

DISCRIMINATORY TREATMENT OF THE FEMALE OFFENDER IN THE CRIMINAL JUSTICE SYSTEM*

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A new social consciousness as to the status of men and women in our society has developed in recent years. Debate over this status has often centered around the proper roles of men and women and how each group should be treated vis-à-vis the other. While the debate may never produce lasting answers, the consensus appears to be that at the very least some level of equality or parity is required.

Gender debates have a counterpart in the criminal justice system. While offenders cannot be viewed as representing the mainstream of society, their needs and goals are similar to the aims of members of the general society. Presumably, many want to improve their standard of living, obtain good jobs, have and maintain families, be free from sickness, vindicate their legal rights, and engage in recreational activities. Therefore, although there is a heightened level of security and a more restrictive atmosphere, the aspirations of individuals within the prison community may be seen as a microcosm of society as a whole.

Whatever crimes they committed, most inmates will one day return to society. Although some releasees will never be rehabilitated or lead law-abiding lives, others will. For inmates with such potential, the correctional environment is a key factor in preparing them for their eventual return to the mainstream of society.

The task of establishing this environment — correctional programming¹ — is a function of the executive branch of government. A significant developing issue in the area of correctional programming is whether or not government should take a more active role in the area of gender equality by setting examples in its administration of correctional institutions.

The mandate of the equal protection clause of the fourteenth amendment is that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the

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¹ Correctional programming is the entire process into which an inmate is assimilated when incarcerated. Elements of correctional programming include classification and designation, employment, job-training, rehabilitation, and education. Correctional programming regulates the daily life of inmates. See THE MANUAL OF CORRECTIONAL STANDARDS XX (American Correctional Association 3d ed. 1966) (referring to *Declarations of Principles*, American Correctional Association, Principle VII) [hereinafter cited as MANUAL OF CORRECTIONAL STANDARDS].

laws."² An examination of state legislation and the factual findings of courts that have reviewed the administration of correctional institutions for women show that many states have not been diligent in providing female prisoners with equal protection under the law. Possibly the reason for the lack of concern about the equal treatment of women in correctional institutions is that women prisoners do not provide a powerful enough constituency to stimulate legislative and administrative action. While male prisoners create temporary and often substantial improvements through the process of riot and reform, the resulting benefits for women prisoners have been less dramatic. By failing to improve the conditions of incarceration for women at the same time improvements are made to benefit male prisoners, states are not signaling female offenders that the way to achieve reform is to riot. It is reasonable to assume, however, that female inmates are aware of a greater receptivity to gender-related issues and may make demands for equal treatment because of that awareness.

One measure of the concern about gender-related issues is the emergence of class action suits by female prisoners. Aided by a new test³ to determine the constitutionality of various conditions and aspects of confinement, and perhaps a more realistic orientation by the public and subsequently the courts toward women, female prisoners have achieved some success in obtaining parity of treatment with male prisoners. Judicial mandates, however, have not been entirely satisfactory. While a process that can be precise and that bases decisions on the proven values of the past has some merit in the correctional context, these proven values of the past are often wrought with sex-discrimination and chauvinism and often embody penological theory reminiscent of the dark ages.⁴ Each of the judicial decisions in this area reflects an attempt to adhere to the time-honored legal practice of reaching back in the wealth of legal precedents for guidance in arriving at a decision and fashioning a remedy. This system based on *stare decisis* will not solve the problems of the correctional system outside the factual context of the particular case presented for decision. Many issues, sex discrimination foremost among these, can only be resolved through innovative and revolutionary change — developed and initiated not by courts but by legislatures and correctional administrators. One of the major conclusions to be drawn from recent decisions is that while courts have become a solution of last resort, they have only a limited role in regulating the criminal justice system.

This article will review the needs of female offenders and the manner in which courts have applied the intermediate level of analysis for determining whether disparate treatment of female and male offenders is constitutional. Although the needs of women in some areas are greater than the needs of men, proportionately fewer resources have been allocated for meeting the needs of female prisoners than have been allocated for males in correctional institutions. Courts, legislatures, and correctional administrators must strike a balance between the goal of parity and the different physiological needs of male and female prisoners. If parity is defined as essential equality and if it is recognized that male

² U.S. CONST. amend. XIV, § 2.

³ The "new test" is also referred to as intermediate scrutiny and was first enunciated in *Craig v. Boren*, 429 U.S. 190 (1976). The test enunciated in *Craig* requires that, to be valid, gender-based classifications serve important government objectives and be substantially related to the achievement of those objectives.

⁴ Society in general exhibits disdain for prisoners. In addition, society generally has been reticent about accepting judicial or legislative mandates changing the role of women, and has resisted claims of discrimination by women. Logic dictates that penological theories and theorists will reflect these views and embody many of these prejudices.

and female prisoners solely by virtue of their sex have different needs in the areas of medical care, personal hygiene, parental rights, family relationships, and privacy, it becomes obvious that a balance must be struck between parity of programs offered at correctional institutions and the prisoners' needs. Often physiological differences make equality both undesirable and unnecessary. In areas where no apparent difference in physiological needs exists,⁵ however, parity can only be achieved by offering equal programs or equal opportunities.⁶ Public attention has focused on the abhorrent conditions of correctional institutions, but until recently this attention had focused on correctional facilities for men. Recent case law spurred scrutiny of female facilities and needs of female prisoners.

In addition, this article will address methods for producing correctional reform. Specifically, the article will discuss how administrative policies and procedures can be molded to address and correct specific sex-related problems within the correctional institution. Existing legislation is suggested as a model and discussed as a vehicle for remedying discriminatory treatment. Furthermore, this article will examine uniform national correctional standards and suggest application of these standards to state corrections programs as a viable method of initiating change. Finally, the author hypothesizes that the failure of the federal equal rights amendment and the birth of the New Federalism may draw attention to an avenue of reform in individual states previously ignored. To achieve the agreed upon goals of non-discriminatory treatment and reasonable gender parity, all three branches of government and correctional professionals must explore both traditional and non-traditional penological theory.⁷ In a gender sensitive area, the courts may be more receptive to gender-related complaints as a result of the intermediate level of scrutiny afforded constitutional challenges to gender-based classifications. While courts can provide temporary remedies, gender parity in the correctional system must ultimately be achieved through legislation or enforcement of uniform correctional standards.

I. THE EVOLVING CONSTITUTIONAL STANDARD OF REVIEW FOR SEX-BASED CLASSIFICATIONS

Within the last decade, the United States Supreme Court has reassessed its approach in analyzing the constitutionality of statutory classifications based on gender. The result of this reassessment has been the evolution of the "intermediate tier of review" for gender-based classifications. Prior to 1971, a line of Supreme Court cases⁸ held that statutorily

⁵ Used here, "needs" applies to psychological as well as physiological needs.

⁶ This essential equality of programs and opportunities is applicable to such areas as legal advice and legal resources, vocational training, work release, and recreation. This list is not exhaustive but is rather representative of the types of programs which require equality.

⁷ Penological theory is used by the author to denote the rationale for dealing with the adjudicated criminal as implemented by the states' formal system of criminal justice. It includes but is not limited to such concepts as retribution, deterrence, and rehabilitation.

⁸ See, e.g., *Hoyt v. Florida*, 368 U.S. 57 (1961) (jury selection excluded women unless they applied); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (women prohibited from serving as bartenders unless married to tavern owner); *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1872) (women excluded from the practice of law). These cases had the effect of denying women certain opportunities upon grounds of administrative convenience, preservation of the home or the virtue of women. Other cases were predicated upon the protection of women from physical hardships. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (minimum wage law for women); *Muller v. Oregon*, 208 U.S. 412 (1908) (maximum working hours for women).

created sex discrimination did not violate the equal protection clause of the fourteenth amendment if some rational basis existed to justify the different treatment of similarly situated males and females.⁹ Gender discriminatory statutes were accorded a presumption of validity by the Court.¹⁰ Individuals who alleged a denial of equal protection had the burden of establishing that the legislation was without a rational basis or was unrelated to the achievement of a valid purpose.¹¹ The Court almost always upheld gender discriminatory statutes.¹² The cases reaching the Supreme Court were merely representative of a large body of lower federal and state court decisions sustaining sex discrimination in a myriad of situations including professional and occupational licensing, employment practices, property rights, domestic relations, and criminal liability and punishment.¹³

The Court broke the tradition of upholding sex-based discriminatory legislation which met the rational basis test in *Reed v. Reed*.¹⁴ In *Reed*, the mother of a minor decedent contested the statutory preference given to the father to serve as administrator of the deceased child's estate.¹⁵ An Idaho statute did not allow the exercise of any discretion by the probate court in appointing an administrator of an estate, but simply mandated that "males must be preferred to females."¹⁶ The Idaho Supreme Court interpreted this provision as authorizing the appointment of male administrators where both a male and a female were equally qualified for the sake of administrative convenience.¹⁷ The United States Supreme Court, however, held that a preference given to males for administrative convenience alone was arbitrary and did not satisfy the fourteenth amendment.¹⁸ *Reed* is significant because until that time the Court had routinely accepted any preferred basis for the discriminatory treatment of women, and had on occasion provided its own rational justification, if none was forthcoming.¹⁹

⁹ The same standard of review has been applied where federal legislation is alleged to be discriminatory under the due process clause of the fifth amendment. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 (1975). The rational basis test determines whether a classification is rational, whether it furthers a proper government purpose and whether all persons within the classes established are treated equally. See, e.g., *Hoyt v. Florida*, 368 U.S. 57, 59-62 (1961).

¹⁰ John & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. Rev. 675 (1971).

¹¹ *Id.* at 678-82.

¹² *Id.*

¹³ *Id.*

¹⁴ 404 U.S. 71 (1971).

¹⁵ *Id.* at 73.

¹⁶ *Id.*

¹⁷ See *Reed v. Reed*, 93 Idaho 511, 514, 465 P.2d 635, 638 (1970), *rev'd*, 404 U.S. 71 (1971).

¹⁸ 404 U.S. at 76-77.

¹⁹ See, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948). In *Goesaert*, the Supreme Court upheld a state statute providing that a woman could not be a licensed bartender unless she was the wife or daughter of the bar-owner. *Id.* at 467. The Court conjectured that the legislature must have distinguished between wives and daughters of bartenders and other women because "Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight." *Id.* at 466. The dissent, however, thought that this reason could not be the justification for the statute since the statute allowed male bar-owner's wives and daughters to tend bar even in the absence of the male owner, although preventing other women from tending bar even if a man was present to keep order. *Id.* at 468 (Rutledge, J., joined by Douglas and Murphy, JJ., dissenting). Similar reasoning was criticized by the dissent in *Flemming v. Nestor*, 363 U.S. 603, 612 (1960), where the Supreme Court upheld the denial of Social Security benefits to certain persons living abroad on the basis of

Reed was subsequently used by the Court in *Frontiero v. Richardson*²⁰ as the basis for holding that sex was a suspect classification requiring application of the strict scrutiny test.²¹ *Frontiero* struck down a federal statute which conditioned benefits to the husbands of Air Force servicewomen upon a showing of dependency, but did not require such a showing for benefits to be given to wives of servicemen.²² Similarly, the Court, in *Weinberger v. Weisenfeld*,²³ invalidated a federal restriction on Social Security benefits available to widowers, but not widows, in cases where a surviving spouse had minor children.²⁴ Although the *Weinberger* Court relied on *Frontiero* to reach its decision,²⁵ the opinion contains none of the "strict scrutiny" language espoused in *Frontiero*. The Court in *Craig v. Boren*²⁶ apparently resolved its philosophical differences about the status of sex-based classifications by adopting a new test.²⁷ *Craig* involved a state statute prohibiting the sale of liquor to men under 21 and women under 19.²⁸ Under the test announced in *Craig*, gender-based classifications do not violate the equal protection clause if they serve "important government objectives" and are "substantially related to the achievement of those objectives."²⁹ This level of scrutiny lies somewhere between the strict scrutiny and rational basis tests. In addition to using intermediate scrutiny to invalidate gender classifications based merely on stereotypes and administrative convenience, courts have used the intermediate scrutiny test to validate statutory classifications resulting in advantages to women, based upon Congressional intent to provide compensation to women for previous disadvantages women have suffered because of their gender.³⁰ An exception to the use of intermediate scrutiny in review of statutory classifications still exists regarding the need for protection or punishment. Typically these statutes are still reviewed under the rational basis test on the assumption that men and women are not similarly situated with respect to the need for protection or punishment.³¹

Thus, judicial review of sex-based classifications under the intermediate scrutiny standard now focuses on whether males and females are similarly situated or whether a statutory classification is based upon mere "administrative convenience and outworn

presumed congressional motives of economy. The dissent criticized the decision as being sustained on the basis of "implication and vague conjecture." *See id.* at 640 (Brennan, J., joined by Warren, C.J., and Douglas, J., dissenting).

²⁰ 411 U.S. 677 (1973) (plurality opinion).

²¹ *Id.* at 682. The strict scrutiny test requires not only that the rational basis test be met but also that the classification or discrimination be necessary to promote some important state interest and that no less burdensome alternative be available to achieve the governmental objective. *Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972).

²² 411 U.S. at 688-91.

²³ 420 U.S. 636 (1975).

²⁴ *Id.* at 643.

²⁵ *Id.* at 642-43, 645.

²⁶ 429 U.S. 190 (1976).

²⁷ *Id.* at 199.

²⁸ *Id.* at 192.

²⁹ *Id.* at 197. *See also* *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981).

³⁰ *See* *Califano v. Webster*, 430 U.S. 313, 316-17 (1977) (women allowed to exclude more lower-income years in computing old-age benefits than men). The Court had previously sustained government programs intended as ameliorative of prior discrimination even using the rational basis test. *See, e.g., Schlesinger v. Ballard*, 419 U.S. 498, 505-08 (1975) (women officers given longer statutory period to advance in rank before mandatory discharge); *Kahn v. Shevin*, 416 U.S. 351, 355-56 (1974) (widows, but not widowers, allowed annual property-tax exemption).

³¹ *See, e.g., People v. Reilly*, 85 Misc.2d 702, 707-08, 381 N.Y.S.2d 732, 738-39 (1976).

cliches."³² Application of the "similarly situated" test sometimes leads to results that are hard to reconcile, as is evidenced by the holdings in two cases decided on the same day by the Supreme Court. In *Caban v. Mohammed*,³³ the Court held that New York could not deny the father of an illegitimate child the right to consent to adoption of the child, where the state required the consent of the mother.³⁴ After applying the intermediate test, the Court found no fundamental difference between unwed mothers and fathers.³⁵ The Court rejected an administrative convenience argument that adoption of illegitimate children would be encouraged if only the mother had to consent.³⁶ In *Parham v. Hughes*,³⁷ the Court found a Georgia statute that permitted the mother but not the father of an illegitimate child to sue for the child's wrongful death consistent with equal protection.³⁸ The Court relied upon a Georgia law providing that only the father could legitimate the child.³⁹ Four justices dissented on the grounds that the state should not be allowed to use one sex-based statutory provision to justify the imposition of another.⁴⁰

These seemingly anomalous results obtained by application of the intermediate standard of review indicate that the law relevant to gender classifications will continue to develop on a case-by-case basis. The intermediate level of scrutiny does establish a logical framework, however, for evaluating judicial responses to challenges to discriminatory aspects of the criminal justice system brought by female offenders. While sex-based discriminatory treatment is pervasive in the criminal justice system,⁴¹ the United States Supreme Court has decided only one case involving criminal activity where a sex-based classification was under constitutional attack.⁴² The job of shaping the bounds of equal protection as applied to gender-based classifications in the criminal justice system thus has been performed by the state and lower federal courts. In the next section of the article, judicial disposition of claims involving discrimination in assigning criminal liability and determining sentences⁴³ and discriminatory treatment of women in penal institutions will be examined.⁴⁴

³² *Parham v. Hughes*, 441 U.S. 347, 355 (1979). See also *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (presumption that father is breadwinner and mother is "center of home and family life" is part of "baggage of sexual stereotypes").

³³ 441 U.S. 380 (1979).

³⁴ *Id.* at 394.

³⁵ *Id.* at 389.

³⁶ *Id.* at 389-91.

³⁷ 441 U.S. 347 (1979).

³⁸ *Id.* at 358.

³⁹ *Id.* at 352-53.

⁴⁰ *Id.* at 361-62 (White, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting).

⁴¹ See *infra* text accompanying notes 45-387 for discussion of gender discrimination in the criminal justice system.

⁴² See *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981). Michael M. was a seventeen and one-half year old male charged with statutory rape under a California law which only provided criminal liability for men engaged in an act of sexual intercourse with a female minor. The statute was challenged on equal protection grounds and was found not to violate the fourteenth amendment equal protection guarantee. Prior to this decision, various attempts to bring sexual discrimination in the criminal process before the Court have been unsuccessful. *E.g.*, *Meloon v. Helgemoe*, 564 F.2d 602 (1st Cir. 1977), *cert. denied*, 436 U.S. 950 (1978) (statutory rape by males only); *In re Fenwick*, 110 Ohio 350, 144 N.E. 269 (1924), *appeal dismissed for lack of substantial federal question sub nom.* *Fenwick v. Myers*, 275 U.S. 485 (1927) (indeterminate sentences for women offenders).

⁴³ See *infra* text accompanying notes 45-107 for a discussion of gender-based discrimination claims in imposing criminal liability and sentencing.

⁴⁴ See *infra* text accompanying notes 108-387 for a discussion of discriminatory treatment of women in the criminal justice system.

II. SEX-BASED DISCRIMINATORY TREATMENT IN CRIMINAL STATUTES AND AT SENTENCING

A. Criminal Liability Based on Gender

The legal system appears to accept the notion that an individual's gender is a sufficient and rational consideration when imposing criminal liability. Criminal statutes discriminate between the sexes by defining crimes that can be committed by only one sex and by imposing different sentences on the offender according to sex. In addition, criminal statutes that are gender-neutral on their face are often applied in a discriminatory manner.

Typically, behavior proscribed for one sex only is related to sexual misconduct such as forcible rape, statutory rape, carnal knowledge, seduction, and to a lesser extent, prostitution. Punishment of forcible rape, only when committed by a male against a female, has been uniformly sustained by the courts as a permissible discrimination based on gender.⁴⁵ These findings can be justified when one considers that more women are subjected to forcible sexual relations by men than men from women. Additionally, physiological evidence of forcible rape of women can be more readily obtained, and it is obviously much more difficult for a woman to force a man to have sex.⁴⁶ As previously mentioned, the standard of review employed is typically the rational basis test, on the assumption that men and women are not similarly situated with respect to the need for protection or punishment.⁴⁷

Statutory rape is normally defined as sexual relations between an adult male and a female minor. The majority of courts have found gender-based classifications in the statutory rape statutes consistent with equal protection principles under either the "rational basis"⁴⁸ or "strict scrutiny" tests.⁴⁹ The United States Court of Appeals for the First Circuit, however, held New Hampshire's statutory rape provision unconstitutional using the intermediate level of review in *Meloon v. Helgemoe*.⁵⁰ Arguments offered by the state to justify forcible rape statutes included prevention of pregnancy, psychological harm to the female, and physiological differences between male and female minors.⁵¹ The First Circuit rejected all these contentions as being unsupported by the evidence,⁵² reasoning that the state had been unable to prove its contentions and had merely relied upon stereotypical notions of male-female sex roles.

⁴⁵ *E.g.*, *State v. Kelly*, 111 Ariz. 181, 184, 526 P.2d 720, 723 (1974), *cert. denied*, 420 U.S. 935 (1975); *People v. Gould*, 188 Colo. 113, 115-16, 532 P.2d 953, 954-55 (1975); *People v. Medrano*, 24 Ill. App. 3d 429, 431-32, 321 N.E.2d 97, 98-99 (1974); *Brooks v. State*, 24 Md. App. 334, 337-39, 330 A.2d 670, 673 (Md. Ct. Spec. App. 1975); *People v. Reilly*, 85 Misc. 2d 702, 703-10, 381 N.Y.S.2d 732, 735-40 (1976); *State v. Giles*, 34 N.C. App. 112, 113-14, 237 S.E.2d 305, 306-07 (1977); *State v. Ewald*, 63 Wis. 2d 165, 172-74, 216 N.W.2d 213, 217-18 (1974).

⁴⁶ *See* *Finley v. State*, 527 S.W.2d 553, 556 (Tex. Crim. App. 1977).

⁴⁷ *See, e.g.*, *People v. Reilly*, 85 Misc. 2d 702, 707-08, 381 N.Y.S.2d 732, 738-39 (1976). *See supra* text accompanying note 31.

⁴⁸ *See, e.g.*, *People v. Mackey*, 46 Cal. App. 3d 755, 760-61, 120 Cal. Rptr. 157, 160, *cert. denied*, 423 U.S. 951 (1975); *People v. Salinas*, 191 Colo. 171, 174, 551 P.2d 703, 706 (1976); *People v. Mndange-Pfupfu*, 97 Misc. 2d 496, 499-502, 411 N.Y.S.2d 1000, 1003 (1978); *State v. Wilson*, 296 N.C. 298, 306, 250 S.E.2d 621, 629 (1979); *Ex parte Groves*, 571 S.W.2d 888, 891 (Tex. Crim. App. 1978); *State v. Housekeeper*, 588 P.2d 139, 140 (Utah 1978).

⁴⁹ *See, e.g.*, *State v. Thompson*, 162 N.J. Super. 302, 304, 392 A.2d 678, 679 (1978).

⁵⁰ 563 F.2d 602, 603-04 (1st Cir. 1977), *cert. denied*, 436 U.S. 950 (1978).

⁵¹ *Id.* at 605.

⁵² *Id.* at 606-08. *Contra* *State v. Thompson*, 162 N.J. Super. 302, 306, 392 A.2d 678, 680 (1978); *State v. Wilson*, 296 N.C. 298, 306, 250 S.E.2d 621, 629 (1979).

Subsequent decisions in other jurisdictions have not adopted the result in *Meloon*.⁵³ The Supreme Court addressed the subject in *Michael M. v. Superior Court of Sonoma County*⁵⁴ and in a plurality opinion held discriminatory statutory rape laws constitutional. Restating policy reasons similar to the justifications proffered by the state in *Meloon*,⁵⁵ the Court reasoned that the requirement that the gender-based classification bear a fair and substantial relationship to an important governmental interest⁵⁶ was met when the legislature decided to punish "the participant who, by nature, suffers few of the consequences of his conduct."⁵⁷ Furthermore, the Court compared the risk of pregnancy with the risk of criminal sanctions and concluded that a statutory rape provision "imposed solely on males . . . serves to roughly 'equalize' the deterrents on the sexes."⁵⁸ In the aftermath of *Michael M.*, it seems fair to say that under any and all standards statutory rape statutes like the New Hampshire statute challenged in *Meloon* are constitutional.

Carnal knowledge statutes are another means of protecting women from sexual abuse. These statutes differ from rape laws in that physical force is not involved in the proscribed conduct. Lack of consent may exist due to the inability of the woman to consent because of mental incapability, for example,⁵⁹ or because of duress, as for example abuse by male guards of female inmates or patients,⁶⁰ or because of a psychological dependence, such as the existence of a doctor-patient relationship.⁶¹ Many states have recently revised their carnal abuse statutes to apply even-handedly to both males and females, not because of constitutional attack, but as part of the general revisions of states' criminal codes.⁶² Courts in the states retaining "male only" carnal abuse statutes are not likely to overturn them in view of the nearly universal judicial and legislative acceptance of gender-based distinctions in the rape laws.

Seduction is the use of a promise to marry or other deception by a male to induce a female to have sexual intercourse.⁶³ Seduction was not a crime at common law but a number of states have included seduction as a crime in their criminal codes.⁶⁴ The essence

⁵³ *Helgemoe v. Meloon*, 436 U.S. 950 (1978). The Chief Justice and Justice Blackmun would have granted certiorari and reversed summarily. *Id.*

⁵⁴ 450 U.S. 464 (1981). See generally Comment, *Gender-Based Statutory Rape Legislation and the Equal Protection Clause: Michael M. v. Superior Court of Sonoma County*, 19 AM. CRIM. L. REV. 99 (1981).

⁵⁵ *Michael M.*, 450 U.S. at 470-73. See *supra* text accompanying note 51.

⁵⁶ 450 U.S. at 469, 473. Justice Rehnquist's opinion does not specifically acknowledge review under the standard of intermediate scrutiny. The opinion does, however, reject California's application of strict scrutiny and cites the test defined in *Reed v. Reed*, and later refined in *Craig v. Boren*, requiring the classification to bear a substantial relationship to important governmental purposes. Thus, the Court, without specific acknowledgment, apparently adopted an intermediate tier of review.

⁵⁷ *Michael M.*, 450 U.S. at 473.

⁵⁸ *Id.*

⁵⁹ See, e.g., MD. ANN. CODE art. 27, § 463(a)(2) (1982); MASS. GEN. LAWS ANN. ch. 272, § 5 (West 1970).

⁶⁰ MICH. COMP. LAWS ANN. § 750.342 (West 1968); N.D. CENT. CODE § 12.1-20-06 (1976); WYO. STAT. § 6-97 (1957).

⁶¹ MICH. COMP. LAWS ANN. §§ 750.90, 750.341 (West 1968).

⁶² See, e.g., IOWA CODE ANN. §§ 709.1-709.4, 709.8 (West 1979); MD. ANN. CODE art. 27, §§ 464-464C (1982); MASS. GEN. LAWS ANN. ch. 272, §§ 3, 5 (Cum. Supp. 1978); N.J. STAT. ANN. § 2C:14-2 (Supp. 1984); N.D. CENT. CODE § 12.1-20-03 (Supp. 1983).

⁶³ 70 AM. JUR. 2D *Seduction* § 3 (1973).

⁶⁴ See Note, *Sex Discrimination in the Criminal Law: The Effect of the Equal Rights Amendment*, 11 AM. CRIM. L. REV. 469, 474-75 & n.33 (1973) [hereinafter cited as Note, *Discrimination*].

of the offense is deprivation of a woman's virtue, the "brightest jewel in the crown of her womanhood," by trick or artifice.⁶⁵ The inclusion of this offense in criminal codes further exemplifies the special status women have been accorded based upon the conventional wisdom that they are more vulnerable to undesired sexual intercourse than men. The constitutional issue of gender discrimination in this context has not been raised in any reported case but courts are likely to consider the vulnerability of women as sufficient justification for the validity of seduction statutes that classify according to gender.

Prostitution laws are constantly being attacked as examples of overt sexual discrimination, either because the statutes prohibiting the conduct are directed at females but not males, or because the laws do not provide for criminal liability for patrons, or finally, because the laws are discriminatorily enforced. Although prostitution is usually defined as the offer by a woman to have sexual intercourse for pay,⁶⁶ a majority of states have adopted sex-neutral prostitution statutes.⁶⁷ Many of the states having sex-neutral prostitution laws do not impose any criminal liability upon the prostitute's patron.⁶⁸ Since the decision not to criminalize the acts of the patron is not based upon sexual differences, it does not constitute a suspect classification or raise a gender discrimination issue to be analyzed under the intermediate scrutiny standard, and therefore need only be justified on a rational basis.⁶⁹

The policy supporting criminal liability for the prostitute only focuses on the status of the prostitute and the patron in prostitution transactions. The prostitute is engaged in continuous and indiscriminate sexual activity, while the patron is only sporadically involved. If the intent of prostitution laws is to prevent the spread of venereal disease and to maintain certain standards of public decency, it is questionable whether a statute proscribing criminal liability for the prostitute but not the patron could even withstand the minimum scrutiny test, since the patron is equally capable of causing the undesired effects.⁷⁰

The potential for sex-based discrimination also exists in the enforcement of sex-neutral prostitution laws. Even where laws treat prostitute and patron, male or female, equally, police may only attempt to secure convictions of female prostitutes.⁷¹ While the

⁶⁵ *People v. Gould*, 70 Mich. 240, 245, 38 N.W. 232, 235 (1888). See 70 AM. JUR. 2d *Seduction* § 3 (1973).

⁶⁶ See *People v. Robinson*, 4 Cal. App. 3d 1014, 1017, 84 Cal. Rptr. 922, 923 (1970); *Salt Lake City v. Allred*, 19 Utah 2d 254, 257, 430 P.2d 371, 372 (1967).

⁶⁷ See Rosenbleet & Pariente, *The Prostitution of the Criminal Law*, 11 AM. CRIM. L. REV. 373, 422-27 (1973) [hereinafter cited as Rosenbleet & Pariente]. Three states that still retain female only prostitution statutes, however, have upheld the constitutionality of the statutes against equal protection attack. See *Wilson v. State*, 258 Ind. 3, 6-7, 278 N.E.2d 569, 570-71, cert. denied, 408 U.S. 928 (1972); *State v. Devall*, 302 So. 2d 909, 913 (La. 1974); *State v. Mertes*, 60 Wis. 2d 414, 418-19, 210 N.W.2d 741, 744 (1973). But see *State v. Woods*, No. 443072 (Minneapolis, Minn. Munic. Ct., Dec. 21, 1971) (female only prostitution ordinance held unconstitutional). Rosenbleet & Pariente, *supra*, at 422-27.

⁶⁸ Cf. Rosenbleet & Pariente, *supra* note 67, at 403.

⁶⁹ See *Blake v. State*, 344 A.2d 260, 262-63 (Del. Super. Ct. 1975); *Commonwealth v. King*, 374 Mass. 5, 17-19, 372 N.E.2d 196, 204 (1977).

⁷⁰ But see *State v. Hicks*, 360 A.2d 150, 153-54 (Del. Super. Ct. 1976) (rational basis for imposing greater penalty on prostitute than patron).

⁷¹ See, e.g., *People v. Superior Court of Alameda County*, 19 Cal. 3d 338, 349, 562 P.2d 1315, 1320, 138 Cal. Rptr. 66, 71 (1977) (police employed more male decoys). Other more subtle forms of discrimination may also exist, for example, imposing different standards of proof required for conviction. In one jurisdiction, male prostitution for purposes of sodomy must be established by corroboration whereas other forms of prostitution need not be corroborated. Compare *Wajer v.*

courts have recognized discriminatory enforcement of penal laws as a valid defense to prosecution,⁷² the defendant asserting gender discrimination as a defense must make a strong showing of purposeful discrimination. Because gender is not yet a suspect classification,⁷³ evidence that only women are arrested,⁷⁴ even if by police department policy,⁷⁵ has been deemed insufficient to establish intentional discrimination. Given the Supreme Court's interest in eradicating sex-based discriminatory treatment, something less than a strong showing of intentional enforcement against one sex should be sufficient to meet the burden of proof on this issue.

The foregoing analysis of statutes imposing criminal liability based on gender is intended to be an illustrative and not exhaustive survey of crimes limited to one sex.⁷⁶ These examples demonstrate that legislatures and courts have continued to adhere to the notion that gender represents a valid basis for distinction in imposing criminal liability. Because in most cases women have been shielded from prosecution for acts which would be criminal if committed by men, the impact of these laws on women is at least superficially benign. The harm, however, lies in the attitudes that such laws foster. The underlying theme is that men and women are different and as such can be treated differently — and unequally — in practices involving sentencing and conditions of incarceration.

B. Sentencing Disparity

Although courts have struck down gender-based disparities in sentencing statutes on equal protection grounds, courts generally continue to accept disparities justified by physiological differences.⁷⁷ The protective attitude toward women that underlies enactment of rape and other statutes directed at men only is further manifested in sentencing laws. One type of sentencing statute involves the imposition of indeterminate sentences upon women for the same crimes for which males would receive fixed terms. Conventional wisdom concerning female offenders was that women were more susceptible to rehabilitation than men and thus should be kept institutionalized for as long as needed to

United States, 222 A.2d 68, 69 (D.C. 1966) (no corroboration needed to commit female prostitute) with *Kelly v. United States*, 194 F.2d 150, 155 (D.C. Cir. 1952) (corroboration required in conviction of male for homosexual conduct).

⁷² *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). See also *Alexander v. Louisiana*, 405 U.S. 625, 626-32 (1972).

⁷³ See, e.g., *Cook v. City of Price*, 566 F.2d 699 (10th Cir. 1977); *United States v. Sacco*, 428 F.2d 264 (9th Cir. 1970), cert. denied, 400 U.S. 903 (1970).

⁷⁴ See, e.g., *Blake v. State*, 344 A.2d 260, 263 (Del. Super. Ct. 1975).

⁷⁵ See *Commonwealth v. King*, 374 Mass. 5, 372 N.E.2d 196 (1977). In this case the court affirmed the conviction of a female for prostitution despite a showing by the defendant that the police department had a policy of arresting females, but not males, for violating the prostitution statute. *Id.* at 18, 372 N.E.2d at 205. The court reasoned that the defendant had offered no evidence on the issue of whether male prostitutes were charged with violations of other offenses, such as sodomy. *Id.* at 18-19, 372 N.E.2d at 205. The court indicated, therefore, that given such a showing it would have found for the defendant. The court also stated, in dictum, that under the then newly enacted equal rights amendment to the state constitution gender was recognized as a suspect classification and that discriminatory enforcement of the prostitution law would thereafter be unconstitutional. *Id.* at 19-22, 372 N.E.2d at 205-07.

⁷⁶ For a more comprehensive discussion of criminal liability predicated upon gender, see generally, Note, *Discrimination*, *supra* note 64.

⁷⁷ The authors here take notice that males and females are physically dissimilar. The differences translate into varied needs in areas such as hygiene, medical care, food and nutrition, and clothing.

achieve the desired goal.⁷⁸ To implement this theory, some states created special facilities for women and separate sentencing statutes for all offenders sent to such facilities.⁷⁹ Perhaps the most familiar example was the Pennsylvania statute known as the "Muncy Act."⁸⁰ The Muncy Act required the sentencing judge to issue a general sentence to women convicted of offenses punishable by more than one year imprisonment, to issue a three-year sentence if the maximum permitted by law was three years or less, or to fix the term at the maximum allowable where the permissible term was longer than three years.⁸¹ The sentencing judge, therefore, had no discretion to issue less than the maximum sentence or to provide a minimum sentence with eligibility for parole for female offenders, as could be done for male offenders.⁸² Another invidious effect of the Muncy Act was that most women were sent to the penitentiary at Muncy for offenses which if committed by a male would only result in a county jail term.⁸³

Constitutional attack on equal protection grounds brought about changes in the Muncy Act and similar statutes in other states. Judicial decisions have invalidated the indeterminate type of sentencing for women for a variety of reasons⁸⁴ and have rejected many of the stereotypes⁸⁵ that still pervade the legislative treatment of criminal liability of women. In *Commonwealth v. Daniel*,⁸⁶ the court, in overturning the Pennsylvania Muncy Act, held that no rational basis existed to distinguish between men and women in the imposition of a sentence for the same crime.⁸⁷

In *State v. Chambers*, the Supreme Court of New Jersey, noting the fundamental nature of the interest involved, subjected that state's sentencing statute to a rigorous process of evaluation.⁸⁸ Earlier, when the issue of unequal sentencing treatment for

⁷⁸ See Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 326-27 (1974); Temin, *Discriminatory Sentencing of Women Offenders: The Argument for ERA in a Nutshell*, 11 AM. CRIM. L. REV. 355, 358 (1973) [hereinafter cited as Temin].

⁷⁹ States that had authorized the establishment of rehabilitative institutions included Connecticut, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, and Wisconsin. See Temin, *supra* note 78, at 358 & n.15.

⁸⁰ PA. STAT. ANN. tit. 61, § 566 (Purdon 1964), amended by PA. STAT. ANN. tit. 61, § 566 (Purdon Supp. 1984).

⁸¹ *Id.*

⁸² See, e.g., *Commonwealth v. Sheaffer*, 149 Pa. Super. 51, 53, 63, 23 A.2d 215, 217, 221 (1941).

⁸³ See Temin, *supra* note 78, at 360-61.

⁸⁴ The reasons given by courts for invalidating indeterminate sentencing include fourteenth amendment equal protection grounds, violations of state constitutions, and public policy reasons that embody the concept that the commission of like crimes requires the imposition of similar penalties.

⁸⁵ Examples of such stereotypes include the idea that an assault committed by a female cannot be as damaging as an assault committed by a male, that prostitution is a woman's profession, and that males deserve more severe punishment for incest than women. The most significant stereotype, however, is the idea that women are more amenable to rehabilitation than men.

⁸⁶ 430 Pa. 642, 243 A.2d 400 (1968).

⁸⁷ *Id.* at 650, 243 A.2d at 404. The court noted the existence of physical and biological differences between the sexes but said that none of these differences was relevant to a determination of sentence. *Id.* at 649-50, 243 A.2d at 403-04.

⁸⁸ *State v. Chambers*, 63 N.J. 287, 296, 307 A.2d 78, 82 (1973). For comments on *Chambers*, see Comment, *Sex Discrimination — Disparate Sentencing of Male and Female Offenders Violates Equal Protection — State v. Chambers*, 8 SUFFOLK U.L. REV. 830 (1974); Comment, *Sex Discrimination in Sentencing Criminal Offenders is Unconstitutional*, 50 N.D. L. REV. 359 (1974); Comment, *State v. Chambers: Sex Discrimination in Sentencing*, 1 NEW ENG. J. PRISON L. 138 (1974); Casenote, *Disparate Statutory Sentencing Schemes for Males and Females Declared Unconstitutional: State v. Chambers*, 23 CATH. U.L. REV. 389 (1973).

women offenders was first presented to the court,⁸⁹ the court had remanded the case for rehearing, ruling that the State of New Jersey would be required to demonstrate a "substantial justification empirically grounded to the greatest extent possible."⁹⁰ Subsequently, in *State v. Chambers*, the state attempted to show that the facilities for women were intended to rehabilitate and that women were more amenable to such treatment than men.⁹¹ The court rejected the state's statistics on recidivism as being of questionable validity.⁹² According to the court, the state's evidence at the most established the existence of emotional differences, but not of any "differences in capacity for intellectual achievement, self-perception, self-control, or the ability to change attitude and behavior, adjust to social norms and accept responsibility."⁹³ Thus, the court held that there was no basis to incarcerate only women for an indeterminate term.⁹⁴

A federal district court declared the Connecticut indeterminate sentencing statute to be unconstitutional in *United States ex rel. Robinson v. York*⁹⁵ under a "strict scrutiny" approach.⁹⁶ The court rejected the same arguments raised in *Chambers*,⁹⁷ that is, that women's institutions were rehabilitative and that longer sentences were required to accomplish the desired goal.⁹⁸ The court discussed deterrence as a goal but could not find any evidence to sustain longer sentences for women predicated upon such a goal.⁹⁹

Chambers, *Daniel*, and *Robinson* are significant developments in the evolution of sex-neutral sentencing provisions. These cases subjected the accepted notions of penological treatment of female offenders to substantial scrutiny and discarded many sex-based theories as unsubstantiated. Under the standards adopted in these cases, any future sex-based classifications in sentencing statutes will have to be founded on empirical evidence establishing a substantial justification to survive constitutional attack. A further result of these cases may be a more critical evaluation of indeterminate sentencing regardless of sex. The failure of the states to demonstrate that women were benefiting more than men from rehabilitation to any measurable degree — even though women were assertedly more susceptible to rehabilitation — could raise doubts about the state's ability to rehabilitate male and female prisoners, and casts doubt on any statistical study proffered by the state to support such a claim.¹⁰⁰

Statutes imposing heavier sentences on males for similar crimes have generally withstood attack on equal protection grounds. The Illinois Supreme Court in *People v.*

⁸⁹ See *State v. Costello*, 59 N.J. 334, 282 A.2d 748 (1971).

⁹⁰ *Id.* at 346, 282 A.2d at 755.

⁹¹ 63 N.J. at 295, 307 A.2d at 82.

⁹² *Id.* The court also noted that almost all the witnesses had agreed that no penological reason justified indeterminate sentencing for women only. *Id.*

⁹³ *Id.* at 296, 307 A.2d at 82.

⁹⁴ *Id.* at 296-97, 307 A.2d at 82-83.

⁹⁵ 281 F. Supp. 8 (D. Conn. 1968).

⁹⁶ *Id.* at 14-17. The court analogized gender-based classifications of women to classifications made on the basis of race. *Id.* at 14. Other courts declared the same statute to be unconstitutional based upon the less stringent rational basis test. See *United States ex rel. Sumrell v. York*, 288 F. Supp. 955, 956-57 (D. Conn. 1968); *Liberti v. York*, 28 Conn. Supp. 9, 10-11, 246 A.2d 106, 107 (Conn. Super. Ct. 1968).

⁹⁷ 63 N.J. at 295-96, 307 A.2d at 82.

⁹⁸ *Robinson*, 281 F. Supp. at 15-16.

⁹⁹ *Id.* at 16.

¹⁰⁰ As will be demonstrated in the next section of the article, the absence of rehabilitative results for women may well be the result of a failure to appropriate necessary resources rather than a failure of penal theory. See *infra* text accompanying notes 108-387.

Boyer,¹⁰¹ for example, held that under either a rational basis or a strict scrutiny test, the imposition of a heavier penalty upon a male who commits incest with a female child was justifiable.¹⁰² The court cited the state's interest in protecting female victims from pregnancy and psychological harm as support for its conclusion.¹⁰³ Another example was the First Circuit's decision in *Wark v. Robbins*,¹⁰⁴ upholding on equal protection grounds the constitutionality of a Maine statute that imposed a heavier penalty on males than on females for escape from prison.¹⁰⁵ The court in *Wark* held that the convicted male offender failed to meet his burden of proof on the threshold issue of whether males and females were similarly situated.¹⁰⁶ The court, noting the substantial difference in statutory treatment of security at prisons for males and females, such as the possession of firearms by guards at male institutions and the heavier penalties imposed on men for assisting escape, reasoned that the potential for male escape creates a greater risk of harm to others than does the potential for female escape.¹⁰⁷

An analysis of the cases involving gender-based classifications indicates that gender-based classifications have not been eliminated in sentencing provisions. Gender-based classifications are generally held to pass constitutional muster if they relate to physiological differences between the sexes or are attempts to protect women from what is perceived to be a greater risk of serious harm.

III. DISCRIMINATORY TREATMENT OF WOMEN IN PENAL INSTITUTIONS

Sex-based discrimination in assigning criminal liability and imposing sentences is coupled with discrimination in correctional institutions. The correctional system has long been male dominated. The rules, structure, programs, and standard operating procedures of the system were adopted and implemented on the assumption that they were to be largely applied to male prisoners. The result, however benign and unintentional, has been the discriminatory treatment of female prisoners. This disparate treatment is evident in a number of areas in penal institutions. This section of the article will identify the areas where disparate treatment exists, and will discuss previous attempts to remedy the disparities. The section of the article that follows will suggest possible solutions to the problems presented. Discussion of the gender discrimination problems identified will take

¹⁰¹ 63 Ill. 2d 433, 349 N.E.2d 50 (1976).

¹⁰² *Id.* at 436, 349 N.E.2d at 51.

¹⁰³ *Id.* at 436, 349 N.E.2d at 51-52.

¹⁰⁴ 458 F.2d 1295 (1st Cir. 1972).

¹⁰⁵ *Id.* at 1295-96, 1299.

¹⁰⁶ *Id.* at 1297-98. Other cases sustaining heavier penalties directed against males include cases involving an assault statute imposing a maximum two-year sentence on males and a 30-day sentence on females, *see State v. Gurganus*, 39 N.C. App. 395, 250 S.E.2d 668 (1979), and the felony murder rule based upon the commission of a rape wherein rape is only one of the statutorily recognized classes of criminal sexual conduct, *see People v. McDonald* 86 Mich. App. 5, 272 N.W.2d 179 (1978). Again, physiological reasons were given to support the results. Although the assault case purported to apply the "important government objective" test of *Gurganus*, it did not rely upon empirical evidence to establish a greater risk of harm from male assaults nor legislative history to show a clear intent to protect against this risk. Without such substantiation, the court was simply relying upon a rational basis test *sub silentio*. *See generally State v. Gurganus*, 39 N.C. App. 395, 250 S.E.2d 668 (1979).

In a case that anticipated *Craig v. Boren*, a Texas court declared that the state could not impose confinement on seventeen-year-old males convicted of drunk driving when females could only be subject to a fine for the same offense. *Ex parte Tullos*, 541 S.W.2d 167 (Tex. Crim. App. 1976).

¹⁰⁷ *Wark*, 458 F.2d at 1298.

into account the interrelationship between the specific problem areas and the correctional process as a whole — an interrelationship often overlooked by analysts keen on eradicating isolated discriminatory practices.

*A. Institutional Designations, Transfers and Classifications Within
the Women's Correctional System*

Due to the small number of prison facilities for women, their location, and the application of programs designed for correctional facilities for men, women are confronted with discriminatory treatment in the designation,¹⁰⁸ transfer,¹⁰⁹ and classification¹¹⁰ phases of incarceration. After sentencing, the most important decision affecting an offender and the achievement of society's rehabilitative, retributive, incapacitative, or punitive goals is ordinarily an evaluation regarding the most appropriate correctional institution and program for each offender.¹¹¹ This decision determines whether an inmate is placed near to family and friends so that positive relationships can be maintained. Although many states maintain several correctional institutions for men in various locations throughout the state, few have more than one prison for women.¹¹² While prisons for women are generally located in rural areas,¹¹³ male prisoners have a greater likelihood of being assigned to an institution in an urban area near home, educational, and vocational opportunities.¹¹⁴ Therefore, women are at a disadvantage with respect to maintaining family relationships and acquiring an education or useful vocational skills while in prison.

Some states do not even have in-state prison facilities for women and send their female prisoners to other states.¹¹⁵ The problems of interstate transfers were exemplified in *State ex rel. Olson v. Maxwell*.¹¹⁶ The controversy in *Maxwell* arose because North Dakota did not then have adequate in-state correctional facilities for women, and the sentencing

¹⁰⁸ Designation is the process through which it is determined to which facility a prisoner will be assigned.

¹⁰⁹ Transfer refers to the removal of an inmate from one general prison population to another, or to a restricted population or isolation for either administrative or punitive purposes. See *MANUAL OF CORRECTIONAL STANDARDS*, *supra* note 1, at 360.

¹¹⁰ Classification refers to the determination of the prisoner's program of treatment, training, employment, care and custody, and, in some instances, the recommendation of a transfer to a more suitable institution. See *MANUAL OF CORRECTIONAL STANDARDS*, *supra* note 1, at 351.

¹¹¹ Designation can be the result of a simple selection process involving limited alternatives or a sophisticated analysis using information prepared in a pre-sentence analysis report and diagnostic techniques. In addition, rather than being a product of the correctional system, it may be set as a condition of a plea bargain. For an indication of the impact of the classification-designation decision upon inmates, see R. GLICK & V. NETO, *NATIONAL STUDY OF WOMEN'S CORRECTIONAL PROGRAMS* 52 (1977) [hereinafter cited as R. GLICK & V. NETO].

¹¹² Fabian, *Toward the Best Interests of Women Prisoners: Is the System Working?*, 6 *NEW ENG. J. PRISON* L. 1, 17 (1979) [hereinafter cited as Fabian].

¹¹³ See R. GLICK & V. NETO, *supra* note 111, at 11-13.

¹¹⁴ These locational disadvantages have been partially overcome by greater availability of community treatment centers. See, e.g., MD. ADMIN. CODE § 12.02.03; OKLA. STAT. ANN. tit. 57, § 504.3 (Curr. Supp. 1979-80); PA. STAT. ANN. tit. 61, § 460.11 (Purdon Supp. 1984).

¹¹⁵ Fabian, *supra* note 112, at 17; see also, Note, *The Sexual Segregation of American Prisons*, 82 *YALE L.J.* 1229, 1233 (1973) [hereinafter cited as Note, *Sexual Segregation*].

¹¹⁶ 259 N.W.2d 261 (N.D. 1977). A similar result was reached in two lower court cases in the same state. See *State v. Iverson*, No. 9138 (N.D. Dist. Ct. March 23, 1973); *State v. Wright*, No. 9138 (N.D. Dist. Ct. March 23, 1973).

judge had specified that the defendant could only be incarcerated within state.¹¹⁷ The state's attorney general sought to have the order set aside because otherwise the defendant would have to be put into permanent protective custody without the benefit of recreation, work, or other rehabilitative programs the state was unable to provide.¹¹⁸ The North Dakota Supreme Court found that female prisoners assigned to out-of-state institutions suffered a grievous loss by being denied the same opportunity as male prisoners to appear in person before the parole board, by having fewer visits from families and friends, and by having reduced opportunity to confer with counsel.¹¹⁹ Furthermore, the court held that the transfer of women prisoners to out-of-state facilities was based upon sex alone and was inherently suspect under the state constitution.¹²⁰ The court refused to accept the lack of state funds as a justification and ordered that the female inmate be sent to an in-state facility.¹²¹ Execution of this order was postponed until the legislature could meet to authorize the necessary expenditures.¹²² In the meantime, out-of-state transfers were allowed after a hearing.

Since most states have at least one in-state women's correctional facility, the factual circumstances that gave rise to the issue presented in *Maxwell* may never materialize again. The reasoning of *Maxwell*, however, may still be applicable to instances of out-of-state transfers of selected prisoners for rehabilitation and training in the absence of in-state facilities.¹²³ If the absence of facilities is not based on gender, as it was in *Maxwell*, no constitutional theory exists to prevent the state from transferring prisoners to out-of-state facilities, assuming good faith.¹²⁴ If the state's failure to provide the facilities is related to the prisoner's sex, however, then *Maxwell* may still provide a basis for constitutional attack. The United States Supreme Court in two companion cases, *Meachum v. Fano*¹²⁵ and *Montayne v. Haymes*,¹²⁶ rejected constitutional attacks upon the practice of intrastate transfers, holding that an inmate has no right to be sent to or to remain in a particular institution that might be more conducive to his or her particular rehabilitation.¹²⁷ Thus, except for the *Maxwell* situation, prisoners have no absolute right to be

¹¹⁷ *Maxwell*, 259 N.W.2d at 624-25.

¹¹⁸ *Id.* at 625.

¹¹⁹ *Id.* at 630-31.

¹²⁰ *Id.* at 631.

¹²¹ *Id.* at 631-32.

¹²² *Id.* at 632. The court applied a variation of the so-called "Sunburst Rule," derived from *Great Northern Railway v. Sunburst Oil & Refining Company*, 287 U.S. 358 (1932), wherein the particular rule of law derived from the case is not applied to the parties, but prospectively only. 259 N.W.2d at 632.

¹²³ See, e.g., GA. CODE ANN. § 77-309 (1982); HAWAII REV. STAT. § 50 (1976); ME. REV. STAT. ANN. tit. 15, § 295 (1964); MONT. CODE ANN. § 80-1907 (1983); NEV. REV. STAT. §§ 209.300-330 (1974); WYO. STAT. §§ 9-16-160 - 163 (1977).

¹²⁴ Transfers as retaliation for the exercise of a constitutional right, however, are still subject to review. See *Buisse v. Hudkins*, 584 F.2d 223, 229, 232 (7th Cir. 1978).

¹²⁵ 427 U.S. 215 (1976).

¹²⁶ 427 U.S. 236 (1976).

¹²⁷ In *Meachum*, the Court held that due process does not protect the inmate from being transferred to another less hospitable institution within the same state. 427 U.S. at 225. In *Montayne*, the Court added that a transfer could occur without a hearing even if the inmates' alleged conduct was the cause for the transfer. 427 U.S. at 242. Lower federal courts and state courts have applied these decisions to interstate prisoner transfers. See, e.g., *Currey-Beg v. Jackson*, 422 F. Supp. 926 (D.D.C. 1976); *Rebideau v. Stoneman*, 398 F. Supp. 805 (D. Vt. 1975); *Girourard v. Hogan*, 135 Vt. 448, 378 A.2d 105 (1977). Where there are state created rights or expectations, however, a hearing is

incarcerated in a particular prison.

In states with only one correctional institution for women, the key post-sentencing decision does not involve the choice of the institution to which to send a prisoner, but rather the choice of the dormitory or cottage within the prison to which a prisoner should be assigned. Because of the smaller number of female prisons, prison populations in these institutions are more heterogeneous than are populations in prisons for men. While men can be assigned to various prisons based upon the severity of their offense, security risks or rehabilitative needs, all women are grouped together in one institution regardless of their needs or problems. Correspondingly, while prisons for men may be designed to deal with the needs of specific types of prisoners, a correctional institution for women must provide a broader range of services and programs.¹²⁸ Women's facilities have not always met this challenge. Moreover, a heterogeneous population presents problems for the classification and separation of female prisoners on the basis of security risk, behavior and background. While some states have separate maximum, medium, and minimum security facilities for men, some of the same states house all women, regardless of their security risk, in the same institution. For many female prisoners the security measures are thus overly restrictive.¹²⁹ Female prisoners have challenged the resulting classification systems as discriminatory and have argued that such systems turn institutions originally designed to be rehabilitative into punitive prisons.¹³⁰

In *Canterino v. Wilson*,¹³¹ for example, the District Court for the Western District of Kentucky was faced with two entirely different classification systems in the Kentucky correctional system, one for men and one for women. While the system for men rewarded good behavior, the system for women punished violations of rules by taking away privileges.¹³² The classification system for women was a behavior modification program¹³³ which regulated virtually every aspect of an inmate's prison life including visitation, personal hygiene, recreation, and other privileges. The system was highly subjective and not validated by professional testing.¹³⁴ The court found that while the stated goals of the classification system for females were to promote personal growth, a positive attitude, and socially accepted behavior, the system actually produced the opposite results.¹³⁵ In addition, female inmates were not evaluated for purposes of security and treatment on the basis of standard criteria indicating their potential and willingness to adjust to prison life.¹³⁶ Rather than controlling troublemakers by isolation and other measures, the entire

required prior to the transfer and reasons must be given for the decision. See *Meachum*, 427 U.S. at 229.

In states where hearings are required, a woman inmate could assert the presence of special circumstances that would create a hardship for her, such as the existence of infant children. In such circumstances, given the wide discretion allowed to prison administrators, see *Wakinekona v. Olin*, 459 F. Supp. 473 (D. Hawaii 1978), *aff'd*, 461 U.S. 238 (1983), the inmate will have to demonstrate a strong need to remain at the present location to avoid the transfer.

¹²⁸ *Fabian*, *supra* note 112, at 17.

¹²⁹ *Id.*

¹³⁰ See *Canterino v. Wilson*, 546 F. Supp. 174 (W.D. Ky. 1982); *Barefield v. Leach*, Civil No. 10282 (D. N. Mex. 1974), *cited in* *Glover v. Johnson*, 478 F. Supp. 1075, 1078-79 (E.D. Mich. 1979).

¹³¹ 546 F. Supp. 174 (W.D. Ky. 1982).

¹³² *Id.* at 182, 184.

¹³³ *Id.* at 180.

¹³⁴ *Id.* at 182.

¹³⁵ *Id.* at 181.

¹³⁶ *Id.* at 182.

female population was subjected to a mandatory system of behavior modification.¹³⁷ None of the prisons for men had a comparable system and no male prisoners were subjected to a system that restricted the exercise of normal privileges.¹³⁸

In holding that the classification systems in Kentucky unconstitutionally discriminated against women, the court found that correction officials had either implicitly or consciously decided that women were less capable than men of handling basic privileges.¹³⁹ Women were restricted from exercising normal privileges while men were not "because of an exaggerated fear that administrative inconvenience would result if female inmates were allowed the same modicum of freedom as male inmates These restrictions were imposed solely because of gender with the objective of controlling the lives of women inmates in a way deemed unnecessary for male prisoners."¹⁴⁰ The court held that a state policy that presumes that members of one gender suffer from an inherent handicap or are innately inferior is illegitimate.¹⁴¹ The court found, therefore, that the classification system, based on gender and unrelated to any important governmental objective, violated the equal protection clause of the fourteenth amendment.¹⁴² The approach adopted in *Canterino* is the only approach consistent with constitutional policy.

B. Constraints Upon the Maintenance of Family Relationships

Maintenance of strong family relationships can foster rehabilitation within the prison environment and successful reintegration into the community upon release.¹⁴³ Conversely, prison procedures that unreasonably curtail visitation and telephone contact between family members can contribute to future crime because destruction of family relationships can lessen the incentive for ex-offenders to lead law-abiding lives. Some evidence indicates that women have a greater need to maintain stable family relationships than men.¹⁴⁴ A recent study indicated that this need is so great that family type relationships develop within women's prisons:

According to a survey of the literature on women's prisons, the majority of females in prison are members of make-believe families. In the typical family thus described, inmates play the roles of mother, father, sister, or brother to each other. The father role generally would be assumed by a masculine-appearing woman (butch); his wife (femme) would take on the mother role in

¹³⁷ *Id.*

¹³⁸ *Id.* at 180-82.

¹³⁹ *Id.* at 206-07.

¹⁴⁰ *Id.* at 207.

¹⁴¹ *Id.* (citing *Hogan v. Mississippi University for Women*, 458 U.S. 718, 724 (1982)).

¹⁴² *Id.* For other cases where courts have found classification and reward systems that discriminate against women unconstitutional, see *Mitchell v. Untreiner*, 421 F. Supp. 886, 895 (N.D. Fla. 1976); *Barefield v. Leach*, Civ. No. 10282 (D. N. Mex. 1974), cited in *Glover v. Johnson*, 478 F. Supp. 1075, 1078-79 (E.D. Mich. 1979); *Molar v. Gates*, 98 Cal. App. 3d 1, 18, 159 Cal. Rptr. 239, 249-50 (1979); *People v. Andrea*, 48 Mich. App. 310, 314-15, 210 N.W.2d 474, 477 (1973) (unequal reward systems would be unconstitutional, although none found here).

¹⁴³ Maintenance of an inmate's ties with the family has been shown to be the most important factor in successful reintegration. See N. HOLT AND D. MILLER, EXPLANATIONS IN INMATE FAMILY RELATIONSHIPS 61 (1972) (published by the California Department of Corrections, Research Division).

¹⁴⁴ *Id.* at 61-62.

relation to several other, perhaps younger inmates. 'The parent fulfills the desire to nurture; the child has her need to be nurtured fulfilled' . . . family membership are the norm in institutions that are exclusively female.¹⁴⁵

The location of institutions and the institutions' visitation procedures also contribute to imprisonment having a disproportionate impact on the family relationships of women as compared to those of men.¹⁴⁶ Often institutions for women are located in remote areas where the female inmates have more limited access to family, friends and attorneys than the access available to male inmates who can be incarcerated near their home communities.¹⁴⁷ Visitation procedures can foster family relationships. Family relationships are difficult to maintain, however, when visitation procedures prevent contact visits¹⁴⁸ by placing a screen or glass partition between family members. Elimination of contact visits is administratively desirable since security concerns often mandate strip and cavity searches after each outside contact. This procedure is time consuming and often requires additional correctional staff. Similarly, short visiting hours tend to discourage visits by relatives who have to travel long distances. Restrictions on the use of telephones similarly prevent maintenance of strong family relationships.

Attempts by both male and female prisoners to maintain family relationships have resulted in considerable litigation, with different outcomes. While it is generally recognized that prisoners do not have an absolute right to see visitors,¹⁴⁹ courts differ as to how much deference should be given to administrative regulations on this issue. In reality, prison officials' decisions are accorded great deference by the courts in the scheduling of visits and the type of visitors permitted.

Denial of contact visits has been frequently challenged on constitutional grounds with varying results.¹⁵⁰ The Supreme Court in *Block v. Rutherford*¹⁵¹ recently stated that security interests outweigh the family's right to contact visits.¹⁵² The Court's decision accorded great deference to the security concerns reflected in the visitation policies of professional correctional officials.¹⁵³ Justice Burger, writing for the Court, stated that policies restricting contact visits must be reasonably related to security interests.¹⁵⁴ The Court found that Los Angeles County's blanket prohibition of contact visits was "an entirely reasonable,

¹⁴⁵ Van Wormer, *Social Function of Prison Families: The Female Solution*, 9 J. PSYCH. LAW 181, 182 (1981) [hereinafter cited as Van Wormer].

¹⁴⁶ See Comment, *Women's Prisons: Laboratories for Penal Reform*, 1973 WIS. L. REV. 210, 221-22. See generally R. GLICK & V. NETO, *supra* note 111.

¹⁴⁷ L. CRITES, *THE FEMALE OFFENDERS* 123-24 (1976) [hereinafter cited as L. CRITES].

¹⁴⁸ Contact visits occur when a prisoner is visited by an individual from outside the prison population and prison staff. These visits are face to face and actual physical contact is allowed, thus creating the possibility that weapons or other forbidden items could be given to the prisoner.

¹⁴⁹ See, e.g., *Wojtczak v. Cuyler*, 480 F. Supp. 1288 (E.D. Pa. 1979); *In re Carrafa*, 77 Cal. App. 3d 788, 793, 143 Cal. Rptr. 848, 851 (1978). But see *Valentine v. Englehardt*, 474 F. Supp. 294 (D. N.J. 1979) (denial of visitation rights to inmate's children unconstitutional).

¹⁵⁰ See, e.g., *Moore v. Janning*, 426 F. Supp. 464, 467-68 (S.D.N.Y. 1977) (where the court held that denial of contact visits was not unconstitutional). But see *Inmates of the Allegheny County Jail v. Pierce*, 612 F.2d 754, 758-59 (3d Cir. 1979); *White v. Keller*, 588 F.2d 913, 914 (4th Cir. 1978); *Bono v. Saxbe*, 450 F. Supp. 934, 947 (E.D. Ill. 1978) (where prison security has been considered as a justifiable basis for refusing to allow contact only between pre-trial detainees and visitors).

¹⁵¹ 104 S. Ct. 3227 (1984).

¹⁵² *Id.* at 3232, 3233.

¹⁵³ *Id.* at 3232.

¹⁵⁴ *Id.*

non-punitive response to legitimate security concerns, consistent with the Fourteenth Amendment."¹⁵⁵

In spite of the uncertainties as to what visitation restrictions are constitutionally permissible, denial to women of the same visiting privileges that are given to men constitutes a violation of equal protection unless there is a substantial government interest to be protected.¹⁵⁶ The court in *Canterino v. Wilson*, for example, found that female prisoners in Kentucky were denied equal protection by state policies that allowed male prisoners twice as much visitation time as female prisoners and that allowed men unlimited access to telephone calls during free time while allowing women no more than fifteen minutes per month for telephone calls.¹⁵⁷ The *Canterino* court held that to the extent that the correctional system imposed restrictions on female inmates in the exercise of privileges routinely allowed to male inmates that could be accorded all prisoners without compromising legitimate correctional needs, the system violated the equal protection clause of the fourteenth amendment. According to the court, the restrictions on the exercise of normal privileges do not serve any important governmental function and therefore can not withstand constitutional scrutiny.¹⁵⁸

Budgetary considerations and physical protection of female inmates were rejected in *Molar v. Gates*¹⁵⁹ as adequate justifications for denying female inmates an equal right to contact visits.¹⁶⁰ While male inmates in county jails could have contact visits, the female inmates in *Molar* were separated from their visitors by a glass partition so that they could not touch their visitors or hold infants.¹⁶¹

C. Incarceration and Its Effect on Parental Rights

For female offenders the greatest constraints of incarceration are both the potential for termination of parental rights and the limited contact with their children.¹⁶² In this respect, imprisonment has a disproportionately greater effect on women than on men. One study found that "the role of mother is more crucial for the mother herself than is the father's role to him, and . . . her separation from her children, and the concomitant major change in her role, more directly strike at her essential personal identity and her self-image as a woman."¹⁶³ Recent analysis by institutions engaged in sociological gender

¹⁵⁵ *Id.* at 3234.

¹⁵⁶ *Canterino v. Wilson*, 546 F. Supp. 174 (W.D. Ky. 1982).

¹⁵⁷ *Id.* at 184, 201.

¹⁵⁸ *Id.* at 207. In citing to *Hogan v. Mississippi University for Women*, 458 U.S. 718, 724 (1982), the court was applying the principles and test established in *Craig v. Boren*, 429 U.S. 190, 197 (1976).

¹⁵⁹ 98 Cal. App. 3d 1, 159 Cal. Rptr. 239 (4th Dist. 1979).

¹⁶⁰ *Id.* at 10, 27, 159 Cal. Rptr. at 244, 253.

¹⁶¹ *Id.* at 7-8, 159 Cal. Rptr. at 242-43.

¹⁶² See K. GABEL, 'THE LEGAL ISSUES OF FEMALE INMATES 2-3, 51-88 (1982) (printed by the School for Social Work, Smith College and National Institute of Corrections) [hereinafter cited as K. GABEL] for survey results indicating that the primary concern of female inmates with children is over custody and family issues.

As this article was being readied for publication, the American Correctional Association released a new work dealing with the issue of inmates and parental responsibilities. See generally J. BOUDOURIS, PRISONS AND KIDS, PROGRAMS FOR INMATE PARENTS (American Correctional Association 1985).

¹⁶³ L. CRITES, *supra* note 147, at 101 (quoting S. FALBA, WOMEN PRISONERS AND THEIR FAMILIES (1968)).

research concluded that the enforced emotional detachment¹⁶⁴ of male prisoners is less severe because a father generally has less of an emotional bond to his children and because he often leaves a wife behind to care for them.¹⁶⁵ Recent studies also indicate that between sixty and eighty percent of incarcerated females have children and approximately half of the inmate mothers are the sole supporters of their children.¹⁶⁶ While inmate fathers can depend on their children's mother to care for their children, most inmate mothers must rely on someone other than the father to care for their children. One study revealed that eighty percent of the inmate mothers left their children with their mothers upon incarceration.¹⁶⁷ Maintenance of the parent-child relationship is not only an important factor in the rehabilitation and mental health of the female inmate,¹⁶⁸ but it is also crucial to the development and maturation of their children.¹⁶⁹ Despite the importance of maintaining strong family relationships, many correctional institutions for women have not established adequate programs for maintaining such relationships,¹⁷⁰ while some institutions even have procedures that discourage visitation.¹⁷¹ Furthermore, most correctional institutions have not adopted provisions for pregnant women or for women with newborn children.¹⁷²

Termination of parental rights is traumatic for both the child and the parent.¹⁷³ Although most statutes dealing with the termination of parental rights do not specify imprisonment as an automatic ground for termination of these rights, there are some state statutes that do so specify, thereby imposing punishment additional to incarceration for the commission of a crime.¹⁷⁴ These latter statutes create a presumption of unfitness due to the inability of a parent to perform parental duties. These statutes do not take into

¹⁶⁴ Enforced emotional detachment describes the situation occurring when incarceration in a correctional institution results in severance of the parent-child relationship both physically and emotionally.

¹⁶⁵ Note, *Mothers Behind Bars: A Look at Parental Rights of Incarcerated Women*, 4 NEW ENG. J. OF PRISON L. 141, 142-43 (1977) [hereinafter cited as *Mothers Behind Bars*].

¹⁶⁶ *Id.* at 142-43 & n.53. See generally *Female Offenders Problems and Programs*, FEMALE OFFENDER RESOURCE CENTER, NATIONAL OFFENDER SERVICE COORDINATION PROGRAM, AMERICAN BAR ASSOCIATION (1976); MCGOWAN AND BLUMENTHAL, *WHY PUNISH THE CHILDREN? A STUDY OF WOMEN PRISONERS* (1978) (published by the National Council on Crime and Delinquency).

¹⁶⁷ R. GLICK & V. NETO, *supra* note 111, at 119 cited in *Mothers Behind Bars*, *supra* note 165, at 143 n.10. See also Haft, *Women in Prison: Discriminatory Practices and Some Legal Solutions*, 8 CLEARINGHOUSE REV. 1, 4 n.27 (1974) [hereinafter cited as Haft]. Another study revealed that female inmates had an average of 2.43 children as compared to 1.3 for males. Sack, Seidler & Thomas, *The Children of Imprisoned Parents: A Psychosocial Exploration*, 46 AM. J. OF ORTHOPSYCHIATRY 618 (1974), cited in *Mothers Behind Bars*, *supra* note 165, at 143.

¹⁶⁸ K. GABEL, *supra* note 162, at 86.

¹⁶⁹ Rippon and Hassell, *Women, Prison and the Eighth Amendment*, 12 N.C. CENT. L.J. 434, 448 (1981); Van Wormer, *supra* note 145, at 181.

¹⁷⁰ See Note, *On Prisoners and Parenting: Preserving the Tie that Binds*, 87 YALE L.J. 1408 (1978) for an analysis of the parent-child bond and the effects of current prison practices on children.

¹⁷¹ A 1974 survey of 81 federal and state prisons revealed that 39 institutions did not have any programs for the inmates' children. CRIME AND DELINQUENCY LITERATURE, SUMMARY REPORT ON PRISON NURSERY STUDY COMMITTEE 36 (1975).

¹⁷² L. CRITES, *supra* note 147, at 101, 121-24.

¹⁷³ Research has shown that the early years of a child's life are critical to the formation of that child's personality and intellect. The mother plays an indispensable role in her child's growth. In its present form, however, incarceration makes it virtually impossible for an imprisoned mother to provide the support necessary for the child's satisfactory development. See generally J. BECK, *HOW TO RAISE A BRIGHTER CHILD* 161 (1975).

¹⁷⁴ Haft, *supra* note 167, at 1, 4 n.6.

account that such inability is proximately caused by the rules of the incarcerating institution, which prevent a child from being with the parent, rather than by the parent's voluntary abandonment of the child.¹⁷⁵ In the absence of an express legislative mandate, many state courts have equated incarceration with abandonment of the child and therefore consider it an event for which parental rights can be terminated.¹⁷⁶ The courts use a *parens patriae* concept to find the power to decide whether or not parental rights are to be terminated.¹⁷⁷ Although this concept has recently fallen into relative disfavor,¹⁷⁸ its vestiges remain to clothe the courts with a power that has particularly invidious effects on the incarcerated mother. In most instances an incarcerated mother is replaced by a child care agency that seeks to provide the guidance, support, and care of the absent mother. The child care agency often places the mother under tremendous legal and psychological pressure to put the child up for adoption. An incarcerated mother who succumbs to this pressure is denied an important element in her process of rehabilitation — the existence of family ties, which can make the time spent incarcerated less emotionally damaging and concomitantly provide a greater incentive to obtain an early release and a successfully completed parole. Both child care agencies and courts in this country, faced with issues arising out of the incarceration of a parent, have generally focused only on the best interests of the children.¹⁷⁹ This focus has necessarily resulted in the subordination of parental rights in favor of the child's welfare.¹⁸⁰

Despite the derogation of a prisoner's parental rights, the concept of parenthood as a fundamental right has been reaffirmed by the United States Supreme Court.¹⁸¹ The Court's recognition of the tension existing between parental rights and conflicting state policy is illustrated by the Court's decision in *In re Millar*.¹⁸² In *Millar*, the mother had a long history of mental illness and lived alone with her child. In an effort to prevent the mother from possibly causing harm to the child without radically interfering with the parental relationship, the Court affirmed a lower court order finding that the mother had neglected her child, but granted the mother custody subject to one year's probation.¹⁸³ Although this situation is clearly distinguishable from that of an incarcerated mother, the policy behind *Millar* can be instructive when attempting to strike a balance between parental rights, child needs, and correctional goals, which seek to rehabilitate the offender, foster a healthy sense of responsibility, and maintain family relationships.

The California legislature, recognizing the dual nature of this problem, enacted a statute¹⁸⁴ that permits any woman incarcerated in that state who has a child under two years of age, or gives birth to a child while incarcerated, to keep her child until its second

¹⁷⁵ See, e.g., ALASKA STAT. § 20.10.040 (1962); WASH. REV. CODE ANN. § 26.32.040 (1961).

¹⁷⁶ See, e.g., *In re Jacques*, 48 N.J. Super. 523, 138 A.2d 581 (1958).

¹⁷⁷ See Kleenfield, *The Balance of Power Among Infants, Their Parents and The State* (pt. 3) 5 FAM. L.Q. 64, 66-71 (1971).

¹⁷⁸ See Ketcham & Babcock, *Statutory Standards for the Involuntary Termination of Parental Rights*, 29 RUTGERS L. REV. 530, 534-36 (1976).

¹⁷⁹ Comment, *The Prisoner Mother and Her Child*, 1 CAP. U.L. REV. 127, 129 (1972).

¹⁸⁰ *Id.* at 130.

¹⁸¹ *Stanley v. Illinois*, 405 U.S. 645, 651 (1971). In *Stanley* the Court held that depriving unwed fathers of custody of their children violated the due process and equal protection clauses of the United States Constitution. *Id.* at 658.

¹⁸² 40 A.D.2d 637, 336 N.Y.S.2d 144 (N.Y. App. Div. 1972) (per curiam).

¹⁸³ *Id.* at 638, 336 N.Y.S.2d at 145-46.

¹⁸⁴ CAL. PENAL CODE § 3401 (Deering 1971).

birthday, or longer if the situation permits.¹⁸⁵ This position, although an ideal initial step toward solving the problem, has been slow to gain acceptance in other jurisdictions.¹⁸⁶ The reason for this lack of acceptance seems to be a combination of administrative convenience and legislative short-sightedness. Current child-psychological thought indicates that the care a child should receive for adequate development need not originate from the biological parent.¹⁸⁷ This concept is highly amenable to situations of parental incarceration — it provides a psychological justification for what is, in essence, a judicially easy resolution of difficult issues.

The majority of states have not embraced the California model and each state's statute differs according to how its courts interpret the statute's construction and emphasis. While most states place the emphasis on the welfare of the child, some states continue to focus on parental rights. In Minnesota, for example, the state's highest court in *In re Welfare of Scott*,¹⁸⁸ addressed the issue of whether the offense committed was severe enough to justify termination of the offender's parental rights.¹⁸⁹ In *Scott*, the putative father was involved in a car chase after the mother and child that resulted in his shooting and killing the mother and injuring the child.¹⁹⁰ The court specifically stated that it was not the subsequent imprisonment but rather the father's violent conduct that justified the termination of his parental rights under the Minnesota statute.¹⁹¹ Reasoning that the violent propensities of the father's personality placed the physical and psychological well-being of the child in jeopardy, the court mandated the termination of his parental rights.¹⁹²

An opposite result under similar facts was reached by a New Jersey court in the case *In re Adoption of J. by J. and A.*¹⁹³ In that case the father was convicted of stabbing the mother to death.¹⁹⁴ While the father was incarcerated and awaiting trial, his wife's family assumed custody of the child.¹⁹⁵ After the father's conviction, the wife's family filed adoption proceedings.¹⁹⁶ The lower court found that the father's criminal record alone was inadequate grounds for termination, but that the nature of his crime disqualified him on an abandonment theory.¹⁹⁷ On this rationale, the "best interests of the child" test was applied and the adoption was approved.¹⁹⁸ The New Jersey Supreme Court, however, reversed the lower court's decision on the grounds that the jailing did not necessarily evidence a forsaking of parental rights and obligations under the terms of the New Jersey statute,¹⁹⁹ and was not indicative of the father's future capacity to resume his parental

¹⁸⁵ *Id.*

¹⁸⁶ For cases stating that incarceration alone is not enough to establish abandonment, see, e.g., *Diernfeld v. People*, 137 Colo. 238, 240, 323 P.2d 628, 631 (1958); *In re Welfare of Staat*, 287 Minn. 501, 506, 178 N.W.2d 709, 713 (1970); *State v. Grade*, 231 Or. 65, 67, 371 P.2d 68, 69 (1962).

¹⁸⁷ See GOLDSTEIN, FREUD & SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 16-21 (1973).

¹⁸⁸ 309 Minn. 458, 244 N.W.2d 669 (1976).

¹⁸⁹ *Id.* at 459, 244 N.W.2d at 671-72.

¹⁹⁰ *Id.* at 462, 244 N.W.2d at 671-72.

¹⁹¹ MINN. STAT. ANN. § 260.221(b)(4) (West 1982).

¹⁹² *Scott*, 309 Minn. at 461, 244 N.W.2d at 671.

¹⁹³ 139 N.J. Super. 533, 354 A.2d 662 (1976), *rev'd*, 73 N.J. 68, 372 A.2d 607 (1977).

¹⁹⁴ *Id.* at 537, 354 A.2d at 662-63.

¹⁹⁵ *Id.* at 537-38, 354 A.2d at 663.

¹⁹⁶ *Id.* at 538, 354 A.2d at 663.

¹⁹⁷ *Id.* at 545, 354 A.2d at 665-66.

¹⁹⁸ *Id.* at 545-46, 354 A.2d at 666.

¹⁹⁹ N.J. STAT. ANN. 9:3-24 (West 1976) (repealed 1977).

obligations.²⁰⁰ The inconsistency of these decisions can be reconciled by realizing that the Minnesota court focused upon the best interests of the child, while the New Jersey Supreme Court applied that state's statute in a manner more likely to protect the rights of the parent where the child was not immediately threatened with harm.²⁰¹ The New Jersey approach is fairly typical of the standard used to judge whether or not abandonment has occurred after incarceration.²⁰² Where the parent has made custodial arrangements for the child's care and has attempted to contact the child on a regular basis during incarceration, abandonment usually will not be found.²⁰³

One of the factors a reviewing court may take into account in deciding whether to terminate parental rights is the ability of the parent to support the child materially upon release. This ability can be enhanced by an adequate prison vocational program. Such programs are often either unavailable or limited for the women prisoners. This limitation adversely affects the chances for an incarcerated mother to retain custody of her child, as it prevents her from significantly upgrading her marketable skills to a level that would satisfy a reviewing child-care authority. The net effect is to leave an incarcerated mother in a position much more likely to be deemed "abandonment" than would be the case with an incarcerated father.

The entire abandonment issue, however, would and should be moot if more states adopted the California approach to child custody in prison. In New York, for example, the policy of recognizing the importance of a strong parent-child relationship²⁰⁴ has resulted in a statutory approach similar to the California approach.²⁰⁵ Because current theories of corrections are founded upon the concepts of reformation and not Talionic justice,²⁰⁶ the California approach is a positive step because it reduces the spectre of additional punishment for women with children while increasing the incentive for, and the likelihood of the successful rehabilitation of women prisoners.²⁰⁷

D. Vocational Training

Successful reintegration of offenders depends in part upon providing education and training programs that teach the skills necessary for obtaining gainful employment upon release. Such programs are often considered rehabilitative in nature. For many inmates, however, these programs are strictly habilitative, because they have never had employment skills. Many women's institutions do not offer the training nor do they have the resources to support the programs to the same extent as male prisons.

Although the movement toward creating a rehabilitative environment and programs

²⁰⁰ The court reversed the lower court in a per curiam decision, "substantially for the reasons expressed in the dissenting opinion of Judge Crahay" of the lower court. *Adoption of J.*, 73 N.J. at 68, 372 A.2d at 607. See 139 N.J. Super. at 546-48, 354 A.2d at 668-69 (Crahay, J., dissenting).

²⁰¹ *Id.* Compare *Scott*, 309 Minn. at 461-62, 244 N.W.2d at 671-72, with *Adoption of J.*, 73 N.J. at 68, 372 A.2d at 607 (adopting dissenting opinion of lower court, 139 N.J. Super. at 546-48, 354 A.2d at 668-69 (Crahay, J., dissenting)).

²⁰² This standard is obviously not used by those courts which equate incarceration with abandonment.

²⁰³ *In re T.M.R.*, 41 Cal. App. 3d 694, 698-700, 116 Cal. Rptr. 292, 294-95 (1974).

²⁰⁴ See *Apgar v. Beauten*, 75 Misc. 2d 439, 442, 347 N.Y.S.2d 872, 875 (Sup. Ct. 1973).

²⁰⁵ See N.Y. CORRECT. LAW § 611 (McKinney 1968), that permits a newborn to stay with its mother in jail or in prison subject only to requirement that the mother be physically fit to care for infant.

²⁰⁶ See, e.g., OR. CONST. art. I, § 15.

²⁰⁷ *State v. Grady*, 231 Or. 65, 371 P.2d 68 (1962).

may have originated in correctional institutions for women,²⁰⁸ recent studies indicate that vocational and educational programs for men far outnumber programs provided for women.²⁰⁹ While men's prisons tend to offer programs in fields such as welding, auto repair, electronics, construction, television repair, tailoring and plumbing, women's prisons offer training in the substantially less financially rewarding areas of housekeeping, cosmetology, food service, nurses' aid, and secretarial training.²¹⁰ Although such areas are consistent with the interests of some female inmates, a recent survey of female prisoners in an Illinois facility revealed that the top twelve vocational areas of interest in descending order were child care center aid, key punch operator, nurses' aid, typist, cosmetologist, computer programmer, data processor, medical or dental assistant, photographer, clothing designer, cashier, and correctional or parole officer.²¹¹ Despite such interests, some women's prisons offer no vocational training.²¹²

A number of reasons have been cited to justify the lack of vocational programs for women. First, many women who are interested in such programs lack sufficient education to qualify for them,²¹³ and prison education programs are often inadequate.²¹⁴ Second, vocational choices are limited by the small size of women's correctional prisons. Third, correctional institutions for women located in rural areas are not as able to compensate for the lack of institutional programs through the use of community-based vocational training as are male institutions located in urban areas. Fourth, the short duration of incarceration of most prisoners prevents many inmates from completing training programs. Unless there is a high degree of coordination between institutional programs and community based programs, the institutional training is wasted. To complete training programs and obtain employment, inmates need community assistance in continuing the training programs at a suitable location upon release.

Although prisoners in general do not have a constitutional right to receive vocational training,²¹⁵ female prisoners have brought actions on equal protection grounds because of the disparity in the vocational programs available to female inmates as compared with the programs offered male inmates. In *Canterino v. Wilson*,²¹⁶ the court compared four aspects of vocational education and training and found gross disparities in the quality and

²⁰⁸ Fabian, *supra* note 112, at 3-6; Sorensen, *Educational and Vocational Needs of Women in Prisons*, in *CORRECTIONS TODAY* 62 (May-June 1981) and references cited therein [hereinafter cited as Sorensen].

²⁰⁹ A 1973 national survey found that men's prisons had an average of 10.2 vocational training programs per institution compared with an average of 2.7 programs for women in prisons. Note, *Sexual Segregation*, *supra* note 115, at 1243 n.80.

²¹⁰ *Id.* at 1241-43, 1269-73. For more recent similar findings, see K. GABEL, *supra* note 162, at 82-83.

²¹¹ Sorensen, *supra* note 208, at 66.

²¹² For example, in a study of four prisons for women in the northeast, seventy-three percent of the inmates were receiving no training. K. GABEL, *supra* note 162, at 83-84.

²¹³ Note, *Female Offenders: A Challenge to the Courts and the Legislature*, 51 N.D.L. Rev. 827, 838 (1975).

²¹⁴ K. GABEL, *supra* note 162, at 43, 84. A survey of four prisons in the northeast revealed that most female inmates believed that the education available was poor or very poor. *Id.* at 84.

²¹⁵ See, e.g., *Padgett v. Stein*, 406 F. Supp. 287, 296 (M.D. Pa. 1975) (no duty to rehabilitate inmates); *Russell v. Oliver*, 392 F. Supp. 470, 474 (W.D. Va. 1975) (no inmate right to vocational materials); *James v. Wallace*, 382 F. Supp. 1177, 1180 (M.D. Ala. 1974); cf. *Smith v. Schneckloth*, 414 F.2d 680, 682 (9th Cir. 1969) (failure of State to provide rehabilitation and vocational training for narcotics addict does not violate eighth amendment).

²¹⁶ 546 F. Supp. 174 (W.D. Ky. 1982).

quantity of programs available for men and women in the Kentucky correctional system.²¹⁷ The four areas included vocational school courses within the institutions, prison industries and farms, on-the-job training, and community-based programs.²¹⁸ While women had access to only two institutional training courses, business office education, and upholstery, men had access to fourteen different trades including auto body, carpentry, drafting, masonry, plumbing, printing, radio and television repair, welding, upholstery, air conditioning repair, small engine repair, meat cutting, and electrical repair.²¹⁹ In addition, the programs for men were full time, while women trained part time.²²⁰ Not a single prison industry was available to women prisoners, while male prisoners had jobs making garments, furniture, printing, recapping tires, repairing automobiles, and making soap.²²¹ Similarly, the range of on-the-job training available to women was less extensive than the range of opportunities available to men.²²² Community-based vocational training release programs were available only to male inmates.²²³

After determining that female prisoners in Kentucky received substantially less vocational education and training than men, the court examined whether the disparate treatment of female inmates was substantially related to an important government objective.²²⁴ In its defense, the State of Kentucky asserted that the difference in treatment was based upon size, needs, interests, and security.²²⁵ The court, however, following the decision in *Glover v. Johnson*,²²⁶ held that institutional size and a state's desire to preserve limited resources cannot be used to justify an allocation of those limited resources that unfairly denies women equal access to programs routinely available to men.²²⁷ In considering Kentucky's argument, the court found that the needs of female prisoners for vocational training and education were at least as great as the needs of male prisoners.²²⁸ Similarly, the court noted that test results showed that female prisoners had a high interest in vocational training.²²⁹ Finally, the court held that the security interests put forth by the state were insufficient to justify the disparate provision of vocational programs.²³⁰ The disparate treatment of female prisoners was not, therefore, substantially related to an important governmental objective.²³¹

In holding in favor of the female complainants, the court found that by providing grossly unequal vocational opportunities to men and women, the State of Kentucky had

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 188-96.

²²⁰ *Id.*

²²¹ *Id.* at 191-93.

²²² *Id.* at 193-97.

²²³ *Id.* at 188-96.

²²⁴ *Id.* at 211-12 (citing *Hogan v. Mississippi University for Women*, 458 U.S. 718, 724-25 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976)).

²²⁵ *Id.* at 211.

²²⁶ 478 F. Supp. 1075 (E.D. Mich. 1979). In *Glover*, the female plaintiffs claimed that the state had violated their constitutional rights by offering educational and vocational rehabilitation opportunities substantially inferior to opportunities offered male prisoners. The district court held that while it is neither feasible nor wise to require identical treatment of male and female inmates by the state, the constitution requires a greater degree of parity in rehabilitation programming.

²²⁷ *Canterino*, 546 F. Supp. at 211 (citing *Plyler v. Doe*, 457 U.S. 202, 220-25 (1982)).

²²⁸ *Id.* at 211-12.

²²⁹ *Id.* at 212.

²³⁰ *Id.*

²³¹ *Id.*

violated the equal protection clause of the fourteenth amendment and several federal statutes.²³² The court further held that the equal protection clause requires parity, not identity, of treatment for female prisoners in the area of jobs, vocational education and training. This standard, the court concluded, could be met in any way that made available to women opportunities substantially equivalent "in substance if not form" to opportunities accorded men.²³³

E. Work Release and Vocational Training Release

Female inmates have been denied the opportunity to participate in valuable work release²³⁴ and vocational training release programs.²³⁵ These programs are important features in correctional programming because they are considered effective means of promoting reintegration.²³⁶ Inmates who are given the opportunity to obtain training and work outside the prison walls are more able to adjust to final release²³⁷ and develop better self-images while incarcerated than inmates forced to stay within the institution. Programs allowing prisoners access to the outside world tend to reduce the costs of incarceration since the released inmates are often housed at less costly "halfway houses." Participants are usually required to contribute to program administration costs, room and board, and are able to provide support for dependents, thereby lessening their reliance upon public support via welfare.²³⁸ In spite of the tangible and intangible benefits of such programs, however, they are not operated at most women's correctional facilities. A recent survey of fourteen state correctional facilities revealed that only two percent of the prison population and one percent of the jail population at women's institutions participated in work release programs.²³⁹

²³² *Id.* at 209-12. The federal statutes included 20 U.S.C. § 1681(a) (1982) (education); Comprehensive Employment and Training Act of 1973, Pub. L. No. 93-203, § 132, *added by* Pub. L. No. 95-524, § 2, 92 Stat. 1948 (1978), *repealed by* Job Training Partnership Act of 1982, Pub. L. No. 97-300, § 184(a)(1), 96 Stat. 1357 (1982); The Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d(c)(1) (1982). All of these statutes prohibited states from discriminating against women through the allocation of federally received grant funds.

²³³ *Canterino*, 546 F. Supp. at 210. The concept of "parity of treatment" in correctional institutions had been put forth previously in *Barefield v. Leach*, Civil No. 10282 (D.N.M. 1974), *cited in* *Glover v. Johnson*, 478 F. Supp. 1075, 1078-79 (E.D. Mich. 1979). In both *Barefield*, involving the New Mexico correctional system, and *Glover*, involving the Michigan correctional system, female inmates had substantially less access than men to vocational training programs. New Mexico had less justification for the disparate treatment because the women's prison was adjacent to the men's institution.

²³⁴ The terms "work release" or "work furlough program" refer to correctional programs allowing inmates to leave an institution for the purpose of continuing regular employment during the daytime, but requiring the inmates to report back to lockup nights and weekends. *See* MANUAL OF CORRECTIONAL STANDARDS, *supra* note 1, at 17.

²³⁵ A release program, as a pre-release tool, provides an opportunity to individuals who, in the judgment of the departmental screening committee, need further transitional preparation for community life. MANUAL OF CORRECTIONAL STANDARDS, *supra* note 1, at 17.

²³⁶ Although there is little empirical evidence that work release programs lower recidivism later, correctional officials maintain their belief in their benefits. *See* Note, *Denial of Work Release Programs to Women: A Violation of Equal Protection*, 47 S. CAL. L. REV. 1453, 1457 n.27 (1974) [hereinafter cited as Note, *Work Release*].

²³⁷ *Id.*

²³⁸ *Id.* at 1457 n.30.

²³⁹ R. GLICK & V. NETO, *supra* note 111, at 84-85.

If this sample is representative of the entire country, there is just cause for questioning why work release programs have not been made more widely available to women inmates. Correctional administrators have offered numerous reasons to justify this situation including the bald assertion that women do not benefit from work release. Some administrators claim that women do not need rehabilitation while others state that women need more rehabilitation than men and that work release is incapable of meeting their greater needs.²⁴⁰ Another highly suspect justification is that women prisoners do not have dependents to support and thus their economic need is less than the need of male inmates.²⁴¹ The most common objection to women's work release programs is that these programs are not efficient uses of the limited funds allocated to correction because the administrative problems and expenses are disproportionately high.

The issue of the unavailability of vocational training and work release was addressed in *Canterino v. Wilson*.²⁴² The *Canterino* court found that women in the Kentucky correctional system were denied access to all three forms of vocational training release that were available to men: vocational training release, gradual release, and expedient release.²⁴³ Vocational training release was a program created by statute which allowed prisoners to reside at county jails during the last ninety days of confinement so that they could search for jobs or attend vocational training schools in the area where they would be released.²⁴⁴ Gradual release served the same purpose as the vocational training release program but was restricted to male prisoners with parole dates.²⁴⁵ Expedient release allowed prisoners with parole dates to be released early if they had employment and home plans confirmed by letter.²⁴⁶

In finding that Kentucky discriminated against female prisoners by not providing these programs for women, the *Canterino* court concluded that the state had violated the equal protection clause of the fourteenth amendment.²⁴⁷ The same rationale was used in *Glover v. Johnson*,²⁴⁸ where another federal district court held that women were constitutionally entitled to participate in work release programs available to men.²⁴⁹ In *Glover*, all eligible female inmates of Michigan correctional institutions could be placed at community treatment centers.²⁵⁰ Placement at a community treatment center enabled the inmates to find a job and continue to hold it for as long as they wished, even past their release date.²⁵¹ Male inmates could also qualify for placement in community treatment centers, but only a limited number could be accommodated. Male inmates who could not be accommodated participated in "work pass" programs. Work pass is a program wherein inmates are released to local employment during the day and return to the institution at night. Women inmates objected to placement only at the community treatment centers

²⁴⁰ Note, *Work Release*, *supra* note 236, at 1459.

²⁴¹ *Canterino v. Wilson*, 546 F. Supp. 174 (1982).

²⁴² *Id.* at 196.

²⁴³ *Id.* at 188.

²⁴⁴ *Id.* at 196.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 196, 209-12.

²⁴⁷ *Id.* at 207. Note that the *Canterino* court also found violations of two separate federal statutes.

Id.

²⁴⁸ 478 F. Supp. 1075 (E.D. Mich. 1979). See also *Green v. Koch*, Civil No. 4402 (S.D.N.Y. 1979), where the City of New York agreed to open community-based work release programs to women.

²⁴⁹ 478 F. Supp. at 1083-87.

²⁵⁰ *Id.* at 1086.

²⁵¹ *Id.* at 1092.

because they considered it to be a "less desirable alternative" than work pass. The female prisoners argued that some of the community treatment centers were located in undesirable areas, that their regulations were onerous, and that minor infractions would jeopardize the inmates' chances for release.²⁵² The defendant, head of the Michigan Department of Corrections, on the other hand, testified that his department preferred the use of community treatment centers since the inmates had the opportunity to develop economic sufficiency as well as to readjust to life in the community. This latter benefit was unavailable to inmates required to return to the institution each evening.²⁵³ The court decided that both types of programs were valuable and that there was no reason to deny women the alternatives available to men.²⁵⁴ The state of Michigan had admitted that placement of women at community treatment centers was highly desirable; its only argument against work pass for women was that it was "less desirable."²⁵⁵ The court did not consider this distinction to be an important enough governmental interest to justify disparate treatment.²⁵⁶

The state in *Glover* did not raise any of the reasons usually mentioned by correctional administrators for not implementing work release at their institution, which include concerns about security, smuggling of contraband, transportation and potential for escape.²⁵⁷ A strong argument can be made that these reasons all relate to costs and are not particularly convincing since work release programs are self-supporting.²⁵⁸ Furthermore, the court in *Glover* indicated that economic considerations alone would not justify official inaction or unwillingness to operate the prison in a constitutional manner.²⁵⁹ In the future it will not be worth while to litigate cases like *Glover* since the court made it very clear that economic and administrative convenience arguments will not pass constitutional muster.

Another case upholding the right of women inmates to have access to work release programs was *Molar v. Gates*.²⁶⁰ *Molar* arose out of the California practice of sending all female inmates to the same facility while allowing some males to be sent to minimum security institutions where work release was available.²⁶¹ The *Molar* court found this

²⁵² *Id.* at 1093.

²⁵³ *Id.* at 1092.

²⁵⁴ *Id.* at 1093.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 1092-93.

²⁵⁷ See Note, *Work Release*, *supra* note 236, at 1460.

²⁵⁸ *Id.*

²⁵⁹ *Glover*, 478 F. Supp. at 1078. A similar approach was taken by the court in *Dawson v. Carberry*, No. C-71-1916 (N.D. Cal., Mar. 17, 1972) when the state asserted that higher costs made the program uneconomic. The case is particularly significant since it relied upon the minimum scrutiny test of *Reed v. Reed*. See also *Canterino*, 546 F. Supp. at 195-96, 209-12 (W.D. Ky. 1982) (the court found that the disparity in access to work release programs violated the female prisoners' equal protection rights).

²⁶⁰ 98 Cal. App. 3d 1, 159 Cal. Rptr. 239 (1979).

²⁶¹ *Id.* at 6, 159 Cal. Rptr. at 243-44. In *State ex rel. Olson v. Maxwell*, 259 N.W.2d 621 (N.D. 1977), the court refused to permit the state to transfer female inmates out of state to facilities where work release and other programs were available. *Id.* at 631-32. *Maxwell* thus supports the holding in *Molar* that the states should make their programs available on an equal opportunity basis. See also *Green v. Koch*, Civil No. 79-4402 (S.D.N.Y. 1979) (complaint) wherein the plaintiffs alleged that the city violated their civil rights, contrary to 42 U.S.C. § 1983, by failing to operate a women's correctional facility at which they could have participated in work release and other programs.

practice to be violative of that state's constitution and of the equal protection clause of the fourteenth amendment.²⁶²

Given the acceptance of work release by correctional administrators as a desirable program, courts are presented with an easy decision if this kind of program is implemented only in men's institutions. In such a situation the court is not faced with the dilemma of evaluating competing alternatives under a parity of treatment standard because the program is either in effect or not in effect. Thus, the impact of the few reported decisions in this area is greater than in most of the others discussed in this article, where administrative discretion is pervasive.²⁶³ In the area of work release and vocational training, however, courts have uniformly instructed correctional administrators to provide female prisoners the same opportunities provided to male prisoners.

F. Recreation

In spite of the progress made in offering recreational opportunities in prison systems, female prisoners have been forced in several instances to sue for parity of recreational opportunity. Suits to increase recreational opportunities can be based upon eighth amendment claims of cruel and unusual punishment,²⁶⁴ fourteenth amendment equal protection arguments,²⁶⁵ or on state statutory grounds. Cruel and unusual punishment claims can be based upon medical and penological evidence that a lack of recreation, fresh air and outdoor activity is harmful to the mental and physical well being of inmates.²⁶⁶ Inadequate recreational activity deprives inmates of the opportunity to "blow off steam and excess energy," thereby increasing tension and threatening prison security as well as personal physical and psychological well-being.²⁶⁷

Most of the cases brought by female inmates over recreational issues are equal protection challenges based upon allegations that male prisoners have vastly superior opportunities for recreation. In *Canterino v. Wilson*,²⁶⁸ the court compared recreational opportunities in the Kentucky correctional systems and found that "men at the most restrictive male institution have more access to the outdoors in one day than women . . . have in a normal week."²⁶⁹ The court held that the state must provide women inmates with recreational and outdoor activities "substantially equal" to recreational opportunities offered male prisoners.²⁷⁰ Inconsistent with *Canterino* is the decision in *Cooper v. Morin*,²⁷¹ where the court denied the gender based equal protection claims of female inmates even though male inmates had access to gymnasium facilities over twice as many hours per week as female inmates.²⁷² The court reasoned that male inmates outnumbered females

²⁶² *Molar*, 98 Cal. App. 3d at 10-11, 159 Cal. Rptr. at 249-51. The court relied upon an earlier interpretation of the California Constitution that sex was a suspect classification. See *Sailer Inn v. Kirby*, 5 Cal. 3d 1, 17-19, 95 Cal. Rptr. 329, 339-41 (1971).

²⁶³ A court ordered work release program may itself have a broader effect by alleviating the lack of vocational programs traditionally characteristic at women's institutions.

²⁶⁴ See *Cooper v. Morin*, 398 N.Y.S.2d 36, 78 (1977) and cases cited therein.

²⁶⁵ See *Canterino*, 546 F. Supp. at 215.

²⁶⁶ See *Cooper*, 398 N.Y.S.2d at 78-79.

²⁶⁷ See *id.* at 79.

²⁶⁸ 546 F. Supp. at 202.

²⁶⁹ *Id.* at 201-02.

²⁷⁰ *Id.* at 201-02, 215.

²⁷¹ 398 N.Y.S.2d at 78.

²⁷² *Id.*

by approximately ten to one and there was a higher participation level for men.²⁷³

The typical reasons put forth by correctional officials to justify disparities in recreational opportunities for men and women are lack of financial resources and security.²⁷⁴ Such reasons have been rightfully rejected.²⁷⁵ For example, in *Bukhari v. Hutto*,²⁷⁶ the court held that the fourteenth amendment requires that any sex-based disparity serve important governmental objectives and be substantially related to achieving such objectives.²⁷⁷ While the court sympathized with the government's argument that providing a wide range of programs for a smaller number of prisoners at a female prison entails a financial burden, it emphasized that budgetary considerations cannot be used to justify official or legislative unwillingness to operate a prison in a constitutional manner.²⁷⁸ Furthermore, the court concluded that, while security at a prison may justify provision of different opportunities for men and women, the equal protection clause requires parity of treatment.²⁷⁹ Similarly, in *Molar v. Gates*,²⁸⁰ the court rejected both budgetary considerations and arguments that less recreation for women was necessary to protect female inmates from sexual assault.²⁸¹ The court reviewed a number of remedies available to the government including integrating existing facilities or closing down institutions where the provision for sufficient recreation programs cannot be made.²⁸²

G. Staff Integration and Inmate Rights of Privacy

Security needs in a prison place restraints upon privacy. The Supreme Court in *Hudson v. Palmer*²⁸³ held that a prisoner has no reasonable expectation of privacy in his prison cell entitling him to the protection of the fourth amendment against unreasonable searches.²⁸⁴ The Court noted that imprisonment carried with it the loss of certain rights, and that the losses were necessary to accommodate institutional needs and to achieve internal security and safety.²⁸⁵ The majority opinion addressed itself to a prisoner's personal effects and his cell, not to his person.²⁸⁶ The dissent, commenting on this aspect of the majority opinion, noted that the majority apparently believed that at least a prisoner's person is "secure from unreasonable search and seizure."²⁸⁷ Whether *Hudson* applies to the search of the person of a prisoner or to the search of one held at a pretrial

²⁷³ *Cooper*, 398 N.Y.S.2d at 67-68. But see *Batton v. North Carolina*, 501 F. Supp. 1173, 1178 (E.D.N.C. 1980) (where the court denied a government request for summary judgment on female inmate's "equal protection" claims because the government merely listed facilities available to women without indicating frequency of use and comparing facilities available to men and women).

²⁷⁴ See *Mitchell v. Untreiner*, 421 F. Supp. 886, 894-96 (N.D. Fla. 1976); *Bukhari v. Hutto*, 487 F. Supp. 1162, 1172 (E.D. Va. 1980); *Molar v. Gates*, 98 Cal. App. 3d 1, 18-19, 159 Cal. Rptr. 239, 250-51 (1979).

²⁷⁵ See *supra* note 274.

²⁷⁶ 487 F. Supp. 1162 (E.D. Va. 1980).

²⁷⁷ *Id.* at 1171.

²⁷⁸ *Id.* at 1172.

²⁷⁹ *Id.* at 1171; see also *Canterino*, 546 F. Supp. at 215.

²⁸⁰ 98 Cal. App. 3d 1, 17-18, 159 Cal. Rptr. 239, 249-50 (1979).

²⁸¹ *Id.* at 18, 159 Cal. Rptr. at 250.

²⁸² *Id.* at 20, 159 Cal. Rptr. at 251.

²⁸³ 104 S. Ct. 3194 (1984).

²⁸⁴ *Id.* at 3202.

²⁸⁵ *Id.* at 3199.

²⁸⁶ *Id.* at 3194-205.

²⁸⁷ *Id.* at 3200-01, 3208.

detention facility is uncertain.²⁸⁸ A clear difference exists, however, between necessary restraints and unwarranted intrusions on the rights of prisoners such as unreasonable strip and cavity searches.

One goal of prison officials should be to achieve security through the least intrusive methods to preserve the inmate's right to privacy. This goal should not be considered as a form of unnecessary pampering. If one of the objectives of imprisonment is to inculcate inmates with respect for the rights of others, the state should accord inmates as much privacy as is consistent with reasonable security considerations.²⁸⁹

The mixture and proper assignment of male and female staff within a prison is crucial to insuring privacy. Some states provide separate prisons for women staffed with female personnel in key areas such as sleeping quarters and the hospital.²⁹⁰ Other prisons segregate the living quarters of the male and female prisoners.²⁹¹ The more advanced prison systems restrict strip and body cavity searches so that these searches are conducted in women's institutions by either trained physicians or trained female correctional personnel.²⁹² While many of these methods for insuring privacy have come about through statutory provisions²⁹³ or through the accreditation process,²⁹⁴ often they have resulted from litigation.

For many years the presence of female correctional officers was the exception rather than the rule. Title VII of the Civil Rights Act of 1964,²⁹⁵ which prohibits employment discrimination based upon sex, provided the impetus for change. Women seeking employment in men's institutions as guards brought several actions alleging that denial of employment to them was a violation of Title VII. For example, in *Dothard v. Rawlinson*,²⁹⁶ the Supreme Court held that height and weight qualifications that virtually eliminated women from obtaining positions in the Alabama corrections system were unlawful.²⁹⁷ The Court, however, further held that sex was a bona fide occupational qualification for such a position because of the "jungle atmosphere" of that state's institutions.²⁹⁸ In *Gunther v. Iowa State Men's Reformatory*,²⁹⁹ the Court, applying the same test as applied in *Dothard*, held that sex was not a bona fide occupational qualification for a job as prison guard, reasoning that the privacy rights of male prisoners can be protected by assigning female guards to positions that would not infringe on their right to privacy.³⁰⁰

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ See generally SINGER AND STATSKY, *RIGHTS OF THE IMPRISONED* (1974).

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ See *infra* text accompanying notes 410-36.

²⁹⁴ 18 U.S.C. § 4042 (1982); see 28 C.F.R. §§ 552.10-552.24 (1984).

²⁹⁵ 78 Stat. 241 (1964), 42 U.S.C. §§ 2000e to 2000e-17 (1982).

²⁹⁶ 433 U.S. 321 (1977).

²⁹⁷ *Id.* at 328-37. But see *Manley v. Mobile Co.*, 441 F. Supp. 1351 (S.D. Ala. 1977), where the court held for the plaintiff and distinguished the holding from *Dothard* on the basis that the position applied for would involve limited contact with inmates. *Id.* at 1358-59.

²⁹⁸ *Dothard*, 433 U.S. at 336-37.

²⁹⁹ 612 F.2d 1079 (8th Cir. 1980). The court of appeals in *Gunther* found that the prison in the case before it was a medium security institution and did not have a "jungle atmosphere" as in *Dothard*. *Id.* at 1085. Thus, sex was not a security concern.

³⁰⁰ The state also failed to prove that the privacy interests of the inmates would preclude female guards from performing a large part of the duties required of the position. *Id.* at 1086. But see *Lóng v. State Personnel Board*, 41 Cal. App. 3d 1000, 116 Cal. Rptr. 562 (1979), where the California Court of Appeals denied relief to a female minister who sought employment in a youth correctional facility. The court found that for the female minister to go into the facility dormitory in the evening

Ironically, while females have had to sue to secure their right to work in a prison for men, there is a conspicuous absence of litigation by men attempting to work in prisons for women.³⁰¹ Prisons for women have traditionally employed male administrators and male guards. Some state correction administrators, apparently, have not regarded women's right to privacy to be as sacred as the corresponding right of men.³⁰²

Women have a higher regard for privacy than men because women are socialized to be more modest. Even if the assignment of guards of an opposite sex were the same for male and female prisons within a state correctional system, the impact would still be greater on female prisoners. Female prisoners have been forced to vindicate their rights to privacy, in the face of resistance by state officials, through litigation. In *Forts v. Ward*,³⁰³ female inmates at the Bedford Hills Correctional Center objected to the assignment of males to duties which allowed them to observe the inmates while sleeping in their cells, while showering, and while in the infirmary.³⁰⁴ The trial court ordered that male guards be given different work assignments to avoid contact with female inmates during those periods.³⁰⁵ On appeal, however, the United States Court of Appeals for the Second Circuit reversed that portion of the judgment prohibiting male guards from observing females in their cells while they slept, reasoning that privacy could be insured by issuance of nightgowns to inmates.³⁰⁶ Similarly, a suit by a male inmate, who claimed that his privacy was violated by a female guard delivering mail to his cell once a day, was dismissed on the ground that the intrusion was too minimal.³⁰⁷

Strip and body cavity searches are particularly sensitive intrusions on prisoners' rights to privacy. While the female plaintiffs in *Battan v. North Carolina*³⁰⁸ conceded that such searches do not per se violate their fourth amendment right to be free from unreasonable searches and seizures, they alleged that the manner in which such searches were conducted violated their rights. They contended that sterile procedures were not followed during vaginal searches and that male guards watched female inmates during strip searches.³⁰⁹

would not interfere with the right to privacy of the residents, but that she could be subject to sexual assault. Thus, the court determined that the state had a compelling security interest in excluding females from the facility. *Id.* at 569-72. *Accord Philadelphia v. Pennsylvania Human Rights Comm.*, 7 Pa. Commw. 500, 513, 300 A.2d 97, 103-04 (1973) where sex was held to be a bona fide occupational qualification in a youth correction center.

³⁰¹ *But see* *Fesel v. Masonic Home of Delaware*, 447 F. Supp. 1346, 1354 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979), involving a male nurse denied employment by an employer because two-thirds of the patients were women and objected to being attended by a male nurse. Due to the small size of the institution, the hiring of a male nurse would have required an additional female nurse to be hired.

³⁰² *Id.* at 1352.

³⁰³ 434 F. Supp. 946 (S.D.N.Y.), *rev'd and remanded*, 566 F.2d 849 (2d Cir. 1977), 471 F. Supp. 1095 (S.D.N.Y. 1979), *aff'd in part and rev'd in part*, 621 F.2d 1210 (2d Cir. 1980).

³⁰⁴ 434 F. Supp. at 948.

³⁰⁵ *Id.* at 949.

³⁰⁶ 621 F.2d at 1210.

³⁰⁷ *Avery v. Perin*, 473 F. Supp. 90, 92 (D.N.H. 1979).

³⁰⁸ 501 F. Supp. 1173, 1180 (E.D.N.C. 1980).

³⁰⁹ *Id.* The court refused to find for the state on a motion for summary judgment because the claims were actionable and there were genuine issues of material fact. *Id.* See *Daugherty v. Harris*, 476 F.2d 292, 294-95 (10th Cir. 1973) for a holding that rectal examinations of male prisoners for security reasons are constitutional. The *Daugherty* rationale was followed in *Barefield v. Leach*, No. 10282 (D.N.M. 1974), *cited in Glover v. Johnson*, 478 F. Supp. 1075, 1078-79 (E.D. Mich. 1979), where the court held that vaginal and rectal searches are constitutional if performed by trained matrons.

As more females are employed in correctional facilities, the social attitudes that form the underlying basis for objection to discriminatory hiring policies will change. It has already been suggested that the continued use of sex as a bona fide occupational qualification is based upon outmoded notions of sex roles.³¹⁰ In fact, the presence of members of the opposite sex within the institution in roles that do not unnecessarily violate the privacy of either male or female inmates may produce psychological benefits such as minimizing alienation and promoting rehabilitation.³¹¹

H. Medical Care

Despite indications that the medical needs of women may be greater than those of men, recent studies and cases indicate that women's prisons are less likely than men's prisons to have full-time medical staff or adequate hospital facilities.³¹² Recent studies show that women entering correctional institutions are more likely than men are to have medical problems when entering prison. In addition to having a higher incidence of asthma, drug abuse problems, seizure disorders, hypertension, diabetes, hepatitis, heart disorders, gastrointestinal problems, and genitourinary disorders than men,³¹³ many women suffer from gynecological problems.³¹⁴ In a study of four prisons for women in northeastern states, eighty-six percent of the women experienced health problems during incarceration.³¹⁵

Medical services for women are so inadequate in some correctional institutions that they have been at issue in several class action suits.³¹⁶ In *Todaro v. Ward*,³¹⁷ for example, the court found that New York State had failed to provide the entire population of the

³¹⁰ Note, *Sex Discrimination in Prison Employment: The Bona Fide Occupational Qualification and Prisoners' Privacy Rights*, 65 IOWA L. REV. 428, 442 (1980).

³¹¹ *Id.* at 443.

³¹² See Note, *Sexual Segregation*, *supra* note 115, at 1229-730 (eighty-seven percent of the women's prisons and twenty-seven percent of the men's prisons surveyed had no full-time physicians); see also, Resnick and Shaw, *Prisoners of Their Sex: Health Problems of Incarcerated Women*, in PRISONER'S RIGHTS SOURCE BOOK: THEORY, LITIGATION, AND PRACTICE II (Robbins ed. 1980) [hereinafter cited as Resnick and Shaw].

³¹³ Novick, Della Penna, Schwarts, Kemmlinger, and Lowenstein, *Health Status of the New York City Prison Population*, 15 MEDICAL CARE 205 (1977); see also U.S. DEPARTMENT OF HEALTH, VITAL & HEALTH STATISTICS, CURRENT ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, 11-13 (1981); and 25 PHARMACEUTICAL MANUFACTURERS NEWSLETTER No. 1 (1982) (stating that sixty percent of all visits to physicians were by women and sixty percent of all new drug prescriptions were for women).

³¹⁴ B. Anno, *Analysis of Inmate Patient Profile Data*, American Medical Association, Program to Improve Medical Care and Health Services in Jails (1977).

While the AMA found that 14.6% of the women surveyed reported breast lumps, 42% had unusual vaginal discharges, 4.2% had unusual vaginal bleeding, and 12.8% were pregnant, only 8.9% of the men surveyed had abnormalities of the penis, scrotum, and testes. *Id.* at 73-74. See also R. GLICK & V. NETO, *supra* note 111, at 66; Williams, *Health Care for Women Inmates in the New Mexico State Penitentiary*, PROCEEDINGS, 2D NATIONAL CONFERENCE ON MEDICAL CARE AND HEALTH SERVICE IN CORRECTIONAL INSTITUTIONS (1978) (where fifty percent of the problems of women in the New Mexico State Penitentiary were found to relate to gynecologic or obstetric pathology).

³¹⁵ Sixty-two percent of the women with medical problems in the four northeastern prisons studied considered their health problems not to be resolved. Eighty-one percent rated the medical care as poor or very poor. The highest rating of medical care came from one prison where women inmates received a favorable decision because of a suit involving medical care. See K. GABEL, *supra* note 162, at 84.

³¹⁶ See *Todaro v. Ward*, 565 F.2d 48, 50 (2d Cir. 1977).

³¹⁷ 431 F. Supp. 1129 (S.D.N.Y. 1977), *aff'd*, 565 F.2d 48 (2d Cir. 1977).

Bedford Hills Correctional Facility in New York with access to adequate medical care or with the delivery of treatment prescribed by physicians.³¹⁸ At the time the suit began, Bedford Hills contained nearly 400 women but did not have a full-time physician.³¹⁹ Delay in obtaining the services of a physician ranged from two weeks to two months.³²⁰ Furthermore, the court found inadequate evaluations of inmate complaints by the nurse,³²¹ repeated failure to perform laboratory tests ordered,³²² long delays in the return of laboratory results, insufficient follow-up procedures where abnormal test results were reported,³²³ a grossly inadequate system for keeping medical records,³²⁴ and a lack of adequate supervision of inmates in the sick wing.³²⁵ In reaching its decision that Bedford Hills violated the inmates' eighth amendment rights to medical care, the *Todaro* court applied the principles expressed in *Estelle v. Gamble*.³²⁶ There the Supreme Court held that the principles behind the guarantee against cruel and unusual punishment "establish the government's obligation to provide medical care for those whom it is punishing by incarceration."³²⁷ The *Estelle* Court held that "deliberate indifference to the serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the eighth amendment."³²⁸

In a more recent case, *Canterino v. Wilson*,³²⁹ female inmates claimed that their eighth amendment constitutional rights were being violated by inadequate medical attention and that their fourteenth amendment rights were being infringed because the medical care provided to women was inferior to the care provided to men in the Kentucky correctional system.³³⁰ On the eighth amendment claim, the court held that the evidence fell short of demonstrating "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."³³¹ The court reasoned that the plaintiffs did not allege denial of medical care to any particular person but only showed deficiencies which could make "unnecessary suffering inevitable."³³² On the fourteenth amendment claim, the court held that the medical care provided to women was substantially equivalent to the care provided in prisons for men.³³³

Beyond the principles established in *Estelle*, the quantity and quality of medical care necessary to meet the constitutional standards is still unclear. In *Edwards v. Duncan*, the court held that a prisoner is entitled to reasonable medical care.³³⁴ In attempting to clarify

³¹⁸ 565 F.2d at 50.

³¹⁹ 431 F. Supp. at 1134-36.

³²⁰ *Id.* at 1145-46.

³²¹ *Id.* at 1145.

³²² *Id.* at 1147-48.

³²³ *Id.* at 1148-49.

³²⁴ *Id.* at 1145-46.

³²⁵ *Id.* at 1139-40.

³²⁶ 429 U.S. 97 (1976).

³²⁷ *Id.* at 103.

³²⁸ *Id.* at 104.

³²⁹ 546 F. Supp. 174 (W.D. Ky. 1982).

³³⁰ Post-Trial Brief for Plaintiffs at 1, *Pat Canterino v. George Wilson*, Civil No. 80-0545-L(J).

³³¹ 546 F. Supp. at 214.

³³² 546 F. Supp. at 215. See also *Barefield v. Leach*, Civ. No. 10282 (D.N.M. 1974), cited in *Glover v. Johnson*, 478 F. Supp. 1075, 1078-79 (E.D. Mich. 1979), where the court also found that the female inmate claims of inadequate medical care were unsubstantiated.

³³³ 546 F. Supp. at 215.

³³⁴ 355 F.2d 933, 944 (4th Cir. 1966).

this standard, the court in *Mills v. Oliver*³³⁵ stated that, "this does not mean that every prisoner complaint requires immediate diagnosis and care, but that, under the totality of circumstances, adequate medical treatment be administered when and where there is reason to believe it is needed." In another attempt to define the term reasonable, the court in *Stokes v. Hurdle*,³³⁶ held that deprivation of "essential" medical care is unreasonable.³³⁷ Furthermore the court held that:

In determining whether medical care was "essential" in a given case, the question is whether a physician exercising ordinary skill and care would have concluded that the symptoms evidenced a serious injury; whether the potential for harm by reason of delay or denial of medical care was substantial; and whether such harm did result Hence, a deprivation of medical treatment that seriously endangers the prisoner's well being would be actionable [under the Civil Rights Act].³³⁸

These cases lead to two important conclusions. First, the adequacy of medical care in any prison, whether for women or men, has been determined on a case-by-case basis, analyzing individual complaints according to the same standards developed in medical malpractice cases. Second, the case law provides little guidance to prison administrators concerning "reasonable" or "adequate" care in areas such as the ratio of doctors to inmates, the ratio of nurses to inmates, medical training for prison medical and security staff, response time for responding to medical needs, facilities, and access to community treatment to supplement prison capabilities.

One of the few cases that has provided measurable standards for the delivery of medical care to women in correctional institutions is *Garnes v. Taylor*.³³⁹ The institution held sixty female prisoners. The court found delays in providing initial medical examinations for newly arriving inmates, delays which resulted in some drug addicts going "cold turkey," pregnant inmates aborting, and delay in referring inmates for psychiatric treatment.³⁴⁰ While the court acknowledged that a doctor had recently been assigned to make daily visits to the institution, it nevertheless ordered that no prisoner was to be placed in segregation for medical, psychiatric or emotional reasons unless she was examined by a physician within eight hours.³⁴¹ Segregation could not continue unless the inmate was examined every twenty-four hours.³⁴² Pregnant inmates were to be maintained on methadone.³⁴³ Inmates displaying unusual behavior were to be examined within forty-eight hours.³⁴⁴

Medical care in the correctional setting, whether for men or women, is woefully inadequate. The problem for women is more acute, however, because of the greater number of medical problems experienced by female inmates and the proportionately greater number of the female inmate population affected by health problems. Failure to

³³⁵ 367 F. Supp. 77, 79 (E.D. Va. 1973).

³³⁶ 393 F. Supp. 757 (D. Md. 1975).

³³⁷ *Id.* at 761.

³³⁸ *Id.* See generally Isele, *Constitutional Issues of the Prisoner's Right to Health Care*, American Medical Association (1978).

³³⁹ Civil No. 159-72 (D.D.C. 1976).

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Id.*

provide adequate care is undoubtedly a violation of the eighth amendment. Because female prisoners have greater medical needs, equal or similar medical care may not be sufficient to satisfy the mandates of the equal protection clause. Correction officials may find it necessary to provide female prisoners with more medical professionals more often, and dispense more medical care and advice than provided for male prisoners to comply with equal protection standards.

1. *Abortion and Pre-Natal Care Services*

Prison affects the rights of pregnant women and their unborn children. The case law supports a woman's right to procreate and her right to have an abortion. Actions of prison officials, however, can deny both rights. In addition, actions by prison officials may be detrimental to the health and welfare of unborn infants. In *Skinner v. Oklahoma*,³⁴⁵ the Supreme Court declared that procreation is one of the "basic civil rights of man . . . fundamental to the very existence and survival of the race."³⁴⁶ The Court invalidated a statute providing for the sterilization of habitual criminals, holding that state actions affecting procreation are subject to strict judicial scrutiny.³⁴⁷ While there have been no cases of female inmates being physically forced to abort a pregnancy, there have been reports of inmates being pressured into having abortions.³⁴⁸ Women who want to exercise their constitutional right to have an abortion during the first trimester of pregnancy³⁴⁹ may find that right frustrated by a lack of early detection of pregnancy, when inmates experience long periods of delay in obtaining medical evaluation and when pregnancy tests are not administered upon admission to prison.³⁵⁰ The district court in *Lett v. Withworth*,³⁵¹ held that to prevent irreparable harm to a prison inmate, she could not be denied her constitutional right to have her pregnancy terminated prior to the end of the second trimester of her pregnancy.³⁵² After the Supreme Court held in *Maher v. Roe*³⁵³ that the state is not required to pay for abortions for indigents, some courts have ordered that abortions be performed on women inmates who request them but that the expense not be paid by the counties involved.³⁵⁴

Once an inmate decides to give birth, the prison environment presents potential dangers to the health and welfare of both the mother and the unborn child. The potential pre-natal problems range from inadequate diets and drug use or abuse to abusive treatment of pregnant inmates. Pregnant women need a diet high in protein, vitamins,

³⁴⁵ 316 U.S. 535 (1942).

³⁴⁶ *Id.* at 541.

³⁴⁷ *Id.*

³⁴⁸ See McHugh, *Protection of the Rights of Pregnant Women in Prisons and Detention Facilities*, 6 NEW ENG. J. PRISON LAW 233, 235 (1980) [hereinafter cited as McHugh].

³⁴⁹ This right was established by the Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973).

³⁵⁰ See *Todaro v. Ward*, 431 F. Supp. 1129, 1143-51 (S.D.N.Y. 1977), *aff'd*, 565 F.2d 48 (2d Cir. 1977), for examples of delay in delivery of various health care services.

³⁵¹ Civil Action No. C-1-77-246 (S.D. Ohio 1976); see also *Wolfe v. Schroering*, 541 F.2d 523, 525 (6th Cir. 1976); where the court held that a third person could not veto a mother's right to have an abortion unless the veto is to protect maternal health.

³⁵² *Lett v. Withworth*, Civ. Action No. C-1-77-246 (S.D. Ohio 1976).

³⁵³ 432 U.S. 464 (1977).

³⁵⁴ See, e.g., *Doe v. Jennings*, Civil Action No. 79-6810 (W.D. Pa. 1979); *Comm. of Va. v. Aldridge*, (Civil Action Cir. Ct., Arlington, Va., 1979).

and other nutrients.³⁵⁵ Prison food, however, is normally low in vitamins and protein but high in starches.³⁵⁶ Nutritional deficiencies have been linked to high pre-natal mortality, retardation, hypertensive disorders, brain damage, and premature delivery.³⁵⁷ A recent survey of twenty-six state, federal, and local correctional institutions for women revealed that fourteen made no provisions for special diets or vitamin supplements for pregnant inmates.³⁵⁸ Some correctional facilities have been ordered to employ registered dietitians as consultants and to provide special diets for health reasons.³⁵⁹

Drug addiction and the use of drugs to control inmates are problems that can severely affect pregnant inmates. Heroin use during pregnancy can cause premature labor, infant mortality, and passive drug dependence in the newborn.³⁶⁰ Many prisons, however, do not have plans to meet the needs of the addicted mother or unborn child.³⁶¹ Inmates at the District of Columbia Women's Detention Center, for example, brought an action based in part on the practice of putting new prisoners through "cold turkey" withdrawal from methadone, a practice that can result in miscarriage and damage to a fetus.³⁶² In its final order, the court in this action ordered that pregnant prisoners who were maintained on methadone prior to incarceration be maintained at least temporarily on methadone.³⁶³ Moreover, the administration of tranquilizers to calm inmates and mood-elevating drugs to counteract depression is a common practice in many prisons. Even though such drugs can pose danger to an unborn fetus, many institutions do not test for pregnancy before administering the drugs.³⁶⁴

Conditions for delivering babies in prison have also been criticized in recent cases. For example, a federal district court in *Newman v. Alabama*³⁶⁵ found that the facilities for child birth at the Tutwiler Prison for Women were so inadequate that the health and lives of both the women and newborn were endangered. While the institution had an average of seven or eight deliveries each year, "[t]he delivery table has no restraints, paint is peeling from the ceiling above it, and large segments of the linoleum floor around the table are missing. There are no facilities to resuscitate the newborn or otherwise provide adequate care should any complications arise during delivery."³⁶⁶

J. Access to Courts and Legal Materials

Female prisons often do not make adequate legal resources available to the prison population. Access to the courts and legal materials is essential to insure that the female prisoner's rights to counsel and to equal protection are not violated.³⁶⁷ Ready access to legal materials and individuals trained in the law can enable many prisoners to determine

³⁵⁵ See McHugh, *supra* note 348, at 241.

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Laaman v. Helgemoe*, 437 F. Supp. 269, 326 (D.N.H. 1977); *Pugh v. Locke*, 406 F. Supp. 318, 334 (M.D. Ala. 1976).

³⁶⁰ McHugh, *supra* note 348, at 243-44.

³⁶¹ *Id.*

³⁶² *Garnes v. Taylor*, Civil Action 159-72 (D.D.C. 1976).

³⁶³ *Id.*

³⁶⁴ McHugh, *supra* note 348, at 243.

³⁶⁵ 349 F. Supp. 278 (M.D. Ala. 1972), *cert. denied*, 421 U.S. 948 (1975).

³⁶⁶ *Id.* at 282-83.

³⁶⁷ Jacob and Sharms, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal Correctional Process*, 18 KAN. L. REV. 493, 511 (1970).

that many of their concerns are unfounded. Others can pursue vindication of their rights and in the process learn that the legal system operates for their benefit.

A recent study of prisons for women in four northeastern states revealed vast differences in the nature and quality of legal resources available.³⁶⁸ The study analyzed the availability of appropriate law books, law librarians, public defenders, private attorneys, jailhouse lawyers, duplicating equipment, and access to telephones for contacting attorneys.³⁶⁹ Results of the research revealed that each prison had structural weaknesses in these areas and "missing links in the provision of legal resources prevented meaningful use of existing materials and personnel."³⁷⁰ Use of these resources was found to be more a function of the extent of resources available and regulations of an institution than of the interest of inmates in pursuing redress for their legal needs.³⁷¹ In analyzing such needs, the researchers found that they were ranked in the following order: child custody and family issues, good time and jail credit issues, prison program issues, appeal and sentencing issues, disciplinary issues, detainees, and warrants.³⁷²

The United States Supreme Court, in *Bounds v. Smith*,³⁷³ held that "prison authorities [must] assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from prisoners trained in law."³⁷⁴ The court of appeals had struck down the plan at issue in *Bounds* because it provided women prisoners with less access to legal research facilities than male prisoners.³⁷⁵ The plan was discriminatory because it provided that the library for male prisoners would contain federal and state materials, but the library for women inmates would only contain state statutes and treatises.³⁷⁶

In *Glover v. Johnson*,³⁷⁷ the district court compared the law libraries and paralegal training available to men in the Michigan state prisons with the libraries and training available to women prisoners. Although the law library for women was less extensive than the libraries for men, the court noted that the library for women was adequate under the standards set forth in *Bounds v. Smith*.³⁷⁸ In addition, while noting that the state paid for the volumes necessary to meet the standards in *Bounds*, additions to the libraries were paid for voluntarily by inmates through a resident benefit fund³⁷⁹ financed from sales of

³⁶⁸ K. GABEL, *supra* note 162, at 3-5, 91-140.

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 4-5.

³⁷¹ *Id.* at 2-3, 51-88.

³⁷² *Id.*

³⁷³ 430 U.S. 817 (1977).

³⁷⁴ *Id.* at 828; see also *Johnson v. Avery*, 393 U.S. 483, 490 (1969), where the Court also held that if a prison does not provide some form of legal assistance to inmates, it may not bar inmates from furnishing such assistance to other prisoners.

³⁷⁵ *Smith v. Bounds*, 538 F.2d 541, 543 n.1 (4th Cir. 1975), *aff'd on other grounds*, 430 U.S. 817 (1977).

³⁷⁶ *Id.* at 543-45.

³⁷⁷ 478 F. Supp. 1075 (E.D. Mich. 1979).

³⁷⁸ *Id.* at 1095-96; see also *Batton v. North Carolina*, 501 F. Supp. 1173, 1178 (E.D.N.C. 1980), where the court found that the library for women prisoners met the standards of *Smith v. Bounds*, and was in fact superior to the libraries in most of the state's prisons.

³⁷⁹ Resident benefit fund's are programs wherein a percentage of money spent by inmates is contributed to a target fund to be used for specific agreed-upon purposes for the benefit of the entire prison population. See *MANUAL OF CORRECTIONAL STANDARDS*, *supra* note 1, at 551.

commissary goods.³⁸⁰ Although the contributions to the benefit fund at the men's prison averaged \$10,000 per month, women prisoners only contributed \$300 per month.³⁸¹ Thus, women prisoners' legal resources were less abundant than men prisoners' because women prisoners bought fewer commissary goods; indeed there were fewer female prisoners to do the buying.

Access to legal materials alone does not satisfy the state's obligation under *Bounds*.³⁸² The *Glover* court found that the female prisoners had not developed the legal expertise to use the library and that the Prison Legal Services, an organization that provided legal service to inmates, was limited in the kinds of cases it could handle. As a result female inmates were left without the assistance of counsel in "critical areas of the law."³⁸³ In responding to a claim that the lack of a paralegal training program for women prisoners similar to the program offered to male prisoners violated the equal protection clause and denied women equal access to the courts, the district court in *Glover* held that a legal education course for women prisoners was justified, not because a similar program was offered at a prison for men but because skilled women were needed to provide meaningful access to the courts.³⁸⁴ The court's decision was ultimately based, not on equal protection grounds, but on the sixth amendment right to counsel.

In a similar case, female inmates at the Kentucky Correctional Institution for Women brought suit, in *Canterino v. Wilson*,³⁸⁵ claiming that the law library was inadequate and that they had inadequate access to legal service provided by the public defenders' office.³⁸⁶ The district court held that to bring access to the courts for male and female prisoners to constitutional parity, on equal protection grounds:

female prisoners must be provided with a library that is equivalent to the libraries at two of the prisons for men, that the amount of time for women to use the library be increased and that women prisoners be provided the equivalent of at least one half-time attorney to assist in all areas including habeas corpus and other civil matters.³⁸⁷

All prisoners have a right to counsel and legal resources in the prison setting. Courts generally seem to disfavor unequal resources or unequal access to resources between male and female prisoners and have, as a general rule, found equal protection violations when states did not provide parity of resources and essential equality of opportunity to use those resources.

³⁸⁰ Commissary goods include personal equipment or provisions, such as, deodorant, chewing gum, and candy, the distribution of which to the general prison population is regulated. See MANUAL OF CORRECTIONAL STANDARDS, *supra* note 1, at 551.

³⁸¹ *Glover*, 478 F. Supp. at 1095.

³⁸² *Bounds*, 430 U.S. at 817.

³⁸³ *Glover*, 478 F. Supp. at 1095.

³⁸⁴ *Id.* at 1097.

³⁸⁵ 546 F. Supp. 174 (W.D. Ky. 1982).

³⁸⁶ *Id.* at 203.

³⁸⁷ *Id.* at 216. The question of whether a state could provide female and male prisoners with a different form of legal service consistent with *Bounds* has not been decided. For example, under *Bounds* it would appear to be constitutional for a state to provide female prisoners with adequate assistance of legal counsel and male prisoners with an adequate law library and paralegal training. A subsidiary question, therefore, would be whether a state's rationale that women have less skill in the legal areas, as was found in *Glover*, would be sufficient justification for disparity in treatment.

- K. *Interrelationship Among Specific Elements of the Institutional Environment and the Correctional Process*

Traditionally, determinations regarding which institution to assign a sentenced offender, and the security classification of the inmate within an institution, have been the most important decisions affecting inmates because they affect the level of freedom and access to inmates' programs, family, and treatment. The rehabilitative and treatment programs must be available to inmates once the assignment decision is made. The effectiveness of institutional administrators in arriving at such decisions determines not only the quality of institutional life benefits that an inmate may obtain from incarceration, but ultimately may affect society as it copes with former prisoners and their families.

Theoretically, the goals and values of an institution form an important element of the correctional process because obviously all activities are directed toward their achievement. Rules, regulations, and standards are not only aimed at achieving the goals but affect program participation by inmates and the institution's psychosocial environment. The psychosocial environment involves not only the relationships among inmates but also relationships between inmates and correctional staff. To a certain degree it may involve intrafamily relationships. It is the responsibility of management to coordinate these elements. Arguably, the most important influences affecting an institution are legislation, court decisions, family contacts, and information concerning community attitudes and acceptance of ex-offenders. In the final analysis it is the interrelationship of these elements of a correctional institution and these external influences that have resulted in a need for female inmates to seek vindication of their rights through the courts.

IV. BEYOND THE COURTS — ALTERNATIVE APPROACHES FOR ACHIEVING CHANGE

Although class action suits by female inmates can be an effective means for reducing discriminatory conditions between men and women in state correctional systems and for vindicating other rights of prison inmates, there are several negative results stemming from litigation. First, there is a diversion of resources that could be used to foster meaningful reform toward payment of the costs of litigation. Second, the orders and opinions of a court are of limited applicability in states other than the court's own jurisdiction. Third, litigation can be viewed as a symptom of a reactive or crisis-oriented government rather than a proactive one devoted to meeting the needs of its citizens.

A number of alternatives to litigation exist that are not only preferable to court ordered reform in a democratic society but are also theoretically more responsive to the needs of both inmates and society. This section of the article will discuss three such alternatives: state legislation, which is often closer to the immediate problems of the state prisons; uniform national standards, which can provide general guidelines and standards for all prisons to meet; and the equal rights amendment and "New Federalism," which in combination may provide a whole host of new solutions to old and new problems.

A. *State Legislation*

While state legislatures can be presumed to intend that female and male prisoners be treated equally, equal treatment often is not achieved. Express legislation at the state level is needed to correct existing disparities. Statutes in most states do not explicitly require equality in classification, programming, treatment, policies, procedures or in other areas of prison life. Ironically, although correctional institutions for women were designed to emphasize rehabilitation rather than punishment, budgetary allocations and the adminis-

tration of available facilities have often not accomplished that objective. At least one study³⁸⁸ indicates that classification and inmate discipline systems can actually be counter-rehabilitative,³⁸⁹ and further reveals that male prisoners often have greater opportunities for treatment, vocational training, education, and work than women. A review of state statutes throughout the country indicates that very few states mandate equal treatment and programming for women and men. Although the following discussion is not intended to provide an exhaustive review of such laws, it provides some examples of typical legislation. Some statutes can be considered more progressive because they specifically mandate equal programming for men and women.³⁹⁰ While some state codes make no reference to equal treatment, the respective states have administered the statutes to effectuate relative equality.

The most predominant type of statute throughout the country mandates the separation of sleeping quarters for male and female prisoners, unless the prisoners are married to each other.³⁹¹ Some states mandate that female prisoners be supervised only by female guards³⁹² and searched only by female guards.³⁹³ Many states also have statutes concerning custody of the children of inmates or provisions for the termination of parental rights. One of the most beneficial statutes for purposes of maintaining and fostering family relationships is found in Maryland where the governor is authorized to parole, commute or suspend a female prisoner's sentence when she is about to give birth.³⁹⁴ If the mother's sentence is only suspended, the state allows the father or other relatives to care for the child until the mother's release.³⁹⁵ In California, female prisoners with less than two years to serve on their sentence and with children less than two years old can be released to a public or private facility in the community to live with their children. Community facilities are to provide pediatric care and are directed to care for the mother's mental stability and to assist the mother in developing good mothering habits as well as the ability to function in the community upon release.³⁹⁶ Other statutes merely allow mothers to maintain custody of a newborn while in prison for one year,³⁹⁷ eighteen months³⁹⁸ or two years.³⁹⁹ Upon termination of this period, or in some cases immediately after birth, these statutes provide for either foster care of the child until completion of the mother's sentence or, if in the "best interests" of the child, termination of parental rights.⁴⁰⁰

Legislative standards for medical care within prisons vary substantially from state to state. The most comprehensive and far-reaching statute is found in Wisconsin where the legislature mandated that "standards for delivery of health services in state correctional institutions . . . shall be based on the essential standards of the American Medical Association for health services in prisons."⁴⁰¹ Several states have statutes that provide for

³⁸⁸ See generally K. GABEL, *supra* note 162.

³⁸⁹ *Id.*

³⁹⁰ See, e.g., CAL. PENAL CODE §§ 4002, 4110 (West 1982).

³⁹¹ See, e.g., CONN. GEN. STAT. ANN. § 18-62 (West 1975).

³⁹² CAL. PENAL CODE § 4021 (West 1982).

³⁹³ *Id.*; FLA. STAT. ANN. § 944.24(1) (West 1973). *Contra* Mich. Stat. Ann. § 28.884(2) (Callaghan Supp. 1984), which allows body cavity searches by the opposite sex.

³⁹⁴ MD. ANN. CODE art. 27, § 699 (1982).

³⁹⁵ *Id.* See also VA. CODE § 53.1-41 (1982).

³⁹⁶ CAL. PENAL CODE §§ 3410-3424 (West 1982).

³⁹⁷ ILL. ANN. STAT. ch. 38, § 1003-6-2(g) (Smith-Hurd 1982).

³⁹⁸ N.Y. CORRECT. LAW § 611 (McKinney 1968).

³⁹⁹ N.J. STAT. ANN. §§ 30:4-26.2 (West 1982).

⁴⁰⁰ See *id.*; CONN. GEN. STAT. ANN. § 18-69 (West 1975); FLA. STAT. ANN. § 944.24(2) (West 1973).

⁴⁰¹ WIS. STAT. ANN. § 53.385 (West Supp. 1984).

medical treatment involving limited areas such as abortion and child delivery.⁴⁰² Often a female prisoner may have the physician and surgeon of her choice for determination of pregnancy and delivery, but she or her family must pay for the choice of not using institutional physicians.⁴⁰³ A Tennessee statute authorizes a doctor, rather than a correctional administrator, to decide when hospitalization outside of an institution is necessary for any type of treatment.⁴⁰⁴

California is one of the few states that mandates, by legislation, that men and women in county detention facilities have equal access to vocational, recreational and treatment programs and privileges except when the number of one sex in the institution is so low that diversion of resources is not justified.⁴⁰⁵ Other state statutes merely authorize the establishment of educational and rehabilitation programs in correctional institutions for women, without reference to whether they must be equivalent to the programs provided for men.⁴⁰⁶ While many states have only one correctional institution for women, Pennsylvania has authorized establishment of regional community treatment centers for the treatment and rehabilitation of women.⁴⁰⁷ Some states have statutes that allow women to take part in work release programs.⁴⁰⁸ New York authorizes the use of its work release provision for release of a woman to care for her family when it is necessary and reasonable.⁴⁰⁹

This selective overview of existing state statutes and practices indicates that results achieved when individual states attempt to establish guidelines for equal and effective treatment of women in the criminal justice system are inconsistent and unpredictable. While state legislation has advantages over litigation, variances among states in the levels of equality of treatment and the comprehensiveness of services provided to female inmates suggest that adoption and enforcement of uniform national standards may provide a more effective means of bringing about needed reform.

B. Uniform National Standards

The adoption of national uniform correctional standards would be a positive and substantial step in the direction of achieving gender equality.⁴¹⁰ Case law has thus far proved to be inadequate in providing correctional administrators with explicit minimum standards for operating prisons.⁴¹¹ Often contradictory and applicable only to narrow factual problems, decisional law involving correctional institutions is frequently so broad and general that it provides little guidance to other states. These opinions do not provide a model for reform but are instead remedy specific to the facts presented by each case.

⁴⁰² CAL. PENAL CODE §§ 3406, 4023.6 (West 1982); MD. ANN. CODE art. 27, § 699 (1982); *see also* MASS. GEN. LAWS ANN. ch. 127, § 21 (West 1974).

⁴⁰³ CAL. PENAL CODE §§ 3406, 4023.6 (West 1982); MD. ANN. CODE art. 27, § 699 (1982); *see also* MASS. GEN. LAWS ANN. ch. 127, § 21 (West 1974).

⁴⁰⁴ TENN. CODE ANN. § 4-6-109 (1979).

⁴⁰⁵ CAL. PENAL CODE § 4029 (West 1982).

⁴⁰⁶ *See* ILL. REV. STAT. 1968, ch. 23 § 2802 (*repealed by* P.A. 77-2097, § 8-5-1 (1973)); ILL. REV. STAT. 1973, ch. 38, § 1003-2-2(a), (b), (d) (West 1984); IND. STAT. § 11-7-9-9 (1976); OHIO REV. CODE ANN. § 5143.25 (Baldwin 1984); PA. STAT. ANN. tit. 61, § 578 (Purdon 1964); TENN. CODE ANN. § 41-825 (*repealed, now* § 41-5-103 (1982)); WASH. REV. CODE ANN. tit. 72, § 72.15.050 (West 1982).

⁴⁰⁷ PA. STAT. ANN. tit. 61, § 460.11 (Purdon Supp. 1984).

⁴⁰⁸ *See, e.g.,* UTAH CODE ANN., tit. 64, ch. 9b-2 (2) (1983).

⁴⁰⁹ N.Y. CORRECT. LAW § 891 (McKinney 1968 & Supp. 1984-85).

⁴¹⁰ For discussion on national standard *see infra* text accompanying notes 412-36.

⁴¹¹ As mentioned previously, *supra* text accompanying notes 4-6, cases and the rules of law derived from cases tend to be fact specific.

In recent years a number of national organizations⁴¹² have established comprehensive sets of standards to assist correctional administrators in improving all aspects of prisons.⁴¹³ Courts most frequently cite the standards developed by the American Correctional Association (ACA) and American Medical Association (AMA).⁴¹⁴ These standards reflect the consensus of correctional administrators and other professionals throughout the country on areas of vital importance to daily operations of correctional facilities and the health and well-being of the prisoners.⁴¹⁵

Many of the ACA standards go beyond established legal requirements and have been cited by prison plaintiffs as partial bases for their causes of action.⁴¹⁶ The purpose of the ACA standards is to provide guidelines to correctional administrators for use in developing and evaluating programs to meet the needs of prisoners and to insure protection of prisoners rights without sacrificing institutional security. The effect of implementing these standards has been improved prison relations and improved prison conditions. Of the 164 ACA Adult Correctional Institution standards thirty-three percent are based upon case law.⁴¹⁷ Similarly, thirty-eight percent of the 148 Adult Local Detention Facility standards have supporting case law.⁴¹⁸ Some of the key areas of standard development relevant to the topic of this article include: access to the courts, counsel and legal materials, visitation and contact with family, medical care, classification, rehabilitation and recreation, treatment, and sex discrimination. The standards reflect recent case law but the standards address more than the problems raised in cases — they provide a general framework for how a prison should be run. Organizations that have developed correctional standards are providing courts and correctional administrators with specific and articulated parameters by which correctional institutions can be evaluated to determine whether inmate rights are being preserved.

Most ACA standards are gender-neutral. The ACA made an effort to avoid drafting an extensive set of standards specifically for women because of the belief that unequal

⁴¹² Organizations establishing standards for prisons include: Association of State Correctional Administrators; American Association of Mental Health Professionals in Corrections; Association on Programs for Female Offenders; American Correctional Association; American Medical Association — Health Services in Corrections Institutions; American Bar Association — Committee on Correctional Facilities and Services. Most of these organizations are voluntary associations interested in improving the conditions of prison life.

⁴¹³ American Medical Association, Standards on Medical Care in Correctional Institutions; Standards, American Correctional Association, Commission on Accreditation; D. SECHREST, *Correctional Standards and Policy Programs of American Correctional Association, Federal Standards for Corrections*, U.S. Department of Justice; 1983 ABA COMMITTEE ON CORRECTIONAL FACILITIES AND SERVICES REP.

⁴¹⁴ For purposes of this article the following ACA standards were reviewed: Manual of Standards for the Administration of Correctional Agencies; Standards for Adult Correctional Institutions; and Standards for Adult Local Detention Facilities. The source of those standards is the American Correctional Association, Rockville, Maryland, April, 1981. In addition, the author has consulted AMERICAN MEDICAL ASSOCIATION STANDARDS FOR ACCREDITATION OF MEDICAL CARE AND HEALTH SERVICES IN JAILS (1981).

⁴¹⁵ ACA STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (2d ed. 1981); AMA STANDARDS FOR HEALTH SERVICES IN JAILS (July 1982).

⁴¹⁶ See *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979); *Canterino v. Wilson*, 546 F. Supp. 174 (W.D. Ky. 1982).

⁴¹⁷ Comparison of Adult Institution Standards with case law by the Commission on Accreditation for Corrections, College Park, Maryland (June 1982).

⁴¹⁸ *Id.*

treatment would result from publication and implementation of those standards.⁴¹⁹ Nevertheless, a limited number of standards are drafted specifically for women and provide for essential equality in specific areas of concern. Under the ACA standards, if males and females are housed in the same institution, the women are to be provided with separate sleeping quarters and equal access to service and programs. This latter standard would seem to include legal and medical services as well as work release and vocational training programs. Institutions housing only female inmates must provide essential equality with male institutions in virtually every aspect affecting the inmates' prison life.⁴²⁰

Although these standards do not constitute sources of legal or constitutional rights, they should be adopted by the courts as guidelines in passing judgment on prisoners' claims. Unfortunately some courts have altogether denied the validity of the standards as a proper source of inmate rights. For example, in *Grubbs v. Bradley*,⁴²¹ the court held that, "while guidelines of professional organizations such as the American Correctional Association represent desirable goals for penal institutions, neither they nor the opinions of experts can be regarded as providing constitutional minima."⁴²²

⁴¹⁹ D. SECHREST, CORRECTIONAL SYSTEM STANDARDS FOR WOMEN (May 1979) (prepared for Regional Training Seminar on Planning and Evaluation Programs for Women Offenders, College Park, Maryland).

⁴²⁰ Pertinent Standards For Adult Correctional Institutions include:

2-4133 Existing, renovation, addition, new plant

When males and females are housed in the same institution there are separate sleeping quarters. (Important).

2-4331

When male and female inmates are housed in the same institution, there are separate sleeping quarters, but equal access to all available services and programs. Neither sex is denied opportunities solely on the basis of their smaller number in the population. (Essential).

2-4332

Institutions housing female inmates provide essential equality with male institutions in institutional programs, living conditions, access to community programs and resources, employment opportunities, access to family and other community associations, and decision-making processes affecting status, activities and terms of incarceration. (Essential).

2-4333

Written policy and procedure require that comprehensive counseling and assistance are provided to pregnant inmates in keeping with their expressed desires in planning for their unborn children. (Essential).

DISCUSSION: Counseling and social services should be available from either facility staff or community agencies to assist inmates in making decisions such as whether to keep their child, give the child up for adoption or consent to an abortion. It is advisable that a formal legal opinion as to the law relating to abortion be obtained, and based upon that opinion, written policy and defined procedures should be developed for each jurisdiction. (See related standard 2-4481).

2-4412

The institution provides a variety of work assignments that afford inmates an opportunity to learn job skills and develop good work habits and attitudes that they can apply to jobs after they are released. (Important).

DISCUSSION: Whenever possible, inmate work assignments provide experience relevant to the current job market. Work assignments for women are not limited to traditional tasks assigned to women. (See related standard 2-4332).

ACA STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS (2d ed. 1981).

⁴²¹ 552 F. Supp. 1052 (M.D. Tenn. 1982).

⁴²² *Id.* at 1124; see also, *Bell v. Wolfish*, 441 U.S. 520, 543-44, n.27 (1979); *McMurry v. Phelps*, 533 F. Supp. 742, 750 (W.D. La. 1982).

Other courts, however, have been persuaded by the standards in a variety of areas. The most frequently cited standards are the ACA standards concerning prison cell size and living space for inmates.⁴²³ For example, in *Battle v. Anderson*, the court reviewed ACA, American Public Health (APH) and National Advisory Commission standards and cited with approval the APH standards for square feet per inmate in cells and dormitories.⁴²⁴ In adopting environmental standards for cell space, water, fire protection, air, and food the court noted that, "[i]t is incumbent on the incarcerating body to provide the individual with a healthy habilitative environment With habilitation assured, then possibly or probably the inmate can decide to rehabilitate himself."⁴²⁵

The most comprehensive decision concerning standards was handed down in *Kendrick v. Bland* in reference to inmates placed in restricted confinement.⁴²⁶ Administrators of the Kentucky correctional system were ordered to review ACA and other standards and to develop a plan to deal with environmental factors such as lighting, ventilation, temperature, and water; medical and health; programs such as education and recreation; access to law and regular libraries; visitation and correspondence; food service; social interaction; and length of confinement within a cell.⁴²⁷

Of all the standards applied by courts, the standards on health care have had particular impact. AMA and ACA standards for health care have been compared with the status of care in several cases. In *Kendrick v. Bland*, defendants were ordered to submit a plan for providing emergency medical care which met ACA standards.⁴²⁸ In response to a suit by inmates at the Lucas County Correctional Center in Ohio, the correctional center commissioners contracted with a physician for provision of medical services in accordance with AMA Standards for Accreditation of Medical Care and Health Services in Jails.⁴²⁹ The court in *Ruiz v. Estelle* reviewed ACA standards for inmate to doctor ratio.⁴³⁰ At least one state mandates, by legislation, that correctional institutions meet AMA standards for medical care.⁴³¹

Courts have relied on food and sanitation standards from a variety of organizations. Food service sanitation was evaluated in *Hendrix v. Faulkner* in light of the 1976 Food Service Sanitation Manual of the United States Food and Drug Administration.⁴³² In *Jones v. Wittenberg*, a fourteen-day cycle menu that meets National Academy of Science and ACA standards was proposed to meet the nutritional needs of prisoners in the Ohio correctional system.⁴³³

The standards, drafted by private organizations, provide specific and articulated norms by which correctional institutions should be judged to determine whether or not

⁴²³ See, e.g., *Canterino v. Wilson*, 546 F. Supp. 174, 198 (W.D. Ky. 1982); *Kendrick v. Bland*, 541 F. Supp. 21, 29 (W.D. Ky. 1981); *Ruiz v. Estelle*, 503 F. Supp. 1265, 1282-83 (S.D. Tex. 1980); *Feliciano v. Barcelo*, 497 F. Supp. 14, 17, 22, 35 (D.P.R. 1979); *Battle v. Anderson*, 447 F. Supp. 516, 525-26 (E.D. Okla. 1977).

⁴²⁴ 447 F. Supp. 516, 525 (E.D. Okla. 1977).

⁴²⁵ *Id.*

⁴²⁶ 541 F. Supp. 21, 29-31 (W.D. Ky. 1981).

⁴²⁷ *Id.* at 33.

⁴²⁸ *Id.* at 38-39.

⁴²⁹ *Jones v. Wittenberg*, 509 F. Supp. 653, 685 (N.D. Ohio 1980).

⁴³⁰ 503 F. Supp. 1265, 1308 (S.D. Tex. 1980).

⁴³¹ WIS. STAT. ANN. § 53.385 (West Supp. 1984).

⁴³² 525 F. Supp. 435, 488 (N.D. Ind. 1981).

⁴³³ 509 F. Supp. 653, 667, 669 (N.D. Ohio 1980). See also *supra* notes 351-53 and accompanying text. Other areas where standards have been used include classification and electric equipment.

inmate rights are being infringed. This determination can be accomplished by individual prison administrators implementing the ideas embodied in the standards or by courts adopting the standards as a constitutional minimum when reviewing claimed violations of prisoners' rights. The adoption, implementation and adherence to these standards will improve the psychosocial environment in prison.

The ACA Commission on Accreditation has responsibility for evaluating correctional institutions to determine whether they can be accredited as complying with the ACA standards. Federal institutions are required to meet the standards set by the Federal Bureau of Prisons but state institutions are not.⁴³⁴ In recent years, however, the accreditation process has been a major factor in states receiving federal grants to improve correctional institutions. Receipt of federal funds for corrections was based upon a state's efforts to achieve approval of its institutions by the National Institute of Corrections.⁴³⁵ In addition, correctional administrators can use accreditation as a tool in fighting lawsuits by showing substantial compliance with recognized standards. Thus, while accreditation of state institutions is not mandated, it is highly desirable and beneficial. As of January 1983, adult correctional institutions of the federal government and at least some institutions in eighteen states had received accreditation. Correctional institutions for women in eight states and of the federal government were accredited. Some adult local detention facilities in nine states were also accredited.⁴³⁶ The irony here is that the least equivocal and strongest standards come from correctional administrators who often require more of their own institution than the minimum standards require.

C. ERA and the "New Federalism"

Despite the failure of the federal Equal Rights Amendment (ERA) to gain ratification, state equal rights legislation and constitutional provisions can still provide a viable means to eliminate gender disparity in the criminal justice system by requiring equality of treatment, where necessary and practical, with men. In the early 1960's the President's Commission on the Status of Women stated that a constitutional amendment was needed to assure equality of rights for men and women, and called upon the American judiciary to clarify and eliminate all existing constitutional ambiguities hindering the achievement of equal rights for women.⁴³⁷ This statement served as the impetus for the various legal attacks launched in the 1960's against statutes allotting longer prison sentences to women offenders than to their male counterparts.⁴³⁸ Although some states have changed their previously discriminatory sentencing practices,⁴³⁹ reliance upon the judiciary to resolve the inequities of this situation absent a constitutional compulsion to effect change has generally failed, and suggests an argument for a national ERA.⁴⁴⁰

⁴³⁴ See generally 18 U.S.C. § 4042 (1982).

⁴³⁵ See generally 18 U.S.C. § 4351 (1982).

⁴³⁶ COMMISSION ON ACCREDITATION, AMERICAN CORRECTIONAL ASSOCIATION, SURVEY (1983).

⁴³⁷ Temin, *supra* note 78, at 355, citing THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN REPORT, AMERICAN WOMEN (Supp. 1961) (established by Executive Order No. 10,980, 3 C.F.R. 138), wherein it stated that:

Since the commission is convinced that the U.S. Constitution now embodies equality of rights for men and women, we conclude that a constitutional amendment need now be sought to establish this principle. But judicial clarification is imperative in order that remaining ambiguities with respect to constitutional protection of women's rights be eliminated.

Id.

⁴³⁸ Temin, *supra* note 78, at 355.

⁴³⁹ *Id.* at 361-62.

⁴⁴⁰ *Id.* at 371.

Some people believe that sexual segregation in prison is yet another discriminatory practice of the American correctional system. Based upon obsolete theories about hypothetically differing security and rehabilitative needs that exist between female and male offenders,⁴⁴¹ sexual segregation prevents standardized treatment among incarcerated members of both genders⁴⁴² and results in differential treatment manifested in physical surroundings, recreational activities, staffing personnel, and educational programs.⁴⁴³ As this article has illustrated, incarcerated women are arguably victimized by a correctional system that assigns to them a status different than the status of the male offender. Allegedly benevolent in its objectives, this assignment places women offenders at a social, treatment, and vocational disadvantage. Enactment of the ERA would have been a step towards remedying these disadvantages.⁴⁴⁴

Ratification of the ERA might have resulted in sexually integrated correctional institutions which in turn might have eliminated the disparate treatment to which male and female offenders are currently subjected.⁴⁴⁵ Some ERA advocates contend that both quantitative and qualitative differences existing between the educational programs available to men and those offered to women may have been similarly eliminated,⁴⁴⁶ while assignments to prison industries and work details could have been made on a gender-neutral basis under the influence of the ERA.⁴⁴⁷ In the hands of jurists enlightened by the constitutional mandate of a ratified ERA, the amendment could have been an invaluable tool in correcting some of the blatant disparities of gender based incarceration. While it seems unlikely that if the ERA had been passed it would have been used to integrate each correctional facility and program, it may have provided equality or parity of program opportunity. As it now stands, the advocates of the ERA must embark on yet another ten-year voyage toward ratification. As this article has indicated, other routes can be taken to aid the female offender.

The "New Federalism,"⁴⁴⁸ in its fervor to free the federal government from involve-

⁴⁴¹ The obsolescence of these theories was superbly illustrated in *State v. Heitman*, 105 Kan. 139, 146-48, 181 P. 630, 633-34 (1919), wherein the court noted that:

It required no anatomist, physiologist, psychologist or psychiatrist to tell the Legislature that women are different from men. In structure and function human beings are still as they were in the beginning "Male and Female as created He them." It is a patent and deep lying fact that these fundamental anatomical and physiological differences affect the whole psychic organization. They create the differences in personality between men and women and personality is the predominating factor in delinquent careers . . . [T]he female offender not merely requires, but deserves, on account of matters touching the perpetuation and virility of the species, correctional treatment different from the male offender, in both kind and degree Let it be conceded that the industrial farm for women may fail to accomplish the results hoped for; the statute represents a serious effort on the part of the Legislature to deal justly with a subject of great public concern, and this Court is not authorized to declare the classification . . . is either arbitrary or unreasonable.

Id.

⁴⁴² Note, *Sexual Segregation*, *supra* note 115, at 1231.

⁴⁴³ *Id.* at 1237.

⁴⁴⁴ *Id.* at 1264.

⁴⁴⁵ *Id.* at 1267.

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ The "New Federalism" is a political plan instituted by the Reagan Administration to reduce the activity of all three branches of the federal government in areas of "local" concern to the states. The plan is supposed to return to the states the power that is rightfully theirs and which the federal

ment in the affairs of individual states, has effectively redirected the cause of equal protection for women back to the states. One result of the New Federalism has been to throw institutional plaintiffs out of federal court leaving them without any assurance of a proper forum in which to air their grievances. Federal court, however, is not the panacea of civil rights that it was twenty years ago. Today's federal judiciary, filled with conservative Reagan appointees, is less likely to be sympathetic to the claims of prisoners, much less women prisoners claiming discrimination. State courts can mold remedies designed to fill the gap that exists between present conditions and future legislation, but like all judicial actions, these remedies will be narrow. State legislatures can be petitioned to pass their own versions of an equal rights amendment guaranteeing essential equal treatment. Many of the states already possess their own version of an ERA and are mindful that passage of the federal ERA may result in federal preemption of the state provisions.⁴⁴⁹ Intrastate lobbying may result in ERAs or women-oriented correctional legislation in the remaining states, while judicial pressure could broaden the scope of women's rights in those states presently possessing equal rights amendments to their constitutions. The combined effect of lobbying and other pressure would afford incarcerated women an avenue of escape from gender-based incarceration and its corresponding inequities. Despite previous failures of state initiatives in this area, as the attention of the public is drawn to the area of women's rights, the local ground for this issue will become increasingly fertile and remedial state legislation will undoubtedly become more and more common in the years that lie ahead.

One danger in viewing the New Federalism as the answer to the problems faced by women prisoners is that it can result in a "false federalism." While state and federal officials may demand more local control in eradicating inequality, their words are not always matched by concomitantly necessary requests for local funds to finance the needed results. Likewise, federal officials, who are quick to jump on the band wagon of New Federalism because a transfer of responsibility is an easy means to "pass-the-buck" to local and state governments, may find that in reality local and state governments lack the financial resources and desire necessary to resolve the problems. Furthermore, while some states have the resources and are willing to expend them to improve the plight of women offenders, many local criminal justice systems and other states do not. Thus, without a commitment for reform at the federal level, the best that can be expected is a non-uniform and disparate approach to meeting the needs of women in the criminal justice system.

CONCLUSION

Development of an intermediate test for reviewing claims of gender-based discrimination has opened the courts to women and provided a means for obtaining a semblance of equality or parity with men in the criminal justice system. The results under judicial application of the intermediate standard of review are varied, a circumstance that leads to the conclusion that the courts may not be institutionally equipped to provide a wholly

government had usurped in the past. The result of its implementation is to give back to the states fiscal and political responsibility on matters of public health, safety and welfare concerning state residents.

⁴⁴⁹ See CAL. CIVIL CODE §§ 51, 52 (West 1982); MD. CONST. art. 46; MASS. CONST. pt. 1, art. 1; PA. STAT. ANN. art. 1, § 28 (Purdon Supp. 1984); WIS. STAT. ANN. § 766.15 (West 1982). This list is intended to be representative and not cumulative.

satisfactory solution to the problem of disparate treatment of female offenders in the criminal justice system.

While parity is being sought it is questionable whether parity is an appropriate goal in all areas. The traditional social presumption is that women have a stronger need than men for maintaining family relationships, caring for children, privacy, and medical care. In addition, there is a greater need to protect women from rape and other sexual crimes. Current law, however, does not attempt to reconcile proportionate needs, but instead simply concentrates on parity.

A review of the literature concerning state correctional systems reveals some contradictory results and trends both in the areas of prison administration and the law.⁴⁵⁰ For example, while many sentencing provisions and criminal statutes have been aimed at benefiting women, indeterminate sentencing has penalized women and benefited men. Traditionally, women were considered more receptive to rehabilitation than men. Whether that theory is correct has been difficult to test because those who have been charged with responsibility for effectuating rehabilitation have often invoked contradictory policies and procedures based on gender stereotypes. Perhaps blame can be placed on systems that hire personnel to staff women's correctional institutions, who were not sensitive to the needs of women or understanding of the means for fostering rehabilitation. When decisions were made to place prisons in isolated rural areas, for example, the motivational force and the rehabilitative influence of a family were rarely considered. Similarly, policies and procedures that discourage visitation and terminate parental rights are also often counterproductive. A failure to view women as possessing the same needs as men in areas such as education, training, employment, and recreation has resulted in gross disparities between men and women in providing for programming, treatment and recreation within the same state correctional systems. Most certainly, as the years pass, the disparities are lessening. Although many of the cases cited in this article are over ten years old, recent cases indicate that vast disparities still exist.

In reviewing the limited number of cases that have been reported, certain findings are readily apparent. First, the detailed survey presented in this article indicates that the existing disparities found are pervasive. Second, and perhaps more important in terms of viewing the courts as the source of remedies to establish parity of treatment for men and women in the criminal justice system, litigation is risky, expensive, and needlessly wastes time and resources that could be used more productively to bring about reform. Third, reliance on litigation in this area is misplaced given the ever-changing philosophies and orientations of the judiciary toward women. Recent Supreme Court decisions exhibit a shift from use of the rational basis test for gender discrimination, where women almost always lost, to the strict scrutiny test where a plaintiff in a suspect class will be likely to prevail, to the new substantial relation or intermediate test.⁴⁵¹ Unfortunately, the substantial relation test, as with many other broad judicial doctrines, places extensive burdens of proof on both the plaintiff and defendant.⁴⁵² With the decline of both federal and state support for legal organizations that provide free legal assistance to the poor, use of the

⁴⁵⁰ See *supra*, note 417.

⁴⁵¹ See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971) (rational basis test applied, but female plaintiff successful); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (strict scrutiny); *Craig v. Boren*, 429 U.S. 190 (1976) (intermediate test); *Hogan v. Mississippi Univ. for Women*, 458 U.S. 718 (1982) (intermediate test).

⁴⁵² *Craig v. Boren*, 429 U.S. 190, 197 (1976).

courts by female offenders to vindicate their rights has become increasingly difficult.⁴⁵³ As a result, legal aid, public defender offices, and national organizations are becoming more selective in taking on prisoner rights cases. This selectivity is probably comforting to those correctional administrators and legislators reluctant to provide parity among male and female prisoners.

One of the difficulties in writing this type of article is that by its nature it is critical in a negative sense. People do not sue to show that their life is good. Similarly, the literature on prison matters most often emphasizes negative conditions. The last section of this article, which discussed alternatives to litigation as means to achieve change,⁴⁵⁴ emphasized that some states are concerned with the rights of female inmates. Many state legislators and correctional professionals are involved in various groups developing national standards, and other citizens are actively pursuing correctional reform. Some of the statutes and uniform national standards are representative of a proactive approach to prison reform. Rather than relying on the patchwork directives of court ordered correctional reform, legislative initiative and efforts to implement uniform standards offer a more productive and efficient approach toward gender parity. Only after this view is adopted can inmates turn their attention away from seeking vindication of their rights in this area of harm caused by government and focus on self-improvement and rehabilitation.

⁴⁵³ M. ROY, *WOMEN IN JAIL: PROBLEMS, PROGRAMS AND RESOURCES* (1979); Jacobs and Sharms, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal Correctional Process*, 18 KAN. L. REV. 511 (1970). See *Glover v. Johnson*, 478 F. Supp. 1075 (D. Mich. 1979).

⁴⁵⁴ See *supra* text accompanying notes 388-453.

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