Gender Verification Testing: Balancing the Rights of Female Athletes with a Scandal-Free Olympic Games

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Introduction

This Note discusses the little-known controversy surrounding the test used by the International Olympic Committee (IOC) to verify the gender of all female Olympic athletes. The IOC's reason for using the test is to prevent men from competing in women's events.[1] Although this topic has generated controversy in the medical field,[2] it has been largely ignored by the legal community. This Note discusses the constitutional problems with the gender verification test and proposes an alternative method for the athletes who are subjected to the test.

This Note highlights two areas of constitutional concern and suggests possible alternatives. First, this Note examines a possible Fourth Amendment violation, including a comparison of drug testing cases with the IOC's use of gender testing, and considers issues of reasonableness, consent, privacy, and other competing interests.

Next, this Note examines the equal protection problems posed by gender testing. Since only women are required to take the test, this Note will discuss the standard of review and attempt to determine if the test violates the right of female athletes to equal protection of the laws. Additional areas of concern beyond the scope of this Note are jurisdiction of a United States court over the IOC and standing of an athlete to sue the IOC.[3]

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1. *See infra* notes 5-8 and accompanying text.

2. Albert de la Chapelle, *Gender Verification of Female Athletes*, LANCET at 1265 (1987) [hereinafter de la Chapelle, *Gender Verification*]; Albert de la Chapelle, *The Use and Misuse of Sex Chromatin Screening for Gender Identification of Female Athletes*, 256 JAMA 1920 (1986) [hereinafter de la Chapelle, *Use and Misuse of Sex Chromatin*].

3. If these constitutional concerns became the subject of a lawsuit by an American athlete or athletes, a major hurdle would be whether or not the IOC can even be subject to United States jurisdiction. No court has ever directly faced that question. *See generally* James C. Goettel, Note, *Is the International Olympic Committee Amenable to Suit in a United States Court?*, 7 FORDHAM INT'L L.J. 61-82 (1983-84) (concluding that the IOC has the legal capacity to be sued, but that foreign policy considerations compel restraint). *See also* International Organizations Immunities Act, 22 U.S.C.A. § 288 (West 1990); Amateur Sports Act, 36

Three possible solutions exist to the problems posed by the gender verification test. First, continue using the current test on the theory that the integrity of the Olympic Games is at stake. Second, abolish the test completely in order to restore dignity to female athletes, despite the small probability of a male athlete perpetrating fraud upon the Olympics by competing in a women's event. Third, devise a different gender test that examines multiple factors, including external appearance and psychological identity, to determine an athlete's sex. This Note argues that the last approach is the fairest to the athletes, yet still provides the IOC with a practical way in which to ensure the separation of men and women in the Olympic Games.

I. The Olympic Gender Verification Test

Since 1968 the International Olympic Committee has required all female competitors to submit to a gender verification test prior to competing in the Olympic Games.[4] The IOC decided to use the test[5] in re-

U.S.C.A. §§ 371-393 (West 1988); International Olympic Committee Charter rule 23, *cited in* Goettel, *supra*, at 65 n.26; RESTATEMENT THIRD OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 301 (nonbinding agreements), § 302 (treaties and international agreements subject to prohibition of Bill of Rights), § 321 (implication that international obligations survive restrictions imposed by domestic law) (1987).

For case law on this subject, see DeFrantz v. United States Olympic Comm., 492 F. Supp. 1181 (D.D.C. 1980) (The court decided that the United States Olympic Committee was not a state actor when, under pressure from the Carter Administration, it decided not to send a team to the Moscow Summer Olympics. The court also concluded that the USOC is bound by the rules and regulations of the IOC.); Martin v. International Olympic Comm., 740 F.2d 670 (9th Cir. 1984) (The court denied plaintiffs' request for a preliminary injunction to require the IOC to include certain events for women already offered for men because plaintiffs failed to demonstrate a fair chance of success on the merits of their gender discrimination claim. Therefore, the court did not reach the issue of amenability to suit.); Liang Ren-Guey v. Lake Placid 1980 Olympic Games, Inc., 424 N.Y.S.2d 535, *aff'd*, 403 N.E.2d 178 (1980) (refusing to become involved in the "two Chinas" problem because of the political ramifications, the court thus did not reach the question of jurisdiction but referred to the IOC as having final authority on all questions concerning the Olympic Games); United States Olympic Comm. v. International Sports Marketing, Inc., 737 F.2d 263 (2d Cir. 1984) (stating that the IOC Charter is not a treaty ratified in accordance with constitutional requirements).

Related to the question of jurisdiction is the issue of standing of American athletes, either by themselves or by USOC representation, to sue the IOC in a United States court. The requirements for standing are specifically spelled out in Warth v. Seldin, 422 U.S. 490 (1975), and cases cited therein.

4. Paul Majendie, *Hurry for Your Sex Test, Says Gender Verification Doctor*, REUTERS LIBRARY REPORT, Sept. 16, 1988, *available in* LEXIS, Nexis Library, REUTER File.

5. Prior to the World Track and Field Championships held in August 1991 in Japan, the International Amateur Athletic Federation (IAAF), which is the governing body for track and field, decided not to use the gender verification test. Instead, the IAAF required that each team's physician perform a medical exam of the female athletes prior to competition. *See* Gary Caruso, *Physical Exam to Determine Sex of Athletes*, NAT'L SPORTS DAILY, June 6, 1991, at 13. This new test was criticized as an inappropriate procedure for a team doctor to perform. David Powell, *Sex Tests Cause Complaint*, TIMES NEWSPAPERS, Aug. 21, 1991,

sponse to "rumors of men masquerading as women and 'women who were not really women' competing in the Games."[6] The IOC's rationale for separating men and women in most events is to allow for a matching of persons of equal strength[7] "to prevent unfair competition."[8] History has recorded two examples of athletes, competing before the test was required, who were thought to be women and later assumed to be men.[9] One athlete who actually won medals in the 1964 Olympics was later discovered to be a man when a medical commission composed entirely of men detected the presence of a male, or Y, chromosome.[10] However,

available in LEXIS, Nexis Library, TTIMES File; Peter Hildreth, *Athletics: Britain to Oppose New Sex Testing Formula For Tokyo*, THE DAILY TELEGRAPH, Aug. 4, 1991, *available in* LEXIS, Nexis Library, TELEGR File; *New Sex Test at Track Meets*, CHI. TRIB., July 31, 1991, at 3. The *National Sports Daily* also reported that in light of the IAAF's actions, the IOC was considering adopting a similar gender verification test. Caruso, *supra*.

As of September 19, 1991, the IOC had "shelved" the possibility of replacing the gender verification test with a medical exam. However, such a test will be used in the future "where the sex of a female athlete [is] in severe doubt." *IOC Shelves Idea of Compulsory Physical Sex Tests*, REUTERS LIBRARY REPORT, Sept. 19, 1991, *available in* LEXIS, Nexis Library, REUTER File; Telephone Interview with Don Catlin, M.D., United States representative to the IOC Medical Commission (Oct. 2, 1991).

For the 1992 Winter Olympics in Albertville, France, a new test was proposed to replace the buccal smear/cheek scraping test. *Id. See infra* note 15. A blood test was to be performed on all female athletes to determine if they were genetically female. Ideally, the same type of information about sex chromosomes is detected in blood as it is in skin cells. *Id.* The blood test, however, is imperfect. Dr. Catlin stated that he was told by gender specialists that the flaws in the blood test are *equivalent* to the flaws in the buccal smear test. *Id. See* M.A. Ferguson-Smith, *Olympic Row Over Sex Testing*, 355 NATURE 10 (Jan. 2, 1992) (the author argues that a test for Y-specific DNA ("polymerase" method) is just as bad, in response to Christopher Anderson, *Olympic Row Over Sex Testing*, 353 NATURE 784 (Oct. 31, 1991).

However, the suggested blood test was not used. Instead, the IOC employed a similar cheek scraping test. "Like its predecessor, known as the Barr test, the Dingeon method [or polymerase method] screens for anomalies by laboratory analysis of cell samples scraped from the inside of a competitor's mouth." Paul Holmes, *Olympic Chiefs Brush Off Sex Test Storm*, THE REUTERS LIBRARY REPORT, Jan. 29, 1992, *available in* LEXIS, Nexis Library, REUTER File. "Dingeon's procedure looks for the presence of the male 'Y' chromosone [sic] while the Barr test checked the 'double-X' female chromosome." *Id.* The French medical association claimed the Dingeon test is "intrusive and unreliable." John Powers, *Can't Drive to this Albertville; The Olympics*, THE BOSTON GLOBE, Feb. 2, 1992, at 68. In essence, therefore, nothing has changed.

6. Alison Carlson, *When is a Woman Not a Woman?*, WOMEN'S SPORTS & FITNESS, Mar. 1991, at 26; Lori Ewing, *Gender Testing Unfair*, CALGARY HERALD, Jan. 12, 1992, at F6 ("The incidence of men masquerading as women in sport is negligible.").

7. *Experts Say Competitive Advantage Holds for MD Tennis Star Despite Sex Change*, MED. TRIB., Sept. 22, 1976, at 37.

8. Carlson, *supra* note 6, at 28.

9. *See infra* note 184 and accompanying text. Additionally, an Austrian ski racer who competed as a woman was discovered to be a man in the late 1960s after fathering a child. Barr, *When it Comes to Drugs, Alpine Ski Racers are 'Clean'*, UNITED PRESS INT'L, Feb. 6, 1989, *available in* LEXIS, Nexis Library, UPI File.

10. Lisa M. Bassis, Note, *A Legal Conundrum—Transsexuals in Athletics*, 1 COMM/ENT 369, 371 (1977). *See infra* note 184 and accompanying text. This one known incident,

since 1968 when the test was first used, no imposter has ever been discovered attempting to compete in the Olympics.[11]

The gender verification test, also known as the "Barr body test"[12] or the "sex chromatin test,"[13] seeks to identify genetic males, such as transsexuals, and females with chromosomal disorders that allegedly give them an unfair advantage.[14] The test consists of a buccal smear taken from the inside of the athlete's mouth. The sample is then examined for the requisite XX female sex chromosome.[15] If the correct chromosomes are present, the athlete is issued a femininity card[16] and is then allowed to compete.[17] If anything other than XX chromosomes appears, or if the test results are inconclusive, further testing is done, including a gynecological exam.[18] Although the IOC does not release the results of the test, no one has ever failed the test because they were discovered to be a man masquerading as a woman.[19]

The test's value is questionable. If neither a transsexual nor a man masquerading as a woman has ever been caught by the test, why does the

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although arguably relevant for the retention of the gender verification test, does not justify its retention in light of the relevant constitutional considerations.

11. Larry Doyle, *Doctors Hit Olympic Sex Testing*, UNITED PRESS INT'L, Oct. 10, 1986, *available in* LEXIS, Nexis Library, UPI File.

12. Dianne Klein, *Sex Must Be Explicit at the XXIII Olympic Games*, UNITED PRESS INT'L, July 30, 1984, *available in* LEXIS, Nexis Library, UPI File.

13. *Gender Test for Athletes Called into Question*, REUTERS LTD., Oct. 10, 1986, *available in* LEXIS, Nexis Library, REUTER File.

14. Doyle, *supra* note 11.

15. *See* de la Chapelle, *The Use and Misuse of Sex Chromatin*, *supra* note 2, at 1921; Description of Femininity Test as received from the United States Olympic Committee (on file with the author). A buccal smear is a scraping of the inside of a person's mouth for a sample of skin cells. For a description of the genetic makeup of male sex chromosomes, see *infra* note 34 and accompanying text.

16. *SEC Commissioner Tops List for Olympic Post*, CHI. TRIB., Oct. 14, 1987, at 3.

17. Majendie, *supra* note 4.

18. Bassis, *supra* note 10, at 382; *see* de la Chapelle, *Use and Misuse of Sex Chromatin*, *supra* note 2, at 1920-21. Both articles cite the International Olympic Committe Medical Controls for the Montreal Olympics in 1976 and the Los Angeles Olympics in 1984. The pertinent sections of the medical controls are:

> 1. As a screening test, the determination of X and Y chromatin will be conducted on a smear of buccal mucous membrane.
> 2. If the test is inconclusive, the competitor must undergo further tests as determined by the IOC Medical Commission.
> 3. Should the results of these tests require it . . . a physical examination can be prescribed and performed by a physician gynecologist member of or accepted by the Medical Commission.
> 4. The Medical Commission will issue a femininity certificate to those competitors whose test results are conclusive.

The same controls were used at the Seoul Olympics in 1988. No changes are anticipated for the future. Telephone Interview with Bob Beeten, Sports Medicine Division of the USOC (Jan. 28, 1991).

19. De la Chapelle, *Use and Misuse of Sex Chromatin*, *supra* note 2, at 1920.

IOC persist in using it?[20] Does the integrity of the Olympic Games as an international showcase for athletic ability outweigh the possible Fourth Amendment violations and potential invasion of privacy? Should an athlete who knows she is female allow a simple laboratory test to label her as an acceptable female? Female athletes take the test readily.[21] This compliance may be the reason for the lack of legal controversy regarding the IOC's use of the test. In reality, however, an athlete who has trained most of her life to compete in the Olympics is not going to let a simple test get in her way. The female athletes' compliance and the lack of legal controversy, however, do not mean the test is constitutionally valid. In view of the potential constitutional violations, the IOC must have a legitimate interest in continuing to employ the test.[22] To determine if such an interest exists, the history of gender verification in sports must be examined.

II. Gender Verification in Sports — Origins of the Problem

A. The Renee Richards Controversy

Dr. Renee Richards is a male-to-female transsexual who was a nationally ranked tennis player on the men's tour before her sex change operation in 1975. In 1976 she attempted to enter the United States Tennis Open as a woman and was told she had to pass the gender verification test in order to qualify.[23] Until August 1976 the United States Tennis Association (USTA) had not used a gender verification test.[24]

Richards challenged the use of the test, claiming the USTA instituted it only after learning of her sex change operation.[25] She claimed that the USTA's decision to use the test was specifically to prevent her from playing in the Open. Additionally, she claimed that the medical community regarded the test as "insufficient, grossly unfair, inaccurate, faulty and inequitable."[26]

Judge Ascione of the New York Superior Court agreed with Richards. He stated that it was clear that the USTA purposefully instituted the test, knowing that Richards would fail, to prevent her from playing in the Open.[27] Judge Ascione further stated that the only valid reason for employing the gender verification test in the athletic arena is "to pre-

20. "To date, about a dozen *women* in the Olympics have been banned for life from competition for not being sufficiently feminine." Carlson, *supra* note 6, at 26 (emphasis added). *See also* Hildreth, *supra* note 5. These women failed the gender test because of chromosomal abnormalities, not because they were men masquerading as women.

21. Majendie, *supra* note 4.

22. *See infra* notes 166-74 and accompanying text.

23. Richards v. United States Tennis Ass'n, 400 N.Y.S.2d 267, 268 (1977).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 272.

vent fraud, i.e., men masquerading as women, competing against women."[28] In other words, the test could not be used to eliminate a transsexual, such as Richards. Finally, without striking down the gender verification test because of its recognized acceptance[29] in determining sex, he held that it should not be considered as the sole criterion[30] if circumstances warrant consideration of other factors.[31]

The *Richards* decision is the only case that discusses and rules on the gender verification test. It is an unequivocal statement that the purpose of the test is to prevent fraud, which has never occured at the Olympic Games as long as the test has been used.[32] The decision also points out that chromosomes should not be considered alone when determining gender; other criteria are of equal importance, such as psychological identity (which gender the individual perceives him or herself to be), and apparent gender (which gender society views that individual to be).[33] It is this latter point, that chromosomes should not be considered alone, which serves as a starting point for questioning the IOC's use of the gender verification test, and perhaps replacing it with a new test that considers all the criteria.

B. The Legal Definition of Sex

A genetically normal female has XX sex chromosomes, while a genetically normal male has XY sex chromosomes.[34] Genetic aberrations exist, however, that may give an individual an ambiguous gender status.[35] Consequently, the medical community has devised a way to determine a person's sexual status by using a list of eight criteria.[36] No one criterion is more important than any other, and each is weighed equally

28. *Id.*

29. *Id.* at 272-73 ("acceptable tool for determining sex").

30. *See infra* note 36 and accompanying text.

31. *Richards*, 400 N.Y.S.2d at 273. The decision suggests that other factors should be carefully weighed. In *Richards* the judge considered the USTA's intent in requiring Dr. Richards take the test. *Id.* at 272. The court also weighed the medical evidence which attested to Dr. Richards' sexual identity as a female. *Id.* at 271-72.

32. Doyle, *supra* note 11.

33. *Richards*, 400 N.Y.S.2d at 270-72.

34. Bassis, *supra* note 10, at 373 n.20 (citing J. MONEY, SEX ERRORS OF THE BODY 15-21 (1968)).

35. Bassis, *supra* note 10, at 374 n.22 (citing J. MONEY & A. EHRHARDT, MAN AND WOMAN, BOY AND GIRL 29-35 (1972)).

36. The eight criteria include the following:

when used to determine a person's sex.[37]

The legal community has embraced these criteria for defining sex. In *M.T v. J.T.*,[38] the New Jersey Superior Court held that a male-to-female transsexual was a female for marital purposes.[39] In support of its decision, the court stated that "there are several criteria or standards which may be relevant in determining the sex of an individual."[40] The court emphasized the importance of a person's emotional sense of sexual identity.[41] The court further stated that because "certain regulated sports activities" require sex differentiation, more than one type of test may be important.[42]

In *Anonymous v. Mellon*, the court refused to order the plaintiff's birth record changed to reflect the fact that she was a female as a result of a sex change operation.[43] The court cited *Richards*, however, to support its conclusion that no one factor is determinative of a person's sex.[44] In fact, the court went so far as to state that "basing determination of gender upon any one indicator might well lead to an unwarranted conclusion."[45]

Other courts and commentators state that all eight criteria must be considered, but that a person's psychological sense of gender identity may be the most important criterion.[46] How a person perceives him or herself may be of more value than physiology.[47]

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1. sex chromosome constitution
2. sex hormonal pattern
3. gonadal sex (testes or ovaries)
4. internal sex organs
5. external genitalia
6. secondary sexual characteristics
7. apparent sex (as presumed by others and, consequently, the role in which a person is reared)
8. psychological sex or gender identity (that which a person presumes him or herself to be)

See Bassis, *supra* note 10, at 374; Edward S. David, Comment, *The Law and Transsexualism: A Faltering Response to a Conceptual Dilemma*, 7 CONN. L. REV. 288, 290-91 (1974-75).

37. Anonymous v. Mellon, 398 N.Y.S.2d 99, 102 (1977). The *Richards* decision focused on Dr. Richards' sexual identity, which may indicate that that factor is more important than the rest of the criteria.

38. 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976).

39. *Id.* at 211.

40. *Id.* at 208. Among the criteria, the court included anatomical sex and psychological sex. *Id.* at 207.

41. *Id.* at 209.

42. *Id.*

43. 398 N.Y.S.2d 99 (1977).

44. *Id.* at 101.

45. *Id.*

46. Richards v. United States Tennis Ass'n, 400 N.Y.S.2d 267, 271-72 (1977); *In re* Anonymous, 293 N.Y.S.2d 834, 838 (1968); David, *supra* note 36, at 292.

47. *In re* Anonymous, 293 N.Y.S.2d 834; David, *supra* note 36, at 292.

The legal community's acceptance of the eight criteria for determining sex underscores the arbitrariness of the IOC's use of the gender verification test. By using only sex chromosomes to define sex, the IOC is arbitrarily choosing to ignore several other equally important factors. Not only is the IOC method contrary to that which is espoused by the legal community, but it has also come under attack in the medical community, which derides the gender verification test as fundamentally unsound and unfair.[48]

C. Medical Criticism of the Test

Medical experts consider the gender verification test to be inaccurate and unfair.[49] According to Drs. Albert de la Chapelle and Joe Simpson, the purpose of screening all female athletes is to exclude from women's events males or other individuals whose muscle strength or body build provides them with an unfair competitive advantage over other genetically correct women.[50] Both doctors believe the sex chromosome screening method to be inaccurate and discriminatory because it identifies women with genetic defects who have no muscular advantage, while at the same time misses individuals who do have such an advantage.[51] For instance, Dr. de la Chapelle claims that the sex chromosome test will not reveal women who have taken hormones to increase their muscular strength.[52] Certain other women are treated unfairly by the test simply because they were born with abnormal genetic conditions. Such women might not have the requisite XX chromosomes, but have female body proportions, female external genitalia, female muscle strength, and a female psychological and social condition.[53] In every sense, other than genetic makeup, these people are female. Because of their abnormal sex chromosomes, however, they will not be allowed to compete even though they have no advantage over their competition. De la Chapelle claims to have had "personal experience" with women belonging to this category who have been denied a career in sports because they did not possess the correct genetic make-up.[54]

To further illustrate the unfairness of the test, certain types of genetically abnormal "males" would pass as "females" and would be allowed to compete. Normal males have XY sex chromosomes.[55] A man born

48. De la Chapelle, *Use and Misuse of Sex Chromatin*, *supra* note 2, at 1920; Joe L. Simpson, *Gender Testing in the Olympics*, 256 JAMA 1983 (1986).

49. De la Chapelle, *Use and Misuse of Sex Chromatin*, *supra* note 2, at 1920.

50. *Id.*

51. *Id.* at 1923; Simpson, *supra* note 48, at 1983.

52. De la Chapelle, *Use and Misuse of Sex Chromatin*, *supra* note 2, at 1921.

53. *Id.* at 1922.

54. *Id.*; *see also* Carlson, *supra* note 6, at 28; David Miller, *Women Caught in Gender Trap*, TIMES NEWSPAPERS, Nov. 6, 1990, *available in* LEXIS, Nexis Library, TTIMES File.

55. De la Chapelle, *Use and Misuse of Sex Chromatin*, *supra* note 2, at 1922.

with a genetic abnormality of XXY[56] would pass the test as a female, although the Y chromosome identifies him as a man.[57] A man born with XX sex chromosomes[58] would also pass the test because he has no Y chromosome to identify him as male.[59] Both XXY and XX males may have a normal male body build, male muscle strength, and a male psychological and social orientation.[60]

One of the IOC's prime concerns is to match people of equal strength by preventing men from competing against women.[61] If a male athlete who was aware of his genetic defect attempted to compete in a women's event, what would the IOC officials do? Presumably, their first reaction would be to say that he looks like a male so he must be male and, therefore, cannot compete in a women's event. Suppose our hypothetical male, knowing of his genetic abnormality, submitted to the gender verification test. He would pass! The IOC only considers chromosomes when determining sex, so theoretically this man could compete in a women's event.

Although this scenario is very remote, it illustrates that the test does not serve the purpose for which the IOC employs it. Because a genetically abnormal "male" would pass the test, and a genetically abnormal "female" with no competitive advantage whatsoever would fail, the test is indeed inaccurate and unfair.

Proponents of the test might counter that this scenario is so remote that it really does not affect the validity of the test. If such scenarios are indeed remote, however, why have the test at all? Are men really going to try to compete in women's events in the Olympics? It is not likely.

If the test is not needed, yet is retained, the next step to consider is whether the gender verification test imposes constitutional problems. As the following analysis will show, the IOC must demonstrate a protectable interest that outweighs Fourth Amendment and equal protection concerns to justify retention of the test.

III. Constitutional Concerns

A. The Fourth Amendment

1. State Action

In order to bring a cause of action under the Fourth Amendment, the plaintiff must allege that the offending party was operating under

56. A male with XXY chromosomes has "Klinefelter's syndrome." *Id.*

57. *Id.*

58. This is known as "XX male syndrome." *Id.*

59. *Id.*; de la Chapelle, *Gender Verification*, *supra* note 2, at 1266.

60. De la Chapelle, *Use and Misuse of Sex Chromatin*, *supra* note 2, at 1922.

61. *Experts Say Competitive Advantage Holds for MD Tennis Star Despite Sex Change*, *supra* note 7, at 37.

color of state law.[62] In *National Collegiate Athletic Association v. Tarkanian*, the Supreme Court held that the NCAA is not a state actor.[63] The Court pointed out that the NCAA's rules,[64] which influenced the University of Nevada's decision to suspend Jerry Tarkanian, were independent of any particular state.[65] The University's decision to adopt the NCAA's recommendations was not sufficient to show that the NCAA was acting under color of state law.[66]

Based on this decision, the IOC would probably not be a state actor, since the NCAA is the closest comparison to the IOC. However, it may be possible to find state action if the United States Olympic Committee (USOC) is targeted as the offending party. In *San Francisco Arts and Athletics v. United States Olympic Committee*,[67] the Supreme Court held that the USOC was not a state actor.[68] The Court stated that the USOC remained a private actor, even though it was extensively regulated by Congress.[69] Additionally, "[n]either the conduct nor the coordination of amateur sports has been a traditional governmental function."[70] In his dissent, Justice Brennan argued that "[t]he USOC performs a distinctive, traditional governmental function [because] it represents this Nation to the world community."[71] He stated that Congress had "[p]atently . . . endowed the USOC with traditional governmental powers that enable it to perform a governmental function."[72] Justice Brennan also wrote about the *effect* of the Olympics when he stated that "[e]very aspect of the Olympic pageant . . . reinforces the national significance of Olympic participation."[73] "[I]n the eye of the public . . . the connection between the decisions of the United States Government and those of the United States Olympic Committee is profound."[74] Justice Brennan believed the

62. Burton v. Wilmington Parking Auth., 365 U.S. 715, 721-22 (1961); Monroe v. Pape, 365 U.S. 167, 172 (1961).

63. 488 U.S. 179, 193-95 (1988).

64. The rule violations at issue were recruiting violations. *Id.* at 185.

65. *Id.* at 193. The NCAA has a membership of "several hundred other public and private member institutions . . . ." *Id.*

66. *Id.* at 195.

67. 483 U.S. 522 (1987).

68. The USOC was established under federal law. 36 U.S.C.A. § 1101(46) (West 1988). Congress granted the USOC a corporate charter, *id.* § 371, and imposed certain requirements on it. For example, it must remain apolitical, *id.* § 377, and report its operations and expenditures of grant money to Congress, *id.* § 382(a).

69. *SFAA*, 483 U.S. at 544.

70. *Id.* at 545.

71. *Id.* at 550.

72. *Id.* at 549. In a footnote, Justice Brennan argued that the Court had never expressly limited the definition of a government function as a function " 'traditionally the exclusive prerogative' of the government." *Id.* at 549-50 n.1 (citations omitted).

73. *Id.* at 551.

74. *Id.* at 557.

USOC was a state actor because of the obvious connection between the USOC and the United States government.

Although current Supreme Court law does not consider the USOC or the NCAA a state actor, California law has gone the other direction. In *Hill v. National Collegiate Athletic Association*,[75] the Court of Appeal found that the California constitutional guarantee of privacy[76] reached both governmental and non-governmental conduct.[77] Since the NCAA had already been found to be a private actor in *Tarkanian*,[78] it was required to show a compelling interest[79] in testing student-athletes for drug use because " '[p]rivacy is protected not merely against state action; it is considered an inalienable right . . . .' "[80] Because the court relied on privacy grounds rather than Fourth Amendment grounds, the NCAA had a heavier burden.[81] The court stated that Fourth Amendment analysis requires a balancing of the intrusion against a legitimate governmental interest.[82] In a privacy analysis, the government must show that its interest is compelling, and this is more difficult than Fourth Amendment analysis, which requires only a showing of a legitimate governmental interest.[83]

The IOC is not a state, but it acts in a similar fashion because of its control over American athletes in the Games. Furthermore, the rules promulgated by the IOC Executive Board are not statutes, but they function in an analagous manner. The IOC is the governing body for the Olympics.[84] It alone has the power to make the rules and regulations that control the Games.[85] All Olympic athletes, therefore, are required to abide by the IOC's rules. It has "coercive power"[86] and its "regulation of [Olympic] athletics is a traditionally exclusive prerogative . . . ."[87]

Based on *Tarkanian* and *San Francisco Arts and Athletics*, neither the NCAA or the USOC is a state actor for purposes of Fourth Amendment analysis. Most likely, the IOC is not a state actor either. However,

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75. 273 Cal. Rptr. 402 (Ct. App. 1990), *review granted*, 801 P.2d 1070 (Cal. 1990).

76. CAL. CONST. art. I, § 1.

77. *Hill*, 273 Cal. Rptr. at 408.

78. National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988). *See supra* notes 63-66 and accompanying text.

79. *Hill*, 273 Cal. Rptr. at 410.

80. *Id.* at 408 (quoting Porten v. University of San Francisco, 134 Cal. Rptr. 839 (Cal. App. 1976)).

81. *Id.* at 410.

82. *Id.*

83. *Id.*

84. "The IOC is the final authority on all questions concerning the Olympic Games and the Olympic movement." IOC Charter rule 23, *cited in* Goettel, *supra* note 2, at 65-66 n.26.

85. Goettel, *supra* note 3, at 65-66.

86. O'Halloran v. University of Washington, 679 F. Supp. 997, 1002 (W.D. Wash. 1988), *rev. on other grounds*, 856 F.2d 1375 (9th Cir. 1988).

87. *Id.*

the USOC might be held to the same privacy analysis as the NCAA was in *Hill* if the Olympics were held in California. The USOC would then have to show a compelling interest in the gender verification test that would outweigh the privacy guarantee. As shown above, the IOC would not be able to show such an interest. The effect of *Hill* is to alleviate the state action problem and make the USOC, and probably the IOC, answerable to the California constitutional guarantee of privacy.

2. *Search and Seizure*

The Fourth Amendment of the Constitution expressly guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[88] In *Katz v. United States*, the Supreme Court held that the Fourth Amendment protects "people, not places."[89] However, the Court included an important caveat: "What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection."[90] Therefore, a person's physiognomy would not be protected because as she walks down the street she is "knowingly" exposing herself to public scrutiny. In order to invoke Fourth Amendment protection, an individual must establish that (1) there was no warrant (no probable cause); (2) the search was unreasonable; and (3) consent was not procured.[91]

Although no court has addressed whether the gender verification test satisfies the Fourth Amendment, courts have considered drug testing of employees and of athletes. Most notably, the Court's decisions in *Skinner v. Railway Labor Executives Association*[92] and *National Treasury Employees Union v. Von Raab*[93] upheld the government's right to impose blood and urine tests on, respectively, railroad employees and Customs Service agents.

In *Skinner*, the Court held that the government's drug testing program was an administrative search.[94] The government's interest in regulating the conduct of railroad employees, however, presented a special need that went beyond law enforcement and justified a departure from normal warrant and probable cause requirements.[95] Here, the govern-

88. U.S. CONST. amend. IV.

89. 389 U.S. 347, 351 (1967).

90. *Id.*

91. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (cited in Allison Rose, Comment, *Mandatory Drug Testing of College Athletes: Are Athletes Being Denied Their Constitutional Rights?*, 16 PEPP. L. REV. 45, 59 (1988)).

92. 489 U.S. 602 (1989).

93. 489 U.S. 656 (1989).

94. *Skinner*, 489 U.S. at 621 n.5

95. "When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in the particular context." *Id.* at 619.

ment was concerned about railroad safety and, in particular, drug and alcohol use by employees when on the job. The Court admitted that when the balance of interests precludes a showing of probable cause, there must be individualized suspicion. No such requirement was needed in *Skinner*, however, because the Court deemed the employees' privacy interests minimal. Furthermore, the government interest in administering drug tests immediately following an accident would be jeopardized by requiring individualized suspicion. Therefore, in this particular context, the search was reasonable and outweighed privacy concerns because the government's interest in testing was compelling.[96]

In *Von Raab*, the Court upheld the government's right to impose drug tests on Customs agents who carried firearms or handled classified material.[97] As in *Skinner*, the Court explained that although this was an administrative search, probable cause was not necessary when "the Government seeks to *prevent* the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person."[98] The government has a compelling interest in ensuring the safety and integrity of the borders.[99] This interest, which allows the government to conduct suspicionless searches, outweighs the Customs agents' privacy interests.[100]

In both *Skinner* and *Von Raab*, the government was able to demonstrate a compelling interest for imposing the drug tests that outweighed the employees' privacy interests. The IOC, however, cannot prove a compelling interest. Since the IOC does not release the results of the gender verification test,[101] it does not have the facts on its side to justify using the test. Justice Scalia, who dissented in *Von Raab*, objected to what he saw as the non-existence of "real evidence of a real problem that will be solved by urine testing . . . ."[102] The IOC cannot point to even one instance of a man masquerading as a woman who managed to compete in the Olympics since the test was instituted. Although proponents of the test might argue that this is precisely why the test should remain intact, search and seizure doctrine requires the government to prove its need *before* implementing the invasive procedure.[103]

96. *Id.* at 628.

97. 489 U.S. at 677.

98. *Id.* at 668 (emphasis added).

99. *Id.* at 672.

100. *Id.* at 668.

101. *See supra* note 19 and accompanying text.

102. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting). Justice Scalia said that the Customs Service rules were "a kind of immolation of privacy . . . ." *Id.* The government, he said, was unable to present "*even a single instance* in which any of the speculated horribles actually occurred . . . ." *Id.* at 683.

103. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 621-22 (1988) (discussing the warrant/probable cause requirement); Capua v. City of Plainfield, 643 F. Supp. 1507, 1513

Although both *Skinner* and *Von Raab* concern drug testing of employees, they represent the highest authority regarding when the government can impose drug tests without fulfilling the probable cause requirement of an administrative search. The IOC tests athletes, however, not employees, so analysis of drug testing cases involving athletes is warranted.

In *O'Halloran v. University of Washington*,[104] a student-athlete challenged the NCAA's drug testing program.[105] The court decided two Fourth Amendment issues: (1) whether a urine test constitutes a search, and (2) if it is a search, whether a reasonable expectation of privacy is infringed.[106] The court held that a urine test was a search, but that it did not infringe on the athlete's privacy.[107] The court found that the test was reasonable in light of a student-athlete's diminished expectation of privacy.[108] The court stressed that in a university athletic program there is "an element of communal undress,"[109] and a concern for the health of the student athletes.[110] Additionally, the court found that the University of Washington and the NCAA had a "compelling interest"[111] in the health and safety of the athletes[112] and in the integrity of athletic competitions.[113] The NCAA was able to support its interest with factual evidence that the use of drugs by college athletes was indeed a problem.[114] The court concluded that the interests of the University of Washington and the NCAA outweighed the relatively small compromise of privacy.[115]

The Seventh Circuit upheld a high school's drug testing program in *Schaill v. Tippecanoe County School Corp.*[116] There, the plaintiff objected to a urine test required by the school district for all students who partici-

(D.N.J. 1986) (same). See *infra* notes 132-43 and accompanying text, for a discussion of invasive procedures.

104. 679 F. Supp. 997 (W.D. Wash. 1988), *rev'd on other grounds*, 856 F.2d 1375 (9th Cir. 1988).

105. *Id.* at 998.

106. *Id.* at 1002.

107. *Id.*

108. *Id.* "[O]f primary importance is the health and safety of the student-athlete and the ideal of fair and equitable competitions." *Id.* at 1003.

109. *Id.* at 1005.

110. *Id.*

111. *Id.* at 1002.

112. *Id.* at 1003.

113. *Id.*

114. "The NCAA's grounds for suspicion are past incidents of improper drug use by athletes." *Id.* at 1004.

115. *Id.* at 1002. "[T]he interest in testing is great and benefits redound to the student-athlete as well when competitions are fair, peer pressure and temptations to use drugs are reduced, and their health is protected." *Id.* at 1006.

116. 864 F.2d 1309 (7th Cir. 1988).

pated in interscholastic sports.[117] The court found a urine test to be a search because of the reasonable expectation of privacy associated with passing one's urine.[118] The court, however, found the search to be reasonable in light of the strict guidelines and procedures the school followed. First, the precise program employed by the school district minimalized embarrassment to the student-athletes by not actually monitoring their urination. Second, the school district maintained that the program was only for students participating in interscholastic sports. Furthermore, a positive result would not require a student to be expelled or suspended. The school district had a "substantial"[119] interest in maintaining a drug-free athletic program, and the district could not have used less restrictive measures.[120] In addition, because the students had voluntarily chosen to participate in a regulated off-campus activity, they had a diminished expectation of privacy.[121] Because of these strict guidelines and procedures, the court ruled that the test was not unreasonable, and therefore constitutional.[122]

O'Halloran and *Schaill* illustrate that drug testing in athletic competitions is not a violation of the Fourth Amendment. In the California case *Hill v. National Collegiate Athletic Association*,[123] however, the court decided in favor of the athletes who objected to the NCAA's drug test.[124] In formulating his decision, Judge Premo weighed the athletes' right to privacy against the NCAA's failure to prove that a "compelling" reason existed for violating those rights.[125] Judge Premo based his decision on the guaranteed right to privacy in the California Constitution, which was "intended to reach governmental and nongovernmental conduct."[126] The decision was not made on Fourth Amendment grounds. In California, a privacy interest is balanced against a compelling government interest because it "places a heavier burden on [the proponent] than would a Fourth Amendment privacy analysis."[127] In a Fourth Amendment analysis, the intrusion is balanced against the "promotion of legitimate governmental interests."[128] The California Supreme Court has granted review of the *Hill* decision.[129]

117. *Id.* at 1311.
118. *Id.* at 1311-12.
119. *Id.* at 1322.
120. *Id.*
121. *Id.*
122. *Id.* at 1321-22.
123. 273 Cal. Rptr. 402 (Ct. App. 1990), *review granted*, 801 P.2d 1070 (Cal. 1990).
124. *Id.* at 422.
125. *Id.* at 410.
126. *Id.* at 408.
127. *Id.* at 410.
128. *Id.*
129. Review was granted Dec. 20, 1990. 801 P.2d 1070 (Cal. 1990).

Based on *O'Halloran* and *Schaill*, the central issues in the drug testing cases are (1) does the test qualify as a search, and (2) if so, does the government have a compelling interest that outweighs the athletes' expectation of privacy? If question two is answered in the affirmative, the test is deemed constitutional.

Whether the need for the drug test is "compelling" or "substantial" is unclear, as shown by the decisions above. Neither *O'Halloran* or *Schaill* explicitly states which standard the courts are using. Instead, terms of art, such as "compelling" and "substantial" are used at random without any indication that they are actual standards that the court is following.[130] The Supreme Court held in both *Skinner* and *Von Raab* that when drug testing employees, the government's interest was "compelling"[131] when balanced against the employees' privacy interests. Like the lower courts, the Supreme Court did not explicity state that "compelling" was the appropriate interest the government had to show in drug testing cases,[132] but used the term consistently enough to indicate that that was the level of interest required.

The appropriate standard for gender verification testing is "compelling." The gender verification test is an invasion of personal liberties and is replete with privacy interests. The integrity of an individual's body is a valid interest.[133] Other cases have held that infringements of personal liberty such as forced blood tests,[134] and compelled surgery[135] are instances where a careful analysis must be made to determine if the government should be allowed to proceed.

The circumstances in *O'Halloran*, in which the Court used a compelling interest standard, are more closely related to those of the IOC. The plaintiffs in *O'Halloran* were collegiate athletes; the plaintiffs in *Schaill* were high school athletes. Olympic athletes are more like collegiate athletes in age, years of experience, and training. Fourth Amendment analysis must be applied to gender verification testing. The first question to address is whether a buccal smear, in which an athlete opens her mouth and an instrument is inserted to scrape tissue from the inside of her upper jaw, qualifies as a search?[136] Although a bodily fluid, such as urine or blood, is not being extracted, an instrument is placed

130. *Hill* clearly requires a "compelling" reason, but in a privacy, not a Fourth Amendment, context.

131. Skinner v. Railway Labor Executives Ass'n, 489 U.S 602, 628, 633 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 672, 674, 679 (1989).

132. Words such as "compelling," "substantial," and "rational basis" are used for specific tests in equal protection issues. *See infra* section III.C.

133. *Skinner*, 489 U.S. at 616.

134. Breithaupt v. Abram, 352 U.S. 432 (1957); *see infra* note 136 and accompanying text.

135. Winston v. Lee, 470 U.S. 753 (1985); *see infra* note 144.

136. Description of Femininity Test, *supra* note 15.

within the body and removes a sample of tissue. A determination must be made whether this is equivalent to an extraction of bodily fluids.

In *Breithaupt v. Abram*,[137] the Supreme Court ruled that a blood sample taken from an unconscious person involved in a fatal automobile accident was constitutional because society's interest in drunk driving outweighed the slight intrusion of the person's body.[138] Although the Court did not use the word "compelling," it held that "the individual's right to immunity from such invasion of the body . . . is *far outweighed* by the value of its deterrent effect . . . ."[139]

Nine years later in *Schmerber v. California*,[140], the Court reaffirmed *Breithaupt* in a case involving an extraction of blood from an intoxicated and conscious driver.[141] The Court held that the intrusion was "justified"[142] because the police officer noticed "symptoms of drunkeness"[143] after petitioner's automobile accident. The opinion implies that the justification for the intrusion is grounded in the public's overwhelming interest in highway safety. Additionally, the Court held that the test was reasonable because the extraction of blood is "commonplace in these days of periodic physical examinations."[144]

The similarities and differences between these two cases and the gender verification test are clear. An extraction of blood and tissue sample both involve an instrument penetrating the boundaries of the human body. Neither procedure involves great bodily discomfort.

Despite their procedural similarities, however, the reasons for the tests are different. The nation has an overwhelming interest in keeping its roads and highways safe from drunk drivers. This interest overrides an individual's expectation of privacy and allows for extractions of blood. The IOC's stated interest in using the gender verification test is to ensure the separation of the sexes.[145] Unlike drunk driving, this does not implicate safety.

Similar to the taking of blood is the taking of urine. The court in

137. 352 U.S. 432 (1957).

138. *Id.* at 439.

139. *Id.* (emphasis added).

140. 384 U.S. 757 (1966).

141. *Id.* at 771.

142. *Id.* at 768.

143. *Id.* at 769.

144. *Id.* at 771. The Court listed factors such as the small amount extracted, the little or no pain or risk involved, and the reasonable manner in which the test was performed, to support its holding. *Cf.* Winston v. Lee, 470 U.S. 753 (1985), in which the Commonwealth of Virginia sought to compel Lee, suspected of attempting to commit armed robbery, to undergo surgery with general anesthesia to remove a bullet. The Court held this unreasonable. "A compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime." *Id.* at 759.

145. *See supra* notes 5-8 and acccompanying text.

Capua v. City of Plainfield,[146] however, held that a mass urinalysis of city employees violated the Fourth Amendment.[147] Among its reasons, the court cited the reasonable expectation of privacy in the personal information contained in bodily fluids,[148] the integrity of the body,[149] and the need for individualized suspicion of the person being tested.[150]

Mass urinalysis is similar to mass gender verification testing in many ways. The IOC engages in mass testing by requiring every female who has not already been tested to submit to the test prior to competing. A sample of tissue from an individual's mouth may not be a bodily fluid per se, but it consists of material which is an integral part of a person's body—her cells. A skin cell tissue sample is similar to a blood or urine sample because it consists of cells taken from the inside of a person's body. Furthermore, unlike a urine test but similar to a blood test, gender verification requires an instrument to obtain the cell sample. Thus, just as the taking of a blood or urine sample, a taking of cell tissue from one's mouth is a violation of the body's integrity. Justice Marshall, dissenting in *Skinner v. Railway Labor Executives Association*, stated that the chemical analysis of "blood and urine samples implicates strong privacy interests . . . ."[151] Such analysis reveals medical disorders[152] and is a "periscope through which [the government] can peer into an individual's behavior in her private life, even in her own home."[153]

The court in *Capua* required that there be individualized suspicion, as part of the reasonable suspicion standard.[154] The court agreed that the state's interest in protecting the public from impaired city employees, such as firefighters, was "weighty."[155] Nevertheless, the intrusion on the firefighters' privacy was "severe,"[156] and individualized suspicion was therefore required.

The IOC does not employ the individualized suspicion standard, but easily could apply it. The IOC could examine a person's outward physical appearance to decide whether there is a question about her gender.[157] If this initial examination leads to an individualized suspicion, then the

146. 643 F. Supp. 1507, 1513 (D.N.J. 1986).

147. *Id.* at 1516-22.

148. *Id.* at 1513.

149. *Id.*

150. *Id.* at 1517.

151. Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 647 (1989) (Marshall, J., dissenting).

152. *Id.*

153. *Id.* (quoting Jones v. McKenzie, 833 F.2d 335, 339 (App. D.C. 1987)).

154. *Capua*, 643 F. Supp. at 1517-18.

155. *Id.* at 1517.

156. *Id.* at 1518.

157. *See infra* notes 172-74 and accompanying text.

IOC could require the athlete to submit to the test.[158]

Based on the application of drug testing cases to the gender verification test, the IOC performs a search which violates the athletes' reasonable expectation of privacy. The IOC does not have a safety concern. Although the integrity of the Olympic Games is an important issue, the IOC does not have any facts which warrant the invasive procedure. Therefore, no compelling reason exists to justify the use of the test, and it is thus unreasonable.

3. Consent

A search that would otherwise be unreasonable, and therefore unconstitutional, is nevertheless valid if consent is given.[159] In *Schneckloth v. Bustamonte*, the Court ruled that in order for consent to be valid,

> the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified . . . intrusion against which the Fourth Amendment is directed.[160]

Thus, for consent not to be coerced, the individual must be able to make a voluntary choice. The alternative must be viable, however, to avoid coerced consent.[161]

In the context of the gender verification test, Olympic athletes have no viable alternative. If they refuse to take the test, they cannot compete. They are not coerced explicitly into taking the test, but there is implied coercion because no alternative exists if they refuse. From the perspective of an Olympic-caliber athlete, denial of a chance to compete in the Games after she has qualified could be considered the equivalent of the end of her career in sports.[162] Olympic qualification may be the highpoint of an athlete's life. Therefore, refusing to take the test is not a viable alternative for an athlete.

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158. *See IOC Shelves Idea of Compulsory Physical Sex Tests*, *supra* note 5 (regarding testing in cases of "severe doubt"). It follows that performing a physical exam in cases of severe doubt can only be done if individualized suspicion exists. How will such suspicion be defined? Such a decision must be made on objective grounds, but defining how feminine a woman must appear in order to qualify as a woman is inherently subjective. *See infra* notes 172-74 and accompanying text.

159. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Rose, *supra* note 91, at 63-64.

160. 412 U.S. at 228; *see also* Rose, *supra* note 91, at 64.

161. Rose, *supra* note 91, at 64. "[T]he choice between performing an act or dying constitutes coercion, since death is not a viable alternative." *Id.*

162. Miller, *supra* note 54. (" 'The shock to the women is overwhelming. For the most part, they disappear from sport completely devastated, their careers cut off cruelly and abruptly.' " (quoting Dr. Elizabeth Ferris, former diving champion and medical officer for the Modern Pentathalon Association)).

In support of its position in *Schneckloth*, the Court stated, "[W]hether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of *all of the circumstances*."[163] The rules promulgated by the IOC with respect to gender verification leave no room for an athlete to make any type of choice. She submits to the test because without it she cannot compete. Athough this may appear to be voluntary consent, it is anything but voluntary when examinined in light of all the circumstances. After years of training for the Olympic Games, an athlete who qualifies is not going to let a simple medical procedure that determines her sex stand in her way. Any woman who knows she is a woman would probably view the test as simply another administrative procedure that has to be complied with before she is allowed to compete. This compliance in no way makes the test constitutional, nor is it evidence of voluntary consent.

The athletes know about the test because it is in the IOC Charter and, presumably, they hear about it from other competitors and at other competitions. State of knowledge, however, is only one factor considered when assessing voluntariness of consent.[164] There must be a viable alternative.[165] When viewed in light of all the circumstances, Olympic athletes have absolutely no choice whatsoever in the matter. It is clear from the circumstances that a female athlete's apparent consent is in submission to the IOC's express assertion of authority.

4. The IOC's Interest[166]

In addition to examining the test from the privacy standpoint of the athlete, we must examine the IOC's position because the gender verification test can be considered an administrative search. Specifically, does the IOC have a compelling interest that outweighs the athletes' right to privacy? A two-part argument can be made for the IOC, but it will ultimately fail when compared with the lack of demonstrable need for the test.

First, from the IOC's perspective, it has a compelling interest in using the gender verification test to prevent a scandal from tainting the Games. The IOC could argue that it is of dire importance that no imposter be allowed to enter the Games who has not officially qualified based solely on their athletic ability. Hence, the need for the gender verification test.

163. *Schneckloth*, 412 U.S. at 221 (citing Justice Traynor in People v. Michael, 290 P.2d 852, 854 (1955) (emphasis added)).

164. *Schneckloth*, 412 U.S. at 223.

165. *See* Rose, *supra* note 91, at 64.

166. This includes factors that are additional to those considered in Part III.A.2.

Second, the public has an interest in the Olympic Games because of wide publicity through all major forms of mass media. Those watching the Games expect them to be run in a clean, fair, and professional manner. The Olympics would be reduced to a sham if men could compete in women's events. The public interest combined with the IOC's own interest as the governing body proyide, from the IOC's perspective, a compelling interest in utilizing the gender verification test that may outweigh the athletes' privacy.

In addition to the above concerns, the IOC might argue that another element that needs to be examined and balanced is the method used to carry out the gender verification test. The ultimate determination of a search's reasonableness requires a judicious balancing of the intrusiveness of the search against its promotion of a compelling interest.[167] What is reasonable depends upon how the test is administered.[168] In *Capua v. City of Plainfield*, the court struck down the mass urinalysis program, which was conducted under the surveillance of a testing official.[169] In the context of the gender verification test, the opening of one's mouth followed by a scraping of a tissue sample from the inside of the mouth does not seem to be an unreasonable method when compared to the urinalysis in *Capua*. The IOC's method is very similar to a simple medical procedure that routinely occurs in a doctor's office. Furthermore, for the ultimate purpose of examining an individual's sex chromosomes, the tissue scraping is likely to be the most efficient method. This method of examination seems reasonable and would weigh in the IOC's favor.

The analysis, however, must be taken further. The IOC may not have a compelling interest because according to the available facts, nobody has ever flunked the gender verification test because "she" was male.[170] The IOC does not release the official results of the testing,[171] and with no official verification available, the IOC cannot demonstrate a compelling need for the test. The IOC's interest does not outweigh the intrusion of the athletes' bodies.

An additional consideration is whether the test is justified at precisely the moment it is used. Every female athlete is tested with absolutely no prior scrutiny by Olympic officials to determine if specific facts or reasons would make the test appropriate.[172] Thus, because each athlete is indiscriminately required to take the test, no specific reasons exist in the minds of the officials that could reasonably warrant the test.

167. O'Halloran v. University of Wash., 679 F. Supp. 997, 1002 (W.D. Wash. 1988), *rev. on other grounds*, 856 F.2d 1375 (9th Cir. 1988).

168. Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986).

169. *Capua*, 643 F. Supp. at 1514-15.

170. Majendie, *supra* note 4; Doyle, *supra* note 11.

171. Doyle, *supra* note 11.

172. *Id.*

Every woman, no matter what she looks like, must take the test. If Olympic officials were required to have specific facts and reasons before making an athlete take the test, they would have to examine each woman's physical characteristics before deciding whether the test was warranted. If a particular woman's physical appearance casts some doubt on whether she is indeed a woman, then the officials may have a justifiable reason to administer the test to that particular woman to ensure that she is not male. The simple act of scraping the skin cells would then be considered reasonably related in scope to the circumstances that justified the use of the test.

The above suggestion shows that in order for the test to be justified at the time it is used, the officials must have some suspicion that the woman in front of them may in fact be a man, because the IOC's objective is to keep men from competing in women's events.[173] A woman exhibiting some physical male characteristics would provide the officials with a reason to justify using the test.

This scenario raises some serious questions regarding what standards would be used to determine that a woman does not look enough like a woman. This would be entirely too subjective. The facts available to the official at the moment of the search have to be such that a reasonable person would believe the action was appropriate. Even more degrading than having one's chromosomes examined for proof of gender is having a complete stranger decide a particular woman "looks" too male to actually be a female. Even if the decision were made by a female official, she theoretically would be following official guidelines promulgated by the IOC for purposes of determining if a woman looks female enough to not require testing. This is much too subjective, and proves that to follow these theoretical guidelines would be practically impossible.[174]

C. Equal Protection

The Fourteenth Amendment states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[175] The Fourteenth Amendment applies to the states, and possibly to the USOC.[176] In 1976, the Supreme Court in *Craig v. Boren*[177] articulated a middle-level scrutiny for gender-based classifications. The Court held that the standard required that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[178] In his concurrence, Justice Powell

173. *Experts Say Competitve Advantage Holds for MD Tennis Star Despite Sex Change*, *supra* note 7 ; de la Chapelle, *Use and Misuse of Sex Chromatin*, *supra* note 2, at 1920.

174. Miller, *supra* note 54 ("degrading nude parade").

175. U.S. CONST. amend. XIV, § 1.

176. *See supra* Part III.A.1.

177. 429 U.S. 190 (1976).

178. *Id.* at 197.

stated that the old "rational basis"[179] standard of review had taken on a "sharper focus"[180] when addressing a gender-based classification. Applied to the IOC, *Craig v. Boren* emphasizes the necessity of proving that the gender verification test must be substantially related to achieving the IOC's objectives.

For an equal protection analysis, the gender verification test must be examined to see if it serves an important IOC objective, and if the test is substantially related to the achievement of those objectives. The gender verification test presents an obstacle to female athletes with which male athletes do not have to contend. According to the available medical literature, the test is scientifically flawed and unfair.[181] Furthermore, facts show that the test does not serve an important IOC objective. The IOC's goal in employing the gender verification test is to prevent men from competing in women's events.[182] Despite the unavailability of test results,[183] there is simply a very low likelihood of fraud.[184] Furthermore, according to Dr. de la Chapelle, equality among athletes is impossible to achieve because of varying levels of natural strength among women.[185] Even though the IOC's goal of equality through separation of the sexes is important, the very low chance of fraud combined with women's varying levels of strength prove that the gender verification test does not serve an important IOC objective. Although a man has never been caught trying to enter a women's event, it is possible that a man may try to enter a women's event some day. Based on the past history of the Olympics, however, this is unlikely to happen. The IOC could argue that the test is necessary to ensure a scandal-free Olympic Games.[186] However, Dr. Robert Voy, director of sports medicine for the United States Olympic

179. *Id.* at 211.

180. *Id.*

181. *Supra* notes 49-60 and accompanying text.

182. *Supra* notes 5-8 and accompanying text.

183. Doyle, *supra* note 11.

184. In 1967, a Polish sprinter named Eva Klobukowska, who had competed as a woman and won two medals in the 1964 Olympics (before the gender verification test was used), was discovered to be a man and stripped of his medals. *Doctors: Sex Test to be Done, Done Better at World Indoor Athletics Championships*, XINHUA GENERAL OVERSEAS NEWS SERVICE, Mar. 2, 1989, *available in* LEXIS, Nexis Library, XINHUA File; Majendie, *supra* note 4. *See also* Bassis, *supra* note 10, at 371.

In other instances, two Soviet women who won medals in the 1960 and 1964 Olympics refused to compete rather than submit to testing. *See* Klein, *supra* note 12.

Further research did not locate any other instances in which a medal-winning athlete's sex may have been in doubt.

185. De la Chapelle, *Gender Verification*, *supra* note 2, at 1265.

186. Although there may be some validity to this argument, one need only look at the Ben Johnson scandal to realize that drug tests to prevent artificial athletic enhancement are needed, while other types of tests are not. Ben Johnson was stripped of his gold medal when he was found to have taken muscle producing hormones.

Committee in 1986, discounted gender verification.[187] Gender verification presents no overriding concern for the health, safety, and morals of the Olympic Games.[188]

IV. Conclusion

The gender verification test requires an examination from the point of view of the individual athletes, and from the point of view of the IOC, which has the best interests of the Olympics in mind. The two constitutional arguments regarding the Fourth Amendment, and equal protection, require meticulous balancing of the interests of the athletes and the IOC. The equal protection argument can be resolved in the athletes' favor, because the IOC will not be able to prove that the gender verification test serves an important governmental interest.[189] The outcome of the Fourth Amendment argument with respect to unreasonable search is not as clear. When it is broken down into its individual components and analyzed, the most striking aspect is not the search or the privacy expectations or the consent. It is the IOC's compelling interest in maintaining a scandal-free Olympic Games[190] coupled with the enormous public interest involved.[191]

Despite the Fourth Amendment and equal protection arguments against the test, some may argue that the integrity of the Olympic Games is too important to dislodge the test. If the test were abandoned and a single male athlete was able to perpetrate fraud upon the Olympics by competing in a women's event, the Olympics could possibly lose some of its integrity as the premier showcase for international sport. Because the likelihood of this occurrence is so low, however, that possibility does not outweigh the violation of the athletes' constitutional rights. Therefore, the remote instance of fraud is outweighed by the female athletes' interest in having their dignity restored. Furthermore, integrity of a sports event

187. In his statement, Dr. Voy emphasized the need for drug testing: "[W]e're more concerned about the use of anabolic steroids than we are about the very rare woman with a genetic abnormality." Doyle, *supra* note 11.

188. In a more recent equal protection case, Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1981), the Court held that women did not lack opportunities in nursing which would justify a state-supported all-female university, and therefore a male applicant's right to the equal protection of the laws was violated. *Id.* at 729-31. The Court stated that the party seeking to uphold a statute that classifies individuals on the basis on their gender must carry the burden of proof. *Id.* at 724. The burden is met only by showing that the gender-based classification serves " 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the acheivement of those objectives.' " *Id.* (quoting Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980)). The gender verification test is a gender-based classification which, as shown above, does not serve an important IOC objective.

189. *See supra* notes 181-88 and accompanying text.

190. *See supra* note 166 and accompanying text.

191. *Id.*

is simply not as important as fundamental personal liberties. Because neither retention of the test nor its complete abandonment are advisable, the best way of reconciling the IOC's interest with the dignity of female athletes would be to use a different type of gender verification test.[192] Such a test would examine the eight factors recognized by the legal community as being determinative of sex.[193] This approach would take into consideration not only a person's chromosomes, but her external appearance and her own gender identity.[194] Such an approach supports the idea that an athlete who perceives herself as a woman and wants the world to perceive her in the same way, is a woman no matter what her genetic make-up. This approach satisfies the interests of both the IOC and the individual athletes.

192. During the Winter Olympics in Albertville, the International Amateur Athletic Federation (IAAF) announced it was officially replacing the Barr body test with a simple physical exam. Gina Kolata, *Track Federation Urges End to Gene Test for Femaleness*, THE NEW YORK TIMES, Feb. 12, 1992, at 1. " 'What they really care about are real men who masquerade as women. . . .' And to find them . . . 'it is a whole lot simpler to just look at anatomy than to go through genetic shenanigans.' " *Id.* (quoting Dr. Richard Berkowitz, chairman of obstetrics, gynecology and reproductive science at Mount Sinai Medical School). The IAAF is urging that a physical exam be used for all international competitions. *Id. See also* Michael D. Lemonick, *Genetic Tests Under Fire*, TIME, Feb. 24, 1992, at 65; *supra* note 4.

A physical exam, however, raises serious concerns. Some athletes may feel that a genital examination by a stranger is much more intrusive than a cheek scraping. Furthermore, some standard will have to be followed to enable a doctor to determine if an athlete's genitals look female enough. This raises questions of subjectivity. The IAAF's proposal, while seeking to implement a test which is more fair and won't disqualify from competition women who have abnormal sex chromosomes, seems to be a rather backward proposition. *See* Kolata, *supra*. Indeed, this type of test was used before the Barr body test, and was discarded because it was less scientific and degrading. *Id.* Furthermore, the potential for abuse exists. Pat Rico, a member of the IAAF's women's committee, stated that she knew of athletes who competed in the August 1991 World Track and Field Championships in Tokyo "whose sex verification test consisted of 'pulling up their shirts.' " *Id.*

193. Bassis, *supra* note 10, at 374; David, *supra* note 36, at 290-91.

194. "It might be thought that the easiest solution to a situation in which there are conflicting indications of sex is that the classification should be determined by a majority of the factors . . . . The eighth factor, gender identity, is arguably the most important." David, *supra* note 36, at 292. David does not assume that all eight factors are of equal weight. *Id. Cf.* Anonymous v. Mellon, 398 N.Y.S.2d 99, 102 (1977) (no single criteria is determinative of sex).