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**Engendering Trans Inclusion in Interscholastic and Intercollegiate Athletics: A Critical Analysis of Sex and Gender in Sports, Title IX Protections post-Bostock, and Intersectional Methods of Antidiscrimination Law**

Jack Mackey

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Engendering Trans Inclusion in Interscholastic and Intercollegiate Athletics: A Critical Analysis  
of Sex and Gender in Sports, Title IX Protections post-*Bostock*, and Intersectional Methods of  
Antidiscrimination Law

A thesis submitted in partial fulfillment of the requirement  
for the degree of Bachelor of Arts in Gender, Sexuality, and Women's Studies  
from William & Mary

by

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May 13, 2021

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Gender, Sexuality, and Women's Studies

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May 13, 2021

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I also want to thank my parents, who raised me to be ever-critical of the world around me, especially when I see instances of injustice. I am forever grateful for their love and support, and for the sacrifices they have made for me. Thank you also to my friends, especially those who have supported me during my time at William & Mary. I am where I am today because of all of you.

I am also grateful for every coach and teammate I have had during my time as a student-athlete, both before and during my participation in intercollegiate athletics. I have found a unique sense of community and comradery in sports because of you all. And this community has not only made me a better athlete, but also a better person.

Thank you all.

“I have been having to explain myself since I was three or four years old. Texas legislators have been attacking me since I was in pre-K. I am in fourth grade now. When it comes to bills that target trans youth, I immediately feel angry. It’s been very scary and overwhelming. It just...it makes me sad that some politicians use trans kids like me to get votes from people who hate me just because I exist.”

- Kai Shappley, age 10, testifying before the Texas Senate in opposition to Senate Bill 1646, which would characterize gender-affirming healthcare as “child abuse”

“I hope that the next generation of trans youth doesn’t have to fight the fights that I have. I hope they can be celebrated when they succeed, not demonized.”

- Andraya Yearwood, Intervenor in *Soule v. Connecticut*

“I am a lifelong Missourian, I’m a business lawyer, I’m a Christian, I’m the son of a Methodist minister, I’m a husband, I’m the father of four kids: two boys, two girls, including a wonderful beautiful transgender daughter. Today happens to be her birthday and I chose to be here. [...] She plays on a girls volleyball team, she has friendships, she’s a kid. [...] In so many ways this legislation is a solution in search of a problem. [...] I came here today as a parent to share my story. I need you to understand that this language, if it becomes law, will have real effects on real people. It will affect my daughter. It will mean she cannot play on the girls volleyball team or dance squad or tennis team. It will mean she will not have the opportunity, that all of us had, to be part of a team. To be part of something bigger, greater than ourselves. I ask you: please don’t take that away from my daughter or the countless others like her out there. Let them have their childhoods. Let them be who they are.”

- Brandon Boulware, father of a trans daughter, testifying before the Missouri House of Representatives in opposition to HJR 53, which would bar trans kids from playing on sports teams in accordance with their gender identity

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**preface**

After the Supreme Court's 2015 ruling in *Obergefell v. Hodges*, which effectively legalized same-sex marriage in the United States, socially conservative advocacy groups quickly turned their efforts to the targeting of transgender people. On March 23, 2016, North Carolina signed into law House Bill 2 (HB 2), which mandated that individuals in government buildings (including public schools) use the restroom according to the sex assigned to them at birth as identified on their birth certificates ("House Bill 2 / SL 2016-3 (2016 Second Extra Session) - North Carolina General Assembly" 2016). Bills like HB 2 entered a number of state legislatures across the country between 2016 and 2018, most of which were defeated at either the legislative or judicial level. *Grimm v. Gloucester County School Board*, in which Gavin Grimm (a trans boy) was prevented from using the boy's restroom at his high school in Virginia, is probably the most widely-known legal case about trans folks being prevented from using sex-segregated bathrooms in public buildings ("Grimm v. Gloucester County School Board" 2021). That case is ongoing, and Gavin has since graduated from high school.

Since 2018, conservative advocacy groups have moved into the arena of locker rooms and school-sponsored athletics to pursue legislative and legal action against the inclusion of trans people in spaces according to their gender identity. As a result, there are number of ongoing efforts to, in some way, bar trans youth and young adults from competing in interscholastic and/or intercollegiate athletics. These efforts are not isolated incidents, they are the product of years of lobbying and policymaking pushed by conservative advocacy groups like the Heritage Foundation and the Alliance Defending Freedom. They are projects of a conservative movement that has historically sought to uphold racial segregation, restrict access to reproductive healthcare, and criminalize queer and transgender people's lives.

The paper that follows presents an attempt to better understand how these attacks on trans people, particularly trans youth and young people, are being legally articulated in the context of antidiscrimination law. I specifically take up differing interpretations of Title IX that either suggest the statute implores us to discriminate against trans kids or protects them from such discrimination. I also choose to focus on how these arguments about Title IX and protection from discrimination on the basis of sex appear in the context of interscholastic and intercollegiate athletics. In part, I have made this choice because of my own experiences as a queer student-athlete seeing instances of trans exclusion in mainstream athletics discourse. However, I have also chosen to focus on trans (in/ex)clusion in school-sponsored sports because I believe Title IX offers a unique opportunity for us to reimagine sex discrimination in the United States, to embrace more intersectional and prescriptive methods of interpreting the law, and to effect broader change in the ways we understand the role(s) of antidiscrimination law in ensuring sociolegal equality. I also operate within a feminist analytical framework, placing gender at the center of my approach to these issues of law and sports.

Chapters I, II, and III offer histories and overviews of relevant fields of study in the context of the inclusion of transgender student-athletes in school-sponsored sports. Chapter I starts with a brief introduction to feminist and transgender studies' approaches to sex/gender distinctions generally, and the space of sports specifically. It also describes how feminist legal scholars have recently rearticulated the value of engaging with antidiscrimination law as a mode of substantive, material change for queer and trans folks. Chapter II moves more directly into the world of sports by historicizing the ways in which sex and gender have been regulated at elite levels of competition. State legislatures across the country have proposed mechanisms of "sex testing" that have either been deployed in international elite competition historically or continue



to be used today. Yet, the history of sex/gender verification testing reveals how illusory and incoherent categories of sex and gender actually are, calling into question the ways in which they are deployed as means by which to either discriminate against trans folks in sports explicitly or implicitly bar them from competition in the first place. Then, Chapter III turns to the history of Title IX to help explain how language regarding protection(s) from discrimination on the basis of sex came to influence the development of school-sponsored sports, namely through the proactive expansion of opportunities for girls and women to participate in interscholastic and intercollegiate athletics.

Chapters IV, V, and VI subsequently take analytical approaches to two ongoing legal disputes—*Soule v. Connecticut* and *Hecox v. Little*—regarding the inclusion of transgender student-athletes, specifically trans girls and women, in sports. Chapter IV takes a closer look at the language of sex and gender in *Soule* and *Hecox* and explores the importance of such language in legal claims predominantly about “sex discrimination.” Chapter V moves to a recent rearticulation of “sex discrimination” made by the United States Supreme Court in *Bostock v. Clayton County*. In that case, the Court reasoned that Title VII protections from sex discrimination in the workplace effectively included protections from discrimination on the basis of sexual orientation and transgender status. *Bostock* has since been understood as a victory for LGBTQ rights. I take a closer look at the textualist approach the Court takes in *Bostock*, evaluating both how the decision can, in my view, resolve *Soule* and *Hecox*, and how it has important limitations for furthering projects of queer and trans politics. Chapter VI aims to push past the limitations of *Bostock*’s textualism and move towards more intersectional, prescriptive means of interpreting Title IX and antidiscrimination law more broadly. I argue that intersectionality provides an extremely useful method by which the law could both better

understand the operations of discriminatory power and positions of marginalized groups of people. And I suggest that Title IX is an unique focal point to begin such intersectional analyses because of the ways in which it has already been interpreted in affirmative and prescriptive ways in the context of interscholastic and intercollegiate athletics.

There are, perhaps, more pressing issues, inside and outside of the legal context, that more immediately threaten the lives of trans people right now. Indeed, as state legislatures have proposed and passed a number of bills effectively banning trans kids from playing sports, they have also begun introducing legislation criminalizing trans people's access to gender-affirming healthcare (ACLU 2021, Conron et al. 2021; Harvard Law Review 2021; Schmidt 2021; Schneiberg 2021). And articulating a legal argument defending the inclusion of trans student-athletes' rights to play sports does not immediately address arenas of marginalization and domination—like prisons, welfare programs, the immigration system, homeless shelters, and job training centers—that may be more consequential to the everyday sustaining of trans life (Spade 2015, xiv).

However, there are currently 68 bills in 33 states being actively debated in state legislatures right now (as of April 22, 2021) aiming to bar transgender students from playing sports (Freedom For All Americans 2021). And these bills are almost always being introduced in conjunction with bills barring or criminalizing gender-affirming healthcare for trans youth—there are currently 40 such bills being considered in 21 states (Freedom For All Americans 2021). These bills thus present real challenges and threats to the lives of trans people across the country, and need to be immediately responded to in some way. My project tries to hold both this call for immediate legal advocacy and larger demand for more transformative change hand-in-hand, negotiating liberal and radical approaches to legal reform and queer and trans politics. I do

not propose that any solutions this paper suggests are end-all means by which to resolve all forms of queer and trans discrimination and systemic oppression. Rather, I hope to analyze possible remedies for immediate challenges at hand and orient such approaches to the law toward achieving more necessary, radical change.

### **I. Feminist inquiries in sex, gender, and antidiscrimination law**

Sex/gender difference is an essential point of inquiry for feminist theory, queer theory, and feminist activism. Thus, the moment that sex/gender segregation becomes entirely acceptable (if not celebrated) within the arena of sports, feminists immediately invoke Simone de Beauvoir's question of "what is a woman?" (Beauvoir 1949 [2009], 5). Beauvoir defines woman as an Other within masculinist culture: an immanence opposed to transcendence, a fixed nature opposed to self-determinate subject (Beauvoir 1949 [2009]; Young 1979, 13). And Beauvoir saw sports as a relevant issue pertaining to sex/gender difference, writing that "in sports, the goal is not to succeed independently of physical aptitudes: it is the accomplishment of perfection proper to each organism [...] a female ski champion is no less a champion than the male who is more rapid than she: they belong to two different categories" (Beauvoir 1949 [2009], 345). Though Beauvoir seems to accept that men are physically stronger than women, she clarifies that apparent disparities in physical power "have no significance" because the arena of human possibilities is governed by economic and social situations, not biology (Beauvoir 1949 [2009]). Beauvoir asserts a claim central to a major vector of feminist theory and work that is wary of biological essentialisms and instead turns to economic and social systems as means of understanding sex and gender. Starting with Beauvoir's work is useful in the context of interscholastic and intercollegiate athletics because of sports' investment(s) in certain deterministic approaches to sex and gender—through mechanisms like biology. Beauvoir asks us to think deeper about what conditions may (have) produce(d) circumstances of inequality, even within those arenas, like sports, where sex/gender hierarchies are taken as a given.

Other feminist scholars and philosophers have added to Beauvoir's remarks on sports in both ontological and phenomenological ways. According Iris Marion Young, sports have been

constructed as spaces meant to exhibit the body-subject (men) whilst women are constructed as the body-object, making the two mutually-exclusive (Young 1979, 14-15). In other words, sports come to epitomize masculinist culture and become foundational to structures of masculine privilege and ideology (Young 1979, 18). As Susan Cahn puts it: there is “an enduring opposition between sport and womanhood” (Cahn 1994, 207). Bartky adds to this articulation of the masculinist origin of sports by thinking about the discipline of femininity performed in everyday gestures and movements (Bartky 1990, 405). The primary concern is that as sports reinscribe masculinist culture, the very scope of bodily existence and movement for women becomes increasingly limited (Young 1980, 140). These means of thinking about feminine movement, embodiment, and sports inevitably also come to inform the definition(s) of (“proper”) womanhood (Bartky 1990, 408; Schneider 2000, 41; Young 1979, 15). Ultimately, modern sports comes to express and maintain the perception of sex/gender differences (Burke 2004, 136).

While these authors highlight the mutually exclusive nature of feminine embodiment and sports, we can also analyze how sports lean on biological constructions of sex/gender in order to articulate supposed sex/gender differences as biological facts that appear in competition. The problem with this discourse of sex/gender difference is that it is severely limited and fails to effectively account for what may produce differences in sports-related outcomes between men and women. Young and James Fallows illustrate this limitation by deconstructing the concept of “throwing like a girl” (Fallows 1996; Young 1980). The idea of “throwing like a girl” often arises out of a notion that “girls do not bring their whole bodies into the motion as much as the boys” (Young 1980, 142). If we contrast Young’s conclusion that girls are socialized to treat their bodies as weak limitations with the assertions that “throwing like a girl” reflects real bodily

difference(s) based on one's sex/gender, then we develop a more complex understanding of what it "means" to "throw like a girl" (Fallows 1996, 72; Young 1980, 142). In fact, there is not any bodily, structural reason for why men and women should throw in different ways. So, the notion of women's inferior physicality is an artifact of social relations and not necessarily a reflection of a biological reality (Fallows 1996, 72-73).

Fallows and Young point to how a construction of possibilities ends up creating what is known as "throwing like a girl." For any given person, a set of possibilities and potentialities exist. And while these possibilities may be in flux depending on changing circumstances, some restrictions (or resistances) to possibilities are stronger and firmer than others. The construction of masculine and feminine bodily existence, or the gendering of bodies more generally, is one of the ways that bodies' possibilities are regulated. Sex and gender can often come to define one's conceptualization of "I can" and "I cannot" (Young 1980, 147). In more practical terms relevant to "throwing like a girl," sex/gender difference is being artificially created by the limitations we often place on the experiences for girls (and boys) vis-à-vis athletic activity. Indeed, the problem is not necessarily how "males and females are put together differently" but more about how boys are actively taught and encouraged to learn how to throw in a particular manner while girls rarely exist in environments "that encourage them in the same way" (Fallows 1996, 79). Men and women often spend their younger years in very different ways, depending on what is socially acceptable (Fallows 1996, 79). And new motor skills (like throwing a ball) become more difficult to learn as we age, so the task of learning how to throw with your whole body becomes less likely to happen later in life. Thus, "throwing like a girl" is less about any sort of biological sex/gender difference(s) and more invested in how we define and regulate possibilities, opportunities, and potentialities for people based on their sex and/or gender.

Fallows's and Young's work is instructive in a broader context of understanding gender vis-à-vis interscholastic and intercollegiate athletics because it delegitimizes claims of innate physiological differences based on a person's sex and/or gender. Central to concerns with permitting men and women to compete against one another in competition is the belief that men broadly possess bodily superiority (superior physical strength, for instance) over women. Yet, Fallows and Young demonstrate that such hierarchical approaches to gender in sports fall short of effectively capturing the ways gender and senses of embodiment are not simply grounded in biology or physiology but rather informed by processes of socialization.

This mode of thinking amongst feminist scholars also aligns with critiques of how the very concepts of sex and gender have become naturalized when they are actually permeable and fluctuating. Western societies have often legitimated gender through claims of differences in sex physiology (differences in genitalia, for instance), so we often assume a direct line can be drawn between biological sex and socialized gender (Lorber 1994). Such a line is illusory. Sex and gender are distinct means of categorization: they are both social constructions that are taught, learned, emulated, and enforced (Lorber 1994).

Feminist scholars have long analyzed the interaction between gendered embodiment in its biological, social, and experiential relation(s) to the world, with the most recent work embracing a plurality of sexed and gendered existences that exceed the male/female sex binary. The human body is not simply "a mosaic of natural parts" (i.e. biological sex) "and nurtured parts" (i.e. socially-constructed gender) (Fausto-Sterling 2014, 310). Rather, our bodies are dynamic systems that respond to "social input" in ways that the terms "nurture" and "nature" cannot capture (Fausto-Sterling 2014, 310). There may be "some aggregate physical differences between men and women[,]" but to argue that males are on average taller and stronger than

females “is almost meaningless” because the categories have themselves been constructed in divisive ways (Fausto-Sterling 2014, 310). Indeed, our bodies have been socialized into being “male” and “female” through processes of medicalization—processes that are perhaps most evident when medical interventions are deployed to “affirm” and/or supposedly “correct” a person’s sex immediately after birth (Chase 2006; Kessler 1990; Spade 2006). Gayle Rubin famously refers to the division of the sexes as the sameness taboo: “a taboo against the sameness of men and women, a taboo dividing the sexes into two *mutually exclusive categories*, a taboo which *exacerbates the biological differences* between the sexes and thereby *creates gender*” (Rubin 1975, my emphasis). Sex is therefore not a naturalized phenomenon, it is a concept brought into being through the perceived need for sex/gendered organizational mechanisms and hierarchical structures. As Judith Butler notes, “the production of sex [...] ought to be understood as the effect of the apparatus of cultural construction designated by *gender*” (Butler 1990, 10, author’s emphasis). For Butler, sex has just been gender all along (Butler 1986; Butler 1990).

Just like sex, gender is a process of socialization that starts from birth. Margaret Lorber and Rubin argue for the historical necessity of the gender distinction for structuring the division of labor (Lorber 1994; Rubin 1975). Other scholars like Butler and Monique Wittig discuss gender as a means of reproducing both itself and heterosexuality (Butler 1990, 26; Wittig 1993). Regardless of why gender is prescribed, it is constructed from the moment a sex category is assigned. The sex category is made to become gender through gender markers and “once a child’s gender is evident, others treat those in one gender differently from those in the other, and the children respond to the different treatment by feeling different and behaving differently” (Lorber 1994). And Butler argues that the body itself only comes into being, in part, due to the



marking of its gender (Butler 1990, 12). In other words, gender creates particular meaning for any given person, informs the way they are perceived by the world around them, and plays a part in shaping who they become.

Riki Anne Wilchins takes up work done by Butler regarding the notion that the ways in which we discuss physical features of the body exist on the “far side of language” (Butler 1990, 155; Wilchins 2006, 549). These features on the far side of language tend to be associated with the category of “sex” and give the illusion of “being unmarked by a social system” of gender (Butler 1990, 155). But, as Butler points out, the features actually “gain social meaning and unification through their articulation within the category of sex” (Butler 1990, 155). In other words, the features of bodies said to make up the categories of sex are only able to do so through a process of socialization into being that way.

Wilchins is a little clearer than Butler: “Characteristics of mine that are truly innate, that originate ‘on the far side of language,’ ought to be totally apparent to you whether you’d ever seen another human being or not” (Wilchins 2006, 549). Wilchins says that if these physical features (the penis, the vagina, breasts, testicles, etc.) have some kind of inherent meaning (i.e. that a person is male, female, man, woman), then they would have to be recognized as such by an alien or a dog, as well as another person (Wilchins 2006, 549). This does not happen, though, because readings of the body are “culturally relative, contingent upon the context in which you locate” said body (Wilchins 2006, 549). Indeed, “[a]lmost everything about bodies is discovered through comparison from the collection of meanings stored in a common language” (Wilchins 2006, 551). A category so reliant upon certain parts of the body, like sex, thus becomes much less (if at all) a fixed, deterministic category and much more a social construction. Wilchins’s

work thus alludes to the permeability of sports regulations relying on categories of sex that proclaim to be universal and/or definitive.

The sex/gender regulation of competitive sports, at best, struggles with ambiguities of sex and gender, repeatedly relying on the supposed self-evidence of the sex binary. Competitive elite sports naturalize a strict division between men and women through sex-segregated competition and, as discussed in the next chapter, the use of various testing mechanisms to verify the sex of competitors presumes the ability to use bodily surveillance to verify unambiguous sex difference.

Of course, the project of understanding sex and gender is also taken up by sports scholars in a number of ways. Alison Carlson, for instance, takes up the issue of sex/gender verification tests and the ways in which they refuse to account for a woman's "sense of self" (Carlson 2007). Angela J. Schneider further contends that the sports community has given too much power to the medical community in how it determines who is (in)eligible to compete in women's competitions (Schneider 2010, 48). And Krane et al. and Mariah Burton Nelson demonstrate how masculinity and femininity are embedded in the ways we understand sports, particularly as they are coded as spaces meant for men, even when women are included (Burton Nelson 2007; Krane et al. 2007). However, the evaluation of sex and gender in sports scholarship has rarely moved into the realm of understanding both concepts' social (de)construction and such an analysis's implications on sex/gender segregation in sports.

Understanding sex and gender has been enriched by the development of queer and transgender studies perspectives (Stryker and Aizura 2013; Stryker and Whittle 2006). As Rita Felski argues, "[g]ender [...] remains both essential and impossible for feminism, which shifts between a radical questioning of the ontology of femininity and an insistence upon its real effects" (Felski 2006; 572). Thus, as feminists began engaging with queer studies, they became

increasingly interested in the figure of the transgender individual (Proser 2006, 258). The trans subject was understood as a “definitely queer force that ‘troubled’ the identity categories of gender, sex, and sexuality[,]” a subject who can simultaneously exist within and outside of the sex/gender binary and subvert (hetero)normative sexual desires (Cromwell 2006; Proser 2006, 258). And trans people were already ever-present in movements that feminists were paying much attention to, like the gay rights movement, though their presence and contributions were rarely acknowledged or appreciated (Devor and Matte 2006, 387). The acknowledgment of trans lives produced new and contradictory possibilities for feminist theory to develop complex and deeply fraught understandings of the meaning of gender, the social practices that exceed the sex binary, and to further trouble simplistic understandings of the relation between gendered bodies and the world.

As feminists initially began to consider the precarious positions of trans folks, and trans women in particular, there was significant disagreement amongst feminist activists and scholars regarding the place of trans people within a feminist politics. The call to exclude transgender people, especially trans girls and trans women, from feminism is best epitomized by Janice Raymond’s infamous 1979 text, *The Transsexual Empire*, which, among other things, claimed that trans women were a “social problem” produced by “the sex roles and identities that a patriarchal society generates” (Raymond 1994, 16). In effect, Raymond argued that trans women were not *really* women and trans men were not *really* men. She claimed that trans women were “constructs of an evil phallographic empire and were designed to invade women’s spaces and appropriate women’s power” (Stone 2006, 223). The arguments presented by Raymond, though refuted by a significant number of feminist, trans, and queer studies scholars, continue to be put forth in “both academic and popular media contexts” (Pearce 2018, 32). In popular discourse

today, those who identify as feminists and maintain views similar to Raymond's are often described as "trans exclusionary radical feminists," or TERFS, or "gender critical feminists" (Fahs 2018, 145).

TERFs make up a small, but vocal, minority; transgender studies has pushed feminist scholars to produce more productive understandings of sex/gender and embodiment. As Butler published *Gender Trouble* and effectively argued that sex has just been gender all along, trans studies scholars also engaged in work that was critical of mainstream feminism's insistence upon definitions of womanhood that reconstructed particular experiences of embodiment. Emi Koyoma writes, "[t]he question of trans[gender] inclusion [...] pushed [feminists] to the position of having to defend the reliableness of such absurd body elements as chromosomes as the source of political affiliation" (Koyoma 2006, 704). And feminists quickly found that attempting to make universal distinctions between transgender women and cisgender women was often nonsensical and "fraught with many bizarre contradictions" (Koyoma 2006, 704).

Sandy Stone contributes particularly important ideas within the context of the inclusion of transgender athletes in interscholastic and intercollegiate competition. Stone discusses the "treacherous area" that medical doctors and trans people navigate when any given trans person has a trans identity that "is something different from *and perhaps irrelevant to* physical genitalia" (Stone 2006, 232, author's emphasis). This "diagnostic battlefield" remains particularly troubling for trans people in sports as regulations at the interscholastic, intercollegiate, and international/elite levels of competition have begun to establish specific, medicalized boundaries between who can and cannot compete in certain sex/gender-segregated competitions (Stone 2006, 232). These regulations adopt a specific understanding of transness as being born in the "wrong body," which, while being the experience of a number of trans people,

adopts a “myth by which Western bodies and subjects are authorized” such that “only one body per gendered subject is ‘right’” and “[a]ll other bodies are wrong” (Stone 2006, 231). Indeed, it seems necessary to disrupt or destroy “the power of the medical/psychological establishment and their ability to act as gatekeepers for cultural norms, as the final authority for what counts as a culturally intelligible body” (Stone 2006, 232). Stone’s contribution, then, is invested in being extremely critical of how trans people’s bodies are being medicalized, and thus also of how medicine has become a means of defining how bodies should be (properly) gendered, including but not limited to the realm of sports.

Beyond troubling sex/gender binaries, both feminist and transgender studies engage in considering the mechanisms necessary to produce (trans)gender justice. One of the key strategies discussed by scholars and activists alike is legal action and advocacy, especially in the arena of antidiscrimination law. The pursuit of civil rights protections is itself fraught. In the context of LGBT people, and trans folks in particular, legal reforms are understood as means by which communities might achieve a sense of recognition and inclusion from the nation-state (Juang 2006, 706; Spade 2015, 8; West 2014, 56). This “struggle for recognition” is a “cornerstone of modern US political, social, and cultural activity” and enmeshed in the way we understand the history of civil rights in America (Currah. 2006, 14; Juang 2006, 706). Indeed, gay rights activists have constructed a “usable past” in order to “coordinate a coherent, long-term [legal] strategy based on a model of incremental progress toward greater equality and acceptance within the mainstream” (Minter 2006, 145 and 153). However, in the process of participating in such a legal strategy, the gay rights movement largely marginalized the trans community for fear that trans people would “co-opt or derail the hard-won resources and political power that gay people had worked so long to achieve” (Minter 2006, 153). As a result, there has been a sharp

splintering between the mainstream gay rights movement and trans movements as homosexuality became increasingly normalized and trans folks continued to bear the brunt of racist, classist, ableist, and nationalistic systems of oppression.

Queer social movements have thus “had to contend with why legal change in the form of rights has not brought the deep transformation they were seeking” (Spade 2015, 1). As the mainstream gay rights movement made same-sex marriage its priority at the turn of the century, it fell into the trap of cooperating in a kind of “queer liberalism”: “an unsettling [...] attempt to reconcile the radical political aspirations of queer studies’ subjectless critique with the contemporary liberal demands of nationalist gay and lesbian US citizen-subjects petitioning for rights and recognition before the law” (David. Eng, J. Halberstam, and José Esteban Muñoz qtd. in West 2014, 96). And while projects of anti- and nondiscrimination law may have been a good starting point, they largely failed to attend to the “material conditions of inequality” like ongoing economic and educational inequality, broader problems “that create daily dangerous and deadly situations for poor, gender-transgressive people[.]” and the very means by which gender classifications are codified into law (Juang 2006, 708; Spade 2006, 218 and 231).

Dean Spade notes that LGBT movements primarily approached legal reforms and the politics of inclusion through advocacy for antidiscrimination and hate crime legislation (Spade 2015, 38). In doing so, he argues, these movements opted-in to inclusion and recognition “rather than questioning and challenging fundamental inequalities” created by the institutions they sought to reform (Spade 2015, 30). Again, the ways which gay marriage reform was framed made the entire enterprise actually only beneficial and accessible to those gays and lesbians with the most privilege (Spade 2015, 31). The campaign for gay marriage thus demonstrates how

“formal legal equality at best opens doors to dominant institutions for those who are already closest to inclusion” and very few queer folks end up materially benefitting (Spade 2015, 37).

Spade concludes that antidiscrimination laws often fail trans people because they are not adequately enforced, legal help is often inaccessible to those in need, providing discriminatory intent is almost impossible, and the laws inevitably “strengthen systems that perpetrate [transphobia]” (Spade 2015; 40, 41, and 47). Discrimination law also takes up a “perpetrator/victim dyad” that “creates the false impression that the previously excluded or marginalized group is now equal, that fairness has been imposed, and the legitimacy of the distribution of life chances [has been] restored” (Spade 2015, 42-43). The result is that discrimination cases become highly individualized such that courts can deny systems or programs are entirely flawed and oppressive, “all the while producing and relying on the racialized-gendered images that promote [the] programs” in the first place (Spade 2015, 60). Instead of participating in such a politics of recognition and inclusion, Spade suggests we adopt a critical trans politics that seeks to “transform current logics of state, civil society security, and social equality” (Spade 2015, 1). The fight is not to be had for legal equality but for the “dismantling of systems of state violence that are killing trans people” (Spade 2015, 160).

A challenge for Spade’s and others’ rejection of legal advocacy for recognition and inclusion, though, is that it fails to completely account for the material consequences of being legally unintelligible (West 2014, 99). As Isaac West argues, “[l]egal recognition, if only understood as a site of normalcy, underinvests itself in the productive threat posed by unexpected articulations of equality, and radical separatists’ claim to autonomy and sovereignty misunderstand the sources and possibilities of agency” (West 2014, 99-100). In other words, while legal recognition can fail to account for the material conditions of those facing

discrimination and/or oppression, a turn away from seeking such recognition may underestimate the ways in which queer subjects can subvert and/or transform the law. Furthermore, the law *does* exert certain power and control over people's lives, meaning that a radical rejection of legal reform can leave those already marginalized and oppressed peoples subject to increased discipline and punishment at the hands of the state.

West compares this dilemma within queer studies and queer activism to the tension of the ideology thesis and the indeterminacy thesis within critical legal studies (CLS) (West 2014, 100-101). For CLS scholars, the ideology thesis asserts that the legal system privileges those in power while granting minimal protections to the less privileged. As a result, equality is prevented as "the privileging of individual rights over the collective good hinders the ability of disadvantaged groups from bonding together and demanding legal changes" (West 2014, 100-101). The indeterminacy thesis posits that legal rhetoric "render it 'internally and externally inconsistent'" as abstract concepts like "equality, privacy, and freedom of expression can be interpreted in any number of ways" (West 2014, 101). The product of such rhetorical indeterminacy is "contradictory case law" and "incomplete and fragmented answers to complex social issues" (West 2014, 101). For example, such terms like sex, male, and female have existed as discrete, fixed, and unambiguous categories within the law for years, it is only recently that courts have started to signal more appropriately complex understandings of such words (Greenberg 2006).

Ultimately, West suggests "a two-track approach" to transgender studies and legal advocacy (West 2014, 105). This approach embraces an "impure politics" of "*both* legal inclusion *and* perpetual critique of the legal system" (West 2014, 105 and 191, author's emphasis). Such a positioning towards the law seems to adequately account for the limitations of



what the law can currently do and take heed of the necessary short-term benefits of life that recognition and inclusion can provide. It is thus within an impure politics that we might be able to better articulate claims for transgender justice. Inspired by West's method, this thesis will use a legal lens to understand the terms of transgender student-athletes' inclusion and exclusion from competing in interscholastic and intercollegiate athletics. Given the wave of legislation hostile towards trans youth during the 2020-2021 legislative session, it seems a liberal approach to legal reform is necessary in order to immediately account for and remedy challenges to trans people's abilities to compete in sports, gain some kind of access to healthcare, and/or obtain legal documentation affirming their gender identity. Indeed, as I argue in Chapters IV and V, the legislative and legal attacks being levied against trans folks, both inside and outside the context of school-sponsored sports, aim to not only limit their autonomy and agency but also seek to codify legal mechanisms by which to deny trans people's right(s) to exist. Nevertheless, my engagement with the law tries to remain engaged with Spade's "radical trans politics," keeping an eye on the ways in which systems like antidiscrimination law can only do so much to materially protect and sustain trans lives.

The next chapter moves from strictly scholarly work within feminist, transgender, and legal studies into the history of sex/gender difference and testing in competitive athletics in order to start placing such scholars in conversation with the larger topic of legal discourses regarding the inclusion of transgender student-athletes in athletics. As trans people face legislative and legal battles regarding their eligibility to participate in sports, it is helpful to look at how gender has historically been regulated in the space to help guide our thinking about the unique dilemmas that trans (student-)athletes face.

## II. (A history of) biological sex/gender difference in competitive athletics

Transgender (student-)athletes occupy a very particular space within competitive athletics due to a history of sex/gender segregation within sports. The essentialization of sex/gender difference(s) has greatly influenced the means by which athletes compete: men compete in men's competition, women compete in women's competition. Indeed, the concept of sex difference(s) is informed by athletics' insistence on values of "fair play" and an "even playing field," which reinforce the perceived need for sex/gender segregation. Transness inherently destabilizes the constructions of sex and gender in sports because it disrupts the perception that these categories are fixed and/or immutable. Trans athletes are thus understood as threats to "fair play" and the assumed nature of athletic competition.

As a result of the perceived threat to (what is seen as) necessary sex/gender segregation in athletic competition, rules have historically been imposed to regulate the ways in which sex/gender is understood within sports. The most prominent example of these rules lies in the codification of sex/gender-verification testing at the elite levels of competition. Though sex/gender segregation exists in sports, and other spaces, at the scholastic, collegiate, and amateur levels of competition, it is most regulated-in-practice at the elite level of competition. As a result, in this chapter I look to the history of sex/gender testing as a means of evaluating the importance of strict, binary understandings of sex and gender, the ways in which sex/gender categories are deemed necessary for competition, and how these categories of regulation end up tripping over their own unwillingness to accept the nuances of sex and gender. Furthermore, as more legislative bodies in the United States consider, and pass, legislation barring trans student-athletes from participation in interscholastic and intercollegiate athletics, the likelihood that sex/gender-verification testing becomes an enforcement mechanism for such laws grows. In

other words, though sex/gender testing only exists at elite levels of competition right now, it is very likely that these kinds of tests are considered as means to enforce new laws banning trans students from competing in high school and collegiate athletics.

I rely heavily on Lindsay Parks Pieper's recent historicization of sex/gender testing carried out by the International Olympic Committee (IOC) and International Association of Athletics Federations (IAAF, now known as World Athletics) as part of the narrative presented below. However, I seek to contextualize Pieper's work within feminist critiques of biological sex and socialized gender. The aim of this historicizing is to illustrate how instrumental strict definitions of sex and gender are to sports, critique the construction of those two categories within athletics, and thus reveal the particular difficulties trans athletes face when trying to exist within the space of competitive athletics.

Since the ancient Greek Olympics, the place of women within the space(s) of (competitive) athletics has been "foreign at best" (Schneider 2010, 40). Indeed, essential to Pierre de Coubertin's proposal for the revival of the Olympic Games in 1894 was the suggestion that the Games be reserved for men (Pieper 2016, 14). Coubertin defended such exclusion by arguing that women's bodies were weaker than men's, immediately introducing gender hierarchy at what would soon become one of the highest levels of competition for contemporary competitive athletics (Henne 2015, 93). Women were not permitted to compete until the turn of the century, with 22 women participating in the 1900 Olympics within their own sex/gender-segregated category of competition. Sex/gender segregation was immediately deployed in order to "protect the integrity of women's competition" under the logic that women were "weaker and physically inferior" when compared to men (Henne 2015, 93-94).

Despite the conviction that a strict separation between men and women is crucial for fair play amongst women, these tests have never provided evidence for the definition of an exact sex/gender binary. The very term(s) for the testing, which has occurred in different forms since the 1960s, have shifted from sex verification, women's medical examinations, sex checks, sex controls, femininity tests, gender tests, gender controls, and gender verification (Pieper 2016, 3). However, instead of clarifying the boundaries of sex and gender, the history of these tests reveal that they inevitably reflect an arbitrary attempt to transpose the science of sex onto a fallacious desire for sex/gender segregation in sports.

Though official means of sex/gender testing did not begin until the mid-twentieth century, concerns regarding “ambiguously sexed” women or male athletes dressed as women arose immediately after Coubertin's reintroduction of the Olympics (Pieper 2016, 16). In 1936, IOC anxieties regarding sex/gender segregation were furthered after two former European women's champions, Zdenek Koubková and Mark Edward Louise Weston, underwent sex-reassignment surgery (Pieper 2016, 29). Both athletes' surgeries gained international attention and heightened sex/gender anxieties at the IOC by directly demonstrating the instability of sex and gender, challenging the sex/gender-segregated nature of sport (Pieper 2016, 29).

In the same year, female competitor Dora Retjen was “discovered” to be a man after finishing fourth in the women's high jump (Henne 2015, 94; Pieper 2016, 29). Though Retjen was later determined to have an intersex condition, anxiety about “hermaphrodites” and those with “sex ambiguities” fostered recommendations that female competitors undergo physical inspection to ensure that they were “actually” female (BBC Sport n.d.; Henne 2015, 94; Pieper 2016, 16). Retjen nevertheless provoked IOC concerns about “gender fraud” because they presented a challenge to binary sex/gender segregation in sports and questioned the strict

separation between “male” and “female.” Sex/gender differences were seen as instrumental for the very existence of women’s sports, at least at the elite level of competition. Ideas regarding gender verification and gender fraud thus pervaded international athletic competition long before the enactment of official, scientific sex/gender verification testing.

These anxieties of sex/gender distinctions vis-à-vis segregation in sports led to the institution of sex/gender regulatory mechanisms at both the IAAF and the IOC. In 1946, the IAAF began to require that women get physician’s letters verifying their biological sex, and beginning in 1948 the IOC required that women submit affidavits, signed by a doctor, that certified that they were women (Pieper 2016, 31). The turn to medical verification of sex identity marks an important shift in the governance of sex in sport. The medicalization of sex/gender becomes bound up in the perceived need for sex/gender segregation in sports as medicine is deployed as an authoritative force in debates of sex and gender. This relationship between medicine and sports sets up a particularly troubling scenario for trans athletes today as “the medicalization of trans identities forces trans people to conform to rigid disciplinary gender norms in order to access medical technologies” (Spade 2015, 68). Just as medicine continues to use gender as an “administrative force” today, sports’ turn to medical sex/gender verification illustrates its own (re)deployment of gender as a means by which to govern athletes (Spade 2015, 68). We thus see the medicalization of sex/gender becoming increasingly involved with the (re)socialization of gender through sex/gender segregation in sports. Subsequently, the management of athletics and sports is also bound up in contemporary understandings of medicine, though the relationship is complex and at times adversarial.

Following the regimes of medical testimony, the first “test of femininity” at the elite level of competition was introduced in 1966 at the European Championships of Athleticism in

Budapest (Bohuon and Rodriguez 2016, 29). The test involved “a gynecological and morphological examination [...] in which the visible genitals [...] as well as muscular strength and respiratory capacity, had to remain below the capacities deemed as masculine” (Bohuon and Rodriguez 2016, 29). These kinds of tests were also known as “nude parades[,]” and were instituted, in part, due to Western anxieties about the rise of the USSR and its female athletes’ success in international competition (Pieper 2016, 36). The imposition of these physical exams demonstrates a very specific understanding of sex and gender in sports, one that centers the parts of the body that exist on the far side of language and appear to be essential markers of maleness and femaleness but actually are not (Butler 1990, 155). These tests also reveal that sports are concerned with a particular kind of embodiment that is narrowly defined as masculine or feminine and conforms to specific medicalized understandings of the body. Clearly, though, this kind of understanding of embodiment is threatened by any variance in sex/gender expression, whether it be on the body or not. The physical examinations, and later tests, thus participate in a circuitous logic to justify their existence: the tests require particular, gendered conformity to normalized categories of sex/gender; are challenged by deviations from those norms; and thus seek to eliminate those people and bodies who do not fit neatly into the predetermined categories. Rarely, if ever, are the premises structuring the perceived need for the tests called into question.

After being deemed unethical and too embarrassing for athletes, these kinds of physical examinations were replaced, in 1967 by the IAAF and in 1968 by the IOC, with the Barr body test (Bohuon and Rodriguez 2016, 29; Henne 2015, 100 and 102). The test takes a buccal smear in order to identify a Barr body chromosome, one of which would be present in the normalized female body, none would be present in the normalized male body (Priyadharscini and Sabarinath

2013; Carr n.d.). The Barr body test, though, had several flaws. Importantly, any chromosomal order understood as nonnormative would result in an athlete failing the test and being barred from competition, and women with androgen insensitivity syndrome (AIS) failed the test despite actually “compet[ing] at a biological disadvantage because they [could not retain] testosterone” as much as most other women—given the premise that testosterone levels are markers of future athletic success (Henne 2015, 102). The typical explanation for the Barr body test seems to fall short in this example of women with AIS because they are exclusively being denied participation in athletic competition because their body is not deemed normatively female. Furthermore, if sex/gender testing is most concerned with maintaining fairness in a world where men are inherently stronger than women, then there is no material reason to exclude women with AIS because their gender nonconformity actually puts them at a *dis*advantage if testosterone is understood as a performance-enhancing hormone. Furthermore, if women with AIS were able to compete effectively against women with more “regular” levels of testosterone, then there may be less evidence to suggest that testosterone is a marker of inherent athletic superiority.

The initial move to require women competitors to receive doctor’s notes confirming that they were women, the transition to physical examinations at competitions, and the eventual institution of the Barr body test illustrate a means by which competitive sports sought to (re)construct strict binaries of sex/gender through what appear to be ever-more sophisticated methods of sex detection. In reality, though, the shifts from different types of sex detection demonstrate the instability and incoherence of sex and gender. Anne Fausto-Sterling’s work on biological sex and the socialization of gender most clearly demonstrates this kind of instability.

Biological sex can be understood as the product of several stages of biological development through which a fetus becomes a human baby and is subsequently socialized into

gender. The Barr body test focuses on chromosomal sex, which is the product of an X or Y-bearing sperm and X-bearing egg. Chromosomal sex is widely understood as a double set of autosomes: a person either has an X and Y or two Xs (Fausto-Sterling 2012, 4). Sex does not end here, though. Once a fetus has chromosomal sex, it begins the development of “fetal gonadal sex,” which involves the development of testes at the eighth week of fetal development or the ovaries at the twelfth week of development (Fausto-Sterling 2012, 4). These gonads in turn begin producing hormones, which creates “fetal hormonal sex” (Fausto-Sterling 2012, 4).

Once the gonads begin producing hormones, the fetus begins developing “internal reproductive sex,” which involves the development of the uterus, cervix, and fallopian tubes, or the vas deferens, prostate, and epididymis (Fausto-Sterling 2012, 5). Genital sex, which is of particular interest to athletic physical examinations of sex/gender, does not develop until the end of the fourth month of fetal development. By birth, then, there are five “layers of sex” and these layers “do not always agree with one another” (Fausto-Sterling 2012, 5). In other words, there are at least five stages in the development of what we understand as “biological sex” where an adjustment in hormone production or gonad development may disrupt the supposed uniformity of “male” and “female.” For example, male gonadal development requires action by the Sry and Sox9 genes in the correct sequencing (Fausto-Sterling 2012, 19). In the absence of either of these genes, male fetuses develop as females would, just without female gonads. Fetuses otherwise understood as female face similar requirements of the FoxL2, Wnt4, and Rspo1 genes, in the proper sequence, for the proper development of female gonads (Fausto-Sterling 2012, 19).

As part of Fausto-Sterling’s deconstruction of biological sex, she describes the “bipotentiality” of sexual development (Fausto-Sterling 2012, 20). There is a plethora of important “moments of indifference” during fetal development when uniform biological sex may



be disrupted (Fausto-Sterling 2012, 22). For instance, there is a moment when both XX and XY fetuses have identical phalluses before responding to fetal hormonal sex (testosterone or estrogen). It is at this moment, or any other moment of indifference/bipotentiality, when “all that needs to happen is [for] something out of the ordinary [to switch] or derail the process of sexual development at one of the levels from chromosomal to genital sex” (Fausto-Sterling 2012, 22). This kind of disruption results in intersexual development, also called disorders of sexual development (DSDs) (Fausto-Sterling 2012, 25).

The nuance of biological sex thus highlights the problem(s) with using medical or scientific verification, including the Barr body test, as a means by which we determine whether a woman is truly a woman. Even Murray Barr, the micro-anatomist who developed the test, warned against its use as a determination of sex (Pieper 2016, 66). In 1956, Barr published an article that argued for limited use of the chromosomal check because of the frequent situations in which “the body cells are at variance with the obvious sexual anatomy” (Barr qtd. in Pieper 2016, 66). In 1959, the test was further critiqued in the medical field when scientists Susumu Ohno and Theodore S. Hauschka verified that the Barr body only identified one X chromosome, not both (Pieper 2016, 66). This finding meant that prior to 1959, an individual with XXY sex chromosomes would have been identified as a woman when post-1959 they were labeled as a man (Pieper 2016, 66). Chromosomal sex was thus much less clean-cut than previously thought, and the ability for a chromosomal sex test (like the Barr body test) to operate as a means to administratively regulate sex/gender faltered.

By 1987, Barr was explicitly arguing that his test be abandoned as a control mechanism in competitive athletics (Pieper 2016, 66-67). And while the medical community generally disagreed with the IAAF and IOC’s understanding of the significance of sex chromosomes, all

three institutions sought to maintain medicalized means by which to separate men and women (Pieper 2016, 69). As medicine developed more complex, albeit still restrictive, means by which to categorize bodies into certain sexes and genders, the sports community was still invested in sex/gender segregation and the means by which one could “prove” one’s claim to a certain sex/gender. Of course, the process of “proving” identity was at the mercy of the sports institutions writing rules governing which bodies constituted which sexes/genders, severely limiting the agency of athletes who were/are gender nonconforming, intersex, and/or trans.

The Barr body test was replaced by several different regimes of regulation and control between the IAAF and the IOC. In 1990 and 1991, the IAAF developed policies that controlled sex/gender in new ways. With the starting point that sex/gender controls were necessary in order to keep “male masqueraders” out of women’s competition (despite there not being evidence of such instances occurring), the IAAF began to adopt the idea of “physical checkups,” later called “health checks” (Pieper 2016, 149-150). The IAAF terminated all sex chromatin testing. However, it had already partially substituted these tests with drug/doping controls that required athletes provide urine sample in the presence of officials. While athletes provided urine samples, officials could easily conduct a visual inspection of genitalia, returning to the primary concern of males masquerading as females (Pieper 2016, 150).

As part of their newly instituted “health checks,” the IAAF required physical inspections of all athletes, male and female, though this regulation faced quick backlash at the 1991 World Championships in Athletics and was quickly terminated in 1992 (Pieper 2016, 150 and 160). Members of a number of countries’ medical teams voiced concerns that “health checks” were simply a “reversion to the ‘nude parades[,]’” some team doctors even refused to do the examinations themselves (Pieper 2016, 150). Female athletes also recognized the health checks

as too similar to physical examinations done prior to Barr body testing, calling the checks a “peek-and-probe” examination (Pieper 2015, 151). Interestingly, some members of the Australian sports federation deemed the inspection of men as “pointless” (Pieper 2015, 151). This perception that testing men would be pointless reveals how gender hierarchy structured, and continues to structure, sports because it both (re)articulates women’s inferiority vis-à-vis men’s physical prowess and neglects to regulate male-ness as much as it does female-ness. In other words, testing women is seen as important in order to “discover” any unfair advantages they may have—advantages that are almost always associated with sports’ construction of male-ness. In contrast, testing men is deemed unnecessary because men are assumed to have those advantages associated with male-ness already. Regardless, the IAAF scrapped the universal application of health checks, but it still maintained a right to “check any ‘questionable’ competitor on a case-by-case basis” (Pieper 2016, 151).

While the IAAF initially reverted to an earlier system of sex/gender testing through physical examination, the IOC replaced the Barr body test in 1991 with the polymerase chain reaction (PCR) test (Henne 2015, 103; Bouhuon and Rodriguez 2016, 29; Pieper 2016, 160). The PCR test sought to identify the Sry gene, which is typically located on the Y sex chromosome and leads to the development of male gonads in its subjects (Fausto-Sterling 2012, 19; Heine 2015, 103; Settin et al. 2008; “SRY Gene: MedlinePlus Genetics” n.d). In contrast to the Barr body test’s investigation of the presence of “femaleness,” the PCR test was interested in identifying the presence of “maleness” within women as means of excluding said women from competition. In other words, “female athletes no longer had to prove that they were women but that they were not—at least in part—male” (Heine 2015, 103). Just like the perception that men should not be subject to sex/gender testing, the PCR test’s investigation of male-ness within

women privileges the notion that said male-ness inherently leads to an unfair advantage within women's competition. The PCR test thus further institutionalizes a patriarchal sex/gender hierarchy that structures the ideology of sex/gender segregation in sports.

The IOC first widely used the PCR test at the 1992 Winter Games in Albertville, France. By the time the Games were set to begin, twenty-two French scientists had signed a petition denouncing PCR use on medical and ethical grounds; French ministers had called on the president of the IOC at the time (Juan Antonio Samaranch) to not use the test; and the French Medical Association's ethics commission threatened disciplinary action against any French doctor who participated in PCR verification at the Olympics (Pieper 2016, 152-153). Internationally, a number of doctors and medical professionals critiqued the IOC's use of the PCR test because of its "combination of inappropriate genetic techniques, prejudice of the IOC's 'female only' test, the IOC's failure to consider naturally produced biological differences, and the consequential stigmatization caused by a positive result" (Pieper 2016, 153). Despite these protests, the IOC decided to use the PCR test for the 1992 Winter Games in Albertville and the 1992 Summer Olympics in Barcelona. PCR testing remained in use at the Olympics through the 1998 Games, with the IOC Executive Board voting to stop the testing in 1999. Like the earlier objections to using the Barr body test, scientific and medical consensus formed to reject genetic tests as appropriate for determining the legitimacy of the sex identity necessary to compete in women's sports.

By 1999, sex/gender controls in international competitive athletics had effectively ceased due to mounting pressure from the medical community and the athletes themselves (Erikainen 2019, 114). The IOC's Athletes' Commission, formed in 1981, played a large part in advocating for the end of sex/gender verification protocols, but they also argued that the IOC maintain its

right to suspicion-based checks (Pieper 2016, 175). For instance, female Olympians largely supported sex/gender testing for two reasons. First, they tended to fail to recognize the flaws in the control methods, both in the controls' insistence on stable biological sex differences and the risks of false negatives (Barr body) and false positives (PCR test) (Pieper 2016, 166). And second, many female Olympians accepted the need for protection from gender-transgressive people (Pieper 2016, 165). In part, these controls also served to verify these women's own womanhood after passing the tests. Women competing in the Olympics understood, and often continue to understand, sex/gender testing and/or suspicion-based checks as necessary to ensure "fair" competition. Indeed, the irrational fear of men masquerading as women in order to compete at the elite levels of athletics persists.

Regardless of the IAAF's and IOC's public moves to eliminate sex/gender testing and verification protocols, sex/gender regulation and the control of "womanhood" within sports continued in three ways. First, the need to account for institutional anxieties about men masquerading as women found a helpmate in anti-doping regulations (Pieper 2016, 175). The need for urine samples with officials present basically replicated the "nude parades" of the mid-twentieth century. Second, both the IAAF and IOC maintained rights to inquire about "suspicious" athletes (Erikainen 2019, 115; Pieper 2016, 176). IAAF and IOC officials could/can effectively look at an athlete, deem them "suspicious," and require that they undergo the PCR test. This kind of approach relies heavily on presumptions about the outward appearances of sex/gender, overtly punishing strong-looking women (especially women of color and of the Global South) and perpetuating the polarization of athleticism and womanhood (Pieper 2016, 175 and 176).

While during the 20<sup>th</sup> century the concern of the IOC and IAAF focused on “masquerading men,” in 2003 the IOC came to what is known as the Stockholm Consensus, a policy that directly addresses the participation of transgender athletes in Olympic competition (IOC Medical Commission 2003; Müller 2016, 419; Pieper 2016, 176). If they wanted compete at the Olympics, transgender athletes had to undergo sex-reassignment surgery and alter external genitalia, receive legal recognition by “appropriate official authorities,” and undergo hormone therapy “appropriate for the assigned sex” in order to minimize “gender-related advantages” (IOC Medical Commission 2003; Müller 2016, 419; Pieper 2016, 176). In 2015, the IOC released new guidelines for transgender athlete participation after recognizing that new cultural norms and laws of many of its member nations were accounting for an importance of “autonomy of gender identity in society” (International Olympic Committee 2015). The IOC clarified that athletes who transition from female to male may compete without restriction in the male category while those who transition from male to female and want to compete in the female category must declare their gender identity as female, demonstrate that their total testosterone level has been below 10 nmol/L for at least 12 months prior to first competition, and must maintain such a level of testosterone throughout the time period they wish to compete in (Erikainen 2019, 129; International Olympic Committee 2015).

Regulations of sex and gender, particularly as they relate to the construction of femaleness, have also developed in the context of athletes with hyperandrogenism. In April 2011, the IOC’s Medical Commission recommended new guidelines for the participation of female athletes that “target[ed] female athletes with hyperandrogenism” (Erikainen 2019, 127; Henne 2015, 90). The commission argued that elevated levels of androgen production within women with hyperandrogenism provided those athletes with an unfair advantage. Indeed, the

commission noted that “[t]he androgenic effects on the human body explain why men perform better than women in most sports and are, in fact, the very reason for the distinction between male and female competition in most sports” (IOC qtd. in Henne 2015, 90; Pieper 2016, 182). This kind of framework maintains hegemonic conceptualizations of male athletic superiority, and subsequently calls the “womanness” of women with hyperandrogenism into question. Women with elevated levels of androgens thus became deviant female athletes, subject to new kinds of sex/gender controls (Pieper 2016, 182). The IOC’s Medical Commission’s recommendations were adopted in June 2012 (International Olympic Committee 2012). The IAAF adopted similar protocols almost immediately (Erikainen 2019, 127; Pieper 2016, 182; World Athletics 2011).

Initially, the IOC required that women with hyperandrogenism be assessed to either have testosterone levels under a “normal ‘male range’” of 260 to 1,000 nanograms per deciliter, or demonstrate that “she is resistant to the effects of androgens to compete in women’s events” (Henne 2015, 91). Athletes suspected of having hyperandrogenism were also made to be “examined and diagnosed” at select reference centers in Australia, Brazil, France, Japan, Sweden, or the United States (Pieper 2016, 182). No resource centers existed on the African continent or in India, and once athletes were diagnosed with hyperandrogenism, they had to undergo “treatment” at their own expense (Pieper 2016, 182). A reciprocal exam to account for men with abnormal levels of androgens was not considered (Pieper 2016, 184). As seen earlier in the backlash regarding the IAAF’s proposed “health checks,” sex/gender verification testing is not understood as necessary for men because the markers of unfairness in women’s competition are inherently coded as associated with male-ness. So, elevated levels of testosterone in a male competitor would not be seen as necessarily unfair but rather as simply a kind of natural gift of sorts. Here, then, we see a significant gap in how men’s and women’s competitions are

constructed in relation to a concept of fairness. And that gap is structured by a hierarchical understanding that males are physically superior to females.

On March 19, 2013, the Sports Authority of India (SAI), following the IAAF and IOC, adopted a policy that set a bar of 2 nmol/L for eligibility in the women's category of competition (Government of India's Ministry of Youth Affairs & Sports 2013). If women were found to have levels of testosterone higher than that, they were to be evaluated by a physical examination by a medical panel. In June 2014, Dutee Chand, an Indian runner who had just competed in the women's Asian Junior Athletics championships, was sent a letter from the Athletics Federation of India that requested she submit to a "Gender verification test" (Erikainen 2019, 1). Chand went to a SAI training camp and underwent medical exams, including blood tests, gynecological examination, karyotyping, and an ultrasound (Erikainen 2019, 1). These examinations concluded that Chand had female hyperandrogenism and SAI notified her that she was not eligible to compete in the female category (Erikainen 2019, 136).

Chand quickly filed an appeal to the Court of Arbitration of Sports (CAS), which suspended the IAAF's and SAI's regulations on hyperandrogenism due to a "lack of evidence about the presumed link between (endogenous) testosterone and athletic advantage" (Erikainen 2019, 136). This CAS ruling permitted athletes with female hyperandrogenism like Chand and, perhaps more famously, Caster Semenya to compete in international competition. However, in 2017, the IAAF put its support behind a study done by Stéphane Bermon and Pierre-Yves Garnier that supposedly provided evidence that "female athletes with high endogenous testosterone have a (statistically) significant performance advantage over other women" (Erikainen 2019, 138-139). Despite this study's reliability and methodology being immediately called into question, the IAAF informed CAS in March 2018 that it had created a new set of



regulations regarding women with female hyperandrogenism (Erikainen 2019, 139). These new regulations were published on April 26, 2018, and required that these athletes must be “recognized at law either as female or as intersex (or equivalent)[,]” must reduce their levels of testosterone to below 5 nmol/L for at least six months prior to competition, and maintain said level of testosterone for as long as they want to be eligible to compete (World Athletics 2018; World Athletics 2019). These new regulations only applied to athletes in the female classification in so-called “restricted events”: the 400m run, the 800m run, any hurdles event, the 1500m run, and the mile. The new rules also avoided language of “female hyperandrogenism” and leaned more towards DSD language (Erikainen 2019, 140). Chand’s case in the CAS was thrown out, making her once again ineligible to compete.

In June 2018, Semenya announced that she would challenge the IAAF’s new rules; however, she lost this legal challenge in the CAS on May 1, 2019 (*BBC Sport* 2019). Semenya appealed the CAS decision to the Federal Supreme Court of Switzerland, which initially granted an injunction on June 3, 2019, permitting Semenya to compete, but reversed said ruling on July 30, 2019, while it continued to consider the legal challenge (Mather and Longman 2019). On September 8, 2020, the Federal Supreme Court of Switzerland ruled against Semenya’s challenge, upholding the IAAF’s rules on DSDs and effectively barring Semenya from international competition unless she agrees to lower her levels of testosterone (Dawson 2020; Dunbar and Imray 2020).

In this chapter, I have tried to outline a brief history of sex/gender testing mechanisms in order to elucidate the means by which sex and gender are regulated in competitive athletics. The regime of sex/gender testing at the most elite levels of competition are important to take note of because they are being called upon by US state legislatures as means by which to determine the

“biological sex” of those trying to compete in interscholastic and intercollegiate athletics. For example, on April 14, 2021, Florida’s House of Representatives passed the “Fairness in Women’s Sports Act,” which effectively requires genital inspections of student-athletes whose gender has been called into question (Altman 2021; Padgett 2021). Indeed, a number of legislative bills attempting to bar trans youth from competing in sports point to external genitalia, chromosomal sex, and/or circulating levels of testosterone as determinants of a person’s sex, all of which (as this chapter has described) have been used at the most elite levels of athletic competition. Though I will return to issues of sex/gender testing in later chapters, recognizing its history in athletics is important in order to better contextualize the ways in which “sports” create particularly-gendered spaces hostile to nonconformity.

In the next chapter, I turn to the history of Title IX as a means of evaluating how these kinds of gendered regulations interact with antidiscrimination law in the US. I aim to historicize Title IX’s passage and development so as to better understand how “sex discrimination” has been affirmatively interpreted and opened up opportunities for gender equity in interscholastic and intercollegiate sports.

### **III. Historicizing Title IX's perception of sex/gender and transgender discrimination**

The governance of sex in elite sports takes on a different tenor when state anti-discrimination law encounters institutions of sports competition. Namely, Title IX has been used as a mechanism by a number of legal advocates in efforts to eliminate sex discrimination in the United States. Schools are “central to reproducing hegemonic cultural norms” in the US and thus Title IX’s potential to articulate means by which we might resolve forms of gender injustice in the education system has immense implications (Currah 2006, 7). Furthermore, Title IX has been implicated in the development of American interscholastic and intercollegiate sports since its passage in 1972, making it an instrumental part of how sex and gender have been (re)produced in sports for the past 50 years. In this chapter, I turn to a brief history of Title IX, both within and outside of the context of sports, in order to better understand how the law has already been used to intervene in the space. In evaluating how Title IX has been articulated historically, within the context of sports, and recently in the defense of transgender students’ rights, I hope to glean a means by which we might (re)interpret Title IX as a tool for the inclusion of transgender student-athletes in interscholastic and intercollegiate athletics.

On June 23, 1972, Title IX of the Educational Amendments of 1972, which “bars sex discrimination in education programs and activities offered by entities receiving federal financial assistance[,]” was passed in Congress (United States Department of Justice 2012; United States Department of Justice 2015). In its original text, Title IX states that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance” (United States Department of Justice 2012; United States Department of Justice 2015). The passage of Title IX has since been widely understood as one of the most, if not the

most, important piece of legislation affecting women's sports in the United States (MacKinnon 1987, 122; Theberge and Birrell 2007, 168).

However, Title IX faced numerous legal challenges in the immediate years after its passage, and its scope and breadth are still contested. Some argue that Title IX has largely “departed from the law’s original purpose[,]” moving away from “eliminating institutional barriers to educational opportunity for women and girls, and toward [...] changing the way we think about sex differences, gender roles, and sexuality in general” (Melnick 2018). And they question whether the impact of Title IX on athletics “is actually good for women’s education” (Melnick 2018). Regardless, Title IX has enabled the inclusion of women in interscholastic and intercollegiate athletics in the United States, and has recently become a means by which the rights of transgender students and student-athletes are advocated for.

Prior to the passage of Title IX, athletes were able to seek redress for sex/gender discrimination through the Fourteenth Amendment (Holliday 1996, 261). Through the Fourteenth Amendment, a sex/gender discrimination claim had to show a “close nexus between state participation and the challenged regulation[,]” and then determine the validity of the regulation based on a two-pronged test: does the regulation serve an important government objective? and is the regulation substantively related to achieving that objective? (Holliday 1996, 261).

Three legal cases decided in 1973 demonstrate the ways in which sex/gender discrimination in sports was adjudicated prior to the passage and institution of Title IX. In *Morris v. Michigan Board of Education*, the court provided an injunction that permitted girls to compete with boys in non-contact sports competitions (Holliday 1996, 262; *Morris v. Michigan State Board of Education* 1973). The court based its injunction on the plaintiffs’ demonstration

that girls could compete on boys teams without harm, and that no alternative, comparable competitive programs sponsored girls' participation. *Brendan v. Indiana School District* followed suit with the court ruling that generalized discrimination was not permissible based on paternalistic arguments of physiological sex differences (Holliday 1996, 262). And in *Brenden v. Independent School District* the court ruled that when women are denied access to the only team available for participation in a particular sport, when said team is predominantly male, "their rights to participate in that sport are entirely obliterated" (*Brenden v. Independent School Dist.* 1972; *Brenden v. Independent School Dist.* 1973; Holliday 1996, 262). *Morris, Brendan*, and *Brenden* demonstrate how sex/gender discrimination in sports were adjudicated prior to Title IX; however, their focus on exclusion leaves open the opportunity for Title IX to address broader forms of discrimination.

Title IX's wording has origins in the wording of Title VII of the Civil Rights Act of 1964, which "prohibits employment discrimination based on race, color, religion, sex[,] and national origin" (United States Equal Employment Opportunity Commission n.d.; Wiles 1996, 269). Several amendments to Title IX were proposed soon after its passage. Most prominently, Senator John Tower (R-TX) introduced the "Tower Amendment" in 1974, which suggested that revenue-generating sports be exempt from Title IX (The National Coalition for Women and Girls in Education, n.d.; Wiles 1996, 269). In 1975, Senator Jesse Helms (R-NC) introduced "A bill to amend Title IX of the Education Amendments of 1972, and to preserve academic freedom[.]" which attempted to remove athletics from the jurisdiction of Title IX (Helms 1975; Wiles 1996, 269). Neither the Tower Amendment nor Helms's amendment passed.

In July 1974, Senator Jacob Javits (R-NY) introduced the "Javits Amendment," which directed the Department of Health, Education, and Welfare (HEW) to create and publish

regulations pertaining to Title IX that addressed intercollegiate sports competition and consider the “nature of particular sports” (Gender Equity in Sports 2006; Wiles 1996, 269-270). In 1975, HEW issued regulations permitting sex/gender segregation based on comparative skill and in contact sports, mandating schools “make affirmative efforts” to provide women with athletic opportunity and support, and requiring schools “conduct an annual survey to ascertain interest levels for both men and women for particular sports” (Wiles 1996, 270). Sex/gender segregation was thus, through the Javits Amendment, made to “prevent male domination of a team, redress past discrimination of a team, and prevent injuries to female athletes” (Holliday 1996, 261). The Javits Amendment, though, clearly assumes male superiority and female inferiority, at least in the context of sports, which (as discussed in the prior chapter) is a seriously flawed framework with which to approach sports competition. The HEW’s proposed rules were published on June 4, 1975, and went into effect on July 21, 1975 (*National Collegiate Athletic Assn. v. Califano* 1978). However, HEW’s 1975 regulations received considerable criticism and were reworked into finalized regulations, which were published on December 11, 1979 (“History of Title IX” 2019). These new regulations introduced per capita funding for scholarships provided to male and female athletes and allowed for “nonequivalent funding for football and basketball if the differences were due to ‘nondiscriminatory factors,’ such as equipment cost, injury rate, and facilities” (United States Department of Education 2020; Wiles 1996, 270). Within the sphere of interscholastic and intercollegiate athletics, then, Title IX came to be understood as a mechanism by which to reduce/eliminate sex/gender inequality within existing athletics programs and proactively compensate for past sex/gender discrimination within sports at institutions (Holliday 1996, 261; Wiles 1996, 271).

Title IX's scope was regularly (re)interpreted by the courts in the years following its passage. One of the first major legal challenges to Title IX came from the National Collegiate Athletics Association (NCAA) as HEW was taking public comment on its proposed regulations. On February 17, 1976, the NCAA filed suit against HEW, "seeking a declaration that the Title IX regulations [were] illegal as they applied to athletic programs of institutions of higher education" (Beene 2013, 69; "History of Title IX" 2019; *National Collegiate Athletic Assn. v. Califano* 1978; The National Coalition for Women and Girls in Education, n.d.; Trahan 2016). The NCAA, on behalf of itself and its members, sought exemption from HEW's regulations because they "reach collegiate athletic programs[, which] do not directly receive federal assistance" (*National Collegiate Athletic Assn. v. Califano* 1978). The court ruled against the NCAA, finding that "the NCAA lacked standing as an organization, and that no injury to the NCAA was found" (Beene 2013, 71). The NCAA appealed the decision twice in 1978, both of which failed (Beene 2013, 73; *National Collegiate Athletic Assn. v. Califano* 1978). Nevertheless, the NCAA's challenge evidenced a primary objection to Title IX's reach into interscholastic and intercollegiate sports: that sports did not receive federal funding and were thus exempt from federal regulation.

The next major legal challenge regarding Title IX's scope came in the 1982 case *University of Richmond v. Bell*, in which the University of Richmond (UR) was asked to cooperate with a Title IX investigation by the Department of Education's Office of Civil Rights (OCR), which had replaced HEW in 1979 through the Department of Education Organization Act (Ribicoff 1979; *University of Richmond v. Bell* 1982). UR refused to cooperate with OCR's request to "investigate and regulate" its athletics department because the department did not receive federal funds "and therefore would not be within the reach of Title IX" (*University of*

*Richmond v. Bell* 1982). OCR threatened to initiate enforcement procedures, prompting UR to file a legal complaint seeking “injunctive and declaratory relief” from OCR’s requests (*University of Richmond v. Bell* 1982). Ultimately, the district court ruled in favor of UR, favoring a narrow definition of Title IX’s language of “program or activity.” The court demanded that a program or activity must directly receive federal financial assistance in order to be subject to Title IX regulation.

Later that year, in *Haffer v. Temple University*, the Third Circuit Court of Appeals ruled in such a manner that contradicted the *University of Richmond v. Bell* decision. In *Haffer*, eight women charged Temple University with sex discrimination in the university’s athletic department. Temple denied the discrimination complaint and argued that Title IX only applied to educational programs or activities that “*directly* [receive] federal funds” (*Haffer v. Temple University* 1982, author’s emphasis). However, the courts sided with the plaintiffs’ argument that Temple’s athletics department was subject to Title IX regulations because it “*indirectly* benefits from the receipt of federal funds; because Temple’s athletic program indirectly benefits from the large amounts of federal financial assistance furnished to the University in the forms of grants and contracts” (*Haffer v. Temple University* 1982). In other words, Temple received federal financial assistance that may or may not have directly gone to its athletic department, but even if that money did not go to athletics it freed up funds that may or may not have done so. The *Haffer* plaintiffs also suggested that Temple’s athletic department *did* directly receive federal funds, which the district court agreed with (*Haffer v. Temple University of Commonwealth System of Higher Education* 1981). Effectively, *Haffer* took an expansive approach to the scope of Title IX, a decision that almost directly contradicts *University of Richmond*.



This disagreement within the process of adjudicating Title IX's scope eventually led to the Supreme Court's taking up of *Grove City College v. Bell*. Of prime concern in *Grove City* was the question of what constitutes an educational program or activity (Wiles 1996, 271). In *Grove*, the Department of Education (DOE) had requested Grove City College (GCC) to sign an "Assurance of Compliance" form for the 1979 Title IX regulations. GCC refused to sign the document despite 482 of its students being eligible for and/or receiving Basic Education Opportunity Grants (BEOGs) or Guaranteed Student Loans (GSLs) (Wiles 1996, 272). DOE threatened to revoke some of this student financial aid if GCC did not sign the compliance form, ultimately producing the *Grove* case. While the DOE understood its financial aid to students as aid to GCC as an institution, GCC simply saw such assistance as aid to individuals. The Supreme Court ruled in favor of the DOE, with an important caveat that only BCC's financial aid office had to comply with Title IX because it was the only department directly affected by the BEOG and GSL assistance. The Court ruled that Title IX only applied to those parts of an institution that directly received federal financial assistance and could not be used to impose institution-wide compliance.

After the *Grove* decision, "Title IX effectively no longer applied to intercollegiate sports" (Wiles 1996, 273). The Court's decision faced a decent amount of scrutiny, particularly because it ignored Congress' intention for Title IX to "broadly affect institutions" (Wiles 1996, 273). Justice Brennan's dissent in *Grove*, partially joined by Justice Marshall, made this very point, noting that "the Court [...] ignores the primary purposes for which Congress enacted Title IX" (*Grove City College v. Bell* 1984). He elaborated:

[A]llowing Title IX coverage for the College's financial aid program, but rejecting institution wide coverage even though federal moneys benefit the entire College [...] may be superficially pleasing to those who are uncomfortable with federal intrusion into

private educational institutions, but it has no relationship to the statutory scheme enacted by Congress (*Grove City College v. Bell* 1984).

Justice Brennan argued that Congress understood financial aid to students as the same thing as aid to institutions, and that the Court's decision as it stood was "absurd" because while GCC's financial aid office could not discriminate on the basis of sex, every other part of the college was not prohibited from doing so (*Grove City College v. Bell* 1984). Regardless, *Grove* gutted Title IX's scope and authority, triggering congressional response by means of the Civil Rights Restoration Act of 1987.

Introduced on February 19, 1987, by Senator Edward Kennedy, the Civil Rights Restoration Act of 1987 (CRRA), also known as the Grove City Bill, revised and/or clarified language in Title IX (and a few other pieces of legislation) ("Civil Rights Restoration Act of 1987 (1988 - S. 557)" n.d.). Though the CRRA was vetoed by President Reagan, the Senate overrode the veto and it was enacted on March 22, 1988 ("Civil Rights Restoration Act of 1987 (1988 - S. 557)" n.d.; Kennedy 1988). The CRRA clarified the interpretation of Title IX's "program or activity" language, stating that the term applies to "all of the operations of [...] a college, university, or other postsecondary institution, or a public system of higher education" (Kennedy 1988). Thus, the CRRA re-expanded the scope of Title IX, and effectively made all intercollegiate athletics programs subject to its regulations.

Almost immediately, the NCAA began considering gender equity more seriously, publishing a "Gender-Equity Study" of its member institutions in 1992 ("History of Title IX" 2019; Wiles 1996, 275). In the same year, *Franklin v. Gwinnett County Public Schools* was decided. In *Franklin*, a petitioning student filed a complaint under Title IX after facing sexual harassment from a sports coach (*Franklin v. Gwinnett County Pub. Sch.* 1992). The student sought compensation for damages, but the district and appellate courts dismissed the case on the

grounds that Title IX did not authorize awards of damages (*Franklin v. Gwinnett County Pub. Sch.* 1992). The Supreme Court reversed the decision to dismiss, deciding that plaintiffs alleging sex discrimination under Title IX are entitled to compensatory damages, effectively putting significant liability pressures on institutions should they be found to discriminate on the basis of sex (*Franklin v. Gwinnett County Pub. Sch.* 1992; Wiles 1996, 274). The CRRA expanded the scope of Title IX while *Franklin* gave it teeth. The NCAA and schools across the country began expanding women's athletics programs to become Title IX compliant.

This history of Title IX adjudication largely informs how it has developed since 1992 within the sphere of interscholastic and intercollegiate athletics. Since 1979—with revisions and clarifications in 1996, 2003, and 2005—OCR has outlined a three-part test to determine if an interscholastic or intercollegiate athletics program is Title IX compliant (“Intercollegiate Athletics Policy: Three-Part Test -- Part Three Q’s & A’s” 2020). In order to be compliant, an institution must meet one of the following criteria:

- (1) The number of male and female athletes is substantially proportionate to their respective enrollments; or
- (2) The institution has a history and continuing practice of expanding participation opportunities responsive to the developing interests and abilities of the underrepresented sex; or
- (3) The institution is fully and effectively accommodating the interests and abilities of the underrepresented sex (“Intercollegiate Athletics Policy: Three-Part Test -- Part Three Q’s & A’s” 2020; Simon 2004, 126).

These rules apply to “approximately 16,500 local school districts, 7,000 postsecondary institutions, as well as charter schools, for-profit schools, libraries, and museums” (United States Department of Education 2020). However, though most institutions are not Title IX compliant, no institution has actually lost any federal moneys as a result of such noncompliance (“Title IX Q&A” n.d.). These institutions often face damages and legal fees in lieu of losing government assistance.

Title IX's relationship with transgender rights, both inside and outside of interscholastic and intercollegiate athletics, is a relatively new one. Just as Title IX followed in the footsteps of Title VII so do the adjudication of transgender discrimination cases originate in Title VII-based claims. Indeed, courts look "to Title VII when construing Title IX" (*Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.* 2017). *Tronetti v. Healthnet Lakeshore Hospital*, for instance, marked one of the first times a district court accepted a claim of discrimination based on gender transition as constituting sex discrimination under Title VII (*Tronetti v. TLC Healthnet Lakeshore Hosp.* 2003). In 2006, *Mitchell v. Axcan Scandipharm Inc* expanded on *Tronetti* by asserting that claims of harassment targeting trans employees specifically constitutes discrimination based on sex stereotypes under Title VII (*Mitchell v. Axcan Scandipharm, Inc.* 2006). And in *Schroer v. Billington* and *Lopez v. River Oaks Imaging and Diagnostic Group*, district courts ruled that the withdrawal of job offers based on gender transition or transgender status constitutes sex discrimination under Title VII (*Lopez v. River Oaks Imaging & Diagnostic Group* 2008; *Schroer v. Billington* 2008). These Title VII cases laid the groundwork for later legal challenges arguing that Title IX protected the rights of trans students.

On October 26, 2010, OCR sent out a Dear Colleague Letter (DCL) on bullying that expressed the DOE's interpretation of Title IX with respect to trans students for the first time. The letter stated that though Title IX "does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination" (Ali 2010, 8). This DCL was followed by a now-rescinded 2016 DCL that more explicitly expressed the OCR's interpretation of Title IX as it pertains to discrimination based on a student's gender identity (Lhamon and Gupta 2016). It was

primarily after these DCLs that district and appellate courts took up issues of transgender discrimination in schools.

The locus of contestation for trans rights in schools has been the use of restrooms according to one's gender identity. Like sports, restrooms are often spaces of sex/gender segregation left unquestioned. However, courts have begun to understand that the exclusion of trans students from the restrooms that align with their respective gender identities is a form of sex discrimination, and thus in violation of Title IX. In *Whitaker v. Kenosha Unified School District and Bd. of Educ. v. U.S. Dep't of Educ.* the courts ruled that excluding trans students from restrooms according to their gender identities violated Title IX (*Bd. of Educ. v. U.S. Dep't of Educ.* 2016; *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.* 2017). The recent case of *Adams v. Sch. Bd.*, decided by the Eleventh Circuit Court of Appeals on August 7, 2020, reaffirmed this interpretation of Title IX, ruling that such exclusion from restrooms constitutes a punishment of students' gender nonconformity and presents a harm to trans students (*Adams v. Sch. Bd.* 2018; *Adams v. Sch. Bd.* 2020). And the widely reported case of *Grimm v. Gloucester County School Board* has also been recently ruled on, at the appellate level, in favor of Grimm (*Grimm v. Gloucester Cty. Sch. Bd.* 2020).

The judgments in favor of plaintiffs in *Adams* and *Grimm* are, in part, the product of *Bostock v. Clayton County, Georgia*, which was decided on June 15, 2020, by the Supreme Court of the United States. *Bostock* combined three cases (the other two being *Altitude Express, Inc., et al. v. Melissa Zarda and William Allen Moore, Jr.* and *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*) in which plaintiffs alleged they were fired because they were homosexual or transgender, which they claimed violated their rights under Title VII (*Bostock v. Clayton County, Georgia* 2020). *Bostock* is particularly remarkable because

it rearticulates the Court's understanding of "discrimination on the basis of transgender status" in relation to "sex discrimination," effectively positioning the former as a form of the latter. In the Court's decision, Justice Neil Gorsuch writes that "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids" (*Bostock v. Clayton County, Georgia* 2020). In *Bostock*, the Court effectively understands discrimination based on a person's transgender status as a form of sex discrimination, which seems to suggest that instances of trans discrimination in educational institutions receiving federal assistance constitute violations of Title IX. Given *Bostock's* new precedent establishing transgender status as a protected category, there are newfound potentials for articulating Title IX's ability to protect trans students and student-athletes from discrimination in schools and sports.

After the Court's June 2020 ruling, OCR published two letters on August 31, 2020, that clarified its interpretation of Title IX post-*Bostock*. The first letter was a notice of investigation (NOI) to Shelby County Schools, which revealed OCR's revised interpretation that discrimination against a student on the basis of their sexual orientation constituted a violation of Title IX (Richey 2020). The second letter, though, was a revised statement of interest in *Soule v. Connecticut* that argued that despite *Bostock's* reading of sex discrimination under Title VII extending protections to trans people, Title IX still did not protect transgender people's rights to compete on sex-segregated sports teams (Richey 2020). OCR argued the one of Title IX's goals was to specifically protect girls and women's opportunities in athletics and that *Bostock's* context of Title VII differed enough from Title IX that discrimination against trans people in school-sponsored sports need not trigger a Title IX violation (Richey 2020).

However, on January 20, 2021, President Joe Biden issued Executive Order 13988 on “Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation” (Biden 2021). This executive order, in part, directed federal agencies to interpret the prohibition of sex discrimination as (also) prohibitions on discrimination on the basis of gender identity or sexual orientation, given the Court’s logic in *Bostock* (Biden 2021). OCR has since rescinded its statement of interest in *Soule v. Connecticut* (Goldberg 2021).

Interpretations of antidiscrimination law, particularly Title IX protections from sex discrimination, are thus subject to a constant flow of revising, revisioning, and reconceptualization. Since 1972, Title IX has been deployed as a mechanism through which to, in part, expand opportunities for girls and women in sports. Yet, only recently have Title IX protections been considered as extending to trans students and/or trans student-athletes. And because of Title IX’s history of promulgating opportunities for primarily cisgender girls and women in school-sponsored sports, moves to interpret the statute as extending to transgender girls and women have been met with a number of legal challenges bound up in the language of “sex” and “discrimination.”

In the next chapter, I begin to analyze the language of sex and gender in the context of Title IX in two ongoing legal cases: *Soule v. Connecticut* and *Hecox v. Little*. I particularly attempt to demonstrate how the law’s interpretation(s) of sex and gender are too simple and deterministic, failing to account for the ways in which sex and gender broadly operate as social constructions and specifically structure hierarchies of power and ability in sports. In other words, I suggest that antidiscrimination law wants the language of sex and gender to do things that it cannot do—like impose inherent meaning of a body or suggest innate physiological advantage in sports. Despite the fluctuating meanings of sex and gender, legal claims like those presented in

*Soule* and *Hecox* suggest that singular interpretations of these categories are necessary in the context of articulating a claim of sex discrimination. Yet, investments in specific definitions end up (re)constructing the gender binary and hierarchies that almost always disadvantage women and trans folks. The language of sex and gender in claims of sex discrimination is thus extremely important because it ends up determining whose lives and experiences are visible to the law, and whose remain marginalized.



## VI. The language of sex, gender, and Title IX in *Soule* and *Hecox*

According to Title IX, no person shall “be subjected to discrimination under any education program or activity receiving Federal financial assistance” on the basis of sex (United States Department of Justice 2012; 2015). Because sex is essential to the legal determination of discrimination under Title IX, claims articulating a violation of the law must rely on particular understandings and/or definitions of sex and/or gender. In *Soule v. Connecticut* and *Hecox v. Little*, the language of sex and gender is understood in fundamentally different ways that greatly affect the ways in which arguments in favor of and against the inclusion of trans student-athletes in interscholastic and intercollegiate athletics are made. The issue of trans inclusion in sports is particularly involved with the embodiment of sex, or how sex appears on the body, making the discussions of sex and gender all the more charged and legally fraught. This section addresses how the language of sex and gender is understood and interpreted in *Soule* and *Hecox*, and how such language comes to affect the concept of “sex discrimination.” First, I provide overviews of both cases to provide necessary context for the following chapter(s). Then, I show that *Soule* takes a rather hostile and irregular position on the language of sex and gender, making the language almost essential to the entire case that the plaintiffs present to the court. *Hecox*, on the other hand, presents a much more liberal participation in the language of sex and gender, though its reliance on medical discourses reveals how much of a hold the field of medicine has on which bodies are understood as “properly” sexed and “properly” gendered. Finally, I describe the threat that *Soule* presents to trans people in the United States and the legal system more broadly through its engagement in what Judith Butler calls the “far side of language.” Ultimately, *Soule* aims to codify a means by which it could be argued that the legal recognition of transgender people could constitute a form of sex discrimination in and of itself. Any ruling in favor of the

plaintiffs in *Soule* would thus put all trans people in the country in immanently more precarious sociolegal positions.

## A. Case overviews

### i. *Soule v. Connecticut*

On May 9, 2013, the Connecticut Interscholastic Athletic Conference (CIAC), the sole governing body of interscholastic sports in Connecticut, adopted new language in Article IX, Section B of its bylaws, regarding rules of eligibility that allowed for transgender students to “participate in CIAC athletic programs consistent with their gender identity” (The Connecticut Association of Schools 2013, 7). Seven years later, on February 12, 2020, three high school track athletes—Selina Soule, Chelsea Mitchell, and Alanna Smith—filed a legal complaint for injunctive relief and damages against the CIAC and a number of local school boards in Connecticut, challenging the CIAC’s transgender policy. The complaint alleged that the CIAC policy violated Title IX by effectively providing more opportunities to those students born biologically male than those born biologically female. The *Soule* complaint also names two Black trans girls, Terry Miller and Andraya Yearwood, in its filing, both of whom have filed to intervene as defendants in the case.

The Plaintiffs in *Soule* are being represented, in part, by the Alliance Defending Freedom (ADF), a “religious liberty” advocacy organization that has been designated as a hate group by the Southern Poverty Law Center (SPLC) (“Alliance Defending Freedom” n.d.). Among other things, ADF has supported the recriminalization of sex between LGBTQ adults, defended state-sanctioned sterilization of transgender people, and argued that queer people “are more likely to engage in pedophilia (“Alliance Defending Freedom” n.d.).

The *Soule* complaint argues that the CIAC’s policy regarding transgender students violates Title IX based on a particular understanding of sex discrimination, biological sex, and gender. This understanding is best understood through a footnote at the beginning of the complaint, which says:

Because Title IX focuses on equal opportunities between the sexes, because this Complaint is precisely concerned with effects of *biological* differences between males and females, because the terms “boys” and “men” are commonly understood to refer to males, and to avoid otherwise inevitable confusion, we refer in this complaint to athletes who are biologically male as “boys” or “men,” and to athletes who are biologically female as “girls” or “women.” This Complaint uses the names preferred by each student rather than legal names (*Soule et al.* 2020, 2, my emphasis).<sup>1</sup>

The complaint also contrasts “boys” as “those born with XY chromosomes” with “those who are born female—with XX chromosomes” (*Soule et al.* 2020, 3). Given this understanding of sex, the *Soule* complaint argues that the CIAC policy “ignor[es] the physical differences between the sexes” that make sex/gender segregation in some sports, like track and field, necessary (*Soule et al.* 2020, 11). The plaintiffs point to puberty as the moment when males start producing levels of testosterone great than females, which provides boys with “a wide range of physiological changes that give males a powerful physiological athletic advantage over females” (*Soule et al.*, 12). Furthermore, the plaintiffs allege, “female puberty brings distinctive changes to girls and women that *identifiably impede athletic performance*” (*Soule et al.* 2020, 13, my emphasis). Therefore, according to the complaint, by the time students governed by the CIAC policy are

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<sup>1</sup> Verified Complaint for Declaratory and Injunctive Relief and Damages, *Soule et al. v. Conn. Ass'n of Sch., Inc. et al.*, No. 3:20-cv-00201 (D. Conn. 2020), available at [https://www.aclu.org/sites/default/files/field\\_document/soule\\_et\\_al\\_v\\_ct\\_association\\_of\\_schools\\_et\\_al.pdf](https://www.aclu.org/sites/default/files/field_document/soule_et_al_v_ct_association_of_schools_et_al.pdf) and/or <https://adflegal.org/sites/default/files/2020-04/Soule%20v.%20Connecticut%20Association%20of%20Schools%20-%20Complaint.pdf>. Hereafter I refer to and cite this complaint as: (*Soule et al.* 2020, page number).

competing against one another, there are absolute physiological advantages that boys (biological males) have over girls (biological females).

The plaintiffs go to great lengths to demonstrate this absolute advantage, providing comparisons of the best-performing boys and girls athletes in the 60m, 100m, 200m, 400m, and 800m races. They also point to how different standards are set for boys and girls in different competitions in a variety of sports (ex. height of the net in volleyball, hurdle height in track, standard weight used by shot-putters) (*Soule et al.* 2020, 14). The complaint also cites Doriane Lambelet Coleman, a professor at Duke Law, who has written about sex segregation and sports in the past. Since the *Soule* complaint's initial filing, and ADF's continued use of her work, Professor Coleman has clarified her support for current NCAA policy regarding the inclusion of transgender student-athletes (*Hecox* 2020, 31).<sup>2</sup> The *Soule* complaint also points to CeCe Telfer, the first trans woman to win an NCAA championship (she won the NCAA Division II women's 400m hurdles in 2019), as a means of demonstrating that testosterone-suppressing drugs do not meaningfully account for the absolute advantages that biological males enjoy over biological females (*Soule et al.* 2020, 20).

Importantly, the plaintiffs construct a narrative of transgender student-athletes that suggests “a larger wave of males claiming transgender identity as girls and women” and results in the displacement of “those born female—girls” from “varsity spots, playing time, medals, advancement to regional meets, championship titles and records, recognition on the victory podium[,]” and opportunities for collegiate recruitment, among other things (*Soule et al.* 2020,

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<sup>2</sup> Complaint for Declaratory Relief and Injunctive Relief, *Hecox v. Little*, No. 1:20-cv-00184 (D. Idaho 2020), available at [https://www.aclu.org/sites/default/files/field\\_document/hecox\\_v\\_little\\_complaint.pdf](https://www.aclu.org/sites/default/files/field_document/hecox_v_little_complaint.pdf). Hereafter I refer to and cite this complaint as: (*Hecox* 2020, page number).

21). This narrative refuses to acknowledge that trans girls are “actual” girls, so the complaint can argue that “girls” are losing opportunities to “biological males.” Indeed, the complaint argues that “if the law permits males to compete as girls in high school, then there is no principled basis on which colleges can refrain from recruiting these ‘top performing girls’ (*in reality males*) for their ‘women’s teams’ and offering them the ‘women’s’ athletic scholarships” (*Soule et al.* 2020, 22, my emphasis). A key part of *Soule*’s claim thus hinges on an insistence that *trans girls are not really girls*, so a policy that provides trans girls with opportunities according to their gender identities (like the CIAC’s) is inherently a violation of Title IX.

In its articulation of the impacts of the CIAC policy’s (negative) impacts on the plaintiffs, the *Soule* complaint alleges that Terry Miller and Andraya Yearwood have “taken” opportunities away from female track athletes because they were identified as male at birth (*Soule et al.* 2020, 24). The plaintiffs argue that Terry and Andraya have, in part, displaced a number of other “female athletes” by effectively disrupting the processes by which girls qualify for championship competition (*Soule et al.* 2020, 24-39). For example, the complaint charges Terry and Andraya with denying Chelsea Mitchell a gold medal at the 2019 CIAC State Open Championship Women’s Indoor Track 55m because they finished first and second, respectively, while Chelsea finished third (*Soule et al.* 2020, 30). Interestingly, Chelsea beat Terry twice the next year in the 55m at the Connecticut State Class S Championship and the State Open, though the plaintiffs’ lawyers insisted that said result had no bearing on the ongoing legal proceedings in *Soule* (Associated Press 2020; McFarland 2020).

Nevertheless, the plaintiffs in *Soule* argue that “boys” are “competing in CIAC girls’ track and field events” and are thus “depriv[ing] many female athletes of opportunities to achieve public recognition, a sense of reward for hard work, opportunities to participate in higher level

competition, and the visibility necessary to attract the attention of college recruiters and resulting scholarships” (*Soule et al.* 2020, 33). Furthermore, the plaintiffs say they “feel stress, anxiety, intimidation, and emotional and psychological distress from being forced to compete against males with inherent physiological advantages” in girls competition: Chelsea gets physically ill before races in which she competes against trans girls and Selina is depressed after losing championship competition spots to trans girls (*Soule et al.* 2020, 38).

The *Soule* complaint culminates in two charges against the CIAC: the CIAC is violating Title IX by “failing to provide effective accommodation for the interests and abilities of girls” and by “failing to provide equal treatment, benefits[,] and opportunities for girls” (*Soule et al.* 2020, 46 and 48).

Since filing the suit in February 2020, Chelsea Mitchell has been recruited to run track at and currently attends William & Mary, Selina Soule has been recruited to run track at and currently attends the College of Charleston, and Alanna Smith continues her high school track career in the CIAC (Barnes 2020; Soule 2020). As of June 2020, Terry Miller was still unsure whether she would continue running track and Andraya Yearwood had decided to attend North Carolina Central University, though she decided she would no longer be running competitively (Barnes 2020).

## ii. *Hecox v. Little*

On February 13, 2020, Idaho State Representative Barbara Ehardt introduced House Bill 500 (HB 500), named the “Fairness in Women’s Sports Act,” to the Idaho state legislature (Ehardt 2020). By March 18, 2020, HB 500 was passed by both Idaho legislative bodies, and on March 30, 2020, it was signed into law by Idaho Governor Bradley Little (Ehardt 2020; Richert

2020). Effectively, HB 500 “categorically bars women and girls who are transgender, and many who are intersex, from participation in school sports consistent with their gender identity [...] by requiring proof of ‘biological sex’” in ways that are purposefully trans- and intersex-exclusive (*Hecox* 2020, 2-3). The most important section of the law, in the context of *Hecox*, is the following:

Interscholastic, intercollegiate, intramural, or club athletic teams or sports that are sponsored by a public school or any school that is a member of the Idaho high school activities association or a public institution of higher education or any higher education institution that is a member of the national collegiate athletic association (NCAA), national association of intercollegiate athletics (NAIA), or national junior college athletic association (NJCAA) shall be expressly designated as one (1) of the following based on biological sex: (a) Males, men, or boys; (b) Females, women, or girls; or (c) Coed or mixed. (2) Athletic teams or sports designated for females, women, or girls shall not be open to students of the male sex. (3) If disputed, a student may establish sex by presenting a signed physician's statement that shall indicate the student's sex based solely on: (a) The student's internal and external reproductive anatomy; (b) The student's normal endogenously produced levels of testosterone; (c) An analysis of the student's genetic makeup (Ehardt 2020).

HB 500 attempts to explicitly define biological sex within the context of sports and then presents a blanket means by which any person may call any athlete’s sex into question through a dispute process that can only be resolved by fitting into particular understandings of sex. Furthermore, the bill “does not specify what reproductive anatomy, genetic makeup, or normal endogenously produced testosterone levels” constitute a “normal” male or female (*Hecox* 2020, 30).

On April 15, 2020, Lindsay Hecox, a Jane Doe, a Jean Doe, and a John Doe (represented by the American Civil Liberties Union, Legal Voice, and Cooley LLP) filed a complaint against the state of Idaho, alleging that HB 500 “discriminates on the basis of sex and transgender status and invades fundamental privacy rights” (*Hecox* 2020, 5). Lindsay Hecox, the lead plaintiff in the *Hecox* filing, is a trans woman attending Boise State University. Prior to HB 500’s passage, she was planning on trying out for the Boise State cross country team in August 2020 (*Hecox*

2020, 6). Jane Doe is a 17-year-old cisgender girl attending Boise High School and she is being represented by her mother and father, Jean and John Doe (*Hecox* 2020, 6). The *Hecox* complaint ultimately alleges that HB 500 violates the Equal Protection clause of the Fourteenth Amendment, deprives the plaintiffs of their Fourteenth Amendment right to due process, constitutes an unconstitutional means of search and seizure under the Fourth Amendment, presents a lack of fair notice to relevant actors under the Fourteenth Amendment, and violates Title IX by discriminating against transgender people on the basis of sex and/or transgender status (*Hecox* 2020, 43-53).

In contrast to the complaint in *Soule*, the *Hecox* complaint goes to great lengths to clarify differences between gender identity and biological sex. For instance, *Hecox* details the process by which trans people experience gender dysphoria and are medically treated for such a diagnosis in order “to eliminate the clinically significant distress [and help] a transgender person live in alignment with their gender identity” (*Hecox* 2020, 35). *Hecox* also explains that the precise treatment for gender dysphoria looks different for each person, and that while hormone therapy and other medical interventions may be necessary, “[n]ot all transgender people need surgical treatment to alleviate their dysphoria” (*Hecox* 2020, 35-37). This articulation of the (medicalized) experience of trans folks is necessary because, as *Hecox* enumerates, “[e]ven women [and girls] who have had gender-affirming genital surgery to treat gender dysphoria” would be barred from sports competition under HB 500 because they would not have the “correct” internal reproductive anatomy to be considered “women” nor would they meet the hormone requirement because their hormone levels would most likely not be considered “endogenous” (*Hecox* 2020, 39-40). HB 500 is thus an explicit attempt to bar all trans girls and women from sports in Idaho.



The *Hecox* complaint also raises concerns about the processes by which HB 500 outlines an athlete's sex could be disputed. "Female athletes who are successful, who have features that are considered masculine, or who simply become someone's target," according to *Hecox*, "may [now] have their sex 'dispute[d]'" and thus be subject to medical sex/gender verification testing (*Hecox* 2020, 41). This aspect of HB 500 is what most affects someone like Jane Doe because the means by which a dispute can be started under the Idaho law basically allows for any given woman or girl's gender to be scrutinized for no reason other than that their "biological sex" is inconsistent with that of a "normal female." Furthermore, the testing required to receive sex/gender verification under HB 500 is expensive, can reveal extremely private personal information to the state officials responsible for checking a student's sex/gender verification, and "can cause trauma and trigger past sexual and other types of trauma" (*Hecox* 2020, 41-42). This fear of having one's sex/gender disputed and scrutinized will, according to the *Hecox* complaint, deter a number of women and girls from deciding to participate in competitive athletics and will increase the stigma and shame that trans athletes currently experience (*Hecox* 2020, 43).

An amicus brief filed at the appellate court by the National Women's Law Center (NWLC), and supported by 60 other organizations "committed to racial and gender justice and LGBTQ rights[,]," further elucidates a concern regarding HB 500's implications for cisgender women and girls: that it will disproportionately affect Black and brown girls (*NWLC* 2020, 1 and 7).<sup>3</sup> HB 500, they argue, "rests on old, fundamentally inaccurate and harmful stereotypes

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<sup>3</sup> Brief for *Amici Curiae* National Women's Law Center, Lawyers' Committee for Civil Rights Under Law and 60 Additional Organization in Support of Appellees and Affirmance, *Hecox v. Little et al.*, Nos. 20-35814, 20-35815 (US Court of Appeals for the Ninth Circuit Dec. 2020), available at [https://www.aclu.org/sites/default/files/field\\_document/nwlc\\_ecf-stamped-hecox-amicus-12.21.2020.pdf](https://www.aclu.org/sites/default/files/field_document/nwlc_ecf-stamped-hecox-amicus-12.21.2020.pdf). Hereafter I refer to and cite this document as: (*NWLC* 2020, page number).

regarding athleticism, biology, and gender, which particularly harm girls who are transgender and Black and brown [...] These stereotypes frequently result in such girls being told outright that they are not, in fact, girls” (*NWLC* 2020, 7). The NWLC’s brief and the *Hecox* complaint outline brief histories of sex/gender verification testing—which I have also done in Chapter II—and then the NWLC shows how such testing has historically disproportionately affected Black women and women from the Global South (*NWLC* 2020, 21). They point to international and widely-known examples of athletes—like Caster Semenya, Santhi Soundarajan, Dutee Chand, and Serena Williams—to show how suspicion-based testing is most often weaponized against Black and brown women deemed not “feminine” enough by their peers to compete. HB 500 puts the power of suspicion in the hands of coaches, administrators, and fellow athletes to judge what a woman’s body *should* look like, and this power will be used to specifically police the bodies of Black and brown women in Idaho (*NWLC* 2020, 23-24).

On August 17, 2020, the United States District Court for the District of Idaho ruled in favor of Lindsay Hecox’s motion for preliminary injunction, halting HB 500’s implementation until the courts can rule definitively on the constitutional and statutory challenges to the law (*Hecox v. Little* 2020).<sup>4</sup> Though the District Court rules primarily on whether the plaintiffs in *Hecox* have standing to challenge the law’s constitutionality, it also recognizes a valid Title IX challenge given the Supreme Court’s recent ruling in *Bostock v. Clayton County*.

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<sup>4</sup> *Hecox v. Little*, 479 F. Supp. 3d 930, 2020 U.S. Dist. LEXIS 149442, 107 Fed. R. Serv. 3d (Callaghan) 758, 2020 WL 4760138 (United States District Court for the District of Idaho August 17, 2020, Filed), available at <https://advance-lexis-com.proxy.wm.edu/api/document?collection=cases&id=urn:contentItem:60M6-62S1-JS0R-23B2-00000-00&context=1516831>. Hereafter I refer to and cite this document as: (*Hecox v. Little* 2020, page number)

On November 12, 2020, *Hecox* was appealed by the Attorney General of Idaho and two Intervenor—Madison Kenyon and Mary Marshall, cross country and track athletes at Idaho State University who competed against Juniper Eastwood, a trans woman who used to run for the University of Montana, and had ““deflating experiences”” (*Hecox v. Little* 2020, 8). Kenyon and Marshall are being represented by the ADF. The case is currently being adjudicated in the Ninth Circuit Court of Appeals.

#### B. Language in *Soule v. Connecticut*

The language of sex and gender is so instrumental to the case presented by the plaintiffs in *Soule* that it tries to be clear of its definition(s) of sex/gender from the second page of the brief:

Because Title IX focuses on equal opportunities between the sexes, because this Complaint is precisely concerned with effects of *biological* differences between males and females, because the terms “boys” and “men” are commonly understood to refer to males, and to avoid otherwise inevitable confusion, we refer in this complaint to athletes who are biologically male as “boys” or “men,” and to athletes who are biologically female as “girls” or “women” (*Soule et al.* 2020, 2).

The complaint articulates the “biological differences” that it is concerned with in a myriad of ways that primarily focus on chromosomal sex (boys are “those born with XY chromosomes” and girls are “those who are born female [...] with XX chromosomes) and supposed physiological differences between the sexes (*Soule et al.* 2020, 3 and 11). Physiological differences, according to the *Soule* complaint, are essential to the very notion of providing athletic opportunities to women because “ignoring differences in male and female physiology [...] would for many sports ‘effectively eliminate opportunities for women to participate in organized competitive athletics”” (*Soule et al.* 2020, 11-12). Furthermore, the complaint argues that puberty operates as a juncture for when sex-related physiological differences become too

powerful for female athletes to overcome as levels of circulating testosterone in males makes it “impossible for girls and women in the vast majority of athletic competitions” to win (Soule et al. 2020, 12).

In addition to its arguments of inherent male-superiority, the *Soule* complaint asserts that there is also inherent female-inferiority within competitive athletics as “female puberty brings distinctive changes to girls and women that identifiably impede athletic performance” (Soule et al. 2020, 13). These notions of male superiority and female inferiority are touted to be “inescapable biological facts of the human species, not stereotypes, ‘social constructs,’ or relics of past discrimination” (Soule et al. 2020, 14). The *Soule* complaint thus relies on an understanding of sex and gender that make the two effectively synonymous and cements sex/gender differences that aim to naturalize sex/gender hierarchies. In other words, the complaint affirms essential, biological differences between men and women that are understood to be undeniable, unalterable, and mark men as superior and women as inferior.

The naturalization of gender differences in *Soule* is ultimately essential to both Title IX claims of sex discrimination made in the complaint. First, the complaint argues that the CIAC has failed to “provide accommodation for *interests and abilities* of girls [...] by permitting males to compete in girls’ track and field events (Soule et al. 2020, 47, my emphasis). By failing to account for the profound, inescapable physiological differences between girls and boys, the *Soule* complaint suggests that the CIAC has failed to accommodate for the (inferior) abilities of girls in relation to those (superior) abilities of boys. And by allowing trans girls (whom the *Soule* complaint only ever refers to as “boys” or “biological males”) to compete in girls’ competition, cisgender girls (“girls” or “females”) have lost opportunities relative to their male counterparts. The second claim of sex discrimination under Title IX made in *Soule* further elaborates on the

issue of lost opportunities by arguing that “the CIAC policy that permits males to participate in girls’ events and be recognized as winners of girls’ events” fails to “provide equal treatment, benefits[,] and opportunities in athletic competition to girls” (*Soule et al.* 2020, 49). Both claims enumerate harms to the plaintiffs as “loss of the experience of fair competition; loss of victories and the public recognition associated with victories [...] loss of visibility to college recruiters; emotional distress, pain, [and] anxiety” (*Soule et al.* 2020, 47-49).

Clearly, the *Soule* complaint fails to confront any nuance in the ways in which we might understand sex and gender. And it effectively refuses to acknowledge and/or respect the gendered experiences of trans people, as evidenced by its refusal to even address trans girls as “trans girls” but rather as “males” or even “boys.” *Soule* even goes so far as to suggest that “wave[s]” of “males” are “claiming transgender identity as girls” and thus more and more (“real”) cisgender girls are losing opportunities in athletics (*Soule et al.* 2020, 21). Not only is such a claim false because there is no evidence that an increasing number of trans women are displacing cis women in competitive athletics but it further exemplifies *Soule*’s unwillingness to acknowledge that trans girls and women are girls and women.

Indeed, the denial of trans girls’ existence (at least as girls or women) is so instrumental to *Soule* that the case is currently stalled at the appellate court because the plaintiffs’ lawyers requested that the district court judge recuse himself after asking them “to refrain from continuing to refer to the transgender females involved in [the] case as ‘males’” (Chatigny 2020).<sup>5</sup> In his denial of the plaintiffs’ recusal request, Judge Robert N. Chatigny wrote that “for

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<sup>5</sup> Order denying Motion to Transfer/Disqualify/Recuse Judge, *Soule et al. v. Connecticut Association of Schools, Inc. et al*, No. 3:20-cv-00201, (D. Conn. 2020), available at [https://www.aclu.org/sites/default/files/field\\_document/soule\\_et\\_al\\_v.\\_ct\\_association\\_of\\_schools\\_et\\_al\\_-\\_order\\_denying\\_recusal\\_request.pdf](https://www.aclu.org/sites/default/files/field_document/soule_et_al_v._ct_association_of_schools_et_al_-_order_denying_recusal_request.pdf). Hereafter I refer to and cite this document as: (Chatigny 2020).

plaintiffs' counsel to continue to call these transgender youth 'males' would be needlessly provocative, and inconsistent with norms of civility in judicial proceedings" (Chatigny 2020). Even more, Judge Chatigny notes how "calling transgender girls 'males' can cause significant mental and emotional distress [...so] referring to these transgender youth as 'transgender females' would be consistent with 'science, common practice, and perhaps human decency'" (Chatigny 2020). Judge Chatigny's refusal to recuse himself importantly demonstrates how courts already have a conception of how to talk about trans people and understand some of the stakes in the language of sex and gender. Furthermore, his argument against recusal illumines how out-of-legal-standard the complaint and argument in *Soule* really are in their insistence that we refer to trans girls and women as "males."

In their petition for writ of mandamus to the appeals court, the ADF argues for recusal by insisting that "[f]actually and scientifically, Petitioners' claim is exclusively about human biology and the substantial advantage in physical capabilities that the bodies of male humans enjoy after passing through even early stages of male puberty" (*Soule et al.* petition 2020, 3).<sup>6</sup> The gender identities of trans girls are, according to the ADF, "objectively irrelevant to the deprivation of equal opportunity inflicted on women and girls by competition against males because it is irrelevant to the physiological advantages in athletic capability" (*A Soule et al.* petition 2020, 4). The ADF asserts that the plaintiffs in *Soule* "must refer to the two athletes [Andraya Yearwood and Terry Miller] who have taken opportunities from girls in Connecticut in the way that is relevant to physiology and to Title IX: by their sex" (*Soule et al.* petition 2020, 4).

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<sup>6</sup> Petition for writ of mandamus to the United States District Court for the District of Connecticut, *Soule et al. v. Connecticut Association of Schools, Inc. et al.*, No. 3:20-cv-00201 (US Court of Appeals for the Second Circuit 2020), available at <https://adflegal.org/sites/default/files/2020-07/Soule-v-Connecticut-Association-Schools-Mandamus-Petition.pdf>. Hereafter I refer to and cite this document as: (*Soule et al.* petition 2020, page number).

Thus, instead of realigning to legal norms that would, according to Judge Chatigny, still allow for the case to “be fully and fairly litigated consistent with professional ethics and constitutional protections[,]” the plaintiffs in *Soule* double-down on the language of sex and gender they use in their complaint (Chatigny 2020). Indeed, at some level, *Soule*’s entire case rests on how the law chooses to understand the language of sex and gender.

### C. Language in *Hecox v. Little*

In contrast to the *Soule* complaint, *Hecox* levies several legal challenges against HB 500 in Idaho, only one of which being that it presents a violation of Title IX. The *Hecox* complaint suggests that sex discrimination under Title IX “encompasses discrimination against individuals because they are transgender, because they are women and girls (whether cisgender or transgender), and because they depart from stereotypes associated with sex” (*Hecox* 2020, 50). This particular interpretation of sex discrimination under Title IX is a nod towards *Price Waterhouse v. Hopkins* (1989), in which the Supreme Court held that gender stereotyping constituted sex discrimination. The argument follows that discrimination against trans folks is, in some way, a form of gender stereotyping and thus a form of sex discrimination.

Further, the *Hecox* complaint challenges the ways in which HB 500 tries to define sex. The complaint argues that “[n]either Title IX, its regulations, nor its guidance purports to define ‘sex’ based on endogenous hormone levels, internal or external reproductive anatomy, or chromosomes” (*Hecox* 2020, 51). Even more, the complaint provides its own definitions and explanations for sex/gender terms. For instance, it differentiates between gender identity and biological sex such that “‘gender identity’ is the medical term for a person’s internal innate sense of belonging to a particular sex” (*Hecox* 2020, 33). Every person, according to the complaint, has

a gender identity, “there is a significant biologic component underlying gender identity” and “gender identity is durable and cannot be changed by medical intervention” (*Hecox* 2020, 33). Though this definition may problematically assume that gender identity must inherently link to a particular sex category or identification, it still elaborates on a distinction between sex and gender that *Soule* neglects.

*Hecox* also clarifies that “[t]he term ‘biological sex’ is imprecise” because sex attributes can include “chromosomes, certain genes, gonads, the body’s production of and response to certain hormones, internal and external genitalia, secondary sex characteristics, and gender identity[,]” some of which may not always align “in typical ways” (*Hecox* 2020, 33). Sex designation/determination, *Hecox* points out, “usually occurs at birth based on the infant child’s genitals” and “[m]ost people have a gender identity that aligns with the sex they are assigned at birth” (*Hecox* 2020, 33-34). However, trans people have “a gender identity that does not align with the sex they [were] assigned at birth[,]” which can lead to “gender dysphoria,” “a serious medical condition that, if left untreated can result in severe anxiety and depression, self-harm, and suicidality” (*Hecox* 2020, 34). And while treatment for gender dysphoria can take myriad forms—surgical intervention not *always* being necessary—*Hecox* stresses that “a critical part of treatment is affirming ‘social transition’: the process by which a person expresses themselves consistent with gender identity” (*Hecox* 2020, 35). When it comes to the context of athletics, “forcing a girl who is transgender out of spaces designated for girls is extremely harmful and can result in serious health consequences” (*Hecox* 2020, 35). Importantly, the *Hecox* complaint *refers to trans girls as girls*, using inclusive and affirming language tossed aside by HB 500 and the *Soule* complaint.



The *Hecox* complaint's Title IX claim thus takes a significantly different approach to the language of sex and gender than *Soule* does by both being inclusive and affirming of trans people in said language. The language used in the *Hecox* complaint is also more aligned with legal standards than *Soule*'s is. For instance, in the District Court of Idaho's granting for preliminary injunction in *Hecox* the court actually relies on definitions of "sex," "gender identity," "cisgender," "transgender," "gender dysphoria," and "intersex" put forward by the plaintiffs' complaint (*Hecox v. Little* 2020, 5). This use of the language in the *Hecox* (preliminary) decision demonstrates how legal norms and standards lean towards the language put forward by the *Hecox* complaint while *Soule*'s stalling-out in the appellate court exemplifies how out-of-standard that complaint's language is.

However, the rhetoric deployed in *Hecox*, and broadly accepted within the legal community and judiciary, presents its own problems. Namely, despite challenging popular understandings of sex and gender, the complaint still leans heavily into medicalized language as a means of seeking validation for its claims. For example, the complaint asserts that a trans person "is someone who has a gender identity that does not align with the sex they are assigned at birth[,]” and that this results in gender dysphoria, "the diagnostic term for the condition where clinically significant distress results from the lack of congruence between a person's gender identity and the sex they are designated at birth" (*Hecox* 2020, 34). This particular articulation of transness wades into Sandy Stone's "diagnostic battlefield" in which we specifically come to understand transness as being born in the "wrong body" (Stone 2006, 231 and 232). The product of this "wrong body" narrative is a world in which we attribute one type of sexed body per gendered subject and regulate or discipline those bodies that may not conform to such a paradigm (Stone 2006, 231).

While Stone's work focuses on physical parts of the body associated with certain cultural norms of sex and gender, *Hecox* focuses on the role of hormones as a mechanism by which we might be more inclusive of trans people and their bodies. For instance, the complaint describes how the lead plaintiff, Lindsay Hecox, is being "treated with both testosterone suppression and estrogen" as part of her treatment for gender dysphoria (*Hecox* 2020, 13). This hormone treatment, it argues, "lowers her circulating testosterone levels and affects her bodily systems and secondary sex characteristics" (*Hecox* 2020, 13). And Lindsay's hormone treatment is consistent with existing NCAA guidelines regarding the inclusion of trans women in varsity intercollegiate athletics (*Hecox* 2020, 14; NCAA Office of Inclusion 2011).

Still, Stone's critique of the medicalization of trans people's bodies applies to the *Hecox* complaint because it points toward medical knowledge of transness to make its case. Indeed, the medical and psychological establishment remain "gatekeepers for cultural norms [...] the final authority for who counts as a culturally intelligible body" (Stone 2006, 232). In other words, as the *Hecox* complaint participates in medical discourse about transness as a means of obtaining authority for its claims, it also reifies the ability for medicine to determine *who* and *what kind of body* counts as properly cisgender or transgender. The complaint even provides a photo of Lindsay in which she has long hair, appears to be wearing makeup, and is dressed in "feminine" clothing so as to demonstrate how her hormone treatment for gender dysphoria "properly" aligns with her identity as a trans woman. The point is not to critique Lindsay here but instead to be critical of how a very particular narrative of transness is being provided to the courts through the use of medical discourses. A trans student-athlete with less access to medical resources, for example, may be less intelligible to the court in a case like *Hecox*, which means that the medical

field maintains a great deal of power—socially and legally—to determine whose bodies count in “x” category and whose bodies do not.

Stone’s critique, along with arguments presented by scholars like Judith Butler, Emi Koyoma, and Riki Anne Wilchins, are important to keep in mind in the context of a case like *Hecox* because it pushes the legal logic of the complaint to questions essential to broader action. For instance, why is hormone treatment for one year necessary in order for a trans girl or woman to compete in interscholastic or intercollegiate athletics? What if that trans student-athlete cannot obtain access to such treatment? What if a trans student-athlete does not currently want to undergo hormone treatment? should they still be restricted from competition? Why are certain medical interventions required by athletic governing bodies and others are not? What if a student-athlete identifies as nonbinary and wants to compete in a sports category different from the sex they were assigned at birth? These questions exist somewhat outside of the scope of the project at hand, but they remain instrumental to broader discussions of how we might work to further understand the nuances of the language of sex and gender in sports.

#### D. *The Far Side of Language and the Threat of Soule v. Connecticut*

Because Title IX articulates a particular concern over discrimination “on the basis of sex,” the language of sex and gender is essential to how any claim of discrimination is made under the statute. In *Hecox v. Little*, the language of sex and gender is articulated in such a way that makes it legally reasonable to argue that discrimination against trans folks because they are trans constitutes (a form of) sex discrimination, perhaps under particular conditions, like medical transition. This argument is supported by the Supreme Court’s June 2020 decision in *Bostock v. Clayton County*, which I will take up in the next chapter to demonstrate how a textualist

approach to Title IX (following *Bostock*) resolves both *Hecox* and *Soule*. In this last section, though, I would like to further elucidate the argument and implications of harms in *Soule*, particularly as they relate to that case's reliance on trans-exclusionary language.

In *Soule*, the plaintiffs express a number of affectual harms that exist outside of the context of being (theoretically) denied opportunities through the inclusion of trans athletes in competition. "The Plaintiffs[,] according to the complaint, "are demoralized [...] they also feel stress, anxiety, intimidation, and emotional and psychological distress from being forced to compete against males with inherent physiological advantages in the girls' category" (*Soule et al.* 2020, 38). Selina Soule has "suffered depression after being excluded from participation in State finals because top places in the girls' ranking were occupied by males" and Chelsea Mitchell "has felt physically sick before races in which she knew she would have to race against a male" (*Soule et al.* 2020, 38). This enumeration of emotional and psychological harms is important because it both encapsulates the complaint's transphobic rhetoric and exemplifies a larger move to portray trans women and girls as an inherent threat to cis women.

First, it is necessary to (appropriately and) explicitly describe the complaint in *Soule* as transphobic for two reasons: (1) it purposefully refuses to acknowledge the trans girls it names in its complaint as trans girls and (2) its investment in affectual claims of intimidation, emotional distress, and physical illness whilst in the presence of trans girls. While the *Soule* complaint does refer to Terry Miller and Andraya Yearwood by their chosen names, it fervently refuses to refer to them as trans girls. Instead, the complaint insists on referring to Terry and Andraya as "males" and uses other language inconsistent with the imperative to affirm trans people's experiences and identities. Furthermore, when the complaint asserts that Chelsea Mitchell "felt physically sick" before she competed against Terry and/or Andraya because of their mere presence in the race, it

is creating a direct link between their existence as trans girls and Chelsea's feelings of distress (*Soule et al.* 2020, 38). The complaint teeters on the edge of language of disgust in some of its descriptions of how *Soule's* plaintiffs felt about competing against trans girls. According to the Oxford English Dictionary (OED), to be transphobic is to be "hostile towards [...] transgender people" ("Transphobic, Adj." n.d.). The *Soule* complaint clears the bar of hostility towards Terry Miller and Andraya Yearwood, and generally poses a greater threat to trans youth in Connecticut (if not also the rest of the country). The complaint and its rhetoric are transphobic.

Furthermore, the language that the *Soule* complaint uses to explain the harms of the CIAC's inclusive policy towards trans youth is not only hostile towards trans people but also takes a step towards constructing trans girls and women as inherent threats cisgender girls and women. Given the context of interscholastic competitive athletics, the complaint articulates this supposed inherent threat through the language of universal, absolute physiological differences between the male and female sexes. Indeed, the plaintiffs are "demoralized," according to the complaint, because there is no hope of "experiencing the thrill of victory" when competing against trans girls "with inherent physiological advantages" (*Soule et al.* 2020, 38). This construction of trans girls and women in sports as inherent threats to cis girls and women operates in two ways. First, it aims to argue that trans girls and women disrupt notions of a level-playing field because of their supposed superior physiological capabilities. And second, it anchors its characterization(s) of trans girls and women in Butler's "far side of language," insisting that cis women be understood as inherently, universally inferior to men in sports.

I want to take up the argument of fair play first. Disputes over what kind of biological advantages exist for males over females in the context of sports are extremely contentious, remain unresolved, and often fail to acknowledge and/or account for transgender people. Instead

of (re)hashing these ongoing debates over biological/physiological advantages, I will focus specifically on the advantages listed in the *Soule* complaint. *Soule* situates the turning point in male and female development at puberty, at which point, according to the complaint, the levels of circulating testosterone in males increases to levels ten to twenty times higher than those levels that occur in females (*Soule et al.* 2020, 12). This testosterone “drives a wide range of physiological changes that give males a powerful physiological athletic advantage over females,” according to the complaint (*Soule et al.* 2020, 12). Furthermore, the *Soule* complaint argues that “female puberty brings distinctive changes to girls and women that identifiably impede athletic performance,” making girls and women increasingly inferior to boys and men in sports (*Soule et al.* 2020, 12). *Soule* thus naturalizes a patriarchal, misogynistic hierarchy in sports through its understanding of the sex binary.

Importantly, *Soule*’s explanation of the sex binary expresses neither a willingness to think critically about the nuances of sex differences nor an effort to understand the unique positions of trans folks within discourses of sex difference. Indeed, by only addressing the trans girls its complaint targets as “males,” the complaint fails to accurately conceptualize the biological and physiological experience(s) of trans girls and women. The complaint also relies on testimony and an article written by legal scholar Doriane Lambelet Coleman—whose work has been used to show that trans girls and women would inevitably displace all cis girls and women in sports—even though her work has only ever made comparisons between male and female athletes and failed to account for trans girls and women *not being* “male athletes.” In other words, the *Soule* complaint relies heavily on the idea that we can assume that trans girls and women in sports will have the same results as men. Not only is such logic flawed because it inherently assumes that trans girls and women are simply “males” but also, because of its refusal to acknowledge trans

girls and women as girls and women, it fails to understand that trans girls and women would not inherently put out the same competitive results if they identified as men (for any number of reasons including, but not limited to, possible gender-affirming hormone treatment).

Furthermore, if testosterone is the locus for athletic (dis)advantages, then it seems more fair for everyone if we simply segregate athletic competition(s) based on levels of testosterone. In other words, even if we take *Soule's* word that testosterone is an inherently-performance-enhancing hormone, then it seems that the best course of action would be to simply separate levels of competition on the basis of testosterone levels. Or, if *Soule* and its supporters would like to argue that other "physiological" factors structure the hierarchy of athletics, then we can account for those factors as well. The point is that the locus of athletic (dis)advantages *is not sex itself*. Being identified as male at birth does not inevitably make one faster or stronger than every other person identified as female at birth, gonads do not determine athletic success or advantage, and the presence or absence of a Y chromosome does not make a person more or less athletic. "Sex" is thus being used as a proxy for other things that people are concerned may (or may not) disrupt the level-playing-field and fairness. And there's a great unwillingness to move towards non-sex categories of athletic competition because to do so would more explicitly demonstrate that "physiological advantages" occur in a variety of ways, most of which are probably not inherently or exclusively dependent on a person's sex or hormone/androgen levels.

The *Soule* complaint's reliance on the notion of "physiological differences" and "physiological advantages" between males and females also relies on a particular participation in what Judith Butler calls "the far side of language" (Butler 1990, 155). The complaint profoundly insists that the physiological advantages it describes "are inescapable biological facts of the human species, not stereotypes, 'social constructs,' or relics of past discrimination" (*Soule et al.*

2020, 14). Thus, it insists that its articulation of the category of “sex” is “unmarked by a social system” of gender (Butler 1990, 155).

The complaint, though, is wrong in its assertion that its characterization of “physiological advantages” and “sex” are “inescapable biological facts,” and not “social constructs” (*Soule et al.* 2020, 14). First, the language of “physiological difference” and “physiological advantage” lacks necessary specificity. Physiology differs widely amongst all people, and sometimes these differences express themselves through challenges to the level-playing-field in ways people are less concerned with (Michael Phelps’s large wingspan, for instance). And in *Soule*, “physiological advantages” are solely the byproducts of elevated levels of circulating testosterone in “biological males” that occur during and after puberty. Yet, even testosterone can be said to be socially constructed, at least in part, because of social norms that link the hormone to virility and physiological superiority (Jordan-Young and Karkazis 2019). Further, testosterone *may* do certain things to a body that *might* make it more inclined to run a faster 1500 meter race or jump a little farther in the long jump; however, that bodily relation to testosterone is certainly not a universal one given that some people’s bodies actually cannot retain the hormone in their systems (ex. androgen insensitivity syndrome). “Physiological advantages,” then, arise in any number of ways, some of which may be tied to characteristics that the category of “sex” attempts to capture, but some of which also exist outside of the paradigms of sex.

The way that *Soule* weaponizes the language of “sex” can also be subject to critical scrutiny that reveals the category’s social construction. In other contexts, Butler and Fausto-Sterling have effectively deconstructed sex to demonstrate that it is at least not a binary and that the meanings we place on the terms “male” and “female” are not inherent or essential (Butler 1990; Fausto-Sterling 2012). And Suzanne Kessler’s work demonstrates how we literally



medically (re)construct sex and gender onto the bodies of children who do not meet social norms of the sexed body at birth (Kessler 1990).

In the space of sports, we can simply look at the history of sex/gender testing at elite levels of international competition to show how the categories of “sex” have never been as stable as people have wanted them to be. The constant shifting of testing mechanisms, the moving-of-the-line of demarcation for what counts as “male” and what counts as “female,” and the regulations adopted to expel those people whose lives and bodies defy supposed bodily norms all demonstrate ways in which sports actively participate in the social construction of sex. The *Soule* complaint’s usage of “physiological advantages” and “biological sex” thus reach out to the far side of language in search of some apparent, inherent capital-t truth *that is not actually there*. The very social construction of the ways in which we understand and account for “physiological advantages” and the inability for a category like “sex” to succinctly or effectively capture the nuances of human physiological development, demonstrates the absence of authority in *Soule*’s claims. In other words, *Soule* is using “physiological advantages” and “sex” as if they have some innate, essential power behind them that makes the complaint’s legal claims any more legible and affirmative. The complaint’s refusal to acknowledge the ways in which these words are socially constructed, and the very sense that they are so, disrupts any kind of leverage the plaintiffs think they hold by using them.

It is important to recognize these two things—the idea of inherent, universal “physiological advantages” experienced by all “biological males” and the supposedly coherent category of “sex”—as social constructs because the *Soule* complaint has deployed them in such a way that to accept both as true would be to also accept that trans girls and women should not be recognized as girls or women. The language of “physiological advantages” implies that these

advantages are almost exclusively and universally experienced by “males,” reifying the idea that cisgender women are inherently inferior to men in the arena of sports. This logic is deeply problematic because it opens up the possibility for a rational basis for the exclusion of trans girls and women from sports. This argument can only be made if we (1) accept that girls and women are consistently and universally inferior to men in sports, (2) refuse to recognize the myriad of factors that the category of “sex” cannot adequately capture in terms like “male” and “female,” and/or (3) do not recognize trans girls and women as girls and women. The *Soule* complaint does all three.

The logic in *Soule* is also extremely dangerous because through trying to form a rational basis for the exclusion of trans girls and women from sports it (re)articulates an understanding of sex and gender that not only refuses to acknowledge trans girls and women but also (re)constructs trans girls and women as immediate threats to cisgender girls and women. Indeed, *Soule* may find unusual allies in trans exclusionary radical feminists also seeking to develop a narrative in which the boundaries of womanhood cannot possibly be understood to encompass the lives and experiences of trans women. This narrative is so troubling because it contends that any discussion of transgender recognition and/or rights is a zero-sum game for cisgender girls and women. In other words, any (re)affirmation of transgender rights is strictly understood as a loss of some sort to cisgender girls and women. And this is the framework within which *Soule* operates: transgender girls and women are having their rights affirmed by being allowed to compete, which (according to the complaint) threatens the rights and opportunities of cisgender girls and women in sports.

Of course, the logic that leads to this zero-sum game falls apart at all three points of contention. At all levels of competitive athletics, but especially at the interscholastic and

intercollegiate levels, it seems remiss to argue that girls and women are consistently and universally inferior to men. James Fallows and Iris Marion Young, in their deconstructions of “throwing like a girl,” demonstrate how biological constructions of bodily difference are at least in part informed by the sets of possibilities and potentialities the social world allows to exist for girls and boys (Fallows 1996, Young 1980). Second, “sex” cannot do what the sports world wants it to do. It cannot neatly account for widespread differences in physiology that appear across all populations of people and that may or may not disrupt our notions of fair play. Sex, at least as it is deployed in *Soule*, is a poor proxy for other characteristics of embodiment that may or may not have implications on how successful any given person is in sports. Finally, to not recognize trans girls and women as girls and women is to deny them the agency and autonomy they ought to have with regards to their gender. To not affirm trans people in their identities is to deny them their ability and right to exist as who they are. And when we do not affirm and respect trans people, we know that their social positions and health outcomes become increasingly precarious.

*Soule* presents an easier target for critique because of its explicit use of hostile anti-trans arguments and repudiated biological “facts.” *Hecox*, though, holds central the need for affirming gender identity while also accepting the legitimacy of medical intervention as a pre-condition for trans girls and women to be affirmed as women in sports. In some ways, then, despite seeking a ruling that would find exclusion of transwomen in interscholastic and intercollegiate athletic competition as a form of sex discrimination, the affirmation of the NCAA’s policy for transgender inclusion also affirms the idea that the “biological male” haunts the existence of the trans girl and trans woman.

A key argument in the *Hecox* complaint is its assertion that HB 500 goes to extreme lengths to prevent trans girls and women from competing in sports. It makes this argument, in part, by comparing HB 500 to NCAA and IOC policies regarding the inclusion of transgender athletes, particularly trans women. The NCAA mandates that trans women undergo at least 12 months of testosterone suppression treatment prior to competing on a women's team (NCAA Office of Inclusion 2011). The IOC has a similar requirement by which trans women must demonstrate that their total testosterone levels have been below 10 nmol/L for 12 months prior to their first competition and throughout the time period they wish to compete (Erikainen 2019, 129; International Olympic Committee 2015). HB 500, then, goes beyond the scope of national and international sports regulatory bodies' own guidelines allowing for the participation of trans women in elite athletics.

*Hecox* thus brings forward Lindsay Hecox, a trans woman who has done everything required by the relevant institutions in order to compete in intercollegiate athletics, as the challenger to HB 500. Yet, (at least in part) arguing that HB 500 is a wrongfully discriminatory piece of legislation by contrasting it to well-established institutional regulations at more elite levels of sports competition suggests that HB 500 is *only* wrong because it goes *too far*. That is, *Hecox* does not refute the claim that some kind of regulation of trans women's bodies is necessary in order for them to "fairly" compete in sports. *Hecox* subsequently ends up relying on the same exact premise that motivates the *Soule* complaint: that trans girls and trans women are simply "biological males" with preexisting physiological advantages inherent in their bodies through their maleness. The only difference between the two complaints in the deployment of this logic is that *Hecox* is less overt in its affirmation of such a flawed system for understanding sex and gender.

So, it becomes important to not only argue that someone like Lindsay Hecox should be allowed to compete in women's sports because she is a trans woman but also that existing regulation of trans people's bodies as prerequisites to competition are incredibly flawed. Stone's "diagnostic battlefield" reappears in NCAA and IOC rules regarding the inclusion of trans athletes because both end up (re)constructing notions of which (trans) bodies are "right" and which are "wrong." Furthermore, the NCAA and the IOC continue to solely understand trans women as "biological males," putting language like "physiological advantages" and "testosterone" at the center of the ways in which we are told to understand trans women, at least in the context of sports. But, again, we cannot and/or should not be effectively treating trans women in sports as if they were/are biological males and there is little to no evidence for claims that testosterone is the mechanism by which we can and/or should measure athletic capacity or capability (Jordan-Young and Karkazis 2019). This particular critique of NCAA and IOC policies does not even account for the ways in which the "trans-inclusionary" regulations reinforce a reliance on class-based constructions of transness, are implicated in the racialization of transness and gender more broadly, and systematically reaffirm notions of male superiority and female inferiority (both inside and outside of a sports context).

This chapter has focused on the language of sex and gender in *Soule* and *Hecox* because, as I hope to have shown, the language is essential to the implications of both cases. Particularly when we are engaging with the law, the language we use becomes extraordinarily important because of the law's power to inevitably determine who gets to live and thrive and who is left as a subject to deferred death. In the case of *Soule*, we are presented with a legal argument that deploys, among other things, a logic that portrays transgender girls and women as ever-present threats to cisgender girls and women. *Soule* also only seeks injunctive relief under Title IX,

meaning that if the court were to rule in their favor it would establish a precedent for accepting such a logic as enough to make a claim for sex discrimination. Thus, *Soule* presents an extremely dangerous effort to codify legal precedent establishing legal recognition and/or protection of trans girls and women as a form of sex discrimination (presumably against cisgender girls and women). It bears insisting, then, that if such a thing were to happen, the consequences for trans people across the US would be disastrous, both within and outside of legal antidiscrimination contexts.

In the next chapter, I look to the Supreme Court's June 2020 ruling in *Bostock v. Clayton County* as a means to resolve *Soule* and *Hecox* immediately, avoid the risk of validating the argument for sex discrimination in *Soule* in any way, and (re)establishing precedent that makes bills like HB 500 illegal. I engage heavily with the textualist interpretation of the law presented in the *Bostock* opinion to propose that even when the law is interpreted in the most conservative manner, it still protects transgender student-athletes from being barred from competition according to their gender identity. I then turn to critiquing the Court's textualism in order to elucidate the ways in which "sex discrimination," as described in *Bostock*, fails to account for the unique ways in which trans girls and women, particularly those trying to compete in interscholastic and intercollegiate athletics, experience myriad forms of gender-based, racialized discrimination. In developing such a critique I hope to illustrate the limits and boundaries of *Bostock*, and point towards problems of antidiscrimination law that still need to be resolved in order to secure the rights of trans people in sports.

## V. Resolving *Soule* and *Hecox* in a post-*Bostock* world

In June 2020, the Supreme Court of the United States ruled in favor of the plaintiffs in *Bostock v. Clayton County*, a case primarily considering whether being fired for being homosexual or transgender constituted a form of sex discrimination under Title VII. The Court's opinion was written by Justice Neil Gorsuch, who took a strictly textualist approach to the statute in determining that “[a]n employer who fires an individual merely for being gay or transgender defies the law” by violating Title VII and discriminating on the basis of sex (*Bostock* 2020, 33).<sup>7</sup> The ruling was widely seen as a victory for queer and trans people because it effectively established that discrimination against LGBT people *because they were LGBT* constituted sex discrimination. And *Bostock* is understood as a case that can have implications on cases outside of Title VII's limited scope, like those that engage with Title IX. The defendants in *Bostock* presented this concern about scope as an argument to the Court, positing that a decision in favor of the plaintiffs “will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination [...like] sex-segregated bathrooms, locker rooms, and dress codes” (*Bostock* 2020, 31). Interscholastic and intercollegiate sports were almost certainly on the defendants' minds as well.

In this chapter, I briefly articulate the Court's textualist approach in *Bostock* and then argue that the case's implications on Title IX effectively resolve *Soule v. Connecticut* and *Hecox v. Little*. I then aim to demonstrate the limitations of the Court's textualist approach to Title VII's

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<sup>7</sup> *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 207 L. Ed. 2d 218, 2020 U.S. LEXIS 3252, 104 Empl. Prac. Dec. (CCH) P46,540, 28 Fla. L. Weekly Fed. S 294 (Supreme Court of the United States June 15, 2020, Decided), available at <https://advance-lexis-com.proxy.wm.edu/api/document?collection=cases&id=urn:contentItem:604P-P051-JS0R-21DV-00000-00&context=1516831> and/or [https://www.supremecourt.gov/opinions/19pdf/17-1618\\_hfci.pdf](https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf). Hereafter I refer to and cite this case as: (*Bostock* 2020, page number).

language in *Bostock*, the pitfalls of antidiscrimination law generally, and the ways in which the language of sex discrimination can still be used against trans student-athletes post-*Bostock*. I hope to establish these limitations in anticipation of Chapter VI's intersectional, prescriptive approach to antidiscrimination law, with regards to protections for transgender student-athletes' ability to compete in school-sponsored sports.

A. A textualist reading of sex discrimination in *Bostock v. Clayton County*

*Bostock v. Clayton County* was decided together with *Altitude Express, Inc., et al. v. Zarda et al.* and *R. G. & G. R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission et al.* (*Bostock* 2020, 1). In all three cases, an employee was fired for either being gay or transgender (*Bostock* and *Altitude Express* involved firings of gay employees while *R. G. & G. R. Harris Funeral Homes* involved the firing of a trans woman, Aimee Stephens, who died a month prior to the Court's ruling in June 2020). All three cases involved claims of sex discrimination in the workplace, which is outlawed in Title VII of the Civil Rights Act of 1964 (along with discrimination on the basis of race, color religion, and national origin) (*Bostock* 2020, 2). The Supreme Court ruled that in all three cases the employers had violated Title VII because they had discriminated against an employee on the basis of sex. According to the Court:

An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids (*Bostock* 2020).

In its opinion, the Court also emphasized that it reached such a decision by interpreting "the express terms of the statute" and the "written word of the law" (*Bostock* 2020, 2). In other words, the Court took a strictly textualist approach to Title VII in *Bostock*, interpreting the statute "in



accord with the ordinary public meaning of its terms at the time of its enactment” (*Bostock* 2020, 4). Another way to think about this textualist approach is that the justices only work with the “plain statutory commands” and make no assumptions “about intentions or guesswork about expectations” that may or may not have been on lawmakers’ minds at the time of enactment (*Bostock* 2020, 33). In its textualist approach to *Bostock*, the Court makes three important legal maneuvers: (1) it defines sex as male and female, (2) it establishes a “but-for” test of discrimination, and (3) it argues that sex discrimination occurs when a person is intentionally treated worse because of their sex.

In its move to interpret Title VII as it was written and understood in 1964, the Court first aims to “determine the ordinary public meaning” of “sex” (*Bostock* 2020, 4 and 5). In *Bostock*, the employers (defendants) argued that in 1964 “sex” meant that someone was male or female based on their reproductive biology while the employees posited that “even in 1964, the term bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation” (*Bostock* 2020, 5). The Court asserts that its approach to the cases does not rely on a resolution to the disagreement between the two parties regarding the definition of sex, and the employees’ lawyers do not depend on winning the debate over the definition to make their case, so “sex” in *Bostock* becomes understood as “referring only to biological distinctions between male and female” (*Bostock* 2020, 5).

The second textualist interpretation of Title VII’s language focuses on “what Title VII says about [sex,]” which is that it “prohibits employers from taking certain actions ‘because of sex” (*Bostock* 2020, 5). The ordinary understanding of “because of,” to the Court, is “‘by reason of’ or ‘on account of[,]” which establishes a “but-for” test of causation (*Bostock* 2020, 5). In other words, Title VII becomes relevant in a sex discrimination complaint when an employer

takes an action against an employee that they would not have taken if not for the employee's sex. Using the Court's interpretation of "sex," then, the but-for test becomes one of simply determining whether an employee would have been treated differently were they the opposite sex (to the Court, male or female). Furthermore, the but-for cause does not have to be the *only* cause of disparate treatment, "[s]o long as the plaintiff's sex was one but-for cause of [an employer's] decision, that is enough to trigger the law" (*Bostock* 2020, 6).

The last relevant textualist understanding of Title VII's language (at least in relation Title IX and interscholastic/intercollegiate athletics) is the Court's discussion of what would have been understood as "discrimination" in 1964. The Court comes to interpret the language of "discrimination" in Title VII as to treat persons differently, which means that to "discriminate against" means to treat an "individual worse than others who are similarly situated" (*Bostock* 2020, 7). In cases of sex discrimination, the Court has also established precedent that "difference in treatment based on sex must be intentional" (*Bostock* 2020, 7). Taken together, these three interpretations of Title VII's language lead the Court to conclude that "an employer who intentionally *treats a person worse because of sex* [...] discriminates against that person in violation of Title VII" (*Bostock* 2020, 7, my emphasis). Put another way: "if changing the employee's sex would have yielded a different choice by the employer [then] a statutory violation has occurred" (*Bostock* 2020, 9).

Given these three particular readings of Title VII's language, the Court develops an important chain of logic that constructs discrimination against gay and transgender people as (a form of) sex discrimination. In other words, the Court argues that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex" (*Bostock* 2020, 9). In sum, the Court puts forth an

interpretation of homosexuality and transgender status that make them “bound up with sex” because to discriminate against a person for being gay or trans, in the Court’s opinion, “requires an employer to intentionally treat individual employees differently because of their sex” (*Bostock* 2020, 10).

The *Bostock* opinion spends a lot of time parsing out this logic through a number of examples, but I choose to only describe one for brevity’s sake. In an attempt to answer employers’ arguments that they do not perceive their discrimination against gay and trans people as motivated by sex, the Court puts forth the idea that employer intentions mean little as long as it engaged in discrimination *because of sex*. The Court considers an example in which gay and/or trans job applicants would have to check a “gay” or “transgender” box on an application form (*Bostock* 2020, 18). If no information about sex was provided to the employer as they reviewed these applications and they chose to not hire people who checked either the “gay” or “transgender” box, then the employer would presumably be discriminating against gay and trans people but not because of their sexes. The Court refuses this logic because “[t]here is no way for an applicant to decide whether to check the homosexual or transgender box without considering sex” (*Bostock* 2020, 18). The *Bostock* ruling argues that in the instance in which a person does not know what “gay” or “transgender” mean, instructions would have to be written out describing the words, and such a task could not be done “without using the words man, woman, or sex” (*Bostock* 2020, 18). In all cases in which a gay or trans employee is discriminated against, then, the employer is intentionally participating in sex discrimination.

While this reading of discrimination against gay and trans employees may seem limited, it is seemingly necessary in the face of employer arguments that “sex must be the sole or primary cause of a diverse employment action for Title VII liability to follow” (*Bostock* 2020, 22). That

is, the Court acknowledges that “homosexuality and transgender status are distinct concepts from sex[,]” but maintains that “discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second” (*Bostock* 2020, 19). So, even when an employer aims to explicitly and/or exclusively discriminate on the basis of homosexuality or transgender status, they nevertheless are subject to claims of sex discrimination. The Court’s logic and underlying textualist interpretations should be subject to critique, but before I move to *Bostock*’s limitations I want to first clarify how the case remedies *Soule* and *Hecox*.

#### B. Title IX and sex discrimination post-*Bostock*

While the Court decided *Bostock* without considering its implications beyond Title VII, the decision has already had impacts on other cases involving sex discrimination. The most relevant application of the Court’s articulation of sex discrimination lies in Title IX claims—as anticipated by the employers in *Bostock* (*Bostock* 2020, 31). As noted in Chapter III, Title IX’s language is largely modeled after Title VII’s, which makes the quick application of *Bostock* to Title IX cases unsurprising (United States Equal Employment Opportunity Commission n.d.; Wiles 1996, 269). And the application of *Bostock* in Title IX cases involving discrimination against transgender students has remained relatively straightforward: the Court has held that discrimination against transgender people constitutes sex discrimination; this makes discrimination against transgender students (because they are trans) in violation of Title IX.

The widely known case of *Grimm v. Gloucester County School Board* provides a clean-cut example of how *Bostock* is being written into Title IX claims and judgments. In an August 2020 appellate level ruling, the Fourth Circuit Court of Appeals found that because of *Bostock*,

“[the court has] little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him ‘on the basis of sex’” (*Grimm v. Gloucester Cty. Sch. Bd.* 2020).<sup>8</sup> Their ruling continues, saying that “[e]ven if the [Gloucester School] Board’s primary motivation in implementing or applying the policy was to exclude Grimm because he is transgender, his sex remains a but-for cause for the Board’s actions[,]” which constitutes a form of sex discrimination and leaves Gloucester’s School Board in violation of Title IX (*Grimm v. Gloucester Cty. Sch. Bd.* 2020). The decision explains the but-for cause in simpler terms than the Supreme Court does in *Bostock*, saying that in cases of trans discrimination “the discriminator is necessarily referring to the individual’s sex to determine incongruence between sex and gender, making sex a but-for cause for the discriminator’s actions” (*Grimm v. Gloucester Cty. Sch. Bd.* 2020). The Fourth Circuit found that Gloucester School Board’s bathroom policy violated Title IX (*Grimm v. Gloucester Cty. Sch. Bd.* 2020).

Thus, because of *Bostock*, discrimination against transgender students in schools precedentially constitutes a violation of Title IX. Yet, the Court notes in its opinion in *Bostock*, “we do not purport to address bathrooms, locker rooms, or anything else of the kind [...] [w]hether other policies and practices might or might not qualify as unlawful discrimination [...] are questions for future cases” (*Bostock* 2020, 31-32). It seems, then, that the question of whether Title IX’s protections against sex discrimination protect trans students from discrimination will have its own day before the Court. Nevertheless, *Bostock* is clear: discrimination against

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<sup>8</sup> *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 2020 U.S. App. LEXIS 27234, 2020 WL 5034430 (United States Court of Appeals for the Fourth Circuit August 26, 2020, Decided), available at <https://advance-lexis-com.proxy.wm.edu/api/document?collection=cases&id=urn:contentItem:60P3-Y431-F1P7-B3K5-00000-00&context=1516831>. Hereafter this decision is referred to and cited as: (*Grimm v. Gloucester Cty. Sch. Bd.* 2020).

transgender people is (a form of) sex discrimination. Given that precedent and clarity, we can move to resolve *Soule v. Connecticut* and *Hecox v. Little* in ways that permit trans student-athletes to compete in sports according to their gender identities.

i. Resolving *Soule v. Connecticut*

After the Supreme Court’s ruling in *Bostock*, the complaint presented in *Soule v. Connecticut* is, at the very least, incomplete and incoherent. The plaintiffs in *Soule* seek relief under Title IX based on their understanding that they have lost opportunities to “biological males,” but in doing so it erases the presence of transgender discrimination. Indeed, the plaintiffs are asking for an injunction that would prohibit “males—individuals with an XY genotypes—from participating in events that are designated for girls, women, or females” (Soule et al. 2020, 49). This kind of injunction would constitute a form of discrimination based on transgender status, and therefore also a form of sex discrimination, triggering a Title IX violation. And the complaint’s unwillingness to acknowledge the existence of trans girls and women operates in stark contrast to *Bostock*, in which even a textualist/originalist approach to the law acknowledges the existence of trans girls and women. Further, even though *Bostock* strictly defines sex as “male” or “female,” the Court’s opinion is careful not to refer to trans girls or women as “biological males,” presumably because it knows that doing so *would be grossly inaccurate*. The plaintiffs in *Soule* thus seek relief through a statute that their argument itself is in violation of.

ii. Resolving *Hecox v. Little*

Given *Bostock*’s clarification that trans discrimination requires sex discrimination, Idaho’s HB 500 would compel all schools in Idaho to violate Title IX. Though HB 500 does not

explicitly discriminate against trans girls and women, it effectively makes it impossible for them to meet the standards required by the law. Trans girls and women seeking to participate in athletics at their schools are thus discriminated against—treated worse, to use the Court’s language in *Bostock*—because they are trans. Further, but for HB 500’s perception of trans girls and women as “of the male sex[,]” transgender student-athletes would not face the worse treatment (i.e. exclusion from participation in school-sponsored athletics according to their gender identity) that HB 500 subjects them to (“HOUSE BILL 500 – Idaho State Legislature” n.d.). To borrow language from the *Hecox* complaint, “barring [Lindsay] Hecox from girls’ and women’s athletic teams [...is to] subject her to discrimination in educational programs and activities ‘on the basis of sex,’ in violation of her rights under Title IX” (*Hecox* 2020, 51). And though the *Hecox* complaint was filed pre-*Bostock*, the Court’s June 2020 ruling only serves to bolster such a claim.

### C. The limitations of *Bostock* and antidiscrimination law

While the textualism of *Bostock* may resolve *Soule* and *Hecox*—and inevitably present an important legal hurdle for pending legislation attempting to prevent trans student-athletes from competing in sports—the case has severe limitations. In this section, I develop critiques of the textualist interpretations I outlined in section A, return to some broader critiques of antidiscrimination law introduced in Chapter I, and express some concerns over how *Bostock* may be unable to effectively answer equal protection claims that aim to prevent trans student-athletes from competing in interscholastic and intercollegiate athletics. These limitations do not severely decrease the power and impact of *Bostock*, but they are meant to motivate a sense that

broader work, perhaps inside and outside legal advocacy, is necessary in order to protect the rights and interests of queer and trans people.

i. Textualist interpretations fall short

The Court's textualist approaches in *Bostock*, while initially helpful in remedying immediate attacks on trans people's rights and lives, are severely limited. In this subsection, I briefly outline some critiques of the three assumptions discussed in section A. I show that all three assumptions fall short of advancing antidiscrimination law in ways that would holistically prohibit forms of discrimination and/or substantively improve the lives of queer and trans people.

“Sex”

First, the Court determines the ordinary public meaning of “sex” as a person being a “male” or “female” (*Bostock* 2020, 5). However, as discussed in Chapters II and IV, sex and gender are far more complex and less biologically determined than the Court's interpretation in *Bostock* accounts for. The Court's textualist approach to “sex” may not have been a key point of contention in *Bostock* because its logic was still sound within a sex binary, but in cases where the sexed body is more at the forefront of debates regarding sex discrimination it seems like textualism falls short. Indeed, the Court's assumption that sex refers “only to biological distinctions between male and female” does very little for legal advocates trying to advance more nuanced ways of understanding sex discrimination, particularly as it relates to trans folks.

Discrimination against trans youth and young people in sports is a particularly rich context to express the limitations of the Court's interpretation of “sex.” For instance, at the core of *Soule*'s claim is that trans girls and women are simply “biological males,” or at least should be



understood as such by the law. If the courts found this claim persuasive in the context of sports (because sports are more biologically grounded than most forms of employment), then *Bostock* would serve to endorse anti-trans discrimination. Yet, as Chapter IV demonstrates, to equate trans girls with a class of biological males is to fundamentally misunderstand trans identity, categorically refuse that trans people exist, and dismiss the number of ways in which “biological sex” cannot be understood in a male-female binary. Yet, *Bostock* leaves *Soule*’s claims that trans people are bound by their “biological sex,” presumably their sex designated at birth, completely unresolved. Trans discrimination may still be a form of sex discrimination, but the Court has left the law vulnerable to being pushed to decide where the boundaries of sex “really” are. And given the history sex/gender testing in sports and Title IX’s authority to prohibit sex discrimination in interscholastic and intercollegiate athletics, claims about whether trans people should be allowed to compete in sports are bound to compel the law to clarify questions about “sex” in due time.

*“But-for”*

Second, the Court’s but-for test for differential treatment falls flat when considering the ways in which discrimination operates through a number of social frameworks at any given point in time. If we replace the Court’s language for the but-for test in *Bostock* with relevant Title IX language, we might get something like: would a student(-athlete) have been treated differently (or faced disparate treatment) were they the opposite sex? A “yes” answer that question would, presumably, trigger Title IX. But this test is too simplistic for two reasons. First, student-athletes already face a “separate but equal” treatment on the basis of sex. Thus, disparate treatment is insufficient to conceptualize the harm specific to trans girls and women in sports. Second,

discrimination against women can be both a form of sex/gender discrimination *and* race discrimination.

Under Title IX, sex/gender segregation in interscholastic and intercollegiate athletics is permissible given that the segregation is equitable. This notion of equity is borne out of the three-part test discussed in Chapter III, which requires the number of male and female athletes is proportional to enrollment, an institution is expanding opportunities for the underrepresented sex, and the institution is accommodating the interests and abilities of the underrepresented sex (“Intercollegiate Athletics Policy: Three-Part Test -- Part Three Q’s & A’s” 2020; Simon 2004, 126). In practice, this “separate but equal” treatment is often subject to criticism by female athletes—a recent example being the differential access to and resourcing of weight rooms for women’s and men’s basketball teams at the NCAA Division I tournament (Sullivan 2021; Young 2021). In other words, sex/gender segregation in interscholastic and intercollegiate remains inequitable by a number of metrics: on average, men’s teams receive double the amount of funding than women’s teams at the collegiate level; athletic scholarships are differentially and unequally distributed between men and women; and women’s sports continue to be treated as second-class competitions by governing bodies like the NCAA, at least when compared to the amount of money invested and produced by men’s competitions (Gerstmann 2019; Kirshner 2021; and Meredith 2017).

Importantly, though, this “separate but equal” policy approach and differential treatment has difficulty reckoning with the harms that trans girls and women trying to compete in interscholastic and intercollegiate athletics experience. Because segregation in sports hinges on the (incoherent, malleable, and illusory) category of “biological sex,” trans student-athletes generally, and trans girls and women in particular, are subject to increased scrutiny because their

“biological sex” may or may not “correctly” align with the gendered category of competition they want to compete in. In other words, trans girls and women become suspect *as women* because of their assigned sex at birth. As a result, they are susceptible to being understood, at least within athletics, as “biological males” with “physiological advantages” as compared to cisgender (read: “real”) girls and women.

Deploying the but-for test in cases of sex discrimination leaves us only capable of understanding trans girls and women as “biological males.” Chapters II and V challenged the language and validity of this framework for understanding sex and gender inside and outside the law. But, the Court’s use of the but-for test in *Bostock* demonstrates its own inability to substantively understand the difference between sex discrimination and trans discrimination. I will briefly discuss the important difference(s) between the two when discussing the limits of the Court’s interpretation of discrimination, but first I want to emphasize the conceptual failure for a but-for account of discrimination that Black (trans) women face in sports.

The NWLC’s amicus brief in *Hecox v. Little* provides clear evidence in support of a but-for approach to antidiscrimination law, and sex discrimination in particular, is flawed because it elides the ways in which Black girls and women in sports experience unique forms of discrimination. Their brief outlines the ways in which the sex discrimination imposed by HB 500 would disproportionately affect Black and brown girls because of raced-gendered stereotypes regarding what girls competing in athletics are “supposed” to look like (*NWLC* 2020, 7). In other words, HB 500 would uniquely discriminate against Black and brown girls because their gender has been and would be disproportionately called into question by those with imparted authority and power to scrutinize a student-athlete’s gender under the law. HB 500 thus not only violates Title IX protections from sex discrimination but also enables forms of racial discrimination.

Kimberlè Crenshaw details the uniquely precarious position that Black women occupy within the but-for framework of antidiscrimination law (Crenshaw 1989, 151). Key to antidiscrimination law, she argues, is the expressed desire to address how race or gender may impact otherwise fair or neutral decision-making processes, but this approach is limited as it only accounts for the ways in which this *or* that category determine outcomes (Crenshaw 1989, 151). And “[b]ecause the scope of antidiscrimination law is so limited, sex and race discrimination have come to be defined in terms of the experiences of those who are privileged *but for* their racial or sexual characteristics” (Crenshaw 1989, 151, author’s emphasis). In other words, the result of antidiscrimination law’s narrow approach to sex discrimination is that the paradigm for such discrimination “tends to be based on the experiences of *white women*” (Crenshaw 1989, 151, my emphasis). Discrimination that uniquely affects Black women thus becomes unintelligible to antidiscrimination law through the but-for cause paradigm.

This acknowledgment of Black women’s position(s) vis-à-vis antidiscrimination law is paralleled by the ways in which they are forced to navigate the space(s) of competitive athletics. While sex/gender segregation in sports serves to reinscribe women’s physical inferiority, Black women in sports are all too often “implicitly masculinized because of their skin color and physiological difference” (Bailey 2016). For example, Serena Williams has faced intense amounts of popular scrutiny because she is a successful Black woman tennis player. Not only are Serena’s accomplishments undercut because she is a female athlete but her body, attitude, and words “have been misconstrued to reproduce stereotypes of Black women and reinforce [w]hite power” (Razack and Joseph 2021, 297). She is subject to racialized-gendered scrutiny, attacks that target her Black womanhood as a single construction (i.e. not simply her woman-ness and/or her Blackness).

Sports thus contribute to a culture of misogynoir, to borrow Moya Bailey's term, in which Black women experience an "amalgamation of anti-Black racism and misogyny" (Bailey 2016; Bailey and Bailey 2018). In an analysis of how Caster Semenya's gender was scrutinized at the international level of competition and reported on by popular media, Bailey illustrates how misogynoir structures biomedical discourse and social norms (Bailey 2016). The misogynoir structures have become essential to hegemonic perceptions of Black women inside and outside of the sports context (Bailey 2016). The example of Caster Semenya demonstrates the ways in which sex/gender testing in sports has historically been used to regulate gender and race by constructing the "proper" female athlete as a white woman and increasingly subjecting the nonwhite (particularly Black) woman's body to biomedical scrutiny. The NWLC brief in *Hecox*, then, correctly asserts that Black and brown girls and women would be subject to increased scrutiny under HB 500 because the culture of sports is invested in the anti-Black racism and misogyny of misogynoir.

In turn, the *Soule* complaint can be described as exhibiting a kind of transmisogynoir, a challenge to the very right of Black trans women to compete in interscholastic and intercollegiate athletics that even cisgender Black women in sports do not necessarily experience (Bailey and Bailey 2018). The complaint takes aim at Terry Miller and Andraya Yearwood both because they are trans girls and because they are Black, the first reason being perhaps more explicit than the latter. Indeed, while the *Soule* complaint simply articulates a challenge to CIAC policy that focuses on the inclusion of transgender student-athletes, its targeting of Terry and Andraya demonstrates a (re)inscription of transmisogynoir in sports—one that hinges on the premise that trans girls are not "really" girls. And *Soule*'s assumption that trans girls are not "really" girls is subtly supported by the already-present impulse in sports to scrutinize Black women athletes'

gender. Just as Serena Williams faces forms of discrimination that uniquely target her Black womanhood so are Terry and Andraya facing attacks that center their Black trans womanhood.

The “single-issue framework for discrimination” that a but-for test of discrimination adopts, then, seems incapable of understanding how Black women and Black trans women navigate forms of discrimination in sports (Crenshaw 1989, 152). When we look to the Court’s use of the test in *Bostock*, its insistence that we can “see” sex discrimination by hypothetically changing the sex of the person facing discrimination and determine if there would have been a different outcome is misguided. Indeed, Black women and Black trans women face forms of sex discrimination that are unintelligible to such a hypothetical, particularly in sports. And in the cases of trans people facing forms of discrimination especially, it seems problematic to assume that simply changing the “biological sex” of a trans person would have presumably made it such that an instance of discrimination would not have occurred. Indeed, despite *Bostock*’s helpful logic that trans discrimination is a form of sex discrimination, the two are, importantly, distinct.

### *“Discrimination”*

The Court’s textualism in *Bostock* defines “discrimination” as a difference in treatment when an individual or group is treated worse than others similarly situated. This definition, as the Court notes, is “roughly what [discrimination] means today” (*Bostock* 2020, 7). At first glance, this definition is appropriate in the context of *Bostock* because of the Court’s attempt to construct discrimination against trans people as a form of sex discrimination. However, this idea that trans discrimination cannot exist without sex discrimination, while helpful in the immediate address of discriminatory attacks on trans folks across the country, aims to make a false equivalence. Transgender discrimination and sex discrimination *are not the same thing*.

Using the Court’s definition of discrimination, it would appear that *Bostock* aims to argue that trans people facing discrimination are subject to disparate treatment because of their sex (sex being the differences between male and female, and nothing more). Yet, trans student-athletes are not strictly being barred from participation in sports because of their sex. Sex and biology may play a powerful role in the ways in which laws and regulations aim to discriminate against trans people, but their transness itself is also central to the discrimination they face. Indeed, their being trans—crossing, traversing, entangling, and ignoring of the boundaries and definitions of heteronormative, binary gender categories—is essential to the reasons for which they are subject to discrimination. The *Soule* complaint, for example, does not simply articulate a claim that would treat Terry Miller and Andraya Yearwood (and other transgender student-athletes) in a disparate manner because of their respective sex; it also positions their transness at the core of its argument, most notably by refusing to even recognize them as trans girls. In the case of HB 500, the new law may discriminate on the basis of sex by putting an undue burden on girls and women to “prove” their gender whenever they are called under suspicion, but it also specifically discriminates against trans girls and women by establishing standards for competition that most, if not all, of them would be able to meet. Again, the language of sex may be instrumental to a law like HB 500, but the law still discriminates against trans folks in unique ways that cisgender people do not face. The disparate treatment is not strictly sex-based.

The equating of sex discrimination and trans discrimination also leaves open an important point of attack for anti-trans operatives seeking to specifically bar trans student-athletes from sports. As the *Soule* complaint attempts to claim, trans girls and women seeking to compete in athletics do not face discrimination if not allowed to compete in women’s categories because they can still compete in men’s competition. If anything, *Soule* insists, it would still be fairer to

keep trans girls and women in the men's categories because of their (supposedly) inherent, permanent physiological advantages. This claim remains intact post-*Bostock*. There is a possible, legally intelligible argument to be made that discrimination against trans girls and women in sports is not sex discrimination, despite the Court's ruling in *Bostock*. Antidiscrimination law pertaining to discrimination on the basis of sex remains capable of being weaponized against trans folks because *Bostock* simply equated sex discrimination and trans discrimination instead of clarifying the ways in which the two are different.

By arguing against the claim that trans girls and women should just compete in men's sports competitions/categories, we can quickly see how the Court's simple account of "sex" and "discrimination" fail trans people. Fundamentally, trans girls and women cannot be understood as men. Even if we grant arguments like that presented in the *Soule* complaint that "biological sex" assigned at birth is incredibly important—though, we really should not be ceding this ground, as Chapters II and IV aimed to show—it is incredibly detrimental to the wellbeing of any given trans person to insist that they are not who they are. To forbid a trans girl or woman from competing in women's competition while suggesting they can still compete in men's competitions (because that is "who they really are") is, in effect, a violent act. Yet, this is, perhaps, what a textualist reading of "sex discrimination" would ask us to do: to insist that trans girls and women are ultimately "biological males" and should thus be required to compete in men's sports. Importantly, though, we would subsequently be treating trans girls and women in a disparate and/or differential manner, triggering the Court's reading of discrimination. And we would be treating trans girls and women in sports differently not because they are girls or women *but because they are trans*.



Trans girls and women in sports experience discrimination not simply or only because they may not perform womanhood in the right way (though, that certainly could play a part in discriminatory intent) but because they are suspect as women in the first place. And the culture of sports has seemingly decided that “sex,” whatever that may mean at any given point in time (genitals, gonads, chromosomes, hormone levels, etc.), is the mechanism by which womanhood should be tested. As a result, trans girls and women are not understood by the sports world as women because they were often assigned the sex “male” at birth. In other words, sports, at least those that are sex/gender-segregated, are inherently invested in trans discrimination. Sex-segregated sports lean on the construction of “biological sex” in order to both regulate “proper” expressions of gender and discriminate against trans people because they are trans. This kind of specific discrimination against trans folks exists inside and outside of the sports context, and operates in ways that “sex discrimination,” at least as the Court discusses it in *Bostock*, cannot possibly capture.

Taken together, these critiques of the Court’s textualist approaches in *Bostock* simply aim to demonstrate what its judgment does not or cannot do. The case’s outcome, that discrimination against trans people constitutes sex discrimination, is a somewhat liberal reading of antidiscrimination law in that it provides a means by which legal advocates might better be able to defend trans folks from overt, clear, and public forms of discrimination. However, the methods by which the Court chose to reach its conclusion in *Bostock* reveal troubling logics that fail to account for myriad and complex ways in which trans people experience forms of discrimination—discrimination in sex-segregated state-operated institutions like prisons, lack of access to gender-affirming and gender-confirming healthcare, and vulnerability to gendered surveillance by the US security state, for instance (Spade 2015, 81-86). Certainly the Court’s

originalism, its unwillingness to push the language of the law to its limits, constrains the ramifications of *Bostock*. But this failure may not necessarily be the result of the Court's textualism or *stare decisis*; rather, the Court's relatively apparent disinclination to create a kind of broader precedent for antidiscrimination law's understanding of queer and trans people keeps *Bostock*'s implications relatively focused on the relationship between sex discrimination and discrimination against trans people. And while the *Bostock* judgment may have been somewhat progressive in its conclusions, it is necessary to push the Court's logic further in order to achieve more equitable outcomes and material benefits for queer and trans people.

ii. What Title IX and antidiscrimination law cannot do

As discussed briefly near the end of Chapter I, feminist and legal scholars have often been critical of how transformative and/or effective antidiscrimination law can be for those subject to forms of discrimination and oppression. In the context of what antidiscrimination law can and cannot do for trans folks, I turn primarily to Dean Spade's work on critical trans politics, which argues (in part) that "we must move beyond the politics of recognition and inclusion" in order to achieve real, transformative change (Spade 2015, 8). Antidiscrimination law can even operate in ways that end up sanctioning further violence against marginalized people, enabling "harmful systems to claim fairness and equality while continuing to kill us" (Spade 2015, 47). The Court's decision in *Bostock* deals very strictly with antidiscrimination law given its particular (re)articulation of sex discrimination, so the ways in which it affects future arguments and rulings in antidiscrimination cases is subject to a critical trans critique.

The primary critique of antidiscrimination law in *Bostock*'s case may be to question what the case actually materially achieves for trans folks. As Spade notes, discrimination cases

involving employment have limited impact “given the staggering unemployment of trans populations stemming from conditions of homelessness, lack of family support, violence-related trauma, discrimination by potential employers, effects of unmet health needs, and many other actions” (Spade 2015, 41). In other words, *Bostock* does little to nothing to actually resolve systemic issues like trans poverty and inability to access affirming healthcare that preclude and structure the ways in which they may end up facing discrimination in the workplace. Title VII, after all, only applies to issues of employment, and will not offer protection to those trans people who are unemployed, those whose primary income is made through sex work, undocumented trans people, etc. *Bostock* only (maybe) expands legal protections of those select few trans people who are able to participate in the legitimated, capitalist market economy. Everyone else—those nonwhite, not-“properly”-trans, those differently abled, indigenous, undocumented folks—is left behind.

Even if we concede that *Bostock* achieved a successful extension of legal protections for trans people from discrimination on the basis of transgender status, though, the case’s ability to effectively protect trans folks from employment discrimination is still suspect. For instance, “discrimination and violence against people of color have persisted despite law changes that declared them illegal” (Spade 2015, 40). And antidiscrimination laws are rarely adequately enforced, with few people being able to afford counsel necessary to make legal claims of discrimination (Spade 2015, 40). So what does *Bostock* even do, given this framework? Very little. Insofar as we might be able to call the Court’s opinion in *Bostock* a “victory” for “trans rights,” “[t]he call to seek out formal legal equality through demands for inclusion [...] not only fails to offer respite from the brutalities of poverty and criminalization, but also threatens to [re]produce the very conditions that shorten [trans] lives” (Spade 2015, 137). The post-*Bostock*

world looks very much the same as the pre-*Bostock* world for most, if not all, trans folks. Their lives have not materially changed simply because the Supreme Court loosely ruled that they can seek legal redress if they are discriminated against in the workplace on the basis of sex.

*Bostock*'s impact, then, is severely limited in scope and efficacy.

### iii. Sex discrimination and equal protection

Because *Bostock* was precisely concerned with sex discrimination under Title VII, and because the current project is primarily concerned with sex discrimination under Title IX, I have said nothing about equal protection claims under the Fourteenth Amendment. While *Soule*'s entire case rests on two Title IX claims, the *Hecox* complaint does put forth a deprivation of equal protection under the Fourteenth Amendment claim alongside its claim that HB 500 violates Title IX. Furthermore, just as Title IX has been weaponized by those arguing for the exclusion of trans student-athletes from competitions, so could such arguments be made under the Equal Protection Clause of the Fourteenth Amendment; however, such an argument is not necessarily made in either *Soule* or *Hecox*.

In short, the argument could be made that even if discrimination against trans folks constitutes a form of sex discrimination, such discrimination is at least somewhat necessary in the context of competitive athletics for the purposes of equity. In other words, the defendants in *Hecox*, for instance, could argue that there is a compelling state interest in discriminating against trans girls and women in order to safeguard and preserve opportunities for cisgender girls and women under the equal protection clause of the Fourteenth Amendment. *Bostock* alone would have a considerable amount of trouble answering such an argument, primarily because it involves a statutory claim and not a constitutional one but also because its attempt to tie trans

discrimination to sex discrimination would be an ineffective response to this kind of equal protection claim. Indeed, *Bostock*'s rearticulation of sex discrimination would force the Court into a bind were it to be confronted by an equal protection claim that insisted that the inclusion of trans girls and women in sports was in some way a form of sex discrimination itself. This kind of claim would also presumably include some of the dangerous logic presented in *Soule* that seeks to codify the legal recognition of trans people as sex discrimination.

To answer this kind of equal protection claim would be beyond the scope of this paper specifically, but it seems important to at least point out that *Bostock* would fail to respond to it effectively. In *Bostock*, the Court's equivocation of sex discrimination and trans discrimination means that it has yet to confront the zero-sum game argumentation presented by complaints like *Soule*. In other words, the Court has not come to terms with how to approach antidiscrimination law arguments that suggest that the affordance of protections to trans girls and women presents a revocation of protections for cisgender girls and women. Further, the Court's ruling in *Bostock* almost sets up sex discrimination to subsume trans discrimination. Trans discrimination becomes *a form of sex discrimination*, according to the Court's logic. *Bostock* thus hierarchizes forms of sex discrimination, which makes the (re)construction of this hierarchy its only avenue by which to answer the zero-sum argument. Indeed, it seems as if the Court would have to determine whether transgender discrimination is of more or less concern to the law than cisgender sex discrimination in order to answer an equal protection claim. This hierarchic thinking, though, would only redevelop the zero-sum paradigm and pit the interests of cisgender women against those of transgender women. A more robust, nuanced analysis of the appropriate level of judicial scrutiny would, perhaps, be the only way to remedy an equal protection claim given *Bostock*'s logic.

In this chapter, I have attempted to take the textualist logic presented by the Supreme Court in *Bostock v. Clayton County* and apply it to *Soule* and *Hecox* as a means to resolve those two cases. I then turned to a critique of the Court's textualism in order to illumine the limits of *Bostock*. While the June 2020 decision was certainly a victory for queer legal advocacy efforts, it still failed to accurately account for the ways in which queer people navigate and encounter discrimination in particularly gendered and racialized spaces. In the sixth and final chapter, I will argue for a more intersectional and prescriptive approach to antidiscrimination law, particularly in the context of sex discrimination. I hope to show that Title IX offers an unique opportunity for the law to be pushed toward prescriptive approaches to antidiscrimination because of its history in expanding protections to interscholastic and intercollegiate athletics.

## VI. Towards prescriptive antidiscrimination law in sports, Title IX, and beyond

In their article, “Reconstituting the Future: An Equality Amendment,” Catharine MacKinnon and Kimberlé Crenshaw write that “[d]iscrimination based on sex and gender [...] has been recognized only very recently and merely by interpretation [...] making its protection particularly thin and vulnerable” (Crenshaw and MacKinnon 2019). In response to the inequality that persists despite existing antidiscrimination law, they propose an Equality Amendment to the United States Constitution that extends both negative rights and affirmative rights to marginalized peoples. “Negative rights” are those antidiscrimination law is most accustomed to providing: those “rights that are predicated on discriminatory state action, state or federal[,]” or individual discriminatory action (Crenshaw and MacKinnon 2019). This framework is, in other words, prohibitive in nature—antidiscrimination law exists to prevent the supposed perpetrator of discrimination from treating the victim of such action in a disparate manner, individualizing the experience of discrimination (Spade 2015, 42).

In contrast, “affirmative rights,” in this context, constitutes a vision of “equality as a right, permitting legal claims for discrimination against nonstate actors and state actors alike who deny equal rights” (Crenshaw and MacKinnon 2019). Crenshaw and MacKinnon take up embedding positive rights in their proposed Equality Amendment by putting in language like “Congress and the several States *shall* take legislative and other measures to prevent or redress any disadvantage suffered by individuals or groups because of past and/or present inequality” (Crenshaw and MacKinnon 2019, my emphasis). The word “shall” “requires legislative and administrative authorities to implement this Amendment,” according Crenshaw and MacKinnon, “[t]here is no option not to” (Crenshaw and MacKinnon 2019). Affirmative rights thus go beyond simply prohibiting individual acts of discrimination; instead, they encourage (or require)

those in power to ensure equity through state action. The perpetrator/victim framework of negative rights disappears if antidiscrimination law turns to affirmative rights, making antidiscrimination less about individualized action(s) and more about creating systems, structures, policies, and laws that aim to foster equality from the get-go.

In this final chapter, I take up this affirmative rights framework in order to suggest that more intersectional, prescriptive approaches to antidiscrimination law would foster substantive change for marginalized peoples and make the law more able to “see” those people and experiences it has too often ignored or erased. The context of Title IX and interscholastic and intercollegiate athletics offers, in my view, an unique opportunity for such an approach to antidiscrimination law to be taken up because of the statute’s history of proactive equitable-policymaking in schools. In other words, a reinterpretation of “sex discrimination” post-*Bostock* alongside a more intersectional methodology for evaluating claims of discrimination may help ensure the rights of trans people in school-sponsored sports. And this kind of (re)interpretation of the law in Title IX may serve as an example for broader changes to antidiscrimination law in other contexts. I start this chapter grounded in the contexts of *Soule* and *Hecox*, reasserting that there is no biological basis for discrimination against trans folks in interscholastic and intercollegiate athletics. Then, I briefly explain how a more intersectional approach to antidiscrimination law, particularly as an alternative method to the but-for test, may allow for the law to better understand uniquely precarious positions of oppressed peoples facing instances of individualized and systemic discrimination. I then return to the realm of antidiscrimination law with an intersectional method, suggesting that the law cannot, and should not, pit the interests of cisgender women against those of transgender women. Finally, I suggest that an intersectional,



prescriptive approach to Title IX protections would invest in an affirmative rights framework, which could have ripple effects in other realms of (antidiscrimination) law.

A. Trans discrimination in interscholastic and intercollegiate athletics has no biological basis

Every legislative attempt to bar trans youth and young people from competing in interscholastic and intercollegiate athletics in the US has, in some way, relied on the construction of “biological sex” as a means by which to insist that trans folks should not be allowed to compete according to their gender identity. The male-female sex binary structures almost every level of competitive athletics—from rec sports at the local high school to elite competition at the Olympics. And while the binary has, historically, not been strictly enforced (through a mechanism like sex testing) at most non-elite levels of competition, legal complaints like *Soule* and pieces of legislation like HB 500 present new attempts to codify “biological sex” in the law as a means of discriminating against trans, intersex, and gender nonconforming people. Indeed, legislative attempts to prevent trans people from playing sports seek to enforce their laws through varying forms of sex/gender testing.

Yet, as discussed in Chapters II and IV, the history of sex/gender testing in sports demonstrates the very incoherence and illusory nature of “biological sex.” As testing mechanisms changed so did the lines between what counted as “male” and what counted as “female.” So, legislative attempts to (re)inscribe and/or (re)impose any kind of sex/gender testing regime in school-sponsored sports is not only (purposefully) hostile towards trans folks but also inherently faulty. In other words, just as the *Soule* complaint attempts to isolate the essential-ness of gender through the use of terms like “physiological advantages” and “sex,” so do most

attempts at preventing trans youth from playing sports, all of which neglect evidence that we cannot (and/or should not) naturalize binary sex and innate sex difference(s).

To demonstrate the complexity of sex and gender, we can simply turn to a quick critique of HB 500's mechanisms for demonstrating sex: (1) internal and external reproductive anatomy, (2) normal endogenously produced levels of testosterone, and (3) genetic makeup (Ehardt 2020). HB 500 is unclear on whether a student-athlete would need to "prove" their sex through one or all of these requirements, but all three are suspect. First, internal and external reproductive anatomy do not always neatly fall into the categories of "male" and "female" that HB 500 would supposedly want them to. Development of "internal reproductive sex" is relatively complicated and can be disrupted by simple mis-sequencing of the Sry, Sox9, FoxL2, Wnt4, and/or Rspo1 genes during fetal development (Fausto-Sterling 2012, 5 and 19). Furthermore, there are any number of reasons why a person may have certain internal reproductive anatomy that does not strictly align (in a sex-binary system) with their external reproductive anatomy. A person with a vagina and internal, undescended testes, for example, is unintelligible to HB 500's first determiner of sex. People who have had hysterectomies performed for health reasons would also trouble HB 500's first requirement.

It is also unclear how external or internal reproductive anatomy are especially relevant to sports. If HB 500 is actually interested in "fairness," it seems strange that it would fixate on external genitalia and internal reproductive anatomy since neither seems to really suggest superior athletic capabilities on their own. The need to know or verify a student-athlete's external genitals in order to ensure fairness seems silly if we simply consider that HB 500 suggests that the presence of a penis or vagina on a body conjures some kind of physiological (dis)advantage in sports. Apparently, having a penis, vagina, uterus, or testes has intense

ramifications on a person's ability to, for instance, throw a baseball. Clearly, though, the presence or absence of certain external or internal reproductive anatomy does not actually lead to hierarchical potentials for athletic performance. Instead, HB 500's first mechanism solely serves as a means by which to reconstruct "biological sex" as a uniform category for sorting people into the sex binary. And those student-athletes with bodies who may not neatly fit into such a binary—like trans youth, kids with intersex conditions or disorders of sexual development, and gender nonconforming folks—are simply not allowed to play sports.

Second, measuring levels of testosterone in order to determine any given person's "biological sex" is a doomed endeavor. Despite arguments from policymakers that there exists a "sex gap" in levels of testosterone (T), women's and men's levels of the hormone generally overlap (Jordan-Young and Karkazis 2019, 183-184). In other words, T levels are not dimorphic and cannot be used to include or exclude any given person from the categories "woman," "man," "female," or "male" (Jordan-Young and Karkazis 2019, 184-185). Policymakers and those who pay attention to sports (athletes and non-athletes) often subscribe to the logic that higher T levels correspond to better performance. But, as Rebecca M. Jordan-Young and Katrina Karkazis describe throughout their book, *Testosterone: An Unauthorized Biography*, the effects on T on the body vary widely and cannot be uniformly described as "enhancing performance" in all areas of activity or sport (Jordan-Young and Karkazis 2019). Testosterone does have effects on the body, particularly on the development of tissues like muscles and visceral fat, but no exact relationship between the hormone and physical development can be drawn because (1) hormones do not work in isolation and (2) changes in performance cannot neatly be correlated with changes in hormone levels (Jordan-Young and Karkazis 2019, 169-178). Testosterone, then, is at least much more complicated than a bill like HB 500 is willing to acknowledge. And at the very

least, using T levels to determine any given person's "sex" would demonstrate a fundamental misunderstanding of how hormones actually operate in relation to people's bodies.

Finally, there is too much variation in "genetic makeup," chromosomal sex, to actually sort people into neat categories of "males with XY chromosomes" and "females with XX chromosomes." As the history of the Barr body test at the IOC- and IAAF-levels of competition show, chromosomal sex does not binarize into XX and XY; rather, there are several different ways in which chromosomal sex can present itself in/on the body. Like internal and external reproductive anatomy, though, it seems strange for a policy interested in "fairness" in sports to fixate on chromosomal sex. The mere presence of an X chromosome instead of a Y chromosome (or vice-versa) does not substantively mean much for a person or their body. Sex chromosomes do tend to trigger certain kinds of sexual development in fetuses, but as Anne Fausto-Sterling points out, there are several "moments of indifference" during fetal development when the fetus could develop in a different way than we might otherwise expect (Fausto-Sterling 2012, 22 and 25). So, the presence or absence of an X or a Y chromosome in a person cannot be used to uniformly assign them a certain gender nor do sex chromosomes fundamentally have an impact on a person's athletic (cap)abilities. Like HB 500's first requirement of reproductive anatomy, "genetic makeup" is being used not to actually ensure fairness but to specifically deny those people whose bodies do not fit neatly into XX and XY categories the opportunity to compete in school-sponsored sports.

Taken together, these three critiques of HB 500's mechanisms for determining a person's "biological sex" demonstrate that not only is "sex" an elusive category but using it as a determiner for prospective performance or success in sports is, at the very least, suspect. A person's genitals, their levels of testosterone, and/or their chromosomal sex do not prescribe a

certain level of athletic ability, even when all three align in a male-female sex binary system. Therefore, the mechanisms that HB 500 deploys in order to ensure fairness do not actually ensure fairness. Instead, they aim to (re)construct the binary sex system in the specific context of interscholastic and intercollegiate athletics in order to purposefully prevent trans, gender nonconforming, and intersex people from playing sports. HB 500 is not interested in fairness in women's sports, it is solely interested in discrimination. And "biological sex" provides no sound basis for discrimination in sports.

#### B. An intersectional approach to protections against sex discrimination

In Kimberlé Crenshaw's 1989 essay "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" and in "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color," published in 1991, she articulates the ways in which "single-axis" analyses of Black women's experience(s) of exclusion (and discrimination) fail to account for the ways in which "the intersectional experience is greater than the sum of racism and sexism" (Crenshaw 1989, 140). Crenshaw argues that "any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated" (Crenshaw 1989, 140). In "Mapping the Margins," Crenshaw clarified that intersectionality was not a "totalizing theory of identity" but rather a means of demonstrating "the need to account for multiple grounds of identity when considering how the social world is constructed" (Crenshaw 1991, 1244-1245). Since Crenshaw's introduction of the term, "intersectionality has increasingly influenced scholarship, research, and curricular choices in colleges and universities" as well as

become “an important form of critical inquiry and praxis [...] within and outside the academy” (Collins 2019, 21 and 22).

Importantly, Crenshaw originally articulated intersectionality in the context of antidiscrimination law, specifically with regards to a Title VII claim in *DeGraffenreid v. General Motors*, in which five Black women made “not purely a race claim, but an action brought specifically on behalf of Black women alleging race *and* sex discrimination” (Crenshaw 1989, 142, author’s emphasis). Intersectionality is thus, at least to some extent, rooted in analysis of antidiscrimination law. Indeed, Crenshaw goes about articulating intersectionality by demonstrating the limitations of “the top-down strategy of using a singular ‘but for’ analysis to ascertain the effects of race or sex” in a discrimination claim (Crenshaw 1989, 139). And as I discussed in Chapter V, the singular axis of sex discrimination does not effectively account for the experiences of trans girls and women in sports.

So, I turn to intersectionality as an answer to antidiscrimination law’s inability to understand the experiences of trans girls and women in sports. In part, this turn is a means by which to better elucidate the similarities and differences between “sex discrimination” and “trans discrimination.” But I also embrace intersectionality here because of its origins in understanding the particular experiences of Black women facing discrimination. As I noted in Chapter V, it is no coincidence that Black trans women are the targets of logics like those presented in *Soule*. Black cis girls and women and Black trans girls and women in sports are subject to particular forms of scrutiny that only an intersectional approach to antidiscrimination law can capture.

In this context of antidiscrimination law, protections against sex discrimination, and sports, I choose to take up intersectionality as methodology (Cooper 2016, 400). That is, I want to suggest that we should approach the subject of trans discrimination in interscholastic and

intercollegiate athletics by “thinking about how various social identity categories co-constitute and are constituted by other categories” (Cooper 2016, 402). And more broadly, I want to push towards a means of thinking about antidiscrimination law that adopts “an intersectional way of thinking about the problem of sameness and difference and its relation to power” (Chow et al. 2013, 795). Intersectionality has always been about “the structural convergence among intersecting systems of power that created blind spots in antiracist and feminist activism” (Collins 2019, 26). Thus, antidiscrimination law must take up intersectionality as a heuristic that “recog[nizes] the significance of social structural arrangements of power, how individual and group experiences reflect those structural intersections, and how political marginality might engender new subjectivities and agency” (Collins 2019, 26). Embracing an intersectional method would, I think, work to greatly remedy cases of discrimination and perhaps construct better, more equitable futures.

Though a precise articulation of an intersectional method within antidiscrimination law and judicial processes seems beyond the scope of the project at hand, I do want to briefly describe how it helps contextualize discrimination against trans youth in interscholastic and intercollegiate athletics. Just as “[t]he intersectional effects of race and gender are facilitated within the U.S. sociolegal system, cumulatively stacking the deck against women of color” so do they, and histories of trans exclusion inside and outside of sports, structure the ways in which trans folks navigate school-sponsored sports (Crenshaw and MacKinnon 2019). The next three sections of this chapter take up an intersectional method in order to demonstrate the approach’s ability to better understand the conditions in which sex discrimination occurs (particularly in the context of Title IX and sports). I first critique the zero-sum game framework that current legal debates regarding sex discrimination set up when pitting the interests of cisgender women

against those of trans women. Then, I turn to a broader question, enabled by an intersectional method, of why there are so few trans girls and women in interscholastic and intercollegiate athletics. Finally, I push Title IX's conceptualization of protections from sex discrimination in sports to clarify *who* is being protected from *what*. The answers to these questions, I think, demonstrate why an intersectional approach to antidiscrimination law is incredibly necessary to better account for how multiple axes of power are always exerting influence over the ways in which marginalized groups of people experience discrimination.

### C. Zero-sum games and the contest over cis/trans rights

Instrumental to the project of a legal complaint like *Soule* is the idea that the extension of rights to transgender girls and women is mirrored by an encroachment on the rights of cisgender girls and women. In other words, these kinds of arguments set up a zero-sum game when it comes to discussions of sex discrimination. The logic goes that we *have to* discriminate against transgender girls and women in order to preserve the rights of cisgender girls and women because to include trans women would lead to cis women losing something (opportunities, scholarships, sense of safety, etc.). The slippery slope of this logic, as noted in Chapter IV, becomes clear quickly: if we do not discriminate against trans girls and women then the very recognition and inclusion of them *as women* constitutes a form of sex discrimination in and of itself. When presented within the context of antidiscrimination law, and particularly protections against discrimination on the basis of sex, *Soule's* zero-sum framework suggests that we should not only discriminate against trans girls and women but also establish that the very legal recognition of them is a form of sex discrimination against cis girls and women.



This zero-sum framework, though, is unsound. As I described in Chapter IV, at least in the context of sports, the extension of the ability to participate to trans girls and women in no way encroaches on the rights of cis girls and women *because all of them are girls or women*. To deny that trans girls and women are not who they say they are is to fundamentally misunderstand gender and transness and constitutes an act of violence. So, despite what *Soule* would like us to think, girls and women are not losing opportunities when trans girls and women are included in sex/gender-segregated sports because being trans does not negate people's experience of being a girl and/or a woman. The law, then, *should not* accept this kind of zero-sum framework in its interpretation of protections against sex discrimination (and antidiscrimination law more generally) because to do so would be to inevitably deny trans girls and women their gender autonomy.

Furthermore, the law *cannot* embrace a zero-sum framework when it comes to cisgender and transgender women's rights, at least in part because of the Court's ruling in *Bostock*. As I noted in Chapter V, the Court's textualism binds itself when confronted with the project of distinguishing between sex discrimination and trans discrimination. In its equivalence of the two, the Court effectively recognizes that trans girls and women are girls and women, at least to some extent (*Bostock* does not say anything about trans identity, and would seemingly still subscribe to language like "assigned ['x' sex category] at birth"). Yet, the Court's textualist approach to the language of "sex" implies it still holds onto some kind of essential notion of "male" and "female" as markers of identity. A textualist approach to *Soule*'s sex discrimination claim would thus seem to accept the complaint's assertion that trans girls and women are simply "biological males;" however, to accept that argument would require that we subsequently treat trans girls and women worse than cis girls and women. And *Bostock*'s inclusion of discrimination on the

basis of transgender status under the umbrella of sex discrimination means that such worse treatment would itself constitute a form of sex discrimination. The legal logic here is circular. It is sex discrimination all the way down. The zero-sum game falls apart.

While the law cannot currently embrace a zero-sum framework, at least when it comes to protections against sex discrimination being afforded to both cis and trans girls and women, that does not mean that the game does not exist elsewhere and/or may reconfigure itself within this particular context. As a result, we should remain focused on why we *should not* embrace a zero-sum framework on this issue: because trans girls and women are girls and women, experiencing similar (though not always the same) kinds of discrimination and navigating patriarchal, misogynistic, and heteronormative spaces in similar (though, again, not always the same) ways. We should therefore understand the experiences of trans girls and women in a more intersectional manner, considering their experiences as *both* girls and women *and* trans people.

#### D. Where are all the trans student-athletes?

An intersectional approach to sex discrimination claims regarding the (in/ex)clusion of trans student-athletes in sports would also consider the ways in which the relevant parties have operated, and perhaps experienced prior forms of discrimination, in school-sponsored sports. In other words, it would evaluate how discrimination (sex-based or otherwise) may have operated prior to the moment of the discriminatory action that triggered the claim at hand. This kind of approach would, perhaps, help answer an important question essential to both the *Soule* complaint and HB 500: to what extent are trans girls and women *actually* competing in interscholastic and intercollegiate athletics? The answer to this question is relatively simple: not much, if at all. Indeed, when legislators attempt to pass laws that would ban trans girls and

women from playing school-sponsored sports, nearly none of them can name a trans student-athlete in their state or an instance in which a trans student-athlete's presence has caused a problem (Crary and Whitehurst 2021). HB 500 thus reacts to a problem that is not there, and the *Soule* complaint insists that a (necessary) policy of inclusion is *too inclusive* (and, subsequently, discriminatory) despite only two student-athletes taking advantage of said policy.

Despite what claims like that presented in *Soule* and HB 500 would suggest, there is no wave of “males claiming transgender identity as girls and women” in order to play school-sponsored sports (*Soule et al.* 2020, 21). An intersectional answer to *Soule*'s insistence that this kind of displacement is, in fact, happening would call attention to the means by which trans students already experience a number of barriers to entry prior to the potential of participating in interscholastic and intercollegiate athletics.

In school, trans youth regularly experience forms of discrimination like being denied access to restrooms consistent with their gender identity, bullying and harassment from students and teachers, and gender-based dress codes (Human Rights Watch 2016; National Center for Transgender Equality n.d.). This puts trans youth at elevated risk for physical and/or psychological harms, makes them more likely to miss school for fear of harm, makes them less likely to continue their education, and decreases their overall academic success (Human Rights Watch 2016; National Center for Transgender Equality n.d.). Outside of school, trans youth experience a lack of access to healthcare, gender-affirming and otherwise—and even when they have access to healthcare, trans kids tend to underutilize such opportunities (due to fears of transphobia, for example) and generally report poorer health outcomes (Downshen et al. 2018; Rider et al. 2018). And there a number of ongoing efforts across the country to restrict, outlaw, and/or criminalize gender-affirming care for trans youth despite the overwhelming evidence

suggesting such care is essential for their mental and social wellbeing (Conron et al. 2021; Harvard Law Review 2021; Schneiberg 2021).

Given this context, it does not seem incredibly surprising that trans youth are not racing to participate and compete in interscholastic and intercollegiate athletics. The circumstances that young trans people are made to navigate because they are trans, including forms of discrimination, could operate as barriers to entry for school-sponsored sports. There are other, perhaps more important, material conditions that trans people must address prior to engaging with the world of sports. This sentiment is not to diminish sports—certainly, athletics possesses an unique opportunity for trans people in particular to engage in exploration and celebration of one’s sense of embodiment—but rather to contextualize the experiences of trans folks in schools prior to their engagement, or lack thereof, in competitive athletics.

The engagement in an intersectional approach to sex discrimination in school sports is important here, then, because it reveals broader ways in which discriminatory intents and actions are playing out alongside those sports-specific claims. So, for instance, an intersectional methodological approach to the *Soule* complaint might be suspicious of how Title IX is being rhetorically and legally deployed against two trans girls (and trans youth more generally) who most likely already experience forms of sex discrimination outside of the sports-specific context. And like section C of this chapter discussed, an intersectional approach would also put gender *and* transness at the center of its analysis of protections from sex discrimination in sports under Title IX. In other words, intersectionality’s multiple-axis framework would insist that we take a more holistic approach to cases of discrimination, and develop necessarily nuanced means by which to attend to the ways marginalized groups of people experience discrimination outside of case-specific contexts.

### E. The subject of protection

Finally, an intersectional method of antidiscrimination law would think more critically about how discrimination operates under the law. In particular, an intersectional approach would be more direct in thinking about *who is the subject of protection* under a given antidiscrimination law. Crenshaw's analysis of *DeGraffenreid v. General Motors* does this kind of work through its critique of the single-axis framework of discrimination: white women have been understood by the law as those needing protection from sex discrimination and Black men have been understood by the law as those needing protection from race discrimination (Crenshaw 1989). That is, protections from discrimination on the basis of sex have historically been (re)articulated as means to protect white women from discrimination and protections from discrimination on the basis of race have historically been (re)articulated as means to protect Black men from discrimination. Thus, Crenshaw's intersectional process illumines the particular position of Black women before the law, a position that is vulnerable to possible forms of discrimination without legal recourse due to the law's inability to perceive how discrimination on the basis of race and sex can have unique effects for Black women.

In this regard, Crenshaw's work can provide a more radical reading of how the *Soule* complaint targets Terry Miller and Andraya Yearwood and its refusal to acknowledge trans identity. The complaint argues that sports are an unique space in which sex and gender end up meaning a lot due to physiological differences between the sexes (a claim I have already refuted). Outside of the explicitly biological ramifications of *Soule*'s claim are three important axes of power at work: the regulations of transness, gender, and race. The *Soule* complaint delegitimizes transness by exclusively referring to trans girls and women as "biological males,"

language that is not only incorrect and inaccurate but also, as Chapter IV explains, is very dangerous given its deployment in a legal context of antidiscrimination. Then, the complaint's targeting of Terry Miller and Andraya Yearwood (re)invests in a (trans)misogynoir-esque culture in sports, as Chapter V briefly points out.

Conceptualizations of gender and race are bound up with one another in the complaint, then, because it deploys antidiscrimination law protections against sex discrimination—protections historically articulated for (cisgender) white women—in the context of two Black trans girls being allowed to compete in school-sponsored sports. The complaint cannot escape this context, and an intersectional method of antidiscrimination law would insist that we evaluate the sex discrimination claims in said way. Further, when we understand *Soule* as engaging in this particular context of contestation, we can more explicitly name what it is doing. In its delegitimizing of trans identity, the complaint effectively claims that trans girls and women—particularly the Black trans girls called out in its text—are “actually” boys/men. And given the case's claim of sex discrimination (due to CIAC policy but also, in practice, the inclusion of Terry Miller and Andraya Yearwood), it is implicitly engaged in a narrative that Black boys and men are invading spaces meant for white women.

This narrative that the inclusion of transgender student-athletes in interscholastic and intercollegiate athletics inevitably permits Black boys and men access to spaces meant for white women has two significant implications. First, the narrative decides that there is some “hidden truth” that trans folks are protecting from the rest of the world. For the *Soule* complaint in particular, this “hidden truth” is “biological sex.” In the figurative world of the complaint, trans folks are reducible to some kind of truth, and that is their sex—their genitals, their hormones, their chromosomes. In reality, though, we know that (1) there is rarely any singular “truth” to

anyone or their identity and (2) transness is not reducible to something like “sex,” whatever that means in any given context. Second, though, the complaint’s narrative subtly takes advantage of tropes that hypersexualize Black men and construct them as threats of violence to, in particular, white women. So not only are Black boys and men gaining access to a space meant for white women (here, interscholastic and intercollegiate athletics) but in doing so we are, according to the complaint’s narrative, putting cis white women at risk of violence because of the threat Black men pose to them.

This is, as I said, a radical reading of the *Soule* complaint, and perhaps pushes the bounds of intersectionality as method a bit too far. Nevertheless, contextualizing the *Soule* complaint within the very specific fields of sports and antidiscrimination law protections from sex discrimination quickly reveals increasingly pernicious lines of thought behind what appear to be somewhat straightforward legal claims. This project of contextualization also reveals how much is at stake in a case like *Soule*. It shows that a sex discrimination case is not always simply about discrimination on the basis of sex; rather, these cases are often bound up with other systems and axes of power that operate together, complexly and nuancedly. And an intersectional approach to antidiscrimination law provides us with the tools necessary to see all this context, in all its complexity. Ultimately, an intersectional method of antidiscrimination law is desirable because it helps us better explain how discrimination operates beyond single-axis frameworks. If we are truly invested in bettering the law’s understanding and protection of marginalized groups of people, then it seems like intersectionality provides a good method with which to begin.

F. Title IX, intersectionality, and pushing towards an affirmative rights framework

To return to Crenshaw and MacKinnon's discussion of an Equality Amendment, antidiscrimination law requires affirmative action from legislative and administrative authorities in order to actually dismantle systems that prop up and preserve an unequal socioeconomic order (Crenshaw and MacKinnon 2019). In this final section, I want to briefly explain why Title IX and its authority over interscholastic and intercollegiate athletics might help push us towards a more prescriptive approach to antidiscrimination law, particularly if we start with the project of transgender equity in schools.

As I discussed in Chapter III, Title IX's scope has been disputed a number of times since its inception, in cases like *National Collegiate Athletic Assn. v. Califano*, *University of Richmond v. Bell*, *Haffer v. Temple University*, and *Grove City College v. Bell*. This history of Title IX's scope, particularly as it relates to discrimination on the basis of sex in school-sponsored sports, was effectively resolved through the Civil Rights Restoration Act of 1987, which clarified that interscholastic and intercollegiate athletics were indeed subject to Title IX regulations. Though Title IX's scope is certainly still subject to legal challenges, its historic impact in sports could for all intents and purposes be described as affirmative and/or prescriptive in nature. Indeed, though Title IX constitutes a form of antidiscrimination law, and its language supposedly only provides for negative rights (protections against sex discrimination), it has led to the affirmative creation of girls' and women's sports teams, the affordance of scholarships reserved for girls and women, and the creation of girls' and women's leagues at the scholastic and collegiate levels of competition. Indeed, OCR's three-part test for Title IX compliance is itself a mechanism by which Title IX prescribes certain policies and actions in order to prevent sex discrimination from the out-set ("Intercollegiate Athletics Policy: Three-Part Test -- Part Three Q's & A's" 2020; Simon 2004, 126).



Title IX is thus an unique statute within antidiscrimination law because it demands preemptive action be taken in order to avoid instances of sex discrimination, its history in school-sponsored sports being a prime example of said approach. As a result, we might wonder how Title IX's prescriptive approach to interscholastic and intercollegiate sports would change if it, and antidiscrimination law more generally, were to engage in a more intersectional method of analysis. In other words, Title IX currently operates through a single-axis understanding of sex discrimination that primarily centers the experiences of cisgender white women. But, if we do away with the single-axis framework and engage in more intersectional praxis, Title IX's prescriptive approach in sports might change.

For instance, an intersectional approach to Title IX grounded in Crenshaw's original analysis of Black women's positions vis-à-vis Title VII might start asking critical questions about the opportunities afforded to Black girls and women in school-sponsored sports. Furthermore, considerations of class, transness and gender identity, religion, ability, and other identity categories would come to the fore were an intersectional method be embraced by those interpreting Title IX. This does not necessarily mean the interpretation and implementation of Title IX policies and regulations would focus on ever-specific categories of people and their participation in sports so as to ensure sex/gender equity within the space. Rather, practicing Title IX in a more intersectional manner would think about what institutions, systems, and structures perpetuate specific forms of sex/gender discrimination that target marginalized groups of people. An example of this kind of thinking might be that we not only encourage the participation of trans folks in sports but we also become more critical of the regulations surrounding trans participation in the first place. Indeed, if we are truly invested in preventing discriminatory

action on the basis of sex, questionable medicalized prerequisites for participation imposed on a specific class on individuals (in this case, trans young people) should be highly suspect.

The other meaningful contribution that an intersectional approach to Title IX and its effects on interscholastic and intercollegiate athletics could provide is a rethinking of what constitutes equity or equal opportunity in sports. Often, Title IX's impact on school sports is understood through mechanisms like the number of student-athletes who are girls and women vs. the number of student-athletes who are boys and men, equal distribution of scholarship funds between the genders, and/or equal access to sports-related facilities. Again, though, these measurements of equity often rely on a single-axis framework for understanding sex discrimination and a narrow definition of what it means to be treated "disparately" or "differentially." Intersectionality might help us reimagine ways for sports to be more equitable—from eliminating sex/gender-segregated teams to increasing access to gender-neutral bathrooms at sports venues or more actively recruiting trans student-athletes to earn scholarships and compete on teams at the collegiate level, to provide a few examples.

In this way, perhaps a more intersectional approach to Title IX can imperfectly—or impurely, as Isaac West might put it—engage with Dean Spade's radical trans politics. That is, the inclusion of transgender student-athletes in interscholastic and intercollegiate athletics may not immediately present itself as an arena for substantive, transformative change to the material conditions necessary to sustain trans lives, but it could perhaps expand the ways in which school-sponsored sports understand their dedication(s) to equity. And in that expansion of what it means to prevent discrimination on the basis of sex, the realms of interscholastic and intercollegiate athletics could come to increasingly benefit the lives of trans folks. Furthermore, an intersectional approach to Title IX could mark the beginning of larger, broader changes to how

we create, interpret, and engage with antidiscrimination law as a whole, slowly encouraging more intersectional, prescriptive methods of understanding and preventing discrimination. Title IX is already a powerful means by which the law aims to codify equality. Folding in an intersectional approach would only serve to bolster its promise.

**afterword**

This project has attempted to discuss the ways in which legal contestations over the issue of transgender inclusion in interscholastic and intercollegiate athletics are ever-fraught. In part, tensions over inclusion are the product of subpar understandings of sex and gender. But, the law's inability to effectively account for the experiences of trans folks in the context of sports, and remedy the harms they face within said space, also demonstrates a larger problem with antidiscrimination law. That is, antidiscrimination law is failing to adequately respond to the needs of queer and trans folks simply seeking out means to live without fear of persecution and/or discrimination. The legislative and legal persecution of trans youth in the past year—through efforts to bar them from playing sports and attempts to criminalize their healthcare—reveal just how limited antidiscrimination law is in scope and practice.

I have thus suggested that we take a new approach to antidiscrimination law, at least in the context of school-sponsored sports. This approach would be increasingly intersectional and prescriptive, attending to the ways in which discrimination and oppression operate in multifaceted ways that have especially dire consequences for queer and trans youth, particularly those of color. Taking up an intersectional method in our interpretations of “sex discrimination” under Title IX would, in my view, open up new possibilities and (re)imaginings of what equity looks like in education and school-sponsored sports. In other words, this project has not only invested in the need to include trans youth in interscholastic and intercollegiate athletics but also taken up a mandate to restructure our very understanding(s) of how antidiscrimination law should function in order to best sustain the lives of those who are most vulnerable.

At the end of this issue, it bears reminding everyone that most at stake in conversations about whether trans young people should be allowed to compete in school-sponsored sports are

the livelihoods of kids. Legal arguments like those presented in *Soule* and *Hecox* do not exist in a vacuum, they permeate throughout and outside of the legal system, into media and culture, into sports and schools. These legislative and legal attacks, then, should not be underestimated or disregarded because they could have, and probably are already having, real effects on the lives of trans kids in the US. No child should have to go before the law and defend their right to exist, yet trans kids across the country have testify in front of state legislative bodies. Kids have had to defend their rights to gender-affirming healthcare and their ability to play on sports teams with their friends. Something has gone awfully wrong with our conceptualizations of the law and the promise of antidiscrimination if we are creating conditions in which trans kids have to defend their right to exist. It is thus imperative we move to reorient ourselves and our approaches to the law so that we might better (re)create systems of (trans)gender justice.

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