

# WOMEN'S SPORTS AND THE FORGOTTEN GENDER

ARA WILSON\*

## I INTRODUCTION

Gender is a relatively new contender in the world of sports. Any close observer of women's athletics is aware that there are debates underway over the boundaries of eligibility in female divisions of sex-divided sports at state, national, and international levels.<sup>1</sup> While sex testing has existed for decades at the elite levels of sport,<sup>2</sup> current measures target a scale past what was established through nude parades or buccal smears to discover X chromosomes, with varying ideas about which sex-linked traits might serve verification purposes. The debate within women's sports is even broader still, asking whether biological measures associated with males and females should even provide the basis for determining who can compete in sex-segregated female sports.

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\* Associate Professor of Gender, Sexuality & Feminist Studies, Duke University. I wish to thank Doriane Lambelet Coleman for the invitation to participate in this symposium on sports and gender for candid dialogue about these issues. The thinking behind this article was honed while co-teaching an undergraduate interdisciplinary course on Nature/Nurture Sex/Gender with the neurobiologist Professor Christina Williams. It also benefited from dialogues undertaken in a Transgender Studies Initiative at Duke University. Any errors or missteps are the responsibility of the author.

1. See generally Silvia Camporesi, *Why Caster Semenya and Dutee Chand deserve to compete (and win) at Rio 2016*, THE CONVERSATION (Aug. 9, 2016, 10:09 AM), <http://theconversation.com/why-caster-semenya-and-dutee-chand-deserve-to-compete-and-win-at-rio-2016-63727> [<https://perma.cc/2L2A-9UX5>] (arguing against the regulation of biological measures of hyperandrogenism); Malcolm Gladwell & Nicholas Thompson, *Caster Semenya and the Logic of Olympic Competition*, NEW YORKER (Aug. 12, 2016), <https://www.newyorker.com/news/sporting-scene/caster-semenya-and-the-logic-of-olympic-competition> [<https://perma.cc/A4YP-N6CV>] (discussing an argument for setting an upper limit on testosterone levels in female Olympic competition); Juliet Macur, *What Qualifies a Woman to Compete as a Woman? An Ugly Fight Resumes*, N.Y. TIMES (Aug. 4, 2017), <https://www.nytimes.com/2017/08/04/sports/olympics/gender-dutee-chand-india.html> [<http://perma.cc/HXK7-LPK5>] (providing an overview of Olympic sprinter Dutee Chand's lawsuit against the International Association of Athletics Federations); Cyd Zeigler, *Dutee Chand's early 100-meter exit says a lot about Caster Semenya*, OUTSPORTS (Aug. 14, 2016), <https://www.outsports.com/2016/8/14/12475190/caster-semenya-dutee-chand-intersex-olympics> [<https://perma.cc/2L46-SVW6>] (highlighting Dutee Chand's Olympic performance to argue against testosterone regulation in female Olympic competition).

2. See, e.g., LINDSAY PARKS PIEPER, *SEX TESTING: GENDER POLICING IN WOMEN'S SPORTS* (2016) (explaining the ways that the International Association of Athletics Federation (IAAF) and the International Olympic Committee (IOC) undertook sex testing from the 1920s through the 1990s). See also María José Martínez-Patiño et al., *The unfinished race: 30 years of gender verification in sport*, 388 LANCET 541, 541–42 (2016), available at [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(16\)30963-1/abstract](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(16)30963-1/abstract) [<https://perma.cc/53PN-SAZN>] (providing an overview of changes in Olympic gender verification approaches from 1961 to 2016).

The main fault line in these women's sports debates lies between two understandings of being female for the purposes of competition: one focused on sex and one focused on gender. Those emphasizing criteria based on biology, whom Alice Dreger calls the Anatomists,<sup>3</sup> would establish eligibility based on measurable biological differences associated with sex. Conversely, the latter view understands gender as the psychic identity of the individual. The Identifiers,<sup>4</sup> as Dreger dubs them, propose that eligibility to compete in women's sports be based on an athlete's gender identity, as determined by either self-identification or legal sex status.

Discussions of qualification for women's sports are awash in highly technical detail, backed by citations to scientific studies of human biology. Anatomists insist that sex-linked features confer a biological advantage to men in sports. Therefore, fair play requires determining biological boundaries between males and females. Even the Identifiers traffic fluently in the science of sex differences, deploying biological data to counter the view that there are clear-cut and bimorphic distinctions between males and females. A passing familiarity with this biological material reveals that differentiating between two distinct categories of male and female humans is nowhere near as simple as popular thought would suggest. Indeed, heightened public attention to the biology of sex in the sports arena has been a boon to feminist and queer scholars, who are invested in deconstructing or denaturalizing stark binary notions of maleness and femaleness, which, interestingly, means that biological sex is still the fulcrum of these discussions about sports. Even with voices arguing that gender self-identification is what matters for women's sports, the subject that predominates these discussions is sex—the biological domain.

Compare the amount of attention devoted to understanding the astounding complexity of biological sex characteristics with the amount devoted to gender. While non-scientists and sports authorities become versed in the technical science of sex differentiation, little time is spent parsing the general category of gender. Few commentaries offer definitions of gender—beyond explaining that it is not sex. They do not explain gender identity, describe different features of gender, or cite research that analyzes gender as a structuring element in sports. From these discussions, it would appear that all one needs to know about the category of gender comes either from which box a legal or psychiatric authority checked off or from what is already known from some undefined crowd-sourced common sense. However, the existence of the interdisciplinary field of Gender Studies shows there is far more to gender than that.

Compared to the solicitous care accorded to biological sex, the concepts of gender in debates about qualification to compete in female sports are unexamined, and at best partial. It is not surprising that greater attention is

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3. Alice Dreger, *The Olympic Struggle Over Sex*, ATLANTIC (July 2, 2012), <https://www.theatlantic.com/health/archive/2012/07/the-olympic-struggle-over-sex/259321/> [<https://perma.cc/X4RL-JBJC>].

4. *Id.*

afforded to sex than to gender given both the historical view of biological sex as a relatively obvious quality that is established by looking at one's body and given that the distinction between sex and gender is relatively recent.<sup>5</sup> Still, this asymmetry is not merely the result of a lag time before more people understand intersex conditions or transgender identity. It is also a symptom of the category of women's sports today. Reflection on the category of gender itself can clarify some of the murkier areas of debate about the identity of athletes. This article offers an exegesis of the gender rubric towards that end. It differentiates between two distinct if related dimensions of gender: gender as a person's identity—the touchstone for Dreger's Identifiers—and gender as a social-cultural institution. While both facets of gender have been discussed in relation to sports, the identity axis of individual gender identity has taken center stage in the debates about eligibility. The concept of gender as identity has thereby displaced the understanding of gender as a historical, social, and cultural force that has informed critical commentary about women's sports since at least the 1960s. Considering the distinction between gender as an individual property and gender as a social phenomenon has implications for thinking about sex-segregated sports. Emphasizing this distinction in the meaning of gender recasts the debate between Anatomists and Identifiers over criteria for eligibility for women's sports: it shifts the focus from the gender of individual athletes to gender at the social scale. A historical and socio-cultural understanding of “women” provides a different, and non-biological, rationale for interpreting the protected domain of women's sports than does an historic focus on individual bodies and identities. In turn, the social conception of gender leads to a different understanding of an individual athlete's gender in relation to athletic competition.

## II

### GENDER AS IDENTITY

In its long history as a grammatical term, the word “gender” has described a linguistic category of nouns. While contemporary English does not have grammatical gender formally (beyond pronouns), its linguistic ancestors did: French, Germanic languages, and Old-English assign nouns a gender. While many words taking masculine or female grammatical gender refer to people and objects that we might associate with biological sex, grammatical gender extends well beyond these sexed associations. Some languages assign all nouns a gender from two, three, or more options. Therefore, the grammatical category of gender often has little to do with what we consider biological sex—for example, a table, which arguably has no sex, is assigned the feminine gender in French and the masculine gender in German. According to linguistics, grammatical gender derives from the

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5. See JOANNE J. MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSEXUALITY IN THE UNITED STATES* 3 (2009); David Haig, *The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001*, 33 *ARCHIVES SEXUAL BEHAV.* 87, 87–96 (2004) (tracing the emergence of the non-grammatical use of gender in scholarship).

symbolic system of language itself rather than from the non-linguistic world.<sup>6</sup> Grammatical gender thus provides an excellent example of how a discursive system creates meanings by establishing distinctions, oppositions, or connections that do not derive from the material reality outside of the sign system; this linguistic insight influenced much analysis of the social-cultural construction of reality.<sup>7</sup> As this article explains below, this linguistic category of gender was repurposed to describe a fundamental attribute of people themselves. The application of gender to people and social patterns relied on a distinction between biological, physical sex, and the more immaterial domain of masculinity and femininity. This schism between biology and psyche-culture echoes the divide between the table and its grammatical gender.

Gender first migrated from grammar to the now commonplace human-centered usage in mid-twentieth century university medical clinics.<sup>8</sup> Johns Hopkins University and the University of California Los Angeles developed a specialty in the psycho-medical treatment of people who were considered to exhibit “disorders” of sex development: the initial focus on intersexuality (called hermaphroditism until the 1950s) expanded to include transsexuality—now transgender—and homosexuality.<sup>9</sup> Among “normal” people, gonadal sex, sexuality, self-perception, and gender expression appeared to line up nicely. Those who lined up were the statistical norm—meaning a majority of people, who not coincidentally also represented the cultural norm—and were evaluated as proper, natural, and true. In those with disorders, these elements did not line up. Their chromosomes were not the norm; or their psychological self-concept did not match their genotype and phenotype. The lack of linear relation among biological characteristics, sexual desire, and self-perception was the disorder. Vocabulary for capturing these different elements was limited. The word “sex” was modified as sex role, sex identity, and psychological sex in ways that seemed to conflate rather than illuminate the different elements that practitioners were seeing made a person a woman or a man. Practitioners needed terminology to distinguish these components and differentiate a person’s biological sex from their feelings of

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6. See FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* (Perry Meisel & Haun Saussy eds., Wade Baskin trans., 2011) (1959) (providing the original framing of linguistic systems as symbolic systems, or structuralism).

7. See Greville G. Corbett, *Sex-based and Non-sex-based Gender Systems* (Matthew S. Dryer & Martin Haspelmath eds., 2013), *WORLD ATLAS OF LANGUAGE STRUCTURES ONLINE*, available at <http://wals.info/chapter/31> [<https://perma.cc/RZX8-U6TZ>] (providing a survey of grammatical gender across languages and identifying cases that do and do not refer to what we consider sex); see also Joan Scott, *Gender: A Useful Category of Historical Analysis*, 91 *AM. HIST. REV.* 1053, 1053–75 (1986) (proposing the study of gender as part of a social system of meanings rather than biological sex).

8. See Haig, *supra* note 5, at 91; see also JEMIMA REPO, *THE BIOPOLITICS OF GENDER* 24 (2015) (explaining Money’s introduction of the concept of gender as distinct from sex).

9. See JOANNE J. MEYEROWITZ, *HOW SEX CHANGED: A HISTORY OF TRANSEXUALITY IN THE UNITED STATES* 10 (2009) (providing a history of transsexual medicine); ELIZABETH REIS, *BODIES IN DOUBT: AN AMERICAN HISTORY OF INTERSEX* 115–52 (2009) (explaining how Johns Hopkins University established the leading protocol on intersex treatment and how it influenced conceptions of gender); SUSAN STRYKER, *TRANSGENDER HISTORY* 93 (2008) (establishing Johns Hopkins University and UCLA as earliest United States sites of transsexual clinics).

themselves and their conduct. Sexologist John Money drew on contemporary sociological language of status and roles to introduce the phrase “gender role” in medical publications.<sup>10</sup> Money’s use of gender role was closely followed by the concept of gender identity, which was the suggestion of psychoanalyst Robert Stoller.<sup>11</sup> In the late-1960s, the new concept of gender identity spread among those working on disorders of sex in the United States and abroad, but it remained largely confined to medical and psychological circles.<sup>12</sup> Experts did not work alone, but rather worked in dialogue with those we now call intersex or transgendered people, who also were active agents in seeking care and who shaped the emerging medical, legal, and public discourse about gender.<sup>13</sup>

The two sides of the women’s sports eligibility debate ultimately hark back to the same source. Not surprisingly, the Anatomists’ determination of female identity through sex-based characteristics (for example, chromosomal or hormonal markers) derives from biomedical science. Less obvious is the fact that the concept of gender identity also emerged from mid-twentieth century American science and medicine. The notion that gender is a personal, subjective identification emerged from the fields of psychology, endocrinology, and sexology, and from practitioners who were versed in the unfolding genetic science. In the debates around women’s sports, the intellectual source of the Identifiers’ and the Anatomists’ arguments come from the same waters.

Mid-century United States psychiatry drew on a generalized psychological framework of the time, an American Freudianism that posited a psychosexual development of the self. Sex—in the more capacious sense that included what we now call gender identity—was intertwined with sexuality and was central to forging a sense of selfhood in early childhood that endured in the adult. In the psychoanalytic view, the very understanding of oneself as a distinct person, who is the locus of experience and an actor in the world, was inextricable from sex (gender) and sexuality. Such a view included convictions about the healthy, proper, and normal development of identity. The normal child forms a gender identity that matches her biological sex, behaves accordingly, and matures into a heterosexual adult. As an essay in the *American Journal of Psychoanalysis* stated in 1968, “disturbance in the earliest periods of development result in ambiguous gender identities that compose the group of transsexuals, transvestites, and homosexuals.”<sup>14</sup> The understanding of gender and sexual non-conformity to norms was understood not merely as statistical deviance but as unhealthy,

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10. John Money, *Hermaphroditism, Gender and Precocity in Hyperadrenocorticism: Psychologic Findings*, 96 BULL. JOHNS HOPKINS HOSP. 253, 254 (1955).

11. Robert J. Stoller, *A Contribution to the Study of Gender Identity*, 45 INT’L. J. PSYCHOANALYSIS 220, 220–26 (1964).

12. See Natalie Shainess, *The Formation of Gender Identity*, 5 J. SEX RES. 75, 75 (1969) (mentioning that this version of gender identity was still considered new in the late 1960s).

13. JOANNE J. MEYEROWITZ, HOW SEX CHANGED: A HISTORY OF TRANSSEXUALITY IN THE UNITED STATES 10, 153–57 (2009) (highlighting the role of transgender subjects in influencing trans medicine or medical understandings of transsexualism).

14. Harry Gershman, *The Evolution of Gender Identity*, 28 AM. J. PSYCHOANALYSIS 80, 90 (1968).

pathological, and disordered. The conflation of gender identity and sexual orientation, or the idea that there was something ambiguous to transgender people or gays, appears to us now as a messy product of its time. The harsher judgments of psychoanalysts were softened by the biomedical approaches of Johns Hopkins, or endocrinologists like Harry Benjamin, who accepted gender identity as more or less fixed and therefore not amenable to a psychoanalytic cure.<sup>15</sup> In any case, the mid-century medley of sex, sexuality, and gender identity was consonant with scientific ideas of the normal development of selfhood. The therapeutic attention that these clinics offered to transgender or intersex patients came with labels such as pathological or psychological disorders. Despite these normative judgments, transsexual (and later transgender) advocacy relied on this biomedical sense of gender as an individual, psychic identity separate from biological sex.

Although this mid-century psycho-medical version of gender combined social, somatic, and psychological elements, the psychological sense of gender as psychic identity—what had been called “psychological sex”—came to predominate. This over-shadowed a sociological meaning implied in the concept of gender role. Medical clinics addressing transsexualism understood gender primarily to refer to an individual’s psychic identity—at issue was whether or not an individual’s identity matched their physical sex, or how mind matched body. The individual focus is captured in the way diagnoses consolidated around the term identity. According to historian of transsexuality Joanne Meyerowitz, “the use of ‘gender identity,’ as opposed to ‘gender role,’ . . . more clearly differentiated the subjective sense of self from the behaviors associated with masculinity and femininity.”<sup>16</sup> In this view, the gendered self has a private psychological interior. The psycho-medical understanding of gender identity solidified an enduring focus on the individual as the salient unit, with gender as a property of the individual.

Biomedical understandings of both sex and gender identity manifest in current debates about eligibility as a female competitor. Whether sex or gender, both orientations focus on the individual. The clinical concept of gender identity replaced the more social concept of gender roles, with a focus on individual psychic identification. The modes of thought that inform these debates share a method that is predicated on measuring individuals. Even averages, means, or distribution—like testosterone ranges by sex—are predicated on measurements established at the level of the individual. However stark the divide between those who call for criterion based on sex versus those who call for criterion based on a person’s identification, both perspectives rely on the individual athlete as the salient unit of evaluation for participation in women’s sports. Such individualism is a legacy of each perspective’s origins in biomedicine and psychology.

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15. See MEYEROWITZ, *supra* note 13, at 102–03 (discussing Benjamin’s work).

16. *Id.* at 115.

Caster Semenya. Dutee Chand. Before them, Renée Richards, Dora Ratjen. The instances that have brought the eligibility issue to public light reduce to this question: Is this particular athlete female? For nearly a century, authorities have sought an effective criterion to define eligibility for female sports to be applied to individuals. The individual focus seems obvious in discussion of athletics, which recognizes the embodied achievements of people in competition against others. Even in a team sport, the collective is comprised of individual selves. When a competitor is disqualified on grounds of sex/gender, it is as an individual, not as a national team, as has been the case for doping. One of the trenchant criticisms of eligibility processes for female sports is the terrible effects it has on specific individuals, notably a number of high achieving athletes,<sup>17</sup> who are subject to invasive scrutiny.

Consider the efforts to quantify eligibility for trans women, which hinge on the question: Is this particular athlete female? The policies of diverse sports bodies are a mishmash.<sup>18</sup> On the one hand, the Fédération Internationale de Volleyball not only requires a birth certificate to establish gender identity, it also notes that “[f]emale players may be required to submit a gender certificate and/or medical examination.”<sup>19</sup> This policy considers gender to be a statutory phenomenon. On the other hand, for other authorities, the gender eligibility question can now be: How long has this athlete been female? A number of rules, including recent International Olympic Committee (IOC) policies, add a temporal requirement to qualification; that is, they add a minimum length of time that has elapsed since some marker of transition.<sup>20</sup> The IOC 2016 requires trans women to have declared a female identity for four years and to have a specified testosterone level for one year.<sup>21</sup> Others, following IOC’s earlier 2004 protocol, require two years of taking hormones and “living in their newly assigned gender”<sup>22</sup> after what is known as gender-confirming or gender-affirming surgery. Under either policy, gender is grounded in somatic changes, yet it is the differentiation of gender from sex that has introduced a new temporal element to identity.

At the longest, this time element of gender relates to the biographical life. If not clear from the birth certificate, how has this child been known throughout her life? Debates over gender verification differ not only in the criteria for femaleness, but also in the temporal criteria for determination. The International Quidditch Association has no temporal criteria; rather, it relies on self-identity.

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17. See PIEPER, *supra* note 2, at 133–37 (providing examples of the harmful impact of gender verification testing on high-achieving athletes).

18. See Bethany Alice Jones et al., *Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies*, 47 *SPORTS MED.* 701, 707–12 (2017) (providing an overview of thirty-one sports policies “in relation to their inclusiveness of transgender competitors”).

19. *Id.* at 708.

20. *Id.*

21. *Id.*

22. *Id.*

The International Gay and Lesbian Football Association relies on legal status, and thus on some marker of before and after.<sup>23</sup> The criteria for eligibility in women's sports is currently a muddle. Stepping back from the confusing diversity of gender policies in athletics, one thing that becomes clear is their exclusive focus on the individual as the locus of gender. Policies to establish sex or gender eligibility are predicated on gender being the property of the individual, even if not determined by the individual herself. If we can bracket the individual nature of athletic competition, we can see the emphasis on the individual as a particular kind of logic, which is realized in historical and cultural modes. Physical sports center on bodies. Within cultures of modernity, bodies themselves are conceptualized in deeply individual terms. Classic Western political thought emphasizes "possessive individualism," which sees an individual person "as essentially the proprietor of his own person or capacities."<sup>24</sup> Possessive individualism applies as well to sex and gender. Regarding this Western thought, political theorist Paisley Currah says that "sex is cast as an inalienable property of the individual, before and outside of politics and therefore not subject to revision."<sup>25</sup> While this inalienability has been used to argue against gender reassignment, Currah notes that "much transgender rights advocacy and doctrinal legal analysis of the problem . . . depend on asserting that gender identity is inalienable, immutable" and the property of the person.<sup>26</sup> R.W. Connell also outlines this widespread Western ontology: "In common-sense understanding gender is a property of individual people."<sup>27</sup> Even when the emphasis shifts from biological sex, Connell writes, "gender is still usually seen in terms of socially produced *individual* character."<sup>28</sup>

### III

#### GENDER AS SOCIAL

The conception of gender as a person's identity, predicated on a deeply-set interior psychic orientation and property of the individual, is central to understanding gender scholarship and advocacy. It informs the emerging etiquette that holds that the choice of a third-person pronoun should be based on the preference of the person referred to, not the speaker's interpretation of their identity. Liberal traditions seem primed to accept the individual's self-designation as the basis for juridical identity. Moreover, there is a discernible trend to use gender identification, rather than identification based on biological markers in a

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23. *Id.*

24. CRAWFORD B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 3 (Wynford ed., 2011) (1962).

25. PAISLEY CURRAH, *NOT THE UNITED STATES OF SEX* 26, available by request at [http://www.academia.edu/8866993/Not\\_the\\_United\\_States\\_of\\_Gender\\_Regulating\\_Transgender\\_Identities](http://www.academia.edu/8866993/Not_the_United_States_of_Gender_Regulating_Transgender_Identities) [<https://perma.cc/YV95-W3QY>].

26. *Id.*

27. R.W. CONNELL, *GENDER AND POWER: SOCIETY, THE PERSON AND SEXUAL POLITICS* 139 (1987).

28. *Id.* (emphasis added).

range of legal and policy realms.

However, the concept of gender is not confined to the understanding of it as a psychic property of individuals. The history of gender concepts includes a rubric focused on social-cultural dimensions that are collective, not individual. Considering gender at a social scale—as so much discussion of women's sports since the 1960s has—provides different entry points into the evaluation of sex-differentiated sports.

From the late 1960s, feminists began to adopt the term “gender” from the medical and psychological realm. Money's 1955 formulation of “gender role,” which drew on a sociological understanding of gender as roles related to gender status, offered an early history of this trend. Money wrote: “[T]he term gender role is used to signify all those things that a person says or does to disclose himself or herself as having the status of boy or man, girl or woman, respectively.”<sup>29</sup> Money's article prefigures the performative gender theory of Judith Butler by many decades. Queer theory, in particular, has emphasized gender not as an expression of an inner self, but as acts—“all those things that a person says or does”<sup>30</sup>—that continually reestablish the sex/gender that was presumed to precede them. Since one discloses oneself to another, Money's use of “gender role” implies social interactions; “gender status” means the values, meaning, or authority that society attributes to that position. Such a sociological conception differs from the emphasis on gender identity, or psychological sex, that replaced it. Feminist use of gender expanded on this social level. Rather than seeing gender identity as the inherent property of individuals, feminists interpreted people's identification as a normative female or male as the result of socio-cultural forces.

Feminists returned to the grammatical roots of gender in which social systems of language arbitrarily assign a gender to nouns representing objects, like tables. Most feminists still retained some sense that sex is a biological feature, although they did not leave that idea unquestioned. Gayle Rubin's 1975 article posited that “[g]ender is a socially imposed division of the sexes.”<sup>31</sup> Making the case that both sex and gender are social constructions, Suzanne Kessler and Wendy McKenna argued that “a world of two ‘sexes’ is a result of the socially shared, taken-for-granted methods which members use to construct reality.”<sup>32</sup> Most feminist voices presented gender as a broad social-cultural schema that deployed, but did not emanate from, sex differences. As a major feminist historian put it, “gender is understood to be a way of classifying phenomena, a socially agreed upon system of distinctions rather than an objective description of inherent traits” of sex.<sup>33</sup> While sexology had delinked gender from biological sex, feminists went further,

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29. Money, *supra* note 10, at 254.

30. *Id.*

31. Gayle Rubin, *The Traffic in Women: Notes on the “Political Economy” of Sex*, in *TOWARD AN ANTHROPOLOGY OF WOMEN* 157, 179 (Rayna R. Reiter ed., 1975).

32. SUZANNE J. KESSLER & WENDY MCKENNA, *GENDER: AN ETHNOMETHODOLOGICAL APPROACH* vii (1978).

33. Joan W. Scott, *Gender: A Useful Category of Historical Analysis*, in *GENDER AND THE POLITICS OF HISTORY* 29 (1988).

showing that the qualities seen to emanate from sex, that were an essential part of being a woman, were in fact cultural ascriptions and were moreover predicated on subordination to the masculine category. An example relevant to sports would be a general belief that women—or at least, white women—were naturally more frail than men. This belief translated into the exclusion of women from running marathons and the establishment of shorter long-distance events for example in cross-country races. Subsequently, women’s performances in distance events have shown that belief to be the product of ideology rather than of actual biological capacities.<sup>34</sup>

A strong version of this feminist theory of the construction of gender holds that gender is not an elaboration of sex, but to the contrary that sex is itself a social construction. Our gender system, that is also heterosexual, and intersects with race and other axes of social difference, produces a cultural emphasis on binary sex differences and guides the selection of constituent components of sex.<sup>35</sup> Gender constructs sex. In debates about women’s sports, this perspective scrutinizes the investment in identifying some biological sex characteristic to define eligible femaleness for competition.<sup>36</sup> As Judith Butler wrote about a high-profile case of determining an elite runner’s eligibility to compete as a female, “the negotiated agreement . . . is not based on the ‘facts’ of sex, but on a consensus achieved among the various parties to the case about how to proceed.”<sup>37</sup> She continues: “This co-operative venture suggests as well that sex-determination is decided by consensus and, conversely, where there is no consensus, there is no determination of sex.”<sup>38</sup> By asking, “[is] this not a presumption that sex is a social negotiation of some kind?”, Butler is arguing that, insofar as sex matters to us, it is defined and therefore created out of social processes.<sup>39</sup>

In feminist analysis, deciding who counts as a woman is always the result of a social process. Particularly for those drawing from critical traditions beyond a formal liberal framework, gender is not only inextricably social, but it is also intertwined with power. In decades of feminist thought, as well as in discussions about sports, the ways in which that power is understood varies. Noting the complexity of defining a clear-cut measure of biological sex, critics of sex

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34. Maureen M. Smith & Alison M. Wrynn, *History of Gender and Gender Equality in the Olympics and Paralympics*, in ROUTLEDGE HANDBOOK OF SPORT, GENDER AND SEXUALITY 57–65 (Jennifer Hargreaves and Eric Anderson eds., 2014) (finding that “male hegemony in the sports world continues to impact on women’s opportunities as athletes and leaders in the Olympics and Paralympics”).

35. REPO, *supra* note 8, at 101; *see also* ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 74 (2000).

36. *See* PIEPER, *supra* note 2, at 1–10 (showing that cultural notions of gender shape definitions of sex in sport); Cheryl Cooky & Shari L. Dworkin, *Policing the Boundaries of Sex: A Critical Examination of Gender Verification and the Caster Semenya Controversy*, 50 J. SEX RES. 103, 103–11 (2013) (examining policies of “gender verification” and “sex testing”).

37. Judith Butler, *Wise Distinctions*, LRB BLOG (Nov. 20, 2009), <https://www.lrb.co.uk/blog/2009/11/20/judith-butler/wise-distinctions> [<https://perma.cc/AH7B-55SS>] (discussing the IAAF decision concerning an athlete’s eligibility to compete as female).

38. *Id.*

39. *Id.*

verification for women's sports argue that the belief that biology is the arbiter of femaleness is an ideological tenet that is shaped by, and reproduces, systemic gender inequality.<sup>40</sup>

The idea of biologically-based binary sex is organized according to an understanding of difference that is organized in relation to heterosexual norms and is often inflected with racial connotations: These forces motivate attempts to “police” gender and sex in sports. These critics have data at the ready. They can point to an enduring history in which exceptional female athletes have been derided as not truly female. Many of the female athletes whose gender was questioned were from the Cold-War-era communist bloc countries or in the present, from the Third World. This intersection of gender with non-Western or non-First World identity reinforces feminist suspicions that the investment in defining appropriate female status reflected prevailing ideologies.<sup>41</sup> Analyses of discourse excel in showing how binaries form by excluding those who fit, and discourses of female athletes are rife with examples of boundary violations by lesbians, women of color, or women who are tall or muscular—“the question of too.”<sup>42</sup> Even if women's sports is understood as a domain of empowerment, for the critics of sex/gender verification, the effort to “police” boundaries of femaleness has more to do with legacies of gender hierarchy, reflecting a view of females—or femininity—as needing protection.<sup>43</sup> Attempts to fix a definition of female that rely on an idea of true sex reinforce, rather than erode, gender schema that have long punished athletic girls and women.

The counterpoint to enforcing boundaries is emphasizing inclusivity—an ethical and political commitment to not exclude people based on normative judgments. Exclusion is particularly unwarranted when the criteria are considered arbitrary, which the shifting targets of biological sex-link measures seem to be. It is also subject to critique when the principles of exclusion are predicated on, or perpetuate, historical modes of oppression. The unattractive history of public denigrating female athletes for not being “real” women, or for being “too masculine,” lends itself to this charge. The feminist understanding that gender is a social phenomenon characterized by a particular habit of delimiting

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40. See Jaime Schultz, *Caster Semenya and the “Question of Too”: Sex Testing in Elite Women's Sport and the Issue of Advantage*, 63 *QUEST* 228 (2011). See also PIEPER, *supra* note 2; Katrina Karkazis et al., *Out of Bounds: A Critique of the New Policies on Hyperandrogenism in Elite Female Athletes*, 12 *AM. J. BIOETHICS* 3, 3 (2012).

41. See PIEPER, *supra* note 2, at 123.

42. See Schultz, *supra* note 40, at 237 (“When does progress in one's athletic performance come too quickly and when is that performance too good for a woman? Allegedly, the combination of Semenya's appearance and the improvements in her race times instigated the calls for her tests.”). See also Katrina Karkazis et al., *supra* note 40, at 3.

43. See PIEPER, *supra* note 2, at 8 (arguing that the International Olympic Committee's presumption of a “need to protect women athletes degraded female athleticism and reaffirmed a belief in male physical superiority.”); Cooky & Dworkin, *supra* note 36, at 108 (“for sport-governing bodies, sex testing is necessary because of the underlying belief that all biological males are stronger, bigger, faster, and thus superior athletes . . . .”); Karkazis et al., *supra* note 40, at 6 (“From the beginning, only female athletes have been subjected to sex testing because concerns about ‘fraud’ and ‘fairness’ have centered on the possibility that males could unfairly outperform females.”).

appropriate modes of being female that are not particularly empowering, athletic-wise, leads many to prefer letting a competitor's own identification determine eligibility—or, as a compromise, their legal status.<sup>44</sup> Perhaps paradoxically, then, gender as a social force returns to gender as a psychological attribute of the individual, and among activist voices it returns gender to its rightful domain as the property of the individual.<sup>45</sup>

#### IV

#### GENDER AS INSTITUTION

The rise of transgender advocacy has invigorated the sense of gender as identity, such that in many realms, that is its primary meaning. Yet from a social and cultural perspective, the centerpiece of feminist analysis, the major locus of gender—and arguably sex—lies in social formations rather than individuals, even if individuals realize or challenge gender codes in their being. Such thinking can feel counter-intuitive. “It is a considerable leap to think of gender as being also a property of collectivities, institutions, and historical processes,” the sociologist Connell concedes.<sup>46</sup> Yet, as feminist analysis insists, “[t]here are gender phenomena of major importance which simply cannot be grasped as properties of individuals, however much properties of individuals are implicated in them.”<sup>47</sup> Gender in the social sense refers to codes, customs, institutions, collective meanings, and dominant values as well as patterns of behavior and interactions. Gender might be described as a social institution itself or as embedded in other social institutions. Much of gender scholarship emphasizes language—or more precisely, discourse—in an echo of gender's linguistic roots and the structural linguistics that inform discourse analysis. Whether it is a social institution, mode of discourse, cultural imaginary,<sup>48</sup> or governing logic, gender is a supra-individual social fact, formed by patterns shaped in the milieu of particular worlds in particular historical moments.

This conception understands gender as part of social, cultural systems based on male dominance. Gender does not only refer to a cultural differentiation between two categories of people but also to the way power defines their relation and to the notion of systemic inequality in relations among men and women, boys and girls. Gender is not gender neutral. Recognizing intersectionality also means understanding that gender is one axis of social position that combines with other axes, such as race, nationality, and class. Because gender is a social construct, feminists assert, gendered arrangements can be changed.

In reality, feminist views of sports have long reflected this institutional, social view of gender. Feminist authors have conceptualized gender at three levels: individual/categorical, institutional/distributive, and symbolic/ideological/

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44. Karkazis et al., *supra* note 40.

45. See CURRAH, *supra* note 25.

46. CONNELL, *supra* note 27, at 139.

47. *Id.* at 139.

48. See generally CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES (2004).

relational, which are largely determined by the particular school of research.<sup>49</sup> The focus of this article is on what these authors call “institutional/distributive” understandings of gender, which sometimes relied on the inherited vocabulary of sex roles. For example, numerous studies show “how resources such as sponsorships, media coverage, participation possibilities and jobs in sport are distributed between men and women” and explain that such differences in allocation result from, or amount to, structural inequalities of gender.<sup>50</sup>

Other strands of scholarship, such as those from a cultural studies vein, consider the enduring conflation of masculinity with athleticism, the ambivalent relationship of femaleness to sports, and the ways that race combines with these naturalized associations. There is a longstanding body of scholarly analyses, advocacy reports, and journalism that emphasizes the institutional form of gender in shaping the organization of sports as well as the experience of it, discussions which do not depend on the individual gender identification of athletes.<sup>51</sup> Such work reflects a larger effort to challenge what is seen as the systemic organization of women’s athletic activity in a subordinate relation to men’s athletic activity—on the way that gender schema subordinate the class that is demarcated as female to the male class.

Such a system may work to the detriment of men. For example, the conflation of athleticism with masculinity and the valorization of sports as a public good lead to prioritizing participation in sports over academic learning. At the elite levels of college sports, Division I male athletes who participate in remunerative sports often do not receive a genuine college curriculum, which leads to weaker qualifications for life following their athletic tenures.<sup>52</sup> Understandably, most structural evaluations of gender and sports highlight the penalty on women and those who do not conform to gender norms, such as gay men.

The institutional sense of gender has shaped many policies (like Title IX) related to sports, yet this systemic social and historical meaning is elided in the debates about eligibility for women’s sports. One explanation for this elision, particularly from explicit feminist advocacy that is steeped in structural analysis, lies with the increasing prominence of transgender concerns in progressive gender and sex politics. This entails a commitment to promoting self-determination of gender identity as a human right. In advocacy around sports, such commitment produces emphasis on including transgender athletes, which in practice mostly means the inclusion of trans women or women-identified people in women’s divisions of sex-differentiated sports.<sup>53</sup>

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49. Annalies Knoppers & Mary McDonald, *Scholarship on Gender and Sport in Sex Roles and Beyond*, 63 *SEX ROLES* 311, 312 (2010).

50. *Id.* at 313.

51. *See id.*; *see also* Smith & Wrynn, *supra* note 34, at 57–65.

52. For a proposal to use Title IX compliance to remedy male athletes deprived of a legitimate college education, *see* Sarah E. Gohl, *A Lesson in English and Gender: Title IX and the Male Student-Athlete*, 50 *DUKE L.J.* 1123, 1156–64 (2001).

53. *See generally* Karkazis et al., *supra* note 42.

The debates about eligibility for women's sports oppose a criterion of gender identification determined by the athlete or legal authorities—the Identifiers—to some version of sex, which is a biological marker determined by biomedical tests. These stances appear to understand women's sports differently. For the Anatomists, women's sports should be a protected category of competition because male biological traits often lead to athletic advantage. For the Identifiers, there does not appear to be simple consensus about why women's sports should remain a distinct division, and indeed, if it should. Some commentators have called for removing a sex/gender-based distinction, perhaps to be substituted with other criterion akin to weight classes in wrestling or boxing.<sup>54</sup>

## V

### THE FORGOTTEN GENDER

What if we viewed the domain of women's sports through a social, rather than individual lens? Those who champion female participation in sports have relied on an ethic of inclusion that operates at the individual level of the individual athlete, yet which is inextricable from an understanding that girls and women have been systemically excluded from robust athletic competition—with, of course, variation across times, cultures, societies, and particular sports. It was a stroke of tactical genius to apply Title IX to school sports, which is arguably the domain where it has had its strongest effects. Title IX is predicated on recognizing that girls and young women have been granted fewer athletic resources by schools than boys and young men. Such inequity does not depend on the psychic identity of athletes but rather on their social status. It is also not reducible to an individual level. The history of organized sports and the cultural values attached to athleticism has privileged male participation and has compromised females not only as individuals but also at a social scale and as a gender. This inequality interprets gender in a systemic, structural, or institutional sense.

Might recognizing the *longue durée* of unequal athletic opportunities afforded males and females recast the understanding of the protected nature of women's sports? An emphasis on social gender is unlikely to resolve questions of how to adjudicate participation in the case where an athlete's gender raises questions. Viewing women's sports as a social-cultural domain operating in a landscape shaped by systemic gender hierarchy does change the terms of the debate from the given oppositions of gender versus sex or self-identity versus biology. This opposition truncates the meaning of gender for sports. Centering on gender brings to the fore different interpretations of women's sports—notably, the difference between emphasizing gender as a social institution and as an individual identity. Taking gender as a social phenomenon recasts debates about women's sports that are predicated on individual identity.

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54. Cf. Joanna Harper, *Athletic Gender*, 80 LAW & CONTEMP. PROBS., no. 4, 2017, at 142–43 (pointing out that “equitable competition” can and does exist between athletes with different capabilities, in boxing for example, as long as the “magnitude of the advantage” is not too high).

The systemic view would see the distinct carve-out of women's sports as a remedy to the historical legacy of a gender hierarchy in athletics, which much evidence suggests is also on-going. Instead of protecting women's sports via female as individual identity, then, the institutional understanding suggests that women's sports can be seen as a protected class on the basis of social, cultural, and historical reasons—institutional gender—rather than an individual basis. Critics of gender verification charge that protecting the cultural category of female by excluding trans women athletes is unjust. What is less examined is the relationship of transgender inclusion predicated on self-determination, or gender identity, to investments in women's sports as a remedy for the social history of gender inequality in athletics.

The institutional understanding of gender involves a different temporality than does the attribution of individual identity. In adjudicating an individual's eligibility to compete as a female, the disparate policies focus on the individual biography; most current policies concentrate on the present and recent past. The social, institutional meaning of gender refers to a historical, rather than biographical, sense of time. All evidence suggests that in most countries, most college-age athletes, born at the end of the twentieth century, grew up under social systems that allocated more resources and value to sports associated with males to varying degrees.<sup>55</sup> Arguably, an unequal context applies to younger athletes as well. The experience of gender non-conforming individuals feeling unwelcome in sports realms does not belie the broader social character of gendered athletics. Moreover, the existence of prominent trans women athletes suggests that not all gender non-conforming children assigned to the male sex were alienated from high-level competition.

A compelling criticism of the focus on sex-linked characteristics in defining athletic advantage notes the issue of stark variation in economic resources—Mandy Merck mentions childhood nutrition, access to coaching and equipment, training regimes and financial resources.<sup>56</sup> The vast resource inequality among countries or within them is a reality that is all too often obscured by the presumption of a level playing field at international competitions. The Journal of the American Medical Association also notes that many factors advantage or disadvantage athletes: “economic opportunities, access to facilities, and skilled coaching among them.”<sup>57</sup> Tellingly, these examples of what we could see as inequality are presented as counterpoints to concerns about male advantage in women's sports. That is because the question of advantage of those assigned male at birth has been reduced to questions of biological, sex-linked advantages. Financial resources, access to facilities, skilled coaching, training regimes—are

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55. See Knoppers & McDonald, *supra* note 49, at 314 (finding that “men's sport enjoys significantly more financial clout and sponsorship support than does women's sport”); see also Smith & Wrynn, *supra* note 34, at 57–65.

56. Mandy Merck, *The Question of Caster Semenya*, 160 *RADICAL PHIL.* 2, 6 (2010).

57. Myron Genel, Joe Leigh Simpson & Albert de la Chapelle, *The Olympic Games and Athletic Sex Assignment*, 316 *JAMA* 1359, 1360 (2016).

these not the precise elements that champions of women's sports have identified as factors disadvantaging female athletes? The emphasis on sex/gender as individual identity has obscured legacies of the gendered nature of competitive sport. Such structures shape and funnel individual experience.

It is hard to deny the widespread pattern in which those who are assigned male tended to be more encouraged into embodied athleticism—more coached, more pushed to compete—within an unequal gender system. In the 1970s, no woman could have competed in a decathlon. To this day, few girls play Little League Baseball: there are no girls' baseball teams.<sup>58</sup> A trans woman who competed in the decathlon, who played baseball or football or other male-predominant sports, formed her athletic self under a gendered sports culture that advantaged participants identified as males. Whatever gender identity an individual athlete may have, her formative athletic experience took place within a social arena structured by gender. If we recognize that male and female sports are social fields situated in history, then we need not reduce gender to individual athletes' identities. This article does not address the question of who should be eligible to compete in women's sports or what the criteria should be. The point is that discussions of women's sports, particularly those that are invested in a separate women's division as a form of protected class,<sup>59</sup> need not remain confined to a dichotomy between gender identity and biological sex. Moreover, support for women's sports does not need to rest on the identity of individuals, whether determined biologically or psychologically. Women's sports can instead be grounded on a commitment to redress gender inequalities in athletic opportunities.

## VI

### CONCLUSION

Judith Butler asks, “why don't we think instead about standards for participation under gender categories that have the aim of being both egalitarian and inclusive?”<sup>60</sup> Butler would likely share an understanding that the social organization of sports has been unfair to women. By egalitarian, Butler presumably means the sense of fair play that informs commitments to a separate arena for women's sports. Along with many feminist observers, Butler's call for inclusion challenges exclusions based on a particular and prejudicial delineation of what a “true” woman is.

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58. Scott Cacciola, *A Woman Among Boys*, N.Y. TIMES (August 21, 2014), <https://www.nytimes.com/2014/08/21/sports/being-a-girl-gives-mone-davis-an-edge-at-little-league-world-series.html> [<http://perma.cc/K9HX-K9C9>] (“Only 1,259 girls played high school baseball nationwide in 2013, compared with 474,791 boys . . .”).

59. See Doriane Lambelet Coleman, *Sex in Sport*, 80 LAW & CONTEMP. PROBS., no. 4, 2017, at 112 (noting that separate the women's category in sport can be considered a “legal imperative” and a means to reduce discrimination by sex under the equal protection doctrine).

60. Butler, *supra* note 37.

Recognizing a distinction between sex and gender challenged a consensus that biological sex is the sole criterion for eligibility to participate in sex-segregated female sports, while the increasingly sophisticated understanding that sex does not fall into two discrete, unitary biological categories complicated the articulation of sex-based verification of athletes. Debates about eligibility for the protected category of women's sports have contrasted gender identity with biological sex. They ask: How do we decide if this athlete is female—at least female in the context of competition? The terms of this debate focus on the individual, a legacy of biomedical origins of the concept of gender identity, and markers of biological sex. Within the controversy about women's sports, gender has come to refer to identity, with progressive advocacy emphasizing values of inclusion of those who do not fit conventional definitions of female. The underlying terms of this debate have sidelined a social definition of gender despite its central role in arguments for a robust endorsement of women's sports.

Butler's reference to both egalitarian and inclusive aims registers the sports debates in a way that nods to two domains of gender, without naming them as such. Differentiating these two axes expands the perspective on women's sports. The concept of gender is not confined to the understanding of it as a psychic property of individuals. For supporters of women's sports who recoil at biological essentialism, resurrecting the systemic version of gender recasts these debates about qualification. The well-documented patterns of gender inequality in sport offer grounds for justifying women's sports in social, not biological terms. Such a view can incorporate critiques of "policing" appropriate femininity in sport. At the same time, an institutional view of gender might ask athletes about their experiences regarding athletics over their lifetimes. Were they shaped by the gendered inequalities found in sports? This systemic view does not lead to a new technique for adjudicating who qualifies to compete as a female in the protected arena of women's sports. These questions are likely to fall more in the realm of ethics for competitors who recognize gender inequality and are committed to a value of fair play in women's sports. Where the understanding of the gender identity of individuals and the critical sense that systemic gender inequality continues to structure sports agree is in the understanding that one is not born, but becomes, a female athlete.