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You Can Only Race if You Can't Win?

The Curious Cases of Oscar Pistorius & Caster Semenya

SHAWN M. CRINCOLI

This article discusses the curious case of Oscar Pistorius within the context of international sports law and compares it to the situation regarding Caster Semenya. Both athletes are controversial South African runners whose eligibility to compete in IAAF-sanctioned races was called into question, in one case due to the use of prosthetics and in one case due to alleged intersexuality. This article not only represents the first comprehensive look among legal scholars at the Court of Arbitration for Sport tribunal's decision in the Oscar Pistorius case, but it is almost certainly the first to discuss Caster Semenya's eligibility as well. These cases raise important issues of disability, sex, and societal treatment of difference.

The article argues that in balancing the rights of competing athletes, fair competition, and equal opportunity, the current lex sportiva places too high a burden on individual athletes who are different. While it is important to balance the rights of competing athletes, a standard that forces atypical athletes to undertake lengthy and costly steps to gain eligibility on a case-by-case basis, rather than operating from a baseline assumption of presumptive eligibility, misallocates the risk that these athletes wield an unfair advantage over competitors. More significantly, a policy that sets the bar for eligibility precisely at the point where atypical athletes are virtually guaranteed to lose to the 'normal' athlete does not allow for meaningful participation in competition. Finally, the functional limitation on fair and equal participation in elite competition within the athlete's desired category calls into question that athlete's identity & humanity, which is contrary to both the stated purposes of the Olympic movement and broader conceptions of human rights.

I. INTRODUCTION

A. HAVE YOU MET OSCAR?

Oscar Pistorius is an athlete, a world-class runner, a sprinting champion.¹ In a word, fast. The problem? Pistorius might be too fast. Despite the fact that he is not the fastest man on earth,² Pistorius may still be too fast for his own good. Whereas Pistorius considers

1. *Life Without Limitations: Oscar Pistorius Profile*, OSSUR, <http://www.ossur.com/?PageID=13008> (last visited Apr. 28, 2011).

2. Jamaican sprinter Usain Bolt is currently the "fastest man on earth." See *Fastest Man on Earth Usain Bolt Wins Laureus Sportsman of the Year Award*, LAUREUS.COM (June 10, 2009), http://www.laureus.com/press_releases?article_id=1652 (describing Bolt's achievements for which he received the prestigious award). Bolt holds the world records in both the 100 and 200 meter races, with times of 9.58 and 19.19 respectively. See *World Records – Men*, TRACKANDFIELDNEWS.COM,

himself to be a regular athlete,³ he is best known for the extraordinary fact that he happens to be a double-amputee who is fast enough to compete among able-bodied runners. A Paralympic world-record holder, Pistorius has set his sights on competing against the world's fastest runners on the largest track and field stage in sports: the Olympics.⁴ As a result, "The Blade Runner," as Pistorius has been dubbed,⁵ has spent a significant portion of the past few years battling for the right to race, contesting the decision of the International Association of Athletics Federations ("IAAF") that his disability creates an advantage on the track, one that should render Pistorius ineligible to compete against able-bodied athletes.⁶

In May 2008, the Court of Arbitration for Sport ("CAS"), the supreme arbiter on questions of eligibility within federation sports,⁷ ruled that Pistorius was eligible to compete. This ruling reversed the decision of the IAAF that the carbon-fiber prosthetic *Cheetah* flex-foot blades Pistorius uses to run constitute an impermissible "technical device" under IAAF Competition Rule 144.2(e).⁸ The CAS discussed the massive procedural failures that led to the IAAF ineligibility ruling,⁹ and, instead, relied upon a more extensive scientific evaluation of Pistorius and the *Cheetah* blades to determine that while the mechanics of running differ between Pistorius and able-bodied runners, he possesses no measurable advantage.¹⁰ Having prevailed in the legal arena, Pistorius has focused his attention on qualifying for and competing in the 2012 Olympics in London.¹¹

<http://www.trackandfieldnews.com/tfn/records/records.jsp?listId=1> (last visited Apr. 15, 2011). In comparison, Oscar Pistorius holds the world records among disabled athletes with times of 10.91 and 21.58. Note, though, that Pistorius's best event is actually the 400 meters, a race that does not come with the label of world's fastest man. Pistorius' best time in the 400 meters is 46.52 seconds, which trails Michael Johnson's record of 43.18 from 1999 by 3 seconds. See *Oscar Pistorius Profile: Oscar Pistorius' Website*, OSCARPISTORIUS.COM, http://www.oscarpistorius.com/index.php?option=com_content&view=article&id=1233:400-metres&catid=110:achievements&Itemid=269 (last visited Apr. 20, 2011). Meanwhile, Bolt, who uses the 400 meter races only as a training technique rather than as a competitive goal, has a personal best of 45.28 at that distance, just inside the current Olympic qualifying time of 45.55. See *Usain Bolt*, NYTIMES.COM (Aug. 21, 2009), http://topics.nytimes.com/topics/reference/timestopics/people/b/usain_bolt/index.htm (last updated Aug. 21, 2009).

3. Jere Longman, *An Amputee Sprinter: Is He Disabled or Too-Abled?*, N.Y. TIMES, May 15, 2007, at A1, available at http://www.nytimes.com/2007/05/15/sports/othersports/15runner.html?_r=1&oref=slogin (quoting Pistorius as saying "I don't see myself as disabled").

4. Prior to the 2008 Olympics, Pistorius admitted that he was unlikely to qualify for the games in Beijing. He remained hopeful as to the 2012 Olympics. See *Pistorius Admits Beijing Appearance Will be Difficult*, USA TODAY (May 19, 2008), http://www.usatoday.com/sports/olympics/2008-05-19-pistorius-beijing_N.htm (stating that "[d]ouble-amputee sprinter Oscar Pistorius thinks he might have a more realistic chance of qualifying for the 2012 London Olympics than this summer's Beijing Games."). Although he did not compete in the 2008 Olympics (he did compete in the Paralympics), Pistorius is now focusing on preparing for the 2012 Olympics. See *Oscar Pistorius Profile*, *supra* note 1 (noting "his ambition to compete in the 2012 Olympics in London").

5. Josh McHugh, *Blade Runner*, WIRED, Mar. 2007, available at <http://www.wired.com/wired/archive/15.03/blade.html>. Pistorius has titled his autobiography after this well-known nickname. See OSCAR PISTORIUS, *BLADE RUNNER* (2009).

6. The IAAF Council ruled that Pistorius was ineligible to compete in early 2008. *Pistorius is Eligible for IAAF Competition*, IAAF (May 16, 2008), <http://www.iaaf.org/aboutiaaf/news/newsid=44917.html>.

7. Matthew J. Mitten & Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, 8 VA. SPORTS & ENT. L.J. 71, 78–91 (2008) (describing CAS jurisprudence).

8. *Pistorius v. IAAF*, Arbitration CAS 2008/A/1480 (May 2008) (Ct. of Arb. for Sports), available at <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1480.pdf> [hereinafter *Pistorius Arbitration*].

9. *Id.* at 6–9.

10. *Id.* at 10–14.

11. Pistorius was injured in a boating accident in 2009 but that event was not expected to detract significantly from his chances of competing at the 2012 Olympics. See *Double-Amputee Sprinter Oscar Pistorius Hurt in Boating Accident*, N.Y. TIMES, Feb. 22, 2009, at D4, available at <http://www.nytimes.com/2009/02/23/sports/othersports/23pistorius.html>.

Although the CAS found for Pistorius, its ruling was narrow in scope.¹² The Tribunal specifically announced that the decision would not apply to future cases regarding athletes who use prosthetics.¹³ The CAS concluded that Pistorius would be permitted to run only so long as the evidence regarding the *Cheetah* blades, which were thoroughly vetted and examined, did not change.¹⁴ Should Pistorius ever prove to be the fastest sprinter among all runners, it is likely that his eligibility would be revoked. Thus, his legal victory remains somewhat hollow; that is, Pistorius can only compete—for now—because it is clear that he cannot win. Notably, since the CAS decision, the scientists involved in the testing have published additional research regarding the debate over whether the *Cheetah* blades create an advantage and whether the CAS even explored the right scientific questions.¹⁵

While Pistorius is unique, his case raises significant issues in sports governance beyond his own eligibility. First, it forces the question of what constitutes an improper “technical device” for competition. This debate is far broader in the context of elite athletic competition than the specifics of Pistorius’s disability. Given advances in technology, this discussion spans a wide range of issues facing the sporting world, from the clothing and shoes that athletes wear to specific surgeries they undergo, from pharmaceutical assistance, whether permitted or forbidden, to the largely unexplored sector of genetic modification.¹⁶ The IAAF declared Pistorius ineligible based on perceived biomechanical advantages, whereas another athlete who may have had a steel rod placed inside his leg rather than beneath it,¹⁷ or for whom a knee ligament has been reconstructed from other organic material,¹⁸ would face no similar inquiry. Pistorius and his *Cheetah* blades are only one small piece in an overarching debate searching for a more unified theory of what it means to participate in unassisted, elite athletic competition and how society celebrates athletic achievement.

More globally, the Pistorius case reflects the challenges that sports governing bodies face when they seek to apply rules of competition to athletes who differ from the norm. To

12. See discussion *infra* Section II.C.

13. Pistorius Arbitration, *supra* note 8, at 14, ¶ 56.

14. *Id.* at 14, ¶ 55.

15. For a discussion of the most recent scientific studies, see *infra* Section II.C. See Peter G. Weyand & Matthew W. Bundle, *Point: Artificial Limbs Do Make Artificially Fast Running Speeds Possible*, and Rodger Kram et al. *Counterpoint: Artificial Limbs Do Not Make Artificially Fast Running Speeds Possible*, J. APPL. PHYSIOLOGY (Nov. 5, 2009), available at <http://jap.physiology.org/cgi/reprint/01238.2009v1?maxtoshow=&HITS=20&hits=20&RESULTFORMAT=&searchid=1&FIRSTINDEX=0&displaysectionid=POINT-COUNTERPOINT&resourcetype=HWCIT> [hereinafter *Point & Counterpoint*]; Alena M. Grabowski et al., *Running-Specific Prostheses Limit Ground-Force During Sprinting*, BIOLOGY LETTERS (Nov. 4, 2009), available at <http://rsbl.royalsocietypublishing.org/content/early/2009/11/02/rsbl.2009.0729.full.pdf+html?sid=8f99e0df-66cb-4902-8f76-5dc491e90bc3>. For a lay look at the debate and a discussion of how the CAS may not have considered all relevant scientific testimony, see David Epstein, *New Study, For Better or Worse, Puts Pistorius' Trial in Limelight*, SPORTSILLUSTRATED.CNN.COM (Nov. 19, 2009), http://sportsillustrated.cnn.com/2009/writers/david_epstein/11/19/oscar.pistorius/index.html.

16. Blair H. Moses, *Eligibility of Athletes Receiving Necessary Gene Therapy: The Oscar Pistorius Case as Procedural Precedent*, 49 JURIMETRICS J. 343 (2009) (analogizing from the Pistorius case to provide guidance for treatment of athletes who undergo gene therapy for medical reasons); Shayna M. Sigman, *Are We All Dopes? A Behavioral Law & Economics Approach to Legal Regulation of Doping in Sports*, 19 MARQ. SPORTS L. REV. 125, 133 (2008).

17. *Athlete Trades Broken Bones for Broken Records*, THEBOSTONCHANNEL.COM (Nov. 12, 2008), <http://www.thebostonchannel.com/news/17967174/detail.html> (describing a college football player's recovery from a motorcycle accident).

18. See, e.g., Dr. Jonathan Cluett, *What You Need to Know About ACL Tears*, ABOUT.COM (Apr. 8, 2011) <http://orthopedics.about.com/od/aclinjury/tp/acl.htm>.

what extent do the rules of fair competition permit accommodation? How does one balance the rights of Pistorius against those of competing sprinters? Can the law of sport maintain fidelity to domestic or international laws regarding equality of opportunity? Pistorius forces us to grapple with these questions through the lens of disability while questioning what disability even means.

B. HAVE YOU MET CASTER?

Caster Semenya is an athlete, a world-class runner, and a middle-distance champion.¹⁹ Like Oscar Pistorius, Caster Semenya is South African. Like Oscar Pistorius, Caster Semenya participated in other sports prior to running; Oscar played rugby,²⁰ Caster played football.²¹ Like Oscar, she is fast. Some would say she is too fast. In August 2009, the eighteen year old Semenya won gold at the World Championships in the 800 meter race, shattering her personal record and winning the championship.²² The IAAF promptly investigated Semenya due to the significant improvements in her performance, seeking evidence of drug use and subjecting the athlete to sex testing.²³ It was later revealed that such sex testing had begun in Semenya's home country, even prior to the IAAF's investigation.²⁴

Unlike Pistorius, Semenya's "disability" is not outwardly visible. In fact, Semenya was likely unaware of whether she was different from the other athletes she competed against until the IAAF forced her to undergo sex testing. This process required Semenya to meet with at least five medical experts, including a gynecologist, endocrinologist, internist, psychologist, and gender expert.²⁵ In July 2010, eleven months after the investigation began, the IAAF cleared Semenya to race, issuing no additional information regarding the

19. Caster Semenya has competed in the 800m and 1500m races. *Semenya, Caster Biography*, IAAF, <http://www.iaaf.org/athletes/biographies/letter=s/country=rsa/athcode=242560/index.html> (last visited Apr. 20, 2011).

20. See *infra* notes 44–45.

21. Andrew Malone, Emily Miller & Stewart Maclean, 'She Wouldn't Wear Dresses and Sounds Like a Man on the Phone': Caster Semenya's Father on His Sex-Riddle Daughter, *DAILY MAIL* (Aug. 22, 2009), <http://www.dailymail.co.uk/news/worldnews/article-1208227/She-wouldnt-wear-dresses-sounds-like-man-phone-Caster-Semenyas-father-sex-riddle-daughter.html> (describing how Semenya played football among other sports).

22. Christopher Clarey, *Gender Test After a Gold-Medal Finish*, *N.Y. TIMES*, Aug. 19, 2009, at B13, available at <http://www.nytimes.com/2009/08/20/sports/20runner.html> (noting the significant size of Semenya's victory margin).

23. David Smith, *Caster Semenya Row: 'Who are White People to Question the Makeup of an African Girl? It is Racism'*, *THE OBSERVER* (Aug. 23, 2009), <http://www.guardian.co.uk/sport/2009/aug/23/caster-semenya-athletics-gender> ("The IAAF says it was obliged to investigate after Semenya made improvements of 25 seconds at 1500m and eight seconds at 800m – the sort of dramatic breakthroughs that usually arouse suspicion of drug use."); see also Ryan Lucas, *SAfrican In Gender Flap Gets Gold For 800 Win*, *NEWSVINE.COM* (Aug. 22, 2009), http://www.newsvine.com/_news/2009/08/19/3168203-safrican-in-gender-flap-gets-gold-for-800-win (suggesting that even prior to the race, the South African federation was investigating Semenya).

24. *Government Wants Chuene Fired*, *ESPN.COM* (Sept. 20, 2009), <http://sports.espn.go.com/oly/trackandfield/news/story?id=4489230> (discussing how the president of the South African federation for track and field lied about Semenya's case and that sex testing began on August 7th, 2009, in South Africa, even before Semenya's race performance at the World Championship).

25. See Smith, *supra* note 23.

athlete's medical condition.²⁶ Thus, any discussion of Semenya's difference remains speculative.

In September 2009, the IAAF medical examination allegedly discovered that Semenya had testes, male internal reproductive organs, instead of ovaries, female internal reproductive organs.²⁷ In other words, Semenya was reported to have an intersex condition.²⁸ While the IAAF has now ruled on Semenya's eligibility, there have been no official announcements revealing the results of testing. The report of intersexuality has been neither confirmed nor denied.²⁹ Since the type of intersexuality that Semenya was suspected of having would have likely caused her body to produce testosterone at far greater levels than the average woman,³⁰ the IAAF did consider stripping Semenya of her gold medal and requiring her to return the prize money that accompanied the medal.³¹ For nearly a year, it was unclear if the IAAF would even allow the race results to stand, let alone continue to allow Semenya to compete against other women.³² Meanwhile, Semenya grew weary of waiting, announcing her own intentions to return to racing and noting that she had not actually been banned or prevented from running.³³ She was merely trying to cooperate with the process, a process that she believed took far too long to reach resolution. Only after Semenya indicated her intention to return to racing did the IAAF follow up with its announcement that she would be eligible to compete.³⁴ And when Semenya returned to racing, she was faced with mocking and rejection by some of her competitors, who, today,

26. David Epstein, *Biggest Issue Surrounding Semenya Remains Unanswered*, SI VAULT (Nov. 19, 2009), <http://sportsillustrated.cnn.com/vault/article/web/COM1163081/index.htm>.

27. Mike Hurst, *Caster Semenya Has Male Sex Organs and No Wombs or Ovaries*, THE TELEGRAPH.COM.AU (Sept. 11, 2009), <http://www.dailytelegraph.com.au/sport/semenya-has-no-womb-or-ovaries/story-e6f9xni-1225771672245>. See also Epstein, *supra* note 26 (citing the Telegraph article as the source of the information regarding Semenya's medical condition and discussing the ramifications of that information); Ariel Levy, *Either/Or: Sports, Sex, and the Case of Caster Semenya*, THE NEW YORKER, Nov. 30, 2009, available at http://www.newyorker.com/reporting/2009/11/30/091130fa_fact_levy ("On September 11th, Australia's *Daily Telegraph*, a tabloid owned by Rupert Murdoch, reported that Semenya's test results had been leaked, and that they showed that Semenya, though she was brought up as a girl and had external female genitalia, did not have ovaries or a uterus. Semenya was born with undescended testes, the report said, which provided her with three times the amount of testosterone present in an average female—and so a potential advantage over competitors.").

28. For a definition of "hermaphrodite," see <http://www.merriam-webster.com/dictionary/hermaphrodite>.

29. The IAAF issued a statement in the middle of November 2009 expressly declining to comment on medical aspects of Semenya's case and noting that "the IAAF, the South African Ministry of Sport and Recreation and Caster Semenya's representatives are in discussions with a view to resolving the issues surrounding Caster Semenya's participation in Athletics." *Caster Semenya – Statement*, IAAF (Nov. 18, 2009), <http://www.iaaf.org/aboutiaaf/news/newsid=54923.html>.

30. See Epstein, *supra* note 26 (discussing whether three times the average testosterone level of women is within the permissible hormonal limits for international competition).

31. *Id.* ("An agreement between the IAAF, the governing body for track and field, South Africa's government, and Semenya's lawyers will allow Semenya to keep the gold medal and the prize money she won at the world championships in Berlin in August.").

32. Anna Kessel, *Gold Medal Athlete Caster Semenya Told to Prove She is a Woman*, GUARDIAN (London) (Aug. 19, 2009), <http://www.guardian.co.uk/sport/2009/aug/19/caster-semenya-gender-verification-test>.

33. See Owen Slot, *Caster Semenya Ready to Make Statement of Intent and Get Back on Track*, THE SUNDAY TIMES (June 10, 2010), http://www.timesonline.co.uk/tol/sport/more_sport/athletics/article7147133.ece (discussing Semenya's continued training despite her uncertain status).

34. *800m Champ Semenya Cleared to Race*, ESPN.COM (July 6, 2010), <http://sports.espn.go.com/oly/trackandfield/news/story?id=5357298>.

continue to believe that she is simply too different to race amongst the pool of female athletes.³⁵

There is much that is not known regarding Caster Semenya's case. Respecting the privacy of the athlete means that the results of the testing will never become known. It is unclear if Semenya was asked to undergo treatment or surgery to change her natural organs and hormones or even what her baseline physiology is.³⁶ There is absolutely no evidence that Semenya has any male internal organs, and no basis for the original media reports that she does.

Just like in the case of Pistorius, the question seemed to be whether Semenya has an advantage.³⁷ If Semenya did have an advantage, then she would not have been allowed to race. One may conclude from the fact that Semenya has been cleared to run and the limited information provided about that decision that the IAAF has determined that she does not possess an advantage, even as some of her competitors remain suspicious. The shadows of this year-long investigatory process may loom large over the remainder of Semenya's athletic career.

Intersexual athletes, like Caster Semenya was suspected to be, and transgender athletes,³⁸ pose eligibility questions analogous to those raised in the case of Oscar Pistorius. Semenya is not the first athlete to force the IAAF or the International Olympic Committee ("IOC") to grapple with questions of sex and gender in competition, nor is there any official blueprint in the world of elite sports competition for handling intersexuality. The current "solutions" to dealing with atypical athletes, like Pistorius and Semenya, seem to permit them to compete only when they are disadvantaged. More bluntly, if these athletes win, then the victory is ascribed to an advantage arising from their unusual conditions. In turn, these athletes may only be permitted to race if they are not capable of winning at all. And it is the lack of assurance from the IAAF that Semenya has no advantage that seems to be unsettling competitors.³⁹

35. Christopher Clarey, *Semenya Returns and So Do Questions*, N.Y. TIMES, Aug. 22, 2010, at D1, available at <http://www.nytimes.com/2010/08/23/sports/23iht-TRACK.html>.

36. *SA Threatens 'War' over Semenya*, BBC MOBILE (Sept. 11, 2009), <http://news.bbc.co.uk/sport2/hi/athletics/8249948.stm> (reporting that Semenya would not likely have to relinquish her medal and discussing the potential that Semenya may be required to undergo treatment before being deemed eligible to compete).

37. *Id.* ("There are three possible outcomes from the expert's discussions: that the condition does not give her a competitive advantage; the condition gives her a competitive advantage, which cannot be treated; or most likely, the condition can be treated in some way if she consents to it, and in time she can return to competition.").

38. For a discussion of the transgender athlete, see Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholarstic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1 (2011); Shayna M. Sigman, *From Sex-Testing to the Stockholm Consensus: The Tenuous Lex Sportiva of the Transgender Athlete*, Symposium, *Transgender Law: Challenging the Boundaries of Law and Gender*, 4 J. RACE, GENDER & ETHNICITY 31, 31-38 (May 2009), available at <http://www.tourolaw.edu/JournalRGE/uploads/Issues/Vol4Issue2/TransSymposiumTranscript.pdf> (discussing the Stockholm Consensus and how treatment of transgender athletes in misguided); Jill Pilgrim, David Martin, & Will Binder, *Far From the Finish Line: Transsexualism and Athletic Competition*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 495 (2003) (providing a comprehensive overview of the treatment of transgender athletes across various sporting disciplines); Yael Lee Aura Shy, *"Like Any Other Girl": Male-to-Female Transsexuals and Professional Sports*, 14 SPORTS LAW. J. 95 (Spring 2007).

39. See Clarey, *supra* note 35.

C. OSCAR AND CASTER VS. THE FIELD

This article discusses the curious case of Oscar Pistorius within the context of international sports law and compares it to the situation regarding Caster Semenya. This article also compares the treatment of Caster Semenya to that of other athletes with sex or gender variations, including both intersexual and transgender athletes.

This article argues that, in balancing the rights of competing athletes, fair competition, and equal opportunity, the current *lex sportiva* places too high a burden on individual athletes who are different. While it is important to balance the rights of competing athletes, a standard that forces atypical athletes to undertake lengthy and costly steps to gain eligibility on a case-by-case basis, rather than operating from a baseline assumption of presumptive eligibility, is problematic. The fact that both Pistorius and Semenya are currently eligible to run does not negate the fact that each has lost significant training and racing time to the process of being declared eligible, and that very process has done little to demonstrate to competing athletes why they should embrace these – or any other – athletes who are different.⁴⁰

This framework misallocates the risk that these athletes wield an unfair advantage over competitors, requiring the individual athletes to bear too high a burden in the name of protecting all other athletes and the purity of competition. Given the short window for elite achievement in many sporting fields, such a burden ensures that the question of eligibility may prevent an athlete from being able to compete among the best in the world.

This is particularly problematic at a time when sports governing officials and competitors are highly uneducated regarding the nuances of difference, whether related to issues of disability, sex, or gender. It is far too easy to begin the downward spiral to rumor-mongering and doubt, without proper respect for the privacy and dignity of the individual athlete. The current legal landscape—in terms of both the law of sport and international or domestic laws—provides insufficient protection of these basic human rights. This danger is exacerbated by the fact that many of the complaints against atypical athletes come from competitors, or “the field,” who can hardly be considered unbiased. The IAAF, IOC, and other organizations governing sport need to be able to issue eligibility decisions and guidelines that genuinely protect all individuals. However, the predominant voices are often those of the “normal” majority, rather than the scant minority athletes that need protection.

Next, this article maintains that the current policies set the bar for eligibility precisely at the point where atypical athletes are virtually guaranteed to lose to the “normal” athlete. Given that victory and defeat are measured in fractions of a second, it is nearly impossible for any two athletes to be perfectly evenly matched. As a result, standards that find any advantage grounds for disqualification presume that eligibility stems from disadvantage. This is true both for Pistorius and Semenya, as well as a handful of other athletes. No amount of process can validate such a substantive rule in a system that clearly does not plan to allow these athletes an opportunity for meaningful participation in competition.

It is true that some amount of advantage may indeed nullify the sporting categories that seek to promote the fairness of the competition. After all, it is a fundamental aspect of athletic competition to allow athletes to compete against similarly situated athletes. Children compete in age brackets, as do masters or seniors. Many sports rely on weight-classes. Men

40. See, e.g., Dave Middleton, *Jenny Meadows Happy to Race Against Caster Semenya*, GUARDIAN (London) (July 7, 2010), <http://www.guardian.co.uk/sport/2010/jul/07/jenny-meadows-caster-semenya>.

and women seldom compete against one another. Almost all elite athletes have genetic variances from the average population that allow them to succeed in the first place. Normally, these genetic differences, such as height or the distribution of various muscle-tissue types, are celebrated, rather than disqualified. Shaquille O'Neal, Yao Ming, or Michael Phelps can each be labeled a "freak of nature," but all are celebrated "freaks!"

This article asserts that the governing bodies of sports, including, but not limited to, the CAS and the IOC, have mistakenly drawn the line in the wrong place for treatment of certain kinds of physiological differences. Although there is no smoking gun evidence that this is due to intentional discrimination or bias, the implication of the current standards is that distinguishing these athletes is acceptable and desirable. Given the history of discrimination against the rights of the disabled, intersexual, or transgender, it is important to scrutinize distinctions that seem to place the greater burden for inclusion on the individual instead of the organization to be accommodating and understanding. In tough cases, where legitimate concerns may exist on both sides, the risk of a mistake with regard to inclusiveness ought to be borne by the sports organizations and the field (the pool of competing athletes), not by the individual.

Finally, this article addresses the implications of the treatment of athletes like Oscar Pistorius and Caster Semenya to the philosophy of sport. A functional limitation on equal participation in elite competition in the athlete's desired category calls into question that athlete's identity and humanity, which is contrary not only to basic notions of human rights, but also to the stated purposes of the Olympics.⁴¹ To prohibit Pistorius from competing against other runners is to deny him a sense of his identity as a *normal* sprinter. To Pistorius, the *Cheetah* blades are how he runs; they are not a device. When attached to his body, they are an integral piece of his self and his identity as a runner. Similarly, to prohibit Semenya from competing against other female runners is to deny her identity as a woman and an athlete. Semenya is not a man pretending to be a woman. No magazine make-over ought to be necessary for her to prove her femininity,⁴² and no complex medical and psychological testing can challenge her womanhood. A cryptic statement that a panel of experts has concluded that Semenya may compete, effective immediately, hardly undoes the damage of the questioning, the rumors, the media leaks, and the fact that other athletes running the 800 meter race view Semenya as someone to mock, scorn, or reject.

This article concludes that, although sport needs some objective standards to protect all athletes, it is a grave mistake when policy discussions and determinations alter issues of identity and the human condition. Rather than setting rules that presuppose would-be cheating or gamesmanship, the governing bodies of sport, accompanied by the authority and legitimacy of antidiscrimination and human rights laws, ought to focus on treating all athletes with the presumption of a good faith desire to participate. Then, *all* athletes would be able to play, maintain their privacy, *and* have a fair chance to win.

41. *The Modern Olympic Games*, THE OLYMPIC MUSEUM, at 2, available at http://multimedia.olympic.org/pdf/en_report_668.pdf (stating the purpose of the Olympic Games).

42. Will McCahill, *Semenya's Makeover Downright Cynical: Too Bad South African Athlete Can't Just "Wear Pants If She Feels Like It"*, NEWSER (Sept. 8, 2009), <http://www.newser.com/story/68907/semenyas-makeover-downright-cynical.html> (quoting Jezebel blogger Anna N. critiquing the public relations choice of Semenya's makeover and asserting "the idea that she has to put on a dress and lipstick to prove her femaleness to people is pretty depressing").

II. THE CURIOUS CASE OF OSCAR PISTORIUS

A. SEE OSCAR RUN

Oscar Pistorius is a sprinting prodigy. Born without fibula bones in his legs, he is a double-amputee below the knee.⁴³ Pistorius grew up using prosthetics and competing in athletics, particularly rugby.⁴⁴ He began sprinting only in 2004, at the age of 17, while rehabilitating a knee injury sustained playing rugby.⁴⁵

The Paralympics are the Olympic-equivalent for athletes with physical disabilities.⁴⁶ The rules for eligibility in the Paralympics are more complicated than those in the Olympics because they seek to pit similarly situated athletes against one another. Athletes are categorized based on their levels of disability to facilitate this goal.⁴⁷ They then compete against athletes of similar disability levels, ensuring a fair opportunity to compete and prevail.⁴⁸

Within one year from when he began sprinting, Pistorius set the world record at the Athens Paralympics in the 200 meter sprint, while competing against single-amputees (T44 category).⁴⁹ He also medaled in the 100 meter race.⁵⁰ Pistorius is currently the record holder in the double-amputee (T43 category) for the 100, 200, and 400 meter, and these record performance times are all equal or better than the current T44 record.⁵¹ Pistorius has also shown improvement since he began running, as he has broken his own world records dozens of times.⁵²

Pistorius first competed against able-bodied runners in his native South Africa in 2005. He won an open competition in the 100 meter, and he finished sixth in the 400 meter at the South African Championship.⁵³ The International Association of Athletics Federation ("IAAF") invited him to compete in the 400 meter race at the Grand Prix, but Pistorius

43. See Longman, *supra* note 3; McHugh, *supra* note 5.

44. See McHugh, *supra* note 5.

45. Gareth A. Davies, *My Sport: Oscar Pistorius*, TELEGRAPH.CO.UK (May 9, 2007), <http://www.telegraph.co.uk/sport/mysport/2312850/My-Sport-Oscar-Pistorius.html> (quoting an interview with Pistorius where he states, "I thought that I would be going back to the rugby season at school in April 2004, but started sprinting as part of my training after an injury, entered the South African disabled championships, and never looked back.").

46. See *Official Website of the Paralympic Movement*, INT'L PARALYMPIC COMM., <http://paralympic.org/IPC> (last visited Apr. 20, 2011) (describing the creation of the International Paralympic Committee (IPC), "the global governing body of the Paralympic Movement" that was created in 1989 and has managed the Paralympic Games since 1994).

47. See *Making Sense of the Categories: BBC Sport Online's Guide to the Different Disability Categories at The Paralympic*, BBC SPORT (Oct. 6, 2000), <http://news.bbc.co.uk/sport2/hi/olympics2000/paralympics/959701.stm> (explaining the six main categories of disability, of which amputee is one, and then how these other categories are broken down within each specific sport).

48. *Id.*

49. See *Oscar Pistorius Profile*, *supra* note 2.

50. *Id.*

51. *IPC Athletic Records*, INT'L PARALYMPIC COMM., <http://ipc-athletics.paralympic.org/records/> (search for records under "Paralympic Records" and "Outdoor") (last visited Apr. 20, 2011) (listing Pistorius' Paralympic records of 11.16 in the 100 meters, 21.97 in the 200 meters, and 47.49 in the 400 meters).

52. See *Oscar Pistorius Profile*, *supra* note 2 ("Pistorius has now broken his own world records 27 times").

53. *Id.*

declined due to personal reasons related to his education and training.⁵⁴ He returned to elite competition against able-bodied runners in 2007, and in March of that year, he placed second in the South African Championship 400 meter.⁵⁵

Later that month, the IAAF adopted Competition Rule 144.2(e) prohibiting the use of technical devices that would provide users with an advantage over other athletes.⁵⁶ The text of the Rule states, “[f]or the purpose of this Rule the following shall be considered assistance, and are therefore not allowed. . . use of any technical device that incorporates springs, wheels or any other element that provides the user with an advantage over another athlete not using such a device.”⁵⁷ During a press conference in June 2007, the IAAF President was asked about Pistorius’ eligibility. He answered that absent scientific evidence demonstrating an advantage, Pistorius was free to compete.⁵⁸

Pistorius was subsequently invited to run at the Golden Gala event in Rome in July of 2007. The IAAF specifically staged a “B” race which would be video-recorded using high definition cameras from different angles. Pistorius placed second in this race.⁵⁹ A cursory viewing of the video demonstrates that Pistorius is slower in his acceleration than other runners, and runs with a flatter stride (less bounce).⁶⁰ Most sprinters running a 400 meter race are fastest in the first and second 100 meters of the race.⁶¹ Pistorius is notably different; he is fastest in the second and third 100 meters of the race.⁶² There is no indication that Pistorius has a different stride length or that the amount of time his *Cheetah* blades are in contact with the ground differs from other athletes.⁶³

Following the Rome event, Pistorius agreed to undergo more testing to determine whether his prostheses would fall under those devices rendered impermissible by Rule 144.2(e).⁶⁴ The IAAF charged Dr. Elio Locatelli with the task, and he in turn referred the matter to Professor Brüggemann at the Institute of Biomechanics and Orthopaedics at the German Sport University in Cologne.⁶⁵ On November 12 and 13, 2007, Pistorius went to

54. Hannington Osodo & Alistair Thomson, *Fastest Man on No Legs*, THE TRIBUNE ONLINE EDITION (July 2, 2005), <http://www.tribuneindia.com/2005/20050702/spr-trib.htm#2> (noting that school studies kept Pistorius from accepting the invitation); Matthew Pryor, *Pistorius Willing and Able to Compete with the Best*, TIMESONLINE (April 24, 2006), http://www.timesonline.co.uk/tol/sport/more_sport/athletics/article708725.ece?print=yes&randnum=1151003209000 (“The World Championships in Helsinki, which I was invited to go to, were a huge thing for me and I couldn’t go. But I didn’t want to waste 11 years of school.”).

55. Pryor, *supra* note 54 (explaining that Pistorius had run the 400 meter race only five times when he finished in sixth place with a 47.34).

56. Pistorius Arbitration, *supra* note 8, at 3.

57. *Id.* (citing the rule in part and describing its enactment on March 26, 2007). *See also* INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS, COMPETITION RULES 2009, R. 144.2(f), *available at* http://www.iaaf.org/mm/Document/Competitions/TechnicalArea/04/95/59/20090303014358_httppostedfile_CompetitionRules2009_printed_8986.pdf (the current R. 144.2(f) is exactly the same as the former R. 144.2(e)).

58. Pistorius Arbitration, *supra* note 8 at 3.

59. *Id.*

60. PDoctor1980, *Oscar Pistorius – Golden Gala 2007 e risposta a una disabile*, YOUTUBE (May 16, 2008), <http://www.youtube.com/watch?v=5PIAMi-OKOc>.

61. Pistorius Arbitration, *supra* note 8, at 3.

62. *Id.*

63. *Id.*

64. *Id.* at 3–4.

65. *Id.*

Cologne where he raced against, and was tested with, five control athletes at the Institute's laboratory.⁶⁶

Dr. Brüggemann issued the ensuing report, known as the Cologne Report, on December 15, 2007.⁶⁷ The Report found that Pistorius had "significant biomechanical advantages" due to his flatter stride and the decreased energy loss from his *Cheetah* blades, as opposed to if he had ankle joints.⁶⁸ Based on the Cologne Report, on January 14, 2008, the IAAF Council ruled that Pistorius was ineligible to compete in IAAF-sanctioned events against able-bodied athletes.⁶⁹ The IAAF decision determined that Pistorius' use of the *Cheetah* blades constituted a technical device that provided the runner with an advantage over other able-bodied athletes, thus violating IAAF Competition Rule 144.2(e).⁷⁰

B. SEE OSCAR APPEAL

Oscar Pistorius appealed the IAAF's eligibility decision to the Court of Arbitration for Sport. The CAS has jurisdiction over the IAAF on matters of eligibility, and reviews all issues *de novo*, whether determinations of rules, laws, or facts.⁷¹

Pistorius raised several claims in his appeal. First, he challenged the process that led to the IAAF decision as "procedurally unsound."⁷² Next, Pistorius argued that the IAAF decision was "unlawfully discriminatory."⁷³ Last, he claimed that the IAAF decision was "wrong in determining that Mr. Pistorius' use of the *Cheetah Flex-Foot* device contravenes Rule 144.2(e)."⁷⁴ The CAS treatment of each of these claims will be taken in turn.

1. FAILURES IN PROCESS

a. A PROBLEMATIC MOTIVE

Rule 144.2(e) was introduced in March of 2007, shortly after Pistorius began competing against able-bodied athletes.⁷⁵ Pistorius' appeal raised the claim that the manner in which this rule was enacted and then applied against him was procedurally defective.⁷⁶

66. *Id.* at 4.

67. *Id.*

68. *Id.* ("In total the double transtibial amputee received significant biomechanical advantages by the prosthesis in comparison to sprinting with natural human legs.").

69. *Id.* at 5.

70. *Id.*

71. *Id.* (citing IAAF Competition R. 60.11 placing jurisdiction of appeals in the hands of the CAS and describing the CAS standard of review). See also Mitten & Davis, *supra* note 7 (discussing the CAS more generally); TAS/CAS, *General Information/20 Questions About The CAS*, TAS/CAS, <http://www.tas-cas.org/20question> (last visited Apr. 20, 2011).

72. Pistorius Arbitration, *supra* note 8, at 6.

73. *Id.* at 9–10.

74. *Id.* at 10–14.

75. *Id.*

76. *Id.*

In considering this claim, the CAS first examined whether Rule 144.2(e) (“the Rule”) was enacted specifically for the purpose of targeting Pistorius or whether there was an alternative explanation for it.⁷⁷ The IAAF offered testimony that “the introduction of this new Rule was aimed primarily at the use of spring technology in running shoes.”⁷⁸ The CAS rejected this potential motivation for the Rule, since the issue of questionable running shoes predated the Rule’s enactment and continued to be handled adequately, without any need for a new rule or policy.⁷⁹ In addition, the CAS noted that the IAAF had conceded during the hearing that another rule prohibits shoes that give athletes additional assistance constituting an unfair advantage, namely Rule 143.2.⁸⁰ As a result, the CAS found that it was “likely that the new Rule was introduced with Mr. Pistorius in mind.”⁸¹

The CAS had no objection to the “B” race filming of Pistorius, nor with the effort to test whether Pistorius had an advantage over other athletes, particularly given that Pistorius consented to participate.⁸² However, once the IAAF handed the testing over to the Cologne Institute, the CAS found that “the process began to go ‘off the rails’.”⁸³

b. A PROBLEMATIC CHARGE

An initial misstep was made when the IAAF charged Professor Brüggemann with his task.⁸⁴ The IAAF asked Brüggemann to determine whether Pistorius had an advantage in specific aspects of his running.⁸⁵ For example, the IAAF instructed Professor Brüggemann to test Pistorius while running in a straight line, after the acceleration phase.⁸⁶ Yet, the CAS noted, after having observed the Rome videotape, the IAAF would have known that excluding the start and acceleration phases of the race would have excluded the portions in which Pistorius was disadvantaged, thereby distorting the analysis.⁸⁷

In fact, at the CAS hearing, “Prof. Brüggemann made it clear that he did not believe that his mandate was to determine all of the advantages and disadvantages of running with the *Cheetah Flex-Foot* prosthesis.”⁸⁸ Given that the entire point of the Cologne testing was to determine if Pistorius violated Rule 144.2(e), it would seem that examining all the advantages *and* disadvantages the runner encountered would have been precisely the correct mission for the IAAF to have given the professor.

77. *Id.* at 7.

78. *Id.* at 6.

79. *Id.*

80. *Id.*

81. *Id.* at 7.

82. *Id.* (referring to the filming of the B race as “a *bona fide* exercise primarily designed to check whether Mr. Pistorius’ stride-length was greater than that of other athletes who ran comparable times in competition.”).

83. *Id.*

84. *See id.* (describing errors in the instructions to Prof. Brüggemann).

85. *Id.*

86. *Id.* (“The correspondence between the IAAF and Prof. Brüggemann shows that his instructions were to carry out the testing only when Mr. Pistorius was running in a straight line after the acceleration phase. By the time that the IAAF commissioned the Cologne tests it was known that this was the part of the race in which Mr. Pistorius usually ran at his fastest.”).

87. *Id.*

88. *Id.*

c. A PROBLEMATIC REPORT

In what continued to be a litany of procedural errors, not only was the IAAF's charge troubling, but the IAAF also ensured that Dr. Robert Gailey, the scientist that Pistorius and Ossur, the manufacturer of the *Cheetah* blades, selected to join in the Cologne testing, "was essentially 'frozen out' to such an extent that he declined to attend the Cologne tests."⁸⁹ Dr. Gailey was offered the opportunity only to observe testing, not to have any input into protocol or data analysis.⁹⁰ Dr. Gailey sent an email to the IAAF's Dr. Locatelli, who had delegated the testing to Professor Brüggemann and the Institute. The email raised several questions and offered a few suggestions regarding testing protocol.⁹¹ However, this communication was never sent to Brüggemann, who remained completely unaware of the potential for Dr. Gailey to participate in the testing or of Dr. Gailey's questions and recommendations.⁹² Therefore, the conclusions Professor Brüggemann reached, issued in the Cologne Report, were tainted by the limitations of the IAAF charge as well as the exclusion of Pistorius' chosen scientist, Dr. Gailey, to have meaningful input in the process.

The problematic Cologne Report continued down a troubled path. Pistorius was given less than one month to respond to the complicated scientific document.⁹³ Meanwhile, the IAAF created its own summary of the report and provided it to its Council members.⁹⁴ Professor Brüggemann was never shown a copy of the summary prior to the CAS hearing on this case, nor did he approve of its contents.⁹⁵ Once given a chance to review the summary at the hearing, Brüggemann "acknowledged that the summary as presented to Council members was not wholly accurate."⁹⁶

d. A PROBLEMATIC VOTE

This flawed eligibility process culminated with a vote of the IAAF Council members. On Friday, January 11, 2008, the IAAF's summary of the Cologne Report was distributed along with a call for a vote on eligibility.⁹⁷ Members were asked to return their votes by Monday morning, January 14.⁹⁸ The voting technique specified that abstentions would be counted as votes against eligibility for the athlete.⁹⁹ Only thirteen of twenty-seven Council members met the deadline, which was then extended.¹⁰⁰ Meanwhile, the CAS found that prior to the vote, Dr. Locatelli and several other IAAF officials had commented to the press that Pistorius would be deemed ineligible.¹⁰¹

89. *Id.*

90. *Id.*

91. *Id.* at 8.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

The CAS concluded that “at least some IAAF officials had determined that they did not want Mr. Pistorius to be acknowledged as eligible to compete in international IAAF-sanctioned events, regardless of the results that properly conducted scientific studies might demonstrate.”¹⁰² Additionally, the CAS concluded that the IAAF’s handling of this case “fell short of the high standards that the international sporting community is entitled to expect from a federation such as the IAAF.”¹⁰³ This phrasing is quite understated. Plain and simple, the IAAF railroaded Oscar Pistorius through its manipulation of his case, from the direction of testing through its final decision to ban the athlete.

2. WHAT CONSTITUTES UNLAWFUL DISCRIMINATION?

Since the CAS resolves all issues *de novo*, the procedural deficiencies merely set the tone for its decision regarding whether Oscar Pistorius may compete against other athletes. After describing the process, the CAS addressed Pistorius’ next claim, that the decision to ban him was unlawfully discriminatory.¹⁰⁴ Pistorius asserted that the IAAF failed to search for “any alternative solution, modification or adjustment that might permit him to participate in such events on an equal basis with able-bodied athletes,” denying “fundamental human rights, including equal access to Olympic principles and values.”¹⁰⁵

IAAF Rules have a choice of law provision. Issues of substantive law are governed in accordance with the laws of the Principality of Monaco.¹⁰⁶ There is no specific antidiscrimination or disability law in Monaco that would give rise to Pistorius’ claim.¹⁰⁷ When Casey Martin sued the Professional Golfers Association¹⁰⁸ to allow him to use a golf cart while competing on the tour, he brought his claim under the Americans with Disabilities Act (“ADA”), which requires reasonable accommodations of disabilities in certain contexts.¹⁰⁹ Pistorius had no such analog to the ADA under which to bring his claim.

The UN Convention on the Rights of Persons with Disabilities (“The Convention”) might protect some athletes with similar claims to Pistorius.¹¹⁰ Article 30.5 requires a signatory “[w]ith a view to enabling persons with disabilities to participate on an equal basis with others . . . to encourage and promote the participation, to the fullest extent possible, of persons with disabilities in mainstream sporting activities at all levels.”¹¹¹ The Convention was adopted in December 2006, opened for signature in March of 2007, and came into force on May 3, 2008, when it obtained its twentieth ratification.¹¹² While signatories to the Convention may have created legally binding obligations upon themselves, even prior to the

102. *Id.*

103. *Id.* at 9.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 661 (2001) (holding that under Title III of the ADA, Martin should be permitted the use of a golf cart on the PGA tour as a permissible ‘modification’ on account of his disability).

109. Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (2008).

110. Pistorius Arbitration, *supra* note 8, at 9.

111. Convention on the Rights of Persons With Disabilities and Optional Protocol, G.A. Res. 61/106, art. 30.5(a), Dec. 6, 2006, U.N. Doc. A/RES/61/106, available at <http://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>.

112. Pistorius Arbitration, *supra* note 8, at 9.

Convention taking full effect, which corresponds to the timeframe in which the Cologne Report and IAAF ban happened, the Principality of Monaco has neither signed nor ratified this Convention, nor has it adopted this Convention as its own law.¹¹³

As a result, the CAS did not need to consider how to apply Article 30.5 of the Convention to the case of Oscar Pistorius.¹¹⁴ Furthermore, the CAS explained that, even if the Convention were valid law to be applied to Pistorius, all the Article would require is competition on the “same footing as others,”¹¹⁵ which is precisely the issue presented in the case: does Pistorius compete on an equal basis with other athletes, as compared to having some advantage?¹¹⁶

3. WHAT CONSTITUTES AN ADVANTAGE?

After determining the procedural defects in the case and the limited reliability of the Cologne Report's conclusions, and noting that no specific antidiscrimination laws protect Pistorius, the CAS then moved on to the core issue of the case: did Pistorius' use of the *Cheetah* blades constitute an advantage under Rule 144.2(e)?

At the outset of this discussion, the CAS explored the ambiguities in the language of the Rule.¹¹⁷ It questioned the phrase “technical device,” though it assumed for purposes of this case that the prosthetic qualified as such a device.¹¹⁸ The CAS also questioned the use of the phrasing “incorporates springs,”¹¹⁹ suggesting that the human leg is naturally a spring, and speculating whether a difference exists between an actual spring and something that incorporates a spring.¹²⁰

Moving beyond quibbling over technicalities in the term “spring,” the CAS focused its attention on the language regarding advantages. It accepted that Rule 144.2(e) could indeed be viewed as a sensible rule that protects athletes against those who use “powered aids, such as motors, wheels, springs (as in ‘pogo sticks,’ for example), or other active propulsive devices.”¹²¹ Indeed, these are advantages, and the Rule prohibits devices that “provide the user with an advantage.”¹²²

The IAAF argued before the CAS that the term “advantage” was meant in an absolute sense, and that any device that provided an advantage, “however small, in any part of a competition . . . must render that athlete ineligible to compete regardless of any compensating disadvantages.”¹²³

The CAS rejected that argument, finding that such a definition of advantage “flies in the face of both legal principle and commonsense.”¹²⁴ Instead, the CAS adopted an

113. *Id.*

114. *See id.* (describing the purpose of Art. 30.5).

115. *Id.*

116. *Id.* at 10.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

interpretation that advantage meant “overall net advantage.”¹²⁵ If the disadvantages from the device outweighed the advantages, then the athlete, who was at a competitive disadvantage, could not be thought to have been provided an advantage.¹²⁶ Accordingly, the inquiry needed to identify whether Pistorius had a net overall advantage from using the *Cheetah* blades, which is something Professor Brüggemann had never been asked to determine.¹²⁷ The burden of proof fell on the IAAF to show by a “balance of probability” that Pistorius had such an advantage.¹²⁸

In February of 2008, Pistorius went back to the laboratory for more testing, this time under the protocol of his own experts, who delivered the Houston Report as evidence for this case.¹²⁹ The IAAF and Pistorius offered contesting arguments regarding whether the *Cheetah* blades delivered an overall net advantage, and the CAS weighed the scientific evidence before the panel.¹³⁰ There are essentially two potential areas for Pistorius to have an advantage. The first focuses on the differences in the biomechanics of his running, namely that his stride is flatter and less bouncy.¹³¹ The question was whether this difference might constitute an advantage.¹³² Second, due to a different energy transfer system, it is possible that Pistorius would have a metabolic advantage over other athletes.¹³³ In other words, perhaps Pistorius would not get fatigued as quickly as other athletes, either as a matter of his body tiring or lung capacity.

There were many areas where the experts on each side of the case agreed.¹³⁴ The scientific experts for the IAAF acknowledged the validity of the Houston tests and report.¹³⁵ That report demonstrated that Pistorius used the same amount of oxygen as other runners at sub-maximal speed, and that Pistorius fatigued normally.¹³⁶ While the Cologne Report did not engage in the same level of metabolic testing, the testing it did with regard to metabolic rates, including blood lactate amounts, produced inconclusive results.¹³⁷ The argument regarding energy loss or energy transference from the Cologne Report was also deemed inconclusive, as the experts all agreed that energy “loss” is often absorbed elsewhere.¹³⁸

As for the biomechanics, the experts agreed that Pistorius does run “flatter” than other runners.¹³⁹ However, it could not be determined if a less bouncy running stride constituted an advantage or a disadvantage.¹⁴⁰ In fact, there was some evidence that some sprinters train themselves to “bounce more” to create more speed.¹⁴¹ Running may be an easy sport to

125. *Id.*

126. *Id.* at 10–11.

127. *Id.* at 11.

128. *Id.* (describing the IAAF’s burden of proof and the “balance of probability” standard as the appropriate choice for a non-disciplinary matter).

129. *Id.* at 12.

130. *Id.* (discussing the expert testimony and the panel’s assessment of the evidence).

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 13.

139. *Id.*

140. *Id.*

141. *Id.*

begin, but its inherent simplicity belies the complexity of the mechanics involved.¹⁴² New training techniques as well as strategies for improved biomechanics continue to bring about development and achievement.¹⁴³

Most importantly, the experts agreed that “a mechanical advantage by a prosthetic leg would be expected to lead to a metabolic advantage for a runner.”¹⁴⁴ Since neither the Cologne Report nor the Houston Report found a metabolic advantage, there was reason to believe that there was no mechanical advantage.¹⁴⁵

As a result of this evidence, the CAS determined that the IAAF did not meet the burden of proof that Pistorius had an advantage.¹⁴⁶ The IAAF decision of January 14, 2008, declaring Pistorius ineligible, was revoked, and Pistorius was deemed eligible to compete in IAAF-sanctioned events.¹⁴⁷ In reaching this conclusion, the panel noted that, even though the *Cheetah* blades had existed for a decade, no runner other than Pistorius, whether a single or double amputee, had ever run fast enough to compete with able-bodied runners.¹⁴⁸ This reinforced the CAS decision; if the *Cheetah* blades were such an advantage, why had no other athlete until then been able to use them for that purpose?¹⁴⁹

C. RUN OSCAR RUN?

The CAS decision finding for Oscar Pistorius was issued with three significant caveats. First, the CAS limited its ruling to the existing *Cheetah* blades, not any subsequent developments in prosthetics that may indeed be able to provide net overall advantages.¹⁵⁰ Next, the CAS declared that its decision does not rule out the possibility that with developments in scientific knowledge, a new testing protocol could someday discover that Pistorius does have an advantage with the *Cheetah* blades.¹⁵¹ Therefore, the CAS decision has no *stare decisis* or precedential value to Pistorius if the opportunity arises for more testing. Finally, the CAS determination has no validity as applied to any other athlete, even if the athlete uses the same model as Pistorius does, the *Cheetah* “flex-foot” blades.¹⁵² Future athletes “must collaborate with the IAAF to have his or her eligibility under Rule 144.2(e) . . . interpreted on an individual basis.”¹⁵³

The first limitation makes sense. After all, the CAS should only rule on issues before the panel, and it would be irresponsible to issue Pistorius or any other athlete a blanket license to compete, no matter what device Ossur or another manufacturer may develop in the future. Nonetheless, the limitation suggests that any new device would require Pistorius to undergo the entire testing process from the beginning, rather than being permitted to demonstrate how a new prosthetic is functionally equivalent to the *Cheetah* blades. If, for

142. See *id.* (noting conflicting hypotheses on whether more vertical force is an advantage or disadvantage).

143. See *id.* (discussing adaptations of running styles).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 14.

151. *Id.*

152. *Id.*

153. *Id.*

whatever reason, he is no longer able to use that particular prosthetic, then he will be unfairly required to re-visit issues that have already taken significant time away from his life and training.

The second condition is more problematic. It stands to reason that if someone were to discover new scientific evidence demonstrating that Pistorius has a clear overall net advantage, the case ought to be re-opened. However, the CAS decision speaks of “a testing regime designed and carried out to the satisfaction of both Parties,”¹⁵⁴ a vague statement regarding the leverage that the IAAF would continue to hold over Pistorius to force him to agree to additional testing in the future. It is unclear that there is any initial gate-keeper (as opposed to after-the-fact CAS review) that would prevent the IAAF from abusing this process. Given the IAAF’s gross mishandling of Pistorius’ eligibility,¹⁵⁵ the lack of clarity combined with the implication that the IAAF is a neutral party capable of reinitiating testing is troubling.

The secondary and tertiary review by the IAAF would be aided by the continued attention that researchers have bestowed on Pistorius and the science of his running. In fact, the CAS process itself has been the source of additional scientific data that may lead to future controversy for Pistorius or similarly situated runners. Several studies have recently been published about Pistorius and the mechanics of the *Cheetah* blades, giving rise to a battle of the experts and further questioning of the CAS decision-making process.¹⁵⁶

As described above, the CAS based its decision on some of the findings contained in the Houston Report. This report was generated by the Rice University Locomotion Laboratory, and it was the work of seven experts in biomechanics and physiology.¹⁵⁷ At the CAS hearing, two of the experts presented the team’s findings: Hugh Herr and Rodger Kram.¹⁵⁸ Ultimately, two other experts of the team of seven, Peter Weyand and Matthew Bundle, would reach a different conclusion, namely that Pistorius has an advantage over able-bodied competitors.¹⁵⁹

On November 5, 2009, the Journal of Applied Physiology published a debate on whether “artificial limbs make artificially fast running speeds possible.”¹⁶⁰ This disagreement was between five of the Houston Report experts, two other colleagues, who found no advantage for Pistorius,¹⁶¹ and Weyand and Bundle, who believed that Pistorius does have an advantage. The primary area of dispute relates to the speed with which Pistorius swings his blades in the air and repositions them under his body.¹⁶²

154. *Id.*

155. *See* discussion *infra* Part II.B.

156. Jessica Stark, *Study Conducted at Rice Revives Olympic Prospects for Amputee Sprinter: Experts Find No Scientific Basis for Olympic Ban*, RICE NEWS & MEDIA REL., May 16, 2008, available at <http://www.media.rice.edu/media/NewsBot.asp?MODE=VIEW&ID=11016>.

157. *See id.* (listing the seven experts: Peter Weyand, Hugh Herr, Rodger Kram, Matthew Bundle, Craig McGowan, Alena Grabowski, and Jean-Benoit Morin).

158. *Id.*

159. *Id.*

160. *See Point & Counterpoint*, *supra* note 15.

161. Six of the seven authors of the *Counterpoint*, which argued against any advantage for Pistorius, additionally published another article on the mechanics of “running-specific prostheses,” finding the prosthetics more limiting on force-generation and achieving top speeds. *See* Grabowski, *supra* note 15.

162. *See Point & Counterpoint*, *supra* note 15.

More troubling was the fact that Weyand and Bundle claimed to have evidence of Pistorius' advantage prior to the CAS decision.¹⁶³ In a press release in May of 2008, Weyand was quoted as stating, "Based on the data collected at Rice, the blades do not confer an enhanced ability to hold speed over a 400 meter race . . . nor does our research support the IAAF's claims of how the blades provide some sort of mechanical advantage for sprinting."¹⁶⁴ The conclusion of the Houston experts, that "the scientific evidence put forth by the IAAF investigation to ban Pistorius was fundamentally flawed," was reported as unanimous.¹⁶⁵ Yet, Weyand subsequently stated that he never claimed that Pistorius had no advantage, and that due to the technicalities of publishing scientific research and the narrow question presented by the CAS (exploring the validity of the IAAF's report), neither the CAS nor the public had the full findings of the Houston Report experts in May of 2008.¹⁶⁶ Weyand further alleged that Hugh Herr, one of the two experts who presented the Houston findings to the CAS, and who is also a double-amputee, was never willing to consider that Pistorius might have an advantage.¹⁶⁷

Weyand is not the only scientist who has questioned Pistorius. Ross Tucker, a South African exercise physiologist, alleged on his Science of Sport blog that he was approached when the Pistorius legal team shopped around for researchers who would prove that he had no advantage.¹⁶⁸ Since Tucker felt that Pistorius had an advantage, he declined to participate in the process.¹⁶⁹ However, unlike Tucker, who cannot substantiate his belief in Pistorius' advantage, Weyand has recognized and published data, albeit contradictory to the data of his opponents.

Any attorney who has witnessed a battle of the experts can hardly be surprised by the outgrowth of Pistorius' testing. The key, though, is that the matter is hardly settled. Perhaps the CAS was correct to leave open the case of Oscar Pistorius' eligibility, in the face of future contrary scientific evidence. However, to the extent the CAS failed to consider all data that was available at the time of the decision, due to narrow questions posed to the scientific experts, and to the extent that the politics and logistics of science publishing have created advocates and detractors with strong opinions on the correct analysis of the data, the burden ought not be on Pistorius to re-arbitrate the issue of his advantage or lack thereof, should the IAAF choose to side with Weyand and Bundle. In other words, the experts clearly feel strongly about their findings, Pistorius, and the CAS hearing and decision.¹⁷⁰ This suggests that a second review of the matter may be fraught with additional procedural or substantive flaws and defects, and the decision to reopen this case should not be considered lightly. While the CAS could not foresee the breakdown between the experts behind the Houston Report—indeed, one may wonder what the CAS would have decided if

163. David Epstein, *New Study, for Better or Worse, Puts Pistorius' Trial in Limelight*, SPORTS ILLUSTRATED (Nov. 19, 2009), http://sportsillustrated.cnn.com/2009/writers/david_epstein/11/19/oscar.pistorius.

164. Stark, *supra* note 156; Epstein, *supra* note 163.

165. Stark, *supra* note 156.

166. Epstein, *supra* note 163 (conceding that while the press release "does not contradict the newly released conclusions . . . it's certainly more than enough to confuse the lay sports fan . . . only with 20/20 hindsight is it now apparent that the scientists took the wording narrowly to mean only that the precise basis presented to the CAS for an Olympic ban was not sound").

167. *Id.*

168. Ross Tucker, *Oscar Pistorius Gets a 10 Second Advantage in a 400m Race*, THE SCIENCE OF SPORT BLOG (Nov. 18, 2009, 11:52 AM), <http://www.sportsscience.com/2009/11/oscar-pistorius-gets-10-second.html>.

169. *Id.*

170. Epstein, *supra* note 163 (referring to the scientific disagreement as "a not-so-civil debate" and the way in which the published research "devolves into thinly veiled insults").

it did have all the published results—it could have realized that the inconclusive data combined with a highly suspect IAAF agenda or perhaps even just the complaints of other competitors might lead to premature requests for reconsideration of Pistorius' eligibility.

Last, the lack of applicability of this ruling to any other athlete also raises red flags. While arbitration tribunals do not operate with the same presumption of *stare decisis* that courts do, it is nonetheless unclear why the CAS decision should not have persuasive value for other disabled athletes seeking to compete on the general playing field. The CAS declared, "It follows that this Ruling has no application to the eligibility of any other amputee athletes, or to any other model of prosthetic limb; and it is the IAAF's responsibility to review the circumstances on a case-by-case basis, impartially, in the context of up-to-date scientific knowledge at the time of such review."¹⁷¹ The case-by-case method merely introduces the opportunity for inconsistent treatment of athletes, placing this judgment in the hands of the IAAF, which has already proved incapable of living up to its own standards in this case.

Furthermore, the CAS's concern about the time and cost of future testing seems misplaced. The panel decision expresses "hopes that this will not impose a substantial burden on the IAAF, because of the unique nature of Mr. Pistorius' case. However, if it does create an additional burden, it must be viewed as just one of the challenges of 21st century life."¹⁷² The panel issues no such consideration for the athlete who might be burdened, even though it is the athlete whose training is interrupted by this process and who would be required to jump through the testing hoops that the IAAF would set, even at his or her own cost.

The upshot of the CAS decision is that Oscar Pistorius is eligible to compete—for now. At an able-bodied IAAF sanctioned competition in July of 2008, Pistorius set a personal best time in the 400 meter.¹⁷³ Nonetheless, his time was just 0.7 seconds shy of the Olympic qualification cut-off.¹⁷⁴ When Pistorius failed to qualify for the 2008 Beijing Olympics, it was not at all surprising; he spent the bulk of his prior year battling for his eligibility.¹⁷⁵ One may wonder if Pistorius could have shaved off the additional 0.7 seconds from this new personal best had he not spent so much of his time and energy devoted to his eligibility case.

Pistorius' efforts to qualify were not without some controversy. The IAAF general secretary expressed concern about "safety" if the South African Olympic Committee were to select Pistorius for their 4 x 400 meter relay team.¹⁷⁶ The Pistorius legal camp threatened action if the IAAF attempted to influence the South African selection. The IAAF retreated, insisting that it would comply with the CAS decision regarding Pistorius' eligibility.¹⁷⁷ In

171. Pistorius Arbitration, *supra* note 8, at 14.

172. *Id.*

173. *Double-Amputee Pistorius Fails Again to Qualify for Olympics*, ESPN.COM (July 11, 2008), <http://sports.espn.go.com/oly/trackandfield/news/story?id=3483741>.

174. *Id.*

175. *Id.* (describing Pistorius' 46.62 time as 1.07 seconds shy of the 45.55 qualifying time and noting that "Pistorius has struggled to regain his form after spending most of 2008 away from training to concentrate on fighting the ban, which was lifted on May 16").

176. Joshua Robinson, *Pistorius is Down to His Last Hope*, N.Y. TIMES, July 17, 2008, at D5, available at <http://www.nytimes.com/2008/07/17/sports/olympics/17rings.html>.

177. *Id.*

the end, the South African Olympic Committee did not select Pistorius, as four other athletes had posted better times.¹⁷⁸

Pistorius continued to be successful at the 2008 Paralympic Games.¹⁷⁹ After all, there is no rule that he cannot run against disabled athletes, even while he challenges himself among the general field of elite runners. Only twenty-four years old now, Pistorius has plenty of time to recover from the effects of fighting for his eligibility in 2008 and from an off-track boating accident that he suffered in 2009,¹⁸⁰ to train and set his sights for the 2012 London Games and beyond. So long as his eligibility is not revoked, there is plenty of time to prepare.

III. THE CURIOUS CASE OF CASTER SEMENYA

A. SEE CASTER RUN

If Oscar Pistorius' introduction to the international running community was fast, then Caster Semenya's can be viewed as meteoric.¹⁸¹ While Semenya may have a fair number of characteristics in common with Oscar Pistorius besides speed—nationality, sport of choice, support at home, controversy surrounding eligibility, and representation by the same law firm¹⁸²—there are significant differences between the two. Pistorius is a young, white man who grew up with financial security in Johannesburg.¹⁸³ Semenya is a young, black woman who grew up in an impoverished rural village in South Africa's Limpopo Province.¹⁸⁴

Another notable difference between Pistorius and Semenya is that Pistorius originally detested running, whereas Semenya embraced it.¹⁸⁵ As described earlier, Pistorius began running to rehabilitate a rugby injury and his international success came quickly. As a youth, Semenya enjoyed various traditionally male sporting activities, like football

178. Joshua Robinson, *Amputee Sprinter's Beijing Quest is Over*, N.Y. TIMES, July 19, 2008, at D1, available at <http://www.nytimes.com/2008/07/19/sports/olympics/19track.html>.

179. Stephen Wade, *Pistorius Wins 3rd Gold in Beijing Paralympics*, USA TODAY (Sept. 16, 2008), http://www.usatoday.com/sports/topstories/2008-09-16-4209797663_x.htm (reporting that Pistorius won the gold medal in the 2008 Paralympics in the 100, 200, and 400 meters races).

180. See *Double-Amputee Sprinter Oscar Pistorius Hurt in Boating Accident*, *supra* note 11.

181. Christopher Clarey, *Gender Test After a Gold-Medal Finish*, N.Y. TIMES, Aug. 19, 2009, at B13, available at http://www.nytimes.com/2009/08/20/sports/20runner.html?_r=1 (quoting IAAF general secretary Pierre Weiss as explaining that Semenya “was unknown three weeks ago . . . Nobody could anticipate this one. Sorry. We are fast, but we are not a lion.”).

182. Jeremy Hodges, *Dewey Takes Up Semenya Case in IAAF Dispute*, LEGALWEEK.COM (Sept. 21, 2009), <http://www.legalweek.com/legal-week/news/1534157/dewey-takes-semenya-iaaf-dispute> (discussing that Dewey & LeBoeuf was recommended to Semenya by the South African minister of sports and recreation due to the firm representation of Oscar Pistorius, and that the firm has taken on the case on a pro bono basis).

183. *Oscar Pistorius' Autobiography Out This Week; He Says His Prosthetics Have Taken Him Everywhere He's Wanted to Go in Life*, MEDIA DIS&DAT (May 4, 2009, 6:53 PM), <http://media-dis-dat.blogspot.com/2009/05/oscar-pistorius-autobiography-out-this.html> (citing The Times' (South Africa) book review of *Blade Runner*, in which Pistorius notes that, until his parents divorced and the family scaled back, he was “spoilt rotten”).

184. See Levy, *supra* note 27.

185. Compare *Oscar Pistorius' Autobiography*, *supra* note 183 (quoting Pistorius as saying he “loathed” athletics and thought “Geez, this is terrible”), with Chandre Prince, *Hero Caster's Road to Gold...*, TIMES LIVE (Aug. 30, 2009), <http://www.timeslive.co.za/sundaytimes/article35010.ece> (describing Caster as a child who “would run religiously every day” as an “obsession.”).

(American soccer), wrestling, and karate.¹⁸⁶ Semenya was deemed too rough to compete in girl's football, but continued playing association football with boys.¹⁸⁷ As part of her training for football, Semenya took up running every day.¹⁸⁸ Though Semenya was a valuable member of her football club, it was on the track she shined.¹⁸⁹ Until leaving for university in Pretoria, Semenya ran with the local Moletjie Athletics Club.¹⁹⁰

Semenya debuted in elite competition at the 2008 World Junior Championships in Poland at the age of seventeen,¹⁹¹ and later that year she won gold in the 800 meter race at the Commonwealth Youth Games.¹⁹² In the summer of 2009, Semenya won gold in both the 800 meter and 1500 meter races at the 2009 African Junior Championships.¹⁹³ Not only did Semenya's 800 meter time of 1:56.72 set a junior national record, a championship record, and a personal best; at the time, it was the best 800 meter time run during the entire 2009 competitive season.¹⁹⁴ The performance also qualified Semenya to compete in her first senior competition, the 2009 World Championships in Berlin.¹⁹⁵ Weeks later, Semenya improved upon that record time, registering a 1:55.45, which was good enough for gold at the World Championships.¹⁹⁶ Counting her performances in regional, national and international competition, Semenya won thirty-one medals and received numerous awards in her home country in 2008 and 2009.¹⁹⁷

186. Malone, Miller & Maclean, *supra* note 21.

187. *Id.* (quoting Semenya's father as describing her as "heartbroken" and stating, "[u]p until that point, Caster had lived for football and she was desperate to play the game. The coaches said she was a 'hard mama'—too tough and too big to play."); Patrick Sawyer & Sebastian Berger, *Gender Row Over Caster Semenya Makes Athlete into a South African Cause Célèbre*, THE TELEGRAPH (Aug. 23, 2009), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/southafrica/6073980/Gender-row-over-Caster-Semenya-makes-athlete-into-a-South-African-cause-celebre.html> (describing how Semenya was "disqualified from her school's girls' football team at the age of 14 for being too rough").

188. Donald McRae, *Caster Semenya: 'People Want to Stare at Me, to Touch Me. I Don't Think I Like Being Famous So Much'*, THE GUARDIAN, Nov. 13, 2009, at p1 Sports, available at <http://www.guardian.co.uk/sport/2009/nov/14/caster-semenya-donald-mcrae-training-camp>.

189. Levy, *supra* note 27.

190. *Id.*

191. Philip Hersh, *Others in 800 Meters Raise Questions About Surprise Winner Caster Semenya of South Africa; International Officials Start Inquiry*, L.A. TIMES, Aug. 20, 2009, at C1, available at <http://articles.latimes.com/2009/aug/20/sports/sp-world-track20?pg=2> (noting Semenya's time in 800 meters race at the 2008 World Junior Championships as 2:11.98).

192. *Youth SA Team Strikes Gold*, IOL SPORT (Oct. 16, 2008), http://www.iol.co.za/index.php?set_id=6&click_id=4&art_id=nw20081016164120337C414633 (listing Semenya's gold-winning performance was 2:04.23, which was a new South African record).

193. Levy, *supra* note 27 (showing that Semenya's performance in the 800 meters was 1:56.72); see also AFRICAN ATHLETICS, <http://www.africanathletics.org/?p=245> (listing results of 1500 meters; Semenya's time was 4:08:01).

194. Mark Ouma, *African Junior champs, Day 2*, IAAF (July 31, 2009), <http://www.iaaf.org/news/kind=100/newsid=52412.html> ("South African Caster Semenya clocked the fastest women's 800m time in the world this year at the Africa Junior Championships at the Germain Comaramond Stadium in Bambous, Mauritius on Friday . . .").

195. Levy, *supra* note 27.

196. Anna Kessel, *Gold Medal Athlete Caster Semenya Told to Prove She Is a Woman*, GUARDIAN (London) (Aug. 19, 2009), <http://www.guardian.co.uk/sport/2009/aug/19/caster-semenya-gender-verification-test> (noting Semenya's time of 1:55.45 as being 2.45 seconds faster than the performance of Janeth Jepkosgei, the defending champion).

197. Prince, *supra* note 185 (listing the awards as including "the Aganang Local Municipality Sportsperson of the Year 2008/09, South African cross-country championship in Mpumalanga 2008, Cossasa School Sport Athletics Gauteng 2009, Confederation of African Athletics 2008 and Limpopo provincial athletics championships 2008.").

The story of Semenya's global success is brief, at least for the moment. For now, the ending remains unclear. We have not heard the last of this twenty-year-old runner, an athlete described as both "a natural"¹⁹⁸ and "a young Usain Bolt."¹⁹⁹ In July 2010, Semenya returned to racing and many predict in due time, she will set the world record in the 800 meter race.

The remainder of the Semenya story continues off the track, where things went, figuratively, off track, for both the athlete and the IAAF. Within hours of her performance at the 2009 World Championships, the IAAF launched an investigation into the athlete.²⁰⁰ The IAAF cited the drastic improvements in Semenya's racing times over the 2008 and 2009 competition seasons, finding the situation highly suspicious and suggestive of drug use.²⁰¹

The IAAF also compelled Semenya to undergo what the media dubbed a "gender test," though the process is actually one of sex testing and consists of more than one test.²⁰² The difference between sex and gender will be explained in the next section. Though it remained hidden at the time, it appears as though South African officials, at the request of the IAAF, had already begun the process of conducting sex tests on Semenya as early as August 7th, weeks before the Berlin competition, though it is not clear that the athlete was made aware of this at that time.²⁰³

Once it was reported that the IAAF was investigating Semenya, a media frenzy ensued.²⁰⁴ Semenya went from being a little known athlete, competing in a race widely ignored by the common sporting public, into the spotlight. Very few could say who held the women's record for the 800 meter race, yet Caster Semenya's name, face, and body became recognizable overnight. Much of the attention was unflattering or insensitive, questioning Semenya's "mannish" appearance and voice.²⁰⁵ Despite the fact that Semenya was no stranger to questions about her gender,²⁰⁶ she was so upset by the handling of her case that she threatened to boycott the medal ceremony and had to be convinced to attend.²⁰⁷

198. Levy, *supra* note 27 (quoting Coach Phineas Sako of the Moletjie Athletics Club).

199. Malone, *supra* note 21 ("Caster looked like a young Usain Bolt").

200. Kessel, *supra* note 196.

201. Clarey, *supra* note 181 (quoting IAAF spokesman Nick Davies as saying, "We just acted in a way we thought was sensible If we would have sat back and done nothing, it would have been very strange of us as well.").

202. *Id.* ("Davies emphasized that the testing is extensive").

203. Jere Longman, *South African Runner's Sex-Verification Result Won't Be Public*, N.Y. TIMES, Nov. 19, 2009, at B10, available at <http://www.nytimes.com/2009/11/20/sports/20runner.html> (describing how then-president of Athletics South Africa, Leonard Chuene, rejected the medical advice of a South African top sports medical official to have Semenya withdrawn from the Berlin race, "because the results of the tests were not yet known"); Rick Broadbent, *Caster Semenya to Keep Her Gold Medal*, TIMES (London) (Nov. 20, 2009), http://www.timesonline.co.uk/tol/sport/more_sport/athletics/article6922916.ece (stating that Semenya was "duped into believing they were drug tests.").

204. Tom Fordyce, *Semenya Left Stranded by Storm*, BBC SPORT (Aug. 19, 2009), http://www.bbc.co.uk/blogs/tomfordyce/2009/08/semenya_left_stranded_by_storm.html (referring to the "media siege" and "cloud of official suspicion" in Semenya's case as "callous" and "cruel").

205. Sawyer & Berger, *supra* note 187.

206. See, e.g., Malone, Miller & Maclean, *supra* note 21 (quoting school officials who explained that they kept a copy of Semenya's birth certificate with them, because of frequent questions regarding her sex and quoting Semenya as stating, "They are doubting me" as the reason she would be taken to "the toiler" for further checking).

207. Sawyer & Berger, *supra* note 187 ("So hurt was the 18-year old Semenya that she had to be persuaded by the president of her country's athletics federation, Leonard Chuene, to step onto the podium to accept her gold medal"); Prince, *supra* note 185 (noting that "the allegations 'deeply hurt' her").

The IAAF alleged the fact that the federation required sex testing was only made public due to a leak, and that Semenya was never intended to be thrown to the media.²⁰⁸ However, there are some allegations that the source of this leak was an erroneously sent fax from an IAAF official.²⁰⁹

Allegations were also raised regarding the role that race may have played in the handling of Semenya's case.²¹⁰ South African officials and others insisted that Semenya would not have been treated the same way, had she been white or male.²¹¹ For about one month following the race and the leak of the IAAF sex testing, Semenya became a focal point regarding the treatment of gender and race in sport. Subsequently, the IAAF admitted that Semenya's case could have been handled better and with greater sensitivity.²¹² At the same time, as the facts have unraveled, it has become clear that Athletics South Africa and South African officials may have forced the IAAF's hand in this instance, claiming racism and an invasion of privacy, when more could have been done internally to protect Semenya.²¹³ As other sports "scandals" came and went, Semenya's case faded from the public conscience, popping only from time to time with vague pronouncements that offered no new information until the ultimate IAAF announcement of Semenya's eligibility in July 2010.

Many expected the IAAF to rule at its November 2009 Council meeting on whether Semenya would be allowed to keep the medals and prize money she had won, and whether she would be allowed to compete against women in the future. On November 18, 2009, the IAAF issued a statement that Semenya was still undergoing medical testing, and that her eligibility was not yet determined.²¹⁴ As a result, Semenya's case would not be discussed at

208. Smith, *supra* note 23 ("The International Association of Athletics Federations (IAAF) is standing its ground, saying it only made the sex test public after it had already been reported in the media.").

209. Gordon Farquhar, *New Twist in Semenya Gender Saga*, BBC SPORT (Aug. 25, 2009), <http://news.bbc.co.uk/sport2/hi/athletics/8219937.stm> (referring to the source of the leak as a fax sent to the wrong person); Ross Tucker & Jonathan Dugas, *How Do You Know the Sex of a Chromosome? Pull Down Its Genes! If Only It Were That Easy . . .*, THE SCIENCE OF SPORT (Aug. 25, 2009, 9:08 PM), <http://www.sportsscientists.com/2009/08/caster-semenya-debate-some-physiology.html> ("And finally it's now emerged that the leak that saw this process made public came because a fax was sent to the wrong person. What a pity for such a sloppy mistake to have such repercussions, and the IAAF will hopefully take action there, because they've also got a great deal to answer for when it comes to the leak. Not for the process or their policy, mind you, but for this leak, which was a grave error.").

210. See, e.g., Smith, *supra* note 23; Sawyer & Berger, *supra* note 187 (quoting the youth wing of the South African Communist Party, which is an alliance with the ANC, as stating, "the accusations against Semenya pander to 'the commercial stereotypes of how a woman should look, their facial and physical appearance, as perpetuated by a backward Eurocentric definition of beauty'"); Levy, *supra* note 27.

211. Sawyer & Berger, *supra* note 187 (quoting Butana Komphela, the chairman of the Parliament's Portfolio Committee on Sport and Recreation, as saying, "The humiliation of Semenya was a sign of sexist action by IAAF as it undermined the achievements of women. It is a very gross action that gives an impression that the IAAF only recognizes good things when they are done by men;" and quoting Gugu Ndima of the Youth Communist League as saying, "It represents a mentality of conforming feminine outlook within the white race, that as long as it does not fall within this race or starve and paint itself in order to look like the white race it therefore is not feminine.").

212. Michael Sohn, *Is a Female Track Star a Man? No Simple Answer*, TIME.COM (Aug. 25, 2009), <http://www.time.com/time/health/article/0,8599,1918668,00.html> ("IAAF president Lamine Diack admitted that the affair could have been treated with more sensitivity.").

213. See generally *SA Chief Issues Semenya Apology*, BBC SPORT (Sept. 19, 2009), <http://news.bbc.co.uk/sport2/hi/athletics/8261566.stm>.

214. *IAAF: Semenya Still Undergoing Gender Tests*, WORLD-TRACK.ORG (Nov. 18, 2009), <http://world-track.org/2009/11/iaaf-semenya-still-undergoing-gender-tests>.

the November Council Meeting, and “no further comment will be made on this subject until further notice.”²¹⁵

Within a day or two of the IAAF announcement, several news accounts reported that an agreement had been reached whereby the IAAF would allow Semenya to keep the medal and prize money from the race she won.²¹⁶ While medals, championship records and titles are important to athletes, so is the prize money that they win, especially for athletes who come from poor families. Elite athletics is not just about being the best or fastest; it is an important source of income. However, all of these reports about Semenya being able to keep her medal and money appeared to derive from information provided by South Africa’s sports minister, and the IAAF failed to verify that such a determination regarding the race results had been made at that time.²¹⁷ Given the tremendous controversy surrounding the South African handling of Semenya’s case, which included the resignation of an Athletic South Africa coach, the suspension of the South African president of Athletics by the South African Sports Confederation and Olympic Committee, and an official apology issued to Semenya, there was reason to doubt whether the IAAF and the South African sporting officials were on the same page in November of 2009.²¹⁸

In March, the IAAF announced that no further progress had been made in Semenya’s case.²¹⁹ Semenya responded in late March announcing her intention to resume racing,²²⁰ and on April 6, 2010, she set her return date as June 24, where she would race in Spain.²²¹ More than six months after the process began, only the IAAF officials, and perhaps Semenya and her legal team, knew exactly where things stood in terms of what medical testing or treatment would still be necessary. In June 2010, Semenya reaffirmed her commitment and intention to race in the 2010 season, noting that she was not banned or declared ineligible, and that she had voluntarily chosen to cooperate with the IAAF process.²²² Perhaps in response to Semenya’s announcement or perhaps in response to behind the scenes agreements or medical treatments, the IAAF announced in July 2010 that Semenya was clear to race, and the athlete resumed racing.²²³

215. *Id.*

216. See, e.g., *Gender-Test Runner Semenya to Keep Gold Medal, Says South Africa*, CNN.COM (Nov. 19, 2009), <http://www.cnn.com/2009/SPORT/11/19/athletics.semenya.test.gold/index.html>.

217. *Semenya Will Keep Gold Medal*, SI.COM (Nov. 19, 2009), <http://sportsillustrated.cnn.com/2009/more/11/19/caster.semenya.ap/index.html> (quoting the South African sports ministry that Semenya will be able to keep her medal and citing the IAAF refusal to confirm this fact).

218. See, e.g., Broadbent, *supra* note 203 (illustrating time-line of Semenya’s case); *Government Wants Chuene Fired*, ESPN.COM (Sept. 20, 2009), <http://sports.espn.go.com/oly/trackandfield/news/story?id=4489230> (“We need to be upright in censuring the officials who handled the matter,” said secretary-general Gwede Mantashe, the South African Press Association reported. ‘ASA didn’t handle the matter with the utmost transparency and honesty.’”).

219. *No Progress in Semenya Case*, RTE SPORT (Mar. 11, 2010), <http://www.rte.ie/sport/athletics/2010/0311/semenyac.html>.

220. Sophie Taylor, *Caster Semenya Comeback In Spite of IAAF*, THE FIRST POST (Mar. 31, 2010), <http://www.thefirstpost.co.uk/61636,sport,other-sport,caster-semenya-announces-comeback-in-spite-of-iaaf-after-gender-tests-and-hermaphrodite-claim>.

221. *Caster Semenya Returns to Racing June 24 in Spain*, ESPN.COM (Apr. 6, 2010), <http://sports.espn.go.com/espn/wire?section=trackandfield&id=5059569>.

222. Southern Times Writer, *Semenya Vows to Race Again This Season*, THE SOUTHERN TIMES (June 4, 2010), http://www.southerntimesafrica.com/article.php?title=Semenya_vows_to_race_again_this_season_&id=3934.

223. *Caster Semenya May Compete*, IAAF (July 6, 2010), <http://www.iaaf.org/aboutiaaf/news/newsid=57301.html>.

B. RUN CASTER RUN?

After embarking on testing to determine if Semenya has a “rare medical condition” that would provide her with an unfair competitive advantage, the IAAF finally issued a statement that, based on the recommendation of a panel of medical experts, Semenya was cleared to race.²²⁴ The presumption from the IAAF ruling is that Semenya either has no competitive advantage or has one which can be mitigated via some form of treatment.

Semenya returned to racing in July 2010, winning her first race back in Finland.²²⁵ In August 2010, she returned to Berlin, one year after her victory in the championship that led her down the path of IAAF investigation.²²⁶ Her future in the sport remains to be seen.

While there was a brief statement issued, there was no official or public ruling on Semenya’s eligibility, leaving any questions regarding whether the process was defective unanswered. Semenya remains eligible to race and one can only speculate what compromises may have been reached to achieve this result. In her return to racing, Semenya has already won and lost, and her times have been slower than one might have projected based on her performance last year.²²⁷ It is unknown how much of this is attributable to the distraction the process of sex testing had on Semenya’s training, though one can safely assume that there would be some effect of the months of eligibility limbo.²²⁸

To the credit of the IAAF, the federation recognized the need for confidentiality of the results of Semenya’s sex test.²²⁹ The current lack of information regarding the outcome of Semenya’s case suggests that the IAAF was able to prevent additional leaks and increased its own attention to ensuring that Semenya’s privacy rights were not further violated. Whether a result of enlightenment or the threat of lawsuit, this was a move in the right direction, though far too late to protect Semenya’s privacy. The IAAF’s lack of information after nearly a full year of behind the scenes testing has left some of Semenya’s competitors feeling more justified in rejecting her right to race and skeptical as to the fairness of racing against her.²³⁰

While one cannot commend the handling of Semenya’s eligibility by either Athletics South Africa or the IAAF, as a procedural or substantive matter, it appears as though the IAAF is taking steps to improve how it treats athletes with atypical sex or gender variations. During the course of the year’s public silence regarding Semenya, the IOC recommended the establishment of official “gender testing” to assist federations, such as the IAAF, in evaluating atypical athletes, such as Semenya, in a more consistent and private manner.²³¹

224. *800m Champ Semenya Cleared to Race*, *supra* note 34.

225. *Caster Semenya Wins Comeback Race in Finland*, CBSNEWS (July 15, 2010), <http://www.cbsnews.com/stories/2010/07/15/sportsline/main6681573.shtml>.

226. *Semenya Returns to Berlin*, S. AFR. ATHLETE (Aug. 20, 2010), <http://www.saathlete.com/latest/semenya-returns-to-berlin>.

227. Andrew Dampf, *Caster Semenya Baffles Observers with ‘Incomprehensible’ Run*, THE HUFFINGTON POST (Sept. 10, 2010), http://www.huffingtonpost.com/2010/09/01/caster-semenya-baffles-ob_n_701845.html.

228. See Anna Kessel, *Caster Semenya Speaks of Rough Ride Back from Suspension*, THE GUARDIAN (June 7, 2011), <http://www.guardian.co.uk/sport/2011/jun/07/caster-semenya-diamond-league>.

229. See, e.g., David Smith, *Caster Semenya Gender Test Results Delayed After IAAF Intervention*, THE GUARDIAN (June 10, 2010), <http://www.guardian.co.uk/sport/2010/jun/10/caster-semenya-gender-test-iaaf>.

230. Clarey, *supra* note 35.

231. *IOC Recommends Gender-Test Centers*, CBSNEWS (Jan. 20, 2010), <http://www.cbsnews.com/stories/2010/01/20/sportsline/main6120277.shtml>.

Nonetheless, there is some evidence that the IAAF is still struggling with how to regulate participation in women's sport based on conceptions of advantage. In April 2011, the IAAF introduced new rules for determining the eligibility of female athletes with "hyperandrogenism," in an effort to bar athletes thought to have too many male hormones to fairly compete with women. It is yet to be seen whether these new regulations will prevent other athletes from being mistreated like Semenya or, instead, form the basis for future mistreatment.²³²

C. SEX & GENDER IN SPORT

The history of sex testing in sports is muddled and often ugly. Sex testing was introduced to elite athletic competition in the late 1960s.²³³ Regional competitions began using sex tests in 1966, and the Olympics officially conducted sex testing starting in 1968.²³⁴ The original method for sex testing was a visual inspection, which not only degraded the athlete, but could also produce inconclusive and erroneous results.²³⁵ Over time, most sporting officials, though not all, switched to a chromosomal analysis, whether based on a smear or swab, like the Barr body test, or a DNA-based test, like the PCR (polymerase chain reaction).²³⁶ This chromosomal approach also has its flaws. In 1996, eight female athletes "failed" sex tests, only to be later classified as having permissible intersex conditions.²³⁷

Officially, the IAAF ceased sex testing in 1991 and the IOC followed suit in 2000.²³⁸ However, the IOC, the Olympics, and the federations still maintain the authority and ability to subject individual athletes to sex tests and do so in specific cases of athletes who compete in Olympic sports.²³⁹ In Beijing, a laboratory was set up for the purpose of sex testing²⁴⁰ and early in 2010, the IOC indicated the need for more formal testing centers.²⁴¹

232. See Shawn M. Crincoli, *Eligibility: The IAAF Hyperandrogenism Regulations and Discrimination*, WORLD SPORTS L. J., June 2011.

233. See Pilgrim, Martin & Binder, *supra* note 38, at 509 (describing how initial sex tests in the late 1960s consisted of "nothing more than women traipsing nude in front of a panel of physicians who were monitoring for appropriately corresponding genitalia").

234. *Id.* at 509.

235. See *Olympics Sex Test*, PEAK PERFORMANCE, <http://www.pponline.co.uk/encyc/olympics-sex-test-583> (last visited Mar. 4, 2011).

236. Pilgrim, Martin & Binder, *supra* note 38 at 510–12 (describing the split between the IAAF and the IOC between using the PCR test, once the Barr body test was abandoned).

237. Emine Saner, *The Gender Trap*, GUARDIAN (London) (July 30, 2008), <http://www.guardian.co.uk/sport/2008/jul/30/olympicgames2008.gender>.

238. Joe Leigh Simpson et al., *Gender Verification in the Olympics*, 284 JAMA 1568, 1568–69 (2000); Pilgrim, Martin & Binder, *supra* note 38, at 99, 101; David Epstein, *Well, Is She or Isn't She? Sex Testing an Athlete Isn't Nearly as Simple as It Sounds*, SI VAULT (Sept. 7, 2009), <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1159745/1/index.htm> (noting that the IAAF convened a panel of experts in 1990 to make suggestions on how to verify sex and the experts recommended abolishing sex testing, due to the virtual impossibility of finding a clear cut answer).

239. Ian O'Reilly, *Gender Testing In Sport: A Case for Treatment?*, BBC NEWS (Feb. 15, 2010), <http://news.bbc.co.uk/2/hi/8511176.stm>.

240. Katie Thomas, *A Lab is Set to Test the Gender of Some Female Athletes*, N.Y. TIMES (July 30, 2008), <http://www.nytimes.com/2008/07/30/sports/olympics/30gender.html> (describing the creation of the lab and the controversy surrounding sex testing of athletes).

241. See CBSNews, *supra* note 225.

It is unclear how often these tests occur. An IAAF official has indicated that since 2005, eight athletes have been subjected to sex testing, four of whom were asked to cease competing.²⁴² Due to the athletes' privacy, officials attempt to conduct these investigations quietly and confidentially. As the Semenya case demonstrates, this does not always happen. Even when such testing does remain private, there exists the potential for individual athletes to be forced into quiet retirement, as recommended by the IAAF, rather than challenge eligibility, which would typically require publicizing the results of the testing at the expense of the athlete's privacy. When sex testing functions well – to the extent one agrees with sex testing to begin with – the public and media would not know what had occurred or any resolution had been reached. Indeed, it is unclear if Semenya has received any treatment based on the testing that occurred. Given her public reactions and insistence on returning to competition over the course of the testing process, one can speculate that no changes have occurred. But this is mere speculation; any effort to investigate the subject would be inappropriate and disrespectful of the athlete's privacy. To the extent Semenya does not regain the running form and performance she demonstrated prior to testing, there will be some speculation whether she has received medical treatment that would affect her performance and to what extent she has been harmed by the IAAF's protracted process of sex testing.

Sex testing has grown more elaborate, reflecting the complexities of sex and gender.²⁴³ Semenya met with no fewer than five medical experts. Her sex testing has included a gynecologist, endocrinologist, internist, psychologist, and gender expert.²⁴⁴ The days of the strict chromosomal approach are behind us, as the IAAF and the IOC have struggled to protect competition in sports that is based on binary categories of male or female at a time when there is increasing medical knowledge that people are not always so easily categorized.²⁴⁵

1. THE DIFFERENCE BETWEEN SEX AND GENDER

a. SEX AND THE INTERSEXUAL

Many people use the terms sex and gender interchangeably.²⁴⁶ The IAAF attempted to determine the "true" sex of Caster Semenya, and other athletes like her. Sex is a biological or physiological manifestation, and it represents the sum of the body's sexual or reproductive system.²⁴⁷ When a baby is born, or even *in utero*, expecting parents want to

242. Broadbent, *supra* note 203, at 1 (citing Pierre Weiss, IAAF general secretary as indicated that Semenya was the eighth athlete to undergo sex testing since 2005, and referring to a 2006 policy paper indicating that six intersex conditions are permissible for future competition).

243. For a representative perspective of how sex and gender testing have changed over time, see IAAF Policy on Gender Verification, IAAF, <http://www.iaaf.org/mm/document/imported/36983.pdf> (last visited Apr. 15, 2011); M.A. Ferguson-Smith & Elizabeth A. Ferris, *Gender Verification in Sport: The Need for Change?*, 25(1) BRIT. J. SPECIAL MED. 17 (1991).

244. *Champion Female Runner's Gender Tested*, CBSNEWS (Aug. 20, 2009), <http://www.cbsnews.com/stories/2009/08/20/sportsline/main5254301.shtml>.

245. See, e.g., Julie Shapiro, *Check Only One: M/F/Other*, 11 CARDOZO WOMEN'S L. J. 587, 587 (2005).

246. Tarynn M. Witten, et al., *Transgender and Transsexuality*, 216-17, in *ENCYCLOPEDIA OF SEX AND GENDER*, 216, 216-17 (Carol R. Ember & Melvin Ember eds., 2003) (noting that "[o]ne of the most widely used word-processing programs identifies sex and gender as interchangeable" and that a study conducted in 2000 questioning if people knew what gender meant found that a "common response" was that gender is the same as sex).

247. Pilgrim, Martin & Binder, *supra* note 38, at 497-99.

know if the baby is a boy or a girl. Doctors examine the external genitalia to pronounce the baby's sex.²⁴⁸ In many cases, this cursory evaluation is sufficient, because the entirety of the sexual system is in alignment.²⁴⁹ That is to say, the outsides match the insides.

In rare cases, though, treating sex as a binary choice between male and female physiology is incorrect. Intersexuality is the medical term for individuals who are neither strictly biologically male or female.²⁵⁰ Debates over how to properly define and classify intersexuality have produced varying estimates of its prevalence in the population, ranging anywhere from roughly 0.018 % to 1.7% of all live births.²⁵¹ Between 0.1 and 0.2 % of intersex cases produce ambiguities that lead to specialized medical intervention and quite often surgery.²⁵² Some of these conditions are linked to medical deficiencies and other risks.²⁵³

Though different conditions can produce intersexuality, one common criterion is that the person has a chromosomal make-up that differs from how he or she appears.²⁵⁴ For example, individuals may have XY chromosomes, which typically would render them male; however, something prevents the body from undergoing the usual development of a male. People with Androgen Insensitivity Syndrome (AIS), one of the more common intersexual conditions, cannot properly metabolize androgens, and, thus, lack the ability to synthesize and develop from male hormones.²⁵⁵ AIS can produce an array of different external appearances along the male to female spectrum, which means that some individuals appear outwardly female and grow up without any knowledge that they have this condition.²⁵⁶

b. GENDER AND THE TRANSGENDER

Whereas sex focuses on physiology, gender refers to identity. Gender is the sense of self that makes one "feel" that she is a girl or woman (or in the alternative, a boy or man).²⁵⁷

248. *Id.* at 498 (referring to this as the 'natal sex').

249. *See id.*

250. Stephanie Busari, *Gender Row Athlete: What is Intersexuality?*, CNNHEALTH.COM (Aug. 20, 2009), <http://www.cnn.com/2009/HEALTH/08/20/gender.athlete.intersex/index.html> (defining intersexuality and acknowledging that "there are around 20 to 30 types of biological 'intersex' conditions, each of them affecting the body in different ways.").

251. *Compare How Common is Intersex?*, INTERSEX SOC'Y OF N. AM., <http://www.isna.org/faq/frequency> (providing statistics based on the research of Anne Fausto-Sterling) (last visited Apr. 28, 2011) with Leonard Sax, *How common is Intersex? A Response to Anne Fausto-Sterling*, 39 J. SEX RES. 174, 175 (2002) (critiquing Fausto-Sterling's inclusion of conditions that may not be identified clinically as intersex conditions to produce a higher rate of incidence). For a middle-ground figure, see Alice Domurat Dreger, "Ambiguous Sex" – or Ambivalent Medicine? Ethical Problems in the Treatment of Intersexuality, 28 THE HASTINGS CENTER REP. 24, 26 (1998) (estimating intersexuality at 1 in 1,500 live births, or in other words, 0.067%).

252. *Id.*

253. *Are there Medical Risks Associated With Intersex Conditions?*, INTERSEX SOC'Y OF N. AM., http://www.isna.org/faq/medical_risks (last visited Apr. 28, 2011).

254. *See Is Intersex the Same as "Ambiguous Genitalia"?*, INTERSEX SOC'Y OF N. AM., <http://www.isna.org/faq/ambiguous> (last visited Apr. 28, 2011).

255. *See What is Intersex?*, INTERSEX SOC'Y OF N. AM., http://www.isna.org/faq/what_is_intersex (last visited Apr. 28, 2011).

256. Busari, *supra* note 250 (discussing why Semenya likely does not have AIS, based on her physical appearance and the questions being asked about her condition).

257. See Christine A. Smith et al., *Words Matter: The Language of Gender*, in HANDBOOK OF GENDER RESEARCH IN PSYCHOLOGY 364 (2010).

In the vast majority of the population, gender corresponds with sex.²⁵⁸ Someone who is biologically male will feel like a man. Someone who is biologically female will feel like a woman. For some, though, there is mismatch between their gender and sex. To be transsexual is to have a biological or physiological sex that is different from one's own gender.²⁵⁹ The psychological term for the condition once used was Dissociative Identity Disorder, in recognition of the fact that the gender identity is disassociated from the body's manifestation.²⁶⁰ This condition is now called Gender Identity Disorder.²⁶¹

The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM,"), lists the main components of Gender Identity Disorder. This includes: (1) an insistence that one is of the opposite biological sex or a strong desire to be the opposite sex; (2) evidence of persistent discomfort with, and the perceived inappropriateness of the individual's biological sex; and (3) evidence of clinically significant distress or impairment in work or social life.²⁶²

As part of the diagnosis, the DSM clearly excludes intersexual individuals from the definition of Gender Identity Disorder.²⁶³ It does, however, include the possibility that an intersexual may wish to change the sex he or she was assigned. For these people, the DSM offers the category of Gender Identity Disorder Not Otherwise Specified.²⁶⁴ These DSM categories are not without controversy since they suggest that transgender or transsexual individuals have a psychological defect or disorder.²⁶⁵ At the same time, living a life in the "wrong" body does produce harmful psychological effects, including depression and suicidal thoughts.²⁶⁶ Psychological counseling is a mandatory step on the path to what is commonly, and somewhat misleadingly, called a "sex change," and the DSM categorization itself may allow some transgender individuals to obtain health care for treatments or otherwise assert their rights.²⁶⁷ As a result, even proponents of transgender rights often do

258. See *supra* notes 242-244 and accompanying text.

259. Pilgrim, Martin & Binder, *supra* note 38, at 500-03.

260. National Alliance on Mental Illness, *Dissociative Identity Disorder*, [http://www.nami.org/Content/ContentGroups/HelpLine1/Dissociative_Identity_Disorder_\(formerly_Multiple_Personality_Disorder\).htm](http://www.nami.org/Content/ContentGroups/HelpLine1/Dissociative_Identity_Disorder_(formerly_Multiple_Personality_Disorder).htm) (last visited Apr. 7, 2011).

261. See *DSM-IV-TR Diagnostic Criteria For Gender Identity Disorder*, PSYCHIATRIC NEWS, July 18, 2003, at 32, 32, available at <http://pn.psychiatryonline.org/content/38/14/32.full> (listing criteria for gender identity disorder); Ken Hausman, *Controversy Continues to Grow Over DSM's GID Diagnosis*, PSYCHIATRIC NEWS, July 18, 2003, at 25, available at <http://pn.psychiatryonline.org/content/38/14/25.full> (discussing controversy over GID's inclusion in DSM-IV-TR).

262. See American Psychiatric Association, *DSM-IV-TR Diagnostic Criteria For Gender Identity Disorder*, PSYCHIATRIC NEWS 32 (July 18, 2003).

263. Gender Identity Disorder Information, *What is GID?*, <http://www.hemingways.org/GIDinfo/about.htm> (last visited Apr. 7, 2011).

264. *Id.*

265. See, e.g., Lois Wingerson, *Gender Identity Disorder: Has Accepted Practice Caused Harm?* PSYCHIATRIC TIMES, May 19, 2009, available at <http://www.psychiatrictimes.com/display/article/10168/1415037> (describing the controversy surrounding labeling atypical gender identities as a "disorder").

266. *Id.*

267. *The World Professional Association for Transgender Health, Inc., WPATH Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.*, WPATH (June 17, 2008), <http://www.wpath.org/documents/Med%20Nec%20on%202008%20Letterhead.pdf> (urging "health insurance carriers and healthcare providers in the United States to eliminate transgender or trans-sex exclusions and to provide coverage for transgender patients and the medically prescribed sex reassignment services necessary for their treatment and well-being, and to ensure that their ongoing healthcare (both routine and specialized) is readily accessible.).

not agree on the subject of DSM inclusion.²⁶⁸ A full discussion of this topic falls well outside the scope of this article.

2. THE *LEX SPORTIVA* OF INTERSEXUAL AND TRANSGENDER ATHLETES

a. THE RATIONALE FOR SEX TESTING

While Caster Semenya might be the most recent noteworthy athlete to garner attention with regard to her gender, there exists a long history of sex testing within elite athletic competition.²⁶⁹ Questions regarding sex and gender identity have forced the IOC, the federations, and other athletic organizations to grapple with how to celebrate the achievements of female athletes without compromising the integrity of athletic records, fairness to all women in sports, and the identity or humanity of particular individual athletes.

The story of sex testing is linked to two significant narratives regarding women's participation in elite sports: discrimination and doping. It is also connected to a fear of gender-based impostors and cheats. This age-old subject has been explored in fiction, whether the purpose is to make an audience think, to make people laugh, or simply for shock value.²⁷⁰ To establish the background against which Semenya is categorized and judged as a cultural matter, this subsection discusses each of these aspects in turn: first, discrimination, then, doping, and, finally, gender-bending.

i. DISCRIMINATION & CULTURAL NORMS

First, it is impossible to understand the role that sex testing has played in elite sports without acknowledging a long-standing history of discriminatory treatment of female athletes that has been accompanied with a systematic denial of athletic opportunities for women.

The original claim against women's inclusion in athletics was that women were too fragile to play sports and that doing so would damage a woman's health.²⁷¹ While such claims may seem ridiculous in 21st century Western societies, athletic competitions, particularly the modern Olympics, were especially slow to offer women a chance to compete.²⁷² Some sports were modified to "protect" women from misperceived dangers.²⁷³

268. GENDER IDENTITY REFORM ADVOCATES, <http://www.gidreform.org/index.html> (last visited April 7, 2011).

269. See *supra* notes 233–237 and accompanying text.

270. Some famous fictitious accounts of gender-bending include: William Shakespeare's *Twelfth Night* or *What You Will* (play 1600-01); Virginia Woolf's *Orlando* (novel 1928); *Bosom Buddies* (television series 1980-82); *Victor/Victoria* (film 1982); *Tootsie* (film 1982); *Yentl* (film 1983); *The Crying Game* (film 1992); *Mrs. Doubtfire* (film 1993).

271. See Andy Milroy, *Equality for Women?*, ASSOCIATION OF ROAD RACING STATISTICIANS, http://www.arrs.net/article_equalityforwomen.php (last visited April 7, 2011) (describing the IAAF hostility to women athletics from the early 20th century through 1960); Larry Eder, *Evolution of Olympic Women's Athletics, Courtesy of IAAF (Mel Watman), Comments by Larry Eder*, RUNBLOGRUN (Aug. 6, 2008, 9:39 AM) <http://www.runblogrun.com/2008/08/evolution-of-olympic-womens-athletics-courtesy-of-iaaf-mel-watman-comments-by-larry-eder.html> (noting the "strong antipathy to women's athletics" in the 1920s).

272. See Eder, *supra* note 271.

273. *Id.*

In our post-Title IX world, it has become clear that women are capable athletes, and that athletic participation in many cases bolsters women's health, rather than undermining it.²⁷⁴ If anything, the concern should be that elite female athletes are now subject to the same over-training, recurrent injuries, and commercial exploitation that successful male athletes endure.²⁷⁵ The same classic *machismo* disregard for safety and injury has permeated women's sports, as women demonstrate that they are just as tough and capable as men.²⁷⁶

Embedded in this long-standing discrimination is a pervasive cultural determination that sports are part of the masculine domain and that athletic achievement is simply not feminine behavior.²⁷⁷ It is still perceived as an insult if you tell someone that he runs or throws "like a girl," even as elite female runners outrun and elite softball pitchers outgun the vast majority of the male population.

Other scholars have explored the hyper-masculinization of sports culture in various contexts, including the extent to which female athletes are either hyper-sexualized or questioned regarding sex or sexual orientation.²⁷⁸ This has resulted in the athletes themselves engaging in a range of displays to express their own femininity, including expressions through hair, make-up, nail polish, or simply by acting more provocatively and sexual.²⁷⁹ Mixed in the balance are cultural standards of beauty or feminine appearances,

274. See, e.g., *Women Involved in Sports May be Healthier*, UPI.COM (Dec. 21, 2009), http://www.upi.com/Health_News/2009/12/21/Women-involved-in-sports-may-be-healthier/UPI-82601261435502 (reporting on the findings of the Women's Sports Foundation recently published document, Ellen J. Staurowsky et al., *Her Life Depends On it II: Sport, Physical Activity, and the Health and Well-Being of American Girls and Women*, WOMEN'S SPORTS FOUND. (Dec. 2009), <http://www.womenssportsfoundation.org/~media/Files/Research%20Reports/Her%20Life%20Depends%20On%20It%20II%20Covers%20and%20Inside%20with%20December.pdf>); Robert Kaestner & Xin Xu, *Effects of Title X and Sports Participation on Girls' Physical Activity and Weight*, Univ. of Ill. at Chi. (Feb. 2006), <http://harrisschool.uchicago.edu/Programs/beyond/workshops/ppepapers/obesity-title-9-advances.pdf> (demonstrating positive effect on the health of adolescent girls from increased athletic opportunities).

275. Compare, e.g., Michael Sokolove, *WARRIOR GIRLS: PROTECTING OUR DAUGHTERS AGAINST THE INJURY EPIDEMIC IN WOMEN'S SPORTS* (2008) (describing the risks to young girls and women in elite soccer from a culture that values over-training and playing hurt), with Mark Hyman, *UNTIL IT HURTS: AMERICA'S OBSESSION WITH YOUTH SPORTS AND HOW IT HARMS OUR KIDS* (2009) (looking at the increase in over-use injuries in youth sports, particularly arm injuries in teenage pitchers).

276. This unfortunately has produced skewed problems for women in the areas in which they are *not* physiologically like men. Young women participating in sports appear to suffer severe knee injuries (e.g., ACL tears) and head trauma (e.g., concussions) at a much greater rate per exposure hour than young men do. See, e.g., Katherine Hobson, *4 Injuries That Hurt Female Athletes: Concussions, Stress Fractures, "Runner's Knee," and ACL Damage are Big Problems for Women in Sports*, U.S. NEWS (Aug. 15, 2008), <http://www.usnews.com/health/family-health/articles/2008/08/15/4-injuries-that-hurt-female-athletes.html> (referring to studies showing that women experience concussions more frequently than men in sports like basketball and soccer, and at the same rates in ice hockey, despite the lack of body-checking in women's hockey).

277. See Eder, *supra* note 271.

278. See, e.g., Jennifer L. Knight & Traci A. Giuliano, *Blood, Sweat and Jeers: The Impact of the Media's Heterosexist Portrayals on Perceptions of Male and Female Athletes*, 26 J. SPORTS BEHAV. 272 (2003) (discussing media coverage of gender stereotypes and sexual orientation regarding athletes).

279. See, e.g., Ron Sirak, *Overexposed?*, GOLF DIGEST (Sept. 7, 2009), http://www.golfdigest.com/golfworld/columnists/2009/09/golf_espn_posing_semi_nude_sirak (discussing the controversy over three LPGA decision to pose in "ESPN the Magazine in tastefully covered states of undress"); Randy Kim, *Behind the Scenes at Danica Patrick's SI Swimsuit Shoot*, AOLNEWS.COM (Feb. 10, 2009), <http://backporch.fanhouse.com/2009/02/10/behind-the-scenes-video-from-danica-patricks-si-swimsuit-shoot> (including a behind the scenes video that discusses Patrick's 2008 and 2009 photo shoots for the Sports Illustrated Swimsuit Issue); Christie Succop, *Amazing Moments in Olympic History: Florence Griffith-Joyner*, TEAMUSA.ORG (Sept. 30, 2009), <http://www.teamusa.org/news/article/16583> (referring to Griffith-Joyner's trademark long fingernails and willingness to race with her hair down and noting that "Griffith-Joyner set a

and these norms are fraught with racial as well as gender-based judgments. It is this cultural effect that was most recently seen when Caster Semenya engaged in a magazine makeover, looking very much the girl that she was accused of not being.²⁸⁰

To summarize this rationale, sex testing is a tool by which officials, competing athletes, the media, and the general public, can give legitimacy to questions regarding the femininity of any athlete who is thought to be too masculine. Sometimes the suspicion relates to performance, to appearance, And sometimes to attitude and personality. For Semenya, all three of these aspects have been called into question. Her running performance and improvements seem too good for her to be a girl. She does not look feminine enough (especially prior to the make-over). And she has been described as a tomboy, deemed too rough to play football with girls. Thus, the act of questioning Semenya's sex and gender falls into the category of widely accepted societal behavior,²⁸¹ even if this type of questioning is disrespectful to Semenya or anathema to her dignity.

ii. DOPING -- TURNING WOMEN INTO MEN

It is also impossible to understand the role of sex testing in elite athletic competition without recognizing the extent to which it was co-opted as a tool in the battle against doping and performance enhancing drugs. Women who dope by taking steroids often develop masculinizing characteristics, such as a deeper voice, male-pattern hair growth, and increases in lean muscle mass inconsistent with female endocrinology.²⁸²

For one transgender athlete, doping magnified gender confusion. Heidi Krieger was a track and field athlete who competed in the shot put for East Germany. In 1979, she joined the Dynamo Sports Club, the state-machine run athletic school and training facility, which was storming international competition with drug-fueled success.²⁸³ From the age of fourteen, when she joined, Krieger was given steroids and injections, while being told these were vitamins, glucose or birth control.²⁸⁴ The hormones wreaked havoc on Krieger's body, leading to aggression, depression, mood swings, and anatomical changes consistent with the masculinizing effects of androgenic-anabolic steroids.²⁸⁵

precedent for female athletes by demonstrating that they can be both feminine and athletic.”).

280. *Makeover for SA Gender-Row Runner*, BBC MOBILE NEWS (Sept. 8, 2009), <http://news.bbc.co.uk/2/hi/8243553.stm> (reporting on Caster Semenya's makeover in South Africa's *YOU* magazine); see also Levy, *supra* note 184 (describing Semenya's makeover expression as “painfully uncomfortable” and “garish” and how the images were deeply disturbing to Funeka Soldaay's cousin, a South African young woman with an intersex condition).

281. Brittney Griner is a college basketball player who has also raised similar questions to Caster Semenya on these three parameters, despite no questions as to her sex. Guy Trebay, *Brittney Griner, Basketball Star, Helps Redefine Beauty*, N.Y. TIMES, April 8, 2010, at E8, available at <http://www.nytimes.com/2010/04/08/fashion/08Brittney.html> (noting that tolerance and even appreciation of the beauty of muscular, aggressive, androgynous-appearing female athlete has increased, though people still question the sex and sexuality of such athletes).

282. Sigman, *supra* note 16, at 149.

283. Jere Longman, *DRUG TESTING; East German Steroids' Toll: 'They Killed Heidi'*, N.Y. TIMES (Jan. 26, 2004), <http://www.nytimes.com/2004/01/26/sports/drug-testing-east-german-steroids-toll-they-killed-heidi.html?src=pm>.

284. *Id.*

285. Matthew Syed, *How Blue Pills Turned Heidi Krieger into a Man*, TIMES (London) (July 5, 2008), http://www.timesonline.co.uk/tol/sport/more_sport/article4273050.ece.

In 1986, Krieger won gold in the shot put at the European Championships,²⁸⁶ but the victory was short-lived. Crippled with mood swings, depression, and chronic pain, Krieger retired from competition in 1990.²⁸⁷ In 1997, Krieger underwent surgery for sex reassignment, and he now lives as a man, and goes by the name Andreas.²⁸⁸ Doping did not cause Andreas Krieger's gender identity confusion; the confusion predated the introduction of performance enhancing drugs.²⁸⁹ Doping did, however, exacerbate the situation, producing physical side effects that Krieger felt left him no choice but to abandon his former female body.²⁹⁰ Already masculinized in irreversible ways, Krieger chose to transition.²⁹¹

In 2000, Dr. Manfred Hoepfner, the East German medical director, and Manfred Ewald, the president of the East German Olympic Committee, the masterminds behind the East German doping program, were tried on charges of causing bodily harm to the athletes they treated.²⁹² Retired athletes suffered from cancer, liver damage, pregnancy difficulties, birth defects in offspring, and psychological harms.²⁹³ The doctors were convicted and given suspended sentences and probation, respectively.²⁹⁴

Evidence from secret documents revealed that more than 10,000 athletes were given steroids over a twenty-year time period beginning in the late 1960s, with the greatest impact on the *female* athletes.²⁹⁵ The East German team rose from obscurity to significant medaling and record-setting performances at the elite level due to this state-wide system of doping.²⁹⁶ It is no wonder that many of the women competing for the country looked masculine. The amount of steroids given to Krieger (and others like him) exceeded, by more than fifty times, what a female naturally produces. This represented an amount far greater than the testosterone that Canadian sprinter Ben Johnson was taking when he was caught doping.²⁹⁷ Some of the drugs were not even clinically tested before they were given to the athletes.²⁹⁸

For Andreas Krieger, the story has a happy ending of sorts. During the trial, he met another former athlete, Ute Krause, who was testifying.²⁹⁹ Krause had been a swimmer in the East German system.³⁰⁰ Krause's rapid weight gain from the steroids led her to become bulimic and she later quit sports after a suicide attempt.³⁰¹ The two fell in love and

286. *Id.* (Krieger's winning distance at the Championships in Stuttgart was 21.10 meters).

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Apology Over East German Doping*, BBC NEWS (May 5, 2000), <http://news.bbc.co.uk/2/hi/europe/738098.stm>.

293. Longman, *supra* note 283.

294. For an excellent overview of the East German doping lawsuit, see Steven Ungerleider, FAUST'S GOLD: INSIDE THE EAST GERMAN DOPING MACHINE (2001). The former athletes have also brought a class action lawsuit against Jenapharm, the drug company responsible for providing many of steroids. Roger Boyes, *Sex-Change Athlete Sues Pharmaceutical Company*, TIMES (London) (June 11, 2005), <http://www.timesonline.co.uk/tol/news/world/article532095.ece>.

295. See Syed, *supra* note 285.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

married.³⁰² A “Heidi Krieger Medal” is awarded each year to Germans who combat doping, and part of the award is taken from Krieger’s tainted gold medal.³⁰³ The happy ending, however, is marred by the fact that Krieger still suffers severe physical effects related to the doping.³⁰⁴ And the irony is not lost on Krieger that, while he was previously tricked into taking steroids, he now voluntarily has his wife inject him with testosterone, as is typical for female-to-male transsexuals.³⁰⁵

Sex testing was introduced at the Olympic level precisely when officials started to realize how commonplace performance enhancing drugs had become at the elite level.³⁰⁶ There was no suitable testing for doping,³⁰⁷ yet the performances and appearances of the women competing suggested that *something* was making the women perform more like men. The expectation was that sex testing could capture some of these steroid-fueled athletes.³⁰⁸

The IOC officially dropped sex testing in 2000, though it continues, as noted above. This timeframe corresponds to the introduction of better doping detection methods. It also matches an era in which sex and gender are better understood, to the point where a mere chromosomal test is recognized to be insufficient to determine an athlete’s sex.³⁰⁹

iii. GENDER-BENDING AS A TROPE

Last of the rationales is a deep-rooted concern that, without some controls, there is a risk for gender-bending cheating.³¹⁰ The unique category of women’s sports is perceived to be threatened from the risk of men pretending to be women in order to win. This concern persists despite the fact that there is no evidence of a male athlete having ever won an Olympic medal while pretending to be a woman. In fact, there is only one reported case of someone who even tried.

“Dora” Ratjen competed for Germany in the 1936 Berlin Games in the high jump, where she placed fourth.³¹¹ Later, she won gold at the European Championship in Vienna in 1938.³¹² Beyond that, Ratjen did not compete.³¹³ However, Ratjen was noteworthy for what

302. *Id.*

303. Longman, *supra* note 283.

304. Syed, *supra* note 285.

305. *Id.*

306. Saner, *supra* note 237.

307. *Id.*

308. *Id.*

309. *Id.*

310. See Steven Lynch, *Where Men Were Men . . . and So Were the Women*, GUARDIAN (London) (Aug. 7, 2004), <http://www.guardian.co.uk/sport/2004/aug/07/athensolympics2004.olympicgames31> (describing the history of cheating in the Olympics).

311. Aaron Kuriloff, *25 Great Hoaxes, Cheats and Frauds in Sport*, ESPN.COM (Apr. 17, 2005), <http://sports.espn.go.com/oly/columns/story?id=2039471> (ranking Ratjen as #18 on the list of all-time cheats in sports).

312. *Id.*; Stewart Maclean, *Is She Really a HE? Women’s 800m Runner Shrugs Off Gender Storm to Take Gold*, DAILY MAIL (Aug. 19, 2009), <http://www.dailymail.co.uk/news/worldnews/article-1207653/Womens-800m-gold-medal-favourite-Caster-Semenya-takes-gender-test-hours-World-Championship-race.html>.

313. Stefan Berg, *How Dora the Man Competed in the Woman’s High Jump*, SPIEGEL ONLINE (Sept. 15, 2009), <http://www.spiegel.de/international/germany/0,1518,649104,00.html>.

she wasn't—female.³¹⁴ Ratjen raised some suspicion due to his deep voice and unwillingness to shower with women, although he was accepted by his fellow German teammates, including Gretel Bergmann, who had been dropped from the team due to alleged underperformance (i.e., being Jewish).³¹⁵

The truth about Ratjen's sex was later discovered by police at a train station, responding to a concern about a man dressed as a woman.³¹⁶ Ratjen later allegedly commented that living as a girl for three years was “most dull.”³¹⁷ There is some suggestion that Ratjen had atypical genitalia, and it is unclear to what extent this was known to Nazi officials, who compelled him to compete as a woman.³¹⁸ Nonetheless, there was no question that Ratjen was male, in both sex and gender. After the fact, Ratjen returned the gold medal he had won, and his world record from Vienna was erased from the books.³¹⁹

To date, Heinrich “Dora” Ratjen is the only male athlete who has pulled the wool over the eyes of officials in order to compete as a woman. Nonetheless, while Ratjen can be swept aside as atypical, he represents a significant fear in the minds of IOC officials and female competitors. Even though Ratjen is an exception that proves a rule, it is a popular movie or television trope that a man could dominate athletic competition by pretending to be a woman, just as another demonstrates that a woman pretending to be a man can achieve some of the successes expected of men.³²⁰ Even the regimes that demonstrated systematic cheating, such as the East German steroid machine, have attempted to gain advantages to make their women bigger, faster, and stronger, rather than trying to pass men off as women. To date, this impostor concern has proven unsubstantiated. It reflects a societal unease about what it is to be male or female, rather than any genuine threat to sport.

b. CASES OF INTERSEXUAL ATHLETES

The first significant Twentieth Century case of an intersexual athlete had the twists and turns of a mystery novel. Stanislaw Walasiewicz, better known as Stella Walsh, was a Polish-American track and field athlete.³²¹ Though Walsh emigrated to the United States as an infant, the sixteen-year-old was disqualified from her place on the U.S. Olympic team in

314. There are some discrepancies in reports of Ratjen's true first name. Compare Kuriloff, *supra* note 311 and Maclean, *supra* note 312 (both referring to Ratjen as Hermann), with Samuel Goldsmith, *Margaret Bergmann Lambert, 95, Gets Olympic Record Back After '36 Nazi Team Replaced Her With Man*, N.Y. DAILY NEWS (Nov. 24, 2009), http://www.nydailynews.com/sports/more_sports/2009/11/24/2009-11-24_qns_woman_95_gets_olympic_record_back_after_36_nazi_team_replaced_her_with_man_h.html (referring to Ratjen as Horst), and Berg, *supra* note 313 (referring to Ratjen as Heinrich). It appears that the naming confusion may exist because Ratjen really was originally named Dora, due to confusion regarding her sex, and only later in life did he take on a male name.

315. See Berg, *supra* note 313.

316. *Id.*

317. *Id.* (disputing this story and quote as coming from a 1966 *Time* magazine article that had several factual errors concerning Ratjen).

318. *Id.* (noting that for many years, Bergmann had maintained that the whole incident was a Nazi plan).

319. *Id.* See also Goldsmith, *supra* note 314.

320. Movies in which a boy or man pretends to be a woman or girl for sports team purposes include *LADYBUGS* (Paramount Pictures 1992) and *JUWANNA MANN* (Morgan Creek Productions 2002). Movies in which a girl or woman pretends to be a boy or man for sports team purposes include *SHE'S THE MAN* (DreamWorks SKG 2006).

321. Mike Rizzuto, *The Confusing Case of Stella Walsh . . .*, JEFFDAVISTODAY.COM (July 13, 2009), <http://www.lakearthurtoday.com/content/confusing-case-stella-walsh>.

1927 because she was not a citizen, nor would she be eligible to become a citizen until she turned twenty-one.³²² Instead, Walsh joined the Polish national team, and ran for Poland in the 1932 and 1936 Olympics, winning nine medals in total: five gold, three silver, and one bronze.³²³ At the 1936 Olympics, Walsh was defeated in the 100 meter by an 18-year-old American athlete, Helen Stephens.³²⁴ This victory was deemed suspicious and questioned by the Polish media considering Walsh's talent and dominance as an athlete.³²⁵ As a result, accusations were leveled that Stephens was really a man.³²⁶ Stephens was forced to undergo a genital inspection, which confirmed that, indeed, she was a woman.³²⁷

Meanwhile, after 1936, Walsh limited her participation to amateur events.³²⁸ She became a U.S. citizen, involved herself in working in sports with children, and was ultimately inducted into the US Track and Field Hall of Fame in 1975.³²⁹ In a cruel twist of fate, Stella Walsh was shot during a robbery at a department store in 1981.³³⁰ The autopsy revealed that Walsh had an intersexual condition. She had both male and female chromosomes and ambiguous genitals, relating to a genetic condition known as mosaicism, a mutation that causes some cells to be XY and others to be XX.³³¹ The US Olympic Committee determined that there would be no effort to retract or disqualify Walsh's medals posthumously, despite the fact that she was intersexual.³³²

Though there have been athletes identified through sex tests to be intersexual, it has not been a common occurrence. One would hope that the infrequency of reported sex tests discovering intersexual athletes is a consequence of both their rare numbers and a respect for the privacy of athletes discovered to have some form of sexual ambiguity. There is no formal IOC rule regarding treatment of intersexual athletes, though anecdotal evidence suggests that intersexual athletes must conform to the typical presentation of the female sex through hormonal and/or surgical treatment before they would be eligible to compete against women.

While the stories of Dora Ratjen and Stella Walsh are commonly cited in the annals of athletes who may have been men competing among women, far fewer accounts mention Ewa Klobukowska or Erik Schinegger, two of the first intersexual athletes to be identified by sex testing in the late 1960s. In 1967, Klobukowska, a Polish runner, became the first athlete to flunk a chromosomal-based sex test; she was forced to return the two Olympic medals she had won in 1964 and refrain from competition.³³³ Klobukowska was reported to have "one chromosome too many," suggesting that she was mosaic, and possessed some

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*; See also *Report Says Stella Walsh; Had Male Sex Organs*, N.Y. TIMES (Jan. 23, 1981), <http://www.nytimes.com/1981/01/23/sports/report-says-stella-walsh-had-male-sex-organs.html> (describing the autopsy report).

332. Bob Proske, *Gender Questions Began in Cleveland with Olympian Stella Walsh Decades Ago*, CLEVELAND.COM (Aug. 21, 2009), http://www.cleveland.com/livingston/index.ssf/2009/08/gender_questions_began_in_clev.html (noting "that there was speculation that Walsh would be stripped of her Olympic medals, but nothing came of it").

333. Maclean, *supra* note 312.

XXX cells.³³⁴ Interestingly, it was reported that Klobukowska later became pregnant and bore a son.³³⁵

While Klobukowska was the first atypical athlete discovered by chromosomal testing, Schinegger was the athlete who prompted the universal adoption of such testing.³³⁶ Born as Erika Schinegger, the Austrian became a World Cup skiing champion.³³⁷ Her 1968 Olympic dreams were interrupted when sex testing revealed Schinegger's intersex condition, and she was barred from competing.³³⁸ Schinegger chose to transition to become Erik and is noteworthy for having competed on ski tours as a woman and, later, as a man.³³⁹ Schinegger later married and became a father.³⁴⁰

Also lost in the discussion of the development of sex testing is the story of two sisters: Tamara and Irina Press. The Press sisters were Ukrainian Jews who dominated track and field events for the Soviet Union in the 1960s, during the height of the Cold War.³⁴¹ The sisters were suspected of not being "real women" due to their appearances and achievements, which included setting twenty-three world records.³⁴² It was unclear if the Presses were doping, men, or both. Their existence has been deemed partially responsible for pressure from Western countries to take sex testing seriously. The Presses's subsequent disappearance from elite athletic competition once sex testing began suggested to the testers that they must be doing something right.³⁴³ The Press sisters quietly retired in 1966, allegedly to care for an ailing mother, and seemingly disappeared into obscurity, except for their achievements that are still noted in the record books.³⁴⁴

Though athletes and others critiqued sex testing from the time it was introduced, the first case that forced the IAAF to reconsider its stance on the matter did not come until the mid-80s. Maria Martinez Patino was a Spanish hurdler who failed a chromosomal-based sex test in 1985.³⁴⁵ Like the other athletes before her, she was surprised to learn the results of the test. Unlike Klobukowska or Schinegger, Patino refused to withdraw from competition, despite requests from Spanish officials that she fake an injury.³⁴⁶ Instead, she competed in the 60 meter hurdles, winning gold at the World Championships.³⁴⁷ Patino was stripped of

334. *Genetics: Mosaic in X & Y*, TIME (Sept. 29, 1967), <http://www.time.com/time/magazine/article/0,9171,899860,00.html>.

335. David Smith, *Caster Semenya Sex Row: 'She's My Little Girl,' Says Father*, GUARDIAN (London) (Aug. 21, 2009), <http://www.guardian.co.uk/sport/2009/aug/20/caster-semenya-sex-row-athletics>.

336. *Encyclopedia: Erika Schinegger*, NATIONMASTER.COM, <http://www.statemaster.com/encyclopedia/Erika-Schinegger> (last visited Apr. 8, 2011).

337. *Id.*

338. *Id.*

339. *Id.* Schinegger's 1988 autobiography is titled MEIN SIEG UBER MICH. DER MANN, DER WELTMEISTERIN WURDE, which means: "My victory over myself: the man who became a female world champion." In 2005, Kurt Mayer created a documentary film about Schinegger called ERIK(A) (Kurt Mayer Film 2005).

340. *Id.*

341. *Maria's Story*, ANDROGEN INSENSITIVITY SYNDROME SUPPORT GROUP, <http://www.aissg.org/articles/MARIA.HTM> (last visited Apr. 13, 2011).

342. *Id.*

343. *Id.*

344. *Id.*

345. Chris Alonzo, *Meet Maria Patino, The Latino Woman/"Man" Athlete Who Already Went Through This Gender Nonsense Decades Ago*, GUANABEE (Aug. 21, 2009, 3:11 PM), <http://anyguy.guanabee.com/2009/08/maria-patino-transgender-athlete>.

346. *Id.*

347. *Id.*

her medals and kicked off the Spanish National team.³⁴⁸ She fought to be reinstated, ultimately being allowed to compete again, once she demonstrated that she has AIS, an intersexual condition that produces no competitive advantage.³⁴⁹

For Patino, the reinstatement came slightly too late. When she was allowed to compete again, she was past her prime; she missed qualifying for the 1992 Olympics in her home country by hundredths of a second.³⁵⁰ Maria Patino's case demonstrated the danger in the lengthy process that required an athlete to fight for eligibility; namely, that the window for elite competition is often extremely short. An athlete "temporarily" banished from the track may never return, despite having done nothing wrong and possessing no advantage. Patino's treatment prompted the IAAF to revisit the question of sex testing, leading the federation to drop formal chromosomal testing.³⁵¹

Though it may be slow, the IOC also would learn to differentiate among intersexual athletes. Edinanci Silva is a judoka (competitor in judo) from Brazil who was born with both male and female sex organs.³⁵² During the 1990s, she underwent surgery to reflect her decision to live and compete as a woman, consistent with her gender identity.³⁵³ Silva has represented Brazil in three Olympic Games and has medaled at the World Championships and Pan American Games.³⁵⁴ One athlete whom Silva defeated in the 2000 Sydney Games, Natalie Jenkins, repeatedly referred to Silva as a "he" at a press conference, even though the IOC has accepted Silva's eligibility to compete as a woman.³⁵⁵

This represents a common theme throughout the cases of atypical athletes: some of their competitors refuse to accept the athlete as he or she is and will complain or worry about any advantages the atypical athlete may possess. While one should not trivialize the concern that some athletes may have a genuine advantage, given Silva's physiology and surgery, there was no suggestion that she had any advantage over competitors. Jenkins exhibited poor sportsmanship and disrespect for an athlete who bested her.

For Santhi Soundarajan, the consequences of her intersexual condition were far more dire than mere rudeness from an uneducated competitor. Soundarajan is an Indian runner who was forced to undergo a sex test after she medaled in the 800 meter race at the Asian games in 2006.³⁵⁶ Like Caster Semenya, Soundarajan was examined by a gynecologist, an endocrinologist, a psychologist, and a genetic expert.³⁵⁷ She was deemed to have "failed" the sex test, and she was informed that she was insufficiently female to be competing among women.³⁵⁸ Reports suggest that Soundarajan has AIS, though the details of her condition or results of her test were never confirmed.³⁵⁹ Soundarajan was disqualified from

348. *Id.*

349. *Id.*

350. *Id.*

351. Myron Genel, *Gender Verification No More?*, MEDSCAPE (May 26, 2000), <http://www.medscape.com/viewarticle/408918>.

352. Smith, *supra* note 340.

353. *See id.*

354. *Brazil Announce Star-Studded GB World Cup Team*, BRITISH JUDO, <http://www.britishjudo.org.uk/home/BrazilTeam.php> (last visited Apr. 8, 2010).

355. Saner, *supra* note 237.

356. *Id.*

357. *Id.*

358. *See id.*

359. *Id.*

the race and stripped of her medal.³⁶⁰ The runner, who had no prior inkling of her condition, was humiliated by the process and the public nature of what happened to her.³⁶¹ Adding to the sensitivity was her cultural heritage. Not all countries or cultures are accepting or tolerant of female athletes in the first place. Even among those that are, most still fail in acceptance and tolerance of those deemed “different.” The families of questioned athletes may not always be supportive. Caster Semenya is fortunate that her entire family stood by her side through the course of her case.³⁶²

After the discovery of her intersexuality and the treatment from her community that she received, Santhi Soundarajan attempted suicide.³⁶³ Fortunately, that attempt was unsuccessful. Nonetheless, it is no hyperbole to recognize that sex testing and the failure to keep the results private not only was devastating to this young woman’s athletic career, but also destroyed her life.³⁶⁴ Soundarajan now coaches athletes at a small academy that she started in an effort to reclaim her life, and she told reporters that if her reward money was restored, she would spend it on her students.³⁶⁵

C. TREATMENT OF TRANSGENDER ATHLETES

There are a handful of transgender athletes who have competed at an elite level. When sex reassignment surgery first came into existence in the 1930s, there were several accounts of European athletes who transitioned, including Czech runner Zdenka Koubkova.³⁶⁶ Since there is no indication that any of these athletes competed after their transitions, this section will not feature their exploits. Instead, this section introduces some of the transgender athletes who have competed after transitioning, and it describes how their eligibilities have been treated among various sport’s governing bodies.

There are currently several known transsexual athletes who are openly competing in their respective sports. Other transgender athletes may choose to remain closeted, simply competing in their transitioned state, so this section is not exhaustive. Renee Richards is a famous transsexual tennis player who competed in the late 1970s and early 1980s.³⁶⁷ Mianne Bagger is a golfer who was born in Denmark and lives in Australia.³⁶⁸ Canadian

360. *Id.*

361. *Id.* (noting that Kristen Worley, a transgender cyclist, has advocated for Soundarajan to have her medal restored); *The Sad Story of Santhi Soundarajan*, THE TIMES OF INDIA (Jan. 10, 2007), http://www.dailytimes.com.pk/default.asp?page=2007\01\10\story_10-1-2007_pg2_17 (explaining that while the IOC stopped sex testing, the Olympic Council of Asia required it); Harmeet Shah Singh, *India Athlete Makes Plea for Semenya*, CNN.COM/ASIA (Sept. 14, 2009), <http://www.cnn.com/2009/WORLD/asiapcf/09/14/Semenya.India.Athlete> (quoting Soundarajan as saying, “I still feel sad. And that’s why I want Semenya should be treated with honor. She’s a good athlete...Don’t reject (withdraw) her medal. She should be allowed to run (as a woman).”).

362. Smith, *supra* note 335.

363. Singh, *supra* note 361.

364. *Id.* (adding that Soundarajan was ostracized and “still feels haunted by her past”).

365. *Id.*

366. *Medicine: Change of Sex*, TIME (Aug. 24, 1936), <http://www.time.com/time/magazine/article/0,9171,756527-1,00.html> (describing the treatment of Koubkova, and Mark Weston, who competed for England, both athletes who transitioned from female to male).

367. *Richards, Renee*, GLBTQ, http://www.glbtq.com/arts/richards_r.html (last visited Apr. 13, 2011).

368. *Player Profile: Mianne Bagger*, LADIES EUROPEAN TOUR, <http://www.ladieseuropeantour.info/profiles/120149.htm> (last visited Apr. 16, 2011).

Kristen Worley competes in cycling,³⁶⁹ whereas her compatriot Michelle Dumaresq competes in mountain biking.³⁷⁰ Each of these athletes falls under the ambit of a different sports organization and, as a result, their treatment has been inconsistent. A complete discussion of the circumstances for transgender athletes falls outside the scope of this article, though it is notable that each of these four athletes is male-to-female (MTF) transsexual. Most of the concern about the advantages that transgender athletes possess in competition stem from the worry that MTF transsexuals are advantaged as compared with typical female athletes.³⁷¹ For female-to-male (FTM) transsexuals, the concern would be what form of medical waiver, and what testosterone levels, should be given for the “doping” that is necessary as part of the hormone replacement therapy to masculinize the athlete’s body.³⁷²

There is no single organization controlling all sports. There also is no one set of laws that applies to each sport’s governing body. Each organization system must follow the laws of its home jurisdiction, which may include international laws or treaties, as well as domestic laws. As a result, the rules for these athletes vary greatly.

The International Olympic Committee (IOC) is a large umbrella organization that governs elite sports competition by both country and sport.³⁷³ Participating countries maintain National Olympic Committees (NOC) to administer sports within their borders and among their athletes.³⁷⁴ The United States Olympic Committee (USOC) was created by Congress for this purpose.³⁷⁵ The USOC is an agency with delegated authority, though it is not viewed as a state actor for legal purposes.³⁷⁶

The sports themselves are governed by the federation system. Each sport has its own federation. The International Association of Athletics Federations (IAAF) is the governing body for track and field.³⁷⁷ In addition, each country participating has a national governing body (NGB) for the sport. For example, in the United States, track and field is governed by USA Track & Field (USATF); in South Africa, the NGB is Athletics South Africa (ASA).³⁷⁸ In many sports, the NGB oversees athletes and competitions at the youth levels as well.³⁷⁹

The cases of Oscar Pistorius and Caster Semenya are both eligibility cases within the IOC system, falling in the jurisdictions of the IOC, the South African Olympic Committee,

369. Elizabeth Chuck, *Hidden Past, Hopeful Future for Trans Athletes*, NBC SPORTS (Feb. 26, 2006), <http://nbcsports.msnbc.com/id/10809648>.

370. Michelle Dumaresq, *Michelle’s Adventures* (Jan. 10, 2003), <http://ai.eecs.umich.edu/people/conway/TSuccesses/MichelleDumaresq.html>.

371. Heather Sykes, *Transsexual and Transgender Policies in Sport*, 15 WOMEN SPORT & PHYSICAL ACTIVITY J. 3 (2006), available at <http://www.transgenderlaw.org/resources/Sykes.pdf>.

372. *Id.* See Buzuvis, *supra* note 38, at 17.

373. See generally Int’l Olympic Comm., *The Organisation*, OLYMPIC.ORG, <http://www.olympic.org/about-ioc-institution> (last visited Apr. 7, 2011).

374. Int’l Olympic Comm., *National Olympic Committees*, OLYMPIC.ORG, <http://www.olympic.org/ioc-governance-national-olympic-committees> (last visited Apr. 7, 2011).

375. See Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220501-03 (2010).

376. *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 543 (1987) (holding that the USOC is not a state actor, since there is no government control).

377. *The International Athletic Foundation at Glance*, IAAF, <http://www.iaaf.org/aboutiaaf/foundation/index.html> (last visited Apr. 8, 2011).

378. See USA TRACK & FIELD, <http://www.usatf.org>; ATHLETICS SOUTH AFRICA, <http://www.athletics.org.za>.

379. Mitten & Davis, *supra* note 7, at 75.

IAAF, and the ASA. Not all sports fall within the governance structure of the IOC and federation system. This is particularly true of professional sports in the United States, which are typically governed in independent league or association systems.³⁸⁰ This ranges from the “big leagues,” such as Major League Baseball (MLB) or the National Football League (NFL) to somewhat smaller associations, such as the Association of Volleyball Professionals (AVP) or the Professional Bowlers Association (PBA). These non-IOC sports systems are free to make their own rules, though they still must follow domestic law.³⁸¹

Professional sports leagues are welcome to participate within the federation system, and this is the norm outside the United States. In Europe, for example, this is far more common, as there is far greater transnational competition and movement of athletes.³⁸² The premier European football leagues all belong to FIFA, the Federation Internationale de Football Association. FIFA’s rules govern all competition.³⁸³ Using an organization like FIFA enables professional leagues to coordinate their scheduling and player movement, and also to accommodate important international tournaments, such as the World Cup and the Union of European Football Associations (UEFA) Cup.³⁸⁴

Due to the variations in sports governance, athletes may face different rules and hurdles in gaining eligibility. Oscar Pistorius obtained the right to run in IAAF-sanctioned races. This eligibility would be useless to him if he were to attempt to play in the National Football League (NFL) or become a mixed martial artist.³⁸⁵ Casey Martin obtained the legal right to use a golf cart on the PGA tour. This ruling is limited to that organization and any other bodies obligated to follow the holding of that Supreme Court decision.³⁸⁶ Similarly, transgender athletes face an array of legal and sports ruling regimes determining their eligibility. This section discusses how different systems have produced different results for these athletes in terms of eligibility.

380. *See id.* at 100.

381. *See id.* at 100–02.

382. *Commission White Paper on Sport*, at 14, COM (2007) 391 final (Jan. 9, 2009), available at http://ec.europa.eu/sport/white-paper/whitepaper8_en.htm#4_2.

383. *Laws of the Game* 2010/2011, FIFA, http://www.fifa.com/mm/document/affederation/generic/81/42/36/lawsofthegame_2010_11_e.pdf (last visited Apr. 28, 2011).

384. Thomas M. Schiera, *Balancing Act: Will the European Commission Allow European Football To Reestablish the Competitive Balance That It Helped Destroy*, 32 BROOK. J. INT’L L. 709, 712–13 (2007).

385. Steve Cantwell is an amputee aiming to compete in mixed martial arts. *See* Sergio Non, *No Elbows, No Knees, No Problem: Amputee Set for MMA*, USA TODAY (April 22, 2009), <http://content.usatoday.com/communities/mma/post/2009/04/65879517/1> (describing that, when Cantwell was denied a license to fight in Georgia, he moved to Alabama, which does not regulate MMA).

386. Indeed, Paralympians who have challenged the USOC under the ADA for failing to provide equal benefits to disabled athletes have lost and courts have rejected the analogy to Casey Martin, since the Paralympics are not open to the public. *See, e.g.,* Shepherd v. U.S. Olympic Comm., 464 F. Supp. 2d 1072 (D. Colo. 2006) (lawsuit by former wheelchair basketball player); Hollonbeck v. U.S. Olympic Comm., 513 F.3d 1191 (10th Cir. 2008) (lawsuit by three wheelchair racers). For a discussion of these cases, *see* Joshua L. Friedman & Gary C. Norman, *The Paralympics: Yet Another Missed Opportunity for Social Integration*, 27 B.U. INT’L L.J. 345 (2009) (arguing against the separation of the Olympics and Paralympics under the USOC).

i. RENEE RICHARDS – ON THE TENNIS COURT, IN THE NEW YORK COURTHOUSE

Renee Richards was the first transgender athlete to pursue a legal right to compete. Born as a male named Richard Raskind, he competed in men's tennis in high school and college.³⁸⁷ Though he served in the Navy and became a doctor, Raskind still played competitive tennis, reaching the final of the 35-and-over championship in 1972.³⁸⁸ A male-to-female (MTF) transsexual, in 1975 Raskind transitioned, and she became known as Renee Richards.³⁸⁹

Richards competed in women's tennis from 1977 to 1981, but this did not come without a legal battle. In 1976, the United States Tennis Association (USTA) denied Richards' entry to the U.S. Open, on the grounds that she had not been born a woman.³⁹⁰ Richards challenged this ruling, and a New York state court agreed with her.³⁹¹ In 1977, in a landmark decision, the court declared that denying entry to the U.S. Open violated the athlete's rights.³⁹² Since Richards had no competitive advantage, the court said that she must be allowed to participate.³⁹³

The USTA is an NGB that falls under the federation system, but the decision was based solely in domestic law. Even though the federation system did not deem Richards eligible, as it had no specific policy for transgender athletes in 1976, the NGB had no choice but to follow the law of its own country.³⁹⁴ At the same time, the New York court's authority only reached tennis events held in New York public parks.³⁹⁵ Had Richards wished to play in other locations, she may not have been permitted to do so.

After the ruling, Richards had some success competing in doubles and singles in the 35-and-over category.³⁹⁶ She remained connected to tennis through coaching for some time after her retirement from competitive playing. Since the end of her playing days, Richards has been a somewhat controversial figure within the transgender community. Richards has commented that she now believes that MTF transsexual athletes do have an advantage over other women, and that they should not be eligible to compete.³⁹⁷ When asked to comment on Caster Semenya's case, Richards indicated that while it would be sad if Semenya has more male characteristics than female ones, Semenya still should not be allowed to compete against women.³⁹⁸ Richards has also made similar comments regarding other transsexual

387. Transcript: *'The Second Half of My Life'*, NPR (Feb. 8, 2007), <http://www.npr.org/templates/story/story.php?storyId=7277665>.

388. John Ireland, *He Shoots, She Scores*, IN THESE TIMES (June 27, 2007), http://www.inthesetimes.com/article/3232/he_shoots_she_scores.

389. See Renee Richards, *SECOND SERVE* (1983).

390. *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267, 267 (N.Y. Sup. Ct., 1977).

391. *Id.* at 272.

392. *Id.* at 273.

393. *Id.* at 272.

394. *Id.* at 268.

395. *Id.* at 268.

396. *Id.*

397. Joyce Wadler, *The Lady Regrets: At Home with Renee Richards*, N.Y. TIMES, Feb. 1, 2007, at F1, available at http://www.nytimes.com/2007/02/01/garden/01renee.html?pagewanted=1&_r=1 (Richards referred to the IOC decision to permit transgender athletes to compete as "a particularly stupid decision").

398. Gregg Doyel, *Renee Richards Breaks Down X's and Y's of Semenya Situation*, CBSSPORTS.COM (Aug. 25, 2009), <http://www.cbssports.com/columns/story/12111173> (noting the hypocrisy in Richards's opinion and quoting Richards as differentiating herself because of her age at the time she was competing).

athletes, such as Mianne Bagger, who is discussed below. As a commentator, one may agree or disagree with Richards. On the merits of her own landmark case, though, Richards is a true pioneer.

ii. THE STOCKHOLM CONSENSUS – THE CURRENT IOC REGIME

In 2003, the IOC Medical Commission, which deals with issues of medical health and ethics, created an ad hoc committee to grapple with the treatment of transgender athletes.³⁹⁹ The resulting document, known as the Stockholm Consensus, has allowed transgender athletes to compete in IOC sanctioned events in their transitioned sex category since 2004, provided that they meet a set of guidelines.⁴⁰⁰ Athletes who transition prior to puberty—a virtual impossibility for most, given legal and medical hurdles—need not follow the guidelines and may compete immediately.⁴⁰¹

The Stockholm Consensus provides that eligibility will be determined on a case-by-case basis.⁴⁰² The three main requirements of the Consensus are that an athlete can become eligible to compete once: (1) the athlete has completed surgical changes to the transitioned sex, including surgery on the external genitalia and a gonadectomy; (2) the athlete has obtained legal recognition by “appropriate official authorities;” and (3) the athlete has undergone hormone therapy for a sufficient length of time to minimize advantages. The Consensus recommended a two-year minimum waiting period after surgery.⁴⁰³

Some may find it difficult to critique the Stockholm Consensus guidelines because they are a set of standards and not rules. Each athlete will be dealt with on a case-by-case basis, so it is not clear the extent to which there is room for discretion in application of, or variation from, the guidelines. Furthermore, the Stockholm Consensus represents, at the minimum, a fair effort by the IOC to allow for the eligibility of transgender athletes.

That said, the Stockholm Consensus presents several challenges. The biggest problem with the guidelines is that they set complicated—and sometimes impossible—barriers to entry for athletes that have no connection to athletic performance. Many countries do not allow for legal recognition of transsexual people in their transitioned sex. Surgery is costly and may not be desired for privacy or personal reasons. The amount of time it takes to undergo surgery and legal recognition, even if possible, is often far greater than the amount of time it takes to lose any athletic advantage via hormone treatment.⁴⁰⁴

Beyond that, there is no clear evidence that transitioned athletes have an advantage that requires waiting so long after beginning hormone treatment. In fact, there is some indication that athletes may actually have a hormonal disadvantage after transitioning.⁴⁰⁵ Elite competition requires an athlete to be at the top of his or her sport, which allows for a

399. *IOC Approves Consensus with Regard to Athletes Who Have Changed Sex*, OLYMPIC.ORG (May 17, 2004), <http://www.olympic.org/medical-commission?articlenewsgroup=-1¤tarticlespageipp=50&articleid=56230>.

400. *Id.*

401. *See id.*

402. *Id.*

403. *Id.*

404. Sykes, *supra* note 371 at 8.

405. *Id.*

very short window of time, based on the sport. The transgender athletes who have come forward all happen to compete in sports with longer windows of competition. This is surely no coincidence.

iii. PROFILES OF MTF TRANSSEXUAL ATHLETES

This section briefly discusses three MTF transgender athletes, and how the Stockholm Consensus has, or has not, affected their participation in sports. The athletes are golfer Mianne Bagger, cyclist Kristen Worley, and mountain biker Michelle Dumaresq. Each of these athletes has criticized or lobbied the IOC, IAAF or other international sports organizations for better treatment of atypical athletes, particularly as relates to the dignity and privacy to which each individual is entitled, regarding sex and gender.

Mianne Bagger underwent surgery in 1995 and in 1998, she began competing as an amateur woman in Australia.⁴⁰⁶ Bagger won the South-Australian championship in 1999, 2001, and 2002.⁴⁰⁷ In 2004, Bagger made the move to golfing professionally, playing in the Australian Women's Open.⁴⁰⁸ Though Bagger attempted to join Australian Ladies Professional Golf (ALPG), she was turned down at the time due to a rule that required members to have been female at birth.⁴⁰⁹

Bagger did not have to wait very long for that rule to change. Once the IOC issued the Stockholm Consensus in 2004, both the ALPG and the Ladies European Tour amended their membership criteria, allowing transgender golfers to compete.⁴¹⁰ In 2005, Mianne Bagger competed in the Women's British Open, subsequent to a rule change by the Ladies Golf Union, which oversees that tournament.⁴¹¹ The United States Golf Association also adopted a new policy to allow transgender athletes to compete, opening up USGA golf championships, including the U.S. Women's Open, to golfers like Bagger.⁴¹²

Most of the golfing world opened its doors to welcome Mianne Bagger and any other transgender golfers. There remained, however, one significant holdout. The Ladies Professional Golf Association (LPGA), which is responsible for American professional golf tournaments and is the largest and best-known women's professional golf association, refused to change its "female at birth" membership entry policy.⁴¹³ Since the LPGA is not governed by the USGA or the federation system, and since there were no domestic or

406. John Esterbrook, *Transsexual Tees Off at Pro Event*, CBSNEWS (Mar. 4, 2004), <http://www.cbsnews.com/stories/2004/03/04/world/main603942.shtml>.

407. *Player Profile: Mianne Bagger Amateur Highlights*, AUSTL LADIES PROF'L GOLF, http://www.alpg.com.au/index.php?page_id=player&id=1299# (last visited Mar. 30, 2011).

408. *See Bagger Cleared for British Open*, BBC SPORT (Feb. 9, 2005), <http://news.bbc.co.uk/sport2/hi/golf/4249647.stm>.

409. *See* Peter Stone, *Bagger Triggers Sex Rule Change and Heads for Europe*, SYDNEY MORNING HERALD, Sept. 2, 2004, at 38, available at <http://www.smh.com.au/articles/2004/09/01/1093938997899.html?from=storyrhs>.

410. *ALPG Gives Mianne Bagger the Green Light*, ISEEKGOLF.COM (Nov. 29, 2004), <http://www.iseekgolf.com/news/3129-alpg-gives-mianne-bagger-the-green-light>.

411. *Transsexual to Play British Open*, DAILY MAIL (Feb. 9, 2005), <http://www.dailymail.co.uk/sport/othersports/article-337216/Transsexual-play-British-Open.html>.

412. Cyd Zeigler, Jr., *USGA Welcomes Trans Golfers*, OUTSPORTS.COM, <http://www.outsports.com/moresports/050325transgolf.htm> (last visited Apr. 17, 2011).

413. *Fore! Transgender Golfers Get into Catfight Over 'Female at Birth' Rules*, DAILY MAIL (Feb. 8, 2011), <http://www.dailymail.co.uk/news/article-1354617/Transsexual-golfer-Mianne-Bagger-blasts-Lana-Lawless-female-birth-rules.html>.

international laws binding on the LPGA demanding recognition for or accommodation of Bagger, there was little she could do to compete in this prestigious golf circuit. The best legal case for Bagger would have been if the LPGA held an event at a public location in a jurisdiction that provided for gender identity protection in its anti-discrimination laws. Such a situation would parallel the Richards case, allowing Bagger entry to the clubhouse. Mianne Bagger did not pursue this route, preferring to educate and lobby the LPGA behind the scenes.⁴¹⁴

However, in October 2010, another transgender golfer, Lana Lawless, did just that. Lawless, a retired police officer who transitioned in 2005, is a professional golfer who won the women's world championship in long drive in 2008. The Long Drivers of America, which oversees the competition, changed its rules to match the LPGA's "female at birth" eligibility rule. After Lawless was denied permission to apply to qualify at LPGA tournaments, she filed suit against both the Long Drivers of America and the LPGA in California, based on that state's civil rights laws.

In December 2010, the LPGA members voted to change the female at birth policy, to allow transsexual women to compete.⁴¹⁵

There are some things that Kristen Worley and Michelle Dumaresq have in common. They are both Canadian. They are both athletes. They both ride bicycles at an elite level, which is governed by the Union Cycliste Internationale (UCI), the cycling federation. They are both MTF transsexual. And they have both been activists for the transgender community since coming out, and they have both criticized the Stockholm Consensus.

Kristen Worley, who is both a cyclist and world-class water skier, came out as transsexual and emerged on the competitive scene only after the IOC adopted the Stockholm Consensus.⁴¹⁶ Dumaresq began competing as a mountain biker in 2001, prior to the Consensus.⁴¹⁷ In addition, since Dumaresq's sport is not an Olympic one, there are more significant racing opportunities for her outside the IOC-sanctioned system.

Michelle Dumaresq first began entering races in May of 2001, after a lifetime of free-riding in the Vancouver area. Dumaresq won the first two races she entered, and her time as a novice category rider in the first race was faster than the time of the winner in the professional category.⁴¹⁸ Other bikers began to complain, and Cycling BC, the regional arm of the Canadian Cycling Association (the NGB for cycling), suspended her racing license.⁴¹⁹ The Canadian Cycling Association and Cycling BC consulted with both the UCI and local organizers, ultimately declaring Dumaresq eligible to race as a woman in April 2002, because her B.C. birth certificate declares her to be a female.⁴²⁰

Dumaresq's racing license was re-issued after the temporary suspension, and she continued her meteoric rise to the upper echelon of Canadian mountain bike racing. After

414. *Id.*

415. Press Release, The Dolan Law Firm, LPGA Changes Female at Birth Policy Following Transgender Woman's Discrimination Suit (Dec. 1, 2010), <http://www.prweb.com/releases/LPGA-Changes-Policy/12-2010/prweb4853364.htm>.

416. See Jacob Anderson-Minshall, *Kristen Worley: Reaching for the Olympics—And More*, WINDY CITY MEDIA GROUP (Nov. 14, 2007), <http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=16630>.

417. *Michelle's Adventures*, *supra* note 370.

418. Chris A. Cavacuiti, *Transgender Athletes*, 2 (2006), <http://www.cpath.ca/wp-content/uploads/2010/06/Transgender-Athletes.pdf>.

419. *Id.*

420. *Id.* at 3.

placing third in her first race as a professional, Dumaresq easily won her next race.⁴²¹ It was at this point that many racers protested Dumaresq's eligibility. They signed a petition and tried to get her disqualified from racing.⁴²² But Dumaresq had been issued a racing license and she was permitted to ride, so the results would stand. Dumaresq went on to win the Canada Cup Mountain Bike Series in 2002 and the Canadian National Championships in 2003 and 2004.⁴²³

Dumaresq proved particularly controversial, despite the fact that she met every standard of what would soon become the Stockholm Consensus. Other athletes, women whom she once thought were her friends, had no problems with her competing—so long as she was not winning. Once Dumaresq was winning, all of a sudden they did not think she should be permitted to race. Though Dumaresq initially had trouble winning at the international level, her teammates and competitors made it clear that she was not welcome if she were to win.⁴²⁴

In 2006, long after the Stockholm Consensus standards made it clear that an athlete like Michelle Dumaresq was eligible to compete and deemed to have no advantage, the second-place finisher in the Canadian National Championships, Danika Schroeter, put on a shirt stating "100% Pure Woman Champ." The Canadian Cycling Association suspended Schroeter for the poor sportsmanship move, which was clearly aimed to take away from Dumaresq's victory and achievement.⁴²⁵

While Dumaresq gained her eligibility prior to the Consensus, Kristen Worley did not emerge on the international scene until 2006.⁴²⁶ Unlike Dumaresq, who was open with fellow bikers about her transgender history from when she started to compete, Worley stayed under the radar until 2006, despite her athletic talents in both water skiing and cycling. Worley began hormone treatment in 1996 and underwent surgery in 2001.⁴²⁷

Worley applied for eligibility as a woman and has since railed against the process. To become eligible to compete in both water skiing and in cycling, Worley had to submit "medical records and blood work to four separate panels: the two organizations that oversee cycling and water skiing in Canada and the two that govern international competitions in both sports."⁴²⁸ Worley also endured questioning from an all-male panel, and "she describes a conference call she had with officials of Water Ski and Wakeboard Canada as 'gross.'"⁴²⁹

While both Mianne Bagger and Michelle Dumaresq have spoken or written about intersexual or transsexual athletes, Kristen Worley has become an advocate for the rights of atypical athletes.⁴³⁰ She has since taken up the cause of intersexual athlete Santhi

421. *Id.*

422. *Id.*

423. *Canada Cup Series Champions Crowned*, PINKBIKE.COM (Aug. 6, 2002), <http://www.pinkbike.com/news/article869.html>.

424. *See* Cavacuiti, *supra* note 418, at 4.

425. *Id.*

426. Chuck, *supra* note 369.

427. Anne McIlroy, 'I'm A Woman On The Move', GLOBE & MAIL (Canada) (Sept. 7, 2007), <http://www.theglobeandmail.com/sports/article779766.ece>.

428. *Id.*

429. *Id.*

430. *See* Randy Starkman, *Complaints Against Caster Semenya 'Total Sour Grapes'*, THE STAR (Aug. 23, 2010), <http://www.thestar.com/sports/olympics/article/851583--complaints-against-caster-semenya-total-sour-grapes>; Nandita Sengupta, *Hope to Return Santhi Her Dignity: Worley*, TIMES OF INDIA (Aug. 1, 2010),

Soundarajan and is petitioning to have Soundarajan's medal returned.⁴³¹ Worley also adopted Semenya's cause, and she has alleged that Semenya has congenital adrenal hyperplasia (CAH), a "natural" intersexual condition among women that causes Semenya to produce extra testosterone. Worley points out that CAH can be revealed through simple blood tests, and that the excess production of testosterone can easily be counteracted by an androgen suppressant.⁴³²

More significant than her advocacy on behalf of Semenya or Soundarajan alone, Worley has called attention to the fact that the IOC has known about intersexual athletes for over fifty years, and that its continued failure to create a coherent policy that respects these individuals is particularly troublesome.⁴³³ Indeed, Worley has offered her own suggestion for how the IOC should deal with athletes of atypical sex or gender via blood tests that can work in conjunction with World Anti-Doping Agency (WADA) testing that is already occurring for elite athletes.⁴³⁴ It seems that IOC may agree with Worley to some degree. In January 2010, the IOC held a conference devoted to dealing with the questions of sex and gender variance in athletes, and it determined that official testing sites should be established which would have the expertise to handle the medical evaluation and treatment, in conjunction with existing doping regulations.⁴³⁵

IV. ELIGIBILITY CONSIDERATIONS FOR ATYPICAL ATHLETES

A. THE SIGNIFICANCE OF SPORT

The stories of Oscar Pistorius and Caster Semenya are compelling. Pistorius has been lauded for his willingness to fight, despite adversity. In 2007, Pistorius was awarded the BBC Sports Personality of the Year Helen Rollason Award, which is given "for outstanding achievement in the face of adversity."⁴³⁶ Pistorius has steadfastly pursued his Olympic dream and has been recognized as a source of inspiration by many. Semenya, due to her youth and the recent emergence of her controversy, has not received the same acclaim as Pistorius. Nonetheless, she has also been celebrated as a "heroine" in her native South Africa.⁴³⁷

The beauty of athletic competition stems from its ability to demonstrate the universality of the human condition. The sporting venue is one in which athletes, without regard to race, class, nationality or religion, have been able to achieve in ways that once seemed impossible. And to the extent athletes have been barred from competition due to prejudice, it is a black mark on the record of sporting history. Elite athletic competition

<http://timesofindia.indiatimes.com/sports/more-sports/interviews/Hope-to-return-Santhi-her-dignity-Worley/articleshow/6242555.cms>.

431. Sengupta, *supra* note 430.

432. *Id.*

433. Kristen Worley, *Sport Leaders Request That Random Gender Verification Testing of Female Athletes at the 2010 Winter Olympic Games in Vancouver Be Prohibited*, COAL. OF ATHLETES FOR INCLUSION IN SPORT (Jan. 25, 2010), <http://kristenworley.ca/wp-content/uploads/2010/01/CoalitionPR25thcp.pdf>.

434. Kristen Worley, *An Alternative to the IOC's Gender Testing Policy*, WORLD SPORTS L. REP., Feb. 2010, at 02, 02-03, available at <http://kristenworley.ca/wp-content/uploads/2010/02/WSLRfeb10worley.pdf>.

435. CBSNews, *supra* note 231.

436. 'Blade Runner' Handed Olympic Ban, BBC SPORT (Jan. 14, 2008), <http://news.bbc.co.uk/sport2/hi/olympics/athletics/7141302.stm>.

437. SA Threatens 'War' over Semenya, *supra* note 36 (quoting South Africa's sports minister as stating, "Caster is a woman, she remains our heroine.").

allows us to celebrate the performances of men and women who push the boundaries in physical accomplishment. At the epicenter of athletics lies running. Running, perhaps the oldest and purest of all sport, presents an opportunity to measure victory and defeat in quantifiable seconds and meters.

Along came Oscar Pistorius and Caster Semenya, two runners who demonstrate that the running track is fraught with questions related to disability, gender and equality. What makes their eligibility cases interesting, as a matter of rules of competition, and so difficult to determine, is that they both fall in the middle of the cultural uncertainty we share when it comes to science, technology and difference. What excellence do we celebrate with their accomplishments? Is it the success of the runner or the success of the prosthetic manufacturer? Is it the success of the runner or the success of a natural hormonal quirk akin to doping? What adherence to fairness can we guarantee their competitors?

B. MAN VERSUS MACHINE

Oscar Pistorius was born without legs and by all traditional measures is considered disabled. To Oscar, he no more relies on prosthetics to walk and *Cheetah* blades to run as a myopic individual wears glasses or contact lenses (or perhaps gets laser corrective surgery) to see better. He is not meaningfully *different*, and as such, there is no reason to prohibit his participation in races with the legged competition field. Tension exists between viewing Pistorius as inspirational and viewing him as not meaningfully different. If he is not genuinely different, then what is so special about him? Acknowledging his perseverance is a form of recognizing his difference and celebrating his triumph. Perhaps it may be viewed as hair-splitting, but it seems that Pistorius is *different* from some athletes, on account of the adversity he has faced, while he is no different from other athletes, when it comes to conditions regarding levels of advantage or disadvantage.

As compelling as this may sound, one could say the same of wheelchair athletes. Athletes who rely on wheelchairs for locomotion routinely compete in races and team sports, such as basketball and rugby. Are these athletes different from Pistorius and the field simply because they are not ambulatory? They too face adversity. They too can overcome this with technical assistance. The slippery slope argument forces us to question what makes Pistorius the same as legged sprinters and what makes athletes in wheelchairs different. If the issue is wheels versus legs or leg-like devices, then what of pogo sticks compared to the *Cheetah* blades? How can one even speak of artificial springs, when the entire human leg is, itself, a spring? The process of enactment of Rule 144.2 regarding technical devices might have been flawed, but the rule itself holds a kernel of truth and logic. At some point, a runner relies on a device—a *thing*—rather than *himself* to achieve, and at that point, the competition is compromised. It no longer represents the triumph of human effort and spirit; it demonstrates the superiority of human invention.

There is a deep-rooted fear that science and technology can ultimately threaten what makes us human. The two primary themes relate first to man's ability to create a new type of machine or artificial existence, and secondly to that creation having sentience to fight and/or overcome humanity. The 19th century saw Mary Shelley's *Frankenstein*; the early Cold War era, Isaac Asimov's *I, Robot*; by the end of the 20th century, the endemic battle of man versus machine would be represented in *The Terminator* and *The Matrix* movies.

The man versus machine trope creates a tension within our understanding of sports. If athletic competition measures the extreme abilities in body, heart and mind of athletes,

artificial creations threaten to undermine what it means for humanity to achieve. This debate lies at the core of technological development in sport, whether it be in the discussion of the proper treatment of performance-enhancing drugs, genetic modification, or high-tech swimsuits, running shoes or tennis rackets.

There is a recurrent purist approach to athletics that aims to keep out new technologies. The differences are most apparent in how events are officiated or refereed. Running times, for example, are calculated by computers; they have been for years now, and there is absolutely no one advocating a return to the imperfection of human timing. On the other hand, a sport like baseball has only recently introduced any form of instant replay, and only in very limited circumstances, despite the fact that technology could provide machines far more accurate for aspects of umpiring, such as calling balls and strikes.⁴³⁸ Meanwhile, in 2009, FINA, the international swimming federation, issued a ban on high-tech swimsuits that would be effective starting in 2010, recognizing that nearly all elite swimming records had been shattered after the introduction of these technological devices.⁴³⁹

Currently, Oscar Pistorius has various types of prosthetic legs. They are external. They are visible. What if Oscar Pistorius had cybernetic legs that fused both organic and inorganic material to create a new form of prosthesis instead of needing to use one type of prosthesis for walking and his current *Cheetah* blades for running? He might look like every other runner on the outside, yet on the inside, he would possess some “less than” (or perhaps “more than”) human characteristics propelling his locomotion.

What if Oscar Pistorius had an artificial heart? What if Pistorius had artificial lungs? What if these artificial lungs were capable of a higher VO₂ max than any other athlete could naturally have? In the face of so many “what ifs,” one might be tempted to point out that if Pistorius had wheels, he could also be a truck. The point of such hypothetical questions is that they are not that remote. Artificial organs and prosthetic limbs may not yet be equal to “natural” ones, but they are getting closer and closer, and there is no reason to think that at some point, they will not surpass the abilities of the organs and limbs they replace.

The tension arises from accepting that Oscar Pistorius is 100% fully man, not machine.⁴⁴⁰ People may be born without certain limbs or organs, or people may lose limbs or organs due to disease, war, or accident. Science and technology allow us ways to replace organs and limbs that are missing or broken beyond repair. In general, this melding of human-created machinery to assist man is celebrated. The Western world has created a golden age for those living with disabilities, at least compared to prior generations. However, once the machine aspect is strong enough to overtake the natural creation, positive feelings give way to deep-rooted fears. Will this be the breakthrough that compromises humanity?

The question remains: by what standard should eligibility in sports be determined? Oscar Pistorius was deemed eligible because he has no advantage. Does the argument that

438. *No Extended Replay for 2010 Postseason*, ESPN.COM (Sept. 20, 2010), <http://sports.espn.go.com/mlb/news/story?id=5598222>.

439. Karen Crouse, *Swimming Bans High-Tech Suits, Ending an Era*, N.Y. TIMES, July 25, 2009, at D1, available at <http://www.nytimes.com/2009/07/25/sports/25swim.html>.

440. Isabel Karpin & Roxanne Mykitiuk, *Going Out On A Limb: Prosthetics, Normalcy and Disputing The Therapy/Enhancement Distinction*, 16 MED. L. REV. 413, 427 (2008) (claiming that Pistorius should be allowed to race and that in his situation, “we see the concept of enhancement failing to adequately manage the complex relation between the contemporary highly technologised and always already modified but so-called ‘natural’ body and the enhanced/modified so-called disabled body.”).

denying his eligibility denies his humanity necessarily mean that he must be allowed to compete, whether he has an advantage or not?

The fundamental principles of the Olympic Movement include the “practice of sport” as a “human right,” “without any discrimination of any kind;” yet they also require “mutual understanding with a spirit of . . . fair play.”⁴⁴¹ They ask: at what point do all athletes have an equal chance of winning? That is where we draw the line. The problem, of course, is that there is never pure, exact equality. That is why in a race someone always wins and others lose. No one can pinpoint exactly when Pistorius has an equal chance of winning. At most, we can observe if he has a heightened chance or a very limited one. In fact, Pistorius himself has stated that if he had a demonstrable advantage, he would stop competing among able-bodied athletes, because he only wishes to win a “fair” race.⁴⁴²

By this standard, Pistorius’ case seems simple.⁴⁴³ Let him run until he has a real advantage on a track. Allow him to win races. Only when it is clear that Pistorius is faster than everyone, then conduct the testing to see if it is because of his *Cheetah* blades. After all, Oscar Pistorius is faster than other Paralympians, and they also run with prosthetics. Clearly, his advantage in that context is not a product of manufacturing, so some accord must be given for his natural abilities. At some point, though, the technology may be such that it is clear: Oscar Pistorius has an advantage. Then it would be time for him to stop competing against a disadvantaged able-bodied field. However, the unequivocal presumption ought to be in favor of Pistorius in the absence of evidence that he is meaningfully different when it comes to sprinting. To place the burden of proof on Pistorius or any athlete like him creates two problems: it leads to a false sense of security that the results at athletic competitions are pure, and causes harm by denying the atypical individual or minority’s humanity, integrity, and right to fair participation.

C. MAN VERSUS WOMAN

The case for intersexual athletes is even more challenging than the case for Oscar Pistorius. It is also far more challenging than the case for changing the Stockholm Consensus guidelines for transsexual athletes. In the case of transsexual athletes, the Stockholm Consensus relies on factors that are not related to questions of fairness or advantage. Even in the criteria where the Consensus does consider actual advantages, particularly with regard to hormone levels, the Stockholm Consensus errs on the side of extending the waiting period for eligibility to two years, despite the dearth of evidence demonstrating any advantage that far removed from treatment.⁴⁴⁴

441. INT’L OLYMPIC COM., OLYMPIC CHARTER 10 (2007), http://multimedia.olympic.org/pdf/en_report_122.pdf.

442. Tom Knight, *Pistorius Is No Novelty Sprinter*, TELEGRAPH (London) (July 11, 2001), <http://www.telegraph.co.uk/sport/othersports/athletics/2316794/Pistorius-is-no-novelty-sprinter.html>.

443. See generally Peter Charlsh & Dr. Stephen Riley, *Should Oscar Run?*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 929 (2008) (arguing in favor of Pistorius’ eligibility and critiquing the current standards for disabled athletes); Alexis Chappell, Recent Development, *Running Down a Dream: Oscar Pistorius Prosthetic Devices, and the Unknown Future of Athletes with Disabilities in the Olympic Games*, 10 N.C. J. L. & TECH. ONLINE 16 (2008), available at <http://cite.ncjolt.org/10NCJOLTOldEd16> (describing the CAS decision and agreeing with the decision).

444. OLYMPIC.ORG, *supra* note 399.

If the allegations considering Semenya's intersexual condition were true, then she very well may have a decisive advantage over other women. The question becomes whether the sporting world can accept the level of difference and advantage that she would have, without it devastating the meaning of elite competition among women. So far, there is no evidence suggesting that Semenya is anything but female, both in sex and gender. However, it does seem possible that she has a distinct hormonal advantage over "typical" women. Should she or any other athlete who has such a condition be required to undergo hormonal treatment to minimize this advantage? Has the IAAF imposed this criteria on Semenya in the shadow of secrecy surrounding her case? And even if Semenya has been cleared to compete without the need for "treatment," what connection can one draw from the way the IAAF handled her case to the recent promulgation of rules regarding "hyperandrogenism" in female athletes?

Setting Semenya aside, to deny the eligibility of an intersexual athlete is to deny her gender identity as a woman, on account of her biological sexual ambiguity or hormonal differences. It is to say that she is not sufficiently female to compete with other women. Yet if the purpose of the sex categories of sport is to allow women to compete against others similarly situated, then allowing intersexual athletes to compete is to deny the opportunity of other women for an equal chance at winning.

Women are not biologically the same as men. Forced to compete against men, they would struggle in many athletic areas. The male gender identity is not the problem; rather, the problem is the physiology of the ratio of lean muscle mass, pound for pound. How is inclusion of an intersexual athlete with a natural hormonal advantage who has not received treatment any different than permitting a transsexual athlete who has not yet undergone any treatment to compete? Each may be of the female gender, yet each may still possess some of the advantages of male biology. On the other hand, how is the potential hormonal advantage of an intersexual athlete different from the hormonal advantage that some women naturally have over other women?

Again, a line drawing problem emerges. There are women who are biologically female, who possess more lean muscle mass than others and produce more testosterone. They are allowed to participate. Indeed, they are the overwhelming majority in athletics. There is no existing category for the intersexual, nor are there enough athletes with similar conditions to justify creating a new category of competition. An intersexual athlete may be neither biologically male nor female as traditionally understood, or she may be clearly female with hyper production of testosterone. Either situation would mean that the athlete would likely be disadvantaged competing with men, while she would be advantaged competing with women.

If the only choice is one of disadvantage or advantage, which one is correct? One could argue that gender identity should govern exclusively. If an athlete has been raised as a female and she feels that she is a girl, then that alone ought to be her eligibility ticket to compete. Under such a system, Caster Semenya would have been free to compete without any need for investigating her sex at all. Yet a rule of sports governance that relies solely on gender identity seemingly requires the inclusion of transsexual athletes, even prior to any medical treatment. It seems problematic to allow transsexual athletes who clearly possess significant biological advantages before undergoing hormone therapy to compete. On the other hand, by what rationale can the intersexual athlete and transgender athlete be differentiated from one another?

Perhaps, here, the answer lies in the imperfect Stockholm Consensus. The Stockholm Consensus separates athletes who have transitioned prior to puberty from those who have

not.⁴⁴⁵ On its face, this designation seems bizarre. It would be highly extraordinary to discover a transsexual athlete who transitioned before the onset of puberty, despite the fact that gender identity disorder exists in childhood and many transgender individuals were aware of their gender confusion or unhappiness long before puberty.⁴⁴⁶

Nonetheless, many of the difficulties surrounding intersexual athletes, like Semenya, are that they were raised as girls and never believed themselves to be any different from any other woman. The gender identity of their youth, before puberty, is female. Erik Schinegger is a rare instance of an intersexual athlete who embraced the opportunity to transition and live as a man. To the extent that the IOC seeks to prevent another Dora Ratjen or the suspicious Soviet Press sisters, there needs to be some rule in place regarding the potential for an adult athlete who wants to “fake” or “cheat” as transgender.

While many may argue that this risk is overblown and ought to be shelved, this concern simply does not exist at all for the athlete discovered to be intersexual. No one knew when Caster Semenya or Santhi Soundarajan were born that they *were not* necessarily female as commonly understood or that they may have possessed atypical hormone profiles; and no one could have predicted that they would have become elite runners. Under this perspective, the athletes ought to be allowed to compete, despite any advantages, because it came about naturally without any effort to cheat or distort the competitive process. In fact, failure to permit these athletes to compete would be a denial of their womanhood and identity. It would be akin to suggesting that a female athlete who is naturally 6 foot 6 can take advantage of her physiology on the basketball or volleyball court, whereas a female athlete given an internal endocrine-based advantage must suppress this; no one suggests that tall women should medically stunt their growth to compete with women whose height falls closer to that of the average female.

An alternative viewpoint, which might be more acceptable to those who worry more about the disadvantaged competitors, would be to rule for eligibility based on hormones alone. The IOC and federations have previously determined the acceptable bounds of testosterone for women to still be eligible to compete.⁴⁴⁷ This was done in the name of doping and drug testing. The upper boundaries were set quite high, in recognition of the variance within the female population.⁴⁴⁸

While methods for drug testing have become more sophisticated, it would seem that there is no reason the IOC or IAAF could not judge athletes solely by a hormonal profile. Using the WADA or moving to a biological passport profiling system would allow for greater ease in monitoring an athlete's hormone levels. Under such a system, Semenya's eligibility would have depended solely on her endocrinology, rather than a more complicated assessment of her physiology. Any decision by the IAAF to move toward a hormonal cut-off based on a biological passport would create a better template for how to deal with athletes of atypical sex or gender in the future. Indeed, this is the proposal that transsexual athlete Kristen Worley has suggested: requiring athletes with naturally

445. *Id.*

446. *See e.g.,* Syed, *supra* note 285.

447. *Disorders of Sexual Differentiation (DSD): A Consensus Statement*, WOMEN SPORT INT'L (2010), available at http://www.sportsbiz.bz/womensportinternational/conferences/documents/2010_June_Baltimore_DSD.pdf.

448. *See generally* Gina Kolata, *Some Researchers Question the Tests for Testosterone*, N.Y. TIMES, July 28, 2006, at D1 (explaining natural variations in testosterone levels).

occurring over-production of testosterone to take an androgen suppressant to bring hormone levels into an acceptable range if they want to be included in women's competition.⁴⁴⁹

This would protect the competing field at the expense of the individual, by setting an acceptable range for hormone profiles. But it also provides the individual with an option of compromising and seeking hormonal treatment that would ensure that she is not meaningfully different from the other athletes in the field. At a minimum, this would be a step in the right direction to avoid dragging another athlete through the same ordeal that Semenya has suffered. Mandatory and confidential biological passport profiling of all athletes prior to competition would remove the media circus that occurred in this and prior instances. And, last, keeping quality records of athlete's biological profiles and hormone ranges could provide useful information that could assist endocrinologists and other medical professionals treating transgender or intersexual individuals in the population more generally. Unfortunately, the federation system still lacks the ability to implement the biological passport system in a comprehensive way.

As discussed earlier, it appears that the IOC recognizes the need for this type of solution, in principle. At a conference in January 2010, the IOC declared the need for gender test medical centers, which could help the various federations deal with "disorders of sex development."⁴⁵⁰ And this is the direction the IAAF has moved toward, with its recently adopted hyperandrogenism regulations. Any execution of such a functioning system is in its infancy though, and by leaving determinations of eligibility and the investigation process to the federations themselves, it's not clear that this amounts to a step forward. Due to the decentralized nature of sports governance, both within and outside of the IOC, it is unclear how appropriate dignity, privacy and eligibility protections can be afforded to all elite athletes, particularly when they have been grossly violated in the past. Given the history of sex testing and continued problems in process, relying on either the future prospect of a biological passport system or a more generalized hormone-based cut-off for eligibility remain imperfect methods for dealing with the questions of advantage and disadvantage in sport.

D. CONCLUSION – ELIGIBILITY AS A FOOTNOTE TO EDUCATION

We are at the cusp of a revolution in sport. Science and technology have outpaced our rule-makers, the officials who govern sport. A man born with no legs can now use prosthetics and run at world class speeds. A teenager understood to be born a woman can be physiologically profiled to break down her composition, as a chromosomal matter, as a matter of reproductive organs both inside and out, and as a matter of gender identity. An athlete born biologically male can seek treatment that would allow her to live a full and complete life as a woman, and her right to continue in sport will not be infringed. The medical developments have been remarkable and it is impossible to predict the next frontier in sporting eligibility, whether it relates to gene therapy, artificial organs, or some other unknown.

At the same time that experts know and can do so much, the public still understands atypical athletes so little. Falling back on a hard-wired reaction to *difference*, the public instinct is to question, stare, and, often, mock that which is less understood. The officials

449. Worley, *supra* note 434.

450. IOC Recommends Gender-Test Centers, *supra* note 231.

and ministers of sport have failed to protect athletes, such as Oscar Pistorius and Caster Semenya, from turning into objects and spectacles; instead, they too have been caught up in the insensitivities surrounding atypical athletes.

This article focuses on rules of eligibility; however, that is merely a result of the reactive nature of federation sports. The true role that sport ought to play is an educational one. Sport, as a historical and cultural matter, can cut through societal barriers, uniting people with a common goal and demonstrating through its performance-centric focus that categories such as nationality, race, religion, gender, and class are all subsumed within the larger human condition.

Cases like those of Oscar Pistorius and Caster Semenya afford the IOC and the IAAF the opportunity to be leaders in the world, ushering in an era of global acceptance and understanding of difference, whether it be in the realm of sex, gender or disability. Rather than judiciously guarding the record books from would-be cheaters who have never materialized and protecting those competitors who are more likely to perceive anyone else who prevails as unfairly advantaged, these organizations and officials ought to be at the forefront of research, development and education. This would include supporting further research into physiology and human movement, as well as endocrinology and the intersexual or transgender. Only then will the elite athletic world be better able to understand the science and technological developments that will be exhibited by the next Oscar Pistorius or Caster Semenya. What happened to Oscar was a travesty. What happened to Caster was a tragedy. Despite the fact that both Pistorius and Semenya emerged eligible and triumphant, the athletes were not unscathed. There should be no opportunity or excuse for handling the next athlete to demonstrate difference in the same way.

