University of Michigan Journal of Law Reform

Volume 34
Issues 1&2

2000

The Mixed Messages of Title IX

Sherman J. Clark
University of Michigan Law School

THE MIXED MESSAGES OF TITLE IX

Sherman J. Clark*

INTRODUCTION

I recently had the chance to watch my eight-year-old daughter play in her first game of field hockey. After one abbreviated practice, the Burns Park Ice Dragons (yes, the Ice Dragons) met their opponents (the Honey Creek Honey Bears, if I recall correctly) on the local elementary school field. Poetry in motion it was not. Picture ten children clustered together with sticks, gleefully trying to bludgeon a slow-moving, but thick-skinned, rodent of some sort.

Then something happened. The ball squirted loose, and the Ice Dragons were somehow able to corral it into the net at the end of the field. For a moment the girls looked as though they did not know what had happened, until it dawned on them—they had *scored a goal!* They smiled, then they cheered. A few even endeavored a tentative high five.

On my daughter's face, I saw a look which took me back to every little league game, every swimming race, and every pick-up basketball game in which I had participated. We *did* it! her eyes seemed to say. *We* did it! Her look appeared to say bring on the next ball, the next game, the next challenge. Maybe I read too much into it, but maybe not. In any event, my daughter did not spend any time or energy analyzing the situation. All she said was, "Daddy, field hockey is *soooo* fun!" To this father at least, this experience represents Title IX.[1] Title IX is a regime which has, directly and indirectly, often by fits and starts, and without ever being a model of theoretical elegance or coherence, helped bring about a world in which more and more women and girls share in a set of invaluable experiences that were almost the exclusive province of men and boys three decades ago.

Yet, what is Title IX really? How can I reasonably say that a 1972 educational, anti-discrimination statute is in any way responsible for Ann Arbor Youth Field Hockey—a league which was not legally mandated in any sense, but which came about because of women like Mrs. Huntzicker of Morton Street, who wanted to make sure

* Professor of Law, University of Michigan Law School. B.S. 1989, Towson State University; J.D. 1992, Harvard Law School.

1. 20 U.S.C. § 1681(a) (1994).

that her daughter Annika could do more than watch big brothers Joe and Dave play ice hockey? What did Title IX have to do with that? Has Title IX been given too much credit? And even if Title IX has been indirectly responsible for the broad growth of athletic opportunities for women and girls, has that end been achieved only by stretching Title IX beyond its intended or appropriate bounds? And perhaps most critically, what does the twenty-first century hold for Title IX? Is it poised to fuel and support the further growth of women's athletics? Or has Title IX been stretched to the point where a backlash is the likely next chapter? These are the questions which occupy the articles in this Symposium, and they are questions which all those interested in the future of women's sports ought to care about a great deal.

On its face, Title IX appears to be a straightforward, anti-discrimination statute. The text of the statute does not address itself particularly to sports, but simply states: "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. . . ."[2]

In practice, however, Title IX has behaved quite differently from, for example, its employment discrimination cousin Title VII. The regulatory framework built up around Title IX, in fact, bears little relation to the structure of evidentiary presumptions and motive-based analyses employed in the Title VII context.

Instead, and as detailed in several of the articles presented in this Symposium, the regulations implementing Title IX describe the substantive conditions precedent to liability. There are two primary ways in which an educational institution can run afoul of Title IX in the area of athletics: either by treating female athletes unfairly or unequally or by failing to provide equal or adequate opportunities for women to participate in athletics in the first place.[3] The first basis of liability, unequal treatment, is factually complex but conceptually straightforward. One can mistreat or discriminate against female athletes in ways very much analogous to the ways in which one can mistreat or discriminate against female employees. Indeed, the Office of Civil Rights (OCR) has promulgated a fairly concrete set of guidelines—factors to be con-

2. *Id.*
3. 34 C.F.R. § 106.41(a) (1999).

sidered in evaluating this unequal treatment form of Title IX violation.[4]

The conceptual difficulties begin with the second, unequal provision of opportunities mode of offending Title IX. Because of several key differences between athletics and most other contexts, it is more difficult to interpret Title IX, in the sports context, in ways analogous to those employed to evaluate employment discrimination, for example. As a result, the regulations describe a process for measuring compliance. This process is described in detail in several of the articles in this Symposium, but for immediate purposes it is sufficient to note that compliance with Title IX hinges largely on a comparison between the number of athletic opportunities provided to men and women at a given educational institution.[5] In particular, the OCR has enacted regulations which require that under most circumstances a college or university must achieve or be moving towards "substantial proportionality" between the ratio of available athletic opportunities and the ratio of men and women in the relevant student body.[6]

This emphasis has inspired an ongoing critique of Title IX—a critique which hinges largely on the claim that the approach taken by courts amounts to the imposition of quotas. It is argued that these requirements are no more appropriate or permissible under Title IX than they are under Title VII, where a similar statutory prohibition against discrimination in the employment context has been held not to require the sort of "affirmative action" called for by courts under Title IX. Moreover, critics maintain that the affirmative action courts have come to require under Title IX, so far from being statutorily mandated, is in fact constitutionally prohibited, at least so far as state actors are concerned.

Courts have not been moved by this critique, the debate over which is best and most fully captured by the recent litigation involving Brown University.[7] Nor, however, have the courts done much in the way of responding to these criticisms of the Title IX analytic structure. Instead, the dominant response on the part of courts—epitomized in many ways by the First Circuit in the Brown

---

4. A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979), *available at* http://www.ed.gov/offices/OCR/docs/t9interp.html (last updated Aug. 13, 1999).

5. *Id.*

6. *Id.*

7. Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993), *remanded to*, 879 F. Supp. 185 (D.R.I. 1995), *aff'd in part and rev'd in part*, 101 F.3d 155 (1st Cir. 1996), *cert denied*, 520 U.S. 1186 (1997).

University cases—has been simply to deny that anything unusual is occurring.[8] In the midst of an otherwise sophisticated discussion, one encounters what resembles an elementary school playground dispute: "No fair. You're imposing quotas!" "We are not!" "You are too!" "Are not!" "Are too!" At some point, the parties to the debate began talking past each other.

It is possible to unravel this dispute and, if not resolve it, at least identify some sources of confusion. In order to do so however, it is necessary to face one powerful reality. Despite persistent judicial efforts to pretend otherwise, something different is present here. In the context of intercollegiate athletics, it is simply not possible to treat Title IX like Title VII.

As an initial matter, Title IX contemplates—indeed expressly authorizes—a separate but equal approach to gender equity.[9] This is a point which many commentators have appreciated, and which has been the focal point of debate over Title IX since its inception—a reality which puts tremendous strain on the courts' implicit claim that they are doing nothing more than enforcing a straightforward, anti-discrimination statute.

In addition, there is a second way in which intercollegiate athletics differ markedly from other contexts. Put simply, college athletic recruiting is, in general, an "affirmative action." Colleges and universities in recruiting athletes do not simply choose among applicants in such a way as to allow us sensibly to ask whether some subset of those applicants have been discriminated against in the sense that female or minority applicants might be. Instead, they recruit, affirmatively, for virtually all available opportunities—opportunities which are open in each case only to men or only to women. That much being obvious, it is tempting to think of discrimination in college athletics as analogous not to unfair hiring practices but rather to unequal pay or working conditions. In fact, Title IX does prohibit unfair or unequal treatment of female athletes, but that was not at issue in *Brown*.[10] The aspect of Title IX at issue in *Brown* and similar cases was the provision of opportunities for participation.[11]

Nor is it reflective of reality to speak of college athletics as providing some sort of service or educational opportunity to students, in the sense that female athletes at a given school are not having

8. *See id.*
9. 20 U.S.C. § 1681(a) (1994).
10. *See Brown*, 101 F.3d at 174–80.
11. *Id.*

their needs fairly and equally met. Why not? Because college sports teams are almost entirely made up of people who would not be at that school if that sport did not exist there. Put differently, the addition or subtraction of opportunities for intercollegiate athletic competition at any given school will affect the composition of the student body rather than the number or quality of opportunities available to current students. This point is easily overlooked amid rhetoric about the educational value of athletics. Sports do have educational value, but a school wishing to provide that value to its current students would be well-advised to emphasize intramurals rather than intercollegiate athletics.

This does not mean that colleges and universities cannot have an impact on the total number of available opportunities. Collectively, they most certainly do. The point is that schools are not simply being required to treat their own students fairly. Instead, they are being asked to participate in the creation of opportunities which must exist in order to generate a situation in which students across the board have equal opportunities. Colleges and universities are being required to treat equally not just their own student body, but also a hypothetical student body as it would be composed in the presence of equal athletic opportunities.

There is nothing necessarily wrong with this situation, and at first blush at least nothing necessarily inconsistent with the statute itself. Markedly different circumstances may well justify substantially differing interpretations of facially similar statutes, such as in this case, Title IX and Title VII. My point is merely that the realities of Title IX enforcement do not mesh with a claim that nothing more is being asked than what other anti-discrimination statutes have long required in other contexts. As an additional demonstration, recall the first key difference between Title IX and other areas of anti-discrimination law, the *Plessy*-like embracing of "separate but equal." Ask what supporters of women's athletics would say if the nation's colleges and universities decided to "comply" with Title IX by opening up every team to both men and women: one basketball team, staffed by the ten best players the school can recruit; one hockey team, etc. This possibility is not as far-fetched as one might first suspect and has in some form been advocated by at least a few high-profile women athletes.[12] Nonetheless, it seems safe to say that most female athletes, and most people with an interest in providing real opportunities for female athletes,

12. *See* Marcia Federbush, Speech, *An "Olympics" Approach: A More Equitable Approach to Athletics than Title IX Offers*, 34 U. MICH. J.L. REFORM 265, 272 (2001).

would hardly be satisfied with this sort of compliance. Notably, this solution is in a narrow sense the very essence of nondiscrimination. It is a solution we would not only accept, but would also likely demand in most other contexts. Were we to learn that a physics department had refused to admit women, or that some practice had operated to prevent women from participating in student government, we would demand one physics department open to all and one student council open equally to men and women. In the context of athletics, however, for some reason this "ideal" solution would not satisfy anyone. Nor should it. Again, my point is not that something is necessarily wrong with Title IX enforcement, but there most certainly is something happening. Moreover, it is something that frequently involves the counting and comparing of opportunities rather than a strictly qualitative comparison of treatment. It may or may not be appropriate to describe this as a quota system, but if the current enforcement structure is to survive long term in the face of the current critique, supporters will need to confront and justify, rather than simply deny, the uniquely "quota-like" and "affirmative action-like" aspects of that structure.

The articles making up this Symposium issue provide an excellent entree into such an inquiry. Two of the articles in this issue confront the question of what one should make of the very real differences between Title IX and other regimes of antidiscrimination law. Each of these pieces—one by Deborah Brake[13] and one by Julia Lamber[14]—highlight a similar point, although in distinct and distinctly valuable ways. Both Professors Brake and Lamber make the point that "nondiscrimination," as a subject of legitimate legal and social concern, need not be conceived nearly so narrowly as critics of Title IX would appear to apply.[15]

Professor Brake argues persuasively that it is not only improvident for supporters of Title IX to deny or downplay the differences between Title IX and Title VII, but that it is similarly insufficient simply to argue that different circumstances mandate different enforcement structures.[16] Professor Brake argues that the unique features of athletics require a unique approach, but that approach itself then requires an affirmative theory. In other words, Title IX

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

14. Julia Lamber, *Gender and Intercollegiate Athletics: Data and Myths*, 34 U. MICH. J.L. REFORM 151 (2001).

15. *See* Brake, *supra* note 13, at 19; Lamber, *supra* note 14, at 152.

16. *See* Brake, *supra* note 13, at 34–45.

needs not merely an excuse but a justification, a positive account of why the particular structure governing Title IX is the right one.[17]

Professor Brake suggests that such an account is available in the form of anti-subordination theory.[18] Rather than focus merely on formal equality, anti-subordination justifications for legal action emphasize that an array of social and institutional practices can come together to reinforce the subordinated status of groups.[19] Recognizing and elucidating this dynamic can reveal or highlight the discriminatory nature of facially neutral practices and structures.[20] As a primary instance, Professor Brake observes that a regime which allowed colleges and universities to tie the provision of athletic opportunities to the interests of current student bodies would implicitly entrench or legitimate the web of factors which have caused what seem like lower levels of interest or motivation.[21] If I may be forgiven for putting a radically oversimplified turn on Professor Brake's analysis, a school that spends millions per year recruiting male athletes and comparatively little recruiting female athletes (or potential female athletes) should not, on Professor Brake's view, be able to use the fruits of the one inequality to justify the other.

In fact, and as Professor Brake recognizes, the problem is actually much deeper than that, because a school which did spend an equal amount of money on recruiting male and female athletes might be able to push the "applicant pool" argument back a level, by claiming that interest and ability among high school athletes (potential college and university athletes) differs between men and women.[22] This is less true than it once was, but to the extent that such a disparity remains, it is perhaps best seen as evidence of the depth of the chicken and egg problem facing supporters of women's athletics. People choose whether to play high school sports for reasons which are influenced, directly and indirectly, by what sports are played at higher levels. As Professor Brake persuasively argues, a richer account of anti-discrimination law is needed to confront and deal with the breadth and depth of the inequalities facing women athletes.[23] On her view, a more fully developed

17. *See id.* at 61–122.
18. *See id.* at 26–31.
19. *See id.* at 31–45.
20. *See id.*
21. *See id.* at 45–61, 69–74.
22. *See id.* at 49–61.
23. *See id.* at 147–49.

and focused vision of emerging anti-subordination theory may offer such an account.

Professor Lamber similarly argues that it is fruitless, even counterproductive, to deny the unique aspects of the athletic context as those aspects guide the enforcement of Title IX.[24] Rather than propose a specific justificatory theory, however, Professor Lamber sees the Title IX arena as calling out for the construction and articulation of such a theory.[25] As Professor Lamber observes, it is not as though we should be pleased or satisfied with the pinched and formalistic way in which anti-discrimination law and theory have been worked out in other areas.[26] Title VII jurisprudence is perhaps less a model than a cautionary tale.

Thus, Professor Lamber invites us to see the emerging critique of Title IX as an opportunity rather than (merely) a difficulty.[27] Here is an arena in which we have no choice but to work out a viable theory of anti-discrimination. If there is something coherent and appealing between the Scylla of quotas and the Charybdis of hollow formalism, the enforcement of Title IX in the athletic context will force us to find it. Professor Lamber's hope—and I believe it to be a reasonable one—is that the lessons we are forced to learn in the context of Title IX might someday help us develop a richer vision of anti-discrimination law in a broad range of other contexts.[28]

In the only judicial contribution to this Symposium, the Honorable Donald Shelton highlights what is perhaps the best "proof" as it were, that Title IX is not just another anti-discrimination statute. Judge Shelton confronts the wisdom and propriety of allowing colleges and universities to comply with OCR enforcement guidelines by cutting men's sports rather than adding women's sports.[29] Under some circumstances, schools have perceived or at least maintained that they are simply unable financially to provide new opportunities for female athletes in sufficient numbers to meet the OCR substantial proportionality test.[30] As a result, some have achieved compliance by cutting or reducing to club status some men's sports.[31] Men's gymnastics and wrestling have been particu-

24. *See* Lamber, *supra* note 14, at 152–54.
25. *See id.* at 228–29.
26. *See id.* at 152–53.
27. *See id.* at 181–204.
28. *See id.* at 228–29.
29. *See generally* Donald E. Shelton, *Equally Bad Is Not Good: Allowing Title IX "Compliance" By the Elimination of Men's Collegiate Sports*, 34 U. MICH. J.L. REFORM 253 (2001).
30. *See id.* at 260.
31. *See id.* at 257.

larly hard-hit.[32] This strategy has been expressly endorsed by the Department of Education's Assistant Secretary for the OCR in a Memorandum issued along with a document entitled *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test.*[33] Judge Shelton describes this as a "loophole" and argues that it does nothing for women to cut men's sports.[34] Most supporters of women's athletics would agree. While some might reasonably hope that the threat of having to cut men's sports might serve as a valuable incentive for the creation of opportunities for women, few would accept a "solution" to the problem of gender equity in sports that in the end relied heavily on reducing opportunities for men rather than increasing outlets for the participation of women. Up to this point, then, Judge Shelton has expressed the perfectly sensible view that two wrongs do not make a right, or, as the title of his article puts it, *Equally Bad Is Not Good.*[35]

Judge Shelton says something more, however. He argues that allowing colleges and universities to comply with Title IX by cutting men's sports is not only undesirable but also inconsistent with the statute itself. Judge Shelton states that "[t]he goal is not equal opportunities for women. The goal is more opportunities for women. Therefore, the law's intent is satisfied when opportunities are equally good, not bad."[36] Judge Shelton supports this reading of the statute with legislative history, in which the goal of increasing opportunities for women was in fact described as motivating Title IX.[37]

Consider a hypothetical outside of sports. Imagine that a university were found to be sponsoring a special science club in which students discussed current developments in chemistry, and suppose the club were open to men only. It seems clear in such a case that Title IX would give the university two choices: open the club up to all students or eliminate the club entirely. If the club is seen to be worthwhile, we might well hope that the university would open it up to women rather than eliminating it entirely, but our hope and the law's requirements might not be coterminous. The absence of sufficient science clubs may be a problem, but it does

---

32. *Id.* at 257.

33. U.S. Dep't of Educ. Office for Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996), http://www.ed.gov/offices/OCR/docs/clarific.html (last modified Jan. 10, 2001).

34. Shelton, *supra* note 29, at 257–58.

35. *Id.* at 258, 260.

36. *Id.* at 260.

37. *Id.*

not seem to be one directly addressed by the statute, which speaks to the problem of unequal treatment.

In the athletic context, then, one might argue that Congress could have simply mandated that colleges and universities provide this important social good—athletic opportunities for women. Congress could have required that each school provide some specified level of opportunities. The question, at least for many critics of current interpretations of Title IX, is whether Congress did or did not pass such a statute.

This critique is not unanswerable. For example, perhaps the focus on equal opportunities in the language of Title IX is misleading. Perhaps the level of opportunities for men is relevant not as a standard but as a benchmark. It is certainly possible to argue that substantial proportionality is best understood as simply a rough and ready means of determining how large a share of this public good—athletic opportunities for women—each college or university can fairly be required to provide. These arguments will not be easy to make, and in particular run the risk of unhitching Title IX from the familiar array of theoretical justifications employed in the context of anti-discrimination law. However, the risk may be unavoidable.

Those who, justifiably I believe, insist that Title IX is not "merely" about discrimination as traditionally and narrowly conceived, may have to face the fact that, to those who continue to hold a more restricted view of what sort of regulatory action is justified under the heading of anti-discrimination law, they will be heard as saying that Title IX is not really about discrimination at all. And while this is—given the assumed narrow use of the term discrimination—a perfectly plausible and appealing argument, it is one which will always be in some tension with Congressional use of the rubric and language of traditional, discrimination-focused, anti-discrimination law.

I should not leave the impression that this entire Symposium is devoted to these particular interpretive questions. On the contrary, I have highlighted a few threads of these diverse and thoughtful contributions. Two other pieces in this Symposium illustrate the diversity of viewpoints and perspectives on these issues. First, Marcia Federbush brings her wealth of experience and insight to bear on the question of whether "separate but equal" is indeed the only possible response to physical differences in size and strength which make traditional anti-discrimination remedies less appealing in the

athletic context.[38] She proposes a conceptual framework sometimes referred to as the Olympics approach, in which a renewed and broadened sense of what it means to be "teammates"—a notion at the heart of what is often cited as a prime benefit of athletic participation—might help to ameliorate much of the "us vs. them" thinking which obstructs progress towards what should be mutual goals.[39]

Second, Barbara Osborne Bickford and Marilyn Yarbrough address an issue of practical and perhaps paramount importance in the day-to-day lives of female athletes: To what extent does Title IX provide a means of challenging the radical disparities in pay between those who coach women's athletics and those who coach men's athletics?[40] Professors Bickford and Yarbrough review the facts, which reveal staggering inequities in both coaching opportunities and compensation, and highlight the ways in which Title IX has been and might be, alone or in combination with other statutes and regulations, applied to this ongoing problem.[41]

No doubt, and as the contributors to this Symposium would readily acknowledge, many things have changed for the better in the nearly three decades since the passage of Title IX. But, as those whose work appears in this collection would quickly point out, much remains to be done. Moreover, the coming years may well prove a critical turning point. Will the mounting critique of Title IX find a place in the case law and result in a retrenchment? Or will a persuasive positive theory of Title IX emerge with sufficient force and coherence to breathe new life into this venerable but threatened edifice? If in a decade, when my daughter goes to college, her newfound love of sports has not abated, and she as a young woman seeks the camaraderie, challenge, and just plain fun she has recently discovered as a girl, what will she find? Are we about to witness a flowering of Title IX jurisprudence accompanied, one would hope, by increased opportunities? Or should we be alert for a retrenchment, perhaps accompanied by a loss of opportunities so far gained? For those who wish to think seriously about those questions—about the fate of Title IX and of women's athletics more generally—the articles in this Symposium are an excellent place to begin.

---

38. *See* Federbush, *supra* note 12, at 267–71.

39. *Id.* at 270.

40. *See generally* Barbara Osborne & Marilyn V. Yarbrough, *Pay Equity for Coaches and Athletic Administrators: An Element of Title IX?*, 34 U. MICH. J.L. REFORM 231 (2001).

41. *See id.* at 246–51.