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The FEMALE Act: Bringing Title IX into the Twenty-First Century

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The FEMALE Act: Bringing Title IX into the Twenty-First Century

ABSTRACT

What was once lauded as a progressive champion for women has been decaying in practice. Enacted more than forty-five years ago, Title IX's unforeseen consequences and shortcomings are primarily borne by female collegiate athletes. To comply with Title IX, the majority of college athletic programs follow the proportionality standard, which mandates that male and female participation in athletics must be substantially proportional to universities' overall undergraduate enrollment. Female participation in college athletics has increased to nearly five times the pre-1972 participation rates since the introduction of Title IX. While that progress is admirable, the athletes of today—both male and female—deserve better.

A decrease in the number of female coaches, high rates of sexual abuse of female athletes, and elimination of successful men's programs are some of the major negative unintended consequences of Title IX as it is currently implemented. It is in the best interest of all serious collegiate athletes—male and female—to update the system to ensure the integrity of college athletics and wellbeing of student athletes. This Note argues that the best way to fix Title IX is to alter its biggest weakness: the proportionality requirement. Specifically, this Note suggests a new solution: the FEMALE Act, which would (1) remove the top revenue-producing sport at each school from the proportionality calculation; (2) require schools to meet the proportionality requirement with coaches, not just athletes; and (3) add provisions that better protect athletes from sexual abuse.

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Title IX of the Education Amendments of 1972,¹ originally lauded as a progressive champion of women, has been decaying in practice. Enacted more than forty-five years ago, Title IX's unforeseen consequences and shortcomings are primarily borne by female collegiate athletes. To comply with Title IX, the majority of college athletic programs follow the proportionality standard, which mandates that male and female participation be substantially proportional to universities' overall undergraduate enrollment.² Female participation in college athletics has increased to nearly five times the pre-1972 participation rates since the introduction of Title IX.³ While this progress is admirable, Title IX has fallen short in unexpected areas. The athletes of today—both male and female—deserve better.

Amateur athletes dream of joining the elite ranks of college athletics, training and sacrificing countless hours in the process. The few that achieve this dream, however, are often greeted with unsettling scenarios when they set foot on campus, eager to start their collegiate

1. Education Amendments of 1972, Pub. L. No. 92-318, Title IX, 86 Stat. 235, 373-75 (1972) (codified as amended at 20 U.S.C. §§ 1681-88 (2018)).

2. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979); *see infra* Section I.B (discussing Title IX compliance standards in detail).

3. *Title IX and Women's Athletic Opportunity: A Nation's Promise Yet to Be Fulfilled*, NAT'L WOMEN'S L. CTR. (July 2008), <https://www.nwlc.org/sites/default/files/pdfs/Nation's%20Promise%20July%202008.pdf> [https://perma.cc/E8A7-FY72].

athletic careers.⁴ It may happen before they even get there—such as a mass email sent out to every female student, boasting about the opportunity to try out for the rowing team and become a Division I athlete—no experience required!⁵ It may be a frustrating inability to get treatment efficiently since the training room is overcrowded with fresh, inexperienced athletes who have injured themselves while learning their new sport. It may come in the form of a letter informing them that the university is cutting their program, despite the team's exceptional performance.⁶ These exceedingly common scenarios result directly from the shortcomings of Title IX; yet they are just the tip of the iceberg.

A decrease in the number of female coaches, high rates of sexual abuse of female athletes, and elimination of successful men's programs are some of the major negative unintended consequences of Title IX as currently implemented. It is in the best interest of all serious collegiate athletes—male and female—to update the system to ensure the integrity of college athletics and the well-being of student athletes.

This Note argues that the best way to fix Title IX is to alter its biggest weakness: the proportionality requirement. Part I traces the history of Title IX, as well as how it is implemented and its effects on college athletics. After discussing the various unintended consequences of Title IX as it currently exists, Part II explores commonly suggested solutions to fixing Title IX. Part III suggests a comprehensive new solution: the FEMALE Act, which would (1) remove the top revenue-producing sport at each school from the proportionality calculation; (2) require schools to meet the proportionality requirement

4. See, e.g., Erin Jordan, *Some Say False Gender Balance in University of Iowa Athletics*, GAZETTE (Mar. 6, 2016), <https://www.thegazette.com/subject/news/education/higher-education/some-say-false-gender-balance-in-university-of-iowa-athletics-20160306> [<https://perma.cc/AU2Z-X7GA>] (reporting on an investigation that the University of Iowa was “padding” its women's rowing team with inexperienced athletes); Daniel McGraw, *No Rowing Experience? No Problem. Here's a College Scholarship*, AM. CONSERVATIVE (Mar. 20, 2019, 9:59 PM), <https://www.theamericanconservative.com/articles/no-athletic-experience-no-problem-heres-a-college-scholarship/> [<https://perma.cc/2UFA-RTHX>] (noting that women's rowing teams are often used to “balance out” football teams' numbers and that many college rowers had never tried the sport prior to arriving at their university). The phenomenon of “padding” rowing rosters has received more coverage recently due to college admissions scandal at prominent US universities such as the University of California. See Matthew Ormseth, *In College Scandal, Rowing Was the Ideal Sport for Stowaways, Cheating*, L.A. TIMES (Apr. 12, 2019, 5:00 AM), <https://www.latimes.com/local/california/la-me-college-admissions-scandal-lori-loughlin-olivia-jade-crew-rowing-20190412-story.html> [<https://perma.cc/JH2V-RDA4>].

5. See e.g., Jordan, *supra* note 4.

6. See, e.g., David Jesse, *EMU Cuts Four Sports, Leaves Football Untouched*, DETROIT FREE PRESS (Mar. 21, 2018, 6:01 AM), <https://www.freep.com/story/news/local/michigan/2018/03/21/eastern-michigan-university-cuts-four-sports-leaves-football-alone/443159002/> [<https://perma.cc/27R9-3QVW>].

with coaches, not just athletes; and (3) add provisions that better protect athletes from sexual abuse.

I. BACKGROUND

Originally enacted to facilitate gender equality in education, Title IX quickly gained significance for athletic departments at all levels.⁷ In 1979, Congress finally introduced the compliance standard that is still used today: the proportionality standard.⁸ The proportionality standard dictates that athletic “participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.”⁹ Title IX and the implementation of the proportionality standard at all education levels greatly increased female participation in athletics.¹⁰ While this progress is admirable, Title IX has had unintended negative consequences, including a decrease in the number of female coaches, high rates of sexual abuse of female athletes, and the elimination of successful men’s programs.¹¹

A. *History of Title IX and College Athletics*

As part of the Education Amendments of 1972, Congress enacted Title IX; President Nixon signed the bill into law on June 23, 1972.¹² Designed to prevent discrimination based on sex, Title IX reads as follows: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹³ Although this Note focuses on the effects of Title IX in college athletics, the bill was designed to prohibit sex discrimination in educational institutions at all levels.¹⁴ Note that

7. See *infra* Section I.A.

8. See Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

9. *Id.*

10. See *infra* Section I.B.1.

11. See *infra* Part II; Section I.B.2.

12. *History of Title IX*, WOMEN’S SPORTS FOUND. (Aug. 13, 2019), <https://www.womenssportsfoundation.org/advocate/title-ix-issues/history-title-ix/history-title-ix/> [<https://perma.cc/3ZTA-UEV8>].

13. 20 U.S.C. § 1681(a) (2018).

14. *Id.* § 1681(a), (c); see also U.S. DEPT OF JUSTICE, EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX 1–2 (2012), <https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/ti-tleixreport.pdf> [<https://perma.cc/96FS-M7BG>] [hereinafter EQUAL ACCESS TO EDUCATION].

the actual text of Title IX does not mention athletics.¹⁵ However, the biggest controversies and resistance to Title IX have materialized in college athletics, with amendments being proposed to limit the effects on certain athletic programs and backlash from sports programs arising soon after its passage.¹⁶ For example, Senator John Tower (R-TX) presented what is popularly known as the “Tower Amendment” in 1974.¹⁷ The Tower Amendment sought to exclude revenue-producing sports from Title IX compliance, recommending the following exemption to the bill: “This section shall not apply to an intercollegiate athletic activity insofar as such activity provides to the institution gross receipts or donations required by such institution to support that activity.”¹⁸ The Senate ultimately rejected the Tower Amendment after hearing extensive testimony from its supporters and opponents; though Senator Tower intended to protect big revenue sports like football, those opposed to the amendment feared it would grant further advantages to male athletes while it would fail to advance the interests of female athletes.¹⁹

Since 1974, Title IX has undergone a number of changes.²⁰ After the Tower Amendment failed, Senator Jacob Javits (R-NY) suggested an alternative amendment that required the Commission on Health, Education, and Welfare (HEW) to issue Title IX regulations that included “with respect to intercollegiate athletic activities, reasonable provisions considering the nature of particular sports.”²¹ Thus, Title IX, which began as a general prohibition on sex discrimination in education, shifted focus to athletics.²² Multiple attempts to further amend Title IX arose in 1975, culminating in HEW issuing a “final” Title IX regulation on July 21, 1975, offering more guidance on how schools could comply with Title IX:

15. 20 U.S.C. § 1681(a).

16. See *History of Title IX*, *supra* note 12. For example, in 1975, Rep. James O'Hara (D-MD) introduced House Bill 8394, proposing “sports revenues first be used to offset the cost of that sport, and only then to support other sports,” but the bill failed in committee before reaching the House floor. See *id.* Later that year, Congress reviewed and approved Title IX regulations and rejected numerous resolutions disapproving regulation of college athletics. See *id.*

17. *Id.*

18. *Prohibition of Sex Discrimination, 1975: Hearing on S. 2106 Before the Subcomm. on Educ. of the S. Comm. on Labor & Pub. Welfare*, 94th Cong. 61 (1975), <https://files.eric.ed.gov/fulltext/ED136136.pdf> [<https://perma.cc/9DQR-UD2M>].

19. *Id.* at 2–447; *History of Title IX*, *supra* note 12.

20. See generally EQUAL ACCESS TO EDUCATION, *supra* note 14; *History of Title IX*, *supra* note 12.

21. S. REP. NO. 93–1026, at 4271 (1974) (Conf. Rep.).

22. See generally *History of Title IX*, *supra* note 12.

A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.²³

High schools and colleges had three years to meet the compliance standards, whereas elementary schools were given one year.²⁴

Despite these compliance standards, schools still struggled to understand how to adhere to these standards, as the legislation had not laid out a clear standard to follow.²⁵ In 1979, HEW issued a final policy interpretation on "Title IX and Intercollegiate Athletics," which established the three-prong test that remains the compliance standard today.²⁶ This test underwent minor changes and clarifications but has more or less been the compliance standard for the past forty years.

B. Title IX Implementation in College Athletics

The three-prong Title IX compliance test assesses intercollegiate athletic programs based on three factors:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

23. 34 C.F.R. § 106.41(c) (2019); *History of Title IX*, *supra* note 12.

24. *History of Title IX*, *supra* note 12.

25. *See, e.g., id.*

26. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.²⁷

While schools can comply with Title IX by meeting any one of these three standards, the first prong—commonly known as the “proportionality requirement”—is the most commonly used, as it is arguably the most straightforward and objective of the three prongs.²⁸ Accordingly, most Title IX lawsuits focus on the first prong, claiming that universities have failed to comply with the proportionality requirement.²⁹

Due to its “objective and quantifiable nature,” the proportionality standard established a sort of “safe-harbor provision” for university athletic departments.³⁰ As one author put it, “Courts have made it clear that when an athletic program achieves a statistical balance between male and female athletes, it presumptively achieves Title IX compliance.”³¹ In *Cannon v. University of Chicago*, the Supreme Court of the United States held that Title IX gives an individual the right to sue if he or she has been personally affected by a Title IX violation.³² This case was crucial in establishing a remedy outside of Office of Civil Rights (OCR) investigations for those affected by Title IX violations³³—students could now sue their university directly if they felt

27. *Id.*

28. See generally Abigail M. Mabry, Note, *Title IX: Proportionality and Walk-Ons*, 44 U. MEM. L. REV. 497, 507–08 (2013).

29. See Victoria Langton, Note, *Stop the Bleeding: Title IX and the Disappearance of Men's Collegiate Athletic Teams*, 12 VAND. J. ENT. & TECH. L. 183, 184–96 (2009) (discussing the trends of legal challenges to Title IX by male athletes).

30. Mabry, *supra* note 28, at 507–08.

31. *Id.* at 508.

32. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979).

33. The OCR receives and assesses complaints concerning potential civil rights violations perpetrated by institutions that receive federal funding. *OCR Complaint Processing Procedures*, U.S. DEPT. EDUC.: OFF. FOR CIV. RTS., <https://www2.ed.gov/about/offices/list/ocr/complaints-how.html> [<https://perma.cc/NZ23-YUD7>] (last modified Jan. 10, 2020). If the OCR chooses to move forward with a complaint, it will conduct an investigation. *Id.* In the event that a recipient is found noncompliant with civil rights laws, the OCR

will contact the recipient and will attempt to secure the recipient's willingness to negotiate a voluntary resolution agreement. . . . If the recipient does not agree to correct its noncompliance with the civil rights law(s) by entering into a resolution agreement, OCR may initiate proceedings to suspend, terminate, or refuse to grant or continue

they had been wronged.³⁴ However, the Court seemed to exclude athletics from this category a few years later in *Grove City College v. Bell* when it held that Title IX only applied to certain programs at universities—and did not include athletics.³⁵ “In other words, if a college . . . did not receive federal funding to operate its athletic program, the athletic program would not fall under Title IX requirements.”³⁶

Congress explicitly rejected the Court’s interpretation when it enacted the Civil Rights Restoration Act of 1987.³⁷ This legislation mandated that “all programs at educational institutions receiving federal funding fall under the jurisdiction of OCR,” which governs Title IX compliance.³⁸ This brought athletic programs back under the authority of Title IX.³⁹ In *Franklin v. Gwinnett County Public Schools*, the Court reinforced the idea that an individual could seek damages for Title IX violations by educational institutions.⁴⁰ Thus, the fact that individuals can sue schools for Title IX violations provides further incentives for institutions to comply with Title IX.⁴¹

By focusing on and reinforcing the proportionality requirement, courts helped solidify the tendency for schools to concentrate solely on the proportionality requirement.⁴² A clarification letter was distributed in 1996 explaining that schools did not have to use the proportionality test.⁴³ However, this letter was apparently misleading:

Federal financial assistance to the recipient, or may refer the case to the Department of Justice.

Id. Prior to the decision in *Cannon*, OCR investigations were the only possible remedy for Title IX violations, which made it difficult for athletes to secure legal remedies. *See Cannon*, 441 U.S. at 688–89.

34. Mabry, *supra* note 28, at 501–02.

35. *Grove City Coll. v. Bell*, 465 U.S. 555, 574–75 (1984).

36. Mabry, *supra* note 28, at 502.

37. Civil Rights Restoration Act of 1987, Pub. L. No. 100–259, 102 Stat. 28 (1988) (codified as amended in scattered sections of 20 U.S.C., 29 U.S.C., 42 U.S.C.).

38. Mabry, *supra* note 28, at 502.

39. *Id.*

40. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992).

41. Diane Heckman, Commentary, *Equity in Athletics, Inc. v. Department of Education: On the Eve of Title IX’s 40th Anniversary Comes a Full Court Press to Dismantle Use of the Effective Accommodation Test in Intercollegiate Athletic Programs*, 281 EDUC. L. REP. 1, 3 (2012).

42. *See* Jay Larson, Note, *All Sports Are Not Created Equal: College Football and a Proposal to Amend the Title IX Proportionality Prong*, 88 MINN. L. REV. 1598, 1605–06 (2004).

43. *See* OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST (1996), <http://www.ed.gov/print/about/offices/list/ocr/docs/clarific.html> [<https://perma.cc/4SKC-EFEA>]; Larson, *supra* note 42, at 1605–06.

While acknowledging that the “safe harbor” language of the 1996 Clarification Letter led many schools to “erroneously believe” that they must use the proportionality prong, the Further Clarification reiterated that each of the three prongs is a sufficient means of complying with Title IX, and “no one prong is favored.”⁴⁴

While this approach may have increased female participation on its face, it also led to undesirable and unintended consequences, such as elimination of successful men’s teams, a significant decline in female college coaches, and higher exposure of female athletes to sexual abuse by coaches.⁴⁵

The National Collegiate Athletic Association (NCAA), “a member-led organization dedicated to the well-being and lifelong success of college athletes,” is a major player in Title IX compliance.⁴⁶ As the national governing body of college athletics, the NCAA creates and enforces the rules and policies surrounding college sports.⁴⁷ Despite declaring dedication to the well-being of student athletes, the NCAA receives frequent harsh criticism for its practices.⁴⁸ Professional basketball player LeBron James is one of its most recent critics, calling

44. See OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., FURTHER CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE REGARDING TITLE IX COMPLIANCE (2003), <https://www2.ed.gov/about/offices/list/ocr/title9guidanceFinal.html> [https://perma.cc/LA45-ZYFR]; Larson, *supra* note 42, at 1605–06.

45. See, e.g., Linda Flanagan & Susan H. Greenberg, *How Title IX Hurts Female Athletes*, ATLANTIC (Feb. 27, 2012), <https://www.theatlantic.com/entertainment/archive/2012/02/how-title-ix-hurts-female-athletes/253525/> [https://perma.cc/4PH8-MRPP]; Jeré Longman, *Number of Women Coaching in College Has Plummeted in Title IX Era*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/sports/ncaabasketball/coaches-women-title-ix.html> [https://perma.cc/73JY-DAP5]; Katie Thomas, *Colleges Cut Men’s Programs to Satisfy Title IX*, N.Y. TIMES (May 1, 2011), <https://www.nytimes.com/2011/05/02/sports/02gender.html> [https://perma.cc/DZB4-AKYC]; *The Battle for Gender Equity in Athletics in Colleges and Universities*, NAT’L WOMEN’S L. CTR. (Aug. 2011), https://www.nwlc.org/wp-content/uploads/2015/08/2011_8_battle_in_college_athletics_final.pdf [https://perma.cc/F4FP-C5SA] [hereinafter *The Battle for Gender Equity*].

46. *What Is the NCAA?*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> [https://perma.cc/N7LQ-D8S5] (last visited Feb. 22, 2019).

47. *Id.*

48. See, e.g., Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <https://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/> [https://perma.cc/JEN2-ALWG]; Jerry Brewer, *NCAA Needs to Rethink Amateurism Because the Next Zion Williamson Was Watching*, WASH. POST (Feb. 21, 2019, 2:23 PM), https://www.washingtonpost.com/sports/colleges/ncaa-needs-to-rethink-amateurism-because-the-next-zion-williamson-was-watching/2019/02/21/24735a08-3612-11e9-af5b-b51b7ff322e9_story.html?utm_term=.cca04db3ba02 [https://perma.cc/5J4M-F7WM]; Richard Vedder, *The Three Reasons College Sports Is an Ugly Business*, FORBES (Mar. 14, 2018, 10:36 AM), <https://www.forbes.com/sites/richardvedder/2018/03/14/perpetual-madness-not-just-in-march/#3a39e9fb65bc> [https://perma.cc/7NC8-F7FB].

the organization “corrupt.”⁴⁹ The NCAA is constantly under fire for questionable practices, inconsistent enforcement, and potential corruption, yet the organization holds immense power.⁵⁰ In spite of the organization’s negative aspects, a Title IX solution attractive to the NCAA is crucial to its success.

1. Positive Effects of Title IX in Women’s College Athletics Participation

While imperfect, Title IX has undoubtedly increased opportunities for female athletes over the last forty-six years.⁵¹ According to the National Center for Education Statistics, the female participation rate in high school athletics is ten times higher now than at the time Title IX was passed—an increase of 1,000 percent.⁵² However, despite this increase, the number of female participants in high school sports today has yet to reach the number of male participants in 1972.⁵³ Today, the number of male participants in high school sports outpaces the number of female participants by over one million.⁵⁴ While this Note focuses on college athletics, high school participation rates naturally carry over to college athletics.

According to a study by the NCAA, athletic participation opportunities have increased for both men and women since the passage of Title IX.⁵⁵ Division I programs boast the highest female athlete participation, with 46.7 percent of championship sport opportunities offered to women, who make up an average of 53 percent of the

49. Kyle Boone, *The NCAA Has a New Critic as LeBron James Says It Is a ‘Corrupt’ Organization*, CBS SPORTS (Feb. 27, 2018, 3:23 PM), <https://www.cbssports.com/college-basketball/news/the-ncaa-has-a-new-critic-as-lebron-james-says-it-is-a-corrupt-organization/> [https://perma.cc/M4TZ-8TVL].

50. See, e.g., Ahiza Garcia, *NCAA Surpasses \$1 Billion in Revenue for First Time*, CNN: BUS. (Mar. 7, 2018, 1:48 PM), <https://money.cnn.com/2018/03/07/news/companies/ncaa-revenue-billion/index.html> [https://perma.cc/A335-G5MH] (nearly \$1.3 billion of the league’s revenue came from championships and tournaments).

51. THE NAT’L COLLEGIATE ATHLETIC ASS’N, *45 YEARS OF TITLE IX: THE STATUS OF WOMEN IN INTERCOLLEGIATE ATHLETICS* (2017), http://www.ncaa.org/sites/default/files/TitleIX45-295-FINAL_WEB.pdf [https://perma.cc/327K-TH2Z] [hereinafter 45 YEARS OF TITLE IX].

52. *Fast Facts: Title IX*, INST. EDUC. SCI.: NAT’L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=93> [https://perma.cc/MX36-9ZV6] (last visited Jan. 21, 2020).

53. *Id.* (“In 1972, when Title IX was passed, boys’ participation numbers were 3,666,917, which is 324,591 more than girls have in 2016.”).

54. 45 YEARS OF TITLE IX, *supra* note 51, at 16 (discussing the fact that in 2016 male participation sat at 4,544,574 (58 percent of male high school students), whereas female participation was 3,324,326 (42 percent of female high school students)).

55. *Id.*

undergraduate population at Division I schools.⁵⁶ The gap has gotten smaller between male and female participation in intercollegiate sports, but it is larger at the Division II and Division III levels, with a 16.6 percent gap in Division II and a 16.8 percent gap in Division III.⁵⁷ Thus, while Title IX has effectively helped increase female participation in intercollegiate athletics, it has not altogether eliminated the gender gap in college sports participation.

2. Negative Effects of Title IX: Men's Sports Are Cut to Comply

An unintended consequence of Title IX is the tendency for universities to cut low revenue-generating men's athletic teams to meet the proportionality requirement rather than spend more money funding new women's programs.⁵⁸ As one article aptly describes, "The practice is frowned upon by the Office for Civil Rights, but it is not prohibited."⁵⁹ Whether Title IX compliance is the true cause behind these cuts is frequently debated.⁶⁰ Nonetheless, it is worth discussing when considering Title IX's shortcomings in terms of gender equality.

For example, Southern Methodist University (SMU) cut a successful men's track and field team in the same year that it added a women's equestrian program.⁶¹ While the school's athletic director justified the decision by claiming that SMU "must concentrate [its] resources . . . to those programs deemed most viable," the men's team had a strong history of success, finishing in the top six at the NCAA indoor track and field championships and top ten at the outdoor championships in the decade leading up to the cut.⁶² Thus, although the athletic director characterized the team as less viable, it is clear that

56. *Id.*

57. *Id.*

58. See Langton, *supra* note 29, at 183 (discussing the trends of legal challenges to Title IX by male athletes).

59. Thomas, *supra* note 45.

60. See Peter Keating, *The Silent Enemy of Men's Sports*, ESPN (May 22, 2012), <http://www.espn.com/espnw/title-ix/article/7959799/the-silent-enemy-men-sports> [<https://perma.cc/Q9B8-Z6NG>]. While it is difficult to point to one single factor that has contributed to the elimination of certain men's teams, some critics have pointed out that football is the true "enemy" of men's college sports due to the sport's large rosters and high amount of scholarships. See Andrew J. Boyd, Comment, *Righting the Canoe: Title IX and the Decline of Men's Intercollegiate Athletics*, 37 J. MARSHALL L. REV. 257, 275 (2003); Keating, *supra*.

61. *SMU Drops Successful Men's Track Team*, WASH. POST (Feb. 20, 2004, 3:35 PM), <http://www.washingtonpost.com/wp-dyn/articles/A58091-2004Feb20.html?noredirect=on> [<https://perma.cc/6A8X-GVME>].

62. *Id.*

this was a Title IX compliance move.⁶³ While increasing opportunities for female athletes is undoubtedly a positive goal, it should not be achieved at the expense of successful male athletes. Furthermore, SMU serves as just one example—this is a common practice in the history of Title IX compliance.⁶⁴ Between 1981 and 1999, college athletic departments cut 363 men’s teams—171 wrestling teams, 84 tennis teams, 56 gymnastics teams, 27 track teams, and 25 swimming teams.⁶⁵ Some scholars argue that this has created animosity between genders within universities.⁶⁶

C. Ongoing Critiques of Title IX

In addition to the backlash from the elimination of various men’s teams, another prominent argument against Title IX’s proportionality requirement is that it is physiologically unrealistic—that is, men naturally tend to participate in sports at a higher rate than women.⁶⁷ While many female athletes may bristle at this critique, there is scientific evidence supporting the idea that Title IX may be unfairly “forcing” gender equality in sports participation.⁶⁸

Another commonly raised issue is the tendency of colleges to add large-roster female sports to satisfy the proportionality standard, even in sports where female interest is low—and thus the quality of the sport is diluted.⁶⁹ When these “filler” teams are added to meet Title IX proportionality, arguably the whole athletic department suffers; the quality of performance and commitment to excellence of the overall athletic program is brought down by these “quota” teams.⁷⁰ As one

63. See *id.* (stating that “SMU decided to drop its men’s track and cross country teams . . . in a move based on gender equity.”).

64. See, e.g., Thomas, *supra* note 45.

65. Boyd, *supra* note 60, at 257.

66. See, e.g., Langton, *supra* note 29, at 195; Jean Marbella & Carrie Wells, *Title IX Law Scrutinized as Universities Cut Teams*, BALTIMORE SUN (Apr. 6, 2013, 5:28 PM), <https://www.baltimoresun.com/maryland/bs-md-towson-title-ix-20130406-story.html> [https://perma.cc/PHK5-3C33].

67. Ted Leland & Karen Peters, *Title IX: Unresolved Public Policy Issues*, 14 MARQ. SPORTS L. REV. 1, 2 (2003).

68. See, e.g., Robert O. Deaner et al., *A Sex Difference in the Predisposition for Physical Competition: Males Play Sports Much More than Females Even in the Contemporary U.S.*, PLOS ONE, Nov. 2012, at 1; Allie Grasgreen, *Equal Opportunity, Unequal Interest?*, INSIDE HIGHER ED (Nov. 15, 2012), <https://www.insidehighered.com/news/2012/11/15/lower-female-interest-sports-calls-title-ix-application-question-study-says> [https://perma.cc/ESJ7-Z3YR].

69. Leland & Peters, *supra* note 67, at 3; Elizabeth A. Hueben, Comment, *Revolution, Numbers, IX: The Thirtieth Anniversary of Title IX and the Proportionality Challenge*, 71 UMKC L. REV. 659, 674 (2003).

70. Hueben, *supra* note 69, at 674–75.

author noted, “[I]n an effort to pump up women’s numbers, schools cut corners by adding large women’s teams and dropping other men’s sports programs. This approach slights both male and female athletes and undermines the spirit of Title IX.”⁷¹ Many universities send out mass emails to incoming freshmen girls, emphasizing that no prior experience is required.⁷² Some schools are known to add names of female students to their rosters, even when they do not actually participate.⁷³ For example, more than half of the seventy-one women on the cross-country team at the University of South Florida did not even run a race in 2009, and, when questioned, “a few [of these women] laughed and said they did not know they were on the team.”⁷⁴ This practice is harmful to athletic programs because it dilutes what it means to be a college athlete.

II. ANALYSIS

Title IX has increased opportunities for female athletes, but its shortcomings are undeniable.⁷⁵ Despite having good intentions, Title IX has had some serious unintended consequences, including a decrease in the number of female coaches at the college level, higher exposure of athletes to sexual abuse, and the elimination of successful men’s teams.⁷⁶ The question of how to address these consequences is frequently raised. Most solutions focus on fixing the elimination of successful men’s teams to meet proportionality requirements.⁷⁷ Some of the most commonly suggested solutions include eliminating football from proportionality calculations, removing walk-on athletes from the calculation, and eliminating the proportionality calculation altogether.⁷⁸ These solutions fail to address the more serious negative consequences Title IX has for female athletes: the lack of female role models and high exposure to sexual harassment and abuse.

71. *Id.* at 674.

72. *Id.* at 674–75; Jordan, *supra* note 4.

73. Katie Thomas, *College Teams, Relying on Deception, Undermine Gender Equity*, N.Y. TIMES (Apr. 25, 2011), <https://www.nytimes.com/2011/04/26/sports/26titleix.html> [<https://perma.cc/U6XQ-TSW7>].

74. *Id.*

75. *See supra* Section I.B.

76. *See infra* Section II.A.

77. *See infra* Section II.C.

78. *See infra* Section II.C.

A. Unintended Consequences of Title IX

While female participation undoubtedly increased since the introduction of Title IX, a number of unintended negative consequences of Title IX illuminates the need for reform. In particular, these negative consequences include the decrease in the number of female coaches and increase in the exposure of female athletes to sexual abuse.⁷⁹ Unfortunately, a bill intended to promote the welfare of women has, in some cases, had the exact opposite effect.

1. Decrease in Number of Female Coaches

One unexpected consequence of Title IX compliance is a dramatic decrease in the number of female coaches in college athletics.⁸⁰ When Congress enacted Title IX in 1972, 90 percent of female college teams were coached by women.⁸¹ However, in the past forty-six years, that number has dropped to just 40 percent.⁸² A bill designed to empower women should not be putting women out of a job, yet Title IX is hurting female athletes and coaches in more ways than one.⁸³ Although the decline in female coaches can be attributed to a number of factors, a driving factor is likely monetary: “As more money and higher salaries came into college sports, men became increasingly interested in coaching women’s teams.”⁸⁴ Title IX makes the prospect of coaching a female college team much more attractive, as it forces schools to give female teams equal funding.⁸⁵ While it is difficult to attribute this trend to one factor, money has been a major one.

Another likely factor is the overall gender gap in positions of leadership in the United States. As one author put it, “The truth is men dominate coaching for the same reason that they run most of our Fortune 500 companies and our country. When we think of leaders, we tend to think of men.”⁸⁶ The sports world is dominated by men, and college coaching is no exception.⁸⁷ Eighty percent of college athletic

79. Flanagan & Greenberg, *supra* note 45; Longman, *supra* note 45.

80. *See* Longman, *supra* note 45.

81. *Id.*

82. *Id.*

83. *See id.*; *see also* *The Battle for Gender Equity*, *supra* note 45.

84. Longman, *supra* note 45.

85. Kim Elsesser, *Here’s Why Women’s Teams Are Coached by Men*, FORBES (Mar. 1, 2019, 1:37 PM), <https://www.forbes.com/sites/kimelsesser/2019/03/01/heres-why-womens-teams-are-coached-by-men/#6116b8acb3f9> [<https://perma.cc/R9RY-MJDM>].

86. *Id.*

87. *See Gender Equality in Sports Media*, UNESCO, <https://en.unesco.org/themes/gender-equality-sports-media> [<https://perma.cc/J9YC-AWX7>] (last visited Jan. 23, 2019).

directors are men, which may create a cycle of men hiring other men over women.⁸⁸ While having a male coach is not necessarily a negative for female athletes, some experts worry that “young women are not often getting the opportunity to have a female coaching role model,” which can be “detrimental to development.”⁸⁹ Furthermore, while it is not only acceptable but common for female teams to have male coaches, it is extremely rare for male teams to have female coaches.⁹⁰ Tara VanDerveer, the women’s basketball coach at Stanford, views the female coaching gap as “Title IX’s greatest failure,” arguing it is a “disturbing trend” that sends the message to girls that “[i]t’s okay for you to play, but you don’t have what it takes to coach.”⁹¹

2. Higher Exposure of Female Athletes to Sexual Abuse

Another unintended consequence of Title IX—likely closely related to the decline of female coaches—is an increase in exposure of female athletes to sexual abuse.⁹² A particularly timely and egregious example of this high rate of sexual assault was the abuse perpetrated by Larry Nassar of USA Gymnastics and Michigan State University.⁹³

88. Longman, *supra* note 45. The percentage of female athletic directors has almost doubled since 1990, going from 11 percent to 19.5 percent; this progress is admirable but far from equitable. See *Female Athletic Directors Almost Double Since 1990, Still Lag at D-I Programs*, HIGHERED DIRECT (Aug. 24, 2018), <https://hepinc.com/newsroom/female-athletic-directors-show-growth-since-1990-still-lag-at-d-i-programs/> [<https://perma.cc/8F7S-NBM6>]; see also Mechelle Voepel, *Women in Athletic Departments: Welcomed or Marginalized?*, ESPN (June 20, 2017), https://www.espn.com/espnw/culture/feature/story/_/id/19686799/women-athletic-departments-welcomed-marginalized [<https://perma.cc/YNR8-C6K9>] (pointing out that “while the landscape for women in college athletics administrations is improving overall, a lot of work remains”). One head coach attributed the gender disparity in coaching staff to the lack of female athletic directors, saying that it is “because we only have 10 percent women athletic directors in Division I. People hire people who look like them. That’s the problem.” Lam Thuy Vo, *This Women’s Basketball Coach Is Going Viral for Her Explanation on Why She Stopped Hiring Men*, BUZZFEED NEWS (Apr. 6, 2019, 11:00 AM), <https://www.buzzfeednews.com/article/lamvo/this-womens-basketball-coach-got-real-about-why-she-stopped> [<https://perma.cc/T5KX-H2PA>].

89. Longman, *supra* note 45.

90. According to NCAA data, in 2016, 40.2 percent of women’s sports had female coaches, compared to just 4.6 percent of men’s sports. 45 YEARS OF TITLE IX, *supra* note 51, at 42. This trend carries over to professional athletics on an even greater level. In the NFL, there are just four women on coaching staffs. Courtney Connley, *Meet Four Women Changing the Face of NFL Coaching*, CNBC (Sept. 30, 2018, 10:00 AM), <https://www.cnbc.com/2018/09/28/meet-four-women-changing-the-face-of-nfl-coaching.html> [<https://perma.cc/534A-GMV2>].

91. Flanagan & Greenberg, *supra* note 45.

92. *Id.*

93. Abigail Abrams, *‘I Thought I Was Going to Die’: Read McKayla Maroney’s Full Victim Impact Statement in Larry Nassar Trial*, TIME (Jan. 19, 2018), <http://time.com/5109011/mckayla-maroney-larry-nassar-victim-impact-statement/> [<https://perma.cc/Z69Z-95VU>]; Alice Park & Billy Perrigo, *‘It Started When I Was 13 Years Old.’ Olympic Gymnast McKayla Maroney Says U.S.*

While Nasser was not a coach, he is a prime example of men dominating positions of power in the world of sports. Similarly, USA Diving is currently under scrutiny and facing sexual misconduct allegations.⁹⁴ While it is impossible to pin these unfortunate events on the shortcomings of Title IX, there exists an undeniable pattern.⁹⁵ In the past twenty-nine years, over one hundred coaches either resigned or were banned from USA Swimming⁹⁶ due to sexual misconduct allegations.⁹⁷ Studies have found that athletic environments in general “can create opportunities for abuse” but that incidents are drastically underreported.⁹⁸

Scholars argue that the physical nature of sports, combined with the “tremendous intimacy in coaching situations” and the fact that “[y]oung people are sexually attractive,” contributes to this troubling trend.⁹⁹ Regardless of physical or psychological explanations, the failure to protect girls and young women from sexual abuse by coaches and trainers is both problematic and unacceptable. McKayla Maroney, an Olympic gymnast and one of Nasser’s victims, described her experience

Team Doctor Molested Her, TIME (Oct. 18, 2017, 11:59 AM), <http://time.com/4987066/mckayla-maroney-metoo-molested/> [<https://perma.cc/4PAG-56QF>].

94. Mark Alesia, *Lawsuit Says Coaches Accused of Sexual Abuse Still Working with Children in USA Diving*, INDY STAR (Oct. 2, 2018, 3:14 PM), <https://www.indystar.com/story/news/2018/10/02/usa-diving-sexual-abuse-larry-nassar-john-wingfield-ripfest/1487155002/> [<https://perma.cc/3MFQ-VT9H>].

95. Flanagan & Greenberg, *supra* note 45 (“For female players, the gravest consequence of having male coaches has been an increased risk of sexual abuse. Pediatrician Ken Feldman, the recently retired medical director of the Children’s Protection Program at Seattle Children’s Hospital, says that although there is no formal tracking of sexual abuse by coaches per se, ‘girls will be more victimized than boys.’”).

96. *List of Individuals Permanently Suspended or Ineligible for Membership*, USA SWIMMING, <https://www.usaswimming.org/utility/landing-pages/safe-sport/banned-member-list---perm> [<https://perma.cc/P5KN-NGVV>] (last updated Dec. 18, 2019) [hereinafter *List of Individuals*]. Two female athletes are suing Will Bohonyi, a volunteer assistant diving coach at the University of Indiana, USA Diving, and the Ohio State University Diving Club, alleging sexual assault. *Former Athletes Sue USA Diving over Allegations of Sexual Abuse*, GUARDIAN (July 16, 2018, 5:06 PM), <https://www.theguardian.com/sport/2018/jul/16/usa-diving-sexual-abuse-allegations> [<https://perma.cc/4F4N-RXMC>] (“Bohonyi has been on USA Diving’s list of banned coaches since 2015, but the lawsuit alleges that action didn’t happen until six months after Ohio State University investigated one of the plaintiff’s allegations and fired him. The report, the lawsuit says, was provided to USA Diving.”).

97. See *List of Individuals*, *supra* note 96; see also Flanagan & Greenberg, *supra* note 45.

98. See Michele LaBotz et al., *Athletic Environments Can Create Opportunities for Abuse*, AAP NEWS (Feb. 23, 2018), <https://www.aapublications.org/news/2018/02/23/coaches022318> [<https://perma.cc/NF4L-XNR5>]; Marlee Burrige, *Sexual Abuse in Women’s Sports*, MICH. DAILY (May 21, 2018, 10:13 AM), <https://www.michigandaily.com/section/columns/marlee-burrige-sexual-abuse-womens-sports> [<https://perma.cc/5NF5-4AX5>] (noting that “many female athletes fear getting cut from a team or losing playing time if they displease a coach”).

99. Flanagan & Greenberg, *supra* note 45.

in harrowing detail, shedding light on just how much reform is needed.¹⁰⁰

Addressing sexual misconduct is a historically difficult problem in all spheres.¹⁰¹ Little research is available on effective ways to reduce sexual assault; however, a new study conducted in the US military suggests that bystanders may be the key to preventing sexual assault.¹⁰² Firing coaches and imposing criminal sanctions do not seem to be effective deterrents, but bystander training may be a better tool to combat this troubling trend.¹⁰³ A major reason sexual assault victims do not speak up is because they are afraid to—training others to look for signs could help them spot issues where victims are unwilling or unable to come forward themselves.¹⁰⁴ Another potentially powerful enforcement mechanism is bystander liability, which would hold people personally liable if they could have intervened in sexual misconduct issues but did not.¹⁰⁵

B. Trends in Title IX Lawsuits

A common trend in Title IX litigation involves athletes suing their university because either their program has been cut or their school will not give their sport varsity status.¹⁰⁶ Although female

100. Abrams, *supra* note 93.

101. As one report noted, “Sadly, there’s very little evidence-based research on strategies to prevent or address sexual harassment. The best related research examines sexual assault on college campuses and in the military. That research shows that training bystanders how to recognize, intervene, and show empathy to targets of assault not only increases awareness and improves attitudes, but also encourages bystanders to disrupt assaults before they happen, and help survivors report and seek support after the fact.” See Brigid Schulte, *To Combat Harassment, More Companies Should Try Bystander Training*, HARV. BUS. REV. (Oct. 31, 2018), <https://hbr.org/2018/10/to-combat-harassment-more-companies-should-try-bystander-training> [<https://perma.cc/U2FM-WJ5Y>].

102. See *supra* text accompanying note 101. The military is especially prone to sexual assault, and this research should be assessed with that in mind; nonetheless, the findings suggest colleges should focus on training bystanders to speak up. See Lindsay M. Orchowski et al., *Evaluations of Sexual Assault Prevention Programs in Military Settings: A Synthesis of the Research Literature*, 183 MIL. MED. 421, 421, 426 (2018).

103. See Orchowski et al., *supra* note 102, at 421; Schulte, *supra* note 101.

104. Claire Cain Miller, *Sexual Harassment Training Doesn’t Work. But Some Things Do.*, N.Y. TIMES (Dec. 11, 2017), <https://www.nytimes.com/2017/12/11/upshot/sexual-harassment-workplace-prevention-effective.html> [<https://perma.cc/V2YM-QEG9>].

105. See generally S. Claire Swift, Note, *Bystander Liability After Dunphy v. Gregor: A Proposal for a New Definition of the Bystander*, 15 REV. LITIG. 579 (1996) (discussing the bystander liability doctrine in detail).

106. Brian L. Porto, Annotation, *Suits by Female College Athletes Against Colleges and Universities Claiming that Decisions to Discontinue Particular Sports or to Deny Varsity Status to Particular Sports Deprive Plaintiffs of Equal Educational Opportunities Required by Title IX (20 U.S.C.A. §§ 1681–1688)*, 129 A.L.R. Fed. 571 (1996).

athletes tend to have more success in Title IX lawsuits than male athletes—female athletes tend to win those suits whereas male athletes tend to lose—this is likely an extension of the proportionality effect.¹⁰⁷ Furthermore, lawsuits reinforce the dominance of the proportionality test because this standard gives judges an identifiable, quantitative basis for judgment.¹⁰⁸

C. Commonly Suggested Solutions

Title IX critics propose various solutions to alleviating its shortcomings.¹⁰⁹ Some of the most commonly suggested solutions to Title IX's application to college athletics include (1) excluding football teams from the proportionality calculation, (2) excluding walk-ons from the proportionality calculation, and (3) eliminating the proportionality requirement altogether.¹¹⁰ This Section explores these proposed solutions as well as why they have not been implemented.

1. Excluding Football from Calculation

Given the unusually large size of the average football team, some Title IX critics suggest excluding football programs from the proportionality calculation.¹¹¹ This argument directly stems from schools tending to focus on proportionality compliance: the average college football roster boasts 111 players.¹¹² In contrast, the women's sport with the highest average roster size is rowing, with an average size of sixty-one members.¹¹³ Thus, advocates of removing football

107. See, e.g., *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332, 334 (3d Cir. 1993) (affirming the district court's preliminary injunction to reinstate the university's women's field hockey and gymnastics teams based on an alleged violation of Title IX); see also Langton, *supra* note 29, at 183 (discussing the trends of legal challenges to Title IX by male athletes).

108. See, e.g., *Favia*, 7 F.3d at 342–44 (suggesting that the focus of proportionality requirements should be on the total number of athletes, not the number of teams); *Cohen v. Brown Univ.*, 991 F.2d 888, 899–900 (1st Cir. 1993) (giving deference to the interpretation of the OCR and, therefore, evaluating compliance based on student athletes, not total teams provided, while also rejecting Brown's claim that proportionality should be based on relative interest instead of general student enrollment).

109. See generally Larson, *supra* note 42, at 1627–36; Mabry, *supra* note 28, at 508; Christopher Paul Reuscher, Comment, *Giving the Bat Back to Casey: Suggestions to Reform Title IX's Inequitable Application to Intercollegiate Athletics*, 35 AKRON L. REV. 117, 151 (2001).

110. See Larson, *supra* note 42, at 1627–36; Mabry, *supra* note 28, at 499; Reuscher, *supra* note 109, at 151.

111. See Larson, *supra* note 42, at 1627–36.

112. See NAT'L COLLEGIATE ATHLETIC ASS'N, 2004–2010 NCAA GENDER-EQUITY REPORT 14 (2012), <http://www.ncaapublications.com/productdownloads/GEQS10.pdf> [<https://perma.cc/7NVT-2Y3K>] [hereinafter NCAA GENDER-EQUITY REPORT].

113. See *id.*

teams from the proportionality equation argue that this would enable schools to comply with the test without cutting men's sports teams or adding low-quality, large-roster women's teams.¹¹⁴ On many levels, this makes sense: nearly all NCAA Division I sports have male and female teams with similar team sizes, as seen in the following table prepared by the NCAA.¹¹⁵

114. See Larson, *supra* note 42, at 1627–28.

115. See NCAA GENDER-EQUITY REPORT, *supra* note 112, at 14.

DIVISION I OVERALL – ATHLETICS PARTICIPATION						
Sport	Men's Teams			Women's Teams		
	Number of Participants	Number of Teams	Average Squad Size	Number of Participants	Number of Teams	Average Squad Size
Baseball/Softball	9,776	288	34	5,503	277	20
Basketball	5,184	335	15	4,764	332	14
Bowling	-	-	-	266	30	9
Cross Country	4,792	306	16	5,752	331	17
Crew	1,303	28	47	5,157	85	61
Equestrian	-	-	-	739	18	41
Fencing	374	20	19	399	23	17
Field Hockey				1,679	76	22
Football	26,411	239	111			
Golf	2,954	289	10	2,100	244	9
Gymnastics	311	16	19	1,038	62	17
Ice Hockey	953	34	28	542	24	23
Lacrosse	2,566	56	46	2,400	88	27
Rifle	139	19	7	137	23	6
Rugby	-	-	-	19	1	19
Skiing	191	12	16	203	13	16
Soccer	5,482	194	28	8,237	310	27
Squash	154	10	15	119	9	13
Swimming/Diving	3,877	138	28	5,392	194	28
Tennis	2,644	258	10	2,913	314	9
Track & Field–Indoor	9,753	252	39	11,804	303	39
Track & Field–Outdoor	10,815	271	40	11,922	310	38
Volleyball	456	22	21	4,729	318	15
Water Polo	586	22	27	711	31	23
Wrestling	2,373	75	32			
Average Number of Participants per Institution	277.5			232.5		
Average Sponsorship per Institution	8.6			10.2		

*The participation data are reported from the 2009–10 NCAA Sports Sponsorship and Participation Rates.¹¹⁶

Bolstering this argument is the fact that football schools have more difficulty complying with Title IX proportionality than non-football schools.¹¹⁷

Advocates of excluding football from calculations also argue that, as typically the highest revenue-producing program at universities, football programs should be classified as “profit centers” or businesses and therefore be exempt from Title IX proportionality calculations.¹¹⁸ One critic argues that

[i]n reality, the purpose of athletics is not to provide lifelong skills for the student, but to operate as a “profit center” for the institution. The major premise behind this alternative is that an institution may designate those sports that produce revenue as “businesses” and those that do not produce revenue as “amateur.”¹¹⁹

While this classification may be a viable idea in theory, it raises the issue of whether football players should then be paid for their participation and would open the door to a vast set of new problems.¹²⁰

The football exemption, by itself, inadequately responds to Title IX’s deficiencies. This solution neglects the many schools that do not have football programs.¹²¹ Some critics also argue that “a football exemption sends the wrong message because it implies that football is a sport above the realm of gender equality.”¹²² Excluding football may also increase the gender gap because schools would add one or more men’s teams to replace all of the football players in the proportionality calculation.

2. Excluding Walk-Ons from Proportionality

Another remedy, suggested by the Commission on Opportunity in Athletics, is to eliminate walk-on (nonscholarship) athletes from the

117. See Larson, *supra* note 42, at 1608–09.

118. Mabry, *supra* note 28, at 512; Reuscher, *supra* note 109, at 151.

119. Reuscher, *supra* note 109, at 151.

120. See generally Jeffrey Dorfman, *Pay College Athletes? They’re Already Paid Up to \$125,000 per Year*, FORBES (Aug. 29, 2013, 8:00 AM), <https://www.forbes.com/sites/jeffreydorfman/2013/08/29/pay-college-athletes-theyre-already-paid-up-to-125000year/#33540fb62b82> [https://perma.cc/UWG6-JEPA]; Patrick Hruby, *The NCAA Says Paying Athletes Hurts Their Education. That’s Laughable.*, WASH. POST (Sept. 20, 2018, 1:11 PM), www.washingtonpost.com/outlook/the-ncaa-says-paying-athletes-hurts-their-education-thats-laughable/2018/09/20/147f26c0-bb80-11e8-a8aa-860695e7f3fc_story.html%3foutputType=amp [https://perma.cc/Z2PC-L76Q]; Quinn Thomas, *Paid for Plays: Should College Athletes Get Paid*, BLEACHER REP. (June 14, 2010), <https://bleacherreport.com/articles/405726-paid-for-plays-should-college-athletes-get-paid> [https://perma.cc/F7YX-KWJZ].

121. Mabry, *supra* note 28, at 513.

122. *Id.*; see also Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 MARQ. SPORTS L. REV. 11, 21–22 (2003).

male-to-female athlete ratio calculation.¹²³ In a recommendation to the OCR, the commission proposed the following: “For the purpose of calculating proportionality with the male/female ratio of enrollment in both scholarships and participation, these ratios will exclude walk-on athletes as defined by the NCAA. Proportionality ratios will be calculated through a comparison of full or partial scholarship recipients and recruited walk-ons.”¹²⁴ One rationale behind this solution is that far fewer resources are spent on walk-ons, since they do not receive scholarships.¹²⁵ Furthermore, this solution could alleviate the “football problem,” as college teams with the largest number of walk-on athletes are typically football teams, and football teams present major challenges for schools trying to comply with the proportionality requirements of Title IX.¹²⁶ Moreover, men’s teams typically have more walk-ons than women’s teams, so this solution purports to make it easier for schools to pass the proportionality test without eliminating men’s teams altogether.¹²⁷

While this recommendation appears promising at first, it falls short when compared with the serious shortcomings of Title IX compliance in its present form.¹²⁸ Walk-ons do not comprise a majority of athletes in Division I programs, so this solution would likely have a very marginal effect, particularly at Division I schools.¹²⁹ Furthermore, this solution fails to address the lack of female coaches in college athletics and the prevalence of sexual abuse.¹³⁰ The elimination of walk-ons from proportionality requirements focuses on the monetary aspects of college athletics; eliminating walk-ons is a solution aimed at helping football schools meet proportionality requirements—without more, it fails to honor the spirit of Title IX.¹³¹ Eliminating walk-ons from

123. Mabry, *supra* note 28, at 519.

124. SEC’Y OF EDUC.’S COMM’N ON OPPORTUNITY IN ATHLETICS, U.S. DEP’T. EDUC., “OPEN TO ALL”: TITLE IX AT THIRTY 38 (2003), <http://www2.ed.gov/about/bdscomm/list/athletics/title9report.pdf> [<https://perma.cc/3VR5-X22H>].

125. Walk-on athletes are nonscholarship athletes; while teams spend money on walk-ons for travel and equipment, walk-on athletes are inherently cheaper participants for teams due to their nonscholarship status. See Joe Leccesi, *The 5 Most Commonly Asked Questions About Being a College Walk-On*, USA TODAY: HIGH SCH. SPORTS (Apr. 13, 2017), <https://usatodayhss.com/2017/the-5-most-commonly-asked-questions-about-being-a-college-walk-on> [<https://perma.cc/F2VK-KSGE>].

126. Mabry, *supra* note 28, at 520–21.

127. *Id.* at 520.

128. *Id.* at 521.

129. At the Division I level, 59 percent of student athletes receive “some level of athletics aid.” See *NCAA Recruiting Facts*, NCAA, <https://www.ncaa.org/sites/default/files/Recruiting%20Fact%20Sheet%20WEB.pdf> [<https://perma.cc/K8U3-H5YF>] (last updated Mar. 2018).

130. See Flanagan & Greenberg, *supra* note 45.

131. See *id.*

the calculation may help the overall athletic compliance department but fails to adequately account for the needs of female athletes.

3. Eliminating Proportionality Altogether

Another commonly suggested solution is to eliminate the proportionality requirement altogether.¹³² Advocates of eliminating this prong tend to focus on the fact that complete elimination would reverse negative effects on men's athletic programs—football teams would be free to maintain their massive rosters, and nonrevenue sports, like track and field or swimming, would have less fear of being cut to meet the quota.¹³³ However, this is very unlikely to happen for the same reasons that schools favor the proportionality test. It is the easiest test to implement, and it has had some positive effects; despite its imperfect application, this standard has increased female participation in college athletics.¹³⁴

In a similar vein, another proposed alternative to the proportionality standard is to shift the focus to the third prong of Title IX compliance: the accommodation of student interests.¹³⁵ Schools can comply with Title IX under the third prong by showing “that the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program.”¹³⁶ This would require schools to conduct a survey of incoming female students to gauge their interests; the school would then structure athletic opportunities according to these responses.¹³⁷ If universities could guarantee a completely accurate survey of interests, this might work. However, that is almost certainly not the case, so this approach raises several serious issues. First, this approach could potentially stop the increase of athletic opportunities for women, or even eliminate existing opportunities.¹³⁸ Additionally, inaccurate

132. See generally Mabry, *supra* note 28, at 515–16; see, e.g., Danielle M. Ganzi, Note, *After the Commission: The Government's Inadequate Responses to Title IX's Negative Effect on Men's Intercollegiate Athletics*, 84 B.U. L. REV. 543, 566–68 (2004).

133. See Mabry, *supra* note 28, at 515–16.

134. See *id.*

135. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,417 (Dec. 11, 1979); Mabry, *supra* note 28, at 513.

136. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418.

137. Mabry, *supra* note 28, at 513–15.

138. See ALLISON KASIC & KIMBERLY SCHULD, INDEP. WOMEN'S FORUM, TITLE IX AND ATHLETICS: A PRIMER 17 (2008), <http://www.iwf.org/files/6eb8c73b785c0d0b1be6b0abc7778379.pdf> [https://perma.cc/G4UF-98MU].

survey findings could result in serious misrepresentation of female students' interests.¹³⁹ Finally, as evidenced by the majority of schools' tendencies to adhere to the proportionality test, this third prong would simply be too difficult to apply in practice.¹⁴⁰

III. SOLUTION: THE FEMALE ACT

The best way to address the shortcomings of Title IX as implemented is to enact the Facilitating Empowerment, Mentorship, and Athletic Leadership in Education Act (the "FEMALE Act" or the "Act"). The FEMALE Act proposes adding the following provisions to Title IX: (1) excluding the top revenue-generating team from proportionality requirements, (2) applying the proportionality requirements to coaching staff, and (3) requiring schools to bolster sexual assault protections with more stringent enforcement and incentive mechanisms designed to empower victims to speak up.

A. Excluding the Top Revenue-Generating Team from Proportionality Calculations

Excluding the top revenue-generating team from proportionality calculations would solve the "football problem" at many schools without overlooking schools that do not have football programs. Schools may be reluctant to admit it, but football is simply a different beast.¹⁴¹ Football programs can produce millions of dollars of revenue and have incomparably large team sizes due to the nature of the sport.¹⁴² Further, teams that produce the most revenue often benefit the other athletic programs at their schools by providing funding for programs that typically do not bring in revenue.¹⁴³ While critics may be quick to point out that not all schools' football teams make enough profit to support all nonrevenue generating sports, football is nevertheless bringing in money that other teams are not.¹⁴⁴ If football teams did not produce

139. See *id.* at 17–18.

140. Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731, 731 (2003).

141. For further discussion of football within college athletics, see *supra* Section II.C.1.

142. Kristi Dosh, *Does Football Fund Other Sports at College Level?*, FORBES (May 5, 2011, 9:02 PM), <https://www.forbes.com/sites/sportsmoney/2011/05/05/does-football-fund-other-sports-at-college-level/#64a0666671c2> [<https://perma.cc/V36X-3HWM>]; see *supra* Section II.C.1.

143. Dosh, *supra* note 142.

144. See Cork Gaines & Mike Nudelman, *The Average College Football Team Makes More Money Than the Next 35 College Sports Combined*, BUS. INSIDER (Oct. 5,

revenue, there would be significantly less athletic funding at many schools, which translates into fewer teams—both male and female.¹⁴⁵

Excluding the top revenue-producing team from proportionality calculations would benefit the overall integrity of college athletic departments by reducing both the need for “filler” teams¹⁴⁶ and the tendency for schools to cut successful, nonrevenue-generating men’s teams.¹⁴⁷ This provision also increases the likelihood of the FEMALE Act’s enactment because it takes into account the interests of all athletes, male and female. It bestows a privilege of sorts on the most financially successful team at a school, which should help engender support for the Act.

B. Extending the Proportionality Requirement to Coaching Staff

A Title IX solution that ignores the gender inequities in the coaching realm would be inexcusably incomplete. While Title IX clearly needs improvement, the proportionality test has proven to be effective in increasing female participation in athletics.¹⁴⁸ Thus, extending the proportionality test to coaching staff to close the gender gap makes sense. Admittedly, this solution will not please everyone. Male coaches may see it as a direct threat to their jobs, and athletes may worry that their experienced male coaches will be replaced by females less qualified just to meet the quota.¹⁴⁹ In an effort to accommodate these potential issues, this Note proposes that universities be given ten years to comply with “coach proportionality.” This would allow athletic programs to slowly incorporate more women into their coaching staffs over time, allowing time for thoughtful hiring processes and gradual transitions.

Introducing more female coaches into the college system would clearly benefit female athletes, but it also has the potential to benefit male athletes. Women are becoming more dominant in the workforce

2017, 2:36 PM), <https://www.businessinsider.com/college-sports-football-revenue-2017-10> [<https://perma.cc/2QCH-T6XG>].

145. See, e.g., Steve Berkowitz et al., *2017–18 NCAA Finances*, USA TODAY, <http://sports.usatoday.com/ncaa/finances/> [<https://perma.cc/TWH3-ZMJV>] (last visited Feb. 9, 2020).

146. See *supra* Section II.C.1.

147. See *supra* Section I.B.2.

148. See *supra* Section I.B.1.

149. Boyd, *supra* note 60, at 269–70; see also Hudson Taylor, *Gender Equality in College Coaching: Where We Continue to Drop the Ball*, HUFFPOST (May 23, 2015), https://www.huffpost.com/entry/gender-equality-in-college-coaching-where-we-continue-to-drop-the-ball_b_6911990 [<https://perma.cc/DM4C-CA4E>] (arguing that “women do not have vocal male allies among coaches,” equating their silence to “an implicit endorsement of this biased culture”).

and occupy more positions of leadership than ever before.¹⁵⁰ Having female leaders within the college athletic system would benefit male athletes by better preparing them for an increasingly diverse workforce.¹⁵¹ Studies show that while men may say they support gender balance in the workplace, they often still feel threatened by female bosses.¹⁵²

By ensuring there are more female coaches in athletic departments, the FEMALE Act would hopefully protect female athletes from sexual assault. This Note by no means assumes that female coaches would never sexually assault their athletes nor that female athletes are the only victims of sexual abuse. However, statistically speaking, female athletes are typically the victims who suffer this type of abuse from their male coaches and staff.¹⁵³

C. Increasing Sexual Assault Protections

Finally, the FEMALE Act proposes provisions requiring schools to bolster sexual assault protections with more stringent enforcement and incentive mechanisms designed to empower victims to speak up. Creating an environment where victims can speak up and are supported is crucial, yet this type of environment is severely lacking in athletics and the world in general.¹⁵⁴

150. See Marcus Noland & Tyler Moran, *Study: Firms with More Women in the C-Suite Are More Profitable*, HARV. BUS. REV. (Feb. 8, 2016), <https://hbr.org/2016/02/study-firms-with-more-women-in-the-c-suite-are-more-profitable> [<https://perma.cc/82EY-CSYK>]; Voepel, *supra* note 88.

151. Blaze Petersen, *The State of US Workplace Diversity in 14 Statistics*, ARCHPOINT (Dec. 1, 2016), <https://archpointgroup.com/the-state-of-us-workplace-diversity-in-14-statistics/> [<https://perma.cc/4STJ-YBMV>].

152. See Shana Lebowitz, *3 Experiments Suggest Men Are Threatened by This Type of Boss*, BUS. INSIDER (July 12, 2015), <https://www.businessinsider.com/study-on-men-threatened-by-women-bosses-2015-7> [<https://perma.cc/VD42-64Z2>].

153. See *supra* Section II.A.2. This is not solely attributable to the high percentage of male coaching staff; men are significantly more likely than women to commit rape and other sex crimes. *2017 Crime in the United States*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-42> [<https://perma.cc/5CRP-94C4>] (last visited Feb. 9, 2020).

154. See, e.g., Sarah Fitzpatrick & Tracy Connor, *McKayla Maroney Says She Tried to Raise Sex Abuse Alarm in 2011*, NBC NEWS (Apr. 22, 2018, 5:59 PM), <https://www.nbcnews.com/news/us-news/mckayla-maroney-says-she-tried-raise-sex-abuse-alarm-2011-n867911> [<https://perma.cc/9X25-5NGF>] (“Nassar apparently sensed [McKayla Maroney’s] unease because he told her she shouldn’t mention his technique to anyone and dangled her childhood dream in front of her. ‘He said nobody would understand this and the sacrifice that it takes to get to the Olympics,’ Maroney recalled.”); Kaelyn Forde, *Why More Women Don’t Report Sexual Assaults: A Survivor Speaks Out*, ABC NEWS (Sept. 27, 2018, 9:40 AM), <https://abcnews.go.com/US/women-report-sexual-assaults-survivor-speaks/story?id=57985818> [<https://perma.cc/229D-864A>].

College teams meet regularly for NCAA compliance meetings.¹⁵⁵ Typically, these meetings cover the general “dos and don’ts” of being an NCAA athlete and are aimed primarily at monetary issues to ensure that players are not getting paid under the table.¹⁵⁶ The FEMALE Act proposes that a portion of these regular compliance meetings be dedicated to educating athletes and staff on the signs of sexual abuse, as well as what constitutes sexual abuse and what resources the university has in place to process and address sexual misconduct allegations.¹⁵⁷

Furthermore, the FEMALE Act would introduce bystander liability provisions to hold coaching staff accountable when athletes are abused. McKayla Maroney spoke up after Larry Nassar assaulted her in 2011, and her coach ignored her.¹⁵⁸ Firing and banning coaches from the sport does not seem to be effective; personal liability may prove to be a more effective enforcement mechanism.

IV. CONCLUSION

Title IX’s biggest success in the world of sports lies within the undeniable growth of female participation in athletics. However, the outdated legislation needs a facelift. What brought new opportunities to many women has also had negative, unintended consequences. It is time to address Title IX’s shortcomings to ensure that it lives up to its intent: empowering women and creating opportunities.

Commonly suggested solutions are inadequate. Shifting compliance inquiries to the “interest” prong would be difficult to administer and prone to inaccuracies.¹⁵⁹ Eliminating football from proportionality calculations suggests that football is above the reach of Title IX and fails to address the many schools that do not have football

155. See, e.g., 2019-20 NCAA Division II Compliance Calendar, NCAA, https://ncaaorg.s3.amazonaws.com/compliance/d2/2019-20D2Comp_Calendar.pdf [<https://perma.cc/B2DD-S7QA>] (last visited Feb. 9, 2020) (suggesting teams meet monthly to cover compliance topics such as ethical conduct, extra benefits, gambling, and eligibility).

156. *Id.*

157. See, e.g., Beth Howard, *How Colleges Handle Sexual Assault in the #MeToo Era*, U.S. NEWS & WORLD REP. (Oct. 1, 2018, 9:00 AM), <https://www.usnews.com/education/best-colleges/articles/2018-10-01/how-colleges-handle-sexual-assault-in-the-metoo-era> [<https://perma.cc/YH2K-ZGSC>]; *Project Safe: Center for Sexual Misconduct Prevention and Response*, VAND. U., <https://wp0.vanderbilt.edu/projectsafe/> [<https://perma.cc/REH4-QZRS>] (last visited Feb. 9, 2020); *Vanderbilt University Sexual Misconduct and Intimate Partner Violence Support and Resource Information*, VAND. UNIV., https://cdn.vanderbilt.edu/vu-wp0/wp-content/uploads/sites/133/2018/07/25214126/VU-One-Page-Resources-List_Students_2018-19.pdf [<https://perma.cc/9PP5-F48T>] (last visited Feb. 9, 2020).

158. See Fitzpatrick & Connor, *supra* note 154.

159. See *supra* Section II.C.3.

programs.¹⁶⁰ Similarly, removing walk-ons from the equation falls short of addressing all the inadequacies of Title IX.¹⁶¹

College athletes need the FEMALE Act. The proposed solution addresses the “football problem” that schools often struggle with in their proportionality efforts, while simultaneously promoting the interests of female coaches and athletes. The Act would also be an important contributor in changing the dialogue concerning sexual assault by incentivizing athletes and coaches alike to speak up and imposing more serious consequences for misconduct. In the era of #MeToo and #TimesUp, now is the time for the FEMALE Act. Women are speaking up, and the world is listening.

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160. *See supra* Section II.C.1.

161. *See supra* Section II.C.2.

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