

2022

Sarah and Sam Make Contact: Thoughts on the Contact Sports Exception and Title IX at 50

Adam Epstein

Follow this and additional works at: <https://scholarship.law.marquette.edu/sportslaw>



Part of the [Entertainment, Arts, and Sports Law Commons](#)

Repository Citation

Adam Epstein, *Sarah and Sam Make Contact: Thoughts on the Contact Sports Exception and Title IX at 50*, 33 Marq. Sports L. Rev. 173 (2023)

Available at: <https://scholarship.law.marquette.edu/sportslaw/vol33/iss1/9>

This Symposium is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

SARAH AND SAM MAKE CONTACT: THOUGHTS ON THE CONTACT SPORTS EXCEPTION AND TITLE IX AT 50

ADAM EPSTEIN*

INTRODUCTION

On November 28, 2020, Sarah Fuller of Vanderbilt University became the first woman to play in a Power Five college football game when she kicked off the second half against the University of Missouri in Columbia.¹ Fuller became the goalie for the university's Southeastern Conference championship soccer team that same year, having won the championship just a week before her appearance on the football field.² Recall that 2020 was the year that the pandemic appeared and altered the global landscape, and COVID-19 directly impacted Vanderbilt's placekickers who either voluntarily sat out the season or were sidelined due to COVID-19.³ As a result, Vanderbilt's head coach reached out to the soccer team to find a kicker, and Sarah tried out and earned the role.⁴ Vanderbilt had yet to win a game that season and trailed Missouri

* Chair and Professor, Department of Finance and Law, Central Michigan University.

1. See Lydia Massey, *Sarah Fuller Makes History as 1st Woman to Play in a Power 5 Football Game*, NPR (Nov. 28, 2020, 4:17 PM), <https://www.npr.org/2020/11/28/939716026/sarah-fuller-makes-history-as-1st-woman-to-play-in-a-power-5-football-game> (clarifying that the Power Five “consists of the biggest and most popular athletic conferences: the Southeastern Conference, Atlantic Coast Conference, Big Ten Conference, Big 12 Conference and Pac-12 Conference.”).

2. See Barrett Sallee, *Vanderbilt Kicker Sarah Fuller Makes History as First Woman to Play in a Power Five College Football Game*, CBS SPORTS (Nov. 28, 2020, 3:16 PM), <https://www.cbssports.com/college-football/news/vanderbilt-kicker-sarah-fuller-makes-history-as-first-woman-to-play-in-a-power-five-college-football-game> (describing her kick as a “squib kick” and mentioning other female kickers by name who have played in college football games but not in one of the Power Five conferences).

3. Massey, *supra* note 1.

4. See Adam Sparks, *Vanderbilt Football Considers Women's Soccer Player at Kicker Against Missouri Because of COVID-19*, TENNESSEAN (Nov. 25, 2020, 10:35 AM), <https://www.tennessean.com/story/sports/college/vanderbilt/2020/11/25/vanderbilt-football-female-soccer-player-kicker-missouri-covid-19/6421363002/>; see also Geoff Schwartz, *Sarah Fuller Deserved Her Feat*, FOX SPORTS (Dec. 12, 2020), <https://www.foxsports.com/stories/college-football/sarah-fuller-deserved-her-feat-for-vanderbilt-commodores> (noting that despite the fact that Vanderbilt does not have a men's soccer team, any individual

21-0 at halftime.⁵ Sarah performed the second half kickoff, and her achievement garnered national attention. Just a few weeks later back home in Nashville, Sarah became the first woman to score any points in a Power Five football game as she kicked two extra points against the University of Tennessee in a 42-17 loss, ending Vanderbilt's season with an 0-9 record.⁶

As much as Sarah's moment should be recognized, it is equally important to acknowledge that several other women served as college kickers for decades before Sarah broke the Power Five scoring barrier.⁷ For example, Liz Heaston became the first woman to play in a college football game over twenty years earlier than Sarah on October 18, 1997, when she kicked two extra points for Willamette University against Linfield College.⁸ Then four years later, Ashley Martin kicked in an NCAA Division I-AA game, now known as the Football Championship Subdivision, on August 30, 2001, providing three extra points for Jacksonville State University against Cumberland University.⁹ Two years after that, Katie Hnida of the University of New Mexico became the first woman to score in Division I-A, now known

soccer player who kicked off that day would have been asked to kick the ball as Sarah did that day as a squib kick down the field).

5. See Andrea Adelson, *Sarah Fuller Plans to Stick With Vanderbilt Football, Addresses Halftime Pep Talk*, ESPN (Nov. 29, 2020), https://www.espn.com/college-football/story/_/id/30415785/sarah-fuller-plans-stick-vanderbilt-football-addresses-half-pep-talk (offering that both LeBron James and Hope Solo tweeted about her achievement. Adelson also notes that head coach Derek Mason was fired the next day); see also Cassandra Negley, *Vanderbilt Kicker Sarah Fuller Says 'I'm Sticking Around,' Explains Halftime Pep Talk*, YAHOO! SPORTS (Nov. 29, 2020), <https://www.yahoo.com/video/vanderbilt-kicker-sarah-fuller-says-im-sticking-around-explains-halftime-pep-talk-004839650.html> (noting that Vanderbilt lost the Missouri game 41-0).

6. See Teresa M. Walker, *She Scores! Fuller Kicks 2 Extra Points For Vandy, Vols Win*, AP NEWS (Dec. 13, 2020), <https://apnews.com/article/college-football-missouri-tigers-football-sarah-fuller-womens-soccer-football-de7447930919e68c6a76bee25d079648> (providing the video of Sarah kicking an extra point against Tennessee).

7. See Sallee, *supra* note 2; see also *Vanderbilt Kicker Breaks Barrier But Missouri Dominates 41-0*, ESPN (Nov. 28, 2020), <https://www.espn.com.sg/college-football/recap?gameId=401237143> (providing video of Sarah's kickoff against Missouri and also summarizing other women have played college football as kickers to include Tonya Butler who was the first woman to kick a field goal in an NCAA Division II game for West Alabama on September 13, 2003).

8. See *Woman Kicks Extra Points*, N.Y. TIMES (Oct. 20, 1997), <https://www.nytimes.com/1997/10/20/sports/woman-kicks-extra-points.html>; see also Joe Raineri, *First Woman to Play in College Football Game, at Willamette University, Reflects on Her Experience*, KGW (Nov. 30, 2020, 6:44 PM), <https://www.kgw.com/article/sports/first-woman-to-play-in-college-football-game-at-willamette-university-reflects-on-her-experience/283-3cb9b758-3eb2-4839-b1b6-6037652fef2f> (referencing Sarah Fuller's achievement, providing video Liz Heaston kicking in 1997, noting that Heaston also played soccer for Willamette, and also offering a recent interview with Liz in which she attributes her opportunity to kick directly to Title IX).

9. See *Martin First Female to Play, Score in Division I*, ESPN (Aug. 31, 2001, 12:22 PM), <http://static.espn.go.com/ncf/news/2001/0830/1246153.html>.

as the Football Bowl Subdivision, on August 30, 2003, with two extra points against Texas State.¹⁰ Twelve years after that, April Goss kicked an extra point in for Kent State in the second quarter of the team's 45-13 win over Delaware State on September 12, 2015.¹¹ Thus, Sarah's accomplishment should be cherished—but so should the many others long before hers and much before social media could spread the word in an instant.

In 2003, the same year that Katie Hnida played and scored for the University of New Mexico, Samantha “Sam” Gordon was born.¹² In 2012, videos went viral on YouTube of nine-year-old Sam playing against boys in youth football and displaying that she scored thirty five times, had 232 carries, and rushed for 1,911 yards in one season.¹³ Sam's exploits attracted the attention of the National Football League and Sam became a star appearing on a Wheaties cereal box¹⁴ and in a Super Bowl commercial.¹⁵ As of 2022, Sam is

10. See Arianna Sena, *Hnida Named One of 30 Most Influential Women in College Sports*, UNM NEWSROOM (May 4, 2016), <http://news.unm.edu/news/hnida-named-one-of-30-most-influential-women-in-college-sports> (acknowledging Hnida's feat and asserting that Hnida's kicking shoes are displayed at the College Football Hall of Fame); see also Will Webber, *UNM Athlete Hnida, Who Became First Woman to Play College Football, Gravely Ill*, SANTA FE NEW MEXICAN (Nov. 1, 2018), https://www.santafenewmexican.com/sports/unm-athlete-hnida-who-became-first-woman-to-play-college-football-gravely-ill/article_fda99722-09a6-5627-a8e6-7ab7a9b662fb.html (noting that a GoFundMe page was launched by Katie's family in 2018 due to an adverse reaction from a prescription drug. The author also mentions that Katie transferred to the University of New Mexico from the University of Colorado where she claimed that she was sexually assaulted by one of her teammates though she did not press charges. The author also quotes disparaging statements made by then Colorado head football coach Gary Barnett about Katie's kicking ability); Greg Couch, *Katie Hnida's Historic Football Story Not a Fairy Tale*, BLEACHER REP. (Dec. 13, 2014), <https://bleacherreport.com/articles/2266206-katie-hnidas-historic-football-story-not-a-fairy-tale> (providing a picture of Katie's jersey in the College Football Hall of Fame and telling the story of Katie's experiences at the University of Colorado and her transfer to the University of New Mexico).

11. See *Kent State's April Goss Kicks Extra Point in Historic Feat For Female Player (Video)*, CLEVELAND (Sept. 13, 2015, 1:36 AM), https://www.cleveland.com/sports/2015/09/kent_states_april_goss_kicks_e.html (providing video of the kick and offering that April became the second woman to score in a Football Bowl Subdivision game); see also Nicole Auerbach, *Inside the Game: How April Goss Came to Kick for Kent State*, USA TODAY (Sept. 18, 2015, 3:20 PM), <https://www.usatoday.com/story/sports/ncaaf/mac/2015/09/15/april-goss-kent-state-kicker-extra-point-score/72316044/> (discussing April's experience as a walk-on at Kent State including how former University of New Mexico kicker Katie Hnida and April shared their stories with each other after Katie reached out to April via Twitter).

12. See Alex Vejar, *Utah's Sam Gordon Was a Viral Star at 9. Now She's in Leadership of a Pro Football League For Women*, SALT LAKE TRIB. (May 26, 2022, 9:51 AM), <https://www.sltrib.com/sports/2022/05/25/sam-gordon-went-viral/> (offering that Sam is now on the advisory board of the X League, a new 7-on-7 professional football league only for women players. Vejar authors that the X League has teams in eight U.S. cities with plans to expand. Vejar also informs readers that Sarah has since graduated and moved on to play soccer at Columbia University).

13. Sportz Filmz, *Sam Gordon – Girl Football Player Fast and Fun to Watch! (Official)*, YOUTUBE (Nov. 9, 2012), <https://www.youtube.com/watch?v=l06NGucUe6A> (providing a lengthy highlight video of Sam Gordon's).

14. Vejar, *supra* note 12.

still involved in a lawsuit which has, so far, unsuccessfully demonstrated that the Utah High School Activities Association (UHSAA) and three Utah school districts are in violation of Title IX or the Equal Protection Clause in the U.S. Constitution by not offering a separate football team for girls.¹⁶ Meanwhile, Sam plays a vital part in a new women's only football league called the X League.¹⁷

Though Sam's attempt to force Utah schools to field girls' football teams has thus far failed in the courts,¹⁸ and she has graduated and plays soccer at Columbia University, girls are allowed to play high school football in Utah.¹⁹ Nevertheless, Sam has not been the only one to seek legal redress through the American legal system in the fifty years since Title IX was enacted in order to increase opportunities for girls and women to participate and compete in sports.²⁰ Indeed, the courts have played a vital role interpreting the scope, extent, and limits of Title IX.²¹

15. NFL, *The 100-Year Game / SBLIII*, YOUTUBE (Feb. 3, 2019), <https://www.youtube.com/watch?v=tJjilUHIvNtY>. It should be noted that NFL referee Sarah Thomas also appears in the same commercial which has over 15 million views on YouTube.

16. Vejar, *supra* note 12 (authoring that the case is on appeal). See Alex Vejar, *Federal Judge Rules Against Girls Trying to Create Sanctioned, Separate High School Football in Utah*, SALT LAKE TRIB. (Mar. 1, 2021, 9:55 PM), <https://www.sltrib.com/sports/high-school-sports/2021/03/02/judge-rules-against-girls/> (reporting that U.S. District Court Judge Howard Nielson, Jr., ruled in favor of the UHSAA and the Jordan, Canyons and Granite districts in a bench trial. Vejar quotes from Nielson's opinion, "[i]t is well settled that laws that discriminate on the basis of sex are subject to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment The mere fact that Defendants do not provide separate football teams for boys and girls is not discrimination on the basis of sex, however." Vejar quotes Nielson again, "[t]o the contrary, it is undisputed that girls are permitted to play football and do in fact play, albeit in extremely limited numbers." Vejar reported that the bench trial lasted thirteen days and included testimony from coaches, athletic directors, survey experts, girls who played high school football, and those who played in the Utah Girls Tackle Football League (UGTFL)); see also U.S.C. §§ 1681-1688 (2022) and its implementing regulation found at 34 C.F.R. § 106.41 (2022); U.S. CONST. amend. XIV (Equal Protection Clause).

17. Vejar, *supra* note 12 ("The X League, which begins its inaugural season June 10, is essentially the continuation of the Legends Football League, which was originally called the Lingerie Football League at its inception in 2009 before undergoing a major rebrand in 2013 and later restructuring into its current form." Referring to Sam, "Gordon said the lingerie iteration of the league was 'sexist' and didn't put women in the best position to succeed.").

18. The most recent published decision related to the Sam Gordon case is styled as *Gordon v. Jordan Sch. Dist.*, 522 F. Supp. 3d 1060, 1063 (D. Utah 2021), and Sam is referred to as "S.G." in which her father Brent Gordon is listed as "represent[ing her] in this litigation." In fact, Sam, through her father, is not the only plaintiff in the case as a group of parents are listed as plaintiffs acting on behalf of their high-school-age daughters. *Id.* at 1061, 1063-64. Judge Nielson, states, "Plaintiffs submitted no evidence that anyone from UHSAA said or did anything to prevent or discourage any girl from playing . . ." *Id.* at 1087.

19. *Id.* at 1086.

20. See Rachel Axon, *USA Today Answers Your Questions About Title IX and its Role in College Sports*, USA TODAY (May 26, 2022, 5:00 AM), <https://www.usatoday.com/story/news/investigations/2022/>

I. HEATHER SUE'S BATTLE

However, well before Sarah, Sam, and the others who earned their distinct places in football history, one woman had to resort to the courts to fight for her own right just to play in the first place—Heather Sue Mercer. In 1994, Duke University allowed Mercer to try out for the football team as a placekicker, and Mercer was listed on the spring roster but was not allowed to attend a summer training camp or dress for the games.²² Mercer was as a walk-on, but her first year she served as a manager during the 1994 season and attended practices.²³ During the spring 1995 semester, Mercer played in the Blue-White Game and kicked the winning 28-yard field goal for the Blue team.²⁴

05/26/title-ix-college-sports-questions-answered/9837129002/ (Providing a summary of questions and answers about Title IX and offering, “[t]he text of Title IX is just 37 words, but it packs a punch: ‘No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.’”).

21. Title IX interpretation has evolved over time just like society. Some prominent Title IX cases for context and further exploration and research could include *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979) (holding a private right of action is available under Title IX); *Grove City Coll. v. Bell*, 465 U.S. 555 (1984) (holding that Title IX did not apply to collegiate athletic programs but rather only to the specific programs that received federal funds. Four years later Congress enacted the Civil Rights Restoration Act of 1987 that legislatively reversed that decision and therefore Title IX applies institution-wide); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60 (1992) (allowing individuals to sue and recover monetary damages for violations and attorney’s fees when intentional discrimination is proven and when actions are intentional to avoid Title IX compliance); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (reinstating women’s gymnastics and volleyball programs and the case eventually settled out of court); *NCAA v. Smith*, 525 U.S. 459 (1999) (holding that dues payments do not raise the NCAA to the level of a covered program or activity under Title IX even though its member institutions must still comply with Title IX); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) (holding that a school board may be held liable for damages under federal law when the school has actual knowledge of student-on-student sexual harassment and is deliberately indifferent to the action and fails to address the situation. The harassment must be so severe, pervasive, and objectively offensive, that it can be said to deprive the victim of access to the educational benefits or opportunities provided by the school); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 298 (2001) (holding that a state high school athletic association is within the scope of Title IX even if one of its members is a private school); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (holding that there can be a private right of action for individuals who allege and reveal Title IX violations even though they themselves were not subject to sex discrimination themselves reasoning that Title IX mirrors Title VII even though it is not explicit in the Title IX statute).

22. See ADAM EPSTEIN, *SPORTS LAW* 214 (2013).

23. See *Heather Sue Mercer’s Score Might Lead to Future Losses For Women*, *ATHLETIC BUS.* (Mar. 31, 2001), <https://www.athleticbusiness.com/operations/article/15140245/heather-sue-mercers-score-might-lead-to-future-losses-for-women> (offering that Duke was appealing the decision at that time and “[a]n unfortunate repercussion of the Mercer case might be high schools and colleges choosing the safe route of preventing Title IX discrimination regulations from applying to contact sports by simply prohibiting women from trying out for these teams.”). This was in reference to *Mercer v. Duke Univ.*, 190 F.3d 643 (4th Cir. 1999), in which the Fourth Circuit Court of Appeals held that the district court erred, finding instead that Mercer had stated a valid claim under Title IX regulations. Further, the three-judge panel relied on an

Both Fred Goldsmith, the Duke University head football coach, and Duke's kicking coach told Mercer that she made the team, but she was then cut from the team in 1996.²⁵ In 1997, Mercer sued Duke and alleged that once she was allowed on the football team that it was a form of sex discrimination under Title IX to treat her differently because of her sex.²⁶ In October 12, 2000 a federal jury ordered Duke to pay one dollar in actual damages and two million dollars in punitive damages to Mercer.²⁷ In 2002, however, the Fourth Circuit Court of Appeals vacated the punitive damages award and held that such damages may not be awarded in private actions.²⁸

Mercer's case continued until 2005 in which she was awarded attorney's fees.²⁹ More importantly, Mercer's legal battle broke new ground in the Title IX space by establishing that "the contact-sports exemption does not permit a school to discriminate against women that the school has allowed to participate in contact sports. Mercer's case was the first to so hold, and it will serve as guidance for other schools facing the issue."³⁰ In essence, Heather Sue's legal battle helped pave the way for many other women who served as college kickers. Who knows the impact she had on other girls and women who just wanted a chance to play football during the first twenty-five years of Title IX.

II. THE "CONTACT SPORTS" EXCEPTION TO TITLE IX

Whether it be Sarah, Sam, Heather Sue, or anyone else, when it comes to football, girls' and women's increased participation in high school and college football has not gone unnoticed though it has not yet been mainstreamed

analysis and interpretation of 34 C.F.R. § 106.41(b) and concluded that if members of the excluded sex are allowed to try out and the university voluntarily opened the team to members of both sexes, as in the case of Heather Sue, then Title IX and regulations related to discrimination based on gender apply. *Id.* at 647-48.

24. *Heather Sue Mercer's Score Might Lead to Future Losses for Women*, *supra* note 23.

25. *Id.*

26. *Id.*

27. *Id.*

28. *See Mercer v. Duke Univ.*, 50 F. App'x 643, 644 (4th Cir. 2002). It did not help Mercer's case that an intervening Supreme Court decision *Barnes v. Gorman*, 536 U.S. 181, 189-90 (2002) concluded that punitive damages were not available in private causes of action under Title VI of the Civil Rights Act of 1964 of which, according to the Court, Title IX was modeled after.

29. *See Mercer v. Duke Univ.*, 401 F.3d 199 (4th Cir. 2005).

30. *Id.* at 206. The court also felt that Duke University's "doomsday predictions" that schools would simply refuse to allow women to even try out for football were misguided. The court, referencing the "trail that Mercer blazed," discussed the exploits of both Ashley Martin and Katie Hnida in its decision and authored that "in 2003, nearly 3,000 girls in high school (where Title IX is also applicable) played football, and another 10,000 participated in other traditionally male sports like ice hockey and wrestling." *Id.* at 208.

whether it be due to size, speed, strength, skill, or interest.³¹ Still, that interest seems to be increasing especially in Utah, Sam Gordon's home state.³²

Another reason might be because the federal regulation that allows schools to exclude girls and women from "contact sports" and not run afoul of Title IX.³³ This is often referred to as the "contact sports exception" to Title IX.³⁴ There is a decent amount of discussion of the contact sports exception among published judicial decisions³⁵ and legal scholarship.³⁶ Under this federal statutory exception to Title IX, schools (more formally known as "recipients") may discriminate between sexes in particular sports, all of which are characterized as "contact" in nature.³⁷ The federal regulation reads, in part:

(a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

31. There is not a single college or high school in the United States that has a girls tackle football team.

There does not appear to be another youth league in the United States other than UGTFLL. There are no other development leagues, and no colleges offer scholarships for girls tackle football players. In short, the level of popularity of girls tackle football shown by Plaintiffs appears to be a unique phenomenon within Salt Lake and Utah Counties. Even the popularity of girls tackle football in this area appears to be closely associated with one particularly impressive family, the Gordons. S.G. is a talented young athlete whose success has been nationally recognized and has no doubt affected her peers' interest in girls tackle football.

Gordon v. Jordan Sch. Dist., 522 F. Supp. 3d 1060, 1094 (D. Utah 2021).

32. *Id.*; see also Vejar *supra* note 12; Timothy Wahl, *Women's Interest and Participation in Football Growing Sharply*, AM. FOOTBALL INT'L (Apr. 2, 2021), <https://www.americanfootballinternational.com/womens-interest-and-participation-in-football-growing-sharply/> (providing a link and referencing a comprehensive Ohio University study from 2020 backing that claim).

33. 34 C.F.R. § 106.41(b) (2022). It might be important to recognize that the federal regulation here does not refer to girls, boys, women, or men, but rather as "members of the excluded sex."

34. Some courts and legal scholarship refer to it as an "exception" while others refer to it as an "exemption." I prefer "exception," which is also the more common word used in federal and state cases.

35. A Lexis® search for "contact sports exception" resulted in forty total federal (7) and state (33) cases most significantly coming from Illinois (13) and Iowa (8). A search for "contact sports exemption" resulted in only four federal cases (3 from the Fourth Circuit and 1 from the Ninth Circuit). Interestingly, Judge Nielson in *Gordon v. Jordan School District*, 522 F. Supp. 3d 1060, 1092 n.8 (D. Utah 2021), referred to the contact sports exception rather as the "Contact Sports Rule." *Id.*

36. A Lexis® search for "contact sports exception" resulted in 120 secondary materials. On the other hand, a search for "contact sports exemption" resulted in 74 secondary materials.

37. 34 C.F.R. § 106.41 (2022).

(b) Separate teams. Notwithstanding the requirements 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 try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.³⁸

Notice that the regulation defines “contact sports” to include “boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.”³⁹ In these specific contact sports, members of the excluded sex do not have to be allowed to try out for the only team the school (again “recipient”) sponsors because these sports are “contact sports.”⁴⁰ This means that Sarah and Heather Sue and Katie and others could have legally been excluded from playing football in the first place without violating Title IX. However, as demonstrated in the *Mercer* decisions, once a female is allowed to try out and compete in a contact sport (e.g., football) at that institution, she (i.e., the “excluded sex”) must not be treated differently on account of their sex.⁴¹

38. *Id.* An interesting analysis of the phrase, “competitive skill” can be found in Section (b) which states, “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.” See Caleb R. Trotter, *Approaching 50 Years: Title IX’s “Competitive Skill” Exception to the Prohibition on Single-Sex Sports*, 10 MISS. SPORTS L. REV. 153, 154, 163 (2021) (authoring that it is not entirely clear what “competitive skill” means, but that “it is best to conceptualize the exception as two separate sports exceptions: one for contact sports, and the other for non-contact sports where team selection is determined by ‘competitive skill.’ This necessarily means that non-contact sports where team selection is not based on competitive skill must be open to members of both sexes.”).

39. 34 C.F.R. § 106.41(b) (2022).

40. *Id.*

41. *Mercer v. Duke Univ.*, 301 F. Supp. 2d 454, 465 (M.D.N.C. 2004), *aff’d*, 401 F.3d 199, 212 (4th Cir. 2005) (“Therefore, the lesson to be learned from *Mercer*’s lawsuit is that female athletes who are permitted to try out for a men’s contact-sports team at a federally funded institution are entitled to the same rights as their male counterparts to be free from discrimination on the basis of gender.”).

Still, is this contact sports exception provision necessary anymore? Even if one supports the contact sports exception, what about sports not mentioned in the statute which do involve varying degrees of contact such as baseball, field hockey, lacrosse, soccer, and water polo? Are they covered under the regulation which does not list them specifically but instead leaves interpretation up to others by stating, “and other sports the purpose or major activity of which involves bodily contact”⁴² The answer is unclear and inconsistently interpreted and applied especially in the sport of field hockey in which boys have tried to compete on girls’ teams because the school did not sponsor the same sport for boys.⁴³

Some states adhere to the opinion, since it is not specifically mentioned in the statute, that field hockey is indeed a contact sport and therefore boys may be excluded—at least under federal law—under the contact sports exception to Title IX.⁴⁴ If field hockey is a contact sport, then members of the opposite sex (i.e., boys) can be excluded from playing (or even trying out) for the girls’ team under the regulation. Unfortunately for field hockey, there is disparity among the states.⁴⁵ For example, boys have been excluded from participating in field hockey in high school in Rhode Island.⁴⁶ Pennsylvania allows boys to play on a “mixed gender” sports team if four criteria are met.⁴⁷ In Massachusetts, boys may indeed play on the girls’ field hockey team.⁴⁸

42. 34 C.F.R. § 106.41(b) (2022).

43. EPSTEIN, *supra* note 22, at 213-14; *see also* Williams v. Sch. Dist., 998 F.2d 168, 180 (3d Cir. 1993) (reversing the district court’s decision which had held as a matter of law that field hockey is not a “contact sport.”).

44. It would not be inappropriate consider updating the regulation to include other sports by name rather than leave it up to the courts as to which non-named sports are “contact sports.”

45. EPSTEIN, *supra* note 22, at 213-14.

46. *Id.* at 213. (noting other state decisions prohibiting boys from playing on girls’ field hockey teams such as in Maine and New Jersey); *see also* Kleczek *ex rel.* Kleczek v. R.I. Interscholastic League, Inc., 768 F. Supp. 951, 952 (D.R.I. 1991); Kleczek v. R.I. Interscholastic League, 612 A.2d 734, 735 (R.I. 1992); *see also* William Geoghegan, *Field of His Own*, INDEP. (Feb. 4, 2016), http://www.independentri.com/independents/article_706ef923-f6b7-52f8-b2e6-61bc053cc715.html (authoring that Tommy Meyer of South Kingstown, Rhode Island, started playing field hockey with his sister but cannot play on a high school team due to RIIL rules, and that Meyer may have been the first boy to ask for a waiver in Rhode Island since Brian Kleczek).

47. *See* Ross Lippman, *Palmyra School Not Allowing Boy to Play Field Hockey*, ABC 27 (Sept. 20, 2017, 6:19 PM), <https://www.abc27.com/news/palmyra-school-not-allowing-boy-to-play-field-hockey/> (offering the four criteria under the PIAA constitution and bylaws).

48. *See* Cam Smith, *The War Against Boys Playing Feld Hockey is Picking Up Steam in Mass.*, USA TODAY HIGH SCH. SPORTS (Nov. 16, 2018, 7:41 AM), <https://usatodayhss.com/2018/the-war-against-boys-playing-field-hockey-is-organizing-in-mass> (“Massachusetts was the first state to rule it was unconstitutional to bar a player from competing based solely on gender some three decades ago.” Smith also notes that there is a growing concern over boys playing on girls’ field hockey teams in the state especially

On the other hand, even though wrestling is expressly mentioned as a contact sport in the federal regulation, there have been huge strides in girls and women competing in wrestling at all levels including against boys as well.⁴⁹ For example, in 2006, Michaela Hutchison won the Alaskan state wrestling championships competing against the boys.⁵⁰ In 2020, Heaven Fitch won the North Carolina High School Athletic Association state wrestling title in her weight class.⁵¹ In 2021, American Tamyra Mensah-Stock won a gold medal at the Tokyo Olympics.⁵²

In fact, girls wrestling at the high school level has become so popular that “[t]wenty-five states have added separate girls wrestling championships since 2018, joining the six states” to sanction it from 1998 to 2015 (Hawaii, Texas, Washington, California, Alaska, and Tennessee).⁵³ Connecticut added an additional class for its 2019-20 postseason, Utah conducted its first girls’ championship event in February 2021, and Wisconsin held its inaugural girls’ state wrestling tournament in January 2022.⁵⁴ Over thirty states now have girls’ wrestling championships with other recent additions to include Florida, Idaho, Illinois, North Dakota, Michigan, Minnesota, and Nebraska.⁵⁵

when the Menard brothers led their team to a Western Massachusetts title). *See also* Meredith Prince & Caitlin Newton, *3 Senior Boys Defy Convention on Girl-Dominated Field Hockey Team*, WAYLAND STUDENT PRESS (Sept. 12, 2019), <https://waylandstudentpress.com/79319/articles/3-senior-boys-defy-convention-on-girl-dominated-field-hockey-team/> (noting that field hockey is predominantly a male sport around the world).

49. *See* Cody Porter, *Participation in Girls Wrestling Explodes Across Country*, NFHS (Dec. 20, 2021), <https://www.nfhs.org/articles/participation-in-girls-wrestling-explodes-across-country/> (offering, too, that women’s wrestling appeared at the Olympics for the first time in 2004 in Athens, Greece).

50. *See* *Girl First to Win State Prep Wrestling Title Over Boys*, ESPN (Feb. 5, 2006), <https://www.espn.com/espn/news/story?id=2320537> (noting that she wrestled at 103 lbs. and became the first girl in the nation to win a state high school wrestling title when competing against boys).

51. *See* Joshua Rhett Miller, *Female Wrestler Heaven Fitch Wins High School Championship in North Carolina*, N.Y. POST (Feb. 28, 2020, 9:48 AM), <https://nypost.com/2020/02/28/female-wrestler-heaven-fitch-wins-high-school-championship-in-north-carolina/> (providing a short video clip of the victory in the 106 lbs. division).

52. *See* Porter, *supra* note 49 (offering that she became the first American Black woman and second American woman ever to win Olympic gold in wrestling).

53. *Id.*

54. *Id.* (noting that nationally, according to Porter, “[a]s many as 28,447 participated during the 2019-20 season, according to data collected from the National Wrestling Coaches Association and state high school associations by the USA Wrestling Girls High School Development Committee.”).

55. *Id.*; *see also* Hank Lee, *NCHSAA Sanctions Girls Wrestling*, WCNC (Apr. 27, 2022, 7:07 PM), <https://www.wcnc.com/article/sports/high-school/north-carolina-high-school-girls-wrestling-sanctioned/275-24c68231-63d3-4b2f-8982-28542cff8ac2> (reporting that the North Carolina High School Athletic Association announced that girls wrestling will become an officially recognized sport in the 2023-2024 school year).

At the college level, women's wrestling is taking off, too. On September 23, 2021, the University of Iowa made history by becoming the first Power Five conference school to add a women's wrestling program joining Sacred Heart University and Presbyterian College as the three Division I schools to offer the sport.⁵⁶ Collegiately there are thirteen Division II teams, twenty-two Division III teams and thirty-six NAIA teams.⁵⁷ "Since 2020, women's wrestling has been recognized by the NCAA as an emerging sport. It can become an NCAA Division I Championship sport if adopted by 40 schools in the next 10 years."⁵⁸ Regardless of one's opinion as to whether field hockey is a contact sport,⁵⁹ it is clear that interest in girls wrestling—as much as a contact sport as football according to the regulation—has exploded.⁶⁰

For those in the camp of increasing opportunities for girls and women in the sport of football—as I am—there does not appear to be any state high school athletic association sponsored tackle football teams for women just yet. However, girls' flag football is a recognized varsity women's high school sport in at least five states: Alabama (currently no state championship), Alaska (no state championship), Georgia, Florida, and Nevada.⁶¹ Alaska, Alabama, and Georgia run their seasons in the fall, while Nevada uses the winter, and Florida plays in the spring.⁶² Further, both Nike and the National Football League have offered money to enhance the growth of the sport.⁶³

Considering the fact field hockey as a "contact sport" is inconsistently applied at the state level, girls and women's wrestling is seeing explosive growth at all levels, and football (albeit currently flag football) continues to

56. See Porter, *supra* note 49.

57. *Id.*

58. *Id.*

59. Before class a few years ago, I asked a student-athlete who was on the university's field hockey team if she thought the sport was a contact sport. A few weeks later I asked the head coach her opinion. One said "yes" the other said "no."

60. See Taylor Jenkins, *FHSAA Adds Girl's Wrestling State Championship*, PLANT CITY OBSERVER (Nov. 18, 2021, 7:00 AM), <https://www.plantcityobserver.com/fhsaa-adds-girls-wrestling-state-championship/> (noting the growth of the interest in the sport in Florida and providing a historical context to include the following, "[i]n 1998, Hawaii became the first state to officially sanction a high school state championship tournament for girl's wrestling and Texas followed suit in 1999. Then came Washington in 2007, California in 2011 and the dominoes began to fall across the nation.").

61. See Nate Perry, *Girls Flag Football on Rise in High Schools, State Associations*, NFHS (Oct. 6, 2021), <https://www.nfhs.org/articles/girls-flag-football-on-rise-in-high-schools-state-associations/>.

62. *Id.*

63. *Id.* (noting that Nike announced a \$5 million partnership with the NFL offering a one-time \$100,000 payment to any state association willing to set up a flag football pilot program in 2021, as well as any others looking to grow their existing flag football. Florida, for example, was the first state to receive money from Nike and used it to purchase new football uniforms, socks, and other items).

expand among the states at the high school level, maybe the time has come to amend the contact sports exception or repeal it entirely. Does it continue to serve a legitimate purpose? Is it to protect girls and women from potentially injurious physical contact with boys and men? Is it designed to provide some measure of legal protection from schools, teams and coaches who exclude members of the excluded sex (usually women) who might sue for discrimination? Is it to prevent one school from (possibly) having an unfair competitive advantage by having a male on the girls' team?

III. VIEWS

There has been academic discussion on whether the contact sports exception should be repealed or amended particularly right after the *Mercer* decisions twenty-or-so years ago,⁶⁴ but there have been a few contemporary articles as well.⁶⁵ For example, in 2020 author Katlynn Dee points out that as society has changed, now is the time to remove “historic stereotypes” about women in the context of sport, too.⁶⁶ Dee states,

[t]he notion that women are inherently weak and delicate has no place in the world of sports, where some of the strongest females dominate. Gender distinctions have been largely reduced in employment and the military, yet they remain

64. See, e.g., Abigail Crouse, Comment, *Equal Athletic Opportunity: An Analysis of Mercer v. Duke University and a Proposal to Amend the Contact Sport Exception to Title IX*, 84 MINN. L. REV. 1655, 1684 (2000) (proposing the Department of Education could delete the contact sport exception and let the regulation read as follows: “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, . . . members of the excluded sex must be allowed to try out for the team offered.” Crouse continues, “[t]he language relied upon by the district court in *Mercer*—that Title IX does not require schools ‘to integrate their teams nor to provide the same choice of sports to men and women’—should be deleted. In its place, new text should convey that every student at a school, regardless of gender, should have the opportunity to try out for any sport offered by the school. Selection for the team may then be made according to an athlete’s skills but not according to gender. The interpretation should also include, among its factors and standards, that try-outs must be open to members of both genders when only one team is offered in a sport.”). See also Kimberly Capadona, Comment, *The Scope of Title IX Protection Gains Yardage as Courts Continue to Tackle the Contact Sports Exception*, 10 SETON HALL J. SPORTS L. 415, 418 (2000) (“To deny female athletes the protection of the law merely because the sport in which they participate involves bodily contact is without logic.”).

65. See *supra* note 36 and accompanying text. Based upon my research using Lexis® in secondary materials, however, almost all the law literature in the database calls for a repeal or modification of the contact sports exception.

66. See Katlynn Dee, Comment, *Strong but Sidelined: A Call for the Elimination of the Contact Sport Exception Through the Lens of Title VII’s Disparate Treatment Analysis*, 69 DEPAUL L. REV. 1011, 1011 (2022).

prevalent in athletics. While employment laws and military regulations open the doors to women in physically demanding jobs and the top-ranked combat positions, education laws close the gates to football fields and rope off the basketball courts from female athletes. The contact sport exception in Title IX prohibits female athletes from playing contact sports with the opposite sex. This policy of exclusion prevents gender equality in collegiate athletics and must be rescinded.⁶⁷

Dee advocates removing the contact sport exception for three reasons including the generalized stereotypes about women's physical abilities without consideration for their individual talents or qualifications, an athlete's sex does not inhibit their ability to play the sport because "sex does not go to the essence of the contact sport," and lastly that the rationale that the exception is in place for safety reasons is, instead, a "pretext for the legislature's intent to protect revenue-producing sports like men's football and basketball from female encroachment."⁶⁸ Dee further argues that the contact sport exception is unconstitutional and inconsistent with the Equal Protection Clause.⁶⁹ Dee also hopes to "spark the conversation" that Title IX is inconsistent with Title VII's disparate treatment analysis.⁷⁰

Dee recognizes the academic nature of the article and that it may have both "theoretical and practical impact."⁷¹ Nevertheless, Dee points out that with the very recent state laws related to "name, image, and likeness" which allow student-athletes to be paid could, in theory, result in student-athletes being deemed employees at their institutions.⁷² This, then, could make it possible that institutions would be in violation of Title IX from a Title VII employment law perspective based upon sexual discrimination.⁷³ Specifically, Dee states, "[t]he student athletes that will benefit from these name, image, and likeness compensation laws will be predominately male football and basketball players because they are the ones that receive the most publicity

67. *Id.* at 1011-12.

68. *Id.* at 1012.

69. *Id.* at 1037-41.

70. *Id.* at 1041-42.

71. *Id.* at 1050.

72. *Id.* at 1052 ("Female student athletes, if deemed employees, will be able to utilize this Comment's Title VII analysis to combat the discriminatory effects of the contact sport exception under both the systemic disparate treatment analysis and potentially the disparate impact analysis.").

73. *Id.* at 1050-51.

and commercial attention.”⁷⁴ As a result, in Dee’s eyes this could be discriminatory and therefore represent disparate treatment or impact on females.⁷⁵

Dee concludes, “[i]n order to allow young women and girls the equal opportunity to derive the positive physical, mental, and social benefits associated with participation in sports, the contact sport exception and other forms of sex segregation in athletics must be removed.”⁷⁶ Further,

[r]escinding the contact sport exception will level the playing field both in the athletic arena and in the professional world. It will teach these female athletes that they are not second-class anything; that they can get off the sidelines and show the world their strength. If you let them play, they will show you their worth.⁷⁷

Also in 2020, yet unlike Dee, Doriane Lambelet Coleman, Michael J. Joyner, and Donna Lopiano addressed the complex dilemma based upon the “identity movement” which has attempted to move towards more of a “sex-blind” landscape—through advocacy—to secure needed protections for those involved in the transgender community to participate in sport consistent with their *gender identity*.⁷⁸ The authors recognize the political nature of Title IX⁷⁹

74. *Id.* at 1051. It should be noted that Dee’s article was written prior to the change in the NCAA’s “interim policy” on name, image, and likeness (NIL) that went into effect in the summer of 2021. *See, e.g.*, Michelle Brutlag Hosick, *DI Board of Directors Issues Name, Image and Likeness Guidance to Schools*, NCAA (May 9, 2022, 5:21 PM), <https://www.ncaa.org/news/2022/5/9/media-center-di-board-of-directors-issues-name-image-and-likeness-guidance-to-schools.aspx> (offering that although the interim policy first was enacted to allow student-athletes to earn income from NIL, the 2022 guidance “is appropriate now as there is better understanding about the impact on student-athletes.”).

75. Dee, *supra* note 66, at 1052.

76. *Id.* at 1055-56.

77. *Id.* at 1056.

78. *See* Doriane Lambelet Coleman et al., *Re-affirming the Value of the Sports Exception to Title IX’s General Non-Discrimination Rule*, 27 DUKE J. GENDER L. & POL’Y 69, 73 (2020). It is noteworthy that their article was cited in footnote 2 by the case that drew national attention to transgender participation in high school sports in Connecticut. *See* Soule v. Conn. Ass’n of Schs., No. 3:20-cv-00201, 2021 U.S. Dist. LEXIS 78919 (D. Conn. Apr. 25, 2021) (involving the legal challenge to the transgender participation policy of the Connecticut Interscholastic Athletic Conference which permitted high school students to participate in sex-segregated sports consistent with their gender identity. In citing the article, the court noted that it was a “case of first impression” and that “[t]he issue implicates opposing interests that are not easily reconciled.” *Id.* at *3-4, 4 n.2). The court granted the motion to dismiss as it was no longer justiciable but offered that “[c]ourts across the country have consistently held that Title IX requires schools to treat transgender

and summarize different arguments for and against Title IX modification which could in effect be “revolutionary”⁸⁰ if Title IX were to go “sex-blind” instead.⁸¹

Rather than take an all-or-nothing approach by making a statement such as “transgender girls are girls”⁸² or calling for or focus only on a repeal of Title IX’s contact sports exception entirely, the authors propose language that accepts Title IX’s commitment to “sex equality” while at the same time recognizing that “sex-linked competitive advantages” do exist and in a contact sport physical safety might be implicated.⁸³ The authors continue, “[t]he structure of the Title IX regulatory scheme makes clear that the goal is sex equality, not sex neutrality.”⁸⁴

Finally, these three authors make it clear though that while they support equality for “trans people,”⁸⁵ they also recognize that physical differences do exist between males and females, that male puberty does create an athletic performance gap, and stating, “[c]hanging how we define ‘female’ so that it includes individuals of both sexes, and then disallowing any distinctions among them on the basis of sex, is by definition and in effect a rejection of Title IX’s equality goals.”⁸⁶ Indeed, the authors recognize that there are no

students consistent with their gender identity. Every Court of Appeals to consider the issue has so held.” *Id.* at *29-30.

79. Coleman et al., *supra* note 78, at 72 (offering that the “fate” of women’s sports “has always been tied to the larger political climate” (quoting SUSAN WARE, TITLE IX: A BRIEF HISTORY WITH DOCUMENTS 13 (2007)).

80. *Id.* at 73.

81. *Id.* at 73-74. It is interesting to note that throughout the article, the authors frequently refer to the “contact sports exception” as just the “sports exception” or sometimes as the “carve-out” to Title IX.

82. See Erin Buzuvis et al., *Sport Is for Everyone: A Legal Roadmap for Transgender Participation in Sport*, 31 J. LEGAL ASPECTS SPORT 212, 236 (2021) (stating, “transgender girls are girls” on three occasions).

83. See Coleman et al., *supra* note 78, at 131.

84. *Id.* at 132.

85. *Id.* at 133.

86. *Id.* The authors recognize the evolutionary nature of Title IX since 1972 but resist the temptation to ignore the inherent differences among sexes and to go sex-blind in the popular debate of gender identity. They state,

[t]he challenge as we move into Title IX’s second semi-centennial is to persuade institutions finally to address the remaining disparities in their support of female athletes and female sport at the same time that we enter a new revolutionary period in which we are being asked to imagine that “female” includes individuals of both biological sexes so long as they identify as women and girls. This ask reflects the intellectual choice to conceive of sex as a social construct rather than as a fact of biology tied to reproduction, and also the strategic choice of trans rights advocates to work toward law reform that would disallow any distinctions on the basis of reproductive sex. A popular manifestation

easy answers and inclusivity challenges for trans people will continue as science and social norms continue to evolve.⁸⁷

IV. CHANGING PERCEPTIONS AND MOVING FORWARD

Regardless of whether the contact sports exception to Title IX should remain in the statute as-is or be amended (or outright repealed), this fifty-year-old statute has had a profound impact on participation for girls and women in sport⁸⁸ and perceptions of female physical abilities have changed considerably over time, too.⁸⁹ Unfortunately, the fight for equality continues to have to resort to the courts in some cases as demonstrated most recently by the class-action lawsuit by members of the U.S. Women's National Soccer Team over unequal pay and treatment.⁹⁰ Some have suggested that schools that give preferential treatment to male athletes in the new order world of name, image and likeness (NIL) might violate Title IX as well.⁹¹ In sum, Title IX and its

of this strategy is their insistence that we accept as threshold truth rather than as political claim the proposition that "Trans women are women, period."

Id.

87. *Id.* at 133-34.

88. See Axon, *supra* note 20 ("At the high school level, girls' athletic participation has grown from 294,000 in 1972 to more than 3.4 million in 2018-19, according to the National Federation of State High School Associations. Collegiately, fewer than 30,000 women competed before Title IX compared to more than 219,000 women in 2020-21.").

89. See EPSTEIN, *supra* note 22, at 201 (offering that it is astonishing by today's cultural norms that it was not until the 1972 Munich Olympic Games that women were allowed to compete in the 1,500- and 3,000-meter track races. Epstein notes that the 1984 Los Angeles Olympics was the first to allow women to compete in the marathon. The 5,000 and 10,000 meters did not make their appearance until 1992 in Barcelona, and women's steeplechase was added for the 2008 Beijing Olympics. The International Olympic Committee included women's boxing on the schedule for the 2012 London Olympics). See also Emily Russell, *The Fight For Equality in Women's Ski Jumping is About More Than Ski Suits*, NPR (Feb. 5, 2022, 2:46 PM), <https://www.npr.org/2022/02/03/1077924174/winter-olympics-women-ski-jumping> (offering that ski jumping only became an Olympic sport for women in 2014 and there is still a struggle for equal pay and more opportunities to compete in the sport like the men at the international level).

90. See *American Women Players Settle Equal Pay Lawsuit Against US Soccer For \$24M*, USA TODAY (Feb. 22, 2022, 10:13 AM), <https://www.usatoday.com/story/sports/soccer/wusa/2022/02/22/uswnt-us-soccer-settle-equal-pay-lawsuit-24-million/6890851001/> (noting that U.S. women have won four World Cups since their program started in 1985, while the U.S. men have not reached a semifinal since 1930); see also Jeff Carlisle, *USWNT, U.S. Soccer Federation Settle Equal Pay Lawsuit for \$24 million*, ESPN (Feb. 22, 2022), [https://www.espn.com/soccer/united-states-usaw/story/4599482/uswntus-soccer-federation-settle-equal-pay-lawsuit-for-\\$24-million](https://www.espn.com/soccer/united-states-usaw/story/4599482/uswntus-soccer-federation-settle-equal-pay-lawsuit-for-$24-million).

91. See Arthur Bryant & Cary Joshi, *College Sports NIL is Headed for a Collision With Title IX*, SPORTICO (Nov. 10, 2021, 8:55 AM), <https://www.sportico.com/law/analysis/2021/college-sports-nil-title-ix-1234645328/> (admonishing athletic administrators and others to include compliance officers, employees, boosters, athletes and supporters that male and female athletes have to be treated "equally" when it comes to compliance with state laws and the NCAA policy related to name, image, and likeness (NIL) in the new

discussion, interpretation and application continue to meet the challenges of a changing society in a seemingly endless less-than-certain terrain.⁹²

However, a discussion or analysis of the contact sports exception does not appear to be at the forefront of current mainstream discourse involving Title IX which has opened up thousands of opportunities for girls and women,⁹³ though further consideration of females playing football did catch fire with young Sam Gordon's gridiron exploits and her subsequent attempt to force Utah schools to field girls' football teams may still limp its way in the federal courts after being sacked in 2021.⁹⁴

Instead, the contemporary debate has centered on participation and competition in sport based upon *gender identity* rather than biological sex. For example, at the time of this essay, more than a dozen states have passed laws that prohibit transgender female athletes from competing against athletes who are born biologically female, most recently Indiana.⁹⁵ The discussion of

world order after the NCAA "suspended its NIL restrictions for all incoming and current students in all sports.").

92. See Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637, 32,637-39 (June 22, 2021) (proclaiming that Title IX prohibits discrimination based on sexual orientation and gender identity as a result of the Supreme Court decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which concluded that discrimination based on sexual orientation and discrimination based on gender identity inherently involve treating individuals differently because of their sex).

93. See, e.g., Kenny Jacoby et al., *Title IX Was Intended to Close the Gender Gap in College Athletics. But Schools Are Rigging the Numbers*, YAHOO! (May 30, 2022), <https://www.yahoo.com/news/title-ix-intended-close-gender-090430302.html> (calling into question the practice of circumventing the spirit of Title IX at the college level by "double- and triple-counting women while undercounting men and even classifying male practice players as women" and thereby creating the "illusion of thousands more female athletic opportunities."); See generally *Requirements Under Title IX of the Education Amendments of 1972*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (Jan. 10, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/interath.html> (providing a summary of the Title IX landscape).

94. See Vejar, *supra* notes 12-17 and accompanying text.

95. See Scooby Axon, *Transgender Swimmer Lia Thomas Says She Didn't Transition to Gain Advantage in College Sport*, USA TODAY (May 31, 2022, 9:23 AM), <https://www.usatoday.com/story/sports/college/2022/05/31/lia-thomas-transgender-swimmer-didnt-transition-gain-advantage/9999262002/> (citing the *Movement Advancement Project* and stating that "more than a dozen states prohibit transgender students from participating in sports that are consistent with their gender identity"); see also Andy Berg, *Indiana Legislators Vote to Override Governor's Trans Veto*, ATHLETIC BUS. (May 25, 2022), <https://www.athleticbusiness.com/operations/governing-bodies/article/15292452/indiana-legislators-vote-to-override-governors-trans-veto> (reporting that Indiana state senators voted 32-15 to override Governor Eric Holcomb's veto of the bill that banned transgender females from competing in girls' school sports. Berg reported that the Indiana House also voted that same day in favor (67-28) of overriding Holcomb's veto); Fei Gao & John Wolohan, *Transgender Male's Appeal Over Access Costs District \$4M*, ATHLETIC BUS. (May 23, 2022), <https://www.athleticbusiness.com/operations/legal/article/15290911/transgender-males-appeal-over-access-costs-district-4m> (offering that Caitlyn Jenner and Martina Navratilova also expressed concerns about transgender athletes such as swimmer Lia Thomas competing against other women).

transgender participation in college swimming reached epic proportions in 2022 as Lia Thomas, a transgender woman who competed for the University of Pennsylvania's men's swim team for several years before transitioning and competing for the women's team during the 2021-2022 season, made a splash among her competitors.⁹⁶ On January 19, 2022, the NCAA decided to take a sport-by-sport approach to transgender participation.⁹⁷ Indeed, this decision caused considerable public discourse,⁹⁸ continuing to promote debate among teammates,⁹⁹ competitors,¹⁰⁰ Title IX advocates,¹⁰¹ and others¹⁰² related to

96. See Cydney Henderson, *Olympian Brooke Forde Says She Has No 'Problem Racing Against' Transgender Swimmer Lia Thomas*, USA TODAY (Jan. 27, 2022, 5:39 PM), <https://www.usatoday.com/story/sports/college/2022/01/27/olympian-brooke-forde-defends-transgender-swimmer-lia-thomas/9241395002/>; see also Amanda McMaster et al., *Transgender Swimmer Lia Thomas Speaks Out About Backlash, Future Plans to Compete*, ABC NEWS (May 31, 2022, 6:31 AM), <https://abcnews.go.com/GMA/News/transgender-swimmer-lia-thomas-speaks-backlash-future-plans/story?id=85068951>; Michael Powell, *What Lia Thomas Could Mean For Women's Elite Sports*, N.Y. TIMES (May 30, 2022), <https://www.nytimes.com/2022/05/29/us/lia-thomas-women-sports.html> (offering that Lia was not the only trans swimmer at the 2022 NCAA Championships. In fact, Yale swimmer Iszac Henig, a transgender man, swam the 100-yard women's freestyle finishing in a tie for fifth. Powell notes, however, that if Iszac had chosen to swim in the men's category that Henig would not have qualified for the championship).

97. See Gao & Wolohan, *supra* note 95. See also *NCAA Adopts New Policy For Transgender Athletes*, USA TODAY (Jan. 19, 2022, 10:36 PM), <https://www.usatoday.com/story/sports/college/2022/01/19/ncaa-new-policy-transgender-athletes/6588340001/> (offering that the NCAA's policy brought it more in line with the U.S. and International Olympic Committees and transgender participation for each sport will be determined by the policy for the sport's national governing body).

98. See, e.g., Katie Barnes, *NCAA Updates Policy on Transgender Participation, to Let Each Sport Set Eligibility Requirements*, ESPN (Jan. 19, 2022), https://www.espn.com/college-sports/story/_/id/33105305/ncaa-updates-policy-transgender-participation-let-sport-set-requirements ("The new policy comes at a time when transgender athletes continue to be a focus of national debate."); Shalise Manza Young, *Transgender Swimmer Lia Thomas Deserves Our Respect. Brava to Brooke Forde For Understanding That*, YAHOO! SPORTS (Jan. 26, 2022), <https://sports.yahoo.com/transgender-swimmer-lia-thomas-deserves-our-respect-brava-to-brooke-forde-for-understanding-that-233442732.html> (praising U.S. Olympian and Stanford University swimmer Brooke Forde for her public acceptance of transgender swimmer Lia Thomas and would have no problem racing against Lia at the NCAA swimming championships later that year. The author also notes that at the time of the article, Thomas was the fastest swimmer in the country in the 200 free and 500 free, and that it led to "outrage, much of it phony and politically motivated.").

99. Patrick Reilly, *Teammates Say They are Uncomfortable Changing in Locker Room with Trans UPenn Swimmer Lia Thomas*, N.Y. POST (Jan. 27, 2022, 9:34 PM), <https://nypost.com/2022/01/27/teammates-are-uneasy-changing-in-locker-room-with-trans-upenn-swimmer-lia-thomas/>; see also Dan D'Addona, *Lia Thomas Teammate: Situation is 'Unfair' and NCAA is 'Discriminating Against Cisgender Women'*; *Locker Room Discomfort*, SWIMMING WORLD (Mar. 9, 2022, 7:45 AM), <https://www.swimmingworldmagazine.com/news/lia-thomas-teammate-situation-is-unfair-and-ncaa-is-discriminating-against-cisgender-women-locker-room-discomfort/>. But see Katie Barnes, *16 Lia Thomas Teammates Support the New Transgender Rules*, ESPN (Feb. 3, 2022), https://www.espn.com/college-sports/story/_/id/33209246/16-lia-thomas-teammates-support-transgender-rules.

100. Compare Julie Kliegman, *300-Plus Collegiate, Elite Swimmers Sign Letter to NCAA Supporting Lia Thomas*, SPORTS ILLUSTRATED (Feb. 10, 2022), <https://www.si.com/college/2022/02/10/lia-thomas-college-elite-swimmers-letter-to-ncaa-new-policy-transgender-eligibility>, with *University of Arizona Stars*

Lia's participation in these intercollegiate national championships. Ultimately, Lia became the 2022 NCAA Division I women's national champion in the 500-yard freestyle, though not without controversy, and she tied for fifth in the 200-yard freestyle.¹⁰³ Nonetheless, at the end of the day, swimming is obviously not a contact sport, nor has the contact sports exception been modified to include gender identity instead of (or in addition to) sex. Still, as already discussed, several authors encountered this topic and with different perspectives.¹⁰⁴

Write Letter to NCAA on Lia Thomas, Transgender Debate, SWIMMING WORLD (Mar. 25, 2022, 7:28 AM), <https://www.swimmingworldmagazine.com/news/university-of-arizona-stars-write-letter-to-ncaa-on-lia-thomas/> (authoring that the letter which was sent to the NCAA Board of Governors questioned the fairness of Thomas competing and that the NCAA “has successfully failed everyone” by trying to “appease everyone.”).

101. See Dawn Ennis, *Goodbye, Lia Thomas? New NCAA Trans Student-Athlete Policy is 'Effective Immediately'*, FORBES (Jan. 20, 2022, 3:00 AM), <https://www.forbes.com/sites/dawnstaceyennis/2022/01/20/goodbye-lia-thomas-new-ncaa-trans-student-athlete-policy-is-effective-immediately/?sh=3f2053e34db4> (“The new NCAA policy sounds a lot like the old one The board hasn't resolved the intractable balancing between fairness, playing safety and inclusion. They failed women by not prioritizing fairness.” (quoting former Olympic swimmer Nancy Hogshead-Makar, a member of the Women's Sports Policy Working Group)). See also Josh Moody, *A Trans Swimmer Roils Women's Sports*, INSIDE HIGHER ED (Jan. 27, 2022), <https://www.insidehighered.com/news/2022/01/27/what-success-trans-swimmer-lia-thomas-means-ncaa> (offering that to some people Lia Thomas represents a role model and someone who is breaking barriers, while to others Lia represents the “death of women's sports.”).

102. See Angie Kirk, *Biological Gender in Fair Competitive Sports Policy*, INSIDE HIGHER ED (Jan. 27, 2022), <https://www.insidehighered.com/views/2022/01/27/biological-males-should-not-play-womens-athletic-teams-opinion> (opining that it is legitimate for states that have passed laws to prohibit biological males from competing on biological female teams because it makes competition more fair for females and that it would be unfair for biological males to compete on women's athletic teams. Kirk states, “[a]llowing biologically male athletes to take the places, titles, scholarships and opportunities of females will instead continue a practice of unfair sex-based disadvantage for the women at our colleges and universities. As such, higher education sports programs must demarcate competition based on biological sex.”).

103. See Steve Almasy, *Transgender Swimmer Lia Thomas Finishes 5th in NCAA Women's 200-yard Freestyle Final*, CNN (Mar. 18, 2022, 7:00 PM), <https://www.cnn.com/2022/03/18/sport/lia-thomas-ncaa-swimming-championships-spt/index.html> (providing that Lia also won the 100-yard, 200-yard and 500-yard freestyle races at the Ivy League women's championships the previous month); see also *Experts Cite Data and Research For Why Transgender Participation Should Be Outlawed in Female Sports*, SWIMMING WORLD (May 12, 2022, 10:05 AM), <https://www.swimmingworldmagazine.com/news/experts-cite-data-and-research-for-why-transgender-participation-should-be-outlawed-in-female-sports/> (quoting scientists from their published article who assert that there is a conflict between the search for fairness in sports and the desire for inclusion at the same time, stating, “[i]mportantly, female athletes should not be forced to assume the burden of competing against unfair male physical advantages in the name of inclusion.”).

104. See Coleman et al., *supra* note 78. But see Buzuvis et al., *supra* note 82, at 252 (proposing legislation that comports with existing laws while extending greater protection to the transgender community and gender identity “while holding fast to the truism that sport is for everyone, and access to participate should not be limited based on antiquated notions of one's assigned sex at birth.”).

CONCLUSION

In 2020, Vanderbilt kicker Sarah Fuller reached another Title IX milestone by becoming the first woman to play and then score points in a Power Five football game. In 2012, Sam Gordon demonstrated her talented youth tackle football skills against the boys to the point that she ended up on a Wheaties box and in an NFL Super Bowl commercial. Long before Sarah and Sam were many other examples of women breaking barriers to participate in college football. Those women did not have the benefit of instantaneous social media to spread the word of their achievements a decade or two before Sarah and Sam, yet their unique challenges and successes must not be forgotten as Title IX celebrates its fiftieth anniversary. Heather Sue Mercer had guts to fight for her right to be treated no differently than the men, and Katie Hnida had to transfer to another school. Despite hurdles and forces that stood in the way of their dreams and said “no,” they did not take “no” for an answer.

After the *Mercer* decisions, there was an uptick in the amount of discussion on the contact sports exception in academic circles. Then there was a bit of a lull. Today, there is little discussion on the exception itself and, instead, the national discourse has turned to gender identity and transgender participation in sport such as in swimmer Lia Thomas. Despite the lack of conversation over the exception, interest in girls’ wrestling has blossomed and many schools are offering separate teams. In fact, due to increased interest and participation, some states are offering girls’ championships. The NCAA now views women’s wrestling as an emerging sport and the University of Iowa announced that it will have full-fledged Division I women’s team beginning in 2022. Similarly, yet slowly, a few states offer flag football as a varsity sport—and some offer statewide championships there, too.

So, what do we do with the contact sports exception to Title IX, if anything at all? To me, it seems a bit anachronistic, representing possibly the paternalist perceptions from a previous generation in a bygone era. Though one could argue it serves some purpose in 2022, I’m not buying it. This exception has not prevented the talents of girls like Heaven Fitch from inspiring other girls to compete in wrestling—the sport that involves the most bodily contact—from winning a boys’ state championship because there was no girls team. All Heaven needed was a chance. Now, North Carolina will recognize girls’ wrestling as a varsity sport in 2023.

In the context of Title IX, if any human being wants to try out for and play tackle football—or any contact sport for that matter—as an eligible player in high school or college, and as long as the players and coaches are made aware of and assume the inherent risks of that sport, then why not let the players (and parents or guardians, if necessary) make the decision whether to tryout and

play rather than be told “no” from the outset simply on account of their sex? Ultimately, I find the contact sports exception is not necessary. To me, maintaining the contact sports exception sends the message “you can’t” rather than “you can.” Who knows how this will play out? So, rather than focus on the exception, right now I’ll focus on the exceptional.