

# FOREWORD

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Historically, debates about what it meant “to be a woman” for purposes of sport were largely confined to elite sports circles. That changed in 2009, when it was announced that South African runner Caster Semenya, the just-crowned world champion in the women’s 800 meters, had been subjected to gender-verification testing. Fellow competitors were outspoken: Semenya was not a woman, they said, and it was unfair to allow her to compete in the women’s category. “These kind of people should not run with us,” said Italian runner Elisa Cusma, “For me, she is not a woman. She is a man.”<sup>1</sup> “Just look at her,” said Russian runner Mariya Savinova.<sup>2</sup>

The controversy set off debates around the world about whether and why sex segregated sports are justified and how eligibility determinations for the women’s category should be made. Suddenly, in social media and the popular press, at coffee shops, and in chats at the local grocery store, people who had rarely paused to question issues of biological sex, gender identity, or affirmative action in sports debated Semenya’s case, and what it meant for conceptions of binary sex categories. It also inspired this volume, in which scholars from gender studies, law, philosophy, and biology bring insights to bear on an issue that is important, not only to sport, but to cultural debates about gender and sex more broadly.

Ara Wilson provides essential vocabulary, distinguishing sex from gender and gender from gender identity, and from that background, explains that debates about eligibility for the protected category of women’s sports can be divided into two camps: those who favor a test of gender identity and those who favor a test of biological sex. Those favoring “criteria based on biology . . . would establish eligibility based on measurable biological differences associated with sex.”<sup>3</sup> Those favoring criteria based on gender “propose that eligibility to compete in women’s sports be based on an athlete’s gender identity, as determined by either self-identification or legal sex status.”<sup>4</sup> Wilson argues that, while significant time and

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This article is also available at <http://lcp.law.duke.edu/>.

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1. Ariel Levy, *Either/Or: Sports, Sex, and the Case of Caster Semenya*, *NEW YORKER* (Nov. 30, 2009), <https://www.newyorker.com/magazine/2009/11/30/eitheror> [<https://perma.cc/M5CZ-L5HA>].

2. *Id.*

3. Ara Wilson, *Women’s Sports and the Forgotten Gender*, 80 *LAW & CONTEMP. PROBS.*, no. 4, 2017, at 8.

4. *Id.*

energy is spent elaborating and assessing the science of sex differentiation, little time is spent parsing the general category of gender. She concludes that focused reflection on the category of gender can clarify some of the murkier areas of debate about the identity of athletes and that gender studies as a discipline has much to offer in this debate.

Mary Anne Case laments the common tendency to begin a history of women's sports as originating in the late nineteenth or even the twentieth century. A longer historical perspective reveals that "a culture's openness to women's participation in sports was tied to whether that participation was seen to have a heterosexual payoff."<sup>5</sup> Case explains that "[i]n ancient Greece and Africa as well as in medieval and early modern Europe," female physical fitness was seen as conducive to reproductive fitness: "[a] successful female competitor was seen as a desirable mate."<sup>6</sup> Beginning "[i]n the nineteenth century," female athleticism was not only viewed as "unattractive, but strenuous physical exercise was thought to risk physiologically compromising her reproductive capacity."<sup>7</sup> She argues that the commonplace "progress narrative"<sup>8</sup> about women's sports is misguided because it "begin[s] at precisely the time women were seen as least suited to participate in sports."<sup>9</sup> Case concludes by reflecting on the evolution of women's sport in the modern period, contributing the important historical point that at least some contemporary competitions—she features boxing as her final example—actually bring us back to a past when female athletes were not hamstrung by Victorian notions of fragility and incapacity but were, rather, highly valued as women and even as mothers for their physical strength and prowess.

Patrick Shin engages in a values-driven analysis of sex segregation in sport. He explains that this analysis must be "sensitive to two distinct sets of values or perspectives . . . [those] that are 'internal' to the institutions of sport" and those "that are 'external' to sport."<sup>10</sup> A perspective from within sport "focuses primarily on considerations rooted in the ethos of athletic competition"<sup>11</sup> whereas a perspective external to sport "focuses primarily on considerations that relate to broader social norms such as anti-discrimination principles and notions of equality."<sup>12</sup> Applying this analysis "reveals, especially when it reaches the difficult terrain of the appropriate treatment of transgender athletes, [] that solutions that may be consistent with the values that are internal to sport may not be acceptable from the external vantage point of equality and anti-

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5. Mary Anne Case, *Heterosexuality as a Factor in the Long History of Women's Sports*, 80 LAW & CONTEMP. PROBS., no. 4, 2017, at 26.

6. *Id.*

7. *Id.* at 26–27.

8. *Id.* at 28.

9. *Id.* at 26.

10. Patrick Shin, *Sex and Gender Segregation in Competitive Sport: Internal and External Normative Perspectives*, 80 LAW & CONTEMP. PROBS., no. 4, 2017, at 48.

11. *Id.*

12. *Id.*

discrimination.”<sup>13</sup> Still, Shin, concludes, the “difficult cases” are not easily solved by a rule that would have external values preempting internal ones because the values of “competitive sport are so deeply entangled in traditional social conceptions of sex and gender that” it is not obvious what exactly the “external” value of gender equality requires.<sup>14</sup>

Doriane Coleman pursues the question whether replacing sex with gender in law and policy is a cost-free proposition, or else best on balance given our sense of what Shin describes as the values internal and external to sport. In this article, she provides an answer in the context of elite sport. Employing standard equal protection analysis, she first summarizes the inherent differences between males and females, focusing on the biology of sex and sex differentiation and its effects on the comparative anatomical capacities of males and females. As a scientific matter, and as applied to existing sports and events, these capacities dictate an insurmountable performance gap between the best elite females and the best elite males. Coleman then develops a rich description of elite sport’s institutional goals: “to showcase the best athletes, to produce related benefits for stakeholders, and to use sport as a means to spread certain values throughout society.”<sup>15</sup> And she explains that “[i]n all three respects, sport seeks specifically to reverse societies’ traditional subordination of women by providing females with opportunities for equal treatment and empowerment.”<sup>16</sup> Coleman agrees with Shin that the values that drive sport are internal to the institution and that, as such, they must continually be checked to ensure their compatibility with higher values, including those that seek “to recognize, normalize, include, and empower intersex and trans people.”<sup>17</sup> But, she argues, elite sport satisfies this burden, at least in this period, because its values concerning the women’s competitive category largely mirror society’s values as reflected in statutes such as Title IX and the United States Supreme Court’s sex discrimination jurisprudence. Coleman concludes that because the best females are not competitive for the win against the best males, if these values are to continue to govern sport, it is essential that eligibility criteria are based on sex and not gender, and that narrowly tailored sex testing that goes specifically to the biological characteristics that underlie the performance gap can and should be implemented ethically and respectfully, consistent with existing medical standards of care.

Richard Auchus writes as a clinical and research endocrinologist with expertise in exercise physiology further to describe the biology of sex and sex differentiation. He focuses on the intersex conditions that are particular conundrums for elite sport because they involve individuals with testes and bioavailable androgens that are often or exclusively in the male range. He explains that however affected athletes identify personally or legally, these sex

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13. *Id.*

14. *Id.*

15. Doriane Lambelet Coleman, *Sex in Sport*, 80 LAW & CONTEMP. PROBS., no. 4, 2017, at 85.

16. *Id.*

17. *Id.* at 102.

characteristics give them the well understood physiological advantages that correspond with being male and having an XY genotype, testes, and an androgenic endocrine system. Taking the easiest case for scientists, 5-alpha reductase deficiency, in which the individual experiences *hypoandrogenism*—lower-than-normal testosterone levels—only in a very brief, in utero developmental period unrelated to athletic capacity, Auchus argues that if elite sport wants to continue to provide a space for females to be competitive for the win, it must enforce eligibility criteria that exclude individuals with this condition just as it excludes otherwise indistinguishable males. Including them as females with *hyperandrogenism*—higher-than-normal testosterone levels—signals a shift in eligibility criteria from sex to gender, and at least tacit acceptance of the anti-competitive effects that characterize the performance gap. Harking to Joanna Harper’s argument that individuals may have different genders for different purposes, he concludes that, as in medicine, sport can and should respect individuals’ gender identity even as it sorts by sex for relevant institutional purposes.

Joanna Harper develops the case for the inclusion of trans athletes in elite competition in her article *Athletic Gender*. Foreshadowing her upcoming book by the same title, Harper approaches the issue as a scientist and athlete, specifically applying her training as a medical physicist and her personal experience transitioning from male to female even as she continued to compete in elite marathons. As Auchus ended, Harper begins with the premise that gender is multifaceted, and argues that institutional recognition of this fact is both commonplace and inclusive of the real experiences of trans people. She proposes that in the elite sports space, being honest about the biology of sex and the advantages of an androgenic endocrine system while at the same time respecting gender identity and providing for the inclusion of trans athletes requires sports governing bodies both to allow individuals to compete in the category with which they identify and to condition eligibility for the women’s category on completion by trans women of a version of the medically-standard endocrine transition protocol. Male-to-female trans athletes can choose not to transition their biological or “athletic gender” and to compete as men, or they can transition that gender and compete as women. In either case, their female social and psychological gender remains constant. Harper’s approach has already been influential as it is the basis for the Olympic Movement’s current rules for trans athletes.

Erin Buzuvis closes out the issue with a reflection on the applicability—mainly the inapplicability—of the arguments from elite sport to the adult recreational context and beyond. Using the history of her own feminist softball league and drawing on her scholarly work in sports, gender, and discrimination law, Buzuvis makes a really nice case for being careful about generalizations among sporting contexts which are only all the same if one ignores the essential details: their missions and their organizers, participants, and norms. Like Shin and Coleman, Buzuvis’s essay also proposes that a “values-driven process” is useful for assessing the question of sex segregation in “other sporting contexts”

which, like elite and adult recreational sport, have their own and often different goals and thus might rightfully adopt different eligibility rules.<sup>18</sup> Using this template, she suggests that “youth sports leagues may determine that objectives like character development, skill-building, and growing the sport warrant maximizing inclusion to the greatest extent possible, leading to removal of sex and gender altogether as criteria for participation.”<sup>19</sup> Buzuvis concludes by speaking specifically to one of the most important current issues in the American educational landscape, transgender adolescents: “[i]n the realm of scholastic sports, where segregation is arguably necessary to maximize participation, policymakers should consider the educational value to students when diverse participants coexist within gender categories, and therefore seek to define eligibility within those categories as broadly as possible.”<sup>20</sup>

Taken together, these multidisciplinary approaches to the common question of sex in sport should inform contemporary debates about the relative salience of biology in the different institutional spaces that comprise this world. The issue’s authors provide relevant factual background from their respective areas of expertise and offer arguments from those disciplines about how policymakers within and outside of sport should assess and resolve the debates. Because sport has significant cultural currency and cross-cultural significance, we expect that these contributions and the processes by which they are generated will also have salience as questions about sex and identity are addressed in the non-sporting contexts in which they also arise.

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18. Erin Buzuvis, *Challenging Gender in Single-Sex Spaces: Lessons from a Feminist Softball League*, 80 LAW & CONTEMP. PROBS., no. 4, 2017, at 172.

19. *Id.*

20. *Id.*