Institutional Myths, Historical Narratives and Social Science Evidence: Reading the "Record" in the Virginia Military Institute Case

Dianne Avery
University at Buffalo School of Law

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INSTITUTIONAL MYTHS, HISTORICAL NARRATIVES AND SOCIAL SCIENCE EVIDENCE: READING THE "RECORD" IN THE VIRGINIA MILITARY INSTITUTE CASE

DIANNE AVERY*

I. INTRODUCTION

In 1993, The Citadel, a state-supported all-male military college in Charleston, South Carolina, conditionally admitted a high school senior named Shannon Faulkner and then withdrew its acceptance upon discovering that Faulkner is female. Faulkner sued, claiming violation of her constitutional right of equal protection. On August 12, 1995, under a court order and accompanied by United States marshals, Faulkner joined The Citadel Corps of Cadets as the first female cadet in its 152 year history.¹ Less than a week later, Faulkner walked out of The Citadel, accompanied by the "whoops and cheers from scores of cadets and their supporters."² She announced to reporters that she was defeated by the accumulated stress of 2½ years of litigation and the realization of how truly alone she was as the single female cadet among 2000 male cadets.³

*Professor of Law, State University of New York at Buffalo. In writing this Article, I have benefitted in Buffalo from discussions sponsored by the Baldy Center for Law and Social Policy and by the Friday Faculty Forum. Joan Bertin, Shelley Chao, Judith Resnik, Kathy Urbanyo and Mary Wyckoff read the final draft of the Article and kindly shared their reactions with me. I owe particular thanks to Lucinda Finley, Nancy Staudt and Mary Anne Case, who responded to lengthy drafts, and provided support and advice throughout the project. Also, the law librarians at Buffalo, particularly Marcia Zubrow and Bette Walf, have provided invaluable assistance tracking down materials for me. No person, however, read more drafts or provided more encouragement than Fred Konefsky. I cannot thank him enough for his contributions.


³ Wilgoren, Female Cadet Leaves Citadel, supra note 2.
Just a few days after Faulkner abandoned her dream of receiving a Citadel education, forty-two women arrived at the Mary Baldwin College Campus in Staunton, Virginia, to begin four years of training as the “charter class” of the Virginia Women's Institute for Leadership ("VWIL"), "determined not to suffer Faulkner's fate." The cadets at the state-supported Virginia Military Institute ("VMI") thirty-five miles away might have whooped and cheered as well, for the opening of VWIL signaled VMI's victory in preserving its "156-year-old all-male tradition." It was, nevertheless, an uncertain victory, for the fate of VWIL and VMI depended on whether the Supreme Court would grant certiorari, and possibly reverse and remand the decision of the Fourth Circuit Court of Appeals in United States v. Commonwealth of Virginia, better known as the VMI case.

The VMI litigation began in 1990 when a woman — who remains anonymous — complained to the Justice Department about VMI's all-male admissions policy. In the resulting lawsuit, the United States lost the liability trial before the district court, but successfully established on appeal that VMI's male-only policy violates the Equal Protection Clause. The court of appeals, however, "remand[ed] the case to the district court to give to the Commonwealth the responsibility to select a course it chooses, so long as the guarantees of the Fourteenth Amendment are satisfied." In the remedial phase of the litigation, the Commonwealth of Virginia and the VMI defendants enlisted nearby Mary Baldwin College to develop a plan for a "parallel" military college program for women on its campus. Mary Baldwin — a

7. See Kayyem, supra note 5, at 248-49 (noting that "[t]he young woman whose letter sparked the United States' interest in VMI dropped out of the picture fairly quickly," and "her identity was never disclosed in any of the court opinions"); see also id. at 264.
8. VMI I, 976 F.2d 890.
9. Id. at 900.
small, private, liberal arts, all-women's college — had already undertaken "a long-range planning process" that included "considering a more deliberate focus on leadership." At VMI's urging, and with the incentive of the lawsuit, the guidance of the trial and appellate court decisions in *VMI I*, and the promise of state aid and a hefty $5.5 million endowment from the VMI Foundation, Mary Baldwin College had all the impetus it needed to go forward with its planning for VWIL.11

In *VMI II*, after a six-day trial featuring expert testimony by educators, deans, historians, physiologists and social scientists, Chief Judge Jackson L. Kiser approved the proposed VWIL as an adequate remedial plan and ordered its implementation "with all deliberate speed."12 On January 26, 1995, a divided Fourth Circuit panel affirmed Judge Kiser's judgment and remanded the case with detailed instructions for district court "oversight" of the implementation of the VWIL plan.13 On May 26, 1995, the Justice Department filed its petition for a writ of certiorari; the United States challenged the VWIL separate-but-comparable remedial plan and argued that the only adequate remedy in this case was for VMI to admit women and become coeducational.14

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11. The district court found that the VMI Foundation had agreed to "endow the VWIL program with a permanent endowment of $5.4625 million, in addition to its other financial contributions." *Id.* at 499. The total amount promised by VMI "for endowment, operational expenses, construction and scholarships" was $6.9 million. Office of the Governor, Commonwealth of Virginia, Advisory to the Media, *Governor Wilder Endorses Mary Baldwin College Leadership Curriculum as Solution to VMI Co-Education Lawsuit* (Sept. 25, 1993), reprinted in Joint Appendix at 181, *VMI II*, 44 F.3d 1229 (Nos. 94-1657 & 94-1717). Mary Baldwin College's present endowment is $20.5 million. *VMI II*, 852 F. Supp. at 499. The VWIL plan also provides for a contract for services for VWIL between the Commonwealth, Mary Baldwin and VMI. *VMI II*, 852 F. Supp. at 492. The Virginia General Assembly approved per capita funding for the VWIL students in the amount of $7308 per student for the 1995-96 academic year — the same appropriation provided for cadets at VMI. Also, VWIL's share of the Commonwealth's Unique Military Appropriation for the Virginia Corps of Cadets is estimated at $1900 per VWIL student. Defendants' Second Status Report at 5-6 (No. 90-126-R) (Apr. 28, 1995), *VMI II*, 44 F.3d 1229. One commentator has observed that "[p]ress reports suggested that VMI had offered to pay off Mary Baldwin's longstanding debt in exchange for the school's willingness to maintain VWIL." Kayyem, *supra* note 5, at 252 n.33.


13. *VMI II*, 44 F.3d at 1242 (2-1 decision).

14. *VMI II*, 44 F.3d 1229, *petition for cert. filed*, 63 U.S.L.W. 3681 (U.S. May 26, 1995) (No. 94-1941). The questions presented in the petition of the United States were (1) "[w]hether a State that provides a rigorous military-style educational program for men can remedy the unconstitutional denial of the same opportunity to women by offering them a different type of single-sex educational program deemed more suited to the typical woman," and (2) "[w]hether coeducation is the required remedy in the context of this case." Petitioner's Brief at II, *VMI II* (No.
In mid-March of 1995, while the Justice Department considered whether to seek certiorari in the VMI case, Converse College students, faculty and trustees debated whether their private all-women's school should "bail out" The Citadel\textsuperscript{15} and improve their own shaky finances by agreeing to establish a women's "leadership institute" on their "manicured, leafy campus" in Spartanburg, South Carolina.\textsuperscript{16} Only with such a program in place could South Carolina succeed in keeping Shannon Faulkner from enrolling with the new incoming class at The Citadel. On May 27, 1995, the public announcement of the federal government's decision to seek Supreme Court review of VMI II momentarily preempted the extensive and sometimes frenetic media coverage devoted to Shannon Faulkner's protracted legal campaign to gain admission to The Citadel and The Citadel's increasingly desperate attempts to keep her out.\textsuperscript{17} The Washington Post reported that the Justice Department, in its "29-page petition, . . . said the plan for a Virginia Women's Institute of Leadership at Mary Baldwin College is 'patently unequal' " to and "will lack the resources and prestige

\textsuperscript{94-1941). See also VMI II, 44 F.3d 1229, petition for cert. filed, 64 U.S.L.W. 3001 (U.S. June 23, 1995) (No. 94-2107) (Virginia challenging the liability determination in VMI I).

15. Others have characterized Converse College's decision to assist The Citadel in maintaining its all-male status as a bail-out. See, e.g., Linda L. Meggett, Court Asked to Overturn VMI Ruling: Citadel Plan Late: Officials Said an Alternative Leadership Program for Women Would Be Filed by Friday, POST & COURIER (Charleston, S.C.), May 27, 1995, at A17 ("The Citadel wants to use the program created at Mary Baldwin College to bail out VMI as a model for the Converse program.").


17. See Faulkner v. Jones, 858 F. Supp. 552 (D.S.C. 1994) (granting the United States permission to intervene as a plaintiff in Faulkner; holding that Faulkner's right to equal protection was violated by the state's facially discriminatory policy of providing benefits of education at The Citadel to men only and that insufficient demand was an inadequate justification for failing to provide substantially equal educational opportunities for men and women; and ordering The Citadel to admit Faulkner immediately and to implement, by the fall of 1995, a remedial plan for other women that satisfies the requirements of equal protection), aff'd with modification, 51 F. 3d 440 (4th Cir.), motion to stay denied, 66 F.3d 661 (4th Cir.), cert. dismissed, 116 S. Ct. 331, cert. denied, 116 S. Ct. 352 (1995); see also Faulkner v. Jones, 10 F.3d 226 (4th Cir. 1993) (affirming grant of preliminary injunction to plaintiff, Shannon Faulkner, and directing The Citadel to admit her to day classes), 14 F.3d 3 (4th Cir.) (denying motion to stay mandate), 114 S. Ct. 872 (1994) (granting emergency stay pending review and order vacating stay), 1994 WL 456621 (D.S.C. Aug. 5, 1994) (denying motion for stay pending appeal), 61 F.3d 278 (4th Cir. 1995) (denying emergency motion for stay pending appeal).
of" VMI, and that the state's plan was "an unconstitutional throwback to the separate-but-equal doctrine of racial segregation."^{18}

Within days the *New York Times* picked up the theme and published an editorial with the headline, *V.M.I., a Constitutional Throwback.*^{19}

But the media's attention quickly returned to the apparently more absorbing questions of whether an adequate Converse College program would be ready in time to meet the district judge's approval, whether The Citadel would require Shannon Faulkner to shave her head like other first-year cadets, or whether Faulkner would live alone in the infirmary or have a room in the cadets' barracks.^{20}

In the meantime, several papers reported that the Attorney General of Virginia endorsed the VMI alternative program at Mary Baldwin College with the statement, "I am optimistic that, should the Supreme Court decide to hear the case, it will see no need to disrupt this unique educational opportunity for women."^{21}

With this nice turn of phrase, suggesting a sensitivity to the unique educational needs of women, the Commonwealth's highest law enforcement officer masked Virginia's primary motivation in joining VMI in its defense of the Mary Baldwin plan. The real concern was not whether the State would be free to provide new educational opportunities for women, but whether the State could continue to fund VMI without changing its unique character as an all-male bastion — a status enjoyed for over 150 years. From the inception of the *VMI* litigation in 1990, VMI and its supporters, like the defendants in the subsequent *Citadel* litigation, argued that the values and practices of their traditions stood as an

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21. Statement of James Gilmore, May 27, 1995, *as quoted in Blake, supra note 18; see Hsu, supra note 18.*
absolute barrier to change, particularly a change as fundamental as admitting women to their all-male institutions.

Tradition for the sake of tradition might appear to be a flimsy argument against a change arguably compelled by the United States Constitution. However, the supporters of VMI and The Citadel could draw comfort from the fact that at least one Justice of the United States Supreme Court appeared to understand what was at stake in the *VMI* case. In 1993, the Supreme Court denied VMI's petition for a writ of certiorari which was filed after VMI had lost in the liability phase in *VMI I.* Justice Scalia agreed that it would be "prudent" to deny certiorari at that time, but he qualified his brief opinion with an observation on the role of the Supreme Court in imposing change on traditional institutions: "Whether it is constitutional for a State to have a men-only military school is an issue that should receive the attention of this Court before, rather than after, a national institution as venerable as the Virginia Military Institute is compelled to transform itself." Scalin's theme — that courts should eschew orders and remedies that compel transformation in the traditions of venerable institutions — captured the essence of the argument made on behalf of VMI, and accepted by the Fourth Circuit, that "[i]f [the court] ordered VMI to admit women, the program would be irrevocably altered, forever denying its unique methodology to both men and women." When the Fourth Circuit affirmed District Judge Houck's decision to issue a preliminary injunction compelling The Citadel to admit Shannon Faulkner to day classes, Circuit Judge Hamilton began his dissent by reiterating Justice Scalia's theme: "Without pause or demonstrated concern for the devastating consequences of its

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23. 508 U.S. at 946.
24. *Id.*
25. *Id.* (citing *VMI I,* 976 F.2d at 900).
26. *VMI II,* 44 F.3d 1240.
actions, the majority emasculates a venerable institution by jettisoning 150 years of impeccable tradition and distinguished service.”

This Article explores the assumptions underlying the legal arguments and the expert testimony in the VMI case within the context of the institutional myths and historical narratives that VMI has encouraged and facilitated. The thesis is that VMI has a complex and rich history that embodies both the traditions and the innovations that are a product of the tension between school and state educational policies and the cadet culture. Indeed, VMI has re-created itself many times to accommodate both external and internal pressures to alter or abandon certain formal and informal rules and practices. Venerable though it is, VMI bears little resemblance to the small institute that was founded in 1839 to train Virginia's young white males to be “citizen-soldiers.” Moreover, despite the power of its origination myths, its present-day traditions only faintly echo the forms and purposes of the practices of its past. VMI has immersed itself in, and drawn from, the myths and culture of Southern manhood as it has attempted to give content to its mission of educating citizen-soldiers. Beginning early in its history, however, the Institute abdicated to the cadets much of the responsibility for their own socialization and training. Thus, it is not possible to understand VMI as an institution without appreciating the influence of the autonomous cadet culture in shaping and defining the school’s traditions, as well as its larger values and goals.

The primary sources for the Institute’s history throughout this Article are the narratives written by VMI’s own historians, and the contemporaneous documents, letters and photographs reproduced in their published works. Part II.A of this Article challenges VMI’s myth of continuity by demonstrating from these historical narratives the ways in which the early traditions of the Institute have changed in regard to race relations and religion. Part II.B examines the complex story of race at VMI, accounting for the evolution of the Institute’s

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28. Id. at 234 (Hamilton, J., dissenting); see id. at 238 (Hamilton, J., dissenting) (quoting from Scalia’s opinion in Virginia Military Institute, 508 U.S. 946, and asking: “Is The Citadel entitled to the same consideration as VMI? Obviously, The Citadel must be afforded this same opportunity to defend its all-male admissions policy on the merits before this court ravages such a long-standing tradition.”); Faulkner v. Jones, 51 F.3d 440, 457 (4th Cir. 1995) (Hamilton, J., dissenting) (“I cannot accept the majority's invitation to be a party to the destruction of a venerable institution . . . .”); Faulkner v. Jones 66 F.3d 661, 662 (4th Cir. 1995) (Hamilton, J., dissenting) (“Before this Court should allow Shannon Faulkner to enter the Corps of Cadets at The Citadel, thereby trashing a venerable 152 year history of holistic education for young men at that institution, the Supreme Court of the United States should pass on this question.”).
policies and practices, from its long history of racist treatment of black Americans to its more recent posture of accommodation and tolerance. Part II.C describes the slow but profound transformation of VMI into a secular military college from its early contested identity as a sectarian Christian military institute.

To understand what VMI has become today requires a close look at what it set out to be and why. Thus, Part III examines the early history of VMI with particular attention to the development of its mission of educating citizen-soldiers. Part III.A suggests that in attempting to replicate VMI’s outcomes, the educators who planned VWIL paid lip service to the concept of a citizen-soldier, apparently with only the vaguest notion of the origins of the term or what it might mean today. Part III.B describes the state and local political compromises and accommodations that produced VMI as a unique educational experiment modeled after West Point and located at the Lexington Arsenal. In an attempt to explain the evolving pragmatic, ideological and gendered contours of VMI’s notion of a citizen-soldier, Part III.C explores the development of the idiosyncratic military missions and civil callings of VMI’s cadets and graduates in the nineteenth century.

Part IV focuses on the VMI litigation and the role of the defendants’ attorneys, the VMI alumni and the district judge in shaping and manipulating the facts presented at the trial to accommodate legal theories that effectively perpetuate the myths about the significance of VMI’s gendered traditions and its all-male cadet culture. In particular, the VMI Alumni Association and the VMI Foundation influenced the course of the litigation and the theories of the case as intervenors and also funded the bail-out — the development and implementation of an alternative educational program for women at Mary Baldwin College. Their function in the VMI litigation reflects their sometimes controversial posture as the guardians and translators of VMI’s core traditions and as spokesmen for the cadets.

Part V continues the examination of the district judge’s treatment of the facts in the trial on the VWIL remedy through a critique of his conclusions about the expert testimony of feminist scholars. Both the government and the defendants called as witnesses prominent feminist scholars with expertise in psychological research on gender differences and the history of women in higher education. While the district judge found the clear and concise testimony of several key plaintiff’s experts to be contradictory and unreliable, he generally
adopted wholesale the expert opinions of the defense witnesses and, surprisingly, relied extensively on the vague, speculative and anecdotal testimony of their feminist historian. For the most part, the judge's broader factual conclusions fit well within the framework of the mythic vision of VMI and the significance of its traditions, particularly the notion that the all-male cadet culture must be preserved at all costs. Thus, it seems appropriate to consider, as part of a broader debate about the uses and misuses of feminist scholarship and expert testimony in litigation dealing with issues of women's rights, how the testimony of the feminists from both sides of the case contributed to or facilitated the process of judicial fact-finding in VMI II.

Finally, Part VI returns to the histories of VMI to confront the "Catch-22" theory of the case: the idea that VMI cannot become coeducational because "the introduction of women at VMI will materially alter the very program in which women seek to partake."29 The district court found, and the court of appeals agreed, that if women were admitted to VMI three essential aspects of the holistic program would have to be abandoned or fundamentally altered: the harsh indoctrination of the rat line, the total lack of physical privacy in the barracks and the rigorous, uniform demands of the physical training program. The Catch-22 theory assumes that these aspects of VMI's program cannot be changed because they embody venerable traditions of the Institute which carry out important state educational objectives. Nevertheless, VMI's historical narratives demonstrate that over the years and within changing parameters, the Institute has allowed the cadets considerable autonomy to create and enforce practices and rituals that ostensibly make worthy cadets into men and drive the unworthy — the unmanly — out of the Corps. The contemporary traditional practices and rituals of the cadet culture are what VMI, its cadets and particularly its alumni, fear losing if women are admitted.

Part VI draws on VMI's history to show that many of the Institute's formal policies governing the rituals and abuses of the rat line, the physical arrangements and supervision of barracks life, and the type and degree of physical training have often been altered to accommodate the vast changes VMI has undergone in 150 years. Indeed, the transformations have at times been rapid and profound, reflecting the values and interests of the cadets as well as the broader changes in

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29. VMI I, 976 F.2d at 899.
society that VMI has not been able to ignore despite its apparent insularity. Most importantly, while the institutional myth is that the traditional practices, rules and rituals of the rat line, the barracks and the gymnasium reflect state educational policy, the historical record reveals that most of the traditions are nothing more than the artifacts of cadet culture, constantly created, reconstituted, copied and abandoned. They are not state or school policy and, in fact, sometimes contravene state policy and state laws. The narratives about VMI's cadet culture explain the opinions of the expert witnesses from both sides of the case that no educators would approve of the adversative methodology of the VMI program for either men or women. These are games and rules dreamed up and played out by very young men, not policies formulated by responsible educational decision makers. To accept the Catch-22 rationale is, therefore, to accept the legitimacy of the cadets' authority over state educational policy, thereby placing the idiosyncrasies of cadet culture above the constitutional standards or demands of equal protection. Ironically enough, VMI has shown an ability throughout its history to adapt to change. VMI just wants to stop changing now on the issue of admitting women.

II. TRADITION AND CHANGE

A. The Myth of Continuity

Perhaps the most powerful myth constructed about VMI is that it is an institution that has never changed. Indeed, VMI's stature and uniqueness derive from its perceived continuity with the past and its ability to resist change. At the conclusion of his decision in VMI I, Judge Kiser wrote:

VMI is a different type of institution. It has set its eye on the goal of citizen-soldier and never veered from the path it has chosen to meet that goal. VMI truly marches to the beat of a different drummer, and I will permit it to continue to do so.\(^{30}\)

Graduates of the Institute are both proud, and to outsiders, rather aggressively defensive, about the school's apparent insularity and obsolescence. In a 1984 address in Richmond, Virginia, Harry F. Byrd, Jr., a former United States Senator from Virginia, and VMI alumnus, offered the following description of VMI:

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\(^{30}\) VMI I, 766 F. Supp. at 1415.
Senator Byrd ended his speech with the acknowledgment that “our beloved Institute . . . for nearly a century and a half, through changing times and circumstances, has remained unswervingly faithful to the timeless ideals of self-discipline, persistence, integrity and honor upon which it was founded.” Senator Byrd, however, seemed to recognize implicitly that the Institute had, in fact, changed over time — that it was not obsolete or out of step — and that, when necessary, the Institute had transformed itself — its structure, its rules, its curriculum, its extracurricular activities, even its admissions policies — in order to remain unswervingly faithful to timeless ideals.

While certain abstract ideals, including the notion of equality and the school’s mission of producing citizen-soldiers, have persisted unchanged from the founding of the Institute, the way in which those ideals have found expression in institutional norms and functions has necessarily changed through changing times and circumstances. The shared meanings in our society of the terms equality, discipline, citizen-soldier, and even honor, are vastly different today than they were in 1839. To become a national asset and to carry out its timeless ideals, VMI has transformed and re-created itself many times. Many changes have been resisted and have occurred slowly, characterized, as in all colleges, by struggle and tension, particularly between the various factions of the school: the students and student groups, the faculty, the administration, the Board of Visitors, the graduates and the Alumni Association. But the institution has been marked as much by the reality of change as it has been by the myth of its unchanging traditions.

Much of this Article is devoted to an examination of the historical narratives of VMI’s founding as told by its official historians: Henry F. Byrd, Jr., The Virginia Military Institute: “In Peace a Glorious Asset, in War a Tower of Strength” 7 (1984) (Address Before the Newcomen Society of the United States (Mar. 26, 1984)).

32. Id. at 23.
A. Wise, William Couper and Jennings C. Wise. From their historical accounts emerges a picture of the evolution of the institution and the cadet culture from before the Civil War to the present time. Part of this story concerns the development of the school’s mission of producing citizen-soldiers, a concept that continues to have significance today in the VMI litigation. Before I explore this subject more fully, however, I will rely on the historical record to illustrate several ways that VMI has changed as an institution in order to maintain and be faithful to its ideals. Despite Justice Scalia’s image of VMI as unchanging, an image that is apparently widely shared, this venerable Institute has transformed itself and changed its rules and traditions in response to both internal and external forces. Professor Katherine Bartlett recently argued that “[t]o treat tradition as a coherent whole, subject to ready ascertainment, retrieval, and replication, and as distinguishable from what is modern is to engage in fictions that ignore some of tradition’s most significant features. Traditions are not unitary, coherent, or integrated wholes.”

Bartlett’s point is illustrated in what is undoubtedly the most telling, and deepest, transformation in VMI’s tradition of racism: its

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33. Henry A. Wise, Drawing Out the Man: The VMI Story (1978) [hereinafter H.A. Wise]. Henry Wise, a lawyer and VMI graduate, became historian of the VMI Alumni Association in the 1960s. His one-volume history, which covers the period from the years leading up to the founding of VMI in 1839 to 1976, was based on interviews with alumni, as well as Institute archives and prior histories. The book, an extremely insightful account of VMI’s history, was intended “to appeal, not only to VMI buffs, but more broadly to Virginians and educators.” Id. at xv.

34. William Couper, One Hundred Years at V.M.I. (1939). Couper, graduate of the VMI class of 1904, was the executive officer and “historiographer” of VMI. See 1 id. at v. His four-volume history of VMI’s first one hundred years is a dense and rich compendium containing extensive archival materials. According to Henry Wise, Couper’s “research notes continuing into the 1950s fill a large number of filing cabinets stored at the Institute and at the Virginia Historical Society, Richmond.” H.A. Wise, supra note 33, at 145-46.

35. Jennings C. Wise, The Military History of the Virginia Military Institute from 1839 to 1865 (1915) [hereinafter J.C. Wise]. Colonel Jennings C. “Tim” Wise, graduate of the class of 1902, was commandant of cadets from 1912 to 1914 and taught economics at VMI from 1914 to 1915. He was also the father of Henry A. Wise. H.A. Wise, supra note 33, at 101, 241.

36. Katherine T. Bartlett, Tradition, Change, and the Idea of Progress in Feminist Legal Thought, 1995 Wis. L. Rev. 303, 317. Bartlett made the argument in the context of her criticism of “[t]he rigidity of Justice Scalia’s view of tradition.” Id. at 316. See generally id. at 315-19. Bartlett also observed that the conservative and rigid concept of tradition reflected in Justice Scalia’s views in his decisions “presupposes an opposition between tradition and change that historians and sociologists have long rejected in describing how traditions are maintained and how change is accomplished.” Id. at 318.
acceptance of black cadets, beginning in 1968, after more than one hundred years of being a preserve of Southern white manhood and a guardian of the traditions and history of the Confederate Army. While VMI has always taken great pride in the way its military structure and rules embody and reinforce the ideals of democracy and equality, these terms have had a very contextual meaning, reflecting the social and cultural norms of place and time. In theory, the military environment and code of conduct produces an external uniformity, stripping away or hiding individual differences and inculcating in each cadet a sense of respect for every other cadet. The goal is to live out, in daily life, the democratic idea that all men are created equal by disregarding superficial differences that derive from physical appearance, social background, wealth or status, and respecting only the hierarchy implicit in the cadet class system and military rankings, where status is earned, not ascribed.

In its early years, the Institute attempted to enforce this notion of equality as a way of overcoming social class and wealth distinctions that inevitably arose in a school that had two financial categories of students: the regular state cadets and the irregular pay cadets. The public myth is that the cadets have always been completely transformed by their conditioning in the first year and that they abandon the trappings of class and the longings for wealth. The reality is that the Institute has worked hard, and not always successfully, to teach the cadets to ignore individual differences that are inherited but not earned. VMI historian Colonel William Couper wrote:

Those who are not familiar with the customs at military institutions give little thought to the democracy which there exists — the two things seem incompatible. And yet the rich and the poor are on the same plane to the extent which seldom exists elsewhere and cadets are generally not interested in such distinctions, with the result that each learns something worth while from the other. The room furnishings must be the same. The clothing must be the same, so far as you can see. True, the rich boy at a dance may have on a silk shirt

37. H.A. Wise, supra note 33, at 287. Henry Wise reported that the first five black cadets were admitted to VMI in August of 1968. Id.

38. Id. at 14. In 1978, Henry Wise reported that the “regular” or “state” cadets were Virginia residents who received “tuition, room, and board at state expense subject to subsequent service in repayment. . . . [State cadets were] appointed by the Board of Visitors on recommendation of a state senator, not more than one each year per senate district.” Id. In 1910, the Virginia General Assembly created “the classification of ‘Virginia Cadet’ . . . which meant that all bona fide residents of the Commonwealth received free tuition. Thereupon only a varying number of selected Virginians had so benefitted. The new classification, with state cadets, and pay cadets who were nonresidents of the state, made three financial categories . . . .” Id. at 91.
and the poor boy may wear a cotton shirt, or on occasion no shirt, but the uniform — that exterior shell which one sees — is exactly the same for all. The same material. The same tailoring. The only difference is the personality of the individual, and on that he stands or falls. There are those, however, who rebel against this uniformity and, strangely enough, they are frequently the poorer cadets — they would have better room furnishings, clothing, or food, and such has always been the case. 39

Difference, then, has always found expression and has even been tolerated, condoned and even encouraged. The norm that, apart from class and military rankings, cadets should treat each other as though they are equals, has always been in tension with the way students experience each other as individuals and the Institute's need to accommodate differences that are inherent in a student body from diverse backgrounds and with diverse needs. 40

B. RACE: VMI'S TRADITION OF DISCRIMINATION AND ACCOMMODATION OF DIFFERENCE

Though class and even religious differences were accommodated early on, racial difference has been another matter entirely. The Institute has a long history, that it shares with many Southern schools and colleges, both public and private, of discriminating against black Americans. Until the end of the Civil War, the Institute counted slaves among its property holdings. 41 Moreover, in the very last days of the Civil War, VMI's acting superintendent suggested that the

39. 1 COUPER, supra note 34, at 290.
40. For example, students needing to work have had jobs as waiters in the Mess Hall, where they would serve other cadets eating family-style at long tables. Equality has thus made way, when necessary, for recognition of a subservient status indicating financial need. Henry Wise reported that the "[c]adet waiter program" was first "phased out in the spring of 1962," when it was replaced by "regular employees" of a food service firm, and then it was subsequently restored. H.A. Wise, supra note 33, at 307, 308. In the 1975-76 school year, 21 cadets earned $15,000 in wages working as cadet waiters. Id. at 549.
41. Couper reported that in VMI's early years, "the superintendent was authorized to purchase 'the necessary slaves for the quarters of cadets, provided the same can be made upon a credit of twelve months' and here we have the first mention of the genus stoop nigger." 1 COUPER, supra note 34, at 85. The following story regarding Hunter's Raid on the Institute, see infra text accompanying notes 207-08, was recounted by the superintendent in his 1864 annual report to the VMI Board of Visitors:

All the regular negro servants of the institution showed a marked fidelity. Our trusty baker, Anderson, the property of the Institute, was stripped of everything, and on being asked whether he had made himself known as belonging to the State, promptly replied, "No, indeed, — if I had told the Yankees that, they would have burnt me up, with the other State property."

J.C. Wise, supra note 35, at 371 (quoting Francis H. Smith, Annual Report (July 15, 1864)).
young officers in the Corps of Cadets could be used to drill "negro troops." Formal equality had little impact on the status of most black males associated with the Institute during and after Reconstruction; black servants replaced black slaves. Years of de jure segregation in the South under the blessing of Plessy v. Ferguson legitimized VMI’s understanding of equality under the law. But Virginia’s version of offering Blacks and Whites separate-but-equal educational facilities ended with high school. Virginia provided the opportunity of a VMI-style higher education to white males only; the Commonwealth offered no VMI opportunity for black males, not even a separate-but-equal black VMI.

The dismantling and final overruling of Plessy’s separate-but-equal doctrine — which began in the 1950 Supreme Court cases dealing with public graduate-level education and culminated four years later in Brown v. Board of Education of Topeka — produced no change in VMI’s de facto discriminatory admissions procedures that ensured the continued exclusion of black male students. Indeed, a 1956 change in Institute regulations on “the physical qualifications for admission” added a new screening process for applicants whose qualifications might be in question. The extra screening procedure, included in the rules until 1963, was a fairly transparent attempt to make sure that no Blacks coming out of newly desegregated public schools slipped through the admissions process. VMI’s resistance to external pressures to integrate its student body was also reflected in a

42. J.C. Wise, supra note 35, at 413-14 (quoting Letter from John T.L. Preston, VMI Acting Superintendent, to John C. Breckinridge, Secretary of War (Feb. 17, 1865)).

43. See the photograph, “In the Mess Hall, c. 1903,” in A VIRGINIA MILITARY INSTITUTE ALBUM, 1839-1910: A COLLECTION OF PHOTOGRAPHS AND MANUSCRIPTS FROM THE VMI ARCHIVES, LEXINGTON, VIRGINIA 61 (Diane B. Jacob & Judith M. Arnold eds., 1982) [hereinafter VMI ALBUM], showing the interior of the Mess Hall around 1903 with the Cadet Corps seated at long tables with white table cloths. The somber white faces of the young cadets are turned toward the camera. Along the right hand wall, standing at attention in long white aprons, white coats and black ties, are the waiters, who are all black men.

44. 163 U.S. 537 (1896).


46. 347 U.S. 483 (1954) (holding that separate public elementary schools and high schools for white and black students are inherently unequal under the Fourteenth Amendment).

47. H.A. Wise, supra note 33, at 287.

decision of the Board of Visitors to refuse donations from philanthropic organizations, such as the Ford Foundation, that would contribute funds only to racially integrated colleges.\textsuperscript{49}

The admission of the first small group of black cadets in 1968 thus appears to have been a grudging acceptance of the idea of racial equality. Although the Institute did admit Blacks voluntarily, without the compulsion of a court order, the implications of \textit{Brown v. Board of Education}, the Civil Rights Act of 1964, and the dramatic unfolding of the events of the Civil Rights movement in the South made racial integration inevitable. Henry Wise wrote that the Institute's superintendent during this period, a Marine brigadier general, "though born and raised on the Virginia peninsula, had no reservations about accepting any qualified candidate."\textsuperscript{50} But any qualified candidate, although the category now included black males, of course did not include any females, regardless of how qualified.

Having accepted integration, VMI reconceptualized its ideals to incorporate the black cadets fully within the institutional ethos of equality. In theory, equality meant that Blacks would receive no special attention. Henry Wise commented:

\begin{quote}
It was thoroughly understood and accepted that there was to be no discrimination, reverse or otherwise. To put it another way, the black new cadets were to receive no undue attention in the administration of the rat line, either on the tough or lenient side. And that's the way it was and has been.\textsuperscript{51}
\end{quote}

In fact, the working out of this new meaning of equality challenged some of the traditions of the Institute, "rooted in a bygone age, [that] were distasteful to the black cadets," such as the customary salute of the chapel in Lexington where General Robert E. Lee is buried and the requirement that all cadets sing "Dixie" and salute the Confederate flag at the annual New Market ceremony, which honors the ten VMI cadets who died in the Civil War Battle of New Market.\textsuperscript{52} These symbolic traditions evoking VMI's links to the South's slave-holding past were eventually abandoned, despite resistance by "older alumni

\textsuperscript{49} H.A. Wise, \textit{supra} note 33, at 287.
\textsuperscript{50} Id. at 287-88. The superintendent from 1960 to 1971 was General George R. E. Shell. See id. at 255-57.
\textsuperscript{51} Id. at 288.
\textsuperscript{52} Id. at 347, 347-49. \textit{See generally id.} at 347-52 (discussing the changing format of the New Market ceremony in response to complaints, cadet polls and direct disobedience of regulations by black cadets and sympathetic white cadets).
and younger ones who had their elders’ feeling for the Confederate tradition.”

The debate over the form of the New Market ceremony revealed that the objectionable Confederate symbols used in the ceremony were neither truly traditional nor historically accurate. Students discovered that the symbols “had not become a part of [the ceremony] until comparatively recent times” — sometime during the early 1950s — and they “played no part in the action of the Corps of Cadets at New Market.” Since the institution was constantly engaged in remaking its traditions, the black cadets and their supporters wondered “why were symbols having a political significance, namely, the symbols of the Confederacy, made a part of the ceremony proclaimed as a tribute only to individual bravery and devotion to duty?”

Admitting black male cadets to VMI did cause the school to transform itself, to abandon some traditions, and to redefine its commitment to equality. This change, like many other changes the Institute has experienced over time, had to overcome active resistance, deep-seated racism, as well as the inertia of institutional traditions both old and new. However, in the end, racial integration came to be seen as yet another manifestation of the Institute’s faithfulness to its core ideals. Henry Wise captured this idea when he wrote:

It cannot be said that integration has been without a single problem, since the Negro heritage and some of VMI’s traditions of 100 years

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53. Id. at 351. In the early to mid-1970s, the cadets themselves spearheaded the changes in the New Market ceremony, many of which were facilitated by the administration and opposed by the alumni and Board of Visitors. See id. at 349-51. Despite the administration’s apparent willingness to alter rituals and bend rules to avoid confrontations over student-initiated demands on the issue of integration, the administration and others seem to have resented suggestions from the federal government about the nature and scope of change compelled by the civil rights laws. “[A] team of HEW functionaries had roved state college campuses, VMI among them,” producing what Henry Wise characterized as “unreasonable demands on Virginia state-supported colleges in the name of civil rights.” Id. at 290, 289. Wise noted that the VMI superintendent dealt with the “wrath” of the government with a “soft answer” in that “[t]he chief of the regional office [of the Department of Health, Education and Welfare] soon found herself transferred elsewhere.” Id. at 290. The implication is that the VMI network closed ranks to protect the institution from what was perceived as an intrusion by an over-eager federal government agent.

54. Id. at 350-51. The Confederate flag had not become part of the New Market ceremony until the tour of duty of a particular commandant, Colonel Pancake, from 1951 to 1954. Id. at 348-49. Also, the Corps of Cadets fought at New Market under the VMI colors, not the Confederate flag and “no reference to ‘Dixie’ had been discovered in the Institute records.” Id. at 350. The origins of the New Market ceremony in 1887 are described in 2 COUPER, supra note 34, at 323-24.

55. H.A. Wise, supra note 33, at 350.
and more are mutually incompatible. Yet integration at VMI has reinforced its proud boast that once a man walks through that arch and becomes a cadet, his background, name, and circumstances do not count. The stand he makes... is the stand he takes, whether in the esteem of his fellows, or in the classroom, or in any other facet of cadet life.56

The ideal of equality at VMI has been redefined to bring black males into the select inner circle. In 1991, about seven percent of the VMI student body was black.57 In VMI I, Judge Kiser found that “Black cadets particularly appreciate the egalitarianism of VMI.”58 But circumstances and background still do count, as VMI has developed special programs and budgeted additional funds to recruit and retain black male students.59 The special offerings include “a three-week college orientation workshop [for] black (male) high school students.”60 One of the numerous student clubs at VMI is the Promaji Club, which “[l]ike all clubs at VMI, ... is open to all students,” but “is organized as a club following the interests of black cadets.”61 Thus, even the student culture has changed to reflect the racial diversity of the student body.

The story of race relations at VMI would not be complete, however, without acknowledgment of the Institute’s formal and informal policies regarding the admission and treatment of young men from foreign countries. Henry Wise reported that “[i]n 1905, ... Chinese citizens applied and were admitted for the first time; this started continuous attendance by them. They made excellent cadets and rendered outstanding service to their country.”62 Necessarily, some

56. Id. at 289.
57. VMI I, 766 F. Supp. at 1437.
58. Id. (citations to transcript omitted). When Blacks were first admitted to VMI, this “egalitarianism” had another experiential dimension according to Henry Wise, who related an anecdote[ ] of those days [that] should not be taken amiss. A reporter from a metropolitan journal asked a black new cadet if he was getting equal treatment. The young man, now an officer in the United States Air Force, laughingly replied: “This is the most equal place I ever heard of. Here they treat everybody like a nigger.”

H.A. Wise, supra note 33, at 288.
60. Id. at 1437. “The students live in the barracks, attend classes, and go through demanding physical training ‘to show them what it might be like at VMI.’” Id.

61. Id.
62. H.A. Wise, supra note 33, at 85. Wise added that there was “steady enrollment from many other Asiatic countries. There followed men from South and Central America and less frequently from Europe and Canada.” Id. At the same time that VMI selectively opened its admissions to foreign citizens, Congress prohibited admission to the Naval Academy of students “from any foreign country except upon authority of law hereafter enacted.” Act of June 29, 1906, ch. 3590, 34 Stat. 553, 577. A series of joint resolutions of Congress waived West Point’s
accommodations were made in the academic program to teach English to foreign students who had to overcome the language barrier in addition to cultural barriers. Other accommodations were also necessary. In commenting on the harshness of rat punishment during the 1920s, Henry Wise noted that "the Chinese, to avoid possible risk of foreign complications, were exempt from the worst of all this. The young men of Asia made up for it by running a free laundry for old cadets." Thus, special treatment of the Chinese cadets mandated by international humanitarian norms and diplomatic concerns produced a set of dominant and subordinate relations in the cadet subculture that was based on racism and racial stereotypes.

Although enrollment in the Reserve Officer Training Corps (ROTC) has been required at VMI since World War II, this requirement has been waived for foreign cadets. Such noncitizen cadets also do not benefit from ROTC scholarships and government allowances. In some cases, however, being a male applicant from statutory loyalty oath and service obligation requirements, codified in Revised Statutes §§ 1320-1321 (1916), and the analogous Naval Academy regulations, for individual applicants from Central and South America and China. See, e.g., J. Res. 16, 55th Cong., 1st Sess., 30 Stat. 221 (1897); J. Res. 11, 13-14, 55th Cong., 3d Sess., 30 Stat. 1387-88 (1899); J. Res. 38, 57th Cong., 1st Sess., 32 Stat. 747 (1902); J. Res. 17, 58th Cong., 2d Sess., 33 Stat. 586 (1904); J. Res. 5-6, 32, 58th Cong., 3d Sess., 33 Stat. 1279, 1286 (1905); J. Res. 33, 59th Cong., 1st Sess., 34 Stat. 834 (1906); J. Res. 20, 59th Cong., 2d Sess., 34 Stat. 1423 (1907). Thus, foreign applicants were generally barred from the federal academies during this period, with a few notable exceptions requiring the intercession of Congress.

63. Henry Wise suggests that the Chinese students were exemplary in part because of their determination to overcome barriers they faced. He observed that "The men from China came to get engineering and military education, and they were determined to do so. The language barrier afforded no time for "trifling." In that respect they certainly differed from a certain genus in Barracks who have made trifling their favorite activity throughout the history of the Institute.

H.A. Wise, supra note 33, at 85; see also id. at 375 (quoting an observation from the VMI 1975 Self-Study Report that "the students from Southeast Asia . . . tend to have great difficulty learning to express themselves in written English").

64. Id. at 123.

65. The National Defense Act of 1916 "permitted the War Department to conduct officer training at civilian institutions and to provide equipment and to detail officers for that purpose." William P. Snyder, Leaders for the Volunteer Force: The Problems and Prospects of ROTC, in The System For Educating Military Officers in the U.S. 71, 72 (Lawrence J. Korb ed., 1976) [hereinafter Educating Military Officers]; see National Defense Act of 1916, ch. 134, 39 Stat. 165. Within five years, the first group of VMI graduates received commissions as officers in the ROTC. H.A. Wise, supra note 33, at 102-03. Henry Wise reported that "ROTC . . . is required at VMI, except for those disqualified for commission, such as cadets physically disabled or noncitizens of the United States." Id. at 344. This historical fact contradicts one of the findings of fact in Judge Kiser's decision in VMI I: "Each cadet who matriculates at VMI 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 VMI." 766 F. Supp. at 1424.

another country that is currently favored by United States foreign policy and by economic necessity has had advantages. For example, shortly after the Naval Reserve Officer Training Corps (NROTC) was instituted at VMI in 1974,\(^67\) "[i]t coordinated with the Royal Iranian Navy to enroll thirty Iranian midshipmen for the 1975-76 session."\(^68\) Nevertheless, Henry Wise reported that "VMI was reluctant to accept that many in one year, although a few Iranians earlier in the Corps had done well."\(^69\) The following year, "[t]he Institute limited the number of matriculants from that oil-rich country to ten."\(^70\)

VMI's history of accommodating racial and cultural differences between cadets is long, complex and not always praiseworthy. It is a history that challenges the fidelity of the Institute and cadets to the ideal of equality, since the persons deserving equal treatment, as well as the meaning of equality itself, have been continuously redefined. Chinese nationals were the first of many citizens of foreign nations who were admitted to VMI long before VMI admitted African-American male citizens of the United States. The Chinese cadets apparently experienced both a privileged status and demeaning treatment by other cadets. Meanwhile, black American males had to wait one hundred years after receiving the constitutional guarantee of equal protection before VMI would accept them as cadets. But once they were admitted, the black cadets inevitably changed some aspects of the culture and traditions of the Institute. Recognition of the legal rights of black cadets brought about a deep and fundamental change in the ideal of equality for VMI cadets. In 1968, VMI not only "veered from the path it ha[d] chosen" to train "citizen-soldiers,"\(^71\) it set off on an entirely new path — a path not so much chosen by the Institute as compelled by external legal rules and social values.

It is ironic, of course, that VMI, purportedly dedicated to training citizen-soldiers, for many years admitted noncitizen males representing many countries and non-African races, while discriminating against African-American male citizens, and that it continues to admit

\(^{67}\) Id. at 342.

\(^{68}\) Id. at 344.

\(^{69}\) Id.

\(^{70}\) Id. Interestingly, Henry Wise suggested VMI's defensiveness about its motives in admitting, first, thirty Iranians and then admitting only ten Iranians in 1976, when he wrote: "Would a larger group have been accepted had the shah donated an oil well or two to meet VMI's pressing capital needs? That impertinent and hypothetical question is unlikely to receive attention in Teheran or Lexington." Id.

\(^{71}\) VMI I, 766 F. Supp. at 1415.
males who are noncitizens, while prohibiting the admission of American citizens who are female.72 These admissions policies and practices call into question the school’s devotion to its historic mission of producing citizen-soldiers to serve the Commonwealth of Virginia and the nation. Men who are neither citizens of the United States nor eligible for service in the federal forces or Virginia’s militia, can enroll, while able-bodied women who are both U.S. citizens and eligible to serve in its regular and reserve forces or in the state militia, cannot.73

VMI’s long history of racial discrimination must be read, too, as a story of change and resilience: the Institute has demonstrated its ability to create new moral, cultural and social norms in the face of a century of resistance to the inclusion of black cadets. The rules and rituals of the Institute have changed to accommodate different racial and cultural subgroups of students. The idea that all cadets should treat each other as equals, that none are to be favored or demeaned because of some immutable attribute or background such as race or foreign birth, necessarily incorporates the idea that differences do exist and must be tolerated. Even if it is assumed that most women are different than men, there is no reason why they, like black men, or Chinese or Iranian nationals, could not be treated as equals at VMI;


73. Similarly, in South Carolina, The Citadel recently abandoned its commitment to educating Armed Forces veterans when female Armed Forces veterans sought admission to its day program. Appellee’s Brief at 4, Faulkner v. Jones, 10 F.3d 226 (4th Cir. 1993) (No. 93-2030). Virginia law provides that the state’s militia “shall consist of all able-bodied citizens of [Virginia] and all other able-bodied persons resident in [Virginia] who have declared their intention to become citizens of the United States, who are at least sixteen years of age and, . . . not more that fifty-five years of age.” VA. CODE ANN. § 44-1 (Michie 1994). Thus, the militia is no longer defined as an exclusive preserve of only free, white, male “able-bodied citizens.” See infra note 229 (explaining history of race, status and gender requirements of early federal militia acts).
no reason why the Institute could not survive this change as it has survived other profound changes in its past.

C. RELIGION: THE TRANSFORMATION FROM SECTARIAN CHRISTIAN MILITARY INSTITUTE TO SECULAR MILITARY COLLEGE

In the early years of the Institute, the cadets were expected to demonstrate the ideals of honor, duty and integrity through their commitment to religious faith and their regular participation in the religious life of the school and the community. When the Institute was founded in the late 1830s, there were two churches in Lexington — one Presbyterian and one Methodist — and well into the twentieth century, Lexington was described as "a traditional bastion of Presbyterianism." The first superintendent, Francis H. Smith, however, was a low-church Episcopalian whose "devout Christianity" verged on fanaticism. Smith quickly imposed on the VMI cadets his understandings of the significance of Christianity in the training of citizen-soldiers. His regulations required that "[d]uties appropriate for the Sabbath, including attendance on Divine service, which shall be imperative, shall be prescribed by the Superintendent, and each cadet shall be required to conform thereto." Exceptions to the "imperative" of mandatory church attendance and Bible classes were made if "parents objected," but otherwise the character of the Institute and the nature of its rules were very heavily influenced by Christianity, and especially Smith’s own Episcopalianism.

74. 1 COUPER, supra note 34, at 13.
75. H.A. Wise, supra note 33, at 162. In 1943, a Lexington resident complained to the VMI superintendent that a Roman Catholic bishop had delivered the sermon at graduation. Id.
76. Id. at 64.
77. 1 COUPER, supra note 34, at 95 (quoting VMI regulation).
78. Couper quotes the following from Smith:

"It became the duty of the Superintendent," wrote Colonel Smith, "to determine what duties should be prescribed for the Sabbath, in addition to the 'imperative' duty of attending Divine service. After a mature consideration of the question, the Superintendent directed that all cadets, except those whose parents objected on the ground that the regulations would infringe on the liberty of conscience, were required to attend Bible recitations every Sunday. . . . The view taken by the Superintendent was that the school stood in loco parentis, and must enjoin all those duties for the Sabbath, which, in a well-regulated Christian home might properly be required by the parent, subject to the limitation of religious scruples stated above. Thus the foundation was laid for systematic religious instruction, under the authority and sanction of law; and upon this foundation without varying the slightest particular, the cadets have been trained year by year, and class by class, in the nurture and admonition of the Lord."

1 Id. at 95-96.
During Smith's fifty year tenure as superintendent of VMI, the predominantly Presbyterian citizens of Lexington periodically "complained to Richmond that Smith was running a sectarian institution." This hostility about the particular religious character of the Institute was not surprising since the distinctions between the Lexington residents and the VMI cadets grew out of their disparate cultural and national origins. The majority of the citizens of Lexington were "of Scotch-Irish and of German heritage whose ancestors immigrated mostly from Pennsylvania," while "the majority of [the] cadets . . . were of English colonial stock." Charges of sectarianism surfaced in 1844, when Superintendent Smith "direct[ed] the attention of the [VMI] Board to certain reports which [had] been circulated, by which [he was] charged with the design and effort of giving a denominational character to the Institute." The following year, Smith defended the Institute against claims of sectarianism before a committee of the Virginia House of Delegates. Later that year he again raised the issue in his report to the VMI Board of Visitors:

It becomes my duty to notice an anonymous communication under the signature of "Alumnus," which renewed the charge of sectarianism formerly adduced against the institution, embracing in his remarks the Visitors, the officers, and the cadets; two-thirds of

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79. H.A. Wise, supra note 33, at 17. One VMI cadet wrote that "[t]his place is carried almost entirely by the Presbyterians, who are the most bigoted people in the world, especially those here." Id. at 53 (quoting Letter from David W. Fleet, VMI Class of 1874, to Lulie Belle Lyne, in GREEN MOUNT AFTER THE WAR: THE CORRESPONDENCE OF MARIA LOUISA WACKER FLEET AND HER FAMILY, 1865-1900, at 62-95 (Betsy Fleet ed., 1978)); see id. at 51.
80. Id. at 34.
81. 1 Coulper, supra note 34, at 135 (quoting Francis H. Smith, Report to Board of Visitors (June 24, 1844)). For Smith's discussion of the charge of sectarianism, see 1 id. at 135-37. Smith described the "charges" as "embraced under the following heads":
   1. That I have exercised an influence in framing the denominational character of the Board of Visitors.
   2. That I exercise an influence in securing the appointment of the sons of Episcopal parents, to the exclusion of others.
   3. That in my dealings with the merchants of Lexington, I confer the patronage of the Institute upon those who belong to the Episcopal church alone.
   4. That I exert a similar influence, and with a like design, in the dealings of the cadets themselves.
   5. That I am partial and arbitrary in requiring the attendance of the cadets upon the services of the Episcopal church, to the neglect of others.
   6. That I afford privileges of access to the cadets to the Episcopal clergyman which are denied those of other denominations.
   7. That I secure the appointment of officers to the Institute who are either Episcopalians, or who being neutral in religion, may become so, to the disregard of the claims of others.
   8. That I am a zealous member of the Episcopal church, and exert my influence as a private citizen in building it up, a privilege to which it is contended I have no right.
1 id. at 136. Smith denied "all these charges, except the last." 1 id.
whom jointly and separately were believed to be of one denomina-
tion. As such a charge, if true, would justly entitle the institution to
the condemnation of the people of the State, by whose funds it was
supported, I called upon "Alumnus" to make known his name, and
expressed my readiness to prove that his charges were unfounded.82

In the mid-1850s, "[s]ectarian attacks again developed," leading the
Episcopal bishop of Virginia to refute "a report that he had stated that
V.M.I was an Episcopal institution."83

Evidence from the historical record suggests that Smith and
others had reason to be defensive about the charge of sectarianism.
Smith founded the Episcopal church in Lexington,84 and many of the
faculty he hired were either Episcopalian or converted to the Episco-
pal religion after coming to VMI.85 Most of the cadets, being "of Eng-
lish colonial stock," had undoubtedly been raised in the Episcopal
church which was the heir to the Anglican church that had been the
established church of the Virginia colony until the Commonwealth
formally abolished the interdependence of church and state in 1786.86

In many ways, Smith interjected his Anglican Christianity into the life
of the Institute, undoubtedly calling forth memories of Virginia's divi-
sive struggles over the relationship between religion, politics and com-

82. 1 id. at 143 (quoting Francis H. Smith, Report to Board of Visitors (June 30, 1845)).
83. 1 id. at 283. On March 21, 1854, Bishop William Meade wrote, in response to the
report of his alleged statement: "I never was guilty of the folly or falsehood of uttering anything
so notoriously contrary to fact." 1 id. (quoting Bishop William Meade). The charge of sectarian-
ism at VMI at the time was part of a more generalized complaint about "Episcopal influence in
monopolizing state institutions." 1 id. (quoting a speech of Dr. George Junkin in spring of 1854).
84. H.A. Wise, supra note 33, at 17. Smith's church, originally named Grace Church, was
later renamed Robert E. Lee Memorial Church. George M. Brooke, Jr., John M. Brooke,
Naval Scientist and Educator 331 n.49 (1980).
85. See, e.g., Brooke, supra note 84, at 329-31 (reporting the confirmation of VMI Profes-
sor John M. Brooke in 1869 before he married the widow of the son of Smith's
Episcopal church). Brooke's biographer reported that in 1866 Brooke "asserted that VMI was
'Episcopalian in tone' and the church records bear him out." Id. at 299. These records reveal
that "[t]hroughout the nineteenth century the vestry of the local Episcopal church was domi-
nated by VMI professors, and almost all of the senior professors were Episcopalian. In addition,
every superintendent from 1839 to 1970 was an Episcopalian and a large percentage of the
cadets were of that faith." Id. at 299 n.25.
(describing the transformations that led to Virginia's adoption of Thomas Jefferson's bill for
establishing religious freedom). See generally Up from Independence: The Episcopal
Church in Virginia (Brewster Ford et al. eds., 1976).
87. For example, Smith instituted the symbolic practice of presenting each graduate, along
with his diploma, with "a beautifully bound Oxford edition of the Bible, as a present from the
Superintendent, inscribed with some appropriate extract from the Old or New Testament." 1
and influence of his state office to compel the cadets to express publicly and collectively their religious beliefs, thereby violating the intent of Virginia's law and the federal Bill of Rights regarding the contours of religious freedom.88

The compulsory church attendance that began with Superintendent Smith's imperative persisted for over 130 years as a tradition that was sometimes admired and sometimes resisted by the cadets. In 1850, a student of Washington College wrote his mother:

I was sorry to see you had formed such an opinion of the Institute as not to want me to go there. I can solemnly say that, that Institute, in my opinion, is one of the best schools in this country... I board with Maj Gilham, a decent young Episcopalian. He is their Professor of Chemistry, and I have been introduced to all except one, and if being a member of a church is any recommendation I will tell you the solemn fact, they are all Episcopalians except one (Capt. Massie) and he is a Presbyterian; and another truth, those cadets are marched to church in Lexington twice every Sunday & at night have Bible Recitation.89

The piety of cadet culture reflected contemporary society as well as institutional requirements. In 1856, the cadets held a "great religious revival" which was "the first of a number[,]... notably the revival of 1869, 'when some eighty cadets made a profession of religion.'"90 A

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88. Historian Rhys Isaac wrote that "[w]ith [Virginia's] enactment of [Thomas Jefferson's] bill for religious freedom, religion was declared to be a matter for the individual alone; with the rejection of the alternative of republican instruction, morality also was de facto left to be a private concern." ISAAC, supra note 86, at 295.

89. 1 COUPER, supra note 34, at 310 (quoting from Francis H. Smith's History of V.M.I.). Couper refers repeatedly in his first volume to Smith's memoirs as History of V.M.I. However, Smith's memoirs were
room in the barracks was designated as a "Prayer Hall," in 1856 or 1857, "for the private and social devotions of the cadets."\footnote{1}

Following World War II, however, complaints about "compulsory church attendance," among other aspects of Institute life, were "rife."\footnote{2} Finally, in 1958, as an alternative to marching in formation to Lexington churches, VMI offered the cadets nondenominational services, "conducted by various local ministers," in a hall on Institute grounds.\footnote{3} Several years later, VMI obtained the services of "an official Institute chaplain" who also taught religion.\footnote{4} Henry Wise observed,

Thus there was an option for those cadets who preferred the hall service to that of one of the Lexington churches. Except nonbelievers and those of Jewish faith (Lexington had no synagogue), all cadets still had to attend a religious service every Sunday. Former cadets of the "Old Corps" well remember Sunday morning church formations, at which the first captain in clarion tone directed: "All Catholics, Jews, and nonbelievers fall out." Catholics had been to early mass. Those to attend other services then reformed into church details which marched to their respective places of worship.\footnote{5}

In spring of 1973, no doubt bowing to constitutional requirements imposed on the federal military academies, the VMI Board of Visitors formally "abolished compulsory attendance by cadets at a Sunday religious service."\footnote{6} Though mandatory chapel attendance was no longer required, Henry Wise reported that as of the mid-1970s "[a]ttendance at nondenominational services in Jackson Memorial Hall or at a Lexington church [was] nevertheless encouraged."\footnote{7}

\footnotesize{published as a book titled \textit{The Virginia Military Institute, Its Building and Rebuilding}. See infra notes \textbf{154} and \textbf{272}.}

\footnote{1} I \textsc{C}ouper, supra note \textbf{34}, at \textbf{311} (quoting from Superintendent Smith's Annual Report, (July 7, 1857)) & n.5 (describing the location of "Prayer Hall" which "was located in what is now room no. 122[,] . . . a room occupied for some generations by the first cadet captain").

\footnote{2} H.A. \textsc{W}ise, supra note \textbf{33}, at \textbf{198}.

\footnote{3} \textit{Id.} at \textbf{234}.

\footnote{4} \textit{Id.}

\footnote{5} \textit{Id.} at \textbf{234-35}.

\footnote{6} \textit{Id.} at \textbf{355}; see Anderson v. Laird, 466 F.2d 283 (D.C. Cir.), cert. denied, 409 U.S. 1076 (1972) (holding that the requirement of mandatory chapel attendance for cadets and midshipmen at federal military academies violates the First Amendment's Establishment Clause); see also \textsc{J}ohn \textsc{P.} \textsc{L}ovell, \textit{Neither Athens nor Sparta? The American Service Academies in Transition} 221, 312 n.9 (1979) (discussing the history of cadet resistance to mandatory chapel at the federal military academies).

\footnote{7} H.A. \textsc{W}ise, supra note \textbf{33}, at \textbf{406}.
Henry Wise asserted that "narrow morality in the excessively pious sense is not stressed in Institute education." But divine law was viewed as a source of authority and the Institute had a long tradition of compelling each cadet, every Sunday, to proclaim publicly his religious belief or nonbelief in Christianity and/or God. Cadets either fell in or they fell out. Surely those who fell out — particularly those who were "non-Christians and nonbelievers in a supreme being" — understood that, while they had the freedom to be different from the Christian majority, being different in this way might also be stigmatizing.

Like VMI's treatment of black male Americans, its treatment of the issue of religious freedom has undergone enormous transformation since the Institute was founded. The Institute followed a circuitous route before emerging finally, only a few decades ago, as a truly modern secular institution that fully respects the privacy and autonomy of the religious beliefs of its students. In moving from a culture of de facto sectarianism to a fully realized secularism, the school has had to replace the Christian foundations of some of its ideals with a morality based on individualism. Relations between persons and groups are defined today by both the order of the military regime and the democratic forms of student governance, not the tenets of Christian faith.

In light of the history of squabbling between the Presbyterians of Lexington and Washington College, and the Episcopalians of VMI, it is ironic that Mary Baldwin College, the school VMI selected to become home to VWIL, is not only a private school, but is also affiliated with the Presbyterian Church of the United States.

98. Id.
99. See Brooke, supra note 84, at 354 (noting that Superintendent Shipp, in his Annual Report of June 20, 1896, asserted that "divine law, human experience, both assert the absolute necessity of order, subordination, self-restraint, respect for constituted authority"); see also Lovell, supra note 96, at 19 (noting that chapel services at West Point early in the nineteenth century were "nominally nonsectarian, but . . . Episcopalian in format" because of the perception that the Episcopalian service was particularly suited to inculcating cadet discipline).
100. H.A. Wise, supra note 33, at 406.
101. The Mary Baldwin College catalogue states:

Mary Baldwin has been related since its founding to the Presbyterian Church (U.S.A.), and it continues under auspices which reflect its Christian heritage. All departments of the College shall be open alike without regard to race or creed to all qualified students, and no denominational or sectarian test shall be imposed in the admission of students or in the selection of faculty.

of its venerable past that the institution can still value religion without compelling the cadets to conform to a prescribed set of religious practices. But one way of reading the history of religious practices and traditions at VMI is as a story of a limited and constrained tolerance of diverse religious beliefs within a superficially homogeneous Christian institution, giving way to acceptance of religious diversity and autonomy within a superficially secular institution. In any event, VMI has fundamentally altered its historical relationship to Christianity in general and Episcopalianism in particular. In doing so, the Institute has created a new secular faith in its mission of producing citizen-soldiers.

In 1970, reflecting on his eleven years as superintendent of VMI, during “a period of some of the most trying and triumphant times for higher education in Virginia and the United States,” General George Shell offered the following observations:

Changes have been made, many of them more rapidly than some would wish and other less speedily than their advocates urged. While many have regarded the changes as “chipping away at the very foundations” of the Institute, they usually have been changes that were demanded by the times and which will have long-range benefits for the Institute and its cadets.102 If VMI had not changed, it would not have survived. Change is not just a means to reach goals, but the goals themselves are reshaped and redefined to provide new meanings and means. To fulfill its mission of producing citizen-soldiers in modern times, VMI had to relinquish its identity as an all-white Christian military academy. This transformation ultimately required the school to reconceptualize its timeless ideals of equality and the very meaning of citizen-soldier.

III. THE HISTORIC MISSION OF VMI: TRAINING THE “CITIZEN-SOLDIER” OR “DRAWING OUT THE MAN”?

A. CREATING A MISSION FOR VWIL: THE REMEDIAL PLAN

In the remedial phase of the VMI litigation — VMI II — one of the primary goals of the Mary Baldwin College task force that developed the defendants’ plan for VWIL was to create an all-female institution that would produce citizen-soldiers.103 From the outset, the

102. H.A. Wise, supra note 33, at 328, 329 (quoting George Shell).
103. Judge Kiser wrote that “VWIL’s stated mission is to produce the ‘citizen soldier,’ i.e., women who are trained for leadership in both civilian and military life.” VMI II, 852 F. Supp. at 476.
task force members agreed to focus on attempting to replicate the outcomes of a VMI education, while adapting the methodologies of the VMI program to what they perceived to be the special developmental, physical and psychological needs of women generally, and, specifically, of women who would be likely to apply to VWIL. Although VMI's holistic approach to education is built on the assumption that

104. The witnesses who testified for the defense at the VMI II trial on the remedial plan included several persons who were experts in single-gender education or who had taught at single-gender institutions. See VMI II, 852 F. Supp. at 486-89 ("Defendants' Expert Witnesses" section). Significantly, several of the defendants' key expert witnesses were administrators from Mary Baldwin College who had either participated in the task force or were to have a role in implementing the new VWIL. These were: Cynthia Haldenby Tyson, President of Mary Baldwin College; James D. Lott, Dean of the College at Mary Baldwin College; Lewis D. Askegaard, Associate Dean of Mary Baldwin College; and Heather Anne Wilson, Dean of Students at Mary Baldwin College. See id. President Tyson formed the task force and appointed Dean Lott and Dean Wilson as co-chairs. Id. at 492; see Joint Appendix at 419-28, VMI II (Nos. 94-1667 & 94-1717). At least two of the outside expert witnesses had been involved in development of the plan. For example, Harvard sociologist David Riesman acknowledged in his deposition, which was read at the VMI II trial, that he "was asked about drafts [of the plan] and responded." Joint Appendix at 699, VMI II (Nos. 94-1667 & 94-1717). Professor Richard C. Richardson, an expert on higher education from Arizona State University, had been "asked to make recommendations on the VMI remedies." Joint Appendix at 738, VMI II (Nos. 94-1667 & 94-1717); see VMI II, 852 F. Supp. at 491 (noting that in the development stages of the plan, President Tyson and Dean Lott "were also in contact with Dr. Richardson"). These witnesses could hardly be considered disinterested, as their institutional loyalties and professional reputations had become linked with both the court's acceptance of the plan and its ultimate successful implementation at Mary Baldwin College. Moreover, all of the witnesses from Mary Baldwin College -- from the president to the various deans -- had invested their recent professional and academic careers in educating women in a single-gender environment. Thus, in attempting to create a female version of VMI within a women's college, the task force quite naturally followed their assumptions about the type of women who presently apply to and enroll at Mary Baldwin, and the type of women who would be likely to want to attend a new program for women set within Mary Baldwin College, but directed at producing VMI-type graduates.

The plan that emerged does not pretend to satisfy the developmental, physical and psychological needs of women who would want to go to VMI as it exists today. Indeed, the task force and the defense experts appear to assume that no women would really want to attend VMI, and only a few would want to attend a female VMI that used the VMI adversative methodology. Moreover, in planning for VWIL, the task force considered the market demand for VWIL to be "a very important factor," even though "[t]here has been no market analysis . . . ." Joint Appendix at 766, 767, VMI II (Nos. 94-1667 & 94-1717) (Testimony of Dr. Richard C. Richardson). Defense expert Josiah Bunting III, "a VMI expert on educational institutions," VMI I, 766 F. Supp. at 1417, with a "concentration on single-sex education," VMI II, 852 F. Supp. at 486, testified that the group of students who apply to VMI "is an unusual and self-selected group of young men, just as the group applying to VWIL at Mary Baldwin would be an unusual and self-selected group of young women not probably broadly representative of the whole population of people applying to college." Joint Appendix at 1104, VMI II (Nos. 94-1667 & 94-1717). What was left out of Bunting's analysis was the logical assumption that the women who would want to attend VMI are also a self-selected, unrepresentative subset of the general population, and, very likely, not the same subset as those women who want to attend VWIL. Bunting became superintendent of VMI in August, 1995. See Allison Blake, VMI Picks Leader: His Experience as Educator Stressed, ROANOKE TIMES & WORLD NEWS, Aug. 2, 1995, at Cl.
each part of its program is essential to achieving its overall mission, the Mary Baldwin College task force adopted the VMI mission of producing citizen-soldiers and rejected the underlying adversative VMI method. In 1986 VMI's Board of Visitors defined the school's mission as follows:

"It is the mission of the Virginia Military Institute to produce educated and honorable men, prepared for the varied work of civil life, imbued with the 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. To accomplish this result, the Virginia Military Institute shall provide to qualified young men undergraduate education of highest quality — embracing engineering, science, and the arts — conducted in, and facilitated by, the unique VMI system of military discipline."\(^\text{105}\)

The VWIL mission, which the task force admitted was "comparable to and derived from the mission statement of VMI," was 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."\(^\text{106}\)

Using this declared mission, the task force then worked backward to build a program that would fulfill the five goals of VMI, which a government witness, Dr. Conrad, identified at the trial in \textit{VMI I}: "(1) education, (2) military training, (3) mental and physical discipline, (4) character development, and (5) leadership development."\(^\text{107}\) The task force then selected from the VMI methods and program several elements that they believed could be adapted to the women's college environment at Mary Baldwin.\(^\text{108}\) But the task force rejected wholesale all aspects of the adversative method that is the defining and

\(^{105}\) \textit{VMI I}, 766 F. Supp. at 1425.

\(^{106}\) Joint Appendix at 40, 46, \textit{VMI II} (Nos. 94-1667 & 94-1717) (VMI Defendant's Proposed Remedial Plan (No. 90-0126-R) (Sept. 27, 1993)).

\(^{107}\) \textit{Id.}; \textit{VMI I}, 766 F. Supp. at 1425-26. This was only one occasion out of many when the VMI defendants effectively used testimony from the plaintiff's witnesses for their own purposes.

\(^{108}\) Examples included requiring VWIL students "to participate in four years of ROTC and in an ROTC summer camp" and "to take and pass eight semesters of physical education" including "physical training and 'a cooperative confidence building program' to be held twice a week." \textit{VMI II}, 44 F.3d at 1234; \textit{VMI II}, 852 F. Supp. at 494-95 (Findings of Fact regarding "Military Leadership and Training" and "Physical Education and Training" at VWIL). Presently only one Mary Baldwin College student is enrolled in the ROTC program arranged in conjunction with James Madison College, \textit{VMI II}, 852 F. Supp. at 501, and Mary Baldwin students are required to
unique military feature of a VMI education,\textsuperscript{109} and proposed to offer to students at VWIL neither a bachelor of science degree nor a residential engineering program, which are integral aspects of VMI's academic offerings.\textsuperscript{110} The resulting VWIL program is not a "women's VMI" which "the task force concluded . . . some women would be suited to and interested in experiencing,"\textsuperscript{111} but a "unique"\textsuperscript{112} program for women "utilizing . . . a structured environment emphasizing leadership training."\textsuperscript{113}

The legal problem facing VMI from the inception of the litigation and plaguing it through the liability phase was discovering an "important objective which supports the provision of [its] unique educational opportunity to men only."\textsuperscript{114} The equal protection analysis of gender-based classifications adopted by the Supreme Court in \textit{Mississippi University for Women v. Hogan}\textsuperscript{115} requires that "[t]o withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective."\textsuperscript{116} Enter the citizen-soldier. VMI argued, and the district court and court of appeals

\begin{itemize}
\item take only two semester hours of physical education. \textit{Mary Baldwin Catalogue}, \textit{supra} note 101, at 90.
\item \textsuperscript{109} Quoting from the Fourth Circuit's opinion in \textit{VMI I}, 976 F.2d at 897, the task force articulated the following rationale for its rejection of the adversative model of education:
\begin{quote}
The Plan recognizes, as the Court of Appeals stated, that "men and women are different, and our knowledge about the differences, physiological and psychological, is becoming increasingly sophisticated." Consequently, the Plan seeks to utilize educational methodologies that are appropriate to women and which will be educationally superior to any artificially parallel or "separate but equal" VMI for women. The Plan will provide a "distinct and superior" program for women.
\end{quote}
\item Because the Plan seeks to achieve for women the same educational goals promoted at VMI, the Plan includes educationally sound adaptations of the VMI methodology to meet the distinctive developmental characteristics and educational needs of women. For example, the uncontroversed evidence in the VMI litigation established that the so-called "adversative" model of education is developmentally unsuitable for the vast majority of female students.
\end{itemize}

\textit{Joint Appendix} at 40, 43, \textit{VMI II} (Nos. 94-1667 & 94-1717) (VMI Defendants' Proposed Remedial Plan (No. 90-0126-R) (Sept. 27, 1993)).

\begin{itemize}
\item \textsuperscript{110} \textit{VMI II}, 852 F. Supp. at 503.
\item \textsuperscript{111} \textit{VMI II}, 44 F.3d at 1234, 1233-34.
\item \textsuperscript{112} In approving the VWIL program, Judge Kiser, relying on testimony of feminist historian Elizabeth Fox-Genovese, noted that "VWIL is a good design for producing female citizen-soldiers and will be unique in the country." \textit{VMI II}, 852 F. Supp. at 478. The role that Fox-Genovese and other experts played in developing the successful defense theories of the case is discussed \textit{infra} part V.
\item \textsuperscript{113} \textit{VMI II}, 44 F.3d at 1234.
\item \textsuperscript{114} \textit{VMI I}, 976 F.2d at 892.
\item \textsuperscript{115} 458 U.S. 718 (1982); see \textit{VMI I}, 976 F.2d at 895-96.
\item \textsuperscript{116} \textit{VMI I}, 976 F.2d at 895 (quoting Clark v. Jeter, 486 U.S. 456, 461 (1988)) (emphasis added).
\end{itemize}
agreed, that “[t]he mission of VMI is to produce ‘citizen-soldiers, educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary.’”117 Certainly no one could (and no one did) argue with the proposition that producing citizen-soldiers was an important governmental objective. The problem was in defining citizen-soldiers today, in the last decade of the twentieth century, as a role to be filled by men only. VMI attempted to get around this problem by redefining its “important governmental objective” with a neat piece of circular reasoning that almost worked.

The logic of VMI’s argument118 went something like this: (1) the mission of VMI is and has always been to produce citizen-soldiers; (2) the VMI holistic system of adversative education that has developed over the last 150 years to accomplish this mission is pedagogically suited to men and not to women; (3) admission of females to VMI would destroy the “egalitarian ethos that is a critical aspect of VMI’s training”;119 (4) the success of the VMI system depends on continuation of a single-gender (all male) environment; (5) the “essence” of the VMI system “is not maleness, as distinguished from femaleness,” but “the homogeneity of gender in the process, regardless of which sex is considered”;120 (6) “single-genderedness in education can be pedagogically justifiable” because “[m]en and women are different”;121 (7) Virginia has a policy of “autonomy and diversity” in its system of higher education;122 (8) a single-gendered public institution adds diversity to Virginia’s system of higher education; (9) “VMI’s male-only admissions policy is in furtherance of a state policy of

117. Id. at 893.
118. In his dissent in VMI II, Judge Phillips provided a somewhat more condensed and slightly different version of VMI’s justification for its male-only admissions policy:
VMI’s distinctive educational program, featuring rigorous military discipline and an “adversative” methodology, is suitable only for men and not for women; to the point that the admission of any women into it would effectively destroy it; the demonstrated value to society of that program and those it has produced [i.e., “citizen-soldiers”] is too important to allow it to be destroyed in that way.

VMI II, 44 F.3d at 1247 n.7. Judge Phillips further noted that the VMI defendants “continue to press [this argument] by ‘protective’ cross-appeal on this appeal after having sought to challenge its rejection in the Supreme Court.” Id. Unquestionably, the tenacious spirit of the New Market cadets lives on in the VMI parties and their attorneys.

119. VMI I, 976 F.2d at 897. The Fourth Circuit ruled that “the record supports the district court’s findings that at least these three aspects of VMI’s program — physical training, the absence of privacy, and the adversative approach — would be materially affected by coeducation . . . .” Id. at 896-97.
120. Id. at 897.
121. Id.
122. Id. at 898.
‘diversity’”,¹²³ (10) therefore, VMI’s “classification based on sex” — the single-gender admission policy — is “substantially related to an important governmental objective” — diversity in higher education.¹²⁴

VMI’s argument is rather disingenuous. By the end of the analysis, the mission of producing citizen-soldiers virtually disappears. Half-way through, the policy of diversity essentially replaces the citizen-soldier mission as the governmental objective. It is like saying that VMI did not set out to be male as opposed to female, but set out to be homogenous for pedagogical reasons, and it just happened that they adopted male methods of training students to become citizen-soldiers (which just happened to be one of many possible missions they could have chosen), but they could just as easily have chosen female methods (or perhaps, even a different mission). In other words, the goal was to achieve diversity in higher education by providing students with a single-gendered educational opportunity, and it was a historical accident that one gender was chosen over the other.

In VMI I, the Fourth Circuit Court of Appeals ultimately agreed with VMI’s contention “that, as its admissions policy is justified by the mission of developing citizen soldiers, a legitimate and important state purpose is served.”¹²⁵ The court also found that “the record supports [Judge Kiser’s] conclusion that single-sex education is pedagogically justifiable, and VMI’s system, . . . a holistic formula of training, even more so.”¹²⁶ But the Fourth Circuit could not quite accept the last link in the argument: that the male-only admissions policy was a function of a state policy of diversity in education. Among other reasons for rejecting this argument, the court wryly noted that not only was there no “stated policy justifying single-sex education in state-supported colleges and universities,”¹²⁷ the only stated policies that had been presented — from the policies of the Council of Higher Education to a legislative commission report to statements of the governor — cut the other way, affirming nondiscrimination in higher education on the basis of sex.¹²⁸ Even the empirical evidence of the historical trend in Virginia (like all other jurisdictions) “away from gender

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¹²³. Id. at 899.
¹²⁴. Id. at 895 (citations omitted) (emphasis added).
¹²⁵. Id. at 896.
¹²⁶. Id. at 898.
¹²⁷. Id. at 899.
¹²⁸. The State Council of Higher Education for Virginia, the body legislatively delegated the task of developing educational policy for Virginia, has “reaffirm[ed] a policy of autonomy and diversity to provide a variety of choice,” but “an overriding goal of Virginia’s system of
diversity" to coeducation undermined VMI's position.\textsuperscript{129} The court concluded:

In short, VMI has adequately defended a single-gender education and training program to produce "citizen soldiers," but it has not adequately explained how the maintenance of one single-gender institution gives effect to, or establishes the existence of, the governmental objective advanced to support VMI's admissions policy, a desire for educational diversity.\textsuperscript{130}

The fallacy in VMI's argument was that "[a] policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender."\textsuperscript{131} Thus, the court ruled, "[a]s the record stands . . . evidence of a legitimate and substantial state purpose is lacking."\textsuperscript{132} The court held that the male-only admissions policy failed to conform to the requirements of the Fourteenth Amendment. It turned out to be a Pyrrhic victory for the United States and the numerous amici curiae who had filed briefs in support of the plaintiff-appellant in \textit{VMI I}.\textsuperscript{133} In the end, by revealing the fatal flaw in VMI's argument that its admissions policy

\textsuperscript{129} \textit{VMI I}, 976 F.2d at 899. The 1990 Commission on the University of the 21st Century gave meaning to the concept of access by acknowledging the state policy of nondiscrimination on the basis of "sex, race, or ethnic origin." \textit{Id.} at 898-99. Furthermore, in one of several ironic twists in the history of the litigation, Governor Lawrence Douglas Wilder, the first black governor of Virginia, who held office when the case first went to trial, initially refused to endorse VMI's position and announced that "no person should be denied admittance to a State supported school because of his or her gender." \textit{Id.} at 899; see \textit{VMI I}, 766 F. Supp. at 1408. As a consequence, "the state, as a party, . . . bow[ed] out of the liability phase of the litigation as a house divided." \textit{VMI II}, 44 F.3d at 1242; see \textit{VMI I}, 976 F.2d at 899. By the time the litigation reached its remedial phase, Governor Wilder was out of office and Governor George F. Allen, a white male conservative, was in, and the new governor — with the blessing of the former governor who had apparently "favored coeducation at VMI in the face of no other alternative" — signed on to the VWIL plan. \textit{VMI II}, 44 F.3d at 1242. Even the Virginia state legislature produced the needed appropriations bill. See \textit{VMI II}, 44 F.3d at 1242. The established state authorities — both executive and legislative — thus closed ranks behind VMI, its president, the VMI Board of Visitors, the VMI Foundation and the VMI Alumni Association, as well as Mary Baldwin College. The two Fourth Circuit judges who upheld Judge Kiser's affirmation of the plan seemed to sigh in relief that they did not have to be party to "destroy[ing] . . . any sense of decency that still permeates the relationship between the sexes." \textit{VMI II}, 44 F.3d at 1239. If the cherished distinctions that defined Southern manhood and womanhood were going to be obliterated, at least it would not happen on their watch.

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{Id.}

\textsuperscript{132} \textit{Id.} at 900.

\textsuperscript{133} The list includes the American Civil Liberties Union, the National Organization for Women (NOW), the National Women's Law Center, the NOW Legal Defense and Education Fund, and the Women's Law Project. See \textit{VMI I}, 976 F.2d at 890-91; see also \textit{VMI II}, 44 F.3d at 1229 (listing amici curiae in the appeal of \textit{VMI II}).
satisfied the *Hogan* test, the court showed VMI and the Commonwealth how they could devise a remedial plan and build a trial record that would both preserve VMI’s all-male admissions policy and serve as a remedy to VMI’s constitutional violation. The Fourth Circuit provided VMI and, ultimately, the task force at Mary Baldwin College with a clearly marked road map to assist them in creating a single-gendered alternative to VMI that would carry out the state policy of diversity in education.

This was slippery ground for the United States. But the ground had proved to be both slippery and low for Justice Department attorneys from the moment the case was remanded to Judge Kiser for a remedy. By opening up the possibility of a parallel single-gendered program as a remedy to the constitutional violation in *VMI I*, the Fourth Circuit shifted the focus of VMI’s litigation strategy away from the abstract legal problem of articulating a legitimate governmental objective to support VMI’s men-only policy to the practical factual problem of finding a willing sister school in Virginia, coming up with a viable alternative program, finding the money for it and marshaling the witnesses and documentary evidence to defend it at a trial on the proposed remedy. The defendants — with VMI and its cohort of administrators, Board members and alumni now joined by the governor and the Commonwealth, and with the funds of the VMI Foundation available to help endow an alternative program — held the high ground. Not only were they back in front of Judge Kiser, who had proved to be very sympathetic to their witnesses and legal arguments in the first round, but, as the proponents of the remedial plan, they presented their witnesses first at trial. Thus, the defense attorneys had the opportunity to frame the factual issues before Judge Kiser in the first instance, forcing the government attorneys to attack a plan that seemed to have a little of something in it for everyone, except, perhaps, for a few women — unnamed and unidentified — who might want to attend and might benefit from either a coeducational VMI or a “mirror image VMI for women.”

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134. *VMI II*, 852 F. Supp. at 481. Judge Kiser admitted that “the VMI methodology could be used to educate women” and that “some women . . . may prefer the VMI methodology to the VWIL methodology.” *Id.* One commentator observed that the Justice Department’s litigation of the *VMI* case has been hampered at trial by not having a named plaintiff to play the public role that Shannon Faulkner has played in the litigation of the Citadel case: “*VMI* highlights the value to society of having named plaintiffs in gender discrimination cases.” Kayyem, *supra* note 5, at 264, 264-66.
Furthermore, in the trial on the proposed remedy, the ground had shifted precipitously. Faced with the defendants’ proposed remedial plan, the United States, as a first line of offense, “continue[d] to maintain that the only action by the Commonwealth which will comport with the Equal Protection Clause is to admit women to VMI.” Judge Kiser apparently thought so little of the government’s position that he relegated the argument to a footnote in his decision approving the plan. Thus, the United States was forced into a peculiar fallback position: attacking the details and theory behind the elements of the plan itself under the theory that it failed to provide separate-but-equal educational benefits for women. Judge Kiser, however, admitted both that “[t]he sophistry of the ‘separate but equal’ concept was roundly rejected in Sweatt v. Painter” and that “if ‘separate but equal’ is the standard by which the Commonwealth’s plan must be measured, then it surely must fail . . . .” So, reasoned Judge Kiser, since the court could not possibly apply the long-discredited separate-but-equal doctrine, and since “[o]ne must assume that the Fourth Circuit did not assign the Commonwealth an impossible task when it suggested that the Commonwealth was free to establish ‘parallel programs’ or to devise ‘creative options or combinations’ that would comply with the court’s decision,” the appropriate standard for evaluating the plan must be whether it was comparable to VMI’s program. For Judge Kiser, that seemed to be the only option left.

Because the district court adopted the legal standard put forth by the defense, the United States had no choice but to continue its fight on that narrow patch of ground. This was terrain that clearly favored the defense. Difficult as the theory of separate-but-equal had proved to be in application to real cases, separate-but-comparable was a theory with no bounds, no limits. As the expert witnesses for both sides spent six days analyzing and critiquing the two programs, it began to appear that VWIL was not just comparable to VMI but actually better than VMI — for both men and women. How could the United States possibly complain about a remedial program that promised women a superior single-gender education that would very likely make them

135. VMI II, 852 F. Supp. at 473 n.2.
136. Id.
137. Id. at 475 (citation omitted).
138. Id.
even better citizen-soldiers than could ever be produced by the antiquated, outdated, unsound educational methods applied down the road at VMI? As defense expert Professor Elizabeth Fox-Genovese testified, “Oh, I think VWIL is as good a design for producing female citizen soldiers as I have seen and indeed it would be unique in the Commonwealth. It may well be unique in the country.” Fox-Genovese even went on to speculate that the “icing to the educational cake” for graduates of the VWIL program will be that “these young women” should “benefit disproportionately” from the VMI alumni network. Is the VWIL program really affirmative action rather than equal access? Is this what VMI and the Commonwealth really wanted to accomplish?

When the case arrived for its second review at the Fourth Circuit, Judge Niemeyer, writing for the majority, attempted to avoid — by a preemptive strike delivered by footnote — any misunderstanding about the majority’s treatment of the separate-but-comparable/separate-but-equal concepts that might result from Judge Phillips’ dissent. Judge Niemeyer explained that “the test we utilize would allow separate and substantively comparable facilities where a state justifies its offering of single gender education as a legitimate governmental objective.” Ironically, the concept of diversity, which had failed to pass intermediate scrutiny as a legitimate state objective in the Fourth Circuit review of Judge Kiser’s decision in VMI I, had, in the interim, been resurrected by the VMI parties and the court as the mechanism for remedying the constitutional violation. Conveniently overlooking the fact that diversity was a sham objective that had not been even remotely on anyone’s mind when VMI was founded, or in the more than a century and a half since then, Judge Niemeyer, writing for a

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139. Two of the plaintiff’s expert witnesses, Carol Nagy Jacklin, an expert on the psychology of gender and developmental psychology, and Alexander William Astin, an expert on assessment of higher education programs, were each asked on cross-examination whether he or she was aware of “any educational authority” that recommended the “adversative methodology for the education of women.” Joint Appendix at 856, 992, VMI II (Nos. 94-1667 & 94-1717). Each responded with more information than the question demanded. Jacklin said, “No, nor for men.” Id. at 856. Astin responded, “I’m not sure there are any such authorities who advocate it for men.” He was then asked, “What’s your answer again, sir?” and he responded, “I say, I’m not sure there are educational authorities that I’m familiar with who are advocating that form of education for men or women.” Id. at 992.

140. Id. at 570.

141. Id. at 575.

142. VMI II, 44 F.3d at 1237.

143. Id. at 1237-39.
now disunified Fourth Circuit panel, embraced Virginia's newly discovered, newly funded and newly applied policy of providing diversity through single-gendered education. In reviewing Judge Kiser's approval of the plan for a single-gender alternative to VMI at Mary Baldwin College, Judge Niemeyer concluded that "Virginia has met the first part of our intermediate scrutiny test" because "we should defer to a state's selection of educational techniques when we conclude, as we do here, that the purpose of providing single-gender education is not pernicious and falls within the range of the traditional governmental objective of providing citizens higher education."\textsuperscript{144}

In his dissent in \textit{VMI II}, Judge Phillips was not fooled for a moment by all the talk of a standard of separate-but-substantively-comparable nor by the majority's acceptance of Virginia's post-hoc rationale of diversity through single-gendered education. Putting aside "[t]he logical first question [as to] whether separate single-gender undergraduate educational facilities for men and women are 'inherently unequal' so that the proposed plan . . . would be \textit{per se} violative of equal protection," Judge Phillips assumed that "some separate-but-equal arrangement might pass equal protection muster, [although] the one here proposed would not."\textsuperscript{145} Then Judge Phillips devoted part of his dissent to an identification and analysis of the governmental objectives asserted by the Commonwealth to justify continuation of VMI's policy of excluding women.\textsuperscript{146} This was not an easy task, as the defense could not readily point to a single benign state objective that was both truthful today and historically valid. So they improvised. Judge Phillips observed, "There is a real problem of identification in this case, for the Commonwealth seems uncertainly to advance a number as alternative or cumulative free-standing possibilities."\textsuperscript{147} Judge Phillips then suggested that "[t]hree might be identified" from the appellee's brief:

(1) providing separate single gender educational facilities for both men and women because of the intrinsic value to some in both genders of such a social environment for education ("intrinsic value");
(2) producing both men and women particularly suited for leadership roles as "citizen-soldiers" by providing separate single-gender educational programs for each that are designed to accommodate

\textsuperscript{144} Id. at 1239.
\textsuperscript{145} Id. at 1245.
\textsuperscript{146} See id. at 1246-48.
\textsuperscript{147} Id. at 1246.
their different psychological and emotional strengths and weaknesses in becoming effective leaders in either domain ("gender-adapted leadership training"); and (3) providing separate single-gender educational facilities for men and women as part of an overall objective of providing a diverse array of state-supported higher-education opportunities ("system diversity").148

None of these possibilities was ever the actual purpose for forming VMI, although they serve, rather transparently, as after-the-fact rationalizations for proposing VWIL.149 As Judge Phillips observed, "[the] overriding purpose remains the preservation of VMI as a state-supported educational institution for men only, with all other asserted purposes of the plan merely secondary means to that end."150 If Hogan tells us anything, it is that the intermediate scrutiny standard must be applied to the original intent behind a single-gender policy and to the assumptions that "tend[ ] to perpetuate the stereotyped view" of men's and women's appropriate roles in society, thus making those dichotomous roles "a self-fulfilling prophecy." Judge Phillips asserted one rationale for deciding the case:

A conclusion that the actual, overriding purpose of the proposed separate-but-equal arrangement remains the preservation by that means of the original 1839 policy of excluding women from VMI, a policy that unquestionably has been driven unchanged since its origins by a stereotyped view of the proper role and capabilities of women in society, would of course require declaring the proposed arrangement violative of equal protection without further inquiry into specifics.152

148. Id. at 1246 (footnotes omitted).
149. See id. at 1248 (Phillips, J., dissenting) ("There are unique circumstances here that were not present in Hogan or in any other case of which I am aware in which a state's asserted objectives have been rejected at the threshold as demonstrably not the 'actual purpose' of a challenged gender-classification."); see also id. at 1247 (Phillips, J., dissenting) ("[T]he objectives advanced represent after-the-fact rationalizations that, quite understandably, may be advanced by any state required in litigation to justify a gender-classification whose seeds were planted long before equal protection jurisprudence had come into being or had evolved to the point of drawing it in question."). Expressly denying that he was questioning "the good faith of the Commonwealth," Judge Phillips generously implied that the Commonwealth's lawyers were doing no more than zealously representing their clients' interests — that the asserted "rationalizations" were "compelled by the exigencies of this litigation." Id.
150. Id. at 1247 n.7.
152. VMI II, 44 F.3d at 1248 (citing Hogan, 458 U.S. at 729, 730). Despite his adoption of this perspective of the case, Judge Phillips de-emphasized its role in his ultimate finding that the Commonwealth's remedial plan was unconstitutional: "Although . . . I believe a decision on that ground would be proper, I would not decide the case on that basis alone, or even primarily." Id. In what can only be described as an abundance of judicial caution, Judge Phillips proceeded to
How did Judge Phillips arrive at this understanding of the defendants' asserted justifications for VMI's men-only policy? He did what Hogan compelled him to do; he "look[ed] realistically to the historical record, taking judicial notice of much of relevance that is known to the whole world and of which we are not compelled to feign ignorance . . . ." It thus seems relevant to ask the question: What does the historical record tell us about how VMI adopted and developed its mission of producing citizen-soldiers and how it came to be and continued as a school for men only? Though Judge Phillips does not describe the historical record of which he took judicial notice, what might that record reveal if it were examined thoroughly?

analyze the merits of Virginia's remedial plan under a separate-but-equal analysis: "Assume then for purposes of this case that the governmental objectives earlier identified should be accepted as reflective of the 'actual purposes' of the proposed plan despite my stated doubts about their reality as other than compelled remedial rationalizations . . . ." Id.


153. VMI II, 44 F.3d at 1247.
B. THELEXINGTON ARSENAL

In Drawing Out the Man: The VMI Story, Henry A. Wise, historian of the VMI Alumni Association, described the formation of VMI in 1839 as a “new and doubtful experiment.” The creation of the school was less the result of a carefully planned program in public higher education than a solution to a specific problem of state and local politics. In 1816, the Virginia legislature established an arsenal west of the Blue Ridge on less than ten acres of land located on the outskirts of the small town of Lexington. By the mid-1830s, the Lexington townsfolk unhappily coexisted with the detachment of about twenty soldiers garrisoned at the arsenal. Other than routine drills, occasional parades and their primary duty of guarding the arsenal buildings, the soldiers of the Lexington Company of State Guards — mostly enlisted men — had little to occupy their time. One of VMI’s first teachers, Colonel John T.L. Preston, later recalled that “[t]he [soldiers’] discipline was strict, but could not prevent them from making use of their leisure in ways that made them a very undesirable element in the population of a small town . . . .”

The solution that emerged from numerous discussions among the prominent citizens of Lexington was to “chang[e] the soldier guard to a cadet guard.” In 1834, the Franklin Society, a local literary and historical society, suggested that the state provide a “suitable place” for the establishment of a military academy. In his memoirs, The Virginia Military Institute, Its Building and Rebuilding, published in 1912, VMI’s first superintendent, Francis H. Smith, described the Institute’s origins as “a doubtful experiment,” in his memoirs, The Virginia Military Institute, Its Building and Rebuilding, published in 1912. Id. at 66. See Act of Feb. 8, 1816, ch. 16, 1815 Va. Acts 32.

The arsenal at this time stored “about 30,000 stand of arms” and a “brass six-pounder.” Couper reported that “the size of the detachment varied from time to time but in general it consisted of the captain, a sergeant, one or two corporals, ten to thirteen privates, and a few employees among whom were the musicians.” Id. at 13; see J.C. Wise, supra note 35, at 30-31 (discussing the arsenal legislation and the makeup of the State Guards). For a full account of the history of the arsenal, see 1 Couper, supra note 34, at 4-13, and see also Act of Feb. 8, 1816, ch. 16, § 3, 1815 Va. Acts 32, 33 (providing for composition and term of service of arsenal guard).

See H.A. Wise, supra note 33, at 11-13 (discussing the role that Preston, a Lexington lawyer and Washington College alumnus, played in the founding of VMI). For a more detailed description of Preston’s background, see J.C. Wise, supra note 35, at 32-33.

154. H.A. Wise, supra note 33, at 9. VMI’s first superintendent, Francis H. Smith, described the Institute’s origins as “a doubtful experiment,” in his memoirs, The Virginia Military Institute, Its Building and Rebuilding, published in 1912. Id. at 66.

155. Id. at 9; 1 Couper, supra note 34, at 9, 11; see Act of Feb. 8, 1816, ch. 16, 1815 Va. Acts 32.

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158. See H.A. Wise, supra note 33, at 11-13 (discussing the role that Preston, a Lexington lawyer and Washington College alumnus, played in the founding of VMI). For a more detailed description of Preston’s background, see J.C. Wise, supra note 35, at 32-33.

159. 1 Couper, supra note 34, at 17 (quoting John T.L. Preston, VMI Semi-Centennial Celebration Address (July 4, 1889) [hereinafter Preston, Semi-Centennial Address]; see J.C. Wise, supra note 35, at 31 (commenting that the “enlisted men of the Lexington Company . . . were . . . an undesirable element in the social economy of aristocratic Lexington,” and “the members of the idle command were in the nature of things of such a low social order as to be objectionable to the thrifty people of Lexington . . . .”).

160. 1 Couper, supra note 34, at 14. Preston wrote in 1835 that “[t]he project of a literary institution, instead of one of purely military character, is not new . . . . Ever since the erection of
debating association 161 — to which Preston belonged — addressed the question: "Would it be politic for the State to establish a military school, at the Arsenal, near Lexington, in connection with Washington College, on the plan of the West Point Academy?"162 The debating society enthusiastically embraced the concept and "agreed to give the matter a practical shape."163 In the fall of 1835, Preston pressed the campaign forward by publishing a series of three articles in the Lexington Gazette on the topic: "Whether it be practical so to organize the Lexington Arsenal, that it shall preserve its present character and uses as a military establishment, and be, at the same time, a Literary Institution for the education of youths."164 Public support for the idea of transforming the purpose and the occupants of the arsenal led to two citizens' petitions to the state legislature in January of 1836.165 Within days, the legislature introduced a resolution to send the issue to the Committee on Schools and Colleges.166 In the meantime, local opponents of the plan presented their own petition to the legislature suggesting, among several schemes, that the local militia assume the guard duties of the Virginia soldiers.167 To some area residents, the idea of replacing unruly enlisted soldiers with unruly young cadets had little appeal. On January 20, 1836, the Buchanan Advocate, carried an article declaring that

[I]t would not be safe to trust frolicsome, inconsiderate boys with the duty of guarding instruments of death. . . . Who would rest secure if his own life and that of his wife and children were perpetually dependent upon the vigilance and prudence of a boy . . . especially a Virginia boy . . . proverbially indiscreet as our youths are?

the arsenal, it has been a favorite plan with some of our most intelligent citizens, to whom none would impute the character of visionary theorists." 1 id. at 14-15 (quoting John T.L. Preston, [publication not identified] (Aug. 28, 1835)).

161. John T.L. Preston commented that, in the mid-1830s, the Franklin Society was "one of the important institutions of the town"; its membership was "composed of the most influential citizens, lawyers, physicians, merchants and mechanics"; it had "valuable real estate" holdings, including "a commodious brick building"; it had "weekly meetings [where] were discussed, with ability, questions literary, scientific, moral, local, and political"; and "[i]n politics its influence was felt throughout the country, and no practical matter of interest to the town or community escaped its inquiry." 1 id. at 17 (quoting Preston, Semi-Centennial Address, supra note 159).

162. 1 id.
163. 1 id.
164. 1 id. at 18.
165. Couper reported that "a petition, dated January 13, 1836, subscribed to by ninety-four citizens was presented to the legislature praying a reorganization of the arsenal, and on the same day eighteen citizens of Fairfield, a nearby hamlet, presented a similar petition." 1 id. at 24.
166. 1 id.
167. 1 id.
INSTITUTIONAL MYTHS

... [O]ut of the ten cadets appointed from this Congressional District to West Point, not one remained to graduate, not from the want of talent but from the restive spirit of insubordination which so shamefully characterizes our youth. . . . Would our high Southern blood delight in the business of scrubbing muskets and sewing up cartridge boxes, when they could obtain an education at Yale by blacking boots and doing odd jobs?\(^{168}\)

Several other concerns emerged from the various petitions and news articles on the issue. Both proponents and opponents of a cadet school shared an interest in wresting control of the arsenal from the State and reasserting local autonomy.\(^{169}\) But a solution had to be politically feasible. While replacing the arsenal guard with local militia would satisfy the desire for local control, it offered the State nothing. On the other hand, a state school for boys and young men who could also guard the arsenal was politically attractive to the legislature, particularly because the plan proposed that every state senatorial district would be responsible for the appointment of one of the anticipated "quota" of the forty "state" cadets who would make up each entering class.\(^{170}\)

But the nature of the education to be provided — classical versus technical and scientific — and the link between the school's academic and military missions evolved over several years. John Preston's plan envisioned a form of classical "liberal" education, perhaps not unlike his own education at Washington College, the University of Virginia and Yale.\(^{171}\) One of the early plans presented in Preston's 1835 articles proposed "to supply the place of the present Guard, by another, composed of young men, from seventeen to twenty-four years of age, to perform the necessary duties of a guard, who would receive no pay, but, in lieu, have afforded to them the opportunities of a liberal education."\(^{172}\) The educational components of Preston's early proposal incorporated English, the classics, sciences and military arts.\(^{173}\) The military aspect of Preston's program served several stated purposes. Preston had written: "We would have the whole Guard or School

\(^{168}\) 1 id. at 24-25 (quoting Buchanan Advocate, Jan. 20, 1836).

\(^{169}\) The driving impulse was not unlike the hostility shown today in Western states by local citizens groups, including ranchers, farmers and militia groups, to federal policies regarding control and administration of federal lands.

\(^{170}\) J.C. Wise, supra note 35, at 40.

\(^{171}\) Id. at 33.

\(^{172}\) 1 COUPER, supra note 34, at 18 (quoting Preston, Semi-Centennial Address, supra note 159, quoting "Cives" [John Preston's pseudonym], Lexington Gazette, Aug. 28, 1835).

\(^{173}\) See 1 id.
under military discipline, not only to secure the object of the State in establishing this military post, but likewise that industry, regularity, and health might be promoted."\textsuperscript{174} Undoubtedly, the promise of a military regimen was also intended to address the concerns of those opponents who expected that young cadets would be more disruptive and less responsible than the existing state soldiers.

In addition, Preston's early notion that the military school would somehow be "connect[ed] with" Washington College\textsuperscript{175} offered the proposed arsenal school the instant prestige of an association with a private liberal arts college that had a long and distinguished history of educating young men. More importantly, Washington College had the facilities, faculty and educational curriculum already in place and could provide the cadets with everything but their military training. Conveniently located just west of the arsenal grounds,\textsuperscript{176} Washington College was also an institution that had become an integral part of Lexington life. Incorporating the military school into a well-regarded local college offered economy to the State and some degree of autonomy to the local residents.

Thus, on March 22, 1836, the legislature approved an act creating a military school at the arsenal and annexing it to Washington College "as a part and branch of [the] college."\textsuperscript{177} It took another year of legislative maneuvering and "more [citizens'] petitions for and against the proposed school"\textsuperscript{178} before the act was amended to authorize the governor to appoint four persons who, with the commonwealth's adjutant general, would comprise the Board of Visitors for the new military school.\textsuperscript{179} In May of 1837, the governor appointed the first Board — four generals and a colonel\textsuperscript{180} — and ordered them to meet in Lexington the following September.\textsuperscript{181} In a step that proved to have

\textsuperscript{174} 1 id. at 19.
\textsuperscript{175} See 1 id. at 17 (quoting Preston, Semi-Centennial Address, \textit{supra} note 159); see also \textit{supra} text accompanying note 162; H.A. Wise, \textit{supra} note 33, at 16-17 (describing the early history of the relations between VMI and Washington College). Washington College was founded in 1749 and renamed Washington and Lee University in recognition of General Robert E. Lee, who became president of the college following the Civil War. \textit{Id.} at 45; see \textit{Act of Feb. 4, 1871}, ch. 64, sec. 1, § 1, 1870-71 Va. Acts 60, 61 (renaming Washington College).
\textsuperscript{176} 1 \textit{Couper, supra} note 34, at 25 n.20.
\textsuperscript{177} Act of Mar. 22, 1836, ch. 12, § 6, 1835-36 Va. Acts 12, 13 (repealed 1839); 1 \textit{Couper, supra} note 34, at 27; see also 1 id. at 25 (discussing Act of March 22, 1836).
\textsuperscript{178} 1 \textit{Couper, supra} note 34, at 25.
\textsuperscript{179} 1 \textit{id.} at 25-26; see \textit{Act of Mar. 22, 1837}, ch. 22, § 1, 1836-37 Va. Acts 20.
\textsuperscript{180} See 1 \textit{Couper, supra} note 34 at 26 (identifying the members of the first Board of Visitors by name, rank and county).
\textsuperscript{181} 1 id.
immense impact on the eventual character of VMI, the first Board of Visitors elected Colonel Claudius Crozet as its president. Crozet was "[a] native of France, graduate of L'Ecole Polytechnique, soldier under Napoleon, former professor of engineering at West Point, . . . [and] chief engineer of Virginia in 1837." Jennings C. Wise, a former VMI Commandant of Cadets, speculated that Crozet had "in all probability, discussed with some of the principal citizens [of Lexington] the project of founding a military school in Lexington long ere it took tangible form." The opportunity for such discussions certainly existed; during the years that Preston and the Franklin Society were pursuing their plan for a military school, Crozet was supervising the construction of the Kanawha Canal near Lexington. According to Jennings Wise, "Lexington had frequently been visited by Captain Crozet," who "undoubtedly perceived the opportunity offered Virginia" by a military school located on the arsenal grounds. In his eight years as president of the VMI Board of Visitors, Crozet ensured the realization of his vision of the "West Point of the South," as VMI soon came to be known.

In the fall of 1837, however, John Preston's original idea for bringing the school under the wing of Washington College was still the official state plan. In August, the Board of Visitors dutifully presented the terms of the state plan to representatives of the Washington College trustees, who promptly rejected them. The chairman of the committee appointed by the Trustees of Washington College replied to Colonel Crozet that the trustees opposed "all right on the part of the legislature to establish for them such or any other connexion without their consent." As VMI's modern historian observed, "With sound legal reasoning, the college regarded the statute as an unlawful interference with its autonomy as a private school . . . ." The subsequent report that the Board of Visitors sent to the governor included a grim assessment of the existing arsenal buildings, which would have to

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183. Id. at 9-11. For a more detailed biographical sketch of Crozet, see J.C. Wise, supra note 35, at 28-32.
185. Id.
186. Id.
187. Id. at 49.
188. 1 COUPER, supra note 34, at 27.
189. 1 id. at 27 (quoting Letter from the Chairman of the College Committee to Colonel Crozet, President of the Board of Visitors (Aug. 7, 1837)).
190. H.A. Wise, supra note 33, at 16.
be improved and expanded to accommodate even "the smallest admissible number" of twenty-five cadets.¹⁹¹ Without either the cooperation of Washington College or state funds to expand the arsenal's facilities, the plans for a military school were again postponed. The Board of Visitors reported that

The legislative body alone can obviate the difficulties growing out of the provisions of the present law, which will produce a collision between the two institutions, and thereby impair at least, perhaps destroy the utility of both. . . . We feel ourselves, therefore, compelled by these circumstances to suspend for a while the organization of the military school . . . .¹⁹²

Yet another year passed before the legislature seriously addressed the arsenal question again. In the interim, a second Board of Visitors was appointed with one extremely symbolic and significant change: John T.L. Preston replaced one of the generals.¹⁹³ Now there was not only a civilian on the Board, but a local Lexington man as well. The selection of Preston — described by William Couper as "the original champion of the project"¹⁹⁴ — certainly assured local support for the new school. Preston, in his new official capacity, was asked by a state legislator from Rockbridge County to come up with a name for the school.¹⁹⁵ Preston obliged with the following name and explanatory gloss:

Virginia Military Institute . . . seemed appropriately significant:
VIRGINIA — as a State institution, neither sectional nor denominational. MILITARY — indicating its characteristic feature.
INSTITUTE — as something different from either college or university. The three elements thus indicated are the basis of a triangular pyramid, of which the sides will preserve their mutual relation to whatever height the structure may rise.¹⁹⁶

While Preston might have anticipated the pervasive and, at times, controversial denominational influences on the Institute, he could hardly

¹⁹¹. 1 Couper, supra note 34, at 27-28.
¹⁹². 1 id. at 28 (quoting VMI Board of Visitors' Report to the Governor of Virginia (Aug. 9, 1837)). Couper noted that in December of 1837, the governor conveyed to the legislature the Board's report, containing also their proposed amendments to the act. 1 id.
¹⁹³. 1 id. at 28-29.
¹⁹⁴. 1 id. at 29.
¹⁹⁵. 1 id.
¹⁹⁶. 1 id. (quoting John T.L. Preston); see J.C. Wise, supra note 35, at 34.
have imagined how quickly the Institute would grow beyond its humble Virginia roots to become a military college that offered baccalaureate degrees to students drawn from beyond the boundaries of Virginia.\textsuperscript{197}

Nevertheless, a good name did not make an institution; funding and implementing legislation were still needed. Before a final bill creating VMI could be maneuvered through the state legislature, however, several further developments were politically necessary. First, the Board of Visitors was expanded in 1839 to ten members. Preston was now joined by four other Lexington residents who, like Preston, had been educated at Washington College.\textsuperscript{198} Discussions about a cooperative exchange with Washington College had continued even after the college rejected a more formal affiliation,\textsuperscript{199} but the college had concerns about competition from another school in Lexington,

\begin{footnotesize}
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\item \textsuperscript{197} For discussion of (1) the significance of Christian and specifically low-church Episcopalian and Presbyterian religions in the development of the ethos of VMI, (2) the transformation of VMI to a college granting Bachelor’s degrees, and (3) the transformation of VMI from a provincial school for state students only to a regional school, see supra part II.C. and infra text accompanying notes 249-52, 306.
\item \textsuperscript{198} 1 Couper, supra note 34, at 29; see Act of Mar. 29, 1839, ch. 20, § 2, 1839 Va. Acts 17 (providing that the governor appoint a Board of Visitors consisting of “nine fit and proper persons” and the adjutant general).
\item \textsuperscript{199} The college hoped to use VMI to fulfill the terms of a $15,000 endowment it had been offered by the Virginia Society of Cincinnati for the purpose of creating a “chair of Military Science and Gunnery” at Washington College. J.C. Wise, supra note 35, at 53-54. The Cincinnati Society endowment had played a role in the state’s original proposal to make the military school a branch of Washington College. See 1 Couper, supra note 34, at 27. For a brief period, from 1839 to 1846, VMI and Washington College established a cooperative arrangement whereby the Cincinnati Society annuity was paid to VMI’s “principal professor,” Major Francis H. Smith, as the “Washington College Cincinnati Professor of Military Tactics,” to provide for the military training of the “Cincinnati Class” — a group of twenty Washington College students. H.A. Wise, supra note 33, at 16-17; 1 Couper, supra note 34, at 71-72; J.C. Wise, supra note 35, at 54. College students wore uniforms and drilled with the VMI cadets. Id. In exchange, VMI cadets “were privileged to pursue the course of Chemistry at the College.” Id. Relations between the two rival institutions were strained, and the arrangement was abandoned following complaints brought against VMI in 1845 by the Washington College Trustees, charging VMI with exceeding its legislative mandate and engaging in sectarianism. See generally 1 Couper, supra note 34, at 139-47. VMI’s superintendent, Francis H. Smith, defended the Institute’s interests before a committee of the House of Delegates. 1 id. at 139-40. The resulting acrimony caused Washington College to formally sever all relations with VMI on February 22, 1846. See 1 id. at 139-47; H.A. Wise, supra note 33, at 16-17; J.C. Wise, supra note 35, at 54.
\end{itemize}
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particularly a school that received state funds. The college could, no
doubt, keep a closer watch on the development of its potential rival if
several of its distinguished local alumni served on the new VMI Board
of Visitors. The addition of the new Board members from Lexington
assured some degree of oversight of the new school by both the col-
lege and the local citizenry.

In addition, three of the new appointees to the Board from Lex-
ington were state legislators, one of whom, Colonel Charles P.
Dorman, had introduced the first bill for an independent school at the
arsenal in 1837. In early 1839, Colonel Dorman obtained legislative
approval of his resolution to transfer the VMI bill, which had been
languishing for several years in the Committee on Schools and Col-
leges, to the Committee on Military Laws, which he just happened to
chair. With Dorman both chairing the legislative committee with
oversight of the arsenal and serving on the VMI Board of Visitors,
whose members were now more or less equally distributed between
citizens and soldiers and between Lexington residents and outsiders,
serious political opposition to the proposed educational experiment at
the old arsenal vanished. On March 29, 1839, the act establishing the
Virginia Military Institute was passed.

Although the military character of the newly formed VMI was
initially dictated by the requirements of guarding the state arsenal, the
military structure came to be regarded as a good method for educating
young men. In addition, from his background as a student at L'Ecole
Polytechnique and a professor at West Point, Captain Crozet brought
to the planning of VMI his conceptions of the importance of scientific
and technical training for young men so they would be capable of
serving the State as engineers and teachers, and, if needed, soldiers.
The tension on the second Board of Visitors between the career mili-
tary officers, who focused on state-wide problems and needs, and the
Lexington civilians, state legislators and Washington College alumni,

create a new institution which is a hybrid of its parent institutions, but never fully accepted by them.

200. 1 COUPER, supra note 34, at 25, 29.
201. 1 id. at 29; see Act of Mar. 29, 1839, ch. 20, 1839 Va. Acts 17.
202. The Arsenal Act of March 29, 1839, authorized the Board of Visitors
to admit as the regular students or cadets . . . any number of young men not fewer than
twenty, nor exceeding forty, and who shall not be less than sixteen nor more than
twenty five years of age; and in this admission to be made upon undoubted evidence of
fair moral character, a strict regard shall be had to the proportionate population of the
four great constitutional divisions of the state ....

Act of Mar. 29, 1839, ch. 20, § 2, 1839 Va. Acts 17, 18; see VMI ALBUM, supra note 43, at 4
(quoting the Arsenal Act).
who focused on local problems and needs, produced a unique accommodation. VMI's mission of producing citizen-soldiers captured this political compromise between state and local needs, between public and private institutions, between generals and gentlemen, between the technocrats and the literati. VMI thus carved out a new educational niche — in both Lexington and the Commonwealth — to teach science, engineering, English and languages within a military setting to the sons of poor, largely uneducated, farmers and artisans. In so doing, VMI ensured that its applicants would be drawn from a different pool than the middle and upper-class gentlemen who sought a liberal education at private Washington College. While the town of Lexington certainly hoped to gain from replacing the arsenal soldiers with Institute cadets, Washington College had no interest in seeing its secure position in the town or the state threatened by a rival educational institution. VMI was not created on a clean slate, but had to shape its character and find its place in response to the complex and conflicting demands of the town, the local college and the state.

203. VMI historian Henry Wise wrote:

VMI was the first southern school to teach engineering and industrial chemistry. This indeed was a remarkable departure from the conventional college curriculum, which was largely confined to the classics. The founders felt that there was a need for technical courses of practical application in contrast to the traditional college geared to more abstract learning. With comparatively low academic admission standards in the first years, the founders wished to give sons of artisans and farmers an educational opportunity, a rare thing for them.

H.A. Wise, supra note 33, at 13.

In 1845, VMI's first superintendent, Francis H. Smith observed:

[I]t seems indispensable in an institution like this, which is designed to provide an education for the poorest of our citizens, that provision be made to suit the character of the instruction to the previous preparation of the candidates. Many cadets are now admitted . . . who are very imperfectly taught in the elements of a common English education.

1 COUPER, supra note 34, at 146 (quoting Colonel Smith, Annual Report (June 30, 1845)).

204. Perhaps in recognition of the need for flexibility and change in the new school, the legislation creating VMI was phrased in expansive, general terms and interpreted liberally by the Board of Visitors. For example, in 1845, Superintendent Smith defended VMI against charges by Washington College that the Institute was exceeding its legislative mandate in admitting additional pay cadets beyond the apparent “maximum” limit of forty “state” or “regular” cadets prescribed in the statute. Superintendent Smith wrote that “those who modeled the law had very indistinct ideas of the character of the school to be established. The scheme was regarded as chimerical, and it seems as if the Legislature had given a carte blanche to the Board to do the best they could with it.” 1 COUPER, supra note 34, at 144 (quoting Francis H. Smith, Annual Report (June 30, 1845)).
C. "The West Point of the South"

1. Military Missions — From Play-Soldiers to Drillmasters to War Heroes

On the "snowy, cold November 11, 1839, [when] the first cadet sentinel . . . mounted guard in the old arsenal courtyard to relieve the militia guard," the state military requirements of protecting the arsenal seemed to have changed very little. One cadet wrote to his parents that winter:

I have just returned from exploring the dusky halls of the old Arsenal. There are deposited in this arsenal at which we are stationed, fifty six thousand stand of arms including a vast number of old rifles, muskets, pistols and Dragoon swords. The value of the whole is estimated at about seven hundred thousand dollars so you see we have great responsibility resting upon us.

Although the task of guarding the arsenal was quickly overshadowed by the educational mission of the new school, the arsenal helped to define VMI for its first twenty-five years. The cadets may have been young and inexperienced, but between classes and military drills, pranks and hazing, they were guarding real munitions. On June 12, 1864, Union troops under the command of General David Hunter swept into Lexington, drove the cadets out and burned VMI and "all the buildings connected with it." An eyewitness watched the devastation as she recorded: "They set fire to the Institute about 9 o'clock; the flames are now enveloping it; the towers have fallen; the Arsenal is exploding as I write."

Though the arsenal may have symbolized VMI's historic military link to the Commonwealth, the cadets themselves embodied the best
and worst of the pervasive military ethos of the antebellum South.\(^{209}\) Drawn primarily from the isolated farms and small towns of mostly rural Virginia,\(^{210}\) many of the cadets were very young, lower class, poorly educated and ill-behaved. Public education in Virginia, where it existed, was abysmal\(^{211}\) and illiteracy was rampant.\(^{212}\) Twelve out of the twenty-eight cadets who entered VMI in 1839 were only sixteen years old.\(^{213}\) Growing up in a culture where violence was prevalent,\(^{214}\) boys "[a]t an early age . . . developed strong proclivities to fight and

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\(^{210}\). Franklin reported that "[i]n 1852, the most densely populated state below the Potomac was Virginia with 23 persons per square mile. Meanwhile, Massachusetts had 127 persons per square mile. In the face of such overwhelming odds, there was little opportunity to develop and maintain free public education." \(^{211}\)Id. at 130 (footnotes omitted). According to Franklin, one contemporaneous observer "got the impression that in the 1850's three-fourths of Virginia was still in the forest and that the bulk of the population was scattered in the remote corners of the state, out of communication with the rest of the world a goodly portion of the time." \(^{212}\)Id. at 21 (footnote omitted).

\(^{211}\). \(^{213}\)Id. at 130.

\(^{214}\). Franklin noted that "[i]n 1837, Governor Campbell of Virginia reported that almost one-fourth of the persons applying for marriage licenses in ninety-three Virginia counties could not sign their names. There were more illiterates in Virginia in 1850 than in 1840." \(^{213}\)Id. at 131 (footnote omitted). The comparative statistics are even more revealing: "In 1850, the New England States had an illiteracy ratio among the native white population over twenty years of age of .42 per cent; the Middle Atlantic states, 3 per cent; and the Southern states 20.30 per cent." \(^{213}\)Id. (footnote omitted).

\(^{213}\). The age distribution of the 28 cadets in the first entering class was as follows: 12 cadets were 16 years old, 6 cadets were 17 years old, 4 cadets were 18 years old, 3 cadets were 19 years old, 2 cadets were 20 years old, and 1 cadet was 22 years old. \(^{213}\)See VMI Album, supra note 43, at 7 (reproducing Matriculation Register of Cadets (Nov. 11, 1839)). The extreme youth of some of the early VMI cadets may seem startling today when students typically turn 16 at the end of their sophomore year or early in their junior year in high school and turn 18 sometime before or during their first year in college. Some VMI students may have been even younger than 16. Reports of the New Market Campaign indicate that some of the boys were as young as 15. Jennings Wise reported that "the average age of the cadets in the battle of New Market was very close to seventeen and a half years," which was "as great as [the age] of the younger Confederate conscripts of 1864." \(^{214}\)J.C. Wise, supra note 35, at 330. The New Market cadets, however, very likely reflected a different age distribution than the entering class of 1839, because the youngest, least trained cadets would have been left to guard the arsenal. Jennings Wise reported that at New Market "[t]here were some over twenty-one, numbers over twenty, and more over nineteen than under sixteen." \(^{214}\)Id. at 331.

\(^{214}\). Franklin commented that

The apparent anxiety of Southern men to do battle, whether on the barroom floor, on the streets, or in more "honorable" places, may be explained largely by the conditions of life that developed and persisted in the South. The nature of the Southern economy discouraged the growth of compact communities which could provide diverse social experiences and where a sense of group interdependence could take root.

Franklin, supra note 209, at 19.
acquired its needed skills. An early experience of the young Southerner was learning to handle firearms and other weapons with proficiency.\footnote{215} Schools and colleges seemed to produce little improvement in the rough behavior of young men\footnote{216} and educators searched for methods of effectively imposing discipline.

In November of 1839, shortly after the first cadet had arrived at VMI, Colonel Crozet wrote to Virginia's governor:

At an age when passions are yet unmitigated by the lessons of experience, it is generally imprudent to trust to the self government of a young man. Habits of unrestrained indulgence have frequently laid the foundation of ruin of youths, who, if submitted to proper discipline and restraint at this trying season of life . . . would otherwise have become useful and distinguished members of society. The wise and prudent parent will choose for his son that education which will impart to him habits of order and regularity, and that seminary where a degree of parental authority may exercise a beneficial control over his activities.\footnote{217}

Crozet, as a former West Point professor, would have observed firsthand the advantages that a military education could offer to Southern young men,\footnote{218} and it was logical that West Point became the model for VMI and the Southern military colleges that followed VMI's lead.\footnote{219} As John T.L. Preston later observed:

\footnote{215} \textit{Id.} at 17. 
\footnote{216} Franklin observed that Southern schools did not always succeed in developing temperate, refined qualities in their students, and, in many instances, no attempt was made to do so. In fact, in many schools were found some of the most vigorous manifestations of the fighting spirit . . . Duels, though not often fatal, were almost common occurrences. . . . The maturity of the college and the development of a tradition of learning had little if any effect on the conduct of students . . . Local regulations of the town or college against horseracing, cock-fighting, drinking, and the like did little to restrain them. Young men reared on plantations had not always learned the lesson of self-control. Removed from the restraint of comparative isolation, they seemed to have appreciated none of the proscriptions that were inevitable in most educational institutions. \textit{Id.} at 133-34. 
\footnote{217} \textit{Id.} at 138 (quoting from a conversation between Claudius Crozet and Governor D. Campbell (Nov. 21, 1839)).
\footnote{218} Franklin reported that "[b]etween 1802 and 1829, 1,913 young Southerners sought admission, while the much more populous North and West could boast of only 2,160 young men who sought training at the Academy." \textit{Id.} at 144 (footnote omitted). Southerners were also disproportionately represented among the graduates of West Point. \textit{Id.; see id.} at 145 (observing that the South "needed schools and colleges to discipline young Southerners accustomed to disregarding law and order, to prepare them for living in a society having peculiar institutions and habits, and to educate them in the true values of Southern civilization").
\footnote{219} Franklin wrote that "[s]outhern military schools not only disclaimed any pretense to originality, but publicized the fact that they were modeled after West Point or V.M.I." \textit{Id.} at 167.
It was altogether natural that those upon whom devolved the difficult task of organizing the second Governmental Military School in this country should take for its model, as closely as differing conditions would allow, the military school of the United States, which had already taken rank with the best military schools of the old world.220

Preston went on to describe several significant “differing conditions” of West Point and VMI. West Point had: (1) “unlimited means”; (2) “a single object to accomplish . . . [i.e.,] to give the best possible military education to army officers”; and (3) the future of “[e]very graduate” was assured because he was “immediately assigned to a rank in the army that secured to him a competent support, with prospect of promotion in a brilliant service.”221 Because the United States government subsidized the entire cost of a West Point cadet’s education and provided the graduate “a coveted position” as a regular officer, the imposition of strict discipline was justified and “could be enforced with a minuteness and rigor impossible under other conditions,” such as at VMI “where much less was offered.”222 VMI, on the other hand, was required to “begin with a very meagre endowment” and was expected to seek different objectives which dictated a more moderate approach to military discipline.223 Preston explained:

The object was not to fit its graduates for a single profession, exacting in its demands, but not comprehensive in its scope, but to prepare young men for the varied work of civil life. This made necessary an education of which the intensity diminished as the comprehensiveness enlarged. The result when obtained is nobler, but to many young men the prospect is not so attractive as that of a military career. And hence less pressure of restraint is practicable. The military feature, though essential to its discipline, is not primary in its scheme of education.224

James McPherson observed that “[i]n 1860 of the eight military ‘colleges’ in the entire country seven were in the slave states.” McPherson, supra note 207, at 328.

220. 1 CouPER, supra note 34, at 31 (quoting Preston, Semi-Centennial Address, supra note 159).
221. 1 id. at 32 (quoting Preston, Semi-Centennial Address, supra note 159).
222. 1 id. at 33 (quoting Preston, Semi-Centennial Address, supra note 159).
223. 1 id.
224. 1 id.; see also H.A. Wise, supra note 33, at 11-12 (quoting the same portion of John T.L. Preston’s VMI Semi-Centennial Celebration Address (July 4, 1889)). Henry Wise observed that Preston had “describe[d] the Institute’s mission in . . . words as applicable today [1978] as ever.” Id. at 11.
Transplanting the West Point educational model to Virginia’s material, social and cultural conditions, however, would require a superintendent of extraordinary vision and iron will. The VMI Board of Visitors found that man in Francis Henny Smith, who was a gentleman and devout Episcopalian from an aristocratic Tidewater family. Smith’s West Point training and subsequent military and academic pursuits made him uniquely suited to lead the Institute in the direction desired by Colonel Crozet and endorsed by the Board of Visitors. From the outset, Smith understood the unique role that VMI’s adoption of West Point’s military discipline would play in educating Virginia’s citizen-soldiers. In his History of the V.M.I., Smith later recounted:

From the beginning I had to rely upon discipline as a means of forming and developing individual character, and in this way ensuring the strength of the school by enforcing the rules of its government. Many bad subjects were sent here to be reformed, and, although it was by no means a desirable thing to be in any sense a Reformatory School, or “House of Correction,” we started with the idea that we would admit such bad subjects, and try and see what could be done with them. The military organization of the institution had a tendency to fascinate such unruly spirits, who might be made valuable men by the military pride which promotion to the military offices of the school held out to them.

225. See J.C. Wise, supra note 35, at 37-40 (describing Smith’s background and appointment as superintendent of VMI).

226. Smith had been educated at West Point, served briefly as a United States military officer and taught mathematics at Hampden-Sydney College before being appointed to preside over the new Virginia Military Institute. Henry Wise provided the following retrospective observation on Smith’s 50 years as the first superintendent of VMI:

For years General Smith was dogged by charges of imperious ways, unorthodox financial methods, and intermittent lapses of discipline within the Corps. Some considered that his devout Christianity verged on fanaticism. . . . [But] [i]n VMI’s first half century . . . the greatness of that man’s character, foibles and all, was all-important. . . . That dedicated gentleman used himself up in the birth, advancement, rebirth, and preservation of VMI, and he was superb.

H.A. Wise, supra note 33, at 64. See generally id. at 64-67.

227. 1 Couper, supra note 34, at 129 (quoting Francis H. Smith, The Virginia Military Institute, Its Building and Rebuilding 242 (1912)); see J.C. Wise, supra note 35, at 90-93. Jennings Wise described the administration and philosophy of military discipline under Superintendent Smith and Commandant Gilham — a “veritable martinet” who was “the disciplinarian and the champion of the military ideals of the Institute.” Id. at 90. William Gilham, an 1840 West Point graduate, left the United States army to become commandant of the VMI Corps in 1846. Id. at 55; see also id. at 55-56 (describing Gilham’s military history). In 1860, Gilham published a manual of military tactics to aid in drilling Virginia militiamen. Formally titled Manual of Instruction for the Volunteers and Militia, the work came to be known as Gilham’s Manual, and was adopted as the official instruction manual for the Confederate States Army. Id. at 114-15. Gilham’s methods of military training and drilling had long been employed at VMI by the
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While military discipline was seen as a particularly necessary expedient for transforming many of Virginia's "bad" boys into "valuable" men, it also ensured that those men would be capable of bearing arms in time of war. Whereas West Point trained professional career soldiers, VMI was closer to the egalitarian principles of democracy in producing citizen-soldiers. Historian John Hope Franklin observed that "[t]he founding fathers had a strong aversion to the idea of a large standing army. To avoid any necessity they decided to encourage the development of a citizen soldiery." According to Franklin, the American concept of the citizen-soldier that had emerged in the early republic rapidly gained acceptance when the 1792 congressional authorization for "a uniform militia throughout the United States" — composed of "[e]very able-bodied white male citizen between the ages of eighteen and forty-five" — was expanded in 1803 "to require the governors to hold in readiness a detachment of militia not exceeding 80,000, officers included" and "to accept, as a part of the detachment, any corps of volunteers that would engage for a period not exceeding twelve months." The result was "the emergence of a strange, if not strong, citizen soldiery" that produced "as many armies as there were states" and, particularly in the South and West, "as many separate armies as there were communities — and, worse still, several small armies within one community."

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228. FRANKLIN, supra note 209, at 171.

229. Id.; see Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271 (providing for the enrollment in the militia of "every free able-bodied white male citizen" between the ages of 18 and 45), amended by Act of July 17, 1862, ch. 201, 12 Stat. 597 (providing for the enrollment of "all able-bodied male citizens" between the ages of 18 and 45) and by Act of Mar. 2, 1867, ch. 145, § 6, 14 Stat. 422, 423 (striking the word "white" from prior acts relating to militia); see also Act of Mar. 3, 1803, ch. 32, § 1, 2 Stat. 241 (providing authorization for the President to request state governors to mobilize a detachment of up to 80,000 militia troops).

230. FRANKLIN, supra note 209, at 172-73. For a discussion of the development of volunteer military groups in the South's "congenial atmosphere," id. at 173, and the military functions and social role of Southern citizen-soldiers during the early republic and antebellum eras, see Franklin's chapter titled "The Citizen Soldiery." Id. at 171-92. After discussing many of the civic and social activities of militia organizations in the South, Franklin noted:

While it appeared that the citizen soldiers were, at times, preoccupied with matters that may be regarded as extraneous, they did not lose sight of the reason for their organization. Whenever they tended to overlook their function of protection and defense, either some incident or the articulate element of the civilian population reminded them of it. They busied themselves repelling Indians, putting down slave insurrections, and participating in the nation's wars with England and Mexico.

Id. at 185.
But the deeper significance of the militia muster in preserving the racial and gender hierarchy of Virginia culture had roots stretching back to the eighteenth century when the first militia acts were passed in the colony. Historian Rhys Isaac commented that “[t]he structure of the militia and the patterns of its infrequent comings together can be seen as a microcosm of male-dominated Anglo-Virginian society.” Through the militia acts, colonial legislators both articulated “the sense that society is a ranked system of dignity, honor, and obligation” and legitimized the use of force against slaves: One such militia statute required that “[o]nce a month the slave quarters were to be visited by a patrol of not more than five men.” The county muster embodied both order and disorder, “provid[ing] both an important means of formalizing authority in society and assemblies at which the male fraternity of warriors might get drunk together.” Isaac concluded:

The commitment of the leaders of this society to the militia and their roles in it is not hard to understand. It was in accord with a powerful current in eighteenth-century Anglo-American ideology. The arms-bearing English yeomanry and gentry were . . . closely associated with the farmer-soldiers of the venerated early Roman Republic . . . . The internal pressures to which contemporary Virginia society was subject, with its base in the enforced repression of a growing population of enslaved blacks, ensured that such identification with the role of citizen as armed man was reinforced in the colony.

Thus, in the first decades of its existence, the military aspect of VMI’s educational program, with its uniforms and drills, held out for each cadet the possibility of an easy entree — with an officer’s rank — into a volunteer militia group in his home community. More importantly, entering this exclusive “fraternity” of the “citizen as armed man” assured the VMI graduates a well-recognized and privileged status in a hierarchical society. VMI cadets had been listed on state militia rolls since the 1840s. But until just before the Civil

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231. See generally Isaac, supra note 86, at 104-10 (discussing the social and cultural role of the militia and the militia muster in colonial Virginia).
232. Id. at 104.
233. Id. at 105.
234. Id. at 106; see, e.g., Militia Act of 1757, ch. 1, § 27, 1757 Va. Colonial Acts 341.
236. Id. at 109 (footnote omitted).
237. H.A. Wise, supra note 33, at 35.
War, the VMI Corps of Cadets, as a separate body, had no state military function other than guarding the arsenal and parading at ceremonial events.

Despite their military discipline, the cadets often demonstrated both their immaturity and their Southern notions of manliness in fights, hazing incidents and mutinies. In 1848 the Institute's first "garrison court-martial" was convened to adjudicate charges resulting from "a fracas between two cadets during which a partisan bystanding cadet became so excited that he attacked more or less feloniously one of the combatants with a heavy stick."238 Couper noted:

A characteristic of the fifties was the use of arms by cadets against each other. These offenses were frequent and usually met with dismissal. Stabbing with a bayonet; use of a knife; carrying concealed weapons after a threat, were some of the methods employed. Later, duelling made its appearance but these affairs were always detected and quashed by dismissing the parties — a careful check of the records reveals no actual duel but the alumni records clearly show that some former cadets died and inflicted death in duels.239 A mutiny in 1851 "resulted in the temporary dismissal of the entire class of about forty."240 A second mutiny in 1852 was also "conducted by first-classmen," and "[a]s is the case in most similar instances[,] the grievance was puerile . . . . "241 "Hazing, in the form of abuse and bodily punishment inflicted on new cadets . . . by upperclassmen, grew rife in this period. In summer camp of 1858 occurred the first reported instance of a cadet's dismissal for abusing a new cadet.242 Applauding the cadet's swift punishment, General Richardson, Virginia's adjutant general and an ex-officio member of the VMI Board of Visitors,243 wrote to the superintendent,

I feel more gratification than it is in my power to express, that the unmanly and most cowardly and detestible [sic] practice of quizzing and maltreating the new cadets is at an end. This has brought more

238. 1 COUPER, supra note 34, at 189-90.
239. 1 id. at 257-58.
240. H.A. WISE, supra note 33, at 23.
241. 1 COUPER, supra note 34, at 258-59.
242. H.A. WISE, supra note 33, at 24; see 1 COUPER, supra note 34, at 337-38.
243. See H.A. WISE, supra note 33, at 12 (describing General William H. Richardson's role on the VMI Board of Visitors).
discredit and injury upon the Institute than anything that has
occurred since its foundation.244

Within a month, "the dismissal of another hazer led to another
mutiny" and permanent dismissal of "[a]ll fifteen of the rebels."245
Far from ending in 1858, "hazing in various forms continued,"246 as
did letters of complaint of "‘roughness and ungentlemanly incivility’
by a few old cadets toward ‘the new comers.’”247

This decade witnessed other adjustments in the development of
the Institute. In 1850, "the Virginia Constitutional Convention . . .
enacted suffrage on the basis of white male population instead of the
earlier formula of population and land ownership.”248 Increasing the
base of white male enfranchised citizens in Virginia undoubtedly
broadened the base of VMI’s applicant pool. But a more profound
change occurred in 1858 when non-Virginians were first admitted.
VMI’s emphasis on scientific and technical training had led in the mid-
1850s to “a flood of applications from prospective patrons in other
States who desired to have their sons admitted as pay cadets.”249 In
1857 the number of state cadets was increased from thirty-two to
forty, but the corresponding increase in state aid had not kept pace
with the rapid increase in costs since 1840.250 Combined with the
Panic of 1857, this effective decrease in the state subsidy made it
harder for the Board to fill the allotted places in the incoming class
with pay cadets from Virginia only.251 Superintendent Smith was thus
directed “to select the cadets first from the applicants from Virginia,
and, if there still remain any vacancy, then such applications as may
come from the Southern States.”252 Thus financial needs compelled
VMI to become more than just a parochial state school and to rede-
fine itself with the broader regional interests of the South. This shift
came as the cadets were about to be transformed from boys playing
soldier games on school grounds to young men marching and dying on
the fields of war.

244. 1 COUPER, supra note 34, at 337-38 (quoting Letter from General William H. Richard-
son to Acting Superintendent (Sept. 9, 1858)); also quoted in H.A. WISE, supra note 33, at 24.
245. H.A. WISE, supra note 33, at 24. This “mutiny” is described in 1 COUPER, supra note
34, at 337-38.
247. 1 COUPER, supra note 34, at 265.
248. H.A. WISE, supra note 33, at 25; see VA. CONST. of 1850, art. III, § 1.
249. 1 COUPER, supra note 34, at 298.
250. 1 id. at 335.
251. Couper reported that “[a]n analysis of the annual amount paid by a pay cadet at this
time showed that the average was $362.77 and the State cadets averaged $139.58.” 1 id.
252. 1 id. at 335 (quoting VMI Board of Visitors Report (June 30, 1858)).
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According to historian John Hope Franklin,

In the mid-fifties the anxieties of some citizens of the upper South regarding their militia bordered on hysteria. A Richmond paper said that the Virginia legislature would be faithless to its gravest duties if it failed to strengthen the militia. Indeed, it should provide for the drafting of 20,000 men. The graduates of the Virginia Military Institute could then train 200 regiments that would become proficient in offensive or defensive warfare.\textsuperscript{253}

Franklin reported that "[i]n 1854, a visitor told the cadets at the . . . Institute that they constituted the nucleus for an effective citizen soldiery. In the days ahead they would be expected to 'bring the freemen's arm to aid the freeman's cause.' \textsuperscript{254}

On the eve of the Civil War, "the South had come to rely more and more on its citizen soldiery for the military defense of the section. To be a man in arms in 1860 was claim to the respect and admiration of the entire community."\textsuperscript{255} Furthermore, as Franklin observed, by this time,

[T]he relationship between military education and Southern policy was established. If they achieved nothing else, the West Points of the South succeeded in inculcating among a considerable portion of the population an appreciation for their role in serving and protecting the community. Out of these institutions, in increasing numbers, were coming leaders who could train and command human material to serve as the bulwark of the South's defense.\textsuperscript{256}

Thus, responding to the adjutant general’s call to duty, only days after Virginia seceded from the Union on April 17, 1861, most of VMI Corps of Cadets\textsuperscript{257} set forth on a march to Richmond under the command of Professor of Natural and Experimental Philosophy, Major Thomas “Stonewall” Jackson.\textsuperscript{258} The governor “had ordered the Corps to proceed to Richmond to provide drill-masters for the volunteers, and to impart to the raw soldiery of the South the principles

\textsuperscript{253} FRANKLIN, supra note 209, at 188.
\textsuperscript{254} Id. at 169 (quoting B.J. Barbour, Address Delivered Before the Literary Societies of the Virginia Military Institute, July 4, 1854, 20 S. LITERARY MESSENGER 513 (Sept. 1854)).
\textsuperscript{255} Id. at 189.
\textsuperscript{256} Id. at 170.
\textsuperscript{257} Forty-eight of “the younger, and less experienced, cadets” remained behind to guard the arsenal. J.C. Wise, supra note 35, at 140. Henry Wise reported that the total Corps in 1861 consisted of “nearly 300” cadets. H.A. Wise, supra note 33, at 35.
\textsuperscript{258} See 1 COOPER, supra note 34, at 263 (describing Jackson’s role as a professor at VMI).
contained in *Gilham's Manual.*" Arriving at the Capitol Building, the cadets listened to the governor deliver his charge, and "within a brief hour," the "fledglings" had "become men with the fullest responsibilities of manhood and of their calling." West of Richmond, the Corps encamped on the Fair Grounds — renamed "Camp Lee" — where "immediately the undrilled, undisciplined, partly unarmed, and un-uniformed volunteers of Virginia began to arrive."

The raw volunteers afforded much amusement to the well-trained cadets. Many of them reported with squirrel rifles, shot guns, butcher's knives, and ancient horse pistols. Some wore red shirts and coon-skin caps, and all were imbued with the belief that the true soldier must present a dare-devil aspect with the unkempt hair and scraggly beard of the border ruffian. To these men the trim cadets appeared play-soldiers and dandies, almost beneath their contempt, and they at first regarded the little "whipper-snappers" placed over them with the utmost disfavor.

One such volunteer later recalled his first exposure to the young VMI cadets:

I was three and thirty years old, a born invalid, whose habit had been to rise late, bathe leisurely and eat breakfast after everybody else was done. To get up at dawn to the sound of fife and drum, to wash my face in a hurry in a tin basin, wipe on a wet towel, and go forth with a suffocated skin, and a sense of uncleanliness to be drilled by a fat little cadet, young enough to be my son, of the Virginia Military Institute, that, indeed, was misery. How I hated that little cadet! He was always so wide-awake, so clean, so interested in the drill; his coat-tails were so short and sharp, and his hands looked so big in white gloves. He made me sick.

The cadet drillmasters, however, proved to be so effective that they trained 15,000 to 20,000 "raw recruits" at Camp Lee, and "[t]heir services were in demand wherever men were being trained and they were especially sought by those who were to be heralded as the great military chieftains."
2. "Civil Callings" — From Normal School to Engineering School — "Drawing Out the Man" to Serve the State

VMI’s military identity has tended to overshadow the primary goal of the school’s evolving educational curricula, which VMI graduate and former United States Senator, Harry F. Byrd, Jr., has defined as to “prepare[ ] VMI cadet-students well to follow civil callings in peacetime.” Senator Byrd observed that “the military, the most conspicuous feature of the Institute, often creates the impression that training men to be soldiers is the main objective” which masks “other vital aspects of an educational design for ‘drawing out the man.’” But the educational design of the Institute grew out of the Commonwealth’s need for persons capable of filling particular civil callings that would contribute to the overall welfare of the state. Virginia legislators in 1839 would not have dreamed of suggesting that women — or Blacks — be educated at state expense to fill the civil callings so desperately needed to build the state’s economy, any more than they could have imagined women or Blacks being soldiers. The State did not set out to make grown men out of Virginia’s white boys for the private purpose of serving the personal and material needs and desires of the individual boys and their families, but to serve the public needs of the state. “Drawing out the man” was a means to an end, not an end itself.

On July 4, 1842, when the sixteen cadets remaining from the first entering class received diplomas, showing that they had qualified for the “Degree of Graduate of the Virginia Military Institute,” the Commonwealth needed not just citizens trained in the military arts, but men who could serve in developing the human and material resources of the state. During his fifty years as superintendent,

[Francis Smith] believed that the Institute, as a school where practical subjects were taught, held a special place in the educational system of the state. It could supply the state with engineers to construct the internal improvements so urgently needed and teachers who could instill discipline in the schools. . . .

General Smith’s goals were achieved to a remarkable degree. During the first twenty years of the Institute’s history it provided

265. Harry F. Byrd, Jr., Foreword to H.A. Wise, supra note 33, at xiii.
266. Id. at xiv.
267. H.A. Wise, supra note 33, at 20; 1 Couper, supra note 34, at 101; see Act of Feb. 14, 1842, ch. 26, 1841-42 Va. Acts 22 (authorizing conferral of “the degree of graduate of the institute”); 1 Couper, supra note 34, at 96-104 (describing the first graduation ceremony and diploma qualifications in detail).
Virginia with 160 teachers, some of whom adopted teaching as a career, and 52 civil engineers.268

Although VMI from the start had self-consciously modeled many of the nonmilitary aspects of its instruction on West Point's technical and engineering curriculum, the abysmal state of public education in Virginia pointed to an emphasis on a rather different function for this new state school — educating Virginia men to be schoolteachers. VMI's early educational design as a "normal school" was established by the Institute and the state legislature before the first class of cadets graduated. Quickly endorsed by Governor James McDowell, the idea for a normal school originated in 1841 with General William H. Richardson, the state's adjutant general and ex officio member of the VMI Board of Visitors.269 In January of 1842, the VMI Corps traveled to Richmond where their parade of forty-six cadets "drew large crowds and made a profound impression on those who saw it."270 The cadets' trip to Richmond, however, was primarily a public relations effort orchestrated by General Richardson.271 The trip provided the opportunity for "[t]he cadets [to be] examined before the House of Delegates in the various subjects of their curriculum by three Cadet Instructors who not only demonstrated the proficiency of the academic instruction of the entire Corps, but their own high efficiency as

268. BROOKC, supra note 84, at 294. Couper reported that a poll taken in 1859 revealed that "[s]o far the institution had provided 160 teachers, of whom 55 were still teaching; and of the 52 former cadets who had followed the civil engineering profession, 28 were so engaged at the time this poll was taken." 1 COUPER, supra note 34, at 353.

269. H.A. WISE, supra note 33, at 12. Richardson, who became Virginia's adjutant general in 1841, had previously served as "secretary of the Commonwealth and state librarian." Id. Henry Wise observed that "[t]hroughout his almost uninterrupted tenure as adjutant general until 1876, [Richardson] was aggressive in VMI's interest." Id.; see J.C. WISE, supra note 35, at 50-52 (describing the role of General Richardson in obtaining passage of the Act of March 8, 1842).

In 1857, a Lexington attorney wrote that he had discovered, among the papers of Governor McDowell,

a paper containing notes preparatory to a law carrying out the normal school feature in the Vir. Mil. Inst., on the back of which is this endorsement in the handwriting of the Gov. "Note. The within was written by Jas. McDowell whilst attending as visitor of the V.M.I. in July 1841, and meant hastily to embody the gen'l idea upon which it would be proper to make the Institute, in some degree, a normal school. The suggestion first came from Gen'l Richardson, was presented by J. McD. to the Board of Visitors and led the way to the law on that head of 1841-42." 1 COUPER, supra note 34, at 94 (quoting Letter from J.D. Davidson to the Superintendent, V.M.I. (July 24, 1857)).

270. 1 COUPER, supra note 34, at 90; see J.C. WISE, supra note 35, at 51 (stating that the Corps in Richmond consisted of 60 cadets and describing how "the popular imagination was aroused and great crowds followed the splendidly-drilled Corps, from place to place").

trained teachers."272 "The real object of the trip . . . was concerned with a bit of legislation" — "a bill pending before the General Assembly" which would increase state funding for the Institute and, as Superintendent Smith phrased it, "‘place[] the Institute . . . on its distinctive mission, as a Normal School to supply the schools of the Commonwealth with efficient teachers.'"273 Within months of the cadets' return to Lexington, the Virginia General Assembly passed the Act of March 8, 1842, approving an increase in annual funding and providing that

[E]very cadet who shall hereafter be received on state account, shall be required to act in the capacity of a teacher in some one of the schools within the commonwealth, for the term of two years after finishing his course at the institute, unless excused by the board of visitors: Provided however, [t]hat nothing in this act shall be so construed as to deprive such cadet of any portion of his tuition fees as a teacher.274

VMI's plan for educating future teachers for Virginia was warmly received in Lexington. An editorial in the Lexington Gazette raved about VMI's "first Commencement day" on July 4, 1842, as "indeed an interesting, a glorious day!" — a "brilliant and imposing spectacle."275 The editorial compared VMI to West Point, which the Institute "will soon . . . equal in every respect."276 Unlike West Point,

272. Id. at 51. Henry Wise reported that "[i]n 1842 the Board provided for the employment of senior cadets as assistant instructors . . . ." H.A. Wise, supra note 33, at 66. Francis Smith wrote:

The principle guiding the Board of Visitors in making this provision for assistant instructors was, by enabling the Superintendent to divide the classes into small sections, to ensure thoroughness in the instruction, by the daily drill of each cadet on the appointed lesson [sic]. This is an important principle, and has contributed, in a great degree, to the efficiency of the graduates of the Institute, in their professional pursuits, particularly in the work soon to be given them by law as teachers. It was steadily adhered to over forty years; and every departure from it has uniformly tended to dilute the instruction, and to increase the number of deficient cadets.

Id. (quoting from Francis H. Smith's published memoirs, History of V.M.I.). Wise continued, "Daily recitation was de rigueur until the 1930s, and a number of instructors today believe it is better than the present method used in many classes with lectures supplemented by frequent written and oral tests but without daily performance by all students in class." Id.

273. 1 CouPER, supra note 34, at 92, 93 (quoting from Smith's History of V.M.I.).

274. Act of Mar. 8, 1842, ch. 24, § 2, 1841-42 Va. Acts 21; see 1 CouPER, supra note 34, at 93 (quoting statute printed in Smith's History of V.M.I.). Couper reported from contemporaneous accounts that the 1842 VMI appropriations bill faced "very little opposition in the House" and passed the Senate with "[c]lose nicking, 14 to 13." 1 id. (quoting Letter from General C.P. Dorman (Mar. 8, 1842)). Henry Wise noted that the obligation imposed on state cadets "still pertains, but now there are alternative ways of repayment, including military service." H.A. Wise, supra note 33, at 20; see VA. CODE ANN. § 23-107 (Michie 1993).

275. 1 CouPER, supra note 34, at 99, 100 (quoting LEXINGTON GAZETTE, July 7, 1842).

276. 1 id. at 100.
however, VMI deserved the “patronage and favor” of the General Assembly for the Institute had a very special role in the State:

[VMI is] a school which is destined to confer the greatest blessings on Virginia, in sending forth accomplished soldiers to impart skill and discipline and a military spirit to her militia; and in giving to her common schools gentlemen who are educated, and capable to instruct the youth of our State. Are not these most important objects, and can any one doubt that the true interest of the Commonwealth is to encourage, by every means in its power, an institution by which these objects can be certainly attained?\(^{277}\)

Jennings Wise commented that, by the Act of March 8, 1842, “the Institute became, not only the second governmental military school in America, but the first Normal School in Virginia.”\(^{278}\) It would be another fourteen years before the University of Virginia “was impressed with a similar character.”\(^{279}\) Wise attributed to the subsequent labors of [VMI’s] graduates . . . the fact that between 1845 and 1860 the number of College students in Virginia increased from 500 to 2,500, “giving Virginia the proud preeminence of having a larger number of young men attending colleges, in proportion to white population, than any other State in the Union.”\(^{280}\)

Superintendent Smith, “in commenting on the system of education developed at the Institute, . . . pointed out that it provided native teachers in the State . . . [who] gave the school a normal character and stimulated students to seek a college education.”\(^{281}\)

\(^{277}\) 1 id.

\(^{278}\) J.C. Wise, \textit{supra} note 35, at 52. Couper reported that “[i]t was in 1843 that the first considerable number of teachers went out from V.M.I. to the schools of the State.” 1 \textit{Couper, supra} note 34, at 125. In surveying graduates of the period from 1839 to 1881, Couper noted that “forty classes embracing 3,470 cadets, have been admitted, and of these 1,241 have been graduated. The record shows 200 killed in battle, 175 professors and teachers, 135 civil and mining engineers, 120 merchants, 94 farmers and planters, 59 physicians, 30 clergyment, and 19 bankers.” 1 \textit{id.} at 34-35.

\(^{279}\) J.C. Wise, \textit{supra} note 35, at 52; see Act of Mar. 12, 1856, ch. 91, sec. 1, § 6, 1855-56 Va. Acts 79, 80; see also 1 \textit{Couper, supra} note 34, at 150-51 (quoting from the text of the Act of March 12, 1856, and discussing the “full influence of the two State institutions to the important duty of providing teachers for the schools of Virginia”).

\(^{280}\) J.C. Wise, \textit{supra} note 35, at 52 (quoting Francis H. Smith); see 1 \textit{Couper, supra} note 34, at 151 (quoting Francis H. Smith), 336 (quoting Smith’s Annual Report (June 22, 1886)).

Couper reported,

The advance in higher education in Virginia in the decade 1850-1860 was extraordinary. The number of colleges in the State more than doubled; the student enrollment increased from 1,343 to 2,824; and the annual income of these institutions grew from $159,760 to $246,940. Small it may seem by present day standards but seen from the contemporary point of view it was the largest number of colleges, teachers employed, students, and annual income of any State in the Union in 1860.

1 \textit{id.} at 336.

\(^{281}\) 1 \textit{Couper, supra} note 34, at 336.
Although both men and women taught in Southern schools before the Civil War, "[w]hite women had constituted only about a quarter of teachers from the antebellum years through the 1870s . . ." Historian Anne Firor Scott noted that educational opportunities for females in the antebellum South were severely constrained despite the appearance, in the eighteenth century, of "a flurry of concern for educating women 'as companions not as playthings for men'" which "had never wholly disappeared from the didactic literature" of the early nineteenth century. "By the 1830s the inadequacy of women's education was a favorite topic for public speakers. . . . [A] good many men said that women who knew nothing but home skills were often dull and trying wives, not efficient even in dealing with their domestic responsibilities." But few "respected southern gentlemen" perceived any advantages, practical or otherwise, in providing a rigorous classical education for girls or in offering a college education for young women. "In practice . . . when marriage at fifteen or sixteen was common, the time allocated for instruction was short; and while numerous female seminaries and academies were scattered about the South, not much could be said for the rigors of their curriculums or the qualifications of the teachers."

Not surprisingly, then, in 1842, when Virginia's General Assembly was considering the bill that would establish VMI's state function as a school for educating teachers, where state-supported cadets would owe the State two years of teaching service, it would have seemed only natural that this investment of state funds — creating an obligation of significant personal service back to the community — would be made only in an all-male school. Virginia had to increase rapidly the number of qualified teachers in its widely dispersed rural

283. ANNE FIROR SCOTT, THE SOUTHERN LADY: FROM PEDESTAL TO POLITICS, 1830-1930, at 67 (1970). Scott noted that "[a]n increasing number of southern men, many of them ministers or college presidents, . . . attacked the assumption of female inferiority — at least intellectual inferiority — and advocated a more serious and thorough education for women." Id. at 68.
284. Id. at 68.
285. Id. at 71.
286. Id. at 67-68.
communities and small towns; the State also required young men who could travel to the schools where they were most needed. Since VMI would not admit married men and automatically expelled any cadet who married while at the Institute, a VMI graduate/teacher was not likely to be encumbered by family responsibilities. And, if he married during his two years of teaching service, his wife would be expected to leave her family and community and follow him to his new domicile. A similar commitment of state funds to educate female students would have been unthinkable in the 1840s. It would have been "unnatural" to require women to remain unmarried during their prime years of eligibility for marriage, and the State could not have counted on women to complete their two years of service without the intervening complications of marriage or other domestic responsibilities to their families.

Moreover, throughout the nineteenth century, Southern white schoolteachers typically faced hardships, particularly in rural communities, that would have been considered difficult for many young white men and entirely unsuitable for young white women. Historian Edward L. Ayers described the conditions experienced by rural schoolteachers in the South following the Civil War — the material aspects of which were no doubt similar to the antebellum period:

Every rural community expected to have a schoolteacher somewhere not too far away. Turnover was great — the average white teacher stayed at a school about three years, a black teacher two and a half. ... "To be a country school teacher in those days meant to live a life just a cut above that of the hired hand, the only difference being what one did during the day," a South Carolina man recalled. The teacher "boarded around" among the families who had children in the school, "taking pot luck and subject to the hazards peculiar to each house: dirt, bed-bugs and other vermin, leaky roofs, musty bedclothes, and poor folks' food."288

Discipline in such rural schools was particularly troublesome because "[t]he student body varied greatly from one day to the next"

287. Henry Wise noted that "[t]he wedlock ban had been initiated in 1839 on the theory that it was simply too great a responsibility for a cadet to bear in his crowded routine." H.A. Wise, supra note 33, at 297. In 1945, the Board of Visitors finally agreed "to modify for veterans the long-standing rule prohibiting a cadet entering or remaining at VMI if married." Id. at 482. In the 1960s, "[p]robably no new regulations stirred more criticism than the twice yearly nonmarriage certification." Id. at 297.

288. See Ayers, Southern Crossing, supra note 282, at 33; see also Edward L. Ayers, The Promise of the New South: Life After Reconstruction 211-12 (1992) [hereinafter Ayers, Promise of the New South].
and "[t]he students might vary in age by a decade and in height by several feet." The Virginia legislators certainly recognized that the young VMI cadets who could parade so well and had mastered their recitations would have no trouble "establish[ing] dominion over some of the larger boys." While some schools might have no choice but to hire a woman teacher, the State had a choice in how to spend state funds to promote education, and those funds in Virginia went to training male teachers before the Civil War. Women might have intelligence, but they lacked the authority and physical strength that men possessed, and such attributes were seen as necessary to supervise unruly male adolescents in the classroom. Edward Ayers reported that one "schoolgirl from Mississippi" complained:

We have hard times with the boys at school. They are so bad.... Mortimer Mason is the terror of the school. Miss Hester has not whipped any yet but she is all the time racking Barrett over the head with her pencil she hit Maud on the nuckles wit a ruler because she disobeyed her she is not strict enough with boys.

Only a male could effectively assert in the classroom the gender hierarchy demanded by the Southern patriarchal family and slave-owning culture.

Although shared understandings about appropriate gender roles dictated Virginia's decision to make VMI — a male, military preserve — into the State's first normal school, shared concerns about protecting and building up sectional interests underlay the Institute's decision to admit only Virginia residents until 1858, and after that, before the war, only students from other Southern states when spaces were available. VMI's superintendent, Francis Smith, later observed that when VMI's "first teachers went out in 1843... it was regarded as an unworthy calling for a young Virginian to teach school." However, according to Smith,

[The Act of March 8, 1842] had a far-reaching influence on the educational work of the State. Before its passage, the schools of the State were, for the most part, supplied with teachers from the northern states, many of whom were simply adventurers. Here and there a graduate from the universities of Great Britain taught, and some

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289. Ayers, Southern Crossing, supra note 282, at 33.
290. Id.
291. Ayers, Promise of the New South, supra note 288, at 212 (quoting Letter from Mary Lou Burrus to "My Dear Cousin" (Nov. 30, 1890)) (punctuation and spelling unchanged)); see Ayers, Southern Crossing, supra note 282, at 33.
292. See supra text accompanying notes 249-52.
293. 1 Couper, supra note 34, at 150 (quoting Francis H. Smith).
of them were very superior teachers. The University of Virginia had also some distinguished graduates . . . who conducted large classical schools, but the State was much in need of good teachers.\textsuperscript{294}

By the mid-1850s, as sectional concerns mounted, the VMI graduates had assumed many positions formerly held by non-native white teachers. Not only had VMI contributed significantly to the educational mission of the Commonwealth, but it had made teaching a viable career for a majority of its early graduates.

The male hegemony of the burgeoning teaching profession in Virginia was to be changed dramatically by the Civil War. The war disrupted all previous relations of class and gender. As Anne Scott noted, "Schoolteaching was taken over by women, as native schoolmasters answered the call to arms and those from the North went home."\textsuperscript{295} The war's impact on the Institute and its educational mission was devastating. The school's dual mission contained both its strength and the potential seeds of its destruction. In the 1850s,

The Superintendent had laid great stress before the Legislature on the fact that in building up the Institute the State was not only fostering its educational and industrial development, but at the same time was providing for its defense in the event of war; and as the imminence of sectional strife became more apparent, this argument proved more and more availing.\textsuperscript{296}

As of July 4, 1859, the Institute had produced a total of 354 graduates,\textsuperscript{297} many of whom had entered careers as teachers and engineers. But, "on the battlefields of the Civil War, 259 VMI men sacrificed their lives as citizen soldiers,"\textsuperscript{298} including the ten young cadets — "baby soldiers" — who were killed or mortally wounded in the Battle of New Market.\textsuperscript{299} The school's military character was nearly its undoing:

[I]n 1864 the physical plant was almost totally destroyed when Union General David Hunter burned the Institute. Given the physical destruction, the financial distress, and the sagging morale after Appomattox, only an act of great faith and determination could raise the Institute from the ashes. The indomitable Francis Smith turned to the task with vigor, proposing to start immediately on the physical rehabilitation of the Institute so that a full corps could be

\textsuperscript{294} 1 id. at 93 (quoting Francis H. Smith, \textit{History of V.M.I.}).
\textsuperscript{295}  Scott, \textit{supra} note 283, at 82.
\textsuperscript{296}  J.C. Wise, \textit{supra} note 35, at 94.
\textsuperscript{297}  1 COUPER, \textit{supra} note 34, at 352.
\textsuperscript{298}  BROOKE, \textit{supra} note 84, at 294.
\textsuperscript{299}  H.A. Wise, \textit{supra} note 33, at 40.
enrolled. . . . [B]y acting quickly the Institute not only could supply the state with highly trained practical men to aid in the urgent work of restoration but could move into the forefront of southern education. 300

While the State had a dire need for engineers and teachers before the Civil War, the Institute’s survival during Reconstruction depended on its continued ability to demonstrate its value to the Commonwealth. In 1867, when “a new state legislature came into being[,] . . . [t]he majority was hostile to the old order and did not look kindly on the ‘property known as the Virginia Military Institute,’ as a legislative committee termed the college.” 301 Henry Wise reported:

That committee adopted a resolution in 1868 ordering Smith to show cause why VMI “should not be obliterated.” The superintendent, a great persuader, with political finesse as well as vigor, rose to the occasion. He convinced the lawgivers of VMI’s great potential through its technical know-how to aid the restoration of the life and economy of Virginia. 302

Smith had traveled to Europe in 1858 to study its best military and technical schools, especially L’Ecole Polytechnique, and his subsequent report, Scientific Education in Europe, became the basis for his new design of the curriculum. 303 “[T]he essential feature was a recommendation that the Virginia Military Institute be organized as a General Scientific School, with three special schools of application: 1. Agriculture; 2. Engineering; and 3. Fine Arts.” 304 What had made sense in the antebellum South of “exhausted soil, old and decaying towns, wretchedly-neglected roads, and in every respect, an absence
of enterprise and improvement," had even more appeal nearly ten years later with the added devastation of the war.

The rebuilding of the Institute after the war thus provided an opportunity for VMI to reinvent itself as a scientific and technical school. By 1870, when Virginia was readmitted to the United States, VMI was fully committed to the education of engineers, scientists and other technical professionals, as well as to a more significant role in the state system of higher education, conferring the baccalaureate degree for the first time, "but on distinguished graduates only." The "agricultural phase of the three-part technical school modeled after L'Ecole Polytechnique" was never realized because of a state decision to use land grant funds to open the Virginia Agricultural and Mechanical College in Blacksburg — now referred to as Virginia Tech. Nevertheless, VMI was, at least to all outward appearances, in the vanguard of Southern progressivism along with schools "that concentrated on agricultural or industrial training" such as "Clemson, Virginia Tech, Texas A & M, Georgia Tech, and others [that] began in the 1870s and 1880s, driven both by the national government's support for land-grant colleges and by the practical bent of Southern legislators and benefactors."

As schoolteaching became the domain of women after the Civil War, VM's identity as a normal school simply disappeared, replaced by its new role emphasizing science, engineering and the baccalaureate degree as preparation for "manly" professional careers in the

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306. H.A. Wise, supra note 33, at 48. The "Degree of Graduate continued for the others until 1913, when the bachelor's degree uniformly was awarded, retroactive to 1912, and it was made available to earlier graduates who desired it." Id.; see supra note 267.

307. Id. Henry Wise observed, From the Morrill Act of 1862, . . . Virginia [had] acquired 300,000 acres of public land. Proceeds of the sale of it were distributable among colleges, subject to the legal requirement that their curricula include military training. The statutory condition still stands, but enforcement today at land grant colleges is lax, to say the least. The original plan was to divide the money equally among Hampton Institute, the University of Virginia, and VMI. What came out of it was one-third for Hampton and two-thirds for the new Virginia Agricultural and Mechanical College at Blacksburg (now Virginia Polytechnic Institute and State University). That was a sad loss to the university but a near critical blow to VMI. Id. at 47-48; see Morrill Act of 1862, ch. 130, 12 Stat. 503; Va. Code Ann. §§ 23-114 to 23-131 (Michie 1993) (Virginia Polytechnic Institute and State University).

308. In fact, Smith's conservatism blocked educational innovations urged on him by some of his more progressive faculty members. See, e.g., Brooke, supra note 84, at 337-39.

309. Ayers, Promise of the New South, supra note 288, at 420.
pragmatic and often technical worlds of manufacturing, science, business, banking and law. To be sure, VMI continued to train white male teachers, but now primarily for roles in higher education or school administration; indeed, some VMI alumni, after receiving masters degrees or doctorates, returned to teach at the Institute, which for many years preferred to hire its own graduates. Southern state universities, in continuing to exclude female and black students, reinforced the notion that a career as a scholar or as a college teacher in the South’s public and private white male colleges and universities was for white men only.

[T]he South has not been notable for training and supporting female scholars. The region’s poverty, together with its fierce resistance to coeducation and devotion to private, church-sponsored colleges, limited white women’s opportunities. Black women were more likely to attend coeducational institutions, but these schools, which were founded for the most part by northern missionaries after the Civil War, concentrated on moral supervision and vocational training. Although both white women’s colleges and coeducational black institutions nurtured autonomy, leadership, and social responsibility, they did not prepare women for scholarly careers, and research institutions such as the University of North Carolina and the University of Virginia did not fully open their doors to women until the 1970s.

310. Colonel Joseph R. Anderson, VMI class of 1870, “historiographer” and president of the VMI Alumni Association, observed early in the twentieth century:

The V.M.I. has pride in her long list of educators and their splendid work. In this list are sixteen college presidents; more than one hundred college professors; forty odd principals of academies and city high schools and superintendents of public education; and more than four hundred assistant professors and other teachers.

4 COUPER, supra note 34, at 112, 122 (quoting Joseph R. Anderson, The V.M.I. and Her Sons — in the Past, Address Before the Washington (D.C.) Chapter of the V.M.I. Alumni Association (Mar. 15, 1904)).

311. See BROOKE, supra note 84, at 294 (noting that as the school grew, “the junior positions in the faculty were filled with outstanding graduates of VMI who grew up with the school,” and that, during John Brooke’s “long service” on the faculty from 1865 to 1899, “most of his colleagues were graduates of the Institute”). Henry Wise commented on the changing composition of the faculty in more recent times: “[I]n 1952... alumni instructors predominated [on the faculty of 90], [b]y 1956 the ratio had dropped to 50 percent, ... [and] [b]y 1975 the alumni ratio had fallen to 31 percent.” H.A. WISE, supra note 33, at 227. Although by the mid-1970s, the “alumni generally ... [felt] that intangible and vital values of the VMI experience [could not] be maintained unless a large number of teachers [were] graduates,” the superintendent was apprehensive of inbreeding.” Id.; see id. at 271, 383-85 (regarding concerns of alumni about low proportion of faculty who are VMI graduates).

But teaching schoolchildren was another matter; by the 1870s many white Southern women had proved themselves fully capable of handling both the intellectual demands and discipline problems of teaching boys and girls in a coeducational environment, even under the stressful and impoverished conditions following the war and Reconstruction. Edward L. Ayers uncovered the following contemporaneous declaration: "'We want more lady teachers in the county,' an east Tennessee newspaper announced. 'Past experience proves very conclusively that they are quite or more successful than the gentlemen.'" But teaching schoolchildren was another matter; by the 1870s many white Southern women had proved themselves fully capable of handling both the intellectual demands and discipline problems of teaching boys and girls in a coeducational environment, even under the stressful and impoverished conditions following the war and Reconstruction. Edward L. Ayers uncovered the following contemporaneous declaration: "‘We want more lady teachers in the county,’ an east Tennessee newspaper announced. ‘Past experience proves very conclusively that they are quite or more successful than the gentlemen.’"313 This candid reassessment of gender roles and abilities typified the general reconceptualization of the role of men and women in education that “contributed significantly to the changing patterns of women’s lives” during and after Reconstruction.314

Several important developments contributed to the feminization of the teaching profession. First, the “surge of interest in education”315 placed public school education on the political and moral agenda of Southern states and communities. The demographics and economics of education in the South called for new solutions. "At the turn of the nineteenth century, the ratio of children to adults in the southern states was nearly double that of the rest of the nation, while the section’s expenditures per child for education averaged less than one-half that of other regions."316 Thus, “[s]chool reform, not coincidentally, stood as the most widely heralded and beneficial of all the reforms of the progressive South.”317

Second, “[t]he increasing interest in education coincided with the need of large numbers of women to find paid employment. School-teaching had always been a respectable thing to do, and now it was the first thought of many upper-class women who needed to earn

313. AYERS, SOUTHERN CROSSING, supra note 282, at 33. Although Ayers does not date the source, it is assumed from the passage in which it appears that the newspaper account appeared during the period following Reconstruction.

314. SCOTT, supra note 283, at 110.

315. id.

316. DEWEY W. GRANTHAM, THE SOUTH IN MODERN AMERICA: A REGION AT ODDS 333 (1994); see AYERS, PROMISE OF THE NEW SOUTH, supra note 288, at 418 (describing conditions and reform of Southern education at the turn of the century); AYERS, SOUTHERN CROSSING, supra note 282, at 176.

money.  

Nevertheless, the supply of educated women could not meet the sudden new demand for white female teachers. Anne Scott wrote that

Whether women went into the fledgling public schools, opened their own little private schools, or taught in one of the seminaries and academies which had survived from the past, many of them felt their preparation for teaching to be inadequate. They were therefore ready to respond dramatically when the educational reformers organized summer institutes or summer normal schools. Even three-day teacher-training institutes were oversubscribed, so great was the felt need of improvement.

Finally, in response to this demand came "[t]he next logical step" — "regular teacher-training schools" — more popularly known as normal schools. Paralleling the development of agricultural, industrial and technical schools for men only, the normal schools were primarily designed to train women for the teaching profession and other vocations. Following Reconstruction, Mississippi established the "first state-supported college for women in the United States" — the State Industrial Institute and College — for the purpose of providing "collegiate education, normal training, and industrial preparation to the young women of Mississippi."

Other Southern states quickly followed Mississippi's lead. Anne Scott made the following observation about these early normal schools for women:

Small and inadequate though they were, these normal schools were extremely important. Coming into a vacuum, they had far-reaching influence. They offered the first systematic training to prepare women for remunerative work. While they were at the outset primarily vocational, they provided enough general education to awaken the interest and spur the ambition of able girls who sometimes then went on to northern schools. The teachers trained in these normal schools began to teach in the public schools and there helped create the clientele for the few women's liberal arts colleges which were beginning to develop in the South. Bit by bit a little

318. Scott, supra note 283, at 111.
319. Id. at 112.
320. Id.
321. Some early normal schools were coeducational. For example, see Anne Scott's description of the private normal school established in Nashville in 1875 in which "scholarships were being offered to women on equal terms with men." Id.
322. Id. at 113.
323. See id. at 113-14 (describing the founding of state normal schools for women in Alabama in 1895 and in North Carolina in 1891).
core of college-educated women was built up, whose influence belied their number. Among them could be found the first tiny group of lawyers, doctors, and college professors and from their ranks were drawn many of the leaders of community action in the years after 1890.324

As a result of these transformations in Southern educational policies, practices and institutions, "every additional schoolroom created a new job for a woman, and by the turn of the century women schoolteachers constituted a growing cadre of professional women."325 The number of white women schoolteachers in the South "doubled in the 1880s while the number of white men declined. Women accounted for a majority of white teachers by the late 1880s and by 1900 the proportion of women in the South's schools was about the same as in the North."326 While "teaching absorbed the largest number of upper-class single women in search of employment,"327 Ayers noted that "[t]eaching became one of the few jobs in which women enjoyed an advantage, though it was not always a young woman's first choice. . . . [In addition,] teachers' pay remained at appallingly low levels."328

The Virginia Military Institute, once touted as the first normal school in Virginia, turned its focus on the task of preparing boys to become men for manly work. When it became evident that the civil calling of teaching school to children and adolescents was now defined as women's work with — particularly for Southern white men — low pay and low status, VMI quietly relinquished its formerly prominent and proud role in the state as a teacher training institute to the normal schools for women that were being established throughout the South. In redefining the public image of its peacetime mission, VMI cast aside any pretense that it designed its curriculum to serve, first, the needs of the state and only secondarily the needs and desires of its students. The state's need for qualified teachers could be filled more cheaply and efficiently by women, and so the state, too, was complicit in accepting gender as a defining limitation on the school's program. In a real sense, "drawing out the man" became the public purpose of

324. Id. at 114 (footnote omitted).
325. Id. at 115.
326. Ayers, Southern Crossing, supra note 282, at 33.
327. Scott, supra note 283, at 118.
328. Ayers, Southern Crossing, supra note 282, at 33; see Ayers, Promise of the New South, supra note 288, at 212.
the Institute, and as shifts occurred in the social and cultural conceptions of what it meant to be a man, the school and the state reshaped VMI's curriculum to fit that new meaning.

In reinventing itself after the Civil War, VMI returned to the essential outlines of the West Point model of education it had originally adopted, but the Institute needed to offer something special, something that would set the school apart from other schools in the competition for scarce state funds. While "the concept of citizen soldier was strong" before the war, it was not immediately clear how that mission would be served after the war. With regard to civil callings, the options for continuing "as a school where practical subjects were taught" were constrained by a lack of resources. Agriculture had been lost to the land-grant schools, and school teaching was becoming an underpaid woman's job. The school continued to press forward with its offerings in applied sciences, but the professors were hampered by lack of books, laboratories and equipment. Even after rebuilding the physical facility — through the end of Smith's tenure as superintendent in 1890 and on into the last decade of the century under the leadership of General Scott Shipp — the faculty, administration and Board of Visitors debated the direction of the school: whether and how to increase enrollment, whether to raise admission standards, whether to revise the curriculum, whether to focus on intellectual or practical attainments, and how to fit their academic goals into the military environment.

The uncertainty created by this transitional period and one aspect of its resolution was captured by the fact that in 1896 Superintendent Shipp addressed himself to those "well-meaning friends" who suggested the VMI curriculum would be improved by adding such courses as "telegraphy, stenography, typewriting, bookkeeping and many useful and subordinate arts." Shipp insisted that it was "much higher work to train the mind than the hand or eye" and there was insufficient time to do both.

329. BROOKE, supra note 84, at 293.
330. Id. at 294.
331. Resources after the war were particularly affected by the controversial and highly politicized decision of Superintendent Smith and the Board to rebuild the Institute in Lexington rather than in Richmond, the site preferred by state legislators, thus losing the opportunity to become a land-grant college. Id. at 296-97; see supra note 307.
332. Id. at 295-96.
333. Id. at 289-362, passim.
334. Id. at 357.
Ironically, all of these jobs had at one time been the exclusive domain of male workers, but by the 1890s the feminization of these jobs in the United States was under way. \(^{335}\) Shipp surely did not reject these practical subjects because he perceived them as not manly enough for VMI graduates; indeed, he appears to have assumed that they were appropriate jobs for men. Within the framework of a practical education, however, Shipp and his faculty sought a more prestigious, higher role for the Institute alumni in the development of the South. He no doubt perceived that

An educated man, faced with the choice among positions within the office hierarchy, was unlikely to choose to be a typist instead of a manager, who was higher-paid and invested with a fair degree of authority and power. \(\ldots\) [A] man who had enough education and literacy skills \(\ldots\) to obtain a job as a clerical worker was also probably educated enough to at least aspire to, and in many cases to attain, a managerial or professional position.\(^{336}\)

Whereas before the war the educational goals for its students had been less ambitious, particularly given the class background of most of the cadets and the provincial character of the school, the Institute now became more competitive and more select, grooming its graduates for positions of power and prestige in the newly emerging businesses and professions of the postwar South. VMI thus chose to expand its engineering curriculum, develop its academic offerings, raise its admissions standards, recruit out-of-state students and strengthen the credentials of its faculty.\(^{337}\) In short, it became more like an undergraduate college but with this difference: VMI educated men to be not just leaders, but citizen-soldiers. Shipp, the former commandant of

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335. Margery Davies writes:

Feminization proceeded at different rates in different job categories. It proceeded briskly among stenographers and typists: by 1880 women already made up 40 percent of the group; by 1900 they accounted for over three-fourths; and in 1930 they completely dominated the field — over 95 percent. The case was different for bookkeepers, cashiers and accountants. Women made up less than 6 percent of this group in 1880. That figure had only increased to 29 percent by 1900, and by 1930, was still only slightly more than half. \(\ldots\) The largest group of clerical workers, clerks, was still more male than female in 1930, when the percentage of women stood at 35 percent.

Margery W. Davies, Woman's Place Is at the Typewriter: Office Work and Office Workers, 1870-1930, at 52-53 (1982). It is likely that VMI's "well-meaning friends" were from Lexington or rural Virginia where they were isolated from some of the early effects of the transformations in gender-typed work roles occurring in urban, industrialized centers. See e.g., infra note 742.

336. Davies, supra note 335, at 57.

337. When General Shipp became superintendent, "vacancies created by \(\ldots\) resignations gave the Institute the opportunity to appoint its first Ph.D. to the faculty." Brooke, supra note 84, at 356. On recruitment of students, see id. at 355.
cadets, wrote in 1893, that the strict military regimen would produce "a trained body of energetic, self-reliant, practical men, who know how to turn to the best advantage all their endowments and attainments." VMI would be poised to educate the civilian leaders, managers and professionals of the New South: "military discipline could be made the handmaiden of intellectual achievement."

The continued relevance and legitimacy of VMI's military methodology, however, depended as well on the role its graduates might serve, not as officers of militia organizations in Virginia or the South, but as officers in the federal military. As VMI's links with the federal government and especially the United States Army were cemented in the last decades of the century, new content was given to VMI's concept of citizen-soldier. The historic ties of VMI's graduates to their local militia were replaced with opportunities to serve in the federal military or "the nation's reserve forces." Yet the meaning of citizen-soldier remained gendered, as it had been from the years of the early republic: women's status as citizens was still contested — their citizenship was theoretical and ambiguous — and their possible roles as soldiers were beyond contemplation.

338. Id. at 354 (quoting Superintendent Shipp's Annual Report (1893)).
339. Id.
340. "While VMI was doing its part to perpetuate the glories of the Confederacy and advertise the progress of the 'New South,' it was also drawing closer to the federal government." Id. at 359; see id. at 359-60 (discussing the "[l]inks" that VMI "forged with the Union," including establishing the "custom" of having the United States Army "detail an experienced officer at the Institute as commandant for a limited tour of duty" and the predominance of VMI graduates among the Virginians who "served as officers in the Spanish-American War and the Philippine insurrection").
341. From 1819 to 1916, the "ROTC thus served the militia; like the militia, it had only a tenuous association with the regular Army," but in its modern phases, leading up to and following the National Defense Act of 1916, "ROTC . . . serve[d] the nation's reserve forces" and eventually was "sanctioned and supported by the regular components." Snyder, supra note 65, at 72 (discussing National Defense Act of 1916, ch. 134, 39 Stat. 166). See generally JOHN GARRY CLIFFORD, THE CITIZEN SOLDIERS: THE PLATTSBURG TRAINING CAMP MOVEMENT, 1913-1920 (1972); GENE M. LYONS & JOHN W. MASLAND, EDUCATION AND MILITARY LEADERSHIP: A STUDY OF THE ROTC 27-63 (1959), noted in Snyder, supra note 65, at 91 n.8.
342. See JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 16-19, 38-40, 80-81, 91-94 (1991) (explaining that in the early republic, "the good life, good government, and good citizenship became more, rather than less, white and masculine by definition in both its individualistic and collective manifestations," Id. at 81, and that after the Civil War, "U.S. citizenship continued to reflect two related power concepts — namely, the contradiction between the theoretical rights of national citizens of the United States and the actual freedom to exercise those rights at the state level by traditionally disadvantaged groups of citizens," Id. at 18); Linda K. Kerber, "May All Our Citizens Be Soldiers, and All Our Soldiers Citizens": The Ambiguities of Female Citizenship in the New Nation," in ARMS AT REST: PEACEMAKING AND PEACEKEEPING IN AMERICAN HISTORY 1, 2, 15 (Joan R. Challinor & Robert L. Beisner
Thus, as VMI and VWIL today set about filling in the contours of what it means to educate citizen-soldiers, they begin with a concept laden with historical connotations of both race and sex discrimination. And, though the understandings of both the inclusiveness of citizenship and the possibilities of military service for Blacks and women have been altered fundamentally since the turn of the century, the VWIL plan, as well as VMI itself, continue to embed the training of citizen-soldiers in educational methods based on gendered assumptions. This accommodation, rather than including women in the civil and military life of the state and nation, perpetuates their original exclusion from the concept of citizen-soldiers.


A. CHIEF JUDGE JACKSON L. KISER: FINDING FACTS OR PRESERVING MYTHS?

The district court decisions in the VMI case are somewhat unusual because Chief Judge Jackson L. Kiser appended to the two opinions lengthy and detailed outlines of numerous specific findings of fact. The court’s general factual conclusions based on these specific findings adopted wholesale VMI’s mythic vision of its role in preserving Southern manhood and defining the relation of gender to the

eds., 1987) (noting that in “the acceptance of a new relationship between the military and the republican state, . . . American men . . . knew they were citizens and might be soldiers . . . [and] American women knew they were citizens, but not soldiers,” and that “in America, the family circle remained a woman’s state and the meaning of citizenship for women remained ambiguous”); Linda K. Kerber, The Paradox of Women’s Citizenship in the Early Republic: The Case of Martin vs. Massachusetts, 1805, 97 Am. Hist. Rev. 349, 350, 355 (1992) (commenting that “[t]he political discourse of citizenship has been gendered since its origins, in ways that historians are only beginning to comprehend,” that “citizenship is continually being reconstructed” with “gendered implications of superficially neutral rhetoric . . . in which political language [is] used to emphasize and sometimes redefine the meaning of masculinity,” and that “an ideology that takes enormous pains to exclude women is, by that very fact, an ideology interactive with women”).


344. In VMI I, the Findings of Fact run almost 30 printed pages, 766 F. Supp. at 1415-43 (about four times as long as the opinion itself, 766 F. Supp. at 1407-15), while in VMI II, the Findings of Fact are nearly 20 pages long, 852 F. Supp. at 485-503 (only slightly longer than the opinion, 852 F. Supp. at 471-85). One commentator observed that “Judge Kiser’s format in his decision makes VMI a good example of how influential the trial process is in affecting the decision-making process in constitutional cases. The VMI decision re-creates legislative facts by appending findings of fact. This procedure is certainly not unique, but it is rare.” Jackson, supra note 152, at 4 (footnotes omitted).
school's educational mission of producing citizen-soldiers. The first trial, on the constitutionality of VMI's men-only admissions policy, consisted of factual testimony about "public higher education in Virginia," "VMI's mission" and "the unique VMI educational method," as well as expert testimony about "gender-based" physiological and developmental "differences" between men and women, and both expert and factual testimony about the "anticipated effects of coeducation on VMI." The second trial, on the constitutionality of the proposed VWIL remedy, included factual and expert testimony about "the proposed remedial plan," the "status report" on the "VWIL program specifications," the "history," background and facilities of Mary Baldwin College, and the "differences between VWIL and VMI."

Although Judge Kiser distinguished the expert witnesses from the fact witnesses, he blurred the distinctions about the weight and relevance of evidence pertaining to the facts about VMI and Mary Baldwin College — the adjudicative facts — and the general, empirical evidence from the fields of social sciences, human physiology and education — the legislative facts. Each fact in the two appendices is presented as if it has the same legal significance and certainty as the one before and the one after. Yet, within the pages of adjudicative facts — of which some are unassailable, some equivocal, some important and some trivial — and in the opinions themselves, can be found numerous controversial legislative facts. The findings of fact and the broader factual conclusions embody the judge's understandings about


347. The categorization of facts as adjudicative or legislative has been attributed to Kenneth C. Davis. *See* Jackson, *supra* note 152, at 2 n.4 (discussing Kenneth C. Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952-59 (1955)). *See generally* Jackson, *supra* note 152, at 1-13 (examining judges' use of adjudicative and legislative facts and reviewing some of the scholarship on the role of legislative facts in constitutional decision-making). Beginning with the premise that "[legislative] facts are tested most effectively in the trial arena through the tools of observation and cross-examination" rather than through a "Brandeis brief" presented to an appellate court, *id.* at 5, 2-3, Jackson showcased Judge Kiser's decision in *VMI I*, as being "better informed" and "adequately analyzed," and as providing "settled facts that fully support offered theories." *Id.* at 4, 19, 5. Jackson argued that *VMI I* "demonstrates the force that legislative facts can have in an appellate court when they are settled and adequately analyzed by the trial judge." *Id.* at 19. Jackson was correct that Judge Kiser's type of fact-finding was influential in the appellate decision-making process, but, as I hope to show with this Article, he missed the mark in his conclusions that the decision was "better informed," "adequately analyzed" or fully supported by "settled facts." In fact, Judge Kiser's decision is an illustration of how pernicious legislative facts can become when it is assumed that they are settled by a trial judge.
the relationship between research about gender, Virginia's educational policies and constitutional law. Packaged as facts, many of these conclusions are nothing more than simplistic or reductionist summaries of complex and sometimes controversial research and scholarship findings that are stripped of their underlying assumptions, caveats and qualifications. Moreover, many of the adjudicative facts about VMI are shaped by Judge Kiser's apparent acceptance of the Institute's mythic image of itself. But the trial record presented only a small and incomplete sampling of the historical and cultural narratives that can be — or have been — told about VMI.

The legal and policy implications of Judge Kiser's fact-finding should be placed within the broader context of the underlying historical and ideological narratives and counter-narratives that VMI's own historians, administrators, students and teachers have produced. The trial testimony and Judge Kiser's factual conclusions — about the legitimacy of the Institute's method of educating citizen-soldiers, the significance of tradition and change at VMI, and the relevance of the "essential" aspects of VMI's holistic educational methodology — are worth examining in the context of the larger record of VMI's history and the myths that have grown out of that history. Like all institutions that can claim a past and a set of traditions, VMI has an interest, particularly in the VMI litigation, in preserving and re-creating what it sees as valuable myths and obscuring troublesome stories that detract from the power of those myths.

Judge Kiser accepted the myths of VMI, and he played an important role in perpetuating them, in turning some of the myths into facts and in persuading the Fourth Circuit Court of Appeals that VMI's traditions made it a very special place — "a different type of institution" — that, if possible, ought to be preserved just the way it is. But Judge Kiser failed to question VMI's articulation, for purposes of the litigation, of the value of its traditions or the significance of change. There is another way to view VMI that was captured in 1972, in these observations by VMI's tenth superintendent, General Richard Logan Irby:

348. The court of appeals could only overturn the district court's findings of fact if they were clearly erroneous within the meaning of Federal Rule of Civil Procedure 52(a). Anderson v. City of Bessemer, 470 U.S. 564, 573, 576 (1985). This would have been a formidable burden for the United States to meet because Judge Kiser's broad factual conclusions were ostensibly supported by so many specific factual findings which arguably had at least some support in the record.

349. VMI I, 766 F. Supp. at 1415.
INSTITUTIONAL MYTHS

Living on past glories is not enough. . . . VMI must move forward with the times. I put to you a simple question. Is it necessary to relinquish those fundamental values for which VMI has always stood? I say no; they are just as essential as they ever were. This is not to say that changes are not in order — of course they are. Any institution which attempts to live on its past glories and with an attitude such as was so well stated in "The Charge of the Light Brigade," "Theirs not to reason why, theirs but to do and die," is likely to end up with the same fate. Ours is to reason why and when the "reason" is not satisfactory to then say "Why." If the "Why" is not satisfactory, obviously change is called for.  

Judge Kiser heard days of testimony and found a great many facts, but he failed to ask why VMI continued to refuse to admit women or why admitting women would destroy VMI — why was this litigation, for VMI, "nothing short of a life-and-death confrontation"? Judge Kiser dodged the difficult questions, invoking instead VMI's past glories. His opinion in VMI I began with an allusion to the New Market cadets, and both of his VMI opinions ended with allusions to cadets marching to the fife or to the drum. These were clever rhetorical devices, illustrating Judge Kiser's awareness of the persuasiveness of historical narratives and metaphor. But another judge might have started, like General Irby, with an allusion to the "Charge of the Light Brigade" and ended, perhaps with more historical accuracy, with the VMI cadets waking to a bugler sounding reveille.  

351. VMI I, 766 F. Supp. at 1408.
352. The New Market cadets have been described as having performed a "gallant, even spectacular, infantry charge" directly into "the face of heavy rifle and artillery fire." John G. Barrett & Robert K. Turner, Jr., Introduction to LETTERS OF A NEW MARKET CADET: BEVERLY STANARD ix, ix-x (John G. Barrett & Robert K. Turner eds., 1961). But the tragic deaths at New Market of many of the young VMI cadets, who had never before engaged in battle, were preventable: the cadets, like the soldiers in the Charge of the Light Brigade, advanced up the hill toward the Union guns with "[t]heir line ... as perfectly preserved as if on dress parade or in the evolutions of a review." 2 COUPER, supra note 34, at 321 (quoting Letter from Captain Franklin E. Town, United States Army, reprinted in TIMES-DISPATCH (Richmond, Va.), Apr. 24, 1898)). Though the eyewitness accounts of the New Market Battle are contradictory, this much appears true: the veteran Confederate soldiers, who most certainly recognized the foolhardiness and dangers of marching lockstep directly into artillery fire — like the infamous Light Brigade — at first held back, but as they witnessed the cadet ranks "being decimated," the veterans "on both sides" responded to the "heroic enthusiasm" and "boyish cheers" of the cadets. J.C. Wise, supra note 35, at 318, 321, (quoting EDWARD R. TURNER, THE NEW MARKET CAMPAIGN (1912)). For one historical interpretation of the role of the veterans, see generally id. at 315-23 (quoting primarily from Professor Edward Turner's work).

Beginning in 1906 a professional bugler replaced the two black musicians — very likely former slaves — who, in addition to "chopping wood, hauling water and attending to the other
may well be that VMI needs a wake-up call before its cadets march lockstep into becoming anachronistic oddities in the face of a changing world where they will be no more suited to be citizen-soldiers than to be men in modern society, or even gentlemen in the New South. But the myths of VMI have clouded the issues of the case, making it more difficult, and more imperative, to take another look at Judge Kiser’s facts.

B. The Defendants, the VMI Alumni and the VMI Attorneys

The theories and underlying facts developed in VMI I owe much to the fact that the State’s interests came to be defended in the VMI litigation partly by two intervenors — the VMI Alumni Association and the VMI Foundation — two private organizations that have no state responsibility for VMI’s admissions policies and, no doubt for this reason, were not named as defendants in the VMI lawsuit. VMI’s attorneys can be credited with authoring the legal theories and the perspectives on the facts in VMI I that so decisively shaped Judge Kiser’s legal and factual conclusions and also defined the elements of the VWIL remedy. But the VMI alumni organizations also played an important role in the case — a role that reflects the alumni’s historic influence over the direction of VMI’s policies.

The defendants named in VMI I were the Commonwealth of Virginia, Governor Wilder, VMI, the Institute’s superintendent, the Board of Visitors, the Board’s president and members, and Virginia’s State Council of Higher Education and its members and officers. The State Council and its members and officers were dismissed from the action, and Governor Wilder was “given permission not to participate in the litigation” based on the fact that “[i]n his answer to the

wants of the Institute,” played the fife and drum for reveille and taps and to signal the time for other daily cadet routines. 1 COUPER, supra note 34, at 68; see H.A. WISE, supra note 33, at 408.

353. Commentators, including Professor Elizabeth Fox-Genovese, a witness for the defense in the VMI case, have noted that the cadets’ public demonstration of jubilation at Shannon Faulkner’s departure from The Citadel on August 19, 1995, was not behavior worthy of either true soldiers or of Southern gentlemen. See Elizabeth Fox-Genovese, Single-Sex Education Under Siege, WALL ST. J., Aug. 24, 1995, at A16 (“Doubtless the Citadel’s cadets did not fully live up to their own standards of gentlemanly conduct.”); David H. Hackworth, How to Make a Real Warrior, NEWSWEEK, Sept. 4, 1995, at 28 (“You would never have marine recruits whooping when someone busted the course.”).

354. For a general description of the Alumni Association and its history, see H.A. WISE, supra note 33, at 473-98. For a similar discussion of the VMI Foundation, see id. at 499-520.


356. Id.
complaint, [he] stated that 'the failure to admit females to [VMI] is against his personal philosophy' and 'no person should be denied admittance to a state supported school because of his or her gender.' Subsequently, "As the result of Governor Wilder's position and because of the conflict between the Governor, the Commonwealth, and VMI, the Attorney General of Virginia was granted leave to withdraw from representation of any party." Next, "the Commonwealth obtained pro bono counsel, who . . . obtained on behalf of the Commonwealth a stay of proceedings against it during the liability phase of litigation, on the condition that it abide by the court's liability determination." Finally, the two private entities — the VMI Foundation and the VMI Alumni Association — "intervened as defendants in the case over the United States' objection."

Thus, with the State Council on Higher Education and its members dismissed, and the Governor and the Commonwealth out of the litigation for the trial and appeal of the liability question, only the VMI administration and the Board of Visitors and its members were left as defendants. Joining them, and in effect filling the vacuum left by the Governor and the Commonwealth, were the two intervenors, private entities — the VMI Foundation and VMI Alumni Association — represented by their private counsel. The VMI Foundation, which has the largest per capita endowment of any undergraduate college in the country, retained Griffin Bell, the former United States Attorney General, to represent VMI's interests. It was a powerful legal team with ready access to the media and the ability to draw on the VMI alumni's broad network of resources and information.

357. VMI I, 976 F.2d at 894.
358. Id. The attorney general of Virginia was then Mary Sue Terry, "the first woman elected to statewide office in Virginia history, [who took] to the ramparts as a most unlikely defender of VMI's all-male tradition, . . . [bringing] down a hail of critical fire." Stokes & Groves, supra note 152, at 418. Commentators have suggested that Terry withdrew in part because she was "stung by popular criticism." Russo & Scollay, supra note 152, at 1074.
359. VMI I, 976 F.2d at 894.
360. VMI I, 766 F. Supp. at 1408; see 976 F.2d at 894 n.3 (noting that the Foundation and Association, "neither of which is a state agency, were allowed to participate in the litigation as intervenors" (emphasis added)).
361. VMI I, 976 F.2d at 894.
362. At the April 1991 six-day trial on liability, "[a]ll defendants, except Governor Wilder, were represented by common counsel," and Governor Wilder, who had separate counsel, "did not personally appear or participate in the trial." VMI II, 766 F. Supp. at 1408.
363. See Stokes & Groves, supra note 152, at 418; see also VMI II, 852 F. Supp. at 503 (finding that VMI's endowment of $131 million is "the largest endowment on a per student basis" of "any . . . undergraduate institution in the nation").
Indeed, the alumni influence on the course of the litigation extended beyond their own private association and foundation. The Board of Visitors, the body that determines VMI's admissions policies, is itself dominated by VMI alumni.\footnote{766 F. Supp. at 1409.} While the members of the Board are "nominated by the Governor . . . subject to confirmation by the State Senate,"\footnote{Id. at 1421. The Virginia adjutant general sits as an \textit{ex officio} member of the Board. \textit{Id.} at 1409; see VA. CODE ANN. § 23-93 (Michie 1993).} Virginia law requires that of the seventeen Board members, twelve "\textit{must be} VMI alumni."\footnote{766 F. Supp. at 1409 (emphasis added); see VA. CODE ANN. § 23-93 (Michie 1993). The statute also provides that four members "shall not be alumni of the Institute." VA. CODE ANN. § 23-93. Because of VMI's admissions policies, this statutory requirement obviously means that only a maximum of five slots on the Board are open to women. The Board was first opened to nongraduates in response to a 1965 recommendation of the Southern Association of Colleges and Schools after its first accreditation visit to VMI. See H.A. Wise, \textit{supra} note 33, at 282-84. After June 30, 1985, the statute required that eight of the twelve alumni "shall be residents of the Commonwealth" and "[t]he remaining alumni visitors shall be nonresidents." VA. CODE ANN. § 23-93.} General John W. Knapp, VMI's superintendent during the two trials and the appeals to the Fourth Circuit, is a 1954 graduate of VMI as well as a former member of the faculty.\footnote{General Knapp was head of the civil engineering department, dean of the faculty, and for one year, acting superintendent, before being appointed superintendent in 1989. He announced his retirement plans in May of 1995. \textit{See John W. Knapp to Retire as Superintendent of VMI, VIRGINIAN-PILOT} (Norfolk), May 26, 1995, at B9. Knapp was replaced by another VMI alumnus, Josiah Bunting, who was an expert witness for the defense in both VMI trials. \textit{See supra} note 104.} Significantly, the remaining public defendants in the liability phase were sufficiently aligned with the private intervenors that they were able to share common counsel without raising problems of conflict of interest.

It seems legitimate to question whether these two VMI alumni organizations, which have an interest in perpetuating the Institute as a fraternity closed to women, should have taken the role as \textit{de facto} representatives of the public defendants and the public interest in litigating the liability phase of VMI \textit{I}. Over the years, VMI alumni as individuals have earned a reputation for expressing forcefully their opinions about cadet behavior and discipline and for second-guessing changes that are made in Institute practices and policies.\footnote{See \textit{e.g.}, H.A. Wise, \textit{supra} note 33, at 241-42.} Moreover, the alumni as individuals or through their association have often been at odds with VMI's administration, the Board of Visitors and other state bodies interested in educational change. For example, in 1956 the Board of Visitors censured two alumni "for harassing the
superintendent and interfering with his administration."369 Earlier, in 1928 the Barton Commission was asked "to study the role of state-supported colleges in the higher educational system of Virginia."370 The Commission, considered "a 'hotbed' of postwar pacifism," caused a furor among alumni when it "included a recommendation that VMI be turned over to its alumni or converted into a vocational school."371

The Board of Visitors, an inherently conservative group with its majority alumni membership, has sometimes been a conduit for alumni views and has at times resisted changes urged by the faculty or the administration. More importantly, the cadets are able to use their contacts with the alumni to influence the Board of Visitors. Not only do the alumni "base their conception of the Institute on what it was during their cadetship,"372 but they also turn to the present cadets for information about VMI. As VMI's modern historian noted:

Alumni views frequently reflected those of cadets, sometimes mistakenly because of a hasty jumping to conclusions before all the facts were in. Yet thoughtful opinion of Corps leaders was picked up by alumni and quite frequently was the harbinger of, and a strong influence on, policy changes made by the Board of Visitors.373

The responsiveness of the Board of Visitors to alumni demands led one VMI superintendent to caution the Board that "It should be borne in mind by the Board of Visitors that V.M.I. is a State Institution and that the first responsibility of the Board is to the Commonwealth of Virginia, not to the whims of the alumni."374

The cadets historically have created their own cultural practices and rituals, established their own formal and informal rules for their residential coexistence, and determined and enforced their own standards for distinguishing cadets from outsiders, true men from boys. In addition, working through alumni, cadet leaders have had an indirect,

369. Id. at 242; see id. at 243-46 (discussing the "criticism [which] came largely from graduates in Virginia" of the "alleged mistakes and inadequacies of leadership" of the superintendent in handling the cadets' brief abolition of the rat line in 1957).
370. Id. at 126.
371. Id. at 126-27. Henry Wise noted that one legislator, who was sympathetic to VMI alumni, provided a "typical" response to the Barton Commission recommendation: "I'll be here voting against withdrawal of State aid from V.M.I. when all the 'ists' are under the ice where Hell froze over." Id. at 127.
372. 1 COUPER, supra note 34, at 333.
374. Id. at 249 (quoting General William H. Milton, Jr., Annual Report (June 30, 1960)).
but not insignificant, role in shaping the policies of the Board of Visitors. Ironically, this suggests that if a majority of the cadets themselves wanted women to be admitted to VMI they very likely would be able to use their ties to the alumni to influence the Board of Visitors to effect a change in the admissions policy. But having the power to change is not the same as having the will to change: as long as the VMI alumni and the cadets continue to replicate their culture of manhood by their control over the socialization of each new class and the exclusion of those who are not manly enough, they will never have the will.

In the *VMI* trials, the VMI attorneys successfully created for Judge Kiser the mythic vision of the Institute's purpose: it is the secret, insiders' knowledge that each cadet and alumnus shares about the Institute's role in his own personal achievement of manhood. The VMI attorneys also successfully developed a legal theory and an analysis of the facts that would transform this private purpose into a public purpose of the Commonwealth of Virginia. Their most difficult task, however, was to buttress the myth with scientific fact — to make the myth ring true in court — while they simultaneously and scrupulously disavowed the use of stereotypes. For this, they had to rely extensively on the testimony of experts drawn primarily from the social sciences, higher education and physiology, in the remedial phase, the defendants also brought in a feminist historian. The government plaintiff had its own social science experts, as well as a feminist psychologist and an expert in comparative historical sociology and the sociology of gender. The use of such experts was creative and risky for both sides. But, for the defense, the experts proved to be essential in transforming the mythic culture of VMI, which is continuously created and re-created by VMI cadets and alumni, into "facts" that Judge Kiser could "find" in his opinions.

378. Dr. Carol Nagy Jacklin. See *id.* at 490.
379. Dr. Michael S. Kimmel. See *id.*
V. THE SOCIAL SCIENCE EVIDENCE: DEFENDING AND CHALLENGING GENDER STEREOTYPES

A. THE ROLE OF THE FEMINIST EXPERTS

The legal question before Judge Kiser in the trial in VMI II was whether the defendants' proposed remedy — the VWIL plan — could "pass equal protection muster under the appropriate intermediate level of scrutiny." The VMI attorneys, however, succeeded in turning the case into a trial, first, on the merits of single-sex education in general (not just the VWIL program) based on evidence of gender-based differences in learning styles, second, on the legitimacy of state autonomy in providing diverse educational methodologies by taking account of desired outcomes, cost and existing student demand, and finally, on the lack of demand among most women for a VMI-style education. Coeducation at VMI was never considered as a possibility; the only issue was whether VWIL would be appropriate for women and produce an outcome similar to VMI.

To defend their VWIL plan and provide the evidence to support their theory of the case, VMI called upon a number of social science and education experts, including a number of experts who had testified in the liability trial. Prominent among the roster of new witnesses for the VWIL trial was Elizabeth Fox-Genovese, feminist historian and scholar of feminist theory and women's education, Eleonore Raoul Professor of the Humanities at Emory University, and author of *Feminism Without Illusions*. David Riesman, Henry Ford II Professor of Social Sciences, Emeritus, at Harvard University and author of *The Lonely Crowd*, made a repeat "appearance" by having his deposition testimony read at the trial. Combined with the testimony of Richard C. Richardson, Jr., an expert on higher education who was a witness in *VMI I* and a consultant on the development of the VWIL...
plan, the testimony of Fox-Genovese and Riesman was persuasive in
convincing Judge Kiser “that the differences between VWIL and VMI
are justified pedagogically and are not based on stereotyping.”

The United States, on the other hand, never abandoned its origi-
nal position, as stated in its complaint, that the appropriate remedy
was for VMI to change its admissions policy and become coeduca-
tional. Since this remedy was not before the court, however, the
government attempted to use empirical research on gender differ-
ences and its relationship to the political and pragmatic meaning of
equality as a basis for invalidating the VWIL plan. In support of its
argument that equal protection analysis requires VMI to offer women
the same unique educational methodologies used at VMI, not equal
outcomes, the government attempted to establish that the outcomes
of VWIL and VMI would not be the same unless outcomes were
defined so broadly that they became meaningless. The government
argued that the trial court finding that the facilities and methodologies
at the proposed VWIL were “substantially” different from VMI was
dispositive on the issue of whether the plan adequately remedied
VMI’s constitutional violation. Finally, the government argued
that, as a matter of law, the lack of demand among women for either a
VMI-type education or admission to VMI was irrelevant to the ques-
tion of the sufficiency of the VWIL remedy.

On the issue of gender differences, the government presented the
testimony of another feminist scholar, Carol Nagy Jacklin, an expert
on the psychology of gender and its relationship to learning, co-author
of The Psychology of Sex Difference, Dean of Social Sciences and
Communication at the University of Southern California, and profes-
sor of psychology. Jacklin testified that the average differences
between men and women on a number of psychological and social
attributes that affect learning were insignificant when compared to the

386. VMI II, 852 F. Supp. at 481. For Richardson’s qualifications as an expert, see id. at 487-
88.
387. Complaint at 4, VMI I (No. 90-0126-R) (seeking a permanent injunction barring VMI
from “discriminating on the basis of sex in the operation of VMI, including admission policies”),
reprinted in Joint Appendix at 32, 35, VMI II (Nos. 94-1667 & 94-1717); see Appellant’s Brief at
40, 42, 43, VMI II (Nos. 94-1667 & 94-1717); Appellant’s Reply Brief at 17-18, VMI II (Nos. 94-
1667 & 94-1717).
388. See Appellant’s Brief at 38-39, VMI II (Nos. 94-1667 & 94-1717).
389. See id. at 29 (citing Joint Appendix at 333-34, VMI II (Nos. 94-1667 & 94-1717)).
390. See id. at 17-18.
391. See ELEANOR E. MCCOBY & CAROL NAGY JACKLIN, THE PSYCHOLOGY OF SEX DI-
FERENCES (1974).
392. See VMI II, 852 F. Supp. at 490.
wide variability among individuals within each group.\textsuperscript{393} In other
words, the differences between the sums of the aggregated scores of
each group were either nonexistent or so small that gender was a poor
predictor of any individual’s score. Therefore, the government attor-
neys argued, reliance on generalizations about average characteristics
of women as a rationale for denying public benefits to an individual
solely because she is female is unlawful stereotyping that stigmatizes
the individual.\textsuperscript{394}

Two other government witnesses had potential for providing key
testimony. The witness on the “comparability of higher educational
programs” was Alexander William Astin, Professor of Higher Educa-
tion and Director of the Higher Education Research Institute at the
University of California at Los Angeles.\textsuperscript{395} In his 1977 book, \emph{Four
Critical Years}, Astin had “extolled the virtues of single-sex education
at the college level.”\textsuperscript{396} Despite his belief in the pedagogical benefits
of single-sex education, Astin had revised some of his earlier scholar-
ship.\textsuperscript{397} At the trial, he was highly critical of numerous assumptions
underlying the VWIL plan, particularly the notion that VWIL, with its
very different student body and educational methodology, would be
able to produce outcomes similar to VMI.\textsuperscript{398} The other government
witness, Michael S. Kimmel, “an expert in historical sociology and the
sociology of gender,”\textsuperscript{399} was prepared to compare the VWIL plan to
its historical counterparts and to testify generally about the role of
institutional stereotyping in the history of women’s education.\textsuperscript{400}
Judge Kiser, however, virtually ignored Kimmel’s historical insights,
possibly because of Kimmel’s admission that he was a “spokesman”
for a men’s “pro-feminist” organization.\textsuperscript{401} More importantly, Judge
Kiser completely discredited most of the testimony of Jacklin and
Astin because of a probing cross-examination by the defense that

\begin{thebibliography}{99}
\bibitem{393} Joint Appendix at 821-23, \textit{VMI II} (Nos. 94-1667 & 94-1717).
\bibitem{394} Appellant’s Brief at 17-18, 23 n.6, \textit{VMI II} (Nos. 94-1667 & 94-1717).
\bibitem{395} \textit{VMI II}, 852 F. Supp. at 489.
\bibitem{396} \textit{Id.} at 479.
\bibitem{397} \textit{See Alexander W. Astin, What Matters in College? Four Critical Years
Revisited} (1993).
\bibitem{398} Joint Appendix at 965-67, \textit{VMI II} (Nos. 94-1667 & 94-1717).
\bibitem{399} \textit{VMI II}, 852 F. Supp. at 490.
\bibitem{400} Joint Appendix at 879-80, \textit{VMI II} (Nos. 94-1667 & 94-1717).
\bibitem{401} \textit{See id.} at 891 (Kimmel admitting on cross-examination that he is a “spokesman”
for NOMAS, the National Organization of Men Against Sexism); \textit{see also VMI II}, 852 F. Supp. at
490.
\end{thebibliography}
effectively undermined the consistency and objectivity of their scholarly opinions.\textsuperscript{402} Their personal beliefs in a political and legal notion of equality that discounted the significance of gender differences — particularly with regard to women's access to public education — was used to discredit their testimony about their specific research findings and to question the reliability of their professional judgment generally.

The trial on the VWIL remedy was reminiscent of an earlier controversial trial testing the meaning of equality of opportunity and the significance of historical gender differences — and testing the credibility and expertise of one feminist scholar against another under the "winner takes all" rules of the courtroom. The case was EEOC v. Sears, Roebuck & Co.,\textsuperscript{403} in which the EEOC attempted to prove that Sears had engaged in a pattern of sex discrimination in its hiring practices for its commission-sales positions. To establish liability in the absence of direct evidence of intentional discrimination, the EEOC presented statistical evidence showing a disparity in the numbers of men and women the corporation had hired for these jobs. The Sears attorneys argued that the disparity was caused, not by managers limiting opportunities for women in commission sales, but by women's lack of interest in pursuing those types of jobs.

To prove their theory, the defense attorneys relied on the "logical conclusions" drawn from "feminist scholarship about women's collective identity and culture as women," as established in the testimony of Professor Rosalind Rosenberg, a well-respected feminist historian at Barnard College.\textsuperscript{404} The EEOC attempted to establish the irrelevance and unreliability of Rosenberg's conclusions with their own well-known feminist expert, historian Alice Kessler-Harris. Using historical studies, Kessler-Harris testified that women and men in the workplace were motivated primarily by the same economic self-interest and that structural limitations on women's opportunities were more significant in determining women's work preferences than cultural factors. On the witness stand, under both direct and cross examination, Rosenberg "held to a tight model that unproblematically linked socialization to individual choice," and "her descriptions of gender differences accorded with prevailing normative views."\textsuperscript{405} On

\textsuperscript{402} See VMI II, 852 F. Supp. at 479, 480.
\textsuperscript{403} 628 F. Supp. 1264 (N.D. Ill. 1986), aff'd, 839 F.2d (7th Cir. 1988).
\textsuperscript{404} FOX-GENOVESE, \textit{supra} note 384, at 71.
\textsuperscript{405} JOAN WALLACH SCOTT, \textit{The Sears Case, in Gender and the Politics of History} 170-71 (1988).
the other hand, Kessler-Harris was subjected to a devastating cross-examination that both revealed the internal contradictions of her attempt to articulate a sophisticated structural and contextual historical analysis of women’s work preferences, and demonstrated the inconsistencies in her testimony based on evidence from her own scholarship. The defense also challenged the objectivity of her analysis of employer behavior in the labor market because of her assumptions, expressed in her writings, that employers were motivated by hostility to workers’ rights generally. The result was that the district court judge found Kessler-Harris’s testimony unreliable, accepted Rosenberg’s explanation of the gender disparity and held that Sears was not liable under Title VII for employment discrimination.

In the aftermath of the case, feminist historians criticized Rosenberg for testifying for the defense and decried the court’s use of scholarship on women’s history to uphold Sears’ allegedly discriminatory hiring practices. Legal and feminist scholars, including Kessler-Harris, subsequently debated whether Rosenberg had compromised her feminist principles in testifying for the defense, and whether an expert like Kessler-Harris could have survived a skillful cross-examination, given the nature of “[t]he exacting demands of the courtroom for consistency and ‘truth,’” the fact that each strand of feminist theory was so complex, contextual, political and even internally...
contradictory, and that feminists were themselves so divided on the question of the meaning of difference. While the risk that the testimony of feminist experts would be “misused and misheard” in the VMI case — as well as in other substantive areas of the law — has raised concern among feminist scholars, the Sears case, as the paradigmatic, and problematic, trial of the meaning and utility of feminist theories about difference, has continued to have a central place in the work of feminist legal scholars on the jurisprudential concept of equality under Title VII.

B. PROFESSOR ELIZABETH FOX-GENOVESE

The VMI II trial similarly set one feminist against another — this time on the relationship of social science scholarship and the history of women’s education to the constitutional significance of gender differences in guaranteeing equality under the law. Ironically, the defense’s feminist, Elizabeth Fox-Genovese — who played a somewhat analogous role in VMI II to Rosenberg’s role in Sears — had written about the Sears case in her book on feminism and individualism, noting that though she “disagree[d] with aspects of Rosenberg’s stand,” the debate about her testimony had been “wonderfully revealing” because “all she had done was to draw logical conclusions from many feminists’ own favorite premises about gender difference.” There was one important difference between Sears and VMI II, however, which should allow Fox-Genovese to escape the broad—

411. For example, with regard to the issue of battered women, Elizabeth Schneider recently wrote that “[a]lthough the purpose of admitting expert testimony on battering was to describe many of the common experiences that battered women share, it is too often ‘misused and misheard to enshrine old stereotypes in a new form.’” Elizabeth M. Schneider, Hearing Women Not Being Heard: On Carol Gilligan’s Getting Civilized and the Complexity of Voice, 63 Fordham L. Rev. 33, 34 (1994) (quoting Elizabeth M. Schneider, Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering, 9 Women’s RTS. L. REP. 195, 215 (1986)); see Gilligan Brief, supra note 152, at 3-4, 13-15 (arguing that “VMI has distorted and seriously misrepresented Professor Gilligan’s research to advance conclusions that it does not support and that she does not endorse”).


413. FOX-GENOVESE, supra note 384, at 71.
based criticism from other feminists that Rosenberg received. The Sears trial was on the issue of the defendant’s liability for discrimination. In VMI II, liability had already been determined, and the trial was about the appropriateness of the remedy developed by the defendants. The question was no longer whether the Commonwealth denied women equal protection of the law by funding VMI as a male-only military college, but what should be done to remedy this legal problem — an issue about which feminists and legal scholars reasonably could and did disagree. In any event, the trial provided Fox-Genovese with an opportunity to put forward her “own favorite premises” in the context of a lawsuit that had major constitutional ramifications as well as significant implications for the future of single-sex public education. As an expert witness for the defense, Fox-Genovese could, conceivably, be faithful to her feminist theories and put them to use in promoting new opportunities for less privileged women, thus, on the latter score, distinguishing herself from Rosalind Rosenberg. Moreover, with good preparation by VMI’s attorneys, a carefully contained direct examination, a sympathetic judge and a little luck with the government’s cross-examination, she could avoid the fate of Alice Kessler-Harris.

A close reading of the transcribed testimony of Fox-Genovese, submitted to the Fourth Circuit in VMI II, suggests that she got a free ride from Judge Kiser and, to a lesser extent, from the government attorneys. Her testimony on direct examination was surprisingly lacking in substance for a scholar of her erudition and stature; much of her testimony consisted of repetitive, vague, conclusory observations about women’s education and the VWIL plan. Indeed, her responses to the VMI attorney on direct examination seem more of a testimonial to the VWIL plan than testimony about her own extensive scholarship and research findings. While she seems to have done her homework in preparation for the trial, it also appears that she was not adequately coached on how to deliver her testimony: the open-ended

414. See, e.g., Caplice, supra note 152, at 272-75 (approving the rationale of the VWIL plan); Susan Estrich, Single-Sex Schools Work Despite Citadel, USA TODAY, Aug. 24, 1995, at A17 (stating in her editorial, “I’m actually beginning to feel sorry for the much-maligned male cadets at The Citadel.”). Susan Estrich is a member of the External Advisory Council for the Virginia Women’s Institute for Leadership.

415. Fox-Genovese testified as follows regarding her “familiarity” with VMI and Mary Baldwin College:

I have not visited the Virginia Military Institute but by now I have read a great deal about it; as an antebellum historian, I know it, as it were, from its origins, and the same is true of Mary Baldwin, I might add, but I have talked to graduates of VMI, I have
questions she was asked invited impressionistic, rambling responses. Even when she was ostensibly offering her professional judgment about factual matters, her expert opinions were interspersed with pure speculation and brief discourses on her political or normative views. For example, in the following testimony on direct examination, she interjected her personal beliefs, as an aside, into a description of the demographics of Mary Baldwin's current student body:

One of the things that is most striking about Mary Baldwin is that the income of the families who send their daughters there has been declining during the last 20 years, so that Mary Baldwin, which started as a very elite institution years ago is now an institution that is serving a population of middle class, lower middle class people, black and white, and it's in that sense I very much admire, I will confess, what they're doing, because they are taking ordinary, if you will, young women and giving them the possibility of imagining ambition.  

Later, overruling the government's hearsay objection, Judge Kiser went so far as to allow Fox-Genovese to recount an anecdote about a conversation she had with a student on one of her two visits to the Mary Baldwin campus.  

studied the catalog. I have read the Richardson report; I have viewed hours of tapes. In short, I've read everything I could get my hands on about VMI.  
With respect to Mary Baldwin, in addition to having read about it for years because I'm interested in women's education in the south, I have now visited it twice, talked with students twice, talked with faculty members, talked with administrators.  
Joint Appendix at 561-62, VMI II (Nos. 94-1667 & 94-1717).  
416. Id. at 562-63 (emphasis added).  
417. In response to the plaintiff's hearsay objection, Judge Kiser said, "It is hearsay but, if I understand, this is the way Dr. Fox-Genovese conducts her research by interview."  
Id. at 563-64. After hearing more of the hearsay, Judge Kiser qualified his ruling, stating, "Of course, this is the basis of her [Fox-Genovese's] opinion. It doesn't necessarily mean what the young woman said is true."  
Id. at 564. Fox-Genovese, on the witness stand, responded, "It is one of the ways, thank you, Your Honor," and finished retelling the anecdote about a "young African-American woman who was a little less talkative than some of [her] fellow students," who had explained how her highest aspiration had once been to get a B.A. and she now aspired to earning a Ph.D.  
Id. at 563-64. Perhaps realizing the significance of the hearsay objection and its qualification, Fox-Genovese then attempted to place the anecdote on a more secure scholarly footing:  
This is an anecdote and, part of my own research strategy to talk to people and hear what they have to say.  
The anecdote, is borne out by the scholarly work which suggests that schools such as Mary Baldwin make their greatest contribution to students who are less than very [affluent] when they start, that they do introduce them to ambition, that one of the clear advantages is a new commitment to and interest in multi-culturalism and a sense that they can put their education to work and do something in the world.  
This is borne out by, for example, Darryl [sic] Smith's most recent work but, also, by Valerie Lee and her coworkers and Nancy Monaco and her coworkers. It's right there in the scholarly literature.  
I would say from everything I have read and heard exactly the same is true of VMI  
. . . .
Overall, Fox-Genovese gave an unpredictable performance that could have backfired before another judge and other attorneys. There may have been a method, however, in the VMI attorney’s low-key, nondirective style of direct examination: it provided Fox-Genovese with opportunities to deliver broad-ranging conversational narratives containing occasional, oblique references to her own work and to research studies of other scholars. Not only did Judge Kiser apparently hang on her every word in the courtroom, as demonstrated by his extensive reliance on her testimony in his opinion, but the level of generality of her responses undoubtedly made it more difficult for the government attorneys, on cross-examination, to demonstrate internal inconsistencies or contradictions within her own written work. It is possible, too, that the government’s attorneys misjudged how much Judge Kiser would rely on her testimony. This was, after all, a bench trial, and the judge could be expected to evaluate and weigh the testimony fairly and critically. As it happened, the government attorney made few objections during direct examination of Fox-Genovese, possibly assuming that there was little value — and little harm — in her unfocused, anecdotal testimony.

In retrospect, this may have been a strategic error on the part of the United States attorneys, and they should have followed, chapter and verse, the model of the Sears attorneys’ effective cross-examination of Alice Kessler-Harris — a model that the VMI attorneys used, with great success, on the government’s experts. For example,

\[Id.\] at 563-65. Subsequently, Fox-Genovese began a sentence with, “One of the students told me,” and quickly segued into her own preemptive hearsay objection and a somewhat defensive justification for the hearsay: “That may be hearsay but statistically the majority of . . . .” \[Id.\] at 569-70.

although Fox-Genovese testified that Mary Baldwin's single-sex education gave "ordinary... young women... the possibility of imagining ambition," her autobiographical account of her own single-sex college education suggests it contributed little to her own imagination of her future:

When I finally got to college, and might have been expected to have a better idea of what women do when they grow up, things were not much clearer. I still remember how anxiously my best friend and I scrutinized the women faculty members — since we were at a women's college, there were women faculty members — to find what today would be called role models. No luck. Our women professors were almost all single, and the few who were not had marriages that we could not make sense of. . . . Our mothers were married but did not have careers. The choice was stark and distressing.

Moreover, coeducational graduate school "looked even worse" than her single-sex undergraduate experience, because "[t]here were no women professors, and . . . almost no women classmates." To the extent that an "education in feminism must include a measure of autobiography," her own story about the "emotional and psychological tension" she experienced in coeducational graduate school, in part because of her mother's influence, has clearly shaped her view of why VWIL is the appropriate remedy in the VMI case; for example, Fox-Genovese wrote that Shannon Faulkner's experience in her one week at The Citadel — without a single other woman classmate — is precisely what a "vulnerable young woman" should not be subjected to. For Fox-Genovese, the district court decision that required The Citadel to admit Faulkner surely did not implement a "viable concept of justice," rather it elevated a notion of equality based on abstract individualism at the expense of "the collective historical experience to which both men and women are heir." The VWIL plan is a paradigm of the equitable solution to the dilemma of difference that Fox-Genovese has articulated in Feminism Without Illusions:

419. Joint Appendix at 563, VMI II (Nos. 94-1667 & 94-1717).
420. Fox-Genovese, supra note 384, at 246-47.
421. Id. at 247.
422. Id. at 246.
423. Id. at 247.
Minimal justice should offer women the same opportunities for individualism as men. The history of gender relations and the differences in male and female biology constitute powerful barriers to the simple inclusion of women in the individualistic market and polity. Women require discrete opportunities. Or, rather they require a new conception of the economy and polity that can take account of sexual asymmetry without subjugating women to men.\footnote{426}

VWIL, in effect, is an affirmative action plan for women who want to enter the "individualistic market and polity" as citizen-soldiers. Fox-Genovese testified:

I think VWIL is as good a design for producing female citizen soldiers as I have seen and indeed it would be unique in the Commonwealth. It may well be unique in the country.

... .

What it does is to put a premium on being ready to serve your country, whether in the military sphere or in the private sphere ... and [it] carries with it a strong notion of service that is ... very frequently absent from under graduate [sic] education these days. [T]he notion of citizen soldier is at the core of the program and especially well conceived because it is planned for women who do not necessarily expect to pursue military careers.

What it does is to join that element of public service to the prospect of \textit{success in the normal world of business and law and so forth}.\footnote{427}

She would likely argue that the VWIL plan also provides "a new conception of the economy and polity that can take account of sexual asymmetry without subjugating women to men."\footnote{428} Thus, VWIL will educate its students in a "new conception" of leadership that differs from the adversative, hierarchical model that VMI uses for its male cadets. David Riesman asserted that the VWIL model is based in part on the scholarship of Rosabeth Moss Kanter:\footnote{429}

One of a number of students of leadership and organization who have emphasized the need for less hierarchical organization than is

\footnotesize
\begin{itemize}
\item \textit{Id.} at 86.
\item Joint Appendix at 570-71, VMI II (Nos. 94-1667 & 94-1717) (emphasis added).
\item Fox-Genovese, \textit{supra} note 384, at 86; see \textit{supra} text accompanying note 426.
\item See \textit{Rosabeth Moss Kanter, Men and Women of the Corporation} (1977). For a discussion of Kanter's contributions to structuralist theories of the workplace equality, see Chamallas, \textit{supra} note 412, at 2378-82.
\end{itemize}
found in the inherited and still customary male structures, in con-
trast to a more open, more cooperative mode in which leadership is
couraged at every level, and there are many fewer levels. 430

Carol Nagy Jacklin’s testimony that “[Kanter’s] work, in fact, sug-
gests that the non-hierarchical style is more effective for both men and
women.” 431 was consistent with Judge Kiser’s conclusion that “the
VWIL approach towards educating and preparing women leaders was
preferable to the VMI approach.” 432

It is not immediately clear, however, why women must be com-
pletely segregated from men to learn leadership according to the
Kanter model, nor why, if this model is better for men as well, it
should not be introduced at VMI, along with a “critical mass” of
women students. 433 Does Fox-Genovese endorse VWIL because it
both teaches women how to be leaders in the world of public service,
business, law “and so forth,” and acknowledges “sexual asymmetry”
— “the existence of fundamental differences between men and
women” that lead her to “suspect that at least some mutual hostility
will always characterize relations between them”? 434 Should all
women who want to be leaders be segregated at Mary Baldwin to pro-
tect them from heterosexual relations and from the hostility of sexu-
ally aggressive men while they learn cooperative leadership before
entering an economy and polity which “pits individuals, men and
women, against each other.” 435 Judge Kiser found that “[t]he evi-
dence at trial indicated that the VMI methodology could be used to
educate women and, in fact, some women... may prefer the VMI
methodology to the VWIL methodology.” 436 How could the court
justify a remedy that gives nothing to these women — the class of

430. Joint Appendix at 147, VMI II (Nos. 94-1667 & 94-1717) (Affidavit of David Riesman).
431. Id. at 845 (emphasis added).
432. VMI II, 852 F. Supp. at 480.
433. As Chamallas notes, “Kanter’s prescription for change was batch or cluster hiring: hire
more than one woman at a time and concentrate them, rather than scatter them, throughout the
organization. This ‘critical mass’ strategy was thought to maximize women’s potential to influ-
ence the culture in their specific working groups.” Chamallas, supra note 412, at 2381 (citing
Kanter, supra note 429, at 282).
434. Fox-GENOVESE, supra note 384, at 101. Fox-Genovese states that “[t]he basic biologi-
cal and especially sexual differences between men and women remain irreducible, but their
forms and resultant relations change significantly over time.” Id.
435. Id. at 104. Fox-Genovese writes: “We are not likely to legislate the human condition
out of existence. Nor are we likely to restore previous relations between men and women. We
are irreversibly engaged on a course that pits individuals, men and women, against each other as
individuals in the workplace.” Id.
436. VMI II, 852 F. Supp. at 481.
women denied an opportunity to attend VMI — and offers a new educational opportunity to an entirely different group of women?

The answers are in two critical assumptions of the plan — assumptions reinforced by Fox-Genovese in her testimony. The first assumption is that “most” women entering college who would be interested in VWIL have already experienced failure, are already victims of the male-dominated culture of individualism and need a single-sex education to build their confidence in order to re-enter that culture as healthy, fully functioning actors. The second assumption is that there is very little demand among “most” women entering college to undergo the VMI-style of adversative training or life style. Thus, the few women who would intentionally choose such an education, like Shannon Faulkner, can be ignored because they are either so different from the average woman that they are, in effect, deviant and marginal, or they are not so different after all and merely need to accept what the experts have determined is good for them — the VWIL style of education.

Fox-Genovese articulated the first assumption in the following testimony:

I see this program as taking the young woman who went to a large coeducational high school and never quite became class president and was about to give up on the possibility that she could compete with young men of her class in that way.

What something like VWIL does is to give her the experience, not bind up her wounds or nurture her, they can do that, too, but give her the experience of working in elections and observing women in leadership and all the rest of the program that will permit her to go out again and play as a full player in a world of elections and, especially when we’re talking about something like Mary Baldwin in the Commonwealth of Virginia. I think all of us who follow women in politics know that the real secret to women’s advance in political leadership is entering the local level young.

It means you have to know how the game is played. You have to come out of college and even do an externship while you’re in college and get in on the ground floor in the parallel process.

I think this program will have precisely that effect.\footnote{Joint Appendix at 574-75, VMI II (Nos. 94-1667 & 94-1717).}
Fox-Genovese, however, may be projecting her autobiography and the ghosts of her own history onto the “average” young women of the current generation. In *Feminism Without Illusions*, she wrote:

I belong to a generation of women for whom the main model of achievement was “prom queen” and who could not imagine what to do with themselves as “ex-prom queens,” even if we never had a prayer of being prom queen in the first place. Women who have been reared to think of themselves primarily as girls normally cannot readily imagine their futures or what it might mean to grow up. Even women like those of the present generation who are being reared with the assumption that they will have careers and work for their livings, remain haunted by the experience of the women of my generation and the general assumptions of our culture.\(^\text{438}\)

But there are young women who are not diminished or stunted by their experiences growing up as girls. Rather than looking backward to the stories of failed ex-prom queens, they may be emboldened by the images of contemporary women who graduate first in their class from West Point, join the United States Forest Service as smoke jumpers\(^\text{439}\) or sail in the America’s Cup. Fox-Genovese, who, at one point in her writing is critical of the “assumption that one individual can determine another individual’s desires,”\(^\text{440}\) discounts the aspirations of the women who might want a VMI-type education, even at VMI. When asked whether a “hypothetical Jackie Jones who wrote a letter with respect to attending VMI, [would] be attracted to VWIL,”\(^\text{441}\) she responded:

- **A** I’m not sure whether Jackie Jones would be attracted to VWIL or not because, frankly, I don’t know Jackie Jones very well. *If Jackie Jones’ ambition in life is to break barriers, climb Everest because it is there, no, she will not be attracted to VWIL.*

  - **If she really wants to become a leader, she will be attracted to VWIL.** I doubt she would be attracted to [an] all female VMI because I do believe that the presence of men and the distinguished history are virtually an indissociable part of what people think they want from VMI. If they want the institution itself. A very brief

\(^{438}\) Fox-Genovese, *supra* note 384, at 248-49.

\(^{439}\) There are 15 women on the “elite” 400-member Corps of U.S. Forest Service Smoke Jumpers — firefighters who parachute into wilderness areas “wearing about 80 pounds of equipment and clothing” in order to put out forest fires. Perri Knize, *Flying into the Inferno: Every Year the Nation’s Elite Corps of Smoke Jumpers Faces an Ordeal by Fire*, SPORTS ILLUSTRATED, Sept. 4, 1995, at Environment.

\(^{440}\) Fox-Genovese, *supra* note 384, at 84.

\(^{441}\) Joint Appendix at 578, *VMI II* (Nos. 94-1667 & 94-1717) (question of VMI attorney on direct examination).
analogy, but in, at the beginning of this century, the late 19th cen-
tury, for a woman to aspire to become a lawyer was black horse and
exciting and very bold because it was virtually cut off to her.

But this is high-roller ambition. It's as much fancy as it is reality.
The women that wanted to support themselves became nurse[s],
teachers, librarians because those were the professions they could
enter and that they could count on to provide livelihood, and that's
the . . . analogy to the kind of distinction I'm drawing.\footnote{442}

Fox-Genovese admits she does not really know the imaginary
Jackie Jones, whose nineteenth century counterpart aspired to be a
lawyer "because it was virtually cut off to her." She asserts that the
modern-day Jones's "high-roller ambition" to "break barriers" is
more "fancy" than "reality," for if Jones really dreamed of being a
leader, she would want to come to VWIL where she would learn a
"profession [she] could enter and . . . could count on to provide a
livelihood" — a profession analogous to nursing, teaching and librari-
anship in the nineteenth century.

What Jones needs to do, instead of "climbing Mount Everest," is
to learn about computers because, as Fox-Genovese testified, at
VWIL the students will "have more training in mathematics and sta-
tistics and computers, not to mention the science and languages, but
I'm particularly focussed myself on the importance of the math and
statistics and computers."\footnote{443} Fox-Genovese is "particularly focussed"
on computers because, as she later testified: "I've been interested to
note that women tend to advance much more rapidly in computers
than in some other areas because it's a new field and you can do it or
you can't."\footnote{444} In addition, the VWIL women will be ahead of women
from other schools because "[t]hey will have a solid grounding in math
in the way most women at liberal arts institutions are not
grounded."\footnote{445}

Fox-Genovese testified that Mary Baldwin students "are fre-
frequently young women whose mothers did not go to college. They are
young women from families in which professional aspirations aren't
necessarily very high or very well developed."\footnote{446} Her "opinion of the
type of student that [she] would expect to be attracted to VWIL," on

\footnote{442} Id. at 578-79 (emphasis added).
\footnote{443} Id. at 568-69.
\footnote{444} Id. at 580.
\footnote{445} Id. at 569.
\footnote{446} Id. at 563.
the other hand, was that they would be only slightly different than the type of student who presently attends Mary Baldwin. Her expectation was that:

[She would be] something similar to the kind of student that Mary Baldwin has been attracting for the last little bit and if these budgets we've heard about include plans for advertising and recruitment, students from [middle-class] background who really do have a sense of ambition, that there is something else out there they might be or do, they don't know quite what it is, and VWIL, I think, will appeal to them. Quite possibly women who will not have the connections or the finances to go out of state very easily, and for whom a focus program suddenly looks like a very special opportunity.

Statistically speaking, I expect that it will attract a mix of students, white and black, of modest background, middle, lower middle class, through the socioeconomic profile that we're seeing at the moment."447

Fox-Genovese could strongly endorse the VWIL plan because it carries out a form of distributive justice that is consistent with her views of the appropriate resolution of the tension between collective and individual rights.448 The plan achieves distributive justice in terms of sex, race and socioeconomic class: it reallocates educational dollars spent by the State by increasing opportunities for women in the middle and lower classes and among racial minorities. It is essentially a "collectivist form of affirmative action"449 based on principles of equity, not equality. Furthermore, in preserving VMI while creating a new institution for women based on women's needs, it respects the

447. Id. at 576-77. Fox-Genovese appears to have underestimated the caliber of prospective VWIL students, and their ambitions, as compared to Mary Baldwin students.

A recent report suggests that the female cadets [at VWIL] may be better prepared than other Mary Baldwin students and their VMI peers. Students accepted to the women's institute have an average 3.5 grade-point average and an average combined Scholastic Assessment Test score of 1,031. The average Mary Baldwin freshman has a 3.0 GPA and a 928 SAT. This year's VMI freshman class has an average 3.0 GPA and a 1,021 SAT.

Kiran Krishnamurthy, Military, But Not Male, FREE LANCE STAR (Fredericksburg, Va.), May 2, 1995, at A8.

448. For example, Fox-Genovese has written:

The distributive ideal assumes that justice, rather than applying equally or undifferentiatedly to all, should apply to each according to situation or classification, which means according to community. But to sustain an ideal of distributive justice, we must have legally sanctioned communities or groups that take socially recognized priority over individuals. More than that, we must have a collective conception of society that acknowledges the possibility that the good of the whole in some way transcends the good of individuals, as they themselves define it.

FOX-GENOVESE, supra note 384, at 78.

449. Id. at 76.
collective values of "the society as a whole." The plan thus avoids the harms to society created by endorsing a notion of equality based on individual entitlement, typified by Shannon Faulkner's assault on The Citadel, which assumes "that women and men may and should be functionally interchangeable." Fox-Genovese has written that "[i]n practice, affirmative action means that middle-class white young men now have to share the available places in colleges, universities, and professional schools with middle-class white young women, as well as with African-Americans, Hispanic-Americans, and others." The VWIL plan, however, is a systematic reform, unlike either affirmative action that promotes individual women at the expense of men or equal access that ignores sex entirely. The young men at VMI will not "have to share the available places" in their college because VWIL creates new places and a new institution. The male cadet culture will not be disrupted, and the male cadets as a group will not feel as if they are being disadvantaged by the new opportunities being created for women at VWIL. The reality, of course, is that funds for education will be redistributed: the state appropriation for VMI cadets and the pool of private funds previously devoted exclusively to VMI will now be shared with the VWIL women.

VWIL, then, is a form of benevolent social-engineering that will benefit one previously disadvantaged group without seriously impairing the overall interests of the previously privileged group. But, as Fox-Genovese demonstrates in her testimony, the nature of the remedy engineered for the women has a methodology built on a number

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450. *Id.* at 72.
451. *Id.* at 80, 269 n.78 (citing *Elizabeth H. Wolgast, Equality and the Rights of Women* 42-44, 103, 108 (1980)).
452. *Id.* at 69.
453. See *id.* at 79 (Fox-Genovese noted that "the failure of feminist and other reformers to rethink basic premises has crippled their efforts to effect systematic reform").
454. Virginia has entered into a "contract for services" with Mary Baldwin and VMI to run the VWIL program. *See VMI II*, 852 F. Supp. at 492-93. Virginia's per capita distribution of its Unique Military Appropriation to support the Virginia Corps of Cadets will be allocated among VMI, VWIL and Virginia Tech, with each institution receiving about $1900 per student. In addition, the State will provide Virginia cadets at VWIL with a direct subsidy of up to $7308 per student for the 1995-96 academic year. *See Defendant's Second Status Report, at 5-6, VMI II* (No. 90-0126-R) (Apr. 28, 1995). Also, the VMI Foundation has entered into an agreement to provide $5.4625 million to permanently endow the VWIL program. *See VMI II*, 852 F. Supp. at 499. That endowment, however, will not become permanent until all appeals of the VMI case are exhausted. In the meantime, commencing September 1, 1995, Mary Baldwin, under their amended agreement with the VMI Foundation, began to receive the income stream on the permanent endowment of $22,760 a month and will have access to construction and scholarship funds. *See Defendant's First Status Report, at 8, VMI II* (No. 90-0126-R) (Oct. 28, 1994).
of assumptions about the group of women who will benefit from VWIL, assumptions about who they are, what they are like, what they need, and what they ought to do with their lives. The VWIL plan is designed to provide indecisive young women with purposeful, but realistic, goals and the technical education they need to achieve those goals. Fox-Genovese testified:

[T]here is tremendous consciousness among educators and increasingly among the general public of the importance for women of rounding themselves solidly before they face the world and establishing not merely personal networks with other women . . . . There is a new leadership, there are tremendous consequences of the kinds of new skills that are required by leadership, and a sense that women really might do very well at this, not least because as leadership changes it becomes something more of a level playing field.\footnote{Joint Appendix at 580, VMI II (Nos. 94-1667 & 94-1717).}

In this respect, her ambitions for VWIL reflect the motives of some of the founders of VMI over a century and a half ago who hoped to better the lives of poor white Virginia farm boys and make them into men who could take on useful roles in a changing society.\footnote{See supra part III.B.} The difference, of course, is in the methodology. As Fox-Genovese stated, "one of the justifications for the VMI methodology is to obscure the economic and social differences among young men and to subject them to ferocious discipline with the special interest of moving them beyond what they ordinarily might have been expected to be."\footnote{Joint Appendix at 565, VMI II (Nos. 94-1667 & 94-1717).}

Women at VWIL, because they are women, will not need ferocious discipline, but they will need discipline nonetheless. And the "educational and societal outcomes" for women in VWIL will be "fully comparable" to VMI's outcomes according to Fox-Genovese:

Well, the issue of outcomes in [VWIL], as I understand it, has been subject to debate and misunderstanding in this case. When I think about outcomes, I think of what one — where one would like to see a student at about age 30 launched on her life, or by extension his life, and in, from that perspective, I think the outcomes of the program will be in important ways fully comparable to VMI.

I expect the students who go through the VWIL program to have gained tremendously in self-confidence, in discipline, not merely self-discipline, which women tend to be good at, but the respect for external discipline.

\footnote{Joint Appendix at 580, VMI II (Nos. 94-1667 & 94-1717).}
They will have the experience of working cooperatively with other women. They will have been taught what too [in]frequently women are taught, some are, but not enough — the mental discipline and physical discipline are intimately related especially [for] one who [h]as desires to become a leader.\textsuperscript{458}

But, according to Fox-Genovese, to achieve this comparability in outcomes the programs cannot use comparable methods, but must adopt educational methods that take account of fundamental gender differences. The following question and answer were given in the direct examination of Fox-Genovese:

Q Doctor, in your opinion, does a single gender Educational Program for women such as VWIL, need to use the same methodology as VMI uses with respect to the rat line and the adversative system in order to produce the outcomes?

A No, I don't believe it does. I am not one of those who would say there is no woman any place who wouldn't want or couldn't stand the adversative system. That is really not the point.

But the overwhelmingly scholarly evidence, quite apart from my personal experience but the overwhelmingly scholarly evidence suggests that young women by the time they reach college for whatever reason have less confidence in themselves than young men.

In other words, we really don't need to beat upitiness [sic] and aggression and all of that out of young women. That isn't the point.

If you look classically and I think there is an article, for example, in one of the books that Carol Jacklin edited that argues that what adolescence is [is] a period of emotional stress and typically, which is to state statistically, not stereotypically, but statistically that takes the form of [delinquency] in men and depression in women.

Anyone who reads the literature or works on an undergraduate campus knows that anorexia is rampant among young college students and frequently most likely to affect the brightest.

They doubt themselves so they want to exercise control and the control they feel they can exercise is over their own bodies, how much food they take in. This is a turning of energy inward instead of projecting it outward; instead of getting drunk and going and having a fight, or whatever it is that young men do, young women statistically are more likely to turn it upon themselves.\textsuperscript{458} Id. at 568-69.
Therefore, to reinforce that seems to me counterproductive and I'm not saying they don't need discipline because I deeply believe they do need discipline.

Anorexia is self-discipline turned pathological, but what young women need is to understand the fit between a predictable order of the outside world and their own tendencies toward self-discipline, and I simply don’t believe the adversative model is required to accomplish that.459

From a rather unfocused discussion of the relationship of a highly stressful “adversative” educational method to the developmental needs of college undergraduates based on statistical differences between adolescent males and females with regard to stress, anxiety, self-confidence, assertiveness and aggression, Fox-Genovese digresses to an analysis of the causes and cures for anorexia among female undergraduates. Quite remarkably, she appears to assume that because her experience is that anorexia is “rampant” on college campuses, most of the “bright” women likely to want to attend VWIL will be anorexic and, hence, “pathological.” They will, therefore, need the structured, but nonadversative discipline that VWIL will incorporate into its “holistic” program.460 The overall message is that if parents send their delinquent, “uppity” sons to VMI and their depressed, anorexic daughters to VWIL the outcomes will be whole, productive citizen-soldiers.

Historically, VMI did begin as somewhat of a “reform school” for *uppity* young boys,461 but it is hardly thought of, and certainly not advertised, in that context today. The present-day entering cadets are older, more sophisticated and better educated than their forebears. Ironically, if the *inputs* to VMI and VWIL — the students who enter — are so different, and different methodologies must be used to assure that the outcomes of the two institutions will be “fully comparable,”462 the result seems to be a rather androgynous person — men who have their “uppitiness and aggression” almost literally “beat” out

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459. *Id.* at 571-73.
460. Fox-Genovese testified that not every hour of marching in formation is necessarily a prerequisite for being a citizen soldier, it may simply be the way in which VMI creates its distinct holistic environment, and the most important aspect of it may be the holistic environment which, in theory, could be created for another population by other means.

*Id.* at 583.
461. See *supra* part III.C.1.
462. Joint Appendix at 568, *VMI II* (Nos. 94-1667 & 94-1717).
of them and women who have their anxiety and depression transformed into self-confidence.\textsuperscript{463} As Judge Kiser wrote, "If VMI marches to the beat of a drum, then Mary Baldwin marches to the melody of a fife and when the march is over, both will have arrived at the same destination."\textsuperscript{464}

The destination, of course, is not the same if only because VWIL graduates will always be alumni of Mary Baldwin College — a status in Virginia that, for the foreseeable future, is not likely to provide the access to the benefits of the VMI alumni network that VMI graduates have.\textsuperscript{465} And though Fox-Genovese made the broadly credible (but extremely debatable) assertion that the academic reputations of the

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\textsuperscript{463} Interestingly, Deborah Rhode has noted that "[e]arly supporters of coeducational programs" had argued, in opposition to the claims that coeducation would produce androgyny, that "[n]ot all tendencies toward androgyny were disadvantageous; society would benefit when men became more 'orderly [and] gentle,' and women became 'stronger and more earnest' through joint education." \textit{Rhode, supra} note 409, at 293.
\end{quote}

\begin{quote}
\textsuperscript{464} \textit{VMI II}, 852 F. Supp. at 484. Mary Anne Case suggested to me that Judge Kiser's drum and fife formula is a prescription for androgyny, and she has developed this point in her article on sex and gender. See Mary Anne C. Case, \textit{Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence}, \textit{105 Yale L.J.} 1, 99-100 (1995). I have attempted to develop somewhat the implications of Elizabeth Fox-Genovese's testimony to demonstrate that the graduates of VMI and VWIL, as she has described them, appear to be undifferentiated, atomistic, androgynous individuals who will fit into "our weeding out global multi-cultural world" of "corporations, law firms, [and] of small businesses that need to relate to the world of larger corporations." Joint Appendix at 577, \textit{VMI II} (Nos. 94-1667 & 94-1717). In other words, VMI and VWIL will create the perfectly fungible, corporate person. The following question and answer came from the direct examination of Fox-Genovese:
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Q. How would you compare the profile [of the students likely to be attracted to VWIL] to students who attend VMI?
A. My hunch is it's almost identical, and, by the way, I think a lot of the outcomes will be very similar as well. Something in the order of 52 percent of the students at VMI major in the liberal arts, and less than 20 percent of the students at VMI go on to military careers.

The leadership — at VMI they go into business, the law, some into politics, some into the clergy, so it's a mix. The leadership we're increasingly talking about for our weeding out global multi-cultural world is a leadership of corporations, law firms, of small businesses that need to relate to the world of larger corporations.

In other words, the careers in business and the law, the professions generally are as good a route to leadership positions as anything else, and [I] think both schools will move young people toward a steady foothold, a sure foothold in those kind of professions.

Joint Appendix at 577-78, \textit{VMI II} (Nos. 94-1667 & 94-1717).
\end{quote}

\begin{quote}
\textsuperscript{465} The court of appeals noted that "[i]t is true that VWIL is at its incipiency, and the VWIL degree from Mary Baldwin College lacks the historical benefit and prestige of a degree from VMI." \textit{VMI II}, 44 F.3d at 1241; see Judge Motz's dissent from denial of rehearing en banc, \textit{VMI II}, 52 F.3d at 93 ("People do not seek to attend VMI only for the course work or the citizenship and military training. At least as important is VMI's reputation, the opportunity to know and learn from other students, faculty, and graduates, and the ability to rely on those connections and friendships in later life.").
\end{quote}
two schools are “absolutely comparable,” their reputations and connections in the world of business, politics and the military are not comparable at all. Fox-Genovese, nevertheless, apparently anticipates that the VMI alumni, honorable gentlemen that they are supposed to be, will acknowledge and pay their debt to the VWIL students and to Mary Baldwin College for saving the Institute from being forced to admit women.

C. PROFESSOR CAROL NAGY JACKLIN

Although Elizabeth Fox-Genovese appeared to sail through her testimony without serious challenge, the trial had its casualties — its feminist “Kessler-Harrises” — and they were all government expert witnesses: Professors Jacklin, Astin and Kimmel. Of these three, Carol Nagy Jacklin, on direct examination, provided the most detailed, scientific, consistent and coherent testimony about the significance of measurements of differences between males and females, as reported in numerous psychological studies. Under an extremely rigorous and probing cross-examination, however, she appeared to contradict or undermine much of what she testified to on direct examination. Moreover, she had to admit under cross-examination that her scholarly views, like those of virtually all academics, have been or could be criticized by other researchers.

Q Dr. Jacklin, as I understand your testimony, you believe that The [VWIL] Plan is based on the gender stereotype that men and women learn differently; is that correct?

A Yes.

466. Fox-Genovese testified that her opinion was they are “both fine schools that do a quality job in educating their students,” and they are both “fundamentally pedagogical,” “modest” and “take[ing] the work of education seriously,” but neither are “cutting-edge research, prestigious scholarly institutions.” Joint Appendix at 566, VMI II (Nos. 94-1667 & 94-1717).

467. Fox-Genovese testified:

I am deeply convinced that the VMI alumni network is going to add a very important icing to the educational cake. I really expect these young women to benefit disproportionately from that network. In the first instance if VMI does mean it produces citizen soldiers and men of honor, they will be indebted to the young women of the VWIL Foundation, but, in addition to that, just the other day, there was an article in the Wall Street Journal which explicitly admitted that a number of very large companies, including Fortune 500 companies are beginning to set aside chief management, upper level management positions for women because they are worried that they do not have enough women in upper management.

This is a very common problem. For the members of the VMI alumni network to have females whom — to whom they feel responsible and for whose worthiness they can vouch, to have women like that to recommend is a real asset and I suspect we’re going to do a better job placing them than the VMI grads.

Id. at 575-76 (emphasis added).
Q And you also, and the conclusions that you have drawn regarding the Proposed Remedial Plan, they are the result of your judgment, are they not?
A Are my conclusions the result of my judgment?
Q Yes.
A Yes.
Q Do you believe that other experts could reasonably disagree with you, don't you?
A About this particular judgment?
Q Yes.
A Yes.

Q Now, the testimony that you have given this morning and your conclusions are based upon your work on gender differences; is that correct?
A They are based on my work which includes *meta analysis of many people's work*.
Q The work on which you're basing your work has in fact been criticized by other experts who believe there are differences in the development of men and women; is that not correct?
A I believe that there are differences in the development — I believe there are average differences which I talked about today.
Q But your work and your conclusions about gender differences have been criticized by other experts; is that correct?
A Yes. 468

Judge Kiser found that "Dr. Jacklin's testimony was contradicted by most of the evidence in the record," and the reliability of her opinions was suspect because she "agreed that experts could reasonably disagree with her opinion — [s]pecifically, [she] stated that experts could reasonably disagree as to how to accommodate differences in formulating educational programs." 469 Undoubtedly further undermining Jacklin's credibility in Judge Kiser's eyes were her admissions

468. Id. at 864, 866-67 (emphasis added).
469. VMI II, 852 F. Supp. at 480 & n.8. It is not clear that any social scientist's expert opinions could hold up if she honestly answered this type of leading question. For example, Elizabeth Fox-Genovese would have to admit that there are scholars who reasonably disagree with her own conclusions. As Deborah Rhode observed, "American feminists have always differed over difference." RHODE, supra note 409, at 306 (emphasis added).
elicited in response to leading questions on cross-examination — that she believed "that political issues are part of science, even though political positions are usually neither clear nor verbalized by most scientists," that "political views ['can be'] a source of bias in gender research," that "some of [her] colleagues — [though no 'individual' that she knows 'personally'] ['may very well'] have advocated that gender differences should not be reported in research findings at all," "that she has cautioned readers of [her] work that [she is] a feminist," and that she is a member of the American Civil Liberties Union (ACLU) and the National Organization for Women (NOW).

Faced with a conservative, Reagan-appointed judge, Jacklin had an uphill battle in attempting to establish her credibility and reliability as an expert witness. She became the "Alice Kessler-Harris" of the VMI case.

This development was unfortunate because Jacklin's testimony regarding her meta-analysis of the research on gender differences could have been critical in challenging Judge Kiser's finding that "the differences between VWIL and VMI are justified pedagogically and are not based on stereotyping." Her testimony primarily concerned the validity of the assumptions in the VWIL plan about how men and women learn. The government began its direct examination of Jacklin:

Q Dr. Jacklin, have you done any examination of the assumptions upon which The Plan is based?
A Yes. I have.
Q And what conclusion have you reached?
A The assumptions on which The Plan is based are in error in that they assume that males and females learn in different ways.
Q Dr. Jacklin, are you familiar with the psychological research that compares the ways in which men and women learn?

470. Joint Appendix at 876, 877, 878, VMI II (Nos. 94-1667 & 94-1717).
471. Chief Judge Jackson L. Kiser was appointed to the District Court for the Western District of Virginia by President Reagan in 1982. Immediately prior to his appointment, Kiser had been in private practice for over 20 years with the law firm of Young, Kiser, Haskins, Mann, Gregory & Young. He received his B.A. from Concord College in 1951 and his LL.B. from Washington & Lee University in 1952. He served in the U.S. Army Judge Advocate General's Corps from 1952 to 1955, and as a captain in the U.S. Army Reserve from 1955 to 1961. Before entering private practice, he worked from 1958 to 1961 as assistant U.S. attorney for the Western District of Virginia. Almanac of the Federal Judiciary, 4th Circuit, at 61 (1995).
472. VMI II, 852 F. Supp. at 481.
A Yes; I am.

Q And has consensus been reached in that body of research as to whether or not men and women learn differently?

A Consensus has been reached that men and women learn in similar ways. There are many different kinds of learning but in all of those different kinds of learnings no sex differences have been found.

Q Is there any psychological evidence that men and women learn differently?

A No.

Q What about other psychological traits, Dr. Jacklin? Are [sic] there evidence that men and women learn differently?

A There are some average differences between men and women, but the average differences between men and women are trivial compared to the very large individual differences within the group of men and within the group of women.

Q Okay. In comparing psychological traits of two groups, what is meant by average difference?

A An average difference is taking one group and finding out what the average behavior, the average test score of one group, let's say, females, and then you take the average behavior or the average test score of a second group, males, and you compare those two averages.

There have been some traits found where the average differences — where there is a difference between the average, but, again, I want to emphasize that what is striking and much larger than the average differences between males and females is the incredibly [sic] variability among males and incredibly [sic] variability among females. In fact, we know that, as we look around, we know men differ from each other and women differ from each other.

Q So, according to the psychological research, how do the average differences in psychological traits between men and women compare with the differences in psychological traits among women or among men?

A The average differences are trivial compared to the very large differences within the two groups. 473

473. Joint Appendix at 820-23, VMI II (Nos. 94-1667 & 94-1717).
Jacklin then proceeded to demonstrate to the court "how great the individual differences are" by using two illustrative graphs — frequency distributions or bell curves — which she drew on a chalkboard.\textsuperscript{474} In measuring group differences in a trait such as fear, she explained, psychologists would "take the average together, all of the scores of one group, and would average together all of the scores of the other groups [sic] and that is the difference, that is the average difference between the two groups."\textsuperscript{475} She then emphasized "that [the] average difference is far overshadowed or outweighed by the individual variability within the group of women or within the group of men."\textsuperscript{476} She then asked the court's permission to draw a third graph:

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A Oh, may I do one more, one more graph? The reason this is important, and I think confusing is that when people use the word difference in their mind. . . . [She then described the third graph that she drew on the board, superimposing the frequency distributions of the two graphs she had drawn previously.]

When people talk about difference, I think they have in their heads the idea that these distributions are separate; that here are men and here are women and the distributions are not the same.

They don't appreciate the overlap in the distributions, so I think the use of the word "difference" actually is confusing, because not only in lay person's terms but in educated person's terms, difference seems to mean not overlapping distributions but the distributions are incredibly overlapping.

Q Dr. Jacklin, in summary, for all psychological traits that have been studied, which is larger, the overlap of the male and female curves or the point at which they do not overlap?

A Well, I don't want to put it that way. The point at which they don't overlap would be the extremes.

Q Yes.

A I think you mean — I believe you're asking what are larger, the average difference between males and females, or the variability among males and among the group of females.

Q Yes, and which is larger?
\end{quote}

\textsuperscript{474} Id. at 824; see id. at 823-29 (graphing test scores on any particular psychological trait on the x-axis and the number of individuals who earned each score on the y-axis).

\textsuperscript{475} Id. at 827-28.

\textsuperscript{476} Id. at 828.
A The variability among females and among males is much larger, far outweighs the average difference between males and females.

Q Thank you.

THE COURT: The point being you can't generalize as to any one individual?

THE WITNESS: That's exactly right and gender is used as if you could generalize. Gender seems to be used to try to predict many things that aren't well predicted by gender.477

In VMI II, Judge Kiser summarized Jacklin's testimony as asserting that “[g]ender is not a useful predictor of learning patterns.”478 He described the “bell curve graphs” she had drawn on the chalkboard as illustrating that “[f]or both men and women the bell curve was a typical one — small numbers of persons at the beginning and ending with large numbers of persons in the middle.”479 Judge Kiser then continued with an extremely revealing and unsophisticated commentary on the significance of Jacklin’s third drawing in which she superimposed the two bell curves.

Of interest, however, was a narrow band where there was no overlap between the curve for males and the curve for females. When one thinks about Dr. Jacklin’s conclusions, she is stating what educators — indeed, the public in general — have known for a long time; that people are born with varying degrees of ability and drive. It is certainly no revelation that within a given population of males, there will be slow learners, average learners, and fast learners. The same holds true with any given population of females. Thus, the bell curves are not surprising.480

First, Judge Kiser discounted the overall value of Jacklin’s testimony because he claimed that she had contributed nothing that everyone has not already known for a long time. In this sense he implied that her expert opinions were not worth very much because experts are supposed to tell us surprising or revealing things — not things that we already know from our own experience, such as, that individuals differ from each other in ability and drive. Secondly, and of key significance, he not only appears to have misunderstood or misinterpreted the meaning of her conclusions about the statistical analysis of

477. Id. at 828-30 (emphasis added).
478. VMI II, 852 F. Supp. at 479.
479. Id. at 480.
480. Id. (emphasis added).
gender studies, but he made a fundamental error in focusing his attention on "a narrow band where there was no overlap" between the two curves. He asserted that this narrow band is "[o]f interest," presumably because it seemed to support his conclusion that the pedagogical differences between VMI and VWIL are based on true, scientifically measured differences and not stereotypes. Descriptions of general traits or characteristics of a group of people can, of course, be supported by social science data and still, as a matter of law, be considered stereotypes when applied to individuals. But Judge Kiser’s interpretation of Jacklin’s graphs and conclusions led him to assume that the narrow bands had independent statistical significance, and his analysis stopped there. For a social scientist, however, the narrow band of no overlap between the two bell curves is of no utility for educational and counseling purposes unless the statistical difference has predictive value.

The predictive value of any particular research study indicating some average sex differences in a trait or skill depends on a number of variables, including the sample size and the construction and nature of the testing instrument. Individual tests are not as reliable as consistent results across a number of different types of studies designed to test for the same trait. In Carol Nagy Jacklin’s early work with Eleanor Maccoby, published in their 1974 book The Psychology of Sex Differences,

They summarize[d] and critically evaluate[d] a large body of work on the psychology of sex differences, concluding that at least eight different claims for sex differences were disproved by the results of then available scientific studies and that the findings about seven other alleged differences were either too skimpy or too ambiguous to warrant any conclusions at all, but that sex differences in four areas — verbal ability, visual-spatial ability, mathematical ability, and aggressive behavior — were “fairly well established.”

481. See, e.g., Gilligan Brief, supra note 152, at 10 (discussing “linguistic and legal” meaning of the word stereotype).

482. ANNE FAUSTO-STERNING, MYTHS OF GENDER: BIOLOGICAL THEORIES ABOUT WOMEN AND MEN 25-26 (1985) (citing ELEANOR E. MACCOBY & CAROL N. JACKLIN, THE PSYCHOLOGY OF SEX DIFFERENCES (1974)) (references to tables omitted). Cynthia Fuchs Epstein summarized the Maccoby and Jacklin conclusions about “beliefs about sex differences” based on “their evaluation of the empirical literature” in 1974 as follows:

Among the unfounded [beliefs] are those that report that girls are more “social” and more suggestible, have lower self-esteem, and excel over boys at repetitive tasks; that boys are more analytical; that girls are more affected by heredity and boys by environment; that girls are less motivated than boys toward achievement; and that girls are more auditorially oriented and boys are more visually oriented. They report equivocal
As sociologist Cynthia Fuchs Epstein later observed, "Certainly, Maccoby and Jacklin showed [in 1974] that many popular stereotypes are not supported by any research."\(^4\)\(^8\)\(^3\) The Maccoby and Jacklin 1974 survey of all the empirical findings in the psychological literature on sex difference, however, was subsequently "criticized by some psychologists because of the problems the critics say are inherent in most if not all studies of sex differences."\(^4\)\(^8\)\(^4\) These problems included their failure to assess the reliability of the research methodology and interpretation of each study included in the survey and their reliance on laboratory studies that generally do not account for social roles and expectations as determinants of behavior.\(^4\)\(^8\)\(^5\) The criticism led Jacklin to a more sophisticated statistical method of analyzing a large body of empirical research — meta-analysis:

Since the publication of their book . . . a new approach known as meta-analysis has been used by Jacklin and others to reevaluate their 1974 conclusions. The new approach looks at the size of group differences, thereby allowing questions about such matters as verbal ability to be phrased in the following way: "If all you knew about a person was his or her score on a test for verbal ability, how accurately could you guess at his/her sex?" Meta-analysis is a highly sophisticated way of evaluating the meaning of several interrelated studies. It is simple in principle, albeit statistically complex. Instead of calculating separately the averages and standard deviations of males and females, one looks at the entire population (males and females together) and estimates the variability in the population as a whole using a statistic called the variance, which is related to the standard deviation. Like the standard deviation, the variance tells evidence with regard to tactile sensitivity, fear, timidity, anxiety, competitiveness, dominance, compliance, nurturance, and "maternal behaviors." But in their estimation certain sex differences do hold up — that girls excel in verbal ability and boys in quantitative ability, and that boys are more aggressive.

CYNTHIA FUCHS EPSTEIN, DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER 79-80 (1988); see FAUSTO-STERLING, supra at 25 (Table 2.1: "Summary of Maccoby and Jacklin’s Findings on Sex Differences").

483. EPSTEIN, supra note 482, at 80.
484. Id. (citations omitted).
485. See generally id. 76-83 (discussing the problems and alleged flaws in past sex difference studies). As Anne Fausto-Sterling has explained:

All the papers reviewed by Maccoby and Jacklin used what is called the hypothesis-testing approach to the study of sex differences. Using this approach, a researcher hypothesizes the existence, for instance, of a difference in verbal ability between boys and girls. Tests are given, average scores for boys and for girls are calculated, and the means, the standard deviations, and the number of subjects used to measure the statistical significance of any difference are presented. Maccoby and Jacklin simply tabulated how frequently a particular significant difference showed up in such studies.

FAUSTO-STERLING, supra note 482, at 29.
one about the appearance of the bell-shaped curve that summarizes individual scores. In meta-analysis, one calculates how much of the variance found in the mixed population can be accounted for on the basis of gender, and how much is due to variation between members of the same sex and/or experimental error. We have already seen with the hypothesis-testing approach how one can obtain a meaningless but statistically significant difference by using a very large sample size. Meta-analysis provides a way of telling how large a given statistical difference is and thus how meaningful it is in reality.

Using meta-analysis, then, what becomes of Maccoby and Jacklin's "well-established sex difference" in verbal ability? It teeters on the brink of oblivion. . . . Clearly, it makes little sense to base educational and counseling decisions that relate to verbal ability on simple observation of a child's sex, rather than on some actual analysis of his or her particular capacities.\textsuperscript{486}

Essentially this was the point that Jacklin consistently made in her testimony in the \textit{VMI II} trial: a person's sex is a very poor predictor of behavioral traits that have been measured by psychologists.\textsuperscript{487} On direct examination, Jacklin testified extensively regarding the consensus of the psychological research on sex differences in learning and other psychological traits. Her conclusion about research on learning was that "[c]onsensus has been reached that men and women learn in similar ways. There are many different kinds of learning but in all of those different kinds of learning no sex differences have been found."\textsuperscript{488} With regard to "other psychological traits," Jacklin testified that "[t]here are some average differences between men and women, but the average differences between men and women are trivial compared to the very large individual differences within the group of men and within the group of women."\textsuperscript{489} The government's direct examination then proceeded through questions about the consensus of findings on sex differences in studies of a number of different traits

\textsuperscript{486} \textit{Fausto-Sterling}, supra note 482, at 29-30 (citations and references to tables omitted).

\textsuperscript{487} Epstein cited the work of other scholars, including Kay Deux and A.H. Eagly, which supported the original conclusion of Maccoby and Jacklin that, in Epstein's words, "sex has not been a consistently powerful predictor." \textit{Epstein}, supra note 482, at 81. Moreover, Epstein continued, "When sex differences are found, the determinants of the behavior are likely not to have been identified." \textit{Id}.

\textsuperscript{488} Joint Appendix at 821, \textit{VMI II} (Nos. 94-1667 & 94-1717).

\textsuperscript{489} \textit{Id}. at 821-22.
including cognitive abilities, but also, despite Judge Kiser's contrary assumption, including developmental and emotional traits.

Jacklin testified that, as with learning generally, no sex differences were shown in tests that measured learning under stress or verbal cognition. On a number of other traits, the average differences between males and females were "small" or "trivial" when compared to the "large" or "overwhelming" variability of individuals within the group. These traits were fearfulness or anxiety, self-esteem, arrogance, aggression, assertiveness, maturation rates, spatial cognition, development of self-confidence and sociability. The government attorney asked Jacklin:

490. Judge Kiser discounted Jacklin's opinions because he erroneously assumed that her conclusions about the statistical significance of sex differences were based primarily on studies of "cognitive abilities" not "developmental and emotional differences." After dismissing the importance of Jacklin's testimony about the bell curves, Judge Kiser made the following observation: "Thus, the bell curves are not surprising. Moreover, the education experts who find a need for single-sex colleges do not base their opinion on the difference in cognitive abilities of male[s] and females, but rather on developmental and emotional differences between the sexes." VMII, 852 F. Supp. at 480.

491. Joint Appendix at 831, VMII (Nos. 94-1667 & 94-1717); see id. at 843 (testifying about "induced mental stress" that "learning under stress would not differ from [sic] men and women at all"). Interestingly, Jacklin also testified at her pre-trial deposition that "under stress simple kinds of things are learned well." Id. at 859-60 (emphasis added). It may be that the mindless rote memorization required of fourth-class cadets — the rats — is the only type of learning that is appropriate for VMI's adversative method.

492. Id. at 833. Jacklin admitted there was "a lot of controversy" about the research findings on verbal cognition, but that "there doesn't seem to be any difference at all." Id.

493. See generally id. at 823-49 (testimony on the sex differences regarding social development).

494. Id. at 823 (testifying that "you can find an average difference between males and females but it's far overshadowed or outweighed by the individual variability between men and women").

495. Id. at 830 (testifying that "[i]t would certainly be true" that gender cannot be "used to try to predict [self-esteem]").

496. Id. (testifying that the "average differences" between the sexes is "overwhelmingly less" than the "individual variability" in measures of arrogance).

497. Id. at 830-31 (testifying that for "some types of aggression" there are no sex-based differences, but that "many tests of aggression do find average differences" which, however, are "trivial compared to the overwhelming, large individual differences between people within the group").

498. Id. at 831 (testifying that "you would find some difference but it would be very small," and that "[t]he curves would be almost overlapping").

499. Id. at 831-32 (testifying that the "average gender differences in maturation rates ... is far more [sic] shadowed by the individual variability among females [sic] and among females"); see id. at 839.

500. Id. at 832-33 (testifying that "average group differences ... are trivial" compared to "variability within the group").

501. Id. at 840-41 (testifying that the "average difference ... between males and females are trivial compared to [those] within the group variability").
Q So if I wanted to predict an individual’s level of any one of these psychological traits, how useful would gender be for making that prediction?

A That’s what I tried to suggest, that gender is not a good predictor because of the individual variability; gender is not a good predictor for these psychological traits at all.

Q In your opinion, if there was an educational methodology that required a certain level of one of these psychological traits in order to be beneficial for that individual, would gender be a useful predictor of whether or not that methodology would be beneficial for that individual?

A No. Again, gender is not a good predictor because the average differences are so overshadowed by the individual differences.

Q In your professional opinion is it possible to look at educational methodologies and determine whether or not they are appropriate to women?

A No. Because there are so many individual differences and individual variations among women, and there are among men.

With regard to men’s and women’s responses to the components of the VMI adversative methodology — “induced mental stress,” “absolute equality of treatment,” “absence of privacy” and “minute regulation of behavior” — Jacklin testified that “[t]here is no evidence that there are average differences, forget the individual variability.”

The VWIL plan is based on generalizations about women’s psychological characteristics. For example, the Mary Baldwin VWIL task force rejected VMI’s adversative model because of the assumption that “[f]or females, the adversative model is not conducive to the development of confidence and self-esteem.” In fact, there is no support in the research literature for the assumption that the VMI adversative methodology is conducive for building confidence and self-esteem in men either. Jacklin testified that there is “no evidence that the

502. Id. at 848-49 (testifying that “often males and females may have different concerns about what group they’re concerned about . . . but, in fact, male[s] and females both are very concerned about their relationships with other people”).
503. Id. at 833-34, 838.
504. Id. at 842-43.
505. Id. at 840 (quoting VMI Defendants’ Proposed Remedial Plan at 5).
506. The fact that VMI is known for some of the outstanding graduates it has produced, such as General George C. Marshall, is not evidence that the VMI methods are better for males
adversative model is better for males or for females” and that the work of Rosabeth Moss Kanter on methods of developing leadership “suggests that the non-hierarchical style is more effective for both men and women.” Jacklin concluded that she did not “believe” that it was “possible to say what leadership development program will be most effective for women” “because women are not a single group. Women vary. Women are different just as men vary and men differ from each other.” But she would not “recommend” the rat line “for men or for women” and was not “aware of any educational authority that has recommended the adversative method of education” for men or women.

On cross-examination, VMI’s attorney, Anne Marie Whittemore, attempted to impeach Jacklin’s testimony by her skillful use of Jacklin’s deposition testimony and scholarly research. The cross-examination is reminiscent of Alice Kessler-Harris’s, in which her own words and theories were used to discredit her testimony in the Sears case. On cross, Jacklin admitted that psychological studies, including her own, had found differences between men and women regarding the than other methods might be. Clearly the VMI methods are not suitable for the 15% to 20% of cadets who drop out of VMI, many within the first few weeks. Given the self-selection of students who apply to and then enroll at VMI, the attrition rate is quite remarkable. The more interesting question is what has happened to those who dropped out within the first week, before their “uppityness” is beaten out of them, and VMI has then rebuilt them in the mold of a VMI man. The only scientific way to evaluate the effectiveness of VMI’s methodology, including the rat line, would be to do a longitudinal study of comparable cohorts of men, such as men who went to VMI, men who were admitted and left, men who applied but went to other schools because of choice (they were admitted to VMI) or because they were rejected, or men who would have qualified but never applied and went to other schools. The value of the VMI adversative aspects of the educational experience may be less important in later success than the quality of the academic experience and the fact that graduates are essentially initiates into an elite fraternity that provides significant connections in Virginia business and politics. For young men from the middle and lower-middle classes it may be the closest they can come to achieving the status, history and affiliations of being born into the Southern aristocracy. The VMI ring is a surrogate for a good name and a distinguished family history. See Gilligan Brief, supra note 152, at 11 n.31 (noting that VMI’s witnesses “admitted that most men do not want, and would not profit from the extreme adversative environment at VMI” and that “[s]ome students might well select VMI, despite its educational philosophy, not because of it, in order to take advantage of the prestige and career opportunities it confers on graduates”).

507. Joint Appendix at 840, VMI II (Nos. 94-1667 & 94-1717); see id. at 856.
508. Id. at 845.
509. Id. at 849-50.
510. Id. at 861, 856 (paraphrasing Jacklin’s responses to VMI counsel’s leading questions on cross-examination). Defense counsel Anne Marie Whittemore was clearly annoyed that Jacklin continuously attempted to qualify her responses to leading questions that called for only a “yes” or “no” answer. It is apparent that Jacklin knew exactly what she was doing in attempting to keep the context in her responses under a hostile cross-examination.
511. See supra text accompanying notes 403-12.
psychological traits she testified about on direct examination.\textsuperscript{512} At first glance, it appears that Jacklin’s testimony on cross-examination contradicted what she had testified to on direct. Her testimony on cross, however, was fully consistent with her testimony on direct that there \textit{are} differences, but the average differences between men and women are not as significant as the differences between individuals within each group. The responses that defense counsel elicited on cross-examination describe the nature of the differences, not their statistical significance or predictive value. Jacklin had consistently admitted, on direct and cross-examination, that average differences between men and women had been found by researchers. Despite defense counsel’s attempts to limit her answers on cross, she tried to illustrate the meaning of these differences within their statistical and utilitarian context and within the context of questionable findings in the results from twenty year old research.\textsuperscript{513} At one point, plaintiff’s counsel objected to the defense’s attempts to make Jacklin contradict her earlier testimony: “Your Honor, if I could interpose an objection. There’s been — this is not an impeach[ment] to what she said. She has agreed there are average differentials and I don’t see what the impeachment is.”\textsuperscript{514} Judge Kiser responded: “She can read [her deposition testimony] and explain it.”\textsuperscript{515}

But the court’s estimation of Jacklin’s testimony had been seriously undermined by the cross-examination: defense counsel effectively, but disingenuously, raised questions about the consistency of her testimony, the strength of her reputation among her peers, her objectivity and her political bias. To the uninitiated, many of the

\textsuperscript{512} For example, Jacklin made several admissions: that “[t]here are differences in what is a stressor for a male or a female,” Joint Appendix at 866, \textit{VMI II} (Nos. 94-1667 & 94-1717); that “[s]ex role content does matter to attention, and attention sometimes matters to learning,” \textit{id.} at 868; that “[a]s children get older,” “girls tend to have less confidence in their academic ability than boys,” \textit{id.}; that there is “evidence that men’s achievement motivation may be sustained or even stimulated by competitive conditions whereas women react in the opposite way,” \textit{id.} at 869-70; that “college men overpredict how well they’ve done and women underpredict how well they’ve done,” \textit{id.} at 870; that there is a “trend for college-age women to be externalizers” and that “men tend to [be] internalizers,” \textit{id.} at 872; that “with respect to measures of self-esteem that during the college years some sex differentiation does occur,” \textit{id.} at 873; that “during the college years women have less confidence than men in their ability to perform well on a variety of task[s] assigned to them,” \textit{id.}; that “college women have less sense of being able to control the events that affect them than college men,” \textit{id.} at 874; and that “college women tend to define themselves more than college men in social terms . . . .” \textit{id.}

\textsuperscript{513} \textit{See id.} at 869 (Jacklin testifying that certain research she had done with a colleague was “20 years old” and “there have been some changes in these areas over the last 20 years”).

\textsuperscript{514} \textit{Id.} at 871.

\textsuperscript{515} \textit{Id.}
questions would seem like cheap shots, but to litigators it is how the courtroom game is played. In any event, the defense’s tactics worked; Judge Kiser found virtually all of Jacklin’s testimony unreliable, concluding that “Dr. Jacklin’s testimony was contradicted by most of the evidence in the record.”

The “evidence in the record” included the trial testimony of the witnesses who testified about the pedagogical benefits of “single-sex education,” a topic about which Jacklin claimed no expertise whatsoever. It also included the books and articles reporting on studies pertaining to single-sex education, many of which reported findings of sex differences on certain traits.

But, in fact, there was nothing inconsistent at all between Jacklin’s testimony and other reliable evidence in the record relating to her areas of expertise. Indeed, unlike many of the defense witnesses, including Elizabeth Fox-Genovese, Jacklin did not offer as testimony any anecdotes, hunches or personal opinions, and her answers were straightforward, direct, unadorned, consistent, responsive and limited to the subjects within her knowledge as an expert in the psychology of gender differences. Joan E. Bertin, the attorney for amici curiae Professor Carol Gilligan, wrote that under the Supreme Court’s Daubert standards the testimony of VMI’s expert witnesses was “wholly lacking in evidentiary reliability and qualifies in the true sense of the word as ‘junk science.'” Bertin’s “Gilligan Brief” argued persuasively that “[t]he trial court . . . admitted the testimony of witnesses who were not properly qualified as experts, permitted them to express opinions that were not properly supported, and relied upon this evidence to reach conclusions about psychological and behavioral characteristics of males and females and educational methodologies suitable to those characteristics.”

The testimony of Carol Nagy Jacklin cut to the heart of the assumptions made by all the VMI witnesses about the significance of

517. Joint Appendix at 850, *VMI II* (Nos. 94-1667 & 94-1717). Judge Kiser asked Jacklin, “Doctor, am I safe in assuming that you find no pedagogical justification in single-gender schools?” Jacklin responded, “No. I have not studied single-gender versus coeducational schools. I have not studied that.” *Id.*
518. For example, as noted in the *Gilligan Brief, supra* note 152, at 9 n.21, Dean Lott testified that “we are convinced by all of the literature in the field that . . . there are no inherent differences between the way men and women learn.” Joint Appendix at 440-41, *VMI II* (Nos. 94-1667 & 94-1717).
519. *Gilligan Brief, supra* note 152, at 13 (citing Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)).
520. *Id.*
gender differences. She said, again and again, sex cannot predict an individual’s psychological makeup. The VMI witnesses, who agreed with this basic point, were nevertheless convinced that it was appropriate to use psychological generalizations about women to define the content and methodology of the VWIL program solely because it had been defined as a program for women only. In this regard, Elizabeth Fox-Genovese’s testimony stands out because the court relied on it so extensively and because she has impeccable credentials as an expert on women’s education, including its history. Jacklin had a very narrow scientific point to counter Fox-Genovese’s broad normative rationale for endorsing the VWIL plan: using assumptions about how the average woman is different than the average man to create an educational program for a group of potential students you know nothing about, except that they will be female, is to rely on stereotypes. As Kay Deaux and Brenda Major have written:

We know, from both extensive research and common observation, that gender stereotypes are pervasive. People typically believe that men and women differ in a wide range of personality traits, physical characteristics, role behaviors, and occupational positions. Traits related to instrumentality, dominance, and assertiveness, for example, are believed more characteristic of men, while such traits as warmth, expressiveness, and concern for other people are thought more characteristic of women. These beliefs are not all-or-nothing ascriptions; rather, people make judgments about the relative likelihood that women and men will exhibit various characteristics.521

Fox-Genovese made a variety of assumptions, using sex as a predictor, about the characteristics of a student population that did not even exist. She attempted to refine her assumptions by projecting generalizations about the social class and race of the present Mary Baldwin students onto the hypothetical VWIL students. This was all guess work, not science. She and other VMI witnesses assumed that there would be little demand for a female VMI, but they had no data

521. Kay Deaux & Brenda Major, A Social-Psychological Model of Gender, in Theoretical Perspectives on Sexual Difference 89, 95 (Deborah L. Rhode ed., 1990) (footnotes omitted) [hereinafter Theoretical Perspectives]. Deaux and Major also note:

In recognizing that people have certain beliefs about gender, we do not assume that there is no basis in reality for these beliefs. Research indicates that on the average men score higher on measures of instrumentality and women score higher on measures of expressiveness. But these observed differences tend to be relatively small, generally smaller than assessed beliefs about the differences.

Id. at 277 n.8.
to support this assumption because no surveys had been done. Some of the assumptions about the future VWIL students and the demand for a VWIL education may turn out to be correct, but they were not empirically grounded when they were asserted. And while demand might generally be relevant when the State is considering developing a new educational program, demand should not have driven the remedy for an existing educational program that has systematically, for over a century and a half, made the creation of demand by women impossible. Why would women demand a VMI-education, or even an all-women's VMI-type of education, when VMI has made it so clear that women will not be admitted to VMI and that its unique educational method is for men only? Demand — which can be created and destroyed by various institutional structures and social norms — should have been as irrelevant in shaping the remedy in VMI II as it was in determining the liability in VMI I. Nevertheless, like the slippery use of the "lack of interest" defense in the Sears case, the "lack of demand" argument was asserted by the VMI defendants to shift part of the responsibility for the architecture of the VWIL plan to the true victims of VMI's sex discrimination — women who might want to go to VMI and are unlikely to attend VWIL.

The court of appeals in VMI I observed that "[m]en and women are different, and our knowledge about the differences, physiological and psychological, is becoming increasingly more sophisticated." Carol Nagy Jacklin's testimony presented the trial court with sophisticated insights about the state of our knowledge about psychological differences between men and women: we know about a number of differences, and we know, as a scientific matter, that these average differences are poor predictors of behavior for any individual. Sex, therefore, should not be used as a proxy for a more complex assessment of an individual's abilities, characteristics and desires. Fox-

522. See VMI II, 44 F.3d at 1235 (commenting on the lack of a "scientific survey"). Elizabeth Fox-Genovese testified as follows in response to defense counsel's question about student demand:

Q Doctor, based on your work with undergraduates, would you describe to the court your opinion of anticipated student demand for VWIL and compare it to the demand that you just indicated for an all-woman's mirror image of VMI?

A Look, we haven't had studies of this but my . . . based on my reading of the literature on young women in college education, my own experience interviewing, my knowledge of polling data and the amount of time I spend talking to students, my own and other people's, I would be very much surprised if there was very much demand for a female VMI and I would expect the demand for VWIL to be significant and to rise.

Joint Appendix at 579-80, VMI II (Nos. 94-1667 & 94-1717) (emphasis added).

523. See supra note 412.

524. VMI I, 976 F.2d at 897.
Genovese, however, did not really care about the individual — the hypothetical Jackie Jones — who might not fit the assumptions she projected for the typical VWIL student. Rather, Fox-Genovese was engaged in a project of social and economic reform that went far beyond the contours of the remedy called for by the court of appeals in *VMI I*.

The VWIL program presented an opportunity for Fox-Genovese to implement her ideas about preserving the collective values of the society in advancing the welfare of a particular group of socially, economically and psychologically disadvantaged women — those who she imagined might want to attend VWIL — at the expense of the (presumably, she believed, few) individuals who might want to attend VMI or a VMI-type of school. This was not sophisticated social science, but a projection — onto a concrete problem — of a political, economic and social solution, the framework of which is detailed at great length in *Feminism Without Illusions*. Essentially, Elizabeth Fox-Genovese’s testimony was a piece of advocacy, while Carol Nagy Jacklin’s was reportage. The former was promoting a plan for engineering outcomes that discounted individual choice and will; the latter was providing a cautionary tale about the limits of our scientific knowledge of human psychology and the behavior of individual men and women.

It is ironic that Fox-Genovese placed so much reliance on biology as the determinant of the entire VWIL educational program, and particularly, of the features that distinguished VWIL from VMI. By elevating biology to a legal category determining which persons who want to become citizen-soldiers can go to VMI and which can go to VWIL, Fox-Genovese appears to join company with sociobiologists who argue that such sex-based distinctions in the law are justified.

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525. Fox-Genovese testified that

As I understand all of this, and I don’t claim to be an expert. I did visit West Point this fall and as a guest with an extensive tour. I read a lot about VMI. I think what is essential to military preparedness is what we need to be looking at because it is not clear to me that all of the wearing of a uniform and the rat line and the discipline in the way in which the VMI students must carry themselves and must respond to their superiors both among the student body and among the officers.

It isn’t — the point of all of that is to produce a result, and if there were reason to believe that in training young women you could produce similar kinds of results without the same intensive military atmosphere, then that would be fine.

Joint Appendix at 582-83, *VMI II* (Nos. 94-1667 & 94-1717) (emphasis added).
because they reflect natural differences between men and women. As biologist Ruth Hubbard has written:

Sociobiologists argue that animals, including humans, do things that help spread their genes about. Behaviors that let them do that most effectively become universal traits. Among males, these are behaviors that lead them to inseminate as many females as possible, hence male promiscuity; for females they are behaviors that optimize the ability to spot and attach themselves to genetically well endowed males and to take good care of the few precious offspring they can produce in their lifetime, hence female fidelity and nurturance.

Though some legal sociobiologists would accept women's subordination to men as natural, Fox-Genovese's embrace of a crude biological determinism in the *VMI* case is not necessarily a conservative, antifeminist position. In any event, as historian Carl Degler has suggested, "modern proponents of a biological approach to human behavior are more often than not ideologically liberal and social reformist in outlook." Though she is clearly reform minded, Fox-Genovese has rejected the liberal agenda of equal rights that rests on many of the premises of individualism. Her position on difference and its relation to biology in the *VMI* case is similar to the views of sociologist Alice Rossi:

[Rossi] has by no means abandoned her commitment to the achievement of equality for women. Equality, she insists, should not be confused with sameness. "Difference is a biological fact" in men and women, "whereas equality is a political, ethical, and social concept. No rule of nature or of social organization says that the sexes have to be the same or do the same things in order to be social, political, and economic equals."


528. *See Kay, supra* note 526, at 75 (noting that the reconceptualized feminist focuses on sexual differences — albeit to "liberate women from male dominion").

529. Carl N. Degler, *Darwinians Confront Gender; or, There Is More to It than History*, in *Theoretical Perspectives*, *supra* note 521, at 33, 37.

530. *Id.* at 40 (quoting Alice S. Rossi, *The Biosocial Side of Parenthood, 1 Hum. Nature* 72 (1978)).
Fox-Genovese would similarly argue that, in the scheme of things, VWIL is different than VMI, but that it is politically equal or comparable to VMI.

But Fox-Genovese is far more ambivalent about the role of biology than her testimony in the VMI case would suggest. For example, she wrote in *Feminism Without Illusions*,

> The modern technological and contraceptive revolutions have radically reduced the significance of biological difference for most aspects of life. . . . Modern technology ensures that there are very few occupations that women cannot perform as effectively as men. In what way, after all, is muscular strength a prerequisite for pushing the button that will unleash nuclear warfare? Or flying a jet bomber? Women have proved fully capable of becoming astronauts. There is no biological reason that they should not serve at the highest levels of military command or business administration or political power.

Those who wish to argue from physiology to social role are rapidly being forced to argue that although men are indeed better suited than women to serve in the infantry or in heavy labor, they are hardly better suited to sit behind desks, making important decisions and earning mega-salaries. One of the most striking aspects of our society lies in the declining relevance of men’s physical strength to the most important business of life, including the exercise of economic and political power. . . . Men do retain the advantage of physical strength over women, but the significance of the advantage has steadily decreased and is now questionable.\(^5\)

Though Fox-Genovese acknowledges that “[i]n truth, many women today want what many men want: to make a decent living, to have a rewarding personal life, and to get on in the world without rocking too many boats,”\(^5\) she does not know why any women would want what many sons of Virginia want: to attend VMI — which has been the route to a decent and rewarding life for generations of young men. Shannon Faulkner did not want to rock the boat to get into The Citadel, but then no one made it easy for her. Fox-Genovese herself noted that “[t]oday, women can plan to go to graduate school, law school, medical school, or business school without fearing that they will be denied admission simply because they are women.”\(^5\) But they cannot

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531. *Fox-Genovese, supra* note 384, at 252.
532. *Id.* at 246.
533. *Id.* (emphasis added).
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attend VMI or The Citadel, for that reason alone — *simply because they are women*. Degler observed that

Socially the most striking measure of the transformation wrought by the new feminist movement in the United States was the admission of women not only into the once distinctively male domain of the military service, *but also into the military academies themselves*, something permitted in no other society enlisting women in the armed services except Canada.\(^{534}\)

VMI, however, has resolutely set its face against this wind of change, determined not to allow women into the inner sanctum. Why VMI does not follow West Point's example today, as it did in 1839, is part of the story that follows. But why Fox-Genovese chooses to stand with VMI is particularly complex given her own writings on the role of biological sex differences and her apparent rejection of assigning social roles according to sex:

> Professional sports rank among the few remaining arenas in modern life to which the biological differences between men and women are relevant. Sexual relations rank as another. By and large, the worlds of work and politics do not . . . Thus although many of us, women as well as men, do not wish to see it that way, it remains true that the vast majority of our social roles result from social choices, not from the dictates of biology. This change in the relevance of men's physical strength, which has come upon us rapidly, causes unavoidable confusion, but we cannot afford to let our own confusion shape our future.\(^{535}\)

In a moment of autobiographical candor, she admits, "I have no difficulty in recognizing the differences between women and men."\(^{536}\) But she also recognizes that "the real question is not whether there are differences. The question concerns the consequences of the differences."\(^{537}\) While Carol Nagy Jacklin — the feminist social scientist — wants to measure the statistical significance of the differences, Elizabeth Fox-Genovese — the women's historian — wants to recount their consequences. Yet even Fox-Genovese asks: "Are boys entitled to win just because they are boys? Should girls be reared, as they so frequently have been, to fear winning — and worse, to refrain from winning — out of respect for boys' superior anatomy?"\(^{538}\)

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536. *Id.* at 249.
537. *Id.* at 250.
538. *Id.*
Fox-Genovese is moved more by that fearful, uncertain girl than the hypothetical Jackie Jones who will do just fine without her help — who doesn’t even need help. The VWIL student needs protection — from violence, from male sexuality, from harshness and adversity. There is a peculiar focus in the VMI opinions on the distracting influence and the dangers of cross-sexual relations. It is not clear whether the judges are more worried about the men losing their edge or the women being raped. Fox-Genovese, according to her testimony, is very attuned to women undergraduates and their biological and psychological problems, including anorexia. Many feminists would say that in letting VMI remain all-male — in participating in Mary Baldwin’s “bailout” — Fox-Genovese has contributed to VMI’s continued subordination of women. Fox-Genovese, no doubt, would say that she is really being subversive, that VMI will go the way of the dinosaurs, while VWIL will free many women of their fears of men and their fears of failure.

VI. UNRAVELING THE “CATCH-22” THEORY OF THE VMI CASE

A. STUDENT CULTURE OR STATE EDUCATIONAL POLICY? THE INVENTION AND AFFIRMATION OF THE “CATCH-22” THEORY

Undoubtedly, the most creative and successful legal and factual theory that the VMI counsel argued and “proved” in the liability phase of the VMI litigation was the so-called “Catch-22” theory. Although the defendants failed to convince the court of appeals that the Commonwealth of Virginia had “articulate[d] an important policy that substantially supports offering the unique benefits of a VMI-type of education to men and not to women,” the unanimous panel of circuit judges in VMI I concluded that “the introduction of women at VMI will materially alter the very program in which women seek to partake.”

539. See, e.g., VMI II, 44 F.3d at 1238 (stating that a “sex-neutral” atmosphere can be less distracting to late adolescents).

540. “The Catch-22 is that women are denied the opportunity when excluded from VMI and cannot be given the opportunity by admitting them, because the change caused by their admission would destroy the opportunity.” VMI I, 976 F.2d at 897 (referring to “the classic paradox,” in Joseph Heller, Catch-22 (1961)).

541. Id. at 899.

542. Id.
This Catch-22 theory and its factual predicates were significant factors shaping the proposal for a Virginia Women's Institute for Leadership at Mary Baldwin College, as well as a decisive rationale behind the subsequent approval of the remedial plan in VMI II. In affirming Judge Kiser's ruling on the VWIL proposal, the court of appeals in VMI II recapitulated its reasoning in VMI I:

We also affirmed findings of fact that coeducation would destroy aspects of VMI's program which lie near the core of its holistic system and that the admission of women therefore would deny them the very benefit they sought by their admission. The district court found that coeducation would require fundamental changes (1) to the adversative method which pits male against male because that method would not produce the same results when a male is set against a female; (2) to the absence of privacy which was found to be essential to the leveling process; and (3) to physical training, requiring VMI to adopt, as was required at the U.S. military academies, a dual-track program for men and women in order to achieve equality in effect. We concluded that coeducation at VMI would thus deny those women the very opportunity they sought because the unique characteristics of VMI's program would be destroyed by coeducation. The Catch-22 is that women are denied the opportunity when excluded from VMI and cannot be given the opportunity by admitting them, because the change caused by their admission would destroy the opportunity.

In view of these findings, we did not direct the Commonwealth of Virginia to change VMI to a coeducational college . . . but allowed that Virginia might properly decide to alter the program and admit women to VMI, or establish parallel institutions or parallel programs, or abandon state support, leaving VMI the option to pursue its own policies as a private institution.543

After the Commonwealth of Virginia won the district court's acceptance of its "parallel program" at Mary Baldwin, the government argued on appeal that because VWIL cannot provide women with "an education equal to men," the "only appropriate remedy" is for VMI to admit women so that they can benefit from its "unique

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543. VMI II, 44 F.3d at 1233 (quoting VMI I, 976 F.2d at 897) (footnotes omitted). In VMI I, the court of appeals had suggested that Virginia could pursue at least three possible options to remedy its constitutional violation: "to admit women to VMI and adjust the program to implement that choice, . . . establish parallel institutions or parallel programs, . . . abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution . . . [or develop] other more creative options or combinations." VMI I, 976 F.2d at 900.
educational methodology." The court of appeals criticized "the government’s syllogism . . . [for] failing to follow its logic to completion." The court of appeals, with impeccable logic but questionable sense, again raised the Catch-22:

If we ordered VMI to admit women, the program would be irrevocably altered, forever denying its unique methodology to both women and men. Changes would have to be made to the adversative method, to the absence of privacy, and to the physical requirements of the program, all of which are part of VMI’s unique methodology.

In response to the Catch-22 argument, the United States took several positions on the issue of whether women would change VMI. First, the government argued that admitting some women really wouldn’t change VMI at all. Second, even if some changes occurred — such as the introduction of new distractions and stresses because of cross-sex relationships or mitigation of the harshness of the rat line — the courts cannot justify refusing to admit women merely because of changes that might result from either the cadets’ or administrators’ subjective responses to women or their stereotyped assumptions about women’s abilities. Third, changing the Institute from male-only to male and female is a change that is “constitutionally required,” which should be distinguished from other changes in attitudes, policies or practices that are a consequence of the legally compelled change. Fourth, the “minimal” changes that would have to be made to accommodate “personal privacy” of men and women “would not result in changes in VMI’s educational method or the ratcheting down of VMI’s requirements.” Fifth, with regard to physical education requirements, “VMI would not have to make any

544. Appellant’s Brief at 42, 17, VMI II, 44 F.3d 1229 (Nos. 94-1667 & 94-1717); see VMI II, 44 F.3d at 1240.
545. VMI II, 44 F.3d at 1240.
546. Id.
547. See Appellant’s Brief at 34, VMI I, 976 F.2d 890 (No. 91-1690) (arguing that “there is no reason why VMI would have to change its educational method if women are admitted” and that the district court “had” recognized [that] the evidence establishes that some women can meet VMI’s present requirements” (citations omitted)); see also id. at 35 (arguing that “there is undisputed evidence that the admission of women would not affect VMI’s academic or ROTC programs, and that women could become adjusted to, and participate in, the honor system,” and that “there is no evidence that the admission of women would affect the class system or dyke system” (citations omitted)).
548. Id. at 35-37.
549. Id. at 34-35 n.25.
550. Id. at 38.
changes . . . to admit women,” because if VMI “insists on its principle of absolute equality,” it can “hold any women it admits to the same standards as men.”551

VMI’s ultimate, and most unanswerable, formulation of the Catch-22 was summarized by the United States in its reply brief in VMI I: “VMI argues that even if we show that the admission of women will not affect any of VMI’s various systems and components, the very admission of women will nevertheless change the VMI experience because women are not men.”552 There was no way around it, as the government had to admit. Obviously, “the admission of women to VMI would result in one real change — women would be present — and thus, of course, in the strictest sense VMI would not remain exactly as it is.”553 VMI’s position was very much like arguing that an all-white public school should not be compelled to admit black children who are seeking admission because racial integration will destroy the school’s unique characteristic — racial homogeneity. Thus, the hypothetical argument would go, the black children who are admitted will be denied the very benefit they seek — which has been defined as the opportunity to attend an all-white school.554

VMI argued, moreover, that any change must be considered, not with respect to particular policies, customs or practices of VMI, but by viewing the VMI program “holistically.”555 The government responded:

551. Id. at 40.
552. Appellant’s Reply Brief at 6, VMI I (No. 91-1690) (citing Appellee’s Brief at 28-30, VMI I, 976 F.2d 890 (No. 91-1690)). Griffin Bell argued on appeal to the Fourth Circuit: “VMI can’t be VMI if it lets women in. . . . By obtaining what she wants, [the plaintiff would] lose what she wants because it wouldn’t be there anymore.” Suzanne Fields, Reprieve for Brother Rat, Wash. Times, Oct. 8, 1992, at G1 (quoting Griffin Bell).
553. Appellant’s Brief at 41, VMI I (No. 91-1690). The next sentence captures the government’s ambiguous stand on the question of change: “But none of the changes identified by the court constitutes a change that must be made if women are admitted.” Id.
554. One response to this hypothetical would be that the black child does not desire to be part of an all-white public school and the woman does not desire to be part of an all-male public school, but they are both seeking an educational opportunity offered by a public educational institution on an equal basis with other persons regardless of their own race or gender and indifferent to the race or gender of the students at the school.

Quite clearly the admission of Blacks to VMI resulted in changes in traditions. See Stokes & Groves, supra note 152, at 419 (discussing the changes in the New Market ceremony resulting from the admission of black cadets in the 1960s); see also supra notes 52-56 and accompanying text.
555. Appellant’s Reply Brief at 6, VMI I (No. 91-1690) (citing Appellee’s Brief at 28, VMI I (No. 91-1690)).
This contention . . . simply avoids our argument that the record shows that VMI can admit women without changing its systems and components, and prevents an analysis of the facts. If we cannot respond to the district court's conclusion that the admission of women will change VMI by examining what it is the court says may change, then the district court's decision is essentially appeal-proof.

The court of appeals, reluctant to "impose a conformity [between men and women] that common experience rejects," "accept[ed] the district court's factual determinations that . . . material aspects of [VMI's] essentially holistic system would be substantially changed by coeducation." But the court did examine the hypothesized changes in "VMI's systems and components" to this extent: the court agreed with the judgment of the district court that three key changes would be required under coeducation — changes in the adversative method, the degree of privacy of the barracks life and the egalitarian nature of the physical training — and that these three consequences of coeducation were "fundamental" changes that would "destroy aspects of VMI's program which lie near the core of its holistic system." The only way to win on this issue would have been for the United States to convince the court that VMI's program was not as "holistic" as VMI claimed, or that even if it were a holistic program, those particular changes were either (or both) not "fundamental," but trivial, or not "at the core," but at the periphery, of the holistic program.

Indeed, this is what the government attempted to do. Thus, those arguments that may be characterized on one level as rather peculiar, inconsistent and even contradictory — women will not change VMI at all; women will change VMI somewhat, but only in minor respects; and women will change VMI fundamentally, but only in legally irrelevant ways — are, on another level, the best arguments that could possibly have been raised at the time to counter the conundrum posed by VMI's Catch-22 theory. The real problem was that, after VMI I, the Catch-22 argument took on a life of its own; it became the rationale behind VMI's position that the Mary Baldwin alternative was not only a better remedy than coeducation, but was the only appropriate remedy. This argument, however, contradicted the reasoning behind the

556. Appellant's Reply Brief at 6 n.4, VMI I (No. 91-1690).
557. VMI I, 976 F.2d at 897, 892.
558. VMI II, 44 F.3d at 1233.
Fourth Circuit's ruling in *VMI I* that one possible constitutional remedy would be for VMI "to admit women to VMI and to *adjust the program* to implement that choice." 559

Nonetheless, VMI's idea that any change should be resisted and all traditions preserved drove much of the *VMI* litigation, forcing the United States to appear to equivocate about the change it was seeking at VMI. The government was in an awkward position, both politically and with regard to its litigation strategy. Should it argue that women won't change VMI because women are the same as men? Or should it adopt the position that women will change VMI because women are different? Either way, the Justice Department attorneys would please some feminists and anger others, win over some judges and alienate others. In the end, the United States tried to have it both ways, a position more than adequately supported by the evidence: admitting women will change VMI in some ways — but not in any ways that will affect its educational mission or traditional principles.

The concern expressed in the *VMI* trials about the nature and degree of change that coeducation might bring to VMI in the future, obscured recognition of the many changes that have occurred in VMI's past, as well as the complex ways in which its traditions have evolved. Although the United States presented some important evidence about how VMI had previously both changed its traditions and continued to accommodate differences in abilities and backgrounds of individual students, the judges upholding the VWIL program did not seem to grasp the significance of these insights. There is other evidence, too, much of it provided by VMI's own historians, that suggests different ways of viewing the Institute's traditions and its attitudes toward change. By reading the record and reviewing the district court's factual findings in the *VMI* case in the context of the institutional histories of the school, we begin to see that there is a significant distinction between the evolving traditions of the school that are created or abandoned by the cadet culture and the educational policies and missions of the school that are created or abandoned by the administration, the Board of Visitors or the state. Everywhere in the evolution of cadet traditions and in the more self-conscious changes in school policies, the power, money and influence of the VMI alumni

559. *VMI I*, 976 F.2d at 900 (emphasis added). The minimal adjustments apparently contemplated by the court of appeals included conversion to a "dual-track physical training program," alterations in facilities and practices to accommodate "some degree of privacy" between men and women, and limitations on "the deliberate harassment that upperclassmen give to 'rats.'" *Id.* at 896.
through their Alumni Association and the VMI Foundation is felt — sometimes encouraging change, sometimes resisting it and always attempting to shape the school's policy to serve what the alumni perceive to be their own interests.

To evaluate what tradition and change mean at VMI, and to determine whether coeducation is a fundamental change at the core of VMI's program, we must first answer the question: Who's in charge? And of what? If it turns out, as I argue here, that many of the traditions present in VMI's adversative method and barracks life are a product of constant changes in cadet culture — some informal, undemocratic and spontaneous, and others the result of more formal, democratic processes of student government — these traditions surely should give way to equal education opportunities for men and women. As the United States argued in its brief in *VMI I*, all change is not the same: some change has legal dimensions, while other change — which just happens or is chosen — may or may not have legal implications.560

Even if it is assumed that some traditions deserve cautious or even reverential treatment, the source of a tradition, how it came to be, who created it and why, certainly ought to be explored.561 Even customs and traditions that have been legitimized over time by a state's elected representatives are open to constitutional challenge. The Virginia state legislature has explicitly delegated authority over VMI's admissions policy to the Board of Visitors,562 not the alumni, not the administration and, most certainly, not the VMI cadets. If the state legislature fails to assure that its authority, its power and, particularly, its public funds are used in ways that do not violate the constitution, then the courts have an obligation to look behind historic institutional arrangements and traditions in order to protect adequately both the authority of the state and the rights of individuals.

B. "Adversative" Training on the Rat Line

The unique feature of VMI — and The Citadel — that today distinguishes these institutions from the federal military academies is

560. Appellant's Brief at 34-35 n.25, *VMI I* (No. 91-1690).


562. VA. CODE ANN. § 23-104 (Michie 1993); *see VMI I*, 976 F.2d at 893.
their continued use of the adversative method of disciplining and initiating new cadets. The phrase "adversative method" is a euphemism for the often crude, violent and demeaning cadet-administered governance and discipline, generally known to cadets as "the system" — a set of social relations, rules, practices and rituals similar to those found in "earlier military training and English public schools." Entering cadets at VMI are indoctrinated to military life and cadet culture through the "fourth-class system" — the rat line. The court of appeals in the VMI case defined the rat line as the harsh orientation process to which all new cadets ("rats") are subjected during their first seven months at VMI. Designed to be comparable to the Marine Corps' boot camp in terms of physical rigor and mental stress, the rat line includes indoctrination, minute regulation of individual behavior, frequent punishments, rigorous physical education, and military drills.

The rat line is nothing more than a highly developed form of fraternity hazing which, as it is practiced in the setting of a military college like VMI, creates numerous opportunities and incentives for upperclassmen to mentally and physically assault, torment, torture and brutalize the new cadets. When the judges and the parties in the VMI case referred to the adversative method, then, they were using a term of art to denote the level, nature and duration of hazing rituals that are both consistently practiced by older cadets on the new

563. The word adversative, a term in the grammarian's lexicon, has been given a new meaning in the VMI case. The usage and meaning of adversative has been defined as follows: "adj. Expressing antithesis or opposition. Said of words. -n. An adversative word, as however or but." THE AMERICAN HERITAGE DICTIONARY OF ENGLISH LANGUAGE 19 (1969).
564. H.A. Wise, supra note 33, at 401. Will McLean, the narrator and hero of Pat Conroy's autobiographical novel about The Citadel, recalls his first weeks as a cadet:

There was no toleration of dissenters in "the system." "The system" was a phrase we heard from the time we rose at reveille until we fell exhausted into our beds at night.

The plebe system. The Fourth Class system. Through the system, we would learn of our inner reserves of strength, or innate capacity to resist violence.

565. VMI I, 976 F.2d at 893.
566. Id. At The Citadel, the fourth-class cadets are called "knobs."
567. The verb, "to haze," is defined as: "To initiate (as into a college fraternity) by exacting humiliating performances from or playing rough practical jokes upon." AMERICAN HERITAGE DICTIONARY, supra note 563, at 605-06.
cadets and are presently condoned or tolerated by the Institute. The boundary between the routine harsh treatment of new cadets as a part of their traditional orientation into the system, and the more exceptional forms of serious physical assault or psychological harassment the Institute or the Commonwealth of Virginia would punish as unlawful hazing, is not always clearly defined and has changed considerably through the Institute's history. Most of the practices of the fourth-class system are now officially prohibited at the federal service academies for a variety of reasons — because the system itself tends to encourage hazing abuses, because the military has moved toward more positive methods of training its officers and because there is broad consensus among experts that hazing has no positive educational value and many negative effects that make it unsuitable for the modern military. But VMI, like The Citadel, persists in its belief that the fourth-class system is an essential part of its holistic educational method of training citizen-soldiers.

In light of the ban on hazing at the federal academies, and more generally on college campuses, it is not surprising that, in VMI I, Judge Kiser accepted David Riesman's testimony "that the adversative model of education is simply inappropriate for the vast majority of women," and "that if VMI were to admit women, it would eventually find it necessary to drop the adversative system altogether and adopt a system that provides more nurturing and support for the students." Hence the Catch-22. The "success at West Point in assimilating women" was not "proof that VMI could do likewise," but evidence of the inevitability of the "drastic" changes that women would bring to VMI's traditional ways. Judge Kiser found that "without a doubt . . . VMI's present methods of training and education would have to be changed as West Point's were." According to the defense experts who testified in the VMI II trial, this would be an improvement. But the court of appeals agreed that the record supported Judge Kiser's conclusions that "changes necessary to accommodate coeducation would tear at the fabric of VMI's unique methodology."

569. See, e.g., VMI I, 766 F. Supp. at 1440-41 (Findings of Fact regarding West Point's experience in "mov[ing] away from its adversative new cadet system to a much more developmental style of training and emphasis on positive leadership"). Interestingly, women first entered West Point in 1976, but the "prohibition" on "[h]azing of new cadets" that was "technically improper prior to 1990" was not enforced until then. Id.
570. Id. at 1413.
571. Id. at 1423 n.8.
572. VMI I, 976 F.2d at 897.
Moreover, in developing the VWIL plan, the Mary Baldwin College task force also rejected VMI's adversative model as "wholly inappropriate for educating and training most women for leadership roles." Judge Kiser accepted this proposition in *VMI II*, noting that "[i]n the opinion of one of the leading experts on the educating of women, Dr. Elizabeth Fox-Genovese, an adversative method of teaching in an all-female school would be not only inappropriate for most women, but counter-productive." The task force, however, threw out the baby with the bath water. Consistent with the nearly unanimous views of educators and military officers on the disutility of hazing for men or women, the task force quite appropriately rejected VMI's fourth-class system — the rat line. But they also modified or completely rejected most of the remaining "masculinist" components of VMI's military program, so that, as their promotional literature reveals, VWIL is not a military institute at all, but a revamped Mary Baldwin College curriculum, integrated with an ROTC program and designed primarily to prepare women for leadership in civilian life. The irony is that for the last twenty years or so, Mary Baldwin, like many similar small private women's colleges in the South, ostensibly has already been preparing women for roles in public life — including leadership roles — as opposed to their historical mission of educating women for private life, particularly for domestic roles as wives and mothers. In fact, the VWIL program is an implementation of a curricular development to enhance leadership training for Mary Baldwin

574. *Id.*
575. For example, VWIL's admissions recruiter, Lori Esch, stated that, in selecting the uniform that the VWIL students will wear for official Virginia Corps of Cadet functions, "[w]e wanted something that let femininity show through. We didn't want anything too masculine." *Women's Leadership School Unveils Uniforms, Virginia-Pilot* (Norfolk), Feb. 16, 1995, at B7. Esch reported that the staff of the Mary Baldwin College Office of the Dean of Students "came up with the idea for the [uniform] jacket by looking through fashion magazines," and she was quoted as saying that "[t]he military look is in this year." *Id.*
576. An admissions brochure, obtained from the Mary Baldwin College Office of Admissions in August of 1995, prominently displays the following quotation, identified as a statement in the February 20, 1994, Richmond *Times-Dispatch*, by Dr. Elizabeth Fox-Genovese, Eleonore Rauol Professor of Humanities, Emory University: "VWIL can be counted upon to train ordinary young women in the twin possibilities of ambition and responsibility and to return them to the businesses, law firms, colleges, court houses and legislatures of the Commonwealth where, by their actions and their example, they will inspire future generations of young women — and young men." *MARY BALDWIN COLLEGE, VIRGINIA WOMEN'S INSTITUTE FOR LEADERSHIP AT MARY BALDWIN COLLEGE: ESPRIT DE CORPS* (1994).
577. Margaret Hopkins, a 1995 graduate of Converse College, the private women's college proposed as the women's alternative to The Citadel in South Carolina, sees "no need for another leadership program" at Converse College. Gaulden, *supra* note 16. Hopkins, the only student in
students which was being considered by the college president and deans before the Fourth Circuit’s decision in VMI I.\textsuperscript{578} In rejecting the nonadversative model of military training found at West Point and the other federal academies today, which prohibits hazing the fourth-class cadets, the Mary Baldwin task force made market assumptions about the average woman’s lack of interest in a military academy environment and educational assumptions about the inappropriateness of a military-style education for women generally. Even if it is assumed that lack of demand is relevant in the VMI remedy, the experience of growing enrollments at the service academies and at private coeducational military academies suggests that the assumptions underlying VWIL may not be well founded.\textsuperscript{579}

If West Point, the educational institution on which VMI was modeled, has improved its pervasive and demanding military training by abolishing the hazing associated with the fourth-class system, why does VMI continue to not only tolerate, but defend, the rat line? The answer lies in part in VMI’s particular history as an all-male military institution that initially educated rowdy, young, poorly educated farm boys and that evolved, after the Civil War, into a gateway for young men into an elite and exclusive fraternity dedicated to the ideals of Southern manhood and ultimately devoted to cementing its own networks of power, prestige and wealth throughout the South, but particularly in Virginia. VMI has always been, at least formally, a public institution; but in functional terms, the cadets themselves, through their ability and freedom to haze the new cadets, have power to influence who will be allowed to stay at VMI and who will be driven out. The upper-class cadets create the hurdles and arbitrarily enforce the rules they design, coercing many new cadets to leave the school and

\textsuperscript{578} Appellant’s Brief at 35, VMI II, 44 F.3d 1229 (Nos. 94-1667 & 94-1717); Appellant/Cross-Appellee’s Reply and Answering Brief at 5, VMI II (Nos. 94-1667 & 94-1717). The government briefs quote from the trial testimony of Mary Baldwin’s president, Cynthia Haldenby Tyson, stating that the VWIL program will be “a natural evolution of [the school’s] mission” of educating “women in a single-sex environment.” Joint Appendix at 617, VMI II (Nos. 94-1667 & 94-1717) (emphasis added).

\textsuperscript{579} For example, Norwich University, “the country’s oldest private military college,” which was “founded in 1819” — 20 years before VMI — and “admitted its first eight women in 1974,” has a “record 65 women” in its entering class of 310 cadets in the fall of 1995. Sara Rimer, \textit{Northfield Journal; Women Are “No Big Deal” at an Old Military College}, N.Y. Times, Sept. 6, 1995, at A16. Rimer quotes Norwich’s recruiter Colonel Craig Lind, a 1971 Norwich graduate, as saying, “I tell these young men, ‘You’re going to work for, and work with, women. The sooner you understand that the better.’” Id.
thereby limiting the size of the close-knit fraternity created by its graduates — i.e., the men who wear the VMI ring. The assumption, or the myth, is that only the best, the strongest, the most manly survive the rat year, but the system is a crude form of natural selection, and there is nothing natural about it. Star athletes and academic achievers, talented musicians and artists, and just plain all-around nice young men — those who stand out in a crowd, show any sign of "weakness" as men, or for any reason offend an upperclassman — are likely to be targeted for extra hazing. As one journalist noted in describing The Citadel's fourth-class system, "it might just be chasing out the wrong boys."580

The practice of hazing new cadets that developed into the traditional rituals of the fourth-class system that are now touted as an essential part of the VMI educational experience, began informally shortly after VMI's first entering class of cadets completed their three year certificate program. VMI historian William Couper reported that the first recorded instances of hazing, which were relatively mild, met with strong disapproval by the VMI administration.581 When the "pioneer" class of VMI cadets graduated in July of 1842, the remaining two classes of cadets went to a summer encampment for military training consisting of "drill, tactics, field training, route marches, and bivouacs."582 Couper recounted that the summer encampment of 1842 differed from the previous encampments — the pioneers were absent. They had been graduated. Up to this time each class had taken on new duties and responsibilities; from now henceforth each oncoming class would simply carry on the work and the traditions of those who had gone before. This state of mind perhaps suggested to the old cadets the idea that they were privileged to impose on those who had not before worn the gray. Certainly nothing of the kind had happened before, but immediately after the new cadets reported an order was issued concerning the extent to which the

580. Reilly, supra note 568, at 73.
581. 1 Couper, supra note 34, at 115. A photograph titled "Camp scene, c. 1868-72" in VMI Album, supra note 43, at 60, is accompanied by the following description:
The first summer camp was established in July 1840, on the Institute's Parade Ground. Except for those who were granted a summer furlough, all cadets lived in camp after the First Class graduated in July until the beginning of the academic year in September. "Rats" arrived sometime during the encampment, and the camp order books contained many references to demerits given to old cadets who engaged in hazing the newcomers. . . . Camp remained a fixture of cadet life throughout the nineteenth century, although the time and place of encampment changed.
582. H.A. Wise, supra note 33, at 26 (providing a history of the evolution of the early summer camps).
new cadets were being "imposed upon by the system of 'quizzing' now prevalent in the corps." It is the first mention of hazing; mild in nature, it is true, and not bodily harmful but mentally it is a cruel form of torture which will probably always be indulged in by a certain type.  

It is easy to imagine that the young men in the small Cadet Corps in the pre-Civil War era would have seen the summer camp as a release from the academic burdens and rigid schedule of the school year and an opportunity to break rules and engage in pranks and horseplay. In any event, Couper reported that early in the summer of 1846 a "sermon order" was issued to deal with a "bad habit which broke out" — "the use of 'opprobrious titles' as applied to new cadets and to all strangers who visit the institution." The "bad habits" persisted and the pranks continued despite the superintendent's orders prohibiting them, but they were at first fairly tame as later recalled by Captain George C. Chamberlaine, a cadet who entered VMI in the summer of 1850:

At this time hazing did not amount to much. Indeed, the word itself was not known. A few jokes were played on "plebes," such as taking their blankets after they had gone to bed and using them in the guard house, dragging them from their tents when they were asleep and the like; but nothing was done to hurt them. One of the principal jokes was "Marching on Orderly." When the new cadets were coming in, all who had entered during the week were informed that their duties as orderlies would commence on Sunday morning. They were instructed to put on their best clothes and be ready to "march on orderly" at nine o'clock. The squad usually consisted of five or six men who were marched around camp and halted in front of a tent. The command was then given to "right dress," and as the poor unsuspecting fellows were doing their best to line up, the tent opened and they were drenched with water by bucketsfull, thrown by old cadets from the tent. This of course closed the performance.

Couper wrote that the "scourge" of hazing "appeared at the beginning of every period of encampment quite regularly in the fifties" when it "played a part in the deliberations" of the Board of Visitors, whose ex

583. 1 COUPER, supra note 34, at 115.
584. 1 id. at 160. Couper speculated that this use of "opprobrious titles" "may have been the germ of the urge to fasten on every cadet a nickname." 1 id.; see 2 COUPER, supra note 34, at 197 (referring to the order of July 17, 1846, concerning "the use of opprobrious titles").
585. 1 COUPER, supra note 34, at 231-32 (quoting George C. Chamberlaine, The Institute as It Was in 1850, in VIRGINIA MILITARY INSTITUTE, THE BOMB (1901)).
officio member, General William H. Richardson, the state's adjutant general, "was utterly unbending in handling hazing cases." In 1852, General Richardson wrote a report on hazing at VMI, complaining that

The practice which has so long prevailed at the Institute, and which it has always been the wish and determination of the Board to suppress, of quizzing, and often maltreating, the new cadets in sport is not only subversive to the discipline of a military school, but puerile and unbecoming in those who have had the advantage of even one year's training at the Institute, as it is ungenerous and cruel to those who come from their homes and the protection of kind parents, to enter upon the necessary restrictions of a military education, among strangers.

Richardson's report included his recommendation on the appropriate discipline for the "delinquents" who engage in conduct in "violation of the regulations in this particular" — dismissal from the Institute.

Couper observed that "despite these warnings the practice continued and complaints of 'roughness and ungentlemanly incivility' by a few old cadets toward 'the new comers (or plebes, as they are generally termed) continued." By 1853, the summer camps continued to experience what had by then become the "customary trouble with

586. 1 COUPER, supra note 34, at 264. For a discussion of General Richardson's role in VMI's early development, see H.A. WISE, supra note 33, at 12.
587. 1 COUPER, supra note 34, at 264-65 (quoting General William H. Richardson, Report to the VMI Board of Visitors (1852)).
588. 1 id. at 265.
589. 1 id. Couper speculated that the use of the term "plebe" for fourth-class cadets may have been taken over from the United State Military Academy but it has not been used at V.M.I. since the early sixties, if, indeed, it was in general use prior to that time.
New cadets at V.M.I. are called "rats" and such has been the custom to times when the memory of living men runneth not to the contrary.

1 id. In VMI I, Judge Kiser relied on the testimony of the VMI commandant, Colonel Norman M. Bissell, for the finding that "[e]ntering students at VMI are called 'rats' because the rat is 'probably the lowest animal on earth.'" 766 F. Supp. at 1422. According to Henry Wise, who dates use of the term rat to the 1850s, the legend is that the custom arose when Washington College students began using the term of opprobrium to refer to the VMI cadets, "who retaliated by calling the [Washington College] student 'minks' because they were so mean and sly in their contacts with cadets." H.A. WISE, supra note 33, at 17; see 1 COUPER, supra note 34, at 311 n.6 (recounting the same legend). The terms very likely also connoted the class distinctions that separated the VMI cadets from Washington College students and that reflected resentment by the cadets of the generally well-off gentlemen from the college and disdain by the college students for the uncivilized lower-class farm boys who made up most of the early Corps of Cadets. See supra part III.C.1. Minks may be "mean and sly" but they are also one of the most valued fur-bearing mammals whose natural habitat is woodlands and whose beautiful pelts could be afforded only by the rich. Rats, however, are ugly, disease-bearing rodents found in gutters and sewers.
hazing." The pranks and initiation rituals of the cadets apparently got out of hand at times as evidenced by the decision of the superintendent in 1853 to prohibit the ritual of subjecting new cadets to "Marching off Orderlies." Couper described this practice as "a mild form of maltreatment of the new cadets" — "a bit of buffoonery which was not obnoxious to the authorities of the Institute." Nevertheless, because of the "outraged feelings of the public concerning the more vicious forms of hazing," the custom of "Marching off Orderlies" was "abolished along with the rest." The fourth class, responding to the "many and grievous complaints . . . manifested by the legislature of Virginia and the people generally," adopted a resolution "to abstain not only from the abuse of the new cadets ourselves, but to use our most strenuous exertions to prevent others from so doing." The act of contrition was to be repeated by future classes of cadets.

The specific events that precipitated the "outrage" of the public in 1853 are not described by Couper, but the undercurrent of violence and the constant threat of physical harm present at VMI at the time are suggested by his descriptions of the cadet duels and frequent use of knives and bayonets during the 1850s. In 1858, VMI for the first time acted on General Richardson's recommendation that cadets be dismissed for hazing: that summer a cadet was "promptly kicked out" when he "started to abuse a new cadet." General Richardson wrote that he believed that the expulsion had brought "an end" to the "unmanly and most cowardly and detestable practice of quizzing and maltreating the new cadets." But in describing the consequences of a hazing incident that resulted in another expulsion "less than three

590. 1 Couper, supra note 34, at 273.
591. 1 id.
592. 1 id.
593. 1 id.
594. 4 id. at 251 (quoting Resolution of Fourth Class Cadets, printed in Annual Report of the Superintendent (1853)).
595. See, e.g., 4 id. (quoting an editorial in the September 24, 1928, issue of The Cadet, which expressed the resolve of the cadets who were "opposed to hazing and . . . pledged themselves to see that it will not bob up again").
596. 1 id. at 257-58. See discussion of cadet violence of this period, supra text accompanying notes 238-47.
597. 1 id. at 337.
598. H.A. Wise, supra note 33, at 24 (quoting Letter from General William H. Richardson, member of the Board of Visitors, to the Acting Superintendent (Sept. 9, 1958)); see 1 Couper, supra note 34, at 337.
weeks after [Richardson's] letter,” Couper reflected that “there seems to be always another bully who will take the chance.”

This second incident led to the 1858 cadet “mutiny” which resulted in the dismissal of the fifteen “rebels” “who refused to attend parade unless the dismissed cadet was reinstated.” The mutiny reflected a pattern of cadet responses to the exercise of authority and discipline by the VMI superintendent during the 1850s. VMI's experience with “mass disobedience of orders” dated to the spring of 1851 when “the first square-off between the first class and constituted authority . . . resulted in temporary dismissal of the entire class of about forty.” The response of the Board of Visitors to the cadets’ appeal was to reinstate them “subject to confinement to the Post until graduation.”

The authority of the superintendent to regulate and discipline cadet behavior was thus counterpoised against the raw power of the cadets to engage in collective forms of disobedience of orders and rules. The cadets’ exercise of this power challenged the military hierarchy of the Institute, but it also received unofficial sanction from the Board of Visitors, which was reluctant to uphold the expulsion of large numbers of cadets, particularly in the graduating class. While keeping an eye to future enrollments, the Board, as well as the superintendent, had to maintain a delicate balance between the conflicting demands of the present cadets, both new and old, their parents, the local citizenry and the legislature.

As hazing continued over the years, the superintendent and Board were either unable or unwilling to discipline effectively any but the most egregious forms of conduct. The problem lay, in part, in the inability of the VMI administrative, academic and military staff to supervise the barracks. Lack of resources from the outset made it economical to allow the cadets to govern themselves through the class

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599. 1 Couper, supra note 34, at 338. Couper reported that “the cadet who was imposed on let it be known that he would whip the entire third class, one at a time, rather than submit to indignities and this he proceeded to do until his collar-bone was broken.” 1 id.

600. H.A. Wise, supra note 33, at 24. The acting superintendent who dismissed the 15 cadets for their “disobedience to an express order,” was concerned that the mutineers had “manifested so inadequate sense of the evil resulting from the practice of maltreatment.” 1 Couper, supra note 34, at 338 (quoting Major John T.L. Preston).

601. H.A. Wise, supra note 33, at 25.

602. Id. (the campus of VMI is also referred to as “the Post”).

603. To this day, no professionals live in the barracks or provide any direct supervision of upperclassmen’s methods in “running” the rats in the barracks. VMI I, 766 F. Supp. at 1423. Susan Faludi wrote that The Citadel has a similar style of student “governance” where “the college gives a handful of older students leave to ‘govern’ the others as they see fit.” Faludi, supra note 568, at 68.
system that had developed. While the class system ostensibly provided a hierarchical model of governance that was consistent with VMI's military education, as well as providing experience in democratic models of self-governance, it also resulted in the first class assuming control over the rules and practices of hazing that became established as the fourth-class system — eventually known as the "rat line." The first class derived their authority to set the boundaries of permissible hazing practices by virtue of their acknowledged ability to mutiny over the discharge of a student caught hazing.

In practice, as the hazing traditions developed, most of the hazing would be carried out by the third-class cadets — the sophomores — who had just completed their "rat" year and who had an interest in seeing the new cadets suffer as much or more than they had. In time, the third class came to be recognized as the "disciplinarians" of the system. This has meant that the hazing is actually performed by some of the youngest, most immature and most sophomoric cadets. Their authority and power, however, is far more precarious than that of the first-class cadets since they (and their parents) have not yet made a significant investment in the VMI degree; thus the third-class cadets must rely on the first class to legitimize and, if necessary, defend their conduct. Because the first class creates and enforces the rules of engagement for the hazers, the boundaries for acceptable behavior are governed more by custom and the evolution of internal norms of behavior and social relations in the barracks than by reference to external societal standards. Therefore, individual upperclassmen and vigilante-style groups of cadets who have engaged in immature and abusive physical and psychological hazing of new cadets have generally been protected by the silence, if not the approval, of their own and more senior classmates. Ultimately the first-class cadets defended the hazers who were caught and threatened with dismissal. The class system thus implicitly rewarded and legitimized the acts of a few "bullies" in each class whose imaginative and novel forms of successful hazing became the customary rituals of the following years. The administration, in permitting the upper-class cadets to administer the rat line, eventually became complicit, sometimes

604. In VMI I, Judge Kiser found that “[t]he 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.” 766 F. Supp. at 1422-23. 605. Id. at 1423.
unwittingly, in the code of silence and even in the cover stories that
masked the extent and seriousness of the hazing.606

During the Civil War, evidence of the VMI administration's sub-
tle shift to a more laissez-faire policy on hazing appeared in the super-
intendent's annual report of 1863 in which he "took advantage of the
opportunity to insert in the record every order which had been issued
pertaining to the cowardly practice."607 The list contained twenty
orders dating back to the 1846 directive forbidding "the use of oppro-
brious titles" and concluding with the superintendent's discussion of a
contemporary hazing case that had been publicized when an "ex-
cadet" "filed a memorial and complaint with the legislature."608
Superintendent Smith wrote:

Before suggesting any change in the established policy of the
institution, I deem it proper to say that in my judgment . . . the evil
cannot be entirely removed. It may be controlled measurably. The
public opinion of the school may be arrayed against it; the vigilance
and faithfulness of the cadet officers may stop the outward manifes-
tations of it; the elevation of the general tone of the school, by
appeals to heart and conscience and good feeling, may prevent gen-
eral malpractices; the censure of the indignant public sentiment may
help to strengthen this tone; but until the spirit of mischief, natively
alive in every child's heart, and prominently developed in many a
rude boy's growth, is entirely removed — then, and not till then,
will this universal evil, common to all schools, be fully and com-
pletely eradicated.609

Smith then elaborated on his "moral objection[s]" to two recommen-
dations that had been made for dealing with hazing: first, that "in
every case of maltreatment," the superintendent might "convene a
court of enquiry, before which every cadet shall be required, upon
pain of dismissal, to inform upon the guilty parties" or, second, that
each graduate, as a condition of receiving a diploma, might be asked
"to purge himself, before the board of visitors, of every infraction of
the laws of the school which prohibit maltreatment."610 In rejecting
the recommendations on moral grounds, Smith signaled assent to an

606. For example, Henry Wise wrote that "there was more success in preventing incidents
from becoming publicized than in preventing their occurrence. Occasional serious injuries were
covered up by attributing them to a friendly scuffle . . ." H.A. Wise, supra note 33, at 120.
607. 2 Couper, supra note 34, at 196.
608. 2 id. at 197, 196.
609. 2 id. at 197 (quoting Colonel Francis H. Smith, Annual Report (Mar. 31, 1863)).
610. 2 id.
unwritten policy of respecting the cadet code of silence about hazing incidents.

As the administration began to adopt a "boys will be boys" attitude about the inevitability of hazing, however, the hazing practices were becoming progressively more physical and dangerous. For example, a form of hazing called "bucking" that persisted into the 1900s, was well established by the time of the Civil War.\(^6\) The renowned sculptor and VMI graduate, Sir Moses Ezekiel, provided a description of his experience with "bucking" in 1862:

At that time it was customary for every newcomer at the Institute to be called a "rat," and any old cadet had the right to exact any service from a "rat" and also, on meeting him, to order the "rat" to hold up his right hand, when the old cadet would take hold of it and twist his arm until it was almost out of joint, declaring that he was impudent. If the "rat" made any resistance, he was taken to a room in the barracks, his hands were bound together over his knees, and he was turned over on his face and bucked with a bayonet scabbard, his name being spelled on his back side with a lick for every letter, and Constantinople for a middle name.\(^6\)

Though it was clear that the administration formally disapproved of bucking, the cadets in the fall of 1873 attempted to extend the practice by engaging in a mass bucking of the entire rat class.\(^6\) Couper's account of the story demonstrates how the class system of governance worked:

Carefully picking an afternoon,... when the authorities of the Institute were absent, the three upper classes formed a cabal to reinstate a practice known as "bucking." When everything had blown over and the penalties had been assigned it was readily admitted that it was a cowardly practice, and still more cowardly to protect the ring-leaders by a combination which on the surface made the entire body appear to be equally guilty.\(^6\)

The subsequent investigation into the "sorry practice" resulted in the cadets designing their own confession and punishment to ward off more serious penalties from the administration: cadet representatives signed another of the many "penitent declaration[s]" resolving to

\(^6\) A. Wise, supra note 33, at 57.
\(^6\) Id. (quoting Moses Jacob Ezekiel, Moses Jacob Ezekiel: Memoirs from the Baths of Diocletian 104 (Joseph Gutmann & Stanley F. Chyet eds., 1975)).
\(^6\) J.C. Wise, supra note 35, at 57.
\(^6\) 3 Couper, supra note 34, at 244.
"'maintain the laws of the school'" by their "'examples and influence.'" This familiar pattern of cadet "combinations" to carry out hazing or protect a hazer, followed by confession, contrition and a new resolution to abjure the practice in the future was repeated many times over the years.

By the early part of the twentieth century, the administration, however reluctantly, had come to tolerate a degree of hazing, though the practices continued to be controlled exclusively by the cadets with intervention by the Institute in only the most extreme cases where outsiders became involved. General Shipp, a strict disciplinarian, whose retirement in 1907 was motivated in part by hazing, remarked in his last annual report that

No one, so far as my knowledge goes, has ever been injured here by hazing. They are teased and annoyed, and in some cases maltreated; but I have known very many who were most anxious to get away at first, and yet braved it through, express great satisfaction with themselves for so doing. The attitude of cadets is that hazing weeds out the weaklings, and that they are well rid of those who leave.

Apparently Shipp had, in the end, accepted the cadets' justification for hazing; surviving it made them feel better and the system eliminated the "weaklings." Henry Wise reported that in the early 1900s "[c]adets boasted 'give us your son and we will give you back a man.'" This was accomplished through new forms of corporal hazing that apparently flourished in an environment marked by a rebellious spirit of the cadets. The practice of bucking continued into the 1910s, and by the early 1920s, when "the term bucking itself seems to

615. 3 id. (quoting from the cadets' declaration).
616. H.A. Wise, supra note 33, at 88, 87.
617. 4 COUPER, supra note 34, at 101 (quoting General Scott Shipp, Annual Report (June 17, 1907)). Henry Wise quoted General Shipp's 1907 comments on hazing, and asserted that Shipp's observation contains much truth today [in the late 1970s]. With all the admitted evils, particularly to VMI's public image of the violent, corporal forms of hazing that were prevalent up to a generation ago, no one died as a result of it. That is a boast that not all civilian colleges can make. In some of them fraternity initiations have caused death. H.A. Wise, supra note 33, at 87. Henry Wise later acknowledged that to "boast" that hazing at VMI had not resulted in any deaths was "a pallid apology for violent hazing." Id. at 120.
618. H.A. Wise, supra note 33, at 120.
619. For example, Wise reported that "there was a notorious episode in 1911 when eighty members of the third class... were dismissed for doing as they pleased after returning from a typhoid-epidemic furlough." Id. at 99. Again, in 1920, "the seniors ran amuck celebrating the New Year... There were no dismissals, but there were heavy penalties..." Id. at 107.
have dropped out of the vernacular, its salient feature continued” in a somewhat altered form: “A rat was made to bend over a table with arms spread out upon it and his posterior was swatted repeatedly with a sword, bayonet scabbard, or broomstick.” Wise reported that “[b]y 1923 beatings aimed at the posterior had ceased except for ‘taking in’ a rat, which symbolized accepting a new cadet into the ranks of the old at or a few days before Finals.” Starting as a “few licks” or “gentle taps” which were “applied to the rat’s rear as he was taken in,” the “taps got worse” and evolved into a ritual known as “Bloody Sunday.” This “bloody” celebration of the new cadets’ rite of passage into manhood “was superseded sometime after World War II by ‘running the gauntlet’ of flailing old cadets,” and when “[a]ll this got too rough . . . [it] was succeeded by the ‘breakout’ about 1960.”

Around 1918, according to Henry Wise, the “dangerous practice known as a ‘sheenie’ came into vogue.” Wise described a sheenie as follows:

When a new cadet lapsed in performance of any detail of his lowly role . . . he often was ordered by an old cadet witness of the derelection [sic] to “come around to my room after supper.” The host was more often a third classman, a sophomore, rather than a second or first, to whom ordering rats around was no longer a novelty. . . . On arrival at the host’s doorway, the rat would take a running slide into the room knocking over as many chairs and other objects as possible in the process. This prescribed mode of entry ended as the rat came to a stop, “finning out,” the term for the exaggerated and stiff posture, with belly drawn in and shoulders forced back with the aid of bended elbows, hands at trouser seams with palms to the front (which suggested the term itself). Amid a torrent of verbal abuse and demands for recitation of facts, which a new cadet is supposed

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620. Id. at 121.
621. Id.
622. Id.
623. Id. One cadet described his experience “running the gauntlet” with “[t]he old men lined up on either side of the long hall armed with paddles (newly cut), sticks, and even clubs.” Id. at 52-53 (quoting Letter from David W. Fleet to his mother (Sept. 5, 1871)). Wise described the “breakout” as follows:

This terminal rite of the new cadets’ lowly status consisted of their fighting their way through clusters of old cadets until their painful and tortuous upward climb ended with arrival on their home base, the fourth stoop. Having thus broken out of the rat line, they attained recognition as fourth classmen, no longer rats but not yet third classmen until after Finals, which now usually is an event some four months in the future. The “breakout” is an ongoing annual riot.

Id. First-class cadets continue to supervise the “breakout” today. See VMI I, 766 F. Supp. at 1423.
624. H.A. Wise, supra note 33, at 121.
to know by heart, the rat often received not-so-gentle help in “suck-
ing up his gut” as the heel of the old cadet’s hand pounded on the
offending stomach.\footnote{625}{Id. at 121-22. The practice of the “dark room sheenie” is discussed in id. at 123. For a photograph of cadets “Finning out” in the “Old Corps,” in the 1920s, see id. at 122. For a 1904-
05 cadet “finning out,” see the photograph titled “Rat finned out,” in VMI ALBUM, supra note 43, at 41.}

The advantage of this particular form of physical abuse was that seri-
ous injuries could be inflicted without the revealing evidence of
bruises. Wise observed that practices like the sheenie provided a
“cloak” for the “sadism . . . that often comes out among men living in
close quarters in which some have authority over others, unless string-
gent measures are taken and unless the group, as a body, refuses to
tolerate such excesses.”\footnote{626}{H.A. Wise, supra note 33, at 122-23.}

The cadets in the 1920s, however, appeared to have little regard
for external norms of behavior or justice, and internal controls were
weak. In the fall of 1927, in response to the dismissal of a cadet for
hazing, the first class went on “strike” by “failing to attend classes for
one day” and “demand[ing] that the superintendent resign” and that
the cadet be reinstated.\footnote{627}{Id. at 119.}

Their mutiny was highly organized: Couper reported that “the cadets mounted their own guard” and “preserved
perfect order.”\footnote{628}{4 Couper, supra note 34, at 251. Couper observed that “[t]hese antics are always pecu-
liar to the first, or senior, class which probably feels a sense of responsibility in the management
of various things, or to the third class, which in many colleges indulges in actions peculiar to the
sophomoric temperament.” 4 id. at 250.}

Their demands, however, were refused, the cadets
were “shown the error of their ways,” their “academic work was
resumed” and, as had happened on previous occasions, “the episode
passed into history accompanied by the customary pledge” of the
cadets to “‘suppress entirely any form of such hazing.’”\footnote{629}{4 id. at 251.}

This temporary breakdown of authority at VMI, nevertheless, suggested to the
state legislature that hazing was getting out of hand at the Institute.
Certainly the cadets had directly challenged the right of the superin-
tendent to punish cadet hazing and cast doubt on his ability to control
the cadets in general through exercising military command. The Gen-
eral Assembly responded in 1928 by passing a statute “making hazing
a felony, requiring the reporting of such cases to the commonwealth’s
attorney for presentment to the grand jury, and giving the party
offended a right of action for the recovery of damages." The state statute was presumably intended to act as a backstop to the authority of the superintendent in hazing cases. But the criminalization of hazing, by raising the stakes for cadets who were caught, may have had the unintended consequence of reinforcing the cadets’ code of silence and the Institute’s unofficial tolerance of hazing incidents. In any event, Henry Wise reported that “[c]orporal hazing abated for a time.”

When Lieutenant General John Archer Lejeune, an Annapolis graduate and former commandant of the United States Marine Corps, became VMI superintendent in 1929, he was “determined to finish the work of eradicating hazing, which General Cocke [his predecessor] had undertaken.” Lejeune imposed such a strict “rough” rule, reportedly suspending one cadet without an opportunity for a hearing, that the cadets “considered the rat system no longer effective.” In April of 1934, the three upper classes “abolished” the rat line — the practice of “walking the outside of the stoops and cutting corners at right angles” — as well as “the last vestiges” of hazing such as “taking in” a rat. Walking the rat line, however, was “revived . . . by the first class . . . after almost a year and a half in limbo.” Henry Wise observed that, although “something of a rat system was preserved,” an old cadet hardly dared say ‘boo’ to a rat. Hazing in the vicious sense had finally been eliminated. Some of the alumni who had endured the “vicious” hazing of the early decades of the century may have viewed these changes at VMI with dismay — they must have believed that they were better, stronger men because of the pain, fear and anxiety they had experienced as rats. But as Wise aptly noted,

630. 4 id.; see Act of Mar. 22, 1928, ch. 365, 1928 Va. Acts 965 (codified as amended at Va. CODE ANN. § 18.2-56 (Michie 1993) (“[T]o haze, or otherwise mistreat so as to cause bodily injury” upon “any student at any school, college, or university” is a Class 1 misdemeanor, unless the injury would be such as to constitute a felony, and in that event the punishment shall be inflicted as is otherwise provided by law for the punishment of such felony.”) The victim of such “hazing or mistreatment” has a “right to sue, civilly, the person or persons guilty thereof, whether adults or infants.” If “any school, college or university, receiving appropriations from the State treasury” has “satisfactory proof of the guilt of any student found guilty of hazing or mistreating another student so as to cause bodily injury,” the school “shall . . . expel such student” and “report” the expulsion to the Commonwealth’s attorney.”). In 1978, Henry Wise reported that “[n]o one so far has availed himself of this law.” H.A. WISE, supra note 33, at 120.

631.  H.A. Wise, supra note 33, at 120.
632.  Id. at 130, 132.
633.  Id. at 132-33.
634.  Id. at 133.
635.  Id.
636.  Id.
although "[t]he old hazing did forge unbreakable bonds among those who survived it . . . , there is nothing to indicate that any lesser men were turned out after its disappearance."637

In 1936, General Lejeune addressed the upper-class cadets with these comments on hazing:

In accordance with my annual custom at this time, I will say a few words about hazing. Hazing is out of date as it is not in accord with the spirit of the times in which we live.

It is a relic of a by-gone age when school boys, soldiers, sailors and men in civil life were flogged and women were ducked. Nowadays enlightened public opinion in America does not permit the use of "the cat of nine tails" in the naval service, or the rod by school masters, or the whipping post or the ducking stool as a punishment by the courts, or hazing in schools and colleges.638

While the periodic variations in the degree of institutional control over hazing and general discipline at VMI have been attributed to the pattern of "alternations of strict followed by less strict superintendents,"639 the events and intrusions of the outside world have been influential as well. For example, during World War II large numbers of men in the Army Service Training Program ("ASTP") received their training at VMI along with the remnants of the VMI Corps of Cadets, which then primarily consisted of boys under eighteen and young men who did not qualify for the army.640 When the entering class of new cadets arrived at VMI in June of 1943, 144 ASTP men were there undergoing training.641 Consequently, the rat line was "moderated," "as it was not considered fitting for VMI rats to have to do their thing in front of the soldier-trainees."642 The General Committee, which is "the disciplinary arm of cadet-student government," had taken over responsibility for "‘shaping up’ the rats."643 Henry Wise reported that

The third class thought the emasculated rat system was worse than none at all, and the rat line was wholly abolished for about a day, to

637. Id. at 120.
638. Id. at 141-42 (quoting Lieutenant General Lejeune, Annual Report of the Superintendent (1936-37)).
639. Id. at 88.
640. Id. at 160-61.
641. Id. at 161.
642. Id. Susan Faludi reported on a similar phenomenon at The Citadel during World War II when "the fourth-class system of knob humiliation was all but discontinued. Upperclassmen couldn’t even order a knob to brace." Faludi, supra note 568, at 69.
643. H.A. Wise, supra note 33, at 161.
be restored at the insistence of the General Committee, with the commandant's approval, as an important aid to discipline. But one of the major reasons for its restoration was demand by the new cadets themselves, who felt that they would not be true VMI men unless they had gone through the traditional rat system.\(^\text{644}\)

Moreover, during the war, as older veteran cadets, including disabled veterans, returned to the Institute, the "[n]ew cadet ex-service-men naturally were not enthusiastic about a rat line designed for boys who had not experienced rigid discipline. Consideration was shown the rat former soldiers."\(^\text{645}\) In the eyes of veteran soldiers, the rat line rituals were no doubt revealed as nothing more than petty, sophomore fraternity initiation rites, which, in their worst manifestations, permitted and even encouraged gratuitous physical violence and psychological harassment, and, in their mildest forms, were demeaning and embarrassing. In any event, the rat system of "quizzing" and maltreatment bore no relation to the actual qualifications and leadership skills needed by an officer in the military. The behavior of the returning officers challenged even the spit-and-polish image of a military man that was embodied in the fourth-class system of minute regulation of behavior that had long been practiced at the federal service academies. One scholar of the evolution of the military training at West Point observed that the following description by Dwight D. Eisenhower, "recalling his cadet days at West Point prior to World War I, had not changed an iota by 1940 and served equally well as a description of what cadets or midshipmen at the other two academies experienced."\(^\text{646}\)

The discipline was not so much harsh as inexorable. If one was guilty of an offense, report was automatic and the number of demerits to be received was exact. Justice was evenhanded, even though, at times, it seemed too swift.

\(^{644}\) Id. The concern about "emasculating" the rat line is, of course, at the heart of VMI's objection to admitting women. It is ironic that it was the presence of the ASTP trainee-soldiers, men who were preparing to go to war, that caused the rat line to be modified or "emasculated." Cadets today have claimed that they would be embarrassed to perform the demeaning rat line rituals in front of women. For example, Susan Faludi reported that in The Citadel trial, "When a Citadel attorney asked [Norman] Doucet [the cadet regimental commander], why female cadets would pose a problem on the campus, the only issue he raised was the humiliation that cadets would feel if women observed the cadets' on-campus interactions." Faludi, supra note 568, at 79. The cadets at VMI in 1943 obviously were embarrassed to perform their rat routines in front of "real" men as well.

\(^{645}\) H.A. Wise, supra note 33, at 185.

\(^{646}\) John P. Lovell, The Service Academies in Transition: Continuity and Change, in Educating Military Officers, supra note 65, at 37.
Offenses were possible everywhere. Dust on the window sills of the room. Improperly folded garments in the clothes locker. A few seconds late for formation. A badly prepared lesson. An unbuttoned jacket. An improper element of the uniform. Negligence of almost any kind. Each had its prescribed demerits and, if in any month the total exceeded a certain level, the victim was required to walk the area — an expression used to describe punishment [marching back and forth within an area carrying a rifle] inflicted during free hours.647

In contrast to the typical academy plebe or the VMI rat, the World War II veteran ex-officers at VMI, whose “maturity and judgment were assets in many phases of cadet life . . . sometimes set a poor example of military behavior. They could be pretty ‘gross,’ a term in cadet argot which means untidy, sloppy and not ‘with it’ militarily.”648

It was difficult to maintain the fictions underlying the rat line in the face of the contempt that the returning officers had for the elaborate and often pointless regulations the rats were required to obey. Henry Wise wrote that even

veterans who were in the regular companies and not exempt from any military duty were a disturbing influence, too. Some of them appeared at meal formations wearing bedroom slippers, while ex-paratroopers on occasion greeted bugle calls signaling formations with “Geronimo” yells as they jumped from the second stoop. Many of them were interested only in their academic work, which hurt sports and all extracurricular activities. The Glee Club drew exceptional interest, with over one hundred trying out for it, more even than for football. This led to formation of a rat glee club.649

Many of the veterans thus ignored or openly defied the norms of the rat culture and established their own priorities, putting academics before all else and choosing singing — an activity associated more with choir boys than tough soldiers — over the “manly” and “bloody” sport of football. The war, and the real world of adult values, intruded deeply into the insular culture of the Institute, upsetting traditions, priorities and expected gender roles. Despite these social and cultural transformations, the fabric of VMI was not torn. Henry Wise, for instance, credited “the veterans, especially the brother rat class of

647. Id. (quoting Dwight D. Eisenhower, At Ease: Stories I Tell to Friends 18 (1968)).
648. H.A. Wise, supra note 33, at 185.
649. Id.
1944” as being “a tremendous force in restoring the Corps” following the war.\textsuperscript{650}

A key to understanding the significance of the ways in which the World War II veterans challenged the cadets’ practices of rat discipline can be found in the \textit{VMI II} trial testimony of VMI’s expert on military leadership, Major General Robert Edwin Wagner:

\begin{quote}
Q General, does the ROTC program at summer camp include an adversative training methodology like the rat line?

A No, it does not, nor is it necessary and this opens up a very confusing subject, and I call it the, Your Honor, I call us the M Analogy. The M Analogy in VMI is a military environment designed through this adversative system to produce what we call the VMI graduate.

It is unique to the Virginia Military Institute. The M in military training is teaching specific skills and leadership skills to lead soldiers. They are profoundly different and they are not the same. Some years ago I was fortunate enough to command the second armored Calvary \textit{[sic]} regiment on the border in Germany. This regiment held out 60 percent of the Cold War line between east and west Germany and West Germany and Czechoslovakia, 5,000 men, helicopters, tanks, armored Calvary \textit{[sic]}, an elite organization; they could shoot. They could move; they could communicate; they looked mean. They looked bad. Battle dress uniform, camouflage.

My great fear is three times a year we had to parade the regiment for a variety of reasons, and these guys couldn’t march very well. They didn’t know how to shine their shoes very well and a lot of them hadn’t gone to VMI. So we had to go through a lengthy process and teach them all those skills.

But for anybody to say that they were not vitally engaged in the military profession, Your Honor, is wrong.\textsuperscript{651} Susan Faludi has written about the gender ambiguities of the “domestic” training aspects of the fourth-class system at The Citadel — learning how to make your bed and shine your shoes, and how to help your brother cadet tuck in his uniform shirt.\textsuperscript{652} The tension between soldiers who look “bad” and “mean” and soldiers who know how to “shine their shoes” and “march very well” has set VMI cadets and graduates off from the ranks of fighting soldiers since the “clean” and

\textsuperscript{650} Id.
\textsuperscript{651} Joint Appendix at 724-26, \textit{VMI II} (Nos. 94-1667 & 94-1717).
\textsuperscript{652} Faludi, \textit{supra} note 568, at 79.
“white-gloved” cadets with “short and sharp” “coat-tails” met the “dare-devil” “raw volunteers” with “red shirts and coon-skin caps” on the fields outside Richmond just before the Civil War.653 Embedded within the images of the two types of soldiers are distinctions of social and economic class, and the analogous hierarchical distinctions in the military between officers and enlisted men; between those who give orders and those who do the actual fighting. While both officers and soldiers are viewed as manly, the officer’s civilian counterpart is the white-collar professional, politician or corporate manager and the soldier’s civilian counterpart is the blue-collar worker. To become an officer, the natural, untutored and rough man of the lower classes has to be civilized, educated and domesticated — namely, feminized.654

During Reconstruction, the Institute set about the serious mission of educating students who, regardless of their socio-economic background, could aspire to entering the elite ranks of officers in the federal military or becoming civilian leaders in the South. That they had accomplished this mission by the end of World War II is evident by the comment of a veteran that “‘you don’t stand a chance in Virginia without a VMI education.’”655 But the role of the rat system in preparing cadets for their modern peacetime functions as citizen-soldiers remained problematic. Beginning in 1950, the cadets instituted the “resurrection,” a “rough, periodic reemphasis on rat discipline” that “stress[ed] difficult physical and psychological hurdles for the rats as a substitute for the banned rougher practices.”656 By the spring of 1957, protests against the current “resurrection” surfaced from the faculty, the superintendent and even a former president of the Board of Visitors.657 The faculty, reiterating a frequent concern, “recommended abolition of the practice on the ground that its rigors seriously interfered with new cadet attitudes in class and their academic performance.”658

When the superintendent, General Milton, confronted the cadets with a direct order to stop the disciplinary “resurrection” practices, including the “continuous running” required of the rats, he provoked

653. See supra quotations in text accompanying notes 262-63.
654. See Mary Anne C. Case’s discussion of the “androgynous result” of VMI’s method of using “masculine methods . . . to achieve feminine” traits. Case, supra note 464, at 99. Case argues that “one major difficulty with the [VWIL] plan” (as well as with VMI) is “its gender essentialism — the assumption that sex and gender are coextensive.” Id. at 100.
656. Id. at 243.
657. See id.
658. Id.
a rebellion by the "upper-classmen [who] had come to regard internal Corps matters, like resurrections, as their sacred right." 659 To demonstrate their feelings about General Milton's order, "the first class . . . decided to do away with the rat line." 660 Thus it came about that "the rat line and class distinction ceased" for two weeks during which "the VMI Cadet [VMI's school newspaper] likened the school to an Ivy League college." 661 Henry Wise described as "historic" the subsequent meeting of the Board of Visitors, at which the Board met with a "delegation of cadet leaders" and "asked them to restore the rat system." 662 Significantly, "the Board did not, and could not, order that to be done." 663 Several days later the cadets, on their own authority, reinstituted the rat line without the abusive practices proscribed by the superintendent's order. 664 The reason for the Board's lack of authority over the rat system lay in the fact that the rat system was a product of the cadet culture, not Board policy. Although the Board unofficially approved of the rat system, and all of the alumni members had survived the rat line themselves, the Board believed it could neither restore nor abolish something it had not formally created in the first place. Henry Wise described the peculiar status of the rat system as follows:

Obviously, the power to apply corrective measures, including curbing abuses in the operation of the rat system, lay in the superintendent's hands. On the other hand, that system was an element of cadet life which had evolved in the Corps over the years. Although the rat line and its value always had been recognized by the Institute administration, it was no part of official regulations. If the cadets themselves decided to drop the rat line, that was up to them. 665

Conflicts between the institution's interest in fulfilling the school's academic mission and the cadets' interest in maintaining control over

659. Id.
660. Id. at 243-44 (emphasis added). The first-class cadets carried out their decision by holding a Corps meeting and obtaining the agreement of the second- and third-class cadets. Id. at 244.
661. Id. at 244.
662. Id. (emphasis added).
663. Id. (emphasis added).
664. Id. In the immediate aftermath of the 1957 standoff between the cadets and the superintendent, the Board appointed a study committee of three alumni military officers to uncover the failings in the VMI administration that allowed the events to occur. The committee's secret report ultimately led to Board approval of General Milton's handling of the "resurrections," but the entire affair revealed deep divides between the administration, some Board members and some alumni about how the Institute should be administered. See id. at 244-46.
665. Id. at 243 (emphasis added).
the rat system have been an inevitable consequence of this accommodation of official policy to cadet cultural values and practices. In the 1968-69 school year — the first year that black male students were admitted — the superintendent's attempt to end the rat year after five months rather than the usual seven months, prompted another assertion of cadet autonomy: "The first class insisted that the matter traditionally was one for its decision alone, and that, because of the alleged weakening of the rat line, it should be continued in the fullest possible effectiveness until the spring break."666

Over the course of VMI's history, then, the cadets have modified, abolished and revived the rat line several times, and they have continually defended their authority to control it. The value of the rat line to the older cadets and to the alumni who, by definition, have survived it, remains unquestioned — a sort of divine right. Yet the value of the rat system to VMI's primary educational mission is highly questionable and often contentious. The VMI 1975 Self-Study Report, which declared that "[t]he Institute has never altered its conviction that academic excellence comes first," also noted that "[f]rom time to time, almost all faculty members lose patience with the effect of rat line practices on fourth class performance in the classroom."667 In General Milton's final annual report, he reflected on the criticism he received from "uninformed and unthinking vocal alumni" over the consequences of his attempt to restrict the rat line "resurrections."668 His words of advice to the Board reveal the conflicting loyalties its alumni members surely continue to experience: "It should be borne in mind by the Board of Visitors that V.M.I. is a State Institution and that the first responsibility of the Board is to the Commonwealth of Virginia, not to the whims of the alumni."669

The alumni evidently feel that admitting women to VMI and abolishing the rat line will cheapen the coin of the realm — the VMI

666. Id. at 313. See generally id. at 312-13. Henry Wise reported that, in February of 1968, the superintendent prevailed over the cadets' contrary wishes, terminated the rat system for the remainder of the year and announced that in coming years it would end after five months, in January. Id. at 312-13. For a discussion of the rat system and its dependence on the class system and student self-governance, see id. at 395-401. The rat year continues for seven months at the present time. See Appellant's Brief at 9, VMI I (No. 91-1690). In its early manifestations, the rat "year" was even longer. Thus, when alumni bemoan the fact that VMI standards are dropping because the current rats have it easier than the rats in their own time, it is very likely true that it is now easier.


668. Id. at 249 (quoting William H. Milton, Jr., Superintendent's Annual Report (June 30, 1960)).

669. Id.
ring. But abandoning the adversative method may, in fact, enhance
the value of a VMI education by creating an environment where
fourth-class cadets can concentrate on academic work and modern
military training without the constant apprehension of being subjected
to rat discipline. Unless the Board of Visitors and administration
assert their authority over this particular aspect of cadet culture, or
the Supreme Court requires the admission of women and the cadet
culture changes on its own, the myth that only truly "manly" men can
survive the rat line to become citizen-soldiers will continue to have a
place in Institute life. But as a matter of law, it is important to
remember that the rat line is a product of student culture, not man-
dated state educational policy.

C. "A TOTAL LACK OF PRIVACY"

In VMI I, Judge Kiser found, and the court of appeals affirmed,
that coeducation would require a "fundamental" change in the
"absence of privacy" that is "essential to the leveling process" of the
VMI program. Specifically, Judge Kiser concluded that if women
were admitted to VMI "[a]llowance for personal privacy would have
to be made. Doors would have to be locked, and the windows on all
of the doors would have to be covered. This would alter the adversa-
tive environment that VMI students must now endure." In his
.appended Findings of Fact, Judge Kiser elaborated on The Anticipated
Effects of Coeducation on VMI as follows:

[VIII.] D. Need for Privacy

1. If VMI were to admit women, there would be changes in the
barracks culture. Adaptations would have to be made in order to
provide for individual privacy, for the sake of the men as well as for
the sake of the women.

2. The introduction of privacy required by admission of women
at VMI would contradict the principle that everyone is constantly
subject to scrutiny by everyone else. The honor code would cease
to be the absolute boundary between VMI and the outside world
because it would become possible for cadets to take action at VMI
without being observed.

670. VMI II, 44 F.3d at 1233 (citing VMI I, 976 F.2d at 897, as affirming the factual findings
of Judge Kiser regarding the issue of VMI's absence of privacy in VMI I, 766 F. Supp. at 1412-13,
1421, 1424).


672. Id. at 1438 (citations omitted).
Judge Kiser listed additional details about the physical conditions of the barracks and aspects of barracks life that limit privacy of the cadets in his Findings of Fact, *The Unique VMI Educational Method*.673

Judge Kiser assumed that the "privacy required by admission of women" would necessitate "fundamental" changes in (1) the long-standing open conditions of the barracks facilities, (2) the traditional aspects of the barracks culture, consisting of the rules, practices and customs developed by the cadets regarding their interpersonal relations in the barracks, (3) essential components of the VMI adversative methodology which are intended generally to create a sense of equality between cadets and particularly to induce stress and reduce self-esteem in fourth-class cadets, (4) the practices and physical arrangements required for routine inspections of cadets, their rooms and equipment as well as overall regulation and observation of cadet behavior, and (5) the practices and physical arrangements that are necessary to enforce the honor code. Furthermore, Judge Kiser and the court of appeals assumed that if any one of these component parts were altered, it would have negative effects on all other components. The trial evidence and the historical record belie all of these assumptions.

Obviously no one was seriously proposing that coeducation would require that all customary distinctions between the sexes be extinguished — that cadets would be expected to dress and undress in front of members of the opposite sex, or that men and women would share barracks rooms, gang showers and gang bathrooms.674 Nevertheless, VMI argued, and the district court and court of appeals agreed, that the necessary changes in barracks life would be fundamental and pervasive, altering significant elements of the VMI experience.675 Ultimately this reasoning led, at least in part, to the conclusion that the appropriate degree of privacy between the sexes would best be provided by placing women on a separate all-women campus thirty-five miles from VMI and maintaining VMI's all-male

673. Id. at 1425, 1421; see id. at 1423-35 (Findings of Fact, part III.F. (Barracks) listing specific facts regarding barracks facilities and rules that limit personal privacy).

674. I say seriously because a VMI alumnus asserted, presumably sarcastically, that to make men and women "truly equal" at VMI, they would have to share everything — "same barracks, showers, barber, tailor, [and] physical education demands." Lewis H. Diuguid, *The Case for an All-Male VMI: We Need a Few Islands of Eccentricity in Our Unisex Sea*, WASH. POST, June 4, 1989, at B5.

675. See VMI I, 976 F.2d at 897.
policy. This rationale suggests both stereotypical Southern sensibili-
ties about the relationship between the sexes and a lack of trust in the
ability of young men and women to adapt their behavior in a coeduca-
tional living situation to accommodate concerns for personal privacy
between the sexes. In addition, the heightened concern about per-
sonal privacy at VMI seems quaint in a time when, in coeducational
residential facilities at colleges and universities throughout the coun-
try, thousands of men and women are living in close proximity in cir-
cumstances where they must develop their own arrangements for
respecting personal privacy.

In approving the VWIL plan and rejecting coeducation, however,
the court of appeals took judicial notice of “common experience”
about the sexual life of late adolescents, as well as news media reports
about sexual assaults and drinking on coeducational campuses.676 The
court revealed its assumptions about the impropriety during late ado-
lescence of “relationships between the sexes” in its statement that it is
“not . . . surprising” that “a sex-neutral atmosphere can be less dis-
tracting to late adolescents in an educational setting where the focus is
properly on matters other than relationships between the sexes.”677
The court noted that “women’s colleges are experiencing an unantic-
ipated surge in enrollments and positive public attention,” in part
“because of worrisome statistics on drinking and concerns about date
rape and other violent crimes at institutions with both men and
women.”678 The court believed that placing women into the barracks
environment with its “lack of privacy” would “destroy . . . any sense of
decency that still permeates the relationship between the sexes.”679
The historical record suggests, however, that the VMI cadets and their
student culture and traditions could not be accurately described as
“sex-neutral.” And, only if “decency” between the sexes means pres-
ervation of the historic myth of the “Southern lady”680 or the stereo-
type of the modern “Southern woman”681 can it accurately be said

676. VMI II, 44 F.3d at 1238.
677. Id. (emphasis added). The assumption that VMI is a “sex-neutral” atmosphere is
rather astounding, as it implies that sex is not thought about, talked about, planned for or
engaged in, and that sexual relations occur only between persons of the opposite sex.
court’s reference to date rape seems to imply that VMI should not admit women for their own
good — because the VMI men who will be unable to control their sexual urges will rape or
assault women if they are present as cadets on the Post.
679. Id. at 1239.
680. See generally Scott, supra note 283.
681. Two sociologists have written the following summary defining “Southern woman”:
that VMI has contributed to a "sense of decency . . . between the sexes."682 Furthermore, while VMI has in the past attempted to regulate both the public and private sexual behavior of its cadets, neither VMI nor Virginia has articulated a public mission today to protect "decently" between the sexes. But the State does have a declared policy of providing educational opportunities "without regard to sex, race, or ethnic origin." 683

In light of the defendants' stipulation "that the barracks could be physically altered to accommodate women,"684 the privacy issue presented by the VMI case is not whether coeducation is socially or morally desirable or whether alteration of the barracks or its culture is

The term *Southern woman* conjures up a specific cultural image. Southern womanhood is essentially white and relatively well to do. From journalistic satire to scholarly writings a consistent, dominant image of the Southern woman emerges. Southern by "the Grace of God," she is a lady in her innocence, including the absence of knowledge of vulgar topics and language. She is modest in her concerns, dress, and demeanor. Her timidity, never marred by assertiveness or anger, is complemented by her subservience to her parents, husband, spiritual counselor, and God. All of these protect her from the harsh realities of money, the world of work, and rapists. She, of course, matches or rewards this protectiveness with self-denial and a compassionate concern for others.


682. *VMI II*, 44 F.3d at 1239.

683. *VMI II*, 976 F.2d at 899 (quoting the Commission on the University of the 21st Century, Report to the Governor and General Assembly of Virginia (1990) (emphasis added by court).

The court of appeals noted that:

Our inability to find a stated policy justifying single-sex education in state-supported colleges and universities is confirmed by the Virginia Attorney General's statement about the absence of such a state policy: "In the absence of a statute explicitly expressing the General Assembly's view on the policy issue, [the Governor's] statement of the Commonwealth's policy [that 'no person should be denied admittance to a State supported school because of his or her gender'] is persuasive."

*Id.* (emphasis added by court).

684. *See* Appellant's Brief at 38 n.28, *VMI I* (No. 91-1690). VMI has, in fact, experimented in the past with the configuration and location of the barracks toilets and bathrooms. Couper wrote:

The completion of the Smith Building [in 1900] released a number of rooms in the barracks which had been used for academic purposes and greatly relieved the congestion in the cadet quarters. With so many additional rooms available at one time it was natural to experiment with them and it was determined to convert a tier of rooms . . . into toilets and bathrooms. They were so used from 1900 to 1919, when all such facilities were consolidated in one place with greatly increased cleanliness and sanitation.

4 COUPER, supra note 34, at 87-88; see 4 id. at 88 n.7 (describing other locations of "such facilities," apparently referring to shower rooms); see also infra note 760 and accompanying text. Interestingly, Couper indicates that the design of the toilets and bathrooms was motivated, not by an institutional interest in decreasing the personal privacy of the cadets as part of a holistic adversative methodology, but by pragmatic health concerns for cleanliness and sanitation, presumably including the convenience of cleaning the facilities thoroughly, quickly and cheaply. 4 COUPER, supra note 34, at 88.
feasible, but what combination of changes in facilities, practices and rules would be required to provide the desired level of privacy between the sexes if coeducation is legally required. To be sure, some changes in the barracks facilities and practices would have to be made, but the United States argued in its brief to the court of appeals that the changes necessary to provide for adequate personal privacy between the sexes "need only be minimal." For example, the federal service academies and Virginia Polytechnic Institute (VPI) already have coeducational barracks where both male and female students "live in the same barracks and occupy identical rooms side-by-side." Furthermore, "women could be provided with identical but separate group shower and toilet facilities." And, if separate facilities were not feasible, all students could share a common bathroom, "if, as at VPI, a sign was put on the door indicating which gender could use the facility at a particular time." Equality of facilities and rules is possible while still maintaining privacy between the sexes.

Nevertheless, Judge Kiser found that VMI "cadets are never free from scrutiny" because "[t]here are no locks on the doors," the doors have windows with "no window shades or curtains" and, apparently, other windows in the rooms also have no shades or curtains. Furthermore, "[t]here is a constant intermingling of cadets as a result of

685. Appellant's Brief at 38, VMI I (No. 91-1690). The court of appeals in VMI I observed, all the parties also agree that men and women would and should be entitled to some degree of privacy, at least to the extent that men and women not, in all respects, be exposed to each other. While again there was much debate among the parties as to the changes that might be required to accommodate this at VMI with the admission of women, all agreed that some accommodation would be necessary.

976 F.2d at 896.

686. Appellant's Brief at 38, VMI I (No. 91-1690). VPI's full name is Virginia Polytechnic Institute and State University.

687. Id.

688. Id. at 38 n.28.

689. VMI I, 766 F. Supp. at 1424. In discussing the absence of window shades, Judge Kiser specifically referred to windows in the doors, but he also seemed to include all the windows in the barracks, including room windows which face either the interior or the exterior of the barracks quadrangle. The image portrayed by the judge is of cadets living in a fish bowl where all their activities are constantly monitored by any curious passersby. Photographs of the barracks taken over the years since they were rebuilt after the Civil War, however, reveal what appear to be window shades partially or completely covering many windows on the outside walls. See VMI Album, supra note 43, at front endleaf (barracks in 1880), v (barracks in 1893), 22 (barracks around 1876-80), 46 (barracks in 1889), 58 (barracks in 1893); see also H.A. Wise, supra note 33, at 207 (bottom photograph, "Barracks in the 1880s"). A colleague reading a draft of this Article said that he could not imagine not having window shades (or some window covering) in the South because of the heat, particularly in buildings without air conditioning.

Furthermore, a photograph of the interior of a barracks room shows two cadets studying — one at a desk, one on a bed — in a barracks room which has a single, tall, mullioned window at
the close and intimate quarters and the number of cadets assigned to a room." The government argued, however, that there was no factual basis for concluding that locks on doors would be necessary to provide privacy between the sexes for dressing and undressing. In addition, the government noted that VMI could place shades on the windows for use "when the cadets are changing clothes" or (if VMI preferred to change cadet practices rather than invest in window shades) "the cadets could change in the bathroom." The government's brief captured well the problem with VMI's assertion that men and women could not be provided adequate privacy without destroying essential components of the VMI program:

It strains credulity to conclude that VMI would no longer be using the same educational method — or that the VMI experience would be fundamentally altered — if women (and men) undress and use bathroom facilities without members of the opposite sex present. Moreover, dressing and using bathroom facilities in the presence of only members of the same sex does not contradict the alleged principle that VMI treats all cadets equally. Members of each gender would have the same lack of privacy vis-a-vis their own gender — and this is treating everyone the same in this context.

the far end. H.A. Wise, supra note 33, at 383. The window has a shade which is pulled part way down. The photograph, titled "Cadets studying in their room," is undated, but appears from the surrounding text and internal evidence to be from the 1960s or 1970s. The caption indicates that the photograph was provided "[c]ourtesy of the] VMI Public Information Office." Id. Since it seems unlikely that a window shade was temporarily placed on the barracks window for the sole purpose of a public relations photograph, the two cadets pictured must have missed out on an essential aspect of their VMI experience — a total lack of privacy. VMI I, 766 F. Supp. at 1424 (emphasis added). The point is that VMI cadets apparently have always had privacy in their barracks rooms from anyone not living in the barracks, which would include all females, as well as the VMI faculty and staff, and any visitors to the VMI campus.

690. VMI I, 766 F. Supp. at 1424. VMI reported in 1985 that the "average occupancy rate of cadet rooms . . . was 3.7 cadets per room." Id.

691. See Appellant's Brief at 38 n.29, VMI I (No. 91-1690) (assertion of United States that district court's conclusion regarding need for locks was not supported by the evidence). Indeed, it is not clear a priori whether women would be safer from sexual assault (which appears to be what the court of appeals feared) with or without locks, and an argument could be made that VMI's present system of openness and "constant intermingling of cadets" may provide women with more security in their barracks rooms than would locked doors. Some college officials have noted that "having the sexes in the same buildings, floors, and even wings, creates a low-charged 'familial' ambience, in which men and women generally relate more as extended family members than potential sex partners." Rogers Worthington, Coed Dorms, Once a Shocking Idea, Are Now Popular, THE BUFFALO NEWS, Mar. 31, 1996, at A16.

692. Appellant's Brief at 38, VMI I (No. 91-1690).

693. Id. at 38-39.
The plan for the VWIL women who would live in Mary Baldwin residences does not provide for a similar absence of privacy. The assumption of the remedial plan seems to be that women need a high degree of privacy vis-a-vis men, therefore it is inappropriate to have them in the VMI barracks living with men; and women also need a high degree of privacy vis-a-vis each other, therefore, even if women are living with women and are segregated from men in the VMI barracks, the women’s privacy needs will still not be met. On the other hand, a high degree of privacy — suitable to women’s presumed special needs — can be provided by the “wide range of living arrangements” at Mary Baldwin College. The government’s witness, James Francis Brewer, testified that VMI and Mary Baldwin College “are on the opposite extremes of the privacy continuum,” and Judge Kiser’s findings support this conclusion:

About 18 percent of the rooms on the Mary Baldwin campus are single rooms.

At MBC [Mary Baldwin College], the largest bathroom serves approximately 35 or 40 students. At VMI there is one bathroom on each stoop, serving up to 400 students.

At MBC, each shower or tub has a door or curtain, while at VMI there are gang showers containing about 24 heads.

At MBC, each residential room has a solid door with a lock. At VMI the barracks rooms doors have windows and are unlocked.

Nonetheless, the testimony on the issue of privacy indicated that there is no basis — other than stereotyped ideas about women — to assume that women have a greater need than men for privacy with

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694. At the trial on the VWIL remedial plan, when asked whether the proposed Mary Baldwin plan provides for the absence of privacy, the defendant’s sociology expert, David Riesman, testified: “My sense is that it does not fully provide for that component.” Joint Appendix at 704-05, VMI II (Nos. 94-1667 & 94-1717); see Appellant’s Brief at 32, VMI II (Nos. 94-1667 & 94-1717).


696. Joint Appendix at 818, VMI II (Nos. 94-1667 & 94-1717); see Appellant’s Brief at 32, VMI II (Nos. 94-1667 & 94-1717).

697. VMI II, 852 F. Supp. at 502 (paragraph numbers and citations omitted). The VMI barracks have a high average room occupancy rate. See VMI I, 766 F. Supp. at 1424. The VMI barracks have no “single” rooms for occupancy by only one cadet; however, in 1896, four cadets occupied what was termed a “single room” measuring 21 x 17 feet, whereas a “double room” held five cadets. 4 COUPER, supra note 34, at 47.
regard to their own sex. At the trial on the remedial plan, the government's expert witness on the psychology of gender differences, Carol Nagy Jacklin, testified as follows on direct examination:

Q . . . Dr. Jacklin, is there any evidence in psychology to suggest that there are any differences in the way women learn that would make any of these elements [induced mental stress, absolute equality of treatment, absence of privacy, and minute regulation of behavior] inappropriate for women?

A No.

Q Let me make sure I said the question correctly. Is there any evidence in psychology to suggest that there are any differences in the way men and women learn that would make any of these elements inappropriate for women?

A Again, you're now using women as a group. I don't want to use women as a homogenized group. Nonetheless, no group differences have been found in learning to differentiate males and females in any of these areas.

Q Let's take a look at induced mental stress. Is there any psychological evidence that there are larger differences between men and women in their response to induced mental stress than the differences among women as a group?

A In fact, the curves would be completely overlapping. Learning under stress would not differ from men and women at all.

Q In terms of a response to absolute equality of treatment, response to absence of privacy, response to minute regulation of behavior?

A There is no evidence there are average differences, forget the individual variability. There is no evidence of average difference in these areas.698

Another government expert, sociologist Michael S. Kimmel, was asked, on direct examination, to evaluate the proposed VWIL plan:

Q Dr. Kimmel, you have testified that you've reviewed the Proposed Remedial Plan in this case?

A Yes. I have.

Q As an expert in the area of comparative historical sociology and the sociology of gender what opinions have you formed about the assumptions underlying The Plan?

698. Joint Appendix at 842-43, VMI II (Nos. 94-1667 & 94-1717).
When I first read The Plan, my experience was one of familiarity, although I had never seen it before. I said, "My goodness, it sounds like so many things I've seen in archives in libraries around the country about the arguments about what would be appropriate for women as a group and what kinds of things women are suited for."

My belief then was that this plan was based on stereotypical notions of what was appropriate for women, what would be suitable for women and specifically what would not be suitable for women.

Q ... How would you compare the assumptions underlying the VWIL program with the historical ones about which you have testified?

A Again, my reading of this plan gave me the feeling that I've seen it before, and that in the guise of exempting women from the things for which they were not suited, women were being excluded from the opportunity of the kind of educational methodology that is used at VMI.699

CROSS EXAMINATION

Q Can you name me one woman's college that employs an adversative model of education?

A No. I can't.

Q Nothing in history about that, is there?

A No, I haven't found any.

Q Do you know of any woman's institution that has a rat line?

A No. I don't.

Q And it's been your experience that women don't require more privacy than men?

A Would you repeat the question please?

Q The question is, you said that the absence of ... privacy in this plan was based on stereotypical thinking. My question is, what do you base that on?

699. Id. at 879-80.
A My evaluation of The Plan would not break it down into the specific components in this particular way. My reading of The Plan as a whole contained, I believe, these kinds of stereotypes. Around the particular issue of privacy, I don’t know of any study that makes the argument, historically, I know of no study that makes the argument, that women need more privacy than men do.

Q Well, as a sociologist do you yourself feel that women require more privacy than men, yes or no, please?
A I don’t know.
Q You don’t know?
A I don’t know.700

If the VWIL program does not require an absence of privacy, just how essential and significant to VMI’s overall program are the physical aspects and customs of barracks life that destroy or limit personal privacy? Judge Kiser appeared to assume that a cadet’s lack of personal privacy, vis-a-vis all other cadets, is an essential aspect of “the principle that everyone is constantly subject to scrutiny by everyone else.”701 Thus, the Catch-22. Because privacy concerns would keep women from sharing gang showers with the men at VMI, the men and women could never treat each other as full equals. Separate bathrooms would destroy egalitarianism. Window shades on the doors and door locks would destroy the honor system. Privacy for bathing and dressing would destroy the ability to observe and regulate cadet behavior.

But the historical record of VMI does not indicate any educational policy — of either the school or the state — that requires cadets to watch each other dress, undress, bathe and use the bathroom in order to become citizen-soldiers. The school as an institution of the state has no educational reason for limiting the personal privacy of cadets, and, indeed, the United States Constitution, with limited exceptions particularly pertaining to drug searches and drug testing,702 would protect individual students from unconsented or coerced invasions of or intrusions on their bodily privacy by state actors. The school does, however, have a legitimate role in assuring that each

700. Id. at 885-88.
701. VMI I, 766 F. Supp. at 1438.
702. See Veronia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386 (1995) (holding that a public school’s policy of testing student athletes for drugs as a part of an overall anti-drug policy does not violate a student’s federal constitutional right to be free from unreasonable searches).
cadet successfully carries out the school’s program of academic study, military drills and physical education within the parameters of its regulations and the cadets’ honor code. Not surprisingly, the historical record reveals that the administration and Board of Visitors have from the outset been concerned with the school’s ability — as *parens patriae* — to supervise adequately the moral, intellectual and physical development of each individual cadet.

For example, when VMI grew rapidly from twenty-eight students in 1839, to eighty-seven students in 1845, to “almost 300 in 1860,”1703 the ability of the administration and faculty to provide individualized attention to each cadet was severely strained. The tradition of upper-class cadets monitoring the behavior of cadets below them in the hierarchy, as well as cadets watching out for each other within a class, both simulated a military structure for cadet relationships that fit the purposes of the school and gave the faculty and administration an additional means of looking out for their growing number of charges. As Henry Wise wrote: “A constant apprehension of the Board of Visitors during periods of growth has been that the Corps would grow too large fully to benefit from the traditional VMI experience, which, though thoroughly organized and disciplined, is an individual one with close observation of the student-cadet.”1704

It is important, then, to distinguish between the close observation of each cadet’s behavior and performance that is an aspect of the school’s official policy of providing individualized attention to each student’s development at VMI, and the close scrutiny which cadets are afforded of each other that has developed as a by-product of the student culture at an all-male school that, at least initially and for most of its existence, had limited funds to spend on barracks facilities and amenities. The close observation of cadet behavior by cadets, faculty, military instructors and administrators is clearly an element of the school’s mission of producing citizen-soldiers, of its principles of honor and egalitarianism, and of its methods of stress, regulation of behavior and individual attention. But the close scrutiny of cadets’

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1704. *Id.* at 29. Wise also noted that in 1899, when “[t]he first separate academic structure, the Francis H. Smith Building,” was constructed, “[t]he location of the . . . building was chosen to obstruct the erection of more barracks rooms there” because “[i]n time of relatively high attendance the Board of Visitors had been apprehensive of too large a Corps, which some felt would endanger the individual kind of education that characterizes VMI.” *Id.* at 80-81; see 4 COUPER, *supra* note 34, at 47.
bodies and private bodily functions by other cadets living in the barracks is not required by the school’s mission or its principles and methods, and is certainly not a fundamental or essential aspect of the VMI program. The significance of the absence of privacy in the VMI barracks is that it is an artifact of student culture, practices and rituals that are constantly changing in nature and periodically reaffirmed by the alumni. But the absence of privacy and some of the cadet rituals that have come to embody it, have not been adopted or ratified as educational policy by either VMI or the Commonwealth of Virginia.

When the Institute first opened in 1839 many entering cadets were extremely young — around sixteen years old — and rather poorly behaved, a fact that gave the school somewhat of a reputation as a “reform” school for boys. When the first twenty-eight cadets arrived in November of 1839, “there were available for cadet quarters not more than seven rooms, one of which was a detached log cabin.” Since “[o]ne of the rooms was used as an office . . . men lived like sardines in a can.” Constant adult supervision of the cadets was not possible with a staff of only two professors. Thus, from the beginning, Colonel Francis Smith, the superintendent, “encouraged” the cadets to make their own rules to deal with their internal relations revolving around their barracks life.

With no space or facilities for the cadets to separate or lock up their personal belongings, the “cadets framed the honor system in the early months, soon after the birth of the Institute.” The honor code, which was not written down until after the Civil War, provided simply that a VMI cadet “does not lie, cheat or steal.” Henry Wise wrote:

Besides inspiring integrity for its own sake, it originally was a protection, a practical means of making life tolerable in primitive facilities that afforded no security for personal possessions. Today in the comparatively “luxuriously” appointed Barracks the honor system

705. See, e.g., supra text accompanying notes 660-65.
706. See discussion supra notes 211-216, 227 and accompanying text. Indeed, common experience suggests that some parents may view military school as a good way to shape up adolescent sons when parental discipline has failed.
708. Id.
709. See id. (discussing the $6000 budget that had to pay for the cadets' allotment and pay the salary of the two professors).
710. Id. at 389.
711. Id.
712. Id.
713. Id. at 390.
still serves such a utilitarian purpose, for a cadet's quarters and property are unprotected by lock and key.\(^{714}\)

The honor code in its origins thus had nothing to do with personal physical privacy but was developed as a means of protecting the cadets' personal property. Because the VMI honor code depends on the integrity of each cadet, rather than, as Judge Kiser concluded, on "the principle that everyone is constantly subject to scrutiny by everyone else,"\(^{715}\) the code would continue to operate the same way that it always has even if there were locks on the doors or shades on the door windows.\(^{716}\)

Moreover, as Henry Wise observed, the honor code must be distinguished from the VMI official regulations, which have a very different genesis and purpose. While the honor code was developed by the first group of cadets, the regulations, "patterned substantially on those governing the United States Military Academy,"\(^{717}\) were adopted by the Board of Visitors in May of 1839, before the first cadets arrived.\(^ {718}\) In 1904 the regulations "pertaining to the interior discipline and police" were "separated from the general regulations which governed the operation of the Institute itself," and printed in a booklet "officially known as the Blue Book."\(^{719}\) The 244 articles that made up the first set of regulations in 1839,\(^ {720}\) however, governed all aspects of

\(^{714}\) Id. at 389. The cadet-run Honor Court was not established until 1908. Id. It is worth noting that the form of VMI's "drumming out" ceremony, by which a cadet is expelled for violating the honor code, has been modified several times over the years "to make it more dignified and slightly less humiliating for the culprit." Id. at 389-90.

\(^{715}\) VMI I, 766 F.Supp. at 1438.

\(^{716}\) While the honor code continues today to serve the function of permitting cadets to keep their valuable personal property in their unlocked barracks rooms or to leave their books on a library desk without concern for theft, the code is perhaps more important for its role in demanding that cadets exhibit total honesty and trustworthiness at all times and in all places, regardless of whether their conduct is under scrutiny by others. The true test of the honor code is, first, its ability to compel a cadet's honorable behavior when he is unobserved by others, and, second, to compel a cadet's honest reporting of his dishonorable behavior that was not observed by others. Thus, the honor code would be a poor system if its success depended on a "total lack of privacy" and "constant scrutiny" of behavior. Id. at 1424. The fact that the University of Virginia continues to operate with a similar honor system, even older than VMI's, without imposing on its students a total absence of privacy, even after the admission of women in the 1970s, suggests that Judge Kiser was completely wrong in assuming that VMI's honor code would collapse if VMI cadets could "take action at VMI without being observed." Id. at 1438; see, e.g., H.A. WISE, supra note 33, at 394 (observing that the honor system at the University of Virginia "still functions fairly well").

\(^{717}\) 1 COUPER, supra note 34, at 42. See generally 1 id. at 37-42.

\(^{718}\) 1 id. at 41.

\(^{719}\) 4 id. at 95.

\(^{720}\) 1 id: at 41.
administration of the Institute and prescribed, in great detail, even the most minute and mundane aspects of daily cadet life:

The familiar "No cadet shall be allowed to keep a waiter, horse or dog" is there and so it continued until the advent of the automobile and airship. Other prohibitions concern liquor, absences, cooking, damage to property or arms, false reports, visiting in or absence from barracks, and combinations. Other prohibitions which have passed into the discard pertained to playing cards, use of tobacco, and duelling. . . . The Saturday inspection under arms and a thorough weekly room inspection, in addition to numerous other inspections, were prescribed before the first cadet was appointed — or even the principal professor. 721

Therefore, in response to new technology, changing social norms, pressure from cadets and, undoubtedly, the impossibility of enforcing some rules, the Institute's regulations changed in their particulars but not in their comprehensiveness or level of detail. The lack of privacy in the barracks, which Judge Kiser considered to be essential to the "minute regulation of behavior," 722 has traditionally made it more challenging and exciting for cadets to get away with violating the official regulations that they consider unimportant or trivial. For example, the early prohibition on the use of alcohol and tobacco was routinely evaded when cadets were off Post. A photograph titled "New Year's Eve," taken around 1893, shows six cadets in dress uniform posing happily for the camera, each with a cigar in his mouth, sharing four bottles of champagne. 723 A carefully posed photograph of twelve somber uniformed cadets is titled "'Rats' with cigarettes, 1890." 724 Even the supposed absence of privacy in the barracks, by tradition, has not kept cadets from having a good time in defiance of regulations. A photograph taken around 1902 shows "[r]oommates Joseph C. Allen and Herbert Tutwiler enjoy[ing] a friendly game of cards." 725 The two are sitting at a table in their barracks room holding cards; one is smoking a cigarette, the other a pipe; and what appears to be a pint bottle of liquor is sitting on the table.

721. Id. at 42.
722. VMI I, 766 F. Supp. at 1424.
723. VMI ALBUM, supra note 43, at 85. Until early in the 1950s, the rules required that cadets caught using liquor were to be punished by automatic dismissal. H.A. Wise, supra note 33, at 233.
724. VMI ALBUM, supra note 43, at 29. Five of the 12 cadets — including all those who appear to be the youngest — have long white cigarettes hanging from their lips. The photograph suggests that the moment captured on film was a rite of passage for the young smokers. Id.
725. Id. at 86
Furthermore, evidence from VMI's past indicates that the windows in the barracks room doors had coverings — shades or curtains of some sort — that afforded the occupants some degree of privacy, as well as opportunity to break the rules. For example, an 1898 photograph, taken in the barracks courtyard, shows in the background a barracks room door with windows and what appear to be curtains inside covering most of the exposed glass. And although barracks room doors have traditionally not had locks, in earlier times the cadets have been able to close their room doors — and play cards, drink, eat, smoke or whatever — out of sight of persons standing on the stoop outside. In 1856, a cadet wrote to his father:

Two of my room mates . . . and myself — were sitting in my room, playing a social game at cards, a professor came to the door knocked and came in. We concealed our cards, as quick as possible, but not soon enough to escape . . . . The number of my demerits "is rather my misfortune than my fault."

This story would make no sense if the professor could simply look in the door window and observe what the occupants are doing. Nor do the "stick" inspections, described by Henry Wise, make any sense unless the inspectors could not look into the cadets' rooms because the doors were closed and the windows in the doors were covered:

[The status checks such as room inspections for absentees are] conducted by tactical officers who strike the door to a cadet room with a small baton in passing by to elicit from within the report of "All right, Sir" if all are present or officially accounted for. If there is an absentee without authority or whose authority is in doubt, he is notified by his roommates of the time of the check so that he can report himself if not "all right." For the occupants of the room the stick check eliminates the inconvenience of being inspected in detail for absentees.

It was the honor code, not an absence of privacy, or even the regulations, that compelled an honest response to the stick check. Henry Wise observed:

[Some have confused the Corps's [sic] honor system with the Blue Book, the Institute's administrative regulations. The latter are intended as a part of the process of developing the whole man by

726. Id. at 68 (photograph of gymnasts in front of building, taken around 1898, in which the window on the door appears to be covered); see id. at 36 (photograph of courtyard, taken around 1903, in which many of the windows in the barracks doors appear to be covered).

727. Id. at 86 (quoting Letter from Joseph H. Chenoweth to his father (Feb. 18, 1856)).

728. H.A. Wise, supra note 33, at 393.
teaching him how to handle himself in dangerous or very tight situations, such as combat. Obviously, young men seldom see the need or value of all the official strictures laid down in the Blue Book. If one is disposed, as of course all normal youth are to a degree, to evade some of the regulations, to “beat the system,” meaning the Institute system, he does so at the risk of incurring the prescribed penalty. It may range from minimum to dismissal. The Honor Court, however, is not often concerned there, unless, for instance, a false official statement is involved in the infraction.  

Wise continued, “Although ‘beating the system,’ the Institute regulations, is a game cadets play with the ‘enemy’ in the persons of tac [tactical] officers, the honor system is no game and is taken in dead earnest.” The Honor Court, formally established in 1908, is run entirely by students who have the primary authority to investigate and adjudicate violations of the honor code reported by cadets and to administer the single penalty of expulsion in a ceremony known as “drumming out.”

As the school grew and physical conditions and societal expectations changed, the requirements for supervision and discipline of the cadets also evolved. Young men and boys initially relinquished a great degree of personal freedom and the comforts of civilized life when they enrolled in the Institute. In 1864 cadet Beverly Stanard wrote to his sister that VMI “is one of the dullest & meanest places in Christendom,” and, later, to his mother: “Here I am, no longer a freeman, but a prisoner within the lofty walls of the V.M.I.” Indeed, for nearly the first one hundred years of its existence, the cadets attended school without break nearly year round, including, for many years, a required summer camp. Furloughs to leave the Post for holidays were unheard of, and cadets needed to obtain special permission of the superintendent, based upon their parents’ special

729. Id. at 392-93.
730. Id. at 393.
731. Id. at 389-90. No doubt to satisfy due process concerns, the Honor Court “verdict” must be confirmed by the superintendent and can be appealed to “higher authority.” Id. at 394; see supra note 714.
732. Letter from Beverly Stanard to his sister (Mar. 13, 1864), in STANhAD, supra note 352, at 43. Beverly Stanard was one of the VMI cadets who died as a result of wounds received in the Civil War Battle of New Market. Id. at xviii-xxi.
733. Id. at 57 (Letter from Beverly Stanard to his mother, formerly Ellen B. Taliaferro (May 9, 1864)).
734. See H.A. Wise, supra note 33, at 26 (describing the early summer camps).
pleading, even to go home for family emergencies. Rebellions against the strict leave policy did occur. William Couper reported that "a combination among the cadets to 'take' a furlough at Christmas in 1902 was nipped just in time to stave off trouble." The cadets were not granted leave at Christmas until 1920, and even then cadets with excessive demerits were denied the privilege of the eight-day furlough. But by 1925, the Christmas furlough was extended to ten days and was no longer conditioned on a cadet's disciplinary standing. By the mid-1950s, seniors were permitted up to seven weekend leaves each semester and by 1970, first-class cadets were permitted to keep their own cars on the Post.

Thus, with greater privileges and the means to leave the Post at various times of the year, cadets no longer experienced the prison-like conditions and regulations of earlier years. Nor could the nearly 1300 cadets enrolled today be observed as closely by the administration, faculty or other cadets as in the days when the Corps numbered a few hundred cadets. Leave time at holidays or for weekends has for many years provided opportunities for cadets to reenter the world outside VMI and to engage in platonic or sexual relationships unobserved by other cadets or agents of the school or the state, to use a private toilet in a restaurant, to take showers in the privacy of a motel bathroom or a home, to dress and undress alone and unwatched. The strict scrutiny envisaged by Judge Kiser thus gives way all the time to the reality that VMI is not a prison and the cadets are not inmates who have no freedoms and no opportunity for privacy whatsoever.

In fact, the cadets are not isolated at VMI from women, sex or dating relations as the Court of Appeals for the Fourth Circuit seemed

735. See, e.g., John G. Barrett & Robert K. Turner, Jr., Introduction to Stanard, supra note 352, at xiv (describing the letters that Mrs. Stanard wrote in 1863 requesting permission for her son Beverly to return home because of her "ill health").

736. 4 Couper, supra note 34, at 236.

737. 4 Id. at 236; H.A. Wise, supra note 33, at 108.

738. 4 Couper, supra note 34, at 236; H.A. Wise, supra note 33, at 108. Couper reported that the Christmas furlough was later extended to 12 days, and each year an attempt is made to effect a change based on the submission of a permit. The tendency to change regulations by this procedure has increased greatly in recent years but it has not been found that petitions which concern the Christmas furlough ever request that it be shortened.

4 Couper, supra note 34, at 236.

739. H.A. Wise, supra note 33, at 233.

740. Id. at 297-98.

741. See VMI I, 976 F.2d at 894 (noting that VMI has "approximately 1,300 male students"). Henry Wise reported that "the Corps numbered 1,000 for the first time in 1958." H.A. Wise, supra note 33, at 232.
to presume. VMI, even without admitting women as cadets, is hardly a sex-neutral environment. Women have long been present on the Post or closely connected to cadet life at the Institute, and cadets have always experienced cross-sex relationships of one sort or another. Women were present from the founding of VMI as wives and daughters of the faculty and administrative staff, and women have been hired as support staff since 1925 and as professors for the last twenty years.\textsuperscript{742} VMI’s summer school has admitted women since 1966.\textsuperscript{743} In 1971, “colorfully dressed girls from Southern Seminary Junior College” joined the “cadet cheerleading squad” and “helped lead the Corps in giving lung to” VMI’s cheers at football games.\textsuperscript{744} Sexual relations between cadets and women over the years have ranged from the formal and proper to the informal and illegal — from “formal hops” in the 1920s where “full dress” was “de rigueur for cadets and faculty” and “dancing with wallflowers” was “[a]mong a new cadet’s chores,”\textsuperscript{745} to excursions by car in the 1950s to a “favorite rendezvous where cadets and their dates used to frolic” in a “cluster of cabins” called “Stevesville” located on a highway outside Lexington.\textsuperscript{746}

\textsuperscript{742} Henry Wise reported that in 1925 VMI hired “[t]he first female stenographer.” H.A. Wise, supra note 33, at 118. The first nurse was hired in 1900, replacing a “matron.” 4 Coupé, supra note 34, at 85. Launderesses had been employed at the Institute for a period prior to the mid-1880s, and before 1852, the laundry was done by “individuals” — apparently white women living in Lexington. 4 id. at 87 n.6.

In 1974, VMI hired, as an assistant professor of chemistry, “its first woman to teach on a full-time basis.” H.A. Wise, supra note 33, at 357. Susan Faludi reported that The Citadel did not hire its first tenure-track female professor in the Political Science Department until 1988. Faludi, supra note 568, at 70-71. Faludi also observed that “[i]n order to maintain [the] world view [that ‘women are objects’], the campus has to be free of women whose status might challenge it . . . .” Id. at 70.

\textsuperscript{743} Henry Wise reported that “[w]omen, unheard of as students at VMI, were among the 572 attending [the five-week summer school] in summer 1966, but the excitement was blunted as they did not live in Barracks.” H.A. Wise, supra note 33, at 278. VMI’s public summer school developed out of a private summer coaching school founded in 1908 to instruct current cadets in courses they had failed and prepare potential cadets for admission. Id. at 92-93.

\textsuperscript{744} Id. at 341.

\textsuperscript{745} Id. at 125.

\textsuperscript{746} Id. at 138. Henry Wise reported that prior to the 1950s:

Cadet diversions, except on special weekends, had been all-male affairs, for girls seldom visited Lexington except on occasions of football games and hops. By the 1950s female students were permitted to have automobiles and more frequent absences, so they came to see cadets much oftener [sic]. No lady and few respectable elders cared to go to a beer joint. Cars were much more convenient for cadets and their dates. . . . [Stevesville] was a cluster of cabins of the kind that was made obsolete by the modern motel. . . . In 1960 the Institute put the place off limits, and that rule was rigorously enforced. First-classmen took to renting houses in the country for their hideaways. Stevesville in 1976 still stands, vacant, deteriorating, an eyesore against the beautiful background of the Blue Ridge Mountains.

\textit{Id.}
Alumni complained in 1955 about "cadet conduct in local restaurants and taprooms, and 'wild' graduation parties with girls in Barracks."\textsuperscript{747}

Furthermore, the aftermath of World War II and the Korean War brought the reality of marriage and changing attitudes about sexual behavior to the Institute. Married veterans who sought re-admission to VMI initially were blocked by VMI's absolute ban on cadets marrying.\textsuperscript{748} In 1945, however, responding to pressures from the Alumni Association and the fact that "not a few" veteran former cadets "had wed and gone to other colleges,"\textsuperscript{749} the Board of Visitors "agreed to admit married former cadets, provided that they live in Barracks and conform to regulations in all other respects."\textsuperscript{750} By the fall of 1946, "continuing alumni pressure" and "the new superintendent's recommendation" convinced the Board to permit veterans of the senior class who had married before September 5 to apply to live in Lexington as civilian students. This meant no duties other than academic. As civilian students they were not allowed to eat in the mess hall or to enter Barracks without permission, and were subject to penalties for interference with the routine of regular cadets. Nineteen initial applications were approved. Under this policy married second classmen were required to live in Barracks but were given more than ordinary absentee privileges.\textsuperscript{751}

The prohibitions against second-class married veterans living "off Post" finally gave way when "[c]rowded conditions provided a convenient excuse to give all married ex-servicemen the option of becoming civilian students beginning with the 1948-49 session."\textsuperscript{752} Then even unmarried veterans were permitted to attend VMI and live outside the barracks with "civilian status" until "[t]he last of the civilian students were gone in 1950."\textsuperscript{753}

\begin{itemize}
\item \textsuperscript{747} Id. at 241.
\item \textsuperscript{748} Id. at 176; see id. at 297 (describing origination and purpose of rule in 1839, as well as the method of enforcing the rule through a biannual nonmarriage certification).
\item \textsuperscript{749} Id. at 177.
\item \textsuperscript{750} Id. at 176-77. VMI's superintendent, General Kilbourne, "was firm in his conviction that any easing of regulations would be harmful to all the mixed-up classes containing veterans and nonveterans," but he was overruled by the Board of Visitors. Id. at 176. The Board's new policy of admitting married cadets and permitting them to live off Post had an early precedent. During the Civil War, Superintendent Smith granted a married VMI applicant "a special exception" from the rule prohibiting marriage, as well as from the requirement that all cadets live in the barracks. Interestingly, the cadet's "good conduct was guaranteed by his wife and by John Miller, a resident of Lexington with whom they boarded." 2 Coubé, supra note 34, at 115-16.
\item \textsuperscript{751} H.A. Wise, supra note 33, at 184.
\item \textsuperscript{752} Id. at 185.
\item \textsuperscript{753} Id. at 185, 186. Henry Wise reported that after 1950, "civilian status was granted only in rare instances, less than a half dozen to the present time [1976-77]." Id. at 186. The choice of
\end{itemize}
Thus, at least for a period of a few years, "regular" cadets attended academic classes with cadets who were married and living with their spouses in or near Lexington. Moreover, the regular cadets lived in the barracks and shared all aspects of barracks life with second-class married cadets who were permitted what amounted to conjugal visits. VMI had altered its rules and traditions to accommodate both the institution of marriage and the needs of married men for sexual privacy. It could not be said for the veterans with civilian status that the "the most important aspects of the VMI educational experience occur in the barracks." When necessary, the principle of egalitarianism gave way to special privileges and accommodation of the special needs of individuals in a subgroup.

Sex without marriage, however, was treated somewhat differently by the Corps and the administration, as well as the Board of Visitors. In the same period that veterans were first being exempted from the singles-only rule, the cadets dismissed a fellow cadet for "consorting with women of ill repute." Several years later, however, the cadets initiated a fundamental change to the honor code, at least with respect to private consensual sexual relations:

The honor code had included the hated Rule Twenty, known as the "terrible twenty," which forbade sexual intercourse on the VMI Post. The theory of that rule and others looking to private morals was that no gentlemen [sic] would "sully his own nest." Aware of this sanction, some mothers were happy to have their daughters attend the dances and have dates at VMI when they would not allow their girls to visit other colleges.

Veterans returning to finish their cadetship, however, had become comparatively liberal. They believed that "biology cannot be legislated." For that and for administrative reasons, such matters of individual morality were eliminated after 1952 from the honor

the term "civilian status" to refer to the returning veterans who lived off Post is somewhat ironic in light of the fact that many of the cadets in the barracks were late adolescents — often boys of no more than 16 or 17 years of age — simulating a military life whereas the veterans were men returned from an actual war, some of them with war injuries.

Korean War veterans did not have to experience "[t]he confusion and changes in policy toward veterans after World War II." Id. at 232. The policy was as follows:

Married ex-servicemen were admitted, and they and unmarried ones had the same options: once a returnee had completed two academic years at VMI, counting time before and after duty in the armed forces, he could choose between continuing as a full-time cadet or taking civilian status, that is, live off Post, with academic duties only.

Id.

754. VMI I, 766 F. Supp. at 1423.
755. H.A. Wise, supra note 33, at 198 (apparently quoting the Board of Visitors). The Board of Visitors refused to reinstate the cadet despite his "plea for clemency." Id.
code. . . . It seems clear that the code would have been subjected to tremendous strain had it continued to dictate a man's private moral standards in a changing world. . . . A factor in the honor system's continued effectiveness lies in avoiding overburdening it with concerns that are not clearly matters of honor in the context of integrity.\footnote{756}

Nonmarital sexual relationships were no longer officially regulated, as long as they remained private and relatively discrete, heterosexual and within the traditional bounds of decency for a Southern gentleman. The Institute thus extended the zone of privacy it had previously acknowledged only for married cadets.

VMI's real reason for injecting the privacy issue into the litigation may have been its desire to preserve the nude male bonding rituals that have been created by the cadets — such as the early custom of skinny-dipping in a nearby river and the now widely publicized "shower run."\footnote{757} The nude shower run is a ritual that apparently

\footnote{756} Id. at 201-02.\footnote{757} A scene of cadets bathing nude on a river bank is documented in a photograph, taken around 1908, which is titled "Skinny-dipping." VMI ALBUM, supra note 43, at 84. Such nude bathing by cadets had apparently pre-dated the Civil War. In June of 1858, the VMI Headquarters issued an order regarding nude bathing which read:

Complaints have been made to the Act Sup't [sic] by citizens residing near Jordans Bridge, that they are seriously inconvenienced by the publicity of the bathing of cadets. The regulations authorized bathing in the river between parade and call to quarters, and it is hoped that the cadets will always avail of such hours and bathe at such places, as may not offend the delicacy of females passing the Bridge at Jordans. Many private families pass to and fro by this thoroughfare and it is due to them as well as to the reputation of all concerned, that respect should be paid to females who may very properly be offended by the publicity of the bathing immediately in the vicinity of the Bridge.

\textit{Id.} (reproducing Order No. 78, VMI Headquarters (June 23, 1858)); see 1 COUPER, supra note 34, at 81 (describing the cadet's required "exercise" in the 1840s of engaging in "[t]he sport of swimming" and the Institute's concern about cadets "'annoy[ing] the females near Jordan's Point by bathing too close to the bridge,'" apparently quoting a VMI Order).

The "shower run" was characterized as an aspect of VMI's "hazing and humiliating treatment that shapes a VMI cadet" by William A. DeVan, who described the "shower run," based on his interview with a 1988 VMI graduate, as follows:

All rats are stripped naked and run through the communal shower with some shower heads turned on all hot and others all cold. Although the substantive benefits of this treatment are at best questionable, it does provide the kind of common shared experience that binds together each class of cadets.

DeVan, supra note 152, at 534 & n.313 (citation omitted), also quoted in Saferstein, supra note 152, at 663 n.126. Saferstein noted that:

the court's [Judge Kiser's] vague statements [in \textit{VMI}] about cross-sex relationships are its way of dancing around the fact that the extra edge of adversativeness, distinguishing VMI from an ROTC program, largely consists of male bonding activities, including the sort of insulting or demeaning hazing that could constitute sexual harassment in a coeducational environment.

Saferstein, supra note 152, at 663 (footnote omitted).
bonds the rats in their mutual experience of embarrassment, humiliation and undoubtedly extreme discomfort, if not pain, from being exposed to extremes in water temperatures. Though many people would consider this ritual to be a silly, if not dangerous, form of hazing, to the cadets it is just another part of the holistic VMI experience — the adversative training that separates the weak from the strong on the path to building true men. If women were admitted to VMI, they surely could not be subjected to the shower run, and this cadet custom would either disappear on its own or be made illegal and possibly go underground as happened with an earlier cadet tradition of throwing home-made bombs into the barracks courtyard. Nevertheless, VMI could hardly argue that the shower run is “essential to the leveling process” of the VMI adversative experience. The shower run, like many customs at VMI, was created by the cadet culture, not by the administration, Board of Visitors or any state educational body. Moreover, although it is not clear when this particular cadet ritual began, it could not possibly have existed before 1916 when Jackson Memorial Hall opened with “[t]he first showers at VMI.” Thus, for nearly seventy years (and very likely much longer), VMI managed to produce citizen-soldiers even though the rats were not put through a

758. As discussed in part VI.B., supra, VMI has a long tradition of secret clubs, hazing rituals and other violent customs that violate the official Institute rules and sometimes state criminal laws as well. When cadet customs have become too offensive, the Institute has prohibited them, though some cadets have continued secretly to defy the rules. For example, in the 1880s, a small group of VMI cadets formed a secret society called the “Molly McGuire’s” who apparently were responsible for blowing up a powder magazine at VMI in 1884. H.A. Wise, supra note 33, at 56; see VMI ALBUM, supra note 43, at 88 (excerpt from the diary of Thomas J. Nottingham, reporting on the destruction of the “Arsenal” on that day (Dec. 2, 1884)). In a photograph titled “The ‘Molly McGuire’s’ c. 1890,” the “Molly McGuire” cadets are posed in front of a banner with a skull and crossbones. Id. One cadet is hooded and the other two are wearing hats and have bandannas with eye holes covering the top part of their faces. Each has a gun in his pants’ waist or in a holster. After the powder magazine was destroyed, the Board of Visitors banned secret societies, but they continued to exist for years, as did the cadets’ fascination with explosives. H.A. Wise, supra note 33, at 56. For example, “[t]he annual and dangerous practice of rolling ingeniously made and dangerous bombs into the Barracks courtyard,” was “an organized event” from the 1920s to World War II, and explosions “sporadically continued” thereafter. Id. at 56-57; see also id. at 135.

759. VMI II, 44 F.3d at 1233. This is not to say that the cadets themselves do not view these experiences as an “essential” part of male bonding. Kenneth Karst has written a perceptive article about the “pursuit of manhood” in the military in which he argues that “[t]he ‘male bonding’ issue goes to the heart of the combat exclusion.” Kenneth L. Karst, The Pursuit of Manhood and the Desegregation of the Armed Forces, 38 UCLA L. Rev. 499, 542 (1991).

760. H.A. Wise, supra note 33, at 94. When the barracks were rebuilt after their destruction in the Civil War, they originally “had no water facilities on the stoops” and cadets had to bathe in the river. Id. at 49 (quoting John L. Waring’s recollections of his experiences at VMI in 1866-67 which were published in the VMI Cadet, Dec. 12, 1932).
shower run. The shower run is neither an ancient custom nor a legitimate educational methodology.

VMI's privacy argument, reduced to its essentials, posits that only people who can get nude together can be equal. A corollary of this principle would be that anyone excluded from this ring of initiates who experience a total absence of individual privacy cannot be equal to those who are included. Since women, because of social norms and legal concerns about sexual harassment, must be afforded some privacy if they live in a college setting with men, they cannot be equal to men. If they are not equal, they are either superior or subordinate. The place of young women at VMI has historically been subordinate to the male cadets, and the privacy argument assures that they will remain so. Thus, though cadets have seen many women at and around VMI — as visiting mothers or sisters, as faculty spouses and daughters, as secretaries and teachers, as girlfriends, Southern belles and women of ill repute, as cheerleaders, summer students and fellow military trainees in summer ROTC camps and even, at one time, as cadets' wives — the cadets have never seen the women as true equals — as cadets — because the cadets have defined equality as requiring a set of customary relations and rituals that only the male cadets can share with each other. The VMI cadet culture and its ideology of equality thus replicates and reinforces the traditional inequality of Southern gender relations.

Will the cadets of VWIL become equal to the VMI cadets as a result of their leadership training at Mary Baldwin College? By definition this is not possible. The leveling process of the VMI barracks will not be replicated at Mary Baldwin College, and even if it were, it would not count because the cadets' notion of equality, as well as honor, requires cadets to give up all physical privacy together by taking gang showers, using gang bathrooms and living in unlocked rooms with windows in the doors and with no window shades. Even a separate program for women identical to VMI's can never be equal to VMI, because women will always be outsiders to the private male locker-room experiences of the "real" VMI cadets.

If women were admitted to VMI there would have to be, as Judge Kiser believed, some changes and adaptations in barracks culture and facilities, but these changes would be minor and trivial in comparison to the fundamental change that would have to occur in the VMI ideology of gender relations. VMI would have to acknowledge that men and women can be equal without sharing a gang shower, that honor
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can exist despite the privacy of closed doors and window shades and that adversity can be experienced without group nudity. The Institute's history and the social science testimony at the VMI trials suggest that it is VMI's distorted notions of equality, honor and adversity — not the absence of privacy in the VMI barracks — that is the true barrier to the admission of women.

D. THE EFFECTS OF A GENDER-BASED DUAL-TRACK PHYSICAL TRAINING PROGRAM

Expert testimony in the VMI case established that if VMI were to admit women, it would have to develop "a dual-track physical training program for men and women in order to achieve equality in effect." As Judge Kiser phrased this piece of the Catch-22 argument:

Physical education requirements would have to be altered, at least for the women. The current program, where every student must pass precisely the same physical test before graduation, would prevent a disproportionate number of women from graduating, thus forcing VMI either to establish different requirements for women, or to eliminate or substantially reduce the requirements so that they could be applied to both sexes, which would remove one important part of the VMI system of education.

The implications of this finding of fact were critical in the Fourth Circuit’s approval of the VWIL plan, which creates a separate and very different physical training program for women at Mary Baldwin College, but spares VMI the allegedly adverse effects of having such a program on its own campus.

The conclusion that VMI should not be forced to change its program rested on several key findings made by Judge Kiser: (1) that the "more than 120 physiological differences that exist between men and women" which were "identified by West Point's Office of Institutional Research are very real differences, not stereotypes," (2) that "[u]nlike the federal service academies, VMI currently does not use 'ability groups' in its physical programs or activities," because all VMI

761. See VMI II, 44 F.3d at 1233.
762. VMI I, 766 F. Supp. at 1413.
763. Id. at 1432; see id. at 1432-34 (Findings of Fact regarding "Gender-Based Physiological Differences"). As the court of appeals announced in upholding Judge Kiser's findings in VMI I: "Men and women are different, and our knowledge about the differences, physiological and psychological, is becoming increasingly more sophisticated." VMI I, 976 F.2d at 897. The government admitted that there are "plain physiological differences between men and women." Appellant's Brief at 40, VMI I (No. 91-1690).
cadets are subjected to "the same physical requirements," that "changes in [the] physical education requirements," such as adopting a dual-track program, perhaps with "comparable or equivalent training," as the federal service academies and military have done, would be necessary because of the physiological differences between men and women, (4) that such a fundamental change in the physical training program would produce "class differences between male [sic] and females" and would "undermine the ethic of egalitarianism by creating jealousies and concerns about whether people were being treated equitably," (5) that "approximately 15% of females in the applicant pool could successfully meet the requirements of the current VMI physical fitness test" which "98% of VMI cadets pass . . . before graduation," (6) that, as at West Point, "[c]oeducation would also affect [the] physical training . . . incorporated into the rat system," possibly by "eliminat[ing] practices such as . . . requiring physical activities such as push-ups," and (7) that, in sum, "[g]iven the actual physiological, psychological, and sociological differences between males and females," admitting women to VMI would destroy the fundamental aspects of the egalitarianism and adversativeness that are considered essential elements of VMI's unique holistic educational program.

If VMI adopted a coeducational physical education program, however, average physiological differences based on sex would not be as important as either the average similarities in men's and women's interests and abilities in sports and fitness, or the significant individual differences in interests and abilities between all cadets — differences which are already accommodated in the VMI physical education program. VMI is hiding behind sociobiological arguments about the significance of sex-based differences in order to determine, and to limit, its culture as a producer of men only. Nevertheless, even within VMI's circumscribed function as a school that aspires to make men

764. VMI I, 766 F. Supp. at 1438.
765. Id. at 1439.
766. Id. at 1440.
767. Id. at 1438.
768. Id. at 1439, 1441. For example, West Point abolished its "common practices" of "[h]azing . . . new cadets . . . [by] demeaning or insulting activity, and requiring excessive physical performance," and replaced these practices with a "new system [which] uses positive motivation, instead of stress, as a means of leadership development." Id. at 1441. Judge Kiser also made the following finding: "Female cadets would not be able to perform the tasks in the VMI rat training program at a level comparable to that of male cadets." Id. at 1438.
769. Id. at 1439-40.
out of boys — as a means of making boys into citizen-soldiers — the Institute has a long history of adapting its physical training program to contemporary societal needs, trends and customs, as well as accommodating the requirements of its program to the physiological differences between the individual cadets who are admitted.

The myth is that VMI has a sex-based universal standard for physical fitness that it has rigorously applied to every cadet at all times and for all time. Yet accounts from VMI's history and the evidence from the VMI trials portray a very different story. The Institute routinely classifies cadets by their physical abilities and interests and, when it has perceived an institutional self-interest in affording special privileges, the Institute has accommodated significant differences between cadets' physical abilities, interests and physiology. Its policies have ranged from special treatment for intercollegiate athletes to admission or retention of students who were disabled or physically disqualified for military service.770 Moreover, VMI did not originally have a formal physical education program771 and its modern program has constantly evolved to serve the needs, interests and abilities of a diverse student body and the interests of the alumni. The rigor of the Institute's formal physical training program has varied depending on external circumstances as well as the personalities and styles of the presiding superintendent, the commandant and the staff of the Physical Education Department.772

VMI's modern physical training program has numerous components — from the formal physical education program, to intercollegiate and intramural sports, to the VMI military drills and ROTC summer camp training, to the "rat challenge" obstacle course, to the random strenuous physical demands made on rats by upperclassmen as a part of the rat-line practices.773 Not all of the components have existed from the founding of the Institute in 1839, nor has a universal

770. See infra text accompanying notes 823-26.
771. See infra text accompanying notes 774-76.
772. For example, Henry Wise noted a benevolent — and definitely unofficial — custom adopted by Herbert Patchin, the Director of Physical Education from 1942 to 1963, to mitigate the effects of sleep deprivation on the rats: "'Herb' Patchin's prescription for rats consisted largely of sleep sessions in the visiting team's dormitory in Cocke Hall. Herb gave rats no vocal sympathy, but he did think sleep was what they needed most during the period allocated for phys-ed." H.A. Wise, supra note 33, at 457.
773. Some of the customary strenuous physical demands on the rats such as "finning" and the more brutal forms of hazing such as "bucking" were eventually prohibited by the administration, and the nature and extent of rat line discipline has been constantly modified by the cadets themselves. See supra text accompanying notes 611-26.
physical fitness standard been required throughout the Institute’s history or consistently for all cadets. For example, according to Henry Wise, VMI’s Department of Physical Education, which was not established until 1933, initially developed a mandatory curriculum for fourth-class cadets consisting of “calisthenics, personal hygiene, swimming and intramural games,” and required that all cadets “not engaged in intercollegiate athletics had to participate in intramurals.”

“Organized games of physical exercise formed no part of cadet life until 1866,” and “organized athletics, as we would recognize them, did not start until the 1890s.” Before the Civil War, “fishing, hunting, mountain climbing, limited gymnastics, fencing, and quoit pitching were the cadet sports,” and in addition, for many years the nearby North River provided the cadets with opportunities for swimming and ice skating — sometimes required as part of the physical regimen and other times officially sanctioned for recreation. What is noteworthy about these early athletic activities is that they were primarily individual — not team — sports that many cadets would have learned as boys and would have been likely to engage in during their adult lives. More importantly, none of these early sports and recreational activities involved bodily contact like football, boxing or wrestling.

Over the years, the types of intercollegiate and intramural sports offered at VMI gradually changed to suit contemporary needs and

774. H.A. Wise, supra note 33, at 456.
775. Id. at 432.
776. Id. at 57.
777. Id. at 432. Fishing, hunting, mountain climbing, swimming and ice skating were fitting, and no doubt, customary activities for many early VMI cadets who were young men drawn primarily from the poorer classes of rural white Virginia. See supra note 210 and accompanying text. All of these sports would have required little in the way of uniforms, equipment or facilities — ideal for a school that constantly had to struggle for funds. Gymnastics later became an organized club sport, providing its members with costumes, consisting of tights and decorated, fringed pantaloons and bodices, and opportunities to display publicly their gymnastics skills. See, e.g., VMI ALBUM, supra note 43, at 76 (photograph titled “VMI Gymnasium Club. Best Athletic Performance ever given, June 21, 1887”), 68 (photograph titled “Team Spirit, Gymnasium team performing stunt, c. 1898”).
778. STANARD, supra note 352, at 40 (Letter from VMI cadet Beverly Stanard to his mother, describing the “elegant fun” of skating “down the river as far as you wished” — and with “a great many ladies on the ice” — on a Saturday when “all [cadets] could go that wished.” (Feb. 21, 1864)); H.A. Wise, supra note 33, at 57; see, e.g., VMI ALBUM, supra note 43, at 79 (photograph titled “Ice hockey on the North (now Maury) River, 1904-5,” and photo reprint of “Order granting permission to go skating, February 2, 1886”), 84 (photo reprint of Order of June 23, 1858, regarding regulations concerning cadets’ “bathing” [swimming] in the river); see also, e.g., 4 COUPER, supra note 34, at 30.
demands. Baseball was introduced after the Civil War, and intercollegiate football by the 1890-91 school year, although VMI did not travel for games until 1901, and even then the administration expressed concerns that "the trips and training tables [would be] an unwarranted interference with classes and discipline." A gymnastics club existed as early as 1887, and a tennis club by 1895. In the school year 1908-09, VMI instituted basketball as an intercollegiate sport.

The nature of the physical education training required for cadets has also varied over time. For example, during World War II, "heavy conditioning exercises were substituted for conventional sports training" to better prepare cadets for the combat roles they were expected to assume on graduation. Following the war, the Physical Education Department resumed sports training for non-athletes that was geared to intramural sports rather than combat, while athletes on intercollegiate teams received training and conditioning appropriate to their sports. Despite VMI's initial reluctance in the late nineteenth century to have cadets suffer from the distractions of intercollegiate sports, by the mid-twentieth century the school had adopted athletic and physical training programs for men that compared favorably, given fiscal limitations, to programs at West Point and other "model" colleges. By 1975, VMI's Self-Study Report stated that VMI "fields intercollegiate varsity teams in twelve sports: football, basketball, baseball, wrestling, swimming, soccer, golf, tennis, cross-country, indoor and outdoor track, and rifle marksmanship." Club sports in the mid-1970s, which competed with other schools but

779. H.A. Wise, supra note 33, at 57, 432-33, 86; see VMI Album, supra note 43, at 70-75 (photographs of early football and baseball players and teams). Football apparently was played as early as 1889-90. VMI Album, supra note 43, at 70 (photograph titled "Football team, 1889-90"). Evidently rugby was played as early as 1860. H.A. Wise, supra note 33, at 57.

780. See VMI Album, supra note 43, at 76, 68 (photographs of 1887 and 1898 gymnastics teams), 77 (photograph titled "Tennis club, 1895").

781. See id. at 78 (photograph titled "VMI's first intercollegiate basketball team. From The Bomb, 1909").

782. H.A. Wise, supra note 33, at 157. The physical education department used the "Army TC-87 program, designed for heavy combat conditioning." Id. at 174.

783. Id. at 174. As an indication of the post-war shift in emphasis on skills training, Henry Wise reported that VMI adopted a swimming program in which "[e]very rat learned to swim and most became better than average to excellent." Id.

784. For example, in the late 1940s, Herbert Patchin, the director of the Physical Education Department, "personally looked at physical education at West Point and seven other colleges and came away convinced that results at VMI were second to none, although the facilities were second to most." Id. at 174-75. Today, VMI belongs to the Southern Conference and the National Collegiate Athletic Association ("NCAA"), and in 1974 the Board of Visitors formally adopted a policy that VMI would follow all rules of the Conference and the NCAA. Id. at 424.

785. Id. at 425.
received no funding from VMI, were "fencing, judo, lacrosse and rugby."\textsuperscript{786}

Due in part to modern-day Title IX requirements\textsuperscript{787} and evolving student demand at all-women's and coeducational colleges, VMI's intercollegiate and intramural sports, other than the contact sports of football, boxing, wrestling and rugby, are all sports that college women can and do compete and excel in today, albeit in most cases on a "dual-track" with men's teams.\textsuperscript{788} The Mary Baldwin College Physical Education Department is no doubt typical of present-day small women's colleges: it currently offers some physical education courses in activities designed particularly for women's interests — such as synchronized swimming and ballet — as well as in many of the sports that VMI offers.\textsuperscript{789} Nevertheless, Mary Baldwin, unlike VMI, does not require participation in intramural team sports throughout all four years and the scope and competitive level of its intercollegiate sports program is more limited than VMI's.\textsuperscript{790} The VWIL physical education program will be both more rigorous and demanding than the regular Mary Baldwin program, and it will focus on the VWIL mission of leadership training. The program will adapt VMI's physical training requirements to the physiology of the average women and offer skill.
training in the particular sports that are viewed as necessary for women to get ahead in the business world. As James D. Lott, Dean of the College at Mary Baldwin College, testified for the defense in VMI II:

Q And would you describe, please, the physical training requirements at the Virginia Women's Institute for Leadership?

A . . . [T]he physical and health education component is based on essentially on the VMI physical education program. For the traditional student, the regular student at Mary Baldwin, we have only a one-year requirement in physical education.

We have one course called fitness, which is required for one semester hour, and then students take two other half-semester courses. The VWIL students in contrast would take eight semesters of physical education.

And that corresponds to the VMI program. As part of the physical education course, she would be required to complete a fitness test with each course, that, too corresponds to VMI. The fitness test would be calculated in the evaluation of the student by the physical education faculty.

. . . We make some slight differences where we think it's appropriate. We will not require boxing. We would have self defense built into this.

We're requiring, as of now, tennis, golf and racquetball and that came from our physical education faculty. In the Task Force discussions they were asked why those three, they made the point that these are the sports used in cooperate [sic] leadership, and being able to play golf, being able to play racquetball, being able to play tennis gives you a leg up, so I think that was clever thinking on their part.

Of course, if women truly need golf, racquetball and tennis to succeed as leaders in the male world of corporate America, they could be taught these skills at VMI as well, and perhaps eventually on a more competitive, intercollegiate level.

791. Dr. Lott, who "has taught for 30 years at MBC [Mary Baldwin College]," "testified as a defense expert in higher education, single-sex education, leadership education for women, curriculum and program development." VMI II, 852 F. Supp. at 487.

792. Joint Appendix at 452-53, VMI II (Nos. 94-1667 & 94-1717); see VMI II, 852 F. Supp. at 495 (finding that "[t]he VWIL physical education program will have a self-defense component rather than a boxing component" and that "VWIL will require tennis, golf and racquetball because, according to the Task Force, these sports are popular among corporate leaders").
In any event, the variety of intramural and intercollegiate sports offered at VMI demonstrates that, from the time that VMI began to teach and sponsor team and individual sports in a systematic fashion, distinctions have been made between cadets based on athletic ability and physiology — size, weight, speed, strength and agility. One has only to compare the size and apparent body strength of the cadets in a photograph of VMI's 1895 football team with a photograph of its 1895 tennis club to appreciate what is common knowledge, that different sports require different types of physical abilities and body types.\textsuperscript{793} VMI has never required that every cadet become a linebacker, or even participate in intercollegiate sports, although traditionally a large percentage of cadets have chosen to join intercollegiate teams.\textsuperscript{794} Because participation in intramural sports is required, the policy has been that "[a]ll cadets are invited and encouraged to try out for whatever sport may interest them . . . ."\textsuperscript{795}

If women were to attend VMI, they could be treated equal to the male cadets by being permitted to participate in the intramural sports that interest them and for which they are athletically suited. In time, with increasing enrollment of women, VMI could possibly field highly competitive intercollegiate teams of women athletes in sports like tennis, basketball, volleyball, track or swimming. Unfortunately, the vision of what is appropriate for the physical training for female citizen-soldiers in Virginia has been constrained by the Mary Baldwin task force's notion of what sports female corporate executives need, not what sports the VWIL cadets may want and be suited for — and the focus of the physical education program planned for VWIL, unlike at VMI, is primarily on sports that develop individual skills and physical fitness, not team play.

The district court in the \textit{VMI} case concluded that admitting women to VMI would destroy the school's practice of total egalitarianism by creating class distinctions and fostering resentment of special treatment or separate standards for women. But the very existence of VMI's intercollegiate athletic program already creates class distinctions and differences which VMI officials have acknowledged are a

\textsuperscript{793} VMI \textit{ALBUM}, \textit{supra} note 43, at 72, 77.

\textsuperscript{794} For example, the VMI 1975 Self-Study Report noted that "in 1973-74, 360 cadets participated in varsity or junior varsity intercollegiate athletics, a figure representing nearly 33 percent of the Corps of Cadets." H.A. Wise, \textit{supra} note 33, at 425.

\textsuperscript{795} \textit{Id.} (quoting VMI 1975 Self-Study Report).
source of tension between VMI athletes and other cadets.\textsuperscript{796} Even male high school students applying to VMI are undoubtedly aware of differences between athletes and non-athletes in their status and prospects for admission. Like other colleges with Southern Conference or NCAA programs, VMI aggressively recruits its varsity football and basketball players and also heavily subsidizes the cost of their education using private funds raised by alumni.\textsuperscript{797}

Although each VMI athlete "must participate fully in the academic and military programs on exactly the same basis as every other cadet," it is disingenuous for VMI to claim that "[n]o favoritism is shown\textsuperscript{798} to the intercollegiate athlete simply because "[h]e lives in the same barracks, eats in the same mess hall, and marches to the same classes with every other cadet."\textsuperscript{799} Once they are at VMI, athletes have always received special privileges and treatment that other cadets do not receive\textsuperscript{800} — from extra and different foods at training tables, to frequent opportunities to travel away from VMI, to having "a slightly different daily routine because of practice time and competition."\textsuperscript{801} Perhaps more significantly, athletes also receive individualized extra attention, particularly from the network of supportive adults — coaches, faculty, tactical officers and administrative staff — as well as other athlete cadets.\textsuperscript{802} The coaches "are their effective advocates," providing the athletes with an additional source of support during the rat year.\textsuperscript{803} Moreover, since 1936, when VMI alumni first began to target athletes for scholarship aid through their Alumni

\textsuperscript{796}. See id. at 431 (discussing the differences between VMI athletes on scholarship and the average non-athlete).

\textsuperscript{797}. For example, in the 1973-74 school year, "70 percent of the varsity football team and 100 percent of the basketball team [were] cadets on full or partial grants-in-aid." Id. at 425 (quoting VMI 1975 Self-Study Report). For a discussion of the history of, and institutional justification for, private funding of athletic scholarships at VMI, see generally id. at 427-30, 521-30.

\textsuperscript{798}. Id. at 431 (quoting Slater Report on the Long-Range Planning Committee on Athletics 18-19 (1975)) [hereinafter Slater Report].

\textsuperscript{799}. Id. at 425 (quoting VMI 1975 Self-Study Report).

\textsuperscript{800}. See supra note 772.

\textsuperscript{801}. H.A. Wise, supra note 33, at 431 (quoting Slater Report, supra note 798). In VMI I, the court found that "[c]adets who participate in NCAA sports during the regular school year are excused from the physical parts of rat training during the hours that they are practicing their sport." 766 F. Supp. at 1422.

\textsuperscript{802}. H.A. Wise, supra note 33, at 431 (quoting Slater Report, supra note 798).

\textsuperscript{803}. Id. (quoting Slater Report, supra note 798).
Association, VMI athletes have received fairly constant interest, concern and oversight by alumni sports boosters. Thus, both internally and externally, officially and unofficially, many persons are actively involved in retaining the athlete cadets in the program, including protecting them from some of the worst abuses of the rat line. Ironically, it is this institutionalized special treatment and perhaps jealousy of the athlete’s macho image and star status at intercollegiate games that causes many upper-class non-athletes to treat the entering athletes more harshly than the other rats.

In 1975, the VMI commandant, Colonel Buchanan, observed that “[t]he prestige of varsity athletics is so carefully laddered that those who start a game enjoy greater formal as well as informal respect among cadets, and, of course, the relative ‘manliness’ of the various sports is a major factor in according respect and status even among athletes.” It is no accident that the tradition has been for the overwhelming majority of athletic scholarships to be awarded to football and basketball players. Principles of egalitarianism can not easily be maintained in a culture that accords more money and prestige to men on the gridiron than to men in tights or swimming trunks. The dilemma is that each cadet gains or loses status from multiple aspects of his life at VMI, and for an institution that espouses equality and blindness to class distinctions, there are formal and informal ladders of status everywhere — in the class structure and student government, in the ranks of the cadet officers, in the classroom, on the playing fields and in the barracks. As Colonel Buchanan understood the path to leadership for cadets, each cadet who aspires to a high military rank also “must gain the respect of his subordinates in some minimum achievement in academics, athletics, and as a regular guy. It must be

804. Id. at 521. See the discussion of the development of the Sportsmen’s Club which was organized in 1948 under the auspices of the Alumni Association and later renamed the Keydet Club in id.

805. Anecdotal evidence of this phenomenon is described in an article about the extremely abusive hazing experienced by athletes at The Citadel. See Reilly, supra note 568, at 72. Fictional development of this theme is found in Pat Conroy’s novel, The Lords of Discipline, which is set at a Southern military institute modeled on The Citadel, Conroy’s alma mater. The major character in the book is a scholarship basketball player, who experiences both the resentment of the upper-class non-athlete cadets and the protective oversight of his coach and other teammates. CONROY, supra note 564, at 146-48.

806. H.A. Wise, supra note 33, at 421 (quoting Colonel William J. Buchanan). Colonel Buchanan, the thirty-eighth VMI commandant, was considered by VMI’s historian, Henry Wise, to be “an unusually perceptive man of superior intellect.” Id. at 411.

807. For example, in 1974-75, “the percentage of cadets with athletic scholarships” in sports other than football or basketball was “less than 5 percent.” Id. at 425 (quoting VMI 1975 Self-Study Report).
emphasized that these minimum achievements are norms set by other cadets and not by the Institute or even by the cadet rank structure.\textsuperscript{808}

The key is the recognition that the norms — the standards that determine whether a cadet is accepted into the fraternity at VMI — are established by the cadet culture, not by the Institute or its Board of Visitors or any outside body like the Virginia Council of Higher Education. Thus, while the VMI Physical Education Department has formally adopted a single set of objective physical fitness criteria, based on male physiology, which each cadet ostensibly must satisfy by graduation, the physical fitness standards that really count for survival at VMI are the arbitrary norms set informally and subjectively by cadet culture generally, and particularly by individual cadets and subgroups of cadets. The new cadets are tested by these arbitrary norms most extensively during the rat year, outside of official activities, at virtually any time of day or night, and according to the momentary whim, perversity or benevolence of upper-class cadets administering the rat line. Many cadets fail to meet these innumerable random and arbitrary physical challenges and many cannot survive the constant cadet-administered physical and psychological abuse that is accepted as part of rat discipline. Over fifteen percent of cadets fail to make it through the first year, and another approximately five percent of the entering class fails to graduate.\textsuperscript{809} This high attrition rate exists, not because cadets have failed the physical fitness test administered by the Physical Education Department, but because they have failed the totally arbitrary, and sometimes vicious and specifically targeted, “testing” administered by the upperclassmen.\textsuperscript{810}

Therefore, in the VMI case when Judge Kiser concluded that a reason for keeping women out of VMI was that “every student must pass precisely the same physical test before graduation,”\textsuperscript{811} he failed to acknowledge the legal and factual significance of the real physical

\textsuperscript{808} \textit{Id.} at 422 (quoting Colonel William J. Buchanan) (emphasis added).

\textsuperscript{809} “For the past five school years an average of 16.7% of cadets have dropped out of VMI prior to the second year.” Appellant’s Brief at 8, VMI I (No. 91-1690).

\textsuperscript{810} \textit{See} Reilly, supra note 568, at 72, 74 (describing how individual cadets at The Citadel are singled out to become the victims of particularly abusive hazing practices). In \textit{The Lords of Discipline}, the upper-class cadets singled out and tortured the one black student, the first Black to be admitted, as well as a shy, overweight boy, and others. Cadets who were well-liked — who were viewed as fitting in with the guys — were spared the worst excesses of the constant hazing. \textit{See} CONROY, supra note 564. \textit{Lords of Discipline}, albeit a fictional account, was based on Pat Conroy’s experiences as a cadet at The Citadel from 1963 to 1967 as well as his interviews with “men from West Point, Annapolis, the Air Force Academy, VMI, The Citadel, and dozens of military high schools around the South.” \textit{See id.} at Author’s Note.

\textsuperscript{811} VMI I, 766 F. Supp. at 1413 (emphasis added).
testing of the rats — the constantly varying, ad hoc, arbitrary physical and psychological hazing imposed by upperclassmen that supposedly "weeds out the weaklings." The cadets themselves define what it means to be a weakling and who deserves to be weeded out. There are no ROTC physical fitness standards here, nor professionals to administer them; indeed there are no standards at all and the cadets are in charge.

Judge Kiser's conclusion that every cadet was subject to the same physical standards also misstated his own specific finding that "98% of VMI cadets," — (but not every cadet) — passes the test "before graduation," and ignored the fact that VMI's only nonwaivable physical requirement for admission is that the applicant must be a male. At the time of trial the 1990-91 VMI Catalogue stated that "[t]o qualify for enrollment at VMI, an applicant must be in sound health, good physical condition, and must be able to participate fully in the Institute's strenuous physical programs. VMI's physical and medical standards are essentially those required for enrollment in ROTC." But, the VMI superintendent "testified that the ROTC standards are used for screening, and may be waived in the discretion of the Superintendent."

812. 

813. Superintendent Scott Shipp wrote that "[t]he attitude of cadets is that hazing weeds out the weaklings, and that they are well rid of those who leave." H.A. Wiss, supra note 33, at 87 (quoting General Scott Shipp, Superintendent's Annual Report (June 17, 1907)).

814. In the wake of Shannon Faulkner's departure from The Citadel, Newsweek's military correspondent, retired Army Colonel David Hackworth, made this same point in comparing today's U.S. Marine Corps boot camp to the discipline that new cadets — called "knobs" — receive at The Citadel. Colonel Hackworth wrote:

There are some parallels between marine boot camp and The Citadel. Both put their recruits through fire, shocking them in pressure-filled situations so they learn to react to every possible challenge. A grunt needs blind obedience on the battlefield. But the Marine Corps — which I believe has the most efficient, rigorous training in the country — produces this without the sophomoric hazing that seems common at The Citadel. That's because marine training is conducted by seasoned drill instructors (D.I.s). At The Citadel, it's the upperclassmen who put the "knobs" through their paces.

815. See Appellant's Brief at 29 n.22, VMI I (No. 91-1690) (citing testimony of General John William Knapp, Superintendent of VMI).
816. Id. at 29-30 n.22 (citing to Appendix at 1511).
817. Id. at 30 n.22.
Moreover, the government argued that "[t]here was substantial and undisputed evidence that some women can do the current physical training and military drills, pass the VMI physical fitness test, do everything that happens on the rat line, and otherwise do all of the activities required of VMI cadets."\footnote{818} While it was estimated that only about fifteen percent of females in the pool of likely applicants could pass the physical fitness test on the first try,\footnote{819} just over fifty percent of the males who are admitted to VMI are able to pass the test when they start their first year.\footnote{820} The "nearly 50% of new cadets [who] fail the physical fitness test the first time" are provided "remedial physical training."\footnote{821} All females are deprived of the opportunity that all male VMI cadets have — either to pass the test, or to fail the test and receive remedial training in order to pass it sometime during their four years as cadets, or not to pass the test at all, despite remediation.\footnote{822}

How does VMI account for the two percent of the graduating cadets who, despite opportunities for remedial training, fail to pass the physical fitness test for four years in a row? It is not explained, but VMI's history shows that occasionally the Institute has waived or lowered its general physical standards for individuals or subgroups to suit its own institutional, and occasionally the nation's, interests. For instance, during World War II, VMI admitted veterans who were physically disabled.\footnote{823} For three years during the war, from June 1943 to 1946, while VMI opened its facilities and resources to train hundreds of men in the Army Service Training Program, the VMI Corps itself was a skeleton consisting of "boys under eighteen and 4-F's."\footnote{824}
In 1972 the “special consideration” of the VMI superintendent made it possible for a cadet who had his left leg amputated because of bone cancer to return to the Institute for a year.\textsuperscript{825} Although the cadet quite courageously “insisted on performing most normal cadet duties,”\textsuperscript{826} VMI did not assert the cadet’s physical inability either to perform all cadet functions or to pass a required physical fitness test as a bar to his returning to the Institute following his surgery.

These historical examples of exceptions to the VMI’s physical fitness standards — for classes of cadets or for individuals with special needs — show a very different image of VMI than the one that Chief Judge Kiser portrayed. VMI does not apply a universal standard to every cadet, and the ROTC standards it claims to have adopted are not the same standards used in ROTC programs which provide for the physiological differences between men and women in order to admit all on an equal basis.

VMI’s tradition of providing what is in effect a modern multi-track individualized physical fitness and sports training program which gives attention to the physical development, ability and sports interests of each cadet, suggests that VMI would survive with a dual-track physical training program for men and women. Despite the potential for cadet jealousies, VMI has tolerated special classifications for intercollegiate athletes and for some disabled cadets because of the unique contributions they have made to the life of the school. Indeed, the admission of females, and female athletes in particular, would very likely improve VMI — increasing the quality of the applicant pool and the diversity of its intercollegiate sports offerings.

VII. CONCLUSION: “THE CHANGING OF THE GUARD”

An 1890 photograph from the VMI archives captures the historical dichotomies between masculine and feminine roles and the separate spheres of men and women that are expressed, reinvented and reaffirmed in the VMI litigation.\textsuperscript{827} The photograph, titled “The changing of the Guard,” shows five women — all wearing long Victorian gowns and skirts, with high-collared blouses and frills and flounces. They are standing at parade rest in front of the barracks.

\begin{footnotes}
\item[825] Id. at 356.
\item[826] Id.
\item[827] See VMI Album, supra note 43, at 82 (photograph dated “c. 1890”).
\end{footnotes}
Four are wearing white pith helmets and holding rifles with bayonets. The fifth woman — the "Captain of the Guard" — is dressed grandly in a gown with enormous lapels and huge blousing sleeves. She has a captain's sash and tall helmet, and delicately holds a sword in her crossed hands. The photograph was obviously taken for fun, a bit of amusement on a sunny summer day. The women's expressions are serious, but not somber: the "captain" is nearly smiling. What must they have thought about this playacting? Could they possibly have imagined that they, too, might become citizen-soldiers? That women would in their own lifetimes be able to vote? Or that, within a century, women would attend West Point, even though they were still excluded from the West Point of the South?

The VMI case demonstrates the value and the currency of the Institute's mythic vision of its contemporary role in making boys into men, and men into citizen-soldiers. The institutional myths have grown out of true accounts of the past — the historical narratives that, like the 1890 photograph of five women posing as guards, starkly reveal moments of the past that contain complexities and ambiguities the modern eye cannot blindly ignore. VMI has used its mythic and simplistic reinterpretation of the past to lay claims on the future, to deny the dreams of women who are no longer constrained by long skirts and pantaloons, who dare to be lawyers and doctors and military officers, who believe that they are entitled to share fully in the social compact that underlies the concept of the citizen-soldier. The Institute and its lawyers have used the rhetoric of myth to shape the legal arguments in the VMI litigation, and their experts have grounded the myth in the language and understandings of social science and "facts" about women. Thus transformed and re-created, the myths have been invested with the force of law by federal judges who appear to want to protect the "gentler" sex from the harsh adversities of a male military academy, as well as to protect VMI from an assault on its "essential" masculine identity.

What is overlooked is the role of the cadets themselves in creating many of the elements of the adversative method that VMI and the Commonwealth of Virginia are defending: the courts have elevated and legitimized the traditions of the cadet culture as if they were state educational policies. The narratives collected and retold by VMI's historians demonstrate that the cadet culture and the institutional

828. Pith helmets were then "part of the summer uniform" for VMI cadets. Id. at 66 (caption to photograph titled "Members of the Guard").
norms and rules of VMI have been altered many times since 1839 and that the true strength of the Institute has been its ability to adapt to developments in the larger world around it. Women can now truly be citizen-soldiers. The guard has changed once again.