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Mary Daily v. Boston College: The Impermissibility of Single-Sex Classrooms Within a Private University

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MARY DALY v. BOSTON COLLEGE: THE IMPERMISSIBILITY OF SINGLE- SEX CLASSROOMS WITHIN A PRIVATE UNIVERSITY

MARYAM AHRANJANI*

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* J.D. Candidate, American University, Washington College of Law, 2001; B.S., Social Policy, Northwestern University, 1998. I would like to thank the hardworking staff and editors of the *Journal of Gender, Social Policy & the Law*, Professor Jamin Raskin, my advisor and mentor, who altruistically offers enthusiasm and support to any WCL student who knocks on his door. I would also like to thank my Mom, Dad, Sheereen, and Sheila. Finally, I would like to extend my heartfelt gratitude to Paul, Sarah, Paula Caplan, and all my other friends for allowing me to bounce ideas off of them.

I. BACKGROUND: THE MARY DALY¹ CONTROVERSY

In 1992, the American Association of University Women published a study claiming that public, coeducational schools shortchange girls.² Consequently, interest in single-sex³ schools resurfaced.⁴ In 1996, *United States v. Virginia*⁵ intensified the debate about single-sex education.⁶ The latest controversy surrounds the legality of single-sex classrooms within a private university.⁷

In the fall of 1998, Boston College administrators unsuccessfully ordered Mary Daly, a seventy-year-old Women's Studies professor, to admit men into her classroom after twenty-five years of excluding them.⁸ Daly claimed that the school effectively "fir[ed] a tenured professor"⁹ after a male student threatened to file a lawsuit.¹⁰

1. See Robin Estrin, *Feminist BC Theologian Asks Court for Help*, ASSOCIATED PRESS, May 24, 1999, at 1, available in Westlaw, News Library, APWIRE file [hereinafter Estrin, *Feminist*] (characterizing Daly as a "self-described radical feminist theologian" who is "considered a pioneer" in the field of women's studies).

2. See AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION, HOW SCHOOLS SHORTCHANGE GIRLS—THE AAUW REPORT (1992) [hereinafter AAUW REPORT] (interpreting studies that suggest the educational system is not meeting girls' needs).

3. "Single-sex" is a preferable term since it refers to biological classification, whereas "single-gender" refers to sexual identification. See ANN OAKLEY, SEX, GENDER, AND SOCIETY 5 (1972). Many sources use the terms interchangeably, but the author has tried to avoid using "single-gender" when possible.

4. See David & Jacqueline Sadker, *Separate—But Still Short-Changed*, WASH. POST, Nov. 1, 1995, at A19 (arguing that instead of organizing all-female classrooms as a permanent response to gender inequalities in educational outcomes, such as disparities in standardized test results, improving current coeducational classes is the ideal).

5. See 518 U.S. 515, 556-59 (1996) (holding that Virginia failed to show "exceedingly persuasive justification" for excluding women from Virginia Military Institute and that the remedial plan offered for women at a separate college did not offer both sexes benefits comparable in substance to survive an equal protection evaluation).

6. See MYRA SADKER & DAVID SADKER, FAILING AT FAIRNESS: HOW OUR SCHOOLS CHEAT GIRLS 233 (1994) [hereinafter SADKER & SADKER] (discussing historical inequalities for women in coeducation and arguing that single-sex schools help girls develop higher self-confidence, a stronger sense of identity, and intellectual curiosity over a broader range of subjects than their coeducational counterparts).

7. See Robin Wilson, *Judge Denies Bid to Stop Retirement by Boston College Professor*, CHRON. OF HIGHER EDUC., June 4, 1999, at B11 (explaining that neither the Supreme Court, nor Massachusetts appellate courts have yet to consider the issue of single-sex women's studies classes within a private university).

8. See, e.g., Doris Sue Wong, *Judge Rejects BC Teacher Who Bars Men*, BOSTON GLOBE, May 25, 1999, at B4 (explaining Daly's decision to take a leave of absence for one semester rather than allow males into her class). See generally Robin Estrin, *Radical Feminist BC Prof Told She Must Teach Men*, ASSOCIATED PRESS, Feb. 25, 1999, at *1, available in Westlaw, News Library, APWIRE file [hereinafter Estrin, *Radical Feminist*] (describing the "ironic" fact that when Daly first arrived at Boston College, the College of Arts and Science did not admit women, so she taught men only).

9. See Estrin, *Feminist*, *supra* note 1, at 1 (quoting Daly's attorney's claim that Boston

The litigation originated when senior Duane Naquin accused the school of discrimination in violation of Title IX of the Education Amendments of 1972¹¹ after Daly excluded him from her introductory feminist ethics course.¹² After the school asked Daly to admit Naquin to her spring course, she refused and took a leave of absence to avoid teaching the male student.¹³ The Center for Individual Rights, a conservative Washington, D.C. public interest law firm, sent a letter to Boston College on behalf of Naquin threatening legal action if Daly did not change her policy.¹⁴ Daly responded by arguing Naquin “did not have the prerequisite.”¹⁵

Professor Daly has offered one-on-one tutorials to almost two dozen male students since she started teaching at Boston College in 1966.¹⁶ Daly rationalized not allowing male students in her class by arguing that women are inhibited when men are in the room,

College used “backdoor tactics” to fire a tenured professor, which could have “sweeping ramifications for academic freedom and for tenured professors nationwide who disagree with school administrators”); *see also* Cindy Rodriguez, *Feminist Theologian Fights BC Over Retirement Question*, BOSTON GLOBE, May 15, 1999, at B4 (quoting Daly that her firing was “thug behavior”).

10. *See Judge Backs Firing of Prof for Barring Men From Feminist Classes*, THE COMMERCIAL APPEAL, May 26, 1999, at A6 [hereinafter COMMERCIAL APPEAL] (describing Judge Martha Sosman’s denial of Daly’s pre-trial motion to enjoin Boston College from distributing registration materials that did not list her courses).

11. *See* 20 U.S.C. § 1681 (1994) (providing that “[N]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”).

12. *See* COMMERCIAL APPEAL, *supra* note 10, at A6 (reporting that Naquin was excluded from the course because Daly felt that the presence of males interrupts the dynamic of the class); *see also* Samantha Miller, *No Boys Allowed: Axed for Barring Men from her Classes, Noted Feminist Mary Daly Battles Back*, PEOPLE, June 14, 1999, at 101 (describing how Naquin felt offended when Daly showed him the door after he entered her class on the first day); Kim Franke-Folstad, *Feminist Professor Has Gone Too Far From Reality*, DEN. ROCKY MTN. NEWS, May 30, 1999, at 6A (recounting that when two male students, including Naquin, attempted to enroll in her Introduction to Feminist Ethics course, Daly ordered them to exit the room with the words, “You are not welcome here”).

13. *See* Miller, *supra* note 12, at 103 (quoting Boston College spokesman Jack Dunn, “[Professor Daly] wanted to preach to a converted group of followers”); *see also* Estrin, *Radical Feminist*, *supra* note 8, at 1 (stating that Daly will not open her classes to men because doing so would “fundamentally alter her teaching philosophy”). Daly began to teach coed classes in the early 1970s and observed problems. *Id.* Daly said, “[e]ven if there were only one or two men with 20 women, the young women would be constantly on an overt or a subliminal level giving their attention to the men because they’ve been socialized to nurse men.” *Id.*

14. *See* Estrin, *Radical Feminist*, *supra* note 8, at 1 (observing that the Center for Individual Rights has handled similar lawsuits, including one which effectively ended affirmative action in the admissions process at the University of Texas).

15. *See* Cindy Rodriguez, *College Tells Feminist to Accept Males or Quit*, CHI. TRIB., Mar. 7, 1999, at 6 (asserting that Daly did not allow Naquin to enroll in her course because she knew he was associated with a conservative group at Boston College).

16. *See* Estrin, *Radical Feminist*, *supra* note 8, at 2 (describing Daly’s solution to barring admittance to male students in a coeducational setting).

thereby lessening the impact of her teachings.¹⁷ According to Daly, she did not violate Title IX of the Education Amendments of 1972¹⁸ because the spirit of the law is “to improve the situation of women,” which is what class does.¹⁹

This Comment discusses the rationale underlying single-sex education and the diversity in its implementation. This Comment argues that not only are single-sex classrooms within private undergraduate institutions legally unsound, but also that this approach fails to address long-term public policy concerns about the situation of women in education. As the United States grapples with education reform,²⁰ it is far too easy to initiate Band-Aid solutions.²¹ Single-sex education, ranging from single-sex classrooms to single-sex public schools, should exist as an option, but Title IX and equal protection standards must be satisfied.²²

The first section of this article discusses the historical perspective on single-sex education. The second section argues that single-sex classes within a private university receiving federal funding violate Title IX and other legal principles. This Comment concludes with recommendations for ways to incorporate single-sex education into the landscape of a private, coeducational university.²³

17. See Wong, *supra* note 8, at B4 (explaining Daly’s reason for excluding males from her feminist seminars and conveying that Daly would rather retire than admit males into her seminars).

18. See 20 U.S.C. § 1681 (1994) (prohibiting discrimination on the basis of sex in any federally-funded program).

19. *But see* COMMERCIAL APPEAL, *supra* note 10, at A6 (implying that whether Daly’s classes improve the situation of women is arguable).

20. See generally Ben Wildavsky, *School Daze, Budget Frays: A Knockdown Battle Over a Pot of Education Dollars*, U.S. NEWS & WORLD REP., Apr. 19, 1999, at 42 (describing the Clinton Administration’s attempt to close failing schools, improve teacher training and stop automatic promotion of failing students to increase accountability).

21. See Lisa K. Hsiao, *‘Separate but Equal’ Revisited: The Detroit Male Academies Case, 1992/1993* ANN. SURV. AM. L. 85, 88 (arguing both that “separate but equal” schools raise public policy concerns because they “create or perpetuate insidious gender roles and stereotypes”). Furthermore, “the establishment of [African-American male academies in Detroit] would only postpone recognition that the solution to the current educational crisis lies not in removing females from the schools, but in allowing equal access to a quality education for males and females together.” *Id.* See also Michael John Weber, Note, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099 (1993) (asserting that legal obstacles stand in the way of establishing African-American all-male schools). See generally Michael Meyers, *Separate is Not Equal*, WASH. POST, Sept. 23, 1992, at A19 (stating that single-sex education is not the panacea for the problems that plague public education).

22. See *United States v. Virginia*, 518 U.S. 515, 535 (1996) (asserting that single-sex schools offer benefits to “at least some students” and can indisputably “serve the public good”).

23. See GENERAL ACCOUNTING OFFICE, PUBLIC EDUCATION: ISSUES INVOLVING SINGLE-GENDER SCHOOLS AND PROGRAMS, at 9-10 (1996) [hereinafter GAO REPORT] (outlining successful single-sex programs that overcame constitutional concerns after school administrators consulted with the Department of Education’s Office of Civil Rights).

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II. HISTORICAL PERSPECTIVE

A. Primary and Secondary Public Education

Public education evolved from primarily all-boys' education to coeducation before the turn of the twentieth century.²⁴ Prior to the 1900s, formal education was mostly available only to boys; girls were typically educated in the home.²⁵ Gradually, the nation's system of "common" schools began to admit and include girls and, by the 1850s, almost as many girls as boys attended elementary school.²⁶

During the 1800s, many debated the desirability of coeducation in secondary schools.²⁷ Opponents to coeducation cited the need to protect the chastity of girls and to protect their health.²⁸ Supporters argued that girls deserved formal education as much as boys did.²⁹ In addition, considerable discussion centered on the appropriate curriculum, including differences in abilities and learning styles of boys and girls and whether they should learn the same material.³⁰

Young women and their parents struggled for years to convince administrators to allow them access to schools.³¹ By 1890, coeducation served as the most common model for public schools.³²

24. See *id.* at 2 (citing DAVID TYACK & ELISABETH HANSOT, *LEARNING TOGETHER, A HISTORY OF COEDUCATION IN AMERICAN PUBLIC SCHOOLS* (1990), which describes the history of girls' participation in public education in the United States).

25. See GAO REPORT, *supra* note 23, at 2 (explaining that girls rarely obtained access to formal education).

26. See GAO REPORT, *supra* note 23, at 2 (providing a brief history of integration of girls into public education in the United States during the 1800s).

27. See GAO REPORT, *supra* note 23, at 9 (explaining that before the 19th century, most public schools were single-sex).

28. See IRENE HARWARTH ET AL., U.S. DEP'T OF EDUC., *WOMEN'S COLLEGES IN THE UNITED STATES: HISTORY, ISSUES, AND CHALLENGES* 5 (1997) (explaining the argument that women would not be able to "endure the strain of higher learning"). Dr. Edward Clarke, a retired Harvard Medical School professor, published a treatise in 1873 in which he observed that if women used their "limited energy" on studying, they would endanger their "female apparatus." *Id.* Dr. Clarke also wrote that young women could not take college classes and still "retain uninjured health and a future secure from neuralgia, uterine disease, hysteria, and other derangements of the nervous system." *Id.* (citations omitted). See also GAO REPORT, *supra* note 23, at 2 (describing initial resistance to integrating girls into public schools because of a need to "protect girls both from danger to their health and from boys").

29. See MARY PIPHER, *REVIVING OPHELIA: SAVING THE SELVES OF ADOLESCENT GIRLS 16-45* (1994) (describing the history of paternalism and the stereotype of young girls as fragile beings who did not need to be formally educated).

30. See GAO REPORT, *supra* note 23, at 3 (providing a discussion of both sides of the debate).

31. See GAO REPORT, *supra* note 23, at 2 (describing the process of sex integration in American public schools).

32. See GAO REPORT, *supra* note 23, at 2 (explaining that once the Civil War ended, most public schools admitted girls).

Some public, single-sex schools continued to exist, but they were far outnumbered, for economic and practical reasons, by coeducational schools.³³

A minor renaissance has risen in public, single-sex education in recent years.³⁴ The most recent highly publicized example is the Young Women's Leadership School of East Harlem.³⁵ The founders of the school established the single-sex environment to help minority girls from low-income backgrounds "build self-esteem, become more assertive, and take on new leadership roles."³⁶ Although a preference for single-sex education for girls anchors the school's founding philosophy, little research has been done on single-sex public schools.³⁷ Supporters of the school, however, believe that a single-sex environment would allow girls to feel more comfortable making mistakes, encourage them to participate more in athletics, and increase their level of support for one another since they are not competing for male attention.³⁸

Opponents of the publicly funded single-sex school argue that it constitutes state-supported sex separation³⁹ and that single-sex

33. See SADKER & SADKER, *supra* note 6, at 18 (explaining that coeducation replaced single-sex education once school officials realized the cost differential between the two systems).

34. See Nadine Strossen, *A Symposium on Finding a Path to Gender Equality: Legal and Policy Issues Raised by All-Female Public Education*, 14 N.Y.L. SCH. J. HUM. RTS. i, v (1997) (asserting that single-sex schools, classes and programs have sprouted up throughout the country).

35. See *id.* at iii (describing the American Civil Liberties Union's stance against the school, despite the public support it has garnered).

36. See Jacques Steinberg, *Just Girls, and That's Fine With Them*, N.Y. TIMES, Feb. 1, 1997, at B1 (describing how girls who remain silent in class have letters sent home to their parents urging them to speak up in class). A student at the school stated, "[l]ast year, if I would have brought up a question about masturbation, the boys would have laughed. This year, I brought it up in class and the girls were like, 'Thanks, Abby.'" *Id.* at 25. Another student said that the school "feels like home. You can be more open." *Id.*

37. See Tamar Lewin, *Single-Sex Education on the Rise: Pupils More Likely to Thrive, Achieve in Same-Sex Classrooms*, PITTSBURGH POST-GAZETTE, Oct. 12, 1997, at A18 (conceding that recent interest remains unsupported by conclusive social science research).

38. See Jacques Steinberg, *Central Board Backs All-Girls School*, N.Y. TIMES, Aug. 22, 1996, at B3 (noting that New York City School Board Chancellor Rudy Crew supports Young Women's Leadership because he believes it will offer significant educational benefits to young women who might fall through the cracks of regular coed schools); Jennifer Young, *A Symposium on Finding a Path to Gender Equality: Legal and Policy Issues Raised by All-Female Public Education*, 14 N.Y.L. SCH. J. HUM. RTS. 29, 30 (1997) (explaining that the girls at Young Women's Leadership School of East Harlem insisted on creating a school basketball team); see also Kristin S. Caplice, *The Case for Public Single-Sex Education*, 18 HARV. J.L. & PUB. POL'Y 227, 259 (1994) (arguing that females tend to exhibit more cooperative behavior in the absence of males).

39. See Jason M. Bernheimer, *Single-Sex Public Education: Separate but Equal Is Not Equal at the Young Women's Leadership School in New York City*, 14 N.Y.L. SCH. J. HUM. RTS. 339, 372-73 (1997) (claiming that the Young Women's Leadership School fails to comply with the VMI decision because segregating girls to increase their math and science abilities is not an exceedingly persuasive justification).

schooling does not prepare students for a coeducational world.⁴⁰ Furthermore, critics contend that the market does not provide for this form of schooling because there is no demand for it, and that single-sex education may not be as beneficial for men as it is for women.⁴¹

B. Women's Access to Higher Education

Women's colleges were established in the mid 1800s and still enjoy tremendous success today.⁴² Women's colleges emerged at a time when men's access to higher education was expanding, but women's access was extremely limited.⁴³ Prior to the Civil War, Antioch, Oberlin, and Hinsdale were the only three private colleges that admitted women.⁴⁴ The University of Iowa and the University of Utah were the only two public universities that admitted women.⁴⁵ The Civil War, however, caused a decline in male student enrollment, thereby making some schools more agreeable to admitting women.⁴⁶ By 1870, eight state universities accepted women.⁴⁷

Today, women's colleges claim to offer a positive learning environment,⁴⁸ role models of success, and opportunities for leadership.⁴⁹ Some studies show increased student satisfaction,

40. See Caplice, *supra* note 38, at 279 (noting an existing powerful criticism of public single-sex education).

41. *But cf.* Caplice, *supra* note 38, at 279, 286 (exploring the contention that all-male schools are perceived as seeking to exclude women from gaining access to "power and influence").

42. See HARWARTH ET AL., *supra* note 28, at 58 (describing women's colleges as a small, but highly visible segment of American higher education institutions).

43. See HARWARTH ET AL., *supra* note 28, at 1 (remarking that women's colleges filled a void for women's access to higher education).

44. See HARWARTH ET AL., *supra* note 28, at 1 (commenting that the original goals of women's colleges were teacher training and religious and health education).

45. See HARWARTH ET AL., *supra* note 28, at 1 (noting that most women seeking higher education attended private girls "academies" before they had access to coeducational opportunity).

46. See SADKER & SADKER, *supra* note 6, at 22 (explaining that many schools reluctantly began to admit girls and women because of low male enrollment, and that male students and professors openly ridiculed female students); *see also* HARWARTH ET AL., *supra* note 28, at 1 (explaining that social changes, including the American Civil War, led to higher acceptance rates for women into public and private colleges).

47. See HARWARTH ET AL., *supra* note 28, at 1 (describing the gradual acceptance of women by a small number of "mainstream" universities).

48. See SADKER & SADKER, *supra* note 6, at 233 (including personal accounts of graduates from women's colleges).

49. See HARWARTH ET AL., *supra* note 28, at 84-85 (describing a study comparing women's leadership opportunities in coeducational and women's colleges); *see also* M. Elizabeth Tidball, *Educational Environment and the Development of Talent*, U.S. DEP'T OF EDUC., SINGLE-SEX: PROPONENTS SPEAK 50, 54 (Debra K. Hollinger & Rebecca Adamson eds., 1997) (explaining that the presence of a substantial number of women faculty and women in positions of

higher educational aspirations and attainment, and lofty career aspirations and occupational outcomes for students of women's colleges.⁵⁰ In 1997, twenty-four percent of female members of Congress and thirty-three percent of women board members of Fortune 500 companies graduated from women's colleges.⁵¹ While some studies indicate positive effects,⁵² others show that women's colleges have little or no effect compared to coeducational schools on various outcomes.⁵³

C. Current Status of Single-Sex Education

Since the 1960s, the number of single-sex institutions, public and private, secondary and post-secondary, have declined steadily.⁵⁴ The once ubiquitous single-sex public K-12 institutions are now virtually nonexistent.⁵⁵ In 1993, only one percent of all students in the United States attended a single-sex, K-12 school.⁵⁶ Private single-sex schools exist mainly at the secondary level, and the number of post-secondary single-sex institutions is declining.⁵⁷

leadership within an institution benefit women students not only by their presence, but also by their concern for "issues that affect women in higher education").

50. See SADKER & SADKER, *supra* note 6, at 233 (comparing the outcomes of students who attended women's colleges to their coeducational counterparts).

51. See HARWARTH ET AL., *supra* note 28, at 83 (indicating that women who attend women's colleges are more likely to have studied math, science, or economics, more than two times as likely to receive doctoral degrees, and more likely to attend medical and law school than their coeducational counterparts); see also Judy Mann, *Women's Colleges: A Study in What Works*, WASH. POST, Aug. 15, 1997, at E3 (providing statistics about women's college graduates).

52. *Id.*; see also Cornelius Riordan, *The Case for Single-sex Schools*, U.S. DEP'T OF EDUC., SINGLE-SEX SCHOOLING: PROPONENTS SPEAK 43, 44 (Debra K. Hollinger & Rebecca Adamson eds. 1993) (showing that while "no negative attitudinal results accrue to females attending single-sex secondary or post-secondary schools . . . [t]he results for males . . . are generally null or negative"). However, "among African-American and Hispanic males in the United States . . . findings parallel the results for girls—favoring single-sex schools in both attitudinal and cognitive outcomes." *Id.*

53. See HARWARTH ET AL., *supra* note 28, at 83 (describing studies that indicate women's colleges are not the panacea that some people believe them to be). Furthermore, in at least some of the studies, flaws in the research methodologies have raised questions regarding their validity. *Id.* Methodological problems include "lack of ability to control background characteristics (such as student motivation, socioeconomic status, and academic ability), small sample size, and focus on single institutions." *Id.*

54. See DEBRA K. HOLLINGER, U.S. DEP'T OF EDUC., SINGLE-SEX SCHOOLING: PERSPECTIVES FROM PRACTICE AND RESEARCH i, i-ii (Debra K. Hollinger, ed. 1993) (intending to find out what, if any, outcomes result from attending single-sex schools).

55. See *id.* at i (describing the current status of single-sex public education).

56. HOLLINGER, *supra* note 54, at i.

57. See HOLLINGER, *supra* note 54, at i (explaining that the single-sex institutions (mostly private, post-secondary schools) that have survived over the years "trumpet their virtues," but the fact remains that they appear to be an "endangered species"); see also HARWARTH ET AL., *supra* note 28, at 47 (indicating that in 1993, women's colleges accounted for less than one percent of the 14.3 million students enrolled in all institutions of higher education). See generally HARWARTH ET AL., *supra* note 28, at 11 (noting that presently there are only three

To understand the current controversy about single-sex classes within a private university, it is important not only to have a historical perspective of single-sex education, but also to consider the U.S. Supreme Court's role in defining the limits of single-sex education.

III. THE UNITED STATES SUPREME COURT AND SINGLE-SEX EDUCATION

Legislation resulting from social changes caused a decline in enrollment at single-sex schools and the dissolution of many single-sex institutions.⁵⁸ In 1972, Congress enacted nondiscrimination legislation to protect students from discrimination in education on the basis of gender.⁵⁹ Title IX of the Education Amendments of 1972 prohibits school districts from discriminating against students on the basis of sex and sets legal limits to single-sex public education.⁶⁰ Since the passage of Title IX, several Supreme Court cases, including *United States v. Virginia* ("VMI")⁶¹ and *Mississippi University for Women v. Hogan* ("Hogan"),⁶² have challenged single-sex public education under the Equal Protection Clause of the Fourteenth Amendment.⁶³ In fact, the Supreme Court has only heard three cases in the area of single-sex education since the passage of Title IX, including *Vorcheimer v. School District of Philadelphia* ("Vorcheimer"),⁶⁴ *Hogan*,⁶⁵ and *VMI*.⁶⁶ The *Vorcheimer* Court used a different analytical framework,⁶⁷ so most legal

publicly-funded women's colleges existing in the United States—Mississippi State University for Women, Douglass College of Rutgers University, and Texas Women's University).

58. See HARWARTH ET AL., *supra* note 28, at 21-30 (explaining how World War II and the ensuing women's liberation movement led to, *inter alia*, legislation regarding women in higher education).

59. See Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1994) (prohibiting discrimination based on sex in any school program receiving federal funding).

60. *Id.* § 1681(a)(1).

61. 518 U.S. 515, 539-40 (1996) (holding that Virginia, in failing to show exceedingly persuasive justification for excluding women from the citizen-soldier program offered at VMI, violated the equal protection rights of female applicants, and that the remedial plan offered by Virginia to create separate programs for women at Mary Baldwin college did not afford both men and women comparable benefits in substance to survive equal protection scrutiny).

62. 458 U.S. 718, 733 (1982) (holding it unconstitutional to deny a male entrance into a publicly funded, single-sex nursing college).

63. U.S. CONST. amend. XIV ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

64. See 532 F.2d 880, 888 (1976), *aff'd per curiam by an equally divided court*, 430 U.S. 703 (1977) (ruling all-male high school that denied female applicants admission did not violate the Equal Protection Clause).

65. See *Hogan*, 458 U.S. at 733 (O'Connor, J.) (finding that a state-supported university cannot deny qualified males admittance to its nursing school).

66. See *VMI*, 518 U.S. at 534 (requiring integration of women into the historically all-male, publicly funded military school called Virginia Military Institute).

67. See GAO REPORT, *supra* note 23, at 12 (explaining that the Court in *Vorcheimer* did not

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scholars rely more heavily on *VMI* and *Hogan*.⁶⁸ The Courts in *VMI* and *Hogan* relied on the intermediate scrutiny standard, which requires that the gender-based classification serve important governmental objectives and that the discriminatory means employed be substantially related to the achievement of those objectives.⁶⁹

A. *Vorchheimer v. School District of Philadelphia*

In *Vorchheimer*, an all-male public high school in Philadelphia denied admission to a female student solely on the basis of her sex.⁷⁰ At the time of the lawsuit, the Philadelphia School District operated two single-sex academic high schools, Central High School (“Central”) and Philadelphia School for Girls (“Girls”).⁷¹ The U.S. Court of Appeals for the Third Circuit found that Girls and Central were academically and functionally equivalent, and that the admission requirements based on gender classification did not violate the Equal Protection Clause of the Fourteenth Amendment.⁷² The court reasoned that sex should not be treated the same as race under the Equal Protection Clause because, unlike race, fundamental differences do exist between girls and boys.⁷³ The court also noted that the primary aim of any school system should be to provide the highest quality education possible, which, in this case, meant single-sex education.⁷⁴

On appeal, the Supreme Court affirmed the lower court decision without comment.⁷⁵ However, it did so in a 4-4 split, which means the decision is binding only in the Third Circuit.⁷⁶ In 1983, female

use the intermediate scrutiny test requiring a valid justification for employing a suspect classification).

68. See GAO REPORT, *supra* note 23, at 13 n.17 (asserting that *Vorchheimer* has no precedential value, except in the Third Circuit).

69. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982) (laying the framework of scrutiny for classifications based on sex).

70. *Vorchheimer v. School Dist. of Phila.*, 400 F. Supp. 326, 333 (E.D. Pa. 1975).

71. See GAO REPORT, *supra* note 23, at 12-13 (explaining that both schools maintained excellent reputations). Enrollment in either school was voluntary. *Id.* The district also provided coeducational college preparatory high schools. *Id.*

72. See *Vorchheimer*, 532 F.2d at 885-87 (considering whether states can provide “separate but equal” high schools for males and females).

73. See *id.* at 886 (asserting that since boys and girls have fundamental differences, unlike people of different races, gender cannot be treated the same as race).

74. See *Vorchheimer*, 532 F.2d at 887-88 (explaining that, given the objective of a quality education and the theory that adolescents may study more effectively in single-sex schools, the court decided that the policy of the school board here did bear a substantial relationship to providing high quality education).

75. See *Vorchheimer*, 430 U.S. at 703.

76. See *Vorchheimer v. School Dist. of Phila.*, 532 F.2d 880, 888 (3d Cir. 1976), *aff'd by an equally divided court*, 430 U.S. 703 (1977) (holding that the separate but equal schools did not

students again sought admission to the all-boys Central High School and brought suit in the Common Pleas Court of Philadelphia County alleging that being denied admission to Central violated their rights under the Pennsylvania and U.S. Constitutions.⁷⁷ The court found that *Vorchheimer* did not bar the claim because representation by plaintiff's counsel was "materially inadequate."⁷⁸ The court proceeded to order the admission of girls to Central on the grounds that Girls did not provide equal facilities and opportunities to female students that Central provided to male students.⁷⁹

B. Mississippi University for Women v. Hogan

Mississippi University for Women ("MUW"), the nation's first public women's college, opened its doors in 1884.⁸⁰ Joe Hogan, a registered nurse and qualified applicant, was denied admission to MUW's School of Nursing baccalaureate program solely on the basis of sex.⁸¹ He filed suit against the school in 1982.⁸²

By a vote of 5-4, the Supreme Court held that denying men admission to the nursing school violated the Equal Protection Clause.⁸³ In its analysis, the Court used a modified intermediate level of scrutiny: the state needed to show an "exceedingly persuasive justification" for classifying individuals on the basis of sex.⁸⁴ That burden can be met only by showing that the classification serves "important governmental objectives" and that the discriminatory

violate the equal protection clause of the Fourteenth Amendment); Mark Walsh, *Number of Single-Sex Programs on the Rise, GAO Says*, EDUC. WK., June 12, 1996, at 7 (explaining that the Supreme Court decision creates no precedent since the vote resulted in a tie).

77. See GAO REPORT, *supra* note 23, at 13 n.17 (summarizing a subsequent lawsuit against the Philadelphia School District).

78. See GAO REPORT, *supra* note 23, at 13 n.17 (indicating that the court could hear this case even though it was based on the exact same facts and law because plaintiff's counsel made a grievous mistake by not providing the court with relevant evidence).

79. See GAO REPORT, *supra* note 23, at 13 n.17 (analyzing where the Supreme Court erred in *Vorchheimer*). In finding the representation inadequate, the trial court noted many facts not considered by the Supreme Court. *Id.* For example, the boys' campus was almost three times larger, its library had almost twice as many books, the boys' school had a computer room, and its graduates received almost twice the amount of college scholarship money. *Id.*

80. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 719-20 (1982) (explaining that the state legislature created the school).

81. See *id.* at 721 (citing the lower court's factual determination that Hogan was a qualified applicant).

82. See GAO REPORT, *supra* note 23, at 12 (explaining that MUW has admitted only women since its inception by a Mississippi statute in 1884).

83. See *Hogan*, 458 U.S. at 724 n.8 (citing *Orr v. Orr*, 440 U.S. 268, 273 (1979) for the proposition that the policy of denying males the right to obtain a nursing degree at MUW imposed upon *Hogan* "a burden he would not bear were he female").

84. *Hogan*, 458 U.S. at 724.

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means employed are “substantially related” to achieving those objectives.⁸⁵

Justice O’Connor, who wrote the majority opinion, decided that the state’s primary argument, that the policy constituted educational affirmative action for women, was not persuasive since women have not lacked opportunities to enter nursing.⁸⁶ If anything, argued O’Connor, the statute “tends to perpetuate the stereotyped view of nursing as an exclusively women’s job.”⁸⁷ The policy also failed because the state did not prove that the gender-based classification was substantially and directly related to its proposed compensatory objective.⁸⁸ MUW now admits men, but it remains committed to providing “distinctive opportunities for women.”⁸⁹

The majority in *Hogan* carefully said that the Court was not considering whether a state could fund “separate but equal” colleges for men and women.⁹⁰ Rather, the Court considered only whether a man should be admitted to the School of Nursing and not other schools within MUW.⁹¹ The Court did not find that all public single-sex education was unconstitutional, just that Mississippi’s articulated objective did not warrant excluding one sex.⁹² Furthermore, the Court did not discuss the status of private single-sex education.⁹³

85. *Id.*

86. *See id.* at 729 (explaining, furthermore, that historically the field of nursing never excluded women).

87. *See id.* at 729 (implying that the school’s women-only admission policy did not serve as affirmative action for women, but instead served to perpetuate negative stereotypes); *see also* Denise C. Morgan, *Finding a Constitutionally Permissible Path to Sex Equality: The Young Women’s Leadership School of East Harlem*, 14 N.Y.L. SCH. J. HUM. RTS. 95, 108 (1998) (describing how such stereotyping depresses the wages of women in the field).

88. *See* GAO REPORT, *supra* note 23, at 12 (explaining that the requisite connection between the means and the end failed to exist in this case because the classification did not serve its articulated purpose).

89. *See* HARWARTH ET AL., *supra* note 28, at 35 (citing the Board of Trustees of State Institutions of Higher Learning in Mississippi, which stated, “[t]oday, the university refers to itself as Mississippi University for Women . . . and smart men, too!”).

90. *See Hogan*, 458 U.S. at 720 n.1 (conveying that since Mississippi maintains no other single-sex public university or college, the Court was not “faced with the question of whether States can provide ‘separate but equal’ undergraduate institutions for males and females”).

91. *See id.* at 723 n.7 (“[W]e decline to address the question of whether MUW’s admissions policy, as applied to males seeking admission to schools other than the School of Nursing, violate[d] the Fourteenth Amendment.”).

92. *See id.* at 728 (stating that “[i]n limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.”).

93. *See* Respondents’ Brief at 35-36, *United States v. Virginia* (Nos. 94-1941, 94-2107) (explaining “[t]he unconstitutionality of the MUW women-only admissions policy invalidated in *Hogan* does not affect the continued legality of private single-sex education.”).

C. United States v. Virginia

Virginia Military Institute, the state's only public, single-sex institution of higher education, purports to produce male "citizen-soldiers" who are both civilian and military leaders.⁹⁴ Title IX does not apply to undergraduate institutions of higher education that have traditionally and continually had a policy of admitting only students of one sex.⁹⁵ VMI is such an institution.⁹⁶ Using a unique system of "adversative training" not available elsewhere in Virginia, VMI teaches a strong moral code, physical discipline, and mental challenge.⁹⁷ With the largest per-student endowment of any undergraduate school in America, VMI obviously instills in its graduates a sense of pride.⁹⁸

In a suit brought by the Justice Department in 1990, a U.S. District Court held that VMI's male-only admissions policy does not violate the Fourteenth Amendment's Equal Protection Clause.⁹⁹ The District Court reasoned that single-sex education yields substantial benefits for both men and women and that VMI's unique method of instruction enhanced diversity in an otherwise coeducational Virginia system.¹⁰⁰ In 1992, the U.S. Court of Appeals for the Fourth Circuit disagreed and ordered Virginia to remedy the constitutional violation.¹⁰¹ In response to this reversal, Virginia proposed to create the Virginia Women's Institute for Leadership (VWIL) as a parallel program for women.¹⁰² VMI proposed that it be allowed to continue to admit only men, and that it would assist nearby Mary Baldwin College in establishing a "leadership" program for women that would

94. See *United States v. Virginia*, 518 U.S. 515, 520 (1996) (describing the school's philosophy and aims).

95. 20 U.S.C. § 1681(a)(1). See *Vorchheimer v. School Dist. of Phil.*, 532 F.2d 880, 883 (3d Cir. 1976), *aff'd* 430 U.S. 703 (1977) (finding that Title IX applies only to specified types of educational institutions and excludes from its coverage the admission policies of secondary schools).

96. See *VMI*, 518 U.S. at 540 (stating that VMI had a "historic and constant plan—a plan to 'affor[d] a unique educational benefit only to males.'" (citation omitted)).

97. See *id.* at 520 (describing how VMI aims to instill physical and mental discipline in its cadets and implant in them a strong moral code).

98. See *id.* (noting that alumni place a high value on their VMI training, as evidenced by the fact that VMI has the largest per-student endowment of all public undergraduate institutions in the Nation).

99. See *United States v. Virginia*, 766 F. Supp. 1407, 1410 (W.D. Va. 1991) (entering judgment in favor of Virginia).

100. See *VMI*, 518 U.S. at 524 (restating the District Court's rationale that if single-sex education for males constitutes an important governmental objective, it becomes obvious that the only means of achieving that objective is to exclude women from VMI).

101. See *United States v. Virginia*, 96 F.3d 114, 117 (4th Cir. 1996) (requiring Virginia to provide equal educational opportunities to its women as well as its men citizens).

102. *VMI*, 518 U.S. at 548 (describing the state's plan to comply with the Circuit Court's holding).

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approximate VMI's program for males.¹⁰³ The Fourth Circuit ruled that despite the difference in prestige between VMI and VWIL, the two programs would offer "substantively comparable" educational benefits.¹⁰⁴ The United States appealed to the Supreme Court.¹⁰⁵

The Court tackled the issue of whether Virginia's creation of the VWIL as a comparable program to VMI satisfied the Fourteenth Amendment's Equal Protection Clause.¹⁰⁶ The Court decided that VWIL did not meet the equal protection requirement because the program and facilities at Mary Baldwin College were not comparable to those at VMI.¹⁰⁷ Virginia argued that the men-only policy is based on a philosophy of leadership training that involved physical fitness, emotional stability, and self-discipline.¹⁰⁸ Virginia claimed that it maintained a valid interest in providing educational opportunities to students who could benefit from single-sex education and admitting women would fundamentally alter the school's curriculum.¹⁰⁹ Virginia also argued that VWIL provided a separate-but-equal educational opportunity for women.¹¹⁰ VWIL did not use VMI's adversative method, but instead a cooperative method to build self-esteem.¹¹¹

The United States countered with the argument that separate is not equal.¹¹² It also argued that VWIL and VMI were not equal in terms of resources, reputation, and the value of its degrees. Finally, the United States disputed Virginia's claim that VMI's adversative

103. See RIORDAN, *supra* note 51, at 45 (explaining Virginia's attempt to comply with the court's ruling by creating VWIL). Women in this program would live in separate dormitories from regular Baldwin students, participate in leadership activities, and enroll in the Reserve Officers' Training Corps program at Baldwin. *Id.*

104. See *VMI*, 44 F.3d 1229, 1240-41 (4th Cir. 1995) (affirming the District Court's approval of the remedial plan).

105. 116 S. Ct. 281 (1995).

106. See *VMI*, 518 U.S. at 530-31 (asking whether the VMIL program is the appropriate remedy if it is found that VMI has violated the Constitution's Equal Protection principle).

107. See *id.* at 566 (Rehnquist, C.J., concurring) (stating that VWIL is "distinctly inferior to the existing men's institution and will continue to be for the foreseeable future").

108. See *id.* at 522 (describing VMI's hierarchical "class system" of privileges and responsibilities, the "rat line," and the stringently enforced honor code).

109. See *United States v. Virginia*, 518 U.S. 515, 540 (1996) (claiming that "[a]lterations to accommodate women would necessarily be 'radical,' so 'drastic,' Virginia asserts, as to transform, indeed 'destroy,' VMI's program.").

110. See *id.* at 546 (proclaiming that VWIL served to provide female cadets the same education that VMI provided to male cadets).

111. See *id.* at 548-49 (explaining that VWIL students receive their leadership training in seminars, externships, and speaker series, which pale in comparison to the physical rigors of VMI's adversative leadership training).

112. See *id.* at 546 (maintaining that the government's assertion that VMI's solution, VWIL, is "pervasively misguided").

method must substantially change with the admission of women.¹¹³

In a 7-1 decision¹¹⁴ the Court held that VMI's male-only admissions policy was unconstitutional since no adequate alternative for women existed.¹¹⁵ Because it failed to show "exceedingly persuasive justification" for VMI's sex-based admissions policy, Virginia violated the Fourteenth Amendment's Equal Protection Clause.¹¹⁶ Virginia failed to support its claim that single-sex education contributes to educational diversity because it did not show that VMI's male-only admissions policy was created or maintained with the purpose of furthering educational diversity.¹¹⁷

Furthermore, the Court ruled that VWIL could not offer women the same benefits as VMI offered men.¹¹⁸ VWIL would not provide women with the same rigorous military training, faculty, courses, facilities, financial opportunities, or alumni reputation and connections that VMI affords its male cadets.¹¹⁹

Finally, the Supreme Court found the Fourth Circuit's "substantive comparability" standard between VMI and VWIL misplaced.¹²⁰ Holding that the Fourth Circuit's "substantive comparability" standard was a displacement of the Court's more exacting standard, the Court required that "all gender-based classifications today" be evaluated with "heightened scrutiny."¹²¹ Under the heightened scrutiny standard, because Virginia's plan to create VWIL would not provide women with the same opportunities as VMI provides its men,

113. *See id.* at 524 (setting forth the government's argument that the only accommodations the school would have to provide to women that they didn't for men included bathroom and other living facilities, but that the school's educational philosophy and teaching methods would not have to change if they admitted female cadets).

114. *See United States v. Virginia*, 518 U.S. 515, 558 (1996) (reporting that Justice Thomas took no part in the consideration or decision of the case).

115. *See id.* at 563 (Rehnquist, C.J., concurring) ("Had Virginia made a genuine effort to devote comparable public resources to a facility for women, and followed through on such a plan, it might well have avoided an Equal Protection violation.").

116. *See id.* at 534 (finding that Virginia's remedial plan did not cure the constitutional violation—i.e., equal opportunity).

117. *See id.* at 539 (explaining that Virginia failed to show the requisite intent necessary to justify a suspect classification).

118. *See id.* at 557 (reporting that VWIL retained a faculty less impressively credentialed and less well paid than VMI's faculty and that VWIL provided limited course offerings and fewer opportunities for military training and for scientific specialization than VMI).

119. *See United States v. Virginia*, 518 U.S. 515, 551 (1996) (describing the myriad of ways in which VWIL does not qualify as VMI's equal, including facilities, reputation, alumni base, etc.).

120. *See id.* at 555-56 (reversing the Circuit Court's holding that VMI and VWIL were similar enough to withstand an equal protection attack).

121. *See id.* at 555 (stating that heightened scrutiny requires that quasi-suspect classifications, including sex and illegitimacy, must be substantially related to the achievement of important governmental objectives).

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Virginia failed to meet the requirements of the Equal Protection Clause.¹²² VMI cadets and alumni expressed disappointment at the Court's decision, claiming that "the presence of women will disturb cadet cohesion."¹²³

On July 13, 1996, after six years of litigation and six million dollars in legal expenses, VMI's governing board narrowly voted 9-8 to develop a plan for admitting women in 1997.¹²⁴ The first females graduated from VMI in May, 1999.¹²⁵ An alumni plan to privatize the school by purchasing it from the state, thereby removing it from the Court's jurisdiction, failed.¹²⁶ Two days after the Court declared VMI's admissions policy unconstitutional, the Citadel¹²⁷ announced it was going coed.¹²⁸ Some people fear that the VMI vote ended the history of all-male military colleges, as well as all public single-sex institutions of higher education in the United States.¹²⁹ In her majority opinion, however, Justice Ginsburg wrote:

Sex classifications *may be used* to compensate women 'for particular economic disabilities [they have] suffered,' to 'promot[e] equal employment opportunity,' *to advance full development of the talent and capacities of our Nation's people.* But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.¹³⁰

Thus, many argue that public single-sex schools are constitutionally

122. See *id.* at 555-56 (explaining Virginia's failure to provide equal opportunities to young women and men interested in the type of education offered at VMI).

123. See Linda Greenhouse, *Court Invalidates VMI's Exclusion of Women*, N.Y. TIMES (www ed.) (June 27, 1996) at <http://world.std.com/~weezer/co/con9603.html> (quoting Josiah Bunting, the head of VMI, as saying, "[t]his is a savage disappointment for the alumni.").

124. See *VMI Reluctantly Agrees to Admit Women*, N.Y. TIMES (www ed.) (July 15, 1996) at <http://world.std.com/~weezer/co/con9671.html> [hereinafter *VMI Reluctantly*] (reporting the reaction of VMI's governing board to the Supreme Court's decision).

125. See Josh White, *Diplomas, Dreams, and Dissent; First Female Cadets Graduate From VMI*, WASH. POST, May 16, 1999, at C1 (describing VMI's conferral of degrees to female cadets for the first time in the school's history).

126. See *VMI Reluctantly*, *supra* note 123, at B3 (stating that the estimated cost of the plan was over \$200 million and it would probably start a new round of litigation); see also HARWARTH ET AL., *supra* note 28, at 35 (stating that once VMI's Board of Visitors was faced with a choice of becoming a private institution or admitting women, it voted nine to eight to admit women starting in Fall, 1997).

127. See Mike Allen, *Citadel Admits Women After VMI Decision*, N.Y. TIMES (www ed.) (June 30, 1996) at <http://world.std.com/~weezer/co/con9672.html> (noting that the Citadel is South Carolina's state-supported all-male military college).

128. See *id.* (summarizing the Citadel's reaction to VMI).

129. See Jennifer R. Cowan, *Distinguishing Private Women's Colleges From the VMI Decision*, 30 COLUM. J.L. & SOC. PROBS. 137, 137-38 (1997) (stating that VMI's supporters, including Justice Scalia, argue that this decision necessarily extends a destructive arm towards private, single-sex education in the United States).

130. See *VMI*, 518 U.S. at 533-34 (providing Justice Ginsburg's assertion that discrimination against women is unacceptable).

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permissible under certain circumstances including an expressed intent to provide “affirmative action” to correct past injustices.¹³¹ Only further litigation will decide the fate of public, single-sex institutions.¹³² The Court “implied that the decision should not affect government funding of private colleges,”¹³³ but the “impact of the VMI decision on private single-sex education is not yet clear.”¹³⁴ The Court has not yet decided on primary or secondary school level single-sex schools.¹³⁵

IV. ANALYSIS

A. Statutory and Constitutional Considerations

Title IX prohibits sex discrimination at educational institutions that receive federal funds.¹³⁶ However, it explicitly exempts private colleges that do not receive federal funds and public colleges that historically admitted only one sex.¹³⁷ Therefore, private colleges not receiving federal funds can allow single-sex classrooms.

1. Title IX of the Education Amendments of 1972

Title IX protects people from sex-based discrimination in education programs or activities which receive federal financial

131. See *Hogan*, 458 U.S. at 728 (explaining the majority opinion’s recognition of affirmative action as a valid defense to a sex classification in certain cases).

In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened [W]e consistently have emphasized that ‘the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.’

Id. (citations omitted).

132. Many people thought the ACLU suit against Young Women’s Leadership School of East Harlem had the potential to reach the Supreme Court. See Jacques Steinberg, *Crew Defends Establishment of All-Girls School*, N.Y. TIMES, Sept. 25, 1997, at B3 (asserting that the school will continue to exist until there is a plaintiff willing to sue the school for violation of Equal Protection). To date, however, the ACLU has been unable to find a plaintiff. Jacques Steinberg, *All-Girls Public School Opens in New York*, N.Y. TIMES, Sept. 5, 1996, at B1.

133. See Cowan, *supra* note 128, at 148.

134. See Cowan, *supra* note 128, at 148 (asserting that although some claim that a decision against VMI would force private women’s colleges to admit men or to close down, the differences between VMI and private colleges as well as equal protection jurisprudence suggests that no connection exists).

135. See GAO REPORT, *supra* note 23, at 11 (noting that although single sex public education could be challenged under the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court has not yet decided such an issue).

136. See 34 C.F.R. § 106.34 (1999) (providing an explanation of when Title IX applies).

137. 20 U.S.C.A. § 1681(a)(5) (West 1998); see also *Grove City College v. Bell*, 465 U.S. 555 (1984) (White, J.) (holding that since the college received federal financial assistance, it was thus subject to the statute prohibiting sex discrimination).

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assistance.¹³⁸ The programs or activities may include, but are not limited to: admissions, recruitment, financial aid, academic programs, student treatment and services, counseling and guidance, discipline, grading, classroom assignment, vocational education, recreation, physical education, athletics, housing and employment.¹³⁹

The United States Department of Education maintains an Office for Civil Rights (“OCR”) to enforce Title IX.¹⁴⁰ There are twelve enforcement offices throughout the country, and the headquarters are in Washington, D.C.¹⁴¹ Although it has not received many complaints of violations, OCR has worked with many schools over the years to ensure that their programs comply with Title IX.¹⁴² For example, in response to a 1996 complaint against a community college, OCR issued an opinion letter stating that single-sex self-defense courses (in this case, all-female) are permissible as long as “substantial privacy interests compel offering the course in a single-sex environment” and also that the course must be offered to boys.¹⁴³

As implemented by the Department of Education, Title IX generally prohibits single-sex classrooms in coeducational schools.¹⁴⁴ The regulation, however, contains some exceptions, including single-sex classes for portions of physical education classes when students play contact sports,¹⁴⁵ classes on human sexuality,¹⁴⁶ and chorus classes.¹⁴⁷

138. 34 C.F.R. § 106.1 (2000).

139. *Id.* § 106.4(c)–(e).

140. See GAO REPORT, *supra* note 23, at 7 (describing the process of Title IX enforcement).

141. See Title IX and Sex Discrimination, (visited July 15, 1999) at http://www.ed.gov/offices/OCR/tix_dis.html (noting that Title IX covers state and local agencies that receive funds, which include 16,000 local school districts and 3,200 colleges and universities).

142. See GAO REPORT, *supra* note 23, at 7 (providing that in each instance of a request for guidance or complaint on either single-sex schools or classrooms, the school district and OCR have resolved the matter without litigation).

143. See United States Department of Education, Office for Civil Rights, Op. Reg'l Dir., Boston, MA (Apr. 23, 1998) (highlighting the fact-sensitive nature of the permissibility of single-sex courses).

144. GAO REPORT, *supra* note 23, at 7; 34 C.F.R. § 106.34 (stating that a “recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex”).

145. See 34 C.F.R. § 106.34(c) (1999) (listing wrestling, boxing, rugby, ice hockey, football, and basketball as “sports the purpose or major activity of which involves bodily contact”).

146. See *id.* § 106.34(e) (providing that portions of classes in elementary and secondary schools that “deal exclusively with human sexuality may be conducted in separate sessions for boys and girls”).

147. See *id.* § 106.34(f) (1999) (providing that recipients may create “requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex”).

If the Assistant Secretary for Civil Rights finds discrimination on the basis of sex, she may require a recipient to take remedial action necessary to overcome the effects of the discrimination.¹⁴⁸ A recipient may also take affirmative action to overcome the effects of conditions that have limited participation because of sex in the absence of a finding of discrimination by the Assistant Secretary.¹⁴⁹ The classifications, however, that result in single-sex classes must be directly related to the reasons for the implementation of the single-sex classes.¹⁵⁰ Three conditions must be met: (1) beneficiaries of the single-sex classes must have had limited opportunities to participate in a school's programs or activities due to their sex; (2) less restrictive or segregative alternatives that may have accomplished the goals of the single-sex classes must have been considered and rejected; and (3) there must be evidence that comparable sex-neutral means could not have been reasonably expected to produce the results sought through the single-sex classrooms.¹⁵¹

Professor Daly argued that her classes served as affirmative action for women who were once excluded from higher education.¹⁵² She insisted that female students learn better "without male distractions."¹⁵³ This rationale, unfortunately, does not comport with the narrow room afforded by Title IX to single-sex classes for affirmative action purposes. The class of students who benefited from Daly's classes did not include the same students who were discriminated against in past years.¹⁵⁴ In fact, women now comprise the majority of college students¹⁵⁵ and enjoy nearly equal educational and professional opportunities as men.¹⁵⁶ Since her female students

148. 34 C.F.R. § 106.3(a) (2000).

149. *See id.* § 106.3(b) (2000) (authorizing institutions to take action to overcome the effects of conditions that resulted in limited participation by persons of a particular sex).

150. *See* GAO REPORT, *supra* note 23, at 22 (explaining that, in the absence of a finding of discrimination by the Assistant Secretary for Civil Rights, a "recipient may take affirmative action to overcome the effects of conditions that have limited participation by gender" if the classifications made are directly related to the reasons for the existence of the single-sex classes).

151. GAO REPORT, *supra* note 23, at 22-23.

152. *See* Miller, *supra* note 12, at 101 (quoting Daly, "[t]he point of my class is that there [can] be a space where women can create our own thoughts and our own philosophy, unencumbered by patriarchal invasions . . . [i]t's not about discrimination at all.").

153. Miller, *supra* note 12, at 101.

154. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982) (establishing that a State can "evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification").

155. *See* HARWARTH, *supra* note 28, at 27 (conveying that women comprised almost fifty-five percent of all students in higher education by 1991).

156. *See* Anita K. Blair, *The Equal Protection Clause and Single-Sex Public Education*: United

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were not part of the class injured by past discrimination against women in higher education,¹⁵⁷ and since Daly provided no evidence that comparable sex-neutral means could not produce the results sought through the single-sex classrooms,¹⁵⁸ Daly's all-female classes appear to be statutorily impermissible.

2. The Funding Issue

When Title IX was amended in 1972 to prohibit sex discrimination at educational institutions that receive federal funds, the only schools exempted from the regulation were private colleges and public colleges that historically admitted only one sex.¹⁵⁹ Although private, Boston College receives federal funds; thus, a claim that the school is exempt from Title IX on these grounds fails.¹⁶⁰

Because almost all schools, including private universities, receive federal funds, Title IX applies to almost every educational institution, contrary to what the statutory list of exceptions implies.¹⁶¹ The Supreme Court considered the issue of federal funding and private schools in *Grove City College v. Bell*.¹⁶² There has been some debate about whether private schools must comply with Title IX since, theoretically, they are not federally funded.¹⁶³ However, the Court ended the debate by holding that Title IX binds the private college even though the school did not directly receive any federal financial

States v. Virginia and Virginia Military Institute, 6 SETON HALL CONST. L.J. 999, 1011 (1996) ("As of 1994, women were 22.3% of physicians, up from 15.8% in 1983, and 24.8% of lawyers and judges, up from 15.8% in 1983. In 1992, 35.7% of M.D. degrees and 42.7% of J.D. degrees were conferred on women. Between 1971 and 1992, the percentage of bachelor's degrees conferred on women rose from 43.4% to 54.2%, from 40.1% to 54.1% for master's degrees, and from 14.3% to 37.1% for doctorate degrees.").

157. See SADKER & SADKER, *supra* note 6, at 1-35 (articulating the numerous barriers women have faced in higher education). Past discrimination includes barred admittance into institutions of higher education, "glass ceilings," and career tracking into the fields of teaching, nursing, and secretarial assistance. *Id.*

158. See Wilson, *supra* note 7, at B11 (including Judge Sosman's opinion that Daly has failed to provide empirical evidence for her claims).

159. 20 U.S.C.A. § 1681(a)(1) & (5) (West 1997).

160. 34 C.F.R. § 106.4 (2000) (requiring that a school that receives federal funds comply with Title IX).

161. 20 U.S.C.A. § 1681 (West 1998). See *Title IX: A Sea Change in Gender Equity in Education* (visited July 15, 1999) at <http://www.ed.gov/pubs/TitleIX/part3.html> (reporting that OCR extends protection to 51.7 million elementary and secondary school students, 14.4 million college and university students, almost 15,000 school districts, more than 3,600 colleges and universities, more than 5,000 proprietary schools, and thousands of libraries, museums, vocational rehabilitation agencies and correctional facilities).

162. See 465 U.S. 555, 575-76 (1984) (holding that direct tuition grants to students are a form of federal financial assistance to the school and requiring that all school departments comply with the requirements of Title IX).

163. See Cowan, *supra* note 128, at 164-71 (articulating both sides of the debate).

assistance.¹⁶⁴ Some of its students received basic educational opportunity grants under the U.S. Department of Education's alternate disbursement system, and used those grants to pay for their education.¹⁶⁵ Since Grove City College received federal funds, it had to comply with Title IX regulations.¹⁶⁶

Since Boston College receives federal funds both directly and indirectly through student loans and grants,¹⁶⁷ it must comply with Title IX. Therefore, single-sex classrooms are only permissible in the above listed circumstances.¹⁶⁸ If a private coeducational institution of higher education receives no federal or state financial assistance other than aid to students, conditions imposed by Title IX would not apply since both the institution and students would be free to avoid conditions by ending their participation in federal student aid programs.¹⁶⁹ Thus, the trigger mechanism for whether a school must comply with Title IX is whether it receives any direct or indirect federal funding.¹⁷⁰

3. The Fourteenth Amendment and Equal Protection

Single-sex education may also be challenged under the Fourteenth Amendment's Equal Protection Clause.¹⁷¹ The Supreme Court has not yet considered the constitutionality of single-sex classrooms within a private university.¹⁷² The Court, however, has concluded that justification for classification based on sex under the Equal

164. See *Grove City College*, 465 U.S. at 565 ("The economic effect of direct and indirect assistance [in the form of student loans] often is indistinguishable[.]").

165. See *id.* at 559 (describing "Grove City College [as] a private, coeducational, liberal arts college that sought to preserve its institutional autonomy by consistently refusing state and federal financial assistance").

166. See *id.* at 574 (providing that "[s]ince Grove City operates an 'education program or activity receiving Federal financial assistance,'" the U.S. Department of Education may properly demand that the college execute an Assurance of Compliance with Title IX).

167. Telephone Interview with staff member of financial aid office at Boston College, in Boston, Mass. (July 16, 1999).

168. See 34 C.F.R. § 106.34(a), (c), (d), and (e) (1999) (considering single sex classes permissible only when they involve contact sports, human sexuality, or chorus); see also *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982) (permitting single-sex classes as affirmative action to undo past discrimination only in certain narrow circumstances).

169. See *Grove City College*, 465 U.S. at 555 (implying that the key factor in determining whether a school is required to comply with Title IX is whether the school directly or indirectly receives federal funds).

170. 20 U.S.C.A. § 1681(a) (West 1998).

171. See U.S. CONST. amend. XIV (declaring that a state may not deny anyone under its jurisdiction equal protection of the laws).

172. See *Wilson*, *supra* note 7, at B11 (explaining that, despite five reprimands from the college over a twenty year span, since no student has actually filed suit against Professor Daly, Daly has never admitted a male into one of her classes).

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Protection Clause must be genuine, “not hypothesized or invented post hoc in response to litigation.”¹⁷³ Furthermore, the justification cannot rely on “overbroad generalizations about the different talents, capacities, or preferences of males and females.”¹⁷⁴

In addition to the federal Equal Protection Clause, some state constitutions have similar equal protection provisions or equal rights amendments that have been interpreted by their courts as more rigorous or restrictive than the federal Equal Protection Clause.¹⁷⁵ In *VMI*, the Supreme Court decided that under the equal protection analysis, state actors “controlling gates to opportunity may not exclude qualified individuals based on ‘fixed notions concerning roles and abilities of males and females.’”¹⁷⁶ Barring admission of men from Women’s Studies courses implies that only women can and should benefit from learning about the history of women and discrimination against them.¹⁷⁷ Although Daly offers one-on-one tutorials for men, this procedure is as questionable as saying VWIL offered opportunities equal to those available at VMI.¹⁷⁸

*B. Considering the Context: Women’s Studies Courses
Should be Coeducational*

There is little evidence that single-sex classrooms are *necessarily* better than coeducational classrooms.¹⁷⁹ A teacher’s duties include making sure her or his classroom runs smoothly and effectively. In response to the argument that a male presence in a classroom

173. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

174. *Id.* at 533. See Cindy Rodriguez, *College Tells Feminist to Accept Males or Quit*, CHI. TRIB., Mar. 7, 1999, at 6 (describing Daly’s failure to cite anything but her own personal observations as evidence that her justification for single-sex classes satisfied this requirement).

175. See GAO REPORT, *supra* note 23, at 15 (asserting that even if a single-sex education program is acceptable under federal law, it may still be challenged under state laws).

176. See *VMI*, 518 U.S. at 542 (citing *J.E.B. v. Alabama*, 511 U.S. 127, 139 (1994)) (stating that equal protection principles, as applied to sex classifications, indicate that “state actors may not rely on ‘overbroad’ generalizations to make ‘judgements about people that are likely to . . . perpetuate historical patterns of discrimination’”).

177. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982) (O’Connor, J.) (asserting that rather than compensating for discriminatory barriers faced by women, MUW’s policy “tends to ‘perpetuate the stereotyped view of nursing as an exclusively woman’s job’”).

178. See *VMI*, 518 U.S. at 548 (“VWIL affords women no opportunity to experience the rigorous military training for which VMI is famed. Instead, the VWIL program ‘deemphasize[s]’ military education and uses a ‘cooperative method’ of education ‘which reinforces self-esteem[.]’”).

179. See AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION, SEPARATED BY SEX: A CRITICAL LOOK AT SINGLE-SEX EDUCATION FOR GIRLS, at 9 (1998) [hereinafter AAUW, SEPARATED] (citing experts’ findings that merely creating single-sex classes, without additional teacher training and other support, is “probably not . . . enough to create meaningful change”).

inhibits women's participation,¹⁸⁰ it is the teacher's responsibility to teach in a sexually neutral manner and to encourage students to respect one another's opinions. Creating single-sex classrooms to "shield" women from men seems only to further the archaic stereotype that women need to be protected and cared for against rational masculine dominance.¹⁸¹

Supporters of coeducation claim that boys and girls learning together is the most "realistic" system where students prepare for participation in a democratic, mixed-sex society.¹⁸² Men need to learn about the history of sexism as much as, if not more than, women.¹⁸³ Just as Germans whose relatives participated in Hitler's Nazi regime need to learn about the racism of World War II, so do men need to learn about past and current sex discrimination, especially if they plan to participate in a multi-gendered workforce.¹⁸⁴

Applying Justice O'Connor's reasoning from *Hogan*, keeping men out of feminism classes perpetuates the stereotype that only women need to learn about women's history.¹⁸⁵

V. RECOMMENDATIONS

Although Daly feels certain her students perform better in single-sex classes,¹⁸⁶ the research findings are mixed.¹⁸⁷ According to sixteen researchers at a recent roundtable assembled by the American Association of University Women, there is no evidence that single-sex education, in general, "works" or is "better" than coeducation.¹⁸⁸ To

180. See Estrin, *Radical Feminist*, *supra* note 8, at *2 (providing Professor Daly's rationale for single-sex classes).

181. See HARWARTH ET AL., *supra* note 28, at 5 (conveying Dr. Clarke's professional belief that women enrolled in college courses are at a greater risk for a variety of physical ailments).

182. See SADKER & SADKER, *supra* note 6, at 248 (critiquing the anti-single-sex education argument that single-sex education provides an unrealistic educational experience for children).

183. See Miller, *supra* note 12, at 103 (articulating Boston College spokesman Jack Dunn's claim that Daly's no-male policy stifled campus debate and his assertion that "[Daly] wanted to preach to a converted group of followers, and that's dangerous.>").

184. See SADKER & SADKER, *supra* note 6, at 248 (describing the opinion that coeducational schools serve as a training ground for real life because real life also includes both men and women).

185. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 729 (arguing that excluding men from the nursing profession creates a self-fulfilling prophecy for men who do not enter the profession because society and our education system deem nursing a "woman's job").

186. See Estrin, *Radical Feminist*, *supra* note 8 (describing how Daly stopped admitting males into her classes in the early 1970s when she observed a negative effect on women).

187. See AAUW, SEPARATED, *supra* note 179, at 2 (citing studies which show both positive and negative effects associated with single-sex education).

188. See *id.* (concluding that "the 'success' or 'failure' of any K-12 single-sex education initiative is relative to a particular group of students in a particular setting and a given set of

be sure, some researchers have found that single-sex classes can be beneficial for young women because the students perceive the classroom as a safer environment where they feel more free to express themselves.¹⁸⁹ According to the AAUW, some studies suggest that single-sex classes provide an opportunity for young women to consider issues of sex identity and varieties of roles women can now consider in society.¹⁹⁰

Many experts argue that the positive findings for single-sex settings are at least partly attributable to aspects of the settings other than the sex of the students, including a small student body, a strong emphasis on academics, and a commitment to the school's mission and values.¹⁹¹

Students who matriculate at a coeducational, private school expect to enroll in whatever class they desire without being discriminated against because of their sex.¹⁹² The coeducational university experience can serve as a training ground for the realities of a multi-gendered world.¹⁹³ School officials have a proactive responsibility to ensure equal opportunities *before* a student has to file a lawsuit.¹⁹⁴

Assume, however, that Daly continues to believe single-sex classes are the only way to go. It is possible, in fact, to conduct single-sex classes and still comply with Title IX requirements.¹⁹⁵ For example, Boston College may implement a program similar to the one Connecticut implemented after seeking OCR's advice. The

academic or social objectives"); *see also id.* at 8 (explaining that a meta-analysis of studies on single-sex classes show mixed results).

189. *See id.* at 8 (describing that one University of Arizona researcher said "that for middle-school girls she has studied, the experience of the 'safe environment' of single-sex classes has been critical" to the development of self-identity).

190. *See id.* at 82 (explaining that "[e]vidence from both the literature and our research in the African-centered schools suggests that girls in single-sex classrooms can be encouraged to explore a variety of roles and options.").

191. *See* HOLLINGER, *supra* note 54, at 54 (referring to statistical studies that analyze the factors contributing to a school's effectiveness); *see also* AAUW, SEPARATED, *supra* note 179, at 5 (suggesting that positive outcomes of single-sex environments can be attributed to the *students* and not the environments, stating that by choosing a single-sex environment students make a "pro-academic choice").

192. E-mail Correspondence with Paula Caplan, Ph.D., Author and Visiting Professor of Psychology at Brown University (July 12, 1999).

193. *See* United States v. Virginia, 766 F. Supp. 1407, 1441 (1991) (declaring that experts agreed that if VMI admitted women, "the VMI ROTC experience would become a better training program from the perspective of the armed forces, because it would provide training in dealing with a mixed-gender army").

194. *See* Wilson, *supra* note 7, at A16 (providing Daly's lawyer's opinion, which stated that if Boston College did not agree with Daly's practices, it should have subjected her to formal disciplinary proceedings).

195. *See* Caplice, *supra* note 38, at 231 (arguing that single-sex schools are "not per se unconstitutional" because the Supreme Court has left room for educational diversity).

Connecticut Department of Education wanted to implement a new introductory technology course to be offered in two formats: an all-girl class and a coeducational class.¹⁹⁶ After consulting with OCR, Connecticut revised its plan such that it had a regular coeducational class and a class targeted at female students but accessible to all.¹⁹⁷ Since technically all students could enroll in either class, OCR found that the revision did not raise concerns about discrimination under Title IX.¹⁹⁸

VI. CONCLUSION

While some social science research certainly supports Daly's assumption of underlying sexism in coed classrooms,¹⁹⁹ women must learn how to cope with and overcome such obstacles. Single-sex education is not a long-term or a panacea solution to cure the problem of sexism in coed institutions.²⁰⁰ Separating men and women in classrooms does not necessarily correspond to greater academic achievement.²⁰¹

Daly claimed her classes did not violate Title IX because the law was designed to improve the situation of women; she feels her classes aim to do just that.²⁰² Her classes did violate Title IX, however, because Boston College, although private, is not exempt from federal

196. See GAO REPORT, *supra* note 23, at 9-10 (indicating that Connecticut later "revised the format so that it had a 'regular class and a second class targeted for female students but accessible to all students regardless of sex.'"); see also Cowan, *supra* note 128, at 182 (describing how some women's colleges allow male students to register for some classes without recognizing males as matriculated students as a way to avoid discrimination claims).

197. See GAO REPORT, *supra* note 23, at 9-10 (providing a description of Connecticut's revised single-sex plan, which incorporated OCR's legal advice).

198. See GAO REPORT, *supra* note 23, at 7 (explaining that OCR generally wishes to work out solutions with school officials rather than to litigate violations).

199. See SADKER & SADKER, *supra* note 6, at 11-14 (asserting that bias against girls and women persists from the elementary grades through graduate school). See generally Eileen McNamara, *Educator Steers Her Own Course*, BOSTON GLOBE, Feb. 28, 1999, at B1 (stating that only twenty-nine percent of tenured faculty members at Boston College are women).

200. See Caplice, *supra* note 38, at 281 (stating that one of the compelling criticisms of single-sex education concerns the fear that it does not prepare students to compete in the coeducational world after school). But see William Henry Hurd, *Gone with the Wind? VMI's Loss and the Future of Single-Sex Public Education*, 4 DUKE J. GENDER L. & POL'Y 27, 37 (arguing that single-sex schools produce more successful students).

201. See Young, *supra* note 38, at 30-31 (stating that, just as bad coeducational schools exist, so do bad single-sex schools exist, so that the sex of the students in a school cannot be the only factor determining success or failure).

202. See *Feminist*, *supra* note 1 (describing Daly's response to school officials who claim that her "separate but equal" courses violate federal anti-discrimination laws, that her classes serve as affirmative action for past discrimination against female students in higher education); see also Margo Harakas, *A Conversation with Mary Daly*, SUN-SENTINEL, Apr. 15, 2000, at 1D (providing Professor Daly's assertion that "the discussion moves faster if the women have a space of their own").

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regulations and because single-sex classes within a private university simply do not fall within the narrow exceptions to Title IX.²⁰³ Daly's affirmative action rationale fails because the women allegedly benefiting from her single-sex classes are not the same ones who were harmed from the initial discrimination in higher education.²⁰⁴ Since her classes perpetuate the social stigma that women are fragile, Daly's affirmative action claim has no merit.²⁰⁵ A jury trial was originally scheduled for late summer or early fall, 2000, to determine whether Boston College violated Professor Daly's due process rights.²⁰⁶ On Monday, February 5, 2001, the day before the case was to be heard, Daly and her attorney approached Boston College regarding a settlement.²⁰⁷ The agreement they reached stipulated that the parties would release a joint statement announcing that the case had been settled and that Daly had retired.²⁰⁸ Because of the settlement, interested observers will remain in suspense on the issue of the permissibility of single-sex classes within private universities.

In the end, Professor Daly merely pursued her beliefs and took advantage of the freedom afforded her by Boston College; the school

203. See Miller, *supra* note 12, at 103 (quoting Daly, "There is a great need for women's space."); Wilson, *supra* note 7, at A16 (providing the Middlesex Superior Court's response to Daly's preliminary injunction attempting to stop the college from suspending her courses and from treating her as retired by excluding her name from the 1999-2000 course materials). Judge Martha B. Sosman said, "there is no question that the school has adequate cause to terminate Daly' because of her violation of anti-discrimination laws." *Id.*

204. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982) (O'Connor, J.) ("It is readily apparent that a State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification.").

205. See *United States v. Virginia*, 518 U.S. 515, 533-34 (1996) (O'Connor, J.)

Sex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered,' to 'promot[e] equal employment opportunity,' [and] to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were to create or perpetuate the legal, social, and economic inferiority of women.

Id.

206. See Margo Harakas, *Radical Differences Boston College Says the Tenured Professor Broke School Policy by Banning Male Students From Her Feminist Ethics Class*, SUN-SENTINEL, Apr. 15, 2000, at 1D (explaining that Professor Daly's suit against Boston College alleges breach of contract, violation of tenure rights, and denial of academic freedom).

207. See Ana Marie Cox, *Feminist Theologian Who Barred Men From Her Classes Settles Suit Against Boston College*, Chron. of Higher Educ., Feb. 7, 2001, at 4 (describing the settlement agreement); see also Ana Marie Cox, *Feminist Theologian's Lawyer May Have Nullified Her Settlement With Boston College*, Chron. of Higher Educ., Feb. 9, 2001, at 3 (articulating Daly's response to the agreement).

208. See *id.* (asserting that Daly's attorney violated the terms of the agreement reached by the parties by issuing a press release calling the settlement a "victory" for Mary Daly). According to Gretchen Van Ness, Daly's attorney, the press statement resulted from a "misunderstanding." *Id.*

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basically allowed her to break the law for over twenty-five years.²⁰⁹ When well-known institutions of higher learning fail to enforce hard-fought federal anti-discrimination statutes, one wonders if there is any point in lobbying Congress to pass such legislation. Unfortunately Professor Daly's recently-settled case only concerned the issue of whether a tenure agreement existed between her and the school, although her refusal to stop teaching single-sex classes certainly would have come out in litigation.²¹⁰ Once again, although schools maintain a legal and ethical responsibility to uphold state and federal laws, apparently it requires litigation to force them to do so.²¹¹

209. See *Radical Feminist*, *supra* note 8 (observing that Daly believes that the school failed to enforce Title IX requirements in this instance for over twenty-five years).

210. See *Feminist Theologian at Boston College Challenges Retirement*, CHRON. HIGHER EDUC., May 28, 1999, at A8 (explaining the school's assertion that Daly entered into an agreement to retire, with which Daly disagrees).

211. See *Wilson*, *supra* note 7 (asserting that even though administrators complained to Daly several times over the years, they never actually forced her to allow men into her class because there was never a lawsuit against her).