

January 2006

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Natasha L. Carroll-Ferrary
New York Law School Class of 2007

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Recommended Citation

Natasha L. Carroll-Ferrary, *Incarcerated Men and Women, the Equal Protection Clause, and the Requirement of “Similarly Situated”*, 51 N.Y.L. SCH. L. REV. 596 (2006-2007).

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NATASHA L. CARROLL-FERRARY

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Protection Clause, and the Requirement
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ABOUT THE AUTHOR: Natasha L. Carroll-Ferrary is a 2007 J.D. candidate at New York Law School.

I. INTRODUCTION

The Equal Protection Clause of the Fourteenth Amendment guarantees that people who are similarly situated are treated equally.¹ In order to be “similarly situated,” groups need not be identical in makeup, they need only share commonalities that merit similar treatment.”² Consider the story of Joan Johnson and George Smith, both of whom were divorced with two children and both of whom worked two jobs to support their family.³ One night, in towns far away from each other, both Joan and George committed murder. Both were arrested, indicted, and convicted, and both were sent to single-sex prisons for ten years. Despite these similar experiences, however, Joan and George were treated very differently in prison. George had access to educational and vocational programs so that he could enhance his mechanical skills and get a job when released from prison. Joan also had some programs, but they were focused on child-rearing and sewing, which would help her in her home, but would not help her get a job upon release from prison. Despite the fact that Joan and George are not identical in gender makeup, the commonality of being imprisoned for criminal convictions shows that they are similarly situated. A state that treats similarly situated people, like Joan and George, differently violates the Equal Protection Clause if the state does not have a sufficiently “important” legal reason for doing so.⁴

In most gender discrimination cases, courts simply take for granted that men and women are similarly situated.⁵ Courts discuss only whether the challenged

1. See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 522 (2004) (citing *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 532, 439 (1985)); *Plyler v. Doe*, 457 U.S. 202, 248 (1982). The Fourteenth Amendment states: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of laws, nor deny to any person within its jurisdiction the *equal protection of the laws.*” U.S. CONST. amend. XIV, § 1 (emphasis added).

2. *Betts v. McCaughtry*, 827 F. Supp. 1400, 1405 (W.D. Wis. 1993).

3. Joan Johnson and George Smith are fictional characters.

4. See *supra* note 1; see also discussion *infra* Part III.A (discussing the standard of review used in racial discrimination claims, gender discrimination claims, and claims of prisoners).

5. Because courts presume that men and women are similarly situated, courts also do not decide whether gender differences are valid reasons for the state to treat each gender differently. See, for example, *Reed v. Reed*, 404 U.S. 71 (1971), which was one of the first cases in which the Supreme Court addressed a gender-based classification. The Court determined that males and females were similarly situated based on the objective of the state legislation, stating:

The objective of s 15-312 clearly is to establish degrees of entitlement of various classes of persons in accordance with their varying degrees and kinds of relationship to the intestate. Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to that objective. By providing dissimilar treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause.

Id. at 77. But one hundred years prior to *Reed*, the Court upheld an Illinois law preventing married women from becoming members of the bar. *Bradwell v. Illinois*, 83 U.S. 130 (1872). In so deciding, Justice Bradley’s concurring opinion made comparisons to show how men and women are *not* similarly situated:

The claim that, under the fourteenth amendment of the Constitution . . . the statute law of Illinois, or the common law prevailing in that State, can no longer be set up as a barrier against the right of females to pursue any lawful employment for a livelihood (the practice of law in-

policy violates the Equal Protection Clause.⁶ In the context of claims of gender discrimination in prisons, however, several circuit courts have held that male and female inmates are not similarly situated, and have dismissed their equal protection claims.

This Note will argue that male and female prisoners are similarly situated. The circuit courts that have found that male and female inmates are not similarly situated rely on differences between the parties and differences between the prison structures that are constitutionally irrelevant, arbitrary, and inconsistent with the purposes of incarceration. Courts should instead consider male and female prisoners similarly situated because of their shared status as people incarcerated by the state for criminal convictions. Since they are similarly situated in this essential way, prisoners' claims of gender discrimination under the Equal Protection Clause should not be dismissed.

Part II of this Note discusses a brief history of the prison system and the role of gender in the system. This history will show why there was, and continues to be, gender segregation and discrimination in prisons, and how this contributes to gender stereotypes outside the prison walls. In part III, this Note summarizes equal protection jurisprudence and describes several circuit court cases that have held women prisoners are not similarly situated to male prisoners for purposes of an equal protection analysis. Part IV argues that women prisoners are similarly situated to male prisoners and that their equal protection claims should be considered, rather than dismissed. Part IV also compares gender discrimination in prisons with discrimination in other cases in which the courts did not undertake a similarly situated analysis. Part V concludes that the courts need to address inmates' equal protection claims. Courts should not dismiss claims by simply stating that male and female prisoners are not similarly situated. If men and women, like Joan and George, are not considered similar in the context of being incarcerated by the state for criminal convictions, then the Equal Protection Clause fails to protect a portion of the population from illegal gender discrimination.

cluded), assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life. It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. 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.

Id. at 140–41 (Bradley, J., concurring).

6. See cases discussed *supra* note 5.

II. THE PRISON SYSTEM AND THE ROLE OF GENDER

Throughout the history of the United States prison system, female prisoners have suffered discrimination as a result of their separation from male prisoners.⁷ At the creation of state prisons in the late 1700s, there were so few women prisoners that the state found no need for separate prison facilities for women and men.⁸ This led to problems with accommodating mothers, creating rehabilitation programs, and finding appropriate treatment, punishment, and work assignments, especially since prison administrators were unsure how to treat the women.⁹ There were additional problems with sanitation and over-crowding because men and women were using the same facilities.¹⁰ Over time, it became obvious that housing women and men prisoners together also created problems with privacy, sexual exploitation, and infant mortality because the facilities were not sanitary or equipped to assist women and their children.¹¹ Therefore, as the number of women inmates began to increase in the 1900s, women were moved to separate small cellblocks in the prison yard or to separate units outside the prison walls.¹² This made the women less susceptible to sexual exploitation, but also reduced their access to medical, religious, food, and exercise services since they were removed from the main prison.¹³ By the mid-1970s, about half of the states had separate facilities for women.¹⁴

The population of women in prison has continued to increase since the 1970s.¹⁵ By the end of 2005, there were 107,518 women in federal and state prisons, an increase of 776% since 1977.¹⁶ In contrast, there were 1,418,406 men in prison at the end of 2005, which was an increase of 417% since 1977.¹⁷ De-

7. See Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law — A Case Study of Women in United States Prison*, 13 HARV. HUM. RTS. J. 71, 87 (2000).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. The Curry School of Education, University of Virginia, *Women in Prison in the U.S.: Facts and Figures*, http://curry.edschool.virginia.edu/prisonstudy/index.php?option=com_content&task=view&id=728&Itemid=74 (last visited Feb. 19, 2007).

15. See GEORGE HILL & PAIGE HARRISON, U.S. DEP'T OF JUSTICE, *FEMALE PRISONERS UNDER STATE OR FEDERAL JURISDICTION* (2005), <http://www.ojp.usdoj.gov/bjs/data/corpop03.csv>.

16. See *id.*; Bureau of Justice Statistics, U.S. Dep't of Justice, *Prison Statistics*, <http://www.ojp.usdoj.gov/bjs/prisons.htm> (last visited Feb. 19, 2007).

17. See PAIGE HARRISON, U.S. DEP'T OF JUSTICE, *SENTENCED MALE PRISONERS UNDER STATE OR FEDERAL JURISDICTION* (2005), <http://www.ojp.usdoj.gov/bjs/data/corpop36.csv>; Bureau of Justice Statistics, U.S. Dep't of Justice, *Prison Statistics*, <http://www.ojp.usdoj.gov/bjs/prisons.htm> (last visited Feb. 19, 2007).

spite the increase in the number of women in prison, many states have only one female prison facility which houses all women regardless of the type of crime committed; on the contrary, men are sentenced to maximum, medium, or minimum security facilities, depending on the seriousness of the crime of which they were convicted.¹⁸ Since there are fewer women's prisons, prison administrators often do not offer treatment and rehabilitative programs that address the diverse interests of the women in prison.¹⁹ And, because female facilities are smaller, their prisons tend to have fewer institutional services than male prisons.²⁰

Although there are now programs available to both men and women, the prison programs that exist tend to perpetuate social stereotypes.²¹ Male prisoners have more opportunities for vocational, educational, and health services and programs than women.²² For example, male prisons frequently offer training for higher paying jobs and teach more "male-stereotyped skills," such as car repair, electronics, welding, and machine repair.²³ Women's prisons, on the other hand, focus on more stereotypically "female" skills, such as garment-making and laundry.²⁴ These program selections are rooted in historical perceptions of the skills required by men and women.²⁵

The type of training that prisoners receive drastically affects how well women and men adjust once they leave prison.²⁶ The programs in women's prisons prepare women for the most underpaid and unstable jobs in society, such as sewing and cooking.²⁷ A woman leaving prison with these skills will likely be

18. Lawrence Bershad, *Discriminatory Treatment of the Female Offender in the Criminal Justice System*, 26 B.C. L. REV. 389, 404 (1985).

19. Jennifer Arnett Lee, *Women Prisoners, Penological Interests, and Gender Stereotyping: An Application of Equal Protection Norms to Female Inmates*, 32 COLUM. HUM. RTS. L. REV. 251, 256 (2000).

20. *Id.* at 256–57.

21. Karen F. Lahm, *Equal or Equitable: An Exploration of Educational and Vocational Program Availability for Male and Female Offenders*, 64 FED. PROBATION 39, 39 (2000); *see also* Lee, *supra* note 19; Theresa A. Miller, *Keeping the Government's Hands Off Our Bodies: Mapping a Feminist Legal Theory Approach to Privacy in Cross-Gender Prison Searches*, 4 BUFF. CRIM. L. REV. 861, 873 n.34 (2001) (citing Jocelyn Pollack, *Women in Corrections*, in ALIDA MERLO & JOCELYN POLLACK, *WOMEN, LAW AND SOCIAL CONTROL* 97, 101 (1995)).

22. *See* ESTELLE B. FREEDMAN, *THEIR SISTERS' KEEPERS: WOMEN'S PRISON REFORM IN AMERICA, 1830–1930*, at 153–55 (1981).

23. *Id.* at 154.

24. *Id.*; *see also* Lee, *supra* note 19, at 253, 254–55 (stating that "female inmates receive fewer and inferior educational and vocational programs, while both men and women are offered stereotypically gendered programs" and that "female inmates do not have access to the same quality of programming as men"). Lee further explains, "women have access to programs that are considered appropriate for them — housekeeping, clerical positions, and food services duties." *Id.* at 258.

25. Lahm, *supra* note 21, at 39; Lee, *supra* note 19, at 251.

26. Lahm, *supra* note 21, at 39, 45.

27. *Id.* at 45.

unable to support herself or her family, and may become dependent on government assistance or recidivate and end up back in the prison system.²⁸

III. THE EQUAL PROTECTION CLAUSE AND KLINGER

A. *The Notion of Similarly Situated and the Equal Protection Clause*

The Equal Protection Clause of the Fourteenth Amendment requires that “no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.”²⁹ If a state enacts legislation that classifies people on the basis of, for example, race or gender, it must be “reasonable.”³⁰ Under the Equal Protection Clause, “[a] reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law.”³¹ In order to bring an equal protection claim, a plaintiff must be similarly situated to the group or person with whom the plaintiff compares herself.³² If two people are similarly situated but are treated differently by the same program or statute, then the plaintiff can bring an equal protection claim.³³ If the plaintiff is not similarly situated to the other person, then there is no basis for such a claim.³⁴

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28. *Id.* The U.S. Department of Justice, Bureau of Justice Statistics reported in a 1994 study (the most recent year for which data is available) that nearly fifty-two percent of prisoners were back in prison within three years of their release, either because of committing a new crime or because of parole violations. And nearly sixty-eight percent of prisoners were re-arrested within three years of release. Bureau of Justice Statistics, U.S. Dep’t of Justice, Reentry Trends in the U.S.: Recidivism, <http://www.ojp.usdoj.gov/bjs/reentry/recidivism.htm> (last visited Feb. 19, 2007).
29. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).
30. See Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344 (1949).
31. *Id.* at 346. For example, a state may wish to enact a criminal statute that punishes a male for statutory rape but does not punish the female participant when the female is under eighteen and is not the male’s wife. If the primary purpose of the statute is to prevent illegitimate pregnancies, the Supreme Court has held that since almost all of the harmful effects “fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct.” *Michael M. v. Superior Court*, 450 U.S. 464, 473 (1981). Since the purpose of the law is gender-based, the statute must only ensure that all males who are similarly situated are treated similarly, and that all similarly situated women are treated similarly.
32. *Klinger v. Neb. Dep’t of Corr. Servs.*, 31 F.3d 727, 731 (8th Cir. 1994) (“The similarly situated inquiry focuses on whether the plaintiffs are similarly situated to another group for the purposes of the challenged government action.”).
33. See *Michael M.*, 450 U.S. at 477 (“The Constitution is violated when government, state or federal, invidiously classifies similarly situated people on the basis of the immutable characteristics with which they were born.”).
34. See Tussman & tenBroek, *supra* note 30, at 344. (“The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require in its concern for equality that those who are similarly situated be similarly treated.”).

If a state enacts a policy that contains, for example, a gender or racial classification, a court will review the challenged legislation using one of the levels of scrutiny established by the Supreme Court.³⁵ The levels of scrutiny permit states to enact needed policies while simultaneously preserving individuals' rights to be free from discrimination.³⁶

The Supreme Court addressed whether a racial classification violated the Equal Protection Clause in *Korematsu v. United States*, holding that "courts must subject [legal restrictions which curtail the civil rights of a single racial group] to the most rigid scrutiny."³⁷ In a subsequent case, the Court clarified that the "most rigid scrutiny," also known as strict scrutiny, meant that the classification must be narrowly tailored to serve a compelling state interest.³⁸ The Supreme Court has also determined that state actions involving challenges to gender classifications must satisfy a lower standard of "intermediate scrutiny."³⁹ The Court defined intermediate scrutiny to require that the state show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"⁴⁰ The courts employ strict scrutiny and intermediate scrutiny tests to ensure that people are not discriminated against in a way that violates the Equal Protection Clause. For cases involving social or economic regulations that do not involve a suspect class such as race, the legislation at issue must meet the much lower "reasonable basis" or "rational basis" standard of review; the legislation is valid "if the classification drawn by the statute is rationally related to a legitimate state interest."⁴¹

35. See *Korematsu v. United States*, 323 U.S. 214 (1944); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); see also *Higgs v. W. Landscaping & Sprinkler Systems, Inc.*, 804 P.2d 161, 164 (Colo. 1991) ("When a statute is subjected to an equal protection challenge, the level of judicial scrutiny varies with the type of classification utilized and the nature of the right affected. In the absence of a suspect class (such as a classification based on race or national origin), an abridgement of a fundamental right (such as freedom of speech or freedom of religion), or a special classification triggering an intermediate standard of review (such as classifications based on gender or illegitimacy), an equal protection challenge must be analyzed under the rational-basis standard of review.").

36. See, e.g., *Romer v. Evans*, 517 U.S. 620, 631 (1996) ("The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."); *Norwood v. Harrison*, 413 U.S. 455, 466-67 (1973) ("The Equal Protection Clause would be a sterile promise if state involvement in possible private activity could be shielded altogether from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal.").

37. 323 U.S. 214, 216 (1944).

38. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

39. See *United States v. Virginia*, 518 U.S. 515 (1996).

40. *Id.* at 533 (quoting *Hogan*, 458 U.S. at 724).

41. *City of Cleburne*, 473 U.S. at 440 (citations omitted).

Incarcerated persons are entitled to protection under the Equal Protection Clause despite the fact that they are separated from society for criminal convictions.⁴² In addressing a prisoner's discrimination claim,⁴³ Justice Stevens argued in his dissenting opinion in *Hewitt v. Helms* that the treatment of a particular prisoner should be compared with the treatment of the prison population as a whole.⁴⁴ The Court in *Turner v. Safely* accepted Justice Stevens's rationale and held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."⁴⁵ Thus, the Court initially promulgated the lower "reasonable basis" standard of review for cases involving equal protection challenges concerning their confinement.⁴⁶

B. The Problem the Klinger Court Created

In *Klinger v. Department of Corrections*, a group of women prisoners from a female-only facility, the Nebraska Center for Women ("NCW"), sued the Nebraska Department of Corrections because it provided programs and services that were allegedly inferior to the nearby male-only facility, the Nebraska State Penitentiary ("NSP").⁴⁷ The women prisoners argued that they received inferior "vocational, educational and employment opportunities and programs, rehabilitation programs, exercise and recreational programs and facilities, visiting privileges, legal programs, medical, dental and psychological services, and treatment

42. In a dissenting opinion in 1983, Justice Stevens wrote: "[A]n essential attribute of the liberty protected by the Constitution is the right to the same kind of treatment as the State provides to other similarly situated persons. A convicted felon, though he is properly placed in a disfavored class, retains this essential right." *Hewitt v. Helms*, 459 U.S. 460, 485–86 (1983) (Stevens, J., dissenting). Four years later, the Supreme Court reiterated in *Turner v. Safely* that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." 482 U.S. 78, 84 (1987).

43. Under the Equal Protection Clause, a prisoner can bring a claim that he was not treated in the same manner as another prisoner, perhaps because of biases based on a particular conviction, race, gender, religious affiliation, or sexual orientation, among other claims. *See, e.g.*, *Sockwell v. Phelps*, 20 F.3d 187, 191 (5th Cir. 1994) (prisoners argued that the segregation of two-man cells by race at Angola prison violated the Equal Protection Clause); *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990) (holding in part that a prison policy that permits Jewish inmates to wear yarmulkes and Muslim inmates to wear kufis, but limits or prohibits Rastafarians from wearing crowns does not violate the Equal Protection Clause because the size of the Rastafarians' headgear enhances security concerns).

44. *Hewitt*, 459 U.S. at 486.

45. *Turner*, 482 U.S. at 89.

46. *Id.* Eighteen years after *Turner*, in *Johnson v. California*, the Supreme Court held that racial classifications, even if being challenged in a prison, should be examined under strict scrutiny instead of the reasonable basis standard. 543 U.S. 499, 505 (2005). The Court limited the reasonable basis review from *Turner* to "rights that are 'inconsistent with proper incarceration.'" *Id.* at 510 (citing *Overton v. Bazetta*, 539 U.S. 126, 131 (2003)). Reasoning that racial classifications are never consistent with proper prison administration, the Court held that "all racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny." *Id.* (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (brackets inserted by Court)).

47. *Klinger*, 31 F.3d 727.

associated with security classifications.”⁴⁸ The Eighth Circuit held that the inmates at NCW and NSP were not similarly situated for the purposes of prison programs and services, and therefore dismissed the women prisoners’ claims.⁴⁹ The court based this holding on the following observations: (1) the male facility housed six times as many inmates; (2) the average stay at the male facility was two or three times longer than the average length of stay at the women’s prison; (3) the women’s prison was less secure than the men’s prison; and (4) the women had “special characteristics distinguishing them from male inmates.”⁵⁰ The court specified that these “distinguishing characteristics” included the fact that women prisoners are more likely to be single parents with primary responsibility for raising children and that women are more likely to be victims of sexual or physical abuse.⁵¹ The court also noted that male inmates are more likely to be violent.⁵²

The *Klinger* court did not limit its definition of distinguishing characteristics to those differences specifically discussed, thereby leaving open the question of whether other distinguishing characteristics might justify finding that male and female prisoners are not similarly situated. Additionally, the court’s examples of distinguishing characteristics, such as that women are more likely to be single parents with primary responsibility for raising children, actually perpetuate the gender-based stereotypes that the women prisoners were challenging. The women inmates wanted programs and facilities which would ensure that they could reenter society just as productively as their male counterparts, regardless of the stereotypical obligations of child-minding.

The Eighth Circuit in *Klinger* stated that it was necessary to look at the factors that distinguished the all-male prison from the all-female prison to establish exactly how different the two institutions were.⁵³ The court said that such differences in population size and other characteristics of the prisons justified the prisons administrators’ choice to have different types of programs.⁵⁴ The program choices at each prison were made “under the restrictions of a limited budget,” and the court noted that “prison officials must make hard choices.”⁵⁵ Thus, the court stated that the prison administrators “must balance many considerations, ranging from the characteristics of the inmates at that prison to the size of the institution, to determine the optimal mix of programs and services.”⁵⁶

48. *Id.* at 729.

49. *Id.* at 731.

50. *Id.* at 731–32.

51. *Id.*

52. *Id.*

53. *Id.* at 732.

54. *Id.*

55. *Id.*

56. *Id.*

However, the court also noted that the women prisoners were not alleging that any possible funding differences between the two prisons were discriminatory.⁵⁷

Despite finding that the women and men were not similarly situated, the *Klinger* court cited to the reasoning in *Turner v. Safely*, which held that the reasonable basis standard of review should apply to challenged prison policies.⁵⁸ The court stated that, as in *Turner*, courts should defer to the prison authorities because they have little expertise in running prisons.⁵⁹ The officials' choices should not be placed under "close judicial scrutiny," since their decisions "resulted from the complicated interplay of many variables — some of which were beyond their control — and thus are not susceptible to ready explanation."⁶⁰ The court did not detail what the acceptable variables may be or explain why the prison officials need not justify their program choices.⁶¹ The court merely stated that showing deference to prison authorities, originally stated in *Turner*, justified finding that the men and women were not similarly situated; however, the court did not acknowledge that the *Turner* court utilized the deference during the reasonable basis review, and not at the "similarly situated" stage.⁶² The *Klinger* court held that because the prisoners were not similarly situated, there could be no equal protection violation. The court did not analyze the program using any level of scrutiny — strict, intermediate, or rational basis — to determine whether the program violated the Equal Protection Clause and to ensure that the women were free from illegal gender discrimination.⁶³

C. Other Circuit Courts Followed *Klinger*

Several other circuit courts have followed *Klinger* and found that male and female inmates are not similarly situated and that equal protection claims should therefore be dismissed. In *Pargo v. Elliott*,⁶⁴ the inmates at the Iowa Correctional Institute for Women ("ICIW") alleged that some of the policies, programs, practices, services, and facilities differed substantially from those at Iowa's all-

57. *Id.*

58. *Id.*

59. *Id.* Thus, it appears that under the reasonable basis standard of review, if the prison authorities have a reasonable basis with respect to prison administration for implementing a policy, even if it involves some kind of discrimination, the court may find it valid under the Equal Protection Clause.

60. *Id.* at 732–33.

61. *Id.* at 733.

62. *Id.*

63. Because the court would still need to analyze the policy under the applicable standard of review, the court may or may not find that there was an applicable state justification for implementing the policy. If there was a justification that met the appropriate standard of review, the policy may be permissible — even though it contains a gender classification. The opportunity to review the policy with respect to the Equal Protection Clause would simply ensure that the women were free from illegal, impermissible gender discrimination.

64. 894 F. Supp. 1243 (S.D. Iowa 1995).

male correctional facilities, and that those differences constituted an equal protection violation.⁶⁵ The complaint cited many differences, including that the female inmates had fewer opportunities to work off-grounds, less access to libraries, less access to educational and training programs, and fewer phone and yard privileges.⁶⁶ The court, citing *Klinger*, held that male and female prisoners were not similarly situated and thus dismissed the claim.⁶⁷ The court stated that in order to determine whether male and female prisoners were similarly situated, it had to look beyond the status of the challengers as inmates and analyze the similarities and differences in the makeup of the institutions.⁶⁸ The court then re-articulated the four factors that the court in *Klinger* used, rewording them to create five conditions: “population, length of custody, custody level of inmates housed, types of crimes, and other special characteristics that distinguish female inmates from male inmates.”⁶⁹ The court determined that those factors underscored significant differences between male and female prisoners, and concluded that the female inmates at the female-only prison were not similarly situated to the male inmates at the nearby male-only prison.⁷⁰

65. *Id.* at 1251–52.

66. The complaint challenged policies based on the classification of the inmate at ICIW: (A) All ICIW Inmates—classification, access to courts, annual classification review, classification screening for prison jobs, classification decisions to segregate HIV/AIDS inmates, movie censorship, access to counselors, access to canteens, treatment, education and training, self-image, inmate level system inequity, rate of pay, and visitation; (B) Minimum Live-Out Custody Inmates—minimum live-out classification disparities, housing, institutional off-grounds work, yard privileges, library access, furlough, visitation, substance abuse programs; (C) Minimum Custody Inmates—minimum live-out classification, work opportunities off-grounds, yard privileges, library access, access to hobby crafts, phone privileges, canteen limitations; (D) Medium Custody Inmates—off-grounds work, equity of level system, yard privileges, library access, access to hobby crafts, phone privileges, canteen limitations; and (E) Maximum Custody Inmates—equity of level system, yard privileges, library access, access to hobby crafts, phone privileges, canteen limitations, visitation.

Id. at 1252.

67. *Id.* at 1253, 1259.

68. *Id.* at 1254 (citing *Klinger*, 31 F.3d at 731–32).

69. *Pargo*, 894 F. Supp. at 1254. This Note will adopt the *Pargo* court’s articulation of the *Klinger* factors as five separate conditions and refer to them as the “five *Klinger* factors.”

70. *Id.* at 1261, 1259, 1287.

First, the women’s institution uniquely combines all security levels of inmates. Women inmates constitute a very small portion (six percent) of the total prison population, so they all can be housed at a single institution. Second, women generally spend less time in prison than men because women generally are sentenced for fewer crimes, and for less serious crimes. Women often are paroled earlier than men because they are considered to be lower risk parolees. Third, characteristics common to inmates at the women’s institution are different from characteristics of inmates at men’s institutions. The differences among the various men’s institutions and ICIW are so significant that comparisons between the two would ignore “separate sets of decisions based on entirely different circumstances.” The court holds that Iowa women inmates and men inmates, grouped in large or divided classifications, are not similarly situated.

Id. at 1261 (citing *Klinger*, 31 F.3d at 732). “In analyzing Plaintiffs’ claims, the court has examined the factors set out in *Klinger*, 31 F.3d at 731–32, in determining whether the women and men inmates are

The factors that the *Klinger* and *Pargo* courts used to differentiate male and female prisoners were again adopted by the D.C. Circuit in *Women Prisoners of the District of Columbia Dep't of Corrections v. District of Columbia*.⁷¹ In *Women Prisoners*, women were housed in the Lorton Minimum Security Annex (the “Annex”) on the grounds of the men’s Minimum Security Facility (“MSF”).⁷² The women from the Annex were taken to MSF at specified times in order to attend academic courses and to use the gymnasium.⁷³ The women from the Annex brought suit challenging, *inter alia*, general living conditions and the discrimination in the availability of academic, vocational, work, recreational, and religious programs on the basis of gender.⁷⁴ The district court found that the women from the Annex had access to work as receptionists, housekeepers, and librarians while similarly situated males had access to carpentry, electrical, and mechanical work.⁷⁵ The district court also found that men had greater recreational opportunities, with more time for recreation and organized intramural team sports.⁷⁶ The district court thus held that the women prisoners were denied equal protection because of the differences in treatment as compared to the nearby male prisoners.⁷⁷

The D.C. Circuit Court of Appeals reversed the district court order that required improvements in the work, recreational, and religious programs available to female inmates, and also required improvements that related to law library hours, group events, and transportation to job interviews.⁷⁸ Though the women claimed a violation of both Title IX⁷⁹ and the Equal Protection Clause, the court relied on the *Klinger* court’s holding that “dissimilar treatment of dissimilarly situated persons does not violate equal protection.”⁸⁰ The court stated that women prisoners will always find ways to argue that male prison facilities are “better,” just as male prisoners will always find ways that female prison facilities are “better.”⁸¹ The court then applied the five *Klinger* factors to determine that

similarly situated.” *Id.* at 1259. “Based on the factors of population size, security level, types of crimes, lengths of sentences, and special characteristics of inmates, the court concludes that ICIW inmates are not similarly situated to the various categories of male inmates at selected institutions.” *Id.* at 1261.

71. 93 F.3d 910 (D.C. Cir. 1996).

72. *Id.* at 913.

73. *Id.*

74. *Id.*

75. *Id.* at 915.

76. *Id.* at 916.

77. *Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia*, 899 F. Supp. 659 (D.D.C. 1995).

78. *Women Prisoners of the D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910, 916 (D.C. Cir. 1996).

79. Title IX refers to 20 U.S.C. § 1681 *et seq.*, which prohibits gender discrimination in educational institutions.

80. 93 F.3d at 924 (quoting *Klinger*, 31 F.3d at 731).

81. *Women Prisoners*, 93 F.3d at 927 (quoting *Klinger*, 31 F.3d at 732).

the male and female prisoners were not similarly situated and therefore could not establish an equal protection claim.⁸²

The Fifth Circuit appeared to embrace *Klinger* in *Yates v. Stalder*, but remanded for further factual findings.⁸³ In *Yates*, a group of male prisoners brought a claim against the Secretary of Louisiana Department of Public Safety and Corrections under 42 U.S.C. § 1983,⁸⁴ alleging discrimination because the living conditions for male prisoners were much harsher than the conditions for nearby female prisoners.⁸⁵ The plaintiffs complained that the female inmates did not have to work in agricultural fields, could earn assignment to semi-private rooms through merit programs, and were confined in air-conditioned facilities.⁸⁶ The district court concluded that the male and female prisoners were not similarly situated because the prisons were “geographically and structurally dissimilar.”⁸⁷ The Fifth Circuit held that the district court’s factual findings of dissimilar geography and prison structure were inadequate to apply *Klinger* since the court did not make other determinations about the prison, such as average length of stay or security level of the prisons.⁸⁸ The court therefore remanded for further proceed-

82. *Women Prisoners*, 93 F.3d at 924–26. The court succinctly laid out the five factors from *Klinger*, as described in *Pargo*: “population size of the prison, security level, types of crimes, length of sentence, and special characteristics.” *Id.* at 925 (citing *Pargo*, 894 F. Supp. at 1259–61).

Given these significant differences in the situations of the women at the Annex and CTF and those of the men at the facilities with which the court compared them, and given the fact that the court’s Title IX and equal protection analyses both depend on findings that they were similarly situated, we need not examine the programs themselves in order to vacate the program-related provisions that appellants have challenged.

Women Prisoners, 93 F.3d at 927.

83. 217 F.3d 332 (5th Cir. 2000).

84. 42 U.S.C. § 1983 (2000) states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

85. *Yates v. Stalder*, 217 F.3d 332 (5th Cir. 2000).

86. *Id.* at 333.

87. *Id.*

88. *Id.* at 334; see also *Oliver v. Scott*, 276 F.3d 736, 746 (5th Cir. 2002). “To prove an equal protection violation on the basis of sex, male prisoners must prove male and female prisoners are similarly situated. Courts should consider ‘the number of inmates housed in each facility, their average length of stay, their security levels, and the incidence of violence and victimhood.’” *Oliver*, 276 F.3d at 746 (citing *Yates*, 217 F.3d at 335).

ings to establish a record with facts that might make the case more comparable to *Klinger*.⁸⁹

IV. WOMEN AND MEN PRISONERS ARE SIMILARLY SITUATED AND THEIR EQUAL PROTECTION CLAIMS SHOULD NOT BE DISMISSED

Women prisoners, like all other women in society, should be considered similarly situated to their male counterparts when they bring a claim of gender discrimination, and their equal protection claims should not be dismissed. This section will argue that courts should not look to the five areas that *Klinger* used to determine whether male and female prisoners are similarly situated. Those categories are constitutionally irrelevant, arbitrary, and inconsistent with the purposes of incarceration. This section concludes that women prisoners and male prisoners are similarly situated because of their shared status as people who are incarcerated by the state for criminal convictions.

In *Klinger*, the district court found that the female prisoners were similarly situated to the male inmates at NSP for the purposes of prison programs and services.⁹⁰ The court reasoned that: (1) both were incarcerated in Nebraska institutions; (2) the inmates were roughly comparable as to custody levels; (3) the purposes of incarceration were the same for men and women; (4) there were similar security concerns; and (5) the appropriate time to take account of differences between NSP and NCW was when considering whether the state had a rational basis for the classification at issue.⁹¹ The district court concluded that female and male prisoners are similarly situated and therefore that the female prisoners had a valid equal protection claim, which should be addressed by the court. Courts should follow the reasoning of the district court in *Klinger*. Courts that follow the incorrect reasoning of the circuit court in *Klinger* fail to give female prisoners their day in court, and therefore also are fail to discourage illegal gender discrimination.

89. *Yates*, 217 F.3d at 335.

The record developed in the present case is, as illuminated by a comparison to *Klinger*, wholly inadequate to allow us to determine whether Plaintiffs are similarly situated to the female inmates in LCIW. *Klinger*'s holding is based on a fact intensive examination of, *inter alia*, the number of inmates housed in each facility, their average length of stay, their security levels, and the statistical incidence of violence and victimhood. The district court's opinion in this case mentions only that the male and female units are geographically and structurally different. There is no clear connection between that observation and the Plaintiffs' complaints and nothing in the record that supports the conclusion.

Id. at 334–35. On remand, the district court granted summary judgment to the Secretary of Louisiana Department of Public Safety and Corrections and, on appeal, the Fifth Circuit affirmed. 122 F. App'x 714 (5th Cir. 2004).

90. *See Klinger v. Neb. Dep't of Corr. Servs.*, 824 F. Supp. 1374, 1388 (D. Neb. 1993).

91. *Klinger*, 31 F.3d at 730 (summarizing the district court decision). The district court that decided *Klinger* before it was appealed to the circuit court applied heightened scrutiny, instead of *Turner's* rational basis, because the women were incarcerated at NCW solely because of their gender. *Id.*

A. The Klinger Factors are Constitutionally Irrelevant

The five *Klinger* factors are constitutionally irrelevant for a court considering an equal protection claim. That there are differences between male and female inmates in several aspects does not mean that they are not similarly situated and unable to bring equal protection challenges to prison conditions.⁹² The *Klinger* factors effectively require that the prison context be considered differently from any other context in which gender discrimination is alleged. The circuit court in *Klinger* reasoned that it was necessary to look at the five factors to establish exactly how different the all-male institution was from the all-female institution in order to determine whether male and female prisoners were similarly situated.⁹³ Since the Equal Protection Clause applies to all men and women, regardless of status as a prisoner and regardless of the institution where the person is located, the female prisoners' claims of gender discrimination should not have been dismissed. In most other contexts where discrimination is alleged, courts tend to assume that parties are similarly situated without analyzing individual factors, and instead focus only on the equal protection claim itself.

In *City of Cleburne v. Cleburne Living Center*, the Supreme Court held a zoning ordinance unconstitutional because it required a group home for the mentally retarded to obtain an additional permit in order to maintain facilities on a particular tract of land.⁹⁴ The Cleburne Living Center challenged the ordinance as discriminating against the mentally retarded because other residential facilities not serving a mentally retarded population did not have to seek an additional permit.⁹⁵ In analyzing the case, the Supreme Court conceded that there are differences between mentally retarded people and other people.⁹⁶ For example, the Court noted that those who are mentally retarded "have a reduced ability to cope with and function in the everyday world" and may require constant care or no additional care at all.⁹⁷ The Court stated that because mentally retarded people have different needs, they are different from other people who would occupy a facility that did not require a permit.⁹⁸ However, the Court reasoned that these differences are irrelevant unless the occupants would threaten the city's interests in a way that other permitted uses, such as boarding houses

92. See *Keevan v. Smith*, 100 F.3d 644, 652–53 (8th Cir. 1996) (Heaney, J., dissenting).

93. *Klinger*, 31 F.3d at 732.

94. 473 U.S. 432 (1985).

95. *Id.*

96. *Id.* at 442.

97. *Id.*

98. *Id.* at 448.

and hospitals, would not.⁹⁹ The Court concluded that the ordinance was invalid because it imposed “an irrational prejudice against the mentally retarded.”¹⁰⁰

Similar reasoning should apply in the case of women prisoners who bring equal protection claims. Even if the court finds that female and male prisons have differences, such as the population sizes, security level, types of crimes, length of sentence, and special characteristics, this does not mean that the prisoners themselves are not similarly situated. The Court in *Cleburne* found that the different needs of mentally retarded people did not justify having different standards for acquiring a housing permit. In the same way, even if there are differences between men and women prisoners, there is no justification for treating them differently in terms of accessing the programs and acquiring the skills they need to rehabilitate and reenter society. Different characteristics, such as the relative population size of the male and female prisons, do not negate the right of women prisoners to equal protection in receiving educational and vocational training programs while in prison.

In most other cases involving claims of equal protection violations, courts do not conduct an analysis of whether the parties are similarly situated before considering the equal protection claim.¹⁰¹ In *Klinger*, however, the circuit court stated that the characteristics of the inmates at the prison, as well as characteristics of the prison itself, were relevant for determining which kinds of programs and services to have at the prison. In *United States v. Virginia*, the Supreme Court held that the Virginia Military Institute (“VMI”) could not exclude women from “the opportunity to experience the rigorous military training for which VMI is famed.”¹⁰² VMI provided an intense military training program for men that prepared its students for military service.¹⁰³ In response to a prior circuit court decision, VMI opened an all-female facility, Virginia Women’s Institute for Leadership (“VWIL”), which shared VMI’s mission to produce citizen soldiers, but which utilized a more cooperative method of training.¹⁰⁴ The Court framed the issue as whether VMI violated the Equal Protection Clause by denying admission to women who were capable of performing all of the individual activities required of VMI cadets.¹⁰⁵ The Court stated that it needed to look closely at

99. *Id.*

100. *Id.* at 450.

101. In some of these cases in which the court discusses equal protection, “similarly situated” is an obvious requirement, though it is not explicitly discussed. For example, in both *Grutter v. Bollinger* and *Gratz v. Bollinger*, the applicant perceived himself to be similarly situated to other applicants and thus entitled to the same admissions policies. The Court in *Grutter* never discussed the notion of similarly situated, but clearly considered the equal protection claim. *See Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

102. 518 U.S. 515, 548 (1996).

103. *Id.* at 525.

104. *Id.* at 526.

105. *Id.* at 532 (citing *United States v. Virginia*, 766 F. Supp. 1407, 1412 (1991)).

official action that denied opportunities to women or men based simply on gender¹⁰⁶ and concluded that the fact that the women's school did not have the same programs as VMI was a violation of the Equal Protection Clause.¹⁰⁷ The Court did not discuss whether the men and women at the different schools were similarly situated before applying intermediate scrutiny.¹⁰⁸ The Court did not even use the term "similarly situated" in its decision.¹⁰⁹ In fact, instead of considering any differences between the genders, the Court specifically praised the differences between men and women, and stated that the court could not validly consider the "inherent differences" between men and women.¹¹⁰

Other courts have distinguished *United States v. Virginia* in an effort to explain why it should not apply to prisoners. In *Women Prisoners*, the D.C. Circuit distinguished the female inmates' challenge from the challenge brought by the female applicants against VMI.¹¹¹ The court stated that in *United States v. Virginia*, the male and female educational facilities were equivalent in size and that the programs offered to students were very different, with the female school failing to offer science and math courses.¹¹² The court argued that the prisoners' challenge, unlike the challenge from those of the female applicants in *United States v. Virginia*, did not involve a claim that there were fewer resources allocated per female inmate.¹¹³ Yet the court also stated that the claim of the women prisoners "would appear to be that appellants have mismanaged the resources

106. *United States v. Virginia*, 518 U.S. at 533.

107. *Id.*

108. *Id.* The Court framed the issue as being whether excluding women who were "capable of all the individual activities required of VMI cadets" violated the Equal Protection Clause. *Id.* (citing *United States v. Virginia*, 766 F. Supp. at 1412). The Court then stated, "Without equating gender classifications, for all purposes, to classifications based on race or national origin, the Court, in post-*Reed* decisions, has carefully inspected official action that closes a door or denies opportunity to women (or to men)." *United States v. Virginia*, 518 U.S. at 533. Finally, the Court concluded that the fact that the women's school did not have the same programs as VMI was a violation of the equal protection clause. *Id.* Nowhere in the opinion does the Court discuss the notion of whether the men and women at the different schools are similarly situated and warrant an equal protection analysis.

109. *See generally* *United States v. Virginia*, 518 U.S. 515 (1996).

110. "Inherent differences" between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women "for particular economic disabilities [they have] suffered," to "promot[e] equal employment opportunity," to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.

Id. at 533-34 (quoting *Cal. Fed. Sav. & Loan Assn. v. Guerra*, 479 U.S. 272, 289 (1987); *Califano v. Webster*, 430 U.S. 313, 320 (1977); *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948)).

111. *Women Prisoners*, 93 F.3d at 926; *see supra* notes 71-82 and accompanying text (discussing the facts and circumstances surrounding *Women Prisoners*).

112. *Women Prisoners*, 93 F.3d at 926.

113. *Id.*

allocated to female inmates by failing to provide them with the identical programs offered to the men.”¹¹⁴ Both the claim in *Women Prisoners* and the claim in *United States v. Virginia*, however, challenged the lack of identical programs. The claims were effectively the same, yet the female applicants’ claim warranted scrutiny under the Equal Protection Clause while the women prisoners’ claim was dismissed because the challengers were not similarly situated to the male prisoners.¹¹⁵ The court in *Women Prisoners* stopped at the similarly situated analysis and, citing *Klinger*, determined that male and female prisoners were not similarly situated and therefore did not have a valid equal protection claim.¹¹⁶

In *Cleburne* and in *United States v. Virginia*, the Supreme Court focused its decision on the level of scrutiny that should be applied to claims of discrimination under the Equal Protection Clause, rather than concentrating on the concept of similarly situated.¹¹⁷ Just as the parties in these suits were considered similarly situated without a specific analysis to determine so, male and female prisoners should also be deemed similarly situated based on their shared status as people incarcerated by the state for criminal convictions. Once courts accept that female and male inmates are similarly situated, courts should consider the equal protection claims.

In *United States v. Virginia*, the court specifically stated that the state’s justification for having a gender-based classification “must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it *must not rely on overbroad generalizations about the different talents, capacities or preferences of males and females.*”¹¹⁸ The Court made this strong statement that courts should not stereotype two years after the *Klinger* decision, and future courts should heed the warning. By finding that men and women are not similarly situated, courts that follow *Klinger* permit potential violations of the Equal Protection Clause to continue unabated. As discussed previously, most prison programs are based on stereotyped perceptions of what men and women are capable of doing by, for example, having more programs on mechanics and electronics for men and having more programs on garment-making and laundry for

114. *Id.*

115. See *Keevan v. Smith*, in which the court cites *United States v. Virginia* to acknowledge that heightened scrutiny should apply to cases involving gender discrimination. 100 F.3d at 649–51. Despite that statement, the court concludes that, pursuant to the *Klinger* factors, male and female prisoners are not similarly situated and the court need not scrutinize the prison policies to see if they satisfy intermediate scrutiny. *Id.*

116. See *supra* notes 71–82 and accompanying text.

117. In *United States v. Virginia*, for example, Justice Ginsburg begins her discussion of the level of scrutiny by stating, “Today’s skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history.” 518 U.S. at 531.

118. 518 U.S. at 533 (emphasis added).

women.¹¹⁹ Courts must move past generalized gender differences and scrutinize the policies under the Equal Protection Clause to ensure that the state is not arbitrarily and illegally discriminating based upon gender.

B. The Klinger Factors are Arbitrary

The circuit court in *Klinger* employs arbitrary categories in order to find that women prisoners are not similarly situated with male prisoners. The “population size of the prison, security level, types of crimes, length of sentence, and special characteristics”¹²⁰ are factors that are irrelevant in determining whether male and female prisoners are similarly situated and whether female prisoners have a valid equal protection claim. The court claims that categories are relevant for the prison officials’ determination of funding allocation, but the court does not explain why certain facts about the prisons themselves are relevant, while other factors are not.¹²¹ The court merely cites these differences as being reasons why a prison administrator would choose certain programs for certain prisons.¹²² Some of the factors, such as the fact that women are more likely to be victims of sexual or physical abuse, do not correlate with reasons why they should or should not receive equal educational and training programs. Several of the other factors, such as population size and security level, focus on the details of a particular prison instead of looking at the characteristics of the people who are bringing the claim.¹²³ Furthermore, based on statistics about male and female prisoners with respect to the types of crimes committed and the average length of stay, the courts will never find female prisoners to be similarly situated with male prisoners using the five *Klinger* factors.

The population size of women-only prisons as compared with men-only prisons is likely to continue to be different in most parts of the country. According to the Department of Justice, by the end of 2004, there were 104,848 women and 1,391,781 men in prison.¹²⁴ Thus, it is quite likely that the population size of

119. FREEDMAN, *supra* note 22, at 154.

120. *Pargo*, 894 F. Supp. at 1259–61.

121. *Klinger*, 31 F.3d at 731–32.

122. *Id.* at 732.

123. See, for example, *United States v. Virginia*, in which the Court looked at the characteristics of the people at the institutions and not at the institutions themselves. 518 U.S. 515 (1996).

124. Paige M. Harrison & Allen J. Beck, *Prisoners in 2004*, BUREAU OF JUSTICE STATISTICS BULLETIN, (U.S. Dep’t of Justice, Washington, D.C.), Oct. 2005, at 4, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf>. In 2002, 48.7% of women in jails had no previous sentence, compared with 36.8% of men in jails who had no previous sentence. Consistently, 16% of women in jails were violent recidivists while 29.9% of men in jails were violent recidivists. U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, PROFILE OF JAIL INMATES 7 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf>.

female and male prisons will never be equal, simply because the numbers of incarcerated women and men differ so significantly.¹²⁵

Additionally, the types of crimes that men and women commit are statistically different.¹²⁶ In 2002, about 52% of the male prisoners under state jurisdiction were sentenced for violent offenses, compared to 33% of female prisoners.¹²⁷ However, 29% percent of female prisoners in state jurisdiction were sentenced for property offenses, compared to 20% of males.¹²⁸ In addition, 32% of female prisoners in state jurisdictions were sentenced for drug offenses, compared to 21% of male prisoners.¹²⁹ The statistics on the types of crimes reveal that men are more likely to commit violent crimes and women are more likely to commit property or drug offenses. There is no indication that these trends will change.

That the types of crimes that men and women tend to commit are different implies that other factors will also be different. The required security levels of the prisons are likely to be different in order to correspond with the security needs of the particular facility.¹³⁰ Additionally, the types of crimes committed often warrant different lengths of sentencing. Thus, even if a court disregards the types of crimes committed, the average length of stay of a female prisoner is going to be different from male prisoners in most contexts.¹³¹

Because of the statistical differences between male and female prisoners, a court that analyzes a case with all of the five factors from *Klinger* will never conclude that male and female prisoners are similarly situated.¹³² Even if the

125. See Bureau of Justice Statistics, U.S. Dep't of Justice, Key Facts at a Glance, Correctional Population by Gender, <http://www.ojp.usdoj.gov/bjs/glance/tables/cpgendtab.htm> (last visited Feb. 7, 2007).

126. See Harrison & Beck, *supra* note 124, at 9.

127. *Id.* Violent offenses include murder, manslaughter, rape, other sexual assault, robbery, assault, and other violent offenses. *Id.*

128. *Id.* Property offenses include burglary, larceny, motor vehicle theft, fraud, among others. *Id.*

129. *Id.* Also, 7.1% of male prisoners and 6.1% of female prisoners were sentenced for public order offenses. Public order offenses include weapons, drunk driving, court offenses, commercialized vice, morals and decency charges, liquor law violations, and other offenses. *Id.*

130. Federal Bureau of Prisons, Quick Facts, <http://www.bop.gov/news/quick.jsp#2> (last visited Feb. 20, 2007) (detailing the types of crimes committed, the length of sentence, and the types of prison facilities that the Federal Bureau of Prisons manages).

131. Bureau of Justice Statistics, Criminal Sentencing Statistics, <http://www.ojp.usdoj.gov/bjs/sent.htm> (last visited Sept. 9, 2006) (noting that the average maximum sentence for a violent offense in 2002 was sixty-two months, as opposed to twenty-eight months for property offenses and thirty-two months for drug offenses).

132. See *Keevan*, 100 F.3d at 652 (Heaney, J., dissenting).

[I]t is highly unlikely that any two institutions in a state's prison system will have an identical inmate composition but for the fact that one houses women and the other houses men; specific differences become more tenuous and less important when the challenge is system-wide. While the segregation of inmates by gender is constitutional, the natural consequences of that segregation — e.g., smaller institutions, shorter aggregate lengths of stay, broader ranges of security ratings within institutions — must not be used as a per se bar to our examination of the respective treatment women and men receive while incarcerated.

population sizes of particular male and female prison facilities are equivalent, the general attributes of male and female criminals, including types of crimes, length of sentence, and “special characteristics” are likely to be different.¹³³ These factors are arbitrary and should not be considered. All inmates are within the custody of the state, are subject to the same regulations, and share the goal of rehabilitation once incarcerated.¹³⁴ The programs developed by the Department of Corrections should give equally rehabilitative programs to both men and women.¹³⁵ Effectively, male and female prisoners should be considered similarly situated because of their shared status as people incarcerated by the state for criminal convictions.¹³⁶

C. Use of the Klinger Factors is Inconsistent With the Purpose of Incarceration

A primary purpose of incarceration¹³⁷ for both male and female inmates is to “enable inmates to seek reform within the institution and rehabilitate themselves to function in society as law-abiding citizens.”¹³⁸ In order to reform and rehabilitate, inmates should be permitted educational and vocational training programs and services.¹³⁹ These courses do not need to be gender-specific; male and female inmates can benefit from the same kinds of programs.¹⁴⁰ In fact, by separating the programs based on gender, women who are not receiving the same kind of training as men face a disadvantage when they leave prison and begin to work again.¹⁴¹ The women will lack many of the skills that the men gained during their time in prison, making it more difficult for them to get jobs.¹⁴²

Id. In my research, I could not find any cases in which the court used the *Klinger* factors and found male and female inmates to be similarly situated and therefore warrant an equal protection analysis.

133. *See supra* notes 50–52 and accompanying text.

134. *Keevan*, 100 F.3d at 652 (Heaney, J., dissenting).

135. *Id.*

136. *Id.* Judge Heaney stated:

All inmates, regardless of gender, are under the custody and control of the state as a result of their criminal behavior; all are subject to the same general departmental regulations and policies; and the incarceration in all cases shares common goals, including the reform and rehabilitation of individual offenders. These common characteristics provide a basis for the Department of Corrections to design a program that gives substantially equal opportunities to women and men for rehabilitative work while confined.

137. Other purposes of incarceration include incapacitation, deterrence, retribution, and condemnation. None of these justifications, however, are relevant to the discussion since none would accept the premise that prisoners are generally entitled to educational and training programs.

138. *Klinger*, 31 F.3d at 734 (McMillian, J., dissenting); *see supra* text accompanying notes 134–5.

139. *Id.* at 735 (McMillian, J., dissenting).

140. *Id.*

141. *Id.*

142. *Lee, supra* note 19, at 254–55, 258, 279–80.

Presuming that the purpose of incarceration is to prepare inmates for the “real world,” the *Klinger* court “misapplies Fourteenth Amendment standards at the expense of female inmates.”¹⁴³ The court attempted to justify its decision with respect to the purposes of incarceration by saying that if federal courts overlook prison officials’ decisions, then the officials will be less likely to “experiment” with programs that may benefit the prisoners.¹⁴⁴ However, in *Klinger*, one of the specific programs that was challenged involved educational and vocational training. The male inmates at NSP were able to participate in vocational programs and post-secondary courses that could lead to a college degree; the females at NCW were not afforded this same benefit.¹⁴⁵ The fact that women were not given the same educational opportunities as the men in the nearby facility potentially increased the difficulties of women once they left prison.¹⁴⁶ According to the dissent, the reason for providing dissimilar programs at each facility was due to the differing average length of sentences.¹⁴⁷ As the also dissent noted, it is hard to understand why women would be denied an opportunity based on the length of sentence when the length of sentence was not a factor in providing the opportunity to the men.¹⁴⁸

V. CONCLUSION

The Equal Protection Clause “served to nationalize the protection of individual rights for everyone, allowing for uniform national standards of fairness and equality applicable everywhere.”¹⁴⁹ Despite Justice Stevens’ suggestion that a convicted felon should be entitled to the same kind of treatment that the state provides to other similarly situated persons,¹⁵⁰ the court in *Klinger* narrowly defined similarly situated in the context of gender discrimination in prison conditions, obviating the equal protection claim. Other courts are following the *Klinger* court’s lead and dismissing women prisoners’ claims for equal programs and facilities based on the assumption that men and women inmates are not similarly situated.

143. *Klinger*, 31 F.3d at 734 (McMillian, J., dissenting).

144. *Id.* at 733 (majority opinion).

145. *Id.* at 735 (McMillian, J., dissenting); *Klinger*, 824 F. Supp. 1374, 1402–03 (D. Neb. 1993) (concluding that male inmates had the opportunity to take full college courses, while female inmates did not have similar opportunities).

146. Lee, *supra* note 19, at 254–55, 258, 279–80 (discussing how female inmates face particular problems upon release from prison); *Klinger*, 824 F. Supp. at 1395 (stating that women “have been virtually ignored” by the prison system and that they need training programs for relevant types of higher paying jobs so they can support their families upon release from prison).

147. *Klinger*, 31 F.3d at 735–36.

148. *Id.* at 735 (citing *Klinger*, 824 F. Supp. at 1401).

149. Lawrence Schlam, *Equality in Culture and the Law: An Introduction to the Origins and Evolution of the Equal Protection Principle*, 24 N. ILL. U. L. REV. 425, 433–34 (2004).

150. *Hewitt*, 459 U.S. at 485–86 (Stevens, J., dissenting).

Like other cases in which the court addresses equal protection claims without a detailed analysis of whether groups are similarly situated, women prisoners should also have their equal protection claims addressed to ensure that they are free from illegal gender discrimination. As the Seventh Circuit declared, “in determining who is similarly situated, we have also been careful not to define the requirement too narrowly.”¹⁵¹ By narrowly defining who is similarly situated, people who should be included will be inappropriately excluded because they do not meet the narrow requirements to be similarly situated.¹⁵² Because there are statistically so many differences between male and female prisoners,¹⁵³ utilizing the *Klinger* factors ensures that courts will never find female prisoners to be similarly situated to male prisoners. Therefore, courts avoid considering equal protection claims for a whole class of citizens based solely on their status as prisoners.

The Equal Protection Clause does not define “similarly situated.” Prior to the *Klinger* decision, one district court ventured, “[t]o be ‘similarly situated,’ groups need not be identical in makeup, they need only share commonalities that merit similar treatment.”¹⁵⁴ The *Klinger* court took broad discretion to determine that there were five factors that needed to be met in order to conclude that men and women prisoners were similarly situated. The comparisons that courts are required to make under *Klinger* likely prevent the court from ever having to recognize an equal protection claim for gender discrimination in the prison context. They are constitutionally irrelevant, arbitrary, and inconsistent with the purposes of incarceration. Female and male prisoners are similarly situated because of their shared status as people incarcerated by the state for criminal convictions. Once courts recognize this commonality, women prisoners, like all other women who challenge policies based on gender discrimination, will be entitled to present their equal protection claims. Ultimately, the equal protection claims will ensure that all women and men in prison, like Joan and George, have programs that are appropriate for them to gain skills and training that will prepare them for the world beyond the prison walls.

151. *Chavez v. Ill. State Police*, 251 F.3d 612, 636 (7th Cir. 2001) (involving a challenge to the de facto racial profiling practices of the Illinois State Police).

152. *See, e.g., Freeman v. Madison Metro. Sch. Dist.*, 231 F.3d 374, 382 (7th Cir. 2000). The circuit court concluded that the district court erred by restricting the testimony of individuals to a specific time period of the alleged discrimination. The court stated that because there may have been instances of overlap between specific dates, the relevant inquiry should have been whether the person could testify about the alleged discrimination. By limiting the testimony to specific dates, they were likely to miss relevant testimony.

153. *See* discussion *supra* Part IV.B.

154. *Betts v. McCaughtry*, 827 F. Supp. 1400, 1405 (W.D. Wis. 1993).