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# SEX AND GENDER SEGREGATION IN COMPETITIVE SPORT: INTERNAL AND EXTERNAL NORMATIVE PERSPECTIVES

PATRICK S. SHIN\*

## I INTRODUCTION

A common credo in modern sports is that athletic competition transcends human social difference; within the arena of competitive sport, a person's performance is the only thing that matters.<sup>1</sup> But at the same time, in many sports, participants are placed into separate classes that are prevented from mixing in competition. Adult males do not compete against young boys in weightlifting contests; high school varsity teams generally play against other varsity teams; boxing matches do not pit heavyweights against lightweights. This kind of segregation is presumably uncontroversial. Indeed, some might say that competitions among participants of vastly differing capabilities are inherently unfair.<sup>2</sup> Furthermore, separating athletes into different competitive categories is arguably good for sport because it fosters broader participation and allows for recognition of accomplishments at multiple levels of capability and performance.

The separation of men and women in sports is commonly justified by similar considerations relating to competitive fairness and promotion of broad and equal participation.<sup>3</sup> Yet, in contexts outside of sport, sex- and gender-based classifications<sup>4</sup> are subject to strict social, legal, and moral proscriptions. The practice of segregating men and women in competitive sport is so commonplace that one might assume that it must be legally and morally benign, or perhaps even required as a matter of fairness. Bringing sex and gender discrimination analysis

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1. See Pam R. Sailors, *Conceivable Horizons of Equality in Sport*, in THE BLOOMSBURY COMPANION TO THE PHILOSOPHY OF SPORT 295, 295 (Cesar R. Torres ed., 2014).

2. See DREW A. HYLAND, PHILOSOPHY OF SPORT 62–63 (1990).

3. See *id.* at 62; HEATHER L. REID, INTRODUCTION TO THE PHILOSOPHY OF SPORT 161 (2012); Doriane Lambelet Coleman, *Sex in Sport*, 80 LAW & CONTEMP. PROBS., no. 4, 2017, at 84.

4. The term “sex” is used herein to refer to biological sex, and “gender” is used to refer to gender identity or expression. The terms “man” and “woman” are used equivocally to refer to either sex or gender. “Male” and “female” are used specifically to designate categories of biological sex. Following Doriane Coleman’s usage at a recent symposium (Doriane Lambelet Coleman, Professor of Law, Duke University School of Law, Speech at the Law & Contemporary Problems Symposium (Aug. 26, 2017)), I use the term “intersex” to name a biological category whose members are neither fully male nor female. “Transgender” refers to the category of persons who identify with a gender that does not correspond with their actual or perceived biological sex, as well as persons who identify as gender non-binary, genderfluid, or agender.

to bear might feel like little more than academic contrivance. But controversies surrounding the use of sex classifications to exclude athletes from the division in which they would choose to compete calls for serious normative examination. What exactly is mandatory sex segregation in competitive sport good for, and what are the objections to it?

This article begins to explore these questions from the perspective of a commitment to equal treatment and adherence to anti-discrimination principles. The article suggests that discussions about the justification of sex segregation in sport should be sensitive to two distinct sets of values or perspectives that can come into play. One perspective focuses primarily on considerations rooted in the ethos of athletic competition. One might say that this perspective emphasizes values that are “internal” to the institutions of sport. The other perspective focuses primarily on considerations that relate to broader social norms such as anti-discrimination principles and notions of equality. One might say that this second perspective emphasizes values that are “external” to sport. This article explores the justification for sex or gender segregation in sport from both perspectives. What this exploration reveals, especially when it reaches the difficult terrain of the appropriate treatment of transgender athletes, is that solutions that may be consistent with the values that are internal to sport may not be acceptable from the external vantage point of equality and anti-discrimination. It might seem to follow that resolution of the difficult cases could be achieved by deciding the extent to which external values should be given priority over considerations internal to sport. The rub, however, is that current practices of sex segregation in competitive sport are so deeply entangled in traditional social conceptions of sex and gender that efforts to change the former may tend to have the effect of recapitulating, rather than transcending, the latter. The article concludes that institutional decisions about the use of sex classification criteria to exclude individuals from participating in particular competitions cannot prescind from broader social and moral issues of gender discrimination and the meaning of respect for gender identity and expression.

## II

### THE SOCIAL SIGNIFICANCE OF COMPETITIVE SPORT

It is fair to ask, at the outset, whether questions of discrimination and equality have serious application in the context of competitive sport. One might argue that competitive sport is not a significant domain for economic distribution and that the use of sex or gender classifications in that context do not really raise concerns for ethical inquiry. Adult sport is voluntary, and neither participation nor success is necessary for economic well-being or equal standing in other areas of social and political life. So why should terms of participation in sport be treated as important matters requiring theoretical normative analysis?

Though voluntary, participation in competitive sport is associated with significant goods. Sport is publicly celebrated. It is widely promoted and embraced as an important domain of social life from an early age, and it is

commonly incorporated into primary and secondary public education. Success at the highest echelons of professional and amateur sport can bring money, public recognition, and social status. For top athletes, success in popular competitive sport can provide access to higher education and, more generally, a visible—albeit narrow—path for social mobility. Even at amateur levels, success in sport can carry enhanced social esteem, and regardless of success (in the sense of winning), mere participation can provide social enrichment and contribute to well-being.<sup>5</sup>

Furthermore, competitive sport has a highly institutionalized character.<sup>6</sup> Even in casual and amateur contexts, a central feature of sport is adherence to public rules governing participation. These rules tend to have a constitutive quality; that is, the rules of a sport tend to define the sport itself.<sup>7</sup> Thus, when people care about a sport, they tend to care about its rules. Social value becomes attached to the rules themselves, and a sort of reification takes place. Although the values embedded in the rules of sport surely mirror, to some extent, those of our society, because of sport's cultural significance and the attachments that people develop to it, debates and decisions about the rules governing participation in sport have the potential to imprint values back upon society.

Although participation or opportunity for success in voluntary competitive sport might not be thought, *a priori*, to be an economic good whose distribution would be relevant to questions of justice or anti-discrimination policy, the actual role and influence of sport in our society makes it an appropriate matter of moral and political concern. Given the cultural and social significance of competitive sport, there is reason to object to unfairly exclusionary practices in determinations of who is allowed to participate, especially in sport's most publicly vaunted forms. There is reason to insist, conversely, that rules governing eligibility and participation in sport not be objectionable on grounds of unjust inequality or discrimination.

### III

#### EQUALITY, DISCRIMINATION, AND THE VALUES OF SPORT

Equality is usually a reasonable baseline for the appropriate distribution of access to social goods and opportunities. One can suppose, at least as a default principle, that everyone should have equal claim to the good or opportunity in question. From there, one can then explore whether there are reasons to depart from strict equality.<sup>8</sup> If participation in competitive sport is the good to be

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5. See, e.g., Sarah J. Donaldson & Kevin R. Ronan, *The Effects of Sports Participation on Young Adolescents' Emotional Well-Being*, 41 *ADOLESCENCE* 369, 381 (2006) (reporting results of a study finding a correlation in adolescents between participation in sports and well-being).

6. Cf. Sigmund Loland, *Fairness and Justice in Sport*, in *THE BLOOMSBURY COMPANION TO THE PHILOSOPHY OF SPORT*, *supra* note 1, at 98, 99 (“[S]port competitions can be seen as social practices with the institutionalized goal of measuring, comparing, and ranking participants according to performance of athletic skills.”).

7. *Id.*

8. See JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 123 (2001).

distributed, equality presumably means at least that no one should be deprived of this good solely on the basis of status characteristics, including sex and gender. As a general ideal, this notion seems uncontroversial.

What precipitates disagreement is deciding what equal opportunity to participate in sport, regardless of sex and gender, should mean in practice. Many of the most popular professional and high-level amateur sports organizations engage in mandatory sex segregation. Such segregation might be considered consistent with substantive equality insofar as such an arrangement may be the best way to provide equal competitive opportunities to men and women. This is not, however, the only way to see the matter. A critic of current practices could argue that sex segregation in sport constitutes sex discrimination<sup>9</sup> as standardly defined because it entails the exclusion of some individuals from particular competitions on the basis of sex: men are excluded from women's events and vice versa. And of course the notion of "separate but equal" is not a justification for segregation in other contexts. A strict anti-classificationist might insist, therefore, that consistency with anti-discrimination principles requires a rule of sex and gender blindness in sport, and that all sporting competitions should be integrated.<sup>10</sup> Most people might dismiss such a view as implausible, but it is not theoretically frivolous. In any event, since sex classifications in other contexts tend to carry a burden of justification, it is worth reviewing the arguments for rejecting sex and gender blindness as an interpretation of equality in competitive sport.

The basic argument is fairly simple. The problem with applying formal sex and gender blindness to the rules of participation in competitive sport is that men and women have different capacities in certain areas of physical endeavor.<sup>11</sup> If separate divisions for men and women were abolished, the benefits of participation tied to winning, or having a realistic chance of winning, would almost certainly flow primarily to men, as men would dominate all or most sports—at least at the elite levels—that emphasize speed, power, or strength.<sup>12</sup> The vast majority of women in these sports would likely never even have a chance of breaking into the top ranks.<sup>13</sup> It might be possible to separately recognize women's achievements within a given mixed competition, but the need to do so only proves the point that women would effectively be deprived of the opportunity to be recognized as the overall winner.

One might argue that the fact that men have natural physical advantages over women does not necessarily justify the use of discriminatory classifications.

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9. For just such an argument, see Torbjörn Tännsjö, *Against Sexual Discrimination in Sports*, in *VALUES IN SPORT* 347, 357–58 (Torbjörn Tännsjö & Claudio Tamburrini eds., 2000).

10. See *id.* at 357.

11. See Robinson Meyer, *We Thought Female Athletes Were Catching Up to Men, but They're Not*, *ATLANTIC* (Aug. 9, 2012), <https://www.theatlantic.com/technology/archive/2012/08/we-thought-female-athletes-were-catching-up-to-men-but-theyre-not/260927/> [<https://perma.cc/D34P-FCAZ>].

12. See EMILY RYALL, *PHILOSOPHY OF SPORT: KEY QUESTIONS* loc. 1452 (2016) (ebook); Coleman, *supra* note 3, at 86.

13. See RYALL, *supra* note 12, at 1452; Coleman, *supra* note 3, at 90–91.

Making the most of one's physical advantages, and not being able to win because someone else happened to be physically stronger or faster, is surely a part of competitive athletics. Not having a chance to win in mixed athletic competition might be disappointing for women, but it is similarly disappointing for every individual who was not a true contender because of physical limitations.<sup>14</sup> The argument for creating a separate competition for one physically weaker group sets up a slippery slope of endless fragmentation into smaller and narrower competition classes.<sup>15</sup>

To this argument, one can imagine several responses. One is that the slope is not truly so slippery. Sex segregation in elite competitive sport is a longstanding practice, and its general social acceptance has not in fact spawned demand for divisions along more peculiar lines. Second, even in employment law, sex-based classifications are permitted in some circumstances where they are legitimately necessary for an essential aspect of the business<sup>16</sup>; and a sex-neutral rule can sometimes be found discriminatory if it has a significant disparate and adverse impact on women.<sup>17</sup> Analogously, if neutral sport eligibility rules have a significant disparate and adverse impact on women's enjoyment of sport; and if sex classifications are genuinely necessary to reflect the different capabilities of men and women, sex segregation might not be regarded as discriminatory even under a legalistic definition. And third, the argument against sex segregation in sport begs the question whether adherence to a formal norm of sex and gender blindness should have priority over considerations of substantive equality in access to the particular benefits of competitive sport tied to winning or having a realistic chance of winning, especially when the approach of sex and gender blindness would actually undermine the social value of competitive sport, especially for women.<sup>18</sup>

There are, then, a variety of considerations that pull in different ways. There is a sense that competitive sport is of sufficient social significance that men and women should have equal opportunities to benefit from it and that it would somehow be unfair not to provide separate competitions for women. But there is a lingering worry that reserving separate spaces for men's and women's activities closely resembles what would constitute discrimination in other contexts; plus, to add to the confusion, there is a sense that concerns about equality are somehow out of place in competitive sport, which inherently seeks to separate winners from losers.

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14. See Tännsjö, *supra* note 9, at 352.

15. See *id.* at 357.

16. See 42 U.S.C. § 2000e-2(e)(1) (2016) (permitting employers to use sex-based classifications where sex "is a bona fide occupational qualification reasonably necessary to the normal operation of [the employer's] particular business or enterprise").

17. See *id.* § 2000e-2(k) ("An unlawful employment practice based on disparate impact is established . . . if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin . . .").

18. See Reid, *supra* note 3, at 161 (discussing arguments articulated by ROBERT L. SIMON, FAIR PLAY: THE ETHICS OF SPORT 136 (2d ed. 2004)).

It may be helpful in sorting out this jumble of arguments and concerns to distinguish between two sets of values that appear to be in play. Some of the arguments invoke values internal to the institutions of sport, while others rely more on the broader, external moral considerations that may be relevant.<sup>19</sup> Considerations relating to the equalization of opportunities for men and women to participate in and benefit from sport are largely external, in the sense that the goal of equalization does not come from within sport itself; competitive sport seeks to celebrate certain human inequalities, not to make people equal.<sup>20</sup> Values internal to sport are those that relate to its defining or constitutive features, such as ideals of fair competition, the abilities and traits necessary for excellence, winning and setting records, and general notions of what is “good for the sport.” External values, like sex or gender equality, might provide reasons in favor of sex segregation, while values more internal to sport might generate contrary normative pressure. Or the opposite might be true: sex segregation might be consistent with the principles and goals of competitive sport, but it might not be justified, all things considered, from the perspective of broader social or moral commitments that occupy a higher order of priority. Distinguishing between these two perspectives will help clarify the basis for arguments in favor of and against sex segregation in sport.

#### IV

##### SEX SEGREGATION THROUGH THE LENS OF VALUES INTERNAL TO SPORT

Within a framework of values internal to competitive sport, the main reason to place participants into sex-segregated competition classes is not that it might promote some form of equality, but rather that it helps ensure that competitions are as close as they can be. One of the central goals of competitive sport is arguably to identify and celebrate the comparative excellence of individual or group achievements in various kinds of contests.<sup>21</sup> At least part of the point is to produce a differential ranking of performance in a particular type of activity—that is, to distinguish the best from the rest.<sup>22</sup> If that is true, then there is little value in setting up contests that include classes of competitors who are categorically all but predetermined to fare poorly relative to the top contenders. This is a consideration that is internal to sport. To claim that mixing participants with widely disparate capabilities would degrade the quality of competition is not to say that such integration would be morally objectionable or unjust. It is to claim, instead, that it would not serve the ends of high-level sporting competition, or at least not the particular end of identifying and celebrating top performers.

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19. Without necessarily accepting his broader moral theory, one can find a helpful discussion of the notion of a value that is internal to a practice in ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 188–90 (3d ed. 2007).

20. See Loland, *supra* note 6, at 103.

21. See Mitchell N. Berman, “Let ‘em Play:” *A Study in the Jurisprudence of Sport*, 99 GEO. L.J. 1325, 1358 (2011).

22. See Loland, *supra* note 6, at 99.

Another important feature of sport, especially at amateur and casual levels, is an ethos that success in the sport should be a result of effort, training, dedication to performing to the utmost of one's capabilities, and the pursuit of excellence in the skills and virtues central to the sport.<sup>23</sup> A difficulty with sporting events open to mixed classes of competitors with widely disparate performance capacities is that they betray the idea that results should be a function of maximizing personal ability. This implies that competitions should not be set up in such a way that outcomes for particular classes of participants are essentially predetermined by categorical physiological differences. The notion that results should be tied to the maximization of capability within a physiologically comparable cohort seems central to the precept of fair competition.<sup>24</sup> A contest that produces and celebrates winners who prevail over a physiologically disadvantaged cohort is inconsistent with values fundamental to the institution of competitive sport.<sup>25</sup>

On the other hand, separating competitors into classes that are too narrow also seems undesirable. There would be little purpose in setting up a contest of competitors who perform exactly the same. Part of the goal of competition in sport is to elicit and celebrate meaningful inequalities of performance. Some of the most celebrated achievements and accomplishments in sports have resulted from competitions in which a severe underdog has overcome supposed disadvantages to prevail over the heavy favorite. But there can be no underdogs or favorites if classes of competitors are too narrowly constructed. Thus, the values of competitive sport suggest a need to segregate competitors into different classes comprised of athletes of roughly comparable capability, but which are sufficiently broad to leave space for the emergence of meaningful and even significant differentiation within each class, such as underdogs, favorites, and Davids and Goliaths.

## V

### SEX SEGREGATION THROUGH THE LENS OF EXTERNAL CONCERNS OF DISCRIMINATION

The foregoing considerations, limited as they are, are not meant to be conclusive. However, they provide good reason to believe that sex segregation may be justified from the vantage point of values internal to sport, insofar as it is a positive value in sport to avoid placing classes of individuals that are vastly disparate in physical capability in competition with each other. This should not, however, be the end of the normative inquiry. Even if sex segregation is consistent with the values of competitive sport, it may be objectionable on external grounds. In particular, one might ask whether reliance on sex or gender classifications in determining eligibility for particular competitive events

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23. See Berman, *supra* note 21, at 1358.

24. See Loland, *supra* note 6, at 104, 110; Sailors, *supra* note 1, at 300.

25. Loland, *supra* note 6, at 104.



constitutes wrongful discrimination.<sup>26</sup>

Whether sex segregation in sport constitutes discrimination surely depends in part on the definition of discrimination to which one subscribes. The present interest, however, is not in the concept of discrimination as such, so it is not necessary to argue for or dwell on any particular theory. Rather, the discussion below will address whether there are reasons for objecting to the different treatment of men and women that could provide grounds for regarding such treatment as discrimination under any of the most common theories of discrimination. Without attempting to be comprehensive, a few possibilities are explored below.

According to harm-based theories of wrongful discrimination, a crucial consideration is whether the differentiating practice at issue—here, exclusion from a particular event because of sex or gender status—causes harm to the individual who receives the unfavorable treatment.<sup>27</sup> What constitutes harm for purposes of harm-based theories of discrimination is itself a philosophically contested issue.<sup>28</sup> Such questions are beyond our present scope, but what seems relevant to observe here is that arguments for treating men and women differently in sport tend to be based on the expected benefits of a segregated regime for all. The intended consequence of creating separate sporting events for women is to increase opportunities for women in sport, promote recognition of women's accomplishments, and reduce the risk of marginalization of women athletes due to domination of events by men. It might turn out that sex segregation makes women worse off in certain ways despite what might be intended or expected, but the hypothesized justifications of sex segregation provide reasons not to regard the different treatment of men and women in sport as discrimination within the meaning of a harm-based theory.

Another theoretical conception of discrimination—structural discrimination—focuses on issues of subordination.<sup>29</sup> Does sex segregation contribute to the subordination of women in society? Although the explicit rationale for sex segregation is precisely the opposite of subordination—equalization of women's opportunities and recognition in sport<sup>30</sup>—it is conceivable that the practice could, even if it succeeded in benefiting women in sports, be counterproductive in other contexts. For example, the separation of men and women in competitive sport might reinforce the idea that women should be kept in a separate domain for

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26. Here, discrimination is invoked in a general normative sense and not in a technical legal sense.

27. E.g., KASPER LIPPERT-RASMUSSEN, *BORN FREE AND EQUAL: A PHILOSOPHICAL INQUIRY INTO THE NATURE OF DISCRIMINATION* 154–55 (2014).

28. See Richard Arneson, *Discrimination and Harm*, in *THE ROUTLEDGE HANDBOOK OF THE ETHICS OF DISCRIMINATION* 151, 154–56 (Kasper Lippert-Rasmussen ed., 2018). On a simple consequentialist understanding, the question of harm is ultimately an empirical one, whereas non-consequentialist views might define harming in terms of making someone worse off in any respect or even violating their rights. See *id.*

29. See Andrew Altman, *Discrimination* § 2.3, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Feb. 1, 2011) (rev. Aug. 30, 2015), <https://plato.stanford.edu/archives/win2016/entries/discrimination/> [<https://perma.cc/FD75-APL3>].

30. See Coleman, *supra* note 3, at 85–86.

their own good; that women cannot succeed when placed in competition with men; that competitions among men are where the real action is; and that domains occupied by women are ancillary or nonessential.<sup>31</sup> On the other hand, one must consider the state of affairs that might result from the elimination of sex or gender segregation in sport. Would the expected pattern of results—presumably, domination of many high-profile sports categories by men—have negative consequences for the social status of women? Dominance by men over women in some sports might reinforce broader beliefs that women cannot be equals of men. More generally, the sex-based patterns of success that one would expect to result from mixed competitions could reinforce and perpetuate harmful societal prejudices about the inferior status of women.

According to a third view, the “expressive” theory of discrimination, whether an action or policy is objectionable as discrimination depends on whether the action, or its rationale, expresses disrespect or implies lesser moral, political, or social standing for members of one group relative to another.<sup>32</sup> Does segregation based on sex in sport express disrespect for women—or men? It might be contended that segregation of men and women in sport expresses a sort of dismissive paternalism: respect for women’s achievements and participation in sport might be little more than lip service. Furthermore, what is arguably expressed by the practice of keeping men and women apart is the idea that women should be permitted to enjoy the benefits of sport, but that they must be protected from, and prevented from interfering in, the serious rigors of men’s competitions. Thus, it is possible at least to articulate an argument for regarding sex segregation in sport as problematic according to an expressive theory of discrimination. The weakness of these arguments, however, is that they fail to take seriously the reality of the physiological differences between men and women in elite athletics. The rationale for segregation is not simply that separation is in the best interest of women, but that separation is necessary for women to have equal opportunities in sport because of their physiological differences from men. Far from expressing lesser respect for women, this rationale expresses the idea that in order to recognize the equal status of women, they should have equal opportunities for access to sport and equal recognition of their demonstrated excellence and achievements in the most esteemed categories of athletic endeavor and competition.

Finally, some conceptions of discrimination encompass certain types of stereotyping.<sup>33</sup> Stereotyping discrimination can be defined roughly as adverse treatment of an individual based on a generalized belief about the characteristics of the members of some protected group to which the individual belongs.<sup>34</sup> Sex

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31. In some popular sports, women’s competition is designated as such, whereas the men’s competition is not so qualified. For example: NBA and WNBA; PGA and LPGA. See Ann Travers, *The Sport Nexus and Gender Injustice*, 2 *STUD. SOC. JUST.* 79, 83–84 (2008).

32. See DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* 29, 35–37 (2008).

33. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235–36 (1989).

34. Cf. Patrick S. Shin, *Is There a Unitary Concept of Discrimination?*, in *PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW* 163, 174 (Deborah Hellman & Sophia Moreau eds., 2013).

segregation in competitive sport may be susceptible to an objection of discriminatory stereotyping. The operative stereotype is that women are physically weaker, slower, and generally less physically capable than men. One might respond that it is in fact true that women do not generally perform as well as men in physical contests that reward strength, power, and speed.<sup>35</sup> What one must remember, however, is that the truth of a generalization is not necessarily dispositive of whether reliance on it should be regarded as discrimination. There are contexts, such as employment markets, in which the use of certain classifications as proxies for domain-relevant characteristics would be objectionable as per se discrimination, even if the proxy relation were reasonably valid or statistically justified.<sup>36</sup> For example, an employer cannot use race as a proxy for any job-relevant trait, even if a valid statistical basis for doing so happens to exist because of historical racial inequality.<sup>37</sup> Much has been written about why the law takes this approach.<sup>38</sup> One hypothesis is that the use of certain kinds of classifications can and should be avoided even if statistically or empirically justified when the public legitimization of that classification might have negative spillover effects into social domains where reliance on the classification is more invidious.<sup>39</sup> Despite the truth of the generalizations about sex-based differences that putatively justify the separation of men and women in competitive sport, one might argue that legitimization of sex as a proxy for capability in any context is so potentially pernicious that sex segregation in sports should be regarded as impermissible per se.

The point here is not to claim that this argument, or any of the foregoing arguments about whether sex segregation in sport constitutes discrimination, should or should not be accepted. Rather, the discussion in this part has sought to expose the normative gap between the proposition that sex segregation is good for competitive sport and that sex segregation in sport is justified, full stop. Closing that gap requires deliberation about how the practice of sex segregation within institutions of sport interacts with broader social commitments to sex and gender equality and principles of nondiscrimination.

## VI

### INTERNAL AND EXTERNAL CONCERNS ABOUT BINARY SEX SEGREGATION

Another anti-discrimination-based external challenge to current practices of sex segregation is an objection not to segregation per se, but to its prevailing binary structure. The concern is that the traditional paradigm of reserving men's competitions for persons with biologically—anatomically, hormonally, and

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35. See Meyer, *supra* note 11.

36. See Shin, *supra* note 34, at 175–76.

37. David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 110 (1986).

38. For a discussion of why the law takes this approach, see Shin, *supra* note 34, at 175–76.

39. This suggestion is somewhat similar to the justification for the application of “strict scrutiny” to racial classifications invoked for putatively benign or equality-promoting purposes. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228–29 (1995).

physiologically—male bodies and women’s competitions for biologically female bodies excludes, marginalizes, or evinces disrespect for individuals who do not satisfy the usual criteria for either category or who identify with a gender that does not correspond to their assigned or presumed sex. The most publicized controversies implicating this issue have involved athletes with physical or biological characteristics associated with being male who competed or sought to compete in the women’s category.<sup>40</sup>

From the standpoint of values internal to competitive sport, the issue of gender identity is for the most part a non-starter. The purpose of dividing competitions into separate men’s and women’s events is to minimize the role of insuperable physical disparities in determining outcomes. That purpose is served by classifications tied to biology or physiology. There would be little point in using classifications based on gender or gender identity because insofar as such classifications are delinked from biological sex, they would only operate to reintroduce the problematic disparities that having separate men’s and women’s competitions is supposed to eliminate. Thus, if the goal is to tighten competitions by limiting them to physically comparable cohorts, then the notion of modifying eligibility rules to take account of gender identity might appear to be rather unmotivated.

The objection to the binary system of sex segregation makes sense only from an external standpoint, a perspective that includes gender anti-discrimination values that go beyond the values that define competitive sport. And even from an external perspective, the objection assumes that there is some general anti-discrimination principle that requires the equal treatment of transgender persons—a principle that says that no one should be excluded from or denied participation in any significant social opportunity solely because of transgender status or other gender identity or expression. If this assumption is rejected—that is, if there is no transgender anti-discrimination principle—then the issue of transgender treatment would no longer be a hard question for competitive sport; decisions with regard to such individuals could just be based on internal considerations, such as what would be best for the robustness of competition, overall experience of participation for competitors, and the flourishing of the sport in general.

To explore the harder questions, let us assume that all persons do indeed have a right not to be discriminated against because of their transgender status, gender identity, or gender expression. One argument that proponents of binary sex segregation might then make is that the current system of segregation does not deny anyone the opportunity to compete on the basis of sex, gender, or gender identity. Requiring a person to compete in a category different from what they

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40. See generally Nancy Leong, *Against Women’s Sports*, WASH. U. L. REV. (forthcoming 2018) (manuscript at 22–31), <https://ssrn.com/abstract=2923503> [<https://perma.cc/HP7B-BFHB>] (identifying highly publicized cases of individuals competing in women’s competitions who are then tested for physiologically male traits and discussing the history of gender verification tests in international sport competitions).

would choose is not the same as excluding them from competing. All qualified individuals are given an opportunity to compete regardless of their sex, gender, or gender identity, even if they are not free to choose whether they can participate in the men's or women's competition.

This argument misunderstands the objection, especially as it pertains to rights that protect gender identity and expression. The right to recognition and treatment consistent with an individual's expressed gender identity is violated when an athlete is channeled into a competitor class that contradicts the individual's chosen identity. The right is also violated when an athlete is subjected to testing to determine whether the individual should be permitted to compete in the category with which they identify. Forcing transgender athletes to undergo sex testing could be thought to constitute wrongful discrimination because such a practice would subject such individuals to special burdens to demonstrate eligibility to which others are not and would bespeak disrespect for their expressed gender identity.<sup>41</sup>

These concerns, if taken seriously, have controversial implications for competitive sport. If the traditional categories of men's and women's competitions are retained, one could argue that respect for gender identity requires nothing less than making all eligibility decisions on the basis of self-determination, with no physical testing imposed—except to enforce antidoping restrictions. In effect, under this approach, the paradigm of sex segregation would be converted into one of gender segregation, with every individual's applicable gender classification being a matter of autonomous self-determination.

A likely objection to such a regime is that it would open the door for individuals who identify as women but who possess the characteristics of biological males to compete as women. Such individuals could then dominate the sport.<sup>42</sup> This would undermine the point of having sex segregated competitions in the first place, which is, again, to ensure that women have equal opportunities to enjoy the benefits associated with competitive sport, including those associated with winning.

This line of response to a gender-based classification system arguably misses the point and fails to take gender identity anti-discrimination rights seriously. The notion that self-determined gender-based classifications in sport would undermine the goal of empowering, promoting, and recognizing the achievements of women in sport implicitly assumes that individuals who identify as women but have sex characteristics associated with male biology are not really women, or are not the kind of women intended to benefit from sex segregation.<sup>43</sup>

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41. See Mari Mikkola, *Discrimination and Trans Identities*, in THE ROUTLEDGE HANDBOOK OF THE ETHICS OF DISCRIMINATION, *supra* note 28, at 287, 293–94.

42. See Leong, *supra* note 40, at 23 (discussing the hypothesized problem).

43. It is worth adding that for those who would defend separate women's sports on the basis of values external to sport, such as equalization of women's opportunities, it is then illogical to claim that gender identity simply does not matter. Strictly speaking, women's equality may not matter, either, from the viewpoint of the internal values of sport. If one relies on values external to sport in order to justify sex segregation, one cannot simply say that considerations of gender identity discrimination are flatly

This sort of distinction between “real” women and others who “merely” identify as women is at odds with an attitude of genuine respect for gender identity and expression.<sup>44</sup>

It may—or may not—be true that if athletes who identify as women but have physical advantages associated with male biology were allowed to compete as women, such athletes would dominate women’s competitive sport. This might be perceived as in some way unfair from the perspective of some competitors or the public. But fairness in sport is arguably a function of the rules, not vice versa.<sup>45</sup> The intuition that it would be unfair for a transgender woman to compete against women who have female sex characteristics may simply presuppose traditional sex segregation as the true paradigm of competition. If the question is whether the rules of competition should be changed in order to respect the rights of those who identify as women, it is not clear that the predicted outcome of transgender success in women’s competitions can be presented, without objectionable circularity, as a fairness challenge to a pure self-identification regime.<sup>46</sup> It is, rather, a claim rooted in the internal value of ensuring that competitions take place among participants who are well-matched. The point is that predictions of transgender dominance in a self-determination regime do not directly answer the external objection that the current system of sex-based segregation may fail to respect rights of gender identity and expression. A more responsive rejoinder would show how a sex-based segregation system might in fact be implemented to respect such rights or, from a more consequentialist perspective, show how a sex-based segregation regime would ultimately be for the benefit of all competitors, regardless of sex status or gender identity.

Another solution addressing the treatment of transgender athletes might be to replace explicit sex- or gender-related classifications with formally sex- and gender-neutral classification criteria, such as weight, muscle mass, bioavailable testosterone, or perhaps some measure of demonstrated performance ability. In other words, the paradigm of men’s and women’s sport would be replaced with, for example, high testosterone and low testosterone classes. From an internal sport perspective that prioritizes the quality of competition, a sex- and gender-neutral classification system might accomplish the main goals of the traditional approach. Apart from practical issues of implementation, such as the means of verifying eligibility, a classification system that is formally independent of sex and gender might be a theoretically plausible alternative.

Although such a system could solve the problem of equalizing participation opportunities for all individuals, one might worry about how a formally neutral classification system would interact with entrenched societal attitudes relating to

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irrelevant just because such values are external to sport. If sex segregation is justified on the basis of external considerations, then such considerations should also inform questions about the proper use of gender classifications in sport.

44. See Mikkola, *supra* note 41, at 294.

45. See Loland, *supra* note 6, at 99–100.

46. Cf. *id.* at 109 (“Justifying a rule by reference to the wrongness of breaking it implies logical circularity and is invalid.”).

sex and gender. Presumably, in order for a formally neutral system to yield the fundamental benefits of a sex-segregated system, its classifications would have to closely track the traditional sex-based categories of male and female. As a result, any new technical classification system, whatever the chosen criteria or metrics, could be publicly perceived as a veiled proxy for, or even just a relabeling of, the traditional categories of male and female or man and woman. This is potentially worrisome because the result might be that the neutral functional classifications, insofar as they could be mapped directly onto traditional notions of sex and gender, might have a tendency to reinforce essentialistic attitudes about who truly counts as a man or a woman. If the categories of men and women were replaced with classifications based on measures of bioavailable testosterone, and the resulting classes remained largely identifiable as men and women, the social consequence might be a reinforcement of the idea that individuals with high testosterone are really men, no matter how they may identify, and those with a lower testosterone level are really women, no matter how they may identify. Thus, a sex- and gender-neutral testing regime could fuel socially persistent attitudes that biology is the ultimate determinant of whether someone is really a woman or a man.

To be clear, this concern is more of a comment on the difficulty of changing entrenched social attitudes than on the plausibility of sex- or gender-neutral technical classifications, which of course already exist in some sports—for instance, weight classes in boxing and wrestling. That difficulty is particularly acute in the context of sport because the culture of competitive sport is deeply entangled with societal norms and assumptions about sex and gender. Not only are some sports strongly gendered—for example, football is for men and rhythmic gymnastics is for women—but sport also informs particular conceptions of gender. Playing football and baseball may be part of a canonical notion of masculinity. The concept of gender may not fully derive from practices in sport, but the ways in which men and women are seen as different in competitive sport contribute to what it means to be a man or a woman in society. Because of this entanglement, sport cannot recuse itself from gender issues. In this sense—and contrary to the opening sentence of this article—sport cannot transcend social categories. To the extent that society still struggles with issues of gender identity discrimination, sport's stance on the proper treatment of transgender competitors will remain a central locus of broader social and moral controversy and discussion.<sup>47</sup>

## VII

### CONCLUSION

There are strong reasons to conclude that some form of sex segregation or its functional equivalent is necessary to equalize opportunities to participate in and enjoy the full benefits of competitive sport, at least at elite levels. From the

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47. See Tännsjö, *supra* note 9, at 356–57.

perspective of values internal to sport, this goal can be achieved by any classification that satisfies the “competitive desideratum”<sup>48</sup> of allowing outcomes to be a measure of relative excellence among well matched competitors. As far as the institutions of sport are concerned, it should not matter what classification is chosen as long as eligibility procedures can be fairly implemented. But because the way in which men and women are separated in competitive sport is so entangled with societal concepts of gender, classification schemes in sport implicate external issues of gender equality and discrimination, including difficult questions about the treatment of transgender persons. No solution seems immune from worry. Classic sex segregation systems that determine eligibility for a men’s or women’s competition on the basis of being biologically male or female arguably fail to respect basic anti-discrimination rights that protect gender identity and expression. A gender-segregated regime based purely on autonomous self-identification could solve the problem of respecting anti-discrimination rights, but it might be inconsistent with competitive desiderata embedded in values internal to sport. Alternative classification schemes based on biological or physiological markers might seem to provide a means to sidestep thorny issues of gender, but in fact they could fuel a sort of gender essentialism that would be harmful to progress in expanding societal recognition of rights of gender identity and expression.

There is, then, no clear or easy solution. But what is important to recognize is that the hard—normative, ethical—questions are less about the biology of sex and sport than they are about the extent to which society expects the practices of sport to fully live up to, and indeed to help promote, progressive social attitudes regarding sex and gender.

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48. Berman, *supra* note 21, at 1358.



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