Show Her the Money: How Title IX Complicates Paying Student-Athletes Following O'Bannon v. NCAA

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Introduction

"Show me the money!" In *Jerry Maguire*, Tom Cruise, playing a zealous sports agent, and Cuba Gooding Jr., portraying a money-hungry professional football player, emphatically shout this command. That famous scene highlights what is already no secret: professional athletes are among the wealthiest individuals in America.[2] This is because professional sports make and pay out big money.[3] The NCAA, however, even as a non-profit organization,[4] makes enormous revenues but does not allow its universities to compensate student-athletes (not that many schools are eager to pay them).[5] With increasingly lucrative television contracts,[6] soaring

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[2] *See* Kurt Badenhausen, *America's Richest Athletes*, FORBES (Sep. 23, 2010), http://www.forbes.com/sites/kurtbadenhausen/2010/09/23/americas-richest-athletes/ (explaining how America's richest athletes are among the wealthiest individuals in the country).

[3] *See id.* (describing how lucrative salaries and major endorsement deals contribute to athletes' growing wealth).

[4] The NCAA is a 501(c)(3) non-profit organization that, much like the NFL, is a multi-billion dollar organization. *See also* Christopher L. Gasper, *NCAA must adapt or move aside*, BOSTON GLOBE (Apr. 15, 2014) http://www.bostonglobe.com/sports/2014/04/14/ncaa-can-have-both-ways/NwEJwcM8oFDseuyFWi1b3K/story.html (explaining how the NCAA is a highly profitable organization despite its "non-profit" designation).

[5] *See* John Taylor, *Texas Could Pay Student-athletes $10K Annually*, NBC SPORTS (Oct. 22, 2014), http://collegefootballtalk.nbcsports.com/2014/10/22/texas-to-pay-student-athletes-10k-annually/ (explaining how even Texas, as the most profitable sports program in the country, will only pay athletes if it is forced to).

[6] *See* Amicus Curiae Br. on Invitation by the National Labor Relations Board, Northwestern University v. CAPA, Case 13-RC-121359; *See also* Chris Smith, *The Most Valuable Conferences In College Sports 2014,* FORBES (Apr. 15, 2014, 2:49 PM), http://www.forbes.com/sites/chrissmith/2014/04/15/the-most-valuable-conferences-in-college-sports-2014/ (detailing the multi-million dollar television contracts the ACC, Big Ten, Big 12, Pac-12, and SEC just recently completed with major broadcast networks).

NCAA revenues,[7] expensive facilities,[8] and highly paid coaches,[9] there has been a growing sentiment: show student-athletes the money.[10] These proponents argue the NCAA exploits student-athletes, who deserve part of the revenue they help produce.[11] The NCAA, on the other hand, claims that paying college athletes would blur the distinction between professional and collegiate athletes and undermine the primary goals and policies of college athletics.[12]

In a recent decision, *O'Bannon v. NCAA*,[13] a federal district court held the NCAA's current restrictions that broadly prohibit compensating student-athletes beyond their scholarship packages are not justified. The *O'Bannon* court specifically ruled that the NCAA's prohibition on payments to student-athletes in men's Division I basketball and FBS football for licensing commercial use of their names, images, and likenesses violated federal antitrust law.[14] Therefore, under *O'Bannon,* if schools wish, they may provide additional compensation to certain student-athletes.[15] *O'Bannon* permits schools to share a portion of revenue gained from the use of student-athletes names, images, and likenesses with collegiate athletes through either stipend payments or trust fund contributions to be collected after graduation.[16] This decision represents a major step towards paying college athletes. But because *O'Bannon* was a class action comprised

[7] *See id.; See also Revenues & Expenses, NCAA Division I Intercollegiate Athletics Programs Report 2004 - 2012*, NCAA (Apr. 2013) *available at* http://www.ncaapublications.com/productdownloads/2012RevExp.pdf (comprehensive report detailing how the NCAA revenues steadily increased from 2004 through 2012).
[8] *See e.g*., *The 13 Most Expensive College Football Stadium Renovations*, STACK.COM (Jul. 24, 2014), http://www.stack.com/2014/07/24/most-expensive-college-football-stadium-renovations/ (demonstrating how many football stadiums, for example, cost hundreds of millions of dollars to build and renovate).
[9] *See e.g, College Football Coaches Salaries*, NEWSDAY (Dec. 3. 2014) http://sports.newsday.com/long-island/data/college/college-football/coaches-salaries/ [hereinafter Newsday].
[10] *See e.g.,* Steve Eder, *How Kessler's Lawsuit Could Chance College Sports*, NY TIMES (Aug. 27, 2014) *available at* http://www.nytimes.com/2014/08/28/sports/how-jeffrey-kesslers-lawsuit-could-change-college-sports.html?_r=0 (discussing how pending lawsuits to pay college athletes may change the landscape of collegiate athletics).
[11] *See id.*
[12] *See* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 973 (2014).
[13] *O'Bannon*, 7 F. Supp. 3d 955 (2014).
[14] *See id*. at 1009.
[15] *See id.* at 1005.
[16] *See id.*

of current and former men's basketball and football players,[17] its decision was limited to student-athlete compensation for FBS football and Division I men's basketball players. Implementing *O'Bannon's* approved payment methods and limiting compensation to men's basketball and football players, however, likely constitutes a form of illegal gender-based discrimination in violation of Title IX.[18]

Part I of this article briefly outlines the history of student-athletes' right of publicity. Part II discusses the major tenets of the *O'Bannon* ruling. Part III details Title IX's history and, as applied to collegiate athletics, its institutional requirements and available private remedies. Finally, Part IV argues that limiting compensation to the men's Division I basketball and FBS football student-athletes who comprised the class in *O'Bannon*[19] would violate Title IX because it would result in unequal opportunities for women student-athletes. Female student-athletes on profit-potential teams whose likenesses are also commercially used or licensed must be similarly compensated.[20] Schools that pay only men's basketball and football players may fall out of compliance with Title IX's requirement of substantial proportionality between men's and women's athletic scholarship funding.[21] Moreover, depending on how schools implement *O'Bannon*, individual Title IX disparate impact or disparate treatment claims may be viable remedies for female student-athletes.[22]

I. Right of Publicity for Student-Athletes

The right of publicity gives individuals control over the use of his or her "name, likeness, or other indicia of identity for purposes of trade" by making claims available when likenesses are

[17] *See id.* at 965.
[18] *See* discussion *infra* Part IV.
[19] *See* discussion *infra* Part IV.
[20] *See* discussion *infra* Part IV.B.
[21] *See* discussion *infra* Part IV.A.
[22] *See* discussion *infra* Part IV.B., Part IV.C.

used without consent.[23] Available remedies include damages and injunctions.[24] Historically, the NCAA required student-athletes' consent to the commercial use of their likenesses as a condition of their scholarships.[25] Prior to *O'Bannon*, the NCAA prohibited schools from compensating student-athletes for commercial use of their likenesses.[26] Student-athletes receive other benefits as part of their scholarships, including tuition costs, fees, board, books, school supplies, tutoring, and academic support services.[27] Moreover, students also enjoy access to "high-quality coaching, medical treatment, state-of-the-art athletic facilities, and opportunities to compete at the highest level of college sports, often in front of large crowds and audiences."[28] In return for these goods and services, along with providing their athletic services, football and basketball recruits must consent to their names, images, and likenesses being used for commercial and promotional purposes.[29]

The right of publicity is recognized in a majority of states and protects certain unauthorized uses of a person's name, image, or likeness.[30] The right of publicity's scope varies substantially by state, with some states viewing it as a subset of the right to privacy,[31] and others categorizing it as a property right.[32] Under this right, a claimant must show that his or her identity, which has commercial value, was used by another person or company that appropriated the commercial

[23] Restatement (Third) of Unfair Competition §§ 46, 48-49 (1995).
[24] *See id.*
[25] *See O'Bannon*, 7 F. Supp. 3d at 971.
[26] *See id.*
[27] *See id.*
[28] *Id.* at 966.
[29] *See id.*
[30] Nathan Crown, *Hart v. Electronic Arts, Inc.: The District of New Jersey Tackles College Athletes' Publicity Rights*, 19 SPORTS LAW. J. 345, 348 (2012).
[31] *See, e.g.,* Pavesich v. New England Life Ins. Co., 50 S.E. 68 (Ga. 1905) (holding that publishing a person's picture without his consent and to further the publisher's business is a violation of the right of privacy).
[32] *See e.g.*, Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953) (holding that a "man has a right to publicity value of his photograph in addition to and independent of his privacy right.").

value for purposes of trade without first obtaining the individual's consent.[33] A claimant must also show commercial injury.[34]

The extent to which the right of publicity protects student-athletes is evolving.[35] Currently, nineteen states statutorily recognize student-athletes' right to publicity, while twenty other states recognize this right as a matter of common law.[36] The NCAA appropriates the use of player names, images, and likeness in numerous ways, including live game telecasts, videogames, and archival footage.[37] Revenue derived from such uses is the primary source of compensation to which student-athletes stake a claim.

While there is no federal right to publicity for student-athletes, courts have interpreted state statutes to protect them. In two recent cases, *Hart v. Electronic Arts, Inc.*[38] and *Keller v. Electronic Arts, Inc.,*[39] courts evaluated the extent to which the right of publicity protects student-athletes from use of their likeness in video games. Both courts focused on whether the use of athlete images was transformative[40] enough to negate the right to publicity.[41] In *Keller*, the Ninth Circuit upheld the California District Court's holding[42] that the right of publicity protects student-athletes and simply recreating student-athlete images was not protected free speech.[43] In *Hart*, the Third Circuit held that the student-athletes' publicity claims presented triable issues.[44]

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[33] Restatement (Third) of Unfair Competition §§ 46-49 (1995).
[34] *See id.*
[35] *See* Kendall K. Johnson, *Enforceable Fair and Square: The Right of Publicity, Unconscionability, and NCAA Student-Athlete Contracts,* 19 SPORTS LAW. J. 1, 9 (2012).
[36] *See id.*
[37] *See O'Bannon*, 7 F. Supp. 3d at 968-71.
[38] Hart v. Electronic Arts, Inc., 717 F.3d 141 (3d. Cir 2013).
[39] Keller v. Electronic Arts, Inc., 724 F.3d 1268 (9th. Cir 2013).
[40] *See also* ETW Corp. v. Jireh Pub., Inc., 332 F.3d 915 (2003) (holding that a collage painting of Tiger Woods was a use transformative enough of his actual image to receive first amendment protection over the athlete's right of publicity).
[41] *Hart*, 717 F.3d at 163; *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d at 1271.
[42] *See* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d at 1271.
[43] *See id.*
[44] *Hart*, 717 F.3d at 163.

II. *O'Bannon v. NCAA*

O'Bannon v. NCAA was an antitrust class action lawsuit against the NCAA brought by former UCLA basketball player, Ed O'Bannon.[45] O'Bannon filed suit on behalf of a class of current and former Division I football and men's basketball players.[46] The players claimed NCAA regulations, which required plaintiffs' consent to the commercial use of their likenesses and forbade compensation for such use, violated federal antitrust law.[47] The court agreed, holding that by preventing Division I football and men's basketball players from receiving compensation for use of their names, images, and likenesses, the NCAA's regulations were unreasonable restraints on trade in violation of antitrust law.[48] The court held that stipends or trust fund payments would be permissible forms of student-athlete compensation,[49] but it did not mandate that schools provide compensation.[50] Because student-athletes from other sports were not before the court, it did not discuss whether other student-athletes could be compensated.[51]

According to the court, to comply with amateurism and other policy concerns raised by the NCAA, universities may compensate student-athletes through stipends or trust funds for students to collect from after college.[52] Schools that choose to compensate student-athletes via trust funds must provide each student a minimum of $5,000 per year of eligibility.[53] The court did not specify a maximum payment.[54] The court, however, allowed the NCAA to set a

[45] *See O'Bannon*, 7 F. Supp. 3d at 962-63.
[46] *See id*.
[47] *See id.* at 963.
[48] *See id.* at 1009.
[49] *See id.* at 1005-06..
[50] *See id.*
[51] *See* O'Bannon v. NCAA,7 F. Supp. 3d 955, 962-63 (2014).
[52] *See id.* at 1005-06 (the court did not necessarily rule that these were the two exclusive ways in which schools could compensate student-athletes. It merely held these two payment methods are valid).
[53] *See id.* at 1008.
[54] *See id.*

maximum amount for any payments.[55] The court reasoned that these compensation methods, together with the NCAA's ability to set a compensation cap, would not violate the NCAA's own definition of amateurism because they would only cover educational expenses.[56]

The court did not mandate that schools pay their student-athletes.[57] It merely held that the compensation methods would be legally permissible to pay the plaintiff student-athletes for uses of their names, images, and likenesses.[58] The NCAA could not forbid such compensation.[59] *O'Bannon's* order is prospective.[60] It takes effect for the next recruiting cycle,[61] and thus will impact recruits who enroll in college after July 1, 2016.[62] The NCAA appealed the court's decision, and the court agreed to expedite the appellate process at both parties' request.[63]

A. *Group Licensing and the Market: Who Gets Paid Under O'Bannon?*

Antitrust laws apply to markets. The *O'Bannon* court found markets within college athletics and examined compensation options within the confines of those markets.[64] Specifically, the court found FBS football[65] and Division I men's basketball[66] schools provide an unmatched bundle of services, which caused recruits who could obtain scholarships in this

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[55] *See id*. at 1008.
[56] *See O'Bannon*, 7 F. Supp. 3d at 1005-09.
[57] *See id.*
[58] *See id*.
[59] *See id*.
[60] *See id.* at 1008.
[61] *See id.*
[62] *See* Joe Solomon, *Q&A: What the O'Bannon ruling means for NCAA, schools and athletes*, CBS (Aug. 9, 2014) *available at*http://www.cbssports.com/collegefootball/writer/jon-solomon/24654805/qa-what-the-obannon-ruling-means-for-the-ncaa-schools-and-athletes
[63] *See* Raphielle Johnson, *Judge grants joint request to expedite O'Bannon v. NCAA appeal process*, NBC (Sep. 24, 2014) *available at* http://collegebasketballtalk.nbcsports.com/2014/09/24/judge-grants-joint-request-to-expedite-obannon-v-ncaa-appeal-process/ (explaining how both parties want to expedite the appeal for this case so that a final ruling will be issued before the court's August 1, 2015 injunction goes into effect). The NCAA is also facing multiple other lawsuits, so its desire to quickly know a definitive outcome for O'Bannon is understandable.
[64] *See O'Bannon*, 7 F. Supp. 3d at 965-968.
[65] *See id*. at 965
[66] *See id*. at 965.

market to reject scholarships from lower divisions.[67] The court referred to this as the "college education market."[68] Next, the court recognized a group licensing market, in which student-athletes could be compensated for use of their names, images, and likenesses.[69] The court identified three submarkets within this group licensing market for the use of name, images, and likenesses in: (1) live football and basketball game telecasts; (2) videogames; and (3) re-broadcasts, advertisements, and other archival footage.[70] The court premised its finding of distinct markets on the demand and actual third party licensing in these areas for group licensing of student-athlete names, images, and likenesses.[71] According to the court, this existing demand and licensing justified paying FBS football and Division I basketball players as a whole.[72]

The court limited student-athlete compensation in accordance with the parameters of these markets. Compensation may only be derived from the use of names, images, and likenesses for student-athletes as a group, not individually,[73] and such compensation must be from the schools. Student-athletes may not receive monetary endorsements from third parties because the court supported efforts by the NCAA and its schools to protect against "commercial exploitation."[74] The court stopped short of identifying a market for individual student-athletes to be compensated as it stresses that all student-athletes within the recognized market must be compensated equally.[75]

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[67]*See O'Bannon*, 7 F. Supp. 3d, at 966-68 (explaining that because of the vast opportunities provided by FBS football and Division I basketball schools and because of the nearly exclusive recruiting markets monopolized by these schools, they constitute their own market.).
[68] *See id.*
[69] *See id.*
[70] *See id.* at 968-71.
[71] *See id.*
[72] *See id.*
[73] *See* O'Bannon v. NCAA, 7 F. Supp. 3d, 955, 984 (2014).
[74] *See id.*
[75] *See id*. at 983.

The court justified paying the plaintiff FBS football and Division I men's players not only because there was a market for their likenesses but also because these are revenue producing sports.[76] It does not discuss the extent to which there may (or may not) be a group-licensing market for other men's sports teams or any women's sports teams.[77] Nor does *O'Bannon*'s allowance for compensation apply to lower divisions.[78] The court distinguished non-Division I and Division I schools on grounds that lower divisions spend significantly less on athletics and may not even provide a chance to attend a four-year college.[79] To support this distinction, the court highlighted the immense money at stake in licensing broadcasts, video games, and archival footage in FBS football and Division I men's basketball.[80]

In this article, what the *O'Bannon* court labeled "revenue producing" teams will be referred to as "profit potential" teams. Nearly all college sports teams produce revenue.[81] But most teams' expenses surpass their revenues (i.e., most college teams do not make a profit).[82] To determine whether student-athletes may be paid, the *O'Bannon* court stressed that FBS football and Division I men's basketball teams make enormous profits, which if derived from commercial use of student likenesses, should be shared with student-athletes.[83] An important distinguishing

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[76] *See id.* at 981.
[77] The *O'Bannon* decision does not discuss how its ruling may apply to women student-athletes, since it was limited to ruling on the class before the court.
[78] *See O'Bannon*, 7 F. Supp. 3d, at 966-67 (the court differentiates lower divisions on grounds that they do not offer the same bundle of benefits that Division I teams do).
[79] *See id*.
[80] *See id*., at 968-71.
[81] *See Get aggregated data for a group of institutions - 2013 Revenues*, DEP'T OF EDUC. (2013) *available at* http://ope.ed.gov/athletics/GroupDetails.aspx?67726f75703d332673637265656e3d393035312679656172 3d323031332673656172636843726974657269613d333533643237333932373236373236343734336433313332326633333326633323330333133343230333433613335333033361333133343230353034642672647 43d31322f332f3230313420343a35303a313420504d (showing how nearly all college sports teams make revenue).
[82] *See id.* (showing most teams' expenses outweigh their revenues) [hereinafter 2013 Department of Education Revenue Statistics].
[83] *See O'Bannon*, 7 F. Supp. 3d, at 963 (explaining that plaintiff's claim is to obtain a share of the revenue they help produce).

factor between sports teams in determining whether players should be paid is whether the team makes money, not merely whether it produces revenue. Therefore, to increase clarity, teams that commonly make money will be referred to as "profit potential sports."[84]

B. The NCAA's Justifications for its Compensation Restrictions

To justify its restrictions on student-athlete compensation, the NCAA argued that its restraints were supported by four important policy considerations: (1) preservation of amateurism; (2) competitive balance; (3) integration of athletics and academics; and (4) increased output.[85] While recognizing the validity of these NCAA policies, the court, rejected these interests because they were insufficient to justify the NCAA's sweeping prohibitions on student-athlete compensation.[86]

1. Preservation of Amateurism

The NCAA first argued that its compensation regulations promoted consumer demand for the NCAA's product because they preserve the tradition of amateurism in college sports.[87] In support, the NCAA introduced survey results in which a majority of respondents favored not paying college athletes.[88] The court found that the NCAA presented no evidence to suggest that paying college athletes through its proposed methods would impact the popularity of college sports.[89] It stressed that consumer demand is often driven by feelings of "loyalty to the school,"

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[84] This label is intended to provide a broad categorization. There are rare instances in which teams belonging to traditionally non-profit potential sports will make money. In these cases, it may be left up to the individual schools to determine which teams will receive compensation. But for the purposes of paying college athletes generally, teams with a realistic potential to profit from commercial use of player likenesses should be paid.
[85] *See O'Bannon*, 7 F. Supp. 3d at 973.
[86] *See id.* at 1009.
[87] *See id.* at 973-74.
[88] *See id.* at 975.
[89] *See id.* at 978.

not whether the athletes are paid.[90] As a result, the court held that preserving amateurism did not justify existing NCAA regulations.[91]

2. Competitive Balance

The NCAA claimed the compensation ban was necessary to maintain competitive balance among teams, which in turn was necessary to sustain consumer demand for its product.[92] As an example, a sports league's efforts to achieve optimal competitive balance among its teams may further a pro-competitive purpose if promoting such balance increases demand for the league's product.[93] The court held the NCAA did not sufficiently prove that its compensation ban would affect competitive balance.[94] Moreover, according to the court, even if the compensation ban affected competitive balance, the NCAA did not prove consumer demand would decrease.[95] In reaching its conclusion, the court again noted that college football derives many of its fans from alumni allegiance and other factors independent of competitiveness.[96] The court also held that in light of the existing "arms race" among schools to lure recruits with fancy facilities, dorms, and other amenities, limited payments to student-athletes would only negligibly affect a school's ability to draw top recruits.[97]

[90] *Id.* (explaining that allegiances to schools are shared by alumni who attended a school and by residents in a particular region proximate to teams).
[91] *See* O'Bannon v. NCAA, 7 F. Supp. 3d, 955, 978 (2014).
[92] *See id.*
[93] *See* American Needle, Inc. v. National Football League, 560 U.S. 183, 204 (2010).
[94] *See O'Bannon*, 7 F. Supp. 3d at 979.
[95] *See id*.
[96] *Id.* (Further stating that even if the NCAA could show that competitive balance would suffer, it failed to demonstrate that the "current level of competitive balance is necessary to maintain its current level of consumer demand,").
[97] *Id*. (asserting that the NCAA has not done anything "to rein in spending by high-revenue school or minimize existing disparities in revenue and recruiting).

3. Integration of Academics and Athletics

The NCAA next argued that its compensation ban "promotes the integration of academics and athletics."[98] While recognizing the value of educating student-athletes and integrating them within their school's academic communities, the court found the NCAA's restrictions were not necessary.[99] The court noted that compensated students would still receive scholarships and academic services, and would have their own individual incentives to perform well academically regardless of whether they received a modest stipend.[100] The court emphasized that schools could condition compensation on academic performance, which may actually enhance academic integration.[101] Because compensated student-athletes would continue to receive academic benefits, the court found alleged academic concerns did not justify the NCAA compensation ban.[102]

4. Increased Output

The court rejected the NCAA's fourth asserted policy justification: that the compensation ban was reasonable and pro-competitive because it increases opportunities for schools and student-athletes to participate in FBS football and Division I basketball, which ultimately increases the number of games that can be played.[103] In finding that increased output did not justify a prohibition on student-athlete's compensation, the court highlighted that several school presidents and conference commissioners testified that their schools would not leave Division I if

[98] *See O'Bannon*, 7 F.Supp.3d at 979-80.
[99] *See id*. at 980.
[100] *Id.* (explaining that "the long-term educational and academic benefits that student athletes enjoy stem from their increased access to financial aid, tutoring, mentorship, structured schedules, and other educational services that are unrelated to the challenged rules in this case.").
[101] *See id*.
[102] *See id.*
[103] *See id.* at 981.

forced to pay student-athletes a modest stipend or trust fund contribution.[104] The court denied the existence of any meaningful relationship between restricting college athletes and increased output.[105]

C. Brief Preview of O'Bannon's Title IX Connection

Having a class of only male student-athletes, and not faced with any gender discrimination arguments, the *O'Bannon* court did not address possible Title IX issues. The *O'Bannon* holding was merely that schools which license student-athletes' names, images, and likenesses may pay male student-athletes in the revenue-producing sports of FBS football and Division I basketball. Though schools may pay women athletes too if they choose, paying additional athletes would be expensive. Therefore, many schools may be hesitant to compensate more athletes than *O'Bannon*'s analysis encompasses.[106] As a result, some believe this decision triggers Title IX's requirements,[107] while others argue that Title IX is not applicable at all to this case.[108] But to accurately predict the ensuing legal issues following *O'Bannon*, Title IX's legal requirements and remedies must first be fully understood.

III. Title IX

Title IX of the Education Amendments Act of 1972 prohibits sex-based discrimination by educational institutions receiving federal educational funds.[109] The statute seeks to effectively safeguard women from discrimination and avoid using federal resources to support

[104] *See* O'Bannon v. NCAA, 7 F. Supp. 3d, 955, 981-82 (2014).
[105] *See id.*
[106] *See* Cork Gaines, *Texas AD Says It Would Cost $6 Million to Pay their Athletes and the Fallout Would Change College Sports Forever*, BUSINESS INSIDER (Oct. 22, 2014), http://www.businessinsider.com/university-texas-pay-athletes-2014-10.
[107] *See* Solomon, *supra* note 63.
[108] *See* Andy Schwarz, *Don't Let Anyone Tell You The O'Bannon Ruling Conflicts with Title IX*, DEADSPIN (Aug. 13, 2014), http://deadspin.com/don-t-let-anyone-tell-you-the-o-bannon-ruling-conflicts-1620712195.
[109] *See* 20 U.S.C. § 1681(a) (2006).

discriminatory practices.[110] Title IX, however, protects both men and women.[111] While Title IX is much broader than merely ensuring equal opportunity in sports, it does indeed apply to school athletic programs[112] because "equal opportunity to participate lies at the core of Title IX's purpose with respect to athletics."[113] Title IX applies to all of a school's operations if *any* part of the school receives federal financial assistance, including federal student financial aid.[114] Therefore, Title IX applies to all Division I schools and their sports program, as well as most universities across the country,[115] but not to the NCAA itself.[116]

Within the Department of Education, the Office of Civil Rights (OCR) enforces Title IX.[117] Title IX's text does not expressly mention gender equality in athletics, but Congress empowered OCR to promulgate regulations concerning college athletics.[118] Because Congress delegated effective legislative authority to OCR, courts have given significant deference to the OCR's interpretation of Title IX.[119] As discussed below, Title IX regulations require schools to provide effective accommodation and equal benefits in college athletics.[120] Private disparate

[110] *See* Cannon v. University of Chicago, 441 U.S. 677, 704 (1979).
[111] See 20 U.S.C. § 1681(a) (stating that "no person" shall be subjected to sex-based discrimination).
[112] *See* 34 C.F.R. § 106.41.
[113] Cohen v. Brown Univ., 991 F.2d 888, 897 (1st Cir. 1993).
[114] 20 U.S.C. § 1687; *See also* Grove City College v. Bell, 465 U.S. 555, 570-571 (1984). (The Civil Rights Restoration Act of 1987 legislatively reversed *Grove City College* by establishing that Title IX applies to the entire institution if it receives any federal financial assistance).
[115] *See* 20 U.S.C. § 1681(c) (broadly stating defining educational institutions as "any...institution of vocational, professional, or higher education."); *See generally* James Rapp, EDUCATION LAW § 10B.02(1)(a), 10B-31 4th ed., (Matthew Bender & Co. 2014).
[116] *See* NCAA v. Smith, 525 U.S. 459 (1999); *See generally* Rapp, § 10B.02[1][a], 10B-32 (explaining that Title IX does not apply to the NCAA as an institution just because it receives dues from its federally funded member schools).
[117] *See* 20 U.S.C. § 3441(a)(3).
[118] *See* Section 844, Education Amendments of 1974, 88 Stat. 484.
[119] *See* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 829-30 (10th Cir. 1993) (explaining that courts defer substantially to an agency's interpretation of its own regulations; *See generally* Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) (establishing a commonly referenced legal standard for when courts should defer to administrative agencies).
[120] *See* discussion *infra* Part III.C.

treatment claims are available,[121] and OCR can investigate and bring disparate impact claims on students' behalf.[122]

A. *Brief History of Title IX and Gender Inequality in College Sports*

Title IX was enacted in 1972 as a supplement to the landmark Civil Rights Act of 1964, which did not proscribe sex-based discrimination.[123] In fact, Title IX, in many respects, was patterned after Title VI of the Civil Rights Act, using nearly identical language to bar discrimination.[124] Interestingly, because Title IX, as originally drafted, did not specifically address collegiate athletics, schools did not lobby against it.[125] The ensuing swath of litigation regarding Title IX's impact on sports programs only came once the full extent of its coverage was illuminated.[126]

A long history of sex-based discrimination that extends well beyond the sports field spurred Title IX's enactment.[127] In sports alone there were vastly inferior opportunities for women.[128] Numerous studies have demonstrated the positive, life-long benefits for women who participate in sports[129] and, conversely, the long-lasting feelings of inferiority developed by

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[121] *See* discussion *infra* Part III.D
[122] *See* discussion *infra* Part III.D.3
[123] *See* Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments that Shaped Gender Equity Law,* 22 MARQ. SPORTS L. REV. 325, 326 (2012) (describing how the Civil Rights Act of 1964 prohibited discrimination on the basis of race, color, and national origin, but did not outlaw sex-based discrimination).
[124] See *id.* (detailing the many linguistic and policy similarities between Title IX and the Civil Right Act of 1964); *See also*, *Cannon*, 441 U.S. at 696 (describing how other than the inclusion of the word "sex" instead of race, color, and national origin, Title IX is identical to Title IV of the Civil Rights Act of 1964).
[125] *See* Reid Coploff, *Exploring Gender Based Discrimination in Coaching,* 17 SPORTS LAW. J. 195, 200 (2010).
[126] *See id.*
[127] *See generally* Rapp § 10B.01[2][c] (detailing the long history of discrimination against women in education).
[128] *See* Parker v. Franklin County Community School Corp., 667 F.3d 910, 916 (7th Cir. 2012).
[129] *See id.* (citing Dionne L. Koller, *Not Just One of the Boys: A Post-Feminist Critique of Title IX's Vision for Gender Equity in Sports*, 43 CONN. L. REV. 401, 413 (2010)) ("[S]tudies have shown that sports participation provides important lifetime benefits to participants" such as "discipline, teamwork, time management, and leadership that further long-term personal growth, independence and wellbeing" and "better physical and mental health, higher self-esteem, a lower rate of depression, and positive body image, as well as the development of responsible social behaviors, greater educational success, and inter-personal skills").

women that are excluded from athletics.[130] When Title IX was enacted in 1972, roughly 30,000 female athletes participated in college sports - as compared to 170,000 male athletes.[131] Today, there are roughly 190,000 female and 256,344 male athletes respectively.[132] Thus, contrary to popular myths that Title IX has increased opportunities for women at the expense of men,[133] these statistics demonstrate that Title IX has increased opportunities in collegiate sports for men's *and* women's sports.[134] Amidst controversy over how Title IX should impact collegiate sports offerings, Title IX, generally, is viewed favorably by the vast majority of Americans and widely lauded as a highly successful law in remedying sex-based discrimination.[135] But despite its many successes, inequities persist in athletics.[136]

B. Title IX Institutional Requirement: Effective Accommodation

Courts have interpreted OCR's three-prong analysis to determine whether schools subject to Title IX adequately afford equal athletic participation opportunities.[137] This is commonly referred to as the "effective accommodation" requirement.[138] A school effectively accommodates athletic participation if spaces on existing athletic teams for males and females are "substantially

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[130] *See Parker*, 667 F.3d at 916 (citing Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 178 F. Supp. 2d 805, 837–38 (W.D. Mich. 2001*), aff'd*, 377 F.3d 504 (6th Cir. 2004), *judgment vacated on other grounds,* 544 U.S. 1012 (2005), *aff'd on remand,* 459 F.3d 676, 695 (6th Cir. 2006).
[131] *See* National Coalition for Women and Girls in Education, *Title IX and Athletics: Proven Benefits, Unfounded Objections*, TITLE IX AT 40 1, 9 (2012), http://ncwge.org/TitleIX40/TitleIX-print.pdf (showing further that in 1972 there were 294,015 female athletes and 3,666,917 male athletes).
[132] *Id.*
[133] *See e.g. Debunking the Myths About Title IX and Athletics*, NATIONAL WOMEN'S LAW CENTER (Jan 30. 2012), http://www.nwlc.org/resource/debunking-myths-about-title-ix-and-athletics. This is one of many examples of efforts by civil rights organizations to debunk popular myths about Title IX.
[134] *See* Jocelyn Samuels and Kristen Galles, *In Defense of Title IX: Why Current Policies are Required to Ensure Equality of Opportunity,* 14 MARQ. SPORTS. L. REV. 11, 32-33 (2003) (describing how under Title IX, there has been an increase in the number of men's sports teams offered and men's athletes in general).
[135] *See* Kate Fagan and Luke Cyphers, *Five Myths About Title IX*, ESPNW (April 29, 2012), http://espn.go.com/espnw/title-ix/article/7729603/five-myths-title-ix.
[136] *See* Parker, 667 F.3d at 916 (citing McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 296 (2d Cir. 2004)) ("Despite substantial progress in attitudes about women and sports, the competitive accomplishments of male athletes may continue to be valued more than the achievements of female athletes.").
[137] *See id.* at 918.
[138] *See id.*

proportionate" to their level of full-time undergraduate enrollment.[139] Alternatively, if members of one sex have been and are underrepresented in college sports at a particular school, courts examine whether the school evidences "a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of members of that sex."[140] A final alternative for schools is to show that students' interests in athletic participation are "fully and effectively accommodated by the present program."[141] If a school satisfies any one of these three tests, it is in compliance with Title IX as to equality of athletic participation opportunities.[142]

1. Substantial Proportionality Test:

The "substantial proportionality" test can demonstrate that a school provided relatively equal athletic participation opportunities to men and women.[143] Importantly, "substantial proportionality" does not require exactly proportionate athletic offerings.[144] In essence, OCR wants the percentage of women participating in sports at a university to closely resemble the percentage of women attending the school.[145] OCR recognizes that mandating exact proportionality would be an unworkable quota with school enrollment and team membership numbers varying annually. [146] Thus, OCR does not articulate a specific statistical range in which schools must remain to be in compliance with Title IX and stresses that proportionality should be considered on a case-by-case basis.[147]

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[139] *See* Cohen v. Brown Univ., 991 F.2d 888, 897 (1st Cir. 1993).
[140] *See id.*
[141] *See id.*
[142] *See id.*
[143] *See Cohen*, 991 F.2d at 897.
[144] *See Roberts*, 998 F.2d at 829-30 (explaining how Title IX requires relative proportionality, not a certain statistical ratio).
[145] *See id.*
[146] *See id.*
[147] *See id.*

Cohen v. Brown University[148] provides a useful examination of substantial proportionality at an individual school. In that case, Brown University enrolled 51.8% male and 48.2% female undergraduate students.[149] Brown's varsity sports program participants were 63.4% male and 36.6% female.[150] The court held that Brown's offerings were not substantially proportional to its undergraduate student population.[151] *Cohen* demonstrates that while opportunities do not need to be precisely proportional to the student population, courts will not allow a significant disparity.

2. Program Expansion:

Schools that demonstrate substantially proportionate offerings may comply by establishing and developing a program that is responsive to the interests of the underrepresented sex (normally, women).[152] This test turns on whether a school demonstrates program expansion, not merely an improvement in the ratio of women student-athletes.[153] It reflects a balance between the regulations' intent and the practical concerns inherent in quickly transforming the demographic makeup of athletic programs. On one hand, Title IX's drafters sought to gradually provide increased opportunities, acknowledging the impracticality of instantly requiring schools to comply with Title IX.[154] At the same time, however, they wanted to ensure schools diligently

[148] *Cohen*, 809 F. Supp. 978 (1992).
[149] *See id.* at 991.
[150] *See id*.
[151] *See id.*
[152] *See Cohen*, 991 F.2d at 897.
[153] *See* 44 Fed. Reg. 71418 (December 11, 1979).
[154] Ryther, *Swimming Upstream: Men's Olympic Swimming Sinks While Title IX Swims,* 17 MARQ. SPORTS L. REV. 679, 692 (2007) (discussing the practical concerns with forcing schools to immediately change their programs and the need for allowing deference to each school on how to best implement Title IX requirements).

and continually pursued equal opportunity.[155] This test was integral to initial Title IX enforcement,[156] but courts have focused on it less recently.[157]

3. Fully Accommodating Needs and Interests

The third test evaluates a school's athletic participation and examines any potential unaddressed needs and interests of its students.[158] It requires full accommodation; a school will not meet its burden if it shows only that it provides some, or even proportionate, accommodation of students needs and interests.[159] This test ensures schools provide athletic opportunities to both sexes to the extent participation demand exists.[160]

C. Title IX Institutional Requirement: Equal Benefits

Along with requiring accommodation of student-athlete interests and needs to participate in athletics, Title IX also prohibits discrimination against female student-athletes and ensures equal benefits are provided to both sexes.[161] Schools must provide men and women student-athletes with "reasonable opportunities" for scholarships proportionate to their athletic participation.[162] Title IX does not require schools to grant the same number of scholarships to men and women, and individual scholarships do not have to be of equal value.[163] Instead, Title IX mandates that the overall scholarship aid to men's and women's athletic programs, not the

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[155] *See e.g.,* Cohen v. Brown Univ. (Cohen II), 991 F.2d 888, 892 (1st Cir. 1993) (holding that Brown University adding fourteen women's sports team between 1971 and 1977, but none since 1982, lacked continued improvements; *See also* Cohen v. Brown Univ. (Cohen III), 879 F. Supp. 185, 211 (D. R.I. 1995).
[156] *See* Ryther, *supra* note 154, at 692.
[157] Nearly all case law interpreting this test are within 25 years of Title IX's inception.
[158] *Cohen*, 991 F.2d at 898.
[159] *See id.*; *See also Roberts*, 998 F.2d at 831-32.
[160] *See id.*
[161] *See Parker*, 667 F.3d at 916 (describing how schools, among other things, must provide equal benefits, including equipment, facilities, coaching, scheduling, and publicity).
[162] *See* 34 C.F.R. 106.37(c)(1).
[163] *See* U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter (Jul. 24, 1998), http://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html (hereinafter July 1998 Dear Colleague Letter); *see generally* Rapp, § 10.04[8].

total number of scholarships, must be "substantially proportionate" to each sex's participation rate in athletics.[164] When evaluating substantial proportionality, if a disparity in scholarships is less than one percent, OCR strongly presumes that the difference is reasonable and based on nondiscriminatory factors.[165] But if the disparity is more than one percent, there is a strong presumption that the school violates the "substantial proportionality" requirement. Moreover, even if the disparity is less than one percent, the presumption of compliance can be rebutted "if, for example, there is direct evidence of discriminatory intent."[166]

Beyond scholarships, the OCR considers several other benefits in determining whether equal benefits are provided, including: (1) recruitment of student-athletes, (2) provision of support services, (3) equipment and supplies, (4) scheduling of games and practices, (5) travel and per diem allowance, (6) coaching and academic tutoring, (7) compensation of coaches and tutors, (8) facilities, (9) medical and training benefits, (10) housing and dining benefits, and (11) publicity.[167] The availability and quality of these benefits and opportunities need not be identical, but must be "equivalent."[168] Equivalence means "equal or equal in effect."[169]

There are exceptions to the equivalency requirements. Schools may implement disparities if they establish that such disparity is based on nondiscriminatory factors.[170] Qualifying factors include voluntary affirmative action plans and "legitimately sex-neutral factors" that are temporary.[171] For example, large expenditures associated with a new team's first-year recruiting

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[164] *See id.*; *see generally* Rapp, 10B-142, § 10B.04[8] (explaining how Title IX does not require precise proportionality "down to the last dollar.").
[165] *See id.* (explaining that a valid nondiscriminatory factor to reasonably explain differences in scholarships, for example, could be that a sports team has more out-of-state students - who have higher tuition costs).
[166] *Id.*
[167] See 34 C.F.R. 106.41 (c)(2) - (10); see also Fed. Reg. 71415 & 71416-17 (December 11, 1979).
[168] 44 Fed. Reg. 71414 & 71415
[169] *Id.* at 71415.
[170] *See id.* at 71415-16.
[171] *Id.* at 71416.

would be permissible.[172] Exceptions may also be allowed if funding for contact sports is higher than for non-contact sports because the reason for the disparity is the equipment required for contact sports, not a discriminatory motive.[173]

D. Title IX Private Causes of Action

Title IX does not include an express private cause of action.[174] The Supreme Court in *Cannon v. University of Chicago*, however, recognized an implied private cause of action under Title IX.[175] In *Cannon,* the Court relied on the language, history, subject matter, and underlying purposes of Title IX to imply a cause of action for private victims of discriminations.[176] Subsequently, in *Franklin v. Gwinnett County Public Schools*,[177] the Court established that monetary damages are available in private Title IX suits.[178] A claimant does not need to exhaust administrative remedies before bringing suit directly in court and may bring parallel 42 U.S.C. § 1983 and other constitutional claims.[179]

Civil rights claims typically may be brought under either a disparate treatment or disparate impact claim.[180] For Title IX claims under a disparate treatment theory, a claimant demonstrates intentional discrimination.[181] On the other hand, in a disparate impact claim, a

[172] *Id.*
[173] Id. a71418.
[174] *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 693-94 (1979).
[175] *See id.* at 717.
[176] *See id.* at 709.
[177] Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60 (1992).
[178] *Id.* at 75-76 (holding that monetary damages are recoverable in a sexual harassment suit involving alleged intentional discrimination).
[179] *See* Fitzgerald v. Barnstable School Committee, 555 U.S. 246 (2009) (holding that a claimant is not required to exhaust Title IX administrative remedies before bringing a private claim of action. 42 U.S.C. § 1983 claims can be brought by plaintiffs as a parallel remedy for gender discrimination).
[180] *See* Title IX Legal Manual, U.S. DEPARTMENT OF JUSTICE (Dec. 3, 2014), http://www.justice.gov/crt/about/cor/coord/ixlegal.php (detailing the availability of disparate impact and disparate treatment claims under Title IX).
[181] *See id.*

claimant shows that a facially-neutral policy adversely impacted a protected group.[182] Further discussion of the elements of and differences between these two types of discrimination is necessary to fully understand the potential Title IX ramifications following *O'Bannon.*

1. Disparate Treatment Standard

For a disparate treatment claim, courts commonly apply Title VII's proof standards.[183] A claimant must establish a prima facie case of discrimination.[184] Claimants need not prove a school "acted with discriminatory animus" but only that it "intentionally treated one group less favorably because of their sex."[185] Proving a prima facie discrimination case turns largely on whether a school limited or denied "educational services and benefits, or opportunities to a student or group" of a particular sex "by treating them differently from a similarly situated student or group of students..." of another sex.[186] If a claimant cannot establish a prima facie case, the claim fails, but if the claimant can, it raises an inference of discrimination.[187]

If an inference of discrimination arises, the school then has the burden to rebut a presumption of discrimination.[188] A school must present evidence that disparate treatment was supported by "a legitimate, nondiscriminatory reason."[189] If the court is not satisfied with a

[182]*See id.*
[183] *See* Preston *v.* Com. of Va. *ex rel.* New River Cmty. Coll., 31 F.3d 203, 207 (4th Cir. 1994) ("We agree that title VII and the judicial interpretations of it, provide a persuasive body of standard to which we may look in shaping contours of a private right of action under Title IX."); Howell v. N. Cent. Coll., 320 F. Supp. 2d 717, 720 (N.D. Ill. 2004) ("federal courts have looked to Title VII precedent to inform their analyses of sexual discrimination claims under Title IX"); Middlebrooks v. Univ. of Maryland at Coll. Park, 980 F. Supp. 824, 829 (D. Md. 1997) ("Most courts have taken the Title VII employment discrimination proof scheme and applied it to Title IX gender discrimination cases."); Lipsett v. University of Puerto Rico, 864 F.2d 881, 897 (1st Cir. 1988) (analyzing Title IX through Title VII's burden shifting analysis); Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 66 (1st Cir. 2002).
[184] *See Middlebrooks*, 980 F. Supp at 829. *See generally* Rapp § 10B.01[5][b].
[185] Parker v. Franklin Cnty. Comm. Sch. Corp., 667 F.3d 910, 920 (7th Cir. 2012) (citing Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 459 F.3d 676, 694 (6th Cir. 2006)).
[186] Rapp § 10B.01[5][b].
[187] *See Middlebrooks*, 980 F. Supp. at 829 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).
[188] *Id.* (citing Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).
[189] *Id.*

school's justification for disparate treatment, "then the inference of discrimination drops out of the case," and the plaintiff must prove that the school's nondiscriminatory justification was merely a pretext.[190]

2. Disparate Impact Standard

As discussed below, disparate impact claims under Title IX are limited to administrative complaints to OCR, or suits brought by the federal government.[191] OCR uses a different three-part analysis for disparate impact claims. First, OCR considers whether (facially neutral) school policies adversely impact one sex as opposed to the other.[192] Under this first element, OCR must identify a policy that creates a disparity and is important to the quality of education.[193]If there is no adverse impact, the claim fails.[194]

If OCR finds an adverse impact, it then proceeds to determine whether the policy is “necessary to meet an important educational goal.”[195] At this second stage, OCR examines the importance of the school’s asserted goal and congruity between this goal and the means used to achieve it.[196] If OCR is unsatisfied with the school's reasoning for disparate treatment, it will work with the school to formulate a less discriminatory alternative.[197]

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[190] *Id.*
[191] *See* U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter, at 11 (Jan. 8, 2014) (though this letter explicitly addresses racial discrimination, footnote 4 to the letter explains that the legal framework outlined also applies to Title IX gender discrimination) [hereinafter January 2014 Dear Colleague Letter]; *See also* U.S. Department of Education., Office for Civil Rights, Dear Colleague Letter, at 9, (Oct. 1, 2014), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf (explaining that OCR would consider evidence offered by school district that a difference in resources does not adversely impact the quality of education) [hereinafter October 2014 Dear Colleague Letter].
[192] *Id.*
[193] *Id.*
[194]*See* January 2014 Dear Colleague Letter, *supra* note 191; *see also* October 2014 Dear Colleague Letter, *supra* note 192 (explaining that a mere quantitative or qualitative disparity resulting from neutral policy is not sufficient to find unlawful discrimination).
[195] January 2014 Dear Colleague Letter, *supra* note 191.
[196] *See* January 2014 Dear Colleague Letter, supra note 191; *see also* October 2014 Dear Colleague Letter, *supra* note 191 (explaining that if OCR recognizes the important justification for disparity, it will work with the school to formulate an alternative with a less disparate impact).
[197] *See* January 2014 Dear Colleague Letter, *supra* note 191.

If OCR is satisfied that the school's goal is sufficiently important and the means used are proper, it then decides whether there are equally effective policy alternatives that impose less of a burden on the adversely impacted sex.[198] OCR considers whether the measure is simply a pretext for discrimination, and if there are comparably effective policies with less discriminatory effects.[199] If OCR finds viable alternatives or discovers that the school is acting with a pretextual motive, it will likely determine that the disparate impact resulting from the school's policy constitutes illegal discrimination.[200]

3. How Disparate Impact Claims are Brought and Enforced

Disparate treatment and disparate impact claims not only differ in their substance, but also in the procedural means by which they can be brought. Private individuals may bring disparate treatment claims. Disparate impact claims, on the other hand, are more limited. The Supreme Court in *Alexander v. Sandoval*[201] limited Title VI private actions (and thus, presumably Title IX private actions as well)[202] to damages for intentional discrimination.[203] The Court restrained *Cannon* to claims for intentional discrimination and refused to extend private actions to disparate impact theories.[204] Some courts have implied the existence of private disparate impact claim under Title IX through Title VII,[205] but following *Sandoval* it is generally agreed that Title IX provides no private judicial claim for disparate impact.[206]

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[198] *See* January 2014 Dear Colleague Letter, *supra* note 191.
[199] *See* January 2014 Dear Colleague Letter, *supra* note 191; *see also* October 2014 Dear Colleague Letter, *supra* note 192.
[200] *See* January 2014 Dear Colleague Letter, *supra* note 191.
[201] Alexander v. Sandoval, 532 U.S. 275 (2001).
[202] *See* January 2014 Dear Colleague Letter, *supra* note 191.
[203] *See* January 2014 Dear Colleague Letter, *supra* note 191.
[204] *See* January 2014 Dear Colleague Letter, *supra* note 191.
[205] *See* January 2014 Dear Colleague Letter, *supra* note 191; *see also supra* note 183.
[206] *See* January 2014 Dear Colleague Letter, *supra* note 191.

Although *Sandoval* barred private individuals from bringing disparate impact complaints, OCR enforces disparate impact obligations administratively[207] through complaints from individuals and advocacy agencies and compliance investigations initiated by OCR itself.[208] OCR seeks to resolve noncompliance by a school through mediation, voluntary compliance agreements, and, if necessary, litigation or administrative hearings.[209]

OCR requires complaints to be filed within 180 days of the alleged discrimination.[210] If the complaint is timely and concerns a matter over which OCR has jurisdiction, OCR assesses whether Early Complaint Resolution (ECR) is appropriate.[211] As part of a successful ECR mediation, the parties will reach a compliance agreement without OCR monitoring.[212] If the school that is a party to such an agreement violates its terms, the original complainant must restart the complaint process with OCR. This process burdens the complainant if schools do not abide by their agreement.[213]

If ECR mediation is not pursued (as in most cases), OCR investigates the complaint's allegations.[214] During OCR investigations, schools may accept a "voluntary resolution agreement" to remedy any compliance issues without litigation.[215] If schools do not wish to

[207] *See* January 2014 Dear Colleague Letter, *supra* note 191; *see also Briefing Report for the Committee on Educational Policy*, RACE, SEX AND DISPARATE IMPACT: LEGAL AND POLICY CONSIDERATIONS REGARDING UNIVERSITY OF CALIFORNIA ADMISSIONS AND SCHOLARSHIPS, at 3 (2008), http://regents.universityofcalifornia.edu/regmeet/may08/e2attach.pdf.
[208] *See* January 2014 Dear Colleague Letter, *supra* note 191.
[209] *See* Kristen Galles, *Title IX and the Importance of a Reinvigorated OCR*, 37 ABA HUMAN RIGHTS MAGAZINE 3, (2010), http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol37_2010/summer2010/title_ix_and_the_importance_of_a_reinvigorated_ocr.html.
[210] *See id.*
[211] *See id.*
[212] *See id.*; *see also* October 2014 Dear Colleague Letter (explaining that "OCR focuses on the scope and severity of resource disparities...")
[213] *See* Galles, *supra* note 209.
[214] *See id.*
[215] *See id.*

negotiate these voluntary agreements, OCR will continue its investigation and issue a letter of findings.[216] This letter outlines its findings regarding discrimination at that school and steps the school must take to remedy the situation.[217] If a school does not adequately remedy the discriminatory practices, OCR may refer the case to the Department of Justice (DOJ).[218] DOJ may litigate the matter or pursue an administrative hearing to terminate federal funding to the institution.[219] Litigation and withdrawing funds is rare, however.[220]

OCR's process attempts to remedy discrimination efficiently and without litigation.[221] Complainants do not directly participate in the investigation or resolution process, making the process essentially a negotiation between OCR and the allegedly discriminatory school.[222] Therefore, OCR, rather than the complainant, maintains immense discretion and power as to how the matter will be resolved.[223] Because OCR essentially dictates how Title IX will be enforced, its renewed enforcement efforts[224] can be a key step towards improving Title IX compliance.

IV. Analysis: Title IX Complicates Compensating Student-Athletes Following *O'Bannon*

The compensation options available to schools depend on the extent to which the NCAA abrogates its compensation ban and developments beyond *O'Bannon.* In response to *O'Bannon,* NCAA President Mark Emmert stated the NCAA supports increasing the value of scholarships

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[216] *See id.*
[217] *See id.*
[218] *See id.*
[219] *See id.*
[220] *See id.*
[221] *See id.*
[222] *See id.*
[223] *See id.*
[224] See U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter (April 20, 2010), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html (providing information about the standards OCR uses to assess compliance with Part Three of the "three-part test." The test is used to determine whether institutions are meeting the Title IX regulatory requirement to accommodate students' athletic interests and abilities); *see also* Title IX Enforcement Highlights, at 6-8, U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS (Jun. 2012), http://www2.ed.gov/documents/press-releases/title-ix-enforcement.pdf (detailing ramped up efforts by OCR to remedy the over 900 Title IX athletics complaints it received in 2011 and 2012).

but opposes using trust payments.[225] It is unclear if the NCAA will drop its ban on compensation generally; *O'Bannon* only enjoins it for FBS football and men's Division I basketball. The Big Ten, Pacific-12, and Atlantic Coast conferences also support paying increased scholarships.[226] Notably, separate from *O'Bannon*, the five power conferences may draft their own rules for student-athletes, including increased scholarships.[227] Thus, it seems scholarships, not trusts, are the likely method of payment. This may vary, however, among schools depending on NCAA action.

Title IX issues related to *O'Bannon* have already arisen. For example, the University of Texas stated that, depending on the outcome of several other lawsuits against the NCAA,[228] it will potentially pay all student-athletes (including all women student-athletes) a $10,000 annual stipend.[229] Some speculate Texas' proposed plan for equal payment to all student-athletes would be a proactive step to avoid foreseeable Title IX issues.[230] If a school pays all athletes or pays none of them, it will avoid Title IX problems.[231] Moreover, there is a host of pending litigation against the NCAA on several *O'Bannon*-related issues.[232] But this article focuses on the Title IX implications because it is a matter that will need to be decided (either by a future court or amongst the universities themselves) before finalizing any student-athlete compensation plans.

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[225] *See* Ben Strauss, *After Ruling in O'Bannon Case, Determining the Future of Amateur Athletics*, NY TIMES (Oct. 21, 2014), http://www.nytimes.com/2014/10/22/sports/after-obannon-ruling-figuring-out-whats-next.html?_r=0 (explaining also that the NCAA opposes allowing student-athletes to profit from outside third parties such as for autographed memorabilia).

[226] *Id.*

[227] *See* Brian Bennett, *NCAA board votes to allow autonomy*, ESPN (Aug. 8, 2014), http://espn.go.com/college-sports/story/_/id/11321551/ncaa-board-votes-allow-autonomy-five-power-conferences (explaining that the power five conferences have increased autonomy in many areas, including to decide scholarship payments).

[228] *See* Gaines, *supra* note 108.

[229] *See id.*

[230] *See id.*

[231] This would avoid the potential scholarship disparities that may come with stipends payments to certain male athletes.

[232] *See* Patrick Vint, *Ranking the NCAA's 5 biggest legal battles, from least to most threatening*, SB NATION (Mar. 20, 2014), http://www.sbnation.com/college-football/2014/3/20/5528032/ncaa-lawsuits-obannon-kessler-union.

Limiting potential compensation to the two sports before the court in *O'Bannon* (i.e., FBS football and Division I basketball players), may violate Title IX by disproportionately increasing overall funding for men's athletic scholarships, and also by not affording women student-athletes similar opportunities to receive benefits as part of their compensation packages. Moreover, while the court did not mandate schools to implement stipends or trust payments, if schools limit compensation to the two *O'Bannon* sports, some male student-athletes will have substantially more valuable scholarships than their female counterparts. Therefore, Title IX issues arise at both the institutional level, whereby schools do not provide equivalent scholarship funding to male and female student-athletes, and at the individual level, potentially triggering disparate impact and disparate treatment claims.

A. Title IX Institutional Issues

Title IX analysis for substantially proportionate athletic participation may be unaffected by *O'Bannon*, since the overall number of scholarship student-athletes will not change. Importantly, however, because Title IX requires substantially proportionate scholarship opportunities,[233] if a qualifying school opted to pay $5,000 to each football and basketball scholarship (totaling $20,000 over the four years of college), an impermissible funding imbalance may result.[234]

[233] *See* 34 CFR 106.37(c)(1).
[234] The analysis applied under Title IX may change if student-athletes are eventually considered employees, which some predict may ultimately occur following the holding in the National Labor Relations Board's ruling that allowed Northwestern University's football players to collectively bargain as employees. *See* Northwestern University v. College Athletes Players Association, Case 13-RC-121359 (Mar. 26, 2014) *available at* http://www.nlrb.gov/news-outreach/news-story/nlrb-director-region-13-issues-decision-northwestern-university-athletes (opinion detailing the Nartional Labor Relations Board's ruling).

The NCAA, not individual schools, dictates the maximum numbers of scholarships schools may offer for each sport.[235] The NCAA permits each school to provide roughly 100 football and basketball scholarships (eighty-five for football, fifteen for women's basketball, and thirteen for men's basketball).[236] After *O'Bannon,* overall scholarship funding proportionality may be particularly difficult to achieve because football has, by far, the most scholarships of any sport.[237] About 100 scholarship positions (out of roughly 210 scholarships a school can offer per gender)[238] will include additional funding for men, but not for women. This would essentially create a tiered scholarship system, under which nearly half of the scholarships for male student-athletes provide substantially more funding than any female student-athlete may receive. Considering OCR strongly presumes noncompliance if there is more than a one percent difference in scholarships,[239] adopting *O'Bannon's* permitted payment system, without anything more, will likely violate Title IX. If nearly 100 males receive stipends and all females do not, it would be difficult for overall scholarship funding to remain substantially proportionate to athletic participation. Therefore, schools will likely need to provide stipends to a similar number of female student-athletes to comply.

Certain schools with highly profitable athletic programs can likely pay all student-athletes increased stipends, as Texas stated it would consider doing.[240] But many schools simply cannot afford to do this without significant cutting sports programs (or slashing soaring coaching

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[235] *See The Silent Enemy of Men's Sports*, ESPN THE MAGAZINE (May 23, 2012) (explaining how the NCAA's scholarship limits, not Title IX, most restricts school's sports offerings). This article goes on to detail the maximum scholarship limits imposed by the NCAA for each sport. *See also* N.C.A.A. Division 1 Bylaws, Article 15.5.3.1. ("There shall be a limit on the value of financial aid awards that an institution may provide in any academic year...").
[236] *See id.*
[237] *See id.*
[238] *See id*. (outlining the number of scholarships - full and partial - that schools may provide for each sport).
[239] *See* July 1998 Dear Colleague Letter, *supra* note 163.
[240] *See* Gaines, *supra* note 106.

salaries).[241] In fact, contrary to the court's finding in *O'Bannon*, that schools' budgets can cover the approved payment options, many schools currently struggle to make money. In 2013, for example, roughly twenty-five FBS schools, including relatively prominent programs, such as Pennsylvania State University, the University of Connecticut, Rutgers University, Washington State University, and the University of Colorado, had sports programs operating in the red.[242]

To be fair, many schools may not fully divulge their bottom line by spending as close to all of their revenue as possible, since there is little incentive to show a profit.[243] This practice - which is common for non-profit and government organizations[244] - explains why some schools, such as USC, UCLA, and Boston College's revenues precisely match expenses, equaling zero profits (even though these big program probably make money).[245] But this practice does not negate the fact that many athletic programs lose money and are subsidized by their schools.[246] For instance, only twenty-three out of 228 Division I NCAA programs were "self-sufficient," and only seven of those twenty-three were able to cover their departmental expenses without subsidies.[247] As a result, it will be difficult for many schools to implement *O'Bannon's* approved

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[241] Some school cannot afford to do this without making either cuts to sports programs or cutting back on soaring coaching salaries. *See Special Report: College Football Coaches' Salaries and Perks are Soaring*, NEWSDAY (Oct. 4, 2014), http://www.newsday.com/sports/college/college-football/fbs-college-football-coaches-salaries-are-perks-are-soaring-newsday-special-report-1.9461669 (explaining how the top twenty five paid coaches in college football make nearly $4 million on average).

[242] *See* Paula Lavigne, *College Sports Thrive Amid Downturn,* ESPN (May 1, 2014, 11:23 AM), http://espn.go.com/espn/otl/story/_/id/10851446/sports-programs-nation-top-public-colleges-thrived-economic-downturn-earning-record-revenues (describing many schools are increasingly turning immense profits amidst economic downturn. While this article stresses the money some schools are making, it seemingly ignores the data it relies on that shows many schools, including some prominent public universities with storied sports programs, are, in fact, losing money).

[243] *See id.* (explaining how many schools "keep their actual bottom line under wraps.")

[244] *See id.*

[245] *See id.*

[246] *See* Steve Berkowitz, Jodi Upton, & Erik Brady, *Most NCAA Division I Athletic Departments Take Subsidies,* USA TODAY SPORTS, (July 1, 2013, 12:48 PM), http://www.usatoday.com/story/sports/college/2013/05/07/ncaa-finances-subsidies/2142443/ (explaining how a vast majority of schools are not self-sufficient).

[247] *See Id.*

payment methods, and even harder for them to provide the necessary equivalent funds for women student-athletes to comply with Title IX.

B. Payment Must Extend to All Student-Athletes in the Market as Defined in O'Bannon: Those Whose Names, Images, and Likenesses are Used for Commercial Value and Who Participate in Profit Potential Sports.

As discussed earlier, the NCAA may not forbid compensation stemming from the right to publicity to athletes in Division I men's basketball and FBS football for two reasons.[248] First, their names, images, and likenesses are being used for commercial value in television broadcasts and archival footage, and videogames.[249] Second, these student-athletes are members of profit potential sports programs.[250] Because the plaintiffs in *O'Bannon* were former and present Division I basketball and FBS football players,[251] the court's ruling was properly limited to how compensation applies to the parties before it. But in the aftermath of *O'Bannon*, as schools implement its holding and future courts assess its precedential value, payment must be extended to all student-athletes - men and women - belonging to profit-potential teams whose names, images, and likenesses are used for commercial purposes.

1. If a School Compensates Male Athletes on Profit-potential Sports Teams, Whose Likenesses are Used Commercially, Title IX Requires Compensation for Similarly Situated Female Athletes.

FBS football and Division I men's basketball teams are surely, on the whole, the most profitable college sports programs.[252] But other sports programs also generate profits and use

248 *See* discussion *supra* Part II.A.
249 *See O'Bannon*, 7 F.Supp.3d at 968-71.
250 *See id.*
251 *See id.* at 962-963.
252 *The Equity in Athletics Data Analysis Cutting Tool,* U.S. DEP'T OF EDUC. (2012), http://ope.ed.gov/athletics/ (follow "Get aggregated data for a group of institutions" hyperlink; then insert [search criteria: (1) NCAA Division I-A, (2) Select Category: "Revenues – Men's and Women's and Coed Teams"]) (showing that in the aggregate men's basketball teams make $300 million and men's football teams make $ 1.5 billion, while women's basketball and softball lost money).

player likenesses for commercial purposes. Moreover, not all teams in FBS football and men's Division I basketball make a profit. For instance, in 2011, forty-three of the 341 Division I women's basketball teams earned a profit, as did eighty-six men's Division I basketball teams.[253] Last year at the University of Tennessee, the men's and women's basketball teams each made over one million dollars in profit.[254] The court in *O'Bannon* recognized a market demand for commercial use of certain players' likenesses to justify payment to these men's basketball players.[255] Women's teams that similarly make money for their schools, and whose players' names, images, and likenesses are used for commercial purposes, should be compensated as well because they comprise the same market identified in *O'Bannon*.

Many women's collegiate sports games are televised on ESPN and other major networks.[256] Women's basketball and softball are the most prominent examples, but ESPN alone airs games from several other women's sports, including lacrosse, track and field, gymnastics, volleyball, fencing, and bowling.[257] ESPN and other major networks use archival footage and highlights of women's sports teams. For Example, ESPN produced and aired a documentary on legendary University of Tennessee women's basketball coach, Pat Summit.[258] Along with

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[253] *See* Chris Smith, *When It's Okay to Lose Money: The Business of Women's College Basketball*, FORBES (Mar. 29, 2012, 11:22 AM), http://www.forbes.com/sites/chrissmith/2012/03/29/when-its-okay-to-lose-money-the-business-of-womens-college-basketball/ (explaining how although, generally, women's sports teams make less money than men's sports teams, about fifteen percent of Division I women's basketball teams turn a profit. This article's title is deceiving in that it focuses on the fact that the vast majority of women's sports lose money. However, it ignores the fact that some women's sports teams do indeed make money while their male counterparts do not).

[254] *See University of Tennessee-Knoxville 2013 Athletic Revenues and Expenses*, DEP'T OF EDUC., http://ope.ed.gov/athletics/GetOneInstitutionData.aspx (Search "The University of Tennessee-Knoxville;" follow "the University of Tennessee-Knoxville" hyperlink; Follow "Revenues and Expenses" hyperlink) (last visited Apr 30, 2015) (hereinafter Tennessee Athletics Revenues and Expenses).

[255] *O'Bannon*, 7 F. Supp. 3d at 969.

[256] *See NCAA, ESPN Agree To New Deal*, ESPN (Dec. 15, 2011, 6:20 PM), http://espn.go.com/college-sports/story/_/id/7357065/ncaa-espn-agree-tv-deal-2023-24 (describing how a new deal reached between ESPN and the NCAA expanded the number of women's collegiate sports teams whose games will be televised on ESPN).

[257] *See id.*

[258] *See Nine for IX: 'Pat XO,'* ESPN FILMS (July 8, 2013), http://espn.go.com/espnw/w-in-action/nine-for-ix/article/8948860/nine-ix-film-summary-director-pat-xo.

footage of Pat Summit and interviews of those who know her, the documentary includes game and highlight footage of players.[259] This use of archival footage is not unique to women's college basketball.[260]

When ESPN or other third parties televise games or use archival footage of profit-potential women's sports teams, Title IX requires that these athletes be compensated similarly to what *O'Bannon* allows for male football and basketball players. While contracts for airing men's basketball and football games are often more lucrative than women's sports,[261] women's student-athletes' names, images, and likenesses are still used for commercial value. Moreover, although the *O'Bannon* court broadly designates all FBS football players as part of the same market, television contracts differ drastically for FBS teams in the "power five" conferences as opposed to those in smaller FBS conferences.[262] For example, the ACC, Big Ten, Big 12, Pac-12, and SEC currently have television contracts worth, on average, over $60 million.[263] On the other hand, smaller conferences, such as the Mountain West, MAC, Conference USA, and Sun Belt, possess contracts worth an average of roughly $10 million to $15 million.[264] Despite these differences, the *O'Bannon* court deemed that these dissimilar conferences comprised the same market. Therefore, if significant differences in television revenues amongst men's teams does not distinguish them categorically, the fact that women's teams possess less valuable television contracts should similarly not disqualify them from the market identified in *O'Bannon.*

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[259] *See id.*
[260] *See ESPN Search*, ESPN.COM, http://search.espn.go.com/softball/videos/6 (last visited Apr. 30, 2015) (ESPN page archiving the numerous documentary and highlight footage of college softball).
[261] *See* Lavigne, *supra* note 242 (explaining how the University of Texas' Longhorn Network in worth $300 million over the next 20 years). No similar television contracts exist for women's sports.
[262] *See* Smith, *supra* note 6.
[263] *See* Smith, *supra* note 6.
[264] *See* Smith, *supra* note 6 (follow “Full List: College Sports’ Most Valuable Conferences” hyperlink).

Proponents of paying male but not female student-athletes emphasize that, generally, men's basketball and football make more money than any other women's sports.[265] But attempts to distinguish Division I men's basketball and FBS football from women's basketball and other women's sports on the basis that men's teams make significantly more revenue are partially artificial because of a major factor that enhances revenue for men's sports: donations.[266] The difference in revenue between men's and women's sports is not merely explained by lucrative television contracts or ticket sales.[267] Many men's programs benefit from significantly more alumni donations.[268] For example, in the SEC, for every one dollar donated to women's basketball, roughly sixty-seven dollars were donated to men’s football programs.[269] This revenue source is entirely independent of using players' names, images, and likenesses, and is unrelated to *O'Bannon*'s justifications for paying men's basketball or football players. Moreover, private donations cannot support one gender over the other and circumvent Title IX requirements.[270] Therefore, the fact that men's teams generally make more money than women's teams, alone, is insufficient to overcome the reality that both genders have profit-potential teams whose players' likenesses are used for commercial value. If courts and schools fail to recognize these categorical similarities, schools may be vulnerable to Title IX disparate treatment or disparate impact claims.

Compensation based on whether a sport produces revenue or commercially uses student-athletes' names, images, and likenesses is complicated because "profit-potential" is difficult to

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[265] *See e.g.,* Wendy Parker, *Title IX and the O'Bannon Ruling,* BLUESTAR MEDIA (Aug. 13, 2014, 9:07 PM) http://www.bluestarmedia.org/index.php/blogmain/wparker/item/972-title-ix-and-the-obannon-ruling.
[266] James Bowman, *Why Women's College Basketball Might Be Stuck in the Red,* SWISH APPEAL (Nov. 12, 2013, 8:00 AM), http://www.swishappeal.com/2013/11/12/5090384/ncaa-womens-college-basketball-profits-donations (explaining how men's basketball and football receive significantly more donations than women's sports teams).
[267] *See id.*
[268] *See id.*
[269] *See id.*
[270] *See* Chalenor v. Univ. of N.D., 291 F.3d 1042, 1048 (8th Cir. 2002); *see generally* Rapp, § 10B.04(4)(a).

define. Numerous college sports, including baseball, softball, gymnastics, volleyball, among others, subject athletes to such commercial uses. But these programs almost universally do not make money.[271] As a result, it seems their right to publicity may afford these student-athletes compensation. Yet, schools are not profiting from these student-athletes like they are for men's basketball and football, and, in some cases, women's basketball. Due to this difficulty, while compensation should extend to women's basketball, for example, it is unclear whether this distinction includes other male or female sports programs.

2. Disparate Treatment Claims for Profit-potential Female Student-Athletes.

Female student-athletes in profit-potential sports whose names, images, and likenesses are used for commercial value but not compensated, while their similarly situated male counterparts are, may bring a Title IX disparate treatment claim. Disparate treatment claims cover instances where women are discriminated against because of their sex.[272] Unlike disparate impact claims, disparate treatment claims are used when a policy, on its face, discriminates against women.[273] While proponents of paying men instead of women justify the distinction on the revenue men's teams produce, if similarly situated female student-athletes are not compensated, it would seem nothing but gender explains the distinction.

A disparate treatment claimant would first need to establish a prima facie case of discrimination.[274] The assertion here would be that the school denies educational benefits or opportunities in the form of compensation for women student-athletes' right of publicity, thereby treating them differently from similarly situated men student-athletes. Here, for instance, men's basketball players would receive at least $5,000 in annual payments. Meanwhile, women's

[271] *See* 2013 Department of Education Revenue Statistics *supra* note 82.
[272] *See* October 2014 Dear Colleague Letter *supra* note 191.
[273] *See* October 2014 Dear Colleague Letter *supra* note 191.
[274] *See Middlebrooks supra* note 189 at 829.

basketball players in programs that produce profits and commercially use players likenesses would be denied payment because of the over generalization that men's teams make more money. And, importantly, this is not merely a hypothetical problem. For example, a University of Tennessee men's basketball player, whose team made money,[275] would be paid, while a women's player, whose team also made money,[276] would not. The women's player would receive at least $20,000 less in scholarships over the course of a four year collegiate career. This substantial payment disparity is irreconcilable with the similar profit potential of both teams. It thus appears a women's basketball player, and other women-student athletes, belonging to profit potential teams could establish a prima facie case of discrimination.

As discussed earlier, once a claimant proves a prima facie discrimination case, it gives rise to an inference of discrimination, and the burden of production shifts to the school to justify its disparate treatment.[277] Schools may pay only men student-athletes for non-discriminatory reasons.[278] In these instances, disparate treatment is permissible because differences are explained by legitimate economic realities. But a school cannot provide different benefits simply because, generally, men's basketball and football make more money than their female counterparts. This justification would fail because it would differ substantially depending on the school involved in the claim.

Economic realities at the University of Connecticut and Tennessee further illustrate the need to examine the profit potential of sports teams at each individual school, rather than

[275] *See* Tennessee Athletics Revenues and Expenses *supra* note 255.
[276] *See* Tennessee Athletics Revenues and Expenses *supra* note 255.
[277] *Middlebrooks*, 980 F. Supp. at 829.
[278] *See id.*

nationally. In 2012, Connecticut's football team lost over $2.5 million,[279] and its men's basketball team lost over $1 million.[280] Similarly, its powerhouse women's basketball program lost about $1 million.[281] If payment was extended only to the two men's teams but not the women's basketball program, similarly situated student-athletes would be treated differently. And women would be adversely impacted. The school lost over $3.5 million combined from its two men's teams. Yet players belonging to Connecticut's historically mediocre[282] (and currently, less than mediocre)[283] football program would reap the benefits of college football's national popularity - despite Connecticut's program's own shortcomings - while members of Connecticut's dynastic women's basketball team[284] would be financially penalized by a national preference for men's sports.

At the University of Tennessee, the result would be even more problematic. As discussed earlier, in 2013, Tennessee's men and women's basketball programs each made over $ 1 million, and likenesses of both teams' players were used commercially.[285] Because both teams make money and subject players to use of their names, images, and likenesses for commercial purposes, men and women players both should be compensated. Otherwise, only men would be paid despite the fact that both teams are profitable.

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[279] *See University of Connecticut 2013 Revenues and Expenses*, U.S. Dep't of Educ. (2013) http://ope.ed.gov/athletics/InstDetails.aspx (search terms: (1) clicked on "Get Data" for one institution, (2) narrowed search to "Connecticut," (3) Clicked on "University of Connecticut," and (4) Clicked on "Revenues and Expenses").
[280] *See id*.
[281] *See id.*
[282] The Connecticut football team has a meager .485 winning percentage in its history and has never won a national championship. *See Football Archives,* UConn Football (May 4, 2015), http://www.uconnhuskies.com/sports/m-footbl/archive/conn-m-footbl-archive.html (listing yearly results of Connecticut football, which equates to an all-time winning percentage below .500 and zero national championships).
[283]In 2014, , Connecticut's football team was 2-10, and it does not play in a power five conference.. *See Connecticut Huskies,* ESPN (May 4, 2015), http://espn.go.com/college-football/team/_/id/41/connecticut-huskies.
[284] The Connecticut women's basketball team has won 10NCAA Division I national championships in the last 20 years. *See Geno Auriemma, UConn women win 10th national crown*, THE BOSTON GLOBE (Apr. 8, 2015), http://www.bostonglobe.com/sports/2015/04/07/uconn-women-win-national-championship/nECkUVxnnLRCfTlPbhEnZP/story.html.
[285] *See* Tennessee Athletics Revenues and Expenses *supra* note 255.

Connecticut and Tennessee highlight a much broader reality: if payment is confined to men after *O'Bannon*, only a national preference for the men's basketball and football over women's sports, not a difference in revenue, is left to justify paying men and not women at many schools. A preference for male sports plagued women's sports throughout history and spurred Title IX's creation.[286] This is not a unique phenomenon. About fifteen percent of women's basketball programs make money, while about half of men's basketball teams do.[287] This difference in revenue cannot justify paying some male student-athletes but not paying similarly situated female student-athletes. It would disfavor all female student-athletes, regardless of how much money a given program actually makes for their school. Under such a system, a woman student-athlete claimant could likely succeed in showing that a similarly situated group is treated differently for discriminatory reasons. As a result, *O'Bannon* must be extended to profit potential women's teams whose player likenesses are used commercially. This type of discrimination finds no safe haven under Title IX, and is, in fact, precisely the type of "pretextual" policy Title IX prohibits through its disparate treatment claims.

3. *Disparate Impact Claims for Profit Potential Female Student-Athletes.*

Disparate impact administrative complaints also offer recourse if the reason for paying only male football and basketball players was deemed facially neutral. Perhaps, for example, a school will announce a policy only paying athletes on these two men's teams because that is what *O'Bannon* permits, or because the NCAA's ban on payment has been enjoined only for these two

[286] *See* Parker v. Franklin Cnty. Comm. Sch. Corp., 667 F.3d 910, 916 (7th Cir. 2012).

[287] *See* Chris Smith, *When It's Okay to Lose Money: The Business of Women's College Basketball*, FORBES (Mar. 29, 2012), http://www.forbes.com/sites/chrissmith/2012/03/29/when-its-okay-to-lose-money-the-business-of-womens-college-basketball/.

teams, or because these two teams produce revenue at unique levels. Whatever the school's justification may be, such a policy could produce disparate impact claims.

As discussed earlier, disparate impact claims must be in the form of OCR complaints.[288] Also as discussed earlier, to resolve a disparate impact complaint, OCR must first determine that a school's policy adversely impacts one sex.[289] If a school limited payment to student-athletes belonging to the men's basketball and football teams, athletes on profit potential women's sports programs whose athletes' names, images, and likenesses are used for commercial gain, could fairly easily establish an adverse impact. These student-athletes' scholarships would be substantially less valuable than their male counterparts, creating, essentially, a tiered scholarship system. A $20,000 difference in scholarships over the course of a four-year college career likely satisfies this first element.

If OCR indeed found that a policy created an adverse impact for either sex, it would then examine whether the school's disparate treatment was justified by an important educational goal.[290] Schools may be increasingly forced to pay certain athletes in recognition of their right to publicity. As *O'Bannon* highlighted, schools have several viable interests at stake when restricting student-athlete compensation. But just as the court held in *O'Bannon*, these interests – whether it be preservation of amateurism, competitive balance, integration of athletics and academics, increased output – do not justify overly restricting a student-athletes' right of publicity.[291] Female student-athletes belonging to profit potential teams share the characteristics that *O'Bannon* deemed worthy of compensation for their male counterparts. And because OCR examines how closely related the means used by a school are to its end goal, it would likely

[288] *See* discussion *supra* Part III.D.3.
[289] *See* discussion *supra* Part III.D.2.
[290] *See* January 2014 Dear Colleague Letter, *supra* note 191.
[291] *See O'Bannon*, 7 F. Supp. 3d at 973.

prevent a school from barring payment to profit potential female student-athletes if that same school pays its men's basketball and football players in accordance with *O'Bannon.*

If schools do not extend *O'Bannon* in this critical way, OCR may find such a policy pretextual. On its face, this policy would be neutral. But in effect, this policy impacts similarly situated individuals very differently. OCR's process focuses on finding less discriminatory alternatives.[292] Here, that alternative is clear: equally pay men and women student-athletes belonging to profit potential sports whose names, images, and likenesses are used for commercial value. This equitable solution follows from the court's own reasoning in *O'Bannon* when it stressed that male basketball and football players must be paid equally.[293] Equal pay should not only apply amongst men's teams, but also between men and women owed compensation under their right of publicity. Certain men and women student-athletes have a claim to compensation via their right to publicity. To recognize only one of those claims would likely constitute be an impermissible disparity. Therefore, while schools could assert compensation justifications similar to those offered by the NCAA in *O'Bannon*, OCR would likely deem these interests insufficient to excuse a policy that inordinately disadvantages women.

C. All or Nothing: Extending Payment to All Male and Female Athletes?

As discussed in Part IV, B, if payment is confined only to the plaintiffs in *O'Bannon*, strong Title IX disparate treatment or disparate impact claims are available for similarly situated female student-athletes. Whether or not a school compensates these similarly situated female athletes, it is less clear what Title IX requires for other athletes of both genders who participate in non-profit potential sports and whose names, images, and likenesses are not commercially used. This group includes men and women on teams such as, men's baseball and women's

[292] *See* Galles, *supra* note 209.
[293] *See O'Bannon*, 7 F. Supp. 3d at 983.

volleyball. Because these teams, generally, are not profit potential sports and their players' likenesses are not used, not compensating these student-athletes seems facially neutral. Differential treatment would be based on revenue versus non-revenue and licensing of right of publicity distinctions, not gender. Thus, disparate impact claims are likely the only available remedies.

This group of female student-athletes may be able to show an adverse impact. If a school limited payment to student-athletes belonging to profit potential sports whose athletes' names, images, and likenesses are used for commercial gain, female student-athletes outside this category could likely establish an adverse impact. Just as would the case for women student-athletes belonging to profit potential sports (as discussed above), these student-athletes' scholarships would be substantially less valuable than their profit potential counterparts. A $20,000 difference in scholarships likely satisfies this first element for both male and female non-revenue student-athletes.

The sheer number of scholarships allotted to men's basketball and football enhances the viability of these athletes' claims. If a school adds the *O'Bannon* stipend payment to these roughly 100 male scholarships, the already tilted scholarship scales[294] would be further tipped in favor of male student-athletes. Even if a school provided stipend-bolstered scholarships to profit potential female student-athletes as is proposed here (e.g., to women's basketball players), roughly 100 male but only fifteen female student-athletes would receive stipend-bolstered scholarships. As a result, it appears female non-profit potential student-athletes would have a disparate impact claim. However, their male non-profit potential counterparts would likely not

[294] *See e.g, University of Washington 2013 Revenues and Expenses*, U.S. Dep't. of Educ., http://ope.ed.gov/athletics/InstDetails.aspx (at the University of Washington, 60% of athletic financial aid goes to men, and only 40% goes to women).

because the adverse impact would be that significantly more stipend-bolstered scholarships are provided to men.

Women student-athletes belonging to non-profit potential sports may have a viable disparate impact claim. Yet the success of this claim depends on a few factors. The strength of such claims would depend in the first instance on how many sports at a school are deemed profit potential and entitled to stipend payments. A school that designates women's basketball as a profit potential sport entitled to additional stipend payments adds fifteen scholarships with additional funding.[295] Under such a scenario, a vast majority of women would not receive these enhanced scholarships, while about 100 men would. Thus, women designated as members of non-revenue sports would be adversely impacted because of the decreased value of their scholarship. Moreover, the school would likely violate Title IX because its scholarship funding would not be substantially proportionate to its athletic participation. If, on the other hand, schools designated substantially more women student-athletes as belonging to profit potential sports and afforded stipends to relatively equal numbers of male and female student-athletes, a disparate impact claim is less likely.

Success of disparate impact claims for these student-athletes may also depend on what justifications, if any, OCR deems nondiscriminatory. While schools may be increasingly forced to pay certain athletes in recognition of their right of publicity, the claimants here cannot stake a claim to this right, because their names, images, and likenesses are not used in the same manner as men's basketball, football, and women's basketball players. Therefore, within this group of

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[295] *See* Peter Keating, *The Silent Enemy of Men's Sports*, ESPN THE MAGAZINE, May 23, 2012, *available at* http://espn.go.com/espnw/title-ix/article/7959799/the-silent-enemy-men-sports (explaining that NCAA regulations only allow 12 softball and 15 basketball scholarships).

claimants, schools could argue what the court rejected in *O'Bannon*: increased output[296] (or more generally, inability to pay).

The *O'Bannon* court held the NCAA's interest in increased output did not justify NCAA restrictions because a desire to increase athletic opportunities did not reasonably prevent a school from providing a modest stipend it could afford.[297] The court detailed how evidence presented at trial showed that these stipend payments would not cause any schools to drop out of Division I or force schools to cut sports programs.[298] As previously discussed, the court's assertion may be overstated considering many schools' sports programs lose money and rely on subsidies from their schools.[299] Moreover, this argument would be undermined further if schools were required to pay all athletes. Annually providing an additional $5,000 per student-athletes for about 420 (roughly 210 scholarship permitted for each gender) scholarship athletes constitutes an enormous expense for sports programs. While wealthier schools can rather easily afford these payments, many schools simply cannot without making substantial cuts.[300] As a result, it may not be economically feasible to mandate all schools to pay all athletes, regardless of whether these athletes have a right of publicity at stake.

The quandary that remains is whether the economic difficulties of paying all student-athletes justifies not paying everyone and instead paying only a small number of women who belong to profit potential sports while paying 100 men's basketball and football players. In other words, schools that cannot afford to pay all athletes may risk violating Title IX if they implement a policy that only pays women's basketball, barring all other women on the basis of their non-

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[296] *See O'Bannon*, 7 F. Supp. 3d at 981-982.
[297] *See id.*
[298] *See id.*
[299] *See* Berkowitz, *supra* note 246.
[300] *See* Gaines, *supra* note 106.

profit potential distinction. Schools that cannot afford to pay all athletes may be forced to raise tuition to cover these new costs. With many schools already struggling to provide for their educational needs[301] and with students nationwide drowning in mounting debt,[302] paying all athletes stipends - on top of their existing full scholarships - with students' tuition money is problematic. As a result, student-athletes would not necessarily be receiving compensation from those who get rich from their unpaid efforts. They may be compensated at the expense of tuition paying students, or the taxpayers at public schools.

Proponents of paying college athletes focus on the supposed dire economic state of these athletes during their time in college.[303] Yet student-athletes receive unmatched facilities, educational services and benefits already, and exit school with substantially less debt than the average college student.[304] The advantages schools frequently provide to student-athletes were highlighted recently by the University of North Carolina academic fraud scandal involving widespread, systemic efforts to artificially keep athletes academically eligible.[305] And while North Carolina's situation may seem extreme, schools watering down curriculum or giving

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[301] *See* Steve Odland, *College Costs Out of Control*, FORBES (Mar. 24, 2012), http://www.forbes.com/sites/steveodland/2012/03/24/college-costs-are-soaring/ (detailing the soaring cost of college attendance).

[302] See Phil Izzo, *Congratulations to Class of 2014, Most Indebted Ever*, WALL STREET JOURNAL (May 16, 2014), http://blogs.wsj.com/numbers/congatulations-to-class-of-2014-the-most-indebted-ever-1368/ (describing how the average student has $33,000 in student loans debt after graduation from college, which is more than double the average debt 20 years ago); *see also* Darren Heitner, *College Athletes Are Not Immune to America's Student Debt Dilemma*, FORBES (Jun. 6, 2014), http://www.forbes.com/sites/darrenheitner/2014/06/03/college-athletes-are-not-immune-to-americas-student-debt-dilemma/ (explaining how many student-athletes take out loans as well. However, the average debt of student-athletes is far less than that of the average student, with most student-athletes taking out less than $10,000 - comparing favorably to the $33,000 national average).

[303] *See e.g.* Ryan Grenoble, *UConn Basketball Player Speaks of 'Hungry Night,' Going to bed 'Starving'*, HUFFINGTON POST (April 7, 2014), http://www.huffingtonpost.com/2014/04/07/shabazz-napier-hungry-uconn-basketball_n_5106132.html.

[304] *See* Darren Heitner, *College Athletes Are Not Immune to America's Student Debt Dilemma*, FORBES (Jun. 6, 2014), http://www.forbes.com/sites/darrenheitner/2014/06/03/college-athletes-are-not-immune-to-americas-student-debt-dilemma/ (explaining how many student-athletes take out loans as well. However, the average debt of student-athletes is far less than that of the average student, with most student-athletes taking out less than $10,000).

[305] See Sara Ganim and Devon M. Sayers, *UNC Report Finds 18 Years of Academic Fraud to Keep Athletes Playing*, CNN (Oct. 25, 2014), http://www.cnn.com/2014/10/22/us/unc-report-academic-fraud/.

student-athletes exclusive perks is far from unique. At many schools, it is the norm.[306] But social and economic considerations aside, this issue must be addressed legally by OCR and, potentially, by the courts, as Title IX claims are inevitably brought following *O'Bannon.*

V. CONCLUSION

O'Bannon significantly limited the NCAA's ability to prohibit student-athlete compensation for their right of publicity. But this case should be viewed as a beginning, rather than an end. Title IX requires schools to extend *O'Bannon* to include similarly situated female student-athletes: those who like FBS football and Division I men's basketball players, belong to profit potential sports programs and whose likenesses are commercially used. Schools that do not extend payment to this group of female-student athletes have significant Title IX liability. These female student-athletes can likely succeed on a disparate treatment claim if a school's policy is deemed discriminatory, or, alternatively, on a disparate impact theory if it is considered facially neutral. Moreover, if schools provide about 100 male athletes but significantly fewer females with stipend payments, they are likely in violation of Title IX's requirement that scholarships be substantially proportional to athletic participation.[307]

Beyond these fairly clear obligations, some fear *O'Bannon* opens the floodgates and may force all schools to pay all student-athletes.[308] Schools that do not do so may face disparate impact complaints by some female student-athletes. But it is unclear whether these complaints would succeed. Economic realities may justify not compensating student-athletes who are not in

[306] *See e.g. Top 5 'pay to play' scandals rocking college football*, THEWEEK.COM (Jan. 6, 2011), http://theweek.com/article/index/210800/top-5-pay-to-play-scandals-rocking-college-football.
[307] *See* July 1998 Dear Colleague Letter, *supra* note 163.
[308] *See* Gaines, *supra* note 106.

profit potential sports. In fact, financial constraints may even cause some schools to consider paying none of their student-athletes due to Title IX concerns of selective payment.

Several related cases are currently pending that may clarify *O'Bannon*'s reach. Some of these cases plan to upend the entire NCAA relationship with student-athletes[309] and, if successful, could render *O'Bannon* largely irrelevant. And *O'Bannon* itself is also on appeal.[310] But in the meantime, the NCAA and universities must evaluate how to implement *O'Bannon's* permitted compensation plans consistently with Title IX. Amidst soaring NCAA revenues[311] and coaching salaries,[312] many increasingly view modest stipends as nothing more than a consolation prize. Short of schools paying all student-athletes, there will be Title IX issues. The question is: how these issues will be dealt with – proactively by schools and OCR, or reactively by the courts? Let the games begin.

[309] *See* Cindy Boren, *Five key things to know about O'Bannon v. NCAA*, WASHINGTON POST (Aug. 9, 2014), http://www.washingtonpost.com/blogs/early-lead/wp/2014/08/09/five-key-things-to-know-about-obannon-vs-ncaa/ explaining how the pending litigation by prominent attorney, Jeffrey Kessler, may revolutionize the way college athletes are paid); *see also* Steve Eder, *How Kessler's Lawsuit Could Change College Sports*, NY TIMES (Aug. 27, 2014), 27, 2014), 27, 2014), 27, 2014), 27, 2014), http://www.nytimes.com/2014/08/28/sports/how-jeffrey-kesslers-lawsuit-could-change-college-sports.html?_r=1 (similarly describing the potential impact of Kessler's lawsuit).
[310] *See* Johnson, *supra* note 63.
[311] *See* Smith, *supra* note 6.
[312] *See* Newsday, *supra* note 9.