

ARTICLES

MIRROR, MIRROR ON THE WALL— GENDER, OLYMPIC COMPETITION AND PERSISTENCE OF THE FEMININE IDEAL*

*Linda Sheryl Greene***

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** Leslie Stewart, *The Feminine Ideal in Sport* (1988) (unpublished Master of Arts Dissertation, University of Alberta), 4-5 PQDT, ML45802 (Positing that sport in general incorporated a “feminine ideal” composed of three factors: “Regardless of how it has been defined, it has been important for women to emulate the feminine ideal and despite the fact that the ideal has been defined in dramatically different ways, several factors remain constant: The ideal is defined by male dominated, patriarchal society, in which women, as the feminine ideal, or always defined as other and as subordinate to men, 2) heterosexuality as a major premise of the feminine ideal, and 3) the ideal serves to limit women’s self-determination.”)

** Evjue-Bascom Professor, University of Wisconsin Law School; A.B. California State University-Long Beach; J.D. University of California (Boalt Hall).

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“Mirror, mirror, on the wall, [w]ho in this land is fairest of all?”³

INTRODUCTION— “CITIUS, ALTIUS, FORTIUS,⁴ MASCULUS, FEMININE”

When the Modern Games began in 1896, women did not compete.⁵ The founder of the modern Games adamantly opposed female competition on the basis of a natural law principle it believed governed the role of women. Its leadership held that female competition would violate “the laws of nature” and would be “the most unaesthetic sight human eyes could contemplate.”⁶

“It seems to me therefore that is those sports and games which are suitable for men be modified and reduced so that they cannot anyway injure the woman, and if we can create organizations which will enforce these modified regulations stringently, we will have gone a long way towards achieving our objects.”⁷

Today, the role of women is still limited by policies that echo these outdated assumptions about female capacity, now justified by scientific and fair completion rationales.

In this article I posit that the history of sport is plagued by a commitment to a *feminine ideal*. In part one, I argue that achievement of gender equality in Olympic Sport is limited by a *feminine ideal*. That ideal embodies women as stereotypically feminine and weak, males as stereotypically masculine and stronger, and males as decision-makers over the scope of women’s competitive destiny.⁸

3. *Snow-White and other tales of Aarne-Thompson-Uther type 709*, Little Snow-White, (D. L. Ashliman ed. and trans., (revised June 8, 2013) <http://www.pitt.edu/~dash/type0709.html>.

4. Int’l Olympic Comm., *supra* note 4.

5. JENNIFER HARGREAVES, SPORTING FEMALES: CRITICAL ISSUES IN THE HISTORY AND SOCIOLOGY OF WOMEN’S SPORTS 219 (1994).

6. *Id.* at 209.

7. *Id.* at 213.

8. See Stewart, *supra* note 1 at 4-5, (“[t]he [feminine] ideal has been defined in dramatically different ways, several factors have remained constant: 1) the ideal is defined by male-dominated, patriarchal society, in which women, as the feminine ideal, or always defined as Other and as subordinate to men, 2) heterosexuality as a major premise of the feminine ideal, and 3) the ideal serves to limit women’s self-determination.”); See also Beth Ann Martin & James H. Martin, *Comparing Perceived Sex Role Orientations of the Ideal Male and Female Athlete to the Ideal Male and Female Person*, 18 J. OF SPORT BEHAV. 286, 287 (1995) (“That is, a female cannot be both an ideal woman and an ideal athlete because the characteristics that constitute a good athlete are inconsistent with the characteristics that constitute a good woman. . . Females are perceived by others as either good at being an athlete or good at being a woman but not

In part two, I address the history of exclusion of women from Olympic sport followed by the establishment of feminine stereotype events consistent with Victorian traditions of proper female deportment in contrast to masculine norms. In part three, I examine the expansion of female participation, as well as the persistence of the feminine ideal. This ideal was initially preserved through visual screenings and later through successive and now-discredited scientific measures that declaimed a bright line biological marker distinctions between females and males. In part four, I examine whether opportunity, rules, and structure of Olympic sport denies equality to women by limiting their competitive opportunities and by reinforcing stereotypical notions of athletic superiority of males over females. In part four I discuss reform possibilities including inclusive governance reform, equalization of competitive opportunity, the elimination of rules that imply limitations on female athletic potential as well as those that emphasize or permit the public sexualization of female athletes. And finally, I conclude that the harmonization of Olympic practice with contemporary notions of gender equality will be difficult in light of the male dominated structure of governance as well as heterogeneity of the nations that make up the Olympic family. The elimination of the practice of public sexualization of females will be important to the increased participation of women around the world who wish to refrain from competition involving public sexualization whether based on autonomy sensibilities, culture, or religion. On the other, the maintenance of gender segregation in Olympic sport though based upon protective grounds and stereotypes about males and females may be important to the opportunity of certain women to participate in Olympic sport. These stereotypes maintain the historical myth of female weakness and male power. I further conclude that a thoroughgoing reform of Olympic Sport and its gendered structure would be necessary to achieve gender equality in sport.

I. FROM STEREOTYPE TO SCIENCE— LIMITING FEMALE COMPETITION IN THE 20TH AND 21ST CENTURY

A. *From Exclusion to Suspicion—Science in the Service of the Feminine Ideal*

When the Modern Olympic Games were established in 1896, women did not compete.⁹ As women began to compete in a wider range of sport outside of the auspices of the IOC and women and spectators increased,¹⁰ the IOC held a pivotal medical conference to explore both changes in the roles of women in society and “scientific” justifications for limitations on

both.”); See VICKI KRANE ET AL., *Living the Paradox: Female Athletes Negotiate Femininity and Muscularity*, 50 *SEX ROLES* 315, 323 (2004).

9. *Id.* HARGREAVES, *supra* note 7 at 219.

10. *Id.* See HARGREAVES, *supra* note 7 at 211.

women sport competition.¹¹ The conference produced a document entitled “Women’s Participation in Athletics” which imposed substantial limitations and noted distinctions between male and female Olympic competition and provided a basis for the imposition of limits on those who qualify as female for purposes of Olympic competition.¹²

The . . . basic function of men and women is totally different. Women’s function is highly specialized, and when it is brought into playing those minor differences which I mentioned a moment ago become strongly pronounced, and the woman becomes a totally different creature from that which she was before her role of mother was entered upon. . . The differences which appear in the nervous, skeletal and muscular systems are all necessary edges of the great work of parturition and anything that might tend to hinder or make this more difficult should be heavily deprecated. . . We have therefore before us the problem of finding a suitable mean between those sports which test the muscular frame and put a strain on it, and which are, of course, wholly unsuitable for the feminine organism, which is more delicate and should conserve its energy for the great work before it, and those recreations which are not sufficiently physically energetic to assist the woman towards the most healthy development she may attain. . . It seems to me therefore that if those sports and games which are suitable for men be modified and reduced so that they cannot in anyway injure the woman, and if we can create organizations which will enforce these modified regulations stringently, we will have gone a long way towards achieving our objects.¹³

The next phase of competition began in 1928 and saw the continued segregation of women, but did expand the number of sports deemed “suitable” for women with the inclusion of Athletics (track and field) and gymnastics.¹⁴ A victory in the completion of the 1936 Berlin Olympic¹⁵ became a proxy for claims of national superiority. It was also an opportunity to reassert a feminine ideal. A stunning female success by

11. *Id.* at 212.

12. *Id.* at 212-213. (“It seems to me therefore that is those sports and games which are suitable for men be modified and reduced so that they cannot in anyway injure the woman, and if we can create organizations which will enforce these modified regulations stringently, we will have gone a long way towards achieving our objects.”)

13. *Id.*

14. Int’l Olympic Comm., *Factsheet-Women in the Olympic Movement* (2016), <https://www.olympic.org/women-in-sport/background/key-dates>.

15. See Stephan Szymanski, *About Winning: The Political Economy of Awarding the World Cup and the Olympic Games*, 31 SAIS REV. OF INT’L AFF. 87, 90 (2011); Kevin Wamsley, *The Global Sport Monopoly: A Synopsis of the 20th Century Olympic Politics*, 57 INT’LJ. 395, 402 (2002).

Helen Stephens, an American competitor, gave rise to charges that she was a female imposter;¹⁶ an official examined her genitals in order to confirm her gender.¹⁷ Suspicion arose about the sex of a Polish born sprinter who was in fact later confirmed to have “. . .ambiguous genitalia and abnormal sex chromosomes.”¹⁸ The Berlin Games raised the stakes of Olympic games, laying a foundation for nations disappointed in the performance of their female athletes to hurl charges of masculine gender at winning athletes and for efforts to limit eligibility of women who did not meet feminine stereotypes.¹⁹

The theme of gender suspicion established in this period continued through the United States and Soviet “Cold War.”²⁰ In 1966 women who wanted to compete were “. . .forced to stand naked in front of a committee and were subjected to an inspection of their external genitalia. Two hundred and forty-three women attended for examination and no abnormalities were reported.”²¹ This sordid approach was abandoned, but the practice of verifying female athletes’ gender has persisted. The fear that men would masquerade as women in competition persisted.

The next test adopted came to be known as the “Barr body” test, named after the scientist who discovered a body in the nuclei of cat cells that he determined was associated with ‘female sex.’²² The theory was that the presence of a “Barr body”—nuclei resulting from the remains of an extra X chromosome in females who had two X chromosomes—would be present if a person was “female” but not present in a XY chromosome male who had only one X chromosome. The test, administered by taking cells from the mouth (via a buccal smear) was a more refined approach to sex verification than the nude parades described above. The cells obtained from the buccal smear were test stained to see whether they contained the Barr bodies, the remains of the extra X chromosome associated with the female sex. If the result showed no “Barr body,” the conclusion was that

16. Robert Ritchie, John Reynard & Tom Lewis, *Intersex and the Olympic Games*, 101 J. OF THE ROYAL SOC’Y OF MED. 395-396 (2008).

17. *Id.*

18. *Id.*

19. *Id.* at 396-397.

20. See generally, Allen Guttmann, *The Cold War and the Olympics*, 43 SPORT IN WORLD POLITICS POLI. 554 (1988); Ying Wushanley, *The Olympics, Cold War, and the Reconstruction of U.S. Women’s Athletics*, FIFTH INT’L SYMP. FOR OLYMPIC RES. (last visited November 3, 2016) <http://library.la84.org/SportsLibrary/ISOR/ISOR2000a.pdf> (quoting the 1960 statement of Thomas J. Hamilton, Chair of the Development Committee of the United States Olympic Association (USOA) after the Soviet Union victories over American Women at prior Olympics: “It is very evident that the United States must take a new and hard look at its Olympic movement and efforts. The cold war and present international climate demands that we make the strongest showing possible to uphold the prestige of the United States.”); Ritchie, *supra* note 18 at 396-397.

21. Ritchie, *supra* note 18 at 396-397.

22. *Id.* at 397.

the person was a female in appearance (phenotypically female) but nonetheless a genetic male with a competitive advantage. Later, research chromosome is present It was thought that the absence of the Barr body would confirm that the person was male,²³ but further research revealed that the test had weaknesses. It did not take into account the possibility of “androgen insensitivity” —the inability to utilize testosterone to acquire the lean body mass of males. The argument that women who failed the Barr body test had a competitive advantage over *normal* women became scientifically specious.²⁴ A subsequent approach, adopted in 1991, a byproduct of more sophisticated genetic research developments, involved the examination of a gene thought to be responsible for the fetal choice of testes or ovaries.²⁵ Once again, additional research revealed that the development of male testes was not necessarily associated with the particular gene, and that the fetal sex organ differentiation process was much more complex.²⁶ Later tests at subsequent Olympic games demonstrated that less than the few women tested positive for the gene were either insensitive to testosterone or had an enzymatic condition that had produced a false positive for the gene.²⁷

Slowly, the evidence demonstrated that the distinction between males and females for purposes of segregated sport competition was a “house of cards.” This was due to the science that the revealed that “sex” as a biological/genetic matter and “gender” as a cultural matter is a complex combination of biology and identity.²⁸ The biological dimensions of this complexity have come to be known, perhaps pejoratively, as “disorders of sex development.”²⁹ These DSD’s involve variations in physical characteristics such as the presence or absence of testes, variations in physical development e.g. of testes and ovaries, and variation in the endocrine system. These variations create a “hugely complex group of conditions. These abnormalities challenge both our scientific and social understanding of what ‘sex’ and ‘sexual differentiation’ are.”³⁰

The scientific objectives were driven these social understandings. In path-breaking work Judith Lorber sought to capture gender at the intersection of science and society.³¹ She wrote that western societies seek to legitimate gender by claiming that physiology—female and male procreative differences—justify differences in the treatment of those assigned to the male category and those assigned to the female category. Her contribution—grounded in both biological and social science—was

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

²⁹ Ritchie, *supra* note 18 at 398.

28. *Id.*

29. *Id.* at 395.

30. *Id.* at 398.

31. JUDITH LORBER, PARADOXES OF GENDER (1994).

to posit that gender and sex are not equivalent, and gender as *a social construction* does not flow automatically from genitalia and nor reproductive organs. Lorber contended that these chosen physiological differences “are crude markers” and not the source of the differential social status. Rather, biology is “qualitatively transformed by social practices. Thus, the sum total of gender is not biological nor physiological difference between human females and males.³² She observed that there are numerous “possible combinations of genitalia, body shapes, clothing, mannerisms, sexuality, and roles” that might be combined to produce great variety among human beings: “the social institution of gender depends on the production and maintenance of a limited number of gender statuses and of making the members of these statuses similar to each other.”³³ Lorber quoted Simone de Beauvoir who observed that “[a woman] is not born, but rather becomes, a woman. . . ; it is civilization as a whole that produces this creature. . . which is described as feminine.”³⁴ Lorber explained gender is a multifaceted “social institution.”³⁵

As a social institution, gender is composed of gender statuses, gender division of labor, gender kinship, gender and sexual scripts, personalities, gendered social control, gender ideology, gender imagery. . . For an individual, gender is composed of the sex to which the infant is assigned at birth based on appearance of genitalia, gender identity, gendered marital and procreative status, gender sexual orientation, gender personality, gendered processes – the social practices of learning being taught picking up cues, gender beliefs, gender display. . . [F]or an individual, all the social components are supposed to be consistent in congruent with perceives physiology. The actual combination of genes and genitalia, prenatal, adolescent, and procreative capacity may or may not be congruent with each other and with a sex category assignment. . . gender sexual orientation and procreative status, gender display, personality, and work and family.³⁶

The IOC, seeking isolation from these developments, persisted in its search for a bright line physical or genetic markers to differentiate between males and females. Their next visible effort—and setback—would occur in the context of middle distance runner Caster Semenya.³⁷

32. *Id.* at 17.

33. *Id.* at 22.

34. *Id.*

35. *Id.* at 30.

36. *Id.* at 30-31.

37. *Rio Olympics 2016: Caster Semenya Wins 800m Gold for South Africa*, BBC, Aug. 21, 2016, <http://www.bbc.com/sport/olympics/36691465>; See Ariel Levy, *Either/Or*:

*B. Caster Semenya—Brundage Redux**i. Caster Semenya—"A Witch Hunt?"*

The official Olympic sport sex verification era ended after the controversial case of Caster Semenya, whom sports officials initially targeted on the basis of appearance and performance to determine whether she was eligible for competition as a female.³⁸ Despite the abandonment of wholesale testing, the IOC and the IAAF still sanctioned the pursuit of feminine outliers, and it was in this net that Caster Semenya was entangled.³⁹ At that time, the IOC used the "inspect if you suspect policy."⁴⁰ As a result, these developments did not spare Caster Semenya a very public inquiry into whether she was a man or a woman.⁴¹ And it was in this net in which Caster Semenya was caught.

Initially, Semenya was an unknown runner in a part of South Africa known colloquially as "nowhere" or "Limpopo," a rural village called Gamasenlong.⁴² She belonged to a rural running club without a track or shoes for its members called the Moletjie Athletics Club, a magnet for poor but talented kids seeking a way out of poverty.⁴³ Within a year of official racing she bested the South African women's 800-meter record.⁴⁴ After she won the 800-meter title at the 2009 Berlin World Games, the IAAF disavowed the many media comments on Semenya⁴⁵ but confirmed that it would investigate her sex.⁴⁶

Sports, Sex, and the Case of Caster Semenya, THE NEW YORKER, Nov. 30, 2009, <http://www.newyorker.com/magazine/2009/11/30/eitheror>.

38. See, e.g. Nathan Q. Ha et al., *Hurdling Over Sex? Sport, Science, and Equity*, 43 ARCHIVES SEX BEHAV. 1035, 1037 (2014).

39. *Id.* at 1036.

40. *Id.* at 1037.

41. Tavia Nyong'o, *The Unforgivable Transgression of Being Caster Semenya*, 20 WOMEN & PERFORMANCE: J. FEMINIST THEORY 95, 95 (2010); Delia D. Douglas, *Forget Me . . . Not: Marion Jones and the Politics of Punishment*, 38 J. SPORT & SOC. ISSUES 3, 6, 8 (2014).

42. Levy, *supra* note 40.

43. *Id.*

44. *Id.*

45. See Mike Hurst, *Caster Semenya Has Male Sex Organs and No Womb or Ovaries*, Daily Telegraph, (Sept. 11, 2009), <http://www.dailytelegraph.com.au/sport/semenya-has-no-womb-or-ovaries/story-e6frefxni-1225771672245> (exposing Semenya to worldwide gender scrutiny ahead of any adjudication of her eligibility to compete); See also Oren Yaniv, *Semenya, forced to take gender test, is a woman . . . and a man*, N.Y. Daily News, (Sept. 10, 2009), <http://www.nydailynews.com/news/world/caster-semenya-forced-gender-test-woman-man-article-1.176427>; See also Wells, *supra* note 5 (describing the commentary on Semenya on an online track and field list serve that demonstrated their support for mainstream justifications of the treatment of Semenya).

46. INT'L ASS'N OF ATHLETICS FED'NS, *Statement on Caster Semenya*, (Sept. 11, 2009), <http://www.iaaf.org/news/news/statement-on-caster-semenya>.

Semenya was a victim of that “Inspect if you suspect policy,”⁴⁷ which in essence took IOC policy back to the era of visual suspicion of females bodies that did not conform to feminine stereotype and resultant sex verification. Although Semanya was publicly shamed as a result of the worldwide publication of the fact that the IAAF had subjected her to sex verification,⁴⁸ ultimately the IAAF did clear her for competition,⁴⁹ and she has rebounded on the track and field scene⁵⁰ winning a gold medal in the 800 meters at the 2016 Rio Olympics.⁵¹

Against the background of the feminine ideal, Semanya Caster’s experience was unique because of her race, her class, her athletic superiority, and her relatively fat free muscled body. No one of these characteristics led authorities to single her out, but in combination they led to a concerted to interrogate her femininity and block her potential appearance on the world stage as a representative of South Africa. Her self-presentation violated norms of “hegemonic femininity,”⁵² codified as “the white feminine ideal.”⁵³

ii. “Who is the Fairest of Them All”—Semanya Caster, Intersectionality, and the White Feminine Ideal

Several have observed that sport in general, and Olympic sport in particular, has placed the highest value on a *feminine ideal* with a race and

47. See Ha et al., *supra* note 41.

48. Anna Kessel, *Caster Semanya Speaks of a Rough Ride Back from Suspension*, THE GUARDIAN, June 7, 2011, <https://www.theguardian.com/sport/2011/jun/07/caster-semenya-diamond-league>. (She said of her ordeal: “Sometimes it wasn’t good, you know. Sometimes I was sad, sometimes happy. Just on and off. Always I felt welcome, it’s just you know sometimes as a human being you cannot always be happy. You do good things, you do bad things, people talk.”)

49. INT’L ASS’N OF ATHLETICS FED’NS, *Statement on Caster Semanya*, (July 6, 2010), <https://www.iaaf.org/news/iaaf-news/caster-semenya-may-compete>.

50. Ashfak Mohamed, *Brilliant Caster Just Misses Zola Mark*, ATHLETICS, June 24, 2016, <http://www.iol.co.za/sport/athletics/brilliant-caster-just-misses-zolas-record-2038476>; Sean Ingle, *Caster Semanya Shows Impressive Form With 800 Victory in Doha*, THE GUARDIAN, May 6, 2016, <https://www.theguardian.com/sport/2016/may/06/caster-semenya-diamond-league-doha-800m>; Sean Ingle, *Caster Semanya’s Comeback Puts Her On Course for Rio Gold—and Controversy*, THE GUARDIAN, Apr. 17, 2016, <https://www.theguardian.com/sport/2016/apr/17/caster-semenya-comeback-rio-olympics-gold>.

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

52. Krane, et al., *supra* note 10 at 316 (2004) (This hegemonic femininity is contracted within a white, heterosexual and class based structure, and it has strong associations with heterosexual sexual romance. Hegemonic femininity, therefore, has a strong emphasis on appearance with the dominant notion of an ideal feminine body, as thin and toned. .From magazines, television, portrayals in movies to the election of prom queens, a white and heterosexual femininity is reinforced and reproduced.”)

53. See *Id.*

color component.⁵⁴ Sonja Henie, the figure skater of 1930's fame,⁵⁵ has been an archetype of the white and delicate female athlete without apparent muscularization who appears to effortlessly engage in her "sport."⁵⁶ Henie was an Olympic champion in 1928, 1932, and 1936, and later a Hollywood star in movies that made the blonde the ideal in the sport.⁵⁷ Correlatively, the rules and subjective judging of figure skating have prized femininity and body language that permit rewards for a white female archetype athlete and penalties for women of color whose bodies and form do not conform to a *white feminine ideal*.⁵⁸

Thus and in contrast, African born Suraly Bonaly who had an electric and powerful style, performed backflips on the ice, competed three Olympics, was French National Champion, European Champion, never won a world title and was always compared to her "graceful" and ultimately winning white or Asian Olympic rivals.⁵⁹ Shayla Lawson, a Black American figure skater whose style was denigrated as "too physical," "too defiant," "too sensual," reflected on the skating hierarchy's exclusion of Bonaly from the feminine hierarchy:

Similar to me, Bonaly's figure did not fit the contours and fragility of the ice princess; she was ridiculed by the world of figure skating—often more for her physicality than her immense talent as an athlete. Some in the figure skating world pegged her as a rebel. Even enthusiasts who described her performances as "wonderful" and "spectacular" mentioned her excellence with the caveat that she didn't look like the typical "ice princess." Of course, "ice princess" was just shorthand for the fact Bonaly possessed some of the stereotypical markers of a black woman's body. She had a short, muscular stature with thick thighs and legs. She had dark skin of unmistakably African origins.⁶⁰

54. See MARY LOUISE ADAMS, ARTISTIC IMPRESSIONS: FIGURE SKATING, MASCULINITY AND THE LIMITS OF SPORTS 144-145 (2011); See CARLA L. PETERSON, RECOVERING THE BLACK FEMALE BODIES-SELF REPRESENTATIONS BY AFRICAN AMERICAN WOMEN ix-xvi (Michael Bennett & Vanessa Dickerson eds., 2001); Douglas, *supra* note 44; James McKay & Helen Johnson, *Pornographic Eroticism and Sexual Grotesquerie in Representations of African American Sportswomen*, 14 SOCIAL SOC. IDENTITIES 491 (2008); Roberta Lock, *The Doping Ban: Compulsory Heterosexuality and Lesbopa*, 38 INT'L REV. OF SOC. OF SPORT 397, 410 n.11 (2003).

55. JAMES HINES, FIGURE SKATING IN HISTORY 145 (2006).

56. See ADAMS, *supra* note 57 at 144-145.

57. *Id.*

58. *Id.* at 200-201.

59. *Id.* at 200-204; HINES, *supra* note 58, at 253-256.

60. Shayla Lawson, *Sequins and Surya Bonaly: What figure skating taught me about body acceptance*, ESPN W, July 22, 2016, <http://www.espn.com/espnw/voices/article/17077117/sequins-surya-bonaly-figure-skating-taught-body-acceptance>.

In the era of the discretionary enforcement of “sex” distinctions and female performance limitations, the marquee cases—Caster Semenya and Dutee Chand are prominent examples—have been a species of *show trial and witch hunt*, targeting of women of color with the charge that they are not *really* women, but an *other*.⁶¹

Targeting women of color for enforcement of a white feminine ideal is properly situated against the background of “intersectionality” theory. This enforcement of the “feminine ideal” in Olympic Sport, specifically against women of color such as Semenya and Chand, involves both race and “sex” in the maintenance of a *white feminine ideal*. Initially, “intersectionality” developed as a critical race theoretical framework for analyses of the effect of race, poverty and other factors on the status of African American Women.⁶² Pauli Murray’s 1971 “The Negro Women’s Stake in the Equal Rights Amendment”⁶³ addressed the concerns of Black women in the context of the debate over the addition of a constitutional amendment to prohibit discrimination on the basis of gender. Intersectionality claims would later become more visible in employment discrimination law as many litigators presented their specific employment bias experiences and courts recognized that specialized forms of discrimination shoved black women into the most lowly paid and marginalized work behind white males, white women, and African American males.⁶⁴ By 1995, the intersectionality framework was well established⁶⁵ and had expanded to contexts beyond the intersection of race and gender⁶⁶ and to international law.⁶⁷

61. See Ryan Chiachiere, *Imus called women’s basketball team “nappy-headed hos,”* Media Matters for America (Apr. 4, 2007, 6:00 PM), <http://mediamatters.org/research/2007/04/04/imus-called-womens-basketball-team-nappy-headed/138497> (Don Imus primetime television characterization of the 2007 NCAA championship Rutgers Women’s Basketball team as “nappy headed hos” exemplified this phenomenon); *Imus Calls Girls Nappy Headed Hoes & Jiggaboos!?*, YouTube (Apr. 12, 2007), <https://www.youtube.com/watch?v=bmF8ileOVEo>.

62. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan.L. Rev. 581 (1989-1990); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 Chi. Legal F. 139 (1989); Symposium, *Black Women Law Professors: Building a Community at the Intersection of Race and Gender*, 6 Berkely Women’s L. J. (1990-1991) (The Lawyers Committee Conference included content related to the concept of intersectionality).

63. Pauli Murray, *The Negro Woman’s Stake in the Equal Rights Amendment*, 6 Harv. C.R.-C.L. L. Rev. 253 (1971).

64. LINDA GREENE, *African American Women on the World Stage: The Fourth World Conference on Women in Beijing*, in BLACK WOMEN AND INTERNATIONAL LAW: DELIBERATE INTERACTIONS, MOVEMENTS AND ACTIONS 154 n.35 (Jeremy I. Levitt ed., 2015).

65. See, e.g., Harris, *supra* note 65; Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 Chi. Legal F. 139 (1989); Judy Scales-

In addition to intersectionality, Black female athletes encountered two new phenomena: “pornographic eroticism” and *animalization* are evident in the description of elite Black female athletes.⁶⁸ The roots of these perceptions run deep. In this context, the history of Black women in the United States is inextricably linked to our role during slavery as the means of production of the labor that enabled a nation’s economy. Katherine McKittrick⁶⁹ draws on the work of Marlene Philip’s to situate the historical experience of America and the Black Women.

The danger at the intersection of race and sex and its links to our history is exemplified by sports commentator’s description of the black female body. In fact, the disparagement of black female athletes in sport is rampant in the international Olympic arena. The narratives are representative of dominant white institutions craft to describe the most successful Black female athletes.⁷⁰ It is evident in the criticism of Serena Williams clothes and her body,⁷¹ the specific discussion of her “great big arse” in comparison to the “firm of bottom and pert of breast” Sharapova,⁷² and a commentator’s description of Venus Williams as “urban hip hop...swirling whirling street babe” as compared with the “ultimate femininity” of one of her white opponents,⁷³ and the description of her “breasts that are registered to vote in a different US state from the rest of her.”⁷⁴ Black female athletes have long been compared to animals is a well-established trope—1960 gold medal winner Wilma Rudolph was called

Trent, *Black Women and the Constitution: Finding our Place, Asserting our Rights*, 24 Harv. C.R.-C.L. L. Rev. 9 (1989).

66. See, e.g., Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 Berkeley Women’s L.J. 103 (1994); Robert Westley, *Lat. Crit. Theory and the Problematics of Internal/External Oppression: A Comparison of Forms of Oppression and Intergroup/Intragroup Solidarity*, 53 U. Miami L. Rev. 761 (1998-1999); Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. Davis L. Rev. 853 (2005-2006).

67. See, e.g., Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations*, 52 Emory L.J. 71 (2003); Kevin R. Johnson, *Racial Restrictions on Naturalization: The Recurring Intersection of Race and Gender in Immigration and Citizenship Law*, 11 Berkeley Women’s L.J. 142 (1996); Rep. of the Fourth World Conference on Women, U.N. Doc. A/CONF.177/20/Rev. 1, Annex 1 (1996). (For an account of the process that led to the incorporation of intersectionality principles in the foregoing document, See GREENE, *supra* note 67 at 147-167.)

68. McKay et al., *supra* note 57 at 492.

69. KATHERINE MCKITTRICK, *DEMONIC GROUND: BLACK WOMEN AND THE CARTOGRAPHIES OF STRUGGLE* (2006).

70. McKay et al., *supra* note 57 at 493-494.

71. *Id.* at 494-497.

72. *Id.* at 495.

73. *Id.* at 497.

74. Matthew Norman, *Serena’s Loyal Supporters*, THE TELEGRAPH, January 22, 2006, <http://www.telegraph.co.uk/sport/tennis/australianopen/2331012/Serenas-loyal-supporters.html>.

“the Black Gazelle” and Florence Griffith Joyner was linked to various animals—“la tigresse noire” an African jungle cheetah, a panther, a tiger. One commentator even described her in explicit sexual terms.⁷⁵ A journalist thought it newsworthy to quote competitors who nastily disparaged Griffith Joyner and her sister-in-law, Pentathlete gold medal winner, Jackie Joyner Kersee: “Florence Griffith-Joyner looks like a man and Jackie Joyner Kersee looks like an ape.”⁷⁶ Writers invoked junk science to explain their victories. “A journalist, who consulted sports medicine specialist about Serena’s physique, and was advised that, “it is the African-American race. They just have this huge gluteal strength. With Serena, that’s her physique and genetics.”⁷⁷

C. *After Semanya Caster—The IOC Regulations on Female Hyperandrogenism and the case of Dutee Chand*

i. The 2012 “IOC Regulations on Hyperandrogenism”

The Semanya Caster episode⁷⁸ was to be the proverbial straw that broke the camel’s back since it tipped the scales in favor of mounting criticism against sex verification on scientific, human rights, and ethical grounds.⁷⁹ After consultation and debate, the IOC officially renounced its pursuit of a science based male female ‘sex’ divide and instead decide to focused on the disqualification of women based on a naturally occurring hormone “testosterone.”⁸⁰ The 2012 IOC policy, “IOC regulations on Female Hyperandrogenism”⁸¹ adopted for the 2012 London Olympic Games, disqualified females from competition in the female category based on a prohibited level of naturally occurring testosterone. The Regulations

75. *Id.* McKay et al., *supra* note 57, at 493 (“More dazzling than the nails are her exotic body suits, which she mostly wears with the left leg cut away. She always wears colourful bikini briefs to match the suit. Her ‘one-leggers’ she calls them, which she claims she wears mainly for comfort. She has great panache and sex appeal. With her shock of black hair trailing in the wind and the almost blinding coloured outfits with the cutaway leg, Griffith-Joyner has transformed the world of athletics. The lady represents the highs and lows of her sport: high fashion and low times.”).

76. *Id.* at 497.

77. McKay et al., *supra* note 57, at 498. *See also* Jay Sharbutt, *Jimmy ‘The Greek’ Is Fired by CBS*, L.A. TIMES, Jan. 17, 1988, http://articles.latimes.com/1988-01-17/sports/sp-36803_1_jimmy-snyder (explaining the achievements of black male athletes as “the black is a better athlete to begin with because he’s been bred to be that way. . . the slave owner would breed his big black to his big woman so that he could have a big black kid.”)

78. Wells et al., *supra* note 5.

79. *Id.*; *See also* Louis J. Elsas et al., *Gender Verification of Female Athletes*, 2 GENETICS IN MEDICINE 249 (2000).

80. Int’l Olympic Comm. IOC Regulations on Female Hyperandrogenism (2012) http://www.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2012-06-22-IOC-Regulations-on-Female-Hyperandrogenism-eng.pdf.

81. *Id.*

conclude that the differences in the performance of males and females in sport are due to the differences in their hormones.⁸²

In addition to establishing a panel to oversee doping and medical issues, the regulations also appointed a panel “. . .to evaluate a suspected case of female hyperandrogenism.” The regulations permitted several people to initiate an investigation but do not include any scientific standards.⁸³ If the Chairman decides, an investigation would ensue, the IOC Medical and Scientific Director would obtain the information including “medical history, sex hormone levels, diagnosis, treatment, current findings, etc.” and provide this information to the Chairman who would decide whether to close the case or to appoint an expert panel to decide “whether female hyperandrogenism is present and can be considered to confer a competitive advantage.”⁸⁴ An athlete who refused to cooperate could be suspended from competition. The Regulations required an opportunity for the athlete to be heard⁸⁵ and also required confidentiality “in order to help protect the dignity and privacy of the athlete concerned.”⁸⁶ In the event that an athlete is disqualified, the athlete may appeal to the Court of Arbitration for Sport within 21 days.⁸⁷

Shortly after the promulgation of the Hyperandrogenism Regulations, there ensued criticisms on multiple grounds. The ethical concerns focused on the discretionary nature of investigations.⁸⁸ The human rights concerns focused on the propriety of selecting a natural characteristic on which humans differ as a basis for disqualification from participation in a right protected by an international convention.⁸⁹ The scientific concerns focused on the disagreement over the selection of the measure of testosterone levels as a sole marker of unfair advantage and the legitimacy of the particular level selected.⁹⁰ Thus, it was no surprise to either the scholarly or sporting community that the Regulations were vulnerable and that someone would inevitably refuse to submit to disqualification.

Another downside to the hyperandrogenism regulations is the nature of their selective enforcement. The IOC has not mandated the testing of all women to determine whether they meet the standard it has adopted. Rather, the enforcement regime depends upon the ad hoc identification of females that do not meet the feminine ideal. Thus, it is a regime of selective

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Int'l Olympic Comm., *supra* note 83.

87. *Id.*

88. *Id.*

89. Peter Sonksen et al., *Medical and Ethical Concerns Regarding Women with Hyperandrogenism and Elite Sport*, J. OF CLINICAL ENDOCRINOLOGY AND METABOLISM, 825 (Mar. 2015).

90. *Id.* at 825.; Katrina Karkazis et al., *Out of Bounds? A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes*, 12 AM. J. OF BIOETHICS 3, (June 2012).

enforcement based upon observation. In this regard, it is not far removed from the Avery Brundage regime in which the female sport competitors were summarily disqualified as her appearance did not conform to a feminine ideal. Chand, like Semenya before her, had been a successful competitor and was singled out for scrutiny because of her success and her physical appearance.

ii. The Case of Dutee Chand

Complaining competitors and subsequently Indian sports official raised concerns about Chand's gender in 2013. As a result, the Sports Authority of India subjected Chand to a blood test, clinical test, MRI, and an ultrasound examination;⁹¹ these revealed inflated hyperandrogenism levels and Chand was disqualified from competition.⁹²

Chand appealed her disqualification to CAS, raising two specific issues. First, she contended that the hyperandrogenism rules were because they are discriminatory because the rules disqualify on the basis of a naturally occurring characteristic. Second, she argued that the hyperandrogenism rules were because there is no scientific proof that higher levels of natural androgens improve female performance.

Before responding to Chand's issues, the CAS panel noted both parties' stipulations. The parties had agreed that "although athletic events are divided into discreet male and female categories, sex in humans is not "binary."⁹³ Alliteratively, the panel continuing these theme, noting what science had conceded that "nature is not neat. There's no single determinant of sex. There are people with differences and sexual development (DSD's) not fall who do not biologically fall neatly into traditional categories of women and men."⁹⁴ In addition, the panel noted that all parties had agreed that exogenous testosterone would afford both males and females an unfair advantage because exogenous testosterone improves athletic performance.⁹⁵

Next, the panel addressed the fundamental principles of Olympism set forth in the Olympic Charter, including that "the enjoyment of the rights and freedoms set forth in this Olympic charter shall be secured without discrimination of any kind such as race, color, sex, sexual orientation, language, religion, political or other opinion, national or social origin,

91. Chand v. Athletics Federation of India (AFI), CAS 2014/A/3759, Interim Arbitral Award of Judge Bennett (Ct. of Arbitration for Sport Jul. 24, 2015), http://www.tas-cas.org/fileadmin/user_upload/AWARD_3759_FINAL__REDACTED_FOR_PUBLICATION_.pdf

92. *Id.* at 5.

93. *Id.* at 11.

94. *Id.*

95. *Id.* at 12.

property, birth or other status.”⁹⁶ The court also noted the IAAF objectives that “encourage the participation of athletics at all levels throughout the world regardless of age, gender or race. . .and that all may participate in athletics regardless of their gender, race, religious, or political views or any other relevant factor.”⁹⁷ Of course, the decision also referenced the IAAF regulations “concerning eligibility of females with hyper androgenize to compete in women’s competition;” in 2011, that replaced the previous “gender verification policy” and which now do not reference gender at all.⁹⁸ The CAS court also noted the IAAF rationales for the regulations including “a respect for the very essence of the male and female classifications in athletics, respect for the fundamental notion of fairness and competition in female athletics,” and an acknowledgement that the regulations do permit that females with hyperandrogenism to compete in women’s competition with limitation⁹⁹ subject to compliance with IAAF rules and regulations.¹⁰⁰

After examining the detailed procedures for detecting and confirming hyperandrogenism, the court quoted the IAAF fairness and integrity rationales for the regulations. The role of governing body is “to guarantee the fairness and integrity of the competitions that organized under its rules. . .for all competitors.” Thus, the regulations disqualify a female with hyperandrogenism if her functional testosterone that are in the male range.¹⁰¹

After these preliminary comments, the panel focused on the issues at stake. Did the hyperandrogenism regulations violate the antidiscrimination provisions contained in the Olympic charter, the IAAF charter and International human rights law on the basis of a natural characteristic, and sex?¹⁰² Chand had sharpened this issue when she asked more pointedly whether the “hyperandrogenism regulations

96. *Id.* at 13-14. (The Olympic Charter includes among its fundamental principle the right to compete without discrimination: “6. The enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as race, colour, sex, sexual orientation, or other status.”)

97. Chand v. Athletics Federation of India (AFI), CAS 2014/A/3759, Interim Arbitral Award of Judge Bennett (Ct. of Arbitration for Sport Jul. 24, 2015), http://www.tas-cas.org/fileadmin/user_upload/AWARD_3759_FINAL__REDACTED_FOR_PUBLICATION.pdf *Id.* at 14 (quoting INTERNATIONAL ASSOCIATION OF ATHLETIC FEDERATIONS [IAAF] CONST. ART. III, <https://www.iaaf.org/about-iaaf/documents/constitution>).

98. *Id.* at 14. *Id.* (quoting IAAF Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women’s Competition, §1.1, §1.4, <http://www.sportsintegrityinitiative.com/wp-content/uploads/2016/02/IAAF-Regulations-Governing-Eligibility-of-Females-with-Hyperandrogenism-to-Compete-in-Women%E2%80%99s-Competition-In-force-as-from-1st-May-2011-6.pdf>).

99. *Id.* at 15.

100. *Id.*

101. *Id.* at 22.

102. *Id.* at 32.

discriminate...based on a natural...immutable physical characteristic, namely the quantity of testosterone their bodies produced without any artificial intervention.”¹⁰³ Chand argued that there was no principled basis to distinguish endogenous testosterone from “other genetic trait, even if that trait confers an advantage over fellow female competitors who lack that trait.”¹⁰⁴ Moreover, she argued, the regulations do not limit male testosterone levels.¹⁰⁵ In addition, there’s no testosterone limit applicable to male athletes.¹⁰⁶

CAS concluded that because Ms. Chand had established that the regulations were discriminatory, IAAF had the burden “to establish that the discriminatory effect of the regulations is justified as a necessary and proportionate means of achieving a legitimate objective.”¹⁰⁷ In response, IAAF relied on research that it contended demonstrated that higher testosterone levels in men are “the most important factor in explaining the significant difference in physical performance between elite males and female athletes.”¹⁰⁸ Therefore, IAAF argued, they are the best “discriminating factor between male and female performance in sports.”¹⁰⁹ In support of this proposition, IAAF offered research results that support the relationship between athletic performance and testosterone, and defended its level decision on the ground that the threshold level for disqualification of females is within the normal range for men.¹¹⁰ IAAF also produced evidence in support of the link between “lean body mass” and performance. It argued that there is evidence that increases in lean body mass are attributable to testosterone, that pharmacological or surgical testosterone reduction reduces lean body mass in men. Both parties agreed to these propositions.¹¹¹

On the other hand, CAS also heard a rebuke challenge to the IAAF’s foundational assumption that testosterone confers an advantage. A professor testified that it is more accurate to state lean body mass accounts for differences in strength and aerobic performance, not

103. Chand v. Athletics Federation of India (AFI), CAS 2014/A/3759, Interim Arbitral Award of Judge Bennett (Ct. of Arbitration for Sport Jul. 24, 2015), http://www.tas-cas.org/fileadmin/user_upload/AWARD_3759_FINAL__REDACTED_FOR_PUBLICATION_.pdf.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 33.

108. *Id.* at 37.

109. Chand v. Athletics Federation of India (AFI), CAS 2014/A/3759, Interim Arbitral Award of Judge Bennett (Ct. of Arbitration for Sport Jul. 24, 2015), http://www.tas-cas.org/fileadmin/user_upload/AWARD_3759_FINAL__REDACTED_FOR_PUBLICATION_.pdf.

110. *Id.* at 38.

111. *Id.* at 39.

testosterone levels, and that “endogenous testosterone was an inappropriate criterion for eligibility because of the “overlap in testosterone concentration between the sexes...[rendering] the IAAF level...flawed and scientifically untenable.”¹¹² In addition, the professor testified that “many factors influence performance in female and male athlete such as age, height and genetic factor psychological factors and nutrition.”¹¹³ There was “insufficient data to define a reference range for elite athletes...and no correlation between testosterone levels and lean body mass in either men or women.”¹¹⁴ Further, he opined that “there are insufficient data on elite athletes to establish a proper reference range for men or women.”¹¹⁵ There are many physical traits that confer advantages.¹¹⁶

Other IAAF experts countered. They said that even though there are the characteristics that account for differences in performance, “higher testosterone levels” are the most important factor “explaining the difference and physical performance found between male and female athletes.”¹¹⁷ Other experts for the IAAF agreed that testosterone is a major determinant of lean body mass which in turn determines strength and is the best discriminating factor.¹¹⁸ Further, they argued that there is no chemical difference between endogenous and exogenous testosterone.¹¹⁹ They quarreled with the proposition in support of Ms. Chand’s that “there’s an overlap in the normal ranges of male and female testosterone.” Rather, these experts concluded that “there is usually a clear-cut difference between male and female testosterone levels... a statistically significant difference that places the selected level in the “outlier: category.”¹²⁰ Another IAAF expert testified that elite male athletes consistently outperform female athletes because they have “greater muscle mass and greater power that males develop during puberty... mainly due to anabolic and androgen that affects the vastly higher levels of testosterone that males start to produce from then onward.”¹²¹

112. *Id.* at 40-41.

113. *Id.* at 42.

114. *Id.*

115. Chand v. Athletics Federation of India (AFI), CAS 2014/A/3759, 43, Interim Arbitral Award of Judge Bennett (Ct. of Arbitration for Sport Jul. 24, 2015), http://www.tas-cas.org/fileadmin/user_upload/AWARD_3759_FINAL__REDACTED_FOR_PUBLICATION_.pdf.

116. *Id.*

117. *Id.* at 53.

118. *Id.* at 59.

119. *Id.* at 54.

120. *Id.* at 56-58.

121. Chand v. Athletics Federation of India (AFI), CAS 2014/A/3759, 59, Interim Arbitral Award of Judge Bennett (Ct. of Arbitration for Sport Jul. 24, 2015), <http://www.tas->

When the CAS panel asked why “men are not tested for high levels of testosterone, the response was that there is a separate system of competition. One expert for CAS answered: “There are two categories—male and female—and that males do not experience the same advantage from excess testosterone as do women.”¹²² For its part, the IAAF concluded by emphasizing that it is pursuing a legitimate objective in protecting the fairness in competitive athletics “by ensuring that elite female athletes are able to compete on a level playing field.”¹²³ Women are benefitted because some with hyperandrogenism are permitted to compete, and that IAAF is also protecting the “health of female athletes with hyperandrogenism by facilitating an expert diagnosis of their condition and enabling the athlete to obtain appropriate and beneficial medical treatment for her condition.”¹²⁴ Finally, the IAAF emphasized fairness to “the vast majority of female athletes who are within the (much lower) normal female range.”¹²⁵ Here, the IAAF relied on the arguments of Professor Murray who explained that the justification for limits on endogenous testosterone were ethically driven and directly related to the protected class status of female athletes.

Professor Thomas Murray . . . stated that if women are to be treated as a ‘protected class’ in athletics competition for reasons of fairness, then the IAAF must police the sex divide ‘to safeguard the promise of fair competition offered by the division of disciplines into sex-specific events.’ In light of testosterone’s performance-enhancing effect, the IAAF says that it has ‘an ethical obligation to assure that women athletes who desire to compete against other women do not have to compete against athletes with hormone-related performance advantages commonly associated with men.’¹²⁶

The CAS panel decision did not provide a clear win for either party. It concluded that the regulations were discriminatory, and that as a result the burden “shift[ed] to the IAAF to establish that the hyperandrogenism regulations are necessary and reasonable for the purposes of establishing a level playing field for female athletes.”¹²⁷ Next, the Panel addressed the scientific basis for the hyperandrogenism regulations to determine whether they were in fact necessary and reasonable to a “level playing field” objective . After detailed review of the testimony on both sides the Panel concluded that Chand had not prevailed on the argument that there

cas.org/fileadmin/user_upload/AWARD_3759_FINAL__REDACTED_FOR_PUBLICATION.pdf.

122. *Id.* at 61.

123. *Id.* at 69.

124. *Id.* at 69-70.

125. *Id.* at 70.

126. *Id.*

127. *Id.* at 126.

was no scientific basis for the testosterone limitations. She “ha[d] not established that there’s no relationship between testosterone and athletic performance.”¹²⁸ Next, the panel addressed the question whether endogenous testosterone conferred a performance advantage in female,¹²⁹ concluding that the question of how the female body processes endogenous versus exogenous testosterone “has not received sufficient attention.”¹³⁰ Despite this knowledge vacuum, the Panel reminded that the burden was on Chand to show that the “the hyperandrogenism regulations are unsupported” by scientific fact.

The evidence as to whether endogenous and exogenous testosterone have the same or different effects on the body did not enable the Panel to draw a conclusion one way or the other. There was competing evidence and competing hypotheses but there is an absence of acceptable data properly to validate either hypothesis. This issue then falls to be determined on the basis of the onus of proof. The Hyperandrogenism Regulations are reasonably based on such scientific and medical data and opinion as were available to the IAAF. The onus is on the Athlete to demonstrate that the Hyperandrogenism Regulations are unsupported by, or not based on, scientific data and that a difference does exist between the effects of endogenous and exogenous testosterone. She has failed to meet that onus.¹³¹

The Panel affirmed the legitimacy of testosterone based differentiation because Chand had not carried her burden of persuasion.¹³² Although the panel agreed with the evidence that demonstrated differences in lean body mass between males and females,¹³³ it concluded that “more study is needed on the metabolism of males and females post puberty and differences in lean body mass.” “After more careful discussion, the panel once again noted that Chand had not shown the irrelevance of testosterone in athletic ability or sports performance. . . [n]or had she met her onus on the balance of probabilities of establishing that exogenous testosterone has a different effect on athletic performance than endogenous testosterone.”¹³⁴

128. *Id.* At 137.

129. *Id.* at 137.

130. Chand v. Athletics Federation of India (AFI), CAS 2014/A/3759, 138, Interim Arbitral Award of Judge Bennett (Ct. of Arbitration for Sport Jul. 24, 2015), http://www.tas-cas.org/fileadmin/user_upload/AWARD_3759_FINAL__REDACTED_FOR_PUBLICATION_.pdf.

131. *Id.* at 141-142.

132. *Id.* at 143.

133. *Id.*

134. *Id.* at 143-144.

A final issue remained: are the hyperandrogenism regulations justified as a necessary and proportionate needs of attaining a legitimate sporting objective. The Panel carefully restated its premises and its approach to the resolution of the problem, noting again that because the regulation discriminates against women on the basis of a natural physical trait paragraph¹³⁵ the IAAF must bear the burden to insure that the regulations are a proportionate means to insuring the legitimate objective of ensuring fairness in athletics competition.¹³⁶ The Panel reiterated that even if the IAAF regulations “are intended to pursue a legitimate objective,” nonetheless IAAF must “show a connection between the restriction and fair competition.” The regulations affect hyperandrogenic women and discriminate among between females with different endocrine and physical characteristics,¹³⁷ including females with intersex characteristics. The Panel noted that these athletes are females who will have variations that range from the normal female range to the normal male range but who are *only* eligible to compete as females.

When an athlete is female and therefore only eligible to compete as a female, is it reasonable and proportionate to impose a test that exclude her from the female athlete category for purposes of competition, which she exhibits, naturally, the characteristic most closely associated male competitive advantage. The panel needs to be satisfied on a balance of probabilities that it is.¹³⁸

The panel returned to the fundamental principle, that “every individual must have the possibility of practice and sports, without discrimination of any kind,”¹³⁹ and in closing emphasized the potential overinclusiveness of a testosterone standard against the background of the fair competition rationale. The Panel noted that some female athletes who have high levels of endogenous testosterone have a medical or genetic condition that accounts for those levels. Others may have high testosterone levels but lack the advantage of lean body mass. In particular, CAS concluded that there was “insufficient evidence about the degree of the advantage that androgen sensitive hyper androgenic females enjoyed over non-androgenic females.”¹⁴⁰ Here, the Panel also noted the possibility that

135. *Id.* at 144.

136. Chand v. Athletics Federation of India (AFI), CAS 2014/A/3759, Interim Arbitral Award of Judge Bennett (Ct. of Arbitration for Sport Jul. 24, 2015), http://www.tas-cas.org/fileadmin/user_upload/AWARD_3759_FINAL__REDACTED_FOR_PUBLICATION_.pdf.

137. *Id.* at 146.

138. *Id.* at 148.

139. *Id.*

140. *Id.* at 150-151. (*quoting* from findings as recent as 2014 in an article published in the Journal of Clinical Endocrinology and Metabolism) (“[T]he absence of

individuals with developmental sexual disorders associated with both physical and hormonal variations might make up a percentage of those elite athletes.¹⁴¹ After addressing the diversity of circumstances in which female athletes might have elevated testosterone levels but not necessarily a competitive advantage, the Panel observed that it is the use of testosterone levels to maintain the male-female distinction in a separate competition structure is different from the use testosterone levels to maintain fairness in inter-female competition.

CAS concluded that there was not enough evidence to show that the Hyperandrogenism Regulations fulfill their stated purpose of creating a level playing field for all female athletes.¹⁴² As a result, on July 24, 2015, the CAS panel suspended the Hyperandrogenism Regulations for two years.¹⁴³

D. Digging in Despite Dutee Chand

In November of 2015, The IOC Medical Commission met to consider both issues of female transgender eligibility and its response to the Dutee Chand CAS decision.¹⁴⁴ The meeting concluded with a resolve by the IOC's and IAAF to continue to defend Hyperandrogenism Regulations "for the protection of women in sports and the promotion of the principles of fair competition."¹⁴⁵ The consensus meeting recommended that the IAAF, with support from other international federations, national Olympic Committees, and other sports organizations, should return to CAS with arguments and evidence to support the reinstatement of the hyperandrogenism Regulations. The IAAF did not provide a response before the Rio Olympics, and the IAAF has until July 2017 to submit new evidence.¹⁴⁶ In fact, many have urged the IOC to abandon the regulations altogether.¹⁴⁷

positive evidence concerning the magnitude of the performance advantage that hyperandrogenic females enjoy as a result of endogenous androgen levels.")

141. *Id.* at 153.

142. *Id.* at 153-54. ("The evidence is that there are inadequate data to establish or refute hypotheses in this area... IAAF has not established on the balance of the probabilities that the hyperandrogenism regulations apply *only* to exclude female athletes that are shown to have a competitive advantage on the order as that of a male athlete.")

143. *Id.* at 160-61.

144. Int'l Olympic Comm. [IOC], *IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism* (November 2015), http://www.triathlon.org/uploads/docs/6.b_2015.11_IOC_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-ENG.pdf.

145. *Id.* at 3.

146. The Consensus statement leaves open the possibility that it could enforce the Regulations if it permits women with testosterone levels in excess of the maximum level to compete with males. That approach would seem to flout the spirit of the CAS decision which was made with the party's stipulation that the separate competition regime was a legitimate structure. Perhaps the Commission concluded that IOC/IAAF

Though the focus of the Hyperandrogenism Regulations is a “fair competition”, partisans close to the issue differ over whether the real question is the maintenance of a feminine ideal. Dr. Michael Beloff, Chair of the IAAF Ethics Board said that the question is not whether “they” are female but just how to set standards to maintain the sex segregation in sport.

It’s not that they are not women. The question is something different: should they be able to compete as women in a sporting contest that’s got a binary divide? So you’re not, as it were, casting doubt on their femininity, you’re simply setting some kind of levels in order to have a level playing field. But what the solution may be I’m not in a position to say.¹⁴⁸

Dr. Silvia Camporesi, a bio ethicist, disagreed noting the difference between Chand’s and Caster’s their differences in deviation from a feminine ideal.

I wish [The Semenya controversy] . . . was about the concern for doping, but I think it’s actually more about how she looks and about the issue of gender in track and field. Dutee Chand, for example, doesn’t run fast enough to grab the media’s attention like Semenya. She also doesn’t look like Caster does and therefore doesn’t appear to pose a threat to our perception of femininity.¹⁴⁹

E. Expand and Limit Transgendered Female Participation

As to the eligibility of transgendered females—those who transition from male to females—the IOC’s treatment of transgendered female athletes is consistent with its determination to maintain control over the visible appearance and capacity of females, whether or not a female has identified with that gender from birth or changed her identity from male to female. The Consensus Statement retains the Hyperandrogenism Regulation levels, among other requirements, as basis for competition while revising other requirements including the requirement of surgical sexual reassignment surgery. Its initial policy, recommended in 2003 by

would not be guilty of discrimination on the basis of gender if a woman has a token competitive opportunity, however meaningless might be in fact.

147. Letter from Professor Bruce Kidd to IOC President Thomas Bach and Members of the IOC (Feb. 9, 2016), <http://www.uwo.ca/olympic/files/pdf/kidd-open-letter-ioc.pdf>; *Six months before Olympics, questions raised on IOC’s ‘consensus’ on hyperandrogenism*, INDIAN EXPRESS, Feb. 24, 2016, <http://indianexpress.com/article/sports/sport-others/questions-raised-on-iocs-consensus-on-hyperandrogenism/>.

148. Ruth Green, *Suspended hyperandrogenism regulations under the spotlight at Rio Olympics*, INT’L BAR ASS’N (Aug. 22, 2016), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=4887edb3-28e2-4546-be2f-6e5f14b7e61f>.

149. *Id.*

the IOC Medical Commission,¹⁵⁰ and adopted by the IOC in May 2004 to apply to the 2004 Athens games¹⁵¹ identified those changes as “sex reassignment,” signaling its attention to the persons who compete in its sex-segregated competitive structure. The policy distinguished between pre-puberty sex reassignment, often authorized by parents, and post-puberty gender identity decisions. With respect to pre-puberty sexual reassignment, the IOC concluded “[i]ndividuals undergoing sex reassignment should be regarded as girls and women (female) and . . . individuals undergoing female to male reassignment, who should be regarded as boys and men (male).” As to changes after puberty, the 2003 policy required surgical alteration for males transitioning to female identity including the removal of external genitalia (penis) and gonadectomy (surgical removal of testes), legal recognition of the new gender identity “by appropriate official authorities,” and verifiable “hormonal therapy” and a two-year waiting period following removal of testes.¹⁵² An “[e]xplanatory note”¹⁵³ justified the policy based on increasing opportunities for transgendered individual to undertake pharmacological and surgical measures to change “sex” to conform their physical appearance to their sex. There were no rules for these rare cases, but the possibility of legal sex reassignment and the desire of athletes to continue competition led to the quest for “specific requirements.” It noted that when the IAAF considered the issues in 1990 it recommended a distinction of pre-puberty and post-puberty cases because males who had undergone reassignment should be evaluated for the continuing influence of

150. INT’L OLYMPIC COMM. MED. COMM’N, THE STATEMENT OF THE STOCKHOLM CONSENSUS ON SEX REASSIGNMENT IN SPORTS (Oct. 28, 2003), https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/News/20040517-IOC-Approves-Consensus-With-Regard-To-Athletes-Who-Have-Changed-Sex/EN-report-905.pdf#_ga=1.251200257.660278482.1478401057.

151. Press Release, Int’l Olympic Comm., IOC Approves Consensus with Regard to Athletes who have Changed Sex (May 18, 2004), <https://www.olympic.org/news/ioc-approves-consensus-with-regard-to-athletes-who-have-changed-sex-1> (“The Executive Board of the International Olympic Committee (IOC) today approved the consensus proposed by the IOC Medical Commission stating the conditions to be respected for a person who has changed sex to compete in sports competitions. These conditions will be applied as of the Games of the XXVIII Olympiad in 2004 in Athens.”).

152. *Id.*; See also Press Release, Int’l Olympic Comm., IOC approves consensus with regard to athletes who have changed sex (May 17, 2004), <https://www.olympic.org/news/ioc-approves-consensus-with-regard-to-athletes-who-have-changed-sex>; INT’L OLYMPIC COMM. MED. COMM’N, THE STATEMENT OF THE STOCKHOLM CONSENSUS ON SEX REASSIGNMENT IN SPORTS (Oct. 28, 2003), https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/News/20040517-IOC-Approves-Consensus-With-Regard-To-Athletes-Who-Have-Changed-Sex/EN-report-905.pdf#_ga=1.251200257.660278482.1478401057.

153. INT’L OLYMPIC COMM., EXPLANATORY NOTE TO THE RECOMMENDATION ON SEX REASSIGNMENT & SPORTS (2003), https://stillmed.olympic.org/Documents/Reports/EN/en_report_904.pdf.

testosterone, but there were no standards or specific requirement. Hence the guidelines.

The 2015 IOC Medical Commission rewrote the transgender guidelines. It noted that since 2003 the Stockholm Consensus Statement on Sex Reassignment there has been growing recognition of the importance of gender autonomy in society as evidenced by an increased number of jurisdictions in which a person was able to declare gender identity without government restriction.¹⁵⁴ The statement expresses the need to ensure that “insofar as possible that trans athletes are not excluded from the opportunity to participate from sport competition.”¹⁵⁵ However, the statement continues on that the overriding sporting objective is and remains to guarantee a fair competition, and that restrictions on participation are appropriate to the extent that they are necessary to the achievement of that objective. The positive development for transgendered female competitors is that the Medical Commission rejected the necessity for “surgical anatomical changes” as a precondition to participation.¹⁵⁶ The 2015 Consensus statement concludes that these changes are not necessary for fair competition and may be inconsistent with developing notions of human rights.¹⁵⁷ Nonetheless, the Consensus statement reaffirms the IOC’s historical commitment to limitations of women’s participation in the name of “fair competition.” In that spirit, the consensus meeting concluded “that those who are transitioning from female to male are eligible to compete in the male category without restriction” but imposed limitations on transgender females.¹⁵⁸ The athlete must declare that her identity is female, the athlete may not change that declaration for four years, and the athlete must prove prior to competition that her total testosterone levels have been below the level identified in the hyperandrogenism regulations that were declared unenforceable with respect to non-transgendered females for at least 12 months prior to her first competition—with the possibility of a longer period—to minimize any advantage in women’s competition.”¹⁵⁹ In addition, that total testosterone level must remain below that level throughout the period of

154. INT’L OLYMPIC COMM., IOC CONSENSUS MEETING ON SEX REASSIGNMENT AND HYPERANDROGENISM NOVEMBER 2015 (2015), https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/Who-We-Are/Commissions/Medical-and-Scientific-Commission/EN-IOC-Consensus-Meeting-on-Sex-Reassignment-and-Hyperandrogenism.pdf#_ga=1.80353367.137738771.1479674469

155. *Id.* at 2.

156. *Id.*

157. *Id.* at 3.

158. *Id.* at 2.

159. *Id.* The details of these hormonal therapies are available in Madeline B. Deutsch, *Overview of feminizing hormone therapy*, Center of Excellence for Transgender Health, <http://www.transhealth.ucsf.edu/trans?page=guidelines-feminizing-therapy>.

desired eligibility to compete in the female category—and testing would monitor compliance.¹⁶⁰

The new IOC policy's abandonment of the requirement of surgical reassignment certainly defensible. It is consistent with a developing consensus that mandatory surgical reassignment is unethical. These surgeries vary in their complexity and risk, are not always necessary, and when chosen by an individual must be tailored to the particular needs of that individual.¹⁶¹ The policy is also consistent with the Chand CAS Panel's emphasis on the right to participate in sport without gender discrimination. It is also consistent with the Panel's distinction between the use of a testosterone level to separate those eligible for male and female competition as distinct from the selection of a testosterone level necessary to insure fair to inter-female competition. But it is not clear that the current level chosen will escape challenge by males transitioning to females who wish to compete as females. As the CAS Panel noted, the scientific bases of these endogenous testosterone based distinctions are not free from doubt. Ultimately, these transgender regulations will have their day in CAS.¹⁶²

II. EQUALITY BEYOND INCLUSION—DEFINING, MEASURING, AND INSURING GENDER EQUALITY IN OLYMPIC SPORT

A. *Defining Equality in Olympic Sport*

Whether gender equality exists in Olympic sport depends on chosen equality norms and the selected yardsticks. The current approach of the IOC leaves in place both the gendered structure of sport competition—the “separate” model—as well as the gendered structure of sport with male control over Olympic institutions as well as coaching and management. To explore this topic further, the Centre for Sport Policy Studies at the

160. INT'L OLYMPIC COMM., *supra* note 154, at 3. These changes are consistent with

161. See World Professional Association for Transgender Health “Standards of Care for the Health of Transexual, Transgender, and Gender Nonconforming People 54-65 (7th Version 2011) http://www.wpath.org/site_page.cfm?pk_association_webpage_menu=1351&pk_association_webpage=4655. The National Intercollegiate Athletic Association does not endorse mandatory surgical reassignment as a condition to participation on the basis of a preferred identity. Executive Committee, National Intercollegiate Athletic Association, “NCAA Inclusion of Transgender Student Athletes,” August 2011, https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf. Seventeen states do not require sexual reassignment surgery as a requirement for interscholastic sport participation in preferred gender. See Stacey Michel, “Not Quite a First Place Finish: An Argument that Recent Title IX Policy Clarification from the United States Department of Education Does Not Adequately Protect Transgender Interscholastic Athletes,” 25 *Law and Sexuality* 145, 151-152 (2016).

162. Madeline B. Deutsch, *Overview of feminizing hormone therapy*, Center of Excellence for Transgender Health, <http://www.transhealth.ucsf.edu/trans?page=guidelines-feminizing-therapy>

University of Toronto conducted two audits—one on the 2012 London Summer Games and a second on the 2014 Sochi Winter Games—to assess the extent to which the Olympic competitive opportunities and rules and structures are equal for men and women.¹⁶³ Both audits expressed concern that celebratory statements of gender equality progress were premature, and that a focus on numerical equality and women in leadership was too narrow to address the “persistent issues of gender equality”¹⁶⁴ and “the tendency to assume that equality in participation has been, or will shortly be achieved at the Olympic Games.”¹⁶⁵

They examined the extent to which sport, its institutions, and its rules including male and female separate spheres, construct and reinforce the narratives of male supremacy and aggression, and female subordination and weakness.¹⁶⁶ On the basis of the forgoing discussion of the brutal and humiliating enforcement of a feminine ideal on Olympic competitors, and remaining differences in both competitive opportunities and policymaking roles, Olympic Sport remains a gendered institution.

The audit’s broad question, originally taken up in the context of race, is whether de jure “separate” can be “equal.” In *race*, the answer has been no, *inter alia*, in the context education¹⁶⁷ and recreation.¹⁶⁸ In the context of gender, the policy of separate public gender institutions has fallen after equal protection challenges,¹⁶⁹ while sport has retained separate schemes of competition in both the private and the public sector under legal protection on the basis of tradition and arguments stressing greater opportunity for girls and women in a separate scheme.¹⁷⁰ Notwithstanding this worldwide adoption of a gender separated scheme for sport, the question remains whether such schemes deliver women equal

163. See Michele Donnelly et al., *The Sochi 2014 Olympics: A Gender Equality Audit* (Aug. 2015), <http://physical.utoronto.ca/docs/csps-pdfs/the-sochi-2014-olympics---a-gender-equality-audit.pdf?sfvrsn=2>; see Peter Donnelly et al., *The London 2012 Olympics: A Gender Equality Audit* (Mar. 2013), http://assets.sportanddev.org/downloads/the_london_2012_olympics_a_gender_equality_audit.pdf.

164. P. Donnelly, *supra* note 162, at 5; see M. Donnelly, *supra* note 162.

165. P. Donnelly, *supra* note 162, at 5.

166. Mikaela J. Dufur & Matthew Linford, *Title IX Consequences for Gender Relations in Sport*, 4 SOCIOLOGY COMPASS 732 (2010).

167. See *Mo. ex rel Gaines v. Canada*, 305 U.S. 337 (1938); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950); *Brown v. Board of Education*, 347 U.S. 483 (1954).

168. See *Mayor & City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955).

169. See *United States v. Virginia*, 518 U.S. 515 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995).

170. See 34 CFR § 106.41 (2010). See, e.g., *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996). See also U.S. DOJ TITLE IX LEGAL MANUAL (2015), <https://www.justice.gov/crt/title-ix#I.%20Overview%20of%20Title%20IX:%20Interplay%20with%20Title%20VI,%20Section%20504,%20Title%20VII,%20and%20the%20Fourteenth%20Amendment>.

opportunities to compete without the reinforcement of gender subordination and stigmatization due to the incorporation of “weaker sex assumptions” and rules that reinforce traditional notions of male physical and superiority. A considerable body of sociological literature takes the view that these schemes do embody in their *DNA*’s ancient stereotype about the athletic ability and potential of women¹⁷¹ what Justice O’Connor and Justice Ginsburg in other contexts referred to as “fixed notions concerning the roles and abilities of males and females...[and reflect... archaic and stereotypic notions.”¹⁷² The two audits examine not only numerical equality in medal opportunities, but also the rules and structure of competition.

B. Measuring Equality Through Quantitative and Qualitative Audits

Both audits found differences in the treatment of men and women. The London Summer Games Audit noted that, 90 percent of the journalists covering the games were male¹⁷³ and 85 percent of the content was coverage of men’s sporting events¹⁷⁴ a difference that reinforced the lesser importance of female sport completion as did the decision of some countries to provide luxury transportation arrangements for men such as first-class air for male teams and coach class for women’s teams.¹⁷⁵ There was a difference in the number of events open to men and women—136 and 166 for men, a 15.9 percent difference in the number of competitors affirms the importance of male competitive opportunity¹⁷⁶ and the resultant difference in medal opportunities, —thirty-four more opportunities to medal than women.¹⁷⁷ Provided men with more tangible evidence of their athletic superiority. In cases in which men and women performed the same event or “discipline,”¹⁷⁸ men had more competitors in their events than women,¹⁷⁹ and male disciplines had more sub-disciplines than women; these included boxing, canoe, kayak, all cycling events except cycling track, soccer, rowing, sailing, shooting, water polo, weightlifting, and wrestling.¹⁸⁰ In addition, the report noted events in which men are

171. See, e.g., MCDONAGH & PAPPANO *supra* note 163; HARGREAVES, *supra* note 7, at 26-34, 40-41, 216-220. Michael Messner, *Sport and Male Domination- The Female Athlete as Contested Ideological Terrain*, 5 SOCIOLOGY OF SPORT J. 197, 197 (1988) (“...organized sports...serve[s] as a primary institutional means for bolstering a challenged and faltering ideology of male superiority in the 20th century.”).

172. *United States v. Virginia*, 518 U.S. 515, 541 (1996) (Ginsburg, J.) (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (O’Connor, J.)).

173. P. Donnelly, *supra* note 162, at 14.

174. *Id.*

175. *Id.* at 13.

176. P. Donnelly, *supra* note 162, at 20.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 21-27.

permitted to race farther than women, such as track and field hurdle events, canoe, kayak, cycling events, and swimming¹⁸¹ differences that reinforce notions of female weakness and male superior endurance.

Certain events are judged in part on the basis of appearance criteria that reinforce a stereotypical feminine ideal. Differences in uniforms and attire rules *sexualized* female athletes. The high—or low point—of sexualization was beach volleyball in which women wear bikini swimsuits which were once restricted to a maximum of square inches.¹⁸² The women's only sports, gymnastics rhythmic and synchronized swimming, include appearance in their judging criteria. Synchronized swimming includes grooming, attire, make up, and self-presentation.¹⁸³ For example, "[t]heatrical make-up shall not be worn and [s]traight make-up that provides a natural, clean and healthy glow is acceptable"¹⁸⁴ Performances should be "[c]aptivating,"¹⁸⁵ and competitors should be "[c]onfident and appealing."¹⁸⁶ In describing the elements of excellent score the judging criteria notes that high scorers will be those who are "exhibiting dynamism and strength yet... are fluid, graceful and captivating. They have an allure, an appeal to the senses, a magnetism; in short, they have charisma."¹⁸⁷ Similarly, gymnastics rhythmic, whose rules open with a crotch view photographic of a female in an airborne split¹⁸⁸ requires "skin tight gymnastic leotards... to enable the judges to evaluate the correct position of every part of the body,"¹⁸⁹ a synthesis of beauty and elegance,¹⁹⁰ "character and emotional responses to music,"¹⁹¹ "makeup clear and light,"¹⁹² and "facial expressions... [that] communicate the theme of the music and the message of the composition."¹⁹³

181. *Id.* at 22-23.

182. *Id.* at 27. See FIVB, Uniform change for all beach volleyball events (March 18, 2012), <http://www.fivb.org/viewPressRelease.asp?No=33699&Language=en#.VxFdXXAdODE>

183. P. Donnelly, *supra* note 162, at 28. *FINA Synchronized Swimming Manual for Judges, Coaches & Referees*, FINA (2013-2017), <http://www.rfen.es/publicacion/userfiles/FINA%20SY%20Manual%202013-2017.pdf>.

184. See *FINA*, at 92.

185. *Id.* at 103.

186. *Id.*

187. *Id.* at 109.

188. *Code of Points Rhythmic Gymnastics*, Federation International de Gymnastique 1, 7 (2013-2016), <http://www.fig-docs.com/Media/Codes%20of%20Points%202013%20-%202016/RG/RG%20Total%20CoP%20Feb%2020%202012%20Last%20version-e.pdf>.

189. *Id.*

190. *Id.*

191. *Id.* at 10.

192. *Id.* at 7.

193. *Id.* at 20.

With respect to recommendations, the London Audit acknowledges “an extended period of increasing gender equality at the summer Olympic Games. . .”¹⁹⁴ but concludes that more must be done to achieve gender equality in competitive opportunity, because “there are still substantial differences in terms of opportunities to participate, and in terms of structural characteristics of the competition”¹⁹⁵ For example, the report recommended that the IOC should include opportunities to “equalize the number of events metals available to women”¹⁹⁶ and “establish near equivalents in the number of men and women who are permitted to compete at the Olympic Games and in specific Olympic sports events.”¹⁹⁷ The London Audit acknowledged that the opportunity to achieve these recommendations may depend upon the insulation and exemption that Olympic Institutions—the IOC, its national Olympic committees, and its international sports federations—have enjoyed from developing societal norms.¹⁹⁸ The report recommends that the Olympic movements embrace the World Anti-Doping Agency model in which an international body would set gender equity expectations and norms and also hold Olympic-related institutions accountable to those norms,¹⁹⁹ a step the IOC has authority to adopt.²⁰⁰

In respect to structure and events rules, the London Audit recommended the creation of broadly representative panels to examine the rationales for differing competition distances for male versus female events.²⁰¹ These differences may be the product of paternalistic and protective notions about the capacity of women unrelated to actual female potential.²⁰² In the same vein, the London report recommends that the IOC establish expert panels to determine whether differences in weight categories, venue characteristics, equipment, and duration of competition ought to be revised or eliminated.²⁰³

The London report acknowledges that it is not a comprehensive evaluation of all gender inequalities that plague Olympic sport. The audit notes that there are other controversial issues, including “gender equity funding and sponsorship, publicity and media representation, leadership, gender verification.”²⁰⁴ However, the authors argue that a hard look at competitive inequalities might lay a foundation for a broader project that might lead to wholesale gender reconstruction of Olympic sport.

194. P. Donnelly, *supra* note 162, at 29.

195. *Id.* at 20. *See also* M. Donnelly, *supra* note 162, at 6.

196. P. Donnelly, *supra* note 162, at 30.

197. *Id.* at 31.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 33.

202. P. Donnelly, *supra* note 162, at 34.

203. *Id.* at 34.

204. *Id.* at 31.

In the Sochi Audit, following the 2014 Winter Games²⁰⁵ held in Krasnodar Krai, Russia, and a nearby custom-built Olympic Park on the Black Sea dubbed Sochi,²⁰⁶ faculty from the Center for Sport Policy Studies at the University of Toronto set out to determine whether there were differences in the competitive opportunities for men and women at the Games.²⁰⁷ The report sought to address both “gender differences in their structures and rules” and also to assess whether there were differences in the number of opportunities to compete as well as to earn medals at those games, for men and women athletes. The authors concluded that these “differences in men’s and women’s opportunities to participate and the ways in which they are able to participate (i.e., what their participation looks like and how it is experienced) may reveal important assumptions about gender and, specifically, about presumed essential differences between women and men.”²⁰⁸

The researchers agreed that though women have greater participation opportunities than ever before,²⁰⁹ “there are still substantial [gender] differences in terms of opportunities to participate and the structural characteristics of the competition.”²¹⁰ Additionally, the report looked at the remaining differences between competitive opportunities for men and women. The Audit found that there were 7.5 more events for men than for women—accounting for 7 more gold medal opportunities (as well as 7 more bronze and silver medal opportunities).²¹¹ There are also disciplines in which the numbers of competitors permitted were greater for men than for women.²¹² For example, 89 men and 82 women compete in biathlon,²¹³ 50 men and 42 women compete in Alpine skiing,²¹⁴ and bobsleigh permits 130 male competitors and 40 women.²¹⁵

The Audit identifies the specific instances of gender inequality that exemplify society’s protective notions about women’s athletic capacity, which are reflective of early 20th century notions about the *delicacy* of

205. *Id.*

206. IOC 2014 EVALUATION COMMITTEE REPORT, OLYMPIC WINTER GAMES IN 2014 18 (2007),

https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/IOC/Olympic_Games/Olympic_Games_Candidature_Process/Past_Candidature_Processes/2014_Host_City_Election/EN_2014_Evaluation_Commission_report.pdf.

207. M. Donnelly, *supra* note 162.

208. *Id.* at 5.

209. *Id.* at 6.

210. *Id.*

211. *Id.* at 18.

212. *Id.* at 18-21.

213. M. Donnelly, *supra* note 162, at 18.

214. *Id.* at 11.

215. Bobsleigh permits 24 athletes per country—18 men and 6 women, a difference partially attributable to an additional men-only event, the 4 man sleigh, in addition to the 2 man (*sic*) sleigh in which women also participate. M. Donnelly, *supra* note 162, at 19.

women.²¹⁶ For example, in the rules and structural aspects of the competition,²¹⁷ there are races in which women competed over shorter distance than men such as biathlon and cross country skiing;²¹⁸ alpine skiing and ski-jumping that involve shorter courses and less steep courses-vertical drops;²¹⁹ events that involve different weight categories and weight restrictions for women; and events in which there were differences between men's and women's competition in terms of the height, weight, size and spacing of equipment, or the size of the venue such as biathlon with difference in the timing and spacing of shooting "bouts."²²⁰ In addition, the sport of ice hockey requires women to wear a full facial mask, while only half facial masks are required for men.²²¹ And women are not permitted to "body check"—use her hip or body to hit an opponent, driving her into the boards or ice. Illegal in the women's game, body checking, a cause of concussions,²²² is permitted in the male competition.²²³

The authors also made several recommendations for increasing equality. They recommended that the IOC "equalize the number of event medals available to women"²²⁴ as well as the number of men and women who are permitted to compete at the Olympic games as well as in the specific Olympic sports and events.²²⁵ The Audit also recommended that the IOC change "the rules and structures of events" to eliminate gender inequities.²²⁶ Both the number of competitors and the rules and structures of events are currently within the sole control of multiple international winter sport federations. The report recognizes that the IOC has already acknowledged that numerical gender inequality is no longer acceptable in

216. Even the naming of some sport disciplines embodies assumptions about appropriate female behavior. As the Audit authors note in 'A Note on "Ladies" versus "Women"', one of the most striking differences on the Sochi Olympic programme is the difference in naming among the women's sports. M. Donnelly, *supra* note 199, at 29. Specifically, two of the seven sports (Skating and Skiing) account for nine of the fifteen competitions; both use 'Ladies'. *Id.* The authors note, "It seems that in 2014 much of Lerner's argument [that the term lady imparts a tone of frivolity and lightness to the striving and accomplishments of women] remains relevant." *Id.*

217. M. Donnelly, *supra* note 162, at 17.

218. *Id.* at 20.

219. *Id.* at 21, 23.

220. *Id.* at 22-23.

221. *Id.* at 26.

222. Anthony Marchie and Michael Cusimeno, *Body Checking and Concussions in Ice Hockey – Should Our Youth Pay the Price*, 169 CMAJ 124 (2003).

223. The Audit does not argue that body checking ought to be extended to women's hockey, but merely observes athletes should be consulted about to determine what is appropriate. M. Donnelly, *supra* note 162, at 40.

224. *Id.* at 33-34.

225. *Id.* at 34-35.

226. *Id.* at 37-41.

the Olympic Games and resolved at its 2014 Monaco IOC meeting to “Foster Gender Equality.”²²⁷

The IOC Women in Sport Commission, which monitors gender equality in Olympic sport and makes recommendations to the IOC,²²⁸ has for 16 years urged the IOC to require the equalization of the number of men and women in Olympic Competition.²²⁹ Furthermore, uniform requirements impact athletes’ scores in a gender-biased manner. The Audit noted that figure skating and ski-jumping uniforms were noted as being “specifically gendered”²³⁰ in a way that accentuated the female figure²³¹ by specifying the darts and seams for men’s uniforms and for women’s uniforms: the specifications for women’s uniforms accentuate the bust and hips.²³²

On the other hand, the Audit indicates there are some sports, such as ski-jumping, freestyle skiing, and snowboarding, are scored in the same manner for women and men.²³³ So too it is for both freestyle skiing and snowboarding.²³⁴ In those sports, women and men use the same course and are judged with the same criteria — amplitude, difficulty, execution, variety, pipe use, progression, risk-taking, and combinations.²³⁵ As to snowboard judging, the considerations include an assessment of difficulty, and judges may give a woman a higher score if she incorporates moves ordinarily men only perform.²³⁶

Finally, the report concludes that event names depict gender biases as well. The skating events are called “Ladies Skating” and the skiing event “Ladies Skiing.”²³⁷ The report notes that the athletic federations that govern these sports—the International Skating Union (ISU) and the Federation International de Ski (FIS) —determine the event names.²³⁸ The authors note that several prominent scholars have noted “calling attention to this difference is important because language is never neutral.”²³⁹

227. IOC, OLYMPIC AGENDA 2020 15 (2014), <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/Olympic-Agenda-2020/Olympic-Agenda-2020-127th-IOC-Session-Presentation.pdf>.

228. See THE IOC WOMEN IN SPORT COMMISSION, <https://www.olympic.org/olympic-agenda-2020> (for the role of the Women in Sport Commission’s goals and responsibilities.)

229. See, e.g., REPORT, 5TH IOC WORLD CONFERENCE ON WOMEN AND SPORT (2012), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/women_and_sport/report_5th_conference_women_and_sport_EN.pdf.

230. M. Donnelly, *supra* note 162, at 26-27.

231. *Id.* at 28.

232. See diagrams for men’s and women’s uniforms. *Id.* at 83-34.

233. *Id.* at 28.

234. *Id.*

235. *Id.*

236. M. Donnelly, *supra* note 162, at 29.

237. See *Id.* at 44-51.

238. *Id.* at 29-30.

239. *Id.* at 29.

Instead, language “reveals embedded social meetings, including overt and covert biases, stereotypes, and inequities.”²⁴⁰

In the past, there were numerous contexts in which the separation of women from men was de jure maintained—education²⁴¹ military academies,²⁴² the military, and military combat²⁴³ prisons²⁴⁴ police departments,²⁴⁵ and fire departments.²⁴⁶ We have few contexts remaining in the strict of separation of males from females remain—in prisons²⁴⁷ and in sports.²⁴⁸ Although the developments in both educational institutions and Olympic institutes have provided increased competitive opportunities, they have also incorporated fewer competitive opportunities and medal opportunities. Although some have called for the elimination of separate competition²⁴⁹ the Audit authors call for equalization of numerical and medal opportunities, as well as for rigorous review of differences in rules and structure of events.²⁵⁰ The authors do not provide guidance for this next step, but their call for rigorous review might be modeled on federal employment discrimination law’s limited availability of gender exclusive job categories to those that meet the “bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise,²⁵¹ currently limited to public safety considerations or ²⁵²

240. *Id.* at 29 (quoting Michael A. Messner, et al, *Separating the Men from the Girls: The Gendered Language of Televised Sports*, 7 GENDER & SOC’Y, 121, 133 (1993)).

241. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (gender segregation in Nursing schools unconstitutional).

242. *United States v. Virginia*, 518 U.S. 515 (1996). (gender segregation in military education unconstitutional); *Faulker v. Jones* 858 F.Supp. 552 (D.S.C. 1994).

243. Commander, Submarine Forces Public Affairs, Navy Policy *will allow women to Serve Aboard Submarines*, www.NAVY.MIL (April 29, 2010 6:35 AM), http://www.navy.mil/submit/display.asp?story_id=52954 (last visited Nov. 4, 2016).

244. *Dothard v. Rawlinson*, 433 U.S. 321 (1987) (exclusion of women illegal but sex is bona-fide occupational qualification in violent prison with sex offenders).

245. *Blake v. City of Los Angeles* 595 F.2d 1367, (9th Cir. 1979) (exclusion of women from police service illegal).

246. *Berkman v. City of New York*, 705 F.2d 584 (2nd Cir 1983) (exclusion of women from firefighting illegal).

247. See Sarah Pemberton, *Enforcing Gender: The Constitution of Sex and Gender in Prison Regimes*, 39 SIGNS: J. OF WOMEN IN CULTURE AND SOC’Y 151, 153 (2013) (“... [S]ex segregation in English and American prisons contrasts with the absence of sex segregation in most schools, universities, workplaces, and many medical facilities.”).

248. 34 C.F.R. § 106.41(b) (Title IX of the Education Amendments permits “...separate teams for members of each sex...”).

249. MCDONAGH & PAPPANO, *supra* note 163.

250. M. Donnelly, *supra* note 162, at 22-38.

251. Title VII of the Civil Right Act of 1964, 42 U.S.C. 2000e-2(e) (LexisNexis 2012).

252. *Dothard v. Rawlinson*, 433 U.S. 321 (1987) (exclusion of women illegal but sex is bona-fide occupational qualification in violent prison with sex offenders).

personal intimate privacy.²⁵³ In both *M.U.W v. Hogan*²⁵⁴ and *United States v. Virginia*,²⁵⁵ Justices O'Connor and Ginsburg respectively persuaded the Supreme Court that gender equality required a model of rigorous justification for gender segregation that was "exceedingly persuasive" and devoid of "...overbroad generalizations about the different talents, capacities, or preferences of males and females."²⁵⁶

For various reasons, it seems unlikely that the Olympic family will undertake such a review. The mainstream internal calls for reform, led by the IOC Commission on Woman and Sport, have focused on the equalization of competitive opportunity, not the elimination of the separate structure or competitive rule and structure differences. This is possibly a matter of priority and pragmatics—there is already a theoretical commitment to numerical equality. And the IOC is a highly federalized system with biennial spectacles that leave little time for fundamental reevaluation. Taking that next step—an examination of stereotype, sexuality, and signs embedded in Olympic sport would require a level of introspection inconsistent with the maintenance of the feminine ideal and its bedfellow, hegemonic masculinity.²⁵⁷

III. MALE OLYMPIC GOVERNANCE INSTITUTIONS— FROM TOKENISM TO POWER SHARING

The understanding of the contemporary influence of the feminine ideal in Olympic sport is incomplete without an examination of the gendered nature of Olympic power and governance and hegemonic masculinity. If males dominate all key Olympic organizations, a clear message is sent that women do not belong in policymaking roles. Such a state of affairs would be inconsistent with norms of gender justice that focus on participatory parity as a standard for Olympic Sport in light of its status as a global "major form of interaction"²⁵⁸ politically and economically.²⁵⁹ Participation in Olympic Sport governance that confers

253. *United Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 206 n.4 (1991) (privacy interests may justify BFOQ).

254. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

255. *United States v. Virginia*, 518 U.S. 515 (1996).

256. *Id.*

257. R.W. CONNELL, *GENDER AND POWER—SOCIETY, THE PERSON, AND SEXUAL POLITICS* 183-187(1987) (describing "hegemonic masculinity" as male power and domination over women idealized as feminine and non-masculine men). *See also* R.W. Connell, *Hegemonic Masculinity—Rethinking the Concept*, 19 *GENDER & SOC'Y* 829 (2005) (conceding the need for nuanced and non-essentialist conceptions of masculinity but reaffirming the utility of the hegemonic masculinity construct).

258. Ann Travers, *The Sport Nexus and Gender Injustice*, 2 *STUD. IN SOC. JUST.* 79, 80 (2008).

259. John R. Gold & Margaret M. Gold, *Olympic Cities: Regeneration, City Rebranding and Changing Urban Agendas*, 10 *Geography Compass* 300 (2008) ("Winning the right to host the Olympic Games is widely regarded as the most

enormous prestige and power on its overseers. For example, the power to confer the Olympic Games on a city has led to bribery scandals that have revealed the potential power of IOC members and the abuse of that power.²⁶⁰ The “sex segregated structure of sport . . . in itself represents gender injustice. This structure is coercive and in itself represents gender injustice.”²⁶¹ The domination of male policymakers in Olympic sport produces and reinforces the legitimacy of gender segregation in Olympic sport that, upon close examination, is anything but equal.²⁶²

The leadership of Olympic sports organizations is profoundly gendered although incremental change is underway. There are currently twenty-six women of 98 members on the IOC Board, twenty of whom were appointed after 2000 and sixteen of whom were appointed after 2008.²⁶³ “The vast majority (85 percent) of National Olympic Committees have all-male leadership teams. Only six of the 28 IFs have exceeded the 20 percent threshold.”²⁶⁴

The IOC has not been indifferent to the lack of women in leadership roles in Olympic sport institutions, and there is evidence that Olympic bodies acknowledge the need for increased gender equality in Olympic sport. The IOC created an IOC Women and Sport Commission,²⁶⁵ which initially proposed a 10 % goal for female membership in Olympic governing bodies at its First World Conference on Women in Sport in Lausanne, Switzerland in 1996.²⁶⁶ At its Second World Conference, in 2000, it reiterated its 20% goal by 2005.²⁶⁷ That goal, unmet, was restated at its

significant prize on offer in the never-ending contest between the world’s leading cities for prestige and investment.”).

260. Bill Mallon, *The Olympic Bribery Scandal*, 8 *J. of Olympic Hist.* 11 (2000).

261. Travers, *supra* note 257.

262. *See infra* text accompanying notes 269-272.

263. *IOC Members*, OLYMPIC.ORG, <http://www.olympic.org/ioc-members-list> (last visited Nov. 4, 2016)

264. Maureen M. Smith & Alison M. Wrynn, *Women in the Olympic and Paralympic Games: An Analysis of Participation and Leadership Opportunities*, WOMENSPORTSFOUNDATION.ORG at 7-8 (Apr. 2013), <https://www.womenssportsfoundation.org/sitecore/content/home/research/articles-and-reports/athletes/2012-olympic-report.aspx>.

265. *See The Int’l Olympic Comm.: Women and Sport Comm’n*, OLYMPIC.ORG (Aug. 9, 2016), <https://www.olympic.org/women-in-sport-commission>.

266. Int’l Olympic Comm., *IOC World Conference on Women and Sport, 1996: Resolution of the 1st IOC World Conference on Women and Sport*, OLYMPIC.ORG, <https://www.olympic.org/women-in-sport/advocacy/ioc-world-conference-on-women-and-sport> (follow “Read more about the IOC World Conference on Women and Sport” hyperlink at the bottom of the webpage; scroll down to the slide titled “1st IOC World Conference on Women and Sport: Lausanne, Switz., 1996”; follow “Lausanne Resolution” hyperlink) (last visited Nov. 6, 2016).

267. Int’l Olympic Comm., *IOC World Conference on Women and Sport, 2000: Resolution of the 2nd IOC World Conference on Women and Sport*, OLYMPIC.ORG, <https://www.olympic.org/women-in-sport/advocacy/ioc-world-conference-on-women-and-sport> (follow “Read more about the IOC World Conference on Women and

subsequent World Conferences—Morocco 2004,²⁶⁸ Jordan 2008,²⁶⁹ and Los Angeles 2012.²⁷⁰ In 2007, the IOC amended its Charter to express support for gender equality in Olympic Sport, stating that part of its role is “to encourage and support the promotion of women in sport at all levels and in all structures, with a view to implementing the principle of equality of men and women.”²⁷¹

In 2009, the IOC Women’s Commission funded a study of the status of women’s leadership in Olympic sport institutions as well as to identify barriers to increased representation of women in Olympic sport governing bodies.²⁷² The report entitled “Gender Equity and Leadership in Olympic Bodies”, published in 2010, set forth the details of the marginalization of women in the leadership of Olympic Bodies despite the IOC 2000 that recommended that women should be 20 percent of the leadership of the IOC and of international sports organizations by 2005. The study and report were completed by the Centre for Olympic Studies and Research (COS&R) at Loughborough University.²⁷³ The report, found that among the National Olympic Committees women were 17.6 percent of the membership and 18 percent on the executive committees of international

Sport” hyperlink at the bottom of the webpage; scroll down to the slide titled “2nd IOC World Conference on Women and Sport: Paris, Fr., 2000”; follow “Paris Resolution” hyperlink) (last visited Nov. 6, 2016).

268. Int’l Olympic Comm., III World Conference on Women and Sport: “New Strategies, New Commitments”, OLYMPIC.ORG at 1 (Mar. 9, 2004), <https://www.olympic.org/women-in-sport/advocacy/ioc-world-conference-on-women-and-sport> (follow “Read more about the IOC World Conference on Women and Sport” hyperlink at the bottom of the webpage; scroll down to the slide titled “3rd IOC World Conference on Women and Sport: Marrakech, Morocco, 2004”; follow “Marrakech Declaration” hyperlink).

269. Int’l Olympic Comm., 4th World Conference on Women and Sport: “Sport as a Vehicle for Social Change”, OLYMPIC.ORG (Mar. 8-10, 2004), <https://www.olympic.org/women-in-sport/advocacy/ioc-world-conference-on-women-and-sport> (follow “Read more about the IOC World Conference on Women and Sport” hyperlink at the bottom of the webpage; scroll down to the slide titled “4th IOC World Conference on Women and Sport: Dead Sea, Jordan, 2008”; follow “Dead Sea Report” hyperlink).

270. Int’l Olympic Comm., 5th World Conference on Women and Sport: *The L.A. Declaration*, OLYMPIC.ORG (Feb. 18, 2012), <https://www.olympic.org/women-in-sport/advocacy/ioc-world-conference-on-women-and-sport> (follow “Read more about the IOC World Conference on Women and Sport” hyperlink at the bottom of the webpage; scroll down to the slide titled “5th IOC World Conference on Women and Sport: L.A., U.S., 2012”; follow “L.A. Declarations” hyperlink).

271. Int’l Olympic Comm., *Olympic Charter: In Force from 7 July 2007*, OLYMPIC.ORG at 15 (Oct. 2012), <https://www.olympic.org/olympic-studies-centre/collections/official-publications/olympic-charters> (follow “2007 - Olympic Charter” hyperlink).

272. Henry & Robinson, *Leadership in Olympic Bodies*, *supra* note 256, at 8. See also Smith & Wrynn, *supra* note 256, at 3.

273. Henry & Robinson, *supra* note 256, at 8.

sports federations²⁷⁴ with considerable variation in representation in both categories of organizations.²⁷⁵

These results were consistent with the results of 2013 SHARP report, conducted by n research institute at the University of Michigan at Ann Arbor. The SHARP report found that 85.3 percent of the national Olympic committees had all male leadership teams, and that only six of 28 international federations had exceeded the 20 percent threshold.²⁷⁶ Eight of the 29 United States national governing bodies of sport are below the 20 percent threshold ranging from 0 to 18 percent female representation, and of the 58 leadership positions on United States national governing bodies of sport, six are held by women.²⁷⁷ Within the National Olympic Committees 174 of 204 have all-male leadership teams, 29 have females on their leadership teams, and just one—Zambia—has an all-female leadership team.²⁷⁸

Six of the 28 international (sports) federations have executive boards that exceed the 20 percent threshold for female membership while ten (35.7 percent) have executive boards with no female members.²⁷⁹ At the conclusion of the International Olympic Committee (IOC) Women in Sport Commission's 2012 IOC Fifth World Conference on Women in Sport—themed Stronger Together²⁸⁰—the IOC acknowledged the progress women have made in Olympic participation with two women serving on the IOC Executive Board of fifteen members.²⁸¹ There are currently three female members of the IOC Executive Committee.²⁸²

274. *Id.* at 10.

275. *Id.*

276. Smith & Wrynn, *supra* note 256; *see generally* MAUREEN M. SMITH & ALISON M. WRYNN, WOMEN IN THE 2010 OLYMPIC AND PARALYMPIC WINTER GAMES: AN ANALYSIS OF PARTICIPATION, LEADERSHIP AND MEDIA OPPORTUNITIES, WOMENSSPORTSFUNDATION.ORG (Nov. 2010), <https://www.womenssportsfoundation.org/research/article-and-report/athletes/2010-olympic-report/> (SHARP Center report on the 2010 Olympic and Paralympic Winter Games).

277. Smith & Wrynn, *supra* note 256, at 43-44.

278. *Id.* at 31.

279. *Id.*

280. Int'l Olympic Comm., *supra* note 263.

281. Int'l Olympic Comm. of Int'l Cooperation and Dev., *Progress Report—From the Dead Sea to L.A.: The Journey Towards Success Goes on. . .*, OLYMPIC.ORG at 12 (Jan. 31, 2012), <https://www.olympic.org/women-in-sport/advocacy/ioc-world-conference-on-women-and-sport> (follow “Read more about the IOC World Conference on Women and Sport” hyperlink at the bottom of the webpage; scroll down to the slide titled “5th IOC World Conference on Women and Sport: L.A., U.S., 2005”; follow “Progress Report: From Dead Sea to L.A.” hyperlink); *see also id.* (the Commission reported that nine NOCs were headed by female Presidents, and that there were twenty-three female Secretaries General [heading NOC bodies].).

282. *See The Int'l Olympic Comm.: IOC Exec. Bd.*, OLYMPIC.ORG, <https://www.olympic.org/women-in-sport-commission> (follow “composition” hyperlink) (last visited Nov. 7, 2016); *see also id.* (follow “composition” hyperlink; follow “Angela Ruggiero”, “Gunilla Lindberg” and “Anita DeFrantz” hyperlinks) (the

The IOC Charter does not specifically address governance but does include a broad statement of support for the involvement of women in Olympic sport. Its charter states the IOC, “encourages and supports the promotion of women in sport at all levels and in all structures, with a view to implementing the principle of equality of men and women.”²⁸³ When the IOC held its 127th meeting in December 2014 (Monaco) to agree on its general goals it included two goals related to gender and governance among its thirty-nine recommendations.²⁸⁴ It called for the implementation of a “targeted recruitment process” for IOC Board members to achieve several objectives, including “gender balance.”²⁸⁵ In addition, a second recommendation called for the consideration of gender as a factor in future IOC membership decisions.²⁸⁶ This second recommendation is consistent with the declarations from several IOC Women’s Commissions conferences and demonstrates the beginning of the recognition that more specific measures will be necessary to change the gendered nature of the leadership of Olympic sport.

Some believe the IOC’s approach is still too passive. The IOC’s current embrace of a targeted recruitment to fill board vacancies and the explicit consideration of gender diversity is a necessary but insufficient effort to achieve the gender transformation of Olympic institutions. The “targeted recruitment” language is evidence that the IOC Board leadership has heard about the importance of “disruptive efforts” to achieve diversity.

A key question is whether there may be additional sources of influence in support of greater gender board diversity.²⁸⁷ Key Olympic sponsors might be a source of influence but only if their own boards are diverse²⁸⁸ and there are other pressures to compel them to make the

three female members of the IOC Executive Committee are Angela Ruggiero [U.S. Ice hockey], Gunilla Lindberg [Swed.] and Anita L. DeFrantz [U.S. Rowing].).

283. Int’l Olympic Comm., *supra* note 264.

284. Int’l Olympic Comm., *Olympic Agenda 2020: 20+20 Recommendations*, OLYMPIC.ORG at 15, 24, http://www.olympic.org/documents/olympic_agenda_2020/olympic_agenda_2020-20-20_recommendations-eng.pdf (follow “20+20 Recommendations” hyperlink) (last visited Nov. 7, 2016).

285. *Id.* at 24.

286. *Id.*

287. Olympic sponsors have been asked to take a stand on discrimination against women. “Supporters of gender equality for women in Olympic Sport have asked IOC sponsors to champion their cause.” David Cadman and Ellen Woodsworth, *Olympic Sponsors Asked to Take a Stand on Discrimination Against Women*, COPE (Nov. 25, 2009), <http://cope.bc.ca/olympic-sponsors-asked-to-take-a-stand-on-discrimination-against-women/>.

288. A review of the gender board diversity of the Rio 2016 “partner” sponsors revealed varying levels of demonstrable commitment to gender board diversity. Bridgestone, 1 woman of 9 board members, *Company Overview of Bridgestone Americas, Inc.*, BLOOMBERG <http://www.bloomberg.com/research/stocks/private/board.asp?privcapId=6395422>

gendered leadership of IOC institutions a priority. In the absence of some extraordinary circumstance²⁸⁹ it seems unlikely that these sponsors would focus on the leadership of NOC's or international sports federations as these positions are invisible to the public.

The IOC should undertake specific steps to work towards gender equality among its governing body. A first step is for the IOC leadership to become much more explicit about the need for diversity and its rationales. Although the IOC Charter does forbid discrimination on the ground of sex, its casual embrace as to diversity in leadership may suggest that there may be ambiguity about the fundamental nature of the gender nondiscrimination norm.²⁹⁰ Some may read the charter as a prohibition of conscious intentional discrimination against women rather than an affirmative human rights based mandate for power sharing. The statements of the past two IOC presidents suggest that they embrace the latter view, but the IOC's embrace of gender goals is at least an explicit rejection of tokenism.²⁹¹ The leadership could go farther, expressing

(last visited Nov. 7, 2016); Coca Cola, 4 women of 14 board members, *Board of Directors: Get to Know our Board of Directors*, COCA-COLA, <http://www.coca-colacompany.com/our-company/board-of-directors> (last visited Nov. 7, 2016); Dow, 2 Women of 13 Board members, *Board of Directors*, DOW, <http://www.dow.com/en-us/investor-relations/corporate-governance/leadership/board-of-directors> (last visited Nov. 7, 2016); McDonalds, 3 women of 13 board members, *Corporate Governance: Board of Directors*, McDONALDS, <http://www.aboutmcdonalds.com/mcd/investors/corporate-governance/board-of-directors.html> (last visited Nov. 7, 2016); General Electric, 4 women of 16 board members, *GE Board of Directors*, GE, <http://www.ge.com/about-us/leadership/board-of-directors> (last visited Nov. 7, 2016). Panasonic, 2 women of 11 board members, *Board of Directors*, PANASONIC, <http://pmma.panasonic.com.my/about-panasonic/about-pmma/board-of-directors/> (last visited Nov. 7, 2016). Proctor and Gamble, 3 women of 12 board members, *Who We Are: Our Leadership*, PG, <http://us.pg.com/who-we-are/structure-governance/corporate-governance/board-composition> (last visited Nov. 7, 2016). Samsung, 0 women of 9 board members, *Board of Directors*, SAMSUNG, http://www.samsung.com/us/aboutsamsung/samsung_electronics/management/boardofdirectors.html (last visited Nov. 7, 2016). Visa, 3 women of 12 board members, *Board of Directors*, VISA, <http://www.investor.visa.com/corporate-governance/board-of-directors/default.aspx> (last visited Nov. 7, 2016).

289. There have been extraordinary circumstances that led international federations to address human rights issues, e.g. South African Apartheid. See Sam Bayliss, et al. *Political, Social, and Economic Aspects of the Olympic Games*, (Feb. 2004), <https://olympics.pthimon.co.uk/OlympicsReport.pdf>.

290. Convention on the Elimination of All Forms of Discrimination against Women: Text of the Convention, UN WOMEN, <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (last visited Nov. 6, 2016).

291. Recommendation 38 of "Olympic Agenda 2020", included a commitment to "Implement a targeted recruitment process" among other things, to achieve "Gender balance". Int'l Olympic Comm., *Olympic Agenda 2020: 20+20 Recommendations*, (December 2014), <https://stillmed.olympic.org/media/Document%20Library/OlympicOrg/Documents/>

concerns about the legitimacy and integrity of an Olympic movement where women do not share power and decision-making roles.

A second step is for the IOC to improve the quality of policymaking and operations that gender diversity may bring. There is an abundant literature arguing that gender board diversity improves the economic bottom line in corporations.²⁹² There is also the argument that diversity of decision-makers and team members improves the quality of decision-making and problem solving.²⁹³ The source cognitive diversity is both the infinite variety in individual humans²⁹⁴ our different experiences,²⁹⁵ and our training that influences our approaches to interpretation.²⁹⁶ In addition, our societally constructed identities—race, physical ability, gender, sexual orientation, religion, class, and culture—shape our identities. Our inherently “plastic” brains, Page argues, are differently shaped by our experiences, and those diverse experiences create diverse cognitive tools that shape our interpretation approaches.²⁹⁷ As a result, men and women have different experiences, and they learn to think about identical factual situations differently.²⁹⁸ So it is as well with Blacks, with Latinos, with Gays and Lesbians, and differently-abled people.²⁹⁹ We understand the world differently not because we possess a characteristic, but because the characteristics we possess affect our interaction with the world. This rationale for IOC institution board diversity is especially important given the problems and challenges the Olympic community faces in the areas of gender-leadership diversity, gender competitive inequity, and rules and structures governing female eligibility rooted in 19th century feminine ideals.

Finally, the IOC should mandate programs to address unconscious bias, which despite an institutions best intentions, will lead to the selection of “The Usual Suspects” and render the achievement of gender diversity in governance selection unlikely. The Leadership Report, commissioned by the IOC Woman and Sport Commission, proposes some measures that might change the “Usual Suspects” list, such as the maintenance of a list of qualified candidates that is that is gender balanced, the aggressive

Olympic-Agenda-2020/Olympic-Agenda-2020-20-20-Recommendations.pdf#_ga=1.51327210.259659396.1478303638.

292. Credit Suisse, *The CS Gender 3000: Women in Senior Management*, (Sept. 2014), https://30percentclub.org/wp-content/uploads/2014/10/2014-09-23_Research_Institute_Women_in_Business.pdf. (“greater diversity in boards and management are empirically associated with higher returns on equity, higher price/book valuations and superior stock price performance.”).

293. *Cf.* Scott E. Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* 320-27 (2007).

294. *Id.* at 300.

295. *Id.* at 303-05.

296. *Id.* at 302-03.

297. *Id.* at 301.

298. *Id.* at 307.

299. PAGE *supra* note 289, at 306.

reconsideration and removal of barriers to women's service such as term limits. But research on successful approaches to gender diversity in filling important positions suggest that these are at best well intended half measures in the absence of an open discussion or gender cognitive unconscious bias which might contribute to the routine selection of men to leadership posts.

There is a wealth of scholarly literature on the role of unconscious bias in the maintenance of racial and gender privilege. There is the original literature from the social sciences demonstrating the existence of unconscious bias³⁰⁰ as well as the literature that applies the teaching of social science to particular problems of bias³⁰¹ and offers countermeasures and best practices to insure that institutions are able to find the very best talent in spite of these *innocent* cognitive barriers.³⁰² These unconscious bias concerns also apply to boards.³⁰³ In addition, there is a strong argument in light of the prevalent gender issues that IOC institutions should include among the qualifications for board members those demonstrable lived experience in the gender transformation of institutions.

Last but not least, there are human rights dimensions that support the urgency of gender governance reform. These grounds lie within Olympic Charter³⁰⁴ and beyond³⁰⁵ and transitional justice principles that emphasize

300. Rosabeth Moss Kanter, *Men and Women of the Corporation* 209-42, 274-76 (1977). (There is "extensive evidence that intergroup perception and judgment are often irrationally distorted.")

301. See Ann C. McGinley, *Viva la Evolución!: Recognizing Unconscious Motive in Title VII*, 9 Cornell J. L. & Pub. Pol'y 415, 472-77 (2000); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1181-85 (1995); Linda Greene, Tokens, Role Models, and Pedagogical Politics: *Lamentation of African American Female Law Professor*, 6 BERKELEY WOMEN'S L. J. 81, 84 (1990) (discussing the unconscious bias phenomena associated with tokenism); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Linda Greene, *Equal Employment Opportunity Law Twenty Years After The Civil Rights Act of 1964*, 18 SUFFOLK U. L. REV. 593, 600 (1984) (noting that "substantial sociological and psychological research indicated that race and gender characteristics play determinative roles in the perception and judgment process."); *Women in Science & Engineering Leadership Institute: Unconscious Bias - Gender*, WISELI, <http://wiseli.engr.wisc.edu/subject.php#gbias> (last visited Nov. 7, 2016).

302. Molly Carnes, et al. *Effect of an Intervention to Break the Gender Bias Habit for Faculty at One Institution: A Cluster Randomized, Controlled Trial*. 90.2 J. of the Ass'n of AMERICAN MED. C. 221-230 (2015).

303. See Lawrence Trautman, *Corporate Diversity: Why Are We Still Talking About This*, 17 Scholar 219, 258-59 (2015), citing Aaron A. Dhir, *Towards a Race and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity*, 35 QUEEN'S L.J. 569, 623(2010) (unconscious bias against women and minorities affects corporate board member selection).

304. "osjfkjfd;pulsory. arise undo refelct d e in footnoe m? ion or occurence to determine if something is compulsory. arise undInt'l Olympic

“...the creation of a community based on freedom, equality, human dignity, and respect for the right to diversity.”³⁰⁶

CONCLUSION— THE FUTURE OF THE FEMININE IDEAL: GENDER EQUALITY AND OLYMPIC INSTITUTIONAL INTEGRITY?

My title—Mirror, Mirror On the Wall - Who is the Fairest of Them All—posits the question whether typical Victorian era femininity coupled with an assumption of female delicacy and male control of The Olympic enterprise—early 20th century features of the Olympic movement — continue to define the 21st century Olympic movement. Until the 1990s, the IOC employed science in the service of the enforcement of a feminine ideal for protective and aesthetic reasons— eventually eschewing intrusive and invasive examinations in favor of chromosomal and intracellular characteristics. Although the IOC has abandoned comprehensive “sex verification,” it currently defends a discretionary regime that is a throwback to the Brundage era of visual suspicion. In a case publicized—and criticized—worldwide, the IAAF temporarily disqualified Caster Semenya of South Africa on the ground that the competitors she defeated hurled “male” accusations; the IAAF subjected her to intrusive physical examination but after a confidential process the details of which were leaked to the eventually permitted her to return to competition. The outcry led the IOC to officially abandon “sex verification”

Comm., The Olympic Charter (2015), https://stillmed.olympic.org/Documents/olympic_charter_en.pdf.

305. See, *Convention on the Elimination of All Forms of Discrimination against Women: Text of the Convention*, UN WOMEN, <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (last visited Nov. 6, 2016).

The application of its principles to require the participation of women in the restructuring of post conflict societies are analogous in the Olympic context where women has been historically excluded from governance; Cf. Jeremy Levitt, *Law, Peace Construction and Women's Rights in Africa: Who will Safeguard Abeena and Afia* JEREMY LEVITT (Ed.), AN INTERNATIONAL LAW OF BLACK WOMEN: NEW THEORY, OLD PRAXIS 88, 112 (2015). The Convention on the Elimination of All Forms of Discrimination Against Women necessitates women's participation at every level of conflict, prevention, management, and resolution, including the shaping, development, and implementation of peace agreements and transitional justice initiatives”;

See also Pearl T. Robinson, *Democratization: Understanding the Relationship between Regime Change and the Culture of Politics*, 37 AFRICAN STUD. REV. 39, 50 (1994). (expressing doubt over “whether there can be effective governance without gender equity in the realm of political life”).

306. “Transitional justice refers to societal responses to severe repression, societal violence, and systematic human rights violations that seek to establish the truth about the past, determine accountability, and offer some form of redress.” See RUTH TEITEL, TRANSITIONAL JUSTICE (2000) <http://shr.aas.org/transitionaljustice>. Increasingly, the transitional justice principles have included justice for women who are often the specific targets of human rights abuses. See generally Rana Jaleel, *Feminisms, Ethnic Conflict and the rise of Rape and Sexual Violence in International Law During the 1990's*, 27 CULTURAL STUDIES 115 (2012).

and instead limit female participation through the discretionary enforcement of an *endogenous* testosterone level limitation. The Dutee Chand CAS decision has placed those measures on hold, but that decision does not provide a way clear way forward for a future competitive regime free of protectionist ambition.

The IOC has made progress on both competitive opportunities for women though there remain differences in competitive opportunities and rules and structures that reinforce a feminine ideal. The IOC has also made progress in the inclusion of women on its Board, and has adopted goals that would increase female participation but not eliminate the character of IOC institutions as “hegemonically masculine.” Though it has for decades urged the inclusion of women in leadership, the IOC has not enforced its own directive that its institutions achieve a 20 percent goal of women in leadership roles. To be sure, the IOC must accommodate the global and diverse Olympic family as it fills its board seats. Yet, until the IOC determines that gender justice governance issues may no longer be postponed quadrennial after quadrennial, there is little prospect for gender governance transformation in this quarter century.

The drug testing scandals that tainted the integrity of Olympic Sport in combination with the CAS Dutee Chand decision have provided a respite from the “witch hunt” for females with elevated testosterone. It is indeed ironic that hundreds of athletes who used performance enhancing substances evaded a multimillion dollar drug testing enterprise while the IOC and the IAAF focused on excluding a few women who did not meet a feminine ideal appearance for intrusive intimate examinations.³⁰⁷ There are serious ethical and integrity concerns raised by both systemic banned

307. Rebecca Ruiz, et al., *Russian Insider Says State-Run Doping Fueled Olympic Gold*, NEW YORK TIMES, May 12, 2016, http://www.nytimes.com/2016/05/13/sports/russia-doping-sochi-olympics-2014.html?_r=0; IOC: 31 athletes in six sports positive in retesting of samples from 2008 Olympics, TRIBUNE News Service, May 17, 2016, <http://www.chicagotribune.com/sports/international/ct-ioc-beijing-olympic-samples-retest-20160517-story.html>; David Wharton, Drug retesting discovers 23 suspected cheaters at 2012 London Games, The Los Angeles Times, May 27, 2016 <http://www.latimes.com/sports/more/la-sp-sn-23-cheaters-london-20160527-snap-story.html>; WADA Statement regarding Reanalysis of 2012 London Olympic Samples, WADA, May 27, 2016, <https://www.wada-ama.org/en/media/news/2016-05/wada-statement-regarding-reanalysis-of-2012-london-olympic-samples>; *IOC Executive Board Statement by the IOC Executive Board*, (June 1 2016) <https://www.olympic.org/news/statement-by-the-ioc-executive-board>; Patrick Reedell, IOC Upholds Olympic Ban on Russia’s Track and Field Athletes, ABC NEWS (June 21, 2016), <http://abcnews.go.com/International/ioc-upholds-olympic-ban-russias-track-field-athletes/story?id=40010177>; Rebecca Ruiz, *Rio Drug-Testing Lab Is Suspended by Antidoping Regulator*, NEW YORK TIMES, June 24, 2016 http://www.nytimes.com/2016/06/25/sports/olympics/rio-drug-testing-lab-is-suspended-by-wada.html?_r=0; 2014 IOC Evaluation Commission, *IOC 2014 Evaluation Report XXII Olympic Winter Games in 2014* (June 2007), [stillmed.olympic.org/media/Document Library](http://stillmed.olympic.org/media/DocumentLibrary).

substance enforcement failures and *as well as* the targeting of women who do not meet a feminine ideal standard. In the pause that the *Chand* case imposed, it would be refreshing if the IOC and the IAAF would seriously reflect on this improbable paradox.

The entire Olympic family must embrace gender equality—in competition, governance, coaching—as a fundamental norm. Almost two hundred countries have ratified the Convention on the Elimination of All Forms of Discrimination against Women.³⁰⁸ The United Nations has sponsored Four World Conferences on Women aiming to change the role of women³⁰⁹ the last of which led to the adopted comprehensive Platform for Action.³¹⁰ Perhaps due to inertia due to the world-wide and sprawling nature of Olympic institutions, their relatively autonomous operations, and a decentralized culture, the prospect for gender reform is dim. Ironically, the Olympic movement faces current challenges that provide time to reflect on the unfinished business of gender equality in Olympic sport, even if the distractions are arguably unfortunate.

The century old campaign to preserve the “femininity ideal” and protect women from competition rigors has morphed into a sound bite-suitable crusade for *integrity* in female Olympic competition. It seems ironic that while the IOC labors to reinstate the hyperandrogenism regulations on competition integrity grounds the Olympic movement must address serious systemic integrity concerns that threaten the very conduct of the Rio 2016 Olympics.

What will it take to incent a reconsideration of the feminine ideal in sport with its concomitant commitment to “separate but equal”? Perhaps, it will require the concomitant success of women in sports like long distance swimming and running, triathlon and the marathon, where women routinely best the time of significant numbers of male competitors.³¹¹ Perhaps it will be influenced by changes in the public roles of women such as the rise of women as Fortune 100 CEOs, as command rank leaders in combat, as commanders-in-chiefs of nations as, or a result of their portrayal in media as combat leaders, or as their service as prime ministers and presidents. These are economic, political, and cultural

308. G.A. Res. 38/180 (Dec. 18, 1979).

309. Fourth World Conference on Women, U.N. Doc. A/CONF.177/20/Add.1 (Sept. 4-15, 1995); World Conference of the Women’s Year, U.N. Doc. E/CONF.66/34 (June 19-July 2, 1975); World Conference of the United Nations Decade for Women: Quality, Development and Peace, U.N. Doc. A/CONF.94/30 (July 14-30, 1980); World Conference to review and appraise the achievements of the United Nations Decade for Women: Equality, Development and Peace, U.N. Doc. A/CONF.116/28/Rev.1 (July 26, 1986).

310. G.A. Res. 49/161, ¶ 10 (Feb. 9, 1995).

311. Steven Munatones, *Men Vs. Women in Endurance Sports*, ACTIVE, <http://www.active.com/swimming/Articles/Men-Vs-Women-in-Endurance-Sports> (last visited Nov. 2, 2016). *But see* Valérie Thibault et. al., *Women and Men in Sport Performance: The Gender Gap has not Evolved since 1983*, 9 J. OF SPORTS SCIENCE & MED. 214, 214-23 (2010).

changes that signal the demise of “fixed notions concerning the roles and abilities of males and females and the rejection of “archaic and stereotypic notions” about the abilities of the genders.³¹² These developments may hasten the end of a tenacious feminine ideal in both Olympic Sport and in society at large.

312. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (1982).