CITIZEN-SOLDIER-PARENT: AN ANALYSIS OF VIRGINIA MILITARY INSTITUTE'S PARENTING POLICY

ADINA H. ROSENBAUM*

After discovering for the first time that one of its female cadets was pregnant, Virginia Military Institute (VMI) rewrote its parenting policy to provide for the expulsion of any student who becomes pregnant or who impregnates someone else. In this Note, Adina H. Rosenbaum argues that this new policy violates both Title IX—the federal statute banning sex discrimination in education—and the United States Constitution. Rosenbaum demonstrates that it is a violation of the pregnancy regulations promulgated pursuant to Title IX to expel women for being pregnant and that, in analyzing whether they have been discriminated against, the treatment of pregnant women should be compared to the treatment of similarly able non-pregnant men and women. Thus, the VMI rule, which expels pregnant cadets while allowing similarly qualified cadets to remain in the Corps, fails to meet the requirements of Title IX, even though it also calls for the expulsion of men who have impregnated women. Rosenbaum argues that the policy further violates Title IX because it will have a disproportionate impact, leading to the expulsion of all female cadets who become pregnant but not of all male cadets who impregnate someone. Finally, she explains how, through the policy, the State of Virginia infringes on VMI cadets' constitutionally protected right of privacy, particularly their right to make procreative choices without state interference.

INTRODUCTION

In 1996, the Supreme Court ruled that Virginia Military Institute's[1] refusal to admit women into its citizen-soldier training program violated the Equal Protection Clause of the U.S. Constitution.[2]

* A.B., Harvard University, 1998; J.D., New York University School of Law, 2003. I would like to thank Professor Deborah A. Ellis for her advice and guidance, and Professor Sylvia A. Law for her helpful comments. I would also like to thank Adav Noti, Radha Natarajan, Steve Yuhan, David Ball, Ion Hazzikostas, and the rest of the staff of the *New York University Law Review* for their hard work, insightful suggestions, and careful editing. Finally, many thanks to my family and friends for their support and for their constant willingness to hear me talk about Virginia Military Institute's parenting policy.

[1] Virginia Military Institute (VMI) is a "state-supported four-year undergraduate college" that "[c]ombines the studies of a full college curriculum within a framework of military discipline." Va. Military Inst., Quick Facts, at http://new.vmi.edu/Show.asp?durki=454 (last visited Mar. 8, 2003) [hereinafter VMI Quick Facts]. A VMI education includes military activities and is designed to prepare students for "the requirements of civilian or military life." Va. Military Inst., The VMI Experience, at http://new.vmi.edu/Show.asp?durki=22 (last visited Mar. 8, 2003). However, VMI is not connected to the United States Armed Forces, and the vast majority of its students do not enter into military service. See infra notes 39-41 and accompanying text.

[2] United States v. Virginia, 518 U.S. 515 (1996).

To those who had been following the case, and to those who were primarily interested in what standard of review the current Court would apply to sex-discrimination cases, the Supreme Court decision marked the end of the saga.[3] Though the Court's decision ended discriminatory admissions policies at Virginia Military Institute (VMI), it opened up many new opportunities for VMI to employ discriminatory practices as it "assimilated" women into its Corps of Cadets.[4]

In February 2001, VMI announced for the first time that one of its cadets, a junior from Virginia, was pregnant.[5] Three months later, VMI's Board of Visitors, the governing board that sets the school's admissions policies,[6] adopted a resolution directing the school to implement a policy whereby:

> [A] VMI cadet who chooses to marry, or to undertake the duties of a parent (including causing a pregnancy or becoming pregnant by voluntary act), by that choice, chooses to forego his or her commitment to the Corps of Cadets and his or her VMI education. Such a cadet will be expected to resign from VMI.[7]

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[3] The Supreme Court held that the justification for a gender classification must be "exceedingly persuasive" for the classification to be upheld, and that VMI had not met that level of justification. Id. at 533-34. As the challenge to VMI's admissions policy was working its way through the courts, Shannon Faulkner, a woman, was admitted into the Citadel, South Carolina's state military college, by officials who mistook her name for a man's name. When the Citadel subsequently withdrew her admission, Faulkner filed suit challenging the Citadel's all-male admissions policy. See Faulkner v. Jones, 858 F. Supp. 552 (D.S.C. 1994) (ordering Citadel to admit Faulkner to its Corps of Cadets). The Citadel, together with its alumni and the State of South Carolina, spent over $13 million in an unsuccessful effort to remain an all-male institution. Press Release, ACLU, Legal Fees from the Battle to Admit Shannon Faulkner Will Go to Women's Rights Project (Oct. 4, 2000) (on file with the *New York University Law Review*). Two days after the Supreme Court's decision in *United States v. Virginia*, the Citadel's Board of Directors voted to admit women to the school's Corps of Cadets. United States v. Jones, 136 F.3d 342, 345 (4th Cir. 1998).

[4] VMI chose to use the term "assimilation" instead of "coeducation" because "'coeducation' implied more change than the school desired to undertake." Laura Fairchild Brodie, Breaking Out: VMI and the Coming of Women 74 (2000).

[5] Matt Chittum, VMI Acknowledges First Pregnant Cadet, Roanoke Times & World News, Feb. 16, 2001, at A1, LEXIS, News Library.

[6] Under Virginia Law, the Board of Visitors has the authority to "prescribe the terms upon which cadets may be admitted, their number, the course of their instruction, the nature of their service, and the duration thereof." Va. Code Ann. § 23-104 (Michie 2000).

[7] Va. Military Inst., VMI Policy on Marriage & Parenthood, at http://web.vmi.edu/news/mandp.asp (Apr. 15, 2003) [hereinafter VMI Policy on Marriage & Parenthood]. The policy continued by stating:

> It is the intent of the Board that, absent voluntary resignation, such cadet will not be allowed to continue as a cadet past the end of the semester in which the matter is brought to the attention of the Institute. Provided, however, that this resolution and any regulation developed pursuant hereto shall not be construed to impose new obligations on any cadet retroactively.

VMI clearly formulated its policy in the hope that it would not be challenged on sex-discrimination grounds,[8] and, on its face, the policy appears to be gender-neutral. Just because the policy applies to both men and women—to both those who are pregnant and those who have caused a pregnancy—however, does not mean that it does not discriminate based on sex. Even if VMI itself did not have a discriminatory intent in passing its policy, the policy could set a dangerous precedent for schools across the country to expel pregnant students whenever the school is uncomfortable with their presence, to the detriment of the students and their future children.[9]

This Note argues that even though VMI's policy appears to be gender-neutral, it is an unacceptable and illegal way for the school to respond to student pregnancies, for it violates Title IX of the Education Amendments of 1972 (Title IX)[10] and the Due Process Clause of the Fourteenth Amendment.[11] Part I gives a history of VMI and the policy it adopted in response to its first pregnant cadet. Part II examines the legality of the policy under Title IX, the federal statute that prohibits sex discrimination in education. This Part argues that forcing pregnant women to resign is a per se violation of Title IX and its regulations, even if men who have impregnated women are forced to resign as well. In addition, Part II demonstrates how VMI's policy violates Title IX because of its disproportionate, negative effect on women. Part III explains how VMI's policy violates its students' fundamental right to privacy under the Due Process Clause, which includes a right to make decisions about procreation.

I
AN INTRODUCTION TO VMI

Founded in 1839, VMI's mission is to produce "citizen-soldiers"—men and women educated for civilian life yet ready to serve their country in the Armed Forces. The school emphasizes tradition and honor, and it combines a college curriculum with "a frame-

Id.; Va. Military Inst., Board of Visitors Meeting ¶ 27, at http://new.vmi.edu/media/bov/BOV%202001%20May%20Minutes.pdf (May 12, 2001).

[8] See VMI Policy on Marriage & Parenthood, supra note 7 (noting that "any policy governing marriage and parenthood or pregnancy must be even handed in its treatment of male and female cadets").

[9] Because of the possibility that other schools could follow VMI's lead and implement similar policies, the possible consequences of this policy extend well beyond the sixty-eight females currently enrolled as cadets.

[10] 20 U.S.C. § 1681 (2000).

[11] This Note does not address the legality of VMI's prohibition on marriage.

work of military discipline."[12] VMI students are called cadets, wear military-style uniforms, live in spartan barracks that afford little privacy, and eat in a mess hall. The school is run on an "adversative" model, characterized by "[p]hysical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values."[13] The height of the adversative experience is the "rat line," in which first-year cadets are subjected to a mentally stressful and physically rigorous seven-month period that has been compared to the Marine Corps's boot camp.[14] Cadets must live in the barracks on campus for their four years at VMI.[15]

Even before it began admitting women, VMI had a policy forbidding its students to become parents, yet men who fathered children reportedly had been allowed to remain enrolled at the school.[16] One male cadet attended basketball games with his baby in his lap; another posed in VMI's newsletter with his nine-year-old son.[17] In 1996-97, when VMI was formulating its policies for its first coeducational school year, it worried about the possibility of pregnant cadets and considered a policy under which any cadet who became pregnant or caused a pregnancy would be dismissed from the school.[18] Laura Fairchild Brodie, a member of VMI's Executive Committee for the Assimilation of Women, wrote about the proposal in her book on VMI's transition to coeducation:

> The plan raised too many questions to have ever been viable. How could VMI determine the father of a child? Would male cadets who impregnated female civilians be required to turn themselves in? Would VMI establish a grandfather clause to accommodate the fathers already present among its Corps? And what about abortion? Faced with dismissal from college, a young woman would feel great pressure to end a pregnancy. How would VMI respond if, after informing a pregnant woman of her imminent dismissal, she

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[12] Va. Military Inst., VMI Catalogue 3 (June 6, 2002) [hereinafter VMI Catalogue], http://new.vmi.edu/Show.asp?durki=26.

[13] United States v. Virginia, 766 F. Supp. 1407, 1421 (W.D. Va. 1991).

[14] Id. at 1422.

[15] Id. at 1423.

[16] Calvin R. Trice, Women Brought Changes, Richmond Times-Dispatch, May 13, 2001, at C2.

[17] Laura Brodie, Pregnant on the Parade Ground, Wash. Post, Apr. 1, 2001, at B8; see also Matt Chittum, VMI Drafts Pregnancy Policy, Roanoke Times & World News, June 30, 2001, at A1 (describing VMI's previous prohibition on parenthood as "don't ask, don't tell" policy), LEXIS, News Library.

[18] Brodie, supra note 4, at 143.

announced that the pregnancy had been terminated? The hypothetical nightmares were endless.[19]

Instead of passing the policy, VMI decided to treat pregnant women under its existing medical disability policy, which allows cadets to remain at VMI as long as they can fulfill their cadet duties. If they become unable to fulfill their duties, they are sent home on a medical furlough.[20]

When, in the spring of 2001, VMI discovered that one of its cadets was pregnant, it gave her three alternatives: She could take a leave of absence, live in separate quarters on post, or remain in the barracks.[21] In a press release, VMI explained that it offered these three options in view of the "regulations adopted by the United States Department of Education pursuant to Title IX [that] obligate VMI to sustain the pregnant cadet as a member of the Corps so long as she is certified as medically fit to discharge her duties."[22]

Despite recognizing that VMI had to allow the pregnant cadet to remain a member of the Corps, when VMI's Board of Visitors met in May 2001, it chose to adopt a new policy to deal with pregnancy and parenting. Noting that any policy it adopted would have to be "even handed" in its treatment of male and female cadets, the Board directed the school Superintendent to implement a regulation under which cadets who chose to "undertake the duties of a parent" would be expected to leave the school.[23] In response to this demand, VMI adopted a policy stating that any cadet who becomes a parent will be "expected to resign" from the Corps of Cadets.[24] The policy defines parenthood as beginning the moment the cadet learns that "a child has been conceived as a result of his or her conduct," but does not apply to cadets who became parents before the policy was adopted.[25] Under the policy, cadets who resign may reapply to the school "on a case-by-case basis at a later date."[26] If they do not resign voluntarily, they will be "separated from the Corps" at the end of the semester.[27]

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19 Id. at 143-44.

20 Chittum, supra note 5; see also Week in Review, Richmond Times-Dispatch, Feb. 18, 2001, at C2 ("When VMI was preparing to accommodate women, the school's board of visitors chose not to adopt a policy for pregnancies but to handle them using existing medical disability rules.").

21 Press Release, Virginia Military Institute, Statement on Pregnant Cadet (Feb. 20, 2001), at http://www2.vmi.edu/pr/pregnancy.html (on file with the *New York University Law Review*).

22 Id.

23 See VMI Policy on Marriage & Parenthood, supra note 7.

24 Id.

25 Id.

26 Id.

27 Id. The full policy reads as follows:

VMI's policy took effect with the beginning of VMI's winter term on January 14, 2002.[28] The National Women's Law Center, the American Civil Liberties Union (ACLU) of Virginia, and the ACLU Women's Rights Project have sent letters to VMI warning that the policy may violate Title IX and the U.S. Constitution.[29]

II
TITLE IX

Title IX of the Education Amendments of 1972 prohibits sex discrimination by educational institutions that receive federal funds.[30] The regulations issued by the Department of Education to implement Title IX explain that pregnancy discrimination, as well as discrimination based on parental, family, or marital status, are considered sex discrimination.[31]

With a few exceptions, Title IX applies to all educational institutions that receive federal funding. If one program in a school receives federal funding, all school programs and policies must comply with Title IX.[32] Similarly, the school is subject to Title IX if its students

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> Pursuant to the policy adopted by the Board of Visitors, any cadet who marries or becomes a parent is expected to resign from the Corps. Absent voluntary resignation, should the Institute confirm that a cadet is married or the parent of a child, such cadet shall be separated from the Corps, for failure of eligibility, at the end of the semester in which the information is received and confirmed. For the purpose of this policy, the responsibilities of parenthood are deemed to begin upon a cadet's learning that a child has been conceived as a result of his or her conduct.
>
> All cadets shall, upon matriculation and return each fall, sign a statement confirming their knowledge and understanding of this policy. This regulation shall not be enforced against any cadet on account of any parenthood existing on the date of its adoption.
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> VMI regulations provide that in the event of resignation, cadets may apply for re-admission on a case-by-case basis at a later date.

Id.

[28] Matt Chittum, VMI Policy Forbids Marriage, Pregnancy, Roanoke Times & World News, Jan. 12, 2002, at B1, LEXIS, News Library.

[29] Letter from Marcia D. Greenberger, Co-President, National Women's Law Center, & Jocelyn Samuels, Vice President and Director, Education, National Women's Law Center, to Major General Josiah Bunting III, Superintendent, Virginia Military Institute (Jan. 14, 2002), at http://www.nwlc.org/pdf/VMILetter.pdf; Letter from Kent Willis, Executive Director, ACLU of Virginia, & Lenora Lapidus, Director, ACLU Women's Rights Project, to Board of Visitors of Virginia Military Institute (July 3, 2001), at http://archive.aclu.org/news/2001/n070301b.html.

[30] The statute states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (2000).

[31] 34 C.F.R. § 106.40 (2002); see infra notes 43-51 and accompanying text.

[32] 20 U.S.C. § 1687.

receive federal student aid.[33] Under these standards, VMI is unquestionably a school that receives "federal financial assistance." In the 2000-01 academic year, VMI students received over six million dollars in federal student aid, which constituted 58.1% of the financial aid students received that year.[34] VMI itself received $638,400 in federal funds in 1999.[35]

Among the exceptions to Title IX is one for schools "whose primary purpose is the training of individuals for the military services of the United States."[36] This does not mean, however, that any school that, like VMI, utilizes military methods or has the word "military" in its name is exempted from Title IX.[37] Rather, the exception applies to schools in which military service is the *primary* purpose of the education.[38] While there is a definite military component to education at VMI, the District Court for the Western District of Virginia found that "[t]he role of VMI is not primarily to develop career military men for the U.S. armed services" but rather that VMI's military system is a means of "teaching self-discipline . . .[,] not an end in itself."[39] VMI's emphasis on producing citizen-soldiers who will be prepared for the "varied work of civil life"[40] highlights that it seeks to turn out graduates that it deems responsible members of society, as much—if not more—than it seeks to prepare students for military service. VMI reports that only eighteen percent of its cadets go on to careers in the Armed Forces.[41]

Given that VMI is an educational program that receives federal financial assistance, and that training individuals for military service is

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33 34 C.F.R. § 106.2(g) (2002) ("Federal financial assistance . . . includ[es] funds made available for . . . [s]cholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity."); see also Grove City Coll. v. Bell, 465 U.S. 555, 569 (1984) ("[W]e have little trouble concluding that Title IX coverage is not foreclosed because federal funds are granted to Grove City's students rather than directly to one of the College's educational programs.").

34 State Council of Higher Educ. for Va., Financial Aid Date File Display—2000-01: Students Receiving Federal, State, Institutional and Private Aid—By Source, tbl.16, at http://admin.vmi.edu/ir/schev/fa01.htm (last visited Mar. 11, 2003).

35 Daniel F. Drummond, Pregnancy Policy May Cost VMI Federal Aid, Wash. Times, July 4, 2001, at A1.

36 20 U.S.C. § 1681(a)(4).

37 Cf. Morse v. Regents of the Univ. of Colo., 154 F.3d 1124 (10th Cir. 1998) (upholding harassment complaint of Reserve Officer Training Corps (ROTC) students against university even though harassment was allegedly committed by superior officer within confines of ROTC program).

38 20 U.S.C. § 1681(a)(4) (setting forth exception for schools whose "primary purpose" is to train students for service in U.S. military).

39 United States v. Virginia, 766 F. Supp. 1407, 1427 (W.D. Va. 1991).

40 VMI Catalogue, supra note 12, at 3.

41 Id.

not the school's primary purpose, VMI must comply with the dictates of Title IX, as the school itself recognized in its press release responding to its first pregnant cadet.[42] Part II.A shows, however, that VMI's policy, as it relates to pregnant students, is in direct violation of Title IX's implementing regulations. Part II.B then argues that VMI's policy, as it relates to all parenting students, both male and female, also violates Title IX because it will have a disproportionate, negative effect on females.

A. VMI's Policy, as It Pertains to Pregnant Women, Is a Direct Violation of Title IX's Regulations

By defining parenthood as beginning at the moment the cadet learns a child has been conceived, VMI's policy effectively expels pregnant cadets. Doing so is a direct violation of Title IX's regulations. Although VMI specifically crafted its policy to be "even handed in its treatment of male and female cadets,"[43] and although the policy appears gender-neutral in that it treats female and male cadets who have had sex that leads to pregnancy identically, this does not mean that the policy is nondiscriminatory. In analyzing whether pregnant women have been discriminated against, Title IX does not require that they be compared with men who have engaged in similar actions that have led to similar results. Rather, to determine whether a policy violates Title IX, the treatment of pregnant women under the policy must be compared to the treatment of similarly qualified nonpregnant women and men.[44]

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[42] See supra notes 21-22 and accompanying text.

[43] VMI Policy on Marriage & Parenthood, supra note 7.

[44] VMI could claim that pregnancy discrimination is not sex discrimination under Title IX, especially when pregnant women are being treated identically to men who have impregnated women, and argue that the regulations requiring pregnant women to be compared to similarly-qualified nonpregnant people are therefore outside the scope of the statute. A similar argument prevailed in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), in which the Supreme Court relied heavily upon *Geduldig v. Aiello*, 417 U.S. 484 (1974), see infra note 100, to hold that a disability-benefits plan that did not cover pregnancy-related disabilities did not violate the proscription against sex discrimination in Title VII, despite EEOC guidelines saying that benefits should be applied to pregnancy-related disabilities on the same terms as they are applied to other disabilities.

Such an argument, however, should not succeed. After *Gilbert,* Congress specifically amended Title VII to clarify that discrimination "on the basis of sex," which is the term used in Title IX as well, includes discrimination on the basis of pregnancy. 42 U.S.C. § 2000e(k) (2000). Furthermore, the specific reasons that the Court applied *Geduldig* in *Gilbert* are not applicable to Title IX. The Court in *Gilbert* relied heavily on *Geduldig* because the facts of the two cases were analogous, involving "strikingly similar disability" plans. *Gilbert*, 429 U.S. at 133. Title IX's regulations do not apply to disability plans, however, but to participation in educational institutions. Moreover, while the Court in *Gilbert* argued that Congress had not specifically given the EEOC authority to promulgate regulations under Title VII, 429 U.S. at 141, Congress did give federal agencies that pro-

The portions of Title IX's implementing regulations that pertain to pregnancy do not require a comparison between the treatment of pregnant women and of men. They simply state that a "recipient shall not discriminate against any student, or exclude any student from its education program or activity . . . on the basis of such student's pregnancy."[45] By contrast, the regulation on parental status forbids rules that treat student-parents differently on the basis of sex.[46] The emphasis on different treatment for students of different sexes in the parental status regulations demonstrates that had the Department of Education wanted the pregnancy regulations to require pregnant women to be compared to men who had impregnated women, it could have written the regulations in a way that would do so.[47] As the Department chose to write them, however, simply excluding a student on the basis of her pregnancy is a sufficient basis for a violation.

When a comparison must be made, the pregnancy regulations require pregnant women to be compared to students with temporary disabilities,[48] not to men who have impregnated women. With regard to medical and hospital benefits, the regulations require schools to "treat pregnancy . . . in the same manner and under the same policies

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vide financial assistance to educational institutions the power to promulgate rules under Title IX, 20 U.S.C. § 1682 (2000). Finally, *Geduldig* itself is a case that has been much criticized and seldom reaffirmed. See Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 983 (describing "cottage industry" that has grown up around criticizing *Geduldig*; infra note 100).

45 34 C.F.R. § 106.40(b)(1) (2000).

46 "A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex." 34 C.F.R. § 106.40(a).

47 For example, the Department could have defined pregnancy discrimination as treating students who had engaged in intercourse that led to pregnancy differently on the basis of their sex.

48 This is not to say that pregnant women themselves are disabled. Pregnancy is not a disability but rather a healthy reproductive process. See Reva B. Siegel, Note, Employment Equality Under the Pregnancy Discrimination Act of 1978, 94 Yale L.J. 929, 942 (1985) ("Fundamentally, pregnancy is neither a disability nor a dysfunction, but a normal moment in the human reproductive process . . . ."). Pregnancy shares some attributes with disabilities, however, in that both require medical care and may lead to a temporary inability to perform certain types of physical work. Because of these similarities, the treatment of people with temporary disabilities can provide a good frame of reference in determining whether pregnant women have been discriminated against. Comparing pregnant women to people with disabilities also has its limitations, however. See Colette G. Matzzie, Note, Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act, 82 Geo. L.J. 193, 204 (1993) ("Accommodation of physical needs under the [Pregnancy Discrimination Act is] . . . limited by the existence of someone in the workplace who has received better treatment from the employer."); see also Law, supra note 44, at 1007 ("An equality doctrine that ignores the unique quality of [pregnancy, abortion, reproduction, and creation of another human being] implicitly says that women can claim equality only insofar as they are like men.").

as any other temporary disability."[49] When a school does not have a disability-leave policy, the Title IX regulations require that the school "treat pregnancy . . . as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began."[50] The regulations also provide that schools may only require a pregnant student to present a certificate from her doctor assuring that she is emotionally and physically able to continue her education so long as they require such a certificate from all other students with physical or emotional conditions that require a doctor's care.[51] Under all these regulations, pregnant women are not to be treated like men who have impregnated women, but like people with temporary disabilities.

Comparing Title IX to Title VII of the Civil Rights Act of 1964[52] further supports the argument that the proper comparison is between pregnant women and similarly qualified nonpregnant men and women. Courts often look to the standards developed for Title VII in analyzing sex discrimination under Title IX.[53] Title VII states that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."[54] A policy is therefore discriminatory under Title VII when the policy explicitly differentiates between similarly qualified pregnant and nonpregnant employees. When a pregnant woman claims pregnancy discrimination under Title VII, courts compare the pregnant woman with nonpregnant men and women, not with men who have impregnated women.[55]

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49 34 C.F.R. § 106.40(b)(4).

50 § 106.41(b)(5).

51 § 106.40(b)(2).

52 42 U.S.C. § 2000e (2000). The portion of Title VII that deals specifically with pregnancy is the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k).

53 See infra note 62 and accompanying text.

54 42 U.S.C. § 2000e(k).

55 See, e.g., Gleklen v. Democratic Cong. Campaign Comm., Inc., 199 F.3d 1365, 1368 (D.C. Cir. 2000) (granting that female plaintiff made prima facie showing of pregnancy discrimination when replaced by nonpregnant woman); Kerzer v. Kingly Mfg., 156 F.3d 396, 401 (2d Cir. 1998) (describing part of test for prima facie case of discrimination as whether plaintiff proved that "her position remained open and was ultimately filled by a nonpregnant employee"); Ilhardt v. Sara Lee Corp., 118 F.3d 1151, 1155 (7th Cir. 1997) (noting that "we must compare [the plaintiff's] treatment with that of a group of similarly situated nonpregnant employees to see if she was treated worse because she was pregnant"); Notter v. N. Hand Prot., No. 95-1087, 1996 U.S. App. LEXIS 14954, at *14 (4th Cir. June 21, 1996) (stating, in discussion of whether elements of discrimination claim were met, that plaintiff was replaced by employee who was not pregnant); Holmes v. E.Spire Communications, Inc., 135 F. Supp. 2d 657, 662 (D. Md. 2001) (finding prima facie test

Finally, the most recent case, as of the publication of this Note, to analyze Title IX's pregnancy regulations compared the treatment of pregnant students to the treatment of similarly qualified nonpregnant students, rather than to male students who had impregnated women. In *Chipman v. Grant County School District*,[56] the district court declared it "obvious" that the plaintiffs, two girls who had been refused admittance to a high school honor society after becoming pregnant, had "been treated differently . . . because of pregnancy."[57] The court made this assertion even though the "evidence before the court indicate[d] that the committee would have considered any evidence of paternity in evaluating the character of male students."[58] It did not matter whether or not student fathers would have been admitted to the honor society; what mattered was that the plaintiffs had not been admitted when every other junior with a grade point average of 3.5 or higher had been admitted.[59]

Analyzing the language of the Title IX regulations, comparing Title IX to Title VII, and studying cases decided under Title IX's pregnancy regulations all demonstrate that in deciding whether a policy discriminates, courts should look to whether or not the policy at issue treats pregnant women differently from equally qualified nonpregnant men and women. The VMI pregnancy policy clearly does so. It forces pregnant women to resign from the Institute while allowing non-

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unmet because plaintiff did not show that she was replaced with nonpregnant employee or that nonpregnant employees were treated better).

Additional comparisons to Title VII further undermine the legality of VMI's policy as it pertains to pregnant women. According to the Court, a statute based on "stereotypical assumptions [about pregnancy and the abilities of pregnant workers] would, of course, be inconsistent with Title VII's goal of equal employment opportunity." Cal. Fed. Sav. & Loan Assoc. v. Guerra, 479 U.S. 272, 290 (1987). If VMI's policy is based on the assumption that pregnant women cannot complete VMI's physical requirements, see infra note 91 and accompanying text, it is illegal under this standard.

56 30 F. Supp. 2d 975 (E.D. Ky. 1998).

57 Id. at 979-80.

58 Id. at 977.

59 Id. at 977, 979. In another case in which a girl claimed she was dismissed from the National Honor Society, *Pfeiffer v. Marion Center Area School District*, 917 F.2d 779 (3d Cir. 1990), the Third Circuit reversed the district court's exclusion of evidence showing that a boy who had fathered a child was permitted to enter the Honor Society. Id. at 785-86. The appellate court did so, however, in order to require the district court to evaluate whether the defendant's claim that the girl was dismissed for engaging in premarital sex rather than for pregnancy was pretextual. Id. (arguing that evidence that males who had fathered children had not been dismissed had "the potential of being relevant to whether the council members followed a double standard in evaluating premarital sexual activities of National Honor Society chapter members"). Since VMI is not claiming that it is expelling students for engaging in premarital sex, or even for engaging in unprotected premarital sex, the *Pfeiffer* court's choice to compare the pregnant student to a student who had fathered a child is not relevant to the legality of VMI's policy.

pregnant women and men to remain in the Corps of Cadets or, if they are disabled, to take a medical furlough. In doing so, the policy violates Title IX, even if it calls for the expulsion of males who have impregnated women along with the pregnant women themselves.[60]

B. VMI's Policy Violates Title IX Under a Disparate-Impact Analysis

In addition to violating Title IX's regulations with its ban on pregnancy, VMI's prohibition against parenthood—whether by men or by women—violates Title IX and its regulations under a disparate-impact analysis. Under such an analysis, the relevant question is not whether the policy explicitly treats women differently from men, nor whether VMI had a discriminatory intent when it passed the policy. Instead, the question is whether the policy adversely affects one sex more than the other.

The Supreme Court has never specifically addressed whether a discriminatory impact is sufficient to violate Title IX.[61] In analyzing Title IX cases, however, courts often look to standards developed for Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex, or national origin.[62] As the Tenth Circuit explained in *Mabry v. State Board of Community Colleges and Occupational Education*, "Title VII prohibits the iden-

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[60] By violating Title IX, the policy also violates the Virginia Human Rights Act, which declares it the policy of the Commonwealth to "[s]afeguard all individuals within the Commonwealth from unlawful discrimination because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability, in places of public accommodation, including educational institutions." Va. Code Ann. § 2.2-3900 (Michie 2001). The Act defines unlawful discrimination as "[c]onduct that violates any Virginia or federal statute or regulation governing discrimination." § 2.2-3901. Since VMI is discriminating under Title IX, a federal statute governing discrimination, it is also engaging in unlawful discrimination under the Virginia Human Rights Act.

[61] Sharif v. N.Y. State Educ. Dep't, 709 F. Supp. 345, 360 (S.D.N.Y. 1989); James S. Wrona, Eradicating Sex Discrimination in Education: Extending Disparate-Impact Analysis to Title IX Litigation, 21 Pepp. L. Rev. 1, 7 & n.30 (1994).

[62] 42 U.S.C. § 2000e (2000); see Olmstead v. L.C., 527 U.S. 581, 617 n.1 (1999) ("This Court has . . . looked to its Title VII interpretations of discrimination in illuminating Title IX . . . .") (Thomas, J., dissenting); Middlebrooks v. Univ. of Md., No. 97-2473, 1999 U.S. App. LEXIS 305, at *13 (4th Cir. Jan. 11, 1999) ("Title IX . . . claims are appropriately analyzed under the Title VII proof scheme . . . ."); Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 540 (1st Cir. 1995) ("Because the relevant caselaw under Title IX is relatively sparse, we apply Title VII caselaw by analogy."); Yusuf v. Vassar Coll., 35 F.3d 709, 714 (2d Cir. 1994) ("[C]ourts have interpreted Title IX by looking to the body of law developed under Title VI, as well as the caselaw interpreting Title VII."). But see Franklin v. Gwinnett County Pub. Sch., 911 F.2d 617, 622 (11th Cir. 1990) ("We do not believe applying Title VII to Title IX would result in the kind of orderly analysis so necessary in this confusing area of the law."), rev'd on other grounds, Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992).

tical conduct prohibited by Title IX, i.e., sex discrimination . . . . [W]e see no reason to establish different substantive standards for sex discrimination under Title IX and under Title VII."[63] It has long been accepted that discriminatory intent is not necessary to violate Title VII;[64] through analogy, therefore, such intent should not be necessary to violate Title IX. In addition, the rationale for allowing disparate impact to suffice under Title VII is applicable to Title IX cases. In deciding to allow a disparate-impact analysis under Title VII, the Supreme Court noted the history of employment discrimination favoring white employees.[65] Given that women historically have been discriminated against in educational settings, this same reasoning would justify extending the disparate-impact analysis to Title IX cases as well.[66] A number of lower courts have used explicit analogies to Title VII to extend disparate-impact analysis to Title IX cases.[67]

Courts also often compare Title IX to Title VI of the Civil Rights Act of 1964,[68] since Congress intentionally fashioned Title IX after Title VI.[69] Title VI uses identical language to Title IX, except that whereas Title IX forbids discrimination based on sex in educational institutions, Title VI forbids discrimination based on race, color, or

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63 813 F.2d 311, 316-17 n.6 (10th Cir. 1987). The analogy between Title IX and Title VII was particularly strong in this case because the case dealt with employment discrimination in a school context. Id. at 313.

64 See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1971).

65 Id. (describing Congress's goal in passing Title VII as being to "remove barriers that have operated in the past to favor an identifiable group of white employees over other employees").

66 See Wrona, supra note 61, at 17-18 (arguing that same concerns that led *Griggs* Court to adopt discriminatory impact test are present in cases brought under Title IX).

67 See Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 832-33 (10th Cir. 1993) ("Because it is well settled that Title VII does not require proof of overt discrimination, the district court did not err here in failing to require proof of discriminatory intent." (citations omitted)); Kelly v. Med. Coll. of Ohio, No. 3:00CV7423, 2001 U.S. Dist. LEXIS 2496, at *6 (N.D. Ohio Mar. 6, 2001) ("Title IX cases are analyzed similarly to Title VII cases."); Chipman v. Grant County Sch. Dist., 30 F. Supp. 2d 975, 978 (E.D. Ky. 1998) ("[T]he court believes precedents under the [Title VII] Pregnancy Discrimination Act are applicable here.").

68 42 U.S.C. § 2000d (2000); see, e.g., Sharif v. N.Y. State Educ. Dep't, 709 F. Supp. 345, 360 (S.D.N.Y. 1989) ("[C]ourts examining Title IX questions have looked to the substantial body of law developed under Title VI . . . .").

69 See 118 Cong. Rec. 5807 (1972) (statement of Sen. Bayh) ("[M]y amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of [T]itle VI."); 118 Cong. Rec. 5803 (1972) (statement of Sen. Bayh) (explaining that enforcement powers under Title IX would be "parallel to those found in Title VI"); see also Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998) ("[Title IX] was modeled after Title VI of the Civil Rights Act of 1964 . . . ."); Grove City Coll. v. Bell, 465 U.S. 555, 566 (1984) (same).

national origin in all programs that receive federal funding.[70] In *Guardians Ass'n v. Civil Service Commission*,[71] a majority of Justices agreed that Title VI's regulations may proscribe activities with a disparate-impact,[72] though six Justices, in concurring and dissenting opinions, stated that discriminatory intent is necessary to violate Title VI itself.[73] A challenge to VMI's policy could be brought under Title IX's implementing regulations, specifically those that forbid rules regarding parental status that discriminate based on sex.[74] While the parental status regulations, unlike those at play in *Guardians*,[75] do not specifically state that a discriminatory effect is a sufficient basis for a violation, lower courts that have employed analogies to Title VI in Title IX cases have not always required such an explicit statement in order to apply a disparate-impact analysis. In *Haffer v. Temple University*,[76] for example, the court held that plaintiffs did not need to prove a discriminatory intent because the "Title IX regulations, like the Title VI regulations at issue in *Guardians*, do not explicitly impose an intent requirement."[77]

Under the test used to prove disparate impact, the plaintiff first must prove that the policy causes a negative differential effect on one sex. The burden then shifts to the defendant to show a "business necessity"—or, in cases pertaining to education, an educational neces-

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[70] Title VI states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

[71] 463 U.S. 582 (1983).

[72] See id. at 584 n.2, 591-92; Alexander v. Sandoval, 532 U.S. 275, 281-82 (2001) (noting that five Justices in *Guardians* recognized "that regulations promulgated under . . . Title VI may validly proscribe activities that have a disparate impact . . . .").

[73] See, e.g., Alexander v. Choate, 469 U.S. 287, 293 (1985) (describing Court's two-prong holding in *Guardians*); *Guardians*, 463 U.S. at 610 (Powell, J., concurring in judgment).

[74] See supra note 46. The Supreme Court held in *Alexander v. Sandoval*, 532 U.S. at 293, that there is no private right of action to enforce disparate-impact regulations promulgated under Title VI. The Court's holding in *Sandoval* raises the question of whether the Court would allow private rights of action to enforce disparate-impact cases under Title IX's regulations. Even if the *Sandoval* ruling were extended to Title IX, however, it would not apply to an action brought by the government against VMI.

[75] 463 U.S. at 642 & n.14 (Stevens, J., dissenting).

[76] 678 F. Supp. 517 (E.D. Pa. 1987).

[77] Id. at 539; see also Favia v. Ind. Univ. of Pa., 812 F. Supp. 578, 584 (W.D. Pa. 1993) ("Title IX and the implementing regulations can be violated without showing a specific intent on the part of the educational institution to discriminate against women." (citing *Haffer*, 678 F. Supp. at 539-40)); Sharif v. N.Y. State Educ. Dep't, 709 F. Supp. 345, 360 (S.D.N.Y. 1989) (concluding that plaintiffs did not need to prove intentional discrimination because "[s]everal Title IX regulations specifically prohibit facially neutral policies," though discriminatory practice at issue did not fall under those regulations).

sity—for the policy causing the disparate effect.[78] While the standard of "educational necessity" does not require that the policy be absolutely essential in order to be upheld, it does require that it be reasonably necessary.[79] The plaintiff must then offer an equally effective alternative[80] that does not have as discriminatory an effect or show that the explanation proffered is actually pretextual.[81]

Though VMI's policy applies to both pregnant cadets and cadets who have impregnated someone else, physical differences between being pregnant and being a man who has impregnated a woman will cause this seemingly neutral policy to affect women more than men. To begin with, the policy defines parenthood as beginning at the moment a cadet learns that his or her conduct has led to the conception of a child. While women always know when their activities lead to conception, men often do not.[82] If a male cadet has sex with a woman who becomes pregnant and has no future contact with that woman, for example, the VMI policy will not apply to him at all. Given the exact same circumstances—sex leading to pregnancy and a breakdown of communication between the sexual partners—a female cadet would be forced to leave the school and abandon her VMI education.

Even if a male cadet did know that his conduct had led to a pregnancy, he would be able to hide the pregnancy, and the child eventually born from it, more easily than would a female cadet. If a female becomes pregnant, her pregnancy will eventually become obvious. Even if she gives her child to her parents, other relatives, or the child's father to raise after it is born, the administration will have already noticed her pregnancy and forced her to resign. Though she could become eligible to reapply to the school, her readmission would not

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[78] 42 U.S.C. § 2000e-2(k); see *Guardians*, 463 U.S. at 598; Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). For usage of "educational necessity," see, e.g., *Sharif*, 709 F. Supp. at 361.

[79] See Chipman v. Grant County Sch. Dist., 30 F. Supp. 2d 975, 979 (E.D. Ky. 1998) ("[T]he burden now shifts to the defendants to show that the challenged practice is a reasonable necessity."); see also Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989) ("The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice.").

[80] 42 U.S.C. § 2000e-2(k); see also *Wards Cove Packing Co.*, 490 U.S. at 660 (describing how plaintiffs can overcome business necessity defense by convincing factfinder that alternative practice, "without a similarly undesirable . . . effect," would fulfill employer's interests (quotations omitted)); Dothard v. Rawlinson, 433 U.S. 321, 339 (1977) (Rehnquist, J., concurring in judgment) (explaining that once prima facie case is rebutted, burden returns to plaintiff to show other practices, "*without* such disparate effect," would meet employer's concern).

[81] Connecticut v. Teal, 457 U.S. 440, 447 (1982).

[82] See Nguyen v. INS, 533 U.S. 53, 65 (2001) ("[I]t is not always certain that a father will know that a child was conceived . . . .").

be certain. While it is possible that she could leave campus to have an abortion before the school learned of her pregnancy, this scenario seems unlikely given the lack of privacy in the VMI barracks.

Conversely, it would be fairly easy for a male cadet to hide the fact that his actions had led to the conception of a child. If the woman with whom he conceived had an abortion, the school would most likely never find out about the pregnancy unless the cadet specifically informed the administration or the pregnant woman were herself a cadet. Though the existence of a child would be more difficult to conceal than a pregnancy, it would not be impossible, particularly if the child were being raised by its noncadet mother or her family. While VMI emphasizes its honor code, it is difficult to imagine that all men would be honest about their status as fathers, knowing that the result of their confession would be expulsion. Just as some cadets fathered children in violation of VMI's old rules,[83] it is likely that some percent of men would disobey the rules against parenthood and continue to father children unbeknownst to the school's administration. Therefore, it can be predicted that while the school will learn of almost all instances in which a female cadet becomes pregnant, it will discover a smaller percentage of the cases in which a male cadet impregnates a woman, even if the male himself knows of the pregnancy. VMI's prohibition on parenthood will, therefore, have a disproportionate, negative impact on women.

In light of this disparate impact, VMI must prove that its policy is an educational necessity in order for the policy to be sustained. VMI's main argument in favor of its policy is that both being a cadet and being a parent require a student's full attention, which put the two in conflict with each other. As the resolution adopted by the VMI Board of Visitors in May 2001 states: "[T]o permit an individual to undertake, at once, the demanding and near exclusive duties of time, attention and loyalty required of a Cadet and duties of such primary value and importance as those owed by a . . . parent, would be entirely inconsistent with the demands of Cadet life . . . ."[84]

While the cadet experience is an intense one, the requirement that student-parents resign because they cannot meet the demands of cadet life does not rise to the level of an "educational necessity." VMI seeks to evoke the spirit of military life, yet members of the

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[83] See supra notes 16-17 and accompanying text.

[84] VMI Policy on Marriage & Parenthood, supra note 7. The resolution goes on to say that permitting such an undertaking would also "severely undermine the good order and discipline of the Corps and would be contrary to the lessons of character that the Institute seeks to teach." Id.

armed forces are allowed to be parents.[85] Even the U.S. military academies do not have as strict a policy regarding pregnant and parenting students as does VMI.[86] When military academy cadets become pregnant, they are allowed to take a leave for up to a year. They are then allowed to return and graduate, as long as they do not have the legal obligation to support the children while they are still in school.[87] Finally, VMI itself looked the other way when its cadets became parents[88] until one of its female cadets became pregnant, implying both that the school itself never truly considered a ban on parenthood necessary, and that the sudden crackdown on student-parents is a pretext to allow the school to expel women who become pregnant.

Even if excluding parents does fulfill an "educational necessity," there is a less discriminatory method for dealing with parent-cadets who are preoccupied with nonschool duties. VMI has the power to expel cadets who habitually neglect their academic or military duties.[89] The school could rely on this power to dismiss parent-cadets who are truly neglecting their cadet duties due to their commitments to their children. By using this existing policy rather than implementing a separate policy for parenthood, VMI would be able to meet the goal of dismissing parents whose involvement with their children is a detriment to their studies. This policy would not lead to the result, however, of VMI expelling all pregnant cadets and mother cadets—even if they have abortions or give their children up for adoption—while only expelling father cadets who both know that they have

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[85] The military's child care system is considered by many to be a model for the rest of the country. National Women's Law Center, Be All that We Can Be: Lessons from the Military for Improving Our Nation's Child Care System 1 (2000), at http://www.nwlc.org/pdf/military.pdf.

[86] This Note uses the military academies' policy as a reference point with which to compare VMI's policy, but does not take a position on the permissibility of the military academies' policy itself. As schools whose primary purpose is to prepare students for military service, the military academies are exempted from Title IX. See supra notes 36-38 and accompanying text.

[87] U.S. Military Acad., Policy Memorandum No. 21-98(4)(a)(1) (on file with *New York University Law Review*) ("[W]hen the cadet is no longer pregnant and does not have custody of a child, or legal obligation to support a child, and is otherwise qualified, she will be reinstated to an appropriate Class."); Daniel F. Drummond, VMI Pregnancy Policy out of Step with Service Academies, Wash. Times, July 11, 2001, at C1. While cadets at the military academies who choose to remain active in their children's lives thus are treated similarly to those at VMI, the military cadets at least have the option of having abortions or of putting their children up for adoption and returning to school; not all women who become pregnant are automatically forced to resign.

[88] See supra notes 16-17 and accompanying text.

[89] VMI Catalogue, supra note 12, at 33.

impregnated women and whose status as parents happens to come to the school's attention.[90]

Another argument in support of the necessity of VMI's policy, one that is not explicitly stated in the Board of Visitors's resolution but is used by many of VMI's supporters and seems to lurk in the background of any discussion of VMI's new policy, is that pregnant women would be unable to fulfill the physical requirements of a VMI education.[91] This argument, too, does not prove that expelling pregnant and parenting students is an educational necessity. The military itself does not expel pregnant women.[92] Similarly, VMI did not expel its first pregnant cadet but rather treated her the way it treats students with temporary disabilities; both the Citadel and the federal military academies treat cadet pregnancies as temporary disabilities.[93]

Treating pregnancy as a temporary disability would provide an equally effective and less restrictive alternative means for VMI to ensure that pregnant women were not being forced to perform physical activities beyond their abilities. If a cadet became unable to fulfill her physical requirements, she could be placed on medical furlough. After she gave birth, she could be reinstated without needing to reapply to the school. Though this policy would affect women disproportionately, it would not be as harsh as VMI's current policy because the pregnant cadets would automatically be allowed to return to school. In addition, while under such a policy pregnant women would be treated more harshly than men who had impregnated women, their treatment would be on par with that of men or women with similarly

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[90] Of course, use of the expulsion policy could still lead to such a result if VMI applied the policy in a discriminatory manner, using its discretion to expel all pregnant and mothering cadets, whether or not they had neglected their duties. Like its current policy, however, such a practice would violate Title IX. In deciding whether a pregnant or parenting cadet had neglected his or her duties severely enough to be expelled from the school, VMI would have to apply the same standards it uses to decide whether a nonpregnant or nonparenting cadet had habitually neglected his or her duties.

[91] See, e.g., Brittney Barnes, Pregnancy Ban Appropriate for Military Academy, Collegiate Times, Jan. 22, 2002 (asserting that "VMI is simply not the place for a pregnant woman"); Editorial, No Pregnant Cadets, Wash. Times, Jan. 16, 2001, at A14 ("Pregnancy and pushups are two things that just don't go well together."); Erin Sheley, Mother Rat, Wkly. Standard, Aug. 6, 2001, at 14 (claiming that all military schools agree that it is impossible to reconcile being pregnant with "the realities of a military education").

[92] According to the Army's Standards of Medical Fitness, a "woman who is experiencing a normal pregnancy may continue to perform military duty until delivery." U.S. Dep't of the Army, Reg. 40-501, Standards of Medical Fitness § 7-9(e) (Sept. 9, 2002), http://www.usapa.army.mil/pdffiles/r40-501.pdf.

[93] Drummond, supra note 87; Sheley, supra note 91; see U.S. Military Acad., supra note 87 (allowing pregnant cadets to take up to one year of "medical leave").

limiting physical conditions.[94] Thus, even if VMI could show that it was an "educational necessity" to exclude pregnant women from its full physical regime, there would be a less discriminatory way to do so than expelling them.

Similarly, VMI's other rationales for its policy are either not educational necessities or could be addressed through less discriminatory alternatives.[95] In addition to asserting that the responsibilities of being a parent and being a cadet are mutually exclusive, VMI argues that because the school is run on an "egalitarian premise," it cannot treat some students differently than others,[96] and that its new policy promotes character development and responsible parenthood.[97] As to the first argument, VMI can best fulfill its egalitarian principle by not expelling pregnant and parenting cadets. The goal of treating all cadets equally can best be reached by treating these cadets like all other cadets who either have physical disabilities that require a medical furlough or who have outside activities that could potentially pull the cadets away from their cadet duties. As to the second argument, expelling pregnant and parenting students is not reasonably necessary for VMI to produce responsible cadets with strong characters and a respect for parenthood. In *Chipman v. Grant County School District*,[98] the district court held that the school violated Title IX when two pregnant girls were denied admission to the National Honor Society for not meeting its character requirements. Noting that

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[94] For a discussion of whether pregnant women should be considered more similarly situated to men who have impregnated a woman or to men with similar physical limitations, see supra Part II.A.

[95] These rationales are all gleaned from the VMI Board of Visitors resolution. See VMI Policy on Marriage & Parenthood, supra note 7.

[96] Id. That portion of the resolution states:

> [T]he military structure and operation of the Institute's program relies on the egalitarian premise that all individual members of the Corps are equally subject to the rules and regulations that govern cadet life and therefore circumstances which might form the basis for the need to make exceptions to the Institute's expectations should, as much as possible, be eschewed . . . .

Id.

[97] Id. VMI justifies its policy partly on the grounds that "the values and behaviors inculcated by a VMI education include responsibility, accountability and keen senses of duty and honor." Id. The resolution continues:

> [T]he Institute hopes to communicate to Cadets an understanding, appreciation and respect for the duties of marriage and parenthood in a manner that will encourage the deliberate and responsible undertaking of marriage and parenthood and their attendant responsibilities . . . .

The resolution also implies that the policy is intended to punish students for acting irresponsibly in causing a pregnancy. Id. ("[C]ausing pregnancy or becoming pregnant by voluntary act, without marriage, but while a cadet, constitutes irresponsible conduct unbecoming a cadet . . . .").

[98] 30 F. Supp. 2d 975 (E.D. Ky. 1998).

"[t]here are many alternate means to assess the character of candidates for membership in the National Honor Society by non-discriminatory criteria," the court found that the school district had not met its burden of showing that its practice was an educational necessity.[99] Similarly, there are many nondiscriminatory ways of building character and teaching responsible parenthood, some of which might be more effective than VMI's current policy. VMI could perhaps better promote responsibility by implementing programs that counsel cadets on how to avoid unplanned pregnancies, rather than by simply punishing students who irresponsibly become pregnant. Further, VMI might better promote good parenting by implementing parenting classes, rather than by denying parents the ability to continue their education.

By treating pregnancy as a temporary disability and the potential distractions of parenthood like any other outside activity, VMI could reconcile pregnancy, parenthood, and cadethood without having a discriminatory effect as large as that caused by its current policy. Because there are means for VMI to reach its goals with policies that have less of a disparate impact than the current rule, the current VMI policy violates Title IX.

III
VMI's Policy Violates the Constitutionally Protected Right of Privacy

In addition to violating Title IX, VMI's policy violates its students' constitutionally protected right of privacy.[100] The Supreme

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[99] Id. at 979.

[100] VMI's policy may also violate the Equal Protection Clause of the Fourteenth Amendment. VMI's historical animosity towards having women on campus and its adoption of the policy immediately after finding out about its first pregnant cadet could give rise to an inference that VMI had a discriminatory purpose in passing its policy. See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977) (discussing how "historical background" and "specific sequence of events leading up to [a] challenged decision" can speak to decisionmaker's purpose). While the Supreme Court held in *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974), that the exclusion of pregnancy-related disabilities from a disability policy did not constitute invidious discrimination under the Equal Protection Clause, the Court has yet to extend this analysis to pregnancy discrimination cases that do not involve either disability benefit programs like that considered in *Geduldig* or abortion (which the Court views as a "unique act," Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992)). The Court has not been faced with a school purposefully choosing to exclude pregnant women from all aspects of a program and may recognize that this decision is fundamentally different from a case such as *Geduldig*—in which the Court found that men and women received equivalent benefits—and exemplifies the sexist and stereotypical assumptions about the capabilities of women that should invoke heightened scrutiny under the Equal Protection Clause. See Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 327 (1993) (Stevens, J., dissenting) ("*Geduldig*, of course, did not purport to establish

Court has long recognized that "[a]lthough the Constitution does not explicitly mention any right of privacy, . . . one aspect of the liberty protected by the Due Process Clause of the Fourteenth Amendment is a right of personal privacy, or a guarantee of certain areas or zones of privacy."[101] This right is often traced back to *Griswold v. Connecticut*,[102] in which the Court overturned the convictions of Planned Parenthood workers who had provided married people with information about contraception.[103] Included in the right of privacy is a right to make decisions about childbearing without unwarranted governmental intrusion. As the Court stated in *Planned Parenthood v. Casey*,[104] it is "settled" that "the Constitution places limits on a State's right to interfere with a person's most basic decisions about

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that, as a matter of logic, a classification based on pregnancy is gender neutral. . . . Nor should *Geduldig* be understood as holding that, as a matter of law, pregnancy-based classifications never violate the Equal Protection Clause."); Deborah A. Ellis, Protecting "Pregnant Persons": Women's Equality and Reproductive Freedom, 6 Seton Hall Const. L.J. 967, 970 (1996) (declaring it "legitimate to read [*Geduldig*] narrowly").

101 Carey v. Population Servs. Int'l, 431 U.S. 678, 684 (1977) (quotations omitted).

102 381 U.S. 479 (1965).

103 Id. The Court found that various guarantees in the Bill of Rights created zones of privacy, that the right to marital privacy was within those zones, and that the law in question was not sufficiently tailored to meet its purposes without invading protected freedoms. Id. at 480-86. The foundations of the right to privacy and the right to make procreative decisions can be seen in cases decided even before *Griswold*. The Supreme Court had earlier recognized that the due process guarantee of liberty protected the right "to marry, to establish a home and bring up children," Meyer v. Nebraska, 262 U.S. 390, 399 (1923), and for "parents and guardians to direct the upbringing and education of children under their control," Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925). The Court had also recognized that the right to procreate was "one of the basic civil rights of man." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). Cases decided after *Griswold* have expounded on the scope of the right to privacy. See, e.g., Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that right to privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy"); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (clarifying that right to privacy applies to all individuals, whether "married or single," and holding law that prohibited dispensing contraceptives to unmarried persons unconstitutional).

Although most of the cases describing the Fourteenth Amendment right to privacy focus on the right to avoid or terminate a pregnancy rather than on the right to conceive, the right to privacy extends to procreative decisions beyond those regarding abortion and contraception. See *Carey*, 431 U.S. at 687 ("[T]he teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing . . . ."); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 640 (1973) (holding that restrictive maternity-leave rules burdened "protected freedoms" by penalizing decision to bear child); see also Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 Harv. L. Rev. 1419, 1466 (1991) ("The right of privacy protects equally the choice to bear children and the choice to refrain from bearing them."); John A. Robertson, Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth, 69 Va. L. Rev. 405, 416 (1983) ("This well-established right [not to procreate] implies the freedom not to exercise it and, hence, the freedom to procreate."). But see Tracy Ballard, The Norplant Condition: One Step Forward or Two Steps Back?, 16 Harv. Women's L.J. 139, 149 (1993) (describing insufficient constitutional protection for right to reproduce).

104 505 U.S. 833 (1992).

family and parenthood."[105] The state cannot intrude into "the decision whether to bear or beget a child."[106] Because it is a state school, actions taken by VMI are considered state action[107] and thus may constitute such an intrusion. By effectively expelling students who conceive children, VMI is interfering unjustifiably with their right to privacy.

A. VMI's Policy Fails the Tests Used for Restrictions on Fundamental Rights

When a fundamental right such as the right to privacy is at stake, the government is prohibited from restricting the right unless the restriction serves a compelling state interest and is narrowly tailored to meet that interest.[108] In *Eisenstadt v. Baird*, the Court specifically noted that cases in the *Griswold* line required such strict scrutiny, stating that, "if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under *Griswold*, the statutory classification would have to be not merely *rationally related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest."[109] The Court went on to apply strict scrutiny in both *Roe v. Wade*[110] and *Carey v. Population Services International*.[111]

Under strict scrutiny, the first question is whether the policy burdens the cadets' rights. It clearly does. The goal of the *Griswold* line

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105 Id. at 849.

106 *Eisenstadt*, 405 U.S. at 453.

107 Thus, in *United States v. Virginia*, 518 U.S. 515 (1996), VMI's policy of excluding women was found unconstitutional even though a similar policy by a single-sex private school would not be considered unconstitutional.

108 See Washington v. Glucksberg, 521 U.S. 702, 721 (1997) ("[T]he Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)) (omission in original)).

109 *Eisenstadt*, 405 U.S. at 447 n.7.

110 410 U.S. 113, 155 (1973).

111 431 U.S. 678, 688 (1977). In its most recent cases concerning abortion regulations, however, the Court has backed away from applying strict scrutiny and has instead adopted a test of whether the regulation places an "undue burden" on the woman's right to abortion. Stenberg v. Carhart, 530 U.S. 914, 960-61 (2000); Planned Parenthood v. Casey, 505 U.S. 833, 874 (1992) (O'Connor, J., plurality opinion). The Court developed the "undue burden" test specifically for abortion, which the Court feels is a "unique act" with potential emotional consequences for a great number of people. *Casey*, 505 U.S. at 852. In addition, the Court found that abortion implicates a specific governmental interest in the value of potential life. Id. at 846. As VMI's policy is not an abortion regulation, there is no reason to analyze it under the undue burden test instead of under strict scrutiny analysis. In addition, because the policy severely restricts cadets' rights to bear children rather than just regulating them, it seems likely that the policy would fail the undue burden test just as it fails strict scrutiny.

of cases is to allow people to make reproductive decisions without interference by the state.[112] By expelling, and thereby punishing, students who conceive a child, VMI interferes with their right to make free decisions about childbearing. Cadets at VMI cannot choose to have children—to partake in that "basic civil right[ ] of man,"[113]—without taking the State's wishes about their procreative choices into account.[114]

VMI may argue that it is not infringing on the cadets' rights at all, but merely forcing them to take expulsion into account as a consequence of their actions when they make the decision of whether or not to conceive. Indeed, Virginia is not keeping VMI students from conceiving, nor is it criminalizing conception by VMI students; it is merely telling them that if they do decide to procreate, they will not be able to remain cadets. A regulation does not need to be an outright ban, however, for it to be an intrusion on a fundamental right.[115] In *Cleveland Board of Education v. LaFleur*,[116] the Court held that maternity-leave regulations that forced teachers to go on leave at an arbitrary, fixed date in their pregnancies were unconstitutional because they "act[ed] to penalize the pregnant teacher for deciding to bear a child[;] overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of . . . protected freedoms."[117]

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[112] See supra notes 101-06 and accompanying text. The undue burden test used in abortion cases similarly is intended to protect the right to make decisions without state interference. Under the test, the government can place burdens on women if the burdens help inform her choice, but not if they hinder it. *Casey*, 505 U.S. at 877 (O'Connor, J., plurality opinion).

[113] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[114] The U.S. military academies' parenting policy, see supra notes 86-93 and accompanying text, also burdens cadets' procreative rights and therefore may also be unconstitutional. Since the judiciary gives special deference to the legislative and executive branches when it comes to military affairs, however, these policies are more likely than VMI's to survive strict scrutiny. See Rostker v. Goldberg, 453 U.S. 57, 67 (1981) ("Congress is [not] free to disregard the Constitution when it acts in the area of military affairs. . . . [B]ut the tests and limitations to be applied may differ because of the military context."). The constitutionality of the military academies' parenting policy is outside the scope of this Note.

[115] See *Carey*, 431 U.S. at 688 ("[T]he same test must be applied to state regulations that burden an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision as is applied to state statutes that prohibit the decision entirely.").

[116] 414 U.S. 632 (1974).

[117] Id. at 640. The Supreme Court did not actually apply strict scrutiny to the maternity-leave regulations at play in *LaFleur*, but it used analysis that allowed it to reach the same end. After finding that the leave policy implicated a fundamental right under the Due Process Clause and that some of the policy's provisions served the legitimate objective of keeping physically unfit teachers out of the classroom, the Court found that these provisions swept too broadly because they included a permanent irrebuttable presumption that women at that point in their pregnancies would be unfit to be teachers. The Court held that this conclusive presumption violated the Due Process Clause. Id. at 643-46. Though

The Court recognized that punishing someone for making a decision is, indeed, a burden on the decisionmaking process itself. Considering the important place education holds in a person's life,[118] being expelled would be as much of a punishment to a cadet as being forced to take an unnecessarily early maternity leave would be to a working adult.

VMI may further argue that it is not placing a burden on the decisionmaking process, but only denying a benefit to people who have independently made a decision. After all, Virginia does not need to offer a VMI education to its students. The advantages of a VMI education are merely a benefit it provides to a select group of people. Regardless of whether or not the state is required to provide a benefit in the first place, however, it cannot condition receipt of that benefit on the recipient's forgoing a constitutional right; if the government is forbidden to put direct pressure on a constitutional choice, it likewise cannot put indirect pressure on that choice through the provision of a benefit.[119] Thus, for example, in *Sherbert v. Verner*,[120] the Court held that South Carolina could not deny a woman unemployment insurance benefits because she refused to work on her Sabbath; though the state did not have to provide unemployment insurance at all, once it did provide that benefit, it could not condition it on the recipient forgoing her constitutional right to free exercise of religion.[121]

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the irrebuttable presumption test has been seldom used in the years since *LaFleur*, VMI's policy would fail this test if it were applied instead of strict scrutiny. The VMI policy implicates the same Due Process right that was involved in *LaFleur* and it also makes irrebuttable presumptions about people: It assumes that cadets who are pregnant or parents would be unable to continue to perform their cadet duties. While this might be true of some parent-cadets, it would not necessarily be true of all of them. Yet the policy would expel all pregnant cadets without drawing any such distinction.

118 See Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments.").

119 Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1415-16 (1989) (explaining that "[t]he doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether" and that "[c]onsensus on the doctrine's existence has survived major divisions and shifts of temperament on the Court"); see Cass R. Sunstein, Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion), 70 B.U. L. Rev. 593, 594 (1990) ("It is notable that for all their differences, participants in the debate, both on and off the bench, treat the unconstitutional conditions doctrine as the appropriate device for approaching disputed questions.").

120 374 U.S. 398 (1963).

121 Id. at 403-06. For other "unconstitutional conditions" cases, see, e.g., O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712 (1996) (holding that government cannot retaliate against independent contractor for contractor's political expression); Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought

Cases that involve "unconstitutional conditions," particularly those in the arena of abortion, often turn on whether the government is penalizing people for exercising a fundamental right, or simply choosing not to subsidize that particular right.[122] Thus, in *Harris v. McRae*,[123] for example, the Court upheld the Hyde Amendment, which kept Medicaid from covering medically necessary abortions even though the program covered other medically necessary procedures including childbirth. The Court reasoned that while the government could not place an obstacle in the way of a woman's right to have an abortion, the government did not have to subsidize this right, nor did it have to remove obstacles, such as poverty, that were not of its own making.[124] VMI could similarly argue that it was choosing not to subsidize cadets' choices to have children, rather than penalizing cadets for making procreative choices. VMI's policy differs from that in *Harris*, however, in that VMI is not just refusing to pay the

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has little or no relationship to the property."); FCC v. League of Women Voters, 468 U.S. 364 (1984) (holding that section of Public Broadcasting Act that forbade grant recipients from editorializing violated First Amendment). But see, e.g., Rust v. Sullivan, 500 U.S. 173 (1991) (permitting government to condition receipt of Title X funds on organizations refraining from providing patients with information or counseling about abortion); Lyng v. Int'l Union, 485 U.S. 360 (1988) (finding no constitutional violation in rule declaring households with member on strike ineligible for food stamps); South Dakota v. Dole, 483 U.S. 203 (1987) (upholding rule reducing highway funds to states with drinking ages under twenty-one).

122 See Sullivan, supra note 119, at 1439 ("This penalty/nonsubsidy distinction has increasingly determined the outcomes of unconstitutional conditions challenges."); Sunstein, supra note 119, at 601 (asserting that "conventional arguments in the cases" include that "government may not 'penalize' the exercise of constitutional rights . . . through regulation, spending, and licensing"); see also Seth F. Kreimer, Allocational Sanctions: The Problem of Negative Rights in a Positive State, 132 U. Pa. L. Rev. 1293, 1300-01 (1984) (suggesting that courts distinguish between threats, which make recipients worse off if they exercise their constitutional choices, and offers, which expand potential recipients' range of options). The exact scope of the unconstitutional conditions doctrine has been much discussed with little agreement. See Mitchell N. Berman, Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions, 90 Geo. L.J. 1, 3 (2001) ("The persistent challenge . . . has been to articulate . . . a theory to support the doctrine. Regrettably, more than a century of judicial and scholarly attention to the problem has produced few settled understandings."); Sullivan, supra 119, at 1415 (noting confusion about doctrine's application).

123 448 U.S. 297 (1980).

124 Id. at 316-17. The dissenters in the case disagreed with the majority's framing of the issue. For example, Justice Brennan saw the issue as being not about the failure to subsidize, but about the "discriminatory distribution of benefits," and did not think the policy could be differentiated from "other statutory schemes [such as in *Sherbert*] that unconstitutionally burden[ ] fundamental rights." Id. at 334-36 (Brennan, J., dissenting). Justice Brennan argued that the obstacle that pregnant women eligible for Medicaid faced was not just one of poverty, but of the conjunction of poverty and the government's "unequal subsidization of abortion and childbirth." Id. at 333. The government, therefore, was doing more than simply choosing not to remove a barrier; it was placing an obstacle in the path of a woman's protected right to choose to have an abortion.

expenses connected with cadets having children; it is refusing the cadets all of the benefits of a VMI education once they have children. It is as if the Hyde Amendment had stipulated that once a woman decided to have an abortion she would become ineligible to receive any benefits under Medicaid, a policy that even the majority in *Harris* would have had difficulty labeling as anything but punitive.

Finally, VMI could argue that strict scrutiny should not apply because schools are allowed to burden students' rights in ways that other state entities are not. Although the Supreme Court has long held that "students [do not] shed their constitutional rights . . . at the schoolhouse gate,"[125] the Court has also "generally afforded considerable discretion [to state and local school boards] in operating public schools"[126] and has upheld school regulations and actions that would be prohibited if undertaken by other state institutions.[127] Nevertheless, VMI cannot infringe on its students' fundamental right to privacy by prohibiting them from bearing children. The Supreme Court has generally only allowed schools to engage in actions that limit students' constitutional rights when those actions are necessary for discipline[128]

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125 Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503, 506 (1969); see also Bd. of Educ. v. Earls, 536 U.S. 822, 829 (2002) (citing *Tinker*).

126 Edwards v. Aguillard, 482 U.S. 578, 583 (1987); see also *Tinker*, 393 U.S. at 507 ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.").

127 See, e.g., Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995) (allowing suspicionless drug testing of school athletes because "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere"). The extent to which schools can infringe on the constitutional rights of their students is somewhat uncertain. See Anne Proffitt Dupre, Should Students Have Constitutional Rights?: Keeping Order in the Public Schools, 65 Geo. Wash. L. Rev. 49, 59 (1996) ("[N]o guiding principle has emerged with regard to where school power should rank on the parent-state continuum."); Elizabeth Reilly, Education and the Constitution: Shaping Each Other and the Next Century, 34 Akron L. Rev. 1, 18 (2000) ("Setting the parameters of student rights will no doubt continue into the next century."). Furthermore, different constitutional guarantees are adapted to the school setting in different degrees. See James E. Ryan, The Supreme Court and Public Schools, 86 Va. L. Rev. 1335, 1405 (2000) (pointing out that constitutional rights involving speech, searches, and discipline are altered in school setting, while those involving race, gender, and religion are not).

128 See, e.g., New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) (holding that school officials do not need to obtain warrants to search students because "requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules . . . would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools"); Ingraham v. Wright, 430 U.S. 651, 680 (1977) (noting that requiring notice and hearing before using corporal punishment would "significantly burden the use of corporal punishment as a disciplinary measure"). Even *Tinker*, which is seen as the "high-water mark" for student rights, see Nadine Strossen, Keeping the Constitution Inside the Schoolhouse Gate—Students' Rights Thirty Years After *Tinker v. Des Moines Independent Community School District*, 48 Drake L. Rev. 445, 454 (2000), noted that "conduct by the student, in class or out of it, which . . . materially disrupts classwork or

or when the student activity being limited would "undermine the school's basic educational mission."[129] Allowing student-parents to remain cadets as long as they did not abandon their duties, however, would not necessarily undermine discipline or the school's basic educational mission of producing "educated and honorable men and women."[130] And VMI's policy differs from those that have been upheld due to pedagogical concerns in that it not only affects students when they are at school, but also during their time away from school.[131] In addition, many of the Court's decisions that limit students' rights are based in part on the fact that schoolchildren tend to be minors who require guidance and supervision.[132] VMI's students, however, are mostly full-fledged adults,[133] who do not require their school to act in loco parentis. Furthermore, even parents are not allowed to fully deny their children's right to privacy in procreative decisionmaking,[134] and schools have less authority over children than do parents.[135]

Lower courts that have considered the issue have recognized that students retain their due process right to privacy even while in school.

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involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker*, 393 U.S. at 513.

129 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (upholding suspension of student who used sexually explicit terms at school assembly).

130 VMI Catalogue, supra note 12, at 3. Professor James E. Ryan offers a unifying theory to explain the Court's cases on public schools and the Constitution. Ryan, supra note 127, at 1394-1423. He argues that education fulfills two roles—one academic and the other social—and that the Court tends to uphold regulations that infringe on constitutional rights if they involve schools' academic functioning. Id. Because VMI's parenting policy—like, one would imagine, all regulations affecting the right to privacy in procreative decisionmaking—does not implicate a school's academic function, but rather is aimed at controlling social conditions at the school, it would be struck down under Professor Ryan's theory.

131 The holding of *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), for example, in which the Court allowed schools to exercise editorial control over school newspapers, is limited to "school-sponsored expressive activities." Id. at 273. See Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 454 (W.D. Pa. 2001) ("Although there is limited case law on the issue, courts considering speech that occurs off school grounds have concluded (relying on Supreme Court decisions) that school officials' authority over off-campus expression is much more limited than expression on school grounds.").

132 See, e.g., *Vernonia*, 515 U.S. at 654-55 ("[U]nemancipated minors lack some of the most fundamental rights of self-determination . . . . [T]he nature of [the state's power over schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.").

133 VMI is a four-year college whose applicants are usually between the ages of sixteen and twenty-two. VMI Quick Facts, supra note 1.

134 See Planned Parenthood v. Danforth, 428 U.S. 52, 72-75 (1976) (mandating availability of judicial bypass of parental consent requirement for abortion).

135 See New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) (recognizing that schools "cannot claim the parents' immunity from the strictures" of Fourth Amendment).

In *Arnold v. Board of Education*,[136] the Eleventh Circuit found that it would be a constitutional violation for a school official to coerce a schoolchild into obtaining an abortion.[137] In *Davis v. Meek*,[138] decided even before the Supreme Court had fully developed its substantive-due-process right-to-privacy jurisprudence, the District Court for the Northern District of Ohio held that the right to marital privacy forbids schools from excluding students from extracurricular activities for being married. "The combined effect of the *Griswold* and *Tinker* cases is to preclude the defendants from even trying to do what they have done," the court asserted.[139] *Griswold* and *Tinker* should similarly work together to preclude VMI from being able to burden the procreative rights of its students.

Once it is clear that VMI is burdening its cadets' fundamental rights to make procreative decisions, the question becomes whether VMI's policy can be justified by a compelling state interest and whether it is narrowly tailored to serve that interest.[140] Few interests are considered compelling enough to survive strict scrutiny,[141] and it

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136 880 F.2d 305 (11th Cir. 1989).

137 Id. at 312 ("[G]overnmental coercion to abort a child constitutes impermissible intrusion on this constitutionally guaranteed freedom of choice."). On remand it was found that the school officials had not coerced the plaintiff into having an abortion. Arnold v. Bd. of Educ., 754 F. Supp. 853 (S.D. Ala. 1990).

138 344 F. Supp. 298 (N.D. Ohio 1972).

139 Id. at 302. Similarly, in *Holt v. Shelton*, 341 F. Supp. 821 (M.D. Tenn. 1972), the court relied on the fundamental right to marry to overturn a regulation prohibiting married students from participating in extracurricular activities and school functions. Id. at 822-23. In a number of other cases decided around the same time, other courts overturned similar regulations on married students participating in school activities, though not always on substantive due process grounds. See, e.g., Moran v. Sch. Dist. #7, 350 F. Supp. 1180 (D. Mont. 1972) (holding that rule forbidding married students from engaging in extracurricular activities was denial of equal protection); Romans v. Crenshaw, 354 F. Supp. 868 (S.D. Tex. 1971) (same); Bd. of Educ. v. Bentley, 383 S.W.2d 677 (Ky. 1964) (finding rule that married students must withdraw from school arbitrary and unreasonable). See also *Hollon v. Mathis Independent School District*, 358 F. Supp. 1269, 1270-71 (S.D. Tex. 1973), where the court said that:

> The basis for each of the Federal District Court decisions varies slightly, some courts finding the denial of equal protection inherent in such a policy, other courts finding a fundamental invasion of the right to marital privacy and the right to an education, or finding an unconscionable attempt to punish marriages which were both legal and fully consistent with the public policy of the state, but each decision found exclusionary policy from extracurricular activities based upon marriage to be unconstitutional.

In a number of other cases, however, almost all decided before *Tinker*, state courts upheld prohibitions on married students engaging in extracurricular activities. See, e.g., Bd. of Dirs. v. Green, 147 N.W.2d 854 (Iowa 1967); Estay v. Lafourche Parish Sch. Bd., 230 So.2d 443 (La. Ct. App. 1969); Cochrane v. Bd. of Educ., 103 N.W.2d 569 (Mich. 1960).

140 See supra note 108 and accompanying text.

141 Strict scrutiny has been labeled "strict in theory, but fatal in fact." See, e.g., Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment); Gerald

seems unlikely that the explanations proffered by VMI would be considered compelling enough to justify the school's infringing on its students' constitutional rights. VMI could argue that the school's unique educational methods could not survive allowing cadet-parents to remain on campus, but the Supreme Court did not find convincing the analogous argument that allowing women on campus would jeopardize the school's educational methodology,[142] even though admitting women had the possibility of altering the school's daily life more than permitting parents to remain students does.

Even if VMI could advance a compelling state interest, it seems doubtful that the policy would be tailored narrowly enough to serve that interest. As discussed above,[143] the policy is not even narrowly tailored to the primary rationale VMI set forth for its policy—namely that because of time, attention, and loyalty requirements, being a parent and being a cadet are mutually exclusive. If the goal is to weed out cadets who cannot fulfill their duties, the policy is overinclusive, calling for the expulsion of pregnant women who can still fulfill VMI's physical requirements and of parents who have discovered ways to cope with the dual stresses of parenthood and cadet life. A closer fit between the policy and its purpose is necessary if VMI is going to use its policy to constrain the fundamental procreative rights of its students.

CONCLUSION

In conditioning the education that it provides on its cadets not becoming pregnant or becoming parents, VMI violates the dictates of Title IX and intrudes on its students' fundamental constitutional right to make decisions about procreation without the state's interference. Though VMI's rationales for its policy might be understandable, it must find ways to fulfill its goals without violating its students' statutory and constitutional rights. Fortunately, there are legal ways for VMI to handle the potential consequences of pregnancy and parenthood among its students. If a student abandons his studies due to parenthood, he can be asked to leave, just as any other student who

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Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972). The Supreme Court, however, has repeatedly declared it otherwise. See, e.g., United States v. Virginia, 518 U.S. 515, 532 n.6 (1996) ("[S]trict scrutiny . . . is not inevitably 'fatal in fact.'" (quoting *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring in judgment))); Adarand Constructors., Inc. v. Pena, 515 U.S. 200, 237 (1995) (same).

[142] United States v. Virginia, 518 U.S. at 540-46. The standard used in *United States v. Virginia* was not as stringent as that required in fundamental rights cases. Id. at 532-33.

[143] Supra notes 84-99 and accompanying text.

neglects his cadet duties can be asked to leave; if a pregnant cadet is unable to perform VMI's physical requirements, she can go on medical furlough, just as cadets who are unable to perform the requirements due to temporary disabilities can go on furlough. Ultimately, evaluating students' situations on an individualized basis, in which stereotypes about the abilities of pregnant women and parents do not come into play, is the fairest way to handle pregnant and parenting cadets, and is the way VMI can best live up to its egalitarian ideal.