

**Fair Fights and Foul:  
Competition Categories and Human Rights in Sport**

Leslie A. Howe

This paper is an attempt to clearly delineate the relationship between excellence and fairness in sport, as values and as procedural outcomes of a practice which has as its central concern the capacities of human bodies for certain kinds of difficult self-propelled movement. Both excellence and fairness, as values operative in sport, require carefully balanced categories of inclusion and exclusion as the means of developing and honestly assessing excellence. This means that fairness, the principle by which these categories are fixed, is essential to the creation and authentication of excellence in sport activities.

The primary reason for the priority of fairness is that sport is about bodies. Sport encompasses a great many aspects of human existence: meaning, value, character, virtue, but underneath all those as their ground, that without which there cannot be sport, are material human bodies: muscle, blood, and bone. Moving *our* bodies, rising *above* pain and physical limitation, are expressions for the realisation of conscious projects from *within* and *as* the particular concrete bodies we are, as selves formed out of the lived experiences of a biological organism. Bodies matter in sport, in a fundamental way.

Some contend that inclusion is a more important value than fairness. Defence of such a claim would, however, require the proponent to either deny that sport is a fundamentally bodily pursuit or to argue that the non-bodily aspects of human existence, e.g., virtue, validation, meaning, etc., are more important in sport. Whether such a view is ultimately defensible or not, this paper will concentrate on a specific claim, one that asserts that there is a right to inclusion in sport. As I shall show, there is no such right and, furthermore, even if there was, it would not get those who advance the claim what they want from it, in particular, the claim that transwomen have the right to compete in the women's category in sport. The latter claim is rejected on the grounds that rights to compete are not universally accessible human rights but specific and bounded ones and, in this case, ruled out by the fundamental principle of fairness.

### ***Excellence and Challenge***

Sport practice structures physical contesting in a way that is not wholly unlike the way that music structures human generated sound. A choir isn't just everyone shouting to be loudest but requires its component voices to follow a set of practices and a structured programme so as to produce a particular aesthetic outcome. Sport, likewise, isn't *just* everyone attempting to defeat everyone else; it has rules and competitive structures that marshal and develop basic human physical capacities to achieve defined ends, and which then also allow us to make judgements about the best way *to*, and who is best *at*, the performance

of those physical capacities. So, sport as we know it now, is a set of defined physical movements that exhibit skills and capacities, the deliberate cultivation of which exhibit individuals' development of specific kinds of physical excellence. In what follows, I will typically refer for simplicity's sake to "skills" but what I mean by this should be taken to include a wider range of competencies than, say, specific technique, but also things like endurance, strength, and efficient response to challenge.

It is commonplace to say that sport is about having fun, or about the building of social relations. Gleaves and Lehrbach<sup>1</sup>, for example, centre the development of narratives, placing this above questions of fairness. But these are all outcomes, side-effects, of the practice, not definitive of the practice itself. This would be rather like saying that the point of the practice of carpentry or gardening was the generation of happiness, when although it may be the case that bad carpentry or gardening might still be enjoyable for the one doing it, they do not succeed at either practice considered in its own right. Rather, every sport is defined by a set of skills that participants need to master, along with a set of tasks that enclose and direct those skills. These can be more or less difficult, but they are normally *improvable* up to some limit for that individual. The attraction of sporting activities is very often both their difficulty and the possibility of improving competence.

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<sup>1</sup>John Gleaves and Tim Lehrbach, "Beyond fairness: the ethics of inclusion for transgender and intersex athletes". *Journal of the Philosophy of Sport* 43, 2 (2016) : 311–326.

Excellence in sport can be realised as an achievement particular to an individual for themselves, and as an achievement across a field of individuals. Either way, excellence is a constantly variable target. Whichever conception of excellence we follow we need to have some method of determining it. Bearing in mind that measurement of excellence is always comparative, whether against a standard, previous personal performance, or against other competitors, and that the results in sport are highly provisional, the measuring process must be both as accurate and as fair as possible. In fact, fairness is a condition of accuracy. In sport as in science as in philosophy, begging the question generates fallacious results.

In a contest between two participants, the contest should not be so constituted that one cannot lose and the other cannot win, or else we are no longer doing sport, the very point of which is, not chance, but relative uncertainty. Victory and failure, both, must be possible. If we want not only to measure but to develop as well, then this is also imperative: competitors need to be challenged, but the challenge should not be insurmountable. The measure of an athlete is the outcome of difficult but *appropriate* challenge; a dishonest contest proves nothing. If we are interested in the truth of the matter, what we don't want playing a role in the contest is any one of (a) cheating, (b) a significant mis-match, or (c) random or outside interference, because all of these give us potentially false outcomes. Sport begins with uncertainty and should produce an admittedly fleeting certainty, a true result. Unfair advantages, such as produced by cheating, etc., produce false outcomes; they do not tell us the truth about the athletic qualities of the participants.

### ***Inclusion as a Pragmatic Imperative***

*If* we understand sport, especially competitive sport, as a means for the development and assessment of excellence in certain kinds of physical skills and bodily capacities, *then* sport and its constituent conceptions of excellence are fundamentally dependent on a principle of fairness in competition.<sup>2</sup>

We can distinguish between systemic unfairness *within* a sport, e.g., individuals within sport or sport organisations subjecting identifiable groups or individuals to greater restrictions and fewer rewards, and systemic unfairness *outside* a sport that restricts who can get to the point of being able to gain entry to the goods of participation in that sport. Thus, discouraging girls and women from physical activity significantly narrows the number of girls and women who can achieve sporting excellence, and that lack of example then further discourages others, and so on. Unjust social distributions of wealth and opportunity, inadequate facilities in some neighbourhoods rather than others, expensive fees for equipment and membership, ingrained prejudice, all have their part in discouraging or blocking fully equal opportunities to participate,

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<sup>2</sup> Whether this is the right way to see the purpose of sport competition is open to debate, but even if excellence is about individuals seeking their own best possible performance, all that is argued here still holds. See R. S. Kretschmar, "From test to contest: An analysis of two kinds of counterpoint in sport," *Journal of the Philosophy of Sport*, 2 (1975): 23-30, on test and contest; for alternate views, see Leslie A. Howe, "Not Everything is a Contest: Sport, Nature Sport, and *Friluftsliv*", *Journal of the Philosophy of Sport* 46, 3 (2019): 437-453, and "Altering the Narrative of Champions: Recognition, Excellence, Fairness, and Inclusion," *Sport, Ethics, and Philosophy*, 14, 4 (2020): 496-510.

or in making it difficult for individuals to even consider the possibility of participation. The line here will be indistinct in real world cases but conceptually, at least, we can distinguish between unfair rules constituting sport as a defined activity, and unfair practices pursued by (a) those charged with applying the rules, including in interpretation of success in meeting the requirements of the sport,<sup>3</sup> and (b) widespread social and political failings that may affect but not be shared by those engaged in the practice.

The thing to focus on here is the question of *access* to some specific sport or category within sport, as this is sometimes appealed to in connection with disputes regarding eligibility. That many groups of people have been excluded from sport for specious reasons is not in doubt. The question is whether there can be justifiable exclusions of the sort that are framed as eligibility criteria. There are two arguments to be made here, one on the basis of what sport itself needs to do in order to produce and evaluate or measure excellence, and the other a very broad one about compatibility of entitlements, which I take up in the next section.

The larger the pool from which a sport can draw its participants the better the chances for producing high quality athletes, simply because its sampling range is larger. It makes sense

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<sup>3</sup>For example, coaches or selectors failing to “see” achievements by some as on par with those of others, or being too ready to discount failures by some than by others, being destructively critical of some but ready to praise others despite comparable performances, etc. These are failures that we can attribute to widespread social influences rather than the formal structures of the specific sport practice. That is, it’s not necessarily that, e.g., football or fencing, as activities, are inherently sexist or racist activities, but that some people connected with its functioning are.

to draw wider rather than narrower and then *later* select more restrictively (competitively), if for no other reason than to counter ingrained but faulty assumptions and implicit bias about where to look, e.g., don't assume that all swimmers, basketball players, etc. must have a very specific body conformation. Moreover, if a wider percentage of a society's population think that it is normal rather than exceptional to participate in sport, the base for athlete development is enhanced, with additional benefits to that society in terms of health, fitness, and general well-being. The benefits of sport participation can then be more generally distributed due to broad social expectations and the availability of more and varied competition.

### ***Competition Categories***

Competition in the form of reasonable challenge requires a degree of balance and this is where eligibility requirements and competition levels or categories come in. Sport is a poor determinant of the relative athletic excellence of *either A or B* if A is allowed to compete against B with an *insurmountable* advantage, i.e., one that an opponent has no reasonable expectation of overcoming. As suggested earlier, sport isn't sport unless there is a possibility for each competitor to lose or to win; where only one can win we have a defective contest insofar as the goal is to determine and develop. This *doesn't* mean that there must be perfect parity as this would not achieve either end. Competition occurs within a range of abilities, which is why in a good contest the apparently superior athlete can be beaten by one who is

able to take advantage of other capacities, for example, the small but technically superior competitor who beats the taller one, the player with quicker reflexes thwarting the more powerful, etc. The range of skills and capacities making up a competition level should not be entirely arbitrary, but devised in a way that facilitates the productive interaction of as many as possible of those competing within it. Distortions of competition, on the other hand, lead to distorted results, and thus to a failure to do what sport aims at.

This is not to deny that a given competitor may be so dominant in their field that they win consistently, and this is not necessarily unfair. If we consider real world cases in which this occurs, however, the dominant competitor *within their competition category* is not as dominant as they would be if they crossed category lines. Usain Bolt was not as dominant in men's sprinting or Serena Williams in women's tennis as, e.g., a 125kg class male wrestler would be against a 57kg male wrestler, or a male javelin thrower against a female, *ceteris paribus*. The issue here is what broad class of individuals should be measured against each other such that we can reasonably expect a fair assessment and development of abilities. We can have such categories and still end up with one individual who is generally superior on most occasions without the competition being strictly unfair—sometimes one athlete just is better than the current field. Our problem will be determining at what point competition becomes meaningless and, generally, this will be at the point where advantage becomes insurmountable, i.e., such that no development of ability, technique, or strategy (other than



illegal play) is sufficient (see below).<sup>4</sup>

Competition categories assume a predictable variability among competitors, not uniformity. Depending on the sport, it may make sense to divide competitors on the basis of performance relevant characteristics such as weight, height, age, sex, and competence. The fact of difference within these categories or even across categories does not invalidate the existence of the categories. So, for example, that some women can defeat some men, or some lightweights defeat some heavyweights in a particular sport activity, or aspect of that activity, does not mean that there is no reason to have those distinct categories. If A-competitors regularly display significant and quantifiable superiority to B-competitors, the imperative to maintain sport for as many participants as possible (i.e., inclusion) may well entail maintenance of A and B categories, especially if failure to do so results in the loss of B-competitors from future competition.<sup>5</sup>

Unfairness in sport is both an epistemological and an ethical failure. This is why, apart from questions about justice that I shall explore next, basic inclusion is deeply important for sport to be more than the exclusive property of the few. But it is also why sport and its

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<sup>4</sup>Note that the meaninglessness will extend to such an athlete's competing against a significantly inferior field; there is no athletic point to it for that athlete, and only a very limited one, if at all, for the field.

<sup>5</sup>Loss of B-competitors, if it occurs, may be due to a number of factors: meaninglessness (as above), but also, in a society that only values champions, social resources. See Parry and Martínková "The Logic of Categorisation in Sport". *European Journal of Sport Science* (2021), for a more exacting discussion of the rationale for sport categories.

institutions have to notice physical variations in human bodies and provide the means for fair contests. Our ability to compete is a matter of how our bodies are and how we have learned to use them and the meaning of sport for competitors is grounded in that materiality and in the ways that we direct it toward certain kinds of intentioned activity. Therefore, questions of eligibility for competition categories must be a constitutive element of sport and sporting regulations. These are two distinct, though related, questions. It is fair that every one should be able to compete but for that to happen fairly, we need to accept that we don't get into any game going.

### ***Rights, Goods, and Preferences***

The demand for inclusion in sporting competition, i.e., eligibility, is taken by some to override the constitutive demand for fairness. There are two points of difficulty with such claims, the first having to do with the coherence of sport as a practice, the other with the potential conflict with the equally trenchant claims of other participants. The claim for inclusion is one that demands compliance not *only* by sport understood as some specific organisation, but by those participating in it. Consequently, it is one that necessarily has implications for fairness of competition, because it affects others who also have their own rights of inclusion and to fairness. In most cases, this should be resolvable by extending the mechanisms that ensure fairness, but only if fairness is taken to be the primary value in regulation of competition. If inclusion overrides fairness, it is unlikely that sport can function

as a competitive device for determining excellence in athletic skills. The next question to be examined, then, is whether participation in sport is a human right.

No one is alone in the exercise of their rights; they are a feature of human *society* and when we talk about human rights we do so because we are talking about rights that are due to all humans in virtue of basic characteristics in which we take all humans to share.<sup>6</sup> We refer to *human* rights when we see these as being denied or infringed in some way by civic legislation or practice and reform or redress is called for. Since we are social beings rather than independent rights-islands, social institutions need to find ways to make those rights work together. This is a basic liberal principle, whose lineage stretches from Hobbes and Locke, through Mill, to Rawls, who expressed the point this way: “Each person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all”.<sup>7</sup>

Our basic rights have to be mutually compatible through society. Political liberty and the exercise of my right to sport thus share a rough model: I get to play this game which allows me to do certain kinds of actions and develop certain skills and excellences in myself, so long as

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<sup>6</sup>I take the concept of a “human right” to be defensible on these grounds alone; I do not claim any extra-human origin to such entitlements. But, given that, a claim to a human right must also undergo human scrutiny, i.e., rational defence. Ordinary civic and organisational rights, of course, have a much lower threshold of justification.

<sup>7</sup>John Rawls, “Justice as Fairness: Political not Metaphysical”, *Philosophy & Public Affairs*, 14, 3 (1985): 223-251, 227.

anyone else playing it can do these things too—we must all be treated equally under the rules of the game. Just as a freedom to acquire wealth does not include the freedom to do so by force because that renders everyone’s (capacity to acquire) wealth insecure, my right to compete in a race and prove my excellence does not include the right to do so in a way that denies others the same chance to do so, as I would by either cheating or competing in too unchallenging a category, thus securing an unwarranted victory and invalidating the result.<sup>8</sup>

Those who contend that sport is a human right often maintain that this right trumps the principle of fairness<sup>9</sup>; after all, shouldn’t our fundamental humanity and our right to equal consideration be more important than these mere conventions? The *IOC Charter*, for example, proclaims as the fourth of its “Fundamental Principles of Olympism” that:

“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

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<sup>8</sup>Of course, goalkeepers and forwards have different game permissions, but no players have exemptions (such as the use of drugs or machinery) that cannot be justified by the principle of fair competition. See Rawls, *ibid.*, 232-233.

<sup>9</sup>For example, the masters-level cyclist Veronica Ivy, who cites the *IOC Charter* as demonstrative (see Ivy “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,” *Feminist Philosophy Quarterly* 7, 2 (2021): 1-38). Ivy’s discussion, however, doesn’t directly defend the claim of a human right. In an earlier paper (Veronica Ivy, and Aryn Conrad, “Including Trans Women Athletes in Competitive Sport,” *Philosophical Topics: (Gendered Oppression and its Intersections)* 46, 2 (2018): 103-140, 113-117), she attempts what purports to be a Rawlsian approach concerning the kinds of liberties that can be accommodated in a fairly ordered civil society, but does not address the problem of rights conflicts, or the priority that the IOC gives to fairness in this principle.

requires mutual understanding with a spirit of friendship, solidarity and fair play.”<sup>10</sup>

This statement, while emphatic, is not definitive. In what sense could sport be a *human right*?

At best, such a declaration might serve as an affirmation of everyone’s right to play some kind of sport, but that gives no guidance as to what sport or at what level or in what category.

Certainly, the IOC does not mean to indicate that I can assert my “human right” to throw the javelin in the upcoming Games, for the very good reason that I have not qualified and have never thrown a javelin in my life, i.e., I am not eligible.<sup>11</sup> My standing on such a right would, in fact, infringe on the rights of those who *are* genuinely eligible. Consequently, any such right would have to be realised in a coherent way inside a concrete practice that also respected every other participant’s right, and that means that it would need to deal with conflicts on a basis of mutual understanding and fair play, as per the rest of Principle 4.<sup>12</sup>

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<sup>10</sup> International Olympic Committee, *Olympic Charter*, in force as from 17 July 2020, <https://olympics.com/ioc/olympic-charter>, p. 11.

<sup>11</sup> As the *Charter* points out in detail, the decision making about who gets to compete is down to International Federations and National Olympic Committees, all with their own considerable levels of bureaucracy. Moreover, no sports federation is bound to do what the IOC says it should; the IOC can only make rules on matters directly pertaining to the Olympic Games.

<sup>12</sup> Rawls’ difference principle, on the other hand, does allow violations of equal treatment or opportunity *if* doing so is to “the greatest benefit of the least advantaged members of society (Rawls, op.cit., 227).” Ivy appears to think that this allows some competitors to play with advantages not shared by others if their doing so was also socially beneficial to that group. This doesn’t follow; the purpose of the principle is to correct in favour of fairness rather than away from it.

Sport is just not a plausible candidate for a human right. Humans *need* food, water, shelter, health care, protection from arbitrary violence or detention, because otherwise they die or live subhuman, degrading lives. Freedom to move physically could well fall into this category, as a lack of movement is detrimental to the human body, no better for us than for battery hens. But a need to move does not translate into a right to sport, much less to competitive sport. By analogy, I have a right to food; I do not have a right to avocados. If avocados are available and I am denied them when others can have them, I can reasonably demand an explanation of the basis for avocado-eligibility. If it is a sound justification, then too bad for me and my avocado cravings. Sport is clearly a human *good*, as is art, music, and reliable means of communication, but it is not something the denial of which violates one's humanity, *unless* something else comes into play. We have rights at all because we are human, i.e., rather than pine trees or porcupines, but we aren't ever abstract humans and while we may have abstract or general rights, e.g., food, they do not necessarily give us a specific or concrete good in a given instance, such as avocados. To deny a good to which a person might otherwise have a claim it must be possible to point to a defensibly relevant qualifying or disqualifying characteristic or background condition. Among these distinctions may be membership in specific categories, if they are in fact relevant to the goods being distributed.

There are many goods to which one has no right—a personal and intimate relationship with one's favourite movie star, for example. No one is under an obligation to give us what we want just because we want it. Here, there is clearly a conflict between preferences and

goods.<sup>13</sup> We have a *prima facie* reason, then, to deny a good to one person where there is a conflict with that of another, but especially where allowing access constitutes a greater harm than denial. This may be especially so if the harm is not just denial of a nonessential good to the second party but positive injury.

The rights that we have *in* sport are specific to the sport we are in, such as the right to compete in a particular race, in a particular category, to have one's appeal of a result heard, etc. Rights apply to *those* humans *eligible* for that competition or sport insofar as they are set out by the specific sport's associations and federations. This makes them conditional or private rights, ones belonging to members of their organisations. Moreover, the rules that define and govern sport activity, especially those that set out competition categories and procedures, including exclusions in eligibility for specific competitions, are necessary for participants to gain the goods that the sport provides. In effect, both rights and freedoms, and restrictions on rights, enable the goods that participants enjoy and we are only bound or entitled by these rules so long as we belong to those organisations or clubs. The rights that we have in sport are not human rights but citizen or client rights.

It can be very difficult for people who have dedicated themselves to the pursuit of the

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<sup>13</sup>Cf. Judith Jarvis Thomson's example: "If I am sick unto death, and the only thing that will save my life is the touch of Henry Fonda's cool hand on my fevered brow, then all the same, I have no right to be given the touch of Henry Fonda's cool hand on my fevered brow." "A Defence of Abortion," *Philosophy & Public Affairs*, Vol. 1, no. 1 (1971): 47-66.

goods of sport, poured in their time, physical effort, self-esteem, dreams, identity, and the future of their joints, to see it as simply a preference. We often find it difficult to separate our very existence from it. But so do many other people who dedicate themselves to their art, music, philosophy, archeology, engineering, and so on. To engage in any of these projects of identity is to exemplify the extent to which humans desire satisfaction of a particular kind in how they choose to live their lives. But even a human right to autonomy over our lives would not grant us a right to do whatever we want. Once again, it is because we are not alone.

Sport is both a *voluntary* practice and one without which one can have a full human life and dignity. Moreover, it is a good that will only ever appeal to some people, as a particular preference, whereas liberty and basic material necessity must appeal to all humans because they are conditions, first, for life and, second, for human moral life. It is also the case that sport requires an investment of personal and social resources that may be in conflict with other, perhaps more pressing, needs of other people or for a society as a whole. Consequently, it is a poor candidate for a universal human right.

Nevertheless, let's suppose for the sake of argument, that humans do have a presumptive right to pursue their meaningful preferences and their attendant goods, which could include sport, competitive or otherwise. This cannot be taken to mean that any given individual must be granted an inviolable right to compete in sport, and certainly not anywhere that they happen to wish to do so. Competition in sport always involves others against whom



one competes and, given that fairness is critical to the competition having any valid meaning as a determination of excellence, the rights of others are always implicated. Thus, even if one did have a human right to participate in sport in general, it could not provide sufficient justification for riding roughshod over others who hold the same right. If it is a *human* right, it cannot be a preferential right. Where there is conflict between holders of the same right we need some other mechanism to determine precedence and fairness remains the best available candidate.

Reference to the *Olympic Charter* won't solve this either, as it also states clearly that "[n]obody is entitled as of right to participate in the Olympic Games." (Chapter 5, 44-3, p. 78). Despite the language about human rights, the IOC Charter makes clear that fairness and the constitutive rules of a specific sport (and its relevant International Federation) override the demands of individuals (Chapter 5, II-40, 1, p. 78). The *sport* matters: participation in sport "requires mutual understanding with a spirit of friendship, solidarity **and fair play**" (Principle 4, p. 11, my emphasis). This commitment is repeated in the IOC's 2015 consensus statement on sex reassignment and hyperandrogenism: "The overriding sporting objective is and remains the guarantee of fair competition. Restrictions on participation are appropriate to the extent that they are necessary and proportionate to the achievement of that objective."<sup>14</sup>

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<sup>14</sup>International Olympic Committee, *Consensus Meeting on Sex Reassignment and Hyperandrogenism*. (2015), [https://stillmed.olympic.org/Documents/Commissions\\_PDFfiles/Medical\\_commission/2015-11\\_ioc\\_consensus\\_meeting\\_on\\_sex\\_reassignment\\_and\\_hyperandrogenism-en.pdf](https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf).

### ***What follows from this?***

Fairness remains the most important criterion for determining inclusion or exclusion of participants in different competitive sport categories. Given that sport is fundamentally about bodies and their biological capacities, including the mutual influence they have on each other in dynamic and frequently forceful interaction, we must rely on physiological evidence to get to the right answer about whether an interaction is fair.<sup>15</sup> This should give us grounds for deciding cases involving returning cheaters,<sup>16</sup> the validity of age, sex, and weight classes, and the inclusion of trans athletes. In all these cases, a crucial part must be played by empirical evidence. Fortunately, there is an increasing amount of this, especially with respect to the possible long term effects of PEDs<sup>17</sup> and the effects of androgenising testosterone.<sup>18</sup>

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<sup>15</sup>Not to mention safe, though it is difficult to see how an arrangement that allowed a disproportionate risk to be borne by only some competitors rather than others could qualify as fair. See Jon Pike, "Safety, fairness, and inclusion: transgender athletes and the essence of Rugby", *Journal of the Philosophy of Sport* 48, 2 (2021): 155-168.

<sup>16</sup>John William Devine, "Gender, Steroids, and Fairness in Sport", *Sport, Ethics, and Philosophy* 13, 2 (2019): 161-169.

<sup>17</sup>See J.C. Bruusgaard, I.B. Johansen, I.M. Egner, et al.. "Myonuclei acquired by overload exercise precede hypertrophy and are not lost on detraining," *Proceedings of the National Academy of Sciences of the United States of America*, (2010).

<sup>18</sup>See David J. Handelsman, "Sex differences in athletic performance emerge coinciding with the onset of male puberty," *Clinical Endocrinology* 87, 1 (2017): 68–72; David J. Handelsman, A.L. Hirschberg, S. Berman, et al, "Circulating testosterone as the hormonal basis of sex differences in athletic performance." *Endocrine Reviews* 39, 5 (2018): 803–829; A. Wiik, T. Lundberg, E. Rullman, et al, "Muscle strength, size and composition following 12 months of gender-affirming treatment in transgender individuals," *The Journal of Clinical Endocrinology & Metabolism* (2019); Taryn Knox, Lynley C. Anderson, and Alison Heather, "Transwomen in elite sport: Scientific and ethical considerations," *Journal of Medical Ethics* 45 (2019): 395–403; Emma N. Hilton and Tommy R. Lundberg, "Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage," *Sports*

In view of this, what matters in the design of competitive categories are physiological characteristics, including biological sex. I am here assuming that biological sex is a real, material aspect of human bodies and, as such, relevant for categorisation insofar as it affects capacity for performance. The extent to which it does is a matter for empirical investigation. Our decisions should then be reasoned ones that take that evidence into account. Characteristics that do not matter *in this respect* include religion, language, political affiliation, legal status, sexuality, identity, or gender, because none of these have any effect on the body's capacity for sporting excellence—which is what sport measures.<sup>19</sup>

Consequently, to take the specific case of the inclusion of transwomen in the women's category in sport, a decision will need to take account of three central and overlapping factors: (1) empirical evidence regarding competitive advantage, (2) the importance of fairness in sport, particularly with respect to advantages, and (3) the potential for rights conflicts if advantage is established. The central focus of the present paper is fairness in sport and its relation to the development and determination of excellence, and therefore this discussion is limited to its strict relevance to this issue, i.e., what fairness issues arise from persistent physical

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*Medicine* (2020); Georgina Stebbings, et al, "The BASES Expert Statement on Eligibility for Sex Categories in Sport: Trans Athletes," *The Sport and Exercise Scientist*, Issue 68, (2021).

<sup>19</sup>Competitions can be organised on these latter bases as a celebration of shared social commitments: a Young Socialists football league, or Christian softball, or Gay Games/OutGames. But these will also have to decide how to fix their competition categories if they are serious about the competition, as organisations like Gay Games, OutGames, and EuroGames have done in the past. Indeed, part of the mission of the latter (which largely followed the rules of the various sporting federations) has been to show that sexuality is irrelevant to sporting ability.

advantage.<sup>20</sup>

(1) With respect to the empirical evidence, what is of significance is retained physical advantage beyond the normal statistical variation between individuals within the sex-defined competition category to which inclusion is considered.<sup>21</sup> There will be a few sports for which advantage is irrelevant or negligible, but others for which retained advantage is considerable. Two aspects of physical advantage tend to be focussed on: levels of circulating endogenous testosterone and those structural anatomical advantages gained from post-pubertal androgenisation. The former has until recently received the most attention, not least because of the IOC's response and possibly because it seems to offer the easiest solution, namely, to

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<sup>20</sup>More thorough examinations can be found in John Coggan, Natasha Hammond, and Søren Holm, "Transsexuals in Sport—Fairness and Freedom, Regulation and Law", *Sport, Ethics, and Philosophy* 2, 1 (2008): 4-17; Andria Bianchi, "Transgender Women in Sport", *Journal of the Philosophy of Sport* 44, 2 (2017): 229-242; Cesar R. Torres, Francisco Javier Lopez Frias, and María José Martínez Patiño, "Beyond Physiology: Embodied Experience, Embodied Advantage, and the Inclusion of Transgender Athletes in Competitive Sport", *Sport, Ethics, and Philosophy* (2020); Pam R. Sailors, "Transgender and Intersex Athletes and the Women's Category in Sport", *Sport, Ethics, and Philosophy* 14, 4 (2020): 419-431; Irena Martínková, "Open Categories in Sport: One Way to Decrease Discrimination", *Sport, Ethics, and Philosophy*, 14, 4 (2020): 461-477; Pike op.cit., Parry and Martínková op.cit.

<sup>21</sup>The often disingenuous and certainly misguided objection that the natural lottery already unfairly discriminates by making some people taller and some stronger, etc. can be quickly disposed of here. There is a categorical difference between variations *within* a class and variations that get one *into* a class. E.g., no one gets into the advanced theory course in *X* unless they have passed intro and intermediate, but in that course A does better than B on problems 1, 2, and 3, and C is better than A on practical applications 4 and 5. There is an entry requirement and *then* there are variations in achievement within that class. The point is that what we are concerned with here is a question of fairness of *entry* to a given competition (qualification). Having already demonstrated the necessary qualities to get to this point, that participants perform differently has more to do with how they have used their own differences relative to each other *after* qualification.

treat the situation as an analogue of doping. Under the rules, now abandoned by the IOC but still adhered to by many federations, an athlete simply needs to reduce their testosterone to an acceptable level in order to compete in the protected category. There are at least two problems with this approach. One, widely used guidelines permit levels of testosterone in transwomen that are considerably higher than occur in the majority of natal females.<sup>22</sup> Second, there is a sense in which concentrating on this one tree misses the forest behind it. The decisive issue is the wide set of changes testosterone makes to male bodies at puberty and how those changes advantage male bodies relative to female bodies in sport. Although testosterone suppression leads to a relatively trivial loss of muscle mass, it is likely to be readily regained by training, and has negligible effect on most other physical advantages which are more pertinent to sport performance, such as cardio-vascular capacity, bone length and density, hip-thigh-knee conformation, etc.<sup>23</sup>

(2) From our earlier discussion it is evident that fairness of competition is a fundamental requirement of sport, especially of competitive sport, such that the practice of sport fails in either developing or measuring excellence in athletic capacities or skills without it,

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<sup>22</sup> See *IOC Consensus Statement* (2015). Clark, et al. (2018) and Handelsman, et al. (2018): there is no continuum or overlap in testosterone levels between males and females. See Hilton and Lundberg (2020), 210-211. Richard V. Clark, Jeffrey A. Wald, Ronald S. Swerdloff, Christina Wang, Frederick C.W. Wu, Larry D. Bowers, and Alvin M. Matsumoto. 2018. "Large divergence in testosterone concentrations between men and women: Frame of reference for elite athletes in sex-specific competition in sports, a narrative review," *Clinical Endocrinology* 90 (2018): 15–22.

<sup>23</sup>Hilton and Lundberg op.cit., 211. Also Wiik, et al, op.cit.

and that therefore any rewards gained through failures of fairness are illegitimate and unearned. There are undoubtedly other values to be fulfilled through sport activity, but if this one is abandoned or displaced we have to accept that sport will fail to establish either the truth of who has met its aims or the justice of acclaim for doing so. Moreover, if large imbalances are permitted in competition, many will be excluded from real access to the goods promised by participation in sport, either by being prevented from advancing in their development or by being affected by an unreasonable risk of bodily damage (as in contact sports). It is also important to recognise that this does not only affect elite high performance sport, but sport at all levels; if an advantage is unfair at the Olympic level, it is also unfair at the recreational level. Moreover, insofar as the lower levels of sport development are the means of access to higher ones, it cannot be justifiable or in the best interests of sport development overall to unfairly block access to those who would otherwise be entitled to that development and the available support, such as funding, scholarships, etc. It would be like arguing that university students should be treated fairly but grade school students don't matter so much and can be discriminated against freely.

(3) This has clear implications for the issue of the adjudication of conflicts between rights holders. Arguments about inclusion cannot overlook the circumstance that the protected category into which inclusion is sought already includes those with their own such claims, nor that the existence of that category is to ensure the opportunity to exercise those rights in view of a relative physiological disadvantage vis-à-vis biological males. The proponent

of trans inclusion would then have to make a plausible argument to the effect that transwomen have a rights claim that is (a) greater than that of biological women to enjoy a good to which the latter otherwise have a right, and (b) that the social disadvantage of transwomen overrides the claim of biological women to protection due to their own physical and social disadvantages.

On the basis of what we have seen thus far, the claim for inclusion in women's sport cannot be sustained insofar as it is based on a psychological or social project of identification, which is not relevant to sport competition categorisation given that sport is about physiological skill and the development of its specific excellences. Nor, given that characterisation, is there any plausible basis to argue that such inclusion offers any improvement in fairness, but rather the opposite, since it would also involve the exclusion of those who already have an *at least* equivalent right to compete fairly, and who are already disadvantaged. Moreover, insofar as such inclusion is seen to be unfair, i.e., to fail as competition, it conceivably works against the broader social aims of inclusion.

This does not mean that transwomen should not be included in sport and this paper in no way defends such a position. Rather, given that sport is a human good, transwomen ought to be accommodated in a way that allows for development of each their own excellence, but it would be a nullification of sport for this to happen at the expense of biological women, who are already disadvantaged in sport and in society. The women's category in sport is not the

kind of competition category that a competitor can move in and out of, like age, weight, or skill level. It exists as a protected category designed to enable the continued inclusion of women in sport. Given the physiological advantages in bone, ligament, and tendon structure, muscle mass,  $VO_2$  capacity, heart size, haemoglobin levels, etc., retained by transwomen, fairness demands a different solution than inclusion in the women's category. This seems likely to be the introduction of an Open category, either in addition to or as a replacement for the men's category, with the women's left as it is.<sup>24</sup> If inclusion really is the goal, then this is the fairest option.

### **Conclusion**

Because sport is about the movement and capabilities of physical bodies, any questions of fairness in sport competition have to be focussed on the advantages for sport movement that exist for different bodies. Insofar as sport is also an attempt to determine excellence in these capabilities, it must test/contest in a way that does not render its results meaningless or empty. As stated above, unfair advantages produce false outcomes; they do not tell us the truth about the athletic qualities of the participants, and they also deny just rewards to

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<sup>24</sup>See also Sailors op.cit., Martínková op.cit., Pike op.cit., Parry and Martínková op.cit., Irena Martínková, Jim Parry, and Miroslav Imbrišević, "Transgender Athletes and Principles of Sport Categorization: Why Genealogy and the Gendered Body Will Not Help", *Sport, Ethics, and Philosophy* (2021). Open categories exist in many sports that also divide competitors in some other way. Bianchi op.cit., 237-239, presents a case for using a handicapping system for trans inclusion, but this seems unlikely to work for a great many sports, especially team or contact sports and would be prohibitively complex to apply.



competitors. If sport competition is to tell us anything true about competitors, it has to both sample fairly and widely, *and* ensure that contests are balanced. But while inclusion is vital to finding out who really is the best at some activity, it cannot overrule the requirement of fairness, as it is fairness that ensures the validity of the results. Not being able to lose and not being able to win are equally pointless and dishonest outcomes.

Sport is a human good, but not in and of itself a right. We hold the rights we do in relation to other people who have similar rights and goods and our exercise of our rights should not make society a worse place. Moreover, this paper has argued that the attempt to argue for a right to sport is a great deal more complicated than devising a compelling slogan. This is because any such discussion must distinguish carefully between rights to sport as an activity in general and the rights that one has within sport, which are always specific. There is also an incoherence in demanding a right to participate in an activity which, if granted, renders the activity itself incoherent.

Once again, rights are held together with others. Conflicts of rights are inevitable, but those conflicts must be resolved in a way that does not simply discard the rights of others, and especially not of those who are already disadvantaged. Simply put, (and to paraphrase slightly) we will never get all that we want, but we should get both what we need and what is fair.<sup>25</sup>

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<sup>25</sup>This paper was originally written in June 2021. In November 2021 the IOC released a new set of guidelines (<https://stillmed.olympics.com/media/Documents/News/2021/11/IOC-Framework-Fairness-Inc>)

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lusion-Non-discrimination-2021.pdf). Sections 5, 6, and 7 in particular are problematic for the future fairness of competition. The document suggests that any athlete can presumptively participate in any category and that the burden of proof as to why any particular athlete should not falls on those affected by such admission to show why there is a good reason for them not to. This effectively makes women athletes and individual sport organisations other than the IOC bear the cost of ensuring that women's sport is fair and safe. It ignores any evidence already accrued, relies on an extremely unclear concept of "disproportionate" advantage, which would have to be established on a case by case basis, i.e., per athlete per sport, and eliminates any requirement to lower testosterone, which may have some further consequences for anti-doping efforts. This does, however, leave individual sports federations the option to govern themselves in this regard, if they will.