

THE END GAME: ENVISIONING EQUALITY FOR WOMEN AND GIRLS IN SPORTS

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From the age of 5, I dreamed of the day that I would pitch for the New York Yankees. And I didn't just dream. I practiced and prepared myself for that career. Every day after school, I would throw 500 pitches against the side of my parents' garage. By the time I was 10, I had developed a rising fast ball and an impressive curve that would drop off the table, and I was hard at work on a Bob Turley drop. There was no doubt that I was more than prepared to take the first step in the rites of passage to becoming a major league baseball player—Little League.

I can remember the Saturday morning when I and a bunch of the "guys" on my street went to tryouts. We were nervous, but I knew that I was good. I remember my intensity—the serious way I threw the ball and swung the bat. I remember how good it felt trying to make my glove "pop" every time I caught the ball. I was drafted number one and was not surprised. I was bigger, faster, more coordinated, and simply better than all of the boys.

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Imagine my excitement when we were assigned to teams and lined up for uniforms! My team colors were navy blue and white—Yankees colors! . . .

I was standing there, punching my hand into my glove, grinning, when a very tall father came to stand beside me. He had a rule book that was opened to page 14. On the right-hand side of the page were four words that would change my life forever: “No girls are allowed.” . . . I was devastated. . . .

. . .

My anger is not the volatile kind. It’s the kind that stews under the surface for a long time. And its [sic] not really about not being able to play for the New York Yankees. It is all about someone’s telling me that I could not pursue my dream, my most passionate belief about how good I could be and what I wanted to do in life.¹

I. INTRODUCTION

When I first read Donna Lopiano’s words about wanting to be a New York Yankee, I felt a kindred spirit, for I had always wanted to be a professional basketball player. From the time I learned how to dribble a ball, drive the lane, and shoot a layup, nearly the only thing I wanted to do in life was play basketball. While I stopped short of dribbling the ball everywhere I went, I played ball every chance I got. As a girl growing up in Wyoming in the 1980s, there were no organized leagues in which girls could play outside of the regular school season. Therefore, I honed my skills playing pick-up games at the playgrounds and gyms where I lived. This was not as easy as it sounds, because a girl—particularly one as young as I was—could not just walk into a gym or onto a playground filled with high school boys and grown men and expect to be allowed to play. I, therefore, gained entry by using a male proxy, usually my stepfather, but, later, other guys I played with, who got to know me and how well I could play. I would go to the gym with my male proxy who would call next game, then select

1. Donna Lopiano, *Growing Up with Gender Discrimination in Sports*, in *SPORT IN SOCIETY: EQUAL OPPORTUNITY OR BUSINESS AS USUAL?* 83, 83–84 (Richard E. Lapchick ed., 1996).

me for his team, and we would then proceed to hold court for most of the rest of the day.

While I knew as a kid that there were no women currently playing in the National Basketball Association (“NBA”), by the time I was thirteen, I was 5 feet 8 inches tall and could touch the rim. Further, I was at least as quick, if not quicker, than most of the guys I knew my age. I figured what I lacked in size I would make up for in skill by becoming a great ball handler and a fantastic shot. I thought for sure my dream was a possibility the summer before my eighth grade year, when I found myself in the buffet line in front of Spud Webb. In the preceding year I had watched him become the shortest man in history to win the slam-dunk contest, and I realized as I stood next to him in line that I was actually a little taller than he. I thought, surely, if he could win the slam-dunk contest, I at least ought to be able to try out for a team. That is until I told one of my uncles about my NBA ambitions. Once he quit laughing long enough to speak, he proceeded to tell me that the idea of me playing in the NBA was one of the stupidest things he had ever heard. Why, he asked, had anyone not told me they would never let a girl play in the NBA? When I proceeded to tell him that I was going to be really good, his response was, “It doesn’t matter how good you are; they’ll never let a girl play. Nobody wants to watch a girl.”

Not having the opportunity to play professional basketball, despite how good I might have been, had a bigger impact on my life and decision-making than I often care to admit. While it was possible to play basketball overseas, I did not know of any women who had successfully done so. In contrast, I did know of women who ran track and who had sponsorship deals substantial enough that they could run without having to work. The only other sports that I knew of where women could be professionals—tennis and golf—were never options I seriously considered. It is hard to learn country club sports in a state that largely has no country clubs. More than anything, I wanted the opportunity to keep competing at a high level after college. Thus, I ultimately focused on track, believing it would best provide that opportunity, even though I did not like the sport nearly as much as I loved basketball. Yet, despite how much I wanted to continue doing sports, I made my college choices almost exclusively based on the academics of the school. Of the four undergraduate programs I applied to, only one gave track scholarships to women (and those were almost never full

ride scholarships), and one essentially did not have a women's track program. Why, one might ask, would I make such a decision given the degree to which I loved sports? The answer was quite simple. At some point between my childhood NBA dreams and my high school graduation, I determined that it was next to impossible to have the kind of future I wanted in sports as a girl. In contrast, I knew several successful, well-educated women. Therefore, I focused on school and obtaining the best education I could. While I ran track at Stanford, my primary focus was school. In fact, I focused on school to such a degree that I ultimately graduated early, choosing to forgo my senior season.

It has been nearly forty years since Congress passed Title IX of the Education Amendments Act of 1972.² That simply worded declaration states, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.”³ This declaration has proven to be nothing less than revolutionary. Although Title IX does not specifically refer to sports, it was quickly applied to such,⁴ and within a generation the number of girls participating in high school athletics rose from a few hundred thousand to nearly three million.⁵ Women's participation in intercollegiate athletics rose from under 30,000 immediately before the law's passage to over 150,000.⁶ Yet, almost forty years after Title IX, a five-year-old girl growing up in Lopiano's old neighborhood, while now at least able to play little league,⁷ is no more likely to play baseball for the Yankees, football for the Giants (or at all), basketball for the Knicks, or hockey for the Rangers than Donna Lopiano was several years before Title IX. Unlike myself, at least for now, a five-year-old girl does have the prospect of playing professional women's basketball in the United States. Yet, if she thinks her experience will be anywhere equal to

2. 20 U.S.C. § 1681(a) (1972).

3. *Id.*

4. Ross A. Jurewitz, *Playing at Even Strength: Reforming Title IX Enforcement in Intercollegiate Athletics*, 8 AM. U. J. GENDER, SOC. POL'Y & L. 282, 292-94 (2000).

5. Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 15 (2000-2001) [hereinafter Brake, *Struggle*].

6. SUSAN WARE, TITLE IX: A BRIEF HISTORY WITH DOCUMENTS 1 (2007).

7. In 1974, the Little League rules were revised to allow girls to participate. *Little League Chronology*, LITTLE LEAGUE ONLINE, <http://www.littleleague.org/learn/about/historyandmission/chronology.htm> (last visited Feb. 19, 2012).

that of a man also playing professional basketball, she is sadly mistaken.

Despite all the gains made since Title IX's passage, there are few sports available to women to play professionally.⁸ There are still sports that are almost completely foreclosed to women, such as American football and wrestling.⁹ Expenditures and other indicia of parity in women's and men's intercollegiate athletics show that despite the significant increase in female participation, intercollegiate athletics is still a long way from equal.¹⁰ While women's participation in competition itself has seen significant gains since Title IX's passage, the opposite has actually been the case when one looks at women coaches and employees in high-level administrative positions. There are fewer women in these positions now than in 1972.¹¹ Even when women are able to become professional athletes, or obtain coaching or administrative positions, they almost never receive remuneration on par with their male counterparts.¹² The American sports industry takes in several hundred billion dollars a year,¹³ yet women receive almost none of it.¹⁴ Apart from not having opportunities to participate in

8. See *League List*, WOMEN'S SPORTS FOUND., <http://66.40.5.5/Tips-And-Tools/I-Am-A-Professional-League/List.aspx#> (last visited Feb. 19, 2012) (providing a comprehensive list of women's professional sports opportunities currently available).

9. Welch Suggs, *Tragedy and Triumph in Title IX*, 7 VAND. J. ENT. L. & PRAC. 421, 425 (2004–2005).

10. See NCAA, 2005–06 NCAA GENDER-EQUITY REPORT 16–18 (2008), available at <http://www.ncaa.org/wps/wcm/connect/0462e7804e0d4e469171f11ad6fc8b25/GenderEquityRept-Final.pdf?MOD=AJPERES&CACHEID=0462e7804e0d4e469171f11ad6fc8b25>.

11. VIVIAN ACOSTA & LINDA JEAN CARPENTER, WOMEN IN INTERCOLLEGIATE SPORT: A LONGITUDINAL NATIONAL STUDY THIRTY THREE YEAR UPDATE, 1977–2010 (2010), available at <http://webpages.charter.net/womeninsport/2010pdf%20combined%20final.pdf> (explaining that in 1972, over 90 percent of head coaches of women's teams were female, but by 2010 that number had dropped to 42.6 percent); 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, 2–3 (2008).

12. *Pay Inequity in Athletics*, WOMEN'S SPORTS FOUND., <http://www.womenssportsfoundation.org/home/research/articles-and-reports/equity-issues/pay-inequity> (last visited Feb. 19, 2012).

13. *Sports Industry Overview*, PLUNKETT RESEARCH, <http://www.plunkettresearch.com/sports%20recreation%20leisure%20market%20research/industry%20statistics> (last visited Feb. 19, 2012).

14. This is because a very large share of the revenue is due to the major male professional sports, which is ironic when one considers that one of the primary impetuses for starting the WNBA was the recognition, on the part of the NBA, of the potential buying power of women and the desire to bring women into the fold as potential consumers of the NBA product. See JULIETTE TERZIEFF, WOMEN OF THE COURT: INSIDE THE WNBA 2–6 (2008).

professional sports, women's sports are not offered the television deals, media coverage, and endorsement opportunities available to men.¹⁵ One need only look at the difference between the prospective futures of Maya Moore and Kyrie Irving, the number one picks in the 2011 Women's National Basketball Association ("WNBA") and NBA drafts, respectively, to see that this is true.¹⁶ Further, despite the WNBA's fifteen-year history, there still continues to be questions about whether, or for how long, it will survive as a league.¹⁷ Thus, while the five-year-old girl in my hometown might currently have a shot at turning pro, she would not be unwise to hedge her bets out of fear that the WNBA may no longer exist by the time she is old enough to play professionally. Put simply, despite significant gains in the last few decades, there is still very little that is truly equal between women's and men's sports.

15. Barry Janoff, *Q&A: Candace Parker*, NYSportsJournalism.com, (Feb. 8, 2009, 5:28 PM), <http://www.nysportsjournalism.com/candice-parker-qa/tag/candice-parker> (discussing disparities in endorsement deals); Donna A. Lopiano, *Media Coverage of Women's Sports Is Important*, SPORTS MGMT. RESOURCES (2008), <http://www.sportsmanagementresources.com/library/media-coverage-womens-sports> (last visited Feb. 19, 2012); MICHAEL A. MESSNER & CHERYL COOKY, GENDER IN TELEVISED SPORTS: NEWS AND HIGHLIGHTS SHOWS, 1989-2009 4-5 (2010), available at <http://www.womenssportsfoundation.org/home/research/articles-and-reports/media-issues/women-play-sports-but-not-on-tv> (follow "Women Play Sports but not on TV: Download Now" hyperlink) (describing how the coverage of women in sports on news and highlights shows has recently declined, in some cases receiving no coverage and in others not even constituting 5 percent of media coverage).

16. While the exact amounts of Maya Moore's and Kyrie Irving's respective contracts are unknown, there is no doubt that Irving's NBA contract will be in the multi-millions, whereas the maximum Moore can receive for playing in the WNBA is a little over \$200,000 over her first four years. Roman Augustoviz, *Moore Wins Award, Signs with Lynx*, STARTRIB., (Apr. 15, 2011, 12:59 AM), available at <http://www.startribune.com/sports/119899379.html>. Both Moore and Irving have signed endorsement deals with Nike, Irving with Nike Basketball and Moore with Nike's Jordan division. Moore's deal with Nike is reported to be approximately three to four million dollars. Kristi E. Swartz, *Maya Moore Signs Deal with Nike's Jordan Brand*, ATLANTA J. CONST., (May 20, 2011, 1:17 AM), available at <http://www.ajc.com/sports/maya-moore-signs-deal-951162.html>. The terms of Irving's deal were too new to be public at the time of this writing, having just been signed, but if John Wall's (last year's number one NBA pick) twenty-five million dollar endorsement deal with Reebok is any indication, Irving stands to make a lot more in the endorsement market than Moore. Adrian Wojnarowski, *Wall, Reebok Reach \$25M Deal*, YAHOO! SPORTS (June 9, 2010), <http://sports.yahoo.com/nba/news?slug=aw-wallreebok060910>.

17. Mark Kreidler, *State of Uncertainty for Women's Sports*, ESPN.COM (Jul. 24, 2009), http://sports.espn.go.com/espn/otl/columns/story?columnist=kreidler_mark&id=4352885; see also John Smallwood, *Houston Comets' Demise Not Good Sign for Women's Sports*, PHILA. DAILY NEWS, Dec. 3, 2008, at 62.

The disparities are even more pronounced when one focuses on minority women and women of color. First, women of color do not participate in intercollegiate athletics on nearly the same scale as white women.¹⁸ While women of color, at least African American women, are well represented in the WNBA,¹⁹ they have little to no representation in other major women's professional sports.²⁰ Consequently, the disparities between minority women and men are even starker than those between men and women generally.²¹ Second, when women of color do participate, they tend to be concentrated or "stacked" into a small number of sports, particularly basketball and track & field.²² The problematic nature of this stacking phenomenon becomes even more pronounced when one considers that one way in which many institutions of higher education seek to be in compliance with Title IX is to add additional sports for women.²³ Unfortunately, from the perspective of women of color, the sports that tend to be added are sports like lacrosse, soccer, and rowing²⁴—sports which very few women of color have exposure or access to and therefore sports in which very few women of color participate.²⁵ This effectively means that very few, if any, of the increased opportunities for participation brought about by Title IX will inure to the benefit of women of color.

18. RICHARD LAPCHICK ET AL., THE 2010 RACIAL AND GENDER REPORT CARD: COLLEGE SPORT 13–14 (2010), available at http://www.tidesport.org/RGRC/2010/2010_College_RGRC_FINAL.pdf.

19. RICHARD LAPCHICK ET AL., THE 2011 WOMEN'S NATIONAL BASKETBALL ASSOCIATION RACIAL AND GENDER REPORT CARD (2011), available at http://tidesport.org/RGRC/2011/2011_NBA_RGRC_FINAL%20FINAL.pdf.

20. See, e.g., *Another Milestone on the Greens*, BLACK ATHLETE SPORTS NETWORK (Dec. 15, 2010), http://blackathlete.net/artman2/publish/Golf_25/Another_milestone_on_the_greens.shtml (discussing the first African American woman to pass the Ladies Professional Golf Association ("LPGA") qualifying school, who was also the first African American woman to play on the tour since 2001).

21. See Alfred Dennis Mathewson, *Black Women, Gender Equity and the Function at the Junction*, 6 MARQ. SPORTS L. J. 239, 250–52 (1995).

22. WOMEN'S SPORTS FOUNDATION, WHO'S PLAYING COLLEGE SPORTS?: MONEY, RACE AND GENDER 5 (Sept. 2008), available at <http://www.womenssportsfoundation.org/en/home/research/articles-and-reports/school-and-colleges/money-race-and-gender>.

23. *Id.* at 13.

24. *Id.* at 18; see also Scott R. Rosner, *The Growth of NCAA Women's Rowing: A Financial, Ethical and Legal Analysis*, 11 SETON HALL J. SPORT L. 297, 297–301 (2001).

25. Mathewson, *supra* note 21, at 251.

Kimberle Crenshaw, Angela Harris and others have written about the problem of intersectionality.²⁶ Put simply, “the multiple ways that structures of privilege and disadvantage intersect in individual lives.”²⁷ As Crenshaw explains in her work, anti-discrimination law operates along a single access framework that fails to address the multidimensional experiences of women of color.²⁸ While it might be possible under such a framework for women of color to gain relief as women, or as people of color, the law does not adequately address the particular discrimination or subordination experienced when one is both.²⁹ The additional marginalization of life lived at the intersecting loci of subordination is perhaps no better illustrated than in the realm of sports, where nearly all the discussions of race and sports center on men of color, particularly black men, and nearly all the discussions of women in sports focus on white women.³⁰ When all the men are black and all the women are white what happens to the women of color?³¹

As an African American female from a middle-class family growing up in Wyoming, I have a pretty good idea of what it is like, as Alfred Mathewson states, to “function at the junction.”³² While my nearly all-white female teammates and I bonded over the constant slights and devaluing we experienced as girls trying to carve out meaningful athletic opportunities for ourselves, those same teammates could only look at me with sympathetic eyes and tell me they were sorry when people would yell racial epithets at me on the street or direct nasty comments to me from the stands. While my teammates may have been presumed to be weak and un-

26. 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, 139–40 (1989) [hereinafter Crenshaw, *Demarginalizing*]; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1241–45 (1990); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585, 615 (1990).

27. MARGARET M. ZAMUDIO ET AL., CRITICAL RACE THEORY MATTERS: EDUCATION AND IDEOLOGY 37 (2011).

28. Crenshaw, *Demarginalizing*, *supra* note 26, at 139–40, 148–49.

29. *Id.*; ZAMUDIO ET AL., *supra* note 27, at 37.

30. Marilyn V. Yarbrough, *A Sporting Chance: The Intersection of Race and Gender*, 38 S. TEX. L. REV. 1029, 1029–33 (1997).

31. This phrasing was not originally mine. See Mary Berry, *Foreword*, in ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE, at xv–xvi (Gloria T. Hull et al. eds., 1982).

32. Mathewson, *supra* note 21, at 243.

athletic due to their gender, they were not also presumed to be dumb and incapable of going to college absent an athletic scholarship because of their race. Yet, in addition to our genders, we also shared limitations on our opportunities as a result of being from a rural state, a limitation I was better able to overcome by having well-educated parents from other places.

Experiences both inside and outside of sports have taught me the differential and often more subordinated status I occupy in American society, because I am not just a woman, but also a black woman. Yet, my experience in sports has also taught me that whatever additional discrimination and subordination I and other women of color might experience in the sports arena due to our race, those additional burdens will not be alleviated in any meaningful way until the disparities between men and women are gone. If the people of the state of Wyoming had treated me the same as they treated my white teammates, we still would have had to fight for quality gym space, the best practice times, equal media coverage, equal opportunities to play, equal expenditures, and an equal level of respect. I still would have had to bring a male proxy to pick-up games. I still would not have been able to play professional basketball. Accordingly, I believe that if we want to address the equality issues facing women of color in sports we have to first address the disparities between men and women in sports generally. Will doing so eliminate all the issues women of color face because of their intersectional status? Likely not. But addressing the disparities between men and women and getting to the place of meaningful equality in sports for all women is a necessary and important first step.

Therefore, this Article centers on achieving equality in sports between men and women. In Justice Sandra Day O'Connor's opinion in *Grutter v. Bollinger*, the Michigan Law School affirmative action case, she opined that within twenty-five years, the need for measures such as affirmative action would no longer be necessary.³³ Although she did not articulate why she thought that might be so, I assume what she meant was in twenty-five years we might be at a place of equality such that measures of that kind are no longer needed. Justice O'Connor's words have caused me to question, in much of my subsequent work on equality, how we will know if she is right. Posing that question has

33. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

caused me to realize that when we talk about achieving equality in a variety of realms, we often do not talk about what that equality will look like. For example, how will we know if we have achieved equality in sports such that measures like Title IX are no longer necessary? There are those who believe we are already there. While I do not believe we are there yet, I do believe we need a clear vision of where “there” is. Trying to give some content to the vision of what equality in sports might look like, as well as offer some preliminary thoughts on how we might move toward that vision, is the work I seek to do in this piece. To that end, Part II of this Article discusses what I believe the vision of equality for women in sports ought to be. Part III looks at whether such a vision is even possible. Assuming, as I do, that such a vision is possible, Part IV then looks at whether existing law, particularly Title IX, will be useful in moving us closer to that vision. Part V concludes with why, despite the somewhat utopian nature of what I propose, I believe it is worth pursuing. In keeping with the theme of the symposium, race and intercollegiate athletics, the remaining discussion will be largely situated in that context.

II. THE VISION: MEANINGFUL EQUALITY

Imagine a girl and a boy born into the same family, each possessing world-class athletic ability, each exhibiting a superior work ethic, and each receiving the same degree of coaching, family support, and other resources necessary to become a great athlete. As a result, each develops into one of the best athletes in the world. Despite the seeming equality between the two, the truth of the matter is that the girl, even though a world-class athlete, is not likely to have athletic experiences and opportunities on par with those of her brother. If her passion is to play American football, the opportunity to play will largely be foreclosed to her. If she would like to play her chosen sport, basketball for instance, before thousands of adoring fans, such an experience is much less likely to occur if she is playing for an all-female team, even if that team is very good and very successful. If she would like to play a sport professionally, that is also not likely to happen. Even if she does excel in one of the few sports where women are able to become professionals, the likelihood she will have the same

earning potential as her brother if he were to become a professional in the same sport is low.³⁴

Is this an unrealistic hypothetical? Take the case of Cheryl Miller and Reggie Miller, arguably two of the best basketball players to have ever played the game. As an inductee into the Naismith Memorial Basketball Hall of Fame,³⁵ there are those that argue Cheryl Miller's impact on the game of women's basketball was revolutionary. From her 105 point high school game, to her two National Collegiate Athletic Association ("NCAA") championships, her two NCAA championship Most Valuable Player awards, her NCAA tournament Most Valuable Player award, her Olympic gold medal, her Pan American Games gold medal, her 1986 Goodwill Games gold medal, her multiple Naismith Player of the Year awards, her four All-American selections, and the many other accolades in between, it is not hard to make a case that Cheryl Miller is one of the best female basketball players of all time.³⁶

Her brother, Reggie Miller, was also no slouch. He finished his collegiate career third on the all-time scoring list for the University of California Los Angeles ("UCLA") and holds the school's single-season mark for free throws.³⁷ He went on to be selected as an NBA first-round draft pick by the Indiana Pacers.³⁸ Although he did not win a championship during his eighteen year NBA career, he did lead the Pacers to six Eastern Conference finals.³⁹ Reggie was a superb three-point shooter and, at one point, held the NBA three-point record.⁴⁰ He was selected as an All-Star five times, led the NBA in free-throw percentage five times, and was also an Olympic gold medalist.⁴¹

34. See *supra* notes 14 and 16 and accompanying text.

35. *Hall of Famers: Cheryl Miller*, NAISMITH MEMORIAL BASKETBALL HALL OF FAME, <http://www.hoophall.com/hall-of-famers/tag/cheryl-miller> (last visited Feb. 14, 2012).

36. *Id.*; Curry Kirkpatrick, *Lights! Camera! Cheryl!*, *SI.COM* (Nov. 20, 1985), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1120201/index.htm>; Miki Turner, *Q&A with Cheryl Miller*, *ESPN.COM* (Mar. 9, 2006), <http://sports.espn.go.com/nw/news/story?id=2331983>.

37. Al Balderas, *UCLA Basketball: Reggie Miller to Be Honored*, *OC REGISTER* (Feb. 8, 2010), <http://ucla.ocreger.com/tag/reggie-miller>; *Reggie Miller Bio*, *NBA.COM*, http://www.nba.com/history/players/miller_bio.html (last visited Feb. 14, 2012).

38. *Reggie Miller Bio*, *supra* note 37.

39. *Id.*

40. Jonathan Abrams, *A Big Absence: No Reggie Miller on Hall's List*, *N.Y. TIMES*, Feb. 18, 2011, at B9.

41. *Id.*

While both Reggie and Cheryl were clearly exceptional, there is an argument to be made that Cheryl was the better player. Reggie himself, on more than one occasion, has talked about living in the shadow of his sister.⁴² Despite how great a player she may have been, Cheryl's time playing basketball essentially ended when she played her last game for the University of Southern California ("USC"). In contrast, her brother, the overall eleventh pick in the NBA draft, was able to play professional basketball for eighteen years.⁴³ While good, Reggie's performance at UCLA was not overly remarkable. Instead, it is what he accomplished in his eighteen years in the NBA that earned him Hall of Fame consideration.⁴⁴ Imagine what Cheryl might have done with eighteen more years to play basketball. Imagine the difference in Reggie's life if there had been no professional league in which he could play.

While Cheryl was born at a time when she had more opportunities than most women who played before her, and while she certainly created opportunities for herself and for other women, the opportunities available to her were not equal to those available to her brother. The resources allocated to the USC women's team were less than those afforded the UCLA men's team.⁴⁵ She could not play professionally at home.⁴⁶ While she might have played professionally overseas, she likely would not have earned what her brother earned in eighteen years with the NBA. Similarly, she likely earned less when she coached USC than did her male counterpart, despite the fact that by the time Miller coached at USC, the women's basketball team had won two national championships—largely because of Miller—and the men's team had won none.⁴⁷

42. REGGIE MILLER WITH GENE WOJCIECHOWSKI, I LOVE BEING THE ENEMY: A SEASON ON THE COURT WITH THE NBA'S BEST SHOOTER AND SHARPEST TONGUE 162–63 (1995).

43. Abrams, *supra* note 40.

44. *Id.*

45. See Kirkpatrick, *supra* note 36.

46. The only successful women's professional basketball league in the United States has been the WNBA, which did not commence play until 1996, ten years after Miller finished playing for USC. See JULIETTE TERZIEFF, WOMEN OF THE COURT: INSIDE THE WNBA 7–10 (2008).

47. Richard Hoffer, *Cheryl Miller*, SI.COM (Dec. 6, 1993), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1138704/index.htm> (discussing how Cheryl became the coach at USC while the coach who preceded her was suing the University for

There has certainly been progress in the world of women's sports, particularly in basketball, since Cheryl Miller played her last game for USC twenty-five years ago. Yet, a quarter century later, the opportunities that would be available to Cheryl, in comparison to Reggie, are still quite unequal. If we were talking about a sport other than basketball, such as American football⁴⁸ or auto racing,⁴⁹ the disparities would be even more pronounced. Thus, while the gains made to date with respect to women and sports are necessary and important, they are insufficient. They will not be sufficient until a girl and a boy, like Cheryl and Reggie, no longer have differential opportunities based almost entirely on their genders. Thus, the vision of equality I believe we should be striving for with respect to women in athletics is one that I will term "meaningful equality." Meaningful equality is equality where all sports are as truly open to women as they are to men. It is equality in which all sports-related jobs, such as player, coach, head trainer, broadcaster, athletic director, and many others, are as attainable for women as they are for men. It is equality where equal expenditures and resources are allocated between men and women as a matter of course, such that doing so becomes an expected, unnoticed norm, rather than an exception. Put simply, we will know we have reached a place of equality when Title IX and similar measures are no longer necessary and when parents no longer have to worry about whether their daughters will have the same athletic opportunities as their sons. We are closer than we have been to that ideal, but we are not there yet. There are many who believe such an ideal is unattainable. While I do not think reaching such an idea will be easy, or perhaps even likely, I do think it is possible. Why, is the subject of the next section.

sex-discrimination on the basis that she was being paid less than USC's men's basketball coach).

48. See, e.g., Joanna Cagan, *A League of Their Own: Women Tackle Football and the Business of Sport*, VILLAGE VOICE (Dec. 19, 2000), <http://www.villagevoice.com/2000-12-19/news/a-league-of-their-own/>.

49. See, e.g., *AUTO RACING; Woman Finishes Winston Cup Race*, N.Y. TIMES, (June 11, 2011), <http://www.nytimes.com/2001/06/11/sports/auto-racing-woman-finishes-winston-cup-race.html>.

III. THE ROAD TO MEANINGFUL EQUALITY: DIFFERENCE VALUED EQUALLY

On March 31, 2007, the Wyoming women's basketball team won the Women's National Invitational Tournament ("WNIT") before a sold-out crowd of over 15,000 fans.⁵⁰ For the few long-term, die-hard fans of Wyoming women's basketball, what is most remarkable about that storybook season is not the exciting wins, the extremely loud crowd, or the fans that camped out in the cold and stood in line for several hours to get a coveted seat. What is most remarkable is the way in which that season changed the status and face of women's basketball at Wyoming. Prior to the 2006–2007 season, the Wyoming women's basketball players had roughly the same opportunity to participate in basketball at the university as the men. They played in numbers equal to the men, with nearly equal funding (apart from coach's salaries), in roughly equal facilities.⁵¹ Yet, if one were to ask the Wyoming women prior to the 2006–2007 season if they thought they were equal to the men's team, the answer would likely have been "no," for they were certainly not afforded the same level of value and respect.

The year prior to the 2006–2007 season, the average home attendance for Wyoming women's basketball was 1,687 people per game.⁵² The average for the men's team during that same year was 5,672.⁵³ This was so despite the fact that the men had a record of fourteen wins and eighteen losses⁵⁴ and the women had a record of twenty-one and nine.⁵⁵ If one were to ask potential basketball patrons why they attended the men's games instead of the women's, one would often hear comments like, "women are boring to watch," "women aren't as athletic," and "women can't dunk." Yet, the following year the average women's attendance

50. *Cowgirls are WNIT Champions!*, WYO. ATHLETICS (Mar. 31, 2007), <http://www.wyomingathletics.com/sports/w-baskbl/recaps/033107aaa.html>.

51. Robert Gagliardi, *Tom Burman Plans to Change the Way UW Handles Its Athletics*, WYO. TRIB. EAGLE (Feb. 17, 2007), available at http://www.wyomingnews.com/articles/2007/02/18/news/local_news/02local_02-18-07.txt.

52. *Wyoming Women's Basketball 2005–06 Season Statistics*, WYO. ATHLETICS, <http://www.wyomingathletics.com/sports/w-baskbl/archive/wyo-w-baskbl-archive.html> (last visited Feb. 27, 2012).

53. *Wyoming Men's Basketball 2005–06 Season Statistics*, WYO. ATHLETICS, <http://www.wyomingathletics.com/sports/m-baskbl/archive/wyo-m-baskbl-archive.html> (last visited Feb. 27, 2012).

54. *Id.*

55. *Wyoming Women's Basketball, 2005–06 Season Statistics*, *supra* note 52.

rose to 4,651 people per game,⁵⁶ and since the 2006–2007 season, the women’s average attendance has not dropped below 3,000 people.⁵⁷ Further, in the most recent season, 2010–2011, the average attendance for the men’s and women’s teams was roughly equal, with the women drawing only 589 fewer people on average than the men.⁵⁸

What might account for this significant shift? As I have argued in other work, I think this shift is in large part due to the fact that during the 2006–2007 season, 15,000 fans were exposed to women’s basketball at Wyoming, most of them for the first time, and they realized that whether the women dunked or not, or moved as quickly up and down the court as the men, there was value in the women’s game in its own right, apart and completely distinct from the men’s game.⁵⁹ The women played no different a game than they had prior to the 2006–2007 season, yet the perception of the women’s game and the team changed significantly. For the first time, the women’s team did not exist solely in the shadow of the men, and for a good number of people, the women’s team ceased to be entirely judged according to male norms and standards. The result was increased respect for the women’s team and increased value ascribed to them by the university and the rest of the state.

If the goal, as I state in the previous section, is to get to a place where one’s opportunities in the world of sports are not circumscribed by one’s gender, then the 2006–2007 Wyoming women’s basketball season and subsequent developments provide a good lesson in one of the key, but often overlooked, components of achieving that goal. Specifically, we will not achieve meaningful equality in women’s sports until we get to a place where women’s sports, and women as athletes, have equal value to

56. *Wyoming Women’s Basketball 2006–07 Season Statistics*, WYO. ATHLETICS, <http://www.wyomingathletics.com/sports/w-baskbl/archive/wyo-w-baskbl-archive.html> (last visited Feb. 27, 2012).

57. See *Wyoming Women’s Basketball Season Statistics for the 2007–08 Through 2010–11 Seasons*, WYO. ATHLETICS, <http://www.wyomingathletics.com/sports/w-baskbl/archive/wyo-w-baskbl-archive.html> (last visited Feb. 27, 2012).

58. *Wyoming Women’s Basketball 2010–11 Season Statistics*, WYO. ATHLETICS, <http://www.wyomingathletics.com/sports/w-baskbl/archive/wyo-w-baskbl-archive.html> (last visited Feb. 27, 2012); *Wyoming Men’s Basketball 2010–11 Season Statistics*, WYO. ATHLETICS, <http://www.wyomingathletics.com/sports/m-baskbl/archive/wyo-m-baskbl-archive.html> (last visited Feb. 27, 2012).

59. See Jacquelyn Bridgeman, *The Thrill of Victory and the Agony of Defeat: What Sports Tell Us About Achieving Equality in America*, 7 VA. SPORTS & ENT. L.J. 248, 278–84 (2008).

men's sports and male athletes—not because they have become like men, but because they have developed value in their own right and on their own terms.

To illustrate why the concept of equal value is important to achieving equality in sports, it is once again useful to look at the situation of two siblings. As before, presume two children born into the same family. For example, I have a four-year-old girl and a two-year-old boy. While my two children are alike in many ways, they differ significantly in others. If I set my standard for what a good child is by that which my daughter is and does, my son will never be able to be a good child, or at the very least, he will not be able to be as good a child in my eyes as my daughter. The reason is that because of differences in personality, gender, aptitude, socialization, experience, age, and other factors, they each approach the world differently. For example, my daughter likes corn and my son prefers broccoli. My daughter eats an ice cream cone by eating the ice cream first, whereas my son starts at the bottom of the cone and works his way to the top. If the standards by which I judge my son are the standards set by my daughter, he will always come up short because he is not her and in some ways will always be different from her.

However, if I judge my son not by how he is like my daughter, but by how he is in his own right, then the situation is very different. If my love for my son is not conditioned on how he is like my daughter, but on the fact that he is my son, then it is possible for me to love him and value him in equal measure to the way I value and love my daughter, despite their differences. It is possible for me to want the same things for him as I want for my daughter without taking anything away from her. For example, I can consider them both to be good kids because they both willingly eat their vegetables, although one prefers broccoli and the other corn. Likewise, I can consider them both to be good kids because they do not make a mess when they eat their ice cream, although they approach eating an ice cream cone from different directions.

To illustrate further, let us return to the scenario where my daughter is the norm by which my son is measured. In that scenario, let us assume my daughter decides to go to medical school. Since she sets the standards, the pinnacle of education at our house is now attendance at a top medical school. Because I value her and believe in higher education, I will work to send her

to medical school, and I will support her as much as I can in that endeavor. Let us say in that same scenario that my son is as bright as my daughter and works equally hard, but has no interest in medical school and little aptitude for it, yet he has the potential to be a brilliant lawyer. If the normative standard is medical school, and my son does not choose to go to medical school, then I am likely to value him less for his choice despite how great a lawyer he might ultimately become. If I pay for his education, I may do so reluctantly, and I am likely to give him less encouragement or support because of the way I devalue his choice. In contrast, if the standard is not that which my daughter is and does but whether my children choose to seek a higher education generally, then presumably I will equally value and equally support the educational path each takes, despite their differences, because each has chosen to pursue a professional degree.

As commentators have aptly and correctly explained, American societal norms, in general, and in sports in particular, are male.⁶⁰ As a society, sports are viewed as important and valuable, and perceptions are formed for how sports should be played based on what sports men have played, how men have played them, and what has been important to men.⁶¹ One consequence of having normative standards in sports that are inherently male is that women who choose to participate in sports are treated much like the son described previously, when the normative standards were set by the daughter. In such a situation, it is not possible for women to be considered equal because they will never be men, since, by definition, a woman cannot be something she is not. Since being something she is incapable of being (a man) is required for full equality, the result is an

60. Many scholars, particularly feminist scholars, have made this argument in a variety of contexts. See, e.g., MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 6–13, 62–65 (2d ed. 2003); David Whitson, *Sport in the Social Construction of Masculinity*, in SPORT, MEN, AND THE GENDER ORDER 19–29 (Michael A. Messner & Donald F. Sabo eds., 1990); Bruce Kidd, *The Men's Cultural Centre: Sports and the Dynamic of Women's Oppression/Men's Repression*, in SPORT, MEN, AND THE GENDER ORDER: CRITICAL FEMINIST PERSPECTIVE, *supra* at 31–35; Dionne L. Koller, *Not Just One of the Boys: A Post-Feminist Critique of Title IX's Vision for Gender Equity in Sports*, 43 CONN L. REV. 401, 429–30 (2010).

61. Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 68, 81–83 (2000) [hereinafter Brake, *Struggle*]; Felice M. Duffy, *Twenty-Seven Years Post Title IX: Why Gender Equity in College Athletics Does Not Exist*, 19 QUINNIAC L. REV. 67, 93 (2000); Wendy Olson, *Beyond Title IX: Toward an Agenda for Women and Sports in the 1990's*, 3 YALE J.L. & FEMINISM 105, 116–17 (1990).

inequality from which there is no escape. The closer women tend to approximate men in that scenario, the closer they may come to reaching the equality ideal, but, at the end of the day, as long as sports are gendered male, female athletes and sports participants will be devalued and determined to be lacking.⁶²

In contrast, if the norms are set differently, and are not inherently male, then meaningful equality, like that described in Section II, may in fact be possible. My personal experience, watching the Wyoming women during the 2006–2007 season and since, has led me to believe that this is so. The 15,000 plus fans that stood for forty minutes, screaming until they were hoarse, while their Cowgirls won the 2007 WNIT tournament, were not thinking to themselves as they watched “this is pretty good basketball for women.”⁶³ They were just enjoying good basketball. The many fans who have continued to support the women’s team after that season do so not because the women’s team is now more like the men’s, but because they now value the women’s team more than before. The men’s team has not lost its value or its support because the women’s team has done well. Instead, more people now have season tickets for both sports.

Unfortunately, this is not to say that women’s basketball in Wyoming is now equally valued by everyone, or that women’s sports at the University of Wyoming are now valued equally to men’s sports, for that simply is not true. While a good number of people may have found value in women’s basketball outside of male norms, male sports norms are still pervasive and are still the prevailing standard at the University of Wyoming. Thus, while the Wyoming women’s experience shows that moving past male norms is possible, and that equal value might be obtainable, that experience also shows how far we are from that ideal. If, once again, the end game with respect to women and sports is to have meaningful equality, and if achieving equal value is a necessary step towards that goal, then the next question becomes whether there is anything we can do to engender the creation of equal value. It is that question to which I now turn.

62. Deborah L. Brake and Verna L. Williams, *The Heart of the Game: Putting Race and Educational Equity at the Center of Title IX*, 7 VA. SPORTS & ENT. L.J. 199, 207 (2008); see Christine A. Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043, 1048, 1051 (1987); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1280 (1987) [hereinafter Littleton, *Reconstructing Equality*].

63. *Cowgirls Are WNIT Champions!*, *supra* note 50.

IV. REALIZING MEANINGFUL EQUALITY

A. Title IX—Necessary Yet Insufficient

As stated in the *Introduction*, there is no question that Title IX has made a sweeping impact with respect to women and girls in sports, opening up opportunities for participation in unprecedented numbers.⁶⁴ While those numbers could arguably be larger and the range of sports in which women participate broader, particularly as to women and girls of color, there are few people in the present day who would continue to argue that women have no right to participate in sports.

Be that as it may, as several commentators have pointed out, Title IX and its implementation is not without its flaws.⁶⁵ As will be discussed, one of the biggest flaws of Title IX is the way in which it has not only left in place male norms inherent in American sporting culture, but the way in which it has also served to perpetuate and entrench those norms. One of the biggest ways Title IX has perpetuated, kept intact, and entrenched male norms is through the contact sports exemption.⁶⁶ Put simply, this exemption allows schools to segregate teams by sex and does not require schools to allow members of one sex to try out for the team of another sex when the school only offers the sport to one gender if the sport in question is a contact sport.⁶⁷ Contact sports are sports such as “boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or majority activity of which involves bodily contact.”⁶⁸ The contact sports exemption has served to establish and entrench male norms in two important ways.

First, by creating an all-male preserve, the exemption signals to women, girls, and the rest of the country that females are too weak, un-athletic, or otherwise generally unworthy of

64. See *supra* notes 3 through 6 and accompanying text.

65. See, e.g., MICHAEL J. COZZILLIO & ROBERT L. HAYMAN, JR., *Gender and Amateur Athletics*, in *SPORTS AND INEQUALITY* 387 (2005); *EQUAL PLAY: TITLE IX AND SOCIAL CHANGE* (Nancy Hogshead-Makar & Andrew Zimbalist eds., 2007).

66. 34 C.F.R. § 106.41 (2011).

67. *Id.*

68. *Id.*

playing contact sports.⁶⁹ With the exception of basketball, few women play contact sports on a large scale, especially American football.⁷⁰ Consequently, the American definition of a contact sports athlete is a man. If men are the embodiment of what it means to be a contact sports player, then women, because they are not men, will always, by definition, come up short.⁷¹ Contact sports are often the most popular and revenue-generating of the sports at a given institution.⁷² Thus, the contact sports exemption serves to take the most coveted and valued sports and make them largely unavailable to women.

Second, in addition to making contact sports and masculinity essentially synonymous, the contact sports exemption also allows Title IX schools to serially and disproportionately allocate resources, with a greater amount allocated to men. For example, the Department of Education, Office for Civil Rights, policy interpretation allows unequal athletic programs for men and women “because of the unique aspects of particular sports or athletic activities.”⁷³ As the regulations specifically state, “for the most part, differences involving such factors will occur in programs offering football, and consequently these differences will favor men.”⁷⁴ Thus, the regulations allow for the creation of an all-male preserve and then use the existence of that all-male preserve to justify disparities.

Apart from the contact sports exemption, the three-prong test, used to determine whether an institution effectively accommodates the athletic interests and abilities of both genders,

69. Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN L. REV. 381, 421, 430, 434–35 (2000); Jessica Constance Caggiano, Note, *Girls Don't Just Wanna Have Fun: Moving Past Title IX's Contact Sports Exception*, 72 U. PITT. L. REV. 119, 129 (2010).

70. Today more women play contact sports than in previous decades; however, the number of women that play contact sports, compared to the number of women that play sports generally, is quite small. See, e.g., *2009–10 High School Athletics Participation Survey*, NAT'L FED'N ST. HIGH SCH. ASS'N, available at <http://www.nfhs.org/content.aspx?id=3282> (indicating that roughly 1,200 girls participated in American eleven-player football while 1,109,278 boys participated in American eleven-player football during the same school year); see also Brake, *Struggle*, *supra* note 5, at 16.

71. See *supra* notes 60–62 and accompanying text.

72. See Deborah Brake, *Revisiting Title IX's Feminist Legacy: Moving Beyond the Three-Part Test*, 12 AM. U. J. GENDER SOC. POL'Y & L. 453, 479 (2004) [hereinafter Brake, *Three-Part Test*].

73. Title IX of the Education Amendments of 1972, 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979).

74. *Id.* at 71,415–16.

also serves to entrench and reinforce male norms.⁷⁵ For one, in order to be in compliance, institutions need only tack on participation opportunities for women to those that already exist for men.⁷⁶ While allowing women entry into a previously all-male enclave might seem like, and at the time may have felt like, a serious disruption of male norms, tacking on opportunities does little to change the system and norms that were already in existence.⁷⁷ While a few schools may have chosen to eliminate some male teams in order to comply with the three-prong test, the male sports norms in existence before Title IX have remained in existence after Title IX, with little change.⁷⁸ Title IX and its accompanying regulations, policy interpretations, and enforcement policies do not call into question existing male norms nor do they help upset or disestablish such norms. In fact, Title IX has arguably worsened the entrenchment of these male norms. Title IX, and the seeming equality it has helped engender, serves in many ways to make invisible the male norms that are prevalent throughout all sports. Prior to Title IX, male dominance in sports was obvious and unquestioned because of the blatant way in which women were largely excluded. In a post-Title IX world, where there is seemingly much more gender equality, the dominance of male norms is much less obvious. Consequently, male norms in sports may often appear neutral and natural, when in reality they are anything but.⁷⁹

Accordingly, while in some ways Title IX has been revolutionary, it has not gone far enough if the goal is meaningful equality. As stated previously, a move to meaningful equality requires the creation of equal value with respect to men and women in sports. The creation of equal value requires the upsetting, if not outright elimination, of a sports world where the standards of success and quality are defined by male norms. Because Title IX does little to upset or alter established male norms and arguably helps to reinforce and entrench them, while it has been an important and necessary step towards meaningful

75. See generally Brake, *Three Part-Test*, supra note 72 (addressing three areas where the three-prong test fails to ensure gender equality in sports).

76. See *id.* at 456.

77. *Id.* at 469.

78. *Id.* at 467.

79. *Id.* at 479–81.

equality, it is not sufficient. The question then becomes, of course, what might be better.

B. Possible Alternatives

A full discussion of possible approaches that might move us toward equal value and ultimately meaningful equality is beyond the scope of this symposium piece. Consequently, what I offer here are a few preliminary thoughts on what might help us move in the right direction. The aspects of American society that have led to the establishment and entrenchment of male norms, particularly in the world of sports, are many, varied, and overlapping. Accordingly, any effort to change those norms must also be many, varied, and overlapping.

i. Eliminate the Contact Sports Exemption

For reasons expressed above, if we seek to move into an era of equal value, we have to eliminate all male preserves. This does not necessarily mean that all sports will have to be gender-integrated, although that might possibly be one approach.⁸⁰ Rather, we cannot allow there to be areas of sports which essentially have a sign that says “no girls allowed.” In addition to the previously mentioned problems of equating contact sports with male masculinity, allowing the contact sports exemption to continue means that a disproportionate share of revenue and resources are allocated to men. This is problematic for a number of reasons. Apart from just the sheer inequity, a school sends a signal about that which it values by that on which it spends its money. Schools spend a lot of money on football, and to a lesser extent men’s basketball, based, at least in part, on the justification that these sports are revenue-generating, even if they are not.⁸¹ The contact sports exemption specifically allows for this. The flagship programs at nearly all schools are the all-male teams that

80. See, e.g., Caggiano, *supra* note 69; Blake J. Furman, *Gender Equality in High School Sports: Why There is a Contact Sports Exemption to Title IX, Eliminating It, and a Proposal for the Future*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J., 1169 (2007) (contemplating different possible forms of sports team gender integration).

81. Roger C. Noll, *The Business of College Sports and the High Cost of Winning*, in THE BUSINESS OF SPORTS 477–91 (Scott R. Rosner & Kenneth L. Shropshire eds., 2004); EARL SMITH, RACE, SPORT, AND THE AMERICAN DREAM 119–51 (2d ed. 2009).

fall under the contact sports exemption.⁸² Thus, what is considered to be the epitome of sports in many Title IX institutions is a sport, or definition of sport, to which women have little access.⁸³ As discussed in the previous section, equal value will only be possible when the definition, or the norms by which men and women are judged in sports, are no longer all-male. As long as the contact sports exemption allows the preservation and perpetuation of all-male sports reserves, we will not be able to get to a place of equal value. Accordingly, a movement towards equal value requires elimination of the contact sports exemption.

ii. Equalize the Money

Hand-in-hand with the necessity of eliminating the contact sports exemption is the need to more evenly distribute the money spent on intercollegiate athletics. Several commentators have made the argument with respect to women in sports that a necessary component of achieving equality is to require that the same amount of resources be spent on women's sports as is spent on men's.⁸⁴ In fact, Title IX interpretive regulations indicate that equitably apportioning resources between men's and women's programs constitutes compliance with Title IX's mandate.⁸⁵ I agree with these commentators that equalizing resources within an institution is an important step toward achieving equal value. However, I am focusing here not on even distribution of resources within an institution, but between institutions, particularly resources generated by revenue-producing or perceived revenue-producing sports, like men's Division I football. The current structure of American intercollegiate football, particularly the Bowl Championship Series, and the way in which revenues are distributed to schools based on that system, has resulted in an arms race among institutions.⁸⁶

82. See John C. Weistart, *Can Gender Equity Find A Place In Commercialized College Sports?*, 3 DUKE J. GENDER L. & POL'Y 191, 194-96 (1996).

83. Brake, *Three Part-Test*, *supra* note 72, at 469-71.

84. See, e.g., Littleton, *Reconstructing Equality*, *supra* note 62, at 1312 ("In the sphere of athletics, equality as acceptance would support an argument that equal resources be allocated to male and female sports programs.").

85. 44 Fed. Reg. 71,416 (Dec. 11, 1979).

86. See Noll, *supra* note 81, at 478; Smith, *supra* note 81.

To compete in the arms race, schools must first have a football team and then expend a significant amount of resources working to make that team competitive. Two of the reasons a school competes in the football arms race, and to a lesser degree the men's basketball arms race, are the presumed revenue generated if the school's team fares well and the accompanying positive publicity for the school—two returns on expenditures that are thought to inure to the benefit of the entire institution.⁸⁷ While the revenue generated by the teams may be important, the positive publicity may be even more so, particularly for schools that develop national contender teams. For example, applications to Butler University increased 41 percent after its men's basketball team made it to the NCAA championship game.⁸⁸ Researchers estimate that exposure on a national stage for a team that does well can be worth as much as several hundred million dollars in free advertising.⁸⁹

As long as schools feel compelled to compete in the commercial arms race that is college football, and to a much lesser extent men's intercollegiate basketball, there will be an inordinate amount of resources devoted to these sports and very strong incentives to avoid change. Football, perhaps more than any other sport, is gendered male and defines the male norms of sport. If the money involved in these sports translates into them being untouchable sacred cows, then there is little hope of upsetting, or destabilizing the all-male norms they embody. Ideally then, from the perspective of equality for women in sports, it is likely necessary to eliminate the commercialization of men's football and basketball. Since that is very unlikely to happen, perhaps a greater equalization of the money will at least help slow the arms race and provide some opportunity to upset or destabilize the male norms entrenched in these premier sports.

87. Noll, *supra* note 81, at 482–83; Eamonn Brennan, *Final Four Runs Huge Off the Court, Too*, ESPN.COM (Mar. 30, 2011) http://espn.go.com/blog/collegebasketballnation/post/_/id/28911/final-four-runs-huge-off-the-court-too.

88. Kate Siegfried, *Big Numbers Bring Changes to Admissions*, BUTLER COLLEGIAN (Mar. 30, 2011), <http://thebutlercollegian.com/2011/03/big-numbers-bring-admissions/>.

89. Brennan, *supra* note 87.

iii. Redefine the Definition of Successful Programs

Right now, the epitome of intercollegiate sports success is the sports that are perceived as revenue-generating. While certainly a coach in a non-revenue-generating sport whose team or individuals do well would be considered successful, the spoils go to the coaches and the teams that generate revenue.⁹⁰ This is true in most instances, even when the perceived revenue-generating sports do not actually generate revenue, or when the revenue-generating sports are actually not that good. Coaches of revenue-generating teams that do well (translation: coaches of men's basketball and football teams) are compensated at a rate much higher than their male counterparts in other sports and their female counterparts in all sports, to the extent they even have female counterparts in a given institution.⁹¹

Instead of judging success by revenue generation, there are many other bases of success upon which athletic programs might be judged. For example, a program could be judged based on how many athletes graduate with degrees and how many years it takes them to do so. Programs could be judged on how many athletes from their institution, regardless of gender or sport, go on to compete at the next level, if there is a next level. Programs could be judged based on parity between their men's and women's programs, not just with respect to the proportionality of numbers, as is the current norm, but also with respect to the distribution of all revenues and the presence of women in coaching and other high-level administrative positions. This same measure could also require parity and equality among all salaries of people in those positions regardless of gender. These are just a few examples.⁹²

Regardless, if we are going to start judging programs on a basis other than that which currently exists, the question arises as to how we might create a paradigm shift. As currently

90. Brake, *Three-Part Test*, *supra* note 72, at 460–66; Duffy, *supra* note 71, at 96–97.

91. Brake *Three-Part Test*, *supra* note 72, at 460–66; Duffy, *supra* note 71, at 96; *see generally* Rhode & Walker, *supra* note 11 (discussing, throughout, the dearth of female coaches in college athletics).

92. *See* Vivian Acosta & Linda Jean Carpenter, *Are We There Yet?: Thirty-Seven Years Later, Title IX Hasn't Fixed It All*, ACADEME ONLINE, http://www.acostacarpenter.org/AAUP_%20Are%20We%20There%20Yet.pdf (last visited Feb. 27, 2012) (providing another list of examples).

administered, enforced, and interpreted, I do not believe Title IX is the best legal tool to use to accomplish these ends. Perhaps instead, a better tool might be the accreditation requirements with which all schools must comply. For example, allowing women access to all sports by eliminating the contact sports exemption could be an accreditation requirement. Requiring meaningful equity of resources between men and women athletes at an institution could also be an accreditation requirement. While the United States Department of Education does not accredit institutions, it does provide recognition of accrediting agencies and imposes requirements on agencies it recognizes.⁹³ Ensuring that institutions seeking to be accredited meet the type of possible requirements described above could be one of the obligations imposed on accrediting agencies seeking recognition.⁹⁴

iv. Change Hearts and Minds

Apart from what legal regime we might adopt in pursuit of the goal of meaningful equality, at the end of the day what we are really trying to do is engender a shift in hearts and minds. While history, even Title IX history, has shown that legal rules and pronouncements can certainly help bring about that shift, legal rules and pronouncements alone are not enough. As stated earlier, one of the reasons there was a shift in the popularity of women's basketball in Wyoming is the fact that many more people were exposed to women's basketball in a context where the sport could be judged and valued outside of male norms. Accordingly, if we are going to try to engender a shift to equal value, we must act in ways that destabilize male norms and create opportunities for women's sports to be assessed and perceived outside of those norms. The conference attendant to this symposium is a good example of what I mean.

93. See 34 C.F.R. § 602 (setting forth the regulations governing the recognition process and requirements); see also *Accreditation in the United States: Financial Aid for Postsecondary Students*, DEP'T OF EDUC. (last modified Feb. 1, 2012), <http://www.ed.gov/admins/finaid/accred/index.html> (providing a list of accrediting agencies recognized by the U.S. Secretary of Education).

94. For examples of other possible ways to address Title IX's shortcomings and move toward more gender equity, see Duffy, *supra* note 71, at 119–23 and Koller, *supra* note 60, at 447–55.

Let me state, first and foremost, that I thought this was one of the best conferences I have attended in my nearly ten-year academic career. The quality of the panelists, the nature of the information shared, and the robust exchange of ideas on important topics was superb. However, despite the overall quality of the conference, one glaring shortcoming was the degree to which women, and by extension women of color, were largely absent from nearly all of the conversations. Issues of paying college players to play, recruiting, administrative and coaching opportunities, implicit bias, student-athlete academic support, and the myriad of other important topics discussed at the conference are issues of import to women of color in sports, just as they are to men of color. Yet women were rarely mentioned in all of those discussions, for issues of race and sport, not just at this conference but generally, are gendered male. So much so, that I would hazard to guess that the vast majority of conference participants and attendees did not even notice the degree to which women were not part of the conversation. If those of us who care about these issues and believe we should strive for meaningful equality do not notice when we ignore the existence of, and issues related to, women, then why would we expect anyone else not to do the same? Correspondingly, one possible approach to changing hearts and minds is to strive to make sure women are a part of the sports conversation at all times, in a meaningful way, rather than as an afterthought or a token part of the program.

V. CONCLUSION

I find myself putting the final touches on this piece a few days after the United States Women's World Cup team beat Brazil in one of the most spectacular finishes in world soccer history,⁹⁵ and on the day when they unfortunately lost the World Cup championship in another exciting game to Japan.⁹⁶ As a person who watches and reads an excessive amount of sports, the aftermath of the U.S. soccer team's World Cup win was

95. Jeff Carlisle, *U.S. Wins a Classic Against Brazil*, ESPN.COM (July 11, 2011), http://espn.go.com/sports/soccer/news/_/columnist/carlisle_jeff/id/6754390/women-world-cup-grading-us-performance-brazil-jeff-carlisle.

96. Dex McLuskey, *Japan Beats U.S. on Penalties to Earn First Women's World Cup Soccer Title*, BLOOMBERG.COM (July 17, 2011), <http://www.bloomberg.com/news/2011-07-17/japan-defeats-u-s-in-women-s-world-cup-final-after-penalty-kick-shootout.html>.

remarkable for a couple of reasons. First was the amount of coverage the soccer team received on both television and in print media. Second, and perhaps more importantly, was the way in which the commentary shifted from speaking of “women’s soccer” to just “soccer.” As several excited commentators noted, the last minute header to tie the game and send it into overtime that resulted in a win on penalty kicks was one of the most exciting finishes in soccer history, period⁹⁷—not just women’s soccer history. It was a non-gendered testament to the American spirit and will to win. Despite the many gains that have been made, it is still a rare occurrence when the dominant feature on any sports segment of a news program, or any sports program, is focused on women.⁹⁸ It is almost never when a sport is referred to in a gender-neutral way and the players in that sport are women.⁹⁹ As anyone who regularly watches sports knows, anytime a sport is referenced, the presumption is that the sport in question is the male version of the sport, unless otherwise specified. While this may seem like a small issue of semantics, it is just one more way the male norms of sports remain solid and entrenched. Yet, for a good portion of the day after the U.S. women’s team beat Brazil, we were offered a glimpse into a world where women’s sports is not second-class, but an equally valued part of the sports landscape. As stated in the *Introduction*, if we hope to achieve equality for women of color in sports, at a minimum we must have equality for women in sports. We are not there yet. But, the recent women’s World Cup experience shows that it might be possible, and the day might come when equal value is the norm, and we take meaningful equality for granted.

97. See, e.g., Baltazar, *Best Soccer Game Finish Ever!!*, NOW 100.5 (JULY 11, 2011), <http://now100fm.radio.com/2011/07/11/best-soccer-game-finish-ever/#>.

98. MICHAEL A. MESSNER & CHERYL COOKY, *GENDER IN TELEVISED SPORTS: NEWS AND HIGHLIGHT SHOWS, 1989–2009* (2010), available at <https://dornsifecms.usc.edu/assets/sites/80/docs/tvsports.pdf>.

99. *Id.*