

# Denied the Finish Line: Sex Verification Testing for Intersex Athletes Under the International Association of Athletics Federations

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## I. INTRODUCTION

An overnight success, nineteen-year-old middle-distance sprinter Caster Semenya burst onto the international athletic scene when she<sup>1</sup> won the gold medal in the women's division at the African Junior Championships in Bambous on July 20, 2009, with a time of 1.56.72 in the 800-meter run.<sup>2</sup> She won the same event at the World Championships in Athletics in Berlin on August 19, 2009, with a time of 1.55.45.<sup>3</sup> Not only were both wins the fastest recorded times of the year, but she finished over two seconds ahead of the defending world champion in Berlin.<sup>4</sup> On the way to becoming a young sensation with her athletic prowess and amazing physique, the new

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<sup>1</sup> The author recognizes the dispute as to Semenya's gender and sex. For purposes of this Note, Semenya will be referred to as Ms. Caster Semenya (with female pronoun references).

<sup>2</sup> International Association of Athletics Federations, *Caster Semenya Profile* (2009), <http://www.iaaf.org/athletes/biographies/letter=0/athcode=242560/index.html>.

<sup>3</sup> *Id.*

<sup>4</sup> Williams Lee Adams, *Could This Women's World Champ Be a Man?*, TIME, Aug. 21, 2009, <http://www.time.com/time/world/article/0,8599,1917767,00.html>; Meghan Daum, Opinion, *The Case of Caster Semenya*, CHI. TRIB., Sept. 23, 2009, available at [http://articles.chicagotribune.com/2009-09-23/news/0909220513\\_1\\_testosterone-levels-gender-condition](http://articles.chicagotribune.com/2009-09-23/news/0909220513_1_testosterone-levels-gender-condition).

world champion was promptly halted when questions were raised about her sex, gender, and participation in women's track and field events.<sup>5</sup>

People around the world challenged Semenya's sex and categorization as a female athlete.<sup>6</sup> The International Association of Athletics Federations ("IAAF"), the international sports governing body for track and field recognized by the International Olympics Committee ("IOC"), confirmed that Semenya agreed to a "gender testing process."<sup>7</sup> Officials would attempt to "confirm" Semenya's sex<sup>8</sup> to ensure that she was competing in the "proper" gender category in IAAF-related events. IAAF Director of Communications Nick Davies stated that the issue was not one of a man masquerading as a woman,<sup>9</sup> or one of cheating, but that it was a "medical" issue to be handled privately and delicately.<sup>10</sup>

Having incited sensational news articles about a potential "hermaphrodite"<sup>11</sup> competing in women's events, Semenya's submission<sup>12</sup> to sex "verification" testing<sup>13</sup> calls into question its use for international athletic competition. International competitive sports organizations use the binary system of gender classification to categorize athletes and world records, while

<sup>5</sup> See Adams, *supra* note 4 (describing the speculation rising around Semenya's Mauritius and Berlin record wins and the subsequent IAAF "gender verification" testing).

<sup>6</sup> Some who questioned Semenya's gender were fellow competitors. See *id.* (quoting fifth-place finisher at the Berlin championships, Mariya Savinova, who asserted that "[Semenya]'s not a woman. She's a man."):

<sup>7</sup> *Id.*

<sup>8</sup> This Note will assert that to "confirm" or "verify" an individual's sex is problematic in purpose, application, and effect. See *infra* Part III.

<sup>9</sup> This will later be referred to as "gender fraud."

<sup>10</sup> Adams, *supra* note 4. Unfortunately, this was hardly the case. See *infra* Part II B (highlighting the public spectacle of the Semenya case).

<sup>11</sup> See Nigel Farnedale, *Athletics: Caster Semenya the Latest Female Athlete Suspected of Being Biological Male*, TELEGRAPH, Oct. 25, 2009, <http://www.telegraph.co.uk/sponsored/sport/sportslife/6414523/Athletics-Caster-Semenya-the-latest-female-athlete-suspected-of-being-biological-male.html> (last visited Mar. 7, 2010). As "hermaphrodite" is derogatory, antiquated, and disrespectful, and because "intersex" is the most familiar terminology in the discourse, this Note will refer to individuals with a mixed biological composition and/or ambiguous genitalia as "intersex." See *infra* notes 78–81 and accompanying text (describing the lexicological changes of the intersex community).

<sup>12</sup> Whether or not Semenya's submission to the IAAF was voluntary or required is currently in dispute because the current IAAF policy states that "the athlete concerned can be asked" to undergo the testing. IAAF MEDICAL AND ANTI-DOPING COMMISSION, INTERNATIONAL ASSOCIATION OF ATHLETIC FEDERATIONS, IAAF POLICY ON GENDER VERIFICATION 2 (2006), available at <http://www.iaaf.org/mm/document/imported/36983.pdf> [hereinafter *IAAF Position Statement*]. According to the policy, the testing is not mandatory. *Id.* Should Semenya refuse, it is possible that she would be denied the opportunity to compete.

<sup>13</sup> The legal discourse is inconsistent in the use of the words "sex" or "gender" in relation to the testing. As the testing is based not upon a societal construct of gender but upon a hormonal and/or chromosomal composition of "male" and "female," this Note will refer to it as "sex verification testing." There are also concerns about the use of "verification," as it implies the confirmation of sex. Because the discourse employs "verification," it will be used in this Note.

preventing what sports officials deemed as “gender fraud.”<sup>14</sup> Thus, how “male” and “female” are defined is integral to international sports competition.

Because research indicates that male hormones and testosterone levels improve an athlete’s performance due to increased and rapid muscle growth,<sup>15</sup> that which defines “male” and “female” becomes a critical question and point of tension in the discourse on athletic competition and fair play. The way in which international sports bodies address questions concerning individuals with ambiguous gender presentation and ambiguous genitalia will call into question the effectiveness of sex verification testing.

Coming to the forefront during the Olympics in the 1960s,<sup>16</sup> sex verification testing has long been a staple for international sports and a substantial obstacle for many athletes denied the opportunity to compete from failing these tests.<sup>17</sup> As sports organizations seek to maintain the integrity and fairness of competitive sports, drug testing as well as sex verification testing have become regular components of international sports. Most international sports groups, including the IOC, have eliminated mandatory sex verification testing.<sup>18</sup> Some organizations, including the IAAF, have alternatively implemented recommended or “voluntary” sex verification testing.<sup>19</sup> Recent manifestations of the recommended version included the

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<sup>14</sup> See *infra* notes 123–128 and accompanying text (defining “gender fraud” as the scenario of a male athlete masquerading as a female athlete and competing for potential gain in athletic competition).

<sup>15</sup> See Albert de la Chapelle, *The Use and Misuse of Sex Chromatin Screening for ‘Gender Identification’ of Female Athletes*, 256 J. AMER. MED. ASS’N 14, 1920 (1986) (describing men’s bodies as muscular and as having a structure that would “confer on them an unfair advantage over female competitors”); Hayden Opie, *Australian Medico-Legal Issues in Sport: The View From the Grandstand*, 13 MARQ. SPORTS L. J. 113, 138 (2002) (“For many competitive sports, on average, men possess significant advantages in size and strength. The major source of these differences is found in the role played by the male hormone testosterone.”); M. A. Ferguson-Smith, *Gender Verification in Sport: The Need for Change?*, 25 BRITISH J. SPORTS MED. 17, 17 (1991) (“Genetically determined sex differences in stature, musculature and cardiovascular capacity result in males having a substantial advantage over females in those sports which, in general, require strength, speed, and power.”); *The Sad Story of Santhi Soundarajan*, TIMES OF INDIA, Jan. 9, 2007, available at <http://timesofindia.indiatimes.com/articleshow/1109135.cms> (“[T]estosterone helps in building muscle and strength.”).

<sup>16</sup> David Fahrenthold, “Which Side Are You On? In Athletics and Elsewhere, the Line Between Male and Female Can Be Hazy,” WASH. POST, Oct. 20, 2009, at HE01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/19/AR2009101902875.html?sid=ST2009101903700>.

<sup>17</sup> See *infra* note 152–153 (highlighting other international female athletes who were questioned about their gender).

<sup>18</sup> See *infra* notes 148–50 (examining the removal of mandatory sex verification testing for the Olympics); IAAF *Position Statement*, *supra* note 12, at 2 (specifying that the testing is not mandatory); Pamela Doig et al., CANADIAN ACAD. SPORTS MED., *Position Statement: Sex Testing (Gender Verification) in Sport* (2006), available at <http://www.casm-acms.org/forms/statements/GendereVerifEng.pdf> (condemning the use of the testing).

<sup>19</sup> IAAF *Position Statement*, *supra* note 12.

gender testing laboratories of the 2008 Beijing Olympics<sup>20</sup> and the 2010 Vancouver Olympics.<sup>21</sup> Semenya's case is the most recent submission to the IAAF's recommended testing.<sup>22</sup>

Previous scholarship discusses the legal and policy implications of mandatory sex verification testing under the International Olympic Committee,<sup>23</sup> while other commentary examines the use of drug testing and sex verification testing to "police" gender in the international sports arena.<sup>24</sup> This Note will analyze and examine recommended sex verification testing under the IAAF, and the legal, procedural, and logistical problems that follow. Part II will present the story of Caster Semenya and will discuss the current controversy around her participation in IAAF-sanctioned women's events. Part III will discuss intersex conditions and the medical and legal perspectives on the intersex community. Next, Part IV will detail the history of sex verification testing in international sports competition and the focal shift from physical presentation to genetic composition. Part V will examine the current IAAF sex verification policy. Part VI will present both sides of the sex verification testing debate. Part VII will address the legal implications of sex verification testing. Finally, this Note will propose alternatives to the sex verification testing currently employed by some international athletic sports organizations.

## II. THE CASTER SEMENYA STORY

### A. Biography

Born on January 7, 1991, near the city of Polokwane, South Africa, Mokgadi Caster Semenya was raised in a local township by her father, Jacob

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<sup>20</sup> See Katie Thomas, *A Lab Whose Job Is to Run Gender Tests on Women*, N.Y. TIMES, July 30, 2008, at D1 (discussing the "sex determination laboratory" to evaluate "suspect" female athletes"); Jennifer Finney Boylan, Op-Ed., *The XY Games*, N.Y. TIMES, Aug. 3, 2008, at WK10 (asserting that the Beijing lab uses the "wrong yardsticks" of what is female and male and will thus provide "wrong answers"); Wang Wei and Zhang Ming'ai, *Sex Testing Lab for Beijing Olympics*, CHINA.ORG.CN, Aug. 18, 2008, [http://www.china.org.cn/olympics/news/2008-08/18/content\\_16263487.htm](http://www.china.org.cn/olympics/news/2008-08/18/content_16263487.htm) (describing the Beijing lab's creation and purpose).

<sup>21</sup> See Ian O' Reilly, *Gender Testing in Sport: A Case for Treatment?*, BBC NEWS, Feb. 15, 2010, <http://news.bbc.co.uk/2/hi/8511176.stm> (noting that the testing would continue at the 2010 Vancouver Olympics).

<sup>22</sup> See Adams, *supra* note 4 (discussing the Semenya case as the most recent of sex verification testing).

<sup>23</sup> 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) (articulating the legal and policy implications of mandatory sex verification testing under the IOC).

<sup>24</sup> See Haley K. Olsen-Acre, *The Use of Drug Testing To Police Sex and Gender in the Olympic Games*, 13 MICH. J. GENDER L. 207 (2007) (examining the ways in which drug and doping testing becomes a sex and gender policing tool).

Semenya.<sup>25</sup> Although granted a South African birth certificate displaying her gender as “female,” Semenya grew up amidst ridicule and speculation that she was not quite what she claimed to be.<sup>26</sup> A picture of 11-year-old Semenya shows a tall, lean body and physical appearance different from her female counterparts.<sup>27</sup> A keen interest in sports was apparent in Semenya from a young age, as she enjoyed participating in karate, soccer, and wrestling. Her father commented that “[s]he was preoccupied with sport [and] she never played with dolls.”<sup>28</sup> When she was fourteen, Semenya was disqualified from playing soccer, as the “coaches said she was too rough with the other girls.”<sup>29</sup> Barred from playing with girls and not allowed to play with the boys, Semenya was “heartbroken.”<sup>30</sup>

Shifting her athletic attention in another direction, Semenya discovered a passion for running and began training under her school headmaster, Eric Modiba.<sup>31</sup> Her athletic prowess was evident; shortly thereafter, Semenya won the Mauritius African Junior Championships and the Berlin World Championships.<sup>32</sup> In a picture from the Berlin Championships,<sup>33</sup> Semenya’s physique is noteworthy and admirable. Her defined biceps, protruding abdominal muscles, and strong chest depict a dedicated and hard-working athlete. While she and her family celebrated her recent wins, an Australian sports official commented that she had something “dangling” between her legs and an “Adam’s apple,”<sup>34</sup> launching a flurry of inquiries and suspicions.

### B. *World Championships and Subsequent Suspicions*

While her recent achievements came with much excitement from family and friends, critics wondered whether the gold medal had gone to the “wrong” individual. Due to rising suspicions,<sup>35</sup> the IAAF asked Semenya to

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<sup>25</sup> Andrew Malone et. al., ‘She Wouldn’t Wear Dresses and Sounds Like a Man on the Phone’: Caster Semenya’s father on his sex-riddle daughter, MAILONLINE, Aug. 22, 2009, <http://www.dailymail.co.uk/news/worldnews/article-1208227/She-wouldnt-wear-dresses-sounds-like-man-phone-Caster-Semenyas-father-sex-riddle-daughter.html>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See *supra* note 2–3 and accompanying text (describing Semenya’s Berlin and Mauritius wins).

<sup>33</sup> Posting of Katherine Franke to *Gender and Sexuality Law Blog*, <http://blogs.law.columbia.edu/genderandsexualitylawblog/2009/09/11/gender-verification-tests-in-sports-we-all-have-a-stake-in-caster-semenyas-medal/> (Sept. 11, 2009).

<sup>34</sup> *Id.*

<sup>35</sup> See *infra* note 161 and accompanying text (examining the “suspicious” model of the IAAF’s sex verification testing).

undergo sex verification testing, a form of testing by which officials would attempt to “confirm” her gender.<sup>36</sup> The media later found that the testing was requested before Semenya’s win at the Berlin championships.<sup>37</sup> Additionally, the former head of Athletics South Africa (“ASA”),<sup>38</sup> president Leonard Chuene, received a recommendation from the South African team doctor to withdraw Semenya from the Berlin Championships.<sup>39</sup> Refusing to follow the doctor’s recommendation, Chuene refused to withdraw Semenya and personally authorized sex verification tests, of which he purported to be unaware when later questioned.<sup>40</sup> His actions, which violated IAAF’s policy of confidentiality,<sup>41</sup> subjected Semenya to worldwide speculation about her sex and gender.<sup>42</sup>

On September 11, 2009, Australian newspapers reported that Semenya had undescended testes and above-normal levels of testosterone,<sup>43</sup> causing a media frenzy and outrage from her family.<sup>44</sup> As the IAAF refused to confirm or deny the results, the news spread rapidly and media outlets adversely inferred the results from the IAAF’s silence.<sup>45</sup> The world became aware that Semenya might have ambiguous genitalia.<sup>46</sup> Following the testing, Semenya dropped out of the Pretoria South African Cross-Country Championships, claiming that she was “not feeling well.”<sup>47</sup> Semenya reportedly asked for a

<sup>36</sup> *Gender Test Reporting Triggers Widespread Criticism*, WASH. POST, Sept. 12, 2009, at D02.

<sup>37</sup> Christine Brennan, *Adults Fail Runner in Gender Case*, USA TODAY, Sept. 24, 2009, at 3C.

<sup>38</sup> The ASA is an IAAF National Member Federation. See IAAF.org, *Federations—South Africa*, (2009), <http://www.iaaf.org/aboutiaaf/structure/federations/area=afr/fedcode=152247/index.html> (last visited Apr. 28, 2010) (charting a worldwide map of national member federations, including the ASA).

<sup>39</sup> Brennan, *supra* note 37.

<sup>40</sup> *Where It All Began for Semenya*, SYDNEY MORNING HERALD, Dec. 11, 2009, at 20-21 available at <http://www.smh.com.au/sport/where-it-all-began-for-semenya-20091210-kmd1.html>.

<sup>41</sup> See IAAF *Position Statement*, *supra* note 12 (“The athlete is referred to the investigating authority in confidence for further investigation and advice.”).

<sup>42</sup> See Garth Theunissen, *S. Africa’s ANC Says Track Body ‘Mishandled’ Semenya*, BLOOMBERG.COM, Oct. 29, 2009, <http://www.bloomberg.com/apps/news?pid=20601079&sid=aG7HD4DiJMCK> (noting the ASA and Chuene’s mishandling of the case and their creation of a saga for Semenya).

<sup>43</sup> Jacquelin Magnay, *Secret of Semenya’s Sex Stripped Bare*, SYDNEY MORNING HERALD, Sept. 11, 2009, at News and Features p. 1, available at <http://www.smh.com.au/news/sport/secret-of-semenyas-sex-stripped-bare/2009/09/11/1252519599453.html>.

<sup>44</sup> See *Gender Test Reporting Triggers Widespread Criticism*, *supra* note 36.

<sup>45</sup> The media itself highlighted the extent to which Semenya’s story would be sensational news. See Brennan, *supra* note 39 (referring to Semenya’s “most private aspects of her life [being] played out on the most public of international stages”).

<sup>46</sup> There were also media outlets that presented Semenya as intersex, despite the IAAF’s refusal to confirm the information or find additional evidence beyond the Australian newspapers. See e.g., Posting of Cary Costello to NSRC Blog, <http://nsrc.sfsu.edu/dialogues/users/Cary.Costello/blog/caster-semenya—intersex-perspective> (Aug. 23, 2009 12:47 EST) (“The basic outline of Caster’s situation, as best as I can understand it through news reporting . . . is that she was born intersex.”).

<sup>47</sup> See *Gender Test Reporting Triggers Widespread Criticism*, *supra* note 36.

break from her university final exams, and her coach, Michael Serne, suspected that the recent speculation about her gender motivated the request.<sup>48</sup> As Semenya moved quickly out of the spotlight, suspicions about her sex and gender only grew.

### C. You Magazine Cover

Between the Berlin Championships and the Australian report of Semenya's supposed intersex condition, the September 10, 2009, issue of *You Magazine*, a South African lifestyle magazine, featured Semenya on the cover in what many perceived as a significantly more feminine gender presentation.<sup>49</sup> The picture shows her in a black dress, various jewelry, long hair, and makeup.<sup>50</sup> Semenya was later quoted as saying, "[N]ow that I know what I can look like, I'd like to dress like this more often,"<sup>51</sup> and "I'd also like to learn to do my own makeup."<sup>52</sup>

Katherine Franke, Professor of Law at Columbia Law School and author of the *Gender and Sexuality Law Blog*, commented on the cover photograph.<sup>53</sup> She noted that Semenya "tried to fix this problem . . . when she underwent a makeover to 'feminize' her look and posed as a covergirl . . . [b]ut this performance came too late. Suspicions had been raised."<sup>54</sup> Semenya herself commented on the shoot, stating, "I didn't do this to prove a point but rather to have fun. I don't give a damn what people say about me. I like me the way I am and who cares what other people say?"<sup>55</sup>

While the photo shoot and cover stand in stark contrast to Semenya's previous gender presentation, the timing of the shoot is critical in the progression of the request for sex verification testing and subsequent reports claiming her intersex condition. As will be explored in the following section, Franke's statements complicate the question as to whether Semenya was challenged based on her *sex* or *gender*. These statements also challenge the extent to which "sex verification testing" measures *sex* while suspicions are raised based on *gender presentation*.

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<sup>48</sup> *South Africa's Semenya Asks for Exam Break*, ASSOC. PRESS, Oct. 15, 2009, available at <http://abcnews.go.com/International/wireStory?id=8834577>.

<sup>49</sup> Franke, *supra* note 33.

<sup>50</sup> *Id.* The article also noted her stilettos, which are not visible in the photo. *Id.*

<sup>51</sup> *World in Motion: Caster Semenya Photoshoot Brings Sex back To Top of Agenda*, SUNDAY TIMES, Sept. 8, 2009, [http://www.timesonline.co.uk/tol/sport/columnists/owen\\_slot/article6825732.ece](http://www.timesonline.co.uk/tol/sport/columnists/owen_slot/article6825732.ece).

<sup>52</sup> Daum, *supra* note 4.

<sup>53</sup> Franke, *supra* note 33.

<sup>54</sup> *Id.*

<sup>55</sup> *Gender Row Athlete Caster Semenya Gets a Glamorous Makeover*, MIRROR, Aug. 8, 2009, available at <http://www.mirror.co.uk/news/top-stories/2009/09/08/gender-1row-athlete-caster-semenya-gets-a-glamorous-makeover-115875-21657889/>.

### III. THE GENDER DICHOTOMOUS CONSTRUCT AND THE INTERSEX CONDITION

#### A. *Gender and the Binary System*

Distinguishing between sex and gender is critical to understanding how intersex bodies are culturally and socially understood.<sup>56</sup> Moreover, this distinction becomes critical in the world of sports—a world strictly divided into male and female categories.

While some argue that there is no distinction between sex and gender,<sup>57</sup> “sex” is generally understood as biologically determined.<sup>58</sup> Typically, an individual’s sex constitutes the chromosomal, hormonal, and reproductive makeup, with a heavy reliance on “[w]hat one finds between the legs.”<sup>59</sup> While not the most sophisticated definition, people can rely on its simplicity and have done so to determine sex as definitively male or female. Notably, the chromosomal analysis did not always define sex and gender distinctions; a visual body inspection was the traditional test for sex.<sup>60</sup> Chromosomal analysis is currently used to determine sex, despite the fact that people can have a different chromosomal makeup than traditionally associated with their sex while visually exhibiting their gender.<sup>61</sup>

The societal understanding of gender, on the other hand, generally does not refer to biological or chromosomal composition,<sup>62</sup> but to the cultural or societal attitudes toward the characteristics of the male and female sex.<sup>63</sup>

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<sup>56</sup> The United States legal system traditionally defines “sex” as strictly male and female for suspect classification under the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court has also addressed the immutability of sex. See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (stating that “sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth”).

<sup>57</sup> See e.g. Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 262–63 (2005) (denying the existence of a distinction between sex and gender).

<sup>58</sup> Laura Hermer, *Paradigms Revised: Intersex Children, Bioethics, and the Law*, 11 ANNALS HEALTH L. 195, 200 (2002); see also Jill Pilgrim et. al., *Far From the Finish Line: Transsexualism and Athletic Competition*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 495, 497–99 (defining sex and gender as distinct concepts). But see Alison Carlson, *WOMEN AND SPORTS IN THE UNITED STATES: A DOCUMENTARY READER 100* (Jean O’Reilly & Susan K. Cahn, eds., 2007) (“Many scientists claim that there is no such thing as a clear-cut definition that separates biological females from males, arguing that sex is socially determined, much as gender is (citations omitted).”).

<sup>59</sup> Hermer, *supra* note 58, at 200.

<sup>60</sup> *Id.*

<sup>61</sup> For example, a person may present as a man, but have a female chromosomal makeup, and vice versa.

<sup>62</sup> Hermer, *supra* note 58, at 200. This understanding becomes more complex within the context of the U.S. legal system, however, as federal and Supreme Court cases use the terms “sex” and “gender” interchangeably. See e.g. *Price Waterhouse v. Hopkins*, 490 U.S. 288 (1989).

<sup>63</sup> Julie Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 274–75 (1999).



People exhibiting characteristics associated with men are considered to be “masculine,” whereas those who exhibit characteristics associated with women are considered “feminine.”<sup>64</sup> Normative standards support the notion that men are virile, strong, assertive, macho, and rational, while women are understood as weak, passive, and emotional.<sup>65</sup>

### B. *Impact on the Intersex Community*

The traditional definitions of gender and sex yield a strict binary system<sup>66</sup> in Western culture upon which society relies to categorize various components of life: forms of identification, schools, prisons, sports teams, employment, child custody, and bathrooms, among others. Biologist Dr. Anne Fausto-Sterling’s provocative essay, *The Five Sexes*, highlights the complexities of the binary system:

Western culture is deeply committed to the idea that there are only two sexes. Even language refuses other possibilities . . . thus to write about [an intersex individual] I have had to invent conventions—s/he and his/her—to denote someone who is clearly neither male nor female or who is perhaps both sexes at once. Legally, too, every adult is either man or woman, and the difference, of course, is not trivial.<sup>67</sup>

Thus, while some consider sex and gender to be distinct, others conflate the terms. This can confuse societal understandings of the intersex community. For example, U.S. law provides legal statuses only for men and women under the gender binary,<sup>68</sup> whereas many members of the intersex community fall somewhere in between the rigid categories. As humans can be born with chromosomal, hormonal, and genital combinations of the male *and* female sexes, “fitting” individuals within the male-female dichotomous construct, as well as within the legal system, becomes particularly difficult.<sup>69</sup>

### C. *What Is Intersex?*

While the prevalence of intersex individuals within the general population is difficult to ascertain for a variety of reasons,<sup>70</sup> an estimated 1 in 2,000

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at n. 4.

<sup>66</sup> This paper will use the terms “binary,” “gender binary,” “gender binary construct,” and “dichotomous construct” interchangeably.

<sup>67</sup> Anne Fausto-Sterling, *The Fives Sexes: Why Male and Female Are Not Enough*, THE SCIENCES, Mar.–Apr. 1993, at 20–24.

<sup>68</sup> See MORGAN HOLMES, INTERSEX: A PERILOUS DIFFERENCE 66 (2008) (stating that “for all practical, legal, and social purposes there *are* in fact only two sexes”).

<sup>69</sup> There are a number of scholars who reject the binary system, one of whom has proposed an alternative. See Fausto-Sterling, *supra* note 67 (introducing five sexes in which three categories of intersex are included).

<sup>70</sup> This is partly due to the refusal to come forward as intersex, ignorance regarding one’s own condition, and the medical community’s previous tendencies to hide the condition. See Patricia L.

people exhibit some form of an intersex condition.<sup>71</sup> Dr. Fausto-Sterling estimates that the rate is closer to two percent,<sup>72</sup> while another estimate is about four percent.<sup>73</sup> Some of the numerical disparities can be attributed to forms of reporting; some intersex individuals are unaware of their condition and do not self-identify, while others prefer to conceal their condition. Additionally, as there is much disagreement on the definition of “intersex,” different definitions are used in varying contexts, giving rise to various statistics.<sup>74</sup>

The Intersex Society of North America (“ISNA”) defines intersex as follows:

“Intersex” is a general term used for a variety of conditions in which a person is born with a reproductive or sexual anatomy that doesn’t seem to fit the typical definitions of female or male. For example, a person might be born appearing to be female on the outside, but having mostly male-typical anatomy on the inside. Or a person may be born with genitals that seem to be in-between the usual male and female types. . . . Though we speak of intersex as an inborn condition, intersex anatomy doesn’t always show up at birth. Sometimes a person isn’t found to have intersex anatomy until she or he reaches the age of puberty, or finds himself an infertile adult, or dies of old age and is autopsied. Some people live and die with intersex anatomy without anyone (including themselves) ever knowing.<sup>75</sup>

“Intersex” refers to the physical and/or chromosomal set of conditions in which the features that are socially understood as either male or female are combined in a single body.<sup>76</sup> Some factors that are considered include: the psychological sex of the individual, sex chromosomal constitution, gonadal sex, sex hormonal pattern, internal sex organs other than gonads (e.g., the

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Martin, *Moving Toward an International Standard in Informed Consent: The Impact of Intersexuality and the Internet on the Standard of Care*, 9 DUKE J. GENDER L. & POL’Y 135, 142–43 (2002) (describing the potential futility of using statistical analysis to determine an individual’s sex or gender); Greenberg, *supra* note 63, at 268 n. 9 (noting that the exact frequency of intersexuality can be difficult to determine as some conditions are not apparent at birth and most people are reluctant to come forward with such information).

<sup>71</sup> ARLENE LEV, *TRANSGENDER EMERGENCE: THERAPEUTIC GUIDELINES FOR WORKING WITH GENDER-VARIANT PEOPLE AND THEIR FAMILIES* 353 (2004); Annette Bromdal, *Intersex – A Challenge for Human Rights and Citizenship Rights* (Spring 2006) (unpublished Master’s Thesis, Sodertorn University College) (on file with Sodertorn University College); Advocates for Informed Choice, *Frequently Asked Questions*, <http://www.aiclegal.org/faq.html> (last visited Mar. 10, 2010). See also Sharon Preves, *Out of the O.R. and Into the Streets: Exploring the Impact of Intersex Media Activism*, 12 CARDOZO J.L. & GENDER 247, 247 (2005) (“approximately one or two in every 2000 infants” is born intersex).

<sup>72</sup> ANNE FAUSTO-STERLING, *SEXING THE BODY* 51–53 (2000).

<sup>73</sup> Greenberg, *supra* note 63, at 268.

<sup>74</sup> See Intersex Society of North America, <http://www.isna.org/faq/frequency> (last visited Mar. 10, 2010) (charting the types of conditions and average frequency per condition).

<sup>75</sup> Intersex Society of North America, [http://www.isna.org/faq/what\\_is\\_intersex](http://www.isna.org/faq/what_is_intersex) (last visited May 4, 2010).

<sup>76</sup> Holmes, *supra* note 68, at 32.

uterus or sperm ducts), external genitalia, secondary sexual characteristics (e.g., facial hair), and sex of rearing (generally the sex assigned at birth).<sup>77</sup>

“Intersex” was not always the term used to describe this community. There have been a number of lexicological changes over time, particularly as societal attitudes shifted and the medical community’s perspective further developed. An early term used was “hermaphrodite,” and the language eventually moved to “intersex.”<sup>78</sup> People seeking to avoid the negative connotations associated with “hermaphrodite”<sup>79</sup> shifted to “intersex” and its synonym, “genital ambiguity.”<sup>80</sup> There has been a recent movement to label intersex conditions as “DSD” or “VSD,” for “disorders of sexual development,” “diverse sexual development,” or “variation of sexual development.”<sup>81</sup>

Dr. Alice Domurat Dreger offers three primary categories to describe the current medical intersex discourse: male pseudohermaphroditism, female pseudohermaphroditism, and true pseudohermaphroditism.<sup>82</sup> Under these categories, if an “ambiguous” individual has testicular tissue only, the person is a male pseudohermaphrodite; if ovarian tissue only, a female pseudohermaphrodite; and if one or more ovotestis,<sup>83</sup> a true hermaphrodite.<sup>84</sup> Some of the most common types of intersex conditions include complete androgen insensitivity syndrome (“CAIS”), partial androgen insensitivity syndrome (“PAIS”), congenital adrenal hyperplasia (“CAH”), Klinefelter’s Syndrome, and Turner Syndrome.<sup>85</sup>

CAIS and PAIS are genetic syndromes in which the internal reproductive organs differ from the person’s chromosomal sex due to an X chromosome defect.<sup>86</sup> The fetus develops testes but is unable to respond to

<sup>77</sup> *Id.* Another phrase used to refer to an individual’s psychological sex is “gender identity.”

<sup>78</sup> See e.g., Fausto-Sterling, *supra* note 72, at 31 n.\* (noting that members of the present-day intersex movement eschew the use of the term “hermaphrodite” and prefer “intersex”).

<sup>79</sup> *Id.*; Lev, *supra* note 71, at 355 (describing the intersex community’s reluctance to use the word).

<sup>80</sup> Holmes, *supra* note 68, at 32.

<sup>81</sup> Bromdal, *supra* note 71, at 54–55.

<sup>82</sup> See generally ALICE DOMURAT DREGER, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX 36 (1998).

<sup>83</sup> See *id.* (referring to “ovotestis” as an organ with both ovarian and testicular attributes).

<sup>84</sup> *Id.* As true pseudohermaphroditism is considered “extremely rare,” and as this section is intended to provide a basic survey of intersex conditions, only the more intersex conditions will be discussed here. See Dreger, *supra* note 82, at 37 (explaining true pseudohermaphroditism as a rare and less understood intersex condition).

<sup>85</sup> Lev, *supra* note 71, at 387–88. While this may not be a comprehensive list, and does not purport itself to be, it does include the majority of conditions. Klinefelter’s Syndrome and Turner Syndrome are examples of instances in which “ambiguous” genitalia can result from other conditions besides the three aforementioned categories. See Dreger, *supra* note 82, at 39.

<sup>86</sup> *Id.* at 387.

androgens; the genitals differentiate into the female pattern.<sup>87</sup> In PAIS, for instance, the androgen insensitivity is not complete and the external genitalia can appear typically male, typically female, or somewhere in between.<sup>88</sup> The cells have receptors that fail to respond properly, causing an irregularity in the development of the genitals.<sup>89</sup> The AIS individual has typically female external sex organs and will develop typically female secondary sex characteristics, but will have undescended testes instead of ovaries, absent uterus and cervix, and a vagina that is usually short or absent.<sup>90</sup> Women with AIS can have immature nipples and genitals that have not fully developed, and an absence of underarm and pubic hair, facial oil, or acne.<sup>91</sup> AIS individuals diagnosed during infancy often have surgery performed to remove the undescended testes.<sup>92</sup>

CAH occurs when there is a broken genetic “recipe” for making cortisone in the adrenal glands.<sup>93</sup> Because the recipe is broken, the adrenal glands may make an unusually high level of “virilizing” hormones:<sup>94</sup> they can make XX embryos have larger than average clitorises.<sup>95</sup> An anomaly of the adrenal function causes the synthesis and excretion of an androgen precursor, initiating virilization of an XX in-utero fetus.<sup>96</sup> As the virilization originates metabolically, masculinizing effects continue after birth.<sup>97</sup> CAH can cause the development of characteristics such as dense body hair, a receding hairline, deep voice, and prominent muscles.<sup>98</sup> Klinefelter’s Syndrome is a condition in which an individual with male external features has an extra X chromosome, creating an XXY karyotype.<sup>99</sup> While the physical effects range widely, testosterone production is generally limited for those

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<sup>87</sup> Lev, *supra* note 71, at 387.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 387–88.

<sup>92</sup> *Id.*

<sup>93</sup> Intersex Society of North America, <http://www.isna.org/faq/conditions/cah> (2009) (last visited Mar. 10, 2010). The surgery is often performed for more than its cosmetic or gender assigning effect; CAH is known to cause medical emergencies and the removal of the testes may be medically necessary. See Intersex Society of North America, [http://www.isna.org/faq/medical\\_risks/cah](http://www.isna.org/faq/medical_risks/cah) (2009) (last visited Mar. 10, 2010) (describing the medical risks associated with CAH). Adrenal glands refer to the glands on top of the kidneys that make various hormones and add them to the blood stream. *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Intersex Society of North America, <http://www.isna.org/faq/conditions/cah> (last visited Mar. 10, 2010).

<sup>99</sup> See Lev, *supra* note 71, at 388.

with Klinefelter's Syndrome.<sup>100</sup> They do not virilize as strongly as men without the condition,<sup>101</sup> and doctors often prescribe what they feel is necessary testosterone treatment throughout their lives.<sup>102</sup>

Turner Syndrome is a chromosomal condition occurring in females and is caused by a 45 XO karyotype, where the ovum is fertilized without any sex chromosomes or in which an error occurs early in cell division.<sup>103</sup> People with Turner Syndrome exhibit female external features, but do not develop secondary sex characteristics unless hormone therapy during puberty is provided.<sup>104</sup> Individuals with the Syndrome often need some level of estrogen treatment.<sup>105</sup>

As the Sydney newspaper<sup>106</sup> reported that Semenya may have both female genitalia and undescended testes, which likely accounts for her elevated testosterone levels,<sup>107</sup> some sought to classify her as an individual with an intersex condition, under the assumption that the report was true.<sup>108</sup> Professor Chris Trzepacz of Murray State University explained that "[s]he has partial AIS (androgen insensitivity syndrome) . . . [s]he is genetically male but is resistant to the male hormones such as androgens, and has the physical characteristics of a woman."<sup>109</sup> As intersex conditions vary and do not always provide a competitive "advantage," accounting for intersex conditions is more complex than it may appear.

#### D. *Intersex Legal Status*

The most prominent case outside of the U.S. involving an intersex individual's rights was decided in the Columbian Constitutional Court in 1999.<sup>110</sup> The Columbian court held that intersex children constitute a minority group entitled to special protection against prejudice and the resulting

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 389.

<sup>103</sup> *Id.* A 45 XO karyotype means that a chromosome is missing, as the typical amount is 46.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Magnay, *supra* note 43.

<sup>107</sup> *Id.*

<sup>108</sup> John Powers, *No Easy Solution in Gender Case*, BOSTON GLOBE, Sept. 15, 2009, at 2.

<sup>109</sup> Elaina Deren, *Professor Addresses Sexual Identity*, MURRAY STATE NEWS (KY.), Oct. 15, 2009, available at <http://www.thenews.org/news/professor-addresses-sexual-identity-1.2000923>.

<sup>110</sup> See Morgan Holmes, *Deciding Fate or Protecting a Developing Autonomy? Intersex Children and the Columbian Constitutional Court*, in TRANSGENDER RIGHTS 102, 102–19 (Currah et al., eds., 2006) (describing the case and its impact on intersex rights in Columbia); Bromdal, *supra* note 71, at 11 (same); Jo Bird, *Outside the Law: Intersex, Medicine and the Discourse of Rights*, 12 CARDOZO J. L. & GENDER 65, 66–67 (2005) (noting that the Columbian Court is the only court in the world to recognize that the treatment of intersex individuals can be a human rights violation).

consequences.<sup>111</sup> The court also suggested that where parental attitudes show prejudice, a court may deny support for parental consent to surgically “normalize” the child.<sup>112</sup>

Within the United States, the legal system still does not provide any protected legal status to intersex persons. The closest that the American system has come to addressing intersex issues arose within a procedural due process case involving an intersex prisoner.<sup>113</sup> In *Estate of DiMarco v. Wyoming Department of Corrections*, state prison officials consigned inmate Miki Ann DiMarco to administrative segregation for fourteen months in a high security prison<sup>114</sup> without providing a hearing to challenge their decision.<sup>115</sup> On appeal, DiMarco raised the issue of whether Wyoming had a constitutional duty to provide an opportunity to challenge the placement and conditions of confinement under the Fourteenth Amendment’s Due Process Clause.<sup>116</sup> The Court of Appeals for the Tenth Circuit held that state prison officials did not violate the Due Process Clause in their decision to confine DiMarco, as she did not have a protected liberty interest in her placement and conditions of confinement.<sup>117</sup> Because the case did not specifically address DiMarco’s rights as an intersex individual, it leaves an uncertain status for the intersex community in the United States.

Although there is little case law regarding the legal rights of intersex litigants, decisions affecting transgender litigants are also instructive here. In *Richards v. United States Tennis Association* (“USTA”), Dr. Renee Richards, a post-operative<sup>118</sup> transgender female tennis player, filed a lawsuit in New York challenging the USTA’s policy of using a sex chromatin test to determine whether she was adequately “female” to participate in the women’s tennis tournament.<sup>119</sup> The New York County Supreme Court held that “the requirement of defendants that this plaintiff pass the Barr body test in order to be eligible to participate in the women’s singles of the U.S. Open is grossly unfair, discriminatory and inequitable, and violative of her rights

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<sup>111</sup> Holmes, *supra* note 110, at 102.

<sup>112</sup> *Id.*

<sup>113</sup> *Estate of DiMarco v. Wyo. Dept. of Corr.*, 473 F.3d 1334 (10th Cir. 2007).

<sup>114</sup> *See id.* at 1337 (“At intake, DiMarco was housed in Pod 3, the most restrictive and isolated housing pod used for inmates confined to administrative or protective custody.”).

<sup>115</sup> *Id.* *See also* Cheryl Chase, Intersex Society of North America, *Federal Judge Finds Wyoming Prison Violated Constitutional Rights of Intersexual Prisoner* (2004), available at <http://www.isna.org/legal> (summarizing the *DiMarco* case).

<sup>116</sup> *Estate of DiMarco*, 473 F.3d at 1336.

<sup>117</sup> *Id.*

<sup>118</sup> In this instance, “post-operative” refers to a person who has undergone sex assignment or sex re-assignment surgery.

<sup>119</sup> *Richards v. U.S. Tennis Ass’n*, 400 N.Y.S.2d 267, 268 (1977).

under the Human Rights Law of this state.”<sup>120</sup> This case suggests that a U.S. court may decide in the future that the use of sex verification testing is also unfair to intersex athletes. Using the same line of reasoning as that of the New York Supreme Court, an intersex athlete could argue that fear of gender fraud does not justify sex verification testing. The issue is currently undecided in the United States.

## V. HISTORY OF SEX VERIFICATION TESTING AND THE IAAF POLICY

### A. *The Early Days of Mandatory Sex Verification Testing*

From the first athletic competition in ancient Greece until 1912, men dominated the Olympic Games.<sup>121</sup> As women entered international athletic competition in the twentieth century,<sup>122</sup> however, sports officials saw it as necessary to maintain distinct separators for men’s and women’s sports for fear of the “possibility of men attempting to impersonate female competitors for the purpose of gaining [an] unfair advantage.”<sup>123</sup> The increasing popularity of women’s sports contributed to the desire to prevent male athletes from taking advantage of their higher strength levels.<sup>124</sup>

The fear of gender fraud emerged shortly after the 1936 Berlin Olympics in which German athlete Hermann Ratjen<sup>125</sup> bound up his genitals and competed in the women’s high jump event, taking fourth place.<sup>126</sup> Officials only became aware of the incident due to the athlete’s confession, stating that the Nazis forced him to enter as a woman.<sup>127</sup> This is the only recorded

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<sup>120</sup> *Id.* at 272. Because only X chromosomes can contain Barr bodies, a Barr body test looks for X chromosomes. See *infra* notes 140–47 and accompanying text (detailing the origins and structure of the Barr body test).

<sup>121</sup> James C. Puffer, *Gender Verification: A Concept Whose Time Has Come and Passed?*, 30 *BRITISH J. SPORTS. MED.* 278, 278 (1996).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*; see e.g. Jean D. Wilson, *Sex Testing in International Athletics: A Small Step Forward*, 267 *J. AMER. MED. ASS’N* 850 (1986).

<sup>124</sup> See *supra* note 15 and accompanying text (describing the differences in the bodies of men and women as related to athletic competition); see also Olsen-Acre, *supra* note 24, at 224 (highlighting the emphasis placed on testosterone in women’s bodies to differentiate in sex verification testing). Interestingly, international athletic competition is only concerned about certain events being strictly divided into male and female categories; equestrian events, for example, are mixed-gender events. See Carlson, *supra* note 58, at 100 (“[F]ew Olympic spectators find it strange that men and women compete against each other in equestrian events, but the IOC is unlikely to introduce mixed-sex boxing anytime soon.”).

<sup>125</sup> Ratjen’s name is in dispute, as a name change may have been part of his masquerading as a female. See Dreger, *supra* note 82, at 7 (referring to the story of “Hermann Ratjen”); Gina Kolata, *Track Federation Urges End to Gene Test for Femailness*, *N.Y. TIMES*, Feb. 12, 1992, at A1 (referring to the athlete as Arjen).

<sup>126</sup> Olsen-Acre, *supra* note 24, at 212; Carlson, *supra* note 58, at 105.

<sup>127</sup> Kolata, *supra* note 125; Carlson, *supra* note 58, at 105.

incident of gender fraud to date, and it preceded the period in which sex verification testing was implemented.<sup>128</sup>

Although this was the only known incident of gender fraud, sports officials still implemented mandatory sex verification testing in 1948 at the British Women's Amateur Competition.<sup>129</sup> They required proof of an athlete's femininity from a physician.<sup>130</sup> Seeing the logistical difficulties in implementing this policy,<sup>131</sup> sports officials made new attempts at the 1966 European Athletics Championships in Budapest<sup>132</sup> and the 1967 Pan American Games through the use of an extensive physical inspection of external genitalia for female athletes.<sup>133</sup> Reportedly, this entailed the nude parading of 243 female athletes in front of a panel of doctors.<sup>134</sup> This form of testing was destined for failure, as female athletes complained about its intrusiveness and humiliation.<sup>135</sup> Officials sought alternative methods that would not require an external genital examination.

#### B. *From Physical Examination to Chromosomal Composition*

The creation of the Barr body test, designed in 1948 by Murray Barr<sup>136</sup> provided the foundation for what would later be mandatory sex chromatin testing. Barr discovered a microscopic chromatin mass (known as the Barr body) that is supposedly present in only females, allowing for an examination of the "genetic" sex of individuals.<sup>137</sup> The test was introduced at the 1968 Olympics<sup>138</sup> and was widely held to be a "solution" to the failed test-

<sup>128</sup> Kolata, *supra* note 125; Carlson, *supra* note 58, at 100. There was an incident in which a female athlete who competed at the 1932 Olympic Games was later discovered to have ambiguous genitalia at her autopsy. She was "a genotypic male (XY) born without chemical receptors that respond to androgenic hormones such as testosterone" and that the athlete had ambiguous genitalia, with no female sex organs, as a result. Pilgrim, *supra* note 58, at 507.

<sup>129</sup> Arne Ljungvist, *Gender Verification*, in *WOMEN IN SPORT* 183, 184 (Barbara Drinkwater, ed., 2000). While there is a twelve-year gap between the Ratjen incident and the implementation of this testing, the delay may partly be attributed to events leading to and including World War II.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> The event is also known as the European Track and Field Championships. See Puffer, *supra* note 121 ("The first tests . . . were conducted at the European Track and Field Championships.").

<sup>133</sup> *Id.*

<sup>134</sup> Ljungvist, *supra* note 129.

<sup>135</sup> *Id.*; Puffer, *supra* note 121; see Dreger, *supra* note 82, at 7 (noting that "not everyone was easy to sort by that means"). Interestingly, between five and six (research varies) female athletes did not show up for the testing and subsequently withdrew from competition; it was widely speculated (but unproven) that they withdrew for fear of failing the test. See Carlson, *supra* note 58, at 100 ("Their absence was construed as confirmation that they were afraid to fail the sex test.").

<sup>136</sup> Katrina Karkazis, *FIXING SEX: INTERSEX, MEDICAL AUTHORITY, AND LIVED EXPERIENCE* 45 (2008).

<sup>137</sup> *Id.*

<sup>138</sup> Dreger, *supra* note 82, at 7.



ing,<sup>139</sup> to “insure [sic] femininity in the competitors,”<sup>140</sup> and to “establish equality among athletes.”<sup>141</sup> Being certified “feminine”<sup>142</sup> depended on a microscopic analysis of cells to determine the pattern of chromosomes.<sup>143</sup> The Barr body test, however, created more problems than it solved. It disqualified some female athletes who did not have the requisite chromosomal composition<sup>144</sup> while qualifying male athletes for female competition.<sup>145</sup>

With the advancement of technology and the eventual disapproval of the Barr body test, the polymerase chain reaction (“PCR”) technique found a receptive audience.<sup>146</sup> PCR analysis was performed on DNA extracted from buccal smears.<sup>147</sup> The test used PCR to amplify DNA so that the SRY gene, a testis-determining gene, could be detected on the Y chromosome.<sup>148</sup> Using this form of testing, over 2000 tests were performed at the 1992 Barcelona Games and over 3000 tests were conducted at the 1996 Atlanta Games.<sup>149</sup> After the initial screening, there were fifteen tests to be reviewed in Barcelona and eight in Atlanta.<sup>150</sup> While the Atlanta results all came back negative, the Barcelona results were unconfirmed as they remained confidential.<sup>151</sup> There were still substantial problems with this testing, how-

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<sup>139</sup> Robert Ritchie, et. al., *Essay: Intersex and the Olympic Games*, 101 J. ROYAL SOC. MED. 8, 397 (2008). The chromosomal form of sex verification testing was introduced at the same time as drug testing, which continues today and also carefully inspects the hormonal levels of all athletes. *Id.*

<sup>140</sup> Carlson, *supra* note 58, at 103.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> One such female athlete was Eva Klobukowska, the Polish sprinter who was the first woman disqualified at the 1967 European Track and Field Championships, despite the fact that she was neither hypermasculine nor particularly more successful than other athletes. The test concluded that she was competing “unwittingly as a man.” She was quoted as stating, “I know what I am and how I feel . . . It’s a dirty and stupid thing to do to me.” She was later reported to have submitted to surgery in order to compete again. *Id.* at 104.

<sup>145</sup> *Id.*; see also Puffer, *supra* note 121 (“[F]alse positive and false negative results were not uncommon.”); see also Ritchie, *supra* note 139, at 395–99 (“Women with complete androgen insensitivity syndrome would have been barred from competing due to the presence of XY sex chromosomes despite an entirely female phenotype. Men with Klinefelter’s Syndrome would be eligible to compete as females due to the presence of the Barr body on cytological analysis.”).

<sup>146</sup> Puffer, *supra* note 121; Ritchie, *supra* note 139, at 397.

<sup>147</sup> *Id.*

<sup>148</sup> Puffer, *supra* note 121.

<sup>149</sup> Ritchie, *supra* note 139, at 398. Notably, not everyone agreed with the implementation of the testing. A renowned Spanish geneticist refused to assist with the testing on the basis that women were being unfairly disqualified on account of intersex conditions that would not have provided any physiological, biological, or genetic advantages in competition. *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

ever, causing female athletes like Maria Patino<sup>152</sup> and Santhi Soundarajan<sup>153</sup> to be questioned and left to defend their sex.

Meanwhile, complaints about the testing continued and the IOC sought a more permanent solution to a growing problem. In 1999, a major shift occurred when the IOC suspended mandatory sex verification testing. Replacing it with “recommended” testing, the IOC could request and recommend the testing on an individual basis.<sup>154</sup> From the 2000 Sydney Olympics onward, the testing was to be implemented only when “suspicions” arose.<sup>155</sup>

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<sup>152</sup> Spanish hurdler Maria Patino was found to have a negative sex chromatin test at the 1985 World University Games in Kobe. Despite having passed the test two years prior to the testing, the fact that she left her sex certificate in Spain caused her to undergo the testing again, which she failed. She challenged the test results and later had her female gender re-established, only after public humiliation and trying times. In Patino’s case, she is an XY female with AIS, thus technically carrying the chromosomal composition of a man, despite being physically female. Her condition was not one in which she would have been able to benefit from having “male” chromosomes. See Maria Patino, *Personal Account: A Woman Tried and Tested*, 366 LANCET S38 (2005) (detailing Patino’s personal account of the incidents in Kobe); see also Ljungvist, *supra* note 129, at 186 (summarizing Patino’s testing prior to Kobe); Fausto-Sterling, *supra* note 67, at 1–3 (accounting Patino’s experiences at the 1988 Olympics and the IOC’s ruling); Joe Leigh Simpson, et. al., *Gender Verification in the Olympics*, 284 J. AM. MED. ASS’N 12, 1568–69 (2000) (“Patino had complete androgen insensitivity.”); Olsen-Acre, *supra* note 24, at 218 (“Patino later said of her experience: ‘What happened to me was like being raped. I’m sure it’s the same sense of incredible shame and violation. The only difference is that, in my case, the whole world was watching.’”); Helen Y. Chang, *My Father Is a Woman, Oh No!: The Failure of the Courts To Uphold Individual Substantive Due Process Rights for Transgender Parents Under the Guise of the Best Interest of the Child*, 43 SANTA CLARA L. REV. 649, 669–70 (“Ms. Patino was stripped of her past titles and evicted from her national athletic residence . . . her scholarship was revoked and her boyfriend deserted her”); Greenberg, *supra* note 63, at 273 (“The irony of using the sex chromatin test to deter unfair competition is that Ms. Patino’s condition may have put her at a competitive disadvantage compared to the typical XX female athlete.”).

<sup>153</sup> More recently, Indian middle-distance runner Santhi Soundarajan, who won the silver medal in the 800 meter run at the 2006 Asian Games in Qatar and was stripped of her medal, also failed a sex verification test. See BBC NEWS, *Indian Athlete Fails Gender Test*, Dec. 18 2006, available at [http://news.bbc.co.uk/2/hi/world/south\\_asia/6188775.stm](http://news.bbc.co.uk/2/hi/world/south_asia/6188775.stm) (“Santhi Soundarajan, who took the silver in the women’s 800m race at the Asian Games in Doha, has been stripped of her medal.”); Emine Saner, *The Gender Trap*, GUARDIAN.CO.UK, July 30, 2008, available at <http://www.guardian.co.uk/sport/2008/jul/30/olympicgames2008.gender> (“Soundarajan, a 27-year-old Indian athlete, has had to endure public humiliation after she was stripped of her silver medal for the 800m at the Asian games in 2006 . . . [she] failed a gender test.”); *The Sad Story of Santhi Soundarajan*, THE TIMES OF INDIA, Jan. 9, 2007, <http://timesofindia.indiatimes.com/articleshow/1109135.cms> (“The Olympic Council of Asia stripped Santhi of the silver medal she won in the 800m in Qatar, saying she had been ‘disqualified as per the recommendations of the medical committee on a Games rule violation.’”).

<sup>154</sup> Ritchie, *supra* note 139, at 398.

<sup>155</sup> Simpson, *supra* note 152.

### C. IAAF Policy

While the IOC decided to abandon mandatory sex verification testing in 2000, the IAAF had already abandoned it in the early 1990s.<sup>156</sup> The IAAF brought together medical experts from around the world to deliberate on the necessity of testing.<sup>157</sup> A consensus emerged that overwhelmingly favored removing mandatory sex verification testing.<sup>158</sup> The group concluded that laboratory-based testing should be abolished and replaced with a medical assessment of all athletes.<sup>159</sup> This would include the required urine sample needed for drug testing under direct supervision, creating more difficulty for male imposters to pass as female athletes.<sup>160</sup>

Some of the provisions in the IAAF's current policy, entitled, "IAAF Policy on Gender Verification,"<sup>161</sup> include the following:

1. There will be no compulsory, standard or regular gender verification during IAAF sanctioned championships;

. . .

3. Any problems related to this issue are expected to be picked up by the national team doctors during health checks or by medical/doping delegates at specimen collection during doping control at major championships;

4. If there is any "suspicion" or if there is a "challenge" then the athlete concerned can be asked to attend a medical evaluation before a panel comprising gynecologist, endocrinologist, psychologist, internal medicine specialist, expert on gender/transgender issues. The medical delegate can do an initial check[.]<sup>162</sup>

The policy also notes that certain conditions should be allowed, such as complete or almost-complete androgen insensitivity syndrome, gonadal dysgenesis, Turner Syndrome, congenital adrenal hyperplasia, androgen producing tumors, and anovulatory androgen excess (or polycystic ovarian syndrome).<sup>163</sup> A "suspicion" of gender can be raised based on findings from the anti-doping control specimen collection, by an athlete or representative (who can approach the IAAF or national federation for advice and clarification), or another athlete or team can bring a "challenge" as brought forward to authorities at an athletic event. The national federation, the appointed

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<sup>156</sup> See Puffer, *supra* note 121 ("[T]he [IAAF] . . . brought together experts . . . to deliberate this issue. . . . [T]he consensus was overwhelmingly in favor of abandoning gender verification.").

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*; Myron Genel and Arne Ljungqvist, *Essay: Gender Verification of Female Athletes*, 366 LANCET SUPP. S41 (2005).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> IAAF *Position Statement*, *supra* note 12, at 1.

<sup>162</sup> *Id.* at 2.

<sup>163</sup> *Id.* The testing also allows for transgender athletes to compete after sex re-assignment surgery has been conducted and after hormone treatment has been administered. *Id.*

medical delegate, or the IAAF medical committee then handles the matter.<sup>164</sup>

The policy specifies the administrative process by which the testing is conducted.<sup>165</sup> The case is first brought to the attention of the relevant medical authority,<sup>166</sup> and the authority then decides if there is a case to investigate and the designated party to conduct the investigation.<sup>167</sup> The athlete is then referred to the investigating authority in confidence for further investigation and advice.<sup>168</sup> Once testing is complete, the verdict is passed to the national federation with a recommendation: direct the athlete to withdraw, permit the athlete to remain in the competition, or determine whether certain steps must be taken prior to competing (i.e., whether surgical or medical measures must occur before competition).<sup>169</sup>

## VI. THE CURRENT DEBATE ON SEX VERIFICATION TESTING

This Part will review the most common reasons cited to maintain and to abolish sex verification testing. The arguments supporting the testing rely on the desire to achieve competitive integrity and fairness in sports. Although these concerns are legitimate, this Part will indicate that the costs incurred in maintaining such integrity and fairness far outweigh the benefits of testing.

### A. *Reasons To Maintain the Testing*

Medical experts and sports officials offer a number of reasons to maintain recommended sex verification testing, the first of which is to prevent gender fraud.<sup>170</sup> Since Mr. Ratjen and the 1936 Berlin Olympic Games,<sup>171</sup> the international sports world has been preoccupied with the notion of gender fraud and has sought appropriate remedies.<sup>172</sup>

Other reasons include eliminating suspicions around questioned female athletes and to protect them from the kind of scandal, rumors, and suspicions to which Semenya has been subjected.<sup>173</sup> Also, the policy's mere exist-

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<sup>164</sup> *Id.*

<sup>165</sup> IAAF Position Statement, *supra* note 12, at 2.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> See *supra* Part V.A. and accompanying text (noting the initial purpose of sex verification testing).

<sup>171</sup> *Supra* notes 125–26 and accompanying text.

<sup>172</sup> See Puffer, *supra* note 121 (noting that as men have the competitive advantage, it appears tempting for a male to disguise himself as a female for the potential to excel in women's events).

<sup>173</sup> M.A. Ferguson-Smith & E.A. Ferris, *Gender Verification In Sport: The Need for Change?*, 25 BRITISH J. SPORTS MED. 1, 17 (1991).

tence serves as a deterrent factor for those who might commit gender fraud. Further, groups such as the IOC also cite the importance of protecting the sports world as an untainted arena,<sup>174</sup> thus holding sports in high regard as a form of human interaction with the potential to impact world and foreign relations.<sup>175</sup>

## B. Reasons To Abolish the Testing

### 1. Gender Fraud

Since the implementation of sex verification testing, there has not been a single case of a man masquerading as a woman.<sup>176</sup> Thus, there is no statistical or analytical data indicating that the testing has been effective in revealing any instances of gender fraud.

Additionally, some federations have already noted that the testing is not needed and will not serve any helpful purpose.<sup>177</sup> In 1997, the Canadian Academy of Sports Medicine (“CASM”) released a position statement advocating that “gender verification be eliminated from all competition.”<sup>178</sup> The statement noted that those found to have failed the testing because they were intersex were likely unaware of their condition or did not seek to exploit the condition.<sup>179</sup> Medical associations have also weighed in on the debate—the American College of Physicians (“ACP”) and the American College of Obstetricians and Gynecologists (“ACOG”) passed resolutions calling for a complete ban.<sup>180</sup>

### 2. History

Part of the concern over gender fraud is historical in nature. The basis of sex verification in the World War II and Cold War eras is important in determining its current worth. There were fears that Iron Curtain countries would substitute men in women’s competitions in order to achieve athletic gain and prestige, particularly during a time in which countries fought for symbolic dominance over world powers such as the United States.<sup>181</sup> With

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<sup>174</sup> *Id.*

<sup>175</sup> See INTERNATIONAL OLYMPIC COMMITTEE, OLYMPICS CHARTER (2010), available at [http://www.olympic.org/Documents/olympic\\_charter\\_en.pdf](http://www.olympic.org/Documents/olympic_charter_en.pdf) (noting the fundamental principles of “Olympism”).

<sup>176</sup> Fastiff, *supra* note 23 at 940; Ferguson-Smith & Ferris, *supra* note 173; Ljungvist, *supra* note 129, at 191.

<sup>177</sup> Carlson, *supra* note 58, at 151.

<sup>178</sup> Pamela Doig et al., *supra* note 18, at 1.

<sup>179</sup> *Id.* at 2.

<sup>180</sup> Carlson, *supra* note 58, at 106.

<sup>181</sup> Phyllis Randolph Frye, *The International Bill of Gender Rights vs. The Cider House Rules: Transgressors Struggle With the Courts Over What Clothing They Are Allowed To Wear on the Job*,

these fears largely absent today, it becomes more difficult to justify sex verification testing in the new millennium.

### 3. Media Scrutiny

The concern over gender fraud is not logical given that athletes are already placed under intense levels of media scrutiny that would likely expose gender fraud as it occurs. Athletes have been carefully followed because of drug testing, causing more media exposure than ever before. Access to the internet and social media has brought international sports news to people's fingertips. Of course, the media's presence becomes a double-edged sword to the athlete: while the world learned about Semenya from the media, it is also keenly attuned to and will direct attention to impropriety and cheating in international sports.

Further, contemporary athletic apparel exposes athletes' bodies in ways never previously seen. During the 1940s and 1950s, athletes wore looser and larger clothing. In what some have called an era of "Spandex,"<sup>182</sup> athletes today use sports apparel for competitive advantages. Modern sports apparel is both tighter and shorter than sports apparel from previous eras. As such, it puts athletes' bodies on display in an unprecedented way.

### 4. Subjectivity

A decision to test based on the suspicions of spectators, journalists, and other competitors leaves too much in the hands of external individuals<sup>183</sup> who can essentially define what is "suspicious" under the IAAF policy.<sup>184</sup> Spectators have been known to question athletes even when their gender and sex were not in dispute.<sup>185</sup> Fans of women's U.S. tennis in the 1970s and 1980s never challenged whether Martina Navratilova was female, but they certainly complained about her size, height, muscular stature, and aggressiveness on the court.<sup>186</sup> She was often criticized for being too manly, particularly when compared to athletes like Chris Evert, who was signifi-

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*Which Restroom They Are Allowed To Use on the Job, Their Right To Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133, 171-72 (2000).

<sup>182</sup> See *id.* at 172-73 ("A new way to verify gender was introduced - Spandex. . . There is no way for a man to hide himself and pretend to be a woman while vigorously competing in today's spandex sport outfits.")

<sup>183</sup> These are parties not mentioned in the IAAF policy. See Part V (explaining the IAAF policy).

<sup>184</sup> While the policy does not allow members of the public to call directly for the testing, such suspicions can easily influence athletes or national organizations standing to gain from calling for the testing on another athlete.

<sup>185</sup> See Pilgrim, *supra* note 58, at 535.

<sup>186</sup> *Id.*

cantly smaller in stature and some saw as being bullied by Navratilova.<sup>187</sup> The high level of subjectivity may quickly lead to the hyper-scrutinizing of female athletes and may shift society's understanding of adequate female gender presentation into unrealistic realms. This scrutiny brings drastic and harmful results where female athletes must defend their sex and gender presentation, despite having never violated any policies.

A corollary argument is that using sex verification testing to maintain equality or fairness in competition could lead to leveling the playing field in other ways. "If some women get disqualified for being extra strong, then why not also disqualify those with unusual height or more oxygen capacity?"<sup>188</sup> While the testing targets sex, the reasoning for its application becomes problematic when female athletes might have competitive advantages in other ways beyond chromosomal makeup.<sup>189</sup> This can quickly turn into regulating athlete's bodies in unfair and impractical ways.

The argument that sex verification testing has protected female athletes from ridicule and speculation has been disproved by the numerous stories of questioned female athletes. The testing has created significant embarrassment and controversy for many female athletes. Santhi Soundarajan,<sup>190</sup> Maria Patino,<sup>191</sup> and Caster Semenya are just a few examples of female athletes whose gender and sex were questioned, leading to extreme shame and mass public humiliation—not protection.<sup>192</sup>

## 5. Potential Internal Abuse

If female athletes can challenge another competitor's gender presentation, this can potentially lead to severe abuse of the right to seek the testing. Under the current conditions, a female athlete who is unsatisfied with her scores can request testing for any athlete who performed better than her. This can quickly give rise to demands for the disqualification of those athletes. If a female athlete petitions for the testing in a vindictive and vengeful manner, this erodes the testing's effectiveness. It can also diminish the

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<sup>187</sup> *Id.*

<sup>188</sup> Carlson, *supra* note 58, at 109.

<sup>189</sup> One such example is Flo Hyman, who had Marfan's Syndrome, a genetic disorder causing extra height (6'5" for Hyman). See Carlson, *supra* note 58, at 109 (detailing the story of Hyman's abnormal height). A similar question was posed when 14-time Olympic gold medalist and American swimmer Michael Phelps was found to have a faster recovery time from intense workouts due to his ability to flush out lactic acid faster than the average athlete. Alice Park, *100 Olympic Athletes to Watch*, TIME, July 24, 2008 (Magazine) (describing the condition).

<sup>190</sup> See *supra* note 153 and accompanying text.

<sup>191</sup> See *supra* note 152.

<sup>192</sup> See *supra* Part V (referencing other female athletes who have been subjected to high levels of scrutiny in sports media outlets).

purity and competitive integrity of international sports competition claimed to be the fundamental reason for maintaining the policy.

## 6. Gender/Sex Distinction

As people inspect female athletes and attempt to decide whether Semenya should be subjected to the testing, they conflate the distinctions between sex and gender, which affects all women as it perpetuates harmful sex stereotypes. Semenya was accused of being too “male,” conflicting with sociocultural understandings of how women should present the female gender. Because the testing measures Semenya’s chromosomes and hormones, what is tested does not have a connection to what is perceived as gender in society.<sup>193</sup> Lexicology may also provide further insight—in the early stages, it was called “femininity testing,”<sup>194</sup> implying that sex verification testing determines whether female athletes display an adequate female gender presentation.

For a number of athletes, their external appearance may not match their sex or chromosomal makeup. For example, a person may be physically male and may not be questioned for competition, but may have the karyotype of a female. In this case, the testing could technically disqualify an individual who was not questioned in the first place. Our misunderstandings of sex and gender are evident in sex verification testing.

## 7. Disparate Impact and Treatment of Female Athletes

It has never been documented that a female athlete has masqueraded as a male athlete, nor has there ever been a “fear of fraud in sports over the verification of the male gender.”<sup>195</sup> Consequently, the testing is utilized for only *female* gender fraud—the only athletes who must “prove” their gender are those participating in women’s events. As a result, sex verification testing disproportionately burdens female athletes in comparison with male athletes.

Moreover, sex verification testing stands in contrast to drug testing, which is performed on all athletes, regardless of gender. Because sex verification testing is gender-biased, it creates a non-uniform application in international sports competition.<sup>196</sup> While there have been studies indicating

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<sup>193</sup> See Olsen-Acre, *supra* note 24, at 213–15 (examining the disconnect between sex and gender).

<sup>194</sup> Ferguson-Smith and Ferris, *supra* note 173.

<sup>195</sup> Frye, *supra* note 181, at 186.

<sup>196</sup> See Carlson, *supra* note 58, at 104 (highlighting the story of Olympic high jump champion Debbie Brill, who was first “certified feminine” in 1972 and stating, “It is scary having to report to a ‘sex-control’ station. You go through all these, ‘what ifs.’ You know you are a girl, but what if the test doesn’t show that?”).



that drug testing is a form of gender policing,<sup>197</sup> the application is still gender-neutral.

From a feminist perspective, the testing is problematic as it places extensive emphasis on the presence of “male” hormones (such as testosterone and so-called other “sex” hormones) and does not place similar emphasis on the presence of “female” hormones.<sup>198</sup> The presence of male hormones in the female body has not been extensively studied,<sup>199</sup> creating difficulty in determining what are considered “appropriate” male hormone levels in female bodies. Sex verification testing and the bias inherent in scientific studies of sex and gender reinforce one another. The fact that there is little medical literature on this issue leads to a world in which sex verification testing is always focused on male hormones, reinforcing that the presence or absence of testosterone is key to sex differentiation. Also, different female bodies can have varying levels of testosterone, particularly for physically active women or women engaged in intensive sports training.<sup>200</sup> The prioritizing of the male hormone in testing that already negatively impacts female athletes further demonstrates the discrimination that female athletes face.

## 8. Disparate Impact and Treatment of Intersex Athletes

Sex verification testing also disparately impacts intersex athletes in the private and public spheres. No athlete has ever been known to take advantage of an intersex condition for athletic gain. This is further evidenced in that the testing has never found anyone misrepresenting his or her sex or gender, but has found athletes who have unknowingly competed with an intersex condition.<sup>201</sup> This may have been the case for Caster Semenya, who throughout her life has presented in the female gender, competed in women’s sports, and has been referenced with female pronouns.

Moreover, sports officials may wrongly assume that intersex female athletes have an advantage as they may have higher levels of testosterone typically associated with the Y chromosome. This assumption can unfairly disqualify intersex female athletes whose biological and chromosomal makeup, for example, may actually inhibit the effects of testosterone or “male” hormones.<sup>202</sup> In this instance, the testing technically and wrongly

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<sup>197</sup> See Olsen-Acre, *supra* note 24 (articulating the policing of gender using drug and doping testing).

<sup>198</sup> *Id.* at 224.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> Ritchie, *supra* note 139, at 398.

<sup>202</sup> See *supra* notes 86–92 and accompanying text (describing complete or partial AIS as an intersex condition in which the body cannot respond to or accept androgens or testosterone).

disqualifies an athlete who is neither committing gender fraud nor gaining from her biological makeup.

Sex verification testing can have a tremendous and lifelong impact for athletes suspected of having intersex conditions. It humiliates the individual and brings to light a condition of which the athlete may never have been aware, which can be a psychologically damaging experience and can lead to tragic results. For Santhi Soundarajan, the humiliation led to a suicide attempt and hospitalization. For Maria Patino, this produced worldwide and lifelong speculation that she was not female, even though she successfully challenged the testing. For Caster Semenya, this meant hiding from the media, withdrawing from subsequent competitions, asking for a break from university exams, and seeking support outside of the public sphere.<sup>203</sup>

Additionally, there is a severely high level of public attention and media speculation surrounding the individual, whether or not the person actually has an intersex condition. Additionally, every time the media alleges that an athlete is intersex, previous athletes' names are brought back into the spotlight.<sup>204</sup> While the IAAF and IOC revisit their policies regarding intersex athletes,<sup>205</sup> Semenya's name will continue to be in the news, regardless of the actual results. Should the IAAF or IOC decide to revise their policies, Semenya's story will revive memories of the reasons warranting those changes.

Another major concern for intersex athletes is that if sex verification testing defines what constitutes "male" or "female," it might lead intersex athletes to seek unnecessary sex-assigning surgical or medical remedies.<sup>206</sup> Particularly in the case of intersex athletes whose condition would not warrant remedial work, such surgery would be for "gender corrective" or "gender assignment" purposes.<sup>207</sup> Surgery would be performed simply to align the athlete's body to the idealistic and stereotyped definitions of "male" or "female," which are arbitrarily decided by the sports organization. In effect,

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<sup>203</sup> See *Traumatized Semenya Skips Exams*, BBC News, Oct. 15 2009, available at <http://news.bbc.co.uk/2/hi/africa/8308477.stm> (noting Semenya's request for an extension on her exams).

<sup>204</sup> News reports have demonstrated how Semenya's case brought back into the spotlight names like Patino and Soundarajan, even though they are no longer competing. In a number of the aforementioned articles, their names were included besides that of Semenya.

<sup>205</sup> See *IOC To Discuss "Ambiguous" Gender Cases*, CBS NEWS SPORTS, Oct. 27, 2009, available at <http://www.cbsnews.com/stories/2009/10/27/sportsline/main5425555.shtml>.

<sup>206</sup> This can occur in the context of intersex minors. See Lev, *supra* note 71, at 366–68 (explaining how parents of intersex children often agree to such surgeries under the guise that they are medically necessary).

<sup>207</sup> See Carolynne Juarez, Posting to Blog of San Jose Explosive Training Examiner, <http://www.examiner.com/x-22797-San-Jose-Explosive-Training-Examiner-y2009m12d11-IAAF-will-pay-for-Semenyas-surgery-if-she-fails-test> (Dec. 11, 2009 4:27 PM) ("This announcement seems to indicate acknowledgment that Castor [sic] Semenya is intersexed, and that some form of medical treatment will be required to protect Semenya's health").

this leaves the organization with the disturbing ability to indirectly alter human bodies to fit within their policies.<sup>208</sup>

### 9. Privacy Interest

Another problem specific to the Semenya incident is the unprofessional and improper handling of the testing and the lack of privacy during the process. It is tragic that Semenya's sex, gender, and body have been subjected to public scrutiny amidst claims that she is intersex, and the extensive media attention will plague her for the rest of her life. One commentator aptly noted that while the IAAF permitted Semenya to keep the gold medal from the Berlin Championships, the public humiliation and speculation will remain with her long after people forget about her win.<sup>209</sup> Many say that she was not treated with basic human dignity.<sup>210</sup> Sports columnist Tim Dahlberg succinctly summarizes the situation:

Even if Semenya gets the green light, it's hard to imagine how she can run knowing every eye in every stadium will be studying her intently, trying to determine if she is really a he. Yes, it will be nice if track officials make amends by allowing her to keep her gold medal and \$60,000 first prize. *Would be even nicer if they could give her back her dignity, too.*<sup>211</sup>

This experience is not uncommon for athletes accused of gender fraud. The handling of this situation directly contradicts the argument that sex verification testing maintains the pureness and competitive integrity of the sport or protect athletes from potential scandal and public ridicule. This reality only presents a heartbreaking story of a nineteen-year-old who attempted to compete honestly and fairly and whose severe and abusive mistreatment was displayed for the world to see.

### 10. "Suspicious" Model

The current IAAF policy is based on a model of suspicion; a female athlete who is considered "suspicious" may be subjected to testing. This can cause other female athletes to use the testing as a weapon based on the suspicious model. Comments from female athletes at the Berlin Champion-

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<sup>208</sup> See *id.* (highlighting the IAAF's offer to pay for Semenya's surgery, should it be determined that she needs one).

<sup>209</sup> Tim Dahlberg, *The Shameful Case of Caster Semenya*, ASSOC. PRESS, Nov. 21, 2009, available at <http://abcnews.go.com/Sports/wireStory?id=9145884>

<sup>210</sup> There is also an indication that Semenya faced earlier humiliation when members of opposing sports teams previously demanded a genital examination for Semenya in South Africa. *Id.* While research and studies are not extensive in this area, it would be notable to compare the experiences of athletes who have been subjected to prior ridicule and speculation, similar to the allegations set forth here.

<sup>211</sup> Dahlberg, *supra* note 209 (emphasis added).

ships whose scores were lower than Semenya's suggested support for the testing and anger at the possibility of an intersex athlete winning.<sup>212</sup>

Also, because the testing is "recommended," the organization requires the athlete's consent to proceed. Failure to do so can quickly become subject to intense media speculation and an adverse inference by sports officials and the public that the individual is intersex. In effect, the testing has more compulsory qualities than the policy acknowledges. When an organization requests the testing, it is akin to the force of law, and an athlete faces potential disqualification.

### VIII. LEGAL IMPLICATIONS OF SEX VERIFICATION TESTING

For an athlete seeking to appeal the validity of the testing or results thereof, there may be options for seeking a legal remedy. This next section will examine the most appropriate jurisdiction to challenge the results and validity of the testing and will also examine the possible legal actions available.

#### A. *The Court of Arbitration for Sport*

For international athletes seeking to challenge the actions of the Olympics Movement, the IOC, or one of the international federations (such as the IAAF), they must initiate a complaint with the governing organization.<sup>213</sup> For example, the IOC can render final and binding decisions. Its functions are akin to an administrative agency in that it regulates sports jurisdiction policies and international athletes as well as being the venue in which athletes would exhaust their remedies before seeking alternatives. The IAAF operates in a similar manner, as athletes would lodge a complaint and have the IAAF decide their case before heading to the Court of Arbitration for Sport ("CAS").

For an athlete seeking to appeal the results of a sex verification test or challenge the testing itself, the option for appeal lies with the CAS.<sup>214</sup> Created by the IOC and made public in 1984, the purpose of the CAS was to

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<sup>212</sup> See Michael Kimmel, *Bigotry of the Binary*, HUFFINGTON POST, Aug. 24, 2009, [http://www.huffingtonpost.com/michael-kimmel/the-bigotry-of-the-binary\\_b\\_267572.html](http://www.huffingtonpost.com/michael-kimmel/the-bigotry-of-the-binary_b_267572.html) ("She was accused, by one of her rivals, of actually being a man . . . [T]he bitterly disappointed Italian runner, Elisa Cusma, who finished sixth behind Semenya, said 'These kind of people should not run with us. For me, she is not a woman. She's a man' . . . 'Just look at her,' complained Mariya Savinova, the Russian runner who finished fifth in the race.'").

<sup>213</sup> Court of Arbitration for Sport, <http://www.tas-cas.org> (last visited Mar. 12, 2010). See also Court of Arbitration for Sport, <http://www.tas-cas.org/adhoc-rules> (last visited Sept 5, 2010) (stating that if a claimant is challenging the actions of the IOC in the CAS, "the claimant must, before filing such request, have exhausted all the internal remedies available to him/her pursuant to the statutes or regulations of the sports body concerned.").

<sup>214</sup> *Id.*

have a legal institution providing jurisdiction for international sports-related disputes<sup>215</sup> and to keep these cases out of national court systems.<sup>216</sup> In 1994, the International Council of Arbitration for Sport (“ICAS”)—the organization that directed the structure of the CAS—created two divisions: the Arbitration Division and the Appellate Division.<sup>217</sup> The ICAS later added an Ad Hoc Division to shorten the appeals process and has existed since the 1996 Atlanta Olympic Games.<sup>218</sup>

Since the CAS currently arbitrates and decides appeals on international sports’ drug testing,<sup>219</sup> it is likely the most appropriate venue for sex verification testing appeals. Additionally, its jurisdiction was specifically designed for international sports disputes.<sup>220</sup> Further, the CAS has become a type of court of last resort for international sport-specific jurisdiction; the IOC has subjected itself to CAS jurisdiction,<sup>221</sup> and national courts recognize it.<sup>222</sup> For an athlete seeking to challenge the specific results or the validity of the testing itself, the CAS becomes the final word, as with drug testing cases.<sup>223</sup>

## B. CAS Jurisdiction

One of the parties responsible for making a complete debacle of Semenya’s sex verification testing is the ASA, an IAAF-recognized national federation.<sup>224</sup> The ASA board and several senior managers were suspended over the Semenya incident.<sup>225</sup> Also, the ASA President Leonard Chuene admitted to lying to the South African public about not having any knowledge of gender tests conducted on Semenya.<sup>226</sup> The ASA recognized its

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<sup>215</sup> Anita L. DeFrantz, *Which Rules?: International Sport and Doping in the 21st Century*, 31 *Hous. J. INT’L L.* 1, 20–21 (2008).

<sup>216</sup> *Id.* The Code of Sport-Related Arbitration and Mediation, also part of the CAS, also serves a critical function in international sports arbitration. *Id.*

<sup>217</sup> *Id.* at 22.

<sup>218</sup> *Id.* at 23. The IOC subjected itself to the jurisdiction of the CAS. *Id.* at 24.

<sup>219</sup> For the most recent list, see Court of Arbitration for Sport, Recent Decisions, <http://www.tas-cas.org/recent-decision> (last visited Dec. 18, 2009).

<sup>220</sup> See DeFrantz, *supra* note 222, at 19–21 (describing the IOC’s extensive involvement in the creation of the CAS to decide cases arising from its events).

<sup>221</sup> *Id.*

<sup>222</sup> Brendan I. Koerner, *Where Do Athletes Go to Court? Why, to the Court of Arbitration for Sport, of Course*, *SLATE*, July 1, 2004, available at <http://www.slate.com/id/2103285/>.

<sup>223</sup> *Id.* There has been no report to date of an appeal being successfully filed outside of the CAS.

<sup>224</sup> See *supra* note 38 and accompanying text (noting the ASA’s relationship to the IAAF). The other organization largely blamed is the IAAF.

<sup>225</sup> Ariel Levy, *Either/Or; Sports, Sex, and the Case of Caster Semenya*, *NEW YORKER*, Nov. 30, 2009, at 47.

<sup>226</sup> *Id.*

errors and publicly apologized to Semenya, her family, the president of South Africa, and all South African citizens.<sup>227</sup>

As the ASA is the party whose actions are being questioned, claims about the handling of the testing would involve the ASA as the defending or charged party. A key question arises in attempting to lodge a formal complaint against the ASA: where does an athlete in Semenya's situation bring such claims and what law governs the organization's actions?<sup>228</sup>

One option would be to subject the ASA to the South African court system. Issues facing an athlete wishing to bring claims against an IAAF-related organization are those of jurisdiction and state action. In Semenya's case, and similar to the United States Constitution, the South African Constitution Bill of Rights only applies to the State and agents thereof, not private entities.<sup>229</sup> There are exceptions made for private parties, but such a legal claim would be an uphill battle, as the nature of the right and the duty by such right is taken into account, and application to private parties is generally frowned upon.<sup>230</sup> This also may not foreclose the possibility of a regular tort claim in South Africa.

The ASA's distasteful, unprofessional, and embarrassing actions are not necessarily subject to the jurisdiction of its country's court system, however, as the South African Constitution applies to state actors. Moreover, more national court systems are conceding international sports jurisdiction to the CAS.

Another possibility is to seek legal remedies from the ASA's actions through international human rights law and the United Nations ("UN"), of which South Africa is a member nation. An athlete may attempt to seek

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<sup>227</sup> See Athletics South Africa, *ASA Apologises on Their Handling of the Caster Semenya Gender Verification Processes*, Dec. 5, 2009, available at <http://www.athletics.org.za/News/FullNewsDetail.aspx?NewsID=395> ("Consequently, Athletics South Africa wishes to publicly and unconditionally apologise to Caster Semenya and her family, the President of South Africa as well as to all South Africans for the handling of her gender verification processes and the subsequent aftermath."). Arguably, the apology was too late and subsequently meaningless. See *SA athletics chief suspended over Semenya sex tests*, CNN, Nov. 5, 2009, available at <http://www.cnn.com/2009/SPORT/11/05/athletics.semenya.chuene.africa/index.html>.

<sup>228</sup> While other parties, such as the South African government, may also be able to successfully sue or lodge a formal complaint against the ASA, this discussion will only examine legal remedies from the athlete's perspective.

<sup>229</sup> Johan De Waal, *Chapter 2. Constitutional Law* in *INTRODUCTION TO THE LAW OF SOUTH AFRICA* 55, 89 (C.G. Van Der Merwe & Jacques E. du Plessis, eds. 2004). There are exceptions made for private parties, but such a legal claim would be an uphill battle, as the nature of the right and the duty by such right is taken into account, and application to private parties is generally frowned upon. *Id.* Additionally, this may not foreclose the possibility of a regular tort claim in South Africa.

<sup>230</sup> *Id.*

remedies using the Universal Declaration on Human Rights<sup>231</sup> as a way into the UN Human Rights Commission. This alternative is flawed, however, because it would mean trying to subject the ASA to UN law. This is problematic for the same reason as subjecting the ASA to South African law—it is an IAAF-related organization and the UN typically applies to member nations and not the actions of individual entities.<sup>232</sup> Moreover, the Universal Declaration details a common standard of achievement for all member nations, rather than acting as a document of law.<sup>233</sup>

Despite these hurdles, this does not necessarily leave an athlete without a remedy. The ASA is an IAAF-related organization, which is recognized by the IOC, which is subject to the jurisdiction of the CAS. Consequently, the jurisdictional chain may successfully link the ASA to the CAS, thereby subjecting its actions to CAS jurisdiction.<sup>234</sup> An athlete could raise a com-

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<sup>231</sup> Universal Declaration of Human Rights, G.A. Res. 217A, U.S. GAOR, 3d Sess., 1st. plen mtg., U.S. Doc A/810 (Dec. 12, 1948), available at <http://www.un.org/en/documents/udhr/>. While this section examines the privacy provision, a number of other provisions of the Universal Declaration may also be applicable. First, under Article I of the Universal Declaration of Human Rights, “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Under this provision, Semenya may be able to apply this to assert that was she was not treated with basic dignity, was denied her fundamental individual rights, and more specifically, was denied her individual right to privacy. The use of this provision, standing alone, however, may prove to be difficult, given that the article itself is quite broad in nature. Another article to examine is Article II, which states that “Everyone is entitled to all the rights and freedom set forth in this Declaration, without distinction of any kind, such as . . . sex . . .” Should Semenya wish to pursue her claims based on international law, and given the cooperative nature of international sports and the use of sports to unify countries and nations, Semenya may be able to assert a form of equal protection claim based on sex under this article. Interestingly, as it specifically mentions sex, Semenya’s potential intersex status may allow a viable claim under this article. Article III may provide further support for a claim based on the right to privacy, as it says “Everyone has the right to life, liberty, and security of person.” Under this article, Semenya may be able to claim that the media’s invasions into her private life violate this article, as the media’s portrayal of her body, character, and life were questioned and ultimately subjected to mass humiliation and public ridicule. The privacy interest can be tied to the interest to life and liberty, as the invasion of privacy attacks the right to live freely, without public condemnation, and without constant speculation and coverage. Finally, Article V states that “No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.” While the rough equivalent in the U.S. Constitution traditionally applies to corporal punishment and capital punishment, the United Nation’s provision including “degrading treatment” is key to a potential claim by Semenya. She may be able to raise claims of defamation under this article, as the media’s public treatment of her may enact the “degrading treatment” clause of the article. This may be a more difficult claim to assert, however, particularly given that the article typically applies within a criminal and not civil context.

<sup>232</sup> *Id.*

<sup>233</sup> There have been exceptions to the general principle, but the document was not created as one of law, nor does it purport to be one.

<sup>234</sup> See also *Pistorius v. Int’l Ass’n of Athletic Fed’ns*, CAS 2008/A/1480, 2 (May 16, 2008), available at <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1480.pdf> (describing the IAAF Constitution specifically conceding jurisdiction to the CAS).

plaint to the ASA, IAAF, or IOC, and ultimately appeal the decision to the CAS.

### C. CAS and Judicial Function

The Caster Semenya story has demonstrated the extent to which sports organizations are unequipped and unprepared to handle these situations, leaving a crucial space to be filled. The CAS, which is a reputable, independent, and specialized decision-maker in the international sports world, can play a major role as the governing judicial system poised to decide these cases. Because sex verification testing parallels drug testing in history, purpose, and effect, it is helpful to compare the jurisdiction and case law associated with drug testing to sex verification testing. Moreover, as the CAS has decided appeals of drug testing cases, it can also serve to decide appeals of sex verification testing results.

Additionally, the CAS is the proper venue because it has already faced appeals from the IAAF based on an athlete's supposed physical advantages. Sharing some qualities with Semenya, South African sprinter and double amputee Oscar Pistorius successfully appealed the IAAF decision to disqualify him for the use of his "Cheetah" prosthetic legs worn during competition.<sup>235</sup> The IAAF claimed that the legs were in violation of IAAF Competition Rule 144.2(e), which bans the use of technical devices, as they allegedly provided him with an advantage over able-bodied athletes.<sup>236</sup> Neither party challenged the jurisdiction of the CAS, which asserted its authority to overturn the decision of the IAAF.<sup>237</sup>

On *de novo* review, the CAS raised the issue of whether the IAAF decision wrongly determined that Pistorius's use of the "Cheetah" prosthetic legs contravened Rule 144.2(e).<sup>238</sup> The IAAF acknowledged that it had the burden of proof<sup>239</sup> to show that Pistorius' use of his prosthetic legs provided what the court deemed an "overall net advantage,"<sup>240</sup> and presented evidence, testimony, and statistics in support of their position.<sup>241</sup> The CAS found the evidence insufficient, finding that the IAAF could not demon-

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<sup>235</sup> *Id.* at 3.

<sup>236</sup> *Id.* at 5.

<sup>237</sup> *Id.* at 6.

<sup>238</sup> *Id.* at 9.

<sup>239</sup> The CAS found that "beyond a reasonable doubt" was too high a burden, instead applying the "balance of probability" standard. *Pistorius v. Int'l Ass'n of Athletic Fed'ns*, CAS 2008/A/1480, 14 (May 16, 2008), available at <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1480.pdf>.

<sup>240</sup> *Id.* at 13.

<sup>241</sup> *Id.* at 7-9.



strate that Pistorius would gain from an “overall net advantage over other athletes.” The CAS reversed the IAAF decision to disqualify Pistorius.<sup>242</sup>

The Pistorius case is a key example in demonstrating how a case similar to that of Semenya or any other athlete being investigated for gender ambiguity could be decided. Should the IAAF, ASA, or any other governing body attempt to disqualify an athlete based on gender ambiguity, the organization may find itself required to present evidence that the intersex condition provides an unfair advantage. As the IAAF failed to meet this burden in the Pistorius case, and as certain intersex conditions do not provide an athletic competitive advantage, an athlete in Semenya’s position may find that the CAS is the most appropriate and favorable venue to appeal the results.

The key question the IAAF must ultimately address is whether, on a broader level, its policy of recommended sex verification testing should continue. The next section examines the IAAF’s options and evaluates their advantages and disadvantages.

#### VIII. POTENTIAL SOLUTIONS AND AREAS OF FUTURE RESEARCH

The simplest option is to maintain the testing in its current form.<sup>243</sup> The critical concerns associated with this option have previously been outlined, and the IAAF could face the possibility of future legal action and additional troubles. It also completely ignores the reality of the existence of alternative gender identities and gender and sex-ambiguous individuals. Intersex athletes can and will continually be ensnared by the policy.

##### A. Alternatives to Sex Verification Testing

Should the IAAF remain committed to the notion that the testing is necessary, it must provide alternatives to its dysfunctional testing scheme. One alternative is to conduct a thorough examination that tests a multitude of factors in addition to sex and gender.<sup>244</sup> Sex would be just one of a variety of medical, psychological, physical, biological, and hormonal factors accounted for in the testing. It would accommodate all athletes and would include drug testing, a physical examination, and any other tests that iden-

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<sup>242</sup> *Id.* at 18. The CAS also accounted for the IAAF’s sudden change in policy shortly before Pistorius was to compete, finding that the change was intended to specifically target Pistorius to disqualify him.

<sup>243</sup> Sex verification testing’s validity was most recently questioned during a January 2010 symposium of experts in Miami, Florida. The group focused on intersex conditions as that of medical concerns and concluded that athletes with gender ambiguities may be advised to have treatment and/or surgery to continue competing at the international level. See O’Reilly, *supra* note 21.

<sup>244</sup> Arne Ljungqvist & J.L. Simpson, *Medical Examination for Health of All Athletes Replacing the Need for Gender Verification in International Sports*, 267 J. AM. MED. ASS’N 6, 850 (1992).

tify cheating or fraud. The disadvantages to this system lie in the high levels of financial and administrative burdens.<sup>245</sup>

Another possibility that would relieve the financial and administrative burdens is to conduct the same form of testing on a randomized level for all athletes. It may allay the fears of those who firmly believe in maintaining sex verification testing and find a middle ground between proponents and opponents of the testing, while lessening the financial and administrative burdens.

Despite what might seem like a major setback in the financial and administrative burdens that lie in this form of testing, however, international athletic competition currently performs drug testing on all athletes. The proposed testing would be an expanded version of what already exists. Also, given the level of media scrutiny and erosion of fairness, pureness of the sport, and competitive integrity that the IAAF has faced, the financial and administrative burdens may comparatively be a small price to pay.

#### B. *Abolish Sex Verification Testing Altogether*

The final proposal and what this Note advances is to abolish sex verification testing altogether. In so doing, the IAAF would follow in line with organizations such as the CASM, ACP, and ACOG, all of which have understood the grave complications of conducting the testing for the athlete, the organization, and the public.

The notion of “verifying” sex is extremely problematic; sex verification testing has flaws in its purpose, application, and effect. Some have asserted that the only way to verify an athlete’s sex is to ask the individual.<sup>246</sup> Moreover, athletes competing at the international level are already cognizant of the rigorous and invasive drug testing they will face prior to competition. Drug testing is so invasive as to involve sports officials inspecting athletes urinating in order to avoid contamination. This high level of inspection would also serve to find whether an individual is committing gender fraud<sup>247</sup> without any additional financial or administrative burdens. Drug testing is also routine, as all individuals must subject themselves to it, whereas sex verification testing is unpredictable in its application under the recommended version.

Another reality presented is one that surfaces from the story of Caster Semenya—the media would likely not allow an athlete to commit gender fraud. In an age of constant communication including television, cell

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<sup>245</sup> It may not be fair to weigh such concerns against those of the athlete’s privacy and dignity; the weight given to such factors is questionable.

<sup>246</sup> Ljungqvist & Simpson, *supra* note 244.

<sup>247</sup> Ljungqvist, *supra* note 133, at 191–92.

phones, the Internet, and various handheld devices, news coverage is now ubiquitous. Combined with the presence of sports in society, it would be a Herculean task to successfully commit gender fraud with such intense coverage. While the media can be overly scrutinizing and critical at times, media scrutiny may provide an additional layer of protection from gender fraud.<sup>248</sup> Athletes today must be aware that committing gender fraud places their careers at risk. Finally, athletes are also subjected to visual scrutiny in their current sports and athletic apparel. Nothing is left to the imagination when a typical athletic outfit consists of tight elastic and Spandex material. Athletes do everything possible to gain the most competitive edge, inadvertently revealing significant portions of their body.

## X. CONCLUSION

While mandatory sex verification testing has been abandoned and replaced with a recommended form that seeks “suspicious” athletes under the IAAF policy, the testing, as applied, disproportionately impacts female intersex athletes in international athletic competition. For Caster Semenya, undergoing testing meant enduring intense media frenzy, speculation, mass ridicule, and humiliation.

For a form of testing rooted in a model of gender fraud that has never occurred since the advent of the testing, its ineffectiveness seriously calls into question its necessity and leaves doubt as to why this anachronism of international sports competition still exists. It may be a mere inconvenience for some athletes, but gender verification testing has permanently scarred Caster Semenya’s career. Moreover, changing the testing from a mandatory to a recommended form has only aggravated the situation, as its “suspicious” model is problematic in language, application, and effect.

It is possible to completely abolish the testing and allow the current drug testing policies to maintain the integrity and honesty of the games. Because all athletes are subject to drug testing, drug testing treats male and female athletes equally. There are a number of alternatives available, including randomized testing or conducting a thorough physical examination. The most appropriate solution, however, is to abolish sex verification testing altogether.

Sex verification testing never had and never will have an appropriate place in international sports competition. The IAAF should see to it that sex verification testing’s cleats are permanently hung-up and given their over-due retirement.

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<sup>248</sup> This is not necessarily true of drug and doping testing, which can be conducted without any external factors to trigger media attention. Among other reasons, the lack of visibility with drug use warrants the use of such testing.