3. TREATMENT OF WOMEN BY SPORTS

Because of the unique role that interscholastic and intercollegiate sports play in the United States, we devote much of Chapter Twelve to the huge impact of antidiscrimination legislation, and Title IX in particular, on how women are treated in American sports. The focus of this section is narrowly on the relevance to the best interest of male professional sports of various ways in which women are treated and depicted.

The history of the Professional Golfers Association (PGA) is one of discriminatory exclusion. Its initial charter limited membership to "members of the Caucasian race," a racial barrier not formally lifted until the early 1960s following threatened litigation by Attorney General Robert F. Kennedy. Sometime thereafter, the PGA responded to national criticism by adopting a rule prohibiting members from playing at private clubs that discriminated on the basis of race. After Tiger Woods won his second consecutive Masters in April 2002, the head of the National Council of Women's Organizations (NCWO), Martha Burk, asked Augusta to admit its first female member (with the popular candidate being an avid golfer, Justice Sandra Day O'Connor). However, the club president, "Hootie" Johnson, summarily rejected that request, saying "we will not be bullied, threatened or intimidated . . . at the point of a bayonet."

The Augusta case and popular reaction to it vividly displayed the way that the treatment of women in sports raises far more complicated issues than the historic discrimination against blacks and other minorities. Certainly, there is a strong social, not just legal, consensus that sports must never be segregated by race. By contrast, just about everyone agrees that women athletes must have their separate professional leagues (e.g., in basketball and soccer) or tours (e.g., in tennis and golf, though in 2003 the leading LPGA female golfer, Anika Sorenstam, accepted an invitation to play in a PGA Tour event which has never excluded women, unlike blacks). Indeed, as we shall see in Chapter Twelve, Title IX seems to require separate-but-equal athletic opportunities.

In addition to a sport's response to gender-related anti-social conduct by athletes or owners (discussed above), another issue has been the right of equal access of female sports reporters to male locker rooms for interviews. Back in April 1975, MLB Commissioner Bowie Kuhn instituted a general ban against admission of women sports writers to baseball clubhouses. By contrast, the National Hockey League and the National Basketball Association had decided earlier to give women reporters access to players in their locker rooms. Despite the contrary wishes of the Yankee players, Kuhn insisted that Melissa Ludtke, a Sports Illustrated sportswriter covering the 1977 World Series between the Yankees and the Dodgers, not be allowed into the Yankees' clubhouse.

Ludtke went to court, charging Kuhn with unconstitutional denial of equal access to this part of a public property—Yankee Stadium. Legal resolution of the issue turned on the significance of the storied stadium's ownership by the City of New York, having been acquired from the team by eminent domain in the early 1970s, and then renovated at a cost of nearly $100 million. The Yankees rented the stadium back from the city for all their baseball games, under a lease with a rent formula dependant on attendance at games.

LUDTKE AND TIME, INC. V. KUHN

United States District Court, Southern District of New York, 1978.
461 F.Supp. 86.

MOTLEY, DISTRICT JUDGE.

* * *

Central to the resolution of this case is the undisputed fact that all accredited female sports reporters are excluded from the Yankee clubhouse at Yankee Stadium solely because they are women, whereas all accredited male sports reporters (to the extent that space limitations permit) are permitted access to the clubhouse after games for the purpose of interviewing ballplayers.

Defendants say women reporters are excluded in order 1) to protect the privacy of those players who are undressed or who are in various stages of undressing and getting ready to shower; 2) to protect the image of baseball as a family sport; and 3) preservation of traditional notions of decency and propriety.

Another pivotal fact which is also not disputed is that fresh-off-the-field interviews are important to the work of sports reporters and will give a competitive advantage to those who have access to the ballplayers at that juncture, particularly during the World Series games.

Another critical consideration is the admission that there are several other less sweeping alternatives to the present policy of blanket exclusion of women reporters. Counsel for defendants admitted that those players who are desirous of undressing can retreat to their cubicles in the clubhouse. There the players can be shielded from the "roving eyes" of any female reporters by having each cubicle furnished with a curtain or swinging door. It is also conceded that the player who is undressed and wishes to move about in that state can use a towel to shield himself from view.

Since the Kuhn policy determination is based solely on sex, and since that policy results in denial of equal opportunity to plaintiff Ludtke to pursue her profession as a sports reporter, and since there are several less restrictive alternatives to the total exclusion of women, and since the material facts regarding New York City's involvement in Yankee Stadium and the lease of those premises to the Yankees are not disputed, the only questions remaining for decision are questions of law.

A. State Action

The first question is whether New York City's involvement with Yankee Stadium and the lease arrangement with the Yankees is such as to make the Kuhn policy determination state action within the contemplation of the Fourteenth Amendment.

[The court cited the Supreme Court's leading relevant precedent on this constitutional issue, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). In that case, the Supreme Court found that racial discrimination practiced by a tenant of a public authority constituted "state action" so that the Equal Protection Clause was applicable, in contrast to purely private conduct that is now regulated for public accommodations by the Civil Rights Act.]

Here, as in *Burton*, the place where the discriminatory acts occurred is owned by the state (the City of New York) and leased pursuant to special legislative provisions to the Yankees. In this case, as in *Burton*, the facility involved is maintained and improved with the use of public funds. The Court noted in *Burton* that the relationship of the public and private entities in that case placed them in a relationship of interdependence. The same observation can be made on these facts, where the annual rentals to be paid to the City for use of the stadium depend directly on the drawing power of Yankee games, and the City has in turn invested substantial sums of public money to enhance that drawing power by modernizing and improving the stadium itself.

In defendants' memorandum, they set forth the objectives underlying baseball's policy of excluding female reporters from the locker room. Among these conceded objectives were the aim "to protect and preserve the national image of baseball as a family game . . . and . . . to preserve baseball's audience and to maintain its popularity and standing."

It is an undisputed fact that the City's profit from its lease with the Yankees escalates when attendance at Yankee games increases. Thus the City has a clear interest in the preservation and maintenance of baseball's audience, image, popularity and standing.

* * *

B. Sex Discrimination

1. Equal Protection

On the basis of the undisputed facts, plaintiff Ludtke, while in pursuit of her profession as a sports reporter, was treated differently from her male counterparts (other properly accredited sports writers) solely because she is a woman.

* * *

"To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976). Defendants have asserted, as justification for the complete exclusion of female reporters from the clubhouse at Yankee Stadium, their interest in protecting the privacy of the ballplayers while undressing in the locker room.

The right to privacy is of constitutional dimension, see *Roe v. Wade*, 410 U.S. 113 (1973), and its protection is thus undeniably an important objective. It cannot be said on these facts, however, that there is a sufficiently substantial relationship between that objective on one hand and the total exclusion of women from the Yankee locker room on the other to pass constitutional muster. "Inquiry into the actual purposes of the discrimination . . . proves the contrary." *Califano v. Goldfarb*, 430 U.S. 199, 212 (1977).

At least during World Series games, male members of the news media with television cameras have been allowed to enter the Yankee locker room immediately after the games and broadcast live from that location. In this connection, only a backdrop behind the player standing in front of the camera is provided to shield other players from the "roving eye" of the camera. These locker room encounters are viewed by mass audiences, which include many women and children. This practice, coupled with defendants' practice of refusing to allow accredited women sports reporters to enter the locker room, shows that the latter is "substantially related" only to maintaining the locker room as an all-male preserve.

* * *

[The discussion of Due Process is omitted.]

The undisputed facts show that the Yankees' interest in protecting ballplayer privacy may be fully served by [a] much less sweeping means than that implemented here. The court holds that the state action complained of unreasonably interferes with plaintiff Ludtke's fundamental right to pursue her profession in violation of the due process clause of the Fourteenth Amendment.

The other two interests asserted by defendants, maintaining the status of baseball as a family sport and conforming to traditional notions of decency and propriety, are clearly too insubstantial to merit serious consideration. Weighed against plaintiff's right to be free of discrimination based upon her sex, and her fundamental right to pursue her profession, such objectives cannot justify the defendants' policy under the equal protection or due process clauses of the Fourteenth Amendment.

Injunction granted.

The problems encountered by Melissa Ludtke are now largely resolved. Women regularly work as sportswriters and broadcasters, and women fans attend and watch more football (and

other men's sports) than ever before. (In fact, more women watch baseball on television than men.) Because the media considers women to be a significantly more valuable audience for commercial advertising than men, leagues have had a real incentive to create a comfortable setting for women reporters to interview and interact with the players whose images are being sold in print or on the screen. Indeed, in the 1997–98 season the NBA took an even more important step when it put two women—Dee Kantner and Violet Palmer—on the court rather than in the locker room, as the first-ever female officials in a professional male team sport.

At that same time, the NBA was facing an important civil rights lawsuit for not earlier offering that same role to Sandra Ortiz-del Valle. While both Kantner and Palmer went to court to testify on behalf of the league that it had hired them solely on the basis of their merits relative to their competing male applicants, the jury found that Ortiz-del Valle had been the victim of earlier gender discrimination. It then awarded her $7.85 million in damages, of which $7 million were punitive. In *Ortiz-del Valle v. NBA*, 42 F.Supp.2d 334 (S.D.N.Y. 1999), the trial judge upheld the jury verdict on its merits, but only on condition that the plaintiff accept $250,000 as sufficient punitive damages—which she did.

Another development in the continuing acceptance of women in sports is the recent selection by NBA players of Michele Roberts, a Berkeley-trained attorney working for a leading national law firm, as its new executive director.