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SPORTING CHANCE: LITIGATING SEXISM OUT OF THE OLYMPIC INTERSEX POLICY

*Samantha Glazer**

INTRODUCTION

On April 5, 2011, the International Olympic Committee (“IOC”), the “supreme authority of the Olympic [m]ovement,”¹ released a statement on the need to promulgate a clear set of rules governing the inclusion of intersex² athletes in time for the 2012 Summer Olympic Games in London.³ The IOC’s Executive Board (“EB”) met for two days in London to discuss the issue of the eligibility of female athletes with hyperandrogenism,⁴ a condition where a woman possesses elevated androgen levels—typically involving increased amounts of testosterone.⁵ The resulting principles, a product of two separate meetings in 2010

* J.D., Brooklyn Law School 2013, B.A., Wake Forest University, 2010. I would like to thank my mother for her constant support and thoughtful critiques during the process of writing this Note. Special thanks to Karen Schneiderman for her help in selecting such an engaging subject and to the entire staff of the *Journal of Law and Policy* for their tireless edits and assistance.

¹ *The IOC: The Organisation*, OLYMPIC.ORG, <http://www.olympic.org/about-ioc-institution> (last visited Feb. 17, 2012).

² “Intersex refers to the atypical appearance of the external genitalia at birth where they differ from the usual development of either sex and create difficulty in sex assignment.” Robert Ritchie et al., *Intersex and the Olympic Games*, 101 J. ROYAL SOC. MED. 395, 395 (2008). For a more complete discussion of intersex, see *infra* Part I.B.

³ *IOC Addresses Eligibility of Female Athletes with Hyperandrogenism*, OLYMPIC.ORG (Apr. 5, 2011), <http://www.olympic.org/about-ioc-institution?articleid=124006>.

⁴ *Id.*

⁵ Stephen Franks, *Medical Progress: Polycystic Ovary Syndrome*, 333 NEW ENG. J. MED. 853, 853 (1995).

of the IOC Medical Commission and International Association of Athletic Federations (“IAAF”)⁶ and adopted by the IAAF, constitute the most recent attempt to regulate intersex athlete participation in the Games.⁷ The IOC’s guidelines may be clear cut, but they have a discriminatory effect on female athletes.

The IAAF first introduced a means for determining an athlete’s sex in 1966.⁸ Since then, there have been several iterations of sex tests developed by the IOC and IAAF.⁹ Scholars have noted that traditionally, sex testing within the realm of the Olympics has been justified on two grounds: (1) “sex exists in a binary” and (2) “fairness in sport requires a strict separation of the sexes.”¹⁰ These premises, however, reflect a flawed understanding of sex and competitive advantage, respectively.¹¹ While “sex verification supposes that every athlete can be assigned to one of two sex categories,” scientifically, “[s]ex cannot be distilled to a single determinable factor” that conclusively indicates man or woman.¹² Moreover, though the notion of fairness in sport is well intentioned, sex verification is an incomplete remedy for equality in competition because factors aside from sex contribute to an athlete’s competitive advantage.¹³ Despite its faulty logic, sex testing continues to be a focus of

⁶ The IAAF is the International Sports Federation (“IF”) that governs the worldwide administration of track and field events, referred to as “athletics.” *International Sports Federations*, OLYMPIC.ORG, <http://www.olympic.org/content/The-IOC/Governance/International-Federations/> (last visited Feb. 17, 2012); *International Association of Athletics Federations*, OLYMPIC.ORG, <http://www.olympic.org/iaaf-athletics-road> (last visited Feb. 17, 2012). For further discussion of the relationship between the IOC and IFs, see *infra* Part II.A.

⁷ *IOC Addresses Eligibility of Female Athletes with Hyperandrogenism*, *supra* note 3.

⁸ Anna Peterson, *But She Doesn’t Run Like a Girl . . . : The Ethic of Fair Play and the Flexibility of the Binary Conception of Sex*, 19 TUL. J. INT’L & COMP. L. 315, 320 (2010).

⁹ See *infra* Part II.B.

¹⁰ Erin Buzuvis, *Caster Semenya and the Myth of a Level Playing Field*, MOD. AM., Fall 2010, at 36, 36.

¹¹ See generally *id.*

¹² *Id.* at 37–38.

¹³ *Id.* at 38.

sports governing bodies.¹⁴ As the tradition of sex testing persists, it is critical to recognize that its effects remain predominantly an issue for female athletes.¹⁵ Even the IOC's most recent guidelines reflect an understanding that female, not male, athletes will be held to arbitrary standards of acceptable androgen levels.¹⁶

This Note asserts that the IOC's guiding principles for regulating the inclusion of female athletes with hyperandrogenism result in discriminatory policies against women. In Part I, this Note discusses the terms "sex," "gender," and "intersex." Part II will explain the internal governance structure of the Olympic movement, including the relationship between the IOC and IAAF, as well as detail the various forms of sex testing used throughout history in sporting events by both organizations. Part II will also describe the recent sex testing guidelines developed by the IOC and IAAF. After outlining the history of sex testing in sports and identifying the current sex verification policy at issue in this Note, Part III will transition to a discussion of two separate sex discrimination suits brought by female athletes against Olympic governing bodies.¹⁷ In light of the case law discussed in Part III, Part IV will assess the viability of a sex discrimination suit as a response to the IOC and IAAF's inequitable policy on hyperandrogenism. Ultimately, this Note maintains that the current IOC and IAAF policy on hyperandrogenism facially discriminates against women and that litigation represents a viable vehicle for female athletes to voice their opposition.

¹⁴ Joanna Marchant, *Women with High Male Hormone Levels Face Sport Ban*, NATURE.COM (Apr. 14, 2011), <http://www.nature.com/news/2011/110414/full/news.2011.237.html>.

¹⁵ Shan Kohli, *London 2012: IOC's New Rules for Transgender Athletes Are Sexist*, SPORTS LAW. (May 20, 2011), <http://sportslawyer.in/london-2012-ioc's-new-rules-for-transgender-athletes-are-sexist>.

¹⁶ *Id.*

¹⁷ *Martin v. Int'l Olympics Comm.*, 740 F.2d 670, 673 (9th Cir. 1984); *Sagen v. Vancouver Org. Comm. for the 2010 Olympic & Paralympic Winter Games* (2009), 98 B.C.L.R. 4th 109, para. 1 (Can. B.C.).

I. INTERSEXUALITY AND THE SEX-GENDER DISTINCTION

A. *Sex and Gender: What's the Difference?*

Though colloquially the terms “sex” and “gender” are used interchangeably, this Note assumes a distinction between them, as is common practice in scholarly work examining the participation of intersex or transgender athletes in sports.¹⁸ Sex is a biological determination at birth¹⁹ and is generally defined according to one’s genitals, gonads, chromosomes, and hormones.²⁰ While “[s]ex is about what your body includes[,] ‘[g]ender,’ by contrast is about who you are.”²¹ Gender is dictated by self-perceptions about one’s identity²² and is understood by scholars as a “social construct.”²³ Gender is related to sex in that it “refers to the social, cultural, or attitudinal qualities that are typically associated with a particular sex.”²⁴ Simply, sex is a biological designation and gender is a personal and/or societal designation.²⁵

While one’s sex determines whether one is male or female, gender is determinative of masculinity or femininity.²⁶ Though

¹⁸ See Jessica L. Adair, *In a League of Their Own: The Case for Intersex Athletes*, 18 SPORTS LAW. J. 121, 124 (2011); Emily J. Cooper, *Gender Testing in Athletic Competitions—Human Rights Violations: Why Michael Phelps is Praised and Caster Semenya is Chastised*, 14 J. GENDER RACE & JUST. 233, 237–38 (2010); Alice Dreger, *Sex Typing for Sport*, 40 HASTINGS CENTER REP. 22, 22 (2010); Seema Patel, *Transsexuals in Sport: Inclusiveness and the Level Playing Field 2*, available at http://www.anglia.ac.uk/ruskin/en/home/faculties/alss/deps/law/research/papers_in_law_series.Maincontent.0004.file.tmp/Transsexuals%20in%20sport.pdf.

¹⁹ Cooper, *supra* note 18, at 236; see also Patel, *supra* note 18.

²⁰ See SHARON E. PREVES, *INTERSEX AND IDENTITY: THE CONTESTED SELF* 26 (2003).

²¹ Dreger, *supra* note 18, at 22.

²² *Id.*

²³ Cooper, *supra* note 18, at 237.

²⁴ *Id.*

²⁵ *Id.* at 236–37.

²⁶ Adair, *supra* note 18, at 124; Patel, *supra* note 18. Justice Scalia, in a dissenting opinion, discussed distinctions between sex and gender, noting that, “[t]he word ‘gender’ has acquired the new and useful connotation of

for many people being biologically male is linked to masculinity or being biologically female is linked to femininity,²⁷ some individuals view themselves as masculine while simultaneously possessing biologically female characteristics or as feminine while possessing male characteristics.²⁸ Recognizing the potential for and existence of masculine females and feminine males, the terms “sex” and “gender” will be used throughout this Note to refer to distinct concepts.

cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male.” J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting).

²⁷ Cooper, *supra* note 18, at 238.

²⁸ See Dreger, *supra* note 18. In her article, *The Five Sexes, Revisited*, Anne Fausto-Sterling, a Brown University professor and biologist, argues that there are at least five sexes that should be recognized as “points in a multidimensional space.” Anne Fausto-Sterling, *The Five Sexes, Revisited*, 40 SCIENCES 18, 23 (2000) (explaining her theory on variation in sex); see also Haley K. Olsen-Acre, *The Use of Drug Testing to Police Sex and Gender in the Olympic Games*, 13 MICH. J. GENDER & L. 207, 214 (2007) (discussing Anne Fausto-Sterling’s work). In addition to “male” and “female,” Fausto-Sterling proposes the recognition of “‘herms’ (named after true hermaphrodites, people born with both a testis and an ovary); ‘merms’ (male pseudohermaphrodites, who are born with testes and some aspect of female genitalia); and ‘ferms’ (female pseudohermaphrodites, who have ovaries combined with some aspect of male genitalia).” Fausto-Sterling, *supra*, at 19.

B. Defining Intersexuality²⁹

Individuals whose sex and gender identities do not align are collectively referred to as intersexuals.³⁰ There are a “myriad of conditions”³¹ that comprise intersexuality, which the International Intersex Consensus Conference has termed Disorder(s) of Sex Development (“DSD”).³²

Intersexuality is, perhaps surprisingly, “a relatively common occurrence . . . it is estimated that approximately 1 in 2000 children are born with ambiguous genitalia.”³³ Current scientific standards deem any child with an “adequate” penis to be male.³⁴ “An ‘adequate’ penis is defined as ‘a penis capable of vaginal penetration and urination while standing.’”³⁵ This classification presents an overly simplistic view of sex and highlights society’s general understanding of sex as binary.³⁶ From birth, individuals

²⁹ In addition to appreciating the difference between “sex” and “gender,” it is critical to realize another distinction, intersex from transsexual. While legal commentary on sex testing in sports frequently discusses the treatment of both transsexual and intersex individuals, these terms refer to different scientific and biological conditions. Transsexualism references “[t]he desire to change anatomic sexual characteristics to conform physically with one’s perception of oneself as a member of the opposite sex, coupled with a desire to live full-time in the role of the opposite sex.” *STEDMAN’S MEDICAL DICTIONARY* 415,630 (27th ed. 2000). Intersexuals, meanwhile, are “people who, as individuals, are born with genetic, hormonal and physical features that may be thought to be typical of both male and female at once.” *What is Intersex?*, ORGANISATION INTERSEX INT’L USA, http://oiiusa.org/what_is_intersex (last visited Feb. 17, 2012). This note will focus on policies governing the inclusion of *intersex* athletes.

³⁰ Megan Bell, *Transsexuals and the Law*, 98 NW. U. L. REV. 1709, 1718 (2004).

³¹ Ritchie et al., *supra* note 2.

³² *Id.*

³³ Peterson, *supra* note 8, at 319.

³⁴ Maura Kelly, *Intersex: Sociologists for Women in Society Fact Sheet 1* (2007), available at https://www.socwomen.org/web/images/stories/resources/fact_sheets/fact_03-2007-intersex.pdf.

³⁵ *Id.*

³⁶ Adair, *supra* note 18, at 124. “In a world that tends to classify a person with either a male sex and gender or a female sex and gender, intersexuality can present problems immediately at birth.” *Id.*

are classified as either male or female.³⁷ Rejecting this “either/or”³⁸ designation, Anne Fausto-Sterling argues that sex exists on a spectrum, or as points in space.³⁹ Sex is more fully defined by the following eight factors:

1. Genetic or chromosomal sex—XY or XX;
2. Gonadal sex (reproductive sex glands)—testes or ovaries;
3. Internal morphologic sex (determined after three months gestation)—seminal vesicles/prostate [sic] or vagina/uterus/fallopian tubes;
4. External morphologic sex (genitalia)—penis/scrotum or clitoris/labia;
5. Hormonal sex—androgens or estrogens
6. Phenotypic sex (secondary sexual features)—facial and chest hair or breasts
7. Assigned sex and gender rearing; and
8. Sexual identity.⁴⁰

These factors frequently align so that one is either male or female; however, for intersex persons, determining sex on these indicators is decidedly less clear-cut.⁴¹

Although by no means exhaustive, the following are common forms of intersexuality:

1. *Klinefelter Syndrome*: Men with Klinefelter syndrome have an extra sex chromosome, such that their chromosomal makeup is XXY, instead of the typical XY. “The syndrome is characterized by hypogonadism (small testes, azoospermia, oligospermia), gynecomastia in late puberty, psychosocial problems, hyalinization and

³⁷ *Id.*

³⁸ Olsen-Acre, *supra* note 28.

³⁹ *See supra* note 28.

⁴⁰ Cooper, *supra* note 18, at 238; *see also* Buzuvis, *supra* note 10, at 37–38 (“Sex cannot be distilled to a single, determinable factor. Many biological and social factors—including chromosomes, hormones, genitals, gender identity and gender expression—contribute to our interpretation of whether an individual is male or female.”)

⁴¹ Cooper, *supra* note 18, at 238.

fibrosis of the seminiferous tubules, and elevated urinary gonadotropin levels.”⁴²

2. *Turner Syndrome*: Individuals with this condition have one X chromosome but are missing one sex chromosome. Their genitalia, though female, is underdeveloped.⁴³

3. *Swyer Syndrome*: This condition is also known as pure gonadal dysgenesis. These individuals have an XY chromosomal makeup typical of males; however, they have a female genital appearance.⁴⁴

4. *Persistent Mullerian Duct Syndrome*: This is a “rare form of male pseudo-hermaphroditism characterized by the presence of Mullerian duct structures in an otherwise phenotypically, as well as genotypically, normal man.”⁴⁵

5. *Hermaphroditism*: True hermaphrodites typically have ambiguous external genitalia.⁴⁶

6. *Androgen Insensitivity Syndrome* (“AIS”): This is the most common form of male pseudohermaphroditism and is also known as testicular feminization. Though individuals with AIS are chromosomally and gonadally male, they lack an androgen receptor necessary to interact with the production of androgens, or male hormones.⁴⁷

7. *5-Alpha Reductase Deficiency*: This condition is a form of male pseudohermaphroditism in which an individual appears to be externally female when young

⁴² Harold Chen, *Klinefelter Syndrome*, MEDSCAPE REFERENCE, <http://emedicine.medscape.com/article/945649-overview> (last updated July 26, 2011).

⁴³ PREVES, *supra* note 20, at 30.

⁴⁴ Yang Han et al., *Dysgerminoma in a Case of 46, XY Pure Gonadal Dysgenesis (Swyer Syndrome): A Case Report*, 6 DIAGNOSTIC PATHOLOGY 84 (2011).

⁴⁵ Nishikant N. Gujar et al., *Male Form of Persistent Mullerian Duct Syndrome Type I (Hernia Uteri Inguinalis) Presenting as an Obstructed Inguinal Hernia: A Case Report*, 5 J. MED. CASE REP. 586 (2011); *see also* Adair, *supra* note 18, at 126–27.

⁴⁶ PREVES, *supra* note 20.

⁴⁷ *Id.* at 27–28.

but after puberty becomes more male in appearance.⁴⁸

8. *Congenital Adrenal Hyperplasia*: This condition is a form of female pseudohermaphroditism whereby an individual's external organs develop in a typical male fashion yet the individual's internal organs develop like a female.⁴⁹

While there are a variety of ways in which one can be intersexed, intersexed individuals do not necessarily consider themselves to be intersexual but often view themselves as either men or women.⁵⁰ Within the realm of sports, Alice Dreger⁵¹ notes that “[i]n practice, athletes show up with genders—as men or as women—and sex becomes an issue only if . . . an athlete competing as a woman is suspected of being ‘really’ male”⁵² Here, Dreger references the tradition of sex testing in the Olympics and the IOC's standing to evaluate those “suspected” of being a sex distinct from the one he/she represents himself/herself to be.⁵³ Through sex testing, the IOC thus can challenge an individual's understanding of his or her sex.⁵⁴ Given the IOC's power to interfere with both how an individual perceives himself or herself, as well as an individual's ability to compete in the Olympics, it is therefore critical that the IOC promulgates unbiased policies towards intersexed individuals.

⁴⁸ *Id.* at 40.

⁴⁹ *Id.* at 27.

⁵⁰ Peterson, *supra* note 8, at 319.

⁵¹ Alice Dreger is a Professor of Clinical Medical Humanities and Bioethics at the Feinberg School of Medicine at Northwestern University. *About Me*, ALICE DOMURAT DREGER, <http://www.alicedreger.com/about.html> (last visited Feb. 17, 2012).

⁵² Dreger, *supra* note 18, at 22.

⁵³ *Id.*

⁵⁴ *See id.*

II. THE OLYMPIC MOVEMENT: STRUCTURE AND SEX TESTING POLICIES

A. Organization of the Olympics

The Olympic Movement is comprised of the IOC, International Federations, and National Olympic Committees.⁵⁵ Within the IOC, there is a consultative Congress; a Session that issues final decisions; the EB, which oversees the ongoings of the IOC; and a President, who makes decisions when there is disagreement in the Session.⁵⁶ The Olympic Charter outlines various duties of the IOC, most notably calling upon the organization to “act against any form of discrimination affecting the Olympic Movement; [t]o encourage and support the promotion of women in sport at all levels and in all structures with a view to implementing the principle of equality of men and women . . . [and] [t]o encourage and support the development of sport for all.”⁵⁷

Functionally, the IOC coordinates the efforts of National Olympic Committees (“NOCs”), International Sports Federations⁵⁸ (“IFs”), Organising Committees for the Olympics Games (“OCOGs”), and athletes.⁵⁹ In overseeing IFs, the IOC recognizes their ability to administer specific sports around the world.⁶⁰ Additionally, IFs oversee developments and organize competitions in specific sports.⁶¹

⁵⁵ Cooper, *supra* note 18, at 245.

⁵⁶ *Id.*

⁵⁷ *The IOC: The Organisation*, *supra* note 1.

⁵⁸ The IAAF, which worked with the IOC to develop a policy on hyperandrogenic women in Olympic competitions, is an IF. *International Sports Federations*, OLYMPIC.ORG, <http://www.olympic.org/content/The-IOC/Governance/International-Federations/> (last visited Feb. 17, 2012); *International Association of Athletics Federations*, OLYMPIC.ORG, <http://www.olympic.org/iaaf-athletics-road> (last visited Feb. 17, 2012); *IOC Addresses Eligibility of Female Athletes with Hyperandrogenism*, *supra* note 3.

⁵⁹ *The IOC: The Organisation*, *supra* note 1.

⁶⁰ *International Sports Federations*, *supra* note 58.

⁶¹ *Id.*

IOC policies assist IFs in the governance of their respective sports.⁶²

Notably, the IOC has a distinct legal process for handling disputes that arise in connection with athletes at the Olympic Games.⁶³ The IOC's Olympic Charter mandates that parties arbitrate any dispute arising from the Olympic Games in accordance with the Code of Sports-Related Arbitration.⁶⁴ In 1984, the IOC established the Court of Arbitration for Sport ("CAS") and funded it to ensure that typical expenses associated with litigating in court would not burden athletes and other litigants.⁶⁵ In this way, the IOC assures there is a forum for "increased disputes in international sports"⁶⁶

B. Historical Overview of Sex Testing

Both the IAAF, the IF that regulates track and field events, and the IOC, which oversees IFs like the IAAF, have a substantial history of monitoring the sex of athletes at worldwide athletics events and the Olympics.⁶⁷ In its original form, sex

⁶² See IAAF MED. & ANTI-DOPING COMM'N, IAAF POLICY ON GENDER VERIFICATION (2006), available at <http://www.iaaf.org/mm/document/imported/36983.pdf>.

⁶³ Cooper, *supra* note 18, at 245.

Although the IOC is an international, nongovernmental, not-for-profit organization without the power to make law as such, it operates as part of an expansive and intricate network of regulatory bodies that make decision that very much affect athletes' lives, as well as public perceptions of sport. IOC regulations have the force of law within the Games themselves. Within the Olympic Games, IOC decisions are final and can be appealed only to the IOC Executive Board or in some cases to the Court of Arbitration for Sport (CAS).

Olsen-Acre, *supra* note 28, at 210.

⁶⁴ Int'l Olympic Comm. [IOC], Olympic Charter, r. 59, para. 1, at 104 (Feb. 11, 2010), available at http://www.olympic.org/Documents/Olympic%20Charter/Charter_en_2010.pdf.

⁶⁵ Cooper, *supra* note 18, at 245-46.

⁶⁶ *Id.* at 246.

⁶⁷ Ross Tucker & Malcolm Collins, *The Science and Management of Sex Verification in Sport*, 21 S. AFRICAN J. SPORTS MED. 147, 150 (2009).

testing was aimed at ensuring that men did not disguise themselves and compete in women's events to gain a competitive advantage.⁶⁸ Despite this purported interest in maintaining a strict divide between men's and women's competitions, sex testing has never uncovered a case of an athlete disguising his or her sex.⁶⁹ On the other hand, such testing has exposed female athletes with various forms of sex disorders often previously unknown to the competitors themselves.⁷⁰

The 1936 Olympics in Berlin marks the first instance of gender controversy in the Games.⁷¹ Stella Walsh and Helen Stephens, two female sprinters from the United States, were suspected of being men because of their masculine appearances.⁷² Walsh was even given the nickname "Stella the Fella" by the press.⁷³ Following the 100-meter sprint, where Stephens beat Walsh by 0.2 seconds, Walsh accused Stephens of being a man.⁷⁴ Upon Walsh's death in 1980, it was revealed via an autopsy that Walsh had atypical sex chromosomes and ambiguous genitalia.⁷⁵ Additionally, the 1936 Olympics marks the only known instance of a male masquerading as a female for competitive purposes.⁷⁶ Hermann Ratjen, an Olympic high jumper, bound his genitals in order to participate in the women's competition.⁷⁷ Interestingly, Ratjen placed fourth behind three women.⁷⁸

The purported impetus behind the introduction of formal sex testing in international athletic organizations was the string of

⁶⁸ Adair, *supra* note 18, at 132 ("Predicated on the belief that men and women should compete separately, administrators of athletic competitions historically sought to prevent people from infiltrating the other sex's division in order to gain a competitive advantage.").

⁶⁹ Ritchie et al., *supra* note 2, at 398.

⁷⁰ *Id.*

⁷¹ Peterson, *supra* note 8, at 320.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Olsen-Acre, *supra* note 28, at 212.

⁷⁷ *Id.*

⁷⁸ *Id.*

eight other female competitors between 1932 and 1968 who were accused of being men.⁷⁹ In 1966, the IAAF required all female participants at the European Track and Field Championships to pass a “femininity” test to be eligible for competition.⁸⁰ The test consisted of a physical inspection of an athlete’s genitalia.⁸¹ In 1967, however, the IAAF introduced a new form of sex testing—the chromatin analysis.⁸² The chromatin method involves a “buccal smear,” or a cheek swab, taken from athletes to test for the presence of the Barr body, which is found only in females.⁸³ In light of the IAAF’s developments, in 1968 the IOC instituted the chromatin testing at the Mexico City Summer Olympic Games.⁸⁴ The IOC reasoned that such testing was less invasive than physical inspections; nevertheless, the use of chromosomes to determine sex is still flawed given the numerous chromosome combinations discussed in Part I Section B of this Note.⁸⁵

Ewa Klobukowska, an Olympian and co-world record holder for the 100-meter sprint, was the first athlete disqualified as a result of sex testing.⁸⁶ In 1967, Klobukowska failed her chromatin analysis at the European Cup Track and Field events in Kiev and consequently was permanently disqualified from future events and stripped of her records.⁸⁷ The IOC even went so far as to rescind her medals from the 1960 Olympics.⁸⁸ Klobukowska not only suffered embarrassment within the IAAF but also endured derision from the popular media.⁸⁹ After

⁷⁹ Peterson, *supra* note 8, at 320.

⁸⁰ *Id.*

⁸¹ *Id.* at 321.

⁸² *Id.*

⁸³ Ritchie et al., *supra* note 2, at 397.

⁸⁴ Peterson, *supra* note 8, at 321.

⁸⁵ *Id.*

⁸⁶ Cheryl L. Cole, *One Chromosome Too Many?*, in *THE OLYMPICS AT THE MILLENNIUM: POWER, POLITICS, AND THE GAMES* 128, 129 (Kay Schaffer & Sidonie Smith eds., 2000). It is thought that Klobukowska had XX/XY mosaicism. Ritchie et al., *supra* note 2, at 397.

⁸⁷ Peterson, *supra* note 8, at 322.

⁸⁸ *Id.*

⁸⁹ *Id.*

Klobukowska was essentially turned into a public spectacle following the sex test failure, the IOC and IAAF recommended that athletes similarly situated should withdraw from competitions, citing a warm-up injury, to avoid the media frenzy.⁹⁰

In 1992, yet another form of sex testing was introduced at the Albertville Winter Olympics—the test involved a “polymerase chain reaction (PCR) determination of the absence or presence of DNA sequences from the testes-determining gene located on the Y chromosome.”⁹¹ This test, however, was flawed since at least one of the DNA sequences used in the PCR was not restricted to males.⁹² Moreover, both the buccal smear test and the PCR test are inadequate because they “do not consider hormonal levels, physical appearance . . . or any other of the many factors that can be said to contribute to a person’s sex”⁹³

The 1996 Atlanta Games evidenced a shift in the IOC’s policy on the participation of intersex athletes.⁹⁴ Though the IOC tested over 3,000 women at the Atlanta Games and eight women failed the test, it did not disqualify nor require the withdrawal of any athletes from competition.⁹⁵ Some scholars have speculated that the case of Maria Jose Martinez Patino, a Spanish hurdler, changed the IOC’s outlook towards intersex athletes.⁹⁶ After Patino was ruled ineligible to compete at the 1985 University Games in Japan,⁹⁷ she was diagnosed with AIS.⁹⁸ Though the

⁹⁰ *Id.*

⁹¹ JC Reeser, *Gender Identity and Sport: Is the Playing Field Level?*, 39 BRIT. J. SPORTS MED. 695, 696 (2005).

⁹² *Id.*

⁹³ Olsen-Acre, *supra* note 28, at 217 (“Because the buccal smear and polymerase chain reaction tests identify only chromosomal sex, they can declare athletes to be a sex that the athletes themselves have never identified as.”).

⁹⁴ Peterson, *supra* note 8, at 322.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Michael D. Lemonick, *Genetic Tests Under Fire*, TIME (Feb. 24, 1992), <http://www.time.com/time/magazine/article/0,9171,974937,00.html>.

⁹⁸ Cole, *supra* note 86, at 138. See *supra* Part I.B. for a further

Spanish Athletic Federation removed her name from record books, Patino vigilantly fought to reassume her status as a woman in athletics.⁹⁹ “Armed with the knowledge that because of her androgen insensitivity she was unable to respond to testosterone and was ‘unquestionably female and chromosomally XY,’ Patino managed to be reinstated by the IAAF.”¹⁰⁰ In 1991, the IAAF discontinued its use of the chromatin analysis,¹⁰¹ returning to an earlier method where doctors observed athletes’ genitals during a routine physical examination.¹⁰² The IOC, however, continued to utilize chromosome testing until 1999.¹⁰³

Though the IOC moved away from compulsory sex testing,¹⁰⁴ to this day it retains the right to test athletes on an individual basis who are suspected of being a biological sex that differs from his or her gender.¹⁰⁵ After the 2006 Asia Games, Santhi Soundarajan, an Indian runner, was stripped of her silver medal for failing her sex test.¹⁰⁶ Following the sex test, Soundarajan was diagnosed with AIS.¹⁰⁷ Rumors soon circulated that Soundarajan attempted to commit suicide after discovering the results of the sex test.¹⁰⁸ No longer a competitor herself, Soundarajan now coaches hopeful athletes at a sports academy

explanation of androgen insensitivity syndrome.

⁹⁹ Peterson, *supra* note 8, at 323.

¹⁰⁰ *Id.*

¹⁰¹ Stacy Larson, Comment, *Intersexuality and Gender Verification Tests: The Need to Assure Human Rights and Privacy*, 23 PACE INT’L L. REV. 215, 232 (2011).

¹⁰² Lemonick, *supra* note 97.

¹⁰³ Peterson, *supra* note 8, at 323.

¹⁰⁴ This decision of the IOC was supported by Yale physician and professor Myron Genel “who stated that the tests are difficult to perform, have the potential for error, and are discriminatory towards women.” Larson, *supra* note 101, at 233.

¹⁰⁵ Peterson, *supra* note 8, at 323.

¹⁰⁶ Buzuvis, *supra* note 10, at 36.

¹⁰⁷ Nilanjana Bhowmick & Jyoti Thottam, *Gender and Athletics: India’s Own Caster Semenya*, TIME (Sept. 1, 2009), <http://www.time.com/time/world/article/0,8599,1919562,00.html>. See *supra* Part I.B for an explanation of AIS.

¹⁰⁸ *Id.*

for underprivileged children.¹⁰⁹ Soundarajan continues to consider herself a woman; in fact, her birth certificate indicates that she is female.¹¹⁰ Soundarajan's painful and public experience further highlights the problematic nature of the use of sex testing in determining eligibility for competition, particularly for intersex individuals.

The most recent controversy over an athlete's sex is the case of Caster Semenya.¹¹¹ In 2009, at the Track and Field World Championship, Caster Semenya, a South African athlete, beat the defending world champion in the 800-meter competition by 2.45 seconds.¹¹² Rumors that Semenya was not, in fact, a woman quickly eclipsed the excitement surrounding her impressive performance.¹¹³ Semenya's fellow competitors openly doubted her eligibility for women's competitions given her masculine appearance and record-shattering performance.¹¹⁴ In response to public rumblings over Semenya's questionable womanhood, the IAAF asked that Semenya submit to sex testing to confirm her eligibility for competition in the women's division.¹¹⁵ The results from Semenya's sex test were never publicly released,¹¹⁶ in

¹⁰⁹ *Id.*

¹¹⁰ Harmeet Shah Singh, *India Athlete Makes Plea for Semenya*, CNN (Sept. 14, 2009), http://articles.cnn.com/2009-09-14/world/Semenya.India.Athlete_1_gender-test-suicide-attempt-caster-semenya.

¹¹¹ Peterson, *supra* note 8, at 315.

¹¹² *Id.*

¹¹³ David Epstein, *IAAF Has No Reason to Disqualify 800-Meter Champion Semenya*, SI.COM (Aug. 21, 2009), http://sportsillustrated.cnn.com/2009/writers/david_epstein/08/21/semenya/index.html.

¹¹⁴ Peterson, *supra* note 8, at 315.

¹¹⁵ Epstein, *supra* note 113.

¹¹⁶ Peterson, *supra* note 8, at 316. In September 2009, the Australian Daily Telegraph reported that the results of the sex test revealed that Semenya had female external genitalia but internal testes. Mike Hurst, *Caster Semenya Has Male Sex Organs and No Womb or Ovaries*, DAILY TELEGRAPH (Sept. 11, 2009), <http://www.dailytelegraph.com.au/sport/semenya-has-no-womb-or-ovaries/story-e6frexni-1225771672245>. The IAAF never confirmed these reports, instead declaring that they were not official IAAF statements. Peterson, *supra* note 8, at 316. Despite this, the results reprinted in the Australian Daily Telegraph were reprinted in several other publications. *Id.*; *see also* Hurst, *supra*.

keeping with the IAAF's policy on privacy rights of athletes.¹¹⁷ While Semenya was permitted to keep her prize money, gold medal, and World Champion title, her ability to compete in future events in the women's division remained uncertain.¹¹⁸ Moreover, Semenya herself struggled to recover from harsh public skepticism about her sex, and she reportedly went "into hiding due to the distress and embarrassment generated by the controversy."¹¹⁹ Semenya's story illustrates the delicate balance the IOC must strike in achieving fairness in the Games as well as the serious consequences sex testing practices may have on the reputations and livelihoods of individual athletes.

C. Current Sex Verification Policy

While the IOC has yet to release a finalized policy that will dictate the eligibility of intersexual athletes for the 2012 Olympic Games in London, in April of 2011 it did release a series of principles that will likely dictate the formulation of such a policy.¹²⁰ The principles are guided in large part by the conclusions of two different conferences convened in 2010.¹²¹ The January 2010 meeting, organized by both the IOC Medical Commission and the IAAF, sought to address the scientific implications of female athletes with hyperandrogenism competing on the Olympic level.¹²² The meeting was arguably

¹¹⁷ Peterson, *supra* note 8, at 316.

¹¹⁸ *Id.* Later, the IAAF decided that Semenya would be eligible to compete in future events. Buzuvis, *supra* note 10, at 36.

¹¹⁹ Buzuvis, *supra* note 10, at 36.

¹²⁰ Kohli, *supra* note 15. The principles were released following a two-day meeting of the EB to discuss the issue of female athletes with hyperandrogenism. The IOC stated that it would formalize rules based on the principles at its next meeting in July 2011 in Durban, South Africa. Roy Kessel, *IOC to Adopt Gender Guidelines*, FROM BENCH: OFFBEAT SPORTS L. BLOG (Apr. 5, 2011), <http://www.fromthebench.us/2011/04/05/ioc-to-adopt-gender-guidelines/>.

¹²¹ Gina Kolata, *I.O.C. Panel Calls for Treatment in Sex Ambiguity Cases*, N.Y. TIMES (Jan. 21, 2010), <http://www.nytimes.com/2010/01/21/sports/olympics/21ioc.html>.

¹²² *IOC Addresses Eligibility of Female Athletes with Hyperandrogenism*, *supra* note 3.

prompted by the controversy over Semenya's sex at the 2009 World Championships in Berlin.¹²³ Following Semenya's stellar performance, some athletes questioned the fairness of her ability to compete as a woman in light of her masculine features.¹²⁴

While conference members generally agreed that they should promulgate specific rules addressing female athletes with hyperandrogenism, they gave no indication that they had decided the substance of those rules.¹²⁵ They did, however, reach two general conclusions: (1) "in order to protect the health of the athlete, *sports* authorities should have the responsibility to make sure that any case of female hyperandrogenism that arises under their jurisdiction receives adequate medical follow-up" and (2) "rules need to be put in place to regulate the participation of *athletes* with hyperandrogenism in competitions for women."¹²⁶ Furthering this concern for athlete health, conference members advised that the IOC create "medical 'centers of excellence' . . . to diagnose sex-development disorders."¹²⁷ The IOC Medical Commission Chairman Arne Ljungqvist justified the creation of such centers on the grounds that not every country with Olympic athletes would have the requisite resources to identify and treat intersex athletes.¹²⁸ Constructing "strategically located centers" would allow athletes to be tested by qualified experts in an efficient and expedient manner, Ljungqvist explained.¹²⁹ Another idea discussed at the conference involved requiring all athletes to undergo a medical examination prior to competition.¹³⁰

¹²³ Kolata, *supra* note 121. For further discussion of the controversy over Caster Semenya's sex, see *supra* Part II.B.

¹²⁴ Kolata, *supra* note 121.

¹²⁵ *Id.*

¹²⁶ *IOC Addresses Eligibility of Female Athletes with Hyperandrogenism*, *supra* note 3 (emphasis added).

¹²⁷ Kolata, *supra* note 121.

¹²⁸ *IOC Recommends Gender-Test Centers*, CBS NEWS (Jan. 31, 2011), <http://www.cbsnews.com/stories/2010/01/20/sportsline/main6120277.shtml?tag=contentMain;contentBody>.

¹²⁹ *Id.*

¹³⁰ *Id.* Italy is among several countries that have already instituted such policies for their athletes. *Id.*

The IOC Medical Commission organized a second conference in October 2010 to further discuss the treatment of athletes with hyperandrogenism.¹³¹ The conference consisted of scientists, sports administrators, sports lawyers, human rights experts, female athletes, experts in medical and sports ethics, and a representative from Organisation Intersex International.¹³² The conference further emphasized the need for clear-cut rules that would “respect the essence of the male/female classification and also guarantee the fairness and integrity of female competitions for all female athletes.”¹³³

Drawing upon the conclusions reached by these two panels, the IOC Medical Commission recommended a set of principles to assist in the development of rules governing the participation of intersex athletes.¹³⁴ The principles are as follows:

- (1) A female recognised in law should be eligible to compete in female competitions provided that she has androgen levels below the male range (as shown by the serum concentration of testosterone) or, if within the male range, she has androgen resistance such that she derives no competitive advantage from such levels.
- (2) An evaluation with respect to eligibility should be made on an anonymous basis by a panel of independent international experts in the field of hyperandrogenism that would in each case issue a recommendation on eligibility for the sport concerned. In each case, the sport would decide on an athlete’s eligibility taking into consideration the panel’s recommendation. Should an athlete be considered ineligible to compete, she would be notified of the reasons why, and informed of the conditions she would be required to meet should she wish to become eligible again.

¹³¹ *IOC Addresses Eligibility of Female Athletes with Hyperandrogenism*, *supra* note 3.

¹³² *Id.* The Organisation Intersex International representative was Hida Viloria. See *infra* Part IV.C for a discussion on her views on intersex athletes.

¹³³ *IOC Addresses Eligibility of Female Athletes with Hyperandrogenism*, *supra* note 3.

¹³⁴ *Id.*

(3) If an athlete refuses to comply with any aspect of the eligibility determination process, while that is her right as an individual, she will not be eligible to participate as a competitor in the chosen sport.

(4) The investigation of a particular case should be conducted under strict confidentiality. Although rare, some women develop male-like body characteristics due to an overproduction of male sex hormones, so-called “androgens.” The androgenic effects on the human body explain why men perform better than women in most sports and are, in fact, the very reason for the distinction between male and female in competition in most sports. Consequently, women with hyperandrogenism generally perform better in sport than other women.¹³⁵

Ljungqvist noted that an athlete would only be investigated if she herself sought out medical officials for an evaluation, if she displayed male characteristics during drug testing, or if she had abnormal hormone levels.¹³⁶ At the same time, Ljungqvist stressed that an athlete would not be subject to testing due to accusations of other athletes that the individual was not a woman.¹³⁷

Once the rules are finalized, the EB of the IOC noted that it would encourage IFs to adopt similar rules for use in their competitions, “duly adapted to meet the specificities of the sport concerned.”¹³⁸ In April 2011, the IAAF adopted rules that closely mirror the principles outlined by the IOC Medical Commission, becoming the first international sports federation to do so.¹³⁹ The rules were approved by the IAAF at its meeting in Daegu, South Korea—the host of the 2011 world championships—and went into effect May 1, 2011.¹⁴⁰

¹³⁵ *Id.*

¹³⁶ Kessel, *supra* note 120.

¹³⁷ *Id.*

¹³⁸ *IOC Addresses Eligibility of Female Athletes with Hyperandrogenism*, *supra* note 3.

¹³⁹ Roy Kessel, *IAAF Adopts Rules for Hormone Cases*, FROM BENCH: OFFBEAT SPORTS L. BLOG (Apr. 14, 2011), <http://www.fromthebench.us/2011/04/14/iaaf-adopts-rules-for-hormone-cases/>.

¹⁴⁰ *Id.*

III. *MARTIN* AND *SAGEN*: THE LEGACY OF SEX DISCRIMINATION LAWSUITS AGAINST OLYMPIC POLICIES

If formally adopted by the IOC prior to the 2012 Summer Olympics in London, this policy on hyperandrogenism will likely preclude some female athletes from participation. Female athletes with androgen levels within the “male range” whose bodies do not have an androgen resistance will be considered ineligible for competition in women’s events.¹⁴¹ Such a policy is discriminatory on its face because it is silent on the issue of what constitutes an acceptable level of androgen for men competing in men’s events.¹⁴² For instance, the intersex condition Diplo (XYY) causes men to produce higher levels of testosterone than other men, yet the IOC policy does not disqualify men with Diplo from competitions.¹⁴³

Recognizing this inequity, female competitors must find appropriate methods to challenge this biased policy, such as using litigation to attack the discrimination. This Part discusses two lawsuits that female athletes have brought against the IOC, and/or relevant organizing committees in host countries, alleging sex discrimination in the administration of the Games; namely, *Martin v. International Olympics Committee* and *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*.¹⁴⁴ Though the groups of women in both cases were ultimately unsuccessful in their suits, those

¹⁴¹ *IOC Addresses Eligibility of Female Athletes with Hyperandrogenism*, *supra* note 3.

¹⁴² See Hida Vioria, *Opinion: Gender Rules in Sport-Leveling the Playing Field, or Reversed Doping?*, GLOBAL HERALD (Apr. 11, 2011), <http://theglobalherald.com/opinion-gender-rules-in-sport-leveling-the-playing-field-or-reversed-doping/14837/>.

¹⁴³ *Id.*

¹⁴⁴ Though Jennifer Ann Cleary argues in her Note that these two cases illustrate the inability of litigation to address gender discrimination in the Olympics, this Note maintains that the cases serve as useful vehicles for shaping a gender discrimination claim in regards to the androgen policy and that such a claim is in fact stronger than those in *Martin* and *Sagen*. See Jennifer Ann Cleary, *A Need to Realign the Modern Games with the Modern Times: The International Olympic Committee’s Commitment to Fairness, Equality, and Sex Discrimination*, 61 CASE. W. RES. L. REV. 1285 (2011).

cases are distinguishable from a hypothetical case challenging the latest intersex policy. The cases provide important insight into how women can assert successful claims that the hyperandrogenism policy is discriminatory on the basis of sex.

A. *Martin v. International Olympics Committee*

In *Martin v. International Olympics Committee*, women runners argued that a decision, and the rule used to implement it, was discriminatory. *Martin* illustrates the potential pitfalls female plaintiffs may encounter when they bring a sex discrimination claim against various Olympics bodies in U.S. courts. In particular, if the challenged rule is deemed gender-neutral, the claim is less likely to succeed.

On August 15, 1983, a group of women runners filed a complaint¹⁴⁵ against the IOC, United States Olympic Committee (“USOC”), Athletic Congress of the United States (“TAC”) and Los Angeles Olympic Organizing Committee (“LAOOC”) alleging that the defendants discriminated in the administration of the 1984 Los Angeles Olympic Games by failing to include the 5,000 meter and 10,000 meter women’s track races.¹⁴⁶ The plaintiffs sought declaratory and injunctive relief and requested a writ of mandate from the court directing the defendants to institute women’s 5,000 meter and 10,000 meter track races.¹⁴⁷ The plaintiffs argued, *inter alia*, that the defendants had violated their right to the equal protection of law under the Fifth¹⁴⁸ and

¹⁴⁵ Though the complaint was originally filed by the plaintiffs in Los Angeles Superior Court, it was later removed by the defendants to the United States District Court for the Central District of California. *Martin v. Int’l Olympics Comm.*, 740 F.2d 670, 673 (9th Cir. 1984).

¹⁴⁶ *Martin v. Int’l Olympics Comm.*, No. CV-83-5847, 1984 U.S. Dist. LEXIS 24941, at *1 (C.D. Cal. Apr. 16, 1984).

¹⁴⁷ *Id.* at *4–5.

¹⁴⁸ The Fifth Amendment to the United States Constitution applies only to the federal government. *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926). It states, in relevant part, that a person shall not “be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. “[T]he *Fifth Amendment* does not explicitly contain an ‘equal protection’ requirement. However, the *Due Process Clause of the Fifth Amendment* has been held to contain an equal protection requirement which prohibits the United States

Fourteenth¹⁴⁹ Amendments to the United States (“U.S.”) Constitution.¹⁵⁰

The court ultimately determined that the plaintiffs failed to show a fair chance of success on the merits regarding their federal constitutional claims.¹⁵¹ Though the plaintiffs argued that the court should apply the test for sex discrimination utilized by the United States Supreme Court in *Craig v. Boren*—classifications based on gender “must serve important governmental objectives” and be “substantially related” to those objectives¹⁵²—the court declined to apply that test because it found that Rule 32 was gender-neutral.¹⁵³ Rule 32 of the 1970 Olympic Charter governs the addition of events to the Olympic Program.¹⁵⁴ Under the rule, “a men’s sport may be added to the Olympic Program if it is widely practiced in at least forty

from invidiously discriminating between groups or individuals.” *Martin*, 1984 U.S. Dist. LEXIS 24941, at *22 (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

¹⁴⁹ The Fourteenth Amendment to the United States Constitution applies only to states. *Martin*, 1984 U.S. Dist. LEXIS 24941, at *22. It states, in relevant part, that a state shall not “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. Here, the court found that the LAOOC, though a private entity, could be considered to have engaged in state action. *Martin*, 1984 U.S. Dist. LEXIS 24941, at *24. The court relied upon a state action test announced in *Burton v. Wilmington Parking Authority*, noting that the LAOOC was in a “position of interdependence” with the state of California. *Id.* (citing *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961)).

¹⁵⁰ *Martin*, 1984 U.S. Dist. LEXIS 24941, at *21. The plaintiffs also brought state law claims against the defendants under the California Constitution and the Unruh Civil Rights Act. *Id.* at *41–43. The Unruh Civil Rights Act protects against discrimination by business establishments in California. *California Department of Fair Employment & Housing Fact Sheet*, <http://www.dfeh.ca.gov/res/docs/publications/DFEH-250.pdf> (last visited Feb. 25, 2012).

¹⁵¹ *Martin*, 1984 U.S. Dist. LEXIS 24941, at *41. A plaintiff must demonstrate a “likelihood of success on the merits” of his or her claim to be awarded injunctive relief. *Munaf v. Green*, 553 U.S. 674, 690 (2008) (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006) (internal quotation marks omitted)).

¹⁵² *Craig v. Boren*, 429 U.S. 190, 197 (1976).

¹⁵³ *Martin*, 1984 U.S. Dist. LEXIS 24941, at *27.

¹⁵⁴ *Id.* at *4, 10–11.

countries on three continents,” for the Summer Olympics, “and at least twenty-five countries on two continents” for the Winter Olympics.¹⁵⁵ For women’s events, the sport must be “widely practiced in twenty-five countries and two continents” for the Summer Olympics and “twenty countries and two continents” for the Winter Olympics.¹⁵⁶

The plaintiffs then argued that the rule had a disproportionate impact on women; however, the court noted that a “disproportionate impact must be traceable to an invidiously discriminatory purpose.”¹⁵⁷ The court found no invidiously discriminatory purpose behind Rule 32 because, statistically, the number of female competitors in the Games has almost tripled since 1948;¹⁵⁸ forty-eight women’s events have been added to the Games since 1949;¹⁵⁹ “no new opportunities intended only for male competitors have been added as exceptions to normal rules and procedures”;¹⁶⁰ and the plaintiffs produced no “statements made by persons involved in the decision,” which would illustrate a discriminatory purpose.¹⁶¹ Thus, the court rejected the plaintiffs’ contention that the rule was discriminatory on the basis of gender.¹⁶²

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at *28 (citing *Washington v. Davis*, 426 U.S. 229, 238–44 (1976); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 260 (1979)). In *Feeney*, the court applied a twofold test to determine if a facially neutral statute was invidiously discriminatory: (1) “[A] court must ascertain whether the statutory classification is indeed neutral in the sense that it is not gender based;” (2) If it is neutral, “whether the adverse effect reflects invidious gender-based discrimination.” *Feeney*, 442 U.S. at 274. In *Arlington Heights*, the court listed several factors that would evidence a discriminatory purpose: (1) the decision’s historical background; (2) “the impact of the official action”; (3) events leading up to the official action; and (4) the “administrative history of the decision.” *Arlington Heights*, 429 U.S. at 266–68.

¹⁵⁸ *Martin*, 1984 U.S. Dist. LEXIS 24941, at *31.

¹⁵⁹ *Id.* at *34.

¹⁶⁰ *Id.* at *40.

¹⁶¹ *Id.* at *41.

¹⁶² *Id.*

After the district court denied the plaintiffs' requested injunctive relief, the plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit.¹⁶³ The Ninth Circuit noted that though "the women runners made a strong showing that the early history of the modern Olympic Games was marred by blatant discrimination against women . . . women's participation in the Olympics had increased markedly during the past thirty-six years."¹⁶⁴ The plaintiffs challenged the decision of the district judge on several grounds; specifically, they argued that the district judge had incorrectly concluded that Rule 32 was facially gender-neutral¹⁶⁵ and that the district judge should have shifted the burden of proof to the defendants after they presented ample evidence of historical discrimination in the Olympic Games.¹⁶⁶ Addressing these arguments in turn, the Ninth Circuit rejected the plaintiffs' argument that the Rule was *not* facially neutral because "[R]ule 32 undeniably applies to both men and women athletes as it established criteria for adding *all* new events to the Olympic program."¹⁶⁷ In response to the plaintiffs' second argument, the Ninth Circuit noted that a historical background of discrimination in the Olympics "is insufficient alone to create a presumption of purposeful discrimination or to shift the burden of showing discriminatory intent behind this facially neutral regulation."¹⁶⁸ Thus, under its "very limited" scope of review,¹⁶⁹ the court found that the district judge had applied a proper legal analysis and affirmed the decision.¹⁷⁰ Acknowledging its restricted ability to review the district court's decision, the Ninth Circuit noted that its review on appeal "may provide little guidance as to the appropriate disposition [of the case] on the

¹⁶³ *Martin v. Int'l Olympics Comm.*, 740 F.2d 670, 673 (9th Cir. 1984).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 678.

¹⁶⁶ *Id.* at 679.

¹⁶⁷ *Id.* at 678-79.

¹⁶⁸ *Id.* at 679.

¹⁶⁹ The Ninth Circuit reviewed the opinion of the district court for abuse of discretion, or a "clear error of judgment." *Id.* (citing *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 752 (9th Cir. 1982)).

¹⁷⁰ *Id.*

merits.”¹⁷¹ This disclaimer evidences the possibility for a different outcome had the Ninth Circuit possessed a broader scope of review.

B. Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games

Years after the plaintiffs in *Martin* charged that the absence of the women’s 5,000 meter and 10,000 meter track event was discriminatory, in 2008 a group of female ski jumpers brought suit in the Supreme Court of British Columbia, making similar claims about the exclusion of women’s ski jumping from the Olympic Program.¹⁷² *Sagen* evidences the difficulty with naming defendants in gender discrimination suits concerning the Olympics. Courts are wary of applying national law to international organizations yet are reticent to hold national committees entirely responsible for the implementation of policies guided by those international organizations. The women here claimed that the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Games (“VANOC”) had violated the Canadian Charter of Rights and Freedoms.¹⁷³ They argued that VANOC’s decision to hold men’s ski jumping events and not women’s ski jumping events violated Section 15(1) of the Canadian Charter,¹⁷⁴ which prohibits discrimination on the basis of sex and other protected classes.¹⁷⁵

In analyzing the claim of the female ski jumpers, the court outlined three issues: (1) does the Canadian Charter apply to VANOC, (2) if so, did VANOC breach Section 15 by failing to host women’s ski jumping, and (3) is an infringement under

¹⁷¹ *Id.* (citing *Sports Form, Inc.*, 686 F.2d at 753).

¹⁷² *Sagen v. Vancouver Org. Comm. for the 2010 Olympic & Paralympic Winter Games* (2009), 98 B.C.L.R. 4th 109, para. 1 (Can. B.C.); Cleary, *supra* note 144, at 1296.

¹⁷³ Cleary, *supra* note 172, at 1297 (“The Canadian Charter is Canada’s Bill of Rights and comprises the first part of the Canadian Constitution.”).

¹⁷⁴ *Id.*

¹⁷⁵ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 15 (U.K.), *available at* http://laws.justice.gc.ca/eng/Charter/CHART_E.PDF.

Section 15 negated by Section 1 of the Canadian Charter?¹⁷⁶ In response to the first issue, the court found that, though VANOC is a “private entity,”¹⁷⁷ the Canadian Charter applied to VANOC because it engaged in a “government activity”¹⁷⁸ by “planning, organizing, financing, and staging the 2010 Games.”¹⁷⁹

In addressing the second issue, the court utilized a two-part test to ascertain whether there was discrimination under § 15(1) of the Canadian Charter: “(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?”¹⁸⁰ Interestingly, the court looked to *Martin* to evaluate sex discrimination.¹⁸¹ The court critiqued the *Martin* court’s determination that Rule 32 was gender-neutral, noting that

[t]he majority in *Martin* did not go beyond formal distinctions to consider adverse effects [of] discrimination, in particular, whether the application of rules neutral on their face result in the unequal treatment of women who compete in events that are already included in the Olympics for men but not for women.¹⁸²

Thus, the court rejected *Martin*’s narrower outlook on sex discrimination and found, using its two-pronged test, that (1) the female ski jumpers were being “treated less favourably” as compared to male ski jumpers¹⁸³ and (2) “the Olympic Charter Rules that grandfather men’s ski jumping, while requiring women’s ski jumping events to meet the criteria for inclusion of new events” was discriminatory.¹⁸⁴

Despite its finding of discrimination, the court noted that the plaintiffs’ suit was not brought against the IOC, who

¹⁷⁶ *Sagen*, 98 B.C.L.R. 4th 109, at para. 9.

¹⁷⁷ *Id.* at para. 11.

¹⁷⁸ *Id.* at para. 63.

¹⁷⁹ *Id.* at para. 65.

¹⁸⁰ *Id.* at para. 68.

¹⁸¹ *Id.* at para. 83.

¹⁸² *Id.*

¹⁸³ *Id.* at para. 75.

¹⁸⁴ *Id.* at para. 103.

promulgated the rules, but rather brought against VANOC, the organization that implemented the rules.¹⁸⁵ The court explained that the IOC was not a party to the suit because it was not subject to the Canadian Charter as a Swiss organization.¹⁸⁶ Though the plaintiffs attempted to argue that VANOC's *implementation* of IOC policy was discriminatory, the court noted that VANOC had no authority to select which events would be staged at the Olympics.¹⁸⁷ Rather, the IOC and IFs have authority over Olympic events.¹⁸⁸ Ultimately, the court found that since "VANOC did not make the decision to exclude women's ski jumping from the 2010 Games[.]" VANOC did not violate the Canadian Charter.¹⁸⁹

IV. HYPOTHETICAL SEX DISCRIMINATION SUIT CHALLENGING INTERSEX POLICY

Though the plaintiffs in both *Martin* and *Sagen* were ultimately unsuccessful in their lawsuits charging discriminatory practices at the Olympics, both cases could inform the formulation of a potential lawsuit brought by female athletes challenging the IOC and IAAF policy on hyperandrogenism. Even though the cases are from different countries, the Honourable Madam Justice Fenlon's analysis in *Sagen* engages with the *Martin* court's reasoning, which evidences a willingness

¹⁸⁵ *Id.* at para. 104.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at para. 115.

¹⁸⁸ *Id.* at paras. 116–17.

¹⁸⁹ *Id.* at para. 121. Though the court ultimately ruled that VANOC had not violated § 15 of the Canadian Charter, Honourable Madam Justice Fenton, in writing the opinion, included strong language expressing her regret that the female skiers would not be able to compete: "I acknowledge that there is something distasteful about a Canadian governmental activity subject to the *Charter* being delivered in a way that puts into effect a discriminatory decision made by others" *Id.* at para. 124. Though the plaintiffs appealed the Honourable Madam Justice Fenlon's decision, the British Columbia Court of Appeal dismissed the case, citing reasoning similar to that of the lower court. *Sagen v. Vancouver Org. Comm. for the 2010 Olympic and Paralympic Winter Games* [2010], 98 B.C.L.R. 4th 141, para. 68 (Can. B.C.).

of courts to look beyond their jurisdictions when evaluating sex discrimination claims against an international player such as the IOC.¹⁹⁰ More broadly, U.S., Canadian, and British law “fall within the scope of a single, common legal tradition” characterized by legal borrowing.¹⁹¹ “Legal borrowing” implies a willingness among these countries to, explicitly or implicitly, share jurisprudence.¹⁹² While Vincent-Joël Proulx analyzes “legal borrowing” within the framework of trademark law, the concept has the potential for other applications, particularly when the body of law is susceptible to an international exchange and involves international players.¹⁹³

This section outlines the structure of a potential lawsuit and assesses its likelihood of success. After first addressing the proper venue and parties for such a case, this section then turns to the claim itself and considers what an argument of sex discrimination should look like. Ultimately, this Note concludes that a sex discrimination suit against the IOC/IAAF hyperandrogenism policy would be more successful than either *Martin* or *Sagen* because of the ability to hold the London Organising Committee of the Olympic Games (“LOCOG”) directly responsible for supporting a facially discriminatory policy.

A. Where: British Law on Sex Discrimination

Assuming *arguendo* that the IOC were to finalize its policy on hyperandrogenism prior to the 2012 Summer Olympics in London—which is likely, as it was adopted by the IAAF¹⁹⁴—a sex discrimination suit would necessarily be brought in Britain.¹⁹⁵

¹⁹⁰ *Sagen*, 98 B.C.L.R. 4th 109, at para. 83.

¹⁹¹ Vincent-Joël Proulx, *Borrowing from Our Common Law Cousins: American and British Influences on the Merger of Canadian Trademark and Internet Domain Name Laws*, 22 ARIZ. J. INT’L & COMP. L. 505, 509–11 (2005).

¹⁹² *Id.*

¹⁹³ *Id.* at 511–12.

¹⁹⁴ Kessel, *supra* note 139.

¹⁹⁵ Int’l Council of Arbitration for Sport [ICAC] & Court of Arbitration for Sport [CAS], Statutes of the Bodies Working for the Settlement of Sports-

Recall that in *Martin*, the plaintiffs brought suit in state court in California,¹⁹⁶ charging that the absence of certain women's events at the Los Angeles Olympics was discriminatory.¹⁹⁷ Later, the plaintiffs in *Sagen* litigated their claim concerning the Vancouver Olympics in the Supreme Court of British Columbia.¹⁹⁸ Additionally, the Court of Arbitration for Sport would not have jurisdiction over this suit because there is not a "specific agreement" between the female athletes and the London Organising Committee of the Olympic Games.¹⁹⁹ Despite the outcomes of both *Martin* and *Sagen*, plaintiffs seeking to challenge the implementation of the intersex policy at the London Games would be advised to bring suit in England, the country in which the Games will be staged, to ensure proper venue over the LOCOG.

A claim against various Olympic entities in Britain would most likely be brought under that country's new Equality Act, passed in 2010.²⁰⁰ The law was aimed at synthesizing nine major pieces legislation²⁰¹ into a single, cohesive "legal framework" guaranteeing equality.²⁰² Despite the unification under the

Related Disputes, art. A, § 1 (Jan. 1, 2012), available at http://www.tas-cas.org/d2wfiles/document/4962/5048/0/Code20201220_en_2001.01.pdf.

¹⁹⁶ *Martin v. Int'l Olympics Comm.*, No. CV-83-5847, 1984 U.S. Dist. LEXIS 24941, at *1 (C.D. Cal. Apr. 16, 1984).

¹⁹⁷ *Martin*, 1984 U.S. Dist. LEXIS 24941, at *1-5.

¹⁹⁸ See generally *Sagen v. Vancouver Org. Comm. for the 2010 Olympic & Paralympic Winter Games* (2009), 98 B.C.L.R. 4th 109 (Can. B.C.).

¹⁹⁹ ICAC & CAS, Statutes of the Bodies Working for the Settlement of Sports-Related Disputes, *supra* note 195.

²⁰⁰ Equality Act, 2010, c. 15 (U.K.), available at http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf.

²⁰¹ These nine pieces include the Equal Pay Act 1970, the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995, the Employment Equality (Religion or Belief Regulations) 2003, the Employment Equality (Sexual Orientation) Regulations 2003, the Employment Equality (Age) Regulations 2006, the Equality Act 2006, Part 2, and the Equality Act (Sexual Orientation) Regulations 2007. *What is the Equality Act?*, EQUAL. & HUMAN RIGHTS COMM'N, <http://www.equalityhumanrights.com/legal-and-policy/equality-act/what-is-the-equality-act/> (last visited Feb. 17, 2012).

²⁰² *Id.*

Equality Act, the relevant sex discrimination law is still contained within the text of the Sex Discrimination Act (“SDA”) of 1975.²⁰³ The SDA prohibits both direct and indirect²⁰⁴ discrimination on the basis of sex in the realm of “goods, facilities and services.”²⁰⁵ Notably, there is an exception for sports, as the SDA permits separation of the sexes within sports “where the physical strength, stamina or physique of the average woman puts her at a disadvantage to the average man”²⁰⁶ Moreover, the Equality Act states that “[s]ex discrimination is lawful in certain circumstances when selecting participants for sports and other events of a competitive nature where activities are confined to competitors of one sex.”²⁰⁷ The language of the SDA, and other laws encompassed within the Equality Act, suggests that British law tolerates separate events for different sexes based on physical differences between men and women; however, a lawsuit challenging the IOC and IAAF policy on hyperandrogenism would not object to the existence of separate men’s and women’s divisions in Olympic competition, but rather *how* the Olympic bodies would regulate who counts as a woman. Simply, the discrimination here is the arbitrary definition of woman and the consequences of excluding from competition athletes who consider themselves women.

²⁰³ *Sex Discrimination as a Consumer: What the Law Says*, EQUAL. & HUMAN RIGHTS COMM’N, <http://www.equalityhumanrights.com/advice-and-guidance/your-rights/gender/sex-discrimination-as-a-consumer/sex-discrimination-as-a-consumer-what-the-law-says/> (last visited Feb. 17, 2012).

²⁰⁴ *Id.* (“Indirect sex discrimination occurs when a condition or requirement is applied equally to both women and men but, in fact, significantly fewer members of one sex would be able to comply with it and is not justifiable on objective grounds unrelated to sex.”)

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Sports and Competitions*, EQUAL. & HUMAN RIGHTS COMM’N, <http://www.equalityhumanrights.com/advice-and-guidance/before-the-equality-act/guidance-for-service-users-pre-october-2010/shops-and-services/when-discrimination-is-lawful/sports-and-competitions/> (last visited Feb. 17, 2012).

B. Who: Determining Defendants in a Sex Discrimination Suit

Once deciding where to litigate their claim, hypothetical plaintiffs would then identify the relevant defendants. Recall that in *Martin*, the plaintiffs sued the IOC in addition to U.S. Olympic governing bodies.²⁰⁸ In *Sagen*, however, the plaintiffs did not join the IOC as a defendant.²⁰⁹ Jennifer Anne Cleary, in her Note *A Need to Align the Modern Games with Modern Times: the International Olympic Committee's Commitment to Fairness, Equality, and Sex Discrimination*, suggests that the plaintiffs in *Sagen* did not join the IOC because of the outcome of *Martin* and “the history of deference to the IOC’s decisions.”²¹⁰ Admittedly, in both *Martin* and *Sagen* the courts may have been reticent to demand that an international organization alter the Olympic program.²¹¹

Respect for the IOC’s authority, on the other hand, did not control the outcome of those cases. Although they joined the IOC as defendants, the plaintiffs in *Martin* were unsuccessful because the court found that Rule 32 was not discriminatory on its face.²¹² The plaintiffs in *Sagen* lost *because* they did not bring suit against the IOC, which was responsible for determining the Olympic program.²¹³ The *Sagen* plaintiffs, who brought their claim in the Supreme Court of British Columbia, did not join the IOC because it was not subject to the Canadian Charter.²¹⁴ Thus, the plaintiffs in *Sagen* were out of luck—they could not sue the IOC because of lack of jurisdiction, but could not assert a successful claim against VANOC because it did not control the

²⁰⁸ *Martin v. Int’l Olympics Comm.*, No. CV-83-5847, 1984 U.S. Dist. LEXIS 24941, at *1–5 (C.D. Cal. Apr. 16, 1984).

²⁰⁹ Cleary, *supra* note 144, at 1301.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Martin v. Int’l Olympics Comm.*, 740 F.2d 670, 678–79 (9th Cir. 1984).

²¹³ *Sagen v. Vancouver Org. Comm. for the 2010 Olympic & Paralympic Winter Games* (2009), 98 B.C.L.R. 4th 109, at para. 103 (Can. B.C.).

²¹⁴ *Id.*

Olympic program.²¹⁵ The Honourable Madam Justice Fenlon, however, left open the possibility that there exist “exceptions to the general principle” that VANOC could not be held responsible for the discriminatory policy because it did not create it.²¹⁶

A sex discrimination suit against the hyperandrogenism policy should fall within the exception noted by the Honourable Madam Justice Fenlon. Just as the court in *Sagen* looked to *Martin* to influence its decision, the hypothetical court here should incorporate analyses from *Sagen* and *Martin* into its own decision. Here, the plaintiffs’ success hinges on whether they are able to show that the implementing entity—in this case LOCOG—is so supportive of the discriminatory policy that it should itself be held accountable for it. In *Sagen*, it was important to the Honourable Madam Justice Fenlon’s decision that VANOC had expressed its support for the female athletes; she wrote that VANOC “remains ready and willing to host [a women’s ski jumping] event should the IOC change its decision.”²¹⁷ It was difficult to hold VANOC responsible for enforcing the IOC’s discriminatory decision when VANOC had clearly demonstrated its backing of the female ski jumpers.²¹⁸ Here, however, more support exists for the hyperandrogenism policy than for the female athletes. Not only has the IAAF adopted the policy²¹⁹ but LOCOG has essentially ratified it by recognizing that the final IOC policy on hyperandrogenism will govern at the 2012 Olympic Games.²²⁰ As LOCOG supports the IOC policy on hyperandrogenism, or at least does not outwardly object to it as VANOC did in *Sagen*, the hypothetical plaintiffs here would have a stronger case against LOCOG than the plaintiffs in *Sagen* had against VANOC. Thus, the *Sagen* dilemma of lack of jurisdiction over the IOC is avoided since the local organizing committee itself can be named as a defendant.

²¹⁵ *Id.* at para. 121.

²¹⁶ *Id.* at para. 124.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Kessel, *supra* note 139.

²²⁰ Tony, *New Rules Aim to End Gender Rows*, LONDON 2012 LATEST NEWS (Dec. 27, 2011), <http://londonolympics-2012.net/2011/12/27/new-rules-aim-to-end-gender-rows/>.

C. What: The Sex Discrimination Claim

The IOC and IAAF policy on hyperandrogenism is facially discriminatory because the policy only regulates androgen levels in women, not men.²²¹ The principles put forth by the IOC explicitly require “female[s]” in “female competitions” to have “androgen levels below the male range,” but the policy is silent on what the threshold for the male range is, or if there is an androgen limit for males in male competitions.²²² In this vein, Hida Viloría, the Human Rights Spokesperson for the Organisation Intersex International,²²³ argues that “many athletes have conditions that give them physical advantages, and . . . seeking to remove the advantages of only women with hyperandrogenism is discriminatory.”²²⁴ Viloría cites to the “intersex variation Diplo,” which causes men to produce higher levels of testosterone, and points out, “no one is insisting that [men with Diplo] lower their testosterone levels to the ‘normal’ male level.”²²⁵

Furthermore, the hyperandrogenism policy is overly simplistic because it assumes there exists a “normal” level of androgens in females.²²⁶ Dr. Eric Vilain, a professor of human genetics, pediatrics and urology at the University of California Los Angeles’ David Geffen School of Medicine and participant

²²¹ Kohli, *supra* note 15.

²²² *IOC Addresses Eligibility of Female Athletes with Hyperandrogenism*, *supra* note 3.

²²³ *About*, HIDA VILORÍA, <http://www.hidaviloria.com/about.html> (last visited Feb. 17, 2012).

²²⁴ Viloría, *supra* note 142.

²²⁵ *Id.*

²²⁶ The hormones in question are not naturally exclusive to men. Women and men naturally make androgens—sometimes called strength-building hormones—including testosterone. Yet despite the fact that testosterone belongs to women, too, the I.O.C. and the I.A.A.F. are basically saying it is really a manly thing: “You can have functional testosterone, but if you make too much, you’re out of the game because you’re not a real woman.”

Alice Dreger, *Redefining the Sexes in Unequal Terms*, N.Y. TIMES (Apr. 23, 2011), <http://www.nytimes.com/2011/04/24/sports/24testosterone.html> [hereinafter Dreger, *Redefining the Sexes in Unequal Terms*].

in the January 2010 IOC panel on hyperandrogenism, noted that “there is a tremendous variation in hormone levels even in typical females, which makes determining a baseline virtually impossible.”²²⁷ Additionally, Alice Dreger argues that female athletes are “likely to have naturally high levels of androgens. That is probably part of why [they] succeed[] athletically.”²²⁸ Thus, the IOC’s hyperandrogenism policy is not only discriminatory because it focuses solely on women, but it also rests on flawed logic because it incorrectly assumes that science is capable of quantifying a “normal” level of androgens in women.

The IOC and IAAF policy unfairly targets women with hyperandrogenism on the basis of maintaining a level playing field for other female athletes;²²⁹ however, this rationale is defective because it does not account for the failure of these organizations to regulate other factors that affect athletes’ competitive advantages. For instance, Alice Dreger points out that men tend to be taller than women; however, no sporting body attempts to bar from competition women who are a “male-typical height”²³⁰ Indeed, “sports are inherently unequal regardless of genetics . . . and any potential athletic advantages one might have because of a DSD are no different from other naturally occurring physical advantage like being taller or having more balance.”²³¹ Furthermore, it is unclear whether increased androgens actually translate into a competitive advantage.²³²

²²⁷ Meg Handley, *The IOC Grapples with Olympic Sex Testing*, TIME (Feb. 11, 2010), <http://www.time.com/time/printout/0,8816,1963333,00.html>. Joe Leigh Simpson, an associate dean at Florida International’s medical school, characterized the attempt to discern normal androgen levels for men and women as “absurd.” Epstein, *supra* note 113.

²²⁸ Alice Dreger, *Where’s the Rulebook for Sex Verification*, N.Y. TIMES (Aug. 21, 2009), <http://www.nytimes.com/2009/08/22/sports/22runner> [hereinafter Dreger, *Where’s the Rulebook for Sex Verification*].

²²⁹ Dreger, *Redefining the Sexes in Unequal Terms*, *supra* note 226. Instead, Alice Dreger believes, “[W]hat is really being leveled here is the bodies of female athletes.” *Id.*

²³⁰ Dreger, *Where’s the Rulebook for Sex Verification*, *supra* note 228.

²³¹ Handley, *supra* note 227.

²³² *Id.* “[S]ome sex differentiations are purely biological variations and do not equate to physical superiority. Furthermore, it has never been proven

Clearly, the IOC and IAAF's purported interest in maintaining a level playing field through the strict separation of sexes fails to justify the implementation of an arbitrary hyperandrogenism policy that unfairly discriminates against women.

CONCLUSION

The IOC and IAAF policy on hyperandrogenism plainly conflicts with the sentiment of equality of the sexes within the Olympic Charter. While a sex discrimination suit against LOCOG is not the only means to challenge the hyperandrogenism policy, it represents an effective avenue for addressing the inequity presented by the regulation of androgen levels in women. Certainly, a lawsuit involving female athletes and Olympic organizing bodies would draw international media attention and highlight the unfair practice of sex testing. Female athletes looking to dispute the policy's implementation at the Summer Olympic Games in London would likely have more success than the plaintiffs in *Martin* and *Sagen* because of the importance placed on sex equality in British law, the ability to hold LOCOG responsible for the policy, and the recognition that the policy represents outright discrimination against women.

The IOC and IAAF's efforts to ensure a level playing field in international sports competitions have effectively undercut much of the progress made in the realm of women's sports. By insisting that female athletes possess androgen levels below the "male" level, these organizations have oversimplified what it means to be a woman. Furthermore, the imposition of an artificial definition of woman upon athletes precludes from competition certain athletes that have always considered themselves to be female.

that those whose biological sex is difficult to ascertain have attributes superior to the genetically female." Larson, *supra* note 101, at 232.