

REMEDIATING DISCRIMINATION AGAINST AFRICAN AMERICAN FEMALE ATHLETES AT THE INTERSECTION OF TITLE IX AND TITLE VI

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INTRODUCTION

In *Black Women, Gender Equity and the Function at the Junction* (“*Function at the Junction*”),¹ I visited the intersection of race and gender in examining the impact of Title IX on black female athletes. I applied Professor Kimberle Crenshaw’s single-axis critique of anti-discrimination laws² and Professor Angela Harris’s critique of essentialism³ to African American females in college athletics. Using the works of both to explore the intersection of the forces of race and gender discrimination against black female athletes, I asked whether this intersection concerned the existence of a unique type of discrimination that specifically targeted African American females or the combination of race and gender discrimination acting simultaneously on African American female

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1. Alfred Dennis Mathewson, *Black Women, Gender Equity and the Function at the Junction*, 6 MARQ. SPORTS L.J. 239 (1996).

2. 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 (1989). Professor Crenshaw advances the concept of “intersectionality” in that article and is largely acknowledged as the first, or one of the first, to use the term. See Karla Mari McKanders, *The Unspoken Voices of Indigenous Women in Immigration Raids*, 14 J. GENDER RACE & JUST. 1, 3 n.8 (2010). “Intersectionality” maintains “that gender and race are not independent analytic categories that can simply be added together. Instead, . . . [r]ace is ‘gendered’ and gender is ‘racialized,’ so that race and gender fuse to create unique experiences and opportunities for all groups—not just women of color.” Irene Browne & Joya Misra, *The Intersection of Gender and Race in the Labor Market*, 29 ANN. REV. SOC. 487, 487–88 (2003) (citations omitted).

3. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

athletes. I argued that Title IX benefitted white female athletes more than it did African American females.⁴ The problem was that Title IX was designed to target discrimination and promote equality along the single-axis of gender.⁵ Equal access remedies were premised on the notion that interest and athletic ability were equally distributed between genders.⁶ There was no corresponding premise about even distribution across genders within racial groups.⁷ As a consequence, educational institutions could comply under Title IX simply by providing more opportunities for white women.⁸ I described the problem but only proposed some theoretical fixes.⁹

Professor Tonya Evans pointed out this shortcoming in her article, *In the Title IX Race Toward Gender Equity, the Black Female Athlete Is Left to Finish Last: The Lack of Access for the "Invisible Woman,"*¹⁰ and she called for the development of specific policy or regulatory solutions.¹¹ In this paper, I hope to return to the arguments I made in *Function at the Junction* and respond to Professor Evans.¹²

4. Mathewson, *supra* note 1, at 249–50.

5. *Id.* at 248.

6. *Id.* at 260.

7. *Id.* at 260–61.

8. *Id.* at 260.

9. *Id.* at 258–65 (proposing the use of sports policy rather than legal rules, tort principles rather than equality principles, a mass tort approach, and customized sport-specific rules).

10. Tonya M. Evans, Comment, *In the Title IX Race Toward Gender Equity, the Black Female Athlete Is Left to Finish Last: The Lack of Access for the "Invisible Woman,"* 42 HOW. L.J. 105, 108 (1998).

11. *Id.* at 128.

12. Professor Evans suggests that a fix was more likely to be developed by African American female scholars who were in a better position to explain the experiences of African American female athletes. *Id.* at 108; see also Deborah L. Brake & Verna L. Williams, *The Heart of the Game: Putting Race and Gender Equity at the Center of Title IX*, 7 VA. SPORTS & ENT. L.J. 199, 202–06 (2008) (describing the narrative of Darnellia Russell to demonstrate athletic inequity viewed from the perspective of the African American female). After all, I acknowledged that I did not claim to “get it.” I have returned to the subject because of my continuing interest in equality for African Americans. I am actually interested in equality for all, and I do believe that one’s experiences can limit one’s ability to fathom inequality experienced by others. I can trace my interest in equality for African American females to an incident in ninth grade at the white high school that I attended under a Freedom of Choice Plan. When no black girl made the cheerleading squad, the black players on the football team staged a boycott of football and classes, until the school added a black girl. It was understood that we were in this together.

In Part I, I present a brief treatment of intersectionality in anti-discrimination law focusing on the distinction between cause of action and remedy. Harm caused by gender or racial discrimination may give rise to causes of action based on equal protection principles.¹³ In the case of a claim based on race or gender, there is no question of the existence of a cause of action under existing anti-discrimination laws;¹⁴ the difficulty, however, may primarily be one of proof. In the case of a claim based on a combination of race and gender discrimination or a unique form of discrimination specifically against African American females, there is a question as to whether a cause of action exists under current single-axis-based anti-discrimination laws. Both the combined forms and a unique form of discrimination against African American females lack a similarly situated class with which to show inequality under existing anti-discrimination norms.¹⁵ The combination or unique form of discrimination may be actionable, just on other grounds.¹⁶ The harm resulting therefrom still presents equality considerations even if existing law would not recognize a basis for liability.¹⁷ Nevertheless, the harm suffered or incurred by African American women resulting from the simultaneous effect or a unique form may be identical and worthy of redress. Although I have embraced the existence of a unique force of discrimination directed toward African American females, this conclusion is irrelevant to the basic premise of this Article.¹⁸ In this paper, I focus primarily on the issue of remedy rather than cause of action.¹⁹

13. Mathewson, *supra* note 1, at 239.

14. *Id.*

15. Alfred Dennis Mathewson, *Emphasizing Torts in Claims of Discrimination Against Black Female Athletes*, 38 WASHBURN L.J. 817, 819 (1999).

16. *See id.* at 817 (suggesting mass tort theories as grounds for action).

17. *Id.* at 828–29.

18. I concede that a unique force or form of discrimination directed at African American females is conceptually possible, particularly under the “taste for discrimination” approach in law and economics. *See* GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 14–17 (2d ed. 1971) (outlining the analytical framework for the “taste of discrimination” and, within that framework, the social and physical distance in addition to socioeconomic status between individuals and groups that can cause fear to rise within the majority and prejudice to increase against the minority). A unique force is more difficult under the institutionalized racism of critical race theory.

19. *See* Paul E. McGreal, *Equal Protection and Intersectionality—A Reply to Professor Yarbrough*, 38 S. TEX. L. REV. 1167, 1173 (1997) (arguing alternatively that “discussions on

In Part II, I accordingly go further and argue that the primary intersectionality problem presented by Title IX is one of remedy. I conclude that the differences in the remedial effects of Title IX result, in part, from unremedied racial discrimination, a conclusion that begins with Professor Jerome Dees's argument that *Brown v. Board of Education* and anti-discrimination laws based on the single-axis of race are more responsible for the gains of African American female athletes in intercollegiate athletics.²⁰ However, I will show that the gains are due to the application of both gender- and race-based anti-discrimination laws. The problem is not one of a single-axis cause of action, but rather one of single-axis remedies. Anti-discrimination laws currently do not take into account the confluence of race and gender when fashioning a remedy for either type of discrimination.²¹ Consequently, I will argue that Title IX, in remediating gender discrimination, does not mitigate the effect of racial discrimination against African American females, creating an imbalance in gains between African American and white female athletes. I focus on the flaws in Title IX because Title VI, the race-based counterpart on which it was patterned,²² has not been used as extensively to target racial inequality in athletics.

Finally, in Part III, I offer a policy solution invoking both gender- and race-based anti-discrimination laws. Accordingly, I advocate for the promulgation of regulations or a policy statement pursuant to Title VI and Title IX to specifically address the unremedied racial discrimination against African American female athletes under Title IX and the unmitigated gender discrimination under Title VI.²³ I draw upon the work of Professor

intersectional issues and the Equal Protection Clause are best focused on the threshold question" of on which basis the government action discriminates).

20. A. Jerome Dees, *Access or Interest: Why Brown Has Benefited African-American Women More than Title IX*, 76 UMKC L. REV. 625, 640 (2008).

21. Mathewson, *supra* note 1, at 242.

22. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694 (1979).

23. It is conceptually possible to focus on Title IX alone using essentialist critiques in shaping a remedy. See Evans, *supra* note 10, at 117 ("Title IX will never achieve its ultimate goal of gender equality if it does not articulate policies specifically geared to address the unique form of discrimination experienced by black women."). However, race-based anti-discrimination laws have received too little attention in examining the inequities for African American female athletes. See *id.* at 107 ("[D]espite the importance of sport to the larger society and the existence of discrimination therein, 'sports has historically not been the subject of serious academic study.'"). The harm is caused by a combination of both race and gender discrimination. Mathewson, *supra* note 1, at 243.

Derek Black in *The Mysteriously Reappearing Cause of Action: The Court's Expanded Concept of Intentional Gender and Race Discrimination in Federally Funded Programs*²⁴ to argue that the Department of Education has the authority under the race- and gender-based anti-discrimination statutes, Title VI and Title IX, to make specific findings of racial discrimination against African American female athletes in educational institutions and to prescribe appropriate remedies.²⁵ Moreover, the Department should specifically target middle school and high school athletics programs. The basis for this intervention is equity in the public funding of athletic programs.

I primarily focus on African American females in this paper, although I acknowledge that the analyses and principles presented here may be applicable to women of color in general or women in other specific racial or ethnic groups. It is not my intent to exclude others—it is my intent to assure that African Americans are explicitly included in discussions of diversity.²⁶ As in *Function at the Junction*, I do not deal with intersectionality issues regarding the imposition of the burden of funding remedies for Title IX on African American males who participate in football and basketball.²⁷

I. THE INTERSECTIONALITY PROBLEM

Professor Crenshaw presented the classic intersectionality issues in her argument that conventional anti-discrimination law employs a single-axis model that prohibits discrimination on the basis of race or gender, separately, but does not prohibit

Thus, Title VI has to be brought into the equation to address these imbalances. See Mathewson, *supra* note 15, at 823 (arguing for a remedy specifically targeted at black women through a combination of Title IX and Title VI in order to address both race and gender discrimination).

24. Derek W. Black, *The Mysteriously Reappearing Cause of Action: The Court's Expanded Concept of Intentional Gender and Race Discrimination in Federally Funded Programs*, 67 MD. L. REV. 358 (2008).

25. 34 C.F.R. §§ 100.3, 106.41 (2010).

26. *But cf.* Spencer A. Overton, *The Threat Diversity Poses to African Americans: A Black Nationalist Critique of Outsider Ideology*, 37 HOW. L.J. 465 (1994) (arguing that diversity will marginalize African American communities).

27. *Cf.* Rodney K. Smith, *When Ignorance Is Not Bliss: In Search of Racial and Gender Equity in Intercollegiate Athletics*, 61 MO. L. REV. 329 (1996) (discussing efforts to remedy racial and gender inequity in both male and female collegiate athletics).

discrimination based on race and gender acting in concert.²⁸ The conundrum does not lie in the language of the prescribed rules so much as it does in the acceptable forms of proof that the prohibited discrimination has in fact occurred.²⁹ Anti-discrimination principles flow from notions of equality such that discrimination requires the existence of an inequality.³⁰ A plaintiff must prove that she was treated unequally, with a similar comparison group.³¹ A black woman who has been discriminated against has difficulty proving the requisite inequality.³² It may be difficult to prove that she was discriminated against on the basis of race, because blacks have not suffered as a group since black men do not share the injury. Similarly, she may have faced obstacles proving that she was discriminated against on the basis of gender because women as a group have not suffered since white women do not share the injury.³³

It is problematic that analyses of the intersectionality of race and gender within the confines of anti-discrimination statutes tend to obscure the distinction between the cause of action and the remedy. While Professor Crenshaw critiques the limitations on causes of action,³⁴ Professor Harris's analysis³⁵ of the theoretical limits of essentiality is perhaps more relevant to the question of remedy. The number of elements in Professor Harris's linear equation goes beyond race and gender and may include characteristics such as socioeconomic class and sexuality, among others.³⁶ Her essentialism critique presents a complex function, factoring together race, gender, and sexuality, to show how the experiences of African American women create identity.³⁷ Her analysis opens the door to the exploration of remedies.

The African American female may not have a cause of action, not because an injury is nonexistent, but because the

28. Crenshaw, *supra* note 2, at 149.

29. See McGreal, *supra* note 19. This is true whether a plaintiff tries to show disparate impact or disparate treatment.

30. Crenshaw, *supra* note 2, at 150–51.

31. *Id.*

32. *Id.* at 151–52.

33. *Id.* at 149–51.

34. *Id.* at 140.

35. Harris, *supra* note 3.

36. *Id.* at 585.

37. *Id.* at 588.

action or force that caused the injury, perhaps, coupled with intent, is not prohibited by the anti-discrimination statute.³⁸ If, however, she can show the force that caused her injury was race or gender discrimination, then she may prove a claim for race or gender discrimination, or both, but she has no claim for harm directed at her because of her race *and* gender.³⁹ There is some support in the case law for the proposition that African American females may qualify as a protected class who encounter discrimination as members of two protected groups and who may thereby incur harm not incurred by or greater than that incurred by other members of either protected group.⁴⁰ However, the remedy is limited to those flowing from specific acts of discrimination.⁴¹

Take the case of Don Imus and the Rutgers University Women's Basketball Team. In his morning radio show on CBS in April 2007, discussing the recently concluded NCAA Women's Basketball Championship, Imus referred to the women on the Rutgers team as "nappy-headed ho's."⁴² While the team was comprised of eight black women and two white women, the comment referred only to the black team members.⁴³ There was a huge public outcry, causing CBS to terminate Imus's contract and subsequently settle his wrongful termination claim.⁴⁴ However, what did Imus do that was wrong? Was he racist? Was he sexist? Was he racist and sexist? A case could have been made for both. The term "nappy-headed" has a history as a derogatory term referring to African Americans, male and female, and the term "ho's" has a derogatory connotation against women.⁴⁵ This

38. See *id.* at 615.

39. See McGreal, *supra* note 19, at 1171.

40. See *id.*

41. Carole H. Hofstein, *African American Women and the Limits of Law and Society*, 1 CARDOZO WOMEN'S L.J. 373, 390-92 (1994).

42. David Carr, *Networks Condemn Remarks by Imus*, N.Y. TIMES, Apr. 7, 2007, at B7, available at <http://www.nytimes.com/2007/04/07/arts/television/07imus.html>.

43. Brake & Williams, *supra* note 12, at 209.

44. The format of Imus's radio program emphasized crude, politically incorrect put-downs. See Gwen Ifill, Op-Ed., *Trash Talk Radio*, N.Y. TIMES, Apr. 10, 2007, at A1, available at <http://www.nytimes.com/2007/04/10/opinion/10ifill.html>; John Leo, *The Private Parts on Don Imus*, U.S. NEWS & WORLD REP., Apr. 8, 1996, at 14; Cynthia Tucker, *Who Are the Hos Here?*, TIME, Apr. 23, 2007, at 38, available at <http://www.time.com/time/magazine/article/0,9171,1609770,00.html>.

45. Deepti Hajela, *Other "N-Word" Has Long, Hurtful History with Blacks*, MEMPHIS COM. APPEAL, Apr. 15, 2007, at A7, available at 2007 WLNR 7217658.

incident presents a classic example of a unique force of discrimination against African American females. Imus almost certainly used the term not to refer to blacks or women in general, but specifically, a class of African American women. The term would not be understood to apply to the white players on the team. One African American player filed a lawsuit against Imus for defamation, but it was dropped shortly after it was filed.⁴⁶ She faced substantial obstacles.⁴⁷

The fact that his humor targeted the African American players on the team does not necessarily mean that a unique form of discrimination was brought against them as a class. Rather, it may show that African American females may be affected uniquely by two known forms of discrimination. In analyses of essentialism, scholars have argued that people are affected differently because of their different experiences and circumstances.⁴⁸ Even the concept of African American female athletes presents essentialism issues. It is possible that the African American women on the team were affected differently. This conundrum is discussed in treatments of “sex-plus” analyses of intersectionality.⁴⁹

In the sex-plus line of cases, a woman may establish a Title VII claim by showing discrimination against a subclass of women.⁵⁰ In these cases, typically, the employer discriminated against women who shared some other particular characteristic.⁵¹ In

46. *Rutgers Player Sues Imus*, N.Y. TIMES, Aug. 15, 2007, at D6, available at <http://www.nytimes.com/2007/08/15/sports/ncaabasketball/15/sportsbriefs-imus.html?fta=y>; Jacques Steinberg, *Rutgers Player Withdraws Suit Against Imus*, N.Y. TIMES, Sept. 12, 2007, at D3, available at http://www.nytimes.com/2007/09/12/sports/12_rutgers.html.

47. As reprehensible as Imus’s conduct was, it is questionable whether he violated any federal anti-discrimination statutes. The players were neither employees covered by Title VII, nor students of his in an educational program covered by Title IX, nor did he deny them contracts.

48. See Harris, *supra* note 3, at 585.

49. See Hofstein, *supra* note 41, at 389–403.

50. See *id.* at 391.

51. See *id.* at 390; *cf.* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (acknowledging women with children as a subgroup); Jurinko v. Edwin L. Wiegand Co., 331 F. Supp. 1184, 1187 (W.D. Pa. 1971) (acknowledging married women as a subclass); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1197–98 (7th Cir. 1971) (acknowledging married women as a subclass); Lansdale v. United Airlines, Inc., 437 F.2d 454, 454 (5th Cir. 1971) (acknowledging married women as a subclass); Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977) (acknowledging claims where women were subjected to sexual advancement); Jacobs v. Martin Sweets Co., 550 F.2d 364, 371 (6th Cir. 1977) (acknowledging claims of pregnant single women); *In re* Consol. Pretrial Proceedings in the Airline Cases, 582 F.2d 1142, 1145 (7th Cir. 1978) (acknowledging claims of mothers).

Jefferies v. Harris County Community Action Association,⁵² for example, the employer argued that the plus-characteristics necessarily were limited to those concerning some constitutionally protected right.⁵³ The majority rejected that argument on the grounds that it was inconceivable that Congress crafted a statute that protected subgroups of women but not the subgroup of African American women.⁵⁴ However, race was to be a plus factor rather than a separate cause of action.⁵⁵ Congress has been content to allow the courts to grapple with intersectionality but has not changed the statutory language of anti-discrimination laws to explicitly address the issue.⁵⁶

For example, *Harris v. Portland* is a case in which the court was presented with several claims by an African American female, including one based on racial discrimination, one based on gender discrimination, and one based on combinations of discrimination on the basis of gender, race, and sexual orientation.⁵⁷ In 2005, Renee Portland, then head coach of the Penn State women's basketball program, declined to renew the scholarship of Jennifer Harris.⁵⁸ Coach Portland had been controversial for her announced stance of not having lesbians play for her.⁵⁹ The alleged basis for the non-renewal of the scholarship was that Coach Portland believed that Ms. Harris was a lesbian, in part based on her off-court appearance. Ms. Harris wore baggy jeans and cornrows.⁶⁰ The claim for racial discrimination was based on a pattern of renewal for white players and non-renewal for African American players.⁶¹ In fact, Coach Portland did not renew the scholarships of the two other African American players on the team in 2005 either, but renewed the scholarships of all the

52. *Jefferies v. Harris Cnty. Cmty. Action Ass'n*, 615 F.2d 1025 (5th Cir. 1980).

53. *Id.* at 1034.

54. *Id.*

55. See Hofstein, *supra* note 41, at 389–90.

56. See *id.* at 399–400 (stating that the absence of a clear expression by Congress has failed to provide the courts with guidance on Title VII).

57. First Amended Complaint at 2, 64–66, *Harris v. Portland*, No. 1:05-CV-2648, 2006 WL 1317125 (M.D. Pa. May 3, 2006) (No. 05-2648), 2005 WL 4154198 [hereinafter First Amended Complaint].

58. *Id.* at 24.

59. Kristine E. Newhall & Erin E. Buzuvis, (*e*)*Racing Jennifer Harris: Sexuality and Race, Law and Disclosure in Harris v. Portland*, 32 J. SPORT & SOC. ISSUES 345, 345 (2008), available at <http://jss.sagepub.com/content/32/4/345.full.pdf>.

60. *Id.* at 350.

61. First Amended Complaint, *supra* note 57, at 1–2.

white players.⁶² The terms of the settlement were not disclosed, but the media coverage of the case focused only on the sexual orientation claim.⁶³ Although she asserted a claim for racial discrimination that existed independently of the sexual orientation claim, the crux of her lawsuit was based on the combined effect.⁶⁴ She claimed to have incurred harm from discrimination on race and gender combined with discrimination on the basis of sexual orientation.⁶⁵ The remediation of one did not make her whole. Her damages were measured only by the harm from discrimination based on sexual orientation.⁶⁶ The damages were therefore insufficient to cover the injury she incurred from racial discrimination.

The case presents a classic example of the essentialism critique of anti-discrimination laws. In *Harris*, racial and sexual orientation discrimination were invariably intertwined. It was not clear that she was a lesbian. It was her appearance as a black woman that gave rise to the inference. Coach Portland may have discriminated against her because she appeared to be a lesbian, an inference drawn from notions of how heterosexual black women should dress. This was also a factor in the Imus incident, as he distinguished the women on the Rutgers team from the women on the victorious Tennessee team.⁶⁷ The law did not provide a cause of action for the type of discrimination directed at her because she was a black woman who was stereotyped as a lesbian.

There is very little case law, however, dealing with intersectionality issues in athletics.⁶⁸ Notwithstanding the dearth of case law, those issues have received significant attention in legal scholarship.⁶⁹ Professor Deborah Brake has paid increasing

62. *Id.* at 24.

63. The sexual orientation claim was alleged in connection with race and gender discrimination. Newhall & Buzuvis, *supra* note 59, at 346.

64. See First Amended Complaint, *supra* note 57, at 1–4.

65. *Id.* at 2–3.

66. *But cf. id.* at 35 (alleging that the differential treatment was motivated by sexual orientation).

67. See Brake & Williams, *supra* note 12, at 209–10.

68. See Evans, *supra* note 10, at 127.

69. See, e.g., Brake & Williams, *supra* note 12; Evans, *supra* note 10; B. Glenn George, *Who Plays and Who Pays: Defining Equality in Intercollegiate Athletics*, 1995 WIS. L. REV. 647 (1995); Mathewson, *supra* note 1; Wendy Olson, *Beyond Title IX: Toward an Agenda for Women and Sports in the 1990s*, 3 YALE J.L. & FEMINISM 105 (1990); Marilyn V. Yarbrough, *If You Let Me Play Sports*, 6 MARQ. SPORTS L.J. 229 (1996); Marilyn V. Yarbrough, *A Sporting Chance: The Intersection of Race and Gender*, 38 S. TEX. L. REV. 1029 (1997).

attention to intersectionality in her works on Title IX.⁷⁰ Her scholarship has raised awareness of this issue among lawyers, athletes, sports policymakers, and the public. Existing policy and legal approaches to addressing discrimination against African American female athletes follow the race or gender single-axis approach.⁷¹ For example, the Women's Sports Foundation, in advocating policies to increase opportunities for black women and other women of color, acknowledges that discrimination on the basis of race also affects opportunities for black men and other men of color.⁷² The Foundation's report, however, does encompass multiple barriers adversely affecting opportunities for women of color.⁷³ The scope of most analyses in the legal literature on African American female athletes is limited to Title IX.⁷⁴ Many references to Title VI⁷⁵ note that Title IX was patterned after it.⁷⁶

70. Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 93 (2005).

71. See Megan Ryan, *Comments from the Spring 2007 Harvard Journal of Law & Gender Conference*, 31 HARV. J.L. & GENDER 378 (2008), available at <http://www.law.harvard.edu/students/orgs/jlg/vol312/367-422.pdf>; Evans, *supra* note 10, at 109 (citing Deborah Brake's work in reference to the intersectional issue).

72. See WOMEN'S SPORTS FOUNDATION, RACE AND SPORT: THE FOUNDATION POSITION 3 (2008), http://www.womenssportsfoundation.org/home/advocate/title-ix-and-issues/title-ix-positions/race_and_sport [hereinafter RACE AND SPORT]; see also RICHARD LAPCHICK WITH BRIAN HOFF & CHRISTOPHER KAISER, THE 2010 RACIAL AND GENDER REPORT CARD: COLLEGE SPORT 1 (2011), available at <http://web.bus.ucf.edu/documents/sport/2010-college-rgrc.pdf> (using single-axis approach for reporting data on race and gender in college athletics).

73. See LAPCHICK, *supra* note 72, at 3–5.

74. See, e.g., Brake & Williams, *supra* note 12, at 200–02; Evans, *supra* note 6; George, *supra* note 69, at 647–50; Mathewson, *supra* note 1, at 239–42; Olson, *supra* note 69; Yarbrough, *supra* note 69, at 232–34.

75. 42 U.S.C. § 2000d (2006) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

76. See Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL'Y 51, 53 (1996); Melody Harris, *Hitting 'Em Where It Hurts: Using Title IX Litigation to Bring Gender Equity to Athletics*, 72 DENV. U. L. REV. 57, 91–92 (1994); see also *Mercer v. Duke Univ.*, 50 Fed. App'x 643 (4th Cir. 2002) (declining to award punitive damages under Title IX following a Supreme Court interpretation of Title VI).

II. THE REMEDY PROBLEM

Harris v. Portland leads ineluctably to the conclusion that the intersectionality problem in anti-discrimination laws is primarily one of remedy.⁷⁷ Let us begin with Professor Jerome Dees's observation. He recognized that race- and gender-based anti-discrimination laws have played a role in bringing about gains for African American females in intercollegiate athletics.⁷⁸ He examined the results and concluded that the remedies provided under one have been more instrumental in those gains than the other.⁷⁹ According to Dees, *Brown v. Board of Education*⁸⁰ and its progeny, such as Title VI,⁸¹ have been more beneficial to increasing opportunities for black women athletes than Title IX.⁸² The importance of his observation is the idea that the two forces of discrimination may have a differential impact. His observation that race is more important draws support from critical race theory⁸³ and evaluates the magnitude of the two forces in the intersection.⁸⁴

The gains were more participation opportunities in intercollegiate athletics for African American females.⁸⁵ How did *Brown* bring those gains about? It did so because it called for the integration of African Americans into historically white colleges and universities ("HWCUs").⁸⁶ Charlayne Hunter Gault entered the University of Georgia in 1961, eleven years before the enactment of Title IX, because *Brown* opened the door.⁸⁷ The numbers of African American females entering HWCUs increased thereafter.⁸⁸ How did Title IX contribute to the gains in athletic participation

77. See Newhall & Buzuvis, *supra* note 59, at 361.

78. Dees, *supra* note 20, at 636–37.

79. *Id.*

80. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

81. 42 U.S.C. § 2000d (2006).

82. Dees, *supra* note 20, at 640–41.

83. Patricia Hill Collins, *African-American Women and Economic Justice: A Preliminary Analysis of Wealth, Family, and African-American Social Class*, 65 U. CIN. L. REV. 825, 851–52 (1997); Roy L. Brooks, *Race as an Under-Inclusive and Over-Inclusive Concept*, 1 AFR.-AM. L. & POL'Y REP. 9, 10–13 (1994).

84. Dees, *supra* note 20, at 636–37.

85. *Id.*

86. *Id.*

87. Molly O'Brien, *Discriminatory Effects: Desegregation Litigation in Higher Education in Georgia*, 8 WM. & MARY BILL RTS. J. 1, 20–21 (1999).

88. *Id.*

opportunities? HWCUs not only increased the student slots available to women,⁸⁹ but also they increased the number of athletic participation opportunities for women.⁹⁰ That meant more basketball team slots and more track and field slots, sports in which African American women had historically participated.⁹¹ It also meant the addition of opportunities in the “emerging” or country club sports⁹² in which African American females have had substantially less access and therefore, interest. But for *Brown*, African American women would not have been able to take advantage of those opportunities. But for Title IX, those additional participation opportunities in basketball and track would not have been available. Professor Dees, however, opines that without *Brown* the additional Title IX opportunities would have gone almost exclusively to white women.⁹³ Moreover, the increase in significant opportunities in the emerging sports was not equally available to African American women in any case.⁹⁴ His analysis is appealing on some level, but it begs the question of whether the additional participation opportunities in basketball and track were produced by *Brown* or Title IX, a proverbial which-came-first conundrum.

Yet, Professor Dees’s analysis is insightful not for his conclusion that race-based anti-discrimination laws have been more effective,⁹⁵ but instead for the implicit suggestion that single-axis-based anti-discrimination remedies are inadequate to address the injuries incurred by African American female athletes. This is

89. B. Glenn George, *Forfeit: Opportunity, Choice, and Discrimination Theory Under Title IX*, 22 YALE J.L. & FEMINISM 1, 2 (2010).

90. *Id.*

91. See Brake, *supra* note 70, at 113–14; RACE AND SPORT, *supra* note 72, at 2–3.

92. Dees, *supra* note 20, at 637, 637 nn.91–92 (defining “emerging” or “county club” sports as archery, badminton, equestrian, rugby, squash, synchronized swimming, team handball, rowing, and bowling); A. Jerome Dees, *Do the Right Thing: A Search for an Equitable Application of Title IX in Historically Black Colleges and University Athletics*, 33 CAP. U. L. REV. 219, 265–66 (2004) (explaining that the moniker “county club sports” comes from their availability in more affluent communities, where families have the economic resources to support these sports) [hereinafter *Do the Right Thing*]; Evans, *supra* note 10, at 107; see Mathewson, *supra* note 1, at 257; JOHN CHESLOCK, WHO’S PLAYING COLLEGE SPORTS? MONEY, RACE AND GENDER 31 (2008), <http://www.womenssportsfoundation.org/home/research/articles-and-reports/school-and-colleges/money-race-and-gender> (stating that after the initial expansion of opportunities in existing sports for women, colleges and universities added sports which were less diverse or predominantly white).

93. Dees, *supra* note 20, at 636, 638; see *Do the Right Thing*, *supra* note 92, at 265.

94. Dees, *supra* note 20, at 640–41.

95. *Id.* at 638.

the very problem demonstrated in *Harris v. Portland*.⁹⁶ Both axes must be used together to render African American females whole. If he is correct that *Brown* has been more instrumental, his analysis suggests that a stronger dosage of remedial measures to address racial discrimination against African American females would result in greater gains.⁹⁷

The conclusion that anti-discrimination laws based on race and gender alone or applied in concert are inadequate to provide full redress to African American females can be demonstrated in the interplay of the history of the Fifteenth⁹⁸ and Nineteenth⁹⁹ Amendments. The former, ratified in 1870, prohibits the denial of voting rights based on race.¹⁰⁰ At the time of ratification only men had the right to vote, so its impact on the freed slaves was that only the freed men obtained the right to vote.¹⁰¹ Neither Harriet Tubman, for all her valor, nor Sojourner Truth, for all her eloquent orations, acquired the right to vote pursuant to the Fifteenth Amendment.¹⁰² It is a clear example of a race-based anti-discrimination law with an apparently universal remedy that did not provide relief for African American females.

The latter amendment, ratified in 1920, prohibits the denial of voting rights based on sex.¹⁰³ At the time of its ratification, however, America was in the midst of Jim Crow laws such as whites-only primaries and literacy test requirements that disenfranchised African Americans notwithstanding the Fifteenth Amendment.¹⁰⁴ The vast majority of African American females, thus, did not acquire the right to vote as white women did in 1920.¹⁰⁵ Again, a single-axis-based anti-discrimination law with an apparent universal remedy was inadequate to address the plight of

96. Newhall & Buzuvis, *supra* note 59, at 361–62.

97. Evans, *supra* note 10, at 107–08, 128.

98. Adjoa A. Aiyetoro, *Why Reparations to African Descendants in the United States Are Essential to Democracy*, 14 J. GENDER RACE & JUST. 633, 638 (2011).

99. *Id.*

100. U.S. CONST. amend. XV, § 1.

101. Gretchen Ritter, *Gender and Citizenship After the Nineteenth Amendment*, 32 POLITY 345, 353 (2000) (stating that the Fifteenth Amendment only granted citizenship rights to men, at the exclusion of women).

102. *See id.*

103. U.S. CONST. amend. XIX, § 1.

104. Susan Kates, *Literacy, Voting Rights, and the Citizenship Schools in the South, 1957–1970*, 57 C. COMPOSITION & COMM. 479, 480 (2006); *see* Aiyetoro, *supra* note 98, at 650.

105. Ritter, *supra* note 101, at 347.

African American females. In both instances, it was the remedy rather than the anti-discrimination principle that was inadequate. Professor Ian Ayres's fair driving empirical study of racial discrimination in retail car sale transactions¹⁰⁶ provides another example. He concluded that African Americans and women faced discrimination in such transactions.¹⁰⁷ In his study, he found that white males paid the lowest prices for cars, white females paid more than white males, African American males paid more than both white males and females, and African American females paid the highest prices.¹⁰⁸ While he examined selected civil rights laws¹⁰⁹ as a tool to address such discrimination and primarily focused on amending race-based statutes to address gender, he largely used a single-axis-based approach.¹¹⁰ As with the Fifteenth and Nineteenth Amendments, a race-based remedy would not eliminate the differential between African American males and females.¹¹¹ While African American males would be brought equal to white males, it is not clear that the same would happen for African American females, even with the combination of anti-discrimination laws. Likewise, adding gender discrimination would not necessarily eliminate the differential between white females and African American females. Again, prices for white females would be equalized with white males, but it would not happen for African American females without taking race into account.

Professor Ayres addressed the triggers for the cause of action rather than the remedy.¹¹² Thus, his approach had two prongs. First, he examined two race-based civil rights statutes that provide a cause of action to challenge discriminatory retail car

106. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 852 (1991).

107. *Id.* at 817.

108. *Id.* at 819.

109. *See id.* at 820 (identifying 42 U.S.C. §§ 1981–1982 (2006) as potential means of recourse to address car sales discrimination).

110. *See id.* at 863 (advocating for the extension of 42 U.S.C. §§ 1981–1982 to women and other protected classes).

111. *See Ritter, supra* note 101, at 347 (concluding that even though women were given greater political standing through the adoption of the Nineteenth Amendment, suffrage did not obtain its intended goal of equal citizenship status for women).

112. *See Ayres, supra* note 106, at 863–64 (advocating for the adoption of a disparate impact standard for claims under sections 1981–1982 that allows suits challenging facially neutral bargaining standards that have a discriminatory effect instead of the current standard, which requires proof of intentional discrimination).

sales that may not otherwise be available.¹¹³ Second, he added the axis of gender to those statutes.¹¹⁴ Theoretically, African American females have to use both axes to equalize prices, but the approach does not examine remedies.¹¹⁵ It is not enough to permit a cause of action on a single-axis basis, even separately.¹¹⁶ As in *Harris v. Portland*, a court may pick one as the basis for recovery with damages only for that axis.¹¹⁷ Both axes necessarily must be taken into account in the remedy phase.

Similar effects may be seen in intercollegiate and scholastic athletics. After the enactment of Title VI¹¹⁸ in 1964, African American enrollment increased substantially in HWCUs.¹¹⁹ In 1976, African Americans comprised about 9 percent of undergraduates,¹²⁰ while in 2007 they comprised 13 percent.¹²¹ After the enactment of Title IX¹²² in 1972, female enrollment increased substantially as well.¹²³ Participation opportunities in intercollegiate athletics also dramatically increased.¹²⁴ From 1971 to 2000, the participation of white females rose by 320 percent and that of females of color by 955 percent.¹²⁵ Hispanic females comprise slightly below 3 percent of athletes.¹²⁶ Overall, women of

113. *Id.* at 857–63 (analyzing 42 U.S.C. §§ 1981–1982).

114. *Id.* at 863–66.

115. *Id.* at 864.

116. *See* Newhall & Buzuvis, *supra* note 59, at 360 (explaining that causes of action for discrimination laws must be applied in a categorical manner because of the differing levels of scrutiny that apply to various classes, including race, gender, and sexual orientation).

117. *See id.* at 354 (describing how in *Harris v. Portland*, the court reduced the damages portion of the claim to the single-axis of sexual orientation, to the exclusion of the race and gender axes).

118. 42 U.S.C. § 2000d (2006).

119. *See* U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 2010, at 331, <http://nces.ed.gov/pubs2011/2011015.pdf> (documenting the increase in African American enrollment after Title VI).

120. *Id.* (indicating that African American females comprised 54 percent of African American undergraduates at that time).

121. *Id.* (indicating that by 2004, African American females comprised 64 percent of African American undergraduates).

122. 20 U.S.C. §§ 1681–1688 (2006) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”).

123. Brake & Williams, *supra* note 12, at 206.

124. *Id.*

125. RACE AND SPORT, *supra* note 72, at 2.

126. CHESLOCK, *supra* note 92, at 29 (showing that the participation of Asian and Hispanic females in athletics is below their composition of the student body).

color comprised 26 percent of the student body but only 17.5 percent of athletes.¹²⁷ African American women account for about 10 percent of female athletes.¹²⁸ On the other hand, non-Hispanic white women comprise 77 percent of student athletes, 68.5 percent of the student body, and 75 percent of female athletes.¹²⁹ Males of color comprise 22 percent of undergraduate males and 22 percent of athletes.¹³⁰

African American males and females faced similar discrimination in pursuit of athletic opportunities in intercollegiate athletics in 1972.¹³¹ Both were clustered into a few sports.¹³² Males were clustered in basketball, football, and track,¹³³ while females were clustered in basketball and track.¹³⁴ While the clustering remains for both,¹³⁵ their participation relative to population took different paths after 1972. Even though Title VI and Title IX were in effect, the opportunities for African American females disproportionately decreased relative to white females.¹³⁶ Yet, opportunities for African American males increased disproportionately.¹³⁷ The explanation for the difference is football.¹³⁸ The different trajectories are explained by the absence of multiple-axes remedies.

127. See RACE AND SPORT, *supra* note 72, at 2.

128. Donna Lopiano, *Gender Equity and the Black Female in Sport*, WOMEN'S SPORTS FOUNDATION (Sept. 29, 2011), <http://www.womenssportsfoundation.org/en/home/research/articles-and-reports/athletes-of-color/gender-equity-and-the-black-female-athlete>.

129. See RACE AND SPORT, *supra* note 72, at 2.

130. *Id.* at 3.

131. See *Civil Rights 101: Women*, CIVILRIGHTS.ORG, <http://www.civilrights.org/resources/civilrights101/women.html> (last visited Sept. 29, 2011).

132. DEBORAH L. BRAKE, *GETTING IN THE GAME* 113–14 (2010) (explaining that “clustering” refers to the practice of placing African Americans into a few sports like football, basketball, and track for males and basketball and track for females, while “stacking” refers to the practice of steering African American athletes into specific positions on teams).

133. *Id.* at 114.

134. *Id.*

135. *Id.*

136. *Id.*

137. CHESLOCK, *supra* note 92, at 10 (noting that African American males and white females participate in intercollegiate athletics at rates disproportionate to their make-up in the student body).

138. The implications of Title IX for football have generated considerable controversy. Football policymakers has sought not to be taken into account. See Earl C. Dudley, Jr. & George Rutherglen, *Ironies, Inconsistencies, and Intercollegiate Athletics: Title IX, Title VII, and Statistical Evidence of Discrimination*, 1 VA. J. SPORTS & L. 177, 183 (1999);

Single-axis-based anti-discrimination laws simply have not provided the remedies for African American females in athletics. One researcher seeking to examine the disparity in athletic opportunities for African American females conducted statistical analyses of four sets of data: the National Longitudinal Study, the High School and Beyond Survey, the National Educational Longitudinal Survey, and the Educational Longitudinal Survey.¹³⁹ She made some interesting findings. The data sets revealed that in 1972, African American girls disproportionately participated in high school athletics and that white girls were disproportionately underrepresented.¹⁴⁰ By 1992, the situation had flipped.¹⁴¹ This reversal occurred at the high school level, not the collegiate level.¹⁴² Her findings were consistent with Professor Dees's observation that race-based anti-discrimination laws were more responsible for gains for African American women than Title IX.¹⁴³ The data revealed the ripple effect of an increase in athletic opportunities for white women in intercollegiate athletics and the addition of the less diverse emerging or country club sports.¹⁴⁴

There is a class aspect as well. Moneque Pickett's analyses show that African American girls were more likely to attend a school district in which fewer athletic opportunities were available for girls.¹⁴⁵ She also found a connection to socioeconomic class.¹⁴⁶

Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 11-12, 50 (1992). There has been virtually no examination of the role of football on racial equity in athletic programs. For football, however, the experience of African American males would mirror that of African American females.

139. Moneque Walker Pickett, *The Invisible Black Woman in the Title IX Shuffle: An Empirical Analysis and Critical Examination of Gender Equity Policy in Assessing Access and Participation of Black and White High School Girls in Interscholastic Sports* (Aug. 10, 2009) (unpublished PhD dissertation, University of Miami) available at http://scholarlyrepository.miami.edu/oa_dissertations/288.

140. *Id.* at 53-54. Notwithstanding the disproportionate overrepresentation of African American females in high schools, at the collegiate level, the total number of white females participating in sports exceeded those of females of color in 1971. RACE AND SPORT, *supra* note 72, at 2 (noting that there were 2,137 women of color participating in intercollegiate athletics in 1971 compared to 27,840 white women).

141. Pickett, *supra* note 139, at 53 (noting that Asian and Hispanic females were disproportionately underrepresented in high school athletics in the 1970s and continue to be underrepresented).

142. RACE AND SPORT, *supra* note 72, at 2.

143. Dees, *supra* note 20, at 640.

144. Pickett, *supra* note 139, at 58.

145. *Id.* at 59 (noting that African American females were more likely to attend a school that offered no sports for females, or specifically did not offer softball, basketball, soccer, ice hockey, volleyball, tennis, cross country, track, golf, or gymnastics).

School districts in low-income areas offered more athletic opportunities for girls.¹⁴⁷ Other scholars have also recognized the effect of race, gender, and socioeconomic class.¹⁴⁸

Title VI and Title IX as applied to sports have not operated in the same way. In fact, far more attention has been given to the single-axis of gender under Title IX in opening access to opportunities in intercollegiate and scholastic athletics when examining the status of African American females.¹⁴⁹ While Title IX applies to far more than athletic programs, it has been most visible to the public in its application to athletics.¹⁵⁰ On the other hand, Title VI has been more visible to the public in its application to the nonathletic aspects of educational institutions and programs.¹⁵¹ There is considerable litigation under Title IX and the Equal Protection Clause over equal access, programming, and benefits in the case of gender equity.¹⁵² However, there has been scant case law under Title VI dealing with equal access, programming or benefits in athletic background in the case of racial equality.¹⁵³ There are virtually no reported cases of African American females seeking equity in athletics as such under Title VI, Title IX, the Equal Protection Clause or any other law.¹⁵⁴ The imbalance in access largely results from the absence of remedies under race-based anti-discrimination laws that take gender into account and from the lack of remedies under Title IX that take into account the race of females.¹⁵⁵

146. *Id.*

147. *Id.* at 59–60.

148. *See, e.g.,* BRAKE, *supra* note 132, at 116 (citing DON SABO & PHIL VELIZ, GO OUT AND PLAY: YOUTH SPORTS IN AMERICA 8 (2008), <http://www.ncys.org/pdfs/2008/2008-go-out-and-play-report.pdf>); Brake & Williams, *supra* note 12, at 212–13.

149. Pickett, *supra* note 139, at 5.

150. *Id.* at 6.

151. *Id.* at 92.

152. *See* Diane Heckman, *The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 551, 557 (2003).

153. *But see* Cureton v. NCAA, 198 F.3d 107, 107 (3d Cir. 1999) (involving a case of an African American male and female challenging NCAA uniform minimum admissions standards as racially discriminatory).

154. *But see id.* at 111.

155. BRAKE, *supra* note 132, at 112.

III. THE NEW POLICY

In the absence of an anti-discrimination law explicitly prohibiting discrimination against African American females in athletic and educational programs, the solution is to work with the tandem of race- and gender-based anti-discrimination laws. In this case, the specific laws are Title VI¹⁵⁶ and Title IX.¹⁵⁷ The primary need is for remedies addressing the discrimination against African American females in athletic opportunities. I am proposing to use the two statutes to fashion remedies that take into account the other axis. I am not proposing additional legislation at this time, but rather a regulatory agency solution.

Professor Black has examined the interplay of Title VI and Title IX in a different context.¹⁵⁸ In his review of several Supreme Court decisions over the past decade,¹⁵⁹ he concluded that there is room for a regulatory agency to define the scope of activities that constitute intentional discrimination within the meaning of these statutes for the purpose of private rights of action.¹⁶⁰ At the core of his argument, however, is that federal agencies have the Congressional authorization, subject to judicial deference, to promulgate regulations to enforce statutes under *Chevron v. Natural Resources Council, Inc.*¹⁶¹ Both statutes authorize the relevant regulatory agencies to enforce the statutory prohibitions through rules-regulations or orders.¹⁶²

156. 42 U.S.C. § 2000d-1 (2006).

157. 20 U.S.C. § 1681 (2006).

158. Black, *supra* note 24, at 365–66 (“[T]his Article will reveal the principle that: a violation of Title VI or Title IX occurs not only when the funding recipient directly engages in traditional forms of intentional discrimination, but also when a funding recipient makes a conscious choice to frustrate the congressional objective to eliminate discrimination and inequity in federally funded programs.”).

159. *Id.* at 371–78 (citing to *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Franklin v. Gwinnet Cnty. Pub. Sch.*, 503 U.S. 60 (1992); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999); and *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005)).

160. *Id.* at 424 (“Congress . . . chose not to define what this specifically meant . . . because Congress recognized that agencies are better suited to this task.”).

161. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

162. The authorizing language is virtually identical in both statutes. *Compare* 42 U.S.C. § 2000d (2006) (“No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”), *with* 20 U.S.C. § 1681(a) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

He goes on to make a powerful case for regulatory agency action to define intentional discrimination within the meaning of Title VI and Title IX.¹⁶³ First, neither statute defines the term “discrimination,” but both explicitly authorize the agencies to enforce and interpret the term.¹⁶⁴ Second, reasonable regulations adopted by the appropriate agencies defining the term “discrimination” or “intentional discrimination” should be afforded judicial deference under the *Chevron* standard.¹⁶⁵ He further argues that the deference standard should be applied even in the case of the meaning of race and gender discrimination¹⁶⁶ so long as those words are narrowly defined based on the context in which the disparate impact arises, and the agency articulates its reasoning for how the definition fulfills the statutory objectives.¹⁶⁷

Federal agencies have specifically used this regulatory authority under Title IX with respect to athletics.¹⁶⁸ The regulations were originally adopted in 1975 by the Department of Health, Education, and Welfare.¹⁶⁹ It issued a policy interpretation in 1979, and its successor, the Department of Education, has issued clarifications at least twice.¹⁷⁰ These regulatory pronouncements have provided guidelines for determining activities that constitute gender discrimination in athletics. The courts have consistently accorded deference to the regulations and policy interpretations under Title IX.¹⁷¹ The Department of Education has also issued regulations pursuant to Title VI.¹⁷²

Thus, the Department of Education is authorized under both Title VI and Title IX to determine what activities and conduct constitute discrimination against African American females and give rise to an obligation on the part of an educational institution to appropriate corrective action under

discrimination under any education program or activity receiving Federal financing assistance . . .”).

163. Black, *supra* note 24, at 411–17.

164. *Id.* at 413.

165. *Id.* at 412.

166. *Id.* at 413–14.

167. *Id.* at 414–15.

168. George, *supra* note 89, at 6–8.

169. 34 C.F.R. § 106.41 (2011).

170. 34 C.F.R. § 100.3 (2011).

171. 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, 411 (2010).

172. 34 C.F.R. § 100.3.

those statutes.¹⁷³ I would amend both sets of regulations, modify the Policy Interpretation for Title IX, and perhaps issue a Policy Interpretation for Title VI, all of which would cross-reference each other.

For example, appropriate language could be added to 34 C.F.R. § 106.41, specifically cross-referencing Title VI and its regulations and authorizing an accounting of race and other plus factors, such as socioeconomic class, in taking affirmative measures to overcome the effects of prior discrimination or the effects of conditions which resulted in limiting participation. The Title VI regulations may need more tweaking because Title VI applies to all recipients of federal funding and is not limited to educational institutions or athletic programs.¹⁷⁴ The simplest fix would be to add language to 34 C.F.R. § 100.3(b)(4) and (b)(6) authorizing the taking into account of gender and other plus factors, such as socioeconomic class, in taking affirmative action to overcome the effects of prior discrimination or the effects of conditions that resulted in limiting participation. To bring symmetry to both sets of regulations, a separate section on athletics, a true counterpart to 34 C.F.R. § 106.41, which pertains only to athletics in the case of Title IX, could be added.

The regulatory fix could amend the Policy Interpretation for Title IX.¹⁷⁵ The fix would focus on the second and third prongs of the three-prong safe harbor provision.¹⁷⁶ These provisions relate to access and opportunity.¹⁷⁷ I would not hesitate to use the substantial proportionality standard¹⁷⁸ because of the need to determine the appropriate comparison group. The second prong, a continuing history of providing opportunities for African American females¹⁷⁹ is more directly tied to the approach of using

173. Heckman, *supra* note 152, at 560.

174. See 42 U.S.C. § 2000d (2006) (prohibiting discrimination in any program receiving federal assistance).

175. See generally 45 C.F.R. § 86 (2011).

176. Brake & Williams, *supra* note 12, at 213 (“[Under the] three-part test for measuring compliance[,] . . . recipients can show [(1)] that the percentage of email athletes is close to the percentage of female students at the institution; or [(2)] that they have a history and continuing practice of addressing the needs of the underrepresented sex; or [(3)] that they otherwise are fully accommodating the athletic interest and abilities of the school’s female students.”).

177. *Id.*

178. *Id.*

179. *Id.*

multiple axes to fashion remedies. Again, axes besides race or gender, such as socioeconomic class, should be used as well. The third prong would require educational institutions to fully and effectively accommodate the interests and abilities of African American females.¹⁸⁰

The Department of Education would begin with an effort to define the nature and scope of discrimination against female athletes of color, expressly including African American female athletes.¹⁸¹ It may follow the approach used in the regulations and the Policy Statement for Title IX on establishing the activities or conditions that constitute or do not constitute such discrimination.¹⁸² It perhaps should use a predominant factor test¹⁸³ for determining the appropriate axis on which a violation occurs—whether it is a result of gender or racial discrimination separately or a simultaneous effect of both types of discrimination. My primary focus, however, is on remedies. I am proposing that the Department of Education specifically focus on the appropriate corrective actions required to fulfill the objectives of both statutes. The regulations or Policy Interpretations should be premised on the proposition that single-axis-based anti-discrimination laws must take multiple axes into account in fashioning remedies.¹⁸⁴ The Department of Education thus should prescribe remedies to address surviving racial and gender discrimination against women of color, including African American females in athletic programs. If it were to determine that the principal violation of anti-discrimination laws was based on race, it would shape a remedy that took account of gender.¹⁸⁵ Likewise if it determined that the

180. *Id.*

181. Although the focus of this paper is primarily on African American females, the policy fix would be one of general applicability. The Department of Education should acknowledge its intent to address intersectional issues for African American female athletes.

182. *See, e.g.*, Title IX of the Education Amendments of 1972, 44 Fed. Reg. at 71,415 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 88) (providing a means to assess an institution's compliance with Title IX).

183. *Cf.* Crystal L. Miller, Note, *The Goods/Services Dichotomy and the U.C.C.: Unweaving the Tangled Web*, 59 NOTRE DAME L. REV. 717, 723–24 (1984) (explaining the predominant factor test as applied to Article 2 of the Uniform Commercial Code).

184. The Department of Education may adopt the essentialist critique and consider factors in addition to race or gender such as class, sexual orientation, age, or disability.

185. Historically, it has been controversial whether cheerleading qualifies as a sport when dealing with remedies for gender discrimination in athletics. *See generally* Noffke v. Bakke, 748 N.W.2d 195 (Wis. App. 2008) (holding that cheerleading was not a “sport”

principal violation was gender-based, it would take into account race.¹⁸⁶ And if it determined that a violation was based on race and gender discrimination, it should prescribe corrective action to address the simultaneous occurrence of both.

In contemplating the presence of multiple axes, the regulatory approach should go beyond the axes of race and gender. Professor Harris's essentialism analysis is useful in examining the development of remedies for the discrimination faced by black women.¹⁸⁷ Under this critique, the sex-plus doctrine would be used to fashion appropriate remedies, rather than for establishing a cause of action.¹⁸⁸ It has precedent in the eggshell plaintiff rule from tort law.¹⁸⁹ The essentialism critique provides a theoretical basis for measuring the injury suffered by black women from either race or gender discrimination apart from merely proving that the woman was a victim of either type of discrimination.¹⁹⁰ Other scholars have also acknowledged the need for the application of other axes, particularly socioeconomic class.¹⁹¹ The agency may adopt disparate impact standards and courts should accord deference to those standards as long as the standards are narrowly drawn and supported by context and reasoning.

Finally, the regulations necessarily must target middle and high school athletic programs.¹⁹² The disparities in the development of African American and other female athletes grows

covered by the statute at issue). Using both Title VI and Title IX would allow the Department of Education to address the issue of racial imbalance in cheerleading squads at colleges and universities. Both of these statutes deal with discrimination in federally funded programs. While Title VI applies to all federally funded programs, both statutes apply to educational institutions receiving federal funds. Further, Title VI can be used to establish a cause of action for African American females as well as establishing a remedy.

186. Mathewson, *supra* note 1, at 263.

187. *Id.*

188. *Id.*

189. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 291-92 (5th ed. 1984).

190. Compare Harris, *supra* note 3, at 585 (explaining that gender essentialism compartmentalizes women into race or sex categories without intersecting race and sex), with Mathewson, *supra* note 1, at 263 (applying gender essentialism to theories of recovery).

191. Ruth Louise Hall, *African American Women and Sport*, in ENCYCLOPEDIA OF WOMEN AND SPORT IN AMERICA 4-5 (Carole A. Oglesby ed., 1998).

192. See Mathewson, *supra* note 1, at 265 (discussing the lack of opportunities for female athletes at "lower levels"); see also Picket, *supra* note 139, at 11 (noting the limited range of high school level sports).

wider as the years pass, due in large part to the inequities in athletic programming and resources at the middle and high school levels.¹⁹³ The regulatory approach must necessarily be explicit in addressing the inequities there.

CONCLUSION

Legal scholars have written about inequities for African American female athletes in intercollegiate sports for decades.¹⁹⁴ The time has come to move beyond the acknowledgement of the existence of intersectionality issues confronting African American female athletes. It is at least time for regulatory agencies to act. I have proposed a modest fix in this paper. I propose to use Title VI, prohibiting racial discrimination, and Title IX, prohibiting gender discrimination, to tackle the issue. The fix consists of using multiple-axes-based remedies to address single-axis-based causes of action for discrimination. The fix recognizes that the law cannot remediate discrimination against African American female athletes under one axis without taking the other into account. I am also proposing to go a step further and use essentialism critiques to include other axes such as socioeconomic class. For too long, African American female athletes have been invisible;¹⁹⁵ with these changes, they will become visible in positive law.

193. Picket, *supra* note 139, at 11.

194. *Cf.* Mathewson, *supra* note 1, at 252 (discussing one African American female scholar and athlete writing about inequities in sports in 1981).

195. Hall, *supra* note 191, at 4.

