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Sexual Orientation, Gender Identities, and the Law: A Research Bibliography, 2006–2016

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LGBTQ Athletes and Discrimination in Sport

Rebecca Mattson*

The scholarship regarding sexual orientation and gender identity in sports is twofold. First, many articles address the discrimination that LGBT athletes face in sports, particularly intercollegiate and professional. Second, the scholarship addresses a growing movement to allow transgender children to play sports with the gender that they identify with, not the gender that is on their birth certificate.

Athletes have faced discrimination and harassment based on sexual orientation in many ways. Some intercollegiate athletes have been effectively forced off of the team for their sexuality. While this raises a Title IX flag, religious institutions are able to receive an exemption under Title IX. In the professional world of sports, few athletes are openly homosexual; most remain closeted until retirement. The professional sports arena has traditionally been hostile to LGBT athletes with some players stating that they would be uncomfortable sharing a locker room with a gay teammate. The scholarship seems to indicate, however, that there is growing acceptance of LGBT athletes.

More recent scholarship has focused on the issue of transgender students seeking to play sports. Athletes seek to play alongside teammates who share the same gender identity, even if that is not the same-sex category. Critics allege that players of a different sex will give a competitive advantage. This is a growing movement, and scholars argue against the critics and instead that inclusive policies that allow transgender children to play as the gender they identify with is the appropriate resolution, and it will have the most benefit not only for the child, but also for the team and the community.

To search for scholarship in this area using free databases such as Google Scholar or Fastcase, you may start by using key terms such as *LGBT*, *sports*, *athletics*. Further research should include use of associated relevant broadening key terms such as *queer*, *sexual orientation*, *lesbian*, *gay*, or *trans*.

Other key research terms include:

Athletes

Discrimination

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Gender identity
Intercollegiate athletics
Title IX

If you are using LegalTrac, the following subject headings may be helpful:

Bisexuality--Laws, regulations, and rules
Gays--Civil Rights
Gays--Laws, regulations, and rules
Homosexuality--Laws, regulations, and rules
Lesbians--Civil rights
Lesbians--Laws, regulations, and rules
Sexual minorities--Laws, regulations, and rules
Sexual minorities--Civil rights
Sexual orientation--Laws, regulations, and rules
Transgender people--Civil Rights
Transgender people--Laws, regulations, and rules

BROWN, GARY T., *MIND, BODY AND SPORT: UNDERSTANDING AND SUPPORTING STUDENT-ATHLETE MENTAL WELLNESS* (2014).

Chapter 5 of *Mind, Body and Sport* contains an article by Susan Rankin and Genevieve Weber on discrimination against and harassment of LGBTQ student athletes. This section discusses issues such as inclusive policies, increasing awareness of LGBTQ issues and concerns, and increasing awareness of transgender concerns, to name a few. The section concludes with other recommended resources.

Brown, Krista D., *The Transgender Student-Athlete: Is there a Fourteenth Amendment Right to Participate on the Gender-Specific Team of your Choice?*, 25 MARQ. SPORTS L. REV. 311–28 (2014).

In this article, Brown argues that transgender athletes have a Fourteenth Amendment right to play on the sports team that comports with their gender identity. She asserts that high school athletic associations should have policies that discuss transgender rights and allow a transgender student to request to play on a gender-specific team. Such policies should also have an appeal process in the event that the request is denied. Brown concludes that such a policy would allow associations to retain control but also would comport with Fourteenth Amendment Due Process and Equal Protection rights.

Buzuvis, Erin E., *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1–60 (2011).

In this article, Buzuvis seeks to set forth criteria for developing athletic policies that favor inclusion of transgender athletes. She notes the history of excluding females from sports and extends this exclusion to transgender athletes who are barred from participation based on birth certificate gender identity and the fears of competitive advantage. Buzuvis recommends that athletic participation should be in accordance with gender identity, not birth certificate identity. She asserts that using a sex category, male or female by birth, as a proxy for actual physical features and competitive advantage is scientifically imprecise. Finally, Buzuvis concludes that policymakers should ensure that anti-harassment policies are in place and that there are safe spaces, such as locker rooms or changing areas that do not effectively bar transgendered students from participating in sports.

Carroll, Helen, *The Present Explosion of LGBT Sports*, 34 LAW & INEQ. 499–510 (2016). Keynote from Symposium: Playing with Pride: LGBT Inclusion in Spots, the 2015 Symposium hosted by *Law & Inequality: A Journal of Theory and Practice*, Nov. 6, 2015, University of Minnesota Law School.

Carroll addresses two causes of increase in acceptance of LGBTQ athletes: coaches and administrators trying to maintain careers and being open about sexual orientation or gender identity and efforts to make sure that LGBTQ athletes are able to comfortably participate in sports while acknowledging sexual orientation and gender identity. She enumerates several examples of athletes who have openly addressed their sexual orientation or gender identity and several examples of discrimination litigation. Carroll cautions that there is still backlash against LGBTQ athletes and that people must continue to be vigilant and advocate for the safety and dignity of all athletes.

Gálaz, Timothy A., *Bargaining for the Next Gay Player: How can Jason Collins Help to Develop the National Basketball Association into a More Inclusive Workplace?*, 21 JEFFREY S. MOORAD SPORTS L.J. 461–528 (2014).

The author discusses Jason Collins, the first openly gay player in any of the major sports leagues, and his inability to secure a signing on a team

after he announced that he was gay, and potential remedies he may have. Gálaz states that, even if Collins were able to prove discrimination, he would face an uphill battle pursuing remedies. The NBA's collective bargaining non-discrimination policy has not been tested in this manner yet, and the author concludes that Collins should test it to begin paving the way for more out-of-the-closet NBA players.

Griffin, Leslie C., *Beyond the Basketball Court: How Brittney Griner's In My Skin Illustrates Title IX's Failure to Protect LGBT Athletes at Religious Institutions*, 34 LAW & INEQ. 489–98 (2016). From Symposium: Playing with Pride: LGBT Inclusion in Sports, November 6, 2015, University of Minnesota School of Law.

Griffin uses Brittney Griner's story as a LGBT basketball player at Baylor to highlight the problem of LGBTQ athletes at religious institutions. Griner was forced to "keep quiet" about her sexual orientation if she wanted to continue to play for Baylor. Griffin notes that universities want to profit from LGBT athletes but stay within the religion's teachings. Many religious universities revoke scholarships for LGBT athletes or ask them to leave; although there is possible recourse for these actions, Title IX makes exceptions for religious institutions that file for exemption.

Osborne, Barbara, *No Drinking, No Drugs, No Lesbians: Sexual Orientation Discrimination in Intercollegiate Athletics*, 17 MARQ. SPORTS L. REV. 481–502 (2006–2007).

In this article, Osborne examines the intersection of sexual orientation and college athletics. She notes that discrimination is rampant in college athletic programs and examines the impact of such discrimination, viability of legal claims and potential remedies, and makes recommendations for programs to decrease the incidence of sexual orientation discrimination. Osborne notes that players who suffer from discrimination are often humiliated and isolated due to the discrimination and sometimes suffer physical violence; coaches are often denied employment or advancement or even terminated due to sexual orientation discrimination. Osborne recommends that intercollegiate athletic departments create atmospheres of respect and acceptance and that they comply with the institution's non-discrimination policy; at the time of the writing of the article, 562 colleges or universities included sexual orientation as a protected category in their non-discrimination policies.

Pirics, Meghan M., *Undressing the Locker Room Issue: Applying Title IX to the Legal Battle over Locker Room Equality for Transgender Student-Athletes*, 27 MARQ. SPORTS L. REV. 449–70 (2017).

Recent months have seen heated debates over bathroom and locker room issues surrounding transgender students. The author begins this discussion by referencing a 2015 Office for Civil Rights decision that a school district in Illinois violated Title IX by excluding a transgender female student from access to the women's locker room during her physical education classes and as a member of a women's athletic team. Through this lens, the author explores the complex relationship between Title IX and gender identity discrimination. Pirics concludes by asserting that the Supreme Court should decide whether Title IX protects against gender identity discrimination. She asserts that if the Supreme Court decides that "transgender" is not a protected class, Congress should amend Title IX to include protections for transgender discrimination.

ROPER, EMILY A., *GENDER RELATIONS IN SPORT* (2013).

This book examines the broader issue of gender relationships in athletics, and is intended for students studying in the social sciences. Chapter four, "Sexual Identity and Sport," examines issues surrounding LGBTQ athletes and the hostile environment they face. Chapter eight, "Sexual Harassment and Abuse and Sport," is also of interest because it discusses the culture of sport as well as risk factors for harassment and abuse that need to be recognized.

Rozenberg, Elliot S., *Leveling the Playing Field: Making it Easier to Come out of the Closet. From Inside the Locker Room*, 30 ENT. & SPORTS L. 1–21 (2012).

Rozenberg asserts that the homophobic environment in professional sports is a type of employment discrimination that should be remedied; he analyzes potential claims under existing law. He notes that traditionally athletes and coaches were expected to keep their sexual orientation a secret and that mere questioning of an athlete's sexuality could mean the end of his or her career. Rozenberg argues that athletes are employees, not independent contractors, and therefore should be able to sue both the team and the league for employment discrimination. He further notes that sexual orientation is not a protected class under Title VII, and that athletes should use state and local laws until federal anti-

discrimination legislation that includes sexual orientation, such as the Employment Non-Discrimination Act, is passed.

Shell, Morgan, *Transgender Student-Athletes in Texas School Districts: Why Can't the UIL Give All Students Equal Playing Time?*, 48 TEX. TECH. L. REV. 1043–79 (2016).

Shell begins the article by addressing the social climate after the U.S. Supreme Court's decision on *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), noting that the LGBT community deserves equal protection within the law. Shell states that transgender students, in particular athletes, are not receiving this equal protection when athletic policies require a transgender student to play sports in accordance with the gender on their birth certificates instead of in accordance to their gender identity. Policies that require adherence to the birth certificate essentially exclude transgender students from participating in sports, which potentially has equal protection and Title IX implications.

Sinisi, Jennifer V., *Gender Non-Conformity as a Foundation for Sex Discrimination: Why Title IX May Be an Appropriate Remedy for the NCAA's Transgender Student Athletes*, 19 VILL. SPORTS & ENT. L.J. 343–70 (2012).

Sinisi examines the NCAA's policies and the impact they have on transgender athletes as well as potential Title IX protections. NCAA policy states that athletes must compete as the gender that matches their classification identified on a driver's license or other state-issued documentation. Sinisi argues that colleges and institutions adhering to such policies are open to litigation because, since many of Title VII's protections have been applied to Title IX cases, Title VII's protection against gender stereotyping should also be applied. Sinisi argues that requiring a person to conform to gender norms is gender stereotyping.

Skinner-Thompson, Scott & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC'Y 271–300 (2013).

Skinner-Thompson and Turner argue that all students in grades K-12 should be allowed to participate in athletics according to their gender identity. They argue that Title IX requires such an inclusive policy. The authors analogize transgender discrimination to Title VII employment discrimination and Title IX anti-harassment precedent. They conclude

that any alleged concerns regarding locker room privacy or potential competitive disadvantage is overblown, and the benefits of allowing transgender students to play alongside children of the same gender that they identify with allows the students and the community to thrive.

Stefanilo, Michael, Jr., *If You Can Play ... You Can Play*—*An Exploration of the Current Culture Surrounding Gay Athletes in Professional Sports with a Particular focus on Apilado v. NAGAA*, 20 SPORTS LAW. J. 21–42 (2013).

The purpose of this article is twofold; first, Stefanilo examines the culture surrounding LGBT athletes in the Big Four (NHL, NFL, MLB, and NBA), and, second, he discusses a court decision that he believes was a step backwards for LGBT athletes. Stefanilo states early in the article that, although at the time of writing there had not been a Big Four athlete who came out, the general culture in sport was moving toward acceptance. However, he argues that the Court's decision in *Apilado v. N. Am. Gay Athletic Alliance*, 792 F. Supp.2d 1151 (W.D. Wash. 2011), upholding a rule of the NGAA that required no more than two heterosexuals on a team was detrimental to LGBT rights and acceptance in sport. He concludes that the NGAA should promote inclusion for all athletes, regardless of sexual orientation.

Williams, Claire, *Sexual Orientation Harassment and Discrimination: Legal Protection for Student-Athletes*, 17 J. LEGAL ASPECTS SPORT 253–84 (2007).

Williams examines Title IX and the Equal Protection Clause of the Fourteenth Amendment to determine what, if any, protections exist against sexual orientation discrimination in sports. She further examines Title VII and the First Amendment as alternate avenues for legal recourse against sexual orientation discrimination. Williams argues that the language of Title IX should be altered to include sexual orientation discrimination and make a clear distinction between harassment and discrimination. She further argues that sexual orientation should be held to an intermediate level of scrutiny in equal protection analysis.

Wilson, Robin Fretwell, *Squaring Faith and Sexuality: Religious Institutions and the Unique Challenge of Sports*, 34 LAW & INEQ. 385–488 (2016).

In this article, Wilson examines the leniency religious colleges and universities are given in creating exceptions to law based on religious beliefs. Wilson argues that facially neutral policies continue to exclude LGBT students and will come under fire legally, particularly under Title IX. Policies that religious institutions can protect their interests in the conduct of their student athletes by enacting broad policies that apply equally to heterosexual students.

ZEIGLER, CYD, *FAIR PLAY: HOW LGBT ATHLETES ARE CLAIMING THEIR RIGHTFUL PLACE IN SPORTS* (2016).

This book examines key moments in the history of sports that have influenced participation for openly LGBTQ athletes. The book contains stories about athletes who have come out as LGBTQ, such as Michael Sam and Fallon Fox. The author also discusses younger athletes who have come out and made a positive impact in sports at the high school and college levels.

Ziegler, Elizabeth M., "*It Got too Tough to not Be Me*": *Accommodating Transgender Athletes in Sport*, 39 J.C. & U. L. 467–509 (2013).

Ziegler argues that eligibility criteria for participation in tournaments, state, conference, and national, should be standardized to reduce or eliminate incidence of transgender athletes experiencing problems in being able to participate. She states that participation regulations vary widely across different levels of competition. Ziegler argues that, on the K-12 level of competition, there should be a uniform policy across all governing bodies that is more flexible because K-12 athletes are of a younger age and it is unrealistic to require sex reassignment surgery. She argues that, even at the college level, it is unrealistic to require sex reassignment surgery, and the NCAA should include in its policy specific steps to help athletes transition. She concludes that the NCAA should include the current policy in their bylaws so that schools may be subject to sanctions if they fail to comply.

Primary Sources

Apilado v. N. Am. Gay Amateur Athletic All., 792 F. Supp. 2d 1151 (W.D. Wash. 2011)

Obergefell v. Hodges, 135 S. Ct. 2584 (2015)

Title IX, An Act to Amend the Higher Education Act of 1965, Pub. L. No. 92-318, 86 Stat. 235 (1972), codified at 20 U.S.C. §§ 1681–1688