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## The Title IX Athletic Regulations and the Ideal of a Gender-Free Society

# The Title IX Athletic Regulations and the Ideal of a Gender-free Society

Rosalind S. Simson<sup>1</sup>

## *Abstract*

Some philosophers and political theorists have argued that to achieve a just society we must eliminate gender roles. Few would dispute that many of the reductions in the influence of gender over the last fifty or so years have increased justice in the U.S. Whether justice requires that our society become entirely gender-free, however, is more controversial. A common argument for retaining at least some gender roles is that some are natural consequences of biologically-determined average physical differences between the sexes. Athletics is one context in which people often make this argument. This article focuses on school athletics and the Title IX athletic regulations in order to gain insight into the implications of biological sex differences for the question of whether the creation of a gender-free society is a realistic and worthy ideal. Although Title IX has been hugely successful in increasing female participation on school sports teams, males today still dominate school athletics, and gender roles are still very operative in school sports. This article proposes a framework, based on the concept of equal opportunity, for understanding what it might reasonably mean for a society to be “gender free.” It then argues that overall equality of opportunity requires equality of athletic opportunity, and that, despite its successes, Title IX’s failure to repudiate gender influences makes it unlikely that, in its current form, it will ever lead to equality of athletic opportunity. The article goes on to propose revisions of Title IX that would truly equalize opportunity in the school athletic arena. It thus suggests that the gender-free ideal is ultimately compatible with biologically determined average physical differences between the sexes.

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In her 1989 book, *Justice, Gender, and the Family*, political scientist Susan Okin argues that to achieve a just society we must eliminate gender roles: “A just future would be one without gender. . . . In its social structures and practices, one’s sex would have no more relevance than . . . the length of one’s toes.”<sup>2</sup> In a somewhat similar vein, philosopher James Sterba embraces the “ideal of a gender-free society” in his 1998 book, *Justice for Here and Now*: “[T]he traits that are truly desirable in society [must] be equally open to both women and men or, in the case of virtues, equally expected of both women and men.”<sup>3</sup>

The notion of a gender-free society is very intriguing. Few would dispute that many of the reductions in the influence of gender over the last fifty or so years have made the United States more just: for example, the enormous increases in the percentages of women attending graduate and professional schools.<sup>4</sup> Most people also would probably agree that some additional reductions in the influence of gender would increase justice further: for instance, eradicating sexual harassment. Whether justice requires that our society become entirely gender-free, however, is more controversial. Gender roles are still operative in our lives in a wide variety of ways. Many of these are interwoven with the influences of race, class, religion, and ethnicity in ways that complicate the task of evaluating the goal of a gender-free society.<sup>5</sup>

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<sup>2</sup> SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 171 (1989).

<sup>3</sup> JAMES P. STERBA, *JUSTICE FOR HERE AND NOW* 80 (1998). *See id.* at 77 n. 1 for a list of other theorists who have advocated a gender-free society.

<sup>4</sup> *See* U.S. Dep’t of Educ., 2010 DIGEST OF EDUCATION STATISTICS, *available at* [http://nces.ed.gov/programs/digest/d10/tables/dt10\\_196.asp?referrer=list](http://nces.ed.gov/programs/digest/d10/tables/dt10_196.asp?referrer=list) (displaying a table of statistics on male and female enrollments in U.S. graduate and professional schools over the last 150 years).

<sup>5</sup> *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139-67 (1989) (explaining the concept that societal disadvantage is often best understood in terms of the intersection of different characteristics).

A common argument for retaining at least some gender roles is that some are natural outcomes of biologically-determined physical differences between the sexes.<sup>6</sup> The kinds of physical differences that defenders of gender often cite as material are disparities between women and men in reproductive functions, hormone levels, and average ranges of height, weight and muscle mass.<sup>7</sup> Although the implications of these physical differences for gender roles vary greatly among social groups,<sup>8</sup> many view the very existence of these differences as posing a broad-based challenge to the possibility and desirability of a totally gender-free society.

Athletics is one context in which it is common to justify gender roles by pointing to physical differences between the sexes.<sup>9</sup> My project in this article is to focus on the athletic arena in order to facilitate serious discussion about whether the existence of biological sex differences indicates that a gender-free society is neither a realistic possibility nor even a worthy ideal. My strategy for this project is to examine the Title IX requirements for school athletic programs, which Congress adopted in 1972 and has subsequently periodically revised.<sup>10</sup> Because schools play a crucial role in shaping the aspirations, ambitions, and life choices of young people, the messages they send about gender roles have long-term implications. Title IX was an extremely ambitious and hugely successful effort to reduce male dominance in school athletics. It is largely responsible for the nearly tenfold increase since 1972 in the number of girls playing high school sports and the nearly fivefold increase in the number of young women

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<sup>6</sup> See ALISON JAGGAR, FEMINIST POLITICS AND HUMAN NATURE 106-12 (1983) (discussing “biological determinism”).

<sup>7</sup> See STEVEN GOLDBERG, WHY MEN RULE: A THEORY OF MALE DOMINANCE (1993) (defending this view); *But see* Judith Lorber, *Believing is Seeing: Biology as Ideology*, 7 GENDER & SOCIETY 568, 568-81 (Dec. 1993) (critiquing this view).

<sup>8</sup> See, e.g., MaryJo Sylwester, *Culture, Family Play Role in Sports for Latina Girls*, USA TODAY, Mar. 29, 2005; Doris R. Corbett & Denyce Calloway, *Physical Activity, Challenges Facing African-American Girls and Women*, THE PRESIDENT’S COUNCIL ON PHYSICAL FITNESS AND SPORTS E-NEWSLETTER (Winter 2006), [http://www.fitness.gov/enewsletter/Winter06\\_science.html](http://www.fitness.gov/enewsletter/Winter06_science.html).

<sup>9</sup> See, e.g., Ross Tucker & Jonathan Dugas, *Genes and Performances: Why Some are More Equal than Others*, THE SCIENCE OF SPORT (Aug. 11, 2011), <http://www.sportsscientists.com/2011/08/training-talent-10000-hours-and-genes.html>.

<sup>10</sup> 20 U.S.C. §§ 1681-88 (2010).

playing college sports.<sup>11</sup> Due largely to Title IX, the opportunities of female students today to enjoy the many benefits of athletic participation are far more similar to those of male students than ever before. These benefits include developing physical skills, learning teamwork, gaining leadership experience, achieving status in school, and making social connections that may be useful in future careers.<sup>12</sup>

Nevertheless, males still dominate school athletics in the U.S. today. Females now make up 57% of college students,<sup>13</sup> but roughly 40% of college athletes.<sup>14</sup> Attendance at male school athletic events is far greater than at female school athletic events.<sup>15</sup> Men coach roughly 57% of all female school sports teams, but women coach less than 3% of all male school sports teams.<sup>16</sup> Women are only 8% of athletic directors at Division I schools, and only 4% at Division IA schools.<sup>17</sup>

There are various possible explanations for the continued male dominance of school athletics nearly forty years after the adoption of Title IX. Among these are that enforcement of

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<sup>11</sup> See *Understanding Title IX and Athletics 101*, WOMENSPORTSFOUNDATION.ORG, <http://66.40.5.5/Content/Articles/Issues/Title-IX/U/Understanding-Title-IX-and-Athletics-101.aspx> (last visited Nov. 14, 2011).

<sup>12</sup> See Julia Lamber, *Gender and Intercollegiate Athletics: Data and Myths*, 34 U. MICH. J. L. REFORM 151 (2001) (discussing these and other benefits of school sports participation).

<sup>13</sup> Kellee Edmonds, *College Gender Gap Appears to be Stabilizing with One Notable Exception*, *American Council on Education Analysis Finds*, AMERICAN COUNCIL ON EDUCATION (Jan. 26, 2010), [http://www.acenet.edu/AM/Template.cfm?Section=Press\\_Releases2&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=35338](http://www.acenet.edu/AM/Template.cfm?Section=Press_Releases2&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=35338).

<sup>14</sup> 2009 Equity in Athletics Disclosure Act Report, U.S. DEP'T OF EDUCATION, OFFICE OF POSTSECONDARY EDUCATION, <http://ope.ed.gov/athletics/GetDownloadSelectedData.aspx>.

<sup>15</sup> For example, in 2010 the average attendance at Division I women's college basketball games was 1,642. See Associated Press, *Women's Hoops Sets Attendance Mark* (May 17, 2011, 1:39 PM), <http://sports.espn.go.com/nw/news/story?id=6559525>. Average attendance at Division I men's college basketball games was 5,245. See 2010 National College Basketball Attendance (For All NCAA Men's Varsity Teams), [http://www.ncaa.org/wps/wcm/connect/8753820042742b01b8b6be967b4a3893/Awide\\_Mbkbattlists.pdf?MOD=AJPERES](http://www.ncaa.org/wps/wcm/connect/8753820042742b01b8b6be967b4a3893/Awide_Mbkbattlists.pdf?MOD=AJPERES) (last visited Aug. 17, 2011).

<sup>16</sup> See Deborah L. Rhode & Christopher J. Walker, *Gender Equity in College Athletics: Women Coaches as a Case Study*, 4 STAN. J. C.R. & C.L. 1, 9 (2008). For detailed statistics on male and female college coaches, see *Women in Intercollegiate Sport: A Longitudinal National Study Thirty-three Year Update, 1977-2010* (2010), <http://webpages.charter.net/womeninsport>.

<sup>17</sup> Libby Sander, *In the Game, But Rarely No. 1*, CHRONICLE OF HIGHER EDUCATION, Feb. 27, 2011, available at <http://chronicle.com/article/Despite-Decades-in-the-Game/126507/?key=Tj5xJ>.

Title IX has been too lax,<sup>18</sup> that forty years is not enough time, and that male dominance in sports is a natural consequence of average biological differences between the sexes.<sup>19</sup> It is worth considering, however, whether at least part of the explanation may rest with Title IX itself, because it does not embrace the goal of eliminating gender from school sports, and in some ways even reinforces gender roles. The rules concerning single-sex teams and those regarding the allotment of athletic participation slots are noteworthy in this regard.

Specifically, this article seeks to answer the following questions: In what ways do the Title IX athletic regulations embrace gender roles? Are these affirmations of gender unavoidable consequences of human biology, or would justice be served by revising Title IX to repudiate gender? More broadly, what can an analysis of Title IX teach us about whether the total elimination of gender roles is a desirable and achievable societal ideal?

*Part I* proposes a general framework for understanding what it might reasonably mean for a society to be “gender-free”. *Part II* discusses several key Title IX athletic regulations and identifies both respects in which they work to reduce gender influences and respects in which they either fail to reduce such influences or even reinforce them. It also proposes possible ways of revising Title IX to bring it closer to the ideal of a “gender-free” society described in *Part I*. Lastly, *Part III* considers the implications of this analysis for the goal of a gender-free society.

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<sup>18</sup> See Katie Thomas, *Long Fights for Sports Equity, Even with a Law*, NY TIMES, July 29, 2011 (discussing recent lax enforcement of Title IX).

<sup>19</sup> On average, adult American males are 5.6 inches taller and 30 pounds heavier than adult American females. National Center for Health Statistics, Body Measurements, CENTERS FOR DISEASE CONTROL AND PREVENTION, December 2, 2011, [www.cdc.gov/nchs/fastats/bodymeas.htm](http://www.cdc.gov/nchs/fastats/bodymeas.htm). For an extensive discussion of physical differences between males and females that relate to athletic performance, see EILEEN McDONAGH & LAURA PAPPANO, PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS 52-63 (2008).

### **Part I: The Concept of a Gender-Free Society**

The mere mention of a gender-free society conjures up for some people a parade of horrors ranging from a proscription on public single-sex bathrooms<sup>20</sup> to a societal practice of gestating fetuses in laboratories rather than in wombs.<sup>21</sup> I believe that these sorts of concerns are based on strained, and not very functional understandings of the meaning of “gender-free.” In this section I outline a proposed conceptualization of the gender-free ideal that I think can apply broadly across social groups and that is grounded in the notion of equal opportunity, which is widely hailed as the hallmark of the “American Dream.”<sup>22</sup> I suggest that this conceptualization provides a useful framework for considering whether a gender-free society might someday be realized, or at least should serve as a worthy ideal.

#### **A. What the ideal of a gender-free society does *not* mean**

I suggest, first of all, that achieving a gender-free society would not require ignoring, denying, or eliminating by medical means the various anatomical, chromosomal, and hormonal characteristics that we currently use to distinguish males and females. Although we have become increasingly aware of the many varieties of intersex people,<sup>23</sup> and perhaps might someday decide that the biological categories “male” and “female” are more problematic than

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<sup>20</sup> Concerns about this were famously instrumental in torpedoing the Equal Rights Amendment in the 1970’s. See *Myths ... and Facts*, 4ERA.ORG, [www.4era.org/myths.htm](http://www.4era.org/myths.htm) (last visited November 14, 2011).

<sup>21</sup> For an example of a proposal along these lines, see SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* (1970).

<sup>22</sup> For example, historian James Truslow Adams wrote in 1931: “The American Dream is that dream of a land in which life should be better and richer and fuller for every man, with opportunity for each according to ability or achievement. It is . . . a dream of a social order in which each man and each woman shall be able to attain to the fullest stature of which they are innately capable . . . , regardless of the fortuitous circumstances of birth or position.” JAMES TRUSLOW ADAMS, *EPIC OF AMERICA* 214-15 (1931).

<sup>23</sup> For a discussion of the frequency of chromosomal, gonadal, hormonal, or genital deviations from the two sex standard, see COMMITTEE ON UNDERSTANDING THE BIOLOGY OF SEX AND GENDER DIFFERENCES, *EXPLORING THE BIOLOGICAL CONTRIBUTIONS TO HUMAN HEALTH: DOES SEX MATTER?* 21 (Theresa M. Wizemann & Mary-Lou Pardu eds., 2001). For Katherine M. Franke’s discussion of the “myth of biological dimorphism,” see *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 8, 36-40 (1995).



helpful, we continue today to use these categories in our explanations of a wide array of phenomena, such as reproduction, genetics, and sexual function. As I understand the notion of “gender free,” neither the feasibility nor appeal of a gender-free society turns on our abilities or desires to abandon maleness and femaleness as biological categories.<sup>24</sup>

Biological characteristics inevitably have some influence on people’s life experiences. This would not change if society were to become gender-free. As long as we continue to categorize people as biologically female or male, there will continue to be experiences that we associate with each of these categories. Although these experiences will undoubtedly always vary in some ways among individuals and among social groups, there very probably will continue to be some experiences that we consider distinctively female or distinctively male. For example, until highly effective anti-cancer vaccines are developed and widely used by all sectors of the population, we are very likely to view the experience of prostate cancer, as well as the fear of developing it, as characteristically male, and both the experience of ovarian cancer and the fear of developing it as characteristically female.

The existence of some biologically based differences between the categories female and male raises the possibility that women and men may never be represented roughly equally in every job and role. Under my analysis, a disproportionate representation of people of one sex in a particular job or role might suggest, but would not necessarily imply, that a society is not gender-free. As an illustration, consider the overwhelming male dominance of construction

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<sup>24</sup> To the extent that “androgyny” means having both male and female characteristics, I do not equate the elimination of gender with androgyny. For discussion of the relationship between the concepts of “gender-free” and “androgynous,” see James P. Sterba, *Reconciling Conceptions of Justice*, in JAMES P. STERBA, ALISON M. JAGGAR, CAROL C. GOULD, ROBERT C. SOLOMON, TIBOR R. MACHAN, WILLIAM A. GALSTON & MILTON FISK, *MORALITY AND SOCIAL JUSTICE: POINT/COUNTERPOINT* 18-26 (1995).

work in the U.S.<sup>25</sup> Many of the reasons for this are highly gendered. Sexual discrimination and sexual harassment have been rampant in this field, with the result that many women have been precluded from performing, and deterred from applying for, this sort of work.<sup>26</sup> That some jobs that require considerable muscular strength are female-dominated – for example, work in industrial laundries<sup>27</sup> – suggests that insufficient physical strength may not be a large part of the reason for the low percentages of female construction workers. Undoubtedly, it will be an even smaller factor in the future, as more women engage in serious physical conditioning and as technological advances reduce the amount of physical strength needed to perform many jobs. However, there may always be some jobs in construction that require exceptional brawn, and it is possible that, for biological reasons, some difference in average muscular strength between the sexes will always persist. If at some future date the only reason that more men than women do these jobs is that, for biological reasons, men disproportionately have the requisite physical strength, I suggest that this distribution of jobs would be consistent with the elimination of gender.<sup>28</sup>

It is also possible that, as a result of biological factors, males and females, as groups, may never have identical interests. On my view, the persistence of some disparity in the numbers of males and females who have particular interests also might suggest, but would not necessarily imply, the continuing influence of gender. Consider, for instance, the decision to take several

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<sup>25</sup> According to the Bureau of Labor Statistics, women were approximately 2.7% of construction laborers in 2010. *Household Data Averages, Employed Persons by Detailed Occupation, Sex, Race, and Religion or Latino Ethnicity*, U.S. DEP'T OF LABOR (2010), <http://www.bls.gov/cps/cpsaat11.pdf>.

<sup>26</sup> See Advisory Committee on Occupational Safety and Health, *Women in the Construction Workplace: Providing Equitable Safety and Health Protection*, § Workplace Culture, U.S. DEP'T OF LABOR (submitted to the U.S. Occupational Safety & Health Admin. June 1999), <http://www.osha.gov/doc/accsh/haswicformal.html>.

<sup>27</sup> Jenny Carson, *Laundry*, in 1 *ENCYCLOPEDIA OF U.S. LABOR AND WORKING-CLASS HISTORY* 777 (2007).

<sup>28</sup> I am disagreeing to some extent here with Susan Okin's claim that a future without gender would be one "in which men and women participated in more or less equal numbers in every sphere of life, from infant care to different kinds of paid work to high-level politics." OKIN, *supra* note 2, at 171. Although I believe that a disproportionate number of people of one sex in a particular job or role should trigger careful scrutiny into the possibility that societal disadvantage is responsible, I leave open the possibility that eliminating gender would in some cases not eliminate this disproportionality.

months off from paid work to care for one's newborn. Clearly, there are many gendered reasons that far more mothers than fathers in our society make this decision. Among these are differing societal expectations of mothers and fathers<sup>29</sup> and women's generally lesser earning power that makes it economically more feasible for many families to forgo mothers' paychecks than fathers'.<sup>30</sup> At the same time, however, women's biological capacity to breastfeed infants may always lead more women than men to have an interest in staying home to care for their newborns. A roughly even distribution of new mothers and new fathers making the decision to take time at home would suggest that a society is in that respect gender-free. But a failure to achieve such a distribution does not by itself, under my analysis, demonstrate that a society is not gender-free.

### **B. What the ideal of a gender-free society *does* mean**

I propose that for a society to be gender-free it must provide males and females with equal opportunity to engage successfully in a wide range of activities central to human flourishing. It would be difficult, if not impossible, to achieve consensus on a list of these activities, but I suggest that, at a minimum, such a list would include: 1) developing one's innate talents; 2) competing effectively for any jobs except those that one is biologically precluded from performing – for example, a woman cannot be a sperm donor, and a man cannot be a surrogate biological mother; 3) participating actively in local and national governance; 4) serving others in one's community and in society more generally; and 5) providing care to family and friends.<sup>31</sup>

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<sup>29</sup> See, e.g., Aron, *Difference Between Father and Mother*, DIFFERENCE BETWEEN.COM (Feb. 1, 2011), <http://www.differencebetween.com/difference-between-father-and-mother>.

<sup>30</sup> According to the Bureau of Labor Statistics, in 2006 74% of husbands earned more than their wives. TED: The Editor's Desk, *Wives Earning More Than Their Husbands, 1987-2006*, U.S. DEP'T OF LABOR (Jan. 9, 2009), <http://www.bls.gov/opub/ted/2009/jan/wk1/art05.htm>.

<sup>31</sup> The theory of equal opportunity that I am proposing here could be broadly characterized as "perfectionist." This means that I am not advocating equality of opportunity for the sexes simply because equality is intrinsically

Equal opportunity of this sort obviously requires the absence of sex-based discrimination. However, I suggest that it also requires that males and females, as groups, have equal opportunity both to access any societal resources needed to be successful in activities central to human flourishing, and to develop any necessary personal tools. Examples of “societal resources” to which people may need access are sources of information, equipment and facilities, and people in positions of influence. Examples of “personal tools” that people may need to develop are skills, interests, and such personal attributes as patience, confidence, ambitiousness, leadership, and resilience.<sup>32</sup>

Inevitably, factors entirely specific to individuals affect their access to societal resources and their opportunities to develop their skills, interests, and abilities. One person, for instance, may have particularly supportive and encouraging parents; another may happen to have a teacher who takes a special interest in him or her. This is why my proposed account of the gender-free ideal focuses on groups, rather than on individuals.<sup>33</sup> In a gender-free society, males and females, *as groups*, would have equal opportunities to access the societal resources and to develop the personal tools needed for the kinds of activities central to flourishing listed above.

Of course, sex is hardly the only group characteristic that in our society often affects people’s opportunities. Among the other characteristics that figure prominently in this regard are

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valuable, but rather because particular activities are valuable, and so it is important for males and females to have equal access to them. For a defense of the claim that feminist equality arguments are persuasive only insofar as they identify the sorts of life activities that are inherently valuable and thus should be equally available to females and males, see KIMBERLY YURACKO, PERFECTIONISM AND CONTEMPORARY FEMINIST VALUES 88-102 (2003). See also ALISON JAGGAR, FEMINIST POLITICS AND HUMAN NATURE 35-47 (1983). I am not suggesting here that the list of activities that I have offered is exhaustive or that to flourish as a human, every person must be successful in every one of these activities.

<sup>32</sup> In discussing Title IX’s proportionality requirement, Kimberly Yuracko advocates a tool-giving model of equal opportunity that she does not link to a theory of a gender-free society and that is much narrower than mine. It requires that “all children be given an adequate or ‘fair’ opportunity to develop the skills and attributes they need to compete for jobs in the future.” Kimberly 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, 736 (2003).

<sup>33</sup> Other writers have also made this point about the need to conceptualize equal opportunity in terms of groups. See, e.g., Robert Young, *Equal Opportunity*, 70 PACIFIC PHILOSOPHICAL QUARTERLY 261, 266 (1989).

race, ethnicity, class, age, religion, and sexual orientation. In proposing that the gender-free ideal requires eliminating disadvantage to opportunity that stems from sex, I mean either from a person's sex alone, or from his or her sex in conjunction with one or more other group characteristics.

Some theorists have taken a narrower view of the concept of equal opportunity than the one that I have proposed, taking it to require not that people have equal chances to *develop* their interests and abilities, but only that people who *already have* the same interests and abilities have equal chances to be successful in their endeavors.<sup>34</sup> I do not believe that such an approach can provide a conceptual basis for a gender-free society, because it ignores that people's interests and abilities are very often shaped by the options their society makes available to them. For example, when most colleges and universities were closed to women<sup>35</sup>, few women had either the desire or educational preparation to become physicians. Even if, hypothetically, the handful of women who had the requisite interest and qualifications had been as successful in becoming physicians as similarly motivated and qualified men, the society of that time could not fairly have been called in that respect gender-free.

I underline that by "equal opportunity," I do not mean equal success, or even equal probability of success. Although success requires opportunity, it typically also requires much more. Most people simply lack the capacity to become professional musicians or brain surgeons, regardless of the opportunities for development afforded them. As I suggested earlier, it is possible that, due to an uneven distribution of some biologically determined characteristics

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<sup>34</sup> For example, this position, often labeled "formal equality," is defended by Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 8 WOMEN'S RTS. L. REP. 175 (1982). In the Title IX context, this position is argued by Michael Straubel in *Gender Equity, College Sports, Title IX and Group Rights: A Coach's View*. See Michael Straubel, *Gender Equity, College Sports, Title IX and Group Rights: A Coach's View*, 62 BROOK. L. REV. 1039, 1041-1042 (1996).

<sup>35</sup> See Rosalind Rosenberg, *The Limits of Access: The History of Coeducation in America*, in WOMEN AND HIGHER EDUCATION IN AMERICAN HISTORY (1988) (discussing the history of coeducation in the U.S.)

between the sexes, males and females, as groups, may have neither equal capabilities to serve in every societal role nor equal interests in doing so. I am proposing that for a society to be gender-free it is sufficient that, with the exception of the handful of roles or jobs that inherently require that a person be of a specific sex, men's and women's relative interests in serving, and relative abilities to serve successfully, in particular roles or jobs should not be prejudged on the basis of their sex. With the very few exceptions noted above, maleness and femaleness, whether alone or in combination with some other group characteristic, should never be a reason for limiting the opportunities made available to individuals to access the societal means, or to develop the personal tools, needed to succeed in activities central to human flourishing.

Giving females and males equal opportunities, in my view, often requires taking gender-conscious measures to address the lingering effects of past public and private discrimination on the basis of sex.<sup>36</sup> If not remedied, such effects disadvantage females and males, as groups, with respect to the five activities listed above. Thus, if, as a result of past discrimination, a field of work is dominated by people of one sex – e.g., electrician and pre-school teacher – then measures beyond simply mandating nondiscrimination may be needed to render these jobs equally welcoming to males and females. Such measures might include making special efforts to recruit and retain a critical mass of qualified people of the traditionally excluded sex and making efforts to ensure that pay scales for jobs that have traditionally been sex-segregated are equitable. Similarly, if the equipment used in a particular line of work was built with the expectation, rooted in stereotype, that people of only one sex would be using it – for instance, if the controls in an aircraft are positioned in such a way that significantly fewer women than men can reach

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<sup>36</sup> Many writers have made this point about the limits of "formal equality." See, e.g., Alison Jaggar, *Sexual Difference and Sexual Equality*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 239-54 (1990). See also Sterba, *supra* note 3, at 84. See also Martha Fineman, *The Vulnerable Subject*, in TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY 162-63 (2011).

them – then a redesign of the equipment will be needed to make the job of pilot as available to women as it is to men.<sup>37</sup>

Under the view that I am advocating, the fact that some individuals are less successful than others in the five activities listed above does not by itself indicate a violation of equal opportunity. The determinative issue is the *reason* for the differences in success. Equal opportunity is not violated if people's lesser success is due either to individual bad fortune or to lesser biologically based capabilities in the relevant areas. By contrast, equal opportunity is violated if some people's lesser success is the result of their membership in a group that society disadvantages by ongoing discrimination, the lingering effects of past discrimination, or the influence of stereotypes. Very simply, society has a special obligation to make up for disadvantage that it causes.<sup>38</sup>

To the person disadvantaged, it may seem equally unfair whether the disadvantage stems from individual misfortune or from societally based factors. The student whose struggles in Algebra 2 are the result of a very poor teacher for Algebra 1 may not really care whether her problems stem from having been randomly assigned to a poor teacher<sup>39</sup> or from having been assigned to a less demanding class with a poorer teacher because of a gender-stereotyped perception of her mathematical abilities. However, this difference is crucial in deciding whether the requirements for equal opportunity obligate society to seek remedies for the problem.

On the view that I am proposing, the requirements for equal opportunity are not violated if people with a disability that makes one of the five activities discussed earlier biologically impossible for them are not given opportunities like those of other people to engage successfully

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<sup>37</sup> See Jessica L. Roberts, *Accommodating the Female Body: A Disability Paradigm of Sex Discrimination*, 79 U. COLO. L. REV. 1297 (2008).

<sup>38</sup> See Bernard Williams, *The Idea of Equality*, in PHILOSOPHY, POLITICS AND SOCIETY, 110 (1962).

<sup>39</sup> I emphasize that I am speaking here of *individual* bad fortune, and not, for example, the bad fortune of having been born into a poor family and therefore having attended an inferior school in an impoverished neighborhood.

in that activity. Because, for example, it is impossible for individuals with severe mental retardation to acquire the knowledge and critical thinking skills needed for responsible voting, the state does not violate their equal opportunity rights if it does not attempt to provide them with the education needed to acquire such knowledge and skills. By contrast, even assuming for purposes of argument that females and males, as groups, do not have identical biologically based capabilities in each of the areas (1) – (5) discussed earlier, there is no question that many individuals of each sex do have the capabilities to succeed in all of these areas. As groups, the abilities of males and females, like those of sighted and blind persons, for instance, are similar enough to make it imperative that they be given equal opportunities with respect to activities (1) – (5).<sup>40</sup>

Some theorists have taken a more far-reaching approach to the requirements for equal opportunity, arguing that these requirements include a societal obligation to try to compensate for *all* disadvantages suffered by people, without regard to whether those disadvantages have societal or biological causes or simply were the result of personal bad luck.<sup>41</sup> If one takes this approach, one might identify the activities central to human flourishing in very broad terms that

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<sup>40</sup> I will not attempt here to answer the question of just how similar the abilities of people must be to say that they are similar enough to warrant that they be given equal opportunities. Unquestionably, however, males and females are similar enough; the average differences between men and women as groups are smaller than the differences among men and the differences among women. See *Single-Sex Physical Education Classes: The Women's Sports Foundation Position*, WOMEN'S SPORTS FOUNDATION, [http://www.womenssportsfoundation.org/en/home/advocate/title-ix-and-issues/title-ix-positions/single\\_sex\\_physical\\_education\\_classes](http://www.womenssportsfoundation.org/en/home/advocate/title-ix-and-issues/title-ix-positions/single_sex_physical_education_classes) (last visited Aug. 19, 2011). See also DIANE HALPERN, *SEX DIFFERENCES IN COGNITIVE ABILITIES* (2000) (discussing the cognitive differences between males and females). See also REBECCA M. JORDAN-YOUNG, *BRAINSTORM: THE FLAWS IN THE SCIENCE OF SEX DIFFERENCES* (2010). See also Rosalind Simson, *Feminine Thinking*, 31 *SOC. THEORY AND PRACTICE* (2005). See also COLETTE DOWLING, *THE FRAILTY MYTH: REDEFINING THE PHYSICAL POTENTIAL OF WOMEN AND GIRLS* (2000) (discussing the physical differences). See also McDonagh & Pappano, *supra* note 19, at Ch. 2. I also will not attempt to address here the complex question of whether, and if so how, discrimination on the basis of disability should be treated differently from sex discrimination. For a general discussion of this issue, see Pamela Brandwein and Richard K. Scotch, *The Gender Analogy in the Disability Discrimination Literature*, 62 *OHIO ST. L.J.* 465 (2001).

<sup>41</sup> This is the position that Christopher Jencks labels “strong humane justice.” See Christopher Jencks, *Whom Must We Treat Equally for Educational Opportunity to be Equal*, 98 *ETHICS* 518, 522 (1988). See also JOHN E. ROEMER, *EQUALITY OF OPPORTUNITY* (1998).



apply equally to all persons, whether or not they have a disability that would make some or all of activities (1) – (5) impossible for them. For example, one might argue that in order to provide equality of opportunity, a society must supply all persons with the means and tools needed for a full and meaningful life or for the full realization of their capabilities.

I agree that society has obligations to people that go beyond the requirements for equal opportunity that I have identified. Most basically, for instance, I believe that society has an obligation to ensure that all people have adequate food and shelter, irrespective of their capabilities in the activities (1) – (5) listed above. I also believe that society has a duty to provide aid to the victims of natural disasters, debilitating illness and so forth, even when it bears no responsibility for these occurrences. Moreover, I agree that people with severe disabilities of all kinds have rights to an education designed to promote a good quality of life.

For several reasons, however, I am reluctant to explain the requirements for a gender-free society in terms of the expansive conception of equal opportunity described above. First, the concepts “full and meaningful life” and “full realization of one’s capabilities” are so vague that it is difficult to tell what protections are afforded by framing the requirements for equal opportunity in these terms. Second, interpretation of these requirements is easily influenced by unfounded stereotypes. If one believes that, as groups, males and females have very different capabilities, one may be satisfied that society has equally provided both groups with the resources for living full and meaningful lives or for fully realizing their capabilities, even if it has provided them with very different educations and career options.<sup>42</sup> Surely, this is not what the concept “gender-free” sensibly means. Lastly, I think that it is important to distinguish between naturally- and societally-caused disadvantage. There is something particularly invidious about

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<sup>42</sup> See, for example, Rousseau’s infamous discussion of gender differences and consequent need for different educations for males and females. JEAN-JACQUES ROUSSEAU, EMILE: OR ON EDUCATION 357-451 (1979).

disadvantage rooted in prejudice, and it is prejudice based on sex that an analysis of the concept “gender-free” is intended to highlight.

### ***Part II: The Title IX Rules for Athletics***

The Title IX rules for athletics provide an excellent vehicle both for understanding my proposed conceptualization of a gender-free society and for thinking critically about its feasibility and desirability. In many respects Title IX clearly promotes the gender-free ideal as I have described it above. In other respects, however, Title IX sheds light on various challenges to the realization of this ideal.

Title IX of the Education Amendments of 1972 states that “[n]o person in the U.S. shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any educational program or activity receiving Federal financial assistance.”<sup>43</sup> The penalty for failing to comply is a cutoff of all of that institution’s federal funding – not simply the federal funding for the particular program in noncompliance.<sup>44</sup> Congress’s inclusion of athletics within Title IX reflects its perception that fielding sports teams is an important part of a school’s educational mission.

Research studies have identified numerous benefits that students derive from playing on school-sponsored athletic teams.<sup>45</sup> Participation on school teams promotes physical fitness, which is often linked with mental wellness. It builds confidence and self-esteem, teaches teamwork, resilience, and concepts of fairness, and provides leadership opportunities. For those

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<sup>43</sup> 20 U.S.C. § 1681(a) (2000).

<sup>44</sup> See *Grove City College v. Bell*, 465 US 555 (1984) (applying Title IX only to the specific program receiving federal funds), *superseded by statute*, Civil Rights Restoration Act of 1987, 20 U.S.C. §§ 1687-1688 (1994) (applying Title IX to the entire institution rather than the specific program receiving federal funds).

<sup>45</sup> See McDonagh & Pappano, *supra* note 19, at 225-35 (discussing the many ways in which sports participation is beneficial in our society).

who excel, it facilitates admission to, and acquisition of financial aid for, college. In addition, the friendships and connections that student athletes forge often benefit them not only in school, but also later in life. Large numbers of U.S. political and business leaders played on high school and college sports teams, and many have pointed to their playing on these teams as instrumental in their subsequent career successes.<sup>46</sup>

Research in the years since the passage of Title IX has confirmed that the benefits of school sports are at least as great for girls as for boys.<sup>47</sup> In a society that so often values females primarily for their sexual attractiveness and submissiveness, athletics provides a realm in which people value girls and young women for their physical strength, their assertiveness, and their leadership abilities. Research has shown that, compared to otherwise similarly situated girls who do not play sports, female student athletes tend to have lower rates of depression, engage less often in high-risk behaviors, have fewer teen pregnancies, have higher rates of high school graduation, and fall victim less frequently to male violence. The proportion of women leaders in business and politics who played on athletic teams during their school years far exceeds the proportion of women more generally who played on such teams.<sup>48</sup>

The evidence just cited strongly suggests that to achieve the gender-free ideal outlined in Part I schools must provide equal athletic opportunities for girls and boys. Participation in athletics helps students to access the societal means, and to develop the personal tools, needed

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<sup>46</sup> *Id.* at 229-35.

<sup>47</sup> See *Benefits - Why Sports Participation for Girls and Women: The Foundation Position*, WOMEN'S SPORTS FOUNDATION, [http://www.womenssportsfoundation.org/home/advocate/foundation-positions/mental-and-physical-health/benefits\\_why\\_sports\\_participation\\_for\\_girls\\_and\\_women](http://www.womenssportsfoundation.org/home/advocate/foundation-positions/mental-and-physical-health/benefits_why_sports_participation_for_girls_and_women) (last visited Aug. 19, 2011) (discussing the benefits of female sports participation).

<sup>48</sup> A 2002 survey by Mass Mutual Financial Group of 401 senior women business executives in the U.S. in companies with more than 100 employees found that 81% had played on athletic teams after elementary school. See Mass Mutual Financial Group, *From the Locker Room to the Boardroom: A Survey on Sports in the Lives of Women Business Executives* (2002), <http://www.assembly.ca.gov/acs/committee/c187/Publications/Testimony.pdf>.

for the wide range of human activities (1) – (5) identified earlier. Participation in sports obviously enables students to develop their innate athletic talents. At least as importantly, it enhances their abilities to work with others from diverse backgrounds, to take responsibility for their actions, to compete fairly, to rebound from setbacks, and to step up to leadership roles. These lessons, together with the networking opportunities that school sports so often provides, help prepare students not only to succeed in the job market, but also to become good citizens and community and societal leaders.

Perhaps less obviously, school athletics also help prepare students to become good caregivers. By fostering the ability to compete effectively for jobs and therefore to be economically self-sufficient, athletic participation enhances students' future capacities to provide their families with safe and supportive living environments and good educational opportunities. By helping students to develop confidence and self-esteem, sports participation also enhances students' future abilities to be good role models for the children in their families and effective advocates for family and friends. More broadly, it helps prepare students to make wisely the innumerable large and small decisions that are part of caring for others.

Of course, participating in school sports is hardly the only means available for accessing the societal means, or for developing the personal tools needed for activities (1) – (5). Many people who never played on school athletic teams have been successful in their careers, in their communities, and in their roles as caregivers. The point is simply that for schools to make more accessible to males than to females a valuable avenue for personal and career advancement and for the development of crucial life skills runs counter to the concept of a gender-free society. Regardless of whether individuals actually participate in school sports, having equal opportunity to become a successful school athlete is an essential component of a society that is gender-free.

In its language, Title IX appears fully to embrace the goal of equal access to school sports and, thus, to promote the gender-free ideal outlined in Part I: Any school “which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes.”<sup>49</sup> Moreover, courts have affirmed that Title IX does require real parity in athletic opportunity in various respects. For example, schools must provide male and female athletes with equal access to equipment, facilities, coaching, and academic tutoring.<sup>50</sup> Perhaps not surprisingly, parity of this sort is not always realized. For many reasons, including the financial constraints that deter many would-be plaintiffs from legally challenging violations of the Title IX rules, many schools are able to operate in noncompliance with Title IX.<sup>51</sup> Nevertheless, in the ways just described, Title IX clearly has moved schools toward the goal of equal athletic opportunity for the sexes.

At the same time, however, there are two main respects in which Title IX does not fully embrace the gender-free ideal described in Part I. These are the focus of the discussion to follow. The first concerns the broad latitude that Title IX gives schools to create sex-segregated teams. The second concerns the “substantial proportionality requirement” set forth by the Department of Education Office of Civil Rights in a 1978 Policy Interpretation. According to this ruling, schools should offer athletic participation slots for male and female students in

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<sup>49</sup> 34 C.F.R § 106.41(c). In a 2010 policy clarification of Title IX, the Office for Civil Rights, which enforces Title IX, reaffirmed this commitment to equal opportunity: “Title IX stands for the proposition that equality of opportunity in America is not rhetoric, but rather a guiding principle.” U.S. Dep’t of Educ., Office of Civil Rights Dear Colleague Letter (April 20, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html>.

<sup>50</sup> See 20 U.S.C. § 1681(a) (2000) (listing factors that Title IX expressly requires must be equal in order for there to be equal athletic opportunity for the sexes).

<sup>51</sup> College administrators estimated in 2002 that only 20% of school athletic programs were in compliance with Title IX. See Jerome Solomon, *Title IX, Thirty Years Later: Sexes Still Unequal in Athletics*, THE HOUSTON CHRONICLE, June 23, 2002, at A1. See also Katie Thomas, *College Teams, Relying on Deception, Undermine Gender Equity*, N.Y. TIMES, Apr. 25, 2011 (providing a recent discussion of colleges' attempts to circumvent the Title IX requirements). Non-compliance is also an issue on the high school level. In November 2010, the National Women's Law Center filed administrative complaints against the Chicago public schools and eleven other public school districts alleging lack of Title IX compliance. See National Women's Law Center, Center Files Title IX Complaints against 12 School Districts (Nov. 10, 2010), <http://www.nwlc.org/press-release/center-files-title-ix-complaints-against-12-school-districts>.

numbers “substantially proportionate” to the numbers of males and females in their student bodies.<sup>52</sup>

### **A. Sex-segregated teams**

Title IX permits schools to have male-only and female-only teams in the same sport “when selection for such teams is based on competitive skill or the activity in question is a contact sport.” “Contact sports” are defined as “boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or main activity of which involves bodily contact.”<sup>53</sup> Thus, Title IX allows schools to require almost all teams in sports that schools offer to both males and females to be sex-segregated, and single-sex male and female teams are the norm virtually everywhere. In contact sports, schools may limit all teams – even club and recreational teams – to only one sex. Moreover, Title IX defines “contact sports” so loosely that few sports are clearly excluded. In non-contact sports, schools may mandate that teams be sex-segregated whenever participation on the team is determined by skill level. So, for instance, a school could not require its recreational intramural tennis teams to be single-sex, but it could require its varsity and junior varsity tennis teams to be single-sex.

Title IX also permits schools to offer different sports to males and females, and almost all schools do.<sup>54</sup> For example, it is virtually unheard of for schools to field a girls’ football team or a boys’ softball team. The Title IX rules on when schools must allow members of the excluded sex to try out for a team in a sport offered only to one sex are somewhat complex. In contact

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<sup>52</sup> 44 Fed. Reg. 71,418. As discussed in Part IIB below, this “substantial proportionality requirement” is only the first part of a three-part test. The policy interpretation provides two fallback positions for schools that fail to achieve substantial proportionality.

<sup>53</sup> 34 C.F.R. § 106.41 (1995).

<sup>54</sup> Clearly some sports are more expensive to field than others. For example, football teams are far more expensive to field than volleyball teams. The Title IX implementation regulations state clearly that having equal aggregate expenditures for male and female sports is not required by Title IX. 34 C.F.R. § 106.4(c).

sports, schools are always free to limit participation on a team to only one sex. In non-contact sports, the rules vary depending on whether the excluded sex is one whose “athletic opportunities . . . have been limited”<sup>55</sup> – i.e., whether those excluded are female. If a school has only a male team in a particular non-contact sport, females must be allowed a fair opportunity to try out for the team. However, if a school has only a female team in a particular non-contact sport, the school is free to exclude males from that team.

In allowing for sex-segregated teams whenever selection for teams is based on competitive skill – even in non-contact sports – Title IX essentially defers to schools’ typical judgments that few females could qualify for school varsity and junior varsity teams if these teams were coed and participation were determined by tryouts. The rules about when schools must allow students of one sex to try out for a team in a sport offered only to students of the other sex suggest that the rule makers may have attributed some average differences between males and females in athletic performance to females’ historically lesser opportunities to develop their athletic skills. At least arguably, this may be why it explains its asymmetrical treatment of male and female eligibility for such teams in terms of past limitations on female athletic opportunity.

Of course, there is no question that opportunities for females in sports historically were limited. Girls and women traditionally were actively discouraged from participating in sports.<sup>56</sup> Not only were they often taught that it is unfeminine to be physically assertive,<sup>57</sup> but they historically were warned by physicians that strenuous athletic activity could jeopardize their

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<sup>55</sup> 34 C.F.R. § 106.41 (1995).

<sup>56</sup> See JENNIFER RING, *STOLEN BASES: WHY AMERICAN GIRLS DON'T PLAY BASEBALL* (2009) (providing an in-depth analysis of the historical exclusion of girls and women from baseball).

<sup>57</sup> See Susan K. Cahn, *From the “Muscle Moll” to the “Butch” Ballplayer: Mannishness, Lesbianism, and the Homophobia in U.S. Women's Sport*, 19 *FEMINIST STUDIES*, 343, 347 (1993).

fertility.<sup>58</sup> As recently as 1972 when Congress passed Title IX, few school sports teams were open to females.<sup>59</sup>

However, Title IX does not attribute all, or even most, differences in athletic performance between males and females to past or ongoing societal practices. The rules clearly contemplate that for the most part teams will always be single-sex. There is no suggestion that schools will ever be required to create, or even to work toward the goal of creating, co-ed teams in contact sports. Moreover, when participation on teams is determined by skill level, Title IX appears to accept single-sex teams as the norm even for non-contact sports. The only exceptions it carves out in the case of non-contact sports are for the few cases where females would like to try out for a male team at a school that lacks a female team in that sport. Schools with adequate resources can usually avoid this result simply by creating such a female team.

The implications of compulsory sex segregation in sports for female athletic opportunity, and more generally for the gender-free ideal set forth in Part I, are debatable. The Supreme Court has never taken a case on sex-segregation in sports, but there have been numerous such cases in other courts. Some of these cases deal with challenges brought by females to school or athletic league policies that required them to play on female rather than male teams in their chosen sport. Other cases address challenges brought by students of both sexes to policies that precluded them from playing a desired sport because their school offered that sport only to students of the other sex. The reasoning in these cases illuminates many key issues.

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<sup>58</sup> See THE READER'S COMPANION TO U.S. WOMEN'S HISTORY 558 (1998).

<sup>59</sup> For example, in 1972, the average number of collegiate sports teams open to females per school was 2.5; in 2010 it was 8.64. See *Women in Intercollegiate Sport: A Longitudinal National Study Thirty-three Year Update, 1977-2010*, supra note 16.



## 1. Male and female teams in the same sport

The 1981 federal appellate case of *O'Connor v. Board of Education of School District 23*<sup>60</sup> is a typical case of the former sort.<sup>61</sup> Karen O'Connor was an exceptionally talented sixth grade basketball player who wanted to play on her junior high school's boys' team rather than its girls' team because she believed that the higher caliber of play there would better enable her to develop her basketball skills. She conceded that the teams were equal in such other respects as equipment, facilities, and coaching. There was no question that Karen would make the boys' team if allowed a fair opportunity to try out,<sup>62</sup> but her school denied her request, citing the Title IX regulations on contact sports.<sup>63</sup> Karen unsuccessfully raised a fourteenth amendment challenge to the constitutionality of the applicable Title IX regulations. The appellate court held that the school's sex-segregated approach met the constitutional standard for sex-based classifications,<sup>64</sup> because it was substantially related<sup>64</sup> to the important governmental objective of encouraging girls to participate in sports, and of thereby equalizing athletic opportunities for the sexes.<sup>65</sup> According to the court, a ruling in favor of Karen would undermine future female athletic participation at her school, because allowing Karen to try out for the boys' team would require also allowing boys to try out for the girls' team. Since boys, on average, tend to be better

<sup>60</sup> *O'Connor v. Bd. of Educ. of Sch. Dist. No. 23*, 645 F.2d 578 (7th Cir. 1981).

<sup>61</sup> Another case in which the court used the same basic reasoning is *Ritacco v. Norwin Sch. Dist.*, 361 F. Supp. 930 (W.D. Pa. 1973) (rejecting girl's challenge to rule requiring her to play on the girls' rather than the boys' tennis team). The court used somewhat similar reasoning in *Victoria Ann Cape v. Tennessee Secondary Sch. Athletic Ass'n*, 563 F.2d 793 (6th Cir. 1977) (rejecting challenge to girls' basketball rules).

<sup>62</sup> *See O'Connor*, 645 F.2d at 579 (acknowledging that Karen had played on organized basketball teams with boys outside of school since the age of seven, had frequently been her team's leading scorer, and had won numerous awards for her play on those teams).

<sup>63</sup> *O'Connor*, 645 F.2d at 582.

<sup>64</sup> *See Craig v. Boren*, 429 U.S. 190, 197 (1976) (setting out the standard of "middle tier review"). *See also U.S. v. Virginia*, 518 U.S. 515, 531 (1996) (characterizing middle-tier review as requiring the justification for the challenged classification to be "exceedingly persuasive.")

<sup>65</sup> Karen argued that even if the rule excluding girls from the boys' team was in general substantially related to the goal of increasing girls' participation in sports, it was arbitrary as applied to her. The court rejected this argument, quoting Justice Stevens' explanation in denying an application to vacate a stay in the case: "If the classification is reasonable in substantially all of its applications, I do not believe that the general rule can be said to be unconstitutional simply because it appears arbitrary in an individual case." 449 U.S. 1301, 1306 (1980).

basketball players than girls, some boys who failed to make the boys' team would probably try out for and displace some girls who would otherwise make the girls' team. The result, according to the court, would be fewer girls playing basketball.<sup>66</sup>

To assess the implications of the court's ruling for the gender-free ideal outlined in Part I, it is necessary to consider both the possible negative consequences of excluding girls like Karen from boys' teams and the persuasiveness of the argument that such exclusions promote overall female athletic participation. With regard to the former consideration, male teams usually provide greater opportunities than do female teams for exceptional female athletes both to access the societal resources needed for activities central to human flourishing and to develop the necessary personal tools. To be sure, all sports teams provide opportunities for students to learn about fair competition, to practice leadership, and to develop resilience. In fact, outstanding female athletes might find more leadership opportunities on female rather than on male teams. Nevertheless, when female athletes who could make male teams are barred in secondary school from the typically higher caliber of play on those teams, they have diminished opportunities to develop their innate athletic talents. As a result, they may be less likely to earn college athletic scholarships or, in some instances, to go on to careers in professional sports. Moreover, since male teams at most schools have more visibility than do female teams,<sup>67</sup> outstanding female athletes who are barred from male teams will typically have fewer opportunities to gain acclaim and to network with adults in their communities. In the long run, these missed opportunities may negatively affect these students' careers and abilities to achieve positions of influence. Finally,

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<sup>66</sup> O'Connor, 645 F.2d at 681. *See also* O'Connor, 449 U.S. at 1307.

<sup>67</sup> For an analysis of media coverage of male and female sports, see The Center for Feminist Research, University of Southern California, *Gender in Televised Sports, News and Highlights Shows, 1989-2009* (June 2010), <http://www.usc.edu/dept/cfr/html/documents/tvsports.pdf>. For a report that focuses on college sports, see Suzanne Huffman, C.A. Tuggle, & Dana Scott Rosengard, *How Campus Media Cover Sports: The Gender-Equity Issue, One Generation Later*, MASS COMMUNICATION AND SOCIETY 475-489 (2004).

the negative consequences of these exclusionary policies are not limited to the exceptional female athletes themselves. Excluding even the best female athletes from trying out for male school teams inevitably sends the message that, no matter how able girls are, they are not good enough to play on their schools' best teams. One detrimental effect of this message is that it lends support to the belief, reflected in most hiring practices, that men can be qualified to coach female teams,<sup>68</sup> but, with rare exception, women are not qualified to coach male teams.<sup>69</sup> More generally, this message cannot help but negatively influence the self-esteem and ambition not only of exceptional female athletes, but also of those who view them as role models.

Are these negative effects a reasonable price to pay in order to promote the goal of increasing female participation on school sports teams? I suggest that they are not, because the court in O'Connor was mistaken in its view that schools that field sex-segregated teams in the same sport must treat boys who wish to try out for girls' teams in the same way that they treat girls who wish to try out for boys' teams. The situations of male and female school athletes differ considerably.<sup>70</sup> For various societal reasons, it is very likely that, as groups, male student athletes have come closer to realizing their athletic potentials than have female student athletes. Our society still makes athletic participation more attractive to boys than to girls. Many families still encourage their sons more than their daughters to participate in sports.<sup>71</sup> In many circles, it is still less socially acceptable for girls than for boys to be physically aggressive. Success in a contact sport often is seen as an affirmation of a boy's masculinity but as a challenge to a girl's

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<sup>68</sup> It is an interesting commentary on perceptions of competence in sports that men are often hired to coach female teams in sports that they never played on a varsity or junior varsity basis. For example, in 2010 men coached 44.3% of college volleyball teams and 36.2% of college softball teams. See *Women in Intercollegiate Sport: A Longitudinal National Study Thirty-three Year Update, 1977-2010*, *supra* note 16.

<sup>69</sup> See *supra* text accompanying note 16.

<sup>70</sup> One indication of the very different situations of males and females in this regard is that, although there have been suits by females like Karen O'Connor who wish to play on their school's male team instead of its female team, there have been no suits by males who wish to play on their school's female team instead of its male team.

<sup>71</sup> For an analysis of surveys concerning family dynamics surrounding this issue see Don Sabo & Phil Veliz, *Go Out and Play: Youth Sports In America* 61- 63 (Women's Sports Foundation, 2008).

femininity.<sup>72</sup> At most schools, males derive more social status than females do from playing on an athletic team. Female teams generally enjoy less fan support and receive less media attention than do male teams.<sup>73</sup> Girls have fewer athletic role models than boys do. Finally, the predominance of males both as participants in professional sports and as coaches<sup>74</sup>, broadcasters,<sup>75</sup> trainers,<sup>76</sup> sports information directors,<sup>77</sup> etc., typically leads more boys than girls to think of a career in sports as a realistic possibility.<sup>78</sup>

To counteract these societal factors and thereby create equal opportunity for males and females in school athletics, I suggest that schools must be more protective of female teams than male teams. Thus, I suggest that to promote the gender-free ideal outlined in Part I, schools that currently field sex-segregated teams in the same sport instead should allow females to try out for male teams, but not vice-versa. In effect, this means that schools should replace male and female varsity teams with one co-ed team and one team limited to females. The purpose of such a policy would be to encourage overall female participation in sports without compromising the opportunities of outstanding female athletes, of those who regard them as role models, or of women who wish to coach male teams.

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<sup>72</sup> Catharine MacKinnon argues that “being female and being athletic have been socially contradictory and . . . being male and being athletic have been more or less socially synonymous.” CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 120 (1987); For extensive analysis of the masculine culture associated with sports, see Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 92-107 (2001) Evidence of the cultural tension between femininity and athleticism can be seen in the sex testing of successful female athletes, the lesbian-baiting of female athletes and coaches, and the emphasis in the media on the femininity of female athletes. *Id.* at 108-116.

<sup>73</sup> See *supra* note 67.

<sup>74</sup> See text accompanying note 16 *supra*. Coaches of female teams also on average earn considerably less than coaches of male teams. For example, in 2005-2006, head coaches of male Division I basketball teams earned more than twice as much as head coaches of female Division I basketball teams. See *Title IX Athletic Statistics*, <http://www.aauw.org/act/laf/library/athleticStatistics.cfm> (last visited Aug. 19, 2011).

<sup>75</sup> For example, in 2009 the three TV network affiliates included no female sports announcers. See *Gender in Televised Sports*, *supra* note 67.

<sup>76</sup> In 2010, 72% of head athletics trainers for collegiate teams were male. See Rhode & Christopher, *supra* note 16.

<sup>77</sup> In 2010, 88% of college information directors were male. See Rhode & Christopher, *supra* note 16.

<sup>78</sup> For discussion of the very significant differences in the athletic budgets for male and female teams at most schools, see Brake, *supra* note 72, at 75-79.

If schools allow females to try out for male teams but not vice versa, will they provide more athletic participation slots for females than for males and thereby unfairly disadvantage males? Furthermore, will this approach lead schools to run afoul of Title IX's requirement that they offer athletic participation slots in numbers substantially proportional to the ratio of females to males in their student bodies? In my view, the approach that I have outlined does not undermine equal opportunity for males, because it simply compensates for males' ongoing advantages in the school athletic arena. With regard to whether the approach violates the substantial proportionality requirement, I raise questions in Part IIB below about the compatibility of this requirement with the gender-free ideal. For present purposes, however, it suffices to say that in the near future, the problem of too many female athletes is unlikely to arise in most schools. Few coed schools today actually satisfy the proportionality requirement.<sup>79</sup> A large majority still offer more slots for males than for females. Moreover, at the collegiate level, coed schools today on average are 57% female,<sup>80</sup> so it would be in keeping with the proportionality requirement to provide more athletic participation slots for women than for men. Finally, it will undoubtedly take considerable time before there is a critical mass of female athletes who both can earn spots on previously all-male teams and prefer to play there. As long as females are a small minority on a predominantly male team, some qualified females will hesitate to join due to concerns that they may not be warmly welcomed. Others may forgo the opportunity because they would prefer to play on the female team where they can more easily be a star.

Title IX does not require the protective treatment of female teams that I have outlined, but neither does it proscribe it. Nothing in Title IX prohibits schools that currently have sex-

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<sup>79</sup> See American Council on Education, *supra* note 13.

<sup>80</sup> See *Understanding Title IX and Athletics 101*, *supra* note 11.

segregated teams in the same sport from allowing students to try out for teams designated for the other sex. Nor does Title IX anywhere state that if schools allow females to try out for teams that are currently designated for males, they must also allow males to try out for teams that are currently limited to females. In fact, since Title IX explicitly differentiates between males and females with respect to whether schools must allow students to try out for teams in sports that the school offers only to one sex, it is reasonable to infer that it would not violate Title IX for schools also to differentiate between males and females with respect to whether they allow students to try out for teams that the school offers on a sex-segregated basis to both sexes.

To achieve the gender-free ideal described in Part I, however, it probably would not be enough simply to encourage schools to introduce the asymmetrical treatment of male and female teams that I have described. Because many people fail to appreciate both the importance of athletics for females and the advantages that males still enjoy in the school athletic arena, it is likely that schools would encounter resistance from students and parents if they simply instituted such policies on their own. To ensure that schools do not give in to such resistance, I suggest revising Title IX so that it not only permits asymmetrical treatment of male and female teams, but instead requires it. This requirement should not make an exception for “contact” sports.

Mandating protective treatment of female teams is compatible with the Constitution. To meet the standards for equal protection, different treatment of males and females must be substantially related to promoting an important governmental interest. I have already argued both that equalizing athletic opportunities between the sexes is an important governmental

objective and that, in order to achieve this objective, there are very good reasons to be more protective of female teams than male teams.<sup>81</sup>

A common argument for sex-segregation in contact sports is that it is important for safety: Since males on average tend to be taller and heavier than females, allowing mixed sex teams would too often result in females getting hurt.<sup>82</sup> Courts largely have rejected this argument<sup>83</sup> – with good reason. Sex segregation in contact sports is not substantially related to the important governmental interest in promoting safety in athletics. First, since girls tend to mature earlier than boys, the generalization that boys on average are bigger than girls is untrue in middle school.<sup>84</sup> Even in high school and college where the generalization typically is true, the range of differences in size among individuals of each sex is larger than the average differences in size between the sexes.<sup>85</sup> If no males are automatically precluded from trying out for male teams because of safety concerns stemming from their size, then worries about safety cannot be a reason to deny all females – regardless of their size – an opportunity to try out. Of course, coaches may reasonably take safety considerations into account when selecting students for competitive teams, but they must treat males and females the same in this regard. Lastly, it is important to recognize that there are also safety concerns when superior female athletes play on teams and in leagues composed of far less accomplished players. Many injuries occur when a standout athlete is double- and triple-teamed by enthusiastic, but significantly less skilled,

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<sup>81</sup> For the argument that the 14<sup>th</sup> Amendment requires that females be allowed to play on male teams, see Dana Robinson, *A League of Their Own: Do Women Want Segregated Sports?* 9 J. CONTEMP. LEGAL ISSUES 321, 328-330 (1998).

<sup>82</sup> See, e.g., Steve Sampsell, *Co-Ed Sports: When to Separate Boys and Girls*, KIDSPORTS MAGAZINE, Mar. 2009. For an extensive discussion of this concern, see McDonagh & Pappano, *supra* note 45, at 183.

<sup>83</sup> For an extensive discussion and ultimate rejection by the court of the safety argument, see *Hoover v. Meikeljohn*, 430 F. Supp. 164 (D. Colo. 1977). See also *Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020 (W.D. Mo. 1983); *Lantz v. Ainbach*, 620 F. Supp. 663 (S.D. N.Y. 1985).

<sup>84</sup> For statistics on average heights and weights of boys and girls at different ages compiled by the Centers for Disease Control, see *Clinical Growth Charts*, CDC.GOV, [http://www.cdc.gov/growthcharts/clinical\\_charts.htm#Set1](http://www.cdc.gov/growthcharts/clinical_charts.htm#Set1) (last visited Aug. 19, 2011).

<sup>85</sup> See *supra* note 40.

opponents. Moreover, if the standout female athlete is significantly bigger and stronger than most of the other players on the female team, then it would be safer for the other female players if she played on the male team.

In a gender-free society of the sort outlined in Part I, the asymmetrical treatment described above would apply to all levels of competition. At the middle school and high school levels, where athletic participation slots generally are assigned on the basis of competitive tryouts, the system would be relatively easy to implement. The practical problems would be greater on the college level, where athletes typically are recruited by schools. To implement a system of both female and coed collegiate teams, schools would recruit outstanding female athletes for coed teams, just as they recruit outstanding male ones, but they would also recruit female athletes for all-female teams. Students recruited for female teams could, if they wished, try out for coed teams, along with any other male or female “walk-ons” who wanted to try out. By the same token, female students cut from coed teams could try out for female teams. Some women might play on female teams early in their college careers and might subsequently be invited to join, or decide to try out for, coed teams. Any student recruited for a female team who earned a spot on a coed team would be allowed to use any athletic scholarship she received for either team. Of course, many details would need to be worked out in order to implement such a system, but I believe that the practical problems would not be insuperable if coaches were truly committed to identifying and supporting young women who have the potential and desire to play on coed teams.

One obstacle to the approach just described is that it would be difficult for students to move between all-female and coed teams, because schools typically require male and female



teams in the same sport to play by different rules.<sup>86</sup> There is nothing in Title IX to prohibit or even discourage this practice, and the rule differences in some cases are dramatic. In lacrosse, for example, the male and female games differ on the kinds of sticks used, the amount of contact allowed, the number of players on a team, the dimensions of the field, and the protective gear worn.<sup>87</sup>

Sex-specific playing rules undermine the gender-free ideal outlined in Part I, because they tend both to reflect and to reinforce gender stereotypes. Sometimes the differences in rules reflect assumptions about females being more graceful than males. An illustration is the requirement that female, but not male, gymnasts perform a floor routine set to music. More often, the differences in rules rest on assumptions about females having too little strength, endurance, or combativeness to play by male rules. The now defunct female rules for basketball are an excellent case in point.<sup>88</sup> As recently as 1977, a federal appellate court ruled that schools could constitutionally require girls' teams to play a half-court game while boys' teams played full-court.<sup>89</sup> According to the judicial opinion, most females lack the physical strength to play the full-court game, and therefore the different treatment of girls' and boys' teams was substantially related to the important governmental interest in promoting girls' participation in sports. Today, full-court basketball is the norm for females everywhere, and the level of female

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<sup>86</sup> See MCDONOUGH & POMPARO, *supra* note 19, at 13-14.

<sup>87</sup> See Austin Starkweather, *LAX 201: Men's vs. Women's LAX*, THE DAILY PRINCETONIAN, Apr. 25, 2001.

<sup>88</sup> The girls' rules required that there be six players for each team on the court – three guards and three forwards – and that no player could cross the center line. On each half of the court would be one team's guards and the other team's forwards. Only forwards were allowed to shoot the ball, and dribbles were limited to three bounces. See RING, *supra* note 56, at 101.

<sup>89</sup> *Victoria Ann Cape v. Tennessee Secondary Sch. Athletic Ass'n.*, 563 F.2d 793 (6th Cir. 1977).

play has improved so much that NBA commissioner David Stern recently expressed the opinion that the day is not too far off when women will play in the NBA.<sup>90</sup>

To promote equal opportunity of the sort described in Part I, I suggest that Title IX would need to be revised to require that coed and female teams in the same sport play by the same rules. Appropriate committees could decide in each sport whether these would be the current male rules, the current female rules, or instead, some hybrid of the two. In thinking about appropriate rules for school sports in a gender-free society, it is important to take into consideration that the rules of most sports were originally developed by and for males.<sup>91</sup> Thus, for example, the regulation height of the basket in basketball was chosen with the range of male heights in mind. In a gender-free society, a committee charged with setting the height of the basket perhaps might consider the possibilities of lowering the basket so that more players of both sexes could dunk the ball or raising it so that no one could do so. Alternatively, a rules committee might consider awarding only one point for successful shots taken from within five feet of the basket, so as to neutralize to some degree the advantages of being tall.<sup>92</sup>

Some might object that rule changes of these sorts would make the game of basketball less exciting and therefore less popular with fans. The popularity of a sport, however, depends upon a variety of often complex factors that can be difficult to predict. Rule changes of the kinds described might spur creativity and ingenuity, as coaches and players seek ways to use the rules to their teams' advantage. The considerable fan interest today in women's tennis suggests that spectators at least sometimes appreciate finesse and athleticism as much as strength.

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<sup>90</sup> See Ian Thomsen, *Weekly Countdown: A Woman's Place Could Soon Be in the NBA*, SI.COM (Dec. 4, 2009), <http://sportsillustrated.cnn.com/vault/article/web/COM1163560/index.htm>. There are still some small differences in rules between male and female basketball – for example, females play with a slightly smaller ball.

<sup>91</sup> See KENDALL BLANCHARD & ALYCE CHESKA, *THE ANTHROPOLOGY OF SPORT: AN INTRODUCTION* 233-48 (1985).

<sup>92</sup> Some rule changes that benefit smaller players by making the style of play less physical than it was previously have already been instituted in the NBA – for example, the 2005 rule change that curtailed hand checking. See David Dupree, *Next up 100? Strategies, Rule Changes, Make it a Possibility*, USA TODAY, Jan. 24, 2006.

Furthermore, the preference of many fans for college sports over professional sports, despite the latter's generally higher caliber of play, indicates that fan interest often depends not only on the quality of the play, but also on such intangible factors as school allegiance, romanticized notions of scholar athletes, and so forth. Finally, it is important to remember that the reason that Title IX applies to sports is that athletics have an important educational role. From this perspective, the goal of making sports equally accessible to girls and to boys has higher priority than the goal of producing a game that spectators will find optimally entertaining.

Another possible objection to the kinds of rule changes proposed here is that significant rule differences between college and professional sports would make it difficult for the best college players to transition to professional teams. In light of the miniscule proportion of college players who go on to professional careers, however, it does not make sense for secondary schools and colleges to give this consideration higher priority than others discussed here. Furthermore, the problem is hardly insurmountable. If professional teams are wedded to their current rules, and if the rule differences truly pose obstacles to players' abilities to transition to professional teams, then professional teams could set up farm systems, like baseball's, to provide the necessary training. Alternatively, professional teams could decide that the simpler route is simply to move to college rules.

## **2. Different sports for males and females**

Many of the legal cases that deal with sex-segregation in athletics have involved students who wished to play a sport reserved at their school for the other sex. Males denied the opportunity to play sports like volleyball and field hockey have brought some of these suits. Females excluded from sports like football and wrestling have brought others.

As noted earlier, Title IX allows schools to exclude males from all interscholastic female athletic teams. Using reasoning similar to that of the court in *O'Connor*, courts typically have upheld these exclusions against constitutional challenges. For example, Gregory Clark and several of his teammates on a championship amateur volleyball team wanted to play volleyball for their high schools, but the Ninth Circuit ruled that the Fourteenth Amendment permitted their schools to limit participation on their varsity volleyball teams to girls, even though the schools offered no volleyball teams for boys.<sup>93</sup> According to the court, allowing boys to try out for girls' teams would very probably lead to the displacement of significant numbers of girls from those teams.<sup>94</sup> Therefore, schools' policies of reserving their volleyball teams for girls were substantially related to the important governmental interests in "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes."<sup>95</sup> Although the court acknowledged that athletic opportunities could be equalized more fully by other means, such as creating a boys' volleyball team, the existence of "wiser alternatives than the one chosen does not serve to invalidate the policy here since it is substantially related to the goal."<sup>96</sup>

Females typically have fared better than males in their challenges to school policies that excluded them from sports offered only to the other sex. Since Title IX requires that females be allowed to try out for teams in non-contact sports that their schools offer only to males, most of

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<sup>93</sup> *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982). *See also* *Petrie v. Illinois High Sch. Ass'n*, 394 N.E.2d 855 (Ill. App. Ct. 1979) (precluding boys from playing on girls' volleyball team permitted under the Fourteenth Amendment and under the strict scrutiny standard of the Illinois Constitution); *Mularadelis v. Haldane Cent. Sch. Bd.*, 427 N.Y.S. 2d 458 (App. Div. 1980) (excluding boys from girls' volleyball team permitted under the Fourteenth Amendment); *Williams v. School District of Bethlehem, PA*, 998 F.2d 168 (3rd Cir. 1993) (excluding boys from girls' field hockey team permitted under the Fourteenth Amendment). A minority of cases have gone the other way. *See, e.g.,* *Gomes v. Rhode Island Interscholastic League*, 604 F.2d 733 (1st Cir. 1979) (prohibiting the exclusion of boys from girls' volleyball team under the Fourteenth Amendment).

<sup>94</sup> *Clark*, 695 F.2d at 1127.

<sup>95</sup> *Id.* at 1131.

<sup>96</sup> *Id.* at 1132.

the challenges to school policies that excluded females from particular sports have involved contact sports. Numerous girls have successfully argued that these exclusions violate the Fourteenth Amendment. For example, thirteen year old Nichole Force raised an equal protection challenge to her junior high school's policy of making football tryouts available only to boys.<sup>97</sup> School officials made the familiar argument that if Nichole were allowed to compete for a spot on the football team, then boys would have to be allowed to try out for the volleyball team, which the school limited to girls.<sup>98</sup> The school went on to maintain that if football were open to girls, some of the best female athletes would leave volleyball for football, and if volleyball were open to boys, many boys who could not make the football team would try out for and make the volleyball team. The result would be male domination of the volleyball team and a reduction in overall female athletic participation at the school.<sup>99</sup> The federal district court rejected this argument on several grounds. First, it ruled that the school had failed to demonstrate that there were substantial numbers of girls at the school who wanted to play football or boys at the school who wanted to play volleyball.<sup>100</sup> Second, it argued that it would not be unconstitutional for the school to allow girls to try out for football but to preclude boys from trying out for volleyball, because such an approach would be substantially related to the important governmental interest in redressing past discrimination against females in athletics.<sup>101</sup> Lastly, the court pointed out that if the school chose to make tryouts for both the football and volleyball teams open to all students

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<sup>97</sup> *Force v. Pierce City R-VI School District*, 570 F. Supp. 1020 (W.D. Mo. 1983). See also *Lantz v. Ainbach*, 620 F. Supp. 663 (S.D. N.T. 1985) (precluding girls from trying out for high school football team violates the Fourteenth Amendment); *Adams by and through Adams v. Baker*, 919 F. Supp. 1496 (D. Kan. 1996) (prohibiting girls from trying out for wrestling team violates Title IX and the Fourteenth Amendment). For a similar result involving baseball, which Title IX does not identify as a contact sport, see *Carnes v. Tennessee Secondary Sch. Athletic Ass'n.*, 415 F. Supp 569 (E.D. Tenn. 1976). For a defense of the claim that the Fourteenth Amendment requires that females be allowed to try out for male teams, see *Robinson*, *supra* note 81, at 328-30.

<sup>98</sup> *Force*, 570 F. Supp. at 1025.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 1026.

<sup>101</sup> *Id.* at 1027.

and found that the result was male domination of the volleyball team, the school could decide to offer two volleyball teams, one for girls and one for boys.<sup>102</sup>

As I noted earlier in discussing *O'Connor*, I believe that, since males and females are still situated very differently in the athletic arena, the important governmental interest in equalizing athletic opportunities for the sexes is promoted by schools being more protective of female teams than male teams. Thus, to the extent that the issue is constitutionality, I agree with the results in both *Clark* and *Force*. However, if the concern is promoting the gender-free ideal outlined in Part I, then I suggest that a different tack would be needed: Title IX would have to be revised to require schools to offer all of the same sports to males and females.

The court in *Force* noted that Nichole should be allowed to try out for the football team in part because “each sport has its own relatively unique blend of requirements in terms of skills and necessary physical attributes, and each person, male or female, will for a variety of reasons probably find one or another sport more enjoyable and rewarding than others.”<sup>103</sup> Therefore, the goal of increasing female participation in sports is promoted by providing more variety in the available sports. The issue for the gender-free ideal, however, is more complex than this. By offering football only to males, schools send the message to students that rough and tumble sports that reward great physical strength are ill-suited to females. The larger meaning that students naturally may attach to this message is that work that demands a great deal of physical strength and toughness – for example, building houses and fighting fires – is also most appropriate for men. By the same token, a school that offers gymnastics only to females communicates the idea that females are better suited than males to sports that require grace and self-control and that are beautiful to watch. The larger implication that students typically draw

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1028.

from this message is that having self-control and appearing graceful and attractive are more important for women than for men. Inevitably, these stereotypes then influence the work and other life choices that these students make, as well as the jobs and roles that others offer them. As explained above in Part I, it is possible that, due to average biological differences between the sexes, males and females, as groups, might not be equally interested in, or equally successful at, football and gymnastics, even in a gender-free society. However, in such a society the opportunities to choose which sports to participate in would be the same for all.

As a practical matter, the task of truly making equally available to both sexes sports that schools currently offer only to one poses some challenges. By the time children are old enough to compete on school teams – in most districts, around sixth grade – they generally have already absorbed societal messages about which sports are suited to males and to females. Moreover, their schools have typically reinforced these messages by offering some sports only to males and others only to females. In most school districts today, a high school coach who suddenly announced that girls were welcome to try out either for the previously all-male football team or for a prospective female football team would find few girls with the interest, skills, or confidence to show up for the tryouts.

To create a culture in which males and females truly have equal opportunities to participate in the same sports, one place to start is with mandatory coed physical education classes in elementary and secondary schools, where all students are exposed to the same wide variety of sports and fitness regimens.<sup>104</sup> This means, for example, that gym classes would introduce all children to football and gymnastics, as well as to weight training and aerobic dance.

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<sup>104</sup> I am not addressing here the complex issue of whether to allow single-sex schools. Obviously, single-sex schools have single-sex gym classes. Title IX exempts any institution “that traditionally and continually from its establishment has had a policy of admitting only students of one sex.” *See* 20 U.S.C. § 1681(a)(5).

Prior to the adoption of Title IX, most physical education classes in the U.S. were single-sex.<sup>105</sup> The 1975 regulations that implemented Title IX mandated coed gym classes, although they allowed teachers to separate students by sex in activities that involve bodily contact.<sup>106</sup> The U.S. Department of Education revised these implementation regulations in 2006 to make it easier for schools to offer single-sex classes in any subject – including gym.<sup>107</sup> Schools are now permitted to offer sex-segregated classes as long as students are offered the option of a comparable coed class. As a result, a growing number of school districts have been reintroducing single-sex classes, including gym.<sup>108</sup>

One reason that sex-segregation in gym runs counter to the ideal of a gender-free society discussed in Part I is that it provides too great a temptation to reinforce gender stereotypes by developing different curricula for girls and for boys – for example, aerobic dance for girls and weight training for boys. But even if the curricula are the same, separation of the sexes is problematic for the gender-free ideal. The purpose of physical education is, after all, *education*. Gym class provides a prime opportunity to teach males and females to work together as teammates, to challenge each other as opponents, and to examine their assumptions about gender. The message that may be communicated by single-sex gym is that there are areas in which males and females do not work well together and cannot compete against each other. Students may apply this message not only to the athletic arena, but also to other activities central to human flourishing discussed in Part I.

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<sup>105</sup> See RICHARD SWANSON & BETTY SPEARS, HISTORY OF SPORT AND PHYSICAL EDUCATION IN THE UNITED STATES (1994).

<sup>106</sup> 34 C.F.R. § 106.34(a)(2), (c).

<sup>107</sup> 71 Fed. Reg. 17,858 (Oct. 25, 2006).

<sup>108</sup> For information on the growing numbers of single-sex classes in public schools, see *Single Sex Schools/Schools with Single-sex classrooms/What's the difference?*, NAT'L ASS'N FOR SINGLE-SEX EDUC., SINGLESEXSCHOOLS.ORG, <http://www.singlesexschools.org/schools-schools.htm> (last visited Nov. 14, 2011).



A major factor currently motivating sex-segregation in physical education is that girls often have very negative experiences in coed gym classes.<sup>109</sup> They commonly complain that boys in their gym classes make derogatory comments about girls' athletic abilities and physical appearances, dominate competitive scrimmages by refusing to pass to girls, and more generally, try to show girls up. To use co-ed gym to promote the elimination of gender, physical education teachers would need to find ways to change the ethos of co-ed gym classes of this sort. To some extent, this means simply refusing to tolerate put downs and uncooperative behavior. However, it also means devising class activities that reward a wide variety of physical skills and attributes – for example, not only activities where size and strength are advantageous, but also ones that showcase endurance, flexibility and agility. Boys are less likely to make fun of girls' performance if the activities that all students must take part in include not only football and basketball, but also gymnastics and zumba.

To truly change the culture of gym class, however, the lessons of coed gym would need support from other parts of the curriculum. For example, social studies and English teachers might do a unit that studies the harmful effects of stereotypes in athletics, the history of female exclusion from sports, and the ways in which this history still influences athletics today. Included in this unit might be lessons about the accomplishments of athletes in sports typically associated with the other sex. For illustration, teachers might show videos of male Olympic figure skaters and of part of a championship game in the Women's Professional Football League. Assigned readings might include a biography of Babe Didrikson Zaharias – including her well-publicized proficiency as a seamstress and the unsubstantiated rumors of her homosexuality -- and Jennifer

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<sup>109</sup> For a discussion of female perceptions of single-sex and coed gym classes, see Julie A. Derry, *Single-Sex and Coeducation Physical Education: Perspectives of Adolescent Girls and Female Physical Education Teachers - Research*, MELPOMENE JOURNAL (Fall-Winter 2002).

Ring's very readable recent book on the masculinization of baseball in the U.S.<sup>110</sup> Teachers might also assign some readings on court cases that involved students who wished to play on teams reserved at their schools for the other sex.

In organizing school teams in sports that schools currently offer only to males, I suggest that the approach most in keeping with the gender-free ideal outlined earlier is the one that I have proposed for sports that schools currently offer on a sex-segregated basis to both males and females: two varsity teams, one open to both sexes and the other reserved for females. This strategy would increase the number of athletic participation slots open to females and also would help to break down the stereotype that sports like wrestling and football are unsuited to girls. A difficulty, however, is that if a school has never allowed females to play on a team in a particular sport, then, even if girls have learned the basics of that sport in gym class, there may still initially be few girls with the interests and skills to play the sport competitively. The best approach to this situation varies according to the sport. In wrestling, for instance, it might be easier than in some other sports for females to make coed teams, because competition is organized into weight categories.<sup>111</sup> Moreover, the one-on-one nature of competition in wrestling means that even if there are only a small number of females who would like to wrestle but who fail to make the coed team, a school may be able to organize a small female team. Football presents a more complicated case, because the premium placed on physical size at many of the positions may mean that few girls are able to make the coed team, and there may well be too few interested girls to fill the large roster of an all-female team. The most practical approach then might be for schools in relative geographical proximity to join forces to field a small number of all-female football teams.

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<sup>110</sup> RING, *supra* note 56.

<sup>111</sup> For a discussion of girls who have successfully competed with boys in wrestling, *see infra* note 116.

Schools would need different strategies for sports that they currently offer only to females. Once again, the approach best suited to promoting the gender-free ideal would vary with the sport. Consider, first, sports like volleyball and field hockey, which girls often first take up in high school and which do not particularly reward skills or traits usually associated with females. Since males generally have greater experience in sports than females, and since many of the skills needed for these sports to some extent are transferable from other sports, allowing males to compete with females now might significantly reduce female participation on these teams. The best approach for sports like volleyball and field hockey might be to begin by allowing males to try out for previously all-female teams and monitoring the results. If, over time, males displace significant numbers of females on these teams, then schools would take the same approach as I have suggested for sports currently offered on a sex-segregated basis to both sexes: a co-ed team and an all-female team.

A different tack might be better suited to a sport like gymnastics. Because small stature tends to be an advantage in gymnastics, and because proficiency in gymnastics typically requires years of intensive training, it is unlikely that allowing males to try out for female teams will quickly result in the displacement of large numbers of females. Therefore, the best approach for gymnastics, at least in the short run, might be the counterpart of the one that I have suggested for sports that schools currently offer only to males: Allow males to compete for spots on co-ed teams and offer all-male teams for interested students who fail to make the coed team. A possible objection to this approach is that the justification provided earlier for retaining all-female teams does not apply to all-male teams, because males, as a group, are currently advantaged, not disadvantaged, in the athletic arena. I suggest, however, that in light of both the relatively high visibility of gymnastics as a stereotypical female sport and the small numbers of

students with the skills to compete in gymnastics, the gender-free ideal would be promoted, not undermined, by taking measures to make gymnastics more accessible to males.

Although attracting males to sports traditionally associated with females would be an effective way to tackle stereotypes, it might undercut schools' abilities to satisfy Title IX's substantial proportionality requirement. As I have already noted, I raise questions in Part IIB below about the relationship of this requirement to the gender-free ideal. But assuming for now that undercutting schools' abilities to achieve proportionality remains a concern, how much of a concern it would be in this instance would largely depend on two factors. One is whether attracting boys to play sports typically associated with girls would increase the total number of boys participating on school teams, or whether it simply would shuffle the sports in which boys who play on school teams participate. A second factor would be schools' success in recruiting girls to school athletics. The approaches discussed above would create numerous new participation slots for females on school teams. There are many strategies that schools could use to encourage girls to try out for these slots. For instance, they might honor female athletes at school assemblies, sponsor outings for them to appealing events, and invite female college or local professional athletes to speak at the school and perhaps to lead clinics with girls' teams.<sup>112</sup>

### **3. The elimination of single-sex teams**

I do not believe that at this point in time it would best promote the gender-free ideal outlined in Part I to require all school teams to be coed. As I have argued, females and males still are not equally situated in the athletic arena, and so treating them identically in all respects

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<sup>112</sup> In some areas schools can tap into programs to encourage female athletic participation sponsored by groups outside of the particular school or school district. For example, in June, 2011, Northeastern University sponsored the "Dream Big! Leadership Conference" in which 150 students, teachers, and coaches from a dozen public Boston Schools gathered to hear former Olympic, professional, and collegiate female athletes talk about how their experiences in sports had helped pave the way for their subsequent careers in a wide variety of fields. *Dream Big! Conference Pairs Urban Girls with Accomplished Women Athletes*, SPORT IN SOCIETY (June 21, 2011), <http://www.northeastern.edu/sportinsociety/new/2011/254.html>.

would simply perpetuate inequality. Few females today could compete on an equal footing with males for spots on coed teams, and so requiring that all competitively selected teams immediately become coed would very probably result in these teams being predominantly male.<sup>113</sup> But would the protective treatment of female sports that I have described undermine the gender-free ideal by communicating the message that female teams need protection because females are athletically inferior to males? Although this concern is not frivolous, I believe that this stigmatizing message is communicated even more strongly by the alternatives: the current regime of sex-segregated teams and the option of requiring now that all school teams be coed. Moreover, I believe that the likelihood that students will perceive the protective treatment of female teams as stigmatizing can be significantly reduced if education about past and persisting social inequalities in athletics is included in middle school and high school curricula. If students perceive the protective treatment as a temporary measure needed to rectify these inequalities, then the negative effects of stigmatization can be minimized and, I believe, outweighed by the benefits of protection.

But what about in the long run? For how long should the protective treatment go on? It is noteworthy that Title IX currently identifies no end date for the protective treatment of female sports that it sanctions – i.e., its requirement that in non-contact sports that schools offer to only one sex, schools may exclude males from trying out for female teams but must permit females to try out for male teams. If the goal is to achieve a gender-free society, then the answer to the question of how long protective treatment should be in place is straightforward: Until females and males truly have equal opportunity in the athletic arena. This means until they have equal opportunity both to access the societal resources needed to be a successful school athlete and to

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<sup>113</sup> See the concluding section for discussion of the likelihood of roughly equal representation of the sexes on coed teams if the changes proposed above are implemented.

develop the necessary skills, interests, and personal attributes. Clearly, there is no simple way of determining when this benchmark has been reached. However, I have identified some metrics for evaluating progress toward this goal: Females and males would have equal access to equipment, facilities, and coaching; they would receive equal encouragement and opportunity to play *any* sport offered by their school at the highest level their school makes available; the spectrum of sports offered and promoted by schools would include not only ones that primarily reward size and strength, but also to an equal extent ones that reward flexibility, agility, finesse, and endurance<sup>114</sup>; and the rules by which these sports would be played would be developed with the range of sizes of females and males equally in mind. Clearly, equal opportunity of this sort is still a long way from being realized.

Once true equality of athletic opportunity were achieved, however, both males and females would be equally eligible to compete for spots on all school athletic teams. Schools would then need to make some decisions about how many teams to offer in each sport. If schools replace the single-sex teams that they currently field with coed teams, they would offer four teams in every sport that they currently offer on a varsity and junior varsity basis to both males and females and two teams in every sport that they currently offer on a varsity and junior varsity basis to only one sex. In a gender-free society, Title IX would require that in deciding which sports to offer and how many teams to field in each sport, schools give priority to ensuring that they offer a spectrum of sports that showcase a wide variety of skills.

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<sup>114</sup> In *The Frailty Myth: Redefining the Physical Potential of Girls and Women*, Collette Dowling gives some examples of average physiological differences between males and females that tend to work to females' advantage in athletics. DOWLING, *supra* note 40 at 206. For example, being flexible is an advantage in gymnastics, diving, and ice skating, and having a lower center of gravity helps in hockey, golf, and tennis. See also JENNIFER HARGREAVES, *SPORTING FEMALES: CRITICAL ISSUES IN THE HISTORY AND SOCIOLOGY OF WOMEN'S SPORTS* 286 (1994); MCDONAGH & PAPPANO, *supra* note 44, at 58-61.

#### 4. Other proposals for creating coed teams

Before leaving the subject of sex-segregated athletic teams, I would like to address briefly two radical ideas for the immediate creation of coed teams that some courts and commentators have considered. The first is that all school sports follow the example of wrestling and boxing and limit competition to participants within a specified size range.<sup>115</sup> Thus, for example, a high school might have two coed basketball teams, one for students shorter than five feet seven inches and the other for students this height or taller. Proponents of this approach can point to instances in which females have successfully competed with males on this basis. For example, in the past five years, three girls have prevailed over male competition and won state high school wrestling titles in their weight class: two in Alaska and one in Vermont.<sup>116</sup> The appeal of this proposal is that it would promote equality of athletic opportunity without categorizing on the basis of sex and therefore would preempt the concerns about stigmatization raised by the protective treatment of female sports discussed above.

Despite its allure, I do not believe that at the present time this proposal would be of great assistance in equalizing athletic opportunities between the sexes. Comparably sized males and females today typically are not similarly situated in the athletic arena. At any specified height, the average male, for all the reasons discussed earlier, has had greater athletic opportunity than the average female, and consequently, has probably come closer than she has to realizing his athletic potential. As a result, for reasons apart from innate athletic talent, open tryouts now for both of a school's size-segregated basketball teams would almost certainly lead to both teams being dominated by males. If the various strategies discussed earlier succeed at some future

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<sup>115</sup> The court in *Petrie v. Illinois High School Association*, 394 N.E. 2d 855 (Ill. App. Ct. 1979), discussed this possibility but concluded that such an approach would not benefit females because a size classification would not compensate for the average strength differential between males and females.

<sup>116</sup> See Jere Longman, *On Wrestling Mat, Girls Still Face Uphill Struggle*, N.Y. TIMES, Feb. 27, 2011, available at <http://www.nytimes.com/2011/02/28/sports/28wrestling.html?pagewanted=all>.

point in creating equal athletic opportunities for males and females, then I believe that this proposal would at that time be worthy of serious consideration as a possible way of neutralizing the effects of biologically determined average differences in size between males and females.

A second radical proposal for the immediate creation of coed sports teams is that coed schools should require that all athletic teams take as their model mixed doubles in tennis. This means that they should mandate that all team rosters be half male and half female and that the players on the court or field at all times be equally divided between males and females.<sup>117</sup> If in any season there is insufficient interest or ability on the part of one of the sexes to allow the team to satisfy this requirement, then the school would be precluded in that season from fielding a team in that sport. Ideally, students who want to play that sport would prevail on classmates of the needed sex to join the team. Colleges would have to be sure only to field teams in sports where they could be confident of recruiting the requisite number of qualified players of each sex. To address the possible scarcity of interested and qualified players of each sex at the high school and college levels, these requirements might be phased in, so that they would apply first to middle schools, three years later to high schools, and three years after that to colleges.

This is an intriguing suggestion, because it would provide a quick fix for a variety of inequalities that currently persist in the athletic arena. It would instantly give female and male students equal access to all of the same sports, and it would ensure that the teams on which males and females play are treated equally in all respects, including receiving equal media attention and fan support. Nevertheless, I have serious reservations about this proposal. Some of these concern the practicality of mandating that male and female athletes, regardless of whether their average skill levels are comparable, play together on varsity teams. But more basically, the

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<sup>117</sup> For an extensive explanation and defense of this proposal, see B. Glenn George, *Fifty/fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L. J. 1107 (2002).



approach reifies categorizing on the basis of sex and therefore runs counter to the gender-free ideal outlined in Part I. Under my analysis, a requirement for the elimination of gender is that males and females be provided with equal opportunity to develop the skills, interests, and personal attributes needed to succeed in a wide spectrum of sports. Whether males and females in fact would be equally interested in, and successful at, each sport is at this point an open empirical question. As I noted earlier, it seems to me quite possible that, due to average biological differences between the sexes, males and females in a gender-free society might not, as groups, be equally interested in, or equally successful at, football and gymnastics.

### **B. The substantial proportionality requirement**

The second aspect of Title IX that warrants attention in assessing the implications of the legislation for the gender-free ideal discussed in Part I is its requirement, issued as part of a 1978 policy interpretation, that schools offer athletic participation opportunities for male and female students “in numbers substantially proportionate to their respective enrollments.”<sup>118</sup> This is a very demanding standard, particularly for coed colleges today where women typically make up roughly 57% of the undergraduate population. More than thirty years after it was established, few coed schools at any level have actually reached this benchmark. In recognition of the difficulty of satisfying this requirement, the policy interpretation made “substantial proportionality” only the first part of a three-part test. A school that fails to achieve substantial proportionality can avoid being deemed in violation of Title IX if it can demonstrate either (a) that it has a “continuing practice of program expansion [in athletics], which is demonstrably responsive to the developing interests and abilities” of its female students,<sup>119</sup> or (b) that the

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<sup>118</sup> 44 Fed. Reg. at 71, 418.

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

athletic interests and abilities of its female students “have been fully and effectively accommodated by the present program.”<sup>120</sup> The Supreme Court has never addressed the constitutionality of the three-part test, but this issue was the focus of *Cohen v. Brown University*, a 1996 federal appellate case.<sup>121</sup> The plaintiffs in this class action suit were “all present, future, and potential Brown University women students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown.”<sup>122</sup> They charged the university with violating Title IX when, as part of a university-wide cost-cutting initiative, it demoted two female and two male sports teams from varsity to club status. This meant that the teams would no longer receive funding or support services from the university for salaried coaches, medical trainers, transportation, and so forth, and that the teams for the most part would no longer compete against varsity teams from other schools. The demotions left virtually unchanged the school’s male to female varsity athletic participation ratio: Females at the time were roughly 51% of Brown’s student body, but only about 38% of its varsity athletes.<sup>123</sup>

Brown did not deny that it failed to satisfy the substantial proportionality requirement. Furthermore, since its actions effectively eliminated two viable women’s varsity teams, it could not claim that it satisfied either of the other parts of the three-part test. Instead, Brown argued that the three-part test is unconstitutional, because it discriminates against men. According to Brown, the substantial proportionality requirement is essentially the sort of quota that the Supreme Court has struck down in other contexts.<sup>124</sup> In addition, Brown argued that the third part of the three-part test unconstitutionally disadvantages males, because it requires schools to

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

<sup>121</sup> 101 F.3d 155 (1st Cir. 1996).

<sup>122</sup> *Id.* at 161.

<sup>123</sup> In 1993-94, there were 897 Brown students on varsity teams, of which 555 (61.8%) were male and 342 (38.13%) were female. That year Brown enrolled 2796 male students (48.86%) and 2926 female students (51.14%). *Id.* at 164.

<sup>124</sup> *Id.* at 174.

give less weight to male than to female athletic interest.<sup>125</sup> Brown produced surveys of student interest in athletic participation that indicated that, on average, women at Brown had less interest in playing on sports teams than did men. To fully accommodate the athletic interests and abilities of its female students, Brown in effect argued that it would have to allot a varsity spot to every minimally able female student who had even a small interest in playing on a team while denying spots to large numbers of athletically accomplished male students who cared a great deal about playing on school teams.

In a 2 – 1 decision, the court ruled against Brown and upheld the constitutionality of the three-part test. According to the court, the test withstands the intermediate scrutiny required for classifications based on sex, because it is substantially related to the important governmental objective of “avoid[ing] the use of federal resources to support discriminatory practices.”<sup>126</sup> First, the court rejected Brown’s claim that the substantial proportionality requirement imposes a quota on male and female athletic participation. On the court’s view, parts (2) and (3) of the three-part test render the expectation of proportionality “a rebuttable presumption, rather than an inflexible requirement.”<sup>127</sup> Furthermore, the court challenged Brown’s claim that female students at the school tend to have less interest in athletic participation than male students do. According to the court, it is impossible accurately to assess female athletic interest in an environment in which athletic opportunities for young women have been so limited by discrimination. In the words of the court, “interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience.”<sup>128</sup> Thus, for example, if a middle school or high school does not provide opportunities for girls to play a particular sport, few girls at the school will develop an

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 184 *citing* Cannon v. Uni. Of Chicago, 441 U.S. 677, 704 (1979).

<sup>127</sup> *Id.* at 171.

<sup>128</sup> *Id.* at 179.

interest in playing that sport. Moreover, at the college level, female students with a strong interest in a particular sport generally will not apply to a school that lacks a women's team in that sport. Thus, one would expect that at schools that field many male sports teams but few female ones, surveys would find far greater male than female student interest in playing on teams. By the court's reasoning, such surveys would not be a fair measure of whether these schools are providing the equality of athletic opportunity mandated by Title IX.

I agree with the Cohen court's ruling that the three-part test is constitutional. In my view, the court was correct that the substantial proportionality requirement is not a quota. Moreover, even if it were a quota, it is not clear that it would be unconstitutional: The quotas that the Supreme Court has disallowed dealt with race, and so were subjected to strict scrutiny;<sup>129</sup> by contrast, sex classifications under Supreme Court jurisprudence must meet only the lesser standard of intermediate review. I also agree with the court's analysis of the appropriateness of giving more weight to women's than to men's expressed interest in athletic participation.<sup>130</sup>

Even if the three-part test is constitutional, however, the question that is of concern here is whether it promotes equal opportunity and the ideal of a gender-free society. As I argued earlier in discussing the proposal that all team rosters be required to have equal male and female representation, the mandate that male and female athletic participation be pre-set at a specific number or narrow range of numbers is not in keeping with the gender-free ideal outlined in Part I. The assumption that if males and females truly had equal athletic opportunity, they would be equally interested in playing on school teams seems less controversial than the assumption that

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<sup>129</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 201 (1995).

<sup>130</sup> In 2005 the Bush administration Office of Civil Rights issued a clarification of the three-part test that established that colleges and universities could use email surveys alone to determine male and female interest in participating in intercollegiate sports. It also established that the burden is on government regulators and on women to show that a school has failed to satisfy part (3) of the three-part test. In 2010 the Obama administration Office of Civil Rights rescinded the 2005 clarification. See *supra* note 49.

they would be equally interested in playing each particular sport. Nevertheless, the concept of a gender-free society that I have proposed is based on providing equal opportunity, not on guaranteeing equal outcomes. If the equal outcomes stipulated by the substantial proportionality requirement could only be produced by going beyond the demands of equal opportunity, then mandating such outcomes in my view not only would discriminate against males, but also would stigmatize females. I have already outlined the sorts of changes in Title IX that I believe would foster true equality of opportunity and therefore promote a gender-free society. If these changes were actually put into effect, there would be no place for the three-part test.

As long as true equality of opportunity is not yet realized, however, there may be some value in retaining the substantial proportionality requirement. If schools take the kinds of measures identified in Part IIA above – including being more protective of female teams than male teams – their percentages of female and male athletes will probably come close to the percentages of females and males in their enrollments. Although, on my view, Title IX should not take proportionality as an end in itself, a failure to achieve proportionality may be an indication that a school is not making progress toward providing equal opportunity. Since proportionality is easier to measure than progress toward equal opportunity, I propose that, at least for the near future, a showing of lack of proportionality continue to be a permissible basis for a Title IX suit. Schools unable to demonstrate that they had achieved proportionality would then have the burden of showing, not that they had satisfied either of the other parts of the three-part test, but instead that they had achieved, or at least were making progress toward achieving, equal opportunity.<sup>131</sup>

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<sup>131</sup> Kimberly Yuracko defends the proportionality requirement on the grounds that it “encourages girls to develop a set of traits, skills, and possible self-conceptions that are considered important for their future success and also important, more generally, for a good human life.” *See supra* note 32, at 800. I believe that the proportionality

### ***Part III: Conclusion***

I have argued that, because of the many benefits of school sports participation, equality of athletic opportunity between males and females is necessary for the overall equality of opportunity that I have suggested would characterize a gender-free society. Moreover, I have proposed an analysis of equal opportunity and the gender-free ideal in the context of school athletics that is fully compatible with biologically determined average physical differences between males and females. Suppose, however, that at some future date, females and males achieve equal athletic opportunity along the lines described above, but that because of these average biological differences, there are significantly more males than females on school athletic teams. Would such an outcome really be compatible with a gender-free society, or would the existence of such a differential itself fuel stereotypes that would reinforce gender roles? Moreover, if eliminating gender would mean that males would be disproportionately represented on school sports teams, would the elimination of gender be desirable?

First, it is difficult to predict all of the effects of the changes described in Part II on male and female representation on school athletic teams. Inevitably, change has unforeseen consequences, and the success of a new regime will require commitment and imagination on the part of those implementing it. However, I believe that substantial disparities between male and female representation on school teams is not at all likely to be the result of implementing the proposals discussed above. The gaps in performance between male and female athletes have narrowed considerably during the nearly forty years that Title IX has been in effect.<sup>132</sup> If equality of athletic opportunity of the sort described above were instituted, these gaps would

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requirement is the best means for achieving these results only for as long as it helps to equalize athletic opportunity as I have defined this concept.

<sup>132</sup> For discussion of research that shows that women's athletic performances are improving at a faster rate than men's, see HARGREAVES, *supra* note 114, at 284-88.

almost certainly close a great deal more. One reason would be improvements in the performance of females, driven by improved fitness regimens, higher levels of competition, more encouragement, and greater degrees of participation, at least during the period when female athletics receive protective treatment. Other reasons would be increased emphasis on sports that reward finesse, grace, agility, and endurance, and rule changes that would work to neutralize some of the advantages of males' generally greater size. In addition, there might be increased numbers of sports that limit competition to players within specified size ranges.

Second, even if implementing the proposed changes does ultimately lead to a somewhat disproportionate male presence on school athletic teams, it is far from inevitable that this disproportionality will lead to a resurgence of gender roles. It is the job of educators to help students to understand that, although equality of opportunity requires the elimination of societal pressures to conform to gender stereotypes, it does not require that males and females, as groups, in the end have identical interests and abilities. I believe that if schools truly take seriously their obligation to teach students to recognize stereotypes and their harmful effects, it is unlikely that significant numbers of students will embrace gender roles simply because males and females are not equally represented in every activity at their school.

Finally, it is important to remember that, although representing one's school on a competitively selected athletic team is an important means of accessing the societal resources and of developing the personal tools needed for the activities central to human flourishing discussed in Part I, it is hardly the only means. If true equality of opportunity were implemented in all areas of education, the result might be a disproportionate representation of females in some other important arena. For example, it might turn out that, for reasons unrelated to gender influences, girls' organizational skills, on average, develop earlier than boys', and that girls

therefore outnumber boys as heads of student organizations. Furthermore, insofar as there are distinctive benefits of athletic participation for all students, I suggest that Title IX should be revised to require schools to devote a substantial proportion of their athletic resources to recreational sports for all students. Although recreational sports do not provide all of the benefits of varsity and junior varsity teams, they do provide important opportunities to improve physical fitness, to learn teamwork, and to develop athletic talents, confidence, and leadership skills.

I have argued that, although Title IX has been very successful in increasing female participation on school athletic teams, it is unlikely in its current form to lead to true equality of athletic opportunity and thus to the elimination of gender roles in school sports. Moreover, because of the important role that school sports play in communicating ideas about gender, true societal equality of opportunity is unlikely to occur without the elimination of gender roles in the arena of school athletics. In this article, I have outlined some revisions of Title IX that I suggest would bring us closer to achieving that goal. Although I have painted with a broad brush and have not addressed many of the practical details of implementing the revisions that I have described, I believe that I have discussed the proposed revisions with enough specificity to show that implementation would in fact be feasible and in the long run desirable. In addition, I believe that the general theory of equal opportunity that I have outlined has potential applicability to other contexts in which biological differences between the sexes might appear to pose a challenge to the elimination of gender roles.