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## You Play Ball Like a Girl: Cultural Implications of the Contact Sports Exemption and Why It Needs to Be Changed

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# YOU PLAY BALL LIKE A GIRL: CULTURAL IMPLICATIONS OF THE CONTACT SPORTS EXEMPTION AND WHY IT NEEDS TO BE CHANGED

MICHELLE MARGARET SMITH\*

## ABSTRACT

Women in the United States have historically earned significantly less income per year compared to their male counterparts. In 2014, the pay discrepancy was at its lowest point with women earning seventy-nine cents per every dollar men earned. This discrepancy exists even though women now attain college degrees at a higher rate than men and make up 47% of the labor force. In sports, the pay discrepancy is even greater. At the professional level, women earn as little as 1.2% of what their male counterparts earn. This Note addresses how changing the contact sports exemption in Title IX to allow women to play with men would provide women greater opportunities and higher salaries at the professional level.

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## I. INTRODUCTION

Women in the United States have historically earned significantly less income per year compared to their male counterparts.<sup>1</sup> In 2014, the pay discrepancy was at its lowest point with women earning seventy-nine cents per every dollar men earned.<sup>2</sup> This discrepancy exists even though women now attain college degrees at a higher rate than men<sup>3</sup> and make up 47% of the labor force.<sup>4</sup> In sports, the pay discrepancy is even greater. At the professional level, the percentage of earnings that women make compared to their male counterparts is as low as 1.2%.<sup>5</sup>

The United States Women's National Soccer Team most recently highlighted the pay discrepancy in sports.<sup>6</sup> In 2015, shortly after their World Cup victory, five members of the U.S. Women's National Team filed a wage discrimination lawsuit against U.S. Soccer.<sup>7</sup> The suit highlighted the pay discrepancies women face and stated that "[t]he women would earn \$99,000 each if they won [twenty] friendlies, the minimum number they are required to play in a year. But the men would likely earn \$263,320 each for the same feat, and would get \$100,000 even if they lost all [twenty]

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<sup>1</sup> U.S. DEP'T OF LABOR, WOMEN'S BUREAU, BREAKING DOWN THE GENDER WAGE GAP (2014) [hereinafter GENDER WAGE GAP], [https://www.dol.gov/wb/media/gender\\_wage\\_gap.pdf](https://www.dol.gov/wb/media/gender_wage_gap.pdf) (charting women's median annual earnings of full-time, year-round workers as a percentage of men's).

<sup>2</sup> *Id.*; see INST. FOR WOMEN'S POLICY RESEARCH, IWPR #Q056, WOMEN'S MEDIAN EARNINGS AS A PERCENT OF MEN'S MEDIAN EARNINGS, 1960–2015 (FULL-TIME, YEAR-ROUND WORKERS) WITH PROJECTION FOR PAY EQUITY IN 2059 (Sept. 2016), <https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/Q056.pdf> (graphing pay discrepancy and showing that in 2015, women earned eighty cents to every dollar that men earned).

<sup>3</sup> GENDER WAGE GAP, *supra* note 1 (highlighting that 40.7% of women in the labor force who are at least twenty-five years old have a college degree compared to 36.4% of men who are at least twenty-five years old).

<sup>4</sup> U.S. DEP'T OF LABOR, WOMEN'S BUREAU, EQUAL PAY (2014), [https://www.dol.gov/wb/images/EqualPay\\_infographic.pdf](https://www.dol.gov/wb/images/EqualPay_infographic.pdf). For a non-exhaustive list of reasons the discrepancy exists, see GENDER WAGE GAP, *supra* note 1.

<sup>5</sup> See *infra* note 135.

<sup>6</sup> In addition to the pay discrepancy that U.S. Soccer imposes between the two teams, FIFA imposes a similar pay discrepancy. In 2015, the U.S. women's team earned significantly less for winning the Women's World Cup in 2015 than the German men's team earned for winning the Men's World Cup the year before. *Pay Inequity in Athletics*, WOMEN'S SPORTS FOUND. (July 20, 2015), <https://www.womenssportsfoundation.org/research/article-and-report/equity-issues/pay-inequity/>. "For winning the 2015 Women's World Cup, the U.S. Women's National Team won \$2 million. Germany's men's team took home \$35 million," and "[t]he U.S. men's team finished in 11th place and collected \$9 million . . ." *Id.*

<sup>7</sup> See Andrew Das, *Top Female Players Accuse U.S. Soccer of Wage Discrimination*, N.Y. TIMES (Mar. 31, 2016), [http://www.nytimes.com/2016/04/01/sports/soccer/uswnt-us-women-carli-lloyd-alex-morgan-hope-solo-complain.html?\\_r=0](http://www.nytimes.com/2016/04/01/sports/soccer/uswnt-us-women-carli-lloyd-alex-morgan-hope-solo-complain.html?_r=0) (discussing the lawsuit filed by the women's national team); see also SI Wire, *Court Rules in Favor of U.S. Soccer, USWNT Can't Strike*, SPORTS ILLUSTRATED (June 3, 2016), <http://www.si.com/planet-futbol/2016/06/03/usa-womens-soccer-lawsuit-court-ruling-olympics> (discussing a separate action in which a court ruled the team could not strike prior to the Olympics).

games.”<sup>8</sup> This discrepancy further defies logic as the women’s team brought in more revenue than the men’s team in 2015.<sup>9</sup>

The Women’s National Soccer Team has a long history of success on the field. The women have dominated the world stage since capturing the first ever Women’s World Cup in 1991. Since that first World Cup, they have gone on to win two more and added four Olympic gold medals.<sup>10</sup> In comparison, the U.S. Men’s National Soccer Team has never won a World Cup or Olympic medal in the history of the program and failed to qualify for the upcoming 2018 Men’s World Cup.<sup>11</sup> Yet, despite the women’s team’s athletic successes and support from some of the Men’s National Team players in their quest toward equal pay for equal play,<sup>12</sup> the Women’s National Team’s only recourse was to continue to play while pursuing the lawsuit in court.<sup>13</sup>

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<sup>8</sup> See *U.S. Women’s Team Files Wage-Discrimination Action vs. U.S. Soccer*, ESPNW (Apr. 1, 2016) (citing the U.S. Women’s team’s EEOC filing), <http://www.espn.com/espnw/sports/article/15102506/women-national-team-files-wage-discrimination-action-vs-us-soccer-federation> (“Additionally, the women get paid nothing for playing more than [twenty] games, while the men get between \$5,000 and \$17,625 for each game played beyond [twenty].” (citing the U.S. Women’s team’s EEOC filing)).

<sup>9</sup> See Andrew Das, *Pay Disparity in U.S. Soccer? It’s Complicated*, N.Y. TIMES (Apr. 21, 2016), <http://www.nytimes.com/2016/04/22/sports/soccer/usmnt-uswnt-soccer-equal-pay.html>.

<sup>10</sup> The United States Women’s National Team has won three World Cup Championships and four Olympic golds since being established in 1985. *World Champions: USA Wins 2015 FIFA Women’s World Cup*, U.S. SOCCER (July 5, 2015), <http://www.ussoccer.com/stories/2015/07/05/21/19/150705-wnt-v-jpn-game-story> (highlighting the team’s third World Cup title); see *U.S. Women’s National Team Earns Fourth Olympic Gold Medal with 2-1 Victory Against Japan in Front of 80,203 at Wembley Stadium*, U.S. SOCCER (Aug. 9, 2012), <http://www.ussoccer.com/stories/2014/03/17/11/16/us-wnt-vs-japan-gold-medal-match> (highlighting the team’s four Olympic gold medals); *U.S. WNT Flashback—20th Anniversary of First-Ever Match: Who Scored First?*, U.S. SOCCER (Aug. 18, 2005), <http://www.ussoccer.com/stories/2014/03/17/12/57/u-s-wnt-flashback-20th-anniversary-of-first-ever-match-who-scored-first> (stating that the women’s national team was established in 1985).

<sup>11</sup> FIFA granted provisional membership to the Men’s National Team into FIFA in 1913 and full membership in 1914. Timeline of the History of U.S. Soccer, U.S. SOCCER, <https://www.ussoccer.com/about/history/timeline> (last visited Jan. 7, 2018). The women’s team was not formed until 1985. Grant Wahl, *USA’s Haunting World Cup Qualifying Failure Emits Blame, Shock and Calls for Change*, SPORTS ILLUSTRATED (Oct. 11, 2017), <https://www.si.com/soccer/2017/10/11/usa-world-cup-qualifying-failure-us-soccer-gulati-arena>.

<sup>12</sup> See Lindsay Gibbs, *They Persisted: U.S. Women’s Soccer Secures New Deal After Lengthy ‘Equal Play, Equal Pay’ Campaign*, THINK PROGRESS (Apr. 5, 2017), <https://thinkprogress.org/womens-soccer-secures-new-deal-ffe06dc4b9e1/>.

<sup>13</sup> In a different action, a federal judge ruled that “[t]he United States women’s national soccer team is bound by the terms of its collective bargaining agreement with U.S. Soccer . . . [which] means the players cannot strike before August’s Rio Olympics in their quest for better pay . . . .” Andrew Das, *U.S. Women’s Soccer Team Can’t Strike Before Olympics, Judge Rules*, N.Y. TIMES (June 3, 2016), <https://www.nytimes.com/2016/06/04/sports/soccer/judge-rules-us-womens-soccer-team-cant-strike-before-olympics.html>. On April 5, 2017, “[m]embers of the U.S. women’s national team and U.S. Soccer ratified a new collective bargaining agreement . . . .” Graham Hays, *U.S. Soccer, Women’s National Team Ratify New CBA*, ESPN (Apr. 5, 2017),

Although the Women's National Team brought pay discrepancy to the forefront, it did not address pay discrepancies in the various professional leagues.<sup>14</sup> The pay discrepancies faced by women in professional sports in the United States is larger than the national averages of women in the workplace.<sup>15</sup> For a number of women, the pay is not enough to earn a sustainable wage.<sup>16</sup> For these women, the only way to afford to continue to pursue their careers as professional athletes is to maintain multiple jobs.<sup>17</sup>

This Note will address how changing the contact sports exemption in Title IX to allow women to play with men will provide women greater opportunities and higher salaries at the professional level. Section II of this Note examines the history of Title IX, the benefits received from participating in sports, and the cultural landscape of the sports arena post-Title IX. Section III outlines the contact sports exemption and how courts interpret it to bar women from participating in contact sports. Section IV analyzes the discrepancies between men and women at the professional level in terms of pay and opportunity. Section V proposes a solution to the problem by altering the contact sports regulation language to prevent its use as a defense to bar qualified women from participating in contact sports with men. This section will also address possible concerns that arise from changing the regulation. Finally, Section VI draws together the connection between the proposed regulation and the new opportunities it would create for women at the professional level.

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<http://www.espn.com/espnw/sports/article/19082314/us-soccer-women-national-team-ratify-new-cba>. Although, the new collective bargaining agreement increases compensation for the women, some argue “it falls short of complete pay equity with the men’s national team . . . .” Colin Dwyer, *In ‘Important Step,’ U.S. Women’s Soccer Team Reaches New Labor Deal*, NPR (Apr. 6, 2017), <https://www.npr.org/sections/thetwo-way/2017/04/06/522843140/in-important-step-u-s-womens-soccer-team-reaches-new-labor-deal>.

<sup>14</sup> See *infra* notes 110–40 and accompanying text; see also *A Look at Male and Female Professional Athlete Salaries*, ADELPHI U. (Aug. 11, 2014), <http://sportsmanagement.adelphi.edu/resources/infographics/a-look-at-male-and-female-professional-athlete-salaries/> (comparing male and female athletes’ salaries for the 2014 season).

<sup>15</sup> INST. FOR WOMEN’S POLICY RESEARCH, *supra* note 2.

<sup>16</sup> See Shira Springer, *Female Pro Athletes Dream on Without the Dollars*, BOS. GLOBE (Feb. 22, 2015), <https://www.bostonglobe.com/sports/2015/02/22/female-pro-athletes-dream-without-dollars/kXK3NgUJYGBQMEPync45tK/story.html> (“If female pro athletes make any money for playing, it barely covers living and training expenses, especially for players who fall below the superstar tier.”).

<sup>17</sup> *Id.* (“There’s always more that I want to do, but I don’t have time to do it. I want to be on the ice more than twice a week. I want to do more skills work, go to a hockey gym and shoot pucks and stickhandle more often than I’m able to. If we were able to play and get paid for it, to devote all our time to getting better, then, of course, we’d all be getting better and there’d be more amazing players.” (quoting Jordan Smelker, a professional women’s hockey player for the Boston Blades)).

## II. HISTORY

Prior to the passage of Title IX, girls had limited opportunities to participate in sports.<sup>18</sup> They were seen as too fragile to play<sup>19</sup> and as needing protection from the inherent dangers associated with playing a sport.<sup>20</sup> This sentiment prevailed until Senator Birch Bayh sponsored an amendment to the Education Acts in 1972.<sup>21</sup> Congress passed the amendment with the purpose of providing equal opportunity to women in education.<sup>22</sup> Title IX states that “[n]o 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>23</sup> Commentators have most notably praised the amendment for the positive effect it has had on increasing opportunities for women in sports.<sup>24</sup>

### A. Benefits of Participation in Sports

Since the passage of Title IX, participation of women in sports has increased.<sup>25</sup> Prior to 1972, women did not routinely use sports as an avenue toward opportunity; however, today women use sports as one avenue to attain further education.<sup>26</sup> In addition to opportunity, research has shown that participation in sports has led to higher academic achievement<sup>27</sup> as well as an increased likelihood of completing high

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<sup>18</sup> See Betsy Stevenson, *Title IX and the Evolution of High School Sports*, 25 CONTEMP. ECON. POL’Y 486, 487 (2007) [hereinafter Stevenson, *Title IX and the Evolution*] (“Moreover, while millions of high school boys played sports, organized high school sports for girls was a relatively obscure activity with fewer than 300,000 girls participating the year that Title IX was passed.”).

<sup>19</sup> U.S. COMM’N ON CIVIL RIGHTS, MORE HURDLES TO CLEAR 1 (July 1980), <https://www.law.umaryland.edu/marshall/usccr/documents/cr11063.pdf>. (“Although girls and women have participated in sports[,] . . . it was not until recently that they were encouraged to do so. In the beginning they were thought too frail and weak for physical exercise; some years later, in the first quarter of this century, the enthusiasm of college women for team sports and competition was considered dangerous and unwomanly . . . .”).

<sup>20</sup> *Id.* at 2 (“Physical educators were convinced that rough physical contact in competitive sports was more dangerous for women and girls than for boys and men. Competitive athletics, although dangerous for men, were justifiable because they could develop manly strength. They could find no comparable justification for women’s athletics because they did not consider the development of strength appropriate for women.” (citing ELLEN W. GERBER ET AL., *THE AMERICAN WOMAN IN SPORT* 16, 69 (1974))).

<sup>21</sup> 118 CONG. REC. 5,803 (1972); see Birch Bayh, *Personal Insights and Experiences Regarding the Passage of Title IX*, 55 CLEV. ST. L. REV. 463, 468 (2007).

<sup>22</sup> Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, 86 Stat. 373 (codified as amended at 20 U.S.C. § 1681 *et seq.*); Bayh, *supra* note 21, at 468.

<sup>23</sup> 20 U.S.C. § 1681(a) (2018).

<sup>24</sup> See Stevenson, *Title IX and the Evolution*, *supra* note 18, at 488.

<sup>25</sup> *Id.* at 487.

<sup>26</sup> See Susan B. Gerber, *Extracurricular Activities and Academic Achievement*, 30 J. RES. & DEV. EDUC. 42, 42 (1996).

<sup>27</sup> See *id.*; see also Beckett A. Broh, *Linking Extracurricular Programming to Academic Achievement: Who Benefits and Why?*, 75 SOC. EDUC. 69, 69 (2002); Merith Cosden et al., *The*

school.<sup>28</sup> But the increase in academic success is not limited only to high school. Studies have found a correlation between high academic achievement and participation in collegiate sports as well.<sup>29</sup> The benefits of participation in sports persist even after obtaining a college degree, as one study has linked participation in sports to an increase in women participating in the labor force.<sup>30</sup>

Furthermore, regular participation in sports has a positive health influence on adolescents, both physically and mentally.<sup>31</sup> Researchers have found that physical activity is important for children and adolescents to maintain health,<sup>32</sup> gain confidence and self-esteem,<sup>33</sup> and fight obesity.<sup>34</sup> Finally, researchers attribute physical activity to an increase in perceived life satisfaction in adolescents ranging from thirteen to eighteen years old.<sup>35</sup>

### B. *The Cultural Shift Post-Title IX*

After the passage of Title IX, the way that society perceived women in sports shifted.<sup>36</sup> The shift was not to full equality; instead, women are able to play, but society

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*Effects of Homework Programs and After-School Activities on School Success*, 43 THEORY INTO PRAC. 220, 220 (2004); Suzanne E. Eckes, *Title IX and High School Opportunities: Issues of Equity on and in the Court*, 21 WIS. WOMEN'S L.J. 175, 175 (2006); Betsey Stevenson, *Beyond the Classroom: Using Title IX to Measure the Return to High School Sports* 1 (Fed. Res. Bank of S.F., Working Paper No. 2006-44, 2006) [hereinafter Stevenson, *Beyond the Classroom*].

<sup>28</sup> See Ralph B. McNeal, Jr., *Extracurricular Activities and High School Dropouts*, 68 SOC. EDUC. 62, 76 (1995) ("The findings presented here show that participation in athletics has the largest impact, both directly and as an intervening variable [on the reduction of the high school dropout rate]." (emphasis omitted)).

<sup>29</sup> See Daniel A. Nathan, *Of Grades and Glory: Rethinking Intercollegiate Athletics*, 54 AM. Q. 139 (2002) (book review).

<sup>30</sup> See Stevenson, *Beyond the Classroom*, *supra* note 27.

<sup>31</sup> See G. Lawrence Rarick & William Reddan, *Youth Fitness and Health*, 32 REV. EDUC. RES. 515, 515-16 (1962).

<sup>32</sup> See generally Melicia C. Whitt-Glover et al., *Disparities in Physical Activity and Sedentary Behaviors Among US Children and Adolescents: Prevalence, Correlates, and Intervention Implications*, 30 J. PUB. HEALTH POL'Y S309, S309-34 (2009).

<sup>33</sup> See Nicholas L. Holt et al., *Do Youth Learn Life Skills Through Their Involvement in High School Sport? A Case Study*, 31 CANADIAN J. EDUC. 281, 281 (2008); see also Allison J. Tracy & Sumru Erkut, *Gender and Race Patterns in the Pathways from Sports Participation to Self-Esteem*, 45 SOC. PERSP. 445, 455 (2002) ("Our results show that the positive effect of sports participation on self-esteem in adolescence is present for both Caucasian and African American adolescents.").

<sup>34</sup> See Ana C. Lindsay et al., *The Role of Parents in Preventing Childhood Obesity*, 16 FUTURE CHILD. 169, 169 (2006).

<sup>35</sup> See Keith J. Zullig et al., *Adolescent Health-Related Quality of Life and Perceived Satisfaction with Life*, 14 QUALITY LIFE RES. 1573, 1573 (2005).

<sup>36</sup> See Mary Jo Kane, *Media Coverage of the Female Athlete Before, During, and After Title IX: Sports Illustrated Revisited*, 2 J. SPORT MGMT. 87, 87 (1988).

still views them as inferior to men in sports.<sup>37</sup> The cultural perception that women are inferior athletes stems from the masculinity bias in sports and the physiological differences attributed to success, the differences in encouraging boys as compared to girls to participate in sports, and the effects of the media.<sup>38</sup>

First, the masculinity bias emphasizes attributes such as “height, mass, strength, and speed” as being essential characteristics of an athlete.<sup>39</sup> Society focuses primarily on these physical attributes despite the strategic nature of sports, which plays a pivotal part in the success of a team.<sup>40</sup> The focus on the masculine traits in sports creates societal disinterest, as evidenced by attendance at women’s games.<sup>41</sup> In addition to effects on viewership and attendance, when women do achieve athletic success, the public scrutinizes them more harshly than men,<sup>42</sup> and in many cases, the public questions their sexuality or gender.<sup>43</sup>

Second, society more frequently encourages boys to participate in sports than girls.<sup>44</sup> Girls perceive barriers to entry into sports from different societal influences in their life.<sup>45</sup> One study hypothesized that parents are a perceived barrier and ultimately found that “[b]oth adolescent girls and boys shared stories about girls who were not

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<sup>37</sup> See Michael A. Messner et al., *Separating the Men from the Girls: The Gendered Language of Televised Sports*, 7 GENDER & SOC’Y 121 (1993) [hereinafter Messner et al., *Separating the Men from the Girls*]; see also Michael A. Messner, *Sports and Male Domination: The Female Athlete as Contested Ideological Terrain*, in OUT OF PLAY 31, 38 (2007).

<sup>38</sup> See Dayna B. Daniels, *Gender Slurs: Motivation Through Misogyny in Sports Films*, in SEXUAL SPORTS RHETORIC 217, 225–26 (Linda K. Fuller ed., 2010) [hereinafter Daniels, *Gender Slurs*]; Iris Marion Young, *The Exclusion of Women from Sport: Conceptual and Existential Dimensions*, in PHILOSOPHICAL PERSPECTIVES ON GENDER IN SPORT AND PHYSICAL ACTIVITY 13, 18 (Paul Davis & Charlene Weaving eds., 2010); Maihan B. Vu, *Listening to Girls and Boys Talk About Girls’ Physical Activity Behaviors*, 33 HEALTH EDUC. & BEHAV. 81, 82 (2006).

<sup>39</sup> See Young, *supra* note 38, at 18.

<sup>40</sup> See Nancy Katz, *Sports Teams as a Model for Workplace Teams: Lessons and Liabilities*, 15 ACAD. MGMT. EXECUTIVE 56, 57 (2001) (explaining “the benefits of both cooperation and competition [to success].”).

<sup>41</sup> See Bill Littlefield, *No Matter the Sport, Women Athletes Are Always Paid Less*, WBUR (Apr. 16, 2016), <http://www.wbur.org/onlyagame/2016/04/16/pay-gap-female-sports>.

<sup>42</sup> *Danica Patrick: History Says Her Racing Future Is Lose/Lose Situation*, BLEACHER REP. (Apr. 24, 2011), <http://bleacherreport.com/articles/676402-danica-patrick-history-says-her-racing-future-is-lose/lose-situation> [hereinafter *Danica Patrick*] (“The main argument is, if she can’t beat any of the drivers in the IndyCar Series after all these years, how does she expect to beat Cup veterans like Jimmie Johnson, Tony Stewart, Jeff Gordon, Denny Hamlin, Kevin Harvick, Kyle Busch and Carl Edwards?”).

<sup>43</sup> See generally Susan K. Cahn, *From the “Muscle Moll” to the “Butch” Ballplayer: Mannishness, Lesbianism, and Homophobia in U.S. Women’s Sports*, 19 FEMINIST STUD. 343, 343 (1993).

<sup>44</sup> See Vu, *supra* note 38, at 82.

<sup>45</sup> *Id.* Perceived barriers for women’s entry into sports included: adolescent males’ perspectives, self-perception, protective parents, lack of time, “lack of transportation, other girls’ negative behaviors, limited opportunities or availability, reactions from friends, and costs or fees associated with activities.” *Id.* at 89–90.

allowed to play sports because their parents were afraid they would get hurt.”<sup>46</sup> Adolescent boys were also a perceived barrier to girl’s entry into sports.<sup>47</sup> Adolescent girls stated that “boys made fun of girls when they did not perform an activity correctly or play a sport according to the rule.”<sup>48</sup> Adolescent boys confirmed this perception by reaffirming “that they did and said things to discourage girls from being physically active.”<sup>49</sup>

Third, Hollywood continues to perpetuate the culture of inferiority of women in sports.<sup>50</sup> On the big screen, a woman’s participation in sports is portrayed as less worthy.<sup>51</sup> Additionally, the media often shows males insulting opponents by comparing them to females, which suggests that their opponents are less than able to compete.<sup>52</sup> For example, in the movie *The Sandlot*, the insult that caused the group great distress was when Ham Porter said “[y]ou play ball like a giiiiiiiiiiii!”<sup>53</sup> The members of both teams could not believe that Ham had the audacity to imply that a male player was bad enough to be compared to a girl.<sup>54</sup> Although notable exceptions exist, particularly in advertising, that characterize women as competitive in sports,<sup>55</sup> the overall sentiment is that women are inferior.

### III. THE CURRENT STATE OF THE LAW: EXCLUSION OF WOMEN IN CONTACT SPORTS

Promulgated by the Department of Education, Federal Regulation 34 C.F.R. Section 106.41(b) embodies the cultural divisiveness in sports by allowing the discrimination of women in contact sports.<sup>56</sup> The contact sports exemption states:

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<sup>46</sup> *Id.* at 90. “Additionally, parental beliefs that certain activities were only ‘guy sports’ kept girls from being more active.” *Id.*

<sup>47</sup> *Id.* at 89.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See Daniels, *Gender Slurs*, *supra* note 38, at 225–26.

<sup>51</sup> See Dayna B. Daniels, *You Throw Like a Girl: Sport and Misogyny on the Silver Screen*, 35 *FILM & HIST.* 29, 34 (2005).

<sup>52</sup> *Id.*

<sup>53</sup> *THE SANDLOT* (Twentieth Century Fox 1993).

<sup>54</sup> *Id.*

<sup>55</sup> See Chiney Ogumike (@Chiney321), TWITTER (Sept. 14, 2016, 3:50 PM), <https://twitter.com/Chiney321/status/776161107996278784> (tweeting NCAA commercial featuring female athletes and tagline: “genders don’t play sports, athletes do”); Gatorade, *Michael Jordan Mia Hamm “Michael vs Mia” Gatorade Commercial*, YOUTUBE (Mar. 1, 2006), <https://www.youtube.com/watch?v=liKnJ-ejztw> (depicting Mia Hamm and Michael Jordan competing head-to-head in various sports); Kayla Lombardo, *WATCH: Ogumike Sisters and Other Female Athletes Are Done with Empowerment Ads*, EXCELLE SPORTS (Sept. 15, 2016), <http://www.excellesports.com/news/watch-ncaa-commercial-ogumike/>; *Pitch* (Barnstorm Films 2016) (depicting the fictional story about a woman becoming the first female pitcher in the male professional leagues).

<sup>56</sup> 34 C.F.R. § 106.41(b) (2018); 45 C.F.R. § 86.41(b) (2018) (codifying regulations promulgated by the Department of Health and Human Services); *accord* 31 C.F.R. § 28.450(b) (2018).

(b) Separate Teams. . . . [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.<sup>57</sup>

Although courts have allowed defendants to use the exemption as a defense to bar women from participating on men's teams in cases where there was no comparable women's team,<sup>58</sup> women have largely overcome this obstacle under the Equal Protection Clause of the Fourteenth Amendment.<sup>59</sup> The problem, however, persists when a so-called comparable women's team does exist. In those instances, leagues routinely bar women from participating on the men's team, even when they are physically capable of doing so, because the women have the opportunity to play on the all-women's team.<sup>60</sup> When equal opportunity exists, courts have held that the contact sports exemption is an adequate defense that the Equal Protection Clause cannot overcome.<sup>61</sup>

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<sup>57</sup> 34 C.F.R. § 106.41(b) (2018).

<sup>58</sup> *Barnett v. Tex. Wrestling Ass'n*, 16 F. Supp. 2d 690, 694–95 (N.D. Tex. 1998) (concluding “that the defendants were free to exclude Courtney and Melony from participation in boys wrestling without fear of Title IX liability [because of the contact sport regulation].”).

<sup>59</sup> *Yellow Springs Exempted Vill. Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 655 (6th Cir. 1981) (“The regulation additionally permits separate teams in sports which require competitive selection but also requires measures to be taken to ensure equality for the excluded sex, including where necessary an opportunity to try out for the team.”); *Beattie v. Line Mountain Sch. Dist.*, 992 F. Supp. 2d 384, 395 (M.D. Pa. 2014) (holding that the female wrestler was likely to prevail on the merits of her equal protection claim because “[t]he School District does not provide sufficient evidence that any of its stated reasons for prohibiting A.B. from wrestling amounts to the ‘exceedingly persuasive justification’ for the classification.” (quoting *United States v. Virginia*, 518 U.S. 515, 534 (1996))); *Lantz v. Ambach*, 620 F. Supp. 663, 666 (S.D.N.Y. 1985) (“To the extent that the challenged regulation deprives her of the opportunity to try out for the junior varsity football squad, it operates to abridge her right under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the defendants will be enjoined from complying with it or enforcing it.”); *Hoover v. Meiklejohn, Jr.*, 430 F. Supp. 164, 169–70 (D. Colo. 1977) (“It is an inescapable conclusion that the complete denial of any opportunity to play interscholastic soccer is a violation of the plaintiff’s right to equal protection of the law under the Fourteenth Amendment.”).

<sup>60</sup> *See O’Connor v. Board of Ed. of Sch. Dist. No. 23*, 645 F.2d 578, 581 (7th Cir. 1981) (finding the compelling state interest of maximizing participation is satisfied through a system of separate but equal teams); *Lafleur v. Athletic Bd. of Control*, 536 F. Supp. 104, 107 (W.D. Mich. 1982) (stating that because “it is likely that a separate competition will satisfy the Equal Protection Clause the court will not preliminarily order the defendants to allow the plaintiff to compete against men . . .”).

<sup>61</sup> *O’Connor*, 645 F.2d at 582 (“[D]efendants’ compliance with the regulations ‘indicate(s) a strong probability that the gender-based classification can be adequately justified.’” (quoting

A. O'Connor v. Board of Education: *Upholding the Principle of Separate but Equal*

In *O'Connor v. Board of Education*, the United States Court of Appeals for the Seventh Circuit reversed the district court's grant of a preliminary injunction that permitted a sixth grade girl, Karen O'Connor, to try out for the boys basketball team.<sup>62</sup> In court, the O'Connors argued "that the school's classification violated her fundamental 'right to develop'"<sup>63</sup> and that the "programs for boys' and girls' basketball were unequal . . ."<sup>64</sup> The O'Connors also challenged "the validity of the regulations, which expressly permit separate-sex teams and permit exclusion of girls from contact sports . . ."<sup>65</sup> The court first addressed the equal protection argument, concluding that "[t]o be constitutional, a gender-based discrimination must serve important governmental objectives."<sup>66</sup> Observing that the governmental objective was to increase girls' participation in sports, the court held "that the sex-based classification substantially furthered the governmental objective, thus satisfying the equal protection clause"<sup>67</sup> and affording Karen no relief under the United States Constitution.<sup>68</sup>

The court then addressed whether the regulations violated Title IX.<sup>69</sup> The court concluded that there was "no evidence at the hearing to support her claim that the regulations violate Title IX."<sup>70</sup> The court further held "that defendants' compliance with the regulations 'indicate(s) a strong probability that the gender-based classification can be adequately justified.'"<sup>71</sup> Although the court acknowledged that Karen could suffer "potential harm" from being denied the opportunity to try out for

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O'Connor v. Bd. of Educ. of Sch. Dist. No. 23, 449 U.S. 1301, 1308 (1980)); *Lafler*, 536 F. Supp. at 107 ("It is true that there does not appear to be a woman's competition presently in place in which the plaintiff could compete. However, since it is likely that a separate competition will satisfy the Equal Protection Clause the court will not preliminarily order the defendants to allow the plaintiff to compete against men under safety rules and precautions developed, designed, and tested in the context of all-male competition.").

<sup>62</sup> *O'Connor*, 645 F.2d at 583. Initially her father asked permission for her to try out for the boys' team, but the school denied his request because the "[c]onference rules require[d] separate teams for boys and girls in contact sports." *Id.* at 579.

<sup>63</sup> *Id.* At that time, "a professional basketball coach who observed her play rated her ability as equal to or better than a female high school sophomore and equal to that of a male eighth-grade player." *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 582.

<sup>66</sup> *Id.* at 580. The Court framed the issue as "whether Karen O'Connor has demonstrated a reasonable likelihood that the two team approach is not substantially related to the objective of maximizing participation in sports . . ." *Id.* at 581.

<sup>67</sup> *Id.*

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

<sup>69</sup> *Id.* at 582.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* (quoting *O'Connor v. Bd. of Educ. of Sch. Dist. No. 23*, 449 U.S. 1301, 1308 (1980)).

the boys' team, it did not believe that the harm "justifie[d] turning aside years of settled Supreme Court law . . . ."<sup>72</sup>

### B. Cultural Implications of the Contact Sport Exemption

Prior researchers have addressed the contact sports exemption, how it came to be, and its societal ramifications on women.<sup>73</sup> For example, Suzanne Sangree attributed the existence of the contact sports exemption to two factors.<sup>74</sup> First, she found that "powerful lobbies have sought to protect the status-quo ante—the all-male bastions of college basketball and football."<sup>75</sup> Second, she concluded that the exemption is also based on "powerful and longstanding paternalistic stereotypes . . . [that] posit that no females should play contact sports with males because females are inherently weaker, slower, and less coordinated than males, and thus are prone to debilitating injuries when they play rough sports with males."<sup>76</sup>

Collectively, researchers agree that the cultural implications of the contact sports exemption include furthering the notion that women are inferior when it comes to sports.<sup>77</sup> Researchers vary, however, on how best to rectify the problem. The approaches range from advocating for the full repeal of the contact sports exemption<sup>78</sup> to a change that would cause a fifty-fifty split in participation on sports teams, with women and men making up fifty percent of the team as well as receiving fifty percent of the playing time.<sup>79</sup>

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<sup>72</sup> *Id.* at 583.

<sup>73</sup> Deborah L. Brake, *Title IX as Pragmatic Feminism*, 55 CLEV. ST. L. REV. 513, 544 (2007) ("The contact sports exception is one example of a complacent pragmatism, reflecting an uncritical acceptance of 'common sense' understandings that women need protection from physical contact with men in sports."); B. Glenn George, *Fifty/Fifty: Ending Sex Segregation in Sch. Sports*, 63 OHIO ST. L.J. 1107, 1107 (2002); Syda Kosofsky, *Toward Gender Equality in Prof. Sports*, 4 HASTINGS WOMEN'S L.J. 209, 235 (1993) ("[T]he 'contact sports' exception perpetuates stereotypes of females as frail, weak, and limits the types of sports they can participate in." (citing Note, *Sex Discrimination in High School Athletics: An Examination of Applicable Legal Doctrines*, 66 MINN. L. REV. 1115, 1131–32 (1982))); Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 381–82 (2002).

<sup>74</sup> Sangree, *supra* note 73, at 382.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Brake, *supra* note 73, at 527 ("In sports, women are marginalized when they are excluded from highly valued sports opportunities, relegated to the sidelines (literally, in the case of cheerleading) and limited to less-valued activities."); George, *supra* note 73, at 1134; Kosofsky, *supra* note 73, at 235 (explaining that the contact sports exemption "send[s] harmful, implicit messages which are adopted by our society" and "perpetuates stereotypes of females as frail, weak, and limits the types of sports they can participate in." (footnote omitted)); Sangree, *supra* note 73, at 400.

<sup>78</sup> Sangree, *supra* note 73, at 446 (arguing that "[e]liminating the contact sports exemption would be a step toward degendering sport.").

<sup>79</sup> George, *supra* note 73, at 1112 ("proposing 'coed' in the most extreme sense—all teams would be half male and half female, with the further requirement that half of the players on the field or court at any given time would also be half women." (footnote omitted)).

Only one researcher, Syda Kosofsky, addressed the impact that the contact sports exemption may have on women's opportunities in professional sports.<sup>80</sup> However, she determined that "[b]ecause of its limited scope, its sexist assumptions about female athleticism, and its difficult implementation, Title IX, the only federal law aimed at elimination of sex discrimination in sports, cannot reach the problem of lack of opportunities and unequal pay for women in professional sports."<sup>81</sup>

#### IV. THE DISCREPANCY OF OPPORTUNITY AND SALARY OF WOMEN IN PROFESSIONAL SPORTS

After collegiate participation, the effects of the contact sport exemption manifest in the most tangible way as women experience a limited number of professional opportunities.<sup>82</sup> In these limited opportunities, the wage discrepancies go beyond the national average.<sup>83</sup> Many attribute the pay discrepancy to the difference in popularity and viewership between the men's and women's leagues.<sup>84</sup> However, as addressed above, the cultural perception of women in sports that the passage of Title IX in 1972 has fostered plays a role in ensuring that women are continually seen as inferior athletes.<sup>85</sup> This perception of inferiority in turn drives down the popularity of women's sports.

##### *A. The Opportunity Gap*

To better understand the effects of the cultural perception of women in sports, the tables below illustrate (1) the differences between the number of male participants compared to female participants in professional sports, (2) the number of opportunities that men have to participate in games compared to female athletes, and (3) the differences in pay that male athletes earn compared to female athletes.

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<sup>80</sup> Kosofsky, *supra* note 73, at 235.

<sup>81</sup> *Id.*

<sup>82</sup> *See infra* Table 1.

<sup>83</sup> *See* INST. FOR WOMEN'S POLICY RESEARCH, *supra* note 2.

<sup>84</sup> Littlefield, *supra* note 41.

<sup>85</sup> *See supra* notes 36–55 and accompanying text.

Table 1. Number of Male Professional Athletes Compared to Female Professional Athletes in the United States<sup>86</sup>

Sport	Number of Male Participants	Number of Female Participants	Percent Female Compared to Male <sup>87</sup>
Football	1696 (NFL) <sup>88</sup>	0 <sup>89</sup>	0%
Basketball	449 (NBA) <sup>90</sup>	147 (WNBA) <sup>91</sup>	32.7%
Baseball/Softball	868 (MLB) <sup>92</sup>	135 (NPF) <sup>93</sup>	15.6%

<sup>86</sup> Table 1 uses the five major sports in the United States. By adding soccer, the table becomes more conservative; even though soccer is not traditionally a major sport, it has the most female participation and the least amount of pay discrepancy out of the five sports. See Nate Silver, *The 'Big Five' in North American Pro Sports*, FIVETHIRTYEIGHT (Apr. 4, 2014), <https://fivethirtyeight.com/datalab/theres-a-big-five-in-north-american-pro-sports/> (considering whether the MLS could be the fifth major sport in the United States based on the number of Google searches they generate).

<sup>87</sup> These calculations obtained the percentage of participants by dividing the number of female participants by the number of male participants. For example, to calculate the percentage of female participants to male participants in basketball, divide 147 by 449 to get 32.7% ( $147 \div 449 = 32.7\%$ ).

<sup>88</sup> See *Teams*, NFL, <http://www.nfl.com/teams> (last visited Nov. 12, 2016) (showing that there are thirty-two teams in the NFL); Jeanna Thomas, *Here's How NFL Practice Squads Works*, SB NATION (Sept. 2, 2017), <http://www.sbnation.com/2016/9/3/12773904/nfl-practice-squad-players-roster-rules-eligibility-primer> (stating that there is a "mandatory [fifty-three]-man limit" on NFL rosters). Taking these two statistics, multiply the thirty-three-man limit by the number of teams in the NFL to reach the desired calculation. The total number of players does not include players on the practice squad.

<sup>89</sup> There are two women's leagues, the IWFL and the WFA; both require the players to pay to play and therefore are not considered here. See *Information for Starting Your WFA Team*, WOMEN'S FOOTBALL ALLIANCE, <http://www.wfaprofootball.com/new-team-registration/> (last visited Nov. 12, 2016); *Register to Play*, INDEP. WOMEN'S FOOTBALL LEAGUE, <http://www.iwflsports.com/teams/registerplay/> (last visited Nov. 12, 2016); see also *IWFL Welcomes the Woodlands Wildcats*, INDEP. WOMEN'S FOOTBALL LEAGUE, [http://www.iwflsports.com/pressroom/news/index.html?article\\_id=165](http://www.iwflsports.com/pressroom/news/index.html?article_id=165) (last visited Nov. 12, 2016) (showing that all but one team requires players to pay \$1,000 to play in the league).

<sup>90</sup> *Where the NBA Players Come from*, COLLEGIATE BASKETBALL NEWS, <http://rpiratings.com/NBA.php> (last visited Nov. 6, 2016).

<sup>91</sup> *Players*, WNBA, <http://www.wnba.com/players/> (last visited Nov. 7, 2016).

<sup>92</sup> *Opening Day Rosters Feature 230 Players Born Outside the U.S.*, MISTER BASEBALL (Apr. 7, 2015), <http://www.mister-baseball.com/opening-day-rosters-feature-230-players-born/>.

<sup>93</sup> *Team Rosters*, NAT'L PRO FASTPITCH, [http://www.profastpitch.com/teams/team\\_rosters/](http://www.profastpitch.com/teams/team_rosters/) (last Nov. 7, 2016) (clicking the team section quickly calculates the number of players on the roster and provides access to each individual team's roster; add the total number of players per team from each team's roster to obtain the total number of players in the league.).

Sport	Number of Male Participants	Number of Female Participants	Percent Female Compared to Male
Hockey	683 (NHL) <sup>94</sup>	91 (NWHL) <sup>95</sup>	13.3%
Soccer	542 (MLS) <sup>96</sup>	239 (NWSL) <sup>97</sup>	44.1%
Total	4,238	612	14.4%

Table 1 examines the participation rate of men to women in the top five contact sports in the United States and reveals that 612 total women participate in contact sports as compared to 4,238 men. The rate of women participating in sports is 14.4% of men, which means there are almost seven times as many male professional athletes as women. Opportunity is not limited solely by the number of participants in these five sports, but also by the number of games available in which women can participate.

Table 2. Number of Games Per Season<sup>98</sup>

Sport	Games Per Season (Men)	Games Per Season (Women)	Percentage of Female Opportunities Compared to Male <sup>99</sup>
Football	16 <sup>100</sup>	0 <sup>101</sup>	0%
Basketball	82 <sup>102</sup>	34 <sup>103</sup>	41.5%

<sup>94</sup> *Statistics*, NHL, <http://www.nhl.com/stats/> (last visited Nov. 12, 2016).

<sup>95</sup> NAT'L WOMEN'S HOCKEY LEAGUE, <http://www.nwhl.zone/> (last visited Nov. 12, 2016) (clicking the team section provides access to each individual team's roster; find the total number of player per team and add them together for the total number of players in the league).

<sup>96</sup> *Players*, MLS, <http://www.mlssoccer.com/players> (last visited Nov. 7, 2016).

<sup>97</sup> NAT'L WOMEN'S SOCCER LEAGUE, <http://nwslsoccer.com/> (last visited Nov. 12, 2016) (clicking the team section provides access to each individual team's roster; find the total number of player per team and add them together for the total number of players in the league).

<sup>98</sup> Table 2 only considers the number of games that one team plays during the regular season. Teams that make the playoffs would have additional opportunities to play in both men's and women's sports.

<sup>99</sup> These calculations obtained the percentage of opportunities by dividing the number of games per season for women by the number of games per season for men. For example, to calculate the percentage of opportunities for women compared to men in basketball, divide 34 by 82 to get 41.5% ( $34 \div 82 = 41.5\%$ ).

<sup>100</sup> *Creating the NFL Schedule*, NFL FOOTBALL OPERATIONS, <http://operations.nfl.com/the-game/creating-the-nfl-schedule/> (last visited Nov. 12, 2016).

<sup>101</sup> Because the two women's football leagues are pay to play, women have no opportunities to play as a paid professional. See *infra* note 113.

<sup>102</sup> *NBA Frequently Asked Questions*, NBA (Sept. 23, 2016), <http://www.nba.com/news/faq>.

<sup>103</sup> *Frequently Asked Question*, WNBA, <http://www.wnba.com/faq/> (last visited Nov. 12, 2016).

Sport	Games Per Season (Men)	Games Per Season (Women)	Percentage of Female Opportunities Compared to Male
Baseball/Softball	162 <sup>104</sup>	52 <sup>105</sup>	32.1%
Hockey	82 <sup>106</sup>	21 <sup>107</sup>	25.6%
Soccer	34 <sup>108</sup>	20 <sup>109</sup>	58.8%
Total	376	125	33.2%

Table 2 reveals that, even when women have opportunities to become professional athletes, they are limited in the number of games in which they can participate. Men in professional sports have, on average, three times as many opportunities to play in games than women. Still, soccer is the only sport where women's opportunities to play are not less than half of the men's opportunities.

<sup>104</sup> Through 2016, the season was 162 games; however, some discussions have considered making the season 154 games instead. See Jacob Shafer, *Will 2016 Spell the End of Major League Baseball's 162-Game Season?*, BLEACHER REP. (Jan. 8, 2016), <http://bleacherreport.com/articles/2605942-will-2016-spell-the-end-of-major-league-baseballs-162-game-season>.

<sup>105</sup> The author calculated the number of games per season by counting the number of games played by each team. *League Announces 2016 Regular Season Schedule*, NAT'L PRO FASTPITCH (Dec. 7, 2015), [http://www.profastpitch.com/news/index.html?article\\_id=2460](http://www.profastpitch.com/news/index.html?article_id=2460).

<sup>106</sup> *NHL Announces 2016–17 Season Schedule*, NHL (June 21, 2016), <https://www.nhl.com/news/nhl-2016-2017-season-schedule-announced/c-281003352>.

<sup>107</sup> NAT'L WOMEN'S HOCKEY LEAGUE, *supra* note 95 (clicking on teams, then game schedule for a team, provides quick method for calculating the total number of games).

<sup>108</sup> *How Many Games in an MLS Season?*, MLS, <http://www.mlssoccer.com/glossary/how-many-games-mls-season> (last visited Nov. 12, 2016).

<sup>109</sup> *2016 Schedules*, NAT'L WOMEN'S SOCCER LEAGUE, <http://www.nwslsoccer.com/schedule/2016-schedule> (last visited Nov. 12, 2016).

## B. The Wage Gap

Table 3. Salary Minimum/Maximum<sup>110</sup>

Sport	Minimum Salary (Male)	Maximum Salary (Male)	Salary Cap	Minimum Salary (Female)	Maximum Salary (Female)	Salary Cap
Football	\$450,000 <sup>111</sup>	-	\$155,270,000 <sup>112</sup>	n/a	n/a	n/a <sup>113</sup>
Basketball	\$543,471 <sup>114</sup>	-	\$94,143,000 <sup>115</sup>	\$35,000 <sup>116</sup>	\$107,500 <sup>117</sup>	\$878,000 <sup>118</sup>

<sup>110</sup> Non-contact sports are not included because the contact sport regulation does not affect them. However, discrepancies still exist even in non-contact sports.

<sup>111</sup> See Michael Ginnitti, *NFL Minimum Salaries for 2016 and the Veteran Cap Benefit Rule*, SPORTRAC (Jan. 11, 2016), <https://www.spotrtrac.com/blog/nfl-minimum-salaries-for-2016-and-the-veteran-cap-benefit-rule/> (reporting minimum salaries).

<sup>112</sup> See *2016 Adjusted Team Salary Caps*, NFL PLAYERS ASS'N (Mar. 7, 2016), <https://www.nflpa.com/news/all-news/2016-adjusted-team-salary-caps> (reporting league salary cap).

<sup>113</sup> Instead of being paid, women actually have to pay to play football. See Adena Andrews, *Women's Football Players' Passion Is Priceless*, ESPNW (July 30, 2011), <http://www.espn.com/espnw/features/article/6809422/women-football-players-passion-priceless> ("Participation in the WFA is contingent upon meeting a \$1,000 player fee, which is required of all athletes who want to play.").

<sup>114</sup> *What's the Minimum NBA Salary?*, HOOPSHYPE (Oct. 12, 2015), <http://hoopshype.com/2015/10/12/whats-the-minimum-nba-salary/> (reporting minimum salaries over the years).

<sup>115</sup> *NBA Salary Cap for 2016–17 Set at \$94.143 Million*, NBA (July 2, 2016), <http://www.nba.com/2016/news/07/02/nba-salary-cap-set/> (reporting the NBA's salary cap); see *2016–17 NBA Player Contracts*, BASKETBALL REFERENCE, <http://www.basketball-reference.com/contracts/players.html> (last visited Nov. 13, 2016) (stating that the average salary for NBA players is \$5,309,315); see also *NBA Salary Cap History*, BASKETBALL REFERENCE, <https://www.basketball-reference.com/contracts/salary-cap-history.html> (last visited Mar. 3, 2018).

<sup>116</sup> Maurice Garland, *Top WNBA Salaries vs NBA Salaries: Who Gets Paid More?*, BLACK ENTERPRISE (Dec. 28, 2012), <http://www.blackenterprise.com/lifestyle/wnba-player-salaries-vs-nba-salaries/>.

<sup>117</sup> David Berri, *Basketball's Gender Wage Gap Is Even Worse Than You Think*, VICE SPORTS, (Aug. 12, 2015), [https://sports.vice.com/en\\_us/article/basketballs-gender-wage-gap-is-even-worse-than-you-think](https://sports.vice.com/en_us/article/basketballs-gender-wage-gap-is-even-worse-than-you-think).

<sup>118</sup> Garland, *supra* note 116 (discussing the salary cap and minimum salary in 2012).

Sport	Minimum Salary (Male)	Maximum Salary (Male)	Salary Cap	Minimum Salary (Female)	Maximum Salary (Female)	Salary Cap
Baseball/ Softball	\$507,500 <sup>119</sup>	-	\$189,000,000 <sup>120</sup>	\$6,000 <sup>121</sup>	-	\$150,000 <sup>122</sup>
Hockey	\$575,000 <sup>123</sup>	\$14,600,000 <sup>124</sup>	\$73,000,000 <sup>125</sup>	\$10,000 <sup>126</sup>	\$25,000 <sup>127</sup>	\$270,000 <sup>128</sup>
Soccer	\$62,500 <sup>129</sup>	-	\$3,660,000 <sup>130</sup>	\$7,200 <sup>131</sup>	\$39,700 <sup>132</sup>	\$278,000 <sup>133</sup>

Table 3 highlights the pay discrepancies between women and men in their respective sports. There is no sport in which the women's *maximum* salary is more than the men's *minimum* salary in that respective sport. A woman playing in the Women's National Basketball Association ("WNBA") will only earn between 6.4% to 19.8% of what a man playing in the National Basketball Association ("NBA") will

<sup>119</sup> Associated Press, *MLB Minimum Salary Remains at \$507,500 for 2016*, ESPN (Nov. 18, 2015), [http://www.espn.com/mlb/story/\\_/id/14161690/mlb-minimum-salary-remains-507500-2016](http://www.espn.com/mlb/story/_/id/14161690/mlb-minimum-salary-remains-507500-2016) (discussing minimum salary in the MLB).

<sup>120</sup> See Maury Brown, *Breaking Down over \$400 Million in MLB Luxury Tax Penalties Since 2003*, FORBES (Dec. 3, 2015), <http://www.forbes.com/sites/maurybrown/2015/12/03/breaking-down-over-400-million-in-mlb-luxury-tax-penalties-since-2003/#2f180964175a>.

<sup>121</sup> No minimum salary was available; however, the average salary for a player is \$5,000–\$6,000 per season. To be as conservative as possible, the \$6,000 figure was used as the minimum salary. See *FAQ's*, NAT'L PRO FASTPITCH, <http://demo.profastpitch.com/about/faqs/> (last visited Nov. 12, 2016).

<sup>122</sup> See Kelsey McKinney, *When Will the Women of Professional Softball Get the Attention They Deserve?*, SPLINTER (Sept. 5, 2016), <http://fusion.net/story/343825/womens-professional-softball-league/> (discussing NPF salary cap information).

<sup>123</sup> *NHL Minimum Wage & Maximum Wage by Year*, PUCK REP. (June 22, 2017), <http://www.puckreport.com/2009/07/nhl-minimum-wage-maximum-wage-by-year.html>.

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

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

<sup>126</sup> See Matt Larkin, *And the Highest-Paid Player in Women's Hockey Is . . .*, HOCKEY NEWS, (Sept. 28, 2015), <http://www.thehockeynews.com/news/article/and-the-highest-paid-player-in-womens-hockey-is>.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See *Roster Rules, and Regulations*, MLS PRESS BOX, (Nov. 7, 2016), <http://pressbox.mlssoccer.com/content/roster-rules-and-regulations> (the minimum salary figure represents the minimum on the Senior Roster).

<sup>130</sup> *Id.*

<sup>131</sup> See *2016 Roster Rules*, NAT'L WOMEN'S SOCCER LEAGUE, <http://nwslsoccer.com/about/2016-roster-rules> (last visited Nov. 12, 2016).

<sup>132</sup> *Id.*

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

earn if making the minimum salary.<sup>134</sup> A woman playing in the National Pro Fastpitch (“NPF”) making the minimum salary will earn 1.2% of what a man playing in Major League Baseball (“MLB”) will earn.<sup>135</sup> A woman playing in the National Women’s Hockey League (“NWHL”) will earn between 1.7% and 4.3% of what a professional male player making the minimum salary in the National Hockey League (“NHL”) will earn.<sup>136</sup> Women playing in the National Women’s Soccer League (“NWSL”) will earn between 11.5% and 63.5% compared to their male counterparts making the minimum salary in Major League Soccer (“MLS”).<sup>137</sup> The high end of the range—compensation at 63.5% of male counterparts—is still well below the national average for pay discrepancy in the workplace.<sup>138</sup>

Comparing men and women athletes without regard to their respective sports does not yield more favorable results. With the exception of the WNBA and the MLS, no sports have a higher maximum salary for a woman than the minimum salary for a man. In the WNBA-MLS match up, a professional women’s basketball player making the maximum salary would earn 0.58 times more than a men’s professional soccer player making the minimum salary.<sup>139</sup> Finally, the salary caps for the entire women’s softball (\$150,000), hockey (\$270,000), and soccer (\$278,000) teams are less than the minimum salary that a man could make playing football (\$450,000), basketball (\$543,471), baseball (\$507,500), or hockey (\$575,000).<sup>140</sup> This means that the combined salaries for women on their respective teams are less than the pay of one male player making the minimum amount required by their respective league.

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<sup>134</sup> The author calculated this range by dividing the women’s minimum salary by the men’s minimum salary ( $35,000 \div 543,471 = 6.4\%$ ) followed by the women’s maximum salary by the men’s minimum salary ( $107,500 \div 543,471 = 19.8\%$ ). The author rounded these numbers to the nearest tenth.

<sup>135</sup> The author calculated this percentage by dividing the women’s minimum salary by the men’s minimum salary ( $6,000 \div 507,500 = 1.2\%$ ).

<sup>136</sup> The author calculated this range by dividing the women’s minimum salary by the men’s minimum salary ( $10,000 \div 575,000 = 1.7\%$ ) followed by the women’s maximum salary by the men’s minimum salary ( $25,000 \div 575,000 = 4.3\%$ ). The author rounded these numbers to the nearest tenth.

<sup>137</sup> The author calculated this range by dividing the women’s minimum salary by the men’s minimum salary ( $7,200 \div 62,500 = 11.5\%$ ) followed by the women’s maximum salary by the men’s minimum salary ( $39,700 \div 62,500 = 63.5\%$ ). The author rounded these numbers to the nearest tenth.

<sup>138</sup> GENDER WAGE GAP, *supra* note 1.

<sup>139</sup> This author calculated this figure by dividing the men’s soccer minimum salary by the women’s basketball maximum salary ( $62,500 \div 107,500 = 0.58$ ).

<sup>140</sup> See *supra* Table 3.

Table 4. Salary for Men and Women Per Game<sup>141</sup>

Sport	Minimum Male Salary Per Game	Minimum Female Salary Per Game	Maximum Female Salary Per Game	Adjusted Minimum Female Salary	Adjusted Maximum Female Salary
Football	\$28,125	n/a	n/a	n/a	n/a <sup>142</sup>
Basketball	\$6,628	\$1,029	\$3,162	\$84,378	\$259,284
Baseball/Softball	\$3,133	\$115	n/a	\$18,630	n/a
Hockey	\$7,012	\$476	\$1,190	\$39,032	\$97,580
Soccer	\$1,838	\$360	\$1,985	\$12,240	\$67,490

The pay discrepancy only marginally decreases when accounting for the difference in the number of games played between men and women. Table 4 depicts the amount of money per game male athletes earned by dividing the total salary by the number of games played.<sup>143</sup> The same process yields the results for the female athletes' minimum and maximum salary caps listed in the table. To determine the adjusted minimum and maximum salaries for women if they were afforded the same opportunities as men to play, the total dollar amount for the female minimum and maximum salary per game was multiplied by the total number of men's games.<sup>144</sup> For example, to determine the adjusted minimum salary for a professional women's basketball player, the total salary (\$35,000) was divided by the number of total games played by a women's professional basketball player (thirty-four), which yields the amount earned per game (\$1,029). The amount earned per game (\$1,029) was multiplied by the total number of games played by a men's professional basketball player (eighty-two), yielding the adjusted minimum salary for a women's professional basketball player if she played the same amount of games as a men's professional basketball player (\$84,378).

<sup>141</sup> For an example of how the author calculated the figures in this Table, see *infra* note 143.

<sup>142</sup> See *supra* note 89.

<sup>143</sup> For example, a male basketball player earning \$543,471 and playing eighty-two games in a season would earn \$6,628 per game ( $543,471 \div 82 = \$6,628$ ). The author rounded these numbers to the nearest whole number to calculate the total.

<sup>144</sup> This is based on the assumption that the amount paid to a female professional athlete would hold steady as opposed to decrease or increase with an increase in the amount of games being played.

Table 5. Adjusted Minimum and Maximum Female Salaries Accounting for the Differences in the Number of Games Played

Sport	Minimum Salary (Male) <sup>145</sup>	Adjusted Minimum Female Salary <sup>146</sup>	Adjusted Maximum Female Salary <sup>147</sup>	Adjusted Discrepancy Range (min – max) <sup>148</sup>
Football	\$450,000	n/a	n/a	n/a <sup>149</sup>
Basketball	\$543,471	\$84,378	\$259,284	15.5% – 47.7%
Baseball/ Softball	\$507,500	\$18,630	n/a	3.7% <sup>150</sup>
Hockey	\$575,000	\$39,032	\$97,580	6.8% – 17.0%
Soccer	\$62,500	\$12,240	\$67,490	19.6% – 108.0%

The adjusted pay discrepancy ranges reveal that, even after accounting for the differences in the amount of games played, the percentage that a women's professional athlete makes is well below the national average. This holds true in all cases except when comparing the maximum adjusted salary of a woman playing in the NWSL against the minimum salary of a man playing in the MLS; a woman playing in the NWSL making the maximum salary would make 8% more than a man playing in the MLS making the minimum salary.

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<sup>145</sup> See *supra* Table 3.

<sup>146</sup> See *supra* Table 4.

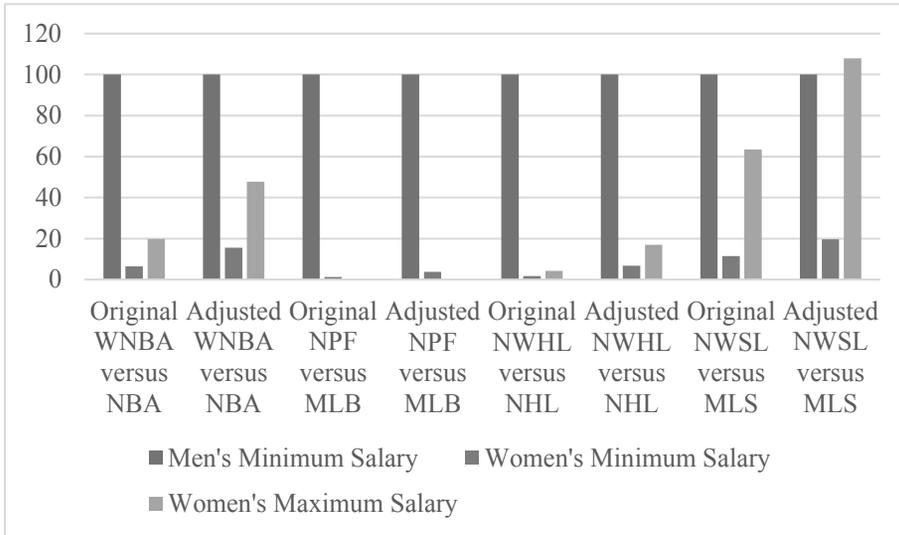
<sup>147</sup> See *supra* Table 4.

<sup>148</sup> The calculations were made by dividing the new Adjusted Minimum Female Salary by the Minimum Salary for a male athlete. For example, the author calculated the Adjusted Discrepancy Range for Basketball as follows: Minimum Adjusted Discrepancy is 15.5% ( $84,378 \div 543,471 = 15.5\%$ ); Maximum Adjusted Discrepancy is 47.7% ( $259,284 \div 543,471 = 47.7\%$ ). The author rounded these numbers to the nearest tenth.

<sup>149</sup> See *supra* note 89.

<sup>150</sup> The range is unavailable because the maximum salary for a woman playing in the National Pro Fastpitch league is unavailable. See *FAQ's, supra* note 121; see also *supra* notes 121–22.

Figure 1. Original and Adjusted Pay Discrepancy Percentages Versus Men's Minimum Salary<sup>151</sup>



The original pay discrepancy range for women playing in the WNBA was 6.4% to 19.8%.<sup>152</sup> The increase in game opportunity increased that range to between 15.5% and 47.7%.<sup>153</sup> This cuts into the pay discrepancy by 9.1% for a woman earning the minimum salary and 27.9% for a woman making the maximum.<sup>154</sup> A woman making the minimum in the NPF would receive a 2.5% pay increase from 1.2% up to 3.7%.<sup>155</sup> Women's professional hockey players in the NWHL would receive a 5.1% to 12.7% increase,<sup>156</sup> thus increasing the original calculated discrepancy range from 1.7% to 4.3% to the new adjusted discrepancy range of 6.8% to 17.0%.<sup>157</sup> Finally, a woman

<sup>151</sup> This Figure depicts the original calculated discrepancy range percentages, *supra* notes 134–37, with the adjusted discrepancy range percentages from Table 5. The Figure also provides the minimum salary for men (depicted by the 100% marker in each respective sport) to help visualize the remaining pay discrepancy even after adjusting for the number of games played.

<sup>152</sup> See *supra* note 134.

<sup>153</sup> See *supra* Figure 1.

<sup>154</sup> The author calculated this percentage by subtracting the Original Discrepancy Range from the Adjusted Discrepancy Range: Minimum (15.5% – 6.4% = 9.1%); Maximum (47.7% – 19.8% = 27.9%). See *supra* Figure 1 for a visual depiction.

<sup>155</sup> See *supra* Table 5.

<sup>156</sup> The author calculated this percentage by subtracting the Original Discrepancy Range from the Adjusted Discrepancy Range: Minimum (6.8% – 1.7% = 5.1%); Maximum (17% – 4.3% = 12.7%). See *supra* Figure 1 for a visual depiction.

<sup>157</sup> Compare *supra* note 136 (calculating the original range) with *supra* Table 5.

playing in the NWSL would receive an additional 8.1% to 44.5%,<sup>158</sup> increasing the original calculated discrepancy range from 11.5% to 63.5% to the new adjusted discrepancy range of 19.6% to 108%.<sup>159</sup>

## V. SOLUTION: CHANGING THE CONTACT SPORTS EXEMPTION

The discrepancies in pay and opportunity for women in professional sports will not dissipate until the culture in the United States shifts to recognize women as competitors in sports. The first cultural shift occurred after the passage of Title IX. However, that law also solidified the perception that women are inferior to men in sports.<sup>160</sup> To change the culture again, Congress must alter the contact sports exemption to allow women to participate in men's sports without losing the opportunity to sustain their own separate and distinct league.

### A. Rewriting the Contact Sports Exemption

To effectuate the change, this Note proposes rewriting the contact sports exemption to encompass two changes. The first change is adding the following sentence: "However, operation of separate teams shall not bar a woman, who is qualified, from trying out for the men's contact sports team." This change alters 34 C.F.R. Section 106.41(b), 45 C.F.R. Section 86.41(b), and 31 C.F.R. Section 28.450 so that the availability of a women's team can no longer bar women from participating in men's sports.

The second change requires removing the words "unless the sport involved is a contact sport" at the end of the sentence that currently reads:

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*.<sup>161</sup>

This redaction serves two purposes. First, it removes wording from the regulation that courts have consistently held violates the Equal Protection Clause of the Fourteenth Amendment.<sup>162</sup> Second, it would provide for a harmonious reading of the regulation

<sup>158</sup> The author calculated this percentage subtracting the Original Discrepancy Range from the Adjusted Discrepancy Range: Minimum (19.6% – 11.5% = 8.1%); Maximum (108% – 63.5% = 44.5%). See *supra* Figure 1 for a visual depiction.

<sup>159</sup> Compare *supra* note 137 (calculating the original range) with *supra* Table 5.

<sup>160</sup> See Messner et al., *Separating the Men from the Girls*, *supra* note 37.

<sup>161</sup> 34 C.F.R. § 106.41(b) (2018); 45 C.F.R. § 86.41(b) (2018); accord 31 C.F.R. § 28.450(b) (2018).

<sup>162</sup> See, e.g., *Beattie v. Line Mountain Sch. Dist.*, 992 F. Supp. 2d 384, 395 (M.D. Pa. 2014) (stating that the school's justifications "although well-intentioned, are simply not sufficient grounds for a gender-based classification under the Equal Protection Clause."); *Lantz v. Ambach*, 620 F. Supp. 663, 666 (S.D.N.Y. 1985) ("To the extent that the challenged regulation deprives her of the opportunity to try out for the junior varsity football squad, it operates to abridge her right under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the defendants will be enjoined from complying with it or enforcing it."); *Hoover v. Meiklejohn, Jr.*, 430 F. Supp. 164, 170–71 (D. Colo. 1977) ("It is an inescapable conclusion that

and would ensure that the addition that provides women the opportunity to try out for men's contact sports would not be undermined. Placed together, the amended section would read:

(b) Separate Teams. . . . [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, operation of separate teams shall not bar a woman, who is qualified, from trying out for the men's contact sports team. In addition, 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. 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.

#### *B. Application: Revisiting O'Connor*

After changing the contact sports regulation to allow qualified women to play on men's teams, players like Karen O'Connor, who wanted to try out for the boy's sixth grade basketball team, would have new opportunities to play and develop. O'Connor was a qualified player; "a professional basketball coach who observed her play rated her ability as equal to or better than a female high school sophomore and equal to that of a male eighth-grade player."<sup>163</sup> O'Connor would have not only been an asset to the team,<sup>164</sup> but she may have also been able to break down the cultural stereotypes that perpetuate the belief that women are inferior to men in sports.

#### *C. The Implications on Professional Sports*

Currently, male professional sports do not ban women from participating in their leagues.<sup>165</sup> Women rarely play in men's leagues; but, when the situation does occur, controversy often arises as to whether or not a woman is good enough to play in the men's league.<sup>166</sup> The most recent example occurred in 2013, after Brittney Griner finished her collegiate career at Baylor.<sup>167</sup> Upon her completion, the sports world

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the complete denial of any opportunity to play interscholastic soccer is a violation of the plaintiff's right to equal protection of the law under the Fourteenth Amendment.").

<sup>163</sup> O'Connor v. Bd. of Educ. of Sch. Dist. No. 23, 645 F.2d 578, 583 (7th Cir. 1980).

<sup>164</sup> See *id.*

<sup>165</sup> See Jennifer Polish, *Women in the Big Leagues: Can They Legally Play on "Men's" Teams?*, LAW STREET (July 9, 2015), <http://lawstreetmedia.com/issues/entertainment-and-culture/women-big-leagues-can-legally-play-mens-teams/> (stating that there are no "regulations—legal or league-based—that actually prevent women from playing in professional "male" sports, even the NBA and NFL").

<sup>166</sup> See Danica Patrick, *supra* note 42; see also Jane McManus, *Can Women Play with Men?*, ESPNW (May 9, 2011), <http://www.espn.com/espnw/news/article/6495612/women-pro-sports-women-play-men>.

<sup>167</sup> *Baylor Bears Women's Basketball*, BAYLOR U., [http://www.baylorbears.com/sports/w-baskbl/mtt/griner\\_brittney00.html](http://www.baylorbears.com/sports/w-baskbl/mtt/griner_brittney00.html) (last visited Mar. 3, 2018).

debated extensively whether she was capable of playing in the NBA.<sup>168</sup> Shortly after the debate started, Dallas Mavericks' owner Mark Cuban considered the idea of drafting her.<sup>169</sup>

The debate over Griner highlights, on a national scale, how deeply entrenched the view that women are inferior to men in sports is in the culture in the United States. This cultural construct will not change unless society provides women the opportunity to play with men when they are young. Society must normalize the idea that women can be equally as competitive as men and must do so starting at a young age. Some promising examples demonstrate the possibility of normalizing this idea, such as in sports outside of educational institutions where parents pay for their children to play in leagues not affiliated with a school.<sup>170</sup> However, effectuating the necessary change would be difficult if the federal government maintains its contact sports regulation that reinforces this idea that women are inferior in sports.

#### D. Addressing Possible Concerns

The proposed changes to the contact sports exemption implicate three concerns. The first, and most troublesome, concern is that men would use the provision to be able to play on the women's teams, which would have the effect of diminishing opportunities for women to participate in sports.<sup>171</sup> However, judges have already made arguments that address and dismiss this concern based on how the regulation currently is written.<sup>172</sup>

In *Yellow Springs Exempted Village School Board of Education v. Ohio High School Athletic Association*, dissenting Judge Nathaniel Jones argued that allowing women to participate on men's teams when there is an equal opportunity would not "result in male domination of female sports programs."<sup>173</sup> Instead, he argued "that separate and exclusive female teams are constitutionally permissible, so that women

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<sup>168</sup> Compare Greg Stardard, *2013 NBA Draft: Brittney Griner Can Play in the NBA, if Given Right Opportunity*, BLEACHER REP. (Apr. 7, 2013), <http://bleacherreport.com/articles/1596102-2013-nba-draft-brittney-griner-can-play-in-the-nba-if-given-right-opportunity#>, with Kate Fagan, *No Woman, Not Even Griner, Could Play in NBA*, ESPNW (May 28, 2013), <http://www.espn.com/espnw/news-commentary/article/9133361/espnw-no-woman-not-brittney-griner-other-play-nba>.

<sup>169</sup> See Tim MacMahon, *Mark Cuban May Draft Brittney Griner*, ESPN (Apr. 3, 2013), [http://www.espn.com/dallas/nba/story/\\_/id/9127664/mark-cuban-give-brittney-griner-opportunity-dallas-mavericks](http://www.espn.com/dallas/nba/story/_/id/9127664/mark-cuban-give-brittney-griner-opportunity-dallas-mavericks). Ultimately, Brittney Griner was the overall first draft pick in the WNBA in 2013. *WNBA Draft 2013*, WNBA, <http://www.wnba.com/archive/wnba/draft/2013/index.html> (last visited Mar. 3, 2018).

<sup>170</sup> See Melissa Issacson, *Who Says Girls Can't Play Football? Certainly Not 13-Year-Old Auburn Roberson*, ESPNW (Nov. 9, 2016), <http://www.espn.com/espnw/sports/article/18004876/who-says-girls-play-football-certainly-not-13-year-old-auburn-roberston> (featuring a thirteen-year-old girl playing quarterback on an all-boys team).

<sup>171</sup> Cf. *Yellow Springs Exempted Vill. Sch. Dis. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 665 (6th Cir. 1981) (Jones, J., dissenting).

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

<sup>173</sup> *Id.*

would have the choice of competing on an ‘open team’ or a single-sex female team.”<sup>174</sup> Ultimately, he found that “the equal protection clause requires schools to give qualified female competitors the opportunity to play on the ‘male’ interscholastic varsity team.”<sup>175</sup> This is in part based on the framing of the question. Judge Jones believed that to answer whether or not there is equal opportunity, “[t]he focus must be placed on the quality of the competitive experience,”<sup>176</sup> and when top female athletes “are denied this opportunity by being restricted to a lower level of competition, equal opportunity is not provided.”<sup>177</sup>

The second concern is that this provision would diminish opportunities for men to play sports in educational institutions.<sup>178</sup> However, this argument has no factual basis. Research has shown that men still dominate participation in sports, despite women making up the majority of the population.<sup>179</sup> At the collegiate level, the NCAA reported that in the 2015–2016 season, “[t]here [were] still more male student-athletes (56.5[%] of the total) than female student-athletes participating in championship sports.”<sup>180</sup>

Additionally, men still receive the majority of funding in sports despite Title IX’s objective of creating equal opportunities for women.<sup>181</sup> In the NCAA’s most recent gender equity study published in 2012, the NCAA calculated the median funding that

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<sup>174</sup> *Id.* (citing *Gomes v. Rhode Island Interscholastic League*, 469 F. Supp. 659 (D.R.I.), *vacated and dismissed as moot at the time of appeal*, 604 F.2d 733 (1st Cir. 1979)).

<sup>175</sup> *Id.* at 666.

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

<sup>177</sup> *Id.*

<sup>178</sup> A number of male collegiate athletes claim that Title IX limits their opportunity to play because their teams are getting cut to shift spending to female sports to maintain compliance, further compounding these problems. See Michael Lancaster, *Title IX Laws and Intercollegiate Athletics*, ATHNET, <http://www.athleticscholarships.net/title-ix-college-athletics.htm> (last visited Mar. 3, 2018) (“I have had the opportunity to compete at the NCAA Division I level at Nicholls State University and Highpoint University for track and cross-country. Unfortunately, I had my scholarship as well as my fellow male teammates’ scholarships cut at Nicholls State University so that the athletic program would be NCAA Title IX compliant.”).

<sup>179</sup> See LINDSAY M. HOWDEN & JULIE A. MEYER, U.S. CENSUS BUREAU, AGE AND SEX COMPOSITION: 2010 (2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf> (showing that the American population is 50.8% women to 49.2% male). The census is a conservative number; however, in colleges in 2013, women made up 57% of the population. *Fast Facts*, IES: NCES, (2016), <http://nces.ed.gov/fastfacts/display.asp?id=98>.

<sup>180</sup> See NAT’L COLLEGIATE ATHLETIC ASS’N, NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 1981–82 TO 2015–16, at 8 (2016), <http://www.ncaapublications.com/productdownloads/PR1516.pdf> (showing the total number of male athletes was 274,973 and the total number of female athletes was 211,886); NAT’L FED’N OF HIGH SCH. ASS’NS, 2014–15 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY 55 (2016), [http://www.nfhs.org/ParticipationStatics/PDF/2014-15\\_Participation\\_Survey\\_Results.pdf](http://www.nfhs.org/ParticipationStatics/PDF/2014-15_Participation_Survey_Results.pdf) (showing that total participation in high school athletics was 7,807,047, of which 4,519,312 were male participants and 3,287,735 were female participants).

<sup>181</sup> See NAT’L COLLEGIATE ATHLETIC ASS’N, NCAA GENDER-EQUITY REPORT 2004–2010 (2012), <http://www.ncaapublications.com/productdownloads/GEQS10.pdf>.

institutions provided its athletes based on the three divisions of competition.<sup>182</sup> The study compared the number of dollars that men and women received in the following categories: overall and recruiting expenses, athletically related student aid, head coach salaries, and assistant coach salaries.<sup>183</sup> At each of the three levels, men received more funding than women.<sup>184</sup> At the highest level of competition, Division I, the overall spending on men's sports was 2.55 times greater than the spending for women's sports.<sup>185</sup> In Division II competition, the overall spending on men's sports was 1.35 times greater than the spending for women's sports.<sup>186</sup> In Division III, the lowest level of competition where member institutions cannot offer any athletically-related student aid, spending on men's sports was also 1.35 times greater than spending on women's sports.<sup>187</sup> The only category in which women were provided more funding than men was for athletically-related student aid in Division I sports when football was taken out of the statistic.<sup>188</sup>

The third and final concern is the physiological differences between men and women. However, when considering ability, plenty of male athletes who cannot participate at a higher level are still afforded the opportunity to try.<sup>189</sup> According to the NCAA, out of the "nearly 8 million students currently participating in high school athletics in the United States, only 480,000 of them will compete at NCAA schools."<sup>190</sup> This translates to only 0.06% of high school student athletes participating at the collegiate level.<sup>191</sup> Under half of the 480,000 athletes are women.<sup>192</sup> If the top female

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<sup>182</sup> *Id.* (dividing Division I schools into FBS and FCS to account for further discrepancy in spending).

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

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 37 (calculating the number by dividing the total amount of dollars spent on the men's teams, \$20,415,600, by the total amount of dollars spent on the women's teams, \$8,006,000).

<sup>186</sup> *Id.* at 79 (calculating the number by dividing the total amount of dollars spent on the men's teams, \$1,692,900, by the total amount of dollars spent on the women's teams, \$1,252,700).

<sup>187</sup> *Id.* at 93 (calculating the number by dividing the total amount of dollars spent on the men's teams, \$754,900, by the total amount of dollars spent on the women's teams, \$557,400).

<sup>188</sup> *Id.* at 60 (noting that the median total amount spent per institution was \$1,443,400 for men and \$1,681,800 for women).

<sup>189</sup> See *Probability of Competing Beyond High School*, NCAA (last visited Nov. 16, 2016), <http://www.ncaa.org/about/resources/research/probability-competing-beyond-high-school> (stating the amount of high school athletes that play collegiate sports); see also *Estimated Probability of Competing in Professional Athletics*, NCAA (Apr. 25, 2016), <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> (reporting on the percentage of collegiate athletes that go on to play professional sports).

<sup>190</sup> *Probability of Competing Beyond High School*, *supra* note 189.

<sup>191</sup> The author calculated this figure by dividing the number of collegiate athletes (480,000) by the number of high school athletes (8,000,000).

<sup>192</sup> See *Probability of Competing Beyond High School*, *supra* note 189.

athletes had the opportunity to try out for the men's teams, then they would surely be able to compete.<sup>193</sup> Society cannot overcome the stereotype that women need protection from the masculinity of sports unless there is a cultural change that starts with opportunities for women to play contact sports with men when they are qualified to do so.<sup>194</sup>

## VI. CONCLUSION

By changing the contact sports exemption, the culture would start to shift toward more acceptance of women as equals in sports. This would have a direct benefit of creating more opportunities for women at every level of the game and would also allow for women to close the pay gap at the professional level. This change would occur in two ways. First, the elite athletes in the women's game would have the opportunity to compete with the men and, thus, would benefit from the large minimum salaries provided. Simultaneously, the cultural shift would create more interest in the women who continue to play in the separate leagues, which would bring more revenue and attention to women's sports. However, these opportunities are only possible if the currently pervasive inferiority culture is broken. Rewriting the contact sports exemption would provide this opportunity.

The limited scope of this Note left some ideas not fully explored and indicates areas where further researchers can expand on the topic of this Note. First, researchers should explore each individual contact sport to see where physiological gaps in median players reside. Such research would provide additional support for allowing top female athletes to participate and develop their skills further. Second, researchers should explore the differences in the physical and strategic side of sports. Such research could show where women could garner a competitive advantage against men. Finally, researchers should conduct survey research to gather more information to see what percentage of the population views women as inferior athletes. Additional research and the proposed regulatory changes in this Note could aid in bringing women the equal opportunities they deserve.

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<sup>193</sup> See *O'Connor v. Board of Education*, 645 F.2d 578, 579 (7th Cir. 1980) (observing that "Karen is a good athlete; a professional basketball coach who observed her play rated her ability as equal to or better than a female high school sophomore and equal to that of a male eighth-grade player.").

<sup>194</sup> See *Lafler v. Athletic Bd. of Control*, 536 F. Supp. 104, 106 (W.D. Mich. 1982) (furthering the stereotype that women need to be protected by finding "the real differences between the male and female anatomy are relevant in considering whether men and women may be treated differently with regard to their participation in boxing.").

