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**Gender Discrimination
In Correctional Policies**

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❖ **Introduction**

Male and female prisoners and detainees are incarcerated in separate facilities or, in some instances, in separate wings of detention or correctional facilities. Many policies and procedures may be the same for male and female prisoners and detainees. But in some instances, policies and procedures may be different depending on gender.

Lawsuits have alleged that some of these differences are the result of impermissible gender discrimination. This article takes a look at how courts have addressed this issue, framing the question in the context of the normal deference given to correctional officials by the courts in creating and implementing policy. A brief discussion reviews how courts deviated from that deference in the context of racial discrimination because of concerns about equal protection of the law.

This is followed by an examination of how courts have extended that analysis to claims of gender discrimination, adopting an intermediate level of scrutiny

between the rational relationship test applied to most correctional policies and the strict scrutiny applied to claims that a policy constitutes racial discrimination.

At the conclusion, there is a listing of some useful resources and references. Issues concerning transgender prisoners are beyond the scope of this brief article.

❖ Usual Rule of Deference to Correctional Policies

Under [*Turner v. Safley*](#), #85-1384, 482 U.S. 78, 89 (1987), **a challenged correctional regulation is ordinarily upheld, with deference given to the discretion of correctional authorities so long as a rule is “reasonably related to legitimate penological interests,” such as safety of security.**

Turner was a U.S. Supreme Court decision involving the constitutionality of two Missouri prison regulations. One of the prisoners’ complaints related to the fundamental right to marry. The Court ruled that a regulation restricting inmates from marrying without permission violated their constitutional right to marry because it was not logically related to a legitimate penological concern, but a prohibition on inmate-to-inmate correspondence was found to be justified by prison security needs. [For more on the issue of marriage, see [Prisoner Marriage](#), 2007 (10) AELE Mo. L.J. 301].

The case formulated a now widely used test to determine if prison regulations that allegedly burden fundamental rights are constitutional. The *Turner* test balances the punitive and rehabilitative goals of correctional officials with the constitutional rights of prisoners by inquiring whether such regulations were “reasonably related” to legitimate penological interests or were instead an “exaggerated response” to those concerns.

To decide whether a regulation was reasonably related to a penological interest, the U.S. Supreme Court spelled out a four-factor test:

- Whether there is a “valid, rational connection” between the regulation and the legitimate governmental interest used to justify it;
- Whether there are alternative means for the prisoner to exercise the right at issue;

- The impact that the desired accommodation will have on guards, other inmates, and prison resources (so-called “ripple effects”); and
- The presence or absence of “ready alternatives,” where the presence of ready alternatives make it more likely that a regulation is unreasonable while the absence make it less likely that the regulation is unreasonable.

This test gives broad deference to the discretion and expertise of correctional officials. As noted in [Pell v. Procunier](#), #73-918, 417 U. S. 817 (1974), judgments regarding prison security “are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.”

❖ Equal Protection and Race Discrimination

Subsequently, however, in applying the right of equal protection of the law to the issue of racial segregation in prisoner housing assignments, the U.S. Supreme Court ruled that the deferential *Turner* test did not apply to such claims. A federal appeals court initially held that a California prison policy under which race was taken into account when double-cell assignments are made in a reception center where new prisoners are confined for their first 60 days while awaiting full classification was not a violation of equal protection but rather was justified under [Turner v. Safley](#), #85-1384, 482 U.S. 78 (1987) because it was “rationally related” to a legitimate penological goal of reducing the possibility of racial violence among inmates. [Johnson v. California](#), #01-56436, 321 F.3d 791, rehearing denied, (9th Cir. 2003).

The U.S. Supreme Court granted review, and in [Johnson v. California](#), #03-636, 543 US. 499 (2005), ruled that prisons cannot segregate prisoners by race even temporarily, except under “extraordinary” circumstances where there is a compelling interest in doing so.

It ruled that an alleged [California Department of Corrections](#) (CDC) unwritten policy of racially segregating prisoners in double cells in reception centers for up to 60 days every time they enter a new correctional facility could only be justified

if it satisfied the requirements of “strict scrutiny,” i.e., served a compelling governmental interest and was “narrowly tailored” towards doing so. The policy was allegedly aimed at helping to reduce racially-related gang violence.

Prior case law, the majority noted, has insisted on the application of such strict scrutiny “in every context,” even for so-called “benign” racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation.

“The reasons for strict scrutiny are familiar. Racial classifications raise special fears that they are motivated by an invidious purpose. Thus, we have admonished time and again that, ‘absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.’ We therefore apply strict scrutiny to all racial classifications to ‘smoke out’ illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.”

“The right not to be discriminated against based on one’s race is not susceptible to the logic of *Turner*. It is not a right that need necessarily be compromised for the sake of proper prison administration. On the contrary, compliance with the Fourteenth Amendment’s ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system. Race discrimination is ‘especially pernicious in the administration of justice.’ And public respect for our system of justice is undermined when the system discriminates based on race.”

Only extreme circumstances, such as a social emergency rising to the level of imminent danger to life or limb, such as a prison race riot, the majority implied, requiring temporary segregation of inmates could justify an exception to the principle that the Constitution is “color-blind, and neither knows nor tolerates classes among citizens.”

Prison administrators, the Court stated, will have to demonstrate that any race-based policies are narrowly tailored to address a compelling interest in prison safety. On remand, the CDC would have the burden of showing that its policy fits those requirements. “Prisons are dangerous places, and the special circumstances

they present may justify racial classifications in some contexts. Such circumstances can be considered in applying strict scrutiny, which is designed to take relevant differences into account.”

The majority emphasized that it had not decided whether the policy in question violated the equal protection guarantees of the constitution, but only that strict scrutiny is the proper standard of review to be applied.

For a more detailed discussion of this issue, see [Racial Classifications and Inmate Housing Assignments](#), 2010 (1) AELE Mo. L. J. 301. On a related topic, in light of the fact that most prison gangs are based on racial or national origin categories, see [Prisoner Classification and Gang Activity](#), 2013 (11) AELE Mo. L. J. 301.

❖ Gender Discrimination and Intermediate Scrutiny

Courts have addressed claims of gender discrimination in correctional policies, and in light of equal protection concerns, have also rejected the use of the deferential *Turner* rational relationship test, but have also not utilized the strict scrutiny test applicable to racial discrimination claims.

Taking note of the deference ordinarily given to prison officials in light of the special duties that arise in the prison context, a federal appeals court ruled that that intermediate scrutiny applies to equal protection challenges of prison regulations which facially discriminate on the basis of gender. Under the intermediate scrutiny test, the question is whether the regulation in question “serve[] **important** governmental objectives and that the discriminatory means employed are **substantially** related to the achievement of those objectives.” (emphasis added).

In this case, the male prisoner sued claiming that prison officials discriminated against him based on his male gender by not allowing him to purchase certain prison vendor products available only to female inmates. Items whose availability depends at least in part on inmate gender include products that contain small metal pieces or otherwise may be used as a weapon, such as hair dryers and electric curling irons, as well as bath robes, scarves, kimonos, and bath towels, which could be used for strangulation; or clothing, such as denim jeans, that “would allow [inmates] to blend in with the general public” and thus could be used to disguise escaped prisoners.

Other items at issue included sugary foods that could be used to make an alcoholic beverage known as “pruno,” and items which the Department claims could give rise to disputes over gambling or money, such as necklaces and bracelets, as well as the card game Uno. For the purpose of the appeal, it was undisputed that under the current property regulation female inmates of the *highest* security classification housed in general population have access to more personal property than male inmates in the *lowest* security classification housed in the general population.

The appeals court held that plaintiff had sufficiently demonstrated that he has standing to bring his equal protection challenge of the regulation governing inmates’ personal property. It further ruled that imprisoned men and women of the same security classification subject to the challenged regulation are similarly situated for the purpose of this case, and that prison regulations such as this one, which facially discriminate on the basis of gender, must receive intermediate scrutiny. Therefore, the appeals court vacated the grant of summary judgment in favor of the prison officials.

The court found that the only relevant difference between the male plaintiff prisoner and an imprisoned woman of the same security level and privilege group, when it comes to allowable property under the Department-wide regulation, was gender. So it concluded that imprisoned men and women of the same security classification subject to the challenged regulation were similarly situated for the purpose of this case, and should be treated the same under the regulation unless treating them differently on the basis of gender “serve[] important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”

Because the appeals court had not yet established intermediate scrutiny as the applicable standard at the time the trial court reviewed the regulation at issue, the appeals court remanded for the trial court to determine the issue in the first instance. [*Harrison v. Kernan*](#), #17-16823, 971 F.3d 1069 (9th Cir. 2020).

The appeals court noted that two of its prior unpublished opinions had also utilized the intermediate scrutiny test. See, [*Laing v. Guisto*](#), #03-35105, 92 F. App'x 422, 2004 U.S. App. Lexis 813 (9th Cir. 2004) (concluding that the plaintiff “failed to provide sufficient evidence to overcome the defendant’s showing that the cross-gender searches serve important government objectives, and that its means are

substantially related to the achievement of those objectives”) and *Goldyn v. Angelone*, #97-17185, 1999 U.S. App. Lexis 22986, 1999 WL 728561 (9th Cir. 1999) (“Prisoners retain the protections of the Equal Protection Clause upon incarceration” and “[w]hen state actors intentionally classify persons based on gender, those classifications require an exceedingly persuasive justification.” The plaintiff challenged alleged discrimination against female inmates in the provision of vocational training opportunities, but the court concluded that she failed to present evidence of the defendants’ intentional, gender-based discrimination.).

Two other federal circuit courts of appeal, both the D.C. Circuit and the 8th Circuit have also applied intermediate scrutiny rather than *Turner* rational relationship scrutiny to claims that prison regulations discriminate on the basis of gender.

In *Roubideaux v. N.D. Dep’t of Corr. & Rehab.*, #07-3780, 570 F.3d 966 (8th Cir. 2009), two North Dakota prison inmates, representing a certified class of female inmates brought a sex discrimination suit under 42 U.S.C. § 1983 and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), claiming, among other things, that from 1997 to the present, the North Dakota prison system provided them with unequal programs and facilities as compared to the male inmates. Under applicable statutes, female prisoners were to be housed in local county jails rather than state correctional institutions, where there were allegedly more vocational programs.

While adopting the intermediate scrutiny test as appropriate for claims of gender discrimination, the court found the statutes at issue substantially related to the important governmental objective of providing adequate segregated housing for women inmates. The statutes substantially furthered the government’s legitimate and important objective of segregating women inmates from male inmates while providing them with the same type of services that are available within the state correctional system.

The court ruled that the state must persuasively show that certain gender-based classifications serve “important governmental objectives” and that the statute in question is “substantially related to the achievement of those objectives.” This heightened standard, however, the court cautioned, does not completely proscribe gender-based classifications “because the physical differences between males and females are real.” While gender classifications may never be used “to create or

perpetuate [a] legal, social, and economic inferiority of women,” the court was “mindful that this claim arises in a prison housing context where the program differences may result from the housing decision and that it is appropriate to segregate male and female inmates on the basis of gender.”

The court also found that the inmates’ assertion that the male inmates had more work opportunities in which to gain vocational skills did not fall within the scope of Title IX.

In [*Pitts v. Thornburgh*](#), #88-5058, 866 F.2d 1450 (D.C. Cir. 1989), females imprisoned by the District of Columbia complained that the District used the facilities of the federal Bureau of Prisons to house long-term women offenders. The result was that long-term women offenders found themselves incarcerated at the Federal Correctional Institution in Alderson, West Virginia, a remote, mountain-bound hamlet situated far from Washington, D.C. Pointing to the District’s policy and practice of incarcerating similarly situated males in District-operated prison facilities located near the District of Columbia, the plaintiffs complained that the differential treatment of (and accompanying burden on) women offenders runs afoul of the equal protection guarantees of the Constitution. This, they claimed, removed them far from the comforts and support of family and the resources that would otherwise be available to them in the local D.C. community.

The appeals court adopted the intermediate scrutiny test, noting that a classification relying explicitly upon gender can peculiarly suggest that the state is pursuing an improper purpose, one that furthers or contains “fixed notions concerning the roles and abilities of males and females,” for example, embodying an objective “to exclude or ‘protect’ members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior.” A classification that facially discriminates on the basis of gender especially raises the danger that the state has chosen means that are not substantially related to a legitimate state interest.

Ultimately, however, the appeals court was persuaded that the challenge fell short. The District’s policy, “upon close examination, does not embody invidious discrimination reflecting such forbidden factors as outmoded conceptions of the role of women in contemporary society. To the contrary, the District has demonstrated that it has sought to utilize federal resources in order to respond in

some measure to the universally recognized blight of the severe overcrowding that afflicts the District of Columbia prison facilities.”

The Third and Sixth federal appeals Circuits have also applied intermediate scrutiny to gender discrimination claims concerning correctional policies in unpublished opinions.

In [*Dinote v. Danberg*](#), #14-3158, 601 F. App'x 127, 2015 U.S. App. 1710, 2015 WL 451639 (3d Cir. 2015), the court upheld the practice of transferring female arrestees from a predominately male institution to an all-women’s institution within 24 hours of their arrival. The female plaintiff’s claim failed because transferring women, and quickly, to a facility that could accommodate them directly accomplished the goal of providing gender-segregated institutions, and the 24-hour limit to which the institution generally adhered was not arbitrary, but was supported by sound gender-neutral reasoning

“Even differential treatment is permissible, however, if it bears a sufficient nexus to a qualifying governmental interest, in the case of a gender classification, the state must show that the classification ‘serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.’”

In [*Pariseau v. Wilkinson*](#), #96-3459, 1997 U.S. App. Lexis 6140, 1997 WL 144218 (6th Cir. 1997), the court applied intermediate scrutiny to a gender-based hair grooming policy. The plaintiff complained that male prisoners in Ohio were subject to gender discrimination because they were required to have their heads shaved upon entry into the system and to keep their hair short throughout their incarceration, while female prisoners were not. The court ruled that judgment for the defendant was proper and the gender discrimination claim was properly rejected because the defendant demonstrated that the hair grooming policy was substantially related to the important objectives of security and identification, which were more vital in handling male prisoners.

❖ Resources

- [Female Prisoners](#). AELE Jail and Prisoner Case Summaries.

- [Race and National Origin Discrimination](#). AELE Jail and Prisoner Case Summaries.
- [Sex Discrimination](#). AELE Jail and Prisoner Case Summaries.
- [Women in Prison: Seeking Justice Behind Bars](#) Briefing Report Before The United States Commission on Civil Rights Held in Washington, D.C. (Feb. 2020).
- [Female Offender Manual](#), Federal Bureau of Prisons (January 2, 2018).
- [Handbook for Prison Managers and Policymakers on Women and Imprisonment](#) by Atabay, Tomris, United Nations. Office on Drugs and Crime (Vienna, Austria) Published 2008. 117 pages.
- [Incarceration of Women in the United States](#). Wikipedia article.

❖ **Prior Relevant Monthly Law Journal Articles**

- [Shackling of Pregnant Prisoners](#), 2009 (12) AELE Mo. L. J. 301.
- [Racial Classifications and Inmate Housing Assignments](#), 2010 (1) AELE Mo. L. J. 301.
- [.Sexual Assault of Female Inmates by a Correctional Officer: --A Case Study](#), 2020 (8) AELE Mo. L.J. 301.

❖ **References:** (*Chronological*)

1. [Sex Discrimination in Prison: Title VII Protections for America's Incarcerated Workers](#), by J. S. Welsh, 42 Harvard Journal of Law and Gender 477 (2019).
2. [Overlooked: Women and Jails in an Era of Reform](#), by Elizabeth Swavola, Kristine Riley, and Ram Subramanian, Vera Institute of Justice (2016).
3. Lara Hoffman, [Separate but Unequal - When Overcrowded: Sex Discrimination in Jail Early Release Policies](#), 15 Wm. & Mary J. Women & L. 591 (2009),

4. Note, [Women's Prisons: An Equal Protection Evaluation](#), 94 Yale Law Journal 1182 (1985).
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