

PANEL II: Thirty Years of Title IX

Moderator: Linda Wharton^{*}
Panelists: Lawrence Joseph[†]
Donna Lopiano[‡]
Alison Marshall[§]
Mike Moyer^{||}

MR. TAXIN: I am very happy that we have this second panel of the day here. This panel about Title IX, I think, is a very important panel. This is a very current issue right now. If you pick up any newspaper or magazine, you will probably see an article about Title IX. There was a piece on “60 Minutes”¹ a few months ago, as well as on ESPN’s “SportsCenter.”² I saw a few pieces regarding Title IX and all of the issues and the current arguments on both sides, and we have both sides represented here today as well.

A little bit of background on Title IX. It was signed into law thirty years ago by President Nixon to combat discrimination against women in sports.³ Since that time, we have seen the

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¹ See CBS News, 60 Minutes, *The Battle Over Title IX*, at <http://www.-cbsnews.com/stories/2003/06/27/60minutes/main560723.shtml> (last modified June 29, 2003) (providing a synopsis of the “60 Minutes” piece on Title IX’s effect on male and female athletes in colleges across the United States). “60 Minutes” is a weekly one-hour national news magazine broadcast on CBS. See CBS News, 60 Minutes, *Program Facts*, at <http://www.cbsnews.com/stories/1998/07/08/60minutes/main13503.shtml> (last modified Nov. 17, 2003).

² “SportsCenter” is a daily sports news and highlights show broadcast on the ESPN television network. See ESPN, *TV Listings*, at <http://sports.espn.go.com/sports/-tvlistings/index> (last visited Feb. 7, 2004).

³ President Nixon signed Title IX into law on June 23, 1972. Pub. L. No. 92-318, 86 Stat. 235 (codified as amended at 20 U.S.C.S. §§ 1681–88 (2000)).

number of female high school athletes increase ten-fold;⁴ women's collegiate sports have grown in both number and popularity;⁵ and two major professional women's sports leagues have developed, the Women's National Basketball Association ("WNBA")⁶ and the Women's United Soccer Association ("WUSA"),⁷ for basketball and soccer, respectively.

Now Title IX has come under fire from groups blaming the law for the decline in men's collegiate sports, such as wrestling—which I am sure you will hear about today—gymnastics, and swimming.⁸

In January of last year, the National Wrestling Coaches Association ("NWCA") instituted a lawsuit against the U.S. Department of Education in the hopes of obtaining a new

⁴ According to the National Federation of High School Associations ("NFHSA"), the number of female high school athletic program participants has increased approximately 340 percent over the last 30 years. In the 1971–1972 academic year the number of participants was close to 800,000; during the 2000–2001 academic year, this number had increased to almost 3 million participants. See InfoPlease, *Participation in High School Athletic Programs, 1972–2001*, at <http://www.infoplease.com/ipa/A0779930.html> (last visited Feb. 7, 2004) (providing a table of data from an NFHSA survey on the number of male and female participants in high school sports for each academic year from 1972 through 2001).

⁵ The number of women participating in National Collegiate Athletic Association ("NCAA") collegiate sport teams has increased by 55,070 from 1983 to 1998, representing approximately 69 percent more women participants. See NCAA, *NCAA Participation at-a-Glance 1983–1998*, at http://www.ncaa.org/participation_rates/1983-98_at_a_glance.html (last visited Feb. 7, 2004) (providing statistical data on the number of women participating in collegiate sports from the 1982–1983 academic year through the 1997–1998 year).

⁶ The Women's National Basketball Association ("WNBA"), a women's professional basketball league, began its first season in June 1997. See WNBA, *History of the WNBA*, at http://www.wnba.com/about_us/historyof_wnba.html (last visited Feb. 11, 2004) (providing a brief history of the WNBA).

⁷ The Women's United Soccer Association ("WUSA"), the "premier women's international professional soccer league," was formed on February 15, 2000. WUSA, *History*, at http://www.wusa.com/about_us/history (last visited on Feb. 7, 2004).

⁸ See CBS News, 60 Minutes, *The Battle Over Title IX*, at <http://www.cbsnews.com/stories/2003/06/27/60minutes/main560723.shtml> (last modified June 29, 2003) (referring to the impact of Title IX on men's collegiate athletics and stating that "[c]olleges have cut hundreds of wrestling teams, along with dozens of men's gymnastics, tennis and track and field teams").

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interpretation of Title IX so as to not have this negative effect on men's sports.⁹

Nine days ago, the federal commission formed to examine Title IX issued its final report.¹⁰ I read the article in the *New York Times* that the commission recommended that the law be refined in some way.¹¹

Here to moderate this panel on Title IX is Professor Linda Wharton. Professor Wharton serves as a consultant on issues of gender equity in education and teaches courses on sex discrimination at the University of Pennsylvania and at University of Pennsylvania Law School.¹² She is currently a visiting specialist in civil liberties and constitutional law at the Richard Stockton College of New Jersey.¹³

Previously, she served as the managing editor of the Women's Law Project¹⁴ for nine years, where she specialized in litigation and law reform relating to gender discrimination in education, employment, and athletics. Notably, Professor Wharton served as lead co-counsel in *Planned Parenthood v. Casey*,¹⁵ decided by the U.S. Supreme Court in 1992.

I am very pleased to introduce Professor Linda Wharton.

⁹ See *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 263 F. Supp. 2d 82 (D.D.C. 2003) (granting the Department of Education's motion to dismiss for lack of standing).

¹⁰ SEC'Y OF EDUCATION'S COMM'N FOR OPPORTUNITY IN ATHLETICS, OPEN TO ALL: TITLE IX AT THIRTY (2003) [hereinafter OPEN TO ALL: TITLE IX AT THIRTY], available at <http://www.ed.gov/about/bdscomm/list/athletics/report.html> (last visited Feb. 11, 2004).

¹¹ Diana Jean Schemo, *Women's Athletics: Title IX Reformers Keep Men in Mind*, N.Y. TIMES, Feb. 27, 2003, at D1.

¹² Professor Linda Wharton's professional biography is available through the University of Pennsylvania Law School's Web site at <http://www.law.upenn.edu/cf/faculty/lwharton> (last visited Feb. 7, 2004).

¹³ See Richard Stockton College of N.J., *Political Science: The Faculty*, at <http://aden.stockton.edu/cgi-bin/ug-faculty-list?program=POLS> (last visited Feb. 7, 2004) (listing Professor Wharton's position as a visiting specialist in constitutional law and civil liberties).

¹⁴ The Women's Law Project is an organization committed to "abolish[ing] discrimination and injustice and to secur[ing] dignity and freedom for women." Women's Law Project, at <http://www.womenslawproject.org> (last visited Feb. 7, 2004). It is a "resource for the women of Pennsylvania and a national leader in the field of women's rights." *Id.*

¹⁵ 505 U.S. 833 (1992).

PROFESSOR WHARTON: Thank you. I am delighted to be here today.

With us today to discuss the development of law and policy around Title IX and the current controversies and criticisms is a very distinguished group of panelists. They bring a lot of knowledge and expertise with regard to these issues. I am going to introduce them in the order in which they are seated. They are Donna Lopiano, Alison Marshall, Mike Moyer, and Larry Joseph.

I am going to first talk a little bit about our format today and then I will tell you a little bit more about each of their backgrounds as they speak. Our format today is that each speaker is going to have about ten minutes to give a presentation, we will then have an opportunity for some dialogue among the panelists, and then we will end with some questions from all of you.

We are going to begin with Donna Lopiano.¹⁶ So, let me tell you a little bit about her very distinguished background. Dr. Lopiano is currently executive director of the Women's Sports Foundation.¹⁷ According to the *Sporting News*, she is listed as one of "The 100 Most Influential People in Sports."¹⁸

She received her bachelor's degree from Southern Connecticut State University and her master's and doctoral degrees from the University of Southern California.

She has been a college coach of men's and women's volleyball and women's basketball and softball. As an athlete, she participated in twenty-six national championships in four sports and was a nine-time All American at four different positions in

¹⁶ Dr. Donna Lopiano's professional biography is available on the Nassau County Sports Commission's Web site. Nassau County Sports Comm'n, *About Us, Board of Directors/Staff*, at http://www.nassausports.org/about/lopiano_bio.html (last visited Feb. 7, 2004).

¹⁷ "Founded in 1974 . . . , the Women's Sports Foundation is a charitable educational organization dedicated to ensuring equal access to participation and leadership opportunities for all girls and women in sports and fitness." Women's Sports Found., *About Us*, at <http://www.womenssportsfoundation.org/cgi-bin/iowa/about/more.html> (last visited Feb. 7, 2004).

¹⁸ In 1997, Dr. Lopiano was ranked sixty-seventh of "The 100 Most Influential People in Sports" in the *Sporting News*. See Nassau County Sports Comm'n, *About Us, Board of Directors/Staff Bios*, at http://www.nassausports.org/about/lopiano_bio.html (last visited Feb. 7, 2004).

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softball. She is a member of the National Sports Hall of Fame, the National Softball Hall of Fame, and the Texas Women's Hall of Fame, among others.

She was previously the University of Texas Director of Women's Athletics for seventeen years and the president of the Association of Intercollegiate Athletics for Women. She is currently a member of the U.S. Olympic Commission Executive Board.

So, let's begin with Dr. Lopiano.

DR. LOPIANO: I think it is my job probably to give you a little overview of the issue and some background, so I will try to be brief and simple. I will leave the complexity to the lawyers that follow me.

I would encourage everybody to kind of look at this as an issue revolving around sharing the sandbox. To be extremist and simple, 30 years ago, almost 100 percent of the resources and 100 percent of the participation opportunities in sport, all the space in the sandbox, went to male athletes.¹⁹

Then, you get a federal law that says you cannot discriminate on the basis of sex in educational programs and activities. It applies to extracurricular activities just as it applies to academic programs—you have sex-separate programs, mind you—and now schools have to deal with sharing the sandbox.²⁰

I think it is really important to understand that whenever you have civil rights law and you have a previously advantaged majority, i.e., male athletes, that no matter what happens, when you have to start sharing, male athletes will lose something. It may not be monetary, but it may be something as simple as not having the gym whenever you want it, not having the biggest gym, not having uniforms whenever you want them, having to share prime time when you play, or maybe having to have a reduced budget.

¹⁹ Before Title IX was enacted, women received about one percent of the total collegiate athletic budget. See Cindy Luis, *Title IX*, HONOLULU STAR-BULL., Jan. 24, 2002, available at <http://starbulletin.com/2002/06/24/sports/story2.html> (last visited Feb. 7, 2004).

²⁰ 20 U.S.C. §§ 1681(a), 1687 (2000) (prohibition of discrimination applies to any "education program or activity receiving Federal financial assistance").

You lose something unless resources are so infinite that you can completely get 100 percent more resources to provide the same treatment in the sandbox for girls as you do for boys, or double the size of the sandbox, however you want to look at it. So, this is a sandbox issue.

There will be some feeling on the part of men, and some reality, that they will lose if women are given the chance to play. However, it is not totally a zero-sum game—if girls get something, boys will lose something. The economy grows as you go on in time. It doesn't stay very small.

And indeed, over the course of the last thirty years in Title IX, we have seen a situation where male participation in the aggregate has increased and not decreased.²¹ We have seen a situation in the aggregate where the amount of money going into men's sports has continued to increase,²² and at least in the case of men's football and basketball, you are looking at situations where seventy-two percent of men's sport budgets are devoted to those two sports in Division I at least,²³ the highest competitive division within the National Collegiate Athletic Association ("NCAA").²⁴ So, understanding that sandbox is pretty important.

There are those who would say that the current participation numbers in sport—which are about forty-two percent female and

²¹ See NAT'L COALITION FOR WOMEN & GIRLS IN EDUC., TITLE IX AT 30: REPORT CARD ON GENDER EQUITY 16 (2002), available at <http://www.ncwge.org/pubs.htm> (last visited Feb. 7, 2004) [hereinafter REPORT CARD ON GENDER EQUITY] (reporting a 23 percent increase in the number of male collegiate varsity athletes and a 6.9 percent increase in the number of male high school varsity athletes over the last 30 years).

²² See, e.g., *Suit Unfairly Attacks Efforts to Boost Women's Sports*, USA TODAY, Jan. 21, 2002, at 10A.

²³ *Id.*

²⁴ The NCAA is a voluntary association of colleges, universities, athletic conferences, and sports organizations, which administers intercollegiate athletics. See NCAA, *What Is the NCAA?*, at http://www.ncaa.org/about/what_is_the_ncaa.html (last visited Feb. 7, 2004). Member institutions of the NCAA are classified as Division I, Division II, or Division III, depending on which NCAA criteria they meet. For more information on each division and its criteria, see NCAA, *What's the Difference Between Divisions I, II and III?*, at http://www.ncaa.org/about/div_criteria.html (last visited Feb. 7, 2004) [hereinafter NCAA, *What's the Difference*].

fifty-eight percent male²⁵—reflect interest, as opposed to opportunity. But it is important to understand how athletic programs happen. They do not happen by the vote of students. They happen by administrators saying, “I will put my money right here to start a women’s soccer program or a JV soccer program.” These are budgetary decisions, and in the case of sport they are sex-separate. So, they are decisions that discriminate on the basis of sex in the allocation of resources.²⁶

A lot of people say, “Well, doesn’t that forty percent represent interest?” You have to point to a state like New Hampshire, for instance, which is about forty-nine percent female and fifty-one percent male at the high school level,²⁷ and its athletic participation is about just that.²⁸ So, the forty-two percent in the aggregate does not mean that some states are not approaching equal opportunity based on proportionality.

In fact, it is very interesting that the states in which football is king or men’s basketball is king, when you go south, that the gaps

²⁵ See REPORT CARD ON GENDER EQUITY, *supra* note 21, at 15 (stating that women account for forty-three percent of college varsity athletes and account for nearly forty-two percent of U.S. high school varsity athletes).

²⁶ See generally JAMES J. DUDERSTADT, INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT’S PERSPECTIVE 87–146 (2000) (discussing the influence of university policies, practices, financing, and governance, as well as external media forces on the evolution and progress of collegiate athletic programs).

²⁷ According to the U.S. Census Bureau’s most recent population census, females constitute approximately 48.75 percent of the population between the ages of 15 and 18 in the state of New Hampshire, while males of the same age group constitute approximately 51.25 percent of the population. This information about New Hampshire can be found in the Census 2000 Summary File 1 on the U.S. Census Bureau Web site at http://factfinder.census.gov/servlet/DTable?_bm=y&-geo_id=04000US33&-ds_name=DEC_2000_SF1_U&-mt_name=DEC_2000_SF1_U_PCT012 (last visited Feb. 11, 2004) (providing a list of the total number of males and females residing in the state of New Hampshire by their ages).

²⁸ In the 2001–2002 academic year, there were 19,710 girls and 20,954 boys participating in high school sports in New Hampshire. This translates into roughly 51.5 percent male and 48.5 percent female participation. See Nat’l Fed’n of State High Sch. Ass’ns, *2001–02 High School Participation Survey: Total Participants by State*, at http://www.nfhs.org/Old_nf_survey_resources.asp (last visited Feb. 7, 2004) (providing a list of the number of male and female participants in high school sports in each state and the District of Columbia).

in participation, and the gaps between proportionality get wider and get larger.²⁹

At the college level, I think it is important to note that any concept of interest is inappropriate. You have about 6.5 or 7 million kids participating down here at the high school level.³⁰ There are only 400,000 participation opportunities up here,³¹ participation opportunities which are very lucrative, that include close to \$1 billion in athletic scholarships,³² free college educations, the very best coaches, and travel; and if you do not get an athletic scholarship, opportunities that include preferred access to the nation's best schools.³³

So, to say that there is an interest problem in colleges and universities—i.e., women are not as interested in sports as men—is exactly the wrong question. You are not going to meet the interest of either males or females, considering how many are down here. It is whether you apportion the limited resources you have and the limited opportunities to play that you have in a non-gender-discriminatory manner.

And indeed, that forty-two percent is even more disturbing at the college level,³⁴ I think, or as disturbing, as it is at the high school level.

The commission report that was just made,³⁵ just to let you guys know what that is all about—and this is my political analysis.

²⁹ Compare *id.* (providing a state-by-state list of male and female participants) with the Census 2000 Summary File 1 on the U.S. Census Bureau Web site at http://factfinder.census.gov/servlet/DTGeoSearchByListServlet?_lang=en&_ts=94400655811 (last visited Feb. 11, 2004) (providing the most recent census results from each state).

³⁰ The total number of male and female high school varsity athletes was approximately 6.7 million in the 2000–2001 school year. See REPORT CARD ON GENDER EQUITY, *supra* note 21, at 16.

³¹ According to the NCAA, there were 355,688 total participants in NCAA-sponsored sports in 2000–2001. See NCAA, About the NCAA, *Miscellaneous Facts and Figures: Fact Sheet*, at <http://www.ncaa.org/about> (Mar. 4, 2002).

³² See *id.* (stating that the total amount of NCAA athletic scholarships awarded in the 1999–2000 academic year were estimated to be \$975,000,000).

³³ See generally DUDERSTADT, *supra* note 26, at 132–33 (describing what a typical student-athlete receives from a university for his or her participation).

³⁴ See *supra* note 25 and accompanying text.

³⁵ See generally OPEN TO ALL: TITLE IX AT THIRTY, *supra* note 10.

In June of 2002, Secretary of Education Rod Paige³⁶ was charged with executing a promise, a plank on the Republican presidential platform of 2000, that promised that the Republicans would get rid of the proportionality test of Title IX.³⁷ He was poised to announce the suspension of all Title IX athletics investigations and a review of the regulations toward that end.

There was a great deal of pressure on the part of the Republicans in Congress to have him not do that. I think the voice that was heard was: “Are you guys crazy? We are three months before an election. Do you want the soccer moms to screw us in going to the polls?”³⁸

So, government did what it does very well when it wants to stall. It appointed a commission to report three months after the election.³⁹ And, as government does so well too, can appoint a commission that is biased one side or the other. This was a commission in which eleven of the fifteen members were from Division I schools, ten of the fifteen were from Division I-A, big-time football schools, no representation at all for high school sports, and one former superintendent of schools at the high school level—a group that had a vested interest in changing Title IX to remove the liability they were under in terms of having to increase budgets to come into compliance with the law.⁴⁰

³⁶ Rod Paige has served as the U.S. Secretary of Education since January 21, 2001. See Dep’t of Educ., *Rod Paige, U.S. Secretary of Education—Biography*, at <http://www.ed.gov/news/staff/bios/paige.html> (last visited Feb. 11, 2004).

³⁷ See Valerie Strauss & Mike Allen, *Panel Named to Study Title IX*, WASH. POST, June 28, 2002, at A27 (quoting “the Republican National Committee’s platform for the 2000 election [which] stated that the party supports ‘a reasonable approach to Title IX that seeks to expand opportunities for women without adversely affecting men’s teams’”).

³⁸ See Christine Brennan, *Title IX Meetings a Losing Proposition*, USA TODAY, Aug. 29, 2002, at 3C (suggesting that the public support of Title IX by President Bush and the Secretary of Education during the months before the November 2002 elections was directly related to the “millions of soccer moms” who could vote in those elections).

³⁹ The Federal Commission’s original deadline to report its findings was January 31, 2003, three months after the November elections. This deadline was later extended to February, and the final report was dated February 28, 2003. See *Title IX: Federal Commission’s Report Now Due in Late February*, NCAA NEWS DIGEST, Jan. 6, 2003, available at <http://www.ncaa.org/news/2003/20030106/digest.html#3> (last visited Feb. 11, 2004).

⁴⁰ See Athena Yiamouyiannis, *Title IX Commission—Inequities in the Process* (2003) (briefing paper for the National Coalition for Women and Girls in Education providing a

The report of the commission pretty much followed suit. It demonstrated that bias toward college athletics, and it indeed recommended any number of points that would weaken Title IX.⁴¹

I think what you can expect to see over the next twelve to eighteen months leading up to the next election is a continued brouhaha in terms of Title IX, that there will be continued efforts to weaken the law, that the secretary of education, probably within the next two to three months, depending on what happens with the war⁴² and whatever, still will try to execute the Republican presidential promise.⁴³ And I don't want you to think it has anything to do with Speaker of the House Dennis Hastert having been a former wrestling coach, Donald Rumsfeld having been a former wrestler, or Rod Paige having been a former football coach.⁴⁴

I think I will close with that.

PROFESSOR WHARTON: Thank you.

Our next speaker will be Mike Moyer. Since 1999, Mike Moyer has been the executive director of the National Wrestling Coaches Association.⁴⁵ He received his bachelor's degree from

description of members of the Commission on Opportunity in Athletics and their backgrounds), available at <http://www.ncwge.org/alerts.htm> (last visited Feb. 11, 2004).

⁴¹ See OPEN TO ALL: TITLE IX AT THIRTY, *supra* note 10.

⁴² See CNN, Special Report, *War in Iraq*, at <http://www.cnn.com/specials/2003/iraq> (last visited Feb. 7, 2004) (providing a synopsis and major highlights of the events related to the U.S. war with Iraq that began on May 1, 2003).

⁴³ See Strauss & Allen, *supra* note 37.

⁴⁴ Speaker of the House of Representatives Dennis Hastert was a football and wrestling coach at Yorkville High School in Illinois. See Office of the Speaker Dennis Hastert, *Biography*, at <http://speaker.house.gov/features/biography.asp> (last visited Feb. 7, 2004). U.S. Secretary of Defense Donald Rumsfeld was all Navy wrestling champion during his service in the U.S. Navy from 1954–1957. See U.S. Trade Deficit Review Comm'n, *The Honorable Donald Rumsfeld*, at <http://www.ustrdc.gov/members/rumsfeld.html> (last visited Feb. 11, 2004). U.S. Secretary of Education Rod Paige coached football at Texas Southern University. See Diana Jean Schemo, *Advocates of Title IX Voice Concern on Panel*, N.Y. TIMES, Dec. 20, 2002, at D1.

⁴⁵ The National Wrestling Coaches Association ("NWCA") is "a professional organization dedicated to serve and provide leadership for the advancement of all levels of the sport of wrestling with primary emphasis on scholastic and collegiate programs." NWCA, *NWCA Mission Statement*, at <http://www.nwcaonline.com/mission.cfm> (last visited Feb. 7, 2004).

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Westchester State College and a master's in athletic administration from James Madison University.

He was the head wrestling coach at George Mason University from 1985 to 1995, with an extremely impressive record. He then served as George Mason's associate athletic director, and he was the chairman of the NCAA Wrestling Commission.

MR. MOYER: Thank you very much. Thank you for that kind introduction. It is really quite an honor to be part of today's presentation. I thought the best place to start was with a little background of the National Wrestling Coaches Association. We are a nonprofit organization. It was established in 1928 with the purpose of serving, protecting, and promoting the sport of amateur wrestling, primarily at the high school and the college levels.⁴⁶

Another interesting note about our sport is that wrestling is the sixth most popular sport in the United States based on high school participation rates.⁴⁷ There are over 244,000 high school wrestlers competing.⁴⁸ And, at the college level, wrestling is the fifth largest revenue-generating sport of all NCAA championships.⁴⁹ Last year in Albany, over 75,000 tickets were sold for the Division I championships.⁵⁰

⁴⁶ See *id.*

⁴⁷ In 2003, wrestling fell in sixth place of the most popular sports for boys behind football, basketball, outdoor track and field, baseball, and soccer. See Nat'l Fed'n of State High Sch. Ass'ns, *Participation Sets Records for Fifth Straight Year*, at http://www.nfhs.org/current_news/View_Publications.asp?pid=593 (Sept. 2, 2003).

⁴⁸ The exact number of high school students participating in wrestling in 2003 was 239,845. See *id.*

⁴⁹ See John Beaudoin, *NCAA Division I Wrestling Coming to Kansas City*, EXAMINER (Kansas City, Mo.), Nov. 15, 2002 (stating that the Division I wrestling championship was the fifth largest revenue producing championship of the NCAA's 87 championships in 2001), available at http://examiner.net/stories/111502/spo_111502017.shtml (last visited Feb. 7, 2004).

⁵⁰ The 2002 NCAA Division I wrestling championships held in Albany were sold out. See Jayson Moy, *ECAC Finalizes Albany Deal: Postseason Tournament Leaves Lake Placid for Pepsi Arena*, U.S. College Hockey Online, at http://uscollegehockey.com/news/2002/06/18_004465.php (last visited Feb. 7, 2004) (noting that the East Coast Athletic Conference ("ECAC") chose the Pepsi Arena for its hockey tournament because the arena had previous success in selling out the 2002 Division I wrestling championships).

The purpose of sharing that with you is our sport is very vibrant, is growing, and has a lot of things going for it. But it has some challenges. With that, I wanted to just clarify our position. There has been a lot of public debate and a lot of media coverage of this very emotional issue, and I wanted to make sure that we started out by being very clear about our position as it relates to Title IX.

We are not attacking Title IX. We completely embrace Title IX, the original spirit and intent, which is to prohibit any intentional gender-based discrimination in academic programs that receive federal funds.⁵¹ I mean, certainly, who could be against that very well-written law, something that we completely support?

We also completely support the implementing regulations, which are to suggest that universities need to provide equal opportunity based on interest. We also do not dispute for one moment that women were seriously discriminated against in intercollegiate athletics over thirty years ago.⁵² It was horrible, and it absolutely needed to change, and we are very encouraged that there has been tremendous change that has benefited women over the last thirty years, as evidenced by the fact that today there are over 600 more teams for women in the NCAA than there are for men.⁵³ There are still more male athletes,⁵⁴ but there are over 600 more teams for women to participate on.

Our lawsuit⁵⁵ is not to debate whether men or women have more interest in athletics. It is also not to debate that women deserve equal access to facilities and scholarships and equipment and other types of funding needs. Perfectly reasonable. They deserve those opportunities. We completely support that.

⁵¹ Title IX, 20 U.S.C. §§ 1681–88 (2000).

⁵² See Luis, *supra* note 19 and accompanying text.

⁵³ In 2001–2002, there were 582 more women’s teams than men’s teams in NCAA Divisions I, II, and III. See NCAA, 1982–2001 NCAA SPORTS SPONSORSHIP & PARTICIPATION REPORT 53–56 (2003) (providing a list of the overall number of men’s and women’s teams in the NCAA Divisions I, II, and III, by each sport) [hereinafter NCAA SPORTS SPONSORSHIP & PARTICIPATION REPORT], available at http://www.ncaa.org/library/research/participation_rates/1982-2001/index.html (last visited Feb. 7, 2004).

⁵⁴ In 2001–2002, there were 150,916 female athletes and 208,866 male athletes in the NCAA Divisions I, II, and III. *Id.*

⁵⁵ Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ., 263 F. Supp. 2d 82 (D.D.C. 2003).

But what our lawsuit is challenging is the interpretation of Title IX⁵⁶—this otherwise great law. The Department of Education came out with an interpretation of this great law which has transformed it into a very strict quota system.⁵⁷

I guess the easiest way to explain it is with an example. If fifty percent of the full-time students on a college campus are women, then fifty percent of the athletes on that campus have to be women.⁵⁸ Clearly, there is no other academic program that is held to this standard, and we do not believe that intercollegiate athletics should be held to this standard at all.

There are two other ways that universities can supposedly comply with Title IX.⁵⁹ The fact of the matter is that they are too vague, and they are very difficult for universities to defend in a lawsuit situation. So, we are focused on this narrow quota system, commonly referred to as proportionality.⁶⁰ At the end of the day, we are firmly seeking a more fair and reasonable interpretation of Title IX, one that protects women without harming men.

People ask us: “Explain to us, in the simplest way, how does this interpretation impact colleges and universities across the country?” And again, going back to a simple example, let’s say an athletic director is really trying to do the right thing and has zeroed in on two sports, softball and baseball. To be fair about things, the athletic director assigns a maximum sports roster for each of these sports being thirty. But, in practicality and in reality, twenty girls

⁵⁶ *Id.* at 85 (stating that the NWCA, along with the other plaintiffs, challenged the U.S. Department of Education’s “‘1979 Policy Interpretation’ and the ‘1966 Clarification,’ pursuant to which Title IX and its regulations are currently enforced”).

⁵⁷ See Dep’t of Educ., Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html?exp=0> (Jan. 16, 1996) [hereafter Office of Civil Rights, *Three-Part Test*] (citing the three-part test for determining Title IX compliance, including whether (1) opportunities for participation are provided in proportion to male/female enrollment; (2) where one gender is underrepresented, the institution is demonstrably responsive to the interests and abilities of that gender; or (3) the interests of an underrepresented gender have been fully and effectively accommodated by a present program).

⁵⁸ This would be accurate under the proportionality prong of the three-part compliance test. *See id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

go out for the softball team and thirty boys go out for the baseball team.

Now, please know I did not just arbitrarily pull these numbers out of a hat. The national averages for roster sizes of these two teams—for women's softball, I believe, it is eighteen and for baseball, I think, it is thirty-one.⁶¹

But anyway, thirty boys go out for the baseball team, and twenty girls go out for the softball team. Under this current application of Title IX, of proportionality, the baseball coach is required to eliminate ten boys from his team. This is what we mean by our lawsuit is not focused on funding; it's focused on participation. This phenomenon is called roster management.⁶² Quite frankly, most of the men's teams across the country are capped.

In preparing for this presentation today, I was talking to a very good friend of mine who is an athletic director at a Division II school. For those of you who might not be aware, in the NCAA there are three levels: Division I, Division II, and Division III.⁶³ The majority of the scholarships are offered at the Division I level; there are no scholarships offered at the Division III level; and there are very few scholarships offered at the Division II level.⁶⁴

But this athletic director, in an effort to do the right thing, has had to cap every one of his men's teams. But to try to help them out, he has assigned roster targets for his women's teams to try to bolster the women's participation in those programs. But he said, "In practicality, what has resulted is the coaches of the boys' teams literally try to inflate their rosters artificially so they can

⁶¹ In 2000–2001, the average size of an NCAA women's softball team was 17.7 and a men's baseball team was 30.5. See NCAA SPORTS SPONSORSHIP & PARTICIPATION REPORT, *supra* note 53, at 155, 159.

⁶² See Eric Pearson, *Counterpoint: Title IX: The NCAA's Dirty Little Secret*, POLITIC, May 13, 2003 ("A popular practice that limits squad sizes is called 'roster management.'").

⁶³ See NCAA, *What's the Difference*, *supra* note 24.

⁶⁴ *Id.* (stating that there are minimum and maximum financial aid awards a Division I school must meet, maximum awards a Division II school must not exceed, and no financial aid awards in a Division III school).

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accommodate those extra boys that just want to be part of the team and are willing to wait their turn to try to earn a starting spot.”

You know, we just don’t believe this makes sense. We don’t believe that this is what our American society stands on. And clearly, it doesn’t do anything to help women. It is clearly intentional discrimination against these boys.

Unfortunately, many universities are not able to meet the proportionality standard through roster management alone and, as a result, they are forced to completely eliminate teams—and many times it is not just one team, it is multiple teams.⁶⁵ Over the last two decades, we have seen over 800 men’s teams eliminated.⁶⁶ Most of these are in sports like track, swimming, and wrestling.⁶⁷ By the way, those three sports represent the three largest medal count sports for the United States in the last Olympics.⁶⁸

The poster program to illustrate this point was Marquette University. Marquette University had a wrestling program that was entirely self-funded for a period of six years by private donations.⁶⁹ In the spring of 2001, Marquette was still forced to discontinue its wrestling program because it could not meet this

⁶⁵ See Bill Pennington, *Men’s Teams Benched as Colleges Level the Field*, N.Y. TIMES, May 9, 2002, at A1 (stating that since the passage of Title IX, more than 170 wrestling programs, 80 men’s tennis teams, 70 men’s gymnastics teams, and 45 men’s track teams have been eliminated).

⁶⁶ Approximately “400 men’s college teams were eliminated during the 1990s, with wrestling taking a particularly hard hit.” *Tinkering to Title IX Aimed at Preserving Men’s Teams*, ST. PETERSBURG TIMES, Jan. 31, 2003, available at http://www.sptimes.com/2003/01/31/Sports/Tinkering_to_Title_IX.shtml (last visited Feb. 7, 2004).

⁶⁷ See *id.* (stating that wrestling has been one of the sports hardest hit by Title IX compliance issues); NCAA SPORTS SPONSORSHIP & PARTICIPATION REPORT, *supra* note 53, at 128 (indicating that over the last 20 years the number of wrestling teams has declined by 138).

⁶⁸ Out of a total of 97 medals won at the 2000 Summer Olympics held in Sydney, Australia, the United States earned 20 medals in Track and Field, 33 medals in Swimming, and 7 medals in Wrestling. See Summer Olympics 2000, Medal Tracker, *By Country: United States*, at <http://espn.go.com/oly/summer00/standings/medalstan.html> (last visited Feb. 11, 2004); Int’l Olympic Comm., Athletes, *Olympic Medal Winners*, at http://www.olympic.org/uk/athletes/results/search_r_uk.asp (last visited Feb. 7, 2004).

⁶⁹ See Pennington, *supra* note 65 (“At Marquette, . . . the [wrestling] team was supported entirely by a booster group, outside the university budget. The wrestling boosters offered to raise more money to keep the program. Marquette declined to reinstate it . . .”).

proportionality standard.⁷⁰ Marquette was not funding the wrestling program to begin with. Clearly, it was intentional discrimination against those wrestlers merely because they were boys, and it did nothing to benefit women on that campus. Again, it just does not seem reasonable to us.

We have many other instances of universities where, once it is announced that they are dropping their men's programs, the alumni try to step to the plate and offer to fund them. But it is not about the funding; it is about participation and meeting this proportionality standard.

People ask us: "What is your vision?" Well, our vision is we want to eliminate proportionality from this interpretation. We want to eliminate this quota system. We want to go back to where universities provide equal opportunity based on interest.

There is a lot that would not change if we are successful. I don't know how many people saw one of the greatest basketball games I have ever seen in my life. It was the women's University of Connecticut versus Duke basketball game, three or four weeks ago.⁷¹ It was in front of a packed house.⁷² It had all the pageantry you would ever want to see in an arena. And it was phenomenal. But please know that those two women's teams existed prior to this quota system ever being implemented.⁷³ Their success has been a result of getting better access to facilities and scholarships and budgetary funding, and that will continue to happen in the absence of proportionality or this quota system.

For those women's programs across the country that are not getting the appropriate allocations of funds, they will retain the

⁷⁰ *Id.*

⁷¹ The two teams played each other on February 1, 2003. See Jere Longman, *College Basketball: No. 1 Duke Is No. 59 in UConn's Streak*, N.Y. TIMES, Feb. 2, 2003, § 8, at 1.

⁷² *Id.* ("The game was played before a national television audience on ESPN2 and a standing-room-only crowd of 9,314 at Cameron Indoor Stadium, the first time the arena had sold out for a women's game.").

⁷³ Duke had its inaugural season in 1975–1976 and UConn had its inaugural season in 1974–1975. See Go Duke, Women's Basketball History, *Year-by-Year Results*, at <http://goduke.ocsn.com/sports/w-baskbl/History/duke-w-baskbl-history.html> (last visited Feb. 7, 2004); UConn Huskies, *Women's Basketball Media Guide: Section 10*, at <http://uconnhuskies.com/sports/Wbasketball/2004/mediaguide/0304MediaGuide.html#10> (last visited Feb. 7, 2004).

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right to pursue legal remedies with the Office of Civil Rights.⁷⁴ We completely support that. It is the fair and just thing to do.

But what will not happen anymore is a situation like in Utah, where high school wrestling is the fourth most popular high school sport in the state, and there is not a single college wrestling program for their boys to compete on;⁷⁵ in a state like Florida, not a single college wrestling program;⁷⁶ in Texas, not a single college wrestling program⁷⁷—despite the fact that our sport is just growing by leaps and bounds at the high school level.⁷⁸

We have other examples of a university in Arizona, in the middle of the desert, contemplating putting a two-mile ditch and filling it with water in the middle of the desert so that they can sponsor a women's crew program, so that they can artificially bolster the numbers of women athletes, and so that they can comply with this proportionality standard.⁷⁹ There are virtually no high school women's crew programs anywhere in the region. So, where are the athletes going to come from?

And then we turn our focus to University of Miami, a university that is surrounded by nothing but water, and it has one of the most storied histories with its men's swim program—for example, Greg Louganis, Olympic gold medalist,⁸⁰ as well as a

⁷⁴ The Office for Civil Rights is a part of the U.S. Department of Justice. See Dep't of Justice, *Office of Civil Rights*, at <http://www.ojp.usdoj.gov/ocr> (last visited Feb. 7, 2004).

⁷⁵ See Lya Wodraska, *Prep Notes: Leopard Basketball's Outlook Uncertain*, SALT LAKE TRIB., Sept. 16, 2003 (noting that wrestling is the fourth most popular sport for boys behind football, track and field and basketball in Utah), available at <http://www.sltrib.com/2003/Sep/09162003/sports/92952.asp> (last visited Feb. 7, 2004). For a list of all NCAA member schools that have men's wrestling teams, see NCAA, *Sport Listing By Institution: Men's Wrestling – All Divisions*, at <http://web1.ncaa.org/ssLists/sportByInst.do?sport=MWR&division=ALL> (last visited Feb. 7, 2004).

⁷⁶ See NCAA, *Sport Listing By Institution: Men's Wrestling – All Divisions*, at <http://web1.ncaa.org/ssLists/sportByInst.do?sport=MWR&division=ALL> (last visited Feb. 12, 2004).

⁷⁷ *Id.*

⁷⁸ For high school participation statistics, see *supra* note 28 and accompanying text.

⁷⁹ See David Hyde, *Irony of Title IX: 'Cane Gets Last Lap*, SUN-SENTINEL (Florida), Feb. 9, 2003, at 1C (discussing Arizona State University's efforts to start a women's crew team).

⁸⁰ Greg Louganis won four Olympic gold medals in diving—two in 1984 and two in 1988. See Greg Louganis, *Biography*, at <http://www.louganis.com> (last visited Feb. 12, 2004).

multitude of other national Olympic athletes, particularly swimmers. They just announced they are pulling the plug.⁸¹ There will be no more men's swimming program on the campus.

We really have to stop this. Our best and brightest athletes across the country deserve a whole lot better. We are asking for America's help in restoring fairness and a more reasonable interpretation to Title IX, one that protects women without harming men.

Thank you.

PROFESSOR WHARTON: Thank you, Mr. Moyer.

Our next speaker will be Alison Marshall. Ms. Marshall is a partner in the Washington, D.C., office of Jones Day. She is an active litigator who has extensive experience handling complex employment litigation matters. She is a frequent speaker on employment and civil rights issues and the author of a number of published articles on equal employment opportunity⁸² issues.

She is also experienced in Title IX litigation, having served as co-counsel for Brown University in the *Cohen v. Brown*⁸³ litigation. She has written and spoken extensively on Title IX and gender discrimination in athletics.

She is a graduate of Princeton University and the University of Pennsylvania Law School. Following law school, she clerked for the Honorable Daniel H. Huyett III in the U.S. District Court for the Eastern District of Pennsylvania.

MS. MARSHALL: Thank you, Linda, and thank you, Michael, for having me here today. I think my purpose here is to provide some of the legal framework for the policy discussion that you have already heard and that you will hear coming forward.

As Linda mentioned, in the 1990s I represented Brown University in what has become one of the foremost Title IX hotly disputed cases. That case arose after Brown, facing financial constraints that many universities did, cut four of its varsity teams,

⁸¹ See Hyde, *supra* note 79.

⁸² See U.S. Equal Employment Opportunity Comm'n, at <http://www.eeoc.gov> (last visited Feb. 2, 2004).

⁸³ *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996).

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two men's teams and two women's teams.⁸⁴ The suit was brought by several of the women who had been on the gymnastics team.⁸⁵ That and the volleyball team were the two women's teams that were cut.⁸⁶ They were claiming that this was a violation of Title IX.⁸⁷

I think it is important to note that, in addition to the proportionality issue, that lawsuit also initially included claims pertaining to other aspects of Brown's athletic program.⁸⁸ They went to transportation provided, scheduling, fields, and whether equal treatment was provided in supporting the various athletic teams.⁸⁹ Those issues were all resolved prior to trial, so that the only issue that was actually litigated in the *Brown* case was the question of participation opportunities and whether there was a violation of Title IX because of differences in participation opportunities.⁹⁰

At the time the case went to trial, the student body at Brown University was fifty-one percent female, forty-nine percent male.⁹¹ Participation rates, depending on how you counted them, ran at about forty-two to forty-three percent female, although there was some issue in terms of when do you count.⁹² And this is one of the challenges that the universities have encountered: how do you count participation and participation rates, given that squad sizes fluctuate from those who may have signed up at the beginning of the season versus those at the end of the season, and what have you.

The issue that was tried directly was whether Brown satisfied what has become called the "three-prong test."⁹³ Title IX itself,

⁸⁴ *Id.* at 162.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 164.

⁹¹ *Id.* at 163.

⁹² *Id.*

⁹³ *Id.* at 166 (describing the "three-prong test" and explaining its application by the district court).

the statute as passed by Congress, did not reference athletics.⁹⁴ It was the implementing regulations that provided for equal opportunity in athletic programs.⁹⁵ And it was a policy interpretation that was issued in 1979, not a regulation, that actually sets out the three-prong test.⁹⁶

The three prongs are as follows. One, whether the intercollegiate-level participation opportunities for male and female students are provided in numbers that are “substantially proportionate” to their respective enrollments. Prong two is whether the institution has a history and continuing practice of expanding opportunities. Prong three is whether the institution is fully and effectively accommodating the interests and abilities of the women on campus.⁹⁷ I will talk about each one of those applied in the *Brown* case.

Substantial proportionality, being the first: clearly, with a student body that was fifty-one percent, if you look at that compared to a participation rate of forty-two to forty-three percent, the court held that there was not substantial proportionality.⁹⁸

I think it is important to go back. Where did the substantial proportionality standard come from? It was the Office of Civil Rights, Department of Education, that came up with that, as I said, in 1979.⁹⁹ They derived from the educational desegregation cases: looking at the population of the community in which the school is located, what is the racial composition of that community, and does the school reflect that racial composition?¹⁰⁰

⁹⁴ Title IX, 20 U.S.C. §§ 1681–88 (2000).

⁹⁵ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106.41 (2003).

⁹⁶ See Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,148 (Dec. 11, 1979) [hereinafter Policy Interpretation].

⁹⁷ See *Cohen v. Brown Univ.*, 101 F.3d at 166; Office for Civil Rights, *Three-Part Test*, *supra* note 57.

⁹⁸ *Cohen*, 101 F.3d at 163, 186–87 (In 1993–1994, the female undergraduate enrollment at Brown University was 51.14 percent, while female participation in intercollegiate varsity athletics was 38.13 percent, presenting a 13.01 percent disparity between the two.).

⁹⁹ See Policy Interpretation, *supra* note 96.

¹⁰⁰ See, e.g., *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954); see also *Cooper v. Aaron*, 358 U.S. 1 (1958).

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The question that has to be asked is whether that standard applies as well in the intercollegiate athletic context, where we are talking about at the college varsity level—and this is the argument that Brown put forth—where interests and abilities have been formed during the primary and secondary school years, and coming out of the high school graduation rates at the time of the *Brown* litigation male participation was about sixty percent versus forty percent female for high school graduating seniors.¹⁰¹

There are other issues that were litigated. One, again relating to the standard, is: what is an opportunity? Remember, it talks about “substantial proportionality and opportunities.”¹⁰² The issue that was litigated for Brown was whether we should be counting the number of participants; or are we talking about the slots, the opportunities, that are on the team?¹⁰³

And how do you measure that? Is that the opportunity, for instance, the fact that the squad is the largest that it has been in recent history? By that measure, Brown would have been in compliance because there were about seventy-five opportunities that were unfilled at the time.

Do we look at travel squad size opportunities? There are other measures to look at opportunities. This has become a very hotly debated issue because one of the proposals, one of the recommendations in the commission that Donna referenced, is to look at opportunities and slots, as opposed to counting the actual number of participants.¹⁰⁴

The issue of what “substantial proportionality” means. Is that going to be exact parity? “Substantial proportionality,” does that

¹⁰¹ See Nat’l Fed’n of State High Sch. Ass’ns, *High School Participation Survey*, at <http://www.nfhs.org/Participation/SportsPart01.htm> (last visited Feb. 4, 2004) (reporting high school athletics participants in 1996–1997 as 3,706,225 boys and 2,474,043 girls).

¹⁰² Under prong one, *opportunities* for participation should be provided in *proportion* to male and female enrollment. See Office for Civil Rights, *The Three-Part Test*, *supra* note 97.

¹⁰³ *Cohen*, 101 F.3d at 167 (discussing the district court’s holding that “intercollegiate athletics opportunities ‘means real opportunities, not illusory ones, and therefore should be measured by counting actual participants’” (quoting *Cohen v. Brown Univ.*, 879 F. Supp. 185, 204 (D.R.I. 1995))).

¹⁰⁴ See OPEN TO ALL: TITLE IX AT THIRTY, *supra* note 10, at 33; *supra* note 41 and accompanying text.

mean if it's a 50/50 student body, the expectation is that the representation is 50/50; or is there going to be leeway in that? That is another hotly debated issue.

For *Brown*, which didn't obviously satisfy the substantial proportionality standard, the question was whether they would meet the second or third prongs of the three-prong standard.¹⁰⁵

Brown had certainly had a history of expanding its opportunities for women.¹⁰⁶ Unfortunately, it had largely been in the early 1970s.¹⁰⁷ *Brown*, at the time, had fifteen varsity teams, almost double the average number of female varsity teams in the country at that point.¹⁰⁸ But the fact of the matter was that because the additions had been made in the early 1970s, it had a history, but not a continuing practice, and, therefore, the court said it did not satisfy the second prong.¹⁰⁹

And then, the final prong is “fully and effectively accommodating.”¹¹⁰ In that context, because we are talking about a university that had cut a team, had cut two women's teams, the court held that clearly there was unmet interest—the volleyball players and the gymnastics players whose teams had been cut.

The question that was argued and addressed is whether it should be, again, a parity issue or whether we would have to take into it the relative interests of men and women at the collegiate

¹⁰⁵ See *Cohen*, 101 F.3d at 166–67 (discussing the district court's holdings with respect to *Brown*'s failure to satisfy the three-prong test).

¹⁰⁶ See *Cohen*, 809 F. Supp. 978, 980–81 (providing a brief history of the male and female athletic programs at *Brown*).

¹⁰⁷ See *id.* at 981 (stating that “virtually all of the women's varsity teams were created between 1971 and 1977”).

¹⁰⁸ During the 1990–1991 academic year, *Brown* funded fifteen women's and sixteen men's intercollegiate varsity teams. *Cohen*, 101 F.3d at 163.

¹⁰⁹ *Cohen*, 101 F.3d at 166.

¹¹⁰ See *id.* at 166–67.

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level.¹¹¹ Brown made the argument that you need to analogize it to a Title VII context.¹¹²

Let me give you a numeric example to think about and to illustrate the issue. If you have an engineering firm in the failure-to-hire context under Title VII that has 200 applicants for 20 positions, and 150 of those applicants are men and 50 are women, but the population at large is approximately 50/50 male and female, under Title VII, is the expectation that of those twenty hires, ten are going to be men and ten are going to be women? In fact, not. Under Title VII law, if you had 150 male applicants and fifty female applicants, the expectation would be that you would be complying with the law if you hired fifteen men and five women.

In the application in the Title IX context, where we have an undergraduate student body of 50/50; let's take as a numeric example 200 slots on varsity teams; and 2,000 students. We know, as Donna has indicated,¹¹³ simply because there are fewer slots at the intercollegiate level, with 2,000 students interested in those 200 slots; if we apply the proportion that are coming out of high school, that are approximately 60/40, and let's say 1,200 of those are men and 800 are women, the *Brown* case says nevertheless that 100 of those slots go to men and 100 go to women, so that one out of twelve of the men who are interested and participated in the past, coming out, based on the high school statistics, are going to be provided the intercollegiate opportunity, versus one out of eight for the women.¹¹⁴

¹¹¹ See *Cuenca v. Univ. of Kansas*, 265 F. Supp. 2d 1191, 1206 (D. Kan. 2003) (rejecting plaintiff's evidence, in a discrimination suit based on Title VII of the Civil Rights Act of 1964 ("Title VII"), that compared the small percentage of Hispanics employed by the defendant to the percentage of Hispanics in the entire state, instead of comparing those Hispanics who were qualified for employment with the defendant).

¹¹² See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2000) [hereinafter Title VII]; *Cohen*, 101 F.3d at 176 (stating that Brown claimed it was error for the district court not to apply Title VII standards in analyzing whether Brown's athletic programs complied with Title IX).

¹¹³ See *supra* notes 27-34 and accompanying text.

¹¹⁴ See *Cohen*, 101 F.3d at 176 (noting that the remedial purpose of Title IX applies to the underrepresented gender, in this case it is women, and that the failure to fully accommodate the overrepresented gender, which is men, does not excuse the failure to provide adequate opportunities for the underrepresented gender).

The First Circuit rejected the analogy to Title VII.¹¹⁵ The reason for the rejection was because they are gender-segregated teams; you cannot apply the same analysis.¹¹⁶ Title IX recognizes that in sports you are going to have a men's volleyball team and a women's volleyball team, not that you are going to have a co-ed volleyball team.¹¹⁷

A second point that the court made in rejecting this was the fact that the institution has control over recruitment and may bring into the student body a representation of interest that is sort of preordained or predetermined.¹¹⁸ I think certainly that has some merit and is worth a further discussion amongst this panel, except for the fact that you look at external measures of interests and abilities and see some consistency among those numbers.

To throw out for some further discussion, I think, looking back at the commission report—and I urge all of you to look at it, both the commission report¹¹⁹ and the minority report,¹²⁰ both of which are available online—is that we have lost sight of Title IX's focus on equity and nondiscrimination by getting into this numbers-only focus, and need to be looking at athletic programs as a whole.

This is certainly something I remind my clients in the universities and colleges of at all times; let's not just focus on the numbers and the participation opportunities, but ask, are you providing each person, regardless of his or her gender, an equal treatment as it comes to other aspects of the athletic experience, whether it is transportation, whether it is scheduling, whether it is

¹¹⁵ *Id.* at 178 (finding no error in the district court's refusal to apply Title VII standards in its inquiry into Brown's compliance with Title IX).

¹¹⁶ *See id.* at 176–78 (stating that “Brown's approach fails to recognize that, because gender-segregated teams are the norm in intercollegiate athletics programs, athletics differs from admissions and employment in analytically material ways”).

¹¹⁷ *See id.* at 177 (“In this unique context, Title IX operates to ensure that the gender-segregated allocation of athletics opportunities does not disadvantage either gender.”).

¹¹⁸ *See id.* (stating that “because recruitment of interested athletes is at the discretion of the institution, there is a risk that the institution will recruit only enough women to fill positions in a program that already underrepresents women, and that the smaller size of the women's program will have the effect of discouraging women's participation”).

¹¹⁹ *See* OPEN TO ALL: TITLE IX AT THIRTY, *supra* note 10.

¹²⁰ *See* SEC'Y OF EDUCATION'S COMM'N FOR OPPORTUNITY IN ATHLETICS, MINORITY VIEWS ON REP. COMM'N OPPORTUNITY IN ATHLETICS (2003), *available at* <http://savetitleix.com/report.html> (last visited Feb. 7, 2004).

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the practice fields and opportunities, or whether it is the coaching staff that you are providing to them?

And I would also encourage that we need to be looking and focusing more—and I don't think the commission particularly did this—at the primary and secondary school levels. Are we doing everything that we can to make sure that their athletic interests are met? They are in the formative years, and you've got to distinguish them from the college years, where you are talking about eighteen-, nineteen-, and twenty-year-olds who have already gone through the high school program and, for whatever reasons, perhaps have had their interests shaped that have yielded the interest rates that we see.

PROFESSOR WHARTON: Thank you, Alison.

Our final speaker is Larry Joseph. Larry is an associate with the law firm of McKenna Long & Aldridge. He concentrates his practice in the area of environmental counseling and litigation. In addition, he has considerable experience in the Administrative Procedure Act ("APA")¹²¹ in environmental and other regulatory contexts. He also has direct experience in Title IX. He is currently serving as counsel for the National Wrestling Coaches Association.

Before joining McKenna Long & Aldridge, Larry was an attorney with the law firms of Pillsbury Madison & Sutro and Morrison & Foerster in San Francisco. He also worked for a start-up technology company in Northern California, where he developed legal software.

MR. JOSEPH: Thanks.

I want to start out by explaining how I got involved in this, and then highlight some differences on the issues that we are dealing with within the NWCA litigation—I think Alison alluded to the First and Third Circuits¹²²—I might as well be frank, our position has lost in eight circuits—so, I'd like to explain why it is that we think we are a little different.

First of all, I met a friend of a friend at dinner, and he was talking about this capping concept that Mike mentioned, where if

¹²¹ 42 U.S.C. §§ 7401–7626 (2000).

¹²² See *supra* notes 88–91 and accompanying text.

you don't have enough people in one half of the sandbox, you start kicking people out of the sandbox.¹²³ I'm a very liberal Democrat, for what its worth, but I couldn't believe that this happens in the United States. I am very supporting, as Mike is and as I hope we all are, of equal opportunity, but that didn't seem like equal opportunity to me.

So, I ran off to the library and read the eight cases¹²⁴—I think there were six at the time—and the legislative history and the regulatory history of these various documents, the 1975 regulations,¹²⁵ the 1979 policy interpretation,¹²⁶ and then the 1996 memo¹²⁷—clarification, I guess, it's called. Based on that research, and my administrative procedure approach to this, NWCA¹²⁸ decided to go forward and challenge these rules. So, I am not coming at this from a civil rights context; I'm coming at it from how did the agency do what it did, and did it have the statutory authority.

That second half, statutory authority, is in this instance civil rights, although it could be a statute about car parts, or anything, the Clean Air Act.¹²⁹ At some level, you are asking, "does this agency have the authority, and what deference should the courts apply to what the agency puts down on paper?" But, even before that, there is the issue of how did they go about putting it down on paper, which is going to be significant here, we think.

The status of the case is the government has filed a motion to dismiss, we have cross-moved for summary judgment, and the government asked that our motion for summary judgment briefing

¹²³ Professor Lopiano first discussed the sandbox idea. *See supra* notes 19–20 and accompanying text.

¹²⁴ *Chalenor v. Univ. of N.D.*, 291 F.3d 1042 (8th Cir. 2002); *Pederson v. La. State Univ.*, 213 F.3d 858 (5th Cir. 2000); *Neal v. Bd. of Trs. of the Cal. State Univs.*, 198 F.3d 763 (9th Cir. 1999); *Cohen*, 101 F.3d 155 (1st Cir. 1996); *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994); *Kelley v. Bd. of Trs.*, 35 F.3d 265 (7th Cir. 1994); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168 (3d Cir. 1993).

¹²⁵ *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 34 C.F.R. § 106.41 (2003).

¹²⁶ Policy Interpretation, *supra* note 96.

¹²⁷ *See Office for Civil Rights, Three-Part Test*, *supra* note 57.

¹²⁸ *See supra* note 45 and accompanying text.

¹²⁹ 42 U.S.C. §§ 7401–7626 (2000).

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be deferred until after the court rules on the motion to dismiss. The court granted that, and so we are waiting for the court to rule on the motion to dismiss.¹³⁰

Before this commission report got finalized, we filed what is called a petition for rulemaking,¹³¹ under the Administrative Procedure Act,¹³² asking that the government repeal the three-part test.¹³³ So, even if the court were to dismiss us, final agency action on this petition would basically cure whatever basis the judge has for dismissing us.

One of the things they are saying is, “Gosh, this was a long time ago—1979. Surely, the six-year statute of limitations has passed.”¹³⁴ This final agency action today on that petition basically starts a new clock, and so we are not particularly worried about dismissal.¹³⁵

We are raising several different arguments here. I will list them. First of all, we are saying substantively they do not have the authority. That has come up in the other eight courts of appeal.¹³⁶

We are challenging the procedural validity. Basically, if an interpretive rule comes out that changes either a prior interpretation or, even worse, a prior substantive regulation, then you need to do a rulemaking to do that. That has not happened here ever. We have migrated from equal opportunity based on interest in 1975, to equal opportunity based on enrollment in 1979—that is a change—and then to equal participation based on enrollment in 1996. Those are all changes, and you cannot do that, so we are challenging procedurally.

¹³⁰ See *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 263 F. Supp. 2d 82 (D.D.C. 2003) (granting the Department of Education's motion to dismiss).

¹³¹ 5 U.S.C. § 553(e) (2000) (allowing interested parties to petition for the issuance, amendment, or repeal of a rule).

¹³² 5 U.S.C. §§ 500–96 (2000).

¹³³ See *supra* notes 93–97 and accompanying text.

¹³⁴ The statute of limitations for filing any civil action against the United States is generally within six years after the right of action accrues. 28 U.S.C. § 2401(a) (2000).

¹³⁵ The Department of Education's motion to dismiss was granted, and the NWCA's motion for leave to file a second complaint was denied. *Nat'l Wrestling Coaches Ass'n*, 263 F. Supp. 2d at 85.

¹³⁶ See *supra* note 124.

In addition, we have raised what is called a “changed circumstances” argument through this petition process, where we are saying basically that while it may have made sense in 1977–1978—those were the data that were looked at in the 1979 policy interpretation—a lot has happened since then. We’ve got unintended consequences, like these men’s teams getting cut, capping happening.¹³⁷ We’ve had women’s college participation catch up and surpass the relative ratio of high school participation,¹³⁸ so one could argue that the college problem is fixed and we need to turn, as we all agree, either to active or passive work at the high school level to get participation up. If it is passive, we just let interest percolate up into the system and meet it when it arrives. If it is active, I think most Americans would say “let’s get all of our kids playing sports,” and so on a relative basis—men versus women, boys versus girls—that would increase the women’s relative share because historically, for whatever sets of reasons, the girls were not participating in sports as much.

So, that petition denial, changed circumstances argument is not something that was raised in the other litigation, just like the procedural validity argument was never raised.¹³⁹ So, those eight courts of appeal are simply not only not controlling as to whether we get to win those two causes of action, they are irrelevant, and indeed, under *Auer v. Robbins*,¹⁴⁰ it’s not that Brown did not raise the APA¹⁴¹ argument, it’s that they could not. You can only do that directly against the agency, and ours is the first lawsuit going directly to the agency, trying to overturn the administrative action of putting pen to paper.

Also, another interesting, and maybe quirky thing, is that Title IX says, as does Title VII on which it is based,¹⁴² that the rules, orders, and regulations that agencies issue to effectuate the intentional discrimination ban of the statute do not take effect

¹³⁷ See Pennington, *supra* note 65.

¹³⁸ In 2000, the ratio of girls’ high school participation was 1 in 3, up from a ratio of 1 in 27 existing at the time Title IX was enacted. See Pennington, *supra* note 65.

¹³⁹ See generally *supra* note 124.

¹⁴⁰ 519 U.S. 452 (1997).

¹⁴¹ See Administrative Procedure Act, 5 U.S.C. § 551 (2000).

¹⁴² Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (2000).

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unless and until approved by the President.¹⁴³ A couple of the judges in those eight circuits scratched their heads about what that might mean, and ended up deciding that it did not mean that 1979 policy interpretation, which was not signed by the President, and 1996 clarification memo, which was not signed by the President, had no bearing.¹⁴⁴ And indeed, if you look in the legislative history of Title IX, it is not at all clear what that means; it is not discussed at all. But Title IX, as I said, is based on Title VII.

If you go back to Title VII of the Civil Rights Act of 1964,¹⁴⁵ someone from this city, I believe, Representative Lindsay,¹⁴⁶ added this presidential approval provision, and he said, “This means the President has to sign it in the *Federal Register*.” As, indeed, Gerry Ford did in 1975.¹⁴⁷

So, and this is why I say it’s quirky, as often happens in administrative litigation, the agency really hasn’t finished the steps in 1979 or 1996, and so in a sense, as Gertrude Stein said, “there’s no there, there,”¹⁴⁸ or “the emperor has no clothes,” whichever you prefer. So, that is a basis where we could get these things chucked out that were litigated in a couple of the cases. But they didn’t go back to the actual legislative history to determine what presidential approval means.

And then, we have another cause of action that is really not all that relevant here. So, on the substance, what’s the most interesting thing? I mean, you don’t care if the President didn’t sign it, or if they didn’t cross their t’s or dot their i’s. The real issue is, can they do that? That is why this is an interesting

¹⁴³ See Title IX, 20 U.S.C. §§ 1681–88 (2000).

¹⁴⁴ See generally *supra* note 124.

¹⁴⁵ See Title VII, 42 U.S.C. §§ 2000e to 2000e-17.

¹⁴⁶ John V. Lindsay represented New York’s 17th Congressional District in the House of Representatives from 1958 through 1965 and served as New York City mayor from 1966 until 1973. See Robert D. McFadden, *John V. Lindsay, Mayor and Maverick*, *Dies at 79*, N.Y. TIMES, Dec. 21, 2000, at A1.

¹⁴⁷ See S. REP. NO. 88-872 (1964), reprinted in 1964 U.S.C.C.A.N. 2355; see also H.R. REP. NO. 88-914 (1964), reprinted in 1964 U.S.C.C.A.N. 2391.

¹⁴⁸ See Kate Mulligan, *There Really Is a There There!*, *Psychiatric News*, at <http://pn.psychiatryonline.org/cgi/content/full/38/4/36> (last visited Feb. 7, 2004) (“Gertrude Stein was talking about Oakland when she made her famous remark, ‘There’s no there there.’”).

discussion rather than a boring administrative law discussion. Here again, I think we raise some arguments that, although they have an administrative bent, are more interesting from a civil rights rather than an administrative law issue.

First of all, when you have a statute like this, which says to many agencies, “you all go out and do this,” rather than to one agency, “EPA, go out and issue regulations to effectuate the Clean Air Act.”¹⁴⁹ The courts, the D.C. Circuit, and the Supreme Court even, basically hold that there is no one agency that gets deference.¹⁵⁰ And so, I will disagree with Alison in one respect. She noted that *Brown* held that of the 200 slots, it’s 100 and 100.¹⁵¹ What *Brown* said, I believe, was that they would, deciding themselves, defer to what the department had said.¹⁵²

And indeed, all of those eight circuits are what are called *Chevron* deference cases.¹⁵³ It’s in a case called *Chevron v. Natural Resources Defense Council*,¹⁵⁴ where the Supreme Court stated that if the EPA issues rules to effect interstitial issues under the Clean Air Act, the courts are only going to step in where they clearly violate the statute. The statute says that the EPA shall issue regulations to effectuate this statute, so Congress has told EPA to go do this. If it is a close call, the courts are not going to second-guess them.”¹⁵⁵

But in the multi-agency context, there is no deference, because agency 1 could come out with something different than agency 2. And so, given that possibility, the courts say, “No, it’s our decision in the first instance; we don’t defer to the agencies.”

Indeed, in the 1971 Title IX that Senator Evan Bayh introduced,¹⁵⁶ which did not pass, it said that the Department of

¹⁴⁹ 42 U.S.C. §§ 7401–7626 (2000).

¹⁵⁰ See, e.g., *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982).

¹⁵¹ See *Cohen v. Brown Univ.*, 101 F.3d 155, 176 (1st Cir. 1996); *supra* note 114 and accompanying text.

¹⁵² See *Cohen*, 101 F.3d at 155.

¹⁵³ See generally *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 843–44.

¹⁵⁶ See 117 CONG. REC. 30,155–30,157 (1971).

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HEW—it was the Department of Health, Education, and Welfare at the time—shall issue regulations to effectuate this.¹⁵⁷ That did not pass.

In 1972, the bill that did pass said that each agency that issues funds shall issue regulations to effectuate.¹⁵⁸ So, you have this clear movement from something that is *Chevron*-like, or Clean Air Act-like, to something that is not. When Congress moves like that, you don't assume that they *sub silentio* meant what they didn't say.

There is another somewhat interesting thing that has come up. There was another gentleman from this town, I believe, Senator Javits¹⁵⁹—there was an amendment that was attributed to him in 1974, two years after the statute was enacted, that says that for intercollegiate sports the department shall issue proposed rules to address the nature of particular sports.¹⁶⁰ It's kind of wishy-washy. I'm not sure what it means. And some courts have latched onto that and said, "Aha, there's your *Chevron*-style delegation. This agency, the Department of HEW, has authority to issue regulations, and we courts should defer." These are a couple of problems that haven't been litigated before.

First of all, when that bill was offered in the Senate, it was part of the Senate bill changed in conference, the sponsor said, "It is not intended to confer on HEW any authority it does not already have under the Act."¹⁶¹ So, the conference committee changed what it was they were to do, but they built their change on a chassis that gave no authority to the agency.¹⁶²

Another interesting quirk is that when the Department of Education was created in 1980, they basically took HEW and split

¹⁵⁷ See 117 CONG. REC. 30,156 (1971) (stating that the Secretary of Health, Education, and Welfare was "directed and authorized to effectuate the provisions . . . by issuing rules, regulations or orders").

¹⁵⁸ See generally 20 U.S.C.A. § 1682 (2003).

¹⁵⁹ Senator Jacob K. Javits served in the U.S. Senate representing the state of New York from 1956 to 1980. See Stony Brook, Jacob K. Javits Collection, *Biography*, at <http://www.sunysb.edu/library/javitsb.htm> (last visited Feb. 7, 2004).

¹⁶⁰ Education Amendments of 1974, Pub. L. No. 93-380, Title VIII § 844, 88 Stat. 484, 695 (1974).

¹⁶¹ See 117 CONG. REC. 30,155–30,157 (1971).

¹⁶² *Id.*

it in two.¹⁶³ They said that these enumerated provisions go over to the new Department of Education, and anything that is not there enumerated goes to Health and Human Services (“HHS”).¹⁶⁴ It turns out that Title IX and this Javits amendment are not one of the enumerated things. To the extent that there is a Title IX czar agency, like the EPA is for the Clean Air Act, it is HHS, not the Department of Education, so their opinion is irrelevant either way—because it is a multi-agency delegation and the courts cannot defer to any one agency; or because the Title IX czar is HHS. The more likely thing is that, true to the statement of the sponsor adding the legislation—which, after all, only calls for proposed rules issued within thirty days of the passage of some statute in 1974—there is not a continuing delegation. And it says “address the nature of particular sports.”¹⁶⁵ It does not say go out and violate the nondiscrimination ban in section 901(a) of Title IX.¹⁶⁶

And indeed, there is a section 901(b)(2), which borrows language from Title VII, as Alison alluded to, which says, no preferential treatment based on the ratios and proportions of one population versus another.¹⁶⁷ So, Title IX actually has something that Title VI does not, and for someone like myself, that makes me feel good, because we can win this case without affecting Title VI at all because Title VI does not have the language that Title IX does. Title IX differs as to preferential treatment, or quotas, or whatever you want to call it.

So indeed, Senator Bayh, who really is the person who is looked to as the primary sponsor of this bill, said that this regulatory authority—which exists under both Title IX and Title

¹⁶³ Brian Faler, *Doing the Cabinet Shuffle: Experts Debate Homeland Plan's Rank Among Reorganizations*, WASH. POST, July 31, 2002, at A17.

¹⁶⁴ *Id.*

¹⁶⁵ See 117 CONG. REC. 30,156 (1971).

¹⁶⁶ 20 U.S.C. § 1681(a) (2000) (proclaiming a “prohibition against discrimination”).

¹⁶⁷ 20 U.S.C. § 1681(b) (“Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area . . .”).

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VI, but is limited in Title VI by this no preferential treatment considering differential population percentages—to issue differential treatment by regulations is limited to very unusual circumstances “where it is absolutely necessary.” Very unusual, “absolutely necessary.” This is Bayh talking about the Senate bill before that “no quota” language got added into the bill from the House.¹⁶⁸ And then he gave examples such as classes for pregnant women and privacy in locker rooms.¹⁶⁹ So, there is no notion of creating an agency that was allowed to mete out opportunities.

That language from Title VII, by the way—and this is a quote again from the Supreme Court, quoting again the *Congressional Record*—says: “This was designed to prevent the statute from being interpreted to lead to undue federal government interference because of some federal employee’s idea of balance or imbalance.”¹⁷⁰ There are some ellipses in that, so I have left out some words, but that is what section 901(b) means. That is exactly what some federal employee, the Secretary of Education in 1979, and the Assistant Secretary for Civil Rights in 1996 did. And so, it clearly violates the statute. I don’t think that language was in any of the decisions. It may have been in the briefs, but it was ignored by the courts.

And then there are, as I said, several instances—I alluded to one—where there were changes in the regulations, from the 1975 regulations to 1979, and then 1979 to 1996, without a rulemaking, and that, under the APA, would be void.

Rather than taking too much of your question time, I will stop. If anyone is interested, I can catalog those, either before or after.

DR. LOPIANO: Linda, I wonder if, before we get to questions, in the interest of fair play, since the panel is two wrestlers and one defendant in a Title IX suit, and I got to go first and obviously didn’t hear the arguments, I would like to make just a couple of points. Is that allowed?

PROFESSOR WHARTON: I think that’s fair. Yes.

¹⁶⁸ See generally 117 CONG. REC. 30,403 (1972).

¹⁶⁹ *Id.*

¹⁷⁰ See *United Steel Workers v. Weber*, 443 U.S. 193, 206 (1979).

DR. LOPIANO: Okay. One, Title IX is an anti-discrimination law. It does not talk about harming men. And if the impression is left that there is equal opportunity for women in sports right now, that is a mistaken impression. At the high school level, males are still getting 1.1 million more opportunities to play sports than are women;¹⁷¹ at the college level, there are 58,000 more opportunities to play more than women;¹⁷² and at the college level, there is \$133 million more in athletic scholarships each year.¹⁷³ We are far from equal opportunity.

Also, in terms of this whole issue of what Title IX is, you cannot say that you are in favor of Title IX, but you are in favor of weakening the definition of equality. That is misleading.

Second point is on this whole notion of interest. To characterize Title IX as being in any way related to interest, with the exception of prong three, is in error. Right now—and I wanted to point this out in terms of Alison—the three-prong participation test, those are three independent tests.¹⁷⁴ You do not have to meet each one of those prongs.

So Brown, for instance, could have restored the two women's teams and could have, without going to proportionality, complied with Title IX without showing proportional participation, and could have argued interest. And indeed, that was a settlement offer. And indeed, today, as the court is following up on the case, for reasons of arrogance or God knows what, Brown refuses to take advantage of prong three and to get out of having to deal with the whole issue of proportionality.¹⁷⁵

¹⁷¹ In 2001–2002, 3,960,517 boys and 2,806,998 girls participated in high school athletics. See Nat'l Fed'n of State High Sch. Ass'ns, *Participation Sets Record for Fourth Straight Year*, at <http://www.nfhs.org/press/participation%20survey02.htm> (last visited Feb. 7, 2004).

¹⁷² According to the NCAA, 206,573 men and 149,115 women participated in NCAA-sponsored sports in 2000–2001. See NCAA, About the NCAA, *Miscellaneous Facts and Figures: Fact Sheet*, at <http://www.ncaa.org/about> (last visited Feb. 7, 2004).

¹⁷³ See Women's Sports Found., *Title IX Facts Everyone Should Know!*, at <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/geena/record.html?record=-862> (last visited Feb. 7, 2004).

¹⁷⁴ See Policy Interpretation, *supra* note 96.

¹⁷⁵ See *Cohen v. Brown Univ.*, 101 F.3d 155, 166–67 (1st Cir. 1996) (discussing the district court's holdings with respect to Brown's failure to satisfy the three-prong test).

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Third point: it is really misleading. Whenever you hear things like rowing in the desert, you should think about that for a second. Whenever you hear an example like Marquette University eliminates wrestling and they had all the money to keep it, there is more behind the scenes.¹⁷⁶ Marquette University eliminated wrestling because it didn't want to add a women's team and have the budget for it. It didn't have anything to do with how much money was privately raised for wrestling. It didn't want to add a women's team. As a matter of fact, they cut wrestling and decided to build a \$31 million basketball arena.¹⁷⁷

So, this is a budget issue where schools are making decisions to eliminate men's teams not on the basis of Title IX telling them to do it, but on the basis of philosophical choices. Schools have the right to say, "I'm going to be number one in the country in medicine and law, and I am not going to offer Russian or microbiology." And those are the decisions that are being made.

Does it hurt the men whose teams are cut? Yes. Would you prefer nondiscrimination law to be implemented by saying, "Well, let's just make sure we split the pie evenly among these new people and the old people." Sure, everybody wants that. But as soon as that conflicts with "I want to be the best in the conference in basketball; or I want to be the best in the conference with football," and then you say, "I'm going to have a small program with every team in the top ten instead of a large program, jack of all trades, master of none, and I am not going to discriminate on the basis of sex," those are the circumstances on which we had this inclination on the part of those schools with those kinds of philosophies to eliminate the low men on the totem pole.

Fourth point, and this has to do with the law: Title IX has nothing to do with teams. You can have 800 more teams for women. It counts participants,¹⁷⁸ the people who play. When you have football with 120 kids, to say that they have equal opportunity if you have one football team that fulfills the interest and ability of

¹⁷⁶ See *supra* text accompanying note 70.

¹⁷⁷ See *id.*; Don Walker, *Marquette Passes Its Goal for Al McGuire Center*, MILWAUKEE J. SENTINEL, Apr. 27, 2003, at 9C.

¹⁷⁸ See Title IX, 20 U.S.C. §§ 1681–88 (2000).

120 men and I should match up with one basketball team for fifteen women, that's stupid, that's absolutely stupid. So, you shouldn't be talking teams.

The whole example of there are thirty-one kids who play baseball and eighteen that play softball, they are two different sports. You need a ten-to-fifteen pitching staff for baseball. You need two for softball. The average team sizes for softball are going to be lower.

Roster management is not a Title IX term; it is an athletic department policy. And athletic departments cap rosters, start playing with numbers, when they want to do what? When they don't want to add another women's team. So, they figure out how to depress men's participation to make their obligation to increase women's participation lower. That is not the law. It is the philosophy of athletic departments.¹⁷⁹

Thank you.

PROFESSOR WHARTON: Thank you, Donna.

I want to give the other panelists an opportunity now to respond to what Donna has said. In particular, I think it would be interesting to hear you address one of the big points she made, which is that Title IX is not the villain here, that this is really about athletic budget priorities and choices made by universities in allocating money to cut less preferred men's sports like wrestling and to choose not to trim the fat from budgets like football and men's basketball. So, could we have some responses?

MR. JOSEPH: Well, certainly at some schools she is absolutely right, and they should be free to make those decisions, whether budgetary or directed toward being the top in their division in a couple of sports rather than in the middle of their division in more sports. That said, to go from that concession on my part to her statement that it never is Title IX, I think, is ludicrous.

In the Marquette example, they built a basketball and volleyball facility for \$31 million rather than adding a women's team. It is men's and women's basketball and, I think, women's-

¹⁷⁹ See Pearson, *supra* note 62.

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only volleyball.¹⁸⁰ So, to say that that \$31 million is somehow men's money because it is basketball is actually factually wrong.

If we eliminate the quota system and schools can still do what they want for their reasons, that is fine. I am sure some schools use Title IX as the villain and they are just really trying to divert the money to some other program.

The final thought is that Dr. Lopiano is suggesting that Marquette needed to add a women's basketball team. That is based on the measuring stick that the Department of Education has adopted, which is equal participation based on enrollment. I guess we just disagree on how you count how opportunity is equal. And so, it may be that Marquette needs to add some men's teams, if you use a different yardstick. That is why this debate over the yardstick of fairness and opportunity can determine whether a particular school under one yardstick is discriminating against men or, under another, against women.

But at any rate, the wrestling team was funding itself and it got cut,¹⁸¹ and that, we think, is intentional gender discrimination.

MR. MOYER: I just cannot think of a single academic program that has demonstrated exactly equal interest between men and women on a national scale. I'll share a quick story.

One of the greatest recognizable people in our sport is Dan Gable, Olympic gold medalist and coach of countless NCAA championship teams at the University of Iowa.¹⁸² Just a couple of months ago, he was doing a wrestling clinic for us at Bergen Catholic High School in New Jersey. There were 600 coaches and wrestlers in attendance. He was demonstrating some technique and making the analogy of what he was showing to being a hunter. He asked, by a show of hands, how many wrestlers and coaches in the audience were hunters. Not a single hand went up. But where Dan Gable comes from, in the middle of Iowa, virtually everybody hunts. So, where it might make sense to have a hunter safety course offered in high schools in Iowa, it doesn't make very much

¹⁸⁰ See Walker, *supra* note 177.

¹⁸¹ See *supra* text accompanying note 70.

¹⁸² See Kevin Sherrington, *Sunday Brunch*, DALLAS MORNING NEWS, Oct. 5, 2003, at 2C.

sense to have a hunter safety course at Bergen Catholic High School in New Jersey.

To use this “one size fits all” measuring stick of enrollment is just seriously flawed. We know that there are nontraditional students on college campuses, students who are older than twenty-three years old, who are not likely to play sports. We might as well pick people that like ice cream and give them a chance to play sports. It’s not any more logical or illogical than using enrollment. We have to get away from enrollment, and we have to get back to providing equal opportunity based on interest. That is, again, what we are specifically focused on.

There could be some college campuses where more women want to play sports than men, and at other college campuses it could be flip-flopped. But to use enrollment as a yardstick to measure interest just does not make sense, and that has come out repeatedly over the last eight months, when this Title IX commission has heard from virtually everybody that there is to hear from.

MR. JOSEPH: And where it is equal, it will not make a difference at all if the standard goes away.

PROFESSOR WHARTON: Alison, would you like to comment on these issues?

MS. MARSHALL: The only thing I was going to add was that we need to parse out the proportionality issue from the rest of Title IX and the athletic program as a whole, and the equity nondiscrimination issue, and focus as well in looking at the university’s program as a whole on the other things that go into making the program.

I continue to be concerned that we have gotten to this focus on this numbers issue, and we’re not looking at the program as a whole. I think they are two separate issues. The issues that Mike and Larry are focused on have to do with the proportionality. The budgetary issues I’m not convinced are driving that issue. It is purely the proportionality. In the budget as whole, we’ve got to be looking at the equity there and the nondiscrimination.

PROFESSOR WHARTON: I just want to come back to one point that has come up several times, and that is in talking about

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the standard, the three-prong test. Several of you in talking about Title IX have referred to it over and over again as a quota system, and you seem to fixate almost entirely on prong one.¹⁸³ And, as we have all acknowledged, there are two other prongs.¹⁸⁴

Now, Mike, you said that you thought they were vague and unclear, and I wondered if we could just talk about that. Why is it that we tend to fixate on just prong one, and we seem not to be willing to acknowledge the existence of the other two prongs?

MR. MOYER: Well, let's say in a practical sense a university administration is going to ask the question; let's say it's trying to comply with having a history of expanding opportunities for women on its campus. It is going to ask the questions: how many women's sports do we have to add; how often do we have to add them; and how do we know when we have added enough?

Our point is that, all too often, the yardstick to measure interest, to answer that question, is you have added enough women's sports when you have reached proportionality. It is temporary, and these universities are buying time as they try to meet this proportionality standard.

These university administrators are leaning on their general counsels—and this came out prominently in these Title IX commission hearings.¹⁸⁵ They do not want to wind up in court.

One of the things that we want to know in athletics, to use basketball, is where the basketball is, and we want to know how many points are scored when that ball goes through that rim. These administrators need to know that they are not going to steer their universities into these expensive lawsuits. So, the general counsels say the safe harbor is proportionality.¹⁸⁶ That is why that becomes the one prong that everybody focuses on.

MS. MARSHALL: I would just add something. From a university perspective, I do mostly counseling. I haven't been

¹⁸³ See *supra* notes 57, 180–83 and accompanying text.

¹⁸⁴ See Office for Civil Rights, *Three-Part Test*, *supra* note 57.

¹⁸⁵ Hearing transcripts of the Secretary of Education's Commission on Opportunity in Athletics are available at <http://www.ed.gov/about/bdscomm/list/athletics/transcripts.html> (last visited Feb. 12, 2004).

¹⁸⁶ See *id.*

involved in any active litigation in this area in recent years. But two things to observe. One is there is an interesting General Accounting Office study on this that came out. Of those institutions that were being investigated by the Department of Education Office of Civil Rights (“OCR”), seventy-one percent of them could have satisfied the second or third prong.¹⁸⁷

Linda, your question is very well put, but what I hear from the clients is precisely what Mike said, which is that in this day and age of costly litigation and the uncertainty of how you go about proving those elements once we get into a court of law, the OCR has said prong one is a safe harbor. Take the path of least resistance. That’s the one we are going to go with.

DR. LOPIANO: Well, as everybody knows, safe harbor is a legal term of art. Prong one is not the only prong in which you can safely comply with the law. This is where, I think, university legal counsel are misleading nonscholarly athletic directors. Athletic directors are simplistic—“just give me a flat number, tell me how to do this, don’t bother me.”

I really think the three-prong test, if you really look into the 1996 clarification¹⁸⁸ in particular, is absolute genius. It is not a fixed number. It allows variants that make sense.

For instance, in prong one, let’s say there are 100 athletes—and this is simple—let’s say there are 100 athletes and right now 47 are men and 53 are women, and it is a 50/50 student population. You might say that any team added is going to be maybe ten women. You don’t have to add another women’s team. You don’t have to meet strict proportionality. The allowable variants under substantive proportionality, which is the standard—it is not strict proportionality—could range from two to seven percent variance in prong one.

In prong two, in terms of continuing interest, or a history and practice of continuing to expand opportunity for the underrepresented gender, people say, “this was okay thirty years

¹⁸⁷ See generally U.S. GEN. ACCT. OFF. INTERCOLLEGIATE ATHLETICS: STATUS OF EFFORTS TO PROMOTE GENDER EQUITY (1996).

¹⁸⁸ See Office for Civil Rights, *Three-Part Test*, *supra* note 57.

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ago, but shouldn't we get rid of this now? Shouldn't we be at equal opportunity?"

The reason why this makes sense in athletics—and again, the genius of the three-prong test—is that it recognizes that sometimes a school might say, “I’m going to move from Division II to Division I, and I’m going to go to a football-playing conference. In order for all of my teams to be eligible, I have to sponsor football; I’ve got to add the team; now I’ve got some space, maybe three or five or six years, to add football first and then to add gradually women’s teams because of changing circumstances.” It’s good flexibility.

When you look at prong three, where you can make a case for a nontraditional student population, you can make a case for “in my region of competing we don’t have any interest in recruiting, we don’t have interest in adding another sport.” If you really read prong three, it is really good stuff.

Why a commission would move from that kind of flexibility to proposing a 50/50 standard, with two or three percent variance, and removing the three-prong test and really getting into a quota system, is absolutely beyond me. So, I would encourage you to think twice before using the term “quota” and to really look at the brilliance of the three-prong test.

PROFESSOR WHARTON: Any comments? Or are we ready to take questions?

QUESTIONER: Usually whenever you hear the Title IX arguments, especially when the men are saying that they’re cutting sports because we need to add women, why do you rarely hear anyone attack the fact that there are still eighty-five scholarships for football, I believe, when the pros only carry fifty-some players? So, fourth-string backups are on scholarship, when the reality is that you could cut twenty scholarships right there and save two men’s teams? So it is because of the alleged money that the football teams pull in, when the reality is that most of them do not make money off their programs? What I mean to say is, why does no one ever seem to attack the basis of the football scholarships?

DR. LOPIANO: Nobody is willing to challenge the elephant in the middle of the room. At least at the Division I level, this is all

about budget, and it's all about wasteful expenditures. There are eighty-seven institutions in the NCAA whose football programs cost more than they bring in, eighty-seven.¹⁸⁹

You are absolutely right. People do not realize that the average number of football players that get into a game on any given Saturday is forty-eight.¹⁹⁰ The average number of football players not available to play on a weekend, because of injury or other reason, is less than six.¹⁹¹ The average number of football players lost for a season because of injury is less than two on any given team.¹⁹²

And then you say, not only do you need 85, 120, or 200 players in the case of Nebraska¹⁹³ for instance, but you need 85 full scholarships, that go to whom?¹⁹⁴ Not even starters. To tackling dummies.

It is about time for us to attack that, because what that does is discriminate against other men's teams too. Because of this inordinate allocation of resources to football, the scholarship numbers in other men's sports are absolutely out of whack. So where you might have fifteen scholarships in a women's sport, in the same sport for men you might have five, because you have to make up for these eighty-five full scholarships over here.

¹⁸⁹ See generally DANIEL L. FULKS, REVENUES AND EXPENSES OF DIVISIONS I AND II INTERCOLLEGIATE ATHLETICS PROGRAMS: FINANCIAL TRENDS AND RELATIONSHIPS – 1999 (2000) (joint project with the NCAA), available at http://www.ncaa.org/-library/research/i_ii_rev_exp/2000 (last visited Feb. 12, 2004).

¹⁹⁰ For the basics about the game of football, see Football.com, *Rules and Information*, at <http://www.football.com/rulesandinfo.shtml> (last visited Feb. 7, 2004).

¹⁹¹ See *id.*

¹⁹² See *id.*

¹⁹³ The University of Nebraska Cornhuskers had 173 football players on its roster for the 2003–2004 season. See Official Home of the Huskers Football, *Football – 2004 Roster & Bios*, at http://www.huskers.com/SportSelect.dbml?DB_OEM_ID=100&DB_LANG=&KEY=&SPID=22&SPSID=4 (last visited Feb. 12, 2004).

¹⁹⁴ Under the NCAA rules, Division I institutions may not award more than eighty-five football scholarships. See NCAA, 2003–04 NCAA DIVISION I MANUAL § 15.5.5.1 (2003). See also *Title IX Has Led to Side Effects*, BUFFALO NEWS (New York), July 6, 2003, at B2 (noting that since NFL teams only have fifty-three players, eight of whom are inactive for games, college football teams could reduce the number of scholarships well below the NCAA limit of eighty-five).

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Basically, football has thrown the whole piece of pie out of whack on the basis of mythology, that it is revenue-producing.

PROFESSOR WHARTON: I'd like to hear Mike's response to that. I wonder if the Wrestling Coaches Association has concerns about football.

MR. MOYER: Well, again, we could talk about Seton Hall University, Compton State, Southern Illinois University at Edwardsville, Southern Colorado University—all schools that dropped wrestling just in the last two years, that do not even have football programs.¹⁹⁵ So, that is number one.

Number two—

DR. LOPIANO: But they might have basketball.

MR. MOYER: I think they have women's basketball.

DR. LOPIANO: No, no. I mean inordinate resources, Seton Hall especially, in basketball.

MR. MOYER: The second point is please remember that the overwhelming majority of student athletes in our country are nonscholarship student athletes. At the NCAA Division III level, there are no scholarships offered at all.¹⁹⁶ At the Division II level, there are very few scholarships offered.¹⁹⁷ The majority of men's teams that have been discontinued are at the Division II and Division III level.

But to specifically answer your question why does football need eighty-five scholarships—and this will hammer home again why our lawsuit is about participation, not funding. If you eliminated twenty scholarship football players tomorrow from a football team, they would be replaced by twenty nonscholarship football players the next day. When that happens, we are right back to having a proportionality issue. We are right back to having to eliminate twenty males from some other team.

¹⁹⁵ See INDEP. WOMEN'S FORUM, INDEP. WOMEN'S FORUM ISSUES: TIME OUT FOR FAIRNESS: WOMEN FOR TITLE IX REFORM (2003) (listing schools that eliminated their wrestling programs in the past ten years), available at <http://www.iwf.org/articles/-default.asp?page=6&fType=> (last visited Feb. 7, 2004).

¹⁹⁶ See NCAA, *What's the Difference*, *supra* note 24.

¹⁹⁷ *Id.*

DR. LOPIANO: No, no. But you would have the money to keep wrestling. That's the whole point. See, right now, of all the proposals advanced by the commission, none would restore wrestling. None really address the basic problem.

MR. MOYER: But how do we explain all of the alumni groups that want to fund their own wrestling programs while the universities are saying, "We're really sorry; we appreciate your generosity"?

DR. LOPIANO: Because they do not want to put the money out for a women's sport to match up to wrestling.

MR. MOYER: The point is that the wrestling programs in many cases, and other men's sports, would not cost the university any money if they were at least allowed to be funded by private donations. But under the application of the current interpretation, you cannot do that.

QUESTIONER: If you allowed private donations and you could find enough people, whether it's football or basketball, once again wrestling could shut out because if you have the ability to give to your football program—boosters, etc.—I don't see wrestling being privately funded in many places, more than a few. And once again, there you would have all the money filtered toward the men and not toward the women.

DR. LOPIANO: That is a very good point, in terms of realizing that Title IX does not deal with revenues, and it does so purposefully. And it does not make an exclusion for booster money. It says, "all I'm going to look at is discrimination on the basis of sex in the provision of opportunity and the treatment of my athletes, regardless of where your money comes from, because you can cook the books however you want to cook the books."

You are exactly right. If you allowed those exclusions, it would take five minutes for athletic departments to do what they tried to do in the early 1970s, to tell all their boosters designate their money for football, endow the football coach's salary, the football operating budget, and all football scholarships, and keep it away from the women. That is exactly what happened in the mid-1970s, until everybody found out that they couldn't really hide money.

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QUESTIONER: Perhaps this might be best suited for Alison, but anyone can take it. Do the prongs go both ways, in the sense that they would apply to men equally to women?

MS. MARSHALL: Title IX certainly encompasses both genders.

QUESTIONER: So, if we are cutting men's teams that previously existed, and presumably there was an interest now, we are now violating the third prong—

DR. LOPIANO: No.

QUESTIONER: Can I finish my question, please?

DR. LOPIANO: It's not interest. You're making a mistake on the question.

QUESTIONER: May I finish my question and then you can point that out?

DR. LOPIANO: All right.

QUESTIONER: If you are cutting teams for which there was an interest in by men, doesn't that then violate the third prong with respect to men?

MS. MARSHALL: "Fully and equally." The prong is written so it is the underrepresented gender. So, although Title IX talks about nondiscrimination, period, the third prong—correct me, Larry, if you want—

MR. JOSEPH: I would like to jump in on that because this is an example of something that they switched around without a rulemaking. It says "fully accommodate," or words to that effect,¹⁹⁸ "the interests of the underrepresented gender."¹⁹⁹ So, we are talking about fully accommodating, at most schools, women.

They issued a contemporaneous document that said "the word 'fully' here means to the same extent as men."²⁰⁰ So, originally it was a standard. The third prong moved you to congruence with the regulations, which were equal opportunity based on interest. In

¹⁹⁸ See Policy Interpretation, *supra* note 96.

¹⁹⁹ *Id.*

²⁰⁰ See generally GOOD SPORTS, INC., COMM'N ON OPPORTUNITY IN ATHLETICS: TITLE IX ATHLETICS BRIEFING BOOK (2002).

fact, the third prong essentially, notwithstanding Donna's thoughts today, meant congruence with the regulations in 1980.

Then, depending on when you want to count it, either in 1990 or 1996, they changed it from "fully means to the same extent as men," which is a relative thing, to "every last woman,"²⁰¹ which is a grammatical reading of the word "fully," certainly. In fact, it is probably a better grammatical reading of the word "fully" than the original thing they said they meant.

The problem that they have is that, in addition to what we say is violating the Constitution, which has not been upheld in those eight circuits I mentioned, it violates the Administrative Procedure Act.²⁰² You cannot get from "to the same extent as men" to "every last woman" without a rulemaking. They have never done that.

DR. LOPIANO: Okay. This is really taking Title IX way into left field. Think about what the prongs are. Here is the standard, the definition of equal opportunity. The safe harbor is that if you can show that your athletic population is proportional to your student body—this is a term of art, a safe harbor. Nobody can accuse you of discriminating on the basis of sex. Prongs two and three are explanations of nondiscriminatory reasons why you do not have to meet prong one.

So, Title IX does not require that you fully meet the interests of the underrepresented gender or fully meet the interests of men and women; it does not say that. It says you can use prong three to justify not meeting prong one by showing that the underrepresented gender does not have the interest to meet that standard. That is completely a misunderstanding of Title IX, if you are going to start saying that Title IX requires fully meeting the interest of either men or women. It does not.

QUESTIONER: I have a question about roster management, and getting back to Dr. Lopiano's opinion about Nebraska football having 200 on a roster. Now, when you consider that only 85 of those are on a full athletic scholarship, that means that the remaining 110 or so are recruited walk-ons, or just walk-ons in

²⁰¹ See Office for Civil Rights, *Three-Part Test*, *supra* note 57.

²⁰² See Administrative Procedure Act, 5 U.S.C. § 551 (2000).

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general. Yet—and correct me if I am wrong—on the ADA reports that we submit in November, they all have to be reported as on the roster.²⁰³

What about the talk and speculation in the commission's report that only including, from a Division I perspective, those student athletes that are on athletic aid for enrollment participation purposes, versus those that are simply walk-ons? Because if you look at Nebraska, when you talk about inflated rosters, that is ten-fold.

DR. LOPIANO: A couple of thoughts. Just to educate everybody, there was a proposal that said in the counting of athletes that you would not have to count anybody who was not on scholarship or who was not recruited under NCAA rules, and that that might be a better way to count.

The problem with that is that in the majority of the institutions in this country there are plenty of kids who are not recruited and who are starters, in Division III, in Division II, and it even happens in Division I. That is one dilemma.

I think the other thing that you should remember is that whenever you deal with walk-ons, this notion of walk-on, somehow people would have you believe that every boy who wants to play has a right to play sports, that this walk-on is this discriminated-against person. The last time I heard, varsity sports were for a certain level of athletes. You try out for the team, you have some sense of how many people you can coach well, and you cut. You have a selection process where you cut. You don't let everybody play. Not everybody has a right to play.

How have we gone from varsity sports for a certain level of person to now everybody has a right to play, whether they are good or not. If you walk on for football, this is kind of an inalienable, genetic kind of thing, you have a right to do it? That is exactly how people are thinking, and that is wrong. If you have limited resources, then it makes absolute sense that you should refine that athletic program to maximize your return on investment.

PROFESSOR WHARTON: Mike would like to respond.

²⁰³ See *supra* note 57.

MR. MOYER: Yes, just really quickly, just again, to highlight the reality of the situation. Probably the greatest wrestler of all time, Cael Sanderson, won four NCAA championships, never lost a match in college, and came out of the great state of Utah that doesn't have a single college wrestling program.²⁰⁴ The last one that was eliminated was a direct result of Title IX. There just has to be a better way of doing this.

QUESTIONER: Can I make a few statements and comments, or questions? This is a very complicated and a very emotional issue, as I see men and women reacting in the audience. I kept wanting to jump up several times. I come at this as at least a triple minority. If I think hard, I can probably think of many other categories in which I fall. I was a beneficiary of Title IX. I'm a woman, I'm a minority, I am currently general counsel of an Olympic sport organization, track and field. Men's track and field programs are being cut; that's not good for us. On the other hand, in the Olympics, the average age of track and field athletes is twenty-nine, so we need to support our athletes in our sports many years afterward.

Let me get to my questions. I am not a scholar on this issue, and I am very emotional about it. And I am not speaking on behalf of USA Track and Field. We have not taken a public position on this.

But, Mike, I would ask you: who cares if ten wrestlers cannot wrestle or ten baseball players have to walk away because there are twenty women and you cannot accommodate those other guys? That's real life. You don't get to do everything you want to get to do in real life. So let's start teaching our kids at the college level to deal with the reality of the world.

How many years have women, for all the years that women were not offered any athletic opportunities, been kept out? Why don't we count out those number of years and those numbers of women and not provide any men's sports until we catch up? So, that is one point.

²⁰⁴ See Kevin Tran, *Mr. Perfect: Cael Sanderson Was Perfect in College, Now He Aims for the World*, Titan Games, at <http://www.usolympicteam.com/titangames/wrestling-CarlSanderson.cfm> (June 25, 2002).

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My other point is that college sports isn't the only options for wrestlers and baseball players. We are seeing in a lot of sports that a lot of kids are going right from high school into the professional ranks. In my sport again, we have a very healthy club system, or we did back in the 1970s and 1980s when I was more active in the sport.

At Brigham Young, there is an article in the paper right now about Brigham Young going outside of the NCAA college environment for its soccer players because of limitations.²⁰⁵ I have no opinion at this point whether that is a good thing or a bad thing.

And I also want to make the analogy to racial discrimination, what I call the black affirmative action issue, because there are all kinds of affirmative action for alumni and, for a long time, white men. We only talk about black affirmative action. But again, do we just ignore the fact that men have been benefited from years and years and years of opportunities of having athletic scholarships that give them educational opportunities? This is about access to education, not just access to athletics and sports programs. You get an education out of this as well.

Those are just a lot of disjointed comments and questions, but it is an emotional and complicated issue.

MR. MOYER: Again, it is very important to us that we are very clear. We are looking for a way that protects women and continues to facilitate opportunities for women without harming men.

What is problematic is—again, let's go back to the athletic director who is trying to do the right thing. He has a men's and women's sport; he's got soccer. If the men's soccer coach can accommodate fifteen extra walk-on boys on his team for the same budget that the women's soccer coach wants to accommodate on her team, should it really matter?

DR. LOPIANO: It does when they cost money, and they cost money. They cost insurance money, medical treatment, tape, and tutors. They do cost money.

²⁰⁵ See, e.g., Jere Longman, *College Team Finds Novel Alternative to N.C.A.A.*, N.Y. TIMES, Mar. 7, 2003, at A1.

MR. MOYER: It is such an insignificant amount of money.

DR. LOPIANO: It is not insignificant.

MR. MOYER: The second thing I would like to say is Donna, in her opening comments, I thought, gave a very compelling reason why America needs sports like wrestling. She mentioned the Speaker of the House Dennis Hastert, Secretary of Defense Donald Rumsfeld, the top economic advisor Steven Friedman—all people that have come through wrestling.²⁰⁶

I think our America is better because of young people that have the opportunity—and I am not just talking about wrestling, but you can go through track and swimming and every other sport that you want, and there is a good number of leaders in our country that will attribute their success to having had an opportunity to participate in sports.²⁰⁷

There is a more fair and reasonable way to do this, as opposed to proportionality.

MR. JOSEPH: Those are all men.

DR. LOPIANO: Mike, here's the thing—and you and I are always on panels. And Mike and I know each other well.

MR. MOYER: We are going to hug after this is over, by the way.

DR. LOPIANO: We can argue like this. But, what really gets me—talk about passion—is here we are talking about men wrestlers who are losing. What is wrestling doing for women? It could have been an Olympic sport. It should be an area where this is a window of opportunity to expand wrestling for women, and wrestling is not doing what it needs to do to really embrace gender equity.

MR. MOYER: There are over 3,000 young women who are now wrestling in high school.²⁰⁸

²⁰⁶ See *supra* note 45 and accompanying text.

²⁰⁷ *Id.*

²⁰⁸ See Ind. State Wrestling Ass'n, Mat Time, *Amateur Wrestling Facts*, at <http://www.iswa.com/MatTime/iswamt01.html> (last visited Feb. 8, 2004) (noting the growth of high school women wrestlers from 804 to 3,036 since 1994).

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DR. LOPIANO: And there should be as many. And how many male wrestlers are there?

MR. MOYER: We are trying to do our best to facilitate those opportunities for women. Women's wrestling was approved, it's my understanding, as an Olympic sport in the next Olympics as well.²⁰⁹

PROFESSOR WHARTON: Why don't you make a comment? We are very close to the point at which we have to close. In fact, I think we are slightly over time.

MR. JOSEPH: The people that Mike mentioned are all, I think, white men. You know, women need opportunities, too. And this is part of education.

Dr. Lopiano earlier mentioned that you pick the squad size, and that's what you go with. There are some that argue about the marginal cost of trimming a few players down from what the coach wants. But capping means you are kicking off people that the coach would want, that do not particularly cost anything more than perhaps minor marginal cost.

I don't know if this is a little into left field, where I have already been placed, but I think of Lincoln's Second Inaugural Address, where he said that we are engaged in a civil war, and maybe we are going to continue to shed blood by the sword until we draw every last drop that was drawn by the bondsman's lash.²¹⁰

To some extent, sports like wrestling are being hurt because of the bad things that happened before. And we do need to add opportunities for everyone, because we want a Secretary of Defense who was a woman wrestler or a woman swimmer or a baseball player. It is part of education and you should not trim it just for these numbers.

As high school interest comes along and younger kids come along, we will meet that interest. That is the law. In the meantime, we shouldn't be kicking people off of educational

²⁰⁹ See Richard Sandomir, *Wrestling's Niche Is Growing*, N.Y. TIMES, Sept. 12, 2003, at D7 (noting that the 2004 Olympic Games in Athens will be the first to include women's wrestling).

²¹⁰ See President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), available at <http://www.bartleby.com/124/pres32.html> (last visited Feb. 4, 2004).

opportunities—forgetting scholarships. They are not even allowed to play, even if someone privately pays for it. That cannot be right.

PROFESSOR WHARTON: Thank you.

We need to end now. However, I think some of the panelists will be around during lunch, and perhaps you can ask individual questions.

Thank you to our panelists. I think this was a very lively debate.