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The Case for Equality in Athletics

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DO WOMEN HAVE THE RIGHT TO HAVE the opportunity to participate on an equal basis as members of male teams? If the answer is "yes," the effects would have far-reaching consequences in professional and amateur athletics, college and university competition, and public high school athletic programs.

The major emphasis of this note concerns litigation by female students in public high schools who have attempted to obtain permission to perform on previously all-male teams. The courts have been careful to restrict their decisions to non-contact sports such as tennis,[1] golf,[2] skiing,[3] track,[4] and swimming.[5] Cases related to contact sports such as baseball,[6] and sex discrimination in interscholastic sports in general,[7] are now pending.

In professional athletics, women's attempts to gain entry into certain heretofore all-male sports have generated some litigation. Recent decisions have permitted women to compete as jockeys.[8] Progress has also been made in wrestling,[9] bowling,[10] and baseball.[11] New York courts have ruled that height and weight requirements for employment as a baseball umpire inherently discriminated against women because the Baseball League did not sustain its burden of proof of showing the requirement to be a "bona fide occupational qualification."[12] Title VII of the Civil Rights Act of 1964 prevents discrimination in employment on the basis of sex.[13] The Equal Em-

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[1] Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973).

[2] Haas v. South Bend Community School Corp., 289 N.E.2d 495 (Ind. 1972).

[3] Brenden v. Independent School Dist., 342 F. Supp. 1224 (D. Minn. 1972, *aff'd* 477 F.2d 1292 (8th Cir. 1973).

[4] Hollander v. Connecticut Interscholastic Athletic Conference, Civil No. 124427 (Conn. Super. Ct., New Haven County, March 29, 1971).

[5] Complaint to Department of Human Rights, City of St. Paul, Minn. 55102. A twelve-year-old girl brought a sex discremination complaint against her high school and won the right to compete for a place on the swimming team. *See* WOMEN'S RIGHTS L. RPTR., No. 2, Spring, 1972, at 41.

[6] Broderick v. Board of Educ., Civil No. ..... (N.Y. Sup. Ct., filed .....).

[7] Ritacco v. Norwin School Dist., Civil No. 72-889 (W.D. Pa., filed .....).

[8] Rubin v. Florida State Racing Comm'n, Civil No. 6819113 (11th Cir. ....., 1968); Kusner v. Maryland Racing Comm'n, Civil No. 37044 (Md. Civ. Ct., Prince George's County, ..., 1968).

[9] Hesseltine v. State Athletic Comm'n, 6 Ill.2d 129, 126 N.E.2d 631 (1955). *But see* Calzadella v. Dooley, 29 App. Div.2d 152, 286 N.Y.S.2d 510 (1968), where the court held that a State Athletic Commission rule against granting wrestling licenses to female wrestlers was not an unjust and unconstitutional discrimination against women.

[10] SPORTS ILLUSTRATED, Aug. 2, 1971, at 44.

[11] New York Times, Aug. 22, 1971, §V. at 3, col. 8.

[12] New York State Div. of Human Rights v. New York-Pa. Professional Baseball League, 36 App.Div.2d 364, 320 N.Y.S.2d 788 (1971), *aff'd*, 29 N.Y.2d 921, 279 N.E.2d 856 (1972).

[13] 42 U.S.C. §2000-e *et. seq.*

ployment Opportunity Commission's guidelines on the bona fide occupational exception have construed this provision very narrowly. They reject the proposition that an employer can refuse "to hire an individual based on stereotyped characterizations of the sexes."[14] According to the Commission, the exception is primarily to apply "where it is necessary for the purpose of authenticity of genuineness . . . i.e., an actor or actress."[15] Authority for sustaining this view is *Griggs v. Duke Power Co.*, a race case, which states:

> What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.[16]

On the university level, The Higher Education Act of 1972, effective June 23, 1972, contains provisions which prohibit sex discrimination in all federally assisted programs. Title IX of the Higher Education Act states:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .[17]

Institutions cannot be required to grant "preferential or disparate" treatment to members of one sex when an imbalance exists with respect to the number or percentage of persons of one sex participating in or receiving the benefits of federally assisted educational programs or activities.[18] Therefore, pressure is now on the various conferences to strike the word "male" from their eligibility rules where such an imbalance can be shown, so that these schools can keep federal funds. The Big Eight Conference[19] has already made such a determination.[20] This action was taken to allow females to participate in those sports recognized by the Conference — baseball, basketball, cross country, football, indoor and outdoor track, golf, gymnastics, swimming, tennis, and wrestling.

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[14] 29 C.F.R. §1604.1[a][ii](1972).

[15] 29 C.F.R. §1604.1[a][iv][2](1972).

[16] 401 U.S. 424, 436 (1971).

[17] 20 U.S.C. §1681. These sex discrimination provisions are patterned after Title VI of the Civil Rights Act of 1964 which forbids discrimination on the basis of race, color, and national origin in all federally assisted programs.

[18] 20 U.S.C.§1681(b).

[19] Iowa State University, Kansas State University, Oklahoma State University, University of Colorado, University of Kansas, University of Missouri, University of Nebraska, University of Oklahoma.

[20] Big Eight Conference Decision, March 2, 1973 meeting, Minute No. 2295, (2), at 1356. It was voted, "That Conference Rule 2.1 be amended by the deletion of the word 'male,'" thus enabling female participation.

Public high schools have been attacked for discrimination against female students in violation of the fourteenth amendment to the Constitution which states that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[21] An analysis of this premise follows.

State Action Under the Fourteenth Amendment

Jurisdiction has been predicated upon a showing that the various State High School Athletic Associations and the defendant school districts are persons acting under color of state law within the meaning of 42 U.S.C. §1983.[22] Following this, they must show a denial of the equal protection of the laws under the fourteenth amendment to the Constitution.

Under the fourteenth amendment, the equal protection demand has been construed to apply only when "state action" is implicated. The Supreme Court observed the expansion of activities involving state action in *United States v. Guest:*

> The involvement of the State need not be either exclusive or direct. In a variety of situations the Court has found state action of a nature sufficient to create rights under the Equal Protection Clause even though the participation of the State was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation.[23]

Reviewing court decisions finding the state action nexus in private conduct impregnated with a state character,[24] or "supported" by the state,[25] commentators have recognized that the inquiry should candidly focus on whether the:

> challenged action or inaction is of sufficient public concern to warrant application of constitutional guarantees.[26]

State action was found in the conduct of a private entrepreneur who held a liquor license because:

> Inquiry should focus upon the alleged sphere of privacy and autonomy in need of protection from federal intervention,

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[21] U.S. CONST. amend. XIV, §1.

[22] Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity or other proper proceedings for redress.

[23] 383 U.S. 745, 755-56 (1966).

[24] Evans v. Newton, 382 U.S. 296 (1966).

[25] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[26] *Developments in the Law — Equal Protection,* 82 HARV. L. REV. 1065, 1072, and n.54 (1969).

> as well as upon the customary search for some causal relation, however tenuous, between state activity and the discrimination alleged.[27]

Significantly, after finding the requisite state action, the court went on to declare inconsonant with the equal protection clause, McSorley's century-old policy of excluding women patrons.[28]

The school systems at issue here all belong to a State High School Athletic Association. Although membership in such an association is voluntary, there are 50 State High School Associations and in order to compete with other members a school *must* belong. The rules of the state associations are binding on its members.[29] The 50 State Associations belong to the National Federation of State High School Associations which represents approximately 22,000 schools and 9,500,000 students.[30] The National Federation cannot require compliance to policy by its members. It is merely a joining together of state associations for their mutual guidance and aid with a minimal duplication of effort. Therefore, the Federation does not *require* its state associations to sponsor interscholastic competition for girls participating on girls' teams only against girls' teams. The Federation merely advocates such sponsorship:

> It believes girls' programs should be feminized in order to encourage women to develop their leadership abilities.[31]

Because no member of the National Federation is bound to do what the Federation advocates, the state associations have various rules concerning female participation on male teams. Because the litigation is as current as it is, the number of states allowing girls on boys' teams is in a state of flux.

Many states have rules comparable to those of the Ohio High School Athletic Association.[32] These rules require that boys' teams must be composed of boys only, and girls' teams must be composed of girls only, for interscholastic contests.[33] Girls' teams are forbidden to compete interscholastically against a boys' team.[34]

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[27] Seidenberg v. McSorleys' Old Ale House, Inc., 317 F. Supp. 593, 597 (S.D.N.Y. 1970).

[28] *Id.*

[29] *E.g.* OHIO HIGH SCHOOL ATHLETIC ASSOCIATION CONSTITUTION AND RULES 1972-1973, Part I, Rule 1, §3.

[30] NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, 1972-1973 OFFICIAL HANDBOOK, at 5.

[31] *Id.* at 30.

[32] OHIO HIGH SCHOOL ATHLETIC ASSOCIATION CONSTITUTION AND RULES 1972-1973. The current rules are presently being revised and are expected to be less restrictive on male-female competition.

[33] *Id* Part I, Rule 1., §2; Part III, Rule 2., §7.

[34] *Id.* Part III, Rule 2., §6.

According to the provisions, no exceptions will be allowed, even preventing mutual consent between contesting schools from waiving the rules.[35] Penalties for violations vary from a "warning," to "probation," to suspension from the Ohio State Association depending on the violation. Decisions, normally made by the Commissioner, may be appealed to the Board of Control.[36]

Much pressure is on the State Athletic Associations to emphasize that participation in interscholastic activities is voluntary, that it is extracurricular, and that it is a highly coveted privilege.[37] Conceding all of these, a doubtful premise at best, courts have *still* found the requisite state action.[38]

The State Athletic Association is *the* means by which the state and local boards of education and the member schools, all state agencies, regulate their interscholastic athletic contests. A federal district court in *St. Augustine High School v. Louisiana High School Athletic Ass'n*[39] refused to let words such as "voluntary" and "private" dull its analysis, and stated:

> For the state to devote so much time, energy and other resources to interscholastic athletics and then to refer coordination of those activities to a separate body cannot obscure the real and pervasive involvement of the state in the total program.[40]

Affirming, the Fifth Circuit stated:

> There can be no substantial doubt that the conduct of the affairs of [the Louisiana High School Athletic Association] is state action in the constitutional sense.[41]

The factors considered relevant by the courts in the *St. Augustine* case are the same as in those cases at issue here: public schools constitute the large majority of the association; principals responsible for carrying out the programs are state officers, state paid and supervised; schools provide and pay for coaches, supply athletic equipment, carry insurance on players and facilities, and supply transportation to teams.[42]

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[35] *Id.* Part I, Rule 1., §3.

[36] *Id.* Part I, Rule 1., §6.

[37] NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, 1972-1973 OFFICIAL HANDBOOK, at 55.

[38] Haas v. South Bend Community School Corp., 289 N.E.2d 495 (Ind. 1972).

[39] 270 F. Supp. 767 (E.D. La. 1967), *aff'd*, 396 F.2d 224 (5th Cir. 1968).

[40] *Id.*

[41] 396 F.2d 224, 227 (5th Cir. 1968).

[42] *Id.* at 227-28; *see also* Mitchell v. Louisiana High School Athletic Ass'n, 430 F.2d 1155 (5th Cir. 1970).

Kelly v. Metropolitan County Bd. of Educ.[43] relied on *St. Augustine* and *Oklahoma High School Athletic Ass'n. v. Bray*[44] for the conclusion that the Tennessee Secondary School Athletic Association is an instrumentality of the state for purposes of the fourteenth amendment.[45] Factors considered relevant were these: the Association was performing a public function by regulation of athletic functions of public schools; its governing board was composed of public school principals or superintendents; expenses of the association were paid from revenue derived from games between member schools; and many games were played at state-owned facilities.[46] Thus, the function of the association "closely identified [it] with state objectives, and subjected it to constitutional limitations placed upon the state."[47]

Similarly, in *Bray*, the court stressed that

> . . . although the Association is a creature of contract rather than legislative action, it is a composite of public schools governed by the Board of Control whose members are public employees and are acting in such capacity.[48]

Further, the court noted that the expenses of the Association are paid from revenue that would otherwise be public revenues. Thus:

> The rules of the Association are made by contract, but, once made, ring with authority and are enforced as against an individual in the name of the public interest under color of the laws of the State of Oklahoma and consequently well within the compulsion of 42 U.S.C. §1983.[49]

The above cases, and others,[50] have been relied on by courts in recent decisions where females challenged association rules forbidding them from playing on male teams, determining that the act of state associations and school districts in administering their programs is state action.[51]

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[43] 293 F. Supp. 485 (D. Tenn. 1968).

[44] 321 F.2d 269 (10th Cir. 1963).

[45] It has previously been determined that actions by public school corporations constitute state action in the constitutional sense. *See* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

[46] 293 F. Supp. 485 (D. Tenn. 1968).

[47] *Id.*

[48] 321 F.2d 269, 273 (10th Cir. 1963).

[49] *Id.*

[50] Butts v. Dallas Independent School Dist., 436 F.2d 728, 729 (5th Cir. 1971); Mitchell v. Louisiana High School Ass'n, 430 F.2d 1155 (5th Cir. 1970); Lee v. Macon County Bd. of Educ., 283 F. Supp. 194 (M.D. Ala. 1968).

[51] Brenden v. Independent School Dist., 342 F. Supp. 1224 (D. Minn. 1972), *aff'd*, 477 F.2d 1292 (8th Cir. 1973); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972); Haas v. South Bend Community School Corp., 289 N.E.2d 495 (Ind. 1972)

In addition, in *Brenden v. Independent School Dist.*,[52] the court found that although the Minnesota State High School League is a voluntary organization, the original allowance for public high schools to join such an association or organization is authorized pursuant to Minnesota Law.[53]

Haas v. South Bend Community School Corp.[54] overruled *State v. Lawrence Circuit Court*[55] insofar as it had determined that the courts will not interfere with the enforcement or administration of the constitution or by-laws of voluntary associations such as the Indiana High School Athletic Association, and held that the actions of the IHSAA are now judicially reviewable.[56]

Haas, while indicating the IHSAA is a voluntary association of approximately 438 high schools, a majority of which are tax-supported institutions, stressed that membership is contingent upon a strict adherence to the rules and regulations of the IHSAA. Some of the rules which indicate the entanglement of the state and the associations are:

> The principal of each member school shall be the authorized representative of his school and is responsible to the IHSAA for the conduct of the athletic program. (Rule 3, §1); . . . Paid coaches, other than those regularly employed as full time teachers by the trustees of the school, are prohibited . . . (Rule 7, §1); . . . No games, meets, or tourneys, shall be played by a member school without the sanction of the Principal. (Rule 9, §1); . . . All inter-school athletic contests shall be subject to the rules of the IHSAA and the Board of Control. (Rule 9, §2).[57]

The court did not question the wisdom of the rules but used them as an indication that

> . . . the IHSAA imposes on its member schools and their respective principals and coaches certain rules, duties and responsibilities . . . . In the majority of cases, the salaries of the respective principals and coaches are derived from tax funds, athletic contests are held in, or on, athletic facilities which have been constructed and maintained with tax funds. . . . it is abundantly clear that the association's very

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[52] 342 F. Supp. 1223 (D. Minn. 1972), *aff'd*, 477 F.2d 1292 (8th Cir. 1973).

[53] *Id.*

[54] 289 N.E.2d 495 (Ind. 1972).

[55] 240 Ind. 114, 162 N.E.2d 250 (1959).

[56] 289 N.E.2d 495, 497 (Ind. 1972).

[57] *Id.* at 497.

> existence is entirely dependent upon the absolute cooperation and support of the public school systems of the State of Indiana. The enforcement of the rules promulgated by the IHSAA and adopted by the member schools may have a substantial impact upon the rights of students enrolled in these tax supported institutions, and we conclude, therefore, that the administration of interscholastic athletics by the IHSAA should be considered to be "state action" within the meaning of the Fourteenth Amendment.[58]

Similar analogies are made in other cases to find the requisite state action in athletic programs found to be discriminatory against women.

Denial of Equal Protection Under the Fourteenth Amendment

The next issue to be decided is: does a rule of a state association, enforced by member public schools, forbidding female participation in interscholastic athletic contests in competition with boys deny female high school students equal protection under the fourteenth amendment to the Constitution?

Two unreported court decisions have indicated that it does not. In *Gregorio v. Board of Education*,[59] the court rejected claims against the exclusion of a female high school student from an all-male tennis team when no such athletic opportunities were provided for her. The judge pointed out that not all discrimination is unlawful and that it was questionable whether the right which the woman was claiming had been infringed — her right to equal use of the school facilities — was actually a constitutional right.[60]

Another unreported decision, *Hollander v. Connecticut Interscholastic Athletic Conference*,[61] concerned a high school girl who was kept off the cross country team. She sued the CIAC for a permanent injunction forbidding the defendant from enforcing any rule or regulation forbidding the defendant from enforcing any rule or regulation that discriminates against a school team or individual on the basis of sex when engaged in cross country running and indoor track. Relying on *Brown v. Wells*,[62] the court held that the plaintiff was not entitled to relief:

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[58] *Id.* at 497, 498.

[59] Docket No. C-198869 (N.J. Super. Ct., Monmouth County, March 16, 1971), *aff'd*, Docket No. A-127770 (N.J. Super. Ct. App. Div. April 5, 1971); *see* WOMEN'S RIGHTS L. RPTR., Vol.1, No. 1, July/August, 1971, at 39.

[60] *Id.*

[61] Civil No. 124427 (Conn. Super. Ct., New Haven County, March 29, 1971); *see*, WOMEN'S RIGHTS L. RPTR., No. 2, Spring, 1972, at 41.

[62] 181 N.W.2d 708, 712 (Minn. 1970).

> Courts should not be called upon to arbitrate the reasonableness of League rules unless objectors are prepared to demonstrate that they are not supported by reason or adopted in good conscience.[63]

The court then proceeded to reason as follows:

> The present generation of our male population has not become so decadent that boys will experience a thrill in defeating girls in running contests. . . . It could well be that many boys would feel compelled to forego entering track events if they were required to compete with girls on their own teams or adversary teams. . . . In a world of sports, there is ever present as a challenge, the psychology to win. With boys vying with girls in cross-country running and indoor track, the challenge to win, and the glory of achievement, at least for many boys, would lose incentive and become nullified. Athletic competition builds character in our boys. We do not need that kind of character in our girls, the women of tomorrow. . . .[64]

Four decisions[65] have determined that the enforcement of state high school association regulations prohibiting girls from participating on or against male teams is a denial of equal protection and due process under the fourteenth amendment. A fifth case, *Seldin v. State Bd. of Educ.*,[66] was put on the inactive list until March, 1973, pending the outcome of an experimental program established, whereby a school or an individual student may apply to the association for permission to allow girls to participate on a specified boys' team, provided there is no girls' team of equal caliber.

These decisions have carefully based distinctions on whether or not the case was brought as a class action[67] and whether or not the school had comparable alternative programs available for the women.[68]

The Supreme Court of the United States has developed two standards of review for determining whether "state action" estab-

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[63] Docket No. C-198869 (N.J. Super. Ct., Monmouth County, March 16, 1971), *aff'd*, Docket No. A-127770 (N.J. Super. Ct. App. Div. April 5, 1971).

[64] *Id.*

[65] Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973); Brenden v. Independent School Dist., 342 F. Supp. 1224 (D. Minn. 1972), *aff'd*, 477 F.2d 1292 (8th Cir. 1973); Reed v. Nebraska School Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972); Haas v. South Bend Community School Corp., 289 N.E.2d 495 (Ind. 1972).

[66] Civil No. 20272 (D.N.J. filed Jan. 31, 1972); *see* WOMEN'S RIGHTS L. RPTR., No. 2, Spring, 1972, at 41).

[67] Brenden v. Independent School Dist., 342 F. Supp. 1224 (D. Minn. 1972).

[68] Haas v. South Bend Community School Corp., 289 N.E.2d 495 (Ind. 1972).

lishes a classification violative of the fourteenth amendment guarantee that those similarly situated should be similarly treated.[69]

A "reasonable relationship" test is generally the one applied: does the classification bear a reasonable and just relation to a permissible state objective? Under this general test, if the purpose is a permissible one and if the classification bears the required fair relationship to that purpose, the constitutional mandate will be held satisfied.[70]

However, in two circumstances a more stringent test is applied. When the "state action" affects "fundamental rights or interests," such as voting[71] or education,[72] or when the classification is made on a basis "inherently suspect," the "most rigid scrutiny" is required. Thus, state action distinguishing on the basis of race or ancestry embodies a "suspect classification," and the burden shifts to the state to show a "compelling state interest" to uphold its constitutionality.[73]

Changes in society's attitude toward women[74] have forced a reexamination of the premises underlying the "suspect classification" doctrine. Although it is presumed reasonable for a state to distinguish between individuals on the basis of their ability or need, it is impermissible to distinguish on the basis of congenital or immutable biological traits of birth over which the individual has no control. Such conditions include not only race, clearly within the suspect classification doctrine, but, it is asserted, include also sex. Sex has been recognized as a suspect classification in at least two decisions which found no "compelling state interest" in limiting individual opportunities on the basis of sex.[75]

The first *United States v. York*, stated that:

> It is difficult to find any reason why adult women, as one of the specific groups that compose humanity, should have a lesser measure of protection than a racial group.[76]

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[69] *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065 (1969).

[70] F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[71] Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667, 670 (1966).

[72] Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971).

[73] Graham v. Richardson, 403 U.S. 365 (1971).

[74] *See* THE CHANGING ROLES OF MEN AND WOMEN (E. Dahlstrom ed. 1967); A. MONTAGU, MAN'S MOST DANGEROUS MYTH 181-84 (4th ed. 1964); G. MYRDAL, AN AMERICAN DILEMMA 1073-78 (2d ed. 1962); Murray & Eastwood, *Jane Crowe and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 235-42 (1965).

[75] Sail'er Inn Inc. v. Kirby, 5 Cal.3rd 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971); United States v. York, 281 F. Supp. 8 (D. Conn. 1968).

[76] 281 F. Supp. 8, 14 (D. Conn. 1968).

Using a "strict scrutiny" standard, the court held that a Connecticut statute providing for incarceration of women up to three years for certain offenses was an invidious discrimination repugnant to the equal protection of the laws because men who were convicted of the same misdemeanors were subject to shorter sentences.[77]

Although the court did not have to decide whether sex was a suspect classification in *Brenden v. Independent School District*,[78] it felt the decision of the California Supreme Court in *Sail'er Inn v. Kirby*[79] was very persuasive. in *Sail'er Inn* the court stated:

> Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from non-suspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relationship to ability to perform or contribute to society. . . . The result is that the whole class is relegated to an inferior status without regard to the capabilities or characteristics of its individual members. . . . Where the relation between characteristic and evil to be prevented is so tenuous, courts must look closely at classifications based on that characteristic lest outdated social stereotypes result in invidious law or practices . . .
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> Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. . . . Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. Like black citizens, they were, for many years, denied the right to vote and, until recently, the right to serve on juries in many states. They are excluded from or discriminated against in employment and educational opportunities. . . .
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> The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage.[80]

The successful athletic cases have not had to reach this issue yet, because they have determined that the defendants have not sustained their burden of showing that a classification based on sex

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[77] *Id.* at 17.

[78] 342 F. Supp. 1224 (D. Minn. 1972), *aff'd*, 497 F.2d 1292 (8th Cir. 1973).

[79] 5 Cal.3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

[80] *Id.* at 19-20, 485 P.2d at 540-41, 95 Cal. Rptr. at 340-41.

bears a rational relationship to a state objective sought to be advanced by the operation of the rule treating the sexes differently.[81]

In *Reed v. Nebraska School Activities Ass'n*,[82] the court allowed a preliminary injunction in a proceeding to enjoin the interschool activities association and school officials from prohibiting a female student from partcipating on a boys' golf team. The judge held that the evidence supported a conclusion that the plaintiff student would probably be successful on the merits.[83] The court saw the issue to be not whether she has a "right" to play golf, but whether she can be treated differently from boys in an activity provided by the state.[84]

This court distinguished cases[85] which assume schools and activities associations may make any rule they choose to make, and also that students have only "privileges" related to sport activities. Such assumptions are untenable in matters of federal constitutional law.[86]

On balancing the interests of the two parties, the court accorded the interests of the plaintiff — value of local and regional competition, opportunity to enhance her reputation, instruction by the coaching staff — as outweighing those of defendants: enforcement of rules unfettered by student attacks, and financial savings. In addition, a finding that plaintiff's benefits were fixed in time to the present golf season persuaded the court to find sufficient irreparable injury to grant the preliminary injunction.[87]

A month later, in May, 1972, a court allowed not only a preliminary but a permanent injunction with a holding limited to the specific facts presented. The decision in *Brenden v. Independent School District*[88] is limited to a situation wherein plaintiff high school girls wished to take part in certain interscholastc boys' athletics (tennis, cross-country track and skiing). It was shown that the girls could compete effectively on these teams, and there were no alternative competitive programs sponsored by their schools which would provide an equal opportunity for competition for these girls. Therefore, application of a rule prohibiting girls from participating in boys' interscholastic athletic programs as to plaintiffs was arbitrary and unreasonable in violation of the equal protection clause of the fourteenth amendment.[89]

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[81] Reed v. Reed, 404 U.S. 71 (1971).

[82] 341 F. Supp. 258 (D. Neb. 1972).

[83] *Id.* at 262.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* at 262-63.

[88] 342 F. Supp. 1224 (D. Minn. 1972), *aff'd*, 477 F.2d 1292 (8th Cir. 1973).

[89] *Id.* at 1234.

The court was extremely careful to indicate just what the case did *not* decide. It did not have to decide whether participation in sports is fundamental, whether sex was a suspect classification, or whether the League rules were unconstitutional or constitutional.[90]

Stressing the fact that the case was not a class action, the court emphasized that the decision applied only to the two plaintiffs. Therefore, the acknowledged substantial physiological differences between males and females presented by defendants' expert witnesses were not relevant to a determination of this case because evidence showed that the two plaintiffs could competently compete on the boys' teams. Even so, the court ruled:

> There has been no evidence that either Peggy Brenden or Tony St. Pierre, *or any other girls*, would be in any way damaged from competition in boys interscholastic athletics, nor is there any credible evidence that the boys would be damaged. (emphasis added)[91]

A successful class action suit obtaining injunctive relief was *Haas v. South Bend Community School Corp.*[92] The case concerned the application of a rule prohibiting male and female students from competing on the same team or against each other only in non-contact sports such as golf, swimming, tennis, track, and gymnastics.[93]

Acknowledging evidence that males generally tend to possess a higher degree of athletic ability than females, the court found that such a classification appears reasonable on its face. However, a rule or law which appears to be non-discriminatory on its face may nevertheless be struck down as a denial of equal protection if it is unreasonably discriminatory in its operation.[94]

Therefore, the court ruled that where the great majority of high schools in the state did not maintain interscholastic athletic programs for girls, the present application of the IHSAA rule denying "mixed" competition in non-contact sports must be struck down as a denial of equal protection. The court found no reason to justify denying female high school students "the opportunity to qualify" for participation with males in interscholastic athletics on non-contact teams, notwithstanding differences in athletic ability or contentions that the rule was necessary to protect girls' athletics and that costs would increase.[95]

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[90] *Id.* at 1231.

[91] *Id.* at 1233.

[92] 289 N.E.2d 495 (Ind. 1972).

[93] *Id.* at 498.

[94] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[95] Haas v. South Bend Community School Corp., 289 N.E.2d 495, 500-01 (Ind. 1972).

A very recent case in this area is a decision of the Sixth Circuit Court of Appeals decided on January 25, 1973 — *Morris v. Michigan Board of Education*.[96] This case was a class action by girls desiring to participate in interscholastic athletics involving non-contact sports. The District Judge's preliminary injunction appeared on its face to apply to contact and non-contact sports alike. Therefore, in affirming the preliminary injunction, the Circuit Court modified the decision to apply to non-contact sports only.[97] The court also took judicial notice that the public policy of the state of Michigan by legislative enactment allows females to participate with males in non-contact athletic activities as of spring, 1973.[98]

Conclusion

Whether by legislative or judicial discussion, participation by females on traditionally all-male teams is an issue of much controversy.

The fear of some directors of state associations is that female teams will be eliminated completely, in that if women can participate on male teams, then males should be allowed to try out for female teams. Therefore, the logic follows that because of the acknowledged physiological differences between males and females, many boys who may not have been good enough to qualify for the male teams could easily have greater ability in various areas than any girls, and thus, make the girls' teams which, in effect, would become male teams.

One possible solution would be that in organized, interscholastic, competitive contests there should be no rules limiting participation on the basis of sex. Individual ability should be the only criterion. These schools should also provide two other intramural teams. Students would qualify for the A team on the basis of ability; whereas, *any* student should be able to participate on the B team. Although the effect may be to have an all male A team and an all female B team, the program would be non-discriminatory, as all students would have the opportunity to qualify for all teams.

Another possible solution — the most radical, but most equitable — would be to have co-educational physical education. Many schools have co-educational physical education through elementary school and then divide the students on the basis of sex when they reach junior high. Possibly, with combined physical education programs the evidence of "physiological differences" between the sexes would

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[96] 472 F.2d 1207 (6th Cir. 1973).

[97] *Id.*

[98] MICH. COMP. LAWS ANN. §340.379 (2) (West. Supp. 1973).

no longer be as valid. Such physical education programs may enable boys and girls to become capable of competing effectively with and against one another, thereby eliminating any need for separate programs according to sex. Until such a program is tried, the real issues may never be settled.

The issue of non-contact sports is still to be resolved, with contact sports waiting in the wings.

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