Separate but Unequal - When Overcrowed: Sex Discrimination in Jail Early Release Policies

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SEPARATE BUT UNEQUAL — WHEN OVERCROWDED: SEX DISCRIMINATION IN JAIL EARLY RELEASE POLICIES

LARA HOFFMAN*

ABSTRACT

It is currently constitutional to house male and female prisoners in separate jail facilities based solely on gender. But is it also constitutional to provide separate early release policies to male and female prisoners convicted of the same crime, in the same county, and sentenced to the same length of time based solely on gender and separate housing arrangements? For decades, jail officials in many counties have released some prisoners before the end of their judicially mandated sentences to relieve overcrowding and meet budget constraints. A small study of jails around the country conducted as research for this Article reflects the differences these early release policies can have between genders. The United States Supreme Court has never directly addressed the issue of differing early release policies based on gender, and lower federal courts have only addressed the constitutionality of unequal programs and services for male and female inmates. Some of these courts analyzed prisoners’ equal protection claims under heightened or intermediate scrutiny, while others have given wide discretion to prison administrators concerning varying needs of individual prisons and applied only rational basis review. This Article argues that all gender-based equal protection claims made by prisoners should be analyzed using intermediate scrutiny, rather than the more deferential rational basis test, and that male and female prisoners subject to early release policies should be deemed similarly situated in an equal protection analysis. Specifically, it suggests that separate gender-based early release policies are not gender-neutral, even when they appear facially neutral, because of the causal relationship between these policies and the segregation of men and women into separate prison facilities. Accordingly, the Article finds such policies unconstitutional under the intermediate scrutiny standard.

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scrutiny standard. Finally, this Article concludes with suggestions for altering these problematic early release policies in ways that are both gender-neutral and cost effective.

INTRODUCTION

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Suppose Jane and John are both convicted of child abuse in Los Angeles, California and are both sentenced on the same day to one year in the county jail. Jane is housed in the women's unit and John in the men's unit. According to current policies, Jane will remain in jail for the entire year, while John will serve only six months of his sentence. Jane will serve double the amount of time that John will solely on account of her gender.

1. Telephone Interview with Source 1, in L.A., Cal. (Feb. 12, 2007) (notes on file with author); Telephone Interview by Union Rescue Mission with Source 2, in L.A., Cal. (Feb. 27, 2007) (notes on file with author) (discussing Los Angeles County policy as of February 5, 2007 that requires male inmates to serve fifty percent of their time for child abuse, while women serve one hundred percent). Note that throughout the Article, interview sources' names have been converted to numbers for anonymity.
What if, instead, they are both convicted of assault and sentenced on the same day to one year in jail? In this case, Jane will be released in just over a month, while John will remain in jail for six months—again solely due to gender. If they are convicted in Detroit, Michigan, on the other hand, it is very likely that John will serve a much shorter percentage of his sentence than Jane because the county jail is so overcrowded with male inmates. But if they are convicted in Calaveras County, California, Jane will most likely not serve any of her sentence because the jail has very few beds for women, while John will remain incarcerated for a much longer portion of his sentence. As these examples illustrate, men and women frequently serve different portions of their sentences solely because of their gender. Is this sex discrimination that violates the Equal Protection Clause?

For decades, jail officials around the country have released some inmates before their sentences ended in order to relieve overcrowding and satisfy budget constraints. But because men and women are typically held in separate quarters, jail officials have employed early release policies that differ by gender—even when the inmates have been convicted of the same crimes. These policies can fluctuate day by day, depending on the number of arrests made and the amount of correctional space available for each sex.

2. Telephone Interview with Source 1, supra note 1. In February 2007, the Los Angeles Sheriff’s Department ordered that all male inmates, no matter what their crime, be released after serving fifty percent of their sentences, except for those men with gang injunctions, who must serve one hundred percent of their time. Telephone Interview with Source 2, supra note 1; see also Stuart Pfeifer, Terms Differ in Jail Releases, L.A. TIMES, May 29, 2006, at A1 (discussing the L.A. County Sheriff’s policy of having gang members serve full sentences for any crime, when others are released early due to overcrowding). On the other hand, the early release of women, who are housed in a separate facility, is regulated by a separate, sliding scale system where offenders are released early depending on the crime committed and how crowded the jail is. Pfeifer, supra; Telephone Interview with Source 1, supra note 1. The Sheriff’s Department implemented these separate policies because of differences in overcrowding in the men’s and women’s facilities. Telephone Interview with Source 2, supra note 1.


4. Telephone Interview with Source 4, in Calaveras County, Cal. (Feb. 9, 2007) (notes on file with author).


6. See, e.g., Pfeifer, supra note 2 (discussing longstanding jail overcrowding issues in Los Angeles County, California); Telephone Interview with Source 3, supra note 3 (stating that the Wayne County jails are “systemically overcrowded” and that they have been under a court order to early release prisoners since 1991).

7. See, e.g., Pfeifer, supra note 2; Telephone Interview with Source 1, supra note 1; Telephone Interview with Source 2, supra note 1.

8. Telephone Interview with Source 4, supra note 4; Telephone Interview with Source 5, in Larimer County, Colo. (Jan. 29, 2007) (notes on file with author); Telephone
It is constitutional to segregate correctional facilities by sex,\(^9\) even though it is clearly a gender-based classification, as it serves important and legitimate government interests, including improved discipline within penal facilities and increased safety for female inmates.\(^{10}\) But that does not mean it is constitutional to release male and female inmates on different schedules depending on overcrowding in each sex-segregated section.\(^{11}\) The United States Supreme Court has not directly addressed this problem, and lower federal court decisions have only touched on it.\(^{12}\) Lower federal court cases focusing on the constitutionality of unequal prison programming offerings\(^3\) by gender have often determined that male and female inmates were not “similarly situated,” due to differences such as size of male and female prison populations and security levels within the prisons.\(^4\) When these cases did evaluate such differences, they generally found that the classifications were gender neutral, because they were made by prison administrators using their discretion to meet the varying needs of their prison populations, rather than explicitly by gender.\(^{15}\) Under the rational basis test, courts have found these programming differences to be constitutional.\(^{15}\) Furthermore, courts have been reticent to closely scrutinize the decisions of prison administrators since the Supreme Court counseled against it in \textit{Turner v. Safley}.\(^{17}\)


\(^10\) See Women Prisoners, 93 F.3d at 920, 929, 932 (discussing the district court's conclusions that the prison had violated a D.C. law which required that prison administrators be responsible for the discipline and safekeeping of all prisoners and that the administration's response to the problem of sexual harassment of women prisoners by guards was inadequate); Volokh, \textit{supra} note 5.

\(^11\) Pfeifer, \textit{supra} note 2; Volokh, \textit{supra} note 5.

\(^12\) See Volokh, \textit{supra} note 5 (citing the circuit court case, \textit{Jackson v. Thornburgh}, 907 F.2d 194 (D.C. Cir. 1990), as the only case Professor Volokh found related to the constitutionality of different release schedules for male and female inmates).

\(^13\) For example, in some prison systems male and female inmates have different access to employment, educational programs, and recreational facilities. \textit{See}, e.g., Keevan v. Smith, 100 F.3d 644, 645, 647 (8th Cir. 1996) (dismissing an equal protection challenge to prisons offering men a broader range of prison industry jobs and post-secondary educational opportunities).


\(^15\) See, \textit{e.g.}, \textit{Pargo}, 894 F. Supp. at 1258, 1265, 1291.

\(^16\) See, \textit{e.g.}, id. at 1284-65, 1290-91.

\(^17\) \textit{Turner v. Safley}, 482 U.S. 78, 85 (1987); \textit{see}, \textit{e.g.}, Klinger v. Dep't of Corr., 31 F.3d 727, 732-33 (8th Cir. 1994) (finding that “[b]ecause courts have little expertise in the
In one case focusing on sex discrimination in early release policies, *West v. Virginia Department of Corrections*, the Western District of Virginia determined that a male-only prison boot camp program that enabled inmates to be released much earlier than their sentences otherwise allowed was unconstitutional under the Equal Protection Clause. The court reviewed the policy under intermediate scrutiny and found that while the State's justifications of budget shortfalls and greater overcrowding in the men's prisons were important state interests, having a male-only boot camp was not substantially related to those interests. Conversely, in *Jackson v. Thornburgh*, the D.C. Circuit reviewed an early release policy in D.C. jails that excluded some of the city's female offenders because they were housed separately in a West Virginia federal prison, due to overcrowding problems in the city's jails. The court found that because many of the city's male inmates were also housed in federal prisons, and thus did not receive the benefits of the policy while some female inmates did benefit from the policy, it was not a sex-based classification. The court thus reviewed the policy under rational basis review and found it to have sufficient merit to pass the test.

While a number of articles have studied gender differences in prison programming, surprisingly, none address the constitutionality of gender differences in early jail or prison release policies. Part I of this Article will discuss the gender differences found in early release policies in county jails in eight states. Some of these counties employ

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19. Id. at 406-08. More recently, "the Supreme Court has held that 'parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive' justification for that action.'" Cmteys. for Equity v. Mich. High Sch. Athletic Ass'n, 459 F.3d 676, 692-93 (6th Cir. 2006) (quoting United States v. Virginia (VMI), 518 U.S. 515, 531 (1996)).
21. Id. at at 197.
22. Id. at 195, 197-98; see also Pers. Admin. of Mass. v. Feeney, 442 U.S. 256, 272 (1979) ("[I]f a neutral law has a disproportionately adverse effect upon [a protected group], it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.").
24. Counties surveyed by telephone interview included Los Angeles County, Calaveras County, and Santa Barbara County in California; Larimer County (Ft. Collins) in Colorado; Marion County (Indianapolis) in Indiana; Washtenaw County (Ann Arbor) and Wayne County (Detroit) in Michigan; Hamilton County (Cincinnati) in Ohio; Marion County (Salem) and Multnomah County (Portland) in Oregon; Salt Lake County (Salt Lake City) in Utah; and Milwaukee County in Wisconsin.
different policies for inmates of each gender, like Los Angeles for example,\textsuperscript{25} while most counties surveyed have one early release policy, but apply it separately to male and female inmates depending on which section of the jail is overcrowded.\textsuperscript{26} Part II analyzes the constitutionality of jail early release policies that differ by gender. I start by arguing that courts should follow the precedent established in \textit{Johnson v. California} and review gender-based equal protection challenges under heightened scrutiny,\textsuperscript{27} rather than the deferential "reasonably related" standard of \textit{Turner v. Safley}.\textsuperscript{28} The section then provides an equal protection analysis of the two early release policy regimes. I argue that male and female inmates who are convicted of the same crime and sentenced to the same amount of time in the same county jail are similarly situated and should be compared under the equal protection doctrine.

I then address whether early release policies should be viewed as gender neutral, as the preference granted to veterans in hiring decisions was in \textit{Personnel Administrator of Massachusetts v. Feeney}, meaning they must be evaluated under the rational basis review standard, or whether they are gender-based classifications deserving heightened scrutiny.\textsuperscript{29} I argue that these early release policies are, in effect, gender-based classifications because of their perfect causal relationship with the underlying policy of segregating inmates by sex. Although early release policies may appear facially gender neutral, in fact, they are not neutral as applied because they are based on the permissible but sex-based policy of segregating inmates by gender. This differs from the circumstances in \textit{Feeney}, where the policy of obtaining veteran status did not have a perfect causal relationship with gender.\textsuperscript{30} In Part II, I also discuss case law involving the assignment of public school sports seasons, because policies of scheduling male and female sports teams into advantageous and disadvantageous seasons is causally dependent upon the gender-based policy of segregating teams by sex.\textsuperscript{31} Indeed, in these cases, courts have

\begin{itemize}
  \item 25. Telephone Interview with Source 1, supra note 1; Telephone Interview with Source 2, supra note 1 (explaining Los Angeles County policies as of February 5, 2007 that require male and female inmates to serve different amounts of their sentences for the same crimes).
  \item 26. \textit{See, e.g.}, Telephone Interview with Source 7, supra note 8 (explaining these release policies work differently between men's and women's sections and that they release early only if there is overcrowding in that section).
  \item 30. \textit{See id.} at 275-80.
\end{itemize}
found policies of scheduling teams' seasons to be gender based, just as the early release policies in jail should be seen as gender based.

As gender-based policies, the early release policies in some jails should be evaluated under the intermediate scrutiny standard. Under intermediate scrutiny analysis, county jail administrators could assert a number of important state interests, including public safety and overcrowding problems, as well as interests that have not been deemed important in past cases like administrative efficiency and cost effectiveness. I contend, however, that releasing men and women differently by gender should not be found by courts as substantially related to any of the important state interests.

In Part III, I argue that given the likely unconstitutionality of these early release regimes, jail administrators should work to alter them. A two-pronged, cost-effective, yet public safety oriented solution would: (1) release more inmates early depending on their danger to society via an inmate ranking system, and (2) include some jail capacity that is more easily redistributed between the sexes, such as smaller pod units, to account for fluctuations. In order to cut down on overcrowding as well as to promote enhanced prisoner reintegration, counties should also embrace less costly, nonjail sentencing options for nonviolent offenders, such as community-based reintegration programs, work release, and electronic tethering.

I. DIFFERENCES BY GENDER IN EARLY RELEASE POLICIES

Due to the overcrowding of many jails in the United States, jail officials are often forced to release inmates earlier than their sentences warrant. In some cases, county jails must release inmates early due to court orders that the jails must not remain overcrowded, while in others the lack of space absolutely requires it. In any case, it is often appointed administrators in a county sheriff's department,

32. Id. at 692-95.
33. See infra notes 239-41 and accompanying text.
34. See, e.g., Telephone Interview with Source 4, supra note 4. In Calaveras County, California, the County Board of Supervisors sued the Sheriff in 1999 to keep the jail population down, because at that time the jail was so dangerously overcrowded that inmates were sleeping in the hallways. Id. A court order resulting from the lawsuit requires the jail population to be kept at sixty five inmates or less, with a mandated proportion of fifty-six males and nine females. Id.; see also Telephone Interview with Source 8, in Hamilton County, Ohio (Feb. 20, 2007) (notes on file with author) (explaining early release is practiced in order to comply with a court mandated jail population cap); Telephone Interview with Source 9, in Salt Lake County, Utah (Feb. 27, 2007) (notes on file with author) (explaining that the County Commission, rather than a court order, requires the county to keep their jail population down).
35. See, e.g., Telephone Interview with Source 7, supra note 8 (noting "kick lists" are run when inmates are sleeping on the floor).
rather than judges or elected officials, who determine who gets released early.\textsuperscript{36}

In nearly all jails, men and women are held in different jail sections, and thus the rates of overcrowding between men and women often differ.\textsuperscript{37} Regulations in many locales ensure that women and men are kept apart and are not within "sight" or "sound" of each other.\textsuperscript{38} Women are housed apart from the men in separate jail wings or "blocks,"\textsuperscript{39} on different floors,\textsuperscript{40} in separate dormitories,\textsuperscript{41} or in "pods" segregated by gender.\textsuperscript{42}

Rates of overcrowding often fluctuate in the men's and women's jail units due to differences over time in arrests, sentencing, and inmate behavior.\textsuperscript{43} In some jails, the number of cells assigned to each gender does not match up with the regular numbers of inmates of each gender, so one gender's cells may be overcrowded while the other gender's are not.\textsuperscript{44} For example, some older jails were built to house few women based on the limited need for beds at the time of construction, but in more recent years as the number of women held and sentenced to jails has increased, overcrowding of women's beds has increased.\textsuperscript{45} In order to solve this problem, some locales have restructured their jails or repurposed men's cells to house women.\textsuperscript{46} A few

\textsuperscript{36} See, e.g., Telephone Interview with Source 3, supra note 3 (stating a court order specifically delegates early release authority); Telephone Interview with Source 10, in Multnomah County, Or. (Feb. 12, 2007) (notes on file with author) (describing their Emergency Population Release (EPR) matrix which involves discretion in classification at intake).

\textsuperscript{37} See, e.g., Telephone Interview with Source 3, supra note 3 (noting women in this county are less likely to get early release because of less overcrowding than in the men's section); Telephone Interview with Source 5, supra note 8; Telephone Interview with Source 6, supra note 8. This differs from prisons, which mostly consist entirely of either men or women.

\textsuperscript{38} See, e.g., Telephone Interview with Source 5, supra note 8; Telephone Interview with Source 6, supra note 8.

\textsuperscript{39} Telephone Interview with Source 11, in Washtenaw County,Mich. (Feb. 20, 2007) (notes on file with author).

\textsuperscript{40} Telephone Interview with Source 5, supra note 8.

\textsuperscript{41} Telephone Interview with Source 12, in Milwaukee, Wis. (Feb. 13, 2007) (notes on file with author).

\textsuperscript{42} A "pod" jail structure is one in which inmates spend their time in a day room surrounded by a number of jail cells that fan out like the rays around the sun. Telephone Interview with Source 6, supra note 8. A guard can see into every jail cell by standing in the middle of the day room. Telephone Interview with Source 11, supra note 39.

\textsuperscript{43} Telephone Interview with Source 5, supra note 8; Telephone Interview with Source 11, supra note 39.

\textsuperscript{44} Telephone Interview with Source 4, supra note 4; Telephone Interview with Source 6, supra note 8.

\textsuperscript{45} See, e.g., Telephone Interview with Source 8, supra note 34; Telephone Interview with Source 13, in Marion County, Ind. (Feb. 13, 2007) (notes on file with author). For example, in Calaveras County, California the women's beds in the jail are always overcrowded. See Telephone Interview with Source 4, supra note 4.

\textsuperscript{46} E.g., Telephone Interview with Source 6, supra note 8.
jails have smaller housing units that they are able to reassign between genders depending on crowding needs, but many jails have not taken such measures. As men and women are held in separate sections of jails which are frequently overcrowded at different rates, many jails have early release policies that result in the release of men and women with similar sentences at different points in their sentences. This difference between the amount of a sentence served by men and women varies considerably across jurisdictions and could be a matter of days, months, or even years.49

There are two types of early release policies that treat male and female inmates differently — those that are explicitly gender based and those that are facially neutral but cause disparate effects on men and women. Some county jails explicitly vary their early release policies by gender. For example, in Cincinnati, Ohio, the population of the Hamilton County Justice Center, the county’s primary jail, is capped by court order at 1,240 inmates. When the county releases inmates early, on average once a month, it “almost always only release[s] women,” because “the jail [was] not built to house as many women” as are now being sentenced to the jail. When the jail’s inmate numbers surge over 1,240, jail administrators “begin by releasing non-violent female offenders after ninety percent of their time is served.” If that does not sufficiently reduce the numbers, they then release nonviolent female offenders who have served eighty percent of their time. The county continues this downward process to those who have served seventy percent, then sixty percent, and so forth, until the population has been appropriately lowered. When all but the violent female offenders are released, the system shifts

47. Telephone Interview with Source 10, supra note 36 (“[The jail] can reassign units between women’s and men’s jails pretty easily. If a women’s pod is open, they can assign men to it.”); see also Telephone Interview with Source 8, supra note 34 (describing how pods are “[c]onstantly shifting” once emptied by weekly early releases); Telephone Interview with Source 11, supra note 39 (stating the sheriff can reassign cell blocks).

48. In my survey of county jails in eight states, the majority of sheriff’s departments that responded to my contact — and reported overcrowding problems — employed early release policies that treated men and women differently. For a list of responsive counties, see supra note 24.

49. Most of these jails hold inmates up to one year or less. See, e.g., Telephone Interview with Source 7, supra note 8; Telephone Interview with Source 6, supra note 8; Telephone Interview with Source 10, supra note 36. When inmates are sentenced to more than one year, they are typically sent to state prison. But some jails allow inmates to be sentenced for up to two years if they are consecutively sentenced for two separate violations. E.g., Telephone Interview with Source 7, supra note 8.

50. Telephone Interview with Source 8, supra note 34.

51. Id.

52. Id.

53. Id.

54. Id.
Male nonviolent offenders who have served ninety percent of their time are sometimes, but rarely, released under this system, because the jail first moves men into the units formerly occupied by women.\textsuperscript{55}

In the chronically overcrowded Los Angeles County jail system, more than 150,000 inmates have been released early since major sheriff department budget cuts in 2002.\textsuperscript{57} Recently, the sheriff’s department ordered that all male inmates, no matter what their crime, will be released after serving fifty percent of their sentences,\textsuperscript{58} except for those men with gang injunctions, who will serve one hundred percent of their time.\textsuperscript{59} The early release of women, who are housed in a separate facility, is regulated by a separate system of “daily criteria.”\textsuperscript{60} In this system, female offenders are released early on a sliding scale, depending on the seriousness of the crime committed and how crowded the jail is at the time.\textsuperscript{61} Currently, female nonviolent offenders, such as petty thieves and drunk drivers, serve ten percent or less of their jail sentences, while those sentenced for the most serious crimes, such as manslaughter, child molestation, and conspiracy to commit murder, serve one hundred percent of their sentences.\textsuperscript{62}

Counties employing overtly gender-based policies stand in contrast to counties that apply the same early release policy differently to male and female inmates depending on which section of the jail is overcrowded. While nearly every jail that conducts early release has some system of releasing those it deems less dangerous first, each gender is dealt with separately with regard to such policies.\textsuperscript{63} For

\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{58} Telephone Interview with Source 1, supra note 1; Telephone Interview with Source 2, supra note 1. The Los Angeles County sheriff began this new policy on February 5, 2007. Telephone Interview with Source 2, supra note 1.
\textsuperscript{59} Id.
\textsuperscript{60} Telephone Interview with Source 1, supra note 1.
\textsuperscript{61} Id.
\textsuperscript{62} Id.; Telephone Interview with Source 2, supra note 1. In earlier years, the “daily criteria” system was applied to both men and women in the Los Angeles jails, but applied differently due to space constraints and arrest fluctuations between the genders. Id. For example, from 2005 to 2006, women convicted of assault served twenty-five percent of their sentences, while men convicted of assault served only ten percent. Pfeifer, supra note 2. Conversely, in 2004, “women convicted of all but the most serious crimes were released immediately” and spent no time in jail. Id. In the last four years, the sheriff’s department has held those inmates deemed the most chronic, dangerous offenders, like prostitutes from certain areas and gang members, for their entire sentences. Id.
\textsuperscript{63} See, e.g., Telephone Interview with Source 13, supra note 45.
example, in one of the largest jails in Oregon, Marion County Jail administrators have created a capacity management plan, which scores each inmate based on criminal history, current charge, and current and past behavior. In Detroit, Michigan the chronically overcrowded Wayne County jails use a similar classification system to release the least dangerous jail inmates early. Each morning, the Marion County Jail Commander and the Wayne County Chief of Jails receive two scored lists, one for their male inmates and one for female inmates. After determining that their jails are overcrowded (which they typically are), they begin by releasing those with the lowest scores who are deemed the least dangerous according to their lists until their jails are not overcrowded anymore.

On average, about ten inmates a day are released in Marion County and nearly twenty in Wayne County. However, in both counties, they will only release inmates of each gender if their units are overcrowded. In Wayne County, the men's units are generally much more overcrowded than the women's units and so more men are released early, whereas in Marion County the women's units have historically been more crowded and so more women have been released early. In recent years in Marion County, before the county changed a twenty-four-bed pod from the men's unit to the women's unit, female inmates were "constantly being released from the list" due to overcrowding, while men were not released early nearly as frequently.

Similarly, in the much smaller Calaveras County Jail, which houses fifty-six males and nine females, jail administrators devised an early release plan to release the least dangerous inmates first. Each morning a designated jail officer creates one "kick list" for men and another for women, beginning with inmates who have committed nonviolent misdemeanors, and ending with those who have committed

64. Telephone Interview with Source 6, supra note 8.
65. Telephone Interview with Source 3, supra note 3 (stating pursuant to a 1991 court order, Wayne County developed an "objective classification plan . . . based on" the severity of crime, prior criminal history, and thirty additional factors).
66. Telephone Interview with Source 6, supra note 8; see Telephone Interview with Source 3, supra note 3.
67. Telephone Interview with Source 3, supra note 3; Telephone Interview with Source 6, supra note 8.
68. Telephone Interview with Source 6, supra note 8; see Telephone Interview with Source 3, supra note 3.
69. Telephone Interview with Source 6, supra note 8; see Telephone Interview with Source 3, supra note 3.
70. Telephone Interview with Source 3, supra note 3.
71. Telephone Interview with Source 6, supra note 8.
72. Id.
73. Telephone Interview with Source 4, supra note 4.
violent felonies, when necessary.\textsuperscript{74} The jail has significantly fewer beds for women, so it releases early many more women than men who have committed similar offenses.\textsuperscript{75} In fact, on a half dozen occasions in 2006 and 2007, convicted nonviolent female felons did not serve any of their sentence due to the overcrowding in the women's unit of the jail, and some women were released almost two years early.\textsuperscript{76} Men with similar sentences, however, served a much larger percentage of their time.\textsuperscript{77} Similarly, in 2005 and 2006, the jail in Marion County, Indiana regularly released groups of less-dangerous women inmates due to overcrowding in the women's jail without releasing groups of similar men.\textsuperscript{78}

Other jail systems, like the Santa Barbara County Jail, begin by releasing early inmates who are closest to finishing their sentences, although those who have committed certain, dangerous crimes are not eligible.\textsuperscript{79} The Population Control Officer regularly releases inmates up to twenty-one days before their sentences are completed, but conducts the procedure separately for men and women.\textsuperscript{80} If there is no overcrowding in the women's facility, then no women are released even though all men with twenty-one days or less to serve are released.\textsuperscript{81}

Other jail systems release early inmates by crime and by time left in their sentence. In Portland, Oregon, the Multnomah County Jails score each inmate based on factors that help determine their dangerousness to society, and thus release inmates primarily based on how dangerous the crime they committed is thought to be by administrators.\textsuperscript{82} Specifically, inmates are released first based on the dangerousness of the crime they committed, and second according to their time left to serve.\textsuperscript{83} Due to overcrowding, men who commit

\textsuperscript{74} Id. \\
\textsuperscript{75} Id. \\
\textsuperscript{76} Id. \\
\textsuperscript{77} See id. \\
\textsuperscript{78} See Telephone Interview with Source 13, supra note 45. \\
\textsuperscript{79} Telephone Interview with Source 7, supra note 8. A list of 150 crimes that are not eligible for early release, such as spousal battery and certain other felonies, was assembled by a jail task force, comprised of individuals from the jails, the courts, the police, and the ACLU, among others. Id. \\
\textsuperscript{80} Id. \\
\textsuperscript{81} Id. For example, according to Source 7, on February 9, 2007, there was no overcrowding in the women's units in the Santa Barbara County Jail, but there was for the men. Id. Consequently, "he instated twenty-one day kicks" to release all men (except for those who committed any of the 150 ineligible charges) who had twenty-one or fewer days remaining to serve, but did not release any women early that day. Id. \\
\textsuperscript{82} Telephone Interview with Source 10, supra note 36. \\
\textsuperscript{83} Id. The type of crime committed is the most important factor in the county's early release policy. Id. "[F]or example[,] if a wife beater only has a few days left [to serve] and
misdemeanors almost never have to serve any of their jail time. Like systems in other counties, this policy is applied by gender and employed only when a section is overcrowded. The women's unit is much less crowded than the men's, so as a result, women have not been released early for the past two years, while men are regularly released early.

II. ARE UNEQUAL EARLY RELEASE POLICIES UNCONSTITUTIONAL?

In order to determine whether it is constitutional to apply early release policies differently to male and female inmates with similar sentences because of differences in overcrowding, several steps must be taken. First, one must determine whether the courts should apply the deferential standard toward administrators of jails and prisons set forth in Turner v. Safley, or whether instead courts should employ the intermediate scrutiny standard of review that is typical of sex discrimination claims and seems to be required by Johnson v. California.

A. Should the Turner Standard of Deferece be Applied?

While Turner lowered the standard of review for some challenges brought by inmates based on constitutional rights, and lower courts have applied it in their review of some sex discrimination cases under the Equal Protection Clause, the Supreme Court's 2005 ruling in Johnson has likely forbidden such application of Turner. In Turner, the Court held that when evaluating whether a prison regulation violates inmates' constitutional rights, courts must defer to prison officials to make "day-to-day judgments" concerning the operations

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84. See id. Thus, the jail is typically full of felons.
85. See id.
86. Id.
88. See Johnson v. California, 543 U.S. 499, 509-12 (2005) (rejecting the Turner deferential standard when considering an equal protection challenge to racially based classifications in prisons and reiterating the universal application of strict scrutiny for race-based classifications).
89. Turner, 482 U.S. at 78, 89.
91. See Johnson, 543 U.S. at 509-12.
of their institutions. The Court held that judicial micromanaging of prison officials' decisions "distort[s] the decisionmaking process," impedes the ability of officials to "adopt innovative solutions," and "would seriously hamper their ability to anticipate security problems." Turner instead set forth a low standard for evaluating the constitutionality of inmates' claims, holding that a "regulation is valid if it is reasonably related to legitimate penological interests."

In Washington v. Harper, the Supreme Court found that the standard of review set forth in Turner "appl[ied] in all cases in which a prisoner asserts that a prison regulation violates the Constitution." The Court noted that "[t]his is true even when the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review." More recently, however, the Supreme Court held in Johnson that the strict scrutiny standard, rather than Turner's reasonably related standard, applied to an equal protection challenge brought by an inmate on the basis of race. The Court found that "[t]he right not to be discriminated against based on one's race is not susceptible to the logic of Turner." The Court held that "Turner's reasonable-relationship test" should be applied only "to rights that are 'inconsistent with proper incarceration,'" and "[t]he right not to be discriminated against based on one's race" does not "necessarily [need to] be compromised for the sake of proper prison administration."

Following Johnson, courts should similarly find that the right not to be discriminated against based on one's sex in early release policies

92. Turner, 482 U.S. at 89 (citing Jones v. N.C. Prisoners' Union, 433 U.S. 119, 128 (1977)).
93. Id. at 89.
94. Id. Turner set forth several factors for a court to consider when determining the reasonableness of a challenged prison regulation. "First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." Id. at 89 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)). So, the logical connection between the policy and objective cannot be too remote and "the governmental objective must be a legitimate and neutral one." Id. at 89-90. Second, the court must determine "whether there are alternative means of exercising the right that remain open to prison inmates." Id. at 90. Third, the court must consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." Id. Fourth, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation." Id.
96. Id. at 223.
97. Johnson v. California, 543 U.S. 499, 509-10 (2005). Johnson challenged the California Department of Correction's "unwritten policy of racially segregating prisoners in double cells in reception centers for up to 60 days each time they enter[ed] a new correctional facility." Id. at 502.
98. Id. at 510.
99. Id. (quoting Overton v. Bazzetta, 539 U.S. 126, 131 (2003)).
should not be evaluated under the low *Turner* standard. While the *Johnson* Court explicitly addressed only racial classifications in the language of the opinion, courts going forward should analogize the similarities of claims of race- and sex-based discrimination claims under the Fourteenth Amendment’s Equal Protection Clause. Like race-based discrimination, sex-based discrimination claims under the Equal Protection Clause have long been deemed by the Court to require heightened scrutiny, “even for . . . ‘benign’ . . . classifications.” Classifications based on sex, like those based on race, also “raise special fears that they are motivated by an invidious purpose,” and heightened scrutiny is applied in those cases, as it is in racial cases, “to ‘smoke out’ illegitimate” notions of sexism by requiring the state to have an important purpose for using the classification.

In applying the standard from *Johnson* to gender-based discrimination policies, the right to be free from gender discrimination while incarcerated — like the right to be free from race discrimination — does not seem “inconsistent with proper incarceration” and does not necessarily need to be “compromised for the sake of proper prison administration.” Gender-neutral early release policies are possible and, in fact, some counties employ such regulations. Accordingly, there are certainly methods to insure against dangerous criminals getting back out onto the streets other than using a sex-based approach.

Further, the race-based policy in California of selecting prison roommates, at issue in *Johnson*, more typically falls under the historical purview of *Turner*, even though the Court refused to apply

100. See id. at 509-10. But if courts do not see such an analogy to *Johnson*, the procedures of jail administrators of applying early release policies differently to female and male inmates due to different overcrowding concerns likely would be upheld under the very deferential *Turner* standard. Courts likely would find that the policies are reasonably related to the legitimate penological interest of reducing overcrowding, while ensuring the public’s safety because gender equal policies could result in inmates being released early despite available jail beds.

101. See id. at 505-15.

102. See, e.g., Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 489-90 (1981) (Brennan, J., dissenting) (stating intermediate scrutiny is required for gender-based equal protection analysis and that the government bears the burden of proving the “importance of its . . . objective and the substantial relationship between the classification and that objective” and suggesting California’s policy should have failed this constitutional test) (citations omitted).


106. Id. at 510.

107. See, e.g., Telephone Interview with Source 5, supra note 8 (stating all inmates except the most dangerous are released after serving seventy-five percent of their sentences regardless of gender).
that standard, whereas early release policies do not. The selection of roommates is a day-to-day operational concern that deals with the control of inmate behavior within the confines of the institutional environment. Early release policies, on the other hand, are not related to controlling inmates day-to-day within the jail’s confines, but instead deal with much broader policy choices of sentence length and the curtailment of individual liberty. Such policies have not been clearly regulated by Turner.

In fact, in other pre-Johnson sex discrimination cases that focus on disparate early release policies between male and female inmates, as well as the placement of inmates in separate facilities by gender, courts have not applied Turner, but instead employed an equal protection analysis. For example, in Pitts v. Thornburgh, where women sued for being sentenced to a far away federal facility, the D.C. Circuit chose not to apply the Turner standard because the policy was not a day-to-day restriction on “the exercise of prisoners’ individual rights within prisons,” but a “general budgetary and policy choice[] made over decades in the give and take of city politics.” Early release policies are similarly policy choices made due to budget shortages that are also often due to county politics.

The court in West v. Virginia Department of Corrections ruled that the deference to prison administrators in Turner does not apply “when an extremely favorable sentencing alternative is” afforded to one gender, but not the other. Gender-based early jail release policies often shorten the sentences of members of one sex but not the other. The lower courts that have applied Turner to inmate sex discrimination claims were typically dealing with differences in prison

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108. Johnson, 543 U.S. at 510 (holding that when roommate selection is based on race, it is a racial classification and Turner's deferential standard does not apply).
110. See Pitts, 866 F.2d at 1453-54; Schwartz, 518 F. Supp. 2d at 576-77.
111. See, e.g., Pitts, 866 F.2d at 1453-54 (distinguishing Turner's day-to-day regulations from broader policy decisions over long periods of time and subject to system wide budgetary constraints).
112. See id. at 1454.
113. Id. at 1453-54 (holding instead that Turner applies to prison procedures that regulate day-to-day operations, such as “prison security or control of inmate behavior . . . [or] the prison environment and regime”).
114. Id. at 1454.
115. West v. Va. Dep't of Corr., 547 F. Supp. 402, 408 (W.D. Va. 1994) (stating “when an extremely favorable sentencing alternative is provided to one class of inmates and not another, and when that classification is based solely on the inmates’ gender, the line [of deference to prison administrators in their operations of the prison system] is crossed”). Additionally, the D.C. Circuit had previously found that Turner's lower standard of reasonableness does not apply to “general budgetary and policy choices made over decades in the give and take of city politics.” Pitts, 866 F.2d at 1454.
and jail programming.\textsuperscript{116} Thus, the lower standard of review required by \textit{Turner} should not apply to early jail release policies; they should instead be evaluated by courts using an equal protection analysis similar to that used in \textit{Johnson}, \textit{Pitts}, and \textit{West}.

\textbf{B. Are Male and Female Inmates Similarly Situated in Regard to Jail Early Release Policies?}

Courts must first determine whether men and women are "similarly situated" in the context in which they are being compared to determine whether any differences in their treatment should be evaluated under the Equal Protection Clause.\textsuperscript{117} While classifications by gender often contravene the Constitution, there are cases when they do not, because "there are differences between males and females that the Constitution necessarily recognizes."\textsuperscript{118} The government's "[t]reatment of dissimilarly situated persons in a dissimilar manner...does not violate the Equal Protection Clause."\textsuperscript{119}

For example, in \textit{Michael M. v. Sonoma County}, the Court held that because women can become pregnant through intercourse but men cannot, the two genders were not similarly situated with regard to a statutory rape statute.\textsuperscript{120} In these "narrow circumstances," the Court has found that "men and women are not similarly situated; in these circumstances a gender classification based on clear differences between the sexes is not invidious, and a legislative classification realistically based upon those differences is not unconstitutional."\textsuperscript{121}

The few courts that have handled cases alleging sex discrimination in early release policies have deemed that male and female inmates are similarly situated.\textsuperscript{122} In \textit{West}, the Court found male and

\textsuperscript{116} See, \textit{e.g.}, \textit{Keevan} v. Smith, 100 F.3d 644 (8th Cir. 1996); \textit{Women Prisoners of D.C. Dep't of Corr. v. District of Columbia}, 93 F.3d 910 (D.C. Cir. 1996); \textit{Klinger v. Dep't of Corr.}, 31 F.3d 727 (8th Cir. 1994); \textit{Pargo v. Elliott}, 894 F. Supp. 1243 (S.D. Iowa 1995), \textit{aff'd}, 69 F.3d 280, 281 (8th Cir. 1995).

\textsuperscript{117} \textit{Michael M. v. Sonoma County Superior Court}, 450 U.S. 464, 478 (1981) (Stewart, J., concurring) (stating that if men and women are deemed not to be similarly situated in the context in which they are being compared, then the court will not review the sex discrimination case under intermediate scrutiny); \textit{Klinger}, 31 F.3d at 731.

\textsuperscript{118} \textit{Michael M.}, 450 U.S. at 478 (Stewart, J., concurring).

\textsuperscript{119} \textit{Keevan}, 100 F.3d at 648.


\textsuperscript{121} \textit{Michael M.}, 450 U.S. at 478. After making this determination, the \textit{Michael M.} Court did, however, apply intermediate scrutiny and found that the statute passed the standard. See \textit{id.} at 472-74.

\textsuperscript{122} See, \textit{e.g.}, \textit{Women Prisoners of D.C. Dep't of Corr. v. District of Columbia}, 93 F.3d 910, 924-26 (D.C. Cir. 1996).
female inmates similarly situated for the purpose of an equal protection challenge to the exclusion of females from a boot camp program that allowed male participants to be released years earlier than their sentences prescribed. The court found that no “acknowledged differences” between men and women justified offering the boot camp to men but not women. In *Jackson v. Thornburgh*, a case challenging the unavailability of early release policies to long-term female inmates, the D.C. Circuit found that men and women in separate facilities who were serving similar amounts of time were also similarly situated.

In cases challenging prison programming as discriminatory based on sex, courts have ruled both ways. The Eighth and D.C. Circuits have held that male and female inmates who are lodged in different facilities are not necessarily similarly situated, while other courts have made the opposite finding. For example, in *Keevan v. Smith*, the court found that female and male inmates were not similarly situated when evaluating their access to educational and employment programs, because women comprised a small percentage of the inmate population, their facilities were smaller in size, their average security classification level was lower, and their average sentence length was much shorter than for males.

The court found that prison

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123. See West v. Va. Dep’t of Corr., 847 F. Supp. 402, 404, 406-08 (W.D. Va. 1994). One “real couple . . . was illustrative of th[e] disparity.” Id. at 404, n.4. “[T]he couple [was] charged at the same time with the same offense, in the same court, before the same judge, and were prosecuted by the same prosecutor.” Id. “Counsel for both defendants requested assignment” to the boot camp, but because the boot camp was only available for men, the boyfriend was sentenced to the boot camp, while the girlfriend was “sentenced . . . to the next best thing: twenty years in the Community Diversion Incentive Program.” Id. If the boyfriend successfully completed the program, he would be released at least eighteen years earlier than his girlfriend. Id.

124. Id. at 408.

125. *Jackson v. Thornburgh*, 907 F.2d 194, 203 (D.C. Cir. 1990). In fact, the court did not even overtly address the similarly situated issue, and jumped right into its equal protection analysis, though the court ultimately rejected a heightened scrutiny standard. *Id.* at 196-97; see also *Pitts v. Thornburgh*, 866 F.2d 1450, 1453 (D.C. Cir. 1989) (stating that female and male prisoners were similarly situated for purposes of a challenge to a gender-based rule specifying that long-term women prisoners be held in a facility much further away from the District than men convicted of similar crimes).

126. See, e.g., *Keevan v. Smith*, 100 F.3d 644, 649 (8th Cir. 1996); *Women Prisoners*, 93 F.3d at 924-25.


128. *Keevan*, 100 F.3d at 648-49. In *Keevan*, female prisoners claimed that the Missouri Department of Corrections violated the Equal Protection Clause by failing to grant them the same access to education programs and prison employment that was provided to male inmates. *Id.* at 645; accord *Women Prisoners*, 93 F.3d at 924-27; *Klinger v. Dep’t of Corr.*, 31 F.3d 727, 731-32 (8th Cir. 1994); *Pargo v. Elliott*, 894 F. Supp. 1243, 1261 (S.D. Iowa 1995), aff’d, 69 F.3d 280, 281 (8th Cir. 1995).
officials at each facility "must balance" the various characteristics of their prisons and inmates in determining the programming to make available. As female and male prisoners were not similarly situated, the officials did not have to provide equal programming to each gender. Conversely, in McCoy v. Nevada Department of Corrections, the district court found that women incarcerated at the Nevada Women’s Correctional Center were similarly situated to the men in other Nevada correctional facilities when reviewing a challenge to unequal programming between the women’s and men’s facilities.

In regard to challenges to jail early release policies, courts would likely rule that male and female inmates are similarly situated. As in West, individuals who committed similar crimes in the same county and received similar sentences, and only differ by sex, seem similarly situated when evaluating the constitutionality of gender-based early release policies. As in West and Jackson, and unlike in Michael M., there do not seem to be any “acknowledged differences” between men and women that would justify different early release policies. Cases about early release policies seem less similar to the unequal programming cases, because the primary argument for why women and men are not similarly situated in those cases is that the different characteristics of male and female prison populations, as groups, require different programming. This logic does not apply in the case of jail early release policies, because such policies are applied not because the male and female populations have different characteristics, but because of different rates of overcrowding. Furthermore, because early release policies differentially affect individual inmates, no

129. Keevan, 100 F.3d at 649 (quoting Klinger, 31 F.3d at 732).
130. Id. at 649-50. The Eighth Circuit took into account factors such as size of prison population, average sentence length, security classification, and types of crimes committed between male and female inmates. Id. at 649.
131. See McCoy v. Nev. Dep’t of Prisons, 776 F. Supp. 521, 522-23 (D. Nev. 1991); see also Wiley v. Trapp, No. 03-4133, 2004 WL 2011453 at *3 (D. Kan. Aug. 16, 2004) (finding that female and male work release inmates were similarly situated because they were “incarcerated in the same prison, had the same security level, committed the same types of crimes and were serving similar sentences”); Glover, 35 F. Supp. 2d at 1015 (finding that, despite the recent Klinger and Women Prisoners cases, male and female inmates housed separately would continue to be treated as similarly situated when evaluating gender-based programming challenges); Canterino, 546 F. Supp. at 207-08 (finding that male and female inmates housed separately are similarly situated and explicitly rejecting administrators’ claims that the different programming was justified by the smaller size, security needs, and interests of the population at the female institution).
134. See supra notes 117-119 and accompanying text.
135. See, e.g., West, 847 F. Supp. at 406-07; see also Jackson, 907 F.2d at 195-98.
argument about their characteristics as a group can apply.\textsuperscript{136} Thus, in early release cases, males and females should be found to be similarly situated, and courts should then continue with their equal protection analysis.

\textbf{C. Gender-Neutral Versus Gender-Based Classification}

\textit{1. Supreme Court Standards}

While the Constitution does not explicitly protect citizens from sex discrimination, the Supreme Court has found the Equal Protection Clause does.\textsuperscript{137} In reviewing a sex discrimination claim under the Equal Protection Clause, if a policy under review for sex discrimination is deemed to be “gender-based,” then courts will apply the intermediate scrutiny standard.\textsuperscript{138} In order to survive intermediate scrutiny under an Equal Protection Clause analysis, a challenged gender-based classification must serve “exceedingly persuasive” governmental objectives and “[t]he State must show ... ‘that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”\textsuperscript{139} Conversely, if a state’s classification is found

\begin{itemize}
\item \textsuperscript{136.} See \textit{Jackson}, 907 F.2d at 197 (noting that because some women did, in fact, benefit from the District’s early release statute, while some men did not, gender classification was not directly causing the disparate aggregate effects).
\item \textsuperscript{137.} See \textit{U.S. CONST.} amend. XIV, § 1. The Fourteenth Amendment to the United States Constitution provides:
\textquote{No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.}
\textit{Id.} (emphasis added); \textit{Reed v. Reed}, 404 U.S. 71, 75-77 (1971).
\item \textsuperscript{138.} \textit{United States v. Virginia (VMI)}, 518 U.S. 515, 531-33, 555 (1996); \textit{West}, 847 F. Supp. at 405. To be liable under 42 U.S.C. § 1983 for violating the Fourteenth Amendment, an entity must be considered a “state actor.” Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n (MHSAA), 459 F.3d 676, 691 (6th Cir. 2006). In \textit{United States v. Virginia}, the sex-based classification at issue was the categorical exclusion of girls from the publically funded Virginia Military Institute, while providing a sub-par institute for females. \textit{VMI}, 518 U.S. at 515-18. In \textit{Craig v. Boren}, an Oklahoma statute prohibiting the sale of 3.2% beer to males under age twenty-one, but only to females under age eighteen was at issue. \textit{Craig v. Boren}, 429 U.S. 190, 190-92 (1976). In \textit{Frontiero v. Richardson}, at issue were federal statutes requiring uniformed servicewomen to prove that their husbands were dependent on them for more than half of their support in order to obtain certain benefits, whereas uniformed servicemen were not required to prove similar dependency of their wives to obtain the same benefits. \textit{Frontiero v. Richardson}, 411 U.S. 677, 678-79 (1973).
\item \textsuperscript{139.} \textit{VMI}, 518 U.S. at 533 (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)). In many state courts, however, “sex discrimination is usually treated as seriously as racial discrimination.” \textit{JENNIFER FRIESEN}, \textit{1 STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES} § 3.01[1] (4th ed. 2006). Unlike the federal courts’ application of intermediate scrutiny, most states that have decided the issue apply a strict scrutiny standard when evaluating sex-based classifications. \textit{Id.} § 302(5)[a].
\end{itemize}
to be "gender-neutral," even if it results in a differential impact on one gender, courts will apply the deferential rational basis review standard. For example, in Geduldig v. Aiello, the denial of state disability insurance benefits for disability relating to normal pregnancies was deemed to be a facially neutral classification that "divide[d] potential recipients into two groups — pregnant women and non-pregnant persons."

A gender-neutral classification can exist even when the differential impact flows from the consequences of an earlier sex-based classification, as is found in Personnel Administrator of Massachusetts v. Feeney. In Feeney, the Supreme Court held that a Massachusetts statute that explicitly preferred the hiring of veterans for civil service appointments was deemed to be a gender-neutral classification, because the statute gave "preference for veterans of either sex over nonveterans of either sex." The Court held that this was so even though the governmental processes through which one could become a veteran excluded most women; in fact, for decades a two percent quota limit was "placed on the numbers [of women] who could enlist," and women were neither eligible for the draft, nor for many of the positions within the armed forces. At the time of the litigation, "over 98% of the veterans in Massachusetts were male; [and] only 1.8% were female." The Court nevertheless deemed the classification to be gender-neutral and applied rational basis review.

Some of the states that do so include California, Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, New Mexico, Pennsylvania, Texas, and Washington. Id. § 302[5][a] & n.109.

140. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979). A state actor merely needs to show that the government action at issue is a rational means to an end that may be legitimately pursued by the government — the lowest standard of constitutional review. Id.


142. See Feeney, 442 U.S. at 277-78.

143. Id. at 256, 280.

144. Id. at 269-70 & n.21.

145. Id. at 270. The Feeney Court found that lawmakers had no intent to discriminate based on sex when passing the law, and found that granting preference to veterans for civil service positions was a rational means to a legitimate end — rewarding veterans for their service. Id. at 277-78. The policy was, therefore, deemed constitutional under the rational basis standard. Id.

146. Id. In contrast to the Supreme Court holding in Feeney, some states have applied strict scrutiny when a classification appears gender neutral on its face, but is shown to have a disparate impact on members of one sex. See FRIESEN, supra note 139, § 3.02[5][b]. For example, California has adopted the rule that "[a] seemingly neutral statute which actually disqualifies a disproportionate number of one sex is discriminatory and vulnerable to the strict scrutiny test." Id. (quoting Boren v. Cal. Dep't of Employment Dev., 130 Cal. Rptr. 683, 687 (Cal. Ct. App. 1976)). In 1976, California held an unemployment statute subject to strict scrutiny and ultimately unconstitutional under the state constitution, because the statute primarily negatively affected women, even though it also affected some men. See Boren, 130 Cal. Rptr. at 684-88. The statute in question
2. Should Jail Early Release Policies Be Evaluated as Gender-Based Classifications?

Early release policies in jails that have different effects on men and women tend to take two forms. Some policies are clearly gender based. For example, Los Angeles has a completely different early release policy for women than it does for men, while Cincinnati's policy uses overt gender-based classifications to allow all nonviolent women to be released before any men are released. These policies are similar to the sex-based classifications in Craig v. Boren, where one set of rules applied to women and the other to men.

On the other hand, most county jails use the same, neutrally-worded policy among men and women, but apply it differently to the separate male and female units of a jail depending on how overcrowded each section is. For example, when the male jail unit is overcrowded, jail administrators will begin releasing male inmates early— independent of whether they are already releasing similarly sentenced women. If the women's unit is not overcrowded, they will not release any women but will release their similarly situated male counterparts. In these cases, the determination of whether the policies are gender neutral or gender based is more difficult because the policy on its face seems gender neutral— to release inmates early when there is overcrowding.

A close analogy can be made to Feeney, because the jails' neutrally-worded early release policies under contention derive from a gender based, yet legally permissible policy: the policy of segregating men and women into separate jail units. Similarly in Feeney, the disqualified secondary breadwinners from receiving unemployment benefits when they left jobs to care for a relative, including the period during which they sought new employment. Id. at 684-85.

147. Telephone Interview with Source 1, supra note 1; Telephone Interview with Source 8, supra note 34.
149. Telephone Interview with Source 3, supra note 3 (indicating that while the release system is based on a gender neutral plan, disparate treatment occurs in light of the fact that women's beds are less likely to be overcrowded and women are less likely to be eligible for certain programs); Telephone Interview with Source 6, supra note 8; Telephone Interview with Source 7, supra note 8; Telephone Interview with Source 10, supra note 36 (indicating that the jail releases prisoners by a gender neutral system, but the release rate between women and men differs based on which unit is overcrowded at the time).
150. E.g., Telephone Interview with Source 3, supra note 3; Telephone Interview with Source 7, supra note 8.
151. E.g., Telephone Interview with Source 3, supra note 3; Telephone Interview with Source 7, supra note 8.
152. Courts have not directly addressed the question of the constitutionality of the segregation in jails and prisons by gender, but very likely would uphold this practice. This policy would survive intermediate scrutiny analysis due to the potential for unwanted
gender-neutral policy of favoring veterans in public service hiring and promotions was based on the consequences of the gender based, but permissible governmental policies for determining veteran status that excluded most women. When analyzing such early release policies, courts could identify this apparent similarity and decide — wrongly — to apply Feeney's rational basis review standard.

However, there is a crucial distinction from Feeney that should instead lead a court to infer that the classification is actually gender based. Unlike the policy of segregating women and men into separate jail sections, the government’s veteran classification in Feeney did not include all men and exclude all women, and so there was a somewhat more attenuated relationship between veteran status and gender. In Feeney, the government used quotas for many years to keep the proportions of women in the armed forces below two percent and did not include women in the draft. But while the numbers of veterans were largely male, a substantial number of women were still able to become veterans. The policy did disproportionately advantage men, but some women also benefitted from the policy: based on the numbers given in the Feeney transcript, an estimated 25,000 women in Massachusetts were veterans in 1970, so having veteran status was

...
not necessarily synonymous with being male. Therefore, the fact that
the government gave a lifetime preference in civil service hiring
(which represented about sixty percent of the public jobs in the state)
to those individuals with veteran status (with at least one day of
"wartime" service) was not a facial sex classification.\textsuperscript{158}

The Court in \textit{Feeney} stressed that the veteran preference was
"extended to women under a very broad statutory definition of the
term veteran," and that the law was "a preference for veterans of
either sex over nonveterans of either sex, not for men over women."\textsuperscript{159}
By making this emphasis, it seems that if women were completely
excluded from the country's armed forces, implying a perfect causal
relationship, \textit{Feeney} would likely have been evaluated under inter-
mediate scrutiny.\textsuperscript{160}

Conversely, in the case of a jail's early release policy, the original
gender-based policy segregating all women from all men in the jails
has a perfect, one hundred percent causal relationship with gender.
It is upon this completely gender-based policy that jails' seemingly
gender-neutral early release policies are based. Thus, in reality the
early release policy is also gender based, because the gender-based
property of the policy of sex segregating inmates is transferred to it.

While the segregation of jail inmates by sex into separate units
(e.g., unit A for women and unit B for men) is constitutional, once seg-
regated, a policy applied differently to unit A versus unit B remains
a facial sex classification, because it applies exclusively to individuals
of one gender and does, in fact, "neatly divide the sexes into winners
and losers."\textsuperscript{161} It is clear that if a policy dealt with inmates from unit
A, every prisoner affected by the policy would be a woman, and no
prisoner affected by the policy would be a man. Though not obvious
at first, this is similar to other gender-based policies, such as that in
\textit{Craig v. Boren}, where all men were restricted from buying 3.2\% beer
before age twenty-one, while women could buy the same beer at age
eighteen.\textsuperscript{162}

Other cases have made similar findings, such as \textit{West v. Virginia
Department of Corrections}, one of the few other cases dealing with sex
discrimination in early release policies.\textsuperscript{163} In \textit{West}, a female inmate

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\textsuperscript{158} \textit{Feeney}, 442 U.S. at 261-62, 274.
\textsuperscript{159} Id. at 279-80.
\textsuperscript{160} See id.
\textsuperscript{161} Jackson v. Thornburgh, 907 F.2d 194, 197 (D.C. Cir. 1990).
challenged a Virginia policy that provided a boot camp pilot program sentencing option only to male offenders.\textsuperscript{164} The camp allowed participants to be released much earlier than their sentences would have prescribed.\textsuperscript{165} The policy limited participation in the pilot program to men only, on the grounds that men’s prisons were more overcrowded than the women’s and male recidivism was more “pressing.”\textsuperscript{166} Although the wording of the statute was gender neutral, the federal district court held that a gender-based classification existed because the program was accessible only to male inmates, not to any female inmates and, consequently, only men received the favorable sentencing provisions,\textsuperscript{167} so the court analyzed the policy under the intermediate scrutiny standard.\textsuperscript{168}

This distinction between partial causation versus perfect causation is also followed in recent sex discrimination cases involving school sports teams.\textsuperscript{169} Like jails, public school sports teams are permissibly segregated by sex,\textsuperscript{170} and their gender-neutral policy of selecting seasons by team is completely causally dependent upon the permissible, gender-based policy of segregation by sex. In recent cases, courts have found that scheduling of single-sex sports teams was a facial gender-based classification, and have consistently applied the United States v. Virginia (VMJ) intermediate scrutiny standard.\textsuperscript{171}

For example, in Communities for Equity v. Michigan High School Athletic Association (MHSAA), female athletes in Michigan challenged the scheduling of high school girls’ sports in “nontraditional” seasons under the Equal Protection Clause.\textsuperscript{172} The MHSAA argued that the scheduling was a facially gender-neutral classification and that “the ‘only facial classification at work in th[e] case was the original decision to have separate high school sports teams for boys and

\textsuperscript{164} Id. at 404.
\textsuperscript{165} Id.
\textsuperscript{166} Id. at 406.
\textsuperscript{167} Id. at 404, 408.
\textsuperscript{168} Id. at 406.
\textsuperscript{170} Courts have asserted that where equal opportunities for both sexes are available, regulations “requiring separate teams based on sex fosters greater participation in sports” by women. Ritacco, 361 F. Supp. at 932. Courts have feared that combining genders on sports teams would result in a substantial risk that “boys would dominate the girls’ programs and deny them an equal opportunity to compete in interscholastic events.” O’Connor v. Bd. of Educ., 449 U.S. 1301, 1307 (1980). Thus, courts typically permit — and encourage — single-sex teams.
\textsuperscript{171} See, e.g., Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n (MHSAA), 459 F.3d 676, 693-94 (6th Cir. 2006); cf. McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 279 (2d Cir. 2004) (finding the lack of nondiscriminatory factors underlying sports team scheduling policies central to upholding judgment against schools for violating Title IX).
\textsuperscript{172} MHSAA, 459 F.3d at 679.
girls." It argued that once single-sex programs had been permitted, choices regarding the implementation of those programs, such as "scheduling, uniforms, [and] coaches," did not classify the players by gender.

The Sixth Circuit disagreed, clarifying that the seasonal scheduling differences on the basis of gender were indeed facial classifications, because the MHSAA mandated that different sex teams play sports in different seasons. The court suggested there was no reason why girls alone should be scheduled in disadvantageous seasons and held the MHSAA had failed to meet their burden under intermediate scrutiny. Indeed, they held once separate teams by gender had been conceded as a facial classification, rules and policies made for each separate team would also be deemed facial classifications when they created disparate impact between the two genders, based again on the perfect causal relationship between gender and team assignment. If, however, sports teams were coeducational and scheduled for the same sport in different seasons, even in small proportion, the court would likely not find any difference in treatment between them to be a facial classification, because the relationship between gender and the composition of teams would no longer be perfectly causal. Thus, by employing such logic, the courts in MHSAA and similar cases consistently applied the intermediate scrutiny standard of VMI, rather than the rational basis review standard of Feeney.

Conversely, the logic of another sex discrimination case concerning early prison release policies correctly followed Feeney, because the facts there dealt with policies that did not have a perfectly causal relationship with gender. In Jackson v. Thornburgh, the D.C. Circuit evaluated the constitutionality of a statute that granted early release based on "Good Time Credits" to prisoners serving sentences in District of Columbia facilities, but did not apply to long-term female offenders who were housed in a federal facility. Due to overcrowding in prisons, the District of Columbia maintained no prison facility for women serving sentences greater than one year, but instead sent these women to a federal facility in West Virginia, along with a large number of the District's male inmates.

173. Id. at 694 (quoting the MHSAA).
174. Id.
175. See id. at 694-95.
176. See id.
177. See id. at 693, 695.
180. Id. at 195.
181. Id. at 196. "Under D.C. Code § 24-425, the Attorney General of the United States
Relying on *Feeney*, the *Jackson* court found the classification to be gender neutral, because the burdened class of prisoners included a large number of males and favored some females — those who were sentenced to terms of one year or less who were housed in District facilities. In fact, pursuant to this practice, only 323 female offenders were housed in the federal facility compared to 1,789 male offenders, meaning that “almost a six-to-one ratio of men [were] denied extra good time over women.” Unlike the jail early release policies discussed above, but like *Feeney*, this statute was based on policies that had only a partially causal relationship with gender, because both men and women were housed in federal facilities. The *Jackson* court held that because the D.C. policy, like the policy in *Feeney*, did “not neatly divide the sexes into winners and losers,” rational basis scrutiny should be applied. Thus, it can be inferred that if the policy had “neatly divide[d] the sexes into winners and losers,” and only women were housed in the federal facilities where they could not take advantage of good time credits, then intermediate scrutiny would have been applied by the *Jackson* court.

The perfect causal relationship between gender and jail housing units means that an early release policy is a facial gender-based classification subject to intermediate scrutiny. Some may counter that in the context of jails’ early release policies, the fact that the policies favor women in some cases, while favoring men in others, means that they are not gender-based policies. But the fact that the gender benefitted by the policy may change over time does not undermine the fact that the policy is motivated by a gender-based classification, which requires application of heightened scrutiny under the Constitution. This argument would be similar to a twist on the *Craig v. Boren* policy, where one year men would be permitted to buy 3.2% beer at age twenty-one, and women at age eighteen, and the next year women designate the place of confinement, “whether maintained by the District of Columbia government, the federal government, or otherwise, for all persons convicted of crimes in the District.” *Id.* “Under this provision District offenders of both sexes have been assigned to federal facilities and are currently serving sentences there.” *Id.*

182. *Id.* at 196-97.
183. *Id.* at 197. Meanwhile, approximately 150 female offenders benefitted from the early release statute because they were housed in District facilities. *Id.*
184. *Id.* Under the rational basis review, the court found “[t]here is no hint that the legislative distinction arose from invidious purposes,” or from “‘archaic and stereotypic notions’ of gender.” *Id.* (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982)). In fact, the court determined that “the fulfillment of the District’s constitutional obligation to avoid unlawful overcrowding of its prisons” justified the policy. *Id.* at 198.
185. See *id.* at 197.
would be permitted to buy the beer at age twenty-one and men at age eighteen. The policy would still be considered gender-based, regardless of the fact that it favored genders differently each year.

D. Applying Intermediate Scrutiny

Courts should find that a gender-based classification has been established and that male and female inmates are similarly situated. Accordingly the burden should shift to the government to justify that classification and show it is "exceedingly persuasive" under the intermediate scrutiny standard, as required by VMI.187 A challenged classification must serve "important governmental objectives," and the state must show that the discriminatory means employed are "substantially related to the achievement of those objectives."188 The state's "justification must be genuine," and "it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."189 The VMI Court moved examinations of sex-based classifications closer to strict scrutiny than the Court had employed in previous sex discrimination cases.190 In VMI, the Court reiterated that to be defined as "substantially related," the gender-based policy must be shown to directly serve the important interest,191 and no alternative policy that is not gender based can equally promote that interest.192

County jails could put forth a number of different potential important state interests to justify their gender-based early release policies that are likely to be acceptable to most courts, including: public safety, the need to ease jail overcrowding, administrative efficiency, and cost savings. Courts should rule that public safety and overcrowding are important — and even compelling — state interests,

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188. Id. at 533 (quoting Hogan, 458 U.S. at 724).
189. Id. The Court continued, "[i]nherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity." Id. In applying this standard, the Court found that the justification that single-sex education "fosters diversity in educational approaches," though perhaps an important objective, was not genuinely served by VMI's educational benefit only being offered to males, while no equal program was being offered to females. Id. at 516, 524-25, 534-40. The Court also found that VMI's mission and methodology were suitable for women. Id. at 540-46. Thus, the Court required that women be admitted to VMI. Id. at 557-58.
190. In states such as California where strict scrutiny is applied to sex-based classifications, the government must show that the classification serves a compelling state interest and that the means are narrowly tailored to meet that interest. See FRIESEN, supra note 139, §§ 3.01[1] & n.2 (noting California case law holding sex as a suspect class), 3.02[2] & n.64 (explaining what is required for strict scrutiny review), 3.02[6][a].
191. See VMI, 518 U.S. at 524, 533, 545.
192. See id. at 540-46.
but should not find administrative efficiency to be important. For all of these interests, however, courts should not find that the discriminatory means employed are substantially related to the achievement of such interests.

1. Ensuring Public Safety

Courts would likely rule that public safety is an important, and even a compelling state interest, given that the Supreme Court has held goals protecting the safety of members of the public to be important. These interests have included protecting the public from drunk driving accidents in *Craig v. Boren* (an “important governmental objective”), 193 protecting prison inmates and guards from violence in *Johnson v. California* (a “compelling” state interest), 194 and protecting young girls from pregnancy in *Michael M. v. Superior Court of Sonoma County* (an important state interest). 195 Concerning jail early release policies, courts are again likely to rule that protecting the safety of the public — for example, from additional inmates who would commit crimes if they were released early from jail, solely because members of the opposite sex are being released early — is an important state interest. 196

Courts should not, however, find that releasing inmates early differentially by gender is substantially related to the achievement of public safety. In *Johnson*, there was some basis for segregating by race, because prison officials believed that “violence and conflict would result if prisoners were not segregated,” but the lower court still held on remand that the prison would have the burden of proving the segregation was narrowly tailored. 197 Similarly, in *Craig*, the defendant state did show data that males under twenty-one were involved in more traffic accidents involving alcohol — but this still did not enable the Court to find that the gender classification was substantially related to preventing traffic accidents. 198 In cases of jail release policies, the relationship between the gender-based early release policies and the objective of public safety is far less direct, and therefore courts should not deem it substantially related.

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196. In fact, it could be argued that the interest in protecting the public from those who have previously violated the law, and have not finished serving their jail sentences, is greater than protecting those inside prisons from violence. Some violence is expected within prisons; guards enter such positions with this knowledge, and the violence is removed from the general public.
197. *Johnson*, 543 U.S. at 503, 515.
Jail administrators might argue that the most straightforward alternative to their current gender-based early release policies — releasing equal numbers of inmates of the opposite gender — would lead to decreased public safety, because if not incapacitated, those inmates could be out harming the public. However, there are many other gender-neutral solutions which do not have this result. For example, a scoring system to release the least dangerous inmates, independent of gender, is actually more aligned with the goal of public safety than a policy based on gender.

2. Alleviating Overcrowding

Courts should rule that easing jail overcrowding is an important state interest in order to prevent the tension and fights associated with being housed in close quarters, as well as the inhumane conditions in which inmates could be forced to live. The District Court for the Western District of Virginia in West v. Virginia Department of Corrections found combating overcrowding to be an important state interest. Moreover, alleviating overcrowding is directly related to jail security, which was ruled a compelling state interest in Johnson v. California.

Though jail officials may argue that gender-based early release policies are substantially related to solving overcrowding, given the separation by gender in the jails, courts should not find that releasing inmates early differentially by gender is substantially related to the achievement of easing jail overcrowding. In West, the state argued that administering a pilot boot camp program, which greatly reduced men's sentences, was substantially related to the goals of reducing prison overcrowding and recidivism, because these problems were "most pressing" in the men's prisons and the government had limited funds to assess the program. But the court found the opposite, because opening the program to men only was not substantially related to achieving reduced overcrowding and recidivism in the women's prisons. The court found that even if differences existed which

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199. See Leonard et. al., supra note 57 (explaining the recent history of early releases in Los Angeles County jails and discussing specific early released inmates who killed or harmed innocent members of the public when they otherwise would have been incarcerated).


204. Id. at 407. The court stated that "[i]f defendants' argument were carried to its logical extension, then the same argument could be used to deny women inmates the opportunity for education, vocational training or rehabilitation," and that "[s]urely such
justified treating inmates differently by gender, "there was no compelling interest in providing male and female offenders with such unequal sentencing options."205 The West court held that the Equal Protection Clause is violated whenever "an extremely favorable sentencing alternative is provided to one class of inmates and not another, and when that classification is based solely on the inmates' gender."206

Officials may argue that, unlike West, the jail programs that consistently release one gender early, but rarely release members of the other sex, would achieve goals of reducing jail overcrowding when the gender being released early is the gender that lives in the overcrowded unit. But this would still not be substantially related, because jail officials could take other measures, such as rearranging space or reassigning some space to the other gender. Continually releasing one gender early for many years, while members of the other gender serve out their entire sentences, is not substantially related to ending overcrowding in this case.

The problem becomes more complex, however, in situations where the number of male and female inmates released early fluctuates day by day — and fluctuates between genders. West does not discuss this issue, and the school sports cases seem to hint that this practice is constitutional to meet logistics concerns. The MHSAA court found that discriminatory scheduling was not "substantially related" to achieving the stated objectives, because it did "‘not justify forcing girls to bear all of the disadvantageous playing seasons alone to solve the logistical problems.’"207 The court held that a compliance plan must disadvantage and advantage boys and girls equally.208 Similarly, in the McCormick case, members of high school girls' soccer teams sued their school districts to reschedule their seasons from the spring to the fall, when most other New York state girls' teams played and when regional and state championships took place.209 That court found that the girls' teams should not have to bear alone the costs of administrative difficulties the school districts used to justify the season schedule.210 Instead, it suggested that to avoid such problems,
the boys and girls teams could alternate seasons by year, so that both were equally advantaged and disadvantaged.\textsuperscript{211}

State officials may cite this finding in the sports team cases to suggest that policies which some days release men early at higher rates than women, but then release women at higher rates on other days, are in fact substantially related to solving the logistical problems of jail overcrowding. But such a solution, where a state policy alternates by gender, favoring one gender one year and the other gender the next, would not apply in the jail early release setting. Unlike girls and boys on sports teams, where males and females would be equally advantaged and disadvantaged because they typically spend four years in high school — and so would spend two years playing in the advantaged season and two years playing in the non-advantaged season — male and female inmates affected by disparate early release policies cannot be both advantaged and disadvantaged by them. Once a woman gets the advantage of early release, she is no longer impacted by future release policies. Her male counterpart is always disadvantaged when compared to the female inmate because he has to serve more jail time for the same crime and sentence. Similarly, in jail policies that vary by year, the individuals who are favored one year will not be the same ones who are disfavored during the following year — even if it favors women one year and men the next — because the policy will not affect the same group of inmates the next year.

Finally, the fact that early release policies concern the total restriction of an individual's liberty makes it even more important that men and women on the individual level be similarly advantaged and disadvantaged. There could be cases when individual children on sports teams would not be evenly advantaged and disadvantaged: for example, if a boy decides to play a sport during a year that happens to be disadvantaged, but does not play that sport the following year, when he would have been advantaged. It is a much more significant restriction to hold someone in jail for an extra year, month, or even a day longer than someone similarly situated, than it is for a student to play soccer in a less convenient season than their similarly situated female counterpart.\textsuperscript{212}

\textsuperscript{211} Id. at 297.

\textsuperscript{212} This notion that the degree of justification required varies with the severity of the discrimination can be illustrated with an example. In women's basketball, players use a slightly smaller ball (approximately one inch smaller) because women's hands tend to be smaller than men's hands. \textit{See}, e.g., Adam Khan, History of Women's Basketball, (Dec. 7, 2008), http://www.articlesbase.com/basketball-articles/history-of-women-basketball-674314.html. Although this is a sex-based classification between teams of different gender, it is unlikely to be struck down under intermediate scrutiny, as neither gender suffers as a consequence of the policy.
3. Enhancing Administrative Efficiency

Some might argue that administrative convenience and cost savings are important state interests and that administering separate early release policies by gender is substantially related to the achievement of these goals. It is administratively easier and cheaper, the argument would go, to administer early release programs differently by gender, because each gender’s beds become overcrowded at different rates. It is too difficult to administer on an equal basis early release programs for men and women who have committed the same crime and have the same sentence. Moreover, it would be too costly to make changes to the current policies or build new jail space to house all inmates for their entire sentences so that neither gender is advantaged or disadvantaged.

The above arguments should not pass intermediate scrutiny because the Supreme Court has held on a number of occasions that administrative efficiency and cost savings are not enough to justify different treatment by gender. In a plurality opinion, the Court held in *Frontiero v. Richardson* that distinctly different treatment of men and women “solely for the purpose of achieving administrative convenience . . . involves the ‘very kind of arbitrary legislative choice forbidden by the [Constitution].’” *Stanley v. Illinois* held that although “[p]rocedure by presumption is always cheaper and easier than individualized determination,” an administratively more efficient, but gender-based statute, was invalid under intermediate scrutiny.

The Court’s restrictions on gender-based classifications remained even when gender “appeared to have substantial value in predicting an admittedly important fact.” At the time that *Craig v. Boren* was decided, “men were more likely than women to have experience in formal business matters,” and at the time of *Frontiero* and *Weinberger v. Wiesenfeld*, the Court acknowledged that it was much more common for women to be dependent on their husbands as the “breadwinner” than for the opposite to be true. However, the Court found that
“such generalizations, even if empirically accurate, could not justify categorically different treatment of the sexes.” Moreover, the sex-based generalizations were, in fact, accurate at the time due to past gender discrimination and cultural norms, and “the facts for which gender was used as a proxy (business experience and dependency) could be ascertained more directly and more accurately by a factual hearing.” As administrative efficiency and cost containment are not compelling state interests, courts should not be required to assess whether the early release policies are substantially related to achieving those objectives potentially alleged by a state.

III. A GENDER-NEUTRAL PROPOSAL FOR FUTURE JAIL EARLY RELEASE POLICIES

A. Some Potential Options

Jail officials can avail themselves of several intuitively evident alternatives to remedy this constitutional problem, each with positive features, as well as meaningful drawbacks. One unattractive option, given jail and sheriff departments’ budget constraints, would be for jail administrators and their political allies to raise money to build more jails to alleviate overcrowding without early release. Though

recognizes higher values than speed and efficiency.” ... On the contrary, any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands “dissimilar treatment for men and women who are ... similarly situated,” and therefore involves the “very kind of arbitrary legislative choice forbidden by the [Constitution] ...”

Frontiero, 411 U.S. at 690 (citations omitted).

219. Schulhofer, supra note 213, at 2193.

220. Id. The Court has also struck down cost efficiency arguments under strict scrutiny review. For instance, in Shapiro v. Thompson, the Court struck down state policies requiring one year waiting periods before new citizens could obtain state welfare benefits, even though it meant that the state might have to pay much more in welfare benefits to new residents. Shapiro v. Thompson, 394 U.S. 618, 622-23, 627-28, 633 (1969). The Court said that while “a State has a valid interest in preserving the fiscal integrity of its programs,” it “may not accomplish such a purpose by invidious distinctions between classes of its citizens.” Id. at 633.

221. Although sex-based policies justified by administrative efficiency have not succeeded under intermediate scrutiny in the past, it is conceivable that there exists a point at which the administrative cost is so high that the Court would accept a certain level of discrimination as justifiable. See Schulhofer, supra note 213, at 2196. For example, if the only alternative remedy for the problem of unequal jail early release policies by gender required the state to spend ten billion dollars to quickly build more jails under a highly expedited schedule, courts applying the intermediate scrutiny standard likely would not require a state to pursue such a costly alternative. In real world cases, however, some other variable could be adjusted to reduce the administrative burden without engaging in discrimination.
this approach is clearly constitutional, its drawbacks include that it is prohibitively expensive and that it does not use public resources in an optimal manner, particularly because many nonviolent inmates pose little threat to society even when released early. A second, better option would be for jails to release men and women who have committed similar crimes and received similar sentences at the same time. This would be constitutional because men and women would be serving the same amount of time and neither group is advantaged or disadvantaged, but the drawback likely to be argued by community security advocates is that jails would release more offenders earlier than necessary and leave empty jail beds. For example, if the women’s jail unit was more overcrowded than the men’s, but men and women with the same sentences were released at the same time, regardless of whether the men’s unit had empty beds, some men would be released early who did not have to be released for overcrowding reasons.

An example of this policy in practice is Larimer County, Colorado, where all jail inmates are serving only seventy-five percent of their sentence in order to ensure no overcrowding in either gender’s unit. This approach is constitutional because there is no differential treatment by gender, however, community security advocates may argue that it will likely result in the release of potentially dangerous inmates, purely for the sake of gender parity, even when the correctional facility actually has the capacity to hold them.

B. My Proposal

Though correcting gender disparity in early release programs is difficult, I believe that there is a solution more innovative than those previously discussed that would fulfill the requirements of the Constitution, while remaining administratively feasible. My proposed model recognizes that early release policies are necessary because jails are overcrowded, public money is (rightly) not typically available to greatly expand jail capacity to the extent necessary to eliminate early release policies, and it is not the optimal use of public finances to build enormous quantities of new jail space to accommodate one hundred percent of every sentence. The option I propose draws from current best practices in jail early release policies and has two parts.

222. Telephone Interview with Source 5, supra note 8; see also Telephone Interview with Source 14, in Or. (Feb. 16, 2007) (notes on file with author) (stating they are mandated to divest twenty-five percent of inmates from the system).
1. Use Best Practices Criteria for Releasing Early the Inmates Who Are Least Dangerous

First, in order to minimize future violent crimes by released inmates, each jail should base their early release policies on factors that reliably predict an inmate’s future propensity for violence and danger to the public. These factors would include weighted criteria, such as the type of crime, sentence length, criminal history, good behavior while incarcerated, and other predictors that researchers have found to forecast future violence. These criteria should interact with the amount of time an inmate has already served to generate a number rank for each inmate, which can be used to create a ranked list of all inmates on a daily basis.

A few jurisdictions already do this, but they rank inmates within each gender so that they have one ranked list for male inmates and a second ranked list for female inmates. Instead, I advocate for one total list of all inmates regardless of gender. Then when the jail becomes overcrowded, the jail administrators will release inmates early according to the ranked list. For example, if the jail was overcrowded by twenty people, then the lowest ranked (i.e., least dangerous) twenty inmates would be released early—that might be thirteen women and seven men, or twenty men and no women. The genders would not be treated equally in terms of percentage released (as they generally do not pose the same risks to society), but would be treated equally in

223. Telephone Interview with Source 14, supra note 222.
224. Criminologists and experts in this field have developed several different types of algorithms to do this. See, e.g., Peter Hoffman & James Beck, The Origin of the Federal Criminal History Score, 9 Fed. Sent’g Rep. 192, 192-94 (1997) (discussing the similarities and differences between the Criminal History and Salient Factor Scores); Peter B. Hoffman, Twenty Years of Operational Use of a Risk Prediction Instrument: The United States Parole Commission’s Salient Factor Score, 22 J. Crim. Just. 477, 478-77, app. 1 at 490 (1994) (discussing the “recidivism prediction instrument” called the “Salient Factor Score” and how it makes predictions); Brian J. Ostrom et al., Nat’l Ctr. For State Courts & Va. Crim. Sent’g Comm’n, Offender Risk Assessment in Virginia 23-30 (2002), available at http://www.vccs.state.va.us/risk_off_rpt.pdf (discussing utilization of “actuarial (or statistical) risk assessment” to study factors influencing recidivism). However, determining which factors to account for and how to weigh each of them is beyond the scope of this Article. In implementing such a system, jail administrators should be careful that the factors do not directly or indirectly discriminate against inmates based on race or socioeconomic background.
225. See, e.g., Telephone Interview with Source 6, supra note 8. But see Telephone Interview with Source 14, supra note 222 (stating men and women are ranked on the same eight weighted criteria, but explaining men and women receive different scores because of factors like age and likelihood of recidivism).
226. A number of studies have found that female offenders pose far less of a risk to society than males. See, e.g., Schulhofer, supra note 213, at 2195-96 & n.182 (discussing what studies have shown to be differences in men and women prisoners, including that
the sense that they are evaluated using objective criteria as opposed to the constitutionally problematic classification of gender. Thus, people who have the same sentence will not necessarily serve the same amount of time, but jails will release people who are the least dangerous to society. The fact that this approach may over-release inmates of one gender relative to that gender's jail capacity constraints would be addressed, as discussed below, by a reallocation of short-term capacity.

2. Optimize Space Between Genders and Include Flex-Space

In order to ensure that the number of inmates of each gender released complies with the ranking system, jail administrators will need to allocate capacity so that the amount of overcrowding by gender closely tracks the number of releases implied by the ranking system. This would involve tracking trends in female and male inmate populations in order to know how many inmates of each gender, with each type of sentence, the jail typically houses. Many jails already track this type of information, yet administrators do not use it to help solve their overcrowding problems across genders, because they do not know that current policies are likely unconstitutional. While the numbers of inmates fluctuate to some extent, especially on a seasonal basis, jail administrators assert that their

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227. See Telephone Interview with Source 6, supra note 8 (explaining how jail administrators began to look at who came into the jail, who spent time in the jail, and who got out of the jail to better understand their overcrowding problems).

228. See, e.g., id. (explaining how the jail began to look closer at the reasons for overcrowding with the help of management consultants).

229. See, e.g., Telephone Interview with Source 4, supra note 4 (discussing population increase in the spring due to judges allowing people to stay home for the holidays prior to turning themselves in); Telephone Interview with Source 7, supra note 8 (discussing offenders permitted to remain out of jail until after the winter holidays, as well as seasonal
populations of men and women stay relatively constant and can often be predicted.\textsuperscript{230}

When jail administrators understand the number and types of offenders by gender that they typically house, they can best allocate their bed space so that the overcrowding in men’s and women’s units will result in all inmates serving durations of their sentences determined by the objective ranking system. This may involve reallocating some bed space from one gender to the other in jails whose gender-based releases do not comply with the above described ranking system, as was done by the Calaveras County Jail.\textsuperscript{231} In these cases, some jail space should be reallocated so that inmates of both sexes are released according to their rankings. This space allocation is made more challenging by the fact that in almost all counties, women and men have to be separated by “sight” and “sound.”\textsuperscript{232} Many jails have reallocated space between the sexes in the past,\textsuperscript{233} and could do so again by transferring wings or smaller units of a jail to the opposite sex.

Even if jail administrators allocate permanent capacity as accurately as possible, they can never completely predict the fluctuations between the sexes. For example, sometimes police will decide to do sweeps of drug dealers, bringing in a large group of mostly men, or will sweep for prostitutes, bringing in a large group of mostly women.\textsuperscript{234} Currently, there seems to be little coordination between the police and jail systems in many counties in this regard. Moreover, an inmate’s behavior within jail often determines how much time he or she serves,\textsuperscript{235} and this can also be difficult to predict, although it can be accounted for as one criterion in the ranking system described above.\textsuperscript{236}

In order to prepare for such fluctuation, jails should have some structural living units that house lower numbers of inmates and can be reallocated more quickly between genders as needed. Again, this...
can be difficult to plan for because of the sight and sound barriers that are normally required. One example of living units already used by county jails that best accommodate such reallocation are pods which can be built to hold as few as twelve or sixteen inmates.\textsuperscript{237} Small dormitories can serve this same function.\textsuperscript{238} As fluctuations occur in the jails, these pods or small dormitories would serve as swing units that would be reallocated between the genders based on fluctuations.

Using a system like this may require limited additional funds, because some amount of restructuring may be needed. Additionally, because pods still house at a minimum twelve or sixteen inmates, the system would still not achieve perfect equity between the genders. There could be occasions when a few extra inmates of one gender would have to be released in order to preserve gender equity, leading to unused beds. But while releasing hundreds of extra prisoners in the name of gender equity could endanger public safety and would not likely be an ideal solution according to community security advocates, releasing a few extra people occasionally would not put society at the same risk.

C. Additional Measures to Reduce Overcrowding

Finally, and of critical importance, counties should take non-gender-based measures to reduce the overall amount of overcrowding in their jails. All counties should promote nonjail sentencing alternatives for nonviolent offenders, which could include: community-based reintegration programs (that focus on recovery, mental health, family reunification, and job skills),\textsuperscript{239} electronic tethering,\textsuperscript{240} and work release.\textsuperscript{241} These types of alternatives to incarceration for those who do not present a risk to society save public money and, arguably, help those convicted to better reintegrate into society.\textsuperscript{242}

\textsuperscript{237} See supra note 42 and accompanying text.
\textsuperscript{238} See supra note 41 and accompanying text.
\textsuperscript{239} See Nora V. Demleitner, \textit{Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions}, 58 STAN. L. REV. 339, 355 (2005); see also Telephone Interview with Source 15, supra note 235.
\textsuperscript{240} See Demleitner, supra note 239, at 355; see also Telephone Interview with Source 3, supra note 3; Telephone Interview with Source 12, supra note 41.
\textsuperscript{241} DUI Foundation, Work Release, http://www.duifoundation.org/legalguide/sentencingalternatives/workrelease/ (last visited Mar. 22, 2009); see also Telephone Interview with Source 5, supra note 8.
\textsuperscript{242} Many have argued that convicted individuals placed in such programs are actually much less likely to recidivate than inmates who have committed similar crimes who are held in jail. See generally Demleitner, supra note 239.
Furthermore, because jails also frequently house defendants who have not yet been tried or sentenced, counties can work to minimize pretrial jail stays through the use of arrest processing centers, where people who are arrested go through the booking process and have their preliminary hearing on the same day and therefore do not necessarily have to be held in jail. Adding extra courts, such as night courts, to arraign and try defendants more quickly, instead of having a large backlog, can also help reduce the number of defendants who are housed in jails prior to conviction and will lead to less overcrowding. The cost of these additional measures would likely be offset by the reduced cost of a smaller jail population. The Indianapolis criminal justice system has been successful in implementing such programs over the past three years.

CONCLUSION

Many jails have different early release policies for their male and female jail inmates, or apply the same early release policy differently to their male and female inmate populations, depending on which gender's population happens to be overcrowded. Following the 2005 Supreme Court ruling in Johnson, along with the federal circuit and district court decisions on gender discrimination in Pitts and West that followed similar reasoning, it is clear that the issue of sex discrimination in jail early release policies should be evaluated under the intermediate scrutiny standard set forth for gender-based classifications in VMJ. It is also evident that male and female inmates who committed similar crimes and received similar sentences are similarly situated and, thus, may be compared in an equal protection analysis.

State officials may claim that early release policies are "gender-neutral," although based on a permissible, gender-based regulation, similar to Feeney. However, as seen in cases such as West and

243. E.g., Telephone Interview with Source 3, supra note 3; Telephone Interview with Source 13, supra note 45 (discussing nine point protocol used to release people, which includes several categories of pretrial inmates).
244. E.g., Telephone Interview with Source 13, supra note 45.
245. Id. Long waits prior to trials further punish the poor and homeless (whether or not they are later found guilty), who are often unable to post bail.
246. Id.
MHSAA, because the early release policies are based on and perfectly causally related to gender, they should be viewed as “gender-based” for the purposes of equal protection analysis and deserving of intermediate scrutiny. Under intermediate scrutiny analysis, county jail administrators could assert a number of potentially important state interests, including public safety, jail security, overcrowding problems, administrative efficiency, and cost effectiveness. However, releasing men and women based solely on gender should not be held substantially related to any of these important state interests by courts.

As this practice is likely unconstitutional, jails should aim to alter their policies. A cost-effective, yet public safety oriented solution would be to (1) release inmates early depending on their danger to society, via an objective inmate ranking system applied to both genders together; and (2) dedicate more easily redistributed jail housing to correct short-term fluctuations between the sexes, such as smaller pod units or dormitories.

Finally, and of significant importance, counties should aim to reduce jail overcrowding in other ways. This should occur pre-sentence, by cutting down on the waiting time between arrests and hearings; as well as post-sentence, by employing alternatives to incarceration for nonviolent inmates, such as work release, electronic tethering, and placement in community based reintegration programs.

254. VMI, 518 U.S. at 531-33.