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by Syda Kosofsky*

INTRODUCTION

Women have limited professional opportunities in sports: there are few sports in which they can become professional athletes, and where there are careers available, the number of positions is small and the pay is rarely enough to make a living. In contrast, men have many lucrative job opportunities in sports. The sports community justifies this overt discrimination by citing differences in male and female athletic ability and explaining the need to yield to consumer demand. Although biological differences between males and females affect their respective athletic performances, there are even more compelling social explanations for the difference in performance levels. There are many social factors which steer women out of sports or into unpopular sports and relegate lower pay and fewer opportunities to professional women athletes. This creates a socially constructed discriminatory situation for women in professional sports, and no adequate legal remedies exist to correct the problem.

This article will explore the gender inequality which is present in professional sports. Facts about the existing inequalities, specifically, the

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1. See infra notes 37-43 and accompanying text.
2. See infra notes 44-112 and accompanying text.
3. See infra notes 144-184 and accompanying text.
4. There is also gender inequality in amateur athletics. Female amateur athletes currently have more legal tools for challenging inequalities, and there have been some success stories: in 1993, a female boxer challenged the policy of the nation’s governing body of amateur boxing which prohibited females from competing, and won her case. See Melanie Mavrides, Small Jab Also Big Step for Women, N.Y. TIMES, Nov. 1, 1993, at B10. The Amateur Sports Act of 1978 requires that the national governing bodies of amateur sports provide athletes, coaches, trainers, managers, administrators, and officials an equal opportunity to participate in amateur competitions without discrimination on the basis of sex. 36 U.S.C. § 391(b)(6) (1993). See Paula Cabot, Public Acceptance of Women in Sport, Address at Conference, Women and Sport: The New Agenda, Issue 2, at 14 (Nov. 1992).
lack of career opportunities for women and the gender-based pay disparity in professional sports, are outlined in Part I. Part II describes the physical differences between males and females and their effects on sport performance. Part III presents a sociological explanation of sports and how gender roles developed in sports, including an overview of the history of modern sports, an explanation of the connection between sports and masculinity, an analysis of the nature versus nurture argument, and a description of the role the media has played in perpetuating gender stereotypes in sports. Part IV explains the social benefits that would result from gender equality in professional sports. Part V critiques the socially created sports inequalities from different feminist perspectives. Part VI analyzes sex discrimination law and shows how the law currently fails to provide a remedy for the unequal treatment of women in professional sports. Finally, Part VII concludes that new legislation is necessary in order for women to gain financial and social equality in professional sports.

I. GENDER INEQUALITY IN PROFESSIONAL SPORTS

Women's historic exclusion from professional sports is well-documented. The fact that discrimination against women in sports still exists is demonstrated by the limited number of opportunities and the small amount of pay available to women as professional athletes. In order to understand why this situation arose and how it needs to change, it is necessary to begin by showing where the inequalities exist.

A. LACK OF OPPORTUNITIES

Women have few opportunities as professional athletes in comparison to the number of opportunities for men. Few professional women's team sports leagues have existed, and when they did, they were short-lived. By contrast, men's professional baseball has existed since 1876, and men's professional football and basketball have existed since the 1890's. THE OFFICIAL ENCYCLOPEDIA OF SPORTS 51 (John Lowell Pratt & Jim Benagh eds., 1964); Ian Tyrell, The Emergence of Modern American Baseball c. 1850-80, in SPORT IN HISTORY 206 (Richard Cashman & Michael McKernan eds., 1979); BENJAMIN G. RADER, AMERICAN SPORTS 251-252 (1983).

In the Olympics, as in professional sports, women have fewer opportunities than men. Women do not compete in boxing, wrestling, weightlifting, ice hockey, water polo, or modern pentathlon, and there are fewer events for women in sports such as kayak, rowing, shooting, and Nordic skiing. Amelia V. Noel, Women in the Olympics: Participation, Patterns, and Trends, THE WOMEN'S SPORTS EXPERIENCE (Women's Sports Foundation, East Meadow, N.Y.), May/June 1993, at 11.

5. By contrast, men's professional baseball league during World War II, when most professional male players were serving in the armed forces 3-6, 1983) (transcript available at the Women's Sports Foundation, East Meadow, N.Y.).
abroad.6 A women's football league was formed in 1972, and a women's professional softball league began in 1975. Neither exists today.7 Women's professional basketball leagues have not fared well.8 However, in 1992, a new professional basketball league for women was established, with eight teams scheduled to play in the 1994 season.9 Although a women's professional volleyball league has survived relatively well, it has failed to achieve the level of popularity of any men's team sport.10

On rare occasions, women attain positions as professional athletes on men's teams. In 1992, Manon Rheaume became the first woman to play professional ice hockey.11 In 1979, Ann Meyers received a one-year contract to play basketball with the Indiana Pacers.12 Coors Beer is sponsoring an all-women's professional baseball team which will compete against men's minor league class A baseball teams during the 1994 season.13

Most opportunities for women in professional sports are in individual sports14 rather than team sports, the most prominent of these sports being tennis and golf.15 However, even in individual sports, women's opportunities to be professional athletes have been limited. There was no profes-

6. See, e.g., Michael A. Lutz, Mom was a Star in Center Field, L.A. TIMES, June 28, 1992, at C4. The 1992 movie A League of Their Own (Paramount 1992), was loosely based on that league, called the All-American Girls Professional Baseball League.


11. Rheaume played goalie for the Tampa Bay Lightning of the National Hockey League in one pre-season game. She now plays with one of the Lightning's minor league teams, the Knoxville Cherokees of the East Coast Hockey League. See Mary Onmsby, Kitchener, TORONTO STAR, Jan. 26, 1994, at E3.


13. See Johnette Howard, Commercially, Suds Acts Still Need Cleaning Up, WASH. POST, Dec. 26, 1993, at D3. Howard criticizes the fact that females are taught softball, not baseball, while they are growing up. Id.

14. Individual professional sports include tennis, golf, running, surfing, skiing, ice skating, and cycling. On the professional level, such sports competitions generally have separate categories for males and females.

15. One study found that women professional golfers chose golf only because of the lack of opportunities to have a professional career in most other sports. Nine out of twenty professional golfers said that they would rather be professional basketball players; other sports were named as well. Christine Brennan, Golfers All of Them, But not Exactly by Choice, WASH. POST, June 11, 1993, at C6.
sional tennis circuit for women until the players themselves sought sponsorship and created a professional tour. Prior to 1972, women were banned from competing in marathons in the United States. In 1973, the sport of horse racing first allowed women to become professional jockeys. The Bass Anglers Sportsman’s Society’s championship fishing tournament (called the BASS Master’s Classic) still bars women from competition. Often, when contests and tournaments do provide professional opportunities to women, they offer fewer positions to women than to men. For example, Ocean Pacific’s surfing contests offer prize money to the top twelve male competitors, but to only the top four female competitors.

In addition to having few chances to pursue careers as professional athletes, women also lack opportunities to become professional sports reporters, umpires, owners, managers, coaches, or announcers. Those persons holding these non-athlete professional positions often have the power to influence the structure of sports. Since women rarely occupy these positions, however, they have little potential to make the changes that would bring gender equality. Only one major league baseball team is owned by a woman. As of 1992, only 48.3 percent of intercollegiate women’s sports teams had female coaches, and only 16.8 percent of intercollegiate women’s athletic programs were headed by female administrators. In 1993, Sherry Davis became the first and only female announcer of Major League Baseball games, hired by the San Francisco Giants. Women are often barred from interviewing men in locker rooms, thus discouraging them from being sports reporters. Only three percent of sports journalists are women. No women have been profes-

16. See Barry Lorge, Don’t Just Go in Circles, Figure Skaters, Go on Tour, N.Y. TIMES, Jan. 16, 1994, at 22.
21. See NELSON, supra note 8, at 5.
sional umpires for major league baseball; two who applied and were not hired recently settled after suing in federal court. 27

The lack of career opportunities for women in professional team sports, the small number of individual sports with opportunities for women, and the disparity in opportunities in sports-related employment for men and women, aggregate to create barriers against women participating in professional sports.

B. UNEQUAL PAY

The pay 28 earned by professional female athletes is considerably lower than that received by their male counterparts, even in the same sport. 29 For instance, the female winner of the 1989 world triathlon championship received $11,000, while, that same year, the male winner received $12,000 and a Jeep. 30 In 1992, the winner of the United States Women’s Open golf tournament won $130,000, while the winner of the United States Open (the men’s tournament) won $275,000. 31 The annual salaries of the 1979 women’s professional basketball league were between $5,000 and $15,000, while men in the National Basketball Association (NBA) that year were paid, on average, $143,000. 32 Even in the Women’s Basketball Association, founded in 1992, the players are not paid enough to support themselves (all hold second jobs), and each receive set salaries of an

27. See Doug Grow, Baseball’s Dreamkeeper Offers Opportunity to a Bitten Believer, MINN. STAR TRIB., Nov. 16, 1993, at 3B. Pam Postema and Teresa Cox were the applicants. Postema was an umpire in the Triple A minor league for 7 years. There, Grow reports, the players “constantly challenged her” because they “didn’t believe she could make a correct call.” Id.

28. Pay for a team sport is usually in the form of a salary, while pay for an individual sport is usually in the form of prize money. The discrepancy in financial awards in sports is further enhanced by the disproportionate number of commercial endorsements received by male athletes. See D. STANLEY EITZEN & GEORGE H. SAGE, SOCIOLOGY OF AMERICAN SPORT 281 (1978).


30. NELSON, supra note 8, at 47.

31. THE 1993 INFORMATION PLEASE SPORTS ALMANAC 719 (Mike Meserole ed., 1993); see also EITZEN & SAGE, supra note 28, at 281 (describing disparity in golf salaries in the 1970s).

identical amount, regardless of their relative experience or ability. This contrasts dramatically with the salaries of the male players of the NBA.

The same financial discrepancies that apply to women professional athletes apply to women professional coaches of collegiate teams, who usually receive less pay than their male counterparts. In 1993, women basketball coaches' salaries were, on average, only 59 percent of the base salaries of male coaches. In 1993, when Marianne Stanley, the head coach of the University of Southern California women's basketball team, demanded she be paid "a salary roughly equivalent to the amount paid to the U.S.C. men's basketball coach," she was fired.

Thus, there are few financial incentives for women to become involved in professional athletics, and unequal opportunities permeate the professional sports industry on a grand scale. This requires an explanation. The sports industry would have us believe that it is women's lower skill levels and the corresponding lack of public interest in women's sports that is the inevitable source of the discrepancies in pay and opportunity. However, this article argues that this is a superficial explanation. To get at the weaknesses in the skill and popularity argument, it is necessary to, first, look at the actual physical differences between males and females and to explore the effects those differences have on athletic performance, and second, to critically examine the way in which those differences have been embroiled in social construction.

II. PHYSICAL REALITIES

The nature argument, the presumption that women are by definition less athletically adept due to their physical characteristics, is used to justify the lack of opportunities and low pay for women in professional sports.

Biologically, there are physical differences between males and females which are relevant to sports performance. In comparison to females, males have longer arms, bigger and stronger legs, more muscle fiber, ten percent larger hearts and lungs, and stronger and broader shoulders. Meanwhile, females have more uniformly distributed and efficient sweat glands, less body weight, and more body fat — stored on the thighs, buttocks, and

33. The Women's Sports Experience, supra note 4, at 6.
34. In 1993, the average NBA salary was 1.2 million dollars. Athletes Sweat Out Tax Plan, Ariz. Rep., Feb. 28, 1993, at D1. The article also reports that the average salary for professional baseball players in 1992 was 1.1 million. Id.
35. See Debbie Becker, Coaches' Pay Sees Gender Gap, U.S.A. Today, Jan 25, 1994, at 1C. The average salary of a female coach was $44,961 versus $76,566 for male coaches. Id.
breasts, making their lower bodies heavier. On average, males are ten percent larger than women.

The popular spectator sports emphasize the unique biological characteristics of men. These sports require skills that rely on specifically male physical advantages. For example, football, where players must tackle one another to the ground, requires large body weight and strong shoulders. Baseball, where players try to hit a ball as far as possible and throw a ball overhand at high speed, requires strong arms. Basketball, where players must jump high to score a basket, requires strong legs and an even distribution of body weight. Because women do not have physiques which allow them to excel at these skills, they are effectively precluded from achieving success in these sports.

In contrast, other sports are more compatible with women’s physiques. It is not uncommon for women to beat men in sports competitions where specifically female attributes are necessary. Distance swimming, where women’s body fat distribution is a benefit, is one example. Also, in long-distance running, women’s efficient sweat glands give them greater endurance than men.

In many endurance sports, women not only compete with men, but often beat them. In 1986, Susan Butcher won the Iditarod, a sled dog race across Alaska, setting a time record. In 1992, Seana Hogan bicycled from San Francisco to Los Angeles faster than any other person ever. In 1993, Lorna Michael placed third in the 2,912 mile Trans-America Footrace across the United States. Ann Trason won the 1989 mixed-sex national championship twenty-four hour running race, completing 143 miles.

However, sports in which women excel are rarely publicized and are not popular with spectators. As a result, there are few professional

38. Interestingly, ten percent “happens . . . to be roughly the increment by which men’s Olympic track and swimming times top those of women.” Id. at 96.
39. See Wood, supra note 37, at 96-98; DYER, supra note 17, at 2 (women often win fifty and one hundred mule running events); Carol L. Rose, The ERA and Women’s Sport: An Hypothetical Trial Case, in WOMEN AND SPORT: FROM MYTH TO REALITY 239 (Carole Oglesby ed., 1978) (citing Robert C. Serfass & John F. Alexander, Physiological Differences Between Females and Males Relative to Athletic Performance 3 (Department of Physical Education at University of Minnesota, unpublished report)).
40. Beat: Memorable Moments From 1974-1994, supra note 12, at 34. She has won the race a total of four times, and other women have also finished first. Id.
41. See Mark Evangelista, Innovative NCL Plans EuroConference, HOUSTON CHRON., Jan. 28, 1993, at C14. Her time was 19 hours, 59 minutes, and 45 seconds. Id.
42. See, e.g. Coast to Coast Journey Ends, CHI. TRIB., Aug. 23, 1993, § 4 (Sports), at 3. She completed the race in 64 days (586 hours, 15 minutes, and 7 seconds). Id.
competitive opportunities for women athletes. The explanation for this is complex. It stems from the manner in which sports developed, the effects of gender-biased nurturing of children, and the perpetuation of sport-related gender stereotypes which are negative toward women athletes.

III. THE SOCIAL CONSTRUCTION OF SPORTS

While there are physiological differences between men and women, the differences between the ways males and females are nurtured also provide an explanation for the discrepancies in athletic performance. The socialization of males and females and the related social construction of sports may be equal factors contributing to gender differences in sports ability. Deborah Rhode writes:

Physiological characteristics are heavily influenced by social norms governing diet, appearance, dress, behavior, and athletic opportunities. How much of males' advantage in most sports results from nature and how much from nurture remains unclear. It is, however, obvious that the differences in men's and women's capabilities are relatively small in comparison to the differences in opportunities now open to them.  

Gender inequality in professional sports is part of the larger picture of gender inequality in society as a whole. Social forces determine which sports have come to dominate the athletic landscape, dictate different roles for men and women in sports, and define what it means to win. The history of modern sports reveals how gender roles in sports have been created, casting men as leaders and athletes while relegating women to subordinate roles. These gender roles are reinforced by the media and the controlling institutions of professional sports who claim that physical differences between men and women are a justifiable basis for these assigned roles.

A. History

Women's absence from sports has been pervasive throughout history, parallelling women's absence from government, high-status and high-pay

44. DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 302-03 (1989). Catharine MacKinnon agrees, pointing out that physical differences are products of the prevailing social paradigm:

That women and girls may not be physically strong, or do not appear physically intimidating compared with men and boys, may be consequences as much as causes of the social image of proper womanhood as weak and of manhood as strong.


jobs, and other roles of social power. Sports have historically had high social value because they represent strength and success and confer prestige, respect, and self-esteem. Because women have been excluded from sports both on professional and recreational levels, they have been denied opportunities to receive the benefits of these valuable qualities. An understanding of why and how women have traditionally been excluded provides an insight as to why and how the modern inequalities in career opportunities and pay for professional female athletes have resulted.

Modern sports evolved during the period of industrialization in the late 1800's. "With no frontier to conquer [and] with physical strength becoming less relevant in work . . . it was feared that males were becoming 'soft,' that society itself was becoming 'feminized.'" Notably, the first wave of feminism also took place during this period, with women beginning to demand and create roles for themselves outside of the domestic sphere. In response to the strong women's movement, a backlash, or "counter-assault on women's rights," ensued. The desire to prevent society from becoming feminized allowed sports to be used as an instrument of backlash.

46. Id. at 913 n.2.
47. Participation in sports in ancient Greece was exclusively male. See Richard D. Mandell, Sport: A Cultural History 55-56 (1984). This has paralleled women's absence from government and other roles of social power. Some very early societies were matriarchies, centered around the Goddess. Those societies reflected a social order of partnership between men and women. Power was not equated with dominance, destruction, or oppression. The last such society was ancient Crete, which fell to invasions over three thousand years ago. See generally Riane T. Eisler, The Chalice and the Blade (1987).
48. See Rhode, supra note 44, at 300. The connection between sports and positions of political power is revealed in the success of several prominent male athletes in politics and government. For instance, Bill Bradley, a professional basketball player for the New York Knicks, became governor of New Jersey and a United States Senator; Byron White, a former United States Supreme Court justice, played professional football for the Detroit Lions; and Jack Kemp, a former United States Congressman and Cabinet member, played professional football for the Buffalo Bills.
50. Id. See also Rhode, supra note 44, at 300-01.
51. Susan Faludi, Backlash xviii (1991). During backlash periods, women are told that if the goals of feminism are attained, they will be worse off than ever before. Liberated women are portrayed as unhappy, angry, and unfeminine. Such propaganda is spread pervasively during backlash times and "serves to stir women's private anxieties and break their political wills." Id.
52. Michael Messner explains that "[h]istorical analyses of sports reveal that ruling groups have shaped and utilized sports to maintain control . . . ." Messner, supra note 49, at 10. Modern sports were "appropriated" from pre-industrial age sports by the upper classes, who "then shaped the structure, rules, values, and meanings of sport in ways that supported and furthered their own interests." Id. at 10; see also Peter Levine, The Promise of Sport in Antebellum America, in The Sporting Image 71-72 (Paul J. Zingg ed., 1988).
During the backlash period, violent sports were promulgated. This reinforced male dominance and social power through both the exclusion of females and by associating aggression with maleness. Women were discouraged from engaging in these violent sports, and were told that if they participated in sports at all, the sports should be gentle exercises done out of the public's eye. Medical experts contributed to the exclusion of women from what were quickly becoming “male” sports by asserting that women's participation in sports was harmful to female reproductive health. As is common during backlash periods, femininity was portrayed as invalidism and incompatible with sports.

Women's participation in sports increased during the 1920's and 1930's, due in part to the admission of women into the Olympic games. However, by 1970, neither views about women as athletes nor the number of women participating in sports had significantly changed. With the passage and implementation of Title IX of the Education Amendments of 1972, schools were required to provide equal athletic opportunities to males and females, causing female participation in sports to grow. However, dominant attitudes, feelings, and social mores change slowly, and even today, many of the early views about women’s physical incompatibility with sports still remain.

B. SPORTS AND MASCULINITY

The development of modern sports has assured that men retain the social dominance that has traditionally been associated with masculinity. Consequently, males’ fear of losing the social position they have fortified through their control of sports is also their fear of losing the power of their

54. MESSNER, supra note 49, at 15; Rader, supra note 49, at 17.
55. Levine, supra note 53, at 73.
56. HELEN LENSKYJ, OUT OF BOUNDS 18 (1986) (in fact, medical studies now show the great benefits of physical exercise to women). See also Rose, supra note 39, at 240-41 (citing Bil Gilbert and Nancy Williamson, Are You Being Two-Faced?, SPORTS ILLUSTRATED, July 4, 1973, at 45). The belief that sports are harmful to females is still quite widespread, and is used to justify the exclusion of girls from “contact sports”. See infra notes 148-49 and accompanying text. Medical experts are also used to enforce male social control over women in other contexts, notably, reproductive rights. LENSKYJ, supra, at 13.
57. FALUDI, supra note 52, at 203-04.
59. Id.
60. Id. See infra note 147 for statistics.
61. DONALD P. SABO, JR. & ROSS RUNFOLA, JOCK: SPORTS AND MALE IDENTITY, xiv (1980). Male sexual prowess and athletic prowess are often equated: “[s]exual relations [are] a matter of conquest and an extension of male competitiveness.” For example, the word “score” is used to mean the sexual conquest of a female. Id.
masculinity and sexuality. When women do attempt to overcome social barriers and participate in athletics, they confront sexism because of these fears.

Because the dominant paradigm equates sport with masculinity, women athletes are seen to be somehow other than feminine. Women are told that they must reject their femininity and sexuality in order to participate in sports. Women athletes are often labelled “tomboys” and “amazons,” and stereotyped as lesbians. Women who defy their submissive roles by participating in sports are thus immediately marginalized and isolated, discouraging other women from participating in sports.

The marginalization and isolation of female athletes creates an antagonistic environment which has resulted in acts of violence toward women athletes. Such acts, perpetrated on both professional and recreational female athletes, include not only harassment, but rape and murder. Famous female athletes who have been victims of assaults or harassment include ice skater Nancy Kerrigan, struck in the knee in January, 1994; tennis player Monica Seles, stabbed in the back in April, 1993; and tennis player Martina Navratilova, who often receives threats. These acts are not just “mere” acts of violence by men against women, but in fact are more specifically directed against women athletes because women athletes represent a threat to the social order of male dominance. Donna

62. Similarly, men whose gender identity is threatened will boast of their athletic abilities in order to assert their masculinity. Donald J. Mrozek, The 'Amazon' and the American 'Lady': Sexual Fears of Women as Athletes, in FROM 'FAIR SEX' TO FEMINISM 282 (J.A. Mangan & Roberta J. Park eds., 1987).

63. Id. at 290-93; CATHARINE MACKINNON, FEMINISM UNMODEIFIED 122 (1987); RHODE, supra note 44, at 300-01. This stereotype has a negative connotation, thus having an additional harmful impact on lesbians.

64. Women's team sports provide further challenges to the male social power structure. While some men may regard individual women as anomalies and label them derisively, an entire team or league of women is more threatening because it represents women taking control and organizing themselves. A team of women directly threatens the traditional structure of men as social and political leaders.

65. Most police departments do not keep exact statistics on the frequency of assaults on females while participating in sports. NELSON, supra note 8, at 119.

66. See Ken Denlinger, Best Security Becoming a Required Element in All Sports, WASH. POST, Jan. 8, 1994, at B1. The explanations given by the perpetrators of the Seles and Kerrigan attacks were that they wanted to disable the women, both of whom were ranked number one in their respective sports, so that other women (Steffi Graf and Tonya Harding) could win. This is a part of the stereotype of women athletes, because they are still seen as vulnerable and in need of protection by men. Without the help of men, the women will not be able to achieve success.

67. An illustration of the proposition that a dominant social class reacts violently to a social minority group's intrusion into sports is an incident that occurred in 1910, when Jack Johnson, a black man, defeated Jim Jeffries, a white man, for the world heavyweight boxing championship. "[M]any blacks saw this as a symbolic victory against racism. Some whites responded to this threat by rioting and attacking blacks in many towns and cities." MESSNER, supra note 49, at 12.
Lopiano, executive director of the Women's Sports Foundation, asserts that attacks upon female professional athletes is part of the larger backlash against women, because females athletes are entering the male profession of sports. 68 According to Jane Larson, a law professor at Northwestern University, "[t]he woman athlete represents a symbol of [the] frustration and . . . displacement that many men feel." 69

 Violence is directed at not only women athletes, but women who "intrude" into sports in any respect. For example, Lisa Olson, a Boston Herald reporter, was sexually harrassed in the New England Patriots' locker room, 70 and other female sports reporters have faced similar mistreatment. 71

 The attacks by men on women athletes and other female "intruders" into sports require an understanding of the perpetrators' motivations. All too often, the attackers explained that they felt that their sexuality was threatened by the female athlete. In the well-publicized case of an attack on a female jogger in New York City's Central Park, one of the six male perpetrators said that he "felt 'like a midget, a mouse, something less than a man.'" 72 The masculine response to the threat represented by women athletes serves to reinforce male domination. An attack on a runner in Virginia consisted of, first, an attempted rape — an assertion of power and masculinity — but, his impotence preventing him from completing the rape, he "'ejected a bullet'" instead. 73 These attacks on female athletes are attempts to stop women from demonstrating strength and power. The social ramifications of these attacks go beyond the individual victims, spreading to all women who desire to challenge their subordination.

 Much of the blame for attacks on female athletes is often placed on the women themselves. They are told they shouldn't have been running alone, at night, or they were wearing provocative athletic clothing. This reinforces the message sent by the attackers: that women are unwanted intruders into the male realm. 74 This viewpoint not only fails to tell males

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69. Michele Ingrassia, Open to Attack: For Women Athletes, a Fear of Stalking, NEWSWEEK, Jan. 17, 1994, at 46, 47.
72. FALUDI, supra note 52, at 67.
73. NELSON, supra note 8, at 124.
74. After raping a runner in Texas, the man told the victim, "'[y]ou shouldn't be running out here alone.'" Id. at 119.
that violence and harassment of women athletes is wrong, but also fails to explain the cause of the violence.\footnote{75}

Athletic prowess is associated with masculinity, which in American society often manifests itself in expressions of violence and dominance.\footnote{76} This is illustrated in the frequent involvement of male athletes in exploitive, if not criminal, sexual acts. For instance, Mike Tyson, once the holder of the heavyweight boxing world championship, was found guilty of raping a teenage beauty pageant contestant in 1992.\footnote{77} Non-professional athletes are also perpetrators of such acts. In the 1993 Glen Ridge sexual assault case in New Jersey, the defendants were four high school football players who were found guilty of gang-raping a teenage girl.\footnote{78} Additionally, members of the “Spur Posse” in Lakewood California, a group of high school athletes who score points for each female they have sex with, have been accused of rape.\footnote{79} The association of sports and violence against women is demonstrated each year, on Superbowl Sunday, when more women are battered than on any other day of the year.\footnote{80} Leading sportswriter Joan Ryan describes this phenomenon: “The athletes on the screen — men often admired to the point of reverence — reaffirm the batterer’s belief of what it means to be a man: aggressive, dominant, physical.”\footnote{81}

The entrance of women into sports, especially on the professional level, will break the alignment of sports with masculinity and the corresponding violence. As female athletes are praised and recognized, rather than marginalized, for their athletic skills, which necessarily include physical strength and social prestige, the link between masculinity and domination will be weakened. Instead of being confronted with blatant sexism and violence, women athletes will serve as role models, teachers, and sources of inspiration to women who want to enter the male-dominated world of sports.\footnote{82}

\footnote{75} Additionally, it limits women’s choices in sports pursuits and keeps them from breaking new ground in athletics. 
\footnote{76} Eisler, supra note 47, at xviii.
\footnote{78} Robert Lipsyte, Will the Moral Court Please Come to Order, N.Y. TIMES, Mar. 19, 1993, at B14.
\footnote{79} See Jane Gross, Where ‘Boys Will Be Boys’ And Adults are Bewildered, N.Y. TIMES, Mar. 27, 1993, at A1 (some of the parents are “downright boastful about their sons”).
\footnote{80} See Joan Ryan, Super Message for All Men, S.F. EXAMINER, Jan. 24, 1992, at D1.
\footnote{81} Id.
\footnote{82} Rhode, supra note 44, at 303.
C. GENDER-BIASED NURTURING

The historical construction of sports and the corresponding association of sports and masculinity has caused gender-biased nurturing which adds further obstacles to women’s equality in professional sports by constraining women from participating in sports and from developing athletic skills. The socialization of females, beginning at birth and continuing throughout their lives, prevents many women from excelling at sports, and thereby prevents women from attaining equal pay and opportunities in professional athletics.

Since 1970, female participation in sports has grown, and, correspondingly, parental attitudes about gender roles in sports have changed. However, actual parental behavior has not substantially changed and girls continue to be nurtured differently than boys. Susan Greendorfer explains that these “early child rearing practices . . . perpetuate myths about play, games, and sport.” Beginning at birth, parents tend to handle their male and female infants differently, in response to society’s gender stereotypes. Girls and boys are provided with different toys. Girls are discouraged from playing sports with boys, and encouraged to play in exclusively female groups. Greendorfer describes how “parents inadvertently deny their daughters opportunities for sport experiences that they do not deny their sons.” Females are taught that their proper role in sports is that of cheerleader or sideline supporter of males, who are the athletes. Young boys can dream of becoming star athletes and are given male sports figures as heros; young girls have few such role models.

83. See THE WILSON REPORT: MOMS, DADS, DAUGHTERS AND SPORTS (Wilson Sporting Goods Co., River Grove, Ill., in cooperation with the Women’s Sports Foundation, East Meadow, N.Y.), June 7, 1988, at 3-6 [hereinafter WILSON REPORT].
85. Id. at 11.
86. Id. at 9.
87. MILLER LITE REPORT ON WOMEN IN SPORTS 3 (New World Decisions, Ltd., Iselin, N.J., in cooperation with the Women’s Sports Foundation, East Meadow, N.Y.), Dec. 1985 [hereinafter MILLER LITE REPORT]. When girls participate in co-ed athletics, they tend to have positive images of themselves and play sports throughout their lives. Id.
88. Greendorfer, supra note 84, at 8. The Wilson Report, addressing the influence of parents on sports participation by their daughters, found that, during their upbringing, females are held back from developing athletic skills which potentially could equal males’ because fathers generally do not encourage their daughters to play sports when they are young. WILSON REPORT, supra note 83, at 4. The report concluded that “[i]f fathers stepped in sooner, . . . and made an effort to encourage their daughters through their own participation as coach, team member, or opponent, girls would . . . develop their skills sooner and therefore more thoroughly . . .” Id.
If a girl is not participating in sports at age 10, there is only a ten percent chance that she will participate in sports at age 25. This statistic has important implications. First, with fewer adult women participating in sports, it follows that there are fewer adult women seeking positions as professional athletes. With less demand for positions for women, the professional sports community can justify its failure to create more positions, maintaining the unequal distribution among men and women. Similarly, some of the women who drop out of sports, or who never begin participating, may be ones who, if they were to participate throughout their lives, would be as talented as the top male athletes. When women are uninterested in participating in sports, they may be less likely to watch sports; thus, the media is not pressured to provide greater coverage of women's sports. These women represent a significant group of consumers who could purchase sports products and other products made by sponsors of athletic competition. This translates into less income for organizations that sponsor sports events, who can then justify the lower pay or absence of positions for women athletes.

D. THE MEDIA

The different roles of men and women in sports are reinforced by the media, which perpetuates the rigid, negative stereotypes about women athletes, thereby discouraging women's participation in sports. The media is an extremely influential social force and has the ability to create new images of women athletes as talented and valuable in professional sports. The media could influence society to enjoy and appreciate women's athletic feats as much as men's, which would translate into equal opportunities and pay for women professional athletes.

The media presents sports as male-dominated. Female athletes receive much less coverage in newspapers, magazines, and on television. For instance, men's professional golf had thirty-five national non-cable television events in 1992, while women's professional golf had nine. A 1990 report found that ninety-two percent of local television news sports coverage goes to men's sports, with women's sports getting five percent and gender neutral topics receiving three percent of the coverage. The print media similarly provides minimal coverage of female athletes.

89. Women's Sports Facts, supra note 23.
92. See Cabot, supra note 4, at 15-16, for statistics and explanations.
When the media does provide coverage of females in sports, the athletes are frequently trivialized. The coverage often comes in the form of "sexist commentary and unflattering stereotypes," for instance, emphasizing the relative beauty of female competitors rather than their skills. Only one issue of Sports Illustrated magazine is devoted to women each year: the swimsuit issue. Filled with photographs of female models in bathing suits, it has very little to do with sports. The use of a women's sexuality to sell products or attract viewers "makes it difficult to take women seriously as athletes on the order of their male counterparts." Thus, Sports Illustrated harms women athletes by portraying women as sex objects who do not participate or belong in professional sports.

Although the media fails to cover most women's sports, it has popularized certain women's sports — ones which do not involve displays of aggression or teams and thereby are not associated with any loss of femininity. Rather, winning in popular women's spectator sports, such as gymnastics and ice skating, relies heavily on appearance. Women competitors wear tight, skimpy outfits, and the focus is on their relative aesthetic grace. It is acceptable for women to perform athletically, as long as they maintain this grace. This message reinforces the tradition-

94. Cabot, supra note 4, at 15-17.
95. That issue far outsells all the others; the magazine’s guaranteed circulation jumps from about 3.15 million copies to 5 million. In 1994, for the first time ever, the swimsuit issue contained male models, “though the men are always in water and do not pose provocatively at poolside.” Stuart Elliot, Advertising, N.Y. TIMES, Feb. 16, 1994, at C2.
96. William C. Rhodon, It’s Time to Turn the Page, N.Y. TIMES, Jan. 23, 1993, at 34.
97. This is similar to the way that pornographic magazines harm women generally; as Catharine MacKinnon and others argue, pornography leads to violence and discrimination against women by objectifying them. See generally Catharine MacKinnon, Only Words (1993); Catharine MacKinnon, Toward A Feminist Theory of the State, supra note 44, at 195-214.
98. LENSKYJ, supra note 56, at 142.
99. In contrast, men are always praised as athletes in spite of their looks. For instance, in 1993, the Philadelphia Phillies were noted for their ugliness and rude habits, but nonetheless their skills enabled them to win the National League Championship in professional baseball. See, e.g., Jon Heyman, Not All That Phunny, NEWSDAY, Oct. 24, 1993, at 7 (describing the Phillies as obese, surly, and fond of spitting and chewing tobacco).
100. Even in tennis, women still wear skirts. Wendy Olson cites this fact as proof that these athletes are attempting to maintain a feminine appearance. Wendy Olson, Beyond Title IX: Toward an Agenda for Women and Sports in the 1990’s, 3 YALE J.L. & FEMINISM 105, 121 (1990).
101. For instance, there is a big contrast in the popularity and media images of Nancy Kerrigan and Tonya Harding. See Robert Lipsyte, It’s Strut Your Stuff for the Good Old Boys, N.Y. TIMES, Feb. 4, 1994, at B13.
al role of women as feminine and graceful, which in turn excludes women from any other sports.\textsuperscript{102}

The fact that a female athlete’s skill is often secondary to her appearance and, in fact, is measured by that appearance explains why women tend to participate in athletic activities because of the benefits to their physical health and appearance, while males cite both health and fun as reasons for playing sports.\textsuperscript{103} Females face several social dilemmas when deciding whether or not to participate in sports: women still feel that “they are too often compelled to choose between being athletic and being feminine,” and they are concerned that “men are often threatened by losing to women.”\textsuperscript{104} The media’s emphasis on femininity and appearance of female athletes is thus part of the backlash against women in professional sports,\textsuperscript{105} directing women away from sports which are associated with strength and leadership.

The media conditions the public to prefer watching male athletes.\textsuperscript{106} When the media covers women playing professional sports, the contrasts between male and female play are highlighted and the women’s version is trivialized and devalued. Some people involved in sports have proposed changes in the women’s version of a sport in order to make female athletes look like male athletes,\textsuperscript{107} predicting that these changes may increase the popularity and excitement for spectators. Others are highly critical of such ideas, opining that there are factors already present in women’s sports that, when properly understood, demonstrate the high skill level that goes into the athletes’ performances.\textsuperscript{108} The media is a potential tool for bringing the public the required understanding, by highlighting the special characteristics and talent present in women’s sports in a positive manner.

\textsuperscript{102} Even in women’s tennis, another popular spectator sport, the media has found it difficult to acknowledge the athletic skills of the players. Rather, commentary often emphasizes the athletes’ comparative beauty and youth. Olson, \textit{supra} note 100, at 122-23.
\textsuperscript{103} \textit{WILSON REPORT, supra} note 83, at 6.
\textsuperscript{104} \textit{MILLER LITE REPORT, supra} note 87, at 3.
\textsuperscript{105} Images of “beauty” are used as a political weapon against women’s rights. See \textit{generally} NAOMI WOLF, \textit{THE BEAUTY MYTH} (1991). The images also have detrimental medical and psychological effects on individual women, who attempt to change their physical appearances in order to fit these images.
\textsuperscript{107} This has been instituted in tennis, where women play a best of three set format and men play a best of five set format so that the women’s game can contain more power. In basketball, there is a debate “whether to lower the basket and reduce the dimensions of the court so that women can dunk and move faster from one end of the floor to the other — making their game more similar to the men’s game.” Alison Muscatine, \textit{Women Still Fighting for Some Court Time: Should Their Game be Compared to Men’s?}, WASH. POST, Nov. 29, 1992, at D15.
\textsuperscript{108} \textit{Id.} (quoting Andy Geiger, Athletic director, University of Maryland, and Kathryn Reich, Communications Director, Women’s Sports Foundation).
If the media were to give women athletes equal respect and equal time in the spotlight,\textsuperscript{109} it would foster a new socialization process where male and female professional athletes are deemed socially equal and, as a result, receive equal opportunities and pay.

E. CONCLUSION

Thus, the development of modern sports, the association of sports and masculinity, the gender-biased nurturing, and the media’s perpetuation of sports-related gender stereotypes have all contributed to limiting women’s athletic participation and accomplishments. Arguably, because women’s participation in sports is just beginning to grow, women have not yet attained their full athletic potential. Even with the social limitations on women’s sports, statistics reveal that disparity between men’s and women’s performances has been decreasing as women’s participation in sports has been increasing.\textsuperscript{110} However, without more opportunities and better financial benefits in athletic careers, women’s athletic performance will continue to be constricted. Athletes improve with proper training. Proper training requires good coaching and equipment, as well as encouragement and support, which women athletes rarely receive.\textsuperscript{111} Presently, most female athletes must support themselves through non-sports jobs, limiting their time to train and travel. Since there is no significant financial reward available from sports, women must plan for other careers instead of devoting that time and energy to improving their athletic talents.\textsuperscript{112} Increased career opportunities in sports would lead to increased competition

\textsuperscript{109}. Commonly, the women’s portion of an event is held early in the day or week, while the men’s event is viewed as the real finale.

\textsuperscript{110}. See Wood, \textit{supra} note 37, at 98; \textit{Dyer}, \textit{supra} note 17, at 135-36 (tables 16 and 17); Rose, \textit{supra} note 39, at 239. In many cases, a woman’s winning time today would have beaten the winning man just a few years ago. For instance, Grete Waitz’s 1981 New York City Marathon time would have made her the overall winner in 1970, and Paula Newby-Fraser’s 1988 Iron Man Triathlon time would have won the event from 1978 to 1983 (she was eleventh overall, out of 1274 competitors). Wood, \textit{supra} note 37, at 31; \textit{Nelson}, \textit{supra} note 8, at 44-45.

\textsuperscript{111}. Rose, \textit{supra} note 39, at 239-40.

\textsuperscript{112}. Sheryl Swoopes, the top female collegiate basketball player in the country in 1993, had to play in Europe in order to receive a salary. See Christine Brennan, \textit{Gender Gap Sends Futures on Different Paths}, \textit{WASH. POST}, June 15, 1993, at E1. Another top female college basketball player, Val Whiting, decided to remain in the United States after college, thus foregoing the professional opportunities available to her elsewhere. See Jake Curtis, \textit{Tough Choices for Women: Life After College Basketball}, S.F. \textit{CHRON.}, Apr. 1, 1993, at E1. Formerly, Japan provided opportunities for women to play professional basketball, but it now bans Americans. \textit{Id}. Many female athletes are unaware that such professional opportunities exist. \textit{Id}. Lisa Fernandez, a top collegiate softball pitcher, has no professional opportunities to compete in her sport. See \textit{One of America’s Best May Yet Get Her Due}, N.Y. \textit{TIMES}, Jan. 16, 1994, at \$21. Fernandez wishes that she had an opportunity to still play her sport. Noting the salaries paid to male professional baseball players, she cynically says she would settle for fifty dollars. \textit{Id}.
which would supply the impetus for women to raise their athletic abilities to a new level.

IV. SOCIAL BENEFITS OF EQUALITY IN SPORTS

Socially created inequalities in sports are a microcosm of gender inequality in society as a whole. Thus, rectification of gender inequality in sports has the potential to benefit women at all levels of society. When society learns to accept women as professional athletes on an equal basis as men, the qualities associated with sports figures — leadership, strength, character, skill, and mental ability — will likewise be associated with women and with femininity, allowing women to expand the limited social roles they currently struggle against.

Equality in professional sports will benefit women beyond the realm of athletics because sports confer social benefits upon participants.113 Sports provide “an opportunity to develop strength of character, leadership, and competitive situations through which to better learn to cope with the demands of the future.”114 Sports also “provide a framework for community, for belonging. They teach people to interact within a team context, to participate in complex group strategies, and to understand the nature of group dynamics.”115 These benefits should be available to both women and men. Equality in professional sports is one way to ensure these valuable social attributes for women.

[G]ender disparities in sports have been both a cause and a consequence of broader cultural stereotypes involving masculinity and femininity. Substantial progress toward gender equality will require challenging those stereotypes wherever they persist, and athletics is no exception.116

113. Sports confer health benefits as well. Females who participate in sports tend to have lower rates of drug use and breast cancer than non-participants. Additionally, teenagers who are athletically active are less likely to become pregnant and more likely to graduate from high school. Women’s Sports Facts, supra note 23.
116. RHODE, supra note 44, at 300.
Currently, skills associated with women are systematically devalued based on that association and, similarly, “[d]isadvantages placed on one group [in athletics] will follow its members throughout their lives.”

Interaction of boys and girls, men and women, in athletics should help to ‘socialize’ those participants to accept members of the opposite sex on their merits, rather than judging them on the basis of sex stereotypes. . . . Ultimately, a new area of communication may be opened between the sexes which will help in other situations where men and women must work together.

Since professional sports careers are representative of power in society, achieving gender equality in professional sports will prove that women have the skills to become leaders in all aspects of society and will garner increased respect for jobs performed by women. In short, equality in sports is a necessary component of overall gender equality.

V. FEMINIST LEGAL THEORY AND INEQUALITY IN PROFESSIONAL SPORTS

Feminist writers, including feminist legal theorists, have recently begun to recognize the importance of critiquing the fundamentally sexist history and practices of sports. Ending male domination of sports is an important part of ending the social subordination of women at all levels of society. Thus, it is necessary for women’s rights advocates outside of sports to recognize the role of sports in the current social paradigm. Women need to have access to legal remedies to correct the inequalities of pay and opportunity in sports, as in other areas of society where there is discrimination. Feminists recognize that the present perspectives in legal analysis of gender discrimination law are male-focused and perpetuate the denial of full equality.

There are three basic feminist perspectives on gender discrimination law. One theory, equal treatment, holds that equality within the current system is possible, provided that women are indeed treated equally. A second theory, special treatment, favors creation of greater opportunities for girls and women in sports by creating separate opportunities exclusively for women. A third theory, dominance theory, argues that equality within the

119. Id. at 79.
120. However, most women’s rights advocates tend to focus on sports only in the high school and college contexts, rather than professional sports. See generally Olson, supra note 100.
121. Id. at 125-26.
present system is impossible, and can only be achieved through a transformation of sports as an institution. 122

In examining how each approach would remedy the unequal pay and opportunities in professional sports, one question is particularly relevant: how should the law address physical differences while still treating men and women equally? To analyze the different answers to this question, it will be helpful to examine how physical differences between men and women are used to justify differential treatment in other realms besides professional sports. The best example is pregnancy, in the context of employment discrimination. Through analogy, this will provide clues as to the methods each feminist perspective would propose for ending inequalities in professional sports.

A. EQUAL TREATMENT

Equal treatment proponents ask the law to ignore the biological "real differences" between men and women because, by definition, equality requires identical treatment of every individual person without regard to physical differences.

The equal treatment perspective is easily described as it applies to pregnancy, a biological "real difference." Equal treatment legislation would treat pregnancy as any other "disability," and ensure a pregnant woman the same protection from discrimination as anyone with a disability. 123 As this example illustrates, equal treatment requires the law to treat women the same as it treats men, applying the standards already in place, without discrimination.

In the professional athletics context, proponents of equal treatment contend that women do not need separate events which are equally paid


Similarly, equal treatment feminists would advocate overcoming the restrictions on women's participation in military combat which are currently imposed due to the physical differences between men and women. There is a statutory exclusion of women from Navy combat (10 U.S.C. § 6015 (1993)), while the Army and Marine Corps preclude women from serving in combat positions as a matter of established policy. Nadine Taub & Elizabeth M. Schneider, Women's Subordination and the Role of Law, in FEMINIST LEGAL THEORY: FOUNDATIONS, supra, at 20, n. 3. Equal treatment feminists recognize that "it is combat experience that sends soldiers up the military promotion ladder, increases their pay and benefits, and apparently fits them for high public office ... ." Christine Littleton, Reconstructing Sexual Equality, in FEMINIST LEGAL THEORY: FOUNDATIONS, supra, at 263 n. 17. Thus, equal treatment theorists refuse to allow any distinctions to be based on biological gender differences, requiring that women who qualify be allowed to engage in military combat.
and which provide equal numbers of positions to athletes because separate events will not be equal — the women’s event will be stamped with inferiority.124 Instead, equal treatment theory would only require that women are not prohibited from trying out for the professional positions currently occupied by men. Equal treatment legislation would thus retain the status quo, because women’s physical differences affecting athletic performance are treated the same as those of a man who lacks sufficient athletic skills to attain a professional sports position.

In this paradigm, only the exceptional female athlete can achieve success. This causes several social problems to arise. First, the rare woman whose skills are equal to those of the men in a particular professional sport is not seen as representative of women generally; instead, she is marginalized within the existing male dominated structure of sports. Second, as few women can achieve success within that discriminatory structure, few women become professional athletes and few attain the high-paying positions.

B. SPECIAL TREATMENT

Special treatment proponents ask the law to acknowledge biological “real differences” between males and females. The law can then eliminate the effects of those differences by modifying institutions to accommodate women.125 Special treatment theory focuses on equal opportunity, rather than equal treatment.126

Special treatment theory is also easily understood when applied to the condition of pregnancy. Special treatment legislation treats pregnancy as a special condition, and creates protections that would ensure that women, when pregnant, have the same opportunities and rights as men and non-pregnant women.127

In professional sports, special treatment legislation would require separate categories and leagues for each gender so that equal pay and equal numbers of opportunities are available to males and females. Special treatment theorists hold that maintaining separate teams and categories provides women with an opportunity to demonstrate what they can accomplish in sports. This argument highlights flaws in the equal treatment argument that women should not be catered to when their skills are not equal to male athlete’s skills. Special treatment legislation emphasizes not

125. Weisberg, supra note 123, at 125.
126. Id. at 124.
127. Similarly, special treatment theory supports women’s participation in the military, even where women’s physical differences would otherwise prohibit them from combat activity, by creating positions where women’s physical differences are not relevant.
only the social acceptibility of women's athletic performances, but their social value.

Special treatment theory also recognizes that it is just as essential that women's sports are properly promoted and would further require equal media coverage of men's and women's sports contests. With both a larger number of opportunities available for women to become professional athletes and wide exposure to women's athletic competitions, the greater societal value associated with female athletes will be an impetus for females to learn sports at early ages and continue to pursue sports throughout their lives.

However, special treatment theory also presents some problems. Specifically, it does not realign sex roles. Special treatment legislation treats men as the prototype, and women as "other." In essence, special treatment is a symptomatic remedy which does not alter the social structure which leads to the inequalities in sports. However, it would bring more improvements than equal treatment. Additionally, because special treatment does not require changes to be as dramatic as dominance theory, it may be the most realistic approach. It is a concrete first step, and may be the best solution until society recognizes the value of female athletes and initiates a demand for further advances in gender equality.

C. DOMINANCE THEORY

Dominance theorists recognize that the causes of gender inequality are entirely social. Recognition of one important fact is essential: "[m]en's [biological] differences from women are equal to women's [biological] differences from men . . . [y]et the sexes are not socially equal." Dominance theorists point out that the biological justification for gender inequality in sports is proffered not only by sports institutions, but by the legal system as well. The legal system must stop treating women's biological differences as disadvantages, and instead correct the socially created biases which allow biological differences to be treated as such.

129. Id. at 151.
130. Catharine MacKinnon's terminology is adopted in this section. See MACKINNON, FEMINISM UNMODIFIED, supra note 63, at 40. However, feminist theorists who have similar views, but label their theories differently, are also discussed.
131. MACKINNON, FEMINISM UNMODIFIED, supra note 63, at 37.
132. The law treats women's physical characteristics as justifications for the military draft exemption for women and statutory rape laws which apply only when female minors are victims. See Bernard Rostker v. Robert L. Goldberg, 453 U.S. 57 (1981); Michael M. v. Superior Court, 450 U.S. 464 (1981). Title IX's competitive skill and contact sports exceptions are further examples of lawmakers' demeaning attitudes about women's athletic abilities. See infra notes 148-49 and accompanying text.
133. Sunstein, supra note 106, at 833.
Applying dominance theory to the example of pregnancy discrimination, the problem is seen as stemming from the historically “male-modeled” workplace. Dominance theory sees, as a solution, the need to “emphasize the basic commonality of procreation as a human endeavor involving both men and women” and thus requires a reconceptualization of the concept of worker which would include both.

Dominance theorists ask, why has “feminine” meant physical weakness? Their answer is that physical weakness translates to easy to control, as well as easy to rape, molest, and sexually harass. Thus, dominance theory provides an explanation of the violence against women athletes. The abuse of women athletes is a random yet systematic “form of terror,” creating and maintaining male supremacy and dominance. It is part of the entire picture of women’s oppression.

Dominance theorists believe equal treatment and special treatment theory cannot make progress in the area of women’s equality in sports because they do not address the inherent social structure underlying the inequalities. Dominance theory supports a transformation in athletics which would change the current status of women, who try to emulate male athletes, play the role of cheerleaders, or participate in “women’s sports”. First, dominance theorists propose less social emphasis on today’s most popular sports. Lyn Lemaire suggests we should “challenge[] the underlying value judgment that defines contact sports as better and more prestigious than other athletic activities.” Second, new standards of measuring performance in some sports could be set, with emphasis

134. Patricia A. Cain, Feminism and the Limits of Equality, in FEMINIST LEGAL THEORY: FOUNDATIONS, supra note 123, at 237, 240 (“if women had participated equally in designing the workplace from the beginning, ... [it] would have been structured so that pregnant workers were not viewed as different from the norm”).


137. Dominance theorists resist women’s participation in military combat, instead urging society to “work[] to get the men excluded, too” due to the fact that “the current institution of combat is the apotheosis of phallocentrism, a nonstop program of hierarchy, barely controlled aggression, and alienation.” Id. at 263 n. 17.

138. MACKINNON, FEMINISM UNMODIFIED, supra note 63, at 7.

139. “Women’s sports” consist of “the feminine physical pursuits that have been left to us.” Id. at 119.

140. Lemaire, supra note 115, at 138
placed not only on speed and strength, areas in which males excel, but on stamina, grace, and finesse, areas in which females excel.\textsuperscript{141} Competition itself should not be deemphasized, because it has value in the social equalization process.\textsuperscript{142} Instead, competition should be de-gendered. One suggestion is to structure professional sports like the Olympics, where the winning country is determined by totalling the points each individual or team has earned.\textsuperscript{143} This scoring system could be utilized in professional sports, so that the winning team is determined by the total contributions of both the male and female competitors.

In sum, feminists who subscribe to dominance theory believe a reconstruction of sport is a prerequisite to true equality between males and females. They believe that popular sports should focus on athletic accomplishment rather than defining athletic success by domination. Law must incorporate dominance theory in order to remedy discrimination in professional sports and to ensure social equality for women.

D. CONCLUSION

Fundamentally, each of the feminist perspectives described above are valuable to a critique of the professional sports inequalities because each begins with the premise that women today are not treated equally by the law. However, no one perspective provides the framework for comprehensive change in professional sports. By combining the strengths of each perspective, a feminist analysis can be developed which aims to overcome the existing lack of opportunities and the discrimination in pay female professional athletes suffer.

In the following section, this article will analyze and criticize current laws and legal standards as they apply to remedying the unequal pay and opportunities for women in professional sports, discovering that there are currently no adequate legal means to redress these inequalities. A feminist analysis which combines the strengths of the three different perspectives would necessarily provide remedies for the inequalities, resulting in not only equal pay and opportunities for women athletes, but also improvement of the social status of women in general.

\textsuperscript{141} In fact, spectators are currently interested in the graceful aspects of even the most aggressive, strength-emphasized sports, evident in the popularity of the slow-motion replay. \textsc{Messner, supra} note 49, at 169.

\textsuperscript{142} Although some suggest that competition is, in itself, oppressive, others recognize its value in the process of social equalization. \textit{Compare} Lemaire, \textsc{supra} note 115, at 141, with \textsc{Messner, supra} note 49, at 181.

\textsuperscript{143} \textsc{Rhode, supra} note 44, at 303.
VI. CURRENT LAWS FAIL TO PROVIDE REMEDIES FOR SPORTS INEQUALITY

A female professional athlete wishing to challenge the opportunity and pay inequalities in professional sports will have difficulty finding a legal remedy. This may explain why there has never been a legal challenge to the practices described above. Current legal definitions preclude a successful action against professional sports because the underlying theories fail to incorporate a feminist perspective. Equality in professional sports cannot be reached without a better approach. As laid out above, a combination of the special treatment, equal treatment, and dominance approaches provides a means of reaching the goal of true equality for women in professional sports.

A. TITLE IX

Title IX directly addresses inequality in sports by requiring that athletic programs in educational institutions receiving federal funds be equally available to females and males. While not purporting to address inequality in professional sports events, Title IX may, in fact, have some effect on professional sports. By ensuring that young females in high school and college have equal opportunities to develop athletic skills and receive equal support from the school, Title IX may be helping to change the stereotypes which have created the inequalities female athletes face as adults. When children are raised in an atmosphere where males and females receive equal athletic opportunities, they will expect and demand those same opportunities throughout their lives. Professional female athletes theoretically would become more accepted by society and thus receive the same opportunities and pay as professional male athletes.

144. Telephone interview with Gil Fried, Director, Sports Law Center (Mar. 10, 1993).
145. Education Amendments of 1972 § 901, 20 U.S.C. §§ 1681-1686 (1976), providing in pertinent part, “[n]o person . . . 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 . . . .”
146. Title IX applies to colleges and universities receiving federal funds. It has been useful in securing more scholarships and support for intercollegiate women’s sports teams. However, it has not entirely cured the problem of inequality in funding. Although women make up about 50 percent of all college students, they receive less than 34 percent of all athletic opportunities, 24 percent of athletic budget operating funds, 18 percent of all recruiting money, and 33 percent of athletic scholarships. Donna A. Lopiano, Ensuring Women Get an Equal Playing Field, THE PLAIN DEALER, Jan. 25, 1994, at 4D. Male college athletes still receive 170 million dollars more per year in athletic scholarships than female college athletes. Id. Donna Lopiano suggests that these statistics continue to show unequal funding because the practice can only be corrected by lawsuits, which are slow and costly. Id.
147. Since Title IX was passed, female participation in sports has grown dramatically, from 300,000 in 1972 to 1.8 million in 1986. Olson, supra note 100, at 111.
However, even within its carefully framed, limited scope, Title IX has its faults. While Title IX contains a general prohibition against segregation of school athletic teams on the basis of gender, it does allow such segregation when the teams select members on the basis of “competitive skill,” and, when the sport is classified as a “contact sport,” females may be denied a team altogether.  

The effect of these provisions is to perpetuate the stereotype that males are stronger and more athletically talented than females.

These provisions of Title IX send harmful, implicit messages which are adopted by our society. It assumes that females need separate teams when team membership is based on “competitive skill” because few, if any, will have the skills to qualify. And, the “contact sports” exception perpetuates stereotypes of females as frail, weak, and limits the types of sports they can participate in.  

Because of its limited scope, its sexist assumptions about female athleticism, and its difficult implementation, Title IX, the only federal law aimed at elimination of sex discrimination in sports, cannot reach the problem of lack of opportunities and unequal pay for women in professional sports.

B. CIVIL RIGHTS ACT AND EQUAL PAY ACT

Title VII of the Civil Rights Act of 1964 prohibits public and private employment discrimination on the basis of sex, covering a wide range of practices, including failure to hire, type of work, and differences in pay. The Equal Pay Act prohibits sex-based wage discrimina-

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148. 45 C.F.R. § 86.41(b) (1981). Federal regulations specify that “contact sports” include “boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of [sic] major activity of which involves bodily contact.” Id.


150. 42 U.S.C. § 2000e-2(a) (1976), providing in pertinent part:

It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

151. Originally, the Civil Rights Act applied only to racial discrimination. Sex discrimination was included by a later amendment. See 110 CONG. REC. 2577, 2584 (1964).

152. 29 U.S.C. § 206(d)(1) (1964), providing in pertinent part:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of
Since professional sports are a form of paid employment, theoretically, the Civil Rights Act and the Equal Pay Act should be useful in rectifying the discrimination that professional women athletes experience in the form of denial of opportunity and unequal pay. While never before applied to professional sports, both Acts have been used to stop gender discrimination in other, analogous contexts. However, both the Acts themselves and their judicial interpretation are inherently limited by the underlying theories of gender differences.

1. Hiring Practices

The Civil Rights Act, while offering protection from sex-based employment discrimination, allows employers to use sex-based classifications for hiring employees if sex is a bona fide occupational qualification (BFOQ). In the professional sports context, women athletes are often not hired for games, leagues, and contests. Employers justify this by arguing that, due to customer preference for male sports events and female athletes’ lack of physical qualifications for the jobs, they are not required to hire an equal number of women. If either of these justifications falls

the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.


153. Unlike the Civil Rights Act, it is limited to sex-based differentials in wages, and does not prohibit discrimination in other aspects of employment. See Barbara Lindemann Schleif & Paul Grossman, Employment Discrimination Law 436 (2d ed. 1982).

154. Both the Civil Rights Act and the Equal Pay Act have several definitional barriers which a plaintiff must overcome in order to challenge unequal pay and opportunities in professional sports. First, before the Civil Rights Act can apply to professional games, leagues, and contests, the employer must have twenty-five or more employees and must be an “industry affecting commerce.” 42 U.S.C. § 2000e(b). Similarly, under the Equal Pay Act, the employer’s business must have some effect on interstate commerce and must have two or more employees. 29 U.S.C. § 203(r), (s) (1976). Courts have already classified professional sports organizations as industries affecting commerce. See, e.g., Barbara Jane Blalock v. Ladies Professional Golf Association, 359 F. Supp. 1260, 1263 (N.D. Ga. 1973); Curtis C. Flood v. Bowie K. Kuhn, 407 U.S. 258, 282-83 (1972) (baseball, football, boxing, and basketball operate interstate). Second, professional athletes must be employees, rather than independent contractors, in order to use either Act. This would only present a problem in individual sports contests, because in team sports, the players usually have an employment contract with the employer. There are a variety of approaches to the definitional problem of what constitutes an employee. (See generally Patricia Davidson, The Definition of ‘Employee’ Under Title VII: Distinguishing Between Employees and Independent Contractors, 53 U.CINN. L.REV. 203 (1984).)

under the BFOQ exception, the Civil Rights Act will not remedy the hiring inequalities in professional sports.

A customer preference argument was made, and rejected, in *Celio Diaz v. Pan American World Airways, Inc.* 156 However, the physical qualification argument was accepted in *E. C. Dothard v. Dianne Rawlinson*,157 where the Court upheld exclusion of women from maximum security prison “contact” guard positions. A female athlete challenging a professional sport’s failure to hire women should analogize to *Diaz* and argue that sex is not a BFOQ because, contrary to the employer’s argument, viewers’ preferences for male athletes is irrelevant to sporting events. A professional sports organization would argue that sex is a BFOQ, pointing to *Dothard*, where job performance was directly linked to sex.

From any feminist perspective, the BFOQ exception is an unacceptable excuse for discrimination. An equal treatment feminist perspective recognizes that any sex-based exception flies in the face of the definition of equal treatment of men and women. A special treatment perspective might allow sex to be a BFOQ, but only where women have been historically excluded — for example, in affirmative action programs which provide job opportunities for women. Dominance theory would question why women’s physical and psychological characteristics carry social meanings and disallow legal distinctions on those bases. Thus, while it is unclear whether the *Diaz* or *Dothard* analogy would be favored by a court examining the hiring practices of professional sports, adoption of any

156. 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). The plaintiff argued that the employer, Pan Am, violated the Civil Rights Act by refusing to hire him as a flight attendant because he was male. The employer argued that sex was a BFOQ because passengers had an overwhelming preference for the personal characteristics of female flight attendants. *Id.* at 387. The court rejected this argument, holding that the personalities of flight attendants were not necessary to an airline’s function of providing safe transportation. *Id.* at 388.

157. 433 U.S. 321 (1977). The Court stated:

A woman’s relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs, could be directly reduced by her womanhood. There is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison. There would also be a real risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women.

*Id.* at 335. Justices Marshall and Brennan, dissenting, criticized the majority for relying on generalized statements about women’s abilities. *Id.* at 343.

158. Although viewer preference might seem relevant because an employer makes more profit by holding more popular events, the same argument could have been made in *Diaz* — that the airline would make more profit by having only female flight attendants. This argument was implicitly rejected. See Kingsley R. Browne, *Biology, Equality, and the Law: The Legal Significance of Biological Sex Differences*, 38 Sw. L.J. 617, 681 (1984) (arguing profit should be relevant).
feminist approach would ensure that the BFOQ exception is not used to exclude women per se.

2. **Equal Pay and Affirmative Defenses**

Once women are hired as professional athletes, they still face equal pay problems. The Equal Pay Act\textsuperscript{159} and the Civil Rights Act both prohibit sex-based wage differentials, requiring equal pay for equal work. The Acts do not prohibit gender discrimination in all employment situations, however. They allow employers to assert affirmative defenses, which, if proven, justify disparate treatment of female employees.\textsuperscript{160}

When a separate women's division is provided in a professional sport, the amount paid to the winner is frequently lower than that paid to the winner of the men's division. Differences between male and female athletes' skills and/or the quality of their performance are cited as justifications for pay differentials in professional sports. The Acts mandate equal pay only if the skill required for one job is equal to the skill required for another\textsuperscript{161} and the Acts simultaneously provide employers with the affirmative defense that athletic performance is measured by "quality of production," which, in the context of professional sports, is indistinguishable from skill.\textsuperscript{162}

\textsuperscript{159} The Equal Pay Act seems an appropriate tool for challenging pay differentials for female athletes because professional sports employers often justify the lower awards and pay they offer to professional women athletes by citing the market's supply and demand, and a stated intent of the Equal Pay Act is to counteract market forces in employment situations. Corning Glass Works v. Peter J. Brennan, 417 U.S. 188, 206 (1974).

\textsuperscript{160} The affirmative defenses are: (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) a differential based on any other factor other than sex. 42 U.S.C. § 2000e-2(h); 29 U.S.C. § 206(d)(1). The affirmative defenses were incorporated into the Civil Rights Act from the Equal Pay Act by the Bennett Amendment in 1976.

\textsuperscript{161} The Equal Pay Act defines equal work as those jobs that require "equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1). The first three requirements do not seem problematic in the professional sports context. The Equal Pay Act requires a more exacting degree of job similarity than the Civil Rights Act. Mary Ann Grigoletti v. Ortho Pharmaceutical Corp., 570 A.2d 903, 909 (1990) (citing, inter alia, Mary Craik v. Minnesota State Univ. Bd., 731 F.2d 465, 479 (8th Cir. 1984), Christine Epstein v. Secretary of U.S. Department of Treasury, 739 F.2d 274, 278 (7th Cir. 1984)).

\textsuperscript{162} Sports employers also might assert that the pay differential is based on a factor other than sex. A factor other than sex might be greater cost, since not as many spectators will pay to see women compete. In City of Los Angeles Dep't of Water & Power v. Marie Manhart, 435 U.S. 702 (1978), the employer asserted that there was a greater cost associated with female employees because women tend to have longer life spans than men and the employer would have to pay them larger pensions. The Court held that this did not qualify as a factor other than sex, in light of the fact that individual life spans vary, with some women having shorter than average life spans. Id. at 707-09. Since individual athletes vary in talent and public popularity, there is a possibility that an individual woman will draw bigger crowds and more sponsors than an individual man. In County of Washington v.
Professional sports currently assess quality of athletic performance in a quantitative manner, measuring an individual's relative speed, strength, throwing ability, hitting ability, etc. A feminist analysis of the quality defense and definition of skill calls into question "the apparent neutrality" of these methods. The standards by which athletic skill and performance quality are measured emphasize the ingrained social and biological advantages men possess. It is only because skill is measured on a "male" scale that women's athletic skill levels are deemed lower than men's.

One way to ensure that the Acts fairly accommodate the inherent discrimination in the social construction of sports is to reject both the definition of skill and the quality defense, because of the male-based standards underlying them. Thus, there can be separate events which have separate standards of skill and quality, but which pay the winners equally.

A second alternative is to keep the legal structure, but to change the way that professional sports measure the comparative skills and quality of athletes — by using non-sex-based factors. Such factors might include weight or height of the competitors. There should also be a different emphasis on which skills are measured, in order to take into account skills at which female athletes excel, for instance, valuing grace, technique, and endurance just as highly as strength and speed.

Alberta Gunther, 452 U.S. 161, 170-01 (1981), the Court allowed a bona fide job rating system to qualify as a factor other than sex. In professional sports, performances are generally rated on speed, the relative number of points scored, or by a more subjective judging system. An employer might argue that these methods of rating be termed bona fide job rating systems. However, as discussed infra, under the quality defense, such methods themselves are usually sexist devices, because they rate the jobs on a male scale of performance. In Corning Glass Works v. Peter J. Brennan, 417 U.S. 188, 207 (1974), the Court held that wages reflecting a job market in which the employer could pay women less than men did not qualify under the factor other than sex defense. Thus, athletic contest organizers or sponsors' defense that "women are willing to settle for less" would not be allowed. In James D. Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589, 591 (3rd Cir.), cert. denied, 414 U.S. 866 (1973), a pay differential was allowed when, due to customer preferences for male sales personnel, women produced, on the average, less profit than male employees. In professional sports, customers prefer men's sports and female athletes produce less profit. However, if the public was socialized to enjoy female athletes, profits would be equal.

163. Lyn Lemaire explains that "determination of athletic qualifications . . . overstates the relevance of some physical traits while ignoring the significance of others." Lemaire, supra note 115, at 125.

164. However, courts have not required women to perform every physical task that men perform in order to eliminate pay differentials. At least one court has held that even if a job requires occasional physical duties which a female employee may not be strong enough to perform, the jobs are not rendered unequal. In Lillian Krumbeck v. John Oster Manufacturing Company, 313 F. Supp. 257, 263 (E.D. Wisc. 1970), although males were assigned all of the heavy lifting that the women were not physically capable of doing, a pay differential was not warranted because the lifting was only occasional.
3. Conclusion

The Equal Pay Act and Civil Rights Act, while helpful in ending gender discrimination in other employment contexts, are not useful in challenging the unequal pay and opportunities existing for women in professional sports. Only with a radical restructuring of sports themselves or the legal definitions underlying the Acts can gender inequality in professional sports be remedied through these statutes.165

C. EQUAL PROTECTION CLAUSE

Under the Constitution, the main avenue of contesting inequality in professional sports is the Equal Protection Clause of the Fourteenth Amendment.166 Equal protection requires a showing of state action, as

165. State civil rights laws may also be used to challenge professional athletic inequalities; for instance, California’s Unruh Civil Rights Act, CAL. CIV. CODE § 51 (1993), stating “[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” In National Organization of Women v. Little League Baseball, Inc., 318 A.2d 33 (1974), a baseball league open to all boys aged eight to twelve, was a place of public accommodation falling under New Jersey’s anti-discrimination law, and the league was forced to allow girls. Similarly, a marathon course was a place of public accommodation subject to New York’s Human Rights Law. New York Roadrunners Club v. State Division of Human Rights, 437 N.Y.S.2d 681 (1981) (holding that there was no discrimination against wheelchair athletes because skateboards and bikes — other wheeled devices — were also barred).


The due process clause has both procedural and substantive components. Procedural due process is the constitutional right to a fair procedure to determine the basis and legality of government action impairing life, liberty, or property. F. David Mathews v. George H. Eldridge, 424 U.S. 319, 321 (1976). As discussed infra, the method of measuring athletic success is an unfair procedure which favors men. To prevail on a substantive due process claim, a plaintiff must demonstrate a life, liberty, or property interest deserving of protection. Professional athletes can argue that there is a fundamental liberty interest at stake, the right to pursue one’s chosen profession. Robert T. Meyer v. State of Nebraska, 262 U.S. 390, 399 (1923) (the right to “engage in any of the common occupations of life” is a liberty interest); see also Melissa Ludtke v. Bowie Kuhn, 461 F. Supp. 86, 98 (S.D.N.Y. 1978). Alternatively, the substantive liberty interest protected by the due process clause “includes a freedom from all substantial arbitrary impositions and purposeless restraints.” Planned Parenthood of Southeastern Pennsylvania v. Robert P. Casey, 505 U.S. ___, 112 S.Ct. 2791, 2805, (1992) (quoting Paul Poe v. Abraham Ullman 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)). A professional athlete could argue that the unequal pay and opportunities women face in professional sports are such arbitrary impositions and purposeless restraints.
the Fourteenth Amendment does not apply to private parties.167

1. State Action

Private conduct abridging individual rights is not a constitutional violation unless the state is involved "to some significant extent."168 The gender disparity in pay and opportunities in athletic contests must be a direct result of state law in order to present a constitutional challenge. There is an argument for finding state action in professional sports contests and leagues in that many sports contests take place on state-owned property or in publicly funded arenas.169

In Melissa Ludtke v. Bowie Kuhn,170 a female reporter sued the New York Yankees and the Major League Baseball Commissioner for equal access to the locker rooms in Yankee Stadium. Yankee Stadium activities were classified as state action since the stadium was funded in part by public funds and the city contributed to its upkeep and maintenance.171 The court, relying on William H. Burton v. Wilmington Parking Authority172, found a "symbiotic relationship" and interdependence between the state and the arena.173 Thus, the Yankees and the Commissioner were required to abide by equal protection principles and allow Ludtke access to the locker rooms.

169. There is a second argument for finding state action in professional sports, but it has little legal support. Contests termed "national championships," which crown a national representative, may involve state action because the organization is performing a public function. State action is present when organizations existing under the auspices of state law perform public functions by exercising powers traditionally exclusively reserved to the state. See, e.g., Terry v. Adams, 345 U.S. 461, 469 (1953) (state action present in actions of Jaybird Democratic Association, a private group which excluded blacks from the voting primaries it ran).

Courts have addressed the question whether sports organizations such as the National Collegiate Athletic Association and the United States Olympic Committee are performing public functions, but most recent decisions have rejected such contentions. See, e.g., NCAA v. Jerry Tarkanian, 488 U.S. 179, 193-99 (1988); San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 542-47 (1987). However, Justices Brennan and Marshall, dissenting, found state action because the USOC had the exclusive power to "represent[] this Nation to the world community." Id. at 550.
171. Id. at 93.
172. 365 U.S. 715 (1961). Blacks were excluded from a restaurant located in an automobile parking building, which was financed by public funds and leased from the Wilmington Parking Authority, a state agency. There was state action because the public parking lot and private restaurant received mutual benefits: the restaurant customers had a convenient place to park, and the parking lot received business from the restaurant patrons. Id. at 724-25.
173. Id.
The analysis used in Ludtke supports finding state action in most sports contests. Sports like football, basketball, and baseball, which take place in arenas like Yankee Stadium, would be subject to the requirements of the equal protection clause. Extending the analysis, other sports would also come under the rule of Ludtke. For example, state action will be present in running races, which are usually held on public roads and are dependent on the municipality for closing off those roads and staffing the course with police personnel; in surfing contests, which usually take place on government-owned beaches; in golf tournaments which are held on public courses; and in tennis matches which are held in publicly funded arenas. Finding state action in these situations will allow a female athlete to bring a constitutional cause of action under the Fourteenth Amendment.

2. Equal Protection

Deprivation of opportunity solely on account of sex violates the Equal Protection clause of the Fourteenth Amendment. Courts will uphold a gender classification if it is substantially related to the achievement of an important governmental objective. A sex-based classification will be struck down when it provides dissimilar treatment for persons who are similarly situated with respect to the object of the classification. Courts are required to be "particularly sensitive" to the possibility that a sex-based classification is based on outdated stereotypes, for example, "reliance on . . . images of women as particularly delicate." While this seems to prohibit gender classifications in professional sports which provide

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174. U.S. CONST. amend. XIV, § 1, providing in pertinent part, "[n]o state shall . . . deny to any person . . . the equal protection of the laws."
175. Curtis Craig v. David Boren, 429 U.S. 190, 197 (1976). This is known as the "intermediate" level of constitutional scrutiny. A higher level of equal protection is applied to racial classifications, termed "strict scrutiny." A classification passes the strict scrutiny test if there is (1) a compelling state interest and (2) the restrictions are narrowly tailored. Strict scrutiny is applied only when there is a "suspect class" or a fundamental right is abridged. A suspect class is one which has been "saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Independent School District v. Demetrio P. Rodriguez, 411 U.S. 1, 28 (1972). Fundamental rights have included the guarantees of the Bill of Rights, criminal procedure fairness, privacy, travel, the right to vote, freedom of association, and certain procedural due process rights. NOWAK, ROTUNDA, & YOUNG, supra note 167, at 448. A lower level of equal protection, the "rational relation" test, is used in cases involving economic interests. New Orleans v. Nancy Dukes, 427 U.S. 297, 303 (1976). Arguably, strict scrutiny should be applied to gender as well as race because gender is a similarly immutable characteristic and both racial minorities and women have suffered from invidious discrimination.
177. Id. at 1296 (quoting Faith A. Seidenberg v. McSorelys' Old Ale House, 317 F. Supp. 593, 606 (S.D.N.Y. 1970)).
separate, unequal positions for women, in fact, equal protection does little
to ensure equal opportunity and equal pay for female athletes.

Although equal protection arguments have been used successfully in
challenging high school athletic association rules prohibiting females from
playing on male teams, courts have distinguished the right to compete
for a position on a team on equal terms from a right to a position on a
team. Even if no female actually made the team, there would be no
constitutional violation as long as females had the possibility of making the
team. In the professional sports context, this would fail to require
equal opportunities for women. All equal protection requires is a process
which is not blatantly discriminatory — it does not require results which
provide actual equality in practice.

The problem with the equal protection framework is that it fails to
acknowledge that the process of athlete selection in professional sports is
designed to prefer male athletes, ignoring the fact that sports are defined by
male attributes and women are socialized differently. In determining
whether men and women are similarly situated, the courts use androcentric
standards, asking whether women are like men. Thus, the standards
fail to provide equal opportunities because they necessarily exclude most
women.

Under the equal protection clause, courts have upheld the constitution­
ality of a “separate but equal” standard for sports teams in the high school
context. Separate-sex teams are constitutional provided that they receive

held that such a rule denied females an equal educational opportunity, reasoning that it is
arbitrary to consider only the general physiological differences between males and females
without regard for individual variants. Id. at 169-70. In Yellow Springs Exempted Village
School District Board of Education v. Ohio High School Athletic Association, 647 F.2d 651,
665 (6th Cir. 1981), a dissenting circuit court justice used similar reasoning. He opined that
a rule prohibiting females from playing on male contact sports teams was unconstitutional
under the equal protection clause. Id. The state had asserted that its rule furthered two
important goals: promoting the safety of female athletes and promoting full participation
of females in sports. In his dissent, Justice Jones wrote that the means of implementation
of the rule, prohibition of females from the male teams, did not have a substantial relation
to the goals. He addressed the state’s assertion regarding females’ safety: “sex cannot be
used as a proxy for physical ability.” Id. at 664 (citing William Herbert Orr v. Lillian M.
Orr, 440 U.S. 268, 280-82 (1979)). He stated that the goal of promoting full participation
by females is not served when “female athletes are denied any opportunity to play.” His
dissent went on to explain that separate but equal teams did not provide a constitutionally
sufficient remedy because the focus of the equal protection analysis is on the quality of the
competitive experience provided, and the defendants had imposed a lower level of quality
upon the female athletes. Id. at 666.


180. This demonstrates the fallibilities of the equal treatment approach, which would
require nothing more than this gender-blind process of selecting team members.

substantially equal support and the programs are substantially equal. 182 Thus, equal protection would seemingly also require professional sports which provide separate categories or teams for men and women to provide equal support to both programs — in the form of equal pay. However, whereas separate teams are required in high schools, they are not required in professional sports. Since separate is not required in the first place, it follows that equal is not required. The separate teams and categories that do exist are not required to be compensated equally because the women's team or category is not seen as an equal counterpart to the male team or category.

Presently, there do exist some sports which offer a separate category for women and separate professional women's teams. These separate teams and categories arguably give women more opportunities and pay than they would receive if they competing directly against men. While these separate teams and categories are, in this viewpoint, a kind of affirmative action, they fail to overcome the cultural perception of women as inferior athletes. Indeed, the fact that the separate teams and categories often fail to provide equal pay or an equal number of opportunities for women perpetuates the message that women are weaker and less athletically talented than men. 183

A real affirmative action plan, incorporating a feminist perspective on equal protection, would only allow differential treatment of males and females that redresses women's subordination. 184 Such a perspective recognizes that there is a social valuation of separate teams and categories which says they are not equal because separateness without equality implicitly connotes that female athletes are inferior. A feminist affirmative action plan requires, at the very least, that women's divisions receive equal pay and opportunities.

182. 430 F. Supp. at 170. Similarly, separate sex public high schools are allowed if attendance is voluntary and the schools provide substantially equal educational opportunities. Susan Lynn Vorchheimer v. School District of Philadelphia, 532 F.2d 880 (3rd Cir. 1976), aff'd by an equally divided Court, 430 U.S. 703 (1977) (Rehnquist, J., not taking part in the consideration or decision of the case).

183. In Mississippi University for Women v. Joe Hogan, 458 U.S. 718 (1982), the Court recognized that some sex-based classifications, designed as affirmative action, actually perpetuate women's subordinate status. A male sought admission to the state's all-women's nursing school, arguing that the women-only policy violated the equal protection clause. The state asserted that the women-only policy was compensation for past discrimination against women — educational affirmative action. The Court held that the substantive harms caused by the sex-based classification undercut the remedial purpose by perpetuating the idea that nursing is a woman's job, which in turn would keep nurse's wages low. Id. at 729-30.

VII. ENFORCING EQUALITY IN SPORTS

Female professional athletes are unlikely to reach wage parity with male athletes or attain equal opportunities in professional sports without the help of legislation to prohibit the discriminatory practices existing today. The current absence of legal remedies devalues women and their roles as athletes. Today, the legal system is significantly involved in the process of subordination of women in sports, as law is one of the most important "legitimators" of social practice. 186

Society spells out by rules and laws its preferred organization of the sexes, enunciating the social roles women and men are expected to play. It is interesting that in spite of the cultural belief that allocations of social roles by sex are predetermined by God or by nature, all societies take great care to establish laws, or rules. 187

By providing remedies, law can be an important instrument for breaking down barriers and removing differences. 188 Legislation which places a high value on women’s performance in athletic competition would benefit both women who choose to pursue athletic careers and women in general, because inequality in sports continually reinforces women’s inequality in society as a whole.

The legislation should prohibit both state and private actors from providing professional job opportunities to male athletes exclusively or in disproportionate numbers. It should further prohibit those actors from paying female athletes less than male athletes. The legislation would need to be comprehensive, covering individual and team sports.

Legislators should follow a feminist methodology in designing a law to ensure gender equality in professional sports. A feminist methodology must include women’s understandings of their position in sports. 189 It must consider the history of each particular sport, focusing on the way the sport has limited the potential for females to excel. Each sport should not only be examined individually, but must further be evaluated in terms of its relation to the changes necessary to overcome women’s subordination in sports as a whole.

Team sports like football or basketball could be restructured. For instance, men’s and women’s separate teams could comprise one unit in

185. See Taub & Schneider, supra note 123, at 9, 13.
186. See CYNTIA FUCHS EPSTEIN, DECEPTIVE DISTINCTIONS 121 (1988).
187. Id. at 119.
188. Id. at 120.
189. See Colker, supra note 184, at 288.
competition, requiring a computation of both teams’ scores to determine the winner. A combined point system, where the score depends on the total of the men’s and women’s teams, would involve women on an equal basis. A combined point system would also require an alternating playing order to ensure that the women’s team was not seen as the “opening act” for the men’s team. This model includes the possibility of modification of the sport for women’s teams: for instance, while the women’s team plays softball, the men’s team plays baseball.

Individual sports could also be restructured. One idea is to categorize competitors by height and weight, rather than by gender. Alternatively, a combined scoring system, as suggested for team sports, could be implemented for individual sports as well, with male and female competitors paired so that winning is dependent on both the male and female participants.

Even without a restructuring of sports, legislation could correct inequalities in professional sports by generally requiring equal numbers of job positions and equal pay. A female athlete would make out a prima facie case of discriminatory treatment by showing that there is disparate pay and/or number of job positions for women in a particular sport. Organizers and leagues would then have the burden of proving that the female category prize money equalled the male category prize money, that the sport is equally winnable by members of either gender, or that the categories are gender neutral (ie. divided by height, weight, etc.) and the prizes for each are equal, with no disparate impact upon one gender. This shifting burden of proof would make it easier for women to bring suit and provide impetus for equal inclusion of women in professional sports.

New professional sports legislation should provide for the monitoring of media coverage of professional sports, to ensure that male and female athletes and men’s and women’s events receive equal coverage.190 Requiring the media to give women’s sports as much coverage as men’s sports can correct the messages sent by current media coverage of sports which oppress and exclude female athletes.191

190. The legislation should be welcomed by sponsors, who will find a new group of consumers in women, many of whom previously shunned athletics because of the social alienation associated with sports.
191. First amendment problems with this part of the proposal could be overcome by legislation analogous to the Federal Communication Commission’s “fairness doctrine.” The fairness doctrine mandates that where one point of view is expressed in media, that media must allow time and space for a reply from the other point of view. While the right of reply provision of the fairness doctrine has been rejected in the print media context, it is allowed in broadcast media. Compare Red Lion Broadcasting Co., Inc. v. Federal Communications Commission, 395 U.S. 367 (1969) (radio station) with Miami Herald Publishing Co. v. Pat L. Tornillo, Jr., 418 U.S. 241 (1974) (newspaper). This could be extended to the media’s coverage of professional sports: where the media provides
Unequal job opportunities and pay disparities in professional sports go hand in hand with a lack of respect for women athletes and indeed with a lack of respect for women in society in general. Achieving equality in professional sports is critical to changing the status of women in American society. Success in sports represents power, strength, and character, and inclusion of women will confer respect upon women in other social situations. Legislation requiring equal opportunities and pay for female professional athletes would send an important message to the public: that women athletes are not only socially acceptable, but valuable, talented, and worthy of respect. Because of the link between sports and social power, this would be an important step toward social equality.