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**If “Ifs” and “Buts” Were Candy and Nuts:
The Failure of Arguments against Trans and Intersex Women's
Full and Equal Inclusion in Women's Sport**

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Abstract

It's relatively easy to say that the debates about whether trans and intersex women athletes deserve full and equal inclusion in women's sport is a contentious contemporary issue. I've already argued *for* the legal, ethical, and scientific basis for full and equal inclusion of trans and intersex women in women's sport. In this paper, I want to analyze what I take to be a representative selection of recent arguments *against* full and equal inclusion of trans and intersex women in women's sport. In short, these arguments tend to be based on mere assumption, unsupported “common sense,” straw arguments, fallacious question begging, and a number of hypotheticals and unsupported counterfactuals rather than established fact. Essentially, they're based on a lot of “ifs.”

Keywords: transgender, intersex, sport, human rights, sport as a human right, transphobia, intersexphobia, Olympics, inclusion in sport, transgender athlete, women's sport

It's relatively easy to say that the debates about whether trans and intersex women athletes deserve full and equal inclusion in women's sport is a contentious contemporary issue. I've already argued *for* the legal, ethical, and scientific basis for full and equal inclusion of trans and intersex women in women's sport.¹ In this paper, I want to analyze what I take to be a representative selection of recent arguments *against* full and equal inclusion of trans and intersex women in women's sport. In short, these arguments tend to be based on mere assumption, unsupported “common sense,” straw arguments, fallacious question begging, and a number of hypotheticals and unsupported counterfactuals rather than established fact. Essentially, they're based on a lot of “ifs.”

¹ See Ivy and Conrad (2018).

In deciding whether trans and intersex women should be allowed to compete as women, who has the burden of proof in the debate? The answer is clear: those who seek to exclude. The International Olympic Committee (IOC), the Court of Arbitration for Sport (CAS), and the UN Human Rights Council (UNHRC) all clearly state that there is a human right to participate in competitive sport. As Aryn Conrad and I have noted (Ivy and Conrad 2018), this right includes the right for trans and intersex women to compete as women in women's sport categories. For the purposes of sport, trans and intersex women are considered fully female. Inclusion is the default. When it comes to human rights, those seeking to exclude have the ultimate burden of proof to justify access to the right. Unfortunately, those who oppose trans and intersex women's full and equal inclusion as women in women's sport forget that they have the burden of proof in the debate.

1. The Burden of Proof Is on the Side Seeking to Exclude from a Human Right

Let me begin with the burden of proof. Why would those who oppose trans and intersex women's full and equal inclusion in women's sport hold the burden of proof? The answer is that sport is a human right. According to whom, you might ask? The International Olympic Committee has, as its foundational document, the Olympic Charter (hereafter, "Charter"), which has seven "fundamental principles of Olympism" (IOC 2020). The fourth fundamental principle reads:

The practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play. (IOC 2020, 11)

It's important to note that the Olympics is only concerned with *competitive* sport. So the right to sport isn't merely about recreational or nonelite sport; rather, the Olympics are only concerned with the most elite levels of competitive sport. Thus, the right to sport is a right to competitive sport, even at the elite levels provided the athlete qualifies.

The sixth fundamental principle is a nondiscrimination clause, which reads:

The enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status. (IOC 2020, 12)

There are a few things of note here. First, in many international legal jurisdictions, including the United Kingdom, the United States of America, Australia, Canada, and others, the socially and legally relevant category “gender identity” is taken to be already subsumed under the category of “sex.”²

Let’s pause for a moment to make this point clear: trans and intersex women are regularly *legally* recognized as being women, as being *female*. Governments and sports organizations make no distinction between “sex” and “gender.” The terms are routinely used interchangeably and in combination. For example, the 2010 UK Equality Act uses language such as “the sex of a woman” and “the gender of a male.” Trans and intersex women’s right to compete in women’s (or “female”) sport is a right to compete as women, as female, in women’s (or “female”) sports categories.

Returning to the Charter, even if one were to reject this current legal fact, the sixth principle is explicitly open-ended: “or other status.” Gender identity is indisputably a relevant social category upon which discrimination, harassment, and the need for social and legal protections obtains. Third, both intersex status and gender identity could also be understood under the protections against discrimination on the basis of “birth,” but that is at this point superfluous.

In their 2015 update, “IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism November 2015,”³ to their 2003 policy, “2003 Stockholm

² A summary of US case law can be found here: <https://transequality.org/federal-case-law-on-transgender-people-and-discrimination>. Repeatedly, Federal courts—including district and district appeals courts—have found that protections against discrimination on the basis of gender identity are subsumed under Title VII protections against discrimination on the basis of sex.

A summary of Canadian case law can be found here: <https://www.vpl.ca/guide/legal-information>. Federal Bill C-16, An Act to Amend the Canadian Human Rights Act and the Criminal Code, explicitly protects trans people from discrimination on the basis of gender identity and expression.

A summary of Australian case law can be found here: <https://humanrights.gov.au/quick-guide/12104>. “The Sex Discrimination Act makes it unlawful to treat a person less favourably than another person in a similar situation because of the gender-related identity, appearance, mannerisms or other gender-related characteristics of the person.”

A summary of UK case law can be found here: <http://www.gendertrust.org.uk/transgender-laws/>. The 2010 UK Equality Act explicitly prohibits discrimination on the basis of sex, and this has been repeatedly decided to include prohibitions against discrimination on the basis of gender identity.

³ https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and

Consensus on Sex Reassignment in Sports,”⁴ the IOC makes clear that intersex and trans athletes have equal rights to competitive sport. The 2015 document reads in part:

Since the 2003 Stockholm Consensus on Sex Reassignment in Sports, there has been a growing recognition of the importance of autonomy of gender identity in society, as reflected in the laws of many jurisdictions worldwide. . . . It is necessary to ensure insofar as possible that trans athletes are not excluded from the opportunity to participate in sporting competition.

Again, the reference to “sporting competition” is explicit. And the policy goes on to list eligibility criteria for trans athletes—it does *not* list criteria for recognizing a trans female as female. Trans women are treated as fully *female* by the IOC and all its member sporting federations.

As explained elsewhere (Ivy and Conrad 2018), the legal structure of Olympic and Olympic-eligible sports (that is, sports that are, or seek to be, included in the Olympics) must abide by the Charter, including its nondiscrimination clause. Moreover, the IOC, all Olympic-eligible sports, and a few others, are under the unique jurisdiction of the Court of Arbitration for Sport (CAS). CAS is an arms’ length arbitral body created by the IOC. It is effectively the supreme court for sport.

CAS has repeatedly ruled that intersex—and by extension trans—women have a right to sport, just like cisgender non-intersex women.⁵ They apply common frames of international human rights law and principles, whereby an athlete’s fundamental

_hyperandrogenism-en.pdf.

⁴ https://stillmed.olympic.org/Documents/Reports/EN/en_report_905.pdf.

⁵ Although the *Semenya* 2019 decision (Mokgadi Caster Semenya v. International Association of Athletics Federations (IAAF), & Athletics South Africa v. IAAF, [2019] Court of Arbitration for Sport, CAS 2018/O/5794 & CAS 2018/O/5798) contradicted much of the reasoning in the *Chand* 2015 case (Dutee Chand v. Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF), [2015] Court of Arbitration for Sport, CAS 2014/A/3759), the right for intersex (and by extension) trans women to compete as women was affirmed. *Semenya* 2019 merely allowed very specific testosterone regulations as an eligibility criterion for competition in women’s events—it did not rule that hyperandrogenic women are not *women* or that such women did not have the right to compete. While I have argued elsewhere (e.g., Ivy and Conrad 2018) that such female–female eligibility rules are unethical, and not supported by available science, nothing about sport being a human right was affected by the *Semenya* case.

right to competition may be overridden if doing so is in service of a worthy social goal, necessary and effective at promoting that goal, and the harm caused to the excluded group is proportional to the social benefit.⁶

Excluding trans and intersex women on the basis of gender identity, sex, or other natural physical traits such as high endogenous testosterone (e.g., hyperandrogenism) are indisputably *prima facie* discrimination. Truly, it is indisputable. As such, the sports body seeking to exclude such women from women’s competition has the ultimate burden of proof to show that the policy is necessary, effective, and proportional.

The question is not *whether* trans and intersex women have a human right to competitive sport—that is not seriously in dispute except by those who misunderstand both the ethics and law of international human rights; rather, the question is *whether* the *exclusion* of trans and intersex women from women’s sport can be justified in an international human rights framework.

In a nutshell, this is the “sport is a human right” argument. Of course, I go into much more detail elsewhere (Ivy and Conrad 2018). But it can be summarized thusly:

- IOC Charter says that participation in sport is a human right.
- IOC Charter prohibits discrimination on the basis of sex “or other status.”
- Gender identity and intersex status are covered by the protections against “sex” or “or other status” discrimination.
- International human rights law and ethics require those seeking to override a right to demonstrate that the policy is in service of a worthy goal, necessary and sufficient for achieving that goal, and the harm is proportional to the social benefit.
- Trans and intersex women are medically, legally, and socially recognized as *female*.⁷

⁶ See the European Convention on Human Rights: https://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁷ See also Ivy (2019f). The terms “woman” and “female” will be used interchangeably for many reasons. First, I am not convinced that there is a meaningful distinction between “sex” and “gender.” Both are socially constructed and both are socially constructed at least in part out of biological “stuff.” Second, common language use tends to use them interchangeably, and it’s often only academic feminists who think that there’s a meaningful distinction. Third, and most relevant: governments and sports governing bodies make absolutely no distinction between sex and gender, and use the terms totally interchangeably such as “the female gender” and “the sex of a man” (e.g., in the 2010 UK Equality Act). Finally, the distinction between sex and

- Therefore, absent such justification, trans and intersex women have a right to compete as women/female.

Conrad and I (Ivy and Conrad 2018) argue that such exclusion clearly cannot be justified. But that is not my purpose here. It is simply an established fact that trans and intersex women have a right to compete as women in women's categories. Instead, I want to focus on the poor quality of the arguments against this "sport as a human right" argument. But I began this section on the question of burden of proof because the default in human rights is inclusion, not exclusion. As noted, the IOC and CAS have clearly ruled that trans and intersex women have a *prima facie* right to compete as women. Trans and intersex women don't need to argue for our inclusion: that's already granted to us through the IOC Olympic Charter and recent CAS decisions (including the *Semenya* case).

Therefore, those seeking to exclude an athlete from her right to compete have the ultimate burden of proof. They cannot simply rely on assumptions and hypotheticals: they're the ones that need hard facts the most. "Ifs" and imagined counterfactuals are insufficient grounds upon which to deny trans and intersex women their right to compete as women in women's categories.

This paper will demonstrate that they have not come close to meeting this burden. In fact, since they seem to forget that they indeed have the burden of proof, most of their arguments are misplaced by attempting to refute arguments about trans and intersex women's right to compete as women.

2. What Does the "Sport Is a Human Right" Argument Actually Entail?

I think it's fair to say that all the most discussed—perhaps "prominent"—work arguing against the full and equal inclusion of trans and intersex women in women's sport adopt the position that such exclusion is, or at least should be, the default. Thus, they seem to position themselves such that those arguing for the full and equal *inclusion* of trans and intersex women in sport have the burden of argument. But as I have just shown, they are mistaken. I think that this fundamental framing error has caused the quality of their arguments to be so low. They tend to focus exclusively on

gender is often only deployed as a reason to exclude trans women from "female" rights and spaces. For example, some may grant that trans women are *women* but not "female," and that sport is about "sex," and therefore trans women should not be allowed to compete in female categories. But they are mistaken: trans women are very regularly legally and medically recognized as *female*; moreover, as noted in the third point, sport and governments make no distinction between sex and gender. CAS has been explicit on this point.

attempting to rebut arguments, such as my own, for the full and equal inclusion of trans and intersex women in sport.

But they’re the ones with the justificatory burden.

I’m going to focus on one recent article by Pam Sailors (2020), as I find it representative of other work, largely unpublished. There is surprisingly little published work on this topic. Most contributions seem to be made via blog post, op-ed, Twitter, or unmoderated internet forums.

Sailors (2020, 421) claims that we can understand the debate as being composed of three broad positions: “those who believe an arbitrary trait is better than none at all, those who believe the lack of a definitive trait means we should not look for one at all, and those who believe the best solution is to eliminate sex-segregated categories altogether.” Adopting the language of Alice Dreger (2012), she refers to the first as “Anatomists” and the second as “Identifiers.”

Sailors writes:

The Anatomists believe that the nature of sport and the importance of maintaining two categories means that some biological marker must be selected. The Identifiers think the complexity of the matter means sports authorities should stop looking for a biological marker. “Instead, we ought to go simply with an athlete’s self-identity as a man or woman (only requiring, perhaps, that it be confirmed by her or his legal status).” (Sailors 2020, 421; quoting Dreger 2012)

Sailors refers to the final group—those arguing for the abolition of sex-segregated sport altogether—as “Abandonists.” This third group is nearly nonexistent: nearly no one is seriously advocating for the complete abolition of sex-segregated sport categories *simpliciter*.

Sailors’s focus seems to be entirely on the arguments—and her rejection thereof—of so-called Identifiers. Sailors takes Abandonism as mostly a nonstarter, as she believes that it would lead to the elimination of women in elite sport (nearly) altogether. I think her reasons for rejecting this position are misplaced, though. There are many sports for which gender categories make little sense.

The Olympic Skeet Shooting event, a summer event, used to be gender-integrated. In the 1992 Barcelona Olympics, the gold medal was won by a Chinese woman, Zhang Shan. Subsequently, in the 1996 Atlanta Olympics, the Games gender-segregated the skeet event *and* didn’t even offer a women’s category. Therefore, the defending Olympic champion was unable to defend her title. A separate women’s event wasn’t added until the 2000 Sydney Olympics. No physiological difference between men and women can explain this policy decision to maintain gender-segregated categories in the skeet event. Clearly, I think, there are at least some

events such as skeet, other shooting events, Equestrian (which is already gender-integrated), and perhaps others should fall under the Abandonist position. Therefore, Sailors rejecting the position wholesale, without the nuance of separating out different sports, is a mistake.⁸

Her representation of the Identifier position is a straw argument. I have not seen any serious proposals that athletes should be allowed to self-identify into whatever competitive category they want. I am often offered as the paradigmatic example of someone holding such a view. However, I have certainly never made any claims even plausibly *misinterpreted* as such! While I believe that trans people should be allowed to compete in the gender they say they are, under a self-identification policy of some sort, *without* medical gatekeeping, I haven't even remotely suggested that, for example, a 23-year-old can "self-identify" as a 65-year-old to enter a masters event for athletes age 65 and over. I also haven't seen anyone make such a suggestion in good faith. (I have, however, seen it used by those acting in bad faith to oppose trans women's inclusion as some sort of odd "gotcha" *reductio ad absurdum*.) Sailors refers to me by name while managing not to cite a single one of my published academic articles, op-eds, media interviews and articles, or documentary interviews. She thus places me within this Identifier camp without offering any proof that I hold such a view. To be clear, I do not.⁹

Referencing the Charter's fourth principle, Sailors (2020, 426) writes:

The principle also restricts itself to participation alone, without guaranteeing that the level of participation be within the realm of choice of the individual athlete. To be precise, what is at issue is not participation in sport, but participation in the women's category of sport. Given that there is a human right to sport, that right extends to all men as well, but it does not confer to all (or any) men the right to compete in the women's category.

This is either a straw argument or a spectacular misunderstanding of what the IOC's "participation in sport is a human right" means. Absolutely no one credibly thinks that

⁸ However, I do think that there are some reasons to maintain gender categories in some sports, but not for the same reasons that Sailors does. But explicating my position and its reasons would require an entirely separate paper.

⁹ This is not about a personal slight: this is about demonstrating that Sailors has constructed a straw argument. She claims that people such as me, by name, hold the Identifier position, but I do not, and Sailors has not cited a single instance of someone who does. She therefore offers a straw argument. QED.

the right to sport is a right to compete at whatever level one wants to, irrespective of qualification criteria.

I may not demand, as a human right, that I compete in the Boston Marathon if I have not obtained a qualifying entry time in an approved event. Similarly, I may not demand to compete in the Olympics, on the basis that “participation in sport is a human right” if I have not qualified to represent my country. I may not also demand to compete as a Bosnian if I am a Canadian citizen and, therefore, would be required to represent my country of citizenship. No one is claiming that the right to sport means such outlandish things.¹⁰ But Sailors thought, it seems, that some might have thought this to the degree that she should refute it. That’s a textbook straw argument.

Moreover, no one is credibly claiming that men have a right to compete in the women’s category! Is she suggesting that hyperandrogenic intersex women and trans women are men? They are not. This is not a debate about including or excluding *men* in women’s sport: it’s about including (or excluding) hyperandrogenic intersex or trans *women* in women’s sport.¹¹ More charitably, perhaps, Sailors seems to suggest

¹⁰ Perhaps naively, one might wonder how far the right to compete extends as a right. Does it mean that one has a right to compete in the Olympics without meeting eligibility criteria? Of course not. No one seriously thinks that “sport is a human right” means this. The right to compete is simply that one may not be excluded from competition *for the mere fact* that one has a particular protected characteristic. Sports that have weight eligibility criteria never exclude someone from competition for being too heavy: there is always a “greater than” (e.g., superheavyweight) class. Being excluded from all events for being “too heavy” would be a violation of the right to compete; but the right to compete does not extend to the right to choose which weight category one competes in, if one does not meet the weight category requirements.

¹¹ Maybe one thinks I’m uncharitable here and that Sailors is referring to hyperandrogenic intersex women and trans women not as “male” but as “biologically male” and that, somehow, this is supposed to make a difference. It does not. First, hyperandrogenic intersex women are female—both biologically and legally. Trans women, in many jurisdictions including the United States, Canada, Germany, United Kingdom, etc. are medically and legally considered female. The concept of “physiologically male” but “socially female” is nonsensical. Indeed, it is transphobic to refer to trans women as male in any sense. What does it mean to be physiologically male? There are 6’4” cis women. So being tall can’t be it. There are very strong cis women, too. There are intersex women with complete androgen insensitivity syndrome who have XY chromosomes but who develop phenotypically female. Trans women often have the hormone profile of cis women. Not all cis women have a uterus. What would it even mean to claim that a trans woman is physiologically male?

that the “sport is a human right” argument logically entails, under the Identifier straw position, that a cis man would have the right to compete as a woman. But, again, this is false and simply not a logical consequence. Why is the man excluded from women’s categories? Because he’s a man/male! The IOC does not have biological criteria for who counts as male or female: they use legally recognized sex. If the athlete’s legally recognized sex is male, then he may not compete in female categories. There are rules about this. Her claim that the human rights argument has this logical entailment is manifestly absurd.

This isn’t about who is or who is not male, a man, female, or a woman. The 2015 CAS decision in *Chand v. AFI and IAAF*¹² was clear: the case was about eligibility criteria within the women’s category, *not* sex verification and whether someone is female.¹³ CAS very clearly decided that, “whether a person is female is a matter of law” and that “the distinction between male and female is a matter of legal recognition”¹⁴ in the athlete’s home country of citizenship. Simply put, if an athlete’s country of citizenship legally recognizes her as female, *she is female* without qualification, including for the purposes of sport. Moreover, the IAAF’s Hyperandrogenism Regulations (a limit on women’s endogenous testosterone to 10 nmol/L, and later to 5 nmol/L) “is not being used to determine whether an athlete should compete either as a male or female. Instead, it is being used to introduce a new category of ineligible female athletes within the female category.”¹⁵

Crucially, the CAS Panel decided that, “there is no separate category in which [hyperandrogenic women] may compete (for example, an ‘intersex category’)” and that “if the [Hyperandrogenism] Regulations apply to a female to preclude her competing as a female, she may not compete as a male.”¹⁶ If someone is deemed to be an ineligible female, she doesn’t thereby compete in “ineligible female” events, though: she’s excluded from competitive sport altogether.

I believe that it is an empty concept typically only deployed to deny trans women equal rights as women/female.

¹² *Dutee Chand v. Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)*, [2015] Court of Arbitration for Sport, CAS 2014/A/3759.

¹³ However, Behrensen (2013) makes a convincing case that the IAAF’s hyperandrogenism regulations are sex verification by another name. The 2019 CAS case regarding Caster Semenya (*Semenya*, CAS 2018/O/5794) seems to support this critique.

¹⁴ *Dutee Chand*, CAS 2014/A/3759, p. 147, para. 510–511.

¹⁵ *Ibid.*, p. 147–148, para. 511.

¹⁶ *Ibid.*, p. 147, para. 510.

I should also note that the IAAF, the IOC, CAS, and thereby effectively all Olympic-eligible sports have *banned* sex-verification policies and testing.¹⁷ In their decision, the CAS Panel note, “the parties agree that it is reasonable and proportionate to divide athletes into male and female categories” and that “gender testing is not an appropriate criterion”; rather, again, “whether a person is a female is a matter of law.”¹⁸ As noted above, though, the Panel does not mean to suggest that there be two female categories of sport: eligible and ineligible. What they mean is that a female athlete deemed ineligible is simply banned from competition: she may not thereby compete as a male, since she is legally female.

The 1996 Atlanta Olympics were the last time the Olympics deployed a sex-verification test; namely, chromosomal testing (Pieper 2016). In 1999, CAS explicitly banned the practice because of its lack of scientific grounding; namely, there were too many false positives due to the newfound understanding of the prevalence of intersex conditions whereby phenotypically female athletes sometimes have a Y chromosome without it conferring an unfair competitive advantage. In the past, female athletes—and only female athletes!—were required to obtain a “Sex Passport” medically certifying the athlete as female.¹⁹

Any framing of this debate, such as Sailors’s, over the inclusion of intersex and trans women in women’s sport as a matter of whether the human right to sport “confer[s] to all (or any) men the right to compete in the women’s category” is a spectacular misunderstanding of the question at issue. Again, it is a straw argument. This is not the issue, and it is not entailed by the “sport is a human right” position.

¹⁷ *Dutee Chand*, CAS 2014/A/3759.

¹⁸ *Ibid.*, p. 147 para 510.

¹⁹ Inexplicably, some prominent female athletes who oppose trans women’s full and equal inclusion in women’s sport want to return to a pre-1996 time when we subjected (only) women to chromosome testing. For example, Sharron Davies has repeatedly called for this. See, for example, “The Caster Semenya Compromise: When It Comes to Women’s Sports, Who Counts as a Woman?” (Madeline Kearns, *Spectator*, May 6, 2019, <https://spectator.us/caster-semenya-compromise/>) and “Sex-Based Discrimination: An Interview with British Olympic Swimmer Sharron Davies” (Raquel Rosario Sánchez, *Woman’s Place UK*, December 3, 2019, <https://womansplaceuk.org/2019/12/03/sex-based-discrimination-an-interview-with-british-olympic-swimmer-sharron-davies/>) and “Ex-Olympic Swimmer Sharron Davies Says Transgender Athletes ‘with a Male Sex Advantage’ Should Be Banned from Women’s Sport—as Martina Navratilova Apologises for Calling Trans Stars ‘Cheats’” (Leigh McManus, *Daily Mail Online*, March 3, 2019, updated July 1, 2019, <https://www.dailymail.co.uk/news/article-6766263/Ex-Olympic-swimmer-Sharron-Davies-says-transgender-athletes-banned-womens-sport.html>).

The issue is not whether it is fair to *include* trans and intersex women in women's sport. It's also not about excluding (cis) men from women's sport. Rules that include trans and intersex women *already* successfully exclude men/males from women's/female sport. The issue is about whether it is fair to *exclude* trans and intersex *women* from women's sport. With human rights, the default is inclusion, not exclusion. We're not supposed to need to argue for trans and intersex women's inclusion, unless in response to successful arguments for our exclusion. Even then, I present very detailed arguments for inclusion elsewhere (e.g., Ivy and Conrad 2018).

Therefore, any arguments based on physiological comparisons between men and women are also irrelevant: the matter is not about including *men* in women's sport; it is about whether it is fair to exclude some *women* from women's sport. Perhaps Sailors is suggesting that trans and intersex women are physiologically identical to cis males such that the physiological data comparing males to females are relevant. However, she would need to first establish that such women are, in fact, physiologically identical to cis males, and she has not done that. She has not presented any data suggesting that trans and intersex women are physiologically indistinguishable from cis males.

Sailors either frames trans and intersex women as men—which is at best transphobic and intersexphobic—or she's wrongly claiming that the "sport is a human right" argument logically implies that cis men would thereby have the right to compete in women's sport, which is manifestly not a logical consequence of the argument.

This misframing is relatively, disappointingly common. In a 2019 poll, Rasmussen asked the question, "Do you favor or oppose allowing transgender students to participate on the sports teams of the gender they identify with, letting biological males, for example, play girls' sports?"²⁰ The result of 54% in agreement was then taken as evidence that public opinion opposed trans women's full and equal

²⁰ Rasmussen Reports. "Americans Oppose Transgender Trend in Athletics," November 08, 2019, https://www.rasmussenreports.com/public_content/lifestyle/social_issues/americans_oppose_transgender_trend_in_athletics.

inclusion in women’s sport. The use of “biological males” is misleading:²¹ trans and intersex women are *female*, both legally and medically speaking.²²

Another question from the Rasmussen Reports (2019) poll was even more misleading. They asked, “Transgender athletes who are biological males are winning at all levels of girls’ and women’s sports these days. Is the addition of biological males to girls’ and women’s sports likely to change those sports for the better or the worse? Or will it have no impact?”

There are two big things wrong with this question. First, trans women are not biological males. What could it mean to be a woman but a “biological male”? Perhaps they mean to make a distinction between “social males,” “legal males,” “medical males,” and “biological males.” But any supposed distinction is artificial. Trans women are routinely accepted as socially female—evidenced at least in part by our inclusion in “female” sport categories. We are also obviously regularly recognized as legally female: my birth certificate, passport, driver’s license, and every single piece of legal identification I have lists me as “female.” Trans women are also regularly medically recognized as female: my medical records all list “female” with no asterisk or modifier.²³

²¹ Discussion of the problems with the phrasing can be found in “New Poll on Transgender Athlete Inclusion Attempts to Hide Its Own Anti-trans Bias” (Ken Schultz, *Outsports*, November 20, 2019, <https://www.outsports.com/2019/11/20/20974627/rasmussen-trans-athlete-poll-bias-transphobic-lgbtq-politics>) and in “Majority of Americans Oppose Transgender Athletes in Women’s Sports” (John Riley, *Metro Weekly*, November 15, 2019, <https://www.metroweekly.com/2019/11/majority-of-americans-oppose-transgender-athletes-in-womens-sports-poll-finds/>). It’s not an accident that photos of me are almost universally included in stories like this, even when they’re not about me specifically. I’ve somehow managed to become the poster girl for opposition to trans women’s full and equal inclusion in women’s sport.

²² For an overview of the landscape of legal recognition, see “Rights in Transition: Making Legal Recognition for Transgender People a Global Priority” (Human Rights Watch, *World Report 2016*, <https://www.hrw.org/world-report/2016/country-chapters/africa-americas-asia-europe/central-asia-middle-east/north-0#>). For an example of policy guidance on medical recognition in the United States, see “Policies on Lesbian, Gay, Bisexual, Transgender & Queer (LGBTQ) Issues” (AMA, <https://www.ama-assn.org/delivering-care/population-care/policies-lesbian-gay-bisexual-transgender-queer-lgbtq-issues>), and in Canada, see “Transgender-Inclusive Care” (June Sing Hong Lam and Alex Abramovich, *Canadian Medical Association Journal Group*, January 21, 2019, <https://www.cmaj.ca/content/191/3/E79>).

²³ Fun fact (fun to me, at least): when I’ve been hospitalized for bike race crashes and other reasons, it’s standard operating procedure to ask female patients whether she

Perhaps “biological male” is supposed to mean “has XY chromosomes” and/or “has a penis,” and maybe even “*had* a penis.” But there are many ways to be female with XY chromosomes, such as complete androgen insensitivity syndrome. And genitals do not play sports: the presence or absence, or the past presence, of a penis has absolutely zero correlation to sport performance. No one has adduced any evidence to suggest otherwise. “Biological male” is a socially constructed category, and it only seems to be deployed as a way to invalidate trans and intersex women as being “not really” female. But we are female, in absolutely every way that matters.

The second, and perhaps most glaring, problem with this poll question is that trans women are *not* winning “at all levels of girls’ and women’s sports these days.” There hasn’t been a single transgender person who has participated in the Olympics, let alone won a medal. No openly trans woman holds an elite world record (mine was an age-restricted masters record).²⁴ No openly trans woman has won an elite world championship in any sport, ever. Rasmussen’s poll was misleading, framing this as an issue of “biological males” competing in female sport.

Similarly, some political ads target the inclusion of trans athletes in their transitioned sex, often mistakenly using trans *boys* or *men* as putative trans girls or women. For example, ousted Kentucky Governor Matt Bevin used trans male wrestler Mack Beggs—a transgender man now in college wrestling on the men’s team—to stoke fear against trans *girls* and *women* in women’s sport. Bevin’s attack ad said, in part, that his opponent supports “allowing biological males to compete on women’s sports teams,” while showing footage that included a news story about Mack Beggs being forced, as a trans boy, to wrestle against cis girls due to a Texas law forcing him to wrestle with his birth-assigned sex. Many people who oppose trans girls and

might be pregnant and when her most recent period was. On the first question, I always laugh and say, “No, no chance.” On the second question, I answer, “I don’t get periods.” If the nurse (or sometimes the doctor) was merely asking this in a perfunctory manner, they would “understand” me as trans and that of course I don’t get periods and that would be the end of it. But more than once, I’ve had to answer the follow up, “Why not?” I’ve learned over time that “Because I’m an athlete” ends the line of questioning because it’s well known that amenorrhea is common among elite female athletes. But before I learned this, I once answered, “Because I don’t have a uterus.” This was again followed up with, “Why not?” I answered, “Because I was born without one.” This still was insufficient for this nurse: “Why?” I finally gave up and came out, “Because I’m trans, OK?” My medical records truly list me as “female,” and I have been treated as *really* female by every medical practitioner I interact with. They are not merely humoring me, as some transphobic people have suggested.

²⁴ I use “openly” because for all we know some stealth trans woman has made this achievement, but we have absolutely no evidence of this.

women in women’s sport use photos of Beggs beating a girl, wrongly claiming that he is a trans girl.²⁵

In their reporting on the aforementioned Rasmussen poll, the *Washington Times*’ accompanying image was of Beggs.²⁶ This creates an odd bias where the photo in which a stereotypically looking athletic boy—who *is* a boy, who *is* male—appears to be dominating a cis girl, but it is included in a story about trans girls and women in women’s sport. Polls and reporting trading on this confusion are to be taken with more salt than is healthy to consume.

But this isn’t about men in women’s sport, or boys in girls’ sport, or even “males” in “female” sport. This is about female–female eligibility rules. *Chand v. AFI and IAAF* (CAS 2014/A/3759) was perfectly clear on this.²⁷

But let’s return to Sailors (2020). Following the aforementioned quoted selection referencing the IOC’s fourth fundamental principle of Olympism, she continues:

Along these lines, it is worth pointing out that there are always limits on who is allowed to compete in any protected category, whether the criterion of inclusion is weight, age, level of disability, etc. For example, trans athlete Veronica Ivy (then known as Rachel McKinnon) won two consecutive world titles in the UCI Union Cycliste International Masters Track Cycling Championship in the 35–44 age group, competing in a protected category within a category. (Sailors 2020, 426)

She continues:

²⁵ The anti-trans rights group Fair Play for Women is often guilty of this.

²⁶ See “Most Americans Oppose Transgender Athletes in Women’s Sports, Poll Finds” (Valerie Richardson, *Washington Times*, November 10, 2019, <https://www.washingtontimes.com/news/2019/nov/10/transgender-athletes-womens-sports-opposed-most-am/>). It’s also crucial to understand that Beggs, his parents, his coaches, and his opponents all wanted him to compete in the boys’ category, but Texas law prohibits trans athletes from competing in anything other than their birth-assigned sex listed on their original birth certificate. See “Transgender Wrestler Raises Questions about Fairness and Equality” (Yona Levin, *Wellesley News*, March 7, 2018 <https://thewellesleynews.com/2018/03/07/transgender-wrestler-raises-questions-about-fairness-and-equality/>).

²⁷ And again, nothing in the 2019 *Semenya* case changes this.

That is, she was protected from competing against both younger cyclists and men. Of course, the human right to sport is possessed also by those younger cyclists and men, but I suspect Ivy would dispute any claim that their right entitles them to compete in the women's 35–44 age group. (426)

She concludes:

It is difficult to see how the human rights argument can be used to permit only some humans the autonomy to identify into categories while prohibiting others from competing in the protected categories of their choice. If self-identity is to be the practice, we can do away with categories altogether (the Abandonist's position) or develop an alternative system of categorization. (426–427)

There are many problems with Sailors's arguments. We can start with the facts: my 2018 championship was in one particular event—the Sprint, sometimes known as the Match Sprint or Olympic Sprint; it is *not* known as the 200-metre Sprint as is often wrongly reported by those not familiar with the sport. In UCI masters racing, age categories begin at 35–39 and increase in five-year increments (40–44, 45–49, 50–54, and so on). Race organizers have the right to combine age categories if the number of entrants of the categories is insufficient to justify the separate categories for that event in that year. For example, in 2018, the 35–39 and 40–44 age categories *in the Sprint event* were combined into the 35–44 category. For the other event I competed in, the 500 m Time Trial (TT)—where I placed fourth, by the way—the categories were separated into 35–39 and 40–44.

In 2019, there were sufficient entrants in the Sprint event and 500 m event for separate 35–39 and 40–44 categories.²⁸ Thus, in 2019 my title is in the 35–39

²⁸ As it happens, the woman who placed second in 2018, Carolien van Herrikhuyzen currently holds the 40–44 category 200 m TT world record at a time faster than my 35–39 category 200 m TT world record. She also won the Sprint in the 40–44 category in 2019. Carolien is also a friend who explicitly supports trans women in women's sport. Also, the woman who placed third in 2019 is also someone who became a friend, who wore my brand sticker "Sport is a human right" on the podium, and who is an explicit supporter of trans women in women's sport: Kirsten Herup Søvang. Media reporting tends not to speak to those on the podium with me who are supportive. In my experience, the overwhelming majority of elite women athletes don't care about trans and intersex athletes' inclusion; the next largest group is explicitly supportive; it's only a tiny, very loud minority who explicitly oppose

category, not the 35–44 category as Sailors mistakenly writes. This isn’t a big issue, but it’s noteworthy that such an easily confirmable fact was overlooked in her paper.

Much more important is Sailors’s repeated straw argument, though. I note that she managed to not cite the dozens of media interviews, op-eds, published keynote addresses, and published academic articles where I clearly articulate the “human rights argument.” Even my Twitter feed has dozens of threads explicating my argument. And again, this is not about personal or academic slights: this is about demonstrating that she has represented me as holding a position that I explicitly do not hold; this is about demonstrating that she is arguing against a straw position.

Her use of the language of “protected category” is also exposed here: a 37-year-old woman competing in the 35–39 female category is not “protected” from younger women and men: these other athletes are simply ineligible for *that* particular event category. They do not meet the age eligibility criterion, and/or the gender criterion, for the 35–39 female category.

I race against the best elite women in the world throughout the year in UCI Elite races (no age restriction). This includes past and future Olympians, the current elite world record holder in the 200 m TT (with a time a full second faster than mine), and riders from all over the globe ranked in the top 30 of the UCI Elite world rankings. I do *lose* most of my races: I can hardly be said to be “dominating” my sport.²⁹ My best UCI elite 2018 result was third place in a keirin event, and in 2019 it was eighth in a Sprint event. That was my solitary top-10 finish in 2019 elite racing. Hardly remarkable results. I’ve never cracked the top 70 in the UCI World Elite Ranking. My highest ranking was something like 84th, briefly in 2019. In my two 2018 Masters World Championship events, I placed fourth and first; in 2019 I placed second and first in an admittedly weaker field (the woman who won gold in the 500 m TT took silver in the Sprint).

This fact seems to elude many people: women are not permitted to compete in men’s categories, except with very special permission, and only very special circumstances.³⁰ Such special cases never extend to championships. Women are flatly

inclusion. Unfortunately, the media seeks them out. Sailors quotes a number of them; it’s not a coincidence that it’s roughly the same five women athletes speaking out against trans women. They’re pretty rare, and often retired.

²⁹ My road racing results can be found here: <https://www.road-results.com/racer/113669>. My UCI results are also searchable on the UCI rankings website.

³⁰ Pro woman racer, Carmen Small talks about her experiences in “Carmen Small: What It’s Like to Race Bikes with Men” (interview by Molly Hurford, *Bicycling*, June 25, 2015, <https://www.bicycling.com/racing/a20023481/carmen-small-what-its-like-to-race-bikes-with-men/>), I do actually sometimes compete in men’s categories in nonsanctioned races, which is completely typical for elite women—cis, trans, or

not allowed to compete in men's categories in world championships or Olympic competitions. Even at the lowly 2019 South Carolina state track cycling championship, I was not permitted to compete in the men's category *because I'm female*. I even asked to, because the women's field was so small that I would have had more racing against the men. The truth is that we are required to compete in the sex/gender category on our race license. Yes, competitive athletes require a *license* to compete, issued from their national or international sports body. In my case, I have a USA Cycling (USAC) license and a UCI license. Both list "F" under "Sex."

As far as USAC and the UCI are concerned, I'm indisputably female. The Canadian and US governments also agree!³¹ I'm not merely "identifying" as female: I *am* female. This isn't as Sailors misrepresents the "autonomy to self-identify into categories." I'm not merely self-identifying into the category of female, I *am* female. I wish this point didn't bear repeating so often.

And the rules of elite sport require athletes to compete in the sex category on their race license. If your license says "F," then you must compete in the female category. Athletes are not permitted to compete "in the protected categories of their choice." It's a red herring at best, and a fallacious straw argument at worst to claim that the right to sport for trans women—as *women*, as *female*—is analogous to a man choosing to compete in a junior women's race. A 29-year-old man can no more do that than a 37-year-old trans woman compete in the 55–59 masters men's category. Why would Sailors even suggest as much? The human right to sport does not imply this at all, and it is of dubious scholarly quality to suggest as such.

The eligibility rules for sport events are always clearly laid out in policy.³² Athletes with "F" as their sex must compete in the female category. Athletes have a racing age determined by their age on December 31 of the year of competition. Thus, an athlete who is 36 as of April in a year of competition, but has a birthday in August, would be considered 37 for that entire year of competition. Athletes must compete in their racing age category. There is no choice. There are no policies to change your

intersex. In regional nonsanctioned races, the women's fields are usually not particularly strong, so the elite women often challenge ourselves against the men (usually losing, but that's hardly the point). In the one men's event I competed in in 2019, I placed tied for 11th out of 12.

³¹ E.g., I am a Canadian citizen but a US permanent resident. My Canadian (British Columbia) birth certificate, Social Insurance Number (Canada's version of the US Social Security Number), passport, Alberta driver's license, South Carolina driver's license, US Permanent Resident Card ("green card"), and my medical records in both countries all say "Female." All of them.

³² For example, the UCI masters cycling eligibility criteria can be found here: <http://www.cyclingmasters.com/site/riders/regulations>.

racing age. Age is *not* analogous with policies allowing an athlete to declare a different sex.

Of course 29-year-old and 63-year-old men have a right to competitive sport! But what that means in practice is that there must be at least some category, within the current structure of their sport, in which they are eligible to compete, notwithstanding qualification requirements. In elite racing, there are no age categories in cycling. A 63-year-old man has a right to attempt to compete in Elite Men’s races. The rules are clear: racers with “Male” on their license may compete in the men’s races. They may not compete in the women’s. In masters (age-restricted) races, athletes must race according to their race age. And likewise, there are age restrictions for junior categories. However, junior racers are generally permitted to race in the elite fields (although there can be some restrictions).

There is no right for a 29-year-old male to race in the 60–64 male race category. It is simply outrageous that Sailors would suggest that the right to sport would entail as such. There are no social practices, policies, or CAS case law to suggest as such. This is simply a straw argument against the, and in particularly *my*, “human rights argument.”

I don’t claim that men do not have a right to sport. They do! They have just as much right as trans women. But the rules of sport—and relevant CAS case law—say that sport is divided into male and female categories, and that “there are only two categories of competition: male and female. These categories are together intended to cover all athletes who wish to participate in competitive athletics.”³³ However, recall that this same CAS decision ruled that “whether a person is female is a matter of law” and that “the distinction between male and female is a matter of legal recognition”³⁴ in the athlete’s home country of citizenship. Men have a right to compete in men’s competitions; masters men have a right to compete in masters men’s competitions; women have a right to compete in women’s competition; and so on.

It simply does not follow that a right to compete in one’s sex and age group (and/or disability group for para events) entails that one has a right to compete in *any*

³³ *Dutee Chand*, CAS 2014/A/3759, p. 148, para. 512. This isn’t to say that I think they’re particularly *right* to only have male and female categories. I’ve said many times that sport is completely ill-equipped to handle nonbinary athletes. I favor a policy, for example, where nonbinary athletes have the right to choose the gender category they think is most appropriate for that particular event. In essence, I wish to return a modicum of trust back to sport: overwhelmingly, trans and nonbinary athletes are keenly aware of issues of fairness and want to compete in the category they think is most fair.

³⁴ *Dutee Chand*, CAS 2014/A/3759, p. 147, para. 510–511.

category one chooses. It is absurd to suggest as such, and thus a straw argument if used against the human rights argument(s).

Recall that Sailors (2020, 426–427) writes, “It is difficult to see how the human rights argument can be used to permit only some humans the autonomy to identify into categories while prohibiting others from competing in the protected categories of their choice.” It’s not hard to see.

In fact, I think it’s pretty simple: the human rights argument does not permit *any* “humans the autonomy to identify into categories.” That is not what happens with policies permitting trans *women*, trans *female* athletes, to compete in the women’s/female categories.

The policies are very detailed. Most international sports federations simply adopt whatever the current IOC policy is. In this case, it is the aforementioned 2015 IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism:³⁵

2. Those who transition from male to female are eligible to compete in the female category under the following conditions:

2.1. The athlete has declared that her gender identity is female. The declaration cannot be changed, for sporting purposes, for a minimum of four years.

2.2. The athlete must demonstrate that her total testosterone level in serum has been below 10 nmol/L for at least 12 months prior to her first competition (with the requirement for any longer period to be based on a confidential case-by-case evaluation, considering whether or not 12 months is a sufficient length of time to minimize any advantage in women’s competition).

2.3. The athlete's total testosterone level in serum must remain below 10 nmol/L throughout the period of desired eligibility to compete in the female category.

2.4. Compliance with these conditions may be monitored by testing. In the event of non-compliance, the athlete’s eligibility for female competition will be suspended for 12 months.

The policy requires a prospective trans athlete to formally declare their sex for the purposes of competition, and the athlete may not change it for a minimum of four years. This is only the first step. But note that the policy doesn’t have anything to say

³⁵ https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf.

about whether an athlete is actually male or female: they leave that up to the athlete’s country of citizenship.³⁶

So a trans woman would formally declare in writing that she is transitioning to compete as female. Of course, an athlete may legally change their gender back to male, but they would not be able to change their sport sex until after the four-year period.³⁷ On a personal note, I did not compete in cycling pre-transition, so I did not have to formally declare my transitioned sex to USAC or the UCI: I was already legally regarded as such, including on my birth certificate.³⁸

In addition to formally declaring her transitioned sex, the athlete must demonstrate that she has maintained her natural endogenous testosterone below 10 nmol/L for a minimum of 12 continuous months before she may engage in her first competition in her transitioned sex. Crucially, and oft overlooked or ignored, if her endogenous testosterone rises above this limit *at any time* during this period, her 12-month clock restarts from the first test date below the limit. The athlete must also be able to demonstrate, for her entire competitive career in the women’s category, that her natural testosterone was continuously below 10 nmol/L. Again, if at any point during her competitive career her endogenous testosterone rises above 10 nmol/L, her 12-month waiting period would restart, and she would be suspended from women’s competition until after the new 12-month period.³⁹

³⁶ It’s absolutely worth noting that not all countries are equally trans-inclusive in the ability for trans people to gain legal recognition of their transitioned sex. This presents an international justice issue. I have suggested many times, including to the IOC themselves in person at their headquarters in Switzerland, that one way to obviate this issue is for the IOC to extend recognition rights to athletes based on the most progressive IOC member nation state’s policies *for the purposes of sport*. Currently, Canada has the most progressive policies: a trans person can gain full legal recognition in their transitioned sex without any medical interventions, including hormones or surgery.

³⁷ This has problematic implications for nonbinary athletes, but let’s put that aside for now. Unfortunately, that problem seems perennially to be put aside, I recognize.

³⁸ Many have claimed that my success in cycling came overnight and without significant effort due to, presumably on their part, some imagined excessive unfair physiological advantage. I was a nationally competitive athlete in badminton before moving to Charleston, SC, where elite badminton is simply nonexistent. Fortunately for me, cycling is physiologically very similar to elite badminton. It took me four full-time years to win my first Masters World Championship. Success didn’t come overnight and without intense effort.

³⁹ The policy doesn’t strictly require that the athlete provide medical documentation; instead, it uses the language that the “athlete’s compliance with these conditions may

Trans women are not simply showing up, looking like a man, and saying, “I’m a woman so you have to let me race in the women’s category!” We can argue over whether self-identification policies should be expanded, but my arguments about sport as a human right do not entail this, as Sailors wrongly claims. Athletes do not simply look at the available race categories for an event and demand to compete “in the protected categories of their choice” (Sailors 2020) because “participation in sport is a human right” (IOC 2020, 11).

3. The “Nondomination Argument” Argument

I have already noted that work such as Sailors’s (2020) seems to treat the trans-inclusion positions as having the burden of proof. Thus she presents what she takes to be the strongest arguments in favor of such inclusion, and attempts to refute or at least undermine them. But again, it’s really those seeking to *exclude* trans women/female athletes from women’s/female sport that have the burden of proof. Sailors is on the side with the burden of proof.

But all the same, let’s turn to another of the arguments that Sailors takes issue with, which she calls the “nondomination” argument.

She writes:

Another way to argue for the inclusion of trans and intersex women in the female sporting category has been to take the opposite position, claiming that there really is not an advantage at all. According to this argument, if trans and intersex athletes really had an unfair competitive advantage, they would be dominating their sports, but the fact that they do not always win means that fears about their inclusion in the women’s category are unfounded. (Sailors 2020, 425)

Let’s again begin with the facts. First, I can’t find anyone seriously claiming that hyperandrogenic intersex women or trans women have no advantage at all. The truth is *we do not know*.⁴⁰ But the truth is also that there’s no clear evidence supporting that there is any such advantage, let alone an “unfair” advantage that could justify

be monitored.” The “may” is important. On another personal note, there’s a reason that I don’t have to continually prove my low testosterone levels: they’re nonexistent. Thus, any testosterone-based policy will fail to exclude me from women’s sport.

⁴⁰ I’ve been repeatedly wrongly quoted as having said, in an October 2019 Sky News interview—filmed during the 2019 Masters World Championships—that I “have” a competitive advantage. I said that “it’s possible” and then went on to explain why I think all of the evidence seems to support the claim that I do not have any such unfair advantage.

exclusion from the women’s category. Remember, there’s a difference between “competitive advantage” and “unfair competitive advantage.”⁴¹ And as Conrad and I note (Ivy and Conrad 2018), we already permit *huge* competitive advantages in sport and call it fair. In fact, elite sport often allows advantages far greater than the 10%–12% that people like Sailors focus on.

Generally, people like Tucker (2019) and Sailors appeal to average differences between male and female athletes, or the differences in peak performances for male and female athletes. But let’s set that aside for the moment.

What is the evidence that trans and intersex women are not dominating their sports? As I noted above, there hasn’t been a single known trans woman who has competed in an Olympics, let alone won a medal. There has similarly never been a known trans woman who has won an elite (non-age-category) world championship in any Olympic-eligible sport, ever. And that’s not for lack of trying! I promise, we’ve been trying!

Trans women have been explicitly and openly allowed to compete in the Olympics since the 2003 Stockholm Consensus statement, which went into effect nearly 10 months before the 2004 Olympics in Athens. Since the 2004 Athens Olympics, through the 2018 Sochi Olympics, there have been over 54,000 Olympians (including those who competed in more than one Games).⁴² Not a single known trans woman has ever been among those more than 54,000 Olympians.

In 2015 when the IOC updated their trans-inclusion policy to remove the genital-surgery component and two-year waiting period, there have been two Olympic cycles: the 2016 Rio and 2018 Sochi games. Those games combine for more than 14,000 Olympians. Again, not a single trans athlete attended. This isn’t for want of hysterics about how the 2015 policy would lead to a trans-woman takeover of the 2016 Games. One *National Review* article claimed, “But what the Olympic Committee and the media are loath to discuss is that their system for allowing transgender athletes to compete in the women’s category is ripe for abuse.”⁴³ Another article stated, “It is simply inconceivable that athletes who have spent most of their lives as men wouldn’t have greater muscle mass, skeletal growth, and lung capacity than someone born female even after undergoing the hormone treatments the IOC requires, which halt male development without entirely reversing it. . . . That is a

⁴¹ See also Friedlaender and Ivy (2020).

⁴² Source: Olympic.org.

⁴³ “Rachel McKinnon Is a Cheat and a Bully,” Madeline Kearns, *National Review*, October 29, 2019, <https://www.nationalreview.com/2019/10/rachel-mckinnon-is-a-cheat-and-a-bully/>.

shame, because the IOC's standards are part of a disturbing trend that threatens the very integrity of women's sports."⁴⁴

Martina Navratilova (2019), in her *Sunday Times* op-ed similarly wrote the following as her core argument:

To put the argument at its most basic: a man can decide to be female, take hormones if required by whatever sporting organisation is concerned, win everything in sight and perhaps earn a small fortune, and then reverse his decision and go back to making babies if they so desire. It's insane and it's cheating. I am happy to address a transgender woman in whatever form she prefers, but I would not be happy to compete against her. It would not be fair.

This is a fantasy. It has never happened. It is unlikely to ever happen. Trans women are not cheating: we are the most heavily scrutinized athletes in the world.

Navratilova continues:

Hundreds of athletes who have changed gender by declaration and limited hormone treatment have already achieved honours as women that were beyond their capabilities as men, especially in sports in which power rather than skill is paramount. McKinnon is just one example. That may uphold the International Olympic Committee's charter, which holds that "the practice of sport is a human right", but it is surely unfair on women who have to compete against people who, biologically, are still men.

Trans women are not "biologically . . . men." That is overtly and indisputably transphobic. Perhaps one might think it unhelpful to say so, but it's a simple fact that referring to trans women—who are, again, medically, legally, socially *female*—as men is a paradigmatic example of transphobia.⁴⁵

Second, who are these "hundreds of athletes"? Apparently I'm an example? How? I didn't compete in cycling before transition, and I obviously didn't compete in the 35–39 age category *before I was 35*. I transitioned at 29. I took up cycling at 31. I

⁴⁴ "The IOC's Transgender Inclusion Threatens the Integrity of Women's Sports," Paul Crookston, *National Review*, July 6, 2016, <https://www.nationalreview.com/2016/07/ioc-transgender-rules-threaten-integrity-womens-sports/2016>.

⁴⁵ Planned Parenthood provides a very basic primer on what constitutes transphobia: <https://www.plannedparenthood.org/learn/gender-identity/transgender/whats-transphobia>.

shouldn’t have to make such an obvious point. Navratilova claims that I couldn’t have achieved a 35–39 UCI Masters Track Cycling World Championship without transitioning to female. She can’t possibly know that: no one can.

The funny thing is that earlier in her op-ed, she writes:

Let me make a critical distinction between transgender and transsexual athletes. Transsexuals have decided to change their gender and have had the deed done, surgically. They are few in number and rarely enjoy a competitive advantage. (Navratilova 2019)

I have a news flash for her: on her definition, I am “transsexual.” I should note that this is an increasingly dispreferred term amongst trans people. It’s heavily medicalized way to say that someone has had a very private medical procedure to, in her terms, “have had the deed done.” People really like to speculate about the status of my genitals. It’s beyond inappropriate. So somehow Navratilova simultaneously doesn’t have a problem with me on the basis of being “transsexual,” and yet thinks that I have an immutable unfair advantage. She can’t have it both ways. Pick a lane, Martina!

Countless commentators also repeatedly refer to me as a man.⁴⁶

Similarly, Andrew Gilligan (2019) wrote about Navratilova’s op-ed, also in the *Sunday Times*:

Navratilova makes a "critical distinction" between athletes such as McKinnon, who retains her male anatomy, and the tennis player Renee Richards, born Richard Raskind, who had irreversible gender-change surgery.

Yet more false, objectifying speculation about the status of my genitals. I’ve generally shied away from confronting this point so far, because the status of my genitals is *my* business—and it is irrelevant to the policy question of trans women in women’s sport. You don’t play sports with your genitals. If you are, I suggest that you might be doing it wrong.

Genitals do not play sports: people do. Genitals have nothing to do with performance advantages.

⁴⁶ E.g., “Rachel McKinnon Is a Cheat and a Bully” (Madeline Kearns, National Review, October 29, 2019, <https://www.nationalreview.com/2019/10/rachel-mckinnon-is-a-cheat-and-a-bully/>) and “A Man Won Gold in Women’s Cycling (Again). When Will We Say ‘No More?’” (Nicole Russell, *Daily Signal*, October 23, 2019, <https://www.dailysignal.com/2019/10/23/a-man-won-gold-in-womens-cycling-again-when-will-we-say-no-more/>). There are dozens of other examples.

But much has been made about justifying antipathy towards me in particular thanks to Navratilova's, Gilligan's, and many others' mistaken speculation about the status of my genitals. I find it humorous that Navratilova and the others seem to have no problem with people like Richards who have had genital surgery, yet wrongly attempt to justify their antipathy towards me on the false supposition that I haven't as well. Perhaps instead of "straw man," we should call this the "straw penis" argument.

Nicola Williams, of the anti-trans hate group Fair Play for Women said, "We are approaching a decision point because there will soon be more Rachel McKinnons, but without fair competition sport becomes meaningless. If girls and women can never win, they will leave sport in droves" (quoted in Gilligan 2019). But I lose almost all of my races. If I'm so scary for women's sport, why do I lose most of my races? It sure seems like women win against me a lot, and Williams's claim that "girls and women can never win" against trans women like me amounts to an irrational fear of trans women. And the irrational fear of trans women is the dictionary definition of transphobia.⁴⁷

There isn't a single trans or intersex woman dominating her sport.

Even Caster Semenya, the most famous, and arguably most successful, intersex woman athlete doesn't "dominate" her sport. Caster has won a total of two Olympic gold medals and holds no world records. By contrast, Usain Bolt has won a total of eight Olympic gold medals and holds three world records. But no one raises claims that Bolt is unfairly dominating his sport; however, such criticisms are levied against Semenya. Why is it fair for a cis man to win as much as Bolt, but it's unfair when an intersex woman wins far less than Bolt?

The clear implication is that even allowing trans women to compete in women's sport "threatens the very integrity of women's sports." But no trans athlete competed in the 2016 Rio Olympics. No trans athlete won a medal. (It's hard to win a medal if you don't even qualify to compete!) Similarly, no trans athlete competed in the 2018 Sochi Olympics, let alone won a medal.

It seems that the integrity of women's sports is doing just fine. But Sailors echoes this same language. She includes a quote from athlete Shannon Rowbury, "Olympic athlete Shannon Rowbury was among those critical of allowing Semenya to compete in the women's category, saying 'It challenges and threatens the integrity of women's sports to have intersex athletes competing against genetic women'" (Sailors 2020, 419).

Semenya is a "genetic woman." Intersex women are women. We know that genetics aren't as simple as woman = XX and male = XY. That's partly why the IOC

⁴⁷ *Merriam-Webster*, s.v. "transphobia," <https://www.merriam-webster.com/dictionary/transphobia>.

formally banned sex-verification testing, including chromosomal testing, in 1999. Suggesting we return to a chromosomal test for athlete sex is asking us to turn back the clock on over 20 years of scientific development.

Sailors (2020, 426) writes:

Most importantly, what matters ethically is not how few or many trans or intersex women succeed in women’s sport, but rather the effects of their participation on women’s sport as a whole. . . . If trans and intersex athletes have an all-purpose competitive advantage, their inclusion in the women’s category will have the same effects as male inclusion, negating the justifying rationale for sex segregation. If even a single athlete is unfairly deprived of her opportunity to triumph, or even to make the team, the judgment of unfairness is not attenuated by the scope of the effect.

Those are a lot of “ifs.” If “trans and intersex athletes have an all-purpose competitive advantage”: but do they? The evidence doesn’t show this at all. But much more importantly, we have good evidence that there is no such all-purpose competitive advantage due to the utter absence of trans women athletes at the Olympics and other elite level sport.⁴⁸

If “even a single athlete is unfairly deprived of her opportunity to triumph . . .” (Sailors 2020, 426). Oddly, trans and intersex women are never considered those who could be unfairly deprived of their opportunity to triumph: that right seems reserved only for cis non-intersex women. In fact, what’s at stake is trans and intersex women’s very right to even *participate* in women’s sport. That seems unjust and unfair. As Sailors (426) says, “their [trans and intersex women’s] inclusion in the women’s category will have the same effects as male inclusion.” She’s begging the question: there’s no evidence that trans and intersex women athletes have an average of 10%–12% advantage over cis non-intersex women. In fact, the 2015 CAS decision noted

⁴⁸ Some have claimed that maybe currently and recently past competing trans women just aren’t that good, and that this explains our utter absence at elite level sport. Well which is it: either we have such a monstrous competitive advantage that we must be excluded or else women’s sport will be destroyed, or we’re not very good and so shouldn’t warrant such an overreaction. Unfortunately, opponents of trans women’s inclusion in women’s sport seem to want to have it both ways. Personally, I never cracked the UCI elite track cycling world rankings top 70, and yet people continue to claim that I have an all-purpose competitive advantage. But they then attempt to explain that I haven’t cracked the top 70 because I’m just not very good after all. Again, which is it? It can’t be both.

that the IAAF did not meet their justificatory burden demonstrating an advantage anywhere near that. As Conrad and I (Ivy and Conrad 2018) make clear, even the IAAF's own evidence showed no average advantage for hyperandrogenic women. And no evidence yet exists that trans women have an average advantage over cisgender women.⁴⁹ All Sailors, Tucker, and others can muster is data comparing cis males to cis non-intersex females, and claiming that trans and intersex women are physiologically identical to cis males, without actually studying trans and intersex women athletes.

What seems to matter to Sailors is what effect the inclusion of trans and intersex women's sport has on "women's sport as a whole." At first blush, it would make it more inclusive! It would mean that all women are included in women's sport! But let's not forget that trans and intersex women are *already* included (though with some medical restrictions).⁵⁰ I think the implication is that including trans and intersex women might deprive "real" (read: cis, non-intersex) women of opportunities. Conveniently, such a position seems not to care about equal access to these social goods for the trans and intersex women athletes. That seems more than a little unfair. Sailors seems to ignore the overwhelming prevalence of transphobia, discrimination, and harassment of trans athletes in sport.⁵¹

The thing is, Sailors doesn't find this nondomination argument even the slightest bit convincing. She claims that "no argument dependent on prior results could possibly have any persuasive power with such a paucity of them" (Sailors 2020, 425). But more than 54,400 Olympians is a lot. And best estimates are that trans people are approximately 0.6% of the US population (Flores et al. 2016). With a world population of approximately 7.5 billion, that means approximately 45 million people are trans. If we just assume that trans women are less than half of the trans people, at say 0.2% of the global population, that's still 15 million trans women in the world.

If there were *any* reliable significant competitive advantage for trans women, the fact that we haven't seen a single trans woman *even compete* in an Olympics is at least a little persuasive. The average age of an Olympian is 27. The focus on excluding trans women from women's sport focuses almost exclusively on *postpubertal* trans women. We've had 14 years of Olympics without a trans Olympian. That's more than enough time for an elite postpubertal trans woman to become successful enough to compete in an Olympics, especially if there's a supposed unfair competitive advantage on the basis of being a postpubertal trans woman. Remember, it's not as if trans

⁴⁹ I discuss the irrelevance of Wiik et al. (2020) in section 4 below.

⁵⁰ Conrad and I (Ivy and Conrad 2018) argue that these restrictions are unethical and not supported by the science adduced in their favour, but this is outside the scope of the present paper.

⁵¹ See, for example, Equality Network (2012).

women athletes weren't competing until only after the 2003 policy change: we've been here all along.

Sailors simply dismissed the point too easily. I think the numbers largely speak for themselves: on the low end, there are 10–15 million trans women worldwide, 54,442 Olympians since trans women have been openly allowed to compete as women, and yet not a single trans woman has even competed in an Olympics. Obviously, there have therefore been zero Olympic medals won by any trans women.

Surely that should carry a little argumentative weight rather than “no argument dependent on past results could possibly have any persuasive power with such a paucity of them.”

Here's the thing: Sailors wants it both ways. She rejects the past results showing an utter lack of trans women in elite women's sport but wants to highlight a single podium at the 2016 Rio Games. Referring to the aforementioned representation of the nondomination argument, she writes:

According to this argument, if trans and intersex athletes really had an unfair competitive advantage, they would be dominating their sports, but the fact that they do not always win means that fears about their inclusion in the women's category are unfounded. This argument is unconvincing for several reasons. To the extent that it works, it works only for trans athletes, not intersex, since the latter have, in fact, dominated at least some events. For example, the podium positions for the women's 800 m running event at the 2016 Rio Olympic Games were all occupied by intersex athletes, with Caster Semenya winning gold, Francine Niyonsaba taking silver, and Margaret Wambui finishing in the bronze medal position. (Sailors 2020, 425)

One podium does not a pattern make. There were 306 podiums at the 2016 Rio Games. Just one was composed entirely of intersex female athletes (and again, no trans women even qualified to compete). Women were eligible for 144 of those podiums (including women-only and mixed-gender sports or categories). One podium out of 144, or 0.69%. So apparently one podium out of 144 is enough for Sailors to point to the results as evidence of events “dominated” by intersex women. I think that's a hasty generalization.

I wouldn't describe the results of a single event as intersex (or trans) women having “dominated” the 2016 Games. The winner didn't even set a world record.

Semenya does not hold the world record in the 800 m event. Sailors doesn't mention any other intersex female accomplishments at the 2016 Rio Games.⁵²

So according to Sailors, 0 out of 54,442 trans Olympians doesn't "possibly have any persuasive power with such a paucity of them," but 1 out of 144 events with intersex athletes on the podium is enough to have persuasive power. No. Sailors can't have it both ways. I don't think it's a coincidence that authors such as Sailors never include the relative frequency of intersex female "domination." Intersex female athletes didn't dominate, even the single 800 m track event that she references. Semenya, the gold medallist, and intersex female at the centre of the global controversy, only has the third fastest 800 m time in the world; she *does not hold the world record*.

Compare Semenya to another accomplished Olympian sprinter, Usain Bolt. Semenya has two total gold medals from the 2012 and 2016 games. Bolt holds world records in every single one of his events: 100 m, 200 m, and 4x100 m relay. Bolt is the only athlete ever to win gold in the 100 m (and 200 m!) in three successive Olympics: Beijing 2008, London 2012, and Rio 2016. Bolt has twice swept all three of his events at the Olympics. He has eight Olympic gold medals.

Semenya has two.

Bolt has 11 world championships. Semenya has three.

No one is clamoring to exclude Bolt for being too successful in his sport. If anyone is dominating sport, it was Bolt (now retired). So why the singular focus on Semenya's two gold medals and no world records? I contend that we celebrate exceptional men, but are suspicious of (and seek to exclude) exceptional women.

While we're looking at facts, let's compare their respective winning margins at the 2012 Olympics. Bolt won his 100 m event by a margin of 1.25%, and won his 200 m event by a margin of 0.62% (and 2.69% over bronze).

Semenya won her event by 0.26%.⁵³

⁵² The language of "domination" is regularly applied to me, despite all evidence to the contrary. For example, "Transgender Cyclist Rachel McKinnon Dominates as Competitors Cry Foul" (Mollie Walker, *New York Post*, October 21, 2019, <https://nypost.com/2019/10/21/transgender-cyclist-rachel-mckinnon-dominates-as-competitors-raise-questions/>). I won one gold (Sprint) and one silver (500 m TT). Dawn Orwick took one silver (Sprint) and one gold (500 m TT). We had exactly the same medal count: why am I said to "dominate"? Moreover, my highest Elite world ranking was 85th in the world. How can the 85th person in the world be said to be "dominating"? It's nonsense, of course.

⁵³ In 2016, Bolt won his 100 m event by 0.82% and his 200 m event by 1.21%. Semenya won her 800 m event by 1.05%. By contrast, David Rudisha won the men's 800 m by

So Bolt won his 100 m event in 2012 by a margin nearly five times Semenya’s respective winning advantage. There was no discussion of whether it was unfair of Bolt, so why the focus on Semenya? I think we know why by now: it’s misogyny.⁵⁴

The simple truth is that trans women are essentially *nonexistent* in elite sport, especially the Olympics. Sailors points to a single podium of intersex women and claims “domination.” This is simply false. It’s hyperbole at best and disingenuous at worst. The problem is that people tend not to check the numbers. But that’s why I’ve provided them. On a plain reading of the record, neither trans nor intersex women are dominating women’s sport. And we celebrate exceptional “dominating” male athletes (such as Bolt, Michael Phelps, etc.), but we cry “unfair” when the rare intersex female athlete, or heaven forefend, an entire podium of intersex women succeeds.

Sailors (2020, 425) argues that “separate categories are justified and necessary when their absence would leave no doubt about who would triumph through possession of competitive advantage.” The implication is that allowing full and equal inclusion of trans and intersex women athletes in women’s sport would “leave no doubt about who would triumph through possession of competitive advantage”; namely, the trans and intersex women.

So where are they? They’re *already* included. And there is considerable doubt as to who will win a given event! In fact, the data seem to support that betting *against* the trans woman is the safe bet, particularly given their complete absence at the Olympics. If I had to bet on who would win the women’s tennis event at the 2020*⁵⁵ Olympics, a cis woman or the nonexistent trans woman (because there won’t be one), I’d bet on a cis woman winning.⁵⁶ I’m not sure which cis woman would win, though.

Simply, Sailors’s argument is a hypothetical: if we allow trans and intersex women to compete with cis non-intersex women, then cis non-intersex women will not (often) win. She has the burden of proof here. She has no evidence for this, save for 0.69% of the podiums at a single Olympics, and 0% of the medals at the Olympics for trans women. That’s a pretty poor argument, I contend.

0.45%. In 2012, Rudisha won by 0.81%. There was nothing comparatively spectacular about Semenya’s winning margin.

⁵⁴ See Manne (2017). See also Serano (2007) for the canonical work on transmisogyny.

⁵⁵ Thanks, COVID.

⁵⁶ There are a number of plausible trans candidates who will be the first ever to compete in the Olympics at the 2020* Games, if they ever happen, but none are medal favorites, and none are tennis athletes. So Navratilova can rest assured, I suppose.

4. Supposed Competitive Advantages Are Just That—Supposed

Sailors (2020, 425) says, “Further, remember that male athletes have a 10–12% performance advantage over female athletes, which means that a trans woman athlete would have to have been more than 10% better than elite female athletes before transitioning in order to be as good as an elite female.” The claim is that, wrongly, trans women are male.⁵⁷ Trans women are medically and legally considered female, including for the purposes of sport.

Sailors’s argument both is a non sequitur (and a misunderstanding of statistics)⁵⁸ and a begging of the question, when she assumes that trans women are physiologically indistinguishable from cisgender men, such that pre- or posttransition trans women also have a 10%–12% average advantage over comparable cis women athletes. There has never been a single scientific study to support this. It’s an assumption. The assumption is that postpubertal trans women are basically men in skirts. And we can’t exclude people from their human right to sport based on an assumption.

To support her assumption, Sailors (2020, 425) quotes Tucker (2019), who writes:

An advantage may still exist. In fact, if the performance of a biological male got worse by anything less than 10% after lowering testosterone, then the resultant MTF athlete would have a conceptually “unfair” advantage, and one that could be theoretically insurmountable.⁵⁹ At 10% impaired, only truly elite men could win medals in women’s sport.⁶⁰ At a 7% loss of performance, you could be a medal winner even as a sub-elite male. But at 4% or less lost with lower testosterone, a sub-elite man could totally dominate women’s sport.

⁵⁷ See Betancurt et al. (2018) and Franklin, Betancurt, and Camporesi (2018).

⁵⁸ Even if we grant the *unproven* assumption that trans women are physiologically indistinguishable from cis men, if a trans woman loses 10% of her performance, she would have to be 11% better. E.g., a 10.0-second sprinter losing 10% of their time would be an 11.0 s sprinter. A 10.0 s sprinter is 11% faster than an 11.0 s sprinter ($11.0/10.0 = 11\%$). It’s a basic misunderstanding of algebra: if you lose 25% of \$10, you’re left with \$7.50. But then gaining 25% doesn’t return you to \$10, you’d have \$9.35. Ten is 25% greater than 7.5, but you’d need a 33% increase from 7.5 to get to 10.

⁵⁹ I also note that “MTF” and “FTM” are increasingly, heavily dispreferred by trans people. Better would be “trans women” or “trans men.”

⁶⁰ It’s also worth noting that this frames women as “impaired” men.

Let’s be careful with our language: “an advantage *may* still exist.” “May.” No evidence is adduced for this. Tucker continues, “In fact, if the performance. . . .” “If.” It’s a counterfactual. Tucker’s claims are entirely hypothetical rather than based on any data about trans athletes and the supposed competitive advantage. But let’s also note that Tucker, and by extension Sailors, seems to position women as “impaired” men, as inherently smaller, weaker, and in need of being protected from trans and intersex women.

Sailors references a recent paper by Anna Wiik and others, which is a study on only 12 *nonathlete* trans women. The authors themselves clearly state that fact:

We acknowledge that this study was conducted with untrained individuals and not transgender athletes. Thus, while this gave us the important opportunity to study the effect of the cross-hormone treatment alone, and as such the study adds important data to the field, it is still uncertain how the findings would translate to transgender athletes undergoing advanced training regimens during the gender-affirming intervention. It is also important to recognize that we only assessed proxies for athletic performance, such as muscle mass and strength. (Wiik et al. 2020, e812)

The only evidence Sailors adduced for the claim that trans women have a 10%–12% competitive advantage over cis women is supposition and a tiny study on 12 *nonathletes using an unreliable proxy for athletic performance*, and she uses that study as evidence for a claim that the authors explicitly didn’t want people to draw from the paper. She has framed the discussion as one about “males” vs biological females. And recall that those arguing against trans inclusion in sport have the burden of proof. This is rather weak evidence on which to base the exclusion of trans women from women’s sport.

Tucker’s cases are simple counterfactuals as bare possibilities. They aren’t evidence. They’re counterfactuals: if trans women’s medical transition has X effect on performance, then they would have Y outcome. But again, there have been 54,442 Olympians since trans women have been allowed to compete and 0 trans Olympians in that time. Remember, if we assume that approximately 0.2% of the world population are trans women, and at most half the Olympians since Athens 2004 (27,221) are women, then we’d expect approximately 54 trans women Olympians. But we’ve seen none. This rather seems to support the claim that trans women are at a distinct *disadvantage*.

The argument about trans women’s supposed competitive advantage is exactly that: supposed. It isn’t measured. Even the oft-cited Wiik study (Wiik et al 2020) wasn’t on athletes and used an unreliable proxy for athletic performance. And

the results we do have more strongly support the claim that trans women are at a *disadvantage* in elite sport compared to cis women. And those seeking to exclude trans women from their right to sport as women/female have the burden of proof. And they haven't even come close to approaching that. It is entirely illegitimate to argue for the denial of the human right to sport on the basis of counterfactuals and hypotheticals.

Let's continue. Sailors's argument is based on the imaginary situation where we simply allow *men* to compete with women openly:

Missy Franklin and Ryan Lochte are swimmers who have had great international and Olympic success. They also have almost identical wingspans, but her best time in the 200-m backstroke is a full 9 s slower than his, which would have put her half a lap behind him if they swam their best times against one another in the same race. "In a world in which competitors were categorized by height and wingspan—or just height or just wingspan—instead of sex, Franklin would not have had a world record; she would not have been on the podium; in fact, she would not have made the team. In those circumstances, we might not even know her name." (Sailors 2020, 424–425; quoting Coleman 2018, 90)

In her previous work, Sailors (2016) has focused on whether women should compete against (cis) men. Both then and now, we're not talking about men competing against women: we're talking about trans and intersex *women* competing as women against other women. Arguments drawing on performance advantages of men are irrelevant to this question.⁶¹ However, Sailors is clearly trying to frame trans and intersex women as physiologically equivalent to men, a fact she has only assumed but not supported.

⁶¹ Lest you think I dismiss this too quickly, I go into excruciating detail elsewhere (Ivy and Conrad 2018). Simply put, *even if we assume* that trans and intersex women have a competitive advantage over cis women, such an advantage would be insufficient to justify their exclusion from women's competition. We already permit huge competitive advantages on the basis of natural physical traits as well as sociological and economic factors, much larger than even the largest *supposed* estimate of an advantage for hyperandrogenic intersex women and trans women due to exposure to higher-than-average endogenous testosterone. The focus on competitive advantage, I have thus argued, is entirely misplaced and rendered effectively irrelevant. Of course, we go into great scientific detail on why this is so.

5. Conclusion: Sport Is a Human Right, Even for Trans and Intersex Women

This debate and its attendant controversy aren't about whether we should allow men into women's sport (we don't), or whether men have a human right to identify into the women's category (they don't). This is about women, real women, who also happen to be intersex or trans, having the same full and equal rights as cis, non-intersex women, as laid out by the IOC Charter and CAS case law. The argumentative, evidentiary burden is on the side that seeks to *exclude* trans and intersex women wholesale from women's competition. It is not on those arguing for trans and intersex women's full and equal inclusion.

In this paper I have shown that the bulk of the arguments against trans and intersex women's full and equal inclusion in sport have been based on assumptions, suppositions, and counterfactuals, not fact. Since this side of the debate has the burden of proof, I submit that they have not come anywhere close to meeting their burden. The default in human rights is inclusion, not exclusion. Trans women are women, are *female*. Trans men are men, are *male*. And intersex women deserve just as much access to women's sport as non-intersex women.

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