legal standard - EP ; Turner

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WOMEN PRISONERS, PENOLOGICAL INTERESTS, AND GENDER STEREOTYPING: AN APPLICATION OF EQUAL PROTECTION NORMS TO FEMALE INMATES

By Jennifer Arnett Lee*

INTRODUCTION

Inmates transition from a life of relative freedom to one that is completely controlled by the state. Women who are convicted face the additional burden of being forced to leave a world where the gender gap is closing for one in which stereotypes "about the way women are" dominate.[1] They quickly discover that progress made for women in the last few decades has not passed through prison gates.[2] Evidence of this phenomenon is presented by the fact that female inmates receive fewer educational and vocational programming opportunities than men.[3] While this disproportionate programming is partly a result of their relatively small numbers,[4] population size

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* B.A., Kansas State University (1996); J.D. Candidate, Columbia University School of Law (2001); Masters of International Affairs (MIA) Candidate, Columbia School of International and Public Affairs (2001); Editor-in-Chief, *Columbia Human Rights Law Review* (2000–01). Special thanks to Professors Robert Ferguson, Gerald Neuman, James Liebman, and Elizabeth Schneider.

1. For an example of how the gender gap is closing, see United States v. Virginia (VMI), 518 U.S. 515, 550 (1996) (invalidating single-sex instruction at a state-run school where no equivalent provisions were made for women).

2. *See* Joanne Belknap, The Invisible Woman: Gender, Crime, and Justice 91–92 (1996).

3. *See id.* at 107–09.

4. As of May 1998, women comprised 7.1% of the federal prisoner population, while men accounted for 92.9% of the prisoner population. Fed. Bureau of Prisons, U.S. Dep't of Justice, A Profile of Female Offenders 3 (1998).

alone does not adequately explain why the few vocational and educational classes that are offered to women relegate them to stereotypical "women's work."[5] I submit that a prevailing reason is that prisons housing females are stuck in a stereotyped, gendered world of the past.

This Note argues that because there is no legitimate penological reason for offering female inmates stereotyped work and educational opportunities, the Supreme Court's equal protection doctrine dictates that such distinctions be judged according to a heightened level of scrutiny as articulated in *United States v. Virginia* (*VMI*).[6] Part I of this Note introduces the problem by examining differential treatment of female inmates. The impact of gender segregated prisons, both historically and currently, is briefly explored. Part II compares the two doctrinal standards that could apply to equal protection claims of female inmates. *VMI's* heightened scrutiny standard for gender discrimination[7] is juxtaposed against *Turner v. Safley's* reasonable relation to "legitimate penological interests"[8] standard for constitutional claims brought by prisoners.

Part III delineates when each standard should apply by defining the boundaries of *Turner*. This Note recognizes that differences in the quantity of programs offered to men and women may be linked to the legitimate penological interest of security, thereby necessitating the application of *Turner's* reasonable relation test. Decisions to spend funds in a gender-stereotyped manner, however, are not legitimately penological. Such decisions treat women differently because they are women and must therefore withstand *VMI's* exceedingly persuasive justification standard. Finally, Part IV applies *Turner* to quantitative differences in male-female programming, while Part V applies *VMI* to qualitative differences. To uphold the constitutional rights of women inmates, courts must apply both the *Turner* and *VMI* tests stringently. In this manner, courts will approximate the goal of ensuring that gender discrimination is not part and parcel of female prisoners' punishment.

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5. *Id.* at 5 (pointing out that women are excluded from "career-oriented training").

6. 518 U.S. 515 (1996).

7. 518 U.S. at 531.

8. 482 U.S. 78, 87 (1987).

I. DIFFERENTIAL TREATMENT OF WOMEN PRISONERS

A. The Problem Defined

Although there are now few areas where state differentiation between men and women persists, it is evident that prisons remain a stubborn exception. In comparison to their male counterparts, female inmates receive fewer and inferior educational and vocational programs,[9] while both men and women are offered stereotypically-gendered programs.[10] In addition, women prisoners have access to inferior health care[11] and are more likely to be imprisoned further from their homes and families than are men.[12] Female inmates have less

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9. Collins and Collins describe a "catch-22" situation for female inmates: while there are few women-only programs, women are rarely allowed to participate in programs with men. William C. Collins and Andrew Collins, Nat'l Inst. of Corr., Women in Jail: Legal Issues 3 (1996). *See also* Belknap, *supra* note 2, at 107–08 (stating that programming for female inmates is "distinctively poorer in quantity, quality, and variety, and considerably different in nature from those for male offenders" (internal quotes omitted)).

10. According to Rebecca Jurado,

> Male prisoners are trained to re-enter society with productive skills: operating machinery, dairy farms, and outside enterprises. Women's prisons . . . provide programs and services which, instead of providing the same earning opportunities to women, focus on stereotypical roles for women: secretarial training, beautician, nursing, and sewing for institutional versus commercial purposes.

Rebecca Jurado, *The Essence of Her Womanhood: Defining the Privacy Rights of Women Prisoners and the Employment Rights of Women Guards*, 7 Am. U. J. Gender Soc. Pol'y & L. 1, 12–13 (1999). *See also* Belknap, *supra* note 2, at 108 ("Most women's prisons have programs in cosmetology, office skills, typing, sewing, hairdressing, and homemaking, but few train women in skills to help them become legitimately independent on their release."); Collins & Collins, *supra* note 9, at 4 (explaining that women prisoners are often relegated to traditional female vocations, such as cosmetology and secretarial programs).

11. According to Collins and Collins, medical services specific to women, such as gynecology and obstetrics, are often not available or are of poor quality. Collins & Collins, *supra* note 9, at 3. Belknap cites an early 1980s study of Rikers Island Correctional Complex in New York City, in which male inmates were four times as likely as women to be seen by a doctor, as opposed to a nurse, for similar complaints. Belknap, *supra* note 2, at 110. *See also id.* at 109–11 (noting, inter alia, the lack of adequate care at women's prisons and the minimization by prison staff of requests for medical care).

access to law libraries and jailhouse lawyers,[13] are more likely to be cited for minor rule infractions than male inmates,[14] and have less access to work release programs.[15] In addition, most female inmates are segregated from their male counterparts[16] in smaller, older, and more remote facilities.[17]

One study commissioned by the National Institute of Corrections reported that sixty percent of male inmates have work assignments, as compared to forty-four percent of female inmates.[18] This same report points out that work assignments are three times as likely to be offered to men prisoners,[19] and that women do not have equivalent access to in-house support service jobs that can count towards "good behavior" time.[20] With respect to vocational training programs, female inmates do not have access to the same quality of

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12. Most states have only one or two facilities for women, whereas there are multiple facilities for men. Twenty-one states operate only one female facility. Morris L. Thigpen and Susan M. Hunter, Dep't of Justice, Current Issues in the Operations of Women's Prisons 2 (1998). *See also* Pitts v. Thornburgh, 866 F.2d 1450 (D.C. Cir. 1989) (explaining that women prisoners from Washington, D.C. were incarcerated in a remote area of West Virginia, while male prisoners were incarcerated within the city limits of D.C.).

13. As of 1990, one half of women's prisons did not have law libraries available for prisoner use. Belknap, *supra* note 2, at 99.

14. According to Belknap, actions such as drying underwear could be cause for a citation, an extra bra could be considered contraband, and sharing shampoo in the shower could be deemed trafficking. Men prisoners were never cited for comparable minor incidents. *Id.* at 98–99 (citing Dorothy S. McClellan, *Disparity in the Discipline of Male and Female Inmates in Texas Prisons*, 5 Women & Crim. Just. 71, 97 (1994)).

15. *See* Belknap, *supra* note 2, at 108 (citing Luke Janusz, *Separate but Unequal: Women Behind Bars in Massachusetts*, Odyssey, Fall 1991, at 6). *See also* Donna L. Laddy, *Can Women Prisoners Be Carpenters? A Proposed Analysis for Equal Protection Claims in Educational and Vocational Programming at Women's Prisons*, 5 Temple Pol. & Civ. Rts. L. Rev. 1, 4 (1995) (stating that women are not offered work release opportunities comparable to what men receive).

16. In 1997, forty state Departments of Corrections (DOCs) operated ninety-two female-only facilities, while only ten state DOCs operated a total of sixteen correctional facilities. Note that six states—Alaska, Kansas, Maine, North Dakota, Vermont, and West Virginia—did not house women in segregated facilities. Thigpen & Hunter, *supra* note 12, at 2.

17. *See* Collins & Collins, *supra* note 9, at 2.

18. *Id.* at 4.

19. Over twenty-three percent of male inmates had outside work assignments, as compared to only 8.1% of female inmates. *Id.*

20. *Id.*

programming as men and "those [programs] that do exist tend to limit participation to traditional female roles, such as cosmetology or secretarial programs, excluding them from more career-oriented training."[21] Women prisoners also have access to fewer and lower-level educational opportunities. According to Joanne Belknap, it is common for men to have access to college programs, whereas women have access only to high school classes.[22]

Women Prisoners v. District of Columbia,[23] a case involving women located at three different facilities, provides a clear example of differential programming opportunities. Minimum security women were incarcerated at "the Annex," located on the grounds of the men's minimum security prison.[24] The district court found that work details available to women were limited to reception, housekeeping, and library assignments, whereas men's work details included carpentry and electrical/mechanical work.[25] Despite the stereotypical nature of these assignments, the D.C. Circuit vacated the district court's order requiring prison authorities to provide women with the same opportunities and programs as men[26] because men and women prisoners were held not to be similarly situated.[27]

In a separate case involving Missouri prisons, women inmates could work as telephone operators or telemarketers, and perform data entry and office copying duties.[28] According to the dissent, "the jobs for men require more skills and give the men a considerable market advantage outside the prison setting."[29] The Eighth Circuit

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21. *Id.* at 5. *See also* Belknap, *supra* note 2, at 108 (explaining that female inmates have access to programs such as cosmetology, sewing, typing, and homemaking, rather than programs that could train them to be economically independent upon release).

22. Belknap, *supra* note 2, at 108 (citing Joycelyn M. Pollock-Byrne, Women, Prison, and Crime 168–69 (1990)).

23. 93 F.3d 910 (D.C. Cir. 1996).

24. *Id.* at 913.

25. *Id.* at 915.

26. *Id.* at 917.

27. *Id.* at 927. To make this determination, the court relied on differences between the male and female facilities. *Id.* at 925–26. This Note explains why differences in facilities cannot be relied on in a similarly situated analysis. *See* text accompanying notes 188–92, *infra*.

28. Keevan v. Smith, 100 F.3d 644, 653 (8th Cir. 1996).

29. *Id.* at 653 (Heaney, J., dissenting).

upheld the differential programming on the grounds that women and men prisoners were not similarly situated[30] and the plaintiffs did not prove that prison officials had discriminatory intent.[31]

Cases such as *Women Prisoners* and statistics from the National Institute of Corrections provide clear evidence that female inmates are offered fewer programs, and that programs they do have access to are gender-stereotyped. Case law and statistics, however, do not explain why such blatant discrimination has been allowed to persist.

B. Prison Segregation

One barrier to overcoming differential treatment is the segregation of men and women inmates.[32] On the one hand, women prisoners comprise a relatively small percentage of the total inmate population,[33] making it less likely that they will receive the same number of programs as men. On the other hand, prison officials claim that different facilities have different needs, and should thus have different programs.[34] While this logic may make intuitive sense, a brief look at historical reasons for segregated institutions makes it clear that the different programs for different facilities argument is founded on a gender-stereotyped vision of the world.

Segregated prisons date to the nineteenth century,[35] when women who had run afoul of the law were considered morally weak

30. *Id.* at 650.

31. *Id.* at 651.

32. As of 1997, ninety-two state facilities housing women inmates were female-only, while only sixteen housed both males and females. Thigpen & Hunter, *supra* note 12, at 1.

33. *See* Fed. Bureau of Prisons, *supra* note 4, at 3.

34. Other possible justifications for differential programming include the incorrect perceptions that women are not major breadwinners and thus do not need paid employment, and that women are better suited to their roles as mother and wife. Pure sexism also plays a role. *See* Belknap, *supra* note 2, at 108. *See also* Klinger v. Dep't of Corr., 31 F.3d 727, 731–32 (8th Cir. 1994) (pointing out that women inmates are more likely to be primary caregivers for children and victims of sexual abuse).

35. In 1839, Mount Pleasant Female Prison, located on the grounds of the Sing Sing prison for men in New York, became the first completely segregated building for women. The Indiana Reformatory Institution for Women and Girls, established in 1873, was the first completely separate facility for women inmates. Kathryn Watterson, Women in Prison: Inside the Concrete Womb 196–98 (1996). *See also* Rosemary

and corrupt.[36] Given this perception, the primary goal of late nineteenth and early twentieth century women's reformatories[37] was to rehabilitate 'weak women' by instilling them with proper values.[38] In 1928, the Fifty-Eighth Congress of the American Prison Association stated:

> We must work for the regeneration, the cleansing of the evil mind, the quickening of the dead heart, the building up of fine ideals. In short, we must bring the poor sin-stained soul to feel the touch of the Divine Hand.[39]

To achieve this "cleansing," it was essential that corrupted females be separated from men and their negative influence.[40] Once they were isolated "in separate, homelike rural institutions surrounded by fresh air,"[41] women offenders could be imbued with traditional values that would teach them the proper woman's role[42]—"to be good housewives, helpmates, and mothers."[43] To this end, they were given classes in domestic skills and taught the importance of familial duties.[44]

Herbert, Note, *Women's Prisons: An Equal Protection Evaluation*, 94 Yale L.J. 1182, 1192 (1985) (explaining that nineteenth century women offenders were jailed in segregated reformatories).

36. According to Rosemary Herbert, the female character was considered "malleabl[e] . . . . This trait meant that women were morally weaker than men, but, at the same time, they possessed a greater potential for rehabilitation." Herbert, *supra* note 35, at 1192.

37. Women's prisons were termed "reformatories" to distinguish them from male "penitentiaries." Watterson, *supra* note 35, at 198.

38. *Id.*

39. *Quoted in id.*

40. The physical separation from men also allowed the "virtuous" women who staffed reformatories to teach by example. Herbert, *supra* note 35, at 1192. *See also* Clarice Feinman, Women in the Criminal Justice System 40–41, 42, 44 (1980).

41. Watterson, *supra* note 35, at 198.

42. *See* Feinman, *supra* note 40, at 42–43; Sharon L. Fabian, *Toward the Best Interests of Women Prisoners: Is the System Working?*, 6 New Eng. J. Prison L. 1, 5 (1979); Herbert, *supra* note 35, at 1192.

43. Watterson, *supra* note 35, at 198. *See also* Belknap, *supra* note 2, at 95 ("[A]n important part of the reform movement in women's prisons was to encourage and ingrain 'appropriate' gender roles, such as vocational training in cooking, sewing, and cleaning.").

44. *See* Feinman, *supra* note 40, at 44, 45; Herbert, *supra* note 35, at 1192.

Remnants of early women's reformatories linger in today's female prisons, where women have access to programs that are considered appropriate for them—housekeeping, clerical positions, and food services duties.[45] Rosemary Herbert argues that because the current gender-segregated system, and attendant stereotyped programming, is based on the view of women prisoners as morally weak, it can never be equal for men and women.[46] The logic of Herbert's reasoning is that integration of prisons would close the book on women's reformatories and thus do much to end the disparate treatment of men and women offenders.[47]

Herbert further argues that segregation in prisons is analogous to pre-*Brown v. Board of Education of Topeka*[48] racially segregated schools in the South, and that gender segregation itself is a constitutional harm: "the reason that led to the rejection of separate but equal for race—the recognition of the harm inflicted by official segregation—must also lead to the categorical invalidation of such sex-based segregation."[49] The underlying assumption of this approach is that differences between men and women are not legally cogniza-

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45. *See, e.g.,* Klinger v. Dep't of Corr., 31 F.3d 727, 736 (8th Cir. 1994) (McMillian, J., dissenting) (arguing that "cost-driven differences . . . do not constitutionally justify limiting [female] inmates' training to domestics and other 'women's' occupations"). For a discussion of the influence of early reformatories' indeterminate sentencing for women on decisions as late as the 1970s, see Watterson, *supra* note 35, at 199–201.

46. Herbert explains that separating and isolating female inmates based on their presumed moral weakness stigmatizes women and "signals that the separation of women from the mainstream is an acceptable, even desirable, practice." Herbert, *supra* note 35, at 1192.

47. *See id.* at 1203 (arguing that prisons must be desegregated to end unconstitutional official discrimination against women prisoners). *See also* Rosemary M. Kennedy, *The Treatment of Women Prisoners After the VMI Decision: Application of a New "Heightened Scrutiny"*, 6 Am. U. J. Gender & L. 65 (arguing that *VMI* mandates "an exceedingly important governmental interest" for segregating prisons by gender).

Belknap provides a different perspective by arguing that co-correctional facilities have done little to equalize treatment between male and female inmates. She claims that traditional gender roles are still encouraged in co-correctional facilities, in two ways. First, women are still provided only stereotypical programming and second, men hold the best prisoner jobs. Belknap, *supra* note 2, at 113–14.

48. 347 U.S. 483 (1954).

49. Herbert, *supra* note 35, at 1191.

ble and that *any* differential treatment is unconstitutional.[50] As Herbert explains:

> When a woman convicted of the same crime and sentenced to the same term of incarceration as a man receives her punishment in an inferior and separate institution, equal justice is a hollow promise to her, and respect for the even-handed administration of justice diminishes as a consequence.[51]

Nevertheless, this Note does not approach segregation of inmates by sex as a per se constitutional violation. In *VMI*, Justice Ginsburg recognized that there are inherent differences between men and women.[52] In doing so, she left open the possibility that there could be some exceedingly persuasive justification for segregating particular schools and, by extension, other state-run facilities. This Note likewise recognizes that there could be an exceedingly persuasive justification for segregating particular prisons by sex, but does not advocate for continued segregation.

It should be noted that male-female differences are a cause for concern in the prison context because increased rape, prostitu-

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50. *See, e.g.*, Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, in* Feminist Legal Theory: Foundations 128 (D. Kelly Weisberg ed., 1993). Williams argues that any special treatment for women "will always embroil its proponents in a debate about whether they are getting more or not enough," and that men and women should thus be treated equally. *Id.* at 150.Williams' version of equality uses an "androgynous prototype" that accounts for pregnancy as its prototype. *Id.* at 151.

For an early argument that women should be treated as equals vis-à-vis men, see John Stuart Mill, The Subjection of Women 117 (Wordsworth Classics of World Literature 1996) (1869).

> [T]he principle which regulates the existing social relations between the two sexes—the legal subordination of one sex to the other—is wrong in itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.

Id.

51. Herbert, *supra* note 35, at 1193.

52. United States v. Virginia (VMI), 518 U.S. 515, 533 (1996) ("Inherent differences between men and women . . . remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity.").

tion, and pregnancies, and the potential exploitation of outnumbered women in desegregated prisons are very real dangers.[53] While heterosexual rape at desegregated facilities is not necessarily more pervasive than homosexual rape or rape by male guards at female-only prisons,[54] other types of sexual exploitation, such as prostitution/pimping and unwanted pregnancies, remain problematic.[55] Security of women prisoners at integrated facilities could and should be improved because women do not currently have an adequate level of security at integrated prisons.[56] Nevertheless, providing women prisoners with programming equivalent to that which men receive should not come at the expense of women prisoners' safety. In addition, it is an undisputed fact that most prison systems remain segregated, regardless of whether or not segregation is desirable. The remainder of this Note therefore focuses on challenging differential programming within the present segregated system.[57]

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53. *See* Belknap, *supra* note 2, at 114 (referring to the problems of prostitution and coerced sexual favors in co-correctional facilities).

54. *See* Ashley E. Day, *Cruel and Unusual Punishment of Female Inmates: The Need for Redress Under 42 U.S.C. § 1983*, 38 Santa Clara L. Rev. 555, 555–57 (1998) (arguing that sexual exploitation of female inmates by male guards and inmates remains problematic). According to Herbert, inmate assault is common in segregated prisons. Herbert, *supra* note 35, at 1202.

55. *See* Kennedy, *supra* note 47, at 18 (pointing to the possible drawbacks of co-correctional institutions: pregnancy, prostitution, pimping, rehabilitation problems (if women "were housed with the very men who may have played a role in their incarceration"), and increased risk of exploitation). *See also* Belknap, *supra* note 2, at 114 (noting that pregnancies, prostitution, and coerced sex occur in co-correctional facilities). *But see* Herbert, *supra* note 35, at 1201 (arguing that "illicit sexual activity and even prostitution" pose no more of an institutional security problem than does homosexual activity in single-sex facilities).

56. Because personal security of prisoners is a matter of supervision, "[w]omen can be more vulnerable in poorly supervised single-sex prisons than they are in co-correctional ones that are properly supervised." Herbert, *supra* note 35, at 1202. Herbert argues that the violent environment of men's prisons is not unalterable, and does not justify gender discrimination. *Id.*

57. For a different view, see *id.* Herbert compares gender segregation to race segregation in prisons and concludes that "[f]ear of uncontrolled violence, including sexual assault, does not justify discrimination on the basis of sex any more that [sic] it does on the basis of race." *Id.* Herbert's solution to the personal security issues that could arise in co-correctional facilities is to provide more prison staff and ensure disciplinary action against violent inmates. *Id.* at 1202–03.

II. COMPETING STANDARDS?

A. Women and Heightened Scrutiny

Prior to the early 1970s, women were not deemed the intended beneficiaries of the equal protection requirement of the Fourteenth Amendment.[58] The Supreme Court upheld laws and other state policies that treated women differently solely because of their sex.[59] Oftentimes these laws and policies were enforced for the supposed protection of women, who were understood to be "dependent upon man"[60] and weaker than him.[61] The Court did not extend the protections of the Equal Protection Clause to women until 1971, when Chief Justice Burger wrote for a unanimous Court that women and men were similarly situated for the purpose of administering estates.[62] Within five years, the Court held that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[63]

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58. "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

59. The Supreme Court has upheld the exclusion of women from: law school admissions, Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872); the workplace after a ten-hour day, Muller v. Oregon, 208 U.S. 412 (1908); juries, Hoyt v. Florida, 368 U.S. 57, 61 (1961); and the armed forces draft registration, Rostker v. Goldberg, 453 U.S. 57 (1981). *See* Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Rule of Law*, *in* Feminist Legal Theory: Foundations, *supra* note 50, at 9, 10–16.

60. Muller v. Oregon, 208 U.S. 412, 421 (1908).

61. Justice Joseph Bradley expanded on this view in *Bradwell v. Illinois*:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

83 U.S. (16 Wall.) at 141.

62. Reed v. Reed, 404 U.S. 71, 76–77 (1971). For a brief discussion of the significance of *Reed*, see Taub & Schneider, *supra* note 59, at 16–17.

63. Craig v. Boren, 429 U.S. 190, 197 (1976). Other Supreme Court cases that applied the "important governmental objectives" standard include Frontiero v. Richardson, 411 U.S. 677 (1973); Kahn v. Shevin, 416 U.S. 351 (1974); Geduldig v. Aiello, 417 U.S. 484 (1974); Schlesinger v. Ballard, 419 U.S. 498 (1975); Stanton v.

The position of today's Court in the face of gender discrimination is exemplified by the holding in *United States v. Virginia* (*VMI*), that distinctions based on gender may stand only when the differentiation is closely related to an "exceedingly persuasive justification."[64] *VMI* involved the exclusion of women from the Virginia Military Institute (VMI), an institution that aimed to produce "citizen-soldiers" through the "adversative method," a physically and mentally rigorous system.[65] Women were excluded on the grounds that single-sex education was beneficial to its students, and that the school's unique adversative system would have to be altered if women were admitted.[66] In response to an adverse circuit court ruling,[67] Virginia established the Virginia Women's Institute for Leadership (VWIL).[68] Although this institution was described by the state as a "parallel" for women, the Court held that it did not provide women with equal opportunity as there were differences in curricula, faculty, funding, prestige, and alumni support.[69]

In holding that VMI unconstitutionally excluded women, and that VWIL was not an adequate remedy, Justice Ginsburg stated that "overbroad generalizations"[70] or "generalizations about the way women are, estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description."[71] Although not equivalent to strict scrutiny, this heightened level of review is very stringent and difficult to meet.[72] Any male-female differences are presumed constitutionally infirm, as it is the burden of the state to offer

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Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636, 643, 648 (1975); Califano v. Goldfarb, 430 U.S. 199, 223–24 (1977); Kirchberg v. Feenstra, 450 U.S. 455, 462–63 (1981); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 136–37 (1994).

64. 518 U.S. 515, 556 (1996).

65. *Id.* at 520.

66. *Id.* at 534–35.

67. United States v. Virginia, 976 F.2d 890 (4th Cir. 1992).

68. *VMI*, 518 U.S. at 526.

69. *Id.* at 553.

70. *Id.* at 533.

71. *Id.* at 550 (internal quotes omitted).

72. *Id.* at 550.

an exceedingly persuasive justification for distinguishing between men and women.[73]

B. Prisoners and Reasonable Relation

By virtue of being confined by the state involuntarily, inmates lose many freedoms they enjoyed prior to conviction.[74] Notwithstanding this fact, prisoners do retain most of their fundamental constitutional rights. The Supreme Court has stated that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."[75] Indeed, only those rights that are "fundamentally inconsistent" with prisoners' status as inmates can be impinged.[76]

Nevertheless, the Court tends to give a great deal of deference to the decisions of prison authorities,[77] even those that strain basic fundamental rights, for two main reasons. First, "courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform,"[78] especially where security is at issue.[79]

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73. *Id.* at 533.

74. *See* Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119 (1977) ("The fact of confinement and the needs of the penal institution impose limitations on constitutional rights . . . ."); Price v. Johnston, 334 U.S. 266, 285 (1948) ("Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.").

75. Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).

76. Hudson v. Palmer, 468 U.S. 517, 523 (1984). *Accord* Bell v. Wolfish, 441 U.S. 520, 545 (1979); *N.C. Prisoners' Labor Union*, 433 U.S. at 129; Meachum v. Fano, 427 U.S. 215, 225 (1976); Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974); Pell v. Procunier, 417 U.S. 817, 822 (1974).

77. *See, e.g., Wolfish*, 441 U.S. at 562 ("[T]he inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute.").

78. Procunier v. Martinez, 416 U.S. 396, 405 (1974). *Accord* Turner v. Safley, 482 U.S. 78, 84–85 (1987) (describing the level of expertise needed to run a prison).

79. *See, e.g., Pell*, 417 U.S. at 827 (explaining that decisions regarding visitation policies implicate security and are therefore "peculiarly within the province and professional expertise of corrections officials"). *See also* Patrick J.A. McClain et al., *Substantive Rights Retained by Prisoners*, 86 Geo. L.J. 1953, 1973 (1998) (pointing out that courts give a great deal of deference to prison officials where internal order is concerned); Jonathan A. Willens, *Structure, Content, and the Exigencies of War: American Prison Law After Twenty-five Years 1962–1987*, 37 Am. U. L. Rev. 41, 123 (1987) (opining that "[p]rison is so complicated and so dangerous that judicial intervention can only do harm"). *But cf.* Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 Harv. L. Rev. 592, 613 (1985) (pointing out that courts'

Second, because prison administration is the province of the executive and legislative branches, judicial restraint is deemed appropriate.[80] Of course, a call for judicial restraint does not negate the principle that "prison walls do not form a barrier separating prison inmates from the protections of the Constitution,"[81] and federal courts retain the duty to uphold the constitutional rights of all citizens, including inmates. "[A] policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims . . . . When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."[82]

In line with the judicial restraint view, *Turner v. Safley* holds that the proper inquiry for prisoners' claims of constitutional violations is "whether a prison regulation that burdens fundamental rights is reasonably related to legitimate penological objectives, or whether it represents an exaggerated response to those concerns."[83] Although the *Turner* court did not explicitly state what qualifies as legitimate penological objectives, it did articulate four factors to determine whether a regulation is reasonably related to legitimate penological objectives.[84] First, there must exist a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it."[85] Second, whether or not "alternative means of exercising the right . . . remain open to prison inmates" is a factor in the constitutional infringement-penological interest

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deference to prison officials can be seen as overlooking the purpose of the Constitution and Bill of Rights). For an analysis of the "deferrer approach" adopted by courts, see Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. Pa. L. Rev. 805, 849–51 (1990).

80. *See, e.g., Turner*, 482 U.S. at 85. *Accord Wolfish*, 441 U.S. at 548; *Martinez*, 416 U.S. at 405.

81. *Turner*, 482 U.S. at 84. *Accord Wolfish*, 441 U.S. at 545 ("[C]onvicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison.").

82. *Martinez*, 416 U.S. at 405–06.

83. 482 U.S. 78, 87 (1987) (internal quotes omitted).

84. *Id.* at 89–91.

85. *Id.* at 89 (internal quotes omitted). Note that the only explicit clue as to what the government interest can be is that it "must be a legitimate and neutral one." *Id.* at 90. This Note will explore what legitimate government interests in the prison setting are. *See* Section III, *infra*.

balance.[86] Third, the impact that upholding the constitutional right would have on guards and other inmates, and on the allocation of prison resources, must be taken into consideration.[87] Finally, a lack of alternatives available to prison authorities can lend weight to the reasonableness determination.[88] In other words, "if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard."[89]

In *Turner*, prisoners at Renz Correctional Institution in Missouri (Renz) claimed that a regulation prohibiting them from corresponding with inmates at other prisons violated their First Amendment rights.[90] They also claimed that a regulation limiting a prisoner's right to marry to situations where there was a compelling reason to allow marriage (i.e., where a pregnancy was involved) violated their fundamental right to marry.[91] The Court applied the above-mentioned four factors to both of the plaintiffs' claims, and determined that the prison regulations in question did not violate the prisoners' First Amendment right,[92] but did violate their fundamental right to marry.[93]

Because the restriction on inmate-to-inmate mail at Renz was "reasonably related to legitimate security interests,"[94] the First Amendment right of prisoners was not violated. The cited security interest, a fear that escapes would be planned through the use of inter-inmate mail, was "logically connected" to the prohibition of inter-inmate mail.[95] In addition, prisoners were not denied all forms of expression and the allowance of inmate-to-inmate correspondence

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86. *Id.* at 90.

87. *Id.*

88. *Id.* at 90–91.

89. *Id.* at 91.

90. *Id.* at 81–82. At Renz, correspondence between inmates was allowed only between immediate family members and for legal matters.

91. *Id.*

92. *Id.* at 93.

93. *Id.* at 98–99.

94. *Id.* at 91.

95. *Id.*

would have a large effect on other inmates and guards.[96] Finally, the Court determined that no easy alternatives were available to prison officials and that the mail prohibition was not an exaggerated response.[97] Given all of these factors, the mail restriction was found not to be in violation of the First Amendment.[98]

With respect to the plaintiffs' restriction of marriage claim, the Court first clarified that the right to marry remains fundamental even in the prison context.[99] The Court then evaluated the security interest offered by the state—the possibility that "love triangles" could provoke violent inmate confrontations.[100] This concern was dismissed as an "exaggerated response"[101] because the evidence showed no connection between the marriage prohibition and the prevention of love triangles;[102] prisoners had no alternative means of exercising their right to marry;[103] easy alternative regulations were available to prison officials;[104] and allowing marriages would have no real effect on other prisoners or guards.[105]

Prison authorities also presented a rehabilitation interest in prohibiting marriage. They argued that because many female prisoners had at some time been subjected to abuse by males, "or were

96. *Id.* at 92. The effect would be that inter-inmate mail could foster informal organizations that could threaten prison security. This in turn could translate into less liberty and security for other prisoners and guards. For a rebuttal to this hypothetical argument, see Justice Stevens' dissent. *Id.* at 106 (Stevens, J., dissenting) (claiming that prison officials had no proof for speculative statements).

97. *Id.* at 93. *But see id.* at 110–12 (Stevens, J., dissenting) (positing that censorship of inter-inmate mail could be an alternative to total prohibition).

98. *Id.* at 93.

99. *Id.* at 95–96. Attributes of marriage that are unchanged by the prison context include their "expressions of emotional support and public commitment," religious significance, possibility for full consummation upon release from prison, and precondition to receipt of government benefits, property rights, and other benefits. *Id.* According to the Court, "these remaining elements are sufficient to form a constitutionally protected marital relationship in the prison context." *Id.* at 96.

100. *Id.* at 98.

101. *Id.*

102. *Id.* In the majority opinion, Justice O'Connor argued that such love triangles could form just as easily without marriage.

103. The Court did not address the lack of alternative means, perhaps because it was self-evident that the blanket prohibition on marriage left no possible alternatives.

104. *Id.*

105. *Id.*

overly dependent on male figures, . . . [they] needed to concentrate on developing skills of self-reliance"[106] rather than getting married. But because the marriage restriction applied to all prisoners at Renz, the prohibition swept more broadly than the rehabilitation concern.[107] The security and rehabilitation interests of prison authorities in restricting marriage did not pass the *Turner* test and were thus held to be invalid.[108]

It is important to note that only security and rehabilitation interests of prison authorities were examined by the Court.[109] The state proffered these interests as the reasons for its policies, and the Court then undertook the above analysis to determine the reasonableness of the restrictions.[110] What the Court did *not* do was provide guidance with respect to non-security or non-rehabilitation objectives of prison authorities. The following section explores whether non-security or non-rehabilitation concerns are considered penological interests, and how courts should approach non-penological concerns that are raised by prison officials.

III. WHICH STANDARD WHEN?

Women prisoners are caught between two very different constitutional standards. On the one hand, the Supreme Court has held that claims of gender discrimination are analyzed against a heightened standard of scrutiny—differential treatment can stand only if it is closely related to an "exceedingly persuasive" justification.[111] On the other hand, prison regulations are upheld so long as they are "reasonably related" to a legitimate penological interest.[112] This section attempts to sort out the two standards and to clarify under what circumstances each should be applied.

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106. *Id.* at 97.

107. *Id.* at 98–99. The restriction applied not only to overly-dependent women, but also to women without a history of abuse and to male prisoners. The restriction also affected civilians who wished to marry an inmate. *Id.* It is unclear whether the Court would have upheld the marriage restriction had it applied only to female prisoners who were deemed "overly-dependent."

108. *Id.* at 99.

109. *Id.* at 91–99.

110. *Id.*

111. United States v. Virginia (VMI), 518 U.S. 515, 533 (1996).

112. *Turner,* 482 U.S. at 87.

A. Doctrinal Confusion

Although the Court has stated that the *Turner* reasonableness standard applies to even fundamental rights that are burdened by a prison regulation,[113] the Court has not heard an equal protection claim of a prisoner since establishing the *Turner* test. As such, lower courts are not entirely clear as to whether *Turner* applies to equal protection claims of prisoners[114] and have applied a wide variety of standards.[115] At one end of the extreme, the D.C. Circuit determined that *Turner* does not apply to any claims of gender discrimination brought by prisoners.[116] The court reasoned that because heightened scrutiny as articulated in *Mississippi University for Women v. Hogan* is appropriate for cases of facial gender discrimination,[117] *Turner's* reasonableness standard could not trump this.[118] One year after the D.C. Circuit's decision, however, the Supreme Court held in *Washington v. Harper* that "even when the constitutional right claimed to

113. Washington v. Harper, 494 U.S. 210, 223 (1990).

114. *See* Glover v. Johnson, 198 F.3d 557, 561 (6th Cir. 1999) (declining to answer whether *Turner* applies to equal protection claims in the prison setting because the district court found parity of treatment, thereby making any equal protection inquiry irrelevant).

115. *Compare* Klinger v. Dep't of Corr., 31 F.3d 727, 732 (8th Cir. 1994) (analyzing only the judicial deference concern of *Turner*), *with* Pitts v. Thornburgh, 866 F.2d 1450, 1454 (D.C. Cir. 1989) (holding that *Turner* is inapplicable to claims of gender discrimination), *with* Thacker v. Campbell, 165 F.3d 28, 28 (6th Cir. 1998) (claiming that only a legitimate penological interest need be shown to satisfy the Equal Protection Clause), *with* Coakley v. Murphy, 884 F.2d 1218, 1221–22 (9th Cir. 1989) ("When a state policy does not adversely affect a suspect class or impinge upon a fundamental right, all that is constitutionally required of the state's program is that it be rationally related to a legitimate state objective."). *See also* Laddy, *supra* note 15, at 16 (noting that while some courts have applied heightened scrutiny to prisoners' claims of gender discrimination, others have applied *Turner*).

116. *Pitts*, 866 F.2d at 1453. For other cases refusing to apply *Turner*, see Women Prisoners v. District of Columbia, 93 F.3d 910, 926–27 (D.C. Cir. 1996) (raising only the judicial deference concern of *Turner*); Keevan v. Smith, 100 F.3d 644 (8th Cir. 1996) (neglecting to raise *Turner* at all in the face of a gender discrimination claim). For support of this position, see Angie Baker, *Leapfrogging over Equal Protection Analysis: The Eighth Circuit Sanctions Separate and Unequal Prison Facilities for Males and Females in Klinger v. Department of Corrections, 31 F.3d 727 (8th Cir. 1994)*, 76 Neb. L. Rev. 371, 383 (1997) (arguing that application of *Turner* "would nullify the scrutiny standards carefully developed by the Supreme Court").

117. 458 U.S. 718, 724 (1982).

118. *Pitts*, 866 F.2d at 1454.

have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review," *Turner's* reasonableness standard applies.[119] It is thus unlikely that equal protection claims of prisoners can completely escape the reasonable relation to legitimate penological objectives analysis of *Turner*.[120]

At the other extreme, some courts have held that *Turner* completely replaces the Court's pre-established equal protection jurisprudence when the plaintiff is a prisoner.[121] Such an approach is misguided because it does not take account of the fact that the *Turner* reasonableness standard is qualitatively, not quantitatively, different from the normal three tiers of equal protection scrutiny. While equal protection analysis hinges on immutable characteristics such as race, sex, and national origin, immutable characteristics do not enter the *Turner* analysis. Whereas equal protection analysis compares the treatment of groups of people, *Turner* is a tool for determining whether restrictions in prison violate pre-established constitutional norms. In its original context, *Turner* does not compare one group of persons to another. Thus, in a world where *Turner* voids traditional equal protection analysis, the underlying base for equal protection claims drops out.

A hypothetical involving race is useful. If *Turner* applied exclusively and race and gender were to thus become irrelevant in the prison context, then all members of one racial group could be held in solitary confinement solely on the basis that inter-racial hostilities could lead to violent confrontations.[122] Such an action would be rea-

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119. 494 U.S. 210, 223 (1990).

120. 482 U.S. 78 (1987).

121. *See* Pearce v. Sapp, 1999 U.S. App. LEXIS 16225, at *5 (6th Cir. Jul. 9, 1999) (stating that groups may be treated differently so long as legitimate penological interests are at stake); Thacker v. Campbell, 165 F.3d 28, 28 (6th Cir. 1998) (holding that only a legitimate penological interest must be shown to satisfy the equal protection clause with respect to a claim that termination of a female prisoner's visitation with her inmate husband violated the Fourteenth Amendment); Glover v. Johnson, 35 F. Supp. 2d. 1010, 1014 (E.D. Mich. 1999) (applying *Turner* instead of *VMI* to a gender discrimination claim).

122. *See* Lee v. Washington, 390 U.S. 333, 334 (1968) (holding that a district court order to racially desegregate Alabama prisons in accordance with the Fourteenth Amendment could proceed, regardless of prison officials' claim that "no allowance for the necessities of prison security and discipline" was made); Cruz v. Belo, 405 U.S. 319, 321 (1972) (noting that race segregation in prisons is unconstitutional unless for

sonably related to the penological interest of security and could plausibly pass muster under *Turner*.[123] The fact that only one racial group was targeted by such differential treatment would be irrelevant. Fortunately, such a scenario was not intended by the Court, as even the *Turner* majority recognized that prisoners are still "protected against invidious racial discrimination by the Equal Protection Clause of the Fourteenth Amendment."[124] Replacing equal protection analysis with *Turner* would run directly counter to this pronouncement. Because *Turner* does not replace equal protection analysis of claims of racial discrimination and scrutiny of invidious gender discrimination is almost as strict as scrutiny of racial discrimination, *Turner* should likewise not replace equal protection analysis for women prisoners.

B. Penological Interests as a Subset of Government Interests

A more reasoned method than the all-or-nothing approach is that *Turner* neither completely replaces the pre-existing equal protection framework, nor renders it completely inapplicable. Instead, the *Turner* reasonableness standard applies only to those claims that involve a legitimate penological interest,[125] while the usual three-tiered equal protection framework applies to claims that do not implicate legitimate penological interests. To clarify this distinction, equal protection analysis looks for some link between the challenged policy and a *government interest*,[126] while the *Turner* standard looks for a link between the policy and a legitimate *penological interest*. A government interest is open-ended in that any type of interest could

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"'the necessities of prison security and discipline'" (quoting *Lee*, 390 U.S. at 334)). *See also* McClesky v. Kemp, 481 U.S. 279, 346 (1987) (Blackmun, J., dissenting) (noting that "racial discrimination within the criminal justice system is particularly abhorrent").

123. In his *Turner v. Safley* dissent, Justice Stevens posited that even the whipping of inmates could be reasonably related to a security interest. Turner v. Safley, 482 U.S. 78, 101 (1987) (Stevens, J., dissenting).

124. *Id.* at 84.

125. *See* Glover v. Johnson, 198 F.3d 557, 566–67 (6th Cir. 1999) (Wellford, J., concurring) (explaining that while prisoners are protected against discrimination, *Turner* applies).

126. *See, e.g.*, N.Y. City Transit Auth. v. Beazer, 440 U.S. 568, 592 (1979) (explaining that safety and efficiency are government objectives); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314–15 (1976) (holding that mandatory retirement at fifty furthers the government objective of "assuring physical preparedness of its uniformed police").

be an interest of the government, while legitimate penological interests are by designation limited to only those interests that are penological in nature. Therefore, *Turner* does not apply to *all* prisoner claims of discrimination, but only to those where the differential treatment is in furtherance of a penological objective. As I argue in the next section, differential treatment based on gender stereotypes alone furthers no penological interest. *Turner* is therefore inapplicable in such situations.

It is important to note that because the *Turner* and equal protection analyses are qualitatively distinct, a prison policy that is not based on a penological interest could still be upheld on equal protection grounds. As penological interests are a type of government interest, an interest that does not fall into the smaller 'penological' category could nevertheless fall into the larger 'government' category. Therefore, the determination that the justification for prison differentiation does not fit within the *Turner* rubric is not dispositive; it could still qualify as a legitimate government interest and thus be upheld.

C. Security, Rehabilitation, and Deterrence of Crime as the Core Penological Interests

To ascertain what interests are legitimately penological, and thereby determine when *Turner* applies to differential treatment claims, it is essential to pin down why the Supreme Court promulgated the reasonable relation to legitimate penological interests standard.[127] The primary reason proffered by Justice O'Connor was that "courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform."[128] Although she did not elaborate as to why courts are "ill-equipped," *Procunier v. Martinez*,[129] the case relied on for this point, offers some guidance. *Martinez* described judges as unqualified to make decisions with respect to penological concerns because "maintaining internal order and discipline, . . . securing their institutions against unauthorized access or escape, and . . . rehabilitating" are issues unique to pris-

127. Turner v. Safley, 482 U.S. 78, 87 (1987).

128. *Id.* at 84 (quoting Procunier v. Martinez, 416 U.S. 396, 405 (1974)).

129. 416 U.S. 396 (holding that a mail censorship regulation violated the First Amendment), *overruled on other grounds by* Thornburgh v. Abbott, 490 U.S. 401, 409–14 (1989).

ons.[130] In addition, prisons are deemed to be the province of the executive and legislative branches.[131] In response to separation of powers issues and judicial incompetence with respect to penological concerns—discipline, security, and rehabilitation—courts generally adopt "a broad hands-off attitude toward problems of prison administration."[132]

Nevertheless, the Court has consistently maintained that prisoners retain those constitutional rights that are not inconsistent with incarceration.[133] *Turner* was promulgated in recognition that a balance needed to be struck between upholding fundamental rights of prisoners and allowing prison authorities to do their jobs without undue judicial interference.[134] *Turner* thus imposes a deferential standard of scrutiny when penological concerns are at issue, and only when penological concerns are implicated.

Since *Martinez*, security has emerged as the primary penological concern.[135] Even though the Court continues to list rehabilitation and deterrence of crime as penological interests, Supreme Court cases involving prisoners' rights subsequent to *Martinez* maintained a deferential approach because *security* was the end objective of challenged prison regulations. In *Pell v. Procunier*, for example, the Court upheld a prohibition of face-to-face media interviews because security was at issue and decisions involving prison security "are peculiarly within the province and professional expertise of corrections officials."[136] *Turner* itself described "safety and internal secu-

130. *Id.* at 404–05.

131. *Id.* at 405. *See also Turner*, 482 U.S. at 85.

132. *Martinez*, 416 U.S. at 404. *See also* Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119, 126 (1977) (noting the "complex and difficult" realities of running a prison).

133. *See, e.g., Turner*, 482 U.S. at 84; Bell v. Wolfish, 441 U.S. 520, 545 (1979).

134. This need for a balance was articulated in Washington v. Harper, 494 U.S. 210 (1990). "Our earlier determination to adopt this standard of review [*Turner*] was based upon the need to reconcile our longstanding adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult decisions regarding prison administration." *Id.* at 223–24.

135. Willens claims that prison officials and their attorneys were able to justify the judicial deference to prison authorities approach by emphasizing the "'necessity' of strict institutional security." Willens, *supra* note 79, at 81.

136. 417 U.S. 817, 827 (1974). *See also* Block v. Rutherford, 468 U.S. 576 (1984) (upholding a ban on contact visits because of a possible security problem); Bell v. Wolfish, 441 U.S. 520, 549–50 (1979) (describing a prohibition on prisoners receiving

rity" as "the core functions of prison administration"[137] and upheld the inter-prison mail restriction only because it was reasonably related to legitimate security concerns.[138]

Notwithstanding the primacy of security, the Court reiterated its view that the category of penological interests includes, and is limited to, security, rehabilitation, and deterrence in *O'Lone v. Shabazz*, decided nine days after *Turner*.[139] Before applying the *Turner* reasonableness standard, Chief Justice Rehnquist delineated what the Court considers "valid penological objectives—deterrence of crime, rehabilitation of prisoners, and institutional security."[140] Yet while deterrence, rehabilitation, and security are all considered penological objectives, the Supreme Court has only applied the *Turner* test or its precursor where security was the objective at issue.[141]

D. Misapplication of *Turner* by Lower Courts

It is clear from the Court's jurisprudence that the *Turner* reasonableness analysis applies only when a legitimate penological issue is concerned. Nevertheless, many lower courts faced with con-

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hardback books unless received directly from the publisher as rationally related to security problems); *N.C. Prisoners' Labor Union*, 433 U.S. at 126–28 (explaining that courts should defer to prison authorities in their determination that the creation of a prisoners' union could be dangerous).

137. 482 U.S. at 92.

138. *Id.* at 91 (pointing to prison officials' testimony that "mail between institutions can be used to communicate escape plans and to arrange assaults and other violent acts"). *See* text accompanying notes 94–98, *supra*.

139. 482 U.S. 342 (1987). *O'Lone* involved Muslim prisoners who claimed that a regulation that prevented them from attending Jumu'ah, a weekly service of central importance to observant Muslims, violated their First Amendment right to free exercise of religion.

140. *Id.* at 348. Because he had already taken pains to show that security was actually a concern in the case at hand, Chief Justice Rehnquist then moved on to apply the four reasonableness factors of *Turner* and concluded that the regulation interfering with Jumu'ah was not constitutionally infirm. The policy examined by the Court was the requirement that prisoners work off-site, which in turn caused Muslim prisoners to not be able to attend Jumu'ah. The Court found a reasonable relation between security in the prisons and the regulation, *id.* at 350, Muslim prisoners had 'alternative means' available in that they could participate in other religious events, *id.* at 351–52, and allowing Muslim prisoners to return to prison to participate in Jumu'ah would have a negative impact on other inmates and prison personnel, *id.* at 352.

141. *See* note 136 *supra* and accompanying text.

stitutional challenges brought by prisoners have given almost total deference to prison officials by failing to inquire whether a penological concern was at stake. This is obvious in the context of differential treatment claims of women prisoners, where courts that have upheld differential treatment undertook only a cursory investigation of security issues or other penological concerns. In addition to not verifying that a legitimate penological objective was at issue, none of the lower courts that have applied *Turner* to equal protection claims of women prisoners have made any pretense of conducting the reasonable relation to legitimate penological interests inquiry.[142]

In *Klinger v. Department of Corrections*, for example, prisoners at the women's facility had an average length of stay one-half to one-third that of prisoners at an all-male facility, and the men's facility was classified at a higher security level than the women's facility.[143] Notwithstanding their lower average security risk, women prisoners had access to fewer programs than men prisoners.[144] In this case, security would seem to work in favor of the women complainants—because they posed a lower security risk, they should have been allowed to participate in more programs. The court, however, did not attempt to relate the differential treatment to security interests, although it hinted that *Turner* was the applicable case.[145] Instead, the *Klinger* court determined that male and female prisoners were not similarly situated,[146] and neglected to apply the reasonable

142. *See* Women Prisoners v. District of Columbia, 93 F.3d 910, 925 (D.C. Cir. 1996) (holding that no denial of equal protection existed where women inmates were offered fewer programs than men); Keevan v. Smith, 100 F.3d 644, 648–49 (8th Cir. 1996) (holding that women prisoners had no equal protection claim even though their facility was smaller and thus dissimilarly situated); Pitts v. Thornburgh, 866 F.2d 1450, 1457 (D.C. Cir. 1989) (holding that women prisoners located in more remote areas were not discriminated against because the cost of building a new facility near D.C. was a legitimate penological concern). *But see* Klinger v. Dep't of Corr., 31 F.3d 727, 731 (8th Cir. 1994) (hinting that if plaintiffs had claimed discriminatory funding, they may have had an equal protection claim).

143. 31 F.3d at 731.

144. *Id.* (citing the district court finding that women prisoners were disadvantaged with respect to nineteen programs and services).

145. *Id.* at 732 (referring to *Turner's* judicial deference mandate).

146. *Id.* at 733. The *Klinger* court stated that because there was no statute on the books that discriminated against women prisoners, there could be no facial classification. *Id.* at 734. Such an approach ignores the fact that the policy of providing women prisoners with inferior programs treats women and men differently based on their gender. A conscious decision is made by prison authorities to provide male inmates

relation inquiry altogether. Even if the prisoners were not similarly situated and *Turner* was indeed the controlling case, a reasonable relation inquiry should have been undertaken.[147] In sum, courts that have heard equal protection claims of women prisoners since *Turner* have upheld differential treatment on non-penological grounds and without undertaking a reasonable relation analysis.

E. Financial Considerations

Some lower courts have upheld differential treatment of women prisoners on financial grounds. Rather than linking differential treatment to security, rehabilitation, or deterrence of crime, prison officials implicitly or explicitly argue that monetary considerations justify the quantitatively and qualitatively lesser programming offered to women. In general, fewer financial resources are expended at women's facilities, at least in part because they are "necessarily smaller."[148] Where resources are tight, a larger portion of the pie is given to prisons with more prisoners.[149] Thus, equalizing male-female programming ostensibly would be a burden on prison resources.

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with certain educational and vocational programs, and to not provide female inmates with these same programs. Gender is the only distinction made between the two groups. That is, because "female recipients may receive poor programming because of their gender and not for some nongender-related reason," *id.* at 738 (McMillian, J., dissenting), a facial classification is at issue.

In a case that did not involve differential programming, but the housing of women at a more geographically-remote area than male inmates, the court determined that women were jailed at the more isolated facility "because they are women." Pitts v. Thornburgh, 866 F.2d 1450,1453 (D.C. Cir. 1989). A facial classification was therefore self-evident. *See also* Glover v. Johnson, 35 F. Supp. 2d 1010, 1015 (E.D. Mich. 1999) (explaining that different educational, vocational, apprenticeship, and work-pass opportunities constitute facial classifications).

147. The Supreme Court has explicitly held that a reasonable relation nexus inquiry is necessary in cases involving prisoners' rights. "[W]hen a prison regulation impinges on inmates' constitutional rights the regulation is valid if it is reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89 (1987).

148. Keevan v. Smith, 100 F.3d 644, 649 (8th Cir. 1996) (explaining that women's facilities are smaller because women "account for such a small proportion of the total prison population").

149. *See* Women Prisoners v. District of Columbia, 93 F.3d 910, 925 (D.C. Cir. 1996) (claiming that "it is hardly surprising" that women at smaller facilities received fewer programming opportunities than men); *Keevan*, 100 F.3d at 647 (stating that male inmates had a "broader range of industry job opportunities"); *Klinger*, 31 F.3d at 731 (citing the district court's finding that women were disadvantaged with respect to

In *Keevan v. Smith*, for example, the decision of which prison industries to place at which facilities was purportedly based on factors such as population size and location of the prison in relation to purchasers of prison industry products.[150] In this manner, male prisoners did layout work for letterheads, forms, and envelopes, while female prisoners worked in the equivalent of a copy center.[151] It seems that the decision to place inferior and stereotypically gendered prison industries at the female facility was not made in furtherance of some security, rehabilitation, or deterrence goal, but rather in an attempt to place prison industries in a cost-effective manner.[152] The logic of the court was that it would be more expensive to place industries at female prisons because they were located in more remote areas and female inmates were outnumbered by men.[153]

This raises two questions: whether financial concerns are legitimately penological in their own right and, if not, whether financial considerations are means leading to the end of security, rehabilitation, or deterrence. There are at least three reasons why budgetary restraints are not penological interests in their own right. First, the Supreme Court has held that the financial burden of treating similarly situated individuals equally cannot outweigh the constitutional mandate of equal protection of the laws.[154] As Rosemary Herbert

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nineteen programs); Glover v. Johnson, 35 F. Supp. 2d. 1010, 1018–20, 1022–23 (E.D. Mich. 1999), *aff'd*, 198 F.3d 557 (6th Cir. 1999) (pointing out programming differences).

150. 100 F.3d at 650–51.

151. *Id.* at 653.

152. "Department policy for the placement of prison industries is based on factors such as population size, availability of a steady work force, and location of the prison in relation to potential purchasers of industry products." *Id.* at 650–51. *See also* Laddy, *supra* note 15, at 18 (noting that prison authorities cite financial considerations such as prison size and inmate length of stay as justifying male-female programming differences).

153. *Keevan*, 100 F.3d at 650–51.

154. *See* Bounds v. Smith, 430 U.S. 817, 825 (1977) ("the cost of protecting a constitutional right cannot justify its total denial"); Califano v. Goldfarb, 430 U.S. 199, 217 (1977) (reiterating that policies that "save the Government time, money, and effort . . . do not suffice to justify a gender-based discrimination"). For similar lower court rulings, see *Klinger*, 31 F.3d at 736 (McMillian, J., dissenting) ("Financial hardship is not a defense to sex discrimination in prisons." (citing Shapiro v. Thompson, 394 U.S. 618, 633 (1969))); Gates v. Collier, 501 F.2d 1291, 1322 (5th Cir. 1974) (holding that financial hardship does not justify unconstitutional prison conditions); Canterino v. Wilson, 546 F. Supp. 174, 211 (W.D. Ky. 1982) ("A desire to preserve the

states, "cost per se is not recognized as a sufficiently important governmental objective to justify unequal treatment."[155] Second, the Court has explicitly limited penological interests to deterrence, rehabilitation, and security,[156] and has not shown any willingness to expand the scope of this limited category. If Chief Justice Rehnquist had intended for financial considerations to be a penological interest, he would have stated as much in *O'Lone v. Shabazz*.[157]

Finally, the *Turner* reasonable relation standard was promulgated as a result of the view that judges should not substitute their judgment for the expertise of prison authorities where objectives unique to prisons are at issue.[158] Contrary to being unique to prisons, financial considerations in prisons are quite similar to financial concerns in other settings, such as state-run schools, where the government cannot offer male students more and better programs than female students simply because there are limited financial resources.[159] Such differential programming based on gender has been clearly designated as a violation of the Equal Protection Clause.[160] In both schools and prisons, the state has control over finite resources and has authority to decide which schools or prisons receive what programs. Because financial considerations are not *unique* to prisons, the *Turner* justification for applying a different standard of review is not present. Financial considerations are not a separate category of legitimate penological interests to be given equal weight as security, rehabilitation, and deterrence because cost alone does not justify differential treatment, and monetary constraints are not unique to prisons.

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state's limited resources cannot be used to justify an *allocation* of those limited resources which unfairly denies women equal access to programs routinely available to men."); McMurry v. Phelps, 533 F. Supp. 742, 767 (W.D. La. 1982).

155. Herbert, *supra* note 35, at 1198. *See also id.* at 1198 n.82 (explaining that cost is "essentially an administrative convenience justification" of the type that has been rejected).

156. O'Lone v. Shabazz, 482 U.S. 342, 348 (1987). *See* note 140 *supra* and accompanying text.

157. *Id.* (declining to include financial considerations as a penological objective).

158. Turner v. Safley, 482 U.S. 78, 84–85 (1987). *See* text accompanying notes 77–80, *supra*.

159. *See* United States v. Virginia (VMI), 518 U.S. 515, 553 (1996) (listing inferior funding as one reason that VWIL was an inadequate remedy to the exclusion of women from VMI).

160. *Id.* at 554.

Nonetheless, there is a point where financial and security concerns merge in the prison context. Because one of the main functions of a prison is the maintenance of a secure environment, a large proportion of a prison's operational expenses are spent on maintaining security.[161] That is, financial decisions are often the means in pursuit of security as the end. As an example, if women prisoners at a 500-inmate facility were provided the same number of programs as men at a 5,000-inmate facility, it is possible that funds that would have been used for security at the women's facility would instead have to be shifted to programming.

Where prison officials can prove that offering women inmates more programs in an effort to equalize programming at male and female facilities would in fact impair their financial capacity to adequately provide for security, rehabilitation, or deterrence, then financial concerns are encompassed by penological interests. Financial decisions would be the means in pursuit of the end of security, rehabilitation, or deterrence. That is, if prison officials can legitimately link budgetary constraints to security, rehabilitation, or deterrence in a case where women prisoners are offered fewer programs than their male counterparts, a legitimate penological interest is at issue and the *Turner* test applies.[162]

This is not to say that prison finances and security issues *always* merge. If women's prisons receive less funding based on some non-security, non-rehabilitation, or non-deterrence reason, then no penological interest is at issue and *Turner* does not apply. In such a case, the normal equal protection analysis would be appropriate. In

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161. Forty-eight percent of estimated operating expenses for federal prisons in 2000 are designated for "institution security and administration," while thirty-seven percent is budgeted for "inmate care and programs." Dep't of Justice Budget 2000, at 649, *at* http://w3.access.gpo.gov/usbudget/fy2000/pdf/jus.pdf.

162. Although this Note does not address discriminatory funding of institutions as a whole, reviewing courts need to be aware of the possibility that women's prisons as entities could receive less funding than comparably-sized men's prisons.

> Because many officials in the predominantly male prison bureaucracy feel women do not need the same type of training and vocational skills as men, men's institutions take precedence when funds are allocated. The tendency to fund women's prisons last is not just a function of their smaller populations. It is also a result of devaluation by sex.

Laddy, *supra* note 15, at 1 (internal quotes omitted).

addition, when prison administrators decide *how* to expend the funds that have been allocated for programming, that is, which programs will be available at which prisons, a legitimate penological interest is not the end goal. These decisions involve only programming, not security, rehabilitation, or deterrence of crime. Equal protection doctrine, rather than the *Turner* standard, must therefore be applied.

As an example, there is no security concern at issue when prison officials decide to provide male prisoners with the opportunity to earn baccalaureate degrees in either Business Administration or Behavioral Sciences, while offering women only the possibility of earning a degree in Applied Liberal Studies.[163] Likewise, security is not an issue in the decision to offer women classes in cosmetology and men classes in carpentry.[164] Security is not an issue when women are provided with qualitatively different programming opportunities than men are. What *is* at issue in the provision of different types of programs to men and women is an assumption that women are best-suited to "female" tasks, while more career-oriented, labor-intensive work should be undertaken by men. Such an assumption treats women prisoners differently than men prisoners because they are women. When the provision of programs is based on gender stereotypes, the allocation of financial resources is a proxy for gender discrimination.[165]

As the dissent in *Klinger v. Department of Corrections* stated:

> Cost-driven differences in institution size and inmate length of stay do not constitutionally justify limiting [women] inmates' training to domestics and other "women's" occupations such as "clerical arts" and homemaking, providing inferior inmate pay, pre-employment training and prison law libraries, while denying them post-

163. *See* Glover v. Johnson, 35 F. Supp. 2d. 1010, 1018 (E.D. Mich. 1999) (pointing out that men at the security level II facility had access to two baccalaureate programs (in Business Administration and Behavioral Sciences), while women at the security level II facility had access to only one baccalaureate program (in Applied Liberal Studies)).

164. *See* Collins & Collins, *supra* note 9, at 4.

165. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199, 206–07 (1977) (holding that the distinction between widows and widowers in the payment of social security benefits was based on "'archaic and overbroad' generalizations" and "'assumptions as to dependency'" (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975) ("archaic and overbroad generalizations") and Weinberger v. Wiesenfeld, 420 U.S. 636, 645 (1975) ("assumptions as to dependency"))).

> secondary education or vocational courses that could lead to a college degree or college credit, and providing [male] inmates with training in higher-paying, more technical, and more varied occupations, more sophisticated and accessible prison law libraries, and educational and vocational courses leading to attainment of a college degree or college credit.[166]

Because gender discrimination does not serve the interests of security, rehabilitation, or crime deterrence, it does not qualify as a legitimate penological interest. When women prisoners are treated differently because of their gender, not for some penological reason, the controlling case is *VMI*.[167]

As mentioned above, the determination that a justification is not a legitimate penological interest is not dispositive, as the justification could still be a government interest, and possibly even an exceedingly persuasive justification.[168] The difficulty in imagining some justification that does not qualify as a penological interest but that survives heightened scrutiny lies in the dilemma of positing some form of gender-based disparate treatment that could survive *VMI* at all. A possibility, however, would be the offering of prenatal classes at women's prisons, but not at men's facilities. The reason for providing such classes only to female inmates—only women can become pregnant—clearly is not related to security, rehabilitation, or deterrence, nor is it a financial concern that can be linked to one of these legitimate penological interests. While the provision of prenatal classes only to women serves no penological interest, it is related closely enough to the government goal of providing women inmates with medically-necessary programming to qualify as an exceedingly persuasive justification. Thus, the determination that qualitatively different programming at prisons does not fit within the *Turner* rubric is not the end of the analysis. Instead, the claim must be analyzed using the heightened scrutiny of *VMI*.[169]

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166. Klinger v. Dep't of Corr., 31 F.3d 727, 736 (8th Cir. 1994) (McMillian, J., dissenting).

167. United States v. Virginia (VMI), 518 U.S. 515 (1996). For an argument that *VMI* should *always* apply to discrimination cases brought by women prisoners, see Kennedy, *supra* note 47, at 67. Laddy, writing before *VMI*, argued that "inmates' claims of sexual discrimination under the equal protection clause require intermediate scrutiny." Laddy, *supra* note 15, at 17.

168. *See* section III(B), *supra*.

169. 518 U.S. at 533.

IV. APPLICATION OF *TURNER* TO QUANTITATIVE PROGRAMMING DIFFERENCES

The previous section explained that while financial considerations are not legitimate penological interests in their own right, they can be the means of achieving security interests, and thus qualify as legitimate penological interests. For financial interests to be considered uniquely penological and thus fit into the *Turner v. Safley* rubric,[170] prison officials must show that providing women prisoners with the same quantity of educational and vocational programs as men prisoners would actually interfere with funds needed for security objectives. Once it is determined that funding and security are related, *Turner* is the controlling case and the quantifiable programming difference must be reasonably related to security funding in order to be upheld.[171]

To determine whether the funding-security relation is reasonable, the four factors delineated by the *Turner* Court should be applied to the particular case. The first reasonableness factor is that a "valid, rational connection" must exist between the means—fewer programs for women as compared to men—and the end—an adequate level of security. This determination would involve a detailed investigation of the prison's resources and how it expends these funds. Prison authorities would have to show a direct correlation between increased funding for programs and a decreased ability to provide security. Note that while this first reasonableness factor is similar to the determination that financial interests can be linked to legitimate penological interests, the two are not identical. The initial question of whether equal programming would interfere with security funding is a less rigorous, threshold matter. The "valid, rational connection" analysis, on the other hand, is more exacting and requires an in-depth examination of the prison's financial situation.

The second reasonableness factor is whether or not the women would have any alternative means of exercising their right.[172] Although equal protection is not a right that is exercised, but one

170. 482 U.S. 78 (1987).

171. This threshold step for determining whether *Turner v. Safley* is applicable involves an inquiry into whether there is a relation between the funding level of women's programs and security. If there is a relation, *Turner* is applied in order to determine whether this relation is *reasonable*.

172. *Id.* at 90.

that is conveyed, courts would probably find that the right to equal protection is vindicated if women have the opportunity to participate in equivalent educational and vocational programs. If they do not have any alternative means to participate in equivalent programs, there is less reason to defer to the judgment of prison officials.[173] This analysis will hinge on how broadly or narrowly the concept 'equal opportunity to participate' is defined. If it is defined broadly—access to any work detail, for example—then women plaintiffs will have a hard case to make unless they have access to *no* work details. If, on the other hand, 'equal opportunity to participate' is defined narrowly—access to work details or educational programs that provide equivalent skills—then it will be easier for plaintiffs to claim that they do not have access to alternative means, and thereby refute the reasonableness of differential programming. The latter interpretation should be employed because it more fully vindicates women prisoners' right to equal protection.

The third factor is "the impact accommodation of the asserted constitutional right will have on guards and other inmates."[174] It is unlikely that providing additional programs to women inmates will have a negative impact on guards and other inmates, unless the additional programs inhibit internal security. Transferring women from behind a switchboard where they perform secretarial tasks, to behind a computer where they could perform more skill-oriented tasks, for example, should not impact guards or other inmates.

The final *Turner* factor, the availability of alternative means to prison authorities,[175] will turn to a large extent on the geographic location of the women's prison in comparison to male facilities.[176] In *Women Prisoners v. District of Columbia*, for example, the women's minimum security facility was located on the grounds of the men's minimum security facility.[177] An easy alternative mean to providing inferior or stereotyped programs to women would be to allow women prisoners access to the men's programs at their facilities, so long as

173. *Id.* (stating that when "alternative means of exercising the right" exist, "courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials'" (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974))).

174. *Id.*

175. *Id.* at 90–91.

176. *See supra* notes 16–17 and accompanying text.

177. 93 F.3d 910, 913 (D.C. Cir. 1996).

adequate supervision and security was provided.[178] In some cases, this same facility alternative does not exist because the women's facilities are located in entirely different towns or even states.[179] The absence of this alternative could be evidence of the reasonableness of the policy, but would not be dispositive. Other alternatives, such as finding a less costly way of providing baccalaureate classes or work programs, would need to be analyzed on a case-by-case basis.

Application of *Turner* to equal protection claims of women prisoners who are offered fewer programs than their male counterparts necessitates a practical approach, balancing the need to maintain appropriate security levels with treating women inmates as equitably as is possible.[180] Women prisoners cannot constitutionally be provided fewer programming opportunities than their male counterparts unless: there is a direct correlation between increased funding for programs and decreased ability to provide security; women have the opportunity to participate in equivalent educational and vocational programs; providing women with more programs has a negative impact on guards and other inmates; and alternative means to providing inferior or stereotyped programs to women are not available to prison authorities. Given these hurdles, it is possible that the provision of fewer programs to women will be found to not be reasonably related to security interests in the majority of cases.

V. APPLICATION OF *VMI* TO QUALITATIVE PROGRAMMING DIFFERENCES

As explained above, the provision of different types of educational and vocational programs to male and female prisoners must be

178. *Id.* at 913, 915 (reviewing the district court's finding that work details available to women were limited to receptionists, housekeeping, librarians, clerical work, and culinary assignments, whereas men had access to programs such as carpentry and electrical and mechanical work). In *Women Prisoners*, females *did* attend classes located at the male facility, but the classes they were offered were different in quality.

179. *See, e.g.*, Pitts v. Thornburgh, 866 F.2d 1450 (D.C. Cir. 1989) (explaining that women prisoners from D.C. were incarcerated in a remote area of West Virginia, while men prisoners were incarcerated within the city limits of D.C.).

180. *Turner*, 482 U.S. at 85 (defining the Court's task as "formulat[ing] a standard of review for prisoners' constitutional claims that is responsive both to the policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights").

examined with *VMI's* heightened level of scrutiny[181] because qualitative programming differences are not legitimate penological interests.[182] As a threshold matter in applying equal protection doctrine, the reviewing court must first determine that the two groups being compared are similarly situated.[183] In the case of women prisoners, some courts have not been willing to seriously consider their equal protection claims because male and female facilities are different.[184] According to these courts, women and men *prisoners* cannot be similarly situated because women's *prisons* are "necessarily smaller" than men's prisons.[185] The majority in *Klinger v. Department of Corrections* went so far as to claim that "differences between challenged programs at the two prisons are virtually irrelevant."[186] But as the dissent in *Women Prisoners v. District of Columbia* explained,

> because the District places men and women into physically different facilities on the basis of sex, . . . *the court's argument that differences in the facilities justify the inferior treatment accorded to women is "notably circular. . . ."* [T]he

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181. United States v. Virginia (VMI), 518 U.S. 515, 533 (1996).

182. *See* text accompanying notes 163–67, *supra*. Quantitative discrepancies that cannot be linked to a legitimate penological interest must also be analyzed according to *VMI*. *See* text accompanying notes 170–71, *supra*.

183. *See, e.g.,* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (stating that similarly situated persons should be treated alike); Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469 (1981) (explaining that gender classifications are acceptable if men and women are not similarly situated in a particular case).

184. Keevan v. Smith, 100 F.3d 644, 648–49 (8th Cir. 1996) (pointing to differences between male and female prisons such as: population size, security classification levels, and average sentence length); Women Prisoners v. District of Columbia, 93 F.3d 910, 925 (D.C. Cir. 1996) (finding differences in "special characteristics" and population sizes); Klinger v. Dep't of Corr., 31 F.3d 727, 731–32 (8th Cir. 1994) (citing different population sizes, lengths of inmate stay, security levels, and "special characteristics" of women).

185. The *Keevan* court held that, "male and female inmates incarcerated in Department prisons are far from similarly situated for purposes of equal protection analysis." 100 F.3d at 649. This statement was made after the court detailed differences in facility size, security classifications, and average sentence lengths. The "[m]ost notabl[e]" difference was the facility sizes. *Id. But see Women Prisoners*, 93 F.3d at 952 (Rogers, J., dissenting) (stating that the size of institutions is not a justification for differential treatment); *Klinger*, 31 F.3d at 736 (McMillian, J., dissenting) (noting that the difference in lengths of stay between men and women prisoners was quite small).

186. 31 F.3d at 733.

> court's holding that male and female prisoners are dissimilarly situated would preclude constitutional comparison of programming no matter how vast the differences in programming were.[187]

Differences in state-created and operated facilities cannot be a proxy for supposed differences between inmates at the facilities.[188] The very difference being challenged cannot be scrutinized at the initial stage of determining whether the two groups are similarly situated. Indeed, if the Court undertook a 'similarly situated' analysis with respect to the institutions being challenged, no case of institutional discrimination would ever survive. In *VMI*, for example, the Virginia Military Institute was not compared to the Virginia Women's Institute for Leadership as an initial question of the similarity of situations, but during the central analytical stage.[189] Likewise, plaintiffs in school desegregation cases are not deemed dissimilarly situated because their schools are different from white schools.

This reasoning applies with equal force to prison facilities. The focus on differences between prison facilities at the 'similarly situated' stage defeats the purpose of the constitutional claim. If the very institution that is challenged as discriminatory is deemed outside of equal protection analysis *because* it is different, blatant discrimination between groups can take place unchecked.[190] Instead, women prisoners who claim that differential programming violates their constitutional right to equal protection are similarly situated to men prisoners because they are "equally as capable of participating in, and benefiting from, the recreational, educational and vocational

187. 93 F.3d at 952 (Rogers, J., dissenting) (emphasis added) (citing United States v. Virginia (VMI), 518 U.S. 515, 543 (1996)). *See also* Herbert, *supra* note 35, at 1189 (explaining that because differences between men and women prisoners are traceable to "official discrimination," such differences "cannot render men and women dissimilarly situated with respect to incarceration").

188. *See generally VMI*, 518 U.S. 515 (holding that differences in schools for men and women unconstitutionally discriminate against women).

189. *Id.* at 546–56.

190. "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." *Women Prisoners*, 93 F.3d at 951 (Rogers, J., dissenting).

opportunities offered to their male counterparts."[191] Most importantly, men and women prisoners are similarly situated for the simple reason that both groups are imprisoned under the authority of the state.[192]

Once it is determined that female prisoners are similarly situated to male prisoners, heightened scrutiny as articulated in *VMI* should be applied. As explained above,[193] *VMI* requires that any differential treatment based on gender be closely related to an exceedingly persuasive justification.[194] "Generalizations about the way women are, estimates of what is appropriate for *most women*"[195] do not qualify as exceedingly persuasive justifications. This means that in the prison context, the provision of different types of programs to men and women must be substantially related[196] to actual differences, such as female inmates' ability to bear children.[197] While generalizations about women as more likely to be single parents and victims of rape, and men as more likely to be violent and predatory, may be true in general,[198] it does not necessarily hold for *all* men or women inmates, and is thus an overbroad generalization.[199] As such, programming based on such generalizations is constitutionally infirm. The biological fact that only women can bear children, on the other

191. Klinger v. Dep't of Corr., 31 F.3d 727, 735 (8th Cir. 1994) (McMillian, J., dissenting).

192. Laddy provides a slightly different application of the similarly situated analysis. She explains that special characteristics of women cannot be relied on to show that they are dissimilarly situated. Laddy, *supra* note 15, at 19–23.

193. *See* text accompanying notes 70–73, *supra*.

194. *VMI*, 518 U.S. at 533.

195. *Id.* at 550 (internal quotes omitted) (emphasis in original).

196. *Id.* at 533.

197. Note that because the *VMI* standard is being applied, it is unnecessary to relate the differential programming to a penological objective, as required by *Turner*.

198. *See, e.g.*, Klinger v. Dep't of Corr., 31 F.3d 727, 731–32 (8th Cir. 1994) (explaining that female inmates have special needs because they are more likely to be single heads of household and victims of sexual abuse, while men "are more likely to be violent and predatory than females").

199. *See VMI*, 518 U.S. at 541 ("State actors controlling gates to opportunity . . . may not exclude qualified individuals based on fixed notions concerning the roles and abilities of males and females."). Rebecca Jurado argues that the modern penological system stereotypes both men and women. Men are seen as "aggressive, intentional in their conduct, and responsive to fairness in treatment." Women are seen as "compliant, passive, emotional, and manipulative." Jurado, *supra* note 10, at 12.

hand, is an exceedingly persuasive justification for providing only women prisoners with a maternity ward because it is based on an actual difference.[200]

CONCLUSION

Women inmates comprise a relatively small percentage of the total prisoner population in the United States. As such, they are often ignored, resulting in even worse treatment than conditions of confinement endured by male inmates. Among other inequalities, female prisoners are offered fewer vocational and educational opportunities than are their male counterparts. Programming opportunities that are offered to women are often inferior in quality and stereotypically-gendered in nature.

In many situations, quantifiable programming differences—the provision of more programs to men—are due to the allocation of funds between institutions. So long as female institutions are provided with fewer funds because they comprise a smaller percentage of the inmate population, and not because of gender discrimination, a penological interest is arguably at stake. Where funding distinctions can be linked to the penological interest of security, rehabilitation, or deterrence of crime, reviewing courts must apply the reasonable relation to legitimate penological interests standard of *Turner v. Safley*.[201] The court must adhere closely to *Turner* and apply each of the four reasonableness factors.[202] Only after these factors are applied may a court determine whether or not the offering of fewer educational and vocational programs to women inmates unconstitutionally infringes on the equal protection rights of this population.

When women prisoners are faced with qualitative programming differences—inferior, stereotypical programming—they are treated differently from male inmates not because of their relatively small numbers, but because they are women. There is no legitimate penological reason for providing women with inferior or stereotypical "women's work." As such, the applicable constitutional standard is

200. *See, e.g.*, Carole Gilligan, In a Different Voice 6–8 (1982); Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1, 14 (1988) (expounding on the "connection thesis," West's explanation of "women's fundamental difference from men").

201. 482 U.S. 78 (1987).

202. *Id.* at 89–91.

heightened scrutiny as articulated in *VMI*.[203] There will be few if any cases where a court can find that prison authorities have an exceedingly persuasive justification for offering women inferior, gender-stereotyped programs.

Application of *VMI* to claims of women prisoners who suffer gender discrimination will make a reality of the statement that the reach of the Fourteenth Amendment extends beyond the walls of women's prisons.[204] Female inmates will not lose their right to be treated as the equals of men upon conviction, and subjugation to the gender-stereotyped world of the past will no longer be part of women prisoners' punishment.

203. 518 U.S. 515 (1996).

204. *Turner*, 482 U.S. at 81 (claiming that the Fourteenth Amendment protects prisoners against invidious discrimination).