

But She Doesn't Run Like a Girl . . . : The Ethic of Fair Play and the Flexibility of the Binary Conception of Sex

Anna Peterson*

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I. INTRODUCTION

Recent controversy surrounding a South African runner has sparked new debate about sex-verification testing and intersexuality in the international sports arena. At the Track and Field World Championship in August 2009, Caster Semenya, of South Africa, ran the women's 800-meter in 1 minute, 55.45 seconds, beating the defending world champion by a remarkable 2.45 seconds.¹ In the wake of this impressive feat, Semenya rose to international infamy when her competitors publicly questioned her gender, and thus her eligibility to compete in women's events due to her masculine features and impressive speed.² Such speculations had the media asking: "Is she really a she?"³

* © 2010 Anna Peterson. J.D. candidate 2011, Tulane University Law School; B.A., 2008, *summa cum laude*, University of New Hampshire.

1. ESPN.com News Servs., *Semenya Wins 800 Meters*, ESPN: OLYMPIC SPORTS, Aug. 20, 2009, <http://sports.espn.go.com/oly/news/story?id=4409318>.

2. Gina Kolata, *Panel Calls for Treatment in Cases of Sex Ambiguity*, N.Y. TIMES, Jan. 21, 2010, at B23, available at <http://www.nytimes.com/2010/01/21/sports/olympics/21ioc.html?>

In response to the suspicion raised, the International Association of Athletics Federations (IAAF), the governing body of international track and field athletics, requested Semenya undergo sex-verification testing, pursuant to the IAAF Policy on Gender Verification (IAAF Policy).⁴ In accord with the IAAF Policy's commitment to confidentiality, the results were not officially publicized;⁵ instead, it was reported that Semenya would retain her gold medal, the prize money, and the title of 800-meter World Champion.⁶ However, at that time, there was no official report on whether Semenya would be allowed to continue participating in women's international athletic events.⁷

Although the results were intended to be confidential, the *Australian Daily Telegraph* reported in September 2009 that Semenya was found to have the external genitalia of a female, but internal testes, instead of ovaries and a uterus.⁸ In a responding press release, the IAAF explicitly clarified that such media reports were not official IAAF statements.⁹ Nonetheless, the Australian report was adopted by the general public and reprinted by other media outlets.¹⁰

emc=etal; see also Robyn Dixon, *Gender Issue Has Always Chased Her*, L.A. TIMES, Aug. 21, 2009, at A1, available at <http://www.latimes.com/news/nationworld/world/la-fg-south-africa-runner21-2009aug21,0,5294672.story>; Dharma Kelleher, *The World of Sports vs. The Gender Frontier*, WORLD OF PROGRESS, Aug. 30, 2009, <http://aworldofprogress.com/the-world-of-sports-vs-the-gender-frontier-2/>; Denis Cummings, *Caster Semenya and the Ambiguity in Determining Sex*, FINDING DULCINEA, Nov. 19, 2009, <http://www.findingdulcinea.com/news/sports/2009/nov/Caster-Semenya-and-the-Ambiguity-in-Determining-Sex.html>.

3. Dixon, *supra* note 2.

4. ESPN.com News Servs., *supra* note 1. See generally IAAF MED. & ANTI-DOPING COMM'N, IAAF POLICY ON GENDER VERIFICATION (2006), available at <http://www.iaaf.org/mm/document/imported/36983.pdf> ("The purpose of [the IAAF Policy on Gender Verification] is to establish a policy and mechanism for managing the issue of gender amongst participants in women's events.").

5. IAAF MED. & ANTI-DOPING COMM'N, *supra* note 4, (stating that all sex-verification testing will undergo a confidential case-by-case evaluation).

6. Sport & Recreation S. Afr., News—Statement on Ms Semenya (Nov. 19, 2009), <http://www.srsa.gov.za/News.asp?ID=238>.

7. Jeré Longman, *South African Runner's Sex-Verification Result Won't Be Public*, N.Y. TIMES, Nov. 20, 2009, at B10, available at http://www.nytimes.com/2009/11/20/sports/20runner.html?_r=1; *Caster Semenya Must Wait for IAAF Decision Before Competing*, GUARDIAN.CO.UK, Jan. 14, 2010, <http://www.guardian.co.uk/sport/2010/jan/14/caster-semenya-iaaf-athletics-south-africa>. In July 2010, the IAAF made the final announcement that Semenya would be allowed to participate "with immediate effect." Press Release, Int'l Ass'n Athletics Fed'n (IAAF), Caster Semenya May Compete (July 6, 2010), <http://www.iaaf.org/aboutiaaf/news/newsid=57301.html>. The IAAF decision was based on a "conclusion of a panel of medical experts." *Id.* However, the IAAF has refused to comment on the specific findings that undergird the decision. *Id.*

8. Mike Hurst, *Caster Semenya Has Male Sex Organs and No Womb or Ovaries*, DAILY TEL. (Austl.), Sept. 11, 2009, <http://www.dailytelegraph.com.au/sport/semenya-has-no-womb-or-ovaries/story-e6f9xni-1225771672245>.

9. Press Release, IAAF, Statement on Caster Semenya (Sept. 11, 2009), <http://berlin.iaaf.org/aboutiaaf/news/newsid=54277.html>. However, the South African Department of Sport

The turmoil surrounding Semenya and the results of her gender test stirred up concerns related to intersex persons¹¹ and how they fit into an international athletics system based on binary sex categories. The controversy primarily focused on fairness in women's events and the concern that intersexual athletes may have an unfair competitive advantage over average female athletes.¹² For example, one critic of the participation of intersexual athletes in women's events, former 800-meter runner and current law professor at Duke University, Doriane Coleman, told the *New York Times*: "If you [allow intersexual persons to compete,] you are making a joke of the fact that there are two classifications—male and female They might as well open it up and have women competing with men."¹³ However, the International Olympic Committee (IOC) has not adopted this hard line against intersexual athletes. Instead, the IOC is considering creating "centers of excellence" that will diagnose and treat those athletes who are found to have "disorders of sex development."¹⁴ The centers would evaluate each athlete on a case-by-case basis to determine eligibility.¹⁵

Semenya's experience and the controversy it spurred highlights the apparent contention between the antidiscrimination principle enshrined in the Olympic Charter and the commitment to the ethic of fair play within the international athletics context. This Comment argues that the antidiscrimination principle and the ethic of fair play are not necessarily in contention, but that to preserve them both, intersexual athletes should be allowed to compete in the gender category with which they are aligned. Part II of this Comment briefly introduces the complex issues involved with defining intersexuality and provides a short history of the gender-verification testing performed by international sport associations and the effect it has had on intersexed athletes. Part III presents international sports law and how the Olympic Charter forms its foundational

and Recreation reported that when an apology was requested, the IAAF responded: "It is deeply regrettable that information of a confidential nature entered the public domain." Sport & Recreation S. Afr., *supra* note 6. This response indicates that the Australian report, although not sanctioned, was not incorrect.

10. See, e.g., Ian O'Reilly, *Gender Testing in Sport: A Case for Treatment?*, BBC NEWS, Feb. 15, 2010, <http://news.bbc.co.uk/2/hi/8511176.stm>.

11. For a discussion of the term "intersex," see *infra* Part II.A.

12. Kolata, *supra* note 2.

13. *Id.*

14. *International Olympic Committee Recommends Gender-Test Centers*, FOXNEWS.COM, Jan. 20, 2010, <http://www.foxnews.com/world/2010/01/20/international-olympic-committee-recommends-gender-test-centers/>; Meg Handley, *The IOC Grapples with Olympic Sex Testing*, TIME, Feb. 11, 2010, <http://www.time.com/time/world/article/0,8599,1963333,00.html>.

15. *International Olympic Committee Recommends Gender-Test Centers*, *supra* note 14.

underpinning. Part IV addresses two of the cornerstones of the Olympic Movement: the antidiscrimination principle and the ethic of fair play. Part V asks whether the sex-verification policies or possible treatment requirements function to discriminate against intersexed persons and whether allowing intersexed persons to participate in competition would undermine the ethic of fair play. Part VI concludes that allowing intersex persons to participate does not undermine the ethic of fair play and that arbitrarily barring them from participation is discriminatory.

II. BACKGROUND

A. *Defining Intersexuality*

Intersexuality denotes “a variety of conditions in which individuals are born with (or develop later in life) ambiguous external genitalia and/or a combination of chromosomes, gonads, external genitalia, and hormones that do not align as typical male or typical female.”¹⁶ Such conditions are also referred to as “disorders of sex development” (DSD).¹⁷ It was common in the nineteenth century to refer to such conditions as “hermaphroditism” and the people living with them as “hermaphrodites.”¹⁸ Although these terms may still be found in some medical literature, they are inherently vague, sensationalistic, and demeaning and, therefore, have been almost entirely replaced by the terms intersex and DSD.¹⁹

16. MAURA KELLY, INTERSEX: SOCIOLOGISTS FOR WOMEN IN SOCIETY FACT SHEET 1 (2007), available at <http://www.socwomen.org/socactivism/intersexMarch2007.pdf>.

17. Elizabeth Reis, *Divergence or Disorder?: The Politics of Naming Intersex*, 50 PERSP. BIOLOGY & MED. 535, 536 (2007).

18. *Id.*

19. *Id.* Although this Comment will use “intersex” and “DSD” interchangeably, it is important to note that these terms are not entirely free of controversy. In the 1990s, the term “intersex” was adopted and promoted by activists to replace the word “hermaphrodite.” *Id.* at 536-37. However, the parents of children born with the different intersex conditions were no more comfortable with this term than they were with hermaphrodite. *Id.* at 537. “To them, *intersex* meant a third gender, something in-between male and female.” *Id.* Most parents supported “disorders of sex development” because it focused on the medical underpinning while downplaying the gender politics. *Id.* Conversely, activists were unhappy with the use of the word “disorder.” *Id.* at 538. Nonetheless, a majority of the speakers at the 2006 symposium held by the primary activist organization, Intersex Society of North America (ISNA), supported the use of “DSD” as the term most likely to affect children and infants positively. *Id.* at 540; see also Emi Koyama, Intersex Initiative, Keynote Speech at the University of Vermont Translating Identity Conference: From “Intersex” to “DSD”: Toward a Queer Disability Politics of Gender (Feb. 2006), <http://www.intersexinitiative.org/articles/intersectods.html> (endorsing the use of the term “DSD” in place of “intersex”). In an effort to settle the debate, one commentator argues that DSD should stand for “divergence of sex development,” which would deemphasize gender politics without using the pathologizing term “disorder.” Reis, *supra* note 17, at 541.

Intersexuality is a relatively common occurrence. Although studies vary, it is estimated that approximately 1 in 2000 children are born with ambiguous genitalia.²⁰ The current medical model classifies any child with an “adequate” penis as male.²¹ An “adequate” penis is defined as “a penis capable of vaginal penetration and urination while standing.”²² Therefore, most children with ambiguous genitalia are classified as female.²³ After being classified, many intersex infants have “genital-normalizing” surgery.²⁴ Common intersex conditions include: Turner’s syndrome,²⁵ Klinefelter’s syndrome,²⁶ complete androgen insensitivity syndrome,²⁷ partial androgen insensitivity syndrome,²⁸ congenital adrenal hyperplasia,²⁹ and 5-alpha-reductase deficiency.³⁰ Despite their physical differences, most intersexed persons do not identify themselves as intersexual.³¹ Instead, they view themselves as “perfectly ordinary heterosexual, non-trans[sexual] men and women.”³²

20. Reis, *supra* note 17, at 539; see, e.g., KELLY, *supra* note 16, at 1 (stating that approximately 1 or 2 in 1000 births result in children with ambiguous genitalia).

21. KELLY, *supra* note 16, at 2.

22. *Id.*

23. *Id.*

24. *Id.* Genital-normalizing surgery on infants is by far the most controversial issue related to intersexuality today. For more information on this subject, see generally, Alyssa Connell Lareau, Note, *Who Decides? Genital-Normalizing Surgery on Intersexed Infants*, 92 GEO. L.J. 129 (2003); Elizabeth Reilly, *Radical Tweak—Relocating the Power To Assign Sex: From Enforcer of Differentiation to Facilitator of Inclusiveness: Revising the Response to Intersexuality*, 12 CARDOZO J.L. & GENDER 297 (2005).

25. An individual with Turner’s syndrome has XO chromosomes, nonfunctioning ovaries, and the external genitalia of a typical female. KELLY, *supra* note 16, at 2. Such individuals are usually classified as female at birth. *Id.*

26. An individual with Klinefelter’s syndrome has XXY chromosomes, testes, and the external genitalia of a typical male. *Id.* Such individuals are usually classified as male at birth. *Id.*

27. An individual with complete androgen insensitivity syndrome (CAIS) has XY chromosomes, testes, and the external genitalia of a typical female. *Id.* Such individuals are usually classified as female at birth. *Id.*

28. An individual with partial androgen insensitivity syndrome (PAIS) has XY chromosomes, testes, and ambiguous external genitalia. *Id.* Such individuals are classified as either male or female at birth. *Id.*

29. An individual with congenital adrenal hyperplasia (CAH) has XX chromosomes, ovaries, and ambiguous external genitalia. *Id.* Such individuals are usually classified as female at birth. *Id.*

30. An individual with 5-alpha-reductase deficiency has XY chromosomes, testes, and ambiguous external genitalia. *Id.* Such individuals are classified as either male or female at birth. *Id.*

31. *Id.*

32. Koyama, *supra* note 19.

B. History of Intersexed Persons at the Olympics

The first controversy over an athlete's gender occurred at the 1936 Olympics in Berlin.³³ Two female sprinters from the United States, Stella Walsh and Helen Stephens, appeared masculinized compared to the other female competitors, causing rumors to circulate that they were in fact men.³⁴ The speculation gained so much notoriety that Walsh was given the unfortunate moniker "Stella the Fella" by the press.³⁵ The issue came to a head when Walsh publicly accused Stephens of being a man after Stephens had beaten Walsh in the women's 100-meter sprint by 0.2 seconds.³⁶ In response to the accusation, the IOC had Stephens undergo a physical examination, which determined that she had the external genitalia of a typical female, which was held to resolve the matter.³⁷ The irony of Walsh's accusation came to light in 1980 after she, a bystander, was killed during an armed bank robbery.³⁸ It was revealed after her autopsy that she had atypical sex chromosomes and ambiguous genitalia, although her particular DSD was not determined.³⁹

Aside from Walsh and Stephens, eight other female competitors were accused of being men between 1932 and 1968.⁴⁰ Such accusations, and the rumors they fueled, were the impetus for the adoption of the use of sex-verification testing by international sport associations.⁴¹ In 1966, at the European Track and Field Championships, the IAAF became the first international sport association to require female participants to pass a "femininity" test to be found eligible to compete.⁴² The IOC quickly followed suit, instituting gender-verification testing at the Mexico City Summer Olympic Games in 1968.⁴³ Such testing was reportedly commenced in response to long-standing rumors of men impersonating

33. Robert Ritchie et al., *Intersex and the Olympic Games*, 101 J. ROYAL SOC'Y MED. 395, 395 (2008).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 395-96.

38. *Id.* at 396.

39. *Id.*

40. Sarah Teetzel, *Equality, Equity and Inclusion: Issues in Women and Transgendered Athletes' Participation at the Olympics*, in CULTURAL IMPERIALISM IN ACTION: CRITIQUES IN THE GLOBAL OLYMPIC TRUST 331, 333 (2006), <http://www.la84foundation.org/SportsLibrary/ISOR/ISOR2006ae.pdf>.

41. Ritchie et al., *supra* note 33, at 396.

42. J.C. Reeser, *Gender Identity and Sport: Is the Playing Field Level?*, 39 BRIT. J. SPORTS MED. 695, 696 (2005).

43. *Id.* Initially, the testing was termed "controlling women." However, this language was promptly replaced by "investigation of femininity," before the IOC settled on "gender/sex-verification testing." Teetzel, *supra* note 40, at 334.

women with the intent to gain an unfair competitive advantage.⁴⁴ For example, the International Athletic Foundation (predecessor of the IAAF) Work Group on Gender Verification Testing stated that the testing was “introduced as a preventative measure” in response to the “rumors that men were masquerading as women[, which] poisoned the atmosphere of high-level competitive sports.”⁴⁵

At the 1966 track and field championship, the sex-verification test required female athletes to submit to a physical inspection of their genitalia.⁴⁶ The following year the IAAF introduced chromatin analysis.⁴⁷ Subsequently, at the 1968 Mexico City Games, the IOC also adopted chromosomal screening to determine the sex of female athletes, arguing that such examinations were less invasive than the physical inspections.⁴⁸ However, using chromosomes as the determining factor of a person’s sex is problematic, as evidenced by the various chromosome combinations associated with different DSDs.⁴⁹

44. Cheryl L. Cole, *One Chromosome Too Many?*, in *THE OLYMPICS AT THE MILLENNIUM: POWER, POLITICS, AND THE GAMES* 128, 134 (Kay Schaffer & Sidonie Smith eds., 2000).

45. *Id.* Despite the pervasive rumors, since the inception of the modern Olympics, there has been only one verified instance of a man fraudulently entering a women’s event. *Id.* at 135. Reportedly, the Nazis forced Hermann Ratjen to compete, under the name Dora Ratjen, in the women’s high jump at the 1936 Berlin Olympics. *Id.* Hermann/Dora came in fourth. Emine Saner, *The Gender Trap*, *GUARDIAN*, July 30, 2008, <http://www.guardian.co.uk/sport/2008/jul/30/olympicgames2008.gender>. Therefore, in the absence of any evidence that men were actually impersonating women, it seems that the testing was primarily motivated by “the perception, rumors, and possibility [that men were] passing” as women. Cole, *supra* note 44, at 135.

46. Cole, *supra* note 44, at 128. Such inspections were later dubbed the “nude parades,” as the women were all required to stand naked in a room to be examined by the three doctors charged with making the sex determination. *Id.*; Ritchie et al., *supra* note 33, at 396-97. At the 1966 championship, all 243 women examined were “diagnosed” female. Cole, *supra* note 44, at 135.

47. Cole, *supra* note 44, at 135. Initially, the chromatin test performed consisted of a buccal smear to detect the Barr body. Ritchie et al., *supra* note 33, at 397. The Barr body will be found only in people who have XX sex chromosomes. *Id.* In 1991, the polymerase chain reaction (PCR) analysis was substituted for the Barr body detection test. *Id.* PCR analysis was used because it screens for the SRY gene, which was thought to be required for male testes to develop in a fetus. *Id.* However, it is now known that male differentiation can result from alternative sex-determining genes. *Id.*

48. Cole, *supra* note 44, at 129, 135.

49. Reeser, *supra* note 42, at 696; KELLY, *supra* note 16, at 2; *see also* Pamela B. Fastiff, Note, *Gender Verification Testing: Balancing the Rights of Female Athletes with a Scandal-Free Olympic Games*, 19 *HASTINGS CONST. L.Q.* 937, 944 (1992) (“[D]octors believe the sex chromosome screening method to be inaccurate and discriminatory because it identifies women with genetic defects who have no muscular advantage, while at the same time misses individuals who do have such an advantage.”); Ritchie et al., *supra* note 33, at 397 (“[T]he introduction of [chromatin analysis] created more problems than it solved—confirming or refuting sex purely via a chromosomal test fails to take account of the complexities of sex determination itself.”). Regardless of such criticism, Eduardo Hay, a gynecologist and obstetrician who worked with the IOC at the inception of the verification tests, stood by the examinations, stating:

The first athlete to be disqualified through such chromosome analysis was Ewa Klobukowska.⁵⁰ Klobukowska, an Olympian and co-world record holder for the 100-meter sprint, “failed” her verification test at the 1967 European Cup Track and Field events in Kiev.⁵¹ The ensuing backlash was harsh and thorough. The IAAF permanently disqualified her for all future events, expunged her records, and removed her name from the record logs.⁵² The IOC retracted her gold and bronze medals from the 1960 Olympics.⁵³ Aside from the professional evisceration by the IAAF, the popular media also subjected Klobukowska to ridicule and speculation.⁵⁴

Subsequently, the IOC and IAAF suggested that athletes who failed the testing should “feign a warm-up injury that require[ed] withdrawal from competition” and thus save themselves trauma such as that endured by Klobukowska.⁵⁵ As a result of such policies, it is unclear how many women failed the sex-verification test and were disqualified before it was discontinued in 1999, prior to the 2000 Sydney Summer Games.⁵⁶

Despite such secrecy, evidence from the 1996 Atlanta Games indicates that at some point between 1967 and 1996, the IOC changed its position toward intersex athletes. At the Atlanta Games, over 3000 women were tested with only eight “failing” the test; however, all athletes were permitted to compete in their respective events.⁵⁷ It is likely that the IOC backed away from the bright-line rule encountered by Klobukowska because of the efforts of Maria José Martínez Patino, a Spanish hurdler.

Patino was excluded from the 1985 University Games in Kobe, Japan, after receiving the results of her chromosome screening.⁵⁸ Patino chose to withdraw quietly, in accord with the official suggestion, and

If the Medical Commission of the International Olympic Committee had wanted to satisfy everybody, we would undoubtedly, at the present moment, have Olympic Games divided into chromosomic groups. For it is easily forgotten, at this stage, ‘that the sole purpose of the Medical Commission in this investigation of femininity, is to ensure the physical equality of the women athletes competing against one another.’

Cole, *supra* note 44, at 142.

50. Cole, *supra* note 44, at 129.

51. *Id.* Although Klobukowska’s precise form of DSD is unknown, it is widely believed that she had XX/XXY mosaicism. Ritchie et al., *supra* note 33, at 397.

52. Cole, *supra* 44, at 129-31.

53. *Id.*

54. *See id.* at 131 (“Who goes there? Ex-miss or missing x?” (quoting Newsweek)).

55. *Id.* at 138.

56. *See* Ritchie et al., *supra* note 33, at 398.

57. *Id.* It was reported that seven of the women had androgen insensitivity syndrome and that the eighth athlete had 5-alpha-reductase deficiency. *Id.*

58. Cole, *supra* note 44, at 138.

returned home to be diagnosed with androgen insensitivity syndrome.⁵⁹ When she refused to repeat her quiet withdrawal from the next competition she entered, she suffered the same fate Klobukowska had experienced approximately twenty years earlier.⁶⁰ The Spanish Athletic Federation struck her name from the record books and publicly disqualified her from all future competitions.⁶¹ Nevertheless, Patino campaigned to regain her sex status. Armed with the knowledge that because of her androgen insensitivity she was unable to respond to testosterone and was “unquestionably female and chromosomally XY,” Patino managed to be reinstated by the IAAF.⁶² Therefore, in light of the decisions at the Atlanta Games, it is likely that Patino’s situation forced the IOC to reexamine its per se exclusion of female athletes who failed the chromosome screening.

Although the IOC abandoned systematic, compulsory sex-verification testing in 1999, it maintained its authority to request that individuals suspected of masquerading as women submit to examination.⁶³ Using the IOC “consensus document” as a touchstone, the IAAF also revised its sex-verification testing approach and instituted the current IAAF Policy.⁶⁴ The IAAF Policy only investigates the sex of an athlete upon suspicion, and sex is determined by “a panel compris[ed] of a] gynecologist, endocrinologist, psychologist, internal medicine specialist, [and] expert on gender/transgender issues.”⁶⁵ Furthermore, the IAAF Policy specifically allows participation by individuals with androgen insensitivity syndrome, gonadal dysgenesis, Turner’s syndrome, congenital adrenal hyperplasia, androgen producing tumors, and anovulatory androgen excess.⁶⁶ This new policy shows the transformation that sex-verification testing by international sports associations has undergone since its inception in the 1960s.

III. INTERNATIONAL SPORTS LAW

Like any body of national law, international law is compiled from a variety of sources. The most widely accepted list of sources for

59. *Id.*

60. *Id.*

61. *Id.* at 138-39.

62. *Id.*

63. Ritchie et al., *supra* note 33, at 398.

64. IAAF MED. & ANTI-DOPING COMM’N, *supra* note 4.

65. *Id.*

66. *Id.*

international law can be found in article 38 of the Statute of the International Court of Justice.⁶⁷ Article 38 identifies:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations; [and]
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁶⁸

The Olympic Charter, the governing document of the Olympic Movement, is classified as a form of “international custom” under the article 38 categories.⁶⁹ Despite its lack of official governmental standing, the Olympic Charter has taken on a central position in the development of international sports jurisprudence, in that it “forms the normative foundation of international sports law.”⁷⁰

The prominence of the Olympic Charter sets competition-governing sports law apart from all other forms of law, because not only is the Charter international in character, but it is nongovernmental as well.⁷¹ The International Olympic Committee (IOC) is the “supreme authority” of the Olympic Movement, as established by Rule 1 of the Olympic Charter.⁷² Rule 15(1) defines the IOC as an “international non-governmental not-for-profit organisation, of unlimited duration, in the form of an association with the status of a legal person, recognised by the Swiss Federal Council.”⁷³ The other institutions of the Olympic Movement include the International Sport Federations (IFs), the National Olympic Committees (NOCs), and the Organizing Committees of the

67. JAMES A.R. NAFZIGER, *INTERNATIONAL SPORTS LAW* 1 n.2 (2d ed. 2004) (“Article 38 is . . . useful as a kind of shorthand, universally accepted restatement of the general sources of international law, regardless of the particular decision-making context.”).

68. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031 (entered into force Oct. 24, 1945), available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>. Article 59 states: “The decision of the Court has no binding force except between the parties and in respect to that particular case.” *Id.* art. 59.

69. NAFZIGER, *supra* note 67, at 2.

70. *Id.* For example, the Olympic ideal, as expressed by the Olympic Charter, was used as the basis for the United Nations Educational, Scientific, and Cultural Organization (UNESCO) International Charter of Physical Education and Sport adopted in 1978. *Id.* at 17.

71. *Id.* at 4 n.13.

72. INT'L OLYMPIC COMM., *OLYMPIC CHARTER* 13 (2007), available at http://www.turin2006.com/Documents/Reports/EN/en_report_122.pdf (“Under the supreme authority of the International Olympic Committee, the Olympic Movement encompasses organisations, athletes and other persons who agree to be guided by the Olympic Charter.”).

73. *Id.* at 29. The IOC sits in Lausanne, Switzerland. *Id.*

Olympic Games (OCOGs).⁷⁴ The relationship between the IOC and the IFs, NOCs, and OCOGs is best described as “symbiotic [because] [t]he constituent organizations retain their autonomy while participating in a mutually reinforcing process.”⁷⁵

There are thirty-five IFs, each of which is associated with a different sport; for example, the IAAF is the international sport federation that governs track and field events.⁷⁶ “[E]ach IF maintains its independence and autonomy in the administration of its sport,” as long as “[t]he statutes, practice and activities of the IFs within the Olympic Movement [are] in conformity with the Olympic Charter.”⁷⁷ If an IF fails to comply with the Olympic Charter, then it will not be recognized by the IOC and will subsequently be excluded from full participation in the Olympic Games and other authorized competitions.⁷⁸

There are approximately 200 NOCs.⁷⁹ “The mission of the NOCs is to develop, promote and protect the Olympic Movement in their respective countries, in accordance with the Olympic Charter.”⁸⁰ Each NOC has the exclusive authority to represent its respective country at authorized IOC competitions.⁸¹ Furthermore, “each NOC is obliged to participate in the Games of the Olympiad by sending athletes.”⁸² The Olympic Charter contains specific requirements for the composition of the NOCs,⁸³ and the IOC retains authority to revoke their recognition.⁸⁴ Finally, the organization of the OCOGs is also provided for by the Olympic Charter.⁸⁵ Once the host city is chosen, its OCOG works with its NOC to stage the Olympic Games.⁸⁶

This interlinking framework of international and national sports associations generates the regulations according to which athletes

74. NAFZIGER, *supra* note 67, at 18; INT’L OLYMPIC COMM., *supra* note 72, at 13. The Court of Arbitration for Sport (CAS), the International Committee for Fair Play, and the International Paralympic Committee are considered partners of the Olympic Movement. NAFZIGER, *supra* note 67, at 19.

75. NAFZIGER, *supra* note 67, at 18-19.

76. *Id.* at 21-22.

77. INT’L OLYMPIC COMM., *supra* note 72, at 57.

78. NAFZIGER, *supra* note 67, at 21.

79. *Id.* at 23.

80. INT’L OLYMPIC COMM., *supra* note 72, at 61. Note that although the Charter utilizes the word “country,” certain dependent nations, such as Puerto Rico, have been extended their own NOC. NAFZIGER, *supra* note 67, at 23.

81. INT’L OLYMPIC COMM., *supra* note 72, at 62.

82. *Id.*

83. *Id.* at 64-68.

84. *Id.* at 63.

85. *Id.* at 75-76.

86. *Id.* at 77-79.

participate in their respective sports.⁸⁷ These regulations affect not only elite athletes participating in international competitions, but also those athletes participating in regional, domestic, and even local sport organizations, all of which defer to the governing principles of the IFs and NOCs.⁸⁸

These [local] associations operate at the base of a pyramid of authority with the IFs and the IOC at the top. This structure for transmitting the authority and legitimacy of the Olympic process influences even schoolyard and sandlot activities whenever aspiring athletes receive support from sanctioned sports organizations that are even indirectly assisted and governed by organizations higher up in the pyramid of the Olympic Movement.⁸⁹

As a result of having such a pervasive effect on athletes worldwide, the Olympic Charter has been granted implicit special status under international law.⁹⁰ The international community, as well as individual states, has recognized this special status, as shown by the fact that they respect the IOC diplomacy and yield to its decisions.⁹¹ For example, in *Martin v. International Olympic Committee*, a 1984 case before the United States Court of Appeals for the Ninth Circuit, the court announced its hesitancy “to undertake the application of one state’s statute to alter [the Olympic Games,] an event that is staged with competitors from the entire world under the terms of [the Olympic Charter].”⁹² Furthermore, the Second Conference of European Ministers Responsible for Sport unequivocally upheld the authority of the Olympic Charter.⁹³ The international deference received by the Olympic Movement and its organizations allows international sports law to develop in “a well-articulated, comprehensive [manner, which] promot[es] and protect[s] the essential values of sports competition.”⁹⁴

IV. THE OLYMPIC MOVEMENT

The late Honorary President of the IOC, Juan Antonio Samaranch, has stated, “The goal of the Olympic Movement is to contribute to building a peaceful and better world by educating youth through sport

87. *Id.* at 80-81; see also Haley K. Olsen-Acre, *The Use of Drug Testing To Police Sex and Gender in the Olympic Games*, 13 MICH. J. GENDER & L. 207, 209 (2007).

88. NAFZIGER, *supra* note 67, at 7.

89. *Id.*

90. *Id.* at 25.

91. *Id.*

92. *Martin v. Int’l Olympic Comm.*, 740 F.2d 670, 677 (9th Cir. 1984).

93. NAFZIGER, *supra* note 67, at 25-26.

94. *Id.* at 7.

practised without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship[,] solidarity and fair play.”⁹⁵ This goal is also found in the “Fundamental Principles of Olympism” set out in the Olympic Charter.⁹⁶ The Fundamental Principles demonstrate the Olympic Movement’s strong commitment to the principles of antidiscrimination and fair play.⁹⁷

A. *Antidiscrimination Principle*

The proscription against any form of discrimination is seen as a cornerstone of the Olympic Movement.⁹⁸ It is instructive to look to the various international human rights instruments to clarify the meaning of the Olympic Movement’s antidiscrimination principle.⁹⁹ For example, the U.N. Convention on the Elimination of All Forms of Discrimination

95. Juan Antonio Samaranch, *Editorial: Olympic Ethics*, OLYMPIC REV., Aug.-Sept. 1998, at 3, 3, <http://www.la84foundation.org/OlympicInformationCenter/OlympicReview/1998/oreXXVI22d.pdf>; Liz Clarke, *Olympics Leader Juan Antonio Samaranch Dies at 89*, WASH. POST, Apr. 22, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/04/21/AR2010042105030_2.html.

96. INT’L OLYMPIC COMM., *supra* note 72, at 11. The Fundamental Principles, state, in pertinent part:

2. The goal of Olympism is to place sport at the service of the harmonious development of man, with a view to promoting a peaceful society concerned with the preservation of human dignity.
-
4. The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play. The organisation, administration and management of sport must be controlled by independent sports organisations.
5. 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.

Id.

97. *Id.*

98. NAFZIGER, *supra* note 67, at 121. For example, the Olympic Charter denounces discrimination five separate times. INT’L OLYMPIC COMM., *supra* note 72, at 11, 14, 62, 83. Furthermore, the commitment to antidiscrimination is also included in the Olympic oath, recited by new members of the IOC, which states:

Granted the honour of becoming a member of the International Olympic Committee . . . I undertake to serve the Olympic Movement to the very best of my ability; . . . to keep myself free from any political or commercial influence and from any racial or religious consideration; to fight against all other forms of discrimination; . . .

Id. at 30-31.

99. NAFZIGER, *supra* note 67, at 127.

Against Women,¹⁰⁰ the International Convention on the Elimination of All Forms of Racial Discrimination,¹⁰¹ and the United Nations Convention on the Rights of Persons with Disabilities¹⁰² all define “discrimination” as

any distinction, exclusion or restriction on the basis of [sex, disability, race] which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁰³

Thus, the international community recognizes discrimination when persons are classified into certain categories¹⁰⁴ and that classification impairs a human right or fundamental freedom.

Before 2006, there was no explicitly recognized human right to sport in the general body of international law.¹⁰⁵ The change occurred when the United Nations adopted the Convention on the Rights of Persons with Disabilities, which states:

States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life With a view to enabling persons with disabilities to participate on an equal basis with others in recreational, leisure and sporting activities, States Parties shall take appropriate measures: . . . [t]o encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels. . . .¹⁰⁶

Despite the fact that until recently other international law human rights instruments had not recognized sport as a human right, the Olympic Charter has steadfastly endorsed the right. For example, the fourth

100. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (1981), *available at* <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> [hereinafter CEDAW].

101. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195, 5 I.L.M. 352 (entered into force Jan. 4, 1969, and ratified by the United States Nov. 20, 1994), *available at* <http://www2.ohchr.org/english/law/pdf/cerd.pdf> [hereinafter CERD].

102. Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, U.N. Doc. A/61/49 (Dec. 13, 2006), <http://www2.ohchr.org/English/law/pdf/disabilities-convention.pdf> [hereinafter CRPD].

103. *Id.* art. 2; *see* CEDAW, *supra* note 100, art. 1; CERD, *supra* note 101, art. 1(1).

104. The impermissible categories, according to the Universal Declaration of Human Rights, are “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Universal Declaration of Human Rights art. 2, G.A. Res. 217 (III) A, U.N. Doc. A/Res/217(111) (Dec. 10, 1948) [hereinafter UDHR], *available at* <http://www.un.org/en/documents/udhr/index.shtml>.

105. Janet E. Lord & Michael Ashley Stein, *Social Rights and the Relational Value of the Rights To Participate in Sport, Recreation, and Play*, 27 B.U. INT'L L.J. 249, 251-52 (2009); NAFZIGER, *supra* note 67, at 126.

106. CRPD, *supra* note 102, art. 30.

Fundamental Principle explicitly states, “The practice of sport is a human right.”¹⁰⁷ Therefore, the Olympic antidiscrimination principle could be defined as proscribing any distinction, exclusion or restriction on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of the human right to sport.¹⁰⁸

B. Ethic of Fair Play

Fair play, like antidiscrimination, is an integral aspect of the Olympic Movement. Aside from the Fundamental Principles, it is also found in the mission of the IOC as enumerated by the Olympic Charter, which states, “The IOC’s role is . . . to encourage and support the promotion of ethics in sport . . . and to dedicate its efforts to ensuring that, in sport, the spirit of fair play prevails”¹⁰⁹ Additionally, the Olympic Eligibility Code also emphasizes the importance of fair play as a criterion for eligibility.¹¹⁰ “Fair play,” however, is not a static concept, but a “value [that] changes from time to time, from society to society.”¹¹¹

107. INT’L OLYMPIC COMM., *supra* note 72, at 11; *see also* Kéba Mbaye, *Sport and Human Rights*, OLYMPIC REV., Dec.-Jan. 1998, at 8, 8, <http://www.la84foundation.org/OlympicInformationCenter/OlympicReview/1998/oreXXVI24/oreXXVI24i.pdf> (“I should like to make three comments. The first is that sport is a human right.”). The meaning of the human right to sport, within the Olympic Charter, is further elucidated by the IOC’s commitment to “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,” “to encourage and support measures protecting the health of athletes,” and “to encourage and support the efforts of sports organisations and public authorities to provide for the social and professional future of athletes.” INT’L OLYMPIC COMM., *supra* note 72, at 15.

108. Note that this is a very inclusive definition of the Olympic antidiscrimination principle, adopting the same impermissible distinctions identified in the Universal Declaration of Human Rights. UDHR, *supra* note 104, art. 2. The use of such an expansive definition is supported by the Olympic Charter’s explicit commitment “to act against *any* form of discrimination affecting the Olympic Movement.” INT’L OLYMPIC COMM., *supra* note 72, at 14 (emphasis added).

109. INT’L OLYMPIC COMM., *supra* note 72, at 14.

110. *Id.* at 80-81. The Eligibility Code states:

To be eligible for participation in the Olympic Games, a competitor, coach, trainer or other team official must comply with the Olympic Charter as well as the rules of the IF concerned as approved by the IOC, and the competitor, coach, trainer or other team official must be entered by his NOC. The above-noted persons must notably:

- respect the spirit of fair play and non violence, and behave accordingly; and
- respect and comply in all aspects with the World Anti-Doping Code.

Id.

111. Jenő Kamuti, International Fair Play Committee, President Greetings, <http://www.fairplayinternational.org/greetings.php> (last visited Feb. 26, 2010).

When Pierre de Coubertin restarted the Olympic Games at the close of the nineteenth century, the concept of fair play was synonymous with the notion of being gentlemanly and chivalrous.¹¹² The modern understanding, on the other hand, has maintained the notion of sportsmanship,¹¹³ but focuses on “steadfast observance of the rules, . . . sensitivity to the spirit of competition and . . . constant and absolute respect at all times for [the] referee, team, colleagues, opponents, [and] spectators.”¹¹⁴ Additionally, and importantly, it is vital to the notion of fair play that there is an understanding among all those listed above that the victor could have been the loser and vice versa because, otherwise, the triumph loses its value.¹¹⁵

It is this final conception of fair play that has moved to the forefront and motivated the continued prominence of fair play in the Olympic Movement. For, “if the loser were not in fact capable of winning, the winner would have fought against a worthless adversary, and his victory would itself be worthless.”¹¹⁶ It is this conception of fair play that created the current system of sport competition that is separated into binary gender categories. “It seem[ed] intuitively obvious, given the physiological differences that exist between men and women, that athletes should compete against others of the same sex [Thus, i]n keeping with the ethic of fair play, most international sports federations . . . organise their major competitions along sex restricted lines.”¹¹⁷ Therefore, fair play has come to mean that each competitor has a legitimate chance at winning.¹¹⁸

Paradoxically, according to the International Council of Sport Science and Physical Education, in cooperation with the IOC and the support of the United Nations Educational, Scientific and Cultural Organization, “[t]he major threat to fair play is the excessive importance now attached to winning.”¹¹⁹ This is due to the fact that when winning

112. *Id.* (“Coubertin . . . regarded the Olympians as modern knights, who protect the weak, fight in an honest and well-meaning way, are unconditionally loyal to the opponent, and observe the unwritten rules as well as the written ones.”).

113. Alain Caillé, *The Concept of Fair Play*, OLYMPIC REV., Aug.-Sept. 1998, at 27, 28, <http://www.la84foundation.org/OlympicInformationCenter/OlympicReview/1998/oreXXVI22/oreXXVI22p.pdf>.

114. Int'l Council of Sport, Sci. & Physical Educ., *Declaration on Fair-Play*, OLYMPIC REV., Aug.-Sept. 1998, at 22, 22, available at <http://www.la84foundation.org/OlympicInformationCenter/OlympicReview/1998/oreXXVI22/oreXXVI22o.pdf> [hereinafter ICSSPE].

115. Caillé, *supra* note 113, at 27.

116. *Id.*

117. Reeser, *supra* note 42, at 695.

118. *See id.*

119. ICSSPE, *supra* note 114, at 22.

replaces the traditional goal of “playing with the opponent so that [each] can deploy all his human skills,”¹²⁰ the competitors may seek to win by any means, such as “by cheating or fouling or taking stimulants or other drugs.”¹²¹ It was this concern about cheating that motivated the adoption of gender-verification testing in the 1960s.¹²² In fact, the testing was initially announced as a showing of how the IOC was dedicated to supporting women athletes; “[m]andatory sex testing, according to the IOC, was a means of protecting new opportunities that had opened up for women”¹²³ by ensuring that men were kept out of their competitions.

However, even the binary system has made modern adjustments allowing for the development of the ethic of fair play. Specifically, in 2004 the IOC ruled that transgendered athletes would be eligible to compete in the category of their self-identified gender as long as they met certain criteria.¹²⁴ The required criteria sought to eliminate any physical advantage that the transgendered person may have carried over from their birth gender.¹²⁵ Thus the concept of fair play continues to evolve, but maintains its grounding in the notion that each competitor must be afforded a legitimate opportunity for victory.

V. ANALYSIS

Although the IOC and IFs have discontinued the “patently discriminatory” blanket sex-verification testing as an eligibility criterion for participation in women’s events, such testing is still conducted on a case-by-case basis, as shown by the IAAF Policy.¹²⁶ While the IOC

120. Kamuti, *supra* note 111 (quoting Jean D’Ormesson).

121. ICSSPE, *supra* note 114, at 22; Kamuti, *supra* note 111 (“The principle of ‘winning at all costs’ became dominant and almost a rule. This doctrine led to such distortions in sport as brutality, aggressiveness, drug use, and racism.”).

122. Cole, *supra* note 44, at 134.

123. *Id.* at 136.

124. *IOC Approves Consensus with Regard to Athletes Who Have Changed Sex*, OLYMPIC.ORG, May 17, 2004, <http://www.olympic.org/en/content/The-IOC/Commissions/Medical/?Tab=5&articleNewsGroup=-1¤tArticlesPageIPP=10¤tArticlesPage=4&articleId=56230>.

125. *Id.* The IOC determined that eligibility for people who had sex reassignment surgery after puberty would include a requirement for “[h]ormonal therapy appropriate for the assigned sex [that] has been administered in a verifiable manner and for a sufficient length of time to minimise gender-related advantages in sport competitions.” *Id.*; see also Teetzel, *supra* note 40, at 335 (“[T]ransgendered athletes can compete as their self-identified gender at the Olympic Games if they meet the qualification standards for their sports and meet three additional criteria: (1) the athlete’s gender is legally recognized[,] (2) the athlete has completed genital reconstructive surgery and had his or her ovaries or testes removed[,] (3) the athlete has undergone a minimum of 2 years post-operative hormone therapy to eliminate any sex-related advantages.”).

126. NAFZIGER, *supra* note 67, at 123; see, e.g., IAAF MED. & ANTI-DOPING COMM’N, *supra* note 4.

policy in relation to intersexed athletes is still developing, the current reports indicate that the eligibility criteria for such athletes, similar to those for transgendered athletes, will depend heavily on whether they have received treatment for their DSD.¹²⁷ Instituting a treatment requirement for intersexed athletes leaves many to question whether such a policy would violate the antidiscrimination policy of the Olympic Charter or if such a policy is justified by the need to preserve the ethic of fair play.

A. *Do Sex-Verification Policies Invidiously Discriminate Against Intersexuals?*

Sex-verification testing was instituted in the 1960s with the explicit purpose of preventing sex fraud.¹²⁸ Within the context of international athletics, in accord with the ethic of fair play, the IOC and IFs undeniably have a compelling interest to prevent cheating in competitions. However, despite this admittedly valid purpose, the wholesale testing of every female athlete was found to be unjustifiably overbroad, as shown by the fact that the testing never revealed a man masquerading as a woman.¹²⁹ Instead, the history of the policy demonstrated that its effect was to identify “athletes as male who [had] lived their entire lives as women [and] who [had] committed no wrongdoing.”¹³⁰

Therefore, the across-the-board verification policy was replaced with a case-by-case medical evaluation based upon suspicion that the athlete was intentionally competing with the wrong sex.¹³¹ Nevertheless, in light of the history of sex-verification testing, it is likely that this narrower policy will continue to affect intersexed athletes overwhelmingly. Thus, such a policy is easily identified as a distinction, exclusion, or restriction on the basis of sex, which has the purpose or effect of impairing or nullifying the recognition, enjoyment, or exercise, on an equal basis with others, of the intersexed athlete’s human right to sport.

127. Kolata, *supra* note 2. A panel of medical experts, specializing in DSDs, was assembled by the IOC in January 2010 to discuss the issue of eligibility criteria for intersexed athletes. *Id.*; O’Reilly, *supra* note 10. One panel member, Dr. Maria New, stated: “Those who agree to be treated will be permitted to participate, . . . [t]hose who do not agree to be treated on a case-by-case basis will not be permitted.” Kolata, *supra* note 2.

128. Cole, *supra* note 44, at 134.

129. Fastiff, *supra* note 49, at 940.

130. Olsen-Acre, *supra* note 87, at 218; *see also* Hayden Opie, *International Sports Law Perspective: Australian Medico-Legal Issues in Sport: The View from the Grandstand*, 13 MARQ. SPORTS L. REV. 113, 140 (2002) (“Much of the history of gender verification in sport has been as a source of profound difficulty for those individuals who are not unequivocally of one or the other sex, rather than as a barrier to the impersonator.”).

131. *See, e.g.*, IAAF MED. & ANTI-DOPING COMM’N, *supra* note 4.

However, unlike the original testing policy, and despite its disparate impact on intersexed athletes, this case-by-case testing would likely be found to be justified, because it is narrowly tailored to the IOC's compelling interest of preventing sex fraud.

However, the IOC's prospective policy requiring intersex athletes to receive treatment as a criterion for participating in international athletic competitions is another matter.¹³² As with the case-by-case testing, which is likely to have a disproportionate impact on intersexed athletes, the additional treatment requirement raises discrimination concerns. As a threshold matter, such a requirement is, on its face, a distinction, exclusion, or restriction on the basis of sex characteristics, which has the purpose or effect of impairing or nullifying the recognition, enjoyment, or exercise, on an equal basis with others, of the intersexed athlete's human right to sport.¹³³ However, unlike the case-by-case sex-verification testing, the treatment requirement cannot be tied to the prevention of sex fraud, because intersex athletes merely want to be allowed to compete in the gender category in which they live their lives.¹³⁴ Therefore, supporters of the requirement have attempted to justify the discriminatory policy on the basis of fair play.

B. Would Allowing Intersexuals To Participate Nullify the Ethic of Fair Play?

Neither the IOC nor the IFs accuse the intersex athletes of intentionally cheating.¹³⁵ In other words, they are not participating in women's events with the sole intent of capitalizing on any inherent advantage; they compete with women because they consider themselves women.¹³⁶ Despite this lack of any intent to cheat, supporters of the additional-treatment requirement for intersexual athletes argue that it is justified on the basis that the IOC and IFs have a substantial interest in

132. Treatment possibilities include hormone therapy or even surgery to remove testicular or gonadal tissue. O'Reilly, *supra* note 10.

133. *See, e.g., id.* ("If [athletes diagnosed with a DSD] want[] to compete . . . they may have no option but to undergo treatment or even surgery—if not, they may have to leave the sport.").

134. Olsen-Acre, *supra* note 87, at 218.

135. For example, in the case of Caster Semenya, Nick Davies, the IAAF spokesperson, stated:

If there's a problem and it turns out that there's been a fraud . . . that someone has changed sex, then obviously it would be much easier to strip results However, if it's a natural thing and the athlete has always thought she's a woman or been a woman, it's not exactly cheating.

ESPN.com News Servs., *supra* note 1.

136. Olsen-Acre, *supra* note 87, at 218.

ameliorating any unfair competitive advantage that intersexed athletes may possess.¹³⁷ Thus, supporters argue that the “real differences” between average women and intersex women justify disparate eligibility requirements, similar to the additional eligibility requirements imposed on transgendered women athletes.

Yet there are several important distinctions between the position of intersexed athletes and transgendered athletes. First, it is scientifically accepted that developed males have certain physical advantages over developed females,¹³⁸ thus the additional requirement that postpuberty male-to-female transgendered athletes receive hormone treatment seeks to ameliorate this scientifically accepted advantage.¹³⁹ However, there is no such scientific consensus that the mere presence of the Y chromosome imbues the intersex athlete with a physical advantage over average XX women.¹⁴⁰ “[T]here is no evidence that female athletes with DSDs have displayed any sports-relevant physical attributes which have not been seen in biologically normal female athletes.”¹⁴¹ For example, despite the controversy sparked by Semenya’s winning time at the 2009 Berlin world championships, her time is ranked only twenty-first, indicating that her feat is clearly not beyond the purview of a female competitor.¹⁴² Therefore, the oft-cited “unfair competitive advantage” that the intersex athlete is accused of possessing is essentially an unsupported assumption.

Second, transgendered athletes have chosen to alter their physiology in order to transition to the gender with which they identify. Conversely, intersexual athletes have made no change to their physicality. “It has

137. This is also the argument of those, like Coleman and Hay, who believe that the physical advantages bestowed by intersexuality are so pervasive that even treatment would be insufficient to level the playing field. Kolata, *supra* note 2; Cole, *supra* note 44, at 136. For example, Hay is quoted as having said, “[Intersexed athletes] must be barred from competition in order to ensure fair play . . . [because] the woman athlete endowed with these masculine anatomical conditions [is given] an unfair and unlawful advantage over the anatomically normal woman athlete.” Cole, *supra* note 44, at 136.

138. Reeser, *supra* note 42, at 695; Opie, *supra* note 130, at 138.

139. Reeser, *supra* note 42, at 697.

140. *Id.* at 696 (“The presence of the Y chromosome (and more importantly, circulating testosterone) confers no physical advantage on [intersexed athletes].”).

141. Ritchie et al., *supra* note 33, at 398. Furthermore, the Work Group on Gender Verification, held by the IAF in 1990, brought together “representatives from medical genetics, gynecology, pediatrics, endocrinology, pathology, biochemistry, psychiatry, psychology, and sports medicine, and athletes” to discuss gender-verification testing and the effect it had on intersexual athletes. Cole, *supra* note 44, at 140-41. Their report “asserted that the occasional individuals with disorders of sexual development such as XY gonadal dysgenesis ‘possess no unfair advantage . . . no physical attribute relevant to sports performance that is not attainable by or present in other 46, XX women.’” *Id.* at 141.

142. ESPN.com News Servs., *supra* note 1.

always been the case that some athletes are better endowed, genetically, than others. And yet we do not consider the natural inequality of genetic endowments to undermine the fairness of competitive sports.”¹⁴³ For example, Flo Hyman, who participated in the 1984 Los Angeles Olympic Games as a member of the United States Women’s National Volleyball Team, had Marfan’s syndrome.¹⁴⁴ Marfan’s, which results in a tall stature and long arms, undoubtedly was a contributing factor to Hyman’s success as a volleyball player.¹⁴⁵ However, it was never even considered that she should be excluded for possessing such a genetic advantage.¹⁴⁶

Hence, the ethic of fair play does not demand a truly level playing field. Instead, it asks that competitive sport be organized so that each competitor has a legitimate opportunity to win and that each “can deploy all his human skills.”¹⁴⁷ Allowing intersexual athletes to compete does not undermine either of these tenets. Thus, the fact that competitive advantage has not been unequivocally shown, in conjunction with the fact that any advantage would be naturally occurring, supports the finding that the discriminatory additional-treatment requirement for intersexual athletes cannot be justified on the basis that it ameliorates unfair competitive advantage.

VI. CONCLUSION

The prospective-treatment requirement for intersexed athletes constitutes a discriminatory restriction on an intersex athlete’s enjoyment of his or her human right to sport. The IOC and IFs cannot justify such a discriminatory restriction on the basis that doing so allows for fair competition. In fact, the ethic of fair play does not demand that the IOC or IFs impose discriminatory eligibility requirements on intersexed athletes but, instead, supports the inclusion of athletes who, through hard work and natural ability, have become elite in their respective events.

143. MICHAEL J. SANDEL, *THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING* 12 (2007).

144. Reeser, *supra* note 42, at 698.

145. *Id.*; see also Olsen-Acre, *supra* note 87, at 219.

146. Reeser, *supra* note 42, at 698.

147. Caillé, *supra* note 113, at 27; Kamuti, *supra* note 111 (quoting Jean D’Ormesson).