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B. Glenn George, *Title IX and the Scholarship Dilemma*, 9 Marq. Sports L. J. 273 (1999)
Available at: <http://scholarship.law.marquette.edu/sportslaw/vol9/iss2/5>

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TITLE IX AND THE SCHOLARSHIP DILEMMA

B. GLENN GEORGE*

After more than twenty-five years of enforcement (or lack thereof), Title IX¹ has finally evolved into a second phase of interpretation. Although Title IX has had a dramatic impact on the opportunities for women in intercollegiate athletics, particularly in the last decade, most of the attention until recently was focused on participation numbers. That battle has largely been won, at least in the courts, if not on the field. More recent attention has now turned to a new issue—the equitable allocation of scholarship dollars. This second wave of Title IX enforcement is well on its way and has already altered the manner in which many institutions are counting and directing their scholarship budgets. The challenge for the 21st century will be to look ahead to the third wave of enforcement—one that reaches a new level of sophistication and maturity in the way in which we discuss and address Title IX's promise of gender equity.

This paper begins with a brief history of Title IX's enactment and early efforts of interpretation and application. I will then discuss the development of a new focus on scholarship dollars and the difficulties inherent in the way that issue is being addressed. This problem creates a potentially significant conflict between a university's obligations under Title IX not to discriminate and strict scholarship quotas imposed by the National Collegiate Athletic Association (NCAA).² Finally, this paper concludes with some questions and issues raised by both waves of Title IX enforcement that have implications for the future direction of Title IX and gender equity in intercollegiate athletics.

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1. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 (1988).

2. The NCAA is the national association of colleges and universities that establishes and enforces recruitment, participation, and competition rules for its members' intercollegiate athletic programs.

I. A BRIEF HISTORY OF TITLE IX

Others have written extensive and comprehensive histories of Title IX which need not be repeated here.³ However, some background is appropriate to put the current status of Title IX enforcement in context. Although over twenty-five years old, Title IX has only developed as a driving force in intercollegiate athletics during the last decade. Title IX's prohibition, included in the Education Amendments of 1972,⁴ states in straight-forward terms that no one "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."⁵ Some schools responded immediately, and there were significant early gains in the participation rates of women in intercollegiate athletic programs. Prior to Title IX, women accounted for only fifteen percent of intercollegiate student athletes; the participation rate for women doubled by 1984.⁶

The application of this prohibition to intercollegiate athletics, however, was not secured until 1988. Some early interpretations of the legislation had limited its application to the particular university programs actually receiving federal dollars.⁷ In 1984, the Supreme Court took the same position in the case of *Grove City College v. Bell*.⁸ Congress acted four years later to overturn the result in *Grove City College*. The Civil Rights Restoration Act of 1987 (1988 Amendments)⁹ amended Title IX to extend its prohibition against sex discrimination to the entire institution as long as a single program within the institution received federal funds. Thus, Title IX did not come into its own as a force in the world of intercollegiate athletics until little more than a decade ago.

In spite of Title IX's questionable application to intercollegiate athletics in its early days, the Secretary of the Department of Health, Education and Welfare moved ahead under statutory mandate to issue

3. See e.g., Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1 (1992); B. Glenn George, *Who Plays and Who Pays: Defining Equality in Intercollegiate Athletics*, 1995 WIS. L. REV. 647.

4. 20 U.S.C. §§ 1681-88.

5. *Id.* at § 1681(a).

6. See Heckman, *supra* note 3, at 33.

7. See e.g., *Hillsdale College v. Department of Health, Educ. & Welfare*, 696 F.2d 418 (6th Cir. 1982), *vacated*, 466 U.S. 901 (1984); *O'Connor v. Board of Educ.*, 645 F.2d 578 (7th Cir.), *cert. denied*, 454 U.S. 1084 (1981).

8. 465 U.S. 555 (1984).

9. 20 U.S.C. § 1687 (1988).

regulations governing college sports programs.¹⁰ Those regulations were issued in 1975 and, interestingly enough, included a section on the allocation of financial aid:

(1) To the extent that a recipient awards athletic scholarship or grants-in-aid, it must provide reasonable opportunities for such award for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 106.41.¹¹

Another section of the 1975 regulations defined the concept of “equal opportunity” in college sports programs by listing ten factors for consideration.¹² Four years later, the Secretary provided further enlightenment in the 1979 Policy Interpretation which focused exclusively on the application of Title IX to intercollegiate athletics.¹³ In 1980, enforcement authority was transferred to the newly created Department of Education and its Office for Civil Rights (OCR).¹⁴

A. *The First Wave: Proportionality in Participation Rates*

Soon after the application of Title IX to intercollegiate athletics was secured in 1988, frustrated women athletes and their advocates turned to the judicial system for relief. A wave of litigation in the early 1990s focused primarily on the issue of participation rates, disputes which were often prompted by the institution’s decisions to eliminate both men’s and women’s teams as part of general budget cuts.¹⁵ The question of participation opportunities understandably took precedent—issues like

10. See Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974). The Javits Amendment, adopted by Congress in 1974, required the Department of Health, Education and Welfare to issue regulations under Title IX concerning intercollegiate athletic activities.

11. 34 C.F.R. § 106.37(c) (1997).

12. See 34 C.F.R. § 106.41(c).

13. See Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX & Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979) [hereinafter “Policy Interpretation”].

14. The regulations were recodified at that time, see 45 Fed. Reg. 30,802, 30,962-63 (May 9, 1980) (establishing Title 34 of the C.F.R.).

15. See e.g., *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1993) (plaintiffs successfully challenged elimination of women’s field hockey and gymnastics teams); *Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992), *aff’d*, 991 F.2d 888 (1st Cir. 1993) (plaintiffs successfully challenged the elimination of women’s volleyball and gymnastics teams); *Roberts v. Colorado*

financial aid, equipment budgets, and practice facilities were irrelevant unless women's teams existed to enjoy those benefits.

OCR's definition of equity in participation rates, generally adopted by the courts, made most of these cases clear winners for the complaining women athletes. OCR's Policy Interpretation offered three avenues for demonstrating compliance in this area, yet only one option was available as a practical matter. In the 1975 regulations, the first factor in the consideration of equal opportunity was "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes."¹⁶ The 1979 Policy Interpretation elaborated on that requirement by establishing three possible measures:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
- (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.¹⁷

As a practical matter, the first option under the Policy Interpretation—the proportionality standard—became the only relevant issue.¹⁸ The expansion of women's teams in the 1970s was followed by the elimination of both men's and women's teams in the 1990s as budgets tightened.¹⁹ Thus, few schools could point to any recent history of expanding

State Bd. of Agric., 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993) (plaintiffs successfully challenged elimination of women's softball team at Colorado State University).

16. 34 C.F.R. § 106.41(c)(1) (1997).

17. Policy Interpretation, *supra* note 13, at 71,413.

18. *See generally* George, *supra* note 3, at 653.

19. The experience of Brown University (described more fully below in the litigation of *Cohen*, 809 F. Supp. 978) is a good example. The expansion of the women's program and the addition of new women's teams at Brown all occurred between 1971 and 1977 (with one exception). The program then remained stable until Brown decided, in 1991, to downsize both the men's and the women's programs by cutting two teams for each. *Id.* at 981. Consequently, when sued in 1992, Brown was unable to successfully point to a recent "continuing practice of

opportunities for women, as required by the second option. The very uncertainty of defining and measuring what it means to “effectively accommodate the interests of both sexes” in option three apparently caused most courts to avoid that standard altogether. By default, the only safe harbor became the proportionality standard. Consequently, school after school lost on (or chose not to dispute) the simple calculation of comparing the percentage of women in the student body to the percentage of women in the intercollegiate athletic program.²⁰

Cohen v. Brown University,²¹ perhaps one of the best known Title IX cases, is a good example. In 1991, Brown University decided to eliminate women’s volleyball and gymnastics, as well as men’s golf and water polo, in a belt-tightening move. The women sued and obtained a preliminary injunction to restore the women’s teams. The plaintiff’s proof was simple—both before and after the cuts, the number of female intercollegiate athletes at Brown University continued to lag behind the percentage of women in the general student body. After two appeals to the First Circuit²² and a denial of certiorari by the Supreme Court,²³ Brown University finally threw in the towel.²⁴ Brown University’s failure to convince the Supreme Court to reexamine the mechanical approach of the proportionality standard was understood by most as the loss of both the battle and the war.

Given the almost universal success of the proportionality standard, most institutions had a clear understanding of their participation obligations under Title IX and began moving toward compliance.²⁵ With par-

program expansion.” *Cohen*, 991 F.2d 888, 903. See also *Roberts v. Colorado State Univ.*, 814 F. Supp. 1507, 1514 (D. Colo.), *aff’d in part and rev’d in part sub nom. Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 510 U.S. 1004 (1993) (noting that no new women’s teams had been added since the 1970s).

20. See Diane Heckman, *The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992-93: Defining the “Equal Opportunity” Standard*, 1994 DET. C.L. REV. 953, 966-94.

21. 809 F. Supp. 978 (D.R.I. 1992).

22. 991 F.2d 888 (1st Cir. 1993) and 101 F.3d 155 (1st Cir. 1996).

23. 520 U.S. 1186 (1997).

24. See Jim Naughton, *Judge Approves Plan to Settle Lingering Claims in Title IX Suit Against Brown U.*, CHRON. DAILY NEWS, June 24, 1998 <<http://chronicle.com/daily/98/06/9806240Sn.shtml>>. The settlement included an agreement to maintain the percentage of women athletes within 2.25 points of the percentage of women undergraduate students, the elevation of water polo to varsity status, and guaranteed funds for three or four years for women’s fencing, skiing, and gymnastics. See *id.*

25. See Jim Naughton, *Tension Between Title IX and NCAA Rules is at Heart of Lawsuit*, CHRON. HIGHER EDUC., June 20, 1997, at A39. The May 1997 report of the NCAA Gender Equity committee found that the women constituted an average of 53% of the student body in Division I schools. See *id.* The percentage of women athletes in Division I, however, was only

ticipation opportunities secured, some began to look ahead to other areas of concern. The allocation of scholarships jumped to the forefront.

B. *The Second Wave: The Scholarship Dilemma*

Now that women athletes were playing, were they getting their fair share of scholarship dollars and financial aid? This issue was first addressed by regulations under Title IX in 1975, but has not been a significant focus of compliance or litigation. That was changed by the National Women's Law Center in June, 1997. In order to bring attention to the issue, the Center filed a complaint with the OCR against twenty-five institutions alleging Title IX violations based on a smaller proportion of financial aid going to women athletes.²⁶ Targeted schools included both large Division I programs, such as the University of Texas at El Paso and the University of Colorado at Boulder, and lesser known athletic programs, such as Bethune-Cookman, Coppin State, and Wofford College.²⁷

On the surface, the scholarship issue seems as straight-forward as the principle of proportionate participation. If you accept proportional participation, it seems a small step to suggest that the allocation of financial aid should also be proportional. Were colleges and universities free to assign those scholarship dollars within their discretion, the logic would be hard to refute. That allocation is significantly constrained, however, by NCAA rules, thus adding a new level of complexity to the problem.

To understand the difficulty, it is critical to understand the NCAA scholarship rules. First, the NCAA mandates a maximum number of scholarships permitted for each team, both men's and women's. In addition, some of these mandates are categorized as "head count" sports, while others are "equivalency" sports. In a head count sport, all athletes who receive a scholarship must be awarded a full scholarship. In

37%. See Jim Naughton, *NCAA Survey Says More Women Play Sports But Get Less Support*, CHRON. HIGHER EDUC., May 9, 1997, at A46.

26. See Jim Naughton, *Advocacy Group Charges 25 Colleges With Violating Title IX*, CHRON. HIGHER EDUC., June 13, 1997, at A39.

27. See *id.* Perhaps responding to the concerns highlighted by the National Women's Law Center in July 1998, OCR issued a "clarification" of its measures for compliance in this area. In its 1990 compliance manual, OCR had permitted the use of a statistical calculation that permitted a disparity as high as 3% to 5% based on "chance." The agency "clarification" has now limited that flexibility and requires that the disparity be no greater than 1%. See Jim Naughton, *Clarification of Title IX May Leave Many Colleges in Violation Over Aid to Athletes*, CHRON. HIGHER EDUC., July 31, 1998, at A34; Karla Haworth, *Statement on Sports Scholarships Frustrates and Confuses Colleges*, CHRON. HIGHER EDUC., Sept. 4, 1998, at A71 (including the full text of the July 23, 1998, letter from OCR's National Coordinator for Title IX Athletics explaining OCR's revised position).

equivalency sports, partial scholarships are permitted, so that a single "full scholarship" can be divided among two or more student athletes.²⁸

Head count sports for women include basketball (fifteen scholarships), gymnastics (twelve scholarships), volleyball (twelve scholarships), and tennis (eight scholarships), totaling forty-seven scholarships for all four sports.²⁹ Head count sports for men include only football (eighty-five scholarships) and basketball (thirteen scholarships), but those two sports alone account for ninety-eight available scholarships.³⁰ Scholarship limits in equivalency sports are generally set at relatively low levels. Soccer and field hockey, for example, permit twelve scholarships each.³¹ As a final element of the problem, the NCAA requires that in order to maintain its status as a Division I school, the school must compete in a minimum of six men's sports.

With the numbers laid out, the mathematical problem is apparent: How many women's teams must be created to offset the eighty-five scholarships permitted in football? A hypothetical Division I institution will serve to illustrate the problem.³² Assume the university offers the mandatory number of six men's programs, football, basketball, track, skiing, tennis, and golf. Eight women's sports are offered—basketball, gymnastics, volleyball, soccer, track, skiing, tennis, and golf. The institution's undergraduate student body is between 45-47% female. By offering two more women's sports than men's, the percentage of female athletes is 45%, thus achieving proportionate participation. If the school awards every scholarship dollar permitted by the NCAA in these sports, however, women will only be receiving 37% of the total financial aid available—well below their "proportional" share.

The problem, of course, is generally limited to large Division I programs that include football. Without the overwhelming number of football scholarships to counterbalance, participation and scholarship compliance would pose few problems. For the Division I schools for which football remains an integral part of their program, however, few solutions are readily available, or very satisfying.

28. See Naughton, *supra* note 26, at A39.

29. See Naughton, *supra* note 26, at A39.

30. See *id.*

31. See Naughton, *supra* note 26, at A39.

32. As anyone familiar with this area will quickly discern, my hypothetical is based roughly on the intercollegiate athletic program I know best—that of the University of Colorado. My remarks should not be interpreted, however, as expressing any opinion about the University's compliance with Title IX.

Perhaps the most obvious solution to this quandary is also the one prohibited by the NCAA. Although only twelve scholarships are awarded in soccer, for example, the team may have almost twice that number of players. Allowing the institution to increase the scholarship dollars to that team (and others, such as track, in a similar situation) would provide an immediate solution without the expense of adding new sports.

Adding more women's teams is another alternative, but a costly one. New sports, of course, cost far more than the scholarship allocations permitted. Coaches must be hired, practice and competition facilities may be needed, additional trainers and other support personnel must be added, equipment and uniforms must be purchased, and travel for competition must be provided. In the hypothetical suggested, for example, the addition of new women's teams would also increase the participation rate and, ironically, result in women participating at a rate in excess of their representation in the student body. (Would this permit the men to sue under Title IX claiming under-representation?)

According to a survey by The Chronicle of Higher Education, only four Division I-A schools in 1995-96 managed to continue football and still achieve proportionate participation and scholarship allocation.³³ Two of these institutions³⁴ had a female student body well below the national average. The other two institutions³⁵ supported very large programs with the total number of athletes significantly in excess of the NCAA average. (The overall results of the Chronicle's survey found that women constituted only 37% of all students competing in intercollegiate athletics and received 38% of the scholarship dollars.)³⁶

Others who have worked with the statistics suggest that both proportionate participation and financial aid can be accomplished by carefully controlling the number of male athletes. Assuming that an institution has a student body of 50%, one commentator has calculated that it is possible to have both a 50% participation rate and a 50% financial aid allocation by fielding the six required men's teams and fielding ten wo-

33. See Naughton, *supra* note 26, at A39.

34. See *id.* University of Utah and the Georgia Institute of Technology.

35. See *id.* The University of Washington's program included 664 athletes; Washington State University's program had 549. The average size of a Division I program in 1995-96 was 442 students. See *id.*

36. See Jim Naughton, *Survey Shows That Men's and Women's Teams Get Unequal Support*, CHRON. HIGHER EDUC., Apr. 11, 1997, at A39.

men's teams, while keeping the rosters for the men's team as low as possible.³⁷

In finding the right combination of sports, men, women, and dollars, institutions may be pushed towards looking for women's sports that provide the highest scholarship numbers and discouraging "extra" male participants who are willing to play without financial aid incentives. (Schools with a student population of more than 50% women will find this an even more difficult equation to satisfy, yet the national average for four year institutions is 53%).³⁸ Such manipulations seem to be taking us further and further from our initial goal of providing equitable athletic opportunities.

II. GENDER EQUITY AND TITLE IX IN THE 21ST CENTURY

The issues of OCR enforcement, proportional participation rates, and the scholarship dilemma raise at least two sets of broader concerns that should give us some pause. The first is the role, both past and future, of the NCAA. The second is our continuing reliance on mechanical solutions to complex and thorny problems.

A. *The Role of the NCAA*

The NCAA's early opposition to Title IX is well-documented, and the organization undoubtedly must be weary of being blamed in perpetuity for statements and acts which happened twenty or twenty-five years ago.³⁹ Nonetheless, even if those early opponents of Title IX have long since moved on, the NCAA's lack of leadership in this area is disappointing.⁴⁰

The NCAA has by no means ignored the issue of gender equity. There have been committees, studies, and reports,⁴¹ and Title IX issues are now a meaningful component of the NCAA's certification process and review. On the other hand, a large number of NCAA members remain out of compliance even with the well-established participation standards adopted by both the OCR and the courts. Yet, the NCAA has never made a serious effort to use its considerable enforcement powers

37. See Jim Naughton, *Focus of Title IX Debate Shifts From Teams to Scholarships*, CHRON. HIGHER EDUC., May 29, 1998, at A45.

38. See Naughton, *supra* note 26, at A39.

39. See George, *supra* note 3, at 660.

40. See *id.* at 660-61, 664-66; see also Darryl C. Wilson, *Title IX's Collegiate Sports Application Raises Serious Questions Regarding the Role of the NCAA*, 31 J. MARSHALL L. REV. 1303 (1998).

41. See George, *supra* note 3, at 660-61.

to make compliance with federal law a requirement for participating in sanctioned NCAA competition. Suspending a school's right to compete is the most serious sanction that can be imposed. It rarely happens and when it does, all eyes are turned on the institution in question. If the right to compete were on the line, I suspect that few schools would need a ten year plan to reach Title IX compliance.

Perhaps more could have been done by the NCAA to work proactively with the OCR to re-examine NCAA rules which impede Title IX compliance in tandem with the development of workable compliance standards. In response to the difficulties now presented by the scholarship dilemma, the NCAA Division I Financial Committee is considering a proposal to decrease the number of football scholarships (from eighty-five to seventy-five), while increasing the number of scholarships permitted for some women's sports.⁴² NCAA members might have been better served if such efforts had been underway long before the National Women's Law Center brought the issue to a head.

The NCAA's ability to maintain some distance from Title IX is now under direct review by the United States Supreme Court.⁴³ The litigation in question involves Renee Smith, a volleyball player who graduated from St. Bonaventure in only two and a half years. Ms. Smith later sought to continue her eligibility when she entered postgraduate programs at Hofstra and then the University of Pittsburgh. The NCAA permits graduate students to participate in intercollegiate athletics, but only if the student continues to play at the institution where he or she earned an undergraduate degree. The NCAA denied requests from both Hofstra and Pittsburgh for a waiver of this restriction. Ms. Smith sued to challenge the NCAA's action and, among other things, included an allegation of sex discrimination under Title IX.⁴⁴

The district court dismissed Ms. Smith's Title IX claim, but the Third Circuit Court of Appeals vacated that dismissal and remanded to permit the plaintiff an opportunity to amend her complaint on the Title IX claim. "Given the breadth of the language of the Title IX regulation defining recipient, we hold that allegations in Smith's proposed amended complaint, that the NCAA receives dues from its member which receive

42. See Naughton, *supra* note 37, at A45. The proposal includes an increase of ten scholarships for women's crew and increases of two scholarships each for women's field hockey, lacrosse, and track. See *id.*

43. Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998).

44. See *id.* at 183-84.

federal funds, if proven, would subject the NCAA to the requirement of Title IX."⁴⁵

Smith v. National Collegiate Athletic Association was recently argued before the Supreme Court, and the decision is pending.⁴⁶ Should the NCAA be subject to direct suit under Title IX, one can imagine other opportunities for encouraging even more aggressive Title IX compliance efforts.

B. *The Next Wave*

The second concern suggested by both the participation and scholarship issues is the re-examination of the mechanical standards that we have relied upon (willingly or unwillingly) to guide us through the first two "waves" of Title IX enforcement. The proportionate participation and allocation criteria as interpreted by the OCR and followed by the courts have several advantages. The rules are clear and unambiguous. Any institution (or fourth grader for that matter) can apply these criteria to determine its own compliance by examining readily available percentages of women in the student body, women as student athletes' gender, and athletic scholarship dollars awarded to each sex. In essence, the OCR is mandating a form of quotas.

There is much to be said for these bright line rules, especially when one goes about changing an entire culture. For most Division I schools with large sports programs, the mandate in the 1970s to significantly increase the investment in and attention paid to women's sports demanded a new attitude and a new approach. Given the overwhelming attention and money associated with football, women's sports were unlikely to achieve any real parity in the absence of some legal coercion. Recognizing the enormity of the task at hand, it is unclear whether a more flexible approach (subject to exemptions and exceptions) could have successfully achieved gender equality in an environment so dominated by men's sports.

On the other hand, such bright line approaches are not without costs. In some cases, we may be encouraging artificial results if a school develops a new women's team based not on the interests of the current or

45. *Id.* at 189.

46. See Welch Suggs, *Supreme Court Case May Have Major Impact on NCAA Support for Women's Sports*, CHRON. HIGHER EDUC., Jan. 15, 1999, at A42; Marcia Coyle, *Set To Spike At The High Court*, NAT'L. L. J., Jan. 25, 1999, at A6. [Editors Note: The Supreme Court rendered its decision on February 23, 1999. The court held that the "NCAA is not subject to the requirements of Title IX on ground it receives dues from its members which receive federal financial assistance." *Smith v. NCAA*, 119 S. Ct. 924 (1999).]

potential women students, but based on the number of participants and/or scholarships that sport will allow the school to add to the program. Similarly, one can imagine the school actively recruiting more marginal female student athletes, while discouraging or turning away similarly situated men. In general, the mechanical standards may eliminate much of the program's flexibility to design a program based more on the needs and the interests of the students. But past experience may leave us skeptical that the program would operate with such lofty motives in the absence of judicial mandates.

For the next wave of Title IX enforcement, part of our challenge should be to explore more thoughtful approaches and frameworks for finding solutions to a complex problem. Sports remains one of the few areas in our society where we continue to sanction gender-segregated programs. Applying the concept of "non-discrimination" in this context has not been an easy task, but our use of quotas and mechanical tests in the early stages should not prevent us from considering more sophisticated analyses in the future.

Two examples may illustrate the problem. On the more trivial side, women have long understood that the design of restroom facilities in any large arena requires something more than duplication in order to achieve equality. If the men's and women's restroom facilities are designed the same size with the same number of stalls, the men will have more readily available access than the women. Without belaboring the details, it is clear that "equality" in that instance requires that the women's restroom facility be larger.⁴⁷

On a more serious front, consider the use of mandatory busing as a tool for desegregating our public school systems.⁴⁸ At the time this remedy was imposed on some districts, it may reasonably have been considered a last resort for an intractable problem based on a much broader societal and cultural framework. While some may continue to believe that busing remains the only practical solution in some cases to achieve a constitutional right, others recognize that the problem is far too complex to be resolved with one simple solution. Our experience with affirmative action as a solution to discrimination in other areas creates similar concerns.

My intent here is not to enter the affirmative action debate or express a position on the wisdom of busing to achieve desegregation in the

47. See Taunya Lovell Banks, *Toilets as a Feminist Issue: A True Story*, 6 BERKELEY WOMEN'S L. J. 263 (1990-91) (discussing the concept of "potty parity").

48. See *Swann v. Charlotte-Mecklenburg Sch. Dist.*, 431 F.2d 135 (4th Cir. 1970).

public school system. Rather, my point is to suggest that quotas and mechanical tests may be an appropriate and even necessary starting point, but they are rarely a good stopping point in addressing an issue as difficult as the elimination of discrimination.⁴⁹

As we move into the 21st century, I hope we will continue to struggle to find a more thoughtful and refined balance between the interests of our men and women student athletes. Our challenge is to eliminate discrimination in intercollegiate athletics in the context of a society in which boys and girls continue to get very different messages in the sports arena. As in other areas of discrimination, an affirmative action response may be part of the solution, but concluding that this is the only and final solution is as good as admitting defeat.

49. Similarly, we may want to consider whether we would in fact wish on our women student athletes a mirror image of the men's programs. The way in which the men's athletic programs have been allowed to develop may not be the ideal we would design for student athletes of either gender.

