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Sex Discrimination: Female Participation in Little League Baseball

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SEX DISCRIMINATION: FEMALE PARTICIPATION IN LITTLE LEAGUE BASEBALL. *King v. Little League Baseball, Inc.*, 505 F.2d 264 (6th Cir. 1974).

Do girls have the constitutional right to participate on an equal basis with boys in Little League baseball? According to *King v. Little League Baseball, Inc.*,[1] girls do not even possess the right to have this question answered by a federal court. This suggests that the paramount consideration in cases challenging sexual discrimination by private athletic organizations is not the presence of a right, but the existence of a remedy.

I. THE FACTS OF KING

Because of the unusual posture of the suit, King was admittedly an unlikely representative of all girls wishing to participate in Little League baseball. *King* was brought as a personal action under 42 U.S.C. §1983[2] for injunctive relief to secure fifth and fourteenth amendment rights, and 28 U.S.C. §2201[3] and §2202[4] for declaratory relief regarding the Little League's ban on female participation.[5] The complaint was based upon revocation of the Little League charter of the Ypsilanti American league[6] after Carolyn Ann King, a twelve-year-old female citizen of the United States and a resident of Ypsilanti, Michigan, was permitted to play on an American

1. 505 F.2d 264 (6th Cir. 1974).

2. 42 U.S.C. §1983 (1970):

Civil action for deprivation of rights. 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 person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. 28 U.S.C. §2201 (1970):

Creation of Remedy. In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

4. 28 U.S.C. §2202 (1970):

Further relief. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

5. Regulation IV(i) of the official Regulations of Little League Baseball, Inc. states: "Girls are not eligible."

6. There were two baseball leagues in the Ypsilanti area chartered by Little League Baseball, Inc., a national corporation created by special act of Congress. Act of July 16, 1964, Pub. L. No. 88-378, 78 Stat. 325. 36 U.S.C. §1071 *et seq.* (1970).

league team. After receiving a preliminary warning from the parent corporation, Little League Baseball, Inc., American had decided to forego the outfield services of King so as not to lose the benefits of the charter.[7] However, Ypsilanti City Council's subsequent directive[8] that the use of municipal parks and baseball diamonds would be withheld from any organization practicing sex discrimination persuaded American to reinstate King and forfeit its charter.

The posture in which the case came before the trial judge was as follows. The City of Ypsilanti had for a number of years provided vital support to local Little League baseball, the rules of which explicitly provided for discrimination on the basis of sex. On the other hand, the city was on record as being opposed to Little League's practice of sexual discrimination and had officially withdrawn from the two locally chartered leagues the use of city facilities.[9] To complicate this factual situation, the City of Ypsilanti and the disenfranchised league chose to align themselves with Carolyn King as plaintiffs in the suit. Beyond the intricacies of the local situation, the record showed that Little Leagues statewide depended, to varying degrees, on the use of municipal facilities.

Both the district court[10] and the Sixth Circuit Court of Appeals dismissed the suit. No Supreme Court review was sought.

II. Reasoning Behind Dismissal

Litigating a suit based on the fourteenth amendment quite frequently necessitates exploration into uncharted areas.[11] Given that

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7. Revocation cost plaintiff American cancellation of its low-rate insurance with the Little League, ability to play with other chartered Little League teams, uniforms, equipment, bank account given under the auspices of the Little League, ability to use Little League's designation on uniforms, stationery, fund drives, etc.

8. The city council directive, dated May 8, 1973, stated:

> [T]he city of Ypsilanti cannot offer the use of municipal facilities to organizations that practice any form of discrimination.
>
> Therefore, until the matter involving Miss Carolyn King and other female children, who wish to take a part in local sports activities, is resolved, the city of Ypsilanti parks and baseball diamonds are not available to the Little League Baseball clubs.

9. However, there was evidence in the record that the official directive was not enforced. Joint Appendix at 222.

10. Civil No. 40304 (E.D. Mich., filed July 25, 1974).

11. As the Supreme Court admitted:

> On the one hand, the Fourteenth Amendment plainly prohibits a State from itself discriminating . . . . On the other hand, §1 of the Fourteenth Amendment does not forbid a private party, not acting against a backdrop of state compulsion or involvement, to discriminate . . . in his personal affairs as an expression of his own personal predilections . . . .
>
> At what point between these two extremes a State's involvement . . . becomes sufficient to make the private [act] a violation of the Fourteenth Amendment, is far from

Little League Baseball, Inc. is a private corporation, *King's* threshold problem entailed some showing that the Little League activities in Ypsilanti were a form of "state action" or otherwise sufficiently connected to those of the state.[12] As far as the district and circuit courts were concerned, this threshold was never crossed. Neither court reached the merits; both dismissed for failure to state a claim upon which relief could be granted.

Conceding that "some state involvement in little league activities on the local level is undeniable," the district court was ultimately impressed with the absence of "significant state involvement in the management or decision-making of the private organization or institution."[13] The district court then examined four cases in order to determine the appropriate indicia of state involvement,[14] and found *King's* facts most in harmony with those in *Statom v. Board of Commissioners*.[15] *Statom*, however, involved racial, rather than sexual, discrimination, and the district court in *King* comments: ". . . state action is found more readily when racial discrimination is in issue than when other rights are asserted."[16]

While the district court decision was based on traditional application of the "under color of" state law requirement of Section 1983, the court of appeals' narrower focus considered only the unique factual situation of the case and determined that, regardless of how the state action question was resolved, no relief was available to the plaintiffs. Viewing itself as imprisoned within the specific factual structure of *King* by virtue of the case's status as a personal (rather than class) action, the appellate court felt that any potential remedy had already been applied. Citing *Moose Lodge v. Irvis*,[17] the court stated:

> . . . if plaintiffs here were entitled to anything in their dispute with

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clear under our case law.

Adickes v. Kress, 398 U.S. 144, 169-70 (1970).

12. The fact that Little League Baseball, Inc. was federally chartered was of little help, for two reasons. First, the challenged action had to be that of the state, not the federal government. Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969). Second, even a state charter had previously been held only a strictly literal indication of state action: "not even those taking the most extreme view of the concept have ever asserted that state action goes that far." Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).

13. 505 F.2d at 266.

14. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Smith v. YMCA of Montgomery, 316 F. Supp. 899 (M.D. Ala. 1970), *aff'd* 462 F.2d 634 (5th Cir. 1972); Statom v. Board of Comm'rs, 233 Md. 57, 195 A.2d 41 (1963); and Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973).

15. 233 Md. 57, 195 A.2d 41 (1963).

16. 505 F.2d at 266.

17. 407 U.S. 163 (1972).

the defendant, it was at best the withdrawal of state action and participation in the activity complained of.[18]

The court of appeals explained that the Ypsilanti City Council directive withdrawing from the local little leagues the use of municipal facilities, and King's continued participation in the games of the subsequently disenfranchised American League, placed *King* plaintiffs before suit in the position *Statom* plaintiffs hoped to occupy after judgment: use of municipal facilities denied to private orqanizations until discriminatory practices discontinued. Therefore, no further remedy was either proper or necessary under the circumstances.[19]

III. Trends in Athletic Discrimination Litigation: Public Function

Those few cases decided prior to *King* specifically challenging a private athletic organization's policy of sex discrimination were unsuccessful in attempting to prove that conceded involvement with municipal government rendered the organization subject to constitutional prohibition.[20]

However, decisions involving private athletic organizations had little trouble identifying the organizations as "serving a public func-

18. 505 F.2d at 267-68.

19. The appellate court's determination that the remedy had already been applied was disingenuous, since there was evidence at the district court hearing that the official directive had never been enforced. Although the city was aware of and ostensibly opposed to discrimination in the use of public facilities, its official inaction would immediately render the *inaction* standard of state involvement applicable to the arrangement between Ypsilanti and the local leagues. *See* Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).

20. In Wachs v. Newton, Civil No. 72-1300-G (D. Mass., filed May 15, 1972), it was so obvious to the court that the Little League program was not connected with state action that the court would not even hear from counsel for Little League but dismissed after plaintiff had presented his case. Magill v. Avonworth Baseball Conference, 364 F. Supp. 1212 (W.D. Pa. 1973), involving a state-chartered private baseball conference, failed both the "symbiotic relationship" test in *Burton*, 365 U.S. 715 (1961), and the state "supervision, control or management" test applied with similar results in *King*.

The Third Circuit affirmed *Magill* seven months after *King* had been decided by the Sixth Circuit, distinguishing the Supreme Court decision in Gilmore v. City of Montgomery, 417 U.S. 556 (1974), because the Avonworth Baseball Conference was not the exclusive user of the municipal playing fields.

On the other hand, courts did not find it difficult to spot state action where athletic programs were interscholastic in nature and included public schools in their membership. Brenden v. Independent School Dist. 742, 477 F.2d 1292 (8th Cir. 1973); Oklahoma High School Athletic Ass'n v. Bray, 321 F.2d 269 (10th Cir. 1963). Where the athletic program involved receives federal assistance "[n]o 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 . . . ." 20 U.S.C. §1681(a) (1974).

tion" in providing "recreation and youth guidance,"[21] where *racial* discrimination was alleged.[22]

The "public function" analysis of discriminatory action enjoyed its first clear exposition as the basis for Mr. Justice Harlan's dissent in the Civil Rights Cases.[23] In its modern form, the public function approach to state action is, for the purposes of this discussion, most relevantly displayed in *Evans v. Newton*.[24] This suit, brought to challenge continued segregation under a private trusteeship, resulted in a Supreme Court ruling summarized by the dissenting Mr. Justice Harlan (the younger) in the following fashion:

> [I]t is not suggested that Baconsfield will use public property or funds, be managed by the city, enjoy an exclusive franchise, or even operate under continuing supervision of a public regulatory agency. State action is inherent in the operation of Baconsfield quite independently of any such factors, so it seems to be said, because a privately operated park whose only criterion for exclusion is racial is within the "public domain." (ante, p. 302).[25]

The public function concept was further extended in *Burton v. Wilmington Parking Authority*,[26] which held that where the state leased premises for use as a coffee shop on publicly owned property, that eating place became subject to equal protection restraints. Accordingly, the state's failure to insist upon a no-discrimination clause in the lease constituted state action. However, in *Moose Lodge* the Supreme Court refused to find state action in the mere licensing by the state liquor control commission of a private club with racially discriminatory membership practices and dining privileges.

IV. Application of Trends to King

A. *Scope of State Action Analysis in Sex-Discrimination Cases*

The district court's theory that non-racial discrimination ne-

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21. Statom v. Board of Comm'rs, 233 Md. 57, 59, 195 A.2d 41, 43 (1963).

22. *E.g.*, Smith v. YMCA, 316 F. Supp. 899 (M.D. Ala. 1970); *But cf.* Wood v. Vaughn, 209 F. Supp. 106 (W.D. Va. 1962).

23. 109 U.S. 3 (1883); see cases cited at 37-43.

24. 382 U.S. 296 (1966). *Evans* involved the operation of Baconsfield, a park originally devised in trust to the city of Macon, Georgia, as a racially segregated facility. After Watson v. Memphis, 373 U.S. 526 (1963), Macon realized it could no longer constitutionally operate the park according to the dictates of the trust, and abdicated in favor of a board of private trustees.

25. Evans v. Newton, 382 U.S. 296, 319 (1966). Following *Evans*, it became settled law that the equal protection clause prohibits a state from operating its recreational facilities on a segregated basis. Lewis, *Burton v. Wilmington Parking Authority: A Case Without Precedent*, 61 Colum. L. Rev. 1458 (1968).

26. 365 U.S. 715 (1961).

cessitates a greater degree of state involvement in order to fall within constitutional prohibitions is stated explicitly in only two cases other than *King*. In *Lefcourt v. Legal Aid Society*,[27] a footnote referred to a suggestion made in *Powe v. Miles*[28] to the effect that where an issue involves racial discrimination, the scope of state action analysis is broader. *Lefcourt* cited *Evans v. Abney*[29] in support of this theory. However, *Evans v. Abney* contains no references to such a standard.

The immediate basis for the *King* pronouncement was presumably *Grafton v. Brooklyn Law School*,[30] one of the cases examined by the district court. The complete reference to the theory in *Grafton* is as follows:

> But while a grant or other index of state involvement may be impermissible when it "fosters or encourages" discrimination on the basis of race, the same limited involvement may not rise to the level of "state action" when the action in question is alleged to affront other constitutional rights.[31]

No citation of supporting authority is given.

The two cases utilizing this stricter standard prior to *King* involved challenges to alleged constriction in the exercise of Bill of Rights freedoms.[32] The theory has never been sanctioned where "status" classifications, such as race, sex, alienage, or national origin have been the subject of discrimination. While certain commentators have noted that the post-Civil War amendments apply "with highly special force to the racial field,"[33] other commentators have argued against this interpretation, claiming that the type of discrimination goes not to the extent of state action but to the constitutionality of the classification.[34] However, Supreme Court holdings that the provisions of 42 U.S.C. §1981 to §1985, phrased in terms of "all persons" and "all citizens," were to be "liberally construed and broadly read,"[35] would seem to support equal application of the state action concept to *all* alleged violations of §1983, without

27. 445 F.2d 1150 (2d Cir. 1971).

28. 407 F.2d 73 (2d Cir. 1968).

29. 396 U.S. 435 (1970).

30. 478 F.2d 1137 (2d Cir. 1973).

31. *Id.* at 1142.

32. *Lefcourt* (first amendment); *Grafton* (first and sixth amendments); *Powe* (first amendment).

33. Black, *Foreward, The Supreme Court 1966 Term*, 81 HARV. L. REV. 69 (1967).

34. *See, e.g.*, H. FRIENDLY, THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA, 35 n. 50.

35. Miller v. Amusement Enterprises, Inc., 394 F.2d 342, 349 (5th Cir. 1968); Griffin v. Breckenridge, 403 U.S. 88 (1971); Jones v. Mayer Co., 392 U.S. 409 (1968).

weighting the state action consideration in favor of the party seeking redress for racial discrimination.

Only months before the *King* district court dismissal, Justice Brennan explicitly noted the similarity between racial and sexual discrimination in *Frontiero v. Richardson.*[36] *Frontiero* suggested that, as between racial and sexual discrimination, the latter was in some respects more enduring.[37] Given this similarity, the fallacy in the district court's distinction of *Statom* is obvious. By the time of the *King* lower court decision, there no longer existed any reason for deeming the race-oriented public function line of cases inapplicable to sexual discrimination claims. If the same standards were to apply in sex discrimination cases, plaintiff King would have succeeded. The racial discrimination suits had developed criteria for the discovery of state action using far looser standards than the "management and decision-making" test flunked by *King*. Significant criteria present in the *King* situation included, besides the corporation's enjoyment of tax-exempt status,[38] both a leasing arrangement[39] and a de facto agreement[40] between the municipalities and the offending corporation.

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36. 411 U.S. 677 (1973).

37. *Id.* at 685:

> . . . our statute books gradually became laden with gross, stereotyped distinctions between the sexes, and indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. [Citations omitted.] And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself 'preservation of other basic civil and political rights' until adoption of the Nineteenth Amendment half a century later.

38. It was undenied that Little League Baseball, Inc. is tax-exempt for both federal and state income tax purposes, and that all property and holdings of the corporation are exempt from local assessment. Tax-exempt status has been a significant criterion of state involvement in several cases and was the sole basis of a finding of "state action" in at least one. Falkenstein v. Department of Revenue, State of Oregon, 350 F. Supp. 887 (D. Ore. 1972).

39. For purposes of showing state involvement in the Little League program, a leasing arrangement between a governmental subdivision and the offending private corporation is a compelling indicator. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); *cf.* Wood v. Vaughn, 209 F. Supp. 106 (W.D. Va. 1962).

40. *Evans* had specified that de facto, as much as de jure, agreements between municipal authorities and private discriminatory groups regarding the use of public recreational facilities, were subject to constitutional prohibitions.

Besides the use of public facilities, there were a number of factual elements in *King* lending credence to a "suggestion" of municipal approval or participation. The record disclosed that certain members of the community viewed the Little League program as part of the city's summer recreational program. The sign-ups for Little League participation were held in city buildings; and the city published a booklet entitled, Summer in Ypsilanti, which listed the Little League as one of the available summer activities.

B. *"Under Color of Any . . . Custom or Usage"*

Apart from the sequence of public function cases, the amount of affirmative state involvement necessary for a 42 U.S.C. §1983 claim had been gradually decreasing.

Only three years before *King*, in *Adickes v. Kress*,[41] the Supreme Court had considered the meaning of "custom or usage" as utilized in §1983. A split Court concluded that "a custom or usage" for purposes of §1983 requires state involvement and is not simply a practice reflecting longstanding social habits generally observed by a community.[42] In his partial dissent, Justice Douglas characterized the majority's interpretation as "too narrow and artificial."[43]

In previous decisions, the Supreme Court had relied on the existence of an established "custom" of racial segregation to buttress otherwise fairly neutral state involvement.[44] In a slightly different direction, the Court had also recently emphasized that the requirements of "under color of" state law did not necessitate actual state involvement.[45] With *Frontiero* as support for a finding that sexual discrimination is at least as widespread a custom as racial discrimination,[46] a scintilla of state action would presumably place private organizations practicing sexually discriminatory policies "under color of" state law.

V. POST-KING

In the fifteen months since *King*, the Little League corporation has amended its charter so that the no-girls rule is no longer in effect.[47] *King*, therefore, is one of the last in a largely unsuccessful line of cases attacking the Little League via a traditional state action approach.

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41. 398 U.S. 144 (1970).

42. *Id.* at 166-67.

43. *Id.* at 179.

44. Garner v. Louisiana, 368 U.S. 157 (1961); Robinson v. Florida, 378 U.S. 153 (1964).

45. United States v. Price, 383 U.S. 787 (1966); United States v. Guest, 383 U.S. 745 (1966).

46. *See* United States v. York, 281 F. Supp. 8, 14 (D. Conn. 1968).

47. The text of the amendment is as follows:

LITTLE LEAGUE BASEBALL-SEX DISCRIMINATION

An act to amend the Act to incorporate Little League Baseball to provide that the league shall be open to girls as well as boys.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that:

Section 3 of the Act of July 16, 1964 entitled: An Act to incorporate the Little League Baseball, Incorporated . . . is amended by striking out 'boys' each place it appears and inserting in lieu thereof 'young people,' and by striking out 'citizenship, sportsmanship, and manhood' and inserting in lieu thereof 'citizenship and sportsmanship.'

36 U.S.C. §1073(1), (2), (3) (1974).

The first successful challenge to Little League Baseball, Inc.'s policy of sex discrimination was decided in the interim between *King* district court and *King* circuit court. The victory in *NOW v. Little League Baseball, Inc.*[48] was accomplished with the help of a state statute and a New Jersey Division on Civil Rights ruling.[49] The pertinent New Jersey statute forbade discrimination in places of public accommodation on the basis of race, color, religion, national origin, and sex, except in the case of sex where the place of public accommodation "is in its nature reasonably restricted exclusively to individuals of one sex."[50] In applying the statute, the New Jersey court stated:

> The statutory 'accommodations, advantages, facilities and privileges' at the place of public accommodation is the entire agglomeration of the arrangements which Little League and its local chartered leagues make and the facilities they provide, for the playing of baseball by the children . . . .
>
> Finally, we discern nothing in the statute or its underlying purposes to persuade us that what would otherwise be a place of public accommodation is any less so because its management and sponsorship is by a nonprofit or membership organization rather than a commercial enterprise, or because it does not have exclusive use or possession of the site of its operation . . . .[51]

Another important case decided during this interim period containing language supportive of a broad scope of state action review in public facility cases was the Supreme Court consideration of *Gilmore v. City of Montgomery*.[52] The Court remanded the decision to the court of appeals for findings of state action to support any injunction placed upon non-school private groups whose use of the public facilities was non-exclusive, but cautioned:

> If, however, the city or other governmental entity rations otherwise freely accessible recreational facilities, the case for state action will naturally be stronger than if the facilities are simply available to all comers without condition or reservation. The city's role in that situation would be dangerously close to what was found to exist in *Burton*, where the city had elected to place its power, property and prestige behind the admitted discrimination.[53]

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48. 127 N.J. Super. 522, 318 A.2d 33 (1974).

49. The administrative agency's decision held that baseball posed no greater threat of injury to girls as a class than to boys. *Id.*, 127 N.J. Super. at 527-30, 318 A.2d at 33-35.

50. N.J. STAT. ANN. §10:5-12(f) (1973).

51. 127 N.J. Super. at 531-32, 318 A.2d at 38.

52. 417 U.S. 556 (1974).

53. *Id.* at 574.

The First Circuit cited *Gilmore's* "stronger case" language in *Fortin v. Darlington Little League, Inc.*[54] a §1983 suit filed by ten-year-old Alison "Pookie" Fortin against a local Rhode Island Little League organization. The court of appeals agreed with the trial court's opinion[55] that *Darlington's* "heavy and preferred dependency upon city facilities"[56] placed it in the "symbiosis" category of state action. On the merits, however, the appellate court disagreed with the district court's assessment that relevant physical differences between boys and girls of little league age provided a rational basis for the exclusionary rule. Terming the expert evidence on these differences "meager support,"[57] the court of appeals at the same time rejected *Darlington's* other rationality arguments[58] as " 'archaic and overbroad generalizations' "[59] insufficient to justify the categorical exclusion of girls.

VI. Denial of Equal Protection?

This analysis indicates that the district court and circuit court were unduly restrictive in refusing to recognize their capacities to entertain the *King* case on the merits. However, the existence of a forum is no assurance of relief. Assuming that exclusion of female candidates from Little League participation is a subject within the cognizance of federal jurisdiction, is there in fact a right to be free from sexually discriminatory exclusion from Little League playing fields?

It is, of course, "only irrational or arbitrary distinctions or classifications that are forbidden by the Fourteenth Amendment."[60] While the equal protection clause does not require "abstract symmetry" or "mathematical nicety,"[61] it does require that lawmakers refrain from invidious distinctions.

The Supreme Court has utilized two standards of review under the equal protection clause. The traditional "rational basis" test finds those classifications constitutional which bear a rational relationship to a valid state purpose. In the area of fundamental rights

54. 514 F.2d 344 (1st Cir. 1975).

55. 376 F. Supp. 473 (D.R.I. 1974).

56. 514 F.2d at 347.

57. *Id.* at 349.

58. These included: the alleged preference of coaches and players; the sense of what is and is not fit activity for girls; girls do not deserve an opportunity to play baseball now because they will move in other athletic channels later.

59. 514 F.2d at 348, *citing* Schlesinger v. Ballard, 95 S. Ct. 572, 576 (1975).

60. Seidenberg v. McSorleys' Old Ale House Inc., 317 F. Supp. 593, 605 (S.D.N.Y. 1970).

61. Goesaert v. Cleary, 335 U.S. 464, 467-68 (1948).

or inherently suspect classifications, distinctions will be upheld where the state meets a greater burden of establishing that it has both a compelling interest justifying the classifications and that the distinctions drawn are necessary to further the rule's valid purpose.[62]

Sex-based classifications, according to *Reed v. Reed*,[63] are subject to scrutiny by the courts and will be struck down when they provide dissimilar treatment for men and women who are similarly situated. The *Reed* court did not find sex to be an inherently suspect classification, however.

In *Frontiero*, Justice Brennan's opinion for the Court stated that sex was inherently suspect. Unfortunately, *Frontiero* is a suspect precedent. Due to the Court's split on different facets of the decision, Justice Brennan was not supported by a majority on the "inherently suspect" point.[64] Subsequent Supreme Court considerations of the subject have yet to produce a definite consensus that sex is an inherently suspect categorization.[65] Despite Justice Brennan's repeated identifications of sexual discrimination with that based on race,[66] the standard for judging classifications based on sex is still the rationality one: discrimination on the basis of sex is tolerated if it bears a rational relation to a permissible purpose.

In *King*, the Little League was prepared to argue that the safety of minor females was a permissible concern to which exclusion from the allegedly "contact sport"[67] of baseball bore a rational relation. Certain scientific studies purported to show that girls between the ages of nine and twelve are more susceptible to harm on the baseball field than boys of that age. Dr. Creighton J. Hale, Executive Vice President, Director of Research for Little League Baseball, Inc. was on record in *King* as testifying to this effect.[68]

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62. San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).

63. 404 U.S. 71 (1971).

64. Justice Stewart's concurring opinion in *Frontiero*, which could have been interpreted as supportive of the "inherently suspect" theory, was clarified by San Antonio School District, 411 U.S. at 107, in a manner indicating his continuing support of the rationality test in cases involving sexual distinctions.

65. *See* Kahn v. Shevin, 416 U.S. 351 (1974); Schlesinger v. Ballard, 419 U.S. 498 (1975); and Weinberger v. Weisenfeld, 420 U.S. 636 (1975). *But cf.* Fortin v. Darlington Little League, Inc., 376 F. Supp. 473, 479 (D.R.I. 1974) and United States v. Reiser, 394 F. Supp. 1060 (D. Mont. 1975), identifying sex as an inherently suspect classification on the basis of *Frontiero*.

66. *See Frontiero*; *Ballard*, 419 U.S. at 511 (Brennan, J., dissenting), *but cf. Weinberger* where Brennan's language for the majority indicates no application of the "inherently suspect" standard.

67. Magill v. Avonworth Baseball Conference, 364 F. Supp. 1212 (W.D. Pa. 1973), took judicial notice that baseball was a contact sport.

68. However, as the *NOW* decision, 514 F.2d at 35-37, pointed out, some experts believe

Since the burden of showing rational relationship rests on the Little League once the case has reached the adjudication stage,[69] the battle of expert witnesses over the safety question would tend to favor plaintiffs, but the decision would be factual, rather than legal, and hence unpredictable.[70]

Another "permissible purpose" espoused by Little League counsel in the *King* case was the prevention of dilution of female sports. The gist of this argument was that allowing women to invade all-male sports would necessarily allow male participation in previously all-female sports organizations. The superior athletic ability possessed by males would eventually result in both boys' and girls' teams being composed entirely of males. This concern was allayed in *Haas v. South Bend Community School Corp.*,[71] a class action by a female golfer desiring to play in interscholastic team competition. The court noted:

> It is unnecessary to sound the fire alarm until the fire has started . . . . Appellees' argument, which demonstrates admirable concern for the welfare of girls' athletic programs, must fail when one considers that at the present time few, if any, programs are in operation which need such protection.[72]

Finally, some courts have noted that the right to equal protection does not exist in the abstract, that it must be balanced against countervailing rights, specifically the two freedoms of choice and association.[73]

While the discovery of state action tends to foreclose consideration of freedom of association where racial discrimination is involved, a finding of sexual discrimination being perpetrated "under color of" state law does not seem to produce the same, almost automatic, effect.[74] Given the apparent Supreme Court agreement that

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these findings are based on unwarranted data in that they are extrapolated from Japanese studies involving mature adults. Dr. Hale's testimony at the *NOW* trial was less persuasive to the New Jersey court than the contrary opinion of the New Jersey Civil Rights Commission.

69. On the allocation of burden of proof, *see Fortin*, 514 F.2d at 348.

70. Compare the *Fortin* appellate court rejection of the safety argument, 514 F.2d at 350, with the *Fortin* district court acceptance of the same argument, 376 F. Supp. at 479.

71. 289 N.E.2d 495 (Ind. 1972).

72. *Id.* at 500.

73. However, the Little League's policy of refusing participation to girls solely on the basis of their sex hardly represented the same exercise of individual choice as that indulged in by an owner of private property. *See* Marsh v. Alabama, 326 U.S. 501 (1946).

More potent, perhaps, than the claim to freedom of choice on the part of the offending corporation, is the insistence upon freedom of association on the part of that corporation's members. *See* Evans v. Newton, 382 U.S. 296 (1966).

74. In *Seidenberg*, for instance, the district court found it necessary to weigh at length various freedom of association claims before finding that the preference for exclusively male

sexual discrimination is a "particularly invidious character of . . . classification,"[75] akin to that based upon race, the compulsion to "balance" in sexual discrimination cases once state action has been found is actually no more necessary than it is in racial discrimination cases. Any attempts to justify the discrimination should be covered in the "rationality" test.

VII. CONCLUSION

King v. Little League Baseball, Inc. is a better illustration of the sentiment, "[t]he literature of 'state action' is the literature of a non-concept"[76] than it is of Justice Rehnquist's recent observation of the judiciary's "higher degree of sensitivity to distinctions based on sex."[77] It must be pointed out, however, that failure to reach what the court of appeals described as "the interesting questions of whether there is a rational basis for discrimination on account of sex in the baseball activities of children of this age, or whether classifications based upon sex are inherently suspect,"[78] was a direct consequence of the technical flaws in the suit as filed.

By making King the sole focus of the complaint, the plaintiffs did, in fact, imprison the case in the specific fact situation surrounding the activity of Little League as it affected her. The problems inherent in styling the case as an individual action were compounded by the alignment of the city as a party plaintiff. The court of appeals noted the joinder with some surprise:

> It must be remembered that the only defendants are the National Little League organization and its Regional Director. If any state action is to be found in the case, it has to be in the actions of those defendants . . . . Contrary to the usual action under 42 U.S.C. Section 1983, the municipal and state authority, therefore, is aligned here with the plaintiffs and not against them.[79]

Alignment exposed the plaintiffs to charges of collusion and was bound to make the courts uneasy about the precedental potential of finding state action where the state was not only not an adversary, but actually joined to the plaintiff's cause of action.

Attention to technical construction of the suit and insistence upon the correct utilization of public function reasoning in sexual

company in a bar was not sufficient reason to deny entrance to equally thirsty women.

75. San Antonio School Dist. v. Rodriguez, 411 U.S. at 107 (1973).

76. Black, *Foreward, The Supreme Court 1966 Term*, 81 HARV. L. REV. 69, 91 (1967).

77. Taylor v. Louisiana, 95 S. Ct. 692, 704 (1975).

78. 505 F.2d at 268.

79. *Id.* at 267.

discrimination claims involving exclusion from public facilities, plus imaginative use of the facially broad provisions of 42 U.S.C. §1983, may not guarantee female participation in "contact sports" organized by private athletic associations. However, *King* demonstrates that failure to successfully traverse the treacherous bridge of state action definitely forecloses any judicial consideration of the "interesting questions" female plaintiffs seeks to pose.

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