

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF DAVIS

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVIS MILITARY INSTITUTE

and

COMMONWEALTH OF DAVIS,¹
Defendants.

MEMORANDUM OPINION AND ORDER

May 15, 1993

No. 93-CV-0000431

BACKGROUND

[The United States Department of Justice filed a complaint on behalf of five female high school students who wanted to be considered for admission to Davis Military Institute (DMI). DMI moved to bifurcate the trial to consider the issues of liability and remedy separately. The District Court granted the motion.

After the liability phase of the trial, the district court held that the all-male admissions policy at DMI violated the Equal Protection Clause. The remedy phase of the trial decided the constitutionality of DMI's proposed parallel program named Davis Women's Institute for Leadership (DWIL) at nearby Betsy Ross College (BRC), an all-women private college. The court held that the separate parallel program for women satisfied the requirements for equal protection. The following is a consolidated opinion of the bifurcated trial].

OPINION AND ORDER

Before CHAPURAN, Judge

This conflict arises out of the United States' challenge to Davis Military Institute's (DMI) all-male admissions policy. The United States asserts that as a state-supported college, DMI's refusal to admit females to the Institute, regardless of their qualifications, violates the Equal Protection Clause of the

1. Counsel for the Defendant will represent the interests of both DMI and the Commonwealth of Davis.

Fourteenth Amendment. DMI argues that although it discriminates against women, the discrimination promotes a legitimate state interest--diversity in education. Thus, the issues to be resolved are whether DMI's practice of excluding women can pass constitutional muster under the Equal Protection Clause, and if not, whether the proposed remedial plan, the Davis Women's Institute for Leadership (DWIL), is a sufficient remedy.

Jurisdiction was properly invoked under Title IV of the Civil Rights Act, 42 U.S.C. § 2000c-6, which permits the United States to bring actions alleging discrimination in violation of either the United States Constitution or other federal statutes.

I.

The male-only admissions policy of DMI, a state institution of higher education located in Lexington, Davis, is challenged by the United States under the Equal Protection Clause of the Fourteenth Amendment. Although the United States argues that strict scrutiny should apply, the Supreme Court has consistently held that intermediate scrutiny is the proper standard for gender classifications. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

DMI claims that its unique methodology justifies a single-gender policy and that material aspects of its holistic system would be changed by coeducation. I find this contention to be true and supported by the evidence. (See Finding II.4). Because of the sum of the changes that could be expected if DMI became coeducational, it would offer neither males nor females the DMI education that now exists. Three aspects of DMI's program -- physical training, the absence of privacy, and the adversative approach -- would be materially affected by coeducation, leading to a change in the egalitarian ethos that is a critical aspect of DMI's training. (See Finding IV).

While these findings answer the question of whether DMI's educational method justifies its all-male policy, they do not answer the larger question of whether the unique benefit offered by DMI's type of education can be denied to women by the state under a policy of diversity, which has been advanced as the justification for the policy. A policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender. Moreover, if responsibility for implementing diversity has somehow been delegated to an individual institution, no explanation is apparent as to how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions.

I am thus left with two conclusions: (1) single-gender education, and DMI's program in particular, serves a legitimate and relevant educational mission; (2) the Commonwealth of Davis, despite its announced policy of diversity, has failed to articulate an important policy that substantially supports offering the unique benefits of a DMI-type of education to men and not to women.

For these reasons I find that the all-male admissions policy at DMI violates equal protection.

II.

I now turn to whether the Commonwealth of Davis's proposal (1) to continue to provide a single-gender military-type college education for men at DMI and (2) to provide, beginning in 1996, a single-gender education with special leadership training for women at Betsy Ross College, located thirty-five miles from DMI, satisfies the requirements of the Equal Protection Clause. Details of the plan may be found in the findings of fact. (See Finding V). Generally, the plan calls for the same outcome of an educated and honorable citizen-soldier, but uses different methodologies to achieve that outcome.

The experts for both sides acknowledge that the proposed DWIL program differs from DMI in methodology since DWIL would not rely on the pervasive military life and adversative methods to achieve its goals. Experts used in designing the program testified that the different approach was selected principally to address the different educational needs of most women. The United States, however, argues that although theoretically a parallel program could be created, an exact replica of DMI is impossible to create. Thus, the United States contends that the only constitutional remedy is admitting women into DMI.

Evaluating the substantive comparability of benefits, I find the difference between the programs is attributable to the professional judgment of a Task Force of how best to provide the same benefits. (See Finding V.2). For purposes of the Equal Protection Clause, I am satisfied that the programs to be offered at both institutions are substantively comparable.

Therefore, it is ADJUDGED that the Davis Women's Institute for Leadership is a sufficient remedy to the Equal Protection Violation. The Commonwealth of Davis and Davis Military Institute are ORDERED to implement the plan. Moreover, this Court retains jurisdiction to oversee the implementation of the plan so as to ensure that it comports with Equal Protection.

APPENDIX: FINDINGS OF FACT

I. Public Higher Education in Davis

1. There are fifteen state-supported four-year colleges in the Commonwealth of Davis. Historically, most of Davis's public colleges were single-sex. Four colleges were originally limited by statute to women only. On the men's side, two universities originally were all-male, but have since become coeducational.

2. All public colleges in Davis, except for the Davis Military Institute, are now coeducational. Thus, Davis has one all-male public institution and no all-female state-supported colleges.

3. In the Fall of 1989, enrollment at the 15 public institutions included 72,819 men and 85,441 women. Of that number, 1312 (all men) are enrolled at DMI. DMI is substantially

smaller than all of the other colleges in the system.

4. Davis offers a diverse array of educational opportunities. The Commonwealth Council of Higher Education's current plan for higher education states that "Davis has always recognized that there are many kinds of excellence and has supported a diversity of missions among its institutions of higher education."

5. The Boards of Visitors of the various public colleges and universities in Davis have traditionally enjoyed, and now enjoy, broad autonomy in the determination of such issues as the institution's mission, curriculum, the composition of its faculty, and the composition of its student body.

6. In the fall of 1989, 3850 women and 2256 men were enrolled in single-sex institutions of higher education in Davis. All of the women, and 944 of the men, were enrolled in private institutions.

7. No defense witness in this case offered to explain why the Commonwealth of Davis provides the option of single-sex public education to men but not to women. No evidence was submitted concerning the cost or practicality of creating a new, all-female public college, or of converting an existing college into an all-female institution.

II. The Unique DMI Educational Method

1. DMI was established in 1832.

2. The DMI method conforms generally to an adversative, or doubting, model of education. Physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values are the salient attributes of the DMI educational experience.

3. The exact system of education at DMI is not offered elsewhere in the United States. Therefore, women have no opportunity anywhere to gain the benefits of this education.

4. DMI alumni are very loyal to the school, both in terms of providing employment opportunities for fellow alumni and for their generous endowments to DMI.

5. DMI is sought out by some applicants for admission because it is known to be the most challenging military school in the United States, and because its alumni are exceptionally close to the school.

A. The Adversative Model

1. The DMI experience is predicated on the importance of creating doubt about previous beliefs and experiences in order to create a mindset conducive to the values that DMI attempts to impart. The adversative model has been used by military service and in the English public schools.

2. The adversative model is not in widespread use in American higher education.

3. Colonel Sherman Grant, the Commandant of Cadets at DMI, summarized the educational process at DMI as follows:

"I like to think DMI literally dissects the young student that comes in there, kind of pulls him apart, and through

the stress, everything that goes on in that environment, would teach him to know everything about himself. He truly knows how far he can go with his anger, he knows how much he can take under stress, he knows how much he can take when he is totally tired, he knows just exactly what he can do when he is physically exhausted, he fully understands himself and his limits and capabilities. Something I think is the mainstay of leadership. I think every DMI man that leaves there knows a great deal about his human capacity to do things under all kinds of duress and stress."

4. All experts agreed that the individual systems comprising the DMI method for leadership and character development must be understood holistically. The individual systems are integrated into a unified experience through the barracks life. Altering any system will affect the educational experience as a whole.

B. Rat line

1. Entering students at DMI are called "rats" because the rat is "probably the lowest animal on earth." In general, the rats are treated miserably for the first seven months of college.

2. Behavior that contributes to DMI objectives is rewarded; behavior that detracts is swiftly punished. Both punishment and reward are collective as well as individual. Being punished or rewarded for the sins or accomplishments of brother rats, as well as for one's own, builds a sense of class solidarity in addition to individual responsibility. The rat line is sufficiently rigorous and stressful that those who complete it feel both a sense of accomplishment and a bonding to their fellow sufferers and former tormentors.

3. The rat line is an extreme form of the adversative model. It challenges all values and all forms of behavior in order to instill the values and behaviors for which DMI exists.

4. Features of the rat line include indoctrination, egalitarian treatment, rituals (such as walking the rat line), minute regulation of individual behavior, frequent punishments, and use of privileges to support desired behaviors.

5. The rat line is comparable to Marine Corps boot camp in terms of both the physical rigor and mental stress of the experience.

6. At DMI almost every conceivable kind of behavior is anticipated and prescribed. There are thousands of regulations in place that govern cadet life.

7. "Motivational activities" including stoop runs, fifteen-minute running and calisthenic events, rifle runs, training marches, and the like, are critical aspects of the rat line.

8. All DMI cadets experience the rat line. The only time cadets can join the corps at DMI is in August, at the beginning of the school year. If cadets leave after joining, they are not replaced.

C. Class System

1. The class system at DMI is a system of privileges and responsibilities aimed at developing the character and leadership of cadets. Each class has specific responsibilities. The first class, or seniors, are responsible for providing overall leadership, writing the standard operating procedures for the rat line for the following year, supervising the rat breakout, and for being a dyke to a rat. The third class, to cite another example, serves as disciplinarians to the rats. The class system is a very highly-developed system for cultivating leadership.

2. After the rat line strips away cadets' old values and behaviors, the class system teaches and reinforces through peer pressure the values and behaviors that DMI exists to promote. This occurs within the barracks setting. The class system supplies the constant supervision of cadets, tutoring, and dispensation of privileges to reward desired values and behaviors.

D. Dyke System

1. The dyke system is closely linked to the class system, and is the arrangement by which each rat is assigned a first classman as a mentor, called a "dyke." The dyke system provides some relief from the extreme stress of the rat line.

2. The DMI system of education creates a sense of loyalty to one's brother rats. The dyke system contributes to this sense of loyalty. The dyke system also creates a cross-class bonding and provides a model for leadership and support.

E. Honor Code

1. The DMI honor code holds that a cadet "does not lie, cheat, steal nor tolerate those who do." The sole penalty for violations of the DMI honor code is expulsion. The DMI honor code dominates all facets of institutional life. It is stringently enforced by an honor court comprised of cadets elected from the upper two classes.

F. Barracks

1. Unlike most colleges, where the library is central and the dormitories are peripheral, the most important aspects of the DMI educational experience occur in the barracks. The barracks, therefore, are crucial to the DMI experience. All cadets are required to live in the barracks for all four years at DMI.

2. The barracks are the situs of the inspections, the rat-dyke relationship, administration of the class system, administration of the honor system, and much of the new cadet training, or rat line.

3. The barracks are designed to reduce all cadets to the lowest common denominator, from which the new cadet training system, class system, honor code, military system and academic system year-by-year builds the values, attitudes and behaviors expected from DMI graduates.

4. The barracks' configuration is a training aid, and the

barracks is a total training environment in which the class system functions. Each class is assigned a floor in the barracks, which has four floors. There is a total lack of privacy. This spartan living and humbleness is an aspect of the egalitarian ethic at DMI.

5. The windows and the doors ensure that cadets are never free from scrutiny. There is constant intermingling of cadets as a result of the close and intimate quarters and the number of cadets assigned to a room. Ventilation is poor. Furniture is unappealing. A principal object of these conditions is to induce stress.

6. There are no locks on the doors of cadet rooms in barracks, no windows in the barracks doors, no window shades or curtains. Barracks rooms open onto stoops. The stoops are open corridors at each level and provide access to the gang bathrooms. On the fourth floor a cadet cannot go to the bathroom or take a shower without being observed by everyone in that quadrangle on all levels. This places cadets under constant scrutiny and permits minute regulation of behavior, especially for the fourth classmen who reside on the top floor.

7. The egalitarian treatment associated with barracks life is as important as the elements of stress and lack of privacy. In barracks, a cadet is totally removed from his social background.

8. No other institution, including the service academies, places such emphasis on barracks or dormitory life. The lifestyle system at DMI is unique.

G. Military System

1. The military regulations, etiquette, and drill primarily furnish a rationale for the rigorous activities that are features of the other DMI systems, including the comprehensive regulation of behavior and the wearing of uniforms. The system is not directly connected to the ROTC program.

2. Each cadet who matriculates at DMI must select one of the four ROTC programs during the first week of school. All cadets must be affiliated with one of the four ROTC programs, for all four years at DMI.

H. Educational System

1. The academic program (aside from physical education) at DMI is not unique. DMI offers undergraduate courses leading to Bachelor of Arts and Bachelor of Science degrees, in liberal arts, science, and engineering disciplines.

2. DMI includes as part of its academic program, a program on "Retention of Black Cadets," designed to offer "crucial academic support" and [s]ocial-cultural support to "minority members of a dominantly white and tradition-oriented student body."

III. DMI's Mission

The mission of DMI is captured in the final report of the Mission Study Committee of the DMI Board of Visitors (issued May 16, 1986), which states:

"It is the mission of the Davis Military Institute to produce educated and honorable men, prepared for the varied work of civil life, imbued with love of learning, confident in the functions and attitudes of leadership, possessing a high sense of public service, advocates of the American democracy and free enterprise system, and ready as citizen-soldiers to defend their country in time of national peril."

IV. Anticipated Effects of Coeducation on DMI

A. A coeducational DMI would substantially affect the method now used to educate citizen-soldiers.

B. If women were admitted to DMI, there would be changes in physical education requirements to reflect physiological differences. Coeducation would also affect physical training, which is incorporated into the rat system.

C. DMI would have to make the changes analogous to those that have been made at the service academies, and might find it necessary to introduce the concept of comparable training (For example, if males were required to run three miles in 18 minutes, females would be required to run three miles in 21 minutes).

D. Cross-sex relationships and dating are attributes of a coeducational system, and are inconsistent with the complete equality that is a central attribute of the DMI system.

V. The Proposed Remedial Plan

A. Development of DWIL at BRC

1. On September 24, 1992, BRC entered into an agreement with the DMI Foundation, Inc., which committed to provide funding for DWIL if it receives court approval.

2. As provided in the Plan, the President of BRC, President Rodham, designated a Task Force co-chaired by Deans Lamar and Gingrich to refine and plan for implementation of DWIL. The Task Force includes faculty, administration and student representation. Members of the Task Force include a political scientist, a professor of sociology, the college residence life coordinator, a professor of theater, a student in the class of 1996, and a professor of philosophy. The Task Force considered where DWIL should follow or depart from the DMI methodology to produce the same outcomes.

B. Mission of DWIL

1. The BRC Task Force concluded that DWIL is appropriate to BRC's commitment "to the education of women for a world of expanding opportunity" in ways which "will lead to flexibility of mind and strength of values and provide the foundation for future careers, professions, and positions of leadership."

2. DWIL will be a publicly-supported, single-sex education program with military training for women. The Commonwealth of Davis will contribute about \$6,000 per DWIL student, which is equivalent to what Davis pays per DMI student.

3. The stated mission of DWIL is to produce "citizen-soldiers

who are educated and honorable women, prepared for the varied work of civil life, qualified to serve in the armed forces, imbued with love of learning, confident in the functions and attitudes of leadership, and possessing a high sense of public service."

C. Academic Offerings and Requirements of DWIL

1. The general education requirements and the academic majors for DWIL students will be the same as those for regular BRC students.

2. The admission standards for the DWIL would be the same as for the traditional BRC program.

3. DWIL students must complete a calculus course.

4. DWIL students will take a leadership externship. This externship, "which should ideally be related to [the student's] major, will be distinguished from other externships by providing an opportunity to experience and reflect on leadership in practice. For instance the student may work for a person whose position she would like to have in ten years and may, in addition to the standard expectations of an externship, be required to keep a journal in which she analyzes and evaluates the leadership styles and strategies she encounters in the externship."

5. DWIL students will participate in the DWIL Seminar, and in Saturday Seminars three times a semester. DWIL students will also organize a Leadership Speaker Series for one semester of the junior year and one semester of the senior year.

6. Although eight male non-residential students currently attend some classes with traditional BRC undergraduate women, no male students will attend classes with DWIL students.

7. BRC does not offer an engineering program. Presently, BRC students may participate in a joint engineering program with Jefferson College, in St. Louis. This joint program will be available to DWIL students. DWIL students would not receive the DWIL tuition discount while participating in the engineering program at Washington University.

D. Military Leadership and Training

1. All DWIL students will be required to complete four years of ROTC. The program at BRC will be conducted by ROTC professors from DMI. Academic classes will be conducted on the BRC campus by the ROTC faculty, who are active duty military personnel. The content and design of the courses are uniformly directed for all ROTC by the respective Armed Service. In addition to classes, organized laboratory activities will be conducted on designated afternoons either on the BRC campus or at the ROTC facilities on the DMI campus. BRC will provide transportation to and from the DMI campus. Juniors and Seniors who are not candidates for a commission will be required to participate in alternative leadership laboratory activities. Physical training and evaluation activities separate from those directed by the Physical Education Department will be conducted by the ROTC faculty, and the ROTC faculty will provide counseling and

advising on the BRC campus on a scheduled basis.

2. The total number of semester hours credit for four years of ROTC is 12. In addition, a six week intensive summer camp between the junior and senior years will provide externship credit for students seeking a commission.

3. DWIL students will constitute a corps of cadets. They will have military rank, will wear uniforms and will drill in ROTC and as part of the Davis Corps of Cadets. Nothing in the DWIL Plan precludes increasing the amount or type of military exercises.

4. The Plan provides for establishment of a Davis Corps of Cadets, comprised of the all-female DWIL, the all-male DMI and the co-ed Davis Tech Corps. As members of the Davis Corps of Cadets, DWIL students will have distinctive military uniforms, different from the ROTC uniform.

5. For approximately one week each summer DWIL freshmen must participate in a "cadre week orientation."

6. DWIL students will not be required to wear uniforms during the school day other than while participating in ROTC or Davis Corps of Cadets activities.

7. Traditional BRC students would not wear military uniforms.

8. DWIL students will not be required to eat meals together.

E. Physical Education and Training

1. DWIL students must take 8 semesters of physical and health education courses. These courses are: advanced fitness ("a course designed for DWIL students"); swimming; tennis; golf; racquetball; and "additional physical education courses, and two health courses."

2. In the sophomore, junior and senior years students will take tennis, golf, racquetball, additional physical education courses, and two health courses. A course in self-defense will be part of the curriculum, and all DWIL students will have training in self-defense and self-assertiveness through a Cooperative Confidence Building program ("CCB") and through the required weekend workshops which will make up an important part of the co-curricular component of the Institute.

3. All DWIL students will complete a battery of fitness assessments at the beginning of the Freshman year and at the end of all subsequent semesters. The Physical Education faculty will establish a set of standards with appropriate recommendations for a standard of maintenance. The results of the tests will be incorporated into the evaluation of the DWIL student in the health or physical education course she is taking during that semester.

4. The DWIL physical education program will have a self-defense component rather than a boxing component.

5. The BRC Physical Education Department will develop the CCB as a co-curricular component. CCB will be held twice a week. The CCB was designed to be analogous to the DMI "rat challenge," and will consist of physically and mentally challenging events, including obstacle courses, rappelling, a ropes course, and team building activities. Students enrolled in DWIL will be required

to participate in this program their freshman year, unless they are involved with practice for a varsity athletic team. Sophomores, juniors and seniors who are not involved with practice for a varsity team will have the choice of participating in the CCB program as leaders or participating in a personal workout program. The latter will be designed to assure that the student meets and maintains the standard of physical fitness determined by the Physical Education faculty.

6. The physical training test for women in DWIL is designed to be comparable in rigor and challenge to the physical training test for men at DMI. The DWIL physical and health education component is based on the DMI physical education program.

7. Physical performance standards will be set by BRC's physical education faculty in consultation and cooperation with the physical education faculty at DMI. National norms and standardized tests for physical fitness will be utilized. The ROTC physical fitness requirements for women are standardized nationwide.

8. DMI will make the Rat Challenge facilities available to DWIL.

F. Co-Curriculum

1. DWIL students will be required to participate in a one-week wilderness-type orientation the summer before their freshman year. The DWIL Orientation will take place the week before regular orientation and will be run by upperclass DWIL students. The Orientation will give upper class students the opportunity to plan, to organize, and to lead.

2. Freshmen DWIL students will room together and will be housed in separate sections of freshman halls to facilitate the development of group identity while also encouraging good relationships and friendships with other freshmen. Freshmen will be subject to a number of rules which will provide an externally imposed order on their daily lives. While the regulations are still being developed, they will include the following: Students will be required to keep their rooms neat (and subject to spot inspection); they will not be allowed to smoke in their rooms; they will not be allowed to change roommates during the first year but will instead be expected to work through any interpersonal problems which arise. They will also have a required study hall from 7 p.m. - 9 p.m. Monday through Thursday.

3. Freshman DWIL students will take many of the same academic courses, will have the same physical education and ROTC experiences, and will work together in teams in the CCB.

4. As BRC students, DWIL participants will be encouraged to participate in BRC activities and class functions, and will be subject to the rules and regulations of the Honor System and the Judiciary System. The Honor System at DWIL will differ from the Honor Code at DMI in that it will not operate with the single sanction of expulsion.

5. Throughout the Freshman year, students will be mentored by upper class DWIL students, and, as DWIL develops, the upper class

students will play an important role in modifying the design of the freshman year to make it as effective as possible in orienting first year DWIL students to the standards and expectations of the Institute.

6. After the Freshman year, DWIL students will be required to live one year in the DWIL House, a residence hall which will also be the center for DWIL meetings and activities. DWIL House residency will provide students with a "lab" for community building and leadership development.

G. DWIL/BRC Residence Life

1. Upper class DWIL students will be required to live one year in the DWIL House. The DWIL House will not be operated on a military format. No regulations or requirements have been developed for the DWIL House.

2. DWIL students will set their own rules and regulations in the DWIL House, within the larger framework provided by the DWIL code of conduct.

3. Upper class DWIL students will play the role of mentor and monitor of the freshmen students. Upper class students will orient freshmen and teach them the standards and expectations of DWIL.

4. DWIL will have a class system, including the mentoring system, in which upper class students teach and mold freshmen.

5. DWIL residential regulations will be enforced and monitored by upper class students in the program.

6. Upper class students will lead the DWIL contingent of the Davis Corps of Cadets, organize and direct the corps' drills, be responsible for enforcing regulations, maintaining esprit de corps and play a central role in the DWIL orientation and the confidence building program.

H. DWIL's ROTC Component

1. The ROTC programs at DMI operate independently of the barracks system and its various components such as the rat line, and nothing about the ROTC programs at DMI is unique to DMI other than the absence of women.

2. All military training for DWIL students will be mandatory for four years, including participation in ROTC.

3. For DWIL students, military training leading to the opportunity to be commissioned in the armed services will be provided by the ROTC program in which all DWIL students will be required to enroll. The courses in ROTC will be taught at BRC, and the labs in ROTC will be held at BRC. The exceptions to ROTC activities at the BRC campus will be the use of facilities which BRC does not have (for example a rifle range).

I. DWIL Access to DMI Alumni Network

1. The DMI Alumni Association has pledged to support BRC and the BRC Alumni Association with respect to DWIL graduates.

2. To assist the DMI Admissions Office, the DMI Alumni Association maintains an alumni recruiting network designed to

educate young people about the benefits of a DMI education. The DMI Alumni Association will do likewise with respect to DWIL.

3. Since 1988, the DMI Alumni Association has assisted DMI alumni who find themselves unemployed. The Association has developed a network of business owners, corporations, DMI graduates and non-graduate employers who are interested in hiring DMI graduates. The Alumni Association will make this placement service available to DWIL graduates.

VI. Betsy Ross College

A. History/General Background

1. BRC was founded in 1842.
2. Betsy Ross College is not a military school.
3. Betsy Ross College has no tradition of producing military leaders, or of training its students for the military.
4. ROTC is currently available to Betsy Ross College students through the program at James Monroe University, although in the past three years no BRC student has been commissioned.

B. BRC Facilities

1. BRC has a 55-acre campus in Broughton, Davis for its undergraduate residential program for women. The campus includes the facilities of the former Broughton Military Academy ("BMA"), which BRC purchased in the late 1970's.
2. At BRC, the largest bathroom serves approximately 35 or 40 students. At DMI there is one bathroom on each stoop, serving up to 400 students.
3. At BRC, each shower or tub has a door or curtain, while at DMI there are gang showers containing about 24 heads.
4. At BRC, each residential room has a solid door with a lock. At DMI the barracks rooms doors have windows and are unlocked.
5. Tullidge Hall, a BMA barracks, is one of the residence halls which may be used for the DWIL program. It can house approximately 50 students.

UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

Docket No. 94-398

UNITED STATES OF AMERICA
Appellant and Cross-Appellee,

vs.

DAVIS MILITARY INSTITUTE
Appellee and Cross-Appellant.

April 12, 1994

Before Sartin, Trocki and Eone, Circuit Judges.

SARTIN, Circuit Judge:

This is a cross appeal from a bifurcated trial by the United States of America on behalf of five female students in the Commonwealth of Davis and Davis Military Institute. The district court held that DMI's admission policy of excluding women violated the Equal Protection Clause of the Fourteenth Amendment. As a possible remedy, the Commonwealth of Davis opted for a "parallel program" and submitted it for approval. The district court found the remedy to be sufficient. DMI appealed the decision on liability; the United States appealed the remedy.

This court affirms the decision as to the Equal Protection Violation. However, because the proposed plan for DWIL does not offer substantively comparable benefits for women as DMI does for men, the case is reversed in part and remanded.

Intermediate Scrutiny Test

The United States Supreme Court has interpreted the Equal Protection Clause of the Fourteenth Amendment to require that statutes containing gender-based classifications satisfy an intermediate level of judicial scrutiny. See Craig v. Boren, 429 U.S. 190 (1976). To overcome an equal protection challenge, gender-based distinctions must (1) serve an important governmental objective, and (2) be substantially related to achievement of those objectives. Id. at 197. Moreover, under this standard of scrutiny, states seeking to uphold such classification "carry the burden of showing an 'exceedingly persuasive justification' for [it]". Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

In the instant case, we are also called upon to evaluate a proposed remedy to DMI's exclusion of women. Therefore, we must determine, in addition to the first two prongs, whether the resulting mutual exclusion of women and men from each other's institutions leaves open opportunities for those excluded to obtain substantively comparable benefits at their institutions. This test must be applied "free of fixed notions concerning the roles and abilities of males and females." Id. at 724-25.

The Proposed Remedial Plan

In lieu of the adversative methods employed by DMI, the DWIL concepts proposes a cooperative method which reinforces self-esteem rather than the leveling process used by DMI. DWIL will be a highly structured program but without the adversative DMI components, such as the rat line and breakout. An expert on women's education stated that an adversative method of teaching would be counter-productive for most women. Most women reaching college generally have less confidence than men. It is the opinion of the Task Force that the methods adopted for the DWIL will produce the same or similar outcome for women that DMI produces for men.

Turning to the intermediate scrutiny test, just as a state's provision of publicly financed education to its citizens is a legitimate and important government objective, so to is choosing one pedagogical technique among many. Although there remains some disagreement among the experts about the extent of the benefits of single-gender education, it is enough that there is a growing consensus that a sexually homogenous environment yields concrete educational benefits. Furthermore, we agree with the District Court that the benefits are substantively comparable. Accordingly, we conclude that DMI has met the intermediate scrutiny test.

AFFIRMED.

EONE, Circuit Judge, Concurring in judgment:

While I agree that the proposed Davis Women's Institute of Leadership (DWIL) is constitutionally sufficient. I am writing separately to express my opinion that the DMI policy of all-male admissions does not violate equal protection in the first place.

In order to satisfy equal protection, a gender-based classification must pass intermediate scrutiny. Here the Commonwealth of Davis has provided an important state interest that is furthered by the all-male admissions policy: diversity in education. Because the Commonwealth of Davis is offering a unique form of education in the name of diversity, it is furthering an important state interest. See Williams v. McNair, 316 F.Supp. 134 (D.S.C. 1970), aff'd, 401 U.S. 951 (1971); Vorcheimer v. School District, 532 F.2d 880, 887 (3d Cir. 1976), affirmed by an equally divided Court, 430 U.S. 703 (1977).

Neither is it possible to argue that because there is no state supported military school for women, there should not be one for men. In accordance with this policy of diversity, the Commonwealth of Davis has traditionally allowed individual institutions to have broad autonomy. The public universities have established their policies based on the perceived needs of the Davis residents. The demand for a public, all-female military college is simply lacking.

The United States argues that lack of demand is no justification for an equal protection violation. While that principle may hold true for civil rights guaranteed by the

Constitution, the answer is not so clear when we consider whether and to whom the state may confer an economic benefit, at least in the context of single gender education. Therefore, I would hold that the all-male admissions policy of DMI does not violate Equal Protection because of the important state interests of diversity and institutional autonomy are furthered by the policy.

TROCKI, Circuit Judge, Dissenting:

I agree with the Court's decision holding that DMI's all-male policy violates the Equal Protection Clause of the Fourteenth Amendment. But I do not agree with the holding that the proposed remedy satisfies equal protection requirements. I question, whether under the Equal Protection Clause, a state can ever have a sufficiently important interest to justify expending public funds to maintain an institution that not only practices inequality, but celebrates it.

Under the guise of diversity, Davis continues to exclude women from what is acknowledged to be one of the country's most prestigious military colleges. It does so with generalizations about the abilities and desires of "most women", but equal protection of the law is not dependent upon the number of people who assert it. Moreover, "proving broad, sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." Boren, 429 U.S. at 204. It is the individual who is entitled to the equal protection of the laws. Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 351 (1938).

The "separate-but-equal" analysis is both inappropriate and useless. No matter how a "parallel program" is fashioned, the student and eventual graduate of DWIL not be able to call on the prestigious name of "DMI" in seeking employment or preference in her various endeavors; the powerful political and economic ties of the DMI alumni network cannot be expected to open for her to the same extent as DMI graduates; the prestige and tradition of her own fledgling institution cannot possibly ever achieve even rough parity with those of DMI. The catch-up game is an impossible one, as any honest reflection upon the matter must reveal.

We have been down this road before. I see no reason to subject gender classifications to a lower standard of scrutiny than we apply to racial classifications. Therefore, the only acceptable remedy under the Constitution in my opinion is the integration of DMI.

Moreover, I cannot agree with the majority's separate-but-equal analysis. Certainly, when separate-but-equal educational arrangements for the races were considered to be tolerable under the Equal Protection Clause, a basic prerequisite was that they be truly, substantially equal in all the relevant criteria, tangible and intangible, by which educational institutions are evaluated. See, e.g., Sweatt v. Painter, 339 U.S. 629, 633-34 (requiring "substantial equality in educational opportunities" to

justify separate state-supported law schools for white and black students, and not finding it upon considering both tangible resources such as "scope of library" and intangible resources such as "position and influence of the alumni," "traditions and prestige"). Though race is a "suspect" classification and gender so far is not, I see no reason why the same requirement of substantial equality of benefits that was thought at one time to justify separate-but-equal schools for the different races should not apply to separate schools for men and women if that classification now does, as race formerly but no longer does, permit separate-but-equal arrangements.

With the program as it stands, DWIL will inflict the stigma of an inferior military education upon the women who attend the school. This program is little different than any other liberal arts school with an ROTC component. As such, women in Davis who desire the unique education of DMI are still denied the experience. In order to meet the requirements of the Equal Protection Clause, the program must change.

For these reasons, I dissent.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,

vs.

DAVIS MILITARY INSTITUTE,
Respondent.

No. 95-100454

ORDER

The petition for certiorari to the United States Court of Appeals for the Fourteenth Circuit is hereby granted that this Court may hear and consider all issues raised by the record. It is further ordered that this case be set down for an expedited hearing in the October 1995 term of this Court.

SHANNON FOLKLORE, Clerk
United States Supreme Court

Dated, August 16, 1995
Washington, D.C.