

# REVIEW OF BRIAN L. PORTO'S *A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS*

BRIAN A. SNOW\*

*A New Season*<sup>1</sup> echoes the theme of several recent books that call for reformation of intercollegiate athletics programs, particularly in football, to eradicate infections of exploitation, greed, and scholarly malaise in America's post-secondary institutions. Its subtitle, however, "Using Title IX to Reform College Sports," invokes a surprising and novel area of exploration.

The author advocates a "participation" model in intercollegiate athletics that permits students to engage in sports in a manner similar to the non-scholarship, non-professional, postulates of the Ivy League, the Patriot League, and the National Collegiate Athletic Association ("NCAA") Division III.<sup>2</sup> Thus, although schools might still sponsor football, their teams would not retain million dollar coaches, aspire to be the national champion, or maintain multiple platoons of starters and reserves. More emphasis would be given to establishment and development of intramural and club sports, and schools would highlight their "student scholars" instead of "student athletes." Reviving memories of Spartan values, students would play for enjoyment and physical development and concentrate on the value of learning instead of touchdowns and three-point plays.

Paradoxically, in spite of this emphasis on academics, this is not a scholarly book. It is, however, an interesting and informative narrative for mainstream readers, highly dependent on popular sports narratives and news articles for its research. It includes many illustrations of the destructive nature of commercialization of college sports coupled with occasional sidebar discussions of the avaricious seekers and the "villains" and miscreants who sometimes inhabit this arena. *A New Season* challenges and assaults the underpinnings of the muscular showboats of the academic world, firing at four primary targets.

## I. PORTO'S FOUR TARGETS

The first broadside shatters a common public perception that athletic programs derive considerable profits from men's football and basketball—enough to

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\* Brian Snow is General Counsel Emeritus for Colorado State University. The author gratefully acknowledges the assistance of Ellen Holmes and Melanie Nyborg McGrath in the preparation of this article.

1. BRIAN L. PORTO, *A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS* (2003).

2. *Id.* at 174.

maintain the so-called “non-revenue sports” like swimming, golf, and tennis, which do not generally realize sufficient earnings to be self-supporting. Actually, most institutions lose money on intercollegiate athletics.<sup>3</sup> Not only do they not earn enough to support less profitable programs, they do not generate amounts sufficient to nourish their alleged “cash cow” in men’s programs.<sup>4</sup> In fact, 74 of the 114 institutions in Division I-A lost an average of \$3.8 million during the 2001–02 year and only forty made a profit.<sup>5</sup> If the presidents and athletic directors of the “losers” were guests on Donald Trump’s television show, “The Apprentice,” after disclosing their financial failures, they would face his words of occupational doom. Yet, they continue to reign. Some coaches in the higher echelons are paid more than a million dollars each year. After a championship season in 2004, Nick Saban, the head coach of Louisiana State University’s (“LSU”) football team was given a new contract calling for an annual payment of \$2.3 million a year—with incentives that could boost his total to \$3.4 million by 2010—the final year of the contract.<sup>6</sup> Although Saban has been credited with improving the academic performance of the football team, LSU has struggled with its treatment of women athletes.<sup>7</sup>

The second strike blasts athletic programs as chronic wasters of money, particularly in the bloated staffs they retain, their separate academic support areas, and the perquisites they lavish on their employees and “friends.”<sup>8</sup> One illustrative example involves an appearance by the University of Wisconsin in the 1999 Rose Bowl. The narrative reveals that Wisconsin earned a payout of \$1.8 million, but expended about \$2.1 million.<sup>9</sup> A breakdown of these expenses showed that \$831,400 went for airfare, housing, and meals for 832 people, including coaches and their families, six baby-sitters, the marching band, the cheerleaders, and three “Bucky Badger” mascots.<sup>10</sup> Thus, the lush payout was transmogrified into a debt of almost \$300,000.<sup>11</sup>

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3. *Id.* at 52.

4. *Id.* at 68–69.

5. *Id.* at 52.

6. See Melinda Deslatte, *LSU Makes Saban College Football’s Richest Coach*, USATODAY.COM, available at [http://www.usatoday.com/sports/college/football/sec/2004-02-19-saban-contract\\_x.htm](http://www.usatoday.com/sports/college/football/sec/2004-02-19-saban-contract_x.htm) (Feb. 19, 2004). Saban moved to even greener gridiron at the end of 2004 by becoming the head coach of the Miami Dolphins with a reported salary of at least \$4.5 million. Steve Wine, *Saban Leaving LSU to Accept Dolphins Head-Coaching Job*, USATODAY.COM, available at [http://www.usatoday.com/sports/football/nfl/dolphins/2004-12-25-saban-accepts\\_x.htm](http://www.usatoday.com/sports/football/nfl/dolphins/2004-12-25-saban-accepts_x.htm) (Dec. 25, 2004). LSU agreed to pay his successor, Les Miles, formerly head football coach at Oklahoma State University, annual compensation aggregating \$1.25 million, plus conditional incentives. ASSOCIATED PRESS, *New Coach’s Start-up Deal Rivals Saban’s*, ESPN.COM, at <http://sports.espn.go.com/ncf/news/story?id=1965507> (Jan. 21, 2005).

7. See *Pederson v. La. State Univ.*, 201 F.3d 388 (5th Cir. 2000) (involving female students’ class action against the university to force LSU to field women’s soccer and softball teams).

8. PORTO, *supra* note 1, at 60–62.

9. *Id.* at 61.

10. *Id.*

11. *Id.* Those responsible for spending in athletics could have used the U.S. government as a model. In 1975, Senator William Proxmire of Wisconsin instituted the “Golden Fleece” award to recognize the government programs that involved wasteful, idiotic, or ridiculous uses of

The third volley hammers athletics as the subordinator and corroder of the academic mantelpiece of institutions of higher education.<sup>12</sup> The reader finds that the term “student-athlete” is an oxymoron. Tales are told about cheating, plagiarism, falsification of transcripts, grade inflation, and intrusion by athletic personnel into course selection, designed to keep the players eligible as opposed to leading them towards a degree.<sup>13</sup> The reader is reminded of the tragic flushing of star athletes like Dexter Manley and Kevin Ross who were apparently neither exposed to “pedagogy,” nor taught the meaning or spelling of such words.<sup>14</sup> More ammunition for undermining the early intellectual development of athletes is provided by the disclosure that the average member of a “top 25” football or men’s basketball team is ill-prepared for college, having departed from high school in the bottom 25% of his class.<sup>15</sup> The book notes that, unfortunately, many athletes disregard their course work, believing that they will earn their livelihood as part of the multi-million-dollar explosion in signing bonuses and long-term pay in the professional world.<sup>16</sup> Such views, which are widespread among athletes at all ages and levels, are myopic. According to information released by the NCAA, only three in ten thousand (approximately 0.03%) of high school senior boys playing basketball will be drafted by a National Basketball Association (“NBA”) team and only nine in ten thousand (0.09%) will be drafted by a National Football League (“NFL”) team.<sup>17</sup> The book also states that African-American athletes, significant contributors to most college basketball and football teams, may face frustration and severe disappointment after they leave college.<sup>18</sup> The author quotes John Hoberman of the University of Texas as referring to sports as a “ritual of survival that reenacts a visceral African-American determination to persevere.”<sup>19</sup> The book then illustrates why the fire fueling hopes and expectations of post-college athletes is so often doused as they confront the reality of the improbability of never playing in the major leagues.<sup>20</sup> They would be more likely to be hit by an asteroid than to

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taxpayers’ money. Winners included a study of social relationships in a Peruvian brothel and a project for building a low-slung backward steering motorcycle that no one could ride. TAXPAYERS FOR COMMON SENSE, *The Golden Fleece Award* (1975–1988), at <http://www.taxpayer.net/awards/goldenfleece/1975-1980.htm> (last visited Mar. 14, 2005).

12. PORTO, *supra* note 1, at 81–104.

13. The nation’s academic community must have shuddered after reviewing the text of the final exam in assistant basketball coach Jim Harrick Jr.’s course, “Coaching Principles and Strategies of Basketball” at the University of Georgia in 2001. The brain-twisting questions included, “How many halves are in a college basketball game?” and “How many points does a 3-point field goal account for in a basketball game?” ASSOCIATED PRESS, *Cake Walk, Final Exam In Harrick Jr.’s Class at Georgia Was Absurdly Easy*, ESPN.COM, at <http://sportsillustrated.cnn.com/2004/basketball/ncaa/03/03/bc.bkc.georgia.easyclas.ap/?cnn=yes> (Mar. 3, 2004).

14. PORTO, *supra* note 1, at 6.

15. *Id.* at 87.

16. *Id.* at 81–104.

17. NCAA, *Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level*, available at [http://www.ncaa.org/research/prob\\_of\\_competing/probability\\_of\\_competing2.html](http://www.ncaa.org/research/prob_of_competing/probability_of_competing2.html) (last visited Mar. 14, 2005).

18. PORTO, *supra* note 1, at 115–24.

19. *Id.* at 116.

20. *Id.*

realize this dream.<sup>21</sup> The author submits convincing evidence by emphasizing:

There are fewer than 3,400 male professional athletes in team sports, and there are approximately 50.2 million American males who are between the ages of fifteen and thirty-nine, of whom approximately 6.2 million are black. This means that the odds of an African-American male becoming a professional athlete are one in five thousand, which is why there are twelve times as many black lawyers and fifteen times as many black doctors in America as there are black professional athletes. Even in basketball, where African Americans dominate top college teams and professional teams, only 1 in 250 Division I college players will win a job in the NBA.<sup>22</sup>

These are heady and instructive messages for young aspirants in professional sports. If they have subordinated and disdained their academic work in favor of the court or playing field, they face the demeaning and helpless prospect of needing jobs after college, but lacking the requisite skills and talents to perform meaningful work.

The fourth blow attacks shameful and painful criminal behavior by players involving violence, such as rape and physical assault, and scandals resulting from gambling and bribery.<sup>23</sup> Coaches also receive their share of scorn, particularly as to stunts that should embarrass a ten-year-old. For example, Bobby Knight, known for throwing chairs, is scolded for his mistreatment of players and colleagues.<sup>24</sup> The author states, "Bob Knight is an extraordinary teacher of basketball, but he is wholly unqualified to teach anybody manners and civility."<sup>25</sup> The book was published prior to Knight's most recent foray into a bizarre angry exchange at a salad bar with the chancellor of the university where he is now coaching.<sup>26</sup> Tom Osborne, the former coach at the University of Nebraska, is also rebuked as an example of a coach who supported the mystique of entitlement often afforded players by excusing their bad behavior, minimizing its seriousness, and prolonging disciplinary actions so they can continue playing.<sup>27</sup> The cases of Larry Eustachy and Mike Price apparently had not materialized when the book was written. Eustachy, while head men's basketball coach at Iowa State, was accused of "partying" with young sorority women,<sup>28</sup> and Price, who had been employed, but

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21. *Id.*

22. *Id.*

23. *Id.* at 124–29.

24. *Id.* at 130–31.

25. *Id.* at 131.

26. Larry Beil, *Notes From the Future of Entertainment*, YAHOO!SPORTS.COM, at <http://sports.yahoo.com/top/news?slug=lb-halftime&prov=yahoo&type=lgns> (Feb. 7, 2004). After a game, Knight's son, who is also one of his assistants at Texas Tech, reportedly said with reference to hunting with his father, "Imagine how I feel. I'm around him when he's got a gun in his hands." Mark Haslet, *Tech's Knight Exonerated Following Most Recent Meltdown*, DESERT-MOUNTAIN TIMES, available at [http://www.dmtimes.net/blog/Sports/\\_archives/2004/2/5/18271.html](http://www.dmtimes.net/blog/Sports/_archives/2004/2/5/18271.html) (Feb. 5, 2004). At a later game that season, some Tech fans wore shirts proclaiming "Lettuce Support Coach Knight." *Id.*

27. PORTO, *supra* note 1, at 129–30.

28. Tom Witosky, *Eustachy Hearing May Take Weeks*, DES MOINES REGISTER, available

had not signed a contract as Alabama's head football coach, was sanctioned for alleged missteps at a topless bar.<sup>29</sup> Both coaches have since been hired to coach by sly and sanctimonious institutions of higher learning that “dare to be great.”<sup>30</sup>

## II. THE PROFESSIONAL DEVELOPMENT LEAGUE OPTION

The author does recommend a possible option for easing the pain<sup>31</sup> of such disappointment for those who are unwilling or unable to attend college, but have strong athletic skills: participation in professional development leagues. Although the NFL primarily relies on colleges to serve as its “farm system,” it does have a distant and shaky attachment to scrums of hopeful grassgrabbers in an alliance known as NFL Europe.<sup>32</sup> The teams in this league, with ironic names like the Rein Fire and Berlin Thunder, are primarily comprised of American players with at least eight non-American nationals.<sup>33</sup> They perform in a soccer-crazed environment among fans who are newcomers to the vagaries and follies of American football. Attendance for the league has steadily declined from an average 25,361 per game in 1991 (when football was a novelty overseas) to 15,925 in 2004.<sup>34</sup> Many NFL owners object to its survival, pointing to the drain from financial losses and limited success in player development.<sup>35</sup>

Another alliance, the Arena Football League (“AFL”) provides some professional opportunities, especially for those who are not capable of playing in the NFL. Although Kurt Warner, an NFL star quarterback, once played in this league, the name of Daffy Duck is probably more recognizable in the United States than those of the AFL's stars. In the midst of the 2004 season, the league passing leaders were Mark Frieb, Tony Graziani, and Clint Dolezel, and the three top

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at [http://www.enquirer.com/editions/2003/05/05/spt\\_wwwsptcol1e5.html](http://www.enquirer.com/editions/2003/05/05/spt_wwwsptcol1e5.html) (May 5, 2003).

29. ASSOCIATED PRESS, *Witt: Price Warned Before Trip about His Behavior*, ESPN.COM, at <http://www.espn.go.com/ncf/news/2003/0503/1548767.html> (May 3, 2003).

30. See ASSOCIATED PRESS, *Eustachy to Return to Coaching Ranks*, ROCKY MOUNTAIN NEWS, available at [http://www.rockymountainnews.com/drmn/college/article/0,1299,DRMN\\_40\\_2756235,00.html](http://www.rockymountainnews.com/drmn/college/article/0,1299,DRMN_40_2756235,00.html) (Mar. 25, 2004); ASSOCIATED PRESS, *Second Chance in El Paso: UTEP Hires ex-Wazzu, Alabama Coach Price to Rebuild Struggling Program*, CNN.COM, at <http://sportsillustrated.cnn.com/2003/football/ncaa/12/21/utep.price.ap/> (Dec. 21, 2003).

The term “dare to be great” has been used in many contexts to exemplify motivation and a quest for success. It may have achieved its greatest prominence in the early 1970s when it was the theme used by renowned pitcher, Glenn Turner, in connection with a pyramid scheme. See *Dare to be Great, Inc. v. Commonwealth*, 511 S.W.2d. 224 (Ky. 1974).

31. “Ease his pain” was also a philosophical chord for evoking alienation and seclusion in W.P. KINSELLA, *SHOELESS JOE* (Mariner Books 1999), and the movie *FIELD OF DREAMS* (Universal Studios 1989).

32. CANADIAN PRESS—ASSOCIATED PRESS, *NFL Europe Starting 10th Season*, available at [http://slam.canoe.ca/Slam020410/nfle\\_10-ap.html](http://slam.canoe.ca/Slam020410/nfle_10-ap.html) (Apr. 21, 2004); NFL EUROPE, *Turning the Dream Into Reality*, at [http://www.nfleurope.com/news/archive/15082000\\_histintro](http://www.nfleurope.com/news/archive/15082000_histintro) (Aug. 15, 2000).

33. SPORTSLINKSCENTRAL.COM, *NFL Europe*, at [http://www.sportslinkscentral.com/Leagues\\_Teams/nfl\\_europe.htm](http://www.sportslinkscentral.com/Leagues_Teams/nfl_europe.htm) (last revised Feb. 2, 2004).

34. Kenn Tomasch, *NFL Europe Attendance*, at <http://kenn.com/sports/football/nfle/> (last updated Feb. 1, 2005).

35. Les Pasquerelli, *NFL Europe Almost Voted Into Extinction*, ESPN.COM, at <http://sports.espn.go.com/espn/print?id=1618267&type=story> (Sept. 17, 2003).

rushers were Dan Curran, Marlon Moya-Moore, and Adrian McPherson.<sup>36</sup> All are obscure except to the most devoted AFL fans. Football purists disdain the AFL, which has nineteen teams in large cities that play indoor on diminutive surfaces (fifty yards long compared to one hundred yards in the NFL) and feature sky-high scores.<sup>37</sup>

Surprisingly, the AFL has not served as a significant source of new players for the NFL. Few advance to a higher level. Its players tend to be older than those joining the NFL and many have previous minor league football experience. By scheduling games after the end of the NFL season, the AFL satisfies the needs of many fans who want to watch football beyond the regular professional season. Accordingly, it has achieved significant profitability. In 2002, one sports journalist observed that the value of AFL franchises had increased by 250% during the prior three years and 45% in the prior three months, resulting in a going rate for acquisition of an AFL franchise of \$7–10 million.<sup>38</sup> This was only a fraction of the amount required to buy a franchise when the league was formed. The AFL, which recently formed its own development league in smaller cities, Arena Football 2, reaped \$1 million dollars for each new franchise.<sup>39</sup> Owners of NFL teams flocked to AFL franchises as investors in its teams and several more are in line to buy League interests.<sup>40</sup> As these owners become dominant in the AFL, it will be interesting to see whether they are content with the profits and escalation of the value of their franchises, including the newly formed Arena Football 2, or whether this is an emerging plan to use both leagues for development of players. Certainly, this could be valuable insurance if there is significant reform in college football and cease their role as the “minor league” for the NFL.

The NBA has been more willing than the NFL to develop alternatives to colleges for training future prospects. It has fewer players and drafts them at an earlier age than its football counterpart. The NBA sponsors and supports a productive prospect development program. Although none of the six participants in this venture, aptly named the National Basketball Development League (“NBDL”), is affiliated with any specific NBA team, the league is a source of player talent and serves as a proving ground for potential front-office employees in areas such as public and media relations, operations, and marketing.<sup>41</sup> Teams in

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36. David Williams, *Arena League: Some Relief for Football Withdrawal*, at <http://www.outsports.com/columns/arenafootball20030304.htm> (Mar. 4, 2003); ARENA FAN ONLINE, *2004 League Leaders*, at <http://www.arenafan.com/history/?page=yearly&fpage=leaders&year=2004> (last visited Mar. 14, 2005).

37. Richard Weiner, *Arena Football League Becomes a Major Success*, USA TODAY, July 11, 2001, at 3C; ARENA FAN ONLINE, *2005 League Leaders*, available at <http://www.arenafan.com/statistics/?page=leaders> (last visited Mar. 14, 2005).

38. Weiner, *supra* note 37, at 3C; Arlen Boardman, *Arena Football Team Owner Takes Philosophy to Gridiron*, POSTCRESCENT.COM, available at [http://wisinfo.com/postcrescent/news/archive/biz\\_12960509.shtml](http://wisinfo.com/postcrescent/news/archive/biz_12960509.shtml) (Nov. 16, 2003).

39. Weiner, *supra* note 37, at 3C.

40. *Id.*

41. Larry Bills, *National Basketball Development League*, at [http://www.hoovers.com/nbdl/--ID\\_111469--/free-co-factsheet.xhtml](http://www.hoovers.com/nbdl/--ID_111469--/free-co-factsheet.xhtml) (last visited Mar. 14, 2005); NBA, *Welcome to the NBA Team Jobs Website!*, at <http://nbateamjobs.teamworkonline.com/teamwork/jobs/default.cfm> (last visited Mar. 14, 2005).

the NBDL include such colorful combatants as the Columbus Riverdragons in Georgia and the Charleston Lowgators in South Carolina. Players must be at least twenty years of age before the start of the NBDL season or have signed a contract with an NBA team and been subsequently released.<sup>42</sup>

The book suggests that both the NBA and the NFL (with a newly created development program) should allow individuals to “pursue [their] dreams” through two separate “minor leagues” in football and basketball, each organized by age and comprised of a “rookie league” for athletes between the ages of eighteen and nineteen without professional sports experience, and a more advanced league for players between the ages of nineteen and twenty who have played professional sports for at least a year.<sup>43</sup> As compensation for their athletic services, participants in the leagues would be paid a salary.<sup>44</sup> Those who do not advance to the major leagues would also be credited with a right to draw upon a “Future Fund,” for future educational or vocational expenses.<sup>45</sup> The author seems unduly optimistic about significant earnings that might be derived even from creative and well-managed operation of these leagues.<sup>46</sup> No analyses of potential revenues or salary projections are provided to support these conclusions. However, the proposal has merit and should be examined more carefully with consideration of subsidies that might be provided by the NFL, other professional teams, and colleges and universities that might enroll some of the players during their playing careers or in the future.

The NFL is not likely to institute a player development system so long as it can continue relying on free services provided by college athletic programs. Of course, college football players and coaches, supported by rabid fans who possess wealth and political influence, are often willing participants in this arrangement. Most players lack a strong reason for favoring change, finding that programs whose players “graduate” to the NFL offer a more luxuriant environment than all other alternatives.

The lifestyles of outstanding players in strong football programs closely resemble those in the NFL. Such college players are taught and directed by a bevy of individual tutors called coaches; conditioned in facilities that feature high-tech benders, lifters, and squatters in music-laden environments with hot tubs and trainers; treated by the best physicians who love game passes and special attention; fed through services of cooks and nutritionists who are especially adept at transforming an average-sized man into a 380-pound human rhino; and given applause and boosts of self-esteem by a legion of “whim-satisfiers” among fans and boosters. Thus, elite players are indirectly groomed for the NFL while playing as “amateurs” in the college systems.

As should be expected, the NFL has rules that keep this connection secure. It bars all players from being employed by a team in the league until at least three years have passed from the date of the player’s graduation from high school. Thus,

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42. PORTO, *supra* note 1, at 186.

43. *Id.* at 214.

44. *Id.*

45. *Id.*

46. *Id.*

a high school graduate who is an NFL prospect can do nothing, work, or go to college (any college or university often will do, irrespective of its academic quality). The player simply cannot get a job performing in the NFL until the requisite period has passed.

Recently, a star running back for Ohio State University, Maurice Clarett, decided to challenge this rule by suing the NFL in federal district court, claiming that its three-year rule violated the Sherman Antitrust Act and the Clayton Act.<sup>47</sup> He had performed spectacularly during his freshman year in college, but was suspended from playing by the university for disciplinary reasons involving NCAA violations during his second year.<sup>48</sup> As he approached his third year, he decided that he was ready to play in the NFL. The NFL, however, refused to accept him because three years had not passed since his high school graduation; so Clarett sued. Clarett prevailed at the district court level, but lost on appeal when the Second Circuit held that the NFL's three-year rule is a permissible condition of employment under both federal antitrust law and federal labor law.<sup>49</sup>

### III. THE RELEVANCE OF TITLE IX

The reader who is attracted by the inclusion of "Title IX" as part of the title of this book may be disappointed that it does not provide a more balanced analysis and comprehensive discussion of the application of this law, which was originally enacted by Congress in 1972 to prohibit gender discrimination by recipients of federal funds in all sectors of education, including admissions and curriculum.<sup>50</sup> Since educational providers, such as elementary and secondary schools and post-secondary institutions, commonly receive some federal assistance, their athletic programs are almost universally subject to Title IX. The book focuses on application of this law to athletics at the collegiate level where males have clearly dominated and women have often been demeaned and subordinated. Title IX has provided a magnificent vehicle for women to compel institutions to accord them fairness and equality in their right to play, to receive scholarships, and to be treated with respect and dignity.<sup>51</sup> Women have vigorously pursued litigation to attain and preserve these rights and have almost uniformly been successful in these efforts. At least eight federal circuit courts of appeal have upheld their claims of discrimination in athletics under Title IX and particularly underscored their right to equality of participation.<sup>52</sup> However, when men have asserted similar rights under

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47. *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 390 (S.D.N.Y. 2004), *rev'd and vacated by*, 369 F.3d 124 (2d Cir. 2004).

48. See NBC4I.COM, *Geiger Announces Clarett's One-Year Suspension, Sophomore Allegedly Violated Two NCAA Bylaws*, at <http://www.nbc4i.com/sports/2468541/detail.html> (Sept. 10, 2003).

49. *Clarett v. Nat'l Football League*, 369 F.3d 124, 143 (2d Cir. 2004).

50. Pub. L. No. 92-318, §§ 901-907, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. §§ 1681-1688 (2000)).

51. See Catherine Pieronek, *Title IX Beyond Thirty: A Review of Recent Developments*, 30 J.C. & U.L. 75 (2003); NAT'L WOMEN'S LAW CENTER, *THE BATTLE FOR GENDER EQUITY IN ATHLETICS: TITLE IX AT THIRTY* (2002).

52. *Nat'l Wrestling Coaches Ass'n v. United States Dept. of Educ.*, 263 F. Supp. 2d 82, 94-95 (D.D.C. 2003) (noting that Title IX has "survived constitutional challenges in no fewer than



Title IX, often as a result of their teams being downsized in numbers or eliminated, the courts have been disinclined to rule in their favor, emphasizing the historic lack of opportunities for women and observing that men's sports must sometimes give way to avoid continuation of the pattern of subordination of women in athletics.<sup>53</sup>

The author suggests that Title IX could serve as a meaningful catalyst for introducing the "participation" model it advocates and borrows one of its regulatory benchmarks, the "substantial proportionality" test, to advance this position.<sup>54</sup> Under a key prong of this three-part test, intercollegiate athletic opportunities for male and female athletes must be provided in numbers that are substantially proportionate to their respective enrollment ratios.<sup>55</sup> Thus, if women represent 52% of enrolled students and men represent 48%, women would be entitled to 52% of the playing slots on athletic teams and men would have only a 48% share. Since football teams include huge numbers of male players, and women's sports generally have relatively small squads, institutions often encounter difficulties in meeting the required proportionality test unless they are financially capable of sponsoring a massive number of women's sports.

Even though the book contains a trenchant analysis of the inner workings of Title IX, including a carefully constructed examination of the proportionality standard, the manner in which this gender-based statute is to be the linchpin for achieving reformation of college sports is fuzzy and tenuous. Although women's sports have received significant opportunities from the application of Title IX, the book does not give a clear and well-constructed description of how use of the proportionality test will provide a structure for redressing many of the concerns raised in the excellent discussion of the history and the problems currently associated with "big-time" college sports. The reference to Title IX as the foundation for reform seems akin to being given some but not all the pieces of a puzzle to complete. The use of a gender-equity law to justify reforming of the entire college sports "industry" without specific regard to the sex of individuals is puzzling and seemingly unrealistic. Certainly, women's sports, which have been historically subordinated, would profit mightily from strict application of Title IX, including the proportionality standards, but one is hard-pressed to visualize how the academic and behavioral issues addressed in the earlier parts of the book would be addressed.

It must be recognized, however, that this book is clearly visionary and, to some extent revolutionary. Thus, this calls for avoidance of hasty and reckless judgments of the book's limitations. In recent years, institutions have repeatedly attempted to comply with the numerical ratios inherent in the proportionality standard by reducing or eliminating men's sports such as wrestling, gymnastics, and baseball. Others have chosen to enlarge the numbers for women's participation by embracing new offerings of particular sports, such as rowing, that

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eight Federal circuits").

53. *Id.* at 85.

54. PORTO, *supra* note 1, at 186.

55. See Letter from Gerald Reynolds, Assistant Secretary for Civil Rights, United States Dept. of Educ., *Further Clarification of the Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance*, U.S. DEPT. OF EDUC., OFFICE FOR CIVIL RIGHTS, available at <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html> (June 11, 2003).

permit expansion of athletic opportunities for women. For example, Kansas State University increased its female participation levels through the addition of an equestrian team (sixty-two women) and a rowing squad (seventy-four women).<sup>56</sup> Its Athletic Director candidly acknowledged, "Both of those sports were added to offset our football numbers."<sup>57</sup>

The existence of large football rosters, almost exclusively involving men, without comparably populated sports for women, has contributed to institutional difficulties in meeting the proportionality standards under Title IX. The book suggests that instead of emasculating several smaller-sized male squads, as many institutions have done in the last few years to comply with the numerical requirements of the proportionality standard, football should be the target.<sup>58</sup> Indeed, it is the prime candidate for reduction in participants because of its mammoth rosters, with each program containing at least eighty-five participants and sometimes more than a hundred. Application of the proportionality test might prompt colleges to decrease the number of football participants to no more than fifty players, as suggested in the book, thereby freeing up enrollment for athletes in other sports.<sup>59</sup> If this were coupled with strengthening many of the non-revenue sports through the participation model by converting them into intramural and club sports, overall athletic opportunities for both men and women would be enhanced. It must be noted that only about 5% of the total number of college students participate in varsity athletics. That leaves colleges with a dilemma that has never been fully addressed. How are they to accommodate the athletic interests of both men and women who constitute the remaining 95%? Both women and men who are not willing or able to participate in varsity football or basketball have long been shortchanged.<sup>60</sup>

In fact, those sports identified as "non-revenue" and those not given varsity status may be the most neglected group in college athletics. If these programs were configured so that not only women, but also those men who are not part of the favored few, were encouraged and offered greater opportunities in more institutionally-supported intramural and club sports, the sports profile of colleges and universities would be more reasonable and equitable for all students. Such action would promote the spirit and value of Title IX by providing opportunities for those who have effectively been "under represented."

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56. Tom Farrey, *Football Grabs Stronger Hold on Purse Strings*, ESPN.COM, at <http://sports.espn.go.com/gen/s/2003/0025/1514457.html> (Feb. 26, 2003).

57. *Id.*

58. PORTO, *supra* note 1, at 159.

59. *Id.*

60. See Jeffrey Owings et al., *Who Reports Participation in Varsity Intercollegiate Sports at 4-Year Colleges?*, NAT'L CTR. FOR EDUC. STATISTICS, available at <http://nces.ed.gov/pubs/97911.pdf> (Dec. 1996); Melanie Noto, *True Sportsmanship—Intramural and Recreational University Sports*, INSIGHT ON THE NEWS, available at [http://www.findarticles.com/p/articles/mi\\_m1571/is\\_48\\_16/ai\\_72274921](http://www.findarticles.com/p/articles/mi_m1571/is_48_16/ai_72274921) (Dec. 25, 2000).

## CONCLUSION

Fans of “big time” college sports, particularly football, are likely to wonder if they have entered a game of virtual dodgeball as they feel pounded by the negative findings and conclusions in this book. Some readers may be provoked and aggravated, silently questioning the accuracy and validity of the assertions made as they reflect on the litany of adverse observations about their vicarious icons. They should recognize, however, that the factual assertions are well supported by research and that this is exactly the book they *need to read* to be prepared for the debates and dialogues that will inevitably flare in the future. The Association of Governing Boards of Universities and Colleges,<sup>61</sup> the Knight Commission,<sup>62</sup> and the NCAA recently have raised significant concerns similar to those in the book about the problems now reflected in college sports.<sup>63</sup> Vanderbilt University has even integrated its athletic department into the operational mainframe of the institution under the *actual* jurisdiction and supervision of its president.<sup>64</sup> Other institutions that have experienced problems in their athletic programs are reviewing this model as a potential alternative.<sup>65</sup>

This book is not only for the sports enthusiast or the skeptic. It is a valuable resource for anyone who cares about the future of higher education in this country.

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61. See ASS'N OF GOVERNING BODS. OF UNIVS. AND COLLS., *Statement on Board Responsibilities for Intercollegiate Athletics*, available at <http://www.agb.org/content/explore/AthleticStatement.pdf> (Mar. 28, 2004).

62. KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, *Calling Big-Time College Sports to Reform*, available at [http://www.knightfdn.org/default.asp?story=annual/2001/knight\\_commission.htm](http://www.knightfdn.org/default.asp?story=annual/2001/knight_commission.htm) (2001); KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, *Knight Commission Study Finds Two-Thirds of Men's Teams Would be Ineligible for NCAA Basketball Tournament*, available at <http://www.knightfdn.org/default.asp?story=/news%5Fat%5Fknight/releases/2004/2004%5F03%5F18%5Fkcia.html> (Mar. 18, 2004); KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, *Trustees' National Group Advances College Sports Reform Effort* (March 18, 2004), at <http://www.knightfdn.org/default.asp?story=/news%5Fat%5Fknight/releases/2004/2004%5F03%5F29%5Fagb.html> (Mar. 18, 2004).

63. See Bill Pennington, *Unusual Alliance Forming to Reign in College Sports*, N.Y. TIMES, Jan. 17, 2003, at D2; Welch Suggs, *NCAA Weighs New Penalties for Academic Laggards*, CHRON. HIGHER EDUC., Apr. 23, 2004, at A42.

64. See Welch Suggs, *A Course Correction for Vanderbilt Sports*, CHRON. HIGHER EDUC., Oct. 17, 2003, at A43; *Vanderbilt U. Keeps Sports But Drops Its Athletics Dept.*, CHRON. OF HIGHER EDUC., Sep. 19, 2003, at A35.

65. *In Need of an Overhaul: Liaison Recommends Vanderbilt-style Dismantling of CU Athletic Program*, CNNSI.COM, at <http://sportsillustrated.cnn.com/2004/football/ncaa/04/16/bc.fbc.universityassaul.ap/index.html> (Apr. 16, 2004).

