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## Title IX: Unresolved Public Policy Issues

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## SYMPOSIUM: TITLE IX AT THIRTY

# TITLE IX: UNRESOLVED PUBLIC POLICY ISSUES\*

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&

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Possibly no other piece of legislation, other than women's suffrage, has had a greater impact [on women]. But, then again, Title IX is not perfect.<sup>1</sup>

Outside of the civil rights laws, and when women got the right to vote, I'm not sure that there's been anything that has had as great an influence on American women and our society than Title IX.<sup>2</sup>

It was a privilege to serve as the co-chair of the Secretary's Commission on Opportunity in Athletics. We had a fabulous line-up of commissioners, were well staffed by the Department of Education, and were given excellent guidance from the Secretary of Education himself.

During my work as co-chair of the Commission, my colleagues and I heard from hundreds of people in America who had stories to tell about Title IX and how it had changed their lives, usually for the better, but sometimes for the worse. The passion expressed in these personal testimonials was compelling and demonstrated the powerful impact this seemingly simple piece of federal legislation has had on American society.

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\*. Note: All quotes from public testimony or written materials pertain to the Secretary's Commission on Opportunities in Athletics, as part of the official record.

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1. Nicole Vargas, *Bay Panelists Talk on Title IX's Impact*, S.D. UNION-TRIB., Nov. 19, 2002, available at 2002 WL 100356402 (quoting Rick Bay, former San Diego State University Athletic Director).

2. Ascribe Newswire, *DePaul University Athletic Director Jean Lenti Ponsetto Earns Respect as Leader & Symbol of Progress Toward Equality in College Sports*, November 22, 2002, available at 2002 WL 101529740 (quoting Jean Lenti Ponsetto, DePaul University Athletic Director).

The arguments surrounding Title IX are often grossly simplified and presented as two competing camps –Pro-Title IX (and therefore pro-women) and anti-Title IX (against women). My experience with Title IX has convinced me that it is so much more complex than a pro/con issue. At its center are a number of issues that overlap, intersect, and sometimes contradict one another.

The purpose of this paper is to delineate four major public policy issues that, in my opinion, are unresolved. In fact, these public policy issues also transcend the sports environment and tell us something about our society at large. Given the wide diversity of athletic programs among colleges and universities, it might be impossible to find solutions to these policy debates that will adequately serve the disparate athletic community. At the conclusion of each section, I have offered some professional comments regarding how these policy issues have been managed on the Stanford campus.

I. IF THERE ARE DIFFERENCES IN THE INTEREST LEVELS TOWARD PARTICIPATION IN SPORTS BETWEEN THE GENDERS, SHOULD IT BE THE GOAL OF OUR PUBLIC POLICY TO ELIMINATE THESE DIFFERENCES OR TO ACCOMMODATE AND EVEN CELEBRATE THEM?

Society doesn't tell them (boys) to be interested in sports, their own biology tells them that.<sup>3</sup>

Interests and abilities rarely develop in a vacuum. They evolve as a function of opportunity and experience.<sup>4</sup>

Much of the debate surrounding Title IX involves the level of interest that the two genders have in athletic participation. The question is: How can we best accommodate the ability and interest of male and female athletes if male and females differ in interest level? Indeed, how can we appropriately measure such a transitory and elusive concept as a person's interest in athletics? During the public forums, the commission heard two distinct voices on this issue. Indeed, both sides of the debate were often voiced by women.

One argument is that if women do have a different (and possibly lower) level of interest in sports than men, these differences are due to a historical lack of opportunities and past discrimination. Until the mid-1900s, women were traditionally discouraged from participating in sports, often over con-

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3. Michael Dobie, *Entitlement?*, N.Y. NEWSDAY, Nov. 24, 2002, available at 2002 WL 103515286 (quoting Kimberly Schuld, former director of the conservative Independent Women's Forum).

4. Naomi Dillon & Sara Burnett, *Is Title IX Doing Harm to Men's Sports?*, CHI. DAILY HERALD, Dec. 2, 2002, available at 2002 WL 103850204 (quoting Athena Yiamouyiannis, executive director of the National Association for Girls and Women in Sport).

cerned about the effect that participation would have on their physical and mental well being. Because of these societal pressures, few women broke through the established norms and expressed an interest in participating in athletics. Since the passage of Title IX in 1972, the number of women participating in athletics has skyrocketed. People on this side of the debate argue that once athletic opportunities were created, women rushed to fill the void – “opportunity creates interest.”

Advocates on the other side of the interest debate argue that men and women differ in their preferences, and that society should accommodate and even celebrate and encourage these differences. If women are interested in athletics then they should have the opportunity to participate; however, false participation opportunities should not be forced when the interest is not there. Many experts and others who testified for the committee pointed out that the common practice used by many campuses is to require the capping of men’s teams or the artificial roster inflation of women’s teams. At many universities, the number of men allowed on a men’s team is limited, helping the athletics program meet the required Prong I ratio, yet leaving many interested walk-ons not allowed to participate.

At the same time, the commissioners heard testimony that many women’s teams have had their squad size mandated by administration, leaving coaches to canvas the campus to find enough women to fill their roster slots. This is especially problematic since many of these “add on” roster spots go to student-athletes who will eventually not have access to competition, adequate coaching, and many times do not even persist on the team throughout the season.

An additional difficulty in dealing with this issue is the lack of specificity over the definition of interest. Prong III of the accommodation of the interest and abilities test requires institutions to “meet the needs and interests” of the under represented gender. At the same time, the government and the courts have not been specific in issuing guidelines as to how to measure this athletic interest. For example, it is not clear exactly which population of prospective women athletes is most appropriate for comparison (i.e. enrolled female students, female students who applied for admission, high school students in the region, etc.).

Our experience at Stanford is that our female students are just as interested in athletics as male students. Thus, we have supported a goal of a 50/50 participation ratio (same as our student body) because we found that women are interested in participating when legitimate opportunities are available to them.

In adding our most recent sport at Stanford, we took a different approach to assess interest. In the fall of 2000, more than eighty novice/freshmen women came to the first, fall women’s crew organizational meeting. Of those eighty women that attended the meeting, only eighteen remained on the team

through the end of the year. We used this initial turnout and subsequent participation as an interest measure—we had evidence that women on our campus were interested in rowing. In fact, we noticed that many of the women who had demonstrated an interest in rowing, yet did not persist as varsity squad members, more closely met the weight restrictions for lightweight crew (135 lbs/athlete). As a result, the decision was made to add lightweight rowing and populate the team almost exclusively from walk-ons, or students who were already on our campus. In the first two years of the program, more than 49 women have participated in lightweight rowing and our team has achieved a top three ranking in U.S.A. Rowing. Women are truly interested in legitimate opportunities; they are not necessarily interested in artificially mandated roster spots.

II. SHOULD THE PUBLIC POLICY GOAL OF TITLE IX BE TO ELIMINATE DISCRIMINATION AGAINST WOMEN IN THE SPORTS MILIEU, TO PROVIDE WOMEN WITH AN EQUAL NUMBER OF OPPORTUNITIES, OR TO GUARANTEE AN EQUAL PARTICIPATION OUTCOME?

Senator Bayh responded that the university gender quotas were “exactly what this amendment intends to prohibit . . . The amendment does not contain, nor does the Senator from Indiana feel it should contain, a quota which says there has to be a 50-50 ratio to meet the test.”<sup>5</sup>

“I’m not sure any of us understand the other two prongs. Listening to my peers, there’s only one prong, and that’s the first one.”<sup>6</sup>

Title IX, requires, among other things, that institutions accommodate the interests and abilities of the under-represented gender—in this case, women. Throughout most of the testimony that the Commission heard, many institutions try to meet this requirement by emphasizing Prong I, providing “substantially proportionate” numbers of participant-athletes as compared to the general proportion of women in the student body. Much of the debate the Commission heard was testimony regarding this Prong of the interest and abilities requirement.

As a public policy matter, however, I believe that there are at least different definitions of outcomes that could be used to assess these non-discriminatory portions of Title IX. As a public policy issue, these different definitions intersect in the sports milieu in many ways and indeed, maybe even extrapolate to other civil rights statutes as well.

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5. David Aronberg, *Crumbling Foundations: Why Recent Judicial and Legislative Challenges to Title IX May Signal Its Demise*, 47 FLA. L. REV. 741, 749 (1995).

6. *Purdue athletic director, Morgan Burke.*

In other words, an argument could be made that an institution should be able to comply with the interest and abilities requirement by doing one of the following:

1. Provide equal opportunity (or designated opportunity slots), or
2. Provide equal outcome (or “roster head counts”).

Clearly, past Office of Civil Rights/Department of Education interpretations have required institutions to meet the interest and abilities tests by providing substantially proportionate “roster head counts.” Despite the across-the-board reliance on roster head count outcome as the best indicator of compliance, there are problems with this method. This method leads directly to the capping of roster head counts in men’s sports. In addition, it can push institutions to artfully and artificially inflate the participation numbers for women in order to achieve the required gender balance. The Commission heard stories of women being recruited off campus so they could put their name on the name roster before the first game. Additionally, scrutiny of EADA reports demonstrates that some schools are reporting female roster head counts so large that it’s hard to imagine how these women athletes have a real collegiate competitive experience (i.e. access to coaching, travel with the team, access to locker rooms, etc.).

At Stanford University, we have used the designated opportunity slot method in all of our planning. We believe that this creates the healthiest environment for men and women athletes. As long as athletic resources are equally provided to the men’s and women’s programs, we do not have roster head count requirements for our squads. Each coach, in each sport, is allowed to decide how many students they want on their team. For example, women’s basketball at Stanford has had a maximum of fifteen scholarships allotted to them every year, but the Stanford team usually only has twelve to thirteen actual roster head counts at the discretion of the coach. At the same time, our men’s basketball team traditionally has an NCAA maximum of thirteen scholarships allocated; yet at the discretion of the coach we usually carry fifteen to sixteen student-athletes. Using the designated opportunity slot method allows us to count both men’s and women’s basketball as fifteen roster spots (for internal planning), and thus, we do not have to artificially inject Title IX into the basketball environment desired by our head coaches.

Some commissioners and others have attacked the “designated opportunity slot” method because they are afraid it is designed only to accommodate men’s walk-ons. Yet, the real benefit of this method of planning is that it creates “quality” opportunities for women. Ironically, we have not only created quality opportunities for women, but the actual roster head count numbers at Stanford have gone from a population of 22% female athletes in 1990 to 47%

in 2002. This is done without cutting men's sports because we are committed to providing "quality opportunities" for women. In reality, the designated opportunity slot method of planning prevented Stanford from pushing women into sports where there was little likelihood they would have a quality experience. Unlike other universities that were starting to comply with Title IX, the designated opportunity slot method required that we add sports to meet the interests and abilities requirement of Title IX.

### III. AS A MATTER OF PUBLIC POLICY, HOW DO WE BALANCE PUBLIC DISTRUST OF QUOTAS WITH THE NEED FOR CLARITY OF COMPLIANCE REQUIREMENTS?

The numbers game, as much as I hate it, in time will be looked back on as beneficial for women's sports. I do believe that when you build it, they will come. Title IX has provided that opportunity.<sup>7</sup>

The unfortunate truth is that Title IX has evolved into something never intended. The act was intended to expand opportunity . . . the evolved enforcement has turned it into a quota program. Title IX is a good law with bad interpretation.<sup>8</sup>

While the courts have consistently ruled that Title IX is not a quota, the Commission heard significant testimony that a large part of the American public believes that Title IX contains quota requirements. Many institutions see the quota/equal outcome method (Prong I) as the only safe harbor from legal liability or public embarrassment.

It is easy to see Title IX as a quota system. Participation ratios are a mathematical equation that each student-athlete is a part of, and at many institutions the participation ratio is a delicate balance. If the number of women participating in athletics changes, then the number of men participating must change as well, and if the numbers are not balanced, a school leaves itself open to attack.

At Stanford we have a stated goal of 50/50 participation opportunities for men and women. A tangible public goal (or quota) has helped motivate the campus community to provide more opportunities for our women athletes. We have been able to justify new facilities and additional women's scholarships by the fact that the institution is committed to a tangible goal.

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7. Anita Weier, *Women's Crew Fills UW's Bill*, CAP. TIMES (Madison, WI), Nov. 16, 2002, available at 2002 WL 24292335 (quoting Sue Ela, a former University of Washington rowing coach and team member who helped start crew as a club sport at UW in 1972).

8. Michael A. Fletcher, *Title IX Panel Weighs Curbs on Scholarships*, WASH. POST, Jan. 24, 2003, available at 2003 WL 10892658 (quoting the remarks of Carol Zaleski, former head of USA Swimming, to the panel during Colorado Springs hearings).

When Stanford positively committed to a tangible goal, it helped focus our constituents and our staff on the path we were taking. Indeed, engendering institutional and public support for the four new women's teams we added during the 1990s, was only possible after we made public our tangible goal: Stanford had defined fairness as 50% participation opportunities for women. Clearly, tangible goals have helped Stanford make progress towards equal opportunity for women in athletics.

IV. IN BIG-TIME COLLEGE SPORTS HOW DO WE RECONCILE THE INCREASED OPULENCE AND COST OF FOOTBALL PROGRAMS WITH THE FACT THAT A DISPROPORTIONATE NUMBER OF THE WOMEN'S TEAMS COME FROM SCHOOLS WITH SUCCESSFUL FOOTBALL MOST COMPETITIVE PROGRAMS?

Football is a great sport, and I love that 107,000 people like it and I know how to multiply (\$38 per ticket).<sup>9</sup>

The real expenses starving minor men's sports of funding are the disproportionate share of university athletic dollars spent on one or two teams – football and men's basketball – and not spent to add new teams for women or to support other men's sports. Title IX should not be the scapegoat for irresponsible nonprofit institutions of higher education that operate their football and men's basketball programs like professional franchises.<sup>10</sup>

Title IX compliance is, at some level, a resource issue. It is necessary to examine where the dollars are being spent within an athletic program when one has to evaluate the real costs of Title IX implementation and the difficulties it might be causing for men's Olympic sports. It is clear from the data presented to the Commission that the increased costs in big-time football have met or even exceeded the increased costs of new women's opportunities. Thus, many advocates argue that the enemy of equal opportunity for women is not Title IX, it is really big-time football.

On the other side of the argument, however, is the fact that the universities that have big-time football programs have won a disproportionate share of NCAA women's championships and provide more financial aid on average for women athletes than Division I schools without football. In effect, football does "raise the bar" for women athletes.

Table I shows that during the 2002-03 Women's NCAA Championship

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9. Gary Lundy, *UT Football Helps Pay for Women's Sports*, KNOXVILLE-NEWS SENTINEL, Sept. 20, 2002, available at 2002 WL 24852543 (quoting Joan Croain University of Tennessee women's Athletic Director).

10. Ralph Nader, *Blame Football, Basketball – Don't Make Title IX a Scapegoat*, PROVIDENCE J.OPINION CONTRIBUTORS, Feb. 15, 2003, available at <http://www.nader.org/interest/013003.html>.



year, 11 of 14 national champions were from schools that support big-time football and 179 of 225 top finishers (80%) were also from big-time football schools. These statistics are very impressive when one considers that only 70 of the 318 schools in Division I sponsor big-time football (as defined by the BCS membership or Mountain West Conference membership). Thus, one could argue that women athletes benefit directly from going to a school that has a big-time football program because they are five times more likely to be a Top 16 finisher in NCAA Division I competition than they are if they go to a non-football, big-time school.

TABLE I

SPORT	2002-03 WOMEN'S NCAA CHAMPION	# OF SCHOOLS IN FINAL POOL/RESULTS AFFILIATED WITH BIG-TIME FOOTBALL*
Basketball	Connecticut (Big East)	14 of 16
Cross Country	BYU (Mountain West)	11 of 16
Field Hockey	Wake Forest (ACC)	9 of 16
Golf	USC (Pac-10)	16 of 17 (includes tie)
Gymnastics	UCLA (Pac-10)	15 of 16
Lacrosse	Princeton (Ivy League)	8 of 16
Rowing	Harvard (Ivy League)	11 of 16
Soccer	Portland (WCC)	12 of 16
Softball	UCLA (Pac-10)	13 of 16
Swimming & Diving	Auburn (SEC)	16 of 16
Tennis	Florida (SEC)	13 of 16
Track & Field- indoor	LSU (SEC)	15 of 16
Track & Field- outdoor	LSU (SEC)	15 of 16
Volleyball	USC (Pac-10)	11 of 16
14 SPORTS FINISHERS/80%	11 OF 14 CHAMPIONS	179 OF 225 TOP

\* Big-Time Football includes the BCS member conferences and schools (the Atlantic Coast Conference, the Big East, the Big 12, the Big Ten, the Pac-10, the SEC, and Notre Dame) and the Mountain West Conference.

Table II shows the top twenty schools (2001-02) in awarding women's scholarships within Division I. A quick survey of this chart shows that all these top twenty schools within Division I in terms of providing scholarship dollars for women athletes were from big-time football schools. In fact, then if a female athlete wants to get an athletic scholarship she has a much better chance of getting one at a big-time football school than a school that does not play football or does not sponsor football on a big-time level.

TABLE II

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TOP 18 UNIVERSITIES IN AWARDING ATHLETIC FINANCIAL AID  
FOR WOMEN

ALL INFORMATION BASED ON 2001-02 EADA REPORTS

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SCHOOL	WOMEN'S SCHOLARSHIPS
Stanford	\$5,361,542
Michigan	\$4,469,864
Ohio State	\$3,768,071
Miami	\$3,415,069
Boston College	\$3,282,690
Notre Dame	\$3,279,386
USC	\$2,866,094
Vanderbilt	\$2,830,481
Michigan State	\$2,779,377
Virginia	\$2,778,199
Maryland	\$2,759,500
Penn State	\$2,724,142
North Carolina	\$2,507,159
Iowa	\$2,230,456
Minnesota	\$2,221,392
UCLA	\$2,145,523
Cal	\$2,072,374
Kansas	\$2,009,090

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These two charts demonstrate that a big and successful football program supported at a high level is a springboard for sponsoring more women's scholarships.

At Stanford, we believe that sponsoring big-time football creates a better

atmosphere for our women athletes, and that as an institution we appreciate the income and other benefits generated from big-time football. As an example, seven years ago we decided we needed to install a "synthetic surface" for our women's field hockey team. We raised approximately \$1 million to achieve this goal and about \$700,000.00 came from football-interested alumni who were persuaded that the football team would "occasionally" use the field for practice. The women's field hockey athletes were, in this case, direct beneficiaries of Stanford's support of big-time football. We have told our women's coaches and our men's Olympic coaches, that rather than seeing football as the enemy, they should support our football team whenever possible because success in football will provide more resources for everyone.

In conclusion, I enjoyed my service as Co-Chair of the Secretary's Commission on Opportunity in Athletics. It was a daunting challenge and I am especially pleased that our work culminated in the Secretary of Education's recent policy clarification (included within this publication) that reconfirmed the importance of enforcing Title IX, the appropriateness of the three areas of compliance, and the three-prong test to assess the meeting of interest and abilities. While this is clearly a step forward for the sports community, I hope that we will continue to debate the above mentioned public policy issues. Finding answers to these questions will only help us do a better job of providing equal quality opportunities for women and men.