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A Critique of *Tilting the Playing Field: Schools, Sports, Sex, and the Title IX* By Jessica Gavora

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### **Author**

Hogshead-Makar, Nancy

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# BOOK REVIEW

## **A CRITIQUE OF *TILTING THE PLAYING FIELD: SCHOOLS, SPORTS, SEX AND TITLE IX*<sup>1</sup>**

TILTING THE PLAYING FIELD: SCHOOLS, SPORTS, SEX AND TITLE IX. By Jessica Gavora. New York: Encounter Books, 2002.

Nancy Hogshead-Makar\*

### ABSTRACT

In this Book Review, the author uses Miguel De Cervantes' *Don Quixote*, as a framework for critiquing Jessica Gavora's, *Tilting the Playing Field: Schools, Sports, Sex and Title IX*. The author argues that Ms. Gavora's criticisms of Title IX are on par with Don Quixote's belief that windmills are evil giants, misguided and misinformed. First, the author suggests that Ms. Gavora incorrectly interprets facts about the status of both high school and college athletic programs and misrepresents the legal reasoning of Title IX case law. The author contends that this misunderstanding results in Ms. Gavora's oversimplified and incorrect conclusion that Title IX is a "quota law" that discriminates against male athletes and requires men's programs to be cut in order for women's programs to be added. Next, the author addresses several other misnomers set forth by Ms. Gavora including the fact that women do not deserve additional sports programs because they

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\* Nancy Hogshead-Makar is an Assistant Professor, Florida Coastal School of Law. B.A. 1986, Duke University; J.D. 1997 Georgetown University Law Center. Professor Hogshead-Makar won three gold medals and one silver medal in the 1984 Olympics in swimming. I am deeply indebted to Kristen Galles and Christine Grant for their invaluable mentorship and sharing of insight throughout the process of writing this Article. A scholarship grant from the Florida Coastal School of Law assisted my work on this Article, as did the excellent research assistance of Beth Stockdale.

1. JESSICA GAVORA, *TILTING THE PLAYING FIELD: SCHOOLS, SPORTS, SEX AND TITLE IX* (Encounter Books 2002).

are not as interested in sports as the men whose teams are being cut, that a strong football program aids the achievement of gender equity and finally that Title IX is *forcing* girls to participate in activities generally associated and dominated by males. Ultimately, the author concludes that Ms. Gavora's description of the state of Title IX is riddled with inconsistencies that misrepresent the goals of Title IX and takes away from the achievements of women who would not have had the opportunity to participate absent the mandates set forth by Title IX.

#### TABLE OF CONTENTS

I.	INTRODUCTION.....	102
II.	TITLE IX PRIMER: THE TWO MINUTE DRILL .....	104
III.	WINDMILL # 1: THE LAW REQUIRES SCHOOLS TO CUT MEN'S SPORTS .....	109
IV.	WINDMILL # 2: TITLE IX DISCRIMINATES AGAINST MALE ATHLETES IN ATHLETIC DEPARTMENTS ....	111
	A. <i>Unequal Participation</i> .....	113
	B. <i>Unequal Scholarship Dollars</i> .....	114
V.	WINDMILL # 3: TITLE IX IS A QUOTA .....	115
VI.	WINDMILL # 4: PRONG 3 OF TITLE IX'S PARTICIPATION TEST DOES NOT PROVIDE SCHOOLS WITH SUFFICIENT CERTAINTY .....	120
VII.	WINDMILL # 5: WOMEN DO NOT DESERVE SPORTS OPPORTUNITIES BECAUSE THEY ARE NOT AS INTERESTED IN SPORTS .....	123
	A. <i>Interest and Walk-On Positions</i> .....	123
	B. <i>The Science of Interest</i> .....	126
	C. <i>Interest Is Part of Title IX's Legal Test For Compliance</i> .....	127
	D. <i>Recruiting Interested Athletes</i> .....	128
VIII.	WINDMILL # 6: FOOTBALL HELPS WOMEN'S ATHLETIC PROGRAMS .....	131
IX.	WINDMILL # 7: TITLE IX IS BEING USED TO TURN WOMEN INTO MEN.....	133
X.	WINDMILL # 8: CASELAW TURNED INTO URBAN LEGEND.....	135
XI.	CONCLUSION .....	140

#### I. INTRODUCTION

Don Quixote, Cervantes' well-known fictional character, is a knight errant who sets about doing great deeds only to end up

“tilting at windmills.”<sup>2</sup> This phrase arises from an incident where Quixote spots windmills and tries to convince his sidekick, Sancho Panza, that they are evil giants with whom he must do heroic battle. Everywhere he journeys, the quixotic traveler sees imagined evils to be remedied; wrongs “he intended to right, grievances to redress, injustices to repair, abuses to remove, and duties to discharge.”<sup>3</sup> In doing so, Quixote engages in combat with perceived enemies of all kinds in pursuit of his illusive vision. His difficulty, though, is that he too often gets absorbed in his mind’s figments and blames his pratfalls and setbacks on the magic powers of a wicked enchanter he deems is his nemesis.

*Tilting the Playing Field: Schools, Sports, Sex and Title IX*,<sup>4</sup> a book by Department of Justice speech writer Jessica Gavora,<sup>5</sup> is a fine example of seeing windmills and believing them to be evil giants that must be slain. In reality, Gavora’s diatribe is a rhetoric-laden, ultra-conservative, companion reader attempting to put some meat on the barebones claims that collegiate wrestlers tried to assert in their lawsuit against the Department of Education.<sup>6</sup> Gavora’s book provides grist for the notion that Title IX of the Education Amendments of 1972<sup>7</sup> (Title IX) is a “quota” law to be blamed for the decisions of schools and universities to eliminate men’s sports teams for the sake of women’s teams.<sup>8</sup> These women’s teams, Gavora argues, are populated by indisposed wo-

2. MIGUEL DE CERVANTES, *DON QUIXOTE* (1605) (John Ormsby, trans.), available at [http://www.csd.tamu.edu/cervantes/english/ctxt/DQ\\_Ormsby/part1\\_DQ\\_Ormsby.html](http://www.csd.tamu.edu/cervantes/english/ctxt/DQ_Ormsby/part1_DQ_Ormsby.html).

3. *Id.*

4. See GAVORA, *supra* note 1.

5. Prior to being hired at the United States Department of Justice, Jessica Gavora worked for the Independent Women’s Forum, a conservative women’s group. See <http://www.iwf.org>.

6. *National Wrestling Coaches Ass’n v. U.S. Dept. of Educ.*, 263 F. Supp. 2d 82 (D.D.C. 2003), *lawsuit dismissed* (plaintiffs alleged that the Department of Education’s regulations interpreting Title IX were improperly promulgated and operated to discriminate against men).

7. 20 U.S.C. §§ 1681-1688 (2000).

8. In response to these and other claims, the Secretary of the Department of Education created the Commission on Opportunities in Athletics, in June 2002, which issued its final report entitled “OPEN TO ALL”: TITLE IX AT THIRTY, available at <http://www.ed.gov/inits/commissionboards/athletics>. See also MINORITY VIEWS ON THE REPORT OF THE COMMISSION ON OPPORTUNITY IN ATHLETICS, available at <http://www.savetitleix.com/minorityreport.pdf> (finding that the recommendations in the Department of Education’s Commission on Opportunities in Athletics weakens Title IX’s protections, substantially reduces the opportunities in athletics to which women and girls are entitled under current law, and that all but one of the Commission’s recommendations fail to address budgetary problems men’s teams face).

men lacking the robust interest in sports that only men possess. Gavora, a non-lawyer, argues that Title IX is simply an aberration in legal reasoning, characterizing the federal judiciary as engaged in Title IX silliness.

This review of *Tilting the Playing Field* (hereinafter "*Tilting*") analyzes some of her attempts to vilify the law and finds her uber-conservative policy arguments against Title IX lacking. Unfortunately, *Tilting* does not shoot straight. It presents seriously incomplete facts and a lack of appreciation for the legal reasoning reflected in the numerous published federal court opinions on the topic, all the while re-hashing losing legal arguments as if they were a phoenix that deserves to rise from its long-cold ashes. The hyperbolic and cagey manner in which *Tilting* is written is designed to leave readers wondering how judges and regulators could interpret and apply Title IX in such an absurd way. The reality is, however, that Title IX — as applied to sports — is an area of the law that is marked by uncommon consistency, has never been held to be a "quota" law, has never required that schools discontinue a team for compliance, and is entirely consistent with the country's other non-discriminatory laws.<sup>9</sup> Simply stated, *Tilting* misstates the law and facts to make Title IX look like a shameful and silly chapter in this country's civil rights efforts with its author engaging in a heroic battle to save men's sports from the brink of elimination. Gavora is merely tilting at Title IX windmills.

## II. TITLE IX PRIMER: THE TWO-MINUTE DRILL<sup>10</sup>

A short Title IX primer is helpful in examining the weak points of Gavora's arguments. Title IX, which was first enacted during the Nixon administration and later strengthened in the first Bush administration,<sup>11</sup> prohibits educational institutions that

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9. In addition to case law, former Assistant Secretary of the Office for Civil Rights, Norma Cantu, specifically rejected that Title IX was a quota statute. See, e.g., 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, 577 (2003).

10. For a more extensive discussion, see Ellen J. Vargyas, *Breaking Down Barriers: A Legal Guide to Title IX* (Nat'l Women's Law Center 1994); Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1 (1992); Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics*, 7 SETON HALL J. SPORT L. 391 (1997).

11. Civil Rights Restoration Act of 1987 (current version at 20 U.S.C. § 1681(2000)).

receive federal funds from engaging in sex discrimination. It says simply:

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<sup>12</sup>

The law's prohibition against sex discrimination is very broad. It applies to every aspect of a federally funded education program or activity — including athletics — and extends to elementary and high schools, colleges, and universities. By 1974, the Department of Health Education and Welfare ("HEW")<sup>13</sup> promulgated a draft of the implementing regulations, received comments, and re-promulgated them in 1975. Congress then held hearings and debated the regulations' fate. Attempts to weaken the regulations failed; and the current regulations were put in effect when President Ford signed them. The regulations required compliance in elementary schools by 1976, and in high schools and colleges and universities by 1978.<sup>14</sup>

Advocates for both men's and women's sports agree that opportunities to participate in sports yield much more than the health benefits of running around a field or swimming up and down a pool: participation in sports is an important educational experience.<sup>15</sup> The male wrestlers say it well in their motto: "Wrestling - Training for the Rest of Your Life."<sup>16</sup>

The regulations with regards to sports require institutions to provide male and female students with the following:

- 1) Equal opportunities to participate in sports,
- 2) An equitable allocation of scholarships monies, and

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12. *Id.*

13. HEW was the administrative predecessor to the current Department of Education.

14. 34 C.F.R. § 106.41(d) (2002).

15. See collected research regarding substantial benefits of athletics participation from the NATIONAL WOMEN'S LAW CENTER, A BATTLE FOR GENDER EQUITY IN ATHLETICS: TITLE IX AT 30 (June 2002), at <http://www.nwlc.org>. See also <http://www.womenssportsfoundation.org>.

16. *Ken Chertow Gold Medal Wrestling Camp System*, at <http://www.kenchertow.com/index.html>. Other slogans from sports advocates include "Study Skills" with a photo of a young girl on the uneven parallel bars, "Career Move," "Dare to Compete," and "Game for Anything." See also *Nike Shoe Commercial* (1995): "If you let me play, if you let me play sports. I will like myself more; I will have more self-confidence. If you let me play sports. If you let me play, I will be sixty percent less likely to get breast cancer; I will suffer less depression. If you let me play sports, I will be more likely to leave a man who beats me. If you let me play, I will be less likely to get pregnant before I want to. I will learn what it means to be strong, if you let me play."

- 3) Equitable treatment in all aspects of athletics, including coaching, facilities, equipment, medical treatment, travel, and support, among other things.<sup>17</sup>

In general, *Tilting* does not appear to dispute the legitimacy of the second two requirements, that women should be given equitable scholarship opportunities or receive equal treatment after a school provides a team.<sup>18</sup> Rather, the book's major focus is the law's requirement that schools provide equal opportunities to participate in sports for both genders.<sup>19</sup>

By July 1978, HEW had received "nearly 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education."<sup>20</sup> It became clear to investigators that universities and athletes needed further guidance on how to comply with Title IX. The central question became whether a school had provided sufficient sporting opportunities for their female student-athletes (i.e., the historically unrepresented gender). In response, HEW issued a policy interpretation (the "Policy Interpretation") in 1979, that further clarified the meaning of Title IX's "equal opportunity" mandate.<sup>21</sup>

The Policy Interpretation set forth three wholly independent ways for schools to demonstrate that students of both genders have equal opportunities to participate in sports. Institutions could comply by showing *either* that:

- (1) the percentage of male and female athletes is substantially proportionate to the percentage of male and female students enrolled in the school, (the so-called "proportionality test") ("Prong 1"); or
- (2) the school has a history and a continuing practice of expanding opportunities for female students because their gender is usually the one excluded from sports, ("Prong 2"); or

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17. Originally published at 45 C.F.R. § 86, now at 34 C.F.R. § 106 (2002) (application to the U.S. Department of Education). For an examination of the general athletics regulation, see 34 C.F.R. § 106.41 (2002), and for review of the athletic scholarships regulation, see 34 C.F.R. § 106.37(c) (2002).

18. *But see* Windmill #8, *infra* p. 335: Gavora has found fault with every Title IX legal opinion, including those that addressed inequities in equal treatment.

19. "A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide *equal* athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c) (emphasis added).

20. 44 Fed. Reg. 71413 (1979).

21. *See* U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, OFFICE FOR CIVIL RIGHTS, OFFICE OF THE SECRETARY, HEW, TITLE IX OF THE EDUCATION AMENDMENTS OF 1972: A POLICY INTERPRETATION: TITLE IX AND INTERCOLLEGIATE ATHLETICS (1979), at <http://www.ed.gov/offices/OCR/docs/t9interp.html> [hereinafter OCR].

(3) the school is fully and effectively meeting its female students' interests and abilities to participate in sports, and competition exists within the school's competitive region ("Prong 3").<sup>22</sup>

If a school meets any one of these tests, it is in compliance with Title IX's participation requirements. *This three-part test has been in effect for more than two decades and has been upheld by every one of the eight federal appeals courts that has considered its legality.*<sup>23</sup>

As a general matter, institutions have no legal obligation to offer any sports programs or any one particular sport, and neither men nor women have a right to play on particular teams. Schools retain the flexibility to decide how the opportunities they create are to be allocated among sports or teams, so long as they provide equal participation opportunities to men and women overall.<sup>24</sup> The Office for Civil Rights ("OCR"), the current governmental agency responsible for enforcing Title IX under the Department of Education, has expressly prohibited schools from demonstrating compliance with either Prong 2 or Prong 3 by cutting men's sports.<sup>25</sup>

The purpose of Title IX is to make discrimination based on gender in education unlawful. As applied to athletics, it is not designed to protect sports or any particular men's or women's sport or team. It is not designed to remedy racial inequities in

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22. 44 Fed. Reg. 71413 (1979).

23. See *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1045 (8th Cir. 2002); *Pederson v. La. State Univ.*, 213 F.3d 858, 879 (5th Cir. 2000); *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 770 (9th Cir. 1999); *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 274-75 (6th Cir. 1994), *appeal after remand*, 206 F.3d 685 (6th Cir. 2000), *cert. denied*, 531 U.S. 824 (2000); *Kelley v. Bd. of Trs., Univ. of Ill.*, 35 F.3d 265, 270 (7th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) [hereinafter *Cohen II*] (upholding the grant of a preliminary injunction to the female student-athletes); *Cohen v. Brown Univ.*, 101 F.3d 155, 170 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997) [hereinafter *Cohen IV*] (this case was before the First Circuit twice, first on Brown University's appeal of a preliminary injunction granted by the district court (*Cohen I*), and the second time after a trial on the merits (*Cohen II*)); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993), *cert. denied*, 510 U.S. 1004 (1993); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3d Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994); see also Heckman, *The Glass Sneaker*, *supra* note 9.

24. See *Horner*, 43 F.3d at 275; *Roberts*, 998 F.2d at 829.

25. OCR CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST, available at <http://www.ed.gov/offices/OCR/docs/clarific.html>; see *Cohen IV*, 101 F.3d at 167 ("[The 1996 Policy clarification] does not change the existing standards for compliance, but does provide further information and guidelines for assessing compliance under the three-part test").



sports<sup>26</sup> or athletic leadership positions,<sup>27</sup> nor is it a tool for helping any particular athlete to obtain or retain a sports experience.<sup>28</sup> Title IX does not prevent schools from abandoning the educational mission of athletics,<sup>29</sup> and it does not prevent schools from deciding to drop a men's team or indeed, its entire athletic department.<sup>30</sup> It does not give pretext to schools that make indefensible decisions. The law is limited to providing both boys

26. See Wendy Olson, *Beyond Title IX: Toward an Agenda for Women and Sports in the 1990's*, 3 YALE L.J. & FEMINISM 105, 129-30 (1991) (discussing the possibility that African American women are typecast into only a few sports that are inexpensive and where there is public access to sports facilities); see also Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (2000) (prohibits discrimination on the basis of race by entities that receive federal funds). *But see*, TITLE IX AND RACE IN INTERCOLLEGIATE ATHLETIC SPORT, available at <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/disc/article.html?record=955> (providing an in-depth assessment of women of color in intercollegiate athletics, and concluding, among other things, that since the passage of Title IX, female college athletes of color have experienced a dramatic increase in NCAA sports participation opportunities, and that female college athletes of color have also experienced a substantial increase in scholarship assistance).

27. See R. VIVIAN ACOSTA & LINDA JEAN CARPENTER, WOMEN IN INTERCOLLEGIATE SPORT: LONGITUDINAL STUDY—TWENTY-FIVE YEAR UPDATE: 1977-2002, at 2 (2002), available at [http://www.womenssportsfoundation.org/binary\\_data/WSF\\_ARTICLE/pdf\\_file/906.pdf](http://www.womenssportsfoundation.org/binary_data/WSF_ARTICLE/pdf_file/906.pdf); see also Heckman, *The Glass Sneaker*, *supra* note 9 (discussing Acosta and Carpenter's most recent study).

28. During CBS's *60 Minutes* on December 1, 2002, a male gymnast whose program had been dropped suggested that Title IX forced schools to discriminate against short people:

BOB SIMON, Host: But where does that leave 5'5" gymnast Jason Lewis? They don't make football uniforms his size.

MALE GYMNAST: You have all these guys who are our size. You know, there's no way we're going to play football ever. I mean, we're not basketball stars. What are our kids going to do? I mean, we're going to be breeding a whole bunch of kids who are — kids sitting in front of the computer eating Funions all day, and you know, getting fat. And then, we're going to look back and go, oh, my goodness, why is our youth in such a sad state of health?

MALE GYMNAST: When me and my wife decide to have kids someday (sic), if things keep going as they are, I pray that I'm going to have girls, because that's the only way they're going to have an opportunity to do any college athletics.

*60 Minutes* (CBS television broadcast, Dec. 1, 2002).

29. Welch Suggs, *How Gears Turn at a Sports Factory: Running Ohio State's \$79-million Athletics Program is a Major Endeavor, with Huge Payoffs and Costs*, CHRON. OF HIGHER EDUC., Nov. 29, 2002, at A32 (attributing the preeminence of Ohio State's athletic program to its academic endeavors, the willingness to do "whatever it takes" to recruit the best athletes and win games, and their dismal graduation rates).

30. Michael Janofsky, *Colleges: Brooklyn College Drops Sports*, N.Y. TIMES, July 2, 1992, at B13 (Brooklyn College eliminated its entire athletic's program in response to a Title IX lawsuit).

and girls, men and women, with educational experiences equitably. Now, to the windmills . . .

### III. WINDMILL #1: THE LAW REQUIRES SCHOOLS TO CUT MEN'S SPORTS

*Tilting's* major, albeit inaccurate, premise is that athletic department decisions to cut men's sports are required by, and are the direct result of, Title IX. Gavora asserts that this "dirty little secret" of Title IX has led to "unintended consequences."<sup>31</sup> Gavora argues that a "law designed to end discrimination against women is now causing discrimination against men"<sup>32</sup> because schools are now forced to limit or reduce opportunities for men's teams.

Gavora is legally and factually inaccurate in her assertion. Title IX and its regulations have never required a school to cut men's teams or men's sporting opportunities. Instead, it is the decisions of athletic directors that are to blame. History illustrates the same concept in the civil rights struggles of the 1950s and 1960s, which saw new desegregation laws that required communities to integrate public parks and swimming pools. Rather than integrate, some communities chose to close these facilities. In *Palmer v. Thompson*,<sup>33</sup> the Supreme Court upheld the decision of the City of Jackson, Mississippi to cease its operation of five swimming pools after a federal district court had declared segregation of the city's recreational facilities to be unconstitutional.<sup>34</sup> The law did not require that Jackson close its public facilities, but it was a permissible choice (albeit of moral consequence). The blame for Jackson, Mississippi's decisions should be placed on the city for closing its public facilities – for their hostility to the principles of racial equality – not on desegregation laws or African Americans. Likewise, the moral blame lies with the decision-makers at schools that discontinue viable

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31. GAVORA, *supra* note 1, at 4.

32. GAVORA, *supra* note 1, at 4.

33. 403 U.S. 217 (1971).

34. *Clark v. Thompson*, 206 F. Supp. 539 (S.D. Miss. 1962), *aff'd per curiam*, 313 F.2d 637 (5th Cir. 1963), *cert. denied*, 375 U.S. 951 (1963) (Justice Black, writing for a five to four majority, said the only effect was that public pools that had been segregated were no longer maintained, thus placing whites and blacks in the same position with respect to public facilities.); *see also Neal*, 198 F.3d at 763, 770 (permitting a university to diminish athletic opportunities available to men so as to bring them into line with the lower athletic opportunities available to women).

men's teams, not the law or female athletes who have struggled for decades for sports opportunities.

Moreover, Title IX "disadvantages" male athletes to the same extent that a new family member "disadvantages" older siblings, or to the same extent that new labor competition from African-Americans in the 1960s "disadvantaged" white workers for jobs. Older siblings must share the family resources with the newly arrived member, and white workers now compete in a larger workforce along with African-Americans for jobs. Prior to 1972, boys enjoyed nearly 100% of the sports opportunities, and now must share those educational resources with an expanded pool of athletes – their sisters. Sharing limited resources equitably is a basic and fundamental tenet of all civil rights laws. The equality principle allowing entities the choice to either bring up the previously disadvantaged group or to bring down the previously advantaged group, is consistent throughout the country's civil rights contexts.

Gavora claims that after the early cases, notably *Cohen*,<sup>35</sup> *Roberts*,<sup>36</sup> and *Favia*,<sup>37</sup> Prong 1 (the proportionality test) became the exclusive test schools could use to "insulate [themselves] from a Title IX lawsuit or federal investigation."<sup>38</sup> But Gavora fails to explore the question of whether the law *caused* institutions to cut the men's teams that they did. Gavora's misleading presentation of the circumstances surrounding Providence University's decision to cut its men's baseball team, for example, is never put to a legal test. What options for the athletic department did the law permit? Did Providence need to close the 11% participation gap between Providence's undergraduate female students, which stood at 59%, and its female student-athletes, who represented just 48% – when there was no demonstrable unmet interest on the part of their female students?<sup>39</sup> A range of

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35. *Cohen v. Brown Univ.*, 809 F. Supp. 978 (D.R.I. 1992) [hereinafter *Cohen I*] (preliminary injunction), *aff'd*, *Cohen II*, 991 F.2d 888, *on remand to* 879 F. Supp. 185 (D.R.I. 1995) [hereinafter *Cohen III*] (trial on the merits), *aff'd in part, rev'd in part*, *Cohen IV*, 101 F.3d 155, *cert. denied*, 520 U.S. 1186 (1997).

36. *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 510 U.S. 1004 (1993).

37. *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332 (3d Cir. 1993).

38. GAVORA, *supra* note 1, at 45.

39. See OCR, *supra* note 21 (test for whether schools are meeting Prong 3); Diane Heckman, *The Explosion of Title IX Legal Action in Intercollegiate Athletics During 1992-93: Defining the "Equal Opportunity" Standard*, 1994 DETROIT C. L. REV. 953 (1994) and Heckman, *The Glass Sneaker*, *supra* note 9 (both discussing schools' use of Title IX as an excuse to drop men's teams without examining the

alternatives was permissible under Title IX,<sup>40</sup> other than cutting the baseball team, and it is legally inaccurate to claim that Title IX *required* Providence to make its decision. *Tilting's* premise — that all decisions to eliminate men's sports are required by Title IX — is a false one.<sup>41</sup>

#### IV. WINDMILL #2: TITLE IX DISCRIMINATES AGAINST MALE ATHLETES IN ATHLETIC DEPARTMENTS

Women in Division IA colleges, while representing 53% of the student body, receive only 41% of the participation opportunities, 43% of the total athletic scholarship dollars, 32% of recruiting dollars, and 36% of operating budgets.<sup>42</sup> The increases in men's athletics operating budgets are outpacing monies spent on women's programs at a brisk pace. Between 1972 and 1993, for every new dollar spent on women's athletics, three *additional new dollars* were added to the men's programs.<sup>43</sup> Women athletes are not the evil giants that Gavora sees. Rather, it is other men — other athletes at the same school — who currently enjoy the greatest proportion of opportunities, scholarships, budgets and facilities.

In spite of these statistics, Gavora still argues that men's sports are rapidly declining and need to be saved from the misguided nature of Title IX. She lists the losses that men's teams have suffered over the years due to Title IX, relying on selective but incomplete statistics from a General Accounting Office ("GAO") report and arguments presented by the plaintiff in the wrestler's lawsuit against the Department of Education, Leo Kocher.<sup>44</sup> But Gavora presents a seriously misleading picture. Gavora fails to report on the major finding of the research from a

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overall budget and expenses for the men's athletic teams when separate programs are offered for male and female student-athletes).

40. WOMEN'S SPORTS FOUNDATION KNOW YOUR RIGHTS, EXPANDING OPPORTUNITIES FOR GIRLS AND WOMEN IN SPORT WITHOUT ELIMINATING MEN'S SPORTS: THE FOUNDATION POSITION (July 23, 2000), at <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/rights/article.html?record=84>.

41. See, e.g., *Mercer v. Duke University*, No. 01-1512, 2002 WL 31528244 (4th Cir. 2002).

42. NCAA, GENDER-EQUITY REPORT 20 (2000), available at [http://www.ncaa.org/library/research/gender\\_equity\\_study/1999-00/1999-00\\_gender\\_equity\\_report.pdf](http://www.ncaa.org/library/research/gender_equity_study/1999-00/1999-00_gender_equity_report.pdf) [hereinafter NCAA Report].

43. DAVID L. FULKS, PH.D., CPA, REVENUES AND EXPENSES OF DIVISION I AND II INTERCOLLEGIATE ATHLETICS PROGRAMS — FINANCIAL TRENDS AND RELATIONSHIPS — 1999 (Michael V. Earle ed., 2000).

44. GAVORA, *supra* note 1, at 34, 52.

related GAO report: when all the men's teams added and dropped are computed, the result is a net gain of 36 men's teams – not a loss.<sup>45</sup> The report clearly demonstrates that men gained both in numbers of teams and numbers of participation opportunities.<sup>46</sup> While the report shows that indeed 180 men's wrestling teams were discontinued between 1984 to 2001, 120 new men's soccer teams were added.<sup>47</sup> Numerous men's baseball, lacrosse and football teams were also added.<sup>48</sup> It is deceptive to mention only the data showing some men's teams have been discontinued without the corresponding data demonstrating the greater number of opportunities gained by men.

The same GAO report also undercuts Gavora's position that the increases in men's opportunities reported by the NCAA merely reflect new schools joining the association, for example, teams that were already in existence and merely moved from one association to another.<sup>49</sup> In fact, the GAO report included all four year colleges' experiences (not just those of the NCAA) of adding and discontinuing sports teams.<sup>50</sup> Gavora fails to explore the many reasons teams are added and dropped at particular schools, other than Title IX. The GAO report cited earlier found that the most frequent reason for discontinuing a men's or women's team was due to lack of student-interest in that sport.<sup>51</sup> Finally, 72% of all schools that added women's sports, did not drop any sport. Gavora tilts at the windmill of women's modestly growing opportunities, while defending men's disproportionately larger share of opportunities and budgets.<sup>52</sup>

Finally, Gavora fails to disclose the numerous women's teams that have also been dropped during the same time period. For example, women's gymnastics alone lost 100 teams, while men's gymnastics teams lost 56.<sup>53</sup> Thus, it is misleading and one dimensional to argue that Title IX is responsible for men's team losses, when men overall have made gains in sports teams and

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45. U.S. GENERAL ACCOUNTING OFFICE, INTERCOLLEGIATE ATHLETICS: FOUR-YEAR COLLEGES' EXPERIENCES ADDING AND DISCONTINUING TEAMS, GAO No. 01-297, at 4 (March 2001), available at <http://www.gao.gov> [hereinafter GAO].

46. *Id.*

47. *Id.*

48. *Id.*

49. GAVORA, *supra* note 1, at 53.

50. GAO, *supra* note 45.

51. GAO, *supra* note 45.

52. See Windmill #6, *infra* p. 331.

53. GAO, *supra* note 45.

opportunities and many women's teams have been dropped during the same time period. It is difficult to swallow *Tilting's* claim that men are being discriminated against.

#### A. *Unequal Participation*

Gavora presents highly selective data suggesting that women are getting more than their fair share of participation opportunities – that they are actually over-represented in collegiate athletics. For example, she questions how women can claim that there is gender-inequity in athletic departments, when, “NCAA member colleges and universities sponsor more athletic programs for women than men — 553 more, to be precise.”<sup>54</sup>

The number of athletic *programs* is a misleading measure of athletic *opportunities*. Gender-equity has never been measured by equivalent numbers of teams.<sup>55</sup> The number of sponsored teams is unrelated to budgets or total expenditures, as evidenced by the fact that even including the additional women's teams that *Tilting* condemns, women still receive just 36% of the overall athletic department budget.<sup>56</sup> Gavora misses this fact because sports team membership ranges anywhere from five players on a typical golf team to well over 100 athletes on a men's football or women's rowing team. Theoretically, one sex could have twice as many teams as the other sex, yet have half the opportunities to participate in athletics. Gender-equity, instead, has long been measured by numbers of actual participation opportunities provided to each gender.<sup>57</sup> The law permits schools to field a men's football team with 115 athletes without requiring the school to match football with either a women's football team, or another team consisting of 115 athletes. Instead, the law looks to a school's entire sports program, and asks whether equivalent participation opportunities exist. This is a far more reasoned measurement of how a school provides these educational resources to boys and girls than simply counting numbers of teams.

Other facts omitted by the author – facts necessary for an accurate picture of overall opportunities for boys and girls in athletic departments — are that male collegiate athletes outnumber female athletes 208,866 to 150,916 thus receiving 28% more op-

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54. GAVORA, *supra* note 1, at 34, 35.

55. 34 C.F.R. § 106.41 (2002). *See supra* note 17.

56. NCAA Report, *supra* note 42, at 20.

57. *Cohen v. Brown Univ.*, 809 F. Supp. 978, 980 (1992).

portunities to participate.<sup>58</sup> In high school athletics, male athletes receive 1.1 million more participation opportunities than their female counterparts (i.e., 29% more).<sup>59</sup> Gavora selectively ignores this data showing a far different picture.

### B. *Unequal Scholarship Dollars*

*Tilting* argues that women receive disproportionate and unjustified levels of athletic scholarships. According to Gavora:

The average female student-athlete now receives more scholarship aid than the average male student-athlete. A GAO study of 532 of the 596 NCAA institutions that grant athletic scholarships showed that these schools spent \$4,458 in scholarship per male athlete and \$4,861 per female athlete.<sup>60</sup>

What Gavora's selective fact-picking overlooks is that it is schools' unwillingness to add more women's teams that accounts for the disparity. Because schools must give scholarship-aid in proportion to athletic participation by gender, (e.g., if 41% of the student-athletes are women, women should receive 41% of the scholarship dollars) and the NCAA caps the number of scholarships a school is allowed to offer per sport, the average per capita scholarship expenditures for women must be higher. There are fewer female athletes to whom scholarship monies are distributed, therefore the concentration of scholarship dollars is higher for an individual female athlete. More accurate facts regarding gender-equity in the area of scholarships reveal that female athletes still receive just 43% of the total scholarship dollars, which amounts to men receiving \$133 million more scholarship dollars each year than female athletes receive.<sup>61</sup>

It cannot be argued with a straight face, as Gavora attempts to do, that male athletes are being discriminated against and need the help of federal civil rights laws to protect them. Men's athletics participation overall is increasing, men's budgets are increasing at a flat-out sprint, and men still enjoy the largest share of the athletic pie. It is easy to be sympathetic to the male ath-

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58. NCAA Report, *supra* note 42, at 22.

59. National Association of Collegiate Women's Athletic Administrators, *Women's Sports Foundation Reaction to the U.S. Department of Education Motion to Dismiss Lawsuit Brought by Wrestling Coach's Association* (May 30, 2002), available at <http://www.aawww.com/nacwaa/wsfresponsetonwca2.htm>, citing *N.F.H.S.A.A. and NCAA Participation Statistics* (2001) (finding that there were 3,921,069 male student-athletes and 2,784,154 female student-athletes).

60. GAVORA, *supra* note 1, at 34.

61. NCAA Report, *supra* note 42, at 22, 34, 46, 58, 70.

letes whose teams are cut, but countless female athletes have also had their teams cut or never had teams at all. Historically, resources have been disproportionately allotted to men's and boys' sports, not to women's and girls', as a result of intentional, unjustifiable discrimination.<sup>62</sup> As a normative matter, civil rights laws should not be altered to provide fewer athletic opportunities for women because some of these resources have been shifted and redistributed to women when they were unfairly denied them. Additionally, civil rights laws should not be altered to protect specific sports. Women simply are not over-represented in collegiate athletics as *Tilting* would have readers believe. Instead, they still receive a demonstrably and substantially smaller share of athletic dollars compared to men in the areas of participation, scholarships, and overall budgets.

#### V. WINDMILL #3: TITLE IX IS A QUOTA

Every federal appeals court that has examined the "quota" issue has upheld the regulations and concluded that Title IX *does not* constitute reverse discrimination and is not a quota law.<sup>63</sup> For example, in *Cohen v. Brown University*, the court held, "No aspect of the Title IX regime at issue in this case – inclusive of the statute, the relevant regulation, and the pertinent agency documents – mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals."<sup>64</sup> The United States Supreme Court's refusal to hear the *Cohen* and the *Roberts* cases, although establishing no precedent, certainly reflects that these lower appellate courts are likely getting the law right. In fact, it is difficult to find greater unanimity of judicial opinion on a topic than this one.<sup>65</sup>

Legal commentators have given frequent thorough justifications for the proportionality test,<sup>66</sup> and to do so again would be

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62. *National Wrestling Coaches Ass'n*, 263 F. Supp. 2d at 87 ("Title IX was enacted as part of the Education Amendments of 1972; following extensive hearings on discrimination in education, during which over 1200 pages of testimony were gathered, documenting "massive, persistent patterns of discrimination against women" in colleges and universities"); *Historic Patterns of Intercollegiate Athletics Program Development*, 44 Fed. Reg. 71419, Appendix A (1979).

63. See sources cited *supra* note 23; see also Heckman, *The Glass Sneaker*, *supra* note 9.

64. *Cohen IV*, 101 F.3d at 170 (1st Cir. 1996).

65. *Id.*

66. Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13 (2001) (symposium discussing the theoretical underpinnings behind the three-part test and offering a comprehensive



repetitious. But providing opportunities in proportion to the genders represented on campus makes sense when both sexes then have an equal opportunity to make a sports team, e.g., 1 in 10 if 10% of the student body participates in sports. Additionally, schools are fundamentally different from employers in that their athletics programs are sex-segregated and are responsible for shaping and defining student interests. Indeed, one of the responsibilities of higher education, in exchange for federal and state tax-exempt dollars, is to expose students to new ideas and help them develop new skills to become more productive members of society.<sup>67</sup> Education is a cultural investment in our collective future. Interest and skills follow opportunity, and opportunity does not exist until sex-segregated teams are created.<sup>68</sup>

Yet Gavora ignores this legal scholarship and the concept of *stare decisis*, the underpinning of the American judicial system. She argues that "The gender-quota logic of Title IX is inexorable . . . . There must be just as many girl athletes per capita at any given school as there are boy athletes. Anything less is *prima fa-*

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justification of this theory as applied to the context of sport); Kimberly A. Yuracko, *One for You And One For Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 Nw. U. L. REV. 731(2003) (examining how "equality of opportunity" is used in the context of education versus in an employment context). "When [legislatures and courts] talk about equality of opportunity in the context of education they do not mean that children must compete for resources; they do not apply the careers-open-to-talents model to this context. Instead, when they talk about equal opportunity, they mean that all children must receive a fair chance to develop the tools and skills they will need to compete successfully in the future. Because Title IX governs the distribution of educational resources, it is the tool-giving model of equality of opportunity, not the careers-open-to-talents model that the proportionality requirement should be judged against when determining its consistency with Title IX's nondiscrimination mandate." *Id.* at 777-78. The test has also been criticized by legal commentators, particularly William E. Thro and Brian A. Snow, defense counsel in losing Title IX litigation. William E. Thro & Brian A. Snow, *The Conflict Between the Equal Protection Clause and Cohen v. Brown University*, 123 EDUC. L. REPORT 1013, 1025 (1998); Brian A. Snow & William E. Thro, *Still on the Sidelines: Developing the Non-Discrimination Paradigm Under Title IX*, 3 DUKE J. GENDER L. & POL'Y 1 (1996); William E. Thro & Brian A. Snow, *Cohen v. Brown University and the Future of Intercollegiate and Interscholastic Athletics*, 84 EDUC. L. REPORT 611 (1993); see also 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 (1999).

67. See generally Yuracko, *supra* note 66.

68. *Cohen IV*, 101 F.3d at 179 ("Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience. The Policy Interpretation recognizes that women's lower rate of participation in athletics *reflects* women's historical lack of opportunities to participate in sports") (emphasis added).

cie proof that someone is being discriminated against.”<sup>69</sup> In examining the Title IX cases of the early 1990s,<sup>70</sup> she states that the “proportionality test took one glance at a school’s statistical data, pronounced the school guilty on the basis of unbalanced numbers and forced it to prove itself innocent.”<sup>71</sup> She argues that this analysis is contrary to *Wards Cove Packing Company v. Antonia*,<sup>72</sup> a 1989 Supreme Court case that held that plaintiffs had to prove that it was the employer’s conduct, and not statistics alone, that caused their group’s underrepresentation at the company.<sup>73</sup>

Certainly, statistics can be a part of the plaintiff’s burden of proof to show that the school’s decision to either eliminate a viable women’s team or to refuse varsity status to a potential team amounts to a denial of an educational opportunity on account of their gender, a prohibited gender-discriminatory practice.<sup>74</sup> But Gavora’s legal reasoning goes astray when she asserts that, “in each of these [seminal Title IX] cases, female athletes charged that statistics – *not any invidious policy or hostile act on the part of the schools* – proved they were victims of illegal discrimination.”<sup>75</sup> Here, Gavora does not appear to understand the meaning of “intentional discrimination” within a legal or a civil rights context. In order to prove intentional discrimination, plaintiffs need not prove that defendants intended to harm female athletes, nor do plaintiffs need to show that defendants acted with discriminatory animus, malice or any other evidence of motive, whether benevolent or invidious. Rather, intentional discrimination means only an intent to treat girls and boys differently.<sup>76</sup>

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69. GAVORA, *supra* note 1, at 6.

70. See cases cited *supra* notes 34-37.

71. GAVORA, *supra* note 1, at 27.

72. 490 U.S. 642 (1989).

73. *Id.* at 642-43, cited by GAVORA, *supra* note 1, at 27-28, 84-85.

74. *Cohen II*, 991 F.2d at 901-02 (holding that the plaintiff has the burden of proof to show that the school is not complying with proportionality); see 20 U.S.C. § 1681 (“...this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such imbalance exists with respect to participation in, or receipt of benefits of, any such program or activity by members of one sex”).

75. GAVORA, *supra* note 1, at 25, 26 (emphasis added). Gavora then goes on to compare this, inappropriately, with racial discrimination cases that do not involve acceptable racially-segregated groups, as sports do.

76. See, e.g., *Pederson v. La. State Univ.*, 213 F.3d 858, 881 (5th Cir. 2000) (“[The university] need not have intended to violate Title IX, but need only have intended to treat women differently”); see also *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (“Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates . . .”); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir.

Organizing collegiate athletics necessarily involves establishing a gender classification and institutions deciding to eliminate a women's team will be deemed to have intended the foreseeable outcome of discrimination against the female athletes.<sup>77</sup> Intentionally and knowingly dispersing resources involves choices that signal valuing one gender's educational opportunities over another.<sup>78</sup> Intentional discrimination does not require demonstrating some animus or maliciousness on the part of the defendant, although such evidence would certainly make the athlete's case stronger.<sup>79</sup> Title IX is therefore entirely consistent with the employment discrimination case of *Wards Cove Packing Company*,<sup>80</sup> In *Cohen, Roberts and Favia*, the universities' intentional conduct — dropping a women's team — caused the women's underrepresentation within the athletic department, and unlawfully denied the women the educational opportunity of sports participation.

While *Tilting* attempts to assert that the only real test for Title IX compliance is Prong 1, Gavora acknowledges that most schools do *not* rely on proportionality or Prong 1 to demonstrate compliance with Title IX.<sup>81</sup> She reports that her Freedom of Information Act request of Title IX compliance agreements between the OCR and colleges and universities from 1992 to 2000 produced just 44 OCR athletics participation reviews. The statistical breakdown showed that 25% agreed to Title IX compliance through Prong 1 or proportionality; 8% agreed to compliance through Prong 2 or demonstrate a continuous history of expansion for women's opportunities; and 64% of the total complied

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1995) ("absence of malevolent intent does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect"); *Innovative Health Systems, Inc. v. City of White Plains*, 931 F. Supp. 222 (S.D.N.Y. 1996), *aff'd* 117 F.3d 37 (2d Cir. 1997) (ordinance against group home for disabled was discriminatory on its face even though not motivated by ill will); *Lenihan v. City of New York*, 636 F. Supp. 998, 1009 (S.D.N.Y. 1985) (intentional discrimination does not require malice or animus toward females); *United States v. Reece*, 457 F. Supp. 43 (D. Mont. 1978) (landlord's refusal to rent to single women because neighborhood was dangerous was intentional discrimination even though not motivated by any invidious intent).

77. *Haffer v. Temple Univ.*, 678 F. Supp. 517, 527 (E.D. Pa. 1987) ("[T]he intent that Temple urges does not exist is provided by Temple's explicit classification of intercollegiate athletic teams on the basis of gender").

78. See *Pederson*, 213 F.3d at 881; Education Amendments of 1972, 20 U.S.C. § 901(a), 20 U.S.C. § 1681(a) (2000); 34 C.F.R. § 106.41 (2001).

79. See *supra* note 76.

80. 490 U.S. 642 (1989).

81. GAVORA, *supra* note 1, at 38.

under Prong 3, accommodating the interests and abilities of women on campus.<sup>82</sup>

As a preliminary matter, one wonders why she attempts to garner such tremendous outcry about OCR activism, when there were just 44 participation cases during an eight-year time-frame, and no college has ever lost any funds for a violation of Title IX standards, despite OCR being responsible for over 1200 colleges and universities. This history clearly cannot be considered governmental "activism."

More importantly, the central thesis of *Tilting* regarding the validity and functionality of the three separate tests is dubious. Gavora acknowledges but dismisses the fact that 72% of the schools reviewed complied with Title IX without providing as many opportunities to women as were provided to men. She argues that because many of the schools complying under Prong 3 were required to add more women's teams, Prong 3 is not a separate test. Yet her own research does not support this conclusion. It concludes that 72% of the schools investigated by the OCR were deemed in compliance with Title IX, despite the school's failure to reach proportionality. This clearly demonstrates that all three tests are viable means of demonstrating compliance with Title IX. That some schools complying under Prong 3 were required to add more women's teams demonstrates that these schools failed to respond adequately to existing unmet interests and abilities among their female student body, not that a "quota" was imposed.

*Tilting* repeats the quota argument incessantly, as if repetition will make it true. The author goads schools around the country to charge at windmills, as did Brown University, by asserting that *Cohen* is only binding in the First Circuit, thus inferring that her "quota" argument under Title IX is not yet settled law.<sup>83</sup> As any attorney will conclude however, advising a university that they "should feel free to litigate within their own jurisdictions"<sup>84</sup> would probably constitute legal malpractice without serious counseling about the slim possibility of success, particularly when Brown University spent millions trying to justify a decision intended to save just thousands per year. Whatever opinion Gavora or others might have on Title IX and alleged

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82. *Id.*

83. *Id.* at 87.

84. *Id.*

"quotas," it is not one shared by the federal judiciary nationwide. Instead, it has been unanimously discredited and rejected.

VI. WINDMILL #4: PRONG 3 OF TITLE IX'S PARTICIPATION TEST DOES NOT PROVIDE SCHOOLS WITH SUFFICIENT CERTAINTY

As described previously in this article, schools can demonstrate that they are not gender discriminating in their athletic offerings when they are fully and effectively meeting the female students' interests and abilities to participate in sports.<sup>85</sup> Gavora argues that schools cannot use this test because it is too vague and does not avoid litigation with certainty. She asks rhetorically, "what does it mean to 'fully and effectively accommodate' women's interest in sports? Does this test obligate a university to offer an athletic team to every woman who comes along and requests one?"<sup>86</sup> Gavora maintains that the "OCR has offered only limited guidance to schools attempting to meet [Prong 3]."<sup>87</sup> In fact, it would be difficult for the OCR to provide clearer guidance regarding the meaning of Prong 3 in its 1996 Policy Clarification, which is set forth in full in this footnote.<sup>88</sup>

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85. 44 Fed. Reg. 71413 (1979).

86. GAVORA, *supra* note 1, at 37.

87. *Id.* at 36.

88. OCR, *supra* note 26, at 10-13.

While disproportionately high athletic participation rates by an institution's students of the overrepresented sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the underrepresented sex, an institution can satisfy part three where there is evidence that the imbalance does not reflect discrimination, i.e., where it can be demonstrated that, notwithstanding disproportionately low participation rates by the institution's students of the underrepresented sex, the interests and abilities of these students are, in fact, being fully and effectively accommodated.

In making this determination, OCR will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team. If all three conditions are present OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.

A) IS THERE SUFFICIENT UNMET INTEREST TO SUPPORT AN INTERCOLLEGIATE TEAM? OCR will determine whether there is sufficient unmet interest among the institution's students who are members of the underrepresented sex to sustain an intercollegiate team. OCR will look for interest by the underrepresented sex as expressed through the following indicators, among others:

- requests by students and admitted students that a particular sport be added;
- requests that an existing club sport be elevated to intercollegiate team status;
- participation in particular club or intramural sports;
- interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
- results of questionnaires of students and admitted students regarding interests in particular sports; and
- participation in particular interscholastic sports by admitted students.

In addition, OCR will look at participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students in order to ascertain likely interest and ability of its students and admitted students in particular sport(s). For example, where OCR's investigation finds that a substantial number of high schools from the relevant region offer a particular sport which the institution does not offer for the underrepresented sex, OCR will ask the institution to provide a basis for any assertion that its students and admitted students are not interested in playing that sport. OCR may also interview students, admitted students, coaches, and others regarding interest in that sport.

An institution may evaluate its athletic program to assess the athletic interest of its students of the underrepresented sex using nondiscriminatory methods of its choosing. Accordingly, institutions have flexibility in choosing a nondiscriminatory method of determining athletic interests and abilities provided they meet certain requirements. *See* 44 Fed. Reg. at 71417. These assessments may use straightforward and inexpensive techniques, such as a student questionnaire or an open forum, to identify students' interests and abilities. Thus, while OCR expects that an institution's assessment should reach a wide audience of students and should be open-ended regarding the sports students can express interest in, OCR does not require elaborate scientific validation of assessments.

An institution's evaluation of interest should be done periodically so that the institution can identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex. The evaluation should also take into account sports played in the high schools and communities from which the institution draws its students both as an indication of possible interest on campus and to permit the institution to plan to meet the interests of admitted students of the underrepresented sex.

**B) IS THERE SUFFICIENT ABILITY TO SUSTAIN AN INTERCOLLEGIATE TEAM?** Second, OCR will determine whether there is sufficient ability among interested students of the underrepresented sex to sustain an intercollegiate team. OCR will examine indications of ability such as:

- the athletic experience and accomplishments—in interscholastic, club or intramural competition—of students and admitted students interested in playing the sport;
- opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; and

Beyond this clear guidance from the OCR, caselaw provides guidance to Gavora's rhetorical questions regarding how a school can demonstrate compliance under Prong 3. The First Circuit in *Cohen* suggested that in order to meet the "unmet interests" test of Prong 3, women needed to be able to compete at the varsity level.<sup>89</sup> In that case, the district court found from extensive testimony that the women's gymnastics, fencing, ski team and water polo team "had demonstrated the interest and ability to compete at the top varsity level and would benefit from university funding."<sup>90</sup> However, unlike the absurd suggestion by Gavora that schools must provide opportunities to any woman who requests a team, the court in *Cohen II* held specifically that that was not the case, ". . . the mere fact that there are some female students interested in a sport does not *ipso facto* require the school to provide a varsity team in order to comply with the third benchmark."<sup>91</sup>

In short, the OCR and case law have provided detailed guidance with examples showing how schools may comply under Prong 3. According to the OCR, women athletes requesting additional educational opportunities in the form of sports participation must be able to demonstrate that there is sufficient unmet interest to support an intercollegiate team, that there is sufficient ability to sustain an intercollegiate team, and that there is a reasonable expectation of competition for the team. As Gavora con-

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- if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.

Neither a poor competitive record nor the inability of interested students or admitted students to play at the same level of competition engaged in by the institution's other athletes is conclusive evidence of lack of ability. It is sufficient that interested students and admitted students have the potential to sustain an intercollegiate team.

C) IS THERE A REASONABLE EXPECTATION OF COMPETITION FOR THE TEAM? Finally, OCR determines whether there is a reasonable expectation of intercollegiate competition for a particular sport in the institution's normal competitive region. In evaluating available competition, OCR will look at available competitive opportunities in the geographic area in which the institution's athletes primarily compete, including: competitive opportunities offered by other schools against which the institution competes; and competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete.

89. See *Cohen IV*, 101 F.3d at 164.

90. *Id.*

91. See *Cohen II*, 991 F.2d at 898 (quoting 44 Fed. Reg. 71418) (emphasis added).

cedes, numerous schools successfully comply with Title IX by relying on Prong 3, and to argue that it is either too vague or that it does not provide schools with certainty from litigation is inaccurate.

VII. WINDMILL #5: WOMEN DO NOT DESERVE SPORTS OPPORTUNITIES BECAUSE THEY ARE NOT AS INTERESTED IN SPORTS

*Tilting* asserts that women are not as deserving of new athletic opportunities because they are not as interested in sports. The villainous Title IX, she argues, is out to change the fundamental nature of men and women. She argues that cutting men's sports has "nothing to do with saving money, and everything to do with making the numbers line up right."<sup>92</sup> In other words, it's not economics that determine sports participation, it's sociology — supposedly schools cannot recruit enough women to participate in their sports program, and that thereby, the law "punishes men for the fact that women are not as interested in sports."<sup>93</sup> To support her conclusions, she relies on some quasi-social science<sup>94</sup> and the fact that women do not walk-on to teams at rates equivalent to men.<sup>95</sup> But her facts and quotes from a few college coaches fail to support her proposition, and instead just speak to cast-off gender stereotypes.

A. *Interest and Walk-On Positions*

*Tilting* cites figures indicating that currently more than six million boys and girls play high school sports, who will then vie for fewer than 400,000 college athletic participation slots. The cut off between high school participation and athletic scholarship dollars is even steeper. According to the NCAA, not even one in 330 high school athletes will land a college scholarship.<sup>96</sup> With 2.8 million girls playing high school sports, it is inconceivable that colleges cannot find women to play on the teams they create, particularly when schools spend almost twice as much money getting men to play on their teams as they do on women.<sup>97</sup> A comparable analogy would be the National Football League claiming

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92. GAVORA, *supra* note 1, at 56.

93. *Id.* at 55, 56.

94. GAVORA, *supra* note 1, at 132-47.

95. *Id.* at 68.

96. NCAA Report, *supra* note 42.

97. *Id.*



that it could not find football players to play in its league, when each year the League drafts fewer than two hundred players and there are currently 60,000 football players in the NCAA. The fact is that demand for sports participation by both males and females far exceeds institutional resources.

The fact that some schools do not have as many female walk-on participants or "bench warmers" as those for men's team does not demonstrate women's lack of interest in sports participation. As Gavora readily admits, women rush to fill genuine competitive athletic opportunities. "[F]ewer women than men are willing to 'ride the bench' for a season without getting a chance to compete."<sup>98</sup>

'Girls are smarter,' says Providence College women's tennis coach. . . They look at the other girls playing and in some cases they say, 'I'm not going to be number nine or number ten. So even though we have twelve spots [on the team] I can't fill them because the girls ask, 'How many travel?' We say, 'Eight.' And they say, 'That's okay coach. Nice knowing you.'<sup>99</sup>

Gavora's examples illustrate that women are inquiring into sports participation opportunities, and demonstrating their desire to compete on a team. They don't want to be symbolic team members with little utility.<sup>100</sup> Gavora's arguments actually support the opposite of the conclusion she intended — that women are very interested in playing sports — and perhaps their interest in sports participation is different from the way men choose to participate, a result she should logically applaud and one the current law permits.

Gavora argues that walk-ons are not about athletic department finances, they are about making the numbers between men and women come out even for "bureaucratic bean counters."<sup>101</sup> But almost no one inside sports attempts to argue that walk-on positions are costless. They may be comparatively less expensive, but they are far from free. Costs include equipment, uniforms, additional supervision in the form of assistant coaches and man-

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98. GAVORA, *supra* note 1, at 68.

99. *Id.*

100. Gavora's arguments regarding walk-ons, however, lack internal consistency. For example, men are lauded for their willingness to walk-on (*id.* at 55-56) but the high numbers of walk-ons for a women's rowing team is an object of scorn. "[A]lthough some coaches question how often the last 80 or so women on a 150-woman squad get to compete . . . coaches have instituted 'no-cut' policies, all in an effort to attract and keep females on their rosters." *Id.* at 66.

101. *Id.* at 55, 56.

agers, medical care, access to the training room, insurance, food provided to athletes at “training tables,” academic tutors, and a host of other benefits related to varsity status. Football walk-ons, in particular, are actually quite expensive. Women’s athletic budgets are comparably smaller, giving coaches a disincentive to keep additional athletes on the bench. Of course funding walk-on positions is about finances.

The legal issue facing schools is whether a school’s heavy male walk-on roster will prevent that same school from starting and funding a women’s team, for which women are expressing a tremendous demand for actual competition. Male walk-ons cost money that could instead be used to field real female athletic opportunities. Deciding whether and how many walk-on positions to budget reflects how a school chooses to allocate financial resources. Far from being divorced from budgetary considerations, decisions regarding allocating these financial resources are inexorably intertwined with gender equity.

Demonstrating the law’s flexibility, Title IX permits (but does not require) unequal expenditures between the sexes when schools are providing the students with equivalent educational opportunities. The 1975 implementing regulations state:

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute non-compliance . . . but the [OCR] may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.<sup>102</sup>

Furthermore, the 1979 policy interpretation recognizes that men’s and women’s teams will have different financial requirements “because of unique aspects of particular sports or athletic activities.”<sup>103</sup> It allows such differences if sport-specific needs are met equivalently in both men’s and women’s programs.<sup>104</sup> In other words, funding an equestrian team may inherently cost more than a swimming team. So long as schools are providing the sexes with the same quality equipment or facilities, the OCR and the courts have considered this cost-differential to be nondiscriminatory in that both the men in the expensive sport and the women in the inexpensive sport are being provided the same educational opportunity to participate on an athletics team. Inci-

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102. 34 C.F.R. § 106.41(c) (2001).

103. Title IX Policy Interpretation, 44 Fed. Reg. 71415.

104. *Id.*

dently, this portion of the law is frequently used justify the enormous budget differential between men's and women's sports.<sup>105</sup>

On the other hand, Title IX also permits (but does not require) men to choose a limited number of teams with numerous positions, including positions with little hope of seeing the competition on the field, while women may choose to have more but smaller teams in which all the team members compete.<sup>106</sup>

While Gavora tries to argue that women demand fewer sports, it is simply that women generally demand a different type of sporting experience. Gavora seems to insist that women demand the same type of athletic competition that men demand. If Title IX does not require cost trade-offs for competing resources as Gavora argues, and consistent with her assertion that unequal outcomes are acceptable if men and women have different interests and abilities, providing women with additional teams in order to meet women's distinctive interests is philosophically consistent. When Gavora tries to argue that schools should not penalize men for the fact that women do not want to walk-on, she is wrong. A closer examination reveals that the argument should be reversed: women should not be penalized by limiting the number of teams provided to them just because men want to walk-on to their teams.

### B. *The Science of Interest*

Given the enormous changes that have occurred in women's athletics over the past 30 years, it cannot be argued that women's interests in sports is immutable or innate. Yet Gavora tries to solve the nature / nurture dilemma, and in her world, nature dictates women's interest. Women are "naturally" more interested in mothering and gathering food than men, who are better at spear-throwing and "clubbing enemies."<sup>107</sup> Gavora uses this evolutionary theory to explain why "90 percent of 2-year-old boys can throw farther than same-age girls." While she acknowledges that her assertions are not provable,<sup>108</sup> she would still use it as "evidence" to legally limit girls' opportunities in athletics. This

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105. This portion of the law represents a political compromise after the originally proposed regulations required equal expenditures between the sexes.

106. 44 Fed. Reg. 71413.

107. GAVORA, *supra* note 1, at 135.

108. *Id.* at 146.

practice is constitutionally impermissible.<sup>109</sup> These are exactly the sorts of unfounded stereotypes that led to the dearth of women's sporting opportunities throughout the 1950s and 1960s. As courts have held:

Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience. . . . [W]omen's lower rate of participation in athletics reflects women's historical lack of opportunities to participate in sports.<sup>110</sup>

Women's participation rates are still increasing.<sup>111</sup> To cap participation rates based on the idea that women are less interested in sports than men would freeze current levels of participation and would prevent current and future growth of women's opportunities.

### C. *Interest Is Part of Title IX's Legal Test For Compliance*

As Gavora admits, interest *is* factored into Title IX's third prong of the participation test for compliance. If a school does not have unmet demand for a potentially viable competitive team, if it is providing opportunities for the women athletes who attend the school and have the ability to play and want to play, then as a legal matter, the school will be in compliance under the third prong of Title IX's participation test.<sup>112</sup> It is the huge demand for women's sports that keeps particularly large institutions from relying on Prong 3 to provide fewer opportunities for women than required under the proportionality test. But this just proves the point that girls are interested in sports.

Gavora poses the following question: "If universities are willing to jettison aspiring male athletes in the name of equality, why not aspiring male physicists?"<sup>113</sup> Gavora confuses the gender-blind physics department with sex-segregated athletic departments. Because athletic departments are permitted by Title IX to

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109. As Justice O'Connor noted in *Nguyen v. INS*, 533 U.S. 53 (2000), the Court has recognized that stereotypes, although empirically grounded, may be rational and impermissible at the same time. She observed that just because a gender-based classification laden with stereotypes may apply to many or most individuals, and even when the generalization is empirically supported, the Court has rejected statutes that classified overbroadly by gender if more accurate and impartial distinctions might have been made. *Id.* at 88-92.

110. *Cohen IV*, 101 F.3d at 178-79.

111. GAVORA, *supra* note 1, at 33.

112. *See supra* note 19.

113. GAVORA, *supra* note 1, at 126.

sponsor separate teams for men and women,<sup>114</sup> they cannot functionally operate in the same gender-blind manner as the other departments within a school. While the math department may not care at all that its male and female enrollment swings drastically from year to year, an athletic department has no such flexibility. A college must decide — well in advance of an athlete's high school sophomore year — how many teams they will be sponsoring when that high school athlete eventually becomes a college freshman. As courts have ruled when closely examining this issue, “determining whether discrimination exists in athletic programs *requires* gender-conscious, group-wide comparisons.”<sup>115</sup> A school *creates* the opportunities and then *recruits* athletes to fill the opportunities created. Title IX simply requires that schools allocate these school-created slots in a nondiscriminatory manner.

#### D. *Recruiting Interested Athletes*

Both courts and legal commentators have discarded Gavora's “relative interests” arguments, also espoused by defense attorneys in *Cohen*:

“[A]ny survey of [the interests of] the student body will be driven by the university's athletic offerings, recruiting practices, admissions preferences, and athletic scholarships, if available. Particularly at Division 1 schools that rely on recruiting to select their intercollegiate athletes, the results of a survey of athletic interest in the student body is predetermined by the university's selection of sports and recruiting practices. For example, if a university recruits twice as many men as women for its intercollegiate athletic offerings, a survey which finds more men than women who claim to be interested in participating in intercollegiate athletics is not a true measure of relative interest. Similarly, a survey of student applicants to a university will be skewed by that university's existing opportunities. Students who want to participate in a sport not offered at a particular university may not apply there.”<sup>116</sup>

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114. The regulations explicitly permit institutions to provide separate-sex athletic teams “where selection for such teams is based upon competitive skill or the activity involved is a contact sport.” 34 C.F.R. § 106.41(b) (1999).

115. *Neal*, 198 F.3d at 773.

116. 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, 79 (1996); see also John C. Weistart, *Can Gender Equity Find a Place in Commercialized College Sport?*, 3 DUKE J. GENDER L. & POL'Y 191, 234 (1996) (“[M]ost schools in Division I and Division II create interest in their programs. They

Courts have recognized that demand for sports at a particular college is due in part to what sports are provided by the college, and a school's efforts to attract these athletes to the campus.<sup>117</sup> Students interested in playing soccer in college will not apply to schools that do not have soccer programs. Additionally, recruiting provides increased numbers of new students with an interest and ability to participate in sports. Athletic departments determine the relative interests of men and women when it chooses its sports offerings and decides the sums spent on recruiting.<sup>118</sup>

Gavora conveniently ignores the enormous sums athletic departments spend recruiting men to play for their schools. Recruiting for women, however, is evidence of a problem inherent in trying to attract more women to participate in athletics.<sup>119</sup> She offers a list of the efforts that have been made to recruit women athletes, concentrating on the recent popularity of large women's crew squads across the nation. "What [athletic directors] needed [ ] was a sport that could accommodate large numbers of women and didn't require previous experience."<sup>120</sup> Efforts to recruit women include scholarships, open-try-outs, coaches walking through campus in search of tall, broad-shouldered women, and advertisements in school newspapers.<sup>121</sup> The fact that male rowers have traditionally been recruited to college campuses using precisely these techniques does not seem to have occurred to Gavora.<sup>122</sup> Indeed, at least one football team from Division 1A has never cut a single walk-on player, even

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do this by recruiting. Their coaches . . . search out appropriate athletic candidates, who are then cajoled, entreated, and given special considerations solely to induce them to come to school to play sports").

117. See *Neal*, 198 F.3d at 769 ("[T]he creation of additional athletic spots for women would prompt universities to recruit more female athletes, in the long run shifting women's demand curve for sports participation. As more women participated, social norms discouraging women's participation in sports presumably would be further eroded, prompting additional increases in women's participation levels"); *Cohen IV*, 101 F.3d at 177 ("[B]ecause recruitment of interested athletes is at the discretion of the institution, there is a risk that the institution will recruit only enough women to fill positions in a program that already under represents women, and that the smaller size of the women's program will have the effect of discouraging women's participation").

118. NCAA Report, *supra* note 42.

119. GAVORA, *supra* note 1, at 64-69.

120. *Id.* at 65.

121. *Id.* at 66, 67.

122. As recognized in *Cohen III*, crew was an example of a sport in which interest commonly develops only after matriculation to college. 879 F. Supp. at 207.

when those players have never had any football experience, in order to fill their teams.<sup>123</sup>

The case of Anita DeFrantz provides the clearest example of this principle at work. One of the most powerful American woman in sports, DeFrantz,<sup>124</sup> was recruited onto the rowing team at Connecticut College using similar techniques mentioned above during her sophomore year. She had never seen a crew team on the water before that time. DeFrantz went on to win an Olympic bronze medal, earn her law degree, become the executive director of the Los Angeles Sports Foundation, and vice president and executive board member of the International Olympic Committee.<sup>125</sup> Without just the sorts of efforts Gavora recites with contempt, DeFrantz would not only have missed out on competition, but also on this gateway to her career in sports leadership positions. Rather than demonstrating women's inherent lack of interest in sports, recruiting was essential in giving DeFrantz the keys to this important educational experience and sports career opportunity.

The last 30 years show irrefutably that interest is a function of available opportunities. Girls and women have rushed to fill genuine participation opportunities as schools have created them, despite the oftentimes second-class treatment they receive. One out of every 2.5 high school girls is now an athlete. Girls currently in high school are participating in athletics at a rate of 2.8 million per year, and 150,000 women now compete in college. It is the huge demand for women's sports that keeps particularly large institutions with a very small percentage of their students participating in the athletic department from relying on prongs 2 and 3 to provide fewer opportunities than required under the proportionality test, proving the point that girls are interested in sports. The myth that Ms. Gavora perpetuates — that women are not as interested in sports — persists stubbornly despite the powerful reality to the contrary. Young women continue to be hampered by schools that fail to field teams because of these outmoded stereotypes that virtually everyone agrees — including Gavora — are not provable, and in fact are inaccurate.

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123. Brief of Appellee at 12, *Mercer v. Duke University*, No. 01-1512, 2002 WL 31528244 (4th Cir. 2002); see Heckman, *The Glass Sneaker*, *supra* note 9.

124. See *Women's Sports Foundation*, at <http://www.womenssportsfoundation.org/cgi-bin/iowa/athletes/article.html?record=68>.

125. *The Official Website of the Olympic Movement*, at [http://www.olympic.org/uk/organisation/ioc/members/bio\\_uk.asp?id=35](http://www.olympic.org/uk/organisation/ioc/members/bio_uk.asp?id=35).

VIII. WINDMILL #6: FOOTBALL HELPS WOMEN'S  
ATHLETIC PROGRAMS

Gavora argues that schools that have large football teams do a better job of providing gender-equity to the female athletes on campus. She tries to make the point that institutions with strong football and men's basketball programs "do the best job of providing opportunities and spending for women's athletics."<sup>126</sup> She describes a study showing that Title IX compliance increased by .4 percentage points for each \$1 million in football profits.<sup>127</sup> However, she fails to tell her readers that schools with big football programs are the same schools dropping men's minor sports, like wrestling.<sup>128</sup> It is precisely at these big football schools, Division 1-A, where men's sports are being cut at the fastest clip.<sup>129</sup> At the Division II and III NCAA schools, where virtually 100% of football programs and athletic departments lose money, the number of men's minor sports per school has actually increased over the past 20 years.<sup>130</sup> In contrast, at the Division I-A level the number of nonrevenue men's sports per school has decreased. If Title IX truly places unreasonable financial constraints on athletic departments, schools with small budgets should have been the first schools to drop men's minor sports, rather than these larger schools. Gavora's statistics support the fact that the opposite is true. The oft-repeated proposition by economists and legal commentators alike that it is football's wasted expenditures and spiraling costs that are actually responsible for cutting men's minor sports,<sup>131</sup> and not Title IX,<sup>132</sup>

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126. *Id.* at 62.

127. *Id.*

128. Equity in Athletics Disclosure Act, Pub. L. No. 103-382 § 360(B), 108 Stat. 3969, 3969-71 (1994).

129. *Id.*

130. Welch Suggs, *At Smaller Colleges, Women Get Bigger Share of Sports Funds*, CHRON. OF HIGHER EDUC., Apr. 14, 2000, at A69.

131. FULKS, *supra* note 43.

132. Andrew Zimbalist, *Backlash Against Title IX: An End Run Around Female Athletes*, CHRON. HIGHER EDUC., Mar. 3, 2000, at B9 (noting that female athletes still play in inferior facilities, stay in cheaper hotels while traveling, eat in cheaper restaurants, have smaller promotional budgets, and have fewer assistant coaches); John C. Weistart, *Can Gender Equity Find a Place in Commercialized College Sport?*, 3 DUKE J. GENDER L. & POL'Y 191, 221 n.101 (1996) (revenue sports depend on large taxpayer and institutional investments and the general good will of the university in order to generate revenue); TOM McMILLEN WITH PAUL COGGINS, *OUT OF BOUNDS: HOW THE AMERICAN SPORTS ESTABLISHMENT IS BEING DRIVEN BY GREED AND HYPOCRISY - AND WHAT NEEDS TO BE DONE ABOUT IT* (1992)



The topic of football raises two separate and seemingly independent public debates on collegiate athletics, occurring simultaneously. In addition to the attention Title IX is receiving, college presidents and governing board directors are appalled by the spiraling costs of operating football programs.<sup>133</sup> In the past two years alone, 2.5 million new dollars have gone into collegiate athletic departments, largely into men's football programs.<sup>134</sup> These costs have nothing to do with making better athletes or a more exciting spectator event, and everything to do with fierce competition for attracting unpaid athletes to the school.<sup>135</sup> These new monies are directed from student fees, general funds and donors, and what does not go into cherry-wood lockers, solid brass nameplates, plush carpets and million-dollar weight rooms ends up in the pockets of coaches. The best paid football coaches now make in excess of \$2 million a year.<sup>136</sup> Quite apart from any public discussion about Title IX, schools throughout the country are questioning whether this expensive brand of football can survive within the context of an educational institution while preserving the educational mission of athletics.<sup>137</sup> Economists and legal commentators alike have placed the blame for any dropping of men's sports squarely at the feet of these big football programs.<sup>138</sup> If these big football programs help women at all, it is

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(arguing for a new distribution of funds, not based on win-loss records, but on such criteria as graduation rates and compliance with Title IX).

133. See Zimbalist, *supra* note 134; see also ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS (Princeton University Press 1999); Michael Sokolove, *Football is a Sucker's Game*, N.Y. TIMES MAG., Dec. 22, 2002.

134. Equity in Athletics Disclosure Act, Pub. L. No. 103-382 § 360(B), 108 Stat. 3969, 3969-71 (1994), available at <http://ope.ed.gov/athletics/index.asp>.

135. ZIMBALIST, UNPAID PROFESSIONALS, *supra* note 133.

136. *Id.*

137. See Sokolove, *supra* note 133; Welch Suggs, *College Presidents Urged to Take Control of College Sports; Knight Commission Seeks to Create a Coalition, Independent of the NCAA, To Create Reform*, CHRON. OF HIGHER EDUC., July 6, 2001, at A35; *Tulane Opts To Remain in Division I-A*, CHRON. OF HIGHER EDUC., June 20, 2003, at A33 (Tulane University announced that it would keep its sports programs in Division I-A of the National Collegiate Athletic Association, ending a two-month debate over whether it should cut its losses — \$7-million annually — by dropping football or restructuring its athletics department and switching to the NCAA's Division III).

138. Weistart, *supra* note 116, at 221 n.101 (1996) (revenue sports depend on large taxpayer and institutional investments and the general good will of the university in order to generate revenue); see McMILLEN, OUT OF BOUNDS, *supra* note 134 (arguing for a new distribution of funds, not based on win-loss records, but on such criteria as graduation rates, compliance with Title IX); see also Brian L. Porto, *Completing the Revolution: Title IX as Catalyst for an Alternative Model of College*

only because Title IX requires that student athletes be given the same treatment and benefits.<sup>139</sup> As schools foist benefits such as facilities, equipment, travel perks, access to training tables and training facilities onto football players, Title IX requires that they provide women athletes with the same benefits.<sup>140</sup> Assuredly, women's advances in schools that have big football programs are not due to the gratuitous nature of schools with football teams.

#### IX. WINDMILL #7: TITLE IX IS BEING USED TO TURN WOMEN INTO MEN

Gavora argues that "What should be of greater concern to those who care about equal opportunity for girls and women is the implicit message of Title IX today: that young girls aren't worthy of respect and admiration unless and until they act like young boys."<sup>141</sup> Yet, Gavora contradicts herself when she recounts a tale of personal accomplishment.

One spring day in Washington a couple of years ago I taped a television show on U.S. women's soccer and Title IX was a leader of the pro-quota women's movement. The show was no more contentious than others I had done on the topic. My fellow panelist and I disagreed diametrically on the impact that Title IX is having not just in sports, but on other areas of education as well. Our conversation was combative, but civil. She made her points and I made mine . . . . After the taping I walked out of the studio in silence with the older woman, a veteran of years of fighting for the feminist cause. As we got into our cars she suddenly stopped and turned to me. "Jessica, I'm going to say something to you that someone should have said a long time ago." She took on a stern, matronly tone and said, "You don't have any idea of the damage you're doing to women. Someday I hope you'll understand the irresponsibility of the things you are saying." "If you have a quarrel with the points I made and the facts I presented, why didn't you make it when the cameras were rolling, in stead of trying to intimidate me in the parking lot?" I said. And I got into my car. I drove away feeling good, both about the argument I had made and about the fact that I had stood up to a more seasoned competitor. The lessons I learned from being an athlete – how to be confident and independent, to trust my abilities and

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*Sports*, 8 SETON HALL J. SPORT L. 351, 369, 383-99 (1998) (describing the corruption resulting from the commercialism of college sports, and the need for a new model of collegiate athletics).

139. 44 Fed. Reg. 71413 (1979).

140. 34 C.F.R. § 106.41 (2002).

141. GAVORA, *supra* note 1, at 9.

strive for excellence – had stood me in good stead. I was my own woman.”<sup>142</sup>

It is curious that the traits she most admires in herself are the very traits most likely to be cultivated by a healthy sports experience: goal-orientation, confidence, independence and a sense of accomplishment. These characteristics were also once socially acceptable exclusively for men. Nowhere in her book does the reader get the sense that Gavora values her intuition, teamwork, or her cooperative spirit, formerly socially acceptable characteristics within the feminine sphere. Traits, incidentally, that gender-equity advocates have long asserted women bring to sports.<sup>143</sup> Women's movement into sports changes the nature of the game fundamentally. Women do not simply adopt classically masculine traits, and the whole of sport is changed with women's increased participation.<sup>144</sup>

Title IX has, to a great degree, eliminated the conflict between being female and being an athlete. If society now considers what Gavora values in herself not merely socially acceptable for women, but admirable for women to possess, Gavora can thank the unprecedented masses of women who have made that possible for her. It is precisely the images of countless female athletes on countless victory stands that are in stark contrast to those omnipresent images of overly thin women in the media and fashion magazines. Accomplished, strong, confident, healthy images of women give all women an alternative choice for self-definition. These alternative images of women make opportunities for women in sports important for women, including the female non-athletes.

In contrast, *Tilting* asserts that

The trend in women's athletics, particularly in the most competitive, high-profile sports, is away from the ideal often claimed by Title IX quota ideologues. Instead of representing the female ideal at the start of the twenty-first century — tough, smart, confident and empowered — female athletes are beginning to resemble the dimwitted, half-civilized male ath-

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142. GAVORA, *supra* note 1, at 10.

143. Carol Oglesby, *Women and Sport, in* SPORTS, GAMES AND PLAY: SOCIAL AND PSYCHOLOGICAL VIEWPOINTS 129, 143 (1989) (noting that sports involve traditionally feminine characteristics, such as cooperation, intuition, teamwork, skill, and inclusiveness as much as male-associated qualities of achievement, independence, and activity); see generally MARIAH BURTON NELSON, ARE WE WINNING YET?: HOW WOMEN ARE CHANGING SPORTS AND SPORTS ARE CHANGING WOMEN (Random House 1991).

144. *Id.*

letes of the feminist stereotype. And in such a situation, the rationale that women's preferences under Title IX are justified because they create better students and better citizens becomes hard to sustain.<sup>145</sup>

Gavora provides no examples of this, and the scholars, research and statistics point to just the opposite conclusion. Women athletes graduate at a far higher rate, with far higher grades than both their male counter-parts and the student-body as a whole.<sup>146</sup> Rather than praising women for moving into uncharted territories with outstanding results, Gavora belittles these women for trying to "act like men." It's just another example of hyperbole over substance.

#### X. WINDMILL #8: CASELAW TURNED INTO URBAN LEGEND

Another problem with *Tilting the Playing Field* is that it inaccurately portrays a number of important Title IX cases by bending the facts and law to create what is best described as the seeds of urban legend. Many of Gavora's assertions are not foot-noted, and the ones that are cited come from newspaper stories or editorials, and not from the relevant court opinions themselves. Her factual inaccuracies are numerous and pointless to recount. But I can't resist demonstrating a few . . .<sup>147</sup>

##### *Daniels v. School Board of Brevard County*<sup>148</sup>

While Gavora asserts that she believes female athletes should be treated equally to male-athletes, she attempts to skewer a court in its decision to remedy unequal treatment. Gavora describes the following case:

When parents of softball players at Merritt Island High School in Florida noticed that the boys' baseball field was nicer than the girls' softball field, they sued the school district under Title IX. The boys, it was true, had better grass, big bleachers, a

145. GAVORA, *supra* note 1, at 160.

146. 2001 NCAA GRADUATION RATES REPORT, available at [http://www.ncaa.org/grad\\_rates/2001/index.html](http://www.ncaa.org/grad_rates/2001/index.html). NCAA Graduation rates for women remain high — 69% compared to 61% for the Division I female student body. Both white and black female student-athletes graduated at rates higher than their student-body counterparts — 72% for whites (64% student body) and 60% for blacks (45% student body). *Id.*

147. While Gavora purports to support the other two requirements imposed on athletic departments by Title IX, equal scholarship allocation and equal treatment, she criticizes these two cases that are about equal treatment, not about requiring institutions to create additional teams. GAVORA, *supra* note 1, at 16, 17.

148. *Daniels v. Sch. Bd. of Brevard County*, 985 F. Supp. 1458, 1460-63 (M.D. Fla. 1997).

concession stand and scoreboards. But the reason was not because the school district had paid for them, but because baseball parents and supporters volunteered their time and money. Still, the court ordered that wherever the resources came from, the facilities had to be equal for girls and boys. That meant the boys' baseball "Home of the Mustangs" sign had to be painted over because the girls didn't have one.<sup>149</sup>

According to the published decisions, however, it was the lack of lighting on the girls' field that caused the parents of the girls' softball team to file suit, and not the inequities in signage, grass quality and other amenities.<sup>150</sup> The court agreed with the plaintiffs that the lack of field lighting caused significant disparities for the girls in spectator attendance, parental involvement, player and spectator enjoyment, and flexibility regarding available practice times.<sup>151</sup> Other examples of inequities cited by the court included batting cages the boys used to sharpen their hitting skills, scoreboards, concession stands, press boxes and signs publicizing the team – all of which added to the prestige of boys' baseball.<sup>152</sup> The girls' softball team in 1997 had none of these.<sup>153</sup> While some of the inequities did result from different levels of booster support, as Gavora's account states, the court found that the girls' fields did not have lighting because the school district itself had made the decision not to light the girls' field. Lack of softball booster support was not the reason.<sup>154</sup>

As for the resolution of the case, while Gavora notes correctly that the court ordered the "Home of the Mustangs" sign removed, she omits the fact that the school board proposed this remedial measure, and not the court. After finding significant disparities between the boys's and girls' programs, the court initially ordered Brevard County to develop its own remedial plan.<sup>155</sup> The school board itself then proposed shutting down the boys' electronic scoreboard, concession stand, press box, announcer's booth, and proposed roping off a portion of the boys' bleachers so that they had the same seating capacity as the girls had.<sup>156</sup> The Board's proposed plan, however, did not involve ad-

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149. GAVORA, *supra* note 1, at 17.

150. Daniels, 985 F. Supp. at 1461.

151. *Id.*

152. *Id.* at 1460-62.

153. *Id.* at 1462.

154. *Id.* at 1461-62.

155. *Id.* at 1463.

156. *Id.* at 1395-96.

ditional funds to remedy the inequities.<sup>157</sup> In evaluating the school board's plan, the court noted:

Unfortunately, the Board's plan leaves much to be desired; it creates the impression that the Board is not as sensitive as it should be regarding the necessity of compliance with Title IX. The Court is inclined to agree with Plaintiffs that many of the Board's proposals seem more retaliatory than constructive. The Board's approach essentially imposes "separate disadvantage," punishing both the girls and the boys, rather than improving the girls' team to the level the boys' team has enjoyed for years.<sup>158</sup>

In March 2001, the Court approved the plans submitted by the Brevard County schools for construction of new facilities, and ordered that the school board ensure there would be no disparities that would violate Title IX in its girls' and boys' baseball programs.<sup>159</sup>

Gavora's condensed account of this case leaves readers with the impression that these girls have gotten federal courts to apply Title IX unreasonably by ordering school districts to paint over signs as a remedy to a trifling problem. In reality, the court consented to a portion of a plan developed by the defendant school board to remedy significant disparities between the two programs. Rather than illustrate the premise that Title IX has gone awry, this case illustrates the burdens female student-athletes still must hurdle in gaining equal treatment for their athletic programs.

*Mercer v. Duke University*<sup>160</sup>

Gavora so mischaracterizes the litigation in *Mercer v. Duke University*<sup>161</sup> that the resulting picture she paints is fictional silliness. Gavora stated:

Coach Goldsmith said that he admired [Mercer's] spunk, but he and several former coaches and kickers testified that she didn't have the strength to boot long field goals against major college competition. Duke denied any bias, but the jury sided with the lady placekicker and awarded Mercer \$2 million for her trouble.<sup>162</sup>

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157. Daniels v. School Bd. Of Brevard County, 995 F. Supp. 1394, 1394-95 (M.D. Fla. 1997).

158. *Id.* at 1397.

159. Landow v. Sch. Bd. of Brevard County, No. 97-CIV-1463-ORL-22KRS, 2001 U.S. Dist. LEXIS 7155, at \*2-4 (M.D. Fla. March 27, 2001).

160. Mercer v. Duke Univ., 190 F.3d 643 (4th Cir. 1999).

161. *Id.*

162. GAVORA, *supra* note 1, at 16.

Again, published opinions and appellee's brief paint an entirely different story. Heather Sue Mercer was an all-state football place-kicker in high school,<sup>163</sup> having been the starting placekicker for Yorktown High School.<sup>164</sup> Yorktown won the 1993 New York state championship, and Mercer was voted All-State placekicker.<sup>165</sup> When she entered Duke University in 1994, she approached Coach Goldsmith and expressed her interest in being a walk-on kicker for the football team.<sup>166</sup> Despite the fact the Goldsmith had never before required another player to try-out, he made Mercer do so, and under adverse conditions.<sup>167</sup> After the tryout, he told her she had not qualified for the team, but told her that she could be a manager.<sup>168</sup> In 1995 she was allowed to practice with the team, and was picked by the seniors (over two male players) to be the kicker during the pre-season intrasquad scrimmage game,<sup>169</sup> where Mercer kicked the game-winning field goal.<sup>170</sup> Although Goldsmith then put her on the team, from 1995 to 1997, he continually took steps to discourage Mercer from wanting to be a part of the team. According to the court, these acts included: Goldsmith prohibited her from attending pre-season training camp in 1995, while allowing the other kickers to do so; he told her that she should outgrow playing little boys' games and instead consider other activities such as beauty pageants or cheerleading; he refused to issue her a uniform or pads or allow her to dress for games; he refused to allow her to sit on the sidelines and told her instead to go sit with her boyfriend in the stands.<sup>171</sup>

Goldsmith later issued a press release stating she was "not on the active roster" – a designation created specifically for Mercer, whereby she could practice with the other kickers, but could not participate at any games.<sup>172</sup> In 1996, Goldsmith dismissed her from the team saying there was no place on the team for

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163. *Mercer*, 190 F.3d at 644.

164. Brief of Appellee at 2, *Mercer*, 2002 WL 31528244.

165. *Id.*

166. *Mercer v. Duke Univ.*, 181 F. Supp. 2d 525, 529 (M.D.N.C. 2001), *vacated in part*, 2002 WL 31528244 (4th Cir. 2002).

167. *Mercer*, 181 F. Supp. at 530.

168. *Id.*

169. *Id.* at 530-31, 538.

170. *Id.* at 531.

171. *Id.* at 531-34, 548-49.

172. *Id.*

her,<sup>173</sup> despite having never cut a single player from the team before.<sup>174</sup>

As Gavora notes, Goldsmith tried to belittle Mercer's athletic abilities both as a trial strategy and publically. But uncontroverted expert testimony established Mercer's superiority as a kicker over Duke's other kickers.<sup>175</sup> Evidence at trial showed that in March 1995, three walk-on placekickers came out for spring practice: Mercer, Pat Tillou and Ted Post.<sup>176</sup> Unlike Mercer, Tillou and Post had never kicked for a high school or college football team.<sup>177</sup> Unlike Mercer, Post had not attended winter conditioning drills, and Tillou attended only the last two weeks of winter conditioning.<sup>178</sup> During spring practice Mercer demonstrated that she was a strong kicker who was more accurate and consistent than Tillou or Post.<sup>179</sup> Evidence at trial also showed that Goldsmith rarely observed Mercer kicking and generally did not allow her to kick from the long distances when the other place kickers were all permitted to do so.<sup>180</sup> Even though cut from the team in 1996, Mercer practiced with the other players in 1997 in hopes of making the team for the next season; however, Goldsmith told her she had no right to be there and told her to leave.<sup>181</sup>

Now imagine that Mercer had endured the same sort of conduct because of her race – making her the sole African-American required to try out for the team under adverse conditions. Imagine teammates picking this African-American to kick the field-winning goal, being told that the athlete is on the team, but prohibited from attending pre-season training camp, while allowing less qualified white athletes to do so. Imagine telling the African-American that they should re-evaluate goals realistically, and

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173. *Id.*

174. Brief of Appellee at 12, *Mercer*, 2002 WL 31528244.

175. *Id.* at 13-14 (“Bill Renner, a former NFL player and nationally recognized kicking expert, observed that Mercer was a good ball-striker, consistent, and disciplined, and had good leg strength, a good trajectory on her kicks, and an effective range from 40 to 45 yards. After reviewing videotapes of Mercer and Jim Mills, Renner concluded that Mercer was a superior kicker to Mills. Likewise, Paul Woodside, a former All-American placekicker at West Virginia University, described Mercer as having outstanding technique, accuracy and consistency, with a field goal range in the mid-40’s. He also concluded that Mercer was ‘far superior’ to Mills”).

176. *Id.* at 4.

177. *Id.* at 4.

178. *Id.* at 4.

179. *Id.* at 4.

180. *Mercer*, 181 F. Supp. at 534.

181. *Id.*



should acknowledge the limitations that their race would forever place on them. Imagine not being allowed to get a uniform or to sit with teammates – all because of the athlete's race. Imagine a coach who refused to realistically evaluate skills because of race. This was the importance of Heather Sue Mercer's case for all women.

After evaluating Duke University's "flagrant disregard" of the ongoing acts of "discrimination and humiliating behavior," the jury assessed the University \$2 million in punitive damages to deter them and others from similar conduct in the future.<sup>182</sup> Logically, *Tilting* should be praising this decision, because it was an example of a woman competing on a men's team, who was requesting treatment on equal terms with the other male athletes. Instead, Gavora has to turn the case into yet-another example of the law gone wrong.

## XI. CONCLUSION

*Tilting the Playing Field* is a quixotic, agenda-driven, opinion piece that blames Title IX for all the evils in athletic departments. It reads like a speech written for an audience of disgruntled male wrestlers who, rather than seeing the real evil giant that crushed their team, view life one dimensionally with a simple mantra: male sports good, Title IX bad. Gavora's speech writing background seems to have prevented her from discussing legal cases without putting a harsh anti-female spin on her analysis of judicial opinions. Her writing is awash with political buzzwords like "quota," "victim," "entitlement"<sup>183</sup> and "affirmative action;" and harsh adjectives and adverbs that seem designed to get attention through talking trash. *Tilting the Playing Field* is not an academic work, though it pretends to be. That its arguments are

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182. *Id.* at 548-49. This \$2 million jury verdict was vacated by the court in November 2002 after the Supreme Court held that punitive damages may not be awarded in private actions brought under Title VI of the Civil Rights Act of 1964. *See Barnes v. Gorman*, 536 U.S. 181 (2002). The Mercer court reasoned that since Title IX, upon which Mercer's claim is based, is also modeled after Title VI and is interpreted and applied in the same manner as Title VI, that the Supreme Court's conclusion that punitive damages are not available under Title VI "compels the conclusion that punitive damages are not available for private actions brought to enforce Title IX." *Mercer*, 2002 WL 31528244, at \*1.

183. In a typical Gavora-twist, she accuses feminists of turning female athletes into welfare queens. "The fact that portraying these remarkable athletes as creatures of entitlement – the welfare queens of the sports world – diminishes their achievement never seems to occur to those feminists who use them for political agenda." GAVORA, *supra* note 1, at 5.

riddled with inconsistencies and its facts drawn from spin provided by losing defense attorneys matters little. Its style is as if its writer were auditioning for a column in the *Conservative Chronicle*: hyperbolic rhetoric with frequent flashes of fiction. For those whose lives revolve around tilting at Title IX windmills, it is a must read.

