

## A Multidimensional Look at the Gender Crisis in the Correctional System

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In 1977, Mary Glover led fellow female inmates at Michigan's Huron Valley Women's Facility in comparable educational, vocational and employment programs to those available to male inmates of Michigan's correctional system.<sup>1</sup> After being denied such services by the prison administration, Glover sought the assistance of the courts.<sup>2</sup> Unlike other courts,<sup>3</sup> however, the United States District Court for the Eastern District of Michigan helped the female inmates by ordering the prison to follow a remedial plan to correct the disparate provision of services.<sup>4</sup> Unfortunately, the court order itself has not yet been enough to successfully get the prison administration to provide the services in accordance with the guidelines set by the court.<sup>5</sup>

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1. See *Glover v. Johnson*, 478 F. Supp. 1075, 1076 (E.D. Mich. 1979).

2. See *id.* at 1075 (finding defendants in violation of the Equal Protection Clause of the Fourteenth Amendment with respect to the provision of educational, apprenticeship and vocational programming).

3. See, e.g., *Pargo v. Elliott*, 894 F. Supp. 1243 (S.D. Iowa 1995) (holding male and female inmates are not similarly situated); *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994) (same).

4. See *Glover v. Johnson*, 721 F. Supp. 808, 851-52 (E.D. Mich. 1989).

5. See *Glover v. Johnson*, 752, 759-60 (E.D. Mich. 1995). While recognizing that the prison officials had made "significant improvements in a number of areas," the court held that they had not "substantially complied" with the court ordered remedial plans. *Id.* Additionally, the court acknowledged that "[i]t may be indigenous to the nature of this litigation that it is seemingly endless," *id.* at 753, but it asserted that the court's involvement would end when there was "substantial compliance" with the goals of a consent judgment or negotiated settlement. *Id.* at 760.

The problem with the Michigan prison was not necessarily that the administrators wanted to deny equal services to women, but rather that they were unable to do so within the confines of the prison's traditional regulatory framework. The struggle within the walls of Michigan's Huron Valley Women's Facility is similar to the historical struggle of prisons in the United States to keep up with evolving societal norms.<sup>6</sup> Prisons must balance the limited constitutional rights of inmates<sup>7</sup> against the reality that internal security is the primary concern of prisons.<sup>8</sup>

Historically, security concerns, combined with social, cultural and economic considerations,<sup>9</sup> have had a significant impact on the development of the United States correctional system and specifically on the treatment of female inmates.<sup>10</sup> While some problems within prisons were solved by separating inmates by gender,<sup>11</sup> questions still persist concerning the degree of limitation on con-

6. See *infra* Part I.A (explaining the history of changes in the correctional system).

7. See *Price v. Johnston*, 334 U.S. 266, 285 (1948) ("Lawful incarceration brings about the necessary withdrawal or limitation of many privileges or rights, a retraction justified by the considerations underlying our system."); see also *Bell v. Wolfish*, 441 U.S. 520, 545-46 (1979) (upholding restrictions on the rights of pre-trial detainees). While inmates retain some of their constitutional rights, these rights are subject to restraint and limitations due to the legitimate goals and policies of the penal institution. *Id.* at 546 (citing *Jones v. North Carolina Prisoner's Labor Union*, 433 U.S. 119, 125 (1977)). "There must be a 'mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.'" *Id.*

8. See *Women in Prison: Programs and Alternatives: Hearings on S. 1158 Before the Comm. on the Judiciary*, 103d Cong. 63 (1993) [hereinafter *Hearings*] (statement by Elaine A. Lord, superintendent of Bedford Hills Correctional Facility). It is a "simple reality" that security is the primary function in correctional facilities. *Id.* The United States Supreme Court has also recognized that "central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." *Pell v. Procunier*, 417 U.S. 817, 823 (1974). Additionally, when a given restriction infringes on an inmate's constitutional rights in the name of furthering security, courts balance the infringement on rights against the institutional security requirement before deciding whether to uphold the practice. *Bell*, 441 U.S. at 547. This balancing results in tradeoffs within the correctional system.

9. Prison security demands a majority of the available funding. *Hearings*, *supra* note 8, at 63. Thus, rehabilitative programs in prisons operate around security requirements. *Id.*

10. See LARRY E. SULLIVAN, *THE PRISON REFORM MOVEMENT: FORLORN HOPE* 6 (1990); Nicole Hahn Rafter, *Equality or Difference*, *FED. PRISONS J.*, Spring 1992, at 17, 17. Prisons created very promiscuous conditions by housing men and women in the same compartments or cells through the early nineteenth century. SULLIVAN, *supra*, at 6; see also Rafter, *supra*, at 17. Starting with one Philadelphia jail in 1790, institutions began to segregate female and male inmates. SULLIVAN, *supra*, at 6.

11. Separating men and women improved prison privacy, decreased isolation of female inmates and decreased the vulnerability of the women to sexual exploitation. Rafter, *supra* note 10, at 17.

stitutional rights and about the tradeoffs the system should make.<sup>12</sup> Female inmates have invoked the Equal Protection Clause of the Fourteenth Amendment<sup>13</sup> as well as Title IX<sup>14</sup> of the Educational Amendments of 1972 in their continuing efforts to alleviate some of these disparities.<sup>15</sup> While these challenges to the correctional system have yielded inconsistent results,<sup>16</sup> it is clear that the system has not yet developed a remedial paradigm to the problems and that a practical and effective remedy remains to be conceived.<sup>17</sup>

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12. As early as the middle of the nineteenth century when prisons were assigning female inmates to a separate area within the prison, the tradeoffs of gender separation began to emerge. *Id.* Primarily, as institutions housed women farther from the central part of the institution, the "less access they had to whatever opportunities were available to the male convicts, such as medical advice and services, religious services, and opportunities to exercise in the yard." *Id.* Because the separate women's units did not have kitchens, the prison staff had to bring food to the women from the men's quarters, but they commonly did that only once a day. *Id.* Additionally, female inmates did not have supervision to protect them from each other. *Id.*

Many legal challenges against correctional agencies focus on the different programs and services offered to male and female inmates and claim the institutional choices, or tradeoffs, violate the civil rights of female inmates. *See, e.g.,* Pargo v. Elliott, 69 F.3d 280 (8th Cir. 1995) (raising claims that services provided to females are inferior to those available to male inmates); *Batton v. State*, 501 F. Supp. 1173 (E.D.N.C. 1980) (same).

13. U.S. CONST. amend. XIV, § 1. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

14. Pub. L. No. 92-318, 86 Stat. 235 (codified as amended at 20 U.S.C. §§ 1681-88 (1997)). Title IX of the Education Amendments of 1972 focuses solely on gender discrimination in that it provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (1997).

15. *See, e.g.,* Jeldness v. Pearce, 30 F.3d 1220, 1228 (9th Cir. 1994) (utilizing Title IX and the Equal Protection Clause to raise a gender discrimination claim with respect to programming offered to male and female inmates); *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994) (challenging the provision of programs and services to female inmates under the Equal Protection Clause); *West v. Department of Corrections*, 847 F. Supp. 402 (W.D. Va. 1994) (challenging denial of participation by females in a male only Boot Camp Incarceration Program under the Equal Protection Clause); *Batton*, 501 F. Supp. 1173 (raising an equal protection claim based on differences between the work release, vocational training and other rehabilitative programs offered to male and female convicts).

16. *Compare* Pargo, 69 F.3d 280 (upholding the legality of prison programming despite many identifiable differences between those offered for men and those for women) with *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979) (holding disparities in services provided to male and female inmates violated the Equal Protection Clause and that the inmates were similarly situated) and *Klinger*, 31 F.3d 727 (holding male and female inmates are not similarly situated for purposes of prison programming).

17. *See* Stefanie Fleischer Seldin, *A Strategy for Advocacy on Behalf of Women Offenders*, 5 COLUM. J. GENDER & L. 1, 10 (1995); *see also, e.g.,* *Glover v. Johnson*, 879 F. Supp. 752 (E.D. Mich. 1995) (ruling that prison officials were not in substantial compliance with a remedial plan designed to correct an equal protection

This Note takes a multidimensional look at the constitutional problem of gender discrimination facing the correctional system and at the equally serious problem of the legal system's failure to find and implement an effective remedy for the constitutional violation. Part I examines the modern correctional system by reviewing the history of changes that led to the development of the system in the United States. Part II looks at administrative law and the tools that are available to courts when reviewing an action by a governmental agency, such as the federal or state department of corrections. Finally, Part III asserts that to resolve the current constitutional problems in the correctional system, the legal community must utilize administrative law practices and tools. Application of these tools will reveal the three dimensions of the current problem: the nature of the administrative hearing, the type of administrative procedure and the rights at issue. These aspects, in illustration, form three dimensions of an administrative cube.

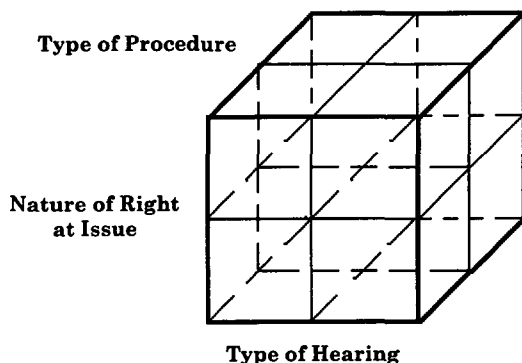


Figure 1.

The cubical paradigm illustrates the procedural structure behind administrative agencies while identifying systemic problems in the correctional system that function together to create gender inequality. After locating the current system within the cube, this Note will identify why the current structure creates problems. The judiciary, along with the legislative and executive branches, can redirect the correctional system within the three-dimensional model by using the tools of administrative law to find a permanent solution to gender discrimination in the system.

## I. The United States Correctional System

### A. The History of Corrections in the United States

The prison system in the United States has developed as a reflection of social, political, economic and cultural changes in society. Interestingly, however, society has not required the prison system to keep up with some of the legal changes that have occurred.<sup>18</sup> In the 1900s, as the United States became increasingly segregated, the prison system did the same by segregating male and female inmates.<sup>19</sup> Since then, this separation by gender has become an accepted characteristic of the modern correctional system.<sup>20</sup>

Female inmates have historically received inferior services compared to those provided to male inmates.<sup>21</sup> First, very few of the female correctional facilities nationwide have vocational training programs, and in general there is a limited number of work programs for female offenders.<sup>22</sup> Second, the services that

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18. Despite the fact that society has attempted to eliminate the separation of people based on an immutable, identifiable characteristic, the gender segregation of prisoners has continued and is accepted. Compare *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (prohibiting the separation of school children based on their race) with *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (upholding a Board of Corrections regulation which was a prima facie case of gender discrimination because being male was a bona fide occupational qualification).

19. See SULLIVAN, *supra* note 10, at 6. The segregation of male and female inmates first occurred with the opening of the Walnut Street Jail in 1790. *Id.* Society viewed this racial gender separation as a "great advance." *Id.* Sing Sing became the first women's prison with rehabilitative services in 1844, and, although it had a short life, it marked a progressive change in women's corrections. *Id.* at 15.

20. See Christine M. Safarik, *Constitutional Law—Separate But Equal: Jeldness v. Pearce—An Analysis of Title IX Within the Confines of Correctional Facilities*, 18 W. NEW ENG. L. REV. 337, 337 (1996); see also *Dothard*, 433 U.S. at 326 (acknowledging and accepting the gender separation of prisons); *Jeldness*, 30 F.3d at 1228 (accepting prison separation by gender due to security needs).

21. See *Hearings*, *supra* note 8, at 10; see, e.g., *Klinger*, 31 F.3d at 729 (claiming women's programs in prison are inferior to those for men); *Pargo*, 69 F.3d at 281 (explaining female inmates' claim of inferior services). See generally SULLIVAN, *supra* note 10 (tracing the inadequate services provided to women throughout the history of America's correctional system). Traditionally, female inmates have had unequal educational programs, including "facilities, programs, services and industrial training opportunities" in comparison to male inmates. *Hearings*, *supra* note 8, at 10. Unfortunately, this programming inequity continues today. See AMERICAN CORRECTIONAL ASS'N, *THE FEMALE OFFENDER: WHAT DOES THE FUTURE HOLD?* 21 (1990) [hereinafter ACA STUDY].

22. See ACA STUDY, *supra* note 21, at 21; see also Beverly R. Fletcher & Dreauna G. Moon, *Introduction*, in *WOMEN PRISONERS: A FORGOTTEN POPULATION* 5, 12 (Beverly R. Fletcher et al. eds., 1993) [hereinafter *WOMEN PRISONERS*]. See generally Rosemary Herbert, *Women's Prisons: An Equal Protection Evaluation*, 94 YALE L.J. 1182, 1182-85, 1193-95 (1985) (analyzing women's corrections under the Equal Protection Clause).

the system does provide to female inmates are problematic in that the vocational training programs for women "provide skills that are not in demand in the outside job market and do not provide a livable wage."<sup>23</sup> Third, the correctional services reflect gender stereotypes; work programs are often limited to "domestic work, hairdressing, typing, sewing and nurse's aide work."<sup>24</sup> Moreover, women's correctional institutions often have inadequate health and medical care, pay women less than men for the performance of the same jobs and use more tranquilizers and psychotropic medications as a means of control.<sup>25</sup>

Explanations for these differences in services focus on the nature of the female inmate population. Some claim that the relatively small female prison population<sup>26</sup> makes the cost of providing better services prohibitive.<sup>27</sup> Others claim that the correctional

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23. Fletcher & Moon, *supra* note 22, at 13.

24. *Id.* (citations omitted); see *Glover v. Johnson*, 478 F. Supp. 1075, 1085 (E.D. Mich. 1979) (identifying the plaintiff's argument that the vocational programs for women in the prison only prepare them for menial positions that are stereotypical for women); *Klinger*, 31 F.3d at 736 (McMillian, J., dissenting) (identifying that that programs for female inmates are limited to domestic work). While male inmates have access to vocational programs in which they could "train to be carpenters, electricians and machine operators, women [inmates] are often restricted to work assignment or classes in sewing, cosmetology, cleaning or food preparation." *Hearings*, *supra* note 8, at 11. One study revealed that these gender stereotypes exist with respect to program goals as well:

[T]he primary goal of programs for female prisoners is often teaching "femininity"—how to walk, talk, and carry themselves. This is related both to the view that female offenders have "failed" as women and must be retrained for the role; and the view that the only hope for women prisoners is marriage.

Fletcher & Moon, *supra* note 22, at 13 (quoting R.R. ROSS & E.A. FABINO, *FEMALE OFFENDERS: CORRECTIONAL AFTERTHOUGHTS* 29 (1986)).

Notably, this problem of stereotyping women in prisons is not unique to the United States. In England, for example, the Prison Department explained in 1973 that female prisoners should be returned to society as "efficient 'housewives'" and to do so the system stressed that education programs for female inmates should cover "personal relationships, family life, home management, child rearing and other domestic topics." PAT CARLEN, *ALTERNATIVES TO WOMEN'S IMPRISONMENT* 19 (1990) (quoting R. Brown, *The Education of Women in Prison*, in *PRISON EDUCATION IN ENGLAND AND WALES* (W. Forster ed., 1982)).

25. Fletcher & Moon, *supra* note 22, at 12.

26. See SULLIVAN, *supra* note 10, at 14 (explaining that in the mid-1800s women were a small proportion of the overall convict population in the United States). See also *Hearings*, *supra* note 8, at 64 (statement by Elaine A. Lord of the Bedford Hills Correctional Facility) (stating that men have been over-represented in prisons in the U.S. for many years). In 1992, there were 833,184 men incarcerated in United States prisons and jails whereas there were only 50,409 women. *Hearings*, *supra* note 8, at 12.

27. See *Glover*, 478 F. Supp. at 1085; Fletcher & Moon, *supra* note 22, at 12. The explanation for this rationale is that the low number of female inmates makes the programming costs higher on a per capita basis. Proponents of this argument

system does not have a strong incentive to spend money to rehabilitate female prisoners because they are not as dangerous to society as their male counterparts.<sup>28</sup> Finally, the system considers female prisoners to be less demanding than men because they are less likely to riot over inadequate prison conditions.<sup>29</sup>

While there are differences in the services available for male and female prisoners, the services that are offered within the correctional system have adapted with society. Specifically, the rehabilitative and punitive aspects of the system have fluctuated as a reflection of the changing sociological and political climates of the day.<sup>30</sup> The 1950s were the Era of Treatment in American correctional facilities,<sup>31</sup> and the period marked a rise in the movement to rehabilitate prisoners.<sup>32</sup> Reality, however, turned this rehabilitative optimism to skepticism as crime rates continued to increase, and the penology perspective had to adjust as the civil rights movement influenced prisoners.<sup>33</sup> As a result, in the 1960s, the correctional system focused on "curing"<sup>34</sup> inmates through commu-

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maintain it is "fiscal reality that providing for a wide range of programs for a smaller number of prisoners entails a greater cost." *Bukhari v. Hutton*, 487 F. Supp. 1162, 1172 (E.D. Va. 1980).

28. See Fletcher & Moon, *supra* note 22, at 12. Female offenders commit more economic crimes than violent crimes. *Hearings*, *supra* note 8, at 12. See generally *infra* notes 58-66 and accompanying text (describing the female inmate population and the crimes that female inmates have committed). Additionally, male inmates are "more likely to be violent and predatory than female inmates." *Klinger*, 31 F.3d at 731.

29. See Fletcher & Moon, *supra* note 22, at 12.

30. See SULLIVAN, *supra* note 10, at 61.

31. See *id.*; cf. FRANK SCHMALLEGGER, CRIMINAL JUSTICE TODAY 445-48 (4th ed. 1997) (identifying 1945-1967 as the Era of Treatment in corrections).

32. See SULLIVAN, *supra* note 10, at 61. The focus of the penal system during that period was on treating and correcting inmates rather than simply on punishing them. *Id.* The American Prison Association marked this systemic redirection by changing its name to the American Correctional Association. *Id.*

The medical model of treatment emerged and gained popularity during this era. SCHMALLEGGER, *supra* note 31, at 447. This approach emphasized "mandatory treatment, indeterminate sentences, and rehabilitation." FED. BUREAU OF PRISONS, U.S. DEPARTMENT OF JUSTICE ANNUAL REPORT 1990, at 7 [hereinafter ANNUAL REPORT]. However, the medical model and the treatment approach were widely unsuccessful due in part to understaffing of programs and questionable diagnosis methods. SULLIVAN, *supra* note 10, at 65. Furthermore, inmates knew that the primary objectives of prisons remained the same; specifically, the aim of the system was "to lock up the convict" and to protect the public. *Id.* at 66-67. This purpose endured all of the orientation changes in the correctional system. See *id.*

33. See SULLIVAN, *supra* note 10, at 76. "The women's movement of the late 1960's . . . renewed demands for equal treatment of male and female inmates. The tide began to turn against domestic training. Instead, advocates insisted on programs that would prepare released women for real-world jobs and self-support." Rafter, *supra* note 10, at 18-19.

34. SULLIVAN, *supra* note 10, at 77.

nity-oriented treatment.<sup>35</sup> This perspective gained support in the 1970s.<sup>36</sup> A change in the attitudes of prisoners, who became somewhat unified against correctional officials, also marked the decade and led to future systemic changes.<sup>37</sup> The 1980s witnessed a decline in the use of community-based corrections as social consensus regarding prisons reverted to classical notions of punishment.<sup>38</sup> A theory of just deserts developed in the correctional system.<sup>39</sup> This perspective continues today.<sup>40</sup>

As the correctional system moved toward rehabilitation and community based corrections in the 1960s and 1970s, prisoners became more politically and legally astute. Inmates raised questions regarding fair process and the rights of offenders within the system.<sup>41</sup> These challenges shook the system. Since the beginning of the United States penitentiary system, courts had essentially ignored lawsuits against correctional facilities and their officials because of a lack of judicial expertise and separation of powers concerns.<sup>42</sup> Additionally, judges used social control theories to explain that judicial interference with the decisions of prison administra-

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35. *Id.* at 83. It was during this era of resocialization that programs such as work release, parole and probation developed with fervor. *Id.* at 83-86. In 1965, the enactment of the Prison Rehabilitation Act officially authorized halfway houses, furloughs and work release programs while putting the Federal Bureau of Prisons in the center of penology. *Id.* at 86.

36. *See id.* at 112; SCHMALLEGGER, *supra* note 31, at 448 (identifying 1967-1980 as the era of the community-based format in corrections).

37. *See SULLIVAN, supra* note 10, at 99. As a result, there were many riots in prisons throughout the nation as the inmates demanded improved living conditions, health care and food. *Id.* at 95-106.

38. *See id.* at 114.

39. *See id.* at 122; *see also* ANNUAL REPORT, *supra* note 32, at 7 (describing the 1980s as the "nothing works" era in which the correctional system minimized rehabilitation and emphasized the notion of just deserts); SCHMALLEGGER, *supra* note 31, at 450 (explaining that the just deserts model is based on the belief that offenders "should get what's coming to them"). Congress enacted the 1984 Comprehensive Crime Control Act, which created the United States Sentencing Commission. SULLIVAN, *supra* note 10, at 125. The Commission asserted that the "rehabilitation of a criminal was of secondary importance to protecting the public and that sentences should reflect the seriousness of the crime committed." *Id.*

40. The era of increased punishment and just deserts theory, which meant more prisoners were in prison and for longer periods of time, *see SULLIVAN, supra* note 10, at 128, still marks the present correctional system. SCHMALLEGGER, *supra* note 31, at 453.

41. *See SULLIVAN, supra* note 10, at 91-92.

42. *See id.* at 92. *But see* FEDERAL BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, FORUM ON ISSUES IN CORRECTIONS, LONG-TERM CONFINEMENT AND THE AGING INMATE POPULATION 94 (1990) [hereinafter FORUM] (explaining the paradox facing the modern correctional system of "having very inexperienced staff managing increasingly sophisticated inmates" which creates potential security problems within the various institutions).



tors "would undermine discipline and cause hazardous conditions for staff and convicts alike."<sup>43</sup> As a result of inmates' legitimate constitutional questions, starting in the early 1960s and continuing in the 1970s, courts began to hear such cases and often ruled in favor of prisoners.<sup>44</sup> Inmates used this new political and legal power to defy prison authority<sup>45</sup> and to change the nature of prison revolts,<sup>46</sup> after which prison administrators were often forced to acknowledge that there were problems within the system.<sup>47</sup> In response to this acknowledgement, the penal system moved away from the treatment approach and refocused on custody as its primary objective.<sup>48</sup>

Despite the judicial system's apparent change in its response to prisoner lawsuits in the 1960s and 1970s, the strong judicial deference to prison administrations has continued.<sup>49</sup> In 1979, the

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43. SULLIVAN, *supra* note 10, at 92.

44. See *id.*; see, e.g., *Johnson v. Avery*, 393 U.S. 483 (1969) (permitting lawyers to provide legal advice to prisoners who could not afford to hire lawyers for their cases); *Cooper v. Pate*, 378 U.S. 546 (1964) (allowing prisoners to sue state officials in federal court for the first time); *Monroe v. Pape*, 365 U.S. 806 (1961) (enabling blacks to bring suit on constitutional grounds directly in federal courts).

45. See Charles H. Jones, *Recent Trends in Corrections and Prisoners' Rights Law*, in CORRECTIONAL THEORY AND PRACTICE 119, 123 (Clayton A. Hartjen & Edward E. Rhine eds., 1992) (explaining that the inmates of the 1960s and 1970s "were no longer content to merely serve time" and that now they "sought to participate in the decision-making processes" of prisons).

46. In the late 1960s and early 1970s, prison gangs began to form as inmates organized themselves based on ethnicity and race. MATTHEW SILBERMAN, *A WORLD OF VIOLENCE: CORRECTIONS IN AMERICA* 119 (1995). These inmate subgroups existed in opposition to other inmate groups rather than just opposing the prison administration. *Id.* With this change in the prison culture, inmate on inmate violence increased in frequency, which added another element of danger to prisons not only during riots but also in daily life. *Id.* at 120. As a result of these changes, there was a major race-instigated riot at San Quentin in 1967, as well as 39 riots in 1969 and 59 in 1970. SULLIVAN, *supra* note 10, at 93.

47. See SULLIVAN, *supra* note 10, at 93-94, 111. In 1971, as a result of prisoner activism and criticism from reformers, the National Advisory Commission on Criminal Justice Standards and Goals admitted that the "system was too arbitrary and discretionary" after the conviction stage of the criminal process. *Id.* at 111. The Commission further acknowledged that the "American judicial system was inadequate and adversely affected the correctional system." *Id.* at 112.

48. See *id.* at 93. This change from the "era of 'everything works' to the era of 'nothing works'" occurred very quickly, and now research reaffirming the value of rehabilitative programs for criminal offenders has challenged the degree of the change. Edward E. Rhine, *Sentencing Reform and Correctional Policy: Some Unanswered Questions*, in CORRECTIONAL THEORY AND PRACTICE, *supra* note 45, at 271, 280.

49. The judicial deference continued only in some situations. When the First or Eighth Amendments were at issue, for example, courts have intervened and required prisons to change their policies to protect the constitutional rights of inmates. See, e.g., *Hutto v. Finney*, 437 U.S. 678 (1978) (affirming that an official prison policy violates the Eighth Amendment if it led to extreme cruelties); *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982) (holding that the Texas correctional system

United States Supreme Court asserted that "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."<sup>50</sup> Furthermore, the Court has stated that judicial deference is necessary under the separation of powers doctrine because prison administration is the responsibility of the executive and legislative branches.<sup>51</sup>

In granting this high degree of deference, the Court also acknowledged the need to protect the constitutional rights of inmates.<sup>52</sup> When reviewing a claim that prison policies infringe on the constitutional rights of inmates, a court may only inquire whether the regulation is "reasonably related to legitimate penological interests."<sup>53</sup> If the regulation is reasonably related, then

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violated the Eighth Amendment). See generally SILBERMAN, *supra* note 46, at 110-16 (discussing the demise of the hands-off policy and the emergence of a legally imposed professionalism in the correctional system).

50. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); see *Wolff v. McDonnell*, 418 U.S. 539, 568 (1974) (deferring to the "sound discretion of corrections officials" to determine, within limits, the appropriate procedural measures to use for certain agency hearings that are adverse to inmates given concerns regarding security and rehabilitative goals).

51. *Turner v. Safley*, 482 U.S. 78, 85 (1987). Operating a prison falls "peculiarly within the province of the legislature and executive branches," and "separation of powers concerns counsel a policy of judicial restraint." *Id.* Recently, the Eighth Circuit Court of Appeals further explained the reasoning behind this deferential treatment:

When determining programming at an individual prison under the restrictions of a limited budget, prison officials must make hard choices. They must balance many considerations, ranging from the characteristics of the inmates at that prison to the size of the institution, to determine the optimal mix of programs and services.

*Klinger v. Department of Corrections*, 31 F.3d 727, 732 (8th Cir. 1994).

52. *Turner*, 482 U.S. at 85. This combination of judicial deference to prison administrations and the recognized constitutional rights of prisoners has created "a lot of confusion out there about where states' rights to run their prisons end, and constitutional protections of prisoners begin." Deborah Sharp, *Worst of the Worst' Flood out of Florida Prisons*, USA TODAY, Nov. 27, 1996, at 3A. In addition, judicial deference to the "highly discretionary" authority of prison administrators makes it difficult to protect the rights of inmates because "opportunities abound for discriminatory practices that are difficult to detect." Douglas C. McDonald & David Weisburd, *Segregation and Hidden Discrimination in Prisons: Reflections on a Small Study of Cell Assignments*, in CORRECTIONAL THEORY AND PRACTICE, *supra* note 45, at 146, 150-51.

53. *Turner*, 482 U.S. at 89; see also Elizabeth M. Parker, Minn. Dep't of Trans., *The Minnesota Administrative Procedure Act After a Decade of Change: The State Agency Perspective*, in THE MINNESOTA ADMINISTRATIVE PROCEDURE ACT AFTER A DECADE OF CHANGE § III, at 8 (1986) ("[I]t is generally held that an agency need only establish a rational basis to support its rules, that is, a reasonable connection between the problem sought to be remedied and the proposed remedy for that problem."). For a regulation to be reasonable, courts should examine several factors, including whether there is a valid and rational nexus between the regulation

the court will uphold it.<sup>54</sup> The Court reasoned that applying strict scrutiny, which is the typical standard of review for alleged violations of the fundamental rights of citizens, would interfere with the ability of prison officials to devise "innovative solutions" to the many problems arising in the course of prison administration.<sup>55</sup>

### *B. Profile of the Female Inmate Population*

The correctional system's female population profile reveals the results of the historical adaptations in the correctional system and exposes some of the problems facing the modern system, including distinctions between male and female inmates. If correctional institutions acknowledged and worked with these differences, they would have important implications for the rehabilitative and support programming in the facilities.<sup>56</sup>

Many social problems are more prevalent within the female inmate population than the male population. First, while the inmate population is still primarily male, the number of female prisoners is increasing at a much faster rate.<sup>57</sup> In trying to identify

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and the legitimate government interest. See *Turner*, 482 U.S. at 89-90.

54. See *Turner*, 482 U.S. at 89.

55. *Id.*

56. See *Hearings*, *supra* note 8, at 8.

57. See *id.* at 12 (statement by Brenda Smith, counsel for the National Women's Law Center); see also ANNUAL REPORT, *supra* note 32, at 3 (reporting the annual increase in the female and male prison populations). From 1980 to 1992, the number of women in prison increased by 275% while the population of male inmates increased by 160%. *Hearings*, *supra* note 8, at 12. Additionally, for each year since 1981, the female population in correctional facilities has increased by a higher percentage than the male population. ACA STUDY, *supra* note 21, at 1; see also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, THE NATION'S PRISON POPULATION GREW ALMOST 9 PERCENT LAST YEAR (Aug. 9, 1995) (stating the number of female inmates increased by 10.6% in 1994 whereas the number of male inmates grew by 8.5%); cf. Sue Kline, *A Profile of Female Offenders in the Federal Bureau of Prisons*, FED. PRISONS J., Spring 1992, at 33 (stating that the female prison population grew at a faster rate than the male population in seven of the ten years between 1981 and 1991). As a result of this growth, there were 50,409 women incarcerated in 1992 compared to 833,184 men. *Hearings*, *supra* note 8, at 12 (statement by Brenda Smith, counsel for the National Women's Law Center).

The unequal number of male and female inmates, and the alarming rate of the population's increase exists at all levels of the system. By 1994, the gender disparity in the population had increased, as there were 434,838 men and 48,879 women in the nation's 3,300 jails. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, THE NATION'S JAILS HOLD RECORD 490,442 INMATES (Apr. 30, 1995). By the end of 1995, there were about 1,078,357 inmates in the state and federal prisons, which primarily house convicted inmates who are usually serving out a sentence of longer than one year; in comparison, jails normally hold people who are either awaiting trial or serving out gross misdemeanor or misdemeanor sentences, which are generally for less than a year. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, ALMOST 1.6 MILLION MEN AND WOMEN IN THE NATION'S PRISONS AND JAILS (Aug. 18, 1996). Of those in a state or federal prison, women repre-

the causes of this trend, scholars have linked the increasing female crime rate variously to the emancipation of women in society at large,<sup>58</sup> to socioeconomic factors<sup>59</sup> and to the approach of the criminal justice system itself.<sup>60</sup> Second, large percentage of female inmates experienced some type of abuse before their incarceration<sup>61</sup> which contributed to the development of their criminal psyche.<sup>62</sup> Third, most women offenders have a history of poverty<sup>63</sup> and many have addictions to controlled substances.<sup>64</sup> Finally, family obliga-

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sented 6.1% of the inmate population. *Id.* These numbers reflect a 113% increase in the inmate population in state and federal prisons and local jails since 1985. *Id.*

58. See Fletcher & Moon, *supra* note 22, at 11; see, e.g., Nanci Koser Wilson, *The Industrialization of Wilderness: Women, Crime and Rurality*, in *RURAL CRIMINAL JUSTICE: CONDITIONS, CONSTRAINTS & CHALLENGES* 147, 164 (Thomas D. McDonald et al. eds., 1996) (explaining that women, as do men, tend to turn to crime as a solution for economic crises when they work outside the home). For a thorough discussion of this theory, see FRED A. ADLER, *SISTERS IN CRIME: THE RISE OF THE NEW FEMALE CRIMINAL* (1975) and RITA J. SIMON, *WOMEN AND CRIME* (1975) (explaining that the existing disparities between the male and female crime rates are due to socialization rather than to biology).

59. See Fletcher & Moon, *supra* note 22, at 11. In 1991, women were usually in federal prisons for convictions for economic crimes, such as drug-related offenses (almost 64%), property offenses (6.3%) and extortion, bribery or fraud (6.2%). *Hearings*, *supra* note 8, at 12.

60. See, e.g., Meda Chesney-Lind, *Rethinking Women's Imprisonment: A Critical Examination of Trends in Female Incarceration*, in *THE CRIMINAL JUSTICE SYSTEM AND WOMEN OFFENDERS, VICTIMS, AND WORKERS* 105 (Barbara Raffel Price & Natalie J. Sokoloff eds., McGraw-Hill 1995) (1982) (attributing the rise in female incarceration to shifts in criminal justice policies rather than to a change in the behavior of women). Given the high percentage of women serving sentences for drug-related offenses, see *supra* note 59, the war on drugs may explain part of the increase in the number of women in prison, see Fletcher & Moon, *supra* note 22, at 8.

61. See *Hearings*, *supra* note 8, at 13 (statement by Brenda V. Smith, counsel for the National Women's Law Center). Prior to being incarcerated, 41% of women in prison and 44% of those in jails were physically or sexually abused. *Id.*; cf. *ACA STUDY*, *supra* note 21, at 56-57 (reporting that 53% of adult female inmates were victims of physical abuse and 35.6% were victims of sexual abuse). As of 1993, 2,000 female inmates were serving time for defending themselves against their batterers. *Hearings*, *supra* note 8, at 13.

62. See *Hearings*, *supra* note 8, at 14. "[P]hysical and sexual victimization and the low self-esteem that accompanies this abuse" are among the key issues that generate criminal conduct. *Id.*

63. See *id.* at 8-9 ("The female prison population is overwhelmingly comprised of low-income women of color caring for dependent children with little family or social support."). With 53% of those in prison and 74% of those in jail, the majority of female inmates in 1993 were unemployed prior to serving their sentence. *Id.* at 12. The sting of unemployment is strengthened by the fact that 80% of incarcerated women are mothers, and 70% of them are single parents. *Id.* These figures correlate with the fact that the majority of women serve time for economic or other non-violent crimes. See *supra* note 59 (listing examples of these crimes). In comparison, drug offenses and property crimes account for 65% of the crimes for which men were incarcerated. *Hearings*, *supra* note 8, at 8.

64. See *Hearings*, *supra* note 8, at 12. See generally Dreama G. Moon et al., *Patterns of Substance Use Among Women in Prison*, in *WOMEN PRISONERS*, *supra*

tions contribute to the needs and demands in inmates' lives outside of the correctional system.<sup>65</sup> While many of the incarcerated women committed economic crimes, their substance abuse mirrors the drug crises facing the entire country today.<sup>66</sup>

*C. Constitutional Considerations of the Right to Access  
Correctional Programs*

Systemically, the penal system has returned to an emphasis on the custodial and punitive aspects of corrections.<sup>67</sup> Nevertheless, both state and federal prisons utilize various services to prepare inmates for their reentry into society and to improve living conditions within prisons.<sup>68</sup> One of the most common community-

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note 22, at 45, 45-54 (describing the high level of substance abuse among women in the correctional system). In 1993, 34% of women in jails were serving time for drug-related offenses. *Hearings*, *supra* note 8, at 12. In addition, the Federal Bureau of Prisons reported that in 1991 64% of women in federal prisons were serving time for drug offenses in comparison to 56% of federal male prisoners. *Id.* at 8.

65. See *Hearings*, *supra* note 8, at 12. Not only are the majority of female inmates mothers, see *supra* note 63, but 85% of them also had custody of their children prior to their incarceration whereas 47% of the fathers in prison had custody of their children prior to serving their time. *Id.* Because of the disproportionately high number of female inmates with family obligations, the incarceration of women has a more significant impact on family stability than the incarceration of men. *Id.* at 9.

66. See, e.g., ANNUAL REPORT, *supra* note 32, at 7 (commenting that the concentration of inmates with substance abuse problems reflects a larger societal problem); Moon et al., *supra* note 64, at 47 ("Another reason that women are increasingly involved with drug-related crimes is that society in general is more involved with drugs. Drug and alcohol addiction are among the most common and serious social problems in U.S. society."). See generally *supra* notes 58-66 and accompanying text (explaining that the female prison population suffers problems stemming from economics, abuse, addictions and family obligations).

67. See *supra* notes 38-39 and accompanying text (tracing the reversion of society and the correctional system from an emphasis on rehabilitation to an emphasis on punishment and just deserts).

68. See FORUM, *supra* note 42, at 73-75 (briefing by J. Michael Quinlan, Director of the Federal Bureau of Prisons). Many institutional programs serve multiple functions. "Work, self-improvement activities, education, vocational training, and other programs not only reduce the debilitating idleness of an overcrowded institution, but offer important security management benefits such as supervised time out of cells, and enhanced security—and consequently public safety." *Id.* at 73; see also SULLIVAN, *supra* note 10, at 71 (explaining that vocational programs have historically improved the "custodial and budgetary state of the prison system"). Additionally, education and literacy programs help to prepare inmates to "function lawfully in society." FORUM, *supra* note 42, at 75. Vocational training programs provide "male and female offenders" with preparation for employment upon their release from prison. *Id.* Moreover, some jails have found that by providing other services, such as crisis intervention specialists, inmates receive appropriate care while the corrections officers do not have to handle mental health problems and can thereby focus on other aspects of their jobs, such as security. Suzanne M. Morris et al., *Mental Health Services in United States Jails*, in CRIMINAL JUSTICE AND BEHAVIOR, Mar. 1997, at 3, 12-13.

based services is parole.<sup>69</sup> Parole authorizes an inmate to serve the remainder of her or his sentence outside of the prison provided that the inmate follows certain conditions.<sup>70</sup> In this sense, parole is part of the process of rehabilitating the inmate into society and is not part of the criminal prosecution.<sup>71</sup> However, prisoners do not have a right to any type of rehabilitative program.<sup>72</sup> If the state chooses to provide a program for inmates, it may establish the terms and conditions of the program.<sup>73</sup>

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69. In 1995, there were more than 700,000 adults on parole under federal, state, or local jurisdictions. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE POPULATION REACHES ALMOST 3.8 MILLION 1 (June 30, 1996) [hereinafter PROBATION AND PAROLE]; see also KATHLEEN MAGUIRE & ANN L. PASTORE, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1995, at 592 (1996) (identifying the number of adults on parole under state and federal jurisdictions). Of this number, 10% were women. PROBATION AND PAROLE, *supra*, at 3.

70. See *Morrissey v. Brewer*, 408 U.S. 471, 480-82 (1972). The inmate is released from prison "based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person." *Id.* at 482. A parolee may enjoy many freedoms, but those freedoms are subject to the conditions of parole, which a parole officer enforces. *Id.* "Supervision [of a parolee] is not directly by the court but by an administrative agency, which is sometimes an arm of the court and sometimes of the executive." *Id.* at 480; see, e.g., MICH. COMP. LAWS § 791.238(1) (1994) (stating that a parolee is under the control of the state department of corrections). If the parolee violates those conditions, the parole authority must determine whether to revoke the parole status and return the parolee to prison. *Morrissey*, 408 U.S. at 479-80; see also PROBATION AND PAROLE, *supra* note 69, at 15 (stating that if a parolee violates a rule or commits another offense, he or she is subject to being returned to prison). Upon revocation of parole, it is generally within the discretion of the parole board whether the parolee will receive good-time credit toward the completion of his or her sentence for the time served on parole. *Id.*; see, e.g., MICH. COMP. LAWS § 791.238(4) (authorizing the state parole board to use its discretion to determine whether to grant good time credit to a parole violator). In general, the provision of good-time credits for inmates varies from state to state. DEAN J. CHAMPION, PROBATION, PAROLE AND COMMUNITY CORRECTIONS 206-09 (2d ed. 1996).

71. See *Morrissey*, 408 U.S. at 480. Because the revocation of parole is not part of a criminal prosecution, all of the rights granted to a defendant in a criminal proceeding are not granted to a parolee at a parole revocation hearing. Nevertheless, parole revocation is a denial of freedom, and the hearings must follow several specific procedures that ensure minimum due process. See *id.* at 487-90. While procedures may vary by jurisdiction, generally a panel or a parole board conducts parole hearings. U.S. PAROLE COMM'N, U.S. DEP'T OF JUSTICE, PROCEDURES MANUAL 12-13, 106 (1983). A hearing, whether for the purpose of granting or revoking parole, involves the interests of one individual and takes testimony from interested parties, while the parole board's decision is the final outcome regarding the person's past behavior. *Id.*; see *Wolff v. McDonnell*, 418 U.S. 539, 573 (1974) (explaining that an inmate's behavior in prison is frequently an important criteria for parole decisions).

72. See *Newman v. Alabama*, 559 F.2d 283, 291 (5th Cir. 1977), *rev'd on other grounds*, 438 U.S. 781 (1978); see also *Hinkle v. Ohio Parole Auth.*, 419 F.2d 130, 131 (1969) (stating inmates do not have a right to parole). Thus, states are not compelled to provide any type of rehabilitation, including parole. *Id.*

73. *Hinkle*, 419 F.2d at 131.

Even though there is no right to these services, if the state provides them, the Equal Protection Clause of the Fourteenth Amendment forbids it from providing the program in a discriminatory manner.<sup>74</sup> When reviewing a government service, the judiciary applies a different standard of review depending upon whose rights the program allegedly violates.<sup>75</sup> Claims involving the classification of individuals by gender receive intermediate scrutiny,<sup>76</sup> which requires that the classification be substantially related to an important government interest if it is to be upheld.<sup>77</sup> The basic but essential question in equal protection analysis is whether the challenged regulation advances the government objective in a manner consistent with the requirements of the Fourteenth Amendment.<sup>78</sup>

It is important to note, however, that for a court to engage in equal protection analysis, the person whose rights are allegedly violated by the government must be similarly situated to those on

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74. See, e.g., *Douglas v. California*, 372 U.S. 353, 355-58 (1963) (holding that due process and equal protection require a state to provide counsel for defendants at a criminal appeal where the state provides a right of appeal because once a state makes a right or procedure available it must make it equally available to everyone).

75. Strict scrutiny is the highest level of review that a court will apply to an equal protection claim. The standard requires that a government classification must be narrowly tailored to achieve a compelling government interest. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 470 (1989) (applying strict scrutiny to a city policy that discriminated against white contractors). Courts reserve this high level of review for discrete and insular minority groups; more specifically, this high standard is applied to classifications based on race and national origin. See *United States v. Virginia*, 116 S. Ct. 2264, 2275 n.6 (1996).

The middle level of review is intermediate scrutiny. This standard requires that the government classification be substantially related to an important governmental objective. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny to a gender discrimination case).

Rational basis review is the lowest level of judicial scrutiny. This standard only requires that the government classification be reasonably related to a legitimate government interest. In other words, a court will only strike a law if the classification is "purely arbitrary." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). This level of review allows a court to defer to a government classification if there is some plausible basis for it, even if that was not the actual basis for the government action, because the Court has "never insisted that a legislative body articulate its reasons for enacting a statute." *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

76. See *Craig*, 429 U.S. at 197-98 (1976).

77. *Id.* at 197. In applying intermediate scrutiny to gender discrimination cases, the Court has ruled that administrative convenience is not an important government interest. *Id.* at 198. Additionally, savings in time, money and effort do not justify gender-based discrimination. See *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977). Furthermore, in contrast to rational basis review, see *supra* note 75, the justification for a gender classification "must be genuine, not hypothesized or invented post hoc in response to litigation." *United States v. Virginia*, 116 S. Ct. at 2275.

78. See *Reed v. Reed*, 404 U.S. 71, 76 (1971).

the other side of the government's classification.<sup>79</sup> In many of the equal protection claims brought by female inmates, the courts have ruled that the female and male inmates are not similarly situated.<sup>80</sup> By making this determination, courts avoid the constitutional question of whether the government action violated the Equal Protection Clause, which frees them from conducting a full constitutional analysis.<sup>81</sup> In several cases, the courts have only required "parity of treatment" of male and female inmates.<sup>82</sup> This minimum level of judicial review has played an important role in the development of the correctional system, the discrimination existing within it and the tensions underlying it. To better understand these issues, it is important to analyze the administration of the correctional system.

## II. The Administrative Perspective

To fully understand the discrimination in the corrections system, it is necessary to understand the system that enables the discrimination to exist. The corrections system and its various departments on the federal and state levels are independent

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79. Courts have interpreted the Equal Protection Clause as being a "direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). "To be 'similarly situated,' groups need not be identical in makeup, they need only share commonalities that merit similar treatment." *Betts v. McCaughtry*, 827 F. Supp. 1400, 1405 (W.D. Wis. 1993).

80. See, e.g., *Pargo v. Elliott*, 894 F. Supp. 1243 (S.D. Iowa 1994) (holding male and female inmates are not similarly situated for purposes of prison programming); *Klinger v. Department of Corrections*, 31 F.3d 727, 733 (8th Cir. 1994) (same). But see *Glover v. Johnson*, 478 F. Supp. 1075, 1078-79 (E.D. Mich. 1979) (holding male and female inmates are similarly situated and that the disparity in facilities between male and female inmates violated the Equal Protection Clause); *Klinger*, 31 F.3d at 733 n.4 (noting that male and female inmates are similarly situated for purposes of the process by which the department of corrections makes decisions). Courts explain that different resources, physical separation, security levels and characteristics of the inmates' profiles distinguish male and female inmates for programming purposes. See *supra* Part I.B (profiling the female inmate population and distinguishing it from the male population); see, e.g., *Klinger*, 31 F.3d at 731-32 (explaining why male and female inmates are not similarly situated for purposes of programming).

81. See, e.g., *Glover*, 478 F. Supp. at 1079 (holding that equal protection in the prison setting requires only parity of treatment between male and female inmates).

82. See *id.* Parity of treatment has a less concrete meaning in comparison to intermediate scrutiny. Courts have consistently held that parity represents something less than identical treatment. See, e.g., *id.* at 1079, 1087 (applying the parity of treatment standard and indicating that it is a sufficient standard for reviewing state actions in the treatment of its prisoners. However, even in *Glover*, where the court found that the parity of treatment test was not satisfied, the proposed remedies have not taken effect because they are so vague. Safarik, *supra* note 20, at 341 n.21.



administrative agencies.<sup>83</sup> As such, departments of corrections, prison administrations and each correctional agency on the federal and state levels exercise considerable discretion in interpreting and applying the powers that the legislatures delegated to them.<sup>84</sup> However, the actions of an agency and judicial review of agency decisions are limited by the rules of administrative law, including either the federal Administrative Procedure Act<sup>85</sup> or the relevant state-law equivalent.<sup>86</sup>

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83. Generally, the various components of the correctional system fall under the classification of administrative agencies. *See, e.g.*, MICH. COMP. LAWS § 24.313 (1994) (stating that the Michigan Department of Corrections is a state agency under the state administrative procedures act). Administrative agencies "are established in fields where it is too difficult to state a practical, general rule." LEE LOEVINGER, *THE ADMINISTRATIVE AGENCY AS A PARADIGM OF GOVERNMENT: A SURVEY OF THE ADMINISTRATIVE PROCESS* 1 (1965). Agencies have specified areas of jurisdiction for which they formulate specific policies, manage large organizations and exercise executive power. *See id.* at 2. Their primary purpose "is the effectuation of some policy which is thought to be in the public interest, rather than merely the securing of justice between parties with conflicting private interests." *Id.* at 10.

Upon the suggestion of the Model State Administrative Procedure Act, however, some States have individually excluded parole boards from their statutory definition of agency because although the boards "are authorized to hold hearings, [they] exercise purely discretionary functions." NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *MODEL STATE ADMINISTRATIVE PROCEDURE ACT* 8 (1946) [hereinafter *MODEL STATE APA*].

84. Because courts do not substitute their judgment for that of the agency with respect to the wisdom or propriety of a decision, agencies have significant discretion in pursuing their policy objectives. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (requiring an explanation for an agency policy decision which was inconsistent with a statutory prohibition); *Murphy v. Oakland County Dep't of Health*, 290 N.W.2d 139 (Mich. 1980) (prohibiting a reviewing court from substituting its opinion for that of an agency when there is evidence in the record to support the agency decision); *see also supra* notes 49-51 and accompanying text (explaining the continuing judicial deference given to correctional agencies). In addition, statutory provisions often grant broad powers to departments of corrections to use their discretion to make decisions. *See, e.g.*, MICH. COMP. LAWS § 791.201 (1994) (creating the state department of corrections); § 791.204 (granting the department of corrections exclusive jurisdiction over "paroles and penal institutions" and other correctional programs); § 791.206 (authorizing the director of the department to announce rules pursuant to the administrative procedures act of 1969 which provide for the "management and control of state penal institutions"); § 791.265(a) (granting director of the department of corrections authority to "extend the limits of confinement of a prisoner" to participate, *inter alia*, in training or educational programs).

85. *See* 5 U.S.C. § 551-706 (1994) [hereinafter *APA*]. The APA provides "comprehensive regulation of procedures in many agencies." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 523 (1978) (quoting *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950)). Congress has amended the federal APA very little since its enactment in 1946. STEPHEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXTS AND CASES* 23 (3d ed. 1992). The APA developed from a recommendation of an executive Committee on Administrative Management, which

When examining an act or decision of an agency, such as a state or the federal department of corrections, it is necessary to determine whether the agency had legal authority to act on the issue in question. A reviewing court must first determine whether the applicable statute authorized the agency to act on the issue.<sup>87</sup> If it did, the court and the agency must defer to the congressional intent.<sup>88</sup> Then the court turns to the Constitution to ensure that the lines drawn by the legislature in conferring a service to prisoners are constitutionally permissible.<sup>89</sup> If the lines are constitutional, then it is necessary to apply the nondelegation test<sup>90</sup> and deter-

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emerged from the widespread concern that the government needed some legislation to "respond to criticisms of the administrative process' fairness and to rationalize disparate administrative practices along more consistent lines." *Id.*; see also Bureau of Nat'l Affairs, *Administrative Procedure Act*, in PAMPHLETS ON ADMINISTRATIVE LAW AND PROCEDURE no. 2, 1 (providing the legislative history of the APA).

86. While the APA is a federal statute and thus only applies to federal agencies, during the last thirty years, many states "have also codified administrative law principles in state administrative procedure acts." BREYER & STEWART, *supra* note 85, at 23 n.33 (citing 13 U.L.A. 347 (1978 pamphlet)). Twenty-seven states and the District of Columbia have codified the Model State Administrative Procedure Act. MICH. COMP. LAWS ANN. Prec. § 24.201, References and Annots. (West 1996). Michigan, the location of the Huron Valley Women's Facility at issue in *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich.1979), is one of these states. See MICH. COMP. LAWS § 24.201-24.328 (1994).

This Note uses the Michigan Administrative Procedure Act and Michigan's related case law to exemplify the state-law equivalent of the federal APA and federal case law. Because the codified Model State Administrative Procedure Acts nearly mirror the federal APA, BREYER & STEWART, *supra* note 85, at 23 n.33, the following administrative law review applies to both federal and state agencies.

87. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); see, e.g., MICH. COMP. LAWS § 24.306 (1994) (codifying the Model State Administrative Procedure Act and authorizing courts to strike down agency decisions that violate statutory authority). Before actually examining an agency's action, a reviewing court must determine whether Congress directly addressed the issue in question. *Id.* If the statute specifically addresses the issue in question, the court must ensure that the agency acted in accordance with the statute. *Id.* If, however, Congress did not clearly address the issue in the statute, then the court must look to the agency's interpretation of the statute to determine "whether the agency's action is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842-43.

88. See *Chevron*, 467 U.S. at 843. If Congress did not directly address an issue via statute, then the court must determine only whether the agency's interpretation of the statute "in the context of this particular program is a reasonable one." *Id.* at 845.

89. See, e.g., *Commonwealth v. Butler*, 328 A.2d 851 (Pa. 1974) (holding sentencing legislation violated the Equal Protection Clause as it applied to women).

90. The Supreme Court first expressed the nondelegation doctrine in *Field v. Clark*, 143 U.S. 649 (1892). It explained that the concept that "Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Id.* at 692.

mine whether the statute constitutionally delegates authority to the department of corrections to interpret and apply the law.<sup>91</sup>

After establishing that the agency had the authority to act, it is necessary to determine whether the agency action was proper both substantively and procedurally. Substantive review of an agency action entails review of factual and legal determinations.<sup>92</sup> While an agency generally has the authority to exercise its discretion in making substantive determinations, there are some limitations on that power. First, the reviewing court must ensure that the agency reasonably interpreted its statutory power.<sup>93</sup> Second, the federal APA and its state-law equivalent place restraints on the substance of agency decisions, but the level of restraint depends on whether the agency maintained a formal<sup>94</sup> or informal<sup>95</sup> record.<sup>96</sup> If the record is formal, then the APA provides for judicial

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91. See, e.g., *Crowell v. Benson*, 285 U.S. 22 (1932) (explaining that there are few limits on the congressional power to create agencies and to delegate power to them but that courts retain judicial review over the legal, factual, and procedural aspects of the decisions). But see *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542-51 (1935) (striking the validity of a congressional statute as an unconstitutional delegation of power). The nondelegation doctrine has been used to strike the statutory delegation of power in only two cases. See *Schechter Poultry*, 295 U.S. at 542-51; *Panama Refining Co. v. Ryan*, 293 U.S. 388, 420-30 (1935). In a recent application of the doctrine, the Eighth Circuit Court of Appeals held that a statute was an overbroad delegation of power and as such that it was unconstitutional under the nondelegation doctrine. *South Dakota v. United States Dep't of the Interior*, 69 F.3d 878 (8th. Cir. 1995), *vacated and remanded*, 117 S. Ct. 286 (1996).

92. See *Crowell*, 285 U.S. at 53 (explaining courts have the authority to review the factual and legal decisions of agencies); see, e.g., MICH. CONST. art. VI, § 28 (providing for state judicial review of agency decisions of law and fact).

93. See *supra* notes 87-88 and accompanying text (explaining the two step process used to determine whether an agency acted reasonably under a statute); see, e.g., MICH. COMP. LAWS § 24.306 (1994) (exemplifying state administrative procedure acts that follow the federal standards by barring agency decisions if they exceed their statutory authority); *Goolsby v. City of Detroit*, 535 N.W.2d 568 (Mich. 1995) (stating that courts shall set aside legal rulings of administrative agencies if they violate the a state statute).

94. See, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (requiring a formal record of the agency decision and the reasons supporting it to enable the reviewing court to apply a substantial evidence standard of review). Formal proceedings are subject to sections 556 and 557 of the APA, which require a record as the basis of an agency decision. 5 U.S.C. §§ 556-57 (1994).

95. While informal adjudication is not subject to APA regulations, informal rule-making proceedings are subject to section 553 of the APA, which requires notice to the public of an agency hearing and an opportunity for the public to comment on the issue. 5 U.S.C. § 553.

96. See, e.g., *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973) (holding that an agency has the discretion to choose either formal or informal rule-making unless the applicable statute uses a clear statement to require a formal process). The type of record influences the level of review because judicial review of an agency's decision is limited to the record from the administrative proceeding.

review based on substantial evidence found in the record as a whole.<sup>97</sup> The APA provides for a lesser, more deferential review using an arbitrary, capricious and abuse of discretion standard if there is only an informal agency record.<sup>98</sup> In either situation, however, the standards are essentially reasonableness tests.<sup>99</sup>

The common law of judicial review of administrative decision-making and the United States Constitution present more general restraints on the substance of an agency's decision. Courts have traditionally required an agency to substantively comply with its own prior actions.<sup>100</sup> When reviewing inconsistent or unsubstantiated agency decisions, the Supreme Court has applied a "hard look" doctrine.<sup>101</sup> In essence, the standard requires an agency to

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See, e.g., MICH. COMP. LAWS § 24.304 (1994) (limiting judicial review to the record of an agency under its state codification of the Model State Administrative Procedure Act); *Greenbriar Convalescent Ctr., Inc. v. Department of Pub. Health*, 310 N.W.2d 380 (Mich. 1981).

97. See, e.g., *Universal Camera*, 340 U.S. 474 (applying a substantial evidence standard of review to a formal rule-making proceeding); *Murphy v. Oakland County Dep't of Health*, 290 N.W.2d 139 (Mich. 1980) (applying the same standard under the state administrative procedure act). This standard of review has been codified in the APA and the Model Administrative Procedure Act as codified in several states, which requires a court to utilize a "substantial evidence" standard when reviewing facts found in formal rule-making. 5 U.S.C. § 706(2)(E) (1997); see, e.g., MICH. COMP. LAWS § 24.306(106) (1994) (adopting the federal "substantial evidence" standard in its codification of the Model State Administrative Procedure Act). The standard looks for substantial evidence on the record as a whole to support an agency decision. *Universal Camera*, 340 U.S. at 490. This considers the viewpoint of a reasonable expert, rather than a reasonable person, examining the record without bias. However, even after applying a substantial evidence test, a reviewing court needs to apply the APA "catch-all" standard to the agency action; specifically, the court must ensure that the agency decision is not "arbitrary, capricious, or an abuse of discretion" in any manner for the court to ultimately uphold the action. 5 U.S.C. § 706; MICH. COMP. LAWS § 24.306; *Association of Data Processing v. Board of Governors*, 745 F.2d 677 (D.C. Cir. 1984).

98. See, e.g., *SEC v. Chenery Corp.*, 322 U.S. 194 (1947) [hereinafter *Chenery II*] (upholding an agency decision because it satisfied the arbitrary, capricious, or abuse of discretion standard even though the decision did not have a record to support it). The APA and the Model State Administrative Procedure Act codified the deferential standard that the *Chenery II* Court adopted. 5 U.S.C. § 706; see, e.g., MICH. COMP. LAWS § 24.306. It serves as a check on the agency decision to use adjudication or rule-making.

99. Compare *supra* note 97 (explaining that the application of the arbitrary, capricious or abuse of discretion standard is the final step of the substantial evidence test) and note 98 (identifying arbitrary, capricious or abuse of discretion as the standard to apply when reviewing an informal agency record) with note 75 (stating that under rational basis review a court will only strike down a governmental classification if it is "purely arbitrary").

100. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983); see also *DeBeaussiaert v. Shelby Township*, 333 N.W.2d 22 (Mich. 1982) (applying the federal requirement to the state by requiring a state agency to follow its own rules).

101. See, e.g., *State Farm*, 463 U.S. at 42 (noting that an agency must explain a

provide a reasoned analysis for a change in its policies or for an inconsistency between its decision and the statute.<sup>102</sup> Additionally, common law restrains agency regulations that are retroactive.<sup>103</sup> Lastly, the Constitution limits the substantive decisions of governmental agencies just as it limits other state actors.<sup>104</sup>

Finally, the courts must engage in a procedural review over the agency's action.<sup>105</sup> First, the agency must follow any specific procedure or hearing specified in the organic statute.<sup>106</sup> If the statute does not impose specific procedural requirements, then the agency generally has the discretion to choose between either a formal or informal record and either an adjudicative<sup>107</sup> or rule-

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change in policy); *see also* *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-21 (1971) (applying hard look review, remanding for plenary review of agency record and requiring an explanation for the agency decision which was inconsistent with a statutory prohibition).

102. *See State Farm*, 463 U.S. at 42. The hard look standard functions to ensure that the agency's decision is not arbitrary, capricious or an abuse of discretion. *See id.* at 42-43. As an example, while an agency needs to be able to "adapt their rules and policies to the demands of changing circumstances," that does not require the agency to deregulate its area. *Id.* at 42 (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)).

103. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) (explaining that retroactivity is valid only with respect to adjudication and that retroactive rule-making should be avoided unless a statute gives explicit power to the agency to do so). *But see* *Miriam Ctr. for the Aged v. Mathews*, 590 F.2d 1250 (3d Cir. 1978) (allowing for rule-making that is secondarily retroactive if it satisfies an arbitrary, capricious and abuse of discretion standard because it only changes the consequences of a past action whereas rules that are primarily retroactive change the legality of the act itself).

104. *See, e.g.*, the discussion of the Equal Protection Clause of the Fourteenth Amendment, *supra* notes 74-79 and accompanying text (explaining that the Amendment prohibits any state from discriminating against certain minorities); *Goolsby v. City of Detroit*, 535 N.W.2d 568 (Mich. 1995) (stating that courts shall set aside legal rulings of administrative agencies if they violate the Constitution).

105. *See, e.g.*, MICH. COMP. LAWS § 24.306 (1994) (codifying the Model State Administrative Procedure Act to authorize a court to strike down an agency decision if the agency violated required procedures).

106. *Cf. United States v. Florida East Coast Ry. Co.*, 410 U.S. 224 (1973) (explaining that a statute can only require an agency to use a formal procedure by clearly requiring it).

107. An adjudicative hearing is similar to a trial with respect to purpose and procedure in that it addresses the interests of one entity and involves testimony, evidence and competing sides. *See* 5 U.S.C. § 551 (1994). Technically, adjudication is an "agency process for the formulation of an order," which is a "final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule-making but including licensing." *Id.*

While agencies have this quasi-judicial function, however, they are notably different from courts. First, in addition to the fact that agency members are not judges, "precedent is of considerably less importance in administrative proceedings." LOEVINGER, *supra* note 83, at 5. Second, agencies are more likely than a court to decide cases in a certain manner to pursue their policy objectives. *See id.* Third, agency boards are not equivalent to unbiased magistrates; in fact, agencies maintain a continuing interest in their respective fields of expertise. *See id.* at 11.

making<sup>108</sup> hearing.<sup>109</sup> Additionally, the APA or its state-law equivalents requires that the agency's procedural selection must not be arbitrary, capricious or an abuse of discretion.<sup>110</sup> The APA also requires an agency to follow certain technical procedures depending on the type of hearing it selects.<sup>111</sup> Beyond statutory re-

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Moreover, "administrative proceedings tend to be more regulatory than adversary, more legislative than adjudicatory." *Id.* at 10. Finally, agencies handle a larger quantity of cases than courts do, and they issue "impersonal institutional opinion[s]" which do not fully ensure that the conclusion reached by the agency is valid. *Id.* at 7.

108. In contrast to adjudication, a rule-making proceeding is similar to a legislative session in that it addresses the rights of many. When the proceeding is informal, it only requires the agency to provide sufficient notice of the hearing to the public and provide the public with an opportunity to comment on the issue (commonly referred to as a notice and comment hearing). See 5 U.S.C. § 551. Rule-making is the "agency process for formulating, amending, or repealing an . . . agency statement of general or particular applicability and future effect." *Id.*

109. See *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952); see also *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) [hereinafter *Chenery I*] (ruling that agencies have the power to choose either an adjudicative or a rule-making hearing). But see 5 U.S.C. § 551 (eliminating agency discretion in limited circumstances by requiring adjudicative proceedings for licensing decisions and rule-making proceedings for decisions involving "rates, wages . . . facilities, appliances, services or allowances therefor . . . or practices bearing on any of the foregoing"); but see, e.g., MICH. COMP. LAWS § 24.291 (1994) (incorporating the federal limitation of agency discretion into its state codification of the Model State Administrative Procedure Act). Regardless of whether the agency chooses an adjudicative or rule-making proceeding, the "hard look" test may apply to the agency decision because the doctrine applies to both types of proceedings. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971); see also *supra* notes 101-02 and accompanying text (explaining the hard look doctrine as a requirement that an agency reasonably explain its decision if the decision represents a policy change or an inconsistency with the applicable statute).

110. 5 U.S.C. § 706; see, e.g., MICH. COMP. LAWS § 24.306 (adopting the federal arbitrary, capricious or abuse of discretion standard in the state codification of the Model State Administrative Procedure Act). An agency abuses its discretion by using an adjudicative hearing when the primary purpose of the agency is to announce a rule of law. See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974) (explaining that in some instances the use of adjudication may be arbitrary and an abuse of discretion). Similarly, the use of a rule-making proceeding would be an abuse of discretion if it was used to avoid a forthcoming adjudication between a specific inmate and the institution. See, e.g., *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (explaining that in some situations the use of a rule-making proceeding is an abuse of discretion by the agency).

111. Compare 5 U.S.C. § 553 (setting forth procedural requirements for rule-making hearings) with 5 U.S.C. § 554 (setting forth procedural requirements for adjudicatory hearings). An agency conducting a rule-making proceeding must provide a hearing for the public to express its views on a proposed regulation and give the public notice of that hearing. 5 U.S.C. § 553. In comparison, the APA requires an agency conducting an adjudicatory hearing to adhere to detailed procedures that are essentially the same as those followed in a court of law, including notice of the adjudication to the parties as well as the "submission and consideration of facts, arguments, offers of settlement." 5 U.S.C. § 554; see also, e.g., MICH. COMP. LAWS § 791.252 (1994) (detailing procedures for an adjudicative prison disciplinary hearing that are similar to the federal procedures for an agency adjudication). In

quirements, administrative common law requires agencies to follow past procedures.<sup>112</sup> If the agency strays from past practice, then it must explain why it is doing so. Finally, the Due Process Clause of the Fourteenth Amendment also regulates the agency's procedure by ensuring that the agency process is fair and reasonable.<sup>113</sup> Due process is the "protection of the individual against arbitrary action."<sup>114</sup> These procedural restraints function together to control agency discretion in the decision-making process.<sup>115</sup>

### III. Analyzing the Inequality of the Correctional System in Light of the Administrative Perspective

Courts have held that the differing security needs and financial restraints of each correctional institution are so unique that the judiciary should defer to the individualized determination of prison officials regarding the policies and programs within their respective institutions.<sup>116</sup> Despite that seemingly logical conclusion, there is a problem—a problem of constitutional proportions. The fact that this judicial deference enables equal protection violations against female inmates in many institutions to continue is undeniable and unacceptable.<sup>117</sup>

The solution to this problem goes beyond acknowledging the existence of the constitutional violation. The real and current need is to find a solution to the infringement on the rights of female prisoners. In doing so, it is necessary to consider the sys-

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general, the rule-making procedures are not as formal or specific as those required for adjudication. Additionally, a reviewing court is generally banned from imposing procedural requirements beyond those set forth in the APA on an agency conducting a rule-making hearing. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978).

112. *See Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370 (1932) (holding that when an agency utilizes its legislative powers to announce a rule, it must follow that rule in subsequent agency adjudications until the rule is overturned in a subsequent rule-making proceeding); *see also DeBeaussaert v. Shelby Township*, 333 N.W.2d 22 (Mich. 1982) (applying the federal requirement to the state by requiring a state agency to follow its own rules).

113. U.S. CONST. amend. XIV, § 1. "No State shall . . . deprive any person of life, liberty, or property, without due process of law." *Id.*

114. *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 302 (1937).

115. *See, e.g., Chenery II*, 322 U.S. 194 (1947) (upholding an agency decision because it was not a plain abuse of discretion).

116. *See supra* notes 50-51 and accompanying text (stating that courts have held that judicial deference to prison administrators is necessary and explaining the reasoning behind the decisions).

117. *See supra* note 15 (identifying constitutional challenges against prison systems); *see also supra* notes 21-25 (describing some differences between programs for male and female inmates); notes 49-51 (identifying the continuing judicial deference to correctional agencies).

temic characteristics of financial restraints and the desire for efficiency. This cannot be done by simply answering whether the Constitution, Title IX or any other legal tool will protect the rights of inmates.<sup>118</sup>

Rather, a more viable way to find a solution to this constitutional violation is to recognize the multidimensional aspects of the problem. The problem is in fact three-dimensional: the type of administrative hearing, the type of procedure applied in the hearing and the rights at issue. First, the type of administrative hearing is either adjudicative or rule-making. Second, the type of procedure that the agency follows is either formal or informal. Third, the nature of the rights at issue is either constitutional or statutory. These elements, as illustrated, form three dimensions of an administrative cube.

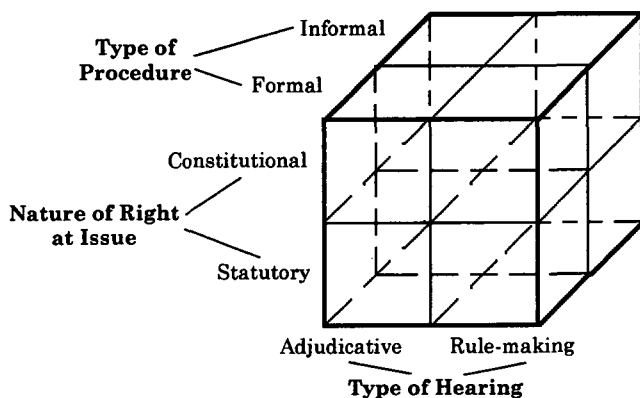


Figure 2.

Within each dimension, courts must ask two questions: 1) upon which part of the dimension should the review focus, and 2) whether the program or decision at issue satisfies the standard or requirement of that dimension.

So far, the legal community has examined only one dimension, that is, the nature of the right being protected. To maximize the power of the law and reach a just solution, the courts and the legal community in general need to look at the remaining two dimensions which represent the process leading up to the decision. In doing this, it is important to keep in mind that the problem is not oppression in the traditional sense; rather, the problem is an

118. See *supra* notes 13-15 and accompanying text (discussing the historical use of these laws in suits by inmates).



underlying systemic structure that enables personal<sup>119</sup> and institutional biases<sup>120</sup> to affect the treatment of a minority group, such as female inmates.

A. *The Current Correctional System in an Administrative Context*

1. Type of Hearing: Adjudicative or Rule-Making

Corrections administrators use different hearings depending on the situation. Parole hearings are a useful illustration of an adjudicative hearing.<sup>121</sup> The proceeding is essentially backward-looking in that the parole decision based on the inmate's past actions.<sup>122</sup> Additionally, the decisions do not carry the weight of precedent because there is no *stare decisis* in administrative law.<sup>123</sup> Moreover, a decision is not even final for the party in the hearing because parole can be revoked if the inmate violates a condition of parole,<sup>124</sup> or parole may be granted at a later date to the same inmate. Adjudication is preferred because it is the most protective of individual rights and can account for the individual facts of an inmate's case.<sup>125</sup>

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119. See *supra* note 107 (explaining that an agency's continuing interest in cases distinguishes it from an unbiased magistrate). By enabling interested people to hear cases, the agency structure enables personal biases to affect agency decisions.

120. Each agency addresses only a "specialized subject matter" which gives it a "limited viewpoint" but not necessarily more social wisdom. LOEVINGER, *supra* note 83, at 12. Because the agency and its members have this narrow perspective, there is no neutral body to represent the broader social needs or the rights of the inmates. Thus, this limited perspective reinforces existing institutional biases. See *id.* at 13.

121. Compare notes 70-71 (identifying parole as a device for releasing inmates early under the supervision of a correctional officer and the process used in parole hearings) with note 107 (an adjudicative hearing addresses one entity and involves testimony, evidence and competing sides).

122. Compare *supra* note 71 (explaining that a parole board's decision is the final outcome of an inmate's past conduct) with *supra* note 103 (explaining secondary retroactivity as a decision that affects the outcome but not the legality of a past action).

123. See *supra* notes 100-02 and accompanying text (explaining that while administrative common law requires agencies to follow their own prior actions, an agency can avoid this requirement by providing a reasoned explanation for its decision) and note 107 (explaining that precedent is less important to administrative agencies than to courts).

124. See *supra* note 70 and accompanying text (describing parole as a conditional release from prison that can be revoked if the parolee violates the terms of parole).

125. Compare note 107 (comparing adjudicative hearings to trials because they address the rights of one individual at a time) with note 108 (describing rule-making proceedings as legislative in that they affect the rights of many individuals).

The system also uses rule-making hearings because it is not always efficient or wise to use adjudication.<sup>126</sup> When an organic statute directly addresses an issue, the corrections department can do nothing except abide by the statute.<sup>127</sup> However, during the implementation process, the agency administrators conduct meetings to determine how to apply the legislative order. While the use of rule-making hearings to make decisions on a system-wide basis is logical and efficient, it is not necessarily protective of the individual rights of inmates. Administrative procedure acts impose fewer specific rules on rule-making hearings than on adjudicative hearings.<sup>128</sup> This gives the agency additional discretion, which increases the chance that bias will affect the decisions of the agency. Thus, inequality in the system initially surfaces in a rule-making proceeding because that is where a correctional department decides which classification of inmates will have access to a program and under what circumstances.

Currently, there is an even greater chance that bias will infiltrate the programming decision-making process because courts are not reviewing the rule-making process when inmates challenge programming decisions.<sup>129</sup> By not reviewing this aspect of the administrative agency, courts are allowing the discretion of correction agencies to go untempered. Thus, the rule-making stage in the process raises significant concern.

## 2. Nature of the Procedure: Formal or Informal

Correctional system proceedings are often informal in that the rationale for a decision need not be "on the record."<sup>130</sup> Because

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126. Making policy decisions, such as what programs to offer in a given institution, or interpreting a substantive statute are examples of rule-making in the correctional system. The decisions affect the rights of several inmates based on a common characteristic rather than on the specific facts involved in an individual's case. This type of generalized decision-making typifies rule-making. See *supra* note 108 and accompanying text.

127. "If the intent of Congress is clear, that is the end of the matter." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); see *supra* notes 87-88 and accompanying text (explaining the two-step process used to determine whether an agency acted reasonably under a statute).

128. See *supra* note 111 and accompanying text (comparing and detailing the procedural requirements for rule-making and adjudicative hearings). Compare 5 U.S.C. § 553 (1994) (setting forth procedural requirements for rule-making hearings) with 5 U.S.C. § 554 (setting forth procedural requirements for adjudicatory hearings).

129. Cf. *supra* note 15 and accompanying text (identifying several cases that challenged prison programming decisions but not the decision-making process).

130. Compare note 97 and accompanying text (explaining that formal procedures require the rationale for decisions to be on the record) with note 98 and accompanying text (explaining the lesser requirements for an informal decision).

statutes authorizing proceedings often do not require them to be formal, agency administrators select the more efficient informal method.<sup>131</sup> In effect, administrators can make decisions based on knowledge within their area of expertise even if that information is not on the record.<sup>132</sup>

This informality opens the door to the denial of a program to female inmates because of security reasons, financial constraints or an underlying bias. The informal process allows agency administrators to mask their biases in technical justifications, even if they do so subconsciously. While some of the technical justifications may be completely unbiased and legitimate, there is no way to know for certain because the decisions do not need to be justified on the record.

Under the principles of administrative law, courts have the authority to review the department of correction's informal procedure and factual findings<sup>133</sup> using the arbitrary, capricious or abuse of discretion standard.<sup>134</sup> Currently, however, by only conducting traditional constitutional review, courts do not apply administrative law principles when reviewing decisions of correction agencies.<sup>135</sup> As a result, the judiciary is not exercising authority to review procedures or factual findings.

In place of administrative review, courts defer to the decisions of correctional agencies by applying only rational basis review.<sup>136</sup> Courts assert that prison administrators should be granted deference to avoid restricting their ability to find "innovative solutions"<sup>137</sup> and to allow them to achieve their objectives of security

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131. An agency generally has the choice between formal and informal process. See *supra* note 96 and accompanying text (explaining that an agency has the discretion to choose between formal and informal procedures unless the applicable statute clearly says otherwise).

132. See, e.g., MICH. COMP. LAWS § 24.277 (1994) (authorizing an agency to use its expertise and specialized knowledge when making a decision). However, because the rationale need not be explained, the agency could potentially make a decision based on knowledge outside of its area of expertise as well.

133. See *supra* note 92 and accompanying text (noting that courts have the authority to review legal and factual determinations of agencies).

134. See *supra* note 98 and accompanying text (tracing the origin of the standard in case law to its codification in the APA and state administrative procedure acts).

135. See, e.g., *Glover v. Johnson*, 478 F. Supp 1075 (E.D. Mich. 1979) (holding that under traditional equal protection standards Michigan's Huron Valley Women's Facility violated the constitutional rights of its female inmates).

136. See *supra* notes 53-54 and accompanying text (explaining that courts will uphold a prison regulation if it is reasonably related to a legitimate penological interest).

137. *Turner v. Safley*, 482 U.S. 78, 89 (1987); see also *supra* note 55 and accompanying text (explaining the Court's reasons for using the minimum level of scrutiny).

and rehabilitation.<sup>138</sup> Unfortunately, not all prison officials are experts<sup>139</sup> and not all innovative solutions are legal.

Using rational basis review for gender discrimination claims results in courts accepting constitutionally inadequate arguments as explanations for discriminatory conduct by correctional agencies. Specifically, rational basis review accepts an administrative convenience argument as a justification for a regulation, whereas intermediate scrutiny does not.<sup>140</sup> While the economic<sup>141</sup> or convenience rationale may explain the need for the institution to deprive some programming to some inmates to some degree,<sup>142</sup> it fails to justify the discrimination against female inmates from a legal<sup>143</sup> or logical<sup>144</sup> standpoint. Moreover, decisions not to provide equal or adequate programming to female inmates do not neces-

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138. See *supra* note 50 and accompanying text (identifying the Supreme Court's deference to corrections officials given concerns regarding security and rehabilitation).

139. See *supra* note 42 (stating that the current correctional system has inexperienced staff managing sophisticated inmates).

140. See *supra* note 77 and accompanying text (explaining that neither administrative convenience, savings in time, nor savings in money justifies gender discrimination under intermediate scrutiny).

141. See *supra* note 27 (stating the economic rationale that programming costs per capita are higher when there are fewer inmates using them).

142. While the per capita costs of programming are higher when they are provided for fewer inmates, see *supra* note 27, providing the services is not intrinsically prohibitive. Rather, the prison administrators have decided that the benefits of providing the services do not justify the costs of the services. While this may be systemically efficient, this economic argument fails to consider either the element of fairness or the civil rights of women. "[S]eemingly practical considerations [such as costs and administrative convenience] may not be used to 'justify official inaction or unwillingness to operate a prison system in a constitutional manner.'" *Klinger v. Department of Corrections*, 31 F.3d 736 (8th Cir. 1994) (McMillian, J., dissenting opinion) (quoting *Bukhari v. Hutto*, 487 F. Supp. 1162, 1172 (E.D. Va. 1980) (citations omitted); see also *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977) (savings in time, money and effort do not justify gender-based discrimination).

143. To justify a claim of gender discrimination under the Equal Protection Clause, the Supreme Court has clearly held that a government regulation must be substantially related to an important governmental interest. See *supra* notes 75-77 (explaining the different levels of scrutiny for equal protection claims and identifying intermediate scrutiny as the appropriate level of review for gender discrimination claims).

144. If correctional administrators rely on the economic rationale, then increasing the number of inmates who have access to a program, i.e., to include both male and female inmates, decreases the per capita costs of the program and increases the system's incentive to provide it. While there may be some increase in administrative costs by granting program access to both men and women, there would still be a per capita cost reduction although it would not be directly proportional. As an example, if one hundred male inmates had access to a work release program, then granting program access to one hundred female inmates would decrease the per capita program costs by distributing the overhead expenses among more people, but the reduction would be less than fifty percent because of a probable increase in administrative expenses.

sarily further the goal of institutional security.<sup>145</sup> For these reasons, the agency discretion that leads to those decisions should be restricted or reviewed, but courts are failing to utilize the tools of administrative law to review the discretion.

### 3. Nature of the Rights at Issue: Constitutional or Statutory

The correctional system faces the issue of the rights of inmates. Inmates have constitutional and statutory rights. Primarily, the Equal Protection Clause of the Fourteenth Amendment ensures that all similarly situated people shall be treated equally.<sup>146</sup> As this applies to inmates, the correctional system always must work to treat similarly situated inmates equally with respect to programming and facilities.<sup>147</sup> Additionally, the correctional system must satisfy the statutory rights of inmates by using its discretion to reasonably interpret the governing statutes.<sup>148</sup>

This duality of rights reflects a tension in legal challenges of correctional systems. Most female inmates who sue base their le-

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145. See *supra* note 68 (identifying several benefits, including improved security, of many programs in the correctional system). The Director of the Federal Bureau of Prisons did not indicate that there was any different advantage gained from these programs when they are provided for only male inmates as compared to female inmates. Furthermore, because female inmates are less dangerous than male inmates, see *supra* note 28, security is less likely to be jeopardized by granting them access to rehabilitative and vocational programs. For a regulation based on a gender classification to be constitutional, it must be substantially related to an important governmental interest. See *supra* notes 75-77 (explaining the intermediate scrutiny standard and its application to cases of gender discrimination).

146. See U.S. CONST. amend. XIV, § 1; *supra* note 79 and accompanying text (explaining the "similarly situated" requirement).

147. But see *supra* notes 79-82 and accompanying text (explaining that some courts have held male and female inmates are not similarly situated while other courts only require prison administrations to satisfy the lesser constitutional "parity of treatment" standard).

148. See *supra* notes 87-88 and accompanying text (describing the *Chevron* doctrine wherein if a statute does not directly address an issue, the reviewing court defers to the agency if the agency acted reasonably); notes 93-99 and accompanying text (explaining that various restraints on agency action, including the *Chevron* doctrine and the arbitrary, capricious and abuse of discretion standard are essentially reasonableness tests). Courts, however, have not adequately ensured the reasonableness of the actions of correctional agencies. Specifically, the judiciary has not used the tools of administrative law, such as hard look review, when reviewing prison programming decisions to ensure that the agencies actually have used their discretion to reasonably uphold a statutory authorization for prison programming. See, e.g., *Turner v. Safley*, 482 U.S. 78 (1987) (upholding unequal rehabilitation services for female inmates by deferring to the decisions of the prison administrators without examining the decisions under the administrative law standards). Thus, it is unclear whether the decisions would survive this administrative review.

gal actions on the Equal Protection Clause.<sup>149</sup> However, many courts and prison administrations focus on the statutory grant of power, such as the authorization for programs such as parole, vocational training and furloughs.<sup>150</sup> It seems that these two groups are on different levels in the legal arena.

Moreover, when analyzing female inmates' constitutional claims, courts add to the complication by using a standard of review appropriate for reviewing the use of statutory power. Specifically, the United States Supreme Court's standard for reviewing the constitutionality of the provision of a prison program is essentially rational basis review.<sup>151</sup> This is not the appropriate standard for an equal protection challenge claiming gender discrimination.<sup>152</sup> By using rational basis review, courts lower the constitutional minimum requirement for gender discrimination. Additionally, when a court starts to conduct true equal protection review, it avoids the full analysis by holding that male and female inmates are not similarly situated.<sup>153</sup> Thus, courts actually analyze the reasonableness of the agency's use of its statutory power.

In administrative law, rational basis is the appropriate level of scrutiny to use when reviewing the use of a statutory power, such as the power to manage and control prisons.<sup>154</sup> However,

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149. See, e.g., *supra* note 15 (listing actions arising under the Equal Protection Clause).

150. See *supra* note 35 (authorizing the Federal Bureau of Prisons to implement various correctional programs); note 84 (identifying the statutes that authorize the Michigan Department of Corrections to manage and control the correctional programs in the state system).

151. See *Parker*, *supra* note 53, at 8 ("[I]t is generally held that an agency need only establish a rational basis to support its rules."). Compare note 53 and accompanying text (explaining that a reviewing court may uphold an agency regulation only if it is reasonably related to a legitimate penological interest) and *Turner*, 482 U.S. at 78 (applying that reasonableness standard to a case challenging prison services) with note 75 (explaining equal protection rational basis review) and *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911) (applying the standard).

152. See *supra* notes 75-77 and accompanying text (describing intermediate scrutiny and identifying it as the appropriate standard for equal protection gender discrimination claims).

153. See *supra* note 16 and accompanying text (identifying cases in which courts held male and female inmates not similarly situated). Courts defer to the judgment of agencies after determining that male and female inmates are not similarly situated. See, e.g., *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir. 1994) (upholding prison programming disparities after determining that male and female inmates are not similarly situated).

154. See *supra* notes 93-99 and accompanying text (explaining that various restraints on agency action are essentially reasonableness tests). After establishing that an agency had the authority to interpret a law, a court must ensure that the agency used its interpretative power reasonably. See *supra* note 93 and accompanying text (identifying this as the first part of the substantive review of an agency's decision).

rather than acknowledging the principles of administrative law, courts maintain that they are conducting traditional constitutional review. By using one administrative law standard of review and no others, the courts misuse administrative law because its principles do not operate alone. In doing so, the courts enable the agency's discretion to operate unfettered.

Thus, within the administrative model, the current correctional system is primarily focusing on the statutory and informal parts of the administrative cube. Additionally, the administrative decisions of whether to provide a service or program to inmates utilize rule-making procedures, which is the stage at which the systemic discrimination affects female inmates.<sup>155</sup>

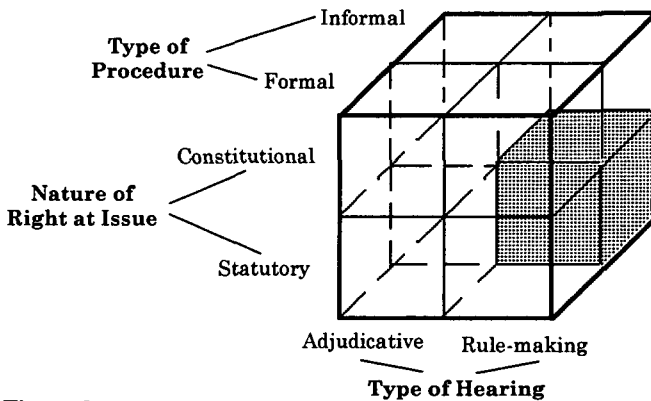


Figure 3.

It is important to recognize this because in doing so one acknowledges that the system is an intersection of the three administrative dimensions and is not simply one-dimensional. None of these factors operates alone, and it is therefore difficult to find a remedy to a problem by looking at only one dimension.

This is part of the present problem in the correctional system. Courts allow the discretion of the correctional departments to go unchecked by only reviewing the rights of inmates<sup>156</sup> and by not

155. In comparison, whether to give an individual female inmate access to a service to which the correctional system provides access to male inmates uses adjudicative proceedings. See, e.g., *supra* notes 121-25 and accompanying text (using parole as an example of an adjudicative hearing). Because the administrative decision of whether to provide services to female inmates is the preliminary and determinative stage in the process and because it reveals the unconstitutional discrimination, that is the stage illustrated in the administrative cube.

156. See generally *supra* note 15 (identifying several legal actions challenging the correctional system on the basis of gender discrimination). The actions focus on the constitutional rights of the inmates under the Equal Protection Clause and

acknowledging the applicability of administrative law principles. This unrestricted discretion enables underlying biases to affect the decision-making process itself and thereby to jeopardize the rights of female inmates. For this reason, as the United States Court of Appeals for the Eighth Circuit indicated, focusing on the rights of inmates independent of all other variables is not enough.<sup>157</sup> Actions should be brought on procedural grounds in light of the principles of administrative law.

### B. *A Proposed Shift in the Correctional Administrative Model*

As the above analysis reveals, the process leading up to programming decisions contributes to the inequality in the correctional system. However, the legal system has not examined the underlying process in its quest for equality in corrections; rather, the focus has been on the unequal results of the process.<sup>158</sup> To rectify the unconstitutional inequality affecting women in the prison system, the judiciary should refocus its constitutional review in light of the principles of administrative law and turn its attention to the procedures in the system.<sup>159</sup> The Supreme Court has explained that courts retain judicial review of an agency's legal, factual and procedural decisions.<sup>160</sup> However, the *Chevron* deferen-

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the statutory powers of the agency rather than on the process the agency invoked to make its decision.

157. *Klinger*, 31 F.3d at 734 (recognizing that to determine "whether the plaintiffs receive inferior programs because of their sex or for some other reason requires looking beyond the fact that female prisoners are segregated from men and examining the reasons behind the defendants' programming decisions").

158. See, e.g., *supra* note 15 and accompanying text (identifying several cases that challenged prison programming decisions but not the decision-making procedures).

159. The United States Court of Appeals for the Eighth Circuit suggested as much in dismissing *Klinger* when it acknowledged there was a flaw in the decision making process that hurt female inmates, but there was no violation under the Equal Protection Clause because the decisions themselves were constitutional on their face. *Klinger*, 31 F.3d at 734 n.4. The court asserted that a "proper equal protection claim may allege differences in the process by which program decisions were made at the prisons." *Id.* at 733.

Administrative law provides a method and standards for reviewing the procedures of agencies. See *supra* notes 105-14 and accompanying text (describing the procedural restraints on agency action ranging from the underlying substantive statute to the applicable administrative procedure act to the Constitution). These restraints and the judicial enforcement of the restraints are necessary to control the high level of discretion given to and exercised by the agencies. In fact, due process serves to "protect . . . the individual against arbitrary action." *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 302 (1937). Because of this, it is imperative that the courts ensure that correctional agencies do not use their discretion to the point of being arbitrary.

160. See *Crowell v. Benson*, 285 U.S. 22, 46 (1932).



tial mandate diminished the power of a court to review agency findings of law.<sup>161</sup> Additionally, because of the deference given to agency expertise, findings of fact receive minimal judicial review.<sup>162</sup> Thus, the key to judicial review of agency decisions is procedural review.<sup>163</sup>

### 1. Judicial Review of the Administrative Rule-Making Hearing

First, courts should utilize their authority under administrative law to examine a department of corrections' use of rule-making hearings. Generally, an agency has unbridled discretion to decide whether to use an adjudicative or rule-making proceeding, but there are some limitations.<sup>164</sup> When reviewing a department of corrections' decision to use a rule-making hearing, a court must ensure that the selection does not violate a statutory procedural mandate,<sup>165</sup> that the selection was not arbitrary, capricious or an abuse of discretion<sup>166</sup> and that the selection is consistent with past department practices.<sup>167</sup>

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161. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

162. See *supra* notes 92-104 and accompanying text (outlining the standards provided by the APA to review the substance, including the facts, of an agency hearing). The deference given to an agency's findings of fact by a reviewing court depends upon whether the agency maintained a formal or informal record. *Id.* If the record is informal, then there is essentially no factual record to review, and courts can only review the agency under the arbitrary, capricious, or abuse of discretion standard. Even if the agency provides a formal record of its findings, however, courts use the substantial evidence test to review findings of fact, but that test is equivalent to only a reasonableness standard. See *supra* notes 97-99 and accompanying text (explaining that the arbitrary, capricious and abuse of discretion standard and substantial evidence review are essentially reasonableness tests). In addition, it is impractical for a court of appeals to review findings of fact because that would essentially require a de novo hearing, which an appellate court is ill-equipped to provide.

163. After minimizing the judicial review of an agency's findings of law and fact, the only *Crowell* element that remains for a court to review is the agency's procedure. *Crowell*, 285 U.S. at 42.

164. See *supra* notes 109-10 and accompanying text; see also *supra* notes 106-13 (explaining the limitations on an agency's discretionary choice between adjudication and rule-making).

165. See *supra* note 106 and accompanying text (explaining that if a statute specifically requires the use of a certain type of hearing, then the department must comply).

166. See *supra* note 110 and accompanying text (explaining the administrative law standard of review over an agency's selection of hearing).

167. See *supra* note 112 and accompanying text. In addition, it would be unusual for an agency to decide whether to implement a system-wide program by conducting an adjudicative hearing. If it did, however, then the consistency requirement would be important, but that is unlikely to occur.

With respect to the decision of which programs to provide to a group of inmates, the most applicable standard of review is the arbitrary, capricious or abuse of discretion standard.<sup>168</sup> Because correction officials determine which programs they will provide throughout an entire department, they are affecting the interests of many people in a centralized manner. This type of decision is most similar to a legislative decision, which affects the rights of several people in an efficient manner.<sup>169</sup> Because of the centralized nature of the programming decision,<sup>170</sup> it is reasonable for a department of corrections to use a rule-making hearing to make its decision. Thus, it is unlikely that the hearing selection will be arbitrary, capricious or an abuse of discretion. However, the administrative review does not end there.

## 2. Taking a Hard Look at the Informal Decisions of Correctional Agencies

For rule-making to be an effective and efficient protector of constitutional rights, a record of the hearing must be generated in a formal proceeding. If rule-making is informal, the reviewing court will "not know the particular or evidential facts . . . on which [an agency] rested its conclusion. Not only are the facts unknown; there is no way to find them out."<sup>171</sup> Because of this, the correc-

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168. The substantive statutes grant the corrections administrators broad authority to establish programs to manage the correctional institutions. See, e.g., MICH. COMP. LAWS § 791.206(6)(d) (1994) (authorizing the director of the department to announce rules pursuant to the Administrative Procedure Act of 1969 which provide for the "management and control of state penal institutions"); see *supra* note 84 and accompanying text (describing the broad statutory power of correctional agencies to pursue their policy preferences).

169. See *supra* notes 108-11 (explaining the required procedures for an administrative rule-making proceeding). In comparison, an adjudicative hearing is less efficient in that it allows individual testimony and the presentation of evidence. See *supra* notes 107, 111. Additionally, even though female inmates are a small percentage of the prison population, if each female inmate challenged the discriminatory policy at her respective institution, the number of adjudications would debilitate the correctional system. See *supra* note 57 (reporting that in 1992 there were more than 50,000 women in correctional institutions nationally). Thus, even though adjudicative hearings provide more protection of individual rights, it is impractical to use them for centralized administrative decisions.

170. This is notably different from a decision regarding whether an individual inmate should be granted access to a program that the department provides.

171. *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 302 (1937). When information is "copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them." *Id.* at 302-03. In comparison, however, informal rule-making excludes meaningful opportunity for judicial review of the decision. *Id.*; see also *supra* notes 95-99 (explaining that the lack of a record in informal decisions forces courts to review the agency action using only the arbitrary, capri-

tional system should balance its governmental interest in efficiency, and thus in rule-making, against the interests of the individual by providing a formal record of each proceeding.<sup>172</sup> In the alternative, the legislature should increase the requirements of rule-making by creating a statutory mandate that the department of corrections must follow formal procedures if it chooses to use a rule-making procedure.<sup>173</sup>

Within the current system's structure, however, courts should review the informal procedures of the agency using the tools of administrative law. While the federal and state administrative procedure acts only require a department of corrections to follow notice and comment procedures when using informal rule-making,<sup>174</sup> the substantive statute, the judicial common law of administrative decision-making and the Constitution also present restrictions on the procedures and substantive determinations of the prison officials.<sup>175</sup> Of these restraints, the standards under the administrative procedure acts and the judicial common law restraints are the most effective.<sup>176</sup>

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cious, or abuse of discretion standard).

172. One way to implement the change to formal proceedings is to have formal, written policies to guide the decisions of the agency. This would provide objective criteria for the agency to follow and a thorough record for courts to examine when reviewing an agency decision. As an example, the Fairfax County Jail in Virginia has a formal, written policy for an Institutional Classification Committee to follow when classifying inmates to different custody levels. Morris et al., *supra* note 68, at 12. The "objective behavioral classification principles" applies to all inmates. *Id.* This results in the classification of inmates based on their behaviors and abilities rather than on factors that could result in a negative stereotype, such as a being mentally ill or addicted to drugs. *Id.*

173. Only a legislature may impose procedural requirements on an agency conducting a rule-making hearing. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978); see also *supra* note 111 and accompanying text (discussing statutory procedural requirements and the inability of courts to impose additional rule-making requirements). A statute can only require an agency to use formal procedures by clearly requiring it. See *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973); see also *supra* text accompanying note 106 (explaining this rule in the context of a procedural review of an agency's action).

174. See *supra* notes 95, 108.

175. See *supra* notes 92-115 and accompanying text.

176. Substantive statutes generally grant broad powers to departments of corrections. See *supra* note 84 (using provisions from the Michigan statute as an example of a broad delegation of power). Additionally, the Due Process Clause of the Fourteenth Amendment only requires prison officials to follow procedures that provide minimum fairness to protect against arbitrary government decisions. See *Wolff v. McDonnell*, 418 U.S. 539 (1974) (holding that prisoners are entitled to minimum due process under the Constitution); see also *supra* notes 113-14 and accompanying text (describing the procedural protection the Due Process Clause provides to individuals against arbitrary agency procedures).

The administrative procedure acts review informal rule-making hearings with the arbitrary, capricious or abuse of discretion standard.<sup>177</sup> While this standard is essentially a reasonableness test,<sup>178</sup> it is not passive. One factor courts look for in determining the reasonableness of a regulation is whether the decision is consistent with past agency policies.<sup>179</sup> In the context of a department of corrections, the decision to provide a given program to some inmates but not to others presents the problem of an inconsistent agency policy regarding the value of a program to the goals of the department.<sup>180</sup> When there is an inconsistent agency policy, the reviewing court should take a "hard look" at the agency's decision.<sup>181</sup> However, when the department of corrections follows an informal process, there will be an insufficient record for the court to conduct a hard look review,<sup>182</sup> and the court would remand the case to the agency to explain its decision.<sup>183</sup> After the department explains its action on remand, the court ensures that the reason is not arbitrary, capricious or an abuse of discretion. Presumably, a department would offer an administrative convenience, security or economic rationale,<sup>184</sup> which the court would likely deem to be reasonable.<sup>185</sup>

In this way, the arbitrary, capricious or abuse of discretion standard, coupled with hard look review, serves as a check on the department's discretion by ensuring that it had a permissible reason for its action. By requiring a department of corrections to pro-

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177. See *supra* note 98 and accompanying text (noting the applicability of this standard in an informal proceeding).

178. See *supra* note 99 and accompanying text (comparing the arbitrary, capricious or abuse of discretion standard to rational basis review).

179. See *supra* notes 100-02 and accompanying text (explaining that courts apply a hard look review if an agency decision is inconsistent with its own past policies).

180. See, e.g., *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979) (reviewing inconsistencies in the provision of programs within the Michigan prison system); cf., e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (reviewing inconsistent policies in the automobile insurance industry).

181. See *supra* notes 101-02. Under a hard look review, a court examines the agency's decision to find an explanation for the inconsistent policy.

182. See *supra* notes 95-98 (explaining that informal procedures do not require agency explanations to be on the record).

183. See, e.g., *State Farm*, 463 U.S. at 30 (remanding for an explanation of an agency decision because the informal process did not provide a record that explained a change in agency policy).

184. See, e.g., *Glover*, 478 F. Supp. at 1085 (using an economic argument to try to justify discrepancies between prison programming for male and female inmates). See generally *supra* note 27 and accompanying text (discussing this economic argument and explaining the rationale behind it).

185. While these arguments are not sufficient to survive intermediate scrutiny, see *supra* note 77, they are sufficient under a reasonableness test because they are not completely arbitrary. See *supra* note 75.

vide an explanation, the court pushes the prison administration toward the formal procedures, even though it occurs after the initial agency hearing. Additionally, if courts remand cases frequently enough under hard look review, correctional agencies may find the informal method to be inefficient in the long run and move toward formal proceedings at the initial hearing. Thus, the review of agency procedures provides an effective manner for courts to review agency decisions.

### 3. Refocusing Review of Constitutional Rights Through the Eyes of Administrative Law

While administrative law provides for the review of both statutory and constitutional rights, constitutional rights should be the final focus in judicial review of a corrections department. This is true because of the nature of the applicable laws. Statutes usually directly address the powers of a department of corrections<sup>186</sup> whereas the Constitution focuses on the rights of inmates.<sup>187</sup> Thus, the Constitution provides a more general protection for inmates and serves as a final check on the discretion of a corrections department.

With respect to prison programming, the Equal Protection Clause can apply in two different ways. First, it can attempt to ensure the substantive fairness in the provision of programs.<sup>188</sup> However, as current case law exemplifies, this approach has not been effective.<sup>189</sup> Second, the Equal Protection Clause can apply to the procedures the agency uses to make the program decisions for male and female inmates. Using equal protection this way would overcome the problems encountered when it is used to review the substantive results of the programming decisions. Specifically, be-

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186. See, e.g., *supra* note 84 (identifying sections of the Michigan code that grant power to the state department of corrections).

187. See U.S. CONST. amend. XIV (protecting individual rights).

188. See *supra* note 15 (identifying cases in which inmates invoked the Equal Protection Clause in this manner).

189. To avoid the constitutional problem, many courts hold that male and female inmates are not similarly situated. See *supra* note 153 and accompanying text (explaining that courts avoid the full constitutional issue by holding that male and female inmates are not similarly situated); see, e.g., *Pargo v. Elliott*, 894 F. Supp. 1243 (S.D. Iowa 1995). Others apply rational basis review without realizing that under administrative law norms this standard should be reserved for reviewing the agency's discretion with respect to procedures and hearings. See, e.g., *Turner v. Safley*, 482 U.S. 78, 85-87 (1987) (upholding a prison regulation under rational basis review when inmates challenged it on constitutional grounds). Finally, as in *Glover v. Johnson*, a court conducts constitutional review to hold that the programs violate equal protection, but they fail to find an effective remedy. See, e.g., *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979).

cause male and female inmates are similarly situated with respect to process,<sup>190</sup> a court would not be able to end the analysis by holding that they are not similarly situated.<sup>191</sup> The identified differences between male and female inmates<sup>192</sup> have no bearing on the procedures that a department uses to make programming decisions.<sup>193</sup> Additionally, when following the norms of administrative law, the court already used a rational basis standard to review the agency's procedure,<sup>194</sup> so it would be illogical to use the same standard again because it would not provide an additional check on the agency's discretion. Because procedural decisions, such as whether to evaluate the needs of inmates, do not impact the institutional security or daily prison operations, courts should not defer to a department's discretion by applying rational basis review.<sup>195</sup>

Thus, the final dimension of administrative judicial review should focus on constitutional rights and apply intermediate scrutiny<sup>196</sup> to review the process correctional departments use when making programming decisions that infringe upon the equal rights of female inmates. When departments use different procedures with respect to male and female inmates, the process will fail equal protection review because proffered justifications, such as administrative convenience or financial constraints, do not substantially further an important governmental interest.<sup>197</sup> If the court finds a constitutional violation when applying equal protection review to a gender discrimination claim challenging an agency's process, the court will be able to identify the first stage of the administrative process that creates the constitutional problem and will implement a remedy at that point in the agency's process.

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190. *Klinger v. Department of Corrections*, 31 F.3d 727, 733 n.4 (8th Cir. 1994).

191. See *supra* note 153 and accompanying text.

192. See *supra* Part I.B.

193. For example, the fact that women commit more economic crimes than men or that female inmates have more family obligations than male inmates is not related to a department's decision to use an informal process or to distribute a questionnaire to inmates to study their needs.

194. See *supra* notes 99 and accompanying text (comparing the arbitrary, capricious or abuse of discretion standard to rational basis review); *supra* Part III.B.2 (applying the arbitrary, capricious or abuse of discretion standard to agency procedures and decisions).

195. See *Turner*, 482 U.S. at 89 (encouraging deference to the discretion of prison administrators to avoid jeopardizing institutional security and infringing on the daily operation of the prison).

196. See *supra* notes 75-77 and accompanying text (explaining that gender discrimination claims warrant intermediate scrutiny, which requires any difference in the procedures that a department follows for making decisions regarding male and female inmates must be substantially related to an important government interest).

197. See *supra* note 77 and accompanying text.

In contrast, current judicial review attempts to impose a final solution without remedying the underlying defective process.<sup>198</sup> By reviewing the underlying process, judicial review of correctional agencies will lead to a permanent solution by addressing the heart of the problem.

If courts acknowledge and properly utilize principles of administrative law to refocus the constitutional review of inmate challenges against prison programming, they will be able to limit agency discretion and protect the rights of inmates. The administrative tools authorize courts to review the rule-making hearings of departments<sup>199</sup> and to lead the agencies toward a formal process by requiring them to explain any inconsistencies in programming decisions.<sup>200</sup> Additionally, courts should more clearly review the constitutional rights at issue by applying intermediate scrutiny to rights of inmates under the Equal Protection Clause.

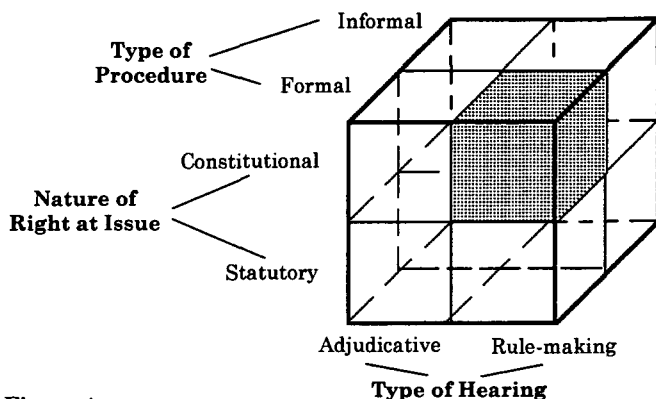


Figure 4.

*Glover v. Johnson* illustrates that finding an effective remedy is just as important as identifying the constitutional problem itself.<sup>201</sup> If the *Glover* court had acknowledged the principles of ad-

198. See, e.g., *Glover v. Johnson*, 721 F. Supp. 808, 851-52 (E.D. Mich. 1989) (ordering Michigan's Huron Valley Women's Facility to follow a remedial plan to correct a disparate provision of services).

199. See *supra* notes 105-15 and accompanying text (explaining the authority of courts to review agency procedures and describing the procedural requirements for agency actions).

200. See *supra* notes 100-02 and accompanying text (describing the hard look doctrine as a tool of administrative law that courts use to require agencies to explain inconsistencies in policy).

201. See *Glover v. Johnson*, 879 F. Supp. 752, 753-54 (E.D. Mich. 1995) (holding that the department of corrections was not in compliance with a remedy that the court ordered more than fifteen years earlier).

ministrative law, it might have achieved a solution to the unconstitutional programming problem at the Huron Valley Women's Facility with more ease and efficiency. As it was, the *Glover* court encroached on the administration's authority by reviewing the wisdom of the correctional programs<sup>202</sup> and ordering specific procedural requirements for the department to follow.<sup>203</sup> Furthermore, the court focused on the substantive state statutes that granted power to the Michigan Department of Corrections,<sup>204</sup> but it did not look at the restrictions imposed on the Department by the state APA. If the *Glover* court had adhered to the principles of administrative law, it still could have ruled that the Department was violating the constitutional rights of female inmates, but it could have also ordered a practical remedy that respected the discretionary authority of the corrections department. This would have enabled the Department to implement a remedy within the fiscal and security restraints of the system.<sup>205</sup>

## Conclusion

Courts have found the gender disparities within the correctional system to be unconstitutional in light of the characteristics

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202. See, e.g., *Glover v. Johnson*, 478 F. Supp. 1075, 1093 (E.D. Mich. 1979) (deciding that the "work pass program is a desirable program"). However, administrative law does not ask courts to question the wisdom or propriety of an agency's decision. See *supra* note 84 (stating that courts do not substitute their judgment for that of an agency with respect to the wisdom or propriety of a decision). Establishing policies is a primary purpose of administrative agencies, see LOEVINGER, *supra* note 83, at 10, and courts undermine that purpose by examining the wisdom of various policy options.

203. *Glover*, 478 F. Supp. at 1102-03. The remedy ordered by the court was very specific in that it required the department to provide specific courses for female inmates, to assess their needs and interests with a specific survey, and to implement apprenticeship programs in conjunction with vocational programs. *Id.* However, administrative law bars courts from imposing procedural requirements beyond those of the administrative procedure acts on an agency conducting a rule-making hearing. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978); see *supra* note 111 (identifying the procedural requirements imposed on agencies by administrative procedure acts and indicating that courts do not have the authority to impose additional procedural requirements on agencies). This is an important element of administrative review because it grants the correctional administrators the discretion they need to run the prisons while enabling the court to restrict the degree of the discretion.

204. See *Glover*, 478 F. Supp. at 1081.

205. "There must be a 'mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.'" *Bell v. Wolfish*, 441 U.S. 520, 546 (1979) (citing *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974)). Security is the primary concern of prisons and demands the majority of available funding, and prison programming operates around the needs of security. See *supra* notes 7-9 and accompanying text.



and demographics of male and female inmate populations. This shows that the written law will protect the rights of female inmates while they are in the correctional system. However, despite this protection from the law itself, female inmates continue to suffer from inadequate and unequal facilities and services in comparison to those provided to their male counterparts. The absence of a remedy in light of *de facto* protection not only feeds on the modern weakness of the law, but it also suggests there is another problem in the system.

The law was meant to function as a tool for identifying problems and solving them in a fair and determinative manner. The modern weakness in the legal system is that the law has become a tool for those who only identify problems in society but who do not work to solve them. It is an insult to the power and the purpose of the law for courts and citizens to point to societal problems and then to propose remedies that are so vague that they are impossible to apply. The fact that unfair and indeterminate holdings are plaguing the correctional system today with respect to the treatment of female inmates serves as further evidence that the written law cannot achieve its full potential without assistance.

In essence, the inconsistent and ineffective decisions of the courts reveal an underlying bias in the legal system. If the law is to achieve its maximum societal impact and actually resolve problems, it needs the assistance of an unbiased process. For this to occur in the penal context, the judicial system needs to start examining the decision-making process within the correctional system as it would the decisions of any other administrative agency. This type of review will provide steps toward a solution, albeit a slow one, to the gender disparities within the system. The decisions holding that unequal services for male and female inmates did not violate the Equal Protection Clause were based on the determination that male and female inmates are not similarly situated. This conclusion is not convincing, and it actually exposes the discrimination permeating the corrections system. By eliminating the dispute regarding whether male and female inmates are similarly situated and by turning the attention of the judiciary to the procedures leading up to the final determinations of the correctional agencies, suits brought under the Constitution and administrative procedure acts will make it more difficult for bias to affect agency decisions.

There is a problem with the women's correctional system, which is to say there is a problem with the correctional system overall. Unfortunately, the problem is not that isolated. It extends

into the judiciary and into society itself. Stereotypes of females still permeate the societal undercurrent. Because the booming female inmate population is still a relatively new phenomenon, the correctional system is still in its formative stages of learning how to respond. This historical moment provides the optimal, and indeed the only, opportunity to ensure that future female inmates will receive fair and equal treatment. Achieving this equal treatment will be a long process, but in order to actually use the power of the law to achieve equality, courts must begin to examine the process itself.