

THE SECRETARY'S COMMISSION ON OPPORTUNITY IN ATHLETICS SQUANDERED ITS OPPORTUNITY TO UNDERSTAND COMMERCIAL COLLEGIATE SPORTS: WHY THEY ELIMINATE MINOR MEN'S SPORTS AND PREVENT TITLE IX FROM ACHIEVING FULL GENDER EQUALITY

SUZANNE SANGREE*

The Department of Education recently announced that it would not revise the regulations that apply Title IX¹ to athletics, thus rejecting the recommendations of its Commission on Opportunity in Athletics (Commission).² The Commission's recommendations would have drastically undercut Title IX's efficacy and would have established a Bush Administration model for severely undermining civil rights protections. Fortunately, the Administration heeded the public critique of the Commission's recommendations and retreated from its previously stated intention to implement them.³ Instead, the Administration reiterated its support for the principles of gender equality embodied in Title IX and thus narrowly averted a civil rights disaster.

The great shame, however, is that a year of expert studies and public hearings concerning Title IX's application to athletics yielded so little insight. The Commission squandered a rare opportunity to understand and address how Title IX's efficacy is limited and how its impact is distorted by the multi-million dollar commercial enterprises of men's football and basketball, which dominate collegiate athletics.⁴

* Visiting Professor, West Virginia University (WVU) College of Law. The author thanks WVU College of Law for its generous writing support through the Hodges Foundation. The author also thanks Tamara Williamson for her research assistance and Douglas L. Colbert for his critical comments and sports savvy.

1. 20 U.S.C. §§ 1681-1688 (2000).

2. Frank Litsky, *Bush Administration Decides Title IX Should Stay as It Is*, N.Y. TIMES, July 12, 2003, at B15; OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., FURTHER CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY REGARDING TITLE IX COMPLIANCE (July 11, 2003) [hereinafter FURTHER CLARIFICATION] (transmitted by letter from Gerald Reynolds, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ.), available at <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html> (last visited Nov. 26, 2003).

3. Erik Brady, *Opposing Commission Factions Trade Barbs over Final Recommendations*, USA TODAY, Feb. 27, 2003, at C12 (describing Secretary Paige's announcement that the Department of Education would "move forward" on the fifteen unanimous recommendations).

4. As explained more fully in Part II, the standards for the commercialization of college sports are set by a handful of Division I athletic programs. "Division I" is a designation of the National Collegiate Athletic Association (NCAA). To obtain this designation members of Division I

Instead, the Commission continued the long-standing tradition of blaming Title IX for the shrinking opportunities in athletics for men when, in reality, the burgeoning arms race in football and men's basketball is the cause.

While the actual number of men participating in collegiate athletics has steadily increased during the thirty years of Title IX's tenure,⁵ men's opportunities have become increasingly restricted to fewer and fewer sports.⁶ Thus, men's athletic opportunities are shrinking in the sense that the diversity of their opportunities is shrinking. Although the number of varsity collegiate slots for men has vastly increased in the last thirty years,⁷ these slots are increasingly concentrated in football and, to a lesser extent, basketball, baseball and soccer.⁸ Opportunities to participate in the "so called" men's minor sports — wrestling, gymnastics, swimming, tennis, golf, track, cross-country, and fencing — have been reduced significantly.⁹ Secretary Paige's Commission collected voluminous, often heart wrenching, testimony from male athletes, parents and coaches who were adversely affected by these eliminations.¹⁰ Despite this testimony, the Commission paid scant attention to the actual cause of men's team cuts. Instead, the Commission relied upon the witnesses' emotional messages to fire an attack on Title IX.

The Commission's February 2003 report¹¹ recommended substantial revisions to Title IX's regulations and enforcement policies.

have to sponsor at least seven sports for men and seven for women (or six for men and eight for women) with two team sports for each gender. . . . Schools that have football are classified as Div. I-A or I-AA. . . . Div. I-A teams have to meet minimum [spectator] attendance requirements [All] Div. I schools must meet minimum financial aid awards for their athletics program, and there are maximum financial aid awards for each sport that a Div. I school cannot exceed.

NAT'L COLLEGIATE ATHLETIC ASS'N, WHAT'S THE DIFFERENCE BETWEEN DIVISIONS I, II, AND III? 1, http://www.ncaa.org/about/div_criteria.html (last visited Sept. 7, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

5. U.S. GEN. ACCOUNTING OFFICE, GAO-01-297, INTERCOLLEGIATE ATHLETICS: FOUR-YEAR COLLEGES' EXPERIENCES ADDING AND DISCONTINUING TEAMS 10-11 (Mar. 2001) [hereinafter 2001 GAO REPORT].

6. *Id.*

7. *See infra* notes 124-128 and accompanying text.

8. 2001 GAO REPORT, *supra* note 5, at 10-11.

9. *Id.* at 11; Welch Suggs, *Cutting the Field: As Colleges Eliminate Teams, the Lessons Athletes Learn Are Losing Out to Commercial Interests*, CHRON. HIGHER EDUC., June 6, 2003, at A37.

10. *See* THE SEC'Y OF EDUCATION'S COMM'N ON OPPORTUNITY IN ATHLETICS, "OPEN TO ALL": TITLE IX AT THIRTY 8-11 (Feb. 28, 2003) [hereinafter COMMISSION REPORT], available at <http://www.ed.gov/about/bdscomm/list/athletics/index.html> (last visited Nov. 26, 2003).

11. *Id.*

As cogently delineated by Jocelyn Samuels,¹² the proposed changes would have vastly undercut gender equity in athletics, most significantly by diluting the substantial proportionality test¹³ for compliance with Title IX.¹⁴ Moreover, by imposing upon female athletes the burden of proving that an interest in equality exists before any protections could be invoked, the proposed amendments would have turned civil rights protections on their heads.¹⁵

Thus, the Commission's proposed regulatory amendments would have set a far reaching and dangerous precedent. By undercutting gender equality in athletics, the result of the Commission's recommendations would have reduced athletic opportunities for women. Further, by ignoring the true cause of the shrinking diversity of opportunities in athletics for men, the Commission's recommendations would not have increased or diversified opportunities for men. Secretary Paige's Commission thus failed to do anything but recommend further restrictions on opportunity in athletics for men and women. Fortunately, the Commission's recommendations were rejected. Unfortunately, after a year of study, public hearings and media attention, there is no greater awareness of the major impediment to opportunity in college athletics: the commercialization of football and men's basketball and the concentration of resources in those sports.

Part I of this article provides a brief review of the legislative history of Title IX and its implementing regulations, revealing that from its inception, the guarantee of gender equality was to be realized within the context of the *status quo ante*¹⁶ of men's commercial college football and basketball. Part II of this article examines the "Arms Race"—the economics and driving philosophy of Division I football and men's

12. Jocelyn Samuels, *Reviewing the Play: How Faulty Premises Affected the Work of the Commission on Opportunity in Athletics and Why Title IX Protections Are Still Needed to Ensure Equal Opportunity in Athletics*, 3 MARGINS 233 (2003).

13. The Department of Health, Education and Welfare (HEW) issued a Policy Interpretation in 1979 setting out three tests to determine whether a collegiate sports program effectively "accommodate[s] the interests and abilities of members of both sexes" under 34 C.F.R. § 106.41(c)(1). Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979) [hereinafter 1979 Policy Interpretation]. The first test is commonly referred to as the "substantial proportionality test." See, e.g., *Cohen v. Brown Univ.*, 101 F.3d 155, 166 n.7 (1st Cir. 1996). It poses the question "[w]hether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments." 1979 Policy Interpretation, 44 Fed. Reg. at 71,418.

14. See Samuels, *supra* note 12, at 243-46.

15. *Id.* at 249-53.

16. The situation that existed before something else (being discussed) occurred. BLACK'S LAW DICTIONARY 1141 (7th ed. 2000).

basketball.¹⁷ Part III provides a case study of West Virginia University (WVU), a member of the Big East Conference of NCAA Division I, where one women's team and four minor men's teams were recently eliminated as part of a long term plan to increase the revenues produced by the football and men's basketball programs. Part IV, "The Title IX Scapegoat," examines the tendency to blame Title IX for cuts to men's teams and concludes that the blame is misplaced. Part V suggests reforms to genuinely expand athletic opportunities for men and women and offers an explanation for why these reforms face tremendous opposition. Alternatively, Part V suggests that universities should reclaim their academic missions by selling off their major commercial collegiate football and men's basketball teams. This article concludes that Secretary Paige was wise to reject the Commission's recommendations, but suggests that there is much more work to be done.

I. TITLE IX DID NOT ALTER THE COMMERCIALIZATION OF MEN'S FOOTBALL OR BASKETBALL

When Congress enacted Title IX in 1972, guaranteeing gender equality in federally funded educational institutions, its application to athletics was barely considered.¹⁸ Title IX was intended to end the systematic discrimination against women in higher education, including the quotas limiting the numbers of women in colleges and universities, the higher standards for admission faced by women applicants, and the

17. For simplicity's sake, this article refers to Division I schools generally and does not make distinctions among them. It should be noted that not all Division I schools are equal when it comes to commercialization. For example, the Division I men's basketball league - the Patriot League - stands out as "The Last Amateurs" in an increasingly professionalized environment. See generally JOHN FEINSTEIN, *THE LAST AMATEURS: PLAYING FOR GLORY AND HONOR IN DIVISION I COLLEGE BASKETBALL* (2000) (describing the formation of the Patriot League and its unique existence as one of Division I basketball's few remaining conferences that offers largely need-based scholarships and emphasizes the thrill of competition to attract athletes). However, the reality is that the most professionalized Division I schools with the biggest budgets set the standard for all of Division I. This standard trickles down to Division II, and even to high school sports as well. See JAMES J. DUDERSTADT, *INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT'S PERSPECTIVE* 141 (2000) (stating that the growth of college football programs in the 1960s led high school football programs "down the same expensive path"); NAT'L COLLEGIATE ATHLETIC ASS'N, *WHAT'S THE DIFFERENCE BETWEEN DIVISIONS I, II, AND III?* 1 (explaining how Division II teams often compete against Division I teams since they are required to play at least fifty percent of their games against Div. II, or I-A or I-AA opponents), at http://www.ncaa.org/about/div_criteria.html (last visited Sept. 7, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

18. Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 387 (2000).

near total exclusion of women from graduate schools and certain professions.¹⁹ Title IX's legislative history reveals that athletics were scarcely mentioned, and then easily dismissed, as if unworthy of Congressional floor time.²⁰

Soon after its enactment, however, women's advocates began to push for Title IX to apply to school athletics.²¹ By 1973, the federal government showed signs that it would adopt this application.²² Previously uninvolved in Title IX politics, the National Collegiate Athletic Association (NCAA) responded by allocating major lobbying resources to the objective of insulating collegiate athletics, specifically men's football and basketball programs, from gender equity requirements.²³ Walter Byers, then NCAA executive director, was quoted in the Washington Post in 1973 as saying that Title IX stood for the "possible doom of intercollegiate athletics."²⁴ A year later, an

19. "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2000). See generally *Discrimination Against Women: Hearings on Sec. 805 of H.R. 16098 Before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor, Part 1*, 91st Cong. (1970) (offering testimony from the hearings on a precursor bill that sought to amend Title VI of the Civil Rights Act of 1964 to include gender as a prohibited basis for discrimination in federally supported education). As documented in Representative Edith Green's opening remarks, "women in the United States constitute[d] only 9 percent of all full professors, 8 percent of all scientists, 6.7 percent of all physicians, 3.5 percent of all lawyers, and 1 percent of engineers." *Id.* at 2. Women admitted to undergraduate schools were "restricted to those who [were] especially well qualified" whereas there was "no similar restriction for male students." *Id.* at 3 (internal citation omitted). Representative Green explained, "[in] the State of Virginia, I am advised, during a 3-year period, 21,000 women were turned down for college entrance, while not one male student was rejected." *Id.*

20. 117 CONG. REC. 30,407 (1971) (statement of Sen. Birch Bayh). During the brief floor debate on an earlier, identical, 1971 version of Title IX, Senator Bayh assured Senator Dominick, "I do not read this . . . [to] mandate[] the desegregation of the football fields." *Id.*

21. See, e.g., *Prohibition of Sex Discrimination, 1975: Hearings on S. 2106 Before the Subcomm. on Educ. of the Senate Comm. on Labor and Public Welfare*, 94th Cong. 95 (1976) (statement of Peggy Burke, President Elect of Ass'n for Intercollegiate Athletics for Women (AIAW) Delegate Assembly) (referring to the AIAW's position that Title IX covered athletics).

22. *Sex Discrimination Regulations: Hearings for Review of Regulations to Implement Title IX of Public Law 92-318 Conducted Pursuant to Sec. 431 of the General Education Provisions Act Before the Subcomm. on Postsecondary Educ. of the House Comm. on Educ. and Labor*, 94th Cong. 438 (1975) [hereinafter *Sex Discrimination Regulations*] (statement of Caspar W. Weinberger, Sec'y of Dep't of Health, Educ. and Welfare) (explaining that even before 1974, the Dep't of Health, Educ. and Welfare took the position that Title IX covered athletics because it was directly modeled after Title VI which did cover athletics).

23. Sangree, *supra* note 18, at 413-14.

24. Linda Jean Carpenter, *The Impact of Title IX on Women's Intercollegiate Sports*, in GOVERNMENT AND SPORT: THE PUBLIC POLICY ISSUES 62, 63 (Arthur T. Johnson & James H. Frey eds., 1985) (quoting Bart Barnes & N. Scannell, *No Sporting Chance: The Girls in the Locker Room*, WASH. POST, May 12, 1974, at A14).

observer noted, “[t]he NCAA is frank to admit the tremendous lobbying effort they have been making to have athletics removed from [Title IX] because they feel they cannot exist with the present interpretation.”²⁵

The NCAA found a ready ally in Senator John Tower from Texas, who proposed several amendments to Title IX in 1974 and early 1975 to exempt all athletics from complying with Title IX.²⁶ Failing in that endeavor, Senator Tower proposed an amendment to exempt any intercollegiate activity “that provided gross receipts or donations” to its host college or university.²⁷ This amendment sought to exempt the so-called revenue producing sports - men’s football and basketball.²⁸ These and similar efforts eventually led to the insertion of the contact sports exemption into the regulations implementing Title IX in athletic programs, thus preventing qualified, skilled and experienced female athletes from the opportunity to compete with men based upon ability in most sports.²⁹ However, efforts to completely exclude college football and basketball from Title IX’s overall enforcement structure were opposed by civil rights advocates and ultimately failed.

Caspar Weinberger, then Secretary of the Department of Health, Education and Welfare (HEW), the federal agency responsible for issuing the Title IX athletic regulations, sought to assuage fears that Title IX meant the end of college football and basketball. In 1975, when announcing the athletic regulations that explicitly exempted contact sports, Secretary Weinberger explained:

With regard to athletics . . . [l]et’s look first at what the regulation does not require because there seems to be a

25. *Id.* at 64 (quoting Memorandum from Carole E. Gordon, to AIAW Executive Board 2-4 (Mar. 20, 1974)).

26. Sangree, *supra* note 18, at 414 (citing 120 CONG. REC. 15,322 (1974) (remarks of Sen. John Tower)).

27. 120 CONG. REC. 15,322 (1974) (discussion modifying Sen. Tower’s Amendment No. 1343). *See generally* Sangree, *supra* note 18, at 414 (charting the history of Sen. Tower’s attempts to modify Title IX). Senator Tower’s proposed Title IX amendment met staunch opposition. *See, e.g.*, 121 CONG. REC. 29,792-95 (1975) (testimony of Margy DuVal, Intercollegiate Ass’n of Women Students).

28. *See* discussion *infra* Part II (explaining the economics of Division I football and basketball).

29. The regulations applying Title IX to athletics exempt “contact sports” from the prohibition against treating persons differently on account of sex or providing athletics separately on the basis of sex. 34 C.F.R. § 106.41(b) (2002). Contact sports are defined as “boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.” *Id.* Because almost all sports involve body contact and risk of injury, the catch-all phrase holds the capacity to swallow the rule. *See generally* Sangree, *supra* note 18.

substantial misunderstanding about that. . . . [I]t does not require women to play football with men; . . . it will not result in the dissolution of athletic programs for men . . . [and] it does not mean the National Collegiate Athletic Association will be dissolved and will have to fire all of its highly vocal staff.³⁰

Weinberger's reassurances point to the problem that we now confront. Title IX did nothing to alter the commercialization of men's basketball and football, sports that were already multi-billion dollar entertainment industries in Division I schools, subsidized by their host academic institutions. Division I college football and basketball teams function as unpaid farm teams for the professional leagues.³¹ To make matters worse, these farm teams are engaged in what commonly has been referred to as an "Arms Race."³² The resulting financial pressures squeeze out other men's sports and vastly circumscribe what Title IX can accomplish. Many who study college athletics, including Secretary Paige's Commission, decry these distortions. However, because college football and men's basketball are considered sacrosanct, few identify those sports as the cause of men's teams cuts and intractable gender imbalance. From the beginning of Title IX, there was a gentleman's agreement not to examine the trees, so now it is difficult to see the forest.

II. THE ARMS RACE

It is widely recognized that Division I football and men's basketball programs have been engaged in an "Arms Race" of escalating expenditures in the hope of producing winning teams and increased revenues.³³ Escalating expenditures on men's basketball and football

30. *Sex Discrimination Regulations*, *supra* note 22, at 438-439 (statement of Caspar Weinberger, Sec'y of the Dep't of Health, Educ. and Welfare).

31. In baseball for example, a farm team is a "minor league team associated with . . . a major-league team as a subsidiary." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 421-22 (10th ed. 1993). Athletes on farm teams are professional players who are paid for their work as they are culled and developed for the major leagues. As it is now, college football and basketball programs function as a "free feeder system" for the professional leagues. John Romano, *Underclass Exodus? Forget It*, ST. PETERSBURG TIMES (Sept. 25, 2003), at 1C.

32. *E.g.*, COMMISSION REPORT, *supra* note 10, at 25, 35 (Recommendation 8). *See also* discussion *infra* Part II.

33. *E.g.*, DEREK BOK, UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION 38-39 (2003); COMM'N ON INTERCOLLEGIATE ATHLETICS, KNIGHT FOUND., A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION (June 2001)

programs is fueled by a circular but flawed logic. Revenue depends upon winning; since fans do not fill the stands for losing teams, losing teams do not get into the most lucrative tournaments or bowls and they do not bring home winner's purses.³⁴ Losing teams also do not receive proceeds from big television contracts.³⁵ Since winning is everything, the

[hereinafter KNIGHT FOUNDATION REPORT], available at <http://www.knightfdn.org/default.asp> (last visited Oct. 27, 2003); DONNA DE VARONA & JULIE FOU DY, MINORITY VIEWS ON THE REPORT OF THE COMMISSION ON OPPORTUNITY IN ATHLETICS 8-9 (Feb. 2003) [hereinafter MINORITY REPORT], available at <http://www.womensportsfoundation.org/cgi-bin/iowa/issues/rights> (last visited Nov. 26, 2003); DUDERSTADT, *supra* note 17, at 140-45.

Preliminary data from a NCAA empirical study of college sports indicate that since 1985, mean operating expenditures on football and men's basketball has increased, as has overall spending on women's sports, while spending on non-revenue producing men's sports has declined. ROBERT E. LITAN ET AL., THE EMPIRICAL EFFECTS OF COLLEGIATE ATHLETICS: AN INTERIM REPORT 16 (Aug. 2003) (commissioned by the National Collegiate Athletic Association) [hereinafter NCAA INTERIM REPORT]. While the study did not break out figures for men's basketball, mean spending per Division I-A football team has increased from \$4.7 million in 1993 to \$6.3 million in 2001. *Id.* at 17. Moreover, the data indicate, football spending has grown disproportionately rapidly at the schools that spend the most on football. *Id.* It is important to note that these figures compare only operating budget expenditures, and do not account for capital expenditures, which are generally very high for the revenue sports. The report notes, "[i]t is important to emphasize that the existence of an 'arms race' may be concentrated in capital expenditures, which are not adequately recorded in the [study] data." *Id.* at 6. See also JAMES L. SHULMAN & WILLIAM G. BOWEN, THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES 257 (2001) (stating that expenditures on college sports "just keep going up"). An earlier NCAA report found that during the eight year period from 1978 to 1985, athletic expenses at all Division I schools had increased by more than 100%. *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1012-13 (10th Cir. 1998). As a case in point, West Virginia University's football budget has increased dramatically in recent years. See discussion *infra* Part III.

34. Football teams that are invited to participate in post-season "bowl" games (such as the Rose Bowl, the Orange Bowl and the Peach Bowl) receive large payments for appearing and even larger sums for winning. MURRAY SPERBER, COLLEGE SPORTS INC.: THE ATHLETIC DEPARTMENT VS. THE UNIVERSITY 42-43 (1990) [hereinafter COLLEGE SPORTS INC.]. For example, in 1987, Indiana University received \$800,000 for each appearance in the All-American Bowl and the Peach Bowl. *Id.* at 43. Likewise, men's basketball teams that qualify to play in the NCAA tournament are paid for participating, with the payments increasing depending upon many games they win. For example Arizona made it to the final four round of the tournament in 1988 and received a purse of \$1,153,000 in 1988. *Id.* at 42. However, football teams and basketball teams must share their winnings with other schools' teams according to formula established by their conferences. *Id.* See also DUDERSTADT, *supra* note 17, at 131. West Virginia University football received \$400,000 for participating in the Gator Bowl in 1997. See *Bowl Money to Assist School with Title IX Compliance*, NCAA NEWS, Dec. 23, 1996, <http://www.ncaa.org/news/1996/961223/active/3346n07.html> (last visited Dec. 1, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class). WVU received between \$1.3 and \$1.5 million for its Gator Bowl appearance one year in the 1990's. *Christmas Comes Early, Mountaineers Headed to Jacksonville for New Year's Day Bowl*, http://www.nis.wvu.edu/Releases_Old/gator.htm (last visited Dec. 1, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

35. Cf. DUDERSTADT, *supra* note 17, at 73-75 (describing the advent of televised broadcasts of college sports games); SHULMAN & BOWEN, *supra* note 33, at 248 (describing how ABC substituted the USC-UCLA game for the Berkeley-Stanford game in 1996, after Stanford lost to

prevailing philosophy is that if you spend more, you win more.³⁶ As a general matter, expenses always increase to outstrip revenues generated.³⁷ Therefore, winning teams can justify lavish renovations to stadiums and training facilities, huge coaching staffs, head coach remuneration that rivals NBA³⁸ and NFL³⁹ coaches' salaries,⁴⁰ first class travel and accommodations for men's teams on the road⁴¹ and country club dormitories.⁴² Furthermore, once one school builds luxury sky boxes in its football stadium, all of the competing schools soon follow.⁴³ Losing schools can justify these same expenses by explaining that if they want to play like the "big boys," they must spend like the "big boys." One must invest in order to build toward a winning team.⁴⁴ Armed with these arguments, athletic directors justify increases in football and men's basketball budgets, at the expense of other sports and academic programs.

Contrary to the prevalent myth that men's revenue producing sports actually produce net revenue, the arms race financially drains host universities.⁴⁵ When Division I teams have good years and are winning tournament purses and filling their stadiums, they make money. Teams, however, generally spend what they earn in good years, acting under the prevailing philosophy that spending more equals winning more, and winning is everything.⁴⁶ Furthermore, even in good years, some of these

Oregon State, which meant that USC and UCLA each received \$150,000 in television revenues).

36. However, preliminary data from a NCAA commissioned report indicate that increased spending on football or men's basketball does not produce increases in winning percentages, and increases in winning records does not produce increases in net operating revenue. NCAA INTERIM REPORT, *supra* note 33, at 4. The study analyzed only operating expenses and not capital expenditures. *Id.* at 6-7. Because football and basketball require costly infrastructures, the recorded expenditures would have been significantly higher had capital investments been included.

37. DUDERSTADT, *supra* note 17, at 146.

38. National Basketball Association.

39. National Football League.

40. DUDERSTADT, *supra* note 17, at 156. ("When an occasional concern floats up . . . the athletic director or the sports press responds that, relative to the world of professional sports, [college sports coaches'] compensation seems reasonable. College sports and professional sports are both part of the same market for top coaches.").

41. *Id.* at 142.

42. *Id.* at 142.

43. COLLEGE SPORTS INC., *supra* note 34, at 133 (quoting Bob Bockrath, assistant athletic coach at the Univ. of Ariz.).

44. See, e.g., BOK, *supra* note 33, at 38-39; DUDERSTADT, *supra* note 17, at 135-36; discussion *infra* Part III (discussing the prevailing attitude that universities need to invest heavily in order produce a winning team).

45. DUDERSTADT, *supra* note 17, at 133-40. Derek Bok refers to this myth as "The Chimera of Profitability." BOK, *supra* note 33, at 38.

46. DUDERSTADT, *supra* note 17, at 136.

winning Division I schools⁴⁷ do not break even when utilizing traditional accounting methods and considering the cost of construction and maintenance of stadiums and other infrastructure.⁴⁸ Some schools pay for debt servicing out of athletic revenues, but many do not.⁴⁹ Additionally, the costs of athletic scholarships are sometimes recorded at in-state tuition rates for athletes from out-of-state.⁵⁰ Also, some coaches' and personnel salaries come out of general university operating expenses and not the expenses of the team they service.⁵¹

In "off years," and in most years for most schools, men's football and basketball do not break even.⁵² Most teams usually run deficits, yet because the university is there to bail them out, they need not account for these deficits.⁵³ Although football and men's basketball programs are

47. BOK, *supra* note 33, at 38.

Although many Division I schools claim to make money on their football and basketball programs, many do not, especially if the capital costs of their facilities are accurately counted. Only a handful of universities, such as Florida State and Notre Dame - perhaps no more than ten to twenty in all - make a profit on their entire athletic programs

Id.

48. *See generally* SHULMAN & BOWEN, *supra* note 33, at 250.

What can be said with confidence is that taking account of the imbedded capital costs of athletic facilities would surely reverse any appearance of financial 'profit' associated with even the most successful big-time program.

Inter-collegiate athletics is a highly capital-intensive activity, and it is foolish to talk (and act) as if these costs did not exist.

Id.

See also DUDERSTADT, *supra* note 17, at 133 ("[M]ost intercollegiate athletics programs at most colleges and universities require some subsidy from general university resources. . . . [M]ost college athletics programs actually lose money, to the tune of \$245 million for Division I schools in 1995-96."); *id.* at 146 (describing the hidden costs of collegiate athletics).

49. COLLEGE SPORTS INC., *supra* note 34, at 131-33.

50. DUDERSTADT, *supra* note 17, at 141.

51. *Id.* at 145-46; *see generally* COLLEGE SPORTS INC., *supra* note 34, at 92-145.

52. BOK, *supra* note 33, at 38-39. Indeed it is exceedingly difficult to institute a business plan to ensure profitability within the context of the arms race. Its imperative is to spend all that is earned. *See* WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 340-41 (1995) (describing increased spending in college sports as a never-ending cycle); DUDERSTADT, *supra* note 17, at 141 (discussing the escalation of spending on college football); SHULMAN & BOWEN, *supra* note 33, at 256-57 ("[I]nstances of true profitability are exceedingly rare - in fact, probably nonexistent if capital costs are counted. . . . As a money-making venture, athletics is bad business."); MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION 27, 219-29 (2000) [hereinafter BEER AND CIRCUS] (discussing the fact that college sports operate in the red); ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 150 (1999) (describing how most NCAA schools' sports programs do not have surpluses).

53. *See, e.g.,* Ray Glier, *Tulane Football Stays in Division I-A*, N.Y. TIMES, June 11, 2003, at C23 (detailing the Tulane Board of Trustees rejection of a proposal to drop its Division I-A football team despite an athletic department deficit of \$6.7 million and football losses of more than one million dollars per year); *see also infra* note 83.

self-supporting in a handful of schools,⁵⁴ it is clear that the vast majority of Division I programs survive because of university subsidies, usually multi-million dollar subsidies.⁵⁵ This is troubling, since the enterprise that is subsidized is commercial, not academic.

Are these big subsidies worthwhile to the universities? Operating multi-million dollar entertainment industries within nonprofit academic institutions drains schools financially and greatly distorts their culture, including student life, the academic enterprise and, most relevant to the present discussion, athletics for minor sports athletes. Many of the big sports schools also develop reputations as “party schools.”⁵⁶ Academics are undermined with doctored admissions standards, gut courses and sham majors,⁵⁷ and university life becomes organized around what one commentator termed “Beer and Circus.”⁵⁸ The salubrious purposes of college athletics - to instill a sense of school unity, to provide students with opportunities for healthy exercise, to develop leadership, to promote

54. Even these programs are probably not “self-supporting” when capital costs are counted. SHULMAN & BOWEN, *supra* note 33, at 256-57. However, it is exceedingly difficult to factor in capital costs because none of the reported data from schools includes capital costs. See NCAA INTERIM REPORT, *supra* note 33, at 6-7.

55. WVU athletic officials estimate that Rutgers athletics receives from \$12 to \$14 million annually from its university. Interview with Michael Parsons, WVU Deputy Director of Athletics, in Morgantown, W. Va. (May 5, 2003) [hereinafter Parsons Interview]. The University of Pittsburgh routinely covers its athletic department’s deficits each year. *Id.* Duke’s basketball team receives \$5 million annually in school subsidy; Vanderbilt, Northwestern and Tulane each receive between \$6 and \$12 million annually. SHULMAN & BOWEN, *supra* note 33, at 248 (adding that “[n]o positive ‘bottom line’ result obtains from most Division IA schools”). See also *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1012 (discussing how the NCAA Raiborn report of 1985 found that 51% of Division I schools responding to NCAA inquiries on the subject suffered a net loss in their basketball programs alone that averaged \$145,000 per school); COLLEGE SPORTS INC., *supra* note 34, at 130-37; DUDERSTADT, *supra* note 17, at 146; Suggs, *supra* note 9, at A37 (“Neither football nor basketball teams pay their own way except at the very largest and richest colleges, the ones with huge stadiums and lucrative television contracts”).

56. See, e.g., BEER AND CIRCUS, *supra* note 52, at 57-59 (detailing the correlation between the University of Oregon’s rise in annual “Party School” lists and its improved success in intercollegiate athletics). Some critics believe that big time athletic programs foster a climate of “privilege and leniency” for an institution’s top athletes, creating a class of students who operate largely beyond the law. See, e.g., *Brzonkala v. Va. Polytechnic & State Univ.*, 935 F. Supp. 779, 782 (D. Va. 1996) (chronicling the rape of a female student by two varsity football players and the university’s failure to punish one offender and minimal punishment of the other), *rev’d* 132 F.3d 949 (4th Cir. 1997), *aff’d sub nom.* *United States v. Morrison*, 529 U.S. 598 (2000); SHULMAN & BOWEN, *supra* note 33, at 418-19 n.5 (reviewing instances of student athletes who were accorded differential academic standards and the allegations that two Naval Academy football players had raped a female midshipman).

57. BOK, *supra* note 33, at 41-46, 54 (“[T]he saga of big-time athletics reveals that American universities, despite their lofty ideals, are not above sacrificing academic values - even values as basic as admissions standards and the integrity of their courses - in order to make money.”).

58. BEER AND CIRCUS, *supra* note 52.

teamwork and character through team sports⁵⁹ and to cultivate alumni loyalty⁶⁰ - are all better met by smaller scale athletic programs.⁶¹ Universities do not need huge stadiums, television audiences and an upper caste of semi-professional athletes masquerading as students⁶² to achieve these purposes.

It is widely believed that the publicity and excitement of a televised winning team attracts more applicants and better students. Studies from the 1970's onward have demonstrated that such beliefs are unfounded.⁶³ There is no association between winning seasons and increases in either numbers of applicants or heightened SAT scores of incoming students.⁶⁴ It is also a myth that athletic scholarships are an effective way of enhancing educational opportunities to underprivileged or minority youth. For one thing, athletic scholarships are not need-based.⁶⁵ Further, while it is true that many college teams are heavily dominated by African-American athletes, especially football and basketball, these athletes' graduation rates are abysmally low.⁶⁶ Most minority student athletes do not graduate college within four or five years, if at all. Only 35% of Division I-A African-American basketball players graduated within six years in 1995⁶⁷ and only 40% graduated in

59. DUDERSTADT, *supra* note 17, at 89-90; Suggs, *supra* note 9, at A38.

60. *Cf.* DUDERSTADT, *supra* note 17, at 129 (explaining that the alumni loyalty generated by watching sports almost always results in gifts to sports programs, not the university at large or to academic programs, and how it is fickle giving coming only on the heels of winning seasons); Welch Suggs, *Oil Tycoon Pledges Millions to Okla. State*, CHRON. HIGHER EDUC., Mar. 28, 2003, at A27 (describing donation of \$55 million to Oklahoma State University by an alumnus, \$20 million of which was designated for a trust fund to help fund refurbishment of the football field).

61. *See* BOK, *supra* note 33, at 46-51.

62. Suggs, *supra* note 9, at A37 ("Barely half of Division I football players earn their degrees within six years of entering college Only 43 percent of basketball players do.").

63. BOK, *supra* note 33, at 48 (reporting several studies in the 1970's and 1980's that found that success in football and basketball does not raise the average SAT scores of students in school involved); NCAA INTERIM REPORT, *supra* note 33 (NCAA commissioned report reviewing data from Division I schools for 8 years makes preliminary conclusion that increased expenditures on sports does not affect SAT scores of incoming students); ZIMBALIST, *supra* note 52, at 176 (describing study covering years 1981-1995 concluded average SAT scores of incoming students do not improve when a schools basketball and football teams have winning seasons).

64. NCAA INTERIM REPORT, *supra* note 33.

65. SHULMAN & BOWEN, *supra* note 33, at 420 n.12 (citing Debra E. Blum, *Colleges Weigh Aid to Athletes Based on Need: Financial Problems Lead to Revival of an Old Idea, but Skepticism Remains*, CHRON. HIGHER EDUC., Sept. 2, 1992 (online edition)).

66. These figures represent significant improvements over previous years. *See Athlete Graduation Rates Continue to Climb*, NCAA NEWS (Sept 1, 2003), <http://www.ncaa.org/2003/20030901/active/4018n01.html> (last visited Dec. 1, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

67. *Id.*

1996 after six or fewer years.⁶⁸ African-American football players fared somewhat better, graduating 49% in 1996.⁶⁹ Although these graduation rates do not vary greatly from non-athlete graduation rates,⁷⁰ perhaps non-athletes' graduation rates would improve if more African-American non-athletes were supported by scholarships and freed from the need to work while studying. Similarly, student athlete graduation rates might increase if scholarship athletes had schedules that gave them more time to attend classes and study. As Derek Bok so aptly concludes, "any university sincerely wishing to educate more minority students would do far better to offer regular scholarships to the best applicants they can find rather than recruit athletes with poor academic credentials and then subject them to the pressures and distractions of high-profile college sports."⁷¹

Title IX did not cause the problems of commercialization, corruption and the distortion of the academic enterprise, nor can it stop them. The first female professional physical educators decried these problems in the late nineteenth century.⁷² These problems were also documented by the Carnegie Foundation Commission report in 1929,⁷³ in succeeding commission reports⁷⁴ and in other articles,⁷⁵ most recently in

68. *Id.*

69. *Id.*

70. *Id.*

71. BOK, *supra* note 33, at 48.

72. SUSAN K. CAHN, COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH-CENTURY WOMEN'S SPORT 23-25 (1994); DONALD J. MROZEK, SPORT AND AMERICAN MENTALITY, 1880-1910, at 152-53 (1983) (detailing the tendency by early female physical educators to de-emphasize the appeal of women's athletics to spectators in favor of ensuring its utility as effective physical education).

73. MURRAY SPERBER, ONWARD TO VICTORY: THE CRISES THAT SHAPED COLLEGE SPORTS 30 (1998) (citing BULLETIN 23 OF THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF HIGHER EDUCATION (1929), a report that summarized a five year comprehensive study of college athletics in the U.S. and Canada concluding recruiting had become corrupt, professionals had replaced amateurs, education was being neglected, and commercialism reigned). Henry Pritchett, director of the Carnegie Foundation for the Advancement of Higher Education stated, "The question is not so much whether athletics in their present form should be fostered by the university, but how fully can a university that fosters professional athletics discharge its primary [educational] function?" *Id.*

74. BOYER COMM'N ON EDUCATING UNDERGRADUATES IN THE RESEARCH UNIV., REINVENTING UNDERGRADUATE EDUCATION: A BLUEPRINT FOR AMERICA'S RESEARCH UNIVERSITIES (1998); COLLEGE SPORTS INC., *supra* note 34, at 333-34 (describing a 1983 American Council on Education Presidents' Proposal recommending that a "Presidents' Board" take charge of the NCAA and that this board "have authority to veto or modify NCAA rules and to impose new rules of its own design on association member subject to review only by a mail vote of presidents of all member institutions"); *Text of the Draft Proposal to Create a Board of College Presidents*, CHRON. HIGHER EDUC., Sept. 14, 1983, at 24-25.

75. See, e.g., WINGSPREAD GROUP ON HIGHER EDUC., AN AMERICAN IMPERATIVE: HIGHER EXPECTATIONS FOR HIGHER EDUCATION (1993); BOK, *supra* note 33, at 38-51. See generally

the Knight Foundation report of 2001.⁷⁶ After coming into effect, Title IX opened the door for women to develop their athletic talents within the distorted culture of this commercialization. Nonetheless, Title IX has proved a ready scapegoat for cuts to minor men's teams.⁷⁷

III. WEST VIRGINIA UNIVERSITY, 2003: A CASE STUDY

The Title IX drama is playing out now at my home school, West Virginia University (WVU). When WVU announced in April 2003 that it would cut four varsity men's teams and one varsity women's team in order to save \$600,000, the lead letter to the editor in the student newspaper the next day blamed Title IX.⁷⁸ While Title IX surely played a role in guiding these cuts,⁷⁹ the primary causes of the budget shortfall were the product of escalating costs of football and basketball coupled with diminishing university resources. These economic pressures are typical of those faced by athletic departments across the country. Indeed, WVU provides an enlightening case study.

In the spring of 2002, WVU's Athletic Department (AD or Department) completed a review of its sports programs and budget, and issued a plan - the Strategic Direction (SD). The SD compared WVU's spending on men's football and basketball to the other fifteen Big East schools⁸⁰ against whom it competes and found that it was next to last.⁸¹

BYERS, *supra* note 52; George Vecsey, *Sports of The Times: Who's Watching the Store?*, N.Y. TIMES, Jan. 11, 1984, at B7.

76. KNIGHT FOUNDATION REPORT, *supra* note 33, at 4 ("[T]he problems of big-time college sports have grown rather than diminished. The most glaring elements of the problems outlined in this report - academic transgressions, a financial arms race and commercialization - are all evidence of the widening chasm between higher education's ideals and big-time college sports.").

77. See, e.g., Christopher Paul Reuscher, *Giving the Bat Back to Casey: Suggestions to Reform Title IX's Inequitable Application to Intercollegiate Athletics*, 35 AKRON L. REV. 117 (2001) (arguing, among other things, that Title IX is responsible for the elimination of low-revenue men's athletic teams); see also *infra* notes 78, 116, 122 and accompanying text.

78. Alex Paschalides, Letter to the Editor, *Where's the Equality in WVU Sports?*, DAILY ATHENAEUM, Apr. 17, 2003, at 4; see also Suggs, *supra* note 9, at A38 (recounting WVU men's tennis coach Ed Dickson's experience of being called into Athletic Director Ed Pastilong's office to be informed that his team was being eliminated partly because of Title IX).

79. Title IX certainly prevented WVU from making up its projected deficit by eliminating all women's teams.

80. The Big East Conference includes West Virginia University, Virginia Tech, the University of Miami, the University of Pittsburgh, Boston College, Syracuse University, Temple University, Rutgers University, Notre Dame University, St. Johns University, Providence University, Villanova University, the University of Connecticut, Georgetown University, and Seton Hall University. See <http://www.bigeast.org/about> (last visited Nov. 18, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class). The Big East recently added five new teams: the University of Cincinnati, DePaul University, Marquette

The SD concluded that to become more competitive, men's football and basketball budgets should increase significantly, coaches' salaries should be augmented and facilities should be upgraded.⁸²

The Department then considered possible sources for the recommended increased spending. It noted that other Big East schools receive multi-million dollar subsidies from their host universities.⁸³ Since the late 1980's, WVU Athletics had not received any university subsidy for its budget, which totaled \$27 million for the 2002-03 academic year.⁸⁴ In considering possible sources of income, the Department examined income-generating strategies of other Big East universities. Notre Dame's Athletic Department profits from its own television contract and from a \$5 million per year product endorsement contract with Adidas.⁸⁵ The AD concluded that such sources of income were unavailable to WVU Athletics.⁸⁶ WVU officials also looked at schools outside the Big East. Because student enrollments at the University of Tennessee, University of Texas and University of Florida are at least twice the size of WVU student enrollment, general student fees are able to generously subsidize the athletic departments at those schools without each student paying thousands of dollars.⁸⁷

To raise the needed revenue, the AD increased tickets prices.⁸⁸ It also sought and obtained approval from the University Board of Governors to issue bonds in order to finance eighteen million dollars of renovations to the Mountaineer Football Stadium and other facilities.⁸⁹ The purpose of the financing was to provide the means for the revenue

University, the University of Louisville, and the University of South Florida. Press Release, Big East Announces the Addition of Five Marquee Institutions, <http://www.bigeast.org/about/11-04-03.asp> (last visited Nov. 18, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

81. Parsons Interview, *supra* note 55.

82. *Id.*

83. *Id.* (noting that WVU athletic officials estimate that Rutgers athletics receives twelve to fourteen million dollars annually from its university and that University of Pittsburgh routinely covers its Athletic Department's deficits each year).

84. *Id.* By the early 1980's WVU Athletics obtained only six percent of its budget from university appropriations. *Id.* To free itself from university oversight and to assist in its own private fundraising, WVU Athletics decided to forego all university appropriations. *Id.* During the 1988-89 academic year the university withdrew from the athletic department the 150 to 160 tuition waivers that it had previously used to finance that number of athletic scholarships. *Id.* From that point on the athletic department became responsible for generating its entire budget. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

generating sports (men's football and basketball) to generate more revenue.⁹⁰

Then, in 2003, additional unforeseen financial pressures necessitated further cuts. Facing a huge deficit in 2003, the state legislature cut appropriations for WVU by \$22 million.⁹¹ It projected that an additional thirty million dollars would be cut the following year.⁹²

To offset these reductions, WVU raised tuition, which significantly increased the AD's scholarship costs.⁹³ In addition, the stadium renovations exceeded the budget and thus necessitated an additional bond issue in April 2003 to cover the new renovation price tag of \$24 million.⁹⁴ Some speculated that additional unanticipated salary increases for the coaching staff added to the increased costs in 2003.⁹⁵

Indeed, the Department's disclosures indicate that football coach Rich Rodriguez' salary almost doubled from \$405,950 for the 2001-02 year to \$700,400 for the 2002-03 year.⁹⁶ When the AD replaced the men's basketball coach last year, the salary for that position rose from

90. WVU athletics officials explained, "they must have better facilities to improve the fans' experience and to attract high-caliber coaches and players." *WVU Expands Scope of Mountaineer Field Project, New Price Tag for Renovations: 11 Million*, CHARLESTON GAZETTE, Apr. 2, 2003, at 3B. Associate Athletic Director Russ Sharp explained that the new club lounge in the football stadium for \$1.9 million is "not really designed for watching the game. . . . It's just an area with a few more amenities." *Id.* Just two weeks later, on April 16, 2003, the WVU athletic department announced it was eliminating four varsity men's minor teams, and one women's team in order to save just shy of \$600,000. Andrew J. Beckner, *Five Athletic Programs Cut*, DAILY ATHENAEUM, Apr. 17, 2003, at 1.

91. Lawrence Messina, *West Virginia Higher Education Continues to Cut Budgets*, CHARLESTON GAZETTE, Oct. 13, 2003, at 3A, <http://library.cnpapers.com/bgi-bin/taxis/search> (last visited Dec. 1, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

92. Bob Hertz, *Why Did They Die? 9-11, Money, Title IX, Changing Tastes All Played Part*, DOMINION POST, May 4, 2003, <http://www.dominionpost.com/a/sports/2003/05/04/ab> [hereinafter *Why Did They Die?*] (last visited Dec. 1, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

93. *Id.* The increased AD scholarship costs are projected to be \$2 million over the five year period 2003-2008. Parsons Interview, *supra* note 55.

94. The renovation budget is intended to "upgrade WVU sports facilities and increase revenue by offering something extra for fans who are willing to pay more. Eleven million of the 24 total is earmarked for luxury skyboxes and a new score board at the football stadium." Parsons Interview, *supra* note 55.

95. Bob Hertz, *Mosser Resigns Post; WVU Varsity Club President Protests Cutback*, DOMINION POST, Apr. 23, 2003, <http://www.dominionpost.com/a/sports/2003/04/22/aa> (last visited Dec. 1, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class). The President of the Varsity Club, a booster club of alumni WVU varsity athletes, resigned after team cuts were announced in April, protesting that the cuts were in part necessitated by a huge bonus to football coach Rich Rodriguez, who recently had renegotiated his contract in exchange for not defecting to a competitor school. *Id.*

96. *Why Did They Die?*, *supra* note 92.

\$282,960 to \$550,000, a 97% increase.⁹⁷ These salary increases are part of a larger trend of shifting more resources to football and men's basketball in response to past losing seasons and dwindling spectator attendance.⁹⁸

In 1994, the WVU football budget was \$3.4 million, 19% of the overall AD budget.⁹⁹ In 2002, that budget was \$5.5 million, or 23% of the AD budget.¹⁰⁰ This combination of foreseen and unforeseen expenses created a projected AD annual budget shortfall of \$600,000.¹⁰¹ All of these are typical financial demands exerted by football and basketball programs on their home schools. These financial pressures are likely to accelerate in the next few years as public universities contend with budget cuts occasioned by state budget deficits,¹⁰² and as private universities continue to contend with dwindling endowments and private donations.

Faced with the projected \$600,000 shortfall in 2003, the Department again reviewed its potential for increasing revenues.¹⁰³ It concluded that given the demographics of the state and the characteristics of its fan base, it could not further increase ticket prices without reducing attendance and losing net revenue gain.¹⁰⁴ With luxury skyboxes already under construction for the football stadium, the Department knew it had maximized potential revenue from corporate skyboxes.¹⁰⁵ Therefore, the Department's budget shortfall had to be covered through cost

97. *Id.* Both the basketball head coach and the football head coach have higher salaries than the University president. *Id.*

98. *Id.* The 2001-02 men's basketball season was the worst in school history, "8-20, and the fourth consecutive season when home attendance, which had peaked at 11,384 in 1982, failed to reach 6,500 in the 14,000 seat Coliseum." *Id.* When young coach Rich Rodriguez took over the football team in that year he produced a losing record of 3-8 and no bowl. *Id.* In addition to the coaching salary increases, \$100,000 was added to the football team recruitment budget for 2003-04 and \$50,000 for men's basketball. *Id.* See also Suggs, *supra* note 9. WVU's Mike Parsons explained, "'We need to have a successful football team because football generates significant revenue. . . . If the [Athletic Department] is going to be self-sufficient, we need a winning team because that means more television appearances, bowl games, better season ticket sales the next year.'" *Id.* at A38.

99. Parsons Interview, *supra* note 55.

100. *Id.* It should also be noted that five coaching positions in the "strength staff" are on the AD books as a separate department. Their combined salaries are \$181,593. *Id.* One can safely assume that men's basketball and football players benefit from this coaching staff's time, but no part of these expenses appear in the football or basketball budgets. *Id.*

101. *Id.*

102. See Timothy Egan, *States, Facing Budget Shortfalls, Cut the Major and the Mundane*, N.Y. TIMES, Apr. 21, 2003, at A1; Louis Uchitelle, *Red Ink in States Beginning to Hurt Economic Recovery*, N.Y. TIMES, July 28, 2003, at A1.

103. Parsons Interview, *supra* note 55.

104. *Id.*

105. *Id.*

reductions.¹⁰⁶

In evaluating potential reductions, the Department considered the following three options. The first option was an across-the-Department budget reduction.¹⁰⁷ Since many of the Department's costs, such as building maintenance, are fixed costs paid to the university, these cuts would fall heavily upon the salaries of AD administrative staff, which was the same staff making the budget decisions. Understandably, this option was rejected.¹⁰⁸ The second option was an across-the-board cut to all team budgets.¹⁰⁹ However, because all team budgets were already reduced by 5% in the 2000-2001 academic year, the AD rejected this option, fearing that further reductions would fatally cripple teams' abilities to compete, consigning them to mediocrity, especially the teams with small budgets.¹¹⁰

The final option that prevailed was to make targeted cuts, eliminating teams based upon their financial impact, their viability and their past and future success.¹¹¹ Under this option, the Department eliminated men's tennis, men's indoor and outdoor track and field, and the men's cross country teams.¹¹² The additional cut that caused the most controversy was the elimination of the men and women's rifle teams, which were extraordinarily successful, winning thirteen NCAA championships in the past fifteen years. However, the rifle teams' future viability was questionable because only forty-three NCAA rifle teams remain in the United States¹¹³ and NCAA rules permit the elimination of championship play whenever there are forty or fewer NCAA teams nationwide.¹¹⁴ The cut saved the Department \$19,879.¹¹⁵ While the 2004 budget figures are not yet available, it will probably reflect an even

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* See Suggs, *supra* note 9.

112. See OFFICE OF POSTSECONDARY EDUC., U.S. DEP'T OF EDUC., INSTITUTION DATA, PARTICIPANTS AND OPERATING EXPENSES, W. VA. UNIV. (Reporting Year July 1, 2001 – June 30, 2002) (outlining the money saved by cutting men's teams: men's indoor track and field saved \$37,792; men's outdoor track and field saved \$26,676; men's cross country saved \$9,633; men's tennis saved \$46,703, <http://www.ope.ed.gov/athletics/InstDetail.asp> (last visited Sept. 7, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

113. Parsons Interview, *supra* note 55.

114. *Id.*

115. See OFFICE OF POSTSECONDARY EDUC., U.S. DEP'T OF EDUC., INSTITUTION DATA, PARTICIPANTS AND OPERATING EXPENSES, W. VA. UNIV. (Reporting Year July 1, 2001 – June 30, 2002), <http://www.ope.ed.gov/athletics/InstDetail.asp> (last visited Sept. 7, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

greater concentration of AD resources in football and men's basketball.

IV. THE TITLE IX SCAPEGOAT

In the spring of 2003, when Ed Dickson, WVU's men's tennis coach, first learned that his team would be eliminated, he asked, "'Is this about Title IX?'"¹¹⁶ This is a common reaction to men's team cuts. On a national scale, the National Wrestling Coaches Association and other advocates of minor men's sports also blame Title IX for the elimination of men's collegiate teams.¹¹⁷

It is true that WVU's entire \$600,000 budget shortfall could have been covered by eliminating all of the WVU varsity women's teams.¹¹⁸ In fact, it is quite likely that more women's teams would have been eliminated ahead of men's tennis, cross-country, track and field and rifle if Title IX was not in effect and enforceable through the substantial proportionality test. However, even if women's teams were eliminated, the football/basketball arms race would still require the elimination of minor men's sports. Indeed, from 1984 to 1988, when the Supreme Court's decision in *Grove City College v. Bell*¹¹⁹ prevented Title IX from applying to athletic programs, colleges and universities cut wrestling teams at a rate almost three times as high as they did in the next twelve years,¹²⁰ after Title IX's application to athletics was reestablished in the Civil Rights Restoration Act of 1987.¹²¹

This reality has not dispelled the impression that Title IX is to

116. Suggs, *supra* note 9.

117. See, e.g., Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ., 263 F. Supp. 2d 82 (D.D.C. 2003); Welch Suggs, *Defying Rumors, Bush Administration Defends Status Quo on Title IX*, CHRON. HIGHER EDUC., June 7, 2002, A41 (explaining how National Wrestling Coaches Association and three other plaintiffs brought suit against the Department of Education alleging that its enforcement of Title IX causes the unlawful elimination of men's teams).

118. See OFFICE OF POSTSECONDARY EDUC., U.S. DEP'T OF EDUC., INSTITUTION DATA, PARTICIPANTS AND OPERATING EXPENSES, W. VA. UNIV. (Reporting Year July 1, 2001 – June 30, 2002) (showing that WVU's total expenditures for women's teams are \$620,946 and that it spends \$17,653 on women's cross country), <http://www.ope.ed.gov/athletics/InstDetail.asp> (last visited Sept. 7, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

119. 465 U.S. 555 (1984) (holding that Title IX enforcement is limited to the specific school program receiving federal funding and does not extend to the university or college as a whole).

120. MINORITY REPORT, *supra* note 33, at 4. During this period, "the number of NCAA institutions sponsoring men's wrestling teams dropped by 53, from 342 to 289 - or approximately 13.3 teams per year. Between 1988 and 2000, that number dropped by 55, from 289 to 234 - or approximately 4.6 teams per year." *Id.* (citing NCAA, 1982-2001 SPORTS SPONSORSHIP AND PARTICIPATION STATISTICS REPORT 119).

121. Pub. L. No. 100-259, § 3(a), 102 Stat. 28 (1988) (codified at 20 U.S.C. § 1687 (1988)).

blame for the elimination of minor men's sports. As University of Minnesota wrestling coach J. Robinson explained, "I've been fighting football and basketball for years. Why can [women] go to the front of the line ahead of me?"¹²² A 2001 report of the General Accounting Office (GAO) confirms Robinson's reality, but not his reasoning. The report found that schools eliminated 2,648 team slots for male wrestlers from 1981 to 1999.¹²³ During that same period, colleges added 7,199 men's slots for football, as well as 5,452 slots for baseball, 1,932 slots in men's soccer and 1,552 slots in men's basketball.¹²⁴ These increases resulted in an overall 5% increase in men's athletic slots.¹²⁵ The increases in football squads alone more than made up for the cuts in all of the other men's teams combined.¹²⁶ While women still lag behind men in athletic participation at four-year colleges, the GAO reported that the number of undergraduate women students participating in athletics increased from 3.9% in 1981 to 5.5% in 1998-99.¹²⁷ During this time-period, the number of men participating in college athletics remained relatively steady, starting and ending the period at 9.3% of the male undergraduate population.¹²⁸

Title IX's proportionality requirement is not the cause for the elimination of wrestling teams. Rather, the data supports the conclusion that the augmentation of more popular and more lucrative men's sports, such as football, baseball, soccer and basketball, is the main cause.¹²⁹ In fighting Title IX,¹³⁰ the wrestlers are misplacing the blame. Title IX merely acts to deflect the hatchet from cutting only women's sports as cuts are being made, but the hatchet is driven by the scarcity created by vastly increasing resources for men's football and basketball programs.¹³¹

122. Anne Stein, *In Sports a New Title Wave of Challenges for Equity*, CHI. TRIB., Apr. 25, 2001, at C8.

123. 2001 GAO REPORT, *supra* note 5, at 10-11 tbl. 2.

124. *Id.*

125. *Id.*

126. While wrestling lost the greatest number of slots, other men's sports also lost: 1,405 tennis; 1,022 gymnastics; 943 swimming; 773 fencing; 436 rifle; 282 skiing; 151 cross-country; 129 ice hockey; 95 water polo; and 12 badminton. *Id.* at 11.

127. *Id.*

128. *Id.*

129. Women's gymnastics, field hockey and fencing have also decreased dramatically during this period. *Id.* at 9-10 tbl. 1 (revealing that 683 women's gymnastics, 229 women's field hockey, and 171 women's fencing slots were eliminated).

130. See, e.g., Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ., 263 F. Supp. 2d 82 (D.D.C. 2003); Welch Suggs, *Defying Rumors, Bush Administration Defends Status Quo on Title IX*, CHRON. HIGHER EDUC., June 7, 2002, A41 (explaining how National Wrestling Coaches Association and three other plaintiffs brought suit against the Department of Education alleging that its enforcement of Title IX causes the unlawful elimination of men's teams).

131. See, e.g., 2001 GAO REPORT, *supra* note 5, at 14 (detailing how seventy-two percent of

The proportionality requirement takes the fall as a mandate to cut so called “minor” men’s teams, but it is really the sacrosanctity of football and basketball that is the cause.

When Secretary Paige appointed the Commission on Opportunity in Athletics, he charged it to “improve the effectiveness of Title IX and . . . build upon the extraordinary progress that has resulted from its passage thirty years ago.”¹³² However, the Commission had its own agenda. The Commission was heavily dominated by representatives of Division I schools. Ten out of the fifteen commissioners were from NCAA Division I schools, all of which host large men’s football and basketball programs.¹³³ There were no representatives from Division II or Division III colleges, junior colleges or high school athletic programs,¹³⁴ despite the Commission’s Charter requirement that its membership include people from these constituencies and that the Commission be fairly balanced.¹³⁵ Given the representation on the Commission, it is not surprising that instead of fulfilling its purpose to build upon the extraordinary progress that resulted from Title IX’s passage thirty years ago, the Commission instead sought to fix the problems Title IX created for Division I athletic programs. Specifically, the Commission sought once again to weaken Title IX’s application to athletics and thus circumvent any pressure to reduce men’s football and basketball.

If the Commission’s recommendations were enacted in revised regulations, the commercialization of men’s sports and its distortions of

schools surveyed who added women’s teams did so without cutting any men’s teams). While about a third of the surveyed colleges discontinued one or more men’s teams, the same number of all categories of four year colleges also added men’s teams in all categories except Division I-A schools. *Id.* at 16 tbl. 5. Only three percent of schools with big commercial football and basketball teams added men’s teams. *Id.* The failure of Division I-A schools to add a significant number of men’s teams is due to the fact that so many additional male athletic slots have been created by the expansion of the size of football teams. *See generally* DUDERSTADT, *supra* note 17, at 141 (describing the rapid growth in the size of college football programs in the 1960’s, and the subsequent transformation of college football into a “corporate and bureaucratic enterprise, with teams of over one hundred players”).

132. COMMISSION REPORT, *supra* note 10, app. 3 at 47 (Commission Charter).

133. Birch Bayh, *Don’t Tamper with Title IX*, BALT. SUN, Feb. 3, 2003, at 15A.

134. MINORITY REPORT, *supra* note 33, at 19.

135. COMMISSION REPORT, *supra* note 10, app. 3 at 47 (Commission Charter).

The members shall include representatives of college, university, and school district officials, such as athletic directors, coaches, and other faculty, and representatives of intercollegiate and secondary school athletes; and may include researchers, state and local officials, and other persons with special expertise in intercollegiate and secondary school athletics or issues of equal educational opportunity. The membership of the Commission will be fairly balanced to reflect representation of a wide range of interests and perspectives relating to men’s and women’s (and boys’ and girls’) athletics.

Id.

the academic enterprise would have remained untouched. However, as elucidated by Jocelyn Samuels, the Commission's recommendations would have inflicted grave damage to the goal of building gender equality and to civil rights law in general.¹³⁶ In addition, the Commission's recommendations would have altered Title IX generally, not exclusively, for the Division I schools they sought to remediate, undercutting Title IX's efficacy in creating greater gender equity in colleges nationwide and in high schools, where there has been little Title IX enforcement to date.¹³⁷

V. HOW TO GENUINELY EXPAND ATHLETIC OPPORTUNITY

A. *Suggested Reforms*

While gutting Title IX would not expand athletic opportunities for women or men, wresting control of football and basketball spending could. One solution is to have the NCAA, in conjunction with university

136. See Samuels, *supra* note 12.

137. See, e.g., NAT'L WOMEN'S LAW CTR., THE BATTLE FOR GENDER EQUITY IN ATHLETICS IN ELEMENTARY AND SECONDARY SCHOOLS (May 2002), *available at* http://www.nwlc.org/pdf/Battle_June 2002.pdf (last visited Dec. 1, 2003); MINORITY REPORT, *supra* note 33, at 10 (Finding 19); *id.* at 12 (Recommendation 7) (describing how the Office of Civil Rights has not exercised its authority, as it should, to collect data on gender equity in high school sports). The Commission failed to specifically address Title IX compliance at the high school level. COMMISSION REPORT, *supra* note 10, at 28 ("Although there has been some discussion about issues related to Title IX compliance at the high school level, the small amount of such testimony and the expertise of the Commissioners does not allow for extensive findings on how high schools are complying with Title IX."). However, Title IX protections are equally important at the high school level. Amy Hetzner, *Review of Title IX May Put Ball in High Schools' Courts*, MILWAUKEE J. SENTINEL, Feb. 10, 2003, at 1A; Kerry A. White, *25 Years After Title IX Sexual Bias in K-12 Sports Still Sidelines Girls*, EDUC. WEEK, June 18, 1997, http://www.edweek.org/civ/ev_printstory.cfm?slug=38titlei.h16 (last visited Sept. 22, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

In the absence of federal enforcement, some states have enacted Title IX equivalencies to enforce gender equity in high schools. See Florida Educational Equity Act, FLA. STAT. ANN. § 1000.05 (West 2003) (requiring high schools to provide equal opportunities, funding and resources to male and female athletes); Georgia Equity in Sports Act, GA. CODE ANN. § 20-2-315 (2001); HAW. REV. STAT. ANN. §§ 302A-461-67 (Michie 2001); see also Mike Fish & David A. Milliron, *Florida's Fairer Clime*, ATLANTA J. & CONST., Dec. 15, 1999, at 1H; Mike Fish & David A. Milliron, *Georgia Treats Girl Athletes Second Class*, ATLANTA J. & CONST., Dec. 12, 1999, at 1A.

United States Senator Olympia Snowe introduced a bill during the last session of Congress to require collection of gender equity data at the high school level. See High School Sports Information Collection Act of 2003, S. 282, 108th Cong. § 2 (2003), *available at* <http://thomas.loc.gov> (last visited Dec. 1, 2003). The Bill was referred to the Senate Committee on Health, Education, Labor and Pensions where it languished.

administrations, impose policies to curb the arms race.¹³⁸ Secretary Paige's Commission made two general recommendations regarding collegiate sports finance.¹³⁹ Recommendation 8 of the Commission's Report states: "The Department of Education should encourage educational institutions and national athletic governance organizations to address the issue of reducing excessive expenditures in intercollegiate athletics. Possible areas to explore might include an antitrust exemption for college athletics."¹⁴⁰ Recommendation 13 advises the Department of Education to encourage the NCAA "to review its scholarship and other guidelines to determine if they adequately promote or hinder athletic participation opportunities."¹⁴¹ Further, to be more specific, roster limits for football could reduce the cost of fielding a team. By shrinking the average size football team of 105 players to 75, new athletic slots and athletic scholarships would become open for men who want to play other sports without increasing the gender imbalance.¹⁴²

The NCAA could impose a host of other measures to curb commercialization, such as limiting game schedules, eliminating televised tournaments and bowl games, prohibiting product endorsements,¹⁴³ capping coaches' salaries (although this would require an exemption from anti-trust law),¹⁴⁴ requiring game schedules to accommodate academic schedules, and limiting practice and training

138. Since its inception, the NCAA has adopted several measures to curb the excesses of men's football and basketball. In 1905, President Theodore Roosevelt convened college presidents at the White House to ban the "flying wedge" formation from college football because it had resulted in 24 deaths in 1904 alone. BOK, *supra* note 33, at 36. In 1906, the NCAA was founded in order to develop uniform rules to guide college sports. *Id.* For the last ten years the NCAA has required that the university control athletic department product endorsement contracts. The NCAA limits to eighty-five the number of scholarship players on a football roster. While imposing these and other incremental limits, the NCAA has proven adept at preventing any meaningful curbs on college sports commercialization. *See, e.g.,* COLLEGE SPORTS INC., *supra* note 34, at 333-340 (describing the NCAA's defeat of a proposal by the American Council of Education in the early 1980s, which would have given a "President's Board" veto and modification authority over NCAA rules, enabling university president's to gain more of their college sports programs).

139. COMMISSION REPORT, *supra* note 10, at 35.

140. *Id.*

141. *Id.* at 36-37.

142. There are only eleven players on the field at any one time and the NFL limits rosters to forty-five players for game days, so a squad of seventy-five would allow ample substitutions.

143. The University of Michigan Athletic Department copyrighted the "block M" and profits handsomely from commercial products marketed on the University's reputation. DUDERSTADT, *supra* note 17, at 92. WVU has copyrighted its logo as well, but the proceeds go to the university, not the athletic department. Parsons Interview, *supra* note 55.

144. *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010 (10th Cir. 1998) (holding that an NCAA rule limiting entry level basketball coaches' salaries was an unlawful restraint on trade in violation of Sherman Antitrust Act).

regimes to reasonable hours, allowing students to be students. It would also be advisable to require all scholarships to be administered by the admissions office and applied on a need basis, thereby eliminating the employer/employee relationship between college athletic departments and student athletes.¹⁴⁵

Some of these ideas were bandied about for years, but the special interests of the decision makers prevented reform. The NCAA is unwilling to adopt any of these measures,¹⁴⁶ in large part because it has a huge financial interest in the commercial college sports entertainment industry it has fostered.¹⁴⁷ In addition, the NCAA is essentially a trade organization for Division I coaches and athletic directors¹⁴⁸ and will not act against their interests. Indeed, as is discussed *supra*, the Commission failed to examine the adverse effects of the arms race on minor men's sports and gender equality, or to consider any of these reforms, because its membership was heavily dominated by representatives of Division I schools invested in perpetuating the status quo.

B. Sell Off the Teams

The solution is clear: remove the professional farm leagues from the universities¹⁴⁹ and sell the teams as franchises along with the stadiums and training facilities. There could still be college teams for the true student athletes - just like there are for ice hockey and baseball - but

145. Allen Sack, *Pay for Play*, NCAA NEWS, Mar. 31, 2003, <http://www.ncaa.org/news/2003/20030331/editorial/4007n38.html> (last visited Dec. 1, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

146. BOK, *supra* note 33, at 39-41.

147. BEER AND CIRCUS, *supra* note 52, at 37 (detailing some of the lucrative financial incentives that the NCAA receives through the hungry commercial college sports entertainment industry).

By the mid-1980's, the NCAA received \$32 million a year from CBS-TV to televise the [men's basketball] tournament . . . and a few million from ESPN, still doing every game not carried by CBS. . . . [I]n 1999, they renegotiated again, upping the fee [to the NCAA] to almost \$6 billion for all tournament games through 2013.

Id.

The NCAA also earns millions in ticket sales to the March Madness (NCAA men's basketball) playoffs, having moved them to big astrodome facilities. *Id.* Throughout the 1990's, only 25% of this revenue went back to the participants and their conferences. *Id.* Some of the losers from the first round failed to even cover their expenses in travel to the tournament. *Id.* The remainder stayed in the NCAA coffers. *Id.*

148. *Id.* at 34 ("[A]s President Atchley and other critics of the NCAA have argued, the NCAA functions mainly as a trade association for coaches and athletic directors, implementing their wishes regardless of these are in the best interests of the member schools . . .").

149. See George Vecsey, *Vanderbilt Should Consider Getting Out of This Cottage Industry*, N.Y. TIMES, Sept. 19, 2003, at D4.

they would be organized on a reasonable scale, with schedules and training regimes compatible with academic life. The athletes who want to go straight to professional sports life could become professionals and receive compensation. This would prevent the recurrent scandals¹⁵⁰ that emerge from the charade that student athletes are really bona fide students who are not entitled to nor receive remuneration.¹⁵¹ Those athletes who remain at the universities would have a chance to be true student athletes, with schedules that permit them to attend classes and study. By removing the professional athletes from college athletic programs, athletic slots would be made available for more students to participate.

The millions, or perhaps billions, of dollars obtained by the universities from selling their football and basketball teams, stadiums and training facilities could be used to endow the remaining university athletic programs. Serious reckoning would be in order at schools with failing commercial football and basketball enterprises for which the market would not pay millions. In the face of a wave of spinoffs at other schools and in the context of deep university budget slashing, schools would no longer be able to justify pumping millions of dollars annually into failing commercial sports enterprises. Much like the emperor's new clothes, the lack of net revenue from revenue producing sports would become quite embarrassingly obvious.

Initially, the above proposal might sound unrealistic, but it is not. We have models from the nationwide trend of universities separating themselves from their medical facilities in a variety of ways, which began in the mid 1980's.¹⁵² As is true of the big athletic programs,¹⁵³ hospitals

150. See e.g., Harvey Araton, *Men Give Women An Unseemly Model*, N.Y. TIMES, April 7, 2003, at D4; Viv Bernstein, *Baylor Coach Told Team to Lie to Investigators*, N.Y. TIMES, Aug. 17, 2003, Sports Section, at 2; Mike Freeman, *Pursuit of Victories Presses on Colleges*, N.Y. TIMES, July 13, 2003, Sports Section, at 4; Mike Freeman, *When Values Collide: Clarett Got Unusual Help in Class*, N.Y. TIMES, July 13, 2003, Sports Section, at 1.

151. COLLEGE SPORTS INC., *supra* note 34, at 202 (proposing that the academic community would not complain as much about college sports if athletic directors simply employed paid athletes instead of "pseudo students"); Vecsey, *supra* note 149 ("[Ohio State football star Maurice] Clarett [is] caught up in a web of questionable money and dubious ethics and his own resentment at working in exchange for an education that he obviously does not want. In other words, your basic Division I program.").

152. See generally THE COMMONWEALTH FUND TASK FORCE ON ACADEMIC HEALTH CTNS., ENVISIONING THE FUTURE OF ACADEMIC HEALTH CENTERS 1 (Feb. 2003) [hereinafter COMMONWEALTH TASK FORCE REPORT], http://www.cmwf.org/programs/taskforc/ahc_envisioningfuture_600.pdf (last visited Dec. 1, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

153. SHULMAN & BOWEN, *supra* note 33, at 248 ("Sudden changes in volatile revenues streams can make balancing a budget quite a feat, even for schools with winning teams. The pendulum can swing quickly.").

and medical complexes have huge fluctuations in earnings from year to year.¹⁵⁴ Moreover, for public universities, there are large costs associated with running medical businesses through state university bureaucracies.¹⁵⁵ As academic health centers sought to shield themselves from the vicissitudes of fluctuating revenues, they partnered with private partners and sold their hospitals to separate nonprofit and for profit corporations.¹⁵⁶

WVU again provides an informative case study. WVU sold its hospital complex, but retained its medical school and dentistry school, with its staff of faculty and student population.¹⁵⁷ Now, when faculty members provide patient care, they do so through a physician association and not the university.¹⁵⁸ The hospital nonprofit corporation, not the university, pays for all nurses, orderlies, capital improvements, facilities maintenance and malpractice insurance.¹⁵⁹ The new hospital entity continues to use the WVU name, through a branding contract.¹⁶⁰

Other schools have chosen to follow different models. Tulane Medical School, George Washington University Medical School and Creighton University each sold their hospitals to for profit chains in order to free themselves from debt, ensure the economic viability of their clinical facilities and protect themselves from potentially catastrophic losses.¹⁶¹ These examples, coupled with the case study of WVU, demonstrate how the separation of the hospital from the university encourages better business planning in the hospital, removes the drain on university resources, and seeks to disentangle the academic mission from the distortions of commercial enterprise.

154. Changes in Medicaid reimbursement rates, competition from HMO's and other market pressures, as well as fluctuations in level of government funding for education and research combine to make academic health center revenue streams unpredictable. See COMMONWEALTH TASK FORCE REPORT, *supra* note 152, at 3; ALLEN DOBSON ET AL., FINANCIAL PERFORMANCE OF ACADEMIC HEALTH CENTER HOSPITALS, 1994-2002, at 19 (Sept. 2002), available at http://www.cmwf.org/programs/dobson_financialperformance_543.pdf (last visited Dec. 1, 2003).

155. Interview with Professor Kevin Outterson, WVU College of Law, in Morgantown, W. Va. (May 5, 2003) [hereinafter Outterson Interview].

156. *Id.*; David Blumenthal & Joel S. Weissman, *Selling Teaching Hospitals to Investor-Owned Hospital Chains: Three Case Studies*, HEALTH AFFAIRS, March/April 2000, at 158.

157. Outterson Interview, *supra* note 155.

158. *Id.*

159. *Id.*

160. *Id.*

161. Blumenthal & Weissman, *supra* note 156, at 163.

In the case of Creighton, the hospital trustees concluded that health care had become a business in which they had neither the managerial capacity nor the capital to compete. . . . [T]hey received a capital infusion that could be used to support academic purposes and relief from the burden of managing a complex business.

Id. at 164.

While the medical models will need to be substantially revised to fit athletics, they suggest a path for athletic team spinoffs. Care will need to be taken to ensure that football and men's basketball are not removed from the books only as a means of avoiding Title IX accountability. Players on the new professional farm teams should be accorded no special consideration if they apply and enroll as part-time students with full-time jobs. Moreover, universities have accommodated the commercial sports enterprises in deep ways.¹⁶² To reclaim the integrity of the academic enterprise, selling off the farm teams will need to be accompanied by a far reaching reevaluation of curriculum, admissions, promotion, retention and undergraduate student social life.

Although the medical center spinoff models will not apply entirely to athletics, it makes sense to sell off football and men's basketball, just as it made sense for universities to separate themselves from their hospital behemoths. Such a move can be economically, culturally and academically beneficial to the university.¹⁶³ It can also solve the problem of the elimination of men's non-revenue producing teams that is caused by the football and basketball arms race, but which has been mistakenly blamed on Title IX. Ultimately, freedom from commercial sports domination will enable universities to move forward toward gender equity in athletics and elsewhere.

VI. CONCLUSION

Secretary Paige's Commission spent a year studying the impact of Title IX on access to athletics for men and women and came to focus on the elimination of minor men's sports as a major problem in collegiate

162. See *supra* notes 53-58 and accompanying text; discussion *supra* Part III; see also Karen Arenson, *Study of Elite Colleges Finds Athletes Are Isolated from Classmates*, N.Y. TIMES, Sept. 15, 2003, at A12 (discussing study by Mellon Foundation concluded that athletes in the Ivy League and 25 other highly selective colleges are admitted with significantly lower grades and College Board scores, performed more poorly than would be expected for students with those grades and test scores, and were increasingly isolated from the rest of the campus community).

163. Two former university presidents have written eloquently about the difficulty of overcoming vested interests and reclaiming academic values by eliminating the commercialization of big-time sports. BOK, *supra* note 33, at 51-53 (describing how university president's hands have been tied regarding reforming big-time college athletic programs); DUDERSTADT, *supra* note 17, at 304 ("[M]ost presidents . . . seem resigned to the status quo."). This well-documented problem has led to a number of suggestions for reform. DUDERSTADT, *supra* note 17, at 263-318. I do not mean to imply that this can happen easily or without struggle. But once the economics of big-time sports and their impact on the culture and integrity of their host schools are more generally understood, I cannot believe that major change will not occur.

life. While extolling the virtues of Title IX,¹⁶⁴ the Commission recommended that Title IX's enforcement mechanisms be weakened in an attempt to reduce the pressure to cut men's teams. Title IX has weaknesses that must be addressed,¹⁶⁵ however the elimination of minor men's teams is not one of those weaknesses. The pressure to cut minor men's teams is not dictated by Title IX, but by the economics of Division I-A football and, to a lesser extent, men's basketball.

As long as football and men's basketball teams are allowed to pursue winning through spiraling expenses, they will dictate athletic department priorities and distort the academic values of their host universities. Since the teams effectively operate as unpaid farm teams, they should be sold to the professionals, shed the charade that they are collegiate amateur teams, and begin operating openly, efficiently and more effectively as the businesses that they are. Universities will then be free to integrate athletic programs back into student life, regain the integrity of their academic programs and foster gender equality in an environment of increasing opportunities for men as well as women.

164. COMMISSION REPORT, *supra* note 10, at 2.

165. While female sports participation has increased dramatically during the thirty years since Title IX was enacted, participation rates still lag behind that of males. "[A]lthough women in Division I colleges are 53% of the student body, they receive only 41% of the opportunities to play sports, 36% of over athletic operating budgets, and 32% of the dollars spent to recruit new athletes." MINORITY REPORT, *supra* note 33, at 2 (citing NAT'L COLLEGIATE ATHLETIC ASS'N, 1999-2000 NCAA GENDER EQUITY REPORT 20, <http://www.ncaa.org/library/research.html> (last visited Oct. 27, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class). The contact sports exemption is also a major impediment to gender equality. See discussion *supra* note 29.