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## Gender Equality in High School Sports: Why There is a Contact Sport Exemption to Title IX, Eliminating it, and a Proposal for the Future.

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# Gender Equality in High School Sports: Why There is a Contact Sports Exemption to Title IX, Eliminating It, and a Proposal for the Future

Blake J. Furman<sup>\*</sup>

“[Tough issues and decisions] give us an opportunity to rethink our basic assumptions about women and men, assumptions sometimes buried beneath our consciousness. They allow us to ask afresh who we are, what we want, and if we are willing to begin to create a new order of things.”<sup>1</sup>

—Wendy W. Williams

## INTRODUCTION

Before New York Jets center Nick Mangold made a name for himself in the NFL, he starred at Archbishop Alter High in Kettering, Ohio.<sup>2</sup> However, Nick is not the only Mangold to go to war on the Alter High gridiron. Nick’s younger sister Holley Mangold is now an offensive and defensive lineman for the varsity

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<sup>1</sup> Wendy Williams, *The Equality Crisis*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 15, 29 (Katharine T. Barlett & Rosanne Kennedy eds., 1991).

<sup>2</sup> See Andrea Adelson, *New York Jets Centre Nick Mangold’s Sister Follows In His Footsteps*, CBCSPORTS, Aug. 1, 2006, available at <http://www.cbc.ca/cp/football/060801/f080180.html>.

team.<sup>3</sup> Unlike most of the women who play as kickers struggling for acceptance on a men's team, Holley—who is 5-feet, 9-inches, and 300 pounds—is in the middle of the action, dealing out physical punishment.<sup>4</sup> Since she started playing at a young age, she has garnered the respect of her teammates, coaches and opponents.<sup>5</sup> But despite being the only woman on a men's team, Holley does not consider herself a feminist.<sup>6</sup> In her own words, she plays because “football is one of the greatest sports there is and if I can keep doing it like my brother, that would be amazing.”<sup>7</sup>

Unfortunately, for every success story like Holley Mangold, there are many stories of girls that are unable to overcome society's social and legal barriers. Many athletically gifted women who want to play a contact sport at the highest level are often denied an opportunity. The idea of women competing with and against men in a contact sport surpasses the law's notions of acceptable limits on sex-role behavior.<sup>8</sup> Even if the majority of society views contact sports as an acceptable activity for women, the law makes it clear that it still sees women as fragile and in need of protection.<sup>9</sup> Accordingly, the Contact Sports Exemption<sup>10</sup> (“CSE”) to Title IX,<sup>11</sup> permits academic institutions to exclude women from even trying out for a men's contact sports team solely on the basis of gender and with no regard for the individual female's skill or ability level. The rationales behind the continued existence of the contact sports exemption are weak at best. By not guaranteeing women an opportunity to tryout for a male contact sports team the law is “clinging . . . to culturally dictated notions that underestimate the flexibility and potential of [both sexes, which in turn limits women] as a class and as individuals.”<sup>12</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> *See id.*

<sup>5</sup> *Id.*

<sup>6</sup> *See id.*

<sup>7</sup> *Id.*

<sup>8</sup> *See Williams, supra note 1, at 19.*

<sup>9</sup> *See 34 C.F.R. § 106.41 (2000).*

<sup>10</sup> *Id.*

<sup>11</sup> Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (1994).

<sup>12</sup> *Williams, supra note 1, at 28.*

Title IX was enacted with the goal of ensuring gender equality.<sup>13</sup> Since its enactment, it has been effective in increasing women's participation rates in athletics.<sup>14</sup> However, the contact sports exemption remains a significant hurdle to achieving true gender equality in the sports world. This paper illustrates the need for the elimination of the CSE, and proposes a new gender equality regime in sports. Part I presents and explains the relevant law regarding gender equality in the sports context. It details the evolution of Title IX and the role of the Equal Protection Clause.<sup>15</sup> Part II presents three potential rationales for the contact sports exemption and explores the historical and ideological underpinnings of those rationales. Part III discusses two prominent feminist legal theories and how they support commonly proposed reform measures for gender equality in sports. Part IV describes a proposal for reform through the complete elimination of gender segregation in high school sports and a requirement that all teams be half male and half female. The proposal demonstrates how gender equality can only be achieved through this dramatic departure from the current system and a return of athletics to their proper role within an academic institution.

## I. THE LAW AND HISTORY BEHIND TITLE IX

### A. *Title IX*

Title IX of the Education Amendments of 1972<sup>16</sup> provides that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”<sup>17</sup> Although

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<sup>13</sup> See 20 U.S.C. §§ 1681–88.

<sup>14</sup> See Women's Sports Foundation — Know Your Rights, *Title IX Q & A* (May 26, 2005), <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/rights/article.html?record=888> [hereinafter “Women's Sports Foundation”].

<sup>15</sup> U.S. CONST. Amend. XIV, § 1.

<sup>16</sup> 20 U.S.C. §§ 1681–1688. See *infra*, Part I.E. for language of the Equal Protection Clause.

<sup>17</sup> 20 U.S.C. § 1681(a). See Glenn George, *Fifty/Fifty: Ending Sex Segregation In School Sports*, 63 OHIO ST. L.J. 1107, 1113 n.28 (2002) (explaining that “[t]he act was

athletics was not a major component of the debate surrounding Title IX's enactment,<sup>18</sup> the sports world—particularly the NCAA<sup>19</sup>—quickly realized that Title IX could drastically alter the nature of sports.<sup>20</sup> Consequently, NCAA lobbyists made considerable efforts to exempt intercollegiate athletics as a whole from Title IX's reach.<sup>21</sup> However, those efforts were not successful.<sup>22</sup>

When those efforts failed, Senator John Tower, R-Tex., proposed an amendment to Title IX, which provided an exemption for “revenue” sports.<sup>23</sup> Although the amendment did not make it through the Senate, it eventually led to a compromise in the form of the Javits Amendment, which directed the Secretary of Health, Education and Welfare (“HEW”)<sup>24</sup> to implement regulations for intercollegiate athletics with “reasonable provisions considering the nature of particular sports.”<sup>25</sup> HEW's Office for Civil Rights (“OCR”) responded with proposed regulations in 1974, which were finalized in 1975.<sup>26</sup>

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amended in 1988 to clarify that the entire institution . . . [is] subject to Title IX's anti-discrimination requirement as long as any program within the institution accepts federal funds”). The amendment allows Title IX to cover most educational institutions, both public and private, and their sports programs (even if the funding does not go to their sports programs) since most receive some sort of federal funding. *See id.*

<sup>18</sup> See Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 387 (2000). *See generally* 20 U.S.C. §§ 1681–88 (in its original form, Title IX made no explicit reference to athletics).

<sup>19</sup> National Collegiate Athletic Association.

<sup>20</sup> George, *supra* note 17, at 1113.

<sup>21</sup> *Id.*

<sup>22</sup> *See id.* at 1113–14.

<sup>23</sup> *Id.* at 1113–14 (explaining that the proposed amendment was an attempt to try and exempt two prominent intercollegiate sports, football and men's basketball, from Title IX coverage).

<sup>24</sup> In 1979, the United States Department of Health, Education, and Welfare split into two agencies—the Department of Education and the Department of Health and Human Services. *See Cohen v. Brown Univ.*, 101 F.3d 155, 165 n.5 (1st Cir. 1996).

The Department of Education later adopted the documents promulgated by HEW, and is now the agency charged with enforcing them. *See id.*

<sup>25</sup> George, *supra* note 17, at 1114 (quoting Gender and Athletics Act, Pub. L. No. 93-330, § 844, 88 Stat. 484, 612 (1974) (codified at 20 U.S.C. § 1681 (1994)). The Javits Amendment was part of the Education Amendments of 1974. *Id.*

<sup>26</sup> *Id.*; *see also* 34 C.F.R. § 106.41 (2000).

*B. 1975 OCR Regulation*

The 1975 Title IX regulation explicitly permitted the creation of sex-segregated sports teams and introduced the contact sports exemption (“CSE”).<sup>27</sup> Essentially, it declared that separate teams for each sex were permitted, but a woman<sup>28</sup> had to be allowed to try out for a men’s sports team if there was no women’s team in that sport *and* if the sport was a non-contact sport.<sup>29</sup> Contact sports are defined in the statute as “boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.”<sup>30</sup> The last clause is a catchall category that allows for the broad application of the rule.<sup>31</sup> This clause was the most troublesome part of the regulation because it allowed university athletic departments to find ways to bar women from men’s “contact” sports with no obligation to permit them to try out or to create an equivalent female squad.<sup>32</sup>

Additionally, the 1975 Regulation required “equal athletic opportunity for members of both sexes,”<sup>33</sup> in an effort to address the large gap in male and female athletic participation rates.<sup>34</sup> Ten

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<sup>27</sup> 34 C.F.R. § 106.41(b).

(b) Separate Teams. Notwithstanding the requirement of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to tryout for the team offered unless the sport involved is a contact sport.

*Id.*

<sup>28</sup> Although the statutory language says, “members of the excluded sex,” the excluded students are almost always women. *See* George, *supra* note 17, at 1115 n.33.

<sup>29</sup> 34 C.F.R. § 106.41(b); *see also* Yellow Springs Exempted Vill. Sch. Dist. Bd. of Ed. v. Ohio High Sch. Athletic Ass’n, 647 F.2d 651, 656 (6th Cir. 1981) (explaining that the contact sports exemption was not ruled unconstitutional because it is “permissive”).

<sup>30</sup> 34 C.F.R. § 106.41(b).

<sup>31</sup> *Id.* A major factor in determining if a sport is a contact sport is the potential for injury it presents. Sangree, *supra* note 18, at 418.

<sup>32</sup> *See* George, *supra* note 17, at 1114–15.

<sup>33</sup> 34 C.F.R. § 106.41(c).

<sup>34</sup> When Title IX was passed in 1971, less than 300,000 girls were high school athletes, as compared to over 3.5 million boys. George, *supra* note 17, at 1115 (citing Nat’l Fed’n

factors were considered; most of them were quantitative.<sup>35</sup> However, the first factor—“whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes”<sup>36</sup>—caused much confusion.<sup>37</sup> No guidance was given as to how an institution could effectively comply with this factor.<sup>38</sup>

### C. 1979 Policy Interpretation

In an effort to reduce uncertainty, the OCR issued a “Policy Interpretation” in 1979 designed to provide a framework for compliance with Title IX’s athletic program requirements.<sup>39</sup> In order for an institution to be in compliance with the OCR regulations, an institution only needs to satisfy one of the three prongs discussed below.

The first prong is called the “substantial proportionality” test and allows institutions to show that they offer athletic opportunities “in numbers substantially proportionate to their respective enrollments.”<sup>40</sup> For example, if the female enrollment at an institution is sixty-five percent, then sixty-five percent of the athletes should be female.<sup>41</sup> There is no specific statistical cutoff point for what constitutes substantial proportionality,<sup>42</sup> but some experts say that a five percent difference or less is appropriate.<sup>43</sup>

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of State High Sch. Ass’ns, 2001 High Sch. Participation Totals, *available at* <http://www.nfhs.org/participation/sportspart01.htm> (last visited Oct. 18, 2002)).

<sup>35</sup> 34 C.F.R. § 106.41(c). Examples of quantitative factors include: provision of equipment and supplies, scheduling of games and practice time, and travel and per diem allowance. *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> The confusion led to nearly 100 complaints alleging discrimination by institutions of higher learning. *See* U.S. Dept. of Health, Educ. & Welfare, Title IX of the Educ. Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (1979).

<sup>38</sup> *See* George, *supra* note 17, at 1116.

<sup>39</sup> Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (1979).

<sup>40</sup> *Id.* at 71,418.

<sup>41</sup> VALERIE M. BONNETTE & LAMAR DANIEL, U.S. DEPT. OF EDUC., TITLE IX ATHLETICS INVESTIGATOR’S MANUAL 24 (1990), *available at* [http://www.ncaa.org/gender\\_equity/resource\\_materials/AuditMaterial/Investigator’s\\_Manual.pdf](http://www.ncaa.org/gender_equity/resource_materials/AuditMaterial/Investigator’s_Manual.pdf).

<sup>42</sup> *Id.*

<sup>43</sup> *See* Welch Suggs, *More Women Participate in Intercollegiate Athletics*, CHRONICLE OF HIGHER EDUC., May 21, 1999, *available at* <http://chronicle.com/>

The second prong allows an institution to establish “a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of the [under-represented sex].”<sup>44</sup> This alternative gave institutions breathing room in the years following enactment.<sup>45</sup> In reality, the second prong is not a viable legal defense today because the period of expansion has long since ended.<sup>46</sup>

The third prong of the test allows an institution to demonstrate that the “interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.”<sup>47</sup> This closely resembles the original standard and, like the second prong, is not a realistic legal option.<sup>48</sup> Courts have typically found that when female athletes are willing to litigate for the opportunity to play, they are adequately interested, and the institution clearly has not accommodated that interest.<sup>49</sup>

Additionally, the OCR’s Policy Interpretation elucidates the CSE. If women can show that they have been (1) historically limited, (2) that there are enough female athletes interested to sustain a team, and (3) that they possess the necessary athletic

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free/v45/i37/37a00101.htm; *Cohen II*, 101 F.3d at 163–64, 166, 173–74 (the First Circuit agreed with the District Court’s finding that a 13.01% disparity between female participation in sports and student enrollment failed the first prong); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993) (ruling that a 10.5% disparity did not satisfy the “substantial proportionality” prong).

<sup>44</sup> Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418.

<sup>45</sup> See George, *supra* note 17, at 1117.

<sup>46</sup> *Id.*

<sup>47</sup> Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418.

<sup>48</sup> *Contra* National Women’s Law Center, *Equal Opportunity for Women in Athletics: A Promise Yet to Be Fulfilled*, A Report to the Comm’n on Opportunity in Athletics, Aug. 2002, available at [http://www.nwlc.org/pdf/EoforWomeninAthletics\\_ApromiseYettoBeFulfilled.pdf](http://www.nwlc.org/pdf/EoforWomeninAthletics_ApromiseYettoBeFulfilled.pdf) (citing a nationwide study by the Department of Education that reviewed seventy-four cases between 1994–1998 and found that only twenty-one schools were held in compliance under the first test). The author is of the opinion that the fact that the other schools in the survey were held in compliance under the other two prongs is an indictment of the courts. It is only the extremely rare case that should still allow compliance under the second prong and the only time a school should be in compliance under the third prong is when the claim is being brought by so few girls that there is not an actual “interest” to be met.

<sup>49</sup> *Cf. Cohen v. Brown Univ.*, 991 F.2d 888, 903 (1st Cir. 1993) [hereinafter *Cohen I*].



ability to play the game, Title IX can require the institution to create an equivalent all-female team.<sup>50</sup> If these three conditions are met, women athletes may look to the courts to mandate the creation of an equivalent female team.<sup>51</sup> However, the CSE continues to permit institutions to bar females from male contact sports teams solely on the basis of their gender and regardless of their size, strength, or ability level.<sup>52</sup>

#### D. 1996 OCR Clarification

In 1996, the OCR again attempted to clarify “nondiscrimination in the context of intercollegiate athletics.”<sup>53</sup> The Clarification embraced the three-pronged accommodation analysis while trying “to emphasize the alternative nature of the three options.”<sup>54</sup> The OCR wanted to signal to both courts and institutions that the third prong is a more viable legal option than litigation history suggests.<sup>55</sup> However, despite a minor reinterpretation of the third prong,<sup>56</sup> the proportionality test remains the best and easiest option for an institution to show

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<sup>50</sup> See Sangree, *supra* note 18, at 390, 394. Once an all-female team is created and proves that it is a viable intercollegiate competitor, it must be accorded equal benefits and status. *Id.* at 394. In theory, if institutions do this, they can use it to satisfy the accommodation prong of the compliance test. Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,418. However, if the institution created an equivalent team then it is unlikely that a complaint would be brought in the first place.

<sup>51</sup> Kimberly Capadona, *The Scope of Title IX Protection Gains Yardage as Courts Continue to Tackle the Contact Sports Exception*, 10 SETON HALL J. SPORT L. 415, 424 (2000).

<sup>52</sup> See Sangree, *supra* note 18, at 394.

<sup>53</sup> See George, *supra* note 17, at 1119. See also U.S. DEP’T OF EDUC., OFFICE OF CIVIL RIGHTS, CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST (1996) [hereinafter Clarification], available at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html>.

<sup>54</sup> See George, *supra* note 17, at 1119 (explaining that the OCR describes the Clarification as an elaboration of the three-prong test).

<sup>55</sup> *Id.*

<sup>56</sup> The Clarification presents another three-part test to evaluate accommodation of student interest (the third prong from the Policy Interpretation): “(a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team.” *Clarification, supra* note 53.

compliance.<sup>57</sup> Fortunately, Title IX has not been the only option available to student athletes.<sup>58</sup>

### *E. Equal Protection Claims*

Since the enactment of Title IX not many cases have challenged the denial of participation on a school team because of one's sex.<sup>59</sup> Of those few claims, most do not reference Title IX.<sup>60</sup> In an effort to circumvent the statutory language of the CSE, plaintiffs (both male and female) have eschewed Title IX entirely and instead claimed that their Fourteenth Amendment rights were violated.<sup>61</sup> The Fourteenth Amendment states that:

No State shall make or enforce any law, which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>62</sup>

To be successful with an equal protection claim, the plaintiff must assert that "she did not have opportunities afforded to her on account of her gender."<sup>63</sup> Equal protection claims regarding

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<sup>57</sup> Luckily for institutions the 1975 regulation has been given substantial deference and considerable weight by the courts. *See* *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993).

<sup>58</sup> When presenting the applicable law in the sports gender equality context, many commentators cite *Mercer v. Duke Univ.*, 181 F. Supp. 2d 525 (M.D.N.C. 2001) as a breakthrough case. However, the main finding, that after Duke University had permitted Heather Sue Mercer to try out for the men's football team she had to be treated the same as similarly situated men (other walk-ons), was merely an application of the traditional anti-discrimination analysis. *See Mercer*, 181 F. Supp. 2d at 539; 34 C.F.R. § 106.41(a) (1975). The court made it clear that Duke could have refused her the opportunity to tryout in the first place. *Mercer*, 181 F. Supp. 2d at 530 n.1. This is relevant to our analysis because it points out that Heather Sue only brought a Title IX claim because Duke was a private institution and thus an equal protection claim was unavailable.

<sup>59</sup> *See* George, *supra* note 17, at 1123 & n.74 (detailing the author's search for cases, and his slim findings of only 21 at the time).

<sup>60</sup> *Id.* at 1123.

<sup>61</sup> *See e.g.*, *Adams v. Baker*, 919 F. Supp. 1496, 1503 (D. Kan. 1996); *Darrin v. Gould*, 540 P.2d 882, 885 (Wash. 1975).

<sup>62</sup> U.S. CONST. amend. XIV, § 1.

<sup>63</sup> Capadona, *supra* note 51, at 426.

classifications based on sex are subject to intermediate scrutiny.<sup>64</sup> The defendant bears the burden of showing that the exclusion is “substantially related” to an “important governmental objective[.]”<sup>65</sup> Institutions ordinarily attempt to justify their exclusionary practices by citing the safety of the female athlete as the important government objective.<sup>66</sup> The flaw in this argument is that the supporting evidence is usually based on stereotypes about the size and strength differences between the sexes without any analysis of the individual athletes involved.<sup>67</sup> However, the rationale that females need to be protected from injury and male domination is overly paternalistic.<sup>68</sup> Ironically, not a single school has barred a smaller or weaker man from trying out for a team.<sup>69</sup>

Courts have struck down state association regulations that prohibit girls from playing high school football,<sup>70</sup> from “compet[ing] or practic[ing] against boys in any athletic contest,”<sup>71</sup> and from playing soccer because of exposure to inordinate risk of injury.<sup>72</sup> From these and other similar decisions, important principles can be extrapolated. First, gender classifications that perpetuate stereotypical notions of gender roles without regard for the abilities of the individual student violate the Fourteenth Amendment.<sup>73</sup> Second, notions of equity dictate that talented and qualified females should be given the opportunity to compete at a potentially higher level (for example, on a men’s team).<sup>74</sup> Third,

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<sup>64</sup> See *United States v. Virginia*, 518 U.S. 515, 568 (1996) (articulating the most recent analysis for sex classifications under the Fourteenth Amendment).

<sup>65</sup> See *id.* at 533 (citations omitted).

<sup>66</sup> See, e.g., *Adams*, 919 F. Supp. at 1504; *Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020, 1024 (W.D. Mo. 1983); *Leffel v. Wis. Interscholastic Athletic Ass’n*, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978).

<sup>67</sup> See *George*, *supra* note 17, at 1126.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See *Darrin v. Gould*, 540 P.2d 882, 893 (Wash. 1975).

<sup>71</sup> *Commonwealth v. Pa. Interscholastic Athletic Ass’n*, 334 A.2d 839, 840 (Pa. Commw. Ct. 1975).

<sup>72</sup> *Hoover v. Meikeljohn*, 430 F. Supp. 164 (D. Colo. 1977). This case and the two previous cases are just a few of the many examples of state regulations that have been struck down.

<sup>73</sup> See *Darrin* at 891–93. See also *Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020, 1029 (W.D. Mo. 1983).

<sup>74</sup> *Pa. Interscholastic Athletic Ass’n*, 334 A.2d at 842.

equal protection rights override concerns that females would be exposed to an inordinate risk of injury.<sup>75</sup>

Despite the success plaintiffs have experienced with equal protection claims, men who want to try out for a women's team are often rejected.<sup>76</sup> Institutions can successfully defend their exclusionary practices by citing production of "sports opportunities for women" as their important governmental objective.<sup>77</sup> Courts often accept this rationale and rule that the exclusion of males is substantially related.<sup>78</sup> Whereas stereotypical notions of strength and physicality have been discarded when women bring suit, when the plaintiff is a man, courts are more receptive to generalizations about size and strength differences.<sup>79</sup> For example, men who wish to play field hockey—typically an exclusively women's sport—are left without any viable options, because they cannot successfully bring either an equal protection claim or a Title IX claim.<sup>80</sup>

## II. ATTITUDES AND HISTORY UNDERLYING TITLE IX

It is not clear why the CSE was included in Title IX, but numerous possibilities exist. The leading potential underlying rationales are: (A) that organized sports were used to restabilize the sex role differentiation that industrialization and the women's movement diminished,<sup>81</sup> (B) protectionism,<sup>82</sup> and (C) the safeguarding of the male sports world from encroachment by

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<sup>75</sup> *Hoover*, 430 F. Supp. at 169–70.

<sup>76</sup> *See George*, *supra* note 17, at 1127.

<sup>77</sup> *Id.*

<sup>78</sup> *See Kleczek ex rel. Kleczek v. R.I. Interscholastic*, 768 F. Supp. 952, 956 (D.R.I. 1991); *Petrie v. Ill. High Sch.*, 394 N.E.2d 855, 862 (Ill. App. Ct. 1979); *B.C. v. Bd. Of Educ., Cumberland Reg'l Sch. Dist.*, 531 A.2d 1059, 1065 (N.J. Super. Ct. App. Div. 1987); *Mularadelis v. Haldane Cent. Sch. Bd.*, 427 N.Y.S.2d 458, 463–64 (App. Div. 1980). *But see Attorney Gen. v. Mass. Interscholastic Athletic Ass'n*, 393 N.E.2d 284, 296 (Mass. 1979) (invalidating a rule that prohibited boys from playing on girls' teams under the state's Equal Rights Amendment).

<sup>79</sup> *See George*, *supra* note 17, at 1127.

<sup>80</sup> *See* 34 C.F.R. § 106.41(b) (1975) (creating a cause of action only where "athletic opportunities for members of [the opposite] sex have previously been limited"). It follows that because males have not typically been the excluded sex at most institutions, no Title IX cause of action exists.

<sup>81</sup> *See Sangree*, *supra* note 18, at 403–04.

<sup>82</sup> *George*, *supra* note 17, at 1129.

women.<sup>83</sup> These three rationales all have roots in the historical and ideological development of American society from the nineteenth century through today.

A. *Restabilization Of Sex Role Differentiation*

From the time that organized athletics emerged in American culture during the mid-nineteenth century they were viewed as the “rough and tumble site for inculcating and solidifying masculine identity; not an appropriate place for the ‘weaker sex.’”<sup>84</sup> Massive industrialization at the end of the nineteenth century in combination with the developing national women’s movement created a crisis in male identity.<sup>85</sup> Before industrialization, the U.S. had an agrarian mercantile economy in which men performed physical labor and had a high degree of control in their family-owned businesses.<sup>86</sup> Men were the breadwinners and the head of the family.<sup>87</sup>

By the 1890s, industrialization had shifted the economy to one dominated by large corporations.<sup>88</sup> Many men no longer worked in physical labor jobs, and they became further removed from the “ownership of the means of production.”<sup>89</sup> A man’s once stable place as “breadwinner and head of the family” was now in constant peril due to high injury rates, and constant firings and layoffs.<sup>90</sup> During the same time period, the prevailing female norm was a cultural ideal of “separate spheres,” with the woman confined to private life in the home.<sup>91</sup> Under this ideology women became

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<sup>83</sup> *Id.*

<sup>84</sup> Sangree, *supra* note 18, at 401.

<sup>85</sup> *See id.* at 402.

<sup>86</sup> *Id.* at 401–02.

<sup>87</sup> *Id.* at 402.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* In addition there was no social welfare system to alleviate the financial and emotional burden men experienced during down times. *Id.*

<sup>91</sup> *Id.* *See also* Williams, *supra* note 1, at 16; *Muller v. Oregon*, 208 U.S. 412, 419 (1908). When deciding the constitutionality of an Oregon law restricting the hours a women could work in a factory, the *Muller* Court cited conclusions from over 90 studies that a women’s maternal functions, the rearing and education of the children, and the maintenance of the home are all so important and so far reaching that there is no need to even discuss why reducing their work hours is appropriate. 208 U.S. at 419.

predominately responsible for raising the children—even the male children.<sup>92</sup> The fact that physical strength had become less relevant in work, coupled with the notion that young men were being raised by women, led to a pervasive fear that males were becoming “soft” and “society was becoming feminized.”<sup>93</sup> Sports were seen as a way for men to “re-forge their masculinity.”<sup>94</sup> In response to the feminist movement, organized sports were developed as a domain that “emphasized physical strength, competition, and violence.”<sup>95</sup>

By the 1920s, women were breaking free “from their status as non-citizens”<sup>96</sup> and were seeking out a larger “share of political and economic power.”<sup>97</sup> Men were threatened by the newfound success of the female community<sup>98</sup> and sought new ways for society to place greater emphasis on their attributes.<sup>99</sup> A focus on brute strength, size, and speed in sports<sup>100</sup> led to society legitimizing male domination through equating force and aggression with success and “maleness with power.”<sup>101</sup>

### B. Protectionism

“The notion that physical contact and unfettered play is inappropriate for fragile females is one deeply ingrained in our culture.”<sup>102</sup> Protectionism is based on the idea that females are inferior athletes to men and must be protected from male

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<sup>92</sup> See Sangree, *supra* note 18, at 402. This was the case because most middle class men spent their majority of their time away from home earning their wages. *Id.*

<sup>93</sup> *Id.* (citing Susan K. Cahn, COMING ON STRONG: GENDER AND SEXUALITY IN TWENTIETH-CENTURY WOMEN’S SPORTS 11–12 (1994)).

<sup>94</sup> Sangree, *supra* note 18, at 403.

<sup>95</sup> *Id.* at 403–04.

<sup>96</sup> *Id.* at 404.

<sup>97</sup> *Id.*

<sup>98</sup> See *id.* Their success included challenging notions that biology preordained women to be subservient to men. See *id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* This led to football, bare-knuckle boxing and basketball becoming very popular. *Id.*

<sup>101</sup> *Id.* (citing MICHAEL A. MESSNER, POWER AT PLAY: SPORTS AND THE PROBLEM OF MASCULINITY 15 (1992)).

<sup>102</sup> Sangree, *supra* note 18, at 409.

domination and injury.<sup>103</sup> Historically, protectionism mainly focused on female frailty and sexual vulnerability.<sup>104</sup>

During the Victorian Era of the 19th century, wealthy society women were excluded from higher learning because it was considered physically dangerous for them.<sup>105</sup> Women were characterized as the “physiologically inferior sex, weakened and ruled by their reproductive systems.”<sup>106</sup> In 1908 the Supreme Court believed that a woman’s “physical structure and a proper discharge of her maternal functions . . . justified legislation to protect her from the greed as well as the passion of man.”<sup>107</sup> It was not until 1979, that the Supreme Court acknowledged that “legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypic gender roles and women’s need for special protection.”<sup>108</sup> This evolved understanding of discrimination led to upholding statutes regulating women’s working hours, and the prohibition of women working night shifts.<sup>109</sup> Unfortunately, while the courts have consistently rejected paternalism based on feminine frailty in equal protection claims, they have yet to rule against the CSE in Title IX claims.

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<sup>103</sup> See *id.* at 400.

<sup>104</sup> *Id.* at 405–07.

<sup>105</sup> *United States v. Virginia*, 518 U.S. 515, 536 (1996). Justice Ginsberg refers to Dr. Edward H. Clarke of Harvard Medical School who was perhaps the most well known speaker from the medical community who opposed higher education of women. *Id.* at 536 n.9. Clarke stated that the physiological effects of hard study and academic competition with boys would interfere with the development of girls’ reproductive organs. *Id.* (citing EDWARD H. CLARKE, *SEX IN EDUCATION* 38–39, 62–63 (1873)).

<sup>106</sup> Cahn, *supra* note 93, at 13; see also Williams, *supra* note 1, at 28 (explaining that “[d]octors and scientists were generally of the view that a woman’s intellect, her capacity for education, for reasoning for public undertaking, was biologically limited”).

<sup>107</sup> *Muller v. State*, 208 U.S. 412, 422 U.S. (1908) (explaining that even if all the statutory restrictions on political, personal, and contractual rights were removed, a woman would still “rest upon and look to him for protection”).

<sup>108</sup> *Orr v. Orr*, 440 U.S. 268, 282–83 (1979) (holding an Alabama statute requiring only husbands, but not wives, to pay alimony upon divorce unconstitutional).

<sup>109</sup> See, e.g., *Muller* 208 U.S. 412; *People ex rel. Hoelderlin v. Kane*, 139 N.Y.S. 350 (Sup. Ct. 1913). *But see* *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974) (considering Equal Pay Act issues resulting from a change in the law that no longer prohibited women from working on the night shift).

Despite how women gained access to education and employment opportunities throughout the 20th century, the emphasis on women's sports remained on cultivating "feminine beauty and sex appeal."<sup>110</sup> Sports were structured around female weakness, and were designed to protect females from appearing too masculine.<sup>111</sup> This led to the growth of individual sports that emphasized grace over strength.<sup>112</sup> Full exertion by women in sports has been repressed throughout the development of organized women's sports.<sup>113</sup> Male notions of what "true women" should act, compete, and even dress like, and their fear and intimidation upon encountering an assertive female have shaped the behavioral development of women athletes throughout the twentieth century.<sup>114</sup>

Over the last twenty years, there has been increased acceptance of a woman "giving it her all;" one need only look at the transformation of female tennis players from the drop-shooting, slicing tacticians of the 1960s to today's crop of players who possess blazing serves and massive ground strokes.<sup>115</sup> Though society's need to accentuate the "feminine" characteristics of female athletes is less prevalent today than years ago, it has yet to produce any progress in CSE cases.

### *C. Protecting the Male Sports World from Female Encroachment*

When the CSE was introduced in the 1975 OCR Regulation, HEW was likely responding to the NCAA's concerns that Title IX could negatively impact college football and basketball.<sup>116</sup> The

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<sup>110</sup> Sangree, *supra* note 18, at 406.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 406–07. See Cahn, *supra* note 93, at 218 (quoting Paul Gallico, *Women In Sports Should Look Beautiful*, READERS DIG., Aug. 1936, at 12, 13 (recommending that women stick to fishing, archery, flying, riding, shooting, swimming backstroke, and speed and figure skating)).

<sup>113</sup> See Sangree, *supra* note 18, at 407.

<sup>114</sup> *Id.* at 402.

<sup>115</sup> The top players on the WTA tour over the last 15–20 years, beginning with Martina Navratilova and Stephanie Graf and continuing with the Williams sisters and Maria Sharapova, have shown that weight-training and strength and conditioning are acceptable for women.

<sup>116</sup> See George, *supra* note 17, at 1129. This assumption is bolstered by the "questionable" inclusion of basketball as a contact sport. *Id.*



NCAA feared that compliance with the requirements of Title IX would result in a diversion of athletic resources and funds away from these moneymaking men's programs. However, it is precisely these types of "artificial barriers" that non-discrimination legislation should aim to eradicate.<sup>117</sup>

### III. FEMINIST LEGAL THEORIES AND HOW THEY UNDERLIE COMMON REFORM PROPOSALS

Legal and social regimes of this country were shaped primarily by male norms— both formally through the law and informally through societal norms. This motivated feminine legal theorists to work harder to achieve gender equity.<sup>118</sup> They often disagree on what the correct norms are, but they almost universally agree that male norms need to be removed as the dominant norms in society. Many of the models feminine legal theorists propose arise out of the common feminist goals of "trying to imagine what a gender equal society would look like, given that [no one] has ever seen one, and trying to figure out the ways of getting there, given that the obstacles to gender equality are so many and so strong."<sup>119</sup> Thus, the CSE is a major obstacle in the sports context, and in response there have been numerous proposals for reform.<sup>120</sup> Two of the most common reform proposals track two of the most popular feminist models for equality.

Deciding the appropriate norm is difficult both to conceptualize and regulate. Additionally, immutable biological differences should not be ignored in a sport's structure because their presence can create an increased risk of injury.<sup>121</sup>

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<sup>117</sup> *See id.*

<sup>118</sup> Christine A. Littleton, *Reconstructing Sexual Equality*, in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER 15, 41 (Katharine T. Barlett & Rosanne Kennedy eds., 1991).

<sup>119</sup> *Id.*

<sup>120</sup> *See* George, *supra* note 17, at 1142–43 (referring to a number of "merit-based" and "gender-blind" proposals).

<sup>121</sup> *Id.* at 1146. (explaining that it is important to note that biological differences will not prevent men and women from playing along side each other. *Id.* at 1146. The set of rules under which they play should take into account these differences, rather than try to apply

A. *The “Gender-Blind” Meritocracy—The Formal Equality Approaches*

The formal gender equality, or symmetrical approach was designed in the mold of the legal racial equality theory<sup>122</sup> and denies that there are any significant natural differences between men and women.<sup>123</sup> This approach encompasses assimilation, the most judicially accepted symmetrical model.<sup>124</sup> Assimilation is based on the idea that “women, given the chance, really are or could be just like men.”<sup>125</sup> Under this approach, laws would require institutions to treat women the same way they already treat men.<sup>126</sup> This approach is often proposed in the form of a gender-blind meritocracy, where teams are comprised of the best athletes, regardless of gender.<sup>127</sup>

Implementation of the assimilation approach requires the elimination of the separate teams requirement and the CSE from Title IX. However, while the assimilation approach is preferred in the context of racial treatment,<sup>128</sup> it is an inferior way to view gender equality in sports because it would cause a substantial reduction in the number of athletic opportunities afforded to women.<sup>129</sup> No matter how hard feminist theorists try, they cannot eliminate the identifiable biological differences between men and women simply by saying that they do not exist.<sup>130</sup> Since the biological differences of strength and speed are the foundation

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an androgynous person standard. *See, id.*, at 1149 (noting that rule modification to avoid injury are supported by “ample precedent”).

<sup>122</sup> *See Littleton, supra* note 118, at 35.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 35–36. This approach has been criticized for enforcing the male norm.

<sup>127</sup> *See George, supra* note 17, at 1142.

<sup>128</sup> There are no significant biological differences between people of different races that justify different legal or social treatment. Ideally, socially and culturally constructed differences should be discarded when deciding legal treatment. *See Palmore v. Sidoti*, 466 U.S. 429 (1984) (The Supreme Court recognized that while there are biases in society, it is inappropriate for the court to give them effect by considering them when issuing a ruling.).

<sup>129</sup> One of the main goals and a major benefit of Title IX is the increase in female athletic participation rates. *See Women’s Sports Foundation, supra* note 14.

<sup>130</sup> *See Littleton, supra* note 118, at 36.

upon which many sports are built, gender equality through assimilation cannot be achieved unless contact sports radically alter their structure.<sup>131</sup>

A second symmetrical approach, the androgyny approach, is also based on the idea that women are, or could be, just like men.<sup>132</sup> However, rather than institutions treating women how they have been treating men, this approach requires formulating a new norm between the two sexes, thus analogous to how an androgynous person would be treated.<sup>133</sup> This androgyny approach creates a gender-blind meritocracy; however, it also involves more of a theoretical exercise than a workable formulation.<sup>134</sup>

### B. A Difference Approach—*The Olympic Model*

A difference approach acknowledges that women and men are “different” and rejects the notion that all gender differences can disappear, or even that they should.<sup>135</sup> Christine Littleton’s “acceptance” model, a prominent difference approach, concedes that there are gender differences, but rather than trying to pretend they do not exist or trying to eliminate them, it focuses on eliminating the disadvantageous consequences women suffer because of them.<sup>136</sup> The goal of the acceptance model is to create symmetry in the “lived-out” consequences of both sexes.<sup>137</sup>

The Olympic model is an example of this acceptance approach. Under it, institutions would be required to have both men’s and women’s teams for each sport and provide each with equal resources.<sup>138</sup> By requiring separate teams and thus avoiding the displacement of females by physically superior males, this model ensures that both men and women have the opportunity to play.<sup>139</sup> However, this is problematic because the effort to reduce the cost

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<sup>131</sup> See Part IV(A)(3) of this note for discussion of altering the nature of contact sports to incorporate the biological advantages typically associated with females.

<sup>132</sup> See Littleton, *supra* note 118, at 36.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> See Littleton, *supra* note 118, at 35.

<sup>136</sup> *Id.* at 37.

<sup>137</sup> *Id.*

<sup>138</sup> See George, *supra* note 17, at 1144.

<sup>139</sup> *Id.*

of gender differences through acceptance actually reinforces the differences.<sup>140</sup> The obvious distinctions that currently exist between different gender teams in the same sport would continue to exist.<sup>141</sup> We already have men's and women's basketball teams, but the gap in status and prestige associated with each team has led the women's team to be seen as a "less favored 'stepchild' in a variety of ways."<sup>142</sup>

#### IV. SO WHAT DO WE DO?

Although abolishing the CSE is an appropriate starting point, its elimination is not a colossal leap forward.<sup>143</sup> The concept that women should be able to try out for men's teams and be judged by their skill level is so basic to our understanding of discrimination that it is surprising that the CSE still exists.<sup>144</sup> So where do we go after we eliminate the CSE? This paper proposes a "shock to the system" approach that integrates men and women, equalizes them, and alters the very nature of the sports they play. This approach avoids the pitfalls associated with a gender-blind meritocracy and the Olympic approach.<sup>145</sup> As UNC Law Professor Glenn George articulates, "we need to create something so different from the current model that it allows athletics to be rejoined with the educational values that should be the driving force behind their place in the institution."<sup>146</sup>

##### A. *The 50-50 Proposal*

Before beginning the discussion of the 50-50 proposal's details, it is necessary to understand that the proposal assumes that

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 1144-45. Women's basketball lags in attendance, TV and press, and ticket prices.

<sup>143</sup> *Id.* at 1143.

<sup>144</sup> *Id.*

<sup>145</sup> A gender-blind approach would result in a huge disparity between male and female athletic participation rates. *See infra* Part III.A. The Olympic approach would continue to allow distinctions between male and female teams in the same sport to exist. *See infra* Part III.B.

<sup>146</sup> *See* George, *supra* note 17, at 1145.

high school sports justify its placement in an academic institution by having goals other than to simply field the best team.<sup>147</sup> Unfortunately, this concept is the topic of much debate and not easily accepted. Subsequently, the 50-50 proposal may have a hard time garnering the necessary support for effective implementation.

### 1. Its Origins

Professor George developed the 50-50 proposal for implementation at the collegiate level in order to have schools “[re]focus instead on the educational values and opportunities that once justified [sports’] place in our educational institutions.”<sup>148</sup> While that justification holds true for high school athletics, instituting the 50-50 proposal at the intercollegiate level would be inappropriate because sports programs at big-name colleges are a lucrative business—more akin to professional sports, than high school athletics. College athletes should be compensated appropriately in order to avoid exploitation by their “academic” institution.<sup>149</sup> For this and multiple other reasons,<sup>150</sup> Professor George’s 50-50 proposal should only be implemented at the high school level and below and not at the collegiate level.<sup>151</sup>

### 2. The Proposal

The 50-50 proposal calls for the complete elimination of segregation, through a requirement that all teams be comprised of

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<sup>147</sup> *Id.* at 1162.

<sup>148</sup> *Id.* at 1146.

<sup>149</sup> The argument that college athletes should be compensated is extensive, and will not be discussed in detail in this paper because it is not necessary to understand its dynamics to gain an understanding of this paper. See ANDREW ZIMBALIST, UNPAID PROFESSIONALS: COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS (Princeton University Press, 2001).

<sup>150</sup> One such reason is that a greater percentage of students are enrolled at private institutions at the college level than at the lower levels. See U.S. Dep’t of Commerce, Schol Enrollment in the United States—Social and Economic Characteristics of Students (1999), available at <http://www.census.gov/prod/2001pubs/p20-533.pdf> (noting that in 1999, 49 of the 57 million students enrolled in high school and below attended public schools, while only 6.5 out of the 15 million college students were at a public school).

<sup>151</sup> The proposal, therefore, should be implemented in elementary schools, middle schools/junior highs, and high schools.

half male and half female athletes.<sup>152</sup> To ensure that the boys are not the only ones getting into the game, playing time would need to be split evenly.<sup>153</sup> Individual sports, like track and wrestling,<sup>154</sup> would hold separate men's and women's heats but the "match" would be scored according to team performance.<sup>155</sup>

At first blush, the 50-50 proposal may seem unrealistic. However upon closer inspection, it has significant advantages. This approach ensures equal quality of coaching for all athletes, equal attention from the press and public, as well as improved facilities, equipment, practice times, and other quantitative improvements for both sexes.<sup>156</sup> It would also eliminate the gender component when comparing the treatment of two sports.<sup>157</sup>

Other reasons why the 50-50 proposal is a superior model are more effectively articulated through an analysis of common issues that will arise.

### 3. Analysis of Common Issues Associated With the 50-50 Proposal

First, elementary and high schools will need to find enough women that are willing to play contact sports.<sup>158</sup> By offering women opportunities to play, there would be a promotion of interest in athletics among younger girls, which has been

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<sup>152</sup> See George, *supra* note 17, at 1145. This would include sports that have traditionally been associated with one sex or the other, such as field hockey. *Id.*

<sup>153</sup> *Id.* At any given time half the participants on the floor must be female. *Id.* When a sport requires an odd number of players on the court or field the number of male or female players would not be allowed to out number the other sex by more than one person at any given time. This approach is commonly used in club sports. In theory, a 50 percent split in playing time between the two sexes would be nice, but in sports with odd number of participants, the calculation would be too hard to do during the course of the game, and would impinge on the coaches' ability to manage the other aspects of the game.

<sup>154</sup> Other examples of common high school individual sports that can institute the same practices, include tennis, gymnastics and swimming. See George, *supra* note 17, at 1145.

<sup>155</sup> See George, *supra* note 17, at 1145. The events would remain the same. *Id.* This is similar to the current system utilized by many states in track. *Id.* The only difference would be that the men and women team scores would combine to form school team scores. *Id.*

<sup>156</sup> *Id.* at 1146. Players of both sexes would be receiving identical benefits. *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

universally embraced as an important thing for society.<sup>159</sup> Getting girls involved in sports at a young age grants them an opportunity for their skill and experience level to develop, and helps erode the social norms that discourage women's participation.<sup>160</sup> If only a few girls try out for the team, then those "interested girls" will recruit their friends.<sup>161</sup> Likewise, since the boys' success is dependent upon the school's ability to field a team, they too would assist in the recruitment of young women to play on their teams.<sup>162</sup>

The transition to a 50-50 regime at the high school level should not be immediate, however. It should be implemented through a gradual phase-in process. First co-ed teams should be established at the grade school level. Three years later, there should be an extension to the middle school level. Finally, three years after that, co-ed teams will reach the high school level.<sup>163</sup>

Professor George articulates the benefits of the 50-50 proposal through answers to a series of inquires that most men and some women have upon their initial encounter with the proposal.<sup>164</sup> Though his answers and the ones presented in this paper often differ, this method of articulating the proposal's benefits is still effective.

*Will women get hurt when they participate in sports with men?*<sup>165</sup> The overly paternalistic attitude that women should be protected should be rejected in the Title IX context similarly to how it has been in equal protection claims.<sup>166</sup> However, the fact that men are generally bigger and stronger than women could lead

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<sup>159</sup> *Id.* at 1146–47. See also Ned Barnett, *No Game for Sissies: Women's Team Loves Smashmouth Football*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 4, 2001, at 1C. "According to the National Association of State High School Associations, 779 girls played high school football in the fall of 2000, and the National Football League reports that 1.3 million girls competed in its annual Punt, Pass, and Kick competition last year." *Id.*

<sup>160</sup> See George, *supra* note 17, at 1147.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* A phase-in process is the most effective method for allowing girls to develop their interest, skill, and experience level. *Id.*

<sup>164</sup> *Id.* at 1146.

<sup>165</sup> *Id.* at 1148.

<sup>166</sup> *Id.*

to an increase in the number and severity of injuries.<sup>167</sup> Undoubtedly, some women will choose not to play because of this risk, but so will many men.<sup>168</sup> The important thing to remember is that it is the individual's decision to make and not the school's or the State's.<sup>169</sup> However, if the number of injuries rises dramatically, it may be necessary to analyze and reevaluate how sports like football are played.<sup>170</sup> New rules and equipment requirements are already frequently added to football (and other sports) to make them safer.<sup>171</sup> Altering the very nature of the game to further decrease the number of serious injuries (to both female and male athletes) will increase the value of sports as part of the educational mission.<sup>172</sup> Additionally, it is not that men are better suited for contact sports, but rather that contact sports are better suited for men, since they were developed by men to showcase their strengths.<sup>173</sup> In response, sports should be altered to place greater emphasis on the biological advantages of women, such as endurance and flexibility.<sup>174</sup>

*Will the games become boring and will anyone come to watch?*<sup>175</sup> As long as both teams are playing under the same set of rules, the games should be competitive and exciting.<sup>176</sup> Additionally, a shift to co-ed teams is unlikely to affect high school

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* See also William Nack & Lester Munson, *The Wrecking Yard*, SPORTS ILLUSTRATED, May 7, 2001, at 60 (explaining that many of professional football's great players of yesterday are disabled members of society today).

<sup>171</sup> See George, *supra* note 17, at 1149.

<sup>172</sup> *Id.*

<sup>173</sup> Dana Robinson, *A League of Their Own: Do Women Want Sex-Segregated Sports?*, 9 J. CONTEMP. LEGAL ISSUES 321, 346 (1998).

<sup>174</sup> See George, *supra* note 17, at 1149. Altering the very nature of the sports would also help eliminate the problems associated with the assimilation approach. See Littleton, *supra* note 118, at 37. However, it would not be endorsed by an acceptance approach because it would be placing superior value on female characteristics. *Id.* at 45.

<sup>175</sup> See George, *supra* note 17, at 1153. Professor George believes that fans' entertainment preferences should not be driving our decisions at the intercollegiate level. *Id.* at 1153-54. The author disagrees because there are millions of dollars at stake for many of the programs. Attendance at college football games regularly exceeds 60,000 and even a slight reduction in attendance, if consistent, can mean millions of dollars in lost profits.

<sup>176</sup> *Id.*



game attendance, since most fans at high school events are parents, other family members, or friends of a participant. The fans' attendance is presumably motivated as much by a desire to support a loved one, as it is by a desire for personal enjoyment. In parts of the country where big name high school programs exist,<sup>177</sup> attendance would not suffer dramatically because the fans will adjust.<sup>178</sup> As a society, our love of sports seems insatiable and sports fans will watch what they are given.<sup>179</sup> Ratings for daytime coverage of Olympic curling (an event few Americans have ever heard of) on CNBC (a channel that rarely broadcasts sporting events) were up 608% from the same time period the previous year.<sup>180</sup> This was due in no small part to the fact that it was the only sport available to watch on television during those hours.

*Will having only one team per sport result in less playing opportunities overall?*<sup>181</sup> To address this problem the number of maximum players allowed on the co-ed teams would be increased.<sup>182</sup> This would not lead to a reduction in the total number of opportunities, but a reapportioning of them between men and women (something already required by Title IX).<sup>183</sup> Some male athletes will lose the opportunity to play at the high school level, but there are an adequate number of intramural club teams and private leagues throughout the country to help meet this demand.<sup>184</sup>

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<sup>177</sup> These include Texas football and Indiana basketball programs. *See generally* <http://www.scout.com>.

<sup>178</sup> *See* George, *supra* note 17, at 1153. The author does not use the argument that fan preferences will adjust as a basis for assuming attendance of college games will not drop. Most spectators of a high school game live close by and can attend at a relatively low cost. Many spectators at a college game have traveled far distances and paid a lot of money to be there. If their preference for the game dips, even slightly, it is unlikely that they will be willing to exert the time, energy, and money to attend the game.

<sup>179</sup> *Id.* at 1153–54.

<sup>180</sup> *See* Rick Patzke, *NBC Sports to Broadcast Curling Championships in 2003* (2002), [http://www.usoc.org/73\\_7046.htm](http://www.usoc.org/73_7046.htm).

<sup>181</sup> *See* George, *supra* note 17, at 1150.

<sup>182</sup> *Id.* Many high school sports do not have a cap how many players can be on the team.

<sup>183</sup> *Id.*

<sup>184</sup> Since club teams already play a major role in college recruitment, failure to compete in high school athletics will not necessarily lead to a lack of exposure to colleges.

*Will the special sense of kinship that grows out of having an all female team be lost when all teams are co-ed?*<sup>185</sup> The positive effects that are produced by participation on a team are not conditioned on that team being comprised of one sex. It is the “teamwork” inherent in any sport that creates special relationships. Additionally, since social norms dictate that there be separate locker rooms, there still would be an element of bonding with members of one’s own sex.

*Will the 50-50 proposal result in a quota system?* Legislatures fear using the word “quota” because of the disdain it invokes in the affirmative action context.<sup>186</sup> However, having “quotas” to foster gender equity in sports is an effective measure and Title IX already creates a virtual quota system through the proportionality test by requiring the matching of male and female athletic slots with their enrollment percentages.<sup>187</sup> The “quota” requirement of the 50-50 proposal is not very different since it requires equal slots for males and females.<sup>188</sup>

*Will the institution of mandatory coed teams damage the value of sports as a meritocracy?*<sup>189</sup> The 50-50 proposal will lead to many instances where a bigger, stronger, faster, and more skilled male is left off the team.<sup>190</sup> However, as Professor George writes, “diversity often presents such difficult choices.”<sup>191</sup> While professional sports are close to a pure meritocracy, high school sports have not been one for many years.<sup>192</sup> The inherent characteristics of a high school environment allow for proper enforcement of regulations that restrict the meritorious aspect of

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<sup>185</sup> See Williams, *supra* note 1, at 28.

<sup>186</sup> See George, *supra* note 17, at 1154.

<sup>187</sup> See George, *supra* note 17, at 1155. See also Policy Interpretation, *supra* note 37.

<sup>188</sup> If a school had such a low percentage of one gender as to make a co-ed team infeasible, they obviously would not be able to compete in a 50-50 league.

<sup>189</sup> See George, *supra* note 17, at 1156–57. A meritocracy would dictate that the strongest, fastest, and quickest would make the team.

<sup>190</sup> See George, *supra* note 17, at 1117.

<sup>191</sup> See *id.* at 1157.

<sup>192</sup> Professor George believes that collegiate sports are not a meritocracy because of regulations such as minimum GPA and admission requirements. *Id.* at 1156–57. However, there is a compelling argument that college sports are very close to a meritocracy because of the common relaxation of admissions requirements for athletes, and suspect policing of the manner in which athlete’s schoolwork gets completed.

athletics. Low overall student enrollment and student-to-teacher ratios give high schools a chance to monitor if and how their athletes are meeting the minimum academic requirements. Finally, since most high school student bodies are determined by geographic boundaries, there is not the problem of favoritism in admissions.

*Will the coaching staffs be radically altered?*<sup>193</sup> Whether or not there can be a requirement that fifty percent of the head coaches be female implicates Title VII<sup>194</sup> employment questions that are beyond the scope of this paper. However, having one co-ed team would eliminate salary equity issues.<sup>195</sup>

*Will there be an increase in sexual harassment incidents within the team?* There have been instances when a woman on a men's team has been sexually harassed and even assaulted.<sup>196</sup> However, this risk becomes greatly reduced when the number of females on the team increases. Since all teams will be required to be half male and half female, the sphere of power that men once felt was being intruded upon by a single female, is no longer relevant, since men and women will have an equal share of power.

## V. CONCLUSION

The call to reform Title IX is in no way an implication that Title IX has been an ineffective piece of legislation. It has produced substantial gains for women in the fight for gender equality in sports. However, the 50-50 proposal is the best chance to provide women with an effective and realistic form of equality in sports. It is a breakdown of a male-female dichotomy and it puts us one step closer to eliminating these dichotomies entirely.<sup>197</sup>

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<sup>193</sup> See George, *supra* note 17, at 1160.

<sup>194</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1964).

<sup>195</sup> Coaches would be paid equal salaries regardless of sex. See George, *supra* note 17, at 1160.

<sup>196</sup> Katie Hnida, a placekicker for the University of Colorado in 1999, told the magazine *Sports Illustrated* she was verbally abused, harassed and molested by other players and—on one occasion—raped by a teammate. Hnida did not report the rape and no charges were ever filed. See *University Asks Police To Look Into Alleged Rape*, CNN.COM, Feb. 18, 2004, <http://www.cnn.com/2004/US/Central/02/18/colorado.football/>.

<sup>197</sup> See Littleton, *supra* note 118, at 50.

Since, I am not a high school girl with a desire to play football, there are several key questions that I cannot answer. Before women can support the 50-50 proposal, or any proposed reform measures, they need to ask themselves: who are we, what do we want, and are we willing to begin to make a new order of things?<sup>198</sup>

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<sup>198</sup> See Williams, *supra* note 1, at 29.