams, in fact, perpetuated Brown's discriminatory treatment of women in the administration of its intercollegiate athletics program."[55]

The Court examined the evidence presented at the district court level regarding the participation/enrollment disparity percentages.[56] As of the 90-91 academic year, Brown funded 31 varsity teams, 16 for men and 15 for women, and of the 894 student-athletes, 63.3% were men and 36.7% were women.[57] By comparison, the enrollment percentages were 52.4% and 47.6%, respectively. As of the 93-94 academic year, the participation/enrollment percentages were 61.87%/48.86% for men and 38.13%/51.14% for women.[58] At that time, there

49. *See Cohen* I, 809 F.Supp. at 1001.
50. *See Cohen* II, 991 F.2d 888, 907 (1993).
51. *See Cohen* IV, 101 F.3d 155, 155 (1996).
52. *See id.* at 162 (citing Cohen III, 879 F.Supp. 185, 188 (1995)).
53. *See id.*
54. *See id.* at 163.
55. *Id.*
56. *See id.*
57. *See id.* (citing *Cohen* I, 809 F.Supp. 978, 980 (D. R.I. 1992)).
58. *See id.* (citing *Cohen* III, 879 F.Supp. 185, 192 (D. R.I. 1995)).

were 16 varsity sports for men and 16 for women.[59] Additionally, virtually all men's sports were created before 1927 while virtually all women's sports were created between 1971-1977.[60] In fact, the only women's sport added since 1977 is winter track, added in 1982.[61]

The district court in *Cohen III* reviewed these facts and found that "Brown maintained a 13.01% disparity between female participation in intercollegiate athletics and female student enrollment, and that 'although the number of varsity sports offered to men and women are equal, the selection of sports offered to each gender generates far more individual positions for male athletes than for female athletes.'"[62] The *Cohen III* court chose to examine the number of actual participants rather than simply the equal number of teams offered[63] because men's sports generally involve more players (i.e., football and soccer teams).[64] As a result, the Court upheld the district court's holding that Brown failed to effectively accommodate both genders under § 106.41(c)(1) and hence violated Title IX.[65]

One of the arguments presented by Brown in *Cohen IV* was that the district court's requirement for numerical parity transformed Title IX into an "affirmative action statute."[66] The Court rejected this argument and explained that Title IX is an anti-discrimination statute and that "[l]ike other anti-discrimination statutory schemes, the Title IX regime permits affirmative action . . . [and] an inference that a significant gender-based statistical disparity may indicate the existence of discrimination."[67] The Court went on to note that one cannot conclude from the fact that a judicial remedy is gender-conscious that "the remedy constitutes 'affirmative action.'"[68]

Brown also argued that the district court's decision in substance, and its application of the three-part test found in the Policy Interpre-

59. *See id.* (citing *Cohen* III, 879 F.Supp. at 192).
60. *See id.* (citing *Cohen* I, 809 F.Supp. at 980).
61. *See id.* (citing *Cohen* I, 809 F.Supp. at 980).
62. *Id.* at 163-64 (citing Cohen III, 879 F.Supp. at 198).
63. The Court in *Cohen* IV affirmed the *Cohen* II reasoning that a court may not find a Title IX violation "solely because there is a disparity between the percentage of students enrolled and the percentage of students participating in athletics." *Cohen* IV, 101 F.3d at 164-65 (citing *Cohen* II, 991 F.2d at 895).
64. Rodney Smith suggests that schools create women's football teams to help achieve equity in actual numbers. This would create a significant number of participation opportunities and would also include a wider range of women (all races and socioeconomic backgrounds) than the country club and prep school sports. *See* Mitten, *supra* note 4, at 1003-1004.
65. *See Cohen* IV, 101 F.3d at 166 (citing *Cohen* II, 991 F.2d at 897).
66. *Id.* at 170.
67. *Id.* at 170-71.
68. *Id.* at 172.

tation, forces it to give preferential treatment to women "in excess of women's relative interests and abilities."[69] The Court negated Brown's argument, noting that schools have a responsibility to *fully* and effectively accommodate the interests of the underrepresented gender.[70] It is simply not enough, explained the Court, to give merely *some* accommodation.[71] The *Cohen IV* Court also reasoned that "[t]he fact that the overrepresented gender is less than fully accommodated will not, in and of itself, excuse a shortfall in the provision of opportunities for the underrepresented gender."[72]

In *Cohen IV*, the Court articulated explicitly the way that Title IX is to operate:

> Title IX operates to ensure that the gender-segregated allocation of athletics opportunities does not disadvantage either gender. Rather than create a quota or preference, this unavoidably gender-conscious comparison merely provides for the allocation of athletics resources and participation opportunities between the sexes in a nondiscriminatory manner.[73]

The last significant defense presented by Brown asserted a "relative interest" argument which provided that any disparity in participation between men and women is a result of "a lack of interest . . . that is unrelated to a lack of opportunities."[74] The Court reviewed Brown's argument "with great suspicion" in light of the purpose of Title IX: "to remedy discrimination that results from stereotyped notions of women's interests and abilities."[75] The next point made by the Court is of major importance to the discussion of gender equity as well as the intersectional approach that I assert. It explained that an athlete's interest and ability "'rarely develop in a vacuum' [but rather] they evolve as a function of opportunity and experience."[76] The Court insightfully notes that Brown's argument does not evince a true measure of women's interest and abilities but instead serves as an ex-

69. *Id.* at 174.
70. *See id.* at 174 (citing *Cohen* II, 879 F.Supp. at 899) (emphasis added).
71. *See id.* (citing *Cohen* II, 879 F.Supp. at 899) (emphasis added).
72. *Id.* at 175 (citing *Cohen* II, 879 F.Supp. at 899).
73. *See id.* at 177.
74. *Id.* at 178.
75. *Id.* at 178-79.
76. *Id.* at 179. "[T]he Supreme Court has repeatedly condemned gender-based discrimination based upon 'archaic and overbroad generalizations' about women." *Id.* (citing Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)).

ample "of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports."[77]

One could use the Court's reasoning to springboard to an argument for the lack of access and opportunity experienced by Black women due to their dual disability: the combination of race and gender discrimination. While some may argue that Black women have not evinced sufficient interest or ability in sports in which they are traditionally underrepresented, I would argue, as the *Cohen IV* court does[78], that the absence of Black women's participation in large numbers in country club and prep school sports is evidence of the discrimination that precludes them from exposure to such sports early in their development. As stated, my life serves as the perfect example of what early exposure can lead to in the lives of young Black girls. But for my introduction to tennis at an early age, I would never have developed an interest in the sport nor the ability to perform at an advanced level. My potential would have always existed. However, only the combination of that potential and an opportunity for exposure lead to my participation and success in tennis at every level of the game.

Title IX will never achieve it's ultimate goal of gender equity if it does not articulate policies specifically geared to address the unique form of discrimination experienced by Black women. The continued addition of country club and prep school sports to achieve equity without corresponding programs to introduce such sports to Black girls at an early age will leave a significant portion of women out of the running for gender equity. In order to further expound on the aforementioned proposition, we next explore the doctrine of intersectionality.

II. THE INTERSECTIONALITY OF RACE AND GENDER

The Critical Race Theory Doctrine of Intersectionality, which is closely associated with Professor Kimberlé Crenshaw, attempts to integrate into employment discrimination law the actual experiences of an outsider group, in this instance, the experiences of African-American women.[79] Angela P. Harris explains: "[i]ntersectionality posits that African-American women share unique life experiences that dif-

77. *Id.* at 179.

78. *Id.* at 179 (The court reasons that lack of athletic ability and interest are often the result of little experience and few opportunities, and further, that discrimination is the basis for so few opportunities).

79. *See generally* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL FORUM 139.

fer from those of African-American men or white women."[80] The doctrine places the experiences of African-American women at the intersection of race and gender. Hence, to the extent that anti-discrimination laws analyze discrimination claims on a "single axis" framework (as does Title IX gender equity law), they necessarily fail to adequately address the discrimination felt by Black women as a result of multiple axes of influence.[81]

Arthur Mathewson uses a chemistry analogy to describe the theory of intersectionality:

> If the mixture [of race and gender] were actually a compound or solution, it would have properties that are different from the sum of the properties of the individual elements. Those new properties might cause it to be subject to forces that would not act upon the individual elements.[82]

When intersectionality is viewed in intercollegiate athletics, one can see that Title IX has failed Black women in numerous ways. This failure is examined by Wendy Olson:

> Title IX has done little to address the diverse needs and problems of groups within the women's sports movement, including those of women of color . . . . If it does not address the needs of all its members, the women's sports movement is a movement without a sense of itself. Despite the visibility of [several Black female athletes], the African-American woman has been largely absent from sport in two ways. First, African-American women are an overwhelmingly small proportion of those participating in collegiate sports. Second, when they do participate, African-American women are usually typecast into only a handful of sports.[83]

While it would be inaccurate to state that Black women have not benefited from the passage of Title IX, the concern is that Black females are not receiving benefits in equal proportion to those enjoyed by white females.[84] Mathewson argues that Title IX is not as effective in the lives of Black women because the statute is incapable of remedying "the historical station of Black women in sports."[85]

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80. *See* Angela P. Harris, *The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 832 (1994).

81. *See id.* However, the issue of intersectionality does not negate the fact that Black women can experience pure racism and pure sexism. *See also* Scales-Trent, *supra* note 15.

82. Mathewson, *supra* note 1, at 244.

83. Olson, *supra* note 8, at 127.

84. *See* Marilyn Yarbrough, *A Sporting Chance: The Intersection of Race and Gender*, 38 S. TEX. L. REV. 1029, 1035 (1997).

85. Mathewson, *supra* note 1, at 251. Mathewson's assertion is premised on his argument that Title IX's "equality model" is flawed because its singular focus is to remedy inequality and

The reality is that "maleness" and "whiteness" have carried great value in America for a long time. Thus, historically, Black women have been relegated to a subordinate position based on both race and gender.[86] Nonetheless, Scarborough notes that "Black women have not been viewed as a separate group with different concerns and experiences from both white women and Black men."[87] Accordingly, society tends to use broad based essentialist terms such as "Blacks" and "women," which translate into Black *men* and *white* women.[88] The result is the reinforcement of the "invisibility of Black women."[89]

Beverly Kearney spoke of her 'foothold' in the two conflicting worlds of race and gender in an article written by Elliott Almond.[90] In 1997, Kearney was chosen to head the National College Track Coaches Association and became the first African-American and the first woman to hold that title.[91] Almond reported that Kearney was disturbed by the reality that the subject of race is rarely discussed (or even acknowledged) in the national movement for gender equity.[92] The result of this awkward silence, says Kearney, is a "growing tension among African-American women who see race as the unwanted stepchild in the fight for equal rights on the playing fields."[93]

In the same article, Donna Lopiano, Executive Director of the Women's Sports Foundation, responded to Kearney's observations by asserting that race and gender are two different issues "which should be attacked fervently - but separately."[94] Perhaps the reluctance to embrace an intersectional approach is linked to the socially constructed perception that Blacks and women must compete for "limited pieces of the sports participation pie."[95] Yet the single-axis approach asserted by Lopiano fails to recognize that current gender equity law provides a remedy to Black women "only to the extent they are in-

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little else. It is further flawed in its presupposition that interest and ability are evenly distributed within gender and that all women stand on equal footing. *Id.* at 259, 260.

86. *See* Cathy Scarborough, Note, *Conceptualizing Black Women's Employment Experiences*, 98 YALE L.J. 1457, 1458 (1989).

87. *Id.*

88. *See id.* (emphasis added). Essentialist theorists, like Angela P. Harris, illustrate the invisibility of Black women by asserting that "[t]he essence of gender is a white woman model, the essence of Blacks is a Black male model." *See also* Mathewson, *supra* note 1, at 243.

89. Scarborough, *supra* note 86, at 1458.

90. *See* Almond, *supra* note 6, at A11.

91. *See id.*

92. *See id.*

93. *Id.*

94. *Id.*

95. Yarbrough, *supra* note 2, at 236 (citing Rosemary L. Bray, *Taking Sides Against Ourselves*, N.Y. TIMES MAG., Nov. 17, 1991, at 56).

jured by the force of gender discrimination like that faced by white women."[96] To the extent that Black women's athletic experiences are compromised by racism, or the simultaneous influence of racism and sexism, there is no remedy under Lopiano's approach.[97]

Timothy Davis asserts that the uni-axis approach to gender equity and the pervasive sentiment expressed by Lopiano illustrates "America's aversion to confronting directly the question of race in the context of sport."[98] Davis goes on to acknowledge the "blissful ignorance" of those who choose not to address the multiple factors of, among others, race and gender and their influences on college athletics.[99] In reality, it is impossible to successfully separate racial oppression from gender discrimination in the lives of Black women because "they are most often experienced simultaneously."[100] As a result, commentators believe that a comprehensive agenda for women and sports in the 1990s must "recognize the diversity of women in and out of the women's sports movement; and address the needs of all women in sports . . . ."[101]

The analysis of intersectionality in the context of intercollegiate athletics is extremely beneficial to understanding the broad themes within the Critical Race movement "[s]ince [sports] represents a microcosm of American society."[102] "[T]he historical reality of Afro-American women's continuous life-and-death struggle for survival and liberation" was born out of the "Black women's extremely negative relationship to the American political system (a system of white male rule)," which, says a Black feminist collective, "has always been determined by our membership in two oppressed racial and sexual castes."[103] Because discrimination encountered by African-Americans in intercollegiate sports "cannot be appreciated apart from the

96. Mathewson, *supra* note 1, at 244-45.

97. *See id.*

98. Davis, *supra* note 8, at 620.

99. *See id.* at 621.

100. Combahee River Collective, *A Black Feminist Statement*, *in* THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR 210, 213 (Cherríe Moraga & Gloria Anzaldúa eds., 2nd ed. 1983). "The Combahee River Collective is a Black feminist group in Boston whose name comes from the guerrilla action conceptualized and led by Harriet Tubman on June 2, 1863, in the Port Royal region of South Carolina. This action freed more than 750 slaves and is the only military campaign in American history planned and led by a woman." *Id.* at 210.

101. Olson, *supra* note 7, at 108.

102. Davis, *supra* note 8, at 617.

103. Combahee River Collective, *supra* note 100, at 210.

historical and social context from which those impediments spring."[104] Next, the historical treatment of Black Women in America will be traced in order to show how the larger community ills continue to plague the microcosms of society like the arena of sport.

III. THE HISTORY OF BLACK WOMEN IN AMERICA AND IN SPORT

> An examination of racism in college sport provides an opportunity for a discussion in a discrete context of the larger social significance of unconscious racism . . . [R]acial justice for African-Americans in college athletics, as in society, remains illusive, absent recognition of the impact of racism. Racism in sport thus represents a reflection of the pathology that pervades our society in general.[105]

Cathy Scarborough explains in her article that Black women have always worked in America.[106] Black women labored long hours as slaves both in the fields and in the homes of slave owners. As the fledgling country developed, Black women continued to labor as sharecroppers and domestics, factory workers, skilled and unskilled laborers, teachers, professionals—translation: slaves by any other name. In addition to holding at least one job, Black women fulfilled their "womanly" duty to care for their husbands, lovers, parents and children.[107] Despite this "history of industriousness," Black women have consistently faced racism and sexism in the work place; in fact Scarborough asserts that these forms of discrimination were impossible to avoid.[108] Judy Scales-Trent notes in *Women of Color at the Center*, that women of color continue to hold "marginal jobs" in disproportionate numbers.[109]

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104. Davis, *supra* note 8, at 623. *See* also Olson, *supra* note 7, at 149 ("For African-American women, the barriers to actual participation in sport can only be eliminated by addressing the role of the African-American woman in society.").

105. Davis, *supra* note 8, at 616.

106. *See* Scarborough, *supra* note 86, at 1457.

107. *See id.*

108. *See id.*

109. *See* Judy Scales-Trent, *Women of Color at the Center: Selection From The Third National Conference On Women of Color And the Law: Women of Color and Health: Issues of Gender, Community, and Power*, 43 STAN. L. REV. 1357, 1358 (1991). Women of color continue to occupy the "marginal jobs which provide no training, little security, no possibility of advancement, jobs where the wages are depressed because of the color and sex of the job holder. Women of color are the maids, the cleaners. They are the health care workers at the bottom rung of the health care industry; the lowest paid clericals; the women hidden in the sweatshops and the fields." *Id.*

Despite the obvious presence and prevalence of gender and race discrimination (or the combination of the two) in the work place, Black women have received little protection in American court rooms. Scarborough notes that the legal system, "has consistently ignored the[ ] social history [of Black women] and failed to truly understand their experiences or address their concerns."[110]

Clearly, the kind of job available is inextricably linked with the level and kind of education received.[111] The sad reality is that children of color receive substandard education far more often than their white counterparts. Scales-Trent makes the following observations: "Even in so-called integrated schools, second-generation discrimination funnels disproportionate numbers of these children into lower academic groups. With a decent education, some [children of color] might be able to stretch beyond the reach of racism. Without it, they will not."[112]

Education, in turn, is linked to the type of neighborhood in which one resides.[113] Women of color, often the primary (or sole) care-providers in the home, are often "selectively segregated" into ghettos by "landlords, mortgage money lenders, house sellers, and the municipal housing authorities."[114] In ghettos, where resources and funding are severely compromised, the result is a substandard education that often relegates women of color to marginal occupations.[115]

Black women also have a long history of political powerlessness in America.[116] Scales-Trent cites a 1976 study of the quality of American life that reinforces an earlier finding: "[C]ompared to white women and black and white men, [Black women] were shown to have the lowest levels of trust in the political process and the lowest feelings of political efficacy."[117] The study also reported that Black women suffer from a more negative overall sense of well-being and general satisfaction than any other segment of the population.[118] Clearly, Black women have a unique history within the larger society plagued by discrimination based on race, gender, and the combination of the two.

110. Scarborough, *supra* note 86, at 1457.
111. *See* Scales-Trent, *supra* note 109, at 1360.
112. *Id.*
113. *See id.*
114. *Id.*
115. *See id.*
116. *See* Scales-Trent, *supra* note 15, at 33.
117. *Id.* at 33-34.
118. *See id.* at 34.

A. History of Black Women in Sport

> Lack of access historically has been the case for Black women in two major ways: '(a) Black women have been disproportionately located at the lower end of the economic hierarchy and, therefore, have been unable to afford private golf, swimming, or tennis lessons. (b) Overt racial discrimination prevented black women from gaining access to the sports participated in by white women.'[119]

The benefits of sport in the lives of all people are extensive. The benefits in the lives of women in particular are important in light of the increased participation of females since Congress passed Title IX.[120] In 1971, 30,000 women were participating in sports.[121] The number increased to 135,000 women as of 1997.[122] Additionally, participation of high school aged girls grew from 300,000 in 1971 to approximately 2.4 million in 1997.[123]

The aforementioned statistics are so encouraging because participation in sports can benefit females in many ways.[124] It can give girls greater confidence and an increased sense of self-worth "by providing them a forum in which to learn how to assert themselves and, in team sports, to do so when others are relying on them."[125] It has also been asserted that sports can help girls have a more positive body image.[126] In general, girls have historically been socialized to "maintain their appearance" and to avoid any activity that may compromise that appearance, such as strenuous activity.[127] This creates a vicious cycle since if few girls participate, fewer still will be motivated to do so—perhaps, as one author suggests—because they believe females either aren't strong enough to participate or that to participate means that

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119. Yarbrough, *supra* note 84, at 1037 (citing WILBERT MARCELLUS LEONARD II, A SOCIOLOGICAL PERSPECTIVE OF SPORT 261-62 (4th ed. 1993)).

120. *See Cheering On Women*, *supra* note 10, at 1627 (citing Women's Sports Foundation, Total Number of Participants in High School and College 1 (Oct. 28, 1996) (unpublished fact sheet, on file with the Harvard Law Library); Jere Longman, *How The Women Won*, N.Y. TIMES, June 23, 1996, § 6 (Magazine), at 23; Abby Goodnough, *The Perks of Equality*, N.Y. TIMES, Dec. 16, 1996, at B1; Telephone Interview with Christine Chastine, Women's Sports Foundation (April 11, 1997)).

121. *See Cheering On Women*, *supra* note 10, at 1627.

122. *See id.*

123. *See id.* The author noted that female participation in recreational sports leagues also increased. *Id.*

124. *See* Thro & Snow, *supra* note 41, at 611 (stating that participation in sports tends to enhance the participants' "learning of important lessons about teamwork, winning and losing, and working hard toward a common goal.").

125. *Cheering On Women*, *supra* note 10, at 1637.

126. *See id.* at 1638.

127. *See id.*

one is masculine.[128] To the contrary, females who do participate realize the fallacy in the aforementioned belief. In fact, women are neither weak, nor frail, and they also need not be masculine to enjoy physical exertion and competition.[129]

Historically, Black women have been excluded from the image of women as weak and frail. Black women in America have never rested on the pedestal created to protect the supposed biologically and spiritually pre-determined timidity of women.[130] In fact, "[r]ather than being seen to possess the same positive feminine heterosexuality as white women, women of color athletes are often portrayed as animalistic and in need of male control."[131] Mathewson notes that Black women defied such taboos about strenuous competitive sport near the time of W.W.I.[132] In fact, in 1927 Tuskegee Institute was touted as having a very successful women's track program.[133]

Black women, like white women, were steered away from sports, but for different reasons. Black women often had to forego athletic opportunities due to "the necessity of work."[134] The late Arthur Ashe also made the same observation:

> Most Black women spent very little time in competitive organized sport. They worked in the home with few appliances of convenience. There were no washers and dryers, no dishwashers, no disposable diapers, and the average workday was twelve hours long. In the South, two-thirds of all Black women who worked outside their own homes did so as domestics in the homes of whites. The only time for recreation were Sunday and Saturday afternoons.[135]

Even when Black women did participate and excel, they were still uniquely burdened by more than gender discrimination. Opportunities for participation, professional pursuits, and resources were extremely limited (if not non-existent).[136] Black women were also

128. *See id.*

129. *See id.*

130. *See* Mathewson, *supra* note 1, at 245. *See* also Bradwell v. Illinois, 83 U.S. 130, 141 (1872) ("The paramount destiny and mission of [white] woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society."); Olson, *supra* note 7, at 109; Yarbrough, *supra* note 2, at 235 (noting that in sport participation and the greater society, "the experience of the African-American woman has never been that of the white woman.").

131. *Cheering on Women*, *supra* note 10, at 1633.

132. *See* Mathewson, *supra* note 1, at 245.

133. *See id.*

134. *Id.* at 246.

135. ARTHUR R. ASHE, A HARD ROAD TO GLORY 75 (1988).

136. Mathewson, *supra* note 1, at 256-57.

susceptible to stacking within a few sports (basketball and track and field), a lack of access to other sports, limited facilities, inadequate training, and very few role models.[137]

Title IX can never achieve its ultimate goal of gender equity unless and until policies are developed to address and counteract the effect of race on gender equity in the lives of Black women. The issues of race and gender as they affect Black women have been analyzed in the arena of employment. Therefore, Title VII jurisprudence can be used to illustrate the court's recognition of Black women as a separate and distinct class of plaintiff in workplace discrimination claims. I will next examine Title VII as an analogy to Title IX gender equity jurisprudence.

IV. BLACK WOMEN AS A SEPARATE AND DISTINCT CLASS UNDER TITLE VII AS AN ANALOGY FOR TITLE IX GENDER EQUITY

Title VII of the Civil Rights Act of 1964 is the legal framework under which discrimination claims in the context of the workplace are addressed.[138] Title VII applies to employers with fifteen or more employees,[139] and Title VII remedies are limited to equitable relief, which includes back pay and front pay, reinstatement or hiring, and attorney fees.[140] In pertinent part, Title VII states:

> It shall be an unlawful employment practice for an employer:
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[141]

137. *See id.* at 257.

138. *See* 42 U.S.C. § 2000e (1998). The Civil Rights Act of 1866, ch.31, 14 Stat. 27 (1877) (current version at 42 U.S.C. § 1981 (1998)) also addresses race discrimination in the workplace, however because this paper addresses race and gender discrimination, I chose to examine Title VII which covers both forms of discrimination (among other categories).

139. *See* 42 U.S.C. § 2000e(b) (1998).

140. *See id.* § 2000e-5(g) -(k) (1998).

141. 42 U.S.C. § 2000e-2(a) (1998).

The primary purpose of the statute, as evidenced by the legislative history and case law, is "to eradicate 'all aspects of discrimination.'" Thus, courts have held that Title VII "is a remedial statute to be liberally construed in favor of the victim of discrimination."[142] Cast in that light, Scarborough believes that courts have broad interpretive powers with respect to Title VII. When compared with Title IX, the questions to be answered are what is the ultimate goal of Title IX and whether that ultimate goal can be achieved without addressing the unique situation of Black women?[143]

The answers, though somewhat difficult to ascertain, can be found in Title IX's legislative history. Though sparse, it indicates that a major objective of the law is to correct the inequitable treatment of *women and girls* who attend federally funded educational institutions.[144] Consequently, all women and girls should benefit equally and to the fullest extent the law will allow.

Numerous Black women have brought Title VII claims against employers for alleged discrimination. In those cases, courts have generally refused to recognize Black women as a separate class of plaintiff with a cause of action for discrimination based on race and sex.[145] Courts tend to force Black women to choose either a race or sex claim even when a Black woman experiences discrimination based on the simultaneous influence of race and gender.[146] The articulated rationale for the courts' refusal to honor combination claims of race and gender is that there is just no easy way to "unbundle" such multiple discrimination.[147] Apparently for the sake of administrative convenience, courts either refuse to find Title VII violations based on combination claims, or implicitly require a plaintiff to choose one or the other at the pleading stage.[148] The unfortunate consequence for Black women, as has happened consistently throughout history, is that they must divide themselves and force their proverbial roundness into the square-like legal structure of Title VII.

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142. Scarborough, *supra* note 86, at 1473.
143. *See id.*
144. *See* Mathewson, *supra* note 1, at 248.
145. *See* Scarborough, *supra* note 86, 1467.
146. *See* Judith Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CAL. L. REV. 775, 797 (1991).
147. *Id.*
148. *See id. See also* Degraffenreid v. General Motors Assembly Div., 413 F.Supp. 142 (E.D. Mo. 1976).

However, a few courts have recognized Black women as a separate and distinct Title VII plaintiff and permitted them to assert a combined cause of action based on the confluence of race and gender.[149] For instance, in *Jefferies* the court permitted a Black woman to sue on the grounds of both race and sex discrimination. Even though the plaintiff could not prove race discrimination since a Black man was promoted over her, that did not preclude her from filing a combined race/gender cause of action.[150] The legal strategy employed in *Jefferies* represents one way to develop "a clear and effective legal construct for analyzing race-based gender discrimination . . . ."[151]

Although Title VII cases in which courts recognized the experiences of Black women as distinguishable from those of Black men and white women are not directly related to gender equity under Title IX, "they are illustrative of the general treatment of Black women in society."[152] For example, in *Degraffenreid*, the court refused to recognize Black women as a distinct class due to the fear of a "Pandora's Box" scenario.[153] Crenshaw's response to this rationale is that "the court's refusal . . . to acknowledge that Black women encounter combined race and sex discrimination implies that the boundaries of sex and race discrimination doctrine are defined respectively by white women's and Black men's experiences."[154]

149. *See* Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416 n.2 (10th Cir. 1987) (holding under Title VII, that discrimination can exist even in the absence of discrimination against a black man or white woman); Jefferies v. Harris County Comm. Action Ass'n, 615 F.2d 1025, 1034 (5th Cir. 1980) (holding that "[r]ecognition of black females for purposes of the prima facie case and proof of pretext is the only way to identify and remedy discrimination directed toward black females"); *but cf.* Degraffenreid, 413 F.Supp. at 143 (holding that Black female plaintiffs could bring an action based on race or sex, but not both. The court feared that recognition of a separate class "would give them relief beyond what the drafters . . . intended.").

150. *See* Winston, *supra* note 146, at 800 (citing Jefferies v. Harris County Comm. Action Ass'n, 615 F.2d 1025 (5th Cir. 1980)).

151. Winston, *supra* note 146, at 805. *Jefferies*, however, has been criticized because of its "sex-plus" analysis. It is argued that sex-plus cases are little improvement from the either/or approach because it "forces Black women to choose gender as their principal identification, thereby perpetuating a fundamental misunderstanding of the nature of discrimination experienced by Black women, most of whom do not consider their race to be secondary to their sex." Scarborough, *supra* note 86, at 1471. While I agree that the sex-plus approach is far from perfect, its existence can be used to argue that if neutral factors are recognized under the law as additional influences, then listed categories (already recognized as protected) should also be recognized as valid in combination claims.

152. Yarbrough, *supra* note 2, at 234.

153. *See Degraffenreid*, 413 F.Supp. at 145.

154. Crenshaw, *supra* note 79.

CONCLUSION

The Black female athlete's lack of access to historically white sports must be remedied by way of heightened sensitivity to the unique history and present circumstance of Black women who endure the simultaneous influence of race and gender. Without new policies and regulations specifically crafted to recognize and eradicate the simultaneous influence of race and gender in the lives of Black women, Title IX will never achieve it's ultimate goal of gender equity in federally-funded institutions. Fashioning such regulations and policies will jump-start a dialogue on the issue of intersectionality that is long overdue in the legal community and will serve as a connection between those in pursuit of gender equity, those in pursuit of racial equality, and those of us who must pursue both goals simultaneously.

TONYA M. EVANS*

* ©1998 Tonya M. Evans, Esq. The author is a Black woman who received her *Juris Doctor* from the Howard University School of Law in 1998. From 1987 to 1991, the author attended Northwestern University on a full four-year tennis scholarship and from 1991 to 1995, she competed on the women's professional tennis tour. The highlights of her professional career include competing at the US OPEN in 1993, and in England, Australia, South America, the Caribbean and Southeast Asia.