

Forfeit: Opportunity, Choice, and Discrimination Theory Under Title IX

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ABSTRACT: Title IX, included as part of the Education Amendments of 1972, is justly credited with creating a revolution for women and their access to sports. Yet the work of eradicating discrimination in sports is far from over. Commentators lament that progress has slowed and even stagnated in recent years as the percentage of women engaged in intercollegiate sports has remained steady rather than increasing. Female college students participate in intercollegiate athletics at a rate significantly below that of their male counterparts. Nationally, women comprise approximately fifty-five percent of all college students, yet they represent only about forty-three percent of all intercollegiate athletes. But the myopic focus on achieving proportionality at the university level has narrowed our focus to a numbers game that impacts a relatively small percentage of college students. This Article presents a broader and more nuanced discussion of the relationship among gender, sports, and discrimination. A more thoughtful (and less dogmatic) consideration of this issue is long overdue. This continued emphasis on participation rates in universities as the primary, if not the sole, evidence of discrimination masks a host of complex and interrelated issues that are largely ignored. Women's lower level of interest in sports is far more than a stereotype; it has been repeatedly confirmed in social science research. The gender gap in sports participation is well established long before these students reach college. Rather than dismissing such findings as sexist stereotypes, we need to pay closer attention to the reasons for such choices in order not only to eradicate discrimination, but also to identify the multiple factors that produce this outcome. Equality of opportunity is only part of a much larger set of issues concerning how we structure our sports programs and what underlying values those programs are or should be promoting.

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INTRODUCTION

Title IX, included as part of the Education Amendments of 1972,¹ is justly credited with creating a revolution for women and their access to sports. At the time of its enactment, a mere 300,000 girls played high school sports. That number has swelled to over 3 million female participants in the 2008-2009 academic year.² The number of female intercollegiate athletes increased from approximately 30,000 to 175,000 during that same period.³ Legendary female athletes such as Mia Hamm, Marion Jones, Serena Williams, and Venus Williams are as well known as some of their male counterparts. Without the

1. Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-909, 86 Stat. 373, 374-75 (1972) (codified as amended at 20 U.S.C. §§ 1681-1688 (2006)).

2. NAT’L FED’N OF STATE HIGH SCH. ASS’NS, 2008-09 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY 48 (2009), <http://www.nfhs.org/content.aspx?id=3282&linkidentifier=id&itemid=3282> [hereinafter HIGH SCHOOL PARTICIPATION SURVEY] (reporting 3,114,091 female participants).

3. The participation numbers for 1972 include recreation programs and therefore are clearly overstated; unfortunately, they apparently are the only available data. See NCAA, 1981-82–2006-07 NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 201 (2008), available at <http://www.ncaapublications.com/p-4124-participation-rates-1981-82-2006-07-ncaa-sports-sponsorship-and-participation-rates-report.aspx> [hereinafter NCAA PARTICIPATION RATES REPORT]. There were 174,534 participants in 2006-2007, the most recent year for which data are available from the NCAA. *Id.* at 61.

force of law, high schools and universities likely would have been considerably slower to support the kind of expansion that fueled such successes.

Yet the work of eradicating discrimination in sports is far from over. Female athletes and teams remain a distant second in public support and media attention. Girls continue to lag behind their male classmates in taking part in sports in high school.⁴ Commentators lament that progress has slowed and even stagnated in recent years as the percentage of women engaged in intercollegiate sports has remained steady rather than increasing.⁵ Female college students participate in intercollegiate athletics at a rate significantly below that of their male counterparts. Nationally, women comprise approximately fifty-five percent of all college students, yet they represent only about forty-three percent of intercollegiate athletes.⁶ While the percentage of women attending college continues to grow, the percentage of intercollegiate athletes who are women has remained relatively stable in recent years.⁷ This lack of proportionality has been the starting point for virtually every discussion about gender equity in athletics. By allowing it to become the end point as well, however, we disadvantage women and our educational institutions.

Women's participation rates in intercollegiate athletics may indeed have stagnated, but so has our discussion of the issue. Although tracking participation rates provides important evidence of Title IX's impact on sports, the lack of proportionality is too often used as proof positive of discrimination. While there is ample evidence of past gender discrimination in intercollegiate athletics, and discrimination no doubt continues at some institutions, the proportional underrepresentation of women in intercollegiate athletics reflects a consistent pattern of proportional underrepresentation in sports at the high school level. If there is discrimination in the system, it starts long before our best athletes are ready for competition at the university level.

Women's relative lack of interest in sports is far more than a stereotype; it has been repeatedly confirmed in social science research. To date, the approach of many Title IX advocates has been to label those data the result of

4. See *infra* note 130 and accompanying text.

5. See, e.g., JOHN CHESLOCK, WOMEN'S SPORTS FOUND., WHO'S PLAYING COLLEGE SPORTS? TRENDS IN PARTICIPATION 3 (2007), available at <http://www.womenssportsfoundation.org/~media/Files/Research%20Reports/Whos%20Playing%20College%20Sports/fullreport.pdf> (noting that progress has "stalled"); Deborah J. Anderson, John J. Cheslock & Ronald G. Ehrenberg, *Gender Equity in Intercollegiate Athletics: Determinants of Title IX Compliance*, 77 J. HIGHER EDUC. 225, 226 (2006) (stating that "gender equity [is] far from complete").

6. According to the U.S. Census figures for 2008, there were 14,955,000 total undergraduates, with women comprising 8,218,000 (54.95%) of that group. U.S. Census Table A-7, College Enrollment of Students 14 Years Old and Over (2008), available at www.census.gov/population/socdemo/school/TableA-7.xls. In 2006-2007, there were 174,534 female intercollegiate athletes and 233,830 male intercollegiate athletes. NCAA PARTICIPATION RATES REPORT, *supra* note 3, at 61-62.

7. See JOHN CHESLOCK, WOMEN'S SPORTS FOUND., WHO'S PLAYING COLLEGE SPORTS?: MONEY, RACE AND GENDER 3, 10 (2008), available at <http://www.womenssportsfoundation.org/~media/Files/Research%20Reports/Money%20Race%20%20Gender.pdf> ("[T]he gap between men's and women's participation has not meaningfully narrowed [from] 2001-[20]02" to 2004-2005.).

discrimination and to demand a fix in the form of proportional representation of women among college athletes. A more thoughtful consideration of this issue is long overdue. Our continued emphasis on participation rates in universities as the primary, if not the sole, evidence of discrimination masks a host of complex and interrelated issues that are largely ignored. We lose sight of the much bigger picture and a range of problems that will likely remain long after we achieve the magic number. We also prevent a discussion about whether proportionality is a justifiable shorthand for the absence of discrimination or even the best goal to achieve. The choices girls are making may not be choices at all if they result from a lack of opportunities and resources. On the other hand, these choices may also reflect considered decisions not to be consumed by a narrow and short-lived world of physical competition when longer-term goals are at stake.

The purpose of this Article is to attempt a broader and more nuanced discussion of the relationship among gender, sports, and discrimination. Title IX is almost forty years old and should be maturing beyond its one-dimensional and outdated beginnings. The demand for proportionality is reminiscent of the focus on formal equality in employment that has long been abandoned by most feminist scholars.⁸ Equality of opportunity is only one part of a much larger set of questions as to how we structure our sports programs and what underlying values those programs promote. Just as the scrutiny of discrimination in the workplace has evolved to consider how the structure and values of the workplace may reinforce traditional roles and stereotypes for men and women, achieving equality in sports requires a multifaceted examination of a wide range of factors to both determine the causes of the disparity and define the appropriate goals.

As we define these goals, we may find that women's proportional participation in the abuses and excesses of our largest athletic programs is not in the best interests of these students or those institutions. Those interests may be better served by looking more broadly at the role of sports in the lives of students. We need to spend more time discussing and identifying some guiding principles and considering how best to achieve them. The price we pay for using the shortcut of proportionality as our measure of discrimination may be shortchanging our female students in the long run. Encouraging exercise as part of a balanced lifestyle, for example, may be a goal more worthy of our athletic resources than fueling the elite world of intercollegiate athletics, which benefits only a handful of students even when proportionality is achieved.

Part I of this Article provides a brief discussion of the history of Title IX, focusing in particular on the proportionality standard, the "accommodation of interests" test, and related statutory interpretations offered by the statute's enforcement agency, the Office for Civil Rights (OCR). Part II addresses the

8. See *infra* notes 110-118 and accompanying text.

problems with equating lack of proportionality with discrimination. By ignoring the size of the pool of qualified individuals from which intercollegiate athletes are selected, the proportionality measure fundamentally overestimates the number of female athletes available for college-level competition. Turning to the accommodation of interests test, this Article examines whether such a test is legitimate or whether it only serves to mask past discrimination, as some courts and Title IX advocates regularly claim. Part III considers evidence about girls' and women's interest and participation in sports from two major research studies. The first study surveyed students in the third through twelfth grades, as well as their parents. The second study draws on surveys of college men and women, with particular focus on the behavior and attitudes of freshmen. Both studies examine a variety of factors that affect interest in sports participation but ultimately confirm that actual interest in sports varies by sex.

Part IV of the Article seeks to re-examine our goals under Title IX and suggests both short-term and long-term strategies for achieving equality in college sports. The process of expanding women's interest in sports needs to begin long before college. Middle and high schools need to provide a wide range of activities to encourage all of their students to develop lifelong habits of exercise and physical fitness. For the vast majority of students, this goal has little to do with intercollegiate athletics and everything to do with long-term health benefits. Similarly, at the college and university level, the investment in varsity sports for the elite should be balanced with wide-ranging recreation programs for the broader student body. At the same time, the very structure of intercollegiate athletics may need to be changed in significant ways, such as limiting the hours of commitment, in order to entice women to participate. Achieving equality in sports requires a much more sophisticated discussion that moves beyond our current focus on the numbers.

I. TITLE IX AS ENFORCED AND APPLIED

A. *The Evolution of Title IX Theory*

Title IX, in simple terms and without elaboration, prohibits discrimination “on the basis of sex” by any institution receiving federal funds.⁹ Although

9. “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” Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 373 (1972) (codified as amended at 20 U.S.C. § 1681(a) (2006)). For a more complete discussion of the history of Title IX, see, for example, NAT'L WOMEN'S LAW CTR., *BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX AND ATHLETIC OPPORTUNITIES* (2007); B. Glenn George, *Who Plays and Who Pays: Defining Equality in Intercollegiate Athletics*, 1995 WIS. L. REV. 647; Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 SETON HALL J. SPORT L. 391 (1997) [hereinafter

intercollegiate athletics programs were not the target of Title IX or even an issue for discussion when the statute was passed, the scope of the legislation and its potential impact on sports quickly became a concern.¹⁰ The National Collegiate Athletic Association (NCAA), the umbrella organization overseeing most college sports, lobbied to exclude all college sports from Title IX. The NCAA executive director condemned the legislation as the “possible doom of intercollegiate sports.”¹¹ Senator John Tower (R-TX) promptly introduced legislation to exclude “revenue sports” from Title IX, which would have effectively insulated men’s football and basketball from any ill effects. Although Senator Tower was unable to garner enough support to pass his amendment, Congress did enact a compromise proposed by Senator Jacob Javits (R-NY). The Javits Amendment directed the Secretary of Health, Education and Welfare (HEW) to develop implementation regulations for intercollegiate athletics, with “reasonable provisions considering the nature of particular sports.”¹²

OCR was assigned the task of enforcing Title IX and developing the regulations required by the Javits Amendment. The regulations, finalized in 1975, included permission for schools to continue operating separate teams for members of each sex, with some limitations.¹³ In further defining the meaning

Heckman, *Scoreboard*]; and Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1 (1992). For an overview of Title IX cases involving intercollegiate athletics, see Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Education*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 551, 568-78 (2003) [hereinafter Heckman, *Glass Sneaker*].

10. In the decade following Title IX’s enactment, lower courts disagreed about whether the prohibition of sex discrimination applied only to the program receiving federal funds or to the entire institution. Since few intercollegiate athletic programs were eligible for any type of federal funding, the more restrictive interpretation would not have applied Title IX to athletics. The Supreme Court decided the issue in 1984, limiting Title IX’s application to the program receiving federal funds. *Grove City Coll. v. Bell*, 465 U.S. 555 (1984). Congress quickly rejected this position, amending Title IX to subject the entire institution (including athletics) to the anti-discrimination requirement if any program within the institution accepts federal funds. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified as amended at 20 U.S.C. § 1687 (2006)). Thus, virtually all colleges and universities and most secondary schools are now subject to Title IX limitations.

11. 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. Frey eds., 1985) (quoting Bart Barnes & Nancy Scannell, *No Sporting Chance: The Girls in the Locker Room*, WASH. POST, May 12, 1974, at A-14).

12. Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974) (codified at 20 U.S.C. § 1681 note).

13. Not surprisingly, schools are permitted to segregate students by sex into separate teams for the same sport. If a sport (such as football) is offered for only one sex, the “disadvantaged” sex—typically women—may still be excluded if the team in question is a “contact” sport. The regulations provide:

Athletics

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

(b) Separate Teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of

of “equal athletic opportunity for members of both sexes,”¹⁴ the regulations listed ten factors for consideration:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice, and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.¹⁵

Many of these factors suggest relatively straightforward comparisons. For example, Title IX may require equitable travel and equipment budgets for the men’s and women’s basketball teams.¹⁶ The first factor, however, requiring the institution to “accommodate the interests and abilities” of both sexes, has been far more troublesome. This issue spoke directly to the respective opportunities available for participation, not just the support and funding for student-athletes already participating in the program.

one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

34 C.F.R. § 106.41(a)-(b) (2009).

14. *Id.* § 106.41(c).

15. *Id.*

16. *Id.* § 106.41(c)(4). As clarified by a later interpretation of the regulations, however, OCR measures equity of support program-wide, not sport by sport. See Title IX of the Education Amendments of 1972; Policy Interpretation, Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,422 (Dec. 11, 1979) (stating that compliance is to be measured by “program wide benefits and opportunities,” not a “sport-specific comparison”); see also *id.* at 71,415 (“Institutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect. Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effect of any differences is negligible.”). In theory, a limited budget for the women’s basketball team (compared to a much better funded men’s basketball team) might be offset by a more generous budget for the women’s volleyball team. As a practical matter, however, the problem historically has been lower funding and support for all women’s teams, thus making a sport-by-sport comparison a legitimate approach. See, e.g., *Landow v. Sch. Bd. of Brevard County*, 132 F. Supp. 2d 958 (M.D. Fla. 2000) (comparing support for high school programs in men’s baseball and women’s softball); B. Glenn George, *Miles To Go and Promises To Keep: A Case Study in Title IX*, 64 U. COLO. L. REV. 555 (1993) (comparing the budgets of the men’s and women’s basketball teams at the University of Colorado at Boulder for the 1991-1992 season); Heckman, *Glass Sneaker*, *supra* note 9, at 580-81.

In 1979, OCR issued a Policy Interpretation in an effort to explain the 1975 regulation requiring the accommodation of interests and abilities.¹⁷ This Policy Interpretation provided three alternative approaches to measure compliance:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
- (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.¹⁸

Although OCR attempted to provide three choices for achieving compliance, the first test requiring proportionality proved to be the only practical option for many universities. The second alternative (“a history and continuing practice of program expansion”) was unavailable unless the school was in the process of active expansion. A common pattern was the addition of women’s sports teams shortly after the enactment of Title IX in 1972, with few additions after that time. The case of *Cohen v. Brown University* is a typical example.¹⁹ In 1991, women represented 47.6% of Brown University’s student body but only 36.7% of the student-athletes. In response to university-wide budget cuts, Brown decided to eliminate four sports: women’s gymnastics, women’s volleyball, men’s golf, and men’s water polo.²⁰ The female gymnasts and volleyball players promptly sued to stop the cuts. Even though Brown pointed to its evenhanded treatment by cutting two teams for each sex, the lack of proportional representation proved fatal to its defense.

With the proportionality defense clearly unavailable, Brown attempted in the district court to rely on its history of expanding the women’s sports program to satisfy the second test under the Title IX Policy Interpretation.²¹

17. Policy Interpretation, Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,413.

18. *Id.* at 71,418.

19. 809 F. Supp. 978 (D.R.I. 1992) (*Brown I*), *aff’d*, 991 F.2d 888 (1st Cir. 1993) (*Brown I*), *remanded to* 879 F. Supp. 185 (D.R.I. 1995) (*Brown II*), *aff’d in part, rev’d in part*, 101 F.3d 155 (1st Cir. 1996) (*Brown II*).

20. *Brown I*, 809 F. Supp. at 981. At the time, Brown supported thirty-one varsity teams, including sixteen men’s teams and fifteen women’s teams. *Id.* at 980.

21. In the appellate court, the university argued “that the district court erred [in concluding that Brown had not satisfied the second prong of the test] by not crediting it sufficiently for its dramatic expansion of women’s sports in the 1970s” *Brown I*, 991 F.2d at 903. Brown had also unsuccessfully asked the district court to define the second prong broadly by considering other

But *Brown* had added all but one of its women's teams between 1971 and 1977, and, except for the addition of women's winter track in 1982, the athletic program had remained unchanged until *Brown's* decision in 1991 to downsize.²² The First Circuit found that *Brown* had failed to meet the second prong of the test, concluding, "The very length of this hiatus suggests something far short of a continuing practice of program expansion."²³

The *Brown* case also demonstrates the inherent problem with the third option offered by OCR, at least in circumstances where a university is attempting to reduce its athletic program by eliminating a women's team. Since the plaintiffs were female athletes fighting to keep their teams and continue participating in intercollegiate athletics, the court concluded that *Brown* obviously was not "fully and effectively" accommodating the athletic interests of at least these female students.²⁴ The Tenth Circuit reached the same conclusion when Colorado State University attempted to cut both its men's baseball team and its women's softball team.²⁵

Since *Brown* had no current plans or recent history of expansion to satisfy the second option and since the very fact of the lawsuit clearly demonstrated women's interest in competing, the university was left with proportionality as the only available standard for Title IX compliance. With 47.6% female students but only 36.7% female athletes, the university failed the proportionality test, and the First Circuit in *Brown I* enjoined the elimination of

improvements in the women's program, such as the addition of more and better coaches. *Brown I*, 809 F. Supp. at 991.

22. *Brown I*, 809 F. Supp. at 981.

23. *Brown I*, 991 F.2d at 903; see also *Roberts v. Colo. State Univ.*, 814 F. Supp. 1507, 1514 (D. Colo. 1993), *aff'd in part, rev'd in part sub nom. Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993) (rejecting the defendant's assertion of program expansion by noting that no new women's intercollegiate teams had been added since the 1970s). *But see Boucher v. Syracuse Univ.*, No. 95-CV-620, 1998 WL 167296 (N.D.N.Y. Apr. 3, 1998) (finding that ongoing efforts to support women's athletics satisfied the second option under the three-part test, even though Syracuse had not added a women's sport in fourteen years), *aff'd in part, dismissed in part, vacated in part*, 164 F.3d 113, 116 (2d Cir. 1999). The issue was not reached on appeal. *Boucher*, 164 F.3d at 119.

24. *Brown I*, 991 F.2d at 903-04. Indeed, three and a half years later the *Brown II* court went so far as to suggest that evidence demonstrating a lack of women's interest alone would never be sufficient to justify disproportionate opportunities: "We conclude that, even if it can be empirically demonstrated that, at a particular time, women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletics opportunities for women than for men." *Brown II*, 101 F.3d at 180. The court's comment was dictum, however, as evidenced by the sentence which followed: "Furthermore, such evidence is completely irrelevant where, as here, viable and successful women's varsity teams have been demoted or eliminated." *Id.*

25. *Roberts*, 998 F.2d at 832 n.11 ("Although the full and effective accommodation of athletic interests is likely to be a complicated issue where allegedly underrepresented plaintiffs sue to force a university to create a neoteric team or upgrade the status of a club team, there is unlikely to be any comparably turbid question as to interest and ability where, as here, plaintiffs are seeking merely to forestall the interment of healthy varsity teams." (quoting *Brown I*, 991 F.2d at 904)); see also *Favia v. Ind. Univ. of Pa.*, 812 F. Supp. 578, 585 (W.D. Pa. 1993) (granting a preliminary injunction requiring the university to reinstate the women's field hockey and gymnastics teams), *aff'd*, 7 F.3d 332 (3d Cir. 1993). See generally Heckman, *Glass Sneaker*, *supra* note 9 (discussing cases and threatened litigation under Title IX involving intercollegiate athletics).

any women's teams.²⁶ When Colorado State University attempted to eliminate its men's baseball and women's softball teams several years later, it faced the same proportionality problem. Although the elimination of both teams improved the percentage of female athletes compared to female students, a 10.6 percentage point disparity between male and female athletes remained.²⁷ The softball players successfully enjoined the implementation of Colorado State University's decision by pointing to the university's failure to meet the proportionality standard.²⁸

With OCR's second and third options for Title IX compliance factually unavailable in many instances, universities often have been left with the first alternative as the only remaining method of Title IX compliance. Thus, the proportion of female student-athletes compared to their percentage in the student population as a whole has become the default measure for discrimination in a number of cases. Application of the standard requires only a comparison of the percentages of men and women in the student body as a whole to the percentages of men and women among student-athletes. If the student body mirrors the national averages with women representing fifty-five percent of all students but only forty-three percent of all intercollegiate athletes,²⁹ for example, the institution fails the test. The test's simplicity and ease of application are inherently appealing.

By contrast, the courts have had no difficulty in upholding a school's right to eliminate men's teams, often as a means of moving towards proportionality. Although male athletes sometimes attempt to claim discrimination and the failure to accommodate their own interests, such arguments are routinely rejected.³⁰ As the advantaged sex, at least in proportionality terms, these athletes find no protection in Title IX.

26. *Brown I*, 809 F. Supp. at 981.

27. *Roberts*, 814 F. Supp. at 1513. The elimination of baseball cut fifty-five male athletes from the program, while the elimination of softball cut only eighteen female athletes. *Id.* at 1514.

28. *Id.* at 1519. *But see* *Pederson v. La. State Univ.*, 912 F. Supp. 892 (M.D. La. 1996), *aff'd in part, rev'd in part*, 213 F.3d 858 (5th Cir. 2000). In considering Louisiana State University's failure to offer women's fast-pitch softball, the *Pederson* court stated that the "effective accommodation of interests and abilities" remained the benchmark of Title IX compliance, not proportionality. *Id.* at 915. The court found a violation of Title IX based on the demonstrated interests of the female students and the fact that the school did have a men's baseball team. Nonetheless, the court suggested that student surveys or other evidence of lack of interest might be used to reach a different result in another case. *Id.* at 915-16.

29. *See supra* note 6 and accompanying text.

30. *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608 (6th Cir. 2002) (rejecting the retention of a men's team where the university had not met the proportionality standard); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1047 (8th Cir. 2002) (same); *Neal v. Bd. of Trs. of the Cal. State Univs.*, 198 F.3d 763 (9th Cir. 1999) (same); *Kelley v. Bd. of Trs.*, 35 F.3d 265 (7th Cir. 1994) (same).

In an effort to save men's wrestling (a program often eliminated when schools have sought to cut men's sports), the National Wrestling Coaches Association sued the Department of Education in 2003 in an unsuccessful attempt to challenge OCR's 1996 Clarification of the three-part test as a "quota" system. *Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ.*, 263 F. Supp. 2d 82 (D.D.C. 2003), *aff'd*, 366 F.3d 930 (D.C. Cir. 2004); *see* Christopher Flores, *Wrestling Coaches Sue Education Department over Title IX Enforcement*, CHRON. OF HIGHER EDUC., Feb. 1, 2002, at A39; *see also* Coll. Sports Council v.

Courts have generally accepted OCR's regulations, including its proportionality standard, with little discussion. The First Circuit in *Brown I*, for example, noted the Javits Amendment's explicit congressional delegation of "the task of prescribing standards for athletic programs under Title IX."³¹ Consequently, the 1975 regulations were entitled to "controlling weight"³² and the 1979 Policy Interpretation was granted "appreciable deference."³³ Other courts have followed suit.³⁴

Two factors combine at many institutions to make proportionality a difficult standard to meet: football and the growing percentage of women that make up student bodies at the college level. Football, with eighty-five allotted scholarships³⁵ and an average squad size of 107 in Division I,³⁶ has far more male student-athlete slots than any other sport.³⁷ No women's sport comes close in terms of the numbers required. For women, rowing is the largest team, with sixty participants on average,³⁸ although the NCAA permits only twenty scholarships for the sport³⁹ and the average size for men's rowing teams is significantly smaller at forty-eight.⁴⁰ For most other teams, the average squad sizes for men and women are comparable. In women's and men's basketball, for example, the averages are fifteen and 15.3, respectively; for outdoor track

Dep't of Educ., 357 F. Supp. 2d 311 (D.D.C. 2005) (holding that the wrestling associations lacked standing to challenge the Clarification), *aff'd in part and rev'd in part*, 465 F.3d 20 (D.C. Cir. 2006).

31. *Brown I*, 991 F.2d at 895.

32. *Id.* (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

33. *Id.*

34. *See, e.g., Miami Univ. Wrestling Club*, 302 F.3d at 608 (holding that the 1979 Policy Interpretation was entitled to "controlling weight"); *Chalenor*, 291 F.3d at 1047 ("We conclude, as did the [*Brown I*] court, that the policy interpretation constitutes a reasonable and 'considered interpretation of the regulation.' Therefore, controlling deference is due it.") (citations omitted); *Neal*, 198 F.3d at 771 (stating that OCR's 1996 Clarification of the 1979 Policy Interpretation and the letter explaining the clarification "merit[ed] deference"); *Boulanhanis v. Bd. of Regents*, 198 F.3d 633, 637-38 (7th Cir. 1999); *Kelley v. Bd. of Trs. of Univ. of Ill.*, 832 F. Supp. 237, 242 (C.D. Ill. 1993) ("Although the law might be interpreted differently, the Court must give deference to regulations and interpretations promulgated under the authority of Congress and existing case law interpreting Title IX."), *aff'd*, 35 F.3d 265 (7th Cir. 1994); *Roberts v. Colo. State Univ.*, 814 F. Supp. 1507 (D. Colo. 1993), *aff'd in part, rev'd in part sub nom. Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993); *Favia v. Ind. Univ. of Pa.*, 812 F. Supp. 578, 584 (W.D. Pa. 1993) ("OCR's policy interpretation deserves our great deference."), *aff'd*, 7 F.3d 332 (3d Cir. 1993).

35. NCAA, 2009-10 NCAA DIVISION I MANUAL § 15.5.6.1 (2009), available at <http://www.ncaapublications.com/productdownloads/D110.pdf> [hereinafter NCAA DIVISION I MANUAL].

36. NCAA, 2005-2006 NCAA GENDER-EQUITY REPORT 13 (2008), available at <http://www.ncaapublications.com/Uploads/PDF/GenderEquityRept-Final6f8612fc-aacf-4cf1-859a-0b556c6124f9.pdf> [hereinafter NCAA GENDER-EQUITY REPORT].

37. *Id.*

38. *Id.*

39. NCAA DIVISION I MANUAL, *supra* note 35, at § 15.5.3.1.2.

40. NCAA GENDER-EQUITY REPORT, *supra* note 36, at 13. Such a disparity in the average rowing team size for the same sport suggests that schools may be inflating the number of participants on the women's teams to improve their male-female ratios. One might question whether these additional female team members in fact enjoy the same opportunities for participation and competition as male team members.

and field, thirty-five and thirty-seven, respectively; and for swimming and diving, identical averages of twenty-six.⁴¹ Thus, in order to match the large numbers of male athletes playing football, a university would need to offer three or four additional women's sports. Indeed, with student bodies often approaching sixty percent women, most schools need to do more than match the numbers of male and female intercollegiate athletes in order to reach proportionality.⁴²

Having observed the hard lessons learned by Brown University and Colorado State University, the recent actions of James Madison University (JMU) may illustrate the path that seems to provide an immediate and easy answer, especially as universities face increasing financial challenges. In 2006, JMU was beating the national average, with its intercollegiate athletes almost evenly split between men and women (49.3% men and 50.7% women). The student body, however, was sixty-one percent female, leaving a gender gap of over ten percentage points. With the stated goals of reducing costs and achieving proportionality in a single move, the governing Board of Visitors voted to eliminate ten sports from its athletic program, including seven men's teams (archery, cross country, gymnastics, indoor track, outdoor track, swimming, and wrestling) and three women's teams (archery, fencing, and gymnastics).⁴³ The end result was a much leaner program with the percentage of female athletes now mirroring the student body. An organization of athletes, coaches, parents, fans, and alumni sued JMU, alleging violations of Title IX, the Equal Protection Clause of the Constitution, and the Administrative Procedure Act. Such claims were unlikely to succeed under available

41. *Id.* Participant numbers should not be confused with scholarship numbers. The NCAA limits scholarships by sport but does not limit participant numbers. Football is permitted eighty-five "counters" (scholarship athletes) in Division I-A, while rowing, with twenty, is the sport with the largest number of women's scholarships. See NCAA DIVISION I MANUAL, *supra* note 35, at §§ 15.5.1, 15.5.3.1.2, 15.5.6.1. In an effort to help schools close the gender gap in scholarship dollars, the NCAA permits more scholarships for women in several sports than men. Steve Berkowitz, *Two Groups, but Similar Agenda*, WASH. POST, Oct. 18, 1993, at E2 (reporting that while the NCAA cut men's basketball scholarships to thirteen, the organization postponed any cuts to women's basketball scholarships "for gender equity reasons"). For example, women's basketball gets fifteen scholarships compared to thirteen for the men; the men's cross country/track and field team is allotted only 12.6 scholarships, while the women's team is permitted eighteen. Women's swimming and diving receives fourteen scholarships, but the men have only 9.9. But these artificial distinctions presumably have little to do with the optimal squad size where the sports are identical. Soccer, for example, is allocated only fourteen scholarships for women and 9.9 scholarships for men (less than the eleven players allowed on the field), but schools field larger teams. NCAA DIVISION I MANUAL, *supra* note 35, AT §§ 15.5.5.1 to .2, 15.5.3.1.1 to .2. At the University of North Carolina at Chapel Hill, for example, the school lists a roster of twenty-eight players on its men's team for spring 2009 and thirty-one members for its women's team. 2009 North Carolina Roster, <http://tarheelblue.cstv.com/sports/m-soccer/mtt/unc-m-soccer-mtt.html> (last visited Apr. 30, 2010); 2009 North Carolina Women's Soccer Roster, <http://tarheelblue.cstv.com/sports/w-soccer/mtt/unc-w-soccer-mtt.html> (last visited Apr. 30, 2010).

42. See Alex Williams, *The New Math on Campus*, N.Y. TIMES, Feb. 5, 2010, at ST1 (reporting that women constitute fifty percent of the student body at the University of North Carolina and fifty-seven percent nationally).

43. *Equity in Athletics, Inc. v. Dep't of Educ.*, 504 F. Supp. 2d 88, 91-92 (W.D. Va. 2007), *aff'd*, 291 F. App'x 517 (4th Cir. 2008).

precedent, given JMU's clear compliance with the proportionality standard after the cuts were made. Not surprisingly, the court rejected the plaintiff's motion for a preliminary injunction that would have required JMU to maintain the teams pending the outcome of the litigation, effectively ending the case for the athletes involved.⁴⁴ While litigation may continue, the student-athletes who lost their teams will likely graduate before a final decision can vindicate their claims.

The JMU solution allows a university to comply with the letter of the law while arguably defying its intent. Title IX advocates would surely have preferred expanding the number of women's teams to meet proportionality or at least combining some expansion of the women's program with the elimination of some men's teams. But the law requires neither, and JMU's approach illustrates a dismaying alternative that may win the proportionality battle but lose the war of expanding participation opportunities for women. Once an institution reaches proportionality, it has no legal incentive to continue monitoring women's sports interests and athletic abilities and can effectively freeze women's athletic opportunities.⁴⁵ By narrowing the focus to proportionality and proportionality alone, OCR and the courts may inadvertently be working against a longer-term objective of increasing participation and expanding opportunities for women.⁴⁶

B. OCR and the Accommodation of Interests: Identifying the Yardstick

Despite the continuing success of plaintiffs in demanding that courts apply OCR's proportionality standard, OCR has been attempting for more than a decade to guide universities through Title IX compliance using the third alternative: "fully and effectively" accommodating the interests and abilities of its female students. In 1996, OCR published a "Clarification of Intercollegiate Athletics Policy Guidance,"⁴⁷ intended as an "elaboration" of the 1979 Policy

44. *Id.* at 90-91, 112-13.

45. The numbers suggest that JMU made a decision to reduce the size of its athletic program to the extent allowed to maintain Division I membership while meeting the proportionality "safe harbor" to avoid Title IX liability. The NCAA requires a minimum number of seven women's teams and seven men's or mixed teams, or eight women's teams and six men's or mixed teams, to maintain Division I status (with slightly more teams required for Football Bowl Subdivision members). See NCAA DIVISION I MANUAL, *supra* note 35, at 317 fig.20-1. Thus, a school does not have the option of simply offering men's football and basketball, balanced with enough women's teams to satisfy proportionality.

46. There has been a significant amount of controversy surrounding the elimination of men's sports in order to comply with Title IX. See CHESLOCK, *supra* note 7, at 2 (responding to claims by "[c]ritics of Title IX . . . that men's intercollegiate athletic participation has severely declined over time" as a result of Title IX enforcement); *supra* note 30 and accompanying text; *infra* note 53 and accompanying text. Although the law clearly permits the elimination of men's teams as one means of compliance, I am certainly not advocating such a solution, and—as well illustrated by the JMU approach—eliminating men's teams does nothing to improve women's access to sports in the short-term or the long-term.

47. OFFICE FOR CIVIL RIGHTS, CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST (Jan. 16, 1996), available at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html> [hereinafter CLARIFICATION 1996].

Interpretation.⁴⁸ OCR reaffirmed the original test and its three alternatives but sought to downplay the use of proportionality as the only realistic option for compliance. While the proportionality test remained a “safe harbor,” the Clarification included a variety of suggestions about how an institution could satisfy the third option by researching and monitoring female student interest. This guidance included a three-part test to measure the accommodation of student interest: “(a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team.”⁴⁹

The Clarification provides little consolation, however, to schools like Brown University or Colorado State University that seek to eliminate some of their women’s teams without meeting the proportionality standard. A university would almost surely fail any test designed to measure student interest in the face of a current group of intercollegiate athletes who have already demonstrated their interests and abilities; the Clarification concedes as much.⁵⁰ As noted by the *Brown I* court, the very acts of protesting the team’s elimination and undertaking the daunting process of litigation attest to the interest of these women in continuing to play their sport.⁵¹ A court would be hard-pressed to conclude that the institution is “effectively accommodating” their interests under such circumstances.

Still, OCR persevered in its efforts to reinforce the viability of the “accommodating interests” test. In July 2003, OCR issued a letter entitled “Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance.”⁵² This new direction, responding to criticism that Title IX compliance was resulting in the loss of men’s teams, emphasized that the elimination of teams is discouraged as a means of reaching proportionality. OCR established a policy of negotiating compliance agreements without such measures but stopped short of suggesting it would be unlawful to cut men’s teams—a practice that has been consistently permitted by the courts.⁵³

48. Letter from Norma V. Cantú, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., to Colleagues (Jan. 16, 1996), available at <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html> [hereinafter Cantú Letter 1996]; see also Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL’Y 51, 69-73 (1996) (discussing the background of the 1996 Clarification).

49. CLARIFICATION 1996, *supra* note 47.

50. *Id.* (“If an institution has recently eliminated a viable team from the intercollegiate program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists.”).

51. *Cohen v. Brown University (Brown I)*, 991 F.2d 888, 904 (1st Cir. 1993).

52. Letter from Gerald Reynolds, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., to Colleagues (July 11, 2003), available at <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html> [hereinafter Further Clarification 2003].

53. *Id.* (“OCR hereby clarifies that nothing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX, and that the elimination of teams is a disfavored practice. Because the elimination of teams diminishes opportunities for students who are interested in participating in athletics instead of enhancing opportunities for students who have suffered from

In 2005, OCR provided a detailed roadmap for establishing a lack of female student interest in sports. “Additional Clarification of the Intercollegiate Athletics Policy: Three-Part Test”⁵⁴ created a new “safe harbor” for compliance with the 1996 Clarification three-part participation test⁵⁵—all intended to satisfy the original 1975 regulation that an institution “effectively accommodate the interests and abilities” of its students.⁵⁶ This guidance offered a “Model Survey” (to be distributed by e-mail) to measure the level of student interest in intercollegiate athletics. While institutions were permitted to utilize other methods to determine student interest and the survey was not required,⁵⁷ the use of the survey created a “presumption of compliance” with the three-part test. Indeed, successful use of the survey preempted any further compliance review by OCR on that issue.⁵⁸ To further ease the burden on the institution, OCR allowed a nonresponse to be counted as lack of interest.⁵⁹

Even apart from the inherent problem of achieving a reliable response rate from this type of survey,⁶⁰ asking current college students about their interest

discrimination, it is contrary to the spirit of Title IX for the government to require or encourage an institution to eliminate athletic teams. Therefore, in negotiating compliance agreements, OCR’s policy will be to seek remedies that do not involve the elimination of teams.”). Nonetheless, courts have consistently upheld a university’s prerogative to eliminate men’s teams as a means of reaching Title IX proportionality. *See supra* note 30. In its letter introducing the 1996 Clarification, OCR stated explicitly that the elimination of men’s teams was a lawful means of meeting the proportionality test; *see Cantú Letter 1996, supra* note 48 (“An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test. However, nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men.”); *see also* *Equity in Athletics, Inc. v. Dep’t of Educ.*, 504 F. Supp. 2d 88, 101 (W.D. Va. 2007), *aff’d*, 291 F. App’x 517 (4th Cir. 2008) (“Every court, in construing the Policy Interpretation and the text of Title IX, has held that a university may bring itself into Title IX compliance by increasing athletic opportunities for the underrepresented gender (women in this case) or by decreasing athletic opportunities for the overrepresented gender (men in this case).” (quoting *Neal v. Bd. of Trs. of the Cal. State Univ.*, 198 F.3d 763, 769-70 (9th Cir. 1999)).

54. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, ADDITIONAL CLARIFICATION OF THE INTERCOLLEGIATE ATHLETICS POLICY: THREE-PART TEST—PART THREE (2005) [hereinafter ADDITIONAL CLARIFICATION 2005].

55. Letter from James F. Manning, Delegated the Authority of the Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., to Colleagues, at v (Mar. 17, 2005) (on file with the *Yale Journal of Law and Feminism*) [hereinafter Manning Letter 2005].

56. 34 C.F.R. § 106.41(c) (2009).

57. “While surveys like the Model Survey provide a standard method by which to collect information on students’ athletic-participation interests, experiences, and self-assessment of ability, surveys of this kind are only one method by which a school may obtain data on its students’ interests. OCR is not mandating the use of this specific prototype or requiring that individual schools conduct elaborate scientific validation or assessment of student interest.” ADDITIONAL CLARIFICATION 2005, *supra* note 54, at 8.

58. Manning Letter 2005, *supra* note 55, at v (“Where the Model Survey shows insufficient interest to field a varsity team, OCR will not exercise its discretion to conduct a compliance review of that institution’s implementation of the three-part test.”).

59. ADDITIONAL CLARIFICATION 2005, *supra* note 54, at 6 (“[S]chools may assume that nonresponse to the census indicates an actual lack of interest if all students have been given an easy opportunity to respond to the census, the purpose of the census has been made clear, and students have been informed that the school will take nonresponse as an indication of lack of interest.”).

60. In a world in which we are inundated with spam and other unwanted e-mails, it is hard to imagine that the kind of survey described in the 2005 Additional Clarification would get more than a cursory glance from the majority of students. Kim Sheehan, *Email Survey Response Rates: A Review*, 6 J. COMPUTER-MEDIATED COMM. (2001), finds that e-mail survey response rates are dropping over time

in participating in intercollegiate athletics seems of questionable value. In order to compete at the intercollegiate level, most student-athletes have spent years developing their skills. By the time they have enrolled in college, the decision has been made—the most talented athletes have been recruited and likely chose a college because of the opportunity to compete on an existing team. Others may have hoped to be recruited while high school students but were disappointed and selected colleges on other bases. No doubt a majority of the 7.5 million high school athletes understand that they do not have the skill to compete for one of the mere 400,000 spots in college sports. Questioning college students at a large university if they are interested in participating in intercollegiate athletics is a little like asking them if they would like to attend Harvard. Many would be uninterested, most would have never considered it a realistic possibility, and the few that might have aspired to matriculate at Harvard would wonder why they are being asked such a pointless question about something that did not and is not going to happen.

Under the leadership of a new Democratic administration, OCR withdrew its 2005 Additional Clarification in April 2010 and replaced it with a new “Intercollegiate Athletics Policy Clarification: The Three-Part Test—Part Three.”⁶¹ Like the 2005 guidance, the stated purpose of this most recent pronouncement is to guide universities through the process of establishing the effective accommodation of the athletic interests and abilities of their students. Each of the three requirements—unmet interest, sufficient ability, and reasonable expectation of competition—is analyzed, with a discussion of the types of evidence to be examined under each. The use of a survey alone is no longer considered a sufficient measure of student interest; rather, the newest Policy Clarification reinforces OCR’s position in the 1996 Clarification that measuring interests and abilities requires the consideration of multiple factors and indicators.⁶² A survey may be used as one such measure, but OCR

(with the two most recent studies in 2000 showing a response rate of twenty-four percent), but response rates can be increased with follow-up reminders. *See also* VALERIE M. SUE & LOIS A. RITTER, CONDUCTING ONLINE SURVEYS 7-9 (2007) (summarizing results of studies of response rates for e-mail and web surveys and reporting response rates from twenty-four percent to seventy-six percent); Colleen Cook, Fred Heath & Russel L. Thompson, *A Meta-Analysis of Response Rates in Web- or Internet-Based Surveys*, 60 EDUC. AND PSYCHOL. MEASUREMENT 821, 829 (2000) (reporting a mean response rate of 34.6%).

61. Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., to Colleagues (Apr. 20, 2010), available at <http://www.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf> [hereinafter Policy Clarification 2010]; Libby Sander, *Education Department Nixes Bush-Era Policy on Title IX Compliance*, CHRON. OF HIGHER EDUC., Apr. 20, 2010, available at http://chronicle.com/article/Education-Department-Nixes/65170/?sid=at&utm_source=at&utm_medium%20=en.

62. Policy Clarification 2010, *supra* note 61, at 6 n.14, 8 (“OCR evaluates all of the indicators discussed here so OCR does not consider survey results alone as sufficient evidence of lack of interest under Part Three. . . . OCR evaluates a survey as one component of an institution’s overall assessment under Part Three and will not accept an institution’s reliance on a survey alone, regardless of the response rate, to determine whether it is fully and effectively accommodating the interests and abilities of its underrepresented students.”). Factors considered by OCR in its list of “non-exhaustive” factors include student requests for the addition of sports, requests to elevate a club sport to varsity status,

explicitly rejected the 2005 position that the failure to complete the survey could be counted as a statement of lack of interest.⁶³

Like the now-withdrawn 2005 guidance,⁶⁴ however, the 2010 Policy Clarification does not seek to measure general interest in a particular sport. OCR is looking for an actual team, and the only goal of assessing interest and abilities is to identify the handful of students actually needed to field that team. If women's basketball were not already offered, for example, interest from only ten to fifteen talented players would be enough. The university becomes obligated to take action whenever there are adequate numbers and ability to create a team in a specific sport.⁶⁵ The 2010 Policy Clarification also takes a more generous view of what constitutes adequate ability on the part of prospective players. These players need not currently possess the skills and talent to compete at the intercollegiate level; it is sufficient if current and admitted students "have the potential to sustain an intercollegiate team."⁶⁶

As with the 1996 Clarification, the 2003 Further Clarification and the 2010 Policy Clarification continue to protect existing women's teams where the institution cannot meet the proportionality standard, regardless of other measures indicating lack of interest. Results in situations like those involving Brown University and Colorado State University remain unchanged. As articulated in the 2010 Policy Clarification, the recent elimination of a varsity sport creates a presumption that there are interested and talented students and that the institution is not in compliance with Title IX.⁶⁷

participation levels in club and intramural spots, interviews with students, coaches, and administrators, survey results, high school participation by admitted students, and sports participation in the schools and areas from which admitted students typically come. *Id.* at 6.

63. *Id.* at 12.

64. See ADDITIONAL CLARIFICATION 2005, *supra* note 54, at 9-10.

65. Policy Clarification 2010, *supra* note 61, at 12-13.

66. *Id.* at 7. Under the 2005 Additional Clarification, even a demonstration of interests and abilities did not necessarily create an immediate obligation to start a varsity team. In order to assess the viability of a sport, the institution was allowed to take intermediate steps by creating an intramural or club team to evaluate whether there was sufficient ability to compete at the intercollegiate level. ADDITIONAL CLARIFICATION 2005, *supra* note 54, at 10. The 2010 guidance is silent on this question, perhaps suggesting that such interim steps would be inadequate. If there is real interest in the sport in question, it seems likely that such an intramural or club team already exists, unless the school's recreational program has refused to create such a team. And if such a team has already demonstrated both the ability and interest to compete at the intercollegiate level, the athletic department should already be aware of this situation as part of its ongoing obligation to accommodate the interests of its female students, suggesting that an interest survey would add little new information. These types of considerations were listed by OCR as "indicators" of unmet interest almost fifteen years ago in its 1996 Clarification. CLARIFICATION 1996, *supra* note 47 (including as indicators "requests by students and admitted students that a particular sport be added; requests that an existing club sport be elevated to intercollegiate team status; participation in particular club or intramural sports").

67. Policy Clarification 2010, *supra* note 61, at 5 ("[I]f an institution recently has eliminated a viable team for the underrepresented sex from the intercollegiate athletics program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport and thus there would be a presumption that the institution is not in compliance with Part Three."). The withdrawn 2005 Additional Clarification took a similar position. ADDITIONAL CLARIFICATION 2005, *supra* note 54, at 7-8 ("Whether or not schools use the Model Survey consistent with the recommendations in the User's Guide, schools cannot use the failure to express interest during a census

In a perverse way, OCR's approach might actually discourage an institution from undertaking a more aggressive policy of experimenting with the addition or substitution of a new women's sport. If the university is overloaded with male athletes (as many universities are) and the university is a long way from meeting the proportionality standard, the future elimination of a women's team will be blocked easily by litigation, as happened in the cases of Brown University and Colorado State University. If OCR's suggested indicators seem to demonstrate insufficient student interest and ability to establish a new team in a particular sport, the university may be better off, from a legal perspective, limiting women's sports to current offerings.

These more recent efforts to guide universities through the process of assessing the status quo—actual, current interest among female students—are arguably at odds with at least some judicial skepticism regarding the lack of interest defense. These courts have found that universities have an affirmative duty to generate such interest through new participation opportunities—not simply to accommodate existing interest. The *Brown* court, for example, stated that it would reject empirical evidence of disinterest even if it were available:

We view *Brown's* argument that women are less interested than men in participating in intercollegiate athletics, as well as its conclusion that institutions should be required to accommodate the interests and abilities of its female students only to the extent that it accommodates the interests and abilities of its male students, with great suspicion. To assert that Title IX permits institutions to provide fewer athletics participation opportunities for women than for men, based upon the premise that women are less interested in sports than are men, is (among other things) to ignore the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women's interests and abilities.

Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience. The Policy Interpretation recognizes that women's lower rate of participation in athletics reflects women's historical lack of opportunities to participate in sports. . . . Thus, there exists the danger that, rather than providing a true measure of women's interest in sports, statistical evidence purporting to reflect women's interest instead provides only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports. Prong three requires some kind of evidence of interest in athletics, and the Title IX framework permits the use of statistical evidence in assessing the level of interest in sports. Nevertheless, to allow a numbers-based lack-of-interest defense to become the instrument of further discrimination against the

or survey to eliminate a current and viable intercollegiate team for the underrepresented sex. Students participating on a viable intercollegiate team have expressed interest in intercollegiate participation by active participation, and census or survey results, including those of the Model Survey, may not be used to contradict that expressed interest.").

underrepresented gender would pervert the remedial purpose of Title IX. We conclude that, *even if it can be empirically demonstrated that, at a particular time, women have less interest in sports than do men, such evidence, standing alone, cannot justify providing fewer athletics opportunities for women than for men.*⁶⁸

The Ninth Circuit expressed similar sentiments in *Neal v. Board of Trustees of the California State Universities*,⁶⁹ in which male wrestlers challenged a reduction in squad size for male teams designed to reach proportionality. In rejecting the challenge of these male athletes, the court noted that the plaintiff's proposed interpretation of Title IX "would have allowed universities to do little or nothing to equalize men's and women's opportunities if they could point to data showing that women were less interested in sports."⁷⁰ Instead, one of Title IX's "central" purposes, according to the court, "was to *encourage* women to participate in sports: The increased number of roster spots and scholarships reserved for women would gradually increase demand among women for those roster spots and scholarships."⁷¹ Thus, at least for the *Brown* and *Neal* courts, Title IX operates almost as an affirmative action mandate for intercollegiate athletics. Where cultural norms and K-12 programs may have failed in generating girls' interest in sports, universities are charged with making up the difference.

II. PROPORTIONALITY, LACK OF INTEREST, AND DISCRIMINATION

If proportionality provided a theoretically sound and easy shortcut for proving discrimination, our universities would have much bigger problems than equity in athletics. Women enter graduate programs in engineering and computer science, for example, at a rate far below their percentages in the general population and among college graduates. In 2006, women accounted for twenty-three percent of graduate students in engineering and twenty-five percent of graduate students in computer science,⁷² yet women comprise about fifty-five percent of undergraduates in the United States.⁷³ In psychology, by contrast, women make up seventy-six percent of graduate students.⁷⁴ A proportionality test would imply that these graduate programs are engaged in extensive sex discrimination by disadvantaging women in engineering and

68. *Cohen v. Brown University (Brown II)*, 101 F.3d 155, 178-80 (1st Cir. 1996) (citations omitted) (emphasis added).

69. 198 F.3d 763 (9th Cir. 1999).

70. *Id.* at 768.

71. *Id.*

72. DIV. OF SCI. RES. STAT., NAT'L SCI. FOUND., WOMEN, MINORITIES, AND PERSONS WITH DISABILITIES IN SCIENCE AND ENGINEERING: 2009, at 6 (2009), <http://www.nsf.gov/statistics/wmpd/pdf/nsf09305.pdf> [hereinafter NSF STATISTICS].

73. See *supra* note 6 and accompanying text.

74. NSF STATISTICS, *supra* note 72, at 6.

computer science and disadvantaging men in psychology programs. But few would accept such an explanation based solely on these disparities or propose that we hold these graduate programs immediately accountable to enroll fifty-five percent women (or forty-five percent men).⁷⁵ Similarly, women are less likely than men to drop out of high school⁷⁶ and less likely to be arrested and imprisoned for crimes,⁷⁷ but serious scholars surely would be skeptical of an assertion that these raw statistics can be fully explained by sex discrimination in our high schools and criminal justice system.

These kinds of numbers more likely reflect the end result of multiple factors and influences rather than the source of the problem. The disparity between men and women in engineering, for example, begins far earlier than enrollment in graduate school; achievement gaps in related high school courses, while shrinking, still persist.⁷⁸ Far more dramatic, however, is the interest gap when women begin their college studies. Regardless of when or how the problem originates, the disparity becomes clear at the undergraduate level when women choose between engineering and liberal arts programs. When freshmen are asked about intended majors, a mere five percent of freshmen women plan to major in engineering, computer science, or the physical sciences, compared to over twenty percent of male freshmen.⁷⁹

75. See, e.g., CATHERINE HILL, CHRISTIANNE CORBETT & ANDRESSE ST. ROSE, AM. ASS'N OF UNIV. WOMEN, WHY SO FEW?: WOMEN IN SCIENCE, TECHNOLOGY, ENGINEERING, AND MATHEMATICS (2010), available at <http://www.aauw.org/research/whysofew.cfm> (exploring a variety of cultural and environmental factors that discourage girls from pursuing careers in science, technology, engineering, and mathematics).

76. High school dropout rates for people sixteen to twenty-four years old in 2008 were 8.5% for boys and 7.5% for girls. The gender gap is slightly wider for white men and women at 5.4% and 4.2%, respectively. THOMAS D. SNYDER & SALLY A. DILLOW, NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2009, at 169 tbl.108 (2010), available at <http://nces.ed.gov/pubs2010/2010013.pdf>.

77. Although women constitute approximately fifty-one percent of the population in the United States, they account for only fourteen percent of all federal arrestees booked by the U.S. Marshall Service and only seven percent of prisoners under state or federal jurisdiction. WILLIAM J. SABOL, HEATHER C. WEST & MATTHEW COOPER, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2008, at 2 (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>; U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 19 tbl.1.3 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs04.pdf>; U.S. Census Bureau, Population Division, Table 3: Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for the United States: April 1, 2000 to July 1, 2008 (NC-EST2008-03), <http://www.census.gov/popest/national/asrh/NC-EST2008-srh.html> (last visited Apr. 30, 2010).

78. See HILL ET AL., *supra* note 75, at 3, 5 ("Historically, boys have outperformed girls in math, but in the past few decades the gender gap has narrowed, and today girls are doing as well as boys in math on average. . . . On high-stakes math tests, however, boys continue to outscore girls, albeit by a small margin. . . . Fewer girls than boys take advance placement (AP) exams in STEM [science, technology, engineering, math]-related subjects . . . and girls who take STEM AP exams earn lower scores than boys earn on average."); see also CHRISTIANNE CORBETT, CATHERINE HILL & ANDRESSE ST. ROSE, AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., WHERE THE GIRLS ARE: THE FACTS ABOUT GENDER EQUITY IN EDUCATION 8, 15-18 (2008), available at <http://www.aauw.org/learn/research/upload/whereGirlsAre.pdf> (discussing the performance gap between boys and girls in math and reading).

79. HILL ET AL., *supra* note 75, at 7.

Engineering graduate programs are selecting largely from a pool of applicants who have completed undergraduate engineering programs—programs that also have significant numerical disparities.⁸⁰ Compared to the overall undergraduate female enrollment of fifty-five percent, only seventeen percent of students enrolled in undergraduate engineering programs are women. Graduate programs, with twenty-three percent female representation, actually have a higher proportion of women than would be predicted based on their undergraduate representation but far below the proportion of women among all undergraduates. Given these numbers, a university may choose as a policy matter to initiate programs designed to attract the underrepresented sex,⁸¹ but it would be naïve to suggest that graduate programs in engineering are the sole source of the problem. Nor has any legal authority used these numbers as conclusive proof that engineering schools are discriminating or imposed an enrollment quota, although Title IX's prohibition of sex discrimination also applies to the academic enterprise.

Consider how a university might handle enrollment for a popular class with only fifty spots but with hundreds of students trying to enroll. Assume that the university decides to use a random lottery system to determine who gets in the class and that the group that signs up for the lottery is one quarter female and three quarters male. In a random lottery, one would expect the class of fifty to be about the same mix, approximately thirty-eight men and twelve women. The university may, however, decide to conduct the lottery in a way that reflects the gender mix of the student body, admitting twenty-two men and twenty-eight women to reflect a student body that is fifty-five percent female. One could imagine the men protesting such a decision as a form of discrimination. But one could also imagine a university making a policy decision—if the course were in computer science or math, for example—to include more women to promote their interest in a major where they are underrepresented. Either approach could be justified on policy grounds, but to construe the failure to use proportional representation as an act of unlawful discrimination would surely go too far.

The analogy to intercollegiate athletics is, of course, far more complicated because there is no comparable method for easily measuring interest at a moment in time, as we can for class enrollment. But the principles are much the

80. According to numbers provided by the National Science Foundation, there were 405,489 undergraduates enrolled in engineering programs in 2006, including 69,869 women. NSF STATISTICS, *supra* note 72, at 32 tbl.B-9. In 2008, the National Science Foundation reported 123,041 graduate students in engineering, including 95,097 men and 27,944 women. DIV. SCI. RES. STAT., NAT'L SCI. FOUND., GRADUATE STUDENTS AND POSTDOCTORATES IN SCIENCE AND ENGINEERING: FALL 2006, at tbls.1, 3, 4 (2008), available at <http://www.nsf.gov/statistics/nsf08306/pdf/nsf08306.pdf>.

81. See, e.g., Northeastern University College of Engineering, Women in Engineering, <http://www.coe.neu.edu/coe/undergraduate/diversity/womeninengineering.html> (last visited Mar. 25, 2010); University of Akron College of Engineering, Welcome to the Women in Engineering Program, <http://www.engineering.uakron.edu/~wiep/index.html> (last visited Mar. 25, 2010); see also AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., UNDER THE MICROSCOPE: A DECADE OF GENDER EQUITY PROJECTS IN THE SCIENCES (2004), available at <http://www.aauw.org/research/upload/underthemicroscope.pdf>.

same. If interest in sports participation for both sexes can be measured with some accuracy (even if imperfect), the default standard of treating proportionality as conclusive proof of discrimination seems illegitimate. OCR's effort to create an alternative compliance mechanism through the use of an e-mail survey has its own serious flaws, but the concept deserves more careful consideration.

The gap between the percentage of women attending college and the percentage of women involved in intercollegiate athletics should mark the beginning of the inquiry, not the end. Without understanding the source of the gap, we are unlikely to be successful in addressing the cause of the disparity. We would be treating a single symptom of a much bigger problem. Instead, we may need to ask more fundamental questions about what goals we hope to achieve. At least one goal for Title IX should be to ensure that women have the same opportunities as men to participate in school sports at every level. Ensuring that these choices are available presents one kind of problem; demanding that women take advantage of these opportunities may be a different kind of problem entirely.

A. Proportionality as a Measure of Discrimination

While an easy and convenient standard to apply, proportionality is simply too crude a measure of discrimination. The lack of proportional representation in engineering may provide reason for concern or suggest the need for further research or new initiatives—such as programs designed to foster girls' interest in math⁸²—but it proves little on its own. Similarly, attributing the gender gap in college sports to discriminatory treatment by universities is too simple an answer and fails to address many underlying issues.

The use of proportionality as a shorthand measure of discrimination may have its roots in systemic disparate treatment theory under Title VII. Under section 707(a) of the legislation, such "pattern and practice" cases allege that an employer routinely and systematically discriminates against members of an identified protected class.⁸³ A key component of proof in such cases is the statistical underrepresentation of the protected class in the workforce when compared to the availability of that group in the relevant labor pool. As explained by the Supreme Court, this theory is based on the belief that, in the

82. See, e.g., Carnegie Science Center, Girls Math and Science Partnership, <http://www.carnegiesciencecenter.org/default.aspx?pageld=156> (last visited Mar. 25, 2010) ("The Girls, Math & Science Partnership (GMSP) was created to address issues regarding girls, their participation in science, and the expansion of their opportunities in and influence on the science and technology workforce. Working with girls ages 11-17, their teachers, parents, and mentors, GMSP draws organizations, stakeholders, and communities together in an effort to ensure that girls succeed in math and science."); GirlStart, <http://www.girlstart.org/index.asp> (last visited Mar. 25, 2010) ("GirlStart is a non-profit organization created to empower girls to excel in math, science, and technology.").

83. 42 U.S.C. § 2000e-6(a) (2006).

absence of discrimination in hiring, an employer's workforce will reflect the racial or gender makeup of the pool from which the employer is hiring:

Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.⁸⁴

Thus, in *Teamsters v. United States*, the Court noted that the transportation company's workforce was five percent African American, but the better paid and more desirable position of line driver was only 0.4% African American.⁸⁵ Additional statistics demonstrated even greater disparity in some terminals. In Atlanta, for example, a city whose population was 51.3% African American, the company did not employ a single African American line driver.⁸⁶

In a companion case issued the same day as *Teamsters*, the Supreme Court considered the statistical comparisons needed in a pattern and practice case where special qualifications or credentials are required. In *Hazelwood School District v. United States*,⁸⁷ the government alleged that a school district in suburban St. Louis had systematically rejected African-American teachers in hiring. The relevant statistical disparity was the ratio of actual hires to the qualified labor pool, a comparison between the percentage of African-American teachers hired by the district and the percentage of certified African-American teachers in the surrounding area.⁸⁸

While pattern and practice discrimination theory under Title VII may suggest an analogous theory of discrimination based on proportionality under Title IX, these cases also demonstrate the inherent flaws in such an adaptation. In order to qualify as proof of discrimination, comparisons must be made between the actual participants and the pool of qualified possible "applicants." That pool for identifying intercollegiate athletes is certainly not the general student body, since few of those individuals possess the requisite skills; those who do possess the skills but do not participate presumably opt not to by

84. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977).

85. *Id.* at 337.

86. *Id.* at 338 n.17. In addition to the statistical evidence, the government also presented testimony describing more than forty specific instances of employer discrimination in transfers to the position of line driver. *Id.* at 338.

87. 433 U.S. 299 (1977).

88. *Id.* at 308. The case was remanded for further development of the appropriate statistics for comparison. The school district argued that the city of St. Louis should be excluded in defining the relevant labor pool. The inclusion of the city of St. Louis was key to the government's statistical case. *Id.* at 310, 311 & n.17; *cf. Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977) (discussing statistical proof in an action challenging the exclusion of Mexican Americans from juries).

choice.⁸⁹ Far more relevant would be the pool of high school athletes. The match is far from perfect, however, since most of these individuals are not performing at the level required to be considered viable prospects for college sports. The pool of high school athletes may also exclude some talented athletes who compete only in other arenas, such as private clubs. Nonetheless, in the absence of better numbers and measures, the population of high school athletes is a legitimate if rough equivalent of a qualified pool for college athletics.

The comparison of female college athletes with the qualified pool of female high school athletes reveals a remarkable parity. Girls represent approximately forty-one percent of all high school athletes⁹⁰ and approximately forty-three percent of all intercollegiate athletes.⁹¹ When compared to the qualified labor pool, as required in systemic disparate treatment cases, proportionality is satisfied. But such a comparison also presumes a fundamental inaccuracy—that all athletes are fungible. In the *Hazelwood* case, one might reasonably assume that all certified African-American teachers in the surrounding area were qualified to teach in the Hazelwood School District. But the actual pool of qualified applicants for intercollegiate spots would require sport-by-sport comparisons—basketball players are not recruited for swim teams. Numbers by sport are likely to reveal significant variations. A female high school basketball player, for example, has a lower chance than a female high school swimmer does of becoming a college athlete. Comparing participation rates in high school with participation rates in college, a female basketball player has only a three percent chance of playing intercollegiate athletics, while a swimmer has an eight percent chance, a field hockey player has a nine percent chance, and a female rower has a hundred percent chance.⁹²

Thus, a fuller understanding of proportionality as a measure of discrimination in intercollegiate athletics suggests that its use in Title IX is often both misunderstood and overstated. Without a comparison of qualified

89. The word “choice” may be misleading, however, since that “choice” may be influenced by aspects of the structure of intercollegiate athletics that may discourage participation of women. See *infra* Section IV.B.

90. In 2008-2009, there were 7,536,753 high school athletes, of which 3,114,091 were girls and 4,422,662 were boys. See HIGH SCHOOL PARTICIPATION SURVEY, *supra* note 2, at 48.

91. See *supra* note 6 and accompanying text.

92. For 2006-2007, there were 15,152 female intercollegiate basketball players compared with 456,967 female high school basketball players; 11,128 female intercollegiate swimmers and divers compared with 143,639 female high school participants; 5500 female intercollegiate field hockey players compared with 63,881 female high school players; and 7210 female intercollegiate rowers (or crew participants) compared with 2685 female high school participants. (Crew is unique in that the number of college rowers is more than double the number of high school rowers.) Of course, many of these high schools participants will never be seriously considered for intercollegiate opportunities since the level of skills will vary widely. NCAA PARTICIPATION RATES REPORT, *supra* note 3, at 61; National Federation of State High School Associations, 2006-07 Sport and Activity Participation Statistics, <http://www.nfhs.org/Participation/HistoricalSearch.aspx> (insert “2006-07” in the “Year” field, then click “Search”) (last visited Apr. 17, 2010) [hereinafter 2006-2007 High School Participation Survey].

pools by sport, the actual level of discrimination in intercollegiate athletic programs is almost impossible to measure. Furthermore, this misunderstanding also impacts the possible remedies to address disparities in participation rates. Increasing the number of female high school track athletes, for example, is unlikely to increase significantly the number of athletes in other sports at the intercollegiate level.

B. Dangerous Territory: The “Lack of Interest” Defense

Is it possible that girls are making real and reasonable choices—at a greater rate than boys—not to participate in sports at the highest and most competitive levels, even when provided those opportunities? As noted earlier, the accommodation of interest standard is sometimes viewed with significant skepticism as nothing more than evidence of past discrimination—that women are less interested in sports only because they have not been offered opportunities to play sports in the past⁹³ and that when participation opportunities become available, women’s interest will increase to match those opportunities. Thus, to even suggest that women are actually making a choice not to participate—even when provided comparable opportunities in middle and high schools—would likely unleash a torrent of protest from Title IX advocates. Such arguments have been used in other arenas to disguise a history of subtle and not-so-subtle discrimination in the form of stereotyped gender roles and thus may justify indignation by feminist legal theorists. Fifty years ago, women may have been primarily interested in jobs as teachers, secretaries, or nurses because those were the career paths open to them. Even without explicit discrimination in hiring, the lessons of socialization and available role models may have shaped women’s interests to match the expectations of a society where women were channeled into certain occupations. A lack of interest defense should not be allowed to mask the effects of a lack of opportunity.⁹⁴

In the arena of employment discrimination, the “lack of interest defense”—sometimes described as a form of blaming the victim—is a particularly notorious legal theory. There may be no better illustration of the issue than the infamous case of *EEOC v. Sears, Roebuck & Co.*⁹⁵ Although *Sears* was only one in a long line of cases where the employer challenged liability for a largely segregated workforce by arguing self-selection,⁹⁶ it is perhaps one of the best-

93. See *supra* notes 68-71 and accompanying text.

94. The *Brown* court was expressing the same suspicion when it noted that it would be unwilling to accept even empirical evidence that women were less interested in sports than men as a basis for offering fewer spots for women. *Cohen v. Brown University (Brown II)*, 101 F.3d 155, 180 (1st Cir. 1996). See *supra* note 64 and accompanying text.

95. 628 F. Supp. 1264 (N.D. Ill. 1986), *aff’d*, 839 F.2d 302 (7th Cir. 1988).

96. See *EEOC v. O & G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 886-89 (7th Cir. 1994) (Manion, J., dissenting); *EEOC v. Chi. Miniature Lamp Works*, 947 F.2d 292, 302-03 (7th Cir. 1991);

known among (and favorite targets of) feminist legal theorists.⁹⁷ The EEOC unsuccessfully challenged Sears's apparent practice of channeling men into higher-paying commission sales jobs (selling appliances, automotive parts, and building and home improvement materials), while women were more typically hired into the lower-paying non-commission jobs (selling such items as clothing, cosmetics, and housewares). The EEOC submitted evidence that women had accounted for only ten percent of the full-time commission sales positions in 1972.⁹⁸ In defending the numbers, Sears relied primarily on the argument that the numbers represented individual preference. Women, Sears argued, were simply less interested in jobs that involved income uncertainty, knowledge of mechanical systems, and occasional home visits to customers. Sears asserted that it should not be held responsible for those choices when the opportunities were freely available to both sexes. Sears bolstered its attack on the EEOC's statistical analysis by offering employee surveys demonstrating that, even in 1982-1983, non-commission salesmen were three times more likely than non-commission saleswomen to be interested in moving to a commission sales job.⁹⁹

Rhodes v. Cracker Barrel Old Country Store, Inc., 213 F.R.D. 619, 654-58 (N.D. Ga. 2003); Allen v. Sundstrand Corp., No. 97 C 50188, 2000 U.S. Dist. LEXIS 13328, at *15 (N.D. Ill. Sept. 5, 2000); Butler v. Home Depot, Inc., 984 F. Supp. 1257, 1266 (N.D. Cal. 1997); see also Dukes v. Wal-Mart Stores, Inc., 222 F.R.D. 137 (N.D. Cal. 2004) (discussing the employer's argument that statistical disparities between men and women resulted from different job interests); Stender v. Lucky Stores, Inc., 803 F. Supp. 259, 325 (N.D. Cal. 1992) (discussing the employer's claim that statistical disparities between men and women stemmed from different job interests). See generally Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1800 (1990); Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073 (1992).

97. See, e.g., Lucinda M. Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914, 937-40 (1987) (book review); Schultz, *supra* note 96; Joan W. Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUD., Spring 1988, at 38-47; Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 814 (1989). But see Neil Dishman, *Defending the Lack of Interest Defense: Why Title VII Should Recognize Differing Job Interests Between the Sexes*, 14 GEO. MASON U. CIV. RTS. L.J. 189 (2004).

The EEOC's massive investigation and action against Sears, Roebuck represented an important landmark in the enforcement of women's rights under Title VII. At the time, Sears was the largest general merchandise retailer in the world. *Sears*, 628 F. Supp. at 1278. The EEOC first brought charges in 1973 and spend six years in investigation and settlement efforts before bringing suit in 1979. The action challenged a wide range of practices that targeted or disadvantaged women. Ultimately, however, only two claims remained by the time of trial, one of which was an allegation that women were discriminated against in hiring and promotion decisions involving commission sales positions. Unlike some of the EEOC's earlier "pattern and practice" cases, the EEOC "relie[d] almost exclusively" on statistics. No individual victims of the alleged discrimination were called to testify. *Id.* at 1300. See, e.g., *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977) ("[T]his was not a case in which the Government relied on 'statistics alone.' The individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life."); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977) (presenting evidence of fifty-five individual applicants denied employment, in addition to statistical analysis). Sears took its own risks by challenging various aspects of the EEOC's approach, rather than conducting its own statistical analysis to demonstrate the consequences of using more accurate or meaningful data. *Sears*, 628 F. Supp. at 1304.

98. *Sears*, 839 F.2d at 316.

99. *Sears*, 628 F. Supp. at 1326. Through studies of current commission sales employees, Sears purportedly demonstrated that the men had superior qualifications. Such qualifications included an

In concluding that the EEOC had failed to prove Sears's systematic exclusion of women from commission sales positions, the district court accepted Sears's argument that commission sales jobs were fundamentally different from other sales positions. The EEOC's applicant data was therefore flawed because it failed to distinguish applicant interest, experience, or qualifications for commission as opposed to non-commission sales. The court was particularly skeptical of the EEOC's failure to offer a single victim to testify to an incident of experienced discrimination, finding it hard to believe that an investigation covering eight years and 900 stores would fail to produce "even one witness who could credibly testify that Sears discriminated against her."¹⁰⁰

The Seventh Circuit affirmed the district court's conclusions, but in a strongly-worded partial dissent, Judge Cudahy accused the *Sears* majority of relying on sexist stereotypes:

These conclusions, it seems to me, are of a piece with the proposition that women are by nature happier cooking, doing the laundry and chauffeuring the children to softball games than arguing appeals or selling stocks. This stereotype of women as less greedy and daring than men is one that the sex discrimination laws were intended to address.¹⁰¹

As previously noted, similar sentiments were expressed by the First Circuit in *Cohen v. Brown University* in its response to Brown's argument that its female students were less interested in sports than its male students: "Thus, there exists the danger that, rather than providing a true measure of women's interest in sports, statistical evidence purporting to reflect women's interest instead provides only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports."¹⁰² Title IX advocates have agreed and are likely to continue to do so.¹⁰³ But demanding such equality of interest as the goal may not serve students' best interests in the long run.

The example of football illustrates the flaw in the argument that creating opportunities will generate the missing interest. Adding women's football,

interest in commission sales when hired, commission sales experience, training or experience relevant to the product line, prior Sears employment, prior "patterns of achievement," and being a minority or Vietnam veteran. *Id.* at 1320. Sears also presented evidence that the commission salesmen's sales performance was superior to that of its commission saleswomen. *Id.* at 1321.

100. *Id.* at 1324; *Sears*, 839 F.2d at 312.

101. *Sears*, 839 F.2d at 361 (Cudahy, J., concurring in part and dissenting in part).

102. *Cohen v. Brown University (Brown II)*, 101 F.3d 155, 178-80 (1st Cir. 1996); see *supra* note 68 and accompanying text.

103. See, e.g., NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., TITLE IX ATHLETICS POLICIES, at iii (2007), available at <http://www.womenssportsfoundation.org/~media/Files/PDFs%20and%20other%20files%20by%20Topic/Issues/Equity%20Issues/N/Download%20Read%20the%20Full%20Report.pdf> ("[G]iven the opportunity to play, women are just as interested in athletics as men. The remaining discrepancies in participation rates are the result of continuing discrimination in access to equal athletic opportunities—the failure of schools and colleges to add more athletic teams for females.").

including its eighty-five scholarships, would be the most obvious solution to the participation disparity and would serve the goal of proportionality. The very fact that few people have seriously advocated for such a solution indicates the complexity of the competing values at stake.¹⁰⁴ If opportunities at the college level are responsible for stimulating interest at the middle and high school levels, as courts and others have asserted, women's football teams could provide almost immediate parity in participation opportunities. Facilities would not be an issue, since universities that offer football already have a field which is often underutilized (as well as the nicest of the athletic facilities in the program). But we assume girls and women would have little interest in the sport. If that assumption is based on socialized stereotypes, the courts have suggested that this is exactly what Title IX was intended to eradicate. If that assumption is based on other factors, such as distinct interests and values, then we are implicitly recognizing that women's interest in sports or lack thereof is inherently different from men's interest in sports.

If we reject women's football as a realistic solution for achieving proportionality, then a school would be required to add three, four, or even more sports for women to balance the large number of male student-athletes participating in football and reflect a student body that is fifty-five to sixty percent female. Presumably the courts would reject efforts to satisfy proportionality by merely increasing the number of athletes on existing teams already offered at most schools, such as basketball, track, and soccer. Such a solution arguably does little to advance the idea of equality since these extra participants likely would have no realistic chance to compete.¹⁰⁵

A university seriously committed to achieving proportionality and providing real participation opportunities must therefore look to new and emerging sports. Recent emerging sports for women now offering NCAA championships include rowing, water polo, ice hockey, and bowling. On the current list of emerging sports are equestrian, rugby, sand volleyball, and

104. Cf. B. Glenn George, *Fifty/Fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L.J. 1107 (2002) (suggesting coed sports, including football, as a means of implementing the goals of Title IX). But see Rodney K. Smith, *Solving the Title IX Conundrum with Women's Football*, 38 S. TEX. L. REV. 1057 (1997).

105. One might question whether schools are already "stacking" existing teams in order to improve their participation rates. As noted earlier, the average squad size for women's rowing is sixty, although only twenty scholarships are allowed by the NCAA. See *supra* notes 38-39 and accompanying text. It seems unlikely that there could be meaningful competition opportunities for that large a group in a sport that requires at most nine participants per boat. Cf. *Mansourian v. Regents of Univ. of Cal.*, 594 F.3d 1095, 1107 (9th Cir. 2010) ("The addition of indoor track, however, cannot be considered evidence of program expansion. It did nothing to expand the number of female athletes, as all the women participating in indoor track also participated in an existing varsity sport."); *Cohen v. Brown University (Brown I)*, 809 F. Supp. 978, 991 (D.R.I. 1992) (rejecting the addition of indoor track as "a sport that merely involved providing indoor space to the existing women's track team").

squash.¹⁰⁶ It is hard to imagine many of these sports becoming a regular part of public middle and high school sports programs, even with scholarship opportunities available. Rugby and perhaps sand volleyball could be added with limited resources, but equestrian, ice hockey, and squash would require special facilities, which are less likely to be readily available. And any new sport would require the cooperation of other conference schools adding teams at the same time in order to provide meaningful competition opportunities. With fewer than six percent of female high school athletes moving on to play in college,¹⁰⁷ not to mention shrinking budgets, it would be hard to justify the additional resources that adding these sports to a school's existing roster would require. Without high school participation opportunities, these emerging sports would be reserved largely for those women from families with the financial resources to pursue these interests through private coaches and organizations.

Thus, equality is already compromised in a formalistic sense. No one is suggesting that the schools simply offer the same eight or ten sports for each sex. Participation numbers in high school confirm that football and baseball remain largely men's sports while volleyball, field hockey, and softball remain largely women's sports.¹⁰⁸ Faced with the never-ending pressures of increased funding for men's football and basketball and the inherent obstacles of adding new sports for women—investments in new facilities and personnel, with a significantly smaller pool for recruiting—a cost-benefit analysis is unlikely to suggest a single or simple solution. The JMU model becomes increasingly appealing for institutions: reduce women's sports to the minimum required for Division I status and eliminate enough men's sports to reach proportionality. Title IX advocates may be handed a hollow victory and have little left to argue. As the saying goes, “Be careful what you wish for.”

C. *The Problem with Identical Expectations*

The formal equality required by proportionality and the argument that universities are responsible for creating participation opportunities in order to foster women's interest in sports both share a common presumption. They assume that equality in intercollegiate athletics can only be achieved if women and men are in lockstep, when they both want the same things at the same time and in the same proportion. Differences are dismissed as proof that historical discrimination has not yet been eradicated. Such reasoning ignores at least two

106. NCAA, Emerging Sports for Women, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/about+the+ncaa/diversity+and+inclusion/gender+equity+and+title+ix/new+emerging+sports+for+women (last visited Mar. 20, 2010).

107. See 2006-2007 High School Participation Survey, *supra* note 92 (reporting 3,021,807 female high school athletes in 2006-2007) and NCAA PARTICIPATION RATES REPORT, *supra* note 3, at 61 (reporting 174,534 female intercollegiate athletes in 2006-2007) ($174,534 \div 3,021,807 = 0.058$).

108. See HIGH SCHOOL PARTICIPATION SURVEY, *supra* note 2, at 47.

other possibilities that may be partially or completely responsible for the observed results. The first is that the institutional structure itself is the source of the problem: the discrimination is inherent in the way our athletics programs are designed. If so, a reexamination of our entire approach to intercollegiate athletics may be in order. The second possibility is that these different choices reflect other kinds of gender differences that are independent of equality of opportunity.

Asking girls in the 1960s and early 1970s about their interest in playing sports likely would have elicited few positive responses. The opportunities were either unavailable or largely invisible; few girls would have given the possibility any real consideration. But we have come a long way since then. We are now in our tenth generation of high school students since Title IX's enactment in 1972, and the more recent generations have had at least some chance to join girls' sports teams in middle school and high school. While male athletes continue to dominate the sports media, the accomplishments of female athletes like Mia Hamm, Marion Jones,¹⁰⁹ Venus Williams, Serena Williams, and others are widely known. These are women who learned to compete within the traditional sports model based largely on a system created by and for male athletes. We may need to look beyond measures of success in the current model and consider the ways that different models might redefine the meaning of success.

Raising the issue of different interests based on gender recalls the arguably outdated debate about formal equality in employment that dominated some early discussions in feminist legal theory. Carol Gilligan's now-classic work *In a Different Voice*, documenting differences in the development of girls and boys and their social interactions,¹¹⁰ fueled an ongoing discussion sometimes referred to as the sameness/difference controversy.¹¹¹ In its simplest form, this

109. Marion Jones represents a complicated symbol of both sides of this coin—success and fame on the one hand but the pressure to maintain a competitive edge on the other. Ms. Jones served as a role model for athletic aspirations and achievements by women with her remarkable five Olympic medals in 2000 (a record for female track athletes) and a world title in 2001 for two hundred meters. But those accomplishments were erased by her admission that she used performance-enhancing drugs and her sentence to a six-month prison term for lying to federal investigators. Ms. Jones's story attests to the dark side of the pressures that come with such success (to which a number of male athletes have succumbed). See Philip Hersh, *Marion Jones Sentenced to Six Months in Prison: A Swift Fall from Grace*, CHI. TRIB., Jan. 12, 2008, at C1.

110. CAROL GILLIGAN, *IN A DIFFERENT VOICE* 24-63 (1982).

111. See, e.g., DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* 221-23 (1990); Monica Diggs Mange, *The Formal Equality Theory in Practice: The Inability of Current Antidiscrimination Law to Protect Conventional and Unconventional Persons*, 16 COLUM. J. GENDER & L. 1, 9 n.17, 6-11 (2007) (discussing the sameness/difference debate and formal equality theory); Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GENDER 1, 8-12, 25-27 (2008) (criticizing gender neutrality and looking to difference feminism to argue that "the gendered primary caretaker role be recognized in divorce law"); Rosemary C. Salomone, *Feminist Voices in the Debate over Single-Sex Schooling: Finding Common Ground*, 11 MICH. J. GENDER & L. 63, 79-84, 81 (2004) (discussing liberal and difference feminism and stating that Gilligan "gave credence to [more recent] arguments in favor of

debate exhibited a struggle between a theory of formal equality and a theory advocating different treatment to recognize different circumstances. Formal equality or “liberal” feminism embraced gender neutrality or fungibility, demanding that women receive the same treatment and opportunities as similarly-situated men. By the 1980s, many feminist scholars had abandoned this approach and moved on to a more sophisticated discussion of the underlying values in American society. As Professor Linda Finley asserted in 1987, “it is hardly fashionable anymore to adhere to liberal feminism. Its goals are largely limited to achieving the same rights and privileges for women as those held by men, without seriously questioning the existing values and structures of male-defined institutions.”¹¹²

Professor Vicki Schultz similarly rejects the approach of liberal feminism in her work examining the lack of interest defense in the context of employment discrimination. She argues that both conservative and liberal views of this defense “assume away the major problem.”¹¹³ The conservative view acknowledges and accepts the socialization of women to prefer “feminine” work.¹¹⁴ The liberal view assumes the absence of any gender differences, presuming that men and women have identical goals and values.¹¹⁵ According to Schultz, both approaches ignore the real problem, which is that workplace structures and cultures themselves “disempower large numbers of women from aspiring to and succeeding in more highly rewarded nontraditional work.”¹¹⁶ Scholars also criticize work cultures demanding long hours and unpredictable schedules that make it difficult for women with family commitments to consider such jobs.¹¹⁷

Current discussions thus attempt to recognize that women often are not “similarly situated” for a host of social reasons based on inherently gendered structures. Even when formal equality is achieved, workplace values may continue to disadvantage women because they are designed to reinforce traditional gender roles. Scholars look for ways of reforming those values and structures to provide women with equal opportunities in conjunction with—not in spite of—competing social structures, such as family obligations.¹¹⁸

same-sex schooling”); Williams, *supra* note 97, at 801 (criticizing Gilligan’s argument that women are more interested in relationships than men as “inaccurate and potentially destructive”); Joan C. Williams, *Reconstructive Feminism: Changing the Way We Talk About Gender and Work Thirty Years After the PDA*, 21 *YALE J.L. & FEMINISM* 79, 86-93 (2009) [hereinafter Williams, *Reconstructive Feminism*] (discussing the evolution of the sameness/difference debate).

112. Finley, *supra* note 97, at 914; see, e.g., Williams, *supra* note 97.

113. Schultz, *supra* note 96, at 1800.

114. *Id.* at 1800-06.

115. *Id.* at 1806-14.

116. *Id.* at 1800, 1824-39.

117. See generally JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000) (demonstrating that the American work culture is structured to support an “ideal worker” without major caregiving responsibilities and to penalize working mothers).

118. As described by Schultz:

Just as feminist legal theory has expanded beyond demands for formal equality, a similar evolution is needed in our discourse on Title IX and sports. The lack of interest issue may require a reexamination of the way in which we structure our school sports programs. It is time that we abandoned the crude measure of proportionality as a meaningful test for discrimination in sports. Instead, the issue demands careful scrutiny to separate the reinforcement of outdated stereotypes from the possibility that legitimate and informed choices are being made. Equating a lack of interest with a lack of opportunity almost forty years (and many generations of students) after Title IX's enactment is too simplistic an argument, and it ignores a wealth of available research about women and sports. Recent studies suggest that girls are more likely to develop a broader range of interests than boys, interests that encompass both nontraditional sports and other extracurricular and service activities.¹¹⁹ Addressing these broader interests may require broader thinking about alternative approaches that encourage and welcome participation beyond the all-consuming demands of intercollegiate athletics as they are currently structured. As will be more fully developed in the rest of this Article, re-envisioning college sports for women might include both greater focus on intramural and recreational opportunities, as well as fundamental restructuring of varsity athletics.

Within the social sciences, the debate is between conventional economists—who pin women's plight on our family roles—and feminist sociologists (and sociologically-inclined economists)—who have produced evidence that discriminatory workplace dynamics are a more fundamental cause. The sociological literature points toward a more contextual approach that rejects static family-based conceptions of women's difference; it shows instead that socially-constructed features of the work world help create the very gender differences (manifested in work aspirations, employment patterns, and familial divisions of labor) that human capital theory attributes to women themselves.

Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1903-04 (2000) (citations omitted); see CYNTHIA COCKBURN, *MACHINERY OF DOMINANCE: WOMEN, MEN AND TECHNICAL KNOW-HOW* 231 (1985) (asserting that the structure of workplaces perpetuates the gender-based division of labor); Schultz, *supra* note 96, at 1824-39 (reviewing sociological evidence demonstrating that structural features of work organizations disempower women); Williams, *Reconstructive Feminism*, *supra* note 111, at 81 (proposing a theory of reconstructive feminism designed "to focus attention not on women's differences but on the masculine norms that make women's differences seem so important"); see also NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION* 41-62, 44 (1997) (calling for a "postindustrial welfare state that effectively dismantles the gender division of labor" by structuring workplaces to support employed caregivers).

119. See, e.g., AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., *GENDER GAPS: WHERE SCHOOLS STILL FAIL OUR CHILDREN: EXECUTIVE SUMMARY* 6 (1998), available at <http://www.aauw.org/learn/research/upload/GGES.pdf>; JOSEPHINE R. POTUTO & JAMES O'HANLON, *NATIONAL STUDY OF STUDENT-ATHLETES REGARDING THEIR EXPERIENCES AS COLLEGE STUDENTS* 32, 41 (2006), available at http://www.ncaa.org/wps/wcm/connect/29f3e6804e0dacaaa060f01ad6fc8b25/2006_s-a_experience.pdf?MOD=AJPERES&CACHEID=29f3e6804e0dacaaa060f01ad6fc8b25; DON SABO & PHIL VELIZ, *WOMEN'S SPORTS FOUND., GO OUT AND PLAY: YOUTH SPORTS IN AMERICA* 3-4 (2008), available at <http://www.womenssportsfoundation.org/~media/Files/Research%20Reports/Go%20Out%20and%20Play%20report%209%2018%2008.pdf>; LINDA J. SAX, *THE GENDER GAP IN COLLEGE: MAXIMIZING THE DEVELOPMENTAL POTENTIAL OF WOMEN AND MEN* 43 (2008).

D. Equal Opportunity Accommodation of Interests

At the risk of further alienating Title IX advocates and feminist legal theorists, I raise another issue of discrimination suggested by the possibility that men and women have different levels of interest in sports. If an institution were to set lower admission standards for women than men applying to graduate programs in engineering, for example, such a practice would raise issues of sex discrimination under Title IX. Similarly, if men, in fact, have greater interest in sports than women, meeting those interests for women but not for men may suggest discrimination against men, which is inconsistent with the statute's fundamental prohibition of sex discrimination.

Beginning with the 1979 Policy Interpretation, OCR's multiple attempts at clarification have focused on defining and measuring the interests of women as the underrepresented sex.¹²⁰ In the original 1975 regulations—in fact, the only formal regulations issued by OCR on the issue of gender equity in participation—the first factor in evaluating the equality of athletic opportunities speaks to accommodating “the interests and abilities of members of *both* sexes.”¹²¹ Later guidance, however, seems to limit OCR's concern to the underrepresented sex, effectively defining gender equity as proportional representation for women. In the new Intercollegiate Athletics Policy Clarification issued on April 20, 2010, OCR elaborates on the range of indicators that may be used to measure unmet athletic interests and abilities but repeatedly limits its focus to the “underrepresented sex.” In describing the use of a survey tool, for example, the guidance states, “OCR evaluates whether the survey is administered as a census to all full-time undergraduate students *of the underrepresented sex* and admitted students *of the underrepresented sex*.”¹²²

OCR thus effectively limits Title IX compliance concerns to the accommodation of the women as the “underrepresented sex,” yet there is nothing in the language of the statute that suggests that its protection extends only to women. On the contrary, discrimination theory, when interpreting similar statutory language in other contexts, repeatedly acknowledges that the

120. Policy Interpretation, Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

121. 45 C.F.R. § 86.41(c)(1) (1975) (emphasis added).

122. Policy Clarification 2010, *supra* note 61, at 10-11 (emphases added). See also *id.* at 5 (“OCR evaluates whether an institution uses processes and methods for assessing the athletic interests and abilities of its students *of the underrepresented sex* that are consistent with the nondiscrimination standards set forth in the 1979 Policy Interpretation.”) (emphasis added); *id.* (“OCR considers a broad range of indicators to assess whether there is unmet athletic interest *among the underrepresented sex*.”); *id.* at 6 (“OCR considers a range of indicators to assess whether there is sufficient ability among interested students *of the underrepresented sex* to sustain a team in the sport.”) (emphasis added); *id.* at 8 (“OCR recommends that institutions have effective ongoing procedures for collecting, maintaining, and analyzing information on the interests and abilities of students *of the underrepresented sex* . . .”) (emphasis added).

prohibition of discrimination applies to both the minority and the majority.¹²³ Title VII's prohibition on race discrimination, for example, although initiated with the goal of protecting African Americans,¹²⁴ is applied to protect whites when race has been used to favor or privilege minorities.¹²⁵

Assume that a university, where men are already overrepresented based on the proportionality test, conducts a survey of all students to measure unmet interest in sports. The survey results show unmet interests for both female and male students in lacrosse, a sport not currently part of the intercollegiate program. These women and men already compete on club teams and have demonstrated their abilities by beating other college teams in the state in friendly matches. In addition, most other schools in this institution's athletic conference already support women's and men's lacrosse, so intercollegiate competition would be readily available. Neither OCR nor any court interpretations of Title IX to date would find any legal obligation on the university's part to establish a men's lacrosse team, but both would almost certainly require the establishment of a women's team.¹²⁶

By reaching this result and sanctioning the failure to "accommodate the interests and abilities of *both sexes*" as required by the 1975 regulations, OCR's approach limits the concept of discrimination, at least with respect to women, to proportionality. Once proportionality is met, a university remains in

123. See, e.g., *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-80 (1976) ("Title VII of the Civil Rights Act of 1964 prohibits the discharge of 'any individual' because of 'such individual's race.' Its terms are not limited to discrimination against members of any particular race. . . . Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes . . ."); *Martinez v. El Paso County*, 710 F.2d 1102 (5th Cir. 1983) (holding that a male secretary's termination was the result of sex discrimination). See generally Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1039-80 (2004) (discussing reverse discrimination theory under Title VII).

124. See generally Herbert Hill, *Black Workers, Organized Labor, and Title VII of the 1964 Civil Rights Act: Legislative History and Litigation Record*, in RACE IN AMERICA: THE STRUGGLE FOR EQUALITY 263-341 (Herbert Hill & James E. Jones, Jr. eds., 1993) (describing the history that led to the enactment of Title VII).

125. See, e.g., *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) (holding that the City of New Haven's refusal to certify test results for a promotion exam because officials feared they might be liable to African Americans who performed poorly constituted a form of race discrimination in violation of Title VII); *McDonald*, 427 U.S. 273 (holding that treating white employees less favorably than black employees based on race violates Title VII).

126. The 1996 Clarification lists "unmet interest," "sufficient ability to sustain a team," and "reasonable expectation of competition" as factors to be considered in the "accommodation of interests" test. 1996 CLARIFICATION, *supra* note 44. All three factors would be satisfied in the hypothetical presented. OCR stated in its 2005 Additional Clarification that the use of its Model Survey would be presumed an "accurate measure of student interest" in sports participation unless there was "other direct and very persuasive evidence of unmet interest sufficient to sustain a varsity team . . ." ADDITIONAL CLARIFICATION 2005, *supra* note 54, at 6. One example provided of such "direct evidence" was "[a] recent broad-based petition from an existing club team for elevation to varsity status." *Id.* at 6 n.10. See *Sanders v. Univ. of Tex. at Austin*, No. A-92-CA-405 (W.D. Tex. Oct. 24, 1993) (approving a settlement in which the university agreed to create women's varsity soccer and softball teams). For other examples of lawsuits in which women have sought elevation of club teams to varsity status, see Heckman, *Scoreboard*, *supra* note 9, at 420 n.142.

the safe harbor of Title IX compliance and no longer has any obligation to continue tracking or addressing the interests of either sex.¹²⁷ The JMU model—offering only the minimum number of women’s teams required for Division I status and eliminating enough men’s teams to meet the proportionality measure—may well become the norm.¹²⁸ By doing so, a school can immediately satisfy’s OCR’s safe harbor for Title IX compliance, declare victory, and give no further thought to the developing interests of its female students. The current analytical approach fails to allow for the theoretical possibility that female students may someday have greater interest and abilities in intercollegiate competition than male students and thus demand the right to be overrepresented as student-athletes. OCR has been striving for a number of years to define what it means to “accommodate interests” and how to measure that interest. If these measurements are legitimate, the results should have value for both sexes, not just women.

III. OPPORTUNITY AND CHOICE

Even assuming that discrimination has some role in preventing women from playing intercollegiate sports, the conclusion that the universities are responsible overlooks too many steps along the way. Almost no one could hope to become an intercollegiate athlete without at least several years of participation and preparation, and some student-athletes have been playing sports since preschool. At what stage or stages of the process does the discrimination occur? The focus of most of the scholarship, and hence most of the blame, has been on the college level. Admittedly, universities are easy targets—hard numbers are readily available, collected annually by the Department of Education under the Equity in Athletics Disclosure Act,¹²⁹ and the history of discrimination in intercollegiate sports is well documented. But the process of developing the interest, experience, and skills to compete at that level starts long before college. Intercollegiate athletics is the end point. What do we know about the pipeline?

As noted, women represent about fifty-five percent of college undergraduates but only forty-three percent of intercollegiate student-athletes. Similar disparities are also reflected in the “feeder pool”—students who participate in athletics in high school. In 2008-2009, over 7.5 million high

127. Having met the proportionality standard under OCR’s original three option test under the 1979 Policy Interpretation, JMU would have no obligation to meet the “effective accommodation” option. See *supra* notes 17-18 and accompanying text.

128. See *supra* notes 43-44 and accompanying text.

129. Improving America’s Schools Act of 1994, P.L. No. 103-382, 108 Stat. 3518 (codified at 20 U.S.C § 1092). See generally U.S. Dep’t of Educ., Equity in Athletics Disclosure Act Survey 2009, <https://surveys.ope.ed.gov/athletics> (last visited Apr. 19, 2010) (providing a mechanism for colleges to submit data to the Department of Education related to gender equity in their athletics programs).

school students participated in team sports. The gender breakdown is remarkably similar to the college participation rates: girls make up about forty-one percent of high school athletes, while boys account for approximately fifty-nine percent.¹³⁰ While the proportionality gender gap is lower in high school because boys make up a larger percentage of the student body, the high school rates would predict a gender gap in participation to persist among women and men that go on to college.¹³¹ A comparable gender gap persists when the general population of undergraduates is surveyed about participation in exercise and sports: forty-four percent of women and fifty-nine percent of men report participation.¹³² If discrimination is responsible for creating those disparities, the gender gap for intercollegiate athletes seems to reflect an earlier established pattern.

A. *Girls and Sports: The Early Years*

Recent studies have provided far more comprehensive information than previously available about girls and sports. In particular, the Women's Sports Foundation has produced several reports in the last few years that provide us with a much richer understanding of the connections between sports and gender.

In October 2008, the Women's Sports Foundation issued one of the first national, comprehensive studies to consider how a variety of family, community, and economic factors relate to physical activity among children. The study targeted third through twelfth graders and analyzed how various factors, including gender, influence children's participation in sports.¹³³ *Go Out and Play: Youth Sports in America* reports the results of two national surveys, one sampling 2185 boys and girls in the third through twelfth grades and a second sampling 863 parents of children the same age.¹³⁴ The study confirms that the gender gap in sports participation starts long before college and offers additional insight into factors that are correlated with sport participation rates.¹³⁵

130. In 2008-2009, there were 7,536,753 high school athletes, of which 3,114,091 were girls and 4,422,662 were boys. See HIGH SCHOOL PARTICIPATION SURVEY, *supra* note 2, at 48.

131. In 2007, boys comprised about 51.3% of all high school students, while girls represented 48.7% of the class. U.S. CENSUS BUREAU, THE STATISTICAL ABSTRACT OF THE UNITED STATES tbl.244 (2010), available at <http://www.census.gov/prod/2009pubs/10statab/educ.pdf>.

132. See *infra* note 157 and accompanying text.

133. SABO & VELIZ, *supra* note 119; Women's Sports Foundation, Issues and Research, <http://www.womenssportsfoundation.org/Issues-And-Research.aspx> (last visited Mar. 23, 2010).

134. SABO & VELIZ, *supra* note 119, at 2.

135. SABO & VELIZ, *supra* note 119; see also AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., *supra* note 119, at 6:

• Girls are twice as likely to be inactive as boys, and male high school graduates are more likely than females to have taken at least one year of physical education. Research links physical activity for girls to higher self-esteem, better body image, and lifelong health.

On the positive side, the vast majority of both boys (eighty-seven percent) and girls (eighty-two percent) have participated in organized team sports at some point, although there is a gender gap even here.¹³⁶ Economic factors and types of communities also predict sports opportunities, with poor urban girls having the lowest participation rates—only one in four have ever taken part in organized or team sports.¹³⁷ Despite the high numbers of both boys and girls who have participated in sports at some time during the elementary through high school years, participation for both groups declines with age, and gender gaps persist in a variety of ways. Study findings include:

- More girls than boys report never having participated in sports (eighteen percent versus thirteen percent).¹³⁸
- Girls, on average, begin participating in sports at a later age than boys (7.4 years for girls versus 6.8 years for boys).¹³⁹
- Minority girls are less likely than minority boys to be involved in sports, and minority girls are proportionally underrepresented in sports compared to white girls.¹⁴⁰
- Girls generally participate in a wider range of physical activities, such as cheerleading, dance, double Dutch, and volleyball, while boys are more likely to play more traditional organized sports.¹⁴¹
- Female athletes often participate in other kinds of clubs and organizations, whereas male athletes generally focus exclusively on sports.¹⁴²
- Sports dropout rates increase with age for both girls and boys but are higher for girls in general and urban girls in particular.¹⁴³ Girls “drop out [of sports] sooner and in greater numbers” than boys.¹⁴⁴
- Both boys and girls report dropping out of sports in order to spend more time studying, but girls are more likely to identify academics as a reason for quitting sports (thirty-six percent versus twenty-six percent).¹⁴⁵

• Boys outnumber girls in team sports, while girls outnumber boys in performing arts, school government, and literary activities.

• Poverty is the largest barrier to participation in sports or extracurricular activities, which are linked to better school performance, good health, and a sense of culture and community.

136. SABO & VELIZ, *supra* note 119, at 9.

137. *Id.* at 3; see also Betsey Stevenson, *Title IX and the Evolution of High School Sports*, 25 CONTEMP. ECON. POL’Y 486, 487, 502-03 (2007) (“[W]hite students with married, wealthy, educated parents are more likely to play sports.”).

138. SABO & VELIZ, *supra* note 119, at 9.

139. *Id.* at 4.

140. *Id.* at 5.

141. *Id.* at 4.

142. *Id.* at 3.

143. *Id.* at 128. The dropout rates for girls in urban, suburban, and rural areas range from four to six percent for third to fifth graders, rising to twenty-five to thirty-two percent for urban, female ninth to twelfth graders. For boys, third to fifth graders drop out at a rate of two to five percent, rising to twenty-two to twenty-nine percent for ninth to twelfth graders. *Id.*

144. *Id.* at 4.

145. *Id.* at 130.

- Girls also report dropping out of sports in order to spend time on other club or extracurricular activities (twenty-two percent). Boys, in contrast, do not report this as a reason at all.¹⁴⁶

- Boys “invest more of their interest and identity in sports,” even if they do not actually participate.¹⁴⁷ About forty-two percent of third to eighth grade boys who did not participate in sports, for example, reported that “sports are a big part of who they are,” while only sixteen percent of non-athletic girls agreed with that statement.¹⁴⁸

B. *Women in College*

Additional research about the characteristics, interests, and concerns of college women provides a more complete picture of how women view themselves and their opportunities. Using two large survey databases—one including 8 million freshmen surveyed at more than 1000 institutions between 1966 and 2006 and a second longitudinal study of students in 1994 and 1998—Professor Linda Sax has documented a wide range of gender gaps to provide a better picture of how women and men approach their college years from entry to exit.¹⁴⁹

Sax’s analyses suggest a number of factors that may have direct or indirect effects on women and their interest in intercollegiate athletics. Some of these factors include:

- The percentage of women attending college continues to grow and exceed the percentage of men, largely due to the rising number of African-American women, Hispanic women, and poor women who are enrolling.¹⁵⁰

- The number of minority students attending college has increased from ten percent to twenty-five percent in the last decade.¹⁵¹

- Freshmen women are more likely to come from poorer backgrounds—the median family income for freshmen women is \$12,000 below that of their male counterparts.¹⁵²

- Women are more likely than men to be concerned about how they will pay for college (seventy percent versus fifty-eight percent),¹⁵³ and more women than men expect to get a job while in college to help pay for expenses.¹⁵⁴

146. *Id.*

147. *Id.* at 158.

148. *Id.* at 3.

149. SAX, *supra* note 119, at 5-6, 10-11.

150. *Id.* at 1-2.

151. *Id.* at 16.

152. *Id.*

153. *Id.* at 19.

154. *Id.* at 20-21.

- Even though women earn higher grades in both high school and college, freshmen women are less likely to report confidence about their intellectual abilities than freshmen men (fifty-two percent versus sixty-nine percent),¹⁵⁵ and the gap widens during the college years.¹⁵⁶

- On issues of exercise and physical well-being, women report lower participation rates in exercise and sports (forty-four percent for women compared with fifty-nine percent for men), as well as lower perceptions of physical health.¹⁵⁷

- Women begin college with “significantly lower ratings on emotional health” than men, a gap that grows during the college years.¹⁵⁸ A higher percentage of women than men report feeling “overwhelmed” (thirty-eight percent of women compared with seventeen percent of men) or “depressed” (nine percent of women compared with five percent of men).¹⁵⁹

- Women are more likely than men to spend time involved in volunteer or community service work.¹⁶⁰

- Women on average spend more time studying than men.¹⁶¹

- Women rate themselves lower on the trait of “competitiveness.”¹⁶² In fact, “competitiveness” had the largest gender gap of all factors identified in the study.¹⁶³

The consistency of some of these gender distinctions is reflected even in the attitudes of the small number of students who actually compete in intercollegiate athletics. In Professors Potuto and O’Hanlon’s recent study surveying student-athletes at eighteen large Division I-A programs, the authors found trends similar to those described by Professor Sax. The male student-athletes expressed “more interest in athletics” combined with “less interest than female student-athletes in curricular and co-curricular activities.”¹⁶⁴ In particular:

- Even apart from their varsity sport, male student-athletes spend more of their leisure time on athletic-related activities.¹⁶⁵

155. *Id.* at 25-27.

156. *Id.* at 79.

157. *Id.* at 31, 33-34.

158. *Id.* at 111.

159. *Id.* at 33.

160. *Id.* at 43. In contrast, men spend significantly more time than women playing video games. *Id.* at 30, 31.

161. *Id.* at 26-27.

162. *Id.* at 27.

163. *Id.* at 195.

164. POTUTO & O’HANLON, *supra* note 119, at 32. The eighteen universities that participated were Iowa, Kansas State, Memphis, Miami, Minnesota, Nebraska, North Carolina, Notre Dame, Oklahoma, Penn State, Rice, Rutgers, South Carolina, Southern California, Texas A&M, Utah, Virginia, and Wake Forest. *Id.* at 3.

165. *Id.* at 40.

- A larger percentage of female student-athletes than male student-athletes regard service projects as “valuable” (an 18.4 percentage point gap) and actually participate in such projects (an 11.5 percentage point gap).¹⁶⁶
- Female student-athletes are more likely than their male counterparts to spend time engaged in campus-wide activities apart from sports.¹⁶⁷
- Female student-athletes are less likely than men to report that sports are interfering with their GPA and are more focused on their academic work.¹⁶⁸

C. *What's Wrong with this Picture?*

The research provided by the Women’s Sports Foundation and the analyses of Sax, Potuto, and O’Hanlon offer a complex picture of girls and college women—their activities, their interests, and their concerns. These empirical data present some real differences between boys and girls and their development before entering college. While we may regret some of these differences and look for ways to address the disparities, dismissing these distinctions as mere perceptions or stereotypes seems inappropriate.

As a group, girls are less likely to become involved in sports,¹⁶⁹ are less invested in sports when they do become involved,¹⁷⁰ and are more likely to drop out of sports as they get older.¹⁷¹ Girls are more interested in club and service activities in both high school¹⁷² and college¹⁷³ than their male counterparts. High school female athletes in particular are more likely to be involved in other kinds of club and service activities¹⁷⁴ and drop out of sports in significant numbers in order to devote more time to these endeavors.¹⁷⁵ Freshmen women enter college from lower economic ranks,¹⁷⁶ are more concerned about how to pay for college,¹⁷⁷ and have less intellectual self-confidence than boys,¹⁷⁸ despite having consistently higher grades in high school.¹⁷⁹ These women spend more hours studying,¹⁸⁰ experience higher levels of stress,¹⁸¹ report lower levels of physical well-being,¹⁸² and are more likely to feel overwhelmed.¹⁸³

166. *Id.* at 41.

167. *Id.*

168. *Id.* at 43-44.

169. SABO & VELIZ, *supra* note 119, at 9.

170. *Id.* at 3, 158.

171. *Id.* at 3, 128.

172. *Id.* at 3.

173. POTUTO & O’HANLON, *supra* note 119, at 32, 41; SAX, *supra* note 119, at 43.

174. SABO & VELIZ, *supra* note 119, at 3.

175. *Id.* at 130.

176. SAX, *supra* note 119, at 16.

177. *Id.* at 19.

178. *Id.* at 25-27.

179. *Id.* at 26-27.

180. *Id.*

181. *Id.* at 2.

Although women are heading to college in increasing numbers,¹⁸⁴ the growing pool of female students is not likely to result in a comparable increase in women interested in playing college sports. As noted in Sax's analysis, these new students are coming largely from minority and economically disadvantaged backgrounds,¹⁸⁵ the groups that the Women's Sports Foundation research indicates are the least likely to be involved in sports.¹⁸⁶

With this information, the disproportionate athletic participation rates for college women and men seem both predictable and inevitable. The participation gap is firmly established by high school and perhaps reinforced by higher rates of stress and economic concerns once women reach college. This is not to suggest that universities bear no responsibility here or that the size of the gender gap warrants no further examination. Nonetheless, it is also clear that the larger problem is created long before women arrive at college by a host of factors that limit their initial and continued interest in pursuing sports. Some of these factors should concern us, such as lack of opportunities, resources, and support for girls' athletics in urban schools. Other explanations may be harder to judge, however, such as decisions by high school girls to devote more time to academics or community service.

For some female students, a decision not to continue playing high school sports (or aspire to play intercollegiate athletics) could well be characterized as both a mature and rational decision that more boys would do well to emulate.¹⁸⁷ While there is much to be gained from participation in sports (apart from the benefits of an athletic scholarship and the promise of a professional career),¹⁸⁸ the time and commitment required to play at the highest levels may not be a rational choice, even for the most talented athletes. Of the 7.3 million

182. *Id.* at 33-34.

183. *Id.* at 33.

184. *Id.* at 1-2.

185. *Id.* at 16-18. Older female students also add to the gender disparity. *Id.* at 1-2 (“[T]he growing gender gap in college enrollments is attributable primarily to increases in college attendance among women from groups historically underrepresented in higher education—namely, African Americans, Latinas, older students, and those of lower socioeconomic status.”) (citations omitted); *see also* CORBETT ET AL., *supra* note 78, at 2 (concluding that the “gender gap in college attendance is almost absent among those entering college directly after graduating from high school,” but older women, who, because of the NCAA age limit of twenty-five are largely ineligible for intercollegiate athletics, outnumber men “by a ratio of almost 2-to-1”).

186. SABO & VELIZ, *supra* note 119, at 5, 15-17.

187. This is not to suggest that sports participation is inherently bad or that community service and studying are always superior choices and should be encouraged to the exclusion of sports. One might argue that there is much to be gained (both short-term and long-term) for both boys and girls in finding a balance of participation in all three activities, especially if “sports” is defined broadly to include an array of physical activities. But sports participation as currently structured at the intercollegiate level and sometimes at the high school level is often all-consuming and leaves little or no time for other endeavors.

188. The Women's Sports Foundation reports that “athletic participation contributes to general health and body esteem, healthy weight, social relationships, quality of life, and educational achievement.” SABO & VELIZ, *supra* note 119, at 75.

high school athletes,¹⁸⁹ only 5.6% join the ranks of college athletes,¹⁹⁰ and only two percent make it into Division I.¹⁹¹ While a select few at the very highest level of this elite group may be preparing for the Olympics or careers in professional sports, those percentages are even smaller.¹⁹² Without football, girls are even less likely to play professionally. When balancing these prospects with the number of hours that must be invested each week to maintain one's athletic skills at the highest level, a sensible consideration would point in other directions for most students.

The insights provided by these studies indicate that we need to significantly broaden the focus and the goals of gender equity in sports. With increasing financial pressures, many elementary schools have been faced with cutting the "extras"—gym, music, art, theater, and similar programs.¹⁹³ The regret when these programs can no longer be offered is that we may be limiting broader interests in life by restricting opportunities for early exposure. We hope that experiencing physical well-being, art, and music will enable future appreciation and enjoyment. Few would claim that the goal of these endeavors is to develop the next Yo-Yo Ma or Georgia O'Keefe. The point is to enrich the experience of all students, not identify the small number of extraordinarily talented students.

The broader goal of promoting physical well-being for all girls and women may be far worthier than efforts to add a few more women to our intercollegiate rosters. The benefits of regular exercise at all ages are regularly touted in the medical community and beyond. The 1996 Surgeon General's Report on Physical Activity and Health concluded that physical activity results in significant health benefits and focused on school programs as one of the most promising opportunities to develop a lifetime habit of fitness:

189. In 2006-2007, 4,321,103 boys and 3,021,807 girls participated in high school athletics, for a total of 7,342,910 high school athletes. See 2006-2007 High School Participation Survey, *supra* note 92.

190. In 2006-2007, 233,830 men and 174,534 women competed in NCAA athletics, for a total of 408,364 intercollegiate athletes. See NCAA PARTICIPATION RATES REPORT, *supra* note 3, at 61-62.

191. In Division I, there were 88,478 men and 72,419 women, for a total of 160,897 student-athletes. *Id.* As one specific example, probability statistics published by the NCAA indicate that only 3.4% of girls who play high school basketball will play at the college level. NCAA, Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level, <http://www.ncaa.org/wps/ncaa?key=/ncaa/NCAA/Academics%20and%20Athletes/Education%20and%20Research/Probability%20of%20Competing/> (last viewed Mar. 24, 2010). Probability statistics for male high school athletes are similarly low: 3.1% for men's basketball, 5.8% for football, and 6.4% for baseball. *Id.*

192. See NCAA, A CAREER IN PROFESSIONAL ATHLETICS: A GUIDE FOR MAKING THE TRANSITION 38 app. C (2004), available at http://www.ncaapublications.com/Uploads/PDF/2004-05_career_pro_athletics220e9cf6-6fe1-4c81-bf80-403a92c6c38e.pdf [hereinafter A CAREER IN PROFESSIONAL ATHLETICS] (only 1.3% of NCAA men's basketball players successfully move to the professional ranks, while two percent of NCAA football players make the jump).

193. See, e.g., Ryan Hurley, *Cuts in Arts Programs Leave Sour Note in Schools*, AT THE CAPITOL, June 25, 2004, http://www.weac.org/news_and_publications/at_the_capitol/archives/2003-2004/arts.aspx.

School-based interventions for youth are particularly promising, not only for their potential scope . . . but also for their potential impact. Nearly half of young people 12-21 years of age are not vigorously active; moreover, physical activity sharply declines during adolescence. Childhood and adolescence may thus be pivotal times for preventing sedentary behavior among adults by maintaining the habit of physical activity throughout the school years. School-based interventions have been shown to be successful in increasing physical activity levels. With evidence that success in this arena is possible, every effort should be made to encourage schools to require daily physical education in each grade and to promote physical activities that can be enjoyed throughout life.¹⁹⁴

The benefits of regular exercise may be of even greater significance for girls and women. A recent study looking specifically at girls and the effects of Title IX concludes that “Title IX and the expansion of school-based opportunities for physical activity among adolescent girls that it caused appears [sic] to have had a significant causal effect on adolescent girls’ physical activity and weight.”¹⁹⁵ Additional research suggests other positive outcomes for girls who participate in sports, finding a positive correlation between high school sports participation and both educational and economic benefits.¹⁹⁶ Girls who played high school sports were more likely to attend college,¹⁹⁷ more likely to enter the workforce,¹⁹⁸ and more likely to enter male-dominated occupations.¹⁹⁹

Targeting the development of sports in middle and high schools, if not elementary schools, will impact far more girls in the short run and may produce a higher yield of long-term benefits for women who continue to exercise long

194. U.S. DEP’T OF HEALTH & HUMAN SERVICES, PHYSICAL ACTIVITY AND HEALTH: A REPORT OF THE SURGEON GENERAL 6 (1996), available at <http://www.cdc.gov/nccdphp/sgr/pdf/sgrfull.pdf>. For a variety of information, publications, and reports about the health benefits of exercise, see The President’s Council on Physical Fitness and Sports, Publications, http://www.fitness.gov/council_pubs.htm (last visited Mar. 24, 2010).

195. Robert Kaestner & Xin Xu, *Effects of Title IX and Sports Participation on Girls’ Physical Activity and Weight* 24 (Nat’l Bureau of Econ. Research, Working Paper No. 12113, 2006), available at http://www.nber.org/papers/w12113.pdf?new_window=1; see also ELLEN J. STAUROWSKY ET AL., WOMEN’S SPORTS FOUND., HER LIFE DEPENDS ON IT II: SPORT, PHYSICAL ACTIVITY, AND THE HEALTH AND WELL-BEING OF AMERICAN GIRLS AND WOMEN 2 (2009), available at <http://www.womenssportsfoundation.org/~media/Files/Research%20Reports/Her%20Life%20Depends%20On%20It%20II%20%20Covers%20and%20Inside%20with%20December.pdf> (“[M]oderate and consistent levels of physical activity and sport for girls and women is essential to good health and well-being.”).

196. Betsey Stevenson, *Beyond the Classroom: Using Title IX to Measure the Return to High School Sports* 23-26 (Nat’l Bureau of Econ. Research, Working Paper No. 15728, 2010), available at <http://bpp.wharton.upenn.edu/betseys/papers/TitleIX.pdf>; see also STAUROWSKY ET AL., *supra* note 195, at 2 (“[E]arly studies examining the connections between physical activity and academic achievement show there is a positive relationship between the two in girls and women.”).

197. Stevenson, *supra* note 196, at 16 (“Title IX may explain a 3.5 percentage point rise in the probability of attending any college and a 2 percentage point rise in the probability of getting a 4 year college degree . . .”).

198. *Id.* at 17-18.

199. *Id.* at 18-19.

after their school days are over. In 2006-2007, there were 408,364 intercollegiate athletes, 174,534 of whom were women.²⁰⁰ If college women were proportionally represented in intercollegiate athletics, the number of female student-athletes would have been 224,600, an increase of just over 50,000.²⁰¹ At the high school level, however, the increase would be over half a million if proportionality were used as the compliance measure.²⁰²

Thus, the almost exclusive focus in the Title IX debate on intercollegiate athletics may be largely misplaced, both in terms of achieving long-term benefits for women and the short-term goal of increasing women's interest in college sports. In the long term, turning our focus to girls long before they enter college is critical to the larger—and ultimately more important—issue of how women relate to sports and physical fitness. In the short term, a goal of increasing interest in intercollegiate athletics requires that we engage girls in physical activity at a much earlier stage. Unless we can generate interest and develop skills in our middle and high school girls, we are unlikely to see significant increases in participation at the college level. The findings of the Youth Sports in America study reinforce the hypothesis that interest in sports is closely tied to access and opportunity. Girls and boys in suburban settings, for example, where sports are more readily available, participate at almost comparable rates, while there is a greater gender disparity in urban areas.²⁰³

It is critical, however, that we also recognize that success in encouraging more girls at the K-12 level to become involved and stay involved with sports may not reap the proportionality benefits one might expect at the college level. These girls are most likely to be offered and drawn to existing sports where girls are already participating in large numbers—basketball, track, and volleyball, for example, with over 400,000 high school girls participating in each during the 2008-2009 school year.²⁰⁴ While this level of interest is a

200. NCAA PARTICIPATION RATES REPORT, *supra* note 3, at 61-62.

201. It should also be noted that proportionality could be achieved in other ways. Without eliminating any male student-athletes, one could instead add approximately 111,250 female athletes to create a larger pool and reach the fifty-five percent target. Alternatively, one could maintain the number of female athletes at the current level and eliminate approximately 91,000 male athletes.

202. If the total number of high school sports participants remained unchanged at 7,536,753 but girls were proportionately represented in that group, the number of girls playing high school sports would be 3,670,398—556,307 participants more than there are today (3,114,091). See HIGH SCHOOL PARTICIPATION SURVEY, *supra* note 2, at 48; U.S. CENSUS BUREAU, *supra* note 131, tbl.244.

203. SABO & VELIZ, *supra* note 119, at 3 (“Whereas similar rates of sports participation between girls and boys exist in suburban communities, urban and rural girls are less involved than their male peers. Variations in the gender gap in athletic participation often appear to be driven by economic disparities, race and ethnicity, and family characteristics. These variations strongly suggest that the girls’ and boys’ participation in sports and exercise is primarily shaped by access and opportunity.”). The Women’s Sports Foundation report provides an extensive set of policy recommendations, largely directed at promoting young girls’ involvement in sports and exercise programs. *Id.* at 168-71.

204. The top five high school sports having the largest number of female participants in 2008-2009 were outdoor track and field (457,732 participants at 15,864 schools), basketball (444,809 participants at 17,582 schools), volleyball (404,243 participants at 15,069 schools), fast-pitch softball (368,921

positive thing for women's sports, in terms of raising competition and skill levels, it will have little impact on the number of women playing in college; these sports are generally already offered in most Division I programs. By contrast, in that school year, the NCAA emerging sport of rugby was available only at fifteen high schools and had only 100 female participants. Sand volleyball and squash were not even listed on the National Federation of State High School Associations' survey of high school athletic participation.²⁰⁵ With so few universities offering these sports, one reasonably might be skeptical that schools at any level will be willing to devote their scarce resources to these emerging sports any time in the near future.

IV. DISCRIMINATION THEORY OR EDUCATIONAL POLICY: DEFINING THE ROLE OF COLLEGES AND UNIVERSITIES

To suggest that universities have been unfairly targeted as the source of discrimination in intercollegiate athletics is not to suggest that they are blameless for past practices or have no role to play in achieving the goal of gender equity under Title IX. Apart from participation opportunities, universities were slow to provide equal treatment and resources to the women's teams that did exist. For many years after Title IX's enactment, women's teams continued to travel by bus, operate on nominal equipment allocations, and otherwise survive on the meager leftovers of athletic department budgets. Meanwhile, men's teams traveled in comfort by plane and were provided newer equipment and superior facilities.²⁰⁶

Many of these blatant disparities have been resolved, however, prompted by OCR compliance reviews, litigation, and the NCAA's inclusion of Title IX compliance as part of the certification process for all of its members.²⁰⁷ Changing attitudes have also played a role. With the female share of the undergraduate population averaging fifty-five percent and growing,²⁰⁸ institutions may be reluctant to ignore the appearance of imbalance by

participants at 15,172 schools), and soccer (344,534 participants at 10,548 schools). HIGH SCHOOL PARTICIPATION SURVEY, *supra* note 2, at 48.

205. *Id.* at 47.

206. See generally George, *supra* note 16 (examining the financial disparity between the men's and women's basketball teams at the University of Colorado).

207. See NCAA, 2009-10 NCAA DIVISION I ATHLETICS CERTIFICATION HANDBOOK 2 (2009), available at <http://www.ncaa.org/wps/wcm/connect/57cf27804f039d28a244b73550f38bbb/C-Handbook%2B09-10.pdf?MOD=AJPERES&CACHEID=57cf27804f039d28a244b73550f38bbb.pdf> (requiring "plans for improvement to address gender issues"). Of course, Title IX continues to be an important means of enforcement when such discrepancies do in fact exist; see, e.g., Barrett v. West Chester Univ. of Pa., No. Civ.A. 03-CV-4978, 2003 WL 22803477 (E.D. Pa. Nov. 12, 2003) (involving plaintiffs using Title IX to challenge how little money their university was spending on recruiting and coaches' salaries for women's teams).

208. A recent study published by the American Council on Education, however, reports that with the exception of Hispanics, the gender gap in college attendance rates may have stabilized. JACQUELINE E. KING, AM. COUNCIL ON EDUC., GENDER EQUITY IN HIGHER EDUCATION: 2010, at v (2010).

continuing programs in which the majority of their students are consistently underrepresented. Just as universities might support programs to increase female representation in certain male-dominated majors, these schools may have strong policy and public relations reasons to continue plans to expand women's involvement in athletics, even apart from legal mandates.²⁰⁹

A. The Smaller Picture: Eliminating Discrimination in the Short Run

To address inequities in intercollegiate athletics, agreement on the problem to be solved is an initial obstacle, particularly if we are prepared to abandon proportionality as an end in itself. The gender disparity in high school sports has been stable for some time and seems unlikely to change in the near future without extensive investments and aggressive efforts to promote sports for girls at a much younger age. Even with such investments, the disparity may never disappear if it is generated in large part by other kinds of gender differences in interests and attitudes, as suggested by Sax's analyses.²¹⁰

If women are unlikely to aspire to become intercollegiate athletes at the same rate as men (and if we reject as our goal an insistence that these women mirror college men in their devotion to sports), the disparity may be viewed from another angle. Much of the support structure that has evolved for intercollegiate athletes, especially for the most prominent sports in high profile programs, is not essential to the existence of intercollegiate athletics. If we acknowledge that women may be choosing not to access this experience at the same rate as men, what are they missing? Certainly this disparity is about more than the chance to play sports and be physically active. Those opportunities are readily available in most universities through extensive intramural and recreation programs. What additional benefits flow from the status of an intercollegiate athlete, and can we diminish the inequality by reducing or eliminating some of those benefits?

While one might identify a number of privileges afforded to intercollegiate athletes, the athletic scholarship may be the most significant and concrete of those privileges for students in Division I. The majority of Division I athletes receive full or partial scholarships to pay their way through college. In football and basketball, most players will be awarded full scholarships, while partial scholarships are permitted in most other sports. Access to those scholarship

209. See Richard A. Epstein, *Just Scrap Title IX*, N.J.L.J., Oct. 28, 2002, at 23 ("Coed institutions bidding for students have every incentive to set the right internal sports balance. . . . Defenders of Title IX will howl in protest that all the recent gains in female athletics are attributable to the statute. Poppycock. With or without Title IX, we would have seen a steep rise in women's sports through the 1970s because the law passed just when social attitudes toward women were radically changing. Private and state institutions are not impervious to student demands; nor should women be painted as society's perpetual victims, unable to speak and act for themselves. Women no longer need Title IX to be heard loud and clear.").

210. See *supra* notes 149-63, 173, 176-85 and accompanying text.

dollars may be reason enough to pursue college sports, and the issue demands careful scrutiny of the inequitable allocation of those resources.²¹¹

Rather than use athletic scholarships as a justification for demanding proportionality in participation, however, an alternative approach would be to reconsider the role of scholarships. OCR currently requires the percentage of financial aid dollars to match participation rates.²¹² Thus, if forty-five percent of the student-athletes are women, then forty-five percent of the total financial aid awarded should go to female athletes. As an alternative, Title IX could be interpreted to require the proportional allocation of scholarship funds even without proportional participation. In other words, female student-athletes would receive fifty-five percent of the scholarship dollars if women represented fifty-five percent of the student body as a whole. This would reduce at least one aspect of discrimination in a program where women are underrepresented by limiting the direct economic consequences of that disparity. A school could thus achieve proportionality in scholarship awards before reaching proportionality in participation rates. The math might require a reduction of scholarships for some male sports, but it could also encourage the addition of female sports.

A second, more radical alternative would be to divorce the issue of scholarships from intercollegiate athletics entirely. While well established in the current system, scholarships are not an inherent requirement of intercollegiate athletics. Schools in Division III, as well as the Ivy League in Division I, already operate full programs without the benefit of athletic scholarships. Divisions I and II could certainly operate under the same rules. Scholarships would still be available to any student athlete who demonstrates need under the same standards used for other students in the university.²¹³

211. Interestingly, the availability of scholarships seems to have little impact on the rate of participation. Even at Division III schools, where athletic scholarships are not permitted, the 2005-2006 participation rates were forty-two percent female and fifty-eight percent male. NCAA, 2009-10 DIVISION III MANUAL § 15.01.3 (2009), available at <http://www.ncaapublications.com/productdownloads/D310.pdf>; NCAA GENDER-EQUITY REPORT, *supra* note 36, at 92.

212. See Letter from Mary Frances O'Shea, Nat'l Coordinator for Title IX Athletics, to Nancy S. Footer, Gen. Couns., Bowling Green State Univ. (July 23, 1998), available at <http://www.ed.gov/about/offices/list/ocr/docs/bowlgrm.html>. The practical consequence may be that female athletes are much more likely to have athletic scholarships than non-football male student-athletes. The NCAA designates some sports as "head count" sports for scholarship purposes—any student athlete awarded a scholarship in those sports must be granted a full scholarship. "Head count" sports include football and basketball, as well as women's volleyball, tennis, and gymnastics. See 2009-10 NCAA DIVISION I MANUAL, *supra* note 35, § 15.5.2. For all other sports, partial scholarships are permitted—thus, the coach of a sport allowed only twelve scholarships by the NCAA, for example, could choose to give "half" scholarships to twenty-four participants. *Id.* § 15.5.3. Football, with eighty-five allotted scholarships which must be awarded as full scholarships to eighty-five participants, makes the scholarship numbers harder to balance for the female student-athletes. Consequently, female athletes in Olympic sports may be more likely to be awarded at least some scholarship dollars compared to their male Olympic sport colleagues.

213. There would, of course, be serious questions of monitoring such awards to ensure that a university was not simply disguising athletic scholarships as need scholarships. Given existing standards routinely used by the federal government and university financial aid offices for defining need, this should not add a serious burden to the program. See, e.g., Free Application for Federal Student Aid,

Perhaps stipends could be added to alleviate the financial burden for these students, acknowledging the many hours that sports demand. The time commitment required to participate in intercollegiate athletics is likely to prevent student-athletes from working part-time jobs to provide additional income. The rules could permit grants equivalent to a twenty-hour-per-week work-study program or job.²¹⁴

B. The Bigger Picture: Eliminating Discrimination in the Long Run

The elimination of the gender bias inherent in college sports will require a perspective that goes beyond the current efforts of shoehorning women into a program and culture developed by and for men. The way that resources are allocated in all college recreational programs and the kinds of activities offered should be open for examination and discussion. For those athletes competing at the intercollegiate level, we may also need to reconsider the time and commitment demanded, weighing those costs for the students involved against the broader goals of the educational enterprise.

In considering the allocation of resources, scholarships are not the only benefit for intercollegiate athletes. Access to superior equipment, practice facilities, trainers, experienced coaches, and high-level competition are certainly additional advantages. These kinds of benefits need not be limited to the intercollegiate program. Enhancing club and intramural sports programs could provide other athletes with better resources as well and could benefit far more students. These programs may also need to ensure that they are offering the broader array of recreational and physical activities that are more likely to be attractive to women, in addition to the traditional team sports.²¹⁵ As long as these programs are open to all students, with ample opportunities to propose and resources to develop new teams, the problem of equal access would be addressed. Women would have the same chance as men to participate in sports, and the choice would be theirs.

Investing in club and intramural sports, as well as other recreational offerings, might better serve the broader goal of encouraging women—in fact, all students—to be more physically active than the current system does. Certainly such enhancements are likely to benefit far more students than the few who are intercollegiate athletes. Women who never had the chance to participate in sports at all or dropped out long ago might be re-engaged. Perhaps it is time to reconsider the division of intercollegiate athletics and student recreation as separate enterprises and envision a continuum instead.

available at <http://www.fafsa.ed.gov>. New NCAA rules would be necessary to control abuses, but the NCAA's extensive monitoring experience suggests that the organization is capable of such supervision.

214. See NCAA DIVISION I MANUAL, *supra* note 35, § 17.1.6.

215. See *supra* note 141 and accompanying text.

Looking at the entire spectrum of sports and exercise opportunities—comprising workout facilities, exercise classes, intramurals, club teams, and varsity sports—is more likely to ensure that scarce resources are allocated with the welfare of all students in mind.

While there are many privileges associated with being an intercollegiate athlete, the costs are high. NCAA regulations limit weekly practice time to twenty hours for Division I programs,²¹⁶ but anyone who has competed at that level understands that the time commitment is often far greater. The twenty hour limit does not include travel to competitions, “voluntary” sessions for skill training, practices organized by team captains, or time spent with trainers rehabilitating injuries.²¹⁷ Apart from practices, classes, and studying, student-athletes often have little time for anything else, and even studying may take a back seat to the daily demands of training and competition. A female college student, even with ample athletic talent, might well conclude that she is better served spending her time on academics and other activities.²¹⁸

Given girls’ greater interest in other community and extracurricular activities, as demonstrated by the Women’s Sports Foundation research, another approach might be to think even more broadly and reconsider what we demand of our student-athletes. If practice time were reduced and more strictly enforced, for example—making sports more like extracurricular pursuits and less like full-time jobs—perhaps women would be more interested in participating. Certainly more research would be needed to reach such a conclusion, but more balance between the roles of “student” and “athlete” might make the athlete role more attractive. Just as women report leaving large law firm practice to find a better work-family equilibrium,²¹⁹ women may be

216. See NCAA DIVISION I MANUAL, *supra* note 35, § 17.1.6.1.

217. In addition to the practice time permitted by the NCAA, student-athletes often participate in additional weight-lifting and training sessions labeled as “voluntary,” though in practice they are voluntary only in name. *Id.* at §§ 17.02.1, 17.1.6. Any rehabilitation or treatment by the athletic trainers also is not included in the hour limit. *See id.* at § 17.02.1; KNIGHT FOUND. COMM’N ON INTERCOLLEGIATE ATHLETICS, A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION 16 (2001) [hereinafter A CALL TO ACTION], available at http://www.knightcommission.org/images/pdfs/2001_knight_report.pdf (“Flagrant violation of the NCAA’s rule restricting the time athletes must spend on their sport to 20 hours a week is openly acknowledged. The loophole most used is that of so-called ‘voluntary’ workouts that don’t count toward the time limit.”). Travel to away games during the season may result in days away from campus and classes.

218. *See supra* text accompanying notes 187-92.

219. *See, e.g.,* CYNTHIA FUCHS EPSTEIN ET AL., THE PART-TIME PARADOX: TIME NORMS, PROFESSIONAL LIVES, FAMILY, AND GENDER (1999) (discussing the efforts of women attorneys to work part-time in order to find a better work-family balance); *see also* Schultz, *supra* note 96, at 1825-26 (“Women’s patterns of occupational movement suggest that there are powerful disincentives for women to move into and to remain in nontraditional occupations. The mobility studies show that women in higher-paying, male-dominated occupations are much less likely to remain in such occupations over time than are women in lower-paying female-dominated occupations, who are more likely to stay put. Thus, just as employers appear to have begun opening the doors to nontraditional jobs to women, almost as many women have been leaving those jobs as have been entering them.”).

rejecting the path of intercollegiate athletics because it demands too much of their time and energy.

Considering the relationship between intercollegiate athletics and other sports and exercise offerings may facilitate the examination of an even bigger picture—returning high-profile college athletics to the universities. The role of women in sports is inherently tied to the broader issue of how sports are managed at our universities. Our athletic programs, and perhaps the sports themselves, were designed to support men and their sports, primarily football and basketball. Women, using the sword of Title IX, have fought hard and with increasing success to become full participants in that structure. But the structure itself may serve to perpetuate historical discrimination and gendered stereotypes, just as some scholars have argued that workplace structures and values are designed to reinforce traditional gender roles.

The Knight Commission on Athletics has spent almost twenty years examining the problem of “big-time” college sports and the excesses such programs demand, anathema to the integrity of our institutions of higher education.²²⁰ A full discussion of the work of the Commission and how it might relate to gender equality in intercollegiate athletics is beyond the scope of this Article.²²¹ Breaking the link between college and professional sports, as well as the money driving both enterprises, however, may open up a much broader discussion of how our colleges and universities can best serve all students. The top athletic programs are more often touted for the number of athletes drafted into the professional ranks—an accomplishment that focuses attention almost exclusively on men—than for the number of students who graduate and successfully pursue other careers.²²² For the benefit of both male

220. See A CALL TO ACTION, *supra* note 217 (describing continuing problems with the culture and growing commercialization of college athletics ten years after the Commission’s original report); KNIGHT FOUND. COMM’N ON INTERCOLLEGIATE ATHLETICS, REPORTS OF THE KNIGHT FOUNDATION COMMISSION ON INTERCOLLEGIATE ATHLETICS (1991-1993) [hereinafter 1991-93 KNIGHT FOUNDATION REPORTS], available at http://www.knightcommission.org/images/pdfs/1991-93_KCIA_report.pdf (“Following decades of presidential neglect and institutional indifference, big-time college sports were ‘out of control.’”); see also JAMES L. SHULMAN & WILLIAM G. BOWEN, THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES (2001) (examining the impact of sports on universities and students at thirty public and private colleges and universities).

221. See generally George, *supra* note 104, at 1138-1161 (discussing A CALL TO ACTION, *supra* note 217, 1991-93 KNIGHT FOUNDATION REPORTS, *supra* note 220, and SCHULMAN & BOWEN, *supra* note 220, and proposing coed teams as a means of ensuring gender equity and eliminating the focus on professional sports).

222. Cf. A CALL TO ACTION, *supra* note 217, at 13-15 (“Under the influence of television and the mass media, the ethos of athletics is now professional. The apex of sporting endeavor is defined by professional sports. This fundamental shift now permeates many campuses. Big-time college basketball and football have a professional look and feel—in their arenas and stadiums, their luxury boxes and financing, their uniforms and coaching staffs, and their marketing and administrative structures. In fact, big-time programs have become minor leagues in their own right, increasingly taken into account as part of the professional athletics system. . . . Big-time athletics departments seem to operate with little interest in scholastic matters beyond the narrow issue of individual eligibility. They act as though the athletes’ academic performance is of little moment. The historic and vital link between playing field and

and female athletes, a focus on the ninety-eight percent who do not enter the professional leagues is surely a more worthy endeavor.

CONCLUSION

There seems to be some agreement among scholars that Title IX is “stuck”—stagnating in the progress being made, stagnating in the percentage of women playing at the intercollegiate level, and stagnating in reaching the goal of proportionality. The statistics confirm the frustration suggested by these claims. After the initial surge of female athletes in college, progress has slowed dramatically. Even worse, the myopic focus on achieving proportionality at the university level has narrowed our focus to a numbers game affecting a relatively small percentage of students.

Studies now confirm what was obvious from observation: girls are less interested in sports than are boys and are more likely to devote their time to academics and community service activities, even when sports opportunities are available. The gender gap in sports participation is well established long before these students reach college. Rather than dismissing such findings as sexist stereotypes, we need to pay closer attention to the reasons for such choices, in order not only to eradicate discrimination that may play a role, but also to recognize the multiple factors influencing this outcome. It may also be time to rethink and perhaps reconfigure our approach to sports in college—identifying broader goals for university sports programs that include all students, not just the elite intercollegiate athletes.

To identify these goals, we need to acknowledge and address a wide range of issues. For young girls (especially those in minority, urban areas), we need to ensure that opportunities for sports participation are enhanced and encouraged. We also need to understand, however, that more girls playing basketball and soccer may not translate into an increasing number of women playing sports in college—both because such sports are already being widely offered at the college level and because girls are more likely to drop out of organized sports to pursue academics and other interests. Increasing participation in intercollegiate athletics will require developing a broader range of sports in the lower schools. At the collegiate level, women may be better served by much more expansive thinking than has characterized discussions of Title IX to date. The vast resources we commit to intercollegiate sports might be better utilized if shared more broadly to enhance club sports, intramural sports, and other recreational opportunities. Within the varsity program, limiting the time and commitment demanded may increase the interest of female athletes who are seeking more balance between academics, service, and

classroom is all but severed in many institutions. Graduation rates for athletes in football and basketball at the top level remain dismally low—and in some notable cases are falling.”).

extracurricular activities. At the end of the day, it is the education of these students that should guide our focus and decisions.

Advocates of Title IX need to consider more carefully the values and the goals at issue. Redefining our sports programs at the middle and high school levels and refocusing our attention on the full spectrum of sports and exercise programs at our universities are likely to pay far greater dividends in the long run. Girls and women need more than access to the existing structure that has been founded on narrowly-cabined views of sports and gender. They deserve a different kind of equality that may never be possible in the current configuration. Title IX has been around for almost forty years—it is long past time to move forward in our discussions of sports and discrimination.