

TITLE IX, AND HOW TO RECTIFY SEXISM ENTRENCHED IN NCAA LEADERSHIP

*By David Lanser**

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INTRODUCTION

In 2012, Pat Summitt’s extraordinary 38-year career as the Tennessee Volunteers women’s basketball coach came to a close.² Summitt’s tenure was cut short after being diagnosed with Alzheimer’s disease, though not before amassing an unrivaled collection of records and accolades.³ Her 1,098 career wins—best all time for any NCAA men’s or women’s basketball coach—include eight national championships, 18 Final Four appearances, and 16 SEC championships.⁴ Accomplishment led to commemoration as Summitt now boasts numerous Coach of the Year awards, an induction into the Naismith Memorial Basketball Hall of Fame,

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2. PAT SUMMITT, SUM IT UP: 1,098 VICTORIES, A COUPLE OF IRRELEVANT LOSSES, AND A LIFE IN PERSPECTIVE 364 (2014).

3. *Id.* at 15.

4. *Id.* at 8.

and a Presidential Medal of Freedom.⁵ Summitt built the Tennessee women's basketball program into a perennial powerhouse, and cemented her status as an icon on and off the court.⁶ There is a concerning undercurrent to Summitt's success, however, and it stems from its scarcity. Not the inimitable accomplishment, but the rarity for a woman to have such an opportunity.

Title IX of the Education Amendments of 1972 was enacted for two primary purposes: to prevent the flow of federal funding to discriminatory institutions, and to provide individuals remedies to rectify discrimination.⁷ Though controversial in its implementation, Title IX has greatly enhanced women's athletic opportunities in the United States.⁸ Unfortunately, those benefits have rarely extended to coaching and administrative positions, and in many ways, women seeking careers in athletics are worse off now than before Title IX.⁹

When Summitt started her coaching career in 1974, she was only 22 years old and Title IX was still in its infancy.¹⁰ Today, despite an unprecedented number of women participating in collegiate sports, women are simply denied that same opportunity to pursue a career in coaching or sports administration.¹¹ Title IX has been an incredible asset for women's sports, but the equality gained on the field should not cease once a student-athlete is handed a diploma. Though Title IX is intended to function as a safeguard for employees as well as students, it is rarely applied as such in the athletic department.

This article first outlines the issues facing women seeking employment as NCAA coaches or administrators. Despite the statistical success of Title IX in promoting girls as athletes, women are virtually excluded from leadership positions across the NCAA, and in many ways are less likely to get a job as a coach or administrator today than before the Act was instated in 1972.¹² The article then demonstrates that this disparity

5. *Coach Summitt Awards*, THE PAT SUMMITT FOUNDATION, http://www.patsummitt.org/our_role/pats_story/her_awards.aspx.

6. Lynn Zinser, *Tennessee's Summitt Steps Down as Coach*, N.Y. TIMES, (Apr. 19, 2012), at B18; *Pat Summitt*, TENNESSEE ATHLETICS, http://www.utsports.com/sports/w-baskbl/mtt/summitt_pat00.html.

7. *Title IX Legal Manual*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/crt/title-ix#II>. (last updated Aug. 6, 2015).

8. National Coalition for Women and Girls in Education (NCWGE): *Title IX at 40: Working to Ensure Gender Equity in Education*, Washington, DC: NCWGE, 2012 <http://www.ncwge.org/TitleIX40/TitleIX-print.pdf>.

9. *Id.* at 14-15; *See also*, ROBERT DRAGO ET AL., FINAL REPORT FOR CAGE: THE COACHING AND GENDER EQUITY PROJECT, at 38 https://www.soe.vt.edu/highered/files/Perspectives_PolicyNews/08-05/CAGE.pdf. (2005).

10. *Pat Summitt*, TENNESSEE ATHLETICS, http://www.utsports.com/sports/w-baskbl/mtt/summitt_pat00.html.

11. Bethany Swaton, *Girls Can Play, Too: Has the Lack of Female Leadership in NCAA Athletics Become an Afterthought?*, 20 SETON HALL J. SPORTS & ENT. L. 1, 5-6 (2010).

12. *Id.* at 5-7; DRAGO ET AL., *supra* note 8, at 48.

lies in stark contrast to the advantages and benefits of having women serve in coaching and administration, such as promoting diversity and fighting against inaccurate and harmful stereotypes.¹³ This section is followed by a discussion on the history and development of Title IX before exploring whether Title IX is best suited to fix the ongoing problems. Specifically, this article outlines the likelihood of pursuing a disparate treatment claim under Title IX versus disparate impact, as well as the ways in which the Office for Civil Rights is authorized to better police schools.¹⁴ The article then asserts the importance of professionalizing administration and coaching careers in order to promote diversity and ultimately improve the NCAA experience. Finally, the article briefly summarizes some recent advancements for women in the field. Though there have been small inroads toward equality in recent years, the Office of Civil Rights must use its enforcement power to professionalize NCAA career paths in order to ensure that progress does not stagnate. Professionalization, spurred by disparate impact lawsuits, offers the most promising path to creating and sustaining gender equality for college coaches and administrators.

BACKGROUND

The problem

No conversation regarding women in sports can be segregated from Title IX. Since its passage in 1972, Title IX has spurred fierce debate regarding its methods of implementation and the role of government in the sports side of education.¹⁵ However, even its staunchest opponents are unable to deny, for better or worse, that participation rates for female student-athletes have skyrocketed in the last 40 years.¹⁶ The number of girls playing high school sports jumped from about 300,000 before Title IX to more than 1.8 million eight years after passage to nearly 3.2 million in

13. Bethany Swaton, *Girls Can Play, Too: Has the Lack of Female Leadership in NCAA Athletics Become an Afterthought?*, 20 Seton Hall J. Sports & Ent. L. 1, 7-8 (2010); Shane Miller, *Tear Down This Wall: Why Men's College Sports Need More Female Coaches*, 22 SPORTS LAW J. 127, 138-41 (2015).

14. Miller, *supra* note 12, at 146; Swaton, *supra* note 1, at fn. 210; Eric Dodds, *The 'Death Penalty' and How the College Sports Conversation Has Changed*, Feb. 25, 2015, <http://time.com/3720498/ncaa-smu-death-penalty/>; See also, HARVARD CRIMSON (NOV. 19, 2014), Title IX Complaints in Higher Education (<http://www.thecrimson.com/table/2014/11/19/ocr-sexual-assault-data/>).

15. See, e.g., Victoria Langton, *Stop the Bleeding: Title IX and the Disappearance of Men's Collegiate Athletic Teams*, 12 VAND. J. ENT. & TECH. L. 183, 206-07 (2009-10); David Klinker, *Why Conforming With Title IX Hurts Men's Collegiate Sports*, SETON HALL J. SPORT L. 73, 81-82 (2003); James J Whalen, *Gender Equity or Title IX?*, 5 KAN. J.L. & PUB. POL'Y 65 (1996).

16. Margaret E Julinao, *Forty Years of Title IX: History and New Application*, 14 DEL. L. REV. 83, 83 (2013); National Coalition for Women and Girls in Education (NCWGE), *Title IX at 40: Working to Ensure Gender Equity in Education*, Washington, DC: NCWGE, 2012 <http://www.ncwge.org/TitleIX40/TitleIX-print.pdf>.

2011, an increase of nearly 1,000 percent.¹⁷ College participation climbed from 30,000 in 1972 to nearly 200,000 in 2011.¹⁸ More men are playing sports today as well, but the rate of increase significantly favors women.¹⁹

Despite these momentous increases for student-athletes, there has been virtually no benefit for women in campus sports leadership positions, such as coaches, athletic directors, athletic faculty representatives, and trainers. As of 2007, only six out of 120 Division I Football Bowl Subdivision (FBS) schools had a woman serving as athletic director, and fewer than 3 percent of collegiate men's teams employed women as coaches.²⁰ In 2010, exactly zero women served as a head coach or assistant coach for any men's baseball, basketball, football, or hockey team.²¹

Even in women's sports, men are much more likely to find a coaching position.²² Though Title IX helped create a 185 percent increase in jobs for coaching women's teams, a startling 98 percent of those new positions were filled by men.²³ As a result, the number of women coaching women's teams dropped from about 90 percent before Title IX to about 40 percent today.²⁴ As of 2010, there were more men than women serving as head

17. Amy Wilson, *The Status of Women in Intercollegiate Athletics as Title IX Turns 40*, June 2012, at 5, <http://www.ncaapublications.com/productdownloads/TITLEIX.pdf>.

18. National Coalition for Women and Girls in Education (NCWGE), *Title IX at 40: Working to Ensure Gender Equity in Education*, Washington, DC: NCWGE, at 9 <http://www.ncwge.org/TitleIX40/TitleIX-print.pdf>; NCAA, *Sports Sponsorship and Participation Rates Report* at 69, 188 <http://www.ncaapublications.com/productdownloads/PR2012.pdf> (In 2010-11, the average NCAA member institution had approximately 414 student-athletes, 236 males and 178 females).

19. National Coalition for Women and Girls in Education (NCWGE), *supra* note 18, at 9.

20. Bethany Swaton, *Girls Can Play, Too: Has the Lack of Female Leadership in NCAA Athletics Become an Afterthought?*, 20 SETON HALL J. SPORTS & ENT. L. 1, 5-6 (2010); NCAA, 2004-2010 *Gender Equity Report*, at 15-16 (2012), <http://www.ncaapublications.com/productdownloads/GEQS10.pdf>.

21. NCAA, 2004-2010 *Gender Equity Report*, at 15-16 (2012) (<http://www.ncaapublications.com/productdownloads/GEQS10.pdf>).

22. Earl C. Dudley, Jr. & George Rutherglen, *Ironies, Inconsistencies, and Intercollegiate Athletics: Title IX, Title VII, and Statistical Evidence of Discrimination*, 1 Va. J. Sports & L. 177, 228 (Fall 1999); Pat Borzi, *Macalester and Hamline are home to an increasingly rare sight: women coaching women's sports*, Jan 15, 2016 https://www.minnpost.com/sports/2016/01/macalester-and-hamline-are-home-increasingly-rare-sight-women-coaching-womens-sports?utm_source=MinnPost+email+newsletters&utm_campaign=37bc0d8607-1_16_2016_Daily_Newsletter1_15_2016&utm_medium=email&utm_term=0_3631302e9c-37bc0d8607-123771833. ("There is a maternity bias in all professions, and coaching is no exception," LaVoi said. "As soon as a woman has a child, she's perceived as less committed, less competent. It's like there's a maternity penalty that doesn't apply to men.")

23. Bethany Swaton, *Girls Can Play, Too: Has the Lack of Female Leadership in NCAA Athletics Become an Afterthought?*, 20 SETON HALL J. SPORTS & ENT. L. 1, 3 (2010).

24. *Id.* at 11.

coaches for women's cross country, crew, fencing, gymnastics, ice hockey, soccer, swimming, rifle, rugby, skiing, squash, tennis, volleyball, water polo, and others.²⁵ There are similar statistics reflected for full- and part-time assistant coaching positions for women's teams, as well.²⁶ Some believe that this problem developed as a direct result of Title IX, which propelled women's sports from an afterthought to a viable career choice.²⁷ The increased status and pay for coaching positions drastically broadened the applicant pool—men were suddenly open to the prospect of coaching women's sports and their new interest virtually shut women out of the market.²⁸

An oft-cited rationale for this disparity is that women student-athletes, as well as fans and administrators, are more likely to associate maleness with sports leadership roles, relegating women to "mere tokens in the world of sports."²⁹ Women are often characterized as uninterested or unqualified to coach men's sports or run an athletic department, preferring instead to focus on traditional gender roles, such as getting married and raising a family.³⁰ This perception may be attributed to a hangover effect from the pre-Title IX days when women were effectively barred from participation, thus giving men "a traditional advantage when it comes to athletic experience because males could participate in athletics long before women."³¹ Such an impression further reinforces men's position of authority in the sports realm, actively cutting against opportunities for women due to an inaccurate characterization.³²

This perception may be changing, but slowly.³³ The idea that women are unqualified or uninterested still plagues women in the business world,

25. NCAA, *2004-2010 Gender Equity Report*, at 15-16 (2012) (<http://www.ncaapublications.com/productdownloads/GEQS10.pdf>).

26. *Id.*

27. VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* 211 (1998); *See also*, Bethany Swaton, *Girls Can Play, Too: Has the Lack of Female Leadership in NCAA Athletics Become an Afterthought?*, 20 SETON HALL J. SPORTS & ENT. L. 1, 3-4 (2010).

28. *Id.*; ROBERT DRAGO ET AL., FINAL REPORT FOR CAGE: THE COACHING AND GENDER EQUITY PROJECT, 10 (2005), https://www.soe.vt.edu/highered/files/Perspectives_PolicyNews/08-05/CAGE.pdf.

29. Bethany Swaton, *Girls Can Play, Too: Has the Lack of Female Leadership in NCAA Athletics Become an Afterthought?*, 20 SETON HALL J. SPORTS & ENT. L. 1, 7 (2010).

30. ROBERT DRAGO ET AL., FINAL REPORT FOR CAGE: THE COACHING AND GENDER EQUITY PROJECT, 18 (2005), https://www.soe.vt.edu/highered/files/Perspectives_PolicyNews/08-05/CAGE.pdf.

31. Bethany Swaton, *Girls Can Play, Too: Has the Lack of Female Leadership in NCAA Athletics Become an Afterthought?*, 20 SETON HALL J. SPORTS & ENT. L. 1, 7 (2010).

32. *Id.*

33. *Id.* at 8; VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* 215 (1999) ("The situation of office workers in 1940 is very different from that of professional women in the 1990s. The marble ceiling and the marble floor are now made of glass, but the present is contiguous with the past. Women receive a lower rate of return from their investments in education and experience than men do. It is as if women were asked to accept lower interest rates on a savings account. Gender schemas discount

generally through unconscious biases.³⁴ This parallel is important to note in today's NCAA culture considering how athletic departments and universities are operating more like business ventures than ever before.³⁵ This movement is especially compelling in the collegiate sports front office, where the role of athletic director as a sports guru has transformed in the NCAA's business-first approach.³⁶ As women make gradual advances in the business world, it is possible that equality in sports may follow.³⁷ However, those gains are likely to come slowly considering the stigma against women in the NCAA and greater sports community.³⁸

Benefits of female leadership in sports

Although women still face significant barriers to equality in the workplace, advocacy groups and legislation have drastically changed perceptions of women in leadership positions since the time Title IX was passed.³⁹ In fact, some studies have shown that Fortune 500 companies with women in senior leadership positions have outperformed the

women's achievements. Women receive less interest because they are seen as investing less than men, even when their investments are equal. In a sense, that is not surprising. Attitudes that were expressed openly and unconstrainedly through the 1960s are unlikely to disappear in forty years, even if they are not longer articulated.”).

34. Marc R. Poirier, *Gender Stereotypes at Work*, 65 BROOK. L. REV. 1073, 1079-1085 (1999); VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* 8-9 (1999) (“[A] set of implicit, or nonconscious, hypotheses about sex differences plays a central role in shaping men’s and women’s professional lives. These hypotheses, which I call *gender schemas*, affect our expectations of men and women, our evaluations of their work, and their performance as professionals. Both men and women hold the same gender schemas and begin acquiring them in early childhood. . . . Whatever emphasizes a man’s gender gives him a small advantage, a plus mark. Whatever accentuates a woman’s gender results in a small loss for her, a minus mark. . . . Gender schemas are usually unarticulated. Their content may even be disavowed. . . . Our interpretations of others’ performance are influenced by the unacknowledged beliefs we all—male and female alike—have about gender differences. . . . Our implicit ideas about men and women as a whole condition our reactions to men and women as individuals.”).

35. Bethany Swaton, *Girls Can Play, Too: Has the Lack of Female Leadership in NCAA Athletics Become an Afterthought?*, 20 SETON HALL J. SPORTS & ENT. L. 1, 15-18 (2010); Katie Thomas, *Experience in Sports Optional for New Leaders*, N.Y. TIMES, Feb. 2, 2010, at B14, <http://www.nytimes.com/2010/02/02/sports/02athletics.html>.

36. Katie Thomas, *Experience in Sports Optional for New Leaders*, N.Y. TIMES, Feb. 2, 2010, at B14 <http://www.nytimes.com/2010/02/02/sports/02athletics.html>; Bill Littlefield, *In Div. I, Small Gains for Female Athletic Directors*, ONLY A GAME, Apr. 25, 2015 (<http://onlyagame.wbur.org/2015/04/25/female-athletic-directors-college-titleix>).

37. Bethany Swaton, *Girls Can Play, Too: Has the Lack of Female Leadership in NCAA Athletics Become an Afterthought?*, 20 SETON HALL J. SPORTS & ENT. L. 1, 18 (2010).

38. Shira Springer, *As Women Break Barriers, More Opportunities Must Follow*, BOSTON GLOBE, (Sep. 13, 2015) <https://www.bostonglobe.com/sports/2015/09/12/opportunities-for-women-are-nice-but-what-comes-next/d4qa3g3MtJMAgth4FPjQXK/story.html>.

39. Bethany Swaton, *Girls Can Play, Too: Has the Lack of Female Leadership in NCAA Athletics Become an Afterthought?*, 20 Seton Hall J. SPORTS & ENT. L. 1, 18 (2010).

competition.⁴⁰ The reasons for these encouraging reports apply equally to any sports leadership position, whether as a business-focused athletic director or a coach. Still, there is much to do to defeat the enduring link between sports and masculinity.⁴¹ That link can be weakened through the presence of women in leadership roles, which “could reduce some of the more damaging consequences of the masculinization of sports.”⁴²

Boys that are involved in sports from a young age are too often exposed to a counter-productive culture of hyper-masculinity.⁴³ This “locker room culture” has been linked directly to the objectification and degradation of women, with some even suggesting that such a reality increases the chances of a man committing sexual harassment or assault.⁴⁴ The desire to succeed at sports coincides with this indoctrination of perceiving women as inferior, but studies show that exposure to women in leadership positions such as coaches or athletic directors can reverse that trend.⁴⁵

Women and young girls involved in sports would also directly benefit from having more female leaders. Research suggests that a lack of female leadership contributes to negative stereotypes of women as sports authorities.⁴⁶ In one study, 91 percent of female athletes perceived male coaches as positive role models, while only 56 percent agreed that women could serve that same function, a perception that has been linked to the historical positioning of women in sports as lesser than their male counterparts.⁴⁷ Research shows that the indoctrination of such a belief, whether implicit or not, can dampen enthusiasm for sports from a young age, and especially negatively affect a young woman’s belief that sports can

40. *Id.* at 19 (A November 2001 study reported that the 25 Fortune 500 firms with the best record for promoting women to senior positions “post returns on assets 18% higher, and returns on investment 69% higher, than the Fortune 500 median of their industry.”⁹⁸ Similarly, a 2007 study conducted by Catalyst, Inc. revealed that Fortune 500 companies with the greatest numbers of women on their corporate board performed better financially than those companies with fewer female board members. 99 Other studies show that boards with higher numbers of women have increased use of non-financial performance measures, such as customer and employee satisfaction reports, improved community relations, and innovation and connection to a wider customer-base).

41. Shane Miller, *Tear Down This Wall: Why Men’s College Sports Need More Female Coaches*, 22 *SPORTS LAW J.* 127, 129 (2015).

42. *Id.* at 138.

43. *Id.*

44. *Id.* (quoting Timothy Jon Curry, *Fraternal Bonding in the Locker Room: A Profeminist Analysis of Talk About Competition and Women*, *Soc. Sport J.* 128-129 (1991), <http://journals.humankinetics.com/acuCustom/SiteName/Documents/DocumentItem/9594.pdf>).

45. *Id.*

46. *Id.* at 140-41.

47. *Id.* at 140.

provide a viable career path.⁴⁸ This belief may be connected to a broader perspective that women are generally inferior, which negatively affects girls, boys, and society as a whole.⁴⁹

Sports, rightly or wrongly, leave an indelible impression on young minds, and correcting this negative perception of women in sports is vital to equality interests. Title IX was a major step in righting the ship, but 40 years later many of these issues not only still exist, but have worsened.

History and development of Title IX

Title IX of the Education Amendments of 1972 is a comprehensive federal law intended to eliminate “barriers that once prevented people, on the basis of sex, from participating in educational opportunities and careers of their choice.”⁵⁰ The law states that: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁵¹ This mandate, enforced and implemented by the U.S. Department of Health, Education and Welfare and the U.S. Department of Education’s Office for Civil Rights (OCR), “provides a public remedy against discrimination by terminating or preventing the distribution of federal funds used to support discriminatory practices” and establishes a private cause of action to support enforcement.⁵² This broad language applies to all aspects of education from elementary school through the university level, not just school-sponsored sports, but its application to women’s sports—and thus its effect on men’s sports—has proven to be its most controversial component.⁵³

HISTORY

Before President Richard Nixon signed Title IX into law on June 23, 1972, “women and girls were virtually excluded from most athletic opportunities in schools” and those opportunities that did exist were often inconsequential, rarely extending to the collegiate level.⁵⁴ The NCAA, which today governs nearly all aspects of college sports, was created in 1906 for

48. *See Id.* at 140-41.

49. *See Id.* at 138.

50. *Title IX Legal Manual*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/crt/title-ix#II>. (last updated Aug. 6, 2015).

51. 20 U.S.C. § 1681(a) (2015).

52. Farah S. Ahmed, *Title IX of the 1972 Education Amendments*, 5 GEO. J. GENDER & L. 361 (2004).

53. *Id.* at 362-64.

54. National Coalition for Women and Girls in Education (NCWGE): *Title IX at 40: Working to Ensure Gender Equity in Education*, Washington, DC: NCWGE, 2012 <http://www.ncwge.org/TitleIX40/TitleIX-print.pdf>. 7-8.

the express purpose of formatting and enforcing rules for men's football.⁵⁵ That focus developed over time to include a larger body of sports, including women's sports, but in 1972 the NCAA offered few athletic scholarships to women and did not facilitate any women's sports championships.⁵⁶ Funding for women's sports was virtually non-existent, and facilities were lacking, if available at all—an inequity which persists today.⁵⁷ As a result, there were less than 30,000 women participating in collegiate sports at the time Title IX was passed, less than one-fifth the amount of male student-athletes.⁵⁸

Title IX, which was introduced by Representative Edith Green as a last-minute amendment in a committee meeting, sought to combat sex discrimination in education, including sports-related disparities.⁵⁹ Importantly, "Title IX is not an affirmative action statute; it is an anti-discrimination statute, modeled explicitly after another anti-discrimination statute, Title VI."⁶⁰ Its original purpose was to correct inequality in "STEM" fields (science, technology, engineering, and math) as well as address sexual harassment and sexual assault on school campuses.⁶¹ By the time the amendment was formally introduced by Senator Birch Bayh, the scope had been extended explicitly to after-school activities.⁶² Though the proposal was attacked for instituting quotas that would hurt men's sports, Senator Bayh maintained that it was intended to do away with quotas, and that the amendment "only requires that each individual be judged on merit, without regard to sex."⁶³ After lengthy debate, the enacted legislation specified that law would not require quotas of any sort, including with regard to sports.⁶⁴

55. Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 Marq. Sports L. Rev. 9, 12 (2000).

56. *Id.*

57. Bill Pennington, *High School Sports; Title IX Trickles Down to Girls of Generation Z*, NEW YORK TIMES, June 24, 2004, http://www.nytimes.com/2004/06/29/sports/high-school-sports-title-ix-trickles-down-to-girls-of-generation-z.html?_r=0.

58. National Coalition for Women and Girls in Education (NCWGE), *Title IX at 40: Working to Ensure Gender Equity in Education*, Washington, DC: NCWGE, 2012 at 9, <http://www.ncwge.org/TitleIX40/TitleIX-print.pdf>; Michelle Hosick, *Equal opportunity knocks: National Girls and Women in Sports Day celebrates 25th year*, NCAA, Feb. 2, 2011, <http://www.ncaa.com/news/ncaa/article/2011-02-02/equal-opportunity-knocks>.

59. Margaret E. Juliano, *Forty Years of Title IX: History and New Applications*, 14 DEL. L. REV. 83, 84 (2013).

60. *Cohen v. Brown Univ.*, 101 F.3d 155, 170 (1st Cir. 1996).

61. Margaret E. Juliano, *Forty Years of Title IX: History and New Applications*, 14 Del. L. Rev. 83, 84 (2013).

62. *Id.* at 85.

63. 117 Cong. Rec. 30,409 (1971).

64. *Title IX Legal Manual*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/crt/title-ix#II> (last updated Aug. 6, 2015).

At the time of passage, however, Title IX did not specify in the provision itself that it could be applied to intercollegiate athletics, despite the fairly clear legislative intent.⁶⁵ This confusion prompted a 1974 amendment to Title IX, which directed the Department of Health, Education and Welfare to publish a regulation “stating that such regulations shall include with respect to intercollegiate athletic activities, reasonable provisions considering the nature of the particular sports.”⁶⁶

In 1979, OCR instituted a method for determining whether members of both sexes have been afforded equal opportunities under Title IX.⁶⁷ The policy interpretation instituted a three-part assessment test, which read:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or (3) Where the members of one sex are under-represented among intercollegiate athletes, and the institution cannot show a continuing practice or program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by their present program.⁶⁸

The three-prong test prompted a rush of litigation that sought to limit the scope of Title IX, specifically as it applied to sports. One of the most significant threats to the OCR guidance came in *Cohen v. Brown University*, in which a private university demoted its women’s gymnastics and volleyball teams from varsity to club status, stripping the teams of university funding, prestige, and access to varsity facilities.⁶⁹ The United States Court of Appeals for the First Circuit held that the District Court’s preliminary injunction restoring the teams to varsity status was appropriate after applying the OCR test.⁷⁰

Another challenge occurred in 1984 when the assumption of broad application to all educational activities suffered a setback. The Supreme Court ruled in *Grove City College v. Bell* that although a private college receiving federal funding did have to abide by federal anti-discrimination laws, the institution only had to do so for those activities specifically funded by the federal dollars.⁷¹ This would have substantially hindered Title IX’s reach, but Congress intervened with the Civil Rights Restoration Act of 1987 (CRRA), which “amends Title IX and other related

65. *Id.*

66. *Id.*

67. HEW Policy Interpretation, 44 Fed. Reg. 71,413, 71,418 (1979).

68. *Id.*

69. *Cohen v. Brown Univ.*, 101 F.3d 155, 170 (1st Cir. 1996).

70. *Id.*

71. *Grove City College V. Bell*, 465 U.S. 555 (1984).

nondiscrimination statutes to afford broad coverage to all of the operations of a recipient.”⁷² The CRRA affirmed that athletics are included under the Title IX provisions.⁷³

Application to coaches and administrators

Though Title IX discussion generally revolves around students, both in and out of the athletic department, the provisions applies equally to educational employees and administrators.⁷⁴ The language of Title IX, however, does not make its applicability to employment obvious on its face. The question was not cleared up until 1982 when the Supreme Court ruled in *North Haven Board of Education v. Bell* that employment unambiguously falls under the “any education program or activity” umbrella, declaring that courts must acknowledge Title IX as “a sweep as broad as its language.”⁷⁵ This ruling has not been challenged in any significant fashion, and the extension to employment is regarded as a well settled assumption.⁷⁶ Since the scope of Title IX extends to extracurricular activities such as sports, that application includes coaches, athletic directors, scouts, trainers, faculty athletic representatives, and other campus athletic leadership positions.⁷⁷

Enforcement

Many of the problems with Title IX as applied to employment for women can be traced to the enforcement procedures. Title IX is enforced by the U.S. Department of Education’s Office for Civil Rights (OCR), which also enforces Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and some parts of the American with Disabilities Act of 1990.⁷⁸ A Title IX suit can be brought against any recipient of federal funding for education, except

72. *Title IX Legal Manual*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/crt/title-ix#II>. (last updated Aug. 6, 2015).

73. *Id.*

74. 20 U.S.C. § 1681.

75. *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 521, 102 S. Ct. 1912, 72 L. Ed. 2d 299 (1982).

76. Margaret E. Juliano, *Forty Years of Title IX: History and New Applications*, 14 DEL. L. REV. 83, 84 (2013).

77. *See, e.g., N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 530 (1982) (holding that Title IX extends to employment decisions, despite no explicit declaration).

78. U.S. Department of Education Office for Civil Rights, *Title IX and Sex Discrimination*, http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [revised April 2015]; Valerie McMurtrie Bonnette, *How Title IX is Enforced* (2012), <http://titleixspecialists.com/wp-content/uploads/2013/09/How-Title-IX-is-Enforced.pdf>. Title VI of the Civil Rights Act of 1964 (which prohibits discrimination on the basis of race, color and national origin); Section 504 of the Rehabilitation Act of 1973 (prohibiting discrimination on the basis of handicap); the Age Discrimination Act of 1975 (prohibiting discrimination on the basis of age); and portions of the Americans With Disabilities Act of 1990 (prohibiting discrimination on the basis of disabilities).

those institutions specifically exempted in the text.⁷⁹ Most often, these actions are brought against educational institutions and school boards since individuals cannot be held liable under Title IX.⁸⁰

When OCR investigates a claim and determines that there is an issue, the violating institution may first be given an opportunity to correct the alleged infractions.⁸¹ If the institution is unwilling to cooperate, OCR can either initiate procedures to terminate the institution's federal funding or refer the case to the U.S. Department of Justice, which can then enforce Title IX in federal court.⁸² OCR rarely takes either of these courses of actions, however, and instead typically pursues a commitment from the violating institution that it will comply with Title IX moving forward and then monitoring whether it adheres to those compliance measures.⁸³

Anyone may file a Title IX complaint with OCR, including non-victims who are not associated with the institution.⁸⁴ However, the complaint must allege a specific discriminatory action and be filed within 180 days of the discrimination.⁸⁵ Federal regulations require OCR to protect the identity of the complainant in an effort to mitigate any potential retaliation, unless given permission by the complainant.⁸⁶ Throughout this process, OCR is tasked to remain neutral and not specifically advocate on behalf of the complaining party.⁸⁷

Importantly, OCR does not have the authority to mandate the precise way in which an offending institution corrects the violation, only that the

79. *Title IX Legal Manual*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/crt/title-ix#II> (last updated Aug. 6, 2015). (exceptions include "educational institutions commencing planned change in admissions," "educational institutions of religious organizations with contrary religious tenets," "educational institutions training individuals for military services or merchant marine," "public educational institutions with traditional and continuing admissions policy," "social fraternities or sororities; voluntary youth service organizations, "boy or girl conferences," "father-son or mother-daughter activities at educational institutions," "institutions of high education scholarship awards in 'beauty' pageants[.]").

80. Hayley Macon et al., *Introduction to Title IX*, 1 *Geo. J. Gender & L.* 417, 420-21 (1999-2000).

81. *Id.* at 429.

82. *Id.* at 429-430.

83. Hayley Macon, *Introduction to Title IX*, 1 *Geo. J. Gender & L.* 417 (1999-2000).

84. U.S. Department of Education Office for Civil Rights, *How to File a Discrimination Complaint with the Office for Civil Rights*, <http://www2.ed.gov/about/offices/list/ocr/docs/howto.html> (last modified Aug. 21, 2016).

85. *Id.*

86. *Id.* (OCR may not pursue an action if the complainant's name is necessary to the complaint and the complainant refuses to be identified. Though OCR needs the name in order to move forward, it must drop the suit even if others are known victims of discrimination).

87. *Id.*

institution complies with Title IX.⁸⁸ OCR must accept any form of compliance that adheres fully with Title IX even if there are alternative methods preferred by OCR or the complainant.⁸⁹

OCR complaints should not be confused with lawsuits, which are entirely separate from OCR enforcement procedures.⁹⁰ OCR is not involved in lawsuits in any capacity, though the department may at times delay its own investigation pending the results of a Title IX lawsuit.⁹¹ Since lawsuits and complaints are kept entirely separate, there is no requirement that a complainant exhaust administrative remedies before filing a lawsuit, and complainants are able to file an OCR complaint and a lawsuit concurrently.⁹² However, as with any lawsuit the individual filing must be the alleged victim of discrimination, though the victim is not vital to an OCR complaint.⁹³

ANALYSIS

Employment discrimination in sports leadership positions ought to be protected by Title IX, but sporadic and toothless enforcement have left women seeking jobs in coaching or administration without many viable options. Title IX changed the landscape for women in sports. Unfortunately, advocates of gender equality are stuck looking for methods to promote Title IX enforcement or alternatives to circumvent the 1972 law entirely.

The many obstacles for disparate treatment lawsuits

Since 1979, the Supreme Court has recognized an implied private cause of action in Title IX lawsuits, drastically expanding the ability of victims to seek restitution for discriminatory practices and rejecting an argument that Title IX regulations are too burdensome for university compliance.⁹⁴ The ruling constituted a major step forward for gender

88. Valerie McMurtrie Bonnette, *How Title IX is Enforced* (2012), <http://titleixspecialists.com/wp-content/uploads/2013/09/How-Title-IX-is-Enforced.pdf>.

89. *Id.*

90. *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979) (finding a private cause of action for Title IX lawsuits).

91. Valerie McMurtrie Bonnette, *How Title IX is Enforced* (2012), <http://titleixspecialists.com/wp-content/uploads/2013/09/How-Title-IX-is-Enforced.pdf>.

92. *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

93. U.S. Department of Education Office for Civil Rights, *How the Office for Civil Rights Handles Complaints*, <http://www2.ed.gov/about/offices/list/ocr/complaints-how.html> (last modified Aug. 20, 2016).

94. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). (Respondents' principal argument against implying a cause of action under Title IX is that it is unwise to subject admissions decisions of **universities** to judicial scrutiny at the behest of disappointed applicants on a case-by-case basis. They argue that this kind of litigation is burdensome and inevitably will have an adverse effect on the independence of members of

equality advocates who no longer had to rely on OCR's discretion whether a Title IX lawsuit was appropriate. Although the private cause of action expanded Title IX's reach, lawsuits have had a low rate of success. In one survey of 190 lawsuits, a Title IX violation was only found in 29 cases, approximately 15 percent.⁹⁵ The raw number of cases is on the rise, however, since the first Title IX case in 1976.⁹⁶ The aforementioned survey reviewed cases through 2007, and it found that 89 of the total number of cases, or 47 percent, took place between 2000 and 2007.⁹⁷ Despite the increased prevalence of lawsuits and OCR complaints, there has been little effect, if any, on the dismal number of women serving as coaches and sports administrators since the 1990s.⁹⁸

The low success rate may play a role in that lack of progress, and unfortunately the difficulty in combating disparate treatment discrimination through Title IX actions may be an inherent aspect of the high bar of proof established in the law. The disparate treatment theory of discrimination addresses actions that treat similarly situated people differently because of their status as a member of a protected class.⁹⁹ To bring a successful disparate treatment suit, a plaintiff must first establish a prima facie case showing: (1) that she is a member of a class subject to discrimination; (2) that she was qualified for the position; (3) that there was a rejection; and (4) that the job remained open after the rejection.¹⁰⁰ Once each of the prima facie elements are met, the employer is given an opportunity to rebut any of evidence by offering legitimate, non-discriminatory reasons for the rejection.¹⁰¹ The plaintiff is then allowed a chance to counter that the employer's proof is either factually inaccurate

university committees.) If this had come later, it may not have been successful as courts today are less likely to find an implied cause of action. *Guardians Association v. Civil Service Commission*, 463 U.S. 582 (1983) produced six separate opinions.

95. *Title IX Complaints in Higher Education*, HARV. CRIMSON (Nov. 19, 2014), <http://www.thecrimson.com/table/2014/11/19/ocr-sexual-assault-data>; Paul Anderson & Barbra Osborne, A Historical Review of Title IX Litigation, 18 J. LEGAL ASPECTS SPORT 127, 136 (2008).

96. Anderson, Paul M. and Osborne, Barbara, "A Historical Review of Title IX Litigation," 18 J. LEGAL ASPECTS SPORT 127, 131 (2008).

97. *Id.* (Additionally, 69 cases or 36 percent of the total number occurred in the 1990s, bringing the total between 1990 and 2008 to 83 percent).

98. Shane Miller, *Tear Down This Wall: Why Men's College Sports Need More Female Coaches*, 22 SPORTS LAW J. 127, 129 (2015).

99. *Title IX Legal Manual*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/crt/title-ix#II> (last updated Aug. 6, 2015).

100. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *See also Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252 (1981) (applying the McDonnell-Douglas framework to gender discrimination).

101. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *See also Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252 (1981) (applying the *McDonnell-Douglas* framework to gender discrimination).

or pretext for discrimination, but still must overcome the burden of persuasion.¹⁰²

This is, of course, a daunting task for any plaintiff without explicit, direct proof of the discrimination. This type of evidence, especially in competitive employment scenarios with a large number of applicants, is difficult to obtain as many decisions are made behind closed doors and plenty of legitimate considerations to deny a candidate may exist.¹⁰³ Employment decisions often rely on explicit vetting processes that are created not only for the institution to find and obtain the highest quality candidates, but also as a screen to prevent employment lawsuits, whether Title IX or otherwise. And even where those processes do not exist, employers generally do not make explicit admissions of their discrimination.¹⁰⁴ However, some circumstantial evidence may be used to prove direct discriminatory treatment, such as comments from which discrimination may be clearly inferred and evidence that similar-situated applicants outside of the protected class received preferential treatment.¹⁰⁵

An unfortunate consequence of this difficult standard is that explicit, non-rebuttable evidence generally tends to be specific to the scenario or actors in a particular case.¹⁰⁶ Even if the lawsuit or OCR complaint creates a policy change or cultural shift at one of the 1,281 collegiate institutions monitored by the NCAA, the specificity necessary to meet the prima facie case likely prevents meaningful change at the other 1,280. The low success rate is unlikely to spur a mass culture shift by universities hoping to avoid liability. There has been no significant push toward a large-scale class

102. Pretext can be proved in many ways, including through circumstantial evidence. Common sins of pretext include the treatment of the individual in question during employment, the company's overall treatment of minorities, the company's policies and practices that may be considered discriminatory, inconsistency by the defendant in citing a reason for the disparity, unreasonable business judgments which negatively affect minorities, and employment statistics. Notably, courts will also accept evidence that the company treated employees that were similarly situated in every way to the plaintiff other than status in a protected class differently for the same actions. For example, if a white employee and a black employee log the same number of unexcused absences over similar time periods and the black employee is fired or demoted while the white employee retains his or her position, courts will often view that treatment as proof the employer's rebuttal is pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973); *See also Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252 (1981) (applying the McDonnell-Douglas framework to gender discrimination).

103. Mack A. Player, *The Evidentiary Nature of Defendant's Burden in Title VII Disparate Treatment Cases*, 49 MO. L. REV. 17, 22-23 (1984).

104. Shane Miller, *Tear Down This Wall: Why Men's College Sports Need More Female Coaches*, 22 SPORTS LAW. J. 127, 146 (2015).

105. *See, e.g., Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 134 (2000).

106. Shane Miller, *Tear Down This Wall: Why Men's College Sports Need More Female Coaches*, 22 SPORTS LAW. J. 127, 146 (2015).

action lawsuit, though one might be necessary to seriously combat discrimination.

Further complicating matters, an individual filing a lawsuit or OCR complaint may have to do so at the cost of compromising her own reputation and career. Nearly a half-century ago, Curt Flood—an All-Star center fielder for the St. Louis Cardinals—filed a lawsuit to fight Major League Baseball’s exemption from antitrust laws despite the fact that doing so would tarnish his career and reputation.¹⁰⁷ Flood proceeded with the lawsuit despite knowing his efforts would not benefit him directly, but could potentially establish rights for future players.¹⁰⁸ Flood was even subjected to a barrage of death threats as fans accused him of ruining baseball.¹⁰⁹ Ultimately, the Supreme Court ruled against Flood, but his efforts paved the way for the free agency era enjoyed by baseball professionals today.¹¹⁰

Flood’s case did not directly involve disparate treatment, but for a lawsuit to make an impact for women in NCAA coaching and administration, it may require a similar martyr-type figure who is willing to jeopardize her career for the movement. A major point of victory for Flood was simply convincing the general public that the antitrust exemption was a problem that required a solution.¹¹¹ Women seeking jobs in coaching and administration seek a similar uphill battle, and because of the high standard for establishing a prima facie case under Title IX a high-profile, political savvy plaintiff may have to risk her entire career and reputation in order for others to break through in the subsequent decades.

Systemic disparate impact, and finding an advantage in raw numbers

A case centered on disparate impact rather than disparate treatment may have a better chance of succeeding on a large scale. Unlike disparate treatment, disparate impact focuses only on the consequences of otherwise gender-neutral practices, not on the intent driving those policies.¹¹² Intent is not an element necessary to prove disparate impact

107. Flood v. Kuhn, 407 U.S. 258, 265 (1972); Allen Barra, *How Curt Flood Changed Baseball and Killed His Career in the Process*, THE ATLANTIC, July 12, 2011 <http://www.theatlantic.com/entertainment/archive/2011/07/how-curt-flood-changed-baseball-and-killed-his-career-in-the-process/241783/>.

108. Flood v. Kuhn, 407 U.S. 258, 265 (1972).

109. *Id.* at 258.

110. Allen Barra, *How Curt Flood Changed Baseball and Killed His Career in the Process*, THE ATLANTIC, July 12, 2011 <http://www.theatlantic.com/entertainment/archive/2011/07/how-curt-flood-changed-baseball-and-killed-his-career-in-the-process/241783/>.

111. *Id.* (Kuhn, echoing the court decisions of previous years, replied that he was sympathetic to Flood’s feelings but “simply did not see how that applied to Major League Baseball.”).

112. *Title IX Legal Manual*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/crt/title-ix#II> (last updated Aug. 6, 2015).

under Title IX.¹¹³ As discussed, direct evidence of intent behind a discriminatory action is difficult and often impossible to produce.¹¹⁴ That barrier does not exist in a disparate impact claim, and the plaintiff could instead rely on the statistics that show a strong preference for male candidates.¹¹⁵

The raw numbers cited throughout this writing—such as fewer than 3 percent of men’s teams employing women on the coaching staff—are likely enough on their own to display that current hiring practices adversely affect women seeking career opportunities in the NCAA, though statistics used to meet a prima facie case of discrimination may be rebutted by the defendant. Alternative explanations for statistical disparities often win the day, and may common approaches could be used by universities in a Title IX employment case, such as asserting a lack of interest by women in open positions, a dearth of qualified women for a position, or that the disparity is not *because of* but rather *in spite of* a protected trait.¹¹⁶ Universities may also argue that, at least for positions in which a coach would have substantial and intimate contact with college men, gender is a “bona fide occupational qualification.”¹¹⁷ These defenses, however, may prove be less persuasive as society continues to normalize women in leadership roles, and are rebuttable as pretext for discrimination.

A disparate impact approach helps circumvent the need for intentional discrimination, but requires that the plaintiff prove a direct connection between an otherwise gender-neutral hiring policy or practice and the disparate impact on the basis of gender.¹¹⁸ Once articulated, the defendant has the opportunity to offer justifications for maintaining the

113. *Id.*

114. *Id.*

115. *Id.*

116. *E.E.O.C. v. Sears, Roebuck & Co.*, 839 F.2d 302, 320 (7th Cir. 1988) (finding that statistical disparities were not enough to defeat a facially gender-neutral policy because women were less likely to be interested in commission sales and were less qualified for the positions); *Pers. Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

117. “[I]t shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, *on the basis of his religion, sex, or national origin* in those certain instances where religion, sex, or national origin is a *bona fide occupational qualification* reasonably necessary to the normal operation of that particular business or enterprise.” 42 U.S.C.A. § 2000e-2 [emphasis added]. *See also*, *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) (holding that hiring only men as correctional officers was “reasonably necessary” for the normal operation of a prison and related to the “essence” of the business); *Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 188 (1991).

118. *Title IX Legal Manual*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/crt/title-ix#II>.

practice as a business necessity.¹¹⁹ These justifications must directly address job performance issues related to gender, must meet an integral need of the institution, and must have a substantial connection to the challenged policy.¹²⁰ Even if an institution is able to demonstrate a sufficient justification for the policy, it must withstand an inquiry into possible alternative practices that could meet the same goals while lessening the adverse impact on the group in question.¹²¹ If that inquiry fails, the institution will still be found liable under Title IX.¹²²

Disparate impact claims are much friendlier on their face to plaintiffs, but may still pose challenges to female professionals in the NCAA. One obstacle, whether or not there is a lawsuit, is that schools already allocate resources to justifying coaching and administration hires, especially in high profile openings.¹²³ The media circus surrounding a high-profile hire often dominates news and the school hosts press conferences pre-loaded with an arsenal of supporting justification for their choice.¹²⁴ Often, schools lean on past playing experience or other defensible justifications for a hire, which generally, on their face, appear to be reasonable.¹²⁵ However, a disparate impact claim could succeed by pointing to the statistical disparities favoring men for openings on women's teams.¹²⁶ Even if there is some logic to hiring men with playing experience to coach men, the same should hold for women coaching women's teams. Better yet, women's playing experience should count equally if a men's position opens, assuming the sport's strategy does not vary significantly by gender.

If using a disparate impact approach, a class action lawsuit could be especially helpful, as it would circumvent the need for a "martyr" plaintiff while at the same time bolster credibility through raw numbers. Title IX claims are, by their very nature, group-based as they allege one class of people is affected in different ways than another. A class action suit would embrace that group identity, thus legitimizing the existence of a harmed class and the extensiveness of the issue. Though the specific facts may differ, virtually any case regarding female employment in the NCAA coaching and administration ranks can be boiled down to the same claim: men are unduly favored for sought-after employment. The familiar experiences of potential plaintiffs make this ripe for a class action approach.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. Adam Kramer, *How a College Football Program Conducts a Coaching Search*, BLEACHER REPORT, Dec. 16, 2013.

124. *Id.*

125. *Id.*

126. Bethany Swaton, *Girls Can Play, Too: Has the Lack of Female Leadership in NCAA Athletics Become an Afterthought?*, 20 Seton Hall J. Sports & Ent. L. 1, 3 (2010).

The failure of the U.S. Department of Education Office for Civil Rights and the NCAA to sufficiently police schools

The United States Department of Education's Office for Civil Rights (OCR) is given wide latitude by Title IX to police NCAA institutions, but, whether due to ambivalence or a perpetual lack of resources, has failed to make meaningful steps toward the Act's stated goals.¹²⁷ Despite Title IX's success increasing the number of female students participating in athletics, OCR complaints are generally unhelpful for the individuals involved since they often drag out longer than the typical four years needed to complete a degree.¹²⁸ Women seeking employment would not be subjected to that same four-year cap, of course, but by any measure four years is a prohibitively long time to wait for an OCR resolution. Though Title IX cases constitute a small percentage of OCR's caseload, complaints often draw national headlines and thus become "among the most time-consuming and closely scrutinized that the office handles."¹²⁹ This political reality drags out investigations, at times for more than a decade, riddling cases with unnecessary complications and depriving many the chance for an equitable resolution in a reasonable timeframe.¹³⁰

Even if the length of the investigation is not an issue, OCR often falls short in other ways. In 2008, for example, OCR allowed Ball State to conduct its own internal investigation of a Title IX complaint.¹³¹ This investigation lasted only two weeks and the university failed to conduct even basic interviews of coaches intimately involved with the issues being investigated.¹³² The university found that its own policies did not violate Title IX.¹³³ Internal investigations, of course, save OCR resources, but may result in unreliable outcomes as the investigators are "retained and compensated by the corporation that is the subject of the allegations, raising troubling questions about loyalty, accountability, and conflicting

127. Katie Thomas, *Long Fights for Sports Equity, Even with a Law*, N.Y. TIMES, Jul 29, 2011, at A1 ("But scores of schools, year in and year out, still fail to abide by the law. For those schools, almost no one disputes this: There is little chance their shortcomings will ever be investigated, and even if they are, few will be meaningfully punished."); Sudha Setty, *Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement*, 32 COLUM. J.L. & SOC. PROBS. 331, 334 (1998-1999).

128. Katie Thomas, *Long Fights for Sports Equity, Even with a Law*, N.Y. TIMES, Jul 29, 2011, at A1.

129. *Id.*

130. *Id.* (At the University of Southern California, for example, a high-profile Title IX suit filed in 1998 took 14 years for OCR to complete its investigation - <http://chronicle.com/article/U-of-Southern-California/136719/>).

131.

<http://www2.ed.gov/about/offices/list/ocr/docs/investigations/05096001.html>]; Katie Thomas, *Long Fights for Sports Equity, Even with a Law*, N.Y. TIMES, Jul 29, 2011, at A1.

132. *Id.*

133. Thomas, *supra* note 132.

objectives.”¹³⁴ For women seeking equality in employment opportunities from the NCAA, the toothless enforcement techniques used by OCR make the agency largely irrelevant.

OCR does have a powerful tool at its disposal, however, as the agency can use Title IX violations to cut the amount of federal funding allocated to a school.¹³⁵ This is among OCR’s biggest bargaining chips to fight against discrimination, yet the use of federal funding leverage has been almost non-existent.¹³⁶ In fact, no school in the history of OCR has ever had its full federal funding cut, signaling an empty threat for other schools in similar situations.¹³⁷

If the NCAA works alongside OCR to handle claims of discrimination in hiring procedures, the so-called “death penalty” has the potential to send a nation-wide message following an OCR investigation.¹³⁸ The death penalty is an idiom for the NCAA’s ability to completely ban a school from competing in a sport for a specified number of years.¹³⁹ The penalty has only been used five times, generally for illegal payments to players or recruiting violations and has effectively changed the NCAA landscape as schools genuinely fear the punishment, or, as a former president of the University of Florida described it, “It’s like what happened after we dropped the [atom] bomb in World War II. The results were so catastrophic that now we’ll do anything to avoid dropping another one.”¹⁴⁰ In theory, the death penalty should apply to academic fraud or other university issues related to its sports program, but the enforcement method has never been used in that fashion, despite some public outcry that it should.¹⁴¹ Using the sixth death penalty to punish a school with particularly grievous hiring practices excluding women would send a clear message to the rest of the NCAA and may be the best approach to creating institutionalized change.

134. Kevin Michels, *Internal Corporate Investigations and the Truth*, 40 Seton Hall L. Rev. 83, 85 (2010).

135. Sudha Setty, *Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement*, 32 COLUM. J.L. & SOC’Y. PROBS. 331, 344 (1998-1999).

136. *Id.*

137. *Id.*

138. Eric Dodds, *The ‘Death Penalty’ and How the College Sports Conversation Has Changed*, TIME, Feb. 25, 2015, <http://time.com/3720498/ncaa-smu-death-penalty/>.

139. *Id.*

140. *Id.*

141. Dennis Dodd, *UNC should get death penalty in academic fraud case, but it won’t*, CBS SPORTS, Oct. 23, 2014, <http://www.cbssports.com/collegebasketball/eye-on-college-basketball/24765048/unc-should-get-death-penalty-in-academic-fraud-case-but-it-wont/>.

Using Title IX as leverage to institute formal mentoring, certification, training, etc. for women in coaching

As noted, schools often rely on past experience in hiring decisions, which, though a reasonable metric, can in some cases unduly burden women candidates. One possible solution to the experience issue is to use Title IX enforcement as a motivator for schools to further professionalize the coaching and athletic administration career path by instituting formal mentoring, certification, and training opportunities.¹⁴² Today, the hiring process is fairly informal, with personal or school relationships playing a key role in acquiring positions similar to apprenticeships which in turn lead to coaching and administration positions.¹⁴³ This type of approach reinforces an “old boy network” in which the same pools of applicants are provided a significant boost for various positions across the country.¹⁴⁴ Such a practice reinforces the negative stereotypes Title IX was instituted to fight through displaying male candidates as better suited for the job than women who lack the same name recognition.¹⁴⁵

A major contributing factor to the inequality in hiring is the proportion of women versus men applying for the same position.¹⁴⁶ Even when the women applying for a position are highly qualified, the chances of finding the right person for the job favor the often significantly larger pool of male applicants, who are also presumably qualified.¹⁴⁷ Professionalizing the career path toward coaching and administration through institutionalized training, certification, and other opportunities for women would eventually even out the applicant pool, making it more likely by sheer numbers for a woman to be selected out of the desired candidates.¹⁴⁸ Furthermore, equalizing the number of female to male candidates “reduces discrimination, harassment, and role encapsulation.”¹⁴⁹ It is worth noting that “of nine major women’s sports in

142. ROBERT DRAGO, ET AL., FINAL REPORT FOR CAGE: THE COACHING AND GENDER EQUITY PROJECT, 25 (2005) https://www.soe.vt.edu/highered/files/Perspectives_PolicyNews/08-05/CAGE.pdf.

143. *Id.* at 14.

144. Bethany Swaton, *Girls Can Play, Too: Has the Lack of Female Leadership in NCAA Athletics Become an Afterthought?*, 20 SETON HALL J. SPORTS & ENT. L. 1, 37 (2010).

145. *Id.* at 35-36.

146. DRAGO, *supra* note 143, at 24.

147. *Id.* (“If you have fifty men applying and three women, the chances that you’re going to find the right fit in the fifty is a lot greater than in the three, so even if there is a lot of qualified women out there, when you’re looking at specific jobs, the critical mass isn’t great enough to really help get women to the top”).

148. *Id.*

149. *Id.* at 21, 24. [At 21: “Role encapsulation describes a situation in which an individual is asked to perform tasks more related to their gender than to their job description. For example, when women are asked to get coffee and men are asked to lift heavy boxes, we see evidence of role encapsulation. Role encapsulation is an insidious way to constraint gender equity because it removes women from their organizational role (with authority, skill, and power) and places them in an extra-

Division I schools, only one – soccer – showed an increase in the proportion of women coaches between 1977 and 2004, and soccer is the only sport with a formalized and widely accepted licensing process for coaches.”¹⁵⁰

OCR could use Title IX enforcement as motivation for the NCAA to institute incentives for schools providing professionalization programs for women. Though the benefits may not be apparent overnight, a widespread support system for women seeking NCAA careers would at the very least legitimize their efforts and likely spur change in the raw hiring numbers.¹⁵¹ The fact is that men are more likely to get mentorship and training in the current NCAA climate, which has been slow to develop past traditional gender stereotypes.¹⁵² Those connections directly contribute to future employment opportunities, thus, in the words of Title IX, denying women the same benefits, not to mention the discriminatory aspects.¹⁵³ Professionalizing the NCAA career path not only improves the candidate pools for each position, it also lessens the inequality in hiring that has emerged since Title IX.¹⁵⁴

Recent advancements and the promise of future opportunity

Despite the disparity in career opportunities, women are making unprecedented advancements elsewhere in the sports world. For instance, the United States Women’s National Team won the 2015 World Cup, setting the United States record for soccer viewership in the process, including a 77 percent increase from four years prior.¹⁵⁵ The NFL recently welcomed its first female referee and first woman to serve as a full-time

organizational or familial role that does not garner respect, recognition, or a promotion.”].

150. *Id.* at 64 (“The nine major sports, as defined by at least 50 percent of Division I schools fielding a women’s team, are basketball, cross country, golf, soccer, softball, swim/dive, tennis, track and field, and volleyball, all of which exhibited declines from 1997 to 2004 in the percentage of women coaches of at least 10 percent excepting soccer, where the figure increased from 29.4 to 30.1 percent (Acosta & Carpenter 2004, pp. 9, 13). Licensing of soccer coaches occurs through the U.S. Soccer Federation (see www.ussoccer.com).”

151. *Id.* at 25.

152. *Id.* at 20.

153. *Id.* at 25.

154. *Id.* at 25.

155. U.S. Soccer, *Women’s World Cup Final is Most-Watched Soccer Match in U.S. History*, U.S. Soccer, July 8, 2015, <http://www.ussoccer.com/stories/2015/07/08/16/59/150708-wnt-victory-breaks-tv-records> (“The U.S. Women’s National Team set a television ratings record during its victory in the final of the 2015 FIFA Women’s World Cup against Japan, making the game the most-watched soccer match in U.S. history. According to FOX, the match clocked in at just under 23 million viewers, an increase of 77% compared to the final of the 2011 Women’s World Cup, a match between the same teams.”).

assistant coach.¹⁵⁶ Jessica Mendoza became the first in-booth analyst in Major League Baseball History.¹⁵⁷ And—slowly—women have started to break further into the NCAA’s coaching and administrative ranks.¹⁵⁸

These developments are important to dispelling negative stereotypes of women in sports. The mere presence of women in increasingly important roles is critical to dispelling stereotypes, especially for younger fans as “a shortfall of women coaches at the elementary and secondary school level, may be partly responsible for negative attitudes expressed toward women coaches.”¹⁵⁹ Exposure is a major factor in legitimizing women’s role in the sports world, and recent trends suggest positive results may be reaped by the next generation.¹⁶⁰

But history shows that this recent push may not have staying power.¹⁶¹ In 2015, Beth Mowins became the second woman ever to work as the play-by-play announcer for an NFL game, albeit a preseason matchup.¹⁶² Mowins’ accomplishment is significant, of course, but the achievement came 28-years after Gayle Sirens called a regular season

156. Ashley Fox, *Meet Sarah Thomas, NFL’s first female official*, ESPN, (Apr. 17, 2015), http://espn.go.com/nfl/story/_/id/12669370/meet-sarah-thomas-first-female-nfl-official-referee; Mike Rodak, *Kathryn Smith hired by Bills as NFL’s first female full-time coach*, ESPN, (Jan. 21, 2016), http://espn.go.com/nfl/story/_/id/14614558/kathryn-smith-hired-buffalo-bills-nfl-first-full-female-assistant.

157. Paul Casella, *Mendoza becomes ESPN’s 1st female MLB analyst*, MLB.COM, (Aug. 25, 2015), <http://m.mlb.com/news/article/145185876/jessica-mendoza-calls-espn-mlb-game>; ESPN.com news services, *Jessica Mendoza, Aaron Boone join ‘Sunday Night Baseball’ broadcast*, ESPN.COM, (Jan. 13, 2016), http://espn.go.com/mlb/story/_/id/14560502/jessica-mendoza-joins-sunday-night-baseball-full (Though worth noting that she was first promoted due to Curt Shilling getting suspended for racist tweets).

158. Tamira Madsen, *Katherine Vosters is a game changer UW*, MADISON MAGAZINE, (Jan. 3, 2016), <http://m.channel3000.com/madison-magazine/business-city-life/katherine-vosters-is-a-game-changer-at-uw/37202434#.VorLibsISuY.facebook>; Pat Borzi, *Macalester and Hamline are home to an increasingly rare sight: women coaching women’s sports*, MINNPOST.COM (Jan. 15, 2016), https://www.minnpost.com/sports/2016/01/macalester-and-hamline-are-home-increasingly-rare-sight-women-coaching-womens-sports?utm_source=MinnPost+email+newsletters&utm_campaign=37bc0d8607-1162016DailyNewsletter1152016&utm_medium=email&utm_term=0_3631302e9c-37bc0d8607-123771833.

159. DRAGO, *supra* note 155, at 36.

160. *Id.* at 51.

161. Shira Springer, *As women break barriers, more opportunities must follow*, BOSTON GLOBE, (Sep. 13, 2015), <https://www.bostonglobe.com/sports/2015/09/12/opportunities-for-women-are-nice-but-what-comes-next/d4qa3g3MtjMAgth4FPjQXK/story.html>.

162. Josh Dubow, *Beth Mowins gets NFL announcer shot during Raiders preseason*, ASSOCIATED PRESS, (Aug. 13, 2015), <http://pro32.ap.org/article/beth-mowins-gets-nfl-announcer-shot-during-raiders-preseason>.

matchup between the Seattle Seahawks and the Kansas City Chiefs.¹⁶³ Both the gap from 1987 to 2015 and the distinction between preseason versus regular season games suggest that these advancements do not guarantee future progress.

Sustaining success is exactly where Title IX comes into play. Using Title IX to create institutional change, rather than simply relying on social trends, ensures that the progress made is sustainable and meaningful. Title IX is more than a tool for ensuring women the same opportunities as men in NCAA athletics, it is a vital component of legitimizing and supporting the fight for equality.

CONCLUSION

More than four decades of Title IX has done little to eradicate barriers for women pursuing careers in NCAA leadership. The good news for women seeking employment is that social trends and pressures have heightened the attention paid to a decades-long fight that has lacked true national exposure.¹⁶⁴ However, change is slow and a long, difficult fight for equality is still ahead. Title IX, while a success for female student-athletes, has yet to make significant meaningful impact on women in coaching and administration, even making some positions more difficult for a qualified woman to obtain.¹⁶⁵ The Office for Civil Rights remains empowered to use federal funding as a significant leveraging chip for enforcing Title IX, but has been extremely reluctant to do so consistently.¹⁶⁶

Litigation may be necessary to spur real action against inherent sexism in NCAA leadership structures, and Title IX does open the door for women to initiate lawsuits through either disparate treatment or disparate impact arguments.¹⁶⁷ However, it is unclear whether lawsuits will result in lasting, meaningful change. To do so, professionalizing the administration and coaching career paths would lessen the degree of individual bias and

163. Zack Peterson, *WLFA news anchor Gayle Sierens calls is a day after 38 years*, TAMPA BAY TIMES (May 20, 2015), <http://www.tampabay.com/news/humaninterest/newscaster-gayle-sierens-calls-it-quits-after-38-years/2230485>.

164. *Id.*

165. Bethany Swaton, *Girls Can Play, Too: Has the Lack of Female Leadership in NCAA Athletics Become an Afterthought?*, 20 SETON HALL J. SPORTS & ENT. L. 1-3 (2010).

166. Sudha Setty, *Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement*, 32 COLUM. J.L. & SOC. PROBS. 331, 334 (1998-1999); see also Eric Dodds, *The 'Death Penalty' and How the College Sports Conversation Has Changed*, TIME, (Feb. 25, 2015) <http://time.com/3720498/ncaa-smu-death-penalty/>.

167. *Title IX Legal Manual*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/crt/title-ix#II> (last updated Aug. 6, 2015); Bethany Swaton, *Girls Can Play, Too: Has the Lack of Female Leadership in NCAA Athletics Become an Afterthought?*, 20 SETON HALL J. SPORTS & ENT. L. 1, 39 (2010).

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thus pave the way for qualified women.¹⁶⁸ That strategy, coupled with disparate impact lawsuits to motivate institutionalized professionalism, would create the most immediate and long-lasting change.

168. ROBERT DRAGO ET AL., FINAL REPORT FOR CAGE: THE COACHING AND GENDER EQUITY PROJECT, 25 (2005)
https://www.soe.vt.edu/highered/files/Perspectives_PolicyNews/08-05/CAGE.pdf.