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Joanna E. Saul

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# This Game is Rigged: The Unequal Protection of Our Mentally-Ill Incarcerated Women

**Keywords**

Unequal protection, Mentally-ill women, Equal rights, Flynn v. Doyle, Mental health treatment for female, Fourteenth Amendment

# THIS GAME IS RIGGED: THE UNEQUAL PROTECTION OF OUR MENTALLY-ILL INCARCERATED WOMEN

By  
Joanna E. Saul\*

## INTRODUCTION

More mentally-ill women fill our jails and prisons every day.<sup>1</sup> Within the past few years, the number of women entering our state prisons has increased at almost twice the rate of men.<sup>2</sup> Even more astonishing is that 73% of these women in state prisons have a mental health problem, in striking contrast to only 55% of male state inmates.<sup>3</sup> Both male and female inmates are equally dependent on the state to provide mental health treatment and both have an equal right to care under the Constitution.<sup>4</sup> However, women often receive mental health services inferior in quality and quantity to those received by men.

If denied treatment, female inmates may have to resort to the courts. In 2005, several female inmates at the Taycheedah Correctional Institution in Wisconsin filed *Flynn v. Doyle*<sup>5</sup> with the assistance of the Wisconsin ACLU on behalf of all women incarcerated in Taycheedah. The lead plaintiff, Kristine Flynn, is a 48 year old woman who suffers from bipolar mood disorder and social anxiety syndrome.<sup>6</sup> She is considered seriously mentally-ill by the Wisconsin Department of Corrections.<sup>7</sup> According to the complaint, Flynn was prescribed eight different psychotropic medications within one year, taking some of them simultaneously.<sup>8</sup> Yet she only had her blood drawn once to test her liver function during that year.<sup>9</sup> In 2002, prison staff ordered her to be immediately taken off of all medications.<sup>10</sup> Flynn attempted suicide six days later.<sup>11</sup> After being taken to the hospital, she took one person hostage and assaulted a security guard.<sup>12</sup> The court-appointed psychiatrist testified that her behavior was due to the interruption in her medication, yet an entire month passed after the assault before she was re-medicated.<sup>13</sup> Four years were added to her sentence, she was housed in segregation, and she still did not receive her medication.<sup>14</sup> Flynn was unable to eat, sleep, or take care of her basic needs during this period<sup>15</sup> and she attempted suicide again.<sup>16</sup> She did not receive any group or individual therapy, despite having requested counseling several times.<sup>17</sup> This case is still pending in the Eastern District Court of Wisconsin.

Flynn is representative not only of women in the Wisconsin correctional system, but of mentally-ill women in correctional institutions across the nation who receive inadequate and ultimately harmful treatment. Imprisoned litigants, such as Flynn, will have to battle separately in each state for their mental health needs. And indeed, if the prison system ignores their needs, courts may be the best recourse. According to the Supreme Court, “[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.”<sup>18</sup> Yet this promise may be mere talk: in reality, the courts have granted “substantial deference” to prison authorities<sup>19</sup> and have perpetuated gender discrimination.

This paper will examine recent inmate equal protection cases and will argue that Flynn and similar plaintiffs nationwide stand little chance of success, given the impossible standard established by the federal appellate courts that defeats any equal protection claim brought by female inmates. Part I will introduce the problem of inadequate mental health treatment for female inmates, including the current level of illness in the female population entering prison, and the gender-based differences in care that the women receive. Part II will examine the Equal Protection clause of the Fourteenth Amendment in relation to the American correctional system. It will compare the most recent Equal Protection cases brought by prison inmates to the seminal case of *United States v. Virginia*, involving female college students. This section will also advocate for a similar application of the law to the claims of female inmates. Part III will conclude that courts need to create a workable standard that ensures the constitutional equal protection rights of female inmates.

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## I. THE INADEQUATE TREATMENT OF MENTALLY-ILL WOMEN PRISONERS

Mental illness is a serious problem for the majority of America’s female inmate population. Inadequate mental health resources for female inmates affect more than just the residents within the prison walls: most inmates eventually leave the prison and return to the community from which they came.<sup>20</sup> The following sections examine first the prevalence of mental health illnesses among female inmates; second, gender-based differences in mental health treatment in prisons; and third, the constitutional right of inmates to adequate mental health treatment.

### A. THE MENTAL ILLNESS OF AMERICA’S PRISON POPULATION

The mental health of America’s inmates is in a crisis: 73% of women in state prisons have a mental health problem.<sup>21</sup> The cause of this crisis is clear: as public mental hospitals have emptied due to cost and other pressures, the mentally-ill, who rightfully should be treated in a hospital setting, have entered our prison systems.<sup>22</sup> From 1955 to 2000, the number of patients housed in state mental hospitals dropped from almost 560,000 to about 56,000.<sup>23</sup> Between 2000 and 2003, the average number of residents in state- and county-run mental hospitals was less than 50,000.<sup>24</sup> Similarly, the lengths of stays in private psychiatric hospitals dropped from twenty-one days per episode in 1980 to five or six days in 2004.<sup>25</sup> Conversely, the adult population in

under correctional supervision grew from 1,842,100 in 1980 to 7,211,400 in 2006.<sup>26</sup> According to a recent Bureau of Justice Statistics' estimation, 705,600 inmates in state prisons had a mental health problem at midyear 2005.<sup>27</sup> Assuming these numbers are correct, there are currently fourteen times as many mentally-ill persons housed in our correctional facilities as in our state mental hospitals. Women in particular are afflicted, as a greater percentage of female inmates are reported to have a mental health problem,<sup>28</sup> while there is lesser availability of treatment.

In addition to their basic mental health needs, inmates with mental health problems also have a higher probability of substance abuse<sup>29</sup> and self-harm, including suicide.<sup>30</sup> Drug abuse has serious public health implications, including the increased risk of disease transmission, such as HIV/AIDS, as well as the risk of injury to any children the women may be carrying. A strong correlation exists between severe mental disorders and suicidal inclinations<sup>31</sup>—suicide is therefore a substantial concern with any mentally-ill incarcerated population and particularly with female inmates.<sup>32</sup> Common methods of suicide attempts by inmates include hanging, overdose, laceration, asphyxiation, and ingestion of toxic substances such as shampoo.<sup>33</sup>

Female inmates across America are afflicted with mental health problems that require attention. Without effective treatment, these women return to the community with the same illnesses, if not made worse due to the length of time without treatment.

### **B. GENDER BIAS IN THE PROVISION OF MENTAL HEALTH SERVICES IN PRISON**

Gender bias in prison has resulted in both over-diagnosis and under-diagnosis of mental illness. Historically, prison staff have used medication to sedate inmates and control disruptive behavior.<sup>34</sup> Criminal women in particular have been "treated" because they exhibited "male" characteristics such as anger or aggression that did not fit the societal mold of the docile homemaker.<sup>35</sup> Conversely, female mentally-ill inmates often suffer from inadequate treatment because they are not correctly identified as mentally-ill or because the prison does not have the resources to treat them.<sup>36</sup> Prisons that do not have the necessary resources frequently house the mentally-ill in disciplinary segregation, limiting the inmates' access to programming or social interaction.<sup>37</sup>

A primary obstacle to the adequate treatment of mentally-ill female inmates is the lack of a national validated instrument for mental health screening for adult prison.<sup>38</sup> Each state has come up with its own system, with varying success. In general, prisons' tools for screening inmates with mental illnesses are faulty.<sup>39</sup> Without a standardized, reliable system, prison staff are subject to the gender stereotypes that have been shown to affect treatment choices and they are more likely to overlook inmates who do need treatment. The inmates themselves may not know that they have a problem and therefore may not bring themselves to the attention of a mental health professional. For example, in a Bureau of Justice Statistics' study in 1999, only 24% of women in state prison and local jails evaluated themselves as being

mentally-ill.<sup>40</sup> In comparison, in a 2006 study, when others within the prison were surveyed regarding symptoms demonstrated by the inmate population, 73% of the female state inmate population were identified as mentally-ill.<sup>41</sup> Clearly, better screening tools need to be developed and used.

Even when women are successfully identified by a screening instrument, men have better access to medical services<sup>42</sup> by virtue of their larger population. Many treatment programs have been designed with men in mind<sup>43</sup> and have not taken into account the unique needs of the female population.<sup>44</sup> In addition, several state prison systems have facilities designated solely for use as a psychiatric hospital

for men, but have no corresponding facilities for women.<sup>45</sup> This is a primary basis for complaint in *Flynn v. Doyle*: in Wisconsin, only men have access to a facility providing round-the-clock care and individualized treatment.<sup>46</sup> The prisons justify gender separations in prison based on security reasons and limited finances. However, under the Equal Protection Clause, women should not be denied the same level of care available to men simply based on their gender.

### **C. THE CONSTITUTIONAL REQUIREMENT FOR MENTAL HEALTH TREATMENT IN PRISON**

Under the Eighth Amendment, prisons are constitutionally required to provide medical health care for inmates.<sup>47</sup> The Fourth and Fifth Circuits have interpreted this obligation as inclusive of mental health care.<sup>48</sup> According to the Fourth Circuit,

[an inmate] is entitled to psychological or psychiatric treatment if a physician or other health care provider, exercising ordinary skill and care at the time of observation, concludes with reasonable medical certainty (1) that the prisoner's symptoms evidence a serious disease or injury; (2) that such disease or injury is curable or may be substantially alleviated; and (3) that the potential for harm to the prisoner by reason of delay or the denial of care would be substantial.<sup>49</sup>

The numerous phrases open to interpretation in the above standard render it useless for practical guidance to prison officials.<sup>50</sup> Thus, several district courts have provided more definite guideposts by which to judge a prison health care system:

The six components are: (1) a systematic program for screening and evaluating inmates to identify those in need of mental health care; (2) a treatment program that involves more than segregation and close supervision of mentally ill inmates; (3) employment of a sufficient number of trained mental health professionals; (4) maintenance of accurate, complete, and confidential mental health treatment records; (5) administration of psychotropic medication only with appropriate supervision and periodic evaluation; and (6) a basic program to

identify, treat, and supervise inmates at risk for suicide.<sup>51</sup>

While this standard provides more definite boundaries for a prison healthcare program, it has not been affirmed by a higher court.<sup>52</sup> Ultimately, female inmates' constitutional right to and need for adequate mental health care is not being met.

## II. THE UNEQUAL PROTECTION OF FEMALE INMATES

Female inmates wishing to sue prisons based on their inadequate treatment will find that the federal courts have narrowed prison-based equal protection law such that it is nearly impossible for female inmates to succeed. The courts have established two barriers to a successful action: (1) splitting hairs over what constitutes "similarly situated" inmate groups and (2) deference to prison finances.

### A. THE COURTS' DISCRIMINATORY APPLICATION OF EQUAL PROTECTION LAW

The Equal Protection Clause of the Fourteenth Amendment requires the government to treat similarly situated people alike.<sup>53</sup> It prohibits intentional discrimination on the basis of gender by state actors.<sup>54</sup> Under this standard, discriminatory classification or treatment between men and women is subject to heightened scrutiny.<sup>55</sup> For a gender-based classification to withstand the heightened standard of scrutiny, it must "serve important governmental objectives," and "the discriminatory means employed [must be] substantially related to the achievement of those objectives."<sup>56</sup> To succeed on an equal protection claim, a plaintiff must pass a threshold showing that she is similarly situated to others who received more favorable treatment.<sup>57</sup> The next sections will examine the recent history of equal protection jurisprudence, providing an in-depth look at the courts' reasoning.

#### 1. EQUAL PROTECTION OF FEMALE INMATES

Flynn's biggest challenge in the Equal Protection arena is finding a "similarly situated" group to satisfy the courts. "Similarly situated" has been broadly defined by the Supreme Court: the two groups do not have to be alike in every aspect.<sup>58</sup> In fact, in *City of Clebourne v. Clebourne Living Center*, the Supreme Court said that even though the group home for the mentally disabled, which was denied a permit by the city, was different from other facilities that were permitted permits, the main question was whether the proposed group home would affect the legitimate governmental interests in a way that the permitted uses did not.<sup>59</sup> In *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>60</sup> a case involving students of different ages and races, and schools of different sizes, the question of whether the students were similarly situated did not even arise.

Female inmates, however, have received far different treatment in the lower courts. For example, in *Klinger v. Dep't of Corrections*, the plaintiffs housed at Nebraska's female institution stated for the purposes of litigation that they were similarly situated to a male facility.<sup>61</sup> The trial court agreed that the two groups were similarly situated because they were both housed in

Nebraska correctional institutions, the institutions had a similar range of custodial levels, and the purposes of incarceration were the same for both groups.<sup>62</sup> The Eighth Circuit, however, reversed the lower court's decision by highlighting the differences between the two institutions: the male facility housed six times as many inmates as the women's; the average stay at the men's facility was two to three times as long as at the women's; the men's facility was two security grades higher than the women's; and the women had different characteristics from the men due to their parental status and likelihood of past abuse.<sup>63</sup> Further, the appellate court highlighted economic limitations: "[W]hen determining programming at an individual prison under the restrictions of a limited budget, prison officials must make hard choices."<sup>64</sup> Thus, the court was willing to allow inferior programming for women based on "limited resources."<sup>65</sup> The court seemed to conclude that comparing male and female institutions is not just comparing apples and oranges, but comparing apples and Volkswagens.

The Eighth Circuit also granted substantial deference to the prisons.<sup>66</sup> The court concluded that doing any prison-to-prison program comparison was "futile" and that doing such a comparison "places the burden on prison officials to explain decisions that resulted from the complicated interplay of many variables."<sup>67</sup> The court stated that any such asking of explanation would result in "micro-management" and worried that the facilities would end up providing only the "bare constitutional minimum of programs and services to avoid the threat of equal protection liability."<sup>68</sup> The aim of the litigation was to show that the prison already was failing to provide the "bare constitutional minimum." Thus, in providing its worst-case scenario of the prison sticking to the bare minimum, the court avoids forcing the prisons to abide by the Constitution so as to avoid litigation.

In the murkiness of prison-based equal protection litigation, at least one court has made clear what "similarly situated" does *not* mean: in *Women Prisoners of the D.C. Dep't of Corrections v. D.C.*, the Court of Appeals for the District of Columbia rejected a three-factor test that included similar custody levels, sentence structures, and purposes of incarceration.<sup>69</sup> Instead, the court emphasized that there are "many considerations" and "innumerable variables," including the characteristics of the inmates and the size of the institution.<sup>70</sup> This standard is extremely vague and presents difficulties to future female prisoner litigants in choosing a similarly situated group to which to compare themselves. Yet even after this rhetoric of innumerable variables, the court focused on but one: the fact that the men's prison had 936 inmates and the women's prison had only 167.<sup>71</sup> The court concluded that "it is hardly surprising, let alone evidence of discrimination" that the smaller facility had fewer programs.<sup>72</sup> This holding is disturbing because it in effect denies to women inmates any potential success on equal protection grounds. Women compose a much smaller percentage of the total inmate population.<sup>73</sup> The smaller number of female inmates allows most states to house all women in the same, multi-classification prison, while men by virtue of their greater population size can be broken into institutions by individual classifications.<sup>74</sup> Under the court's holding, even if the women were housed in separate institutions by classification, they would not be similarly situated to the men due to population; and if the women were housed together, they would not be similarly situated due to classification. The court fails to acknowledge this reality.



Other courts have also adhered to this belief that differing sizes in population necessitates differing number and quality of programs. In *Keenan v. Smith*, in which female inmates brought an equal protection action based on denial of post-secondary education programs and prison industry employment, the Eighth Circuit stated that “because women account for such a small proportion of the total prison population, their facilities are necessarily smaller in size than any of the male-only prisons.”<sup>75</sup> It further admitted that due to the small size of the institution, the most comparable in size of the male institutions is an institution of the highest security classification.<sup>76</sup> The *Keenan* court concluded that two sets of dissimilarly situated inmates cannot be meaningfully compared.<sup>77</sup> At least in this case, Judge Heaney acknowledged the reality that under these standards, no group of female inmates could ever have standing for an equal protection claim.<sup>78</sup> His is a lone voice. The logical extension of the court’s opinions is that women must wait until an equal number of women and men are incarcerated before they can ask for equal services and programs.

As a thought experiment, let us follow the courts’ logic to its conclusion. For women to establish themselves as similarly situated to men, they must compare themselves by either (1) security classification or (2) population. Female inmates have a low chance of successful comparison under the first prong because while most of female prisons include prisoners of all classifications, the men’s prisons are often broken up into individual classifications due to the number of inmates at each classification level.<sup>79</sup> Thus, no such similarly situated group exists. Under the second prong, if women were to use population size to establish a similarly situated group, they would be limited to the highest security men’s prisons. The highest security men’s prisons often house their inmates in solitary confinement for twenty-three hours a day and therefore offer few, if any, programs.<sup>80</sup> Fighting for these programs would not win the female inmates more programming than they already have. For the female inmates, it is a losing game.

In shocking contrast, when *men* raise the equal protection issue, the courts take an entirely different view. Only a year before *Keenan*, a male inmate brought an equal protection claim before the Eighth Circuit in *Bills v. Dahm*<sup>81</sup> and received significantly different treatment. In *Bills*, the male inmate alleged that he was denied overnight visitation from his infant son while female inmates were allowed such visitation.<sup>82</sup> Instead of reviewing its laundry list of differences between a male Level 2 facility and a female Level 4 facility—the same levels of facilities contemplated in *Klinger*<sup>83</sup>—the court stated that “[b]oth prisons hold a significant number of maximum security offenders.”<sup>84</sup> Presumably, no drastic changes had occurred in the Nebraska correctional system, yet the court offered no analysis of the differing population sizes. Instead, the court concluded that “the make-up of the inmate population at each of the prisons are not markedly dissimilar,” yet allows, grudgingly, that it is “objectively reasonable” for a prison official to have believed that the two groups of inmates were not similarly situated.<sup>85</sup> This is a quite a change from the previous opinions that found an insurmountable difference between male and female prisons.

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The court finishes with a parting lecture to the correctional authorities on the constitutional rights of inmates—a lecture notably absent from the cases involving female inmates. The court begins with the lofty statement that “[t]he great object of our Constitution is to preserve individual rights” and that “prison inmates are not completely stripped of these rights as they step through the prison gates.”<sup>86</sup> Further, the court chides that a “prisoner may not be denied equal treatment afforded those who share his relevant characteristics, simply because statistics show that he belongs to a group that typically does not bear those relevant characteristics.”<sup>87</sup> This is remarkable: in other words, a prisoner cannot be denied equal treatment afforded to others, “simply” because statistics and data demonstrate that he is not actually equal to the others. No such allowance for numerical discrepancies was evident in the women’s cases. The gender discrimination evident in the courts’ opinions mars any chance that female inmates might have to bring a successful equal protection suit.

Even if the inmates could prove that they were similarly situated, they would still have to show that the statute or regulation intentionally discriminated against them. In *Canterino v. Wilson*, the Sixth Circuit found that the female inmates “failed to prove that the denial of study and work release to members of their class is gender-based discrimination on its face, because both men and women are included in the class of people who may be denied study and work release.”<sup>88</sup> Under this standard, a claim based on the denial of programs could potentially fail simply because not all male inmates received care.

In some cases, gender segregation in prison may provide sufficient evidence of gender discrimination so that discriminatory intent need not be established. A Fourth Circuit opinion found that “discriminatory intent need not be established independently when the classification is explicit.”<sup>89</sup> Prisons across the nation are segregated by gender and, although such segregation has been found to be constitutional,<sup>90</sup> the practice of sending women to one prison and men to another facially classifies on the basis of gender.<sup>91</sup> If the court finds that the resulting difference in access to services imposes a burden on the female inmates, discriminatory intent may not need to be established.

Overall, the courts have created an unworkable standard, yet refuse to acknowledge that it effectively bars incarcerated female litigants from recovery. Courts should not dismiss an Equal Protection case based on population differences, but should start from the premise that male and female inmates are similarly situated due to the equal dependence on the state to provide mental health services and both have an equal right to care under the Constitution.

## 2. UNITED STATES V. VIRGINIA: SEPARATE BUT NOT EQUAL

In *United States v. Virginia*, decided shortly after the above cases, the Supreme Court contemplated the Equal Protection Clause in regard to gender segregated institutions of higher education, coming to a very different result. The Virginia Military Institute (“VMI”) historically accepted only men into its

academy.<sup>92</sup> VMI enrolled about 1,300 male cadets each year.<sup>93</sup> In response to litigation contesting its refusal of female candidates, VMI proposed a separate, parallel program for women: Virginia Women's Institute for Leadership ("VMIL"), which had an expected first-year class of twenty-five women.<sup>94</sup> While the institutions would share the same mission, "the VWIL program would differ from VMI in academic offerings, methods of education, and financial resources,"<sup>95</sup> largely based on the perceived differences and needs of a female population.<sup>96</sup> The different population sizes and program options are analogous to those in male and female prisons, yet here the Court ruled in favor of the female plaintiffs, finding that VWIL was not an appropriately parallel program and that VMI must admit female cadets. A court has even more reason to make a similar ruling in favor of female inmates; students have the option of choosing whether to attend an inferior school whereas female inmates have no choice.

Justice Ginsburg began her opinion in *Virginia* with the core instruction of equal protection analysis: "Parties who seek to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action."<sup>97</sup> The court "has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."<sup>98</sup> Any justification of such a policy must demonstrate "important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."<sup>99</sup> Sex-based classifications may not be used "to create or perpetuate the legal, social, and economic inferiority of women."<sup>100</sup> In Flynn's case, the gender differences in availability of treatment result in distinct disadvantages to female inmates: they receive inferior mental health services, which will affect their ability to participate in vocational training and other programming integral to post-release success. When the prison denies them equal services, they are maintained in an inferior position relative to the men who receive the services, a disadvantage that affects the women even post-incarceration.

In examining VMI's justification for the male-only classification, the court stated that a justification "must describe actual state purposes, not rationalizations for actions in fact differently grounded."<sup>101</sup> The court rejected Virginia's claim that VMI furthered diversity in educational institution choices; although single-sex institutions may in fact promote diversity, Virginia's public institution history provided no evidence that VMI's single-sex admission policy was intended to further this purpose.<sup>102</sup> Applying this analysis to Flynn's case, the primary reason for gender-segregation in prison appears to be population management or security. Neither reason, however, bears any rational relation to the differing quality of mental health treatment between the male and female institutions.

Differences in institutional populations did not keep the Supreme Court in *United States v. Virginia* from finding similarly situated groups. The Court of Appeals for the District of Columbia justified its holding denying programs to the smaller female correctional institutions by stating that parents of students at Smith College, an all-female institution, would not raise an eyebrow to discover that Harvard University, many times Smith's size, offers

considerably more classes.<sup>103</sup> In contrast, the Supreme Court did not even discuss in *Virginia* the 1,300 student enrollment of VMI in comparison with the twenty-five student enrollment of VWIL.

In addition, inmates have an even stronger claim for medical and mental health services than for educational programming.<sup>104</sup> The Court of Appeals for the District of Columbia stated that "an inmate has no constitutional right to work and educational opportunities."<sup>105</sup> Yet under an Eighth Amendment analysis in *Estelle v. Gamble*, the Supreme Court declared that the government has an obligation to provide medical care for those whom it is punishing by incarceration.<sup>106</sup> If the Supreme Court was dissatisfied with a facility that planned to enroll a mere twenty-five female students a year, surely the federal courts can do better for the 112,498 women in prison who are denied not just educational opportunities, but health care to which they have a constitutional right.

The second prong of the *Virginia* analysis focused on the proposed remedial measures to be taken by Virginia to remedy the equal protection violation. Any remedy must "closely fit the constitutional violation [and] must be shaped to place persons unconstitutionally denied an opportunity or advantage in the position they would have occupied in the absence of discrimination."<sup>107</sup> In the context of prisons, the mental health resources currently available to men—such as separate facilities solely for the treatment of mentally-ill inmates and additional health staff and programs—must be made equally available to female inmates.

Overall, the federal circuit courts have largely dismissed female inmates' suits based on a flawed notion of what constitutes a "similarly situated" party. In contrast, the Supreme Court has always treated the similarly situated analysis as inclusive of groups with some differences and has applied it to higher education institutions much more leniently than the appellate courts have to the female inmate litigants.

## **B. THE 'IMPORTANT GOVERNMENTAL OBJECTIVE' OF PARSIMONY**

The primary justification for a prison's discriminatory policies often comes down to economics. If gender discrimination is established, it may still survive heightened scrutiny if the correctional authorities can establish important governmental objectives that are accomplished through this discrimination.<sup>108</sup> The Court of Appeals of the District of Columbia has already declared that, even allowing that a burden has been imposed on female inmates due to gender discrimination, limited financial resources are enough reason to justify the prison's discrimination.<sup>109</sup> The Eighth Circuit has also found that any analysis of gender discrimination in female inmates' programming must make allowances for the prison's limited resources and economic constraints.<sup>110</sup> Even in *Bowring v. Godwin*, a case that extended an inmate's constitutional right to medical care to also include mental health care,<sup>111</sup> the Fourth Circuit stated:

The right to treatment is, of course, limited to that which may be provided upon a reasonable cost and time basis and the essential test is one of medical necessity and not simply that which may be considered merely desirable.<sup>112</sup>

No one would argue that gender or racial discrimination could exist in greater society based on financial considerations; consider the obvious costs of providing equal pay for equal work. The courts' argument that a constitutional right can be limited by cost therefore seems inherently wrong and solely based on the prisoners' incarcerated status.<sup>113</sup> Thus, even when the female inmates have a winning hand in proving discrimination, they may still fail because the house is bankrupt.

### III. CONCLUSION

Flynn should use *United States v. Virginia* to argue that differing populations and genders cannot be a basis for discrimination in correctional facilities. The broader, national concern,

however, is with the attitude of the courts toward inmates, and the allowances made for discrimination based on imprisonment status. Tellingly, none of the Equal Protection cases found in favor of the inmates. The courts have erected serious obstacles to a successful claim by creating an unworkable standard for "similarly situated" prison groups and allowing finances to limit constitutional rights. Inadequate services for mentally-ill female inmates harm not just the women, but also the poor, urban communities to which many of these women return. Without mental health care, the women are at a greater risk of recidivism. The bottom line is that female inmates have a constitutional right to medical and mental health care and a right to equal treatment to that received by the male inmates, which is not currently being provided in America's prisons.

## ENDNOTES

\* J.D., Georgetown University Law Center (expected May 2009); B.A., The Ohio State University. Thanks to Erica Weisgerber for her superior assistance.

<sup>1</sup> See, e.g., Lucy Adams, *In jail . . . and no desire to get out*, THE HERALD, June 18, 2007, available at <http://www.theherald.co.uk/misc/print.php?article=1477986>.

<sup>2</sup> BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, PRISON STATISTICS, available at <http://www.ojp.usdoj.gov/bjs/prisons.htm> [hereinafter PRISON STATISTICS].

<sup>3</sup> BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES, 1 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf> [hereinafter MENTAL HEALTH PROBLEMS]. Individual states may have even greater discrepancies; see Act Relative to MassHealth Enrollment for Persons Leaving Correctional Facilities in Massachusetts: Hearing on S.B. 598 Before J. Comm. on Healthcare, 180th Gen. Ct. 2 (2003) (statement of Massachusetts Public Health Association) available at [http://www.mphaweb.org/testimony/test\\_masshealth\\_enroll\\_prison.10\\_03.pdf](http://www.mphaweb.org/testimony/test_masshealth_enroll_prison.10_03.pdf) ("In Massachusetts state prisons, more than 17% of male inmates and more than 50% of female inmates have open mental health cases."); NORTH CAROLINA DEPARTMENT OF CORRECTION OFFICE OF RESEARCH, STATISTICS MEMO: MENTAL HEALTH DIAGNOSES IN THE PRISON POPULATION 3 (2007), available at <http://crrp41.doc.state.nc.us/docs/pubdocs/0007052.PDF> ("Comparatively, the percentage of female inmates with a mental health concern has consistently outpaced that of men (five year averages of 58.1% and 29.8%, respectively)."); OKLAHOMA DEPARTMENT OF CORRECTIONS, MENTAL HEALTH FACT SHEET (2007), available at [http://www.doc.state.ok.us/treatment/mental\\_health/fact\\_sheet.html](http://www.doc.state.ok.us/treatment/mental_health/fact_sheet.html) (reporting 79% of female inmates in Oklahoma state prisons have a history or are currently exhibiting symptoms of a mental health problem, compared to 46% of men).

<sup>4</sup> See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) ("These elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met.")

<sup>5</sup> Complaint at 3, Flynn v. Doyle, No. 06-539 (E.D. W.I. filed May 1, 2006), available at [http://www.aclu-wi.org/wisconsin/police\\_prisons/TCI%20Complaint%20-%20for%20filing.pdf](http://www.aclu-wi.org/wisconsin/police_prisons/TCI%20Complaint%20-%20for%20filing.pdf).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* Most drugs are predominantly metabolized by the liver; See generally ALEX J. MITCHELL, NEUROPSYCHIATRY AND BEHAVIOR NEUROLOGY 401 (Saunders Ltd. 2004) (concluding that liver function needs to be monitored to ensure proper distribution of the drug into the patient's system and because overmedication can result in liver damage).

<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Turner v. Safely*, 482 U.S. 78, 84 (1987).

<sup>19</sup> *Id.* at 84-85 ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have, as we indicated in *Martinez*, additional reason to accord deference to the appropriate prison authorities."); see also *Beard v. Banks*, 126 S. Ct. 2572, 2578 (2006) ("[C]ourts owe 'substantial deference to the professional judgment of prison administrators.'") (citing *Overton v. Bazzetta*, 539 U.S. 126, 130 (2003)); *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126 (1977) ("Because the realities of running a penal institution are complex and difficult, we have also recognized the wide-ranging deference to be accorded the decisions of prison administrators."); *Procnunier v. Martinez*, 416 U.S. 396, 405 (1974) ("Most [prisons] require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.")

<sup>20</sup> *Turner*, 482 U.S. at 84. ("Most prisoners return to communities within major counties and cities; within these metropolitan areas, released prisoners are further concentrated in a handful of neighborhoods.")

<sup>21</sup> MENTAL HEALTH PROBLEMS, *supra* note 3, at 1.

<sup>22</sup> See HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 16-17 (2003), available at <http://www.hrw.org/en/reports/2003/10/21/ill-equipped> [hereinafter ILL-EQUIPPED] ("Jails and prisons have become, in effect, the country's front-line mental health providers.")

<sup>23</sup> R. W. Manderscheid & G. P. Hutchings, *Building Comprehensive Community Care Systems*, 13 J. MENTAL HEALTH 37 (2004).

<sup>24</sup> Mark S. Salzer, et al., *State Psychiatric Hospital Census After the 1999 Olmstead Decision: Evidence of Decelerating Deinstitutionalization*, 57 PSYCHIATRIC SERVICES 1501, 1502 (2006).

<sup>25</sup> Manderscheid & Hutchings, *supra* note 23, at 38.

<sup>26</sup> BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, NUMBER OF PERSONS UNDER CORRECTIONAL SUPERVISION (2006), available at <http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm>.

<sup>27</sup> MENTAL HEALTH PROBLEMS, *supra* note 3, at 1 (determining these numbers by either a recent history of mental health problems or symptoms of a mental health problem).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*



## ENDNOTES CONTINUED

- <sup>30</sup> Jason Rodrigues, *Did my sick husband have to die in jail?*, THE OBSERVER, May 20, 2007, available at <http://www.guardian.co.uk/society/2007/may/20/socialcare.deathincustody> (detailing a bipolar British man's death after arrested for being a threat to himself).
- <sup>31</sup> T. Howard Stone, *Therapeutic Implications of Incarceration for Persons with Severe Mental Disorders: Searching for Rational Health Policy*, 24 AM. J. CRIM. L. 283, 302-03 (1997); see also ANDI RIERDEN, THE FARM, 57 University of Massachusetts Press (1997) (“[A]n inmate strapped a cord around a metal ceiling beam in her cell and hanged herself. In and out of the Farm for years, the young woman had been a drug addict with severe psychiatric problems and was rumored to have HIV.”).
- <sup>32</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL. WEB-BASED INJURY STATISTICS QUERY AND REPORTING SYSTEM (WISQARS), [www.cdc.gov/ncipc/wisqars](http://www.cdc.gov/ncipc/wisqars) (last visited on Feb. 9, 2009) (For women in general, suicide is a national problem: it was the fourth-leading cause of death in 2004 for women in the United States aged 18–44 years. In 2004, 3,036 women aged 18–44 committed suicide in the United States, representing 6.0% of all deaths for women in the same category).
- <sup>33</sup> OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, PIECES OF THE PUZZLE: FY 2006 ANNUAL REPORT, 45 (2006), available at <http://www.drc.state.oh.us/web/Reports/Annual/Annual%20Report%202006.pdf> [hereinafter PIECES OF PUZZLE].
- <sup>34</sup> See generally Kathleen Auerhahn & Elizabeth Dermody Leonard, *Docile Bodies? Chemical Restraints and the Female Inmate*, 90 J. CRIM. L. & CRIMINOLOGY 599 (2000) (discussing the use of psychotropic medications on inmates for nonmedical reasons); AMNESTY INTERNATIONAL, “NOT PART OF MY SENTENCE”: VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY, available at <http://www.amnestyusa.org/document.php?id=D0F5C2222D1AABEA8025690000692FC4> (“Various sources have expressed concern to Amnesty International that psychotropic drugs—medication for the treatment of serious psychiatric illness—are sometimes used improperly to control and sedate inmates rather than as medication for psychiatric conditions.”).
- <sup>35</sup> See generally Auerhahn & Leonard, *supra* note 34 (showing that female crime has a long history of being attributed to physio-psychological causes); Deborah R. Baskin, *Role Incongruence and Gender Variation in the Provision of Prison Mental Health Services*, 30 J. HEALTH & SOC. BEHAV. 305 (1989) (showing that mental health placement of female inmates is attributable to both psychiatric need and to a response to role-incongruent behavior); Robert T. Roth & Judith Lerner, *Sex-Based Discrimination in the Mental Institutionalization of Women*, 62 CAL. L. REV. 789 (1974) (arguing that the label of mentally-ill has been used to subordinate women).
- <sup>36</sup> See NANCY STOLLER, IMPROVING ACCESS TO HEALTH CARE FOR CALIFORNIA’S WOMEN PRISONERS, 35-39 (2001), available at <http://prisonerswithchildren.org/pubs/stoller.pdf> (reporting the numerous inadequacies of the California correctional system health care system to treat women inmates); BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS, 9 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhptip.pdf> [hereinafter TREATMENT OF INMATES] (reporting that of 24% of incarcerated women in state prisons who could identify themselves as having a mental health problem, only 67.3% of those women received treatment).
- <sup>37</sup> See Stone, *supra* note 31, at 333-34 (“Moreover, inmates with mental disabilities often lack access to prison programs simply because they reside in segregated housing, placed there by prison officials who believe that inmates with mental disabilities are unable to cope with the prison environment. Studies show that inmates with mental disabilities ‘vegetate’ in segregated housing because of the lack of human and physical resources.”).
- <sup>38</sup> COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, CONSENSUS PROJECT REPORT, 17 (2002), available at [http://consensusproject.org/the\\_report/toc/ch-IV/ps17-intake-inmates](http://consensusproject.org/the_report/toc/ch-IV/ps17-intake-inmates) (“There are no validated instruments for mental health screening in adult populations. . . In many correctional systems, a different mental health screening instrument is employed at each prison in the system.”).
- <sup>39</sup> See Andrew Goldberg, *Brief Mental Health Screening for Corrections Intake*, CORRECTIONS TODAY, Aug. 1, 2006, available at <http://www.thefreelibrary.com/Brief+mental+health+screening+for+corrections+intake.-a0151055492> (“Available instruments are often costly and time-consuming, making them impractical for daily screening of a large number of inmates at intake. As a result, even though most prisons and jails screen inmates for mental illness during booking, research has shown that they miss the majority of inmates with mental health problems, particularly those with less obvious symptoms.”).
- <sup>40</sup> TREATMENT OF INMATES, *supra* note 36, at 3.
- <sup>41</sup> MENTAL HEALTH PROBLEMS, *supra* note 3, at 1.
- <sup>42</sup> See Christine H. Lindquist & Charles A. Lindquist, *Health Behind Bars: Utilization and Evaluation of Medical Care Among Jail Inmates*, 24 J. COMMUNITY HEALTH, 285 300 (1999) (“An unusual gender difference emerges, however, with female inmates reporting more difficulty in accessing medical care, yet greater satisfaction with the care received.” This study, however, clearly is problematic as support as it is based completely on inmates’ self-report rather than an objective analysis of actual difference in access.).
- <sup>43</sup> See, e.g., FEDERAL BUREAU OF PRISONS, GENDER DIFFERENCES AMONG PRISONERS ENTERING DRUG TREATMENT: EXECUTIVE SUMMARY, (2002), available at [http://www.bop.gov/news/research\\_projects/current\\_projects/oretridesgender.jsp](http://www.bop.gov/news/research_projects/current_projects/oretridesgender.jsp) [hereinafter GENDER DIFFERENCES] (“Nearly all prison based substance abuse treatment programs have been designed with male prisoners in mind.”); NATIONAL EVALUATION DATA SERVICES, NEDS ANALYTIC SUMMARY, EFFECTIVENESS OF WOMEN’S SUBSTANCE ABUSE PROGRAMS: A META-ANALYSIS 2 (2001) available at [http://www.icpsr.umich.edu/SAMHDA/NTIES/NTIES-PDF/SUMMARIES/21\\_womens\\_meta\\_analysis.pdf](http://www.icpsr.umich.edu/SAMHDA/NTIES/NTIES-PDF/SUMMARIES/21_womens_meta_analysis.pdf) (“Historically, substance abuse treatment programs have been designed for the needs of a predominantly male client population.”).
- <sup>44</sup> GENDER DIFFERENCES, *supra* note 43 (reporting that inmate substance abuse programs generally do not take into account that women were significantly more likely to have used drugs daily, to have suffered domestic abuse, and to have depression, among other factors).
- <sup>45</sup> Alabama, for example, has the Bullock Correctional Facility, which houses men. See ALABAMA DEPARTMENT OF CORRECTIONS IMPROVEMENTS IN MENTAL HEALTH SERVICES FOR INMATES, 8 (2003), available at [http://hrw.org/reports/2003/usa1003/Alabama\\_Update\\_Haddad.pdf](http://hrw.org/reports/2003/usa1003/Alabama_Update_Haddad.pdf). (“[T]he Bradley Settlement Agreement applies only to male inmates, however, since implementation of the agreement, the ADOC has attempted to include Tutwiler, the female institution, into the Bradley mandates.”).
- <sup>46</sup> WISCONSIN ACLU PRESS RELEASE, WOMEN AT WISCONSIN’S TAYCHEEDAH PRISON SUFFER MEDICAL NEGLECT AND RECEIVE WORSE MENTAL HEALTH CARE THAN MEN (2006), available at <http://www.aclu.org/prison/women/25405prs20060502.html>.
- <sup>47</sup> *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (“These elementary principles [of the Eighth Amendment] establish the government’s obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical ‘torture or a lingering death,’ the evils of most immediate concern to the drafters of the Amendment.”).
- <sup>48</sup> *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1975) (“We see no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart.”); *Newman v. Alabama*, 503 F.2d 1320, 1324 (5th Cir. 1974) (including mental health care within its analysis of the Alabama correctional system’s violations of the Eighth Amendment).
- <sup>49</sup> *Godwin*, 551 F.2d. at 47.
- <sup>50</sup> Possible questions may include what counts as reasonable medical certainty; where is the line that demarcates a “serious” disease; and what clairvoyance would a mental health practitioner have to have to be able to determine that the disease is either curable or that delay in treatment will result in “substantial” harm?
- <sup>51</sup> *Coleman v. Wilson*, 912 F. Supp. 1282, 1298 (E.D.C.A. 1995) (citing *Balla v. Idaho State Board of Corrections*, 595 F. Supp. 1558, 1577 (D. Idaho 1984)).
- <sup>52</sup> As will be discussed in later sections, the above list may be considered an unwarranted intrusion by the judiciary into the private administration by prison authorities.
- <sup>53</sup> See, e.g., *City of Clebourne v. Clebourne Living Ctr.*, 473 U.S. 432, 439 (1985) (“The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.”).
- <sup>54</sup> See, e.g., *J.E.B. v. Ala. ex. rel. T.B.*, 511 U.S. 127, 130-31 (1994). (“Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause. . .”).

## ENDNOTES CONTINUED

- <sup>55</sup> See Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003); *City of Clebourne*, 432 U.S. at 440 ("Legislative classifications based on gender also call for a heightened standard of review. That factor generally provides no sensible ground for differential treatment.").
- <sup>56</sup> *United States v. Virginia*, 518 U.S. 515, 533 (1996) (citing *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)); *City of Clebourne*, 473 U.S. at 441 ("A gender classification fails unless it is substantially related to a sufficiently important governmental interest.").
- <sup>57</sup> *Klinger v. Dep't of Corrections*, 31 F.3d 727, 731 (8th Cir. 1994).
- <sup>58</sup> *Miller-El v. Dretke*, 545 U.S. 231, 247 (2005) ("None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respect, and there is no reason to accept one.").
- <sup>59</sup> *City of Clebourne*, 473 U.S. at 448. ("It is true, as already pointed out, that the mentally retarded as a group are indeed different from others not sharing their misfortune, and in this respect they may be different from those who would occupy other facilities that would be permitted in an R-3 zone without a special permit. But this difference is largely irrelevant unless the Featherstone home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not. Because in our view the record does not reveal any rational basis for believing that the Featherstone home would pose any special threat to the city's legitimate interests, we affirm the judgment below insofar as it holds the ordinance invalid as applied in this case.").
- <sup>60</sup> 127 S. Ct. 2738 (2007).
- <sup>61</sup> *Klinger*, 31 F.3d at 731.
- <sup>62</sup> *Id.*
- <sup>63</sup> *Id.* at 731-32.
- <sup>64</sup> *Id.* at 732.
- <sup>65</sup> *Id.*
- <sup>66</sup> *Id.* at 732-33 ("Subjecting prison officials' decisions to close scrutiny 'distorts the decisionmaking process' and 'seriously hampers [officials'] ability to . . . adopt innovative solutions to the intractable problems of prison administration.' Analyzing this case using a program comparison between NSP and NCW, however, places dozens of substantive administrative prison decisions under close judicial scrutiny and subjects them to after-the-fact second-guessing by a federal court."); see also *Rouse v. Benson*, 193 F.3d 936, 942 (8th Cir. 1999) ("[I]n prison cases, courts will ordinarily defer to the expert judgment of prison authorities, due to the difficulty of running a prison and the commitment of the task to the responsibility of the legislative and executive branches.").
- <sup>67</sup> *Klinger*, 31 F.3d at 732-33.
- <sup>68</sup> *Id.* at 733.
- <sup>69</sup> *Women Prisoners of the D.C. Dep't of Corrections v. D.C.*, 93 F.3d 910 (D.C. Cir. 1996).
- <sup>70</sup> *Id.* at 924.
- <sup>71</sup> *Id.* at 925.
- <sup>72</sup> *Id.*
- <sup>73</sup> PRISON STATISTICS, *supra* note 2 (According to the Bureau of Justice Statistics, on December 1, 2006, there were 112,498 women in state and federal facilities, compared to 1,458,363 men).
- <sup>74</sup> PIECES OF THE PUZZLE, *supra* note 33, at 30 (For example, Ohio's primary female prison, Ohio Reformatory for Women (ORW), houses inmates of all security classification levels. All of the other facilities approximating ORW's size are strictly male facilities of single or grouped security classifications).
- <sup>75</sup> 100 F.3d 644, 649 (8th Cir. 1996).
- <sup>76</sup> *Id.*
- <sup>77</sup> *Id.* ("There can be no such meaningful comparison for equal protection purposes between two sets of inmates who are not similarly situated. The substantial differences discussed above between male and female prisoners demonstrate the dissimilarity of the two distinct groups and the irrelevance of any attempt to compare the number or type of programs offered.") (internal citations omitted).
- <sup>78</sup> *Id.* at 652 (J. Heaney, dissenting).
- <sup>79</sup> PIECES OF THE PUZZLE, *supra* note 33, at 23-24 (Using Ohio as an example, there were 3,840 female inmates total in the system as of midyear 2007. Half were Level 1 and half were Levels 2 and 3. A mere eight composed the highest security levels, 4 and 5. In comparison, there were 45,851 males at midyear 2007. Of these, 13,613 were Level 1, 30,674 were Levels 2 and 3, and 1,564 were Levels 4 and 5).
- <sup>80</sup> *Ohio State Penitentiary*, <http://www.drc.state.oh.us/public/osp.htm> (last visited Feb. 9, 2009) [hereinafter OHIO STATE PENITENTIARY] (For example, Ohio's supermax facility, the Ohio State Penitentiary, offers a handful of community service and academic programs); Ohio Department of Rehabilitation and Correction, Ohio Department of Rehabilitation and Correction, London Correctional Institution, <http://www.drc.state.oh.us/public/loci.htm> (last visited Feb. 9, 2009) [hereinafter LONDON INSTITUTION] (In comparison, a low security prison, London Correctional Institution, offers several industries, career technical programs, college programs, and more involved community service programs).
- <sup>81</sup> 32 F.3d 333 (8th Cir. 1994).
- <sup>82</sup> *Id.* at 334.
- <sup>83</sup> *Klinger v. Dep't of Corrections*, 31 F.3d 727, 731 (8th Cir. 1994).
- <sup>84</sup> *Dahm*, 32 F.3d at 336.
- <sup>85</sup> *Id.*
- <sup>86</sup> *Id.*
- <sup>87</sup> *Id.*
- <sup>88</sup> *Canterino v. Wilson*, 869 F.2d 948, 954 (6th Cir. 1989).
- <sup>89</sup> *Faulkner v. Jones*, 51 F.3d 440, 444 (4th Cir. 1995).
- <sup>90</sup> *Women Prisoners of the D.C. Dep't of Corrections v. D.C.*, 93 F.3d 910, 926 (D.C. Cir. 1996) ("[T]he segregation of inmates by sex is unquestionably constitutional."); see *Pitts v. Thornburgh*, 866 F.2d 1450, 1453 (D.C. 1989) ("[T]he [gender] classification substantially and directly furthers an important government interest (reducing prison overcrowding within the context of finite resources).").
- <sup>91</sup> See *Pitts*, 866 F.2d at 1453 ("It is clear that the government's policies facially classify on the basis of gender: long-term, D.C. women offenders, because they are women, are imprisoned considerably farther from the District than are similarly situated male offenders and consequently suffer a substantial burden.").
- <sup>92</sup> *United States v. Virginia*, 518 U.S. 515, 519 (1996).
- <sup>93</sup> *Id.* at 521.
- <sup>94</sup> *United States v. Virginia*, 852 F.Supp. 471, 481-82 (W.D.Va. 1994).
- <sup>95</sup> *Virginia*, 518 U.S. at 526.
- <sup>96</sup> *Id.* at 526-27.
- <sup>97</sup> *Id.* at 531.
- <sup>98</sup> *Id.* at 532.
- <sup>99</sup> *Id.* at 533.
- <sup>100</sup> *Id.* at 534.
- <sup>101</sup> *Id.* at 535-36.
- <sup>102</sup> *Id.* at 539-40.
- <sup>103</sup> *Women Prisoners of the D.C. Dep't of Corrections v. D.C.*, 93 F.3d 910, 925 (D.C. Cir. 1996).
- <sup>104</sup> For the argument that the heightened level of scrutiny should be applied to female inmates' work and educational programming, see Jennifer Arnett Lee, Note, *Women Prisoners, Penological Interests, and Gender Stereotyping: An Application of Equal Protection Norms to Female Inmates*, 32 COLUM. HUMAN RIGHTS L. REV. 251 (2000).
- <sup>105</sup> *Women Prisoners of the D.C. Dep't of Corrections*, 93 F.3d at 927.
- <sup>106</sup> *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).
- <sup>107</sup> *United States v. Virginia*, 518 U.S. at 547.
- <sup>108</sup> *Id.* at 533; see also *Pitts v. Thornburgh*, 866 F.2d 1450, 1455 (D.C. 1989) (concluding "that the court must determine that the classification is substantially related to the achievement of important government objectives").
- <sup>109</sup> *Thornburgh*, 866 F.2d at 1456 ("Especially in light of the budgetary concerns that the District also cites, we are persuaded that the governmental interest in reducing prison overcrowding is, at the least, an important and legitimate interest for purposes of equal protection analysis.").
- <sup>110</sup> *Klinger v. Dep't of Corrections*, 31 F.3d 727, 732 (8th Cir. 1994).
- <sup>111</sup> *Bowring v. Godwin*, 551 F.2d 44 (4th Cir. 1975).
- <sup>112</sup> *Id.* at 47-48.
- <sup>113</sup> General society has long held the patronizing belief that female correctional institutions are akin to summer camp or a health spa, implicit in which is the feeling that the inmates cannot be lacking for anything. See Krysten Crawford, *Martha, out and about*, CNN/MONEY, March 4, 2005, available at [http://money.cnn.com/2005/03/03/news/newsmakers/martha\\_walkup/index.htm](http://money.cnn.com/2005/03/03/news/newsmakers/martha_walkup/index.htm) (calling Martha Stewart's federal facility "Camp Cupcake"); *Inside a Women's Prison: Ohio's Reformatory Is the Vassar of U.S. Penology*, SPOT, Dec. 1941 (emphasizing inmates' pinocle games and beauty treatments).