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Far from the Finish Line: Transsexualism and Athletic Competition

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Cover Page Footnote

The authors would like to thank Kimberly Clark for her extensive research assistance and valuable feedback during the writing process. We would also like to thank Michele Fuqua and Michelle Dumaresq for their valuable assistance.

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INTRODUCTION

Athletic competitions have traditionally enjoyed the reputation of being “pure” sport. Since the advent of the ancient Olympic Games, it was man (usually naked) competing against man to the limit of their physical abilities. Some things have changed in the new millennium—women now compete and everybody wears clothing—but the image of purity remains in the realm of athletics. Most spectators and some athletic contestants do not look beyond the thrill, tension, and live spectacle of which athlete jumps higher,

throws the ball farthest or hardest, or runs fastest. Man competes against man; woman competes against woman.

The concept of mixed gender competition did not enter the public consciousness until 1973 when, emboldened by Title IX,¹ schoolgirls started to press for more competitive opportunities.² Even then, neither the “tomboy” girls seeking to play on the boys’ soccer team, nor the parents of boys seeking to bar these meddlesome females from the “boys” team, envisioned the day when transsexuals would be lining up to compete with and against their children. Welcome to the twenty-first century and the next challenge for the sports world: how to integrate persons born into one sex who transform themselves to the opposite sex?

I. OVERVIEW: DEFINING THE PLAYING FIELD

A. *Distinguishing Gender from Sex*

The term “sex” refers to characteristics that distinguish between male and female.³ “Genotypic sex” or “chromosomal sex” refers to the presence of the female XX or male XY chromosomes in cells, which distinguish the two sexes.⁴ “Phenotypic sex” or “morphologic sex” refers to the presence of anatomical and/or biochemical features which are distinctly different in males and females; for example, gonads (testes versus ovaries), hormonal dominance (androgens versus estrogens), internal genitalia (sperm ducts versus Fallopian tubes and uterus), external genitalia (penis and scrotum versus clitoris and labia majora), and secondary sex characteristics (variably developed

¹ Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2000).

² Although Title IX was enacted in 1972, the deadline for high schools and universities to comply was not until July 1978. See KATHRYN M. REITH, *PLAYING FAIR: A WOMEN’S SPORTS FOUNDATION GUIDE TO TITLE IX IN HIGH SCHOOL AND COLLEGE SPORTS* 6 (3d ed. 1999), http://www.womenssportsfoundation.org/binary-data/WSF_ARTICLE/pdf_file/195.pdf. Prior to Title IX’s mandatory compliance challenges for female equality, scholastic sports were brought under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. U.S. CONST. amend. XIV. See also *Brenden v. Indep. Sch. Dist.* 742, 477 F.2d 1292 (8th Cir. 1973) (concerning high school females who wanted to participate in such interscholastic non-contact activities as tennis and cross-country skiing and running).

³ See *TABER’S CYCLOPEDIA MEDICAL DICTIONARY* 1747 (18th ed. 1993).

⁴ *Id.*

body hair and breasts).⁵ In contrast, the term “gender” refers to the psychosexual individuality resulting in part from the societal manner of rearing (boy versus girl).⁶ Thus, whereas “sex” considers what is *male* and what is *female*, “gender” considers what is *masculine* and what is *feminine*. The two terms are often (incorrectly) used interchangeably.⁷

In the majority of the population, a high degree of congruence exists between sex and gender, such that an individual fitting all the characteristics of the male sex also identifies with the masculine gender. Transgendered individuals are but one example of a group of people exhibiting incongruence between their natal sex and their gender identity.⁸ Their sex at the time of birth (hereinafter “Birth-Sex”) does not correspond to their psychosexual identity (hereinafter “Gender-ID”). For some transgendered individuals, their incongruence is so profound that they eventually seek hormonal therapy to alter their secondary sex characteristics and genital reconstructive surgery to better correlate the anatomical and psychological aspects of their sex and gender. After such a surgical/hormonal transformation, these individuals are commonly referred to as transsexuals.⁹ A post-operative male-to-female transsexual, for example, will possess the appearance and attitudes of a female, but still retain the chromosomal construct of a male. Transsexuals pursue such physical changes because, despite their past efforts or desire to conform their brain-sex to their Birth-Sex, they learn that the mind’s gender is immutable; the

⁵ See Keith L. Moore, *The Sexual Identity of Athletes*, 205 JAMA 787, 788 (1968). The term “natal sex” is often used to refer to the routine method of identifying an infant’s sex by visual inspection of the neonatal external genitalia and assigning sex on that basis, hoping that there is no ambiguity. *Id.*

⁶ See Melvin M. Belli, *Transsexual Surgery*, 239 JAMA 2143, 2144 (1978); Daniel R. Wilson et al., *Gender vs. Sex*, 284 JAMA 2997, 2997–98 (2000).

⁷ Interestingly, this is reflected in *Merriam Webster’s Collegiate Dictionary*, as it defines “gender” as either “sex” or “the behavioral, cultural, or psychological traits typically associated with one sex.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 484 (10th ed. 1997).

⁸ See Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 281–92 (1999). Intersexed conditions are those medical occurrences in which an individual possesses a combination of female and male characteristics establishing “noncongruent sexual attributes.” *Id.* at 279. Intersexuality will be discussed at length, *infra* Part I.B.3.

⁹ See Greenberg, *supra* note 8, at 289.

mind cannot change spontaneously from male to female or vice-versa.

In the realm of competitive sport, the existence of transgendered individuals poses a dilemma in some contexts. Because of the well-known biological differences between males and females regarding strength and endurance,¹⁰ certain sports activities separate the sexes to ensure fair play.¹¹ In order to enforce this separation, and thus prevent men from masquerading as women, the International Olympic Committee (IOC)¹² once required a mandatory sex verification test, using various strategies ranging from visual inspection of genitalia to chromosomal analysis for all females intending to compete in the Olympic Games.¹³ Notwithstanding the IOC's desire to preserve competitive integrity, sex verification testing for female athletes became a public relations fiasco and raised confusing issues for certain other intersexed individuals.¹⁴ Prior to discussing the manifestations of the IOC's policy, it is necessary to educate ourselves about the world of intersexed individuals.

B. Understanding Transgender Identity

The term "transgendered individual" is not a diagnostic medical term, but rather refers collectively to all persons with gender behaviors and sex identifications that differ from the socially accepted male/masculine and female/feminine behavioral expectations. At least three groups of such individuals have been identified.

¹⁰ See generally J. Keul et al., *Sex-Specific Differences in Performance in Men and Women*, in INTERNATIONAL AMATEUR ATHLETIC FEDERATION [IAAF], *WOMEN'S TRACK & FIELD ATHLETICS* 115–25 (IAAF trans. 1986).

¹¹ See Lisa M. Bassis, *A Legal Conundrum—Transsexuals in Athletics*, 1 HASTINGS COMM. & ENT. L.J. 369 (1977).

¹² "The [International Olympic Committee (IOC)] is the supreme authority of the Olympic Movement. . . . The role of the IOC is to lead the promotion of Olympism in accordance with the Olympic Charter." OLYMPIC CHARTER ch. 1, §§ 1–2, at 10 (2001), http://multimedia.olympic.org/pdf/en_report_122.pdf.

¹³ See Joe Leigh Simpson et al., *Gender Verification in the Olympics*, 284 JAMA 1568 (2000); A. Warner, *Row Erupts Over Sex Testing*, SUNDAY MAIL (Queensl.), Dec. 7, 1997, at 136.

¹⁴ See Pamela B. Fastiff, *Gender Verification Testing: Balancing the Rights of Female Athletes with a Scandal-Free Olympic Games*, 19 HASTINGS CONST. L.Q. 937 (1992); Bassis, *supra* note 11, at 369.

1. Cross-Dressers or Transvestites

Cross-dressers or transvestites dress in the clothing of the opposite sex, either for erotic pleasure or for emotional satisfaction. Transsexuals who eventually undergo the surgical/hormonal intervention often initially engage in cross-dressing as part of their gender exploration activities, although not all cross-dressers are transsexuals and not all transsexuals have engaged in cross-dressing behavior.¹⁵

2. Transgendered Individuals

Transgendered individuals typically begin to perceive that their Gender-ID is the opposite of their Birth-Sex at an early age—four to five years old.¹⁶ Debate continues over whether the gender identity syndrome that characterizes transgenderism is psychiatric in origin, dating back to very early post-natal development, or whether it is biological in origin, dating back to early fetal development when genetic and hormonal influences set the stage for development as male or female. Recent research involving anatomical studies of the hypothalamus suggests that a particular region essential for sexual behavior—the bed nucleus of the stria terminalis (BST)—is not only larger in men than in women, but also is female-sized in male-to-female transgendered individuals.¹⁷ Thus, gender identity may develop through interactions with brain development and sex hormones.

¹⁵ See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532–38 (4th ed. 1994) [hereinafter DSM-IV].

¹⁶ See Donald Russell, *The Sex Conversion Controversy*, 279 NEW ENG. J. MED. 535 (1968). For example, Michele, a fifty-three-year-old woman (post-operative male-to-female transsexual) interviewed for this Article, reported that she experienced her first feelings of gender discomfort at the age of seven. She had been married twice for a total of thirty-one years, fathered a daughter, and tried to suppress her transgendered feelings. Working hard to conform to the masculine Gender-ID, she had been an auto mechanic, lineman, carpenter, electrical engineer, and served in the United States Air Force during the Vietnam War. She even rode a motorcycle across the country trying to use the harshness and cruelty of the road to break her feminine side. Michele reported that, despite her perception that she was a girl/woman (i.e., her brain sex) she would have “taken a pill,” if it existed, to have a Gender-ID consistent with her biological maleness. However, since she could not change her brain sex, she opted for sexual reassignment surgery near the age of fifty. Interview with Michele Fuqua (Jan. 8, 2002).

¹⁷ See M. Breedlove, *Another Important Organ*, 378 NATURE 15, 16 (1995); Jlang-Ning Zhou et al., *A Difference in the Human Brain and Its Relation to Transsexuality*, 378 NATURE 68, 68–70 (1995).

The American Psychiatric Association specifies three criteria for defining a transgendered individual as transsexual: (1) persistent discomfort about one's Birth-Sex, (2) at least two years of persistent preoccupation with acquiring the sex characteristics of the other sex, and (3) having reached puberty (the age at which the reproductive organs mature).¹⁸ As to the number of transsexuals in the population, one survey suggests a prevalence of one out of 12,000 to 37,000 people for male-to-female transsexuals and one out of 30,000 to 150,000 for female-to-male.¹⁹

The strong desire among transgendered individuals to harmonize their Birth-Sex with their Gender-ID has led to development of medical strategies for improving this congruence. Much has been learned since the early 1950s, when a young American male named George Jorgensen underwent hormonal and surgical protocols in Denmark that allowed him to return to the United States as a woman, Christine Jorgensen. Her case was the first surgical sex reassignment on a transgendered individual described in medical literature.²⁰ Jorgensen and her doctors were subsequently contacted in sizable numbers by both men and women who were also interested in receiving such hormonal and surgical procedures.²¹ Clearly, transsexualism was not a unique phenomenon even in the middle of the twentieth century.

After more than fifty years of refinement, a multifaceted treatment protocol is available to transsexuals seeking to surgically align their brain-sex with their physical appearance. These strategies are initiated by detailed interviews to ensure that the patient is genuinely transgendered and free of genetic abnormalities, phenotypic intersexual manifestations (e.g., ambiguous genitalia), and mental disorders such as

¹⁸ See DSM-IV, *supra* note 15, at 537–38. The term “transsexualism” was, in fact, introduced into the DSM-III in 1980, and was replaced in DSM-IV with “Gender Identity Disorder” [hereinafter GID], along with a possible alternative diagnosis of “Gender Identity Disorder Not Otherwise Specified” [hereinafter GIDNOS].

¹⁹ See O. Bodlund & G. Kullgren, *General Outcome and Programmatic Factors: A Five-Year Follow-Up Study of Nineteen Transsexuals in the Process of Changing Sex*, 25 *ARCHIVES SEXUAL BEHAV.* 303, 303–13 (1996).

²⁰ See generally C. Hamburger et al., *Transvestism: Hormonal, Psychiatric, and Surgical Treatment*, 152 *JAMA* 391, 393–96 (1953).

²¹ See C. Hamburger, *The Desire for Change of Sex As Shown by Personal Letters from 465 Men and Women*, 14 *ACTA ENDOCRINOLOGICA* 361, 361–75 (1953–54).

schizophrenia.²² Upon confirmation of transgendered status, appropriate hormonal therapy may be initiated as part of a comprehensive changeover to develop and exhibit phenotypic characteristics of the to-be-assumed sex (breast and buttock fat, skin texture, body hair, etc.).²³ Multiple surgeries are eventually required, as the conversion strategy is not restricted to the reproductive organs.²⁴ Such surgical procedures are often called “sex-change” operations, but this is not correct.²⁵ When combined with hormonal therapy begun pre-surgery and continued post-operatively, the resulting surgery/hormonal-therapy combination serves as effectively as possible to align an individual’s body phenotype with his/her Gender-ID. It is important to note, however, that transsexual surgery is irreversible and it does not permit post-operative transsexuals the ability to procreate.

While specific details vary depending upon the experience of the surgical team, the essence of transforming a transgendered male into a post-operative transsexual female includes amputation of the male genitalia, construction of an artificial vagina, and appropriate urethral rearrangement.²⁶ If such construction is completed successfully, the vagina can fully accept an erect male penis, permitting sexual intercourse.²⁷ Long-term adjunct female hormonal therapy will cause an accompanying estrogen-induced increase in body fat and decreased skeletal musculature due to a reduction in circulating blood testosterone level.²⁸ Additional surgical alterations to the eyelids (blepharoplasty), the nose (rhinoplasty), the chin, the buttocks, and the thyroid cartilage often accompany the comprehensive reconstructive conversion to enhance the feminine appearance.²⁹

²² See S.S. Ratnam & A. Ilancharan, *Sex Reassignment Surgery in the Male Transsexual*, 38 BRIT. J. HOSP. MED. 204, 204 (1987).

²³ See *id.* at 206.

²⁴ See generally *id.* at 204–13.

²⁵ As stated by Georges Burou, a physician who has performed more than 700 male-to-female operations, “I don’t change men into women. I transform male genitals into genitals that have a female aspect; all the rest is in the patient’s mind.” *Prisoners of Sex*, TIME, Jan. 21, 1974, at 63–64.

²⁶ See generally Ratnam & Ilancharan, *supra* note 22.

²⁷ See *id.* at 204.

²⁸ See *id.*

²⁹ See *id.*

Transforming a transgendered female into a post-operative transsexual male requires a hysterectomy, construction of a penis and scrotum using plastic surgery, appropriate urethral reconfiguration, and removal of the female breasts.³⁰ The newly constructed penis will not be capable of achieving an erection, and of course, since there are no testes, no sperm are present.³¹ Various penile implant devices are available, however, to help such patients achieve a form of sexual intercourse.³²

One post-operative male-to-female transsexual described herself as “[s]uffering from Gender Identity Disorder (GID)/Transsexuality,” which she characterized as “horrible!”³³ In her paper entitled *Culturally-Sensitive Transgender Health Care*, psychologist Rachael St. Claire states that: “Transgender persons face numerous complex medical, psychological, and social issues. The transgender person’s process of understanding his or her gender identity and sexual issues can take many years, complicated by social stigmatization, shame, numerous forms of discrimination, and the lack of access to competent health care.”³⁴ In fact, Dr. St. Claire states that “[t]ransgender persons may avoid seeking health-care because of the fear of stigmatization and shame, [as well as] the belief that transgender sensitive health-care is not available.”³⁵

³⁰ See Mehmet H. Ergineli et al., *Vaginectomy and Laparoscopically Assisted Vaginal Hysterectomy as Adjunctive Surgery for Female-to-Male Transsexual Reassignment: Preliminary Report*, 87 EUR. J. OBSTETRICS & GYNECOLOGY & REPROD. BIOLOGY 35, 36 (1999).

³¹ See *id.*

³² See *id.* Because these transgendered people experience irreversible loss of their reproductive potential following surgery, it has been suggested that gamete banking (spermatozoa and oocytes or ovarian tissue) be conducted as an additional part of the transition to their desired sex. Thus, their sperm or oocytes can be preserved for use in future procreation procedures. For those who elect to undergo surgery in their pre-parenting years, this option eliminates the possibility of future regret or guilt (i.e., a sense of such loss as a “price to pay” for their transition). See P. De Sutter, *Gender Reassignment and Assisted Reproduction*, 16 HUMAN REPROD. 612 (2001).

³³ Letter from Michele S. Fuqua to Purdue University (undated).

³⁴ Rachael St. Claire, *Culturally-Sensitive Transgender Health Care*, Transgender Soul, at http://www.transgendersoul.com/info_for_your_physician.htm (last visited Mar. 12, 2003).

³⁵ *Id.*

3. Intersexed Individuals or Hermaphrodites

Alterations in the normal pattern of fetal development can produce any of three variations in chromosomal and phenotypic expression: (1) abnormal sex chromosome complement, (2) males who fail to respond to androgenic hormones, and (3) females who respond inappropriately to male hormones.³⁶ These individuals may not experience Birth-Sex or Gender-ID incongruence, but their abnormal anatomical and physiological orientation may cause them to not be fully accepted in the context of societal norms and expectations. To appreciate these diverse possibilities, a brief review of principles of sexual biology is helpful.

Genetic sex is established at fertilization by chromosomal interaction.³⁷ Phenotypic sex is hormonally determined.³⁸ The brain interacts with the gonads via the anterior pituitary gland using what is best termed a “female default mechanism.”³⁹ Brain-sex is determined hormonally.⁴⁰ The two sex chromosomes appear quite different; there is a huge X and a tiny Y. The ovum and sperm each contain only one of the two.⁴¹ Sperm can carry X or Y, whereas the ovum carries only X. Fertilization, which is a chromosomal pairing, typically produces either XX or XY.⁴² Occasionally, this pairing does not occur. There is a genotype known as XO (Turner’s Syndrome), which is manifested phenotypically by female features, short stature, ovaries so immature that they are just streaks of tissue, and an assortment of structural defects.⁴³ Another genotype is known as XXY, (Klinefelter’s Syndrome), which is manifested phenotypically by male features, long arms and legs, small testes, reduced fertility, and sometimes mental retardation.⁴⁴ Many other such variants occur—genetic sex is thus not a binary arrangement.⁴⁵

³⁶ See R. RHOADES & R. PFLANZER, HUMAN PHYSIOLOGY 958–59 (3d ed. 1996).

³⁷ See *id.* at 954.

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See *id.* at 959.

⁴³ See WILLIAMS TEXTBOOK OF ENDOCRINOLOGY 1337 (Jean D. Wilson & Daniel W. Foster eds., 8th ed. 1992).

⁴⁴ See *id.* at 843–44.

⁴⁵ See *id.* at 751–859.

Ordinarily, XX embryos are destined to become females, and XY embryos become males. At conception, there is a single cell, with no tissues that would identify maleness or femaleness. It is the genetic complement that eventually permits this. An individual will become a male not because he has only one X chromosome, but because he has a Y chromosome.⁴⁶ Likewise, a female results because of the absence of a Y chromosome, not because of the presence of two X chromosomes. Very few genes are located on the Y chromosome, but the Y-linked gene Sex-determining Region Y (SRY) is crucial, for it will eventually stimulate the indifferent gonad in the developing embryo to form a testis.⁴⁷

In the first six weeks of development, an indifferent gonad and two parallel duct systems form regardless of genotype. The two duct systems are often called sex cord regions, and develop into the reproductive system.⁴⁸ If properly stimulated, a so-called Müllerian duct system forms the female internal genitalia, and a Wolffian duct system forms the male internal genitalia.⁴⁹ Further development of one stops growth of the other.

Unless “told” otherwise, the natural trend for the growing embryo is to develop as a female. To form a male, the embryo must be “redirected.” Between days 32 and 65 of fetal development, the SRY gene stimulates the indifferent gonad to form a testis, with the eventual capacity to produce sperm and male hormones such as testosterone.⁵⁰ After this growth stimulation, the Wolffian duct system needs stimulation, and the Müllerian duct system needs inhibition.⁵¹ This is achieved by hormonal action, namely human chorionic gonadotropin (HCG) produced by the developing placenta.⁵² HCG stimulates production of fetal gonadal testosterone (from the interstitial cells) and, Anti-Müllerian Hormone, which suppresses the female duct system.⁵³

Thus, what determines normal male versus female development in utero is not the presence or absence of estrogen,

⁴⁶ See RHOADES & PFLANZER, *supra* note 36, at 952–76.

⁴⁷ *See id.*

⁴⁸ *See id.*

⁴⁹ *See id.*

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² *See id.*

⁵³ *See id.*

but rather, testosterone. The Müllerian (female) ducts only stop growing if they are specifically suppressed.⁵⁴ Testosterone has four initial roles: development of the internal genital ducts, formation of external male genitalia, manifestation of secondary sex characteristics, and masculinization of the hypothalamus.⁵⁵ Interestingly, this latter function occurs through the eventual action of estrogen, which is produced by conversion of testosterone by an aromatase enzyme.⁵⁶ Thus, in male embryos, estrogen acts on the hypothalamus to “program” it into a continual (tonic) hormonal release pattern, which permits constant sperm production.⁵⁷ If this “reprogramming” does not occur, the female pattern will dominate—a cyclic (pulsatile) activity resulting in monthly ovum development.⁵⁸

Each step in sexual differentiation and development must proceed correctly; otherwise, the resulting child may be a mosaic with both male and female features—that is, structurally hermaphroditic. One example of such an aberration is congenital adrenal hyperplasia, or adrenogenital syndrome. This condition occurs because the enzymes in the adrenal cortex that convert 17 α -hydroxyprogesterone to 11-desoxycortisol and then to cortisol are absent, thereby eliminating feedback inhibition by cortisol to the hypothalamus.⁵⁹ As a result, the hypothalamus and anterior pituitary gland greatly increase their steroid production, especially testosterone and estrogen.⁶⁰ Both X chromosomes must be affected, so this aberration can only occur in genotypic females.⁶¹ There is no SRY gene, so ovaries develop, not testes.⁶² There is no Anti-Müllerian Hormone, so the internal ductwork is female (oviducts, uterus, etc.).⁶³ The high testosterone level, however, also stimulates Wolffian duct development, resulting in male secondary sexual characteristics.⁶⁴ The high estrogen level

⁵⁴ *See id.*

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *See id.*

⁵⁸ *See id.*

⁵⁹ *See WILLIAMS TEXTBOOK OF ENDOCRINOLOGY, supra note 43, at 598–605.*

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² *See RHOADES & PFLANZER, supra note 36.*

⁶³ *See id.*

⁶⁴ *See id.*

masculinizes the hypothalamus.⁶⁵ At birth, there is a genotypic girl (XX) who is really a female hermaphrodite, i.e., with ambiguous external genitalia, depending on the extent of masculinization (ranging from clitoral hypertrophy to fusion of the labio-scrotal swellings into a penis).⁶⁶ The likely phenotype of a person with congenital adrenal hyperplasia will be masculine, with increased body hair, well-developed skeletal muscle mass, and thickened vocal cords. From an athletic perspective, such an individual could have an advantage in competitive sport, resulting from a female genotype with a male physique.

Many other aberrations exist. One of the more notable athletes, for example, was Stella Walsh, born Stanisława Walasiewicz in Poland. Ms. Walsh was the 100-meters gold medalist at the Los Angeles Olympic Games in 1932, as well as the first woman under 12 seconds for the distance.⁶⁷ She had an illustrious and successful career in athletics, competing well in the 200-meters, the discus, shot put, and pentathlon.⁶⁸ In later life, she resided in Cleveland, Ohio, and was killed accidentally as a bystander in a robbery.⁶⁹ An autopsy revealed that Ms. Walsh had an XY chromosomal makeup, but ambiguous genitalia.⁷⁰ Specifically, she had no female sexual organs.⁷¹ She was a mosaic best described as a male pseudohermaphrodite—very likely an example of androgen insensitivity syndrome. Thus, she was a genotypic male (XY) born without chemical receptors that respond to androgenic hormones such as testosterone. Such individuals cannot menstruate or conceive, but their female-like external genitalia cause them to be reared as female. Emotionally, such individuals feel female, but tend toward growing tall and lean. In Walsh's case, this also endowed her with elite-level athleticism.⁷²

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ *See* DAVID WALLECHINSKY, *THE COMPLETE BOOK OF THE SUMMER OLYMPICS 188–90* (3d ed. 1996).

⁶⁸ *See id.* at 189–90.

⁶⁹ *Slain Athlete's Sex Questioned*, N.Y. TIMES, Dec. 10, 1980, at B12.

⁷⁰ Judith Newman, *Sex Tests: How Sexism and Bad Science Have Teamed Up Against Athletes*, Sports Jones, at *2, at <http://www.sportsjones.com/sj/357.shtml> (Aug. 24, 2001).

⁷¹ *See Report Says Stella Walsh Had Male Sex Organs*, N.Y. TIMES, Jan. 23, 1981, at A18.

⁷² *See* RHODES & PFLANZER, *supra* note 36, at 359.

C. Sex Verification Testing

Had Ms. Walsh been born fifty years later, her pseudohermaphroditism might have been revealed by a mandatory sex verification test. From the mid-1960s to the dawn of the present millennium, a sex verification test was routine for female athletes participating in international competitions.⁷³ Often, the test served merely as a trivial reaffirmation of an athlete's sex. At the least, it was a minor inconvenience in that a female athlete typically subjected herself to the test only once and then was issued a "femininity card" to be presented at future competitions in lieu of another test.⁷⁴ For some athletes, however, the test results became an unwelcome epiphany with traumatic consequences.⁷⁵ The following is a summary of sex testing in athletic competition, concluding with the highly publicized case of Dr. Renee Richards.⁷⁶

⁷³ See Fastiff, *supra* note 14, at 938–39. Note that Ms. Fastiff, as well as other prominent writers and scholars cited in this Article, refer to the testing as *gender* testing. As discussed, *infra* Part I.A, the terms "sex" and "gender" have often become interchangeable in common discourse. Because the testing discussed in this section is assessing chromosomal configuration, it is not identifying one's gender, but rather one's sex; terminology used in the present Article will so reflect.

⁷⁴ See *id.* at 940.

⁷⁵ Consider the case of Maria José Martínez Patino, the national Spanish record holder for the *women's* 60-meter hurdles. Patino had never questioned her gender. She was raised as a girl, looked like a woman, behaved like a woman, and dressed like a woman. She was, in her own eyes, as well as the eyes of everyone around her, a woman. In 1985, at the World University Games in Kobe, Japan, she took a chromosomal sex verification test. The test indicated that "she" was a man. As it turned out, Patino also had androgen insensitivity syndrome, i.e., an XY genotype, with no androgen receptors, and female-appearing external genitalia. She was raised as a female with the perception that she was female. Yet, in the unflinching eyes of the IOC, she was all male. As a result, Patino suffered international scrutiny and humiliation. See Michael D. Lemonick, *Genetic Tests Under Fire*, TIME, Feb. 24, 1995, at 65 ("Not only was [Patino] barred from competing, but she lost an athletic scholarship and watched her boyfriends walk off in confusion."). For a further study of Patino's case, as well as other instances in which a person's proper sex was called into question during international athletic competition, see Matt Guilbeault, *Intersexism in Sports: A Human Rights Issue*, at <http://members.fortunecity.com/dikigoros/intersexism.htm> (last visited Mar. 13, 2003).

⁷⁶ See *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267 (Sup. Ct. 1977); *infra* Part II.C.3.

1. The History of Sex Testing in the Olympic Community

In response to rumors suggesting that men were masquerading as women for the sole purpose of excelling in international athletic competition, the first sex test occurred at the 1966 European Track and Field Championships in Budapest, Hungary.⁷⁷ Similar tests were conducted at the 1966 Commonwealth Games in Kingston, Jamaica; the 1967 Pan American Games in Winnipeg, Canada; and the 1967 European Cup track and field competition in Kiev, USSR.⁷⁸ These initial tests were given to any female intending to compete and amounted to nothing more than women traipsing nude in front of a panel of physicians who were monitoring for appropriately corresponding genitalia.⁷⁹

A dark cloud quickly formed over the newly instated sex verification testing as female athletes publicly expressed their humiliation over the manner in which they were being evaluated.⁸⁰ Feeling this pressure, the IOC sought alternative methods of testing for femaleness.⁸¹ In 1968, the IOC introduced a mandatory sex chromatin analysis for sex verification at the Olympic Games in Mexico City.⁸² The test, known as the Barr body test,⁸³ took a

⁷⁷ See Arne Ljungqvist & Joe Leigh Simpson, *Medical Examination for Health of All Athletes Replacing the Need for Gender Verification in International Sports: The International Amateur Athletic Federation Plan*, 267 JAMA 850, 850 (1992).

⁷⁸ See *id.*

⁷⁹ See *id.* It was at the 1967 Kiev European Cup that sex testing claimed its first publicly humiliated athlete. Polish sprinter and Olympic gold and bronze medalist Ewa Klobukowska was ruled ineligible after an initial visual inspection indicated ambiguous genitalia. A subsequent investigation revealed the presence of an XXY sex chromosome composition. She was ultimately banned from future women's events and her name was stripped from the record books. Sometime after the sex verification fiasco, she gave birth to a healthy baby. See Canadian Academy of Sport Medicine [CASM], *Position Statement: Sex Testing (Gender Verification) in Sport*, at <http://www.casm-acms.org/Committees/WIISM/PSGenver.htm> (Jan. 22, 1997); Guilbeault, *supra* note 75.

⁸⁰ See Simpson et al., *supra* note 13, at 1568 (2000).

⁸¹ See *id.*

⁸² See *id.* The sex chromatin test was actually used on a small scale during the 1967 Kiev European Cup and 1968 Grenoble Winter Olympic Games, and was indeed the same test used on Eva Klobukowska after her initial physical examination found sex ambiguity. See Guilbeault, *supra* note 75.

⁸³ Barr body is just one of a few names for this type of sex verification analysis. See Bassis, *supra* note 11, at 398 (expressing it as the karyotype test); Fastiff, *supra* note 14, at 940 (expressing it as the sex chromatin test); Ljungqvist, *supra* note 77 (expressing it as the buccal smear test); Simpson et al., *supra* note 13 (expressing it as either the Barr body or X chromatin test).

buccal smear from inside the athlete's mouth and then analyzed the cells for the presence of a stainable chromatin mass (i.e., the Barr body), which is found only in females.⁸⁴ If the Barr body test was positive, the athlete was issued a femininity certification and any doubts concerning her womanhood were laid to rest.⁸⁵ If the Barr body test was negative, however, a complete chromosomal examination was conducted on a blood sample, accompanied by a gynecological examination.⁸⁶

During the 1970s, the Barr body test was gradually phased out and replaced by a cellular metaphase analysis requiring venipuncture (the sampling of blood).⁸⁷ By the end of the 1980s, the Barr body test was rendered entirely obsolete.⁸⁸ The IOC authorized a protocol replacing the Barr body test with the "technically preferable" polymerase chain reaction (PCR) test for the SRY gene.⁸⁹ The rationale for the latter's use was that the presence of the SRY gene on the Y chromosome indicated that the individual was male, and would exclude such an athlete from women's competition.⁹⁰ The IOC inaugurated this new protocol for sex verification testing for international competitions during the 1992 Winter Olympics in Albertville, France.⁹¹

While the IOC was implementing its various methods of sex verification, the International Association of Athletics Federations (IAAF),⁹² the international governing body for track and field (known as "athletics" internationally), also considered revamping its sex verification policy.⁹³ Until 1991, the IAAF utilized the Barr

⁸⁴ See Fastiff, *supra* note 14, at 940.

⁸⁵ See Ljungqvist, *supra* note 77.

⁸⁶ See *id.* But see Simpson et al., *supra* note 13, at 1568 ("Systematic follow-up was rarely available for female athlete's 'failing' the test Follow-up was crucial because the problem was not male imposters, but rather confusion caused by [a] misunderstanding of male pseudohermaphroditism."); CASM, *supra* note 79 ("Shocked athletes, having failed the sex chromatin screening test . . . , have tended to withdraw rather than undergo further investigations which might have proved them eligible.").

⁸⁷ See Simpson et al., *supra* note 13, at 1569.

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See Jean-Yves Nau, *France: Gender Tests for Athletes*, 339 LANCET 354, 354 (1992).

⁹¹ See Simpson et al., *supra* note 13, at 1569.

⁹² The IAAF changed its name from the International Amateur Athletic Federation in August of 2001. The acronym remains the same. IAAF, *Inside IAAF: History*, at <http://www.iaaf.org/insideIAAF/history/index.html> (last visited Mar. 13, 2003).

⁹³ See Simpson et al., *supra* note 13.

body test. However, when the IOC switched to the PCR test, the IAAF did not follow suit. It decided to abolish mandatory sex testing and implemented a strategy similar to the medical examinations conducted prior to the 1968 Mexico City Summer Olympic Games.⁹⁴ The new IAAF protocol granted authority to a medical delegate at an IAAF competition to “arrange for the determination of the [sex] of the competitor should he judge that to be desirable.”⁹⁵ Thus, the IAAF employs a suspicion-based medical examination for questionable cases of sex identity rather than a compulsory examination for all female athletes. The IAAF drug testing procedures that call for close observation of an athlete during urine collection therefore provide the opportunity for determining whether further inquiry is necessary. This is believed to serve as an adequate deterrent to males masquerading as females in athletic competition.⁹⁶ Just prior to the 1992 Albertville Winter Olympic Games, the IAAF published a report that criticized chromosomal and genetic testing as antiquated and recommended that other sport governing bodies follow its lead by instituting suspicion-based sex verification.⁹⁷

2. Current IOC and International and National Sports Federations’ Policies on Sex Testing

In 1992, the IOC declined to adopt the suspicion-based medical examination policy of the IAAF in favor of the PCR test. Seven years later, at its 109th Session, the IOC discontinued mandatory sex testing.⁹⁸ Similar to the discretion reserved to the IAAF medical delegate, the IOC now authorizes its medical commission to conduct a PCR test on an individual basis, should such need

⁹⁴ *See id.*

⁹⁵ IAAF, IAAF HANDBOOK R. 113, at 92 (2003), <http://www.iaaf.org/newsfiles/9582.pdf>.

⁹⁶ This methodology would prevent a male in guise of a female athlete from succeeding at major championship events, as all top place finishers are drug tested. In addition, random out-of-competition testing serves as a deterrent, even though it does not reach every track and field athlete.

⁹⁷ *See* Lemonick, *supra* note 75, at 65 (“Timed to coincide with the Winter Olympics, the report is sure to embarrass the International Olympic Committee, which remains wedded to chromosome testing.”); Ljungqvist, *supra* note 77, at 851–52.

⁹⁸ Simpson et al., *supra* note 80, at 1568 (“The International Olympic Committee has abolished gender verification, beginning with the 2000 Summer Games in Sydney, Australia.”).

arise.⁹⁹ The new sex verification protocol, in place at the onset of the 2000 Sydney Summer Olympic Games, was applauded by members of the medical community for protecting the rights and privacy of athletes “while safeguarding fairness of competition.”¹⁰⁰ Only five of the thirty-four international federations of Olympic sports retain compulsory sex verification testing for their international events.¹⁰¹

In the United States, most national sport governing bodies or professional sport leagues do not have a clearly identified sex testing policy. For example, the Ladies Professional Golf Association (LPGA), in its qualification application, does not require an applicant to provide proof of femaleness despite that the same application limits the members of its organization to “females at birth.”¹⁰²

In the mid 1970s, the United States Tennis Association (USTA), the national governing body for tennis, required all female applicants for the United States Open Tennis Tournament (hereinafter “U.S. Open”) to undergo a Barr body chromosome test.¹⁰³ Following *Richards v. United States Tennis Association*,¹⁰⁴ however, the USTA changed its policy. Currently, the USTA

⁹⁹ See Letter from IOC to Jill Pilgrim (June 5, 2001) (on file with authors).

¹⁰⁰ Simpson et al., *supra* note 13, at 1569.

¹⁰¹ *Id.* The five international organizations that continue to require testing are those that govern basketball, judo, skiing, volleyball, and weightlifting. See *id.* It should also be noted that the United States Volleyball Association [hereinafter USA Volleyball] and United States Judo, respective national governing bodies for those sports, do not conduct sex testing during national events even though their international federations do so at international events. See Letter from USA Volleyball to Jill Pilgrim (July 1, 2001); Letter from United States Judo to Jill Pilgrim (June 29, 2001). In the rare event that the sex of an athlete intending to compete at a USA Volleyball event is called into question, the athlete may be required to provide proof of sex. Such proof can be in the form of an identification card that signifies sex (e.g., driver’s license, passport, or green card), or a copy of a valid medical or health insurance policy that “unequivocally states” the athlete’s sex. However, a birth certificate is not acceptable. USA VOLLEYBALL, SPECIAL INFORMATION CONCERNING USA CHAMPIONSHIP EVENTS § IX, <http://www.usavolleyball.org/natoff/infochampevent.pdf> (last visited Mar. 20, 2003).

¹⁰² LPGA, QUALIFYING FOR 2003 TOUR § 2, at 4 (“Entries are open to professional and amateur golfers who were female at birth.”), <http://www.lpga.com/photos/2003Qapplication.pdf>.

¹⁰³ See *Richards v. U.S. Tennis Ass’n*, 400 N.Y.S.2d 267 (Sup. Ct. 1977); *infra* Part I.C.3.

¹⁰⁴ 400 N.Y.S.2d at 267.

conducts the PCR sex test on a case-by-case basis whenever a controversy arises regarding a competitor's sex.¹⁰⁵

3. When Transsexualism and Sex Verification Testing
Collide: *Richards v. United States Tennis Association*

Dr. Renee Richards was born Richard H. Raskind and in 1974 was nationally ranked thirteenth in the men's 35-and-over tennis division.¹⁰⁶ In 1975, Raskind underwent a sex reassignment operation and "for all intents and purposes, . . . became female, psychologically, socially[,] and physically . . ." ¹⁰⁷ With this, Raskind changed his name to Richards, a post-operative male-to-female transsexual.¹⁰⁸

In 1976, Richards attempted to enter the U.S. Open in the women's division.¹⁰⁹ She was advised by the USTA that in order to qualify she must first pass a sex verification test—the Barr body test.¹¹⁰ Richards requested that the test be waived on the basis that it was discriminatory.¹¹¹ The USTA denied the request.¹¹² Richards ultimately failed to appear at a qualifying site, essentially withdrawing her application from consideration.¹¹³ Seeking to enter the 1977 U.S. Open, Richards sought a preliminary injunction prohibiting the USTA from subjecting her to a sex verification test, citing a violation of both the New York State

¹⁰⁵ Telephone Interview with Julie Chen, Chief Legal Counsel, USTA (July 31, 2001). Following the *Richards* decision against the USTA, the Women's Tennis Association [WTA], the professional association for women's tennis, had required sex tests for admittance to any major competition. Further, Richards had to submit to, and ultimately failed, sex tests for major European tournaments, including Wimbledon and the French Open. See Neil Amdur, *Women Facing More Than an Athletic Struggle*, N.Y. TIMES, Dec. 21, 1980, § 6, at 1.

¹⁰⁶ *Richards*, 400 N.Y.S.2d at 268.

¹⁰⁷ *Id.* at 267 (quoting Dr. Richards's testimony).

¹⁰⁸ *Id.*

¹⁰⁹ See Bassis, *supra* note 11, at 402. Prior to her application submission to the U.S. Open, Richards entered nine women's tennis tournaments of which she won two and finished runner-up in three. See *Richards*, 400 N.Y.S.2d at 268.

¹¹⁰ See Bassis, *supra* note 11, at 402. Prior to 1976, no sex verification test had ever been required in the history of the United States Open Tennis Tournament [hereinafter U.S. Open], nor had the submission of her application to the U.S. Open required a Barr body test for any of its other sanctioned events. *Richards*, 400 N.Y.S.2d at 268.

¹¹¹ *Richards*, 400 N.Y.S.2d at 268.

¹¹² *Id.*

¹¹³ *Id.*

Human Rights Law¹¹⁴ and the Fourteenth Amendment of the United States Constitution.¹¹⁵ Richards claimed that the USTA's decision to institute the test was specifically designed to exclude her from competition. In addition, she argued that the medical community deemed the test to be arbitrary and capricious and that imposition of the test would be "insufficient, grossly unfair, inaccurate, faulty[,] and inequitable."¹¹⁶

The New York trial court held that the only legitimate reason for administering such a test during the course of athletic competition was to "prevent fraud, i.e., men masquerading as women, competing against women."¹¹⁷ The court ruled that the USTA did in fact employ the test specifically to prevent Richards from competing, knowing that she would most certainly fail it.¹¹⁸ The court ultimately granted Richards's request for a preliminary injunction precluding the sex verification test because the USTA discriminately failed to provide an equal opportunity for Richards to compete, thereby violating state human rights laws.¹¹⁹ In its ruling, the court did acknowledge that the test was an "acceptable tool for determining sex, [yet] it is not and should not be the sole criterion, where . . . the circumstances warrant consideration of other factors."¹²⁰

II. ON THE SIDELINES: THE PARAMETERS OF SEX AND GENDER

Rather than attempting to express a bright-line definition for sex and gender, the *Richards* court insinuated that sex determination and gender recognition required a multifaceted approach.¹²¹ In a sense, sex as indicated by genotype (i.e., chromosomal construct) is just one of several determinants to consider.¹²² Not all jurisdictions have applied such a liberal

¹¹⁴ New York State Human Rights Law, N.Y. EXEC. LAW § 297.9 (Consol. 2003).

¹¹⁵ U.S. CONST. amend. XIV; *Richards*, 400 N.Y.S.2d at 268.

¹¹⁶ *Richards*, 400 N.Y.S.2d at 268. *See also* Fastiff, *supra* note 14, at 941–42.

¹¹⁷ *Richards*, 400 N.Y.S.2d at 272.

¹¹⁸ *See id.*

¹¹⁹ *See id.* at 273.

¹²⁰ *See id.* at 272.

¹²¹ *See id.* at 272–73.

¹²² *See id.* Richards's doctor, Dr. Money, testified to the "injustice" of using a chromosomal test as the sole criterion to determine an individual's sex for the purposes of sports eligibility. Dr. Money testified that:

approach in determining working definitions for sex and gender, however.

A. Legally Proscribed Sex and Gender

When faced with matters concerning transgendered individuals—especially transsexuals—courts have struggled to develop consistency. The manner in which sex and gender are determined seems to differ with the circumstances. Following is a brief review of how courts have defined sex and gender in a variety of social and legal contexts.

1. Family Law

In *Daly v. Daly*,¹²³ the Supreme Court of Nevada upheld a lower court ruling that terminated the parental rights of a child's natural father, who also happened to be a post-operative male-to-female transsexual.¹²⁴ The court did not attempt to determine the legal sex of the defendant, ruling instead on the gender-neutral jurisdictional and dispositional requisites for parental rights termination. It did, however, briefly address the defendant's sex-reassignment surgery, stating that "[she,] in a very real sense, has terminated her own parental rights as a father. It was strictly [her] choice to discard . . . fatherhood and assume the role of a female who could never be either a mother or sister to [her] daughter."¹²⁵ Although not explicit, the court's dictum determined that the

[B]y other known indicators of sex, Dr. Richards is a female, i.e., external genital appearance is that of a female; her internal sex is that of a female who has been hysterectomized and ovariectomized; Dr. Richards is psychologically a woman; endocrinologically female; somatically (muscular tone, height, weight, breasts, physique) Dr. Richards is female and her muscular and fat composition has been transformed to that of a female; socially Dr. Richards is female; Dr. Richards's gonadal status is that of an ovariectomized female.

Id. at 272.

¹²³ 715 P.2d 56 (Nev. 1986).

¹²⁴ *Id.*

¹²⁵ *Id.* at 59 (dictum). The court held that the potential emotional and psychological injury the child might suffer if her transsexual father was permitted to see her satisfied the jurisdictional and dispositional grounds to terminate parental rights (i.e., if the termination is in the child's best interests). *Id.* at 60. The jurisdictional/dispositional standard has since been overruled and replaced by a best-interest parental fault test. *See In re New Jersey*, 8 P.3d 126 (Nev. 2000).

defendant assumed her post-operative sex and did not retain her Birth-Sex.¹²⁶

In *Littleton v. Prange*,¹²⁷ the Texas Court of Appeals was faced with the mission of determining a post-operative transsexual's legal sex with regard to marriage.¹²⁸ This case arose out of a wrongful death action in which the plaintiff, Christie Littleton, a post-operative male-to-female transsexual at the time of marriage, sued the defendant for medical malpractice after the death of her husband.¹²⁹ The defendant doctor challenged the action on a standing issue, asserting that plaintiff was a man and, therefore, under Texas Law,¹³⁰ could not legally be the surviving spouse of another man.¹³¹ The court ruled that since the plaintiff was anatomically and genetically male at the time of birth, as a matter of law, she was still a male regardless of her subsequent operation and current appearance.¹³² For at least the purposes of marriage, the *Littleton* court defined one's legal sex as the equivalent of one's biological and anatomical sex at birth.¹³³

Approximately twenty-five years prior to the *Littleton* decision, the New Jersey Supreme Court was presented with a similar situation and ruled quite differently. In *M.T. v. J.T.*,¹³⁴ the court held that a post-operative male-to-female transsexual was a woman for purposes of a legal marriage.¹³⁵ Not unlike the *Littleton* court,

¹²⁶ See *Daly*, 715 P.2d at 59.

¹²⁷ 9 S.W.3d 223 (Tex. Ct. App. 1999). See also Julie Greenberg, *When Is a Man a Man, and When Is a Woman a Woman?*, 52 FLA. L. REV. 745 (2000) (providing in-depth coverage of *Littleton*).

¹²⁸ *Littleton*, 9 S.W.3d at 223.

¹²⁹ *Id.* at 225.

¹³⁰ TEX. FAM. CODE ANN. § 2.001(b) (Vernon 1998) (“[A] marriage license may not be issued for the marriage of persons of the same sex.”).

¹³¹ *Littleton*, 9 S.W.3d at 225.

¹³² *Id.* at 231. The *Littleton* court used the same rationale as the English court in the landmark ruling *Corbett v. Corbett*, 1971 P 83 (P.), in which legal sex was the biological sex assigned at birth.

¹³³ See *Littleton*, 9 S.W.3d at 231. As Professor Greenberg signified, the *Littleton* decision was reached after “three different legal institutions acknowledged that Christie was a woman.” Kentucky officials allowed her to legally marry a man, and Texas officials allowed her to take a woman's name and amend her original birth certificate to reflect her female sex and new name. Greenberg, *supra* note 127, at 748–49.

¹³⁴ 355 A.2d 204 (N.J. 1976).

¹³⁵ *Id.* at 211. The plaintiff wife, a post-operative male-to-female transsexual at the time of marriage, filed a complaint against her ex-husband for support and maintenance. Her husband sought to annul the marriage based on the argument that his ex-wife had the

the New Jersey court focused its analysis of sex determination on physical anatomy.¹³⁶ The difference is that the New Jersey court acknowledged the current physical anatomy of a person as the proper sex, irrespective of the Birth-Sex: “[I]f the anatomical or genital features of a genuine transsexual are made to conform to the person’s gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards.”¹³⁷ The court did note, however, that this combination of psychological and anatomical factors for sex determination is strictly limited to issues of marriage and that for other purposes, such as “public records, services in the branches of the armed forces, participation in certain regulated sports activities, eligibility for types of employment and the like, other tests in addition to genitalia may also be important.”¹³⁸

Although decided in the 1970s, *M.T.*’s liberal approach for arriving at a legal definition of sex did not set the trend for most courts. As evidenced by *Littleton*, the most recent contribution to this legal discussion, the prevailing standard is that one’s sex, for purposes of marriage, is the sex at the time of birth.¹³⁹ Almost all jurisdictions faced with this decision have overlooked the transsexual’s psychosexual identity as the determining factor.¹⁴⁰

genetic make-up of a male, and, therefore, could not have legally married another man. *See id.* at 205.

¹³⁶ *See id.* at 208.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *See Littleton v. Prange*, 9 S.W.3d 223, 230 (Tex. Ct. App. 1999).

¹⁴⁰ *See, e.g., In re Ladrach*, 513 N.E.2d 828 (Ohio Ct. Com. Pl. 1987) (holding that a marriage license could not be issued because post-operative transsexuals do not legally assume their post-operative sex); *B. v. B.*, 355 N.Y.S.2d 712 (Sup. Ct. 1974) (granting an annulment due to the inability for a post-operative female-to-male transsexual to perform sexual intercourse as a male); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (Sup. Ct. 1971) (holding, in an annulment case, that merely removing the male genitalia did not, in and of itself, render the person a female).

2. Civil Rights

a) Title VII of the Civil Rights Act

Title VII of the Civil Rights Act (hereinafter “Title VII”) makes it illegal for an employer to discriminate based upon sex.¹⁴¹ Neither the express language of the statute nor the legislative history defines the term “sex.”¹⁴² Thus, it has been left up to the courts to consider the legal boundaries of “sex” in the employment context. In 1998, the United States Supreme Court ruled, in *Oncale v. Sundowner Offshore Services*,¹⁴³ that a same-sex harassment claim is within the scope of Title VII.¹⁴⁴ Until then, it was unclear whether same-sex harassment was actionable under Title VII, thereby prompting a transsexual who wanted to initiate such a claim to first negotiate the hurdle of the court’s determination of male and female. A post-*Oncale* action turns on whether “discrimination based upon one’s status as [a] . . . transsexual constitutes discrimination based upon ‘sex’ or whether the term ‘sex’ must be limited to only males and females.”¹⁴⁵

Although decided before *Oncale*, *Ulane v. Eastern Airlines*¹⁴⁶ remains the principal and “most illustrative” decision concerning transsexuals and Title VII discrimination.¹⁴⁷ *Ulane* was born a male and had been hired as a pilot for defendant Eastern Airlines in 1968.¹⁴⁸ In 1979, *Ulane* was diagnosed as a transsexual and shortly thereafter underwent sex reassignment surgery.¹⁴⁹ Following the surgery, *Ulane*’s birth certificate was amended to indicate that she was a female and the FAA re-certified her flight status as female.¹⁵⁰ When she returned to work as a female, however, Eastern Airlines fired her.¹⁵¹ *Ulane* filed a Title VII claim alleging that she was fired, and thereby discriminated

¹⁴¹ 42 U.S.C. § 2000e–2000e-17 (2000).

¹⁴² Greenberg, *supra* note 8, at 317–18.

¹⁴³ 523 U.S. 75 (1998).

¹⁴⁴ *Id.* at 82.

¹⁴⁵ Greenberg, *supra* note 8, at 318.

¹⁴⁶ 742 F.2d 1081 (7th Cir. 1984).

¹⁴⁷ Greenberg, *supra* note 8, at 320.

¹⁴⁸ *Ulane*, 742 F.2d at 1082–83.

¹⁴⁹ *Id.* at 1083.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1082.

against, because she was a transsexual.¹⁵² The district court agreed, holding that Ulane was discriminated against because she was a transsexual and that Title VII prohibits such discrimination.¹⁵³ The Seventh Circuit reversed, and held that, for Title VII discrimination, the term “sex” was limited to “biological males” and “biological females.”¹⁵⁴ Interestingly, the Seventh Circuit did state that “[i]f Eastern Airlines considered Ulane to be female and had discriminated against her because she was female . . . , then the argument might be made that Title VII applied.”¹⁵⁵ However, the court found no evidence to support the argument that she was discriminated against because she was a woman. Rather, the discrimination stemmed from Ulane’s status as a transsexual.¹⁵⁶

Most state and local courts follow these federal when they face claims under state or local employment discrimination statutes, as the non-federal statutes are similar to Title VII.¹⁵⁷ Both state and federal courts in New York, however, have held that employment discrimination against a transsexual person violates state and local discrimination and human rights laws.¹⁵⁸

Instead of determining whether the claimant is either male or female, irrespective of their transsexual status, it appears that

¹⁵² *Id.*

¹⁵³ *Id.* at 1084.

¹⁵⁴ *Id.* at 1087 (“[I]f the term ‘sex’ as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress.”). In *Ulane*, The Seventh Circuit repeated what was decided previously in both the Eighth and Ninth Circuits. *See also* *Sommers v. Budget Mktg.*, 667 F.2d 748 (8th Cir. 1982) (ruling that the firing of a transsexual employee because he misrepresented himself as a female when he applied was not Title VII discrimination); *Holloway v. Arthur Anderson*, 566 F.2d 659 (9th Cir. 1977) (holding that the dismissal of the plaintiff after he informed his superior that he was undergoing pre-operative before a sex modification surgery was not Title VII discrimination).

¹⁵⁵ *Ulane*, 742 F.2d at 1087.

¹⁵⁶ *See id.* (“Since Ulane was not discriminated against as a female, and since Title VII is not so expansive in scope as to prohibit discrimination against transsexuals, we reverse . . .”).

¹⁵⁷ Greenberg, *supra* note 8, at 322.

¹⁵⁸ *Id.* Professor Greenberg emphasized two cases: *Rentos v. Oce-Office Systems*, No. 95-CV-7908, 1996 WL 737215 (S.D.N.Y. Dec. 24, 1996), in which a federal district court held that transsexuals were protected from gender discrimination under state human rights laws, and *Maffei v. Kolaeton Industry, Inc.*, 626 N.Y.S.2d 391 (Sup. Ct. 1995), in which a state court held that a local gender ordinance included transsexuals in its prohibition of gender discrimination. Greenberg, *supra* note 8, at 322.

courts faced with Title VII and civil rights cases have side-stepped the issue. They have relied exclusively on the plain meaning of the statutes, ignoring that a transsexual is indeed either a female or male irrespective of whether Birth-Sex or Gender-ID is the determining factor.¹⁵⁹ Thus, the courts focus their analysis on the transsexual status of the victim, rather than on the subjective intent of the victimizer, who is likely reacting to gender stereotypes. It is entirely likely that the objectionable act was motivated by the victimizer's belief that the victim's behavior—either as a man or woman—did not conform to societal stereotypes. This is precisely the type of “prejudice” that civil rights laws were designed to prevent. A male cross-dresser does not lose his “sex” even if he dons feminine attire. Thus, if the cross-dresser is discriminated against at work because of his lack of conformity to the male stereotype, he is suffering discrimination as a man.¹⁶⁰ Likewise, a transsexual whose Birth-Sex is male, but whose Gender-ID and appearance are feminine, is similarly victimized; the important question is whether he suffers discrimination because of his failure to conform to the male stereotype or as a female.¹⁶¹

b) Gender Motivated Violence Act of 1994

The Gender Motivated Violence Act of 1994 (hereinafter “GMVA” or “Act”)¹⁶² was enacted as a federal civil rights law to protect victims of “crimes of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender.”¹⁶³ In *Schwenk v. Hartford*,¹⁶⁴ a pre-operative transsexual, who was anatomically male but dressed and viewed herself as female, filed a sexual assault claim under the GMVA.¹⁶⁵ Schwenk, despite his feminine

¹⁵⁹ This reality leaves the transsexual claimants in a legal gray area.

¹⁶⁰ See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (ruling that discrimination against a male or female who fails to act consistently with societal expectations of how a respective man or woman should act is forbidden under Title VII).

¹⁶¹ See *id.*

¹⁶² 42 U.S.C. § 13981 (2000).

¹⁶³ *Id.* § 13981(d)(1).

¹⁶⁴ 204 F.3d 1187 (9th Cir. 2000).

¹⁶⁵ *Id.* Although the plaintiff, at the time of the alleged assault, had not undergone sex modification, the Ninth Circuit uses the feminine rather than the masculine designation for the plaintiff. For the purposes of consistency, this Article will do the same. See *id.* at 1192 n.1.

appearance, was a resident of the all-male Washington State Penitentiary in Walla Walla, Washington.¹⁶⁶ After she was placed in the prison's medium-security Baker Unit, a prison guard allegedly sexually assaulted her.¹⁶⁷ As a result, Schwenk brought a GMVA claim.¹⁶⁸ The defendant guard argued that because Schwenk's chromosomes and genitalia both were masculine, she was male and "that the GMVA does not protect men who are raped or sexually assaulted by other men."¹⁶⁹ Furthermore, the guard asserted that Schwenk's status as a transsexual does not protect her because, as a general matter, the GMVA does not cover transsexuals.¹⁷⁰ The defendant tried to convince the court his actions were not based on Schwenk's gender, pursuant to the Act, but rather based on the plaintiff's transsexuality.¹⁷¹ In other words, he argued that animus motivated by transsexuality is not the same as fueled by a person's gender, and, therefore, is not proscribed by the Act.¹⁷² The Ninth Circuit rejected defendant's claims and ruled that men are included under the protections of the GMVA.¹⁷³ Further, the court found that for the purposes of both the GMVA and Title VII, the terms "sex"—biological and anatomical characteristics—and "gender"—an individual's sexual identity—are interchangeable.¹⁷⁴ Specifically, because the defendant's actions were found to have been spurred by the plaintiff's feminine appearance and mannerisms, his transsexuality motivated the crime.¹⁷⁵

Contrary to the *Ulane* court, the *Schwenk* court takes a more realistic approach, attributing the victimizer's actions to his perception of the transsexual's sexual identity, irrespective of his or her Birth-Sex.¹⁷⁶ The *Schwenk* court thus considered the

¹⁶⁶ *Id.* at 1193.

¹⁶⁷ *Id.* at 1193–94. Schwenk claimed that the guard grabbed her, "groped her buttocks," and demanded that she perform oral sex on him. *See id.*

¹⁶⁸ *Id.* at 1194.

¹⁶⁹ *Id.* at 1195.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1200–01.

¹⁷² *See id.* at 1200.

¹⁷³ *Id.* at 1201–02.

¹⁷⁴ *Id.* at 1202. The Ninth Circuit relied heavily on the language of the United States Supreme Court in *Price Waterhouse*. *See id.*

¹⁷⁵ *Id.*

¹⁷⁶ *See supra* Part II.A.2.a.

transsexual victim's Gender-ID, and society's reaction thereto, to be the determining factor in a claim for discrimination. This is consistent with the approach taken by the *Oncale* court and flies in the face of civil rights decisions like *Ulane* and its progeny. With the liberal *Schwenk* decision, the Gender-ID standard replaces the Birth-Sex criterion as the appropriate method to determine legal sex. It remains to be seen whether future courts will embrace this approach.

3. Official Documents¹⁷⁷

As indicated in the above discussion of *Littleton*, some jurisdictions allow transsexuals to obtain either a new or amended birth certificate changing both the name and sex.¹⁷⁸ A person's ability to receive a new or modified birth certificate differs, however, among jurisdictions.¹⁷⁹ Some states have adopted statutes that dictate the circumstances under which a new or amended birth certificate may be issued.¹⁸⁰ One state, Tennessee,

¹⁷⁷ For the purposes of this Article, "official documents" are those documents issued by the federal or state government that indicate an individual's sex. Perhaps the most common of such official documents is the birth certificate, as it is issued to almost everyone born in this country. Greenberg, *supra* note 8, at 309–11. In her article, Professor Greenberg explained that the sex indicated on one's birth certificate is provided by the assisting medical attendant during the time of birth. The attendant merely notes the presence of a penis as being male and the absence of a penis as being female. If the sex is ambiguous at birth, physicians typically modify the genitalia "so that they have a clearly male or female appearance." *Id.* at 309.

¹⁷⁸ See Greenberg, *supra* note 127, at 748–49.

¹⁷⁹ Greenberg, *supra* note 8, at 309–11.

¹⁸⁰ *Id.* at 310. Arizona, California, Hawaii, Illinois, Iowa, Louisiana, Michigan, Mississippi, and North Carolina allow the issuance of a new birth certificate if a physician submits an affidavit stating that the original sex on the birth certificate was either incorrect or has since changed. See ARIZ. REV. STAT. § 36-326(a)(4) (1993); CAL. HEALTH & SAFETY CODE § 103,430, 425 (West 1997) (requiring a court order); HAW. REV. STAT. § 338-17.7(a)4 (1993) (giving the administrative official discretion to decide whether an affidavit is needed); 410 ILL. COMP. STAT. ANN. § 535/17(1)(d) (West 1997) (giving the administrative official discretion to decide whether an affidavit is needed); IOWA CODE ANN. § 144.23.3 (West 1997) (giving the administrative official discretion to decide whether an affidavit is needed); LA. REV. STAT. ANN. § 40:62 (West 1992) (requiring a court order); MICH. COMP. STAT. ANN. § 333.2831(c) (1997); MISS. CODE ANN. 41-57-21 (1998); N.C. GEN. STAT. § 130A-118(b)(4) (1997). Alabama, Colorado, District of Columbia, Georgia, Massachusetts, Missouri, New Mexico, Oregon, Utah, Virginia, and Wisconsin allow the amendment of a birth certificate upon a doctor's affidavit or a court order. ALA. CODE § 22-9A-19(d) (1997) (upon a court order); COLO. REV. STAT. ANN. § 25-2-115(4) (West 1990) (upon a court order); D.C. CODE ANN. § 7-

specifically prohibits the amending of a birth certificate to reflect the results of a sex modification surgery or to accommodate a pre-operative transsexual's sexual identity.¹⁸¹ Other states do not have such statutory mandates, thus placing the decision to amend a birth certificate in the hands of the judiciary.¹⁸²

In *Anonymous v. Mellon*,¹⁸³ a New York trial court upheld the Board of Health's decision to leave the sex indicator on a birth certificate blank rather than amend it to show both the original sex and the subsequent change.¹⁸⁴ This decision was reached even though *Richards* held that a chromosomal test was not the foremost determinant of a person's sex for purposes of a tennis tournament.¹⁸⁵ The *Mellon* court acknowledged the *Richards* decision but decided that one's legal sex should be determined on a case-by-case basis.¹⁸⁶ Thus, the Board of Health's decision to leave the sex indicator blank was rational.¹⁸⁷

In *K. v. Health Division, Department of Resources*, the Oregon Supreme Court reversed the trial and appellate courts' allowance of a post-operative transsexual modification of the sex indicator on her birth certificate.¹⁸⁸ The Oregon Supreme Court held that birth certificates are historical records, documenting the facts at the time of birth, and thereby should not be altered to reflect current status.¹⁸⁹

217(d) (2001); GA. CODE ANN. § 31-10-23(e) (Harrison 1998) (upon a court order); MASS. GEN. LAWS. Ch. 46 § 13(e) (2001) (upon a doctor's affidavit); MO. ANN. STAT. § 193.215(9) (West 1999) (upon a court order); N.M. STAT. ANN. § 24-14-25 (D) (Michie 1997) (upon doctor's affidavit); OR. REV. STAT. § 432.235(4) (1997) (upon a court order); UTAH CODE ANN. § 26-2-11 (1996) (upon a court order); VA. CODE ANN. § 32.1-269(E) (Michie 1997) (upon a court order); WIS. STAT. ANN. §69.15(4) (West 1990) (upon a court order).

¹⁸¹ TENN. CODE ANN. § 68-3-203(d) (1996). See also Greenberg, *supra* note 8, at 310.

¹⁸² See Greenberg, *supra* note 8, at 311-14 (discussing decisions from New York, Oregon, Ohio, and Connecticut courts).

¹⁸³ 398 N.Y.S.2d 99 (Sup. Ct. 1977).

¹⁸⁴ *Id.*

¹⁸⁵ *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S. 2d 267 (Sup. Ct. 1977). See also *supra* Part I.C.3.

¹⁸⁶ See *Mellon*, 398 N.Y.S.2d at 102.

¹⁸⁷ *Id.*

¹⁸⁸ 560 P.2d 1070 (Or. 1977).

¹⁸⁹ *Id.* at 1072. This was in opposition to the Oregon Court of Appeals' holding that birth certificates are records reflecting current status. *Id.*

In *Mellon* and *K.*, the courts circumvented the task of defining sex, deferring to the legislature or future courts.¹⁹⁰ Interestingly, it is the earlier birth certificate cases that attempted to establish a standard with respect to sex determination. For example, in *In re Anonymous*,¹⁹¹ a New York court held that if both anatomical and psychological sex are in accord, then the indicated sex should so acknowledge.¹⁹² Thus, if transgendered individuals undergo surgery as a result of their transsexual identity, official documents should reflect the alteration.¹⁹³

In addition to birth certificates, other official documents that indicate a person's sex are driver's licenses and passports.¹⁹⁴ In her article, Professor Greenberg reported that of the state motor vehicle bureaus responding to a survey, thirty-four would provide new licenses indicating a change of sex for post-operative transsexuals if presented with an affidavit from a physician stating that such an operation occurred.¹⁹⁵ Further, six bureaus would authorize new licenses for pre-operative transsexuals if a physician's affidavit indicated that the person was being treated for transsexualism.¹⁹⁶ A United States passport also may be modified to accommodate changes in a person's status.¹⁹⁷ Specifically, changes may be made to reflect a person's current sex status if proof of sex modification surgery is provided or, in the case of pre-operative transsexuals, proof is presented that an individual is about to undergo the operation.¹⁹⁸

These examples highlight that a more practical approach is being employed with respect to official documentation, with decision-making agencies and courts considering: (1) Birth-Sex for historical purposes, (2) no indication in the instance of ambiguity, or (3) the applicant's Gender-ID if a physician supports the

¹⁹⁰ See *Mellon*, 398 N.Y.S.2d at 102; *K.*, 560 P.2d at 1072.

¹⁹¹ 293 N.Y.S.2d 834 (Civ. Ct. 1968).

¹⁹² *Id.* at 837.

¹⁹³ *Id.* See also *id.* at 837–38 (rejecting the reasoning in *Anonymous v. Weiner*, 270 N.Y.S.2d 319, 322 (Sup. Ct. 1966), where the court ruled that sex for purposes of birth certificates should reflect chromosomal sex).

¹⁹⁴ Greenberg, *supra* note 8, at 315.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Memorandum from the Department of State, to Joanna M. Clark, Director, Legal Research Div. J2CP (Aug. 18, 1978), <http://www.twentyclub.org/docs/passport.html>.

¹⁹⁸ *Id.*

application. The lack of uniformity among jurisdictions, however, could result in a bizarre situation. For example, a person born in Tennessee or Oregon who cannot amend his or her birth certificate could obtain a new driver's license and passport indicating post-operative sex, creating confusion among these identifying documents. Further, if this individual (at age forty) chose to compete in a USA Track & Field Masters competition,¹⁹⁹ for which a birth certificate provides proof of age, he or she may be denied entry to his or her post-operative gender classification. Herein lies the dilemma for transsexuals seeking to normalize their lives, achieve a healthy lifestyle, and participate in sports.

B. The Medical Community's Treatment of Transsexualism

Thanks to the pioneering efforts of New York City endocrinologist Harry Benjamin, who worked closely with the transgendered population in the 1950s and 1960s and wrote the first book on the subject,²⁰⁰ a large body of medical information has developed over the years regarding the health care needs of this population. These needs can range from pre-surgical psychiatric counseling and hormonal treatment to urogenital and other plastic and reconstructive surgery with post-surgical follow-up and care by appropriate specialists. One comprehensive and authoritative source of information is *The International Journal of Transgenderism* (IJT), a peer-reviewed quarterly publication devoted entirely to transgender issues.²⁰¹

Furthermore, the Harry Benjamin International Gender Dysphoria Association (HBI-GDA) is a multi-purpose professional society that publishes regularly updated clinical guidelines.²⁰²

¹⁹⁹ "The Masters Track and Field Committee shall conduct and supervise a program for track and field and race walking for all athletes over the age of 40. The committee may conduct Championships for athletes aged 30 through 39." USATF, 2003 COMPETITION RULES art. VI, § II-A, R. 260.1, at 126, http://www.usatf.org/about/rules/2003/2003USATFRules_Article6.pdf. "The age of the competitor on the day of the start of the race determines the age division . . . Only a birth certificate or a U.S. passport will be acceptable as proof of age." *Id.* § II-B, R. 271.4, at 148.

²⁰⁰ See HARRY BENJAMIN, *THE TRANSSEXUAL PHENOMENON* (Symposium Publ'g 1999) (1966), <http://www.symposium.com/ijt/benajmin/>.

²⁰¹ See F. Pfäefflin & E. Colemann, *Introduction*, 1 INT'L J. TRANSGENDERISM [IJT] 1, at <http://www.symposium.com/ijt/ijtintro.htm> (1997).

²⁰² See HARRY BENJAMIN INT'L GENDER DYSPHORIA ASS'N, *STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS* (6th ed. 2001), <http://www.hbigda.org/socv6.html>.

First published in 1979, the HBGDA standards provide a comprehensive consensus of current thinking and sound medical practice regarding optimal hormonal therapy regimens, genital surgery strategies, psychotherapy, and follow-up advice for all stages of progression through the process of sex reassignment. Its most current statistics indicate that 1 in 11,900 males and 1 in 30,400 females are transsexuals.²⁰³ The real number is probably higher because many transgendered individuals go unrecognized.

Comprehensive reviews subsequently have summarized the surgical and psychological outcomes of transsexual patients.²⁰⁴ Thousands of sex reassignment surgeries are performed around the world each year by trained experts who often specialize in this work full-time.²⁰⁵ Indeed, in some areas of the world, such as Thailand, such surgery is big business due to international clients taking advantage of the favorable combination of lower costs (than in North America and Europe) and high-quality medicine offered there.²⁰⁶

Sex reassignment surgery is available at selected hospitals and clinics in both North America and Europe at widely variable costs.²⁰⁷ Whereas costs for vaginoplasty in male-to-female surgery range from \$10,000 to \$28,000 or more, costs for phalloplasty in female-to-male surgery range from \$20,000 to \$60,000 or higher.²⁰⁸ One can find published clinical research can be achieved by examining the subject heading transsexualism in *Cumulated Index Medicus*.²⁰⁹

Transgendered people continue to experience varying forms of discrimination and stigmatization, even among health care

²⁰³ *Id.* § II, para. 1.

²⁰⁴ See Richard Green & Davis T. Fleming, *Transsexual Surgery Follow-Up: Status in the 1990s*, 1 ANN. REV. SEX RES. 163 (1990).

²⁰⁵ See Jason Gagliardi, *No Retreat*, SAN FRANCISCO CHRON. MAG., Sept. 2, 2001, at 6.

²⁰⁶ *Id.*

²⁰⁷ See Maxine E. Petersen & Robert Dickey, *Surgical Sex Reassignment: A Comparative Survey of International Centers*, 24 ARCHIVES SEXUAL BEHAV. 135 (1995).

²⁰⁸ *Id.* at 146.

²⁰⁹ *Cumulated Index Medicus* is a publication of the National Library of Medicine, the U.S. Department of Health, and Human Services that sorts and lists the contents of several thousand of the world's major medical journals. The publication is categorized by author and by subject. The service appears monthly and averages more than 15,000 pages annually.

professionals.²¹⁰ Primary health care providers do not always have professional training in the unique health care needs of post-operative transsexuals and may not even know if medical expense reimbursement for such care is available.²¹¹ Attempts are being made to address the issue of health care disparity among the lesbian, gay, bisexual, and transgendered (LGBT) patient group. In 2000, the Gay and Lesbian Medical Association (GLMA)—an organization of LGBT physicians, medical students, and their supporters—collaborated with Columbia University’s Center for LGBT Health to produce a ninety-page white paper representing the first ever federally funded document on LGBT health concerns.²¹² The GLMA has also produced a companion document for LGBT health²¹³ to supplement the findings presented by the U.S. Department of Health and Human Services in *Healthy People 2010*,²¹⁴ which serves as the federal blueprint for bettering the nation’s health over the next decade. While a sizable number of physicians may not have encountered members of the LGBT community in their practice, ample practical information is becoming available to assist the medical community with knowledge of improved standards of care and understanding for this population.

C. Toward a Definition of Transsexualism in a Sports Context

Upon examining the divergent results across various legal jurisdictions and the diverse medical positions that attempt to define a person’s sex and gender, two general camps emerge: (1) those who view Birth-Sex as determinative—sex is determined genetically at birth and cannot be changed, and (2) those who believe that the Gender-ID is determinative—gender, and not sex, is a reflection of the person’s outward manifestation of his/her identity.

²¹⁰ See St. Claire, *supra* note 34.

²¹¹ See *id.*

²¹² See Laura Dean et al., *Lesbian, Gay, Bisexual, and Transgender Health: Findings and Concerns*, 4 J. GAY & LESBIAN MED. ASS’N 101 (2000), <http://www.glma.org/pub/jglma/vol4/3/j43text.pdf>.

²¹³ See GLMA, *HEALTHY PEOPLE 2010: COMPANION DOCUMENT FOR LGBT HEALTH* (2001), <http://www.glma.org/policy/hp2010/PDF/HP2010CDLGBHealth.pdf>.

²¹⁴ See U.S. DEP’T OF HEALTH AND HUMAN SERVS., *HEALTHY PEOPLE 2010* (2d ed. 2000), <http://www.healthypeople.gov/document>.

Considering these different views, the question of “when is a man a man, and when is a woman a woman,” as recently posed by Professor Julie Greenberg, deserves repeating.²¹⁵ As evidenced above, courts and legislatures have struggled to answer this question consistently. Rather than establishing a bright-line, finite definition of when a man is a man and a woman is a woman, the answer is context-dependent. In the sports context, this approach leads to inquiries into: (1) whether the athlete is a male-to-female or female-to-male transsexual, (2) whether the sport is a traditionally “male” or “female” sport, (3) what the physical characteristics of the individual transsexual athlete are, and (4) whether there is likely to be a real or perceived competitive advantage on the field of play. Failing to apply an objective criteria to these inquiries is likely to be perceived as offensive and biased by many in the transgendered community and unfair to many who hold civil libertarian views. Thus, the challenge for legal professionals advising sports organizations on how to integrate transsexuals into competition is to examine all the perspectives in light of prevailing American legal principles.

III. PERSPECTIVES ON TRANSSEXUALS IN ATHLETIC COMPETITIONS: MEN’S OR WOMEN’S DIVISION?

In certain sports, e.g., equestrian sport, archery, shooting, and yachting, the sexes are not separated for purposes of competition, as sex differences among competitors are irrelevant to athletic performance.²¹⁶ In most sports, however, where sex-related differences in physical strength, oxygen transport in the blood, or power-to-weight ratio can affect performance, separation of the sexes traditionally has been viewed as appropriate.²¹⁷ The existence of separate men’s and women’s divisions in sport competitions poses a dilemma for post-operative male-to-female and female-to-male transsexuals who desire to participate, especially if they possess superior “natural talent.”

²¹⁵ Greenberg, *supra* note 127.

²¹⁶ See Bassis, *supra* note 11, at 396–97.

²¹⁷ See *id.*

A. A Competitor's Perspective: Fairness of Competition

Many female athletes who hesitate to compete against male-to-female transsexuals object to the perceived competitive advantages. The prevailing belief is that transsexuals retain the athletically advantageous male physical characteristics. The critical question is whether there is in fact a competitive advantage in this instance.

1. Male-to-Female Transsexuals

Males have a higher level of androgen hormones, which increase the protein component of the musculature, increasing strength.²¹⁸ Androgens also increase the level of protein hormones, such as erythropoietin.²¹⁹ This hormone in turn stimulates the bone marrow to produce more red blood cells, which contain hemoglobin.²²⁰ More than 98 percent of blood oxygen is transported via hemoglobin, explaining why males have a higher maximum oxygen uptake, which is so important to aerobic endurance.²²¹ Females, due to higher levels of estrogen, exhibit an increased deposition of fat just below the skin.²²² Elite level distance runners, both males and females, have minimal stored body fat, ranging from 5 to 9 percent in men, and from 9 to 14 percent in women.²²³

Examination of the world records in the commonly contested events in distance running shows the influences of these physiological differences. The men's world records demonstrate a range of 6.7 percent (in the 100-meters) to 12.5 percent (in the 5,000-meters) faster than those for women.²²⁴ Thus, the fastest performance times for women do not overlap those of the top men, and are unlikely to ever do so; as one sex improves, so does the other. The differences for other sports vary, depending upon their

²¹⁸ See Keul et al., *supra* note 10, at 118.

²¹⁹ See RHOADES & PFLANZER, *supra* note 36, at 521.

²²⁰ See *id.*

²²¹ See DAVID E. MARTIN & JOHN W. YOUTSEY, *RESPIRATORY ANATOMY AND PHYSIOLOGY* 188 (1988).

²²² See Keul et al., *supra* note 10, at 118.

²²³ See DAVID E. MARTIN & PETER N. COE, *BETTER TRAINING FOR DISTANCE RUNNERS* 264 (2d ed. 1997).

²²⁴ See *id.*

popularity among the two sexes and upon environmental factors. For example, the difference among world records between men and women in swimming is considerably less than for running, because women are assisted in the water by their increased body fat, which contributes to buoyancy.²²⁵ But the difference continues to exist.

Notwithstanding the above, transsexual males who become post-operative females are placed on estrogen therapy, which increases stored fat, decreases power-to-weight ratio, and slows athletic performance in sports where the body mass is supported by the limbs.²²⁶ Castration removes the gonadal source of testosterone, causing a reduction in skeletal muscle mass and circulating blood hemoglobin.²²⁷ The end result is a decrease in strength and in maximum oxygen uptake, which affects both strength-oriented and endurance-oriented activities. The physiological advantage male-to-female transsexuals had before the surgery disappears—their performance characteristics become similar to those of females.²²⁸ The larger male skeletal bone mass remains intact due to the males' typically taller stature.²²⁹ Genotypic females seeing their post-operative female counterparts may question whether this larger person is a fair match for them in sport competition.²³⁰ This larger mass is being powered by a smaller skeletal muscle mass, however, which decreases its power-to-weight ratio, thereby resulting in a competitive disadvantage vis-à-vis unaltered males.²³¹

²²⁵ See David E. Martin, *Performance of Women in Endurance Sports: Interaction of Cardiopulmonary with Other Physiologic Parameters*, 6 BULL. DEP'T GYNECOLOGY & OBSTETRICS & AFFILIATED INSTS. 5, 10, 14 (Emory Univ. Sch. of Med., Atlanta, Ga.), Winter 1984.

²²⁶ See A. Rosenmund et al., *Sex-Related Differences in Hematological Values*, 56 BLUT [BLOOD] 13 (1988).

²²⁷ See *id.*

²²⁸ See *id.*

²²⁹ See *id.*

²³⁰ Consider the case, however, of Geri Lisa Fritz. Fritz was a pre-operative male-to-female transsexual who tried out with the all-women Colorado Silver Bullets semi-professional baseball team and was eventually cut from the final roster. During the tryouts and the decision making process, Silver Bullets officials claimed to not have suspected that Fritz's Birth-Sex was male. Fritz was not released because she was a transsexual, but rather because she was physically incapable of competing at that level. *Bullets Hopeful Born Male*, DENVER POST, Apr. 13, 1994, at D-6.

²³¹ See Rosenmund et al., *supra* note 226, at 13.

2. Female-to-Male Transsexuals

On the other side of the issue are post-operative female-to-male transsexual athletes who desire to participate in the men's division. These athletes experience the opposite physiological changes from their male-to-female counterparts. Their testosterone therapy increases skeletal muscle mass, thereby increasing their power-to-weight ratio.²³² It also increases their blood levels of erythropoietin and hemoglobin, increasing red blood cell mass and maximum oxygen uptake.²³³ Ovariectomy decreases their estrogen availability, which decreases stored body fat and further increases their power-to-weight ratio.²³⁴ These changes would appear to improve performance capabilities vis-à-vis biological males, at least to the extent that the female-to-male transsexual is not disadvantaged by his lower skeletal bone mass and shorter stature characteristic of most women. These differences are not so great as to make the female-to-male transsexual athletes stand out among their fellow competitors. Notwithstanding the physical issues, a female-to-male transsexual risks exclusion from competition at the elite level by the prevailing anti-doping rules governing the use of certain prohibited substances.²³⁵ Thus, transsexuals undergoing testosterone therapy will fail the drug-testing procedures of most sports. Some sports may permit the athlete to obtain a medical waiver or another form of exemption permitting competition despite post-operative testosterone therapy.²³⁶

²³² See *id.*

²³³ See *id.*

²³⁴ See *id.*

²³⁵ See, e.g., IAAF, PROCEDURAL GUIDELINES FOR DOPING CONTROL (2002), <http://www.iaaf.org/newsfiles/9600.pdf>.

Where a prohibited substance is capable of being produced in the body naturally, a sample will be deemed to be positive for that substance where the concentration of the substance or its metabolites and/or their ratios in the athlete's body tissues or fluids so exceeds the range of values normally found in humans so as not to be consistent with normal endogenous production.

Id. sched. 1, at 20.

²³⁶ See, e.g., *id.* § 5.4, at 19 ("An application for exemption must contain a certificate from a qualified physician setting out the reasons why the administration of a prohibited substance is necessary for the health of the athlete."). These exemptions may not be readily granted. See *infra* notes 269–272 and accompanying text.

Male-to-female transsexuals appear to experience more athletic disadvantages, while female-to-male transsexuals could have a significant advantage, but this may not be enough to allow an average size woman to defeat an average-size male. Let us consider once more the case of Dr. Renee Richards, who is a transsexual.²³⁷ In that case, the USTA was not the only entity that protested her participation in the women's tennis draw; some of the female players on the tennis tour also expressed their dissatisfaction.²³⁸ Two British players, Lesley Charles and Glynis Coles, arrived at a tournament in Florida wearing shirts that read, "I Am a Real Woman." Also, Australian Kerry Melville Reid once walked off the court and defaulted as she was trailing Richards 6-7, 1-4 during a tournament in Phoenix.²³⁹ Reid's husband later said, "We don't believe Renee is a woman. Kerry will never play her again."²⁴⁰ Thus, there is no doubt that fellow competitors are likely to protest the participation of post-operative transsexuals.

Kathy Jager illustrates the risks of error, exposure, or discriminatory treatment that follow fellow competitors' resistance to transsexual participation.²⁴¹ Ms. Jager was a 56-year-old American sprinter who participated in the 1999 World Veterans Championship in England.²⁴² After shattering the 100-meters world record for her age group, a fellow competitor questioned her accomplishments, as well as "her muscular build, slim hips[,] and explosive style," accusing Jager of being a man.²⁴³ Jager was forced to undergo a sex test to prove her femaleness even though she had given birth to two children.²⁴⁴ All of this and she was not even a transsexual; her Birth-Sex was indeed female.²⁴⁵ One

²³⁷ See *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267 (Sup. Ct. 1977); *supra* Part I.C.3.

²³⁸ Barry Lorge, *Opposition to Richards Apparently Growing; Few on Tour Support Renee Richards*, WASH. POST, Jan. 1, 1978, at C1.

²³⁹ *Id.*

²⁴⁰ *Id.* (noting that "there seems to be a correlation between how well Richards does on the court and the degree of hostility exhibited by the other players").

²⁴¹ See Duncan MacKay, *Revealed the Secret of the Flying Grandmother from Phoenix*, GUARDIAN (London), May 11, 2000, at 34.

²⁴² See *id.*

²⁴³ See *id.*

²⁴⁴ See *id.*; Jamie Wilson, *I Am a Mother of Two, Reveals Winning Athlete Branded a Man*, GUARDIAN (London), Aug. 4, 1999, at 8.

²⁴⁵ See MacKay, *supra* note 241.

should have no trouble appreciating why transsexuals may be reluctant to participate and excel in the sports arena.

B. A Spectator's Perspective: Competitive Integrity

Opposing competitors are but one constituency motivated to dispute the inclusion of post-operative transsexual athletes in competition. Spectators wedded to a heightened ideal of competitive integrity might also denounce such integration, their argument being that inclusion would detract from competition and the “pureness” of sport. Whether such views should prevail, thereby excluding transsexuals from athletic competition, would probably depend on who is asked—sports leagues, sponsors, men, women, conservatives, or liberals. There is no spectator outcry when an injured football player leaves the field in pain only to return after receiving a cortisone shot. Thus, not all spectators view competitive integrity as essential, or perhaps there are differing expectations within divergent sports contexts. Whatever one's perspective, America's history of racial discrimination and the exclusion of women from sport should provide a frame of reference for this discussion, as should the historic Bobby Riggs and Billy Jean King tennis match in 1973.²⁴⁶ In each instance, widespread societal exclusiveness eventually gave way to tolerance and acceptance.

Renee Richards did state that the crowd response at tennis tournaments in which she participated as a woman had, for the most part, been “fair and neutral.”²⁴⁷ At the time of her inclusion, however, she was forty-three and one wonders what the reaction

²⁴⁶ See generally Earl C. Dudley, Jr. & George Rutherglen, *Ironies, Inconsistencies, and Intercollegiate Athletics: Title IX, Title VII and Statistical Evidence of Discrimination*, 1 VA. J. SPORTS & L. 177 (1999) (discussing the current reluctance to provide equal opportunities for women in intercollegiate athletics); Johnny Clyde Parker, *Civil Rights Legislation: Getting Black Executives off First Base in Professional Team-Sports*, 1986 COLUM. BUS. L. REV. 219 (stating that black businesspersons “have made only limited progress in gaining access to meaningful positions . . . in professional team-sports”); Dean Bonham, *From Billie Jean to Venus, Our Female Athletes Have Triumphed*, DENVER ROCKY MOUNTAIN NEWS, Dec. 10, 2000, at 5G (identifying Billie Jean King's win against the “self-described ‘male-chauvinist pig,’” Bobby Riggs, in the “Battle of the Sexes” as a “defining moment in the history of women's sports”); Robert Curvin, *Remembering Jackie Robinson*, N.Y. TIMES, Apr. 4, 1982, § 6, at 46.

²⁴⁷ Lorge, *supra* note 238, at C1.

might have been if she were in her early twenties.²⁴⁸ Some sport commentators and spectators questioned the integrity of a particular event when some of the female athletes participating (and succeeding) possessed similar muscular development to their male colleagues.²⁴⁹ In the last ten years, female Chinese athletes were scrutinized after drastically improving in both track and field and swimming.²⁵⁰ This rapid improvement, coupled with the well-muscled appearance of some of the Chinese women, prompted one observer to report that “officials have confessed they will be keeping a close eye on female Chinese competitors” at the Sydney Olympic Games, because there will no longer be a mandatory sex test.²⁵¹ At that time, the Chinese women, by significantly improving while the Chinese men remained static in their respective performances, were being compared to some of the eastern European and Soviet bloc female athletes of the 1970s and 1980s.²⁵² Many of these women were later found to have been unknowingly fed male hormones, which in at least one instance may have accelerated latent transsexual tendencies of a female athlete.²⁵³ Television character Archie Bunker’s comment that a few of the Soviet women shot putters “got more his-mones than

²⁴⁸ *Id.*

²⁴⁹ Gina Kolata, *Who Is Female? Science Can't Say*, N.Y. TIMES, Feb. 16, 1992, § 4, at 6 (“For decades, rumors have persisted that some of the best female athletes have in fact been men.”).

²⁵⁰ Karen Allen, *Chinese Women Cause Stir in Swimming Now*, USA TODAY, Sept. 22, 1993, at 2C. For example, the U.S., a world power in swimming since the beginning of the last century, had only seven women ever finish the 200-meter freestyle under two minutes; five Chinese women were able to do it in one weekend. *See id.*

²⁵¹ *See, e.g.*, David O’Reilly, *Women on A-Gender*, SUN (London), May 27, 2000 (noting that one person said, “So many women look like men these days [(at the Sydney Olympics)] it will be hard to be certain”).

²⁵² Allen, *supra* note 250. *See also* Clifford Coonan, *Fund Plan for Doping Victims*, GUARDIAN (London), Oct. 19, 2001.

²⁵³ Heidi Krieger won the 1986 European Shot Put Championships, and attributes his decision to become Andreas Krieger and undergo a sex modification operation in 1997 to the “blue tablets” he was given by German sports officials, which were later revealed to contain anabolic steroids. Krieger reported that his voice deepened as he became able to lift up to 180 tons per week during weight room training sessions. Krieger stated, “The pills accelerated any transsexual tendencies I may already have had. I wasn’t able to identify with my body anymore . . .” *See* Steve Kettmann, *Girlz II Men*, BERLIN DISPATCH, July 3, 2000.

her-mones” was further evidence of spectator attentiveness to gender issues in the sport context.²⁵⁴

Spectators have been known to question the “pureness” of female athletic competition even when the sex of the participants was not in dispute. For example, American fans of women’s tennis in the ’70s and ’80s never publicly accused Martina Navratilova of being a man, but they grumbled over her size, musculature, and aggressiveness as being too manly during the matches when she overpowered the more petite, all-American, girl-next-door, Chris Evert.²⁵⁵

Among such people who emphasize athletic purity, one group that places perhaps the most scrutiny on competitive integrity is sports journalists. Recall, for example, the scrutiny placed on Major League Baseball slugger Mark McGwire when it was revealed that he was taking a performance supplement containing androstenedione during his quest for the single season homerun record.²⁵⁶ Similar media attention was given to Renee Richards. After the court’s ruling, long-time sports writer Dick Young argued that, by letting Dr. Richards compete as a female, “fair and equitable competition” in women’s tennis had been breached and the pureness of the sport had been subsequently spoiled.²⁵⁷ Specifically, Young posed the questions: “Is it fair that [Richards’ potential female competitors] be asked to compete against a 6-foot-2, 142-pound altered male? Is this what we recognize as the goal for balanced participation in sports?”²⁵⁸ Fellow journalist Dave Kindred challenged Young’s arguments by writing that the “very essence of sport is unfair advantage.”²⁵⁹ By this, Kindred implied

²⁵⁴ See David Casstevens, *She Isn’t a Cheater, and She Isn’t a Man*, ARIZ. REPUBLIC, June 2, 2000, at A2.

²⁵⁵ Cf. Rex Bellamy, *Graf the Favourite to Claim Victory in Battle of Nerves*, TIMES (London), July 2, 1988 (“It is often said, usually in a disparaging way, that Navratilova ‘plays like a man.’”).

²⁵⁶ See, e.g., *Swallow This Pill*, CNN/Sports Illustrated, at <http://sportsillustrated.cnn.com/baseball/mlb/1998/target61/yourturn/point.html> (Aug 31, 1988) (comparing commentaries by Jack McCallum and Koysta Kennedy on the merit of Mark McGwire’s (then-potential) record in light of his use of androstenedione).

²⁵⁷ Dave Kindred, *Richards Deserves Medal for Courage, Not Petty Lashing; Praise Due Richards, Not Illogical Scorn*, WASH. POST, Aug. 21, 1977, at D1 (quoting Dick Young).

²⁵⁸ See *id.*

²⁵⁹ *Id.*

that the nature of athletic competition is the exploiting of advantages, i.e., what propels one opponent past another, why there must be a winner and a loser.²⁶⁰ He added, "To reduce sport to a single level of competence is to rob it of life."²⁶¹

C. A Transsexual's Perspective: Athlete Dignity, Privacy, and Discrimination

Transsexuals, like most other individuals, seek athletic competition for physical activity, the excitement of competition, and social interaction, rather than fame and notoriety. An argument can be made that most transsexual athletes would prefer to retain anonymity with respect to their condition and any medical procedures thereby pursued. Thus, to exploit their transsexualism for purposes of sport would be counterproductive to the ultimate goal of being accepted as a member of their post-operative sex or Gender-ID. Nonetheless, the challenge for transsexual athletes remains how to compete without having their dignity undermined, privacy invaded, or being subjected to discrimination from other competitors and spectators.

This is precisely the dilemma that Michelle Dumaresq, a thirty-one year old Canadian downhill biker, raised when interviewed for this Article.²⁶² Dumaresq's problem arises, not only because she is a post-operative male-to-female transsexual, but also because she is a competitive athlete. She participated in snowboarding for six years and mountain biking for fourteen years prior to becoming involved in competitive downhill biking. The International Cycling Union (ICU), the world governing body for cycling, has refused to determine whether Kim can compete as a female, despite the submission of her hormone profile and medical history.²⁶³

Dumaresq reports her first recognition of her female identity at age five. Nonetheless, family and peer pressure caused her to play the male role to the extreme. As a male youth, she played rugby and was the captain for the boy's ice hockey team. She also chose

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² Telephone Interview with Michelle Dumaresq (Nov. 20, 2001).

²⁶³ In Canada, Michelle has full legal status as a female. Her birth certificate and driver's license both identify her as female. *Id.*

a very masculine profession—she is a steel worker. Despite her height of six feet and weight of 200 pounds as a maturing male, even her father recognized that his developing son was “different,” remarking on one occasion that she would “someday make someone a good wife.” As a female, Dumaresq is five-feet-eight-inches tall and weighs 180 pounds. It took her five years to complete the transition from male to female, a process she began at the age of eighteen. Although she reported a high degree of anxiety about revealing herself to co-workers and family, she reports that her co-workers were very supportive.

Dumaresq feels less accepted as an athlete, however. Although she calls her fellow competitors, who accept her as a woman, friends, she hesitates when asked how they feel about competing against her. She admits that her competitors believe that she has a competitive advantage and that they want proof that no such advantage exists. In her defense, she states that as a result of female hormone therapy she has lost four inches and twenty pounds, and has a blood testosterone level of two nanomoles per liter, which is well within the range, with a maximum of 3.5 nanomoles per liter, for an average woman.

Similarly, Dr. Renee Richards said, while competing as a woman, “I want to play professional tennis, which brings me into the public eye, but I don’t want to be in the public eye. I’ve had my fill of being ogled and exploited and used.”²⁶⁴ She added that she looked forward to putting the “zoolike atmosphere” surrounding her participation in women’s professional tennis behind her.²⁶⁵ Richards, who five years previous to her operation, fathered a child, also had to consider the privacy of her family.²⁶⁶ She and her former spouse sent their son to Ireland to protect him from adverse publicity.²⁶⁷ Furthermore, Richards threatened to quit tennis if any more publicity was brought to her son.²⁶⁸

²⁶⁴ Eileen Keerdoja & Jennifer Foote, *Tennis Transsexual*, NEWSWEEK, Oct. 23, 1978, at 28.

²⁶⁵ *Id.*

²⁶⁶ See Joan Ryan, *The Richards Enigma: Private Person, Protective Parent, Publicity Seeker?*, WASH. POST, Apr. 17, 1977, at D4.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

Public scrutiny is but one hindrance transsexual athletes may face; further limitations are evident. For instance, in track and field, a male-to-female transsexual's testosterone therapy would hinder advancement into the elite ranks of the sport. Unless the IAAF's Anti-Doping Commission granted a prior exemption allowing a transgendered athlete to use testosterone—a substance normally prohibited under IAAF rules—the athlete would be suspended from the sport for violating doping rules.²⁶⁹ Such an exemption is only granted in cases of “clear and compelling clinical need.”²⁷⁰ Tracking this rule, the *IAAF Procedural Guidelines for Doping Control* (hereinafter “*Guidelines*”) provide that a medical exemption be granted to athletes “rarely . . . and in very special cases.”²⁷¹ The *Guidelines* caution that the exemption will not normally be granted in cases of acute disease and never when sporting activity may be hazardous to the athlete.²⁷²

Faced with these rules and limitations, a female-to-male transsexual track and field athlete taking the male hormone testosterone must discuss with his doctor whether the likelihood of success in obtaining a medical exemption from the IAAF is sufficient to outweigh the necessity of disclosing personal, medical, and psychological information to an unknown group of sport administrators. Certainly, the transsexual community would argue that the transformation of one's sex to match his or her Gender-ID is indeed a “rare and very special case” of a “clear and compelling” need to administer an otherwise prohibited drug. Whether the IAAF Anti-Doping Commission or any other sport governing body has ever made such a determination is not known; the availability of such a procedure, if truly confidential, however, should provide hope for those post-operative transsexuals (particularly female-to-male) seeking to participate in elite athletic competition. Interestingly, the Olympic drug-testing program in the United States does not provide permission to use certain drugs in advance.²⁷³

²⁶⁹ See IAAF, *supra* note 95, R. 55.5, at 81, <http://www.iaaf.org/newsfiles/9584.pdf>.

²⁷⁰ *Id.*

²⁷¹ IAAF, *supra* note 235, § 5.1, .2.

²⁷² *Id.* § 5.2.

²⁷³ See UNITED STATES ANTI-DOPING AGENCY [USADA], GUIDE TO PROHIBITED CLASSES OF SUBSTANCES AND PROHIBITED METHODS OF DOPING 31–34 (2003), http://www.usantidoping.org/files/USADA_Guide.pdf. The USADA, the domestic

There are a few transgendered athletes competing successfully at the top level in track and field. Karnah Soekarta, who competed for Indonesia as a female. In 1960, she was the official national record holder in several events, notably the 100-meters, 200-meters, and javelin throw.²⁷⁴ She was third in the javelin throw at the 1958 Asian Games in Tokyo and competed in the 100-meters, although she did not advance beyond the semifinals.²⁷⁵ Her javelin performance was listed in the first IAAF/ATFS statistics handbook produced for the 1983 Helsinki World Athletics Championships,²⁷⁶ but her performance entry was deleted in the 1987 edition,²⁷⁷ with an appended note stating “because ‘she’ became a ‘he.’”²⁷⁸

Also, Syria’s Hala Atoura was listed in the 1987 IAAF/ATFS statistics handbook for her 5.55-meter long jump in the Pan Arab Games in Damascus in 1985.²⁷⁹ In the IAAF/ATFS statistics handbook produced for the 1988 Seoul Olympic Games, her name was deleted with the notation that she “has undergone an operation and is now a male.”²⁸⁰ What remains confusing about these two cases is that both Soekarta and Atoura apparently competed as genotypic females prior to the hormonal/surgical protocol that changed their phenotypic sex. That each woman chose to align her Gender-ID with her brain sex should not have caused sport administrators to dismiss their pre-surgical athletic achievements.

organization that oversees doping matters for all of the U.S. Olympic and Pan American sports federations, provides a Restricted Substance Medical Notification Form in order to “notify the relevant medical authorities of the prescribed medical use of prohibited substances that are permitted under certain circumstances.” *Id.* at 34. In general, the USADA form appears only to contemplate the need for an advance waiver or exemption to use drugs necessary to: (1) control asthma, (2) diabetes, or (3) reduce allergic inflammation. *See id.* at 33. The USADA guide does make frequent mention that the athlete’s international federation may have more specific or different standards, indicating a willingness to accept the use of prohibited medications allowed by an international federation. *See id.*

²⁷⁴ Email from Heinrich Hubbeling, Statistician, IAAF, to David Martin, Emeritus Regents’ Professor of Health Sciences, Georgia State University and Chair, Sport Science Subcommittee, USA Track & Field, Inc. (Dec. 2, 2001) (on file with authors).

²⁷⁵ *Id.*

²⁷⁶ *See* IAAF & ASS’N OF TRACK & FIELD STATISTICIANS [ATFS], WORLD CHAMPIONSHIPS IN ATHLETICS: STATISTICS HANDBOOK 285 (1983).

²⁷⁷ *See* IAAF & ATFS, WORLD CHAMPIONSHIPS IN ATHLETICS: STATISTICS HANDBOOK 236 (1987).

²⁷⁸ *Id.* at 238.

²⁷⁹ *Id.* at 229.

²⁸⁰ IAAF & ATFS, 1988 SEOUL OLYMPIC GAMES: STATISTICS HANDBOOK 383 (1988).

Perhaps these women exhibited some of the abnormalities discussed earlier in this Article,²⁸¹ which caused uncertainty regarding their female chromosomal or phenotypic expression.

IV. LEGAL PERSPECTIVES ON TRANSEXUAL SPORTS PARTICIPATION

The societal and legal context in which a sports organization operates exerts a strong influence on its perspective about transsexual participation in sports competition. The viewpoint of a public school principal faced with a pre-operative sixteen-year-old transsexual participating in gym class may differ from that of the president of a state-chartered college or university considering the participation of a twenty-year-old transsexual in team sports like gymnastics, swimming, or volleyball. Likewise, the perspective of a professional or semi-professional sports league assessing the career prospects of a transsexual professional athlete will most certainly differ from an Olympic sports organization seeking to field a gold medal team. Whatever societal and organizational imperatives exist, they must be considered against the appropriate legal framework.

A. Government Actors

As state actors, government funded athletic organizations—sports programs within public universities, colleges, high schools, and grade schools—must adhere to both the U.S. Constitution and appropriate state constitutions.²⁸² Such state actors are bound by the vast body of civil rights laws and equal protection decisions when they face alleged instances of discrimination.²⁸³

Arguably, most instances of transsexual discrimination are likely to be classified as sex-based discrimination, and thus in violation of federal and state laws prohibiting sex discrimination from places of employment, public accommodations, the marketplace of goods and services, or federally assisted

²⁸¹ See *supra* Part I.

²⁸² See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

²⁸³ See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2000e-17 (2000); *supra* Part II.A.2a–b.

programs.²⁸⁴ Transsexuals who feel excluded from collegiate or extracurricular, scholastic, or athletic competition are likely to challenge such exclusion on the grounds that it is sex discrimination in violation of Title IX of the Education Amendments of 1972.²⁸⁵ Title IX provides, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”²⁸⁶ Included within Title IX’s purview are those private institutions that receive federal funding, even if the athletic department does not receive any of the federal apportionment.²⁸⁷

A federally funded entity might argue, in response to a Title IX challenge, that the exclusion of the transsexual athlete was not based upon his or her sex, but rather to protect competitive integrity or preserve a “level” playing field.²⁸⁸ Irrespective of whether the alleged exclusion is sex-based or the result of some other administrative policy, a substantial equal protection issue arises.²⁸⁹ Constitutional jurisprudence related to sex-based distinctions provides that state actors must show “an exceedingly persuasive justification” when treading upon the protection afforded by the Fourteenth Amendment, i.e., equal protection of the laws.²⁹⁰ The persuasive justifications a federally funded institution might cite include the preservation of fairness between the male and female divisions or the maintenance of separate-sex locker rooms. Regardless of what the state’s interest might be, a government actor must also establish that excluding transsexual athletes from competitions is substantially related to the

²⁸⁴ See Jennifer L. Levi, *Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights*, 7 WM. & MARY J. WOMEN & L. 5, 29–32 (2000).

²⁸⁵ 20 U.S.C. §§ 1681–1688 (2000). See also Joseph E. Krakora, *The Application of Title IX to School Athletic Programs*, 68 CORNELL L. REV. 222 (1983).

²⁸⁶ 20 U.S.C. § 1681(a).

²⁸⁷ See, e.g., *Haffer v. Temple Univ.*, 688 F.2d 14 (3d Cir. 1982).

²⁸⁸ Developmental differences and safety concerns have traditionally been argued as a basis for separating males and females during athletic competition.

²⁸⁹ See U.S. CONST. amend. XIV, § 1.

²⁹⁰ *United States v. Virginia*, 518 U.S. 515, 546 (1996) (ruling that the exclusion of women from the Virginia Military Institute was an unconstitutional “gender-defined classification”).

achievement of such an interest.²⁹¹ Given these high constitutional hurdles, instances of transsexual discrimination within scholastic athletics would not survive the heightened scrutiny applied by a reviewing court.²⁹²

In *Doe v. Yunits*,²⁹³ the plaintiff alleged transsexual discrimination within a state-funded educational institution, but not within the context of scholastic athletics. In *Yunits*, a high school student was excluded from her high school on the basis of her Gender-ID and expression.²⁹⁴ The student had been diagnosed with GID; although her Birth-Sex was male, she had a female Gender-ID.²⁹⁵ The student wore clothing consistent with the female gender, such as skirts, wigs, and dresses.²⁹⁶ The school found the student's conduct disruptive to the education process and informed her that she would not be allowed to attend the high school if she wore such clothing.²⁹⁷ In her complaint, the student alleged that the school abridged her freedom of expression.²⁹⁸ In deciding a motion for summary judgment, the court applied a free speech analysis, invoking the Massachusetts Declaration of Rights, Article XVI, which provides that, "The right of free speech shall not be abridged."²⁹⁹ Under this analysis, the court had to first determine whether the student's symbolic acts constituted expressive speech and, if so, whether the school meant to suppress that speech.³⁰⁰ The court reasoned that a male student dressing in clothing and accessories traditionally associated with the female gender was an expression of herself and her Gender-ID. The court

²⁹¹ *Id.* at 533.

²⁹² Such discrimination against transsexual athletes in a scholastic setting is merely conjecture. As of the publication of this Article, the National Collegiate Athletic Association [NCAA] has neither adopted a policy concerning transsexual participation, nor has it, knowingly, been faced with an issue of a transsexual wanting to compete. Letter from NCAA to Jill Pilgrim (Sept. 19, 2001).

²⁹³ No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000), *aff'd sub nom.* *Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

²⁹⁴ *Id.* at *2.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* at *3 (quoting MASS. CONST. art. XVI, *amended by* MASS. CONST. art. LXXVII).

³⁰⁰ *Id.*

found that the school understood this message.³⁰¹ The court also reasoned that the school, by prohibiting the student from wearing women's clothing, suppressed her speech.³⁰² Based on these findings, the court held that the student had a viable claim and would likely prevail.³⁰³

B. Professional Sports Leagues

One might assume that professional sports leagues, as private business enterprises, are not subject to the equal protection clauses of the U.S. Constitution or state constitutions, which would allow them to avoid the kind of claim that prevailed in *Yunits*. Professional leagues do not seek or accept federal or state funding for their business enterprise, supposedly removing them from the scope of federal civil rights laws such as Title IX.

Viewing the issue from another perspective, however, privately owned restaurants that solicit the business of the general public are subject to the anti-discrimination laws contained in the various civil rights statutes, most notably Title VII, which prohibits discrimination in public accommodations, public facilities, and federally assisted programs.³⁰⁴ Thus, Title VII and the various state acts modeled after it have extended the constitutional principle of equal protection to private businesses and individuals. Indeed, professional baseball has been successfully charged with discriminatory hiring and termination practices involving women.³⁰⁵ Title VII has been interpreted to exclude transsexuals

³⁰¹ *Id.*

³⁰² *Id.* at *4.

³⁰³ *Id.*

³⁰⁴ 42 U.S.C. §§ 2000e–2000e-17 (2000).

³⁰⁵ In 1971, a New York State Court of Appeals held that the New York-Pennsylvania Professional Baseball League and the National Association of Baseball Leagues violated the state's human rights law, N.Y. EXEC. LAW § 296(1)(d) (Consol. 2000), by rejecting Bernice Gers's application to umpire citing her failure to meet physical requirements. *See* N.Y. State Div. of Human Rights v. N.Y.-Pa. Prof'l Baseball League, 320 N.Y.S.2d 788 (App. Div. 1971). The court found that the defendants failed to establish that "being of the male sex" was a bona fide occupational qualification for an umpire, and that the height and weight standards were "inherently discriminatory against women." *Id.* at 794.

Another similar case rejected certain professional baseball entities' motion for summary judgment against a female plaintiff's claims for discriminatory firing and restraint of trade. *Postema v. Nat'l League of Prof'l Baseball Clubs*, 799 F. Supp. 1475 (S.D.N.Y. 1992), *rev'd*, 998 F.2d 60 (2d Cir. 1993). The underlying basis of the plaintiff's complaint was the twelve years of sex discrimination and sexual harassment

from its coverage but recent court decisions suggest a possible shift in attitude and sensitivity to sex and gender issues.³⁰⁶

Consistent with this trend, some states have chosen to extend gender-based civil rights protections to sexual orientation. Those states include California, Connecticut, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, and Vermont.³⁰⁷ The District of Columbia also has created a Human Rights law implicating sex and sexual orientation.³⁰⁸ California, Nevada, and Rhode Island prohibit discrimination based on sex and sexual orientation in the areas of employment and real property.³⁰⁹ Connecticut and Massachusetts prohibit discrimination based on sex and sexual orientation in the area of employment.³¹⁰ Vermont, Maine, and Minnesota prohibit discrimination based on sex and sexual orientation in the areas of employment, real property, education, public accommodations, and credit.³¹¹ The states of New Hampshire and New Jersey, along

she experienced as a professional umpire, culminating in her firing by the AAA Minor League Baseball League in 1989. *Id.* at 1478. During her employment, the plaintiff was addressed by a derogatory name, was told her proper role was “cooking,” was kissed and spat upon, and was singled out for special technique training. *Id.*

The district court preserved the plaintiff’s claims of: (1) third party interference with her employment leading to her termination, in violation of Title VII; (2) retroactive application of the trial by jury, compensatory, and punitive damages provisions of Title VII as they relate to intentional discrimination; (3) unlawful discriminatory practices in violation of New York’s human rights law; and (4) violation of state common law restraint of trade. *Id.*

³⁰⁶ In addition to the cases discussed above, *supra* Part II.A.2, a further survey of the case law interpreting civil or human rights laws in the context of transgender discrimination in the professional setting reveals one particularly interesting application of the law.

³⁰⁷ CAL. GOV’T CODE § 12940 (West 2001); CONN. GEN. STAT. ANN. § 46a-81c (West 2002); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2001); MINN. STAT. ANN. § 363.12 (2002); NEV. REV. STAT. 613.340 (2002); N.H. REV. STAT. ANN. § 354-B:1 (2001); N.J. STAT. ANN. § 10:5-3 (West Supp. 2002); R.I. GEN. LAWS §§ 34-37-1, 34-37-3 (2002), VT STAT. ANN. tit. 21, § 495 (2002).

³⁰⁸ D.C. CODE ANN. § 2-1401.01 (2001).

³⁰⁹ See CAL. GOV’T CODE § 12940 (West Supp. 2001); CONN. GEN. STAT. ANN. § 46a-81c (2001); MASS. GEN. LAWS ch. 151B, § 4 (2001); MINN. STAT. § 363.12 (2002); NEV. REV. STAT. 613.340 (2001); N.H. REV. STAT. ANN. § 354-B:1 (2001); N.J. STAT. ANN. § 10:5-3 (West 2001); R.I. GEN. LAWS §§ 34-37-1 and 34-37-3 (2001), VT. STAT. ANN. tit. 21, § 495 (2001).

³¹⁰ CONN. GEN. STAT. ANN. § 46a-81c (2001); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2001).

³¹¹ ME. REV. STAT. ANN. tit. 5, §§ 4552, 4553 (West 2002); MINN. STAT. § 363.12 (2002); VT STAT. ANN. tit. 21, § 495 (2001)

with the District of Columbia, do not specifically denote areas where discrimination is prohibited, but generally prohibit discrimination based on sex or sexual orientation.³¹²

Despite the apparent opportunity for transsexuals to assert their rights in the states that include sexual orientation as a basis for discrimination claims, many of these states' definitions of sexual orientation do not include transgendered persons. California, Connecticut, Massachusetts, New Hampshire, New Jersey, Vermont, Nevada, and the District of Columbia, define sexual orientation as having an orientation for heterosexuality, bisexuality, or homosexuality.³¹³ Only a few states provide a broader definition of sexual orientation that includes transgendered persons. For instance, Minnesota defines sexual orientation as

having or being perceived as having an emotional, physical[,] or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness.³¹⁴

The state of Rhode Island has adopted legislation that will include the phrase "gender identity or expression" in both the Rhode Island Fair Housing Practices Act³¹⁵ and Fair Employment Practices Act.³¹⁶ Rhode Island defines gender identity or expression as:

[A] person's actual or perceived gender, as well as a person's gender identity; gender-related self image, gender-related appearance, or gender-related expression, whether or not that gender identity, gender-related self image, gender-related appearance, or gender-related expression is

³¹² D.C. CODE ANN. § 2-1401.01 (2001); N.H. REV. STAT. ANN. § 354-B:1 (2001); N.J. STAT. ANN. § 10:5-4 (West Supp. 2002).

³¹³ CAL. GOV'T CODE § 12926 (West Supp. 2001); CONN. GEN. STAT. § 46a-81a (2001); D.C. CODE ANN. § 2-1401.02 (2001); MASS. GEN. LAWS ch. 151B, § 3 (2001); NEV. REV. STAT. 6.13.310 (2001); N.J. STAT. ANN. § 10:5-9.1 (West 2001); VT. STAT. ANN. tit. 1, § 143 (2001).

³¹⁴ MINN. STAT. § 363.01(41a) (2001).

³¹⁵ R.I. GEN. LAWS § 34-37-1 (2002).

³¹⁶ *Id.* § 28-5-2 (2002).

different from that traditionally associated with the person's sex at birth.³¹⁷

With these expansions of human and civil rights protections in place, transgendered persons seeking to participate in professional sports may be able to gain legal protection from these states, with others hopefully to follow.³¹⁸ If this legislation is any indication, the trend towards recognizing transsexuals as a protected class for the purposes of discrimination has begun.³¹⁹ Finally, no rules prohibit women from playing professional sports; if a transsexual athlete had the talent and skills to play, therefore, he or she would assumedly be welcome.

³¹⁷ *Id.*

³¹⁸ Idaho, Iowa, West Virginia, and Washington do have not civil or human rights laws. However, they pursue their equal protection objectives through commissions. The states of Alaska, Colorado, Kentucky, Oklahoma, Texas, and Utah also have a commission, but do not specifically designate protections based upon sex or gender.

Arkansas, Florida, Illinois, Michigan, and New York have civil or human rights laws that prohibit discrimination in employment, public accommodations, and other areas based upon sex or gender. ARK. CODE ANN. § 16-123-107 (Michie 2001); FLA. STAT. ANN. § 760.01 (West 2001); 755 ILL. COMP. STAT. ANN. 5/1-102 (West 2001); MICH. COMP. LAWS ANN. § 37.2202 (West 2001); N.Y. CIV. RIGHTS LAWS §§ 40-c, 296 (McKinney 2001).

A few states prohibit the act of discrimination as a matter of public policy without creating a specific statute. Arizona, Indiana, North Dakota, New Mexico, South Dakota, and Tennessee are all included in this category. The state of Indiana, without denoting specific areas where discrimination is prohibited, prohibits discrimination based on sex as a matter of public policy. IND. CODE ANN. § 22-9-1-2 (Michie 2001). The state of Arizona prohibits discrimination based on sex only in the employment setting. ARIZ. REV. STAT. ANN. § 41-1463 (West Supp. 1999). New Mexico prohibits discrimination based on sex in the areas of employment and housing. N.M. STAT. ANN. § 28-1-7 (Michie 2001) (repealed effective July 1, 2006). Lastly, the states of North Dakota, South Dakota, and Tennessee prohibit discrimination based on sex in the areas of employment, public accommodation, education, real property and credit. N.D. CENT. CODE § 14-02.4-04 (2001); S.D. CODIFIED LAWS § 20-13-10 (Michie 2002); TENN. CODE ANN. § 4-21-101 (West Supp. 2002).

Finally, states with no civil or human rights laws at all are: Alabama, Delaware, Georgia, Kansas, Maryland, Mississippi, Nebraska, North Carolina, Oregon, Pennsylvania, South Carolina, Wisconsin, and Wyoming.

³¹⁹ In fact, on January 3, 2001, a bill was introduced in the House to amend the Civil Rights Act of 1964 and the Fair Housing Act to prohibit discrimination on the basis of affectional or sexual orientation. The term affectional or sexual orientation would be defined as "male or female homosexuality, heterosexuality, and bisexuality by orientation or practice, by and between consenting adults." H.R. 271, 107th Cong. (2001).

C. *Olympic Sports Organizations*

All domestic Olympic sports organizations are governed by the Ted Stevens Olympic & Amateur Sports Act (OASA),³²⁰ which establishes the United States Olympic Committee (USOC) and outlines the criteria for recognition as a national governing body for an Olympic sport.³²¹ The OASA provides that part of the purpose of the USOC is “to promote and encourage physical fitness and *public participation in amateur athletic activities*.”³²² According to the OASA, the USOC can only recognize and designate an organization a national governing body if it “[d]emonstrates that its membership is open to *any individual* who is an amateur athlete,”³²³ and “provides an *equal opportunity* to amateur athletes . . . to participate in amateur athletic competition, *without discrimination on the basis of race, color, religion, sex, age, or national origin*.”³²⁴ Finally, the OASA provides that every national governing body must “provide equitable support and encouragement for participation by women where separate programs for male and female athletes are conducted on a national basis.”³²⁵

In light of the recent court decisions and proposed state statutory amendments which recognize transsexuals and/or those with GID, there exists little breathing room for Olympic sports organizations with respect to their obligation to accommodate *any individual or amateur athlete* wishing to participate in amateur athletic competition. While OASA does not specifically mention transsexuals or GID in its anti-discrimination clause, its broad language includes transsexuals in its scope. National governing bodies may question whether their obligation to provide an *equal opportunity* for any individual to participate requires them to make a determination of the appropriate sex category for a post-operative transsexual. The authors believe that it does. Thus, the question is whether to await the instance of a transsexual’s entry into competition or proactively establish a policy. For those Olympic

³²⁰ 36 U.S.C. §§ 220501–220529 (2000).

³²¹ *Id.*

³²² *Id.* § 220503(6) (emphasis added).

³²³ *Id.* § 220522(a)(7) (emphasis added).

³²⁴ *Id.* § 220522(a)(8) (emphasis added).

³²⁵ *Id.* § 220524(6).

sports organizations seeking to be proactive, the authors offer this Article as a source of information and guidance.

CONCLUSION

The evolution of society, whether measured by technological advances, scientific advancement, or enlightened thinking, requires the recognition and accommodation of new realities. While the existence of GID is not new, its existence has reached beyond the lives of those families immediately affected. Ironically, one of the first public cases of transsexualism—Renee Richards—arose in a sports context. In light of the volumes of literature now available on this topic and the many transsexuals interviewed for this Article, there is no doubt that hundreds of thousands of transgendered and transsexual individuals are attempting to live safe, happy, and healthful lifestyles.

Athletic activity is part of the fabric of most societies around the world and has achieved a cult-like following in the United States. It is only natural and inevitable that the transgendered and transsexuals will walk onto the court, line up at the starting line, or skate onto the rink. Just as Americans have learned to accept “coloreds” and the “delicate sex,” isn’t it time that society welcomes individuals who, through an act of fate, seek to balance their biological and mental sexual identity? Just as a thoughtful person would not encourage a schizophrenic to shun medication that helps him or her achieve balance and normalcy, sports administrators, athletic competitors, or spectators should not expect a transgendered person to forgo a treatment that will bring balance and normalcy to their lives.

As discussed above, it is clear that the U.S. judiciary and the various state legislatures are realizing that sex and gender are not always consistent, and are clearly not interchangeable terms. This fact has long been recognized by the medical profession, the IOC, the IAAF, and other Olympic sport governing bodies around the world, all of whom have sought solutions. Regrettably, the “so-called cures”—castration, exclusion from competition, and public exposure—have often been worse than the malady.

In order to integrate the transgendered and transsexual community into athletic competition, the athletic community’s

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principles must include compassion, understanding, and enlightenment. For those who find it difficult to abandon the fiction that sports competition in its current form is “pure,” they need only decide whether to allow the transsexual into the men’s or women’s division. For those who accept and adhere to the Birth-Sex philosophy, the appropriate division is the gender into which the transsexual was born. For those who cling to the Gender-ID approach, the post-operative gender classification determines the appropriate gender division. We can leave for another day, and further research, individuals with inter-sexed, abnormal, and/or ambiguous sexuality. The transgendered athlete has a sex. Let us acknowledge their sexuality and their desire to participate in healthful athletic activities.