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TITLE IX'S COLLEGIATE SPORTS APPLICATION RAISES SERIOUS QUESTIONS REGARDING THE ROLE OF THE NCAA

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This system is so biased against human nature and simple fairness in light of today's high-dollar commercialized college marketplace that the ever increasing number of primary and secondary NCAA infractions cases of the 1990's emerge in the current environment as mostly an indictment of the system itself.¹

The above quote is from Walter Byers, former executive director of the National Collegiate Athletic Association (NCAA).² Mr. Byers served in that capacity for thirty-six years and wrote a book chronicling his experiences.³ Byers' belief, shared by many, is that the original goals and purposes of the NCAA have been subverted by the infusion of unimaginable sums of money into the collegiate athletic atmosphere.⁴ The NCAA originated out of a perceived need to protect and preserve the amateur collegiate spirit, and this goal remains central to its expressed fundamental purposes.⁵ However, monetary concerns permeate the whole athletic system, playing an integral part in what may at first glance appear to be very disparate issues.

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1. WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 3 (1995).

2. *Id.*

3. *Id.* at 369.

4. The NCAA's 1997-98 budget is based upon revenues of \$267 million. NCAA, *Budget Supports New NCAA Structure*, (visited June 30, 1998) <<http://www.ncaa.org/about/finances.html>>.

5. BYERS, *supra* note 1, at 5. "A basic purpose of the NCAA is to maintain intercollegiate athletics as an integral part of the educational program and . . . retain a clear line of demarcation between intercollegiate athletics and professional sports." NCAA MANUAL 1 (1995-96) [hereinafter MANUAL].

One of the most visible legal issues in recent years has centered on the question of gender diversity in athletic participation.⁶ While this debate is seemingly focused on fundamental civil rights, a consistent thread in academic and legal analysis centers on whether the dispute is really a funding issue. More specifically, the issue is whether there is enough money to facilitate the provision of intercollegiate athletic competition for all who want to be involved.⁷ The reality is that all schools have budgetary constraints, and athletic expenditures are generally not of the highest priority since the goal of the institutions is education as opposed to recreation.⁸ To the extent that the dispute over equitable gender participation is truly linked to schools' financial capabilities, serious issues arise regarding the NCAA's role as the distributor of these newfound millions and their response to the varying vulnerabilities of their members that fail to achieve equity.⁹

A BRIEF HISTORICAL REVIEW

Female participation in sports is as old as sport or at least as old as play. Play is the spontaneous activity we think of as fun and associate with the youth in all of us, while sport denotes a form of organized competition.¹⁰ Organized international competitions of sports are commonplace now with the most famous being the Olympics, which normally involve over 100 countries. Women were originally excluded from the Olympics though one was rumored to occasionally cut her hair and sneak into the track and field events.¹¹ Late in the nineteenth century female participation in sports started to become more commonplace;

6. A Lexis legal search on Title IX and college athletics will reference you to over 100 law review articles on the subject, all of which have been written in the last 15 years and most which have been written in the last 5 to 7 years.

7. See generally Darryl C. Wilson, *Parity Bowl IX: Barrier Breakers v. Common Sense Matters-The Serpentine Struggle for Gender Diversity in Collegiate Athletics*, 27 CUMB. L. REV. 397 (1997); Jerry R. Parkinson, *Grappling with Gender Equity*, 5 WM. & MARY BILL OF RTS. J. 75 (1996); B. Glenn George, *Who Pays and Who Plays: Defining Equality in Intercollegiate Athletics*, 1995 WIS. L. REV. 647 (1995) (addressing the funding question).

8. Of course with the onset of the new commercial age of college athletics some opine that many educational opportunities are available precisely because of the existence of high profile athletic programs.

9. See *supra* note 7 and accompanying text for a discussion on the debate of funding collegiate athletic programs.

10. Anthropologists have organized a classification system for the spectrum of activity discussed herein that basically breaks down human activity into groupings of play-games-sports. ALLEN GUTTMAN, FROM RITUAL TO RECORD-THE NATURE OF MODERN SPORTS 1-14 (1978).

11. See generally ARTHUR DALEY & JOHN KIERMAN, THE STORY OF THE OLYMPIC GAMES, 776 B.C. TO 1968 (1969) (discussing the exclusion of women from the Olympics).

however, it is difficult to say exactly when collegiate participation began.

Regardless of its beginnings, participation was extremely limited and it was felt that governmental action was necessary to address the disparities. Thus, Congress passed Title IX in 1972 to address sex discrimination in institutions that received federal funding. Title IX made no mention of college athletics.¹² Universities were one of the environments addressed in the legislative history of the bill, but the discussion focused on educational and employment opportunities.¹³ Shortly after Congress drafted the original bill, a battle of amendments ensued to determine the law's applicability to college athletics.¹⁴ Congress ultimately adopted the Javits amendment, requiring the Secretary of Health, Education and Welfare (HEW) to publish regulations implementing Title IX into intercollegiate athletics.¹⁵ The regulations provided for gender equality and required college institutions to accommodate everyone's interests and abilities.¹⁶ The Office of Civil Rights ("OCR") clarified the obligations of collegiate institutions by issuing an official policy interpretation in 1979.¹⁷ Despite this policy interpretation, some schools contended that Title IX did not apply to their particular institutions.¹⁸

In light of the many conflicting judicial opinions around the country, the Supreme Court accepted review of the issue to determine the scope of Title IX's applicability.¹⁹ The Court held that Title IX applied only to "athletic programs" directly receiving federal assistance, and not to all athletic programs at institutions who receive federal funds.²⁰ Thus, Title IX was rendered negligible as an instrument for improving female participation in sports.

12. Title IX of the Education Amendments of 1972, Pub L. No. 92-318.

13. See generally 117 CONG. REC. 30, 155-56, 30, 406-09, 39, 261-62 (1971) (discussing the legislative history of Title IX, focussing on education and employment opportunities).

14. John Tower, who ultimately became Governor of Texas, in a huff of prescient anxiety pushed for an exemption from Title IX of certain revenue sports. John C. Weistart, *Can Gender Equity Find A Place in Commercialized College Sports?*, 3 DUKE J. OF GENDER L. & POL'Y 191, 264 n.86 (1996). As all major team sports fans know, Texas is one of the country's major football states and Senator Tower was concerned of the potential impact the act might have on the major revenue producing activity for a number of schools throughout the state. *Id.*

15. Thomas A. Cox, *Intercollegiate Athletics and Title IX*, 46 GEO. WASH. L. REV. 34, 36 (1977).

16. See Wilson, *supra* note 7, at 417 (quoting the regulations presently codified at 34 C.F.R. § 106.41(c)(1) (1994)).

17. Title IX and Collegiate Institutions, 44 Fed. Reg. 71,413 (1979).

18. See Wilson, *supra* note 7, at 418 n.80 (illustrating that adversaries are characterized either as "institution-wide" advocates or "program specific" proponents). See, e.g., *Grove City College v. Bell*, 465 U.S. 555 (1984).

19. *Id.* at 570-72.

20. *Id.*

Congress ultimately revived Title IX through its passage of the Civil Rights Restoration Act of 1987.²¹ This Act modified Title IX by amending to it a section expressly defining language within Title IX to indicate that an institution-wide approach was the proper basis for determining if violations were present.²² Thereafter the judiciary actively began enforcing issues of gender equity through the application of Title IX.²³

The case appearing to have the greatest significance in light of the updated judicial analysis was *Cohen v. Brown U.*²⁴ In this district court decision, ultimately affirmed in part and remanded by the First Circuit, a thorough judicial review of the evaluation standards utilized in Title IX actions took place.²⁵ The court also fleshed out some of the skeletal factors listed in the aforesaid references in an attempt to give schools further guidance.²⁶ It was necessary for the court to take such actions because none of the references gave concrete formulas for determining compliance, but instead simply directed consideration to be weighed in light of the anti-discriminatory intent of Title IX.²⁷ While such vagaries upset schools in the past, and continue to do so, from a legal perspective it is the life of the law that it be flexible enough to apply to a variety of situations and avoid extremely narrow constrictions.

The *Cohen* case in retrospect amounted to the beginning of the end of male-dominated collegiate sports.²⁸ Since the decision in *Cohen*, there have been literally hundreds of suits and settlements with nearly every single outcome favoring the Title IX complainant.²⁹ The Supreme Court's refusal to grant certiorari in *Cohen v. Brown*, coupled with the other judicial decisions which

21. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 908, 102 Stat. 28 (1988).

22. § 908, 102 Stat. at 28.

23. Issues of gender equity had found their way into the courts on a sporadic basis despite the questionable scope of Title IX. These actions were based on claims of discrimination under the Fourteenth Amendment of the U.S. Constitution. See Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SP. L. REV. 1 (1992) for a further discussion on issues of gender equity.

24. *Cohen v. Brown U.*, 809 F. Supp. 978 (D. R.I.), *aff'd in part*, 101 F.3d 155 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 1469 (1997).

25. *Id.*

26. Wilson, *supra* note 7, at 423-25.

27. See, e.g., Wilson, *supra* note 7, at 416 n.65 (quoting congressional testimony that Title IX did not mandate quotas).

28. This is not to say that women did not participate in sports in respectable numbers prior to the *Cohen* case. In the 20 years following the enactment of Title IX, participation in sports by females at the high school level quadrupled and more than doubled at the collegiate level. Heckman, *supra* note 23, at 2 n.5.

29. See Dr. Christine H.B. Grant, *Title IX and Gender Equity* (visited July 17, 1998) <<http://www3.arcade.uiowa.edu/proj/ge/present.html>> for a continuous update of Title IX's application to sports.

Title IX advocates consider to be landmark cases, have served to close all discussion of the basic applicability of the Act despite the negative ramifications associated with it.³⁰ These negative ramifications include the decrease in men's collegiate athletic choices. Men's sports are the natural choice for financial options when a struggling athletic department is faced with a mandate to add women's programs.³¹ Other problems include the fact that much of the affirmative action to increase women's participation has a discriminatory impact on male and female minorities.³² Despite these real issues Title IX is rapidly becoming passe in its original sense as those addressing the law are often seeking to stretch beyond the typical athletic boundaries.³³

ANOTHER UNINTENDED CONSEQUENCE?

One can deduce from this short chronicle of significant Title IX events that despite the laudable goal of ending gender discrimination, the law has faced significant controversy during its short history.³⁴ From the outset, one of its major adversaries was "big-time" collegiate sports.³⁵ Despite the fact that this small minority of schools failed to exempt themselves from the law's application, they have been successful in focusing much of the debate about the detrimental effects of Title IX.³⁶ Yet the bulk of landmark litigation has involved small institutions.

30. See *id.* (listing various cases).

31. See *id.* (showing a number of charts indicating a dramatic increase in women's NCAA participation and a simultaneous decrease in certain men's sports such as swimming, wrestling, and gymnastics).

32. See Wilson, *supra* note 7, at 419-23; see also generally Marilyn V. Yarborough, *A Sporting Choice: The Intersection of Race and Gender*, 38 S. TEX. L. REV. 1029 (1997) (discussing the negative impact affirmative action has upon minorities).

33. See, e.g., concurrent conference presentation *Title IX Update: There's More to Title IX Than Athletics* and *Note: Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Rule Oppression*, 110 HARV. L. REV. 1227 (1997) (searching for a "proper" feminist paradigm which can help women and girls fight the alleged social backlash that accompanies their newfound participation in sports).

34. Many conclude that Title IX in its present form and application is still not an anti-discrimination statute. See, e.g., Weistart, *supra* note 14, at 194 (characterizing the Act as one that tolerates open and notorious discrimination). See also Wilson, *supra* note 7, at 439 (characterizing the application of the statute as acceptable, albeit temporarily, affirmative action for female athletes).

35. Big-time college sports generally indicates those relatively few schools that have multi-million dollar budgets for their athletic programs. This represents less than 10% of the membership of the NCAA. They are generally large Div. 1A schools. See BYERS, *supra* note 1, at 37 for how "big-time" sports evolved.

36. See Weistart, *supra* note 14, at 216, 225, 264 n.85-87 (discussing the rejected Tower amendment).

There is no variation in the procedure that exists regarding the application of Title IX based on the size of the institution. However, this standard approach to application is undoubtedly a disservice to the small school. For instance, Stetson University, a school of slightly less than 2,000 students, fluctuated from approximately 7% to 10% student participation in qualified athletics over a three-year period.³⁷ The school averaged 150 male and female participants during this time with women representing slightly over 57% of the student body and just over 51% of the number of student athletes.³⁸ These numbers are important due to substantial proportionality requirements of Title IX.³⁹ If the school were to lose 10 of the 70 female athletes in a transitional year with all other factors remaining equal, it could find itself ripe for a Title IX challenge.⁴⁰ These female athletes could leave by virtue of graduation, attrition or lack of desire to continue in sports, though for purposes of the Act, reasons for numerical reductions are not considered. A movement of such a small number in any vibrant college setting is not unheard of.

However, at a major university such as the University of Colorado at Boulder, the student body numbers were approximately 25,000.⁴¹ The Colorado Athletics "staff" numbers 134 or approximately the same number of total "athletes" at Stetson (137) in the last year referenced.⁴² Colorado football has enjoyed immense popularity in recent years including a centennial season topped off by winning the coveted NCAA National Football

37. STETSON UNIVERSITY NCAA ATHLETICS CERTIFICATION STUDY (1997) [hereinafter STETSON]. Schools are generally prohibited from including comparative data on certain types of sports. *Id.* These sports are typically intramural (teams within the school) activities which are viewed as inappropriate options to adequately offset male opportunities for intercollegiate competition. *Id.* These can be differentiated from club sports which may or may not have coaches, funding and some intercollegiate competition. Club sports have also suffered in terms of being a viable option for interested females, at least in terms of shielding schools from Title IX liability. *See, e.g.,* Cohen v. Brown U., 101 F.3d at 173.

38. STETSON, *supra* note 37.

39. *See* Wilson, *supra* note 7, at 425 (discussing the substantially proportionate requirements of Title IX which courts interpret to mean that the gender composition of the school's athletic program must be substantially proportionate to the gender composition of the student body).

40. *See* STETSON, *supra* note 37. Using 95/96 data from the self-study, the 70 women athletes constituted only 6% of the female student population (1143), but 51% of the student athletes (137). *Id.* A drop to 60 would reduce those percentages to 5% and 44%, respectively. *Id.* If student population figures remained constant, women who are 57% of the student body but only 44% of the student athletic population would represent a 13% disparity. *Id.*

41. *See* *Ralphie's Guide to Student Life* (visited June 30, 1998) <http://www.colorado.edu/sacs/ralphie/s/student_Profile.htm>.

42. *See* *Colorado Athletic Staff* (visited June 30, 1998) <<http://buffaloes.colorado.edu/directory/staffbio/cuad-sta.htm>>.

championship.⁴³ Like the typical big-time NCAA football program, the football team alone typically fields more than 100 players. The school is able to offer a much greater variety of sports than Stetson and an incomparable number of participation opportunities for both sexes.⁴⁴ A fluctuation of 10 athletes from either side of the gender equation is likely to have a negligible effect, or at least certainly not have as dramatic an impact as that postulated by the Stetson example.⁴⁵

If this looks like a comparison of the traditionally suspect proverbial apples and oranges, it is entirely intended. A modest suggestion is that the enforcement powers consider these distinct differences and offer the smaller schools more leeway in terms of compliance time than the period now given.⁴⁶ If altering the time requirements does not seem feasible, another option is the possibility of offering the small schools a broader percentage range than large schools within which they may fall and still remain compliant. Certainly the small school/large school distinction would require some skilled analysis in terms of definitional line drawing; however, the NCAA draws several size related distinctions between its members already.⁴⁷ Recent complaints lodged by one of the primary Title IX advocates groups further highlight the lack of necessary consideration in this area.

In the summer of 1997, the National Women's Law Center (NWLC) cited twenty-five colleges with violating Title IX in athletics.⁴⁸ The Education Department will investigate the allegations and make recommendations on whether further action is necessary.⁴⁹ If a violation is found, the school can work out a

43. See *Colorado's 1990 National Championship* (visited July 17, 1998) <<http://buffaloes.colorado.edu/sports/football/fbhome.htm>> (providing detailed information on the history of Colorado football from 1890 to the present including a tribute to the 1990 championship season).

44. The Golden Buffaloes feature women's tennis, soccer, golf, track and field, cross country, skiing, volleyball, and basketball as intercollegiate sports options. Stetson has traditionally offered women's basketball, cross country, golf, soccer, softball, tennis and volleyball. Colorado also sponsors over 30 club sports, many of which are directed at women and/or are coed and eight intramural sports.

45. STETSON, *supra* note 37.

46. This is a relatively simple compromise in light of many of the extremes now suggested such as repeal of Title IX or the type of endless reporting of numbers suggested by legislation proposed such as that commonly known as The Fair Play Act. See S. 933, 105th Cong., 1st Sess. (1997); see also *Lawmakers Want Federal Gender Report* (visited June 30, 1998) <<http://www.ncaa.org/news/16970630/active/3426nos.html>> (discussing further possible legislation).

47. See, e.g., MANUAL, *supra* note 5 (discussing how the NCAA divides its schools into Div. 1A, Div. 1AA, Div. II and Div. III categories).

48. Jim Naughton, *Advocacy Group Charges 25 Colleges with Violating Title IX in Athletics*, CHRON. OF HIGHER EDUC., June 13, 1997, at A39.

49. *Id.* The 25 schools listed are Bethune-Cookman College, Boston

settlement, which is usually the case, or they can dispute the findings, face a lawsuit, go to court and most certainly lose.⁵⁰ Of the schools listed few fit into the category of big-time sports schools.⁵¹ The senior counsel for the NWLC stated that the choice of schools was a conscious decision to illustrate that the violations were not restricted to a particular locality or institution.⁵² However, one can deduce that, unintentional as it may be, the schools primarily share the trait of small athletic programs.

The focus of the NWLC attack is somewhat different as well. Unlike the landmark suits which through Title IX established female rights to equal play opportunities, these allegations focus on equal pay opportunities.⁵³ The pay referred to here is the scholarship money which some athletes are able to secure, thus freeing them from the concerns of financing their "educations."⁵⁴ This new basis of attack further emphasizes the difficulty of complying with Title IX as it seemingly puts certain sections of the regulations at odds with each other.⁵⁵ Some scholars believe that

College, Boston University, Bowling Green State University, Brigham Young University, College of William & Mary, Colorado State University, Coppin State College, Duke University, Hampton University, Liberty University, Northeastern, University South Carolina State University, University of Colorado at Boulder, University of Maine at Orono, University of New Hampshire, University of North Texas, University of Oregon, University of Texas at El Paso, University of Toledo, University of Tulsa, Utah State University, Vanderbilt University, Wake Forest University, and Wofford College.

50. See *supra*, notes 29-32 and accompanying text.

51. One school that certainly fits this designation is the University of Colorado at Boulder whose recreation and athletic offerings for students is addressed earlier in this article.

52. Naughton, *supra* note 48, at A39.

53. This is not to be literally taken, as there is a significant debate raging now on Title IX's impact on equal pay issues for those who administer athletic programs. See, e.g., materials prepared by Elsa V. Cole, NCAA General Counsel; see also, *supra* note 29 (directing you to a website which maintains updates on these cases). Likewise one of the most contentious issues since the NCAA hit the big time is whether athletes should be paid.

54. Another highly controversial issue is the degree to which education remains a central concern of these institutions. The argument is directed primarily at the big-time institutions who routinely have athletes leave school for professional careers without ever graduating. Wilson, *supra* note 7, at 434-36. While this behavior is most common for football and basketball players, athletes are now starting to leave some of the less traditional sports as well. Major league soccer is putting together a player-development program to offer \$25,000 contracts to 30-40 of the best male soccer players in the country under age 30. Likewise, now that high school players are being admitted into the National Basketball League, a program is under way to formally allow teens to skip college. Debra Blum, *Two New Basketball Leagues Would Allow Players to Bypass College*, CHRON. OF HIGHER EDUC., May 10, 1996, at A48.

55. While the NWLC approach is characterized as new, the regulations applicable to Title IX have, in fact, always considered scholarship issues as

NCAA rule changes regarding the number of scholarships available for specific sports is the only way to overcome this barrier.⁵⁶ This is because the scholarship limits in men's sports are much higher than those set for women.⁵⁷ As it presently stands, the principle Title IX requirements of substantial proportionality in participation opportunities and parity in scholarship opportunities simply do not add up.⁵⁸ Even after the tests have

part of the list of factors to be evaluated in determining compliance. The Office of Civil Rights (OCR) notes 13 program components which may be the subject of their investigations. These 13 factors, which are nonexclusive, are:

34 C.F.R. § 106.37(c) athletic scholarships

34 C.F.R. § 106.41(c)(1) accommodation of athletic interests and activities

34 C.F.R. § 106.41(c)(2) equipment and supplies

34 C.F.R. § 106.41(c)(3) scheduling of games and practice time

34 C.F.R. § 106.41(c)(4) travel and per diem allowance

34 C.F.R. § 106.41(c)(5) opportunity to receive coaching and academic tutoring

34 C.F.R. § 106.41(c)(6) assignment and compensation of coaches and tutors

34 C.F.R. § 106.41(c)(7) locker rooms, practice and competitive facilities

34 C.F.R. § 106.41(c)(8) medical and training facilities and services

34 C.F.R. § 106.41(c)(9) housing and dining facilities and services

34 C.F.R. § 106.41(c)(10) publicity

1997 Policy Interpretation - support services - a recruitment of student athletes

VALERIE M. BONNETT & LAMAR DANIEL, TITLE IX INVESTIGATORS MANUAL 1 (1990).

56. Naughton, *supra* note 48, at 40.

57. For instance, Division I men's football, basketball, and track scholarships for any given year may amount to a total of roughly 51 scholarships, while women's track and basketball may amount to 31 scholarships. Also, during any time period, a school may have up to 85 football players simultaneously on scholarship. There is of course no equivalent for women relative to men's football. MANUAL, *supra* note 5, at 199-200.

58. The scholarship parity determination is supposedly made by the application of two mathematical formulas known respectively as the "Z test" and "T test." These tests are often used in evaluating data relative to numerical disparities underlying discrimination actions. See, e.g., Mark R. Brown, *Gender Discrimination in the Supreme Court's Clerkship Selection Process*, 75 OR. L. REV. 359, at n.39 (1996). The Z test is to be used to determine if athletes of one gender are receiving a disproportionate amount of scholarship funding. MANUAL, *supra* note 5, at 153-63. The T test is used to evaluate whether the average male is receiving significantly more athletic aid than the average female. *Id.* These tests can be performed on a calculator, though presumably one of the more technologically advanced types. The regional offices of OCR will normally run the numbers on a Lotus computer program. The tests themselves are no strangers to controversy, though they have been used in gender discrimination analysis in the past. *Id.* The Z and T test have traditionally been used for large group analysis versus small group analysis though they sometimes merge depending on the statistician's desired use. *Id.* The Z test, used with large groups is basically instrumental in explaining away randomness in samplings. *Id.* Although the Title IX

been applied, there is still a necessity of evaluating whether the differences are significant enough to warrant further action. Despite the number of factors in the applicable regulations, much of the terminology remains undefined both administratively and legally.⁵⁹ Title IX opponents bemoan this as proof of the Title IX enforcers failure to establish adequate protective measures.⁶⁰ The question of size discrimination also provides a venue for the assertion that more traditional issues of discrimination may be involved. Some assert that this size discrimination furthers the disparate racial impact of Title IX.⁶¹ Despite the lack of consensus, it is unquestionable that schools have very different personalities. In today's competitive environment, it is often the school's ability to appeal to a particular demography that ensures its survival.

Normally schools, especially small ones, do not intentionally use their sports programs as their primary recruiting tool. However, an even remotely successful athletic campaign can usually trigger a bumper crop of new applicants.⁶² This bumper crop may also include a few blue chip athletes that the school normally would have been unable to attract, but it certainly falls short of transforming a school into a big-time program.⁶³ The admissions successes are usually hard fought and short-lived, and soon the applicant pool returns to its own equilibrium.⁶⁴

Athletics Investigator's manual goes into detailed examples of how these tests can be applied in the athletic context, there is no discussion as to why these particular tests were selected. *Id.*

59. For instance, "substantial proportionality" has come to mean that the proportion of female athletes is within 5 percentage points of the proportion of female undergraduates. Naughton, *supra* note 48, at A40.

60. The latest pronouncement in terms of adding specifics to Title IX occurred with the Clarification Statement of 1996. Wilson, *supra* note 7, at 428.

61. *See supra* note 32 and accompanying text; *see also infra* note 66 and accompanying text.

62. Mike Dodd, *Sports A Great Calling Card to Present to Potential Students*, USA TODAY, July 11-13, 1997, 1A.

63. *Id.* Indeed, of the success stories discussed in the article, a connection between sports and admissions was found to exist most often in schools that had a strong academic program and the team's success was a surprise. Further, schools do not tend to suffer an application drop when teams are doing poorly though reputational injury can be long lasting and the ability to attract top athletes nullified. Unfortunately, my alma mater offers a fine example of this phenomenon. Southern Methodist University (SMU) had a nationally recognized football team that was (wrongfully?) shut down by the NCAA in 1985. More than ten years later this fact is still mentioned when people discuss SMU despite its fine nationally ranked academic programs such as the business school and fine arts department. SMU does play football now but they have never recovered their national luster mainly because top players seek a more high profile program.

64. Dodd, *supra* note 62, at 2A.

ANOTHER RACIAL DIMENSION

The peculiar susceptibility of minorities to the effects of Title IX's implementation was alluded to earlier.⁶⁵ The primary concern is that a large number of men's programs are being discontinued to free up money to institute women's sports programs, and to provide scholarships for the new participants.⁶⁶ The programs eliminated tend to be heavily populated by minorities, while the programs retained, as well as those added, tend to favor majority population members.⁶⁷ Proponents of Title IX, of course, assert that the figures are statistically insignificant. However, this argument falters when one notes the small number of schools currently in compliance with Title IX.⁶⁸ If compliance is to be found throughout the NCAA on a wholesale basis, more schools will start dropping the large mainstream sports and the figures will become drastic.⁶⁹

Along similar lines of concern is the presence of four historically black colleges or universities ("HBCUs") amongst the 25 schools on the NWLC hit list.⁷⁰ The schools, Bethune-Cookman, Coppin State, South Carolina State and Hampton all have small time sports programs and all were surprised at their inclusion on the list.⁷¹ Many HBCU's are having trouble maintaining their historical status in the face of reverse racial discrimination claims

65. *Id.*

66. See Wilson, *supra* note 7, at 422, 441 n.98 (noting that more than 50% of the college football players in the country are black). In 1997, the 14th NCAA institution in the last five years eliminated football. See Sharon Raboin, *Boston U. Nears End of Era*, USA TODAY, Nov. 7, 1997, at 3C (predicting that this trend toward elimination of football will continue, and lists the schools terminating their football programs thus far). The list of schools consists of Cal State-Fullerton, Cameron, Ramapo, Santa Clara, Wisconsin-Superior, Cal State-Hayward, Lees-McRae, Ore. Tech, Upsala, San Francisco State, University of the Pacific, Cal State-Chico, Sonoma, and Boston University. *Id.* Boston Univ. is one of the schools on the NWLC target list. Naughton, *supra* note 48, at A39.

67. Craig T. Greenlee, *Title IX: Does Help For Women Come At The Expense of African Americans?*, BLACK ISSUES IN HIGHER EDUC., Apr. 17, 1997, at 24.

68. See Wilson, *supra* note 7, at 402 (noting one annual study in which only 9 of the NCAA Div. I's 302 members purported to be in compliance with Title IX).

69. Raboin, *supra* note 66 (pointing out that Boston U will be without football or baseball in 1998, but will offer lacrosse, crew and soccer). See also, Greenlee, *supra* note 67 (concluding that black males and females will have to begin taking up nontraditional sports in the future if they want a college scholarship). Of course, these sports cannot totally fill the void because of the sheer number of opportunities in football.

70. See Naughton, *supra* note 48 (listing these schools).

71. The NWLC unfortunately chose not to consult with any of the schools prior to citing them for violations. Craig T. Greenlee, *Slow Motion Penalty*, BLACK ISSUES IN HIGHER EDUC., Sept. 4, 1997, at 12.

and anti-affirmative action arguments. The new gender discrimination challenges add an unwelcome burden to these institutions.

The four schools also have vastly different characters. Coppin State College in Baltimore, Maryland is an inner city commuter school which has a male/female student body ratio of approximately 28%/72%.⁷² Most of the women are working mothers in their twenties with a limited interest in athletics.⁷³ South Carolina State is over one hundred years old and began as a state supported land grant institution for "coloreds" emphasizing industrial, agricultural and mechanical training.⁷⁴ Located in Orangeburg, South Carolina, it currently enrolls approximately 5,000 students, and remains the only state assisted HBCU in South Carolina.⁷⁵ Bethune-Cookman College (BCC) is a small religiously affiliated private school located in Daytona Beach Florida.⁷⁶ Evolving in the 1920's from a merger of two fledgling technical institutions, BCC currently enrolls approximately 2,250 students.⁷⁷ Hampton University is a private nonsectarian institution of nearly 6,100 students located in the urbanized setting of Hampton, Virginia.⁷⁸

South Carolina State and BCC have both placed moratoriums on mens' athletics with all recent additions being womens' programs.⁷⁹ Of the four schools only Coppin State is without an intercollegiate football team, but all the schools have very modest sports programs.⁸⁰ Just as some argue that there is irony in majority females using a civil rights law to gain access to collegiate athletic opportunities at the expense of minorities, some feel an equal irony exists in listing HBCUs as Title IX violators since the primary mission of the HBCU is to provide opportunities for those who normally might not be able to attend college.⁸¹

Whether these racial overtures ultimately trigger some type of serious response remains to be seen. The fact that HBCUs are being listed among offending institutions and that minority athletes are losing opportunities to attend college due to the reduction of athletic opportunities as well as scholarships is

72. *Id.* at 13.

73. *Id.*

74. See *South Carolina State University: A Century of Progress* (visited June 30, 1998) <<http://www.scsu.edu/welcome/history.html>>.

75. *Id.*

76. See *Bethune-Cookman College Home Page* (visited June 30, 1998) <<http://www.bethune.cookman.edu:80/index.html>>.

77. *Id.*

78. See *Hampton University "Our Home by the Sea"* (visited June 30, 1998) <<http://www.cs.hamptonu.edu/links.html>>.

79. Greenlee, *supra* note 67, at 12.

80. *Id.*

81. *Id.*

undoubtedly more a result of economics than of subtle racism. The fact is that recreation and athletics at all schools is an expensive proposition and many of the NCAA schools operate their athletic departments at a deficit.⁸² If a solution is to be found to the perceived troubles of both majority and minority schools affected by Title IX it will have to be based on harsh economic realities.⁸³

There also remains a question of who should take the lead in bringing about reforms. In proposing changes in compliance times and percentages one is intimating that the federal government take a new position on how Title IX is to be applied. However, the government has remained somewhat steadfast in its refusal to alter the basic Title IX framework leaving any tinkering to be done administratively by the OCR.⁸⁴

The other obvious candidate for the pole position is the NCAA. The NCAA has not stood entirely idle during the Title IX fracas. In 1992 a Gender-Equity Task Force was created to address the concerns raised by an NCAA study on gender disparity.⁸⁵ The task force concluded that the NCAA had failed to assure women an equal opportunity to participate.⁸⁶ The NCAA created a source book for member institutions to help educate its members in necessary changes to their athletic programs.⁸⁷ Within that text it clearly defers to the federal government as the "primary means through which the status and requirements of Title IX regulations have been confirmed, clarified, and enforced in favor of the student athlete."⁸⁸

82. See Raboin, *supra* note 66, at 3C (noting that in 1995 of the 220 Division 1A & AA football programs only about 67 earned a profit, and that the Boston University football program had recently been losing \$3 million annually).

83. The suggestions for dealing with gender inequities are easily simplified when one ignores the financial considerations of the situation. See, e.g., Rodney K. Smith, *Solving the Title IX Conundrum With Women's Football*, 38 S. TEX. L. REV. 1057 (1997) (advocating adding women's football as an option at NCAA member schools, and giving them the same treatment as men). This proposal is not so outlandish in light of many of the serious examples of "powder puff" football played on various scholastic levels to packed houses in football states like Texas and Florida.

84. Congressional hearings were held in 1995 in response to complaints from primarily big-time schools on the perceived vagaries of the regulations. The response was a Clarification Statement in 1996 which only reinforced all the existing points of reference for Title IX application including the adoption of some of the *Cohen* case language. Wilson, *supra* note 7, at 429.

85. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *ACHIEVING GENDER EQUITY: A BASIC GUIDE TO TITLE IX AND GENDER EQUITY IN ATHLETICS FOR COLLEGES AND UNIVERSITIES I-1* (2d ed. 1996).

86. *Id.*

87. *Id.*

88. *Id.*

HARD QUESTIONS FOR THE NCAA

The NCAA clearly supports the general fashion in which Title IX has been administered by the courts and the federal administrative enforcement officers.⁸⁹ They will not change any of their related rules unless it furthers the dictates of Title IX. This may become necessary soon in light of the proportional scholarship issue.⁹⁰ If schools are to keep pace they will have to face their own internal financial demons regarding which sports to sanction and how best to finance them. Some scholars have postulated that association wide reform could be acceptably brought about in a relatively quick fashion through capping football and basketball expenditures.⁹¹ However, if the member schools adopted such a proposal or the NCAA endorsed such a program inevitable antitrust issues would arise.⁹² The NCAA is no stranger to the difficulties of antitrust challenges. While their involvement has been relatively limited, those few instances have been all consuming in terms of time and money. Others theorize that this Catch 22 of the NCAA and the effects of the federal government enforcement will force a privatization of the big-time sports programs.⁹³

Privatization would be a serious blow to the NCAA because they would either have to participate in it as a viable, taxable multi-million dollar corporation, or maintain the status quo while watching the primary source of their big budget disappear.⁹⁴ Yet

89. *Id.*

90. *See* Naughton, *supra* note 48 and accompanying text.

91. *See* Weistart, *supra* note 14, at 250 (offering real economic based alternatives to the present approach, noting that the greatest impediment to peaceful parity is the unharnessed spending of many men's athletic programs, and wondering why college athletics fell into the same trappings of professional sports when they could see the negative aspects of professionalism). The answer to that question lies not in some unwritten law review article as Weisgard suggests, as much as it can be found by simply consulting the list of the seven deadly sins, chief among them in this case being greed.

92. *See id.* (discussing the antitrust potential, specifically reviewing NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984), a case in which the NCAA was found to have violated the antitrust laws by restricting the number of college football games to be televised, and concluding that despite the holding of that case, a budgetary restraint in the name of gender integration can survive antitrust attack). *Compare Id. with*, Timothy Davis, *Balancing Freedom of Contract and Competing Values in Sports*, 38 S. TEX. L. REV. 1115, 1139-1141 (1997) (analyzing the case of Law v. NCAA, 902 F. Supp. 1394 (D. Kan. 1995), in which a court found a cap on certain coaches salaries to be illegal price fixing in violation of the antitrust statutes).

93. Wilson, *supra* note 7, at 435.

94. The NCAA presently maintains a tax exempt status, although its organizational structure and operation is purely corporate. Eighty-two percent of the NCAA's \$220 million dollar plus budget is derived from

without some alternative in the nature of the aforementioned options, schools will continue to have trouble with compliance.⁹⁵ If not in the Title IX area, one of the thousands of rules in the NCAA manual is sure to trip up some member on a regular basis.⁹⁶

The NCAA should not exist primarily or even secondarily to groom professional athletes.⁹⁷ Modest exercise in the form of physical education and intraschool/intramural sports should normally provide an adequate recreational outlet. Some fairly localized intercollegiate competition is understandable, but national junkets in posh settings is not something schools or the NCAA should support.⁹⁸ While colleges, their staff and the NCAA reap gaudy excesses from the professional grooming, the interests of the athlete are rarely protected on an equal basis.⁹⁹ Furthermore, calling these young adults "student athletes" is often

television revenues. The televised sports are traditionally big-time athletic events involving big-name schools. Has anyone ever seen any televised event featuring the smaller schools mentioned in this article?

95. See generally BYERS, *supra* note 1 (decrying throughout his book the fact that rules infractions in the NCAA are commonplace, and suggesting the repeal of several restrictions that he feels are detrimental to athletic competition). See also *Infractions Releases* (visited July 17, 1998) <<http://www.ncaa.org/releases/makemenu.cgi?infractions>> (listing more than 30 committee findings and appeals against a variety of schools during the last year and a half). The unfortunate fact is that at any given time there are always schools serving some sort of NCAA sentence, always some being investigated, and always many more currently in violation, but escaping detection for the moment.

96. See generally MANUAL, *supra* note 5 (consisting of greater than 500 pages of information divided into 33 Articles, which set forth the NCAA's Constitution, Operating By-laws and Administrative By-laws).

97. Only a few of the NCAA athletic events provide an opportunity for professional involvement once a student leaves the school. However, the opportunities are expanding, especially for women's sports. There are now even opportunities to make money from ice-skating and gymnastics. However, all the big-time sports provide these opportunities with prospective earnings in the millions for athletes excelling in baseball, basketball, football, hockey, soccer, tennis and track. See *Women Sports Foundation* (visited June 30, 1998) <<http://www.lifetimetv.com.wosport/stage/interact/html/about.htm>> for more information regarding women's professional opportunities. This website is the home of The Women's Sports Foundation, an organization founded in 1974 by Billie Jean King.

98. See *supra* note 29 (listing the landmark cases in Title IX). In the facts of the cases both settled and adjudicated one will find tales of excesses heaped on athletes, coaches and administrators. Indeed one of the biggest controversies in the NCAA is whether athletes should be paid and deemed employees of the university. See C. Peter Gopelrud III, *Pay For Play For College Athletes: Now, More Than Ever*, 38 S. TEX. L. REV. 1081 (1997) for a compelling argument in favor of paying athletes.

99. *Id.* at 1081. The author's primary emphasis is on the Division I big-time athlete. However, the theory of relativity rules the world, and many athletes at small schools share the same concerns and desires.

a farcical oxymoron.¹⁰⁰ The NCAA rules are too bogged down with complexities to give anything more than rudimentary attention to the "student" part of the characterization. Unfortunately, more attention is given to racial undertones that begin to surface due to the use of standardized test scores as a prerequisite to participating in college athletics.

These issues raise hard questions for the NCAA concerning a potential conflict of interest. The NCAA must ask itself whether business concerns have caused it to lose sight of its purpose.¹⁰¹ Whether, despite the aspirational language espoused in its fundamental policy, it has been blinded by the bright lights of the big time, deafened by the roar of the huge audiences and dumbed by the large sums of money that it seeks to maintain control over. Until these questions are sufficiently answered, debates such as those surrounding Title IX will be generally helpful as most symptomatic remedies are, but the source will remain afflicted with maladies which continue to trigger a range of festering

100. The NCAA manual does address athletic academic requirements at Article 14; yet, despite a constant tinkering with the requirements, the most common litigation faced by the NCAA involves eligibility issues. Cole, *supra* note 53, at IV.

101. The NCAA lists its purposes as follows:

1.2 PURPOSES

The purposes of this Association are:

- (a) To initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit;
- (b) To uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the constitution and bylaws of this Association;
- (c) To encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism;
- (d) To formulate, copyright and publish rules of play governing intercollegiate athletics;
- (e) To preserve intercollegiate athletics records;
- (f) To supervise the conduct of, and to establish eligibility standards for, regional national athletics events under the auspices of this association;
- (g) To cooperate with other amateur athletics organizations in promoting and conducting national and international athletics events;
- (h) To legislate, through bylaws or by resolutions of a Convention, upon any subject of general concern to the members related to the administration of intercollegiate athletics; and
- (i) To study in general all phases of competitive intercollegiate athletics and establish standards whereby the colleges and universities of the United States can maintain their athletics programs on a high level.

MANUAL, *supra* note 5.

disorders throughout the members of its body.¹⁰²

102. Article 3 of the NCAA manual lists the membership requirements of this purely voluntary association. However, related antitrust issues lurk in the background, as the NCAA rapidly becomes the "only game in town". Many schools are defecting from other associations, because those organizations do not have the money to compete with the NCAA. The emphasis then shifts to the question of whether anyone can afford to not be a member of the NCAA. Matthew Aguilar, *Money at the Heart of Matter*, USA TODAY, Aug. 21, 1996, at 3C. See also, Debra E. Blum, *Changing The Field of Competition*, CHRON. OF HIGHER EDUC., May 3, 1996, at A41.

