THE TREATMENT OF WOMEN PRISONERS AFTER THE VMI DECISION: APPLICATION OF A NEW "HEIGHTENED SCRUTINY"

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INTRODUCTION

Through legislative initiatives and court decisions, the United States has attempted to eliminate all barriers based on gender. Discrimination based on gender is unconstitutional and state laws that grant preferential treatment to one gender over another are subject to intermediate scrutiny.¹ Until recently, however, courts were willing to uphold discriminatory treatment when the classification failed to perpetuate a stereotype.² Courts have refused to apply the stricter scrutiny standard in the areas of educational diversity,³ military combat,⁴ and prison segregation.⁵

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1. The Supreme Court first attempted to develop a higher standard of review for gender discrimination claims in the case of Frontiero v. Richardson, 411 U.S. 677 (1973), which involved a law requiring military women, not men, to show that their spouses were dependents in order to gain better housing and medical benefits. A plurality of the Court concluded that "classifications based upon sex, like classifications based on race, alienage, or national origin, are inherently suspect, and must therefore be subject to strict judicial scrutiny." Id. at 688.

2. The heightened scrutiny standard was refined three years later in Craig v. Boren, 429 U.S. 190 (1976), in which the Court struck down an Oklahoma statute that prohibited the sale of beer to men under the age of twenty-one and women under the age of eighteen, holding that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Id. at 197. This test would last until United States v. Virginia, 116 S. Ct. 2264 (1996), in which the Court held that maintaining an exclusively male, public military college violated the Equal Protection Clause. The Court significantly strengthened the second prong of its review by declaring that "all gender based classifications today warrant heightened scrutiny." Id. at 2269.

3. See Associated Gen. Contractors of California v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987) (holding that limited gender-based classification was acceptable only if included members suffer disadvantage related to the classification and if the classification did not reflect stereotypical notions of women).


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In the area of prisoners’ rights cases, courts have been reluctant to apply Equal Protection analysis altogether, developing instead a separate standard of review for prison regulations. This standard of review, until recently, was derived from the Due Process Clause, and maintained that prisoners retained some inherent rights. In 1995, the Supreme Court established a new “hands-off” approach to prison regulations and asserted that a prisoner only faces a deprivation of rights when a regulation “imposes atypical and significant hardship . . . in relation to the ordinary incidents of prison life.” Since then, the Court has expressed a preference for deferring to the states and to prison officials in managing the “volatile environment” of prison life.

Last year, the Court reversed its policy on the issue of educational diversity and ruled that a state-funded school may not prefer one gender over another in the interests of educational diversity. In *United States v. Virginia,* the Court held that although the State was willing to establish a women’s facility similar to the Virginia Military Institute (“VMI”), such a facility could never be equal to VMI because of VMI’s history, prestige and the benefits young male cadets derive from attending VMI. By holding that the alternative women’s facility was inferior to the male facility, the Court rejected Virginia’s argument that the admission of women cadets would destroy VMI’s .

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951 (1971) (stressing diversity in education as a legitimate goal justifying discriminatory treatment along gender lines). But see Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (striking the University’s policy of not admitting men into the nursing school where no male alternative was available and women were not victims of discrimination in the field of nursing).

4. See Rostker v. Goldberg, 453 U.S. 57 (1981) (using the statutory combat exclusion to justify a statute requiring only men to register for the draft); Schlesinger v. Ballard, 419 U.S. 498 (1975) (upholding statutory scheme that automatically discharged male naval officers who failed to receive promotion from lieutenant to lieutenant commander for a second time within nine years, but allowing female officers thirteen years to advance between the grades).

5. See Pargo v. Elliot, 894 F. Supp. 1243 (S.D. Iowa 1995) (holding that differing programs and policies for men and women within prisons did not constitute an equal protection violation).

6. See e.g. Webb v. Lane, 583 N.E.2d 677 (Ill. App. Ct. 1991) (holding that the Department of Corrections’ regulation requiring seizure of unauthorized currency from an inmate did not violate the Due Process Clause).

7. See Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) (stating that “a prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law”).


9. Id. at 2299 (stating that the “hands-off” doctrine is necessary to provide flexibility to prison officials to handle safety and security issues, and the penological purpose of prison discipline, and that courts are ill-equipped and lack expertise in administrating prisons).

10. 116 S. Ct. 2264 (1996) [hereinafter “VMI”].
unique "rat line" structure. The Court held that even if certain gender-based stereotypes are true in the majority of cases, they may not be used when applying Equal Protection analysis.

In so holding, the Court applied a new standard of heightened scrutiny, strengthening the standard by which state action must meet the stated legitimate interest. Since the Court no longer recognizes educational diversity as a sufficient governmental interest to withstand Equal Protection scrutiny, it seems as though gender discrimination will also vanish from the area of prison segregation. This comment argues that the VMI decision mandates that gender segregation in the prison system be abandoned. Women and men are generally housed in different facilities in state and federal prisons, where women receive less programming and training, are farther away from their families, and are housed without regard to security level. Although the Court has generally applied a "hands-off" standard to prison officials, this comment argues that it is unconstitutional to house male and female prisoners in prison facilities that are not equal. The comment also argues that if states are unwilling to improve female facilities, the Court must mandate that women and men be housed together so that women may benefit from the same facilities and programming as men.

Part I of this paper examines two cases from the lower courts and the problems currently faced by women housed in unequal facilities. Part II discusses possible arguments female prisoners may pursue in challenging their unequal prison facilities, evaluating the advantages and disadvantages of whether to challenge segregation itself, or simply the inequality under Title IX. Part III further discusses the new standard of review developed under the VMI case, and Part IV argues that given this new standard, desegregation of prison facilities may be the only way to ensure that women prisoners receive the same opportunities as their male counterparts.

11. Id. at 2270. Virginia argued that women are less adversarial than men, respond more sensitively to harassment and require more privacy. This would interfere with the "rat line" structure, which is "an extreme form of the adversative model, comparable in intensity to Marine Corps boot camp." Id.

12. Id. at 2280.

13. Id. at 2274.

PART I—DECISIONS IN THE LOWER COURTS

On its first day of the 1996 session, the Supreme Court denied certiorari to a case filed by inmates of the Iowa Correctional Institute for Women. These women prisoners unsuccessfully argued in the court below that women prisoners deserve educational and vocational training opportunities equal to those afforded to male inmates pursuant to the Equal Protection Clause of the Fourteenth Amendment. This was not the first time that a class of women prisoners asserted such a claim, nor was it the first time such a claim was denied. It is possible that the Supreme Court will soon be faced with this issue again.

The claim itself presents interesting Constitutional questions regarding the standard of treatment owed to women in a correctional setting, and whether correctional facilities may be segregated by gender at all. In Pargo v. Elliott, the plaintiff class of inmates at the Iowa Correctional Institute for Women ("ICIW") sought declaratory and injunctive relief by claiming that the policies, programs, services, and facilities at the state's only all-female correctional institution, differed substantially from the nine male facilities in the state. In deciding upon this claim, the district court first sought to determine whether the women prisoners were “similarly situated” to the male prisoners who allegedly received preferential treatment.

15. Id.
16. U.S. CONST. amend. XIV, § 2 (stating "No State shall make or enforce any law which shall... deny to any person within its jurisdiction the equal protection of the laws.").
19. See infra note 79 and accompanying text (noting a possible appeal to the Supreme Court).
20. Pargo v. Elliott, 894 F. Supp. 1243, 1252-53 (S.D. Iowa 1995) (discussing that the women did not challenge the segregation of prisoners by gender but the difference in policies, programs, services, and facilities between the male and female prisons).
21. See id. at 1252. (discussing the application of the correct standard to apply to the facts in determining whether the female prisoners were similarly situated to the male prisoners).
court used population levels of the respective facilities, average security levels of the prisoners, types of crimes committed, and the average length of the sentence as factors for deciding whether male and female inmates were similarly situated to each other. In addition, the district court considered "special characteristics" of the populations, concluding that the women were "more likely to be single parents with primary responsibility for child rearing" and tended to be victims of sexual or physical abuse, whereas men prisoners were "more likely to be violent and predatory."

After considering all of these factors, the district court determined that the female inmates were not "similarly situated" to male inmates in the Iowa Department of Corrections system and that any differences in programs were a direct result of differences in the populations. Because the court found that female prisoners were not similarly situated to male prisoners, it determined that no Equal Protection claim existed.

22. See id. at 1254 (stating that these factors may be inherently unfair since women facilities are generally smaller and encompass many security levels). As Appendix A to the Court's decision which showed, 300 women are incarcerated in the Iowa prison system comprising only six percent of the total prison population. See Klinger v. Department of Corrections, 31 F.3d 727, 731-32 (8th Cir. 1994), cert. denied, 115 S. Ct. 1177 (1995) (using these same factors to decide if women prisoners were "similarly situated" to male prisoners).

23. Pargo, 894 F. Supp. at 1261 (noting that female inmates may have "special needs" that require different programs from male inmates).

24. Id. See also Anne Havke, Alternative Sentences: A Just Women's Issue, Nat'l L.J. (Jan. 1996) at A19 (finding that "of the 90,000 female inmates in the U.S. today, approximately 67% are primary or sole caretakers" for their children).

25. Pargo, 894 F. Supp. at 1261 (despite noting that female inmates were more likely to be victims of sexual abuse and therefore different from male inmates, the court acknowledged that ICIW did not have a sex abuse treatment program for its inmates. This was because administrators stated that there was no need for such a program. The court, however, failed to see that the lack of need indicated that the female inmates were not so dissimilar to the males.).


27. Pargo, 894 F. Supp. at 1261 (noting that ICIW did offer specific programs to suit the women on issues such as domestic violence, prostitution, incest, family preservation, anger management and self-esteem).

28. See id. at 1258 (calling the women prison population a "microcosm of [the] entire prison population," providing greater variety and challenges to prison administrators).

29. Id. at 1252. The court rejected the plaintiff's counter argument that if not similar as a whole, the women prisoners were similarly situated to the men as divided by their security classifications. The court found that female inmates will always be different from male inmates simply by reason of population size, smaller facilities, and that a better way to determine similarity is on an individual prisoner's length of sentence and type of crime committed. Regardless, the court found that no matter how one examined the populations, either by gender or by classification, female inmates and male inmates were not similarly situated. Id. at 1253-54.

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The district court, however, did not end its analysis there. Rather, it proceeded to discuss the differences between the male inmate programs and the female inmate programs to determine if gender-disparate treatment existed based on an invidious purpose and if so, if such differential treatment was rationally related to a legitimate state interest. In deciding this issue, the court gave deference to the prison officials’ decisions and, thus, only applied a rational basis review.

After reviewing all of the programs at ICIW and comparing them to various programs at male facilities, the court concluded that “the challenged policies are gender neutral in design and application.” The court held that prison officials had a legitimate reason for treating male and female prisoners differently. However, the court determined that the different treatment was not related to a prisoner’s gender. For instance, among the challenged policies considered, the court examined security classification of inmates for purposes of institutional incarceration. Classification determines

30. See id. at 1254 (explaining that the court used “population, average security levels, types of crimes, and average length of sentence as key factors” in determining if there was an invidious purpose to the gender-disparate treatment); see also Personnel Admin. of Mass. v. Feeney, 442 U.S. 256 (1979) (holding that the plaintiff must show that the discrimination has an invidious purpose).

31. Pargo v. Elliott, 894 F. Supp. 1243, 1262 (S.D. Iowa 1995) (citing Bills v. Dahm, 32 F.3d 333, 336 (8th Cir. 1994), and noting that a court “must proceed to consider whether differential treatment has a rational relationship to a legitimate state interest”). Pargo, 894 F. Supp. at 1262. See Parham v. Hughes, 441 U.S. 347 (1979) (upholding a Georgia law that denied a biological father, but not the mother, the right to recover in a wrongful death action for the death of an illegitimate child). The “rationally related” standard was developed in Reed v. Reed, 404 U.S. 71 (1971), which provides great deference to state regulations.

32. See Pargo, 894 F. Supp. at 1262.

33. Id. at 1264.

34. Id. at 1265.

35. Id.

36. See id. 1265-72 (S.D. Iowa 1995) (examining other policies including: access to courts; libraries and legal materials; annual classification reviews; screening for jobs; rate of pay for work allowance; decisions to segregate HIV/AIDS inmates; movie censorship; access to counselors; access to canteens; long-term rehabilitative treatment, educational opportunities and vocational training; and visitations).

The majority of these policies were substantially equal to the policies of male facilities and based on the facts cited in the court’s opinion, the plaintiffs’ claims seemed somewhat frivolous. For example, the plaintiffs argued that their services to copy legal materials were not equal to the services provided at male institutions. At ICIW, women must drop off their photocopying requests to staff, which is done on a first come, first serve basis with priority given to court documents under deadlines. Photocopying is subject to a limit, but according to an ICIW librarian, no one has ever reached that limit. On the other hand, some male institutions impose limits on photocopying while other facilities charge male inmates fifteen cents per copy. Id. at 1269.

A further example of facts that the court used to show that the female prisoner’s claim was frivolous was based upon the female inmates’ argument that they received unequal treatment when it came to watching movies. The plaintiffs contended that they were unfairly
where an inmate will be housed. It is based on the seriousness of the offense, an inmate's prior record, and his or her personal and behavioral characteristics. The court concluded that these factors were gender neutral and that both women and men were classified in a fair manner. The court also stated that prison officials have a legitimate need to classify inmates in order to accommodate security and rehabilitation interests and that the factors relied upon to classify prisoners were rationally related to legitimate ends. What the court failed to recognize was that although there may be objective criteria in deciding an inmate's security classification, the fact that male inmates will be sent to one of nine facilities, whereas women will only be sent to ICIW, is a purely gender-based classification. For the women prisoners, the security classification is a mere formality when it comes to deciding where they will be housed.

The court recognized that there were some differences between the programs offered at the men's and women's facilities. However, the court determined that there was "substantial parity" between the programs offered to male and female inmates and that "substantial parity" was all that was constitutionally required. Further, the court determined that educational and vocational training programs did not have to be equal, but merely substantially similar.

The court held that it was "reluctant to substitute its judgment for that of prison administrators in reviewing day-to-day program and treated because movies are censored at ICIW. Although ICIW does show R-rated movies, administrators ban movies that show explicit violence towards women or depict women as subordinate. In contrast, at two male institutions, R-rated movies are not shown. Id. at 1271.

Other claims are not frivolous such as educational opportunities and vocational training and long-term rehabilitative treatment, and those issues will be discussed in the accompanying text.

37. See id. at 1265 (finding that a person sentenced to prison in Iowa, regardless of their sex, is assigned a custody score based on written objective standards imposed. The goal is to "place inmates in the least restrictive security level consistent with [the prisoner's] security and treatment needs.").

38. Pargo v. Elliot, 894 F. Supp. 1243, 1265 (S.D. Iowa 1995) (holding that there was no evidence supporting plaintiff's claim of invidious discrimination).

39. See id. at 1278 (noting the legitimate end to be one of security and rehabilitation).

40. See id. at 1265 (maintaining that it is the custody score that determines where male and female inmates will be sent, not gender).

41. See id. at 1273 (recognizing the absence of a sex offender treatment program at ICIW, though present at the male facilities, and noting that the treatment programs for substance abuse, criminal thinking and special needs were generally shorter at ICIW than at the male facilities).

42. Id. at 1279.

43. Pargo v. Elliot, 894 F. Supp. 1243, 1275-76 (S.D. Iowa 1995). Iowa offers some educational and vocational training at all of its facilities, usually in the form of literacy training, GED or high school courses, and social skills training. The longer courses have been found to be more helpful to the male inmate in securing a job after being released. Id.
management decisions.” It concluded by stating that the plaintiffs had not established a “similarly situated” relationship and since there was no evidence of invidious gender discrimination at ICIW, there was no justified Equal Protection claim. The court of appeals affirmed the district court's findings and held that any differences found between the male and female prisons were “rationally related to legitimate penological interests, such as security and rehabilitation.”

In Women Prisoners at the Dist. of Columbia, Dept. of Corrections v. District of Columbia (“Women Prisoners”), female prisoners at Lorton Minimum Security Annex (“Annex”), the Correctional Treatment Facility (“CTF”) and the Central Detention Facility sued the District of Columbia, requesting declaratory and injunctive relief from policies violating the Fifth and Eighth Amendments and Title IX. The women prisoners argued that because they were women, they were receiving inferior health care, fewer educational and vocational training opportunities, and less recreational time than male prisoners in the District of Columbia Department of Corrections (“DOC”). The district court found that DOC was in violation of D.C. Code Ann.

44. Id. at 1291 (quoting Klinger v. Department of Corrections, 31 F.3d 727, 732 (8th Cir. 1994) and noting that holding prison administrators liable for discrepancies in programming “may seriously hamper [their] ability to... adopt innovative solutions to the intractable problems of prison administration”). See also Turner v. Safley, 482 U.S. 78 (1987) (holding that when a prison regulation impinges upon a prisoners constitutional right, courts should give deference to prison administrators by applying a rational basis review). But see Pitts v. Thornburgh, 866 F.2d 1450, 1453 (D.C. Cir. 1989) (distinguishing the issue in Turner that dealt with the day-to-day operation of a prison, from the issue of general budgetary concerns and policies of prisons that effect women and not men, and applying heightened scrutiny).

45. Pargo, 894 F. Supp. at 1291.

46. Pargo v. Elliott, 69 F.3d 280, 281 (8th Cir. 1995). Again, the female inmates asserted that they were similarly situated to male inmates in Iowa either as a whole or by security classifications.


48. In the original “Women Prisoners” case, the United States District Court for the District of Columbia held that the defendants were in violation of constitutional and D.C. statutory requirements and issued a Memorandum Opinion and Order to correct the specific violations. When their motion was denied, defendants subsequently filed a Motion to Stay and/or Modify the Order and appealed to the court of appeals. The court of appeals ordered that the case be held in abeyance pending additional proceedings on the defendants' Motion to Stay in the district court. The district court then granted a temporary stay for 30 paragraphs of the order and ordered the parties to negotiate and agree on those 30 paragraphs. The parties negotiated 26 out of the 30 paragraphs. The district court then considered the remaining four paragraphs concerning health care, apprenticeships and recreation time. Its decision, for the purposes of this paper, will be referred to as "Women Prisoners".

49. Women Prisoners, 899 F. Supp. at 664-65. See also supra notes 23 and 29 (comparing the alleged discrepancies at ICIW and the male prisons in Pargo v. Elliot, 894 F. Supp. 1243 (S.D. Iowa 1995)).
§ 24-442 in providing inadequate health care to the women prisoners. It determined that improved obstetrical and gynecological health care and education were necessary to prevent future harm to the women in DOC's custody.

The court applied an Equal Protection analysis to the claims involving educational and vocational training and recreation time. The court found that the women inmates housed at the Annex were similarly situated to men housed at the Minimum Facility and women at CTF were similarly situated to men at Central, Medium and Occoquan by virtue of their custody levels, sentences and the purposes of incarceration. The court held that the DOC provided the women at Annex and CTF with work details and training, industries, recreation, and education that were inferior to the opportunities provided to the men.


51. Id. See also D.C. Code Ann. § 24-442 (1981) (providing that "[The] Department of Corrections . . . shall . . . be responsible for the safekeeping, care, protection, instruction, and discipline of all persons committed to [facilities under its jurisdiction].").

52. See id. at 665 (ordering the following: the defendants shall hire within 90 days a health educator with appropriate training in obstetrics and gynecology in a half-time position who shall provide clinical and health education, and an additional nurse practitioner, physician's assistant with special training in obstetrics and gynecology, or nurse midwife for clinical services at CTF; and the health educator shall implement an obstetrical and gynecological health education program and health education materials should be made available in the library).

53. See Women Prisoners, 877 F. Supp. 634, 678 (D.D.C. 1994) (showing how originally, the District Court bypassed the plaintiffs' constitutional claims and decided the education issues under Title IX); see also infra notes 98-110 and accompanying text (discussing the application of Title IX to a claim challenging the unequal education and vocational programs for women prisoners).

54. See id. at 675 (explaining how the female prisoners and male prisoners are similarly situated at the respective facilities).


56. See id. at 670-71 (noting that the women at the Annex are employed as maintenance workers, housekeepers, clerks and librarians, but do not perform chores like carpentry or plumbing as the men do at Minimum). The court found that work training opportunities are often denied to the women at the Annex due to the defendants' inability to complete paperwork, insufficient transportation and failure to adequately publicize the opportunities.

57. See id. at 672 (noting that as for the women at CTF, the opportunity to form prison industries, defined as businesses conducted by prisoners who sell what they produce to government agencies, which was present at the male prisons, was absent at CTF and that Central offers ten, Medium two, Occoquan one and CTF none).

58. See id. at 671-72 (finding that the recreational facilities at the Annex were inferior to those at Minimum without justification and that the women at CTF were only provided one hour of recreation time a day, which would be considered punishment at the male facilities where they have two to four hours of recreation a day).

59. See Women Prisoners, 877 F. Supp. 634, 659 (D.D.C. 1994) (noting the inequality where women at CTF have access to only an associate degree, but the men at Central, Medium, and Occoquan may earn bachelor degrees). But see Women Prisoners, 899 F. Supp. 659, 679 (D.D.C. 1995) (ordering defendants to provide access to higher educational opportunities for CTF women).
Finding inequalities among the policies and programs at female and male institutions, the court proceeded to apply heightened scrutiny. Under this heightened standard of review, the court held that the DOC provided no legitimate interest for treating female and male prisoners 'similarly situated' in unequal ways. The court rejected the DOC's argument that the differences in treatment between female and male prisoners, especially in the areas of recreation, prison industries and work details, were primarily attributable to differences in the physical structure of the various facilities. The DOC maintained that the proportion of prisoners to the limited space, personnel, and other DOC resources placed high demands on prison administrators who deserved discretion in deciding and implementing programs for inmates.

The court rejected the DOC's argument that implementing the court's order would cause irreparable damage to the District of Columbia, diverting necessary funds away from city projects. The court concluded that the public interest in having "women prisoners leave jail reasonably healthy and with the capacity to hold productive jobs instead of returning to jail for a publicly financed incarceration" outweighed the interest in saving the public money necessary to implement the order.

60. See Women Prisoners, 899 F. Supp. at 670 (citing Pitts v. Thornburg, 866 F.2d 1450, 1459-54 (D.C. Cir. 1989) (holding that heightened scrutiny was the appropriate standard of review, reasoning that the issues in Pitts involved "general budgetary and policy choices" that were non-administrative in nature and that equal protection claims, as opposed to personal rights challenges, deserved a stepped-up scrutiny)); see also Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that classifications based upon gender must serve important governmental objectives and must be substantially related to achievement of those objectives). But see Turner v. Saley, 482 U.S. 78 (1978) (applying the reasonableness standard when reviewing prison regulations).

61. See Women Prisoners, 899 F. Supp at 671 (stating that "[i]n the area of work training, the unequal participation of women is due to Defendants' inability to complete paperwork, insufficient transportation and failure to adequately publicize those opportunities which are available. There is no important government objective being served." citation omitted).

62. See id. at 671-72 (stating that using physical structures to justify disparate treatment "merely begs the question," and noting that the need for women to acquire skilled details destroys the physical structure justification).

63. Id.

64. Id. at 676-78 (ordering prison administrators to provide equal opportunities for both female and male prisoners, including apprenticeships, educational programs and equal recreation time).


The court of appeals vacated the majority of the district court's order. The court of appeals decided that, although the lower court had jurisdiction to decide the constitutional claims asserted by the plaintiffs, the threshold question of whether the women prisoners were "similarly situated" to the male prisoners was wrongly decided by the district court. The court of appeals criticized the lower court's failure to consider the "special characteristics" of the male and female inmates. Noting that there are "striking disparities" between the sizes of the male and female prison populations, the court held that it is not surprising that there are fewer or different programs offered at women's facilities. It also criticized what it called a "program by program method of comparison." The court found that contrary to the lower court's holding, a DOC decision to provide male, not female, inmates access to any given program did not violate Equal Protection principles. It held that giving females access to such programs would drastically interfere with the duties and responsibilities of prison officials. Instead, the court of appeals opted to give

67. Women Prisoners v. District of Columbia, 93 F.3d 910, 932 (D.C. Cir. 1996), cert. denied, 117 S. Ct. 1552 (1997) (vacating those portions of the Order addressing sexual harassment, obstetrical and gynecological care, population caps, educational and vocational training, fire safety and recreation time; declaring that the District Court abused its discretion in exercising supplemental jurisdiction over the local claims where the plaintiffs' constitutional claims represented a new question of law). [Hereinafter Women Prisoners].

68. Id.

69. Id. (quoting United States v. Whiton, 48 F.3d 356, 358 (8th Cir. 1994) (stating that the threshold inquiry in evaluating an Equal Protection claim is . . . to "determine whether a person is similarly situated to those persons who allegedly receive favorable treatment") and applying that same standard to Title IX cases); see also Plyler v. Doe, 457 U.S. 202, 216 (1982) (stating that the "Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.").

70. See id. at 925 (finding that eighty-two percent of women incarcerated by the District of Columbia are single-parents with primary responsibility for their children and only seven percent are serving sentences for violent crimes); see also supra note 29 and accompanying text (discussing the use of gender-based stereotypes when applying an Equal Protection analysis).

71. See id. (noting that Minimum has a population of 936 male inmates, Annex 167 female inmates and that there are 271 female inmates at CTF compared to 1,373 male inmates at Central, 1,016 at Medium, and 1,767 at Occoquan).

72. Women Prisoners II, 93 F.3d 910, 924 (D.C. Cir. 1996) (arguing that differences in the facilities justify the inferior treatment accorded to women is "notably circular."). But cf. id. at 946-957 (Rogers, J., dissenting) (noting that "two people [who] commit the same crime . . . in all respects—criminal history, family circumstances, education, drug use, . . .—they are identical," except for gender, and that "[s]olely because of [gender], they are sent to different facilities at which the man enjoys superior programming options. . . . The anomalous result is that the more unequal the men's and women's prisons are, the less likely it is that this court will consider differences in the prison experiences of men and women unconstitutional.").

73. Id. at 924-26 (discussing the comparison of the differences in treatment in prison programs for men and women prisons).

74. See id. at 926 (declaring that where one facility offers a specific program, another facility may offer a different program or no program at all without offending the Constitution).
great deference to prison administrators. In cautioning federal courts to move promptly when confronting serious violations in the law by local prison officials, the court referred to the recent passage of the Prison Litigation Reform Act. It held that this legislation was Congress' attempt to curtail judicial administration in prisons.

As of this writing, it is unclear how the plaintiffs in Women Prisoners will proceed. It is unlikely that this issue will disappear. The VMI decision gives female prisoners more ammunition for proceeding to the Supreme Court. If the plaintiffs request certiorari, the Supreme Court should hear arguments and decide this issue by applying the standard of review formulated in United States v. Virginia. The case of Women Prisoners, unlike Pargo, involves drastic discrepancies between the treatment of male and female inmates and would provide a stronger factual basis on which to decide this issue.

75. Id. at 926-27.
76. Id. at 919-20 (citing Rhodes v. Chapman, 452 U.S. 337, 351 n.16 (1981)); see also, Lewis v. Casey, 116 S. Ct. 2174 (1996) (stating that "considerations of comity . . . require giving the States the first opportunity to correct errors made in the internal administration of their prisons"); Bell v. Wolfish, 441 U.S. 520 (1979) (maintaining that "the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial"); Procunier v. Martinez, 416 U.S. 396, 404-05 (1974) (holding that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform."); Preiser v. Rodriguez, 411 U.S. 475 (1973) (arguing that "it is difficult to imagine an activity in which a State has a stronger interest . . . than the administration of its prisons").
77. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-77 (1996). See Harvey Berkman, Prisoners' Rights Lawyers Plan Attack on New Law, NAT. LJ., May 20, 1996, at A14 (explaining that the Prison Litigation Reform Act first requires federal courts to find a constitutional violation before entering remedial orders or accepting settlement negotiations; secondly, opens existing orders and consent decrees subjecting them to immediate termination pending a constitutional violation; and thirdly restricts prisoners' access to courts by abandoning waivers of court fees and requiring prisoners to exhaust administrative remedies before filing in court); see also Prisoners' Rights Legislation: Hearings Before the Sen. Comm on the Judiciary, 104th Cong. (1996) (statement of Walter J. Dickey, Prof. of Law, Univ. of Wis., Madison) (advocating that the importance of prison litigation is that it alerts the State to prison conditions and that without access to the courts, many consent decrees that have improved prisoners' lives would not have been possible).
79. See Toni Locy, Ruling Voided on Treatment of D.C.'s Female Prisoners; Judge Abused Discretion, Appeals Panel Says, Wash. Post, Aug. 31, 1996, at A1 (reporting that attorney Peter J. Nickles, who represented the plaintiffs in Women Prisoners, has several options on which to proceed, and noting that Nickles may return to the District Court and ask for a decision on the Eighth and Fourteenth Amendment issues only or seek a rehearing in front of the entire appellate court with a possible appeal to the Supreme Court, or file a new law suit in D.C. Superior Court).
80. Id.
81. 116 S. Ct. 2264, 2275-76 (1996) (requiring the state to show that the "[challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives'".
82. See supra notes 27, 34, 41 and 47 and accompanying text (stating the differences between female and male facilities in the cases of Pargo and Women Prisoners, and showing greater disparity of treatment of women).
PART II—POSSIBLE ARGUMENTS IN CHALLENGING INEQUALITY

A. Challenging Gender-Segregated Prisons

In both Pargo and Women Prisoners, the women inmates did not challenge the policy of segregating female prisoners from male prisoners in correctional institutions. Because this facial classification was not challenged, the courts in Pargo and the appellate court in Women Prisoners refused to apply heightened scrutiny to any difference which might have occurred in programming.83

The question then becomes whether women would be better off challenging the facial classification of segregating women from men in order to be housed with men, where better facilities, services, and programs exist.84 Because women comprise only four percent of the total state and federal prison population,85 prison administrators are unlikely to devote a large amount of resources to their facilities and programs.86 As a result, female prisoners suffer from inferior programs, conditions of confinement,87 and health care.88 Many states only operate one correctional institution for women.89 Hence,

83. See supra note 20 (stating that the female prisoners filed their complaint based upon the differential treatment they received but not based upon the separations of the sexes).

84. See Rosemary Herbert, Women Prisoners: An Equal Protection Evaluation, 94 Yale L.J. 1182 (1985) (arguing that since female prison populations are smaller than male populations, segregated female institutions will necessarily be inferior to male institutions because of lack of funding and other resources). Herbert notes that the underlying reasons cited for segregated prisons are costs of co-ed facilities, special needs of women inmates, privacy rights, and prison security. Applying an intermediate standard of review to the segregated prison systems, Herbert concludes that none of these objectives are sufficiently related to gender-segregation to withstand Equal Protection analysis. But see Dothard v. Rawlinson, 433 U.S. 321 (1977) (finding that limiting women to competing equally with men for only 25% of the correctional counselors positions in Alabama prisons by height and weight requirements was permissible, due to the large number of sex offenders); Pargo v. Elliott, 894 F. Supp. 1243, 1264 (S.D. Iowa 1995) (maintaining that women and men inmates were not similarly situated and that differing programs and policies for women and men did not result in an equal protection violation); Klinger v. Department of Corrections, 31 F.3d 727, 733 (8th Cir. 1994) (holding that segregation of prisons on the basis of gender is clearly constitutional).


86. Id.

87. See Beverly R. Fletcher and Dreama G. Moon, Conclusions, in WOMEN PRISONERS: A FORGOTTEN POPULATION, 147, 147-50 (Beverly R. Fletcher, Lynda Dixon Shaver, and Dreama G. Moon eds.,1993) (noting that due to the small female prison population, little research is being done on the conditions of confinement of female inmates).

88. See Kim Marie Thorburn, Health Care in Correctional Facilities, 163 West J. Med. 560, 562 (1995) (reporting that a 1992 survey of 85 state and federal prisons indicated that more than 15% did not have on-site gynecological care).

89. AMERICAN CORRECTIONAL ASS., 1995 DIRECTORY: JUVENILE & ADULT CORRECTIONAL DEPARTMENTS, INSTITUTIONS, AGENCIES & PAROLING AUTHORITIES. (1995) (indicating that Alabama, Kansas, Maine, North Dakota, South Dakota, Vermont, and West Virginia operate no
women prisoners are more likely than men to be incarcerated farther from their homes and families and to spend their entire sentence in one facility. The existence of only one facility causes women of different classifications to be housed together and subject to the same rules, so that minimum risk female offenders are treated in the same manner as maximum risk female offenders.

Establishing more gender integrated correctional facilities may help women overcome some of these problems. For instance, if women were housed in facilities with men based on the types of crimes committed, security levels, and lengths of sentences, women would probably have access to treatment programs specifically suited for them and might have more opportunities for educational and vocational training. Further, proponents of integrated prisons maintain that a cross-gender environment is more conducive to rehabilitation, allowing the prisoner to work on social behavior in a setting more similar to the outside community.

It should be noted that there are several disadvantages to an integrated correctional system. First, although some reports suggest that rape and sexual assault is no greater at gender-integrated institutions than at single gender institutions, heterosexual activity has very
different consequences than homosexual activity. For instance, integrated facilities may produce unwanted or unsupported pregnancies, and may lead to increased prostitution and pimping. Second, some argue that the rehabilitation of women prisoners would suffer if they were housed with the very men who may have played a role in their incarceration. Third, the sheer difference in numbers between female and male prisoners would put women in an integrated prison at risk of exploitation and physical harm. Although integrated prisons may have some rehabilitative benefits, they may present a new set of problems. Further, the threat of unexpected pregnancies in the correctional facilities context may be enough for courts to uphold gender segregation.

B. Pursuing a Title IX Claim

Women prisoners can challenge unequal education and vocational programs under Title IX without challenging the facial classification of gender-segregation. Title IX of the Education Amendments of

98. See Karlene Faith, Unruly Women, The Politics of Confinement and Resistance 136 (1993) (discussing how in some gender-integrated prisons, officials would only give women inmates who were granted conjugal visits birth control, thereby causing women inmates to fear their male counterparts). But see Charles F. Campbell, Co-corrections, FCI Fort Worth after Three Years, Coed Prisons, 83, 89 (1980) (indicating that compared to the outside community, the rate of unexpected pregnancies in a gender-integrated prison is much lower).

99. See Rubak, supra note 93, at 46 (stating that female inmates ‘sell’ sex in exchange for cigarettes and other commodities).

100. See Esther Heffernan & Elizabeth Krippel, A Coed Prison, in Coed Prison, 110, 119 (John Ortiz Smyklu ed., 1980) (arguing that women inmates housed at gender-integrated facilities are lost in the midst of male offenders and have no program of their own in which they can develop leadership roles and cohesive structures that would provide them with alternative life-styles).

101. See Herbert, supra note 84 (stating that integration may threaten the safety of women, but women still deserve better than systematic segregation under the Constitution).

102. There is some evidence that gender integrated prisons may be more concerned with ending homosexuality in single-gender institutions, than with rehabilitating its women population. See Campbell, supra note 98, at 94 (explaining how the first gender-integrated federal correctional facility came to be in Fort Worth, Texas in 1971, and stating that the pervasive homosexuality at single-gender facilities demanded an integrated system: "We found ourselves strongly subscribing to the notion that heterogeneity was an essential concept for us, and moreover, that co-correction was an essential ingredient of this heterogeneity and at the same time dependent on it.").

103. Cf. Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (holding that a state may prohibit all use of public facilities and publicly-employed staff in abortions); Dothard v. Rawlinson, 433 U.S. 321, 336 (1977) (upholding an Alabama regulation prohibiting women from working as guards in contact positions at all male prisons asserting that the guard’s "very womanhood would ... directly undermine" security at the male prison).

104. See Jeldness v. Pearce, 30 F.3d 1220 (9th Cir. 1994) (having a case with facts very similar to that of Women Prisoners, this court applied Title IX to the educational programs in state prisons); see also Canterino v. Wilson, 546 F. Supp. 174, 210 (W.D. Ky. 1982), vacated on other grounds, 869 F.2d 948 (6th Cir. 1989) (suggesting further that Title IX, at least in the context of the prison environment, requires a more demanding level of compliance than the Equal
1972 provides 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 . . . ." In *Jeldness v. Pearce*, the court held that under Title IX, state prisons receiving federal funds had to make "reasonable efforts" to offer the same educational opportunities to women as to men. The court based its holding on the statutory language and legislative history of the provision. Some argue that women prisoners would be better off challenging inequalities in the prison context under Title IX rather than under the Equal Protection Clause of the Constitution. This argument is based on the fact that the language of Title IX is a "mirror image" of Title VI of the Civil Rights Act of 1964. In applying Title VI, courts are required to apply strict scrutiny to any action that

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Protection Clause because its language is identical to that of Title VI; Beehler v. Jeffes, 664 F. Supp. 951, 940, 943 (M.D. Pa. 1986) (holding that female prisoners had a cause of action for damages against state prison officials under Title IX in light of their allegations of intentional discrimination).


106. *Jeldness*, 30 F.3d at 1229. See *Women Prisoners v. Department of Corrections*, 899 F. Supp. 659, 668 (D.D.C. 1995) (holding, that despite prison officials’ argument that Title IX does not reach prison industries, recreational activities and work training programs, that Title IX would encompass a "sweep as broad as its language"); see also Christine M. Safarik, *Constitutional Law—Separate But Equal: Jeldness v. Pearce—An Analysis of Title IX Within the Confines of Correctional Facilities*, 18 W. NEW ENG. L. REV. 337 (1996) (arguing that women prisoners may seek remedies from discrepancies in prison treatment under Title IX).

107. *Id.* See also *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 521 (1982) (holding that when a statute explicitly lists exemptions the courts should not imply others) and noting that Congress twice amended Title IX after commencement of challenges by women prisoners, by stating that if Congress did not want prisons to comply with Title IX, it had the opportunity to amend the legislation).

108. *Id.* See also *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 521 (1982) (holding that the words of Senator Bayh, sponsor of Title IX legislation, serve as a statement of the purposes of Title IX); 118 CONG. REC. 55808 (1972) (statement of Sen. Bayh) (explaining that Title IX is "an important first step in the effort to provide for the women of America something that is rightfully theirs—an equal chance . . . to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work").

109. See 20 U.S.C. § 1681 (a)(3)-(9) (providing for several exceptions to the Title IX legislation, with no mention of prisons); see also Safarik, *supra* note 106, at 343 (stating that given the extensive list of exceptions to Title IX, "the absence of prisons among them is noteworthy").

110. *See* Safarik, *supra* note 106, at 338 (noting a recent trend with female inmates turning to Title IX).


112. *See* Cannon v. University of Chicago, 441 U.S. 677, 695-96 (1979) (allowing a woman a right under Title IX to pursue a private cause of action against a private university receiving federal financial assistance, which allegedly denied her admission based on her gender).
distinguishes individuals on the basis of race. Courts, however, have been reluctant to apply strict scrutiny to Title IX challenges.

In the prison context, courts have held either that Title IX does not extend beyond prison educational programs to recreation and work details or that penological interests outweigh compliance with Title IX. Further, the failure of courts to determine what constitutes compliance with Title IX in the prison context may deem its use in program challenges worthless.

PART III—THE NEW EQUAL PROTECTION STANDARD AFTER VMI

Women prisoners challenging unequal treatment under Title IX run the risk that courts will not apply the law to prison work training, recreation and other services provided by prisons. Therefore, in addition to arguing for compliance of Title IX, women prisoners should argue that inferior treatment and facilities at women's prisons is a violation of the Equal Protection Clause. Although these claims have largely been unsuccessful in the past, armed with the tougher scrutiny established in United States v. Virginia, women prisoners should be more successful in gaining equal opportunities.

113. The argument follows, that since the language of Title IX is so similar to that of Title VI, that courts applying Title IX must also use strict scrutiny. See Safarik, supra note 106, at 360-366.

114. See Women Prisoners II, 93 F.3d 910, 927 (D.C. Cir. 1996) (holding that "there are grave problems with the position that work details, prison industries, recreation, and religious services and counseling have anything in common with the equality of educational opportunities with which Title IX is concerned").

115. See supra note 37 and accompanying text. But see Jeldness v. Watson, 857 F.2d 1478 (9th Cir. 1988), remanded sub nom., Jeldness v. Pearce, 30 F.3d 1220, 1234 (1994) (holding that penological interests are not a complete defense to Title IX noncompliance). On remand, the district court ruled that parity of treatment is all that is required in claims brought within the context of the prison setting under Title IX and "penological necessity" is a "complete defense" to Title IX disparate impact claims.

116. See Safarik, supra note 106, at 360 (suggesting that a framework of compliance at women prisons may be based upon women's collegiate sports programs); see also Roberts v. Colorado State Univ., 814 F. Supp. 1507, 1511 (D. Colo. 1993), aff'd in part and rev'd in part sub nom., Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993), cert. denied, 114 S. Ct. 580 (1993) (establishing the effective accommodation test where each college must satisfy one the following requirements: 1) grant women the opportunity for intercollegiate-level participation in numbers substantially proportionate to their prospective enrollments; 2) where one gender has been underrepresented the institution must show a history and continuing practice of expanding opportunities to that gender; 3) if one gender does not demonstrate an interest or ability for a particular sport, the school must assert what sports are suitable for that gender and accommodate the gender's interest).

117. See supra note 106 and accompanying text (discussing the failure of the Title IX argument).

118. See Rafter, supra note 85, at 28 (noting the increase of class action suits brought by women prisoners alleging unequal treatment in violation of the Constitution).

119. 116 S. Ct. 2264 (1996) [hereinafter "VMI"]. In this case, the United States sued the Commonwealth of Virginia alleging an equal protection violation in maintaining the Virginia
In VMI, the Supreme Court began its Equal Protection analysis by considering the state interest, holding that a state must demonstrate an "exceedingly persuasive justification" for upholding a gender-based government action. In providing this justification, the Court explained that a state may consider physical differences between the genders, or may even justify a classification as an attempt to remedy a past wrong. The Court also held that justifications must be genuine and classifications that perpetuate the inferiority of women are illegal.

The Court also explained that "state actors may not rely on overbroad generalizations to make judgments about people that are likely to . . . perpetuate historical patterns of discrimination,"


120. Although the court of appeals decided the Women Prisoners II case after the VMI decision, it failed to apply the new test to the prison context.

121. VMI, 116 S. Ct. at 2274 (quoting 44 F.3d 1229, 1247 (1995) (Phillips, J., dissenting)). See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994) (holding that discrimination on the basis of gender in jury selection does not further the state's interest in achieving a fair and impartial trial); Mississippi Univ. for Women, 458 U.S. 718 (1982) (holding that a policy of single sex admission to a state run school of nursing does not compensate women for past discrimination in a field where there has been no discrimination).


123. VMI, 116 S. Ct. at 2276. See Califano v. Webster, 430 U.S. 313, 320 (1977) (holding that sex classifications may be used "to compensate for particular economic disabilities suffered by women."); California Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272, 289 (1987) (stating that gender classifications may promote "equal employment opportunity" where such opportunity was denied).

124. See VMI, 116 S. Ct. at 2275 (maintaining that the Constitution will not allow post hoc reasons for classification and finding Virginia's justification of diversity in education to be disingenuous because it was not a consideration when VMI was created). Id. at 2279.

125. United States v. Virginia, 116 S.Ct. 2264, 2275 (1996). But see Brief for the Respondents at 8, United States v. Virginia, 116 S. Ct. 2264 (1996) (Nos. 94-1941 and 94-2107) (arguing that differences between VMI and VWIL "are justified pedagogically and are not based on stereotypes," stating that VWIL is founded upon the principle that a "woman's place is in the marketplace and world of ideas").

126. VMI, 116 S. Ct. at 2280 (citing J.E.B., 511 U.S. at 139, n.11). See Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (relying on Frontiero v. Richardson, 411 U.S. 677 (1973), as standing for the proposition that gender classifications based on "archaic and overbroad" generalizations are unconstitutional); Stanton v. Stanton, 421 U.S. 7 (1975) (categorically rejecting the rationale of a Utah statute that required parents to provide for sons until the age of 21, but for daughters only until age 18). The State justified the statute on the belief that men require
suggesting that even though "special characteristics" may be accurate to the majority of one gender, they may not be considered when applying the Equal Protection Clause.127 "[E]stimates of what is appropriate for most women no longer justify denying opportunity to women whose talent and capacity place them outside the average description."128 Quite simply, the individual may not be overlooked when classifying people on the basis of gender.

After considering the classification and the proposed reasons for excluding women from VMI, the Court examined the remedial plan129 of creating an alternative women's institution known as the Virginia Women's Institute for Leadership ("VWIL").130 This plan survived the appellate level, where the court concluded that although there were differences between VMI and VWIL, the programs were 'sufficiently similar' to survive an Equal Protection evaluation.131 However, the Supreme Court ruled that the lower courts erred in providing deferential treatment, rather than heightened scrutiny to VMI's male-only policy.132 Upon inspection of the programs, the Supreme Court determined several key differences between the two schools, noting that VMI was superior in its military training,133 facilities,134 course offerings,135 faculty,136 cohesiveness of its student body,137 and in its more support than women, because girls "tend generally to mature physically, emotionally and mentally" faster and "tend to marry earlier." Id. at 10.

127. See supra note 29 and accompanying text.
128. VMI, 116 S. Ct. at 2284.
130. See Brief for Petitioner at 11, United States v. Virginia, 116 S. Ct. 2264 (1996) (No. 94-1941) (arguing that the burden shifts to the State to justify failure to perform the easiest or most effective remedy).
131. See United States v. Virginia, 852 F. Supp. 471, 481 (W.D.Va. 1994), (holding that the Constitution did not require a "mirror image VMI for women," but must only achieve substantially similar outcomes).
133. VMI, 116 S. Ct. at 2272-73 (noting that VMI cadets are subjected to rigorous military training in the "adversative method," whereas, VWIL students participate in ROTC and are trained in a "cooperative method").
134. Id. at 2284 (finding that VMI is much larger than Mary Baldwin and includes an NCAA-caliber indoor track and field facility, a number of multi-purpose fields, plus baseball, soccer and lacrosse fields, an indoor pool and a football stadium, whereas VWIL only has two multi-purpose fields and a gymnasium).
influential alumni network. The Court determined that these differences were enough to deem VWIL an unconstitutional remedy.

Although Justice Ginsberg, in writing the Court's opinion, does not expressly state that the Court uses a more stringent form of "heightened scrutiny," it is clear that the standard of review is more stringent than the intermediate level of scrutiny previously applied to gender classifications. Under the previous standard of review, the Court has upheld almost every gender-based statute as furthering an important governmental interest. In *Mississippi University for Women v. Hogan*, the Court rejected a nursing school's women-only admission policy, declaring that "diversity of educational opportunities" is not an important state interest where the state provides the educational opportunity to only one gender. *VMI* moves substantially beyond *Hogan*, by declaring that it is not enough for a state merely to provide the other gender with educational opportunities, but that those opportunities must be equal.

PART IV—APPLYING THE VMI STANDARD OF REVIEW TO SEGREGATED PRISONS

In applying the *VMI* standard to the prison context, there must be an exceedingly important governmental interest not only for segregating prisoners by gender, but also for any continuing discrepancies

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135. *Id.* at 2284 (stating that VMI offers bachelor degrees in liberal arts, biology, chemistry, civil, electrical, computer and mechanical engineering. VWIL does not have a math or science focus and to receive an engineering degree a student would be expected to spend two years at Washington University in St. Louis, Missouri and pay the private school's tuition.).

136. *Id.* at 2287 (determining that the faculty at VWIL has less advanced degrees and are paid less than the faculty at VMI).

137. United States v. Virginia, 116 S. Ct. 2264, 2283 (finding that students at VWIL are only a small portion of students on the Mary Baldwin campus and are not required to live together or eat meals together, nor are they required to wear uniforms during the school day, and therefore do not experience the "egalitarian ethic" that predominates at VMI).

138. *Id.* at 2285 (noting that Mary Baldwin's endowment is currently $19 million, whereas VMI's is currently $131 million—the highest among public colleges and universities).

139. *See Id.* at 2292-2296 (Scalia, J., dissenting) (noting that although Ginsberg twice recites the Hogan test of intermediate scrutiny, the Court substitutes its own "exceedingly persuasive justification" test requiring a least-restrictive-means analysis comparable to strict scrutiny).

140. There have only been two exceptions to this—"administrative convenience" and "diversity in educational opportunities." *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (rejecting rational basis review in diversity in educational opportunities); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 152-53 (1980) (holding that "administrative convenience" is not an important government interest to support presumption that widows and not widowers are dependent upon deceased spouse's worker's compensation).


142. *Id.* at 724-25.

in programs. The VMI Court held that psychological and sociological differences between men and women could not be considered when evaluating unequal treatment. This means that prison programs based on special characteristics of an inmate’s gender are impermissible. Thus, applying VMI in a prison context, traditionally male programs, such as plumbing or carpentry must be offered to women prisoners as well. Likewise, programs such as dietary planning or parenting skills must be offered to male inmates.

The VMI Court further held that insufficient demand among women college students for a precise replication of the VMI methodology could not be a factor in an Equal Protection analysis. Analogously, it may be argued that prison officials may no longer excuse their failure to offer certain programs at female facilities on the basis that women prisoners generally lack interest in the subject matter. Also, women prisoners may no longer be denied equal opportunities simply because their population size is less than that of male prisoners.

Taking into consideration VMI’s subtraction of “special characteristics” and demand or population from Equal Protection analysis,

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144. It is possible that VMI would not deem segregated prisons unconstitutional. For in deciding that VWIL was inferior to VMI, the court found that all things being equal, VWIL could never match the benefits derived from VMI’s 157-year history and the prestige which that carries with it. In the prison context, considerations of prestige and history are irrelevant, so that if all other things are equal, prisons do not have to be integrated. However, although a state may properly segregate its prisoners by gender, it does not follow that a state may segregate its prisoners by gender into unequal facilities.

145. United States v. Virginia, 116 S.Ct. 2264, 2283-84 (1996). See Hogan, 458 U.S. at 724-25 (holding that it is unconstitutional to exclude qualified individuals based on “fixed notions concerning the roles and abilities of males and females”). But see Michael M., 450 U.S. at 464 (1981) (finding that men and women are not always similarly situated and that a gender based classification will be upheld, even if the classification does not apply with precision to every individual subjected to it). E.g., Rostker v. Goldberg, 433 U.S. 57, 78 (1981) (holding that men and women are not "similarly situated" in the context of combat); Parham v. Hughes, 441 U.S. 347, 354 (1979) (stating that a classification based on real differences between men and women is valid); Schlesinger v. Ballard, 419 U.S. 498 (1975) (stating that men and women are not "similarly situated" with regard to promotions available to them in the Navy).

146. VMI, 116 S. Ct. at 2284 (ruling that although VMI may not be suitable or desirable to most women, that fact alone cannot excuse the reality that some women may desire and prosper from its curriculum).

147. VMI, 116 S. Ct. at 2280. But see Faulkner v. Jones, 51 F.3d 440, 445 (4th Cir. 1995) (speculating as to whether established rule that “demand is not relevant to an equal protection analysis” might differ when the State confers not a “civil right” but an “economic benefit”).

148. See Brief for Petitioner at 11, United States v. Virginia, 116 S. Ct. 2264 (1996) (No. 94-1941) (arguing that policies that restrict opportunities based on gender stereotypes are harmful precisely because they reinforce restrictive roles for men and women). Cf. Dothard v. Rawlinson, 433 U.S. 321, 330 (1977) (finding that an applicant pool may be artificially depressed due to self-recognized inability to meet stereotypical requirement). But see Orr v. Orr, 440 U.S. 268, 283 (1979) (striking an Alabama statute which awarded alimony only against men, warning that even sex-based statutes designed to mitigate past discrimination "carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women.").
women prisoners are similarly situated to men prisoners. Being similarly situated shifts the burden to prison officials to justify any discrepancies in inmate services and programs. Further, under the VMI standard, such a justification must be genuine and may not perpetuate women's inferiority.

The VMI Court rejected the argument that policy and programming decisions should be left to the judgment of professional educators. Instead, the Court held that where a constitutional issue is raised, judicial determinations are appropriate. Applying this to the prison context, women prisoners may argue that although the daily decisions are left to administrators and wardens, overall policy and programming decisions that offend the Constitution should be handled by the courts.

CONCLUSION

As mentioned above, desegregation of prisons is likely to present new problems, such as prostitution, increased heterosexual assault and unwanted pregnancies. However, the community's interest in rehabilitating and preparing prisoners for life after incarceration far outweighs the potential hazards. Where it has been shown that women prisoners receive fewer and also inferior training and programming, it is evident that some steps must be taken to ensure that women prisoners are given every opportunity that male prisoners are given to succeed after incarceration.

The Court's "hands-off" approach to prison administration is misapplied in the area of Equal Protection analysis. Where the Constitution dictates that women must receive equal treatment, it is not the place of prison officials to determine otherwise.

The VMI decision, which rejects the use of stereotypes and promotes the value of the individual, may prove helpful to women in all areas of society, but will undoubtedly provide the basis for challeng-

151. VMF, 116 S. Ct. at 2275.
152. VWIL was the brainchild of a special Task Force composed of experts in women's education who maintained that the cooperative curriculum was best suited for young women to promote self-confidence and leadership. Regardless, the Court held that the Task Force relied too heavily on 'fixed notions' of what was appropriate for women students.
153. See supra note 44 and accompanying text.
ing unequal treatment in the prison context. The state's interest in maintaining safety and security in the prison system is not undermined by the inclusion of women in equal training and programming. Rather, equal treatment should be found to promote these penal interests. Given that these interests are not sufficient to permit gender discrimination, women prisoners may be successful in challenging the disparities now present in the prison system.