

Professor Doriane Lambelet Coleman
Oral Testimony re: H.R. 5
U.S. House of Representatives, Committee on the Judiciary
April 2, 2019

My name is Doriane Coleman, I am a Professor of Law at Duke Law School, and I support equality.

Supporting equality is always just the beginning, however. The legal history of our country is in part a chronology of efforts designed to give meaning and effect to the original commitment in 1776, “All men are created equal.” The work is ongoing for those of us who weren’t originally meant to be its beneficiaries.

As the milestones reflect, the lesson is that different groups experience inequality for different reasons, at the hands of different people, and in different ways, so that tailoring an effective remedy requires careful attention to those differences.

Although the Nation benefits as equality expands, in fact only some amongst us needed the Emancipation Proclamation and Brown v. Board of Education. Only some of us need Title IX and the Violence Against Women Act.

Approaches to addressing equality that elide relevant differences are not only ineffective; they can actually serve as cover for ongoing inequality.

I’ve recently encountered advocacy that exemplifies this problem:

The argument is that because some males identify as women some women have testes. From this, it follows that sex and sex-linked traits can’t be the grounds for distinctions “on the basis of sex” because this excludes women with testes. Thus, gender identity is the only legitimate basis for classifying someone into and out of, for example, girls’ and women’s only spaces and opportunities.

I support equality including for the LGBTQ community. But I don’t support the current version of H.R. 5 because – and I say this with enormous respect for everyone who cares about and is working on the bill – it elides sex, sexual orientation, and gender identity: It’s all sex discrimination, and, at least impliedly, we’re all the same. In opting for what is in effect a sex blind approach to sex discrimination law, the legislation would serve as cover for disparities on the basis of sex.

Females have and continue to be treated differently precisely because of our reproductive biology and stereotypes about that biology. Pretending that biological females and women with testes are the same for all purposes will take us backward not forward.

I was asked to testify today because I have long worked in the one area where this is most clear: Title IX and opportunities for girls and women in sport.

I was a Title IX baby, one of the first two girls to get a track scholarship to Villanova in 1978. I was a national collegiate champion in 1982 and went on to have a career in the sport before I turned to law practice and academia. For various reasons, without Title IX, it's unlikely that my life as it is would have been possible. Mine is just one of innumerable similar stories.

Title IX, which "requires [schools] to invest in male and female athletes equally" has and continues to power extraordinarily valuable outcomes:

"Since the passage of Title IX . . . , female participation in sport has increased more than 900%." (Schnell, 2016)

Tens of thousands of girls and women are now eligible for college scholarships, ensuring educational opportunities that for many wouldn't be realistic otherwise.

"Girls who play sport stay in school longer, suffer fewer health problems, enter the labor force at higher rates, and are more likely to land better jobs. They are also more likely to lead." (Brooke-Marciniak and de Varona, 2017)

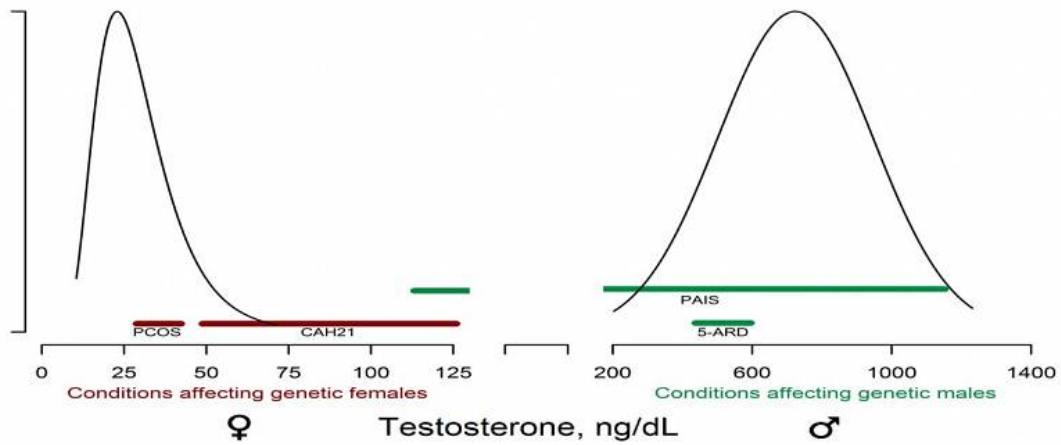
Our numbers in c-suites are notable, as are our contributions to public service. Representatives Demings and Bustos, Senator Gillibrand, and Governor Noem are just a few who are currently in office.

Those of us who were athletes know that segregation on the basis of sex or at least of sex-linked traits is necessary to achieve equality in this space. That's why, even though we've integrated almost all other spaces and opportunities, we are still committed to girls- and women's-only sport.

Scientists agree that males and females are materially different with respect to the main physical attributes that contribute to athletic performance, and they agree that the primary reason for sex differences in these attributes is exposure in gonadal males to much higher levels of testosterone during growth and development (puberty), and throughout the athletic career.

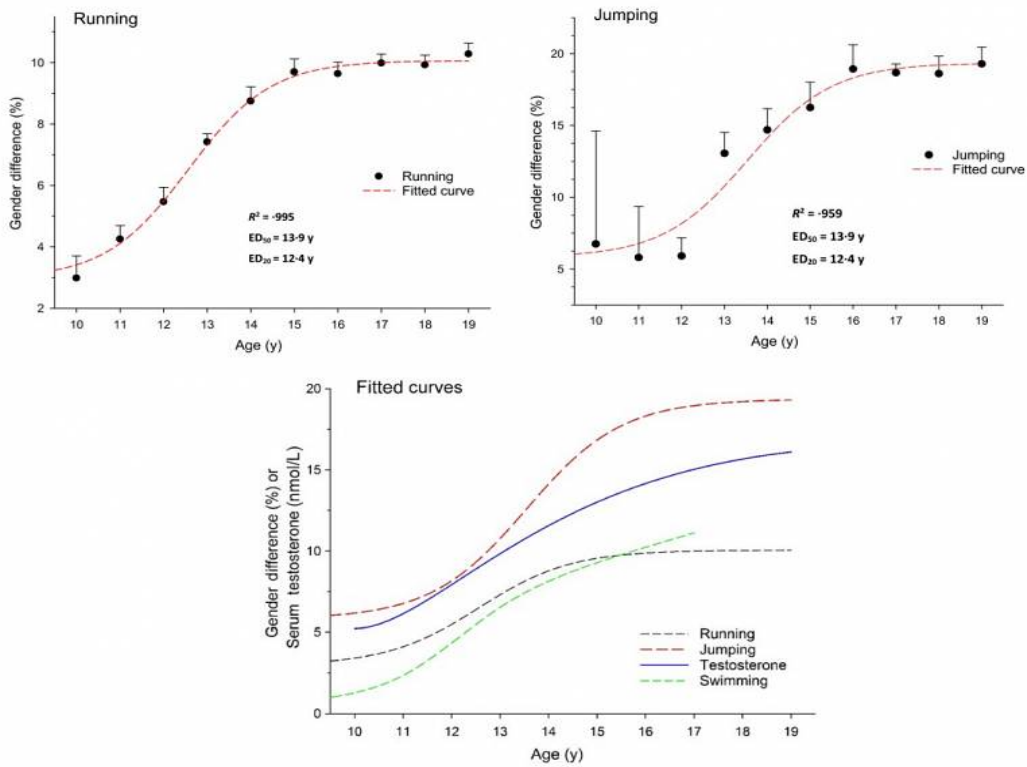
This different exposure literally builds the male body in the respects that matter for sport.

Here's what we mean by much higher testosterone levels. (Clark et al. 2017):



And here are figures that demonstrate how sex differences in athletic performance emerge coinciding with the onset of male puberty. (Handlesman 2018):

Sex differences in athletic performance emerge coinciding with the onset of male puberty

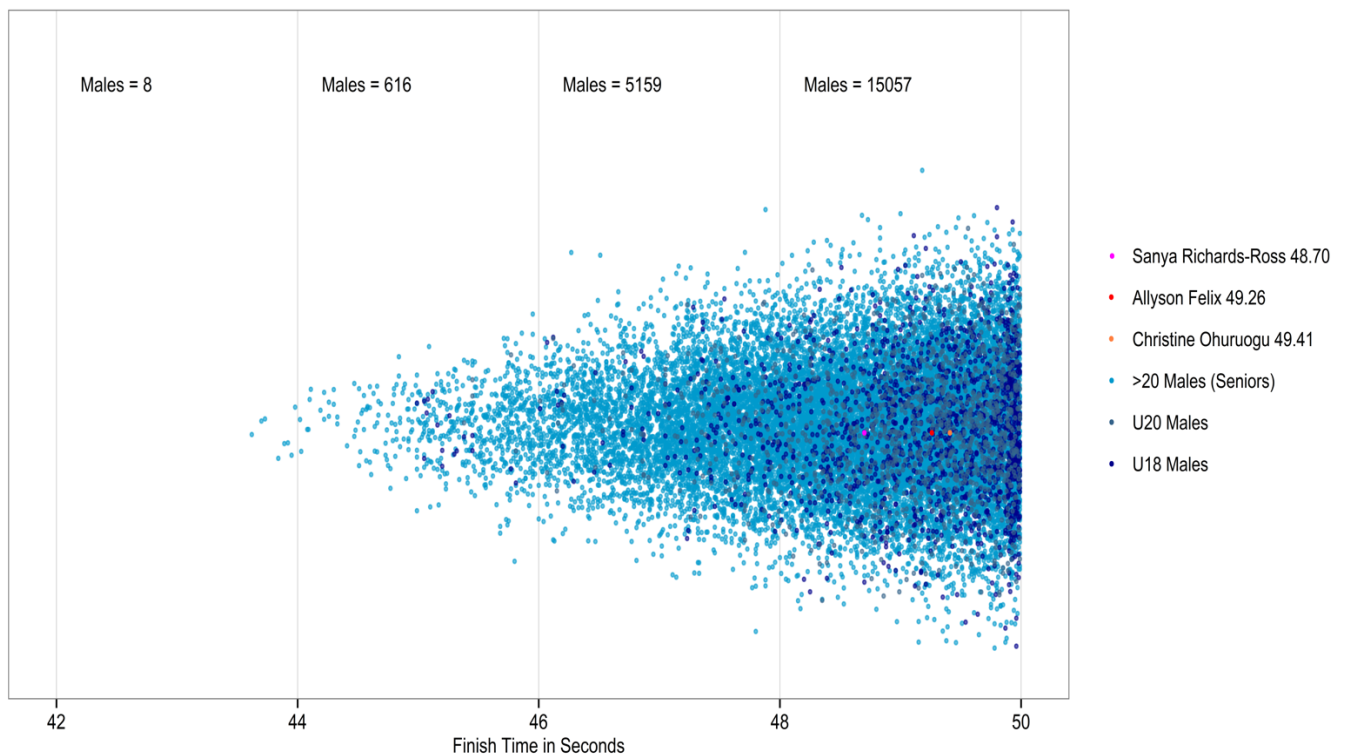


Finally, here's a figure that illustrates the effects of those differences, again starting in adolescence. (Coleman, Shreve, Wald, and Clark 2018). The figure marks the individual *lifetime bests* of three female Olympic Champions in the 400 meters – including Team USA's Sanya Richards-Ross and Allyson Felix – in the sea of male-bodied performances run *just in the single year 2017*.

It shows that *even at their absolute best*, the women would lose to literally thousands of boys and men, including to thousands who would be considered second tier in the men's category.

And because it only takes three male-bodied athletes to preclude the best females from the medal stand, and eight to exclude them from the track, it doesn't matter if only a handful turn out to be gender nonconforming.

Comparing the Best Elite Females to Boys and Men:
Personal Bests for 3 Female Gold Medalists versus 2017 Performances by Boys and Men



If U.S. law changes so that we can no longer distinguish females from women with testes for any purpose, we risk not knowing the next Sanya Richards-Ross or the next Allyson Felix. We risk losing the extraordinary value that comes from having women like Serena Williams, Aly Raisman, and Ibtihaj Mohammed in our lives and on the medal stand. If they bothered to compete, they would be relegated to participants in the game.

One prominent trans activist has said that we shouldn't be concerned that the victories would belong to transgirls and women going forward, because what matters is their liberty to self-identify, and their right to be treated equally (to females) throughout society. Others, including some in the Title IX advocacy community, have embraced this evolution, arguing that what we should care about is participation.

These advocates are right to seek avenues for transgender inclusion, but listen carefully to the particular bargain they are willing to strike. In effect, it is that we don't need parity of competitive opportunity. They are wrong about this.

Participation contributes to equality, but the real power of girls and women in sport isn't in gym class, it's in teams, in competitions, and in victories. It's in the same numbers of scholarships and spots in finals and on podiums. It's in the fact that Brandi Chastain can win Worlds, celebrate like the guys, and get a whole generation of little girls to play soccer because she did. It's in the fact that Simone Manuel can win Olympic Gold in the 100 meters freestyle with millions watching on primetime television, and from there can lead a generation of African American kids to the pool who didn't believe that swimming was for them too.

I encourage you to consider revisions to H.R. 5 that provide for protections for LGBTQ people that don't risk these invaluable goods, and that are otherwise considered about the circumstances in which sex still matters.