

# TITLE IX’S FIELD OF UNREALISTIC DREAMS: IF YOU BUILD IT, WILL THEY COME?

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In the wonderful, magical realism of the iconic baseball movie, *Field of Dreams*, Kevin Costner’s character, Ray Kinsella, hears the phrase, “If you build it, he will come,” as he walks in his Iowa fields.<sup>1</sup> The voice’s pronouncement was prophetic, and, when Ray builds a baseball diamond, Shoeless Joe Jackson and other long-dead baseball legends do come – they come to play baseball on his field.<sup>2</sup>

Authors R. Vivian Acosta and Linda Jean Carpenter also make use of this movie quote in one of their biennial reports on women in intercollegiate sport.<sup>3</sup> Regrettably, however, while Title IX has made strides in fulfilling its promise to female athletes to build them an equal playing field at the intercollegiate level, a better movie analogy is probably the 1992 movie, *A League of Their Own*, starring Tom Hanks, Geena Davis, Madonna, and Rosie O’Donnell.<sup>4</sup> The movie is based upon a team

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<sup>1</sup> FIELD OF DREAMS (Universal Pictures 1989). The movie is based upon the novel, *Shoeless Joe*, by Canadian novelist W.P. Kinsella. W.P. KINSELLA, SHOELESS JOE (First Mariner Books ed., 1999). Kinsella also authored the novel, *The Iowa Baseball Confederacy*, another lyrical ode to baseball written using magical realism to describe a 40-day, 2000- inning game in which an angel statue from a cemetery is one of the many players, and a U.S. president and Leonardo Da Vinci are among the attendees. W.P. KINSELLA, THE IOWA BASEBALL CONFEDERACY (First Mariner Books ed., 1986).

<sup>2</sup> FIELD OF DREAMS, *supra* note 1.

<sup>3</sup> R. VIVIAN ACOSTA & LINDA JEAN CARPENTER, WOMEN IN INTERCOLLEGIATE SPORT: A LONGITUDINAL, NATIONAL STUDY THIRTY-SEVEN YEAR UPDATE 1, 3 (2014),

<http://www.acostacarpenter.org/2014%20Status%20of%20Women%20in%20Intercollegiate%20Sport%20-37%20Year%20Update%20-%201977-2014%20.pdf>.

<sup>4</sup> A LEAGUE OF THEIR OWN (Columbia Pictures 1992).

of athletes from the All-American Girls Professional Baseball League (“AAGPBL”), a women’s professional baseball league founded in 1943 by Philip K. Wrigley and several other major league baseball executives when professional male players were fighting in World War II.<sup>5</sup>

Like the real players in the AAGPBL, the players in the movie constantly worry about their futures, particularly when the war ends and the male athletes return home.<sup>6</sup> This concern is not a Hollywood construct. During the course of its existence, attendance at AAGPBL games at times was strong, attracting as many as 10,000 people at one memorable Fourth of July double-header in 1946.<sup>7</sup> Attendance peaked during the 1948 season when ten teams attracted 910,000 paying fans.<sup>8</sup> However, as more and more time passed after the end of World War II, attendance and revenue declined, and the league eventually disbanded in 1954.<sup>9</sup>

Except for a few very rare cases, this is the reality of women’s sports, and, while Title IX can do many things, it apparently has yet to change public opinion and preference. Title IX seemingly has not yet had a significant impact on spectatorship and revenue for women’s sports, and, in this essay, I want to explore the relationship between attendance at women’s sporting events, revenues at a collegiate level, and how these factors might impact the motivation of women to participate in sports or to become professional athletes.

## I. DATA

The first question is whether an imbalance exists between attendance and/or spectatorship at male versus female sporting events. To that question, let me first respond by sharing a brief review of some of the reported data documenting a large disparity between male and female fan participation in sports.

In the United States, for example, studies indicate that “men spend roughly twice as much time watching televised sports, discussing

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<sup>5</sup> *League History*, THE OFFICIAL WEBSITE OF THE ALL-AMERICAN GIRLS PROFESSIONAL BASEBALL LEAGUE PLAYERS ASSOCIATION, <https://www.aagpbl.org/index.cfm/pages/league/12/league-history> (last visited Sept. 15, 2017).

<sup>6</sup> A LEAGUE OF THEIR OWN, *supra* note 4.

<sup>7</sup> *League History*, *supra* note 5.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* See generally SUE MACY, A WHOLE NEW BALL GAME: THE STORY OF THE ALL-AMERICAN GIRLS PROFESSIONAL BASEBALL LEAGUE 91 (Henry Holt & Co., ed., 1st ed. 1993).

sports, and seeking sports-related information” than do women.<sup>10</sup> This difference is also present internationally. In one multi-country study, men were approximately three times more likely than women to indicate that they watch sports on television, and this gender difference was statistically significant in 34 of 37 countries.<sup>11</sup> While one might think that some of this difference may reflect the fact that a greater number of sporting events feature men, that factor does not appear to impact the spectator data.<sup>12</sup>

Further, fans of both sexes appear to prefer watching men play sports. For example, the attendance and TV viewership of the Women’s National Basketball Association (WNBA) is only a small fraction of that of the National Basketball Association (NBA). In 2015, average WNBA attendance was 7,318 per game over a 10-game season, with a television viewership on ESPN’s networks of approximately 200,000.<sup>13</sup> The NBA’s regular 40-game season attendance was 17,864 per game,<sup>14</sup> and it averaged 1,652,000 television viewers.<sup>15</sup>

In fact, except for extraordinary circumstances, such as the success of the women’s soccer league after the 2015 Women’s World Cup,<sup>16</sup> or those that occurred in World War II with the AAGPBL, attempts to sustain women’s professional play in other sports have not yet been successful in attracting audiences comparable to men’s professional sports. Promoters of women’s sports hoped that Title IX would help turn women and girls into sports’ fans as well as into athletes, but ESPN reports that the balance of its audience has remained fairly constant for more than a decade at three men for every woman.<sup>17</sup>

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<sup>10</sup> Robert O. Deaner, Shea M. Balish & Michael P. Lombardo, *Sex Differences in Sports Interest and Motivation: An Evolutionary Perspective*, 10 *EVOLUTIONARY BEHAV. SCI.* 73, 76 (2016) (Internal citations omitted).

<sup>11</sup> *Id.* at 76.

<sup>12</sup> *Id.* at 75–77.

<sup>13</sup> Richard Sandomir, *After Two Decades, W.N.B.A. Still Struggling for Relevance*, *N.Y. TIMES* (May 28, 2016), <https://www.nytimes.com/2016/05/28/sports/basketball/after-two-decades-wnba-still-struggling-for-relevance.html>. Of course, men’s sports have had a longer history and more time to grow in popularity, and the WNBA is quick to point out that its 2015 attendance figures exceeded the NBA’s numbers at the same point in their developments. *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Press Release, Gianina Thompson, ABC’s and ESPN’s Viewership and Ratings Up for 2015-16 NBA Regular-Season, (Apr. 15, 2016), <http://espnmediazone.com/us/press-releases/2016/04/abcs-and-espns-viewership-and-ratings-up-for-nba-regular-season/>.

<sup>16</sup> *See infra* Section III.

<sup>17</sup> *Cf.* Cheryl Cooky, Michael A. Messner & Michela Musto, “It’s Dude Time!”: *A Quarter Century of Excluding Women’s Sports in Televised News and Highlight Shows*, 3 *COMM. & SPORT* 261, 262 (2015).

There are, of course, cases where women's team sports do attract large audiences, like the University of Tennessee Lady Vols' events or the 2015 Women's World Cup.<sup>18</sup> The U.S. Women's Soccer National team's win over Japan in the 2015 Women's World Cup final drew a television audience in the United States of 26.7 million viewers, making it the most-viewed soccer game in the history of American television and topping the 26.5 million who watched the men's 2014 World Cup final between Germany and Argentina.<sup>19</sup> It even exceeded the 23.3 million viewers who watched the deciding Game 6 of the NBA Finals that year and the 23.5 million who viewed Game 7 of the 2014 World Series.<sup>20</sup> The women's audience eclipsed that of the men's highest ever viewing audience of 18.22 million for its match with Portugal in the men's 2014 World Cup.<sup>21</sup>

But even these examples suffer by comparison when considering overall sports media coverage. As one reporter noted, "[o]ne day after the United States [women's soccer team] advanced to the quarterfinals, a man caught a foul ball at Wrigley Field while bottle-feeding his infant son. The catch appeared on constant replay, receiving more postgame coverage across a broader range of media outlets than the US women's team."<sup>22</sup>

Even locating relevant statistics is difficult: data curation on women's sports is almost impossible.<sup>23</sup> Aside from a few sports like tennis, gymnastics, figure skating, college and professional basketball, and golf, data for women's athletics are often disregarded.

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<sup>18</sup> See Jonathan Hayward, *US-Japan was the Most-Watched Soccer Game in American TV History*, BOSTON GLOBE (July 6, 2015), [https://www.bostonglobe.com/sports/2015/07/06/united-states-win-over-japan-most-watched-soccer-game-ever/9lQ2yFUcl5cfw2rjzAOAJP/story.html?p1=Article\\_Related\\_Box\\_Article](https://www.bostonglobe.com/sports/2015/07/06/united-states-win-over-japan-most-watched-soccer-game-ever/9lQ2yFUcl5cfw2rjzAOAJP/story.html?p1=Article_Related_Box_Article).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Matt Bonesteel, *Women's World Cup Final Draws Huge TV Rating*, WASH. POST (July 6, 2015), [https://www.washingtonpost.com/news/early-lead/wp/2015/07/06/womens-world-cup-final-draws-huge-tv-rating/?utm\\_term=.6596b2cc1234](https://www.washingtonpost.com/news/early-lead/wp/2015/07/06/womens-world-cup-final-draws-huge-tv-rating/?utm_term=.6596b2cc1234).

<sup>22</sup> Shira Springer, *Women's Cup Winners Paid \$2m, Far Below Men's \$35m*, BOSTON GLOBE, July 7, 2015, <https://www.bostonglobe.com/sports/2015/07/06/despite-world-cup-glory-respect-and-equality-elusive/bYoBI8PAqn6O3WtgOZcPAK/story.html>.

<sup>23</sup> Terrance F. Ross, *What Gender Inequality Looks Like in Collegiate Sports*, THE ATLANTIC (Mar. 18, 2015), <https://www.theatlantic.com/education/archive/2015/03/what-gender-inequality-looks-like-in-collegiate-sports/387985/>. Ironically, this article attributes a quote to a male sportswriter that a female colleague actually wrote. *Id.*

“[U]nfortunately, the beauty and breadth of sports data don’t yet extend to women.”<sup>24</sup>

## II. CAUSES

What, then, is the answer to the question, “What do you think has hindered the popularity of female-dominated sports?” Numerous explanations exist for this disparity, deriving from as varied a range of sources as there are sporting events.

While this author does not subscribe to this theory in any way, some point to a perception that men’s sports are more exciting; men generally are bigger, stronger, and faster.<sup>25</sup> This perception is buttressed by the promulgation of different rules for men and women in the same sport, i.e., the WBNA plays with basketballs that are smaller than those in the NBA;<sup>26</sup> tee boxes scoring and placement for men and women;<sup>27</sup> women fast-pitch with underhand throws,<sup>28</sup> underhanded layups, etc.<sup>29</sup>

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<sup>24</sup> Allison McCann, *Hey, Nate: There Is No ‘Rich Data’ In Women’s Sports*, FIVETHIRTYEIGHT (Feb. 26, 2015), <https://fivethirtyeight.com/datalab/hey-nate-there-is-no-rich-data-in-womens-sports/>.

<sup>25</sup> “‘There’s still this cultural investment in the idea that sport is this space wherein talent and hard work is what matters, and things like race, gender and sexual orientation don’t,’ [Professor Cheryl] Cooky says. The thinking goes that if women’s sports were worthy of more coverage, they would receive it. But as Cooky points out, a lot of our perceptions of how interesting women’s sports are come from the media itself. ‘Men’s sports are going to seem more exciting,’ she says. ‘They have higher production values, higher-quality coverage, and higher-quality commentary . . . [t]he media plays a huge role in building and sustaining audiences for sport and they do it very well for men’s sports and they do it horribly for women’s sports.’” Maggie Mertens, *Women’s Soccer Is a Feminist Issue*, THE ATLANTIC (June 5, 2015), <https://www.theatlantic.com/entertainment/archive/2015/06/womens-soccer-is-a-feminist-issue/394865/>. Cf. Chris Bodenner, *Why Aren’t Women’s Sports as Big as Men’s? Your Thoughts*, THE ATLANTIC (June 9, 2015), <https://www.theatlantic.com/entertainment/archive/2015/06/women-and-sports-world-cup-soccer/395231/>.

<sup>26</sup> SARA L. CRAWLEY, LARA J. FOLEY & CONSTANCE L. SHEHAN, *GENDERING BODIES* 126–27 (Judith A Howard et al. eds., 2008).

<sup>27</sup> See *USGA Handicap Manual, Players Competing from Different Tees or Men & Women from Same Tees* § 3-5, <http://www.usga.org/Handicapping/handicap-manual.html#rule-14373> (last visited Sept. 15, 2017).

<sup>28</sup> See, e.g., *The Difference between Baseball & Softball*, ISPORT (Sept. 14, 2017, 9:53 PM), <http://softball.isport.com/softball-guides/the-difference-between-baseball-softball>.

<sup>29</sup> See John Tierney, *Ideas & Trends; Why Don’t Women Watch Women’s Sports?*, N.Y. TIMES (June 15, 2003), <http://www.nytimes.com/2003/06/15/weekinreview/ideas-trends-why-don-t-women-watch-women-s-sports.html>.

Scholars from many disciplines have explored sex differences in sport involvement, including gender studies, health and kinesiology, psychology, etc. One interesting study approached the issue from what the authors described as an “evolutionary perspective” and testing what some might interpret as several provocative hypotheses.<sup>30</sup> After synthesizing the relevant theoretical and empirical work, the authors concluded that females’ underrepresentation in sport — both as participants and spectators — generally reflects their lesser sports interest, not merely fewer opportunities for involvement.<sup>31</sup>

In this article, the authors highlighted studies reporting that, in all societies with data, from hunters and gatherers to large contemporary societies, males participate in sports at least twice as much as females in terms of frequency or duration.<sup>32</sup> The authors contend that their analyses confirm: (1) that prenatal hormones “clearly contribute” to the sex difference in sports interest;<sup>33</sup> (2) that the courtship display hypothesis substantially explains the sports interest of females, particularly their interest in participating, by predicting that women will closely watch male sports to judge a man’s suitability as a mate based on his performance;<sup>34</sup> and (3) that spectator lek hypothesis is important to understanding male sports interest.<sup>35</sup> The spectator lek hypothesis holds that sports constitute physical competitions for status and provide an opportunity to, in an evolutionary sense, evaluate potential competitors and allies in warfare.<sup>36</sup> As I mentioned, it is an interesting piece of scholarship, but one to which very few other scholars have cited and with premises that do not appear to have been widely embraced.<sup>37</sup>

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<sup>30</sup> Deaner, et al., *supra* note 10, at 74.

<sup>31</sup> *Id.* at 74–76, 88–89.

<sup>32</sup> *Id.* at 75.

<sup>33</sup> *Id.* at 74.

<sup>34</sup> *Id.* at 80.

<sup>35</sup> *Id.* at 74, 82–86.

<sup>36</sup> *Id.* at 82. See also Menelaos Apostolou & Rafael Lambrianou, *What Motivates People to Do and Watch Sports? Exploring the Effect of Sex, Age, Partner Status, and Parenthood*, 3 *EVOLUTIONARY PSYCHOL. SCI.* 20, 23 (2017).

<sup>37</sup> Not surprisingly, Deaner and his co-authors evaluate and criticize several non-evolutionary research approaches, such as socialization. See Deaner, et al., *supra* note 10, at 89. They do not, however, apply the same level of critique to studies that do not strongly support their hypotheses, e.g., noting in a small footnote that the evidence supporting a role for prenatal hormones is also correlational, while protesting that, unlike the case for socialization practices, the experimental manipulation of prenatal hormones in humans is unethical. *Id.* at 89 n.1. One might ask why it would not be equally experimentally manipulative if a study intentionally altered, for research purposes, the routines and activities of cohort groups of children, and thereby potentially impacting their possible futures?

## III. CONSEQUENCES

The next question is what impact the spectator data has on women's sports. The obvious answer is the apparently significant consequences for revenue and salaries, the data on which are skewed similarly to that on spectatorship.

Consider first the WNBA. More than 50% of the teams in the WNBA are in the red, and the league's \$25 million payment from its primary broadcaster is only a "tiny fraction of the N.B.A.'s average \$930 million payment from ESPN and TNT."<sup>38</sup> While the WNBA does not disclose individual player contract or salary data, reports indicate that, based upon the league's 12-team/12-player roster, the minimum salary was approximately \$40,000. The maximum salary (for players who have played at least six seasons) is \$105,000, and the average salary is estimated to be approximately \$72,000.<sup>39</sup> The WNBA rookie placing first in the draft earns an average of a little over \$49,000 in her first year of play.<sup>40</sup> Based on these data, the league's total wages approximated \$11,555,000.<sup>41</sup>

To put those numbers in perspective, Kobe Bryant's base salary in 2015 was \$25 million,<sup>42</sup> over two times as much as the entire WNBA.<sup>43</sup> For NBA players in the 2015-16 season, the minimum salary was \$525,093.<sup>44</sup> The maximum salaries ranged from \$16,407-\$22,970 million,<sup>45</sup> depending upon years of service, and the team cap is approximately \$67 million.<sup>46</sup> A first pick draft rookie earns over \$4.5 million.<sup>47</sup>

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<sup>38</sup> Sandomir, *supra* note 13.

<sup>39</sup> See Elizabeth Rockett, *Salary Disparities for Women in Sports* (July 29, 2015), <https://www.slideshare.net/ElizabethRockett/salary-disparities-for-women-in-sports>.

<sup>40</sup> *Id.*

<sup>41</sup> See David Berri, *Basketball's Gender Wage Gap Is Even Worse Than You Think*, VICE SPORTS (Aug. 12, 2015), [https://sports.vice.com/en\\_us/article/wn3mmy/basketballs-gender-wage-gap-is-even-worse-than-you-think](https://sports.vice.com/en_us/article/wn3mmy/basketballs-gender-wage-gap-is-even-worse-than-you-think).

<sup>42</sup> *NBA Player Salaries - 2015-2016*, ESPN (Sept. 14, 2017, 10:59 PM), [http://www.espn.com/nba/salaries/\\_/year/2016](http://www.espn.com/nba/salaries/_/year/2016).

<sup>43</sup> *Id.*

<sup>44</sup> Chris Bernucca, *Salary Cap at \$70 Million, Tax Threshold at \$84.7 Million*, SHERIDANHOOPS.COM (July 8, 2015), <http://www.sheridanhoops.com/2015/07/08/salary-cap-at-70-million-tax-threshold-at-84-7-million/>.

<sup>45</sup> *Id.*

<sup>46</sup> Ken Berger, *Sources: Salary Cap Could Be \$2 Million Higher Than Projected*, CBSSPORTS.COM (Jun 30, 2015), <http://www.cbssports.com/nba/news/sources-salary-cap-could-be-2-million-higher-than-projected/>.

<sup>47</sup> Rockett, *supra* note 39, at 12.

One reporter has called the WNBA out for paying its players such a low percentage of its revenue, calculating that the WNBA is only paying its players about 33% of league revenue—a far lower number than the NBA's contractual 50%.<sup>48</sup> He derived this figure based upon the WNBA's estimated revenue and its average salary data.<sup>49</sup> The reporter projected that the WNBA's average salary would increase to \$114,249 if it paid players 50% of its revenues; that figure was more than the league maximum at the time of the report.<sup>50</sup>

Revenue data from the NCAA offer a similar revenue picture. At the median, the proportion of total revenues for NCAA member schools produced by gender is approximately 67.8% for men's teams and 32.2% for women's teams.<sup>51</sup> One financial outlet reported that, while women's basketball generates more revenue than any other college-level female sport, every major women's college basketball program spends more than they take in.<sup>52</sup> The report mentioned Auburn specifically, reporting that salaries and benefits for all women's basketball coaches totaled \$1.1 million in 2010 when the program's entire operating revenue was just \$64,000.<sup>53</sup> For that year, the program posted a \$3 million total loss.<sup>54</sup>

Title IX, has resulted in several unintended, and unwelcome, consequences for women, one of which is the coaching issue that Professor Erin E. Buzuvis discussed at the University of Tennessee's College of Law's *Title IX: History, Legacy, and Controversy* conference, the subject of, inter alia, this symposium edition. There are fewer women coaching women's teams now than prior to the passage of Title IX.<sup>55</sup> One commentator suggests that this difference appears to be one of opportunity:

Sixty percent of women's Division I head coaches [in 2015] were men, while only 3 percent of all men's coaches were women . . . . [T]he

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<sup>48</sup> See Berri, *supra* note 41.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> NICOLE M. BRACKEN & ERIN IRICK, 2004-2010 NCAA GENDER EQUITY REPORT, NAT'L COLL. ATHLETIC ASS'N 10 (2011) (NCAA Gender Equity Report).

<sup>52</sup> Dashiell Bennett, *There Isn't a Single Women's College Basketball Program That Makes Money*, BUSINESS INSIDER (Apr. 5, 2011), <http://www.businessinsider.com/womens-college-basketball-lose-money-2011-4>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> MC Barrett, *There are Fewer Women Coaches in College Basketball Now Than There Were a Decade Ago*, FIVETHIRTYEIGHT (Jan. 19, 2016), <https://fivethirtyeight.com/features/there-are-fewer-women-coaches-in-college-basketball-now-than-there-were-a-decade-ago/>.

percentage of women in authority positions continues to fall the higher you move within an athletic department. Across all of Division I athletics last school year — men's, women's and coed sports alike — 37 percent of assistant coaches, 35 percent of head coaches, and just 9 percent of athletic directors were women. That figure is up from just 7 percent in 1995-96, but has remained around 9 percent over the last five seasons.<sup>56</sup>

The coaching situation is even more unbalanced at the professional level.<sup>57</sup> There appear to be only a handful of female coaches and referees that are working in male professional sports. For example, the San Antonio Spurs hired six-time WNBA All-Star Becky Hammon as an assistant coach in 2015; she also is the first woman to coach the NBA All-Star Game.<sup>58</sup> As the first female head coach of an NBA Summer League team, Hammon led the Spurs to the 2015 Las Vegas Summer League title.<sup>59</sup> Nancy Lieberman, one of the best players in the history of women's basketball, is an assistant coach for the Sacramento Kings.<sup>60</sup> Kathryn Smith of the NFL's Buffalo Bills was the first full-time female member of an NFL coaching staff.<sup>61</sup> Her appointment was short-lived, however: she was not retained by the team's new head coach Sean

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<sup>56</sup> *Id.*

<sup>57</sup> Professional opportunities for women referees are equally slim. Violet Palmer and Dee Kantner were hired as NBA officials in 1997 and added Lauren Holtkamp in 2014: the NFL did not hire its first female official, Sarah Thomas, until 2015. *NFL's First Woman Ref, Assistant Coach Meet Before Game*, FOX SPORTS (Aug. 15, 2015, 10:47 PM), <http://www.foxsports.com/nfl/story/chiefs-cardinals-nfl-first-woman-referee-assistant-coach-meet-081515>.

<sup>58</sup> *Becky Hammon Will Be First Woman to Serve on All-Star Coaching Staff*, SPORTS ILLUSTRATED (Jan. 29, 2016), <https://www.si.com/nba/2016/01/29/becky-hammon-all-star-game-first-female-coach>. Sources note that Lisa Boyer served on John Lucas' staff in Cleveland in 2001-02. Chuck Schilken, *WNBA Star Becky Hammon to Join San Antonio Spurs Coaching Staff*, L.A. TIMES (Aug. 5, 2014), <http://www.latimes.com/sports/sportsnow/la-sp-sn-becky-hammon-san-antonio-spurs-20140805-story.html>.

<sup>59</sup> *Id.*

<sup>60</sup> Sam Amick, *Kings to Hire Nancy Lieberman as Second Female NBA Assistant Coach*, USA TODAY SPORTS (July 31, 2015), <https://www.usatoday.com/story/sports/nba/kings/2015/07/31/nancy-lieberman-second-female-assistant-coach-sacramento-kings/30922651/>. Lieberman also was the head coach of the Dallas Mavericks' D-League team, the Texas Legends, marking the first time a woman had coached a men's team in the NBA. *Id.*

<sup>61</sup> Mike Rodak, *Bills Will Not Keep NFL's First Female Full-Time Coach, Kathryn Smith*, ESPN (Feb. 1, 2017), [http://www.espn.com/nfl/story/\\_/id/18592587/buffalo-bills-not-retain-assistant-coach-kathryn-smith](http://www.espn.com/nfl/story/_/id/18592587/buffalo-bills-not-retain-assistant-coach-kathryn-smith).

McDermott for the 2017 season.<sup>62</sup> Yet, looking at the women's sport side, seven of the twelve WNBA head coaches are male.<sup>63</sup>

Another interesting Title IX complication is a very controversial NBA-eligibility policy that reveals what some believe to be a strong bias toward men. The NBA's 2017 Collective Bargaining Agreement ("NBA CBA") requires, *inter alia*, that: "The player (A) is or will be at least nineteen (19) years of age during the calendar year in which the Draft is held, and . . . at least one (1) NBA Season has elapsed since the player's graduation from high school (or, if the player did not graduate from high school, since the graduation of the class with which the player would have graduated had he graduated from high school)."<sup>64</sup> Prior to the rule, basketball athletes could forgo college and head straight for the NBA after high school.<sup>65</sup> While many argue that athletes should complete their college degrees, serious athletes often get very little academically out of their college experience; coaches and administrators are likely more concerned about their athletic performance.<sup>66</sup>

Indeed, even the minimal requirements in the existing rule have been heavily criticized on antitrust grounds among others,<sup>67</sup> and, more

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<sup>62</sup> *Id.* Jen Welter worked as a temporary inside linebackers' coach for the Arizona Cardinals. She also became the first female to play a non-kicking position in a men's professional football league when she played running back and special teams for the Texas Revolution of the Champions Indoor Football League. Josh Weinfuss, *Jen Welter Hired by Cardinals; Believed to be First Female Coach in NFL*, ESPN (Jul 28, 2015), [http://www.espn.com/nfl/story/\\_/id/13328608/jen-welter-hired-arizona-cardinals-assistant-coach](http://www.espn.com/nfl/story/_/id/13328608/jen-welter-hired-arizona-cardinals-assistant-coach).

<sup>63</sup> See *Coaches*, WNBA.COM, <http://www.wnba.com/coaches/> (last visited September 15, 2017).

<sup>64</sup> 2017 NAT'L BASKETBALL ASS'N COLLECTIVE BARGAINING AGREEMENT art. X(1)(b)(i) (Jan. 19, 2017) ("NBA CBA"), available at <https://nbpa.com/cba/>.

<sup>65</sup> Marc Edelman & Joseph A. Wacker, *Collectively Bargained Age/Education Requirements: A Source of Antitrust Risk for Sports Club-Owners or Labor Risk for Players Unions?*, 115 PENN ST. L. REV. 341, 355 (2010).

<sup>66</sup> See Brian L. Porto, *Completing the Revolution: Title IX as Catalyst for an Alternative Model of College Sports*, 8 SETON HALL J. SPORTS L. 351, 389–93 (1998).

<sup>67</sup> See, e.g., Edelman & Wacker, *supra* note 65, at 19. See also Michael A. McCann & Joseph S. Rosen, *Law, Technology and the Arts Symposium: Sports and Eligibility--Who is Eligible to Play?: Legality of Age Restrictions in the NBA and the NFL*, 56 CASE W. RES. L. REV. 731 (2006); Brian Shaffer, Comment, *The NBA's Age Requirement Shoots and Misses: How the Non-Statutory Exemption Produces Inequitable Results for High School Basketball*, 48 SANTA CLARA L. REV. 681 (2008) (No mention at all of WNBA!).

practically, for preventing athletes from an extra year of professional earnings and for increasing the potential of career-ending injuries.<sup>68</sup>

Contrast that with the age-eligibility rule for the WNBA, which is endorsed by the NBA and is far more stringent. Art. XIII(1)(b) of the WNBA's Collective Bargaining Agreement (WNBA CBA) requires players to be at least 22; to have completed, or to renounce, their college eligibility; and to have graduated, or to be within 3-months of graduating, from a four-year college or to be four years removed from high school.<sup>69</sup>

While the University of Tennessee's legendary women's basketball coach Pat Summitt was incredibly proud of the 100% graduation rate of all of the Lady Vols who finished their NCAA eligibility under her direction,<sup>70</sup> one must consider that, compared to the prospect of a professional career, female players are required to wait three years longer than their male colleagues before they are eligible to play in the WNBA. As one commenter noted:

The main reasons why there is so much resistance from college players regarding an Age/Education Policy are the increased possibility of getting injured while playing in college . . . and the loss of possible future earnings upon entering the draft and the league. These two motivating factors are the same for male and female college athletes[.]<sup>71</sup>

WNBA player statistics reflect the differing standard. Over 90% of WNBA players have earned a bachelor's degree from a four-year institution, and 20% have earned graduate degrees.<sup>72</sup> No other major professional sport can claim these kind of player education credentials: scholars Marc Edelman and C. Keith Harrison found that the WNBA age/education policy is the only policy in any established professional

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<sup>68</sup> See Jessica L. Hendrick, Comment, *The Waiting Game: Examining Labor Law and Reasons Why the WNBA Needs to Change its Age/Education Policy*, 27 MARQ. SPORTS L. REV. 521, 526 (2017).

<sup>69</sup> 2014 WOMEN'S NAT'L BASKETBALL ASS'N COLLECTIVE BARGAINING AGREEMENT art. XIII(b) (Mar. 2014) (WNBA CBA).

<sup>70</sup> Becca Stanek, *Every Single One of Pat Summitt's Lady Vols Graduated*, THE WEEK (June 28, 2016), <http://theweek.com/speedreads/632844/every-single-pat-summitts-lady-vols-graduated>.

<sup>71</sup> Hendrick, *supra* note 68, at 526.

<sup>72</sup> Marc Edelman & C. Keith Harrison, *Analyzing the WNBA's Mandatory Age/Education Policy from a Legal, Cultural, and Ethical Perspective: Women, Men, and the Professional Sports Landscape*, 3 NW. J. L. & SOC. POL'Y. 1, 4 (2008).

sports league that precludes a potential class of players from entrance until their expected dates of college graduation.<sup>73</sup>

From a salary perspective, one scholar remarked upon the potential loss that the WNBA policy may impose upon a talented player:

The average WNBA career spans only three-and-a-half seasons, most players are out of the league by age thirty, and only the rare, extraordinary player lasts beyond age thirty-five . . . . So the three-year prohibition that a WNBA aspirant endures while her age-mate males play in the NBA amounts to three years of lost income, a three year delay in the potential doubling of salary available to fifth year veterans, and the associated time value of money benefits, but it also likely means -- all other things being equal -- three fewer years to make money as a WNBA player.<sup>74</sup>

Paternalism aside, there are many women with advanced degrees who would be thrilled with even the minimum \$40,000 salary.

The reasons cited for the WNBA's rule include encouraging the perception of WNBA players as role models, both scholarly and athletic, and preparing WNBA players for post-basketball careers.<sup>75</sup> Many however, view these justifications as paternalistic,<sup>76</sup> implicating questions about individual choice. Arguments that it is more important for WNBA players to have post-WNBA employment prospects due to their substantially lower salaries vis-a-vis their male counterparts<sup>77</sup> seem to me only to emphasize the salary disparities and the inequity of the comparative age/education rules. Is the claim really that female players are less able to cope than their male counterparts after retiring from the professional ranks? Further, the rule denies young women three years' salary, an "outcome [that] . . . defeats the . . . purpose behind the age/education policy...to ensure players' independence and empowerment."<sup>78</sup>

As to the role model rationale, well, this author does not really know how to respond to such a claim. Of course, female athletes should be

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<sup>73</sup> *Id.* at 2.

<sup>74</sup> N. Jeremi Duru, *Hoop Dreams Deferred: The WNBA, the NBA, and the Long-Standing Gender Inequity at the Game's Highest Level*, 2015 UTAH L. REV. 559, 582–83 (2015) (citations omitted).

<sup>75</sup> *Cf.* Edelman & Harrison, *supra* note 72, at 24–26.

<sup>76</sup> *See* Duru, *supra* note 74, at 585–88. *Cf.* Edelman & Harrison, *supra* note 71, at 26.

<sup>77</sup> Edelman & Harrison, *supra* note 72, at 25.

<sup>78</sup> *Id.* at 27.

enormously proud of academic achievement, but they should not be required to meet a different standard than their male peers. This double standard perpetuates the stereotypical, and somewhat outdated, view of woman as “philanthropic creatures (i.e. caring, passive, and non-aggressive).”<sup>79</sup>

It does not appear that the WNBA age/education policy has been tested in court.<sup>80</sup> However, if it were to be challenged, some have opined that it might be found not only to violate Title VII’s anti-discrimination prohibitions, but also Section 1 of the Sherman Act as an illegal group boycott.<sup>81</sup> In 1998, Chamique Holdsclaw, who helped lead the Tennessee Lady Vols to three national championships, considered challenging the rule, but she decided to return to Tennessee for her senior season.<sup>82</sup>

Nor do Chamique’s colleagues in the WNBA have an appetite for a legal challenge. Perhaps they feel fortunate just to have the opportunity to play professionally given that women who do make it to the WNBA or who play in other professional sports leagues such as the NWSL find that they number far fewer than their professional male counterparts. Data collected in 2015-2016 by the NCAA indicate that, while more than 480,000 men and women compete as NCAA athletes, very few within each sport advance to compete at the professional or Olympic level.<sup>83</sup> However, male rates are higher: 19.1% of NCAA eligible men’s basketball players moved to the pro level,<sup>84</sup> and there were 449 players on the NBA’s 2016-17 opening-day roster.<sup>85</sup> The NCAA-to-pro figure for women was only 4.9%,<sup>86</sup> and there were less than 145 players in the league.<sup>87</sup>

Women’s soccer may be an anomaly, opportunity-wise. In the NWSL, 40 players, or nearly 27%, of the 148 players eligible are selected to play.<sup>88</sup> There were 5,512 NCAA-eligible men, 81 MLS draft

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<sup>79</sup> *Id.* at 4.

<sup>80</sup> *Id.* at 12.

<sup>81</sup> *Id.* at 12–24; Duru, *supra* note 74, at 566, 595–602.

<sup>82</sup> Edelman & Harrison, *supra* note 72, at 25 (citation omitted).

<sup>83</sup> *Estimated Probability of Competing in Professional Athletics*, NCAA, <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> (NCAA Pro Probability Chart) (last visited July 27, 2017).

<sup>84</sup> *Id.*

<sup>85</sup> *Where the NBA Players Come From*, COLLEGIATE BASKETBALL NEWS (2017), <http://rpiratings.com/NBA.php> (last visited July 28, 2017).

<sup>86</sup> NCAA Pro Probability Chart, *supra* note 83.

<sup>87</sup> *Players*, WNBA, <http://www.wnba.com/archive/wnba/players>. (last visited Sep. 28, 2017).

<sup>88</sup> Meg Linehan, *Who’s In, Who’s Out: National Women’s Soccer League Releases Draft Class List after Major Drama*, EXCELLE SPORTS (Jan. 4, 2017), <http://www.excellesports.com/news/nwsl-2017-college-draft-prospects-list/>.

slots in 2016, and 75 players were selected: 92% selection; 1.4% NCAA-to-pro ratio.<sup>89</sup>

Frustratingly, even when there appear to be more opportunities for women to play and when a women's team draws significantly more spectators than their male counterparts, the salary disparity is present. Recall that the television audience for the 2015 Women's World Cup final was the most-viewed soccer game in the history of American television, larger than audiences for men's final of the 2014 World Cup final, the final games of the 2015 NBA Finals, and the 2014 World Series.<sup>90</sup> Yet the U.S. Women's National Team received \$2 million for its 2015 Women's World Cup win.<sup>91</sup> Contrast that with the \$35 million that the German men's team took home for winning the 2014 Men's World Cup.<sup>92</sup>

Even more appalling, the U.S. men's team collected \$9 million after being eliminated in the second round in the 2014 World Cup; in the men's tournament, teams receive \$1.5 million just for showing up.<sup>93</sup> For regular season play, the National Women's Soccer League (NWSL) minimum was doubled from \$7500 in 2016 to \$15,000 in 2017, while data from the Major League Soccer Players Union (MLS) show that the lowest male players are guaranteed in the low \$50,000's.<sup>94</sup> The NWSL has a \$37,800 per player pay ceiling and a \$265,000 salary cap as compared to the MLS's \$100,000 per player median and \$3 million salary cap.<sup>95</sup>

This pay disparity, as well as issues with differences in other contract terms such as field conditions, i.e., artificial turf, between the women and men's teams, were the subject of dueling legal contests, one a lawsuit filed by U.S. Soccer over the validity of the team's collective

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<sup>89</sup> NCAA Pro Probability Chart, *supra* note 83.

<sup>90</sup> *See infra* Section I.

<sup>91</sup> Colleen Shalby, *U.S. Women's Soccer Team Gets \$2 million for World Cup Win; German Men Got \$35 Million in 2014*, PBS NEWSHOUR (July 6, 2015), <http://www.pbs.org/newshour/rundown/u-s-womens-soccer-team-gets-2-million-world-cup-win-germany-got-35-million-2014/>. Just a side note: all 23 players on the 2015 World Cup champion U.S. women's national soccer team began their careers at NCAA schools. Eric Vander Voort, *Women's World Cup: Looking Back at the USWNT's Time in College*, NCAA (July 5, 2015), <http://www.ncaa.com/news/soccer-women/article/2015-07-01/womens-world-cup-looking-back-uswnts-time-college>.

<sup>92</sup> Shalby, *supra* note 91.

<sup>93</sup> Springer, *supra* note 22.

<sup>94</sup> Kerry Close, *Here's How Poorly Female Soccer Players Are Paid Compared to Men*, MONEY (Mar 31, 2016), <http://time.com/money/4277843/us-womens-soccer-equal-pay/>.

<sup>95</sup> *Id.*

bargaining agreement (CBA) and the other in a wage-discrimination complaint filed with the EEOC by five women players.<sup>96</sup>

Despite the persistent, and sometimes dramatic, pay inequities, women still seek and remain in spots on professional sport teams. For those willing, however, men still have more professional sports opportunities than do women, overall volume-wise. There are just more professional sports open to men than are open to women: there are no professional swim or gymnastic teams.

On a positive note, Title IX certainly has improved U.S. female athletic participation and is associated with larger enrollments of women in higher education, increased graduation rates, greater participation in the work force, and increased economic productivity.<sup>97</sup> For NCAA Division I schools, for example, the graduation rate for women student-athletes was 91% compared to the men's rate of 79%, and the overall student-athlete graduation rate of 84%.<sup>98</sup> Yet, the spectator and revenue data have convinced even some advocates that, even if Title IX built it, they may not come.

Those beginning to question the efficacy of the statute, and those who always viewed it negatively, are asking whether Title IX requirements may be misguided.<sup>99</sup> This despite strong counterarguments that any spectator and revenue gaps are merely the remnant of past discrimination and that viewership is low because women's sports receive little media coverage and are scheduled during unfavorable times, e.g., in direct competition with traditionally strong

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<sup>96</sup> Andrew Das, *Pay Disparity in U.S. Soccer? It's Complicated*, N.Y. TIMES (April 21, 2016), <https://www.nytimes.com/2016/04/22/sports/soccer/usmnt-uswnt-soccer-equal-pay.html>. The EEOC claim is still pending, but the women did reach an agreement with U.S. Soccer on the CBA which, while still not guaranteeing salaries equal to the men, does include base pay increases, improved match bonuses, and improvement on noneconomic issues such as travel and working conditions. See Andrew Das, *Long Days, Google Docs and Anonymous Surveys: How the U.S. Soccer Team Forged a Deal*, N.Y. TIMES (APR. 5, 2017), <https://www.nytimes.com/2017/04/05/sports/soccer/uswnt-us-soccer-labor-deal-contract.html>.

<sup>97</sup> See generally Maggie Jo Poertner Buchanan, *Title IX Turns 40: A Brief History and Look Forward*, 14 TEX. REV. ENT. & SPORTS L. 91, 91–92 (2012).

<sup>98</sup> NCAA RESEARCH STAFF, TRENDS IN GRADUATION SUCCESS RATES AND FEDERAL GRADUATION RATES AT NCAA DIVISION I INSTITUTIONS, NCAA, [https://www.ncaa.org/sites/default/files/2016RES\\_GSRandFedTrends-Final\\_sc\\_20161114.pdf](https://www.ncaa.org/sites/default/files/2016RES_GSRandFedTrends-Final_sc_20161114.pdf). These data (versus federal graduation success rates – no transfer, within 6 years, etc., more restrictive) are generously calculated and allow for transfers, etc., but using these metrics, all athletes either graduate at the same rate or at a higher rate than their non-athletic peers. *Id.*

<sup>99</sup> Daniel J. Emam, Note, *Manufacturing Equality: Title IX, Proportionality, & Natural Demand*, 105 GEO. L.J. 1107, 1110 (2017).

male sports or, in the case of the WNBA, in summer when everyone is outside.<sup>100</sup>

Studies do support these counterarguments. For example, in a 2015 study, scholars found that two major sports news programs featured women's sports coverage less than 1% of the time.<sup>101</sup> In another study, sport scholars Cooky, Messner, & Musto reported that network affiliates in Los Angeles devoted only 3.2% of media coverage to women's sports in 2014; ESPN's SportsCenter dedicated even less time, "a paltry 2%[.]"<sup>102</sup>

There are those who disagree with these conclusions, asserting that the data support claims that women just do not have the same interest as men in sports, something that should be considered in Title IX funding issues.<sup>103</sup> For example, many complain bitterly when a men's team has to reduce its roster in order to maintain compliance with Title IX because a women's team cannot fill its roster, regardless of recruiting or effort.<sup>104</sup> Arguments continue to be advanced for relaxing the "equality" or "proportionality" requirement of Title IX and for adopting alternatives, for example, a "natural demand" concept that would allow colleges to survey students then apportion teams in proportion to the level of interest among each sex.<sup>105</sup>

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<sup>100</sup> Tucker Center for Research on Girls & Women in Sport Scholars, *Even in the Wake of a Record-Setting Women's World Cup, Myths Still Surround Women's Sports*, ESPN (July 7, 2015), <http://www.espn.com/...pnw/news-commentary/article/13215042/even-wake-record-setting-women-world-cup-myths-surround-women-sports>. See also Cooky, et al., *supra* note 17, at 279; Tierney, *supra* note 29. Cf. Amanda Ottaway, *Why Don't People Watch Women's Sports? Ask Sports Journalists*, THE NATION (July 20, 2016), <https://www.thenation.com/article/why-dont-people-watch-womens-sports/>.

<sup>101</sup> A.C. Billings & B.D. Young, *Comparing Flagship News Programs: Women's Sports Coverage in ESPN's SportsCenter and FOX Sports 1's Sports Live*, 9 ELECTRONIC NEWS 3 (2015).

<sup>102</sup> Cooky, et al., *supra* note 17, at 265–66.

<sup>103</sup> See generally Emam, *supra* note 99.

<sup>104</sup> Emam, *supra* note 99, at 1109–10, n.9. But see Tierney, *supra* note 29.

<sup>105</sup> Emam, *supra* note 99, at 1125–38, n.9. The author of this article states that "A law that is rooted in structuralism should adapt to the changes in society. In the decade preceding the adoption of the [Title IX proportionality test], male students outnumbered female students, and thus any push for proportionality in educational programs would necessarily reflect that. Today however, female students greatly outnumber their male cohort. Therefore, proportional representation in sports would create a reality where there would be more female NCAA athletes than male athletes, even though there is greater demand among males to participate in sports. Thus, a proportionality test that was crafted in an era when male students outnumbered female students should be re-examined." *Id.* at 1136–37. Really? Perhaps I misunderstand this contention, but this would, I believe, result in a smaller male population receiving a larger percentage of resources. Is that not the precise state of affairs that Title IX was intended to address? But see Tierney, *supra* note 29.

And, while the Title IX regulations unequivocally require that institutions “provide equal athletics opportunities for members of both sexes,”<sup>106</sup> the Office of Civil Rights’ (OCR’s) 1979 Policy Interpretation allow for some flexibility. For example, it recognizes that men’s and women’s teams may have different financial requirements “because of unique aspects of particular sports or athletic activities[,]”<sup>107</sup> and allows such differences when, for instance, an imbalance in a particular program is associated with the costs of managing an athletic event that draws large crowds, specifically football and men’s basketball.<sup>108</sup> In fact, the 1979 Policy Interpretation states explicitly that “the unique size and cost of football programs” were taken into account in the Policy’s development.<sup>109</sup> This “popularity” factor may be expanding into all aspects of Title IX interpretation and program implementation. Advocates continue to fight this interpretive “creep,” raising the need for research and issues of lack of coverage, marketing, and promotion of women’s sporting events.

#### IV. SOLUTIONS

The final question, and the most challenging, is what might be done to address the persistently and disparately reduced spectatorship figures for women’s sports, thereby potentially improving team and event revenue and individual player salaries.

While there are studies that claim to know what motivates viewers, their results diverge, some claiming that men intrinsically possess greater interest than women in monitoring sports;<sup>110</sup> others refute that claim, ignoring historical and cultural discriminatory realities.<sup>111</sup> This divergence suggests that research is needed to determine the motivation of viewers. Why do the Olympics, “Women’s World Cup, the play of Serena and Venus Williams on the tennis circuit, and some professional women’s golf events . . . generate a broad following[?]”<sup>112</sup> What is it about these particular anomalous events or sports personalities that attract a larger audience, and how could this popularity be emulated by other series in women’s sports?

Theories about these anomalies have been postulated, some of which have supporting data. For example, male and female audiences

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<sup>106</sup> 34 C.F.R. § 106.41(c) (2015).

<sup>107</sup> A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979) (1979 Title IX Policy Interpretation).

<sup>108</sup> *Id.* at 71,416.

<sup>109</sup> *Id.* at 71,419.

<sup>110</sup> See Deaner, et al., *supra* note 10, at 76.

<sup>111</sup> Tucker Center, *supra* note 100, at 3.

<sup>112</sup> Sandomir, *supra* note 13.

are roughly equal during the Olympics, but some have opined that national identity drives viewing rather than gender, explaining the popularity of events such as gymnastics, swimming and beach volleyball.<sup>113</sup> This theory would explain the historic U.S. Women's Soccer National Team's World Cup audiences and even those for some tennis and golf events at which national teams compete. This is worth further exploration, and, if validated, a consideration of ways to extrapolate their success to other women's sports.

It is critical to continue to refute persistent data on biological determinants.<sup>114</sup> Empirical data consistently and strongly demonstrate that "both the quantity and quality of coverage of women's sports is dramatically worse than men's,<sup>115</sup> and it is delivered primarily by male sportscasters. While racially diverse, sport media personalities are 95% male,<sup>116</sup> and who continue to communicate microaggressive commentary related to race and sex that demeans, and discriminates against, women and minority athletes.<sup>117</sup>

Microaggressions are defined as "the brief and commonplace daily verbal, behavioral, environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial, gender, sexual-orientation, and religious slights and insults to the target person or group."<sup>118</sup> Microaggressions can take the form of sexual objectification; of language that consigns athletes to being second-class citizens whose only defining characteristic is her group membership, i.e., gender or race; of racist/sexist language; of commentary that refers to restrictive, acceptable behaviors, with an overemphasis on femininity; of sexist humor and jokes; of language that focuses on traditional feminine appearance, such as hair, makeup, outfits or overall feminine composure; and of comments that focus on physical body shape/image.<sup>119</sup> In sports reporting, these microaggressions create a "dismissive, hostile and sexualized environment" for female athletes

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<sup>113</sup> Aimee Lamoureux, *How the Media Portrays Female Athletes*, BLOG AT WORDPRESS (Apr. 22, 2012), <https://aimeelamoureux.wordpress.com>.

<sup>114</sup> See, e.g., Deaner, et al., *supra* note 10.

<sup>115</sup> Tucker Center, *supra* note 100.

<sup>116</sup> See also Cooky, et al., *supra* note 17, at 278.

<sup>117</sup> See Kara Allen & Cynthia M. Frisby, *A Content Analysis of Micro Aggressions in News Stories about Female Athletes Participating in the 2012 and 2016 Summer Olympics*, 7 J. MASS COMM. JOURNALISM 334, 337 (2017). These conditions exist for athletes of color and those with non-heterosexual sexual preferences or with so-called "non-traditional" sexual identities. Because this article focuses on Title IX, however, an exploration of their situations is beyond its scope.

<sup>118</sup> *Id.* at 335.

<sup>119</sup> *Id.* at 337.

at all levels that focus attention on gender and not on performance or accomplishments.<sup>120</sup>

There is an unlimited supply of examples of this microaggressive reporting, from a televised debate among Fox News panelists about whether female Olympic athletes should wear makeup to a Chicago Tribune twitter headline that identified three-time U.S. Olympian and 2016 trap shooter bronze medalist Corey Cogdell-Unrein only as “wife of a Bears’ lineman[.]”<sup>121</sup> Even sports reports recognize this phenomenon. In a widely reported commentary, ESPN’s Bill Simmons, referred to as The Sports Guy, said this when he weighed into the debate regarding opening Augusta to female members: “And yet there’s Serena Williams dressing like a dominatrix at the U.S. Open, and there’s Jelena Dokic wearing a sports bra that’s looser than Frank Layden’s neck, and there’s Anna Kournikova raking in \$20 million from endorsements without ever winning a tournament. Yup, we just like watching them hit tennis balls. Never has a sport been more honest and dishonest at the same time.”<sup>122</sup>

What other steps can be taken to address persistent Title IX inequities and put an end to microaggressions? Title IX institutions can and should do more to promote women’s sports by allocating more dollars to women’s teams to improve their performance and draw in larger audiences. It has been demonstrated that a successful, well-promoted women’s athletic program can generate substantial revenue.<sup>123</sup>

University media and sports information departments play a critical role, too, creating, regulating, and monitoring the content and quality of marketing. Marketing is a key factor in gaining fan support for sports. Media departments can run ticket promotions, arrange and manage television coverage, and produce or encourage weekly talk programs with fan involvement.<sup>124</sup> Publicity and marketing professionals should commit to using only non-sexist communications; to promoting coverage of women’s sports when negotiating all media contracts, including television, radio, digital, and print, for the more sought-after sports; encouraging coaches with media programs or columns to cover

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<sup>120</sup> *Id.* at 335.

<sup>121</sup> See Lindsay Gibbs, *Media Coverage of Female Athletes is Getting More Sexist: A New Study Finds the Coverage is Pretty Racist, Too*, THINKPROGRESS (July 14, 2017), <https://thinkprogress.org/sexist-racist-sports-media-coverage-d93267bfe8ae>.

<sup>122</sup> Bill Simmons, *Masters of Their Domain*, ESPN, <http://www.espn.com/espn/page2/story?page=simmons/021121> (last visited July 29, 2017).

<sup>123</sup> See, e.g., Jackie Fitzpatrick, *Here Come the Mighty Lady Huskies*, N.Y. TIMES, Feb. 12, 1995, S 13 (Conn. Weekly), at 1 (reporting that the University of Connecticut women’s basketball team plays before sold out crowds and sometimes before a national television audience).

<sup>124</sup> Acosta & Carpenter, *supra* note 3, at 47.

their school's women's teams; to cultivating the media with the goal of increased exposure for women's teams and events; and to producing special interest stories that focus on the athletic accomplishments of their female athletes rather than on material that objectifies their appearances, focuses on their group memberships, or relates to restrictive gender roles.<sup>125</sup>

Finally, the law, too, must play a role in address these persistent inequalities. Our advocacy skills can be effective tools in a variety of settings, i.e., in the courtroom, in administrative processes, and in reform efforts.

University legal departments, for example, can encourage their clients to include coverage of women's sports when negotiating media contracts. They can maintain, monitor, and enforce stringent Title IX compliance systems. NCAA and federal agency lawyers as well as unaffiliated lawyers or those advising individuals, non-profits, or universities can insist upon the imposition of monetary penalties, such as cutting off program funds for male programs; banning coaches; imposing conflict of interest rules to prohibit or restrict the movement of NCAA or other regulatory officials involved in Title IX compliance to and from regulated schools; prohibiting coaches, players, or other personnel associated with Title IX violations from moving into the professional ranks. Of course, there will be serious resistance to such penalties, with opponents arguing that they would deprive the primary student beneficiaries of Title IX of essential resources.<sup>126</sup> However, penalties can be crafted to avoid, as much as possible, this harm. Without the threat of serious penalties, schools have little incentive to comply.<sup>127</sup>

Lawyers can initiate legal actions to enforce Title IX, including bringing private causes of action under Title IX, seeking to intervene in other, relevant suits, or advocating for consistency. For example, the discriminatory eligibility requirements, such as those for the WNBA, are ripe for legal challenge. Relatedly, lawyers also can promote reform of the OCR's administrative enforcement process, including permitting the complainant to intervene as a party to an OCR action and seeking the assistance of state and local education agencies to enforce Title IX.<sup>128</sup>

Our advocacy skills are also useful in other areas of reform. The tax

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<sup>125</sup> See, e.g., Allen & Frisby, *supra* note 117, at 341–42.

<sup>126</sup> Julie A. Davies & Lisa M. Bohon, *Re-Imagining Public Enforcement of Title IX*, 2007 BYU EDUC. & L.J. 25, 41–42 (2007).

<sup>127</sup> Alison Renfrew, Comment, *The Building Blocks of Reform: Strengthening Office of Civil Rights to Achieve Title IX's Objectives*, 117 PENN ST. L. REV. 563, 579–80 (2012).

<sup>128</sup> *Id.* at 579–94.

code potentially could offer more generous deductions for companies that sponsor women's sports or employ female athletes.

The data on spectatorship, revenue and salaries are discouraging, but women fought for Title IX, and we will continue to advocate for its non-discriminatory application. These solutions could provide, over time, increased spectator figures for women's sports, and, concomitantly, stronger, more equitably situated, women's programs. It takes time to build sustained fan support. "Building an audience through a sustained and committed effort -- one that reflects the reality of how many, and how much, women play sports, along with their unprecedented athletic achievements."<sup>129</sup> If there is a commitment to build it, the audiences likely will come.

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<sup>129</sup> Tucker Center, *supra* note 100.

