

# CHANGING SEX/GENDER ROLES AND SPORT

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*This Article argues that sex/gender roles in sport have resulted almost entirely from stereotypes rather than from analytical thinking. This situation has created unfairness and discrimination that have been highlighted by the rising trend of gender fluidity. The Article makes a proposal to remedy this unfairness and discrimination.*

*The Article first traces sex/gender roles in sport before the passage in the United States of Title IX of the Education Amendments of 1972, which the courts have interpreted as applying to women in sport. As the participation of women in sport expanded in the twentieth century, pressure built to end the inferior treatment of women. With the passage of Title IX came the start of tremendous progress.*

*This Article further explores how, despite this progress, stereotypes have still retained influence in sport. The so-called Contact Sport Exemption (CSE) to Title IX, for example, exempted such major revenue-producing sports as football and men's basketball from the requirements of Title IX.*

*The Article maintains that the CSE makes little sense in an era of increasing gender fluidity. With regard to intersex or transgender athletes, the CSE offers little guidance on questions such as whether a person transitioning from male to female could play on a women's field hockey team or whether a person transitioning from female to male could play on a football team.*

*The Article reviews the attempts of sporting organizations, such as the International Olympic Committee and the National Collegiate Athletic Association, to deal with intersex and transgender athletes. The Article argues that the attempted solutions fail because they are not scientifically based, they are invasive, and/or they do not take into account Title IX.*

*The Article then proposes a workable solution based on the following principles: (1) separate but equal teams by sex/gender are permissible; (2) where there is only one team in a sport, females may try out for traditionally-male teams like football and males may try out for traditionally-female teams like field*

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*hockey; and (3) the definition of “sex” is either the sex at birth or the sex with which the individual identifies for all purposes (i.e., not just for sports).*

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## INTRODUCTION

When 1976 Olympic decathlon gold-medalist Bruce Jenner announced his intention in 2015 to transition to the female sex with the name Caitlyn,<sup>1</sup> the transition raised numerous legal and policy issues. This article will explore those issues as well as the interaction between sex/gender and sport more generally. What, for example, would and should have been done by the Olympic authorities had Bruce transitioned to Caitlyn before 1976? Would she have competed as a male or a female, and why?

Sport has struggled with sex/gender<sup>2</sup> for centuries, and the struggle has not become any easier now that sex and gender are becoming more fluid, as discussed in Section I below. The history of that struggle prior to the enactment

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1. Buzz Bissinger, *Caitlyn Jenner: The Full Story*, VANITY FAIR, July 2015.

2. “The term ‘sex’ refers to characteristics that distinguish between male and female. . . . In contrast, the term ‘gender’ refers to the psychosexual individuality resulting in part from the societal manner of rearing (boy versus girl). Thus, whereas ‘sex’ considers what is *male* and what is *female*, ‘gender’ considers what is *masculine* and what is *feminine*. The two terms are often (incorrectly) used interchangeably.” Jill Pilgrim, David Martin & Will Binder, *Far from the Finish Line: Transsexualism and Athletic Competition*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 495, 497-98 (2003). The authors will use these terms by their dictionary definitions, as appropriate, but caution that some cited material may incorrectly interchange the terms.

of Title IX will be briefly reviewed in Section II below to illustrate how stereotypes, rather than reasoned analysis, have been unduly influential in law and policy in this area. As the National Collegiate Athletic Association (NCAA) has stated, contrary to those stereotypes, “[t]he assumption that all male-bodied people are taller, stronger, and more highly skilled in a sport than all female-bodied people is not accurate.”<sup>3</sup>

The 1972 passage of Title IX<sup>4</sup> (reviewed in Section III below), began a new era of exponentially increased female participation in sports.<sup>5</sup> But in sports, most post-Title IX analysis has been binary in terms of sex/gender (*i.e.*, not recognizing athletes other than male or female). Therefore, it is not surprising that relevant case law, statutes, and customs have been based on this binary view of human beings. Moreover, the Contact Sports Exemption (CSE) to Title IX<sup>6</sup> continued the use of stereotypes under a slightly different guise.

Sporting organizations, courts, and legislatures have struggled mightily to create fair and rational rules in an era of greater gender fluidity. Section IV below will explore some of those struggles, none of which have provided a workable protocol because of one or more of the following flaws: they are invasive, they do not have a generally accepted scientific basis, and/or they fail to take Title IX into consideration.

Section V will then propose an appropriate protocol based on three principles: 1) separate but equal teams are permissible; 2) where there is only one team in a sport, females may try out for traditionally male teams, like football, and males may try out for traditionally female teams, like field hockey; 3) the definition of “sex” is either the sex at birth or the sex with which the individual identifies for all purposes (*i.e.*, not just for sports). The proposal, consistent with U.S. Supreme Court rulings, seeks to eliminate the sex/gender stereotype in sports once and for all, while continuing to preserve the rights that Title IX granted to women.<sup>7</sup>

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3. NCAA OFFICE OF INCLUSION, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 7 (Aug. 2011), [https://www.ncaa.org/sites/default/files/Transgender\\_Handbook\\_2011\\_Final.pdf](https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf) [hereinafter NCAA POLICY].

4. 20 U.S.C. § 1681; *Overview of Title IX of the Education Amendments of 1972*, 20 U.S.C. § 1681 *et. seq.*, U.S. DEP’T. OF JUSTICE (Aug. 7, 2015), <https://www.justice.gov/crt/overview-title-ix-education-amendments-1972-20-usc-1681-et-seq>.

5. NAT’L COAL. FOR WOMEN & GIRLS IN COMPETITION, TITLE IX AT 40: TITLE IX AND ATHLETICS: PROVEN BENEFITS, UNFOUNDED OBJECTIONS 7 (2012), <http://www.ncwge.org/PDF/TitleIXat40.pdf>.

6. 34 C.F.R. § 106.41(b) (2010).

7. The proposal treats all non-binary sex/gender categories similarly; the proposal is uniform whether one is transgender like Renée Richards or intersex as Dutee Chand and Caster Semenya are presumed to be.

## I. GENDER FLUIDITY TODAY

Until the late twentieth century, almost all people in Western societies were categorized by their sex, in other words as either male or female.<sup>8</sup> Now however, more people than ever before are undergoing sex reassignment or categorizing themselves by their gender identity rather than their sex.

A sign of society's efforts to keep up with evolving gender identities appears on the popular social media site, Facebook.com. As recently as 2014, American users of Facebook were allowed to identify themselves as one of fifty gender identity categories, and users in the United Kingdom could identify themselves as one of seventy-one different gender identity options.<sup>9</sup> The number of American categories increased to fifty-eight categories shortly thereafter until, ultimately, Facebook adopted a policy to allow its users unlimited custom gender identities.<sup>10</sup>

Below is a sampling of identities, other than male and female, which are currently in use, and basic definitions for each<sup>11</sup>:

- Agender: a person who does not identify with any gender identity.<sup>12</sup>
- Androgynous: a person who does not identify with or present as either a male or female.
- Bigender: a person who identifies as both male and female, although not necessarily in a 50/50 ratio.

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8. JACK DAVID ELLER, CULTURE AND DIVERSITY IN THE UNITED STATES: SO MANY WAYS TO BE AMERICAN 137 (2015).

9. Rhiannon Williams, *Facebook's 71 Gender Options Come to UK Users*, THE TELEGRAPH (June 27, 2014), <http://www.telegraph.co.uk/technology/facebook/10930654/Facebooks-71-gender-options-come-to-UK-users.html>. The 71 gender identities—some of them overlapping—that U.K. Facebook users could identify as are: Agender, Androgyne, Androgynes, Androgynous, Bigender, Cis, Cis Female, Cis Male, Cis Man, Cis Woman, Cisgender, Cisgender Female, Cisgender Male, Cisgender Man, Cisgender Woman, Female to Male, FTM, Gender Fluid, Gender Nonconforming, Gender Questioning, Gender Variant, Genderqueer, Intersex, Male to Female, MTF, Neither, Neutrois, Non-binary, Other, Pangender, Trans, Trans Female, Trans Male, Trans Man, Trans Person, Trans\*Female, Trans\*Male, Trans\*Man, Trans\*Person, Trans\*Woman, Transexual, Transexual Female, Transexual Male, Transexual Man, Transexual Person, Transexual Woman, Transgender Female, Transgender Person, Transmasculine, Two-spirit, Asexual, Female to male trans man, Female to male transgender man, Female to male transsexual man, F2M, Gender neutral, Hermaphrodite, Intersex man, Intersex person, Intersex woman, Male to female trans woman, Male to female transgender woman, Male to female transsexual woman, Man, M2F, Polygender, T\* man, T\* woman, Two\* person, Two-spirit person and Woman.

10. *58 gender options not enough? Facebook now allows unlimited custom identities*, RT.COM (Feb. 27, 2015), <https://www.rt.com/usa/236283-facebook-gender-custom-choice/>.

11. Debby Herbenick & Aleta Baldwin, *What Each of Facebook's 51 New Gender Options Means*, THE DAILY BEAST (Feb. 15, 2014), <http://www.thedailybeast.com/articles/2014/02/15/the-complete-glossary-of-facebook-s-51-gender-options.html>.

12. The hiring of the first openly agender executive in minor league baseball was reported in February 2017. See Ciaran Breen, *Minor League Baseball Team Hires First Openly Non-Binary Executive*, YAHOO! SPORTS (Feb. 27, 2017), <https://ca.sports.yahoo.com/news/minor-league-baseball-team-hires-first-openly-non-binary-executive-192144772.html>.

- Cis: various terms starting with “cis,” meaning a person who identifies with the sex they were born with, followed by terms such as female, woman, male, man, gender, gender male, gender female, etc.
- Female to Male (FTM) or Male to Female (MTF): a person born either a male or female who now lives as the other, whether or not reassignment surgery has been performed, and presents a gender identity consistent with the sex with which the person identifies.
- Gender Fluid: a person whose gender identity and presentation are not limited to one gender identity. There are also similar categories of gender nonconforming, gender questioning, gender variant, and gender diverse.
- Genderqueer or Non-binary: a person who identifies as something other than as part of the traditional two-gender system.
- Intersex: a person who has chromosomes and other physical manifestations that are not consistent with the expected configurations for a biological male or female.<sup>13</sup>
- Neither: a person choosing not to label gender.
- Other: a person choosing not to provide a label for their gender.
- Pangender: “pan” means every, or all, and this is another identity label much like genderqueer or neutrois that challenges binary gender and is inclusive of gender-diverse people.
- Transgender: a person of a gender not traditionally associated with their sex at birth. There are also gender identities within transgender such as transgender man, transgender woman, transgender male, transgender female, and transgender person.<sup>14</sup>

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13. Although the details concerning the biological nature of each has been kept confidential, this is likely the category at issue with Dutee Chand and Caster Semenya, discussed below in Section IV. According to an estimate by Brown University researchers, “one or two in 2,000 infants have surgery to alter their genitals.” Valeriya Safronova, *How a Top Model Became an Intersex Activist*, N.Y. Times (Feb. 16, 2017), <https://nyti.ms/2lr6YjW>; NCAA Policy, *supra* note 3, at 23. It has been estimated that there are at least forty congenital variations of intersex traits. Jenny Kleeman, ‘We don’t know if your baby’s a boy or a girl’: growing up intersex, THE GUARDIAN (July 2, 2016), <https://www.theguardian.com/world/2016/jul/02/male-and-female-what-is-it-like-to-be-intersex>. It is further estimated that 1% to 2% of live births have disorders of sexual development (DSDs), many with indeterminate genitalia. Sara Reardon, The spectrum of sex development: Eric Vilain and the intersex controversy, *Nature* (May 10, 2016), <http://www.nature.com/news/the-spectrum-of-sex-development-eric-vilain-and-the-intersex-controversy-1.19873>.

14. As of June 2016, the transgender population in the United States was estimated to be approximately 1.4 million adults. Jan Hoffman, *Estimate of U.S. Transgender Population Doubles to 1.4 Million Adults*, N.Y. TIMES (June 30, 2016), <https://nyti.ms/29cwIMMo>. It is estimated that nearly 150,000 teenagers between the ages of thirteen and seventeen identify as transgender. Niraj Chokshi, *One in Every 137 Teenagers Would Identify as Transgender*, *Report Says*, N.Y. TIMES (Feb. 23, 2017), <https://nyti.ms/2lBrjRv>.

- Trans\*: a person who does not identify with an established sex or gender label. There are also gender identities within trans\* such as trans\*person, trans\*female, trans\*woman, trans\*male, and trans\*man.
- Transsexual: a person who has undergone treatment or surgery to change their sex. The term is often followed by a sexual connotation such as transsexual woman, transsexual female, transsexual man, or transsexual male.<sup>15</sup>
- Transmasculine or Transfeminine: a person born either male or female who identifies as either masculine or feminine (which is not consistent with the traditional traits of their birth sex), although the person may not identify entirely as either sex.
- Two-spirit: a person who has both masculine and feminine characteristics and presentations.

People with non-binary gender identities would traditionally have been hard pressed to compete on a male or female sports team that did not match the sex stated on their birth certificates. As the NCAA has stated, for example, there is a concern “that transgender women are not ‘real’ women.”<sup>16</sup> However, also according to the NCAA:

Gender identity is a core aspect of a person’s identity, and it is just as deep seated, authentic, and real for a transgender person as for others. Male-to-female transgender women fully identify and live their lives as women, and female-to-male transgender men fully identify and live their lives as men.<sup>17</sup>

As gender has become more fluid, the sports world has had to adjust to ensure that the competitive playing field remains level and that all competitors—regardless of their sex or gender identity—are treated fairly. As noted in Section IV below, these efforts have not yet resulted in a workable solution that can be uniformly applied.

## II. SEX/GENDER STEREOTYPES IN SPORT PRE-TITLE IX

The historical arc of sex/gender discrimination in sport is lengthy and has grown more complex as gender fluidity has increased. In order to understand the current era of greater gender fluidity as it relates to sport, it is necessary to

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15. Dr. Renée Richards, discussed below in Section IV, likely would be included in this category.

16. NCAA POLICY, *supra* note 3, at 7.

17. *Id.* Increasing gender fluidity is, of course, not limited to the sports world. The United States Supreme Court, for example, recently vacated an order for a hearing on transgender bathroom issues because of a change of policy on that issue by the Trump administration. See *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S.Ct. 1239 (2017); Adam Liptak, *Supreme Court Won’t Hear Major Case on Transgender Rights*, N.Y. TIMES (Mar. 6, 2016), [https://www.nytimes.com/2017/03/06/us/politics/supreme-court-transgender-rights-case.html?\\_r=0](https://www.nytimes.com/2017/03/06/us/politics/supreme-court-transgender-rights-case.html?_r=0).

understand the role of sex/gender in sport both before the 1972 passage of Title IX, briefly discussed in this section, and after the passage of Title IX, which will be discussed in Section III below. The discussion in this section is brief because there was not much progress in this area over the course of more than twenty-six centuries from the origin of the Olympic Games in ancient Greece until the early 1970s. For example, women were not allowed to compete in the Olympic Games in ancient Greece.<sup>18</sup> Indeed, married females were not even allowed to attend as spectators.<sup>19</sup>

Fast-forward from 776 B.C. to the beginning of the modern Olympic Games in 1896. Women were still not allowed to compete in those games; Baron de Coubertin, who founded the modern games, thought that such participation would be “impractical, uninteresting, unaesthetic, and incorrect.”<sup>20</sup> Gradually, over a period of decades, women were allowed to compete in more Olympic sports. Finally in 2012, with inclusion in boxing, women were permitted to compete in all sports at a single Olympics.<sup>21</sup>

A major factor keeping women from competing in sports was a belief that such competition would impair childbearing capabilities.<sup>22</sup> That belief was disproven by, among many others, Joan Benoit Samuelson—the first woman to win an Olympic marathon. She was quoted in 2016, on the occasion of the 50th anniversary of female participation in the Boston Marathon, as stating: “It was thought that running would do us bodily harm, and we would never bear children. Now here I am: 150,000 miles and two children later, I’m still running. And I’m cheering on a daughter.”<sup>23</sup>

Female athletic participation was greatly accelerated by the 1972 passage of Title IX, which was enacted eight years after a precursor, the landmark Civil

18. *The Athlete*, OLYMPIC GAMES, <https://www.olympic.org/ancient-olympic-games/the-athlete> (last visited May 14, 2017).

19. *Id.*

20. Emily Dugan, *Ladies First: Why 2012 is the Women’s Games*, *Independent* (July 7, 2012), <http://www.independent.co.uk/sport/olympics/ladies-first-why-2012-is-the-womens-games-7920011.html>.

21. FACTSHEET: WOMEN IN THE OLYMPIC MOVEMENT, INT’L OLYMPIC COMM. (Jan. 2016), [https://stillmed.olympic.org/Documents/Reference\\_documents/Factsheets/Women\\_in\\_Olympic\\_Movement.pdf](https://stillmed.olympic.org/Documents/Reference_documents/Factsheets/Women_in_Olympic_Movement.pdf); *Women at the Olympic Games*, TOPEND SPORTS, <http://www.topendsports.com/events/summer/women.htm> (last visited May 14, 2017). Of note, though, there are still several events, like the men’s decathlon as compared to the women’s heptathlon, where Olympic competitions differ based on the sex of the participants. Aimee Lewis, *Is Sport Sexist? Six Sports Where Men & Women are Still Set Apart*, *BBC* (Sept. 18, 2014), <http://www.bbc.com/sport/golf/29242699>.

22. See U.N. DIV. FOR THE ADVANCEMENT OF WOMEN DEP’T OF ECON. & SOC. AFFAIRS, *WOMEN 2000 AND BEYOND: WOMEN, GENDER EQUALITY AND SPORT 2* (Dec. 2007), <http://www.un.org/womenwatch/daw/public/Women%20and%20Sport.pdf>; Juli Daulton, *The Evolution of Gender Equality in Intercollegiate Sports*, *SKYLINE – THE BIG SKY UNDERGRAD. J.*, 2013, at 1.

23. Jimmy Golen, *Boston Marathon Celebrates 50 Years of Women in the Race*, *ASSOCIATED PRESS* (Apr. 16, 2016), <http://bigstory.ap.org/article/47e502a588c145d687385d0277447468/boston-marathon-celebrates-50-years-women-race>.

Rights Act of 1964 which prohibited employment discrimination.<sup>24</sup> Earlier versions of the bill that would become the 1964 Civil Rights Act did not even mention “sex,” but rather specified only that discrimination on the basis of race, color, religion, and national origin would be unlawful.<sup>25</sup>

In order to scuttle the entire bill, a congressman from Virginia proposed an amendment adding “sex” to that list, jocularly stating that he was responding to a letter from a constituent “to protect our spinster friends.”<sup>26</sup> Jocularly notwithstanding, the amended bill passed in the House of Representatives by a vote of 168 to 133, and the category “sex” ultimately became part of the employment provisions of the Civil Rights Act. Ironically, the “sex” amendment was supported not only by the 12 female members of the House but also by southern representatives who actually opposed the Civil Rights Act.<sup>27</sup>

The legislative history concerning the inclusion of sex, however, was scant, as it was with later sex-related legislation and regulations relating to sports (see Section III below). Indeed, when then Associate Justice William Rehnquist alluded to the 1964 “sex” amendment in a United States Supreme Court decision, he noted that “the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act’s prohibition against discrimination based on ‘sex.’”<sup>28</sup>

Despite the addition of “sex” to the 1964 Civil Rights Act, however, the stereotyping of women continued. For example, one of the co-authors of Title IX, Senator Birch Bayh of Indiana, stated in support of the 1972 bill that would become known as Title IX:

We are all familiar with the stereotype of women as pretty things who go to college to find a husband, . . . marry, have children, and never work again. The desire of many schools not to waste a ‘man’s place’ on a woman stems from such stereotyped notions. But the facts absolutely contradict these myths about the ‘weaker sex’ and it is time to change our operating assumptions.<sup>29</sup>

That stereotype was emphatically rejected by the courts—following the lead of the United States Supreme Court—after the passage of Title IX. For example, a federal district court in Nebraska struck down a rule prohibiting a female from competing on the boys’ wrestling team, citing a United States

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24. GILLIAN THOMAS, *BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN’S LIVES AT WORK* 1-2 (1st ed. 2016); Elizabeth Roth, *The Civil Rights History of “Sex”: A Sexist, Racist Congressional Joke*, in *ISSUES IN FEMINISM* 522-24 (Sheila Ruth, 3d. ed., 1995).

25. THOMAS, *supra* note 24; Roth, *supra* note 24.

26. THOMAS, *supra* note 24; Roth, *supra* note 24.

27. THOMAS, *supra* note 24; Roth, *supra* note 24.

28. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

29. Mike McGovern, *40 Years Later, Title IX a Game-Changer for Women*, ORLANDO SENTINEL (June 24, 2012), [http://articles.orlandosentinel.com/2012-06-24/sports/sns-mct-40-years-later-title-ix-a-game-changer-for-women-20120624\\_1\\_educational-program-or-activity-title-ix-women-s-sports-foundation](http://articles.orlandosentinel.com/2012-06-24/sports/sns-mct-40-years-later-title-ix-a-game-changer-for-women-20120624_1_educational-program-or-activity-title-ix-women-s-sports-foundation).



Supreme Court case that, in no uncertain terms, invalidates the use of stereotypes in law or policy-making<sup>30</sup>:

Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.<sup>31</sup>

### III. TITLE IX AND THE CONTACT SPORTS EXCEPTION THAT DISPROVES THE RULE

Men and women come in all sizes and shapes, a rather unremarkable fact that the drafters of the so-called Contact Sports Exemption to Title IX seemingly did not take into account in their draftsmanship. This oversight has created problems with the Equal Protection Clause of the United States Constitution and various state constitutions.<sup>32</sup> Regarding the changing gender and sex roles that this article addresses, constitutionality is the least of the CSE's problems (*i.e.*, the CSE becomes impossible to apply in a gender-fluid situation).

Should, for example, a biological female who identifies as a male be allowed to try out for the one football team at a school? Should a biological male who identifies as a female be allowed to try out for the one field hockey team at a school? Does it make any difference whether these individuals have undergone hormonal or surgical change? As explained below, the CSE gives no certain answers to these questions, which were not being posed when the CSE came into force in 1975.

The tale of Title IX and the CSE has been oft-told,<sup>33</sup> but not in the context of gender fluidity. Therefore, the circuitous and somewhat mysterious history

30. *Saint v. Neb. Sch. Activities Ass'n*, 684 F. Supp. 626, 629 (D. Neb. 1988).

31. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

32. *See, e.g.*, *Hoover v. Meiklejohn*, 430 F. Supp. 164 (D. Colo. 1977); Opinion of the Justices to the House of Representatives, 371 N.E.2d 426 (Mass. 1977); *Attorney Gen. v. Mass. Interscholastic Athletic Ass'n*, 393 N.E.2d 284 (1979); *Saint*, 684 F. Supp. 626.

33. *See, e.g.*, Jamal Greene, *Hands Off Policy: Equal Protection and the Contact Sports Exemption of Title IX*, 11 MICH. J. GENDER & L. 133 (2005); Blake J. Furman, *Gender Equality in High School Sports: Why There is a Contact Sports Exemption to Title IX, Eliminating It, and a Proposal for the Future*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1169 (2007); Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381 (2000); Lindsay N. Demery, *What About the Boys? Sacking the Contact Sports Exemption and Tackling Gender Discrimination in Athletics*, 34 T. JEFFERSON L. REV. 373 (2012); Brittany K. Puzey, *Title IX and Baseball: How the Contact Sports Exemption Denies Women Equal Opportunity to America's Pastime*, 14 NEV. L.J. 1000 (2014); Kimberly Capadona, Comment, *The Scope of Title IX Protection Gains Yardage as Courts Continue to Tackle the Contact Sports Exception*, 10 SETON HALL J. SPORTS L. 415 (2000); Marielle Elisabeth Dirx, Comment, *Calling an Audible: The Equal Protection Clause, Cross-Over Cases, and the Need to Change Title IX Regulations*, 80 MISS. L.J. 411 (2010).

of Title IX and the CSE will be briefly outlined below to the extent necessary to illuminate the new sex/gender issues in sport.

### A. *The Circuitous History of Title IX*

Today Title IX is best known for its application to sports, especially for the dramatically increased participation of females since it was enacted in 1972. For example, in the first forty years after Title IX was passed, the number of female high school and college athletes increased by a factor of ten, from approximately 310,000 to 3,373,000.<sup>34</sup> Ironically, however, the text of Title IX does not even mention athletics: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>35</sup>

Nor were there any committee reports generated from the congressional hearings on Title IX,<sup>36</sup> beginning the mystery that would deepen, as noted below, with the CSE. Reportedly, when Congresswoman Edith Green of Oregon, who conducted the Title IX hearings, was asked by a lobbyist on women’s issues what the lobbyist could do to help the bill, Green replied: “Nothing. Nobody knows what’s in this bill. And if you start making noise, they’ll ask.”<sup>37</sup>

When it became clear that Title IX was going to apply to athletics, Senator John Tower of Texas proposed an amendment exempting revenue-generating sports<sup>38</sup> (*i.e.*, football and men’s basketball).<sup>39</sup> That amendment, which would have made Title IX much less effective, was supplanted by an amendment proposed by Senator Jacob Javits of New York, which mandated that what was then known as the Department of Health, Education, and Welfare<sup>40</sup> study

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34. Whitney Dangerfield & Allen Barra, *Before and After Title IX: Women in Sports*, N.Y. TIMES (June 16, 2012), [http://www.nytimes.com/interactive/2012/06/17/opinion/sunday/sundayreview-titleix-timeline.html/#time12\\_264](http://www.nytimes.com/interactive/2012/06/17/opinion/sunday/sundayreview-titleix-timeline.html/#time12_264).

35. 20 U.S.C. § 1681(a).

36. Dirkx, *supra* note 33, at 413; David Aaronberg, *Crumbling Foundations: Why Recent Judicial and Legislative Challenges to Title IX May Signal Its Demise*, 47 FLA. L. REV. 741, 747 (1995).

37. Greene, *supra* note 33, at 137.

38. Dirkx, *supra* note 33, at 414.

39. See Furman, *supra* note 33, at 1172 n.23; Kristi Dosh, *Does Football Fund Other Sports at College Level?*, FORBES (May 5, 2011), <https://www.forbes.com/sites/sportsmoney/2011/05/05/does-football-fund-other-sports-at-college-level/#db7da0c71c2f>.

40. In 1980, pursuant to the Department of Education Organization Act, the Department of Health, Education, and Welfare was split into two agencies, the Department of Health and Human Services and the Department of Education. *Title IX Legal Manual*, U.S. DEP’T. OF JUSTICE, <https://www.justice.gov/crt/title-ix> (last visited May 14, 2017). The Department of Education’s Office of Civil Rights was given responsibility to enforce Title IX in educational institutions. *About Office for Civil Rights*, U.S. DEP’T OF EDUCATION, <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last visited May 14, 2017).

“reasonable provisions considering the nature of particular sports.”<sup>41</sup> The result was the CSE<sup>42</sup>:

Separate Teams. Notwithstanding the requirements of paragraph (a) of this section [prohibiting sex discrimination], a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball<sup>43</sup> and other sports the purpose or major activity of which involves bodily contact.

Put simply, Title IX, which was intended to eliminate sex discrimination, had an exception that expressly allowed sex discrimination against females who wanted to play certain traditionally all-male sports like football and against males who wanted to play traditionally all-female sports like field hockey.

#### B. *The Mysterious History of the CSE, and Its Unconstitutional Effects*

Why the Department of Health, Education, and Welfare created the CSE is not well known. When the Department of Education was created out of the Department of Health, Education, and Welfare, the records related to this subject were in large part destroyed.<sup>44</sup> Three points, however, are clear from the face of the CSE: 1) separate teams for males and females are permissible; 2) females may not try out for contact sports; and 3) if there is only one team at a school for a traditionally all-female sport like field hockey, males may not try out for it, because they are not members of a sex for which “athletic opportunities . . . have previously been limited.”<sup>45</sup>

Point One—regarding separate teams for males and females—has been upheld by the courts,<sup>46</sup> but it does not answer any questions raised in a gender-fluid era. Having a male and a female team is not dispositive of the issues of sex/gender discrimination when there are more than two sex/gender options,

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41. Dirxx, *supra* note 33, at 414.

42. 34 C.F.R. § 106.41(b) (2010).

43. It has been argued that basketball was included as a contact sport only because it was one of the revenue-producing sports that Senator Tower wanted to protect. EILEEN McDONAGH & LAURA PAPPANO, *PLAYING WITH THE BOYS* 138 (2008).

44. Dirxx, *supra* note 33, at 415-16; Greene, *supra* note 33, at 140.

45. 34 C.F.R. § 106.41(b) (2010).

46. *See, e.g.,* O'Connor v. Bd. of Educ. of Sch. Dist. 23, 449 U.S. 1301, 1307 (1980); *see also* Greene, *supra* note 33, at 166-67, n.221; Karen L. Tokarz, *Separate but Unequal Educational Sports Programs: The Need for a New Theory of Equality*, 1 BERKELEY WOMEN'S L.J. 201, 211 (1985).

although having female teams may well be necessary to preserve the rights granted by Title IX.<sup>47</sup>

Point Two—prohibiting females from trying out for contact sports—has been consistently found by the courts to be unconstitutional.<sup>48</sup> It violates the Equal Protection Clause of the Constitution,<sup>49</sup> because, although on average, men are bigger, stronger and faster than women, that is not necessarily true in individual cases. Why should the 180-pound woman be prevented from trying out for football when the 97-pound male may do so? Again, Point Two disposes of no issues related to gender fluidity, which will be addressed in Section V below.

Point Three—prohibiting males from trying out for traditionally female teams like field hockey—has fared better in the courts<sup>50</sup> for three reasons, not all of them consistent with the reasoning of the courts on Point Two: i) preventing female injuries, ii) compensating for past discrimination against

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47. See, e.g., *Kleczek v. Rhode Island Interscholastic League*, 768 F. Supp. 951, 956 (D.R.I. 1991); *B.C. v. Bd. of Educ.*, 531 A.2d 1059, 1065 (N.J. Super. Ct. App. Div. 1987); *Laffer v. Athletic Bd. of Control*, 536 F. Supp. 104, 107 (D.C. Mich. 1982).

48. The case of *Hoover v. Meiklejohn*, 430 F. Supp. 164 (D. Colo. 1977) is a good example. There, sixteen-year-old Donna Hoover was a high school junior who wanted to play on the boys' soccer team because her school did not field a girls' team. However, Rule XXI, Section 3 of the Colorado High School Activities Association prohibited such participation. *Id.* at 166. This rule was based on findings that, on average, females have a higher ratio of adipose tissue to lean body weight and less bone density than males and that "males as a class tend to have an advantage in strength and speed over females as a class." *Id.* The court noted, however, that, regarding speed and strength, "the range of differences among individuals in both sexes is greater than the average differences between the sexes." *Id.* Despite that significant fact, the court noted, there is no "eligibility criteria for participation in interscholastic soccer, excepting for sex." *Id.* The court ruled that Rule XXI, Section 3 was unconstitutional because it deprived females of equal protection of the law. *Id.* at 172.

See also *Opinion of the Justices to House of Representatives*, 371 N.E.2d 426, 427 (Mass. 1977) (advisory opinion holding that a proposed law prohibiting girls from participating in high school football and wrestling violated Article 1 of Part I of the Massachusetts Constitution, finding: "Equality under the law shall not be denied or abridged because of sex. . ."); *Saint*, 684 F. Supp. at 629 (striking down prohibition of female participating on high school's only wrestling team, finding "such a paternalistic gender-based classification, that is, one resulting from 'ascribing a particular trait or quality to one sex, when not all share that trait or quality,' is not only 'inherently unfair, but generally tends only to perpetuate 'stereotypical notions' regarding the proper roles of men and women."); *Beattie v. Line Mountain School Dist.* 992 F. Supp. 2d 384, 388-89 (M.D. Penn. 2014) (court found district policy prohibiting girls from wrestling with boys "because of safety concerns regarding the 'physiological differences between male and female athletes'" to be unconstitutional; school district argued that "girls are at a greater risk of inappropriate sexual contact . . ." but the court found that such argument ignores the selfsame problems of potential sexual touching among males).

49. U.S. CONST. amend. XIV, § 1.

50. See, e.g., *Kleczek*, 768 F. Supp. at 951 (finding against a male trying to compete on a female field hockey team). But see *Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n.*, 393 N.E.2d 284, 285 (Massachusetts Supreme Judicial Court issued opinion striking down rule of Massachusetts Interscholastic Athletic Association that "No boy may play on a girls' team.").

women, and iii) preventing males from dominating a sport.<sup>51</sup> In particular, preventing female injuries in the situation of a male trying out for a traditionally female team does not seem any different from the injuries that might occur when a female tries out for a traditionally male team, but the former has generally been prohibited by the courts and the latter has generally been permitted.<sup>52</sup> In any event, Point Three addresses no issues raised by gender fluidity—the male who identifies as female and wants to try out for field hockey is in, metaphorically speaking, a legal no-man’s land.

#### IV. FAILED ATTEMPTS TO SOLVE THE PROBLEM

Resolving the issues discussed above in Section III is a Herculean task. Many sport governing bodies and various courts (including the court of popular opinion) have grappled over the years with the issue of sex/gender in sports and the proper balance that should be struck between fairness to all prospective participants and the avoidance of some type of perceived competitive advantage. There have been some high-profile cases over the past forty years that, while well-intentioned, have not provided a workable framework for dealing with a gender-fluid sports world. Several of those cases, and the relevant sports protocols implicated by them, are discussed below.

##### A. *Renée Richards*

##### 1. *Richards v. United States Tennis Association*

In 1976, four years after the passage of Title IX and three years after Billie Jean King beat Bobby Riggs in a highly-publicized, prime-time nationally-televised tennis match,<sup>53</sup> one of the earliest high-profile cases dealing with the issue of sex in American sports captured the American spotlight. That case involved a New York ophthalmologist named Richard Raskind, who became Renée Richards.

Born in 1934, Dr. Raskind was a very good athlete, having captained his Yale University men’s tennis team.<sup>54</sup> Following college, Dr. Raskind attended medical school and then enlisted in the United States Navy.<sup>55</sup> He subsequently

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51. See, e.g., *Kleczek*, 768 F. Supp. at 956; *B.C. v. Bd. of Educ.*, 531 A.2d at 1065; *Lafler v. Athletic Bd. of Control*, 536 F. Supp. at 107.

52. Demery, *supra* note 33, at 387-90.

53. Jesse Greenspan, *Billie Jean King Wins the ‘Battle of the Sexes,’ 40 Years Ago*, HISTORY (Sept. 20, 2013), <http://www.history.com/news/billie-jean-king-wins-the-battle-of-the-sexes-40-years-ago>.

54. Patricia Burstein, *Whether It’s Richard Raskind or Renee Richards, the Question Still Is: ‘Tennis, Anyone?’*, PEOPLE (Sept. 6, 1976), <http://people.com/archive/whether-its-richard-raskind-or-renee-richards-the-question-still-is-tennis-anyone-vol-6-no-10/>.

55. Michael Hainey, *The Woman Who Paved the Way for Men to Become Women*, GQ (May 26, 2015), <http://www.gq.com/story/renee-richards-interview>.

opened an eye surgery practice on Madison Avenue in New York.<sup>56</sup> In 1970, he married his fashion model girlfriend and together they had a son in 1972. Three years later, the couple divorced.<sup>57</sup> Dr. Raskind continued to compete in various tennis tournaments, achieving a ranking in 1974 of 13<sup>th</sup> nationally in the men's 35-and-over division.<sup>58</sup>

Unbeknownst to many people who knew him, Dr. Raskind had wanted to be a woman since the age of nine. In fact, in private, he had for years dressed in women's clothing and came to identify as a woman he called Renée. He lived for a time in France as a woman.<sup>59</sup>

Dr. Raskind had suffered years of depression and suicidal thoughts. At that time, and, in fact, for many years after, transsexualism was widely considered a mental illness. "Gender identity disorder" was identified as a mental illness in the Text Revision to the Fourth Edition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* published in 2000.<sup>60</sup> Dr. Raskind had attended counseling sessions and had taken other steps to tamp down these societally-perceived abhorrent feelings, but ultimately, Dr. Raskind was certain that he was meant to be a woman.<sup>61</sup>

He underwent hormone therapy with the goal of undergoing sex reassignment surgery. The surgery occurred in 1975, and Dr. Raskind transitioned to Dr. Renée Richards.<sup>62</sup> She relocated to California and again started an ophthalmology practice.<sup>63</sup> She also continued to play in tennis tournaments, now entering the women's brackets.<sup>64</sup>

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56. Johnette Howard, *Renee Richards: A New York Original*, ESPN (Oct. 4, 2011), [http://www.espn.com/new-york/story/\\_id/7057906/30-30-renee-richards-new-york-original](http://www.espn.com/new-york/story/_id/7057906/30-30-renee-richards-new-york-original).

57. Jim Weeks, *Throwback Thursday: The Rise of Renee Richards*, VICE SPORTS (Aug. 27, 2016), [https://sports.vice.com/en\\_uk/article/throwback-thursday-the-rise-of-renee-richards](https://sports.vice.com/en_uk/article/throwback-thursday-the-rise-of-renee-richards).

58. Robin Herman, 'No Exceptions,' and No Renee Richards, N.Y. TIMES (Aug. 27, 1976), [http://www.nytimes.com/packages/html/sports/year\\_in\\_sports/08.27.html](http://www.nytimes.com/packages/html/sports/year_in_sports/08.27.html).

59. Emily Bazelon, *Cross-Court Winner*, SLATE (Oct. 25, 2012), [http://www.slate.com/articles/sports/sports\\_nut/2012/10/jewish\\_jocks\\_and\\_ren\\_e\\_richards\\_the\\_life\\_of\\_the\\_transsexual\\_tennis\\_legend.html](http://www.slate.com/articles/sports/sports_nut/2012/10/jewish_jocks_and_ren_e_richards_the_life_of_the_transsexual_tennis_legend.html).

60. AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 576-82 (4th ed. 2000). In the fifth edition published in 2013, Gender Identity Disorder evolved into Gender Dysphoria, emphasizing the importance of distress about the incongruity between someone's birth sex and the gender with which that person identifies. See Wynne Parry, *Gender Dysphoria: DSM-5 Reflects Shift In Perspective On Gender Identity*, HUFFINGTON POST (Aug. 4, 2013), [http://www.huffingtonpost.com/2013/06/04/gender-dysphoria-dsm-5\\_n\\_3385287.html](http://www.huffingtonpost.com/2013/06/04/gender-dysphoria-dsm-5_n_3385287.html).

61. Sean Newell, *Throwback Thursday: Transgender Tennis Trailblazer Renée Richards Takes on the U.S. Open*, VICE SPORTS (Aug. 25, 2016), [https://sports.vice.com/en\\_ca/article/throwback-thursday-transgender-tennis-trailblazer-rene-richards-takes-on-the-us-open](https://sports.vice.com/en_ca/article/throwback-thursday-transgender-tennis-trailblazer-rene-richards-takes-on-the-us-open).

62. *Id.*

63. Bazelon, *supra* note 59.

64. *Id.*

The first tournament Dr. Richards entered was in La Jolla, California. She did not tell the organizers that she was a transsexual, and she won the tournament.<sup>65</sup> Following her reassignment surgery, Dr. Richards entered nine women's tennis tournaments, winning two and finishing as the runner up in three more.<sup>66</sup> After a journalist discovered that Dr. Richards had undergone sex reassignment surgery, she became a national story.<sup>67</sup>

Dr. Richards was subsequently accepted to compete in the Tennis Week Open, but 25 other women players withdrew in protest. They contended that competing against Dr. Richards was unfair, claiming that she maintained the muscular advantages of a man and would have an unfair advantage. Dr. Richards countered that she did not have a competitive advantage and had been issued legal documents as a woman. Dr. Richards stated, "In the eyes of the law . . . I am female."<sup>68</sup> In fact, the hormones that she had taken resulted in her losing 30% of her muscle mass as well as 40 pounds. She stood 6'2" tall and weighed 142 pounds, a size that was equaled by several other women players at the time.<sup>69</sup>

Dr. Richards desired to enter the U.S. Open. The U.S. Tennis Association (USTA) decided in 1976, for the first time in its 95-year history of national championships, to institute a sex test for all women entrants. Until then, the USTA had used a "simple phenotype test (observation of primary and secondary sexual characteristics)."<sup>70</sup> The new sex test appeared to be a direct result of Dr. Richards' application to participate in the women's draw of the U.S. Open tournament that year.<sup>71</sup> The USTA stated that it was simply seeking to ensure fairness for all competitors. The USTA required each entrant to submit to a chromosome test known as the Barr body test.<sup>72</sup>

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65. Herman, *supra* note 58.

66. Richards v. U.S. Tennis Assn., 400 N.Y.S.2d 267, 268 (Sup. Ct. 1977).

67. Bazelon, *supra* note 59.

68. Herman, *supra* note 58.

69. Bazelon, *supra* note 59.

70. Richards, 400 N.Y.S.2d at 268-69.

71. *Id.* The International Olympic Committee had instituted a similar chromosome test requirement for women competitors beginning with the 1968 Olympics in Mexico City. Katie Thomas, *A Lab is Set to Test the Gender of Some Female Athletes*, N.Y. TIMES (July 30, 2008), <http://www.nytimes.com/2008/07/30/sports/olympics/30gender.html>.

72. Richards, 400 N.Y.S.2d at 268. Humans have 23 pairs of chromosomes; 22 pairs are autosomes (meaning those that are not sex chromosomes) and one pair are sex chromosomes (a combination of X and Y chromosomes). *How Many Chromosomes Do People Have?*, U.S. NAT'L LIBRARY MED. <https://ghr.nlm.nih.gov/primer/basics/howmanychromosomes> (last visited May 14, 2017). "The X and Y chromosomes determine a person's sex. Most women are 46XX and most men are 46XY." *Gender and Genetics*, WHO, <http://www.who.int/genomics/gender/en/index1.html> (last visited May 14, 2017). It has also been determined, however, that, out of every thousand births, a few will have only one X or Y chromosome, or more than two X or Y chromosomes. Moreover, some males are born 46XX and some females are born 46XY. *Id.* In most women, one X chromosome is active and one is inactive. Erika Check, *Women Get Extra Dose of X-Chromosome Genes*, NATURE (Mar. 16, 2005), <http://www.nature.com/news/2005/050314/full/news050314-7.html>. This

After not participating in the 1976 U.S. Open, the next year, in June and July 1977, Dr. Richards went to Lenox Hill Hospital, as required by the USTA, to undergo the Barr body test. The results, however, were “ambiguous.” The USTA asked Dr. Richards to return for further testing but she did not do so. As a result, the USTA did not qualify Dr. Richards to play in the 1977 U.S. Open.<sup>73</sup>

Dr. Richards filed suit in the Supreme Court of New York in New York County against the USTA, U.S. Open Committee, and the Women’s Tennis Association, claiming that they had committed a violation of the New York State Human Rights Law (Executive Law, Section 297, Subdivision 9) and the Fourteenth Amendment to the United States Constitution. She sought a preliminary injunction to be allowed to “qualify and/or participate in” the U.S. Open in the women’s division.<sup>74</sup>

Dr. Richards contended that she was legally and biologically a woman. The surgeon who performed the sex reassignment surgery, Dr. Roberto Granato, told the Court that he had removed the male genitalia and that the outward appearance of Dr. Richards was that of a female. Moreover, he indicated that the internal sexual structure of Dr. Richards was “anatomically similar to a biological woman who underwent a total hysterectomy and ovariectomy.”<sup>75</sup> Dr. Granato further stated that the removal of the testes resulted in a tremendous decrease in male hormones and a decreased muscular mass and that female hormones were administered such that Dr. Richards’ “endocrinological hormonal balance” became that of a woman. He stated that he saw no unfair advantage for Dr. Richards in competing with other women.<sup>76</sup>

In response, the defendants claimed that their primary concern was insuring fairness for those participating in the foremost international tennis tournament held in the United States. They submitted an affidavit from Dr. Daniel Federman “in support of the applicability of the Barr body test for the

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second inactive X chromosome is called a Barr body. *Barr Body Testing*, INST. FOR SOC’Y AND GENETICS (2013), <https://societyandgenetics.wordpress.com/spring-2013/testing-sex-for-competitive-sports/weapons/barr-body-testing/>. The Barr body test determines the presence of this second X chromosome in a cell in a female. *Richards*, 400 N.Y.S.2d at 268. In this test, cells are taken from the inside of the athlete’s cheek and “frozen in interphase, when the Barr body is condensed, and stained to allow viewing under a microscope.” *The Olympics: Break the Gender Binary?*, SERENDIP STUDIO (Dec. 23, 2013), <http://serendip.brynmawr.edu/exchange/critical-feminist-studies-2013/maya/olympics-break-gender-binary>. The presence of this second X chromosome seemingly established that the individual test subject was female.

73. *Richards*, 400 N.Y.S.2d at 270.

74. *Id.* at 269.

75. *Id.* at 271.

76. Dr. Richards also submitted testimony from several other medical professionals and current player Billie Jean King that supported her contention that she was a woman and that the Barr body test should not be used as the sole test to determine the sex of a prospective competitor. *Id.* at 272.



determination of sexual identity.”<sup>77</sup> Dr. Federman detailed the process used in the Barr body test and admitted that the test does not determine the presence or absence of a Y chromosome, and that the more expensive karyotype test does make such a determination but takes a week for results. Dr. Federman opined that “under no circumstances can transsexual surgery produce the internal ductal organs or the gonadal identity of the opposite sex.”<sup>78</sup> Defendants submitted other affidavits in opposition to the motion. These included affidavits from several women players, who asserted that taller and stronger players had a greater advantage against players of like ability.<sup>79</sup>

Ultimately, Judge Alfred M. Ascione ruled in favor of Dr. Richards and granted her a preliminary injunction. The court found the requirement that Dr. Richards pass the Barr body test to be eligible to participate was “grossly unfair, discriminatory and inequitable, and violative of her rights under the Human Rights Law of this State.”<sup>80</sup> The court went on to analyze the reason behind the testing requirement (*i.e.*, to prevent fraud by prospective participants) but found no evidence of any such conduct by Dr. Richards. Ultimately, the court did not strike down use of the Barr body test but held that it should not be the sole criterion considered.

Dr. Richards played in the women’s draw of the 1977 U.S. Open. Her first round opponent was Virginia Wade, the number three seed and reigning Wimbledon champion. Ms. Wade defeated Dr. Richards in straight sets, 6-1, 6-4.<sup>81</sup>

Judge Ascione was clearly ahead of his time with his analysis in the *Richards* case. He found the concerns expressed by the USTA to be based on “unfounded fears and misconceptions” that were trumped by the “overwhelming medical evidence” that Dr. Richards was female.<sup>82</sup> He reached the fact-specific conclusion that Dr. Richards was female and, as a result, she was allowed to play in the U.S. Open female draw. He did not, however, provide any generally applicable protocol that could be applied in subsequent cases.

## 2. *Organizational Policies Following the Richards’ Case*

### a. USTA

Following the *Richards* case, the tennis world continued to struggle to establish a standard or guideline to be used to determine who may and who

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77. *Id.* at 269. Dr. Federman was at the time a Professor and Chairman of the Department of Medicine at Stanford University School of Medicine. *Id.*

78. *Id.* at 269.

79. *Id.* at 270.

80. *Id.* at 272 (citation omitted).

81. Newell, *supra* note 61.

82. *Richards*, 400 N.Y.S.2d at 272.

may not compete in sports competitions. The USTA eventually changed its policy, which now allows transgender athletes to participate, with certain restrictions.<sup>83</sup>

The current USTA policy provides that those transitioning from female-to-male are allowed to compete without restriction, and those transitioning from male-to-female are allowed to compete if: 1) they have declared their gender identity as female, which declaration cannot be changed for a period of at least four years, and 2) “[h]ormonal therapy appropriate for the assigned sex has been administered in a verifiable manner and for a sufficient length of time to minimize gender-related advantages in sport competitions.”<sup>84</sup>

Point 1 above regarding maintaining a gender declaration for four years is not a workable solution because it gives no generally accepted scientific justification for the four-year period.<sup>85</sup> Point 2 regarding required hormonal therapy is not a workable solution because it provides no specific guidance regarding: what is “appropriate” therapy and does not provide a generally accepted scientific theory why it is appropriate; what constitutes a “sufficient” length of time and why, according to generally accepted scientific theory, that is so; what exactly are the “gender-related advantages”; or how those supposed advantages can be disaggregated from other advantages—both genetic (like larger lungs or greater height or weight) and artificial<sup>86</sup> (like so-called Tommy John surgery to replace an elbow ligament with a tendon from another part of the body or special running shoes).<sup>87</sup>

#### b. International Olympic Committee

The International Olympic Committee (IOC) required gender verification testing for female athletes from 1968 through 1998.<sup>88</sup> From 1968 until 1992, as with the USTA, the IOC used a Barr body test. From 1992 through 1998, the IOC instead used a so-called polymerase chain reaction test, which was intended to identify distinctly male DNA sequences.<sup>89</sup> These approaches were clearly not the answer, as they were discontinued before the turn of the century.

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83. *Transgender Inclusion Policy*, U.S. TENNIS ASS’N, <https://www.usta.com/en/home/about-usta/who-we-are/national/transgender-inclusion-policy.html> (last visited May 14, 2017).

84. *Id.*

85. *See infra* notes 119, 142; *infra* text accompanying notes 104-05.

86. *See infra* notes 119, 142; *infra* text accompanying notes 108, 119-20.

87. *See Tommy John Surgery*, WEBMD, <http://www.webmd.com/fitness-exercise/tommy-john-surgery-ucl-reconstruction#1> (last visited May 14, 2017); Jeré Longman, *Do Nike’s New Shoes Give Runners an Unfair Advantage?*, N.Y. TIMES (Mar. 8, 2017), <https://www.nytimes.com/2017/03/08/sports/nikes-vivid-shoes-and-the-gray-area-of-performance-enhancement.html>.

88. Louis J. Elsas, et. al., *Gender Verification of Female Athletes*, 2 GENETICS IN MED. 249, 249 (2000).

89. ELLIS CASHMORE, MAKING SENSE OF SPORTS 184 (5th ed. 2010).

In 2003, the IOC changed its position on the issue of transgender athletes. At that time, the IOC adopted the recommendation of an *ad hoc* committee in Stockholm convened to discuss and issue recommendations on the participation in sports of people undergoing sex reassignment.<sup>90</sup> After study, the recommendations were, in relevant part, as follows: 1) individuals who underwent male-to-female sex reassignment (and the converse) before puberty would be considered females; 2) individuals who underwent male-to-female sex reassignment (and the converse) after puberty would be eligible for participation as females if surgical anatomical changes had been completed (and had been completed at least two years prior to being allowed to compete), recognition of the assigned sex had been legally recognized, and hormonal therapy for the assigned sex had been administered in a “verifiable manner” and for a sufficient time to minimize “gender-related advantages in sport competitions.”<sup>91</sup>

The IOC revised its transgender policy in anticipation of the 2016 Rio Olympic Games. In a November 2015 IOC Consensus Meeting, it was agreed that: 1) people who transition from female-to-male would be eligible to compete as male without restriction; 2) people who transition from male-to-female would be eligible to compete as females if they had: a) declared their gender identity as female (which declaration could not be changed for at least four years), and b) had maintained a testosterone level in serum below 10 nanomoles per liter for at least twelve months prior to her first competition.<sup>92</sup>

The recently adopted IOC policy suffers from many of the same defects as the USTA’s policy. As with Point 1 of the USTA policy, Point 2(a) of the IOC policy provides no generally accepted scientific justification for the four year period.<sup>93</sup> As to Point 2(b), there is no generally accepted scientific basis given for an arbitrary limit on the amount of naturally occurring testosterone in a person’s body, nor is there any explanation how this supposed competitive advantage is disaggregated from other natural and artificial competitive advantages.<sup>94</sup> Moreover, to comply with this requirement, prospective participants would have to take medications or undergo invasive procedures about a core issue of their personal identity—their sex/gender. The burden of proof of the necessity and efficaciousness of such procedures should be on those purporting to require them.<sup>95</sup>

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90. INT’L OLYMPIC COMM. MED. COMM’N, STATEMENT OF THE STOCKHOLM CONSENSUS ON SEX REASSIGNMENT IN SPORTS (2003), [https://stillmed.olympic.org/Documents/Reports/EN/en\\_report\\_905.pdf](https://stillmed.olympic.org/Documents/Reports/EN/en_report_905.pdf).

91. *Id.*

92. INT’L OLYMPIC COMM., IOC CONSENSUS MEETING ON SEX REASSIGNMENT AND HYPERANDROGENISM (Nov. 2015), [https://stillmed.olympic.org/Documents/Commissions\\_PDFfiles/Medical\\_commission/2015-11\\_ioc\\_consensus\\_meeting\\_on\\_sex\\_reassignment\\_and\\_hyperandrogenism-en.pdf](https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf) [hereinafter IOC CONSENSUS MEETING].

93. See *infra* notes 119, 142; *infra* text accompanying notes 104-05.

94. See *infra* notes 119, 142; *infra* text accompanying notes 108 & 119-20.

95. See *infra* discussion of *Obergefell v. Hodges* in text accompanying notes 150-51.

c. International Association of Athletics Federations

In 2011, the International Association of Athletics Federations (IAAF), the world governing body for track and field, enacted a policy entitled *IAAF Regulations Governing Eligibility of Athletes Who Have Undergone Sex Reassignment to Compete in Women's Competitions*.<sup>96</sup> The policy does not apply to female-to-male transsexual athletes, as all such athletes need to compete is to present documentation that the athlete is recognized by the law as a male.<sup>97</sup>

Pursuant to the policy, the athletes who self-identify as transsexual would be required to undergo a three-level medical process, including: 1) providing medical information to an Expert Medical Panel, 2) submitting urine and blood samples for the purpose of conducting an endocrine assessment (to analyze the levels of several androgenic hormones, including testosterone), and 3) having a review of all of the information by the Panel.<sup>98</sup> Ultimately, the Panel is to recommend to the IAAF that the athlete should be eligible to compete in women's competitions "if it determines that her medical treatment following sex reassignment has been administered in a verifiable manner for a sufficient length of time to minimize any advantage in women's competition[s]."<sup>99</sup> If the Panel recommends that the athlete should be ineligible to compete, it is required to provide reasons in writing and may recommend conditions under which the athlete could compete and a schedule for monitoring subsequent treatment intended to allow the athlete to compete.<sup>100</sup> The IAAF Medical Manager then makes the decision whether the athlete is eligible to compete as a woman.<sup>101</sup>

As with the USTA policy and the IOC policy, discussed above, the IAAF Reassignment Policy simply is not workable. The policy provides no guidance as to what is a "verifiable manner" to treat an athlete following sex reassignment or what is a "sufficient length of time to minimize any advantage in women's competition."<sup>102</sup> Presumably, this is intended to refer to androgen levels being below the "male" range, but that is not stated. Moreover, this process is invasive on its face and infringes upon the privacy of these athletes.

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96. INT'L ASS'N OF ATHLETICS FED'NS, *IAAF REGULATIONS GOVERNING ELIGIBILITY OF ATHLETES WHO HAVE UNDERGONE SEX REASSIGNMENT TO COMPETE IN WOMEN'S COMPETITIONS* (2011).

97. *Id.* at 1-2.

98. *Id.* at 4-10.

99. *Id.* at 8.

100. *Id.* at 9.

101. *Id.*

102. See *infra* notes 119, 142; *infra* text accompanying notes 104-05.

## d. National Collegiate Athletic Association

The NCAA has published a thirty-four page document, entitled *NCAA Inclusion of Transgender Student-Athletes*, which outlines guidance for NCAA athletic programs in dealing with issues related to transgender student-athletes.<sup>103</sup> This policy suffers from the same defects as the policies of the USTA and the IOC.

For example, the NCAA policy requires transgender male-to-female student-athletes to undergo at least one year of testosterone suppression treatment before competing on a female team, a requirement that is not generally accepted scientifically. The policy itself acknowledges that the science is at most suggestive, including a quote from Dr. Eric Vilain: “Research *suggests* that androgen deprivation and cross sex hormone treatment in male-to-female transsexuals reduces muscle mass; accordingly, one year of hormone therapy is an appropriate transitional time before a male-to-female student-athlete competes on a women’s team.”<sup>104</sup>

The NCAA policy goes on to state in a footnote that the efficacy of the one year of testosterone suppression medication is not proven but only indicative: “Recent research *indicates* that most salient physical changes likely to affect athletic performance occur during the first year of hormone treatment making a longer waiting period unnecessary.”<sup>105</sup>

Furthermore, although the NCAA policy states that it is important not to “overgeneralize” about the athletic and physical differences between males and females,<sup>106</sup> it does just that by prohibiting all male-to-female transgender student athletes 1) from competing on a female team “until completing one year of testosterone suppression treatment,” and 2) from competing on a female team at all if no testosterone suppression treatment is being taken.<sup>107</sup> Ironically, these policies exist even though the NCAA document acknowledges that it is not possible to disaggregate what effect various competitive advantages have:

[W]hat counts as a competitive advantage may shift dramatically depending on the sport. What is an advantage in one context may be a disadvantage in another. For example, factors such as height, weight, reaction time, and proportion of fast twitch muscle fibers all affect competitive advantage depending on the sport. A female volleyball player may be very tall, and yet few people would consider that to be an unfair competitive advantage in her sport. Similarly, a male swimmer may have a naturally high hemoglobin count enabling him to take in more oxygen, but

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103. NCAA POLICY, *supra* note 3. The policy offers no guidance for intersex student-athletes.

104. *Id.* at 13 (emphasis added).

105. *Id.* at 13 n.8 (emphasis added) (citing Louis Goorin & Mathijs Bunck, *Transsexuals and Competitive Sports*, 151 EUROPEAN J. OF ENDOCRINOLOGY 425 (2004)).

106. NCAA POLICY, *supra* note 3, at 7 (citing Sarah Tetzl, *On Transgendered Athletes, Fairness, and Doping: An International Challenge*, 9 SPORT IN SOCIETY: CULTURES, COMMERCE, MEDIA, POLITICS 227 (2006)).

107. *Id.*

he is not barred from swimming for that reason.<sup>108</sup>

### B. Dutee Chand

Dutee Chand is a track athlete from a small village in India who achieved great success as a competitive junior sprinter. Her junior career culminated in May 2014 when she won gold medals in both the 200 meter and 4x400 meter relay events in the Asian Junior Athletics Championship in Taipei.<sup>109</sup> Unlike Renée Richards, she did not undergo sex reassignment surgery. That did not, however, prevent her sport from attempting to stop her from competing against other women because of concerns that she would have a competitive advantage from an excess of androgen in her body.

Hyperandrogenism is a common endocrine disorder resulting in an excess amount of androgen (such as testosterone) that occurs in 5% to 10% of women.<sup>110</sup> In 2011, before Ms. Chand competed on the track and field circuit and concurrent with its adoption of the IAAF Reassignment Regulations discussed above, the IAAF published its *Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competitions*.<sup>111</sup>

The IAAF's fourteen page set of regulations was intended to address the issue of the eligibility of women with hyperandrogenism to compete in women's track and field competitions. These regulations provided, in relevant part, that females with hyperandrogenism would be eligible to compete in women's competitions provided that they participated in a three-level medical process and were determined to have androgen levels below the "male range."<sup>112</sup>

Any female athlete who declined, failed, or refused to comply with the medical process would not be eligible to compete in women's competitions.<sup>113</sup> In other words, women with elevated levels of androgen could compete in women's track and field events so long as the elevation was not too great, they

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108. *Id.* at 7 n.4. See also *infra* notes 119, 142; *infra* text accompanying notes 116-17.

109. Dutee Chand v. Athletics Federation of India (AFI) & The International Ass'n of Athletics Federations (IAAF), CAS 2014/A/3759, Interim Arbitral Award at 2 (2015), [http://www.tas-cas.org/fileadmin/user\\_upload/award\\_internet.pdf](http://www.tas-cas.org/fileadmin/user_upload/award_internet.pdf) [hereinafter *Chand v. AFI*].

110. Susie East, *Should a Woman's Testosterone Level Matter in Sports?*, CNN (Aug. 12, 2016), <http://www.cnn.com/2016/08/12/health/testosterone-and-hyperandrogenism-in-female-athletes/>.

111. IAAF to Introduce Eligibility Rules for Females with Hyperandrogenism, IAAF NEWS (Apr. 12, 2011), <https://www.iaaf.org/news/iaaf-news/iaaf-to-introduce-eligibility-rules-for-femal-1>; IAAF *Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competitions* (2011) [hereinafter *IAAF Hyperandrogenism Regulations*].

112. IAAF *Hyperandrogenism Regulations*, *supra* note 111. A female needed androgen less than or equal to ten nanomoles per liter or to have an androgen resistance such that they would not have a competitive advantage from the elevated levels of androgen. *Id.*

113. *Id.*

were androgen resistant, or they took steps to lower the elevated androgen to a perceived acceptable level.<sup>114</sup>

Shortly after her greatest junior success, Ms. Chand was required by the Athletics Federation of India (AFI) to undergo certain medical testing, including an ultrasound. Thereafter, on July 13, 2014, Ms. Chand was notified that she would not be permitted to participate in the upcoming World Championships or be eligible for selection for the Commonwealth Games “because her ‘male hormone’ levels were too high.”<sup>115</sup> She was subsequently provisionally suspended from participating in any athletic events.<sup>116</sup>

Ms. Chand filed an appeal of the AFI’s determination that she could not compete with the Court of Arbitration and Sport (CAS) against the AFI and the IAAF. Among other things, Ms. Chand claimed that the IAAF Hyperandrogenism Regulations discriminated against female athletes who possess “a particular natural physical characteristic” and were “based on flawed factual assumptions about the relationship between testosterone and athletic performance.”<sup>117</sup> The IAAF disputed each of Ms. Chand’s contentions.

The panel of arbitrators issued a 161 page Interim Arbitration Award finding in favor of Ms. Chand. The arbitrators held that the two categories of competition—male and female—are intended to cover all athletes and were concerned that those in the intersex population might be excluded entirely from competing.<sup>118</sup> Although finding that the respondents had not acted in bad faith, the arbitrators found that:

On the basis of the evidence currently before the Panel, the Panel is unable to conclude on the balance of probabilities that androgen-sensitive hyperandrogenic female athletes enjoy such a substantial performance advantage over non-hyperandrogenic female athletes that excluding them from competing in the female category, and thereby excluding them from competing at all unless they take medication or undergo treatment, is a necessary and proportionate means of preserving fairness in athletics competition and/or policing the binary male/female classifica-

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114. Similarly, in 2012, the International Olympic Committee, in anticipation of the London Olympic Games, issued the IOC Regulations on Female Hyperandrogenism. INTERNATIONAL OLYMPIC COMMITTEE, IOC REGULATIONS ON FEMALE HYPERANDROGENISM: GAMES OF THE XXX OLYMPIAD IN LONDON (2012), [https://stillmed.olympic.org/Documents/Commissions\\_PDFfiles/Medical\\_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf](https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf). In relevant part, these regulations provided a process whereby competitors, medical personnel and certain others could request a hyperandrogenism investigation of a female athlete. *Id.* The inquiry was to focus on whether the female athlete had hyperandrogenism “that confer[red] a competitive advantage (because it [was] functional and the androgen level [was] in the male range).” If the athlete was found to have hyperandrogenism and to have a competitive advantage, the athlete could be declared ineligible to compete in the London Olympics by the IOC Executive Board. *Id.*

115. *Chand v. AFI*, *supra* note 109, at 5.

116. *Id.* at 8.

117. *Id.* at 2.

118. *Id.* at 148.

tion.<sup>119</sup>

In particular, the CAS found that numerous variables other than higher levels of naturally occurring testosterone may increase athletic performance. Such variables include “nutrition, access to specialist training facilities and coaching, and other genetic and biological variations.”<sup>120</sup>

Ultimately, the arbitrators suspended the IAAF Hyperandrogenism Regulations for a period of two years subject to submission by the IAAF of additional evidence to the arbitrators on the magnitude of the performance advantage hyperandrogenic women enjoy over non-hyperandrogenic women. Should the IAAF not submit any such materials—which the IAAF had not done as of May 2017—the IAAF Hyperandrogenism Regulations would be deemed void after the two year suspension.<sup>121</sup> As a result, Ms. Chand was allowed to compete in women’s competitions.

Following the ruling on the Chand appeal, the International Olympic Committee chose not to attempt to craft an intersex policy or guideline for use at the 2016 Rio Summer Olympics, instead encouraging the IAAF to respond to the CAS in the *Chand* case “with arguments and evidence to support the reinstatement of its hyperandrogenism rules.”<sup>122</sup> Ms. Chand was therefore able to compete in the Rio Olympics where she failed to qualify for the 100 meter semi-finals.<sup>123</sup>

The arbitrators ruling on Ms. Chand’s case clearly believed it was important to maintain the distinction between a men’s and a women’s competition. They indicated that everyone should have the opportunity to compete and not be excluded because they might have some variation of the physical makeup shared by most members of a particular sex. They did not,

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119. *Id.* at 154. See also Natasha Singer, *Does Testosterone Build a Better Athlete?*, N.Y. TIMES (Aug. 10, 2006), <http://www.nytimes.com/2006/08/10/fashion/10Fitness.html> (“Because of the possible side effects, doctors rarely experiment on humans by dosing them with testosterone. . . . Without that kind of empirical data, scientists can only speculate on how testosterone may affect a person’s competitiveness and athletic ability.”).

120. *Chand v. AFI*, *supra* note 109, at 5.

121. *Id.* at 158.

122. Nicole Jeffery, *Transgender Case Halts IOC Plan to Liberalise Rules*, THE AUSTRALIAN (Jan. 27, 2016), <http://www.theaustralian.com.au/sport/transgender-case-halts-ioc-plan-to-liberalise-rules/news-story/7df2f54fb1761108ca6bf3574d4f1060>; Kerry Gillespie, *IOC Won’t Introduce Rules that would Block Indian Sprinter from Rio Games*, THE STAR (Feb. 25, 2016), <https://web.archive.org/web/20160405211929/http://www.thestar.com/sports/amateur/2016/02/25/ioc-wont-introduce-rules-that-would-block-indian-sprinter-from-rio-games.html>. The 2015 IOC Consensus Meeting, addressed both sex reassignment and hyperandrogenism. IOC CONSENSUS MEETING, *supra* note 92. The recommendation following that meeting with respect to hyperandrogenism was that rules should be adopted for the protection of women in sports and that the IAAF should be encouraged to respond to the CAS in the *Chand* case.

123. *Rio 2016 Olympics: It was not My Moment, Says Dutee Chand*, INDIAN EXPRESS (Aug. 13, 2016), <http://indianexpress.com/sports/rio-2016-olympics/it-was-not-my-moment-says-dutee-chand-2973077/>.



however, provide a workable resolution of this issue, rather asking the IAAF to return with additional information about the purported competitive advantage.

Similarly, the IOC has not taken steps to provide a workable framework for dealing with athletes with hyperandrogenism. The IOC has merely urged the IAAF to provide additional arguments and evidence to support the IAAF Hyperandrogenism Regulations that the CAS found unworkable.

### C. Caster Semenya

A higher profile case—because of the level of her success—involved a South African runner named Caster Semenya. Ms. Semenya was born in Ga-Masehlong, South Africa.<sup>124</sup> She took up running at an early age and was a member of the Moletjie Athletics Club. One of her coaches there described her as a “natural” and had her train with the males because he felt that “she was too powerful for ladies.”<sup>125</sup>

As an eighteen-year-old, Ms. Semenya competed in her first senior championship at the 2009 World Championships and won the gold medal.<sup>126</sup> However, rumors circulated that she had been subjected to sex-determination testing. A representative of the IAAF confirmed that Ms. Semenya had been subjected to the testing, stating that the testing had been initiated because of “ambiguity, not because we believe she is cheating.”<sup>127</sup>

Many months passed, as people suspected Ms. Semenya was being subjected to further sex screening. Finally, in July 2010, the IAAF announced that she was cleared to return to racing and that the IAAF accepted the conclusions of medical experts clearing her to participate with immediate effect.<sup>128</sup> Additional details were kept confidential.<sup>129</sup>

Semenya has continued to compete on the international level since that time. After winning a silver medal in the 800 meter finals at the 2012 London Summer Olympics, she won the gold medal in the same race at the 2016 Rio Summer Olympics.<sup>130</sup> Whatever issues, if any, were resolved in her

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124. Ariel Levy, *Either/Or: Sports, Sex, and the Case of Caster Semenya*, NEW YORKER (Nov. 30, 2009), <http://www.newyorker.com/magazine/2009/11/30/eitheror>.

125. *Id.*

126. Christopher Clarey, *Gender Test After a Gold-Medal Finish*, N.Y. TIMES (Aug. 19, 2009), <http://www.nytimes.com/2009/08/20/sports/20runner.html>.

127. *Id.*

128. Simon Hart, *Caster Semenya Given All Clear After Gender Test Row*, TELEGRAPH (July 6, 2010), <http://www.telegraph.co.uk/sport/othersports/athletics/7873240/Caster-Semenya-given-all-clear-after-gender-test-row.html>; Lesego Motshegwa & Gerald Imray, *Semenya Cleared to Return to Track Immediately*, ASSOCIATED PRESS, [https://web.archive.org/web/20100709190844/https://www.google.com/hostednews/ap/article/ALeqM5hMudI8ByYmbiNVB4ofKjep\\_IT\\_kQD9GPJLSO0](https://web.archive.org/web/20100709190844/https://www.google.com/hostednews/ap/article/ALeqM5hMudI8ByYmbiNVB4ofKjep_IT_kQD9GPJLSO0) (last visited May 14, 2017).

129. Motshegwa & Imray, *supra* note 128.

130. *Rio Olympics 2016: Caster Semenya Wins 800m Gold for South Africa*, BBC (Aug. 21, 2016), <http://www.bbc.com/sport/olympics/36691465>.

confidential case obviously do not provide a public, workable solution to the issues of changing gender roles in sport.

## V. PROPOSED LAW AND POLICY FOR A MORE GENDER-FLUID ERA

The solution to the issues raised by changing sex/gender roles in sports makes use of the text of the CSE. The amended text sets out three principles: 1) separate but equal teams are permissible; 2) where there is only one team in a sport, females may try out for traditionally male teams like football and males may try out for traditionally female teams like field hockey; 3) the definition of “sex” is either the sex at birth or the sex with which the individual identifies for all purposes (*i.e.*, not just for sports).

The amended CSE<sup>131</sup> would read as follows:

Separate teams. Notwithstanding the requirements of paragraph (a) of this section,<sup>132</sup> a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, members of the excluded sex must be allowed to tryout for the team offered. For purposes of this part, sex includes the sex at birth or the sex with which an individual identifies.<sup>133</sup>

Although the proposed solution is in the form of a United States regulation, it could apply equally well to any international amateur<sup>134</sup> sport organization.<sup>135</sup>

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131. The proposed solution eliminates contact sports as a consideration, so calling it the CSE becomes a misnomer, which the authors use simply for convenience of reference.

132. Paragraph (a) reads as follows:

General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

34 C.F.R. § 106.41(a) (2010).

133. To the extent that an athlete is using a substance that is prescribed by a licensed physician, that is part of a generally accepted medical protocol for transitioning to a new sex and that is also on the prohibited list of substances of the World Anti-Doping Agency (WORLD ANTI-DOPING AGENCY, THE WORLD ANTI-DOPING CODE INTERNATIONAL STANDARD: PROHIBITED LIST (Jan. 2017), [https://www.wada-ama.org/sites/default/files/resources/files/2016-09-29\\_wada\\_prohibited\\_list\\_2017\\_eng\\_final.pdf](https://www.wada-ama.org/sites/default/files/resources/files/2016-09-29_wada_prohibited_list_2017_eng_final.pdf)) the athlete will be granted a therapeutic use exemption for that substance by the governing body of the athlete's sport. *See, e.g.*, WORLD ANTI-DOPING AGENCY, WORLD ANTI-DOPING CODE INTERNATIONAL STANDARD: THERAPEUTIC USE EXEMPTIONS (Jan. 2015), <https://www.wada-ama.org/sites/default/files/resources/files/WADA-2015-ISTUE-Final-EN.pdf>.

134. Professional sports are beyond the scope of this article. In any event, they do not receive the federal funds that trigger the recipient's Title IX obligations.

135. There are numerous protocols of other sporting organizations—see for example *Policies by Organization*, TRANSATHLETE.COM, <https://www.transathlete.com/policies-by->

The proposed solution is relatively simple, but, unlike the solutions previously proposed and policies adopted, as outlined in Section IV above, it is workable. First, as mentioned in Section III above, separate but equal sports teams for males and females have been consistently approved by the courts.<sup>136</sup> Separate but equal teams are also necessary to ensure that women's sports are not dominated by men,<sup>137</sup> so that compliance with Title IX is possible.

Second, females trying out for male teams have generally been approved by the courts.<sup>138</sup> As discussed in Section III above, however, the equal protection principles that support allowing females to compete on traditionally male teams have not been consistently applied to males desiring to compete on traditionally female teams.<sup>139</sup> The proposed solution remedies this inconsistency.

Third, individuals should not have to go through invasive, humiliating and degrading procedures about one of the most personal subjects, one's sex or gender.<sup>140</sup> The failed solutions in the Richards, Chand and Semenya cases and the policies adopted by the IAAF, IOC, NCAA and USTA, discussed in Section IV, feature such procedures, while not providing a workable solution.<sup>141</sup>

Given the efforts that have gone into these failed solutions, it is fair to argue that there is no non-invasive, scientifically-based, Title IX-compliant solution now available. Furthermore, in a gender-fluid era, by what right does an organization or person dictate to another on the subject of that other's sex or gender? The best argument for issuing such dictates—though it is not a very good one—is that the power to issue them is necessary for athletic organizations to assure fair competition. That argument fails for several reasons.

First, as set out in Section IV above, the argument has failed in at least three high-profile cases: Renée Richards, Dutee Chand, and Caster Semenya. In particular, as the decision-makers stated in the Dutee Chand arbitration, there are many variables affecting athletic performance, including “nutrition, access to specialist training facilities and coaching, and other genetic and biological variations.”<sup>142</sup>

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organization (last visited May 14, 2017)—but all of them suffer from one or more of the same defects as those mentioned in the text: invasiveness, lack of a generally accepted scientific rationale, and/or failure to take Title IX into consideration.

136. *See supra* note 46.

137. *See supra* notes 50-52.

138. *See supra* note 48.

139. *See supra* text accompanying notes 50-52.

140. *See infra* text accompanying notes 145.

141. For example, the USTA required athletes to undergo the Barr body test and the IAAF required athletes to submit to an unspecified “3-level” medical process. *See supra* Section IV.

142. *Chand v. AFI*, *supra* note 109, at 154. *See also* Singer, *supra* note 119 (“Steroids are not going to take someone without athletic ability and turn them into a star athlete, or

For example, in the “other” category mentioned by the arbitration panel, a preternaturally large lung capacity may well give an individual an advantage in sports that require endurance, which many sports do. Does that mean that such a person must be prohibited from competing or be handicapped in some way to level the playing field? The list of “genetic and biological variations” is lengthy, if not endless. One could easily add to that list numerous artificial enhancements, such as eyeglasses correcting to above-average vision or an artificial heart valve implanted in childhood.

Second, according to the NCAA, “fears that men will pretend to be female to compete on a women’s team are unwarranted given that in the entire forty year history of ‘sex verification’ procedures in international sport competitions, no instances of such ‘fraud’ have been revealed.”<sup>143</sup> In the case of Renée Richards, for example, the court found no evidence of fakery, commenting that Dr. Raskind found it “necessary for his own mental sanity to undergo a sex reassignment.”<sup>144</sup> Forcing such a person to compete as a man is, as the court held, neither logical nor humane, and according to the NCAA, “‘sex verification’ tests have been misused to humiliate and unfairly exclude women” and have caused “terrible damage . . . to individual women athletes.”<sup>145</sup>

Also, California has had a law since 2014 allowing elementary and high school students to compete in sports based on the gender with which they identify; the authors have found no report under that law of gender fakery to obtain an unfair advantage.<sup>146</sup> The same is true regarding the handful of other states that have similar laws or regulations.<sup>147</sup> On the other hand, states prohibiting athletes from competing as the gender with which they identify have experienced litigation.<sup>148</sup>

Finally, the confidentiality of the proceedings in the Caster Semenya case speaks volumes about the inability of sports organizations to articulate a

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teach you how to swing a bat and connect with the ball,’ said Douglas A. Granger, the director of the behavioral endocrinology laboratory at Pennsylvania State University.”).

143. NCAA POLICY, *supra* note 3, at 8.

144. Richards v. U.S. Tennis Ass’n, 400 N.Y.S.2d 267, 272 (Sup. Ct. 1977).

145. NCAA POLICY, *supra* note 3, at 8.

146. CAL. EDU. CODE § 221.5(f) (“A pupil shall be permitted to participate in sex-segregated school programs and activities, including athletic competitions, and use his or her gender identity, irrespective of the gender listed on records.”). The authors propose an amended CSE rather than this formulation because this formulation does not specifically allow for separate but equal teams for females. Not making such an allowance creates a situation where males could dominate female teams. *See supra* notes 50-52.

147. *See K-12 Policies*, TRANSATHLETE.COM, <https://www.transathlete.com/k-12> (last visited May 14, 2017); NCAA POLICY, *supra* 3, at 28-29. None of these laws specifically allow for separate but equal teams for females, which creates the problem referenced above in notes 51-52.

148. *K-12 Policies*, *supra* note 147; Katie Mettler, *Texas Policy Forces Transgender Teen Boy to Wrestle against Female Athletes at State Championship*, WASHINGTON POST (Feb. 24, 2017), [https://www.washingtonpost.com/news/morning-mix/wp/2017/02/24/texas-policy-forces-transgender-teen-boy-to-wrestle-against-female-athletes-at-state-championship/?utm\\_term=.4d887367134e](https://www.washingtonpost.com/news/morning-mix/wp/2017/02/24/texas-policy-forces-transgender-teen-boy-to-wrestle-against-female-athletes-at-state-championship/?utm_term=.4d887367134e).

standard more fair and meaningful than simply taking the competitor at the competitor's word as to the sex/gender with which they identify. Ms. Semenya was tested because of "ambiguity, not because we believe she is cheating."<sup>149</sup> But that ambiguity arose through no action of Ms. Semenya except being herself.

Penalizing individuals simply for their personal identity is, according to the United States Supreme Court, not acceptable. As the Court put it in *Obergefell v. Hodges*, the case legalizing gay marriage, the fundamental rights in the Fourteenth Amendment's Due Process Clause "extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs,"<sup>150</sup> and the Constitution provides to all "a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."<sup>151</sup> Sports are clearly "a lawful realm."

#### CONCLUSION

Had Bruce Jenner become Caitlyn Jenner before the 1976 Olympics, she would have been able to compete as a woman pursuant to the protocol proposed in this article. That departure from past practice may seem jarring to some, but, as the United States Supreme Court stated in *Obergefell*, "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."<sup>152</sup> The "received practice" in athletics for centuries has been sexual stereotyping. That era, which was in large part ended for females by Title IX, should now end for those with other sex or gender identities.

In athletic competitions, individual competitors should be allowed to participate as the gender that most closely approximates how each participant identifies. Currently the options are male and female, but there may be more options available as gender fluidity evolves. As stated by Morgan Dickens, a former Cornell University student-athlete: "There are differences between being male and female, but being gender fluid doesn't mean I reject these differences, it just means I'm rejecting the idea that I have to be defined one way or another."<sup>153</sup>

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149. Clarey, *supra* note 126.

150. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2589 (2015) (citations omitted) (internal quotation marks omitted).

151. *Id.* at 2593.

152. *Id.* at 2602 (citations omitted) (internal quotation marks omitted).

153. NCAA POLICY, *supra* note 3, at 15.