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Gender Boxing: The IOC's Policy on Female Hyperandrogenism and Attempt to Draw Bright Lines Between Sexes While the World Outside Athletics Embraces Gender Fluidity

Holly E. Jones

Villanova University School of Law, hjones4@law.villanova.edu

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GENDER BOXING: THE IOC’S POLICY ON FEMALE HYPERANDROGENISM AND ATTEMPT TO DRAW BRIGHT LINES BETWEEN SEXES WHILE THE WORLD OUTSIDE ATHLETICS EMBRACES GENDER FLUIDITY

Holly E. Jones

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I. BATTLE OF THE SEXES: AN INTRODUCTION TO THE OLYMPIC STRUGGLE TO DEFINE ATHLETE GENDER

In a world undergoing a rapid shift toward acceptance of gender-fluidity and gender-neutrality, the realm of athletic competition

keeps a strong grip on rigid boundaries and the gender binary.¹ Elite athletic competition favors broad-sweeping policies in the name of fair competition for the majority at the expense of a minority.² Caster Semenya's portrayal by the media embodies this heated issue.³ The South African middle-distance runner became synonymous with gender testing in athletics after she gained international media attention from her performance in the 2009 IAAF World Championships in Athletics in Berlin.⁴

Semenya captured the public's attention with her stellar performance in the women's 800-Meter event, in which she dominated her competition.⁵ This international attention rapidly shifted from

¹ See Ann J. Curley, *Expert: Gender Testing 'Imperfect' for Female Athletes*, CNN (Aug. 8, 2012, 9:04 AM), <http://www.cnn.com/2012/08/08/health/athletes-gender-testing/> (discussing the International Olympic Committee's (IOC) treatment of Caster Semenya during the 2012 Olympic Games after coming under public scrutiny for her masculine appearance and providing a brief outline of gender testing's history and the methods used by the International Association of Athletics Federations (IAAF) and the IOC).

This year, the London Olympic Committee instituted a new testing policy that measures testosterone levels of female athletes, rather than DNA. The testing is performed only if questions are raised about a female athlete's performance, and must be requested by a chief medical officer of a national Olympic committee or a member of the International Olympic Committee's medical commission.

Id. See also Donna Rose, *Transsexual Athletes Treated Unfairly*, CNN (Oct. 20, 2010, 1:49 PM),

<http://www.cnn.com/2010/OPINION/10/18/rose.transsexuals.sports/index.html>

(providing background for the history of discrimination against minority groups in elite athletics, particularly the discrimination faced by transsexual athletes).

As transgender people continue to integrate into all aspects of broader society, the practices that have historically been accepted as "just the way it is" will be identified as discrimination. So, too, will the daily indignities that so many of us face regarding bathrooms, jobs, housing, harassment and having to prove our manhood or womanhood to be identified as unacceptable, illegal and inherently unfair. *Id.*

² See Curley, *supra* note 1 (discussing flaws with the IOC's updated 2012 policy on gender determination of athletes).

³ See Mike Hurst, *Caster Semenya Has Male Sex Organs and No Womb or Ovaries*, DAILY TELEGRAPH (Sept. 11, 2009, 12:01 AM),

<http://www.dailytelegraph.com.au/sport/semenya-has-no-womb-or-ovaries/story-e6frefxni-1225771672245?nk=41f963a38dc8a83f5666ebdc1558c622> (providing an

example of the crude and offensive manner in which the media portrayed Caster Semenya and her experience with the IOC during the 2012 Olympic Games).

⁴ See Curley, *supra* note 1 (discussing Caster Semenya's ordeal with the IOC during the 2012 Olympic Games).

⁵ See *12th IAAF World Championships in Athletics –800 Metres –Women*, INT'L ASS'N OF ATHLETICS FED'NS (Aug. 19, 2009, 9:35 PM),

<http://www.iaaf.org/results/iaaf-world-championships-in-athletics/2009/12th-iaaf-world-championships-in-athletics-3658/women/800-metres/final/result> (providing

Semenya's athletic performance to speculations, skepticism, and harassment revolving around her gender identity.⁶ Some media sources went as far as to declare "world athletics in crisis" while the debate raged over Semenza's gender.⁷ The IAAF initially banned Semenza from further competition, and it only cleared Semenza for future competition after an eleven month ordeal and countless tests intended to provide guidance that would ultimately allow the IAAF to check a single box with satisfaction: female.⁸

Three years later, Semenza returned to the headlines when she appeared in the 2012 Olympic Games.⁹ Despite clearance to compete in the women's events, Semenza again faced a media onslaught.¹⁰ Semenza's experience is likely unprecedented in the amount of media attention attracted.¹¹ However, the media's fixation on an athlete's

results from the 2009 IAAF World Championships in the women's 800 meter event in track and field, in which Caster Semenza placed first overall).

⁶ See, e.g., Alice Dredger, *Where's the Rulebook for Sex Verification?*, N.Y. TIMES (Aug. 21, 2009), <http://www.nytimes.com/2009/08/22/sports/22runner.html> (covering Caster Semenza's appearance in the 2012 Olympic Games); see also Hurst, *supra* note 3.

⁷ See *id.* ("Basically they . . . have known for months, for years, that she's not normal.").

⁸ See *Athlete Semenza Cleared to Compete After Gender Test Controversy*, CNN (July 6, 2010, 1:20 PM),

<http://www.cnn.com/2010/SPORT/07/06/athletics.semenya.cleared.to.run/>

(discussing Caster Semenza's clearance by the IAAF to return to international competition in women's athletics after gender testing concluded).

⁹ See Faith Karimi, *South Africa's Semenza Makes Olympics Debut 3 Years After Gender Firestorm*, CNN (Aug. 8, 2012, 9:07 AM),

<http://www.cnn.com/2012/08/08/world/europe/olympics-semenya-debut/index.html>

(chronicling Caster Semenza's return to international athletic competition after the 2009 IAAF World Championships).

¹⁰ See *id.* (discussing Caster Semenza's return to international athletic competition).

See also Rebecca Jordan-Young & Katrina Karkazis, *You Say You're a Woman? That Should Be Enough*, N.Y. TIMES (June 17, 2012),

http://www.nytimes.com/2012/06/18/sports/olympics/olympic-sex-verification-you-say-youre-a-woman-that-should-be-enough.html?_r=1& (critiquing the overly-

simplistic nature of IOC's gender-determination tests and the issues and injustice that accompany focusing on testosterone in those tests).

Unlike in doping cases, women with hyperandrogenism have not cheated. There is no reason to disqualify women whose bodies produce any of the complex ingredients that add up to athleticism, be they superb vision, big lungs, flexibility, long legs or testosterone. The obsessive focus on sex has done enough harm.

Id.

¹¹ See Rose, *supra* note 1 (providing a number of examples of discrimination against transsexual athletes in athletic competition in the media).

gender identification is a recurring theme in athletic competition.¹² While a number of realms outside athletics are rapidly shifting away from the gender binary and toward fluidity, the world of athletics adheres to strict binary classification in promotion of fair competition.¹³ Separating individuals into female and male groups in order to enable fair competition necessitates a need for criteria by which to divide the genders.¹⁴ Semenya's ordeal spurred the International Olympic Committee (IOC)¹⁵ to reevaluate the standards by which it makes these divisions.¹⁶

II. ULTIMATE AUTHORITY: THE IOC

The IOC acts as the governing authority for the Olympic Games, determining the standards for allowing athletes to compete in

¹² See Katrina Karkazis et al., *Out of Bounds? A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes*, AM. J. BIOETHICS 3, 6 (2012), available at <http://www.tandfonline.com/doi/pdf/10.1080/15265161.2012.680533> (providing a comprehensive analysis of the IOC's 2012 updated policy on hyperandrogenism and lack of scientific data to support the IOC's chosen testing methods and criteria). A central assumption underlying the IAAF and IOC policies is that atypically high levels of endogenous testosterone in women create an unfair advantage and must therefore be regulated. The current scientific evidence, however, does not support the notion that endogenous testosterone levels confer athletic advantage in any straightforward or predictable way.

Id.

¹³ See Eric Vilain, *Gender Testing for Athletes Remains a Tough Call*, N.Y. TIMES (June 18, 2012), <http://www.nytimes.com/2012/06/18/sports/olympics/the-line-between-male-and-female-athletes-how-to-decide.html> (discussing the difficulty of enabling fair athletic competition while drawing boundaries between eligibility for competition in male and female athletics). "Sports officials are faced with an impossible quandary: a socially imposed sex division in sports (allowing half of the world's population to have a chance at winning) with no clear objective way to draw a line between male and female." *Id.*

¹⁴ *Id.*

¹⁵ See *The Organisation*, OLYMPIC.ORG, <http://www.olympic.org/about-ioc-institution?tab=organisation> (last visited Sept. 7, 2014) (providing background about governance of the Olympic games and the IOC, which serves as the Olympic games' highest governing body).

¹⁶ See Tracie White, *Media Advisory on New Olympics Testosterone Policy: Stanford Expert Available to Comment on Unfair Treatment of Women Athletes*, STANFORD MED. (June 25, 2012), <http://med.stanford.edu/news/all-news/2012/06/media-advisory-on-new-olympics-testosterone-policy-stanford-expert-available-to-comment-on-unfair-treatment-of-women-athletes.html> (critiquing the lack of evidentiary support for the IOC's chosen criteria for gender testing of athletes). "The International Olympic Committee has adopted new gender-policing policies, which a Stanford bioethicist has challenged as unfair, unscientific and possibly discriminatory against women who may not meet traditional notions of femininity." *Id.*

women's events.¹⁷ After announcing the re-establishment of the Olympic Games, Pierre de Coubertin founded the IOC in 1894 as one of three components of the new "Olympic Movement."¹⁸ The IOC, acting as the "supreme authority of the Movement," served in an oversight role alongside the International Federations (IFs) and the National Olympic Committees.¹⁹ IFs consist of the "international non-governmental organisations administering one or several sports at world level and encompassing organisations administering such sports at a national level."²⁰ National Olympic Committees provide authority for the designation of Olympic host cities, while also acting as the exclusive power in deciding which athletes may attend the games.²¹

¹⁷ See Megan McConnell & Matt Long, *International Olympic Committee (IOC): Anatomist*, INST. FOR SO'Y & GENETICS, <http://societyandgenetics.wordpress.com/spring-2013/testing-sex-for-competitive-sports/suspects/ioc/> (last visited Sept. 7, 2014) (providing a historical overview of the IOC's gender testing methods and criteria from the 1960s to present day). The IOC's testing methods over the past half-century have shifted along with innovations in available testing methodology. *Id.* Testing began with the primary goal of detecting males attempting to gain unfair advantages by competing in women's events. *Id.* The IOC sought to detect this in the 1960s with crude "nude parades," in which panels of physicians observed the secondary sex characteristics of nude athletes. *Id.* After switching to chromosomal testing for the presence of Barr bodies (additional x chromosomes in an individual's genetic makeup) the IOC ceased testing altogether only to begin again in the 1990s. *Id.* Using more sophisticated methods, the IOC reintroduced gender testing on a case-by-case basis in 2000. *Id.* In recent years, the IOC's focus shifted from basic genetic makeup, primarily using methods targeting chromosomal compositions, to hormone levels, particularly testosterone levels in hyperandrogenic athletes. *Id.* Thus, the focus of the IOC's testing methods has shifted from detecting males, masquerading as females to gain an unfair advantage in athletic competition, to detecting female-identifying athletes with atypical hormone levels whom the IOC deems to have an unfair advantage in competing alongside other female competitors with more typical hormonal levels. *Id.* One obvious flaw in this logic is the fact that individuals competing in athletics at an elite level are anything but average in physical makeup, though hormonal levels and more evident physical characteristics typically differ a great deal from the average person. This is true for both female and male athletes, though only female athletes are compared to non-elite athlete females in gauging unfair advantage over the competition. Male elite athletes are not compared to non-elite male athletes in determining unfair advantage and are, in large, not considered by the IOC for unfair advantages.

¹⁸ See *The Organisation*, *supra* note 15 (providing background about the history and structure of the Olympics' establishment, governance, and ideals). "The goal of the Olympic Movement is to contribute to building a peaceful and better world by educating youth through sport practised without discrimination or any kind, in a spirit of friendship, solidarity and fair play." *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

Two years later, the world witnessed the “1st Olympic Games of the modern era.”²² In 1900, fourteen years after reinstating the Olympic Games, women finally joined men in the competition.²³ Initially, the games limited women to competition in five athletic events: tennis, sailing, croquet, equestrian, and golf.²⁴ The 2012 Olympics, during which Semenya dominated headlines, marked a milestone for gender equality in athletic competition.²⁵ These games marked the first instance in Olympic history in which women participated in every sport in the Olympic program.²⁶ Unfortunately, the public’s obsession with gender identification served as two steps backwards to this one step forward.²⁷

The Olympics *have* undergone a great deal of progress toward gender equality.²⁸ However, the speed of this progress pales in comparison to that of its athletes.²⁹ This is reflected in the timeline of the IOC’s acceptance of women’s participation in the Olympics.³⁰ Fourteen years from its re-inception, the Olympics accepted the participation of women.³¹ Ninety-one years later, 105 years from the inception of the modern games, the IOC mandated the inclusion of

²² *Id.*

²³ See *Top 10 FAQ*, OLYMPIC.ORG, <http://registration.olympic.org/en/faq> (last visited Sept. 7, 2014) (providing a brief overview of the history of the Olympics’ inclusion of athletic events for women).

²⁴ *Id.*

²⁵ See *id.*; Erin Geiger Smith, *Olympic Lawsuits that Could Have Changed History*, BUS. INSIDER (Feb. 18, 2010, 10:05 AM), <http://www.businessinsider.com/lawyers-going-for-the-gold-ten-olympic-lawsuits-2010-2?op=1> (providing a history of some of the most notorious legal controversies in the history of the Olympic Games). While the 2012 Summer Games marked the first instance in which women competed in every athletic event, women were prohibited from competing in Olympic ski jumping in the 2010 Winter Games. See *infra* note 34 and accompanying text.

²⁶ See *Top 10 FAQ*, *supra* note 23 (providing an overview of participation of women in the Olympic Games). See Smith, *supra* note 25 (detailing the sex discrimination in the 2010 Olympic Games, revealing that sex discrimination is far from eradicated).

²⁷ See Hurst, *supra* note 3 (discussing the controversy surrounding Caster Semenya’s participation in the 2009 IAAF World Championships and the crass manner in which this public discussion took place). “Tests conducted during the world athletics championships in Berlin last month, where Semenya’s gender became the subject of heated debate following her victory in the 800m, revealed evidence she is a hermaphrodite, someone with both male and female sexual characteristics.” *Id.*

²⁸ See *Top 10 FAQ*, *supra* note 23 (providing a brief overview of progression toward equality for women in the Olympic Games).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

competition for women in any event added to the games.³² While commendable in final result, taking almost a century to reach such a conclusion hardly suggests exigency to arrive there.³³

This resolution is by no means an arrival at clear equality for the sexes in the Olympics.³⁴ The Olympic Charter now requires the IOC “to encourage and support the promotion of women in sport at all levels and in all structures with a view to implementing the principle of equality of men and women.”³⁵ The Charter also declares that “any form of discrimination with regard to a country or a person on grounds of race, religion, politics, gender or otherwise is incompatible with belonging to the Olympic Movement.”³⁶ However, this purported inclusion fails to acknowledge equality for those outside society’s rigid gender binary structure.³⁷

An individual’s classification as male or female, which society demands in so many situations, dictates that individual’s legal rights and privileges.³⁸ This classification creates legal issues when the

³² *Id.*

³³ *Id.*

³⁴ See *Vancouver Court Case: Women Ski Jumpers’ Legal Push for the 2010 Olympics*, WOMEN’S SKI JUMPING USA <http://www.wsjusa.com/vancouver-case/> (last visited Sept. 20, 2014) (chronicling the legal fight for the inclusion of women’s ski jumping in the 2010 Olympic Games in Vancouver, which ultimately failed). After the International Ski Federation voted 114-1 to include women’s ski jumping in the 2010 Olympic Games, the IOC declined to include the event. *Id.* This prompted female ski jumpers from five countries to file suit against the IOC for sex discrimination. *Id.* In 2011, the IOC approved one women’s ski jumping event for the 2014 Olympic Games held in Sochi. *Id.*

³⁵ *Olympic Charter*, INT’L OLYMPIC COMMITTEE (Sept. 2015), available at http://www.olympic.org/documents/olympic_charter_en.pdf (detailing the IOC’s primary function and goals in governing the Olympic Games). The Olympic charter serves as the IOC’s governing charter and the codification of the Fundamental Principles of Olympism, Rules and Bye-Laws adopted by the International Olympic Committee. . . . In essence, the Olympic Charter serves three main purposes:

a) The Olympic Charter, as a basic instrument of a constitutional nature, sets forth and recalls the Fundamental Principles and essential values of Olympism.
 b) The Olympic Charter also serves as statutes for the International Olympic Committee.
 c) In addition, the Olympic Charter defines the main reciprocal rights and obligations of the three main constituents of the Olympic Movement, namely the International Olympic Committee, the International Federations and the National Olympic Committees, as well as the Organising Committees. *Id.* at 11.

³⁶ *Id.*

³⁷ *Id.*

³⁸ See *TLDEF in the News*, TRANSGENDER LEGAL DEF. & EDUC. FUND, http://www.transgenderlegal.org/news_index.php (last visited Sept. 7, 2014) (providing a current catalogue of transgender legal issues and suits across the United

classification, which has been thrust upon the individual by society, clashes with that determined by the individual him or herself.³⁹ An individual's success in a legal suit depends on a number of factors.⁴⁰ One key factor is whether the claimant has standing: "a party's right to make a legal claim or seek judicial enforcement of a duty or right."⁴¹ This requires "that the interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question."⁴²

The issue of standing becomes hazier in the world of gender identity and athletics.⁴³ Courtrooms across the nation have recognized rights of individuals to self-identify and have rejected the antiquated concept of gender roles.⁴⁴ The ability of individuals to participate in

States). The Transgender Legal Defense and Education Fund provides updates on current legal issues and suits surrounding transgender issues, providing links to articles discussing the issues and legal outcomes. *Id.*

³⁹ *See id.*

⁴⁰ *See Standing*, BLACK'S LAW DICTIONARY 1924 (9th ed. 2009).

⁴¹ *Id.*

⁴² *Id.* *See also* United States v. Windsor, 133 S. Ct. 2675, 2676 (2013) (internal citations omitted) (discussing the requirements for standing under Article III cases). The requirements of Article III standing are: (1) the plaintiff must have suffered an 'injury in fact,' that is, an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of, that is, the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id.

⁴³ *See* Dredger, *supra* note 6 ([outlining the factors contributing to hyperandrogenism and Androgen Insensitivity Syndrome among other genetic and hormonal conditions that make gender determination a complex issue for the IOC and elite athletic competition](#)).

Consider an analogy: Men on average are taller than women. But do we stop women from competing if a male-typical height gives them an advantage over shorter women? Can we imagine a Michele Phelps or a Patricia Ewing being told, "You're too tall to compete as a woman?" So why would we want to tell some women, "You naturally have too high a level of androgens to compete as a woman?" There seems to be nothing wrong with this kind of natural advantage. So where do we draw the line between men and women in athletics? I don't know. The fact is, sex is messy The [IAAF] has called upon a geneticist, an endocrinologist, a gynecologist, a psychologist and so forth. *Id.*

⁴⁴ *See, e.g.,* David Sharp, *Lawsuit Brought by Transgender Student over Bathrooms, Harassment Goes to Maine Supreme Court*, FOX NEWS (June 12, 2013), <http://www.foxnews.com/us/2013/06/12/lawsuit-brought-by-transgender-student-over-bathrooms-harassment-goes-to-maine/> (detailing Nicole Maines' discrimination suit against her school district for forcing the female-identifying transgender student to use the staff bathroom); Ed Payne, *Transgender First-Grader Wins the Right to*

activities historically reserved for specific sexes illustrates a broad movement toward gender fluidity.⁴⁵ The federal government officially recognizes same-sex couples in the post-*Windsor* era, reflecting society's movement toward acceptance.⁴⁶ This embodies a dramatic shift beyond mere tolerance, which *Lawrence v. Texas* accomplished.⁴⁷ The movement for equal rights for LGBT individuals in the United States has focused on the rights of gay and lesbian individuals.⁴⁸ However, society generally lumps these marginalized groups together, and none have yet achieved uniform equal rights in the United States.⁴⁹

Sex, sexuality, and gender are different concepts that are inextricably intertwined.⁵⁰ Rights based on sex are arguably more

Use Girls' Restroom, CNN (June 24, 2013, 3:15 PM),

<http://www.cnn.com/2013/06/24/us/colorado-transgender-girl-school/> (detailing Coy Mathis's discrimination suit against her school district for refusing to allow the female-identifying transgender first-grader to use the girl's bathroom).

⁴⁵ See *infra* note 47 and accompanying text. See also *infra* note 70 and accompanying text.

⁴⁶ See *infra* note 70 and accompanying text.

⁴⁷ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (finding a Texas statute criminalizing sodomy unconstitutional).

Had those who drew and ratified the Due Process Clause of the Fifth Amendment of the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact only serve to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Id.

⁴⁸ See *infra* notes 70-74 and accompanying text. See also *infra* note 65 and accompanying text (providing a comparison between the efforts made by the gay and lesbian movement for equality verses that those by trans individuals). "The trans perspective is now about where gay and lesbian characters were 20 years ago." J. Tebble, *Is the Tide Turning for Transgender Actors?*, NEW STATESMAN (Sept. 9, 2014, 9:27 AM), <http://www.newstatesman.com/culture/2014/09/tide-turning-transgender-actors>.

⁴⁹ See *LGBT Rights*, ACLU, <https://www.aclu.org/lgbt-rights> (last visited Oct. 18, 2014) (providing backgrounds on key issues revolving around civil rights for LGBT individuals). The ACLU highlights key issues faced by women, including "basic rights and liberties, parenting, relationships and marriage, youth and schools, and transgender discrimination." *Id.*

⁵⁰ See Judith Lorber, *Beyond the Binaries: Depolarizing the Categories of Sex, Sexuality, and Gender*, 66 SOC. INQUIRY 2, 143, 146 (1996) (rejecting the gender binary and stressing the importance of distinguishing between sex, sexuality, and gender).

It is important to split what is usually conflated as sex/gender or sex/sexuality/gender into three conceptually distinct categories: sex (or biology, physiology), sexuality (desire, sexual preference, sexual orientation), and gender (a social status, sometimes with sexual identity). Each is socially constructed but in different ways. Gender is

defined,⁵¹ while those based on sexuality have made considerable progress;⁵² those based upon the social construct of gender lag behind.⁵³ While the United States has made commendable progress toward establishing legally enforceable rights for the LGBT group as a whole, transgender individuals have been left behind.⁵⁴ However, increased litigation and the enactment of inclusive policies and legislation indicates a movement toward legal recognition and equal rights for this marginalized group.⁵⁵ Much of the progress occurring presently builds somewhat upon the acknowledgement of rights for gay and lesbian individuals.⁵⁶

Increased media presence of particular marginalized groups reflects the discrepancy of treatment between these gays and lesbians as opposed to transgender individuals.⁵⁷ Media portrayal serves as a

an overarching category – a major social status that organizes almost all areas of social life. Therefore bodies and sexuality are gendered; biology, physiology, and sexuality, in contrast, do not add up to gender, which is a social institution that establishes patterns of expectations for individuals, orders the social processes of everyday life, is built into the major social organizations of society, such as the economy, ideology, the family, and politics, and is also an entity in and of itself.*Id.* (internal citations omitted).

⁵¹ See *Women's Suffrage in the Progressive Era*, LIBR. OF CONGRESS, <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/progress/suffrage/> (last visited Oct. 16, 2014) (summarizing history of women's rights in the United States post-1900); Heidi Williamson, *A Quick Guide on the Human Rights of Women*, CTR. FOR AMERICAN PROGRESS (last visited Oct. 9, 2014), <http://www.americanprogress.org/issues/women/report/2014/10/09/98695/a-quick-guide-on-the-human-rights-of-women/> (providing statistics and summaries of progression of women's rights in areas of reproductive health, reproductive rights, and reproductive justice).

⁵² See *infra* notes 70-74 and accompanying text.

⁵³ See *supra* note 38 and accompanying text. See also *infra* note 65 and accompanying text.

⁵⁴ See *supra* note 38 and accompanying text.

⁵⁵ See *supra* note 38 and accompanying text. See also *infra* note 65 and accompanying text.

⁵⁶ See *supra* note 65 and accompanying text.

⁵⁷ See Fred Fejes & Kevin Petrich, *Invisibility, Homophobia, and Heterosexism: Lesbians, Gays and the Media*, 10 CRITICAL STUD. IN MASS COMM. 396, 397-98 (1993) (discussing history of the portrayal of gays and lesbians in the media). More so than other minority groups, media presence for gays, lesbians, and trans individuals is crucial for the development of their culture in the United States. *Id.* at 396. Unlike other minority groups, gay, lesbian, and trans individuals generally are not born into a family or community that reflects their own characteristics. *Id.* It is uniquely the product of a modern urban technological society which allows individuals to separate themselves from the power of family, religion, and community of birth and define new expressions of identity, sexuality, and sociality. An important goal of the gay and lesbian movement is achieving an affirmative visibility in the mainstream media

remarkably accurate reflection of society's acceptance of particular groups.⁵⁸ Heterosexual cisgender individuals dominate the media as the default protagonist.⁵⁹ Gay and lesbian characters were once invisible in mainstream media.⁶⁰ This progressed to appearances as the token gay or lesbian individual.⁶¹ While certainly still outnumbered today, gay and lesbian characters now fill protagonist roles.⁶² This holds true for both gay and lesbian characters and the actors and actresses portraying them.⁶³ On the other hand, the presence of a transgender individual on a television show, whether the character or the actor portraying the character, is still considered unconventional enough to make headlines.⁶⁴ Only when an individual's gender is not considered news will transgender individuals have achieved equality.⁶⁵

Id. at 397.

⁵⁸ See *supra* note 57 and accompanying text. See also LARRY GROSS, UP FROM INVISIBILITY: LESBIANS, GAY MEN, AND THE MEDIA IN AMERICA 13-15 (2001) (analyzing the increased presence of gay, lesbian, and transgender individuals in the media). The media has served "both as carriers and reflections of transformations that the force of cultural reaction have been powerless to reverse." *Id.* at xvi. The gender system is supported...by the mass media's treatment of sexual minorities. Lesbians and gays men are usually ignored altogether; but when they do appear, it is in roles that support the 'natural' order and they are thus narrowly drawn. The stereotypic images are always present, if only implicitly, as when gay characters are depicted in a carefully 'anti-stereotypic' manner that draws our attention to the absence of the 'expected' attributes.

Id. at 14-15.

⁵⁹ See *supra* note 58 and accompanying text. See also Eric Anthony Grollman, *Transgender, Genderqueer, Cisgender . . . What Do These Terms Mean?*, KINSEY INST. (Oct. 5, 2010), <http://kinseyconfidential.org/transgender-genderqueer-cisgender-terms/> (defining gender identity terms). Cisgender refers to individuals who identify with their biological sex and societal standards for that sex and gender, as opposed to transgender individuals. This includes women who are biologically female and men who are biologically male.

⁶⁰ See *supra* notes 57-58 and accompanying text.

⁶¹ See *supra* note 58 and accompanying text.

⁶² See *supra* note 58 and accompanying text.

⁶³ See *supra* notes 57-58 and accompanying text.

⁶⁴ See Amanda Holpuch, *Laverne Cox Heralds 'Transgender Tipping Point' on Cover of Times*, GUARDIAN (May 29, 2014, 10:43 AM), <http://www.theguardian.com/media/2014/may/29/laverne-cox-transgender-time-magazine> (discussing Laverne Cox). Laverne Cox, a transgender actress, is celebrated for her prominence "as the first transgender black woman to have a leading role on a mainstream US television show." *Id.* See also Noah Michelson, *Laverne Cox Makes History with Emmy Nomination*, HUFFINGTON POST (July 10, 2014, 12:29 PM), http://www.huffingtonpost.com/2014/07/10/laverne-cox-emmy-nomination_n_5574608.html (discussing Laverne Cox and her historic Emmy nomination). Laverne Cox is the "first openly transgender actress to receive an Emmy nomination." *Id.*

The general public has no qualms with discussing a celebrity's sexuality or gender in the media.⁶⁶ It certainly had no issue doing so with Caster Semenya and neglected to even include her in the conversation.⁶⁷ Numerous news outlets speculated about an inherently personal subject, as was the case several years later with Laverne Cox.⁶⁸ The media continues to reduce members of the trans community to a single facet, indicating the progress that remains to be made.⁶⁹

Individuals in the United States are fortunate enough to assert rights to marry,⁷⁰ serve in the military,⁷¹ use a particular restroom,⁷²

⁶⁵ See Tebble, *supra* note 48 (noting the increased presence of transgender actors in the media and the delayed progress of transgender rights and visibility while mirroring the earlier progress for rights and visibility of gay and lesbian actors). There's something of a sea change taking place that is seeing an increased visibility of trans people in all walks of life, not just the performing arts. The lives of these individuals and the stories they tell are being seen in more and more plays, TV shows, and films. The trans perspective is now about where gay and lesbian characters were 20 years ago.

Id.

⁶⁶ See, e.g., *supra* notes 7-8 and accompanying text. See also *supra* note 64 and accompanying text.

⁶⁷ See, e.g., *supra* notes 7-8 and accompanying text.

⁶⁸ See *supra* notes 7-8 and accompanying text. See also *supra* note 64 and accompanying text.

⁶⁹ See *supra* notes 7-8 and accompanying text. See also *supra* note 64 and accompanying text.

⁷⁰ See *United States v. Windsor*, 133 S. Ct. 2675, 2675-76 (2013) (striking down the definitions of "marriage" and "spouse" as included in the Defense of Marriage Act (DOMA)). Windsor brought suit against the United States for discrimination against same-sex couples when she was denied a tax return on the estate she received upon the death of her lifelong partner, her marriage to whom the United States did not recognize. *Id.* at 2682. This landmark decision held that restricting marriage to heterosexual couples violated the Due Process Clause of the Fifth Amendment. *Id.* at 2695. See also Richard Socarides, *How the Court Ruled on DOMA and Prop 8*, THE NEW YORKER (June 26, 2013), available at <http://www.newyorker.com/news/news-desk/how-the-court-ruled-on-doma-and-prop-8> (summarizing *Windsor* and the passage of Proposition 8 in California in terms of their potential impact on equality for homosexual individuals and equal rights overall in the United States). The decision did not legalize same-sex marriage or require states to legalize same-sex marriage on a federal level. *Id.* However, the ruling requires states in which same-sex marriage is recognized to treat legally married same-sex couples as married in the eyes of federal government. *Id.* [T]he ruling will affect many thousands of couples, perhaps none more dramatically than those gay Americans who are married to foreign nationals and who will now be allowed to sponsor their spouses for green cards. President Obama, in a statement welcoming the DOMA ruling, said, "The laws of our land are catching up to the fundamental truth that millions of Americans hold in our hearts: when all Americans

work in a bias-free environment,⁷³ and even serve time in the correct prison.⁷⁴ Gender-discrimination violates Constitutional rights in these instances.⁷⁵ But with elite athletic completion, a right becomes a mere privilege at some point.⁷⁶ Arguing for a *right* to participate in the Olympics is questionable.⁷⁷ But does this lack of clarity present an opportunity for gender-discrimination without possible remedy for individuals?⁷⁸

are treated as equal, no matter who they are or whom they love, we are all more free.”

Id.

⁷¹ See *Log Cabin Republicans v. United States*, 658 F.3d 1162 (9th Cir. 2011) (finding the U.S. military’s “don’t ask, don’t tell” policy to be a First Amendment violation and enjoining the U.S. government from continuing to adhere to the policy). See also Lizette Alvarez, *Unexpected Turns for Suit Over ‘Don’t Ask’ Rule*, N.Y. TIMES (Oct. 13, 2010),

http://www.nytimes.com/2010/10/14/us/14cabin.html?_r=0 (providing an overview for the discrimination suit against the U.S. military’s “don’t ask, don’t tell” policy). Defense Secretary Robert M. Gates and Admiral Mike Mullen, the chairman of the Joint Chiefs of Staff, called on Congress this year to allow gay men and lesbians to serve openly. “The government is willing to give a convicted felon a gun but won’t give a gay guy a typewriter,” Mr. Woods said, echoing a common refrain of the law’s critics.

Id.

⁷² See *supra* note 44 and accompanying text.

⁷³ See Stephen Braun, *Mitsubishi to Pay \$34 Million in Sex Harassment Case*, L.A. TIMES (June 12, 1998), <http://articles.latimes.com/1998/jun/12/news/mn-59249> (reporting on Mitsubishi’s infamous sexual harassment case, in which the corporation paid \$34,000,000 to victims of ongoing sexual harassment at an Illinois manufacturing plant).

⁷⁴ See Madeleine Davies, *Trans Prisoner Locked in Cell with Rapist Is Sexually Assaulted*, JEZEBEL (Sept. 26, 2014, 5:40 PM), <http://jezebel.com/trans-prisoner-locked-in-cell-with-rapist-is-sexually-a-1639655603> (reporting on transgender inmate Zahara Green’s lawsuit against Rogers State Prison in Georgia for placing her in the same facility as her male rapist).

⁷⁵ See *supra* notes 70-74 and accompanying text.

⁷⁶ See *supra* note 13 and accompanying text.

⁷⁷ See *supra* note 25 and accompanying text.

⁷⁸ See Dredger, [supra note 6 \(outlining the factors contributing to hyperandrogenism and Androgen Insensitivity Syndrome among other genetic and hormonal conditions that make gender determination a complex issue for the IOC and elite athletic competition\)](#).

Consider an analogy: Men on average are taller than women. But do we stop women from competing if a male-typical height gives them an advantage over shorter women? Can we imagine a Michele Phelps or a Patricia Ewing being told, “You’re too tall to compete as a woman?” So why would we want to tell some women, “You naturally have too high a level of androgens to compete as a woman?” There seems to be nothing wrong with this kind of natural advantage. So where do we draw the line between men and women in athletics? I don’t know. The fact is, sex is

III. OVERCOMING THE HURDLES: A HISTORY OF ASSIGNING LEGAL RIGHTS TO SEX AND GENDER

Our society relies upon sexual classification and categorization, particularly in the realm of athletic competition.⁷⁹ From the moment of birth, sex becomes a defining characteristic of an individual's identity.⁸⁰ Upon the birth of intersex children, doctors face a dilemma.⁸¹ "The birth of a child with ambiguous genitalia constitutes a social emergency."⁸² The fact that society considers this situation an "emergency" speaks volumes about the weight society places on gender identity.⁸³

Individuals have affirmed numerous bodily rights through legal action.⁸⁴ Despite the successful suits, gender-identification remains a much more nebulous legal right.⁸⁵ The right to self-identify with a gender lacks the legal clarity assigned to so many other fundamental

messy...The [IAAF] has called upon a geneticist, an endocrinologist, a gynecologist, a psychologist and so forth.

Id.

⁷⁹ See Samantha Shapiro, *Caught in the Middle*, ESPN (Aug. 1, 2012, 2:49 PM), http://espn.go.com/olympics/story/_/id/8192977/failed-gender-test-forces-olympian-redefine-athletic-career-espn-magazine.

⁸⁰ See Sara R. Benson, *Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed*, 12 *CARDOZO J. L. & GENDER* 31, 35 (2005) (discussing the violation of fundamental rights of individuals in performing intersex genital surgery on children).

⁸¹ See *id.* See also, American Academy of Pediatrics, *Evaluation of the Newborn with Developmental Anomalies of the External Genitalia*, 106 *PEDIATRICS* 138, 139 (2000), available at <http://pediatrics.aappublications.org/content/106/1/138.full?sid=f8faacfb-257c-48ba-b204-e7042b1a949a> (detailing the difficulties presented to physicians upon the birth of an individual with ambiguous genitalia and the factors to be considered before performing intersex genital surgery).

⁸² See *id.* "Each infant requires individual consideration based on physical examination, laboratory studies, and parental feelings. In many instances, transfer of the child to a tertiary care facility is necessary for optimal assessment." *Id.*

⁸³ *Id.*

⁸⁴ See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (discussing concept of bodily autonomy). "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.*

⁸⁵ See Laura Hermer, *Paradigms Revised: Intersex Children, Bioethics & the Law*, 11 *ANNALS HEALTH L.* 195, 199 (2002) (discussing the inability of the legal system to enforce rights of individuals subjected to intersex genital surgery due to the highly sensitive and complex issues surrounding gender and gender identification). "[T]he legal system is ill-equipped to deal with the cultural and social issues underlying intersex surgeries." *Id.*

rights.⁸⁶ The number of current suits surrounding this issue reflects the unresolved nature of legal rights and gender-identity.⁸⁷ Intersex genital surgery disproportionately impacts females.⁸⁸ Much like the IOC's attitude toward intersexuality,⁸⁹ questions about gender ambiguity focus on women rather than men.⁹⁰

The treatment of intersex individuals upon birth remains rooted in overly simplistic reasoning.⁹¹ The IOC's policy mirrors this tragically simplistic approach.⁹² Society assigns monumental weight to an individual's gender identity.⁹³ Innovations in technology diminish the need for established gender roles.⁹⁴ Heightened understanding of the complexities of gender accompanies scientific advances.⁹⁵ The world is experiencing an unprecedented shift away from the gender dichotomy.⁹⁶ Despite the movement in social perception, the ability to abandon gender entirely remains limited.⁹⁷

⁸⁶ *Id.*

⁸⁷ *See supra* notes 70-74 and accompanying text.

⁸⁸ *See* Celia Kitzinger, *Intersexuality: Deconstructing the Sex/Gender Binary*, 9 FEMINISM PSYCHOL. 493, 494-95 (1999) (discussing underlying sexism in intersex genital surgery and the complexities behind assigning gender to an individual on the basis of ambiguous secondary sexual characteristics). "On the grounds that 'you can make a hole, but you can't build a pole' about 90 percent of anatomically ambiguous infants are assigned as female, and their genital tissues excised." *Id.* (internal citations omitted).

⁸⁹ *See supra* note 17 and accompanying text.

⁹⁰ *See supra* notes 80-81 and accompanying text.

⁹¹ *Id.*

⁹² *See supra* note 1 and accompanying text.

⁹³ *See* George Dvorsky & James Hughes, *Postgenderism: Beyond the Gender Binary*, INST. FOR ETHICS & EMERGING TECHS. (Mar. 20, 2008), available at

<http://ieet.org/archive/IEET-03-PostGender.pdf> (analyzing the rejection of the gender binary and reduced need for rigid adherence to gender roles in recent times). Enlightenment values and emergent human potentials have come into conflict with the rigid gender binary. We have spent the last two hundred years in the West slowly dismantling the heritage of patriarchal power, culture and thought. Juridical equality, weapons and the police have reduced the determinative power of male coercion. Post-industrial production, contraception and abortion have eliminated most of the rationale for gendered social roles in work and the family, reducing the burden of patriarchal oppression on women.

Id. at 2. Despite this shift away from the gender binary in numerous social realms, elite athletic competition remains fixated on clear lines between the sexes for the sake of safety and fair competition. Athletic competition, particularly elite athletic competition, remains subject to a basic need to separate the sexes, despite the mass societal shift away from such arbitrary gender assignment.

⁹⁴ *Id.*

⁹⁵ *See id.* *See also supra* note 1 and accompanying text.

⁹⁶ *See supra* notes 70-74 and accompanying text.

⁹⁷ *See supra* note 93 and accompanying text.

The IOC's policy on hyperandrogenism personifies this inability to reject the gender binary.⁹⁸

IV. IOC IN LAST PLACE: HOW OTHER AREAS ARE OUT-COMPETING THE OLYMPICS IN THE RACE TOWARD EQUALITY

A. *Gender fluidity acknowledged in non-athletic realms*

Gender-identity impacts an individual's legal privileges and rights in a number of realms outside the athletic context.⁹⁹ "For as long as women have participated in the Olympics, the organization's regional governing bodies . . . have policed competitions, trying to root out men posing as women."¹⁰⁰ The IOC required gender verification tests designed "to prevent unfair competition."¹⁰¹ Initially, tests sought to detect "men masquerading as women and 'women who were not really women' competing in the Games."¹⁰² However, since the introduction of gender verification testing for Olympic participation, "no imposter has ever been discovered attempting to compete in the Olympics."¹⁰³ Prior to mandatory gender verification testing in 1968,

Efforts to ameliorate patriarchy and the disabilities of binary gender through social, educational, political and economic reform can only achieve so much so long as the material basis, biological gendering of the body, brain and reproduction, remains fixed. Postgenderism confronts the limits of a social constructionist account of gender and sexuality, and proposes that the transcending of gender by social and political means is now being complemented and completed by technological means." Dvorsky & Hughes, *supra* note 93, at 2.

⁹⁸ See *supra* note 1 and accompanying text.

⁹⁹ See *TLDEF in the News*, *supra* note 38 (providing a current catalogue of transgender legal issues and suits across the United States).

¹⁰⁰ See Shapiro, *supra* note 79.

¹⁰¹ Pamela B. Fastiff, *Gender Verification Testing: Balancing the Rights of Female Athletes with a Scandal-Free Olympic Games*, HASTINGS CONST. L.Q. 937, 937-38 (1992), available at

<http://www.hastingsconlawquarterly.org/archives/V19/I3/Fastiff.pdf> (discussing the potential Fourth Amendment violation and equal protection violations of the IOC's use of gender determination tests, as well as the overly simplistic approaches adopted by the IOC).

One of the IOC's prime concerns is to match people of equal strength by preventing men from competing against women. If a male athlete who was aware of his genetic defect attempted to compete in a women's event, what would the IOC officials do? Presumably, their first reaction would be to say that he looks like a male so he must be male, and, therefore, cannot compete in a women's event.

Id.

¹⁰² *Id.* at 939.

¹⁰³ *Id.* at 939-40.

the Olympics witnessed only two instances of men competing as women.¹⁰⁴

The IOC has employed a number of different tests to determine gender since the 1960s.¹⁰⁵ Initially, the IOC required committee observation of female competitors' genitalia.¹⁰⁶ These "nude parades" continued until the 1968 Olympics.¹⁰⁷ The IOC replaced physical observation with Barr body detection.¹⁰⁸ Testing evolved yet again in 1992.¹⁰⁹ The IOC replaced the more rudimentary tests with PCR analysis for SRY.¹¹⁰ Concurrently, the IAAF moved to stop mandatory genetic testing.¹¹¹ In 1992, the IAAF "adopted an approach designed to prevent only male imposters from competing."¹¹²

Today, the focus appears to have shifted from self-identifying men competing as women to self-identifying women competing as women, who are designated by society as men.¹¹³ In particular, the IOC and surrounding media coverage remain fixated on female hyperandrogenism.¹¹⁴ In recent years, the IOC's policies have

¹⁰⁴ *Id.* at 939.

¹⁰⁵ Robert Ritchie et al., *Intersex and the Olympic Games*, J. ROYAL SOC'Y MED. 395, 395-99 (2008), available at <http://jrs.sagepub.com/content/101/8/395.full.pdf+html> (discussing the progression of the treatment of intersexed individuals in the Olympic Games). "Gender testing was initially welcomed by female athletes as a method of preventing 'cheaters'." However, it has become apparent that the discrimination against those with DSD was unfair and detrimental to the sport." *Id.* at 398.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ B. D. Dickinson et al., *Gender Verification of Female Olympic Athletes*, MED. SCI. SPORT EXERCISE 1539, 1539-42 (2002), available at <http://cel.webofknowledge.com/InboundService.do?product=CEL&SID=3CsRxiPSIYx3Vgwnw&UT=000178496600001&SrcApp=Highwire&action=retrieve&Init=Yes&Func=Frame&SrcAuth=Highwire&customersID=Highwire&IsProductCode=Yes&mode=FullRecord> (critiquing the tendency of gender determination tests to over simplify the concept of gender and treat athletes unfairly). Gender verification of female athletes has long been criticized by geneticists, endocrinologists, and others in the medical community. Problems include invalid screening tests, failure to understand the problems of intersex, the discriminatory singling out of women based only on laboratory results, and the stigmatization and emotional trauma experienced by individuals screened positive.

Id. at 1542.

¹¹² *Id.* at 1541.

¹¹³ For a discussion of the history and methods of the IOC's policy on hyperandrogenism, see *supra* note 1 and accompanying text.

¹¹⁴ See *supra* notes 7-8 and accompanying text.

undergone rapid change.¹¹⁵ Largely in response to the media fixation on Semenya, the IOC reexamined its policy in 2011.¹¹⁶ Prior to the 2012 Olympic Games, in which Semenya would again make headlines, the IOC issued a press release covering the policy shift.¹¹⁷ The press release focused exclusively on women.¹¹⁸ The Executive Board of the IOC “confirmed the need to set up clear rules to determine the eligibility of female athletes with hyperandrogenism in female competitions, starting with the Olympic Games in London next year.”¹¹⁹ The IOC declared that “a female recognised in law should be eligible to compete in female competitions provided that she has androgen levels below the male range.”¹²⁰

B. Gender-related policies in athletics

i. High school athletics

Participation in athletics decreases significantly as individuals move up the levels of competition.¹²¹ In the 2012-2013 competition

¹¹⁵ See *IOC Addresses Eligibility of Female Athletes with Hyperandrogenism*, OLYMPIC.ORG (Apr. 5, 2011), <http://www.olympic.org/content/press-release/ioc-addresses-eligibility-of-female-athletes-with-hyperandrogenism/> (announcing the IOC’s need to update its policy on hyperandrogenism in female athletes). The IOC announced that the new policy would focus on several specific principles, including androgen levels causing unfair advantages over other female competitors, case-by-case determination of eligibility to participate, and a need to maintain athletes’ confidentiality throughout the process. *Id.*

Although rare, some women develop male-like body characteristics due to an overproduction of male sex hormones, so-called “androgens.” The androgenic effects on the human body explain why men perform better than women in most sports and are, in fact, the very reason for the distinction between male and female competition in most sports. Consequently, women with hyperandrogenism generally perform better in sport than other women. In order to address the issue of female hyperandrogenism, the IOC Medical Commission and the International Association of Athletics Federations (IAAF) jointly organised a scientific symposium in Miami in January 2010, at which the scientific aspects of hyperandrogenism in relation to female sports competition were explored.

Id.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Probability of Competing in Sports Beyond High School*, NCAA.ORG (Sept. 2013), <http://www.ncaa.org/about/resources/research/probability-competing-beyond-high-school> (demonstrating the decreased participation in athletics as level of competition progresses from amateur to professional and other more elite levels of competition). While approximately 460,000 student athletes participated in

year, “a record 7,713,577 students participated in high school sports, an increase from 7,692,520 in 2011-2012.”¹²² Of this group, over 460,000 were set to compete in college athletics.¹²³ Paring down participation even further, roughly 2% of college athletes go on to play professionally.¹²⁴ As participation in athletics decreases while the level of competition increases, when does the transition in athletics from right to compete to privilege to compete occur?

Like the IOC, states are reevaluating their own policies regarding the rights (and therefore abilities) to participate in high school athletics.¹²⁵ However, unlike the IOC and National Collegiate Athletic Association (NCAA) policies, “regulations for transgender high schoolers are far less stringent.”¹²⁶ Unlike the NCAA and IOC, “no state requires students to undergo surgery or hormone therapy before they are allowed to compete.”¹²⁷ Far from rigid limitations precluding individuals from participating, high school athletic policies more often ensure the right of transgender individuals to compete.¹²⁸

collegiate-level athletics, fewer than 2% can expect to go on to play professionally in that same sport. *Id.*

¹²² Terence P. Jeffrey, *Football is Top Sport in U.S.: 1,088,158 High School Players*, CSN NEWS (Feb. 2, 2014, 12:35 AM),

<http://www.csnnews.com/news/article/terence-p-jeffrey/football-top-sport-us-1088158-high-school-players> (detailing student participating in high school athletics by cataloguing participation in high school athletics across all sports offered at the high school level during the 2012-2013 competition season in the United States, as per data published by the National Federation of State High School Associations).

¹²³ See *supra* note 77 and accompanying text.

¹²⁴ *Id.*

¹²⁵ See Ian Lovett, *Changing Sex, and Changing Teams*, N.Y. TIMES (May 6, 2013), http://www.nytimes.com/2013/05/07/us/transgender-high-school-students-gain-admission-to-sports-teams.html?pagewanted=1&_r=1&ref=todayspaper (discussing the changes taking place in eligibility for transgender students to participate in athletics).

[N]ow, high schools are beginning to take on the issue as well, as a small but growing number students who identify themselves as transgender have begun demanding access to the same school activities, like interscholastic sports, that other students enjoy. More than half a dozen states, from Washington to Massachusetts, have adopted rules to allow transgender students to compete on teams that correspond with their gender identities rather than the sex listed on their school records. Half a dozen more states are considering similar regulations. And a bill in the Legislature would make California the first to specifically guarantee by law that transgender students ... are allowed to play school sports.

Id.

¹²⁶ See *supra* note 125 and accompanying text.

¹²⁷ See *supra* note 125 and accompanying text.

¹²⁸ See *supra* note 125 and accompanying text.

ii. College athletics

The Executive Committee serves as the “highest governing body” for the NCAA.¹²⁹ Subordinate to the Executive Committee, the NCAA is further divided into divisions.¹³⁰ Collegiate athletics include three divisions: Division I, Division II, and Division III, each of which is governed by a committee composed of volunteers from member schools.¹³¹ Alongside other association-wide committees, these committees dictate the policies for participation in NCAA collegiate sports.¹³² In its governance of collegiate athletics, the NCAA is “committed to enforcing the rules, creating fair competition . . . for student-athletes across the country.”¹³³ In 2011, the same year the IOC reevaluated its gender verification policies, the NCAA issued a new policy for transgender athletes.¹³⁴

In a press release, the NCAA declared that “athletes who have testosterone in their systems from medical treatment will not be allowed to compete against women’s teams in gender-specific sports at NCAA championships.”¹³⁵ The NCAA thus allowed male-identifying transgender athletes to “compete against men.”¹³⁶ The NCAA made an exception for male-to-female transitioning athletes.¹³⁷ The new

¹²⁹ *Governance*, NCAA.ORG, <http://www.ncaa.org/about/what-we-do/governance> (last visited Sept. 7, 2014) (detailing the governance structure of the National Collegiate Athletics Association).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *See Fairness and Integrity*, NCAA.ORG, <http://www.ncaa.org/about/what-we-do/fairness-and-integrity> (last visited Sept. 7, 2014) (outlining the NCAA’s policy to promote fairness in collegiate athletics). The NCAA is “committed to enforcing the rules and creating fair competition for student-athletes across the country. It’s the responsibility of our universities, athletic programs, coaches, alumni, student-athletes, and ourselves to be fully accountable at every level as we promote student success both on and off the field.” *Id.*

¹³⁴ *See New Policy for Transgender Athletes*, NCAA (Sept. 13, 2011, 3:40 PM), <http://www.ncaa.com/news/ncaa/article/2011-09-13/new-policy-transgender-athletes> (announcing the NCAA’s updated policy on the treatment and eligibility of transgender athletes to compete in collegiate athletics). The NCAA’s updated policy prohibited athletes undergoing testosterone treatment from competing on women’s teams during championship games. *Id.* The policy created an exception for females undergoing hormone therapy for the transition from male to female, allowing such individuals to compete on men’s teams during championship games. *Id.* Outside of NCAA championship contests, the NCAA allows individual teams to create their own policies regarding transgender athletes undergoing hormone treatments to aid in the transition process. *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

policy required athletes undergoing such transition to “provide documentation showing they had testosterone suppression treatment for one calendar year,” requiring proof of continued treatment to remain eligible for participation.¹³⁸ The new policy also exhibited flexibility missing from the IOC’s policies.¹³⁹

While the new standards applied to NCAA championship competitions, “individual schools [were permitted to] make their own decisions about eligibility during regular season play.”¹⁴⁰ Eight states have adopted policies specifically addressing the rights of transgender students to participate in high school athletics.¹⁴¹ Additionally, another six jurisdictions (five states and the District of Columbia) have “trans-inclusive non-discrimination policies that apply to schools (which the ACLU has argued should legally extend to athletics).”¹⁴² California leads the movement toward equality and inclusion for transgender high school athletes.¹⁴³ The state adopted legislation in 2013 enabling transgender students to assert their right to participate with the gender with which they identify.¹⁴⁴

iii. Elite competition

A number of arenas exist for elite athletic competition outside of the Olympics.¹⁴⁵ Like the Olympic Games, these arenas face their

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See Reuben Fischer-Baum, *Here Are the Best States To Be a Transgender High School Athlete*, DEADSPIN.COM (May 24, 2013, 1:15 PM), <http://deadspin.com/here-are-the-best-states-to-be-a-transgender-high-schoo-508251438> (evaluating states’ approaches for ensuring inclusion for transgender high school students in athletic competition). States were evaluated by analyzing policies specifically geared toward transgender athletes and general non-discrimination legislation. *Id.* The evaluation specifically noted significant overlap between states with more inclusive policies for transgender high school athletes and states that have legalized same-sex marriage.

Id.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See *supra* note 125 and accompanying text.

¹⁴⁵ See Amy McCarthy, *Transgender Woman Sues CrossFit for Refusing to Allow Her to Compete with Other Women*, BUSTLE.COM (Mar. 11, 2014), <http://www.bustle.com/articles/17853-transgender-woman-sues-crossfit-for-refusing-to-allow-her-to-compete-with-other-women> (detailing Chloe Jonsson’s suit against the CrossFit organization for the right to compete in the organization’s national athletic competition, the CrossFit Games).

The sports world is no stranger to LGBT discrimination, and now a transgender woman is suing CrossFit for refusing to allow her to compete against other women in the intense exercise regime. This is just the latest instance of transphobia rearing its

own respective gender verification and classification quandaries.¹⁴⁶ The Olympics, along with competition and camaraderie, also foster heated legal suits.¹⁴⁷ These suits, particularly the most notorious, focus on the conduct of competing athletes rather than an individual's supposed right to compete.¹⁴⁸

C. Legal implications: When does “right” to compete shift to “privilege” to compete, and how does this impact legal rights?

Society's shift toward embracing gender fluidity highlights the harsh lines drawn by elite athletic competition.¹⁴⁹ The realm of athletics, particularly competition at the highest levels, continues to grasp for bright lines to fit individuals neatly into a gender dichotomy.¹⁵⁰ Other areas of society appear to be loosening their grips on the social construct of gender.¹⁵¹ The past decade witnessed a

ugly, bigoted head in the world of sports CrossFit hosts their own competitions, which are sort of like the Olympics of working out. Chloe Jonsson, a trans woman and competitor, was told by CrossFit leadership that she wouldn't be able to participate in the women's division of last year's CrossFit Games because she was assigned “male” at birth.

Id.

¹⁴⁶ *Id.*

¹⁴⁷ See *supra* note 34 and accompanying text.

¹⁴⁸ See *supra* note 34 and accompanying text.

¹⁴⁹ See *supra* note 125 and accompanying text.

¹⁵⁰ See, e.g., *supra* note 141 and accompanying text.

¹⁵¹ See JamesMichael Nichols, *Mills College Changes Policy to Allow Transgender Students to Enroll*, HUFFINGTON POST (Aug. 25, 2014, 3:30 PM),

http://www.huffingtonpost.com/2014/08/25/mills-college-transgender-students_n_5710441.html (announcing an all-women's college change in policy to allow admission to any individual identifying as female at time of application).

Mills College in California recently changed its admissions policy to allow anyone who self-identifies as a woman to apply to the school. This definition reportedly includes individuals whose gender identity falls outside of the male/female binary and those not assigned female at birth but who identify as women. Those assigned female at birth but who transition to male while enrolled will also not reportedly be asked to leave the university.

Id. See also Nanette Asmiov, *New Policy Clarifies ‘Female’ for Mills College Admission*, SFGATE (Aug. 21, 2014, 7:50 PM)

<http://www.sfgate.com/education/article/New-policy-clarifies-female-for-Mills-College-5699337.php> (providing an overview of the college's updated inclusive admissions policy and the changes to take place). Mills College's new policy also opens the doors for students not identifying with either male or female, and allows “female students who become male after enrolling” to remain at Mills through graduation. *Id.* See also Ruth Padawer, *When Women Become Men at Wellesley*, N.Y. TIMES (Oct. 15, 2014), <http://www.nytimes.com/2014/10/19/magazine/when-women-become-men-at-wellesley-college.html> (discussing the presence and culture

number of monumental decisions in which society's perception of sex and gender shifted while the legal implications of more fluid classifications followed.¹⁵² The landmark *Windsor* case reflected an altered perception of gender roles.¹⁵³ Though on a basic level it focused on sexual orientation, the decision also demonstrates a shift in perceived gender roles and the rights that accompany such roles.¹⁵⁴ In striking down the Defense of Marriage Act (DOMA), the Supreme Court inadvertently contributed to the movement toward fluidity in gender roles and fluidity.¹⁵⁵

V. JUDGING THE MERITS: EXPLORING A HYPOTHETICAL CASE AGAINST THE IOC

A trend toward acceptance of gender and sexual fluidity appears in a number of policy changes and legal suits.¹⁵⁶ Transgender individuals across the nation have challenged their right to use the bathroom designated for the gender with which they associate.¹⁵⁷ Several all-women's colleges have rewritten their policies to allow transgender students to enroll.¹⁵⁸ However, the motivation behind

of transgender, specifically female-to-male individuals, at Wellesley College). Wellesley College allows admission of any individual that identifies as a female at time of application and admission to the college. *Id.* The college does not require students who transition while still matriculating at Wellesley to transfer, and instead leaves the decision to the individuals. *Id.* While not as inclusive as Mills College's policies regarding the admission of transgender individuals, the policy represents an example of intermediate ground and the shift in single-sex education institutions toward inclusion. *Id.*

¹⁵² See, e.g., Dan Frosch, *Rights Unit Finds Bias Against Transgender Student*, N.Y. TIMES (June 23, 2013) http://www.nytimes.com/2013/06/24/us/agency-says-district-discriminated-against-transgender-student.html?_r=0 (reporting on Coy Mathis's discrimination suit against her school district for refusing to allow her to use the girls' bathroom despite identifying as a female). "Michael D. Silverman, the executive director of the Transgender Legal Defense and Education Fund, which filed the complaint on the Mathises' behalf, hailed the decision as a momentous victory and hoped it would sway how other school districts treated transgender students." *Id.*

¹⁵³ See *United States v. Windsor*, 133 S. Ct. 2675, 2675-76 (2013) (finding the Defense of Marriage Act (DOMA) unconstitutional). The landmark decision found DOMA's "definition of marriage . . . unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment." *Id.* at 2695.

¹⁵⁴ See *id.*

¹⁵⁵ See *supra* note 70 and accompanying text.

¹⁵⁶ See, e.g., *supra* notes 70-74 and accompanying text.

¹⁵⁷ See *id.* See also Sharp, *supra* note 44.

¹⁵⁸ See *supra* note 151 and accompanying text. See also Dominique Mosbergen, *All-Women's Mount Holyoke College Changes Policy to Welcome Transgender*

such classification and abandonment of classification differs drastically.¹⁵⁹ A number of arenas require gender identification for safety reasons, but athletics in particular seeks to segregate the sexes to prevent unfair competition that could more likely result in injuries.¹⁶⁰

With no existing legal suit against the IOC for gender discrimination in testing techniques and criteria, the suit brought against the IOC for gender discrimination in prohibiting women's ski jumping events provides insight as to a hypothetical suit.¹⁶¹ Unlike the IOC's relatively straightforward decision to reject the inclusion of ski jumping events for women, the implementation of gender testing and categorization of athletes is arguably a far more complex claim. While multiple athletes face discrimination as a result of the IOC's policies, the nature of the discrimination has the potential of high variance among athletes. A victory for ski jumpers would have resulted in the inclusion of women's events to mirror those offered (to some extent) to men's events, but the impact of a discrimination suit revolving

Students, HUFFINGTON POST (Sept. 3, 2014, 5:24 PM), http://www.huffingtonpost.com/2014/09/03/mount-holyoke-transgender-policy_n_5760952.html (reporting on Mount Holyoke's President's announcement of Mount Holyoke's updated transgender-inclusive admissions policy, following in the wake of Mills College's policy change).

While we have welcomed trans students in the past and for several years have been in conversation with campus constituencies about how best to foster a respectful environment for all students, we need a formal policy . . . [o]ne that would articulate our commitment to core values of individual freedom, social justice and diversity and inclusion. We recognize that what it means to be a woman is not static . . . [j]ust as early feminists argued that reducing women to their biological functions was a foundation of women's oppression, we acknowledge that gender identity is not reducible to the body.

Id.

¹⁵⁹ See *supra* notes 157-58 and accompanying text.

¹⁶⁰ See Dredger, *supra* note 6 ([outlining the factors contributing to hyperandrogenism and Androgen Insensitivity Syndrome among other genetic and hormonal conditions that make gender determination a complex issue for the IOC and elite athletic competition](#)).

Consider an analogy: Men on average are taller than women. But do we stop women from competing if a male-typical height gives them an advantage over shorter women? Can we imagine a Michele Phelps or a Patricia Ewing being told, "You're too tall to compete as a woman?" So why would we want to tell some women, "You naturally have too high a level of androgens to compete as a woman?" There seems to be nothing wrong with this kind of natural advantage.

So where do we draw the line between men and women in athletics? I don't know. The fact is, sex is messy. . . The [IAAF] has called upon a geneticist, an endocrinologist, a gynecologist, a psychologist and so forth.

Id.

¹⁶¹ See *supra* note 34 and accompanying text.

around gender testing has less clear results.¹⁶² The suits would likely be on behalf of individuals rather than a group, and those individuals would seek a more personal result: ability to compete in the games on an individual level. Thus the personalized nature of potential suits may not impact athletes not party to the suit, whereas the female skiers' claim would have impacted future athletes as well as those party to the suit.¹⁶³

Additionally, the less complex prior case ultimately ended by admitting that no overarching authority dictates the actions of the IOC.¹⁶⁴ While ruling that the ban's effect was discriminatory, the Canadian Supreme Court admitted that the conduct of the IOC fell beyond its jurisdiction.¹⁶⁵ Unfortunately, it is difficult to imagine a court reaching a different outcome in the near future, particularly considering the nature of the games, with years between contests and location differing each time.

The 2010 lawsuit on behalf of female ski jumpers embodied this issue.¹⁶⁶ Female ski-jumpers brought suit against the Vancouver Olympic Committee prior to the 2010 Winter Games.¹⁶⁷ The British Columbia Supreme Court found the prohibition discriminatory.¹⁶⁸ While acknowledging the discrimination, the court made a disheartening observation, that "[o]nly the IOC controls which sports are in the Olympics."¹⁶⁹

This deep-rooted acceptance of IOC supremacy, along with the international nature of the Games, seemingly grants the IOC unchecked power over the athletic competitions.¹⁷⁰ The IOC announced the addition of a single women's ski jumping event in the 2014 Games held in Sochi.¹⁷¹ The court's decision did not force this the IOC to act.¹⁷² Nor is it clear that a court *could* mandate such a decision.¹⁷³

¹⁶² See *supra* note 34 and accompanying text.

¹⁶³ See *supra* note 34 and accompanying text.

¹⁶⁴ See *supra* note 34 and accompanying text.

¹⁶⁵ See *supra* note 34 and accompanying text.

¹⁶⁶ For discussion on the suit's background and progression, see *supra* note 34 and accompanying text.

¹⁶⁷ See *supra* note 34 and accompanying text.

¹⁶⁸ See Smith, *supra* note 25 (detailing the sex discrimination in the 2010 Olympic Games, revealing that sex discrimination is far from eradicated).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See *supra* note 34 and accompanying text.

¹⁷² *Id.*

¹⁷³ *Id.*

VI. CONCLUSION: THINKING OUTSIDE THE BOX – ABANDONING
SOLUTIONS THAT ARE AS OVER-INCLUSIVE AND UNDER-
INCLUSIVE AS THE GENDER BINARY ITSELF

In a number of athletic events, it is difficult to imagine women competing alongside men without a number of safety and unfairness concerns.¹⁷⁴ However, this is not universally true.¹⁷⁵ There is no clear universally applicable solution because gender itself is not a clearly defined or definable characteristic.¹⁷⁶ One solution may be to stop trying to formulate a solution to apply to all athletic events.¹⁷⁷ The advantages and disadvantages of physical characteristics in each vary as much as the sports themselves.¹⁷⁸ The IOC has already shifted away from its “one size fits all” approach.¹⁷⁹ By embracing a case-by-case tactic,¹⁸⁰ the IOC has rejected its historically crude methodology for gender-determination.¹⁸¹

Examining the history of the IOC, it is unclear whether these tests ever effectively accomplished their purported goals.¹⁸² Given the complexity of the matter, it seems unlikely they ever will.¹⁸³ Abandoning the idea of a broad solution is the only way to solve this complex issue.¹⁸⁴

¹⁷⁴ *Id.*

¹⁷⁵ *See supra* note 12 and accompanying text.

¹⁷⁶ *See supra* note 1 and accompanying text.

¹⁷⁷ *Id.*

¹⁷⁸ *See supra* note 160 and accompanying text.

¹⁷⁹ *See supra* note 17 and accompanying text.

¹⁸⁰ *Id.*

¹⁸¹ *See* Katie Thomas, *Gender Tests for Olympians: A Relic that Persists*, N.Y. TIMES (July 30, 2008), <http://www.nytimes.com/2008/07/30/sports/30iht-GENDER.1.14880817.html> (comparing more recent Olympic gender-determination testing to historical tests mandated for all female athletes).

Despite decades of rigorous testing of women athletes, only one known case of gender cheating exists in the history of the modern Olympics - and it was not uncovered by a sex-determination test. In 1936, a German athlete named Dora Ratjen finished fourth in the women's high jump. Twenty years later, Ratjen disclosed that she was in fact Hermann Ratjen, and that the Nazis had forced him to compete as a woman.

Id. The IOC commenced gender-determination tests to detect men masquerading as women. McConnell & Long, *supra* note 17. The IOC has drastically shifted focus to self-identifying women it considers to be unfairly competing alongside women in women's events. *Id.* The nature of the issue has shifted along with our understanding of the complexities of the human body and gender, yet the IOC's testing retains the crudeness of those methods employed in the 1960s. *Id.*

¹⁸² Thomas, *supra* note 181.

¹⁸³ *See supra* note 1 and accompanying text.

¹⁸⁴ *See supra* note 1 and accompanying text.

As science and technology progress, so does our understanding of the human body.¹⁸⁵ The methods by which the IOC determines an athlete's gender have shifted drastically since their inception.¹⁸⁶ However, rather than allowing society to better categorize gender, increased knowledge has further blurred the lines.¹⁸⁷ A number of academic areas now reject the concept of distinct genders altogether, embracing fluidity instead.¹⁸⁸ The rapidity with which policies and legislation now change to reflect legal rights irrespective of "traditional" gender roles embodies this shift.¹⁸⁹ As our society and understanding of gender shifts, so do our governing laws.¹⁹⁰ Society recognizes its past errors and oversimplified views, and then adapts.¹⁹¹ Some realms move more slowly.¹⁹²

Changing policies in athletic competition lag behind other areas, but they are shifting as well.¹⁹³ High school,¹⁹⁴ collegiate,¹⁹⁵ and even higher levels of competition¹⁹⁶ are moving toward increased flexibility of gender. The Olympics present a number of unique factors making this issue even more complex.¹⁹⁷ International cooperation, cross-cultural communication and understanding, and an unparalleled level of competition create an area seemingly outside of society and above the law.¹⁹⁸

Lack of overarching authority means the IOC must affirmatively choose to undertake change to reflect those occurring in society.¹⁹⁹ However, the limitations faced by the IOC in doing so are as unlikely to dissipate as is society's insistence on gender identification. No available choices, including ceasing gender testing altogether or adapting gender tests along with scientific progress, provide the panacea the IOC seeks. Even in the world of elite athletics, in which no individual could be considered average, there

¹⁸⁵ See *supra* note 1 and accompanying text. See also *supra* note 12 and accompanying text.

¹⁸⁶ See *supra* note 17 and accompanying text.

¹⁸⁷ See *supra* note 17 and accompanying text.

¹⁸⁸ See *supra* note 88 and accompanying text.

¹⁸⁹ See *supra* notes 70-71 and accompanying text.

¹⁹⁰ See *supra* notes 70-71 and accompanying text.

¹⁹¹ See *supra* note 65 and accompanying text.

¹⁹² See *supra* note 65 and accompanying text.

¹⁹³ See *supra* notes 120 and 129 and accompanying text.

¹⁹⁴ See *supra* note 120 and accompanying text.

¹⁹⁵ See *supra* note 129 and accompanying text.

¹⁹⁶ See *supra* note 140 and accompanying text.

¹⁹⁷ See *supra* note 12 and accompanying text.

¹⁹⁸ See *supra* note 34 and accompanying text.

¹⁹⁹ See *supra* note 34 and accompanying text.

will always be individuals which society considers as outliers. Whatever path the IOC chooses, it will best serve the majority of individuals by rejecting the rigid classification system society has begun to leave behind.