"Girls of Summer": A Comprehensive Analysis of the Past, Present, and Future of Women in Baseball and a Roadmap to Litigating a Successful Gender Discrimination Case

I. INTRODUCTION

The expression "diamonds are a girl's best friend" is one which typically alludes to the image of a glamorous stone with many carats. However, for some women[1] this aphorism may also apply to their passion for playing on a baseball field.[2]

> Well — it's our game; that's the chief fact in connection with it: America's game; it has the snap, go, fling of the American atmosphere; it belongs as much to our institutions, fits into them as significantly as our Constitution's laws; is just as important in the sum total of our historic life.[3]

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1. For purposes of this comment, the phrase "young women" or "girl(s)" shall refer to females younger than the age of 18. "Women" shall refer to females older than 18.

2. Ann Yost, *The Ladies in Blue Calling the Game the Way It Is*, WASH. POST, Aug. 3, 1993, at E5. "There's a level of commitment in these women that you don't see in baseball much anymore .... [A] lot of guys don't appreciate the opportunities they have; they're just in it for the money. These women are in it solely because of their passion for the game." Pete Williams, *Women Share Passion for Diamond*, BASEBALL WEEKLY, Mar. 16, 1994, at 62.

3. Ken Burns & Lynn Novick, *Preface* to GEOFFREY C. WARD AND KEN BURNS' BASEBALL: AN ILLUSTRATED HISTORY xvii (1st ed. 1994) (quoting Walt Whitman).

As Walt Whitman expressed in the above passage, it is *our* game - all of ours, including women. The majestic game of baseball touches the lives of all people, including females of all ages. The nation has seen the participation of women in baseball featured in recent movies such as "A League of Their Own,"[4] as well as a modern-day professional women's team, the Colorado "Silver Bullets."[5] A testament to the popularity of the Silver Bullets, Major League Baseball has taken them on as an official licensee and will market Silver Bullet clothing, merchandise, and paraphernalia along with that of other minor and major league franchises.[6]

Historically, men assumed that women were only capable of watching the game because they believed women were too delicate to participate.[7] However, some early lovers of the game sought to refine their status as mere spectators and take their love of the game between the foul lines.[8]

A common manner in which females have been discriminated against in the past has been through the limitation of athletic opportunities for young women.[9] This comment seeks

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4. A LEAGUE OF THEIR OWN (Columbia Pictures 1992).

5. Ted Curtis & Joel H. Stempler, 19 COLUM.-VLA J. L. & ARTS 23, 36 n.59 (1995). Coors Brewing Company co-sponsors this women's professional baseball team with Whittle Sports Properties, a Knoxville-based organization. *Id.* It is the only women's professional baseball team in existence today. The "mission" of the Silver Bullets is found in their 1995 Souvenir Program:

> The Colorado Silver Bullets is a team founded with the purpose to provide a nurturing environment for top women athletes to learn and play professional baseball against existing men's teams within the ranks of minor league, semi-pro, college, and amateur baseball. Its aspiration is to inspire female athletes to play the game of baseball at all levels, from little league through professional leagues, and encourage all forms of organized baseball to accept women as players.

For the Love of the Game, 1995 COLORADO SILVER BULLETS SOUVENIR PROGRAM (1995).

6. Pete Williams, *Women Share Passion for Diamond*, BASEBALL WEEKLY, Mar. 16, 1994, at 62. With the emergence of the Silver Bullets, the most significant question for the franchise will be how successfully they will compete against their more experienced male opponents. *Id.*

7. GEOFFREY C. WARD & KEN BURNS, BASEBALL: AN ILLUSTRATED HISTORY 18 (1st ed. 1994).

8. *Id.*

9. *See* WALTER T. CHAMPION, JR., SPORTS LAW IN A NUTSHELL 275 (1993). Specifically, the most common manner which female participation has been restricted was, and is, educational regulations. *Id.* Although these regulations may not be per se discriminatory, they nonetheless discriminate in their application to young women and the sports they wish to play. *Id.* Regulations frequently discriminate by failing to provide equal funding, facilities, or opportunities for female athletes and their staff. *Id.*

to shed light on the long strides that women have made in attempting to break the barrier of social and physical acceptance in amateur and professional baseball. This comment will reveal that within the last two years, the public has experienced a distinct augmentation in its awareness of women in baseball through television broadcasts[10] and newspaper publications about the Silver Bullets.[11]

Introductorily, a fact-specific outline of the history and background of women in baseball and their rocky road to social acceptance will be addressed in Part II. Part III will survey previous litigation that has ensued as a result of the failure of organized amateur and high school baseball leagues to accept women and girls as comparable players. In Part IV, applying legal arguments from past cases including Title IX regulations,[12] equal protection arguments, and civil rights cases, this comment will attempt to sketch out a successful gender discrimination claim for women and girls seeking social and physical acceptance in baseball. Finally, Part V will conclude with an objective outlook of the future of women in amateur and professional baseball.

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10. Telephone Interview with Lynne Haddow, Programming Consultant with Liberty Sports, Inc. (Aug. 18, 1995). In 1995, Prime Sports Showcase Network from Houston, Texas entered into a three-year contract with the Silver Bullets to televise 20 Bullet games per season. *Id.*

11. *See* Tom Pfister, *Bats and Ball in her Future—Foul Ball, Warm Reception Inspire 4 Year-Old,* Baseball Weekly, June 15, 1994, at 34; Pete Williams, *Paying Our Respects—Silver Bullets Bring Back Women Pros,* BASEBALL WEEKLY, Dec. 28, 1994, at 23; Pete Williams, *Silver Lining: Bullets Showed They Belong—Women's Pro Team Aiming to Build on Hard-Won Respect,* BASEBALL WEEKLY, Sept. 7, 1994, at 35; Pete Williams, *Women Share Passion for Diamond,* BASEBALL WEEKLY, Mar. 16, 1994, at 62.

12. 20 U.S.C. §§ 1681-1688 (1990) (hereinafter "Title IX"). With the promulgation of the Education Amendments of 1972, Pub L. No. 92-318, §§ 901-909, 86 Stat. 373-75 (1972), gender discrimination is now prohibited in programs and activities at institutions of higher education receiving federal financial assistance. Grove City College v. Bell, 465 U.S. 555, 555-56 (1984); *see also* Cohen v. Brown Univ., 879 F. Supp. 185, 187 (D.R.I. 1995) (downgrading Brown University's women's volleyball and gymnastics teams from full varsity to club status violated Title IX since it failed to accommodate the interests of its women athletes).

20 U.S.C. § 1681(a), in pertinent part, provides:

> No person in the United States shall, on the basis of sex, be excluded from participation, 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) (1990).

II. The History of Women in Baseball

A. Early History

The notion of women participating in the game of baseball has been around since the middle 1800's.[13] Their presence at the ballpark was initially presumed to keep the male players on their best behavior.[14] However, some women, like Vassar College student Annie Glidden, refused to sit and watch.[15] In 1866, she and her fellow freshman students formed the Laurel and Abenakis baseball clubs.[16] Word of women playing baseball soon caught on at other schools,[17] as women began playing the beloved game just as their male counterparts—but not for long.[18] When doctors and mothers complained of the injuries these women suffered during play, the teams lost their support and suddenly disbanded.[19]

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13. Geoffrey C. Ward & Ken Burns, Baseball: An Illustrated History 18 (1st ed. 1994). The editor of one publication wrote:

> If there is any one effort that clubs ought to make more than another to promote the popularity of our game and to ensure its respectability, it is the one to encourage the patronage of the fair sex. The presence of an assemblage of ladies purifies the moral atmosphere of a baseball gathering, representing, as it does, all outbursts of intemperate language which the excitement of a contest so frequently induces.

Id.

14. *Id.*

15. *Id.* Glidden stated, "[T]hey are getting up various clubs not for out-of-door exercise .... They have a floral society, boat clubs and base-ball clubs .... I belong to one of the latter, and enjoy it highly, I can assure you." *Id.*

16. *Id.* With the assistance and backing of a female medical doctor who believed exercise was necessary to maintain good health, Glidden sought to increase participation of women in the game. *Id.*

17. *Id.* Small schools such as Smith College and Wellesley College followed suit and organized all-female teams, primarily to entertain and amuse the crowd. Karen Nocella & Christine Negley, *Diamonds are a Girl's Best Friend*, 1995 Colorado Silver Bullets Souvenir Program, at 6. Wearing gym-style dresses, these women played hard, but possessed little, if any, true baseball talent. *Id.*

18. Geoffrey C. Ward & Ken Burns, Baseball: An Illustrated History 18 (1st ed. 1994).

19. *Id.* One player, Sophia Richardson, explained how people soon frowned upon their teams:

> One day a student, while running between bases, fell with an injured leg .... We attended her to the infirmary, with the foreboding that this accident would end our play of baseball .... Dr. Webster said that the public doubtless would condemn the game as too violent, but if the student had hurt herself while dancing, the public would not condemn dancing to extinction.

Id.

Formal complaints from unsupportive mothers officially caused the Laurel and Abenakis baseball clubs to fold in the early 1870s. *Id.*

It was not until 1880 when college women reorganized their baseball leagues.[20] However, these women were again reminded by doctors and concerned mothers that the game was much too violent for them, and were forced, once again, to disband.[21] Continuous attempts at reforming the leagues were also futile.[22] One such late nineteenth century team from Springfield, Illinois folded after only four games due to lack of interest and public scorn from outraged editorialists.[23] In September of 1875, the owners of the Springfield club initially fielded its female team as a novelty act called the "Blondes and Brunettes."[24]

Later in 1883, a pair of Philadelphia promoters fielded two women's teams named the Red and Blue Stockings.[25] By the 1890s, the "Bloomer Girls," as they were called, began playing in leagues all over the country.[26] Finally, in 1898, the president of the Atlantic League, Ed Barrow, sought to increase ticket sales and interest for his Reading, Pennsylvania men's team.[27] He soon advertised that a young female pitcher by the name of Lizzie Arlington would play for his club.[28] The ploy

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20. *Id.* Smith College was one school which attempted to reorganize itself at this time. *Id.*

21. *Id.*

22. *Id.* Many critics ostracized the women teams stating that "[t]he whole affair was a revolting exhibition of impropriety . . . ." *Id.*

23. GEOFFREY C. WARD & KEN BURNS, BASEBALL: AN ILLUSTRATED HISTORY 18 (1st ed. 1994). One such editorialist wrote that the team "possess[ed] no merit save that of novelty, and [was] gotten up to make money out of a public that rushes to see any species of immorality." *Id.*

24. *Id.* Although the first team to surface was the "The Dolly Vardens," an all-black female club from Philadelphia (1867), the "Blondes and Brunettes" were perhaps the best-known all-female team. Karen Nocella & Christine Negley, *Diamonds Are a Girl's Best Friend*, 1995 COLORADO SILVER BULLETS SOUVENIR PROGRAM, at 6.

25. GEOFFREY C. WARD & KEN BURNS, BASEBALL: AN ILLUSTRATED HISTORY 19 (1st ed. 1994). Neither promoter used his real name during play. *Id.* It was reported that the players "were selected with tender solicitude from 200 applicants, variety actresses and ballet girls being positively barred." *Id.* Women were admitted free of charge in hopes of increasing attendance. *Id.* At one game in Camden, New Jersey, 500 women turned out to watch the game. *Id.* Women were charged 15 cents thereafter, the price of a children's ticket. *Id.*

26. *Id.* Sometimes men would dress up in women's clothes and even get into the game. *Id.* This team would challenge men's teams to competitive games. *Id.* The excitement of this team kept them playing for nearly 50 years. Karen Nocella & Christine Negley, *Diamonds are a Girl's Best Friend*, 1995 COLORADO SILVER BULLETS SOUVENIR PROGRAM, at 6.

27. GEOFFREY C. WARD & KEN BURNS, BASEBALL: AN ILLUSTRATED HISTORY 19 (1st ed. 1994).

28. *Id.*

worked, as more than a thousand fans[29] showed up at the park to watch her give up two hits, a walk, and no runs in the ninth inning.[30]

Female participation in baseball reached new heights into the early part of the twentieth century.[31] At the age of sixteen, Alta Weiss made her pitching debut for a men's semi-pro team in Ohio in 1907.[32] Her success in her pitching debut increased public awareness of women playing baseball and resulted in larger crowds at the ball park.[33]

By the 1930s, however, women were encouraged to give up the game of baseball and turn to softball.[34] This trend resulted in the disappearance of all-female baseball teams for nearly ten years.[35]

The 1992 motion picture "A League of Their Own" was, in part, based on the All-American Girls Professional Baseball League (hereinafter "All-American League").[36] This league was created by Chicago Cubs owner, Philip Wrigley, who hoped to sustain interest in the game of baseball while the majority of the country's young men were fighting in World War II.[37] In May of 1943, hundreds of women turned out for tryouts

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29. *Id.* More than 200 of the fans in attendance were women. *Id.*

30. *Id.* The local newspaper wrote that "Miss Arlington might do as a pitcher among amateurs, but the sluggers of the Atlantic League would soon put her out of business .... [B]ut, for a woman, she is a success." *Id.*

31. Karen Nocella & Christine Negley, *Diamonds Are a Girl's Best Friend,* 1995 COLORADO SILVER BULLETS SOUVENIR PROGRAM, at 7. The three major stars at the turn of the century were: pitcher Alta Weiss, pitcher Lizzie Arlington, and first baseman Lizzie Murphy. *Id.*

32. GEOFFREY C. WARD & KEN BURNS, BASEBALL: AN ILLUSTRATED HISTORY 77 (1st ed. 1994). She had pitched for the boys' teams since the age of 14. *Id.*

33. *Id.* She pitched five innings, giving up only four hits and one run. *Id.* After the crowd of twelve-hundred people turned out to see her pitch, the *Lorain Times Herald* reported that "Miss Weiss can easily lay claim to being the only one who can handle the ball from the pitcher's box in such style that some of the best semi-pros are made to fan the atmosphere." *Id.* (quoting without citation the *Lorain Times Herald*). Special trains were being run out from Cleveland whenever she pitched. *Id.* When she appeared in Cleveland's Naps' Park, more than 3,000 spectators paid admission. *Id.* Miss Weiss once told reporters that she "can't play ball in skirts" because she "nearly broke [her] neck." *Id.* She decided to then wear wide "bloomers," the equivalent of baggy pants. *Id.*

34. Karen Nocella & Christine Negley, *Diamonds are a Girl's Best Friend,* 1995 COLORADO SILVER BULLETS SOUVENIR PROGRAM, at 6. This movement practically abolished the all-female baseball teams. *Id.*

35. *Id.*

36. *Id.*

37. GEOFFREY C. WARD & KEN BURNS, BASEBALL: AN ILLUSTRATED HISTORY 280 (1st ed. 1994). At that time, more than 40,000 women were playing semi-pro softball all

in this private league, and four teams were formed immediately.[38] The women players in the All-American League would, however, be coached, charmed, dressed, and taught how to maintain all aspects of their "femininity" while performing on and off the playing field.[39] The All-American League soon doubled in size, as reporters labeled the players the "Girls of Summer," "Queens of Swat," and "Belles of the Ball Game."[40] The All-American League was a tremendous success in the Midwest as it drew tremendous crowds and produced an impressive group of stars for over ten years.[41]

On June 21, 1952, a former All-American League player, Eleanor Engle, signed a minor league contract with a men's professional team, the AA Harrisburg Senators.[42] Unfortu-

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across the country. *Id.* Wrigley sought to quickly convert these women into competitive baseball players. *Id.* Unlike the previous teams that were formed, the All-American League was a private league which contained only all-female teams that competed against each other. Karen Nocella & Christine Negley, *Diamonds Are a Girl's Best Friend*, 1995 COLORADO SILVER BULLETS SOUVENIR PROGRAM, at 6. Interestingly, it was originally purported to be a softball league, until it evolved into a format with longer base paths, a smaller ball, and overhand pitching. *Id.*

38. GEOFFREY C. WARD & KEN BURNS, BASEBALL: AN ILLUSTRATED HISTORY 280 (1st ed. 1994). The teams were: (1) the Rockford Peaches; (2) the Racine Belles; (3) the Kenosha Comets; and (4) the South Bend Blue Sox. *Id.*

39. *Id.* Wrigley stated, "femininity is the keynote of our league." *Id.* Wrigley did not allow any pants to be worn or foul language on or off the field. *Id.* Wrigley even employed a cosmetics firm to run a charm school for his players and coaches to educate them on proper etiquette. *Id.* Each team had a chaperon who followed them to each town and approved of all social events. *Id.* Each player was required to wear skirts, high heels, and make-up off the field. *Id.* Violations of these rules resulted in a $50 fine. *Id.* It has been reported that one batter was called back to the dugout because she forgot to apply her lipstick. *Id.*

40. *Id.* The six new teams added to the league were: (1) the Minneapolis Millerettes; (2) the Fort Wayne Daisies; (3) the Grand Rapids Chicks; (4) the Battle Creek Belles; (5) the Kalamazoo Lassies; and (6) the Springfield Sallies. *Id.*

41. *Id.* The All-American League drew more than a million fans in its most successful year. *Id.* Jean Faut won three pitching championships and Joanne Weaver once hit .429 with three consecutive batting titles. *Id.* Sophie Kurys (a.k.a. "Tina Cobb") averaged 100 stolen bases each year. *Id.* In her best season, she stole 201 of 203 bases. *Id.* Finally, Anabelle Lee, the aunt of former Boston Red Sox pitcher Bill Lee, once pitched a perfect game for the Minneapolis Millerettes. *Id.*

42. Karen Nocella & Christine Negley, *Diamonds are a Girl's Best Friend*, 1995 COLORADO SILVER BULLETS SOUVENIR PROGRAM, at 6. The minor league system involves a tiered competition structure. New players typically begin playing on a "rookie" team. Upon consideration and conclusion of the management of the franchise, a player may then ascend through the ranks attaining "A level," "AA level," "AAA level," before reaching the major leagues. The franchise may wish to have a player skip a level or descend to a lower level, depending on the player's overall performance and the needs of the organization.

nately, two days later, Major League Baseball Commissioner Ford Frick invalidated the contract and formally prohibited all females from playing in the minor leagues.[43] In 1953, thirty-two year old second baseman Toni Stone managed to break this forbidden barrier and become the first women to play on a big league men's team when she played with the Indianapolis Clowns, a Negro League franchise.[44] The combination of the dissolution of the All-American League in 1955 and Commissioner Frick's ruling that women be banned from the minor leagues ended a truly monumental era.[45] Over the next four decades, professional women's baseball was non-existent.[46]

B. Present Day Status

On December 10, 1993, the Colorado Silver Bullets were formally recognized as an all-female professional baseball team.[47] Public awareness of women in baseball clearly has been revitalized with the formation of this new franchise.[48] In 1994, the Silver Bullets held nationwide open tryouts for their twenty-four player roster.[49] Over 1,800 women put their jobs

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43. *Id.*

44. *Id.* Ms. Stone batted a .243 and even managed to get a hit off of hall of famer, Satchel Paige. *Id.*

45. *Id.*

46. *Id.*

47. Karen Nocella & Christine Negley, *Diamonds are a Girl's Best Friend*, 1995 COLORADO SILVER BULLETS SOUVENIR PROGRAM, at 6. In December of 1993, the National Association of Professional Baseball Leagues officially recognized the Silver Bullets. *Id.*

48. Pete Williams, *Paying Our Respects—Silver Bullets Bring Back Women Pros*, BASEBALL WEEKLY, Dec. 28, 1994, at 23. Lavonne "Pepper" Davis noted after the Silver Bullets' 1994 inaugural season that it is "awareness" of women's baseball that has made people ponder what the game is truly about. *Id.* Ms. Davis was a former catcher in the 1940s of the All-American League who inspired the character played by Geena Davis in "A League of their Own." *Id.* Ms. Davis has stated:

> It's a first step toward another women's professional baseball league . . . [y]ou have to look at their success in terms of how they made people aware of women's baseball. At a time when the [1994] baseball strike was disillusioning a lot of baseball fans, it was nice to see these women playing the game for the sheer joy and fun of it. If people give them a chance, they'll find that the women's game can be every bit as exciting as the men's game.

Id.

49. Karen Nocella & Christine Negley, *Diamonds Are a Girl's Best Friend*, 1995 COLORADO SILVER BULLETS SOUVENIR PROGRAM, at 6. In 1994, Coors Brewing Co. paid 20 Silver Bullets a minimum salary of $20,000 for a five month, 50 game season. Pete Williams, *Silver Lining: Bullets Showed They Belong—Women's Pro Team Aiming to Build on Hard-Won Respect*, BASEBALL WEEKLY, Sept. 7, 1994, at 35. Members of the 1994 team were not guaranteed a spot on the 1995 team, but they did receive an automatic invita-

and careers on hold to try out for the team.[50] In March and April of 1994, those players who made the spring training roster reported to Orlando, Florida under the tutelage of manager and ex-major leaguer, Phil Niekro.[51] On April 3, 1994, the inaugural twenty-four player squad was announced, as the history of women in baseball took a new and positive turn.[52]

The Silver Bullets, the first all-women's professional baseball team in over forty years, plays against men's minor, college, and semi-pro teams across the country.[53] The Silver

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tion to spring training the following year. *Id.* Those players that made the team the next year received raises from their initial $20,000 salary. *Id.*

Each player is also furnished with a supply of custom made, Louisville Slugger bats. Pete Williams, *Women Share Passion for Diamond*, BASEBALL WEEKLY, Mar. 16, 1994, at 62. In essence, the Bullets will be treated better than most minor league players. *Id.*

50. Karen Nocella & Christine Negley, *Diamonds Are a Girl's Best Friend*, 1995 COLORADO SILVER BULLETS SOUVENIR PROGRAM, at 6. Statistics as to the total amount of women that tried out varied from 1,100 to 1,800. *Id. See also* Pete Williams, *Women Share Passion for Diamond*, BASEBALL WEEKLY, Mar. 16, 1994, at 62 (this article reported that over 1,100 women took part in the nationwide Silver Bullet tryouts). Tryouts were held in: Orlando, Florida (January 8-9, 1994); Denver, Colorado (January 15-16, 1994); Los Angeles, California (January 22-23); Sacramento, California (January 24-25, 1994); Chicago, Illinois (January 29-30, 1994); Hempstead, New York (Hofstra University) (February 5-6, 1994); Atlanta, Georgia (February 12-13, 1994); and Dallas, Texas (February 19-20, 1994). *New Women's Team Flooded with Calls*, Special to BASEBALL WEEKLY, Dec. 29, 1993, at 6.

The new women's team has been a source of tremendous interest for women all across the country. *Id.* The toll free number (800-278-2772) established for the franchise has been constantly flooded with calls. *Id.* Women ranging in age from 16 to 40 tried out for the team. *Id.*

51. Pete Williams, *Women Share Passion for Diamond*, BASEBALL WEEKLY, Mar. 16, 1994, at 62. The training camp roster includes 14 women who are employed as coaches and instructors. *Id.* Former big leaguers Joe Niekro, brother of Phil, and Paul Blair, round out the coaching staff. *Id.* The Bullets staff contend that they treat the women no differently than if they were men. *Id.* However, there are some team rules which do not apply to men's teams. *Id.* For instance, Bullet players cannot be seen around their hotel wearing sports bras, spandex shorts, or tank tops without a shirt or other garment covering them. *Id.* The staff also forbids jewelry on the field. *Id.* There is no rule which prohibits chewing tobacco. *Id.* The median age of all spring training players is 25. *Id.*

Gina Satriano, 28, was one interesting spring training invitee. *Id.* She was a deputy district attorney from Los Angeles who completed a murder trial on March 4, 1994. *Id.* The next morning, Satriano boarded a plane and headed to Orlando to pursue and new career as a pitcher with the Silver Bullets. *Id.* The daughter of former California Angels and Boston Red Sox catcher, Tom Satriano, stated that "the law will have to wait." *Id.*

52. Kathleen Christie, *The Beginning History of the Silver Bullets*, 1995 COLORADO SILVER BULLETS SOUVENIR PROGRAM, at 36. From the onset, the Silver Bullets acquired a tremendous amount of media coverage and interest, even reaching foreign countries. *Id.*

53. Pete Williams, *Women Share Passion for Diamond*, BASEBALL WEEKLY, Mar. 16, 1994, at 62.

Bullets finished their inaugural 1994 season with a disappointing record of 6-38.[54] Despite the fact that not one player hit above .220, and not one pitcher had an earned run average below 4.50, America was formally introduced to an assembly of hard-working, dedicated women who sacrificed their careers, families, and lives to pursue a dream.[55] Current statistics also reveal that the Silver Bullets have made tremendous progress at the conclusion of their 1995 sophomore season.[56]

As a result of the Silver Bullets' successful first two sea-

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54. Pete Williams, *Silver Lining: Bullets Showed They Belong— Women's Pro Team Aiming to Build on Hard-Won Respect*, BASEBALL WEEKLY, Sept. 7, 1994, at 35.

55. Pete Williams, *Women Share Passion for Diamond*, BASEBALL WEEKLY, Mar. 16, 1994, at 62. It is reported that the Bullets played to over 300,000 fans and earned a horde of admirers. Pete Williams, *Silver Lining: Bullets Showed They Belong — Women's Pro Team Aiming to Build on Hard-Won Respect*, BASEBALL WEEKLY, Sept. 7, 1994, at 35. With only six short weeks of formal training together as a team, trying to adapt to the relatively new game of baseball (many had only played softball in the past), the Silver Bullets' on-field development was clearly meritorious. *Id.* Silver Bullet manager Phil Niekro stated:

> If these players had the training that men had, from Little League on up, we might have a woman in the major leagues by now. The experience gap is many, many years. But some day there will be a couple of women in the minors. At that point, they become prospects and after that, who knows? Somewhere down the line, there will be a woman in the major leagues.

Id.

56. Letter from Debra Larson, Director of Public Relations, *Colorado Silver Bullets*, to Colorado Silver Bullets Fans (1995 Season). The Silver Bullets improved in the following respects: (1) they increased their run production from 76 in 1994 to 92 in 1995; (2) the increased their stolen base production from 9 in 1994 to 25 in 1995; and (3) they were only shut out 3 times in 1995 as opposed to 16 times in 1994. *Colorado Silver Bullets v. Reno Diamonds* (Prime Sports Broadcast Network, Aug. 3, 1995).

A comparison of their statistics reveal that the Silver Bullets have made excellent progress in just one year. Letter from Debra Larson, Director of Public Relations, *Colorado Silver Bullets*, to Colorado Silver Bullets Fans (1995 Season). The 1995 season saw every phase of the Silver Bullets' game improve: (1) team record in 1995: 11-33 (compare 1994: 6-37); (2) team batting average in 1995: .183 (compare 1994: .141); (3) team earned run average in 1995: 5.08 (compare 1994: 7.09); (4) number of times shut out in 1995: 3 (compare 1994: 16); (5) total runs scored in 1995: 158 (compare 1994: 83); (6) total number of hits in 1995: 232 (compare 1994: 146); total number of runs batted in during 1995: 116 (compare 1994: 59). *Id.* Further, the 1995 Silver Bullets lost 8 games by only 1 run, and 6 games by only 2 runs. Id.

Public Relations Director, Debra Larson, commented that although attendance figures between the 1994 and 1995 season stayed approximately the same (each game averaged about 6,000 to 6,500 fans) the awareness of the Silver Bullets has steadily increased. Telephone Interview with Debra Larson, Public Relations Director for the Silver Bullets (Nov. 9, 1995). She further stated that games played in major league stadiums typically drew larger crowds and that, as for any other team, attendance was affected by weather conditions. *Id.* At Coors Field in Colorado, the Silver Bullets drew 12,000 fans in a 5-1 loss to the Colorado Sox. *Id.* Finally, Ms. Larson expressed that the Silver Bullets were especially looking for power hitters for their 1996 club. *Id.*

sons, the six team, all-female Mediterranean Baseball League was launched in Europe.[57] Spain, France, and Italy will each be home to two teams in the league, as the future of the sport for women is positively on the rise.[58]

III. Prior Litigation: Women in Amateur Baseball

Despite the commendable efforts of the Silver Bullets in establishing widespread public awareness of their professional team, as well as the efforts to organize professional leagues around the world, women have been frustrated in participating in amateur baseball leagues and school teams across the country over the last thirty years. The Silver Bullets may offer a competitive professional team for the select few women across the country, but for the multitude of women and girls who are not able to play professionally, there has been a consistent deprivation of their participation on male teams for various reasons which will be discussed in detail. This section is separated into two chronologically organized sections: (1) a survey of the significant 42 U.S.C. § 1983 (hereinafter "§ 1983") and equal protection cases brought by women; and (2) an analysis of recent Title IX litigation.

A. § 1983 and Equal Protection Cases

In *National Organization for Women, Essex County Chapter v. Little League Baseball, Inc.*,[59] the New Jersey Superior Court, Appellate Division, concluded that the defendant organization was a "place of public accommodation" and was not within any statutory exemption.[60] The *National Organization*

57. Karen Nocella & Christine Negley, *Diamonds are a Girl's Best Friend*, 1995 Colorado Silver Bullets Souvenir Program, at 7.

58. *Id.*

59. 127 N.J. Super. 522, 318 A.2d 33 (App. Div. 1974), *aff'd mem.*, 67 N.J. 320, 338 A.2d 198 (1974). Little League Baseball appealed a lower court decision which required them to admit girls age eight to twelve to participate in the league. *Id.* at 526, 318 A.2d at 35. Little League's appeal was based on reports which allege that young women were more likely to be injured playing hardball than boys. *Id.* at 527, 318 A.2d at 36.

60. *Id.* at 530, 318 A.2d at 37. Little League, Inc. argued that it was not a place of public accommodation under N.J.S.A. § 10:5-1, the New Jersey statute which prohibits discrimination of an operator of any "place of public accommodation." *Id.* Further, the court determined that organizations such as Little League Baseball, Inc. are within the civil rights statute despite the fact that there is no fixed parcel of land which Little League owned or leased in order to play their games. *Id.* at 531-32, 318 A.2d at 38. Specifically, Little League argued that it fit within N.J.S.A. § 10:5-12(f), which provided fur-

court reasoned that since membership was open to all boys in the community without any restriction (other than sex) and that Little League proposed organizations and facilities for use of the general public, it must be considered a place of public accommodation.[61] With respect to the specific exemption Little League argued was applicable to them under N.J.S.A. § 10:5-12(f), the court pointed out that since all previously exempted places involved exposure of the body and required changing of clothes, the exemption was inapplicable to Little League.[62] Accordingly, the court held that Little League Baseball was a place of public accommodation and, therefore, could not exclude young women ages eight to twelve from participating.[63]

The *National Organization* case included substantial, detailed medical[64] and psychological studies[65] used to demonstrate how the psychological and physical aspects of girls and boys differ in terms of their athletic capability.[66]

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ther exemptions including any "summer camp, swimming pool, gymnasium, comfort station, dispensary, clinic or hospital, or school or educational institution *which is restricted to the individuals of one sex.*" *Id.* at 532, 318 A.2d at 38. (emphasis added); *see* N.J.S.A. § 10:5-12(f); *accord* Israel v. West Virginia Secondary Sch. Activities Comm'n, 388 S.E.2d 480, 488-90 (court determined the Secondary Schools Activity Commission is a "place of public accommodation" as defined in W. VA. CODE § 5-11-3(j) even if general public does not participate in interscholastic sports).

61. *Id.* at 531, 318 A.2d 37-38; *see also* Clover Hill Swimming Club v. Goldsboro, 47 N.J. 25, 219 A.2d 161 (1966) (swimming club is a place of public accommodation within law against discrimination where it was organized for profit and controlled by stockholders).

62. *Id.* at 532-33, 318 A.2d at 38.

63. *Id.* at 533, 318 A.2d at 39.

64. *National Org.*, 127 N.J. Super. at 527-30, 318 A.2d at 35-37. Medical testimony at trial was introduced by several doctors to analyze the reaction times, bone strength, potential for injury, muscle fibers, biomechanics, and psychological implications involved in coeducational little league play and its effect upon children between the ages of eight and 12. *Id.* at 527-28, 318 A.2d at 36. The basis of this conclusion was predicated on Japanese studies of cadavers in which the strength of the bone was measured of persons between the ages of 18 and 80. *Id.* at 527, 318 A.2d at 36-37. Between the ages of 10 and 12, boys possess muscle strength and reaction time superior to girls. *Id.* at 527-28, 318 A.2d at 36.

65. *Id.* A Little League defense expert testified that children need time to be alone with others of the same sex and that this purpose can be better served by allowing only boys to participate in baseball and having girls participate in softball. *Id.* On the other hand, plaintiff's expert testified that the need for sex integrated baseball would augment the mental health of both sexes. *Id.*

66. *Id.* at 529-30. In a 1993 article, it was reported that "[m]en are more likely to exercise vigorously and pick sports that involve competition and physical contact," whereas, women choose activities that involve cooperation and enhance their overall health. Carol Krucoff, *Men, Women and Exercise: Sexes Differ in Approach to Activity*, WASH. POST, Aug. 17, 1993, at Z16. Sociologist Don Sabo says that the reason men are

In 1974, the United States Court of Appeals for the Sixth Circuit in *King v. Little League Baseball, Inc.*[67] affirmed a decision of the District Court, dismissing a § 1983 civil rights action initiated on behalf of a twelve year-old girl who was prohibited from playing on a little league team in Ypsilanti, Michigan.[68] The District Court determined that there was an absence of significant state involvement in the management of Little League Baseball.[69] The Sixth Circuit affirmed, but narrowed the districts court's holding by concluding that plaintiff did not maintain a cause of action for which relief could be granted under § 1983.[70]

On July 16, 1964, Congress originally enacted Public Law 88-378 which incorporated Little League Baseball as a federal

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taught to "win," and women are typically urged to cooperate and "get fit" is because, historically, men have been encouraged to play team sports. *Id.* As of the date of Sabo's study, 37% of high school athletes and 34% of inter-collegiate athletes are female. *Id.* In fact, in 11 of the 50-plus sports surveyed by the National Sporting Goods Association, 75% or more of the participants were male. *Id.* These sports included hunting, football, baseball, ice hockey, target shooting, skateboarding, and martial arts. *Id.* The "male-dominated sports involve a fairly high degree of physical contact or above-average risk of injury." *Id.*

67. 505 F.2d 264 (6th Cir. 1974).

68. *Id.* at 266. Plaintiff, Carolyn Ann King, claimed that the restrictive regulation prohibiting her from playing violated the Equal Protection Clause of the Fourteenth Amendment. *Id.*

69. *Id.* Significant state action is a pre-requisite to maintaining a § 1983 action. *Id.* The District Court compared the extent of state involvement in the instant case with the decision of the United States Supreme Court in *Burton v. Wilmington Parking Authority*. *Id.* (citing Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961)). In *Burton*, the Supreme Court opined that the state must be acknowledged as a participant in the exclusion of a black man from a restaurant where a parking authority could have, but did not, require a private operator of a restaurant to serve all persons. *Id.* at 267 (citing *Burton*, 365 U.S. at 724). The District Court, however, concluded that there was not significant state involvement in either the "management or decision-making" of Little League Baseball. *Id.*

70. *Id.* at 267. The court stressed that based on the evidence set forth, whatever the factual situation had been, it had been changed radically prior to the initiation of the suit. *Id.* Specifically, (1) the City of Ypsilanti cut off the use of its facilities to anyone who discriminated; (2) the national charter of Little League Baseball had canceled its local agreement with the league; (3) the defendant league had admitted plaintiff to play; and (4) the league was operating without discrimination. *Id.* Thus, plaintiff had not set forth a cause of action for which relief could be granted under § 1983. *Id.*

The court noted that Little League Baseball had considered dropping its "boys only" policy and had petitioned Congress for an amendment to its charter to declare girls as eligible players. *Id.* at 268 n.1. The *King* court did not consider this issue in handing down its affirmance. *Id.*; *see* Rappaport v. Little League Baseball, 65 F.R.D. 545 (D. Del. 1975) (defendant Little League's motion to dismiss granted since change in policy of admitting girls rendered moot plaintiff's case for declaratory and injunctive relief).

corporation purporting to "promote, develop, supervise, and voluntarily assist in all lawful ways the interest of *boys* who will participate in Little League Baseball."[71] Subsequent to the *King* case in 1974, the Little League Baseball, Inc. charter was amended to provide that the league would be open to girls as well as boys.[72]

The seminal case on the issue of discrimination of women in amateur baseball is *Fortin v. Darlington Little League, Inc.*[73] In *Fortin*, a female little leaguer sought to challenge the constitutionality of the rules and regulations of the Congressionally recognized corporation of Little League Baseball.[74] The United States District Court for the District of Rhode Island held that the use of a municipal park involved state action which subjected the Darlington Little League's policy to Fourteenth Amendment and § 1983 scrutiny.[75] The *Fortin* court took judicial notice of the fact that baseball was a contact sport and that there was a serious risk of injury should girls play with boys.[76] Accordingly, the District Court entered judgment for the

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71. *Id.*

72. 36 U.S.C. §§ 1071-1088, *as amended*, Pub. L. No. 93-551, 88 Stat. 1744 (1974).

73. 376 F. Supp. 473, *rev'd*, 514 F.2d 344 (1st Cir. 1975). Allison Fortin was a 10 year-old female ballplayer who unsuccessfully sought an injunction at the District Court under § 1983 barring the Darlington Little League from preventing her from playing baseball solely based on her sex. *Fortin*, 376 F. Supp. at 474.

74. *Id.* at 474-75.

75. *Id.* at 478-9. *But see King*, 505 F.2d 264 (6th Cir. 1974) (dismissal of case by the District Court for failure to exhibit state action since enforcement of "no girls" rule did not come under color of state law). There was sufficient state action in the endeavors of the defendant and the court resolved that the state involvement "confers jurisdiction upon this Court over the plaintiff's action under the provisions of the Fourteenth Amendment and 42 U.S.C. § 1983." *Id.* To prevail under this section, one must demonstrate that the deprivation takes the form of "state action" and the rights, privileges, or immunities secured by the Constitution are affected. 42 U.S.C. § 1983; *see also* Lavoie v. Bigwood, 457 F.2d 7, 9 (1st Cir. 1972) (§ 1983 action predicated on "state action" and where plaintiff alleges that defendant's action is "under color of any statute, ordinance, regulation, custom, or usage, of any State").

76. *Fortin*, 376 F. Supp. at 479. Expert medical testimony revealed that there are material differences between boys and girls aged eight to 12 with respect to musculature, bone strength, strength of ligaments and tendons, pelvic structure, gait and reaction time. *Id.* The court underscored that:

> the goal of safety is a legitimate concern of the defendant Darlington Little League, Inc. and this Court cannot say that its rule excluding girls between the ages of eight to 12 years from participating in said baseball games is not rationally related to the effectuation of that reasonable goal.

Id. (citing Magill v. Avonworth Baseball Conference et al., 364 F. Supp. 1212, 1216 (W.D. Pa. 1973)).

defendants.[77]

The United States Court of Appeals for the First Circuit rejected the District Court's reasoning and unanimously reversed the decision.[78] The newly enacted amendment to Little League Baseball's national charter did not directly require local groups who had Little League Baseball teams to admit girls.[79] However, since Darlington relied on the charter to exclude the plaintiff, the case was not moot and the parties were entitled to a decision on the merits.[80] The amendment essentially recommended that local leagues abide by the policy of having girls and boys playing "side-by-side."[81] The First Circuit agreed with the District Court in its finding of significant state action, but could not accept as true that the exclusion of girls from the league was rational.[82] Further, the First Circuit disagreed that between the ages of eight and twelve there are greater physical athletic abilities in boys which pose a danger to girls if they compete against each other.[83] As such, Fortin was able to play little league baseball as long as Darlington

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77. *Id.* at 479. The *Fortin* court also noted, as in *National Organization*, that studies have been performed on the physiological differences between girls and boys at the little league level. *Id.* "Considerable research and studies have been made into the physiological differences that exist between male and female children at the age of Little League Baseball participants." *Id.* "The results indicate that it is not a safe practice for young girls to be included as players on the same teams as young boys in a competitive contact sport such as baseball." *Id.*

78. 514 F.2d 344 (1st Cir. 1975).

79. *Id.* at 346.

80. *Id.* The amendment struck the words "boys" and "manhood" and inserted "young people" into the national charter. *Id.* Pursuant to the Report of the House Committee on the Judiciary, the legislative purpose was "to amend the Federal Charter of Little League Baseball, Inc., to allow girls to participate on an equal basis with boys." H.R.Rep. No. 93-1409, 93d Cong., 2d Sess. 1 (1974). The report further stated that "[y]oung girls, although they may have desired to play Little League Baseball, in the past were prohibited .... Over the years frustration developed until, in 1974, these young girls, through their parents, sought to participate in this activity by petitioning the courts for equal opportunities to play Little League Baseball." *Id.* It was stressed during the hearing that it was the "intent of Congress that this federally chartered organization should treat girls equally with boys, and that Congress would not tolerate separate but equal programs." *Id.* "The proposed legislation, as amended, will accomplish the goals of girls' participation on an equal basis with boys in Little League Baseball, Inc." *Id.* at 2.

81. *Id.*

82. *Id.* at 351.

83. *Fortin*, 514 F.2d at 351. The court further reasoned that since the addition of the new amendment to the national charter, other jurisdictions and communities have encouraged girls to participate, so upholding the District Court's decision would be incongruous. *Id.* at 350.

continued to use the City of Pawtucket's parks and fields.[84] It is significant to recognize that the court's decision was based on three primary factors: (1) the age of the children concerned; (2) the uniqueness of the opportunity; and (3) the recent Congressional amendments to the national charter.[85]

In *Magill v. Avonworth Baseball Conference,*[86] the United States Court of Appeals for the Third Circuit affirmed a ruling of the District Court denying injunctive relief to a ten year-old girl on equal protection grounds.[87] The District Court held that: (1) there was no state action; and (2) assuming there were significant state action, there was an absence of discrimination.[88] The Third Circuit in *Magill* affirmed the District Court's finding of no state action on the part of the private, non-profit baseball league, and, accordingly, did not address the plaintiff's equal protection issue.[89] Although defendant Avonworth never utilized facilities it independently owned,

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84. *Id.* Darlington Little League occupied six of the eight city maintained fields in Pawtucket, Rhode Island. *Id.* at 347.

85. *Id.* at 351. The court held that failure to acknowledge these factors might result in a different outcome. *Id.* For instance, if the group of children were 16 and 17 years old and not nine and 10, the physical differences would be readily apparent. *Id.* Moreover, children only grow up once, and it would seem to this author that the law should afford them every opportunity to experience whatever activity they wish.

86. 516 F.2d 1328 (3d Cir. 1975). The plaintiff, Pamela Magill, then 10 years old, sought injunctive relief under 42 U.S.C. §§ 1983 and 1985 alleging that the defendants had unconstitutionally discriminated against her by refusing to allow her to play little league baseball solely on the basis of her gender. *Id.* at 1330. Plaintiff's claims for money damages were dropped at the preliminary hearings. Magill v. Avonworth Baseball Conference et al., 364 F. Supp. 1212, 1213 (W.D. Pa. 1973). A claim for relief under § 1985(3) is maintained where two or more persons conspire to deprive anyone of equal protection or equal privileges and immunities under the law. 42 U.S.C. § 1985(3) (1994).

87. *Magill*, 516 F.2d at 1328.

88. Magill v. Avonworth Baseball Conference, 364 F. Supp. 1212, 1216-17 (W.D. Pa. 1973). The District Court reasoned that the discrimination in this case, prohibiting a female to play little league baseball because of her gender, was practiced by a private organization who was organized under the nonprofit corporation laws of Pennsylvania. *Id.* at 1214-15. Further, the organization's use of certain community and school district facilities free of charge was so insignificant and unrelated to activities giving rise to alleged discrimination that it could not be classified as state action for purposes of a claim under § 1983 or § 1985. *Id.* Moreover, the simple fact that a private association is acting under a state license does not constitute state action under § 1983, especially where the charter is "neutral and nondiscriminatory on its face." *Id.* at 1215.

89. *Magill*, 516 F.2d at 1330. The Third Circuit held that waiver of a $25 fee for the use of public playing fields by a private corporation, which was organized to encourage playing and enjoyment of baseball among school age youngsters, was de minimis and, therefore, deserving of only slight weight in determining whether the corporation's refusal to permit girls to participate constituted state action. *Id.* at 1336.

and depended upon public facilities, state action was, nonetheless, *not* found since the "mere use of a public park by a private organization does not satisfy the state action nexus test."[90] The court based its reasoning on the premise that although many organizations and citizens depend upon the state for services, this dependence does not transform the activities of the organization or citizen into state action.[91]

Carnes v. Tennessee Secondary School Athletic Ass'n[92] involved a challenge by a female high school student to a state rule which forbade coeducational participation in contact sports.[93] Plaintiff Carnes wished to play for the boy's baseball team and sought a preliminary injunction to prohibit the enforcement of this restrictive regulation.[94] The Tennessee Secondary School Athletic Association ("TSSAA") contended that there were two distinct reasons for not allowing female participation in contact sports.[95] First, the TSSAA wanted to protect females from exposure to an "unreasonable risk of harm,"[96] and, secondly, the TSSAA wished to prevent a male takeover of

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90. *Id.* at 1333; *see also* Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (discrimination by otherwise private entity is not necessarily violative of equal protection if private entity receives benefit or service from the state). The primary inquiry is whether the state involvement is specific. *Magill*, 516 F.2d at 1332. The *Magill* court concluded that where Avonworth was granted nonexclusive, scheduled use of four public playing fields, no municipal officers participated, and no municipal buildings were used for the exclusive purpose of the league, the plaintiff failed to meet her burden of demonstrating significant state action. *Id.* at 1336.

91. *Id.* The court noted that individuals would be unable to take part in athletic events and other recreational activities such as picnics, cookouts, and parties, unless state-owned parks were available to them. *Id.* at 1334. The mere use of such facilities does not transform the uses into state action. *Id.*

92. 415 F. Supp. 569 (E.D. Tenn. 1976).

93. *Id.* at 570.

94. *Id.* The Tennessee Secondary School Athletic Association promulgates rules and regulations for all interscholastic athletic activities in the State of Tennessee. *Id.* Article II, section 32 in the TSSAA handbook prohibits boys and girls to participate together on mixed teams in "contact sports." *Id.* The rule, entitled "Mixed Competition," classifies baseball as a contact sport. *Id.*

The *Carnes* court emphasized that for the plaintiff, Jo Ann Carnes, to be entitled to an injunction, she had the burden of proving: (1) probability of success on the merits; (2) a clear case of irreparable injury; and (3) that a balance of the injury favored the granting of the injunction. *Id.* at 571; *see also* Garlock, Inc. v. United Seal, Inc., 404 F.2d 256, 257 (6th Cir. 1968) (injunctive relief requires showing clear case of irreparable injury and that balancing the injury supported granting the injunction).

95. *Id.*

96. *Id.* The court demonstrated that by denying the plaintiff an opportunity to participate in the sport is improper because boys are susceptible to the same amount of risk as are girls. *Id.* The facts also demonstrate that the plaintiff was "baseball material," as

the female sports.[97]

The *Carnes* court held that only discrimination between the sexes which was reasonable could be constitutionally permitted.[98] As such, the court determined that plaintiff Carnes demonstrated a likelihood that gender discrimination in contact sports was unreasonable because she was an otherwise capable ballplayer who risked losing the opportunity to play in her final season in high school.[99] The court granted the injunction and enjoined the defendant from prohibiting Carnes from participating in baseball "solely on account of her sex."[100]

Similar to *Carnes*, in *McDonald v. New Palestine Youth Baseball League, Inc.*,[101] a young girl sought injunctive relief[102] alleging that the defendant violated her constitutional right of association due to her gender in violation of §§ 1983 and 1985(3).[103] As in any case predicated under § 1983, state ac-

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quoted by her coach, and had participated in other contact sports in the past without any injury. *Id.*

97. *Carnes*, 415 F. Supp. at 571. Here, the plaintiff could only participate in baseball or not play at all, hence, the TSSAA rule serves to bar any participation solely based on her gender. *Id.* at 572.

98. *Id.* The testimony revealed that the coaches believed that the contact sport status of baseball may be questionable. *Id.* Instead of full body contact on a regular basis, baseball simply has occasional collisions, batters occasionally hit by pitches, and runners who sometimes get spiked when sliding. *Id. See also Magill*, 364 F. Supp. at 1216 (W.D. Pa. 1973), *vacated and remanded*, 497 F.2d. 921 (3d Cir. 1973) (holding baseball is a contact sport). *Magill* was later affirmed on the ground that there was no state action. *Magill*, 516 F.2d. 1328 (3d Cir. 1975).

Further, the Department of Health, Education, and Welfare has interpreted a contact sport as "including boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose of major activity of which involves bodily contact." 45 C.F.R. § 86.41 (1975).

99. *Carnes*, 415 F. Supp. at 572. The court stressed that the proof demonstrated that plaintiff appeared physically suited to play baseball and faced the risk of being unable to compete during her senior year. *Id.* at 571-72.

100. *Id.* The *Carnes* court noted that the injury to the plaintiff in being prevented from playing baseball favored granting the injunction. *Id.* The court further ordered the TSSAA to be enjoined from imposing sanctions against the Board of Education or its representatives for permitting plaintiff to participate in any athletic endeavor. *Id.* at 572-73.

101. 561 F. Supp. 1167 (S.D. Ind. 1983).

102. *Id.* at 1168. In determining whether to grant injunctive relief, the court balanced four factors: (1) the adequacy of plaintiff's remedies at law; (2) the plaintiff's likelihood of success on the merits; (3) whether the harm threatened by the injury to plaintiff outweighs the harm threatened by the injunction to the defendants; and (4) whether public interest will be affected by issuance of injunction. *Id.*

103. *Id.* Kelly McDonald brought suit as a mechanism to be permitted to play in the boy's baseball league as opposed to the girl's softball league. *Id.* Both leagues were sponsored by the defendant, New Palestine Youth Baseball League, Inc. *Id.*

tion must be demonstrated by the party claiming relief.[104] Plaintiff alleged that state action was established by: (1) local towns compensating the league; (2) the location of the playing fields on property leased from the community school board; (3) the use of school facilities for league fund raisers; and (4) that playing facilities excluded the non-participating public.[105]

The *McDonald* court found that the defendant was not a private entity which merely took the place of a government function reserved to the state.[106] Accordingly, the court found no state action involved in the operation of the defendant league, as the league was not operating under color of state law.[107] The court stated that the proper test in evaluating the requisite nexus between the state and a private organization is the "symbiotic relationship" between the public and private activities.[108] However, the court contended that plaintiff McDonald failed to allege or prove that the defendant league had

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104. *Id.*

105. *Id.* at 1168-69.

106. *McDonald*, 561 F. Supp. at 1169. Plaintiff McDonald argued that the defendant's baseball league was a substitute for the recreational program that the local towns were authorized to conduct under Indiana law. *Id.* McDonald specifically alleged five separate instances which manifested a "nexus" between the defendants and the state: (1) in 1982, Brandywine Township of Hancock County, Indiana paid the defendant league $500.00 of federal money; (2) during this same period, Sugarcreek Township of Hancock County, Indiana gave the defendant league $2,500.00 from the Park and Recreation Fund, and also gave the league $800.00 in the fiscal year 1983; (3) the fields were located on property leased from the Board of School Trustees of Southern Hancock County (Indiana); (4) the school permitted the defendants to hold fund raisers on school facilities; and (5) the playing fields excluded the remainder of the public. *Id.* at 1168-69.

The defendants contended: (1) that while they did provide a public benefit, the monies received from the towns were not their major source of revenue; and (2) that the league's programs did not preclude the towns from conducting their own leagues. *Id.*

The court found that the plaintiff failed to establish the requisite nexus so as to demonstrate state action. *Id.* at 1170. The court further commented that McDonald failed to allege or establish that the defendant league committed a discriminatory act (such as forcing her to play in a girl's softball league) which was influenced by the state. *Id.* Similar to the conclusion in *King*, the *McDonald* court noted that not only did plaintiff fail to establish likelihood of success on the merits of her § 1983 claim, but she also did not state a claim upon which relief could be granted under § 1983. *Id.*

107. *Id.* at 1170.

108. *Id.* at 1169. *See also* Burton v. Wilmington Park Auth., 365 U.S. 715 (1961) (requisite nexus existed between state and private restaurant where restaurant was located in public parking garage). The symbiotic relationship is essentially a phrase describing the requisite nexus between a private and public entity in order to establish state action. *Id.* In *Rendell-Baker v. Kohn*, the Supreme Court refined the nexus test to also require an independent discriminatory act which was based on a state policy. Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

"been compelled or influenced by the state."[109] Accordingly, since plaintiff did not satisfy the requisite nexus test for state action and failed to demonstrate a likelihood of success on the merits of her § 1983 claim, her motion for a preliminary injunction was denied.[110]

Perhaps the most high profile baseball gender discrimination action was brought by Osbourn Park High School (Maryland) student Julie Croteau.[111] In *Croteau v. Fair*,[112] plaintiff Croteau initiated a gender discrimination suit in the United States District Court for the Eastern District of Virginia against her coach, principal, and county.[113] Croteau alleged that she was cut from the varsity baseball team because she was a female and instituted this proceeding claiming violations of the Fourteenth Amendment, Title 42 U.S.C. § 1983, Title IX of the Education Amendments of 1972, and Section II, Article I of the Virginia Constitution.[114] Croteau moved for injunctive relief and compensatory damages in the amount of

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109. *Id.* at 1170.

110. *Id.* The *McDonald* court applied Federal Rule of Civil Procedure 12(b)(6) in dismissing plaintiff's action for failure to state a claim. *Id.* The court further refused to entertain plaintiff's 42 U.S.C. § 1985(3) argument since the defendants did not act under color of state law. *Id.* The nexus requirement of a § 1983 action must also be established in a § 1985(3) action. *Id.*

111. Alice Digilio, *Female Ballplayer in NCAA Has Productive Rookie Year*, WASH. POST, July 3, 1989, at B5. Croteau, along with her parents, brought a sex discrimination suit against the Osbourn Park High School baseball coach and Prince William County school officials contending that Julie was denied a spot on the varsity roster solely because of her sex. *Id.* Through determination and hard work, she later became the first woman ever to play on an NCAA men's baseball team. *Id.* Although the team finished a dismal 1-21-1, Croteau ended the year hitting .222 with one RBI and only five errors for St. Mary's College of Maryland. *Id.* To properly put it in perspective, she also maintained a 3.2 grade point average. *Id.*

As fate would have it, however, Croteau withdrew from St. Mary's after an incident on the team bus when teammates began reading aloud excerpts from an X-rated magazine which contained degrading descriptions of women's body parts. *Id.* Croteau indicated that this was not the only incident, but one of a plethora of "isolated incidents" in an "inhospitable atmosphere." J.A. Adande, *Boys Will Be Boys Sad Excuse For Fouling Her Out, She Says Female First Baseman Bids Insults Goodbye*, WASH. POST, June 25, 1991, at E5.

As a point of comparison, the first woman pitcher to ever play in the NCAA was Ila Borders of Southern California College. Rick Lawes, *First Female College Pitcher has Major Goal*, BASEBALL WEEKLY, Feb. 23, 1994, at 13. On February 15, 1994, Borders became the first women to step on the baseball mound in a college game. *Id.* She beat Claremont-Mudd, 12-1. *Id.*

112. 686 F. Supp. 552 (E.D. Va. 1988).

113. *Id.* at 553.

114. *Id.* Interestingly, Croteau appeared *pro se*. *Id.*

$100,000.[115]

The District Court denied Croteau's request for injunctive relief and asserted that "there is no constitutional or statutory right to play any position on any athletic team."[116] Furthermore, the *Croteau* court posited that there was insufficient evidence of discriminatory intent[117] to maintain a gender discrimination suit under the Fourteenth Amendment.[118] Accordingly, the court dismissed all complaints of discrimination against the defendants.[119]

In *Israel v. West Virginia Secondary School Activities Commission*,[120] a female high school ballplayer brought a sex dis-

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115. *Id.*

116. *Id.* at 554. The court noted that there is a right to compete to play on the team and to be free from sexual discrimination through state action. *Id.* The court, in denying relief to the plaintiff, emphasized that discrimination claims under the Fourteenth Amendment require intentional conduct. *Id. See* Mescall v. Burrus, 603 F.2d 1266, 1271 (7th Cir. 1979) (discriminatory intent is required to establish violation of Equal Protection Clause of Fourteenth Amendment).

Croteau contended that she possessed the right "to be free from state action infected by gender bias." *Croteau*, 686 F. Supp. at 554. The court stated that plaintiff was entitled to argue this point, but, in this case, there was no evidence of gender prejudice. *Id.*

117. *Croteau*, 686 F. Supp. at 553. The *Croteau* court held that "in sex discrimination cases brought under the Fourteenth Amendment, plaintiff must demonstrate that the discrimination was intentional." *Id.* Discriminatory intent can be identified by examining historical background, a specific sequence of events, any departure from normal procedures, and statements by those making the decision. *Id.* at 553-554. *See* Johnson v. Brelje, 521 F. Supp. 723, 729 (N.D. Ill. 1981) (plaintiff need only show that discriminatory purpose is motivating factor).

In *Croteau*, the plaintiff failed to establish that the decision to cut her from the varsity team was motivated by a gender preference for males. *Id.* at 554. The court was convinced that Croteau received a fair and impartial tryout and the decision to cut her was made in good faith and "for reasons unrelated to gender." *Id.*

118. *Id.* at 553. The court mentioned that although there was a strong showing that Croteau was a fine ballplayer and athlete, competition for a spot on the team was intense. *Id.*

119. *Id.* Since her college years at St. Mary's, Croteau has played for a semi-pro team in Fredericksburg, Virginia where she batted .308 in 1993. Robert Collias, *Hawaiian League Reloads With Pair of Silver Bullets*, BASEBALL WEEKLY, Oct. 12, 1994, at 8. In five years with the Fredericksburg Giants, Croteau batted a respectable .261. *Id.* In addition, Croteau competed for and earned a spot on the 1994 Silver Bullets where she had just four hits in 54 at bats, an .074 average. *Id.* She committed only two errors during her campaign. *Id.* In 1994, Croteau was even invited to play in the Hawaiian Winter League with teammate Lee Anne Ketcham. *Id.*

Perhaps one of the more interesting comments a fan has asked Croteau was, "Are you really a girl?" Pete Williams, *Women Share Passion for Diamond*, BASEBALL WEEKLY, Mar. 16, 1994, at 62. Croteau stated that she could never understand how some people just could not accept the fact that women, too, share the same passion for the game. *Id.*

120. 388 S.E.2d 480 (W. Va. 1989).

crimination suit against the defendant school commission after she was denied an opportunity to play on the boy's baseball team.[121] The commission premised its decision on a regulation which prohibited girls from playing on boy's teams where the school maintained a comparable sport for the other sex.[122] Because plaintiff's school fielded a girl's softball team, the school would be in violation of the regulation if plaintiff were allowed to participate in boy's baseball.[123]

Israel asserted that she was discriminated against in violation of the Equal Protection Clause of the Fourteenth Amendment, state equal protection, and the West Virginia Human Rights Act which prohibited discrimination based on sex by operators of places of public accommodation.[124] As previously seen in *National Organization*, the defendant argued that it

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121. *Id.* at 482. The plaintiff, Erin Israel, had a great deal of experience in baseball. *Id.* She was nominated to all-star teams, recommended by coaches, and labeled as being an "aggressive" player who "understood the game, its concepts, and its technique." *Id.* Israel had been playing baseball in recreation leagues, little leagues, and pony leagues since the age of six. *Id.* In February 1984, Israel tried out for the all-male high school baseball team, but was prohibited from playing on the team because of a restriction set forth by the Secondary Schools Activities Commission. *Id.*

122. *Id.* The regulation promulgated by the Activities Commission, Rule No. 3.9, which prohibits the plaintiff from playing provides:

> [i]f a school maintains separate teams in the same or related sports (ex. baseball or softball) for girls and boys during the school year, regardless of the sports season, girls may not participate on boys' teams and boys may not participate on girls' teams. However, should a school not maintain separate teams in the same or related sports for boys and girls, then boys and girls may participate on the same team except in contact sports such as football and wrestling.

Id.

123. *Id.* at 483. The court also noted that the school would run the risk of being barred from playing in state tournaments if they allowed girls to play on a boy's team where the school fielded a similar female team. *Id.*

124. *Id.* at 482. The West Virginia Human Rights Act establishes discriminatory safeguards and provides in pertinent part as follows:

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the state of West Virginia or its agencies or political subdivisions: . . .
>
> (f) For any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any *place of public accommodations* to:
>
> (1) Refuse, withhold from or deny to any individual because of his race, religion, color, national origin, ancestry, *sex*, age, blindness or handicap, either directly or indirectly, any of the accommodations, advantages, facilities, privileges or services of such place of public accommodation . . . .

Id. at 488 (quoting W. VA. CODE § 5-11-9(f)(1) (1987)) (emphasis supplied); *see also National Org.*, 127 N.J. Super. 522, 318 A.2d 33 (App. Div. 1974), *aff'd mem.*, 67 N.J. 320,

did not qualify as a place of public accommodation because participation in athletics was not open to the general public, but only to those enrolled students who satisfied age, residency, and academic criteria.[125] The court concluded that the statute could not be construed so narrowly, and therefore, determined that the defendant operated a place of public accommodation.[126] The *Israel* court pointed out that the defendant regulates interscholastic athletics and its membership, both of which have a direct impact on the school system.[127]

The *Israel* court recognized that a lawsuit premised on gender discrimination demanded intermediate, or "middle-tier," scrutiny,[128] and held that it is constitutionally acceptable under such analysis for public schools to maintain separate sports teams for males and females as long as they are "substantially equivalent."[129] The *Israel* court posited that there

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338 A.2d 198 (1974) (New Jersey Law Against Discrimination prohibits operator of any "place of public accommodation" to discriminate based on sex).

125. *Israel*, 388 S.E.2d at 488.

126. *Id.* at 489. In reaching their decision, the court considered two factors to determine whether an entity is a place of public accommodation: (1) if it is created and operated pursuant to the laws of West Virginia; and (2) whether it receives funding from public sources. *Id.* (citing Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Comm'n, 309 S.E.2d 342 (W. Va. 1983) (holding that fire departments are places of public accommodation)).

The court further noted that other jurisdictions have addressed the same issue. *Id.*; *see* United States Power Squadron v. State Human Rights Appeal Bd., 452 N.E.2d 1199 (N.Y. 1983) (the place where meetings and activities occurred deemed place of public accommodation); United States Jaycees v. McClure, 305 N.W.2d 764 (Minn. 1981) (place of public accommodation inquiry is whether the organization invited only a screened and selected portion of the public, or whether it engaged in activities in places in which an unscreened, unselected, and unlimited number of persons from the general public was invited); *National Org.*, 127 N.J. Super. at 532-33, 318 A.2d at 38 (places of public accommodation depends on whether organization engages in activities in places where unselected public is given open invitation).

127. *Id.* at 489. Additionally, since the general public was invited to each game, the public accommodation definition was satisfied. *Id.* Since the commission was legislatively created, given powers to service interscholastic athletics, and received dues from surrounding schools, it fell within the statutory definition of a place of public accommodation. *Id.* at 489-90.

128. *Id.* at 484. Intermediate review of gender classifications falls in between "strict scrutiny" for regulations of suspect classes and the ordinary "rational basis" standard used in traditional equal protection analysis. *Id.* The middle-tier analysis which the *Israel* court implemented was first used by the Supreme Court in *Craig v. Boren* whereby "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976).

129. *Id.* The clearest instance of gender discrimination violations under equal protection precepts is where there is a male team, but no female counterpart. *Id.* Under such

are three reasons for upholding such gender discrimination: (1) the physical and psychological variations between males and females; (2) athletic opportunities for women are upgraded when separate teams are maintained; and (3) men may dominate in particular sports if there were not separate teams.[130] The *Israel* court concluded, however, that baseball and softball were not substantially equivalent since there was a considerable dissimilarity in the equipment used and the level of skill required.[131] The court also asserted that it was unlikely that a "mass exodus" of females from softball to baseball would result if females were permitted to try out for the boy's baseball team.[132] Accordingly, the court concluded that the West Virginia regulation violated both the state and federal equal protection clauses since the classification was not substantially related to any important governmental objective.[133]

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circumstances, courts have held that prohibiting a female to try out for a male team violates equal protection standards. *See, e.g.*, Brenden v. Independent Sch. Dist. 742, 477 F.2d 1292 (8th Cir. 1973) (where high schools attended by female plaintiffs provided teams for males in non-contact sports of tennis and cross-country skiing and running, but did not provide such teams for females, application of rule prohibiting females from participating violated equal protection clause); Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977) (complete denial of opportunity to play interscholastic soccer violated female student's equal protection rights, but school had option of discontinuing soccer, permitting both sexes to compete on same team, or fielding separate teams so long as they were substantially comparable); Haas v. South Bend Community Sch. Corp., 289 N.E.2d 495 (1972) (where majority of schools fail to maintain interscholastic athletics for girls, equal protection is violated when it denies girls an opportunity to qualify for participation with boys in non-contact sports).

130. *Israel*, 388 S.E.2d at 484. *See, e.g.*, O'Connor v. Board of Educ. of Sch. Dist. No. 23, 645 F.2d 578 (7th Cir.), *cert. denied*, 454 U.S. 1084 (1981) (preliminary injunction granted restricting school board from refusing to permit female plaintiff from trying out for 6th grade boys basketball team). However, where courts have acknowledged the substantial equivalency issue in sports, this does not require that mere superficial equivalency will be found constitutional under an equal protection inquiry. *Id.* at 485.

131. *Id.* The court conceded that both sports employ a similar format, but there are significant differences such as: (1) the size and delivery of the ball (softball uses a lager, softer ball which is pitched underhand, as opposed to a baseball which is pitched overhand); (2) the number of players on a team (nine for baseball, 10 in softball); (3) the distance from the pitching mound to home plate (60 feet, six inches in baseball; 40 feet in softball); (4) the length of the bat (a 42-inch bat in baseball is permitted, but in softball, a length of 34 inches is maximum). *Id.* Further, the *Israel* court noted that the skill level in baseball is more demanding than in softball. *Id.*

132. *Id.*

133. *Id.* at 487-488. Another mentionable case which specifically dealt with a female player who was barred from playing baseball on a boy's team was *Habetz v. Louisiana High School Athletic Ass'n.* Habetz v. Louisiana High Sch. Athletic Ass'n, 915 F.2d 164 (5th Cir. 1990). Plaintiff Habetz sought a tryout for her high school baseball team which was comprised of all male players. *Id.* at 165. School officials prohibited Habetz from

B. *Title IX Cases*

Since there has not been any case law on point which expressly addresses a Title IX claim by a woman wishing to play on a male baseball team,[134] the 1992 case of *Williams v. School District of Bethlehem, Pa.*[135] offers a favorable holding for a woman wishing to challenge a restrictive rule barring her from trying out for a traditionally male baseball team.[136] Although *Williams* involved a male seeking to play on a female team, it supports the Title IX proposition that "no person" shall be excluded from an educational program or activity solely on account of their gender.[137]

Plaintiff Williams, a male high school student seeking reinstatement to the field hockey team he tried out for and made, filed a motion for a temporary restraining order and preliminary injunction after he was ordered to cease participation by the school district.[138] Thereafter, Williams entered into a compromise with school officials whereby he would be allowed to practice with the team, but would not be permitted to compete in interscholastic competition.[139] Williams asserted that the

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trying out for the team under the guise of the high school athletic association rule which prohibited girls from participating on boys sports teams. *Id.*

Habetz argued that the defendant school association could not prove that the two sexes were not equal and could not compete on the same level. *Id.* After she was denied the opportunity, she brought a civil rights action to enjoin the LHSAA from enforcing the restrictive rule. *Id.* The District Court denied Habetz's request for a temporary restraining order and preliminary injunction and she appealed to the Fifth Circuit. *Id.*

Prior to the final adjudication of the appeal, LHSAA decided to change the rule. *Id.* Both parties disputed the reason for the change. *Id.* Plaintiff contended that the defendant "saw the writing on the wall" and decided to change; defendant claimed that there was a change in perspective to this issue. *Id.* As the new rule stands, the LHSAA allows girls to participate in boys sports if the particular school does not offer a comparable girls sport. *Id.* Defendant asserted at all times that this change was made of their own free will and, should they decide to change it back, they would. *Id.* On appeal from the District Court, the Fifth Circuit ruled that the case was moot and should be dismissed. *Id.*

134. *See Croteau*, 686 F. Supp. at 553. In *Croteau*, the court dismissed the plaintiff's complaint without addressing her Title IX argument. *Id.* Interestingly, the *Croteau* case has been the only case where a female baseball player who had been denied an opportunity to play on a male baseball team argued that she was protected under Title IX.

135. 799 F. Supp. 513 (E.D. Pa. 1992).

136. *Id.* at 514.

137. *See* 20 U.S.C. § 1681(a) (1990). Section 1681(a) provides that "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 . . . ." *Id.*

138. *Williams*, 799 F. Supp. at 514-15.

139. *Id.* at 515.

school violated Title IX, and both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[140] Defendants countered and argued that Title IX had not been violated since field hockey was a contact sport and athletic opportunities for boys had not been previously been limited at the school.[141]

The *Williams* court held that field hockey was not a contact sport under Title IX and 34 C.F.R. § 106.41(b) since field hockey was not specifically designated as such and did not involve significant inherent bodily contact.[142] The court concluded that the defendant violated Title IX by excluding boys from the field hockey team where there was no comparable boys, and because males had been previously denied athletic opportunities at the plaintiff's high school.[143] Furthermore, the *Williams* court reasoned that the policy of banning boys from the field hockey team could not survive equal protection scrutiny.[144] The physical differences between girls and boys did not establish that the school's policy substantially related to the furthering the school's objective of maintaining opportunities for girls to participate in athletics.[145]

In *Cohen v. Brown University*,[146] a class of female athletes from Brown University brought a lawsuit against the univer-

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140. *Id.*

141. *Id.* at 515-16. The plain language of Title IX as it applies to the *Williams* case, prohibits exclusion of boy's from the field hockey team unless the court determines it is a contact sport. *Id.* at 516. Section 106.41(b) of the Code of Federal Regulations states:

> where a [school] operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to tryout for the team offered unless the sports is a contact sport. For purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

Id. at 516 (quoting 34 C.F.R. § 106.41(b)).

142. *Id.* at 516.

143. *Williams*, 799 F. Supp. at 518. Athletic opportunities for boys at this high school had been limited for the previous 18 years. *Id.* During that time, boys had been permitted to try out for 12 teams, while girls could try out for all 22. *Id.* The court also noted that a girl who was good enough could play on a boys team for which there was no comparable girls team (ex. wrestling), as well as on a boys team for which there is also a girls team (ex. basketball). *Id.* However, a boy could not try out for or play on a girls non-contact sport team where a boys team is not offered. *Id.*

144. *Id.* at 519.

145. *Id.*

146. 879 F. Supp. 185 (D.R.I. 1995).

sity and two of its administrators alleging violations of Title IX.[147] The lawsuit centered around Brown University's decision to demote the women's gymnastics and volleyball teams from full varsity status to club status due to financial restrictions.[148] The United States District Court for the District of Rhode Island granted plaintiff's motion for a preliminary injunction and reinstatement of the two teams pending the outcome of the litigation.[149] The United States Court of Appeals for the First Circuit subsequently affirmed the granting of the injunction.[150]

As a result of a trial on the merits, the District Court concluded that Brown University violated Title IX by failing to accommodate the interests of its women athletes.[151] The District Court applied a three prong test to determine if Brown University complied with Title IX.[152] The court concluded that Brown University did not satisfy prong one since the gender symme-

147. *Id.* at 187.

148. *Id.* Prior to the initiation of this lawsuit, both programs were entirely funded by Brown University. *Id.* After the administrative decision to demote these programs, it was declared that these programs would still be able to participate in intercollegiate competition, but only with the use of private funds. Cohen v. Brown Univ., 991 F.2d 888, 892 (1st Cir. 1993). The men's water polo and golf teams were also included in Brown University's decision to eliminate teams from their budget. *Id.*

149. Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1991).

150. Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993).

151. *Cohen*, 879 F. Supp at 187. It should be noted that Brown University employs a bi-level athletic program which consists of "university-funded" varsity teams and "donor-funded" varsity teams. *Id.* at 189. Brown University provides full financial assistance to those university-funded programs, but requires donor-funded teams to collect their own funds through private endowments. *Id.* Donor-funded programs do not have success in maintaining their programs and competitive position. *Id.*

152. *Id.* at 195. Compliance with Title IX may be appraised by using the following criteria:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,418 (1979) (codified at 20 U.S.C. §§ 1681-88 (1990)) (hereinafter referred to as "the Policy Interpretation").

try of Brown University's intercollegiate athletic program was not substantially proportionate in comparison to the student body.[153] Turning to prong two, the court determined that Brown University failed to demonstrate that it maintained a continuing practice of intercollegiate program expansion for its women athletes.[154] Prong three would, in effect, exonerate Brown University's failure to furnish substantially proportionate participation opportunities only if it could illustrate that it "fully and effectively accommodated" the underrepresented sex.[155] The court rationalized that Brown University failed to comply with the third prong in two respects: (1) Brown failed to increase the number of intercollegiate participation opportunities available to women where the interest of a sub-varsity team could be elevated to intercollegiate status; and (2) Brown failed to maintain and support women's donor-funded teams which prevented the athletes from "fully developing their competitive athletic abilities and skills."[156] Accordingly, the court ordered Brown University to submit an extensive plan detailing its compliance with Title IX.[157]

Lastly, in *Roberts v. Colorado State University*,[158] the

153. *Cohen*, 879 F. Supp. at 211. Brown provided 555 (or 61.87%) intercollegiate athletic opportunities to men, but only 342 (38.13%) to women. *Id.* Undergraduate enrollment at Brown during the relevant year was 2,796 men (48.86%) and 2,926 women (51.14%). *Id.* Similarly, Brown offered 479 university-funded spots for men and only 312 for women. *Id.* Of the donor-funded spots, Brown offered 76 for men and 30 for women. *Id.*

154. *Id.* Although Brown made significant progress in expanding women's athletics in the 1970s, Brown only added women's indoor track (1982) and women's skiing (1994) since then. *Id.* Further, simply cutting back on men's teams was not the equivalent of expansion for women. *Id.* Accordingly, Brown had not proven that the percentage of women participation has increased over the years. *Id.*

155. *Id.* The court heard testimony from student athletes, coaches, and experts who explained that there are at least four existing female teams (gymnastics, fencing, skiing, and water polo) which had been participating in competitive schedules and were perfectly capable of competing at the highest varsity level Brown could offer. *Id.* at 212.

156. *Id.* The court reasoned that there was an obvious interest in the women's fencing and skiing teams at the donor-funded level. *Id.* Since status at this level prevented these women from reaching their competitive maximum, Brown had failed to accommodate their interests. *Id.* Therefore, maintaining these sports at the donor-funded level violated prong three. *Id.* Brown's argument that there was a lack of a "reasonable expectation" that intercollegiate competition in skiing, water polo, fencing, and gymnastics would be available within it's region was not entertained since the evidence demonstrated that adequate competition existed in Brown's geographical territory. *Id.* at 213.

157. *Id.* at 214.

158. 814 F. Supp. 1507 (D. Colo. 1993), *aff'd in part rev'd in part*, 998 F.2d 824 (10th Cir. 1993). The United States Court of Appeals for the Tenth Circuit affirmed the District

United States District Court for the District of Colorado determined that the demotion of the women's varsity softball team by the defendant university violated Title IX.[159] At the outset, the *Roberts* court explained that Colorado State University failed to meet prong one since there was a 10.5% discrepancy between female enrollment and athletic participation for women athletes.[160] The court further rationalized that Colorado State University failed to continually expand its women's sports as required under prong two of the Policy Interpretation.[161] Finally, the *Roberts* court opined that the defendant university failed to demonstrate full and effective accommodation of the pursuits of its female athletes.[162]

IV. A Roadmap to a Successful Gender Discrimination Case

Each of the aforementioned cases offer unique arguments for plaintiffs to implement during the course of gender discrimination litigation. Although Little League Baseball, Inc. amended its national charter in 1974 to allows girls to play, there are still many high schools and colleges, which consistently deter women and girls from participating. For purposes of this section, we will assume a female player has been denied

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Court's holding that Colorado State University violated Title IX. Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993). The Tenth Circuit also agreed with the District Court's decision to reinstate the women's softball team. *Id.* at 833. However, the Tenth Circuit concluded that the District Court's decision to order the varsity team to play a fall exhibition schedule was an abuse of discretion since Title IX does not require a court to determine or ensure that a team will be successful. *Id.* at 835.

159. *Roberts*, 814 F. Supp. at 1518-19. The *Roberts* court applied the same three-part test from the Policy Interpretation as implemented in *Cohen*. *Id.* at 1511. *See supra* note 152 and accompanying text. Plaintiffs, members of the women's softball team, claimed that the defendant university did not "fully and effectively accommodate" the interests and abilities of its women athletes and sought an injunction for the team's reinstatement. *Id.*

160. *Id.* at 1512. The percentage of women at Colorado State University was 49.2%, but females comprised only 37.7% of the varsity athlete population. *Id.*

161. *Id.* at 1514. Although women's golf was added to the defendant university's intercollegiate athletic list in 1977, there had not been any further additions to the women's athletic program. *Id.* To the contrary, several men's and women's teams were terminated due to financial dilemma. *Id.* The court reasoned that the Policy Interpretation's definition of "expansion" does not mean that the relative percentage of women's teams shall increase as a result of cutting men's programs. *Id.*

162. *Id.* at 1517. The record revealed that the members of the women's softball team were successful in cultivating interest in the sport since 1992. *Id.* Moreover, the team was growing in popularity among freshman and high school athletes, 75% of whom attend colleges within the state of Colorado. *Id.* at 1517-18.

an opportunity to play for her high school baseball team, and the school also maintains a girls softball team.

A plaintiff alleging gender discrimination may seek relief on three grounds: (1) violation of Title IX (if an educational institution is involved); (2) breach of equal protection rights under the Fourteenth Amendment; and (3) violation of civil rights under 42 U.S.C. § 1983.

A. Title IX

Title IX offers a modest foundation upon which to initiate a claim of sex discrimination in high school or collegiate baseball. Title IX's general premise, as articulated in 20 U.S.C. § 1681(a),[163] is to protect those persons who have been denied participation in, or the benefits of, any educational program or activity which receives federal financial aid.[164] There are several exceptions to Title IX's general premise.[165] A modern analysis of Title IX also reveals specific policies with which intercollegiate athletic programs must comply, namely the

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163. *See supra* note 12; *see also* Jodi Hudson, Comment, *Complying with Title IX of the Education Amendments of 1972: The Never-Ending Race to the Finish Line*, 5 SETON HALL J. SPORT L. 575 (1995) (detailing the history and development of Title IX).

164. 20 U.S.C. § 1681(a) (1990). The United States Supreme Court held in 1984 that Title IX applies to programs that directly receive federal financial assistance. *Grove City College*, 465 U.S. at 574-75. This theory is commonly entitled the "program-specific" approach. *Id.* This approach was modified by the Civil Rights Restoration Act of 1987 which amended Title IX to provide protection from discrimination in all programs and activities which received federal assistance. 20 U.S.C. § 1687 (1990).

165. 20 U.S.C. § 1681(a)(2)-(9) (1990). Specifically, Title IX excepts: (1) educational institutions which have begun the process of changing their admissions policy of accepting students of one sex and not the other; (2) educational institutions controlled by religious organizations; (3) educational institutions which train people for military services; (4) public educational institutions that traditionally and continually had a policy of admitting only students of one sex; (5) social fraternities, sororities, or voluntary youth service organizations (ex. Girl Scouts, Boy Scouts); (6) Boys or Girls conferences; (7) father-son or mother-daughter activities at educational institutions; and (8) scholarships or financial assistance awarded to institution of higher learning from "beauty" pageants. *Id.*

Title IX specifically defines "educational institution" as:

> any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

20 U.S.C. § 1681(c) (1990).

Health, Education and Welfare regulations.[166]

Under 34 C.F.R. § 106.41(b), baseball is considered a non-contact sport.[167] As such, those entities must allow the excluded sex, usually females, to try out for the team.[168] Under *Williams* and the shelter of Title IX, it appears that girls wishing to play on a boy's baseball team should be afforded, at least, an opportunity to try out.[169] As courts have recognized, namely the *Croteau* court, "there is no constitutional or statutory right to play any position on any athletic team . . . [i]nstead, there is only the right to compete for such a position on equal terms and to be free from sex discrimination in state

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166. *See* 34 C.F.R. § 106.41 (1980) (Athletics). Section 106.41 provides in pertinent part:

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to tryout for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intracollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
(2) The provision of equipment and supplies;
(3) Scheduling of games and practice times;
(4) Travel and per diem allowances;
(5) Opportunity to receive coaching and academic tutoring;
(6) Assignment and compensation of coaches and tutors;
(7) Provision of locker rooms, practice and competitive facilities;
(8) Provision of medical and training facilities and services;
(9) Provision of housing and dining facilities and services;
(10) Publicity. . . .

34 C.F.R. §§ 106.41 (a)-(c) (1980).

167. 34 C.F.R. § 106.41(b); *see supra* note 166.

168. *Id. See e.g.,* Lantz v. Ambach, 620 F. Supp. 663 (S.D.N.Y. 1985) (Title IX does not apply to contact sports such as football).

169. *See* 34 C.F.R. § 106.41(b). *See supra* note 166.

action."[170]

Similarly, modern Title IX analysis appears to support female participation in sports. In both *Cohen* and *Roberts*, the courts strictly applied the Policy Interpretation criteria found within Title IX.[171] As such, these criteria may prove to be a valuable tool for an aggrieved plaintiff attempting to state a cause of action for gender discrimination. For instance, a plaintiff should argue since there has been a distinct interest of female participation in baseball in at least one instance, the interests and abilities of the underrepresented sex (i.e. females) will not be fully and effectively accommodated if women were not allowed to participate.[172] Further, since some courts have established that baseball and softball are not similar,[173] the prohibition of young women from baseball establishes the failure to demonstrate a continuing practice of program expansion requirement under prong two of the Policy Interpretation.[174]

B. Equal Protection

In addition to Title IX protection, we have seen cases which have argued traditional constitutional safeguards to support their contention that they had been unreasonably discriminated against. Equal protection[175] of the law is implicated

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170. *Croteau*, 686 F. Supp. at 554.

171. *See Cohen*, 879 F. Supp. at 195; *Roberts*, 814 F. Supp. at 1514.

172. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,418 (1979) (codified at 20 U.S.C. §§ 1681-88 (1990)). Prong three of the Policy Interpretation prohibits institutional conduct whereby the members of the underrepresented sex are not "fully and effectively accommodated" under the present program and there has not been continual program expansion for women. *Id.*

173. *See Israel*, 388 S.E.2d at 485 (detailing significant physical differences between baseball and softball). Similar to the plaintiff in *Williams*, who was not permitted to play a comparable sport, softball has also not been considered comparable to baseball. *See supra* note 131.

174. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,418 (1979) (codified at 20 U.S.C. §§ 1681-88 (1990)). Prong two of the Policy Interpretation provides as follows:

> Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; . . . .

Id.

175. A separate but equal type of athletic program has been an initial attempt at abolishing sex discrimination. WALTER T. CHAMPION, JR., SPORTS LAW IN A NUTSHELL 276

when a classification treats similarly situated persons in a dissimilar manner.[176] For an equal protection argument to be sustained, the claimed discrimination must be the outgrowth of state action, not private activity.[177] Many courts have determined that school board athletic committees are state actors since those organizations are so affiliated with the state that their effects constitute state action.[178] The *Fortin* court found significant state action in: (1) the defendant's use of public, city-owned fields and parks; (2) the defendant's maintenance and care for these fields; (3) the fact that adherence to city specifications for such fields benefitted the general public; and (4) the prohibition of the general public from the use of the fields when the defendant league engaged in a busy schedule.[179] Similarly, the *Israel* court accepted the reasoning of other cases which found significant state action and concluded that since the actions of other organizations were "so intertwined with the state," state action can be established.[180]

Based upon a review of the relevant case law, for an aggrieved plaintiff wishing to bring a gender discrimination action against her high school, state action may be found where: (1) the school utilizes public fields; (2) the defendant participates in or is a member of a state athletic committee; (3) there is special adherence to state athletic rules or regulations; (4)

(1993). Women often lack coaching, equipment, funding, scheduling, and access to facilities. *Id.* A simple glance at the distinctions between the revenue generated between a men's program and a women's program reveals that male sports produce much more money. *Id.* at 277.

176. Reed v. Reed, 404 U.S. 71, 75 (1971).

177. *See Burton*, 365 U.S. at 721-22.

178. *See, e.g.*, Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982), *cert. den.*, 464 U.S. 818 (1983) (Arizona Interscholastic Association activities constitute state action); Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651 (6th Cir. 1981) (90% of OHSAA are public schools in State of Ohio; activities relate to state action); B.C. v. Board of Educ., Cumberland Regional Sch. Dist., 229 N.J. Super. 214, 531 A.2d 1059 (App. Div. 1987) (New Jersey State Interscholastic Athletic Association activities constitute state action).

179. *Fortin*, 376 F. Supp. at 478.

180. *Israel*, 388 S.E.2d at 484. *See e.g.*, Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982), *cert. den.*, 464 U.S. 818 (1983) (state action found in public high school where coaches and administrators represent state advisory committees and athletic and non-athletic activities moderated by the defendant took place on public school grounds); Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n, 647 F.2d 651 (6th Cir. 1981) (defendant is member of Ohio State Board of Education); Brenden v. Independent Sch. Dist. 742, 477 F.2d 1292 (8th Cir. 1973) (defendant is participant in Minnesota State High School League).

there is private performance of a government function;[181] or (5) the state "significantly" involved itself with a private party.[182]

The United States Supreme Court has held that actual physical differences between the sexes can be taken into account when evaluating gender-based discrimination.[183] The *Croteau* court observed that, as a predicate to sex discrimination cases brought under the Fourteenth Amendment, the plaintiff must demonstrate that the discrimination was intentional or that the state actor was motivated by some underlying discriminatory purpose.[184] Current Supreme Court jurisprudence invalidates statutes which treat similarly situated males and females in a dissimilar fashion.[185] Furthermore, the Supreme Court has invalidated classifications that exhibit "archaic and overbroad generalizations."[186]

It was not until 1976, in *Craig v. Boren*, that the Supreme Court set forth the appropriate standard of review when a gender-based classification is challenged on equal protection grounds.[187] Under *Craig*, gender-based discrimination requires an intermediate level of scrutiny.[188] The *Craig* Court succinctly stated the appropriate standard: "[c]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those

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181. *Magill*, 516 F.2d at 1331. *See e.g.*, Terry v. Adams, 345 U.S. 461 (1953) (Supreme Court struck down private, all-white Jaybird Party's candidate selection procedure which excluded blacks).

182. *Id.* at 1131. *See e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (parking authority was joint participant in operation of privately owned restaurant and restaurant's refusal to serve blacks was sufficiently permeated with state action).

183. *See* Michael M. v. Sonoma County, Superior Court, 450 U.S. 464, 469 (1981) (a legislature may not make "overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class").

184. *Croteau*, 686 F. Supp. at 553. *See supra* note 117.

185. *See e.g.*, Reed v. Reed, 404 U.S. 71 (1971) (Court held that "any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution].'").

186. *See* Schlesinger v. Ballard, 419 U.S. 498, 508 (1975) (treatment of male naval officers with more than nine years of active service who failed a second time for promotion were subject to mandatory discharge, whereas women who serve 13 years subject to dismissal for want of promotion was not archaic and overbroad, and demonstrated the fact that male and female naval officers are not similarly situated with regard to availability of professional services).

187. 429 U.S. 190, 197-98 (1976).

188. *Id.* at 197.

objectives."[189]

Some courts have recognized that it is constitutionally permissible for public schools to maintain separate sports teams for males and females as long as they are "substantially equivalent."[190] The *Israel* court emphasized that where the school maintains a male, non-contact sports team (such as baseball),[191] but no female counterpart, an equal protection claim of gender discrimination is most easily settled in the complainant's favor.[192]

The *Little League Baseball, Inc.* courts opined that Little League Baseball must permit female players to try out under equal protection principles.[193] Notwithstanding these holdings, there was not a comparable team for females.

The *Israel* court specifically enunciated that softball and baseball are not substantially equivalent.[194] As previously detailed,[195] the two sports are similar in appearance, but the rules, physical characteristics, and dimensions are quite disparate.[196] Merely maintaining a softball program, the *Israel* court illustrated, does not satisfy the equal protection mandate of substantial equivalency.[197] Consequently, based on prior equal protection decisions, women should be allowed to have

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189. *Id.*

190. *Israel*, 388 S.E.2d at 484.

191. However, one court has taken judicial notice that baseball is a contact sport. *Magill*, 364 F. Supp. at 1216. However, this determination came before the Code of Federal Regulations declared baseball a non-contact sport in 1980. *See* 34 C.F.R. § 106.41 (a)-(c) (1980).

192. *Id.* Courts have held that failure to allow a female to try out for a male non-contact team violates equal protection; *See, e.g.*, Brenden v. Independent Sch. Dist. 742, 477 F.2d 1292 (8th Cir. 1973) (tennis, cross-country skiing and running); Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117 (E.D. Wis. 1978) (baseball, swimming, and tennis); Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977) (soccer). *But see* Sullivan v. City of Cleveland Heights, 869 F.2d 961 (6th Cir. 1989) (10 year-old female hockey player not denied equal protection because she was required to change clothes in a restroom substantially similar to locker room in which the male players changed).

193. *See, e.g., National Org.*, 127 N.J. Super. 522, 318 A.2d 33 (App. Div. 1974), *aff'd mem.*, 67 N.J. 320, 338 A.2d 198 (1974).

194. *Israel*, 388 S.E.2d at 485.

195. *See supra* note 131.

196. *Id.*

197. *Id.* Further, a baseball team is selected from those who apply and possess the requisite ability to make the team. *Id.* at 486. *See also Croteau*, 686 F. Supp. at 554 (decision to cut plaintiff Croteau was made in good faith and "for reasons unrelated to gender").

the door opened to try out for a baseball team which they are otherwise qualified to make.

C. Civil Rights under 42 U.S.C. § 1983

Similar to an equal protection argument, a claim brought under § 1983 requires state action.[198] This provision has been treated as equivalent to the state action requirement of the Fourteenth Amendment.[199] Accordingly, a plaintiff may establish significant state action by demonstrating any of the previously stated criteria.

Subsequent Supreme Court decisions categorized the types of civil rights cases into three major groups:[200] (1) where state courts enforced an agreement affecting private parties;[201] (2) where the state "significantly" involved itself with the private party;[202] and (3) where there was private performance of a government function.[203]

The unlawful discrimination must result from the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[204] Further, the civil rights of individuals cannot be handicapped by the wrongful acts of others unsupported by state authority.[205] Although there is no clear rule to determine when state involvement in a gender discrimination action under § 1983 is sufficient, shifting the facts and weighing the circumstances are two ways in which state involvement may

198. 42 U.S.C. § 1983. Specifically, a cause of action under § 1983 exists only where the plaintiff establishes both that the defendant's action is "under color of any statute, ordinance, regulation, custom, or usage, of any State" and that such action subject the plaintiff "to the deprivation of any rights, privileges, or immunities secured by the Constitution." *Id.*

199. United States v. Price, 383 U.S. 787, 794-95 n.7 (1966).

200. *See* Betty L. Miller, *Constitutional Law—State Action—State-Created Monopoly Favoring Private Landlord Constitutes State Action*, 19 WAYNE L. REV. 1309, 1310-12 (1973).

201. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948) (state action premised on state court enforcement of private, racially restrictive covenants against black purchasers of land).

202. *See, e.g.*, Public Util. Comm'n v. Pollak, 343 U.S. 451 (1952) (Public Utilities Commission action in placing its imprimatur on allegedly objectionable conduct constituted state action).

203. *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953) (Supreme Court struck down private, all-white political party's candidate selection process which excluded blacks).

204. United States v. Classic, 313 U.S. 299, 326 (1941).

205. The Civil Rights Cases, 109 U.S. 3, 25-6 (1883).

be measured.[206]

The *Fortin* decision offers a favorable holding for a plaintiff pursuing § 1983 argument.[207] In *Fortin*, the court stressed that once state action is found, the rationality of the decision to prevent females from playing with males must be scrutinized.[208] Although *Fortin* involved a little league player, it should be argued that the age of the players and the uniqueness of the opportunity to play baseball favor allowing a girl to try out for a boy's team. These two criteria were significant to the First Circuit in the reversal of the District Court's decision in *Fortin*.[209]

V. An Outlook on the Future and Conclusion

It is likely that under constitutional shelter and the auspices of Title IX that a girl or woman who wishes to try out for a boys baseball team, even if there is a comparable girls softball team available, will be allowed to try out. Mixed competition in baseball is unlikely to involve extreme physical contact, despite the fact that physical contact has been known to occur on the diamond.[210] Under this scenario, a girl will have the opportunity to play against the most competitive players. Although it is unlikely that all females will be able to actually compete with males on a consistent basis given their lack of formal training in a sport that has been typically dominated by males, the basic component of any team ultimately comes down to who is the best *player* for the job.

A few of the courts that have addressed this concept have also recognized that the older the age group of men and women, the greater the physical dissimilarities between the two sexes.[211] For instance, at the little league level, girls and boys are roughly both the same size, weight, and strength.[212] If you

206. *Burton*, 365 U.S. at 722.

207. *Fortin*, 514 F.2d 344 (1st Cir. 1975).

208. *Id.* at 351.

209. *Id.* One should argue that the physical differences in a tryout are not apparent since a tryout does not include contact as seen in a regular game situation. Moreover, the opportunity for a girl to play baseball on a competitive level in high school is limited, if not non-existent, so she should at least be able to try out for the team.

210. *See supra* note 98.

211. *See, e.g., Fortin*, 376 F. Supp. at 348-49, 351; *National Org.*, 127 N.J. Super. at 526-29, 318 A.2d at 35-37.

212. *Fortin*, 514 F.2d at 351; *National Org.*, 127 N.J. Super. at 527-29, 318 A.2d at 36.

compare the same two groups six years later, however, the strength and size of boys will far surpass that of most girls.[213] Accordingly, a female player wishing to participate on a male high school baseball team has a challenging encounter ahead of her which will ultimately hinge upon the application of the three previously detailed legal arguments.

This is not to say that young women should be deterred from trying out for a position. To the contrary, the law is on their side.[214] If a school maintains a male, non-contact sport, but no female complement, the majority of the courts typically allow women to try out and participate on the male team.[215]

With the upsurge of awareness that has been generated since the inception of the Silver Bullets, it is likely that we will see more girls begin playing baseball at a young age, and sticking to it.[216] This author has personally observed the Silver Bullets play during their 1995 spring training schedule and was pleasantly impressed with the level of intensity, dedication, and appreciation for the fundamentals that each player possessed.[217] They may not hit "tape-measure" home runs or strike out opposing batters with 90-plus mile per hour fastballs, but these women play with as much heart and desire as many of the major leaguers today. It is through awareness of this team that women and girls will soon share in their passion and play without any restrictions or limitations.

Given the advent of the newly formed Mediterranean League in Europe, baseball is reaching a different level and meeting new challenges.[218] As of 1995, only three women have

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213. *Id.*

214. *See, e.g., Fortin*, 376 F. Supp. 473, *rev'd*, 514 F.2d 344 (1st Cir. 1975); *Carnes*, 415 F. Supp. 569 (E.D. Tenn. 1976); *Israel*, 388 S.E.2d 480 (W. Va. 1989); *National Org.*, 318 A.2d 33, 127 N.J. Super. 522 (App. Div.), *aff'd mem.*, 338 A.2d 198, 67 N.J. 320 (1974).

215. *See, e.g., Carnes*, 415 F. Supp. 569 (E.D. Tenn. 1976); *Israel*, 388 S.E.2d 480 (W. Va. 1989).

216. In a 1994 article published in BASEBALL WEEKLY, a young four year-old became so enthralled with her first experience at the Silver Bullets spring training camp near her home in Winter Haven, Florida that when she grows up, her dream is to become a Silver Bullet. Tom Pfister, *Bats and Balls in her Future—Foul Ball, Warm Reception Inspire 4-Year-Old*, BASEBALL WEEKLY, June 15, 1994, at 34.

217. The Silver Bullets played at the minor and major league facilities of the Boston Red Sox in Fort Meyers, Florida during the month of April 1995. This author attended an intrasquad game during one of the Silver Bullets' morning workouts.

218. Karen Nocella & Christine Negley, *Diamonds are a Girl's Best Friend*, 1995 COLORADO SILVER BULLETS SOUVENIR PROGRAM, at 7. Southpaw Jodi Haller became the first

played college baseball; all three within the last ten years.[219] This trend to play baseball will soon continue as we will likely see more qualified women participating in the game — at every level.

Perhaps the function and effect that the Silver Bullets aspire to possess is best expressed by the following comment: "Rarely do female athletes have this opportunity to raise public awareness of women's athletics, and provide hope for a future in professional sports to thousands of young girls. And with one 'quick study' season under their belts, the Silver Bullets aim to hit the diamond running in 1995."[220]

Public awareness through the valiant efforts of the Silver Bullets, legal opportunities to participate in the game, and support from fans and baseball enthusiasts all over the country will, indeed, strengthen our game at a time when baseball needs it most.

Matthew J. McPhillips

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woman to play in the 70-year history of Tokyo's Big Six University baseball league. Oscar Dixon, *U.S. Woman Pitches a First*, USA TODAY, Sept. 20, 1995, at 3C. The league is Japan's oldest and most competitive amateur baseball league. *Id.* Haller was the starting pitcher for the Meiji University's team when she pitched one and two-third hitless innings in a 4-0 victory over Tokyo University. *Id.* With a fastball clocked at 65 miles per hour, Haller was honored to be the first woman pitcher in the league. *Id.* In 1990, Haller pitched in a college game for St. Vincent (Pa.) College. *Id.* At the present time, she is attending a two-year woman's college at Meiji, majoring in economics. *Id.*

219. Rick Lawes, *First Female College Pitcher has Major Goal*, BASEBALL WEEKLY, Feb. 23, 1994, at 13. Susan Perabo played one game at second base in 1985 for the Division III team of Webster College in Missouri. *Id.* Julie Croteau played first base for the Division III St. Mary's (Maryland) team from 1989-1991. *Id.* Finally, Ila Borders is presently a pitcher at Southern California College, an NAIA school in Costa Mesa, California. *Id.*

220. Kathleen Christie, *The Beginning History of the Silver Bullets*, 1995 COLORADO SILVER BULLETS SOUVENIR PROGRAM, at 36.