PRISON, GENDER, AND EQUALITY: LESSONS FROM NORTHERN IRELAND

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***Abstract**: Prisons in the United States and elsewhere are constructed as fundamentally gendered spaces. Officials and courts tend to view women in prison within narrow tropes, commonly as reproductive actors and victims. While women in prison may share certain characteristics, the reification of gender categories in prison can flatten their experiences in ways that are counterproductive or harmful.*

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The U.S. conception of gender in prison is informed by a notion of formal equality, which this Note contrasts with the substantive equality norms employed by European actors, specifically in Northern Ireland. Exploring the legal effect of gender in prison, this Note proceeds in three parts. First, it engages with U.S. case law regarding women in prison in three areas: 1) equality of programming and services; 2) privacy, dignity, and women's bodies; and 3) staffing and gender, with an eye towards sexual assault. Second, it looks to European and international law to understand a different approach to the same issues. Finally, it takes on a case study of Northern Ireland's women's prison, based on the author's research at the facility. That prison has operationalized principles of substantive equality that serve as a counterpoint to the U.S. approach, allowing for engagement with the implications of gendered prisons.

I. RESPONDING TO GENDER IN PRISON

In the United States, as in many other countries, law relies on sex as a category for classification and placement of people in prison. At present, about 7% of the population of state and federal prisons are women, totaling approximately 231,000 women and girls. Despite representing a small share of the total population, the rate of women's incarceration in the United States is growing at approximately twice the rate of men's incarceration.[1] With women making up such a small portion of overall populations, jurisdictions across the United States and abroad have struggled to balance resource constraints with the need for equal treatment. This Note is the result of my attempt to understand how prison systems reconcile these factors in their women's prisons.

The relatively small number of women in prison in the United States has meant that women's specific needs and circumstances have not always been recognized by administrators, policymakers, or courts. However, in the past two decades there has been a growing focus on women in prison across these spheres. Much of this attention has fallen under the banner of "gender responsivity"—"creating an environment through site selection, staff selection, program development, content, and material that reflects an understanding of the realities of women's lives and addresses the issues of

[1] Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2019,* PRISON POL'Y INITIATIVE, (Oct. 29, 2019), https://www.prisonpolicy.org/reports/pie2019women.html.

the participants."[2] Starting in the late 1990s, researchers and officials worked to incorporate gender-responsive programs in U.S. prisons.[3]

In recent years, state legislatures have taken up the mantle of gender-responsivity. In 2018-2019 alone, thirteen states had enacted legislation to promote the dignity of women behind bars; similar legislation has been introduced in other states, and some corrections departments have enacted such policies independent of legislative action.[4] This wave of legislation and regulation is organized around several common themes, reminiscent of gender-responsive approaches. First, physical differences: many statutes and policies focus on pregnancy and provision of hygiene products.[5] Second, women as parents: laws provide programming or services dedicated to incarcerated people with children.[6] Third, staffing and training: a number of

[2] Stephanie S. Covington & Barbara E. Bloom, *Gendered Justice: Programming For Women In Correctional Settings*, Paper at the 52nd Ann. Meeting of Am. Soc'y Criminology (2000), at 11-12; *see also* Barbara Bloom, Barbara Owen, & Stephanie Covington., *Gender-Responsive Strategies For Women Offenders: A Summary of Research, Practice, and Guiding Principles For Women Offenders*, U.S. DEP'T OF JUST. NAT'L INST. CORR., (May 2005), https://www.maine.gov/corrections/sites/maine.gov.corrections/files/inline-files/Gender%20Responsive%20Strategies.pdf. The United Nations Development Programme defines gender responsiveness as "outcomes that reflect an understanding of gender roles and inequalities and which make an effort to encourage equal participation and equal and fair distribution of benefits." Gayle Nelson, *Gender Responsive National Communications Toolkit*, U.N. DEV. PROGRAMME (UNDP), (2015), at 7, https://www.undp.org/publications/gender-responsive-national-communications.

[3] *See* Barbara Bloom, Barbara Owen, & Stephanie Covington, *Gender-Responsive Strategies: Research, Practice, and Guiding Principles For Women Offenders*, U.S. DEP'T OF JUST, NAT'L INST. CORR., (June, 2003), https://info.nicic.gov/nicrp/system/files/018017.pdf; Emily M. Wright, Patricia Van Voorhis, Emily J. Salisbury, & Ashley Bauman, *Gender-Responsive Lessons Learned and Policy Implications for Women in Prison*, 39 CRIM. JUST. & BEHAV. 1612, 1612-13 (2012), https://journals.sagepub.com/doi/pdf/10.1177/0093854812451088.

[4] *See* Judith Resnik, Alexandra Harrington, & Molly Petchenik, *Recommendations of The Arthur Liman Center for Pub. Int. Law, Yale Law Sch., Women In Prison: Seeking Justice Behind Bars*, U.S. COMM'N CIV. RTS., (Mar. 22, 2019), https://law.yale.edu/sites/default/files/area/center/liman/liman_women_in_prison_recommendations_for_usccr_march_22_2019.pdf.

[5] *See, e.g.*, HB 1158, 2d Reg. Sess. (Col. 2018), https://legiscan.com/CO/text/HB1158/2018; SB 13, 2018 Leg., Reg. Sess. (Conn. 2018); SB 166 An Act to Amend Title 14 and Title 29 of the Delaware Code Relating to the Provision of Free Feminine Hygiene Products, 149th Gen. Assemb., Reg. Sess. (Del. 2018); SB 133, 2018 Leg., Reg. Sess. (Ky. 2018), https://apps.legislature.ky.gov/law/acts/18RS/documents/0115.pdf ; HB 797/SB 598 An Act Concerning Correctional Services – Inmates – Menstrual Hygiene Products, 2018 Gen. Assemb., Reg. Sess (Md. 2018), http://mgaleg.maryland.gov/2018RS/bills/hb/hb0797T.pdf; HB 787/ SB 629 An Act Concerning Correctional Facilities – Pregnant Inmates – Medical Care, 2018 Gen. Assemb., Reg. Sess (Md. 2018), http://mgaleg.maryland.gov/2018RS/bills/hb/hb0787T.pdf.

[6] *See, e.g.*, S2540 Dignity for Incarcerated Primary Caretakers Act, 2018-2019 Leg., Reg. Sess. (N.J. 2018); SB 192 An Act Providing for Judicial Discretion to Release Inmates who are Pregnant or Lactating, 2019 Leg., Reg. Sess. (N.M. 2019); SB 1252 Dignity for Incarcerated Women, 2017-2018 Leg., Reg. Sess. (Penn. 2018).

states enacted requirements regarding staff training in the areas above, or other gender responsive approaches.[7]

As this legislation demonstrates, even while gender-responsivity can have tangible benefits for women, it can also entrench harmful notions about gender that disserve the women it is designed to champion. These policies are grounded in a conception of women prisoners as fundamentally different from their male counterparts, and take for granted that gender should play a role in prison law and policy.[8] However, gender-responsive policies may code women in reductionist roles such as mothers, victims, or reproductive actors—never economic agents. Further, some policies labeled "gender responsive" may be sound policies regardless of gender, and labeling them as gender responsive can limit their reach.[9]

In order to better understand how gender has operated in prisons, leading up to and including the embrace of gender-responsivity, I looked to national law and international standards. In Part II, I survey U.S. constitutional and statutory law. The Supreme Court has never directly addressed the constitutional parameters of prison conditions as determined by gender—as it has done for race-based rules. However, there is a substantial body of circuit-level law on the subject. Of these cases, I look at claims falling into three areas. First, equal access to programs. Courts have evaluated access to programs and services under familiar equal protection standards, operating from principles of formal equality, though none has required complete identity of treatment. These claims are often paired with statutory claims under Title IX. Courts often find women and men in prison are not similarly situated, and thereby avoid mandating equal programming opportunities. Second, claims implicating privacy and dignity, specifically related to gender's intersection with rights against unconstitutional searches and restrictions on restraints for pregnant prisoners, implicating the Fourth, Eighth, and Fourteenth Amendments. Finally, cases addressing gender-based staffing policies bring together the previous three areas in a different configuration that implicates many of the same issues.

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[7] *See, e.g.*, AB 2550, 2017-18 Leg., Reg. Sess. (Cal. 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB2550; HB 3904, 100th Gen. Assemb., Spec. Sess. (Ill. 2018), http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=91&GA=100&DocTypeId=HB&DocNum=3904&GAID=14&LegID=&SpecSess=&Session; SB 558 Dignity for Incarcerated Women Act, 2018 Leg., Reg. Sess. (La. 2018), https://legiscan.com/LA/drafts/SB558/2018.

[8] *See* Covington & Bloom; Bloom et al., *supra* note 2.

[9] *See, e.g.,* Woods v. Horton, 167 Cal. App. 4th 658 (2008).Gender itself is a far more complicated construct than this Note can fully engage. Because prisons are tied to a binary conception of gender, this Note stays within such a framework. This is not to minimize the experiences or existence of the significant number of non-binary individuals in prison. Rather, it is an attempt to understand prisons as they exist at present, with the hope of future engagement with a more complete understanding of gender.

I then turn in Part III to European and international law that interact to regulate prisons for women. I consider international and regional frameworks that provide the contours of this law, including those incorporating prison inspection mandates. Independent monitoring is a prominent feature of European prison governance, whereas it is virtually absent—with a few exceptions—in the United States. I then look to a small sample of case law interpreting international human rights standards and national laws in this sphere. These cases illustrate a European model embracing the notion of substantive equality. This principle allows gender to play a different, and more deliberate, role than in the formal equality model from U.S. law.

For a deeper understanding of how this regime plays out in practice, I focused on one specific facility: Hydebank Wood Secure College in Northern Ireland. I travelled to Northern Ireland and spent several days touring the facility and shadowing various staff, which I discuss in Part IV. I was able to see many of the human rights principles from international law in the everyday operations of the prison, and the ways in which monitoring seemed to drive change at the facility. Hydebank is also an interesting case in that women share the facility with young male prisoners in a model known as co-location. Co-location allows the prison to operate in many respects independent of gender, although it pairs women with a particular subset of men seen as more vulnerable and in need of more programs and services than other men. In this way, co-location operationalizes the principle of substantive equality, and provides a counterpoint to the gender-responsive orientation of many U.S. prisons.

These discussions of U.S. and European case law, European and international standards, and the case study of Hydebank Wood present an overview of where gender has gained saliency in prisons. Efforts to take gender into account in U.S. and international law represent attempts to protect women behind bars. In particular, policies dealing with physical differences may be necessary and appropriate to account for the needs of women. Northern Ireland has taken a different approach, with a prison regime that operates largely independent of gender. In contrast to the prisons the U.S. litigation brings into view, Hydebank Wood presents an opportunity to observe substantive equality norms put into practice within a single prison.

II. THE U.S. LEGAL LANDSCAPE

In the United States, courts have shaped the role of gender in prison through litigation in many areas. Broadly speaking, all prisoners' rights litigation implicates women in prison, and gender interacts with the

experience of prison in any number of unspoken ways.[10] But, as the cases in this Part demonstrate, courts have also considered gender explicitly. The Supreme Court itself has never taken on the constitutional limits of using gender to determine placement or conditions in prison as it has in the case of race.[11] In *Lee v. Washington* (1968) and *Johnson v. California* (2005), the Court prohibited,[12] and reaffirmed its prohibition of,[13] segregation by race in prison. By contrast, prisons are intentionally designed as segregated by sex, an arrangement that no court has rejected.[14] Beyond this baseline segregation, however, courts have maintained certain protections. The cases dealing most directly with gender can be divided into three main areas: 1) equality in programs and services; 2) privacy, dignity, and the body, specifically with regard to searches and restraints; and 3) gender-based staffing policies. This Part engages with each of these areas to understand the role gender plays—or does not play—in U.S. law.

a. Equality of Opportunity

Many cases grappling with gender in prison address equality in programs, services, and other aspects of incarceration between women's and men's facilities. These cases hew to principles of formal equality requiring policies to be constructed in a nondiscriminatory manner.[15] The constitutional basis for these challenges is the Equal Protection Clause of the

[10] There is also a significant body of law and scholarship addressing transgender prisoners, particularly transgender women incarcerated in men's prisons. These cases present their own unique issues that are beyond the scope of this Note. However, the presence of transgender women in prison should not be overlooked. *See* Edmo v. Corizon, Inc., 935 F.3d 757, 768 (9th Cir. 2019), *cert. denied sub nom.* Idaho Dep't of Corr. v. Edmo, 141 S.Ct. 610 (2020), *cert. denied* (ordering prison to provide gender confirming surgery); Norwood v. Kallas, No. 18-C-830, 2018 WL 3575918 (E.D. Wis. July 25, 2018) (request for hormone therapy); Morris v. Fletcher, No. 7:15CV00675, 2018 WL 1163465, at *1 (W.D. Va. Feb. 13, 2018), *report and recommendation adopted*, No. 7:15CV00675, 2018 WL 1158419 (W.D. Va. Mar. 5, 2018), and *report and recommendation adopted*, 311 F. Supp. 3d 824 (W.D. Va. 2018) (request for hormone therapy).

[11] *See, e.g.*, Johnson v. California, 543 U.S. 499 (2005); Lee v. Washington, 390 U.S. 333 (1968).

[12] *Lee*, 390 U.S. at 334.

[13] *Johnson*, 543 U.S. at 512, 515.

[14] Courts have consistently held that the Constitution is chiefly concerned with preventing intentional discrimination, rather than classification by gender, since separation of sexes is a measure related to security concerns. Klinger v. Dep't of Corr. (*Klinger II*), 31 F.3d 727, 729 (8th Cir. 1994); *see* Women Prisoners of the D.C. Dep't of Corr. v. D.C., 93 F.3d 910, 926 (D.C. Cir. 1996) ("[T]he segregation of inmates by sex is unquestionably constitutional."); Pitts v. Thornburgh, 866 F.2d 1450, 1458 (1989) (assuming "these general, widespread practices in American prison systems do not run afoul of constitutional commands.").

[15] *See* Tamar Lerer, *Hawai'i Girls Court: Juveniles, Gender, and Justice*, 18 BERKELEY J. CRIM. L. 84, 131–32 (2013) ("[F]ormal equality is the basic triumph of the litigation on behalf of women in the 1970s and 1980s. In large part, this theory motivates much of the Supreme Court's gender jurisprudence; the similarly situated threshold requirement is a touchstone of formal equality." (citations omitted)).

Fourteenth Amendment (the Fifth Amendment for federal facilities).[16] A subset of cases also raise claims under Title IX, enacted in 1972, which prohibits exclusion from or discrimination in education programs receiving federal funding, including prison programs.[17] Prisoners challenge disparities in the number and kinds of facilities available to them, the programs these facilities provide, and even the physical form of facilities, usually claiming offerings for women are inferior to those for men.[18]

The constitutional framework for gender-based equal protection claims in prison is no different from the standard used in other contexts. As the Court set out in *Craig v. Boren* in 1976, to be constitutional, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[19] Three years later in *Personnel Administrator of Massachusetts v. Feeney*, the Court clarified the State bears the burden to establish an "exceedingly persuasive" justification for such classifications, which cannot be motivated by a discriminatory purpose.[20] In 1996, the Court refined this standard in *United States v. Virginia*, holding that a justification for classification by sex "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."[21] However, the Court made clear that classifications based on "inherent differences" between women and men—many of them physical—are a permissible basis for classifications intended to compensate for "economic disabilities" of women, so long as they are not used "to create or perpetuate the legal, social, and economic inferiority of women."[22] Thus, gender-based constitutional claims receive higher scrutiny than the typical review of prison management decisions articulated in *Turner v. Safley*, in 1987: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably

[16] Pitts v. Thornburgh, 866 F.2d 1450, 1451, 1455 (1989); Women Prisoners of D.C. Dep't of Corr. v. D.C., 899 F. Supp. 659, 670 (D.D.C. 1995) ("Equal protection principles apply to federal action through the due process clause of the Fifth Amendment." (*citing* Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

[17] 20 U.S.C. § 1681(a); *see* Jeldness v. Pearce, 30 F.3d 1220, 1225 (9th Cir. 1994); Klinger v. Nebraska Dep't of Corr. Serv. (*Klinger III*), 887 F. Supp. 1281 (D. Neb. 1995), *aff'd sub nom.*, Klinger v. Dep't of Corr., 107 F.3d 609 (8th Cir. 1997).

[18] *See* Roubideaux v. N.D. Dep't of Corr. & Rehab., 570 F.3d 966, 976 (8th Cir. 2009); Women Prisoners of D.C. Dep't of Corr. v. D.C., 93 F.3d 910, 926 (D.C. Cir. 1996).

[19] Craig v. Boren, 429 U.S. 190, 197 (1976); West v. Virginia Dep't of Corr., 847 F. Supp. 402, 405 (W.D. Va. 1994) ("[S]ex-based classifications, even in the context of unequal prison conditions, are given "intermediate" scrutiny.").

[20] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979); *see* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

[21] United States v. Virginia, 518 U.S. 515, 533 (1996).

[22] *Id.* ("'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.").

related to legitimate penological interests."[23] Though intermediate scrutiny tends to be less deferential to prison administrators than is the trans-substantive *Turner* standard, management concerns and imperatives of deference still weigh heavily in the equal protection analysis in the prison setting.[24]

Antecedent to application of the equal protection or Title IX standards is the question of whether a prison's policies actually classify by gender. For if any characteristic other than gender can explain a difference in treatment, then the disparity need not withstand intermediate scrutiny to pass constitutional muster—the classification must only pass the lowest, rational basis scrutiny. For example, if a women's prison offers one program and a men's prison offers five, then the arrangement would seem to offend the Equal Protection Clause. But if the women's prison has a smaller population than the men's, or if the programs at the men's prison are geared towards individuals with long sentences, and no women have long sentences, then the state may be justified in differentiating its programs. The cases approach this question by asking if women and men are similarly situated for the purpose of the program or policy in question.[25] If the law does not consider them similarly situated, then there is usually no obligation to provide comparable levels of programs and service—allowing departments of corrections to avoid mandates of formal equality.[26] But if women and men are similarly situated, then courts tend to call for equality of programs, although practical realities and norms of deference dissuade courts from mandating perfect identity of treatment.[27]

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[23] Turner v. Safley, 482 U.S. 78, 89 (1987).; *c.f.* Pargo v. Elliott, 49 F.3d 1355, 1356–57 (8th Cir. 1995) (*"*Not all reviews of prison policies or practices require judicial deference . . . . *Turner* does not render prison regulations immune from judicial review. . . .").

[24] *See* Roubideaux v. N. Dakota Dep't of Corr. & Rehab., 570 F.3d 966, 974–75 (8th Cir. 2009) ("[T]the undisputed evidence in the record raises no inference of discrimination in the decisionmaking process because the statutes substantially relate to the important governmental objective of providing adequate segregated housing for women inmates."); Jeldness v. Pearce, 30 F.3d 1220, 1227–28 (9th Cir. 1994) (applying strict scrutiny but noting that "[p]risons are different from other institutions to which Title IX applies").

[25] *See* Keevan v. Smith, 100 F.3d 644, 648 (8th Cir. 1996) ("Whether the female inmates are similarly situated to male inmates requires an inquiry focusing on the purposes of the challenged government action, namely, the assignment of prison industry programs among the various institutions controlled by the Department"); *Klinger II*, 31 F.3d at 731 ("The similarly situated inquiry focuses on whether the plaintiffs are similarly situated to another group for purposes of the challenged government action. . . . Thus, because the similarly situated inquiry depends on what government action the plaintiffs are challenging, we must first precisely define the plaintiffs' claim).

[26] *See Klinger II*, 31 F.3d at 731 ("[W]e hold that [women] inmates and [men] inmates are not similarly situated for purposes of prison programs and services").

[27] *See* Pitts v. Thornburgh, 866 F.2d 1450, 1461 (D.C. Cir. 1989) ("[L]ong-term women offenders, based upon their gender, are incarcerated farther from the District than are otherwise similarly situated male offenders, and, as a result, bear a significant burden. This conclusion, upon reflection, is the unfortunate but legally unexceptional one that the District maintains a classification based upon gender,

The circuits have disagreed as to whether women and men are similarly situated across a variety of contexts.[28] As a general matter, women tend to be fewer in number, serve shorter sentences, and have lower security classifications than men in prison.[29] And women are likely to have suffered trauma before entering prison and are more likely than men to be the primary caregiver of children.[30] In some cases these differences are enough for courts to consider women differently situated from men.[31] But when the policies at issue are general enough that the differences become irrelevant, discriminatory treatment may become impermissible. Given this array of factors, courts have engaged in fact-intensive, context-specific reasoning to determine whether disparities are permissible.[32] As the Court developed its equal protection standards outside the carceral setting, a number of lower courts weighed in on the implications for women in prison.[33]

An early district court decision considered the outer limits of equal protection, holding that budgetary concerns could not justify unconstitutional discrimination on the basis of gender.[34] In *Bukhari v. Hutto*, the Eastern District of Virginia held in 1980 that "fiscal" "practical considerations" are not sufficient to override the requirements of equal protection.[35] A woman incarcerated in Virginia who was confined in segregation at the department's highest security level challenged her conditions of confinement as harsher

imposing a burden upon long-term women offenders. . . . . [N]othing in the various admissions by D.C. officials establishes that invidious discrimination exists or that the District's policies do not respond substantially to the important governmental interest in reducing severe prison overcrowding").

[28] *Compare* Roubideaux v. N. Dakota Dep't of Corr. & Rehab., 570 F.3d 966, 979 (8th Cir. 2009) & Women Prisoners of the D.C. Dep't of Corr. v. D.C., 93 F.3d 910 (D.C. Cir. 1996); Klinger II, 31 F.3d at 731. (not similarly situated) *with* Victory v. Berks Cty., No. CV 18-5170, 2019 WL 5266147, at *1 (E.D. Pa. Oct. 17, 2019) & Sassman v. Brown (*Sassman II)*, 99 F. Supp. 3d 1223, 1229 (E.D. Cal. 2015), *modified on reconsideration*, No. 214CV01679MCEKJN, 2015 WL 8780632 (E.D. Cal. Dec. 15, 2015) (similarly situated).

[29] *See Roubideaux*, 570 F.3d at 976 ("Male inmates in the custody of the DOCR greatly outnumber the female inmates. . . . Two-thirds of the female population are classified as minimum custody inmates and the remainder are medium custody inmates, whereas . . . the male institutions house predominately medium and maximum custody inmates with comparably longer sentences. . . .").

[30] *Compare* Kajstura, *supra* note 1, with Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (March. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html; *see also* Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POL'Y INITIATIVE (Jan. 9, 2018) https://www.prisonpolicy.org/reports/women_overtime.html.

[31] *E.g.*, *Klinger II*, 31 F.3d at 731.

[32] *See*, e.g. Women Prisoners of the D.C. Dep't of Corr. v. D.C., 93 F.3d 910 (D.C. Cir. 1996).

[33] *See* Victory v. Berks Cty., No. CV 18-5170, 2019 WL 5266147, at *1 (E.D. Pa. Oct. 17, 2019); Pargo v. Elliott, 894 F. Supp. 1243 (S.D. Iowa 1995), *aff'd,* Pargo v. Elliott, 69 F.3d 280 (8th Cir. 1995); & West v. Virginia Dep't of Corr., 847 F. Supp. 402 (W.D. Va. 1994).

[34] Bukhari v. Hutto, 487 F. Supp. 1162 (E.D. Va. 1980).

[35] *Id.*; *see also* West, 847 F. Supp. at 407 ("[T]he same argument could be used to deny women inmates the opportunity for education, vocational training or rehabilitation. Surely such an inequitable distribution of resources is not contemplated by the Fourteenth Amendment").

than those of men at the same security level.[36] Her equal protection claim was "based on the admitted disparity between the conditions of confinement in maximum security . . . and those at major male institutions . . . consist[ing] of more restricted freedom of movement among and interaction with the general prison population experienced by the women as opposed to the men."[37] The court recognized the Equal Protection Clause required "a review of the totality of prison conditions and rehabilitative opportunities" and that "[d]ifferences unrelated to such valid concerns as prison security must be remedied."[38]

In 1989, the D.C. Circuit in *Pitts v. Thornburgh* confirmed that gender-based differences were properly considered under the equal protection, rather than penological necessity, standard, in another case positioning sex segregation in opposition to budgetary concerns.[39] In a suit regarding disparities in physical placement, women convicted in Washington D.C. brought an equal protection challenge to the District's policy of incarcerating women sentenced to more than one year in a federal facility in West Virginia, while similarly situated men were incarcerated near Washington, in Northern Virginia.[40] The women claimed that based on their location far from home, they suffered the "hardship of fewer visitors (especially family members) and less preparation for and support in their eventual return to the District than that afforded males imprisoned at the D.C. facilities."[41] In considering the appropriate level of scrutiny and deference to be afforded to prison administrators, the D.C. Circuit concluded that *Turner* deference was inappropriate. Whereas *Turner* applied to "day-to-day judgments . . . concerning institutional operations", questions like those here were "general budgetary and policy choices" that did not "directly implicate either prison security or control of inmate behavior [or] the prison environment and regime."[42] Thus, the court applied heightened scrutiny to the housing policy in question.

Yet even under heightened scrutiny the court rejected the challenge, finding the policy directly related to furthering an important government interest.[43] While the court acknowledged "the obvious hardships imposed on long-term women offenders by removing them so far from the comforts and

[36] *Bukhari*, 487 F. Supp at 1171.

[37] *Id.*

[38] *Id.* at 1172.

[39] Pitts v. Thornburgh, 866 F.2d 1450, 1451, 1455 (1989).

[40] *Id.* The district court also found educational and vocational programs in West Virginia were not inferior to those available to men. *Id.* at 1452.

[41] *Id.* at 1452.

[42] *Id.* at 1453-54 (quoting *Turner*, 482 U.S. at 87).

[43] *Id.* at 1455.

support of family and the resources that would otherwise be available to them in this community" it found that the policy "does not embody invidious discrimination reflecting such forbidden factors as outmoded conceptions of the role of women in contemporary society."[44] Thus, this court accepted resource constraints as a basis for differentiating treatment by gender.[45]

In the mid-1990s, a wave of litigation across several circuits considered equal protection claims dealing with program offerings that differed between women's and men's facilities, and set out legal standards in this area.[46] These cases shortly preceded or coincided with the Supreme Court's decision in *United States v. Virginia*.[47] A foundational case in this line is *Klinger v. Nebraska Department of Correctional Services*, in which women challenged programs in twelve areas—including vocational, educational, employment, rehabilitation, recreational, visiting, and legal programs[48]—in Nebraska's sole women's prison.[49] Raising both equal protection and Title IX claims, the case reached the Eighth Circuit in 1994.[50] The district court initially found that "female prisoners, as a result of their gender alone, can receive only the programs available at [the women's prison]" and that such policies should receive heightened scrutiny as classification based on gender.[51] After comparing offerings at two facilities program-by-program, the court found equal protection violations in many of the programs.[52] As to Title IX, because educational programs received federal financial assistance, the court found the statute—prohibiting discrimination based on gender in federally funded educational programs—applicable,[53] and that differences between

[44] *Id.* at 1451.

[45] *Id.*

[46] Klinger v. Nebraska Dep't of Corr. Serv. (*Klinger III*), 887 F. Supp. 1281 (D. Neb. 1995), *aff'd sub nom.*, Klinger v. Dep't of Corr., 107 F.3d 609 (8th Cir. 1997); Keevan v. Smith, 100 F.3d 644 (8th Cir. 1996); Women Prisoners of the D.C. Dep't of Corr. v. D.C., 93 F.3d 910 (D.C. Cir. 1996); Pargo v. Elliott, 894 F. Supp. 1243 (S.D. Iowa 1995), *aff'd,* Pargo v. Elliott, 69 F.3d 280 (8th Cir. 1995).

[47] 518 U.S. 515, 533 (1996).

[48] *Klinger II*, 31 F.3d at 729.

[49] Klinger v. Nebraska Dep't of Corr. Serv. (*Klinger III*), 887 F. Supp. 1281 (D. Neb. 1995), *aff'd sub nom.*, Klinger v. Dep't of Corr., 107 F.3d 609 (8th Cir. 1997).

[50] *Klinger II*, 31 F.3d at 727;

[51] Klinger v. Nebraska Dep't of Corr. Servs. (*Klinger I*), 824 F. Supp. 1374, 1388 (D. Neb. 1993), *rev'd sub nom.*, *Klinger II*, 31 F.3d 727.

[52] *Klinger I* at 1390-1431.

[53] *See also* Jeldness v. Pearce, 30 F.3d 1220, 1225 (9th Cir. 1994) ("The statute, the case law, and the legislative history all suggest that Title IX should apply to prisons; there is no contrary authority."); *but see* Roubideaux, 570 F.3d at 977–78 ("[T]he prison industries operation is not an educational program or activity within the meaning of Title IX [despite] . . . . on-the-job training provided . . ."). Courts have found Title IX applies to "out-of-class study facilities" such as prisoners' cells. Suter v. State, No. 06-4032-CV-W-HFS, 2006 WL 2583731, at *3 (W.D. Mo. Sept. 7, 2006).

such federally funded programs between women's and men's prisons were unlawful.[54]

The Eighth Circuit reversed.[55] It held that the two groups were not similarly situated for a number of reasons: there were approximately six times as many men at a single facility than at the women's prison; women served sentences on average half to one third as long as the men at that facility; the women's prison had a lower security level, and "female inmates as a class have special characteristics distinguishing them from male inmates."[56] Because of these differences, the court found inconsequential that the women's prison lacked some programs that the men's prison had.[57]

Nor were similar programming opportunities for women required by law.[58] The court explained that "using an inter-prison program comparison to analyze equal protection claims improperly assumes that the Constitution requires all prisons to have similar program priorities and to allocate resources similarly."[59] The Eighth Circuit thus concluded: "Differences between challenged programs at the two prisons are virtually irrelevant because so many variables affect the mix of programming that an institution has. . . *In short, comparing programs . . . is like the proverbial comparison of apples to oranges.*"[60] The district court subsequently held the appeals court's ruling required reversal on the Title IX claims as well.[61] For "if [the men's prison] is not *factually* comparable to [the women's prison], then 'differences between challenged programs at the two prisons are virtually irrelevant because so many variables affect the mix of programming that an institution has.'"[62]

In the same period, courts in the Eighth Circuit developed a more specific test, standardizing *Klinger*'s reasoning, to determine whether women and men in prison are similarly situated, which many courts subsequently adopted.[63] An Iowa district court articulated the five-factor test in *Pargo v. Elliot*, an unsuccessful equal protection challenge to programming disparities.[64] As the Eighth Circuit affirmed in 1995 in a brief per curiam,[65]

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[54] *Klinger I*, 824 F. Supp. at 1431-34.

[55] *Klinger II*, 31 F.3d at 731–32.

[56] *Id.*

[57] *Id.* at 732.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 733.

[61] *Klinger III*, 887 F. Supp. at 1285.

[62] *Id.* at 1287 (quoting *Klinger*, 31 F.3d at 733).

[63] Pargo v. Elliott, 894 F. Supp. 1243 (S.D. Iowa 1995), *aff'd,* Pargo v. Elliott, 69 F.3d 280 (8th Cir. 1995).

[64] *Id.*

[65] *Id.*.

the district court identified the "circumstances of incarceration" relevant to the "similarly situated" inquiry: 1) population size, 2) security levels, 3) types of crimes, 4) average length of sentence, and 5) special characteristics.[66] Quoting *Klinger* to elaborate on this last factor, the district court found women prisoners "more likely to be single parents with primary responsibility for child rearing" and "more likely to be sexual or physical abuse victims" while men "are more likely to be violent and predatory . . ."[67]

The first four factors are premised on a conception of formal equality, matching up facilities and populations for an accounting of their demographics. If the numbers appear comparable, then equality in offerings is required.[68] The "special circumstances" factor complicates the equation, allowing for consideration of social circumstances that might warrant departure from strict comparisons, as the Court would shortly recognize in *United States v. Virginia*.[69] However, in this case, as in many others, the court concluded based on the factors that women and men were not similarly situated, as "[t]he differences among the various men's institutions and [the women's prison] are so significant that comparisons between the two would ignore 'separate sets of decisions based on entirely different circumstances.'"[70] Any "special circumstances" were insufficient to outweigh the more formal factors, and the Department was not required to increase its programming opportunities for women.[71]

In 1996, the Eighth Circuit in *Keevan v. Smith* again considered an equal protection claim challenging disparities in education and prison industry employment in Missouri prisons.[72] The court relied on *Klinger* and *Pargo* to reason that women and men were not similarly situated based on differences in population size, security levels, and length of sentences, and that officials lacked discriminatory intent.[73] Consequently, it found no equal protection violation.[74] This decision, several months after *United States v. Virginia*, highlighted some of the same concerns regarding stereotypical and "artificial constraints" placed on women.[75] Indeed, Judge Haney wrote in

[66] *Id.* at 1259-61.

[67] *Id.* at 1261 (quoting *Klinger II*, 31 F.3d at 731-32).

[68] *Id.* at 1259–60.

[69] 518 U.S. at 533-34.

[70] *Pargo*, 894 F. Supp. at 1261 (quoting *Klinger II*, 31 F.3d at 732). Despite finding women and men not similarly situated, the court reviewed every challenged program, service, or policy before finding disparities rationally related to legitimate government interests and free of invidious discrimination. *Id.* at 1290-91.

[71] *Id.* at 1290.

[72] Keevan v. Smith, 100 F.3d 644 (8th Cir. 1996).

[73] *Id.* at 648–49.

[74] *Id.* at 650.

[75] *Id.*; Virginia, 518 U.S. at 533.

partial dissent, "With very few exceptions, the industrial opportunities offered to female inmates fall within prevailing stereotypes of 'women's work': telephone operators/telemarketers; data entry; and office copying," allowing an inference that "industry placements are based on stereotypical notions of what jobs women can perform and the lesser need for women to become skilled laborers."[76] Still, the *Klinger/Pargo* analysis carried the day, and the court denied the women's claim.[77]

Pargo's influence was not limited to the Eighth Circuit; also in 1996, the D.C. Circuit put the factors into practice.[78] In *Women Prisoners of D.C.*, a broad-ranging challenge to a number of aspects of Washington D.C.'s women's facilities (reorganized since *Pitts*), the D.C. Circuit applied the *Pargo* factors in its analysis of programming disparities to reverse the district court's holding that men and women were similarly situated.[79] The district court found only seven percent of women in the facilities had violent crimes of conviction and 82 percent were single-parent primary caretakers.[80] But it did not make findings regarding types of crimes or special characteristics of men as points of comparison, nor consider the significant disparity in population sizes. The court of appeals noted that "[i]t is hardly surprising, let alone evidence of discrimination, that the smaller correctional facility offered fewer programs than the larger one . . ."[81]

While the appeals court disclaimed "these mechanical ratios [as] a test of comparability," it maintained that "standing alone, the difference in the number of programs provided by prisons having vastly different numbers of inmates cannot be taken as evidence that those in small institutions that offer fewer programs have been denied equal protection. More is required."[82] Moreover, the fact that women were imprisoned in smaller facilities than were men was not in itself discriminatory, but rather "the obvious result of an undisputed fact: there are far fewer female inmates."[83] The court of

[76] *Keevan*, 100 F.3d at 653 (Heaney, J., concurring in part and dissenting in part).

[77] Not only were the women unsuccessful in their equal protection claims, but during the litigation, "Department officials terminated their former practice of allowing outside educators access to male and female prison facilities for the purposes of providing college-level courses to inmates" such that "[n] either male nor female prisoners are currently provided this opportunity", mooting the women's claim. *Id.* at 645-647.

[78] Women Prisoners of the D.C. Dep't of Corr. v. D.C., 93 F.3d 910 (D.C. Cir. 1996).

[79] *Id.*

[80] *Id.* at 925.

[81] *Id.* For example, two of the facilities the district court considered similarly situated had populations of 167 and 936, respectively. The court of appeals noted that "[e]ven if the women . . . had access to a third or half the number of work and religious programs as the men . . . , because of the six-to-one difference in their respective populations, on a per inmate basis, the women had access to two or three times the number of programs as did the men. . . ." *Id.*

[82] *Id.*

[83] *Id.* at 926.

appeals easily found women and men were not similarly situated, and thus identified no violations of Title IX or the Equal Protection Clause.[84] In dissent on these issues, Judge Rogers, citing *United States v. Virginia*, noted that "[b]ecause 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.'"[85] Still, the majority found the numbers persuasive independent of any background circumstances.[86]

The cases thus far have focused on claims based on the Equal Protection Clause, sometimes paired with Title IX. Another case in the same period centered on the statutory claim, with a result more favorable to the women asserting their right to equality in programming.[87] In *Jeldness v. Pearce*, the Ninth Circuit found women and men similarly situated for the purposes of educational programs, and disparities in programs impermissible under the statute.[88] The district court made detailed findings as to each challenged program in line with the *Klinger/Pargo* reasoning—adverting to custody status, safety, and location, in addition to market forces, interest, location, and above all penological necessity—in upholding the disparities.[89]

The Ninth Circuit reversed and remanded in an opinion drawing from principles of formal equality.[90] It reasoned that based on the statutory language, educational programs must be "equally" available to women and men; parity alone was insufficient.[91] It also concluded penological necessity was but one among many concerns in the application of equality principles, rather than a complete defense.[92] The department was not required to offer the same number of classes in the smaller women's prison as in the larger men's prisons, nor was it required to offer "gender-integrated classes,"[93] nor "[s]trict one-for-one identity of classes."[94] But the requirement of a "comparable variety in course selection" could mean a higher than

[84] *Id.* at 927.

[85] *Id.* at 952 (Rogers, J., concurring in part and dissenting in part) (quoting *United States v. Virginia*, 518 U.S. 515, 545 (1996)).

[86] *Id.* at 926.

[87] Jeldness v. Pearce, 30 F.3d 1220 (9th Cir. 1994).

[88] *Id.* at 1226–28.

[89] *Id.* at 1235 (Kleinfeld, J., dissenting) ("In the unchallenged findings of fact, every single distinction between course availability to male and female prisoners is supported by non-pretextual concerns of location, preference, instructor availability, and safety of the public and the prisoners, rather than sex.").

[90] *Id.* at 1229.

[91] *Id.* at 1226-28.

[92] *Id.* at 1230.

[93] *Id.* at 1228.

[94] *Id.* at 1229.

proportionate number of courses offered to women.[95] Most important was the reasonable opportunity for similar courses of study; interests may differ, but denying access entirely was impermissible.[96] Finally, cost and efficiency were not legitimately related to security, and could not override Title IX's requirements.[97]

Courts have continued to wrestle with similar challenges under the Equal Protection Clause, at times allowing the practical realities of prison management to take precedence over imperatives of equality.[98] The Eighth Circuit in 2009 found budgetary concerns to justify differential treatment in *Roubideaux v. North Dakota Department of Corrections and Rehabilitation*.[99] Women incarcerated in North Dakota challenged a policy of transferring women to county jails with facilities and programs inferior to those provided to men.[100] They argued that women's placement decisions were "based on economic concerns born out of a desire to benefit western North Dakota economically rather than out of a concern for what was in their best interests."[101] The Eighth Circuit characterized the decision as one based on cost rather than gender, reasoning that such policy choices "[do] not raise an inference of discrimination on the basis of *gender*."[102] Rather, the policy was "relate[d] to the important governmental objective of providing adequate segregated housing for women inmates" and accommodating different sized populations.[103] The court found no violation of equal protection with respect to the claims of "unequal and inferior programs, education, and services in comparison with those offered to male inmates" as other interests obviated any need for comparison.[104]

Recently, a court took up the *Klinger* reasoning directly to cast doubt on its continuing vitality.[105] A Pennsylvania district court in 2019 found women and men similarly situated with respect to jail policies, holding that some of the policies violated the Equal Protection Clause.[106] In *Victory v.*

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[95] *Id.*

[96] *Id.* For the dissent, "evidence showed . . . women were more interested . . . in cosmetology and secretarial courses. Regardless of whether one thinks that ought to be so, it was. It would be ridiculous to say that letting a prisoner do what he or she wants, if males and females want different things, is sex discrimination." *Id.* at 1235 (Kleinfeld, J., dissenting).

[97] *Id.* at 1230.

[98] Roubideaux v. N.D. Dep't of Corr. & Rehab., 570 F.3d 966 (8th Cir. 2009).

[99] *Id.* at 966.

[100] *Id.* at 970.

[101] *Id.* at 975.

[102] *Id.*

[103] *Id.* at 969.

[104] *Id.* at 970.

[105] Victory v. Berks Cty., No. CV 18-5170, 2019 WL 5266147. (E.D. Pa. Oct. 17, 2019).

[106] *Id.* at *20.

Berks, women in the Berks County Jail System classified at the lowest ("Trusty") security level claimed their conditions were inferior to those of men at the same security level at a different facility.[107] The court found women and men similarly situated, and that the County did not provide women with substantially equivalent treatment.[108] Over the County's arguments of safety concerns, "structural barriers, and lack of female staff", the Court found no important governmental objective underlying the policies, and therefore held that they violated the Equal Protection Clause.[109]

In its reasoning, the court raised doubts as to the utility of the *Klinger* "similarly situated" analysis, noting criticism by scholars also applicable to the *Pargo* factors.[110] By focusing on differences between institutions, this reasoning could miss that programming differentials may not in reality be justified by the characteristics of institutions. The same can be said for arguments from general characteristics of women versus men in prison, or "special circumstances." Reasoning from demographic data will always reveal differences between female and male populations to support finding the groups not similarly situated, precluding courts from even reaching the constitutional question. Indeed, "[f]ocusing on these differences to determine female and male inmates are not similarly situated illogically leads to a court avoiding analysis of an issue which may exacerbate these differences."[111] Accordingly, while the *Klinger* analysis may be "informative," the court disclaimed its "rigid appl[ication] . . . when faced with very different circumstances."[112] With these caveats, the court nonetheless looked at the typical indicia—sentence length, population characteristics and size, and facility operations—to find women and men similarly situated.[113] This recent concern with *Klinger*'s reasoning could indicate appetite to rethink loyalty to the formal equality principles on which these cases rest. This skepticism of *Klinger* could allow for more consideration of social circumstances manifesting in different population

[107] *Id,* at *1.

[108] *Id.* at*20.

[109] *Id.* at *4.

[110] *Id.* at *8–9 (citing Jennifer A. Lee, *Women Prisoners, Penological Interests, and Gender Stereotyping: An Application of Equal Protection Norms to Female Inmates*, 32 COLUM. HUM. RTS. L. REV. 251, 285 (2000); 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 (1997).

[111] *Victory*, 2019 WL 5266147, at *8.

[112] *Id.* at *9.

[113] *Id.* ("Berks County female Trusty inmates and male Trusty inmates are similarly situated as a matter of law. Female and male Trusty inmates have similar lengths of incarceration. . . . The population of female and male Trusty inmates is similar").

characteristics, and could in turn create room for a more substantive conception of equality.

Finally, the foregoing have all followed a similar pattern: women, or classes of women, challenge conditions they believe fall below a permissible floor of equal treatment. But courts have also considered equal protection challenges brought by men to "gender-responsive" programs or other policies designed to support the unique needs of women in prison.[114] Even though *United States v. Virginia* seems to allow program disparities intended to compensate women for discriminatory social structures, in some cases men succeed in their equal protection challenges.[115] Such claims threaten the existence of these programs, as litigation may dissuade officials from offering gender-responsive programs at all, rather than opening them to men.

A state court in *Woods v. Horton* upheld the constitutionality of some gender-based programs in a 2008 case brought by men, finding women and men not similarly situated for all of the programs in question.[116] The plaintiffs brought an equal protection claim in California state court regarding domestic violence survivor programs and programs for mothers in prison.[117] The appeals court found women and men similarly situated for the purpose of domestic violence programs, but not for the prison programs for mothers.[118] Prison officials noted, and the court accepted, that the "programs are gender responsive, 'taking into account the ways in which women prisoners present differently from men prisoners'" and that "different programs are developed to address [male] prisoners' needs, such as third day visiting for male inmate fathers . . ."[119] Mothers were categorically different from fathers in the court's eyes, justifying different programming opportunities.[120]

However, a decade later, a California federal court invalidated a similar program subjected to an equal protection challenge, finding women and men

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[114] *See, e.g.*, Davie v. Wingard, 958 F. Supp. 1244, 1252 (S.D. Ohio 1997) ("Policies requiring men but not women to keep their hair short "serve the compelling goal of promoting prison safety, security, and discipline."); Bills v. Dahm, 32 F.3d 333 (8th Cir. 1994) (considering whether men and women were similarly situated regarding overnight visits from children for women but not men).

[115] *Virginia*, 518 U.S. at 533-34; *see* Sassman v. Brown (*Sassman II)*, 99 F. Supp. 3d 1223 (E.D. Cal. 2015), *modified on reconsideration*, No. 214CV01679MCEKJN, 2015 WL 8780632 (E.D. Cal. Dec. 15, 2015).

[116] Woods v. Horton, 167 Cal. App. 4th 658 (2008).

[117] *Id.* at 662.

[118] *Id.* The court explained, "women prisoners were likely to have been the primary or sole caretaker of their young children, who were likely to be displaced to other relatives or foster care. By contrast, children of incarcerated men were likely to continue living with their mothers. Plaintiffs fail to identify a single inmate father who would qualify for these programs, but was denied his benefit due to his gender. . ." *Id.* at 672.

[119] *Id.* at 673.

[120] *Id.*

similarly situated.[121] In *Sassman v. Brown*, a man challenged exclusion from California's Alternative Custody Program—allowing only women to spend the last twenty-four months of their sentences in residential homes, drug treatment programs, or transitional care facilities—as violative of the Equal Protection Clause.[122] The district court granted summary judgment in his favor in 2015.[123] The program allowed women and limited eligibility to women.[124] The Department stated its purpose was to "implement a gender-responsive program to address women's unique pathways to criminality, and thereby, reduce recidivism."[125] The court distinguished this case from other programming cases, saying "[i]t is about freedom from incarceration" as "male inmates must by definition serve two additional years in a penal institution than they would . . . if they were female."[126]

The court concluded that gender was an unnecessary proxy for program eligibility,[127] as the admission process was "highly individualized" such that "there is simply no reason to resort to generalities rather than to review the facts presented by each particular scenario."[128] Fundamentally, "even though the State has offered ample justification for providing the program *to* female offenders," it "has not offered any rational explanation for *excluding* men."[129] It could not do so without resorting to "fixed notions concerning the roles and abilities of males and females,"[130] as it could not show the program was "substantially related to the State's interests of family reunification and community reintegration when . . . women need not be mothers, nor . . . show a need for rehabilitation or recovery services . . . , but men, even if they show all of the foregoing, may not apply at all."[131] Thus, based on reasoning that took on a more substantive tone, groups of women

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121 *Sassman II*, 99 F. Supp. 3d at 1223.

122 *Id.* at 1229.

123 *Id.*

124 *Id.* at 1230.

125 *Id.* at 1229.

126 *Id.* at 1233-34.

127 *Id.* at 1235-36.

128 *Id.* at 1238.

129 *Id.* at 1243–44. "[N]othing before the Court . . . can justify keeping fathers but not mothers from their children". *Id.* at 1246.

130 *Id.* at 1235, 49 (quotations omitted) ("[A]dopting Defendants' argument, would stigmatize, although in different ways, every criminal defendant . . . . The Court would have to treat female defendants as a class as victims, . . . powerless over their situations, patronizing them with more lenient sentences intended to compensate them for their perceived inferiority with respect to their ability to overcome their particular circumstances. It would have to categorically view male defendants as dangerous and aggressive, with no real regard for their families, punishing them for their perceived inferiority with respect to the potential for rehabilitation and family reunification. . . .").

131 *Id.* at 1251.

and men appropriate for comparison were similarly situated, and the program could not withstand the equal protection challenge.

As can be seen from these cases, courts considering challenges to equality in programming opportunities have operated from conceptions of gender and equality that appear paradoxical at times. A model of formal equality would seem to offer a baseline of protections for women complaining of inferior treatment, even while neglecting to take into account background social ills that may make formal equality insufficient as a remedy. However, under the *Klinger/Pargo* inquiry, findings of difference can cut off the call for equality. Courts recognize gender-based differences as so controlling as to preclude finding women and men similarly situated in many cases.[132] However, because they decline to compare women's and men's facilities, these courts also decline to require equality between them.[133] Thus, the formal equality model exemplified in many of these cases may cut against women's interests.

b. Privacy, Dignity, and Women's Bodies

Another subset of cases deals with policies that implicate women's bodies and their interests in privacy and dignity in two specific contexts: 1) searches of women's bodies, and 2) use of restraints on pregnant prisoners.[134] These claims arise primarily out of the non-gendered standards of the Fourth and Eighth Amendments, respectively.[135] For Fourth Amendment claims, courts inquire into whether plaintiffs have a "reasonable expectation of privacy" given the circumstances surrounding a search.[136] For Eighth Amendment claims, plaintiffs must establish "deliberate indifference" to a

[132] Keevan v. Smith, 100 F.3d 644, 649 (8th Cir. 1996) (finding "substantial differences . . . between male and female prisoners [which] demonstrate the dissimilarity of the two distinct groups and the irrelevance of any attempt to compare the number or type of programs offered"); *Klinger II*, 31 F.3d 727, 731–32 (8th Cir. 1994) (finding women and men not similarly situated because "female inmates as a class have special characteristics distinguishing them from male inmates, ranging from the fact that they are more likely to be single parents with primary responsibility for child rearing to the fact that they are more likely to be sexual or physical abuse victims. Male inmates, in contrast, are more likely to be violent and predatory than female inmates"); & Davie v. Wingard, 958 F. Supp. 1244, 1253 (S.D. Ohio 1997) (finding gender classification "justified because of the differences which existed between male and female inmates regarding the rate of violent behavior and escapes").

[133] *See supra* note 134.

[134] *See, e.g.*, Henry v. Hulett, 969 F.3d 769 (7th Cir. 2020) (searches); Mulvania v. Sheriff of Rock Island, 850 F.3d 849 (7th Cir. 2017) (dignity); Mendiola-Martinez v. Arpaio, 836 F.3d 1239 (9th Cir. 2016) (restraints); Villegas v. Metro Gov't of Nashville, 709 F.3d 563 (6th Cir. 2013) (restraints); Nelson v. Correctional Medical Services, 583 F.3d 522 (8th Cir. 2009) (en banc) (restraints); Jordan v. Gardner, 986 F.2d 1523 (9th Cir. 1993) (searches); Ford v. City of Boston, 154 F. Supp.2d 131 (D. Mass. 2001) (searches); & Women Prisoners of D.C. Dep't of Corr. v. D.C., 877 F. Supp. 634, (D.D.C. 1994), *vacated in part, modified in part*, 899 F. Supp. 659 (D.D.C. 1995) (restraints).

[135] U.S. Const. amends. IV, VIII.

[136] Oliver v. U.S, 104 U.S. 170, 177 (1984).

substantial risk of an objectively serious harm.[137] Some of these cases—especially in the search context—speak in non-gendered terms;[138] others—dealing with shackling during pregnancy—are explicitly gendered.[139] All view women prisoners through a gendered lens, however, whether as past and potential victims or as reproductive actors.[140] While these conceptualizations may flatten women's experiences and assume histories of trauma, they also further an interest in preserving privacy and dignity to women in prison.

Cases addressing searches of prisoners' bodies arise in a variety of forms, implicating the Fourteenth and Eighth, as well as the Fourth, Amendments.[141] In some cases, courts apply the same equal protection framework discussed above to evaluate disparities in policies for searching women and men.[142] For example, in *Ford v. City of Boston*, a Massachusetts district court held in 2001 that the city's policy of transferring women to a maximum security jail where they were subjected to suspicionless strip searches, while keeping men in city facilities where they were not subject to such searches, violated the Equal Protection Clause.[143] Although all were searched, "only female arrestees were routinely subjected to degrading strip and visual body cavity searches" which impermissibly treated women and men differently.[144]

In other cases, courts focus more on the psychological effects of searches, recognizing the histories of trauma with which many women enter prison.[145] With this view of women as vulnerable to sexual abuse, some

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[137] Farmer v. Brennan, 511 U.S. 825, 828 (1994).

[138] *See* Henry v. Hulett, 969 F.3d 769 (7th Cir. 2020); Jordan v. Gardner, 986 F.2d 1523 (9th Cir. 1993); & Ford v. City of Boston, 154 F. Supp.2d 131 (D. Mass. 2001).

[139] *See* Mendiola-Martinez v. Arpaio, 836 F.3d 1239 (9th Cir. 2016); Villegas v. Metro Gov't of Nashville, 709 F.3d 563 (6th Cir. 2013); Nelson v. Correctional Medical Services, 583 F.3d 522 (8th Cir. 2009) (en banc); & Women Prisoners of D.C. Dep't of Corr. v. D.C., 877 F. Supp. 634, (D.D.C. 1994), *vacated in part, modified in part*, 899 F. Supp. 659 (D.D.C. 1995).

[140] *See supra* note 136.

[141] *See supra* note 140.

[142] *See, e.g.*, Jordan v. Gardner, 986 F.2d 1521, 1525 (9th Cir. 1993) ("Noting that many of the inmates at WCCW have histories of sexual or physical abuse by men, the district court found that physical, emotional, and psychological differences between men and women "may well cause women, and especially physically and sexually abused women, to react differently to searches of this type than would male inmates subjected to similar searches by women") & Ford v. City of Boston, 154 F. Supp.2d 131 (D. Mass. 2001).

[143] Ford v. City of Boston, 154 F. Supp.2d 131, 151-52 (D. Mass. 2001).

[144] *Id.* at 151.

[145] *See, e.g.*, Jordan v. Gardner, 986 F.2d 1521, 1525 (9th Cir. 1993) ("The record in this case, including the depositions of several inmates and the live testimony of one, describes the shocking histories of verbal, physical, and, in particular, sexual abuse endured by many of the inmates prior to their incarceration").

courts incorporate gender-specific understandings in their reasoning.[146] In 1993, in *Jordan v. Gardner,* the Ninth Circuit sitting en banc held that cross-gender pat-down searches on women were unconstitutional under the Eighth Amendment.[147] Until 1989, the Washington Corrections Center for Women (WCCW) had a same-gender search policy: outside of emergencies, only women staff were permitted to perform suspicionless searches.[148] In 1988, staff members filed a grievance regarding the policy, as women complained their meal breaks were interrupted to conduct searches.[149] In 1989, WCCW Superintendent Eldon Vail instituted a policy of cross-gender clothed body searches, over warnings from psychologists that the policy "could cause severe emotional distress . . . "[150] Indeed, on the only day the policy was operational, a woman with "a long history of sexual abuse by men, unwillingly submitted to a cross-gender clothed body search and suffered severe distress: she had to have her fingers pried loose from bars she had grabbed during the search, and she vomited after returning to her cell . . ."[151] The district court immediately enjoined the policy, prohibiting the prison from enforcing it, and putting an end to cross-gender searches.[152]

Reviewing the permanent injunction, the Ninth Circuit resolved the case on Eighth Amendment grounds, based on the "prohibition against the unnecessary and wanton infliction of pain."[153] Its decision rested on a record evincing a gendered understanding of the experience of searches, including the "shocking histories of verbal, physical, and, in particular, sexual abuse endured by many of the inmates prior to their incarceration," including the fact that "[e]ighty-five percent of the inmates report[ed] a history of serious abuse . . . including rapes, molestations, beatings, and slavery."[154] These histories, along with "physical, emotional, and psychological differences between men and women may well cause women, and especially physically

[146] *See id.* at 1526 ("The record in this case supports the postulate that women experience unwanted intimate touching by men differently from men subject to comparable touching by women. Several witnesses, including experts in psychology and anthropology, discussed how the differences in gender socialization would lead to differences in the experiences of men and women with regard to sexuality").

[147] *Id.*

[148] *Id.* at 1523.

[149] *Id.*

[150] *Id.* ("During the cross-gender clothed body search, the male guard stands next to the female inmate and thoroughly runs his hands over her clothed body . . . . [A] guard is to '[u]se a flat hand and pushing motion across the [inmate's] crotch area.'. . . . All seams in the leg and the crotch area are to be "squeez[ed] and knead[ed]." . . . [T]he guard also is to search the breast area in a sweeping motion, so that the breasts will be "flattened.").

[151] *Id.* at 1522.

[152] *Id.* at 1523.

[153] *Id.* at 1524. Judge Reinhardt concurred, arguing the case should be decided on Fourth Amendment grounds. *Id.* at 1532 (Reinhardt, J., concurring).

[154] *Id.* at 1525.

and sexually abused women, to react differently to searches of this type than would male inmates subjected to similar searches by women."[155] The court accepted expert testimony that "women experience unwanted intimate touching by men differently from men subject to comparable touching by women."[156] As such, "[t]here is a high probability of great harm, including severe psychological injury and emotional pain and suffering, to some inmates from these searches, even if properly conducted."[157]

Based on this evidence, the Ninth Circuit concluded that cross-gender searches in this case constituted "infliction of pain," bringing them under the ambit of the Eighth Amendment and obviating any need for a Fourth Amendment inquiry.[158] The infliction of pain here was both unnecessary—as WCCW had operated for three years without cross-gender searches during the pendency of litigation[159]—and wanton—as, under the standard of deliberate indifference, the defendants were aware of the potential impacts of these searches before implementing the policy.[160] Thus, the court affirmed the district court's injunction prohibiting the prison from allowing men to conduct non-emergency, suspicionless clothed body searches.[161] In this case, gender was an explicit concern, warranting protective action by the court. The court credited evidence regarding gender-specific histories of abuse and crafted its Eighth Amendment reasoning accordingly.[162]

The Ninth Circuit in *Jordan* did not reach the Fourth Amendment question, but a 2020 decision provides an updated view of the law on that front.[163] In *Henry v. Hulett*, the Seventh Circuit sitting en banc held that "the Fourth Amendment protects a right to bodily privacy for convicted prisoners, albeit in a significantly limited way, including during visual inspections."[164]

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155 *Id.*

156 *Id.* at 1526.

157 *Id.* (quotations omitted). "[W]itnesses, including experts in psychology and anthropology, discussed how the differences in gender socialization would lead to differences in the experiences of men and women with regard to sexuality" and that "unwilling submission to bodily contact with the breasts and genitals by men would likely leave the inmate 'revictimiz[ed],' resulting in . . . symptoms of post-traumatic stress disorder." *Id*. at 1525-26.

158 *Id.* at 1526.

159 *Id.* at 1527 ("[Security] concerns have been met by . . . random and routine searches by female guards.").

160 *Id.* at 1528-29 ("[T]he inmates met their burden of establishing the requisite 'deliberate indifference.'…Vail indicated that the policy was not required for security purposes and that he adopted the…policy without a great deal of knowledge about the impact…Yet long before[,]…Vail was urged by members of his own staff not to institute [it] due to the psychological trauma which many inmates likely would suffer. Further,…a court order was necessary to prevent the searches although one of the first inmates to be searched suffered a severe reaction.").

161 *Id.* at 1531.

162 *Id.* at 1525–26.

163 Henry v. Hulett, 969 F.3d 769 (7th Cir. 2020).

164 *Id.* at 773.

A class of more than 200 women incarcerated and formerly incarcerated at Lincoln Correctional Center in Illinois claimed Fourth and Eighth Amendments violations arising from a mass strip search conducted as part of a cadet training exercise.[165] Though the court's reasoning was not gender-specific, the facts are such that the prisoners' gender is impossible to read out of the decision.

The court set out the facts in graphic detail.[166] The officers and trainees, or cadets, "lined up 200 of the inmates in rows, forced them to stand facing the wall, called them 'bitches,' and threatened to put them in segregation if they were not quiet . . . Prisoners were required to stand until cadets strip searched them—in some cases waiting five to seven hours."[167] While they waited, "[t]he women could not sit, get a drink of water, or use the restroom" and "[s]ome elderly prisoners cried in pain as a result of standing for a long period while handcuffed."[168] The searches themselves were degrading, and staff members yelled derogatory and sexualized insults throughout.[169] Women were forced to strip and stand in a line.[170] Then,

> Officers and cadets ordered the women to raise their breasts, lift their hair, turn around and bend over, spread their buttocks and vaginas, and cough several times. Women were forced to stand naked for as long as fifteen minutes, far longer than a typical strip search because of its group nature . . . The officers and cadets ordered menstruating prisoners to remove feminine products and dispose of them on the floor and in overflowing garbage cans, in full view of others. Women stood barefoot on the bathroom floor, which was dirty with menstrual blood and other bodily fluids.[171]

Although women cadets physically searched the prisoners, "many male correctional officers and cadets [could] see the strip searches taking place."[172]

Given these disturbing details, it is unsurprising that the court found cause for concern. The en banc court reversed the panel and district court, which had both relied on cases dealing with cell searches to deny the Fourth Amendment claim.[173] It made a strong statement regarding privacy and

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[165] *Id.* The case went to trial on the Eighth Amendment question; the jury returned a verdict for Defendants. *Id.* at 776.

[166] *Id.* at 774-75.

[167] *Id.* at 775.

[168] *Id.* at 774.

[169] *Id.*

[170] *Id.* at 775.

[171] *Id.*

[172] *Id.*

[173] *Id.*. at 773–74 (The district court "conclud[ed] that, under Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995), and King v. McCarty, 781 F.3d 889 (7th Cir. 2015) (per curiam), convicted prisoners do not maintain a privacy interest during visual inspections of their bodies. A divided panel of our court affirmed that decision, following the same reasoning"); *Id.* at 776.

dignity, explaining that "to be free from strip searches and degrading body inspections is . . . basic to the concept of privacy," as strip searches are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission," and "[o]ne of the clearest forms of degradation in Western Society."[174] The appeals court held the Fourth Amendment applies to searches in this context, yet stopped short of finding a Fourth Amendment violation.[175] It remanded for the district court to perform a reasonableness inquiry, as even the plaintiffs "concede[d] that prison officials may strip and body cavity search inmates, if the officials conduct those searches in an appropriate manner."[176]

The constitutional holding was stated in terms without reference to gender. The Fourth Amendment guarantees people protection "in their persons … against unreasonable searches"[177] which previous cases established includes body cavity searches.[178] Even so, the prison context has limited the reach of Fourth Amendment protections. As the Supreme Court explained in *Bell v. Wolfish,* upholding strip searches following contact visits in federal pretrial facilities, evaluating the constitutionality of a search "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails."[179] To prove a Fourth Amendment violation, a person must show a "reasonable expectation of privacy"; if it is unreasonable to expect not to be searched in a given situation, then the Fourth Amendment provides no protection.[180] The court distinguished this case from others finding no reasonable expectation of privacy in one's cell.[181] In those cases, institutional concerns for security and order could outweigh prisoners' interest in privacy.[182] Strip searches were of a different order:

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[174] *Id.* at 778 (quoting Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983); Canedy v. Boardman, 16 F.3d 183, 185 (7th Cir. 1994)).

[175] *Id.*

[176] *Id.* at 783 ("Likewise, incidental observations of undressed inmates . . . that are inherent to the continuous surveillance necessary in prisons are almost always reasonable"). The court made clear the Fourth and Eighth Amendments require separate inquiries: "The Eighth Amendment safeguards prisoners against the use of searches that . . . officers subjectively intend as a form of punishment. . . . [But b]ecause reasonableness is an objective test, a defendant's subjective state of mind is irrelevant to a court's Fourth Amendment analysis." *Id.* at 781.

[177] U.S. Const. amend. IV.

[178] Florence v. Bd. of Chosen Freeholders of Burlington, 566 U.S. 318, 326–27, 339 (2012); Bell v. Wolfish, 441 U.S. 520, 560 (1979); *Id.* at 558 ("[I]nmates, both convicted prisoners and pretrial detainees, retain some Fourth Amendment rights upon commitment to a corrections facility").

[179] Bell v. Wolfish, 441 U.S. 520, 559 (1979).

[180] *Henry*, 969 F.3d at 776 (quoting Oliver v. United States, 466 U.S. 170, 177 (1984)).

[181] *Id.* at 777 (citing Hudson v. Palmer, 468 U.S. 517 at 526).

[182] *Id.*at 777 (citing Sparks v. Stutler, 71 F.3d 259, 261 (7th Cir. 1995) ("*Hudson* did not require the Court to decide what interests prisoners retain in their bodies, as opposed to their surroundings.") & Forbes v. Trigg, 976 F.2d 308, 312 (7th Cir. 1992) ("[P]rison[ers] . . . retain protected privacy rights in their bodies, although these rights do not extend to their surroundings." (citing *Hudson*)).

"The privacy interest in one's body is clearly a heightened and fundamental one. And while prison security requires officials to constantly monitor prisoners' cells, the same is not true of their unclothed persons."[183] Dismissing hyperbolic security concerns in prior cases and Judge Easterbrook's dissent,[184] the court concluded that "a diminished right to privacy in one's body, unlike a right to privacy in one's property and surroundings, is not fundamentally incompatible with imprisonment and is an expectation of privacy that society would recognize as reasonable."[185] Thus, the Fourth Amendment protects prisoners—regardless of gender—from unreasonable searches of their bodies. While the decision did not speak in gendered terms, it is noteworthy that the Fourth Amendment holding arose in the context of a women's prison and of highly visible searches in the presence of men.[186] It takes no great leap in reasoning to imagine those factors influenced the register of the court's opinion.

As each court above identified, search policies implicate prisoners' dignitary interests, and women may have heightened concerns in this respect. The Seventh Circuit discussed such dignitary interests in a case several years earlier, in 2017, noting that "[d]ignity serves an important balancing function alongside the legitimate safety and management concerns of jails and prisons."[187] In *Mulvania v. Sheriff of Rock Island County*, eleven women detained pre-trial challenged a jail policy requiring women to wear "white underwear or no underwear at all."[188] Ten of the women were required to remove their underwear, some with officers watching as they changed. They "describe[d] the experience as very uncomfortable, embarrassing, humiliating, and upsetting."[189] The women claimed the policy violated their Fourth, Eighth, and Fourteenth Amendment rights based on "an unjustified dignitary harm" that was "not rationally related to a legitimate governmental objective."[190] The defendant Sheriff countered that the policy was necessary "to prevent detainees from extracting ink from colored underwear" to make

183 *Id.* at 778. And "a court need not give as much deference to a prison administrator's assessment of the necessity of a training exercise…" *Id.* at 781.

184 *Id.* at 789 (Easterbrook, J., dissenting) ("Within this volatile 'community,' prison administrators are to take all necessary steps to ensure . . . safety . . . . [I]t would be literally impossible . . . if inmates retained a right of privacy in their cells." (quoting *Hudson*, 468 U.S. 517 at 517, 525-27)).

185 *Id.* at 779.

186 *Id.* at 774–75 ("Female cadets performed the strip searches, which occurred in a bathroom and beauty shop adjacent to the gym. The bathroom was open to the gym, allowing many male correctional officers and cadets to see the strip searches taking place. The beauty shop was also visible from the gym and had mirrored walls, allowing those passing by to witness the strip searches. As a result, many people who were not performing the strip searches nevertheless observed the female inmates").

187 Mulvania v. Sheriff of Rock Island, 850 F.3d 849, 858 (7th Cir. 2017).

188 *Id.* at 849.

189 *Id.* at 855 (internal quotation marks removed).

190 *Id.*

tattoos, although this had never occurred.[191] According to the Seventh Circuit, the record showed this policy was outside the "correctional mainstream"—it "seem[ed] odd" and "the Sheriff's explanation seem[ed] at least questionable."[192]

The court concluded that the Constitution "requires consideration of individual dignity interests when assessing the permissibility of restrictive custodial policies."[193] The plaintiffs were incarcerated pre-trial, so their conditions were subject to stricter standards than those used to evaluate claims of sentenced prisoners.[194] For pretrial prisoners, conditions are unconstitutional under the Fourteenth Amendment if they "amount to punishment."[195] Given the Sheriff's "meagre" justifications—and the complete lack of evidence in the record indicating that imprisoned people had ever extracted ink from underwear to make tattoos, the sole non-punishment justification provided—the Seventh Circuit found the policy likely punishes detainees, and therefore denied summary judgment to defendants.[196] Central to its decision were the women's dignitary concerns.[197] The policy forced women to attend court hearings without underwear, and one plaintiff was denied underwear while menstruating.[198] As the court explained, "[w]ithout the counterweight of dignity, a jail could presumably set forth security reasons to require detainees to remain naked throughout their detention or other such unseemly measures. The Constitution forbids such tactics."[199] Again here, though the decision was not grounded in gender-based reasoning, the women's physical needs related to menstruation and their gender-inflected dignity played a central role.[200]

Dignitary concerns also emerge in challenges to the use of restraints on pregnant prisoners, which uniquely implicate prisoners' sex.[201] These cases

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191 *Id.*

192 *Id.* at 856. And "[a]ny security justification for the underwear policy is further undermined by defendants' own claim that they often did not enforce the policy." *Id.* at 857.

193 *Id.* at 858.

194 *Id.* at 856.

195 Bell v. Wolfish, 441 U.S. 520, 535 (1979). A condition "amount[s] to punishment" if "imposed for the purpose of punishment," or "is not reasonably related to a legitimate goal—if it is arbitrary or purposeless . . . ." *Id.* at 538–39.

196 *Mulvania*, 850 F.3d at 856.

197 *Id.* at 555–56, 558.

198 *Id.* at 558.

199 *Id.*

200 *Id.*

201 *See* Mendiola-Martinez v. Arpaio, 836 F.3d 1239 (9th Cir. 2016); Villegas v. Metro Gov't of Nashville, 709 F.3d 563 (6th Cir. 2013); Nelson v. Correctional Medical Services, 583 F.3d 522 (8th Cir. 2009) (en banc); & Women Prisoners of D.C. Dep't of Corr. v. D.C., 877 F. Supp. 634, (D.D.C. 1994), *vacated in part, modified in part*, 899 F. Supp. 659 (D.D.C. 1995).

pair dignity with concrete threats to physical health and safety.[202] This issue has received recent legislative attention at both the state and federal levels. Section 301 of the First Step Act of 2018 provides that pregnant prisoners in federal custody may not be placed in restraints, with exceptions for flight risks and threats of harm.[203] The Act applies only to prisoners in the Federal Bureau of Prisons (BOP) or United States Marshals Service, a small fraction of the total prison population, but the majority of states have implemented similar laws or policies, many preceding the federal legislation.[204] In the 2018-2019 legislative sessions, five states adopted measures restricting use of restraints on pregnant prisoners, but thirteen states still had no policies restricting the practice as of late 2019.[205]

In the courts, these cases arise under the Eighth Amendment. In *Women Prisoners of D.C.*, discussed above for its equal protection holdings, plaintiffs challenged the practice of shackling pregnant and postpartum prisoners.[206] At the time, in the mid-1990s, the Department transported women to medical visits with their legs shackled and hands cuffed in a box connected to a belly chain.[207] The district court recognized restraints could be justified for individuals with histories of escape or violence, but held that during "labor and shortly thereafter, . . . shackling is inhumane."[208] To remedy the Eighth Amendment violation, the court ordered the Department to "develop and implement a protocol concerning restraints used on pregnant and postpartum women which provides that a pregnant prisoner shall be transported in the least restrictive way possible consistent with legitimate security reasons."[209] Further, it ordered that the Department "shall use no restraints on any woman in labor, during delivery, or in recovery immediately after delivery;" and from the last trimester, "Defendants shall use no restraints when transporting a pregnant woman prisoner unless the woman has demonstrated a history of assaultive behavior or has escaped . . . , in which case, only handcuffs shall be used."[210] The defendants did not appeal this provision of the remedial

[202] *See supra* note 201.

[203] 18 USC § 4322 (2018). If restraints are used, they must be of the least restrictive form necessary and may not be around the ankles, legs, or waist; behind the back; use four-point restraints; or attach to another person. *Id.* at (b)(3)(A).

[204] *See* Roxanne Daniel, *Prisons neglect pregnant women in their healthcare policies*, PRISON POL'Y INITIATIVE (Dec. 5, 2019), https://www.prisonpolicy.org/blog/2019/12/05/pregnancy/. As of 2019, 39 states had laws or department policies regulating use of restraints on pregnant prisoners.

[205] *See* Resnik, *supra* note 4; Daniel, *supra* note 204.

[206] Women Prisoners of D.C. Dep't of Corr. v. D.C., 877 F. Supp. 634, (D.D.C. 1994), *vacated in part, modified in part*, 899 F. Supp. 659 (D.D.C. 1995).

[207] *Id.* at 646.

[208] *Id.* at 686.

[209] Women Prisoners of D.C. Dep't of Corr. v. D.C., 899 F. Supp. 659, 678 (D.D.C. 1995).

[210] *Id.*

order.[211] Despite the "inhumanity" of shackling pregnant women that this court recognized, the issue remained open in other circuits for decades.[212]

In 2009, the Eighth Circuit in *Nelson v. Correctional Medical Services* took up shackling during pregnancy in a case in which the plaintiff had her legs shackled to the sides of her hospital bed "well into the final stage of labor."[213] The court held this treatment violated the Eighth Amendment, finding it "antithetical to human dignity . . . and under circumstances that were both degrading and dangerous," but remanded for the district court to consider qualified immunity of the implicated officer.[214] Similarly, in 2013 the Sixth Circuit in *Villegas v. Metropolitan Government of Nashville* ruled for a plaintiff who, "[f]or transportation in the ambulance, . . . was placed on a stretcher with her wrists handcuffed together in front of her body and her legs restrained together" and was restrained at one leg until the final two hours of labor.[215] The record made clear the dignitary harms of shackling during pregnancy in a letter from the American College of Obstetricians and Gynecologists:

> The practice of shackling an incarcerated woman in labor may not only compromise her health care but is demeaning and unnecessary. . . Testimonials from incarcerated women who went through labor with shackles confirm the emotional distress and the physical pain caused by the restraints. Women describe the inability to move to allay the pains of labor, the bruising caused by chain belts across the abdomen, and the deeply felt loss of dignity.[216]

The court recognized "the shackling of pregnant detainees while in labor offends contemporary standards of human decency such that the practice violates the Eighth Amendment," although the right could be qualified based on imperatives of safety and security.[217]

It was not until 2016 that the Ninth Circuit, in *Mendiola-Martinez v. Arpaio*, addressed the constitutionality of restraints during pregnancy, labor, or postpartum recovery.[218] Miriam Mendiola-Martinez, who gave birth while

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[211] Women Prisoners of D.C. Dep't of Corr. v. D.C., 93 F.3d 910, 918 (D.C. Cir. 1996).

[212] *See* Mendiola-Martinez v. Arpaio, 836 F.3d 1239 (9th Cir. 2016); Villegas v. Metro Gov't of Nashville, 709 F.3d 563 (6th Cir. 2013);); Nelson v. Correctional Medical Services, 583 F.3d 522 (8th Cir. 2009) (en banc).

[213] *Nelson*, 583 F.3d at 525; *see generally Women Prisoners of D.C.*, 877 F.Supp. at 669 (risk from complete shackling during the third trimester was "obvious").

[214] *Id.* at 534 (quoting Hope v. Pelzer, 536 U.S. 730, 738 (2002)).

[215] Villegas v. Metro. Gov't of Nashville, 709 F.3d 563, at 566 (6th Cir. 2013)

[216] 583 F.3d at 573 (quoting Letter from Ralph Hale, Exec. Dir., Am. Coll. of Obstetricians & Gynecologists, to Malika Saada Saar, Exec. Dir., The Rebecca Project for Human Rights (Jun. 12, 2007) (on file with author).

[217] *Id.* at 574.

[218] Mendiola-Martinez v. Arpaio, 836 F.3d 1239, 1243 (9th Cir. 2016).

incarcerated pretrial in Arizona, raised claims related to her treatment while pregnant and postpartum, including the jail's shackling and restraining her during the birth and recovery.[219] She was shackled at the wrists or ankles during transit, examination at the hospital, and recovery from her C-section; and was chained to other detainees for transport to court.[220] The court followed its sister circuits in holding that "objectively, shackling women in labor exposes them to a risk so serious that it amounts to a constitutional violation," and vacated the decision below on most of Mendiola-Martinez's claims.[221]

For her Eighth Amendment claims, Mendiola-Martinez had to establish defendants "exposed her to a substantial risk of serious harm" and were deliberately indifferent in doing so.[222] She offered reports of a medical professor and evidence from a "chorus of organizations"—the American Medical Association, American College of Obstetricians and Gynecologists, United Nations, and Amnesty International—that "today's society [may not] choose to tolerate" these risks.[223] Further, before she was hospitalized, the jail announced a policy prohibiting use of some restraints during transit for delivery, during labor, and in postpartum recovery unless "extraordinary circumstances" were present; several years later, while the case was pending, the Arizona legislature passed similar legislation.[224] The court accepted this evidence that the risks from shackling were substantial, and defendants were aware of these risks. Although security concerns were present, and might ordinarily call for deference to administrators, "[s]uch deference is generally absent from serious medical needs cases . . ."[225] Thus, the Ninth Circuit found sufficient evidence that defendants exposed her to a substantial risk of serious harm, found evidence of deliberate indifference in the written policies, and remanded most of the claims.[226]

As can be seen, prison policies can implicate women's interests in privacy, dignity, and bodily safety. Though prison administrators and officers have wide latitude to manage prisons as they see fit, courts have stepped in under extreme circumstances to uphold women prisoners'

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[219] *Id.*

[220] *Id.* at 1245. She was released with time served several days later.

[221] *Id.* at 1253, 1257.

[222] *Id.* at 1248 (citing *Farmer v. Brennan*, 511 U.S. 825, 837, 842 (1994)).

[223] *Id.* at 1251-53.

[224] *Id.* at 1253.

[225] *Id.* at 1254. The claims were a "hybrid" between conditions of confinement and medical needs, but less deference was due where the response to an alleged security concern was "exaggerated," as here. *Id.*

[226] *Id.* at 1257.

constitutional rights.[227] Gender is present in these cases to varying degrees, but tends to appear in forms that align with judicial understandings of the imperative to protect women prisoners.[228] These cases present women as mothers and as past and potential victims of sexual violence.[229] Some issues, particularly governing shackling during pregnancy, cannot be divorced from sex. But even in areas like strip searches that are less explicitly gender specific, some courts have imported an understanding of prison and of gendered histories of trauma.[230] Their decisions protect women's privacy and dignity from disappearing completely, even while taking on a narrow view of gender and the varied experiences of women in prison.

c. Staffing and Gender

The areas of litigation above—equal protection and privacy, dignity, and women's bodies—are brought into relief by a final subset of cases,

[227] *See, e.g.*, Henry v. Hulett, 969 F.3d 769 (7th Cir. 2020); Mulvania v. Sheriff of Rock Island, 850 F.3d 849 (7th Cir. 2017); *Mendiola-Martinez v. Arpaio*, 836 F.3d at 1239.

[228] Mendiola-Martinez v. Arpaio, 836 F.3d 1239, 1253 (9th Cir. 2016) (A "chorus of organizations . . . have warned of the danger of restraining women in labor and decried the practice, which is relevant to our inquiry—whether 'today's society chooses to tolerate' the risk posed by restraining women in labor. . . . These same organizations acknowledge, however, that shackles may be necessary, despite the risks, when an inmate poses a flight or safety risk"); Nelson v. Corr. Med. Servs., 583 F.3d 522, 533 (8th Cir. 2009) ("Nelson's protections from being shackled during labor had thus been clearly established by decisions of the Supreme Court and the lower federal courts . . . ."); Jordan v. Gardner, 986 F.2d 1521, 1526 (9th Cir. 1993) ("The record in this case supports the postulate that women experience unwanted intimate touching by men differently from men subject to comparable touching by women. Several witnesses, including experts in psychology and anthropology, discussed how the differences in gender socialization would lead to differences in the experiences of men and women with regard to sexuality. . . [W]e are satisfied that the cross-gender clothed body search policy constituted 'infliction of pain'").

[229] Mendiola-Martinez v. Arpaio, 836 F.3d 1239, 1251 (9th Cir. 2016) ("The expert report states that shackling at 'any point in pregnancy' and 'during postpartum recovery' poses a threat to the mother"); Women Prisoners of D.C. Dep't of Corr. v. D.C., 93 F.3d 910, 930–31 (D.C. Cir. 1996) ("Appellants have conceded that they have failed to protect female inmates from sexual abuse, in violation of the Eighth Amendment. We fail to grasp, therefore, how [the challenged remedial order] is broader than required to remedy these violations, or how it unduly intrudes on appellants' local government functions").

[230] Villegas v. Metro. Gov't of Nashville, 709 F.3d 563, 577 (6th Cir. 2013) (A "psychiatrist . . . , in detailing the various 'episode[s] of shackling' that Plaintiff experienced, described the psychological effects of the shackling on Plaintiff: While in the ambulance, [Plaintiff] had to face the terror that her baby might die. She did not realize that an officer was in the ambulance. She believed that there was no one to remove the shackles. . . . [S]he feared that her son would not be able to be delivered. . . . Her trust in people had been eroded by her treatment, especially the shackling. . ."); Jordan v. Gardner, 986 F.2d 1521, 1525–26 (9th Cir. 1993) ("The inmates presented testimony from ten expert witnesses on the psychological impact of forced submission to these searches by male guards, and related issues. . . . A psychologist specializing in psychotherapy for women testified that the unwilling submission to bodily contact with the breasts and genitals by men would likely leave the inmate "revictimiz[ed]," resulting in a number of symptoms of post-traumatic stress disorder. . . , [T]he inmates' experts . . . were unanimously of the view that some would suffer substantially").

dealing with gender and staffing policies.[231] These cases frequently include remedial plans with provisions governing staffing, often limiting the positions open to or tasks that can be performed by staff of the opposite gender from the prisoners at the facility in question.[232] These staffing policies have given rise to cases attempting to discern when gender-based employment restrictions do not violate the Equal Protection Clause, but rather constitute a permissible tool to combat sexual violence, and to protect the privacy and dignity particularly of women prisoners.[233]

Courts have considered staffing in the context of remedies for abuse and sexual misconduct.[234] In recent years, such plans have been implemented under the Prison Rape Elimination Act (PREA) of 2003.[235] PREA standards designed around an external auditing mechanism were released in 2009 and codified by the Department of Justice (DOJ) in 2012.[236] The Standards are binding on the BOP, and federal funding for states is conditioned on their adoption.[237] However, they do not include a cause of action to allow judicial enforcement, meaning that their target has been in shaping internal policies rather than working through the courts.[238] Even since PREA's enactment these issues remain a major concern for prison management, particularly related to staffing.[239] As the Ninth Circuit wrote in 2015,

> Preventing sexual assaults is . . . a legitimate prison objective. First and foremost, prison administrators have a high interest in shielding inmates from abusive and inherently coercive encounters. Indeed, even allegations of sexual misconduct can destabilize prison life: they can breed mistrust and damage morale among officers and prisoners; drain prison

[231] Dothard v. Rawlinson, 433 U.S. 321 (1977); Teamsters Local Union No. 117 v. Washington Dep't of Corr., 789 F.3d 979 (9th Cir. 2015); Ambat v. City and County of San Francisco, 757 F.3d 1017 (9th Cir. 2014); Breiner v. Nevada Dep't of Corr., 610 F.3d 1202 (9th Cir. 2010); Everson v. Michigan Dep't of Corr., 391 F.3d 737 (6th Cir. 2004); Robino v. Iranon, 145 F.3d 1109 (9th Cir. 1998) (per curiam); Tharp v. Iowa Dep't of Corr., 68 F.3d 223 (8th Cir. 1995); Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993); Chao v. Ballista, 772 F. Supp. 2d 337 (D. Mass. 2011); Victory v. Berks Cty., No. CV 18-5170, 2019 WL 5266147 (E.D. Pa. Oct. 17, 2019); Malinowski v. New York State Div. of Human Rights on Complaint of Malinowski, 58 Misc. 3d 926 (N.Y. Sup. Ct. 2016), *aff'd* 157 A.D.3d 1093 (2018); White v. Dep't of Corr. Servs., 814 F. Supp. 2d 374 (S.D.N.Y. 2011).

[232] *See, e.g.*, *Teamsters Local Union*, 789 F.3d at 979; *Ambat,*, 757 F.3d at 1028; *Jordan*, 986 F.2d at 1527; *Malinowski*, 58 Misc. 3d at 926.

[233] *See, e.g.*, Robino v. Iranon, 145 F.3d 1109, 1111 (9th Cir. 1998) (per curiam); Chao v. Ballista, 772 F. Supp. 2d 337, 351 (D. Mass. 2011); Breiner v. Nev. Dep't of Corr., No. 205-CV-01412-KJD-RJJ, 2009 WL 367501, at *6.

[234] *See supra* note 235.

[235] 34 U.S.C.A. § 30301 *et seq.* (2017).

[236] Prison Rape Elimination Act, 28 C.F.R. § 115 (2012) *et seq.*; *see* Jamie Fellner, *Ensuring Progress: Accountability Standards Recommended by the National Prison Rape Elimination Commission*, 30 PACE L. REV., 1625, 1638 (2010).

[237] 34 U.S.C.A. § 30307 (2018).

[238] *See id.*; 28 C.F.R. § 115 (2012) *et seq.*

[239] *See, e.g.*, Teamsters Local Union No. 117 v. Washington Dep't of Corr., 789 F.3d 979, 990 (9th Cir. 2015); Everson v. Michigan Dep't of Corr., 391 F.3d 737, 739, 755 (6th Cir. 2004).

> resources; and undercut the effectiveness of male officers with the looming threat of a career-ending accusation.[240]

Further, "[w]omen in prison are particularly vulnerable" to sexual misconduct, as they "tend to have a history of sexual, mental, and physical abuse" and are "especially susceptible to exploitation by authority figures such as male prison guards."[241] Despite these recognized concerns, courts and some prison administrators continue to face resistance in implementing policies to combat sexual assault, just one area of concern regarding staffing and gender.[242]

The Supreme Court set out the broader contours of this law in 1977 in *Dothard v. Rawlinson*, the only case in which the Supreme Court has directly addressed employment discrimination in the prison context.[243] There, a woman seeking employment as a prison guard with the Alabama Board of Corrections brought a class claim under Title VII and the Equal Protection Clause alleging her rejection for the position was based on sex.[244] The petitioner was denied employment based on state statutory requirements that correctional counselors be at least 120 pounds in weight and five feet two inches in height.[245] She also challenged an administrative regulation that created gender criteria for contact positions at maximum security institutions—making women ineligible for about three quarters of the positions in the department.[246] The Supreme Court agreed with the three-judge district court that the weight and height requirements violated Title VII, but reversed the panel in holding that the gender requirement was a permissible bona fide occupational qualification (BFOQ).[247]

As to the height and weight requirements, the Court explained that federal courts agree "it is impermissible under Title VII to refuse to hire an

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[240] *Teamsters Local Union*, 789 F.3d 990; *see also* Ambat v. City and County of San Francisco, 757 F.3d 1017, 1028 (9th Cir. 2014) ("[P]rotecting female inmates from sexual misconduct by male deputies, maintaining jail security, [and] protecting inmate privacy . . . [are] essential to the operation of a corrections facility").

[241] Chao v. Ballista, 772 F. Supp. 2d 337, 351 (D. Mass. 2011) ("Women bring their histories to prison with them . . . . For *some* vulnerable female prisoners, a relationship with a guard may result in retraumatization or post-traumatic stress disorder").

[242] *See, eg.*, Breiner v. Nevada Dep't of Corr., 610 F.3d 1202 (9th Cir. 2010); White v. Dep't of Corr. Servs., 814 F. Supp. 2d 374, 384 (S.D.N.Y. 2011); Westchester Cty. Corr. Beevolent Ass'n v. Cty. of Westchester, 346 F. Supp. 2d 527, 534 (S.D.N.Y. 2004); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1085, 1087 (8th Cir. 1980), overruled on other grounds by Kremer v. Chem. Constr. Corp., 456 U.S. 461 (1982); Hardin v. Stynchcomb, 691 F.2d 1364, 1373 (11th Cir. 1982).

[243] *See Teamsters Loc. Union*, 789 F.3d at 987 (Prison employment "is one area where courts have found sex-based classifications justified. The Supreme Court directly addressed the prison environment in just one case, *Dothard v. Rawlinson*, 433 U.S. 321 (1977)").

[244] *Dothard*, 433 U.S. at 323.

[245] *Id.* at 323-324.

[246] *Id.* at 325, 327-28.

[247] *Id.* at 332, 336-37.

individual woman or man on the basis of stereotyped characterizations of the sexes."[248] The criteria, while neutral on face, had a disproportionate impact on women, so established a prima facie case of discrimination.[249] The appellants argued that these requirements were job related, but "produced no evidence correlating the . . . requirements with the requisite amount of strength thought essential to good job performance."[250] In contrast, the explicit gender discrimination in the regulatory requirement was justified under Title VII, under the narrow exception for situations where gender "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[251] Given that Alabama's prisons had been found unconstitutionally "barbaric and inhumane,"[252]

The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel. The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility.[253]

Based on this security concern—grounded in stereotypes—the Court allowed the BFOQ to stand.[254] The Court thus categorized the woman seeking employment—rather than imprisoned women—based on her perceived vulnerability to sexual assault.[255]

Justice Marshall, in dissent, took exception to the Court's reasoning and "the attitude it displays toward women," noting in other states women worked successfully in maximum security prisons.[256] Indeed, "[i]f male guards face an impossible situation, it is difficult to see how women could make the problem worse, unless one relies on . . . the type of generalized bias against

[248] *Id.* at 333.

[249] *Id.* at 329, 339-40.

[250] *Id.* at 331.

[251] *Id.* at 341, n.1 (Marshall, J, concurring in part and dissenting in part);42 U.S.C. s 2000e-2(e)(1) ("[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise").

[252] Pugh v. Locke, 406 F. Supp. 318, 329, 331 (MD Ala. 1976).

[253] *Dothard v. Rawlinson*, 433 U.S. at 336.

[254] *Id.* at 336–37.

[255] *Id.* at 335 ("A woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood. There is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison. There would also be a real risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women").

[256] *Id.* at 342 (Marshall, J., concurring in part and dissenting in part) (citing amicus brief of California and Washington).

women . . . Title VII was intended to outlaw."[257] Further, neither men nor women relied on their physical strength to avoid attacks and maintain institutional order, but instead used authority, threats, and psychology available to "properly trained women, no less than men."[258] According to Marshall, women staff were saddled with the same stereotypes as their incarcerated counterparts, as "the fundamental justification . . . is that women as guards will generate sexual assaults".[259]

Despite Justice Marshall's strong objections, *Dothard* has cemented the permissibility of gender as a BFOQ in the prison setting.[260] But in many cases, this principle has been employed by administrators of women's prisons to protect positions reserved for women staff.[261] These positions conform to the widely-held belief that women's prisons should be staffed—in large part if not entirely—by women.[262] Though *Dothard*'s reasoning also makes this classification vulnerable to challenge, courts considering claims brought by men have found gender-based restrictions can be a necessary step in preventing sexual assault and promoting a baseline of privacy and dignity.[263]

For example, in *Jordan v. Gardner*, discussed above, the Ninth Circuit in 1993 upheld a ban on cross-gender clothed body searches of women, over challenges based on equal employment opportunities for men.[264] The state policy required women officers to perform all non-emergency pat searches of women.[265] Noting that adjustments to scheduling and job responsibilities

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[257] *Id.* at 342-43.

[258] *Id.* at 343.

[259] *Id.* at 345.

[260] *See* Victory v. Berks Cty., No. CV 18-5170, 2019 WL 5266147, at *1 (E.D. Pa. Oct. 17, 2019) ("Berks County requires at least one female officer present in each facility housing female inmates.").

[261] *See, e.g.*, Teamsters Local Union No. 117 v. Washington Dep't of Corr., 789 F.3d 979, 987 (9th Cir. 2015); *Ambat v. City & Cty. of San Francisco*, 757 F.3d 1017, 1025 (9th Cir. 2014).

[262] *See, e.g.*, United Nations Standard Minimum Rules for the Treatment of Prisoners (2015) [hereinafter Mandela Rules], at Rule 81(3) (https://undocs.org/A/RES/70/175) ("Women prisoners shall be attended and supervised only by women staff Members").

[263] *See* Everson v. Michigan Dep't of Corr., 391 F.3d 737, 739, 755 (6th Cir. 2004) (upholding gender restriction on 250 positions to address "rampant sexual abuse of female prisoners . . . stemming from the very presence of male [guards] in the housing units" relying on data that "established that the exclusion of male [guards] will decrease the likelihood of sexual abuse"); Robino v. Iranon, 145 F.3d 1109, 1111 (9th Cir.1998) (per curiam) (upholding Hawaii policy, based on task force study and data on job duties, limiting to women six out of forty-one positions that entailed viewing women in the shower to "accommodate the privacy interests of the female inmates and reduce the risk of sexual conduct [with staff]"); Tharp v. Iowa Dep't of Corr., 68 F.3d 223, 224, 226s (8th Cir.1995) (upholding gender BFOQ for all positions in mixed-gender prisons' women's units).

[264] Jordan v. Gardner, 986 F.2d 1521, 1527 (9th Cir. 1993); *see also* Harris v. Miller, 818 F3d 49, 59 (2d Cir. 2016) ("[I]t is generally considered a greater invasion to have one's naked body viewed by a member of the opposite sex"); Robino v. Iranon, 145 F.3d 1109, 1111 (9th Cir.1998) (per curiam) (Women's "interest in not being viewed unclothed by members of the opposite sex survives incarceration").

[265] *Jordan*, 986 F.2d at 1523.

were usually sufficient to facilitate such policies, the court concluded any security or employment law justifications did not outweigh the necessity to protect the privacy and dignity of prisoners.[266] Put simply, "[t]he wish to avoid a lawsuit from an employees' union . . . does not provide a justification for inflicting pain of a constitutional magnitude upon inmates."[267]

Applying these principles decades later, the Ninth Circuit again affirmed the use of gender-restricted positions to promote more fundamental protections for incarcerated women in Washington.[268] In *Teamsters Local Union v. Washington Department of Corrections*, the court reviewed the use of female-only positions to address a years-long struggle with "sexual abuse and misconduct by prison guards, breaches of inmate privacy, and security gaps" exacerbated by a lack of women employed in sensitive positions—to observe women showering and dressing, and perform pat-downs and strip searches.[269] Following the *Jordan* decision, the Department continued to face difficulties with a predominantly male staff; it initiated multiple investigations of sexual misconduct, and faced a class action in state court.[270] With support from the state Human Rights Commission, it reserved 110 guard positions for women, accompanied by detailed reasoning based on the responsibilities of each position.[271] The union sued to challenge sixty positions.[272]

The Ninth Circuit analyzed the case under the BFOQ standard, allowing for discrimination when the employer can prove that (1) the discriminatory qualification "is reasonably necessary to the essence of its business," and that (2) "sex is a legitimate proxy" for the qualification.[273] It found the Department had carefully "crafted the staffing needs to fit each specific facility and guard post" and had "targeted only guard assignments that require direct, day-to-day interaction with inmates and entail sensitive job responsibilities such as conducting pat and strip searches and observing inmates while they shower and use the restroom."[274] The policy was an appropriate means to achieve legitimate prison objectives of security, protection of women's "privacy and dignity," and prevention of sexual

[266] *Id.* at 1530.

[267] *Id.* at 1529.

[268] Teamsters Local Union v. Washington Department of Corrections, 789 F.3d 979 (9th Cir. 2015).

[269] *Id.* at 981–82 (9th Cir. 2015).

[270] *Id.* at 983 ("State officials . . . substantiated 46 instances of misconduct in a single two-and-a-half-year stretch. . . . [A] consultant detailed the facts in a 240–plus–page report."); Jane Doe 1 v. Clarke (Clearinghouse Civil Rights Litigation), No. 07-2-01513-0 (Wash. Oct. 1, 2010).

[271] *Teamsters Local Union*, 789 F.3d at 984.

[272] *Id.* at 989.

[273] *Id.* at 987 (quoting Ambat v. City & Cty. of San Francisco, 757 F.3d 1017, 1025 (9th Cir. 2014)).

[274] *Id.* at 989.

assault.[275] The court also found the Department's "exhaustive process . . . fits well within the rubric of 'reasoned decision making,'" entitling it to deference.[276] In fashioning the policy, the Department "did not rest on assumptions" but gave "objective legal and operational justifications for why only women can perform particular job functions, like observing inmates unclothed and conducting non-emergency searches."[277] Thus, the Court upheld the BFOQ.[278]

However, the bar for maintaining gender-restricted positions is a high one; the courts invalidate such policies when the classification is insufficiently justified.[279] In 2010, in *Breiner v. Nevada Department of Corrections*, the Ninth Circuit refused to allow the Department (NDOC) to use a BFOQ to restrict staffing in its women's prison.[280] The policy arose out of failings by the prison's former private management, Corrections Corporation of America, including a guard impregnating a prisoner, sexual relationships between prisoners and staff, and a generally "uninhibited sexual environment."[281] NDOC resumed management, instituting a requirement that women fill seventy percent of line staff and the three correctional lieutenant positions.[282] Four men sued, claiming a Title VII violation.[283] The district court granted summary judgment for NDOC, but the Ninth Circuit reversed.[284] The district court found "NDOC's goal of reversing the very real and documented problems . . . by providing more privacy for the female inmates and a better environment for rehabilitation and improving safety and security . . . by reducing the number of compromised male correctional

[275] *Id.*at 990.

[276] *Id.* at 988-89 ("The state shouldn't be demonized for kicking into gear to find a remedy for its long-running challenges . . . This reality underscores the rationale for deference to prison administrators.").

[277] *Id.* at 991.

[278] *Id.* at 994. State courts have also embraced BFOQs in prisons. *See* Malinowski v. New York State Div. of Human Rights on Complaint of Malinowski, 58 Misc. 3d 926, 928, 932, 67 N.Y.S.3d 382 (N.Y. Sup. Ct. 2016), *aff'd* 157 A.D.3d 1093, 66 N.Y.S.3d 650 (2018) ("Assigning an officer of the same sex during [special and suicide] watches preserves the privacy rights and human dignity of the inmate . . . . [Indeed], it is the very fact of the gender difference between the officer and the inmate that causes concerns about violating the inmate's privacy under the PREA and the Constitution").

[279] *See, eg.*, White v. Dep't of Corr. Servs., 814 F. Supp. 2d 374, 384 (S.D.N.Y. 2011); Westchester Cty. Corr. Beevolent Ass'n v. Cty. of Westchester, 346 F. Supp. 2d 527, 534 (S.D.N.Y. 2004); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1085, 1087 (8th Cir.1980), overruled on other grounds by Kremer v. Chem. Constr. Corp., 456 U.S. 461 (1982); Hardin v. Stynchcomb, 691 F.2d 1364, 1373 (11th Cir. 1982); cf. Henry v. Milwaukee Cty., 539 F.3d 573, 58-83 (7th Cir. 2008); Forts v. Ward, 621 F.2d 1210, 1216 (2d Cir. 1980).

[280] Breiner v. Nevada Dep't of Corr., 610 F.3d 1202 (9th Cir. 2010).

[281] *Id.* at 1204-05.

[282] *Id.* at 1205.

[283] *Id.*

[284] *Id.* at 1216.

officers" justified the restriction.[285] But the Ninth Circuit was unconvinced that all men "would tolerate sexual abuse by their subordinates" and "would themselves sexually abuse inmates",[286] or that women, by "their very nature, womanhood, [are] more conducive to dealing with the complexities and differences of female inmates".[287] It found these rationales based in "the kind of unproven and invidious stereotype that Congress sought to eliminate . . . when it enacted Title VII."[288]

As these staffing cases demonstrate, the law of women in prison implicates an array of values, including equality, privacy, dignity, bodily autonomy, and safety, that interact across issues, jurisdictions, and time.[289] In service of these principles, some courts embrace views of women as mothers, victims, and sexual objects.[290] Even so, courts have been willing to act to protect women from harm, whether they see themselves as reasoning on the basis of gender.[291] But in many cases the power of courts to act is sharply constrained by constitutional and statutory limits. Norms of deference to prison administrators and hostility to court involvement in prison management may inhibit robust court oversight beyond the most extreme case.

In addition, this litigation takes place against a backdrop of U.S. law reluctant to engage with notions of substantive equality and the need for

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[285] Breiner v. Nev. Dep't of Corr., No. 205-CV-01412-KJD-RJJ, 2009 WL 367501, at *6 (D. Nev. Feb. 9, 2009) ("[G]ender is a legitimate proxy because . . . some male officers possess a trait precluding safe and efficient job performance—a proclivity for sexually abusive conduct—that cannot be ascertained by means other than knowledge of the officer's gender").

[286] *Breiner*, 610 F.3d at 1216.

[287] *Id.* at 1211.

[288] *Id.* at 1211.

[289] Dothard v. Rawlinson, 433 U.S. 321, 328 (1977) (considering whether gender-based requirements constitute the "arbitrary barrier[s] to equal employment opportunity that Title VII forbids); Jordan v. Gardner, 986 F.2d 1521, 1527 (9th Cir. 1993) (addressing "the conflict between the right of one sex not to be discriminated against in job opportunities and the other to maintain some level of privacy"); Malinowski v. New York State Div. of Hum. Rts. on Complaint of Malinowski, 58 Misc. 3d 926, 67 N.Y.S.3d 382 (N.Y. Sup. Ct. 2016), aff'd sub nom. Malinowski v. New York State Div. of Hum. Rts., 157 A.D.3d 1093, 66 N.Y.S.3d 650 (2018) (finding gender requirements for certain positions "preserved the privacy rights and human dignity of the inmate"); Chao v. Ballista, 772 F. Supp. 2d 337, 359 (D. Mass. 2011) (addressing a prisoner's "substantive right to bodily integrity and her equal protection right to be free from sexual abuse"); Ambat v. City & Cty. of San Francisco, 757 F.3d 1017, 1028 (9th Cir. 2014) (evaluating job qualifications related to the "threat to the safety of female inmates").

[290] Chao v. Ballista, 772 F. Supp. 2d 337, 343–44, 346, 350–52 (D. Mass. 2011); Everson v. Michigan Dep't of Corr., 391 F.3d 737, 756 (6th Cir. 2004) (victims); Ambat v. City & Cty. of San Francisco, 757 F.3d 1017, 1022–23 (9th Cir. 2014) (sexual objects).

[291] *See* Teamsters Loc. Union No. 117 v. Washington Dep't of Corr., 789 F.3d 979, 991 (9th Cir. 2015) ("We conclude that sex is an objective, verifiable job qualification for the posts designated as female-only by the Department and that the Department appropriately considered reasonable alternatives").

affirmative actions to redress structural inequalities and social ills.[292] These background conditions may justify departure from the model of formal equality under which U.S. courts operate. Courts are hesitant to embrace gender or sex distinctions, even when those differences may be a legitimate basis for regulation.[293] Cases on shackling during pregnancy are a prime example.[294] Though courts and legislatures have recently increased regulation of this practice, jurisdictions continued their policies well into the twenty-first century.[295] Legislation restricting the practice is thus a notable departure from the baseline of formal equality. Of necessity, these laws require prison systems to view women prisoners in gendered terms to provide certain protections.[296] To a lesser extent, the equal protection line at times approaches an orientation towards substantive equality as well. The *Klinger/Pargo* line reveals courts wrestling with which differences should have legal significance, and when the pull of formal equality overrides complicating social circumstances.[297] Given these tensions and limitations, I was interested to see how other legal systems approached the challenges of women's imprisonment.

III. A DIFFERENT APPROACH: EUROPE, THE UNITED KINGDOM, AND NORTHERN IRELAND

Having surveyed decisions of U.S. courts, I turned to Europe as an example of a different approach to legal protections for women in prison. In this Part, I look at court decisions from Europe, the United Kingdom, and Northern Ireland in areas paralleling the U.S. caselaw. This is by no means a comprehensive review of European law, but aims to illustrate how some of the same concerns are handled by courts under a different set of national laws and international frameworks. In these cases, international law retains

[292] *See, e.g.*, Students for Fair Admissions v. President & Fellows of Harvard, No. 20-1199, 2022 WL 199375, at *1 (U.S. Jan. 24, 2022).

[293] *See, e.g.*, Breiner v. Nevada Dep't of Corr., 610 F.3d 1202, 1211 (9th Cir. 2010) (rejecting gender as a BFOQ because the state failed to show "men would tolerate sexual abuse by male guards," that "individuals in the correctional lieutenant role are particularly likely to sexually abuse inmates," and that women staff are "less susceptible to manipulation by inmates and therefore better equipped to fill the correctional lieutenant role," all of which "rel[y] on . . . unproven and invidious stereotype[s]")

[294] *See* Mendiola-Martinez v. Arpaio, 836 F.3d 1239 (9th Cir. 2016); Villegas v. Metro Gov't of Nashville, 709 F.3d 563 (6th Cir. 2013); Nelson v. Correctional Medical Services, 583 F.3d 522 (8th Cir. 2009) (en banc); & Women Prisoners of D.C. Dep't of Corr. v. D.C., 877 F. Supp. 634, (D.D.C. 1994), vacated in part, modified in part, 899 F. Supp. 659 (D.D.C. 1995).

[295] *See supra* note 296.

[296] *See* Resnik, *supra* note 4.

[297] *See, e.g.*, Victory v. Berks Cty., No. CV 18-5170, 2019 WL 5266147. at *8–9 (E.D. Pa. Oct. 17, 2019); Jeldness v. Pearce, 30 F.3d 1220; 1235 (9th Cir. 1994); Keevan v. Smith, 100 F.3d 644, 650 (8th Cir. 1996); Women Prisoners of the D.C. Dep't of Corr. v. D.C., 93 F.3d 910, 926 (D.C. Cir. 1996); Pargo v. Elliott, 49 F.3d 1355, 1356–57 (8th Cir. 1995); Klinger II, 31 F.3d 727, 729 (8th Cir. 1994);

primacy—even in domestic courts, the European Convention on Human Rights (ECHR) provides guiding principles.[298] The international frameworks rely on independent monitoring as a centerpiece of prison oversight.[299] Thus, this Part also investigates the role of prison monitoring in securing protections for women prisoners. Given the foundational role of international frameworks, it is useful to discuss litigation in the context of the agreements that shape it.

As a starting point, European law tends to approach gender-based policies from a different perspective than does U.S. law. As discussed above, U.S. law is less engaged with substantive equality than with formal equality.[300] By contrast, European law, and international law more generally, is more comfortable with a sex-differentiated law in the name of substantive equality.[301] Under a paradigm known as parity-democracy, law and policy embrace explicit measures to remedy women's historical subordination.[302] As Professor Ruth Rubio-Marín explains, most European states, as well as European regional law, have adopted "a substantive account of equality between the sexes":[303]

> [P]rovisions that require equal treatment and prohibit discrimination on the grounds of sex are indeed supplemented by provisions or doctrinal interpretations allowing public powers to take measures that classify on the basis of sex, when these measures are proportional to the aim of redressing structural inequalities by redistributing different forms of advantages . . . . Moreover, some provisions or interpretations go further and do not just

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298 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 [hereinafter ECHR], (4 Nov. 1950), ETS 5, https://www.echr.coe.int/documents/convention_eng.pdf.

299 *See* United Nations Standard Minimum Rules for the Treatment of Prisoners (2015) [hereinafter Mandela Rules], at Rules 35, 56, 83–85 (https://undocs.org/A/RES/70/175); G.A. Res. 65/229 (resolution on the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders) [hereinafter Bangkok Rules] at Rule 25 (Dec. 21, 2010) (https://www.unodc.org/documents/justice-and-prison-reform/Bangkok _Rules_ ENG_22032015.pdf); Council of Europe, European Prison Rules (2020) [hereinafter European Prison Rules (2020)] at Rules 9, 44, 92–93, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016809ee581.

300 *See* discussion *supra* Part II.

301 *See, e.g.*, Marc De Vos, *The European Court of Justice and the march towards substantive equality in European Union antidiscrimination law*, 20(I) INT'L J. DISCRIMINATION & L. 62 (2020); Sandra Fredman, *Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights*, 16 HUM. RTS. L. REV. 273 (2016); Rory O'Connell, *Cinderella comes to the Ball: Article 14 and the right to non-discrimination the ECHR*, 29 J. SOC'Y LEGAL SCHOLARS 211 (2009); Christopher McCrudden & Sacha Prechal, *The Concepts of Equality and Non-Discrimination in Europe: A practical approach*, EUR. NETWORK OF LEGAL EXPERTS IN THE FIELD OF GENDER EQUAL. (2009).

302 Ruth Rubio-Marín, *A New European Parity-Democracy Sex Equality Model and Why it won't Fly in the United States*, 60 AM. J. COMP. L. 99, 100 (2012).

303 *Id.* at 113.

> allow, but indeed compel, public powers to take measures to achieve such results.[304]

Accordingly, the United Nations (UN) and Europe are more at ease with thinking about women as having different physical needs—most prominently pregnancy—and living in different social realities than do men, and taking those differences as relevant to regulation.[305] This orientation leads to regulation and litigation that at times depart from the principles and outcomes seen in U.S. law.

a. International Frameworks and Prison Monitoring

The UN has two sets of rules that directly address women in prison.[306] Neither of these frameworks is mandatory, but they form a basis for international norms that can be enforced through national or regional mechanisms. In 2010, the UN adopted the Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).[307] The Bangkok Rules were developed because, "[w]ith the increase in the number of women prisoners worldwide, the need to bring more clarity to considerations that should apply to the treatment of women prisoners has acquired importance and urgency."[308] The rules explicitly take into account "the distinctive needs of women prisoners" and disclaim that "[p]roviding for such needs in order to accomplish substantial gender equality shall not be regarded as discriminatory."[309] The rules accommodate women's caretaking responsibilities;[310] physical needs, particularly related to menstruation,

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304 *Id.*

305 *Id.* at 116.

306 Mandela Rules & Bangkok Rules, *supra* note 299.

307 Bangkok Rules, *supra* note 299.

308 *Id.* at 5.

309 *Id.* at 8.

310 For example, Rule 2 states, "[W]omen with caretaking responsibilities . . . shall be permitted to make arrangements for those children, including the possibility of . . . suspension of detention . . . ." *Id.* at 8. Rule 4 provides, "Women prisoners shall be allocated, to the extent possible, to prisons close to their home or place of social rehabilitation . . . ." *Id.* at 9. Rule 21 states, "Prison staff shall demonstrate competence, professionalism and sensitivity and shall preserve respect and dignity when searching both children in prison with their mother and children visiting . . ." *Id.* at 12. Rule 24 requires, "Disciplinary sanctions . . . shall not include a prohibition of family contact . . ." *Id.* at 12. Rule 26 states, "Women prisoners' contact with their families . . . shall be encouraged and facilitated by all reasonable means. . ." Rule 28 specifies, "Visits involving children shall take place in an environment that is conducive to a positive visiting experience . . . [and] should be encouraged . . ." *Id.* at 13.

pregnancy, and breastfeeding;[311] dignitary concerns including privacy;[312] and potential histories of trauma.[313]

In 2015, the UN adopted its latest evolution of the Standard Minimum Rules for the Treatment of Prisoners, known as the Nelson Mandela Rules, originally adopted in 1955.[314] The Mandela Rules are not gendered but contain provisions specifically for women, related to women's bodies and traditional family roles.[315] Provisions include separation of women and men in prison, limits on use of restraints and solitary confinement, accommodations for pregnancy and childbirth, and provisions for conjugal visits.[316] Both the Bangkok Rules and the Mandela Rules incorporate gendered categories, focusing on the ways women are physically and culturally different from men as a basis for heightened protections.[317]

On a regional level, the European Convention on Human Rights (ECHR) provides many of the rights found in the U.S. Constitution, as well as others.[318] Four provisions are of particular relevance to women in prison: Article 3 guarantees "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment."[319] Article 5 provides for liberty and

[311] Rule 5 states, "The accommodation . . . shall have facilities and materials required to meet women's specific hygiene needs, including sanitary towels provided free of charge and a regular supply of water . . . , in particular [for] women involved in cooking and those who are pregnant, breastfeeding or menstruating." *Id.* at 9. Rule 22 provides, "Punishment by close confinement or disciplinary segregation shall not be applied to pregnant women, women with infants and breastfeeding mothers in prison." Rule 24 states, "Instruments of restraint shall never be used on women during labour, during birth and immediately after birth." *Id.* at 12. Rule 48 says, "Pregnant or breastfeeding women prisoners shall receive advice on their health and diet . . . by a qualified health practitioner. Adequate . . . food, a healthy environment and regular exercise . . . shall be provided free of charge for pregnant women, babies, children and breastfeeding mothers. . ." *Id.* at 16.

[312] Rule 8 states, "The right of women prisoners to medical confidentiality, including. . . in relation to their reproductive health history, shall be respected . . ." *Id.* at 10. Rule 11(2) adds, "If it is necessary for non-medical prison staff to be present during medical examinations, such staff should be women and examinations shall be carried out in a manner that safeguards privacy, dignity and confidentiality. *Id.* Rule 19 states, "Effective measures shall be taken to ensure that women prisoners' dignity and respect are protected during personal searches, which shall only be carried out by women staff who have been properly trained . . . and in accordance with . . . procedures." Rule 20 says, "Alternative screening methods . . . shall be developed to replace strip searches . . . to avoid the harmful psychological and possible physical impact of invasive body searches." *Id.* at 12.

[313] Rule 12 states, "Individualized, gender-sensitive, trauma-informed and comprehensive mental health care and rehabilitation programmes shall be made available for women prisoners with mental health-care needs . . . ." *Id.* at 11. Rule 13 adds, "Prison staff shall be made aware of times when women may feel particular distress, so as to be sensitive to their situation and ensure that the women are provided appropriate support." *Id.*

[314] *See* Mandela Rules, *supra* note 299.

[315] *Id.* at Rules 11, 28, 45, 48, 52, 58, & 81.

[316] *Id.*

[317] *Id.*; Bangkok Rules, *supra* note 299.

[318] ECHR, *supra* note 298.

[319] *Id.*

security except in enumerated circumstances including law enforcement, with specified due process protections. Article 8 guarantees respect for private and family life, including in one's home and correspondence, free from interference except in limited circumstances. And Article 14 prohibits discrimination in enjoyment of protected rights and freedoms on bases including sex—providing the basis for the principle of substantive equality.[320]

The Council of Europe also maintains a comprehensive, though non-binding, framework: the European Prison Rules.[321] Adopted in 1973, it was most recently revised in 2020.[322] These rules include many provisions similar to the Bangkok and Mandela Rules. In overarching regulations for women prisoners, the European Prison Rules require that officials "pay particular attention to the requirements of women, such as their physical, vocational, social and psychological needs when making decisions that affect any aspect of their detention."[323] Commentary accompanying the 2006 revision of the rules describes the challenges facing women in prison, then and now:

> The international and European human rights instruments, norms and guidelines have largely neglected women prisoners . . . . Little consideration is given . . . to the specific problems women face as the primary carers of children or to the backgrounds from which women prisoners come, which are often backgrounds of abuse and violence. The small number of women prisoners, never more than one in 10 of all prisoners, presents difficulties for prison administrations which have to decide if women are to be concentrated in one place, with the implication that they will be distant from their homes, or held nearer their homes in small units, in which case the facilities they need might not be available.[324]

The European Prison Rules thus address explicitly many of the same issues with which U.S. courts contend—including a rising population of women in prison who still make up a small portion of the overall population, with family obligations and histories of trauma informing their experience.

International bodies also impose inspection regimes that govern prison operations.[325] The Mandela Rules call for regular inspections "to ensure that prisons are managed in accordance with existing laws, regulations, policies and procedures, with a view to bringing about the objectives of penal and

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[320] *Id.* at 13.

[321] European Prison Rules (2020), *supra* note 299.

[322] *Id.*

[323] *Id.* at Rule 34.1.

[324] Council of Europe, European Prison Rules (2006) [hereinafter European Prison Rules (2006)], 127-28, https://rm.coe.int/european-prison-rules-978-92-871-5982-3/16806ab9ae.

[325] *See* Mandela Rules, *supra* note 299, at 25 (Rule 83); European Prison Rules (2020), *supra* note 299 at 3 (Rule 9).

corrections services, and that the rights of prisoners are protected."[326] And the European Prison Rules state that "[a]ll prisons shall be subject to regular inspection and independent monitoring."[327] In 2002 the UN adopted the Optional Protocol to the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment (OPCAT),[328] which sets out "a system of regular visits undertaken by independent international and national bodies" to places of detention, "to prevent torture and other cruel, inhuman or degrading treatment or punishment."[329] OPCAT requires each party state to establish a "National Preventative Mechanism" (NPM) to implement its mandates.[330] The UK established its NPM in 2009,[331] made up of monitoring bodies including Criminal Justice Inspection Northern Ireland (CJINI) and Her Majesty's Inspectorate of Prisons (HMCIP).[332] The Inspectorate is statutorily required to inspect every prison, and has "the power to enter any prison at any time, and . . . access within the prison to every prisoner, member of staff and document. . . . without any warning."[333] Inspectors evaluate prisons based on criteria curated by the Inspectorate, and "derive[d] from, and referenced against, international human rights standards."[334] Inspections culminate in public reports, with prison authorities required to indicate whether they will implement recommendations.[335] According to Anne Owers, former UK Chief Inspector of Prisons, the

[326] Mandela Rules, *supra* note 299, at 25 (Rule 83).

[327] European Prison Rules (2020), *supra* note 299 at 3 (Rule 9). *See also id.* at 22-3 (Rules 92-93) ("Prisons shall be inspected regularly by a State agency in order to assess whether they are administered in accordance with the requirements of national and international law and the provisions of these rules . . . . To ensure that the conditions of detention and the treatment of prisoners meet the requirements of national and international law and the provisions of these rules, and that the rights and dignity of prisoners are upheld at all times, prisons shall be monitored by a designated independent body or bodies, whose findings shall be made public.").

[328] G.A. Res. 57/199 (Dec. 18, 2002) [hereinafter OPCAT] (known as the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment).

[329] *Id.* at Part I, Art. I.

[330] UN High Commissioner for Refugees, Optional Protocol to the Convention Against Torture (OPCAT) Subcommittee on Prevention of Torture, *National Prevention Mechanisms*, OHCHR, https://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx.

[331] United Nations Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), *Statement of David Gauke, Lord Chancellor and Secretary for Justice*, UK PARLIAMENT (Jan. 29, 2019), https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-01-29/HCWS1283/.

[332] HM Inspectorate of Prisons, *Members*, NAT'L PREVENTATIVE MECHANISM, https://www.nationalpreventivemechanism.org.uk/members/. HMCIP and CJINI collaborate on inspections in Northern Ireland, with inspection teams provided by HMCIP.

[333] Anne Owers, *Prison Inspection, and the Protection of Prisoners' Rights*, 30 PACE L. REV. 1535, 1539 (2010). The Inspectorate also inspects places of immigration, police, and military detention.

[334] *Id.* at 1541. ("They look for outcomes, not processes, and best practice, rather than minimum auditable standards. They set out, in considerable detail, what a wellrun prison should provide.").

[335] Mandela Rules, *supra* note 299, at 26; Anne Owers, *supra* note 333, at 1542-43.

integration of the Inspectorate in the NPM is essential to "preventing, rather than chronicling or prosecuting, torture and mistreatment."[336]

In addition, many countries have domestic bodies with specific functions, making up "an interlocking system of independent administrative protection of prisoners' rights."[337] For the UK and Northern Ireland, this scheme consists of the Prison Inspectorates, the Prisons and Probation Ombudsman—which investigates individual complaints[338]—and Independent Monitoring Boards—which assign lay citizens to specific facilities for monitoring.[339] According to Owers, the dense network of monitoring mechanisms is central to upholding the rights of prisoners and operates in ways that courts cannot.[340] "The law . . . tends to be activated when abuses or failures have taken place."[341] In contrast, inspections can be both antecedent and alternative to litigation, as "they are part of a gradual process of performance improvement. Because the Inspectorate sees all prisons, it can encourage exporting good practice and highlight bad practice. Because it is independent, it can monitor what is actually happening."[342] Moreover, inspection acts as "the eyes and ears of the public" as "the sense of outrage and concern provoked by some of the worst inspection reports creates a political space in which [officials] can, and sometimes must, improve prison conditions."[343] Thus, prison inspections can motivate change and generate systemic reform.

b. In the Courts

Through inspections, but also through national and transnational courts, European and international human rights law is relevant in the UK in ways not seen in the U.S. Prisons in the UK, including Northern Ireland, are subject to the ECHR and the decisions of the European Court of Human Rights (ECtHR), which provided a basis for human rights complaints through

336 *Id.* at 1538.

337 *Id.* at 1536.

338 Homepage, THE PRISONER OMBUDSMAN FOR N. IR., https://niprisonerombudsman.gov.uk/; See Anne Owers, *supra* note 333, at 1537; Howard Sapers & Ivan Zinger, *The Ombudsman as a Monitor of Human Rights in Canadian Federal Corrections*, 30 PACE L. REV. 1512, 1528 (2010); *Id.* at 1517 ("Ombudsman offices have been created as a direct result of well-publicized serious human rights violations and to address the chronic [failure] of internal prison complaint and grievance mechanisms.").

339 *Our Role*, INDEP. MONITORING BD. FOR N. IR., http://www.imb-ni.org.uk/ourrole.htm; *see also* Vivien Stern, *The Role of Citizens and Non-Profit Advocacy Organizations in Providing Oversight*, 30 PACE L. REV. 1529, 1530 (2010).

340 Anne Owers, *supra* note 333, at 1547.

341 *Id.* at 1545-46.

342 *Id.* at 1544.

343 *Id.*at 1546.

latter half of the twentieth century.[344] In 2000, the Human Rights Act of 1998 incorporated the Convention into UK law, making its provisions justiciable in UK courts.[345] While the ECtHR has affirmed robust protections for people in prison relying on the ECHR,[346] few of the cases I reviewed touched on the conditions of women's imprisonment in particular. In addition to international law, the UK Prison Rules, enacted in 1964 and amended most recently in 1999, provide mandatory orders for prisons, but are not enforceable in court for breach of statutory duty.[347] Northern Ireland has its own analogue in the Prison and Young Offenders Centre Rules (Northern Ireland) 1995, amended most recently in 2010.[348]

Though the UK Prison Rules do not provide additional remedies through the courts, ordinary civil and criminal law causes of action remain available to incarcerated individuals.[349] Under UK law, a convicted prisoner "retains all civil rights which are not taken away expressly or by necessary implication."[350] As a corollary, the guarantee that "a citizen should have unimpeded access to the courts unless such right has been expressly removed by statute" holds true in prison.[351] UK courts have held, for example, that Article 14 of the ECHR, prohibiting discrimination, applies in prison.[352] And UK courts have confirmed their own jurisdiction to review prison

344 ECHR, *supra* note 298; Council of Europe, European Court of Human Rights [hereinafter ECtHR], https://www.echr.coe.int/Pages/home.aspx?p=home.

345 Anne Owers, *supra* note 333, at 1535-36 ("[C]ases involving prisoners' rights have been the most numerous of the UK cases coming before the ECtHR"). Before incorporation of the ECHR, UK courts heard cases under the UK Prison Rules and reviewed administrative decisions. *Id.*

346 *See* Alexandru Enache v. Romania, Case No. 16986/12, § IV (Eur. Ct. H. R. Oct. 3, 2017); R v. Secretary of State for Justice [2015] UKSC 54 [37]; Korneykova & Korneykov v. Ukraine, Case No. 56660/12 (Eur. Ct. H. R. Mar. 24, 2016); Lorsé v The Netherlands Application No 52750/99 (unreported) 4 February 2003; Valasinas v Lithuania Application No 44558/98 (unreported) 24 July 2001; Iwanczuk v Poland Application No 25196/94 (unreported) 15 November 2001.

347 The Prison Rules 1999 (Eng.) [hereinafter UK Prison Rules], https://www.legislation.gov.uk/uksi/1999/728/contents/made (No. 728); *see* Nancy Louks, *Prison Rules: A Working Guide*, PRISON REFORM TRUST 7 (2000) (http://www.prisonreformtrust.org.uk/portals/0/documents/prisonrulesworkingguide.pdf); Becker v. Home Office [1972] 2 QB 407 [418] ("The Prison Rules are regulatory directions only. Even if they are not observed, they do not give rise to a cause of action").

348 Prison and Young Offenders Centres Rules (Northern Ireland) 1995, https://www.legislation.gov.uk/nisr/1995/8/made.

349 Leech, R (on the Application of) v. Parkhurst Prison [1988] UKHL 16 (opinion of Lord Aylmerton) (citing Raymond v. Honey [1983] 1 AC 1 (per Lord Wilberforce at p. 10)); Raymond v. Honey [1983] AC 1 at 10 (Lord Wilberforce) (UK).

350 *Id.*

351 Leech, R (on the Application of) v. Parkhurst Prison [1988] UKHL 16 (opinion of Lord Aylmerton) (citing Raymond v. Honey [1983] 1 AC 1 (per Lord Wilberforce at p. 10)).

352 *See* Secretary of State for the Home Dep't. v. Hindawi & Headley [2004] EWCA 1309 (holding the provision applicable to deportation proceedings). And the UK Supreme Court, considering procedural protections for solitary placement, cited the ECHR and other international authorities. R v. Secretary of State for Justice [2015] UKSC 54 [37]. The court held the solitary regime was not authorized by law.

disciplinary decisions under the UK Prison Rules.[353] Even with the basic availability of judicial review, as in the U.S., UK courts grant prison administrators—usually the governor—a great deal of deference in management decisions.[354]

The substantive law of Europe and the UK is different from that of the U.S., but European courts have reached similar issues to those considered by U.S. courts. The cases I reviewed dealt less with the conditions within prison, and more with levels of custody and release.[355] Still, the principles at issue make these cases a useful point of comparison. In particular, cases dealing with equal opportunities in several areas address issues common to the equal protection line in the U.S., but are resolved differently under substantive equality principles.[356] And cases dealing with searches and shackling of pregnant women implicate privacy and dignity interests similar to those discussed by U.S. courts, but arise in a context framed by international human rights law.[357] In these cases, the European commitment to substantive, rather than formal, equality is a through line uniting disparate areas of law and often distinguishing them from U.S. jurisprudence.[358] European cases are more attentive to substantive parity, where U.S. cases tolerate wide disparities by finding women and men not similarly situated.[359]

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[353] *See* Leech v. Deputy Governor Parkhurst Prison [1988] UKHL 16 (opinion of Lord Aylmerton).

[354] Illustrative of this principle is the Hickling Case, regarding a provision of the Prison Rules authorizing women to keep their babies in prison. Now in Rule 12(2), the provision states, "The Secretary of State may, subject to any conditions he thinks fit, permit a woman prisoner to have her baby with her in prison, and everything necessary for the baby's maintenance and care may be provided there." The Secretary set criteria and procedures for admission to a mother and baby unit, assigning decision-making to the governor, including power to remove a baby. The Secretary had not delegated authority to the governor, but just set conditions with which the governor was to judge compliance. R v. Secretary of State for the Home Department; ex parte Hickling [1985] EWCA Civ J1106-2.

[355] *See* Ēcis v. Latvia, Case No. 12879/09, § V (Eur. Ct. H. R. Jan.10, 2019); Alexandru Enache v. Romania, Case No. 16986/12, § IV (Eur. Ct. H. R. Oct. 3, 2017); R v. Secretary of State for Justice [2017] UKSC 40; Wainwright & Anor v. Home Office [2003] UKHL 53.

[356] *See* Ēcis v. Latvia, Case No. 12879/09, § V (Eur. Ct. H. R. Jan.10, 2019); Alexandru Enache v. Romania, Case No. 16986/12, § IV (Eur. Ct. H. R. Oct. 3, 2017); R v. Secretary of State for Justice [2017] UKSC 40.

[357] *See* Korneykova & Korneykov v. Ukraine, Case No. 56660/12 (Eur. Ct. H. R. Mar. 24, 2016); In re Conway's Application for Judicial Review [2014] NICA 51 (appeal taken from NIQB); Wainwright & Anor v. Home Office [2003] UKHL 53; Lorsé v The Netherlands Application No 52750/99 (unreported) 4 February 2003; Valasinas v Lithuania Application No 44558/98 (unreported) 24 July 2001; Iwanczuk v Poland Application No 25196/94 (unreported) 15 November 2001; Rosaleen McCorley v. Northern Ireland Office & Governor of HMP Maghaberry [2000].

[358] *See supra* note 357.

[359] *Compare* R v. Secretary of State for Justice [2017] UKSC 40 *with* Pitts v. Thornburgh, 866 F.2d 1450 (1989).

i. Equality and Discrimination

International and domestic law contain a number of provisions embracing substantively equal treatment of men and women in prison through explicit recognition of gender.[360] In particular, the Bangkok Rules provide, "[w]omen prisoners shall have access to a balanced and comprehensive programme of activities which take account of gender-appropriate needs."[361] Such programming is to be responsive "to the needs of pregnant women, nursing mothers and women with children" including providing childcare where appropriate.[362] Programming is to accommodate "women prisoners who have psychosocial support needs, especially those who have been subjected to physical, mental or sexual abuse."[363] This mandate also extends to gender-specific pre- and post-release programming.[364] In addition, the European Prison Rules contain a provision regarding work placements that appears to afford more robust protections—even an affirmative duty—to provide equitable work opportunities.[365] The Rules state, "there shall be no discrimination on the basis of gender in the type of work provided."[366] The 2006 commentary on the rules elaborates,

> It is important . . . that women have access to employment of all kinds and are not limited to forms of work traditionally regarded as the province of women. Work should have a broadly developmental function for all prisoners: the requirement that it should if possible enable them to increase their earning capacity serves the same function.[367]

My research revealed no cases implicating this provision, but it appears to be at odds with many of the gendered program offerings considered and upheld by U.S. courts.

Both the ECtHR and UK courts have taken up questions of gender equality in cases that raise similar issues to those discussed above in the U.S. context.[368] A 2017 case at the UK Supreme Court considered gender in regard to "approved premises," (APs), or halfway houses, and whether their

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[360] *E.g.* Bangkok Rules, *supra* note 299, at 15, 16; European Prison Rules (2020), *supra* note 299, at 8 (Rule 26.1).

[361] Bangkok Rules, *supra* note 299, at 15 (Rule 42).

[362] *Id.*

[363] *Id.* at 16 (Rule 42).

[364] *Id.* at 16 (Rules 43, 45–46).

[365] *See* European Prison Rules (2020), *supra* note 299, at 8 (Rule 26.1).

[366] *Id.*

[367] European Prison Rules (2006), *supra* note 324, at 56.

[368] *See* Ēcis v. Latvia, Case No. 12879/09, § V (Eur. Ct. H. R. Jan.10, 2019); Alexandru Enache v. Romania, Case No. 16986/12, § IV (Eur. Ct. H. R. Oct. 3, 2017); R v. Secretary of State for Justice [2017] UKSC 40.

distribution constituted discrimination against women on the basis of sex.[369] Like in the U.S., women make up a small fraction of the correctional population of England and Wales: only 5%.[370] APs are segregated by gender, and, due to the small share of women in the system, only six of the one hundred APs are designated for women—and none in London or Wales.[371] This distribution makes women more likely than men to be placed from home.[372] A women scheduled for release challenged her limited placement options, particularly near London, as discriminatory.[373] She made claims under Articles 8 and 14 of the ECHR, as well as domestic law in the Equality Act 2010.[374]

The court held the distribution of APs constituted discrimination against women, and required the Secretary of State to justify the scheme in subsequent proceedings.[375] In an opinion sounding in notions of substantive equality, it noted the context of "long-standing concern that the prison system is 'largely designed by men for men' and that women have been marginalised within it."[376] Quoting a government report, it explained, "Equality does not mean treating everyone the same . . . [M]en and women should be treated with equivalent respect, according to need. Equality must embrace not just fairness but also inclusivity. This will result in different services and policies for men and women."[377] The case followed similar lines of reasoning to the equal protection cases in the U.S. The lower court initially dismissed the case based on "a material difference between the circumstances" of men and women,[378] finding that "comparing men prisoners with women prisoners was not comparing like with like."[379] The Supreme Court quoted another report adding that "women face very different hurdles from men in their journey towards a law abiding life," and calling for "a distinct approach" to "the problems that women bring into the criminal justice system . . ." The Howard League for Penal Reform, as intervenor, "emphasize[d] the particular difficulties which women face in the criminal justice system, including the problems of re-settlement."[380]

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369 R v. Secretary of State for Justice [2017] UKSC 40.

370 *Id.* at ¶ 2.

371 *Id.* at ¶ 1.

372 *Id.* at 11.

373 *Id.* at ¶ 5.

374 *Id.*

375 *Id.* at ¶ 45.

376 *Id at* ¶ 2. At the time, women made up 5% of the prison population of England and Wales.

377 *Id.* at ¶ 13.

378 *Id.* at ¶ 32 ("The women had different characteristics from the men, fewer being of high or very high risk, and the criteria for admitting them to APs were different").

379 *Id.* at ¶ 6 (citing Cranston, J. [2013] EWHC 4077 (Admin)).

380 *Id.* at ¶ 2.

The Supreme Court in effect found that women and men were similarly situated with respect to AP placement but qualified the comparison by taking account of difference. It explained, "comparing like with like must always be treated with great care - men and women are different from one another in many ways, but that does not mean that the relevant circumstances cannot be the same for the purpose of deciding whether one has been treated less favourably."[381] Particularly where, as here, the circumstances are "something other than the personal characteristics of the men and women concerned, something extrinsic rather than intrinsic," the relevant circumstances may be the same.[382] "In this case, the material circumstances are that they are offenders being released on licence on condition that they live in an AP. . . But the risk of being placed far from home is much greater for the women than for the men."[383]

The court acknowledged the discrimination was not based on animus, but rather the small number of women in the system combined with the policy of segregation of APs by sex: "If they were all mixed sex, then men and women would have exactly the same chance of being placed close to home. If there were some mixed sex APs, the geographical spread would be much better and the corresponding risk for the women would be much lower."[384] But the inspectorate recommended against co-location of men and women at the same APs based on "the particular vulnerability of the women" and the belief that they would have more "successful reintegration into the community . . . if they were protected from the risks associated with mixed sex premises."[385] The court adverted to the fraught history of "separate but equal" in the U.S. and South Africa, and the "periods in [the UK's] own history where segregation of the sexes has led to separate facilities which were very far from equal."[386] But the court found this to be a different problem—"separate but *different*."[387] Based on "the limited number and distribution of APs for women compared with those for men . . . the services are different in this important respect . . . ."[388] In addition, "the needs of women offenders are recognised to be different from the needs of male offenders . . . ."[389] The court concluded that "the present distribution of APs

[381] *Id.* at ¶ 32.

[382] *Id.*

[383] *Id.*

[384] *Id.* at ¶ 33.

[385] *Id.* at ¶ 33.

[386] *Id.* at ¶ 34.

[387] *Id.* at ¶ 37.

[388] *Id.*

[389] *Id.* at ¶¶ 37–38 ("Expecting women offenders, with their many vulnerabilities, to share premises with male offenders who by definition present a high or very high risk of harm is not likely to be an effective way of helping them . . .").

for women is [not] a proportionate means of achieving a legitimate aim"[390] and allowed the case to proceed against the Secretary of State.[391] Thus, in taking account of women's distinct needs, the court's conclusion was likely different from the resolution that a U.S. court would have reached—likely that women and men were not similarly situated, and no further inquiry was required.[392]

Other cases at the ECtHR consider provisions reminiscent of the gender responsive programs challenged by men in *Woods v. Horton* and *Sassman v. Brown*, above.[393] In Alexandru Enache v. Romania (2018),[394] the ECtHR explicitly relied on women's childcare responsibilities to allow differential sentencing.[395] The Court upheld a sex-differentiating provision that allowed mothers of children younger than one to obtain a stay of prison sentence until the child's first birthday.[396] The applicant was an imprisoned father of a child younger than one who claimed the provision violated Articles 8 and 14 of the ECHR.[397] The government contended that the provision aimed to "take account of specific personal situations, including pregnancy of female prisoners and the period preceding the baby's first birthday, having regard in particular to the special ties . . . between the mother and child."[398] It found this goal "legitimate for the purpose of Article 14," not "manifestly ill-founded or unreasonable" and "a sufficient basis for justifying the difference in treatment."[399] The court drew from principles of international law as a basis for allowing differential treatment:

> Article 4 § 2 of the United Nations Convention on the Elimination of All Forms of Discrimination against Women expressly provides that adoption by State Parties of special measures aimed at protecting maternity shall not be considered discriminatory . . . [and] similar provision is made in norms of international law . . . . It considers that these findings are also valid where a woman is deprived of her liberty.[400]

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390 *Id.* at ¶ 42.

391 *Id.* at ¶¶ 45–46.

392 *See, e.g.*, Keevan v. Smith, 100 F.3d 644 (8th Cir. 1996), *supra* Section II.a.

393 Sassman v. Brown (*Sassman II)*, 99 F. Supp. 3d 1223 (E.D. Cal. 2015), *modified on reconsideration*, No. 214CV01679MCEKJN, 2015 WL 8780632 (E.D. Cal. Dec. 15, 2015); Woods v. Horton, 167 Cal. App. 4th 658 (2008); *supra* Section II.a.

394 Alexandru Enache v. Romania, Case No. 16986/12, § IV (Eur. Ct. H. R. Oct. 3, 2017).

395 *Id.* at ¶ 77 ("The Court accepts that motherhood has specific features which need to be taken into consideration, sometimes by means of protective measures").

396 *Id.* at ¶¶ 60, 78.

397 *Id.* at ¶ 49.

398 *Id.* at ¶ 76.

399 *Id.*

400 *Id.* at ¶ 77.

Finding "reasonable . . . proportionality between the means employed and the legitimate aim pursued," the court it held the provision was a permissible difference in treatment.[401]

However, the next year the ECtHR struck down under the same provisions of law a gender-based policy regarding the right to leave prison.[402] In Ēcis v. Latvia (2019), a man sentenced to twenty years' imprisonment requested permission to attend his father's funeral. Women convicted of the same crimes were placed in partly-closed prisons, receiving more and longer visits and phone calls, faster progression to lower security levels, and up to seven days per year of leave which men could not receive.[403] The court affirmed the principles of the previous cases and frameworks, explicitly adverting to the imperative of substantive equality:

> [A] difference in treatment that is aimed at ensuring substantive equality may be justified under Article 14 . . . . [P]roviding for the distinctive needs of women prisoners, particularly in relation to maternity, in order to accomplish substantial gender equality should not be regarded as discriminatory[]. Accordingly, certain differences . . . are acceptable and may even be necessary in order for substantive gender equality to be ensured. Nonetheless, . . . a difference in treatment that is based on sex has to have a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[404]

Here, the Court did not find the differential policy to be reasonable.[405] While the court did not use language approximating the "similarly situated" inquiry, it concluded that the circumstances of women and men were similar enough to require a greater degree of similarity in treatment.[406]

In requiring the elimination of a sex-based distinction, the court endorsed a broader application of the more liberal policies for women in service of less punitive conditions for all.[407] It opined that "there is no objective need to subject women prisoners to conditions that are stricter than necessary" but that "this principle is equally applicable to male prisoners."[408] Further, rehabilitative goals apply "irrespective of the prisoner's sex" and "prison leave is one of the means of facilitating social reintegration of all prisoners" as "maintenance of family ties is an essential means of aiding social reintegration and rehabilitation of all prisoners,

401 *Id.* at ¶ 78.

402 Ēcis v. Latvia, Case No. 12879/09, § V (Eur. Ct. H. R. Jan.10, 2019).

403 *Id.* at ¶ 15.

404 *Id.* at ¶ 86.

405 *Id.* at ¶ 94.

406 *Id.* at ¶¶ 86–93.

407 *Id.* at ¶¶ 90–91.

408 *Id.* at ¶ 91.

regardless of their sex. . . ."[409] Thus, the Court affirmed the goal of rehabilitation and the utility of supporting family ties to this end, but—unlike some U.S. courts—recognized that men as well as women could benefit from these measures.[410]

Though these cases are only a sampling of the universe of litigation, they highlight the commitment to substantive equality rather than the formal equality that underlies U.S. courts' consideration of similar claims.[411] Both systems use a sort of "similarly situated" inquiry in their analysis, tolerating differences in treatment when there is some identifiable difference in the groups justifying the disparity.[412] Both systems also find gender to be an acceptable basis for differentiation in some circumstances, particularly those situating women as mothers or victims of trauma.[413] But European courts appear more comfortable in explicitly relying on gender as both a basis of classification and a justification for additional provisions.[414]

ii. Privacy and Dignity: Searches and Shackling

Like courts in the U.S., European courts have also heard challenges to invasive search practices and policies for restraining pregnant prisoners, both of which implicate concerns of privacy and dignity.[415] As to searches, the international frameworks set out measures to avoid dignitary and other harms.[416] The Bangkok Rules specify, "Effective measures shall be taken to ensure that women prisoners' dignity and respect are protected during personal searches, which shall only be carried out by women staff who have been properly trained in appropriate searching methods and in accordance with established procedures."[417] Further, "Alternative screening methods, . . . shall be developed to replace strip searches and invasive body searches, in order to avoid the harmful psychological and possible physical impact of invasive body searches."[418] Similarly, the European Prison Rules state, "Persons searched shall not be humiliated by the searching process. . . . Persons shall only be searched by staff of the same gender. . . . There shall be no internal searches of prisoners' bodies by prison staff."[419] The 2006

409 *Id.* at ¶ 92

410 *See, e.g.,* Woods v. Horton, 167 Cal. App. 4th 658 (2008).

411 *See supra* Section II.a.

412 *Id.*

413 *Id.*

414 *Id.*

415 *See supra* note 357.

416 Bangkok Rules, *supra* note 299; European Prison Rules (2020), *supra* note 299.

417 Bangkok Rules, *supra* note 299, at 12 (Rule 19).

418 *Id.* at 12 (Rule 20).

419 European Prison Rules (2020), *supra* note 299, at 16 (Rules 54.4-54.6).

commentary elaborates, "The procedures for searching women . . . need to be sensitive to their needs, for example, by ensuring that a sufficient proportion of staff carrying out searches is female. Personal searches should not be carried out in public view."[420] In the UK, Rule 41 of the Prison Rules provides, "No prisoner shall be stripped and searched in the sight of another prisoner, or in the sight of a person of the opposite sex."[421] These rules acknowledge that searches are an established part of the prison regime but are inherently invasive, and attempt to mitigate the harms they inflict.[422]

One case out of Northern Ireland—decided in 2000 before women prisoners were moved to their current location—considered the legality of a mass search at Mourne House, the old women's prison.[423] The prison's governor ordered a "full-scale search of Mourne House and a full body search of all prisoners" based on information that a gun may have been smuggled into the prison.[424] The search was "resisted by a number of Republican prisoners, who barricaded themselves into their cells and did their utmost to prevent the searches from being carried out."[425] Seventeen prisoners brought an action for damages for assault, batteries, and trespasses to the person, alleging unnecessary and unreasonable use of force, and that staff touched them against their will and without consent, forced them to the ground, forcibly removed their clothes, and strip searched them "in an inhumane and degrading manner" in the presence of men.[426]

In upholding the legality of the search, the court relied on another mass search case several years prior, which held that "the governor of the prison has a right to order a search at any time, subject to the direction of the Secretary of State, and is not required to give any reason for the search" except that it must be "bona fide."[427] The court declined to read the "bona fide" element to require an affirmative showing of good faith by prison officials.[428] The governor's good faith was only at issue if "the evidence cast doubt upon the bona fides in ordering."[429] No such evidence existed here. Though only women were searched, the court made no mention of gender

420 European Prison Rules (2006), *supra* note 324, at 76.

421 UK Prison Rules, *supra* note 347, at Rule 41.

422 *Id.*

423 Rosaleen McCorley v. Northern Ireland Office & Governor of HMP Maghaberry [2000].

424 *Id.* at 2.

425 *Id.*

426 *Id.*

427 *Id.* (citing Re Baker's Application [1994] EWHC (QB) (unreported)).

428 *Id.* at 6–7.

429 *Id.*

(aside from the unaddressed allegation of searches in the presence of men) in its analysis, or of the ways trauma may heighten reactions to searches.[430]

Elsewhere, the UK Supreme Court in 2003 considered a policy of strip-searching visitors, women and men, to a men's prison over a charged violation of Article 8's right to privacy, again without mentioning gender.[431] The lower court awarded damages, but the Supreme Court declined to find a generalized tort remedy under Article 8 for "distress caused by an infringement of the right to privacy."[432] It explained that there is "a great difference between identifying privacy as a value which underlies the existence of a rule of law . . . and privacy as a principle of law in itself" and that nothing "in the jurisprudence of the [ECtHR] . . . suggests that the adoption of some high level principle of privacy is necessary to comply with article 8 . . . ."[433] It clarified that prison staff had "acted in good faith" in their searches, and evinced no intent to humiliate the claimants.[434] Thus, the searches did not violate Article 3, prohibiting torture and "inhuman or degrading treatment or punishment," even when considering the rights of visitors to prison rather than the prisoners themselves.[435] However, in other cases, the ECtHR had determined that searches could reach a "degree of humiliation" sufficient to constitute degrading treatment under Article 3.[436] In adopting an approach independent of gender, these cases appear similar to the U.S. cases dealing with searches, even with the consensus against cross-gender searches in domestic and international law.[437] In this area, courts in Europe and the U.S. seem to recognize that invasive searches can be an affront to dignity regardless of the gender of the person searched.

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[430] In a 2014 case, a male prisoner challenged the policy of full-body searching prisoners entering and leaving prison. Because the policy provided for discretion by administrators and officers, the court found the policy and its application lawful. In re Conway's Application for Judicial Review [2014] NICA 51 (appeal taken from NIQB).

[431] Wainwright & Anor v. Home Office [2003] UKHL 53.

[432] *Id.* at ¶ 11.

[433] *Id.* at ¶¶ 31-32.

[434] *Id.* at ¶ 50. The court found the search within the bounds of law even though one visitor developed post-traumatic stress disorder and the other "suffered emotional distress." *Id.* at ¶ 4.

[435] *Id.* at ¶ 49.

[436] *Id.* ("Valasinas v Lithuania Application No 44558/98 (unreported) 24 July 2001 (applicant made to strip naked and have his sexual organs touched in front of a woman); Iwanczuk v Poland Application No 25196/94 (unreported) 15 November 2001 (applicant ordered to strip naked and subjected to humiliating abuse by guards when he tried to exercise his right to vote in facilities provided in prison); Lorsé v The Netherlands Application No 52750/99 (unreported) 4 February 2003 (applicant strip searched weekly over 6 years in high security wing without sufficient security justification)").

[437] *See* Henry v. Hulett, 969 F.3d 769 (7th Cir. 2020); Jordan v. Gardner, 986 F.2d 1523 (9th Cir. 1993); & Ford v. City of Boston, 154 F. Supp.2d 131 (D. Mass. 2001).

In contrast, pregnancy is universally seen as an acceptable basis for differential treatment.[438] As to shackling pregnant prisoners, the international frameworks unequivocally condemn the practice, in some cases explicitly linking it to an assault on women's dignity.[439] The Bangkok Rules provide, "Punishment by close confinement or disciplinary segregation shall not be applied to pregnant women, women with infants and breastfeeding mothers in prison" and "[i]nstruments of restraint shall never be used on women during labour, during birth and immediately after birth."[440] Similarly, the Mandela Rules hold that "'[i]nstruments of restraint shall never be used on women during labour, during childbirth and immediately after childbirth."[441] Further, "[t]he prohibition of the use of solitary confinement and similar measures in cases involving women and children, as referred to in other [UN] standards and norms . . . , [including the Bangkok Rules,] continues to apply."[442] The European Prison Rules concur: "The use of chains, irons and other instruments of restraint which are inherently degrading shall be prohibited . . . . Instruments of restraint shall never be used on women during labour, during childbirth or immediately after childbirth."[443]

These principles play out in an ECtHR decision, Case of Korneykova and Korneykov v. Ukraine (2016).[444] Korneykova sued after she was shackled in a maternity hospital before and after delivering her child, though she was not restrained during the birth itself.[445] She was continuously shackled during her four days at the maternity hospital, including during examinations; at least once her foot was shackled to the bed.[446] Guards only removed her wrist shackles to allow for breastfeeding.[447] Korneykova also challenged the conditions of the cell in which she and her baby were placed, the medical care her baby received, and her placement in a metal cage during her court hearings.[448] The court ruled in her favor on all of these issues.[449] It noted that handcuffing normally presents no Article 3 issue when "applied in connection with lawful detention and does not entail the use of force or public exposure exceeding what is reasonably considered necessary" taking into

438 *See* Bangkok Rules, *supra* note 299; European Prison Rules (2006), *supra* note 324; Mandela Rules, *supra* note 299.

439 *See* European Prison Rules (2006), *supra* note 324, at 28.

440 Bangkok Rules, *supra* note 299, at 12 (Rule 24).

441 Mandela Rules, *supra* note 299, at 15 (Rule 48).

442 *Id.* at 14 (Rule 45).

443 European Prison Rules (2006), *supra* note 324, at 28.

444 Korneykova & Korneykov v. Ukraine, Case No. 56660/12 (Eur. Ct. H. R. Mar. 24, 2016).

445 *Id.* at ¶ 14.

446 *Id.*

447 *Id.* at ¶¶ 14, 20.

448 *Id.* at ¶¶ 25–29, 57–74.

449 *Id.* at 28.

account "the danger of a person absconding or causing injury or damage."[450] However, it "also held on many occasions that handcuffing or shackling of an ill or otherwise weak person is disproportionate to the requirements of security and implies an unjustifiable humiliation . . . ."[451] Here, Korneykova

> was already shackled to a gynaecological examination chair . . . on the day of her baby's [birth]. Any risk of her behaving violently or attempting to escape would have been hardly imaginable given her condition. . . . [I]t was never alleged that she had behaved aggressively . . . [or] attempted to escape or had posed a threat to her own safety.[452]

Moreover, her "unjustified shackling continued after the delivery, when she was particularly sensitive."[453] At all times, she was in the presence of three guards which measure "appears to have been severe enough to respond to any potential risks."[454] The Court thus found a violation of article 3 in this case, as "where the impugned measure was applied to a woman suffering labour pains and immediately after the delivery, it amounted to inhuman and degrading treatment."[455]

The Court also found violations of article 3 in the conditions in Korneykova's cell—specifically the water supply—and her placement in a cage in court, identifying dignitary concerns as to each violation.[456] It had "already criticised a detention facility" for inadequate water "resulting in a dirty environment arousing in a person feelings of anguish" and stressed "that adequate hygienic conditions are vital for a new-born baby and a nursing mother."[457] It also credited her allegations regarding insufficient quantity and quality of food, previously held to violate article 3, and particularly important for a breastfeeding mother.[458] Finally, it credited her allegation of inadequate duration and location of daily outdoor walks, which were to be extended for women with children.[459] Overall, "the cumulative effect" of these conditions was "of such an intensity as to induce in her physical suffering and mental anguish amounting to . . . inhuman and degrading treatment."[460] Regarding placement in a metal cage during trial, the Court noted this treatment "constitutes in itself—having regard to its

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450 *Id.* at ¶ 111.

451 *Id.*

452 *Id.* at ¶ 112.

453 *Id.* at ¶ 113.

454 *Id.* at ¶ 114.

455 *Id.* at ¶ 115.

456 *Id.* at ¶¶139–40; ¶¶ 161–66.

457 *Id.* at ¶¶ 139–40.

458 *Id.* at ¶¶ 141–44.

459 *Id.* ar ¶ 145.

460 *Id.* at ¶ 147.

objectively degrading nature . . . incompatible with the standards of civilised behaviour that are the hallmark of a democratic society—an affront to human dignity in breach of Article 3."[461] Thus, it did not even reach the factors of her advanced pregnancy or status as "a nursing mother separated from her baby" to find a violation.[462]

Therefore, in cases engaging with prisoners' bodies, courts in Europe have followed approaches more similar to those of U.S. courts. Regarding searches, when courts find invasions of privacy they have tended to do so on bases independent of gender.[463] But in the explicitly gendered context of pregnancy, courts are more willing to speak in gendered terms.[464] Still, in this small sampling of cases, principles from international law allow European courts to center human rights concerns in ways not seen in the U.S. Though these cases doubtless protect the rights of plaintiffs who bring them, enforcement of rights in European prisons is bolstered by the regime of prison inspection supplied by international law.[465] This source of oversight is largely absent in the U.S., so I was curious to learn more about its impact. Thus, I looked to Northern Ireland where regular inspections appear to have played a significant role in recent reforms of the women's prison.[466]

IV. THE CASE OF NORTHERN IRELAND

Northern Ireland has received national and international acclaim for the recent reforms of its women's prison, Hydebank Wood Secure College.[467] I decided to look at this prison in some detail to better understand the circumstances around its transformation as well as its current state. In January 2020 I travelled to Northern Ireland and spent four days touring prisons—two at Hydebank Wood, and one each at the two men's prisons in the Northern Ireland Prison Service (NIPS). For most of my time I shadowed Rachel Gibbs, the Assistant Director of Prison Healthcare. I also spoke with other healthcare and custody staff, including formerly incarcerated staff at Hydebank, as well as individuals incarcerated at the prisons. These interactions allowed me to observe many of the principles from international

461 *Id.* at ¶ 164.

462 *Id.* at ¶ 165.

463 *See supra* Section II.b.

464 *See id.*; Korneykova, Case No. 56660/12.

465 *See supra* Section III.a.

466 *See infra* Section IV.b.

467 *See* Andy Martin, "How a stretch in Hydebank Wood can change your life," INDEP. (Aug. 20, 2021), https://www.independent.co.uk/independentpremium/long-reads/hydebank-wood-prison-qualifications-b1905212.html; "Hydebank: 'Remarkable progress' at prison, report finds," BBC (June 9, 2020), https://www.bbc.com/news/uk-northern-ireland-52976224; "NI: Inspectors find improvements at Hydebank Wood and Ash House," IRISH LEGAL NEWS (June 10, 2020), https://www.irishlegal.com/articles/inspectors-find-improvements-at-hydebank-wood-and-ash-house.

law put into practice, including the significant role of prison monitoring in their implementation.

Hydebank Wood is unusual in that it is not only a women's prison; it also serves as Northern Ireland's Young Offenders Centre, for young men ages 18-22, a particularly vulnerable subset of male prisoners.[468] This model—known as co-location—places women and men together at a single facility, under a single regime. Women and men sleep in separate buildings, and have staggered schedules for some activities, but otherwise interact a great deal in classes, work assignments, and informally around the campus.[469] This model of integration allows for a uniquely non-gendered approach to prison management. Hydebank Wood underwent a period of intense public criticism in the mid-2000s-2010s, as did the maximum security men's prison.[470] That facility, Maghaberry Prison, was at one point called the worst prison in Europe.[471] But while there have been some improvements at Maghaberry, Hydebank Wood has become a model of reform. As such, Hydebank Wood presents a useful case study to observe the interplay between international frameworks and monitoring regimes, and the role of substantive equality principles in determining the place of gender in prison.

a. The Prison Governance Structure

A brief overview of Northern Irish prisons is in order. The country has had a fraught history of women's incarceration, as with prison more broadly.[472] Irish society has been profoundly shaped by the Troubles—the decades-long sectarian conflict between Protestants loyal to the UK and Catholics seeking independence.[473] All told, more than 3,700 people died at the hands of paramilitaries on both sides.[474] The conflict, stretching from the

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[468] Prison estate, DEP'T OF JUST., https://www.justice-ni.gov.uk/topics/prisons/prison-estate.

[469] *See* CHIEF INSPECTOR OF CRIM. JUST. IN N. IR., HER MAJESTY'S CHIEF INSPECTOR OF PRISONS AND THE REG. AND QUAL. IMPROVEMENT AUTH. AND THE EDUC. AND TRAINING INSPECTORATE, REP. ON AN UNANNOUNCED INSPECTION OF ASH HOUSE WOMEN'S PRISON HYDEBANK WOOD 23–24 OCTOBER & 4–7 NOVEMBER 2019 3, 6, at 5 (2020), https://www.cjini.org/getattachment/9edcceae-fb5c-4cde-9b01-4b8aea6ca465/report.aspx.

[470] *See, e.g.*, Criminal Justice Inspection Northern Ireland, "Report on an unannounced inspection of Maghaberry Prison" (May 11, 2015), Criminal Justice Inspection Northern Ireland, "Ash House, Hydebank Wood Women's Prison" (Jan. 10, 2013) https://www.cjini.org/TheInspections/Inspection-Reports/2015/October—-December/Maghaberry-Prison; https://www.cjini.org/TheInspections/Inspection-Reports/2013/October—-December/Ash-house.

[471] "Maghaberry prison 'most dangerous in the UK,'" BELFAST TELEGRAPH (Nov. 5, 2015), https://www.belfasttelegraph.co.uk/news/northern-ireland/maghaberry-prison-most-dangerous-in-the-uk-34172935.html.

[472] *See* Linda Moore, *"Nobody's Pretending That It's Ideal": Conflict, Women, and Imprisonment in Northern Ireland*, 91 THE PRISON J. 103 (2011) [hereinafter Nobody's Pretending].

[473] *Id.* at 104.

[474] *See* Jacqueline Kerr, *The [re]settlement of women prisoners in Northern Ireland: From rhetoric to reality (The Howard League for Penal Reform, What is Justice?, Working Paper*, 8/2014) [hereinafter

1960s to the 1990s, was characterized by the long-term, highly-publicized imprisonment of politically-affiliated individuals for their political activities. Women were involved at every level of the conflict, including imprisonment.[475] In prison, they engaged in hunger strikes and infamous "no wash" protests, which included smearing feces and menstrual blood in their cells.[476] Because of the highly-charged political atmosphere, prisons were segregated by political affiliation, known as a "separated regime."[477] Traditionally women were held in the centuries-old Armagh Jail.[478] In 1986 they were transferred to Mourne House, a building on the site of Maghaberry Prison, the high-security men's facility then designated to receive male paramilitaries.[479] Most of the prison guards were Protestant Loyalists, and many prisoners were Catholic Republicans, leading to persistent conflict in the prisons.[480] Though the Troubles officially ended with the Good Friday Agreement in 1998, violence continued sporadically in the following years.[481] The political prisoner units were slowly—though not entirely—emptied.[482]

Today, post-conflict Northern Ireland remains a constituent part of the UK but has a government devolved in many areas from the British, with the Northern Ireland Assembly at its center.[483] Prisons are administratively organized under the Prison Act (Northern Ireland) of 1953, amended in the Good Friday Agreement.[484] The most recent changes were in 2010, when the Department of Justice (DoJ) was established.[485] In addition, the Prison and

From Rhetoric to Reality], https://howardleague.org/wp-content/uploads/ 2016/04/ HLWP_8_2014.pdf; Nobody's Pretending, *supra* note 472.

475 Women and the Conflict: Talking about the "Troubles" and Planning for the Future, WOMEN'S RESOURCE AND DEV. AGENCY, https://www.nirwn.org/wp-content/uploads/2016/12/Women__ConflictReport.pdf.

476 Nobody's Pretending, *supra* note 472, at 105.

477 *See* House of Commons Northern Ireland Affairs Committee, THE SEPARATION OF PARAMILITARY PRISONERS AT HMP MAGHABERRY SECOND REPORT OF SESSION 2003–04 VOLUME I (Feb. 11, 2004), https://publications.parliament.uk/pa/cm200304/cmselect/cmniaf/302/302.pdf.

478 Nobody's Pretending, *supra* note 472, at 105-06.

479 *Id.* at 106.

480 *Id.* at 104-06.

481 From Rhetoric to Reality, *supra* note 474, at 3.

482 In late 2020, there remained three separated republican women prisoners, in addition to 23 republican men and 19 loyalist men separated at Maghaberry. Enda McClafferty, *Northern Ireland: Prison segregation costs more than £2m a year*, BBC NEWS (Oct. 6, 2020), https://www.bbc.com/news/uk-northern-ireland-54439849.

483 English Parliament transferred control of many government functions to Northern Ireland's national assembly in 1998 in a process known as devolution. *Overview of government in Northern Ireland*, NI DIRECT GOV'T SERVICES (2021), https://www.nidirect.gov.uk/articles/overview-government-northern-ireland.

484 Prison Act (Northern Ireland) 1953, c. 18 (http://www.legislation.gov.uk/apni/1953/18).

485 The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, 2010 No. 976, http://www.legislation.gov.uk/uksi/2010/976/made.

Young Offenders Centre Rules (Northern Ireland) 1995, amended most recently in 2010, provide standards for internal governance.[486] As of 2020, DoJ is responsible for most aspects of prison administration and is the home of the Northern Ireland Prison Service (NIPS).[487] Established in 1995, NIPS includes three prisons: Maghaberry Prison, Magilligan Prison, and Hydebank Wood College and Women's Prison.[488] DoJ has primary responsibility for prisons, but prison healthcare falls to the Department of Health.[489] In Northern Ireland, community healthcare is nationalized and run by four regional trusts; South Eastern Heath and Social Care Trust (SEHSCT) manages prison healthcare.[490] NIPS produces annual accounting reports to the Northern Ireland Assembly.[491] In addition, NIPS maintains a confidential complaint system available to residents on their landings.[492] Once the internal complaint process is exhausted, individuals can proceed to the Prisoner Ombudsman or Assembly Ombudsman.[493] NIPS is also subject to regular inspections by external bodies under OPCAT. Prison staff are required to "respect, protect and fulfil people's human rights when delivering services."[494]

According to statistics from the Northern Ireland Department of Justice (DoJ), the average daily prison population of NIPS as of financial year 2019-2020 was 1,516, with an average of 74 women at Hydebank Wood.[495]

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[486] Prison and Young Offenders Centre Rules (Northern Ireland) 1995, SR2009 No. 429 (2010), https://www.justice-ni.gov.uk/sites/default/files/publications/doj/prison-young-offender-centre-rules-feb-2010.pdf.

[487] NIPS is funded through the Assembly through DoJ's annual budgeting. DEP'T OF JUST., N. IR. PRISON SERVICE ANN. REP. AND ACCOUNTS 2019-20 11-16, (2020) [hereinafter 2019 Annual Report]. The Service's annual net expenditures for 2018-2019 totaled £110,567,000. *Id.* at 72.

[488] Prison estate, DEP'T OF JUST., https://www.justice-ni.gov.uk/topics/prisons/prison-estate.

[489] Health Service Structure, SOUTH EASTERN HEALTH AND SOCIAL CARE TRUST, https://setrust.hscni.net/about-the-trust/health-service-structure/.

[490] *Healthcare in Prison*, SOUTH EASTERN HEALTH AND SOCIAL CARE TRUST (2020), https://setrust.hscni.net/service/healthcare-in-prison/. The Trust is led by Assistant Director Rachel Gibbs.

[491] Reporting is required by the Government Resources and Accounts Act (Northern Ireland) of 2001. Government Resources and Accounts Act (Northern Ireland) 2001 c. 6, § 11, http://www.legislation.gov.uk/nia/2001/6/section/11. NIPS action was stalled as, before January 2020, the Assembly had not met for years. *Id.* at 10. Still, the KPTs indicate some improvements. *Id.* at 9-10.

[492] "Landings" refers to the wings, or tiers, of the residential buildings where people incarcerated in NIPS live. Former residents can submit written complaints to the prison Governor but must do so within 21 days of the incident. Visitors can also make formal complaints. Northern Ireland Prison Service complaints policy and procedure, DEP'T OF JUST., https://www.justice-ni.gov.uk/articles/northern-ireland-prison-service-complaints-policy-and-procedure (last visited Feb. 9, 2022).

[493] *Id.*; THE PRISONER OMBUDSMAN FOR NORTHERN IRELAND, https://niprisonerombudsman.gov.uk/.

[494] 2019 Annual Report, *supra* note 487, at 17. The Northern Ireland Human Rights Commission provides a training to staff. *Id.*

[495] R. REDMOND & P. PALMER, THE N. IR. PRISON POPULATION 2019/2020 5 (2020), https://www.justice-ni.gov.uk/sites/default/files/publications/justice/northern-ireland-prison-population-2019-20.pdf (Northern Ireland Statistics and Research Agency). This represented the highest average daily total of

Sentenced and unsentenced (remand) individuals live together in NIPS, meaning many stays are short in duration.[496] Among women, the sentenced and unsentenced populations tend to be approximately equal.[497] In 2019-2020, there was a daily average of 41 sentenced women at Hydebank Wood, and 978 men systemwide.[498] Of sentenced women that year, 85.6% were serving sentences of one year or less, and 56.8% six months or less.[499] For men, those numbers were 76.8% and 49.2%, respectively.[500] Although the total population size, and the number of women specifically, are orders of magnitude smaller than in the U.S., the share of women in the total population is not dissimilar, and the smaller size and single women's facility makes for a manageable subject of study.[501]

b. Prison Inspections and Prison Reform

Official inspections under the NPM appear to have been a major driver of change in Northern Ireland, and the reports produced from this monitoring highlight many issues identified in the international frameworks. Inspections are conducted jointly by CJINI and HMCIP teams, as well as the Regulation and Quality Improvement Authority and Education and Training Inspectorate.[502] Inspectors evaluate prisons according to a rubric known as the healthy prison test, focusing on four main areas: safety, respect, purposeful activity, and resettlement. These prison-level inspections are supplemented by "thematic reviews" across all facilities in the UK or Northern Ireland in specific areas, including women prisoners.[503] A 2006 review, based on inspections across England, Wales, and Northern Ireland, found:

women over the past six years, when the average ranged from 53-65. 409 women entered prison that year. *Id.* at 7.

[496] *Id.* at 6, 11–12.

[497] *Id.* at 17. In 2019-2020, there were 41 sentenced women and 33 women on remand admitted to Hydabank. *Id.*

[498] *Id.*

[499] *Id.* at 13.

[500] *Id.*

[501] In 2019-2020, 74 of the 1516 people (4.8%) in Northern Ireland's prisons were women, a typical gender distribution. *Id.* at 7. In 2019, approximately 231,000 of the approximately 2.3 million people (10%) incarcerated in the United States were women, although the United States figures include juvenile detention, which the Northern Ireland numbers do not. *See* Kajstura, *supra* note 1; Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE, (March 24, 2020), prisonpolicy.org/reports/pie2020.html.

[502] CRIM. JUST. INSPECTION N. IR., REPORT ON AN UNANNOUNCED INSPECTION OF ASH HOUSE, WOMEN'S PRISON (Oct. 27, 2016), http://www.cjini.org /TheInspections/Inspection-Reports/2016/October—-December/Hydebank-Wood-Young-Offenders-(1).

[503] Owers, *supra* note 333, at 1543.

> Women are a small minority of those in prison . . . but they have specific vulnerabilities and needs. . . . [T]hey account for 55% of all self-harm incidents in prison; and . . . the suicide rate among women was two and a half times that of men in prison. . . . Their needs include childcare responsibilities; over half are primary caregivers of children under sixteen . . . . Those needs were not recognised in a system designed for adult men.[504]

The situation of women in NIPS has improved since, but the process has been far from smooth.

Women prisoners remained located at Mourne House during the transitional period following the Good Friday Agreement.[505] In July 2002, a 19-year-old woman named Annie Kelly committed suicide in her cell, catalyzing public outrage.[506] At the time of her death she was in a men's unit because there was no place for women deemed a danger to themselves or others.[507] CJINI and HMCIP conducted an investigation of Mourne House in May 2002, and in February 2003 published a "highly critical" report revealing that NIPS "had no dedicated policy or plan for the treatment of women in custody."[508] The report included a number of recommendations, chief among them separating out Mourne House as a discrete women's prison, rather than managing it as part of Maghaberry.[509] Yet, as an inspector later wrote, "[v]irtually none of our recommendations . . . were put into effect. Indeed, the treatment of and conditions for women at Mourne House became worse."[510] Rather than operate Mourne House as an independent women's facility, NIPS proposed to move women to a unit at Hydebank Wood, which held only young men and boys aged 15-21.[511]

The same year, the Northern Ireland Human Rights Commission (NIHRC) undertook its own investigation into compliance with international

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[504] *Id.* at 1544. *See* HM INSPECTORATE OF PRISONS, WOMEN IN PRISON: A LITERATURE REVIEW (2005) (https://www.justice inspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2014/07/Women-in-prison-20061.pdf).

[505] PHIL SCRANTON & LINDA MOORE, THE HURT INSIDE: THE IMPRISONMENT OF WOMEN AND GIRLS IN NORTHERN IRELAND 44 (2005) (https://www.nihrc.org/uploads/hurt-inside-imprisonment-women-girls-northern-ireland-2005.pdf) [hereinafter The Hurt Inside] (Northern Ireland Human Rights Commission).

[506] *Teenage prisoner found dead in cell*, IRISH EXAMINER (Sep. 7, 2002), https://www.irishexaminer.com/breakingnews/ireland/teenage-prisoner-found-dead-in-cell-67354.html.

[507] Eamonn McCann, *Jail death unlikely to bring change*, BELFAST TELEGRAPH (Jul. 4, 2008), https://www.belfasttelegraph.co.uk/imported/jail-death-unlikely-to-bring-change-28077399.html.

[508] The Hurt Inside, *supra* note 505, at 7-11.

[509] HM CHIEF INSPECTOR OF PRISONS AND THE CHIEF INSPECTOR OF CRIM. JUST. IN N. IR., REPORT ON AN UNANNOUNCED INSPECTION OF THE IMPRISONMENT OF WOMEN IN NORTHERN IRELAND, ASH HOUSE HYDEBANK WOOD PRISON 28-30 NOVEMBER 2004 5 (2004) (http://www.cjini.org/getattachment/cf804842-2d36-43b5-949c-30891e55e15d/Ash-House-Hydebank-Wood-Prison-November-2004.aspx) [hereinafter 2004 Report].

[510] *Id.*

[511] *Id.* at 9-10.

human rights laws, particularly articles 2 and 3 of the ECHR.[512] It found many of the same problems identified by the Inspectorate, that would be repeated in subsequent reports: 1) absence of a concerted strategy "addressing the particular needs of women and girls in prison," including a lack of "gender specific training for prison management or officers";[513] 2) an overwhelmingly male staff supervising women;[514] 3) inappropriate use of segregation for women at risk of self-harm;[515] 4) insufficient medical and mental health care;[516] 5) lack of educational and other programming;[517] 6) failure to respect "[t]he right of women in prison and their children to a meaningful family life";[518] and 7) proposed co-location of women and men at Hydebank, "an unsuitable environment for women and girl prisoners."[519] The report recommended creating a new unit "based on an inclusive assessment of women prisoners' needs, met by gender-specific programmes and administered by trained managers and staff."[520]

Against these recommendations, NIPS moved women to Hydebank in 2004.[521] In light of the controversy, Dame Anne Owers, the UK Chief Inspector of Prisons, and Kit Chivers, Chief Inspector of Criminal Justice in Northern Ireland, conducted an unannounced inspection of the new women's unit, called Ash House.[522] Though there were some areas of improvement, overall the situation of women had worsened, as NIPS had "lost [its] principal advantage . . .—the existence of a purpose-built, separate women's facility—without tackling the underlying" problems.[523] Further, NIPS still had no specific strategy or policies for women, nor separately trained

[512] Phil Scranton, Professor of Criminology at the School of Law at Queen's University, Belfast, and Dr. Linda Moore, NIHRC investigator, wrote a report on the investigation. THE HURT INSIDE, supra note 505, at 9.

[513] *Id.* at 11.

[514] "Approximately 80 per cent of prison officers [at] Mourne House were men and it was not uncommon for the night guard duty to be all male." *Id.* at 11.

[515] It found segregation inappropriate for women at risk of self-harm, with "degrading and inhumane" conditions potentially violating ECHR article 3. *Id.* at 12-13.

[516] *Id.* at 13. Women who interacted with male prisoners in transport or in the hospital "were routinely subjected to verbal abuse and sexual threats." *Id*.

[517] "[W]omen were regularly locked in cells for 17 hours a day, workshops were permanently closed and education classes rarely held . . . . The high level of security, dating back to . . . political prisoners, was inappropriate." *Id.* at 12.

[518] *Id.*

[519] *Id.* at 13; *see* PHIL SCRANTON & LINDA MOORE, REPORT ON THE TRANSFER OF WOMEN FROM THE MOURNE HOUSE UNIT, MAGHABERRY PRISON TO HYDEBANK WOOD YOUNG OFFENDERS UNIT (2004) (https://www.nihrc.org/documents/Prison_Transfer_Report_June04.pdf) (Northern Ireland Human Rights Commission).

[520] The Hurt Inside, *supra* note 505, at 14.

[521] *Id.* at 3

[522] 2004 Report, *supra* note 509.

[523] *Id.* at 6.

management for women.[524] The report emphasized many of the themes that the NIHRC had identified, and questioned whether Ash House, and Hydebank Wood more generally, could be a "suitable environment for women."[525] It highlighted safety issues regarding "vulnerable," "damaged," and "disruptive" women and girls; meanwhile, women complained of being "treated like children."[526] A significant number of women reported victimization by other prisoners and staff, and half reported feeling unsafe.[527] Further, women were strip-searched after all visits, and "[a]lthough women were not completely naked at any stage, this frequent searching was unacceptable and degrading."[528] There was a lack of education and other programming, and an overwhelming sense of boredom among women,[529] which "was likely to compound feelings of depression and anxiety" already exacerbated by poor mental health policies.[530] On the positive side, "the move had succeeded in breaking up some of the negative culture that had infused Mourne House."[531] Relationships between staff and residents had improved, perhaps bolstered by the increasing proportion of women officers; most of the staff "genuinely wanted to do a good job."[532]

In 2007, Owers and Chivers returned to Hydebank for an announced inspection. Their overall assessment was equivocal: "Ash house was providing a generally safe environment, but it remained inherently unsatisfactory that women were held within a male establishment. While some good efforts had been made, there was insufficient focus on the particular needs of women, which meant that the unit fell short of our expectations."[533] The shared site led to restrictions on women's movement, and "the level of searching was disproportionate to the risks posed by women and yielded few finds of illicit articles. Punishments also appeared disproportionately harsh."[534] The inspectors continued to recommend a separate women's facility.[535]

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524 *Id.* at 5.

525 *Id.* at 5.

526 *Id.* at 13

527 *Id.* at 10.

528 *Id.* at 12.

529 *Id.* at 14.

530 *Id.* at 6.

531 *Id.*

532 *Id.* at 5.

533 HM CHIEF INSPECTOR OF PRISONS AND THE CHIEF INSPECTOR OF CRIM. JUST. IN N. IR., REPORT ON AN ANNOUNCED INSPECTION OF ASH HOUSE, HYDEBANK WOOD PRISON 29 OCTOBER – 2 NOVEMBER 2007 5 (2008) (http://cjini.org/getattachment/3ca1e4a3-649a-491d-bb54-f59b80fff6b5/Ash-House-Hydebank-Wood-Nov-2007.aspx) [hereinafter 2007 Report].

534 *Id.*

535 *Id.* at 79.

Inspectors returned to Hydebank in 2011.[536] They reported progress in many areas, including provision of a separate reception building for women, improved (though still not ideal) policies related to suicide and self-harm, reduced punishments for disciplinary infractions, an expanded resettlement program, a low level of force, and lack of a segregation unit.[537] They observed that "[t]he prison appeared safe and calmer than at [the] last inspection, and most women said they felt safe."[538] Overall, the report still identified many areas in need of improvement, including its lack of a systemic approach to suicide and self-harm, its meager policies to remedy bullying,[539] the overrepresentation of men on staff, lack of exercise, overreliance of lockdowns, and lack of guidance on improving the situation for long-term residents.[540]

The report also focused on three main areas of continuing inadequacies paralleled in the international frameworks: programming, healthcare, and co-location with men.[541] It noted the failure to improve and expand educational opportunities or to tailor programs to the needs of women at Hydebank.[542] It also identified a lack of coordination with educational providers or employers in the community to ensure women were prepared for resettlement.[543] Computer skills training was utterly lacking, and while there were some effective teachers, many were poor.[544] As to healthcare, responsibility had transferred from NIPS to the South Eastern Health and Social Care Trust, but the change had not brought any noticeable improvements.[545] The services were "under-resourced, poorly managed and there was sometimes unsatisfactory attention to the needs of patients[,]" and "mental health problems were a particular concern."[546] Finally, the report again identified problems arising from co-location with men, including increased restrictions on movement and poor implementation of security measures related to the

[536] Inspectors were replaced by Dr. Michael Maguire of CJINI and Nick Hardwick of HMCIP. They reported general progress: "The prison appeared safe and calmer . . ., and most women said they felt safe." CHIEF INSPECTOR OF CRIM. JUST. IN N. IR., HER MAJESTY'S CHIEF INSPECTOR OF PRISONS AND THE REG. AND QUAL. IMPROVEMENT AUTH., REPORT ON AN UNANNOUNCED SHORT FOLLOW-UP INSPECTION OF HYDEBANK WOOD WOMEN'S PRISON 21 – 25 MARCH 2011 v (Oct. 2011), http://www.cjini.org/getattachment/13bb7dbe-b18e-406a-bc04-acd5ce4b071a/report.aspx [hereinafter 2011 Report].

[537] *Id.*

[538] *Id.*

[539] *Id.* at 4;

[540] *Id.* at v.

[541] *Id.*

[542] *Id.* at v–vi.

[543] *Id.* at 6

[544] *Id.*

[545] *Id.* at 5.

[546] *Id.* at vi.

men on site.[547] The inspectors continued to advocate for a separate women's facility, "without which the needs of this vulnerable population are unlikely ever to be properly met."[548]

The next inspection, in 2013 adopted a more critical tone, urging "fundamental improvement" in many areas.[549] The inspection was "disappointing" in large part because of the continued co-location at Hydebank, with a "significant and intractable impact upon outcomes."[550] The report noted that women were "inevitably marginalised and restricted in their access to facilities and services," and faced "verbal intimidation from male prisoners."[551] It stated that "it is wrong to run a female prison at the margins of an overwhelmingly male establishment. The impact on outcomes for the women was, in our view, fundamentally disrespectful."[552] Additionally, two of the areas highlighted in the previous report—programming and co-location—remained concerning. Opportunities for purposeful activity had declined since the previous inspection, and were "worse for the women prisoners than the men."[553] Indeed, "[t]he prison was safe but little was done to equip women with meaningful skills, and preparation for release and resettlement needed to be a lot sharper."[554] Overall, "[t]he paucity of opportunities . . . had a negative effect on equipping women for release and the employment market."[555] As to co-location, the report repeated concerns including restrictions on movement and poor implementation of security measures.[556] Frustrated with the lack of progress, the inspectors called for "a radical rethink of the approach to the imprisonment of women."[557]

In 2015, the year before the next inspection, Hydebank was formally converted from a Young Offenders Centre to a Secure College.[558] The next

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[547] *Id.* at 4.

[548] *Id.* at vi.

[549] *Ash House, Hydebank Wood Women's Prison,* CRIMINAL JUSTICE INSPECTION NORTHERN IRELAND, http://www.cjini.org/TheInspections/Inspection-Reports/2013/October—-December/Ash-house (last visited Nov. 1, 2021).

[550] CHIEF INSPECTOR OF CRIM. JUST. IN N. IR., HER MAJESTY'S CHIEF INSPECTOR OF PRISONS AND THE REG. AND QUAL. IMPROVEMENT AUTH. AND THE EDUC. AND TRAINING INSPECTORATE, REPORT ON AN ANNOUNCED INSPECTION OF ASH HOUSE, HYDEBANK WOOD WOMEN'S PRISON 18 - 22 FEBRUARY 2013 v (2013) (http://www.cjini.org/getattachment/3fd65fc3-e0b0-40b8-a06d-4cfe7b8f3e2c/report.aspx) [hereinafter 2013 Report]. The report reiterated many concerns from previous inspections.

[551] *Id.* at v.

[552] *Id.* at vi.

[553] *Id.* at v.

[554] *Id.* at vi.

[555] *Id.*

[556] *Id.* at 15.

[557] *Id.* at vi.

[558] CHIEF INSPECTOR OF CRIM. JUST. IN N. IR., HER MAJESTY'S CHIEF INSPECTOR OF PRISONS AND THE REG. AND QUAL. IMPROVEMENT AUTH. AND THE EDUC. AND TRAINING INSPECTORATE, REP. ON AN ANNOUNCED INSPECTION OF ASH HOUSE WOMEN'S PRISON HYDEBANK WOOD 5 (2016),

year, inspectors gave Hydebank its most positive report to date.[559] Discussing the transition, inspectors noted that "[w]hile main focus was on providing better educational opportunities for the young men . . . , it was also intended to benefit the women in Ash House."[560] Inspectors observed that "a major shift had occurred in the ethos of [Ash House and Hydebank Wood,]"[561] and found a marked improvement in relationships between residents and staff: "Engagement was found to be consistently positive and in some cases was outstanding, with most staff adopting a caring, supportive approach and an interest in the welfare of young men and women in their care."[562] The inspectors were effusive in their praise: "We commend both prison leadership and local managers for the innovation, creativity and determination shown to foster a culture of improvement and create two institutions with a greater rehabilitative ethos. The changes . . . show what can be achieved . . . when prison reform is embraced."[563]

This report lauded the reforms as examples of progress without regard to gender. It stressed the addition of "'normalising' features"—the "pleasant external environment, the enhanced landings," a fully-functioning café operated by residents, and the tuck shop (canteen) equipped with familiar brands—as ways to improve the experience of residents, women and men.[564] It noted that "sensibly" administrators "extended this approach to include the women held in Ash House," leading to "real improvement in the environment and quantity and quality of the learning and skills opportunities available to the women."[565] Much of the improvement came through expanded access to purposeful activity that accompanied the shift to the Secure College model. "[N]early all" residents, women and men, were now "engaged in some form of purposeful activity",[566] demonstrating a commitment to "helping both young men and women prisoners break the cycle of reoffending."[567] Thanks to a partnership with Belfast Met, a college in the community, Hydebank was able to offer a "better quality curriculum" to men and women, although

https://www.cjini.org/getattachment/efa315e4-3288-47e1-85f6-2de9186916fc/report.aspx [hereinafter 2016 Report].

559 CJINI Chief Inspector Brendan McGuigan and HMCIP Chief Inspector Peter Clarke authored this report. *Id.* at 7.

560 *Id.* at 5.

561 *Inspectors 'encouraged' by performance improvement at Hydebank Wood and Ash House women's prison*, CRIM, JUST. INSPECTION N. IR. (Oct. 27, 2016), http://www.cjini.org/NewsAndEvents/Press-Releases/2016/October—-December/Inspectors-encouraged-by-performance-improvement [hereinafter 2016 Press Release].

562 *Id.*

563 *Id.*

564 2016 Report, *supra* note 558, at 5.

565 *Id.* at 6.

566 *Id.*

567 2016 Press Release, *supra* note 561.

"further work was required to increase the range of accredited qualifications."[568]

Yet the nearly universal access to purposeful activity also raised familiar concerns related to co-location: "Gaining access to the developing range of provision meant that women needed to move more freely around the campus, which in turn resulted in more day-to-day contact with the young men held. There were obvious dangers in this around both safety and respect."[569] Therefore, despite their praise, the inspectors again encouraged NIPS to relocate women to a separate facility.[570] The "mixing" on the site remained "a significant challenge", "deeply problematic" and "a wholly unsuitable environment."[571] Still, inspectors appeared less troubled even by this fundamental concern, as "while the mixing of young men and women . . . will continue to present challenges", the reforms "have the potential to meaningfully improve outcomes and transform the experience of the young men and women."[572] Further, inspectors heard from women about "the prevalence of drugs, which they felt were much more available than previously and led to bullying and intimidation."[573] Some concerns were particularly prevalent among women, but problems reached young men too. Most women arrived with mental health concerns, and many reported histories of self-harm, domestic violence, and substance misuse. At Hydebank generally, and Ash House specifically, "mental health support needed to be much better."[574]

In June 2020, CJINI published its most recent report, from an inspection in October and November 2019.[575] This report was even more positive than the 2016 report, and was the first to explicitly endorse co-location as a viable strategy.[576] It acknowledged the "small amount of well-managed contact between male and female prisoners, which has caused some discussion as to whether this is fully in accordance with international standards concerning

[568] *Id.*

[569] 2016 Report, *supra* note 558, at 6.

[570] *Id.*

[571] *Id.* at 5-7.

[572] 2016 Press Release, *supra* note 561.

[573] 2016 Report, *supra* note 558, at 6.

[574] *Id.*

[575] The report's publication was delayed due to the COVID-19 pandemic. CHIEF INSPECTOR OF CRIM. JUST. IN N. IR., HER MAJESTY'S CHIEF INSPECTOR OF PRISONS AND THE REG. AND QUAL. IMPROVEMENT AUTH. AND THE EDUC. AND TRAINING INSPECTORATE, REP. ON AN UNANNOUNCED INSPECTION OF ASH HOUSE WOMEN'S PRISON HYDEBANK WOOD 23–24 OCTOBER & 4–7 NOVEMBER 2019 3, 6 (2020), https://www.cjini.org/getattachment/9edcceae-fb5c-4cde-9b01-4b8aea6ca465/report.aspx [hereinafter 2019 Report].

[576] There were approximately 90 young men ages 18-24 at Hydebank in addition to 70 women. 2019 Report, *supra* note 575.

the separation of the sexes in the custodial environment."[577] The report concluded, based on observations of and by women and men living at Hydebank, that "if properly supervised and managed, such contact can be of considerable benefit to both men and women."[578]

The report also addressed the perennial issues at Hydebank, noting progress on many fronts.[579] The inspectors reported a "respectful establishment," and "positive relationships between prisoners and staff."[580] Staff did not wear uniforms and interacted with residents on a first name basis, which "did not in any way compromise the essential authority of the staff in carrying out their duties."[581] Inspectors found Ash House was "a safe establishment," with violence continuing to decline over 2016 levels, and lower than at other UK prisons.[582] The same held true for self-harm.[583] As to healthcare, the report called the collaboration between all levels of prison and health care staff "encouraging": "Prisoners/students have good access to primary health care services and they are treated professionally with compassion and dignity."[584]

The report noted three areas of continuing concern. First, regarding purposeful activity, "there needed to be more attention paid to the overall impact of the learning and skills provision on the women, improved workshops and enhanced utilization of them."[585] Second, "illicit drugs and diverted prescribed medicines were easily available" and "[t]he positive drug test rate was high."[586] Further, "the substance misuse strategy was weak and there was no drug supply reduction action plan."[587] Finally, there were problems related to staff use of force, including insufficient reporting and review.[588] Still, the report concluded on a positive note:

Overall, this was a heartening inspection that shows how progress can be made when there is a clear vision and drive for improvement from effective leadership and good teamwork. . . . Inspectors are thoroughly impressed by the findings of this inspection and commend all who have worked so hard over many years to achieve, sustain and build on this.[589]

577 *Id.* at 3.
578 *Id.*
579 *Id.* at 4.
580 *Id.*
581 *Id.*
582 *Id.*
583 *Id.*
584 *Id.* at 4.
585 *Id.*
586 *Id.* at 18.
587 *Id.*
588 *Id.*
589 *Id.* at 5.

Thus, Hydebank has in many ways been transformed into a model facility. While no one would claim that all work is complete, the reforms seem to have significant and growing support.[590]

c. Reflections on Hydebank Wood

The process of reform at Hydebank highlights an evolution in the administration's conceptualization of gender in prison. After facing resistance from inspectors, Hydebank now appears to eschew the gender-responsive approach in many, though not all, areas.[591] It instead exemplifies a model based on substantive equality, which gained expression through the prison's transition to a secure college. It is noteworthy that the co-location is at a facility for young men, a group generally considered more vulnerable and less threatening than the overall male population, and the target of enhanced purposeful activity resources.[592] This fact does not necessarily undermine the utility of co-location more generally, but calls for a nuanced approach to its use and evaluation. Indeed, by placing women at a college facility uniquely tooled to support a vulnerable population and foster its residents' development of skills for resettlement, NIPS, whether consciously or not, appears to be furthering principles of substantive equality. Through my visit, I observed many of the ways this approach has been beneficial to residents: women have access to more opportunities than they might otherwise, and both women and men live an environment that more closely approximates the conditions of life in the community.

i. Co-Location

The inspection reports demonstrate the evolution of official attitudes toward co-location, the clearest example of the NIPS' approach to women prisoners as grounded in substantive equality rather than gender-responsivity.[593] This feature runs counter to the principles in international frameworks that favor gender-segregation of prisons.[594] The Mandela Rules call for separation of individuals into single-gender institutions, or at a

590 *Id.*; *Report on an Unannounced Inspection of Hydebank Wood Secure College*, CRIM, JUST. INSPECTION N. IR. (Sept. 6, 2020), https://www.cjini.org/TheInspections/Inspection-Reports/2020/April-June/Unannounced-Inspection-of-Hydebank-Wood-Secure-Col.

591 Part IV.c relies on conversations and original observations from my January 2020 site visit to Hydebank Wood, as recorded in contemporaneously recorded notes. Copies of the notes are on file with the Journal.

592 *See* CHIEF INSPECTOR OF CRIM. JUST. IN N. IR., HER MAJESTY'S CHIEF INSPECTOR OF PRISONS AND THE REG. AND QUAL. IMPROVEMENT AUTH. AND THE EDUC. AND TRAINING INSPECTORATE, REP. ON AN UNANNOUNCED INSPECTION OF HYDEBANK WOOD SECURE COLLEGE 23–24 OCTOBER & 4–7 NOVEMBER 2019 4 (2020), https://www.cjini.org/getattachment/f29852c3-e432-4f16-b9f5-51fe15710792/report.aspx.

593 *See supra* Section IV.b.

594 *See supra* Section III.a.

minimum into "entirely separate" parts of a single institution.[595] The European Prison Rules similarly recognize a "need to detain . . . male prisoners separately from females."[596] In addition, the 1999 UK Prison Rules state that "[w]omen prisoners shall normally be kept separate from male prisoners."[597] However, as the 2019 inspection report explains, there are distinct benefits to co-location that the international frameworks overlook in their endorsement of gender-segregated prisons.[598]

At Hydebank, initially men and women were kept as separate as feasible, and the housing units remain segregated.[599] By the time of my visit, however, there were many opportunities for women and men to interact formally and informally.[600] The daily schedule of purposeful activity is structured so that women and men alternate mornings and afternoons in education and workshops for vocational training. But some activities are designed for women and men to participate in together; some jobs, such as tuck shop, necessarily result in interactions between women and men; and women and men regularly interact during breaks or other unsupervised periods in their days.[601]

The 2019 report evinces some progress towards a shift in culture by embracing co-location and recognizing its benefits.[602] Hydebank leadership, prison and healthcare, is committed to co-location as a strategy for improving residents' experience.[603] These individuals expressed to me the lack of utility in forcing residents into the alien, artificial environment of a gender-segregated existence, consistent with the human rights-centric model focused on reintegration.[604] If prison is oriented towards a return to society, then maintaining categories enforced only in prison makes little sense. It is this thinking that appears to drive the reform-minded program of Hydebank Wood's leadership, striving for prison to approximate the conditions of life outside prison—which is not gender-segregated—to help residents cope with those conditions and prepare for the transition back into society. Hydebank's current leadership has embraced this approach; the challenge now is to bring both lower-level staff and national officials on board.[605]

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595 Mandela Rules, *supra* note 299, at 5 (Rule 11(a)).

596 European Prison Rules (2020), *supra* note 299, at 10 (Rule 18.8).

597 UK Prison Rules, *supra* note 349, at Rule 12(1).

598 2019 Report, *supra* note 575, at 3.

599 2004 Report, *supra* note 509, at 6.

600 *See supra* note 591.

601 *Id.*

602 2019 Report, *supra* note 575, at 3.

603 *See supra* note 591.

604 Mandela Rules, *supra* note 299, at 3 (Rule 4(1)).

605 *See supra* note 591.

Co-location remains controversial among line staff and external observers alike.[606] Without exception, the lower-level prison and medical staff with whom I spoke expressed concerns. These doubts tended to come in two forms. First, staff were worried about conflicts and disciplinary issues that could arise from interactions between women and men, including men bullying women and older women manipulating younger men—a particular consequence of the facility being a young offenders centre.[607] There was also pervasive speculation that sexual relationships, including pregnancies, would result. This critique is based on a rigid gender binary, which, among other limitations, fails to engage with the possibility of same-sex sex. A second criticisms focused on women's access to Hydebank's lenient regime. These critics felt young men were proper recipients of the liberal regime, given their potential for rehabilitation, but that women were less deserving. The women had been sentenced to prison, the argument went, and should not have been permitted to fulfill their punishments under this lax program.

Both of these critiques speak to an impulse that prison should be different from free society and include some element of suffering beyond imprisonment itself. Separating women from men is seen not only as a harm-reduction strategy to prevent disciplinary offenses, but also a punishment in itself. These strains run counter to the strong human rights and normalization principles grounding the international frameworks, to which the higher-level managers seem committed. The frameworks operate take deprivation of liberty as the extent of punishment, and life within prison merely an incident of that punishment—not a site through which to exact additional discomfort. Indeed, the Mandela Rules state that "the prison system shall not, except as incidental to justifiable separation or the maintenance of discipline, aggravate the suffering inherent in such a situation" and "[t]he prison regime should seek to ,minimize any differences between prison life and life at liberty that tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings."[608] It is counterintuitive, then, that the frameworks unequivocally support gender segregation of facilities, as a mixed-gender environment is intrinsic to the concept of life at liberty that the human rights model has as its core.

In addition to normalization, co-location serves the principles of substantive equality found across European law.[609] A specialized environment like Hydebank Wood affirmatively provides women with the programming, support, and skills development they may need to aid their

606 *Id.*

607 *Id.*

608 Mandela Rules, *supra* note 299, at 3 (Rules 3, 5(1)).

609 *See supra* Section III.b.

resettlement in the community.[610] Locating women not just at any facility, but at a specialized facility for young men—both protecting their vulnerability and providing for their rehabilitation—gives women access to a regime from which not all men can benefit. The placement allows women access to programs and services that can respond to social inequalities which may put women in disadvantaged positions upon their return to the community.[611] The prison at once relies on gender to place women in an enhanced program, and removes gender from the equation by providing women with the same regime as the young men. This co-location thus operationalizes principles of substantive equality. Indeed, the worries expressed by staff regarding women's access to a specialized regime may have been features rather than bugs of the project of co-location.

ii. Programming

Beyond the normative underpinnings, women at Hydebank receive tangible benefits from their co-location at a prison for young men.[612] One of the most readily apparent benefits of co-location is in the availability of programming, which the 2016 report discusses extensively.[613] As the U.S. cases illustrate, women's prisons in general tend to have fewer programming opportunities—in number and variety—than men's prisons.[614] Because universally there are fewer women than men in prison, and consequently fewer women's facilities, there is less demand for programs and fewer numbers to fill the programs that do exist.[615] Thus, granting access for women to the programs at any men's facility should expand opportunities for women.

When women and men occupy the same facility, they have access to the same programs, avoiding many of the issues raised in the *Klinger* line of cases.[616] Seen through the U.S. framework, when women and men live together they are necessarily similarly situated, and their participation in the same programs seems a given. In Northern Ireland women are located at only one facility, in much smaller numbers than men even there.[617] Under the logic of many U.S. judges, NIPS would be justified in offering them fewer

610 2019 Report, *supra* note 575, at 51–57.

611 *Id.*

612 *See supra* note 591.

613 2016 Report, *supra* note 558, at 45–49.

614 *See supra* Section II.a.

615 *Id.*

616 *Id.*; Klinger v. Nebraska Dep't of Corr. Serv. (*Klinger III*), 887 F. Supp. 1281 (D. Neb. 1995), *aff'd sub nom.*, Klinger v. Dep't of Corr., 107 F.3d 609 (8th Cir. 1997); Keevan v. Smith, 100 F.3d 644 (8th Cir. 1996); Women Prisoners of the D.C. Dep't of Corr. v. D.C., 93 F.3d 910 (D.C. Cir. 1996); Pargo v. Elliott, 894 F. Supp. 1243 (S.D. Iowa 1995), *aff'd,* Pargo v. Elliott, 69 F.3d 280 (8th Cir. 1995).

617 *See supra* note 591.

programs than are available to men.[618] But co-location raises the number of program users at the facility, allowing for more opportunities for women. And the fact that co-location occurs at a secure college, rather than an ordinary prison, translates to even greater programming opportunities. In this way, co-location furthers the command of the European Prison Rules that "there shall be no discrimination on the basis of gender in the type of work provided."[619] Compensation levels are also the same for women and men and, unlike in U.S. prisons, all residents receive regular payments, reducing dependency on work or payments from family.[620]

Purposeful activity at Hydebank is run out of a central, modern building, shared by women and men. Courses are geared toward preparing residents for life outside of prison.[621] Residents are assessed and given individualized Personal Development Plans organized around specific goals, with an eye towards resettlement.[622] The administration aims for all residents to have completed the essentials of English, math, and computer literacy as preparation for employment.[623] Essential skills classes are mixed-gender, with women and men attending together, in order to maximize available resources.[624] At the time of my visit, the administration was working to provide accreditation for prison programs, and recruit more staff qualified to teach. As to work opportunities, staff were enthusiastic about the onsite coffee bar, where women and men could train as baristas and learn social enterprise skills. In addition, women nearing the end of longer sentences can work outside of Hydebank in the community.[625] These women live at Murray House, a six-bedroom building—half full at my visit—managed by the Prisoner Development Unit (PDU), the department focused on resettlement.[626] At the time of my visit, the prison had reached over 90 percent participation in programs, with a goal of 100 percent.

The women at Hydebank reap the benefits of Hydebank's reorientation to a secure college, with access to the classes and workshops available to young men.[627] By virtue of accessing the same opportunities as men, women avoid being funneled into gendered activities, such as sewing or domestic trades, as they have been in other places and times.[628] I was told that staff

618 *See supra* Section II.a.

619 European Prison Rules (2020), *supra* note 299, at 8 (Rule 26.4).

620 *See supra* note 591.

621 *Id.*

622 2019 Report, *supra* note 575, at 17.

623 *Id.* at 48–49; *see supra* note 591.

624 *Id.*

625 2019 Report, *supra* note 575, at 7, 54, 56, 70.

626 *Id.* at 70.

627 *See supra* note 591.

628 *Id.*

ask women what they want to learn, and enroll them in programs accordingly. For the most part workshops, whether bicycle repair, gardening, or tee shirt design, were open to women and men equally. Still, only women worked in the hair salon, and only one woman had completed the joiners program. I was told women preferred the gardening and kitchen programs, but these preferences may have had more to do with the program staff than the programs themselves. Further, some workshops were ineffectual for women and men alike, with residents sitting around rather than engaging in work. These caveats aside, by improving the quality of life in prison generally, Hydebank ensures women and men benefit equally. With access to the same programs by virtue of co-location, women are not forced to press the types of equal protection challenges seen in the U.S. cases; because they are similarly situated at Hydebank, women and men can benefit from similar opportunities.

Programming is also shaped by the relatively short sentences imposed in Northern Ireland for both women and men.[629] Just over half of the nearly one thousand sentenced prisoners in 2019 were serving four years or less; among sentenced women, the rate was 65 percent.[630] Though Northern Ireland does impose life sentences, even this drastic measure is a term of years, rather than the duration of natural life as in the United States.[631] Given these sentencing patterns, programming at Hydebank is substantially oriented towards resettlement.[632] Much of this programming is housed in the PDU, where incarcerated individuals work with psychologists, addiction and housing specialists, and voluntary sector agencies to prepare for life outside of Hydebank.[633] Drug and alcohol counseling for women and men in the PDU is provided by the organization Start 360 through its AD:EPT program.[634] Some residents are referred to medication-assisted treatment.[635] For the high proportion of residents on remand, the focus is on return to the community: drug counseling is largely geared toward harm reduction and referral to community services.[636] Men and women are offered the same addiction treatment programs.[637] I was told that the young men were more eager participants than women, who tended to be older, and to bring with them histories of trauma often including children taken by the state.

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629 *See supra* note 591.

630 *Id.* at 18.

631 A few men are sentenced to "indeterminate sentences" without end dates, amounting to natural-life life sentences. *See supra* note 591.

632 *Id.*

633 *See* 2019 Report, *supra* note 575, at 51–57.

634 *See supra* note 591.

635 *Id.*

636 *Id.*

637 *Id.*

Though my focus was on residential custody, I also spoke with a member of Northern Ireland's probation agency. Unlike the non-gendered approach at Hydebank, probation has adopted an explicitly gendered approach.[638] The program for women, the Inspire Project, is a gender informed operation lauded as a model in its own right.[639] Staffed entirely by women, it embraces a holistic approach to community support.[640] The transition to probation begins in custody through engagement with local organizations so that services can continue upon release.[641] Significantly, there is also a growing gender-informed probation program for men.[642] The Aspire program, as it is called, does not have an all-male staff due to gender imbalance within the social work profession, but it incorporates mentorship and pro-social programs for men.[643] Thus, even in a model explicitly arranged around gender, both women and men are seen as appropriate beneficiaries.

iii. Security, Normalization, and Dignity

Multiple policies at Hydebank, and other prisons in Northern Ireland to a lesser extent, contribute to an environment that deemphasizes security concerns.[644] Grounded in the concept of "normalization" found in the European Prison Rules,[645] the culture is built on trust, which in turn supports women's dignitary interests. On the most basic level, weapons are virtually absent—or at least invisible—across NIPS.[646] Consistent with the European Prison Rules, in my visits to all three prisons, I never saw a weapon or restraint of any kind.[647] By preventing security implements from entering the prison environment, NIPS prisons set a baseline of trust and normalization.[648] Security can fade to the background, as much as is possible in the confines of a prison.

The orientation toward security was described to me with the phrase "glass walls": residents are given substantial autonomy to control their time, but are observed in the process. They can conduct themselves as they choose,

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638 *Inspire Approach*, PROBATION BD. FOR N. IR., https://www.pbni.org.uk/what-we-do/information-for-people-under-supervision/inspire-project/ (last visited Feb. 10. 2022).

639 *Id.*

640 *Id.*

641 *See* 2019 Report, *supra* note 575, at 51–53.

642 *Aspire Working in Partnership*, PROBATION BD. FOR N. IR., https://www.pbni.org.uk/aspire-working-in-partnership/ (last visited Feb. 10, 2022).

643 *Id.*

644 *See supra* note 591.

645 European Prison Rules (2020), *supra* note 299, at 2 (Rule 5).

646 This is consistent with the Mandela Rules. *See* Mandela Rules, *supra* note 299, at Rule 82(3).

647 European Prison Rules (2020), *supra* note 299, at 19 (Rule 69.2).

648 *See supra* note 591.

up until they hit the so-called wall. In general, there is a great deal of trust in residents.[649] For example, women and men are allowed to attend outside hospital visits unrestrained and entirely unsupervised; staff only escort them to the hospital and pick them up when they are finished.[650] This is a far cry from the U.S., where, in cases like *Mendiola-Martinez*, jurisdictions struggle even to enforce bans on restraints on pregnant women in transit.[651]

This orientation is reinforced by another feature of the system, highlighted in the 2019 report: prison staff do not wear uniforms.[652] Across NIPS, residents wear their own clothes unless they cannot afford them or are recent arrivals waiting for their possessions.[653] The European Prison Rules and UK Prison Rules both provide that unsentenced prisoners wear their own clothes, but the same is not specified for sentenced prisoners.[654] At Hydebank, all residents and even staff wear their own clothes.[655] Residents are able to retain some control over their lives, individual identities, and dignity in this way. In a system in which so much autonomy has been removed, control over one's outward appearance can take on a high salience.[656] At Hydebank, the absence of uniforms is one way of removing distance between staff and residents, and restoring some sense of dignity.

Other aspects of the security regime also reinforce personal dignity through autonomy. Women at the lowest security level, living on the so-called privilege or enhanced landings, are not constantly supervised.[657] They keep the keys to their cells, single or double, and do their own laundry. A major advantage on this tier is the opportunity for women to do their own cooking in a fully-functional kitchen.[658] The administration allocates the funding for each woman's meals for them to order ingredients, which they use as they please.[659] Women teach each other through communal cooking, and bring in parts of their individual identities.[660] Even at higher security levels, where cooking happens away from the landings, women receive

[649] *Id.*

[650] *Id.*

[651] *See* Mendiola-Martinez v. Arpaio, 836 F.3d 1239 (9th Cir. 2016); *supra* Section II.b..

[652] 2019 Report, *supra* note 575, at 4, 25, 32.

[653] *Id.* at 32.

[654] European Rules (2020), *supra* note 299, at 6 (Rule 20.1), 24 (Rule 97.1); UK Prison Rules, *supra* note 299 at Rule 23.1.

[655] 2019 Report, *supra* note 575, at 4, 25, 32.

[656] *See, e.g.*, Erving Goffman, *On the Characteristics of Total Institutions*, *in* ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES 125, 146-47 (1961).

[657] 2019 Report, *supra* note 575, at 15, 22, 43.

[658] *Id.*

[659] *Id.*

[660] *See supra* note 591.

bread, butter, jam, and milk to keep for themselves.[661] In addition to the landings, the prison's garden and gym are open late for residents to access.[662] By giving residents control over these aspects of their lives, Hydebank's regime embraces principles of normalization and dignity drawn from the human rights frameworks.

iv. Mothers, Children, and Family Ties

Some features of prison life are more difficult to disentangle from gender than others; policies regarding babies born to incarcerated women are one such area. NIPS allows mothers to keep newborn babies with them in prison,[663] avoiding potentially traumatic situations like that of Mendiola-Martinez, who was separated from her son shortly after birth.[664] Before allowing a baby in the prison, prison and healthcare staff conduct a comprehensive risk assessment of everyone on the landing to ensure the child's safety; collaborate with a social work arm of the government to develop a child protection plan; and ensure a proper weighing of the child's best interests.[665] Because of the availability of programs and support services, in some cases it may be safer to keep a baby in the prison than in the community. Certain programs are targeted specifically at mothers, such as a library program to tape readings for children and a psychology course dealing with violence and trauma.[666] These programs are still in their infancy, however, and staff expressed a desire for more programs dealing with trauma, specifically related to removal of children by the state. Many pilots were started and never renewed due to lack of funding.[667]

While in some respects parenthood is seen through a gendered lens in NIPS, family visits are not categorized in this way.[668] Given Northern Ireland's small size, and the relatively short distance between Hydebank and even the farthest point in the country, distance from home is less of a concern

661 *Id.*

662 *Id.*

663 *Id.*; 2019 Report, *supra* note 575, at 35. I also visited the Dochas Centre of the Irish Prison Service, the women's prison in Dublin, which has a small mother and baby section. I am grateful to Enda Kelly for his insights on the program.

664 Mendiola-Martinez v. Arpaio, 836 F.3d 1239 (9th Cir. 2016). A few U.S. jurisdictions also have prison nurseries. A 2018 survey found eight programs, the oldest at New York's Bedford Hills Correctional Facility, operating since 1901. Elizabeth Chuck, *Prison nurseries give incarcerated mothers a chance to raise their babies — behind bars*, NBC NEWS (Aug. 17, 2018), https://www.nbcnews.com/news/us-news/prison-nurseries-give-incarcerated-mothers-chance-raise-their-babies-behind-n894171.

665 *See supra* note 591.

666 *Id.*

667 *Id.*

668 *Id.*

than in the U.S. or even elsewhere in the UK.[669] Visitation policies are set by NIPS for all three of its facilities, and frequency of visits is determined by the resident's privilege level.[670] Family Support Officers at each prison assist visitors and facilitate a scheme of Child Centered Visits to "create special opportunities for parents to maintain family links and to bond with their children."[671] In some circumstances, NIPS contributes funds towards travel expenses for low-income visitors of a close relative or partner,[672] and the Northern Ireland Association for the Care and Resettlement of Offenders (NIACRO), a community organization, provides transportation to each prison. At Hydebank, visiting rules and hours are the same for the women and young men.[673] Extra visits can function as a reward for completing various parts of the program.[674] More fundamentally, though, family ties are seen as vital to resettlement and preventing recidivism.[675] Sentence Managers in the PDU assist in setting up visits whenever possible, and bring families to the prison when personal problems present a special need.[676] A special family vising room for children facilitates this process.[677] No aspect of visiting is gendered; indeed, Maghaberry has a skype program for fathers to maintain connections with their children.[678]

v. Staffing and Gender

The international frameworks take a variety of approaches to gender in staffing. The Mandela Rules represent the most extreme position, requiring a woman staff member to be in a "responsible" position for women's units, providing that women be "attended and supervised only by women staff members" and prohibiting men from entering portions of prisons assigned to women outside the presence of a woman staff member.[679] The European Prison Rules simply provide that "[m]en and women shall be represented in

669 *Id.*; *see* Pitts v. Thornburgh, 866 F.2d 1450, 1452 (1989).

670 *Id.*; *Help & Advice for Those Visiting Prison in Northern Ireland*, N. IR. PRISON SERVICE, https://www.justice-ni.gov.uk/sites/default/files/publications/justice/help-advice-for-visiting-a-prison.pdf.

671 *Id.* at 2, 6.

672 *Prison Visits Scheme- Contribution Towards Travel Costs*, N. IR. PRISON SERVICE, https://www.justice-ni.gov.uk/sites/default/files/publications/justice/nips-prison-visits-scheme-overview.pdf.

673 *Visiting Hydebank Wood College and Women's Prison,* DEP'T OF JUST., https://www.justice-ni.gov.uk/articles/visiting-hydebank-wood-college-and-womens-prison.

674 *See supra* note 591.

675 *Id.*; 2019 Report, *supra* note 575, at 17, 53, 55.

676 *See supra* note 591.

677 *Id.*

678 *Id.*

679 Mandela Rules, *supra* note 299, at Rule 81.

a balanced manner on the prison staff."[680] The Bangkok Rules and the European Prison Rules both call for specific training for staff who work with women.[681] All of the frameworks provide that searches of women's person be performed only by women staff.[682] And all embrace a principle of nondiscrimination, on the basis of gender as well as other protected characteristics, in hiring of staff.[683]

NIPS has not explicitly endorsed any of these approaches, though it is more in line with the European Rules; it does not use the sort of BFOQs that some U.S. prisons have embraced. The NIPS rules provide that "[p]risoners may be supervised by officers of either sex" with the qualification that "[i]n circumstances in which privacy would be expected a prisoner will be supervised by an officer of the same sex."[684] Women and men are currently employed in all three of the prisons, although women only began working in Maghaberry in recent years.[685] Anecdotally, they have had a positive effect in reducing violence in that facility.

NIPS hires staff through the Northern Ireland Civil Service.[686] Staff for all three prisons are hired together—there is no separate process for hiring officers to work with women. All CPOs undergo eight weeks training at the Prison Service College,[687] with additional trainings as necessary. As of my visit, there was no specific hiring for positions with women, nor particular requirements for those positions.[688] However, staff assigned to Ash House receive gender-specific training, and some tend to stay at Ash House because of a particular skill working with the women there.[689] Further, NIPS is beginning to implement trauma-informed care training systemwide,

[680] European Prison Rules (2020), *supra* note 299, at 22 (Rule 85).

[681] European Prison Rules (2020), *supra* note 299, at 21 (Rules 81.3-81.4); Bangkok Rules, *supra* note 299.

[682] Mandela Rules, *supra* note 299, at Rule 52(1); Bangkok Rules, *supra* note 176, at Rule 19; European Prison Rules (2020), *supra* note 186, at 16 (Rule 54.5); UK Prison Rules, *supra* note 208, at Rule 41(3).

[683] Bangkok Rules, *supra* note 299, at Rule 30; European Prison Rules (2020), *supra* note 299, at 21 (Rule 82).

[684] Department of Justice, Northern Ireland Prison Service: Prison Rules 21 (Rule 31) (Feb. 1, 2010), https://www.justice-ni.gov.uk/sites/default/files/publications/doj/prison-young-offender-centre-rules-feb-2010.pdf

[685] *See supra* note 591.

[686] *Id.*; *Current Job Vacancies,* NICS RECRUITMENT, https://irecruit-ext.hrconnect.nigov.net/jobs/vacancies.aspx.

[687] *See supra* note 591; *Prison Estate,* DEP'T OF JUST., https://www.justice-ni.gov.uk/topics/prisons/prison-estate (college is located at Hydebank).

[688] *See supra* note 591.

[689] *Id.*

integrating the approach across prisons rather than confining it to gendered applications.[690]

It is also worth noting the politicized context of the prison officer role in Northern Ireland. As discussed above, during the Troubles prisons were sites of political mobilization, and staff became targets of violence as a result.[691] Though the political situation in the country has changed, and there is little remarkable political activity within the prisons, the legacy of violence continues to shape NIPS.[692] Multiple staff members spoke to me about their fear of violence from dissidents even decades after the Troubles. The NIPS website still hosts a roll of honor for prison service members killed.[693] The most recent entry is officer Adrian Ismay, who was murdered in 2016.[694] The 2016 inspection report spoke to this dynamic, noting that it "should be read in the context of continuing challenges in Northern Ireland where dissident groups constitute a real and present threat to the staff who work in [NIPS] including Hydebank Wood and Ash House."[695]

Hydebank is in a transitional phase in its approach to staffing, working to involve officers in the rehabilitation process.[696] This transition is ongoing; staffing is one area with the most room left for change.[697] The recent progress at Hydebank has largely been from the top down, with upper-level staff leading reforms that line staff do not always embrace—as can be seen in attitudes towards co-location.[698] At the time of my visit, there was no particular recruitment strategy focused on promoting institutional culture in line with new goals, and the eight weeks of training may be insufficient to instill the desired norms in new hires. The staff members who do embody the preferred attitude are quickly promoted to higher ranks, leaving line staff who may not completely accept the new program.[699] I heard troubling, though unconfirmed, stories of abusive language used by line staff, indicating that there is still a ways to go in implementing reforms. Indeed, NIPS is beginning to look at backgrounds in social work and other relevant fields in its hiring process.[700]

People repeatedly spoke of the importance of relationships to reform—between higher-level and lower-level staff and between staff and residents.

690 *Id.*

691 *See* Nobody's Pretending, *supra* note 472, at 104–05.

692 *See supra* note 591.

693 *Roll of Honour*, DEP'T OF JUST., https://www.justice-ni.gov.uk/articles/roll-honour.

694 *Id.*

695 2016 Report, *supra* note 558 at 5.

696 *See supra* note 591.

697 *Id.*

698 *Id.*

699 *Id.*

700 *Id.*

Officials seemed eager for input from residents; I was told of a desire for staff position dedicated solely to engagement with residents, to better respond to their needs and suggestions. At present, residents complete a survey regarding their experiences upon leaving Hydebank, the results of which are displayed prominently on screens at the prison's entrance,[701] in addition to surveys conducted as part of external monitoring. In other small ways, the leadership seems receptive to residents' concerns. For example, an official told me leadership had tried to introduce "student" as the preferred term to refer to those incarcerated, but after pushback from an older woman, the administration settled on "resident."

During my visit, I sat in on a mixed-gender choir practice organized by the occupational therapy staff that illustrated crystalized the benefits of the Hydebank program. The choir, Voice of Release, is a collaboration between healthcare and a community organization.[702] Women and men join with healthcare and prison staff every week to sing in the prison's chapel, and perform for family, friends, staff, and on occasion in the community.[703] When I visited, the atmosphere was informal and supportive, the outside instructor joking with the singers and catering to their song preferences; it could have been a choir in any community. There was not a restraint in sight, and apart from the fact that the incarcerated participants were largely younger than the staff, there was nothing to distinguish between them. As a one-time observer I surely missed many of the dynamics that the regular participants felt. Still, it was a strong example of normalization of the prison setting, with residents—women and men—and staff coming together as equals.

V. CONCLUSION

This survey of litigation and regulation raises more questions than answers with regard to conditions of women's prisons. Northern Ireland's approach to reform is one model that has gained significant support from domestic leadership and independent observers, but its applicability beyond that context is unclear. While concerns remain with any prison, it does seem that an environment steeped in external oversight can be a fruitful target for reform. If reform of women's prisons takes hold, Northern Ireland presents a few lessons. Above all, prison administrators and policymakers need not dismiss co-location for some subset of incarcerated individuals. When paired with certain men, women can benefit from approaches to reform that operate independent of gender. Indeed, when women are placed in an environment

[701] *Id.* The results of these surveys were not made available to me upon request.

[702] *A 'Voice of Release' for students at Hydebank,* DEP;T OF JUST., *https://www.justice-ni.gov.uk/news/voice-release-students-hydebank* (organization is The Right Key).

[703] *Id.*

like Hydebank designed to promote purposeful activity, co-location begins to resemble affirmative grants of opportunities that underlie the substantive equality model of European law. While gender-responsive approaches that classify and differentiate by gender surely have their place—most obviously dealing with physical differences like pregnancy and childbirth—and may have utility in facilitating rough assessments regarding histories of trauma, they may not be the panacea some assume. The largely non-gendered program of Hydebank Wood shows that progress can come from universal human rights principles grounded in substantive equality and normalization rather than gender-responsivity.

Though the standards are different across the Atlantic, and case law does not impose exacting directions there, many aspects of the Hydebank regime address concerns at the center of U.S. litigation. Most notably, equal protection issues are more easily avoided when women and men have access to the same opportunities by virtue of their shared location. Co-location thus appears to circumvent many of the equal protection issues in U.S. courts. Women's autonomy and dignity are also supported by a range of programming opportunities and an embrace of normalization and trust, and by deemphasizing security concerns. In other areas, however, Hydebank's co-location may be less desirable. Though I was not made aware of any reports of sexual misconduct, staff expressed related concerns arising out of the fact of co-location. Even if Hydebank has avoided these issues, concerns would surely remain were the model replicated. Finally, many of the challenges remaining at Hydebank can be traced to a need for improved recruitment and training of staff in accord with the approach championed by management.

Even with these reservations, the inspection reports make clear the remarkable transformation the prison has undergone. While this experience may not be perfectly replicable in other contexts, Hydebank illustrates the positive role of inspections, resting on international human rights norms of substantive equality and normalization, in catalyzing reform. And it suggests that deemphasizing gender in reforms may be beneficial for women in prison, at least in some of the areas in which U.S. courts and prisons have taken gender into account.