

TITLE IX AND BASEBALL: HOW THE CONTACT SPORTS EXEMPTION DENIES WOMEN EQUAL OPPORTUNITY TO AMERICA'S PASTIME

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INTRODUCTION

Imagine yourself as a child. I know, I know, it seems a little silly and perhaps even oxymoronic to try to imagine simpler times while reading a legal article, but I implore you to do so. Each of us had something that we aspired to become, be it a racecar driver or a rock star, a ballerina or a ball-player. Do you remember what your aspiration was? For many kids, early dreams and aspirations planted the seed for a real career—a seed that gradually blossomed as those children learned what they liked and what they ultimately desired. That tiny seed of “make believe” helped them to decide how to achieve their particular career choice. Would-be doctors began studying extra hard and taking advanced classes. Hopeful singers belted out tunes at the top of their lungs and enrolled in vocal lessons. Aspiring baseball players joined local teams, where they worked hard at practice—running sprints, catching flies, taking extra cuts, and lifting weights. Slowly, but surely, dreams began to morph into reality.

In today's society, laws of equal opportunity generally promote and encourage children of both genders to pursue whichever career choice they desire.¹ Little girls who dream of becoming baseball players, however, do not have this opportunity. Instead, Title IX's Contact Sports Exemption essentially denies women the chance to pursue baseball as a legitimate career, or even to play the sport at the collegiate level. That might not seem so bad—heck, there are a million jobs out there, and being a professional athlete is only one. But think about that dream of yours again, the one you had when you were a child. What if the law was shaped so that you could not achieve that dream—simply because of your sex? What if all the time and effort you put into shaping your craft in your early years was ultimately futile? What if you knew that you simply could not follow your heart's desire?

This is what many young women who play baseball, or who want to play baseball, face because of the Contact Sports Exemption of Title IX. This seemingly insignificant subsection of the population actually includes, at least,

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¹ Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731, 736 (2003).

300,000 little girls² who are overlooked and ultimately discriminated against. The Contact Sports Exemption, a regulation written to clarify the scope of Title IX, permits educational establishments to segregate contact sports teams solely on the basis of sex.³ This is at odds with the Equal Protection Clause of the Fourteenth Amendment, which requires that individuals be allowed to try out for an athletic team based on their skill—regardless of their gender.⁴

This Note examines current research pertaining to Title IX's Contact Sports Exemption, and argues that the Contact Sports Exemption should be amended so that baseball would no longer be included as a contact sport under the catch-all provision, or to require that a female baseball team be offered wherever a male baseball team exists. Part I of this Note provides a brief overview and history of Title IX and the Contact Sports Exemption. Part II of this Note describes the impact of baseball on American society, and points out differences between baseball and other "contact sports" to show that baseball does not amount to a contact sport. Part III of this Note describes the effect of baseball's categorization as a contact sport on women. This Note suggests that explicitly removing baseball from the Contact Sports Exemption would empower women and place them on a more equal footing with men by welcoming them to participate in America's Pastime.

I. HOW THE CONTACT SPORTS EXEMPTION CONFLICTS WITH TITLE IX'S PROMISES OF GENDER EQUALITY: A BRIEF OVERVIEW OF TITLE IX, ITS REGULATIONS, AND POLICY INTERPRETATION

A. *Title IX's Enactment and the Social Climate*

"I am woman, hear me roar."⁵ This powerful, popular 1970s song soundly represented the feelings of that female generation.⁶ For many women during that era, "cultural revolution" did not connote hippie communes and psychedelic drugs. On the contrary, the "Me Decade"⁷ had women finally thinking of themselves first. In fact, outside of the suffrage movement, the 1970s arguably played the largest role in putting women on equal terms with men in American history.⁸ Women disavowed the image of the "happy home-

² *Landmark Decision Allowed Girls to Play Little League*, MOMSTEAM.COM (Nov. 4, 2003), <http://www.momsteam.com/sports/baseball/general/landmark-decision-allowed-girls-to-play-little-league?page=0%2C0> [hereinafter *Landmark*]; see Barbara Becker, *No Girls Allowed*, HUFFINGTON POST (May 7, 2012, 11:04 AM), http://www.huffingtonpost.com/barbara-becker/girls-little-league_b_1480749.html.

³ Jamal Greene, *Hands Off Policy: Equal Protection and the Contact Sports Exemption of Title IX*, 11 MICH. J. GENDER & L. 133, 134–35 (2005).

⁴ See *id.* at 137.

⁵ HELEN REDDY, *I AM WOMAN* (Capitol Records 1972).

⁶ Susan G. Hauser, *The Women's Movement in the '70s, Today: 'You've Come a Long Way, ' But . . .*, WORKFORCE (May 15, 2012), <http://www.workforce.com/articles/the-women-s-movement-in-the-70s-today-you-ve-come-a-long-way-but>.

⁷ Erik Himmelsbach, *The Me Decade*, L.A. TIMES, Jan. 8, 2006, at 3, available at <http://articles.latimes.com/2006/jan/08/books/bk-himmelsbach8>.

⁸ See Cynthia L. Cooper, *1970s Laws are Today's Ammo for Women's Rights*, WOMEN'S E-NEWS (Mar. 15, 2012), <http://womensenews.org/story/our-history/120315/1970s-laws-are-todays-ammo-womens-rights#.UzCeZvldVqV>.

maker that was often portrayed in television sitcoms.”⁹ On the heels of the Civil Rights Movement and Vietnam War protests, women spearheaded a “new social movement” seeking “independence and stature” that they had previously been denied.¹⁰ Specifically, the decade “gave [women] the tools for how [they] can continue uprooting . . . bias,”¹¹ and provided the necessary backdrop for women’s rights legislation, because generally “[t]here was a spirit that things were not right and they should be changed.”¹²

Title IX was one of women’s newfound tools. The statute arguably has its flaws; however, before the groundbreaking legislation, there was “overwhelming evidence of widespread discrimination against women at all levels of education” that begged for legal intervention.¹³ For example, the Equal Pay Act of 1963 was enacted to combat the fact that women of the 1970s made only fifty-eight cents on the dollar compared to men.¹⁴ On other fronts, men out-represented women collegians at a rate of 1.6 to 1.¹⁵ Women were vitalized by the changing cultural climate, and they sought a place in society equal to that of men.¹⁶

Such pervasive discrimination against females inspired women like Bernice Sandler, the self-proclaimed “Godmother of Title IX”¹⁷ to take action. Sandler responded to gender inequity by filing more than 250 lawsuits against colleges and universities between 1970 and 1971, alleging sex discrimination in hiring.¹⁸ Similarly offended by blatant gender discrimination, Hawaii Representative Patsy Mink¹⁹ and Indiana Senator Birch Bayh²⁰ co-authored legislation called the Equal Opportunity in Education Act which stated, “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under *any* education program or activity.”²¹ Congresswoman Edith Green was another women’s rights pioneer who led the Title IX charge by holding the initial hearings that

⁹ Hauser, *supra* note 6.

¹⁰ *Id.*

¹¹ Cooper, *supra* note 8 (internal quotation marks omitted).

¹² *Id.* (quoting U.S. Supreme Court Justice Ginsberg).

¹³ Rocio de Lourdes Cordoba, *In Search of a Level Playing Field: Baca v. City of Los Angeles as a Step Toward Gender Equity in Girls’ Sports Beyond Title IX*, 24 HARV. WOMEN’S L.J. 139, 144 (2001).

¹⁴ Hauser, *supra* note 6.

¹⁵ Deondra Rose, *Title IX Has Fought Gender Discrimination on Campuses for 40 Years*, PROGRESSIVE (Sept. 13, 2012), <http://www.progressive.org/title-ix-has-fought-gender-discrimination-on-campuses-40-years>.

¹⁶ *See id.*

¹⁷ BERNICE SANDLER, <http://bernice-sandler.com> (last visited Apr. 30, 2014).

¹⁸ Greene, *supra* note 3, at 137.

¹⁹ Notably, Mink was the first woman of color elected to the House of Representatives. *Title IX-The Nine*, AM. CIVIL LIBERTIES UNION (Apr. 12, 2012), <http://www.aclu.org/womens-rights/title-ix-nine>.

²⁰ Birch is known as the “Father” of Title IX and was “the principal architect of the Equal Rights Amendment.” *Id.*

²¹ Kelly Kline, *Forty Years Later: The Impact of Bernice Sandler on Title IX*, FULL COURT (June 20, 2012, 8:54 AM), <http://www.fullcourt.com/kelly-kline-fullcourtwbball/21402/forty-years-later-impact-bernice-sandler-title-ix> (emphasis added).

resulted in Title IX's enactment in 1972,²² following legislation proposed by Bayh and Mink.²³

The original intent of Title IX was difficult to discern because the statute lacks extensive legislative history.²⁴ Nonetheless, it appears that the statute intended equal opportunity for females in every educational aspect. First, the statute was modeled after the Title VI Civil Rights Act of 1964, suggesting that Title IX sought to give women the educational protection they deserve—equal to that of men.²⁵ Additionally, the sponsor of Title IX's bill, Senator Evan Bayh, intimated that the purpose of Title IX was to “provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice.”²⁶ These facts, bolstered by the general political and social sentiment of the country when the statute was enacted,²⁷ show that Title IX intended to put women on an equal playing field with men in terms of education.

B. Title IX Language

Title IX of the Education Amendments,²⁸ adopted without a committee report or formal hearings,²⁹ promised that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”³⁰ Since Title IX was driven to protect educational rights, athletic privileges were never specifically mentioned in the language of the statute;³¹ however, “the issue of discrimination against women in sports programs was briefly addressed in the original debates on the legislation, reflecting an expectation that athletics would be covered.”³²

This “expectation” prompted “[a] vigorous congressional debate . . . over the question of whether Title IX would address gender discrimination in athletics”³³ as concerned educational institutions and sports boosters quickly recognized that Title IX could have a drastic effect on the nature of athletics.³⁴ While the state of sports’ protection under Title IX was in limbo, the Department of Health, Education and Welfare (HEW) opted to include athletics under Title

²² Greene, *supra* note 3, at 137.

²³ See Kline, *supra* note 21.

²⁴ Jennifer E. Powell, *Title IX: Straining Toward an Elusive Goal*, 1 WILLAMETTE SPORTS L.J. 1, 2 (2004), available at <http://www.willamette.edu/wucl/pdf/sportslaw/spring04/powelltitleix.pdf>.

²⁵ Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL’Y 51, 53 (1996).

²⁶ 118 CONG. REC. 5808 (1972) (statement of Sen. Bayh).

²⁷ See *supra* Part I.A (discussing the 1970s).

²⁸ 20 U.S.C. §§ 1681–1688 (2012).

²⁹ Powell, *supra* note 24.

³⁰ 20 U.S.C. § 1681(a).

³¹ See Cliff Leek, *Title IX: Way Beyond Athletics*, SOCIOLOGY LENS (Sept. 11, 2013, 5:00 AM), <http://thesocietypages.org/sociologylens/2013/09/11/title-ix-way-beyond-athletics/>.

³² Brake & Catlin, *supra* note 25, at 53–54 (footnote omitted).

³³ Cordoba, *supra* note 13.

³⁴ B. Glenn George, *Fifty/Fifty: Ending Sex Segregation in School Sports*, 63 OHIO ST. L.J. 1107, 1113 (2002).

IX, spurring a rigorous lobbying campaign “to amend Title IX to exempt sports generally, and failing that, to exempt men’s revenue-producing sports.”³⁵ Specifically, the National Collegiate Athletics Association (NCAA) lobbied against the inclusion of athletics under Title IX, largely because it assumed that Title IX would “drain needed resources from men’s programs,” and would cause the ultimate demise of men’s sports programs.³⁶ The efforts of the NCAA failed, but Title IX was still under fire.³⁷ Texas Senator John Tower introduced two bills known as the “Tower Amendment” geared towards “an effort to exempt revenue-producing sports” from Title IX.³⁸ The bills were rejected, which helped bolster the idea that “Title IX is an appropriate vehicle for challenging gender discrimination in high school and college athletics.”³⁹

Even after athletics were generally accepted as included under the ambit of Title IX protection, the scope and span of the new amendment’s application was largely undefined. In response to these integral ambiguities, and attempting a compromise, the Javits Amendment⁴⁰ was introduced. The 1974 Javits Amendment required HEW to create regulations regarding Title IX’s application to intercollegiate athletics that included “reasonable provisions considering the nature of the particular sports.”⁴¹ By 1975,⁴² the HEW Office for Civil Rights (OCR) finalized regulations, which dispelled any confusion as to Title IX’s applicability to sports by explicitly including athletics in the activities covered under Title IX.⁴³

C. Give and Take: 1975 HEW OCR Regulations and the Problem with Title IX’s Contact Sport Exemption

The 1975 HEW regulations explicitly required educational institutions receiving federal funds to provide equal athletic opportunities to both males and females.⁴⁴ Today, Title IX specifically provides as follows:

[W]here a recipient [of federal funds] operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport.⁴⁵

³⁵ Powell, *supra* note 24, at 3.

³⁶ Joan S. Hult, *The Story of Women’s Athletics: Manipulating a Dream 1890–1985*, in *WOMEN AND SPORT: INTERDISCIPLINARY PERSPECTIVES* 98 (D. Margaret Costa & Sharon R. Guthrie eds., 1994).

³⁷ See Blake J. Furman, *Gender Equality in High School Sports: Why There is a Contact Sports Exemption to Title IX, Eliminating It, and a Proposal for the Future*, 17 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1169, 1172 (2007).

³⁸ Brake & Catlin, *supra* note 25, at 54.

³⁹ Cordoba, *supra* note 13.

⁴⁰ NICOLE MITCHELL & LISA A. ENNIS, *ENCYCLOPEDIA OF TITLE IX AND SPORTS*, 63–64 (2007).

⁴¹ Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484, 612 (1974).

⁴² Furman, *supra* note 37.

⁴³ 34 C.F.R. § 106.41(a) (2013).

⁴⁴ Powell, *supra* note 24, at 3–4.

⁴⁵ *Id.* at 4 (alteration in original).

Finally, with Title IX's help, women were on the path to achieving equality in the classroom and in sport. Nonetheless, while Title IX's monumental promise of gender equality is largely regarded as a home run for women's rights, a noticeable category of women remained on unequal footing.⁴⁶ Specifically, the 1975 HEW Title IX regulation unambiguously allowed the development of sex-segregated athletics teams and introduced what is known today as the Contact Sports Exemption.⁴⁷

Under the regulations, individuals of either gender could be effectively barred from playing a sport that a federally funded institution only offered to one sex.⁴⁸ Such exclusion is dangerous for federally funded educational institutions, as it involves an amalgam of Title IX statutory interpretation and constitutional law regarding the Equal Protection Clause of the Fourteenth Amendment.⁴⁹ Disconcertingly, Title IX's Contact Sports Exemption allows for discrimination amongst the sexes with regards to certain athletic endeavors,⁵⁰ although the Equal Protection Clause expressly forbids gender discrimination. Cases involving baseball have garnered mixed results, creating confusion amongst the female baseball-playing population, and having the effect of largely preventing women from participation in the sport.

D. Contact Sports Exemption Regulations and the Slippery Slope

HEW's Title IX regulations laid out two exceptions where athletic teams could be separated based on gender.⁵¹ The first exception allowed for division by gender "where selection for such teams is based upon competitive skill," while the second exception allowed division when "the activity involved is a contact sport."⁵² The first exception requires a team segregated by gender to allow members of the excluded sex to try out for the team if "athletic opportunities . . . have previously been limited" for them, and there is no equivalent team available.⁵³ The second exception entails the main topic of the paper: the Contact Sports Exemption. The exemption allows for gender division amongst teams even if they are not selected by skill, and are instead based on the gender of the hopeful participant. Under this questionable exemption, females⁵⁴ may

⁴⁶ Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 382 (2000).

⁴⁷ 34 C.F.R. § 106.41(b)

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

⁴⁸ Lindsay N. Demery, *What About the Boys? Sacking the Contact Sports Exemption and Tackling Gender Discrimination in Athletics*, 34 T. JEFFERSON L. REV. 373, 376 (2012).

⁴⁹ Furman, *supra* note 37, at 1178.

⁵⁰ 34 C.F.R. § 106.41(b).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Although the statutory language refers to, "members of the excluded sex," the excluded sex is almost always women. See George, *supra* note 34, at 1115 n.33.

be excluded from all-male “contact sport” teams regardless of their ability solely because of their gender. A “contact sport,” according to HEW regulation, is “boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.”⁵⁵

Further, the regulations stipulated that equivalent contact sports teams *must* be provided for either gender whenever the gender has interests or abilities in a certain sport or “a reasonable expectation of intercollegiate competition” exists.⁵⁶ This essentially meant that educational institutions were required to provide members of both sexes with equal opportunities in interscholastic, intercollegiate, club, and intramural sports teams. A list of ten distinctive factors were instituted for courts to utilize in determining whether a school is providing equal opportunities for both female and male student-athletes. The factors are still relied upon today. They include

- (1) [Whether the selection of sports and levels of competition] effectively accommodate[s] . . . student interests and abilities;
- (2) Provision and maintenance of equipment and supplies;
- (3) Scheduling of games and practice times;
- (4) Travel and per diem expenses;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice, and competitive facilities;
- (8) Provision of medical and training services and facilities;
- (9) Provision of housing and dining services and facilities; and
- (10) Publicity.⁵⁷

Notably, the first factor caused a great deal of confusion as there was no guidance as to how schools were expected to comply in order to satisfy the “interests and abilities” of student-athletes as “interests and abilities” was left conspicuously undefined.⁵⁸ Nonetheless, schools were ordered to comply with Title IX and its accompanying regulations “as expeditiously as possible,” but were given three years to fully comply.⁵⁹ Schools that failed to comply with Title IX would lose federal funding.⁶⁰

E. Clearing the Definitional Murkiness: 1979 Title IX Policy

In 1979, a three-prong test was promulgated in an effort to ensure compliance with Title IX and reduce uncertainty in its application.⁶¹ The Title IX Policy Interpretation stated that educational institutions can satisfactorily comply with Title IX in *any* of three ways: (1) opportunities for both genders are provided “in numbers substantially proportionate to their respective enrollments”; (2) the program has a history of expanding in response to developing interests and abilities in sports; or (3) the program fully and effectively accommodates the interests and abilities of females.⁶²

⁵⁵ 34 C.F.R. § 106.41(b).

⁵⁶ Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71418 (Dec. 11, 1979).

⁵⁷ *Id.* at 71415.

⁵⁸ *Id.* at 71414.

⁵⁹ 34 C.F.R. § 106.41(d).

⁶⁰ See Katie Thomas, *Long Fights for Sports Equity, Even With a Law*, N.Y. TIMES, July 29, 2011, at A1.

⁶¹ Furman, *supra* note 37, at 1174.

⁶² Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71418.

The second prong initially allowed educational institutions leeway in compliance; however, it “is not a viable legal defense today because the period of expansion has long since ended.”⁶³ The third prong is similarly a weak argument for today’s educational facilities, as “[c]ourts have typically found that when female athletes are willing to litigate for the opportunity to play, they are adequately interested, and the institution clearly has not accommodated that interest.”⁶⁴

Federally funded institutions still have a loophole that allows for leniency in compliance. The first prong of Title IX compliance is known as the “substantial proportionality test.” Essentially, this “test” finds that institutions comply with Title IX when they offer athletic opportunities in numbers that coincide with the respective enrollments of males and females at the institution.⁶⁵ Even today, there is no definition or suggestion of what amounts to “substantial proportionality.”⁶⁶

Accordingly, under the first prong of Title IX compliance, individuals seeking to establish their right to participate on an opposite-sex team face an impermissibly high bar. First, an individual may only try out for an opposite sex team when the sport is offered only to one sex.⁶⁷ While the current law may conveniently help to alleviate tensions that could inevitably spring from applying completely gender-neutral principles to team selection, it also severely “limits the scope of Title IX’s integration rights.”⁶⁸ Also, this calls in to question whether sports that are modified to accommodate the alleged “differences”⁶⁹ between men and women are really the same sport as the boy’s version of the game.⁷⁰ Notably, with regards to baseball, many argue that softball is not at all the same sport as its male-dominated cousin.⁷¹ Specifically, “[a]spir[ing] female baseball players contend that [baseball and softball] are not at all the same, given substantial differences in the size and dimensions of the fields and the balls and differences in the equipment, rules, and strategies of the games.”⁷²

Second, females may desire to play on a male team, even when the requisite female “equivalent” is offered. This sort of instance is known in sports law

⁶³ Furman, *supra* note 37, at 1175.

⁶⁴ *Id.*

⁶⁵ Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71414.

⁶⁶ VALERIE M. BONNETTE & LAMAR DANIEL, OFFICE FOR CIVIL RIGHTS DEP’T OF EDUC., TITLE IX ATHLETICS INVESTIGATOR’S MANUAL 24 (1990).

⁶⁷ 34 C.F.R. § 106.41(d) (2013).

⁶⁸ DEBORAH L. BRAKE, GETTING IN THE GAME: TITLE IX AND THE WOMEN’S SPORTS REVOLUTION 42 (2010).

⁶⁹ See Chris Roberts, *Battle Rages to Let Girls in LL*, Sarasota J. 4D (May 23, 1974), available at http://news.google.com/newspapers?nid=1798&dat=19740522&id=j_geAAAAIBAJ&sjid=NY0EAAAIBAJ&pg=7168,2130991.

⁷⁰ See *id.*

⁷¹ Tal Barak, *Men Play Baseball, Women Play Softball*, NPR (June 02, 2005, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=4675763>.

⁷² BRAKE, *supra* note 68, at 42–43.

as a “cross-over case.”⁷³ A female athlete may be extremely skilled and more advanced than others of her gender, and may desire to improve her game and challenge herself through participation with generally bigger and stronger male athletes. Under Title IX’s compliance test, these extremely skilled female athletes may never be able to compete with their male counterparts. The effects of this division are negative and far-reaching, as male athletes are virtually entirely considered to be the “best of the best” in terms of athletics.⁷⁴ Women, therefore, never have the opportunity to prove their potential prowess and skill in sports over men, and they are relegated to being considered only “pretty good for a girl.”⁷⁵

By contrast, sports that are virtually untouched by Title IX regulations and compliance standards (because they are not offered in federally-funded institutions) have great success stories exalting female athletes over their male counterparts. Females have taken advantage of the ability to integrate with males to further the notion of equal skill in athletics, even in sports where a great deal of contact exists. For example, Indy and NASCAR car driver Danica Patrick has excelled in her sport amongst a sea of male competitors. In fact, in 2008, Patrick became the first woman to win the Indy Japan 300.⁷⁶ Then, in 2009, she placed third in the Indianapolis 500 by beating out thirty male competitors in the final race.⁷⁷ In 2013, she became the first woman to win a pole position at the Daytona 500.⁷⁸ Athletes like Patrick show that women do not need the “protection” of the contact sports exemption, even in more “dangerous” sports like racing.

F. And So It Begins: Baseball’s Implicit Inclusion as a Contact Sport

In 1973, even before the promulgation of the 1975 Title IX Contact Sports Exemption, “the first of five pivotal [women’s] baseball cases was decided.”⁷⁹ In *Magill v. Avonworth Baseball Conference*, ten-year-old Pamela Magill sued Avonworth, alleging that her rights under the Equal Protection Clause of the Fourteenth Amendment were violated when she was denied the ability to play in Avonworth’s summer baseball program because she was a female.⁸⁰ There, Avonworth asserted that there was no sort of governmental relation and that it

⁷³ See Furman, *supra* note 37, at 1178; Diane Heckman, The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 551, 563 (2003).

⁷⁴ See, e.g., Rick Paulas, *Why Women Will Never Beat Men in “Sports”*, VICE (July 18, 2013), <http://www.vice.com/read/why-women-will-never-beat-men-in-sports>.

⁷⁵ LESLIE HAYWOOD, *PRETTY GOOD FOR A GIRL: AN ATHLETE’S STORY IX–XXI* (2000); see Paulas, *supra* note 74.

⁷⁶ *Danica Patrick Races Into History by Beating Men at Their Game*, AFP (Apr. 22, 2008), <http://archive.is/7nsgT>.

⁷⁷ Brant James, *Indy 500 is on Danica Patrick’s Mind*, ESPN W (May 19, 2012), <http://espn.go.com/espnw/news-commentary/article/7949664/indy-500-danica-patrick-mind>.

⁷⁸ Dean Schabner, *Danica Patrick Becomes First Woman to Take Pole at Daytona 500*, ABC NEWS (Feb. 17, 2013, 8:00 PM), <http://abcnews.go.com/blogs/headlines/2013/02/danica-patrick-becomes-first-woman-to-take-pole-at-daytona-500/>.

⁷⁹ Sarah K. Fields, *Cultural Identity, Law, and Baseball*, in *SPORT AND MEMORY IN NORTH AMERICA* 28 (Stephen G. Wieting ed., 2001).

⁸⁰ *Magill v. Avonworth Baseball Conference*, 364 F. Supp. 1212, 1213 (W.D. Pa. 1973), *vacated & remanded to* 516 F.2d 1328 (3d Cir. 1975).

was a private entity so the Equal Protection Clause did not apply.⁸¹ Unfortunately for Magill, the judge agreed and had quite the opinion on the issue.⁸² There, the federal district court judge described how the case would have resulted had Avonworth been a representative of the government. In his diatribe, the judge essentially expressed his opinion that baseball was a contact sport that females should not be permitted to play because they would get hurt.⁸³ The Contact Sports Exemption, finalized two years later, only allowed more wiggle room for discrimination against women in the baseball arena. Courts have ruled differently on the issue of allowing females to participate on male teams; however, “it is far from clear” as to whether the law considers baseball to be a contact sport.⁸⁴ The ambiguity of whether or not females will be permitted to play baseball ultimately discourages female play and pushes young women towards the more traditionally feminine sport of softball.

II. A BRIEF HISTORY OF BASEBALL IN THE UNITED STATES: WHY GIRLS SHOULD GET TO PLAY, TOO

Baseball in America: A Symbol of National Pride

Outside of hot dogs and apple pie,⁸⁵ baseball evokes some of the strongest feeling of American nostalgia.⁸⁶ Known as the “national pastime,” baseball is revered above all other sports and is as much a national symbol as the bald eagle or Uncle Sam.⁸⁷ Popular culture holds baseball out to be an American religion, with its athletic heroes as Gods. Baseball players of yesteryear, like “The Great Bambino”⁸⁸ and the “Say Hey Kid”⁸⁹ are worshipped by legions of

⁸¹ *Id.* at 1214.

⁸² *Id.* at 1216.

⁸³ *Id.*

⁸⁴ BRAKE, *supra* note 68, at 44.

⁸⁵ Hearing examiner Sylvia Pressler likened baseball to the tasty “American” treats in her landmark decision to allow New Jersey girls to participate in Little League. *See* Roberts, *supra* note 69; *see also* Landmark, *supra* note 2.

⁸⁶ Sam R. Hall, *As American as Baseball, Apple Pie and . . . Politics?*, CLARION LEDGER (July 4, 2012), <http://blogs.clarionledger.com/samrhall/2012/07/04/as-american-as-baseball-apple-pie-and-politics>; *Sports in America: Baseball*, U.S. DIPLOMATIC MISSION TO GERMANY, <http://usa.usembassy.de/sports-baseball.htm> (last visited Apr. 30, 2014).

⁸⁷ *Sports in America: Baseball*, *supra* note 86.

⁸⁸ “The Great Bambino” is a well-known nickname for legendary Major League Baseball (MLB) baseball player George Herman Ruth, Jr., more commonly known as “Babe” Ruth. “The Babe” is widely considered the greatest baseball player of all time and had a number of remarkable nicknames, including “Sultan of Swat” and “the Home Run King.” LAWRENCE S. RITTER & MARK RUCKER, *THE BABE: A LIFE IN PICTURES* 1-5 (1988); Jennifer Rosenberg, *Babe Ruth*, ABOUT.COM, <http://history1900s.about.com/od/people/p/baberuth.htm?p=1> (last visited Apr. 30, 2014).

⁸⁹ “The Say Hey Kid” is what baseball enthusiasts baptized Willie Mays, a MLB Hall of Famer considered by many to be the best all-around baseball player in history. Steve Langsam, *This Day in Sports History: Mays Hits His Final Home Run . . . Aaron Surpasses Musial’s Record*, MARTINEZ NEWS-GAZETTE, Aug. 18, 2013, available at <http://martinez-gazette.com/archives/6633>.

devout baseball followers, while newcomers like “A-Rod”⁹⁰ and “Prince Albert”⁹¹ inspire new converts. Millions of young people seeking an institutional rite of passage into the quintessential American pastime break in their leather gloves, toss around the ball with dad, and often join Little League.⁹² Kids as young as five and as old as eighteen⁹³ are offered a chance to revel in Little League glory, where the best and most serious players go on to play baseball in high school, and eventually college. There are thousands of high school baseball teams, meaning thousands of opportunities for kids to compete through their teenage years. Specifically, more than 450,000 teenagers play high school baseball in a given year.⁹⁴ Of these thousands of opportunities, young women represent only a small minority of high school baseball players. During the 2009–2010 high school year, only 859 young women were on high school baseball teams.⁹⁵

Moreover, gifted and especially focused players have a good chance of playing in college, where there are over 1,600 teams divided across NCAA Divisions I, II, and III, as well as National Association of Intercollegiate Athletics (NAIA) teams and Junior Colleges.⁹⁶ College baseball teams carry a roster of at most thirty-five individuals,⁹⁷ meaning that each year approximately 55,000 people have the opportunity to play college baseball. Women playing baseball in college, however, is an absolute rarity;⁹⁸ those arriving at the college baseball scene are met with surprise and scrutiny. Notably, the highest level of baseball is even more exclusive. The Major League Baseball Association, or the MLB, consists of thirty teams,⁹⁹ with an active roster limit of

⁹⁰ “A-Rod” refers to Alex Rodriguez, one of the best and most popular contemporary MLB players. See Allen Barra, *Atlas Slugged*, VILLAGE VOICE (Aug. 22, 2006), <http://www.villagevoice.com/2006-08-22/nyc-life/atlas-slugged/>.

⁹¹ *Albert Pujols*, BASEBALL-REFERENCE.COM, <http://www.baseball-reference.com/players/p/pujolal01.shtml> (last visited Apr. 30, 2014). “Prince Albert” is a moniker sported by Albert Pujols, who is widely regarded as one of the best hitters of all-time. See David Schoenfeld, *Is Pujols the Greatest Hitter of All Time?*, ESPN (Oct. 23, 2011), <http://espn.go.com/blog/sweetspot/print?id=17960>.

⁹² LANCE VAN AUKEN & ROBIN VAN AUKEN, *PLAY BALL!: THE STORY OF LITTLE LEAGUE BASEBALL XV* (2001).

⁹³ *Divisions of Play*, LITTLE LEAGUE, <http://www.littleleague.org/learn/about/divisions.htm> (last visited Apr. 30, 2014).

⁹⁴ Bob Howdeshell, *Inside the Numbers*, HIGH SCHOOL BASEBALL WEB, http://www.hsbaseballweb.com/inside_the_numbers.htm (last visited Apr. 30, 2014).

⁹⁵ Pat Borzi, *Women Are Knocking on Baseball’s Door*, ESPN W (May 10, 2011), <http://espn.go.com/espnw/news/article/6514843/women-pro-sports-women-knocking-baseball-door>.

⁹⁶ David Frank, *How to Get a Baseball Scholarship*, ATHNET, <http://www.athleticscholarships.net/baseballscholarships.htm> (last visited Apr. 30, 2014).

⁹⁷ Rick Allen, *The Effect of New Scholarship Rules in Division I Baseball*, INFORMED ATHLETE, <http://www.informedathlete.com/the-effect-of-new-scholarship-rules-in-division-i-baseball> (last visited Apr. 30, 2014).

⁹⁸ Dave Krider, *California Girl Earns College Baseball Scholarship*, MAXPREPS (May 13, 2011), <http://www.maxpreps.com/news/NuRmEX2LEeCkHgAcxJSkrA/california-girl-earns-college-baseball-scholarship.htm>.

⁹⁹ *Team-by-Team Information*, MLB.COM, <http://mlb.mlb.com/team/> (last visited Apr. 30, 2014).

twenty-five players.¹⁰⁰ Consequently, in a given year, only 750 people *in the world* have the opportunity to pursue baseball as a profession in America. After more than a century of professional American baseball,¹⁰¹ not a single female has made it to the “Big Leagues.”¹⁰²

The apparent exclusion of women from the baseball arena is not necessarily for lack of skill. On the contrary, women across the globe play baseball at increasingly high levels. In 2012, Japan won the Women’s Baseball World Cup, edging out the Australian, Canadian, Chinese, Cuban, Netherlands, Venezuelan, and American national teams.¹⁰³ Moreover, other European countries, including France and Italy, show an increasing desire for women’s national baseball teams.¹⁰⁴ One would posit that if there is enough interest in baseball to field a women’s national team that competes worldwide, then the interest is strong enough for collegiate women’s baseball to be required by Title IX regulations. In 2004, the USA Baseball Women’s National Team won the silver medal in the women’s World Series.¹⁰⁵ Today, there are more 300,000 girls playing little league baseball—one in seven Little Leaguers are female.¹⁰⁶ If those numbers aren’t indicative of an “interest” in the sport to satisfy Title IX compliance requirements, then it is unclear what is.

Moreover, women have had a significant interest in baseball throughout American history and have played an extremely important role in the history and development of the iconic sport.¹⁰⁷ Particularly, women are oft-credited with “saving” baseball during the 40s and 50s, when World War II was in full swing.¹⁰⁸ Historian Lois Browne noted that baseball suffered severe criticism and was faced with declining interest because, while generously paid male athletes “swatt[ed] balls . . . [,] their loved ones were dying on foreign shores.”¹⁰⁹ In 1942, Chicago Cubs’ Owner Peter Wrigley started to build a professional women’s league in hopes that women could fill the void that had been created when male players were enlisted in the war.¹¹⁰

¹⁰⁰ *MLB Miscellany: Rules, Regulations and Statistics*, MLB.COM, http://mlb.mlb.com/mlb/official_info/about_mlb/rules_regulations.jsp (last visited Apr. 30, 2014).

¹⁰¹ *Baseball Origins, Growth and Changes in the Game*, PEOPLE HISTORY, <http://www.thepeoplehistory.com/baseballhistory.html> (last visited Apr. 18, 2014).

¹⁰² Nancy Doublin, *No Girls Allowed: Why Aren’t There Any Women in MLB?*, BLEACHER REPORT (Sept. 1, 2010), <http://bleacherreport.com/articles/447773-no-girls-allowed-why-arent-there-any-women-in-mlb>.

¹⁰³ *2012 Women’s Baseball World Cup: Japan Wins Third Title in a Row*, BASEBALL DE WORLD (Aug. 21, 2012) <http://baseballdeworld.com/2012/08/21/2012-womens-baseball-world-cup-japan-wins-title-row/>.

¹⁰⁴ *Justine Siegal Visits France and Italy to Talk About Women’s Baseball*, INT’L BASEBALL FED’N (Jan. 30, 2013) <http://www.ibaf.org/en/news/2013/01/30/justine-siegal-visits-france-and-italy-to-talk-abo/b1e2c0fc-dfbf-4ddf-bdd4-59d667d0d40f>.

¹⁰⁵ Barak, *supra* note 71.

¹⁰⁶ *Landmark*, *supra* note 2.

¹⁰⁷ Richard Goldstein, *Dottie Collins, 84, Star Pitcher of Women’s Baseball League, Dies*, N.Y. TIMES, Aug. 17, 2008, at A22.

¹⁰⁸ *See Id.*

¹⁰⁹ Adam Peterik, *Women’s Baseball During World War II*, ILL. PERIODICALS ONLINE, <http://www.lib.niu.edu/1995/ihy950452.html> (last visited Apr. 30, 2014).

¹¹⁰ Nancy Randle, *A League of Women: When A Unique Brand of Baseball Had Its Day in the Sun*, CHI. TRIBUNE MAGAZINE, July 5, 1992, at 12, available at <http://www.midwayvil.lage.com/wordpress/wp-content/uploads/2012/01/Rockford-Peaches-Packet.pdf>.

The “All-American Girls Professional Baseball League” was similar to men’s baseball as it was played in the 1800s—only the base paths and pitching distance were shortened.¹¹¹ Nonetheless, the women who participated in Wrigley’s All-American Girls Professional Baseball League were required to wear skirts when they played and to promote a feminine appearance.¹¹² Some players particularly hated a “rule requiring bare legs . . . [because of] the bruises and skinned thighs [they] suffered sliding into base.”¹¹³ Strict requirements were in place to preserve the women’s appearance of femininity, including bed checks and rules against smoking and drinking, and “guidelines . . . [stipulated] their hairstyles, clothing and makeup.”¹¹⁴

Even amidst the general climate of gender imbalance, the women who participated in the league maintained general interest in the sport, and helped revitalize its image. The story of America’s new, fresh-faced baseball heroes was commemorated in the hit 1992 movie “A League of Their Own.”¹¹⁵ Nonetheless, the women’s professional baseball league that saved the day was unfortunately ultimately disbanded in 1954.¹¹⁶

Softball has partially filled the void for women seeking to participate in America’s pastime and has seen a huge increase in participation in recent years. In 2012, softball was the fourth most popular girl’s sport for high school female athletes.¹¹⁷ Nonetheless, softball has not always been this popular. Instead, softball was considered a sport for the “weaker” female sex,¹¹⁸ where pitches were lobbed in a slingshot fashion towards the plate. Moreover, the sport isn’t always taken seriously, as individuals of both genders see the much larger “soft” ball and smaller playing field as indicative of physical and athletic gender inferiority. Adding to ridicule of the sport, it was not until 2002 that slow pitch was officially eliminated from the International Softball Federation’s official rules, although the slow pitch style had long been a rare practice.¹¹⁹

III. THERE’S NO CRYING IN BASEBALL!: ASSUMED INTENT BEHIND WOMEN’S EXCLUSION FROM CONTACT SPORTS

Many are mystified as to how a civil rights statute could ultimately morph into legislation that explicitly excludes women from certain areas of athletics based primarily on archaic gender stereotypes. Nonetheless, this is exactly what

¹¹¹ *Id.* at 13.

¹¹² Myron Kukla, *World War II Women’s Baseball League Taught Lesson to Follow Goals*, MLIVE (Feb. 5, 2013, 9:23 PM), http://www.mlive.com/news/grand-rapids/index.ssf/2013/02/post_337.html.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Women Who Played Professional Baseball*, ALL-AM. GIRLS PROF’L BASEBALL LEAGUE PLAYERS ASS’N, <http://www.aagpbl.org/> (last visited Apr. 30, 2014).

¹¹⁷ Angel Verdejo, *Increase in Girls Sports Puts High School Participation at All-Time High*, HOUS. CHRONICLE (Aug. 23, 2012), <http://blog.chron.com/sportsupdate/2012/08/increase-in-girls-sports-puts-high-school-participation-at-all-time-high/>.

¹¹⁸ See Eldon E. Snyder & Ronald Ammons, *Adult Participation in Coed Softball: Relations in a Gender Integrated Sport*, 16 J. SPORT BEHAVIOR 3, 10–11 (1993).

¹¹⁹ Patrick Lynch, *A Brief History of Softball*, TOTALLY GIRLS SOFTBALL (Jan. 6, 2011), <http://totallygirlsoftball.com/blog/a-brief-history-of-softball>.

Title IX has become. There are several reasons advanced for female exclusion from contact sports; however, these “reasons” are feeble at best. Rather, they are thinly veiled, blatant forms of gender discrimination that keep educational institutions “clinging . . . to culturally dictated notions that underestimate the flexibility and potential of . . . [both sexes, which in turn limit women] as a class and as individuals.”¹²⁰ Females are excluded from contact sports for two main reasons.

First, “paternalistic stereotypes” have influenced the idea that women need to be protected from the “violent nature of contact sports.” These stereotypes “focus on the relative fragility of the female body,” and assume that women can never equal men in terms of size or strength.¹²¹ Further, proponents of the Contact Sports Exemption rely on outdated and stereotypical notions to contend that women would suffer injury through participation in contact sports with men.¹²² These stereotypes suggest that females should never engage in contact sports with the male sex because females are characteristically slower, weaker, and “less coordinated than males, and thus are prone to debilitating injuries when they play rough sports” with the stronger, superior opposite sex.¹²³

Second, influential entities like the NCAA have lobbied to maintain status quo by seeking to protect “Old Boys’ Club” sports boosters who are intent on preserving “all-male bastions” of stereotypically masculine sports like football, basketball, and baseball.¹²⁴ Moreover, NCAA schools have been able to use the Contact Sport Exemption as a tool to implicitly exempt revenue-producing sports from Title IX compliance. Notably, not all of the sports explicitly listed in the HEW Contact Sports Exemption regulations are revenue-producing sports. On the contrary, some reports show that football and basketball are the *only* revenue-producing collegiate sports.¹²⁵

IV. ONE OF THESE THINGS IS NOT LIKE THE OTHERS: WHY BASEBALL SHOULD NOT BE INCLUDED IN THE CONTACT SPORT EXEMPTION

HEW’s regulations exempting “contact sports” from sex integration never included baseball. The regulations explicitly included the obvious contact-driven sports of “boxing, wrestling, rugby, ice hockey, football, basketball,” but also listed a dangerous catch-all; that is, “other sports the purpose or major activity of which involves bodily contact.” The language of the catch-all is so vague and malleable¹²⁶ that proponents of male-dominated revenue-producing sports saw an opportunity to exempt a number of other sports that weren’t

¹²⁰ Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 15, 28 (Katharine T. Barlett & Rosanne Kennedy eds., 1991).

¹²¹ Sangree, *supra* note 46, at 382.

¹²² See Roberts, *supra* note 69.

¹²³ Sangree, *supra* note 46, at 382.

¹²⁴ *Id.*

¹²⁵ Christopher Lee, *College Athletics by the Numbers: A Deeper Look at Profitability*, *SPORTSOLOGIST* (Sept. 29, 2010), <http://sportsologist.com/college-athletics-by-the-number/>.

¹²⁶ BRAKE, *supra* note 68, at 44.

explicitly listed in the regulations from compliance with Title IX.¹²⁷ Baseball was a sport quickly targeted for such exemption. At the collegiate level, baseball was less profitable than other revenue-producing titans like football and basketball; however, many saw female participation in baseball as “a symbolic encroachment of females into a male domain.”¹²⁸ The catch-all provision of the Contact Sport Exemption provided the perfect “tool” for individuals looking to exclude women from the game.

Nonetheless, of the sports explicitly listed in the HEW regulation, baseball is glaringly dissimilar. If we consider the statutory interpretation principle of *eiusdem generis*,¹²⁹ it is tough to see how baseball could be included under the Contact Sports Exemption. This common maxim explains that where specific words are followed by a general expression, the general expression is limited to the shared characteristics of the specific words, even though the general expression may ordinarily have a much broader meaning.¹³⁰ This principle serves to limit expansive application of ambiguous language.¹³¹ Applying that concept here, boxing, wrestling, rugby, ice hockey, football, and basketball are the specific terms that must be examined to determine whether baseball fits within the general expression of “other sports the purpose or major activity of which involves bodily contact.”

On review of the listed terms, we can see that baseball does not fit within this definition for several reasons. Noticeably, each of the specifically listed sports includes bodily contact that is unavoidable. Further, four of the five sports listed—boxing, wrestling, rugby, ice hockey, and football—encourage bodily contact and even *require* bodily contact by virtue of the rules. By contrast, baseball is a sport where bodily contact is rare, discouraged, and regularly punished.

First, the only bodily contact the rules of baseball allow occurs when a defensive player tags an offensive player, or when an offensive player slides into a base where that player is waiting to tag him or her. This sort of play does not necessarily occur in every game. Even when it does occur, rules regulate the tag *and* the slide so as to minimize contact. Specifically, the NCAA forbids collegiate baseball players from purposely colliding with each other.¹³² Further, the NCAA baseball rules committee explained in their rulebook that it “is concerned about unnecessary and violent collisions with the catcher at home plate, and with infielders at all bases,” so it instituted the “Collision Rule” to “encourage base runners and defensive players to avoid such collisions whenever possible.”¹³³

Additionally, the rules punish base runners for inciting an avoidable collision or attempting to dislodge the ball through contact. Finally, the rules further

¹²⁷ EILEEN McDONAGH & LAURA PAPPANO, PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS 104 (2008).

¹²⁸ *Id.* at 139.

¹²⁹ BLACK'S LAW DICTIONARY 594 (9th ed. 2009).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² NAT'L COLLEGIATE ATHLETIC ASS'N, 2013 & 2014 NCAA BASEBALL RULES 69 (Jim Paronto ed., 2012), available at <http://www.ncaapublications.com/productdownloads/BA14.pdf>.

¹³³ *Id.* at 80.

discourage bodily contact between the base runners and defensive players by allowing the runner a three-foot lane outside of the base path where they may run “to avoid a tag.”¹³⁴ Further, those who are familiar with the tradition of the game know that players are often punished by being ejected or fined large amounts of money when they engage in a purposeful collision.¹³⁵ In fact, in recent years, numerous efforts have been made to discourage the historical practice of “bowling over a catcher” at home plate.¹³⁶ Bowling over the catcher refers to a base runner purposely slamming into a catcher when there is a play at home plate, to attempt to knock the ball out of the catcher’s glove, instead of sliding and avoiding a collision.

Those arguing for baseball’s inclusion as a “contact sport” point to the fact that baseball pitchers often “bean” hitters with the ball—that is, they purposely throw the ball so as to hit the body of the batter. Although this is historically accepted as “part of the game,” the NCAA discourages and punishes this act. If the umpire believes that the pitcher is intentionally throwing at a batter, the pitcher *and the coach* may be immediately ejected from the game.¹³⁷ Similarly in this instance, the practice of throwing purposefully at a batter is not required by the rules, nor does it occur in every game.

Additionally, the contact of being struck with a ball cannot be considered “bodily contact” in the same vein of football, wrestling, rugby, etc. The sports explicitly listed in the HEW regulations have physical, player-to-player touching that occurs in every single game. In football, rugby, hockey, boxing, wrestling, and (arguably) basketball, aggressive, even violent bodily touching encompasses the essence of the sport. By contrast, a ball striking a batter includes an inanimate object coming into contact with the body; moreover, this occurrence does not happen at all games.

Finally, the sport is generally non-violent. As early as 1967, baseball injuries were analyzed and found to occur at a rate of 1.96 percent, which expert doctors characterized as a “low” injury rate.¹³⁸ This low rate of injury further damages the argument for baseball’s inclusion in the contact sports exemption—girls are no more likely to be harmed than boys, and further, baseball is not an inherently violent or injury-prone sport.

Although the principle of *eiusdem generis* suggests that baseball does not belong under the Contact Sports Exemption, the actual rationale behind the exemption provides further guidance. The Contact Sports Exemption is supposed to protect women from injury through participation in sport with men. However, unlike the sports listed in the HEW regulation, brute strength and physical dominance are not paramount to baseball success.¹³⁹ On the contrary,

¹³⁴ *Id.* at 68–69.

¹³⁵ See Grant Brisbee, *Revisiting the Rules on Takeout Slides*, SB NATION (Oct. 16, 2012, 2:35 PM), <http://mlb.sbnation.com/2012/10/16/3512524/revisiting-the-rules-on-takeout-slides>.

¹³⁶ David Waldstein, *A Dirty Job*, N.Y. TIMES, Sept. 29, 2012, at D1.

¹³⁷ NAT’L COLLEGIATE ATHLETIC ASS’N, *supra* note 132, at 87.

¹³⁸ See FIELDS, *supra* note 79, at 35.

¹³⁹ Steven Goldman, *What Did A-Rod and the Other Cheaters Accomplish?*, SB NATION (July 15, 2013, 4:22 PM), <http://www.sbnation.com/mlb/2013/7/15/4525956/biogenesis-scandal-alex-rodriguez-mlb>.

baseball is often considered the “thinking man’s game;”¹⁴⁰ a sport where success is determined largely by strategy and intellect. Further, it is played by individuals of all sizes and strength, where quickness and agility are valuable attributes.¹⁴¹

It is clear that in baseball, size does not necessarily spell success. Recently, the so-called “Sultan of Short,” major league player Jose Altuve, has achieved professional success, even though he admitted to being only 5’6” in height.¹⁴² Better known players Dustin Pedroia and Jimmy Rollins, who stand at a mere 5’9” and 5’8”, respectively, have garnered significant acclaim for their play. Pedroia was the American League’s Most Valuable Player (MVP) in 2008, while Rollins was the MVP of the National League in 2007.¹⁴³ This demonstrates that women, who have a generally shorter stature than men, would not necessarily be at a disadvantage and could participate in the sport even at a lesser height than men. Why, then, should baseball be included under the Contact Sport Exemption, so that colleges are not required to field women’s baseball teams or allow women to try out for all-male teams? There seems to be no reasonable, rational explanation other than sheer desire to maintain baseball’s hyper-masculine dominance.

Similarly, some sports commentators have already predicted that women could the join ranks of men in the Major Leagues as pitchers, and others question why this sort of integration has not already occurred.¹⁴⁴ Pitching is a skill that also does not necessarily require excessive strength or speed. On the contrary, pitchers who can “make[] the ball move” through placement, control, and spin are often greatly successful.¹⁴⁵ For instance, the “knuckleball” is a pitch that does not rely on speed at all, but instead “floats” or “dances” up to the hitter in a way that is erratic and geared to make the hitter swing and miss. Pitchers like the New York Mets’ R.A. Dickey have found significant success using the knuckleball as their primary pitch; Dickey’s pitch speeds max out in the lowly mid-80s.¹⁴⁶

Notably, a few women have found success with this pitch in lower professional levels. For example, in 2010, woman knuckleballer Eri Yoshida joined

¹⁴⁰ Douglas Flynn, *Thinking Man’s Game*, NEW ENGLAND BASEBALL J. (Mar. 5, 2010), available at <http://www.strike3foundation.org/news/thinking-mans-game/>; David H. Stearns, *A Thinking Man’s Game*, HARVARD CRIMSON (May 4, 2005), <http://www.thecrimson.com/article/2005/5/4/a-thinking-mans-game-baseball-plays/>.

¹⁴¹ See Goldman, *supra* note 139.

¹⁴² Steve Campbell, *Astros’ Altuve Stands Shorter Than All Active MLB Players*, ULTIMATE ASTROS (Aug. 18, 2011, 11:27 AM), <http://blog.chron.com/ultimateastros/2011/08/18/astros-altuve-stands-shorter-than-all-active-mlb-players/>.

¹⁴³ *Id.*

¹⁴⁴ Dave Krider, *Will a Female Ever Play Major League Baseball?*, MAXPREPS (Oct. 6, 2010), <http://www.maxpreps.com/news/jD4NscdZEd-YiQAcxJSkrA/will-a-female-ever-play-major-league-baseball.htm>.

¹⁴⁵ Bill Ripken, *The Truth About Breaking Pitches*, COOPER CNTY. BASEBALL ASS’N (July 31, 2006), http://www.boonvillelittleleague.com/pdfs/coaches_info/CoachesThoughts-BREAKINGPITCHES,THETRUTHABOUT.pdf.

¹⁴⁶ Douglas Sibor, *MLB: Ranking the 10 Greatest Knuckleballers of All Time*, BLEACHER REPORT (May 2, 2012), <http://bleacherreport.com/articles/1169776-mlb-ranking-the-10-greatest-knuckleballers-of-all-time/page/4>.

the Chico Outlaws professional team in the independent Golden League.¹⁴⁷ Yoshida was only eighteen when she was signed to the team.¹⁴⁸ At 5'1" and only 115 pounds, she not only pitched a scoreless first inning in her debut as a rookie, but hit an RBI single in her first professional at bat. Although Yoshida enjoyed success in her first outing, women are typically not nurtured or trained to become professional Major League Baseball players; they are largely ignored and not considered as possible prospects by those running the "Big Leagues." Even Yoshida was not sought after or singled out for special training. Instead, the brave "Knuckleball Princess" learned her tricky pitch from watching her favorite professional baseball pitcher and then "taught herself the pitch."¹⁴⁹ She "never had any formal coaching for how to throw the knuckler."¹⁵⁰

CONCLUSION

This call for reform of Title IX by no means suggests that Title IX has been ineffective. On the contrary, this Note has sought to suggest that Title IX has had, and will continue to have, substantial influence on the protection of women on the field and in the classroom. In fact, female participation in high school sports has risen 970% since Title IX was effectuated.¹⁵¹ Nonetheless, this Note aims to suggest a simple, small improvement that could extend the valuable, significant protection of Title IX to every person deserving of protection. Although the author sees the Contact Sports Exemption in its entirety as a flawed, unnecessary regulation, the purpose of this Note is not to contend that the Contact Sports Exemption, in its entirety, should be condemned. Instead, the Contact Sports Exemption should be applied rigidly, and the catch-all exemption should be strictly limited by the concept of *ejusdem generis*.

Because baseball does not coincide with the other sports listed in the Contact Sports Exemption, it should no longer be subject to exemption. By clearing the contact sport ambiguity regarding baseball, schools would no longer be able to hide behind weak reasoning and a vague catch-all. Young girls seeking to play baseball would have the opportunity to pursue their dreams, without fear of being unduly excluded. Further, the exclusion of baseball from the Contact Sports Exemption would promote a deconstruction of baseball's hyper-masculine dominance, provide equal footing, and bring American society a small step closer to eliminating gender-based stereotypes.

¹⁴⁷ See Krider, *supra* note 144.

¹⁴⁸ *Japanese Female Pitcher Makes US Baseball Debut*, CBSNews (June 1, 2010, 3:12 PM), <http://www.cbsnews.com/news/japanese-female-pitcher-makes-us-baseball-debut/>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Kline, *supra* note 21.