THE CULTURE WAR OVER GIRLS' SPORTS: UNDERSTANDING THE ARGUMENT FOR TRANSGENDER GIRLS' INCLUSION

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ABSTRACT

The question of whether transgender girls with biologically male bodies should compete against cisgender girls has been the subject of heated debate and has become a focal point of the culture wars surrounding transgender rights more broadly. Title IX prohibits discrimination based on sex in education but permits sex-segregated sports teams. The act is silent, however, about how transgender student-athletes should be assigned to such teams. This silence has led to conflicting interpretations by the Obama and Trump Administrations and to divergent policies from school districts across the country. Ultimately, courts will need to decide whether Title IX requires or permits schools to have transgender girls compete against cisgender girls in sports. This Article articulates and assesses the arguments in favor of transgender girls' inclusion—arguments which combine a focus on subjective injury with assertions about objective social priorities. The Article argues that subjective pain forms a weak basis for establishing social rights, while arguments about objective social goals are stronger, but with implications that are often unacknowledged. The Article further emphasizes that however categories are ultimately drawn—or not drawn—in sports, cisgender males are likely to be the winners. The war between transgender and cisgender girls is for the leftovers not the spoils.

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CONTENTS

INTRODUCTION

IN recent years, the question of whether transgender[1] girls with biologically male bodies should compete against cisgender[2] girls has been the subject of heated debate and has become a focal point of the culture wars surrounding transgender rights more broadly. Those in favor of inclusion argue that exclusion will harm the physical and mental health of transgender students and perpetuate gender stereotypes generally.[3] Those in favor of exclusion argue that inclusion will undermine girls' sports as a source of opportunity and empowerment for biological girls.[4]

The law remains unsettled. Title IX of the Education Amendments of 1972 (Title IX) prohibits discrimination on the basis of sex in federally funded education programs.[5] What this usually means is that girls and boys (and women and men) must be measured against the same unitary metric and provided opportunities and rewards based on their performance. Sports, however, are different. In the context of sports, Title IX's implementing regulations permit schools to create sex-segregated sports teams as long as girls and boys receive equivalent opportunities and resources.[6]

Over the past twelve years, schools have been told they would violate Title IX and potentially lose federal funds if they refused to allow transgender girls to participate with cisgender girls on female athletic teams. Schools have also been told they would violate Title IX and potentially lose federal funds if they allowed transgender girls to participate with cis-

1. For a discussion of what the term transgender means to activists, see DAVID VALENTINE, IMAGINING TRANSGENDER: AN ETHNOGRAPHY OF A CATEGORY 33 (2007); *see also Frequently Asked Questions About Transgender People,* NAT'L CTR. FOR TRANSGENDER EQUALITY (July 9, 2016), http://www.transequality.org/sites/default/files/docs/resources/Understanding-Trans-Full-July-2016_0.pdf [https://perma.cc/Y76F-AHSR] (explaining that transgender people "are people whose gender identity is different from the gender they were thought to be at birth" and one's "gender identity" is one's "internal knowledge of your own gender").

2. Cisgender refers to "[a] person whose gender identity matches the gender they were assigned at birth." *See LGBTQ+ Glossary*, IT GETS BETTER PROJECT, https://itgetsbetter.org/blog/lesson/glossary/?gclid=CJwKCAjwr56IBhAvEiwA1fuqGjtrRsVcHkdYpDCS_9I5yazmAGgssmuLpc5gRcDn3_HY7GEZ4aggiBoCshcQAvD_BwE [https://perma.cc/C5RC-PSSK] (last visited Oct. 15, 2022).

3. *See, e.g.*, Joanna Hoffman, *500+ Student Athletes to NCAA Leadership: Speak Out for Trans Athletes*, ATHLETE ALLY (Mar. 10, 2021), https://www.athleteally.org/student-letter-ncaa-hb500/ [https://perma.cc/2HN7-WEP5].

4. *See, e.g.*, Abigail Shrier, Opinion, *Joe Biden's First Day Began the End of Girls' Sports*, WALL ST. J. (Jan. 22, 2021, 1:44 PM), https://www.wsj.com/articles/joe-bidens-first-day-began-the-end-of-girls-sports-11611341066 [https://perma.cc/FTJ5-5DB3]; *see generally* DOUGLAS MURRAY, THE MADNESS OF CROWDS: GENDER, RACE AND IDENTITY (2019); Emillie Kao, *How Pelosi's "Equality Act" Would Ruin Women's Sports*, HERITAGE FOUND. (Apr. 24, 2019), https://www.heritage.org/gender/commentary/how-pelosis-equality-act-would-ruin-womens-sports [https://perma.cc/CG6Y-FNA6]; SAVE WOMEN'S SPORTS, https://savewomenssports.com/ncaa [https://perma.cc/HE3Q-BSLL] (last visited Oct. 15, 2022).

5. 20 U.S.C. §§ 1681–1688 (2018).

6. *See* 34 C.F.R. § 106.41(b)–(c) (2010).

gender girls on female athletic teams. Interpretations of Title IX have not merely shifted, they have flipped.

The first interpretation was that of the Obama Administration, which, through guidance and a "Dear Colleague Letter," announced that Title IX required transgender girls be treated the same as cisgender girls.[7] The second interpretation was that of the Trump Administration, which rescinded the Obama-era pronouncements. Although it did not issue new guidance or regulations, the Trump Administration pushed its own interpretation through enforcement actions. According to the Trump Department of Education, permitting transgender girls to play on girls' sports teams violated Title IX's mandate of gender equality by requiring biological females to compete against biological males.

President Biden has long been a vocal advocate of transgender rights. Indeed, in 2012, then-Vice President Joe Biden stated that transgender discrimination was the "civil rights issue of our time."[8] While on the campaign trail in 2020, Biden pledged that on his first day in office he would reinstate the "Obama-Biden guidance."[9] Biden did not do so, but he did issue an Executive Order making clear his commitment to protect transgender students from misgendering. "Children should be able to learn," the Order provides, "without worrying about whether they will be denied access to the restroom, the locker room, or school sports."[10] It then orders agencies to ensure that all regulations and guidance documents are consistent with this policy.[11]

None of these administrative interpretations have the force of law. The Biden Executive Order, like the Obama-era guidance and the Trump-era enforcement actions, is not binding on courts. It only has the power of its own persuasive authority. In the absence of binding federal authority, states and athletic governing bodies have enacted their own laws and policies covering transgender girls' access to sports. Some bar transgender girls from participating on female teams, some require that transgender girls have access to female teams, and some limit access to

7. Letter from Catherine E. Lhamon, Assistant Sec'y for C.R., U.S. Dep't of Educ., & Vanita Gupta, Principal Dep. Assistant Att'y Gen. for C.R., U.S. Dep't of Just. to Dear Colleague (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf [https://perma.cc/GC4V-CSGR] [hereinafter *2016 Dear Colleague Letter*].

8. *See* Donovan Slack, *Biden Says Transgender Discrimination 'Civil Rights Issue of Our Time'*, POLITICO: POLITICO44 BLOG (Oct. 30, 2012, 6:57 PM), https://www.politico.com/blogs/politico44/2012/10/biden-says-transgender-discrimination-civil-rights-issue-of-our-time-147761 [https://perma.cc/6FRT-BEF4]; *Vice President Joe Biden: Transgender Discrimination 'Civil Rights Issue of Our Time'*, TRANSGENDER L. CTR. (Oct. 31, 2012), https://transgenderlawcenter.org/archives/2312 [https://perma.cc/9DZJ-TTYH].

9. *See The Biden Plan to Advance LGBTQ+ Equality in America and Around the World*, BIDEN HARRIS, https://joebiden.com/lgbtq-policy/ [https://perma.cc/4D6V-KD42] (last visited Oct. 15, 2022).

10. *See* Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

11. *See id.*

transgender girls who have received particular types of medical treatment.[12]

Ultimately, courts will need to decide what Title IX's prohibition on sex discrimination requires in this context. Yet, as the interpretive whiplash of the last twelve years suggests, neither the language nor the legislative history of the statute provides much guidance. It is thus not surprising that the discussion currently taking place about transgender girls' participation in sports is not fundamentally about doctrine or statutory interpretation, it is instead about people, goals, and values.

This Article seeks to articulate and explain the argument for inclusion of transgender girls on female sports teams and to highlight the empirical bases and normative priorities that drive it.[13] Part I describes Title IX's enforcement in this context. It outlines the dramatically different interpretations of the Obama-Biden and Trump-Pence Administrations and highlights in the process that Title IX itself imposes little constraint. Parts II and III turn to the arguments for inclusion and against misgendering of transgender girls in sports.

In an interesting and often blurry way, arguments for inclusion combine a focus on subjective injury with assertions about objective social priorities. Part II articulates those arguments that use subjective injury or subjective welfare as the basis for a right to inclusion. Sometimes these arguments focus on pain in an absolute sense—exclusion causes such intense transgender pain that the pain itself becomes a legal injury warranting redress. Sometimes the arguments seem more utilitarian—transgender inclusion minimizes social pain and maximizes social happiness. The Part highlights several challenges, in general and in this particular context, to using pain as a basis for a legal right.

Part III focuses on arguments that take a more objective form. According to these arguments, misgendering should be prohibited not because the subjective injury it causes is uniquely or particularly intense, but because the social injustice causing the injury—namely, cisgender normativity—is especially deserving of social attention. At times, the arguments seem perfectionist—challenging cisgender normativity is uniquely important because it undermines human flourishing. At other times, the arguments seem grounded in a hierarchy of oppression—challenging cisgender normativity is simply more important than challenging other forms of oppression. These claims, while potentially stronger than the subjective arguments described in Part II, are highly normatively controversial. In addition to making explicit the value judgements underlying these arguments, Part III explores their implications.

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12. *See infra* notes 52–55.

13. This author focuses on the arguments for inclusion, rather than arguments for exclusion, because, traditionally, school athletic teams were sex segregated based on biology. The arguments for inclusion are therefore those that seek change in the status quo.

I. THE INTERPRETIVE BATTLEFIELD

Title IX provides quite simply: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[14] The act was the product of work by Representative Edith Green of Oregon, who, as chair of a Special House Subcommittee on Education, held a series of hearings in 1970 during which "women, educators, athletes, scholars, and government officials outlined several examples of sex discrimination."[15] Working with Representatives Shirley Chisholm (New York) and Patsy Mink (Hawaii) and Senators Birch Bayh (Indiana) and George McGovern (South Dakota), Green was successful in including Title IX in the Education Amendments Act of 1972.[16]

Title IX said nothing specific about athletics, and in the years following its passage, lawmakers worked to figure out what the law meant for school sports.[17] In 1975, the Secretary of Health, Education, and Welfare, as a result of explicit Congressional delegation of authority, promulgated implementing regulations for Title IX.[18] The implementing regulations provided that while Title IX typically required that girls and boys be measured against the same performance metric, this was not the case in the context of athletics where a single competitive metric would largely exclude girls and women from participation.

According to the regulations, Title IX permits sex-segregated athletic teams "where selection for such teams is based upon competitive skill or the activity involved is a contact sport."[19] The implementing regulations

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14. Title IX, Education Amendments of 1972, 20 U.S.C. § 1681.

15. Paula J. Snyder, A Legislative and Judicial History of Title IX in Athletics 30 (May 2008) (Ph.D. dissertation, Kent State University) (on file with author). *See also* 117 Cong. Rec. 39249–50 (1971) (Representative Green describing the "ample documentation" of discrimination against women in education gathered at subcommittee hearings).

16. *See* Snyder, *supra* note 15, at 31–34; *see also* Paul C. Sweeney, *Abuse Misuse & Abrogation of the Use of Legislative History: Title IX & Peer Sexual Harassment*, 66 UMKC L. REV. 41 (1997) (describing the legislative history of Title IX).

17. *See* Snyder, *supra* note 15, at 34. In describing the focus of the act, Senator Bayh explained: "We are dealing with discrimination in admission to an institution, discrimination of available services or studies within and institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever." 118 Cong Rec. 5730, 5812 (1971) (colloquy with Senator Pell).

18. 34 C.F.R. § 106.41(a)–(b) (2010).

19. 34 C.F.R. § 106.41(b) (2010). The regulation goes on to make some provision for cross-sex team participation in instances in which a school operates a team for individuals of one sex but not the other:

> [W]here 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.

were followed by a "Policy Interpretation" promulgated in 1979 by the Department of Health, Education, and Welfare[20] that gave schools further guidance on how to ensure that sex-segregated athletic teams comply with Title IX.[21] Both the implementing regulations and the Policy Interpretation are entitled to judicial deference.[22] Neither, however, provides any guidance for schools on how transgender student-athletes should be assigned to sex-segregated athletic teams.

> For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

Id. The implementing regulations likewise make clear that sex-segregated bathrooms, locker rooms, and housing facilities do not violate the law. *See* 34 C.F.R. § 106.33 (2010) (allowing for separate toilet, locker room, and shower facilities on the basis of sex); 34 C.F.R. § 106.32 (2003) (allowing for separate housing on the basis of sex). For a brief overview of the enactment process of Title IX and the implementing regulations, see Cohen v. Brown Univ., 991 F.2d 888, 893–95 (1st Cir. 1993).

20. Title IX is now administered and enforced by the Department of Education, more specifically by the Department of Education's Office of Civil Rights (OCR) after the Department of Health, Education, and Welfare (HEW) was divided. *See Cohen*, 991 F.2d at 895.

21. *See* Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletes, 44 Fed. Reg. 71,413 (Dec. 11, 1979) (outlining three ways by which Universities could show that their varsity athletic offerings were in compliance with Title IX: (1) show that male and female students are provided varsity athletic opportunities in numbers substantially proportionate to their numbers in the undergraduate population; (2) show that where one sex is underrepresented in varsity athletics, the university can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of members of that sex; or (3) show that the interests and abilities of the members of the underrepresented sex have been fully and effectively accommodated).

22. *See Cohen*, 991 F.2d at 895–96 (explaining with regard to the implementing regulations that "[t]he degree of deference is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX" and providing that the Policy Interpretation is also entitled to "substantial deference" "[b]ecause this document is a considered interpretation of the regulation"); *see also* Biediger v. Quinnipiac Univ., 691 F.3d 85, 96–97 (2d Cir. 2012) (explaining that Title IX's implementing regulation and the subsequent policy interpretation were entitled to a high level of deference). After enacting Title IX, Congress enacted another statute, the Javits Amendment, which instructed the Secretary of Education to publish regulations "implementing the provisions of Title IX . . . which shall include with respect to intercollegiate activities reasonable provisions considering the nature of the particular sports." Education Amendments of 1974, Pub. L. No. 93–380, § 844, 88 Stat. 484, 612 (1974). Congress also provided in the Javits Amendment that it would review the regulations to determine if they were "inconsistent with the act." *Id.* at 576. Congress did then review the Title IX implementing regulations over six days of hearings and allowed them to go into effect. *See* McCormick *ex rel.* McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 287 (2d Cir. 2004) (outlining the history of the Javits Amendment and the Title IX implementing regulations).

Although there had been few cases raising the issue,[23] transgender girls' access to female sports teams became part of the culture wars during the Obama Administration.[24] The Obama Administration's position was clear and consistent—Title IX required schools to permit transgender girls to play on the athletic team associated with their gender identity.[25]

The Obama Administration publicized its position through a series of letters and guidance. In a 2015 letter to Emily Prince from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights at the Department of Education (OCR), the OCR explained that while Title IX permits schools to sex-segregate students in certain contexts—e.g., "locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances[,] . . . [A] school generally must treat transgender students consistent with their gender identity."[26]

In a subsequent Dear Colleague letter issued by both the Department of Justice and the Department of Education in 2016,[27] the Obama Administration provided additional guidance.[28] "The Departments," the letter explained, "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations."[29] This meant that a transgender student with a female gender identity needed to be categorized as a girl for the purposes of sex-segregated sports teams. Gender, rather than biological sex, was to be the factor according to which athletic

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23. *See infra* notes 45 and 53 and accompanying text (discussing example cases).

24. *See, e.g.,* Kylee Scales, *Indiana Schools, Gov. Pence React to Obama Administration's Directive on Transgender Access to School Bathrooms*, FOX59 (May 13, 2016, 5:36 PM), https://fox59.com/news/indiana-schools-react-to-obama-administrations-directive-on-transgender-access-to-school-bathrooms/ [https://perma.cc/Q79U-DUTB]; David Blank, *Transgender Athletes May Displace Female Competitors*, INDYSTAR (June 5, 2016, 5:04 PM), https://www.indystar.com/story/opinion/readers/2016/06/05/transgender-athletes-may-displace-female-competitors/85455100/ [https://perma.cc/NP8V-299P]; Lauren Camera, *Title IX Faces Down the Culture Wars*, U.S. NEWS (Nov. 2, 2018, 6:00 AM), https://www.usnews.com/news/the-report/articles/2018-11-02/trump-obama-use-title-ix-as-a-tool-in-the-culture-wars [perma link unavailable].

25. *See* Letter from James A. Ferg-Cadima, Acting Deputy Assistant Sec'y for Pol'y, Off. For C.R. at the Dep't of Educ., to Emily T. Prince, Esq., (Jan. 7, 2015), https://www2.ed.gov/about/offices/list/ocr/letters/20150107-title-ix-prince-letter.pdf [https://perma.cc/ZZD6-Q8UA] [hereinafter *Letter to Emily Prince*]; *2016 Dear Colleague Letter*, *supra* note 7.

26. *See Letter to Emily Prince*, *supra* note 25.

27. *See 2016 Dear Colleague Letter*, *supra* note 7.

28. The Dear Colleague letter also provided some much needed defining of terms. "Gender identity" the administration explained, "refers to an individual's internal sense of gender." "Transgender describes those individuals whose gender identity is different from the sex they were assigned at birth." *2016 Dear Colleague Letter*, *supra* note 7, at 1.

29. *Id.* at 2.

teams were segregated.[30] The agencies did hedge a bit—perhaps recognizing that biology may sometimes be important—noting that "Title IX does not prohibit age-appropriate, tailored requirements based on sound, current, and research-based medical knowledge about the impact of the students' participation on the competitive fairness or physical safety of the sport."[31] Yet the emphasis was clear—gender trumps biological sex, and exceptions must be narrow and particularized.[32]

Despite its prescriptive tone and threat to withdraw Title IX funding, the Obama-era guidance did not have the force of law.[33] Indeed, having never gone through a formal notice and comment period, it was not even entitled the deference accorded to administrative regulations.[34] The gui-

30. The Dear Colleague letter then goes on to say: "This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity." *Id.*

31. *Id.* at 3.

32. "A school may not . . . adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (*i.e.*, the same gender identity) or others' discomfort with transgender students." *Id.* (footnote omitted).

33. *See Letter to Emily Prince*, *supra* note 25; *2016 Dear Colleague Letter*, *supra* note 7.

34. The U.S. Department of Education website explains that "Guidance documents represent the [Department of Education's] current thinking on a topic. They do not create or confer any rights for or on any person and do not impose any requirements beyond those required under applicable law and regulations. Guidance documents lack the force and effect of law." U.S. DEP'T OF EDUC., https://www2.ed.gov/policy/gen/guid/types-of-guidance-documents.html [https://perma.cc/H7NX-BW2A] (last visited Oct. 15, 2022). The website then goes on to explain and define three categories of guidance documents: (1) guidance document; (2) significant guidance document; and (3) economically significant guidance document. *See id. See also* David E. Bernstein, *The Abuse of Executive Power: Getting Beyond the Streetlight Effect*, 11 FIU L. REV. 289, 290–91 (2016) (explaining that "[t]he Administrative Procedure Act (APA) requires that federal agencies that wish to issue formal, binding regulations based on the agencies' interpretation of operative statutes go through a formal notice and comment process" while guidance, which is "interpretative rules [or] statements of policy," do not have the force of law (quoting 5 U.S.C. § 533(b)(3)(A)(2015))). *See also* Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 97 (2015) (explaining that interpretive rules are easier to issue because they do not go through a formal notice-and-comment process "[b]ut that convenience comes at a price: Interpretive rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'" (quoting Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995))). A federal district court judge in Texas issued a preliminary injunction prohibiting the federal government from enforcing the May 13, 2016, Dear Colleague Letter because it viewed the guidelines as a final agency action that failed to satisfy the notice and comment process of the Administrative Procedures Act. Texas v. United States, 201 F. Supp. 3d 810, 824, 828 (N.D. Tex. 2016). In an exchange with Judge O'Connor in the Texas case, Benjamin Leon Berwick, the attorney for the Department of Justice, told the judge that while the Government would like schools to comply with its guidelines, they are not forced to, and if schools believe their own different "interpretation of the law is correct they can wait for initiation of an enforcement action and then make their argument in context of the enforcement action and they lose nothing." *See* Derek Hawkins, *The Short, Troubled Life of Obama's Transgender Student Protections*, WASH. POST (Feb. 23,

dance had only the force of its own persuasiveness. Not everyone was convinced.

The Obama-era guidance prompted political and legal backlash. In two separate federal lawsuits—one filed in Nebraska and the other in Texas—a total of twenty states challenged the validity of the 2016 Dear Colleague Letter.[35] In response to the Texas suit, Judge Reed O'Connor of the Northern District of Texas in August 2016 granted a preliminary injunction enjoining its enforcement to the extent that it required transgender access to locker rooms, showers, and restrooms consistent with gender identity rather than biology.[36]

Upon taking office, President Trump immediately reversed course and rescinded the Obama guidance.[37] In a Dear Colleague letter on February 22, 2017, the Trump Administration criticized the Letter to Emily Prince and the 2016 Dear Colleague Letter for their lack of legal analysis. It was withdrawing the documents, the Trump Administration said, "in or-

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2017, 6:14 AM), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/23/the-short-troubled-life-of-obamas-transgender-student-protections/ [https://perma.cc/9T4Y-EBZ9].

35. *See* First Amended Complaint for Declaratory and Injunctive Relief, Nebraska v. United States, No. 4:16-cv-03117-JMG-CRZ (D. Neb. July 8, 2016) (plaintiffs include: Arkansas, Kansas, Montana, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, and Wyoming); Complaint for Declaratory and Injunctive Relief, Texas v. United States, 201 F. Supp. 3d 810 (N.D. Tex. Aug. 21, 2016) (No. 7:16-cv-00054-O) (plaintiffs include: Alabama, Georgia, Kentucky, Louisiana, Mississippi, Oklahoma, Texas, Tennessee, Utah, West Virginia, and Wisconsin).

36. *Texas v. United States*, 201 F. Supp. 3d at 832–33. In addition, bills were introduced in several states prohibiting transgender individuals from using restrooms that did not align with their biological sex. *See* Suzanne E. Eckes & Colleen E. Chesnut, *Transgender Students and Access to Facilities*, 321 WEST'S EDUC. L. REP. 1, 8–9 (2015). A bill in Florida sought to make it a crime for transgender people to use a bathroom that did not align with their biological sex. *Id.* at 8–9. Bills were proposed in Texas and Kentucky to create private rights of action for individuals who felt harmed by seeing a transgender individual use the bathroom or restroom associated with their gender identity rather than biological sex. *Id.* at 8.

37. *See, e.g.*, Andrew Kreighbaum, *Transgender Protections Withdrawn*, INSIDE HIGHER ED. (Feb. 23, 2017), https://www.insidehighered.com/news/2017/02/23/trump-administration-reverses-title-ix-guidance-transgender-protections [https://perma.cc/HDD8-J6VC]; Louise Radnofsky & Rebecca Balhaus, *Trump Administration Rescinds Obama Rules on Transgender Bathroom Use*, WALL ST. J. (Feb. 22, 2017, 10:43 PM), https://www.wsj.com/articles/trump-administration-set-to-rescind-obama-rules-on-transgender-bathroom-use-1487790631 [permalink not available]; Jeremy W. Peters, Jo Becker & Julie Hirschfeld Davis, *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html [permalink not available]. The Trump Administration also rolled back Obama-era protections for transgender people in health care, the military, and other areas of civil rights. *See The Real List of Trump's "Unprecedented Steps" for the LGBTQ Community*, HUM. RTS. CAMPAIGN (June 11, 2020), https://www.hrc.org/news/the-list-of-trumps-unprecedented-steps-for-the-lgbtq-community [https://perma.cc/NK7D-2VXA].

der to further and more completely consider the legal issues involved."[38] The letter went on to emphasize that in this context "there must be due regard for the primary role of the States and local school districts in establishing educational policy."[39]

Despite this profession of state deference, the Trump Administration, like the Obama Administration before it, began to enforce its own interpretation of Title IX. Selina Soule, a high school track and field athlete, along with three other high school track and field athletes, challenged a Connecticut Interscholastic Athletic Conference (CIAC) policy that required member schools to permit transgender girls to participate on female sports teams.[40] In a Letter of Enforcement Action, the OCR opined that assigning transgender students to the team associated with their gender identity rather than their biology was not required by Title IX but was instead in violation of Title IX.[41] Such assignments, the OCR explained, violated Title IX by "denying opportunities and benefits to female student-athletes that were available to male student-athletes, including the opportunity to compete on and against teams comprised of members of one sex."[42] The letter concluded by threatening to withdraw financial assis-

38. Letter from Sandra Battle, Acting Assistant Sec'y for C.R. & T.E. Wheeler, II, Acting Assistant Att'y Gen. for C.R. to Dear Colleague, 2 (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf [https://perma.cc/69D6-4RK3].

39. *Id.*

40. Revised Letter from Kimberly M. Richey, Acting Assistant Sec'y for C.R., U.S. Dep't of Educ., Off. for C.R., to Conn. Interscholastic Athletic Conf., et al. (Aug. 31, 2020), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01194025-a2.pdf [https://perma.cc/6E7N-9QYH] [hereinafter *Letter of Impending Enforcement*]. The CIAC Revised Transgender Participation Policy at issue in this challenge provided:

> [T]his policy addresses eligibility determinations for students who have a gender identity that is different from the gender listed on their official birth certificates . . . . Therefore, for purposes of sports participation, the CIAC shall defer to the determination of the student and his or her local school regarding gender identification. In this regard, the school district shall determine a student's eligibility to participate in a CIAC gender specific sports team based on the gender identification of that student in current school records and daily life activities in the school and community at the time that sports eligibility is determined for a particular season.

Letter of Impending Enforcement, supra (quoting CONN. INTERSCHOLASTIC ATHLETIC CONF., REVISED TRANSGENDER PARTICIPATION POLICY (May 9, 2013)).

The CIAC policy did not require "student-athletes to undergo medical treatment or sex reassignment surgery in order to participate in athletics consistent with their gender identity." *Id.* at n.16. This was a change from the CIAC's prior policy which had "allowed transgender student-athlete participation only in accordance with the gender stated on the student's birth certificate unless the student had undergone 'sex reassignment.'" *Id.* at 8.

41. *Id.* at 4.

42. *Id.* at 37. The OCR continued that "CIAC also treated male student-athletes whose gender identity does not align with their sex more favorably than other male student-athletes, by affording them the opportunity to compete on and against teams comprised of members of the opposite sex." *Id.* at 37. "The athletic events in which the female student-athletes competed were coeducational; female

tance to the CIAC and its member school districts if the policy of assigning transgender girls to cisgender girls' sports teams continued.[43] The plaintiffs, who had also filed suit against the CIAC in federal district court,[44] had their complaint dismissed in April 2021 for lack of justiciability.[45]

In a second enforcement action, the Trump Department of Education investigated a complaint filed by Concerned Women for America charging that Franklin Pierce University's policy allowing transgender women to compete on women's sports teams after one year of hormone suppression treatment violated Title IX.[46] The Department of Education took the position that "[w]here separating students based on sex is permissible—for example, with respect to sex-specific sports teams—such separa-

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student-athletes were denied the opportunity to compete in events that were exclusively female, whereas male student-athletes were able to compete in events that were exclusively male." *Id.* at 4. The OCR issued its Letter of Impending Enforcement in the case first on May 15, 2020, and then issued a Revised Letter of Impending Enforcement Action on August 31, 2020, after the Supreme Court issued its holding in *Bostock v. Clayton County, Georgia*. *Id.* at 2 (citing 140 S. Ct. 1731 (2020)). The OCR issued the Revised Letter of Impending Enforcement Action only to emphasize that the Court in *Bostock* limited its holding to Title VII and expressly stated that it was not saying anything about the application of its holding to other statutes or to questions involving sex segregated contexts which were not before it in the immediate case. *Id.* at 33.

In its Letter of Impending Enforcement, the OCR reviewed the participation and event results of two biologically male students who participated in female track events during the 2017–2018 and 2018–2019 school years. *Id.* at 4. The OCR concluded that because of these two students' participation, and often high placed finishes in races, female students were denied the chance to compete in events, win events and receive positive publicity and attention for their victories. *Id.* at 37.

43. The Letter of Impending Enforcement stated that because of the CIAC and school districts' violation of Title IX, "OCR will either initiate administrative proceedings to suspend, terminate, or refuse to grant or continue and defer financial assistance to the CIAC [and school districts] or refer the cases to the U.S. Department of Justice for judicial proceedings to enforce any rights of the United States under its laws." *Id.* at 48–49.

44. *See* Second Amended Verified Complaint for Declaratory and Injunctive Relief and Damages, Soule v. Connecticut Ass'n of Schs., No. 3:20-CV-00201 (RNC), 2021 WL 1617206 (D. Conn. Apr. 25, 2021).

45. *Soule*, 2021 WL 1617206, at *13 (noting that two of the plaintiffs had graduated from high school and there was "no indication" that the remaining plaintiffs would "encounter competition by a transgender student in a CIAC-sponsored event next season").

46. *See* Daniela Allee, *Franklin Pierce University Rescinds Policy for Transgender Athletes, Following Federal Complaint*, N.H. PUB. RADIO (Oct. 21, 2020, 2:11 PM), https://www.nhpr.org/nh-news/2020-10-21/franklin-pierce-university-rescinds-policy-for-transgender-athletes-following-federal-complaint [https://perma.cc/4US2-849H]. Franklin Pierce's policy was consistent with the NCAA's Policy on Transgender Student-Athlete Participation, promulgated in 2011. *See* Letter from Timothy Mattson, Compliance Team Leader, U.S. Dep't of Educ. Off. for C.R., to Kim Mooney, Pres., Franklin Pierce Univ. (Oct. 16, 2020), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01202023-a.pdf [https://perma.cc/HW3V-3R6J] [hereinafter *Letter to Kim Mooney*].

tion must be based on biological sex."[47] In order to settle the case, Franklin Pierce agreed to a Resolution Agreement by which it withdrew its transgender participation and inclusion policy.[48]

In *Bostock v. Clayton County*,[49] the Supreme Court issued a landmark decision on behalf of transgender rights holding that Title VII of the Civil Rights Act of 1964's (Title VII) prohibition on discrimination based on sex encompassed discrimination based on transgender status.[50] Transgender individuals, the Supreme Court made clear, needed to be treated the same as all other workers—regardless of sex. *Bostock* said nothing, however, about how transgender individuals must be treated in instances in which sex segregation is permissible. Indeed, the Court was quite explicit in ducking this issue. Justice Gorsuch, writing for the majority, explained:

> The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.[51]

In the absence of clear guidance by courts, state legislatures and athletic governing bodies have stepped into the void with a range of conflicting policies and rules. On March 30, 2020, Idaho enacted the Fairness in Women's Sports Act, the first state law to expressly designate athletic teams for females and males based on biological sex.[52] The Idaho law is currently being challenged in *Hecox v. Little*[53] by transgender and cisgender female athletes who argue that the law violates both Title IX and

47. *See Letter to Kim Mooney*, *supra* note 46, at 4, 7 (the letter goes on to say that "OCR has concerns that the Policy denies female student-athletes equal athletic benefits and opportunities by permitting transgender athletes to participate in women's intercollegiate athletic teams").

48. *See generally* Resolution Agreement, Case No. 01-20-2023, Franklin Pierce Univ. (Sept. 18, 2020); *see also* Shawne K. Wickham, *NH College Rescinds Transgender Sports Policy After Federal Case*, N.H. UNION LEADER (updated Oct. 19, 2020), https://www.unionleader.com/news/social_issues/nh-college-rescinds-transgender-sports-policy-after-federal-case/article_687943f7-66c8-5682-a0cd-a30f74d7ced8.html [https://perma.cc/GH9R-ZG5V]. Concerned Women for America filed a complaint with the U.S. Department of Education after a transgender female athlete at Franklin Pierce University won a national women's title at the 2019 Division II NCAA Track and Field Championships. *Id.*

49. 140 S. Ct. 1731 (2020).

50. *Id.* at 1743 ("For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex.").

51. *Id.* at 1753.

52. *See* Fairness in Women's Sports Act, IDAHO CODE § 33-6201 (2020).

53. 479 F. Supp. 3d 930 (D. Idaho 2020).

the Equal Protection Clause of the Fourteenth Amendment. In August 2020, the district court in Idaho granted the plaintiffs' motion for preliminary injunction finding that the plaintiffs were likely to succeed on the merits of their equal protection claims.[54] The district court's order was appealed to the Ninth Circuit, and the Trump Department of Justice, in November 2020, filed an amicus brief in support of the Idaho law.[55] The Idaho law has been followed in 2021 by laws passed in South Dakota[56] and Mississippi[57] that also require athletic teams be designated for males or females based on biological sex.[58] The NCAA has adopted an approach that is more inclusive than Idaho but less inclusive than the CIAC. The NCAA requires transgender women to complete one year of testosterone suppression treatment before playing on women's teams.[59]

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54. The court found that cisgender women were harmed because under the act they could be required to prove their sex. *Id.* at 978. While the plaintiffs challenged the act as both a violation of Title IX and the Equal Protection Clause, the district court, in ruling on the plaintiffs' motion for preliminary injunction, addressed only the equal protection claim. *Id.* at 944. It did not specifically address the Title IX challenge. *Id.* Moreover, the court found a likelihood of success on the merits by focusing on the specific wording of the Idaho Act which seemed to broadly exclude transgender girls from participating on female sports teams "entirely, regardless of their physiological characteristics." *Id.* at 985. In considering the appeal, the Ninth Circuit remanded the case down to the trial court to determine whether the legal question is moot in light of the plaintiffs' changed student status.

55. *See* Press Release, U.S. Dep't of Just., The Department of Justice Files Brief Defending the Constitutionality of Idaho's Fairness in Women's Sports Act (Nov. 19, 2020), https://www.justice.gov/opa/pr/department-justice-files-brief-defending-constitutionality-idahos-fairness-womens-sports-act [https://perma.cc/YPF8-KCDL].

56. *See* Greta Anderson, *Athletes Call on NCAA to Respond to Anti-Trans Bills*, INSIDE HIGHER ED. (Mar. 12, 2021), https://www.insidehighered.com/quicktakes/2021/03/12/athletes-call-ncaa-respond-anti-trans-bills [https://perma.cc/ZWH8-FPHC]; Mark Moore, *South Dakota Passes Bill Banning Transgender Athletes in Women's and Girls' Sport*, N.Y. POST (Mar. 9, 2021, 2:24 PM), https://nypost.com/2021/03/09/south-dakota-gov-kristi-noem-will-sign-transgender-athletes-bill/ [https://perma.cc/SX38-46RL]; *see also* H.R. 1217, 96th Leg., 87th Sess. (S.D. 2020).

57. *See* Mississippi Fairness Act, S. 2536, 2021 Leg., Reg. Sess. (Miss. 2021).

58. Many other states are considering similar legislation. *See* Lindsay Crouse, *So You Want to 'Save Women's Sports'?*, N.Y. TIMES (Mar. 24, 2021), https://www.nytimes.com/2021/03/24/opinion/trans-athletes-womens-sports.html?referringSource=ArticleShare [https://perma.cc/F5GG-4D59] (noting that "[m]ore than 20 states are considering bills to ban transgender kids from girls' sports").

59. *See College Policies*, TRANSATHLETE.COM, https://www.transathlete.com/policies-college [https://perma.cc/XV8F-F4U5] (last visited Sept. 5, 2022). The NCAA has been criticized by advocates on both sides of the issue. In July 2020, just over 300 current and former NCAA and professional female athletes wrote to the NCAA Board of Governors urging it to reject calls to boycott Idaho over the Fairness in Women Sports Act and arguing that "true athletic parity for women demands that women's sports be protected for biological females." *See* Dawn Ennis, *Read the Names of the 300+ Women Athletes Who Signed a Letter from an Anti-Trans Group to the NCAA*, OUTSPORTS (Aug. 2, 2020, 7:02 PM), https://www.outsports.com/2020/8/2/21351786/ncaa-300-women-athletes-signatories-letter-save-womens-

Ultimately, courts will need to decide if under Title IX transgender girls may or must be permitted to compete with cisgender girls in sports. The next two Parts of this Article articulate, explain, and assess the arguments currently being made for inclusion. Perhaps not surprisingly, the arguments focus not on statutory language or legislative intent but on what matters most for human flourishing and social justice.

II. SUBJECTIVE HARM

Pain is central to arguments against misgendering in sports. Arguments against misgendering emphasize the intense subjective discomfort experienced by transgender students who are not treated in accordance with their gender identity. Such pain is used both to establish an injury and to justify a legal right to protection.[60] In this Part, this Article explains the central role that subjective pain plays in arguments against misgendering, and it highlights the empirical and normative issues that make subjective pain a weak basis for legal protection.

A. *Absolute Pain*

Advocates emphasize the sheer intensity of the pain experienced by transgender students who are misgendered. The law, they contend, must protect transgender youth from such pain. The pain advocates describe is psychological. It comes not only from the inability to express one's authentic identity, but from the stigma, humiliation, and feeling of degradation that misgendering imposes. Being treated as not a "normal" or "real" girl or boy results in psychic injury. As Harper Jean Tobin and Jennifer Levi explain:

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sports-transgender-inclusion [https://perma.cc/3FKW-UW2F]. In March 2021, 550 college athletes wrote to the NCAA urging it to publicly oppose state efforts to prevent transgender women from competing with cisgender women in school sports and asking it to commit to "only operate championships and events in states that promote an inclusive atmosphere." *See* Hoffman, *supra* note 3; *see also* Anderson, *supra* note 56.

60. Subjective pain is also used to define who is transgender as status flows directly from one's internal sense that the gender they were assigned at birth is wrong and painful. *See, e.g.,* Erin E. Buzuvis, *Including Transgender Athletes in Sex-Segregated Sport*, *in* SEXUAL ORIENTATION AND GENDER IDENTITY IN SPORT: ESSAYS FROM ACTIVISTS, COACHES, AND SCHOLARS 23, 30 (George B. Cunningham ed., 2021) ("Since gender identity is the internal sense of being male or female or something else, it makes sense to recognize that the best evidence of [a transgender girl's] gender identity is what she says it is."); Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students,* 28 WIS. J OF L. GENDER & SOC'Y 301, 328 (2013) (arguing that "[n]o particular type of information (such as medical history information) should be specifically required" to prove one's transgender status to a school); *2016 Dear Colleague Letter, supra* note 7, at 2 (providing that transgender status is a matter of self-attestation and "[u]nder Title IX, there is no medical diagnosis or treatment requirement that students must meet").

> Denying equal access to school facilities for transgender students effectively singles them out, apart from all others in the community, with a stigmatizing message that a transgender boy is not a normal or real boy, or a transgender girl is not a normal or real girl. . . . This is precisely the kind of "badge of inferiority" that antidiscrimination laws, such as Title IX, forbid.[61]

The *Hecox* plaintiffs likewise emphasized that forcing a transgender woman to participate on a men's sport team "would also be painful and humiliating, and potentially subject her to harassment and further discrimination."[62]

The pain advocates describe is physical. Tobin and Levi, for example, explain that "[f]or transgender youth for whom social role transition is recommended, 'life in their assigned gender is very distressing and the relief they get from switching their gender presentation [is] very palpable.'"[63] Scott Skinner-Thompson and Ilona Turner agree. They urge that allowing transgender students to participate in accordance with their gender identity "best advances the well-being of already vulnerable transgender youth by helping to incorporate and include such students in activities that are critical to physical, social, mental, emotional development, and health."[64] For the plaintiffs in *Hecox*, physical pain was central to their challenge to Idaho's law barring transgender women from women's sports teams. "[F]orcing a girl who is transgender out of spaces designated for girls is extremely harmful and can result in serious health consequences"[65] they asserted, before elaborating that "[e]xcluding girls who are transgender and intersex from athletics alongside their peers increases shame and stigma and contributes to negative physical and emotional health outcomes for those who are excluded."[66]

At times, the pain described seems almost spiritual. Erin Buzuvis, for example, describes a fictional high school student, Jaime, who is a transgender girl. In arguing that Jaime should have the right to join a girls' sports team, Buzuvis centers on Jaime's feelings of identity and authentic-

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61. Tobin & Levi, *supra* note 60, at 309.

62. Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, Hecox v. Little, 479 F. Supp. 3d 930 (D. Idaho 2020) (No. 1:20-cv-00184-DCN). *See also* Erin E. Buzuvis, *"As Who They Really Are": Expanding Opportunities for Transgender Athletes to Participate in Youth and Scholastic Sports*, 34 LAW & INEQ. 341, 353–54 (2016) ("[P]olicies that permit gender-consonant participation are 'critically important' to transgender individuals for a host of reasons, including promoting emotional, psychological, physical, and academic benefits." (footnote omitted)).

63. *See* Tobin & Levi, *supra* note 60, at 302 (quoting Edgardo Menvielle, *A Comprehensive Program for Children with Gender Variant Behaviors and Gender Identity Disorders*, 59 J. HOMOSEXUALITY 357, 361 (2012)).

64. Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J. L. GENDER & SOC'Y 271, 272 (2013).

65. Complaint for Declaratory and Injunctive Relief at 35, *Hecox*, 479 F. Supp. 3d 930 (No. 1:20-cv-00184-DCN).

66. *Id.* at 43.

ity. "[I]t just feels wrong to Jaime," Buzuvis explains, "to consider joining the boys' team, when in her heart she does not feel like a boy."[67]

Yet, as a practical matter, subjective pain alone rarely constitutes a legal injury or justifies a legal right. Instead, legal injuries, from which people are entitled to protection and redress, are almost always defined objectively rather than subjectively. It is not enough that a plaintiff suffered injury. Liability typically requires that the defendant's conduct violated some objective standard of care.

Consider, for example, sexual harassment law. It is not enough that the plaintiff experienced severe emotional distress or even that she was unable to perform her work as a result of the challenged conduct. Liability requires that a reasonable person would find the conduct to be severe or pervasive enough to alter the workplace.[68] In the First Amendment context, too, it is not enough that the speaker felt silenced by a particular speech restriction. In deciding whether a speech restriction has gone too far, a court must decide whether as an objective matter the speaker has not been left with adequate alternative avenues of speech.[69] The speaker's claim that restrictions left inadequate alternatives for communication is not enough.[70] Similarly, in the Fourth Amendment context, it is not enough that one feels her privacy has been invaded. The right to protection is only triggered if one's feelings of intrusion are considered objectively reasonable.[71]

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67. Buzuvis, *supra* note 60, at 24.

68. *See* Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993) ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview.").

69. See MARK G. KELMAN, WHAT IS IN A NAME? TAXATION AND REGULATION ACROSS CONSTITUTIONAL DOMAINS 58 (2019) (explaining that "[w]hen the state defends such a speech restriction, it must convince the court that it is objectively the case that the speaker has been left adequate 'alternative channels of communication'").

70. *See, e.g.*, City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 54 (1986) (explaining that: "In our view, the First Amendment requires only that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city"); McCullan v. Coakley, 134 S. Ct. 2518, 2535 (2014) (finding that the buffer zones at issue in the case "impose serious burdens on petitioners' speech . . . . [T]he zones carve out a significant portion of the adjacent public sidewalks, pushing petitioners well back from the clinics' entrances and driveways").

71. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 33 (2001) (explaining that "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable"); Smith v. Maryland, 442 U.S. 735, 740 (1979) (explaining that application of the Fourth Amendment depends on two questions: "The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy[ ]'. . . . The second question is whether . . . the individual's expectation, viewed objectively, is 'justifiable'" (first quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Douglas, J., concurring), then quoting *Katz*, 389 U.S. at 353)). In Part III, *infra*, the Article discusses why religion is treated differently.

There are sound reasons—both empirical and normative—for the law's focus on objective rather than purely subjective measures of deprivation. As an empirical matter, individual reports of subjective pain are unstable over time and context. Which moment or context is the most accurate to measure? When is one's pain report most authentic and true? As a normative matter, if one cares about subjective pain as an indicator of social oppression, what if objective oppression and subjective pain are highly imperfect correlates? What if, in fact, reports of subjective pain are inversely correlated to objective oppression?

Measuring subjective pain is difficult not only because it is hard to know exactly what one is measuring and hard to compare measurements across individuals,[72] but also because even measurements for a single person change over time and are susceptible to small environmental changes. Indeed, when individuals are asked to assess their overall well-being multiple times over the course of a couple of weeks or even over the course of a single hour, studies find only moderate levels of reliability,[73] and susceptibility to small environmental changes—such as finding a dime or the current weather.[74]

Unsurprisingly, then, individuals are easily primed, making reports of subjective well-being susceptible to whatever emotions were triggered in them first.[75] For example, when students were asked about their happiness with their dating lives before being asked about their overall happiness, their answer to the former question impacted their answer to the latter.[76] Positive (or negative) feelings on the specific question primed the students to feel similarly in response to the general question.

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72. *See, e.g.*, Adam J. Kolber, *Pain Detection and the Privacy of Subjective Experience*, 33 AM. J.L. & MED. 433, 446–47 (2017) (describing the challenges of measuring pain and comparing measurements across individuals); Amartya Sen, *Interpersonal Comparisons of Welfare*, *in* CHOICE, WELFARE AND MEASUREMENT (1982). *See also* Robin L. West, *Taking Preferences Seriously*, 64 TUL. L. REV. 659, 680–87 (1990) (arguing that empathy and "sympathetic understanding" makes it possible for individuals to both understand others' pain and compare pain across individuals, but recognizing that "[i]t is not impossible to sympathize with those least like ourselves, but it is harder").

73. *See* Alan B. Krueger & David A. Schkade, *The Reliability of Subjective Well-Being Measures*, 92 J. PUB. ECON. 1833, 1835 (2008) (finding "serial correlation of about .60" when study participants were asked to assess their subjective well-being on occasions two weeks apart); Richard Kammann & Ross Flett, *Affectometer 2: A Scale to Measure Current Level of General Happiness*, AUSTRALIAN J. PSYCH. 35, 259–65 (1983) (finding reliability of 0.50–0.55 when individuals were asked about their well-being twice within the same day).

74. *See* Krueger & Schkade, *supra* note 73, at 1836; *see also* Michael Eid & Ed Diener, *Global Judgments of Subjective Well-Being: Situational Variability and Long-Term Stability*, 65 SOC. INDICATORS RSCH. 245 (2004).

75. The phenomenon behind priming is that "information activated in one context will become more accessible and therefore more likely to be used in subsequent judgment to which it is relevant." *See* Fritz Strack, Leonard L. Martin & Norbert Schwarz, *Priming and Communication: Social Determinants of Information Use in Judgments of Life Satisfaction*, 18 EUROPEAN J. SOC. PSYCH. 429, 435 (1988).

76. *Id.* at 434–35.

Christopher Uggen and Chika Shinohara suggest that priming may also work from the general to the more specific. In other words, priming individuals to a particular type of rights violation or abuse in the world generally may make individuals more likely to see and feel such violations in their own lives. They found that female workers in both America and Japan who entered the workforce during periods of legal change and heightened salience regarding sexual harassment reported higher lifetime rates of sexual harassment than did workers who entered the workforce either prior to or after the period of legal change.[77]

A similar kind of priming may be occurring on college campuses. As colleges focus more openly, explicitly, and persistently on anti-Blackness and white supremacy—through, for example, trainings on unconscious bias, microaggressions, and antiracism—students may become primed to experience particular events or interactions as more racialized, more harmful, and more painful than they otherwise would. Consider two cases that received considerable attention during the 2020–2021 school year. In September 2020, a University of Southern California (USC) business school professor Greg Patton was teaching a class on "filler words" in his course on communication for management when he referred to a filler word used in China that sounds somewhat similar to a racial epithet in English.[78] The experience caused extreme pain to some students. A group of students identifying themselves as "Black M.B.A. Candidates c/o 2022" wrote a letter to the school's dean explaining that they were "offended" and "appalled" and that their "mental health ha[d] been affected" by the incident.[79] Professor Patton had used the same example in his class for years, with no prior complaint.[80]

In December 2020, Professor Jason Kilborn of the University of Illinois Chicago School of Law gave an examination in his Civil Procedure II class that contained a hypothetical involving racial harassment in which he included an epithet for African–Americans in redacted form, using only the first letter of the word followed by several spaces.[81] Seeing the word, even in redacted form, caused some students extreme pain. According to

77. Christopher Uggen & Chika Shinohara, *Sexual Harassment Comes of Age: A Comparative Analysis of the United States and Japan*, 50 SOCIO. Q. 201, 220–23 (2009).

78. *See* Colleen Flaherty, *Failure to Communicate: Professor Suspended for Saying a Chinese Word that Sounds like a Racial Slur in English*, INSIDE HIGHER ED. (Sept. 8, 2020), https://www.insidehighered.com/news/2020/09/08/professor-suspended-saying-chinese-word-sounds-english-slur [https://perma.cc/KZ5Z-DFV3].

79. *See* Tom Bartlett, *How One Word Led to an Uproar*, CHRON. HIGHER ED. (Sept. 14, 2020), https://www.chronicle.com/article/how-one-word-led-to-an-uproar?cid2=gen_login_refresh&cid=Gen_sign_in [https://perma.cc/TF3Z-64CR] (citing Email from Black M.B.A. Candidates c/o 2022 to Geoffrey Garret, Dean, Univ. of S. Cal. Marshall Sch. of Bus. (Aug. 21, 2020, 7:00 AM), https://www.documentcloud.org/documents/7208263-2020-Student-Letter-to-Dean-Friday-August-21 [https://perma.cc/KU5Z-QUYU]).

80. *Id.*

81. *See* Kathryn Rubino, *Law School N-Word Controversy is More Complicated Than It Appears at First Glance*, ABOVE THE L. (Jan. 13, 2021, 4:53 PM), https://abovethe-

a letter sent from the Black Law Students Association, one student experienced "heart palpitations" upon reading the word, another was so "flustered" by seeing the word on the exam that she "had to take several moments to gather [herself] prior to proceeding with the exam" and then "had to seek counsel immediately after the exam to calm myself."[82] Professor Kilborn had used the same question for years without prior complaint.[83] What was different in fall 2020—following the summer in which George Floyd was brutally killed by police and Black Lives Matter protests swept the country—was the salience of racism and racial oppression in the minds of the students in both Patton's and Kilborn's classes.[84]

Framing also affects individual reports of subjective well-being. Who one compares oneself to helps determine whether one feels good or bad about one's current state. Theories of "relative deprivation" were used as early as the 1960s to explain why socially disadvantaged groups sometimes express higher levels of satisfaction than would be expected given their objective disadvantage.[85] The basic insight behind relative deprivation theory is that feelings of satisfaction or dissatisfaction "depend upon comparative context."[86] Members of disadvantaged groups feel less disadvantage when they compare themselves primarily to those within their group as opposed to those of more privileged groups.[87] As a result, women in highly sex-segregated jobs have been found to have pay and job satisfac-

law.com/2021/01/law-school-n-word-controversy-is-more-complicated-than-it-appears-at-first-glance/?rf=1 [https://perma.cc/DA2X-KJPG].

82. UIC JMLS Black Law Student Association (@uic_jmls_blsa), TWITTER (Dec. 30, 2020, 9:34 AM), https://twitter.com/uic_jmls_blsa/status/1344290657825935360?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1344290657825935360%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fabovethelaw [https://perma.cc/2QL2-TZ3E].

83. Andrew Koppelman, *Is This Law Professor Really a Homicidal Threat? The Punitive Overreactions of University Administrators Grow Ever More Demented*, CHRON. OF HIGHER ED. (Jan. 19, 2021), https://www.chronicle.com/article/is-this-law-professor-really-a-homicidal-threat [https://perma.cc/KVV9-ZKS3].

84. Indeed, in their letter to the Dean, USC's Black M.B.A. Candidates c/o 2022 referenced both "the murders of George Floyd and Breonna Taylor and the recent and continued collective protests and social awakening across the nation," as well as the diversity training provided to them by USC. *See* Bartlett, *supra* note 79. For a discussion of the effects of enduring perceptions of victimhood, see Rahav Gabay, Boaz Hameiri, Tammy Rubel-Lifschitz & Arie Nadler, *The Tendency for Interpersonal Victimhood: The Personality Construct and its Consequences*, 165 PERSONALITY & INDIVIDUAL DIFFERENCES 1 (2020); Scott Barry Kaufman, *Unraveling the Mindset of Victimhood: Focusing on Grievances Can be Debilitating; Social Science Points to a Better Way*, SCI. AM. (June 29, 2020), https://www.scientificamerican.com/article/unraveling-the-mindset-of-victimhood/ [https://perma.cc/47KM-6BSV].

85. *See, e.g.*, Ronald P. Abeles, *Relative Deprivation, Rising Expectations, and Black Militancy*, 32 J. SOC. ISSUES 119 (1976); ANGUS CAMPBELL, PHILIP E. CONVERSE & WILLARD L. RODGERS, THE QUALITY OF AMERICAN LIFE (1976); FAYE J. CROSBY, RELATIVE DEPRIVATION AND WORKING WOMEN (1982).

86. *See* Karyn A. Loscocco & Glenna Spitze, *The Organizational Context of Women's and Men's Pay Satisfaction*, 72 SOC. SCI. Q. 3, 5 (1991).

87. *Id.* at 5–6.

tion similar to or higher than those of male workers despite lower levels of pay and authority.[88] Women in sex-segregated fields feel happier simply because they are comparing themselves with other women who are also underpaid and under-placed.[89]

Subjective well-being reports are not simply unstable and unpredictable, they are sometimes irrational. In a series of experiments, Daniel Kahneman and colleagues found that individuals under certain circumstances actually preferred more pain over a longer duration than less pain over a shorter duration. In one study, subjects were exposed to two painful experiences—first their hand was immersed in painfully cold water for sixty seconds, and second their hand was immersed in the same painfully cold water for sixty seconds followed by immersion for another thirty seconds in water that was gradually warmed to a still cold but less painful temperature. Subjects actually preferred the longer trial, even though it involved more overall pain, than the shorter trial.[90] They experienced the more painful experiences as less painful. Kahneman and his colleagues found similar results in a clinical setting when they studied patients' memories of a painful medical procedure. They found that individuals who went through a colonoscopy procedure during which there was a short and nonpainful interval added to the end of the procedure reported the entire experience as less painful than did those who underwent the procedure without the added interval.[91] Individuals, Kahneman and his colleagues hypothesized, focused predominantly on the worst and the final moments of a particular episode—making reports not only inaccurate, but also irrational at times.

These empirical problems suggest a normative one. To the extent that subjective pain is being used as a proxy for objective oppression, it may not be a very good one. Indeed, subjective pain may at times be inversely correlated with objective oppression.

Amartya Sen has made this point quite vividly. In his book *Commodities and Capabilities*, he looks at the results of a 1944 survey conducted by the All-Indian Institute of Hygiene and Public Health in Singur, India.[92] The survey asked individuals about their health and found that while 48.5% of the (male) widowers stated they were either "ill" or in "indiffer-

88. *Id.* at 3–5, 12. *See* Linda A. Jackson, *Relative Deprivation and the Gender Wage Gap*, 45 J. SOC. ISSUES 117, 119–20 (1989) (describing research showing women to be as satisfied with their jobs and pay as men, despite earning less than men).

89. *See* Jackson, *supra* note 88; Loscocco & Spikes, *supra* note 86 (finding women are satisfied with lower wages when they do the same work as men and do not compare their pay with male coworkers, but are less satisfied when they do compare their pay with higher paid men).

90. *See* Daniel Kahneman, Barbara Fredrickson, Charles A. Schreiber & Donald A. Redelmeier, *When More Pain is Preferred to Less: Adding a Better End*, 4 PSYCH. SCI. 401, 403 (1993).

91. *See* Donald A. Redelmeir, Joel Katz & Daniel Kahneman, *Memories of Colonoscopy: A Randomized Trial*, 104 PAIN 187, 192 (2003).

92. AMARTYA SEN, COMMODITIES AND CAPABILITIES app. B at 82 (1985).

ent" health, only 2.5% of (female) widows so reported.[93] Moreover, when individuals were asked if they were simply in "indifferent" health, 45.6% of the widowers answered affirmatively while 0% of the widows did so.[94] As Sen notes, these findings are striking because females in India have worse objective levels of health when one looks at nutrition levels and access to medical care.[95] Sen argues that the self-reports may be off as true measures of well-being because the self-reports may be affected by the social status of the individual.[96] Men, as the heads of households, may magnify their needs and ailments, while women, because of their lower social status, may underplay or diminish their own.[97] Social status may affect expectations and one's expectations may then affect one's report of well-being. This indicates that self-reports may not reflect measurements of the kind of well-being we really care about, which, for Sen, is better reflected by individual capabilities.[98]

Similarly, women in the United States may have been happier when the job market was more segregated. They may have felt less bothered by sexual harassment before they were aware of a legal cause of action to prevent it—but women were not necessarily better off. Black students may have experienced less pain in the classroom before microaggression and anti-racism training became commonplace—but they may not have been better off.

These challenges with measuring and interpreting subjective pain reports make pain a weak and unstable basis for individual rights. But there is another problem as well. If pain matters for the creation of legal rights, then whose pain counts? Excluding transgender girls from female sports teams causes pain, yet their inclusion causes pain as well. If pain matters for legal rights, then how should such tradeoffs be made?

B. *Comparative Pain*

Legal rights are, as Wesley Newcomb Hohfeld explained over a century ago, relational—they impact both the right holder and those whose behavior is limited or constrained as a result.[99] Hohfeld explained that the term "right" is used in different ways but that it is always relational—giving to one person and taking away from another. To use Hohfeld's terminology, a person with a "right" against another person—such as is created by a binding contract—imposes a duty upon that person to act in a particular way. A person with a "privilege"—such as is created by a law

93. *Id.* at 82.
94. *Id.* at 82–83.
95. *Id.* at 82–104.
96. *Id.* at 81–82.
97. *Id.* at 82.
98. Amartya Sen, *Capability and Well-Being*, *in* THE QUALITY OF LIFE 31 (Martha Nussbaum & Amartya Sen eds., 1993); SEN, *supra* note 92, at 83.
99. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

protecting certain behavior—may act in a certain way without liability to others who have "no-right" to prevent the conduct.[100] In the context of school sports, if Title IX prohibits misgendering of transgender athletes, then transgender girls will have a "privilege" to play on cisgender girls' teams and cisgender girls will have no "right" to stop them. The relational nature of rights provides a theory for the stark reality that protecting one party or group ends up harming or restricting another.[101] Such is certainly the case in sports.

Transgender girls' inclusion may eliminate their pain, but it does so at the cost of imposing pain on those cisgender girls who oppose inclusion. Consider, for example, the pain expressed by the cisgender plaintiffs in the Selina Soule case. The plaintiffs, who were challenging the CIAC policy allowing transgender girls to play on cisgender girls' high school sports teams, describe feeling hopeless, dispirited, and depressed as a result of having to compete against students who are biologically male.[102] They experienced pain stemming from lost opportunities to play and lost opportunities to win.[103] According to the plaintiffs: "when an athlete who is genetically and physiologically male is competing in the girls' division, [p]laintiffs and other girls are forced to step to the starting line thinking, 'I can't win.' 'I'm just a girl.'"[104] They explain that for the plaintiffs "and many other female athletes, 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."[105] The plaintiffs describe feeling both physically sick and depressed as a result of having to complete against transgender girls.[106]

For pain to have power in determining rights, one must decide whose pain matters and what pain counts. As Mark Kelman notes in his book, *What Is in a Name?*, there are, in effect, two options: One can argue that one side's pain is worse, in the sense of being more intense, or, one can

100. *Id.* at 30 (describing four legal relationships in a table of "Jural Correlatives" the relationships are: right-duty, privilege-no right, power-liability, immunity-disability). *See* Curtis Nyquist, *Teaching Wesley Hohfeld's Theory of Legal Relations*, 52 J. LEGAL EDUC. 238, 239–40 (2002) (providing an overview of Hohfeld's theory and use of terms).

101. As Mark Kelman bluntly explains: "Remedying the complaining party's felt injury inevitably worsens the position of some other party or parties." KELMAN, *supra* note 69, at 65.

102. *See* Second Amended Verified Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 45, at 34–35.

103. *Id.* at 34–35.

104. *Id.* at 34.

105. *Id.* at 35. *See also* Kelsey Bolar, *8th Place: A High School Girl's Life After Transgender Students Join Her Sport*, DAILY SIGNAL (May 6, 2019), https://www.dailysignal.com/2019/05/06/8th-place-high-school-girls-speak-out-on-getting-beat-by-biological-boys/ [https://perma.cc/LX4T-633Z] (describing several cisgender girls' feelings that competing against transgender girls in sports is unfair).

106. Second Amended Verified Complaint for Declaratory and Injunctive Relief and Damages, *supra* note 45, at 35.

argue that one side's pain is more valid, in the sense of being more worthy of attention.[107] Those arguing for inclusion have asserted both.

Those arguing for inclusion argue that the pain caused by transgender girls' exclusion is worse than the pain caused by their inclusion. They downplay the pain experienced by cisgender girls by noting that few will be excluded as a result of transgender girls' participation. As Skinner-Thompson and Turner, for example, explain: "There is no evidence or indication that the number of transgender girls desiring to participate on a given sport could be significant enough to deny cisgender girls meaningful athletic opportunities . . . ."[108] Of course, if spots are limited, then inclusion by any transgender girl will exclude participation by a cisgender girl. Inclusion will only maximize social happiness if transgender girls will experience more pain and loss upon being excluded than will cisgender girls. Those arguing for inclusion argue this as well.

Those arguing for inclusion argue that transgender girls lose more from exclusion and suffer more pain as a result than do cisgender girls because transgender girls are more socially marginalized. Buzuvis, for example, argues that what cisgender girls lose as a result of exclusion is not as important as what transgender girls gain from inclusion. Sports participation is associated with a wide range of physical, psychological, and social benefits for participants. While these benefits are important for all individuals, they are particularly salient, Buzuvis contends, for the "especially vulnerable population" of transgender youth.[109] Skinner-Thompson and Turner agree, explaining that "[t]hese social, mental, and physical benefits of interscholastic sports participation are even more necessary for vulnerable groups such as transgender students."[110]

But who really knows? Inter-subject pain comparisons are difficult and fraught.[111] How can we measure the subjective pain experienced by the transgender girl who wants to play on a girls' team and is excluded because of her too-masculine body? Similarly, how can we measure the subjective pain experienced by the cisgender girl who does not make a competitive team or fails to win a competitive event because of the participation of a transgender girl? It is at least possible that cisgender girls will feel more pain as a result of transgender inclusion than transgender girls will feel as a result of exclusion simply because cisgender girls may feel

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107. *See* KELMAN, *supra* note 69, at 67.

108. *See* Skinner-Thompson & Turner, *supra* note 64, at 279.

109. Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 48 (2011) (quoting Arnold Grossman & Anthony R. D'Augelli, *Transgender Youth: Invisible and Vulnerable*, 51 J. HOMOSEXUALITY 111, 112–13 (2006)).

110. Skinner-Thompson & Turner, *supra* note 64, at 298.

111. *See* Sen, *supra* note 72.

more of a sense of entitlement to their preferred outcome than do transgender girls.[112]

Moreover, if rights are to be allocated to maximize overall happiness, then there is no reason to count only the pain of those student-athletes who are most directly affected. Parents, spectators, those who care about transgender rights, and those who care about sports may all experience pain depending upon whether transgender girls are included or excluded. Given how divided the country is currently on transgender rights, it is not at all clear which position would maximize overall happiness.

It would be cleaner and easier to simply disregard the pain caused by transgender inclusion altogether. Indeed, those arguing for transgender inclusion sometimes do so, arguing that the pain felt by those who object to inclusion flows from bias and animus and hence is invalid or illegitimate. Tobin and Levi, for example, argue that cisgender girls' discomfort "cannot constitute a legitimate, nondiscriminatory motive for adverse treatment" because the feelings are "a manifestation of bias."[113] "While some non-transgender students or staff may feel genuine discomfort with the presence of a transgender person of the same self-identified and lived gender, these feelings of discomfort," they explain, "are rooted in unfortunate cultural bias and stereotypes regarding transgender people."[114] As such, they conclude, these feelings of discomfort "cannot constitute a legitimate, nondiscriminatory motive for adverse treatment."[115] The Obama Administration adopted a similarly dismissive view of cisgender pain in its Dear Colleague Letter where it explained that:

> [a] school's Title IX obligation . . . requires schools to provide transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns . . . . [T]he desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students.[116]

Similar arguments about the illegitimacy of cisgender discomfort with transgender access have been made in the context of bathrooms. Nathan Hefferman, for example, argues that the efforts to exclude transgender boy Gavin Grimm from using the boys bathroom at his high school were not driven by privacy concerns, but instead by unfounded fear and bias.[117]

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112. *See* SEN, *supra* note 92.

113. Tobin & Levi, *supra* note 60, at 317–18.

114. *Id.* at 317.

115. *Id.* at 317–18.

116. *2016 Dear Colleague Letter*, *supra* note 7, at 2.

117. Nathan Hefferman, Comment, *Potty Politics:* G.G. *ex rel.* Grimm v. Gloucester County School Board, *Title IX, and the Challenges Faced by Transgender Students Under the Trump Administration and Beyond*, 32 WIS. J.L. GENDER & SOC'Y 215, 230–31 (2017).

Ayana Osada calls fears about transgender bathroom use "unfounded" and invalid.[118] Sheila Cavanaugh, in her book *Queering Bathrooms*, describes a transgender woman who recounts her own fear of using men's bathrooms yet attributes cisgender women's discomfort at seeing her in female restrooms to hatred rather than fear.[119]

Even if one finds such arguments in the bathroom context convincing—that is, even if one believes there can be no legitimate reason to oppose transgender women's access to female restrooms—athletics may still require a different analysis. It may be too simple and unduly dismissive to attribute the pain expressed by cisgender girls as stemming only from anti-trans bias. Certainly, the cisgender girls opposed to the CIAC policy requiring transgender inclusion adamantly denied such bias. As one student-athlete expressed: "I think it's a very important thing for people to really understand where we're coming from, instead of just immediately going to, 'We're transphobic.'"[120] Another student explained:

> "We live in such a cruel world, and society is just so hard to figure out sometimes . . . . You never know what the reaction is going to be. It's so hard because you want your voice to be heard . . . but, how can you know what to say that will affect things positively, instead of people twisting what you're saying and turning it against you?"[121]

The girls struggled to explain that their pain stemmed from their belief that transgender girls have an unfair competitive advantage in sports, thereby diminishing their own chances for competitive victories, public attention, and college scholarships. As Selina Soule explained: "It's very frustrating and heartbreaking when us girls are at the start of the race and we already know that these [transgender female] athletes are going to come out and win no matter how hard you try."[122] Another cisgender student-athlete explained:

> "It's not like we're saying that we don't like transgender people. . . . It's just an equality issue where these [cisgender] girls are trying their absolute hardest to try and get those good things on their college resumes, and then it just gets completely taken

118. Ayana Osada, Note, *Obergefell Liberates Bathrooms*, 62 N.Y. L. SCH. L. REV. 303, 316 (2017–2018).

119. SHEILA L. CAVANAGH, QUEERING BATHROOMS: GENDER, SEXUALITY, AND THE HYGIENIC IMAGINATION 77 (2010). *See also* Marie-Amélie George, *Framing Trans Rights*, 114 NW. U.L. REV. 555, 610 (2019) (arguing in the context of transgender bathroom access that "[w]hat the responses to perceived gender transgression imply is that gender conformity is superior, and gender nonconformity is an illness requiring quarantine" (footnote omitted)).

120. *See* Bolar, *supra* note 105.

121. *Id.* (second alteration in original).

122. *Id.*

> away from them because there's a biological male racing against them."[123]

One may find the concerns of cisgender girls overblown. Selina Soule may have lost the chance to compete in the New England regionals in the fifty-five-meter race because she was beaten by two transgender girls and finished eighth rather than sixth, which would have qualified her for the regionals. But, given how few transgender girls there are in sports, how many cisgender girls really are likely to lose concrete opportunities because of transgender girls' participation? Cisgender girls may be empirically wrong in their estimations of how much they will lose as a result of transgender girls' participation. But even if cisgender girls' pain is based on empirically exaggerated estimations of harm, this would at most be an argument for discounting their pain. It does not suggest that the pain itself stems from anti-trans bias and is, as a result, invalid.

One may also find cisgender girls' concerns petty or narcissistic. One might want girls to participate in sports for the love of the sport, for the physical benefits, for the camaraderie. One might find the focus on winning, garnering attention, and attracting college scholarship money unseemly.[124] Yet even if one finds such an emphasis on winning to be unappealing, it seems difficult to disregard as somehow invalid. It is difficult, in other words, to argue that girls' pain stemming from their perceived competitive disadvantage should not count, particularly when Title IX itself values competitive glory, recognition, and rewards for accomplishments.[125] But, if cisgender pain is not invalid, then it must be counted, which leads one back to the problems of balancing pain.

Subjective pain is a weak basis for transgender rights. Not only is the empirical basis for measuring pain and the normative basis for caring about pain uncertain, but it is far from certain that a hedonic utilitarian-

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123. *Id.*

124. *See, e.g.*, Buzuvis, *supra* note 109, at 54 ("Policies that include transgender athletes can promote educational values by mitigating the win-at-all-costs mentality that has crept into scholastic sports programs and undermines the educational purpose of athletics.").

125. Title IX regulations and the Policy Interpretation issued by the OCR of the DOE in 1979, 44 Fed. Reg. 71,413 (1979), require institutions to allocate athletic financial scholarships in proportion to the number of male and female participants in its athletic program. *See* 45 C.F.R. § 86.37(c) (1975) (codified at 34 C.F.R. § 106.37 (1991)); 44 Fed. Reg. 71,415 (1979). The Policy Interpretation gave schools three ways to show they were providing female and male athletes with equal opportunities. The method most often used by schools was the proportionality test. *See* Title IX Policy Interpretation, 44 Fed. Reg. 71,413 (1979). *See also* Dionne L. Koller, *How the Expressive Power of Title IX Dilutes its Promise*, 3 HARV. J. SPORTS & ENT. L. 103, 123 (2012) (explaining that "Title IX has signaled two different, and . . . arguably conflicting messages. The first message is one of equality and empowerment: that girls and women are entitled to participate in athletics on a basis equal to boys and men. The second, less-examined message is . . . that the natural and expected goal of sports participation is to be a highly skilled athlete capable of winning.").

ism would balance in favor of transgender inclusion. It is perhaps not surprising, then, that arguments against misgendering often seem to rely too on more objective claims. This Article turns in the next Part to objective arguments against misgendering in sport.

III. OBJECTIVE GOALS

It may be that arguments against misgendering focus on pain, not because of a belief that such pain is more intense than other kinds of pain, but because of a belief that the pain is caused by a particularly egregious type of harm or injustice. In other words, the argument against misgendering may not really be about avoiding subjective pain but may instead be about furthering objective goals. Indeed, arguments for transgender inclusion often seem to rest on two distinct objective claims: first, that gender identity expression is critical to human flourishing, and second, that cisgender normativity must be dismantled through the erasure of biological sex. This Part explores the normative reach and practical implications of both claims.

A. *Individual Flourishing*

At times, the argument against misgendering in sports sounds distinctly perfectionist. Misgendering must be prohibited not merely because it causes subjective pain, but because it burdens something that is necessary for human flourishing—namely, expression of one's gender identity. Gender, under this view, is like religion in terms of its centrality to individual identity and well-being.

Religion is treated differently than other interests. Indeed, it was the Supreme Court's effort to treat religious interests the same as other kinds of personal interests in *Employment Division, Department of Human Resources of Oregon v. Smith*[126] that prompted Congressional action and correction. In *Smith*, the Supreme Court held that the Free Exercise Clause of the First Amendment was not violated by neutral laws of general applicability even if they burdened some individuals' sincerely-held religious beliefs.[127] In response to *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993.[128] RFRA prohibited the government from substantially burdening a person's exercise of religion, even through neutral laws of general applicability, unless the government could demonstrate that its

126. 494 U.S. 872 (1990).

127. *See id.* at 879 (explaining that the Court's decisions "have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982))).

128. 42 U.S.C. §§ 2000bb (1994).

law furthered a compelling governmental interest and was the least restrictive means possible.[129]

In applying RFRA, courts are highly deferential both to individual assertions of what their religion entails and to assertions of the substantiality of the burden being imposed. In *Burwell v. Hobby Lobby Stores, Inc.*,[130] for example, the Supreme Court said that courts "have no business addressing [ ]whether the religious belief asserted in a RFRA case is reasonable[ ]," nor second-guessing whether the burden on religion was in fact substantial.[131] "[I]t is not for us to say," the Court explained, "that [claimants'] religious beliefs are mistaken or insubstantial. Instead, our 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction.'"[132] The result, as Frederick Gedicks notes, is that "[o]nce a claimant honestly pleads unacceptable religious costs—that complying with a law violates his or her religious convictions—there remains no justiciable question whose answer will make any difference."[133] Rather, "[c]ourts must defer to the claimant's construction of her beliefs, however implausible it may appear to others."[134]

Religion is treated differently under Title VII as well. Title VII prohibits discrimination in employment on the basis of race, sex, religion, and national origin, but it is only in cases involving religion that employers have an obligation to try to accommodate their workers. Once a plaintiff has shown that a religious belief conflicts with an employment requirement, the burden of proof shifts to the employer to show that it offered the employee a "reasonable accommodation" or that doing so would cause the employer "undue hardship."[135] No such accommodation is necessary

129. "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C.S. § 2000bb-1(b)(1)–(2) (1993), *invalidated as against state and local governments by* City of Boerne v. Flores, 521 U.S. 507 (1997).

130. 573 U.S. 682 (2014).

131. *Id.* at 724.

132. *Id.* at 725 (first alteration in original) (quoting Thomas v. Rev. Bd. Of Ind. Emp. Sec. Div., 450 U.S. 707, 716 (1981)).

133. Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (And Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94, 98 (2017). *See also* KELMAN, *supra* note 69, at 54 ("It is hard to imagine a court finding that the state has enacted a regulation that does not put significant pressure on a party to obey the regulation, and existing case law does seem to suggest that threatening to impose even fairly trivial fines on those who wish to engage in religiously mandated activity or refuse to engage in religiously prohibited activity can substantially burden free exercise.").

134. Gedicks, *supra* note 133, at 112. *See also* KELMAN, *supra* note 69, at 37 ("Right now, courts defer completely to the subjective judgment of the complaining party that forcing facilitation substantially burdens the complaining party's freedom to live in accord with her religious beliefs.").

135. *See* 42 U.S.C. § 2000e(j) (2018) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospec-

when an employment law burdens an employee's expression of racial or gender identity.[136]

Scholars have sought to explain, and in some cases defend, the distinctive treatment of religion. According to Andrew Koppelman, "[r]eligion is a distinctive kind of hypergood[ ] because it attempts to respond to the inadequacy of human existence as a whole."[137] Michael McConnell similarly opines that "[r]eligion is a special phenomenon, in part, because it plays such a wide variety of roles in human life."[138] The special treatment of religion is not without critics,[139] but as a matter of law it is settled.

Only in the context of religion do purely subjective expressions of pain establish legally cognizable claims for protection. The right to freely express one's religious beliefs is treated as important and central to human flourishing in a way that even the right to vote, the right to speech, and the right to be free from workplace harassment are not.

Arguments for transgender inclusion often ascribe to gender identity the same centrality to human experience reserved for religious identity and describe gender in similar terms. Buzuvis, for example, claims that "[g]ender identity, a person's basic sense of being male or female, is something far from trivial, but is rather a deeply felt, core component of a per-

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tive employee's religious observance or practice without undue hardship on the conduct of the employer's business.").

136. *See* Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1077 (2009) (noting that in the sex context courts have "failed to question the sex stereotypes underlying conventional 'community standards'" and in the race context "workers have generally not succeeded in challenging bans on dreadlocks or cornrows on the grounds that they are racially discriminatory").

137. Andrew Koppelman, *Is it Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571, 594 (2006). For a more recent account of Koppelman's views, see Andrew Koppelman, *How Could Religious Liberty be a Human Right?*, 16 INT'L J. CONST. L., 985, 986 (2018) [hereinafter Koppelman, *Religious Liberty Human Right?*] (arguing that "[r]eligion is not uniquely valuable" but it is a "class[ ] of ends that many people share").

138. *See* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 42 (2000); *see also* Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U.L. REV. 497, 497–98 (2005); Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property*, 98 COLUM. L. REV. 1843, 1844, 1856 (1998).

139. *See* Gedicks, *supra* note 133, at 149 ("Allowing churches and believers to claim RFRA exemptions without the check of meaningful judicial review is bad for both law and religion."); Micah Schwartzmann, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351, 1355 (2012) (arguing that religion should not be singled out for special treatment because religion is not ontologically distinct from other deep and valuable concerns); BRIAN LEITER, WHY TOLERATE RELIGION? 63–64 (2013) (arguing there is no valid reason to give claims of religious conscience over any special protection than exemption claims based on deeply held secular beliefs); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1315 (1994) (arguing it is unfair to privilege religion over other deep human commitments).

son's identity."[140] She goes on to say that "[m]edical experts assert that gender identity is a 'fundamental part of being human' and 'the most important determinant of a person's sex'—even more important than other sex-determinant factors such as chromosomes, hormones, genitalia, and secondary characteristics."[141] Tobin and Levi make the comparison with religion explicit and argue that expressions of gender identity should be afforded the same deference as expressions of religious faith. They note that "[u]nder Title VII, an employer is generally expected to accept an employee's assertion of a sincere religious belief at face value, unless there is some objective reason to doubt it, such as behavior obviously inconsistent with that belief."[142] Similarly, they contend that "[a]bsent such a reason, there is no justification for a school to question a student's gender identity."[143]

As a normative matter, treating gender identity as central to personhood and gender expression as critical for human flourishing may seem jarring—perhaps even nonsensical—for those who believe that gender itself is nothing more than a social construction.[144] Nancy Knauer

140. Buzuvis, *supra* note 62, at 352.

141. *Id.* (first quoting Brief of World Professional Association for Transgender Health, Pediatric Endocrine Society, et al. as Amici Curiae Supporting Appellant at *12, G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2015) (No. 15-2056), then quoting Brief for Maine Chapter of the American Academy of Pediatrics, et al. as Amici Curiae Supporting Appellant at *8, Doe v. Reg'l Sch. Unit 26, 86 A.3d 600 (Me. 2013) (No. Pen-12-585)).

142. Tobin & Levi, *supra* note 60, at 328.

143. *Id.* The idea that authentic gender expression is core to human flourishing seems undercut somewhat by arguments that transgender students should be entitled to play on whichever sex-based team they would like. Arguments for choice seem to reflect a concern about subjective discomfort rather than a conviction that having one's authentic gender identity recognized is important for human flourishing. *See, e.g.*, Buzuvis, *supra* note 60, at 30 ("For some transgender individuals assigned a female sex at birth, but who identify as male, being restricted from women's sports could be exclusive and isolating, especially if they have grown up playing women's sports and have cultivated a community in that context . . . . Given that women's sports leagues often foster community not only among women, but among lesbians in particular, a requirement that 'you must identify as female to play' has the possibility to exclude someone who has been playing with women all along, but who eventually comes out as transgender."). *See also* Skinner-Thompson & Turner, *supra* note 64, at 296 ("For some transgender students, especially those in the early stages of transition, continuing to participate on a team based on their assigned sex may feel more comfortable. No current policy dictates that a transgender student *must* play on the team associated with their gender identity, nor should they. That decision should be made by the individual transgender student based on his or her needs including privacy, safety, and comfort."). If expressing one's gender identity is critical for human flourishing, then it is not clear why transgender boys/men should be permitted to deny their identity by playing on girls/women's sports teams. If the idea is that transgender boys/men are still affirming their identity as boys/men while playing on female sports teams, then it is not clear why transgender girls/women could not also affirm their gender identity as girls/women while still playing on boys/men's teams.

144. Susanna Rustin, *Feminists Like Me Aren't Anti-Trans—We Just Can't Discard the Idea of 'Sex'*, THE GUARDIAN (Sept. 30, 2020), https://www.theguardian.com/

explains that such a reaction is probably most likely for progressives born in the 1960s and 1970s who, as she describes, grew up being told "that we could be anything we wanted to be and gender didn't matter."[145] The result, Knauer explains, is a tension: "On some elemental level, we were raised to believe that gender is not real and, therefore, it is difficult for us to fathom how one could take gender so seriously that it literally redefines the person."[146] Terry Kogan describes the normative challenges posed by the elevation of gender more starkly. As Kogan explains:

> Given that [for gender critical theorists] gender is socially constructed, a transsexual's autobiographical statement that *he* (a male in the eyes of the critical gender theorist) senses *himself* to have been "born a member of the other gender" makes little sense. According to critical gender theory, while one *may* be born a sexed being, one is not born gendered. One must learn gender presentation.[147]

As a practical matter, if gender were treated like religion, transgender individuals would be entitled to protection/exemption from categorizations based on biological sex—whether for sports teams, locker rooms, bathrooms, or changing rooms—whenever such categorizations burdened their gender identity by separating them from others of the same gender. Transgender individuals (as well as non-transgender individuals) would also be entitled to protection or exemption from unisex standards of dress or grooming to the extent they substantially burdened one's gender identity expression. Expressions of gender identity would, as a result, be treated better than other expressions of individual status—like race or na-

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commentisfree/2020/sep/30/feminists-anti-trans-idea-sex-gender-oppression [https://perma.cc/HB9F-ZFRB] (arguing that the concept of gender identity "can't be forced on women like me who regard questioning gender roles, while advocating on behalf of our sex, as the whole point of feminism").

145. Nancy J. Knauer, *Gender Matters: Making the Case for Trans Inclusion*, 6 PIERCE L. REV. 1, 3 (2007). Probably no one is more associated with the idea of gender as a social construct than Judith Butler. *See* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 140 (1990) ("Gender ought not to be constructed as a stable identity or locus of agency from which various acts follow; rather gender is an identity tenuously constituted in time, instituted in an exterior space through a stylized repetition of acts." (emphasis omitted)).

146. Knauer, *supra* note 145, at 3. Knauer argues that "the first step toward understanding transgender issues is to shed this utopian view of gender." *Id.* Ryan T. Anderson identifies a similar tension within transgender activism itself. Ryan T. Anderson, *Transgender Ideology Is Riddled With Contradictions. Here Are the Big Ones*, HERITAGE FOUND. (Feb. 9, 2018), https://www.heritage.org/gender/commentary/transgender-ideology-riddled-contradictions-here-are-the-big-ones [https://perma.cc/MT62-YFS6] ("[Transgender activists] say there are no meaningful differences between man and woman, yet they rely on rigid sex stereotypes to argue that 'gender identity' is real, while human embodiment is not. They claim that truth is whatever a person says it is, yet they believe there's a real self to be discovered inside that person.").

147. Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled Other*, 48 HASTINGS L.J. 1223, 1229 (1997) (footnote omitted).

tional origin—where subjective burdens on identity alone do not create a cause of action. The result would be a hierarchy of oppression. This prioritization may be neither inadvertent nor unwelcome.

B. *Social Justice*

Arguments against misgendering in sport often rely on a second objective claim—one focused more on social justice than individual flourishing. Namely, transgender girls are girls, transgender women are women, and society must dismantle the cisgender normativity which suggests they are different or less than. Critical to this dismantling is the rejection of biological sex as a useful and meaningful social category.

In her article, *Disaggregating Gender from Sex and Sexual Orientation*, Mary Anne Case nicely summed up the traditional distinction between sex and gender when she explained "gender is for adjectives, sex is for nouns."[148] What she meant was that "'sex' refers to the anatomical and physiological distinctions between men and women; 'gender,' by contrast, is used to refer to the cultural overlay on those anatomical and physiological distinctions."[149]

This traditional distinction has fallen out of favor among those advocating for transgender rights. As Naomi Schoenbaum explains, the "new view" of sex is "premised on an 'internal, deeply held sense' of one's identity. Under this view, sex 'comes from the brain, not the body,' from 'between your ears, not between your legs.'"[150] While sex and gender were once understood as distinct categories that might each be relevant for particular purposes, the biological definition of sex is now being rejected and gender identity is being elevated in importance. Gender identity—which is now both one's "gender" and one's "sex"—is the only categorization that matters.[151]

This new view of sex is at the core of arguments against misgendering. Transgender girls must be allowed to play on girls' sports teams because they are girls.[152] As Skinner-Thompson and Turner explain: "including

148. *See* Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 9 (1995).

149. *Id.* at 10.

150. Naomi Schoenbaum, *The New Law of Gender Nonconformity*, 105 MINN. L. REV. 831, 866–67 (2020) (first quoting GLAAD MEDIA REFERENCE GUIDE 10 (10th ed. 2016), then quoting Denise Grady, *Anatomy Does Not Determine Gender, Experts Say*, N.Y. TIMES (Oct. 22, 2018), https://www.nytimes.com/2018/10/22/health/transgender-trump-biology.html [https://perma.cc/D55P-MJRD]).

151. *See id.* at 867 n.165 ("[G]ender identity is the only medically supported determinant of sex when sex assignment as male or female is necessary . . . . Gender identity does and should control when there is a need to classify an individual as a particular sex." (omission in original) (quoting Expert Decl. of Deanna Adkins, M.D. at 32–33, Carcaño v. McCrory, 203 F. Supp. 3d 615 (2016) (No. 1:16-cv-00236), 2016 WL 4256691).

152. *See* ACLU et al., Statement of Connecticut Women's Rights and Gender Justice Organizations in Support of Full and Equal Access to Participation in Athletics for Transgender People (June 24, 2019), https://www.acluct.org/sites/de-

transgender female athletes in sports consistent with their gender identity helps guarantee that Title IX's goal of providing athletic opportunities for all students (and *all* girls) free of discrimination is realized."[153]

It was this new definition of sex that drove the Obama Administration's transgender policies. The 2016 Dear Colleague Letter explained that the Departments of Justice and Education "treat a student's gender identity as the student's sex for purposes of Title IX and its implementing regulations."[154] "This means," the letter explained, "that a school must not treat a transgender student differently from the way it treats other students of the same gender identity."[155] Gender identity under this view defines both one's gender and one's sex. Biological sex, as a category with legal and social meaning, has simply been erased.[156]

The challenge this new definition of sex poses to cisgender normativity is direct and profound. Cisgender normativity relies on the idea that it is best for one's gender identity and biological sex to be aligned. If biological sex is erased as a meaningful category, then what it means to be cisgender loses any social significance. Biological markers may still exist, but biological sex as a social and legal category does not.[157] With the erasure of biological sex comes the eradication of any privilege from having one's gender identity and biology align. If all that matters is one's gender identity, alignment of identity and biological sex becomes unimportant, if not altogether meaningless.

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fault/files/field_documents/statement_ct_womens_rights_gender_justice_orgs_supporting_trans_athletes_5.pdf [https://perma.cc/CJE4-848L]) ("Transgender girls are girls and transgender women are women."); Shoshana K. Goldberg, *Fair Play: The Importance of Sports Participation for Transgender Youth*, CTR. FOR AM. PROGRESS, (Feb. 8, 2021), https://www.americanprogress.org/issues/lgbtq-rights/reports/2021/02/08/495502/fair-play/ [https://perma.cc/K23X-A7MC] ("These transphobic laws and policies . . . ignor[e] the reality that transgender women and girls are women and girls . . . ."); *see also* Buzuvis, *supra* note 62, at 353 ("In all, the primacy and essential nature of gender identity means that a transgender girls is a girl, and a transgender boy is a boy."); Anderson, *supra* note 146 (quoting Dr. Deanna Adkins, Director of the Duke Center for Child and Adolescent Gender Care, as saying "From a medical perspective, the appropriate determinant of sex is gender identity").

153. Skinner-Thompson & Turner, *supra* note 64, at 277 (emphasis added).

154. *2016 Dear Colleague Letter*, *supra* note 7, at 2.

155. *Id.*

156. *See, e.g.*, Mey Rude, *It's Time for People to Stop Using the Social Construct of "Biological Sex" to Defend Their Transmisogyny*, AUTOSTRADDLE (June 5, 2014), https://www.autostraddle.com/its-time-for-people-to-stop-using-the-social-construct-of-biological-sex-to-defend-their-transmisogyny-240284/ [https://perma.cc/R5ET-B4QX] (noting that "[t]here's actually a wide group of people, some 'allies,' some lawmakers and some just outright bigots who all rally behind the idea of using the social construct of 'biological sex' to misgender trans women").

157. *See Gender Unicorn*, TRANS STUDENT EDUC. RES., https://transstudent.org/gender/ [https://perma.cc/8UAE-AQSB] (last visited Oct. 16, 2022) (rejecting the "inaccurate term" biological sex and referring instead to "sex assigned at birth").

It is not clear whether the demand for biological erasure is meant as a normative trump, an absolute demand which must be pursued at all costs or whether the demand for biological erasure is subject to empirical balancing and counterweights. That is, are the normative ideals incommensurable with and immune to empirical side constraints, or might they at some point fall to them?

Often, advocates for transgender girls' inclusion in female sports downplay the potential harms such inclusion may cause to cisgender girls. They argue that cisgender girls are not likely to be denied opportunities to win, or at least that they will not be denied such opportunities unfairly. Erin Buzuvis, for example, urges that "policymakers should recognize that medical science does not support the conclusion that natal men have physical features presumed to be advantageous in athletics, nor does it support the conclusion that physical features associated with masculinity produce a competitive advantage."[158] Skinner-Thompson and Turner make the same point. They note that "[t]here is significant overlap between the range of size and strength of boys and girls, thus making it likely that an individual transgender student would fit within the range of other team members and competitors."[159] They conclude that while

> ensuring that young women are provided an opportunity to compete in sports is one of Title IX's most important objectives. . . . [I]n the context of youth sports, the physical differences between males and females are not significant enough to justify a belief that a transgender female would inevitably prevail against cisgender female athletes.[160]

Moreover, they argue, given the small number of transgender girls, their inclusion is unlikely to cause any significant changes to female sports. As Skinner-Thompson and Turner contend: "There is no evidence or indication that the number of transgender girls desiring to participate on a given sport could be significant enough to deny cisgender girls meaningful athletic opportunities, even assuming arguendo that transgender girls have innate physical advantages . . . ."[161]

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158. Buzuvis, *supra* note 60, at 40.

159. Skinner-Thompson & Turner, *supra* note 64, at 276.

160. *Id.* at 277. *See also* Masha Gessen, *The Movement to Exclude Trans Girls from Sports*, NEW YORKER (Mar. 27, 2021), https://www.newyorker.com/news/our-columnists/the-movement-to-exclude-trans-girls-from-sports [https://perma.cc/V6M2-5AXR] (arguing that "[t]he goal of this campaign [to exclude trans girls from female sports teams] is not to protect cis-girl athletes as much as it is to make trans athletes disappear").

161. Skinner-Thompson & Turner, *supra* note 64, at 279. *See also* Sean Ingle, *British Olympians Call for IOC to Shelve 'Unfair' Transgender Guidelines*, THE GUARDIAN, (June 12, 2019, 4:00 PM), https://www.theguardian.com/sport/2019/jun/12/olympians-ioc-transgender-guidelines [https://perma.cc/CK5K-9VVN] (quoting transgender academic Joanna Harper: "Transgender women after hormone therapy are taller, bigger and stronger on average than cisgender women. But that does not necessarily make it unfair. In high levels of sport, transgender women are

The empirical question of whether and when transgender girls have unfair advantages over biological girls in sports is neither easy nor settled. Doriane Coleman and Wickliffe Shreve document a "10–12[%] performance gap between elite male and female athletes" in track and field.[162] The gap between non-elite male and female athletes, they explain, is smaller, "but . . . still insurmountable."[163] They attribute male advantage to testes and testosterone levels in the male range.[164] As Coleman and Shreve succinctly put it: "There is no other physical, cultural, or socioeconomic trait as important as testes for sports purposes."[165] Others dispute, or at least problematize, the link between testosterone and athletic performance.[166] Katrina Karkazis and her colleagues caution that while

substantially underrepresented. That indicates that whatever physical advantages transgender women have—and they certainly exist—they are not nearly as large as the sociological disadvantages."); Jack Turban, *Trans Girls Belong on Girls' Sports Teams*, SCI. AM. (Mar. 16, 2021), https://www.scientificamerican.com/article/trans-girls-belong-on-girls-sports-teams/ [https://perma.cc/S2S9-A7DX] ("There is no epidemic of transgender girls dominating female sports."); David Crary & Lindsay Whitehurst, *Lawmakers Can't Cite Local Examples of Trans Girls in Sports*, ASSOCIATED PRESS (Mar. 3, 2021), https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports-914a982545e943ecc1e265e8c41042e7 [https://perma.cc/3YDV-5ABX] ("Legislators in more than 20 states have introduced bills this year that would ban transgender girls from competing on girls' sports teams . . . [y]et in almost every case, sponsors cannot cite a single instance in their own state or region where such participation has caused problems.").

162. *See* Doriane Lambelet Coleman & Wickliffe Shreve, *Comparing Athletic Performances the Best Elite Women To Boys and Men*, DUKE L. CTR. FOR SPORTS L. & POL., https://law.duke.edu/sports/sex-sport/comparative-athletic-performance/ [https://perma.cc/9RL9-2VPF] (last visited Oct. 16, 2022).

163. *Id.*

164. *Id.* The NCAA requires testosterone suppression treatment for one year in order for transgender women to compete in women's sports. *See* NCAA OFF. INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 13 (2011), https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC_TransgenderHandbook.pdf [https://perma.cc/PVK7-NW6U]. The International Olympic Committee requires transgender women to show that their testosterone level has been below 10nmol/L for twelve months prior to their first competition. *See* INT'L OLYMPIC COMM., IOC CONSENSUS MEETING ON SEX REASSIGNMENT AND HYPERANDROGENISM 2 (2015), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf [https://perma.cc/KZF7-YM6C]. The typical range for testosterone for biological males is 7.7-29.4mnols/L. The typical range for biological female is .06 to 1.68 nmols/L. *See* Ingle, *supra* note 161.

165. Coleman & Shreve, *supra* note 162. *See generally* CAROLE HOOVEN, T: THE STORY OF TESTOSTERONE, THE HORMONE THAT DOMINATES AND DIVIDES US (2021).

166. *See, e.g.,* Sara Chodosh, *The Complicated Truth About Testosterone's Effect on Athletic Performance*, POPULAR SCI. (Nov. 20, 2019, 7:30 PM), https://www.popsci.com/story/science/testosterone-effect-athletic-performance/ [https://perma.cc/Z2XY-2BEX](describing studies testing for correlations between natural testosterone levels and performance levels among male and female athletes); Katrina Karkazis & Rebecca M. Jordan-Young, *The Myth of Testosterone*, N.Y. TIMES (May 3, 2019), https://www.nytimes.com/2019/05/03/opinion/testosterone-caster-semenya.html [https://perma.cc/8E2B-7RYW] ("Testosterone doesn't drive

"[c]linical studies do confirm that testosterone . . . helps . . . to increase their muscle size, strength, and endurance," it is too simplistic to assume "that a person with more testosterone will have greater athletic advantage than one with less testosterone."[167] They explain that "[i]ndividuals have dramatically different responses to the same amounts of testosterone, and testosterone is just one element in a complex neuroendocrine feedback system, which is just as likely to be affected by as to affect athletic performance."[168] Eric Vilain, a pediatrician and geneticist who has advised the International Olympic Committee and the NCAA, does believe that testosterone is largely responsible[169] for the performance gap between biologically male and female athletes.[170] Yet for Vilain, differences among individuals and among sports makes the question of whether transgender girls have an "unfair" advantage "complicated."[171]

Nor is it clear how many transgender girls and women may ultimately seek to participate on female sports teams and displace biological girls from such teams. Even simple estimates of the percentage of the population that identify as transgender vary widely, making estimates about potential participation numbers on female sports teams by transgender girls mere guesses. A 2017 study by the Williams Institute found that 0.7% of youth ages thirteen to seventeen identify as transgender and 0.6% of adults identify as transgender.[172] A study published in 2018 based on a

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a single path to athletic performance, nor even a small set of processes that can be linearly traced from more testosterone to more ability.").

167. *See* Katrina Karkazis, Rebecca Jordan-Young, Georgiann Davis & Silvia Camporesi, *Out of Bounds? A Critique of the New Policies on Hyerandrogenism in Elite Female Athletes*, 12 AM. J. BIOETHICS, 3, 8 (2012) (citation omitted).

168. *Id.* ("Testosterone is far from the decisive factor in athleticism.").

169. Eric Vilain, *Gender Testing for Athletes Remains a Tough Call*, N.Y. TIMES (June 18, 2012), https://www.nytimes.com/2012/06/18/sports/olympics/the-line-between-male-and-female-athletes-how-to-decide.html [https://perma.cc/55PW-3ELH].

170. *See* Tinbete Ermyas & Kira Wakeam, *Wave of Bills to Block Trans Athletes Has No Basis in Science, Researcher Says*, NAT.'L PUB. RADIO (Mar. 18, 2021 5:17 PM) (discussing an interview with Dr. Eric Vilain).

171. *Id.* Also complicating matters is that research has found that "transgender women did not lose strength at all" as a result of testosterone suppression therapy and lost "only 5% of the muscle volume over the thigh muscles." Karolinska Institutet, *New Study on Changes in Muscle Mass and Strength After Gender-Affirming Treatment May Have an Impact on Sports Regulation*s (Dec. 13, 2019, 2:52 PM), https://news.ki.se/new-study-on-changes-in-muscle-mass-and-strength-after-gender-affirming-treatment-may-have-an [https://perma.cc/XZN4-Z2Q6]. *See also* Anna Wiik, Tommy R. Lundberg, Eric Rullman, Daniel P. Andersson, Mats Holmberg, Mirko Mandiæ, Torkel B. Brismar, Olof Dahlqvist Leinhard, Setareh Chanpen, John N Flanagan, Stefan Arver & Thomas Gustafsson, *Muscle Strength, Size, and Composition Following 12 Months of Gender-Affirming Treatment in Transgender Individuals*, 105 J. CLINICAL ENDOCRINOLOGY & METABOLISM e805 (2019) [hereinafter *Muscle Strength, Size, and Composition*].

172. JODY L. HERMAN, ANDREW R. FLORES, TAYLOR N.T. BROWN, BIANCA D.M. WILSON & KERITH J. CONRON, WILLIAMS INST., AGE OF INDIVIDUALS WHO IDENTIFY AS TRANSGENDER IN THE UNITED STATES 2 (Jan. 2017), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Age-Trans-Individuals-Jan-2017.pdf

2016 survey of almost 81,000 Minnesota teens found that almost 3% reported as transgender or gender nonconforming.[173] A 2016 survey of first year students at Evergreen College found that 12% of respondents self-identified as gender nonconforming or unsure of their gender identity.[174] A 2017 UCLA study of 796,000 California youth ages twelve to seventeen found that 27% reported they were viewed by others as gender nonconforming at school.[175] A recent study in Pittsburgh found that "nearly 1 in 10 students in over a dozen public high schools identified as gender-diverse."[176]

Arguments about costs suggest that for at least some advocates of transgender inclusion there is a tipping point at which the costs of biological erasure to other groups or other social interests outweigh the benefits. It may be, for example, that if transgender girls have a 10% advantage over cisgender girls in a particular sport they should be included, but if they have a 50% advantage they should not be. Alternatively, it may be that transgender girls should be permitted to compose up to 10% of the positions on a girls' team but not more than that. If there is a tipping point, then costs matter and so does context. Misgendering in sports must be

[https://perma.cc/S75F-EDU9]. *See also* Esther L. Meerwijk & Jae M. Sevelius, *Transgender Population Size in the United States: A Meta-Regression of Population-Based Probability Samples*, 107 AM. J. PUB. HEALTH 1, 4 (2017) (estimating the population of transgender adults in the U.S. at 0.39%).

173. *See* G. Nicole Rider, Barbara J. McMorris, Amy L. Gower, Eli Coleman & Marla E. Eisenberg, *Health and Care Utilization of Transgender and Gender Nonconforming Youth: A Population-Based Study*, 141 PEDIATRICS 1, 3 (2018). These numbers are similar to those reported by the CDC finding that nearly 2% of high school students in the United States identify as transgender. *See* Valerie Strauss, *CDC: Nearly 2 Percent of High School Students Identify as Transgender—and More than One-Third of Them Attempt Suicide*, WASH. POST (Jan. 24, 2019, 6:10 PM), https://www.washingtonpost.com/education/2019/01/24/cdc-nearly-percent-high-school-students-identify-transgender-more-than-one-third-them-attempt-suicide/ [https://perma.cc/U32P-WULZ] (referring to findings published by the Centers for Disease Control and Prevention in its Morbidity and Mortality Weekly Report).

174. *See* EVERGREEN STATE COLL., NEW STUDENT STUDY 2016 (2016), https://www.evergreen.edu/sites/default/files/GNC_NSS2016_Reportwithdata.pdf [https://perma.cc/P4NL-NPL5] (the gender nonconforming students identified as transgender (2%), genderqueer (5%), not sure (2%) and another gender (4%); note the percentages in the study add up to 13% but the study lists gender nonconforming students as 12%).

175. *See* Rachel Dowd, *27% of California Adolescents Say They Are Viewed as Gender Nonconforming, Study Finds*, UCLA NEWSROOM (Dec. 13, 2017), https://newsroom.ucla.edu/releases/27-of-california-adolescents-are-gender-nonconforming-study-finds [https://perma.cc/R7V2-J23J].

176. *See* Dan Avery, *Nearly 1 in 10 Teens Identify as Gender-Diverse in Pittsburgh Study*, NBC NEWS (May 21, 2021, 9:02 AM), https://www.nbcnews.com/nbc-out/out-news/nearly-1-10-teens-identify-gender-diverse-pittsburgh-study-rcna993 [https://perma.cc/K5C5-FU3A] (citing KACIE M. KIDD, GINA M. SEQUEIRA, CLAUDIA DOUGLAS, TAYLOR PAGLISOTTI, DAVID J. INWARDS-BRELAND, ELIZABETH MILLER & ROBERT W. S. COULTER, PREVALENCE OF GENDER-DIVERSE YOUTH IN AN URBAN SCHOOL DISTRICT 2 (2021), https://publications.aap.org/pediatrics/article-abstract/147/6/e2020049823/180292/Prevalence-of-Gender-Diverse-Youth-in-an-Urban/ [https://perma.cc/WQF9-B9CG]).

analyzed separately from misgendering in bathrooms, locker rooms, or prisons because the counterweights, and hence the tipping points, in each context are likely to differ. Biological erasure may not always be required and the benefits of transgender girls' inclusion may sometimes be outweighed by the costs.

For other advocates, however, biological erasure seems more like a normative trump—an absolute requirement—not subject to balancing and without a tipping point.[177] It is, in other words, a moral commitment, not a pragmatic one. But if biological erasure is an absolute requirement, then context does not matter. In all sex-segregated contexts, transgender girls (and women) must be treated as girls (and women) without exceptions or limitations. Male/female categorization need not be eliminated. Retaining such categories, but controlling access based on gender identity rather than biology, does far more to repudiate and reject the social importance of biological sex than would eliminating the categories altogether. Indeed, if male/female categorization in sport were eliminated altogether—with all players competing together—a crucial opportunity to signal society's rejection of biological sex and embrace of gender identity would be lost.[178] Nonetheless, for biological erasure absolutists, across contexts and regardless of costs, transgender girls and women must fall squarely and exclusively in the female category.

The prioritization of oppression is clear. For biological erasure absolutists, challenging cisgender normativity must always be prioritized over challenging the oppression of biological women. It is not simply the case that transgender girls' oppression is deemed more weighty or more legitimate than that of biological girls, it is instead that the latter is simply erased from view. One cannot both deny biological sex as a meaningful

177. *See, e.g.*, Chase Strangio & Gabriel Arkles, *Four Myths About Trans Athletes, Debunked*, AM. C.L. UNION (Apr. 30, 2020), https://www.aclu.org/news/lgbtq-rights/four-myths-about-trans-athletes-debunked/ [https://perma.cc/7PFU-MYW4] ("Trans people are exactly who we say we are. There is no one way for women's bodies to be."); *Get the Facts: Trans Equity in Sports*, GENDER JUSTICE, https://www.genderjustice.us/get-the-facts-trans-equity-in-sports/ [https://perma.cc/WA87-XTPT] (last visited Oct. 16, 2022) ("Trans women are women and trans men are men. When trans women compete in women's sports, there are no men competing."); Will Hobson, *The Fight for the Future of Transgender Athletes*, WASH. POST (Apr. 15, 2021, 9:00 AM), https://www.washingtonpost.com/sports/2021/04/15/transgender-athletes-womens-sports-title-ix/ [https://perma.cc/9GZW-HY5K] (quoting Cathryn Oakley, State Legislative Director at the Human Rights Campaign, as calling a group favoring testosterone suppression requirements for transgender girls and women a hate group and saying "I don't know how you find a middle ground between a hate group and people pushing for equality").

178. This may be one reason why transgender advocates rarely argue for eliminating male/female categorization in sport and focus instead on redefining access. *But see* Erin E. Buzuvis, Attorney General v. MIAA *at Forty Years: A Critical Examination of Gender Segregation in High School Athletics in Massachusetts*, 25 TEX. J. C.L. & C.R. 1, 15–20 (2019) (arguing in favor of more "gender-free" athletic opportunities for high school students).

category and argue that biological women, as a social category, deserve greater respect, recognition, and reward.[179] Given the conflict, efforts to elevate the status of biological women—traditionally at the heart of Title IX's application to sport[180]—must give way, logically and practically, to challenges to cisgender normativity. Indeed, traditional arguments for women's rights centered on biological women as a category become, at best, passé and, at worst, anti-trans.[181]

CONCLUSION

There is nothing magical about the categories we draw, but they do say a lot about us. They reveal what we think matters and who we value. Categories are empirical—showing the distinctions we think are relevant—and, often, they are aspirational—showing the groups we are trying to elevate.

We distinguish wrestlers by weight because we think weight matters—that heavier wrestlers will almost always win against those who are significantly lighter—and because we want to recognize and reward the skills of the lighter wrestlers. We distinguish youth tennis players by age because

179. *See, e.g.*, Emrey Broyles, *Gender-Critical Feminists Are Anti-Feminist*, TUL. HULLABALOO (Mar. 11, 2021), https://tulanehullabaloo.com/56020/intersections/gender-critical-feminists-are-anti-feminist/ [https://perma.cc/H3YG-2DUV] ("If sex isn't real, the lived reality of women globally is erased." (quoting J.K. Rowling (@jk_rowling), TWITTER (June 6, 2020, 6:02 PM), https://twitter.com/jk_rowling/status/1269389298664701952?lang=EN [https://perma.cc/RB83-6LK9])).

180. *See* Deborah Brake, *Revisiting Title IX's Feminist Legacy: Moving Beyond the Three-Part Test*, 12 AM U. J. GENDER SOC. POL'Y & L. 453, 459 (2004) ("[I]n the world of sport, despite massive shifts in female sports participation, there has been a good deal of 'preservation through transformation,' as the opportunity structures have regrouped to preserve the central features of male privilege in sport.").

181. The rise of the label TERF (trans-exclusionary radical feminist) to refer to feminists who oppose transgender girls' and women's participation in women's sports on the grounds that biologically female women should not have to compete against those with biologically male bodies reflects this view. *See* Britni De La Cretaz, *Biden is Already Trying to Protect Trans Rights—& He Woke Up All the Twitter TERFS*, REFINERY29, (Jan. 21, 2021, 2:52 PM), https://www.refinery29.com/en-us/2021/01/10272481/biden-executive-order-transgender-women-girls-protection [https://perma.cc/M4HB-97RF] (noting that "when it comes to allowing trans girls to compete on girls' teams, TERFs argue that they have an advantage over cis girls because they were assigned male at birth. This sexist and transmisogynist claim . . . not only underestimates the skill and athletic talent of girls, it isn't based in reality."); *see also* Hobson, *supra* note 177 (noting that "transgender and women's equality activists denounced" proposals to require transgender girls and women in high school sports and above to suppress testosterone for at least one year before competing on female teams "as transphobic and accused the women [supporting the proposals] of having a myopic focus on sports at a critical time for the transgender equality movement"); Michelle Goldberg, *What Is a Woman?: The Dispute Between Radical Feminism and Transgenderism*, NEW YORKER (July 28, 2014), https://www.newyorker.com/magazine/2014/08/04/woman-2 [https://perma.cc/3CL3-ZGPR] (noting that "[t]o some younger activists, it seems obvious that anyone who objects" to challenges to treating biological womanhood as a meaningful social category "is simply clinging to the privilege inherent in being cisgender").

we think age matters—that high school players will almost always beat those in elementary school. We may not think the younger players are as skillful as their more mature counterparts, but we want to reward their efforts and encourage their development.

Distinguishing athletes based on sex sends the message that biological sex matters to performance. In practice, those who are biologically male will be, and are, those who are most celebrated. Nonetheless, the categorization provides recognition, respect, and resources for biologically female athletes. Transgender athletes are overlooked and unrecognized.

Distinguishing athletes based on gender identity sends the message that identity matters for sports, and for society more broadly. In practice, those who identify as male and have male bodies will continue to be the most celebrated. Nonetheless, the categorization elevates the importance of gender identity and provides recognition and resources for those who identify as female. Biological womanhood, however, is denied importance and salience.

Were we to divide athletes based on characteristics such as muscle mass or testosterone levels, rather than biological sex or gender identity, we would send the message that these characteristics matter for sports. In practice, the most celebrated groupings—the high muscle mass, high testosterone divisions—would be populated heavily (perhaps exclusively) by biological men. Yet the categorization would increase recognition and support for low muscle mass and low testosterone athletes—at least some of whom would probably be cisgender and trans women. Women—as a biological or identity category—would be unseen.

The point is that there is no neutral categorization. There is no categorization in sports, or otherwise, that does not say something about what and who we value. More specifically, there is no categorization that does not send a message about the value that we put on biological sex and gender identity. To be sure, the fight is over opportunities and rewards, but it is also, perhaps more importantly, about respect. Hence, the culture war. Yet it is worth recognizing—perhaps in a moment of cease fire—that this a war over the leftovers, not the spoils. However we categorize sports, cisgender men are the winners. It is women and girls (both biological and trans) who are fighting for the scraps.