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### Title IX Feminism, Social Justice, and NCAA Reform

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# TITLE IX FEMINISM, SOCIAL JUSTICE, AND NCAA REFORM

*Erin E. Buzuvis*<sup>†</sup>

## INTRODUCTION

The opportunity to present at the Social Justice Feminism conference at the University of Cincinnati College of Law in October of 2012 caused me to consider how social justice feminism applies to the area of law in which I study and teach, that of gender discrimination in education and particularly, collegiate and scholastic athletics. As a Title IX scholar-activist, I feel like I'm doing "feminism" all the time. But what does it mean for me, and others who care about sex discrimination in education and athletics, to do social justice feminism?<sup>1</sup>

This article is my attempt to answer that question as it relates to the dominant concern of Title IX activists today, which is the struggle to secure equal resources and opportunities for women in a college athletic environment that is becoming increasingly commercialized. By commercialized, I mean focused on revenues

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<sup>†</sup> Professor, Western New England University School of Law, and Director of its Center for Gender and Sexuality Studies. Thanks to Emily Houh, Kristen Kalsem, and Verna Williams of the University of Cincinnati College of Law's Center for Race, Gender, and Social Justice, for organizing the Social Justice Feminism conference and encouraging the publication of this paper. Thanks also to my conference co-panelists Juliet Williams and Caroline Hyatt, moderator Deborah Brake, as well as the audience for our panel, for invigorating discussion on the ideas in this paper, as well as the broader topic of social justice feminism and education. Finally, thanks to my Western New England colleagues Bridgette Baldwin, Harris Freeman, Sudha Setty, and Giovanna Shay, as well as my partner/colleague Ann Gillard, for tremendously helpful feedback on earlier drafts.

<sup>1</sup> Social justice feminism is an approach to feminism that seeks to actively assist, care, and attend to the needs of those subordinated by the patriarchy, while recognizing and addressing intersecting and multiple oppressions such as those on the basis of race, class, sexual orientation, and disability. Kristin Kalsem & Verna L. Williams, *Social Justice Feminism*, 18 UCLA WOMEN'S L.J. 131, 157-58 (2010).

rather than the educational purpose that ostensibly belies<sup>2</sup> college and universities' athletic programs. Besides posing a threat to higher education in general,<sup>3</sup> commercialization of athletics is a Title IX problem because it creates an incentive to invest more athletic department resources into certain men's athletic programs, particularly football and basketball, rather than distributing them equitably to women's (and other men's) programs. While Title IX requires that schools ensure equal treatment to men's and women's programs,<sup>4</sup> this equality is more theory than reality in most Division I athletic programs, where women's teams generally have lower operating budgets, recruiting budgets, scholarship dollars, and coaches' salaries than men's teams.<sup>5</sup>

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<sup>2</sup> The NCAA's stated mission is to "integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount." See NCAA CORE PURPOSE AND VALUES, <http://www.ncaa.org/about/ncaa-core-purpose-and-values> (last visited Sept. 2, 2014).

<sup>3</sup> See generally, e.g., BRIAN L. PORTO, A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS 81-109 (2003) (providing examples of college sports athletic programs dilute academic standards through fraud and special treatment); MURRAY SPERBER, BEER AND CIRCUS: HOW BIG-TIME COLLEGE SPORTS IS CRIPPLING UNDERGRADUATE EDUCATION (2001) (criticizing college sports for diverting resources and attention away from academic programs and academic integrity, as well as contribute to an undergraduate culture that deprioritizes academics); ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORT (1999) ("Among the[ir] negative externalities are that college sports compromise the intellectual standards and educational process at U.S. universities").

<sup>4</sup> 34 C.F.R. § 106.41(c)(2)-(10) (2014). Inequitable expenditures do not themselves violate Title IX, but are often at the root of disparities in facilities, coaching salaries, recruiting, equipment, publicity and other areas where equal treatment is required. *Id.* at § 106.41(c).

<sup>5</sup> The median expenditure on by universities in the Football Bowl Subdivision of NCAA Division I for operating and recruiting expenses in men's sports was over \$20 million, compared to \$8 million dollars for women's sports. NCAA, GENDER EQUITY REPORT 30 (2010), available at <http://www.ncaapublications.com/productdownloads/GEQ2010.pdf>. The median expenditure for athletic financial aid was \$4 million to 190 male athletes, compared to \$2.9 million to 159 female athletes. *Id.* at 32. They pay head coaches of men's teams three times what they pay head coaches of women's teams receive, and a similar gap exists in assistant coach salaries. *Id.* at 33-34. And while the greater potential of men's sports to generate revenue is not a defense to discrimination, it is also worth noting that only 57% of Division I football and a similar percentage of basketball programs earn more than they

The NCAA is presently considering or has recently undertaken a number of deregulation initiatives addressing restrictions on recruiting, coaching duties, promotion, number of contests and length of season.<sup>6</sup> Such changes would increase incentives for college athletic departments to devote even more resources to favored men's sports. The NCAA is also facing increasing public pressure to deregulate restrictions on athlete compensation.<sup>7</sup> Though the organization remains avowedly

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spend. NCAA, REVENUE & EXPENSES: DIVISION I INTERCOLLEGIATE PROGRAMS REPORT 28 (2010), available at [http://www.ncaapublications.com/productdownloads/REV\\_EXP\\_2010.pdf](http://www.ncaapublications.com/productdownloads/REV_EXP_2010.pdf).

<sup>6</sup> See, e.g., *NCAA Takes First Step to Simply, Deregulate Complex Rulebook*, ASSOCIATED PRESS (Jan. 20, 2013), <http://www.ncaa.com/news/ncaa/article/2013-01-20/ncaa-takes-first-step-simplify-deregulate-complex-rulebook> (describing proposals approved by the Division I Board of Directors at the 2013 annual convention, many of which eliminate restrictions on the coaching and financial resources athletic departments may devote to recruiting prospective athletes); John Infante, *Bigger Changes in Store for the NCAA Next Year*, (Oct. 8, 2012), <http://www.athleticscholarships.net/2012/10/08/big-changes-ncaa-rules-2013.htm> (discussing the potential for significant rules changes for NCAA Division I in the upcoming year, including major deregulation).

<sup>7</sup> See, e.g., Doug Bando, *End College Sports Indentured Servitude: Pay "Student Athletes"*, FORBES, (Feb. 21, 2012), available at <http://www.cato.org/publications/commentary/end-college-sports-indentured-servitude-pay-student-athletes>; Taylor Branch, *The Shame of College Sports*, ATLANTIC MAG., Oct. 2011; Frank Deford, *Bust the Amateurism Myth*, CHRON. OF HIGHER EDUC., (Dec. 11, 2011), available at <http://chronicle.com/article/NCAA-Frank-Deford/130058/>; Boyce Watkins, *Is the NCAA Racist or Just Getting Rich?* BLACK VOICES (Aug. 4, 2009), available at <http://www.bvonmoney.com/2009/08/04/ncaa-paying-college-athletes/>; Michael Wilbon, *College Athletes Deserve to be Paid*, (July 18, 2011), [http://espn.go.com/college-sports/story/\\_/id/6778847/college-athletes-deserve-paid](http://espn.go.com/college-sports/story/_/id/6778847/college-athletes-deserve-paid); see also Ellen Staurowksy, *A Radical Proposal: Title IX Has No Place in College Sport Pay-for-Play Discussions*, 22 MARQ. SPORTS L.J. 575, 578-80 (2012) (noting and documenting public attention to the pay-for-play debate). While noting the recent flurry of commentary calling for student athlete compensation, it is important to note that scholars and commentators have been calling for such reform for many years. Rodney K. Smith, *An Academic Game Plan*, 67 DENV. U. L. REV. 225-27 (1990) (presenting arguments for rejecting continued adherence to amateurism value in college athletics); see also Seth Davis, *Should College Athletes Be Paid? Why They Already Are*, SPORTS ILLUSTRATED (Sept. 21, 2011), available at [http://sportsillustrated.cnn.com/2011/writers/seth\\_davis/09/21/Branch.rebuttal/index.html](http://sportsillustrated.cnn.com/2011/writers/seth_davis/09/21/Branch.rebuttal/index.html) (citing commentator's criticism of amateurism from 1905).

steadfast in its devotion to amateurism, it seems willing to play with the definition of “scholarship” in order to allow some additional payment to certain athletes. For a short time last year, universities in Division I could offer \$2000 “cost of living stipends” to athletes on full scholarship, whose tuition and room and board are covered by the athletic department.<sup>8</sup> While short-lived, this proposal demonstrates NCAA’s willingness to allow for a distribution of resources in a manner that benefits more male athletes than female. Athletic directors themselves acknowledged that they could not fully-fund the stipends in a manner compliant with Title IX.<sup>9</sup>

Social justice feminism provides a lens through which to imagine Title IX advocates’ response to ever-commercializing college athletics that goes beyond the “bean-counting” aimed at ensuring equitable number of opportunities and resources for female athletes. Social justice feminism demands a broader focus on reform that tackles the system giving rise to the inequality, and to do so in a manner that takes into account race-based and other forms of subordination created by that system as well. Borrowing from the three methodological tools suggested by Professors Kalsem and Williams,<sup>10</sup> this article will first explore the history of athletics (and in particular, college athletics) to describe how it has historically functioned as a tool of White patriarchy. Second, this article will examine “the inter-relationships between interlocking oppressions” inherent in the commercialized model of college

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<sup>8</sup> See Chip Scoggins, *NCAA Plan Stirs Support, Concern*, STAR TRIBUNE (Oct. 30, 2011), available at <http://www.startribune.com/sports/gophers/132831943.html>; Andrew Krammer, *Stipend for Athletes Seems Likely As Talks Progress*, MINNESOTA DAILY (Oct. 2, 2012), available at <http://www.mndaily.com/2012/10/02/stipend-athletes-seems-likely-talks-progress> (explaining that the stipend proposal was overridden by a vote of the Division I membership, but that a second stipend proposal will likely emerge).

<sup>9</sup> This is because there are fewer athletic opportunities for women in sports where full scholarships (as opposed to partial scholarships) are the norm. See Christine Brennan, *Unfair NCAA Plan Belongs on Scrapheap*, USA TODAY (Dec. 15, 2011), available at <http://usatoday30.usatoday.com/sports/columnist/brennan/story/2011-12-14/NCAA-plan-was-bad-from-beginning/51935382/1> (quoting University of Nebraska Athletic Director Tom Osborne pointing out the inherent gender inequality in the stipend proposal).

<sup>10</sup> Kalsem & Williams, *supra* note 1, at 175.

athletics, which alienates and marginalizes athletes in a manner disproportionate to race and gender privilege. Finally, this article will make the case for college athletics reform as a social justice issue, not just a Title IX issue. Efforts to deregulate college athletics and pay athletes like employees are moving college athletics in the exact wrong direction where both gender and racial equality is concerned. While we must, as social justice feminists, resist these efforts, we cannot in good conscience be satisfied with that. We must also push for a paradigmatic shift in college athletics, one that requires a redistribution of athletic department opportunities and resources to allow for broader and more egalitarian access to education by students of all genders, races, and means. To that end, we must capitalize the collective power of concerned faculty and students to put Occupy-style pressure on paralyzed presidents and unwilling athletic directors to take drastic and meaningful steps toward reform.

## **I. LOST HISTORY OF RACE AND SEX DISCRIMINATION IN COLLEGE ATHLETICS**

Kalsem and Williams suggest that one method of social justice feminism involves “looking to history to understand subordinating structures, seeks to acquire more knowledge with which to understand and then dismantle the bases of societal institutions that perpetuate hierarchies and inequities.”<sup>11</sup> By examining what they call “lost” history of race and gender discrimination in athletics, we can contextualize the present controversy about commercialization in ways that help resist framing proposed solutions as pitting gender against race.

### ***A. Race, Interest Convergence, and College Athletics***

In a recent article, Professor Amy McCormick and Professor Robert McCormick describe the history of racial integration in college sports through the lens of Derrick Bell’s

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<sup>11</sup> *Id.* at 175.

theory of interest convergence,<sup>12</sup> a theory that proves useful in examining “lost” history.<sup>13</sup> They point out that the NCAA has historically promoted the interest of African-American athletics when doing so converges with, rather than threatens, the interests of the White majority. They argue that the “integration of college sports, as well as the availability of athletic scholarships for young African Americans, emerged, in our view, not from the enlightened beneficence of U.S. universities and their leaders, desirous of improving the lot of African Americans, but instead from the economic interests of those same, predominantly European American leaders.”<sup>14</sup>

Southern universities, which were segregated until the 1960s and 70s, did not have mixed-race athletic teams. In the 1930s and 40s, as a condition for competing against integrated northern schools, many White southern institutions required that their northern opponents bench the Black players on their football rosters. Northern schools were willing to do this to preserve the opportunity to compete in more lucrative regular-season matchups, as well as bowl games.<sup>15</sup> But to keep college football and basketball going during World War II, northern schools had to increase the numbers of Black students on their rosters, which in turn provided stronger reasons to resist the southern schools’ restrictions on mixed-race play. Some were even willing to cancel games and forgo participation in bowl games rather than play without their Black athletes. This in turn put financial pressure on the segregated southern athletics programs and bowl organizers, which eventually lead to widespread integration of college sports.<sup>16</sup> The Cotton Bowl was the first to integrate, in 1947, when all-White Southern Methodist University played Penn State, which had two Black players.

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<sup>12</sup> Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (“The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”).

<sup>13</sup> Amy Christian McCormick & Robert A. McCormick, *Race and Interest Convergence in NCAA Sports*, 2 WAKE FOREST J. L & POL’Y 17 (2012).

<sup>14</sup> *Id.* at 28.

<sup>15</sup> *Id.* at 30.

<sup>16</sup> *Id.* at 33.

Later, it became necessary for southern universities to integrate their own football and (men's) basketball teams, so that they could field the most talented team possible and compete for the financial rewards associated with winning. For example, only in 1970, after University of Alabama's humiliating defeat by an integrated team from University of Southern California, did the last segregated southern football teams finally integrate.<sup>17</sup> As integration gave rise to widespread practice of recruiting and admitting of Black student athletes on football and basketball scholarships, the competitive and financial interests of White colleges and universities clearly predominated, as illustrated by the fact that many Black athletes were recruited solely for athletic talent, without regard for how they would fare off the field and in the classroom. Specifically, colleges engaging in such recruiting practices largely ignored the fact that educational opportunities for Black students had historically been limited by segregation and that they continue to be diminished by the enduring economic disparities tracing back to slavery and other formal discriminatory practices, as well as tainted by stereotypes about diminished intelligence of both African Americans and athletes, as separate and overlapping groups.<sup>18</sup> As a result, Black athletes were set up to struggle academically, fail to graduate, and/or receive a nominal education that provided an artificial credential with no meaningful impact on the athlete's life after college.

Thus, when it was in the interest of college athletic stakeholders to exclude Black players, as the segregated southern universities did, or to bench them in the service of lucrative matchups with segregated southern teams, as the northern universities did, no efforts toward integration were made. But when it became a competitive (and thus, financial) advantage to roster Black players and to insist on their right to play, the northern schools did so, and with little apparent consideration of these players' education. Interest convergence similarly explains the willingness of southern institutions and bowl organizers to finally capitulate on

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<sup>17</sup> *Id.* at 40.

<sup>18</sup> RONALD A. SMITH, *PAY FOR PLAY: A HISTORY OF BIG-TIME COLLEGE ATHLETICS REFORM* 151-52 (2011).



mixed-race play, in response to the competitive and financial advantage integrated teams.<sup>19</sup>

### ***B. Sex, Interest Convergence, and College Athletics***

Similarly, interest convergence rather than an innate sense of gender equity can best explain the decision of college athletic stakeholders to adopt inclusive attitudes about women's sports. In the 1960s, Cold War attitudes put pressure on athletic stakeholders to be more competitive with the Communist-bloc nations in the Olympic medal count.<sup>20</sup> With the notable exception of certain historically Black colleges and universities,<sup>21</sup> American universities produced no female Olympians, despite incubating nearly all U.S. Olympians in men's events. NCAA leadership feared that without NCAA involvement in women's sports, its monopoly would cede to the NCAA's rival, the Amateur Athletic Union.<sup>22</sup> As a result, the NCAA started discussing in the 1960s the need to create championships and governance structure for women's athletics.<sup>23</sup>

A decade later, however, the NCAA was leading the organized, initial resistance to Title IX's application to athletics,<sup>24</sup> further illustrating that its interest in women's athletics was motivated by a desire for control rather than a desire for equality.

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<sup>19</sup> McCormick & McCormick, *supra* note 13, at 37.

<sup>20</sup> SMITH, *supra* note 18, at 144.

<sup>21</sup> See Jerome A. Dees, *Access or Interest: Why Brown Has Benefited African-American Women More than Title IX*, 76 UMKC L. REV. 625, 626 (2007) (citing Tuskegee Institute and Tennessee State as examples of institutions dominant in women's sport).

<sup>22</sup> BARRIE HOULIHAN, *SPORT, POLICY AND POLITICS: A COMPARATIVE ANALYSIS* 172 (1997) (describing the rivalry between the AAU and the NCAA as involving such conflicts as whether NCAA athletes could participate in AAU events, whether the NCAA's allowing of scholarships conflicted with the AAU's principles of amateurism, and whether, in the era before the U.S. Olympic Committee, the AAU would retain control of selecting athletes to represent the U.S. in the Olympic Games).

<sup>23</sup> SMITH, *supra* note 18, at 144 (describing how the NCAA became involved in women's sports for a "self-serving reason").

<sup>24</sup> *Id.* at 147; see also, e.g., Sara A. Elliott & Daniel S. Mason, *Gender Equity in Intercollegiate Athletics: An Alternative Model to Achieving Title IX Compliance*, 11 J. LEGAL ASPECTS SPORT 1, 11 (2001).

Once defeated in its political and litigation efforts to immunize athletics from Title IX, the NCAA had even more reason to seek control of women's sports, which were now poised to receive resources they needed for viability and success.<sup>25</sup> So motivated, the NCAA successfully wrested control of women's sports from the Association of Intercollegiate Athletic Women (AIAW) by luring away its members.<sup>26</sup> The demise of the AIAW not only diminished women's opportunities for leadership in women's sports, but it also established that women's sports would adhere to the NCAA's commercial model, rather than participatory and education-oriented focus that the AIAW espoused.<sup>27</sup> Like the racial integration of college football, the NCAA's inclusion of women did not result from altruism or extrinsically motivated desire for equality. External factors like the Cold War, the NCAA's rivalry with the AAU, and the increased status of women's sports after Title IX, created the interest convergence that motivated the NCAA's involvement in women's sports.

One limitation to this interest convergence analysis is its application to Black women's sporting experience. Black women's interests did not converge with those of dominant college sport when Black men's interests did, since the sports in which Black women's opportunities are concentrated, namely, basketball and track, did not have the economic potential to drive schools toward integration. Nor did they converge when White women's did, because the NCAA's promotion of women's sports, while inclusive of basketball and track, has done little to challenge the structural constraints and cultural stereotypes that still operate as

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<sup>25</sup> SMITH, *supra* note 18, at 147.

<sup>26</sup> *Id.* at 146-47.

<sup>27</sup> *Id.* at 148; *see also* Staurowsky, *supra* note 7, at 64-65 ("What set the AIAW apart from the NCAA in a profound way was the structural commitment to the individual rights of athletes as students. This was a radical departure in the way that college sport governance was conducted, reflecting the belief of AIAW leaders that the existing male models of intercollegiate athletics failed to mesh with the educational mission of higher education because of the nature of the professional and commercial aspects of the enterprise. It was a model above all else that sought to prevent female students from being treated as pawns in the pursuit of victory for victory's sake in a way that would alienate them from the rest of the student body.").

obstacles to Black women's participation in other sports.<sup>28</sup> That said, the examples of race- and gender-related interest convergence, that are discussed here challenge the dominant narrative about inclusivity in college athletics. In parallel fashion, the dominant structure of college athletics opened itself to both female and Black student athletes<sup>29</sup> only as needed for self-preservation, on limited terms, and in a manner imposing negative consequences on both subordinated groups.

## II. MULTIPLE AND INTERSECTING OPPRESSIONS IN COLLEGE ATHLETICS

A second component of Kalsem and Williams' proposed methodology for social justice feminism is "examining the interrelationships between interlocking oppressions" to discern "how issues of gender, race, class, and other categories of identity and experiences work together to create social injustice."<sup>30</sup> For those with a Title IX mindset, it is easy to see the gender oppression that results from commercialized model of college athletics. Revenue-seeking universities are driven to an arms race of spending in the two sports, football and men's basketball, the two sports with the highest commercial potential. For most universities, however, these investments will not pay off with profits (or will produce

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<sup>28</sup> See, e.g., Dees, *supra* note 21, at 638 ("The NCAA's selection of the "country club" sports has increased the opportunities for majority athletes who have demonstrated an interest and ability to participate competitively in those sports.").

<sup>29</sup> Black women remain underrepresented in college athletic opportunities in general, and their opportunities remain largely concentrated in the sports of basketball and track. NCAA, RACE/ETHNICITY REPORT 54, 104 (2010), available at <http://www.ncaapublications.com/productdownloads/SAEREP11.pdf>; see also Erin Buzuvis, *How Diverse Are Women's College Sports?*, TITLE IX BLOG (Jan. 3, 2012), <http://title-ix.blogspot.com/2012/01/how-diverse-are-womens-college-sports.html> (calculating that Black women receive 3% of all college athletic opportunities, despite making up approximately 8% of the college student population).

<sup>30</sup> Kalsem & Williams, *supra* note 1, at 175.

profits that are reinvested into those programs themselves).<sup>31</sup> Commercialism in college athletics threatens women's sports with permanent second-tier status because it authorizes universities to invest in teams in a manner proportionate to their attractiveness to spectators and fans—a measure that is stacked against women's sports—instead of in a manner designed to maximize the educational value of sports to student-athletes themselves, the ostensible mission of college athletics.

Yet, by asking the “other” question,<sup>32</sup> we can see how commercialized college athletic contributes to intersectional and racial oppression as well. The commercial model of college sports favors universities by generating gate receipts, endorsement contracts, and prize money in the revenue-rich sports of football and men's basketball, while the student-athletes who participate in them cannot afford basic amenities beyond the cost of tuition and books that are covered by their “full rides.”<sup>33</sup> The often full-time commitment athletes must make to their programs precludes them from holding a part-time job to earn money for things like clothes, laundry, and the occasional trip home to see their families. The athletic scholarships these athletes receive do little to offset these exploitation concerns. Despite the NCAA's efforts to monitor and promote academic success, the demands of athletics separate many student-athletes from a meaningful academic experience, as suggested by low graduation rates and high rates of student athletes majoring in “eligibility.”<sup>34</sup>

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<sup>31</sup> See NCAA, GENDER EQUITY REPORT, *supra* note 5 (omitting institutional subsidies as a source of revenue, only 17 out of 300 Division I program (5%) were profitable during the 2004-2006 period that was the scope of the study).

<sup>32</sup> As opposed to “asking the woman question,” “asking the other question” means asking “about the implications of race, class or other subordinating structures.” Kalsem & Williams, *supra* note 1, at 181 (quoting Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1981)).

<sup>33</sup> Watkins, *supra* note 7.

<sup>34</sup> BILLY HAWKINS, THE NEW PLANTATION: BLACK ATHLETES, COLLEGE SPORTS, AND PREDOMINANTLY WHITE NCAA INSTITUTIONS 18, 71-73 (2010) (questioning whether universities' multi-million dollar investments in academic support centers are actually investments in “academic evasion centers,” and discussing exploitation through miseducation, including the clustering of Black

In the sports that generally produce the highest revenue—football and men’s basketball—Black students make up a disproportionate number of players, making them disproportionately susceptible to exploitation by the university for which they play.<sup>35</sup> The NCAA’s amateurism rules prevent student-athletes from drawing a salary or otherwise sharing in the proceeds of their labor, which instead inure entirely to the benefit of the institution, and its predominantly White administrators and coaches whose salaries are determined by the team’s success.<sup>36</sup> Moreover, given our nation’s history of race-based economic oppression, Black student-athletes are more likely to be harmed by the financial sacrifices that college athletes must make.<sup>37</sup> Relatedly, systemic racial disparities in elementary and secondary education ensure that Black students are not competing academically on equal footing with their college-bound White

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athletes in watered-down majors that aim not to educate athletes but simply to keep them eligible under the NCAA’s academic standards)

<sup>35</sup> NCAA, RACE/ETHNICITY REPORT, *supra* note 29, at 5 (reporting that students comprise a majority of student-athletes (60.1) in Division I college football programs and a plurality (45.8) in Division I men’s basketball); HAWKINS, *supra* note 34, at 95-98.

<sup>36</sup> McCormick & McCormick, *supra* note 13, at 25 (“In this way, the NCAA amateurism regime—in which free market principles determine compensation for coaches and all other economic beneficiaries of college sports, but not for athletes—replicates the apartheid-like systems that have existed throughout history and under which members of the racial majority have exploited the labor of minorities for entertainment and profit”); *see also* Branch, *supra* note 7 (ascribing to the NCAA’s amateurism rules, “an unmistakable whiff of a plantation”); HAWKINS, *supra* note 34, at 14-15.

<sup>37</sup> HAWKINS, *supra* note 34, at 21 (“Black athletes and White athletes exist in the same labor class (working class) and share similar experiences regarding economic exploitation. However, Black athletes are considered a class fraction because they make up a different structural position based [in part] on different economic relations (socioeconomic status of family upon entering college)); *see also* U.S. CENSUS BUREAU, 2012 STATISTICAL ABSTRACT, *Table 696: Money Income of Families—Number and Distribution by Race and Hispanic Origin: 2009*, available at <http://www.census.gov/compendia/statab/2012/tables/12s0695.pdf> (reporting median income for White families is \$62,545, while median income for black families is \$38,409).

counterparts. As a result, Black athletes are significantly less likely to graduate from college than their White counterparts.<sup>38</sup>

Finally, the commercialized model of college sports is oppressive at the intersection of race and sex. Basketball is the most high profile among college women's sports. And while it is not a sport that is profitable at any institution,<sup>39</sup> it is a sport with the strongest high capacity for revenue.<sup>40</sup> It is therefore the women's sport most vulnerable to the negative effects of commercialism. Basketball also happens to be women's sport with the highest representation of Black athletes, and one of two sports, the other being track, with which most Black female athletes are associated.<sup>41</sup> Its participants, with most significant Black contingent of any women's sport, are doubly oppressed—both by the exploitation that derives from an institution's pursuit of profit, as well as the inferior status of women's sport perpetuated by the commercial model. As long as commercialism dominates,

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<sup>38</sup> Richard Lapchick, KEEPING SCORE WHEN IT COUNTS: GRADUATION SUCCESS AND ACADEMIC PROGRESS RATES FOR THE 2012 NCAA DIVISION I MEN'S BASKETBALL TOURNAMENT TEAMS, (Mar. 12, 2012), available at <http://www.tidesport.org/Grad%20Rates/2012%20Men%27s%20Basketball%20Tournament%20Teams%20Study.pdf> (reporting a 28-percentage point gap between the graduation rates of White and Black student athletes on teams that made it to the NCAA Division I men's basketball tournament); RICHARD LAPCHICK, KEEPING SCORE WHEN IT COUNTS: ASSESSING THE 2011-12 BOWL-BOUND COLLEGE FOOTBALL TEAMS: GRADUATION RATES IMPROVE; RACIAL GAP PERSISTS, (Dec. 5, 2011), available at <http://www.tidesport.org/RGRC/2011/2011%20FBS%20Bowl%20Study%28FinalFinal%29.pdf> (reporting that among bowl-bound college football teams, White student-athletes graduate at a rate of 81% compared to 61% graduation rate for Black student-athletes); HAWKINS, *supra* note 34, at 14. Nor is it the case that athletes who leave college without a diploma are benefitting financially from their college experience by accessing pipeline to professional sports. Fewer than 1% of Division I athletes turn pro. David Meggyesy, *Athletes in Big Time College Sports*, 37 SOCIETY 24, 28 (2000).

<sup>39</sup> Curtis Eichelberger, *Women Basketball Programs Lose Money as Salaries Break College Budgets*, BLOOMBERG NEWS (Apr. 1, 2011), available at <http://www.bloomberg.com/news/2011-04-01/women-s-basketball-teams-operate-in-red-as-salaries-break-college-budgets.html>.

<sup>40</sup> NCAA, GENDER EQUITY REPORT, *supra* note 5, at 21 (identifying basketball as the women's sport with the highest median revenue among Division I institutions).

<sup>41</sup> NCAA, RACE/ETHNICITY REPORT, *supra* note 29, at 54, 104.

women's basketball will remain the little sister to its male counterpart. Moreover, institutions with dominant women's teams have the same strong incentives to require uncompensated sacrifices of its players.

### III. PROCESS AND PARADIGM FOR REFORMING COLLEGE ATHLETICS

As a third method of doing social justice feminism, Kalsem and Williams suggest that feminist solutions be informed by interlocking oppressions, which “keeps the focus on bottom-up strategies in fashioning remedies.”<sup>42</sup> Title IX advocates are understandably concerned about actual and hypothetical efforts to expand the commercialization of college athletics by deregulating and letting the market take over—efforts poised not only to detract even more from the resources available to women's sports, but to further encode their inferior status.<sup>43</sup> The patriarchy uses sport as a tool to maintain male dominance by using it to ascribe to male participants the power and social status associated with athletic participation and success—such as strength and physical competence, social status and leadership ability, and character attributes such as diligence and cooperation.<sup>44</sup> As such,

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<sup>42</sup> Kalsem & Williams, *supra* note 1, at 175.

<sup>43</sup> Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 81-82 (2001) (“The persistence of inequality in the sport opportunities available to male and female athletes reinforces notions of male entitlement and sex difference that further marginalize attempts to reallocate these opportunities more equitably. As a result, disparities in treatment and support, much like disparities in the number of athletic opportunities, contribute to the construction of interest in sport in a way that is not gender-neutral.”); Erin Buzuvis, *Survey Says: A Critical Analysis of the New Title IX Policy and Proposal for Reform*, 91 IOWA L. REV. 821, 859-60 (2006) (describing existing inequality in the allocation of financial resources in college sport, and concluding that “[f]emale athletes and outside observers may read these inequities, in the aggregate, as institutionalizing the inferior status of women's sports.”).

<sup>44</sup> Lois Bryson, *Challenges to Male Hegemony in Sport*, in *SPORT, MEN AND THE GENDER ORDER: CRITICAL FEMINIST PERSPECTIVES* 173 (Michael A. Messner & Donald F. Sabo eds., 1990); Mary Jo Kane, *Leadership, Sport, and Gender*, in *WOMEN ON POWER: LEADERSHIP REDEFINED* 114, 115 (Sue J.M. Freeman et al. eds., 2001); Carole Oglesby, *Intersections: Women's Sport Leadership and*

stakeholders in the patriarchy are motivated to exclude women from sport. Where that is not possible due to the intervention of law, stakeholders seek to deter women's participation, minimize the importance of their opportunities, and to culturally define women's sports as a different and lesser version than the male original.<sup>45</sup> While college athletics is still teeming with examples of athletics as a source of male privilege, Title IX has at least helped women begin to chip away at the cultural tendency to define athlete as a male default.

In this spirit, Title IX advocates would be rightfully concerned about efforts to pay student athletes, even—though uncomfortably—when those proposals are framed as redress for the racial exploitation inherent in a system of college sport that is staunchly amateur to the detriment of athletes and unabashedly commercial to the benefit of the institution.<sup>46</sup> Imagine a world where colleges are allowed to pay their athletes. In this hypothetical world are male and female athletes drawing equal pay for equal work? Regardless of how we might prefer to interpret Title IX on this issue, the fact that female athletes receive fewer scholarship dollars<sup>47</sup> and female athletic department employees lower salaries than their male counterparts<sup>48</sup> suggests that pay-for-play will be disparate as well. This will occur either in blatant disregard of law, as so many Title IX violations do, or under the blanket of a perceived justification in the “market forces” that

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*Feminist Praxis*, in *WOMEN ON POWER*, *supra*, 290, 292; Ellen Staurowsky, *Women Coaching Male Athletes*, in *SPORT, MEN, AND THE GENDER ORDER*, *supra*, 163; Paul Willis, *Women in Sport in Ideology*, in *SPORT, MEN AND THE GENDER ORDER*, *supra*, 31, 35-36.

<sup>45</sup> Brake, *supra* note 43, 108-122.

<sup>46</sup> McCormick & McCormick, *supra* note 13; Branch, *supra* note 7; Watkins, *supra* note 7.

<sup>47</sup> In total, male athletes receive almost \$176 million more annually in athletic financial aid than female athletes. *WSF President Laila Ali Cites 40 Years of Title IX Changing Women's Lives*, *WOMEN IN HIGHER EDUCATION*, Oct. 2012, at 32.

<sup>48</sup> Head coaches of men's teams, who are almost entirely male, have average salaries up to twice as high as coaches of women's teams in the same sport. On average, men's teams head coach salaries in Division I are \$1,783,100, compared to the \$850,400 average head coach salary for DI women's teams. *See NCAA GENDER EQUITY REPORT*, *supra* note 5.



cause some men's sport to be more revenue-producing than women's sports. The result will be a privileged "professional" status bestowed on some athletes, but which only men are eligible to attain, reinforcing male dominance in sport in the service of the patriarchy.

For its part, the NCAA staunchly opposes such reform as undermining of its amateurism values, but that hasn't stopped it from toying with plans to pay athletes under a label other than "salary."<sup>49</sup> For a brief window in 2011, the NCAA allowed Division I universities to provide an additional \$2000 cost-of-living "stipend" to those with full athletic scholarships, as a way to offset the personal deficit many athletes face by virtue of their participation in college athletics.<sup>50</sup> This proposal served to justify gender-equity concerns about the related, larger issue of pay-for-play. By linking the stipend to full-scholarship sports, the NCAA assured its disproportionate benefit to male college athletes. Even the NCAA recognized that this plan would have a gendered effect when it started a conversation with the Department of Education about possibly "exempting" these stipends from having to comply with Title IX. While the NCAA eventually shelved this particular stipend proposal, it is certainly not done addressing the issue of athlete compensation. It is inevitable that "solving" the athlete exploitation problem by paying them (with stipends, salaries, or otherwise) is a solution that would disadvantage female athletes. To accept it as an appropriate solution to the problem of athlete exploitation not only undermines the educational purpose of athletics, it betrays the principal of gender equity, a betrayal that can easily lead to other, similar exceptions that gut the meaning of equality. Consider in this regard an NCAA push for a Title IX exemption so that institutions can pay male athletes, for example.

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<sup>49</sup> Steve Wieberg, *NCAA President: Time to Discuss Players Getting Sliver of Revenue Pie*, USA TODAY (Mar. 29, 2011), available at [http://usatoday30.usatoday.com/sports/college/mensbasketball/2011-03-29-ncaa-pay-for-play-final-four\\_N.htm](http://usatoday30.usatoday.com/sports/college/mensbasketball/2011-03-29-ncaa-pay-for-play-final-four_N.htm) (quoting the NCAA President's opposition to pay-for-play and drawing a distinction from the stipend proposal).

<sup>50</sup> See Scoggins, *supra* note 8.

Such an NCAA would seem not to have an ideological problem supporting a Title IX exemption for football entirely.<sup>51</sup>

As the debate continues, advocates for women's sports and Title IX will continue to confront the uncomfortable dissonance created when proposals aimed to curtail exploitation,<sup>52</sup> a problem with a racial dimension, simultaneously promote gender inequality. The risk, then, is that debate will be framed as one of gender versus race. After all, that same framing has plagued debates about education and athletics reform in other contexts—for example, charges that Title IX's proportionality prong benefits women at the expense of black men,<sup>53</sup> or arguments that sex-segregated classes are necessary, notwithstanding the harmful gender stereotypes they promote, to provide much-needed "character" education and substitute role models for fatherless black boys.<sup>54</sup> It is imperative to resist this framing, because it ensures that any challenge to White male hegemony in sport remains fractured and self-defeating.

Fortunately, there is common ground that unites those concerned separately about race- and gender- oppression inherent in college athletics. The commercial model not only exacerbates disparities between men's and women's sport, but it inflicts hidden costs on African-American society as well. Scholars such as Harry Edwards<sup>55</sup> and John Hoberman<sup>56</sup> have described how sport,

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<sup>51</sup> A position, it bears noting, that the NCAA has taken in the past. *See, e.g.*, Elliott & Mason, *supra* note 24, at 11 (describing NCAA's opposition to Title IX and support in 1974 for the Tower Amendment, which would have created a statutory exemption for revenue-producing sports).

<sup>52</sup> To be sure, not all feminists agree that Title IX governs athlete compensation. *See* Staurowsky, *supra* note 7, at 592 (rejecting the applicability of Title IX to proposals for pay-to-play because "the rationale for offering stipends emanates from the limitations on determining the value of players in the mass-mediated college sport marketplace and not on an argument that has anything to do with educational access or opportunity").

<sup>53</sup> *See, e.g.*, HAWKINS, *supra* note 34, at 100-101 (arguing that the revenue generated from black dominated men's sports funds the Title IX sports that primarily benefit White women).

<sup>54</sup> Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 21 (2004).

<sup>55</sup> Harry Edwards, *Crisis of the Black Athlete on the Eve of the 21<sup>st</sup> Century*, 37 SOCIETY 9 (2000).

including college athletics, operates a tool of White society to maintain racial supremacy. Sport promotes a handful of highly visible, well-paid professional athletes—or potentially college athletes, in a world of pay-for-play—to serve as decoys to distract hundreds of boys into pursuing the same “hoop dreams.”<sup>57</sup> Statistically, however, most will not make it. Instead, they will have forgone opportunity to pursue other careers—careers with the potential to provide personal fulfillment but also to destabilize the White hegemony in such fields as law, medicine, politics, education and other fields with high social capital.

If sport contributes to society’s racial inequality now, pay-for-play exacerbates this problem by creating stronger incentives to lure hopefuls into college athletics, while providing universities an excuse not to care about the moral (and public image) implications of failing to provide student athletes with a meaningful education. Those who fail to turn officially “pro” after college may at least have four years of salary to cushion the blow,<sup>58</sup> but are even less likely to have education to fall back on. In its current form, big-time college sport contributes to racial inequality by providing a narrow range of role models that sell false hope in the myth of salvation through athletics. As further commercializing college athletics promotes the patriarchy, it also promotes black oppression as well.

So how then, should advocates for social justice seek to reform college athletics? In addition to finding race and gender-conscious ways to talk about pay-for-play, we also need to find race- and gender-conscious ways to end the problem of

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<sup>56</sup> JOHN HOBERMAN, *DARWIN’S ATHLETES: HOW SPORT HAS DAMAGED BLACK AMERICA AND PRESERVED THE MYTH OF RACE* (1997).

<sup>57</sup> This reference is to *HOOP DREAMS* (Kartemquin Films, 1994), a documentary by filmmaker Steve James chronicling the lives of two African-American male high school students struggling to use college basketball to escape urban poverty. See also HAWKINS, *supra* note 34, at 148 explaining how the culture of sport—specifically football—cultivates the dreams of young Black men that sport is viable as “a way out, an avenue to a better life”). Richard Whitmire, *Emphasizing Sports Over Academics Sets Up Black Boys to Lose*, *EDUCATION WEEK* (Dec. 13, 2010), available at <http://www.edweek.org/ew/articles/2010/12/13/15whitmire.h30.html>.

<sup>58</sup> Some will. If universities were able to pay athletes according to demand, it is likely that only a handful of standouts will be well paid.

exploitation in its current form. In other words, we must change the system, not to compensate for exploitation, but to eliminate it at its very source. Primarily, what this means is advocating for a paradigm shift to align college athletic departments with educational values reflected in their mission statements and their tax status. Athletic programs must be scaled back to a size and scope that would be sustainable and appropriate even in the absence of substantial revenue. This would require the most expensive athletic programs in the NCAA's Division I to downsize (or "right-size") their administration and coaching ranks, athletic department salaries, facilities, competitions, and travel. Reducing the cost of athletics would eliminate the pressure on universities to pursue revenue, and in so doing, to exploit the labor of their student-athletes. It allows them to have a normal college life and a meaningful education.

To eliminate exploitation and promote right-sized college athletics programs, it is also necessary to eliminate athletic scholarships. From a social justice perspective, athletic scholarships should not provide the primary means to an affordable college education. Instead, institutions' investment in athletic scholarships should be redistributed to programs that provide tuition assistance for academically qualified, economically disqualified individuals. Such redistribution is a social justice priority because it addresses racial economic discrimination that reduces access to higher education, restores students' agency with respect to athletic participation, targets students whose educational aspirations and academic potential are the right fit for institution, and promotes aspirations of college, not college athletics, as the means for socioeconomic advancement. Presently, athletic spending per athlete far exceeds, and is more rapidly increasing, than academic spending per student.<sup>59</sup> In a world of redistributed resources, we would likely see more meaningful educational opportunities and higher rates of graduation for precisely those

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<sup>59</sup> DONNA M. DESROCHERS, AMERICAN RESEARCH INSTITUTE DELTA COST PROJECT, ACADEMIC SPENDING VERSUS ATHLETIC SPENDING: WHO WINS? (Jan. 2013), available at [http://www.deltacostproject.org/pdfs/DeltaCostAIR\\_AthleticAcademic\\_Spending\\_IssueBrief.pdf](http://www.deltacostproject.org/pdfs/DeltaCostAIR_AthleticAcademic_Spending_IssueBrief.pdf).

students who are presently suffering from exploitation under the current model.

Women's sports could also benefit from a downscaled, right-sized model of athletics, since the present commercial model contributes to a disparity of attention, focus, and favorable treatment to the revenue-potential sports of football and men's basketball. Reducing the status of athletics overall eliminates that disparity. Moreover, as mentioned above, a downscaled athletic department would redistribute athletic resources from the (expensive) elite varsity model to opportunities at the club and intramural level. Because these opportunities are less expensive, it would be easy to provide more of them in ways that promote interest and athletics among female college students. A participatory model would also create athletic opportunities that are potentially more inclusive of students who have had less access to athletic opportunities prior to attending college – a disadvantage that affects girls more than boys, and Black girls most of all.<sup>60</sup> These obstacles include structural barriers to participation, such as rising costs of interscholastic participation, the prerequisite athletic background attained in expensive, private feeder programs, and the availability of nonworking parents to provide transportation to practices and competitions. As a result, the athlete population currently served by college athletic departments is “elite” in more ways than one. Using Title IX to leverage “leveling up” strategies only seeks to replace male privilege with what we might call “varsity” privilege, a concentration of educational-athletic resources among privileged student-athletes of either sex. Instead, social-justice feminists must object to the concentration of athletic resources, in both women and men's sports, for the benefit of the metaphorical “1%” of student-athletes who have matriculated schools with well-funded athletic departments and/or come from families with the means to devote resources towards athletics.

Generally speaking, this prescription of de-escalating college athletics is not a new idea. Athletics reformers, including

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<sup>60</sup> Deborah L. Brake & Verna L. Williams, *The Heart of the Game: Putting Race and Educational Equity at the Center of Title IX*, 7 VA. SPORTS & ENT. L.J. 199, 205 (2008) (“By one estimate, black girls represent only five percent of all high school athletes.”).

those representing a contingent of academia, have for decades criticized college athletics and called for its downsizing and decommercialization.<sup>61</sup> But largely missing so far is the framing of college athletics reform as a broad social justice issue with implications for gender, race, and class-based equality. The exemplar college or university undertaking action to address the social justice implications of intercollegiate athletics is Spelman College, which announced last year that it was suspending intercollegiate athletics so that it could devote resources towards promoting fitness and wellness among the student body more broadly.<sup>62</sup> As a historically Black, all-women's college, Spelman is perhaps uniquely situated to both recognize and challenge the social justice implications of sponsoring intercollegiate athletic opportunities for an elite few at the expense of the majority student body. But Spelman need not be the only institution to make paradigmatic changes to the structure of athletics. It provides one example of a model for change, and an example for other institutions to follow for the idea of challenging varsity privilege.

Moreover, sport is a particularly entrenched, high significant cultural institution with many stakeholders invested in maintaining its current form, not to mention advocating for an even more commercialized version of its current form. Upsetting this paradigm will be no easy task. To this end, social justice feminism, with its call for bottom-up solutions, inspires the idea of a grassroots, coalition-based movement bringing together activists for gender- and racial- equality, those with a stake in the rising costs of higher education, as well as concerned faculty, students, parents, and staff for Occupy-style direct and concerted action at the institutional level. Its message: to reframe college athletics into its proper perspective and divorce commercial incentives from its professed educational mission.

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<sup>61</sup> The Knight Commission on Intercollegiate Athletics and the Drake Group are two prominent examples.

<sup>62</sup> Richard Pérez-Peña, *Spelman College Withdrawing from NCAA*, NY TIMES, Nov. 3, 2012, at A15.