THE INTERSECTION OF WOMEN'S OLYMPIC SPORT AND INTERSEX ATHLETES: A LONG AND WINDING ROAD

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I. INTRODUCTION

In August of 2009, Caster Semenya, an 18-year old runner from South Africa, was under suspicion after a victorious performance in the women's 800 meters event at the 12th IAAF World Championships in Athletics in Berlin.\(^1\) Noticeably absent from a post-race news conference, an International Association of Athletics Federations (IAAF) official took Semenya’s place to address the developing controversy surrounding her win.\(^2\) The official spoke about what had been confirmed by the IAAF earlier in the day – that Semenya was undergoing sex determination testing, also called gender testing.\(^3\) The IAAF’s response to the young woman’s performance was curious: It was unclear on what basis officials decided that the appropriate action was to test Semenya’s status as a woman rather than another course of action such as testing for performance enhancing drugs.

The General Secretary of the IAAF and former Triple Jumper, Pierre Weiss, emphasized that gender testing was prompted by “ambiguity, not because we believe she is cheating.”\(^4\) Elisa Cusma of Italy stated her issue with Semenya more vigorously, “[T]hese kind of people should not run with

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\(^2\) Id. The International Association of Athletic Federations is the International Federation for the sport of track & field and, as such, serves as the governing body for the sport.

\(^3\) Id.

\(^4\) Id.
us. . . For me, she is not a woman, she is a man.”

It is hard to take Cusma’s accusations literally. The fear was not that Semenya was biologically a man, but that she had a condition that would preclude her from fitting neatly into the binary sex categories used in athletic competition.

It was likely that Semenya’s case was uniquely concerning to her rivals given the statistical improbability they previously had opposed such a competitor. However, athletes with similar conditions were not a new development in international competition and less-than-sensitive handling of such cases regretfully often was the norm. In May of 2011, and perhaps spurred by the Semenya case, the IAAF announced new eligibility rules focusing on athletes’ levels of androgenic hormones. Likewise, during the summer of 2012, the IOC imposed similar regulations designed to address conditions that give athletes a “competitive advantage.” These new rules provide the promise of a gentler review of athletes under suspicion of gender violations: One that treats such conditions as a health issue and maintains the fairness and integrity of competition without ostracizing competitors or subjecting them to undue scrutiny. If these rules are successful in doing this, many of the issues related to intersex athletes

5 Id.
competing in Olympic sport will be resolved.

Section I of this article reviews the IAAF regulations on gender. Section II of this article discusses issues related to sex and gender. This section introduces the problem of defining gender and specific cases of athletes with Disorders of Sex Development (DSD). Section III discusses existing policies in Olympic sport that pertain to fairness and how they relate to the new policies of the IAAF and IOC. Section IV of this article focuses on the history of sex testing in international athletic competition. Section V wrestles with the question of fairness, which is an essential consideration for any policy relating to international athletic competition. This section discusses the potential for discrimination when defining the contours of what is within the normal range of variation for a female athlete.

II. A REVIEW OF GENDER REGULATIONS

A panel of medical experts assembled by the International Olympic Committee (IOC) in Miami Beach in January 2010 (the January Panel) determined that cases of ambiguous sex should be treated as a medical issue. In Berlin, IAAF officials may have speculated that Caster Semenya could have what is termed a “Disorder of Sex Development” (DSD). The

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January Panel in Miami, though not addressing any particular athlete’s condition, found a need to promulgate a standard for dealing with future cases of athletes with DSDs.\textsuperscript{10} It emphasized that the purpose of any new guideline should not be to preserve a level playing field for all female athletes in competition, but rather for the health of the athlete with the disorder.\textsuperscript{11} Dr. Joe Leigh Simpson of Florida International University, a noted scholar on DSDs, reiterated that the January Panel did not discuss fairness with respect to permitting athletes with DSDs to participate in athletic competitions such as the Olympics or other competitions governed by the IAAF.\textsuperscript{12} In Simpson’s view, the emphasis of the panel was geared toward inclusion: “The entire concept was that these individuals should be allowed to compete.”\textsuperscript{13}

The January Panel’s recommendation was that when an athlete is diagnosed with a DSD, she be given the option to treat the disorder although the treatment may not always be necessary.\textsuperscript{14} The January Panel did not further outline in which cases treatment would be necessary.\textsuperscript{15}

This review was the beginning of an amendment process that would ultimately change the way that the IAAF handled the issue of intersex

\textsuperscript{10} Kolata, \textit{supra} note 8.
\textsuperscript{11} \textit{Id}.
\textsuperscript{12} \textit{Id}.
\textsuperscript{13} \textit{Id}.
\textsuperscript{14} \textit{Id}. and See Press Release, IOC, Summary of Conclusions Reached at Gender Symposium (Jan. 21, 2010), available at http://www.olympic.org/en/content/The-IOC/?NewsTab=1&articleNewsGroup=-1&articleId=76409.
\textsuperscript{15} \textit{Id}. 
In May 2011, the IAAF's announcement of new regulations focused on hyperandrogenism. The new rules provide for “a medical assessment” to obtain information relevant to an eligibility determination. The information is then referred to an expert panel for further recommendation.

Although the new rules require previously diagnosed athletes to notify medical managers prior to events, there are also requirements to protect athletes from speculative accusation: First, the IAAF Medical Manager at an event is required to have “reasonable grounds” for belief that a case may exist before initiating a review, and second, that provisional competition status may be available during reviews, all of which are conducted in confidence.

The overhaul retained the IAAF rationale of fairness in competition as a reason for concern in such cases – review panels are to recommend eligibility where the athlete's androgen levels are found to be outside the female range or where the athlete can demonstrate that a medical condition prevents her from obtaining advantage from higher androgen levels. But the process effectively institutionalizes an approach focusing on the

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17 Id.
18 Id.
19 Id.
20 Id.
therapeutic needs of athletes with irregular conditions: One which precludes reviewers from actually prescribing treatments and instead merely establishes eligibility or non-eligibility and then assists athletes in determining what steps would be necessary to meet eligibility standards.21

III. VARIOUS PROBLEMS IN SEX AND GENDER

A. Gender and Sex are NOT Synonymous

The term “gender test” is actually somewhat of a misnomer. Sex refers to the biological attributes of an individual that can be categorized as male, female, or something that is not typically either male or female such as a DSD.22 Gender, on the other hand, is a social construct.23 There may be a biological component to gender but it is possible for a person who is biologically a woman to have male gender and vice versa. Social scientists separate gender into basic ideas: gender roles and gender identities.24

Gender roles are constructs such as male as hunter/provider and female as nurturer/homemaker.25 Like actors in a play, individuals may aspire to assume traditional paradigms. Gender identity refers to a person’s internal feeling of being a male or female.26 An example is a person who

21 Id. The panel in Miami certainly contemplated that such rules would be promulgated following their effort.
23 Id. See also Canadian Academy of Sport Medicine, Position Statement: Sex Testing (Gender Verification) in Sport, Criticism of Gender Verification, B. Socio-cultural Issues, January 1997.
24 Id.
25 Id.
26 Id.
undergoes surgery to alter his or her biological sex. Such an individual will often cite the desire to bring his or her biological sex into alignment with his or her gender identity as the driving force behind the procedure. In a vast majority of the population, biological sex and the traditional concept of gender are in agreement. Although biology is not a complete determinant, there is likely some biological basis for this agreement. Even a rudimentary understanding of the concepts of sex and gender, however, illustrates why the two terms should not be used interchangeably. Not only is using the word gender synonymously with the word sex inaccurate, it tends to perpetuate norms that may be oppressive.

B. Intersex Issues

1. Name-calling--The Implication of the Term “DSD”

For the remainder of this article, the term Disorder of Sex Development or DSD will be used sparingly. Although this is a technical term used with respect by the IAAF and the IOC, many in the DSD community reject this term due to its use of the word “disorder.” Instead, they use the term “intersex,” which will be used for the remainder of the article. The Intersex Society of North America (ISNA) has stated, “Intersex is not a disorder, rather a variation.”

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27 See Summary of Conclusions Reached at Gender Symposium, supra, note 14.
29 Id.
30 Id.
The origin of the term DSD is the Consensus Statement on Management of Intersex Disorders, which was developed by the Lawson Wilkins Pediatric Endocrine Society in conjunction with the European Society for Paediatric Endocrinology. It was thought that the term DSD was proposed with the intent to standardize the nomenclature within the intersex community and discourage the use of such terms as, “intersex, pseudohermaphroditism, hermaphroditism, sex reversal, and gender based diagnostic labels that are particularly controversial.” There is no doubt that the term DSD was not meant as an insult to the intersex community; nevertheless, to those who do not see their condition as any sort of disorder or abnormality that requires medical normalization, this term can be stigmatizing.

To an extent, the designation of sex into male and female categories is an oversimplification. There are variations due to a multitude of conditions that an individual may knowingly or unknowingly possess that undermine traditional classifications of men or women. Some have gone so far as to state that sex is a continuum that is not susceptible to discrete categorization. In the current state of medical knowledge, this argument

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31 Consensus Statement, supra note 6.
32 Id.
34 GERALD CALLAHAN, BETWEEN XX AND XY: INTERSEXUALITY AND THE MYTH OF TWO
may go too far. At any rate, it is established that there is a percentage of the population that does not fit neatly into the categories of male or female.\textsuperscript{35}

Many intersex individuals choose to identify themselves as either male or female for gender purposes.\textsuperscript{36} This is often because the physical appearance of an intersex individual will often lean heavily toward that of either a male or female.\textsuperscript{37}

2. The Scope of Intersex

Intersex is not one specific condition, but rather encompasses a number of conditions. The Consensus Statement defined DSDs, which are synonymous with intersex conditions such as “congenital conditions in which development of chromosomal, gonadal, or anatomic sex is atypical.”\textsuperscript{38} The Intersex Society of North America (ISNA) defines intersex as, “a general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn’t seem to fit with the typical definitions of female or male.”\textsuperscript{39} The ISNA website identifies no

\textsuperscript{35} Anne Fausto-Sterling considers it “extremely difficult to estimate the frequency of intersexuality.” She cites the psychologist John Money who has estimated that intersexuals may constitute as many as 4% of births. \textit{SEXUALITY AND GENDER} 469 (Christine L. Williams & Arlene Stein ed., Blackwell Publishers, Ltd. 2002); \textit{See also} Adair, supra note 32(discussing the various intersex conditions and noting a 1.7% rate of occurrence).

\textsuperscript{36} \textit{Why Doesn’t ISNA want to eradicate gender?}, INTERSEX SOC. OF N. AMER. (FEB. 17, 2006), http://www.isna.org/faq/not_eradicating_gender.


\textsuperscript{38} \textit{Consensus Statement}, supra note 9.

\textsuperscript{39} \textit{What is Intersex?}, INTERSEX SOC. OF N. AMER., http://www.isna.org/faq/what_is_intersex.
less than sixteen separate conditions that qualify an individual as intersex. The list is as follows: (1) 5-alpha reductase deficiency; (2) androgen insensitivity syndrome (AIS); (3) aphalia; (4) clitoromegaly; (5) congenital adrenal hyperplasia; (6) gonadal dysgenesis; (7) hypospadias; (8) Klinefelter’s Syndrome; (9) micropenis’ (10) mosaicism involving sex chromosomes; (11) MRKH (Mullerian agenesis, vaginal agenesis, congenital absence of vagina); (12) ovo-testes (formerly called “true hermaphrodistism); (13) partial androgen insensitivity syndrome; (14) progestin induced virilization; (15) Swyer Syndrome; and (16) Turner’s Syndrome. This list of diverse conditions hints at the difficulty of categorizing intersex athletes since each condition affects the human body in a unique fashion. In fact, all that can truly be said about a person with any of the above conditions is that he or she does not have a typical reproductive or sexual anatomy.

C. What is Sex Anyway?

In the 19th century, there were only five classifications of sexual anatomy: (1) female, (2) male, (3) female pseudohermaphrodite, (4) male pseudohermaphrodite, and (5) true hermaphrodite. Pseudohermaphrodite was the term used for a person whose physical appearance was at odds with
his or her gonads.\textsuperscript{42} A true hermaphrodite was a person with both male and female external genitalia.\textsuperscript{43} The word hermaphrodite, which at one time was used to describe some intersex conditions, is a reference to the son of Hermes and Aphrodite in Greek mythology.\textsuperscript{44} This son (or daughter) was both fully male and fully female. Although a person may have both male and female external genitalia, it is impossible for a person to be fully male and fully female.\textsuperscript{45} In addition to the inaccuracy of the word “hermaphrodite” is considered stigmatizing and misleading.\textsuperscript{46}

There are at least six criteria to determine a given individual’s sexual status: (1) sex chromosome constitution; (2) sex hormonal pattern; (3) gonadal sex (testis or ovary); (4) internal sex organs; (5) external genitalia; and (6) secondary sexual characteristics.\textsuperscript{47} Considering the vast number of molecules involved in each of these stages and the various ways in which one can be either a man, woman, or intersex, it is not difficult to understand why atypical cases exist or why the governing authorities of sport should be careful in their approach to sex testing. Put bluntly, the need for the new IAAF rule was obviated by numerous historical examples of callously

\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Is a Person Who is Intersex a Hermaphrodite?, INTERSEX SOC. OF N. AMER., http://www.isna.org/faq/hermaphrodite.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Barbara Drinkwater, WOMEN IN SPORT, 188, Blackwell Science, Ltd. 2000. Ljundqvist also includes gender roles and gender identity among the criteria that determine a person’s sexual status. For purposes of keeping biological sex and gender separate, the seventh and eighth of these criteria have been excluded.
handled cases that implied guilt before testing even began.

IV. FAIRNESS: AMBIGUITY, SUSPICION, AND THE FUNDAMENTAL PRINCIPLES OF OLYMPISM

A. Sex Stereotyping at the Olympics

The founder of the modern Olympic Games, Pierre de Coubertin, was opposed to all women’s participation throughout his term as IOC president.\(^48\) He believed that for men, success in sport competition demonstrated personal worth and prepared one to serve the nation.\(^49\) This personal worth came from the social value of domination of others, which was an inappropriate goal for women.\(^50\) The Olympics developed around sports such as track and field that emphasized distance traveled over time, distances jumped in length and height, and weight moved.\(^51\) These quantitative measurements became fused with the idea of masculinity. As a result of this marriage of masculinity and sports that focused on statistical measurement, sports leaders rejected the efforts of women to join track and field events, which were also considered the most important part of the Olympic Game.\(^52\)

Fortunately, the Olympics eventually did allow female competitors


\(^{49}\) Id.

\(^{50}\) Id.

\(^{51}\) Id. at 9.

\(^{52}\) Id.
in track and field in 1928.\(^{53}\) However, society’s thoughts on women’s sports did not change as much through social movement and changed attitudes, but more so through necessity. During the Cold War years, the desire to compete with the Soviet Union and associated Eastern Bloc nations had the unexpected effect of creating more opportunities for U.S. women in sports.\(^{54}\) In 1952, the Soviet Union came to the Olympics with a full team of male and female athletes.\(^{55}\) In order to compete, the United States put aside its traditional notion of the unsuitability of women in certain sports.\(^{56}\) The medal count was more important than preservation of social norms. Women were allowed into sports that previously were closed off to them. These increased opportunities came with increased suspicion of female athletes as masculine and in some cases suspicion about men posing as women.\(^{57}\) This is the era that gave rise to sex testing. Although women were allowed to compete to “serve the nation,” as Pierre de Coubertin so aptly put it, they were not embraced as were men.\(^{58}\)

Instead of encouraging women to compete in “masculine” measurement-type sports, the Olympics worked to channel women into

\(^{53}\) **ALLEN GUTTMAN, WOMEN’S SPORTS: A HISTORY 139 (COLUMBIA UNIVERSITY PRESS 1991).**
\(^{54}\) Wamsley, supra note 48, at 11.
\(^{55}\) Id.
\(^{56}\) Id.
\(^{57}\) Id; See also Jessica Adair, Note, *In a League of Their Own: The Case for Intersex Athletes*, 18 Sports Lawyers Journal 121, 132 (2011) (discussing the history of sex verification tests in the Olympic Games).
\(^{58}\) Wamsley, supra note 48, at 11.
certain sports that society found more appropriate for females.\textsuperscript{59} Sports such as fencing, swimming, tennis, figure skating, and gymnastics that emphasized abilities such as grace, rhythm, and artistry were the order of the day.\textsuperscript{60} Though subtle, the normative enforcement of gender stereotypes correlated disapproval of competitors flirting with atypical boundaries and inclinations were a preview of later concerns to come.

\textbf{B. Overriding Concerns: Human Dignity}

1. The Stigmatizing Effects of Sex Testing: Empirical Examples

a. Stella Walsh

Stella Walsh, also known as Stanislawa Walasiewicz, competed in both the 1932 and 1936 Olympics.\textsuperscript{61} In 1932, she won the 100 meters event.\textsuperscript{62} Walsh had muscle and facial features that were deemed more characteristic of the male sex than the female sex.\textsuperscript{63} As a result, other competitors and the popular media called her “Stella the Fella.”\textsuperscript{64} This was before the time of sex testing, so she competed despite the suspicions. In 1980, Walsh was shot and killed in a bank robbery.\textsuperscript{65} A post-mortem examination of her corpse revealed that she had ambiguous genitalia and

\textsuperscript{59} \textit{Id.} at 11. \textit{See also} Louis J. Elsas, et al., \textit{Gender Verification of Female Athletes}, 2 Genetics in Med. 4, 249-54, 249 (2000).
\textsuperscript{60} Wamsley, supra note 48, at 11.
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{Id.}
atypical chromosomes.\textsuperscript{66} Her specific intersex condition was never ascertained.\textsuperscript{67}

b. Santhi Soundarajan

Stella Walsh was likely aware of her intersex condition since it expressed itself externally. Santhi Soundarajan, however, was not aware of her intersex condition when she was stripped of her medals after a sex test determined that she was not a biologically typical woman.\textsuperscript{68} Soundarajan had AIS, which later became one of the conditions that the IAAF considered not to deem an advantage if the AIS is complete or near complete; however, at the time, there were no such concessions.\textsuperscript{69} Soundarajan won the silver medal in the Asian Games in 2006 in the 800 meters.\textsuperscript{70} Some report that she attempted suicide in September of 2007 due to her humiliation upon discovering that she was not a typical female, but this report is inconsistent with other accounts.\textsuperscript{71} It is established that she took a veterinary drug and subsequently required emergency assistance.\textsuperscript{72} The Indian government issued a statement that Soundarajan’s attempted suicide was “due to personal and domestic reasons and it had nothing to do with sports or any

\begin{footnotes}
\footnote{66}{Id; See also Adair, supra note 57.}
\footnote{67}{Id.}
\footnote{68}{The Sad Story of Santhi Soundarajan, THE TIMES OF INDIA, Jan. 9, 2007, available at http://timesofindia.indiatimes.com/articleshow/1109135.cms; See also Adair, supra note 56.}
\footnote{69}{See INTERNATIONAL ASSOCIATION OF ATHLETIC FEDERATIONS: POLICY ON GENDER VERIFICATION, supra note 6.}
\footnote{70}{The Sad Story of Santhi Soundarajan, supra note 66.}
\footnote{71}{Id.}
\end{footnotes}
government action.” 73 Others report that her attempted suicide stemmed from the familial infighting over the $30,000 that the Indian government awarded her in the wake of the failed test to show its support. 74 After the incident, Soundarajan opened a sports academy where she now trains underprivileged children. 75 Upon learning of Caster Semenya’s predicament, Soundarajan expressed her support for her fellow 800 meters athlete with the comment “[s]he is a woman and that’s it, full stop.” 76

c. Maria Jose Martinez-Patino

A Spanish hurdler, Maria Martinez-Patino was raised as a girl. 77 She passed a sex test and competed at the 1983 World Track and Field Championships. 78 At the time, a woman who passed the sex test was given an official Certificate of Femininity that would prevent an athlete from having to submit to sex tests at every competition. It was important, however, to bring the certificate to competitions and Martinez-Patino failed to do just that in 1985 at the World University Games in Kobe, Japan. 79 Martinez-Patino underwent another Barr body test, but this time there was a

73 Id.
74 Id.
76 Id.
78 Id.
79 Id.
problem. In addition to the Barr body test, she was asked to undergo further karyotype testing. Unfortunately, the results of such testing were not available until after the competition, so she was not allowed to compete in Kobe. Team doctors advised her to fake an injury and withdraw from the event.

While back home in Spain, she attended all of her doctors’ visits alone, not wanting to burden her parents with the matter. Doctors discovered that she had an XY karyotype and androgen insensitivity. She appeared completely female with both breasts and a vagina, but she was subsequently barred from athletics when she competed again at the Spanish National Championships in 1986. Before the race, officials had asked her again to fake an injury and retire. Instead, she competed and officials leaked the information about her condition to the press. In addition, she was expelled from the athletes’ residence, her sports scholarship was revoked, and her times were erased from the record books in Spain. Aside from this professional exile, Martinez-Patino lost much more as some of her

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80 Id; See also Adair, supra note 57.
81 Martinez-Patino, supra note 77.
82 Id.
83 Id; See also Adair, supra note 57.
84 Id.
85 Id.
86 Id.
87 Id.
88 Id.
89 Id.
friends and fiancé abandoned her.\textsuperscript{90}

Amidst this humiliation and turmoil, instead of hiding from the media, she embraced it as a medium for her cause. Coverage of her case helped end chromosome based testing.\textsuperscript{91} In 1988, she was reinstated and competed in the Olympic Trials.\textsuperscript{92} She narrowly missed qualifying for the 1992 Olympic Games in her home country by one-hundredth of a second.\textsuperscript{93} Emblematic of the destruction that can be unleashed upon a person’s life when private sex test results are revealed to the public, Maria Jose Martinez-Patino’s story was also a reminder that any balancing of interests when considering the fairness of allowing intersex athletes to compete should properly consider empirical evidence. For Martinez-Patino, there was found to be no physical advantage from her AIS. Any proponent of a categorical ban on intersex athletes should ask what the purpose of such ban would be if an individual’s condition does not give her an advantage and she has been raised and lived as a female all of her life.

2. Fundamental Principles of Olympism: Human Dignity and Inclusion

The value of human dignity is embodied in the Second Fundamental Principle of Olympism, which states, “The goal of Olympism is to place sport at the service of the harmonious development of man, with a view to

\textsuperscript{90} Id.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
promoting a peaceful society concerned with the preservation of human dignity.”\textsuperscript{94} This principle articulates that sport is at the service of the development of man (or woman). The Fourth Fundamental Principle of Olympism states “The practice of sport is a human right.”\textsuperscript{95} It goes on to state that “Every individual must have the possibility of practicing sport, without discrimination of any kind . . . .”\textsuperscript{96} This principle expresses a policy of inclusion. Any categorical ban on intersex athletes would be in violation of this principle. However, the “possibility” of competing at the Olympics does not rule out requiring alternative treatment of an intersex condition before admission to competition or the establishment of a separate division for intersex. Nevertheless, these principles in concert seem to identify values that require considerations of sport such as a level playing field to accommodate the inclusion of intersex competitors in Olympic competition in a manner that does not place barriers to their participation in a way as artificial as mere suspicious appearance.

\textbf{C. Within the Normal Range of Variation}

Any future decision to include or exclude intersex athletes from competition will make a statement about the acceptable normal range of variation for a female athlete. It may not be possible to precisely define the

\textsuperscript{94} \textit{Olympic Charter}, Fundamental Principles of Olympism, 2.
\textsuperscript{95} \textit{Id.} at Fundamental Principle 4.
\textsuperscript{96} \textit{Id.}
bounds of what is and what is not female. One method of defining the normal range of variation is by gauging whether an intersex competitor’s abilities exceed those of a biologically typical female. This method of defining an acceptable range effectively deems advantages due to intersex conditions unfair. If, however, there are mitigating reasons to believe that intersex competitors are within the normal range of variation for women, then any advantage should be accepted as natural and fair. In defining an acceptable range of variation for female athletes in a manner that does not take into account athletic ability, there is a great danger of prejudice and an overreliance on outmoded sex stereotypes.

It is hard to imagine that traditional stereotypes of acceptable female appearance will not play some role if this review is relegated to case-by-case testing. Bearing in mind the history of discrimination against women in sports, it is imperative that the IAAF’s “reasonable grounds” safeguard be vigorously defended against the possibility of perpetuating traditional sex stereotypes and upholds the Principles of Olympism and inclusion.

D. Semenya’s Ambiguous Appearance

Before the 2009 World Championship, Caster Semenya was told to report for a doping test in South Africa; however, this test was unlike any

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other drug test. Without her permission or consent (she was 18 years old at the time), Semenya was examined physically – her legs were put in stirrups and her genitalia examined; this was not a doping test, this was a sex test. However, the test in South Africa was inconclusive and the IAAF ordered a second test. This second test took place in a Berlin hospital the day before the 800-meter final of the 2009 World Track and Field Championships. Semenya easily won in Berlin and controversy ensued. It would be mid-2010 before the IAAF, citing the conclusion of medical experts, cleared Semenya to compete once again as a woman.

Pierre Weiss pointed to “ambiguity” as the basis for Caster Semenya’s Berlin sex test. It is important to note that the purpose of gender testing, as outlined by an IOC working group that met twice in 1991, was only to ensure that men do not masquerade as women. In fact, in 2000, Arne Ljungqvist opined that the “purpose of gender testing is not to

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99 Id.

100 Id.

101 Id.

102 Id.

103 Id.

104 Clarey, supra note 1.

105 WOMEN IN SPORT, supra note 47, at 188 Id. at 188 (noting that although there were no major conclusions reached about the purpose of gender testing, the sole purpose of preventing male impostors could be identified from the minutes of both meetings).
identify ambiguous cases.” However, because Weiss specified that the IAAF did not believe that Semenya was “cheating,” it is clear that sex verification tests were not administered because officials believed that Semenya was a man masquerading as a woman to gain an unfair advantage. Thus, it seems that the former gender testing policy, at least in practice, was no longer confined to cases of suspected men posing as women.

Maria Savinova, the runner who finished fifth, told journalists that she did not believe Semenya would pass a gender test, saying “Just look at her.” Indeed, Semenya's muscles were much more developed and defined than the other runners in the race. Her six-pack abdominals would be the envy of many male professional bodybuilders. If the “ambiguity” that Weiss was referring to is that Semenya’s physical appearance brings into question her biological sex, Weiss must have been saying that her “masculine” appearance is beyond the normal range of variation for a female athlete. But relying on physical appearance alone is clearly imprecise. Further, initial evaluations based on masculine visual cues runs the risk of discriminating against athletes who do not exemplify traditional female stereotypes.

The fact remains, however, that the only two pieces of information

\(^{106}\) Id. (emphasis in original).
\(^{107}\) Clarey, supra note 1.
\(^{108}\) Id.
that were available to the other runners were Semenya’s physical appearance and her performance in the event. Semenya’s time was short of the World Record even though her victory was by a wide margin of over two seconds. If it is accepted that the current World Record holder in the 800 meters and all of those with faster times than Semenya are females, then this performance alone should not create suspicion. The IAAF cited the relative newness of Semenya to adult competition and her dramatic improvements in performance as additional reasons for their suspicions and subsequent sudden decision to subject her to gender testing. It is not clear how dramatic improvements in performance are less of a feminine feature than a masculine one unless it is alleged that Semenya underwent some gender change to accelerate her improvement. Granted, this is not the first time Semenya had been accused of not being entirely female. However, this may only mean that she has long been the subject of informal sex stereotyping.

V. HISTORY OF SEX TESTING

A. The Early Years

The original purpose of sex testing in women’s sport was to root out

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109 Id.
110 Id.
men masquerading as women. One possible case was Dora Ratjen, who competed in the 1936 Olympic Games for Germany in the high jump event. Ratjen finished fourth in the Olympics and went on to set a world record at the European Championships two years later. It has been alleged that Dora Ratjen, although raised as a female, was born a male and forced to compete as a female by the Nazi regime. Dora (also Hermann) Ratjen’s case is controversial because there were reported abnormalities with her genitalia, and, therefore, it was not certain that she was a typical male disguised as female for the purpose of gaining an athletic advantage. What is certain is that she was registered as Dora Ratjen at birth and raised as a girl and by all accounts it seems as if she continued to live as a female. At worst, Dora Ratjen was a case of a typically male athlete in biological terms who lived a large portion of her life such that it could be said that her gender was indeed female. Ratjen’s experience is part of a wider debate than Caster Semenya’s. Any argument for inclusion of athletes such as Ratjen (if she was biologically male) disregards the biological advantages that a person with a typical male biology is likely to have and focuses on the social fairness of including or excluding typical

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112 Drinkwater, supra note 47. Ljundqvist also includes gender roles and gender identity among the criteria that determine a person’s sexual status. For purposes of keeping biological sex and gender separate, the seventh and eighth of these criteria have been excluded.

113 Tucker & Collins, supra note 62.

114 Id.

115 Id.

116 Id.

117 Id.
biological males who are bona fide gender female.\textsuperscript{118}

It was the accusations that Dora Ratjen was a man posing as a woman and additional accusations of men competing as women in the 1936 Berlin games and later in the 1960 Rome Olympic games that prompted the IOC and IAAF to establish sex verification procedures.\textsuperscript{119} Beginning at the 1966 European Track and Field Championships in Budapest and the 1967 Pan American Games in Winnipeg, sex verification via physical inspection was instituted for all female competitors.\textsuperscript{120} These early sex tests are now referred to as the “Nude Parade” due to the crude and humiliating nature of the procedure.\textsuperscript{121} At the 1966 Commonwealth Games in Kingston, Jamaica, gynecological examinations were performed.\textsuperscript{122} The humiliating nature of these kinds of tests led to the adoption of the sex Chromatin, also known as the Barr body test.\textsuperscript{123}

\textbf{B. The Barr Body Test}

This new test was introduced in the 1968 Mexico City Olympic Games.\textsuperscript{124} The Barr body test, also called the sex chromatin or buccal smear test, involved a microscopic examination of cells scraped from the

\textsuperscript{118} The Canadian Association of Sport Medicine recommends that, “individuals who were raised as females and are psychologically and socially females from childhood should be eligible to compete in women’s competition regardless of their chromosomal, gonadal and hormonal sex.” \textit{CASM Position Statement}, supra note 23.

\textsuperscript{119} Tucker & Collins, supra note 62.


\textsuperscript{121} Id.; See Adair, supra note 57.

\textsuperscript{122} Id.

\textsuperscript{123} Id.

\textsuperscript{124} Tucker & Collins, supra note 62; See Adair, supra note 57.
inner lining of an athlete’s cheek. Under typical circumstances, females have two X chromosomes and men have one X chromosome and one Y chromosome. During prenatal development, the second X chromosome in the typical female is inactivated to form what is called a Barr body in the nucleus of cells. Typical males do not have a second inactive X chromosome and thus do not have any Barr bodies. If a sex chromatin test is positive for Barr bodies, then a test subject has more than one X chromosome. If the test is negative for Barr bodies, then an individual has only one X chromosome. The presumption of those using the Barr body test is that a male with XY chromosomes will test negative for Barr bodies and a female with XX chromosomes will test positive for the Barr bodies and should be granted permission to compete as a woman. Furthermore, there is a presumption that typical male or female chromosomes produce typical male or female genitalia. Conditions present in intersex individuals challenge these assumptions.

To illustrate this, one need only consider a few examples of more common intersex conditions. In Turner’s Syndrome it is common for a

125 WOMEN IN SPORT, supra note 47, at 185.
127 Tucker & Collins, supra note 62.
128 Id.
129 Id.
130 Id.
131 Id. See also ARNE LIUNGQVIST & JOE LEIGH SIMPSON, MEDICAL EXAMINATION FOR THE HEALTH OF ALL ATHLETES REPLACING THE NEED FOR GENDER VERIFICATION IN INTERNATIONAL SPORTS: THE INTERNATIONAL ATHLETIC FEDERATION PLAN. J.AM.MED.ASS’N. 267: 850, 1992, at 499.
person to be missing an entire sex chromosome.\textsuperscript{132} Those with Turner’s Syndrome have a female appearance, but since such individuals lack the second X chromosome typical in females, their cells will not have Barr bodies and the sex chromatin test will consider them males.\textsuperscript{133} The issue with Turner’s Syndrome athletes is that although they are not typically female, they do not have a Y chromosome, as do typical males. A second problematic example for the Barr body test is Klinefelter’s Syndrome. Athletes with Klinefelter’s Syndrome will appear to be typical males, but the Barr body test will admit them into female competition.\textsuperscript{134} Because Klinefelter’s individuals have an XXY karyotype, they will not only have a second X chromosome and thus a Barr body but also a Y chromosome.\textsuperscript{135} The result of the use of Barr body tests on athletes with Turner’s Syndrome and Klinefelter’s Syndrome is that those who look like females and do not have a Y chromosome (Turner’s Syndrome) are banned from competition and those with a male appearance and a Y chromosome (Klinefelter’s syndrome) are admitted.

A third condition, mosaicism, would lead to inconsistent Barr body test results. Those with mosaicism have multiple karyotypes in different cells.\textsuperscript{136} Some cells may have XX karyotypes and others may have XY

\textsuperscript{132} Tucker & Collins, \textit{supra} note 62.
\textsuperscript{133} \textit{Id.} See also De La Chapelle, \textit{supra} note 126, at 1922.
\textsuperscript{134} Tucker & Collins, \textit{supra} note 62.
\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{Id.} See also LJUNGGVIST & SIMPSON, \textit{supra} note 131, at 186.
karyotypes. One can imagine the confusion upon multiple tests. Another common form of mosaicism is XO (O stands for the absence of a chromosome) and XY cell combinations, which would still be problematic even though the Barr body test for such individuals would be consistently male due to the absence of the second X chromosome.

Further, merely detecting the existence of a second X chromosome ignores that the presence of a Y chromosome alone does not necessarily confer an athletic advantage. Individuals with complete or partial androgen insensitivity (AIS) have an XY karyotype, but do not have typical response to androgens (male hormones) due to mutations causing an atypical function in androgen receptors. These individuals have testicles, which can be internal, that produce a normal level of testosterone for a male. Even though typical male levels of androgens are produced, because of a mutation, androgen receptors are completely or partially insensitive to this testosterone. The result is the development of secondary female characteristics and musculature. Individuals with partial or complete AIS may appear as females and be raised female. The Barr body test would root out these athletes as unfit for female competition

137 Tucker & Collins, supra note 62.
138 Id.
139 Id.
140 Id. at 149.
141 Id.
142 Id.
143 Id.
144 Tucker & Collins, supra note 62.
although they may or may not have any athletic advantage from the presence of a Y chromosome.

C. Polymerase Chain Reaction and the End of Compulsory Sex Testing

The IAAF ceased the practice of compulsory sex testing in 1991, but the IOC continued to screen female participants.\textsuperscript{145} The IOC, however, replaced the Barr body test with a Polymerase Chain Reaction test that detects the Sex-Determining Region Y (SRY) gene which is found on the male chromosome.\textsuperscript{146} The product of the SRY gene was thought to be necessary for the development of testicles in males.\textsuperscript{147} Now, however, the SRY test is considered inaccurate because other genes are required for testicular development and some who do not have the SRY gene may have testes.\textsuperscript{148} Additionally, the SRY gene can exist on the X chromosome as the result of translocations during meiosis.\textsuperscript{149} The PCR test for the SRY gene was used during the 1992 and 1996 Olympics.\textsuperscript{150}

In 1999, the IOC ended compulsory sex testing.\textsuperscript{151} The current Chairman of the IOC Medical Commission, Arne Ljungqvist, has cited several reasons for the discontinuation of compulsory sex testing, including: (1) genetic tests do not fulfill the aims of gender verification in sport; (2) 

\textsuperscript{145} Ritchie, \textit{supra} note 61.
\textsuperscript{146} Id.; See also Adair, \textit{supra} note 57 (2011) (discussing the history of sex testing at Olympic Games).
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Tucker & Collins, \textit{supra} note 62.
\textsuperscript{150} Id.
\textsuperscript{151} See Adair, \textit{supra} note 33 at 134.
there is no single and adequate laboratory method for screening for gender; (3) physical examination has been proposed as the only adequate laboratory method for screening for gender, but physical examination is unworkable; and (4) it is suggested that the close media coverage of today’s elite sports and the existing drug control procedures will be sufficient to stop men masquerading as women.\footnote{Ljungqvist, prior to the elimination of compulsory sex testing, stated his opinion that “all forms of examination of athletes concerning their sexual identity should be discontinued.”} D. Current Policies

1. The IAAF and the International Olympic Committee

To understand the current policies, it is important to understand the athletic organizations being discussed and their relationship to one-another. The IOC serves as the “supreme authority” over the Olympic Movement, overseeing the other organizations in the Movement and creating rules that must be followed.\footnote{The Olympic Movement available at http://www.olympic.org/content/The-IOC/Governance/Introductionold/ and Daniel Gandert and Harry Epstein, The Court’s Yellow Card for the United States Soccer Federation: A Case for Implied Antitrust Immunity, 11 VA. SPORTS & ENT. L.J. 1.} Under the IOC, The National Olympic Committees (NOCs) are the member nations’ individual organizing bodies.\footnote{Id.} They focus on their respective nation’s development and pursuit of sports of all

\footnote{WOMEN IN SPORT, supra note 47, at 191-92.} \footnote{LJUNGQVIST & SIMPSON, supra note 131, at 500. See also SIMPSON, ET AL., supra note 119.}
kinds as well as participation in the Olympic Movement. Selection of athletes and teams for participation in the Olympic Games is the responsibility of the NOCs. Also under the IOC, the International Federations (IFs) are the global administrators of a particular sport as recognized by the IOC. With broad-spectrum responsibility for a sport and its athletes, one of the primary functions of the IFs is to maintain the “integrity” of the sport. The International Association of Athletics Federations (IAAF), as an IF, is the international governing body for the sport of track and field.

2. The IAAF Policy

The new IAAF policy on eligibility for women's competition retains the practice of not requiring compulsory sex testing, but furthers the protection from potentially invasive testing even when suspicion arises. The “reasonable grounds” for review standard provides several instances which could trigger a review, including: (1) an athlete approaching the IAAF or her National Federation; (2) results from a routine pre-participation exam; (3) results from a drug test; (4) confidential information received by IAAF officials. Notably, however, the explanatory notes to the

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156 Id.
157 Id.
158 Id.
159 Id.
new policy require such triggering information to come from “a reliable source.”\textsuperscript{161} Ostensibly, a rival competitor’s mere accusation would not suffice.

Maintained is the noteworthy position of the IAAF rejecting laboratory testing as being singularly sufficient to make a sex determination.\textsuperscript{162}

There is a medical evaluation before a panel of at least five experts, instead, including: a gynecologist, an endocrinologist, a psychologist, an internal medicine specialist, and an expert on gender/transgender issues.\textsuperscript{163} In all cases, the IAAF advises that if testes are present, the organs should be removed to avoid malignancy.\textsuperscript{164} Yet, again, this policy of testicular removal for the purposes of the medical health of the athlete echoes the January Panel’s recommendations. While this raises the issue of intersex athletes as disordered rather than within the acceptable variation of healthy females, the advised removal of typically male gonads thus avoids the issue of fairness in competition by means of treating all such conditions as health concerns. Further, IAAF policy specifically delineates some conditions it believes to be permissible in women’s competition because these conditions confer no physical advantage.\textsuperscript{165}

\begin{flushright}
\textsuperscript{161} \textit{Id.}  \\
\textsuperscript{162} \textit{Id.}  \\
\textsuperscript{163} \textit{Id.}  \\
\textsuperscript{164} \textit{Id.}  \\
\textsuperscript{165} INTERNATIONAL ASSOCIATION OF ATHLETIC FEDERATIONS: POLICY ON GENDER
\end{flushright}
In a section detailing conditions that should be allowed, the IAAF lists conditions that it has determined do not give female competitors an advantage. These include: AIS (complete or almost complete), gonadal dysgenesis, and Turner’s Syndrome. Under formerly used tests, competitors may have been barred from competition for having one of these conditions, but the IAAF has determined that they confer no advantage over typical females. In a second section involving conditions that “may accord some advantages but nevertheless [are] acceptable,” the IAAF names three conditions: congenital adrenal hyperplasia, androgen producing tumors, and anovulatory androgen excess (polycystic ovary syndrome). The inclusion of these specific guidelines is refreshing and can serve as the basis for more detailed rules addressing the fairness of intersex in women’s competition – a needed consideration given the history of sex testing.

3. The IOC’s Adoption of a Similar Policy

The IOC adopted regulations similar to those of the IAAF in the month preceding the 2012 Summer Olympic Games. Focusing on testosterone levels and androgen reception, the regulations seek to address conditions that may “confer[] a competitive advantage” (hyperandrogenism)

\[\text{VERIFICATION, supra note 6.}\]
\[\text{Id. supra note 6.}\]
\[\text{Id. supra note 6.}\]
\[\text{Id. supra note 6.}\]
\[\text{Id. supra note 6.}\]
\[\text{International Olympic Committee, supra note 7.}\]
rather than act as a verification of sex.\textsuperscript{170} These new regulations, entitled IOC Regulations on Female Hyperandrogenism, place the responsibility of ensuring compliance with the regulations on the NOCs.\textsuperscript{171} Per the language of the IOC regulation, this responsibility is not one of passively addressing questions of eligibility but rather of “…actively investigat[ing] any perceived deviation in sex characteristics…”\textsuperscript{172} As a result of this delegation of proactive responsibility, the IOC Medical Commission Chairman, Arne Ljungqvist, indicated an expectation that the IOC regulations would not be an issue at the 2012 Summer Olympic Games.\textsuperscript{173}

The regulations indicate the procedure for initiating and conducting an investigation, as well as the consequences if an athlete is determined to have a condition that “confers a competitive advantage.”\textsuperscript{174} An “investigation” can be requested by the athlete herself; “a Chief NOC Medical Officer; an IOC Medical Commission member or an OCOG Medical Officer; or the [IOC Medical Commission] Chairman.”\textsuperscript{175} Should a female athlete have hyperandrogenism which results in an advantage, she


\textsuperscript{171} International Olympic Committee, \textit{supra} note 7.

\textsuperscript{172} \textit{Id.}


\textsuperscript{174} International Olympic Committee, \textit{supra} note 7.

\textsuperscript{175} \textit{Id.}
may be disqualified from the Games and sanctions may be imposed on the “team physician and/or any relevant persons in the investigated athlete’s entourage.”\textsuperscript{176} (emphasis added). Should a female athlete or related personnel refuse to cooperate with an investigation, she may be “provisionally suspended” and sanctions may be imposed on the “team physician and/or any relevant persons in the investigated athlete’s entourage.”\textsuperscript{177} (emphasis added). Such determinations of ineligibility, provisional suspension, and/or sanctions are appealable to the Court of Arbitration for Sport.\textsuperscript{178}

While providing a framework for addressing possible concerns of female athletes possessing a competitive advantage, the IOC regulations are not free from criticism. Vagueness is one of those criticisms – specifically, that the regulation lacks a precise hormonal range that is identified as either acceptable or unacceptable.\textsuperscript{179} According to Arne Ljungqvist, this lack of precision was intentional and was to allow for flexibility when handling cases that may arise.\textsuperscript{180} A similar desire by the IOC for the flexibility to respond as it sees fit seems apparent in the language used regarding sanctions referenced above. Second, the regulations do not address

\begin{footnotes}
\item[176] Id.
\item[177] Id.
\item[178] Id.
\item[180] See Macur, \textit{supra} note 170.
\end{footnotes}
treatment(s), if any, which if pursued may allow a female athlete to compete.\textsuperscript{181} However, Arne Ljungqvist was noted as saying that athletes who choose to lower their testosterone levels medically may become eligible to compete.\textsuperscript{182} A third criticism is that this new regulation may conflict with the existing “Stockholm Consensus” – by possibly allowing those with female hyperandrogenism to maintain a higher androgen level than that allowable for athletes who have transitioned from male to female.\textsuperscript{183} Fourth, is the proposition that testosterone does not convey and is not a proper indicator of athletic ability or competitive advantage.\textsuperscript{184} Additionally, that testosterone can vary “widely depending on time of day, time of life, social status and – crucially – one’s history of athletic training.”\textsuperscript{185} There is also the suggestion that the testosterone in hyperandrogenous women is naturally occurring and thus is not akin to cheating.\textsuperscript{186} Furthermore, there is the proposition that hyperandrogenism is a “biological variation” and is similar to acceptable variations found in other athletes – ranging from conditions that allow for greater endurance and long limbs to genetic variations affecting growth and blood flow for

\textsuperscript{181} Macur, supra note 167.
\textsuperscript{182} Macur, supra note 170.
\textsuperscript{183} Dreger, supra note 176.
\textsuperscript{184} See Karkzis, supra note 98.
\textsuperscript{186} Id. and Karkzis, supra note 98.
Finally, there is the criticism that the regulations are an attempt to ‘police femininity’ since concerns regarding female athletes are often raised due to the fact that they do not conform to an idealized female athletic appearance.

While criticisms may abound, the regulations draw support from some medical professionals as a practical solution to a complex situation. By focusing on testosterone, where the typical male range exceeds the female range by a factor of ten, the regulations received praise as narrowing in on a truly differentiating factor between men and women. Despite being imperfect, the regulation is an attempt at creating a fair environment for competition.

187 Id.
191 Id. (citing Dr. Joshua Safer, Boston Medical Center Endocrinologist and transgender care expert).
192 See Macur, supra note 170; Vilain, supra note 187.
4. What this means for Caster Semenya

IAAF regulations (and, by extension, the new IOC regulations) allow an athlete, under the care of her personal physician, to lower her androgen levels in order to qualify and compete, with the athlete subsequently subject to ongoing monitoring by the IAAF. While there is speculation, due to her more feminine appearance, that Caster Semenya undergoes some type of hormone treatment to comply with IAAF regulations, it is not confirmed. Speculation aside, Caster Semenya qualified to compete in the Summer 2012 Games.

Representing South Africa, Semenya was her country’s flag bearer in the opening ceremony of the Games and was anticipated to win a medal in the 800 meters. She won a silver medal. However, in spite of official clearance to run and a second place victory – rather than first place, Semenya continued to face criticism. In fact, it is that second place victory that spurred questions for some, with Semenya being asked at a

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194 International Association of Athletics Federations, supra note 6.
196 Macur, supra note 167.
199 Id.
press conference if she had intentionally not won gold to avoid controversy.\textsuperscript{200} The allegations were denied by Semenya and she expressed happiness with her second place finish at her first Olympics.\textsuperscript{201}

In an interview with NBC Sports, which aired the day of the women’s 800-meter final of the 2012 Olympic Games, Semenya expressed that her focus is on the future and not on worrying about the past.\textsuperscript{202} Seemingly staying true to her focus and undeterred by the criticism of her second place victory at the 2012 Olympics, Semenya indicated her intention to run again in the 2016 Olympic Games in Rio de Janeiro.\textsuperscript{203}

VI. FAIRNESS: EXISTING REGULATIONS THAT MAY SERVE AS A BASIS FOR FUTURE POLICY

A. A Ubiquitous Issue

It is not surprising that there are existing measures in Olympic sport to establish and preserve a level playing field. The Paralympic classification system is a detailed set of standards that seeks to quantify athletes’ abilities to ensure a level playing field. The Paralympic model illustrates that it is possible to take a group of competitors with diverse abilities and group them in a way that preserves the principles of inclusion and fairness. Doping regulations serve to keep athletes from using

\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} NBC Sports, supra note 98.
\textsuperscript{203} Olympic Silver, supra note 195.
prohibited substances and methods that afford them unfair advantages. Implicit in defining what does and does not constitute doping is the determination that there are advantages that an athlete may possess that are permissible and fair. Finally, the inclusion of transsexual athletes in Olympic competition demonstrates that the IOC intended that women’s Olympic events should not be limited only to those who were born typical XX females. Even though the inclusion of transsexual athletes is conditional, it is encouraging to note that the IOC has adopted specific standards for admission.

B. Useful Examples from Other Realms

1. Paralympics

The classifications used in the Paralympics illustrate that those with ostensibly diverse skill levels can participate on a level playing field. In 1948, Sir Ludwig Guttman organized a sports competition involving disabled World War II veterans.\(^{204}\) The first Paralympics in 1960 grew out of this early competition.\(^{205}\) The “para” in Paralympics stands for “parallel” or “equal to” and not “paraplegic” as many may falsely believe.\(^{206}\) At the 2008 Beijing Paralympics, there were 3,951 competitors from 146


\(^{205}\) Id.

\(^{206}\) Id.
Competitors at the Paralympics may have any number of disabilities, including: blindness or visual impairment, amputated limbs or similar impairments, spinal cord injuries, motor impairments due to cerebral palsy, traumatic brain injury or stroke, and other disabilities. Because of the multitude of ways in which Paralympic athletes are disabled, the games employ a very complex classification system in the interest of placing competitors of similar ability in the same class.

Each sport may have a different classification system. Cycling, for example, has the following rules regarding competitors: the cycling competitions for both road and track are open to amputees, those with cerebral palsy, and the visually impaired. The competition is also open to those athletes with other disabilities, called the les autres class-- those with dwarfism, multiple sclerosis, and congenital deformities. All of those who are visually impaired compete in one class against one another on tandem bicycles with a sighted lead rider. Amputees, those with spinal cord injuries, and les autres athletes compete within one of the following classes: (1) LC1: riders with upper limb disabilities, (2) LC2: riders with disabilities in one leg but who can pedal normally, (3) LC3: riders with an

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207 **Paralympic Games**, http://www.paralympic.org/Paralympic_Games/.
208 Bressen, *supra* note 201, at 335.
209 *Id.* at 336.
210 *Id.*
211 *Id.*
impairment in one lower limb (usually pedal with one leg only), and (4) LC4: riders with impairments affecting both legs. The classification system in cycling significantly differs from the classification systems in other sports because of the obvious differences in the abilities required to perform each sport. Each system was organized in conjunction with sports scientists with expertise in biomechanics, sports physiology, and motor control. Officials are open to challenges by athletes who feel that they have been misclassified. In addition, there have been some athletes with disabilities who have been able to compete in the Olympics, such as Liz Hartel who won silver medals in dressage in 1952 and 1956. Hartel had polio and required assistance to mount and dismount her horse. Maria Runyan was legally blind and competed in the track and field competition in the Olympics in the 1500 meters distance coming in eighth out of all female competitors. Both Hartel and Runyan would have qualified for the Paralympics. Most recently Brian McKeever, a visually impaired Canadian cross-country skier, was selected for both the Olympic and Paralympic teams.

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213 Bressen, supra note 201, at 336. See also Buckley, supra note 9 at 7.
214 Bressen, supra note 201, at 336.
215 Id. at 337.
216 Id.
217 Id.
218 Id.
219 Id.
220 Bressen, supra note 201.
There is a strong movement in the Paralympics away from classification based on type of disability and toward classifications based on functional assessment of an athlete’s ability.\(^{221}\) Currently, some sports, such as cycling, rely in part on a functional assessment of an athlete’s disability by a panel of qualified classifiers.\(^{222}\) This assessment is geared toward assessing the degree to which an athlete’s impairment will have an impact on his/her performance in a specific sport.\(^{223}\) The Athletics Classification Project conducted by the Paralympics is a multi-year project that has been undertaken to establish a new system of classification entirely based on the functional capabilities of athletes.\(^{224}\) Each athlete will be physically assessed, but the core of the process will be a set of standardized tests developed specifically to evaluate the impact of such factors as: loss of range of movement, loss of strength, and increased muscle tone on the ability to run, throw, jump, or push a wheelchair.\(^{225}\) The extensive effort that the Paralympics continues to exert in the interests of developing fair classifications for its athletes based on individual ability stems from its recognition that the circumstances of each athlete’s disabilities and abilities are unique. It is important to note that even in the Paralympics, with its complex and comprehensive system of classification designed to keep the

\(^{221}\) Bressen, supra note 201, at 337.

\(^{222}\) Id. at 336.

\(^{223}\) Id.

\(^{224}\) Id. at 337.

\(^{225}\) Id.
playing field level, men do not compete against women. This classification is so deeply engrained in our culture even under unique conditions it cannot be divorced from sports.

Still, it naturally follows that if the IOC/IAAF and various governing authorities decide that certain intersex conditions may confer athletic advantage, they could choose to quantify these advantages in a system similar to the Paralympic classification system. By choosing to ascertain the functional ability of each athlete in a comprehensive manner, criticisms of unfairness to biologically typical female athletes would disappear to a large extent. Although quantifying ability, if possible, would level the playing field, one criticism is that it could ignore the aspect of sport that produces the thrill of David and Goliath type match ups — the notion that not all advantages are unfair. At the Olympics, it seems that the existence of varying levels of athletic talent alone is not enough to institute a system of complete equality.

2. Doping
   a. Doping Regulation

   The 2009 World Anti-Doping Code defines doping as a broad range of infractions such as: (1) presence of a prohibited substance or its metabolites or markers in an athlete’s sample; (2) use or attempted use of a prohibited substance or prohibited method; (3) refusing or failing without
compelling justification to submit to sample collection; (4) violation of requirements for out-of-competition testing; (5) tampering or attempted tampering with any part of doping control; (6) possession of prohibited substances or methods; (7) trafficking or attempted trafficking in prohibited substances or methods; and (8) administration or attempted administration, assisting, encouraging, aiding, abetting, covering up or any other type of complicity regarding anti-doping rule violations or attempted violations.\footnote{\textsc{World Anti-Doping Agency, The World Anti-Doping Code, Article 1: Definition of Doping} (2009), available at \url{http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/}.} Article 4.3.1 of the Anti-Doping Code states that the World Anti-Doping Agency (WADA) shall consider including a substance or method on the prohibited list if the substance or method satisfies one of the following three conditions: (1) causes enhanced performance; (2) is harmful to the health of an athlete; or (3) against the Spirit of the Sport.\footnote{\textit{Id.} at Article 4.3: Criteria for Including Substances and Methods on the Prohibited List.} When a substance or method fulfills at least two of these three conditions, it can be placed on the list of prohibited substances and methods that is promulgated by WADA every year.\footnote{\textit{Id.}} Furthermore, Article 4.3.2 allows WADA to include a substance or method on the prohibited list if there is “medical or other scientific evidence, pharmacological effect or experience that the substance or method has the potential to mask the use of other prohibited substances
or prohibited methods.”

Banned substances are subject to a Therapeutic Use Exemption (TUE), which allows an athlete to use a banned substance for medical purposes. An athlete must apply for a TUE through his or her physician and the medication should not produce any additional enhancement of performance. The medication should be the only possible method of treating the competitor’s ailment.

There are three main traditional arguments for doping control. First, the user of a banned substance or method receives an unfair advantage. Second, the use of banned substances endangers themselves and other athletes by the creation of unnatural force or speed. Third, if banned substances were permitted, other athletes would feel compelled to use them to escape disadvantage. That a substance or method presents an undue danger to athletes is a strong argument for its exclusion. Moreover, it is reasonable to think that if dangerous performance-enhancing substances were not banned, nearly every athlete would want to use these substances in order not to be at a disadvantage. Only unfair advantage presents a truly

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229 Id.
230 Id. at Article 4.4: Therapeutic Use.
232 Id.
233 Id.
235 Id.
236 Id.
elusive rationale among the counterarguments. Advantages in themselves are not unfair and the task of drawing a line between those advantages that are allowable and those that are not can often be an unwieldy exercise.

b. Permissible and Impermissible Advantages

One method used to root out unfair advantage is to distinguish between those advantages that are natural versus those that are enhanced. One need only look at the sport of basketball to understand that certain bodies are more or less suited to certain sports. Shaquille O’Neal did not achieve a height of over seven feet by training and nutrition alone. Some competitors are fortunate to be born with conditions that aid their performance by no action of their own. An extreme example is Finnish skier, Eero Mantyranta, who won 3 gold medals in the 1964 Olympics. Mantyranta had a genetic anomaly that gave him the advantage of having 40-50% more red blood cells than average. Having more red blood cells allows a human to carry more oxygen to cells, increasing muscle performance. Erythropoietin (EPO) is a naturally occurring hormone that has the effect of enhancing red blood cell production, but the practice of

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237 The psychologist Michael Lavin rejects all three rationales as incomplete and cites a third, perhaps overriding, concern — public disapproval. It is more important that these substances and practices are widely accepted as reprehensible rather than the fact that they are actually unfair. Lavin says that doping regulations work to enforce and perpetuate widely accepted ideals. Id. at 193.


239 Id.

240 Id.
injecting or otherwise consuming EPO to boost natural levels is banned by anti-doping rules. Therefore, if an athlete competing against Mantyranta wanted to use EPO to place himself on equal footing with his naturally gifted competitor, he would be found in breach of doping rules.

A competitor may also use permitted substances and methods in concert with training to develop a fair advantage. WADA aimed to further define permissible use of technologies to enhance performance in its Ethical Issues Review Panel Report on artificially induced hypoxic conditions — a practice that simulates altitude training. In this report, WADA sought to clarify the term “Spirit of the Sport” by stating that “[t]he spirit of the sport . . . celebrates natural talents and their virtuous perfection.” Here, again, the concept of natural versus unnatural advantages was invoked. With respect to the use of performance enhancing substances and methods, WADA distinguished between technologies that operate on the athlete in relation to which the athlete is a passive recipient and technologies that require active participation of the athlete in order to reap the benefits of performance enhancement. Technologies that worked to enhance performance regardless of a competitor’s effort were presumably against the spirit of the sport and those that required active effort were acceptable as

241 Id.
243 Id.
244 Id.
part of the process of virtuously perfecting natural talent. 245 This report, which was part of WADA’s abandoned effort to place altitude simulators on its prohibited list, while a useful attempt at developing a concrete policy, did not put the issue of fairness to rest. 246 Although in many cases the line between fair and unfair methods may coincide with the active versus passive technologies paradigm, there are numerous instances in which an athlete must expend effort to realize performance enhancement from even a prohibited substance. 247 (One wonders how such a two-pronged categorization would look upon “hybrid enhancements” such as the use of steroids in baseball: An increase in a slugger's strength would seem impermissibly passive, yet his use of that strength channeled into a home run swing would seem a practiced art.)

In any case, there is little debate that advantages with which a competitor was born are permissible. If this is the case, then the question with regard to intersex athletes is not whether their advantages are fair but whether it is fair to include athletes who may not be within the normal female range of variation. The difference in these two statements lies in that if one accepts that intersex athletes are within the normal range of variation for females, then they must be accepted without alteration because

245 See Id.
247 Id.
their advantages would be natural gifts like Mantyranta’s.\textsuperscript{248} It is important to consider that natural gifts are not permissible advantages when the sex line is breached. However, the categorical exclusion of all athletes who are not biologically typical females is inconsistent with the current IAAF/IOC policies.\textsuperscript{249} The IAAF/IOC policy regarding post-operative transsexuals demonstrates that the governing authorities believe that there is a workable method of including transsexuals in Olympic sport and that such inclusion is an important goal.

c. Transsexuals in Sport

In 1974, Dr. Richard H. Raskind was an accomplished male tennis player who ranked third in the East and thirteenth nationally in the men’s 35-and-over class.\textsuperscript{250} Raskind, although he was born, raised, and had biologically lived his life for over thirty-five years as a man, identified with the female gender.\textsuperscript{251} He underwent sex reassignment surgery and became Renee Richards.\textsuperscript{252} After biologically becoming a woman, Richards continued to play tennis.\textsuperscript{253} As Renee Richards, she entered 9 tournaments;

\textsuperscript{248} See Canadian Academy of Sport Medicine, Position Statement, CASM Recommendations, \textit{supra} note 23 (stating that female athletes with certain intersex conditions such as congenital adrenal hyperplasia, incomplete androgen insensitivity, or chromosomal mosaicism should be accepted as within the normal range of variation like those who have grown to extreme heights).

\textsuperscript{249} See \textsc{International Association of Athletic Federations: Policy on Gender Verification}, \textit{supra} note 6; \textit{See also Statement of the Stockholm Consensus on Sex Reassignment in Sports}, available at \url{http://multimedia.olympic.org/pdf/en_report_905.pdf}.


\textsuperscript{251} \textit{Id.}

\textsuperscript{252} \textit{Id.}

\textsuperscript{253} \textit{Id.}
and of those 9 tournaments, she won 2 and finished runner-up in 3.\textsuperscript{254} In 1977 she sought to compete in the United States Open tennis tournament, but she encountered a significant impediment.\textsuperscript{255} Because the United States Tennis Association (USTA) had asked her to submit to a Barr body test, which she could not pass due to her XY karyotype, she was prevented from competing.\textsuperscript{256} Richards claimed that the USTA had violated New York State human rights law and the 14th Amendment of the United States by unfairly requiring that she submit to a sex chromatin test, which effectively prevented all male-to-female transsexuals from competing in the women’s division.\textsuperscript{257} In her words, the Barr body test was, “insufficient, grossly unfair, inaccurate, faulty, and inequitable by the medical community in the US for purposes of excluding individuals from sports events on the basis of gender.”\textsuperscript{258}

The USTA submitted an affidavit by Dr. Daniel Federman, who at the time was a professor and Chairman of the Department of Medicine at Stanford University.\textsuperscript{259} He opined that surgery could not reverse the skeletal structure or height that a male-to-female transsexual would have attained through male puberty.\textsuperscript{260} This was an advantage that could not be

\textsuperscript{254} \textit{Id.}
\textsuperscript{255} \textit{Richards, supra} note 247.
\textsuperscript{256} \textit{Id.}
\textsuperscript{257} \textit{Id.}
\textsuperscript{258} \textit{Id.}
\textsuperscript{259} \textit{Id.}
\textsuperscript{260} \textit{Id.}
erased by mere medical procedure. Federman went on to point out that some features of sexual identity could not be changed, including the nuclear and chromosomal. Footnote 261 Gonadal and ductal structures, external genitalia, and hormone balance could be altered by surgery and drugs. Footnote 262 Other attributes of sex including psychological and social sex, were subjective and independent of medical procedure. Footnote 263 Richards submitted numerous affidavits that she did not have a physical advantage over other competitors, including an affidavit by Billie Jean King. Footnote 264 The court agreed with Richards. Consistent with the IOC’s 1990s stance on the purpose of sex testing, the court stated that the only justification for sex tests was to prevent fraud. Footnote 265 In addition, the court stated that there was overwhelming medical evidence that Richards was now female. Footnote 266 As for the Barr body test, the court did not strike it down as unfair; however, it did mention that there were other factors that should be considered such as: external genital appearance, internal organ appearance, gonadal identity, endocrinological make up, psychological development, and social development. Footnote 267 The court seemed to assume still that there was a true sex to be determined by these

Footnotes:

261 Id.
262 Id.
263 Id.
264 Id.
265 Id.
266 Id.
Richards, in her biography, while addressing her acceptance into sport as a woman, said that every time she lost a match it “served to inform the public that she was not an unbeatable behemoth out to prey on helpless little girls.” It seems that Richards, an elite athlete, felt she had to lose in order to participate at all. Although Richards is not binding on the IOC or any International Federation, it should serve as an illustration of sex discrimination and potential legal issues that may arise in the years ahead.

The IOC has adopted the IAAF’s policy on transsexuals. The policy is notable for its concrete conditions for entry. First, for those who surgically change sex from male to female before puberty and undergo hormone therapy, status as a transsexual will not prevent entry. Second, for those who had sex change surgery after male puberty, two years of continuous hormone treatments following surgery are required before an endocrinological evaluation is conducted. Ongoing hormone treatments are also required for this second group. Before handing down these regulations, there was extensive consultation with medical experts. The sharp lines drawn by these rules are an example of the type of rules that

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268 Id.
269 Id. at 100.
270 Id. at 100.
271 Stockholm Consensus, supra note 147.
272 See IAAF Policy supra note 91.
273 Id.
274 Id.
may be developed regarding intersex athletes.

The treatment of transsexuals in sport provides a partial model for how the IAAF and IOC could deal with intersex athletes. Treating intersex as a medical condition sets the upper boundary of fairness at transsexual. That is, after surgery, no intersex athlete is likely to have any more advantage than a transsexual who had previously been a typical male. Thus, if one accepts the policy regarding transsexuals as fair, then there is no need for a categorical ban on intersex athletes. However, a policy that links transsexuals and intersex is faulty because it ignores the essential difference between the two -- choice. Transsexuals have chosen to undergo surgery to match their biology with their gender identity. An intersex person, on the other hand, does not believe himself or herself to have a contradiction between biology and psychology. Intersex individuals prefer to be accepted as normal variations of men or women. Accusations to the contrary thus resonate as particularly insulting to the intersex athletes.

C. Approaching the Problem from Multiple Angles: Possibilities and Pitfalls

Paralympic classifications, doping regulations, and standards for transsexual admission to competition in Olympic competition provide excellent examples of the resolution of the fairness issue in Olympic sport. Unfortunately, no combination of the methods used in these three realms

offers a flawless solution to the issue of intersex athletes. Considering the major potential courses of action illuminates underlying normative principles such as the level playing field, gender stereotyping, and Fundamental Principles of Olympism such as inclusion and non-discrimination.

Take regulatory possibilities at various points on the spectrum: If the IOC and International Federations were to allow intersex athletes to compete without administering sex testing for either the purpose of medical treatment or fairness to typical biological females, they would be making a bold statement with regard to inclusion of all athletes. Intersex athletes could either be admitted under the idea that their participation is presumptively fair or that there are overriding concerns such as inclusion and the undesirability or impossibility of defining the boundaries of “female.” Allowing all intersex competitors would avoid the problems of defining what is fair at the cost of the more than minimum possibility that some athletes would have an advantage due to an intersex condition. (What administrators might most appreciate about this option would be the abandonment of need for all sex verification procedures.)

Alternately, officials could require universal sex testing. Either intersex athletes could all be asked to undergo normalizing procedures without determining whether or not their condition confers athletic
advantage or the athletes could be asked to undergo medical procedures only after it was determined that they have an advantage, or detailed study could seek to establish which conditions may or may not confer advantage. This is not unprecedented as the IAAF and IOC have already adopted measures with respect to AIS (complete or almost complete), gonadal dysgenesis, and Turner’s Syndrome based on the conclusion that these conditions do not confer athletic advantage.276 A policy that required an intersex individual to undergo an operation without a separate determination of whether the athlete’s specific condition conferred advantage would go great lengths to establish a level playing field. But it would simultaneously make the statement that intersex conditions are an unfair advantage and intersex athletes may not be within an acceptable normal variation of biological females.

Conceivably, universal sex testing could even be used to categorically exclude all intersex athletes from women’s competition. True, complaints from typical biological females about a level playing field would be negated. However, exclusion of those who may not have an advantage due to their intersex conditions would seem presumptively unfair. Additionally, total exclusion would further marginalize intersex individuals and rob them of the opportunity to participate in the Olympic Games as

276 See INTERNATIONAL ASSOCIATION OF ATHLETIC FEDERATIONS: POLICY ON GENDER VERIFICATION, supra note 6.
dignified members of society. The creation of an intersex-only division would be of little consolation: Certain athletes may still have conditions that confer advantage over other intersex conditions. Moreover, this kind of segregation would send the message that typical biological women are worth protecting from unfair advantage, but other intersex athletes are not. Many intersex individuals do not wish to have their conditions revealed to the world and a separate division would require them to do so or surrender the privilege of participation. Lastly, an all intersex division would emphasize the condition rather than the individual and might have the effect of creating an exploitative circus atmosphere. At this point, it seems there is little to no chance of a categorical ban on intersex athletes.277

A fourth possibility would instead create finer distinctions within the classification system that now exists. Much like the Paralympic model, a functional assessment of ability could be followed by classification. This could be done with or without regard to sex. To create open divisions without regard to sex may be problematic as men would flood the ranks and comprise a high percentage of limited spots in competition. However, if women were to defeat men in open divisions with regularity, this would do wonders to annihilate gender stereotypes. Still, at this time, there is reason to believe that the women’s division of Olympic sport should have some protection from male competitors. Competitive classes based on functional

277 See Kolata supra note 8.
ability in women’s sport, although seemingly fair, may be unnecessary. This course of action still does not eliminate argument from those who are grouped with intersex competitors and lose to them, but classification based on similar ability would implicitly color such complaints as “sour grapes.”

D. Cautious Optimism

Line drawing at some level will be inescapably tied to the achievement of some semblance of the ideal of equality, but there is reason to believe the hormone-level focused amendments to the IAAF rules form a good start. Through focus on confidentiality and appropriately careful language eschewing the use of “gender verification” and “gender policy,” the rules incorporate an institutional respect for the sensitivity of such investigations.\textsuperscript{278} Yet this focus does not sacrifice fairness to typically female athletes: “The burden of proof shall be on the athlete to establish ... that she derives no competitive advantage.”\textsuperscript{279}

This balance is essential to navigating the challenge for governing authorities of being fair to athletes both within and outside of traditional definitions.\textsuperscript{280} Further, the IAAF amendments acknowledge that regulation in this area must take into account future scientific knowledge, and thus positively portray the regulations as part of a “living document.”\textsuperscript{281}

\textsuperscript{278}IAAF POLICY, supra note 6.
\textsuperscript{279}Id.
\textsuperscript{280}Kolata, supra note 8. “[W]e have to balance fairness to female athletes to fairness to other competitors,” Joe Leigh Simpson.
\textsuperscript{281}INT. ASSOC. OF ATH. FED., supra note 6.
VII. Final Analysis: Ramifications of the New IAAF and IOC Rules

Undoubtedly, the new rules will still provide fodder for criticism in some areas, most notably sociological objection to treating DSDs as a medical issue because of the fear of labeling individual competitors as abnormal. Granted, there may be valid health concerns in some instances, such as the cited potential for cancerous tumors in cases of internal testes. 282 However, there may also be cases in which medical treatment is unnecessary for the health of the competitor. 283 In fact, treatment itself may cause health issues, such as in the case of the removal of functioning gonads, which may lead to a later onset of osteoporosis unless an individual follows a strict hormone replacement regimen. 284

To the extent the new regulations of the IAAF do not serve to prevent cases like Semenya’s, where review seemed far more public spectacle than protection of competitive integrity and safeguarding of individual athletes, they should be further amended. This is clear from the humiliation an athlete endures when selected solely because she resembles a male to some degree and is then subjected to dehumanizing former

282 Id. (noting that in cases of gonadal dysgenesis, gonads should be removed to avoid malignancy).
283 Congenital Adrenal Hyperplasia (CAH) Medical Risks, INTERSEX SOC. OF N. AMER., http://www.isna.org/faq/medical_risks/cah (“Congenital Adrenal Hyperplasia is the only one of all the various causes of intersex that can actually cause a medical emergency.”) and See also http://www.menstuff.org/issues/byissue/intersex.html (noting that although some intersex conditions give rise to health issues, surgically “correcting” the appearance of genitals will not cure these health issues).
procedures such as nude photo requirements; this is inconsistent with the spirit of dignity that is concomitant with the Fundamental Principles of Olympism. But to the extent the new rules conform to the prevention of gender stereotyping that is implicitly prohibited by the Fifth Fundamental Principle of Olympism, which states that “[a]ny 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,” they should be applauded.

VIII. CONCLUSION

The commitment in the new regulations for regular review of scientific consensus provides optimism that should the new regulations prove ineffective going forward, there will not be unnecessary resistance to change; this is the best feature of the amendments.

Assuredly, going forward, detailed standards for intersex athletes based on medical concerns must identify specific ailments that may arise or risk being arbitrary. Because intersex conditions are diverse, formulating

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286 See Martinez-Patino, supra note 76 (discussion of Maria Martinez-Patino who had a normal female body and did not know of her Androgen Insensitivity Syndrome until given a sex test).
legitimately detailed regulations will be arduous. In the alternative, standards for intersex athletes must address the fairness question. Fortunately, there are existing standards that may serve as the basis for either a new classification system or the extension of current policies. However, it may be possible that any athletic advantages that an intersex competitor may possess are of the natural and, therefore, permissible kind.

There are two main possible sources of discrimination to be wary of in future formulations. First, officials must guard against the “reasonable grounds,” which must be raised for an athlete to be investigated, becoming a front for suspicion based on the fact that an athlete’s appearance is outside traditional concepts of femininity. Second, officials must remain aware that exclusion of intersex athletes as outside the normal range of variation carries risks of isolation and ostracization.

Additionally, in defining the contours of “woman,” the IOC and governing authorities must be mindful of inadvertently adopting traditional sex stereotypes. There may be no way to sharply define the normal range of variation. The IOC’s new rule does not include a specific range of acceptable testosterone levels, meaning there is no precise upper limit for acceptable testosterone levels in women – the experts will assess each case individually.288 In addition, the Fundamental Principles of Olympism and

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288 Macur, supra note 170.
human dignity serve as reminders that a level playing field is only part of the appropriate balance. The flexible approach adopted by the IAAF and IOC allowing athletes to consult with medical experts privately is a positive step in establishing the appropriate guidelines.