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## Righting the Canoe: Title IX and the Decline of Men's Intercollegiate Athletics, 37 J. Marshall L. Rev. 257 (2003)

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# RIGHTING THE CANOE: TITLE IX AND THE DECLINE OF MEN'S INTERCOLLEGIATE ATHLETICS

ANDREW J. BOYD\*

## INTRODUCTION

### A. *The Decline of Men's Intercollegiate Athletics*

Men's intercollegiate athletics currently face a severe crisis. Between 1981 and 1999 university athletic departments cut 171 wrestling teams from their rosters.<sup>1</sup> During that time, men's intercollegiate athletics also suffered the loss of 84 tennis teams, 56 gymnastics teams, 27 track teams, and 25 swimming teams.<sup>2</sup> When universities drop men's sports programs, men lose much more than the opportunity to compete on the athletic field. They also lose the opportunity to receive scholarship funds, and thereby the opportunity to obtain a university education.<sup>3</sup>

### B. *Title IX's Effect on Men's Intercollegiate Athletics*

Title IX of the Education Amendments of 1972 was designed to ensure that federally funded educational institutions provide male and female students the equal opportunity to participate in all aspects of the educational process.<sup>4</sup> The most controversial aspects of Title IX are the way in which it has been applied to, and

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1. Aaron Gabriel, *Women Advancing, but at what Expense?*, DAILY HERALD (Ill.), June 26, 2002, § 2, at 10.

2. *Id.* at 1, 10.

3. *Id.* at 10. When university athletic programs cut men's sports, male student athletes are often left with few options. St. Viator high school graduate Josh Kay received a baseball scholarship from Iowa State University, only to see the University drop its baseball team. *Id.* Unable to secure a scholarship offer from another university, Kay chose to attend a local community college. *Id.*

4. Susan M. Shook, Note, *The Title IX Tug-of-War and Intercollegiate Athletics in the 1990's: Nonrevenue Men's Teams Join Women Athletes in the Scramble for Survival*, 71 IND. L.J. 773, 774 (1996). Shook points out that Title IX was not solely intended as a measure to assure equality of athletic opportunity for males and females. *Id.* The legislation was broad in scope, and it was not initially clear that Title IX applied to sports. *Id.* at 775.

its effect on, men's university athletic teams.<sup>5</sup> Title IX has greatly increased opportunities for women to participate in intercollegiate athletics.<sup>6</sup> However, because budget limitations prevent most universities from expanding athletic opportunities for women without cutting costs in other programs, universities must cut men's sports teams to comply with Title IX.<sup>7</sup> This development is an unfortunate and unintended consequence of Title IX. There must be an equitable solution to this problem.

### C. Comment Organization

Part II of this Comment will explain the codification of Title IX, the regulations used for its enforcement, and its legislative history. Part II will also address some of the case law regarding Title IX.<sup>8</sup> Part III will show that the way in which Title IX has

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5. See Charles P. Beveridge, Note, *Title IX and Intercollegiate Athletics: When Schools Cut Men's Athletic Teams*, 1996 U. ILL. L. REV. 809, 810 (1996) (arguing that university athletic programs single out men's teams for budget cuts to meet Title IX requirements); Jeffrey P. Ferrier, Comment, *Title IX Leaves Some Athletes Asking, 'Can We play Too?'*, 44 CATH. U. L. REV. 841, 875-84 (1995) (arguing that Title IX enforcement does not necessarily require that men's sports be cut, and showing that a combination of the following initiatives might remedy this problem: reducing the size of the football team or excluding the football team from Title IX calculations, or increasing the university athletic department budget, or excluding athletics from Title IX altogether); Christopher Paul Reuscher, Comment, *Giving the Bat Back to Casey: Suggestions to Reform Title IX's Inequitable Application to Intercollegiate Athletics*, 35 AKRON L. REV. 117, 148-53 (2001) (noting that cutting men's sports teams so that women's teams can be added is fundamentally inequitable, and proposing that some sports be exempt from Title IX considerations by virtue of their status as profit-generating enterprises for universities); Robert C. Farrell, *Title IX or College Football*, 32 HOUS. L. REV. 993, 1055-58 (1995) (arguing that universities with football programs cannot presently comply with Title IX because of the sheer size of the programs, and proposing cuts in the budgets and size of these football programs, and showing that Title IX problems would become more manageable if university football teams completely divorced themselves from university athletic departments, thereby becoming age-group football teams loosely affiliated with universities). Farrell merely points out that this last proposal is a theoretical option. *Id.* He does not argue that this is a real solution to this problem. *Id.* at 1055-56.

6. Shook, *supra* note 4, at 773.

7. *Id.* at 773-74; Gabriel, *supra* note 1, at 1. Gabriel points out that universities cut men's sports proactively in order to avoid Title IX lawsuits, or to place the university in a position where it can successfully defend against Title IX lawsuits. *Id.*

8. See, e.g., Neal v. Cal. State Univ., 198 F.3d 763, 770-73 (9th Cir. 1999) (holding that universities that comply with Title IX by eliminating men's sports are not in violation of Title IX, noting that Congress understood Title IX would cause the elimination of some men's sports, and pointing out that Title IX is directly responsible for the huge strides women's athletics have made in the past several years: "Title IX has enhanced, and will continue to enhance, women's opportunities to enjoy the thrill of victory, the agony of defeat, and

been applied and enforced has undeniably benefited women's sports, but harmed men's sports.<sup>9</sup> Part IV will propose a legislative amendment that intends to reduce the inequitable consequences of current Title IX enforcement.

## II. BACKGROUND

### A. *The Codification of Title IX*

Title IX is codified under 20 U.S.C. sections 1681-1688.<sup>10</sup> The key provision reads: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under an education program or activity receiving Federal financial assistance . . ." <sup>11</sup> Female plaintiffs suing universities under Title IX have often, but not always, been able to show in court that university athletic departments fall within the scope of section 1681(a).<sup>12</sup>

### B. *Regulations Pertaining to Title IX*

The regulations implementing Title IX are C.F.R. sections 106.37 and 106.41. The key provision of section 106.41(a) reads:

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 such a recipient, and no recipient shall provide any such athletics

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the many tangible benefits that flow from just being given a chance to participate in intercollegiate athletics." )

9. See *Cohen v. Brown Univ.*, 809 F. Supp 978, 1001 (D.R.I. 1992) (determining that Brown University had violated Title IX by demoting women's volleyball and gymnastics teams from varsity standing to club sports not supported by the university), *aff'd* 991 F.2d 888 (1st Cir. 1993), *remanded to* 879 F. Supp. 185 (D.R.I. 1995), *aff'd* 101 F.3d 155, 187 (1st Cir. 1996) (determining that the university could lawfully choose to comply with Title IX by cutting some men's sports).

10. 20 U.S.C. §§ 1681-1688 (2000).

11. *Id.* § 1681(a).

12. See *Haffer v. Temple Univ.*, 688 F.2d 14, 17 (3d Cir. 1982) (rejecting defendant university's argument that Title IX does not apply to its athletic programs because those programs do not "directly" receive federal assistance, and holding that where a university "as a whole receives federal monies," all of its programs, including its athletic programs, are subject to Title IX). *But see Bennett v. W. Tex. State Univ.*, 799 F.2d 155, 157-58 (5th Cir. 1986) (reasoning that since the athletic department of that university did not directly receive federal assistance, the athletic department did not fall under the scope of Title IX). The Civil Rights Restoration Act of 1987 settled this dispute. That Act provided that Title IX did not apply only to specific university programs, but rather applied to "all the operations of . . . a college, university . . ." 20 U.S.C. § 1687 (2000).

separately on such basis.<sup>13</sup>

Section 106.41(c) requires that universities comply with Title IX in twelve separate areas.<sup>14</sup> Section 106.37(c)(1) provides that "To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics."<sup>15</sup>

### C. Three Methods of Complying with Title IX

The Office of Civil Rights offers a Policy Interpretation explaining how a university must show compliance with Title IX.<sup>16</sup> First, the university complies if it can show that athletic opportunities for both males and females exist in "numbers substantially proportionate" to the numbers of males and females at the university.<sup>17</sup> Second, the university complies if it can show a "history and continuing practice" of expanding athletic opportunities for females.<sup>18</sup> Finally, the university complies if it can show that the interests of all student athletes are fully met.<sup>19</sup> If the university can show any one of these three things, it is in compliance with Title IX.<sup>20</sup>

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13. 34 C.F.R. § 106.41 (2000).

14. Title IX Facts, (unpublished manuscript, on file with Good Sports, Inc., Title IX and Gender Equity Specialists, P.O. Box 3003, Oakton, Va.) The twelve areas are:

- 1) Opportunities for male and female athletes to compete.
- 2) Quality of equipment and supplies distributed to male and female athletes.
- 3) The number and times of games and practices.
- 4) Quality of transportation to games, housing, and meal money.
- 5) Availability of tutors for athletes.
- 6) Skill and qualifications of coaching staff.
- 7) Quality of practice and locker facilities.
- 8) Quality of medical care available to athletes.
- 9) Quality of athlete housing and dining.
- 10) Quality of publicity and promotion of teams.
- 11) Quality of "support services" such as office personnel.
- 12) Quality of recruitment methods.

*Id.*

15. 34 C.F.R. § 106.37(c)(1) (2000).

16. Policy Interpretation, 44 Fed. Reg. 71,418 (Dec. 11, 1979).

17. *Id.* In addition, pursuant to C.F.R. § 106.37, the Policy Interpretation also states that athletic scholarships be "available on a substantially proportional basis to the number of male and female participants in the institution's athletic program." Policy Interpretation, 44 Fed. Reg. 71,414 (Dec. 11, 1979).

18. Policy Interpretation, 44 Fed. Reg. 71,418 (Dec. 11, 1979).

19. *Id.*

20. *Id.* Most universities have found that the best way to comply with Title IX is to comply with the proportionality test, as budget limitations prevent

#### D. Title IX's Legislative History

Unfortunately, a search of the legislative history of Title IX turns up very little specific information regarding its application to intercollegiate sports.<sup>21</sup> In fact, the sum total of "congressional debate" on this topic consists of two statements made by Senator Bayh.<sup>22</sup> However, the legislative history does contain an indication of the general nature of Title IX. This history shows that the legislators who passed Title IX did not intend that a numerical analysis based on sex should determine whether a university complied with its requirements.<sup>23</sup> The legislature thus placed language prohibiting "preferential . . . treatment to the members of one sex" in the codification of Title IX, 20 U.S.C. section 1681.<sup>24</sup>

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expanding programs for women. Shook, *supra* note 4, at 773; Gabriel, *supra* note 1, § 2, at 1.

21. See *Cohen*, 991 F.2d at 893 (noting that the lack of legislative history on this issue presents a problem for courts trying to interpret Title IX; noting also that the completed legislation was not accompanied by a Committee report).

22. *Id.* These statements consist of the following two bits of incisive analysis. First, that locker facilities should remain private with respect to males and females. 118 CONG. REC. 5,807 (1972) (statement of Sen. Bayh). Second, that football teams need not be forced to include females. 117 CONG. REC. 30,407 (1971) (statement of Sen. Bayh). See also Shook, *supra* note 4, at 814 n.9, and Ferrier, *supra* note 5, at 884 n.4 (noting that these are the only two statements on record on this issue).

23. See Donald C. Mahoney, Note and Comment, *Taking a Shot at the Title: A Critical Review of Judicial and Administrative Interpretations of Title IX as Applied to Intercollegiate Athletic Programs*, 27 CONN. L. REV. 943, 945 (1995) (stating "the legislative history contains no . . . ambiguity on the issue of . . . quotas as a means of compliance. Indeed, the legislative history surrounding Senator Birch Bayh's 1971 amendment is replete with comments from Senators and Representatives who wished to ensure that Title IX would not require a quota system."). During the debates, Representative Green argued, "a quota system would hurt our colleges and universities. I am opposed to it even in terms of attempting to end discrimination on the basis of sex." 117 CONG. REC. 39,262 (1971). Senator Beal remarked:

I hope it is the intent of the Senate in adopting the amendment that we are desirous of eliminating the sex discrimination that has taken place in education. As we eliminate this, I hope that we are not establishing still another form of bias. I hope what we are saying is that we want everyone to be treated fairly and equally . . . .

118 CONG. REC. 5,813 (1972). Senator Pell stated, "To put it succinctly, we must be sure that this type of amendment is not used to establish quotas for sex . . ." 118 CONG. REC. 18,438 (1972)..

24. 20 U.S.C. § 1681(b) (2000). The relevant text reads:

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area . . . .

This legislative history leads some commentators to argue that Title IX, as it is presently enforced in intercollegiate athletics, gives preference to females, thus inaccurately reflecting the intent of Congress.<sup>25</sup> Other commentators, however, note that there is a lack of information on athletics within this legislative history, and therefore, it is difficult to come to any real conclusions about what Congress intended regarding the effect of Title IX on intercollegiate athletics.<sup>26</sup>

There are thus two basic positions on Title IX's legislative history. First, some subscribe to the view that the legislative history's lack of specific information on athletics renders it impossible to determine Congressional intent regarding Title IX and intercollegiate sports.<sup>27</sup> Second, the opposing view contends that the legislative history has specific information that indicates Congress did not intend for Title IX to give preference to females in any scholastic program<sup>28</sup> or to measure compliance by quotas.<sup>29</sup>

#### *E. Men as Plaintiffs in Title IX Actions*

Male athletes have sued universities under Title IX in attempts to reinstate their sports teams; these cases have been uniformly unsuccessful.<sup>30</sup> For example, in *Chalenor v. University of North Dakota*, the plaintiffs claimed that when the university

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*Id.*

25. Reuscher, *supra* note 5, at 142. Reuscher writes, "Congress erred in passing the Civil Rights Restoration Act of 1987. Congress misinterpreted the legislative history of Title IX . . ." *Id.* at 142. Reuscher later writes, "Presently, Title IX operates a quota system which is in direct contradiction to the original intent and legislative history of the statute . . . Men's teams are not 'sacrificial lambs' so that the hopes and dreams of others may be realized." *Id.* at 157.

26. Shook, *supra* note 4, at 775. Title IX's "vague wording and the relative scarcity of secondary legislative materials accompanying its passage in Congress" made it difficult for universities to determine how Title IX applied to their athletic programs. *Id.*

27. *Id.*

28. Reuscher, *supra* note 5, at 157.

29. Mahoney, *supra* note 23, at 945-49.

30. See *Gonyo v. Drake Univ.*, 837 F. Supp. 989, 996 (S.D. Iowa 1993) (determining that where the percentage of males participating in intercollegiate sports exceeded the percentage of male students, and where the percentage of female athletes was lower than the percentage of female students, the university's decision to cut the men's wrestling team in order to achieve proportionality did not violate Title IX). See also *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615-16 (6th Cir. 2002) (determining that the university's elimination of its men's wrestling, tennis, and soccer teams in order to bring the university into compliance with Title IX was permitted under Title IX). The court also determined that the university's decision to cut the men's teams did not violate the Equal Protection Clause of the Fourteenth Amendment, as the cuts were made in order to comply with valid federal law. *Id.* at 614-15.

cut the men's wrestling team in order to comply with Title IX, the university in fact violated Title IX.<sup>31</sup> The university argued that these cuts were required under Title IX in order to avoid discriminating against female athletes.<sup>32</sup> The court agreed with the university; it held that the university could lawfully choose to comply with the proportionality prong of Title IX, and that the university could lawfully cut a men's sport in order to do so.<sup>33</sup>

Similarly, in *Boulahanis v. Illinois State University*, male plaintiffs sued after the University eliminated the men's soccer and wrestling teams.<sup>34</sup> These cuts followed a study by the University Gender Equity Committee that determined the University was not meeting the requirements of Title IX.<sup>35</sup> The University considered several options that it thought, given its budget situation, would provide equal opportunities for athletes of both sexes. The University then decided to cut two men's sports while adding women's soccer.<sup>36</sup> This action brought the University

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31. *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1043 (8th Cir. 2002). Plaintiff's argument proceeded in the following manner: only men's teams were cut; the university had therefore effectively discriminated against males; Title IX prohibits discrimination on the basis of sex; the university had thus violated Title IX. *Id.*

32. *Id.* The defendant university argued that it faced budget problems that required it to cut men's sports in order to avoid discriminating against female athletes. *Id.* The university argued that without these cuts, the present situation where male athletes receive a "disproportionately large" amount of sports dollars would remain unchanged, and the university would remain in violation of Title IX. *Id.*

33. *Id.* at 1047. *Chalenor* was unusual in that an outside donor was willing to finance the wrestling program. *Id.* at 1048. Unfortunately for the grapplers, the court reasoned that any such donation could not go directly to the wrestling team, but must be distributed equitably according to Title IX. *Chalenor*, 291 F.3d at 1048. "Once a university receives a monetary donation, the funds become public money, subject to Title IX's legal obligations in their disbursement." *Id.*

34. *Boulahanis v. Ill. State Univ.*, 198 F.3d 633, 636 (7th Cir. 1999).

35. *Id.* at 635-36. The study was a numerical analysis in which the percentages of male and female athletes competing in intercollegiate sports at the university were compared with the percentages of male and female students at the university. *Id.* at 635. Forty-five percent of the students enrolled at the university were male, but males comprised sixty-six percent of the intercollegiate athletes at the university. *Id.* Fifty-five percent of the students enrolled were female, but females comprised only thirty-four percent of the intercollegiate athletes. *Id.* "The study concluded that these numbers did not constitute equitable participation opportunities for women." *Id.*

36. *Id.* The university in fact considered ten options, only two of which did not involve cutting at least one men's sport. *Boulahanis*, 198 F.3d at 635. It is interesting to note that three of these options did not include adding any women's sports. *Id.* Title IX has usually been understood to create gains in opportunities for female athletes, but this university realized that if it simply cut enough men's sports, it could achieve proportionality. *Id.* at 635-36. Ultimately, however, the university chose to cut men's wrestling and soccer, and to add women's soccer. *Id.* at 636.



into compliance with the proportionality prong of Title IX.<sup>37</sup>

The court granted the University's motion for summary judgment, which was affirmed on appeal.<sup>38</sup> The court was unmoved by plaintiff's argument that the University's decision was, in effect, sexual discrimination (which Title IX prohibits).<sup>39</sup> The court recognized that budgetary concerns, rather than a desire to discriminate against male athletes, motivated this decision.<sup>40</sup>

Similarly, in *Kelley v. University of Illinois*, male student athletes sued the University of Illinois after the University cut three men's sports teams.<sup>41</sup> The *Kelley* court granted the University's motion for summary judgment, stating that the male athletes were not discriminated against, as the number of male athletes at the university was still "substantially proportionate" to the number of male students at the University.<sup>42</sup> The court rather frankly admitted that Title IX mandated that male athletes must lose opportunities so that female athletes could gain opportunities.<sup>43</sup> Despite the court's sympathy for the plaintiffs, the

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37. *Id.* At this point, females represented the same 55% of students at the university, but they now represented 51.72% of intercollegiate athletes at the university. *Id.* Males represented the same 45% of students at the university, but they now represented 48.29% of intercollegiate athletes at the university. *Id.* Proportionality had been achieved. *Boulahanis*, 198 F.3d at 636.

38. *Id.* at 635.

39. *Id.* at 637. The *Boulahanis* court reasoned that the decision made by the university to cut the men's teams was motivated in part by financial concerns. *Id.* When universities decide to cut men's sports, they do so because they are unable, given budget constraints, to simply add enough women's teams to achieve proportionality. *Id.* "Absent financial concerns, Illinois State University presumably would rather have added women's programs while keeping its men's programs intact." *Id.* This decision, in other words, was not an instance of sexual discrimination against men, but rather a lawful response to the combination of budgetary limitations and the requirements of Title IX. *Id.*

40. *Id.*

41. *Kelley v. Univ. of Ill.*, 832 F. Supp. 237, 240 (C.D. Ill. 1993). The men's swimming, fencing, and diving teams were cut. *Id.* The university also cut the women's diving team. *Id.* This lawsuit was the first instance in which men alleged sexual discrimination following a university's decision to drop men's sports. *Id.* at 241. The argument that cutting men's sports in order to comply with Title IX was in fact a violation of Title IX was then a novel argument. *Id.*

42. *Id.* at 242. Prior to these cuts, the percentages of male and female athletes participating in intercollegiate athletics at the university were not in proportion to the percentages of males and females attending the university. *Id.* at 240. The university faced budget problems that forced it to cut men's sports in order to save money and achieve proportionality of opportunity for males and females. *Kelley*, 832 F. Supp. at 240. This was not discrimination against male athletes, as even after the cuts, the percentage of male athletes at the university was still "substantially proportionate" to the percentage of male students at the university. *Id.* at 242.

43. *Id.* at 243-44. The *Kelley* court's language illustrates the "inherent unfairness" of Title IX enforcement:

court concluded that Title IX in fact allowed their loss of opportunity.<sup>44</sup>

The specific arguments made by the plaintiffs on appeal, and the court's responses to them, illustrate the reasons male plaintiffs were uniformly unsuccessful in these suits.<sup>45</sup> The plaintiffs argued that the regulations and Policy Interpretation regarding Title IX were misinterpretations of Title IX; these misinterpretations were so severe, plaintiffs argued, that legislation intended to prevent discrimination against females actually required discrimination against males.<sup>46</sup> In other words, plaintiffs argued, the practical result of this Policy Interpretation has been to require universities to eliminate men's sports teams.<sup>47</sup> Plaintiffs also argued that if the logic of the Policy Interpretation were applied to the university as a whole, absurd results would follow.<sup>48</sup>

The *Kelley* court reasoned, however, that the Policy Interpretation does not specifically require discrimination; it simply offers three reasonable tests a university can use to determine whether it is in compliance with Title IX.<sup>49</sup> Moreover,

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The Court is not unsympathetic to the plight of members on the men's swimming team and recognizes that Congress, in enacting Title IX, probably never anticipated that it would yield such draconian results . . . . Plaintiffs' case has emotional appeal because it graphically demonstrates the inherent unfairness of decisions which classify and isolate one gender for burdens that the other gender is not required to bear. Certainly it must be acknowledged that the members of the men's swimming team are innocent victims of Title IX's benevolent attempt to remedy the effects of an historic deemphasis on athletic opportunities for women. The Court sincerely sympathizes with the personal loss felt by members of the men's swimming team while recognizing the salutary effects of Title IX for women athletes.

*Id.*

44. *Id.* at 244. Despite any unfairness to innocent male athletes, the court reasoned, Title IX demanded that women receive equitable chances to compete in intercollegiate athletics. *Id.* Although Title IX does not require that universities achieve equality by cutting men's teams, Title IX certainly allows this in cases where universities seek to provide "substantially proportionate" opportunities for both genders to participate in athletics. *Id.* at 242.

45. See generally *Kelley v. Univ. of Ill.*, 35 F.3d 265 (7th Cir. 1994) (discussing benchmarks for a university's compliance with Title IX).

46. *Id.* at 270. Plaintiffs refer to 34 C.F.R. § 106.41 (2000), and Policy Interpretation, 44 Fed. Reg. 71,418 (Dec. 11, 1979).

47. *Id.* Title IX "has through some alchemy of bureaucratic regulation been transformed from a statute which prohibits discrimination on the basis of sex into a statute that requires discrimination against males." *Id.*

48. *Id.* Plaintiffs argued that if this logic were applied to academic departments, Title IX would require that members of both sexes be removed from departments where they are represented in numbers disproportionate to the total number of members of that sex teaching at the university. *Id.*

49. *Id.* at 271. This Policy Interpretation does not require that universities discriminate against male athletes. *Kelley*, 35 F.3d at 270. First, the Policy Interpretation does not require that universities comply with the "substantial proportionality" prong of Title IX. *Id.* There are three ways for universities to

Congress did not intend the regulation (34 C.F.R. § 106.41) to apply to universities as a whole, but specifically to athletic departments.<sup>50</sup>

In sum, male plaintiffs were unsuccessful in these actions because the courts determined that universities may lawfully choose to follow any one of the three Title IX prongs offered by the Policy Interpretation, and none of these prongs require discrimination against male athletes.<sup>51</sup> The unfortunate reality of this situation is that despite the three options for compliance offered by the Policy Interpretation, universities must make cuts in order to conform to the requirements of Title IX, and these cuts occur in men's sports.<sup>52</sup>

### III. THE BENEFITS AND HARMS RESULTING FROM TITLE IX ENFORCEMENT

#### A. Organization

Section B will outline the benefits Title IX produces for women's sports at the university level and as a whole. Section C will argue that Title IX is harmful to men's university sports. Section D will show that this is an inequitable result for male athletes. Section E will review various solutions proposed to remedy this inequity, and show why these proposed solutions are inadequate or incomplete.

#### B. Title IX has Benefited Women's Sports

Following the passage of Title IX, women's intercollegiate sports have enjoyed significant gains.<sup>53</sup> The average number of women's sports teams has increased from 2 per school to 8.14 per

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comply with Title IX. *Id.* The university may show proportionality, a history of expanding athletic opportunities for women, or show that the interests of all athletes are met. *Id.* Second, the proportionality test does not require discrimination against males. *Id.* The test is simply one method among three for universities to use to determine whether they are in compliance with Title IX. *Id.* Universities have flexibility in choosing how best to comply with Title IX. *Id.*

50. *Kelley*, 35 F.3d at 270. This regulation was intended to apply to the "unique set of problems" that Title IX raised for university athletic departments. *Id.*

51. *See generally id.*

52. Reuscher, *supra* note 5, at 118.

53. R. Vivian Acosta & Linda Jean Carpenter, *Women in Intercollegiate Sport, A Longitudinal Study—Twenty-Three Year Update 1977–2000*, (2000) (unpublished Overview of Findings, on file with Carpenter/Acosta, P.O. Box 42, West Brookfield, MA 01585). This study notes that there has not been a corresponding increase in the numbers of women hired as coaches, administrators, or trainers. *Id.*

school.<sup>54</sup> Prior to Title IX, only 2% of all intercollegiate athletes were female; by 2001 that number rose to 43%; the “raw numbers” of female athletes increased from 32,000 to 150,000.<sup>55</sup> These gains followed a number of court decisions finding universities in violation of Title IX.<sup>56</sup>

The numbers of high school females participating in sports has also increased tremendously.<sup>57</sup> Prior to Title IX, females represented only 7% of all high school athletes; by 2001, females represented 41.5% of all high school athletes.<sup>58</sup> Prior to Title IX,

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54. *Id.* Women’s sports are growing at all three levels of intercollegiate athletics. The numbers can be broken down as follows: the average Division I school fields 8.87 women’s sports teams, the average Division II school offers 6.62 women’s teams, while the average Division III school offers 8.45 women’s sports teams. *Id.* A total of 205 women’s sports teams were created at all intercollegiate levels during 1999. *Id.*

55. Feminist Majority Foundation, *Title IX Fact Sheet*, (2002), at <http://feminist.org/sports/titleIXfactsheet.asp>. This is an increase of over 400%. *Id.* However, Title IX has failed thus far to establish perfect proportionality in university sports; women represent 54% of the population of college and university students as a whole, but represent only 43% of the athletes. *Id.*

56. The most historically significant of these decisions is *Cohen*, 809 F. Supp. at 978. In that case, Brown University faced budget shortfalls in its athletic department, and decided to save funds by cutting two women’s sports (volleyball and gymnastics) and two men’s sports (golf and water polo). *Id.* at 981. The court found that Brown had failed each prong of Title IX’s three-part test. *Id.* at 991-92. Brown University failed the substantial proportionality test, as males represented 63.4% of participants in intercollegiate sports, while representing only 51.8% of the undergraduate population; females represented 36.6% of participants in intercollegiate sports, while representing 48.2% of the undergraduate population. *Id.* at 991. Brown failed the “program expansion” test, as it had added only one women’s team since 1977, the women’s indoor track team (which required only that the university give the present women’s outdoor track team indoor facilities). *Id.* Brown failed the “interests and abilities” test simply because there were women at Brown with the “interest and ability” to play intercollegiate volleyball and gymnastics, and these interests were not accommodated. *Id.* at 991-92. The court reasoned that dropping these sports to the club level did not accommodate the women’s interests and abilities to play at the intercollegiate level. *Id.* The most important part of *Cohen*, though, was the court’s ruling that the three-part test is the appropriate standard to use when evaluating whether a university is in compliance with Title IX. *Cohen*, 809 F. Supp. at 990. Three successive appeals confirmed that the appropriate way to evaluate whether a university is complying with Title IX is to look at the three-part test offered by the Office of Civil Rights in its Policy Interpretation. *Cohen*, 991 F.2d at 896-98; *remanded to*, 879 F. Supp. at 199-203; *aff’d*, 101 F.3d at 166. *See also* Favia v. Ind. Univ., 812 F. Supp. 578, 584-85 (W.D. Pa. 1992) (finding that the university’s decision to cut the women’s gymnastics and field hockey teams violated all three prongs of the three part test); *aff’d*, 7 F.3d 332, 343 (3rd Cir. 1993) (citing *Cohen*).

57. Feminist Majority Foundation, *Title IX Fact Sheet*, (2002), at <http://feminist.org/sports/titleIXfactsheet.asp>.

58. *Id.*

only 1 female in 27 played high school sports; that number is now 1 in 2.5.<sup>59</sup> The “raw numbers” are even more startling: in 1971, there were approximately 300,000 females playing high school sports; in the year 2001 there were 2.7 million.<sup>60</sup>

Women’s sports have also enjoyed gains on the amateur and professional levels since the advent of Title IX. Women’s soccer and basketball, in particular, have increased in popularity.<sup>61</sup> The *Neal* court acknowledged a tremendous increase in interest in elite women’s amateur sports.<sup>62</sup> Women’s sports are also expanding rapidly on the professional level, with the recent birth of women’s professional volleyball, basketball, football, softball, and soccer leagues.<sup>63</sup> The Women’s National Basketball Association experienced solid growth in the past few years, and currently fields sixteen teams.<sup>64</sup>

Although it seems clear that Title IX benefits women’s sports, there is another point of view on the expansion of women’s sports. This argument states that while women benefit from the increased athletic opportunities Title IX provides, another more fundamental reason drives expansion in women’s sports.<sup>65</sup> At least

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59. *Id.* It is interesting to note that while at the university level, a rise in the participation numbers of female athletes has meant a corresponding decrease in the numbers of male athletes, this does not seem to be the case at the high school level. *Id.* Since the advent of Title IX, high school males have continued to participate in sports at a rate of one in two. *Id.*

60. *Id.* This represents an 800% increase. *Id.*

61. *Id.* Over 12,000,000 females played basketball in 1999. *Id.* This represents a 15% increase since 1987. *Id.* Over 7,000,000 females played soccer in 1999. *Id.* This represents a 20% increase since 1987. *Id.*

62. *Neal*, 198 F.3d at 773. “This past summer [1999], 90,185 fans crowded into Pasadena’s historic Rose Bowl for the finals of the Women’s World Cup soccer match. An estimated 40 million television viewers also tuned in . . .” *Id.*

63. The following websites contain more information on these leagues: [www.uspv.com](http://www.uspv.com) (volleyball), [www.avp.com](http://www.avp.com) (volleyball), [www.wnba.com](http://www.wnba.com) (basketball), [www.womensprofootball.com](http://www.womensprofootball.com) (football), [www.profastpitch.com](http://www.profastpitch.com) (softball), and [www.wusa.com](http://www.wusa.com) (soccer).

64. The Women’s National Basketball League, (2003), at <http://www.wnba.com>. Also, the Women’s Professional Football League is now in its fifth year of operation, and fields twenty teams. The Women’s Professional Football League, (2003), at <http://www.womensprofootball.com>. However, after one successful season, the Women’s United States Professional Volleyball League cancelled its second season. The Women’s United States Professional Volleyball League, (2003), at <http://www.uspv.com>. Women’s professional volleyball teams, though, do compete in the AVP Pro Beach Volleyball Tour. AVP Pro Beach Volleyball Tour, (2003), at <http://www.avp.com>. The Women’s United Soccer Association was recently forced to suspend operations due to tremendous financial losses. Philip Hersh, *Women’s Soccer League Folds on Eve of World Cup*, CHI. TRIB., Sept. 16, 2003, § 1, at 1.

65. Kathryn Jean Lopez, *Spoiled Sports, Title IX Today*, NATIONAL REVIEW, July 1, 2002, at 37.

part of the reason women's sports enjoy such expansion is that parents take a more active role in encouraging their daughters to participate in athletics; such encouragement occurs "outside the jurisdiction of Title IX."<sup>66</sup> When these females grow up and enter college, however, it is clear that Title IX affords them opportunities to participate in athletics that simply would not exist without this legislation.

### C. *Title IX is a Cause of the Elimination of Men's University Sports*

Since the implementation of Title IX, men's sports programs at the intercollegiate level have lost approximately 400 teams.<sup>67</sup> This is due to the combination of the requirements of Title IX and university budget problems; universities simply lack the funds to expand women's sports and maintain men's sports at their current level.<sup>68</sup>

Despite the seemingly obvious conclusion, some argue there is no direct causal link between Title IX and the loss of men's sports. "To suggest that men are losing out because of Title IX is almost laughable," said Dr. Donna Lopiano, executive director of the Women's Sports Foundation.<sup>69</sup> The argument is that while it seems that Title IX actually causes the loss of men's sports, this loss is due solely to budget mismanagement by university athletic departments.<sup>70</sup>

Male athletes fail to see the humor in this situation. There is a clear causal link between the implementation of Title IX and the loss of men's sports.<sup>71</sup> Without the Title IX mandate to expand women's sports, university athletic departments would not face

66. *Id.* The argument is that women therefore do not need Title IX. *Id.* The success of women in athletics is too often attributed to Title IX. JESSICA GAVORA, *TILTING THE PLAYING FIELD, SCHOOLS, SPORTS, SEX, AND TITLE IX*, 4-5 (2002). Women's success in sports, Gavora believes, is due to the dedication and hard work of female athletes, and overemphasizing the role Title IX plays in their accomplishments diminishes their achievements. *Id.* Women's success in athletics should be attributed to the women who work hard to succeed; these athletes deserve full credit for their accomplishments. *Id.*

67. Patricia Babcock McGraw, *Trimming the Fat Could Cut Down on the Title IX Blame Game*, DAILY HERALD (Ill.), June 27, 2002, §2, at 1.

68. Gabriel, *supra* note 1, § 2, at 1. Gabriel indicates that universities must cut men's sports teams to achieve proportionality. *Id.* The alternative is a costly Title IX lawsuit. *Id.*

69. McGraw, *supra* note 67, § 2, at 1. Lopiano argues that budget problems are solely to blame. *Id.*

70. *Id.* Should universities learn to "live within a tighter budget" and cut expenses in all sports, the argument goes, Title IX problems would be greatly reduced. *Id.*

71. Reuscher, *supra* note 5, at 118.

budget problems of this severity.<sup>72</sup> Courts understand that Title IX essentially means that male athletes will lose opportunities in order for female athletes to gain opportunities.<sup>73</sup> Legal commentators also point out that a consequence of Title IX is "the ever increasing popularity of eliminating low revenue men's athletic teams."<sup>74</sup> Journalists also note that "[i]n an effort to comply with Title IX . . . many schools have opted to cut men's non-revenue sports such as wrestling, gymnastics, swimming, and golf to save money."<sup>75</sup>

It is time to admit and acknowledge that Title IX, for all the good it does for women's sports, is in fact a cause of the elimination of men's sports teams; to argue otherwise is intellectually dishonest.<sup>76</sup> Universities know all too well that unless they meet the proportionality requirement of Title IX, they are subject to federal lawsuits.<sup>77</sup> Because of budgetary concerns, proportionality requires cutting men's sports teams.<sup>78</sup> In at least two instances, universities cut men's sports teams, *added no women's teams*, and declared that proportionality was achieved.<sup>79</sup>

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72. Shook, *supra* note 4, at 773. Shook writes that in order to comply with Title IX "institutions unable to afford athletic expansion have turned to reducing their men's programs to satisfy federal court rulings on Title IX." *Id.*

73. *See, e.g., Kelley*, 832 F. Supp. at 243-44 (recognizing that Title IX requires that male athletes must lose opportunities so that an "historic deemphasis" on women's sports can be remedied).

74. Reuscher, *supra* note 5, at 118. *See also* Shook, *supra* note 4, at 773 (showing that men's teams have been eliminated as a result of the requirements of Title IX combined with university budget problems); Ferrier, *supra* note 5, at 868-71 (describing the method of complying with Title IX by eliminating men's teams as "compliance by subtraction"). Ferrier notes that when several universities in one Conference decide to eliminate, for example, men's golf, the remaining universities in that Conference may also decide to eliminate that sport as well. *Id.* The result of this could be the "regionalization" of some men's sports, as well as a snowballing effect in which universities eliminate the majority of their men's sports teams. *Id.* The Big 12 Athletic Conference is an example of this snowballing effect; only four universities in that conference still have men's swimming and diving teams. Gavora, *supra* note 66, at 162. That Conference may discontinue its men's swimming and diving championship meet, which will "almost certainly result in the remaining schools eliminating their men's [swimming and diving] programs." *Id.*

75. McGraw, *supra* note 67, §2, at 1. Also, at least one female athlete who has benefited from Title IX recognizes the causal link between that legislation and the loss of men's sports. *Id.* Terri Zemaitis-Boumans received a full athletic scholarship to play volleyball at Penn State, but later married a wrestler. *Id.* She states, "Being married to a wrestler, I know the other side of Title IX now . . . It shouldn't be that when one person gains, another loses out." *Id.*

76. Gavora, *supra* note 66, at 152-54.

77. *Id.*

78. *See generally Kelley*, 832 F. Supp. at 237.

79. Gavora, *supra* note 66, at 13-14.

A look at national numbers does not bode well for men's university sports in the future under Title IX and proportionality. The total national undergraduate population is 56% female, but females represent only 41% of university athletes.<sup>80</sup> Note that the *Cohen* court found that where females represented 37% of all participants in intercollegiate sports at the university, but 48% of all students, the university was not in compliance with the proportionality prong of Title IX.<sup>81</sup> Proportionality does not mean perfect proportionality, however; Illinois State University achieved proportionality when females represented 55% of its students and 52% of its student athletes.<sup>82</sup>

In order to achieve proportionality on a national level, either approximately 59,000 new opportunities must be created for female athletes, or approximately 59,000 male athletes must lose their chances to participate in intercollegiate sports.<sup>83</sup> Given the budgetary problems universities face today, further cuts in men's sports are inevitable.

#### *D. The Loss of Men's Sports Due to Title IX Enforcement is Inequitable*

Establishing that Title IX is a cause of the loss of men's sports at universities is only part of the analysis, however. Is the loss of men's sports necessarily a bad or unfair thing?

First, Title IX, as it is currently being enforced by the courts and implemented by universities, harms innocent parties.<sup>84</sup> Young male athletes are losing chances to compete in intercollegiate athletics; losing these chances often means losing scholarships and the chance to obtain a university education.<sup>85</sup>

Second, the damage done to men's sports is contrary to the broadly stated goals of Title IX.<sup>86</sup> Congress did not intend for Title IX to harm men's sports.<sup>87</sup> This legislation was intended only to

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80. *Id.* at 51.

81. *Cohen*, 809 F. Supp. at 991-92.

82. *Boulahanis*, 198 F.3d at 636.

83. Gavora, *supra* note 66, at 51.

84. A close friend of the author was an outstanding high-school wrestler. This young athlete was courted by several Division I wrestling programs as a potential scholarship recipient. Each of these universities then dropped their wrestling programs. After losing his chance at an athletic scholarship, he chose to attend a local community college, where he wrestled and played soccer.

85. *See, e.g.*, Gabriel, *supra* note 1, at 10 (showing how one student lost a baseball scholarship, and also the chance to attend Iowa State University, after the university cut its baseball team in response to Title IX concerns).

86. *See supra* text accompanying notes 21-29 (pointing out that while there is uncertainty as to what Congress' specific intent was in passing Title IX, Congress did not intend that Title IX be used as a means to discriminate against individuals of either sex).

87. Lopez, *supra* note 65, at 37. Lopez writes, "In the minds of its



provide equality of educational opportunities for both sexes.<sup>88</sup> As it is presently implemented however, it “caus[es] discrimination against men.”<sup>89</sup> The *Kelley* court noted the “inherent unfairness” in the loss of men’s sports teams.<sup>90</sup> Taking away educational opportunities for men in any area, including those gained through sports, was not what university administrators were supposed to do to achieve equality of opportunity under Title IX.<sup>91</sup>

Senator Birch Bayh, one of Title IX’s original sponsors, recently stated, “[The elimination of men’s sports] was not the purpose of Title IX. And that has been a very unfortunate aspect of this. The idea of Title IX was not to give fewer opportunities to men; it was to make more opportunities for women.”<sup>92</sup> This commentary, however, has not stopped universities from cutting men’s sports, or stopped the courts from enforcing Title IX.<sup>93</sup> Men’s university sports are in a very real and very serious crisis today as a result of the current interpretation and implementation of Title IX.

The only remaining question is: what is the solution to this crisis? The solution must be one that does not disturb the noble results of Title IX (the stunning increases in participation numbers for female athletes at all levels), but, instead, works to give back male athletes that which they have unfortunately lost.

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congressional sponsors, it actually had nothing to do with women’s crew and men’s wrestling—or indeed any other sport. It was crafted as a general protection against discrimination . . .” *Id.*

88. Mahoney, *supra* note 23, at 945-48. The argument is that the legislature did not intend a quota system that would discriminate against members of one sex. *Id.*

89. Lopez, *supra* note 65, quoting Jessica Gavora. Lopez also cites 20 U.S.C. § 1681(b) (2000). Her argument is that Title IX is now doing “exactly what that provision in the law forbade it to.” *Id.* In other words, she argues that while Title IX expressly prohibits discrimination against members of one sex, as Title IX is presently implemented, male athletes are being discriminated against. *Id.*

90. *Kelley*, 832 F. Supp. at 243-44.

91. Gavora, *supra* note 66, at 20.

92. Jessica Gavora, *Title IX Quota Creep, A Law and Its Legacy*, NATIONAL REVIEW ONLINE, (June 11, 2002), at <http://nationalreview.com/comment/comment-gavora061102.asp>. Standing alone, this quote does not establish that the legislature as a whole never intended to discriminate against male athletes. However, understood in the context of legislative history that indicates Title IX was broadly intended to stop discrimination on the basis of sex, a convincing case can be made that Title IX as it is presently being implemented is contrary to the intent of the legislature that passed it.

93. *See generally Kelley*, 832 F. Supp. at 237 (holding that eliminating the men’s swimming team was a proper remedial measure to comply with Title IX).

*E. An Overview of Several Previously Proposed Solutions to the Title IX Dilemma*

*1. Proposals to Change or Reinterpret Title IX*

Should athletics be excluded from Title IX's scope?<sup>94</sup> This proposal has not received a great deal of support.<sup>95</sup> Title IX clearly applies to intercollegiate sports, given the express language of the Policy Interpretation.<sup>96</sup> Should sports that generate income for universities receive an exemption from Title IX considerations?<sup>97</sup> This proposal would effectively eliminate men's football and basketball from Title IX consideration. This in turn would make it much easier for universities to achieve proportionality.<sup>98</sup> At least one court has rejected this solution, though, reasoning that exempting football from Title IX would simply assure the continuation of discrimination.<sup>99</sup>

Should the three-part test<sup>100</sup> be modified? The Commission on Opportunity in Athletics recently proposed changes to this test.<sup>101</sup> The proposed changes included: establishing a "permissible variance" in proportionality numbers, so that a university that fell as many as seven percentage points away from perfect proportionality would still be in compliance with Title IX,<sup>102</sup> eliminating the "history and continuing practice" prong of Title IX,<sup>103</sup> "tie[ing]" athletic opportunities for women at a particular university to an "interest survey" given to women at that university, so that the university could provide athletic opportunities to females in proportion to "the results of that

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94. Ferrier, *supra* note 5, at 871.

95. *Id.*

96. Policy Interpretation, 44 Fed. Reg. 71,418 (Dec. 11, 1979). However, this Policy Interpretation is by no means set in stone. The Office for Civil Rights could, if it so chose, issue a new Policy Interpretation that would significantly change Title IX. Gavora, *supra* note 66, at 149.

97. Reuscher, *supra* note 5, at 151-53.

98. *See id.* at 154 (showing that some university football teams roster over 100 players).

99. Blair v. Wash. State Univ., 740 P.2d 1379, 1383 (Wash. 1987). The court reasoned that should football be exempt from Title IX considerations, given the sheer size of football teams, men would always have more athletic opportunities than women. *Id.*

100. *See supra* text accompanying notes 16-20 (describing the test).

101. Women's Sports Foundation, *Briefing Paper Three: Proposals Being Considered by the Commission on Opportunity in Athletics Would Further Disadvantage Female Athletes and Dismantle Title IX Protections*, (Dec. 19, 2002), at <http://womenssportsfoundation.org/cgi-bin/iowa/issues/rights/article.html?record=939>.

102. *Id.*

103. *Id.*

survey."<sup>104</sup>

However, faced with overwhelming pressure from various women's sports advocacy groups, the Commission on Opportunity in Athletics ultimately decided to make no changes to Title IX.<sup>105</sup> The proposed changes may have helped universities comply with Title IX without cutting men's sports teams. The implementation of these proposals, however, may have resulted in a reduction in athletic opportunities for females.<sup>106</sup> Such a result would have undone much of the good Title IX has achieved. The best solution to this dilemma will retain the present three-part test and its corresponding benefits for women's sports.

## 2. *Proposals to Alter the Way in which Universities Distribute Funds within their Athletic Departments*

Several commentators suggest that reducing the size of university football teams would (1) enable universities to more easily achieve proportionality and (2) save dollars that could be used to fund other sports.<sup>107</sup> Some uniform reduction in the size of football teams will be required to enable universities to meet the requirements of Title IX; the average Division I football team rosters 117 players and spends \$4,000,000 in athletic department funds.<sup>108</sup>

However, this measure standing alone is incomplete. Some universities have no football program, or field smaller teams that are not as expensive as the typical Division I team. Also, there may be a more flexible option available for universities that would like to retain their large football programs, but still recognize the need to comply with Title IX.<sup>109</sup>

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104. *Id.*

105. Women's Sports Foundation, *Women's Rights Groups Win Title IX Victory*, (Aug. 15, 2003), at <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/media/article.html?record=969>.

106. Women's Sports Foundation, *Briefing Paper Three*, (Dec. 19, 2002), at <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/rights/article.html?record=939>. At a typical university, females could have lost up to 10% of their athletic opportunities. *Id.*

107. See Ferrier, *supra* note 5, at 877-78 (pointing out that while university football teams roster over 100 players, NFL teams roster no more than forty-seven players). See also Shook, *supra* note 4, at 810-11 (showing that most university football teams in fact lose money); Farrell, *supra* note 5, at 1056-58 (arguing that universities must substantially limit the size of their football teams).

108. Farrell, *supra* note 5, at 1052. Farrell writes, "If a school operates a Division I-A football program, it is violating Title IX." *Id.*

109. *Id.* Universities could remove their football programs from their athletic departments. *Id.* at 1055. Farrell notes, however, that this proposal is not "a serious suggestion for action," and "certainly stands in no danger of adoption." *Id.* at 1056.

## IV. A PROPOSED AMENDMENT TO TITLE IX

A. *Organization*

Part IV of this Comment will outline a proposed Amendment to Title IX. This Amendment would make it unlawful for intercollegiate athletic departments to eliminate men's sports teams, unless certain conditions are met. Section B will briefly discuss why this proposal focuses in large part on university football programs. Section C will outline the proposed Amendment. Section D will explain the impact this Amendment will have on universities that field football teams. Section E will explain the impact this proposed Amendment will have on universities that do not field football teams.

B. *Tipping the Canoe: Football*

This proposal requires a radical change in the nature of university football programs. Football programs dwarf all other intercollegiate athletic programs in both size and expenditure: university football programs routinely roster over 100 players, and spend millions of dollars per year.<sup>110</sup> Football is therefore unique among university sports: Jessica Gavora writes, “[F]ootball remains the fat man tipping the canoe of Title IX, a unique obstacle to achieving gender balance in intercollegiate athletic programs.”<sup>111</sup>

C. *A Proposed Amendment to Title IX*

This Comment proposes the following Amendment to Title IX:

1. Intercollegiate athletic departments that field football teams shall not eliminate a men's sports team unless:
  - a. The athletic department makes a good faith showing that there is insufficient interest in that sport at the university to field a competitive team; or
  - b. The university removes the football team from its athletic department entirely and instead fields an age-group football team with a maximum roster of forty-five players.<sup>112</sup> This team would be

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110. *Id.* at 1000-01.

111. Gavora, *supra* note 66, at 60.

112. See RICK TELANDER, THE HUNDRED YARD LIE, THE CORRUPTION OF COLLEGE FOOTBALL AND WHAT WE CAN DO TO STOP IT, 213-217 (Illini Books ed. 1996) (proposing an age-group football league that would be similar to other minor league sports). Telander intended his proposal as a solution for perceived corruption in Division I football, not a remedy for problems universities face as a result of Title IX. *Id.* at 211-13. Under Telander's plan, the players in this league could be (but would not be required to be) university students. *Id.* at 214. Players must have graduated high school, and cannot be over twenty-two years of age. *Id.* The team could use existing university locker, practice, and game facilities. *Id.* The teams would continue to

a professional team owned and operated by the university;<sup>113</sup> or

c. The football program:

i. Offers only up to twenty-three athletic scholarships per year;<sup>114</sup> and

ii. Rosters only up to forty-five players.<sup>115</sup>

2. Intercollegiate athletic departments that do not field football teams shall not eliminate a men's sports team unless:

a. The athletic department makes a good faith showing that there is insufficient interest in that sport to field a competitive team; or

b. The athletic department makes at least a ten percent cut in the budget of each sports team it fields.

#### D. *The Impact of the Proposed Amendment on Universities with Football Teams*

Under the Proposed Amendment, universities could reduce the size of their football programs or divorce the football team from their athletic departments and form age-group teams.<sup>116</sup> The

represent the universities, wearing school colors, using school mascots, etc. *Id.* The universities would own and operate the teams. *Id.* at 216-17. The players would be under contract with and paid by the universities. *Id.* at 214. See also Farrell, *supra* note 5, at 1055-56 (noting that Telander's proposed Age Group Football League could help universities fix Title IX problems by simply removing large, costly football programs from university athletic departments). Farrell; however, does not consider Telander's proposal a serious solution to the Title IX problem. *Id.* at 1056.

113. Telander, *supra* note 112, at 216-17.

114. Each Division 1A university is presently allowed eighty-five football scholarships per year. Farrell, *supra* note 5, at 1057. The logic behind this seemingly high number of scholarships is as follows: football teams are comprised of twenty-two position players, at least two kickers, and several kick returners; a team needs a back-up player at each position; given the violence of the game, approximately fifteen players on average "are injured at any given time;" each team has another fifteen players rostered that are not competing that year; therefore at least eighty-five players are needed to adequately fill a roster. *Id.* at n.405. Division 1AA universities may offer sixty-three football scholarships per year; Division II universities are allowed thirty-six football scholarships; Division III schools are allowed no athletic scholarships at all. Dr. Cynthia E. Ryder, *Death of College Football?*, (2002), at <http://ussa.edu/pubs/SPORTSUP/DEATH.HTM>.

115. The National Football League allows its teams to roster only forty-seven players. Shook, *supra* note 4, at 811. The argument in favor of such a large roster is safety. *Id.* University football coaches argue that reducing team numbers would compromise safety by eliminating needed back-up players. *Id.* The flaw in this argument, Shook explains, is that coaches do not actually use all these extra players during games; usually forty to forty-five players see action in any given contest. *Id.*

116. There is another option. Football was not always played by teams with over one hundred players rostered; football players in years past played both offense and defense. Douglas S. Looney, *One is More Like It*, SPORTS ILLUSTRATED, Sept. 3, 1990, at 28. This was "iron-man football, a time when

Amendment will help universities meet the important proportionality prong of Title IX by (1) saving and/or generating funds that universities could use to expand women's sports programs, and (2) significantly reducing the number of male athletes in university athletic departments.

### 1. *Saving and/or Generating Funds*

Universities that make the required cuts in expenditures under section 1(c) of the Amendment will save money. These universities will field significantly smaller football teams and will spend much less on athletic scholarships.

The university that chooses to field an age-group team under 1(b) will also save money and may even turn a profit. Author Rick Telander points out that the National Football League and other sources could subsidize age-group football in order to take some of the financial pressure off university ledgers.<sup>117</sup> He proposes that these age-group teams operate for profit; presumably universities would attempt to operate age-group teams efficiently, only expending as much capital as necessary to field a competitive and profitable program.<sup>118</sup> The savings and/or profits generated from the change to age-group football could then be used to expand athletic opportunities for women.

Some argue, however, that university football is a financial windfall for athletic departments.<sup>119</sup> Altering the essential nature of university football would thus harm some universities.<sup>120</sup> However, intercollegiate football as it currently operates is expensive; fifty-five Division I teams spent over \$5,000,000 each on football in 1998.<sup>121</sup> Some of the expenses seem extravagant.

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men were men and football players played real football. Which is to say, a time when the same guys played offense, then defense, then offense. All afternoon." *Id.* Looney and Farrell both note that roster sizes could be reduced significantly if universities would return to "single platoon" football. *Id.* See also Farrell, *supra* note 5, at 1057-58 (discussing the advantages of "single platoon" football).

117. Telander, *supra* note 112, at 214-17.

118. *Id.* at 217.

119. *Id.* at 124. Telander points out that college football fans spend tremendous amounts of money on items such as "tickets, parking, pennants, Herbie Husker hats . . ." *Id.*

120. See *id.* (showing that universities seem to profit from football).

121. DOPKE, *1998 Division I College Football Expenses*, (1998), at <http://dopke.com/1998Expenses2.htm>. To be fair, some of these football programs generate tremendous amounts of revenue: twelve university football programs each earned over \$20,000,000 during 1998. DOPKE, *1998 Division I College Football Revenues*, (1998), at <http://dopke.com/1998Revenues2.htm>. For example, Tennessee University realized approximately a \$17,000,000 profit from its football program that year. *Id.* These profits are, however, the exception rather than the rule; Temple University, for instance, lost approximately \$800,000 on its football program during 1998, while Holy Cross

Football teams compete in the fall, yet hold formal spring practice sessions.<sup>122</sup> Three Big Ten university football programs spent upwards of \$9,000,000 each on indoor practice facilities.<sup>123</sup>

Corresponding profits are not always generated.<sup>124</sup> Contrary to popular belief, most university football teams do not make money.<sup>125</sup> The notion that university football teams routinely generate huge profits is a myth.<sup>126</sup>

## 2. Reducing the Numbers of Male Athletes

This Proposed Amendment will also reduce the number of male athletes at some universities. Football programs that exceed the proposed statutory limits for roster size must either meet that limit, or remove the football team from the university's athletic department.

Division I football teams average 117 players.<sup>127</sup> There is no women's football at the intercollegiate level. Proportionality thus requires that these universities add women's teams and cut men's teams in order to "make up" for the sheer size of football programs.<sup>128</sup> This reduction in total numbers of male athletes at

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University lost over \$2,000,000. *Id.*

122. Farrell, *supra* note 5, at 1057.

123. *Id.* at n.413.

124. Telander, *supra* note 112, at 125. Telander quotes Texas Christian University athletic director Frank Windegger: "Michigan was two and a half million dollars in the red. You're talking about a team that can put one hundred thousand fans in the stands, and if they can't meet a budget, then what is everyone else supposed to do?" *Id.*

125. Shook, *supra* note 4, at 810. Shook notes that 86% of all university football teams lose money. *Id.* These losses are significant: 45% of Division I football teams lose an average of \$628,000 per year. *Id.* Telander's assessment of the situation was blunt: "FOOTBALL TEAMS DON'T MAKE MONEY FOR THE SCHOOL." Telander, *supra* note 112, at 135.

126. Shook, *supra* note 4, at 810. There is yet another myth about the revenue generating powers of intercollegiate football: that big-time, winning football programs generate large alumni donations. *Id.* at 811. Research simply does not support this myth; the level of donations to a university is not affected by the prowess of its football team. *Id.* Telander also points out that donations to universities have little to do with whether or not the football team wins games. Telander, *supra* note 112, at 130. In fact, when Wichita State dropped its football team, donations to the university "nearly doubled, jumping from just under \$13.5 million to almost \$26 million in that year." *Id.*

127. Farrell, *supra* note 5, at 1000. Division I football teams are not the only intercollegiate football teams that have large rosters, however: Wabash College, a small Division III school in Crawfordsville, Indiana rosters over 100 players on its football team. Wabash College, *Football Roster*, (2002), at [http://www.wabash.edu/sports/football/01\\_roster.shtm](http://www.wabash.edu/sports/football/01_roster.shtm).

128. Gavora, *supra* note 66, at 60. Gavora explains that the world of proportionality is a "binary" one. *Id.* In other words, proportionality requires that if a university football team carries 100 male players, the university must either provide 100 slots for female athletes, or it must cut 100 slots for other

universities will allow universities to reach proportionality with greater ease, without having to cut men's sports teams with such alarming frequency.

*E. The Impact of the Amendment on Universities without Football Teams*

The Amendment would require universities without football teams to make across the board budget cuts in each athletic team, both male and female, before any men's team can be entirely cut. It is not the purpose of this Comment to propose legislation simply for the sake of saving universities money. The Amendment is intended only to help universities avoid eliminating men's sports programs in order to comply with Title IX. Section 1 of the Amendment will help universities with football programs do this. For that reason, those universities are not required to make these budget cuts in all athletic programs.

Universities that do not have football teams are free from the tremendous burden that sports put on a university trying to achieve compliance with Title IX. However, these university athletic departments face rising costs.<sup>129</sup> This Amendment requires universities to take a hard look at the funds that support all sports programs. Universities must roster fewer players on all teams, play fewer games, and enjoy less expensive training facilities. Saved expenses here can go towards expanding athletic programs for women, as Title IX requires.

## V. CONCLUSION

Men's intercollegiate sports continue to suffer significant losses as a direct result of Title IX enforcement. These losses are contrary to the legislative intent of Title IX and are inequitable. Title IX has, however, engendered remarkable gains in women's sports. The Proposed Amendment to Title IX provides effective protection from unnecessary elimination of men's sports programs, while leaving the structure of Title IX intact.

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male athletes. *Id.*

129. *Id.* at 156-57. Gavora notes that the "slowing economy combined with escalating expenses in athletic programs . . ." is a real problem for university athletic departments. *Id.* at 156. Universities have seen athletic department budgets rise between one and two million dollars during the 1999-2000 school year. *Id.* Even small, nonrevenue producing sports cost university athletic departments an average of \$220,000 per year. *Id.* at 157. These spiraling costs can be attributed to a loss of perspective on the place of sports in education. Gavora, *supra* note 66, at 157. Gavora writes, "Less and less are sports treated as another part of a well-rounded education experience . . . teams must justify their existence by winning." *Id.* The result is increased spending in nearly all sports by nearly all universities. *Id.*



