

SHOULD THE INTERNATIONAL OLYMPIC COMMITTEE BE POLICING
MOTHERHOOD? CONSTITUTIONAL IMPLICATIONS OF REGULATING
PREGNANCY AND THE ABORTION-DOPING SCHEME UNDER DOMESTIC
LAW

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I. INTRODUCTION

Female athletes are cheating the system with a scheme that may be impossible to regulate. While anti-doping codes are growing in size and complexity, they have yet to address what is referred to as the “abortion-doping scheme.” As nature would have it, the miraculous act of childbirth is the most difficult to regulate.

The abortion-doping scheme has not garnered much attention in North America. Most known offenders reside in Eastern Europe and Asia, however, their actions are not inconsequential to American sport. The media has flooded us with images and stories of recent scandals and

conspiracies in the Olympic Games,¹ a series of competitions which “have always brought people together in peace to respect universal moral principles.”² Such moral principles are questioned when athletes intentionally get pregnant to reap the beneficial physiological changes to their bodies, then have an abortion either before or after competition to rid themselves of their unwanted fetus. The intentional conception is solely a means to an end, or another way to partake in the popular and controversial practice of doping.

Can the body governing the Olympic Games, the International Olympic Committee (“IOC”), regulate the right to procreate for the sake of preserving the integrity of the games and enforcing their strict anti-doping code? While the IOC is aware of the scheme, no regulations have been issued regarding the practice. This is because abortion-doping appears constitutionally impossible to proscribe. The United States Constitution permits women to bear children without federal or state interference. The reverse is also true. Our government may not implement obstacles that will unduly burden a woman’s right to choose to terminate an unwanted pregnancy. As this article concludes from interpreting sample hypothetical regulations, proscribing the right to procreate is unconstitutional. However, a narrowly crafted regulation prohibiting the abortion-doping scheme may gather the slightest bit of constitutional support only to be heavily negated by other practical realizations.

Section II of this comment provides a general background to the historical practice of doping in the Olympics. Section III focuses on a discussion of the abortion-doping scheme, and recounts actual documented incidents. Section IV, explaining the state actor theory, lays the foundation for regulation. Section V proposes two hypothetical regulations proscribing intentional pregnancy and abortion, respectively, and engages in an analysis under domestic law. It also presents other problems and issues regarding the regulation of the abortion-doping scheme. Section VI concludes by arguing that, while the proposed hypothetical regulations may not survive constitutional scrutiny, they at least may have a positive moral and ethical impact. Obtaining an abortion may be legal, but the primary reason behind the purposeful conception in the abortion-doping context is immoral.

1. See Hartley Steward, *Olympics Snowed Under: If the IOC Doesn't Act More Aggressively to End Drug Use and Corruption, As Epitomized by the Skating Pairs Scandal, the Winter Olympics Will Devolve Into Pure Farce*, OTTAWA SUN, Feb. 23, 2002, at 14.

2. Olympic Games, http://www.olympic.org/uk/games/index_uk.asp (last visited Feb. 1, 2003).

II. A GENERAL INTRODUCTION TO THE PRACTICE OF DOPING IN THE OLYMPICS

The use of artificial substances to promote athletic performance has always played a role in the history of sports.³ The practice of doping can be traced back to ancient Olympic games from the third century, when athletes ingested substances such as plant extracts and mushrooms to aid in their performance.⁴ While the advent of technology has intensified the level of sophistication behind the practice, doping continues to evade the regulations prohibiting its existence.⁵

Doping is a means of enhancing an athlete's physical competitive ability.⁶ Blood doping serves to artificially improve performance by increasing hemoglobin-binding capacity, which thereby improves oxygen transport within the blood and maximizes oxygen uptake.⁷ The practice is administered by adding blood, red blood cells and blood-related products to the athlete, which may then be followed by a removal of blood from the body.⁸ Athletes continue to train in this blood-depleted state and receive benefits from their intentionally altered blood levels.⁹

Doping gained international recognition in the 1972 Munich games when asthmatic swimmer Rick DeMont failed doping control after winning a coveted gold medal.¹⁰ He was stripped of his medal, and prohibited from competing in subsequent finals.¹¹ All this occurred because DeMont had taken an anti-asthma pill which contained ephedrine,

3. *FAQ About Doping*, <http://www.wada-ama.org/en/t3.asp?p=30463> (last visited Feb. 1, 2003).

4. *Id.*

5. *See generally Drug Runners*, *TIMES OF INDIA*, Aug. 21, 1999.

6. *FAQ About Doping*, *supra* note 3. According to the World Anti-Doping Agency:

Doping is defined as the use of an artifice, whether substance or method, potentially dangerous to athletes' health and/or capable of enhancing their performance, or the presence in the athlete's body of a substance, or the ascertainment of the use of a method on the list annexed to the Olympic Movement Anti-Doping Code.

Id. This definition was recently amended to include methods that potentially enhance performance and pose a risk to athletes. Previous definitions failed to include performance-enhancing drugs. *Plus: Drug Testing, Anti-Doping Officials Draft New Rules*, *N.Y. TIMES*, May 24, 2002, at D7.

7. Poul-Erik Paulev, M.D., *Exercise, Sport and Doping*, <http://www.mfi.ku.dk/ppaulev/chapter18/Chapter%2018.htm> (last viewed Feb. 1, 2003). Dr. Paulev's online physiology textbook provides scientific explanations of the practice of doping. *See id.*

8. Olympic Movement Anti-Doping Code, Chapter 1, General Provisions, http://www.usantidoping.org/files/USADA_Guide.pdf (last viewed Feb. 1, 2003).

9. *Id.*

10. *See Alan Abrahamson, High Performance; Thirty years after Munich, IOC battle against doping is far from over*, *L.A. TIMES*, Sept. 1, 2002, part 4, at 3.

11. *Id.*

a substance banned by the IOC.¹² DeMont stands as just one of many examples in which athletes have been deprived of victory or banned from the games as a result of using performance-enhancing drugs.¹³ Three athletes were removed from the 2002 Salt Lake City games, and two were stripped of their medals after the drug darbepoetin was found in their blood.¹⁴ Doping, whether intentional or unintentional, has become all too common in today's sport society.

The IOC follows a policy of strict liability regarding the detection of banned substances found in an athlete's body.¹⁵ Athletes are considered guilty if a banned substance is detected in their urine test, regardless of how the substance got there.¹⁶ Intent is irrelevant.¹⁷ Some attorneys believe this policy contravenes European human rights, as athletes' careers may potentially be destroyed devoid of proof of intent.¹⁸ Athletes, however, are held responsible for all substances found in their bodies.¹⁹

The IOC has focused its efforts on anti-doping programs as the Committee's primary goal for the Olympic movement.²⁰ The number of tests has been tripled, and in the 2002 Winter Games alone several positive cases were detected.²¹ The IOC has certainly come a long way, judging from the fact that in previous Winter Games, spanning from 1924 to 1998, only five persons were caught.²² However, modern forms of blood doping have made the practice both undetectable and perhaps unable to be regulated.

12. *Id.* While DeMont had completed a standard medical form informing the authorities of his condition and medications, doctors at the games failed to assume responsibility for the oversight in disclosing the drug use to authorities. *Id.* The case serves as a reminder of the complexities of regulating drugs and other performance enhancing substances.

13. *See id.*

14. Alex Lo and Patsy Moy, *Genes Next Frontier for Bad Sports*, SOUTH CHINA MORNING POST, Mar. 5, 2002, at 14. Darbepoetin is linked to erythropoietin (EPO), which increases the production of oxygen-carrying red blood cells. *Id.*

15. Geoff Dyer and David Owen, *Drug Tests May Condemn the Innocent and Miss the Cheats*, FINANCIAL TIMES (London), May 30, 2002, at 13.

16. *Id.*

17. *See id.*

18. *See id.* Cor Hellingham, an attorney in Amsterdam who has participated in doping cases, believes that adherence to a policy of strict liability violates natural justice. *Id.*

19. *See id.*

20. Christopher Clarey, *The Number 1 Issue is Doping; Q&A/Jacques Rogge*, INT'L HERALD TRIB., July 29, 2002, at 12. Drug doping control is the number one goal according to International Olympic Committee President Jacques Rogge. *Id.*

21. *Id.*

22. *Id.*

III. GET PREGNANT, GET AN ABORTION, COMPETE: THE ABORTION-DOPING SCHEME

Pregnancy has been linked to a measurable improvement in athletic performance in female athletes.²³ In fact, the effects of pregnancy parallel the effects of blood doping.²⁴ The benefits of pregnancy include an increase in oxygen-rich blood, which in turn helps boost muscle capacity by thirty percent; improved cardiac and lung functions; and an increase in the production of progesterone, a sex hormone that makes muscles and joints more flexible.²⁵ Female hormonal changes increase aerobic fitness in the first trimester of pregnancy, when the body produces an abundance of beneficial red blood cells.²⁶ In addition, the quadricep muscles in the legs become stronger.²⁷

Pregnant athletes are taking advantage of their own natural advantage. Triathlon winner Bridget McMahon brought home the gold to Switzerland while in the beginning stages of pregnancy.²⁸ Russian champion Yulia Chepalova was four months pregnant in the 2002 Salt Lake City games.²⁹ As a result of her pregnancy, it was stated that Chepalova did not have to use additional stimulants.³⁰ In fact, ten out of the twelve Russian medallists in the 1956 Olympics were reported to be pregnant at the time of competition.³¹ While competing during pregnancy is considered safe in the first trimester, players cease to gain performance benefits after fourteen to fifteen weeks.³² Risk increases after the first three months of pregnancy.³³

While female Olympians may have taken advantage of the physical

23. *Motherhood and Medals Go Together*, BIRMINGHAM POST, Aug. 8, 2002, at 5.

24. See Celeste McGovern, *Brave New World*, ALBERTA REPORT, Feb. 4, 2002, at 56. Pregnancy, like blood-doping, enhances athletic performance by approximately 10 percent. *Id.*

25. *Motherhood and Medals Go Together*, *supra* note 23.

26. *The Secret of Being a Fit Mother*, EXPRESS, Sept. 26, 2000.

27. *Id.*

28. Adrian McGregor, *Marathon Mamas*, AUSTRALIAN, July 30, 2002, at http://www.theaustralian.news.com.au/common/story_page0,5744,480395%255E21784,00.html.

29. Sergei Yugov, *Russian Athlete Yulia Chepalova is Pregnant: It is Useful for the Country and Pleasant for Her*, PRAVDA, Apr. 27, 2002, at 29, at <http://english.pravda.ru/sport/2002/04/27/28079.html>

30. *Id.*

31. Stephen Howell, *The Mother Load*, SUNDAY AGE (Melbourne), Aug. 31, 1997, at 20.

32. *Id.* (According to Carolyn Roderick, team doctor for the Sydney Flames and the Australian Opals.) However, advantages may be counteracted by sickness, fatigue, weight gain and a change in a woman's center of gravity. *Id.*

33. *Id.*

benefits of pregnancy, some have done so in a rather abhorrent manner.³⁴ Athletes may get pregnant two or three months before competition, then have an abortion about two weeks prior to competing.³⁵ Females may become artificially inseminated in order to receive the 'natural' benefits of the abortion-doping scheme.³⁶ The beneficial changes to the woman's physiology linger after the medical procedure, allowing the athlete to obtain an increase in performance.³⁷ After the abortion, the athlete is given time to recuperate, then put through a rigorous training regimen and placed under extreme strain and pressure.³⁸ The practice has been said to have been performed by Eastern European women beginning in the 1980's³⁹, as well as the Chinese.⁴⁰ The scheme was developed after the discovery that human chorionic gonadotropin (HCG), a hormone produced during pregnancy, stimulates the production of testosterone in woman and induces a strengthening or anabolic effect on the body.⁴¹

While some reports have regarded the practice to be speculative or suspicious,⁴² others have confirmed its existence.⁴³ Former International Olympic Committee Vice-President Alexandre de Merode verified stories pertaining to the abortion-doping practice.⁴⁴ De Merode claimed that a Swiss physician was the first to execute the practice in order to improve sports results.⁴⁵ In addition, former Olympians have actually confessed to

34. See Heather Smith, *Mum's the Word*, SYDNEY MORNING HERALD, Mar. 25, 1997, at 46.

35. *Operation Rescue West: Dead Children of Former Olympians to Speak at Winter Games*, U.S. NEWSWIRE, Feb. 7, 2002. According to Troy Newman, director of Operation Rescue West: "Women around the globe repeat this cycle of pregnancy and abortion in order to further their careers." *Id.*

36. Mary Ormsby, *Abortion Part of Training Regimen?*, TORONTO STAR, June 29, 1988, at C3. See also *infra* note 43.

37. See *id.*

38. Dmitry Mikhailov, *Pregnant Champions*, MOSCOW NEWS, July 19, 2000, at 28. Exercise, however, is not recommended for two weeks after the abortion. *Physical Recovery After an Abortion*, <http://www.afterabortion.com/physical.com> (last viewed Oct. 3, 2002).

39. Smith, *supra* note 34.

40. *Drug Runners*, *supra* note 5.

41. Smith, *supra* note 34.

42. See Randy Harvey, *A Sports Machine; East Germans Credit Success to Application of Knowledge*, L.A. TIMES, Aug. 30, 1988, part 3, at 1. Statements from the Western European press fueled speculation that East German athletes were engaging in this practice. *Id.*

43. See Paulev, *supra* note 7. Dr. Paulev of the University of Copenhagen describes the practice in Chapter 18 of his online physiology textbook.

44. Mary Ormsby, *Push is On to Rid Sport of Drugs: Sports Minister Says 'The Net is Tightening' On Would-be Offenders*, TORONTO STAR, June 30, 1988, at F6. While Prince de Merode verified the practice, Dr. Robert Voy, the former chief medical officer of the United States Olympic Committee, claimed the stories to be a "ludicrous myth, in my opinion." *Id.*

45. *Id.*

having participated in the practice.⁴⁶ Some Olympic champions have been so persuaded by the practice that they “contracted” to become pregnant before the Games.⁴⁷

While North American athletes have never been linked to the scheme, their competitors may be practicing this heinous method of doping.⁴⁸ According to a Finnish sports medicine expert: “now that drug testing is routine, pregnancy is becoming the favorite way of getting an edge on competition.”⁴⁹ If this is true, should the practice of abortion-doping be regulated?

IV. PRELIMINARY STANDARDS AND THE STATE ACTOR THEORY

Before considering the application of substantive constitutional standards to the practice, it is important to consider the involvement of the United States Olympic Committee (“USOC”) and its role in the Olympic movement.⁵⁰ The USOC is responsible for carrying out the mission of the IOC, and must administer IOC promulgations involving drug testing.⁵¹ In order to regulate the pregnancy/abortion-doping scheme, one must first

46. See *Soviet Gymnasts ‘Forced to Get Pregnant’*, DAILY MAIL (London), Nov. 22, 1994, at 3. Former Russian Olympian Olga Kovalenko explained that she was ordered by Soviet sports chiefs to sleep with her boyfriend, get pregnant, then have an abortion. *Id.* She was told she would not be able to compete in the Olympics if she did not follow orders, so Kovalenko terminated her pregnancy after ten weeks. *Id.* According to one former Soviet coach, if young girls did not have boyfriends, they were forced to sleep with their coaches: “Olga was lucky. Other 15-year-olds in the women’s team had to have sex with their coaches until they got pregnant. Then they were forced to have an abortion.” *Id.* The British Olympic Committee calls these claims ‘disturbing’. *Id.*

47. Mikhailov, *supra* note 38. Marina Logvinenko, Olympic shooting winner and silver medalist in the 1996 Atlanta games explained that she was persuaded by the national chief physician that pregnancy would ensure a “150-percent guarantee of her victory in the Olympic Games.” *Id.* The physician insisted that Logvinenko arrive at the Seoul Games pregnant, and she complied. *Id.* However, she experienced severe sickness, including toxicosis and vicious vomiting spells, and as a result placed third in one round of pistol exercises. *Id.*

48. McGovern, *supra* note 24.

49. *Id.* The Finnish sports medicine expert’s name was withheld from the article. *Id.*

50. For a useful explanation of the organizational structure of the Olympic Games, see Michael S. Straubel, *Doping Due Process: A Critique of the Doping Control Process in International Sport*, 106 DICK. L. REV. 523 (2002). The IOC determines the anti-doping procedures for the games, and the National Olympic Committees, such as the United States Olympic Committee, are responsible for complying with the rules established by the IOC. *Id.* at 533. Thus, the USOC would be the primary domestic organization behind the potential abortion-doping regulation, and subject to an examination of its role as a state actor in order to properly consider constitutional claims.

51. *Slaney v. International Amateur Athletic Federation*, 244 F.3d 580, 586 n.1 (2001), *cert. denied*, 534 U.S. 828 (2001).

conclude that the USOC should be deemed a state actor.⁵²

The United States Supreme Court held the USOC to not be a state actor in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*.⁵³ However, the Court appeared divided on the issue, and rendered a five-four decision in favor of the USOC.⁵⁴ The majority stated that establishment under federal law by means of a Congressionally-granted corporate charter does not subject a private corporation to state action.⁵⁵ In addition, the USOC's coordination of amateur sports was not deemed a traditional governmental function, thus failing to satisfy the governmental action test.⁵⁶

Four members of the Court dissented, holding the USOC to the standards of a state actor.⁵⁷ "Unlike [other] entities, which merely provided public services, the USOC has been endowed by the Federal Government with the exclusive power to serve a unique national, administrative, adjudicative, and representative role."⁵⁸ The USOC performs important governmental functions, and a sufficiently close nexus exists between the USOC and the government.⁵⁹ The public nature of the USOC lends weight to the argument that the organization should be considered a state actor.⁶⁰

52. The state action theory contends that actions must be undertaken by government, rather than by a private actor, to be subject to the Amendments of the United States Constitution. See generally *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 721 (1961); *International Olympic Committee v. San Francisco Arts & Athletics*, 781 F.2d 733, 737 (1986).

53. 483 U.S. 522 (1987). Petitioners appealed an injunction granted by the lower courts enjoining the use of the word "Olympic" to promote the "Gay Olympic Games." *Id.* at 525-27. They argued, among other things, that the USOC enforcement of exclusive use of the word was discriminatory under the Fifth Amendment. *Id.* at 542.

54. *Id.*

55. *Id.* at 543-44.

56. *Id.* at 545. "This Court has also found action to be governmental action when the challenged entity performs functions that have been 'traditionally the exclusive prerogative of the Federal Government.'" *Id.* at 544. (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)). The Court held that the USOC was performing a function usually maintained by private entities. *Id.* at 544-45.

57. See *id.* at 548-60 (Brennan, J., dissenting).

58. *Id.* at 555 (Brennan, J., dissenting).

59. *Id.* at 548-49. The close nexus between the two parties allows the USOC's actions to be treated as those of the government. See *id.* (Brennan, J., dissenting).

60. *Id.* at 556-57. The dissent states several reasons that the USOC should be held to the standards of a state actor, including: its representative capacity to the world; Presidential opposition to American participating in the 1980 summer Games in Moscow (coupled with the threat of cuts in federal aid to the USOC); a Congressional grant to the USOC, giving the Committee unprecedented authority over all private American organizations involved in international competition; public hearing and reporting requirements; the unique symbiotic relationship between the USOC and the government, thus satisfying the requisite conditions of state action as stated in *Burton v. Wilmington*

District courts have followed in the footsteps of the Supreme Court, and found the USOC to be a private actor in other contexts.⁶¹ However, the recent Supreme Court holding in *Brentwood Academy v. Tennessee Secondary School Athletic Association* concludes that private athletic associations may be held to the standards of a state actor.⁶² The Court relied on the entwinement between state officials and the association. "Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards..."⁶³ The Court stressed the need to conduct a fact-intensive inquiry in assessing whether state action exists.⁶⁴ In this case, the Association was comprised primarily of public schools whose officials perform the majority of its tasks.⁶⁵ Their significant entwinement rendered the Association a state actor.⁶⁶

Brentwood Academy illustrates that the Court may be shifting to the belief that athletic associations may in fact be state actors if their level of government involvement is deemed substantial.⁶⁷ Coupled with the persuasive dissent of the four Justices in *San Francisco Arts & Athletics*, the argument in favor finding state action on the part of the USOC

Parking Authority, 365 U.S. 715 (1961). *See id.* at 550-63 (Brennan, J., dissenting).

61. *See Reynolds v. Athletic Congress of the U.S.A., Inc.*, 1991 U.S. Dist. LEXIS 21191 (S.D. Ohio 1991). The plaintiff in this case, a world class athlete, filed suit alleging that the defendant violated his Fifth Amendment due process rights when investigating a doping violation (amongst other claims). *Id.* at 3. The court cited to the holding in *San Francisco Arts & Athletics*, reaffirming that the USOC is not in fact a state actor. *Id.* at 23. The plaintiff attempted to distinguish the Supreme Court case from the case at hand, stating that the only issue before the Court in *San Francisco Arts & Athletics* involved trademark matters. *Id.* at 24-25. However, the court in *Reynolds* held that the issue and facts to be "virtually identical to those in the instant case, and therefore, the same considerations that prompted the Supreme Court to conclude that actions taken by the USOC was not that of a state actor compels this Court to reach a similar decision. . . ." *Id.* at 25.

62. 531 U.S. 288 (2001). *Brentwood Academy* sued the Association in response to a regulatory enforcement proceeding involving the recruitment of athletes. *Id.* at 293. The petitioner claimed enforcement by the Association was state action and violated the First and Fourteenth Amendment. *Id.*

63. *Id.* at 302.

64. *Id.* at 298. The Court distinguished *Brentwood Academy* from *Nat'l Collegiate Athletic Ass'n. v Tarkanian*, 488 U.S. 179 (1988), based on the facts of each case. *See id.* at 297-98. The Court failed to find state action present on the part of the NCAA in *Tarkanian*. *Id.* at 297. NCAA policies were created by several hundred member institutions, rather than by an organization comprised of public schools all within one state. *Id.* at 297-98. Significant involvement of these statewide public institutions and public officials with the Association led the party to be deemed a state actor in *Brentwood Academy*. *See id.* at 298.

65. *See id.* at 299-301.

66. *Id.* at 298.

67. *See id.*

becomes more cogent.

In deciding that women should not be able to procreate or abort their fetuses to gain an added competitive edge, constitutional rights are being directly implicated.⁶⁸ The USOC, as a domestic satellite of the IOC, should be deemed a state actor in order to properly effectuate the constitutional interests set forth in this comment.

V. DOMESTIC PRACTICAL AND CONSTITUTIONAL CONCERNS REGARDING ATTEMPTED REGULATION OF THE PREGNANCY/ABORTION-DOPING SCHEME BY THE INTERNATIONAL OLYMPIC COMMITTEE.

The International Olympic Committee anti-doping committee has yet to “open a season on pregnant women athletes.”⁶⁹ While the practice is currently not prohibited as a doping method⁷⁰, this section will explore the quandaries of regulation.

Although it may first seem superfluous to attempt to regulate this practice, it might in fact be judicious. Prince de Merode stated that the “IOC will not be policing motherhood.”⁷¹ Yet should they? Under domestic law, the abortion-doping scheme is not illegal.⁷² However, legality should not be the sole factor in allowing for a purposeful absence of regulation.

In customizing a rule to curtail this form of blood-doping, it is imperative to note that all pregnant athletes can not be included in the regulation.⁷³ Legal advice given to the Australian Women’s National Basketball League, as well as other sporting leagues, centers around the premise that teams cannot prevent a pregnant athlete from competing.⁷⁴ To do so would constitute discrimination under equal opportunity laws.⁷⁵

68. See generally *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Roe v. Wade*, 410 U.S. 113 (1973).

69. Mikailov, *supra* note 38.

70. The scheme is not enumerated in the United States Olympic Movement Doping Code. See *Olympic Movement Anti-Doping Code*, http://multimedia.olympic.org/pdf/en_report_21.pdf (last viewed Feb. 1, 2003).

71. Ormsby, *supra* note 44.

72. *Id.* The former Vice-President of the IOC said that the practice was not illegal. *Id.* The international charter of anti-doping procedures is morally, rather than legally, binding. *Id.* Moral enforcement makes regulation impracticable: “U.S. Olympic regulations ban the ‘pregnancy/abortion doping scheme’, though it’s basically an unenforceable law.” McGovern, *supra* note 24.

73. Howell, *supra* note 31. While safety and liability risks are greater for pregnant athletes, the choice to participate is left to the respective competitors. See generally *id.*

74. *Id.*

75. *Id.* Sports law expert Brian Ward referred to the pregnancy regulations as a conundrum, stating “whichever alley way of the law you walk down, you run into some strange results.” *Id.*

In addition, teams would have to deal with issues of disclosure, testing, and legal right of the unborn child.⁷⁶ There would also exist the difficult task of determining the cut-off point amongst players in their early stages of pregnancy. These issues have persuaded leagues to refrain from creating a blanket ban against pregnant competitors.⁷⁷

The World Tae Kwon Do Federation, however, supposedly bans the abortion-doping scheme.⁷⁸ All it takes is one federation to fuel the fire of legislation. In light of current IOC anti-doping procedures, it has been stated that testing can not be both enforceable and fair.⁷⁹ As stated by a scientist who administered testing in the Salt Lake Games, "everything we do assumes the athletes are guilty, meanwhile the ones who are really clever get away with it anyway."⁸⁰ Perhaps new regulations should be enacted to ensure that the determined female doper should not go free.

The next two Sections will explore the benefits and problems of regulating this highly complex area. Two forms of regulation are considered - the first generally targeting the link between doping and intentional pregnancy, and the second specifically aimed at curtailing the abortion-doping practice.

A. *Regulating Pregnancy: A Woman's Right to Procreate*

The natural phenomenon of motherhood is being exploited for the sake of securing a prized medal in the Olympic Games.⁸¹ The link between motherhood and medal-status may be more than just a coincidence.⁸² Potential regulations would target those women who are getting pregnant solely to gain a competitive edge.

Before we may assess the constitutionality of a regulation targeted at prohibiting female athletes from immorally reaping the beneficial effects of pregnancy, a sample regulation needs to be crafted. In order to effectuate the proper prohibition of doping via pregnancy, a regulation may read similar to the following, and would be contained in Appendix A

76. *See id.*

77. Howell, *supra* note 31.

78. *Getting Pregnant to Abort...an Olympic Twist*, Feb. 6, 2002, available at, <http://www.operationrescuewest.org/news/2002Feb6LDI.asp> (last viewed Sept. 18 2002). According to Operation Rescue West, this is the only sport that tests for pregnancy and bans the practice under its blood doping code. *Id.*

79. Dyer & Owen, *supra* note 15.

80. *Id.* Quote from Don Catlin, University of California, Los Angeles.

81. *See* Smith, *supra* note 34.

82. *See* McGregor, *supra* note 28. Experts and coaches believe that both physical and sociological factors positively influence pregnant athletes. *Id.*

of the Anti-Doping Code, under the title “Prohibited Classes of Substances and Prohibited Methods.”⁸³

Prohibited Methods include the following examples: Intentional impregnation for the sole purpose of deriving a competitive physical benefit similar to that of blood doping.

A regulation aimed at remedying this problem must be narrowly structured as to specifically target only those women who may purposely conceive, perhaps even via artificial insemination, to ‘legally’ obtain the prohibited effects of blood doping.⁸⁴

Procreation is a basic right.⁸⁵ The Court in *Skinner v. Oklahoma* promulgated procreation to be “fundamental to the very existence and survival of the race.”⁸⁶ Strict scrutiny must be utilized to review the sample regulation proscribing pregnancy-doping.⁸⁷ “[P]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”⁸⁸ Any regulation encroaching on the right to procreate must serve a compelling state interest and be narrowly tailored to successfully accomplish its legislative goal.⁸⁹

The compelling interest served by this regulation reflects the IOC’s goal of eliminating the practice of doping from international sport.⁹⁰

83. The Olympic Movement Anti-Doping Code, under Appendix A, Prohibited Classes of Substances and Prohibited Methods, states that blood doping and pharmacological, chemical and physical manipulation are prohibited, *available at* http://www.usantidoping.org/files/USADA_Guide.pdf (last viewed Oct. 11, 2002).

84. *See* Ormsby, *supra* note 36.

85. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). The Court considered the constitutionality of Oklahoma’s Habitual Criminal Sterilization Act, which called for the sterilization of certain habitual criminals. *Id.* at 536. The Act was declared unconstitutional, as it violated the equal protection clause contained in the Fourteenth Amendment. *Id.* at 538.

86. *Id.* at 541.

87. *Id.* The *Skinner* Court emphasized the use of strict scrutiny in determining the constitutionality of basic liberties. *Id.*

88. *Griswold v. Connecticut*, 381 U.S. 479, 497-98 (1965) (Goldberg, J., concurring) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

89. *Id.* at 497-98 (Goldberg, J., concurring). Concurring Justice Goldberg used a strict scrutiny standard in protecting the fundamental and basic right of marriage. *Id.* at 499 (Goldberg, J., concurring). The concurrence held that a state statute forbidding persons from using or dispensing contraception failed to meet the strict scrutiny standard. *Id.* at 485 (Goldberg, J., concurring). The statute was unnecessarily intrusive upon the fundamental right of marriage and violated the right of privacy. *Id.* at 485-86 (Goldberg, J., concurring).

90. Preamble of the Olympic Movement Anti-Doping Code, http://multimedia.olympic.org/pdf/en_report_21.pdf, (last viewed Oct. 10, 2002):

Whereas one of the fundamental objectives of the Olympic Movement is to completely eliminate doping from sport, the adoption of the Olympic Movement Anti-Doping Code reflects the solidarity of the entire Olympic Movement in the achievement of such a goal, and

“Doping is fundamentally against the ethos of the spirit of the Olympic Games: the fair game.”⁹¹ While the Greek Olympics were cancelled as a result of corruption,⁹² the IOC is doing everything in its powers to reduce the evil of doping.⁹³ Eliminating all forms of doping may be viewed as a legitimate interest, judged by the various anti-doping codes that are in effect and growing in size.⁹⁴ In establishing a valid regulation against abortion-doping, this sense of fairness and justice must be upheld to remind both legislators and players of the need for an equal playing field.

While the regulation would prohibit pregnancy as a means of doping, and may obliquely qualify as a necessary measure to curtail the practice, the regulation is overbroad, discriminatory, and thus unconstitutional.⁹⁵ It appears that any regulation with the goal of preventing a woman’s purposeful impregnation to ensure a physical competitive edge in vying for the gold may unjustly reach all pregnant athletes and violate the sacristy of our inherent right to procreate. Enforcement of this regulation would entail making theoretically impracticable judgments as to why a woman became pregnant. Such estimations violate a woman’s right to privacy, and may lead to invidious forms of discrimination by the International Olympic Committee.⁹⁶

Married women who become pregnant, whether by accident or by choice, would appear to remain untouched by the sample regulation. Whether their pregnancy was a means to obtain a legal doping advantage

the primary means to achieve this result will be continuing education regarding the ethical values of sport and the dangers, both physical and moral, of doping, this Code must be effective to deal with doping cases as they arise.

Id.

91. *FAQ About Doping*, <http://www.wada-ama.org/en/t3.asp?p=30463> (last visited Feb. 1, 2002).

92. McGovern, *supra* note 24.

93. Clarey, *supra* note 20.

94. Christopher Clarey, *The Olympic Ringmaster; Vantage Point*, INT’L HERALD TRIB., July 29, 2002, at 12. The addition of new banned substances is helping to reduce the evil of doping. *See id.* Three positive tests at the 2002 Winter Games were linked to the new substance darbepoetin. *Id.* “The IOC was able to test for it because of cooperation with the pharmaceutical companies and the man who was the driving force in its development.” *Id.*

95. A statute violates the overbreadth doctrine if reaches more people than intended: “[I]t is clear that the state interest. . . can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with. . .” *Griswold*, 381 U.S. at 498 (Goldberg, J., concurring).

96. The Court in *Skinner* held that sterilizing criminals who committed grand larceny, while providing immunity for embezzlers, was an example of invidious discrimination. *See Skinner*, 316 U.S. at 541-52. “When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it has selected a particular race or nationality for oppressive treatment.” *Id.* at 541.

over other competitors remains masked by their protected marital status.⁹⁷ Young, single women face the risk of stereotypical images of family norms weighing against their potential 'legitimate' pregnancy. Public policy weighs against making a determination as to why such an athlete became pregnant. Even if we consider the extreme case in which a teenage athlete conceives through artificial insemination, it may be impossible to actually determine that she became pregnant for doping reasons. Cultural boundaries may improperly serve to shape our views of legitimacy. The impracticality of determining the reasons behind the pregnancy renders the regulation overbroad and void.

B. Regulating Abortion: A Woman's Right to Privacy and Autonomy

Athletes engage in the abortion-doping scheme to benefit from the advantageous physical effects of their pregnancy, then terminate the life of their unborn child.⁹⁸ While the pregnancy is the actual cause of the doping effect, the previous Section illustrates the constitutional boundaries faced in regulating pregnant athletes. A narrower regulation may be constructed to target those women who obtain abortions either before or after competition. Abortion often serves as an indicative sign of unwanted pregnancy, however, it may also be a means to end intentional conception.⁹⁹

A sample regulation proscribing female Olympians from not only getting pregnant prior to the Olympic Games, but also obtaining an abortion either before or after competition may read like the following and would also be contained in Appendix A of the Anti-Doping Code, under the title "Prohibited Classes of Substances and Prohibited Methods:"¹⁰⁰

Prohibited Methods include the following examples: Intentional impregnation followed by abortion for the sole purpose of deriving a competitive physical benefit similar to that of blood doping.

97. See *Griswold*, 381 U.S. at 495 (Goldberg, J., concurring). Single women, however, enjoy the same fundamental right to procreation as married women. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972). See also *Carey v. Population Services, Int'l*, 431 U.S. 678 (1977) (extending the right of privacy in procreative matters to minors).

98. See Ormsby, *supra* note 36.

99. According to one study, only 7 percent of abortions are so called 'hard cases'. *Why Women Have Abortions, National Right to Life*, at <http://www.nrlc.org/abortion/facts/reasonsabortions.html> (last visited Jan. 24, 2003). Of these 7 percent, 3% are due to maternal health problems, 3% are performed as a result of fetal health problems, and 1% are due to rape or incest. *Id.*

100. See *Guide to Prohibited Classes of Substances and Prohibited Methods of Doping*, *supra* note 83.

This regulation presents an entirely new set of constitutional issues different from the previous instruction generally targeted at proscribing only intentional pregnancy.

The foremost judicial opinion relative to the regulation of abortion is the landmark case of *Roe v. Wade*.¹⁰¹ The plaintiff, a single and pregnant female, challenged the constitutionality of a Texas criminal abortion statute.¹⁰² She claimed the statute “abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth and Fourteenth Amendments.”¹⁰³

The Court recognized that the Constitution fails to explicitly mention the right to privacy.¹⁰⁴ However, the Court has held that the right is in fact entitled to constitutional protection.¹⁰⁵ The right of privacy encompasses a female’s decision whether or not to voluntarily terminate her pregnancy.¹⁰⁶ While the Court concluded that this right to choose may be necessary, it is not absolute.¹⁰⁷ The unqualified right must be weighed against important state interests when implementing legislation.¹⁰⁸

The *Roe* Court adopted a method of strict scrutiny in its analysis of abortion regulation.¹⁰⁹ When fundamental rights are involved, regulation may be legitimate if a compelling state interest exists.¹¹⁰ State determinations serving to protect health and prenatal life are constitutionally justifiable.¹¹¹ The court in *Roe* held that the compelling point comes at the end of the first trimester of pregnancy.¹¹² After this point, the state may step in and regulate the abortion procedure to protect

101. 410 U.S. 113 (1973).

102. *See id.* at 120.

103. *Id.*

104. *Id.* at 152.

105. *Roe*, 410 U.S. at 152.

106. *Id.* at 153. In discussing this right to privacy, the Court enumerated several factors which illustrate the importance of a woman’s right to choose. *Id.* They include: medically diagnosable harm; a distressful life and future; psychological harm; mental and physical health; additional distress resulting from unwanted care; the potential stigma of unwed motherhood. *Id.*

107. *Id.* at 153-54.

In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one’s body as one pleases bears a close relationship to the right of privacy previously articulated in the Court’s decisions. The Court has refused to recognize an unlimited right of this kind in the past.

Id. at 154.

108. *Id.*

109. *See Roe*, 410 U.S. at 155-56.

110. *Id.* at 155.

111. *Id.* at 156.

112. *Id.* at 163.

maternal health.¹¹³ Before this compelling point, the woman's doctor may determine, without state interference, that the pregnancy may be terminated.¹¹⁴ Such an action would be free from the reaches of state regulation.¹¹⁵ Prior to the point of viability, the decision to abort is primarily a medical decision, upon which responsibility rests with a physician.¹¹⁶

Subsequent to *Roe*, the benchmark case of *Planned Parenthood of Southeastern Pennsylvania v. Casey* redefined the potential to regulate abortion.¹¹⁷ The Court reaffirmed *Roe*, but adopted a less stringent method of analysis by adopting an "undue burden" standard.¹¹⁸ With an abandonment of strict scrutiny, the Court found the undue burden test to be the appropriate means of unifying the government's interests with that of the constitutional right of liberty.¹¹⁹

The Court equated the undue burden standard with the "effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."¹²⁰ Statutes regulating abortion should seek to provide greater information regarding a woman's choice rather than hinder it.¹²¹ Regulations that further a legitimate state interest yet serve as a substantial obstacle to a woman's right to choose are impermissible.¹²² Measures will be upheld if they are reasonably related to the state's goal of persuading women to choose childbirth over abortion.¹²³ The Court also held that, as in *Roe*, the State cannot prohibit the termination of a pregnancy prior to the stage of viability.¹²⁴

113. *Roe*, 410 U.S. at 163.

114. *Id.*

115. *Id.* The state may wish to protect fetal life after the fetus reaches a period of viability, meaning that the fetus is capable of life outside of the womb. *Id.* The state may proscribe abortion after viability in order to protect the fetus, except when abortion is necessary to protect the mother's health. *Id.* at 163-64.

116. *Id.* at 166.

117. 505 U.S. 833 (1992). In this case, several abortion clinics, as well as one physician, challenged the constitutionality of the Pennsylvania Abortion Control Act of 1982. *Id.* at 844-45. The Act essentially imposed informed consent procedures upon a woman seeking an abortion. *Id.* at 844. Plaintiffs sought declaratory and injunctive relief. *Id.* at 845.

118. *See id.* at 846. The Court also abandoned the trimester approach used in *Roe*. *Id.* at 872.

119. *Id.* at 876.

120. *Id.* at 877.

121. *Casey*, 505 U.S. at 877.

122. *Id.*

123. *Id.* at 878.

124. *Id.* at 879. States can, however, ensure that the woman's choice is informed:

Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and

While the Court has determined that a woman's right to privacy and autonomy is not absolute, it has yet to determine a consistent standard of review in abortion cases.¹²⁵ It appears that the International Olympic Committee will be unable to proscribe abortion during an athlete's first trimester of pregnancy and only so after viability if it meets the strict scrutiny standards of *Roe*¹²⁶ or fails to cause an undue burden under *Casey*¹²⁷. For purposes of this Section, focus will be centered on the more recent case law.

Under the undue burden standard pronounced in *Casey*, the question arises as to whether this regulation is a substantial obstacle to a woman's right to choose.¹²⁸ In order to implement a regulation that will survive constitutional scrutiny, the legislation must strike a balance between the right of choice and the right to privacy with the integrity of the Olympic Games.

Forcing an athlete to forgo her chance of fulfilling her greatest athletic accomplishment certainly is an obstacle to a woman's right to choose. Once again, the IOC is faced with the problem of determining the intent behind the pregnancy. If we consider the case in which a teenager becomes pregnant via artificial insemination only to have an abortion a few months later, the target audience behind the sample regulation is effectively illustrated. This regulation must be so narrowly crafted as to focus on this category of potential offenders. However, females may legitimately decide to end their unwanted or unexpected pregnancy if they so choose, and their reasons behind abortion may remain undiscoverable.

In one view, the IOC is not in fact disallowing Olympians from obtaining an abortion. The sample regulation is not per se prohibiting women from having an abortion. Athletes would be prohibited from competing if they obtained an abortion to terminate a pregnancy conceived for the sole purpose of doping. Women are still given a choice- either they may abort their fetus or compete for the gold. Whether this choice constitutes an undue burden may be weighed against the primary goal of eliminating the practice of doping in international sport.

While the sample regulation faces serious contention, one factor worth

that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself.

Id. at 872.

125. *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 651 (1994). While the *Casey* Court utilized the undue burden test, there was no majority holding. *Id.*

126. *Roe*, 410 U.S. at 155-56.

127. *Casey*, 505 U.S. at 876-77.

128. *Id.* at 877.

considering may increase its prospects when facing constitutional rigor. Perhaps the strongest argument in favor of regulating the abortion-doping scheme relates to protecting the female athlete's health. "[A]bortion planned after the key competition represents a significant danger for the woman if carried out in a non-medical environment by unexperienced hands. There may also be a great psychological impact."¹²⁹ The increased awareness of the beneficial effects of pregnancy, combined with the negative stigma that may attach to those who take part in the abortion-doping scheme may lead athletes to obtain the surgical procedure from untrained persons. Proscribing the abortion-doping scheme would theoretically eliminate this window of danger. However, in order to properly eliminate this practice, both athletes and physicians need to be included the scope of the regulation. In addition, an exception must be made allowing abortion when the health of the mother or fetus is endangered.

This sample regulation may survive constitutional scrutiny, only to be subject to the challenges described in the following Section.

C. Additional Problems With Implementing Anti-Abortion Blood Doping Regulation

Regardless of how narrowly tailored the anti-abortion regulation may be, a myriad of obstacles challenge its potential for successful implementation. To begin with, it is necessary to address the problem of detection. Violators are not going to leave a paper trail behind them, so the actual detection of the abortion will be difficult. However, testing for the abortion is not scientifically infeasible. It remains possible to detect pregnancy after aborting the fetus, and pregnancy tests would still identify traces of the hormone HCG in the body.¹³⁰ It may take six to twenty-four months after a terminated pregnancy for the female body to resume its

129. *Principal Doping Substances and Their Side Effects*, A compilation prepared for the International Cycling Union, at http://www.uci.ch/english/health_sante/docs/side_effects.pdf (last visited Feb. 1, 2003). The report considered numerous doping methods and their health consequences. According to the study, pregnancy was given its own heading of doping methods, and contained the following information regarding potential doping effects:

In terms of doping, the desired effect is the increase in cardiac capacity during the first months of pregnancy. Later there is an increase in blood volume, in the number of red blood cells and in hemoglobin. Apparently the resulting enhancement in oxygen delivery to the muscles translates into a 10% increase in the deployment of effort.

Id.

130. *During/After You Test FAQ's*, <http://www.factplus.com/faq.asp?test=after&langCode=USENG> (last visited Oct. 3, 2002).

normal hormonal balance.¹³¹ While testing would not identify with any certainty whether an athlete actually had an abortion, it would indicate a suspect hormonal imbalance. Perhaps this imbalance would serve as just cause for further investigation.

Such ‘pregnancy’ tests may or may not become a mandatory part of anti-doping control. While it may be possible to see if the athlete is indeed pregnant, this would serve as an overinclusive means of testing. Yet mandatory pregnancy testing of randomly selected participants may violate the Fourth Amendment.¹³² Probable cause may be needed to properly administer such testing. In the case of *Gruenke v. Seip*, a high school swim coach allegedly required a female swim team member to take a pregnancy test.¹³³ The Court of Appeals for the Third Circuit held that public school officials are prohibited from conducting unreasonable searches and seizures.¹³⁴ The court, however, noted that the constitutionality of a search depends upon its reasonableness.¹³⁵ Reasonableness may be determined by conducting a balancing test of the government’s interests against the individual’s privacy expectations.¹³⁶

The Supreme Court recently declared that a school policy requiring all students participating in competitive extracurricular activities to submit to drug testing to be constitutional in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*.¹³⁷ Respondents alleged that the Policy violated the Fourth Amendment as incorporated by the Fourteenth Amendment¹³⁸, and stated that the Policy neither addressed

131. *Physical Recovery After an Abortion*, <http://www.afterabortion.com/physical.html> (last visited Oct. 3, 2002).

132. *Gruenke v. Seip*, 225 F.3d 290, 300 (3d Cir. 2000). “The Fourth Amendment of the Constitution protects individuals from unreasonable searches and seizures by the government.” *Id.*

133. *Id.* at 295.

134. *Id.* at 300.

135. *Id.*

136. *Id.* at 301. Despite the fact that the Court determined that student athletes have a limited expectation of privacy, the court ultimately held that schools, absent a legitimate health concern regarding the female or her unborn child, cannot compel a student to take a pregnancy test. *Id.*

137. 536 U.S. 822, 825 (2002). Two students at Tecumseh High School challenged the school’s drug testing policy, which

requires all middle and high school students to consent to drug testing in order to participate in any extracurricular activity. . . Under the policy, students are required to take a drug test before participating in an extracurricular activity, must submit to random drug testing while participating in that activity, and must agree to be tested at any time upon reasonable suspicion.

Id. at 826.

138. *Id.* at 827. “The Fourth Amendment of the United States Constitution protects ‘the rights of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.’” *Id.* at 828. The Court must therefore consider the reasonableness of the school’s

a special need nor proposed to remedy a problem within the District.¹³⁹ The Court performed a balancing test, weighing the intrusion against the student's Fourth Amendment rights versus legitimate government interests.¹⁴⁰

The Court addressed the fact that students, like athletes, have a limited expected privacy interest.¹⁴¹ Compared with the School District's important objective in preventing drug use, the Court held that the Policy was in fact reasonable.¹⁴² Testing without regard to suspicion can be legitimate.¹⁴³ In light of this context, it appears that it would be constitutionally permissible for the International Olympic Committee to investigate possible abortion-dopers, and to do so regardless of actual suspicion. Considering the significance of the anti-doping crusade, testing may be reasonable.

In determining whether testing may be done to determine whether an athlete is pregnant or has already aborted the fetus, the search may be reasonable if it is classified under the umbrella of anti-blood doping control. The purpose of such testing is not to infringe on the right of would-be mothers, but rather to distinguish motherhood from deception. Probable cause may be assumed if the physical signs of pregnancy, often times difficult to disguise, become apparent. Symptoms of pregnancy include nausea and vomiting, increased urination, and unusual fatigue.¹⁴⁴ However, these signs alone will not presume that the athlete has committed a doping violation.

The IOC policy of strict liability for doping offenses poses another problem. Athletes generally believe that they have the reason for their positive test results.¹⁴⁵ However, the IOC is not interested in their reasons, and holds the athlete responsible if the prohibited substance is found in their body.¹⁴⁶ "It is deemed to have improved your performance, whether

policy. *Id.* See also *Gruenke*, 225 F.3d at 300.

139. *Earls*, 536 U.S. at 827.

140. *Id.* at 830.

141. *Id.* at 830-31.

142. See *id.* at 837.

143. See *Earls*, 122 S. Ct. at 837. Respondents argued that testing must be based on individualized suspicion because it would be less intrusive. *Id.* However, the Court rejected this argument based on the premise that the Fourth Amendment does not require individualized suspicion. *Id.*

144. *Your Health: Could I Be Pregnant?*, at <http://www.crha-health.ab.ca/htthconn/items/could.htm> (last visited Feb. 1, 2003).

145. *Symposium: Panel II: Regulations Governing Drugs and Performance Enhancers in Sports*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 337, 360 (2002).

146. *Id.*

it did or not, since usually you do not get tested unless you won or placed very highly in your event, so there is an irrebuttable presumption of an improved performance.”¹⁴⁷ This policy significantly burdens potential anti-abortion doping regulation.

It may appear extreme to strip athletes of their medals because they test positive for finding traces of cold medicine in their urine¹⁴⁸, but the IOC policy of strict liability is strictly enforced. How can this policy be adapted to regulating the abortion-doping scheme? Prohibiting athletes from competing or depriving them of their medals based solely on the fact that they had an abortion directly implicates a woman’s right to choose. The IOC could potentially require females to document whether they have had an abortion prior to competition. However, this presents issues of medical privacy and confidentiality.¹⁴⁹

Another facet of the regulation that we must examine relates to the invasiveness of possible testing for such procedures. Olympians are required to subject themselves to numerous tests that impede their privacy. One example of such testing is gender verification.¹⁵⁰ Competitors in elite women’s events must prove they are female by undergoing a sex test.¹⁵¹ The purpose of such testing is to prevent males from impersonating or masquerading as females.¹⁵² While the IOC temporarily abandoned mass screening of participants prior to the 2000 Sydney Games, the prospect of ad hoc testing remains if testing is deemed warranted.¹⁵³ This example illustrates the extensity of testing Olympians are subjected to in order to uphold the utmost level of competitive fairness. The physical invasiveness of testing for pregnancy or for an abnormal hormonal imbalance

147. *Id.* at 360-61 (quoting Madeline Oliveau, who served on a Panel of Arbitrators in the 2000 Sydney Games).

148. *See* Abrahamson, *supra* note 10.

149. *See* Bonnie DeSimone, *Drug Talk Hits Higher Level, Lance Armstrong's and Other Cyclists' Use of Sleeping Tents That Simulate High Altitude Stirs Controversy*, CHICAGO TRIB., July 28, 2002, at 11. Medical privacy may in fact stretch the loophole that allows athletes to take medications on a sports federation’s banned list of substances. As long as prescriptions are kept confidential, the credibility of the detection process will be questioned. *See id.*

150. Hayden Opie, *Medico-Legal Issues in Sport: The View From the Grandstand*, 23 SYDNEY L. REV. 375, 396 (2001). Many multi-sport events, including the Olympics and the Commonwealth Games, require such testing. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 396-97. Original means of sex testing required “athletes to parade nude before a panel of physicians and even direct gynecologic examination.” *Id.* In 1968 however the Olympic Committee began using a buccal smear to determine an athlete’s sex. *Id.* A buccal smear involves scraping cells from the tongue. *See* Buccal Smear, <http://www.nlm.nih.gov/medlineplus/ency/imagepage/9140.htm> (last visited Oct. 27, 2002).

(potentially indicating a recent abortion) would be minimal, as testing would be done through urine samples. However, legal invasiveness presents the more difficult, and more controversial, problem.

Another issue to be considered regards the statute of limitations. The question of whether a time restriction should be integrated into the anti-doping code remains unresolved.¹⁵⁴ “The United States is very keen that there should be no statute of limitations on drug cheats... Europeans feel there should be some limitation.”¹⁵⁵ While enforcing a statute of limitations affects all dopers, it may have a particular impact on abortion-dopers. Athletes who obtain an abortion either before or after competition are willingly exposing themselves and their potential doping scheme to physicians and other medical personnel.¹⁵⁶ Individuals contemplating reporting violations would be bound by time constraints. As the issue regarding the implementation of a statute of limitations remains unsettled, the effect of this measure on the abortion-doping scheme is unclear.

VI. CONCLUSION

This comment addressed an issue, perhaps little known, that permeates our international sporting arena. Female athletes have learned that the miracle of life may hold the key to Olympic victory. This simplistic form of doping is arguably the most objectionable. However, disapproval has not lead to recourse.

At the very least, regulation hopefully will have an ethical and moral impact on athletes. The International Olympic Committee must ultimately prove that proscribing abortion-doping serves the compelling interest of eradicating the practice of doping in the Olympics. While it appears that the regulation focusing on generally prohibiting intentional pregnancy would more clearly be unconstitutional, the abortion-doping regulation, if narrowly tailored, may survive Constitutional scrutiny.

Regulation may pass constitutional rigor if it is narrowly tailored to the specific goal of preventing doping via abortion, and only affect those

154. See Mihir Bose, *Red Tape and In-Fighting Mean a Concerted Policy to Expose Drug Cheats Seems As Far Away as Ever*, DAILY TELEGRAPH (London), Aug. 30, 2002, at 4.

155. *Id.* Rich Young, an advisor to the World Anti-Doping Agency stated: “If a doping offence can be unmasked then that is a deterrent even 30 years later.” *Id.*

156. However, females also have the option of using the abortion-pill, RU-486, providing greater independence and self-sufficiency while accomplishing the intended doping effect. See Sally Pook, *Greater Access to Abortion Pill Criticised*, <http://www.telegraph.co.uk/news/main.jhtml>, Aug. 7, 2002. “When a woman takes drugs, they are much more conscious of everything that is happening. They see it as the more natural option.” *Id.*

seeking to get pregnant for the sole purpose of gaining a competitive edge. However since this seems nearly impossible to successfully enforce, the abortion doping scheme may continue to exist as a chosen means amongst medal-driven female athletes.

Abortion-doping can be described in one word: heinous. Not only is it arguably the most objectionable form of doping, it is also considered by some to be the most objectionable form of abortion.¹⁵⁷ “This is an example of what President Bush declared to be definitely wrong: the purposeful creation of human life with the undeniable aim of destroying it.”¹⁵⁸ Even the most avid of pro-choicers would be hard-pressed to find merit to this scheme.

“Their performance and courage symbolise the Olympic spirit. The myth of the hero always emerges from profound emotional experiences. Each Olympian bears a message of sharing, respect and resolve.”¹⁵⁹ Perhaps in an idealistic world this would be true. Until the Olympics become emancipated from all forms of doping, this maxim surrenders to the sometimes nefarious goal of winning the gold.

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157. Nic Samojluk, *Winter Olympic Surprises*, at <http://www.sdaforum.net/winterolympicsurprises.html> (Mar. 1, 2002). The author states: “What is the price of winning in this case? The life of the unborn. The athlete is trading their developing baby for a piece of gold, silver or bronze. In doing this, she reveals the low esteem she has about both fairness and the value of human life.” *Id.*

158. *Id.*

159. Athletes, http://www.olympic.org/uk/athletes/index_uk.asp (last visited Feb. 1, 2003).