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Intersexuality and Gender Verification Tests: The Need to Assure Human Rights and Privacy

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**INTERSEXUALITY AND GENDER
VERIFICATION TESTS:
THE NEED TO ASSURE HUMAN RIGHTS AND
PRIVACY**

Stacy Larson

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I. INTRODUCTION

Intersexuality is a topic that rarely enters mainstream discussion. It has, however, been at the forefront of several disciplines. Intersexuality has been defined by the medical community, and research in the medical field has focused largely on sex assignment surgeries at the time of birth. Psychologists have attempted to define intersexuality and the “symptoms” associated with it when an individual is diagnosed as intersex. Anthropologists reveal that in primitive societies intersex individuals were outcasts, while in others, they were revered. Social scientists also suggest that gender is a social construct, not something that is biologically determinative. The legal system has failed in its protections of intersex most of the time. An issue that arises is that intersexuality has not been examined from an interdisciplinary or integrative approach. While the medical community and the social sciences have addressed the condition, the legal system has largely ignored it; thus, basic human rights have not been extended to those with an intersex condition. This may partly be due to the fact that the condition is somewhat invisible—that is at least until a person’s sexuality is questioned and examined. Making intersexuality visible in the eyes of the law will allow intersex persons to enjoy the same human rights afforded to others.

Part II of this Comment will discuss the basic foundation of how intersexuality is examined in various fields. Part III of this Comment will trace the timeline of gender verification testing in sports from the early part of the 1900s through the current controversy involving South African runner, Caster Semenya. The discrimination that often results from the use of gender verification tests will be explained. Part IV of this Comment will discuss gender-based legal protections in sports by summarizing and analyzing the applicable provisions of the Universal Declaration of Human Rights and will encourage the international community to place laws on its books to protect the rights of intersex people. Part V will address the need for balancing an athlete’s right to privacy and undue intrusion against the prevailing interests of the state in ensuring that other athletes can compete on a fair playing field with other members of their ascribed sex. Additionally, recommendations for building awareness and tolerance of intersex individuals will be set forth.

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II. INTERSEXUALITY

A. *Biological/Medical Influences*

Several medical and law journals have discussed intersexuality by defining it from a physiological perspective.¹ Since the 1900s, Western medicine has regarded intersexuality as “a medical condition, a disorder of sex development, requiring life-long medical treatment, with genital abnormalities being corrected by surgery to allow so-called normal sexual function.”² Approximately 1.7% of children are born intersex worldwide each year.³ The medical community, in its management of intersex individuals, identifies at least four biological sex differences: genes, gonads, genitals, and brain.⁴

Accord Alliance⁵ defines intersex as:

a term sometimes used to refer to the condition of having a sex anatomy that is not considered standard for a male or female . . . it is an umbrella term that covers many different conditions that appear in humans as well as other animals. The term is often used by adults with DSDs [Disorders of Sex Development] to talk about their bodies and their experiences.⁶

DSDs include (1) congenital adrenal hyperplasia (CAH)⁷, XX ka-

¹ Kurt Hirschhorn, *Human Genetics*, 224 JAMA 597 (1973); see also Natascha Gruber, *Ethics in Medicine: With a Special Focus on the Concepts of Sex and Gender in Intersex Management*, 12 CARDOZO J.L. & GENDER 117 (2005); Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51 (2006); see also Julie Greenberg, *Intersex and Intrasex Debates: Building Alliances to Challenge Sex Discrimination*, 12 CARDOZO J.L. & GENDER 99 (2005).

² Claudia Lang and Ursula Kuhnle, *Intersexuality and Alternative Gender Categories in Non-Western Cultures*, 69 HORMONE RES. 240, 240 (2008), [hereinafter *Alternative Gender*].

³ Sara R. Benson, *Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed*, 12 CARDOZO J.L. & GENDER 31, 33 (2005) [hereinafter *Fundamental Rights*].

⁴ Iain Morland, *Is Intersexuality Real?*, 15 TEXTUAL PRACTICE 3, 530 (2001) (discussing four sex differences [and definitions] recognized by the medical community. Genes refer to chromosomal make up, XX or XY; gonads are the reproductive organs, ovaries or testes; genitals are the external genitalia, clitoris/labia or penis/scrotum; and the brain's sex is formed as a result of exposure to hormones in utero).

⁵ Accord Alliance replaced the now defunct Intersex Society of North America.

⁶ *Glossary of Terms*, ACCORD ALLIANCE, <http://www.accordalliance.org/glossary.html?task=list&glossid=1&letter=I> (last visited Sept. 13, 2010).

⁷ *What is Congenital Adrenal Hyperplasia?*, CONGENITAL ADRENAL HYPERPLASIA: EDUCATION AND SUPPORT NETWORK, <http://www.congenital-adrenalyperplasia.org/> (last visited Sept. 20, 2010) (describing congenital adrenal hyperplasia as “a genetic defect of

ryotype⁸ and indications of excess androgen levels, (2) partial and/or complete androgen insensitivity, (3) complete and partial gonadal dysgenesis,⁹ (4) androgen hormone synthesis, and (5) sex chromosomal abnormalities (i.e. Turner's Syndrome and Klinefelter Syndrome).¹⁰ DSDs (2), (3), and (4) represent XY karyotype and have indications of complete or partial lack of virilization.¹¹

It should be noted that the term intersex differs from the term hermaphrodite. Early medical research described the condition of intersex as hermaphroditism; however, the correct, or currently preferred, term is intersex since a "true hermaphrodite is an individual who has both ova-

the adrenal glands. A person with CAH will not be able to produce several vital hormones known as corticosteroids").

⁸ Anke LUX ET AL., *Clinical Evaluation Study of the German Network of Disorders of Sex Development (DSD)/Intersexuality: Study Design, Description of the Study Population, and Data Quality*, 9 BMC PUB. HEALTH 1, 2 (2009) (noting that although a child may appear female at birth she may not have ovaries) [hereinafter *Clinical Evaluation*].

⁹ *Genetic Conditions: Androgen Insensitivity Syndrome*, GENETICS HOME REFERENCE, <http://ghr.nlm.nih.gov/condition=androgeninsensitivitysyndrome> (last visited Sept. 20, 2010) (defining partial androgen insensitivity as "result[ing] when the body's tissues are partially sensitive to the effects of androgens. . . . [p]eople with partial androgen insensitivity . . . can have normal female sex characteristics, both male and female sex characteristics, or normal male sex characteristics. They may be raised as males or as females, and may have a male or a female gender identity. People with mild androgen insensitivity are born with male sex characteristics, but are often infertile and tend to experience breast enlargement at puberty."). *Id*; Complete androgen insensitivity is defined as a condition in which the individual has "external sex characteristics of females, but do[es] not have a uterus and therefore do[es] not menstruate and [is] unable to conceive a child (infertile). [The individual is] typically raised as female[s] and ha[s] a female gender identity. Affected individuals have male internal sex organs (testes) that are undescended, which means they are abnormally located in the pelvis or abdomen." *Id*; *Gonadal Dygenesis Definition*, Tab for Medical Dictionary, THE FREE DICTIONARY.COM, <http://medical-dictionary.thefreedictionary.com/gonadal+dys-genesis> (last visited Sept 20, 2010) (defining gonadal dysgenesis as "defective development of the gonads, which may be accompanied by abnormalities of the sex chromosomes").

¹⁰ *Clinical Evaluation*, *supra* note 8, at 2; *see generally* P.F.M. Bishop, *Intersex States and Allied Conditions*, 1 BRIT. MED. J. 1255, 1259-61 (1966) (noting that a diagnosis of Turner's Syndrome, in a female, results from a missing X chromosome on the 45th chromosome pair while a diagnosis of Klinefelter Syndrome in a male results from an additional X chromosome).

¹¹ *Clinical Evaluation*, *supra* note 8, at 2; *see also* Katinka Schweizer et al., *Gender Identity and Coping in Female 46, XY Adults With Androgen Biosynthesis Deficiency (Intersexuality/DSD)*, 56 J. COUNSELING PSYCHOL. 189, 190 (2009) [hereinafter *Coping Female*] (discussing that normally during the prenatal period, a chromosomal 46, XY karyotype triggers male sex development. If virilization, the process of developing male secondary sex characteristics, is incomplete because of an enzyme deficiency, then the result is extreme undermasculinization of external genitalia. Once the child is born, his genitalia appear to be that of a female).

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rian and testicular tissue,” a very rare human condition.¹² Nevertheless, the medical community as a whole has traditionally and historically focused its efforts on correcting these sex errors through sex assignment surgery. It is only recently that attitudes towards individuals with DSDs have begun to change.¹³

B. Psychological Influences

The Diagnostic and Statistical Manual of Mental Disorders¹⁴ permits clinicians to code individuals with an intersex condition as “Gender Identity Disorder Not Otherwise Specified (NOS).”¹⁵ Individuals who cannot be coded with having a specific Gender Identity Disorder may receive this diagnosis. Examples of intersex conditions include partial androgen insensitivity syndrome or congenital adrenal hyperplasia *and* accompanying gender dysphoria (emphasis added).¹⁶ Gender Identity Disorder NOS is an Axis I Clinical Disorder.¹⁷ An advantage of a multi-axial system is that it provides a clinician with guidelines “for organizing and communicating clinical information, for capturing the complexity of clinical situations, and for describing the heterogeneity of individuals presenting with the same diagnosis.”¹⁸ However, at least one NOS category is used for each diagnostic class when individuals present with a variety of symptoms that do not map precisely to a given “diagnostic nomenclature.”¹⁹

¹² 5 ENCYCLOPEDIA BRITANNICA 874 (Robert McHenry ed., 15th ed. 1992) available at <http://www.britannica.com/EBchecked/topic/263151/hermaphro-ditism> (last visited Sept. 20, 2010).

¹³ Olaf Hiort, *Alternative Gender Categories in Different Cultures: Lessons to Be Learnt*, 69 HORMONE RES. 251, 251 (2008).

¹⁴ The Diagnostic and Statistical Manual of Mental of Mental Disorders is the manual currently used in culturally diverse populations in the United States and internationally. The wide international acceptance of the Manual suggests that this classification is useful in describing mental disorders as they are experienced by individuals throughout the world.

¹⁵ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-IV-TR) 582 (4th ed., Text Rev., American Psychiatric Association 2000) [hereinafter *DSM-IV*].

¹⁶ *Id.* at 823 (defining gender dysphoria as “a persistent aversion toward some or all of those physical characteristics or social roles that connote one’s own biological sex”).

¹⁷ The *DSM-IV* categorizes disorders within a multi-axial system. Each axis pertains to a different area of information and criteria used to assist the clinician in creating a treatment plan and assessing outcomes for a given diagnosis.

¹⁸ *DSM-IV*, *supra* note 15, at 27.

¹⁹ *Id.* at 4.

An NOS diagnosis may be appropriate in four situations,²⁰ two of which appear most relevant to intersex individuals. First, when “there is an uncertainty about etiology (i.e., whether the disorder is due to a general medical condition . . .).”²¹ Second, when “there is insufficient opportunity for complete data collection (e.g., in emergency situations) or inconsistent or contradictory information, but there is enough information to place it within a particular diagnostic class.”²² The fact that the intersex condition is coded as NOS is itself problematic. The NOS coding suggests that the international psychiatric and psychological communities have not come to a consensus of what it means to be intersex, that intersex could be a general medical condition,²³ or that there have not been enough individuals presenting with similar symptoms to fit them into a particular diagnostic class. Furthermore, and most importantly, “Gender Identity Disorder NOS” requires an intersex condition *and* accompanying gender dysphoria (emphasis added). In other words, an individual with this diagnosis would have to have an intersex condition plus “a persistent aversion toward some or all of those physical characteristics or social roles that connote one’s own biological sex.”²⁴ If an intersex condition means *neither male nor female* or *both male and female*, and biological sex cannot be determined by the binary system, the characteristics or social roles that would attach to intersex are arguably unknown; therefore, it is difficult to understand how one could have an aversion to the unknown.

Because the DSM-IV is used globally by clinicians with diverse cultural and ethnic groups, a supplemental outline for cultural formulation to assist in diagnostic assessment is provided. An “individual’s cultural background, the role of the cultural context in the expression and evaluation of symptoms and dysfunction, and the effect that cultural differences may have on the relationship between the individual and the clinician”²⁵ are reviewed in order to properly “describe systematically the individual’s cultural and social reference group and ways in which the cultural

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *DSM-IV*, *supra* note 15, at xxxv (The term ‘general medical condition’ is used for convenience and does not “imply that there is any fundamental distinction between mental disorders and general medical conditions, that mental disorders are unrelated to physical or biological factors or processes, or that general medical conditions are unrelated to behavioral or psychosocial factors or processes”).

²⁴ *Id.* at 823.

²⁵ *Id.* at 897.

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context is relevant²⁶ to diagnosis and treatment. For example, a clinician is advised to note norms of the cultural/ethnic/social reference group, any local illness or disorder category utilized by the individual's family and community to identify the condition, and the perceived causes or explanatory models/theories of the disorder/illness.²⁷ It is possible, perhaps, that two individuals presenting with the same symptoms would be diagnosed differently, or one might not be diagnosed at all, once cultural factors are considered. Thus, guidelines for diagnosis of the intersex condition are not universal.

In some societies, adults with intersex conditions have reported psychological difficulties including "coping with intersex-specific experiences, such as atypical somatosexual and psychosocial development, medical interventions, and the repeated experience of being different from other boys and girls, men and women."²⁸ Additionally, psychosocial development may be impeded as the intersex individual may not know how to cope with reactions from parents and family members. Emotional reactions, "such as insecurity, anxiety and shame," may "result[ing] in silence and taboo."²⁹

John Money's "Optimal Gender Policy"³⁰ was developed in the 1950s as a method to lessen the stigma associated with intersex conditions, and although it was widely accepted in Canada, the U.K. and much of Europe at the time, today it is not as widely accepted since it has been found that there is a "lack of medical necessity, violation of informed

²⁶ *Id.*

²⁷ *Id.* at 898.

²⁸ *Coping Female*, *supra* note 11, at 189 (citing PEGGY TINE COHEN-KETTENIS AND FRIEDEMANN PFAFFLIN, *TRANSGENDERISM AND INTERSEXUALITY IN CHILDHOOD AND ADOLESCENCE: MAKING CHOICES* (Sage Publications 2003); Milton Diamond, *Sexual Identity and Sexual Orientation in Children with Traumatized or Ambiguous Genitalia*, 34 J. SEX RES. 199 (1997); Kenneth J. Zucker, *Intersexuality and Gender Identity Differentiation*, 10 ANN. REV. SEX RES. 1 (1999).

²⁹ *Id.* (citing S. KESSLER, *LESSONS FROM THE INTERSEXED* (Rutgers Univ. Press 1998); Arlene Istar Lev, *Intersexuality in the Family: An Unacknowledged Trauma*, 10 J. GAY & LESBIAN PSYCHOTHERAPY 27 (2006); SHARON PREVES, *INTERSEX AND IDENTITY: THE CONTESTED SELF* (Rutgers Univ. Press 2003).

³⁰ J. David Hester, *Intersex(es) and Informed Consent: How Physician's Rhetoric Constrains Choice 2* (unpublished manuscript 2004), *available at* <http://www.aissg.org/PDFs/Hester-Informed-Consent-2004.pdf> [hereinafter *Informed Consent*] (noting that the "Optimal Gender Policy" is a medical policy which requires a physician to make a determination of underlying condition(s), selection of gender, surgical intervention, and a commitment by all parties to accept the "real sex" of the patient, all no later than 18-24 months, preferably earlier).

consent, and uncertainty of standards of success.”³¹ Thus, even if physicians and parents make a decision to have a baby undergo reassignment surgery, by the time that individual reaches adulthood, he or she may actually feel like the opposite gender thereby creating psychological distress.

C. Social/Anthropological Influences

Recent empirical studies have examined the societal manifestations of the gender binary system in Western societies. Being born with, or later discovering, an intersex condition has proven to be a challenging situation in terms of both group norms and individual experience. As part of a larger research project on quality of life conducted in Germany, Schweizer et al. conducted interviews with seven individuals with various intersex conditions in an effort to understand their coping mechanisms (1) at the time of puberty and (2) in response to binary gender conception.³² The second item, *in response to binary gender conception*, will be the focus of this section. All seven participants appeared as biological females at birth, all were assigned female at birth, and all live in the female gender role currently.³³ However, all faced developmental difficulties during their lives primarily due to lack of support from others when trying to determine how they fit into the gender binary system. Gender satisfaction was assessed in the study and participants were asked whether having a third gender category would have made their development more favorable.³⁴ The participants were divided on whether a third gender category should be introduced. Some of the participants argued that the gender binary does exist, but that masculinity and femininity exist on a continuum and that “these variations should be socially and ethically accepted.”³⁵ Another stated that the two genders should just be eradicated.³⁶ Lastly, one participant wrote:

Every intersex person should choose in which gender role she wishes to live officially. Whoever is not able to do so should be entitled to live as an intersexual or asexual human being. It is important that intersex conditions are recognized as something existing in actuality, which do[es] not need to

³¹ *Id.* at 2.

³² See *Coping Female*, *supra* note 11, at 192.

³³ *Id.* at 193.

³⁴ *Id.* at 194.

³⁵ *Id.* at 197.

³⁶ *Id.*

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be erased by therapy . . .³⁷

Overall, the authors observed that participants' "feelings of otherness" are characteristic of the intersex experience and that they experience more than only a male or female gender identity.³⁸ This "feeling of otherness" can be detrimental to one's development when living in a society that abides by a rigid male-female stratification.

While issues of gender socialization and identity may be present in Western societies, some non-Western societies have alternative gender categories. An anthropological literature review of the last 100 years reveals that people living in a 'neither-male-nor-female' status can be found in a variety of cultures.³⁹ In some of these cultures, a third gender, or sense of otherness, is celebrated; in others, it represents social or sexual deviance. Nonetheless, it is hypothesized that "the cultural background is a critical determinant for the development of an individual's gender role and/or gender status within a society."⁴⁰

Societies in which intersexuality has been accepted include those in North America, Dominican Republic, Papua-New Guinea, and the Taurus Mountain Range in Turkey.⁴¹ Among the North American Navajo tribe, an alternative gender was recognized for those who were intersex—*nadleehe* (or *nadle*).⁴² A group held in considerable prestige, *nadle* were often called upon to act as mediators during arguments between men and women.⁴³ *Nadle* fulfilled a social *neither-male-nor-female* category, but they were revered as being omnipotent because they could carry out duties of both men and women.⁴⁴ The *guevedoce* of the Dominican Republic are regarded as a "true third gender status."⁴⁵ Although the *guevedoce* are reared and socialized as females, during puberty high levels of testosterone influence the development of a masculine gender role and identity.⁴⁶ It is suspected that the *guevedoce* are well-accepted because males enjoy a higher status than females in machismo socie-

³⁷ *Coping Female*, *supra* note 11, at 197.

³⁸ *Id.* at 197-98.

³⁹ *Alternative Gender*, *supra* note 2, at 241.

⁴⁰ *Id.*

⁴¹ *Id.* at 242-43.

⁴² *Id.* at 243.

⁴³ *Id.* at 244.

⁴⁴ *Alternative Gender*, *supra* note 2, at 244.

⁴⁵ *Id.* at 242.

⁴⁶ *Id.*

ties.⁴⁷ In the Taurus Mountains of Turkey, an intersex individual may opt to undergo sex assignment surgery or continue to live in a *neither-male-nor-female* gender status without ridicule from others.⁴⁸ In Papua-New Guinea, a country that occupies the eastern half of the island of New Guinea, “three sex categories, men, women, and *kwolu-aatmwol* (‘female thing which transforms into a male thing’)” are recognized.⁴⁹ Because the status of *kwolu-aatmwol* “is thought to be associated with special spiritual abilities,” the *kwolu-aatmwol* are not discriminated against.

Furthermore, the early work of anthropologist Margaret Mead endorses the view that cultural conditioning plays a greater role in shaping individuals’ gender roles than biology does.⁵⁰ Mead examined three primitive societies in New Guinea. In one, the *Arapesh*, Mead found that both biological men and women display characteristics and behaviors typical of what Western cultures would consider feminine. For example, both sexes were socialized “to be cooperative, unaggressive [,and] responsive to the needs and demands of others.”⁵¹ In a second society, the *Mundugumor*, both biological men and women were found to possess traits and behaviors most typically associated with the Western ideal of masculinity—violence and aggressiveness.⁵² While the *Arapesh* and the *Mundugumor* societies do not have a gender binary, the third society does. The *Tchambuli* exhibit essentially a role reversal when compared to the Western world. The *Tchambuli* woman is “the dominant, impersonal, managing partner,” while the *Tchambuli* man is “the less responsible and the emotionally dependent person.”⁵³ The findings of Mead and other anthropologists suggest that gender binary is not absolute and universal. Moreover, their research supports the proposition that gender roles are culturally manufactured.

Other societies have treated a third gender category as unfavorable. In the *Pokot Tribe* of West-Central Kenya, hermaphrodites are called

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Alternative Gender*, *supra* note 2, at 242.

⁵⁰ MARGARET MEAD, *SEX AND TEMPERAMENT IN THREE PRIMITIVE SOCIETIES* (HarperCollins Publishers 1935), *reprinted in* SEEING OURSELVES: CLASSIC, CONTEMPORARY, AND CROSS-CULTURAL READINGS IN SOCIOLOGY, at 237 (John J. Macionis & Nijole V. Benokraitis, Pearson Education, 7th ed. 2007) (1995) [hereinafter *Primitive*].

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

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serrer, a degrading label.⁵⁴ Those born as *serrers* are often killed at birth; those whose lives are spared are still chastised and ostracized from the tribe.⁵⁵ For instance, they are not allowed to marry, their social status is diminished, and they are “barely tolerated within society.”⁵⁶ In India, a distinct caste of individuals who feel neither women nor men are called *hijra*.⁵⁷ *Hijra* are biological males who take on Western feminine attributes in behavior, dress, and livelihood; they are regarded as “social women” or “male women.”⁵⁸ Interestingly, *hijra* can be intersex at birth, or one can become so through surgical procedures.⁵⁹ Either way, *hijra* are regarded as a third gender and have a relatively low social status. By some contradiction, however, *hijra* are often called upon to sing and dance during weddings and births, highly regarded religious rites of Indian society.⁶⁰

D. Legal Influences

The law regarding intersexuality has been largely undeveloped or ignored in some instances. In the United States, intersexuality has been explored in the realms of marriage, employment, criminal justice, and human rights—with all case law holding that the law does not provide protection to those of intersex status. On an international level, Colombia and Australia seem to be the only countries that have begun to provide some protection for intersex individuals.

1. Marriage

Marriage is a fundamental right implicitly implied by the Fourteenth

⁵⁴ *Alternative Gender*, *supra* note 2, at 242. (citing P. B. Edgerton, *Pokot Intersexuality. An East African Example of Sexual Incongruity*, 66 AM. ANTHROPOLOGY 1288 (1964)).

⁵⁵ *Id.* at 243.

⁵⁶ *Id.*

⁵⁷ *Id.* at 244.

⁵⁸ JUDITH LORBER, NIGHT TO HIS DAY: THE SOCIAL CONSTRUCTION OF GENDER *in* READINGS FOR DIVERSITY AND SOCIAL JUSTICE (Routledge 2003), *reprinted in* SEEING OURSELVES: CLASSIC, CONTEMPORARY, AND CROSS-CULTURAL READINGS IN SOCIOLOGY, at 245 (John J. Macionis & Nijole V. Benokraitis, Pearson Education, 7th ed. 2007) (1995).

⁵⁹ *Alternative Gender*, *supra* note 2, at 244.

⁶⁰ *Id.*

Amendment of the U.S. Constitution.⁶¹ However, it appears that the fundamental right to marry is not, in reality, extended to all people. Frankle notes:

[L]imitations on marriage affect a greater number of people than is first evident. That is, an apparently heterosexual marriage could be successfully challenged if one person is unknowingly intersex. Confining marriage to between two people of the opposite sex leads to problems deciding what an opposite sex couple is and who defines an opposite sex couple.⁶²

In *Littleton v. Prange*, the Texas Court of Appeals held that the law will not recognize a marriage between a male-to-female transsexual and a male.⁶³ The court did state, however, that it may be more difficult to determine the validity of a marriage when an individual's "chromosomal, gonadal, and genital tests are not congruent."⁶⁴ This is because binary classification into male or female would be impossible. An intersex person could be barred from legally marrying *anyone* because the intersex person does not fit the definition of male or female. Nonetheless, the court declined to offer an opinion on the validity of marriage of an intersex person.⁶⁵ Yet, an Australian court has held that a marriage between a biological female and her intersex husband was invalid on the grounds that he was biologically neither male nor female.⁶⁶ In other cultures, intersex people are not permitted to marry at all (see discussion of *Pokot Tribe* above).

However, in 2008, Australia's Human Rights and Equal Opportunity Commission proposed that intersex be recognized as a third gender for use on official documents for people who have not undergone sex assignment surgery.⁶⁷ As a result, the validity of an Australian marriage between an intersex individual and a male or female could perhaps be upheld since Australia now recognizes a third gender category. In March 2010, Australia became the first nation in the world to allow for a "Sex

⁶¹ U.S. CONST. amend. XIV, § 1 (providing in pertinent part "nor deny to any person within its jurisdiction the equal protection of the laws).

⁶² Randi E. Frankle, *Does a Marriage Really Need Sex? A Critical Analysis of the Gender Restriction on Marriage*, 30 FORDHAM URB. L.J. 2007, 2008-09 (2003).

⁶³ *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999).

⁶⁴ *Id.* at 232 (Angelini, K. concurring) (citing *Corbett v. Corbett*, 2 All E.R. 33, 48, 1970 WL 29661 (P.1970)).

⁶⁵ *Id.*

⁶⁶ Jo Bird, *Outside the Law: Intersex, Medicine and the Discourse of Rights*, 12 CARDOZO J.L. & GENDER 65, 77 (2005) (citing *C. v. D.*, FAM. L.R. 90 (1979)) [hereinafter *Outside the Law*].

⁶⁷ Jerry Norton, Ed., *Australia rights body wants "intersex" gender: report*, REUTERS, Dec. 6, 2008, <http://www.reuters.com/article/idUSTRE4B50-G620081206>.

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Not Specified Recognised Details Certificate” in place of a traditional birth certificate.⁶⁸ Furthermore, “zie” (a gender-specific pronoun) is now legally recogni[z]ed by the Australian government as neither male nor female.⁶⁹

2. Employment

U.S. Courts have given the term “sex” its traditional meaning when construing statutes. In *Wood v. C.G. Studios*, refusing to construe the statute liberally, the U.S. District Court of Pennsylvania found that the Pennsylvania Human Relations Act protects women because of their status as females and prohibits discrimination against men because of their status as males, but that employers are not legally prohibited from terminating employees on the basis of intersex status.⁷⁰ The court reasoned that other cases involving Title VII of the Civil Rights Act of 1964 have found that Congress intended the word “sex” to be given its “traditional meaning.”⁷¹ This is the common finding. Courts have not been able to protect an individual’s “right to gender and/or sex self-expression and identity under the fundamental right to privacy, the First Amendment, or Title VII”⁷²

3. Criminal Justice

In 2004, a U.S. District Court judge found that 438 days of confinement in a maximum security, four-cell, segregated area used to house the Wyoming Women’s Center’s worst inmates, was not cruel and un-

⁶⁸ International Lesbian, Gay, Bisexual, Trans and Intersex Association, *Australia is First to Recognise “Non Specified” Gender*, ILGA.ORG, Mar. 16, 2010, <http://ilga.org/ilga/en/article/mkxGlTY1uh>.

⁶⁹ *Id.*

⁷⁰ *Wood v. C.G. Studios, Inc.*, 660 F. Supp. 176 (E.D. Pa. 1987).

⁷¹ *Id.* at 178.

⁷² *Fundamental Rights*, *supra* note 3, at 52 n.186 (citing Hasan Shafiqullah, *Shape-Shifters, Masqueraders, & Subversives: An Argument for the Liberation of Transgendered Individuals*, 8 HASTINGS WOMEN’S L.J. 195, 204, 207-08 (1997) (“explaining that a transsexual’s right to cross-dress is not a “philosophy or ideal” protected by the First Amendment and both the 7th and 9th Circuits refuse to protect transsexuals under Title VII”); see also Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 345, 379-71 (1999) (citing *Ashlie v. Chester-Upland Sch. Dist.*, No. Civ. A. 78-4037, 1979 U.S. Dist. LEXIS 12516, at 13 (E.D. Pa. May 9, 1979) (“holding that a transsexual who transitions on the job may not seek protection from state government employer job discrimination under the privacy doctrine”)).

usual punishment for an intersex inmate.⁷³ The inmate had been found guilty of passing bad checks and prison officials decided to segregate her when they discovered that she was intersex even though she was not a risk to others.⁷⁴ Although the inmate lost on her *Eighth Amendment* claim (the inmate alleged cruel and unusual punishment because she was isolated from the general population), the inmate's claim that the prison officials violated her *Fourteenth Amendment Due Process* rights was granted.⁷⁵

In at least one Australian territory, "legislation regarding police searches also includes intersex."⁷⁶ The law allows for an intersex person to request either a male or female to conduct a clothing or bodily search.⁷⁷ This recognition of intersex in the area of criminal law is a global first.

4. Human Rights

The Intersex Society of North America reported that the Constitutional Court of Colombia issued three decisions, establishing significant protections for the human rights of intersex individuals and limiting the authority of both parents and doctors to authorize medically unnecessary genital plastic surgery.⁷⁸ This is the first time a court has taken measures to protect the privacy rights of intersex people. It is also the first time a court has considered the social and psychological impacts on the intersex person if the parents and physicians assign the wrong sex to the child.⁷⁹

The decisions of the Constitutional Court may protect the infant

⁷³ DiMarco v. Wyoming Dep't of Corr., 300 F. Supp. 2d 1183 (D. Wyo. 2004).

⁷⁴ *Id.* at 1187, 1189.

⁷⁵ *Id.* at 1196, 1198 (The court found the inmate's Due Process rights were violated because she should have been granted a more thorough housing review, *inter alia*; she was awarded \$1000 in damages).

⁷⁶ *Outside the Law*, *supra* note 66, at 77.

⁷⁷ *Id.* at 77 n.53 (citing specific examples of legislation including Crimes (Forensic Procedures) Act 49A (2000); Drugs of Dependence Act § 189 (1989); Custodial Escort Regulation Reg 6A (2002); Casino Control Act § 108 (1988); Confiscation of Criminal Assets Act § 211 (2003); Intoxicated Persons (Care and Protection) Act § 6C (1994); Periodic Detention Act § 50 (1995); Remand Centres Regulation Reg 7 (1976); Children and Young Persons Act § 400 (1999)).

⁷⁸ *Columbia's Highest Court Restricts Surgery on Intersex Children*, INTERSEX SOCIETY OF NORTH AMERICA [ISNA], <http://www.isna.org/colombia> (last visited Jan. 15, 2011); *see also Background on Columbia's Decisions*, ISNA, <http://www.isna.org/node/21> (last visited Jan. 15, 2011) (Surgery is usually performed so that parents can establish a sex for the child for socialization purposes).

⁷⁹ *See generally Background on Columbia's Decisions*, ISNA, <http://www.isna.org/node/21> (last visited Jan. 15, 2011).

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born with genital ambiguity from the wishes of parents and physicians to pursue genital reconstruction surgery at the time of birth, but the decisions do not address intersexuality in adulthood.⁸⁰ In most developed nations, sex assignment surgery has been a relatively standard procedure performed at a physician's suggestion to the parents of a newborn.

As discussed above, intersex has been interpreted, or even constructed, outside of the confines of American law. In the cases cited above, one theme emerges—that an intersex individual does not have a recognizable sex that fits neatly into an established classification of male or female. Therefore, those with intersex status are denied rights that others enjoy and, simultaneously, are subject to discrimination or subject to the idea that they really do not exist legally because they do not fit within one of the binary categories created by the law.

The right "to define one's own concept of existence"—the liberty interest recognized by the Court in *Lawrence v. Texas*—is an interest that speaks directly to the efforts of intersex people to gain control over the fate of their sex anatomy from parents, physicians, lawmakers, and society.⁸¹ Some legal scholars have argued that fundamental rights should be granted to those who identify as intersex and that intersex should be legally recognized as a sex, like male and female.⁸²

Many states have proposed or adopted resolutions to include legal protection for intersex individuals. In 2008 the General Assembly of the Organization of American States (OAS)⁸³ unanimously adopted a resolution condemning human rights violations based on sexual orientation and gender identity, including intersexuality.⁸⁴ The resolution is noted as the first step in eradicating violence and discrimination; it is believed that the

⁸⁰ See Betsy Driver, *Preface to Cardozo Journal of Law and Gender* Fall 2005, 12 *CARDOZO J.L. & GENDER* 1, 1-2 (2005).

⁸¹ See generally Chai R. Feldblum, *The Right to Define One's Own Concept of Existence: What Lawrence Can Mean for Intersex and Transgender People*, 7 *GEO. J. GENDER & L.* 115, 116-17 (2006). See also Morgan Holmes, *Distracted Attention: Intersexuality and Human Rights Protections*, 12 *CARDOZO J.L. & GENDER* 127 (2005).

⁸² Julie A. Gryce, *Alumni Profile: Pooja Gehl*, 15 *HUM. RTS.* 60 (2007), available at <http://www.wcl.american.edu/hrbrief/15/151.pdf?rd=1>.

⁸³ All 35 independent states of the Americas are members of the Organization. See *Member States*, ORGANIZATION OF AMERICAN STATES, http://www.oas.org/en/member_states/default.asp (last visited Sept. 26, 2010).

⁸⁴ *OAS Adopts Resolution to Protect Sexual Rights*, HUMAN RIGHTS WATCH, June 5, 2008, <http://www.hrw.org/en/news/2008/06/05/oas-adopts-resolution-protect-sexual-rights>.

resolution will lead to changes in law and policy.⁸⁵

Given the lack of legal protection afforded to intersex individuals in global mainstream society, it is not surprising that there are no laws which address gender verification testing and the intersex individual's participation in sports. Many sports organizations, however, do publish regulations on competition. These will be explored in the next section. While it can be argued that gender verification testing is a human rights issue since it infringes on a person's right to privacy, the problem with providing protection is, perhaps, twofold. First, opponents may argue that legal protection is not needed since some people with intersex conditions may identify as either male or female, in accordance with the gender in which they were raised. However, there are others who do not identify as strictly male or female and argue that a third option for sex or gender should be available.⁸⁶ Second, it is not known how many intersex individuals actually participate in organized sports—either because the individual may not know of his/her own intersex condition or because the sports organization may not know unless and until gender is verified. Nonetheless, it is the law's responsibility to protect the intersex athlete's right to participate in a sport for which the individual is otherwise qualified. Additionally, many state anti-discrimination laws only protect people who have undergone surgery, and therefore, do not cover the majority of people in the sex and gender diverse community.⁸⁷

III. GENDER VERIFICATION IN SPORTS

A. History

Gender verification is the process of verifying the eligibility of an athlete to compete in a sporting event that is limited to a single sex. In ancient Greece, all athletes who participated in the Olympics were male, so it was simple to determine their sex by looking at their unclothed bodies.⁸⁸ Women did not begin participating in competitive sports until

⁸⁵ *Id.*

⁸⁶ *Sex and Gender Diversity: Report of Initial Consultation*, AUSTRALIAN HUMAN RIGHTS COMMISSION, http://www.humanrights.gov.au/genderdiversity/consultation_report2008.html (last visited Sept. 26, 2010).

⁸⁷ *Id.*

⁸⁸ Tian Qinjie et al., *Gender Verification in Athletes with Disorders of Sex Development*, 25 GYNECOLOGICAL ENDOCRINOLOGY 117, 118 (2009) [hereinafter *Gender Verification*].

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about the 1920s.⁸⁹ At the 1936 Berlin Olympics, American gold medalist Helen Stephens was suspected of being a man because of her height and lengthy running strides; as a result, she was subjected to a “sex” test by the International Olympics Committee (IOC).⁹⁰ Interestingly, the only documented case of a man disguising himself as a woman was at the 1938 Berlin Olympics; the athlete’s name was Hermann (Dora) Ratjen, and he claimed that he had been persuaded by Nazi officials to pose as a female.⁹¹

Due to the increased performance in the 1960s of athletes registered as female, there was a call for sex verification tests in which females were required to strip naked and undergo a visual gynecological examination.⁹² Another justification for these tests rested on four prior athletes who had competed as women years earlier but who later underwent sexual reassignment surgery and became men.⁹³ The first tests (since 1936) were conducted at the European Championships in 1966 and the Pan-American Games in 1967.⁹⁴ Two Soviet Union Olympic medal winners, Tamara and Irina Press, who had previously set 26 world records between them, disappeared from international sport competition abruptly when gender verification testing became mandatory in 1966.⁹⁵ Although not confirmed, there was speculation that they were men.⁹⁶ Only one athlete was banned from sports for failing the sex test—Ewa Klobukowska.⁹⁷ Doctors had determined that Klobukowska was a “mosaic, with some XYY cells, and others containing a single X and nothing else.”⁹⁸

Because the visual tests were humiliating and degrading, they were abandoned in 1968 and replaced with a genetic test to determine sex

⁸⁹ Arne Ljungqvist et al., *The History and Current Policies on Gender Testing in Elite Athletes*, 7 INT’L SPORTMED J. 225, 227 (2006) [hereinafter *History*].

⁹⁰ Alison Carlson, *Essay: Suspect Sex*, 366 LANCET (MED. & SPORT, SPECIAL ISSUE) S39 (2005).

⁹¹ *Id.*

⁹² *History*, *supra* note 89, at 227.

⁹³ Carlson, *supra* note 90, at S39 (The athletes were: Czech runner Zdenka Koubkova who competed in 1934; Lea Caurla and Claire Bressoles, French track medalists at the 1946 European Cup; Erika Schinegger, an Austrian skier).

⁹⁴ *Gender Verification*, *supra* note 88, at 118.

⁹⁵ Ian O’Reilly, *Gender testing in sport: A case for treatment?*, BBC NEWS, Feb. 15, 2010, http://news.bbc.co.uk/2/hi/in_depth/8511176.stm.

⁹⁶ *Id.*

⁹⁷ Carlson, *supra* note 90, at S39.

⁹⁸ *Genetics: Mosaic in X & Y*, TIME, (Sept. 29, 1967), <http://www.time.com/time/magazine/article/0,9171,899860,00.html>.

through one's chromosomal make up.⁹⁹ Even though the policy of chromosomal screening was to prevent unfair competition, there was great harm to women who were born with sex differentiations that do not pose an unfair advantage.¹⁰⁰ In other words, some sex differentiations are purely biological variations and do not equate to physical superiority. Furthermore, it has never been proven that those whose biological sex is difficult to ascertain have attributes superior to the genetically typical female. In addition, records of known athletes of unascertainable sex have been surpassed by XX females.¹⁰¹

In the 1980s, the Chairperson of the International Association of Athletics Federations' (IAAF) Medical Commission initiated discussions that verification tests not be performed on the grounds that the "rationale for introducing sex controls in the 1960s was no longer pertinent and the procedure discriminated against female athletes with rare genetic disorders of sexual differentiation and development."¹⁰² Finally in 1991, the IAAF Council ceased performing gender verification tests. The Council concluded that (1) women with congenital sex chromosomal defects do not have an unfair advantage and should be allowed to compete as females, (2) the sole reason of gender verification was to prevent males from disguising themselves as females during competition, (3) chromosomal make up is not controlling—those who have been recognized as both legally and psychosocially female since childhood should be allowed to compete with other females, (4) sex reassignments should be examined on an individual basis, and (5) pre-participation exams should be required for female athletes.¹⁰³ However, in 1992, the IAAF Council determined "that the medical delegate at a[n IAAF] competition should have the authority to arrange for the determination of the gender of an athlete at his/her discretion."¹⁰⁴ Perhaps this was due to the discovery of the SRY gene (the sex determining region of the Y chromosome).¹⁰⁵

Qinjie et al. stated that "it was decided to look at the presence or the absence of SRY in athletes and the presence of SRY would deem an athlete a male and an absence of SRY would deem the athlete female."¹⁰⁶ The last time gender verification testing of female athletes was mandato-

⁹⁹ *Gender Verification*, *supra* note 88, at 119.

¹⁰⁰ Carlson, *supra* note 90, at S39-S40.

¹⁰¹ *Id.* at S40.

¹⁰² *History*, *supra* note 89, at 227.

¹⁰³ *Id.* at 229.

¹⁰⁴ *Id.*

¹⁰⁵ *Gender Verification*, *supra* note 88, at 119.

¹⁰⁶ *Id.*

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ry was at the 1996 Olympic Games in Atlanta, Georgia.¹⁰⁷ Three-thousand tests were administered, and eight females tested as “male.”¹⁰⁸ Seven of the eight were found to have androgen insensitivity syndrome (AIS), one had an enzyme deficiency, and yet all were allowed to compete.¹⁰⁹ However, after 1996, even the SRY test had been abandoned by the International Olympic Committee which now conducts gender testing only when there is suspicion that an athlete is competing under an incorrect classification.¹¹⁰ The IOC also suspended any form of mandatory gender testing in 1999 prior to the 2000 Sydney Games.¹¹¹ Beginning in 2000, testing will now only take place at the direction of a medical director of an international sporting event if a complaint has been lodged or a suspicion has arisen.¹¹² The IOC’s decision was well-received 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.¹¹³ In 2004, the International Volleyball Federation ended gender testing.¹¹⁴ While it should be remembered that gender testing was initially conducted to ensure men were not competing in women’s sporting events, the testing has now become particularly controversial for intersex individuals.

B. A Current Controversy—Caster Semenya

At the August 2009 World Championships in Berlin, Germany, 18-year old Caster Semenya of South Africa competed in the women’s 800 meter dash. However, just before she competed, it became public knowledge that the IAAF ordered her to undergo a gender verification test.¹¹⁵

¹⁰⁷ O’Reilly, *supra* note 95.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Gender Verification, supra* note 88, at 119.

¹¹¹ *Gender Verification Suspended on Trial Basis at Sydney Olympics*, INTERSEX SOCIETY OF NORTH AMERICA, <http://www.isna.org/node/90> (last visited Sept. 27, 2010).

¹¹² O’Reilly, *supra* note 95.

¹¹³ Press Release, Yale Office of Public Affairs & Communications, Decision to Abolish Gender Testing at Sydney Olympics Supported by Yale Physician (Sep. 29, 2000), <http://opa.yale.edu/news/article.aspx?id=3384>.

¹¹⁴ *Analysis: International Volleyball Group to End Gender Tests*, NPR (Jan. 31, 2004), <http://www.npr.org/templates/story/story.php?storyId=1627-371>.

¹¹⁵ *Athletics Chief Faces Quit Calls Over Semenya*, CNN.COM (Sept. 22, 2009), <http://www.cnn.com/2009/SPORT/09/20/athletics.caster.semenya.chu-ene.oosthuizen/index.html> [hereinafter *Athletics Chief*]. See also O’Reilly, *supra* note 95 (IAAF “required Semenya to undergo a full physical evaluation and gender verification,

Although South Africa's team doctor requested/suggested she be withdrawn from the race because she had already undergone a gender verification test prior to arriving in Berlin for the competition, the IAAF never requested she withdraw, so the President of Athletics South Africa (ASA) remained silent and allowed her to compete.¹¹⁶ Semenya went on to win the race with the best women's time in the world for 2009.¹¹⁷ The controversy continued as it was initially unclear as to whether the IAAF would publicly release Semenya's test results or whether they would be shared only with her. "The IAAF, the South African government and Semenya's lawyer have since come to an agreement...that the results of the gender verification tests will remain confidential."¹¹⁸

While athletes are often subject to testing (i.e. drug testing) prior to competition, this particular case seemed specifically disturbing because Semenya's gender was questioned publicly and because her medical confidentiality was not protected by IAAF. There have been allegations that the ASA had begun an investigation into Semenya's gender prior to her arrival at the World Championships, but because South Africa, in its role as a newly industrialized country, wanted to get its athletes on the map, ASA ignored what would later become a potential issue for Semenya and allowed her to compete in Berlin anyhow.¹¹⁹ If this is taken as true, then South Africa ostensibly placed its national interests, and ultimate international fame, before Semenya's psychological wellbeing and privacy. In January 2010, the South African Olympic Committee announced that Semenya is ineligible to run in national and international competitions pending the ruling from its parent organization, IAAF.¹²⁰ "Semenya's lawyer release[d] a statement stating that she [Semenya] has not been disqualified from participating in future athletic meetings, and that 'it is clear that our client's rights are once again being infringed.'"¹²¹

A November 2009 news report stated that the South African Minis-

which included reports from a gyn[a]ecologist, an endocrinologist, a psychologist, an internal medicine specialist and an expert on gender").

¹¹⁶ *Id.* See also *South African Official Lied About Semenya Gender Tests*, CNN.COM (Sept. 22, 2009), <http://edition.cnn.com/2009/SPORT/09/19/athletics.caster.semenya.chuene/index.html?iref=allsearch> [hereinafter *Official Lied*].

¹¹⁷ *Athletics Chief*, *supra* note 115. See also *Official Lied*, *supra* note 116.

¹¹⁸ O'Reilly, *supra*, note 95.

¹¹⁹ Carina Ray, *Caster Semenya: 21st Century 'Hottentot Venus'*, NEW AFRICA, Nov. 2009, at 18.

¹²⁰ *SAfrica Olympic Committee: Semenya Can't Run Yet*, INFORM SPORTS, <http://www.inform.com/article/SAfrica%20Olympic%20committee%3A%20Semenya%20can%27t%20run%20yet> (last visited Sept. 25, 2010); see also O'Reilly, *supra* note 95.

¹²¹ O'Reilly, *supra* note 95.

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try of Sports and Recreation will keep the results of Semenya's test confidential.¹²² Although reports in two newspapers stated that Semenya has both male and female characteristics, the IAAF will neither confirm nor deny the results.¹²³ This reluctance to confirm or deny is perhaps a result of the way IAAF handled the case from the beginning. IAAF is now tight-lipped on any future reports disseminating from it and has expressed regret for the disclosure of Semenya's private information.¹²⁴ The IAAF published the following statement on its official website:

The IAAF, the South African Ministry of Sport and Recreation and Caster Semenya's representatives have been and still are in discussions with a view to resolving the issues surrounding Caster Semenya's participation in Athletics. The IAAF will not comment upon the medical aspects of Caster Semenya's case. The medical testing of the athlete is still to be completed. There will be no discussion of Caster Semenya's case at the forthcoming IAAF Council Meeting to be held in Monaco on 20-21 November 2009. No further comment will be made on this subject until further notice.¹²⁵

As a result of the above controversy and the initial handling of the situation by IAAF, the South African government filed a complaint with the United Nations on behalf of Semenya, alleging that the gender testing was both sexist and racist.¹²⁶ Furthermore, the government said it will do all it can to ensure that Semenya's rights are protected.¹²⁷ In addition to filing the complaint with the U.N., the South African government requested the resignation of ASA President Leonard Chuene, since he admitted he knew Semenya had undergone a gender test prior to the World Championships.¹²⁸ The government believes that Chuene did not protect

¹²² *Gender-Test Runner Semenya to keep Gold medal, says South Africa*, CNN.COM, (Nov. 19, 2009), <http://www.cnn.com/2009/SPORT/11/19/athletics.semenya.test.gold/index.html>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Statement, International Association of Athletics Federations, Caster Semenya, IAAF.ORG (Nov. 18, 2009), <http://www.iaaf.org/aboutiaaf/news/-newsid=54923.html>.

¹²⁶ *South Africa lodges complaint over Semenya's case with UN*, THE WEST AUSTRALIAN (Sept. 18, 2009), <http://au.news.yahoo.com/thewest/sport/-a-/sport/6074416/south-africa-lodges-complaint-over-semenyas-case-with-un/> (last visited Jan. 31, 2010). See also Amanda L. Swarr et al., *South Africa Intersex Activism: Caster Semenya's Impact and Import*, 35 FEM. STUDIES 657, 660 (2009) [hereinafter *Intersex Activism*] (referring to racial rivalry).

¹²⁷ Andrew Geoghegan, *Third World War If Semenya Barred: South Africa*, ABC GRANDSTAND SPORTS, (Sept. 12, 2009), <http://www.abc.net.au/news/-stories/2009/09/12/2683897.htm>.

¹²⁸ *Athletics Chief*, *supra* note 117.

the best interests of Semenya.¹²⁹ Certainly it could be inferred that Chuene was only interested in a South African ‘win’ even if meant the exploitation of one of his own runners.

Because the alleged discriminatory practices occurred in Berlin, German law is likely to apply if and when any legal action is taken against the IAAF. Germany’s Constitution includes a provision which protects every citizen’s fundamental right to personality—“Article 2(I) of the German Constitution provides everyone with ‘the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.’”¹³⁰ Germany’s “right to personality” “protect[s] every person’s right to dignity.”¹³¹ Germany’s model of dignity does not relieve the individual of government intrusion and it states “human dignity requires every citizen to be concerned with the social and moral community.”¹³² Two “spheres” of human life are protected under Germany’s personality clause: “freedom of action and the personal sphere.”¹³³ The personal sphere, relevant here, “contains elements of self-determination and autonomy.”¹³⁴ These elements are closely related to America’s protection of privacy [and]...address many of the same concerns as America’s privacy cases.¹³⁵

In the United States, the constitutional guarantee to privacy¹³⁶ refers to an individual’s right to be free from *governmental* intrusion into one’s personal affairs,¹³⁷ whereas, Germany requires *all individuals* to respect another’s claims to dignity.¹³⁸ Clearly, German law is much more expansive than U.S. law. In fact, the German Constitutional Court has recognized various forms of intersexuality, and it has recognized “an indi-

¹²⁹ *Id.*

¹³⁰ *Fundamental Rights*, *supra* note 3, at 53 (citing GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [Basic Law], May 23, 1949, BGBl. I, art. II, s. 1 (Ger.)).

¹³¹ *Fundamental Rights*, *supra* note 3, at 53.

¹³² *Id.* (citing Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 979 (1997)).

¹³³ *Id.*

¹³⁴ *Fundamental Rights*, *supra* note 3, at 53.

¹³⁵ *Id.* (citing Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 979 (1997)).

¹³⁶ *Fundamental Rights*, *supra* note 3, at 52 (American constitutional law recognizes a right to privacy under the penumbra of rights found in the First, Third, Fourth, Fifth, and Ninth Amendments).

¹³⁷ *Id.* at 53.

¹³⁸ *Id.* (citing Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 979 (1997)).

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vidual's ability to choose his or her own gender without regard to conflicting genitalia."¹³⁹

Semenya's case has reopened the controversy surrounding gender verification testing in sports. While public knowledge of the testing infringed on her privacy, perhaps her situation can be the catalyst for international awareness and change. Although it has been done at Semenya's expense, making intersex visible is fundamental to bringing an end to the discrimination, stigmatization, and even violence surrounding it. This is particularly necessary in countries like Semenya's own South Africa where there are serious "penalties" for gender-nonconformity, including rape and murder.¹⁴⁰ For example, in 2008, a South African soccer star, Eudy Simelane, was gang raped and murdered because she was a homosexual.¹⁴¹ Additionally, some South Africans deny intersexuality even exists.¹⁴² Although the results of the gender verification test were never publicly released by the IAAF (as they should not be), Semenya, if found to be intersex, and all intersex individuals, have a basic right to privacy and gender expression.¹⁴³

IV. GENDER-BASED LEGAL PROTECTIONS

Efforts to realize gender-based legal protections are integrally connected to a nation's history, politics, social institutions, and culture. Many nations are deficient in laws that protect certain minority¹⁴⁴ groups from discrimination. As a "gender" minority, intersex individuals have not been afforded equal protection of anti-discrimination laws. The United States, for example, has only recently begun to pass legislation in some states that affords homosexuals the same rights as heterosexuals. However, protections for intersex individuals (and also transsexuals)

¹³⁹ *Id.* (citing DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 331 (2d ed. 1997)).

¹⁴⁰ *Intersex Activism*, *supra* note 127, at 659.

¹⁴¹ *Id.*

¹⁴² *Id.* at 660.

¹⁴³ O'Reilly, *supra* note 95 (discussing press reports that claim Semenya's testosterone levels are three times higher than average and that she also has testes, although neither Semenya nor her lawyer have commented on the reports).

¹⁴⁴ The word minority is being used here to mean any group of individuals who have traditionally, historically and/or consistently been oppressed by a more dominant group. See Council Of National Psychological Associations for the Advancement of Ethnic Minority Interests, *Psychological Treatment of Ethnic Minority Populations* (Nov. 2003), available at <http://www.apa.org/pi/oema/resources/brochures/treatment-minority.pdf>.

have not been included in these laws. A statement by Navi Pally, the U.N. High Commissioner for Human Rights, at a 2008 panel discussion: “[t]hose who are lesbian, gay or bisexual, those who are transgender, transsexual or intersex, are full and equal members of the human family and are entitled to be treated as such,” was made to address nations who still deny human beings their human rights simply because of their perceived sexual orientation or gender identity.¹⁴⁵ Pally continued, “[n]o human being should be subject to discrimination, violence, criminal sanctions or abuse simply because of their perceived sexual orientation or gender identity.”¹⁴⁶

Interestingly, the “Intersex Initiative,” an organization based in the San Francisco Bay area, and Japan, actually opposes the inclusion of intersex in legislation brought on behalf of GLBT activists that prohibits discrimination in employment, housing, or public accommodations.¹⁴⁷ The organization believes the GLBT community has a different agenda and advocates separating intersex individuals based on the premise that intersex is a medical condition that can be better protected by strengthening existing disability discrimination laws as opposed to creating new law.¹⁴⁸ The organization further states that the inclusion of intersex in anti-discrimination laws “would give the false impression that they have done enough to protect intersex people’s rights” when “other serious human rights violations occur in the lives of people born with intersex conditions.”¹⁴⁹ While the “Intersex Initiative” raises strong points and helps distinguish between intersex and other “gender minorities,” intersex, as a classification, should still be swept into any anti-discrimination law as well.

South Africa is a second example of a country that does not afford protection to gender minorities. Lack of gender-based legislation in South Africa is due in most part to its historical struggle for liberation. South Africa has struggled against not only gender-based oppression, but also class-based and racial oppression.¹⁵⁰ Issues that are particular to

¹⁴⁵ U.N. News Center, *Gays, Lesbians Must Be Treated as Equal Members of Human Family*, UN.ORG, (Dec. 8, 2009), <http://www.un.org/apps/news/storyAr.asp?NewsID=29364&Cr=pillay&Cr1=&Kw1=highlevel+panel&Kw2=-&Kw3=>.

¹⁴⁶ *Id.*

¹⁴⁷ *Intersex Initiative, Intersex in Non-Discrimination Law: Why We Oppose the “Inclusion,”* INTERSEX INITIATIVE, (Sept. 6, 2004), <http://www.intersexinitiative.org/law/nondiscrimination.html>.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (referring specifically to non-consented genital surgeries).

¹⁵⁰ *Intersex Activism, supra* note 126, at 661.

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South African intersexuality include the use of the term *stabane*,¹⁵¹ the belief that intersexuality is more common among black South Africans than white South Africans, and past discrimination in medical diagnosis and treatment.¹⁵² These issues may have created the foundation for Semenya's exploitation by ASA's president, but they should now serve as critical components in the agenda to end discrimination.

Both the United States and South Africa are similar in that oppression can be found even within and among an oppressed group. A more effective way to manage and understand these issues is to look at them from a global and humane perspective. In other words, it is necessary to start thinking about intersexuality from a human-based perspective, not a gender- or sex-based perspective. The Universal Declaration of Human Rights provides at least a framework to examine the protections that are theoretically provided to every person.

Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.¹⁵³

Inherent in human beings is the right not to be discriminated against on the basis of "nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status."¹⁵⁴ On December 10, 1948, the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights to end discrimination for all people.

The following Articles of the Declaration are most relevant to the controversy surrounding Semenya and also the lack of protections provided for intersex. However, they may be subject to their own limitations.

Article 1 states: "All *human beings* are born free and equal in dignity and rights. They are endowed with reason and conscience and

¹⁵¹ *Id.* at 662 (*Stabane* is a term used to refer to those born with ambiguous genitalia, but it has also been used as a term of denigration when referring to homosexuals).

¹⁵² *Id.*

¹⁵³ *What Are Human Rights?*, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx> (last visited Jan. 31, 2010).

¹⁵⁴ *Id.*

should act towards one another in a spirit of brotherhood.”¹⁵⁵ This is a healthy starting point since it is unlikely that any contemporary society would argue that Semenya or other intersex individuals are not human beings.¹⁵⁶ However, it is only very recently that the treatment of intersex individuals has been recognized as an issue at all, let alone as a human rights issue.¹⁵⁷ Article 2 provides:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, *sex*, language, religion, political or other opinion, national or social origin, property, birth, or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional, or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing, or any other limitation of sovereignty.¹⁵⁸

Article 3 states: “Everyone has the right to life, *liberty* and *security of person*.”¹⁵⁹

Article 29 states:

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible. (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.¹⁶⁰

In analyzing these provisions, it is possible that the Declaration could be interpreted two ways: Articles 2 and 3 protect the individual being. Therefore, under these Articles, an intersex individual should not be forced to submit to a gender verification test to compete in a sporting event, but Article 29 can be construed as allowing countries leeway in

¹⁵⁵ Universal Declaration of Human Rights art. 1, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/-en/documents/udhr/> [hereinafter *Declaration*] (emphasis added).

¹⁵⁶ Contrast contemporary societies with more primitive societies that believed hermaphroditism arose from the myth of Hermaphroditus wherein a nymph, Salmacis, wanted to possess Hermaphroditus. She snuck up on him while he was bathing and entwined herself around him despite his efforts to slip from her clutches. The two united and became a single form with a dual nature that could not be called male or female, but seemed to be at once both and neither. See *Outside the Law*, *supra* note 66, at 71.

¹⁵⁷ *Id.* at 65.

¹⁵⁸ *Declaration*, *supra* note 155, at art. 2 (emphasis added).

¹⁵⁹ *Id.* art. 3 (emphasis added).

¹⁶⁰ *Id.* art. 29.

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the handling of human rights issues. Thus, it could be argued that gender verification tests affecting intersex individuals is outweighed by the need to protect others' rights to fair competition, or to maintain the public order, thereby making this issue even more difficult to handle.

V. BALANCING FAIRNESS IN COMPETITION WHILE ASSURING HUMAN RIGHTS AND PRIVACY IN ORGANIZED SPORTS

The previous sections examined the obstacles that exist for intersex individuals and recognized that discrimination of intersex individuals is an international human rights issue. This section offers strategies for building awareness and tolerance of the participation of intersex individuals in sports. However, many of the ideas discussed hereunder may be appropriately extended to areas outside of the sports environment.

In January 2010, a group of international experts of DSD in athletes, organized by the International Olympic Committee (IOC), met in Miami, Florida to discuss how to handle female athletes who are discovered to have gender ambiguities.¹⁶¹ Michele Veroken, a leading sports integrity and ethics specialist, noted that gender verification testing is an issue that pertains only to female athletes.¹⁶² The experts concluded the following¹⁶³:

1. That sport authorities, in conjunction with the relevant medical authorities, have a responsibility to follow up on cases of DSD that arise under their jurisdiction;
2. That there be an increase in education and awareness of DSD within the sport community;
3. That PPHE (pre participation health examinations) are important for the purpose of identifying athletes with DSD;
4. That precise diagnosis should be established expeditiously utilizing requisite expertise;
5. That a management plan be drawn up if treatment is necessary;
6. That strategically located centers of excellence be established at which athletes with DSD can, if necessary, be diagnosed and treated; and

¹⁶¹ O'Reilly, *supra* note 95.

¹⁶² *Id.*

¹⁶³ Press Release, Int'l Olympic Comm., Summary of Conclusions Reached at Gen. Symposium (Jan. 21, 2010), available at <http://www.olympic.org/en/content/Media/?articleId=76409&articleNewsGroup=-1>.

7. That rules be put in place to determine eligibility of athletes for sport competition on a case-by-case basis both prior to and following diagnosis of a DSD, including when an athlete is undergoing treatment for DSD or refuses treatment for a DSD.

The IOC's Medical Commission, however, did not say what criteria is used to define female gender, so it is still unclear what exactly the Commission considered to be an ambiguity.¹⁶⁴ Veroken says the future of female athletes who are diagnosed with a DSD is uncertain in that the athlete "may have no option but to undergo treatment or even surgery," and if she does not, she may have to leave the sport.¹⁶⁵ Moreover, there is no guarantee that the athlete would be able to compete even after undergoing treatment/surgery.¹⁶⁶ The IOC is aware that such proposed plans will be scrutinized by the athletes as well as human rights groups.¹⁶⁷ While the IOC recognizes the issues surrounding athletes with DSD, and while some at the symposium said that the obligation of IOC is to the "health of the athlete,"¹⁶⁸ the IOC's conclusions only apply to its affiliated organizations, and, for example, IAAF is not bound by IOC recommendations. However, the IOC maintains that the purpose of developing the recommendations was to develop more explicit criteria to be used to determine who is eligible for competition.¹⁶⁹ The U.S. Golf Association and Great Britain's Ladies Golf Union have already adopted IOC's guidelines.¹⁷⁰

In reaction to the IOC guidelines above, The Coalition for the Inclusion of Athletes in Sport (The Coalition) issued a press release "request[ing] that the organizing committee of the Vancouver 2010 Winter Olympic Games prohibit random gender verification testing of female athletes at the Games, in the best interest of all international female athletes."¹⁷¹ The Coalition does not believe that the IOC has actually elimi-

¹⁶⁴ O'Reilly, *supra* note 95.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Arne Ljungqvist & Myron Genel, *Transsexual Athletes—When Is Competition Fair?*, 366 LANCET (MED. & SPORT, SPECIAL ISSUE) S42 (2005) [hereinafter *Competition*].

¹⁷⁰ *Id.* at S43.

¹⁷¹ Press Release, The Coalition of Athletes for Inclusion in Sport, Sport Leaders Request that Random Gender Verification Testing of Female Athletes at the 2010 Winter Olympic Games in Vancouver Be Prohibited (Jan. 25, 2010) <http://kristenworley.ca/for-immediate-release-sport-leaders-request-that-random-gender-verification-testing-of-female-athletes-at-the-2010-winter-olympic-games-in-vancouver-be-prohibited/> (last visited Jan. 16, 2011) [hereinafter *Vancouver*].

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nated any discriminatory impact on gender testing with its newly published guidelines.¹⁷² For the following reasons, The Coalition alleges that the IOC's guidelines represent a "violation of international laws"¹⁷³ prohibiting gender discrimination and the IOC's own commitment to equality and the right to play"¹⁷⁴:

1. By classifying gender ambiguities as disorders requiring treatment, the IOC is pathologizing a normal spectrum of humanity.
2. By assuming that the only relevant gender issue is in women's events, the IOC ignores the potential advantage of physical characteristics associated with the female form to men in certain sports.
3. By not stating what criteria are relevant to a determination of "male" or "female," the IOC policy is excessively discretionary and subjective.
4. By subjecting only certain women to the policy, the IOC also leaves women open to witch hunts and requests to undergo body modification.

The Coalition envisions "a sport system that is open to all people, at all levels of participation, recognizing in particular those previously excluded because of the narrow definition of what is assumed normal human development."¹⁷⁵ In addition to requesting the IOC abandon gender verification testing altogether, The Coalition has also asked that the IOC work with international and national sport governing bodies as well as athletes who have been discriminated against, vis-à-vis IOC policies, in an effort to develop policies that are based on current research and reflective of basic human rights. Further, The Coalition has published a "Position Statement" on "the guiding principles for inclusion in sport,"¹⁷⁶ which it continues to urge the IOC to adopt.¹⁷⁷

¹⁷² *Id.*

¹⁷³ *Id.* (The Coalition has alleged that "gender verification testing is a violation of human rights, specifically the Canadian Charter of Rights and Freedoms and the Universal Declaration of Human Rights." Additionally, the Coalition argues that gender verification testing "violates the Olympic Movement's stated commitments to equality and the right to play").

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Ann Peel et al., *Position Statement: The Guiding Principles for Inclusion in Sport*, THE COALITION OF ATHLETES FOR INCLUSION IN SPORT, available at <http://www.playthegame.org/fileadmin/documents/recoinclusivesport-cp2.pdf> [hereinafter *Position Statement*].

¹⁷⁷ *Vancouver*, *supra* note 171.

The Coalition's "guiding principles" are rooted in equity, fairness, and inclusivity.¹⁷⁸ They seek to include the maximum number of people in sport participation, even those who have been excluded previously because they did not fit the definition of what is considered "normal human development."¹⁷⁹ Here, the IOC would need to draw on medical experts to educate it on variations of human development and understand that there is really not one 'normal' course of development. The Coalition states facts about gender including that (1) sport is typically organized by gender, (2) gender is individual and is "sociological, biological, and physiological," and (3) gender is fluid in both females and males.¹⁸⁰ The "facts" should be amended to include the following: (1) sport is also organized by sex (there is a distinct difference between the terms sex and gender)¹⁸¹, (2) gender also includes psychological and cultural aspects of one's development, and (3) gender should be examined on a continuum.

The Coalition raises important issues for discussion. Most importantly is whether "gender is [even] a relevant classification in sport."¹⁸² If it is, The Coalition argues, then a fair system of gender determination needs to be developed.¹⁸³ If it is not, The Coalition argues, then women are just objectified in sport if it is found that gender classification is built on "assumptions of male advantage."¹⁸⁴ A secondary issue makes the assumption that gender is a classification and will likely be used in organizing sport, but that it must be accepted that gender is a social construct and not a scientific construct.¹⁸⁵

The Coalition addresses the above issues through a series of recommendations:¹⁸⁶

1. Replace gender testing with individual athlete profiles (for men and women), and include a measure for androgen levels.

¹⁷⁸ *Position Statement, supra* note 176.

¹⁷⁹ *Id.* at 1.

¹⁸⁰ *Id.*

¹⁸¹ See MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/sex> (last visited Sep. 20, 2010) (defining "sex" as "either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures"); MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/gender> (last visited Sep. 20, 2010) (defining "gender" as "the behavioral, cultural, or psychological traits typically associated with one sex") (last visited Sep. 20, 2010).

¹⁸² *Position Statement, supra* note 176, at 1.

¹⁸³ *Id.* at 2.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

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2. Accommodate different body types using the Therapeutic Use Exemption model.¹⁸⁷
3. Require International Sport Federations to determine their own classifications (i.e. weight, height, other physical differentiations) and keep a profile on each athlete. (The Coalition recommends that this classification system be modeled after the Paralympic Games'¹⁸⁸ classifications).
4. Ensure that those athletes competing against each other are members of the same classification.
5. Allow for any appeals to be heard by a neutral panel that has expertise in the selected classifications "with regard to the human rights of athletes, the principles of transparency and accountability, and with the assurance of privacy and confidentiality."¹⁸⁹

Adults who wish to compete, and "who identify their gender as intersex, should be permitted to be legally recognized as intersex in lieu of male or female."¹⁹⁰ As one intersex participant in *Coping Females* explained her view on the question of a third gender: an individual should be able to live within or without a gender role and this ability should not affect the person's recognition as a human being.¹⁹¹

VI. THE LIMITATIONS OF NATIONAL AND INTERNATIONAL LAW

There are approximately 65,000 intersex births worldwide every year.¹⁹² Therefore, there is a need for the laws of nations to recognize

¹⁸⁷ See *Questions and Answers on Therapeutic Use Exemption*, WORLD ANTI-DOPING AGENCY, <http://www.wada-ama.org/en/Science-Medicine/TUE/-QA-on-Therapeutic-Use-Exemption-TUE/> (last visited Sep. 20, 2010) (explaining that athletes may have illnesses or conditions that require them to take certain medications. If the medication happens to fall on the Prohibited List, a TUE may give the athlete the authorization to continue to take the medication).

¹⁸⁸ See *Understanding Classification*, AUSTRALIAN PARALYMPIC COMMITTEE, <http://vancouver2010.paralympic.org.au/content/understanding-classification> (last visited Sep. 20, 2010) (defining classification as a process of grouping together athletes with a similar level of impairment or disability in relation to a specific sport in order to create as fair a competition as possible among athletes with different disabilities).

¹⁸⁹ *Position Statement*, *supra* note 176.

¹⁹⁰ *Outside the Law*, *supra* note 66, at 77 (referencing a recommendation made by Tony Briffa on behalf of the Androgen Insensitivity Syndrome Support Group of Australia).

¹⁹¹ *Coping Females*, *supra* note 11, at 197.

¹⁹² *Fundamental Rights*, *supra* note 3, at 33 (citing Marcus de María Arana, *A Human Rights Investigation Into the Medical "Normalization" of Intersex People: A Report*

intersex as a legitimate classification so that it can be implemented in various international human rights treaties that already exist. To take one example, Article 3 of the International Covenant on Civil and Political Rights refers only to “men” and “women.”¹⁹³ Another example is the International Convention against Apartheid in Sports. Although the Convention reminds members to compel universal respect for human rights and fundamental freedoms without distinction to sex, *inter alia*, Article 1(g) clearly defines “sportsmen” as “men” and “women” who participate in sports activities.¹⁹⁴ The inherent limitation, however, is that member states can object to certain articles of a treaty so that the treaty does not infringe on the individual state’s existing law. Since it is likely that member states will interpret the terms in their traditional sense unless an amendment is passed, intersex individuals will continue to escape the protections of international treaties.

The U.S. Constitution reflects this inherent limitation. First, although an individual’s right to bodily integrity is already a well-recognized fundamental right,¹⁹⁵ the problem with recognizing intersex as a legal classification is that it is virtually a concealed status unless a person self-discloses. An individual’s interest in protecting his/her bodily integrity in areas of procreation and medical treatment have been found to outweigh the state’s interest in regulating an individual’s health care decisions.¹⁹⁶ Therefore, an intersex individual would only enjoy the protection if the individual revealed his/her condition. Second, the First Amendment of the U.S. Constitution explicitly protects an individual’s right to self-expression. Although it could be argued that the First Amendment protects the intersex condition if it is viewed as a form of self-expression,¹⁹⁷ to the extent that it can be agreed that intersexuality is a generally inconspicuous condition involving genitalia and chromosomal make up, most intersex individuals “would not be protected by the First Amendment because they would not be seen as expressing any

of a Public Hearing, THE HUMAN RIGHTS COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO, 8 (Apr. 25, 2005) http://www.isna.org/files/SFHRC_Intersex_Report.pdf.

¹⁹³ International Covenant on Civil and Political Rights, art. 3, 999 U.N.T.S. 171 (Dec. 16, 1966), *available at* http://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch_IV_4p.pdf.

¹⁹⁴ International Convention against Apartheid in Sports art. 1(g), 1500 U.N.T.S. 161 (Dec. 10 1985), *available at* http://treaties.un.org/doc/Treaties/1988/04/19880403%2003-09%20AM/Ch_IV_10p.pdf

¹⁹⁵ *Fundamental Rights*, *supra* note 3, at 43.

¹⁹⁶ *Id.* at 43-44.

¹⁹⁷ *Id.* at 51.

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message.”¹⁹⁸

As noted above, gender verification tests were the subject of controversy since their implementation.¹⁹⁹ Even if an individual state’s law does not allow for a recognized status of intersex, intersex individuals should still be allowed to compete with his/her chosen sex group. However, given the discrepancies between and among national and international law, the inclusion of intersex individuals in sports may be best handled by the sports associations. As Carlson noted, genetic screening was “simply discriminatory” since women born with chromosome irregularities actually possess “no unfair, male-like physical advantages that XX [females] . . . cannot have as a matter of other forms of biological variation.”²⁰⁰ The IOC agrees that every athlete is genetically different and cites examples of athletes “who compete at elite level[s] [and who] will already have exploited some genetic advantage to be in that position . . . with years of training.”²⁰¹ This, of course, raises the question as to what extent a gender ambiguity is just another genetic advantage. To eliminate an unfair advantage and ensure equitable competition, athletic associations should use factors such as age, weight, height, arm span, and muscle mass, for example, to place athletes into classes since these factors are objectively measurable. Having an objective classification system that is sport-specific will enable athletes to compete with other athletes who have similar characteristics. A subjective measurement such as sex or gender should not be used even though exposure to male hormones has actually not been found to provide a competitive advantage.²⁰²

VII. CONCLUSION

Sex as a classification is much more complex than male or female. The discussion on respect and tolerance towards individuals with DSDs must continue around the globe. In discussing the issues on a global scale, biological, psychological, sociological, anthropological, legal, and cultural factors must be considered. The medical profession must regu-

¹⁹⁸ *Id.* (citing *City of Cincinnati v. Adams*, 42 Ohio Misc. 48, 50 (1974)).

¹⁹⁹ *History*, *supra* note 92, at 227.

²⁰⁰ Carlson, *supra* note 90, at S40.

²⁰¹ O’Reilly, *supra* note 95 (noting “high-performance long distances runners and cross country skiers . . . have naturally high MaxV02 levels [, that] . . . successful long distance runners . . . have a predominance of slow-twitch fibres in their muscles [, that] . . . sprinters will probably have a predominance of fast-twitch fibres [, and that] . . . female athletes with high testosterone levels generally perform better in power sports”).

²⁰² *Competition*, *supra* note 169, at S42.

larly provide up-to-date information and findings on biological and medical issues for individuals to make responsible decisions in their personal lives—whether to remain intersex or undergo assignment surgery. The international psychological and psychiatric communities will hopefully have a more refined and universal definition of intersex when the DSM-V is published in 2012. Individuals within various social institutions and cultures need to be more accepting of individual differences and open to the possibility of eliminating the gender binary. The laws, both nationally and internationally, need to provide greater protections to all humans as a matter of preserving human integrity and dignity.

Because the earth is now a multi-cultural planet of migration, trans-cultural considerations are necessary. Although there are only a handful of intersex organizations around the world and although they may have initially been formed to tackle the medical of aspect of the intersex condition, they also educate and campaign on behalf of intersex individuals.²⁰³ Furthermore, two organizations in South Africa are building awareness of intersexuality and using Semenya's case as a catalyst. Gender DynamiX and Intersex South Africa suggest that post-apartheid South Africa has strategic space within its ANC's Freedom Charter and Bill of Rights to end oppression and discrimination of the intersex, *inter alia*.²⁰⁴ Both organizations argue that intersex rights have been inconsistently applied, but with the publicity of Semenya, South Africans are now being educated that it is not just Semenya who was affected, but that the lack of human rights available for this and other groups, touches all, and as a result, cultural norms need to change.²⁰⁵

²⁰³ See *Questions and Answers About UKIA*, THE UK INTERSEX ASSOCIATION, <http://www.ukia.co.uk/about.htm> (last visited Sep. 21, 2010); INTERSEX SOCIETY OF AUSTRALIA (ISOZ), <http://home.vicnet.net.au/~inter-sex/index.htm> (last visited Sep. 21, 2010).

²⁰⁴ *Intersex Activism*, *supra* note 126, at 661.

²⁰⁵ *Id.* at 662.