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# CROSSING THE FINISH LINE: POSITIVE EQUALITY AS A TOOL TO FULLY ACHIEVE TITLE IX'S PURPOSE

JACQUELYN BRIDGEMAN\*

## I. INTRODUCTION

*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.*<sup>1</sup>

Those simple thirty-seven words, written and passed by Congress in 1972 as Title IX of the Education Amendments of 1972, ushered in a new era of progress with respect to opportunity, advancement, and equality for girls and women throughout the United States, particularly in the realm of sports.<sup>2</sup>

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1. 20 U.S.C. § 1681(a) (2022).

2. Title IX applies to nearly all aspects of an educational institution, however for purposes of this article, I will be focused on Title IX's applicability to sports. For an overview of the many areas where Title

Whereas, in 1972 when the amendment passed, girls' participation in high school sports numbered 294,015; nearly fifty years later those numbers are well over three million.<sup>3</sup> Similarly, there were only 29,977 women participating in collegiate varsity sports in 1972; a number that has grown to over 200,000.<sup>4</sup> Additionally, whereas women's opportunities to compete professionally in 1972 were largely limited to golf and tennis, there are now women's professional leagues in a range of sports including basketball, soccer, softball, and hockey.<sup>5</sup> Undeniably, we have come a long way in fifty years.

In March of 2022 my family took a spring break trip to Maui, Hawaii. As I began the first draft of this article, a picture from that trip popped up on my daily computer feed. A selfie photograph of my mother, myself, and my daughter on the beach, a clear blue cloudless sky and a wave crashing against the rocks in the background. As I looked at that picture and smiled at the memories, I realized that the fifty-year history of Title IX can be illustrated by the differing experiences of the three generations of women contained in that photo.

Born in 1951, my mother loved sports and was an outstanding track athlete but, like all women born before 1972 and the passage of Title IX, her opportunities for sports participation were quite limited. Interscholastic sports involving competition against students from other schools did not exist for girls in her community. Rather, scholastic sports participation consisted of intramural opportunities offered under the auspices of the Girls Athletics

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IX applies, see *Sex Discrimination: Overview of the Law*, U.S. DEPT. OF EDUC., OFF. FOR CIV. RTS., <https://www2.ed.gov/policy/rights/guid/ocr/sexoverview.html> (July 12, 2022). Additionally, my discussion will focus nearly exclusively on gender equity issues within the United States. Finally, I would like to affirm support for athletes within the LGBTQIA+ community and the full inclusion and participation of people of all genders and identities within sporting communities. That said, because of where I am choosing to focus my comments in this piece and the points I want to make, most of the discussion will center on the binary male/female construct.

3. Ellen J. Staurowsky et al., *50 Years of Title IX: We're Not Done Yet*, WOMEN'S SPORTS FOUND. 20 (May 2022), <https://www.womenssportsfoundation.org/wp-content/uploads/2022/05/Title-IX-at-50-Report-FINALC-v2-.pdf>.

4. *Id.*

5. *The Rise of Women's Professional Sports*, GA. STATE UNIV. LIBR., <https://exhibits.library.gsu.edu/current/exhibits/show/equal-playing-fields/womens-professional-sports> (last visited Dec. 30, 2022). There have also been opportunities throughout U.S. History for women to compete in non-mainstream sporting events as a professional, such as in rodeo, but those kinds of sports are often overlooked in discussions surrounding Title IX. However, like all sports, women face discrimination in these non-mainstream sports as well. See, e.g., *About the WPRA*, WPRA, <https://www.wpra.com/about-the-wpra/> (last visited Dec. 30, 2022) (women compete in far fewer events in most rodeos as compared to men and have fewer opportunities to earn substantial prize money).

Association.<sup>6</sup> During her junior and senior years of high school, Amateur Athletic Union (AAU) sponsored track and field opportunities for girls became available in her community, but there was no team organized for girls. Accordingly, in order to participate she had to practice on her own, or with the boys' team when she was able, relying on her parents to transport her to local meets. There were no meets offered beyond her local area. The college she attended in the early 1970s did offer a club track team for women, which she joined. However, that team still only allowed for limited interscholastic participation, with her remembering only one instance of travelling across state lines to compete against others.<sup>7</sup>

In 1974, I made my entrance into the world along with the first wave of girls who would never know what it was like to live before Title IX. Growing up in the early stages of Title IX's implementation, we got to experience the initial impacts and subsequent development of the law in real time. Like my mother, I loved sports, but unlike her I had many more opportunities to participate. Yet, such opportunities were uneven and in many ways still limited. For example, I was in the first group of girls allowed to play basketball in our local fifth and sixth grade recreational league, as prior to the year I entered fifth grade the league had only provided teams for boys. Although we were allowed to play, the league organizers were careful to keep teams segregated by gender. Because there were only enough girls for two teams, and we all practiced together, this meant our "games" were only glorified scrimmages. Additionally, because they believed girls were not capable of shooting lay-ups correctly, playing without travelling, or committing an excessive number of fouls, the organizers also refused to teach us fundamental skills or enforce the basic rules of the game for most of the first season. Accordingly, we played each other every week, and spent most of the season working on our skills on our own when we were not complaining and fighting until we were allowed to play by the same rules and be held to the same standards as the boys.

By the time I reached junior high and high school, there were school sports for girls offered through our local school district and on a statewide basis, although there were fewer offerings than for boys. An issue which continues at both the state and local level in our community.<sup>8</sup> Additionally,

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6. See, e.g., Southeast Messenger, *The GAA Gave Girls an Athletic Outlet*, COLUMBUS MESSENGER (Dec. 27, 2007), <https://www.columbusmessenger.com/the-gaa-gave-girls-an-athletic-outlet.html>.

7. Interview with Frances L. Price, Mother, in Laramie, Wyo. (Aug. 9, 2022).

8. In 2019, Wyoming added girls' softball to its roster of high school sports, making the total number of sports offered for girls and boys equal for the eight schools that now offer softball. For schools that are not able to offer girls softball, the total number of sports offered for girls is less than that for boys. Additionally,

opportunities to play outside of school, particularly if one wanted to play a team sport, were nearly non-existent. There were no club leagues in our area for girls and only the occasional tournament. This was due in part to us being girls, but also because we lived in Wyoming, an extremely rural and sparsely populated state. In order to play outside of the season, we would often have to travel across multiple states to find a tournament hosted for girls. In contrast, there were always tournaments within a few hours of home available for boys. Yet, as infrequent as they were, those few opportunities were still much more than what was available for my mother. Similarly, like my mother, I also ran track in college, but unlike her, I was able to do so as part of a varsity sports team after having been recruited by several schools for both track and field and basketball and being offered athletic scholarships in both sports. I chose track, even though my first love was basketball, because the opportunities to potentially run after college for a woman at that time were more plentiful than the opportunities to play professional basketball.

My daughter, who is fifteen as I write this, has grown up with opportunities beyond what I ever hoped for. For the girls of her generation, the ability to participate in a range of school sports is a given. Club opportunities abound and there are more opportunities to play professionally within the United States than ever before. Yet, despite how far we have come, the opportunities for my son still far exceed those of my daughter. My daughter still comes home with tales of discrimination and poor and/or differential treatment, simply because she is a girl. Stories which unfortunately remind me all too well of my experiences when I was her age over thirty years ago. At the same time, some of the gains experienced during my high school and college years, such as the number of women in coaching positions, have now become losses.<sup>9</sup> The opportunities for women to compete at the highest levels and earn comparable money, respect, and prestige, as their male counterparts still seem

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the number of sports offered at the junior high/middle school level for girls remains less as do total participation numbers and the amount of money spent on girls' sports. Tennessee Jane Watson, *Girls Softball Within Closer Reach After Campbell County Vote*, WYO. PUB. RADIO (Mar. 28, 2019, 10:19 AM), <https://www.wyomingpublicmedia.org/education/2019-03-28/girls-softball-within-closer-reach-after-campbell-county-vote>; Daniel Bendtsen, *School Board Votes Unanimously to Start LHS Softball Team*, LARAMIE BOOMERANG (Aug. 14, 2019), [https://www.wyomingnews.com/laramieboomerang/news/local\\_news/school-board-votes-unanimously-to-start-lhs-softball-team/article\\_5fc4f318-0111-5c80-b274a296634a03c1.html](https://www.wyomingnews.com/laramieboomerang/news/local_news/school-board-votes-unanimously-to-start-lhs-softball-team/article_5fc4f318-0111-5c80-b274a296634a03c1.html).

9. Ellen J. Staurowsky et al., *Chasing Equality: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women*, WOMEN'S SPORTS FOUND. 27-31 (Jan. 2020), <https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Executive-Summary.pdf> [hereinafter *Chasing Equality*] (indicating a decline of female head coaches in college women's sports from ninety percent in 1971 to forty-three percent in 2017); Mary Jo Kane, *A Socio-Cultural Examination of a Lack of Women Coaches in Sport Leadership Positions*, in *WOMEN IN SPORTS COACHING* 35, 35-45 (Nicole M. LaVoi ed., 2017).

fleeting at best, if not unobtainable at worst.<sup>10</sup> There are still entire segments of the sporting world where women's participation is minimal or token at best, or non-existent at worst.<sup>11</sup>

As we commemorate the fiftieth anniversary of the passage of Title IX, there is undoubtedly much to celebrate and much progress that has been made. But for those of us who hope for real, meaningful, permanent equality, an equality where the life prospects of my daughter do not differ from those of my son simply because they are of different genders, there is still much more work to do. While this article acknowledges and celebrates the progress made in the last fifty years, it also asks the important question of why full equality is still elusive. It answers that question by arguing that part of the reason full equality is not a reality is because to date, we have approached Title IX from an anti-discrimination perspective or mindset, rather than what I will be referring to as a positive equality mindset. The reason why this matters is because an anti-discrimination approach leaves intact systems of bias, privilege, and ways of thinking that make it extremely unlikely, if not impossible, for us to achieve full equality. Further, an anti-discrimination approach and mindset allows for, and in some cases facilitates, the kind of regression and retrenchment we have seen in some areas, such as attrition in recent years in the number of female coaches and higher-level administrators.

As we reflect during this fifty-year milestone, there are many scholars and policy makers who have offered suggestions and proposals for what to do as we move forward in order to make Title IX even more effective in our quest for gender equality.<sup>12</sup> Many of these are good, even quite good, suggestions and likely much more easily implemented than what I propose here. Accordingly, what I propose I do not propose as something to supplant the good work already being done and the many good ideas that others have for making progress as we move forward. Rather, I hope to offer an additional

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10. SUSAN K. CAHN, COMING ON STRONG: GENDER AND SEXUALITY IN WOMEN'S SPORT 291-301 (2d ed. 2015); Brett Knight, *Naomi Osaka and Serena Williams Make a Fortune but Remain Outliers Among the Highest-Paid Athletes*, FORBES (May 18, 2022, 6:00 AM), <https://www.forbes.com/sites/brettknight/2022/05/18/naomi-osaka-and-serena-williams-make-a-fortune-but-remain-outliers-among-the-highest-paid-athletes/?sh=4c7f48927a9c>.

11. See, e.g., Britni de la Cretaz, *More Girls Are Playing Football. Is that Progress?*, N.Y. TIMES (Feb. 2, 2018), <https://www.nytimes.com/2018/02/02/well/family/football-girls-concussions.html> (detailing the low number of women and girls who play tackle football, including the fact that none play in the NFL and only a few on college teams); Richard E. Lapchick, *2021 Racial and Gender Report Card*, INST. FOR DIVERSITY & ETHICS IN SPORT 1-8 (2021), [https://www.tidesport.org/\\_files/ugd/403016\\_ede01db0e78446e7960974504587709f.pdf](https://www.tidesport.org/_files/ugd/403016_ede01db0e78446e7960974504587709f.pdf) [hereinafter *Race and Gender Report Card*] (detailing throughout how few, if any women, hold positions of coach or higher in many sport organizations).

12. See, e.g., Staurowsky et al., *supra* note 3, at 64-73 (providing an extensive list of policy and practice recommendations based in part on the work of leading scholars in the field).

tool, to be used in the difficult task of building a future that creates full equality for all. Towards that end, Part II contains a brief overview of the uneven progress made, to date, under Title IX. Part III examines some of the reasons why Title IX's ability to achieve full equality has remained elusive. Part IV posits a positive equality approach as a way to move us closer to the equality ideal. Part V concludes with brief suggestions of how a positive equality approach might be implemented.

## II. TWO STEPS FORWARD, ONE STEP BACK: TITLE IX'S UNEVEN MARCH TOWARDS EQUALITY

*The pursuit of equality is more like an ultramarathon than a road race. There are twists and turns and long stretches when we aren't sure we're going in the right direction. Even today, athletic opportunities at most schools are still not equitable. "The amount of change in women's sports really is transformational," says [Susan Ware author of Title IX: A Brief History with Documents]. "But it started from zero; that's the perspective, so getting to 40% [of athletic budgets], that's a lot of progress—the needle just got stuck."*<sup>13</sup>

On June 23, 1972, Title IX became the law of the land. At the time of its passage only 294,015 girls participated in high school varsity sports across the country.<sup>14</sup> Even fewer participated in college sports, with only 29,977 women participating in NCAA varsity athletics.<sup>15</sup> Club opportunities, like those many girls currently enjoy, were virtually non-existent and although women had participated in the Olympics since 1900, only a small portion of Olympic athletes worldwide were women.<sup>16</sup> While at points in time throughout history there were instances where women had the opportunity to play professional sports, such opportunities were fleeting, and by 1972 even the best of female athletes had almost no realistic expectations of turning pro.<sup>17</sup>

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13. Maggie Mertens, *50 Years of Title IX: How One Law Changed Women's Sports Forever*, SPORTS ILLUSTRATED (May 19, 2022), <https://www.si.com/college/2022/05/19/title-ix-50th-anniversary-womens-sports-impact-daily-cover>.

14. Staurowsky et al., *supra* note 3, at 20.

15. *Id.*

16. In 1972, women were only 14.6% of Olympic athletes in the summer Olympic Games and 20.5% of all athletes in the winter Olympics. *Factsheet: Women in the Olympic Movement*, INT. OLYMPIC COMM. 3, 6 (Dec. 9, 2021), <https://stillmed.olympics.com/media/Documents/Olympic-Movement/Factsheets/Women-in-the-Olympic-Movement.pdf> [hereinafter IOC].

17. JAIME SCHULTZ, WOMEN'S SPORTS: WHAT EVERYONE NEEDS TO KNOW 10-28 (2018).

Fifty years later, things have definitely changed. The numbers of girls participating in high school varsity sports has grown tremendously to over three million.<sup>18</sup> The number of female collegiate athletes has risen to over 200,000.<sup>19</sup> Similar increases have been seen in opportunities for girls at younger ages to participate in youth sports as well.<sup>20</sup> The 2020 winter and summer Olympic games marked the highest percentage of women participants of any Olympiad, being just short of half of the participants in both games.<sup>21</sup> For the United States, more than half of its 2020 summer Olympic team consisted of women, and women exceeded men on the U.S. Paralympic team as well.<sup>22</sup> The United States had the largest number of female participants of any country;<sup>23</sup> and the U.S. team finishing first in the 2020 summer Olympic overall medal count, as well as the gold medal count, was due in large part to the U.S. women earning 66 of the United States' 113 medals.<sup>24</sup> Opportunities for women to play professionally in both individual and team sports have increased with organizations like the WNBA recently marking its twenty-fifth season as it continues to develop and grow.<sup>25</sup>

Certainly, progress has been made. However, while interscholastic participation by girls has increased exponentially, there are still many more opportunities for boys to participate in sports at the K-12 level than girls.<sup>26</sup> For example, during the 2018-2019 year, fifty-seven percent of high school athletics participation opportunities went to boys, with only forty-three percent going to girls, translating into over one million more opportunities for boys

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18. Staurowsky et al., *supra* note 3, at 20.

19. *Id.*

20. *The National Youth Sports Strategy*, U.S. DEP'T OF HEALTH & HUM. SERVS., 35-37 (2019), [https://health.gov/sites/default/files/2019-10/National\\_Youth\\_Sports\\_Strategy.pdf](https://health.gov/sites/default/files/2019-10/National_Youth_Sports_Strategy.pdf); *Youth Sports Facts: Participation Rates*, ASPEN INST. PROJECT PLAY, <https://www.aspenprojectplay.org/youth-sports/facts/participation-rates> (last visited Dec. 30, 2022) [hereinafter PROJECT PLAY].

21. IOC, *supra* note 16, at 3, 6.

22. Emily Houghton et al., *Women in the 2020 Olympic and Paralympic Games: An Analysis of Participation, Leadership, and Media Coverage*, WOMEN'S SPORTS FOUND. 8 (April, 2022), <https://www.womenssportsfoundation.org/wp-content/uploads/2022/04/2020-Olympic-and-Paralympic-Report-1.pdf>.

23. *Id.* at 25. There is also evidence that the rise in female Olympic participation internationally is in some ways attributable to Title IX as many female athletes from around the world train at colleges and universities within the United States. Opportunities that are largely available due to Title IX. *Id.* at 7.

24. Rachel Axon, *U.S. Tops Overall and Gold Medal Count in Tokyo, Thanks in Part to Women's Dominance*, USA TODAY (Aug. 8, 2021, 11:50 AM), <https://www.usatoday.com/story/sports/olympics/2021/08/08/us-led-women-tops-china-final-medal-count-tokyo-olympics/5529603001/>.

25. CAHN, *supra* note 10, at 291-301; *WNBA to Commemorate 25<sup>th</sup> Season With "Count It" Campaign and Season-Long Celebrations and Events*, WNBA (Mar. 15, 2021), <https://www.wnba.com/news/wnba-to-commemorate-25th-season-with-count-it-campaign-and-season-long-celebrations-and-events/>.

26. PROJECT PLAY, *supra* note 20.



than girls.<sup>27</sup> Men's opportunities to participate at the collegiate level exceed those of women by over 60,000.<sup>28</sup> Additionally, the money spent on boys' and mens' sports continues to exceed that spent for girls and women, and the facilities provided for men and boys are often superior as well.<sup>29</sup> While women may now have multiple opportunities to play professionally, the earning potential for female professional athletes, with the exception of a miniscule few, is nowhere near the amount of money most male professional athletes are able to earn as a matter of course.<sup>30</sup> In addition to substantially less earning potential, the opportunities to simply compete at a professional level are much lower for women as well.<sup>31</sup> At the same time, media exposure of women's sports, is still virtually non-existent, with women receiving less than five percent of sports coverage, with that total percentage having declined since the 1980s.<sup>32</sup> The almost exclusive presentation of male athletes in sports media coverage continues despite the fact that when women are shown, such as during the FIFA world cup, they can attract billions of viewers.<sup>33</sup>

Additionally, it would appear that some gains have been rolled back or that forward progress in some areas has become stagnant. For example, in the early 1970s, ninety percent of women's collegiate teams were coached by women.<sup>34</sup> At present, that number has dropped to a little over forty percent.<sup>35</sup> While some women have received opportunities previously unheard of, such as Sandra Douglass Morgan becoming the first black woman and only the third woman to be named president of an NFL team,<sup>36</sup> in some ways such progress further highlights the ways in which structures of discrimination and

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27. Staurowsky et al., *supra* note 3, at 30-31.

28. *Id.* at 33.

29. *Id.* at 38-43.

30. Brett Knight et al., *2022 Highest-Paid Athletes*, FORBES (2022), <https://www.forbes.com/athletes/>; Brett Knight, *The Highest Paid Female Athletes Score A Record \$167 Million*, FORBES (Jan. 13, 2022, 6:30 AM), <https://www.forbes.com/sites/brettknight/2022/01/13/the-highest-paid-female-athletes-score-a-record-167-million/?sh=1aa06b1578cc>.

31. *Chasing Equity*, *supra* note 9, at 14.

32. *Id.* at 32; CAHN, *supra* note 10, at 300.

33. *Chasing Equity*, *supra* note 9, at 32-33.

34. *50 Years of Title IX*, WOMEN'S SPORTS FOUND. (2022), [https://www.womenssportsfoundation.org/wp-content/uploads/2022/04/FINAL6\\_WSF-Title-IX-Infographic-2022.pdf](https://www.womenssportsfoundation.org/wp-content/uploads/2022/04/FINAL6_WSF-Title-IX-Infographic-2022.pdf).

35. *Id.*

36. *Las Vegas Raiders Hire Sandra Douglass Morgan, 1<sup>st</sup> Black Woman to Serve as NFL Organization's Team President*, ESPN (July 7, 2022), [https://www.espn.com/nfl/story/\\_/id/34208430/las-vegas-raiders-hire-sandra-douglass-morgan-1st-black-woman-serve-nfl-organization-team-president](https://www.espn.com/nfl/story/_/id/34208430/las-vegas-raiders-hire-sandra-douglass-morgan-1st-black-woman-serve-nfl-organization-team-president).

bias still permeate sports and negatively affect opportunities for women.<sup>37</sup> Clearly, qualified and competent women exist, it's the robust opportunities that are lacking.

Since 1972, Title IX has been an extremely effective tool in opening up opportunities and increasing chances for participation in ways that have engendered tremendous positive change for individuals like myself, my daughter, and for society as a whole. Yet, if the ultimate goal is full equality, which I envision as a society where my daughter and my son's opportunities do not differ simply because they are of different genders, then we have much work left to do. Title IX has addressed and alleviated many symptoms, but the disease of inequality and discrimination persists.

### III. NO PAIN, NO GAIN: GRAPPLING WITH THE HARD TRUTHS IN OUR ELUSIVE QUEST FOR EQUALITY

*Not everything that is faced can be changed; but nothing can be changed until it is faced.—James Baldwin<sup>38</sup>*

Title IX, like other anti-discrimination laws passed around the same time, was not passed in a vacuum or laid upon a clean slate. Instead, it was passed into law in a country with over 300 years of state sanctioned, law enforced, and socially accepted, if not approved, gender discrimination.<sup>39</sup> Put another way, by 1972, men, at least white, cis-gender, heterosexual men, had benefitted from over 100 years of unfettered access to sport, as well as rules and policies meant to not only protect their ability to participate in sports, but to prevent women from doing the same. For example, since its inception, basketball has been popular with women and girls and early in the development of the sport women played in significant numbers and drew substantial crowds. They even made money for themselves and others through industrial leagues or by other means. Yet at nearly every turn both implicit and explicit means were employed to stifle the growth of the sport for women and prevent them from playing. Particularly when their participation threatened gender norms or encroached on sporting domains perceived as reserved for

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37. See generally *Race & Gender Report Card*, *supra* note 11 (detailing gender disparities in key positions throughout collegiate and professional sports).

38. James Baldwin, *As Much Truth as Once Can Bear*, N.Y. TIMES, Jan. 14, 1962, at 38.

39. The wealth of evidence to support this point could fill volumes, two helpful sources that provide a good overview of this terrain are CATHERINE A. MACKINNON, *SEX EQUALITY* (3d ed. 2016); SUSAN GLUCK MEZEY, *ELUSIVE EQUALITY: WOMEN'S RIGHTS, PUBLIC POLICY, AND THE LAW* (2d ed. 2011).

men.<sup>40</sup> Other instances where women sought to participate in a sport, began to flourish in that sport, and then were actively thwarted, abound. The history of women's participation in softball and baseball provides yet another example.<sup>41</sup>

In 1971, women received only “2 percent of overall athletic budgets.”<sup>42</sup> In 1972 there were four major professional sports leagues in the United States, all of which were for men.<sup>43</sup> Similar to today, in 1972 sports and media coverage centered nearly exclusively on men.<sup>44</sup> Accordingly, when Title IX declared that no person be excluded on the basis of sex, it did so against a societal backdrop where women had not only been excluded from participation and the benefits of such participation, but it did so against a backdrop where whole institutions, as well as societal norms and ways of thinking, posited the quintessential athlete as a heterosexual, cis gender male.<sup>45</sup> As champion of Title IX, Representative Patsy Mink has stated in relation to her work on Title IX, “Women athletes were so few and unknown that the only well-known athlete we could bring to testify was Billie Jean King.”<sup>46</sup> As she also stated, “When it was proposed, we had no idea that its most visible impact would be in athletics. I had been paying attention to the academic issue. I had been excluded from medical school because I was female.”<sup>47</sup>

When we talk about Title IX and the progress that has or hasn't been made since the passage of the law, we often talk in terms of equality. Yet, the language of Title IX itself, like nearly every other Civil Rights and anti-discrimination law in the United States, does not require equality. Instead, it prohibits exclusion and denial on the basis of sex (but not necessarily other

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40. See generally PAMELA GRUNDY & SUSAN SHACKELFORD, *SHATTERING THE GLASS: THE REMARKABLE HISTORY OF WOMEN'S BASKETBALL* (2005); CAHN, *supra* note 10, at 83-109.

41. CAHN, *supra* note 10, at 140-163.

42. SUSAN WARE, *TITLE IX: A BRIEF HISTORY WITH DOCUMENTS 1* (2007).

43. *Major Professional Sports Leagues: The US & Canada*, DAILY GAZETTE, <https://dailygazette.com/major-professional-sports-leagues-the-us-canada/> (last visited Dec. 30, 2022) (detailing when each major United States professional sport began).

44. Cheryl Cooky et al., *Women Play Sport, But Not on TV: A Longitudinal Study of Televised News Media*, in *WOMEN AND SPORTS IN THE UNITED STATES: A DOCUMENTARY READER* 337, 337-345 (Jamie Schultz et al., eds. 2d ed. 2019).

45. Joanna L. Grossman & Deborah L. Brake, *Playing “Too Womany” and the Problem of Masculinity in Sport*, in *WOMEN AND SPORTS IN THE UNITED STATES: A DOCUMENTARY READER*, *supra* note 44, at 182-84.

46. JUDY TZU-CHUN & GWENDOLYN MINK, *FIERCE AND FEARLESS: PATSY TAKEMOTO MINK FIRST WOMAN OF COLOR IN CONGRESS 1* (2022).

47. WARE, *supra* note 42, at 3 (reprinting a quote found in BRIAN L. PORTO, *A NEW SEASON: USING TITLE IX TO REFORM COLLEGE SPORTS* 144 (2003)).

bases), and it forbids discrimination.<sup>48</sup> At no point does it say, or actually require, equality. At first blush, this may seem like merely an esoteric discussion about semantics. One might argue that the whole point of not discriminating is to in fact bring about equality. Yet, as can often be the case, I believe this difference in semantics is in fact a reflection of two entirely different mindsets. Mindsets which give rise to two quite different approaches to addressing gender inequality. Specifically, the concept and definition of discrimination centers around the idea of differential treatment. A person is discriminated against when they are treated differently from others, usually similarly situated others, in a negative manner or with respect to some good or privilege.<sup>49</sup> In current American jurisprudence, we recognize actionable discrimination when a person is treated differently in a negative way on the basis of a particular characteristic; a protected category. These are categories like gender, race, religion, etc. upon which we believe most decisions should not be made.<sup>50</sup> Decisions on other bases are presumptively acceptable and in the vast majority of situations, legal.<sup>51</sup>

Many scholars have articulated well the limits of this approach, particularly for those who may face discrimination on the basis of multiple intersecting characteristics,<sup>52</sup> or for those who may face bias that may not be obvious, or where different treatment with respect to others is difficult to prove.<sup>53</sup> And of course there are those who suffer significant discrimination or

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48. 20 U.S.C. § 1681(a) (2022).

49. A discussion of how this idea plays out and is proven and discussed in the many complex facets of American jurisprudence far exceeds the scope of this paper. However, a general overview of this concept can be found in Allen David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 29, 29-46 (Kimberlé Crenshaw et. al., eds 1995).

50. *See, e.g.*, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738-39 (2020) (discussing the protected categories contained in Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (1964) and explaining that “the statute prohibits employers from taking certain actions ‘because of’ sex.”). *See also* *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998) (explaining that Title VII’s provisions outlawing discrimination with respect to terms and conditions of employment “evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women . . . .” (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

51. *See e.g.*, *Oncale*, 523 U.S. at 80-82 (explaining that Title VII is not a general civility code and that it requires a plaintiff to prove discrimination).

52. *E.g.*, Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, *supra* note 49, 357, 357-383.

53. *E.g.*, Charles R. Lawrence III, *The Id, Ego, and Equal Protection: Reckoning with Unconscious Racism*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT*, *supra* note 49, 235, 235-257.

differential treatment, but on the basis of a characteristic not recognized under the law.<sup>54</sup>

While all of these discussions and insights are important and useful, I will offer that there are two other aspects to an anti-discrimination mindset that also hinder our ability to achieve full equality. Specifically, an anti-discrimination approach, particularly as crafted under existing American jurisprudence, does not sufficiently address, nor provide the mechanisms to address systemic, procedural and cultural bias and discrimination. It does little to recognize pervasive harmful norms, and even less to address them. As a result, it does not provide the mechanisms for the kind of transformational change that is necessary if full equality is what we are trying to achieve. In addition to leaving intact and normalizing an unequal status quo, an anti-discrimination mindset also reinforces, supports, and in some ways further entrenches it. As I will discuss more below, in operation, an anti-discrimination mindset often only recognizes harm when there is differential treatment as compared to a particular norm. For example, we know a woman is discriminated against when she is treated differently in a negative or harmful manner because of her gender. While such a construct has helped us identify and address harmful instances of discrimination, what it also does is set the norm by which such discrimination is judged as a white, cis gender, heterosexual man. That construct is the standard and the norm, any deviation from that is the abnormal or the anomaly.<sup>55</sup>

This does two things. First, it keeps intact the construct of the white, cis-gender, heterosexual male as the norm by which all things are judged and calibrated against. Thereby reinforcing and reifying and continuing to entrench existing unequal and discriminatory constructs. Second, it also prevents us from recognizing and addressing some of the ways gender inequality occurs. For example, the constructs of masculinity that surround and support

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54. For example, until the *Bostock* case, federal law did not recognize sexual orientation or gender identity as protected categories, thus failing to prohibit discrimination on these bases in many contexts. In fact, it is still an open question whether the *Bostock* decision will mean that sexual orientation and gender identity will be considered protected categories throughout federal law. See generally Alyssa Connell Lareau & Dylan Nicole de Kervor, *Applying Bostock v. Clayton County to Civil Rights Statutes Beyond Title VII*, 70 DEP'T JUST. J. FED. L. & PRAC. 21, 21 (2022).

55. See, e.g., LISA WADE & MYRA MARX FERREE, GENDER: IDEAS, INTERACTIONS, AND INSTITUTIONS 130 (Sasha Levitt et al. eds., 2d ed., 2019) (explaining “even as patriarchy has steadily declined as a principle of law, its underlying way of *thinking* about gender still persists. First, even though people no longer need to be male to count as full citizens, men continue to be conceived of as the generic human, with women as deviant from the norm. Men, in other words, are the unmarked human . . . . Men’s identity as men is often invisible, even to themselves, while women’s identity as women is usually centrally important. All too often, in other words, men are people and women are women.”).

American football culture not only harm and are discriminatory for women, they can also be the same for men who don't fit those constructs or who participate in sports that are not gendered so quintessentially male.<sup>56</sup> As I will discuss more below, a positive equality mindset and approach allows us to not only recognize and better understand the full way discrimination and inequality operate in our society, such an approach also opens up new possibilities for us to address the same.

#### *A. Entrenched Norms and Ways of Thinking*

One of the problems with entrenched norms is over time they become so taken-for-granted one doesn't realize they are there. Much like breathing the air one cannot see, one may act on such norms and understand the world according to their structures and often not realize it. So much so, that we often do not recognize something as a contingent norm, i.e., a norm that is circumstantial and variable rather than absolute, and instead assume that the way things are and have developed is the natural order of things; a part of the laws of nature and science. This matters because thinking along the lines of entrenched norms can serve to foreclose modes of thought which might lead to effective, workable solutions. Solutions which may be possible to implement and may work better than what we are currently doing, but are never considered. A thought experiment and an example might help to illustrate.

To understand the taken-for-granted status quo that permeates the societal backdrop against which Title IX operates, let's imagine the following. Let's imagine that tomorrow we all wake up and find ourselves in a world where the first person you think of when you think of any sport is a woman. A world where nearly all professional opportunities in sports are given to women and where the worst paid female professional athlete makes ten times the amount of money of all but the very top of the highest paid male athletes. Over ninety percent of sports coverage of any kind features women, and women are dominate in nearly all sports related advertising. The K-12 opportunities for girls to do sports exceed those of boys by more than a million nationwide and well over fifty percent of high school and college athletic budgets go towards supporting female athletes. The largest revenue generating sport at the college level is a sport played almost exclusively by women, and the importance of that sport has significant influence on decisions about conference alignment and participation, governance rules for all sports, as well as what sports a particular school might offer to all of its other athletes.

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56. Grossman & Brake, *supra* note 45, at 182-87.

If we all woke up in that world tomorrow, would we think it unfair? Unequal? Not right? Would all the men and boys who would now be in that much less privileged position bring suit and rise up in arms? If they did so, would anyone question their right to do so? Would anyone argue that they should wait, that these things take time, and that they should be happy that things are at least much better than they have been in the past? After all, to take money or resources from these women to open opportunities for everyone would be unfair and unjust. The men and boys don't generate revenue to the same degree, why should they share in the fruits of the labor of others? Plus, we have built whole structures and systems around women and girls' participation. To change all of that all at once would be catastrophic.

While the above thought experiment may seem at first blush to border on the absurd and be a made-up fantasy, arguably it may only seem that way because the gender being benefited is female instead of male. Because the harsh reality is that that is the world girls and women wake up in every single day in this country. While it may seem absurd and something that should be addressed immediately when we flip the script and it is the men and boys that are in the diminished and less privileged position, we take it as "just the way things are" or an extremely difficult situation to overcome, when the ones being deprived are women and girls.

The tacit, if not explicit, acceptance and reinforcement of such norms and ways of thinking has real world negative consequences not only on the lives of girls and women who have to live in this unequal world, but also on our ability to envision how to fix the same. At the same time, when an anti-discrimination mindset is adopted in the face of such norms, it may be able to alleviate some of the problem, but not all of the problem. What's more, an antidiscrimination approach might also cause unintended harms or additional negative outcomes. An example from my daughter's experience helps illustrate this point.

In 2016, our local school district completed construction on a new high school, the only high school in our small town of slightly over 31,000 people.<sup>57</sup> The spectacular 300,000 square foot, multi-story building cost well over \$80 million to build including some of the best sport facilities in the state of Wyoming.<sup>58</sup> Despite the design and construction of that building taking

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57. *Quick Facts: Laramie City, Wyoming*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/laramiecitywyoming/PST045221> (last visited Dec. 30, 2022).

58. Chilton Tippin, *LHS Bond Approved: New Laramie High School to Come With \$25 Million in Bond Enhancements*, LARAMIE BOOMERANG (May 8, 2013), [https://www.wyomingnews.com/laramieboomerang/news/lhs-bond-approved-new-laramie-high-school-to-come-with-25-million-in-bond-enhancements/article\\_9a77cb6c-5c8b-5ecd-a744-2c4f23b1495b.html](https://www.wyomingnews.com/laramieboomerang/news/lhs-bond-approved-new-laramie-high-school-to-come-with-25-million-in-bond-enhancements/article_9a77cb6c-5c8b-5ecd-a744-2c4f23b1495b.html); *Laramie High School*, U.S. ENG'G, <https://www.usengineering.com/2019/06/laramie-high-school/> (last visited Dec. 30, 2022).

place over forty years after the passage of Title IX, the final design and finished construction contained bigger and better locker rooms for the boys to accommodate for football. Built in the 1970s, our middle school contains the same gendered locker room disparities. When my daughter complained about the unfairness of locker rooms first as to difference in size, and then later regarding access during the COVID pandemic when boys who played football were allowed gym locker room access, but no one else was, she was told that making locker rooms equal was not possible, given the cost, nor was the difference in size and quality unfair, given that boys need more room for football equipment and there are more boys on a football team than there are on any girls' team.

When my daughter entered high school, she and others again complained about the disparate locker room situation. However, high school administrators took a different approach. Rather than tell the girls they were out of luck because girls don't play football, they instead have adopted an approach of locker room rotation, whereby the boys get the favored locker rooms during the fall football season and the girls get them during the winter season and who gets them in the spring rotates.

Entrenched norms and ways of thinking caused us to build two multi-million dollar schools with built in gender based disparities. While one might expect such norms to influence decision making in the mid-1970s, when our middle school was built, those same taken-for-granted norms unfortunately lead to us engaging in a multi-year planning process where either none of the many people involved in that process thought to make sure all facilities would be equal, or they did think about it and found the disparity acceptable and justified, because after all girls don't play football.

The response to the girls' advocacy for fairer treatment at both the middle school and high school levels illustrates both the value of an anti-discrimination approach, but also its limitations. When the girls approached the middle school administrators about the differences in locker room quality and access, they were told that there was nothing they could do because they didn't have the resources to change the structure of the building, and past a certain point it wasn't unfair anyway because the difference in the boys' participation in football, justified a difference in treatment. Hence, they weren't being treated differently or discriminated against on the basis of gender, just the fact that they were not football players.<sup>59</sup>

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59. The fact that in any given year 99% to 100% of football players in our middle school are boys, did not cause the issue to be viewed as a gender-based problem by school administrators.



An anti-discrimination mindset led to the arguably better result in the high school situation. The rotating locker room solution is arguably fairer and more equal in that both genders now have the same access to the best locker rooms. But even with that fairer result, in both instances, even that in which the anti-discrimination approach is applied to create a more equal result, the underlying norms of male, heterosexual privilege remain intact and at best are only minimally questioned. What's more, the high school approach has some negative unintended consequences. Specifically, while rotating locker rooms does allow for more equity, the boys who play only winter sports and the girls who only play fall sports and no spring sports, will never have the chance to use the best facilities. In contrast, as I will discuss more fully in the next section, if a positive equality mindset would have been used in building the new building, one focused on affirmative steps to create fair and equal situations, the building likely would have been built with equal locker rooms to begin with. In a building that cost more than \$80 million to build, it is hard to imagine the cost of doing so would have been prohibitive or even noticeable. Entrenched norms and ways of thinking and seeing the world prevented such equity from happening.

*B. The Negative Effect of Entrenched Norms and Ways of Thinking on Our Ability To Achieve Equality*

Unfortunately, these pervasive norms and modes of thought permeate, affect, and limit our ability to achieve full equality, even in the presence of such important laws like Title IX. Such norms, coupled with an anti-discrimination approach to addressing disparities and inequality, cause us to miss important opportunities for change and allow us to perpetuate and reinforce unequal systems. Sports coverage during the height of the COVID pandemic, the addition of Esports in colleges, and the recently noted failure of the Rooney Rule in the NFL, help explain these points.

1. Example One: Sports Broadcasting During the COVID Pandemic: A Missed Opportunity

In the spring of 2020, as the COVID-19 pandemic spread across the globe, causing most to isolate at home and forcing most sporting events to come to a screeching halt. As the NBA and NHL seasons came to an abrupt end, NCAA March Madness didn't happen, and summer sports didn't start, there became less and less new sports content available for broadcasters to show.

Given the way many of us were locked in our homes, with more time than we may have ever had to watch television, it would seem that folks would be

willing to watch nearly anything half-way interesting after a while.<sup>60</sup> Put another way, if one had a desire to grow interest and viewership of female athletes and women in sports, the height of the pandemic offered a prime opportunity to do so. One we unfortunately did not take advantage of. As the pandemic wore on, networks like CBS and ESPN replayed classic past games to fill the content void. Almost none of those replayed games and sports contests showed past games played by women.<sup>61</sup> A fact even more ironic when one considers that many of the classic men's games, such as past NCAA basketball championships, many viewers would have likely seen before. Much less likely to be the case for past women's games. As the pandemic wore on, and replayed content became less satisfying, we resorted to showing celebrities playing games of HORSE, and then eventually celebrity sports figures playing video games. In the vast majority of these instances those playing HORSE and those we watched playing video games were all men.<sup>62</sup>

As noted over ninety-five percent of sports coverage in the United States centers men and boys.<sup>63</sup> Often that uneven coverage is justified by arguments that fans are not as interested in watching women, or women can't generate enough money. Yet when there was no new male centered content to be had, at a time when viewers would have presumably been willing to watch almost anything, we did not see that as an opportunity to show and advance women's sports. Instead, we doubled down on entrenched norms and manufactured new sporting content centered on men. Content which, under the circumstances, could have just as easily featured an equal number of women.

As discussions about how to grow women sports, particularly women's professional sports, and make them large revenue producers continue, one might question how many lucrative opportunities for growth and expansion we have missed. Not because women's sports aren't sufficiently marketable, or can't generate a sufficient fan base, but because our entrenched norms and

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60. A Saturday Night Live Skit, broadcast in April 2020, performed by Alex Moffat illustrates this point well. In that skit he pretends to be a newscaster for at home competitions such as which laptop computer will boot up first, and which kernel of popcorn will be the first to pop. *Saturday Night Live: Sport Report* (NBC television broadcast Apr. 11, 2020), <https://www.youtube.com/watch?v=040dGF8qhrU>.

61. Michael M. Goldman & David P. Hedlund, *Rebooting Content: Broadcasting Sport and Esports to Homes During COVID-19*, 13 INTL. J. SPORT COMM'N 370, 370-78 (2020).

62. *Id.*; *NBA HORSE Tournament: How to Watch on ESPN, Bracket and More*, ESPN (Apr. 9, 2020), [https://www.espn.com/nba/story/\\_/id/29017165/nba-horse-challenge-how-watch-trae-young-tamika-catchings-paul-pierce-espn](https://www.espn.com/nba/story/_/id/29017165/nba-horse-challenge-how-watch-trae-young-tamika-catchings-paul-pierce-espn).

63. Cooky et al., *supra* note 44, at 338-339.

ways of thinking prevent us from seeing opportunities sitting right in front of us.<sup>64</sup>

## 2. Example 2: The Esports Evolution: History Repeats Itself Yet Again

In 2014, Robert Morris University launched the first collegiate level Esports program. In less than ten years, Esports has grown substantially at the collegiate level, with over 175 schools adding varsity programs<sup>65</sup> and offering substantial amounts of scholarship money to Esports players.<sup>66</sup>

Given the newness of the sport, the fact that it is being created as essentially a new sport decades after the passage of Title IX, and prowess in the sport relies on hand-eye coordination, intelligence, and dexterity, rather than the kind of physical abilities required of sports like basketball and football, it would seem that Esports has the potential to be the gold standard for how to achieve gender equality in a sport. As a completely new sport with a relatively short history, Esports does not have the baggage and structure of other sports that developed for decades in favor of a single gender. All money to support it has to be generated from scratch, and so providing supportive resources equally to women and men should not be overly difficult. Esports are being created after decades of experience with Title IX and so principles of gender equity, and the importance of the same, could easily guide the creation of this new sport.

Yet, when one looks at how Esports is currently developing across the United States, it turns out that like nearly every newly created sport in our history, we are operating under structures of exclusion and the privileging of men. Despite the fact that fifty-seven percent of women between the ages of eighteen through twenty-nine indicate that they play video games and participate in gaming,<sup>67</sup> collegiate Esports teams are over ninety percent male

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64. For an argument that now is the time to invest in women's sports and that they can generate substantial revenue, see *Why It's Time to Invest in Women's Sports*, ELLEVEST (July 27, 2021), <https://www.ellevest.com/magazine/disrupt-money/investing-womens-sports-olympics>; Paul Lee, et al., *Women's Sports Gets Down to Business: On Track for Rising Monetization*, DELOITTE INSIGHTS (Dec. 7, 2020), <https://www2.deloitte.com/global/en/insights/industry/technology/technology-media-and-telecom-predictions/2021/womens-sports-revenue.html>.

65. Staurowsky et al., *supra* note 3, at 61.

66. Brian Seto McGrath, *High School Gamers Are Scoring College Scholarship. But Can Esports Make Varsity?*, NBC NEWS (Sept. 20, 2019, 3:30 AM), <https://www.nbcnews.com/tech/video-games/high-school-gamers-are-scoring-college-scholarships-can-esports-make-n1056671>.

67. Justin Hilbert, *Gaming & Gender: How Inclusive are Esports?*, SPORTS INTEGRITY INITIATIVE (Apr. 9, 2019), <https://www.sportsintegrityinitiative.com/gaming-gender-how-inclusive-are-esports/>.

as are the coaches of such teams.<sup>68</sup> Consequently, nearly all of the scholarship money for Esports is going to men as well.<sup>69</sup>

Title IX and the antidiscrimination approach that informs its application and implementation prohibits discrimination, but it does not affirmatively require equality. Under current jurisprudence, if these new e-sports programs appear to cater to the interests of students and are run in such a way that women can technically participate, even if they choose not to, it is not entirely clear that there is a violation of the law. For example, would this be much different from engineering programs with few female participants? But even if the way these programs are operating is not per se illegal, they clearly are not equal; but unfortunately, Title IX doesn't require equality, it only prohibits discrimination.<sup>70</sup>

### 3. Example 3: The Rooney Rule Gone Awry: Tokenism, the Bad Actor Fallacy, and the Masking of Continued Discrimination.

On, February 1, 2022, former Miami Dolphins head coach, Brian Flores, filed a class action lawsuit against all thirty-two National Football League (NFL) teams alleging racial discrimination in hiring practices.<sup>71</sup> After having been fired by the Miami Dolphins during the offseason, Flores was under consideration for the head coaching position with the New York Giants.<sup>72</sup> As he was going through the hiring process, but hadn't yet finished interviewing, Flores received a text from New England Patriots head coach Bill Belichick, congratulating him on obtaining the Giant's head coaching position.<sup>73</sup> However, as it turned out, Belichick had texted the wrong Brian and it was actually Brian Daboll, not Brian Flores, who the Giants had decided to hire before even interviewing Flores.<sup>74</sup> Belichick's accidental text confirmed what many had long suspected—that many owners were just superficially

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68. Staurowsky et al., *supra* note 3, at 61.

69. *Id.*

70. *See id.* at 29-44 (explaining Title IX's three compliance areas and how they are applied and enforced).

71. *Brian Flores NFL Lawsuit: Live Updates, News as Former Dolphins Coach Files Discrimination Suit, Signs With Steelers*, ATHLETIC (Feb. 22, 2022, 7:15 PM), <https://theathletic.com/live-blogs/brian-flores-nfl-lawsuit-live-updates-news-as-former-dolphins-coach-files-discrimination-suit-against-all-32-teams/PqUm2B11QjI/>.

72. Tyler Lauletta, *Brian Flores' Discrimination Lawsuit is Exposing the NFL's Worst-Kept Secret—The Rooney Rule is Failing Black Coaches*, INSIDER (Feb. 4, 2022, 10:20 AM), <https://www.insider.com/brian-flores-lawsuit-rooney-rule-failed-2022-2>.

73. *Id.*

74. *Id.*

complying with the Rooney Rule and not seriously considering minority candidates for head coaching or other high level positions—and what became the main basis for Flores’ suit.<sup>75</sup>

Per the “Rooney Rule,” NFL teams are required to interview diverse candidates when hiring for coaching and other front office positions.<sup>76</sup> Named after Dan Rooney, chairman of the NFL’s diversity committee who spearheaded the rule, the Rooney Rule was designed to try to help open up opportunities for minority coaches.<sup>77</sup> Unfortunately, even with tweaks to try to improve the rule’s implementation and effectiveness, in its twenty year history the rule has only been minimally effective. Some argue in part because the rule doesn’t require a change in the way owners and team administrators do business or think about diverse hiring. As Jodi Balsam, former counsel for operations and litigation at the NFL stated:

I don’t think there’s a single NFL owner out there who thinks to himself, “I won’t hire somebody who’s Black,” . . . [b]ut there are “risk averse” owners . . . . When it comes to hiring at the senior-most levels, they tend to revert to what they’re comfortable with . . . and they perceive hiring somebody who’s Black as risky.<sup>78</sup>

Unfortunately, this way of thinking has resulted in the Rooney Rule functioning, for many hiring decision makers, as a “check-the-box” task to be completed on the way to continuing business as usual.<sup>79</sup>

The NFL first instituted the Rooney Rule in 2003 after two successful black head coaches were fired from their jobs after the 2001 season.<sup>80</sup> At the time the rule was instituted, there had only been six black men who held head coaching positions in NFL history. At the time Flores filed his suit, Mike Tomlin was the only active black head coach in the NFL.<sup>81</sup> During the twenty

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75. *Id.*

76. Zac Al-Khateeb, *What is the Rooney Rule? Explaining NFL Mandate to Interview Minority Candidates, Its Effectiveness and Criticisms*, SPORTING NEWS (Mar. 28, 2022), <https://www.sportingnews.com/us/nfl/news/what-is-rooney-rule-nfl-minority-candidates-effectiveness-criticisms/1k4m7oilxr8nv1xjs9f9bw2k7d>.

77. *Id.*

78. Scott Neuman, *Why a 20-Year Effort by the NFL Hasn’t Led to More Minorities in Top Coaching Jobs*, NPR (Feb. 3, 2022, 1:23 PM), <https://www.npr.org/2022/02/03/1075520411/rooney-rule-nfl>.

79. *Id.*

80. Zac Al-Khateeb, *supra* note 75.

81. Neuman, *supra* note 78.

years the Rooney Rule has been in effect there have been 129 head coaching vacancies, but only fifteen were filled by black candidates.<sup>82</sup> Given that seventy percent of the players in the league are people of color, it is hard to believe that there isn't more diverse talent available for coaching positions or that could be developed for coaching positions.<sup>83</sup>

The Belichick mistake suggests that part of the reason such inequities persist in the NFL is because although the hiring rules technically changed, the entrenched ways of thinking and doing business did not. More importantly, for purposes of this discussion, the ultimate failure of the Rooney Rule points towards another problem with anti-discrimination laws like Title IX. Specifically, such laws are built upon the underlying presumption that generally how things are is fine and fair and that instances of discrimination are the anomaly, not the norm. The Rooney Rule never asked teams to think expansively and proactively about whether their hiring practices helped bring about equality, or about what they could do to ensure full equal opportunity for all candidates. Rather, all they had to do was add a few minority candidates into the mix of an existing process.

When we prohibit discrimination under the law but don't require equality, we leave intact the status quo as presumptively okay. However, as noted above, the status quo with respect to women in sports, just like the status quo for NFL coaches, is one that is inherently unequal and biased. Accordingly, when the law does not require that status quo to be challenged, or otherwise provide a mechanism to disrupt and change that status quo, the underlying inequity and bias continues.

In operation, the Rooney Rule essentially functions as an anti-discrimination rule, meaning it does not affirmatively require teams to try to engender equality, it merely requires them to employ practices to keep from discriminating. As the Belichick mistake showed, the focus on preventing discrimination, over time did not change the previous way business had been done. It just gave the illusion of progress, at least for a while. In the wake of the Flores lawsuit, the NFL has again amended its Rooney Rule to try to further open opportunities for both minority and female candidates. The amended rule now requires teams to conduct outside interviews with minority and/or female candidates for quarterback coach positions, the place where

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82. Lauletta, *supra* note 72.

83. Dante Chinni, *Data Show How Bad the NFL's Racial Equality Problem is Among Coaches*, NBC NEWS (Feb. 6, 2022, 7:22 AM), <https://www.nbcnews.com/politics/meet-the-press/data-shows-how-bad-nfl-s-racial-equality-problem-among-n1288709>.

many head coaches begin their careers.<sup>84</sup> However, it is not clear that applying the same rule further down the hiring chain, particularly if it continues to be applied in the same manner, will do much more to engender equality. As noted, the Rooney Rule had done very little to disrupt the underlying unequal and biased system.

While the Brian Flores' lawsuit sheds light on the difficulty of achieving equality in the NFL, the NFL is certainly not the only entity struggling with overcoming entrenched discrimination. Like the NFL, many entities and institutions continue to fall short of equality, because like the NFL, they continue to essentially engage in the same kinds of underlying practices, but somehow expecting to get different results. Accordingly, in order to engender transformative change and move closer to the equality ideal we need to employ a different approach. As discussed in the next section, I believe positive equality may be a much needed new approach.

#### IV. ANTI-DISCRIMINATION PLUS POSITIVE EQUALITY: A SUM GREATER THAN ITS PARTS

As the experience of three generations of my family illustrates, Title IX has been extremely effective in the last fifty years in bringing about substantial, meaningful change. Such change has made a huge difference in the lives of the girls and women in my family, just as it has done for millions of women and girls not just in the United States, but throughout the world.<sup>85</sup> Accordingly, my main focus of this paper is not to overly criticize the progress that has been made, or minimize the tremendous amount of great work that has been done, and continues to be done, by many. Rather, my hope is to help heed the call Representative Patsy Mink issued in her speech commemorating the thirtieth anniversary of Title IX where she stated, ““despite our many successes, women and women leaders are still underrepresented in many important areas of society including government, business, and academia. To remedy these and other inequities that continue to persist, we must remain vigilant.””<sup>86</sup>

Fifty years later, the vigilance she spoke about is still needed. As discussed throughout, despite substantial progress, there is still much to do if full equality is the goal. Yet, I think achieving that goal will take more than

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84. *The Rooney Rule*, NFL OPERATIONS, <https://operations.nfl.com/inside-football-ops/diversity-inclusion/the-rooney-rule/> (last visited Dec. 30, 2022).

85. See Houghton et al., *supra* note 22, at 7-8 (indicating that many female Olympians worldwide take advantage of collegiate opportunities in the United States, which are now available due to Title IX).

86. TZU-CHUN WU & MINK, *supra* note 46, at 7.

just hard work and persistence. I think it will also require a radical rethink and approach in some ways. When I ran track in college, towards the end of the season when we were trying to increase our speed, we would do short sprinting drills where we would be pulled forward in a harness attached to a bungee cord. In order to keep from falling on our faces when being pulled, we would have to run much more quickly than we had been doing all season. The point of the drill was to force us to not only transcend our comfort zones, but to get us more comfortable performing at a higher, faster, level. The practice and drills we did up to that point certainly helped get us in shape and helped us run better, but they were not enough on their own to get us to exceed what we thought we could do. Only the bungee drill did that, because it forced us past our fears and showed us that we could succeed in a space beyond where we were comfortable. I propose that we need something similar in our quest for equality under Title IX. I offer that a positive equality approach may be the tool we need to push us further.

In making this proposal, I am not suggesting we supplant or do away with the anti-discrimination approach. As stated, that approach has been quite successful and is still needed. Rather, I am proposing that we add to it. In its *Title IX at 50 Report*, the Women's Sports Foundation clearly articulates the many ways in which Title IX has not been fully implemented, nor enforced, under our current jurisprudence.<sup>87</sup> It highlights also the significant lack of education and knowledge regarding the same.<sup>88</sup> In order to remedy these problems they offer many policy and practice recommendations, which, if adopted and implemented, I have no doubt will move us closer to the equality ideal.<sup>89</sup> However, for the reasons I have discussed, even if all of their suggestions, and others like theirs, are implemented and successful I still think we will need to do more to achieve full equality. In part because in many ways the entrenched norms and ways of thinking will remain the same. Additionally, as I discuss below, our current way of doing things does not allow for the kind of proactive and expansive action that I believe will also be necessary. Something I assert can be achieved if we include a positive equality approach in addition to what we are already doing.

Although we often talk about equality in many contexts, and as mentioned above, we hope laws like Title IX will move us closer to the equality ideal, very rarely do we clearly articulate what an equal society will look like. I offer that we will know laws like Title IX have done their job, and we are living

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87. Staurowsky et al., *supra* note 3, at 25.

88. *Id.* at 25-27.

89. *Id.* at 63-73.



close to full equality, when one does a thought experiment like the one I offered above and changing the gender of the participants does not matter. We will be closer to the equality ideal when we build facilities, systems, and institutions mindfully trying to make sure they are equal, rather than explaining why inequities are justifiable. Put another way, full equality will exist when the opportunities and prospects available to my daughter are the same in all significant aspects as those of my son given their interests, abilities, and talents. While, as discussed, laws like Title IX have brought us much closer to that day, I believe an anti-discrimination mindset without anything more will only get us but so far. Accordingly, I propose we need to adopt and implement what I am calling a positive equality mindset as well.

At a minimum, positive equality requires actors and institutions to refrain from discrimination. However, positive equality goes beyond anti-discrimination and would require actors and institutions to affirmatively try to engender full equality. Positive equality requires entities to not only prevent and address discrimination, but to also go farther and monitor whether they are taking steps and doing what they can to bring about full equality.

Applying a positive equality approach to some of the examples used above will help illustrate. Taking first the locker room disparities at our local high school. If the designers had taken a positive equality approach when designing and constructing the building, one of the principles of design would have been to make sure the building was inclusive, equitable, and accessible for all students. Such an approach would require all design choices to be evaluated, among other things, against whether they were the most equitable and accessible of the options available given function and budget constraints. If initial choices are not the most equitable or accessible, they will not be selected over other choices. At the same time, if none of the choices help further access or equity the goal would be to go back to the drawing board to see if a better design might be created. In making these requirements, the goal would be to proactively design for equity, accessibility, and inclusion from the outset. Presumably, such an approach would have prevented the unequal locker rooms that made it into the final design. At the same time, such a requirement might also have opened up conversations about whether we are being inclusive more generally. Do we have facilities that include, support, and provide accommodations to students of all genders and all levels of ability? Such an approach not only pushes us to be proactive and expansive, it also moves us toward more collaborative problem-solving conversations, rather than conversations centered around blame, fault, and remedy, something our anti-discrimination approach, and individual suit method of enforcement, tends to require.

The development of Esports is another example of the difference and value of a positive equality approach. As stated, despite schools creating and expanding this opportunity nearly fifty years after Title IX's passage, the development of Esports on college campuses is following the development of sports in the past in that that participation opportunities are predominantly going to men, as are the scholarship and other support dollars.<sup>90</sup> Again, an anti-discrimination approach, which essentially only requires that schools do not discriminate, i.e., treat women differently or perhaps in bias fashion, has not prevented us from duplicating these past patterns. However, a positive equality approach, which would require a school to proactively evaluate new offerings and make sure they were affirmatively trying to engender equality, would likely prevent us from falling back into old patterns. It would push schools to examine whether they are doing something to discourage women's participation and whether there is more they could do to actually encourage participation. It would prevent them from taking disparities as the acceptable status quo and require them to proactively try to prevent such disparities from arising in the first place. Some girls and women have articulated that part of the reason they do not participate in e-sports is they worry about the bullying and exclusion they feel when trying to do so, some going so far as to use male avatars to avoid this problem.<sup>91</sup> A positive equality approach would require schools to go beyond the minimum anti-harassment policy and look for ways to make participation safe, inclusive, and free from harassment for all.

During the 2021 NCAA basketball championships the NCAA found itself embroiled in controversy when it's second-class treatment of its female participants was exposed to the world through social media.<sup>92</sup> Pictures and understandably strong statements about the difference in weight and training facilities went viral. In many important aspects the men received much better treatment than the women. Specifically, the men had better weight and training facilities, higher quality food, better outdoor spaces, higher quality COVID testing, nicer swag bags, and better airport signage, among other things.<sup>93</sup> Such disparities are not surprising when one considers the budget for the men's tournament far exceed that for the women's, as did the number of organizing staff.<sup>94</sup>

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90. See *supra* notes 66-69 and accompanying text.

91. Staurowsky et al., *supra* note 3, at 61.

92. Henry Bushnell, *Inside NCAA Basketball's Gender Inequities and How They Were Exposed in 2021*, YAHOO! SPORTS (Mar. 14, 2022), <https://sports.yahoo.com/ncaa-basketball-gender-inequities-2021-exposed-march-madness-162712173.html>.

93. *Id.*

94. *Id.*

In the wake of these allegations, the NCAA had an outside entity conduct an external gender equity review.<sup>95</sup> Among other things, the review found that the NCAA had not lived up to its commitment to diversity, inclusion and gender equity, in large part because the structures and systems of the NCAA were “designed to maximize the value of and support to the Division I Men’s Basketball Championship as the primary source of funding for the NCAA and its membership.”<sup>96</sup> In the months since the scandal broke and the equity review took place, the NCAA has made some progress with respect to implementing the recommendations for creating comparable experiences, but still has only adequately addressed nine of the twenty-three recommendations.<sup>97</sup> One significant disparity between the two tournaments has been the budget allocated for each, with the NCAA spending more than twice as much on the men’s tournament and the difference in spending estimated to be between \$13.5 million to as much as \$35.3 million.<sup>98</sup> Although in the past year the NCAA has increased the budget for the women’s tournament by about \$6 million, there is still a ways to go in closing that gap. There is no indication the NCAA intends to close that gap any time soon.<sup>99</sup>

The inequality between the two tournaments has existed ever since the NCAA started offering a championship tournament for women.<sup>100</sup> Had the women not spoken up so publicly, there is every reason to think the decades long inequities would have continued. Had the NCAA not been publicly shamed into moving towards addressing these issues, the women would likely have had to sue to have any real hope of engendering significant change. However, it’s not clear under which law they might sue as the Supreme Court has ruled that the NCAA is not subject to Title IX, as it is not considered a recipient of federal financial assistance.<sup>101</sup> Even if such a suit were able to be brought, it would be governed by an anti-discrimination approach, which would require the women to show first that they have been treated differently, in a way that was harmful, and then that such differential treatment is on the

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95. *NCAA External Gender Equity Review: Phase 1: Basketball Championships*, KAPLAN HECKER & FINK LLP 1-4 (Aug. 2, 2021), <https://ncaagenderequityreview.com/>.

96. *Id.* at 2.

97. *Report Says NCAA Makes Progress on Gender Inequality With Men’s, Women’s Basketball Tournaments*, ESPN (July 20, 2022), [https://www.espn.com/womens-college-basketball/story/\\_/id/34273158/report-says-ncaa-makes-progress-gender-inequality-mens-women-basketball-tournaments](https://www.espn.com/womens-college-basketball/story/_/id/34273158/report-says-ncaa-makes-progress-gender-inequality-mens-women-basketball-tournaments).

98. Bushnell, *supra* note 92.

99. *Report Says NCAA Makes Progress on Gender Inequality With Men’s, Women’s Basketball Tournaments*, *supra* note 97.

100. *NCAA External Gender Equity Review: Phase 1: Basketball Championships*, *supra* note 95, at 1-2.

101. *NCAA v. Smith*, 525 U.S. 459, 459 (1999).

basis of their gender. Although, given the circumstances, it would seem such a standard would be easy to meet, winning that suit would not necessarily require the NCAA to provide full equality. As we have seen, failure to discriminate under the law does not automatically lead to a fully equal result.

In contrast, if a positive quality approach governed and directed the way the NCAA ran both tournaments, it would require the NCAA to affirmatively take steps to ensure as equal an experience for women and men as possible. It would ask the institution to evaluate and audit whether and to what extent disparities might exist and negatively impact one group versus another and then take proactive steps to, again, engender equality. Essentially this kind of evaluation and steps are a lot of what the NCAA did after the disparities were highlighted publicly and nationally. The hope with a positive equality approach is they would do such an evaluation and implementation from the beginning as a matter of course.

Put simply, a positive quality approach provides benefits and the ability to move proactively in three key ways. First, such an approach acknowledges and provides a way to upset and change the existing unequal status quo by requiring actors and institutions to take measures to proactively change unequal situations, rather than taking for granted that a given situation is fine. Second, such an approach, as the above examples help illustrate, allows for a proactive and more collaborative approach than is available under a regime where the primary mechanism for enforcement is an individual suit. If one of the main goals of Title IX is to create a more equal society, an approach more focused on proactively trying to create that society is likely more effective than one that punishes or tries to force a change in behavior after the fact. Finally, a positive equality approach will also allow us to better address unintended negative consequences as well.

With respect to more effectively addressing unintended negative consequences, a positive equality approach is useful because it allows us to move from the mindset of scarcity and limits to one of more problem-solving abundance focused on increasing opportunities and better treatment for all. For example, one of the issues in the sports context, since the inception of Title IX, has been how to create opportunities for women and girls given that there are already significant opportunities and budget allocations already committed to boys and men. In some instances, solving that problem has led to expansion, in others administrators have chosen to lessen some of the opportunities for

men.<sup>102</sup> Most often the conversation in this context has centered around “taking” from men to give to women, or the unfairness of certain men having to give up opportunities they wanted and cared about, based on disparities they did not create, in order to solve the “problem” of offering opportunities for women. When one thinks that someone will lose something of value or have it taken from them, one tends to try to hold on to that thing of value, sometimes at nearly any cost. Given this, it is not surprising that over the years many men have been resistant at best, if not downright hostile, to expanded opportunities for women.

While certainly not a panacea for all that ails us, a positive equality approach offers a potentially different approach to this situation. Again, much existing thought related to Title IX has centered on how do we help women without hurting men. A positive equality mindset would instead ask, “are we providing as many opportunities as equally for everyone as we can? If not, how do we better do so?” Such an approach allows us to not only cater to interests that exist, it helps us try to generate interest where it might not yet exist. Such an approach would push us to ask questions like, have we done enough fundraising, are we structured in ways that best allow us to offer true equality to all? Such a mindset might help make clearer that one of the biggest hindrances to equality among sports at the high school and college levels is the disproportionate amount of resources devoted to football, particularly at Division I FBS schools, not the addition of opportunities for women.<sup>103</sup> However, a positive equality approach would not necessarily say we get rid of football, it would instead invite us to explore if there is a way to keep football (albeit maybe not exactly how we currently have it) and provide equal opportunities for all women and the men who do not play football. Admittedly, this may mean that we no longer administer our sports programs, and in particular our football programs, as we have been, but the whole point of this approach is to make fundamental transformative changes that bring us closer to the equality ideal. To those who have benefitted from the differential privileging and discrimination that permeate every aspect of our current system, a move toward full equality, at least in the short run, will likely feel unfair and like a loss. Unfortunately, it is not possible to both overly privilege one group and discriminate against another and have full equality at the same time. But again, the goal is to not take from one to give to another to even the

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102. SCHULTZ, *supra* note 17, at 35-36 (noting that these reductions have not be the direct result of Title IX implementation, but rather due to choices made by school administrators when significant athletic budgets are allocated to football).

103. *See id.*

scales. Rather, the goal is to take a different approach altogether that allows everyone to better thrive. Build multiple sets of good locker rooms rather than one, encourage everyone to play e-sports rather than a few. Find new ways to promote sports and develop revenue such that schools can maintain a strong football program and every other sport besides.

Of course, shifting our focus and making transformation change will not be easy. It never is, but then one of the things sports teaches is that hard work, difficulty, and persistence, particularly in the face of difficult odds, is nearly always worth it. Given this, I conclude this piece with preliminary thoughts on how we might move forward with a positive equality approach.

## V. CONCLUSION

Although it may take a substantial shift in thinking and a push outside of our collective comfort zone, the key to implementing a positive equality approach may lie within the wording of Title IX itself. Title IX conditions the receipt of federal funds on compliance.<sup>104</sup> Presumably, then, compliance could be contingent on actors and institutions conducting regular equity audits and then developing and moving forward on plans to affirmatively address any inequities that may be found. This would not be a one-time occurrence, but an ongoing review and adjustment approach with a goal towards adopting best practices and structural changes as warranted. Such an approach would also require institutions to evaluate any new endeavors and programs through an equity lens as well, to ensure that they are proactively constructing programs and opportunities in a manner that helps them achieve full equality.

Others have called for a similar regular monitoring approach to help engender Title IX compliance. The difference in what I suggest here is such regular reviews would not just be focused on how to be in compliance with Title IX, but would focus more on pushing institutions to take affirmative steps towards achieving full equality. As stated, these are preliminary suggestions for how we might move forward with a positive equality approach. A more detailed and specific discussion is beyond the scope of this piece.

In the face of the disparities that still exist surrounding women in sports, full equality seems a near impossibility, but the alternative is to settle for the current status quo. As the history of sports shows, the disparities that women have and continue to face are not due to the shortcomings of women or a lack of interest on their part. Instead, they are due to over a century of systematic

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104. 20 U.S.C. § 1681(a) (2022).

and often deliberate deprivation of opportunities, and the repeated thwarting of efforts to pursue the same. Despite this, women and girls have found a way to take advantage of the opportunities that have been available to them, and have used them to create more. To not continue to push for full equality would be like spending months training for a race, entering the race, and then stopping right before the finish line. Even if it is hard, even if it will require significant changes in our thinking and the way we have done business, we need to do what it takes to get across the equality finish line. No doubt, in the end it will be worth it.