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Women in Jail: Legal Issues

National Institute of Corrections

Morris L. Thigpen, Director

Michael A. O'Toole, Chief
Jails Division

Virginia A. Hutchinson, Project Manager

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by

William C. Collins, J.D.
with
Andrew W. Collins

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Foreword

There are not very many women in jail, compared to the number of men. There are not very many reported lawsuits regarding women in jail, compared to the number of suits brought by men.

Yet, the official who ignores problems relating to female inmates on the basis of comparative numbers, or pushes those problems to a back burner in order to focus on issues involving male inmates, increases exposure to litigation and liability. It is a serious mistake to interpret the comparatively small numbers of court decisions about women in custody as an indication that this group of inmates has no rights or fewer rights than male inmates.

This report reviews the major legal issues concerning female inmates. Probably the most significant of those arises under the Equal Protection Clause of the Fourteenth Amendment and asks officials to explain and justify differences that commonly exist in housing, privileges, and programming provided for male and female inmates. Unless sound reasons exist to justify differences, a court may find a constitutional violation and become involved in overseeing a long remedial process intended to bring programs, facilities, and privileges for female inmates into "parity" with those provided male inmates.

Medical issues are also important for female inmates. They include not only medical concerns held in common with men, but also concerns unique to women. The other legal concern that is probably unique to women as a practical matter relates to sexual harassment and even physical abuse in the jail. A small number of court decisions deal with situations where such abuse had become relatively commonplace in the institution. Most other legal issues of concern to women do not differ significantly from those of male inmates, although meeting the challenges of those issues may be complicated by the relatively small number of women in jail.

Reducing the possibility of having to confront serious litigation on behalf of female inmates can begin in the design and planning of a new jail. It extends into the development of policies and procedures, into trying to maintain similar levels and quality of programming, and into the overall management of the jail.

We hope this report will assist jail administrators in addressing housing, service, and program issues related to female inmates.

Morris L. Thigpen

Morris L. Thigpen, Director
National Institute of Corrections

Section 1. Overview of the Female Inmate Population

Although women make up only a small minority of the nation's jail inmate population, their numbers have risen dramatically over the past decade. Between 1985 and 1996, the number of women held in jails rose from 19,077 to 55,700,[1] an increase of 192% (compared to a 93% increase for male inmates over the same period). As of June 1996, women accounted for 11% of the total adult jail inmate population. By contrast, they accounted for 6.3% of the total prison population.[2]

Inmate Backgrounds

As might be expected, most female inmates come from disadvantaged backgrounds, with education and employment rare and abuse common. A survey of the histories of female jail inmates found that:

- Most had a poor educational background—half never completed high school.[3]
- Over 60% were unemployed when arrested and one-third were not looking for work. Less than one-third of male inmates were similarly unemployed and less than 12% were not looking for work.[4]
- More than 44% of women reported that they had been either physically or sexually abused at some time before entering jail, with over 30% reporting such abuse before the age of 18. Only 13% of men reported prior abuse.[5]
- Two thirds of women in prison had children under 18 years of age, and four of five women had children living with them before incarceration.[6]

Nearly one-third of female inmates were first-time offenders, as compared to only one-fifth of male jail inmates.[7] This rise in new offenders supports the increasing percentage of female inmates as described above.

Drug Offenses

One reason the number of female inmates is growing so rapidly may be the nation's growing lack of tolerance for drug-related offenses through the last decade. A look at some numbers relating to drug use and female inmates finds drug-related issues to be a rising factor in criminal activity among women.

- A drug offense was the most serious offense of more than one-third of female inmates in jail in 1989, compared to only 13% in 1983. This increase in female drug offenders between the years 1983 and 1989 accounts for nearly half the total increase of the female jail population.[8]

- Nearly 40% of female inmates reported they had committed their offense under the influence of drugs, compared to only one-fourth of male inmates.[9]

- Forty percent of incoming female inmates reported daily drug use in the month before their current offense, compared to only 29% of men.[10]

- Two-thirds of women arrested in 20 major cities in 1993 tested positive for drugs at the time of booking, according to a U.S. Department of Justice study.[11]

- Fully 70% of female inmates said they had regularly used drugs at some point in their lives. Only 57% of men reported prior drug use.[12]

- In contrast, alcohol abuse problems were substantially less in female inmates than in male inmates. For instance, just over 20% of women reported being under the influence of alcohol at the time of their current offense, compared to over 43% of males.[13]

Facilities for Female Inmates

Since female inmates have historically constituted such a small percentage of the total inmate population, many jail facilities are unable to cope with the recent drastic rise in their numbers. Although over 60% of jails nationwide hold women, only 13 facilities were reported as "female-only" jails in a December 1992 survey.[14] Nine of these were small to medium jails, holding fewer than 250 inmates. Three women's jails had a capacity of between 250-1,000 inmates, and only one was designed to hold more than 1,000 inmates.[15]

Whether living in large jails or small, female inmates often find themselves without many of the programs and services available to men. Many factors contribute to female inmates being "ignored" in this way. In comparison to their male counterparts, the female inmate population:

- Constitutes only a small minority of the total population in most jails across the nation;

- Causes fewer security problems (for example, one survey found that in 90% of local jails, no female inmates had been involved in escapes in the previous 12 months);[16]

- Experiences less crowding.

Together, these factors can result in the female population being given less attention and a lower priority for resources—an example of the "squeaky wheel" syndrome at work. Women's facilities may be seen as "secondary" to men's. Women are often relegated to older jails, which may be annexed to newer facilities holding male inmates.[17] Others may be sent to jails located in rural areas, away from major metropolitan areas, which can further limit the resources available.[18] While these observations are based on a study of a single state, to a large extent they can be generalized.

The practice of solving a problem by sending female inmates somewhere else overcame a legal challenge in *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989). In this case, a lack of prison space in the District of Columbia resulted in female offenders from the District being incarcerated in a

federal facility located in remote Alderson, West Virginia. Plaintiffs argued that this created an unfair burden on female offenders, especially in the areas of visitation and preparation for their return to the District. However, the Court found that the District's policies were "directly and substantially related to the important government interest in reducing prison overcrowding" and outweighed any arguments of "invidious discrimination" against female offenders. The crowding of concern to the District related to male inmates, not female. While D.C. corrections officials were presumably pleased with the result in *Pitts*, that same result meant many female prisoners did their time in a prison located in a small town in the southeastern corner of West Virginia, hundreds of miles from their families, as a partial cure for a problem related to male inmates.

Programs and Services

Because of the limited resources allocated to female inmates, there tend to be fewer programs and services available to women in jail. This is ironic, since women are more likely than men to have special conditions imposed as part of their jail sentence, including drug or alcohol treatment or psychiatric counseling. A "catch-22" situation exists in many facilities.

- The low number and percentage of female inmates in most jails result in few programs designated as "women-only."
- Women are rarely allowed to participate in programs or activities with male inmates.
- The relatively small number of women in most facilities or systems often results in security classifications being mixed together, making it difficult to operate programs requiring less secure environments.

Together, these factors can restrict women from taking advantage of the wider variety of programs afforded male inmates.

Work Programs

Work programs, a staple of most men's institutions, are much less common for women. One survey reports that nearly 60% of male inmates had work assignments, compared to less than 44% of female inmates.[19] Work assignments outside the jail went to male inmates nearly three times as often as female inmates (23.2% vs. 8.1%).[20] Since male and female inmates are kept separated, women do not have access to many of the support service jobs available in jails, such as food service or laundry. Without such access, female inmates have difficulty obtaining "trusty" positions—jobs that can increase "good behavior" time earned.[21] Furthermore, women recommended for work release are often incarcerated instead because work release programs for women are overcrowded or non-existent.[22]

Health Services

The lack of health services is a frequent issue in lawsuits brought by female inmates. While general medical services are usually available—80 to 90% of jails offer intake screening and/or mental health services[23]—those specific to women are often poor or absent. These services vary from basic

gynecological examinations to pregnancy-related concerns including obstetric examinations, childbirths, and abortions. Approximately half of all jails do not offer these services to inmates.[24]

Pregnancy

Although less than 5% of female inmates are pregnant at the time of intake,[25] the pregnant inmate presents an extremely serious situation for jail officials. Additional medical concerns arise in the jail setting that might not be immediately apparent. Because of factors such as poor socioeconomic conditions and drug use before incarceration, the pregnancies experienced by inmates can be much higher risk than average. This produces a greater demand for medical care and can require more extensive medical training for jail staff, who must be able to recognize when such care is needed.

If an inmate wishes to terminate her pregnancy, must the jail provide or facilitate the abortion? What happens to a child born of a mother in jail? These questions are often left unaddressed and unanswered until problems arise.

Pregnant inmates also present jails with difficult questions. If an inmate wishes to terminate her pregnancy, must the jail provide or facilitate the abortion? What happens to a child born of a mother in jail? These questions are often left unaddressed and unanswered until problems arise—a dangerous situation for inmate and institution alike.

Vocational Training

Vocational training programs are also rarely available to female jail inmates. Those that do exist tend to limit participants to traditional female roles, such as cosmetology or secretarial programs, excluding them from more career-oriented training. When added to the high unemployment rate of incoming female inmates, this lack of adequate training does little to increase the earning capacity of female inmates upon their release.

Family Concerns

The importance of earning capacity and employability among female inmates is especially high because of the high percentage of inmate mothers. Fully two-thirds of the women in jail have children under age 18, and nearly 85% of these women reported they planned to live with their children after release.[26] Since the fathers are often absent (only one-fourth of these children live with their father while the mother is in jail),[27] these women may find themselves as the primary caretaker and wage-earner of the family.

Other family-related concerns can arise as well, such as the extent of visitation opportunities a female inmate should have with her young children. Less than 40% of jails allow mother and child contact visits, and less than 15% allow extended contact visits between mother and child.[28] Since it could be argued that speaking with a two-year-old child via telephone through a glass partition does little to foster a strong mother-child relationship, doesn't this policy inflict emotional damage on both parties? Although most jail sentences are relatively limited in duration, what seems a short time to an adult can be an eternity to a young child. Should mothers of infants be allowed to hold, even breast feed, their children if such contact goes against the jail policy?

The increased level of family concerns for female inmates raises a related concern: access to legal resources that provide assistance in the area of parental rights.[29] Despite a strong concern about child custody and parental rights issues, current court caselaw does not require a jail to provide any legal resources in this area, although the jail has constitutional obligations to provide materials in other areas, *Glover v. Johnson*, 75 F.3d 264 (6th Cir., 1996), *Bounds v. Smith*, 430 U.S. 817 (1977). See p. 28, *et seq.*, for additional discussion of this topic.

Sexual Harassment and Abuse

Sexual harassment by correctional staff is another potential problem that can confront the female inmate. One example appears in *Women Prisoners v. District of Columbia*, 877 F.Supp. 634 (D.D.C. 1994). *Women Prisoners* was brought by female inmates housed in various facilities operated by the District of Columbia Department of Corrections. Unlike the *Pitts* case, discussed earlier, which dealt with female inmates of the D.C. Department of Corrections who had been transferred to a federal prison in West Virginia, *Women Prisoners* dealt with conditions and practices in facilities actually operated by the D.C. Department of Corrections.

Among other issues, the plaintiffs claimed that their Eighth Amendment rights had been violated by frequent occurrences of sexual harassment by the staff. As might be expected, the Court came down hard on officials who showed "deliberate indifference" to the problems faced by the plaintiffs. The physical assaults, vulgar sexual remarks, and lack of privacy all contributed to an "unacceptable . . . level of anxiety" marked by "significant depression, nausea, frequent headaches, insomnia, fatigue, anxiety, irritability, nervousness, and a loss of self-esteem" and constituted cruel and unusual punishment. Furthermore, the obvious failure of the defendants to properly train employees in the area of sexual harassment did not sit well with the Court. Finding the defendants liable under the Eighth Amendment, the Court ordered a number of specific measures designed to prevent future instances of such harassment.

On appeal, the court of appeals reversed a portion of the district court's relief order pertaining to the appointment of a "special officer" to monitor sexual harassment issues. The District of Columbia did not appeal other aspects of the decision regarding sexual harassment, *Women Prisoners of the District of Columbia v. District of Columbia*, 93 F. 3rd 910 (D.C. Cir., 1996).

The problem of sexual abuse of female inmates might be more widespread than previously thought. This may be attributed to permitting male officers to work in contact with female inmates (a result of laws prohibiting sexual discrimination), without strong safeguards to prevent abuse or respond quickly and aggressively when it does take place.

Variations in Sentences

Although women and men sentenced to jail received similar sentences, some of the factors noted above can result in women serving longer sentences for the same offenses than men. The lack of work programs restricts the availability of early release for good behavior. In addition, since women's facilities experience less crowding, female inmates are rarely released early to alleviate crowding, which is a common practice in severely crowded men's jails. The result is that, while the sentence

received by a male and female offender might be the same, the man might be released earlier than the woman.

For example, admission to a boot camp program in Virginia resulted in substantial reductions to the participants' sentence. The program was open only to male offenders. A district court found this discrimination violated equal protection, *West v. Virginia Department of Corrections*, 847 F.Supp. 402 (W.D. Vir., 1994).

Section 2. Legal Issues and the Female Inmate

The legal principles upon which courts evaluate conditions and practices generally apply equally to both men and women.* However, relatively little legal attention has been given to applying these legal principles to female inmates. Part of the reason for this is that the "jailhouse lawyer," the inmate who files suits on his own behalf or on behalf of other inmates, is typically not the fixture in female institutions that it is in male facilities. But, while lawsuits on behalf of male inmates have captured the lion's share of public and judicial attention, some major suits have been brought on behalf of female inmates.

As of the end of 1994, at least 19 major class action lawsuits involving female inmates and dealing with a wide range of issues were decided, settled, or pending.[30] Following is a sampling of issues taken from the cases that had been decided or settled.

- Wisconsin: A women's prison operates under a 1988 consent decree imposing a population cap and addressing programming and medical care.
- Massachusetts: A 1991 consent decree in a state court case improves prenatal services for women at a state prison.
- Illinois: Programs for women and the construction of a 200-bed minimum security prison are addressed in a 1990 consent decree.
- Kentucky: An order addresses a number of prison issues, including crowding, physical plant, sanitation, access to the courts, programming, classification, and work.
- New York: In 1993, a decree in effect since the mid-1970s dealing with medical issues at a state prison is expanded regarding gynecological care and medical staffing. Another case deals with mental health issues at the same facility. The injunctive portion of the case was closed in 1991 after two years of monitoring a settlement stipulation. Damages claims in the same case were settled for $350,000.

Some of the issues in women's cases differ little from those in men's cases (e.g., crowding), but others have unique application for women. The most important of these are reviewed next.

Equality of Programs, Services, and Facilities

The potentially most important area of litigation for female inmates arises under the Equal Protection Clause of the Fourteenth Amendment. This type of claim, commonly known as a "parity case," argues that the programs, services, and/or facilities available to women are significantly lower in quality and

*The appendix to this report provides a general overview of court involvement in corrections.

quantity than those available to male inmates in the same facility or institutional system. These disparities, the claim continues, have no justifiable basis and therefore violate the Equal Protection Clause.

Although major parity cases have been reported at the district court level for 15 years or more, there are still relatively few cases in this area. No equal protection issues involving female inmates have reached the Supreme Court.

Early decisions suggested that the majority of female institutions or sections of facilities housing both men and women, including almost all jails, were vulnerable to this type of suit. It appeared that parity cases could become the vehicle of major reform efforts for female offenders. Several of the major suits listed earlier involve issues of equal protection. However, very recent caselaw may check the momentum of this theory of litigation. Court of appeals decisions in the mid-1990s raise questions as to how courts will analyze differences between men's and women's programs. The final answers to these questions will determine the eventual effect of parity claims. To at least some degree, the parity concept may be at a crossroads: the analytical approach courts generally adopt will have a major impact on the likelihood of the success or failure of future parity claims.

That there are often substantial differences between what is available for men and for women in jails is probably more the rule than the exception. The question that the parity cases try to pose is, "Why do these differences exist?"

That there are often substantial differences between what is available for men and for women in jails is probably more the rule than the exception. The question that the parity cases try to pose is, "Why do these differences exist?" The answers provided by agencies may determine if adequate justifications exist to satisfy the requirements of the Equal Protection Clause.

What does Equal Protection mean? The Equal Protection Clause is part of the Fourteenth Amendment: "...nor shall any State...deny to any person within its jurisdiction the equal protection of the laws."

The Equal Protection Clause does not require that every person or every group be treated exactly like every other. However, for groups that are generally alike, "similarly situated" in legal jargon, the concept of equal protection requires that the government treat such groups alike *or* have a sound reason to explain and justify discriminating against one of the groups.

Depending on the basis of discrimination between groups, courts apply different levels of scrutiny in evaluating the adequacy of the reasons for discrimination. In other words, courts will examine some types of discrimination much more closely than others. The level of scrutiny a court applies in an equal protection case can virtually dictate who wins the case because it determines the government's burden to justify the discrimination.

For example, discrimination based on race is subject to what is known as the "strict scrutiny" test: the government must show discrimination based on race is in furtherance of a *compelling state interest* and is the *least restrictive means* available of furthering that interest. This is a very difficult

burden for the government to meet. By contrast, discrimination directly based on gender is subject to a slightly less demanding test, known as the "heightened scrutiny" test. Under this approach, the government has the burden of showing that classifying groups by gender "has an important purpose and that the relationship between the purpose and the discrimination is substantial," *Klinger v. Department of Corrections*, 31 F.3d 727, 737 (8th Cir., 1994), McMillian, dissenting. Other forms of discrimination, not based on race or gender, are examined under an even more forgiving "rational basis" test.

In early major parity cases, courts found that male and female inmates in an institution or institutional system were similarly situated for purposes of comparison under equal protection. The courts then applied the heightened scrutiny test, which, when applied in this context, asks the government to (1) explain the reasons for treating women differently than men, (2) show that these reasons further some important interest of the government, and (3) show a substantial relationship between the governmental objective and the discrimination.

In most cases that compared men's and women's institutions, the court found that women lived with poorer conditions, facilities, and/or programs and that the reasons offered to explain those differences did not meet the heightened scrutiny test, *Glover v. Johnson*, 478 F.Supp. 1075 (E.D.Mich., 1979), *Canterino v. Wilson*, 546 F.Supp. 174 (W.D.Ky., 1982). The *Glover* and *Canterino* decisions became the model for parity cases, both in how courts evaluated the question of liability and how they formulated relief once liability was found. Several other cases have ended in consent decrees, the defendants not admitting liability but agreeing to a remedial order.[31]

While intent to discriminate against female inmates probably does not explain the common differences, the comparatively small numbers of female inmates combined with traditional notions about women in American society undoubtedly contribute to the differences. Stereotypes about women in general and women in jail persist. It is easy to ignore a group comprising barely 11% of the jail population, especially when it presents fewer management and security problems than the majority group.

Add to this the limited budgets and the need to separate men and women in jail, and it is easy to see where the squeaky wheels are and where the limited amount of grease is likely to go. The result, common in jails across the country, is that female inmates continue to receive fewer programs, live in poorer quality quarters, and generally are not treated in a way substantially equivalent to that afforded male inmates.

The argument that differences are the product of numbers—that it is harder to provide the array of programs and facilities for 11% of the population (women) than for the remaining 89% (men)—was generally rejected as justifying poorer treatment of women in the early parity cases such as *Glover* and *Canterino*.

Relief in Parity Case is Source for "Parity" Label

Given a finding that conditions in a women's institution violate equal protection, how have courts approached the question of relief? Ever since *Brown v. Board of Education*, 347 U.S. 483 (1954), the usual court response to an equal protection violation was an order focused on assuring an identity

of treatment between the two groups that were compared in the lawsuit. "Separate but equal" was a tautology: separate could not be equal.

But "separate" is the rule when dealing with male and female inmates, and no court has challenged or questioned that male and female inmates cannot be mixed, except in very limited, controlled settings.* There are also legitimate differences in the programming needs of male and female inmates, which precise equality of treatment would not recognize.

The result is that courts have adopted an approach to relief known as "parity" in which comparable but not necessarily identical levels of programming and care are required. The expectation several courts have adopted is that programs, facilities, etc. for women should be "substantially equivalent (to those of men) in substance if not form," *Glover, supra.*

Most parity cases have involved prisons, not jails. However, in one jail case, *Dawson v. Kendrick,* 527 F.Supp. 1252 (S.D. W. Vir., 1981), the court ordered certain programs be created for women held in the jail for longer terms. The court recognized that there were valid reasons to keep male and female inmates apart and that there was no reason to order programs for women held only a short time in the jail.

At least in theory, a "parity" approach leaves room for program differences, where the difference can be justified. Despite the potential for accepting differences, some, including two appellate courts, suggest the more likely effect of parity is identity of programs, a stifling of innovation and experimentation, and a possible reduction of all programs to a bare constitutional minimum. This is discussed further in the next section.

Parity at the Appellate Court Level

While plaintiffs have generally prevailed in parity cases at the district court level, equal protection claims have not fared so well at the court of appeals level. Two recent decisions from different courts of appeal suggest that the *Glover-Canterino* approach may be in error.

Before discussing those cases, a couple of other, earlier decisions warrant comment. In *Pitts v. Thornburgh, supra,* the court reviewed and upheld a policy of the District of Columbia under which all female offenders sentenced to more than one year were transferred to a federal prison in Alderson, West Virginia. Applying the heightened scrutiny test, the court found that the District's reasons for transferring a substantial number of the women in the Department of Corrections' custody did further an important government interest, i.e., reducing crowding in the men's facilities. *Pitts* then is an example of where a sex-based discrimination survived legal attack.

Another case coming out of the District of Columbia arose as a result of the District's "Good Time Credits Act." This law granted early release to persons serving time in D.C. jails, *Jackson v. Thornburgh,* 907 F.2d 194, 197 (D.C.Cir., 1990). The problem that led to the suit was the same as

*Corrections has seen some experimentation with co-correctional facilities or programs, but these require very careful screening and supervision of offenders. While allowing some male and female inmates to participate in programs together may be a partial solution to equal protection problems, it is never going to be a complete solution.

that in the *Pitts* cases—the practice of transferring all long-term female inmates out of District facilities to Alderson. These women then were not eligible to benefit from the good time law because they were not housed in a D.C. jail. Some women did remain in District facilities and received benefit of the law. A few male inmates were transferred out of the District and lost the benefits.

Unlike *Pitts*, the court in *Jackson* did not apply the heightened scrutiny test. Instead, it applied a rule developed in other equal protection cases where sexual discrimination does not appear on the face of a statute or policy, but instead where a gender-*neutral* policy creates a negative impact disparately on one group. In such situations, the heightened scrutiny test does not apply. Instead, the plaintiffs must show first that the gender-neutral law or policy has a disproportionately adverse effect on them *and* that the disparate impact reflects a discriminatory purpose: the defendants actually intended to discriminate against the women. This rule finds its genesis in *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), in which the Supreme Court upheld a public employment veterans' preference law despite the fact that 98% of the potential beneficiaries were men.

Under the *Feeney* test, the burden on the government to justify the adverse impact drops from the difficult-to-meet heightened scrutiny test to a much less demanding "rational relation" test: is the denial of benefits to one group (in *Jackson*, the women who were not eligible for good time) rationally related to a legitimate governmental interest? Applying this rule in *Jackson*, the court found the policy furthered the rational goal of reducing crowding, even though women could not benefit from the good time law as much as men.

Recent cases from the District of Columbia Court of Appeals and the Eighth Circuit Court of Appeals challenge the equal protection argument in support of improved women's programming in even more fundamental ways than either *Pitts* or *Jackson*.

The *Glover-Canterino* line of cases is very fact-driven: the courts find male and female inmates to be generally similarly situated, look at the quality/quantity of what men have, compare that to what is available to women, and generally find substantial disparities. The justifications offered by the government are found inadequate under the heightened scrutiny test. The court then orders improvement in the women's programs. To the extent *Glover* and *Canterino* are models (both involved state prison systems, not jails), the court then oversees the improvement efforts of the defendants for perhaps years. (The *Glover* case was still active in late 1996, 17 years after the first major opinion in the case.)

The Eighth Circuit and District of Columbia circuit decisions change how the threshold equal protection question is asked: are the two groups being compared similarly situated?

In *Klinger v. Department of Corrections*, 31 F.3d 727 (8th Cir., 1994), cert. denied, 115 S.Ct. 1177 (1995), the district court compared what was available to women in the Nebraska Center for Women against what was available for men at the Nebraska State Penitentiary.* The approach the lower court took was to compare programs at the women's institution against those at the penitentiary, program

*The comparison was chosen by the plaintiffs, a choice they came to regret. Late in the case, they attempted to change the male comparison group from the Penitentiary to all male facilities in the Nebraska department. The court refused this request, saying it came too late.

by program. Not surprisingly, the court found a wider diversity of programs at the male facility. The court then found a violation of equal protection. This is the traditional *Glover-Canterino* approach.

On appeal, the decision was reversed because the court of appeals felt that women at the single women's institution were not "similarly situated" to male inmates at the penitentiary, which was one of several male facilities. The two groups not being properly comparable, the conclusion that there was a violation of equal protection was, by definition, incorrect since the concept of equal protection simply does not apply to groups that are not alike.

It is possible to read *Klinger* narrowly, as simply reflecting a poor strategic choice by plaintiffs in defining the comparison group. However, the Eighth Circuit declined to give it such a narrow reading in a subsequent case and the court of appeals for the District of Columbia has also adopted a broad reading of the holding.

The approach of the *Klinger* court was applied by the district court in a case involving the Iowa women's prison, *Pargo v. Elliot*, 69 F.2d 280 (8th Cir., 1995). The lower court made extensive findings regarding differences between men's and women's facilities and programming, but ruled against the inmates. The court of appeals' opinion in *Pargo* is very short, doing little but affirming the lengthy decision of the district court, which appears at 894 F.Supp 1243 (D. Iowa, 1995).

Plaintiffs in *Pargo* compared classifications by security level and programming at the Iowa Correctional Institution for Women (ICIW), which houses almost all of Iowa's female inmates, to facilities and programs at a variety of Iowa's male institutions. This was a broader range of comparison than that of *Klinger*. Nevertheless, the district court still found the two groups *not* similarly situated. The court of appeals agreed.

The court declined to take an "inmates are inmates" approach, which looks solely at gross disparities between accommodations for men and women. Instead, the court looked at more subtle questions as the "key factors" in determining the similarly situated question. These included:

- population size of the prison,
- security levels,
- types of crimes,
- length of sentence,
- special characteristics, 894 F.Supp. at 1259, et seq.

The court felt statistical comparisons between groups of male and female inmates were of "limited value" because the numbers of female inmates in various subgroups were not large enough to be statistically significant. After reviewing the five factors it identified as important, the court concluded female inmates at ICIW were "not similarly situated to the various categories of male inmates at selected institutions," 894 F.Supp. at 1261. The court of appeals affirmed.

Perhaps to guard against possible reversal, the district court moved from its "not similarly situated" conclusion (which could have ended its inquiry) to analyzing the merits of the Equal Protection claims of the plaintiffs. The result: a conclusion that even if male and female inmates were similarly situated, there was no Equal Protection violation.

The court used the rational basis test for its Equal Protection analysis, rejecting the tougher heightened standard in light of *Klinger*, and because no facially discriminatory policy was challenged. The court noted the substantial body of literature describing historical discriminatory and stereotypical assumptions that often lie at the root of disparities between men's and women's prisons, but decided "these circumstances do not, however, exist at ICIW," 894 F.Supp. at 1264.

The court then engaged in a lengthy factual review of a substantial number of programs available to male and/or female inmates. The court generally found programs were gender-neutral and were rationally related to legitimate state interests. No evidence of invidious discrimination against women was found. The court of appeals found no error with this analysis.

At about the same time the Eighth Circuit was deciding *Pargo*, the district court of the District of Columbia was deciding *Women Prisoners of the District of Columbia v. District of Columbia*, 877 F.Supp. 634 (D.D.C., 1995), modified 899 F.Supp. 658 (D.D.C., 1995). *Women Prisoners* raised a broad array of issues on behalf of women held in facilities operated by the District of Columbia (not those women transferred to Alderson), including issues regarding conditions of confinement and sexual abuse raised under the Eighth Amendment and sexual discrimination issues raised both under an equal protection theory as well as under Title IX of the Education Amendments of 1972, 20 USC §1681(a). The specifics of Title IX are discussed later in this report. Here it is sufficient to note that Title IX, which generally forbids discrimination on the basis of sex in education programs or activities receiving federal funding, requires an initial finding that males and females are similarly situated in the same manner as an equal protection claim.

The district court found violations of both equal protection and Title IX after first finding the female inmates housed in D.C. facilities were similarly situated to men housed in various other facilities after comparing their custody levels, sentence structures, and purposes of incarceration, a fairly precise comparison. But not precise enough to satisfy the court of appeals. In *Women Prisoners, etc. v. District of Columbia*, 93 F.3d 910 (D.C.Cir.,1996), the court followed *Klinger* and *Pargo* in holding that the evidence did not show male and female inmates to be similarly situated. The court noted the five factors from *Pargo*, emphasizing that the lower court should have considered "the striking disparities between the sizes of the prison populations (male and female) that were being compared," 93 F.3d at 925. The court thus reversed the lower court's finding of an equal protection violation.

The *Klinger-Pargo-Women Prisoners* approach to parity cases does not in theory preclude a conclusion that male and female inmates are similarly situated. Its practical effect may do just that. Clearly, the approach taken by the two appeals courts makes it much more difficult to find male and female inmates similarly situated, especially if, as suggested in *Women Prisoners*, the differing size of the two groups is relevant. It would appear impossible to create a comparison between all (or even most) women and the bulk of male inmates. Application of the five factors from *Pargo* would seem to mean that, at best, comparisons could be made only between small subgroups of male and female inmates. The real effect then of these two cases, if their approach is adopted generally, may be to virtually end the use of equal protection arguments to improve conditions in female facilities.

Klinger and *Women Prisoners* also criticize the program-by-program comparison taken in the *Glover-Canterino* approach and used by the district courts in both cases. In *Klinger*, the court could have ended its opinion with the conclusion that the two groups were not alike for equal protection

purposes. However, the court then went on to say, in essence, "but if they *were* similarly situated, here is the way we would address the equal protection issue." The majority said there could not be an equal protection violation because the lower court had incorrectly applied the heightened scrutiny test. Even though there was a facial gender classification that resulted in women going to one institution and men going to a variety of others, this did not necessarily explain the reasons for program differences between the male and female institutions. In other words, the court of appeals said that the program differences were, as far as it could tell, *not* the product of a facial gender discrimination and therefore the disparities had to be analyzed under the *Feeney* test, which requires plaintiffs to prove discriminatory intent. It is at this point that the *Klinger* court truly parts company with the *Glover-Canterino* approach, which sees the decision to separate male and female inmates as the critical one, requiring heightened scrutiny of every difference that followed. Sometimes "every difference" can be picayune.

In *McCoy v. Nevada Department of Prisons*, 776 F. Supp. 521 (D. Nev., 1991), the court said that among the many disparities it expected defendants to justify to avoid a decision against them was why inmates in the Nevada State Penitentiary had access to more ice machines than did inmates in the women's prison. (*McCoy* involved many disparities far more substantial than ice machines.)

To the court of appeals in *Klinger*, that a women's facility might lack a program available at a men's facility "proves almost nothing," 31 F.3d at 732. Instead, the comparison should be to the process by which programming decisions are made for men and women, 31 F.3d at 733, n. 4.

In *Women Prisoners*, the 2-1 majority specifically refused to be drawn into a program-by-program comparison, because "[S]uch an approach completely eviscerates the deference that federal courts are obliged to give prison administrators," 93 F.3d at 926, 927. The court characterized the plaintiffs' argument as a decision to provide male inmates with access to a program not available to female inmates violated equal protection and that "any divergence from an identity of programs gives rise to equal protection liability," 93 F.3d at 926.

The *Klinger-Pargo-Women Prisoners* approach creates a great deal of uncertainty in what had appeared to be a relatively settled approach to parity lawsuits. These cases make it difficult, perhaps impossible, for a court to find male and female inmates are similarly situated.

These cases also say that even if groups are similarly situated, it is improper to conduct an equal protection review based on a program-by-program comparison. Because the new approach comes from courts of appeals and the older approach from district courts, the *Klinger-Pargo-Women Prisoners* means of analysis carries much stronger precedential value. Because the approach also may effectively remove disparities in programming between male and female inmates from review under the Equal Protection Clause, the approach is controversial and may not be accepted by other courts of appeal.

Even if more courts gravitate toward the institution-friendly tests from *Feeney* or *Klinger*, equal protection comparisons between male and female institutions are certainly not over. The heightened scrutiny analysis will continue to apply in cases where there is a facial discrimination on the basis of gender, such as where a work release program is "for men only." For instance, a boot camp program operated by the Virginia Department of Corrections had the effect of shortening the offender's

sentence. The district court found the "male only" policy violated equal protection, *West v. Virginia Department of Corrections*, 847 F.Supp. 402 (W.D.Vir. 1994).

Regardless of which test ultimately prevails, it is clear that at least some legitimate reason is likely to be required to explain why female inmates are treated differently than their male counterparts. The proactive jail administrator should:

- identify areas of disparate treatment or conditions,
- identify the reasons for such differences,
- work to eliminate such disparities.

If Agency Receives Federal Dollars, Statute May Require More Equality Than Parity in Some Programs

A very undeveloped area of law that has similar, but potentially more dramatic, implications than the parity cases arises under the section of federal statutory law and accompanying regulations commonly referred to as Title IX, 20 USC Sec, 1681 et seq., 45 CFR Sec. 86.1 et seq. The caselaw here is just as divided as it is in the equal protection arena.

Title IX says that no person shall be denied the benefits of or discriminated against on the basis of sex in any education program or activity that receives federal assistance. Before the requirements of the law apply, a state or local government must receive federal financial assistance and must operate an "education program or activity which receives or benefits from such assistance," 45 CFR Sec. 86.2(h). The law applies to educational institutions, with some exceptions. The entire institution receiving federal funds is subject to the provisions of Title IX, not just an individual program which is directly benefiting from the money, 42 USC Sec. 2000d-7 (1988).[32]

Because the requirements of Title IX are tied to receipt of federal education funding, the law may have much more potential impact for prisons than for jails since it is less likely that a jail will have received federal education funding. Two circuit courts have looked at Title IX in the corrections context. One found it applicable, the other did not.

In *Jeldness v. Pearce*, 30 F.3d 110 (9th Cir., 1994),[33] the Ninth Circuit held that Title IX applied to programs operated by the Oregon Department of Corrections. The court went on to say that the requirements of Title IX were stiffer than those of the Equal Protection Clause. "Parity" was not enough. Title IX demands "equality."

Having stated as a general principle that Title IX requires equality, the court then had a very difficult time explaining what equality means in a context which separates men and women, a reality of corrections not challenged in *Jeldness*. After acknowledging that prisons have unique security concerns that must be taken into account in applying Title IX, that women's institutions are typically much smaller than men's, that there may not be a demand for the same courses at men's and women's facilities, and that some programs may be site-specific, the appeals court essentially punted the case back to the district court for the "difficult task of determining how these requirements" of equality should apply, 30 F.3d at 1229.

The dissenting judge in *Jeldness* criticized the majority for reading many concepts into the statute that he felt were not there. He also felt the majority's approach gave little or no guidance to someone trying to read the opinion and understand what it said Title IX specifically would require. The judge also said that, given the great disparity between the numbers of male and female inmates, equality was a "mathematical impossibility." He noted that operating programs with the goal of providing equal opportunity would generate some programs "available to men but not women, given the 20 to 1 ratio between male and female inmates." This "is the lack of equality which troubles the majority," 30 F.3d at 1235. But, the judge then notes, giving women the same total number of courses that were available to men would result in far more courses per prisoner being available to the women. "Equality of one variable forces the inequality of the other," 30 F.3d at 1235.

Jeldness provided the basis for the district court's analysis in *Women Prisoners*. As discussed earlier in these pages, the court of appeals rejected the finding that the female plaintiffs in *Women Prisoners* were similarly situated to male inmates (at least as argued in the case) and reversed the results of the lower court. This result quashed the need for the court to assess the "scope of Title IX in the prison context" but the court noted "grave problems with the proposition that work details, prison industries, recreation, and religious services (all programs addressed by the lower court in its Title IX findings and order) have anything in common with the equality of educational opportunities with which Title IX is concerned," 93 F.3d at 927. The court then vacated various portions of the lower court's order dealing with those programs.

While *Women Prisoners* balks at a program-by-program comparison and refuses to accept that identity of programs is required, its comments in this regard are in the context of equal protection, not Title IX. Therefore, *Women Prisoners* neither reaffirms nor disagrees with the Ninth Circuit's holding that Title IX requires equality of programming where it properly applies.

The limits—or limitation—of Title IX as a source of rights for female offenders have yet to be thoroughly explored, although the narrow approach to the threshold "similarly situated" question taken by *Women Prisoners* may make Title IX claims hard to bring. (It should be noted that Title IX could be the basis of a claim brought by male inmates as well.) *Jeldness* and *Women Prisoners* at the district court level took a broad approach in interpreting a statute and regulations that were not written with the prison or jail setting in mind and which, for that reason, may result in increased judicial involvement with the operation of programs in jails to which Title IX applies.

Cross-Gender Supervision

The growth of equal opportunity and limitations on jobs reserved for a single sex spawned conflict between employees' rights to work and inmates' rights of privacy. With the growth of "cross-gender supervision," more and more correctional officers of one sex supervise inmates of the other sex. The opportunities for female officers to work in male facilities have increased dramatically over the last 10 to 15 years.

Under normal circumstances, an inmate has little or no privacy from supervision by officers. The officer may conduct a pat or strip search or see the inmate changing clothes, using the toilet, or taking a shower. But may an officer not of the same sex as the inmate perform these functions? If not, may the employer obtain a "bona fide occupational qualification" (BFOQ) under Title VII that allows

certain jobs to be reserved for officers of the same sex as inmates? The general answers to these questions are that officers of the opposite sex can perform most of these functions and that BFOQs will be very difficult to obtain. (A fairly clear line is drawn at cross-gender strip searches, and somewhat vaguer lines are perhaps drawn at other places).

BFOQs: Very Hard to Justify—
Accommodation of Interests May Come First

Under normal circumstances, an employer may not discriminate against employees on the basis of sex. Jobs may not be reserved for one sex or the other. There is an exception to this rule when a BFOQ exists that establishes the necessity for a job being performed by a single sex.

In general, courts have been very reluctant to approve BFOQs for correctional officer posts in prisons or jails, *Torres v. Wisconsin Department of Corrections*, 838 F.2d 944 (7th Cir., 1988) overruled in part 859 F.2d 1523 (1988), en banc, *Hardin v. Stynchcomb*, 691 F.2d 1364 (11th Cir., 1982).

The employer who has discriminated against an employee on the basis of sex has the difficult burden of establishing the existence of a BFOQ to justify the discrimination. In the context of whether male employees could be excluded from working with female inmates, the justification would typically be based on concerns that the presence of male employees would intrude too far on the inmates' right to be free from being seen in states of undress by persons of the opposite sex. To succeed in establishing a privacy-based BFOQ, the employer will have to show the conflict between inmate privacy and employee job interests could not be minimized by such steps as rearranging job responsibilities or finding ways of accommodating inmate privacy concerns while still permitting officers of the opposite sex to work with the inmates. Such accommodations might take the form of shower screens or curtains, permitting inmates to block views into cells for brief periods, announcing the presence of an officer of the opposite sex in the unit, making count times known to inmates, and providing reasonable sleeping attire so inmates are not exposed while asleep.

In *Torres*, one of the few cases involving male officers working in a female facility (as opposed to the opposite situation), a ban on male officers working in female units was defended in part as necessary to protect the privacy interests of the inmates. Evidence showed that because of such things as shower curtains and allowing cell windows to be temporarily blocked, there really was no ordinary circumstance in which an officer was likely to see an inmate in a state of undress. As a result, the court rejected privacy as a justification for single-sex posts.

One federal appeals court recognized a small loophole to the normally difficult BFOQ standards. A reasonable gender-based job assignment policy is acceptable and does not have to be justified as a BFOQ if it imposes only a "minimal restriction" on other employees, *Tharp v. Iowa*, 68 F.3d 223 (8th Cir., 1995). In *Tharp*, the two male plaintiffs applied for jobs that their employer, a correctional institution, had recently reserved for women only. Their applications were denied and the jobs were filled by women with less seniority than the men. The evidence showed that the men were not terminated or demoted and suffered no pay reduction. Both were later promoted. Making the jobs single-sex addressed concerns about inmate privacy, rehabilitative services for inmates, and interests of female employees. Under these facts, the court found the restrictions to be minimal and rejected the plaintiffs' case. It is hard to say if the court would have reached the same result if some greater negative impact had befallen the men.

The *Tharp* case may prove important for jails that feel they cannot adequately provide privacy for female inmates by allowing male officers to work in female housing units because it does approve gender-based job restrictions without requiring a BFOQ showing. However, the *Tharp* exception is clearly a very limited one that has yet to be considered, let alone adopted, by other courts of appeal.

Some Inmate Privacy Concerns Continue

To say that it is very difficult to limit officer positions to one sex or another is not the same as saying that courts do not recognize some inmate privacy interests in regard to observation by the opposite sex. They do.

Courts have generally said that some incidental viewing of inmates in states of undress does not offend the Constitution if it is reasonable, the exception rather than the rule, and based on a legitimate reason. Most courts that have approved such observation have at least assumed the institution has made some efforts to accommodate privacy concerns (shower curtains, etc.). In *Thompson v. Wyandotte County*, 869 F.Supp. 893 (D. Kan., 1994), the court found the female inmate's claim of being seen in the shower on "irregular and isolated occasions" did not violate Constitutional protections. Viewing must be "regular" to violate the Constitution, *Canell v. Armenikis* 840 F.Supp. 783 (D.Or., 1993); if circumstances justified a male officer viewing a male inmate nude, they would likewise justify a female officer viewing the inmate.

The major cross-gender supervision cases deal with observation of male inmates by female officers and have generally not imposed major restrictions on those officers' ability to observe inmates, *Grummett v. Rushen*, 587 F.Supp. 913 (ND Cal., 1984), aff'd., 779 F.2d 491 (9th Cir., 1985), *Timm v. Gunter*, 917 F.2d 1093 (8th Cir., 1992). Is what these cases say for female officers and male inmates also true for female inmates and male officers, or will courts say that female inmates have greater privacy protections vis-a-vis being observed in states of undress by persons of the opposite sex? *Thompson* approved "irregular and isolated" observation, assuming a legitimate reason for such observation. (Note: Virtually all the cases that have approved some form of cross-gender supervision assume observation is done in a professional way and for legitimate reasons. If this is not the case, expect court intervention.) *Canell* implied that any time any officer may observe an inmate in a state of undress, the gender of the officer is irrelevant. Still, until more cases have addressed the male officer-female inmate situation directly, it may be wise for agencies to be very cautious about permitting such observation and make serious attempts to provide means of accommodating the privacy concerns of female inmates.

Touching and Closer Observation

While courts are generally willing to accept some cross-gender intrusions into inmate privacy, they continue to draw limits. Except in emergency situations, most courts have said that strip searches must be performed by persons of the same sex as the inmate, *Canedy v. Boardman*, 16 F.3d 183 (7th Cir., 1994).

One court took very strong exception to a policy permitting male officers to pat search female inmates, *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir., 1993). Although the case appeared to be one arising under the Fourth Amendment, the court analyzed the case under the Eighth Amendment and

found that the practice amounted to cruel and unusual punishment. Of persuasive impact for the court was expert testimony to the effect that a substantial number of the plaintiffs (a class comprised of inmates at the women's prison in Washington State) had been subjected to physical or sexual abuse prior to coming to prison and that some of this number would react to the very thorough pat searches as a continuation of that abuse. These women, the experts testified, would suffer severe psychological trauma as a result of the searches.

The obvious reading of *Jordan* is that a policy allowing male officers to pat search female inmates under routine circumstances is unconstitutional. However, one court, interpreting *Jordan*, suggests the case may be limited to its facts and cannot necessarily be read as having broad applicability, *Carl v. Angelone*, 883 F.Supp. 1433 (D. Nev., 1995).

The uncertainty created by *Jordan* and its limited reading by the Nevada district court in *Carl* presents a serious dilemma for the administrator of the small jail, who may have an all male staff much of the time: can male officers pat search females at the time of booking (or other times, for that matter) or must such searches be delayed until a woman can be found to conduct the search? Thorough pat searches of arrestees is an essential part of the booking process. A new inmate should not be allowed to mingle with other inmates without first being thoroughly searched.* But who can do the search if no female staff members are present?

Carl suggests that stronger security concerns might permit an exception to *Jordan*. Other expert testimony might be mustered that would rebut the testimony that was so influential in *Jordan*. Maybe *Jordan* wouldn't apply to the jail booking situation. But most lawyers, perhaps erring on the side of conservatism and liability avoidance, probably would counsel their jail administrator clients to treat *Jordan* as applying to the booking pat search and to only allow female officers to pat search female arrestees.

What about pat searches of male inmates by female officers? Here caselaw strongly suggests that such searches are acceptable and, by implication, *Jordan* is at least limited by the female inmate - male officer situation, *Madyun v. Franzen*, 704 F.2d 954 (7th Cir., 1983), *Canedy v. Boardman*, 16 F.3d 183 (7th Cir., 1994). Even these cases leave some doubt regarding pat searches that involve contact with the inmate's genital area (as a thorough pat search must) when such contact violates the inmate's religious beliefs. This issue, which has not been litigated directly, may be affected by Congressional passage of the Religious Freedom Restoration Act in 1994, a law that made it more difficult for correctional agencies to justify even security-based practices that impose a substantial burden on an inmate's religious beliefs.

Strip Searches of Arrestees

An example of an issue that theoretically applies equally to both men and women but that in fact seems to have applied virtually exclusively to women relates to the practice of strip searching persons at the time of arrest and booking into the jail.

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*Under limited circumstances, an arrestee may be strip searched. *Chapman v. Nichols*, 989 F. 2d 393 (10th Cir.,1993). Absent an emergency situation, such strip searches would be performed by an officer of the same sex as the arrestee.

The common practice in jails used to be to strip search every person booked into the jail, regardless of reason for arrest or whether any specific reason existed to suspect a particular arrestee of possessing contraband. This blanket strip search policy has now been condemned as an unreasonable search violating the Fourth Amendment by eight federal appeals courts prior to 1990. No court has reached a contrary decision. The Supreme Court has refused to review strip search decisions five times. See *Chapman v. Nichols*, 989 F.2d 393 (10th Cir., 1993), for a list of cases dealing with this topic.

The rule that comes from these cases is that an arrestee may be strip searched when there is reasonable suspicion to believe the person is carrying contraband. This suspicion may be based on the reason for arrest (drug offenses, felonies involving some level of violence or perhaps all felonies, or the individual behavior of the arrestee are the most commonly suggested grounds for a strip search). Persons arrested for minor offenses may not be strip searched absent reasonable suspicion.

What makes this a de facto women's issue is that every strip search decision of which the author is aware involved the search of a woman. Despite the overwhelming caselaw condemning strip searching all arrestees, cases still are being reported regarding the practice. For instance, a woman was strip searched in a Texas jail in 1993 after she voluntarily turned herself in on a minor offense, posted bond, and was still in the jail only because she agreed to wait until a court date could be arranged, *Dugas v. Jefferson County*, 1996 WL 388784 (E.D.Tex., 1996).

Medical Care

Male and female inmates share a fundamental right to adequate medical care. Inadequate medical care can, if bad enough, violate the prohibition against cruel and unusual punishment, which is part of the Eighth Amendment to the U.S. Constitution.

Not all poor medical care violates the Eighth Amendment. According to the Supreme Court, only when medical care (or the lack thereof) shows "deliberate indifference to serious medical needs" does it violate the Constitution, *Estelle v. Gamble* 429 U.S. 97 (1976). *Estelle* and other cases make it clear that this is not an easy standard to meet. Actions must show more than negligence or even gross negligence to cross the threshold and become deliberate indifference.

What is "Deliberate Indifference"?

After coining the phrase in 1976 in the *Estelle* case, the Court waited nearly 20 years before it tried to define deliberate indifference. In the case of *Farmer v. Brennan,* 114 S.Ct. 1970 (1994), the Court revisited the phrase and explained that to be deliberately indifferent, an official must "know of and disregard an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference," 114 S.Ct. at 1979. Elsewhere in the *Farmer* decision, the Court said an official could be liable under the Eighth Amendment "only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."

The "actual knowledge" requirement from *Farmer* reversed a trend among some lower courts that had held an official could be found deliberately indifferent to a problem where the official reasonably

"should have known" about the problem. The actual knowledge requirement will probably have its greatest impact in cases that involve only an incident and a single inmate, as opposed to class actions that allege systemic deficiencies in an institution.

A jail official could be liable under the Eighth Amendment "only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."

Thus, several factors are relevant in showing officials were deliberately indifferent:

- A risk of harm must be *excessive* or *substantial*.
- The risk must be for *serious* harm.
- The official must have actual knowledge of the risk. It is not enough that the official should have known of the risk.
- The official must fail to take reasonable steps to abate the risk.

When is a Medical Need "Serious"?

In many cases, there is no real question about whether a medical need is "serious." A condition need not be life-threatening to qualify as serious. Hemorrhoids qualified as a serious medical need in one case, *Henderson v. Harris,* 672 F.Supp. 1054 N.D. (Ill., 1987).

When the answer to the "is it a serious need" question is not obvious, courts must define the meaning of the term. Lower courts have used various phrases to define what makes a medical need "serious." One court asks if the failure to treat a condition will result in "further significant injury or the 'unnecessary and wanton infliction of pain,'" and says a condition is serious if a reasonable doctor or patient would find it important and worthy of comment or treatment, *McGuckin v. Smith,* 974 F.2d 1050, 1059-60 (9th Cir., 1992). The same case indicates that chronic or substantial pain renders a condition serious. Pain is a common element in many "serious medical need" findings.

A condition in which "a lay person would easily recognize the necessity for a doctor's attention" qualifies a problem as serious in the mind of another court, *Hill v. DeKalb Regional Youth Detention Center,* 40 F.3d 1176, 1187.

Risk of Future Harm

In another relatively recent case, the Supreme Court made clear what most had assumed: a risk of future harm, if serious enough, violates the Eighth Amendment, *Helling v. McKinney,* 113 S.Ct. 2475 (1993).

In cases alleging poor conditions, such as inadequate medical care, officials have often found themselves arguing that, in the absence of serious injury or death, conditions could not be found constitutionally deficient. *Helling* makes it clear that someone need not have died from poor conditions for the conditions to be found unconstitutional.

The fundamental principles for medical cases outlined above will be applied in cases involving both male and female offenders. Some of the medical issues that have arisen regarding female offenders are discussed next.

Abortion

Perhaps 5 of every 100 women who enter a jail are pregnant.[34] Some of these women may want prenatal care and may require care for delivery of their babies. Others may want an abortion. Does a woman in jail have the same right to an abortion as her counterpart on the street? If she does have a right to an abortion, must the jail pay for it? Do the answers to these questions depend on whether the abortion is necessary to preserve the health or life of the woman, as opposed to being considered "elective"?

Very few cases deal with the issue of abortion in jail. Only one has addressed the three questions posed above directly, *Monmouth County Correctional Institute v. Lanzaro,* 834 F.2d 326 (3rd Cir., 1987), cert denied, 486 U.S. 1006 (1987). Monmouth County jail policy said that if the jail doctor did not diagnose the medical necessity of the abortion, the woman was required to obtain a court order directing her release from custody and to find her own funding.

The court held that this policy violated two separate constitutional rights: (1) the woman's right under the Fourteenth Amendment to obtain an abortion (this is the general right to abortion), and (2) the right to medical care under the Eighth Amendment. In its Eighth Amendment analysis, the court said it made no difference that the abortion was considered "elective" for the plaintiff because, unless the abortion was performed relatively quickly, the woman would not be able to have the procedure done at all.

Because the policy impinged on the Fourteenth Amendment right to abortion defined in *Roe v. Wade,* 410 U.S. 113 (1973), the court asked what competing interests—"legitimate penological interests" —the jail had that might justify such a restriction of a constitutionally protected right. In balancing the interests of the inmate against those of the institution, the court applied a four-question test that comes from other Supreme Court decisions in the corrections field, most notably *Turner v. Safley,* 107 S.Ct. 2254 (1987).

The first question under *Turner* asks how the restrictions are related to legitimate penological interests. The only rationales the defendants offered in *Lanzaro* related to unspecified administrative and cost burdens the jail might face were it required to offer abortions such as the one requested. Cost and administrative burden arguments rarely suffice to justify the government's denial or restriction of a constitutional right, and the court rejected the defendants' argument here.

In its Eighth Amendment analysis, the court said it made no difference that the abortion was considered "elective" . . . because, unless the abortion was performed relatively quickly, the woman would not be able to have the procedure done at all.

Secondly, the court asked if there were alternative ways the plaintiff might exercise the constitutional right in question. While such alternatives may exist in many contexts where inmates' rights are restricted (for instance, restrictions on practicing one aspect of a person's religion do not preclude practicing other aspects of the religion), the court found no alternative in the abortion context: the woman could either get the abortion or she could not. The jail's policy could easily have the effect of canceling the woman's constitutional right to free choice.

Thirdly, the court asked what burdens would be placed on the jail if the request for an abortion was accommodated. Here the court found that the costs associated with providing an abortion would actually be less than those associated with providing proper prenatal care and delivery.

Lastly, the court inquired as to whether there were obvious alternatives that would accommodate the claim at minimal cost to valid penological objectives. None was found.

As a result of its four-question inquiry, the court concluded that the defendants did not have a "legitimate penological interest" that could justify restricting the plaintiff's right to abortion under the Fourteenth Amendment.

The court also reviewed whether the policy violated the Eighth Amendment: did it amount to "deliberate indifference to a serious medical need"? Defendants argued that because the abortion was not necessary to save the life of the plaintiff, a "nontherapeutic" abortion, it could not be considered a serious medical need. The court rejected this argument, noting the relatively short time that a woman may have to obtain an abortion and concluding that, unless the jail acted quickly on an abortion request, the woman could lose her ability to have an abortion altogether. In deciding an abortion was a "serious" medical need, the court felt that denying an abortion "will likely result in tangible harm to the inmate," 834 F.2d at 349.

Lanzaro equivocates on the question of who must pay for the abortion. The court approved the lower court's order that the defendants had at least the duty to assist the plaintiff in finding someone who would pay for the costs of the abortion. The decision strongly implies that if no other funding source can be found, the jail would have to pay the costs.

Other abortion cases are not as strong as *Lanzaro.* In *Bryant v. Maffuci,* 923 F.2d 979 (2d Cir., 1991), the court assumed an Eighth Amendment right to abortion and then found that the actions of the defendants did not violate that right. The plaintiff requested an abortion late in the second trimester of her pregnancy. Some short delays in arranging for the abortion resulted in it becoming impossible because of the length of the pregnancy. The court also found the defendants' policy regarding abortion, which essentially deferred the decision to the contract medical provider, did not violate any rights of the plaintiff.

. . . it would appear legally prudent for the jail to be prepared to provide abortion services under at least many circumstances.

In *Gibson v. Matthews,* 926 F.2d 732 (6th Cir., 1991), the issue before the court was whether an inmate's right to abortion provided by the jail was clearly established in the late 1980s. In holding it was not, the court expressed some question about whether *Lanzaro* correctly stated the law, without specifically disagreeing with the result in that case.

Abortion remains a controversial issue in American society, one which extends into American jails. While the caselaw remains thin, there are no decisions directly contrary to *Lanzaro,* which found a woman's right to abortion in jail protected under two separate constitutional theories. While *Lanzaro* did not directly hold that the jail must fund abortions, it strongly implied that absent some other funding source, the funding obligation would fall on the jail. From a purely fiscal perspective, the

costs attendant to providing an abortion probably would be less than the costs of providing prenatal care and delivery, if the woman was to be in jail that long.

While some details about a woman's right to demand abortion in a jail setting remain open to debate (e.g., under what circumstances would some delay or even refusal be permissible), it would appear legally prudent for the jail to be prepared to provide abortion services under at least many circumstances. A policy of flatly refusing to provide abortions may be difficult to defend.

Prenatal Care

The most significant pregnancy/childbirth-related issue for jails is the scope of their duty to provide prenatal care for pregnant inmates. As with other medical issues, the seriousness of this issue grows the longer the woman remains in the jail. Delays of minor, routine care are not likely to present a major legal issue if the delay is only for a matter of days and there is no serious consequence arising from the delay. But, while not providing some type of medical care to a woman who will be released from jail in a matter of days may not be significant, refusing the same care to a woman likely to be in the jail for months or more can have serious medical and legal ramifications.

Breast Feeding

There is no generalized right to breast feed an infant in jail, *Southerland v. Thigpen,* 784 F.2d 713 (5th Cir., 1986). However, in another case where a prison permitted contact visits, a district court entered a preliminary injunction permitting a woman to breast feed the baby she could otherwise hold during visits, *Berrios-Berrios v. Thornburgh,* 716 F.Supp. 987 (E.D. Ky., 1989).

In *Southerland,* the woman gave birth to a child while in prison and was allowed to breast feed while in the medical center where the baby was born. She was not allowed to breast feed when she came back to the prison. In the *Berrios-Berrios* case, the court issued its order (which is not necessarily a final ruling on the issue) under a relatively unique set of circumstances: inmates had direct contact with visitors and infants could visit their mothers. In allowing the mother to nurse her baby in the visiting room, the court was demanding a relatively minor change in operating practice. The court refused to order the institution to provide or allow the woman to have a breast pump or to order the institution to store milk for the woman.

While the *Berrios-Berrios* facts could repeat themselves, a jail could avoid them. There is generally no right to contact visits, *Block v. Rutherford,* 468 U.S. 576 (1984). In general, courts have been very reluctant to demand much of institution officials in the visiting area. Perhaps the most courts have done is to order some jails to expand visiting generally in the face of extremely limited visiting opportunities, *Morrow v. Harwell,* 768 F.2d 639 (5th Cir., 1985), (weekend visiting ordered).

Abuse of Female Inmates

The paramount duty of a jail is to maintain safety and security for inmates, for staff, and for the public. There is always some level of risk that inmates will assault other inmates. This risk can be managed but not eliminated given the nature of the inmate population.

If some level of danger to inmates from other inmates is legally and operationally tolerable, danger to inmates from staff is not. There is perhaps no greater indictment against the management of an institution than a showing that staff are assaulting inmates. While reported court decisions dealing with abuse of female inmates by male officers are rare, there are examples.

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In *Hovater v. Robinson*, 1 F.3d 1063 (10th Cir., 1993), a female inmate sued following alleged sexual assaults by a correctional officer. The court of appeals dismissed the case against the sheriff because there was no indication the officer presented any threat of inappropriate sexual behavior toward female inmates prior to the incident, which would permit a finding that the sheriff was deliberately indifferent to the inmate's right to be free from assault by officers. The opinion indicates that had the sheriff had notice of the risk posed by the officer, he and the county could have been liable.

Another court found rape; coerced sodomy; unsolicited touching of female prisoners' vaginas, breasts, and buttocks by prison employees; vulgar sexual remarks by officers; and male officers entering female housing units unannounced harmed some female inmates and was so "pervasive" as to create a serious risk of serious harm to other female prisoners in three institutions in the District of Columbia, *Women Prisoners v. District of Columbia,* 877 F.Supp. 634 (D.D.C., 1994), reversed in part, 93 F.3d 910 (D.C. Cir., 1996). This case was discussed at length earlier regarding equal protection and Title IX.

Injury or the likelihood of serious harm must be shown to meet the objective prong of the Eighth Amendment. To meet the subjective, state of mind prong, evidence must show officials were deliberately indifferent to the risks. Complaints from the women to police, to the Inspector General, and to prison officials alerted officials to the problem, said the court. The court also found that much of the condemned behavior was "widely known by staff," 877 F.Supp. at 666. These factors created an inference of deliberate indifference on the part of the officials. Deliberate indifference was further shown by the lack of staff training on the subject of sexual harassment of female inmates and a lack of information for prisoners on how to file complaints regarding harassment. Poor investigative practices also contributed to the court's finding of an Eighth Amendment violation. One official testified he would leave investigations to the police. Another said he believed he could not take action unless there was a conviction. The result was that many complaints were never resolved and no action was taken against the officers alleged to have committed assaults.

In response to the problems it found, the court in *Women Prisoners* ordered the D.C. Department of Corrections to write and implement a new policy dealing with harassment of female inmates, to implement a new practice of investigating complaints and internal monitoring of complaints and investigations, and to provide training on sexual harassment for all Department employees working with female prisoners. This training was required quarterly "for all years succeeding entry of the Court Order," 877 F.Supp. at 681. Additional training for female prisoners relating to sexual harassment was also ordered. Portions of the lower court's order were reversed on appeal.

One result of the *Women Prisoners* case, which included a substantial number of additional issues in which the court found against the defendants, is that a federal court has imposed ongoing operational requirements on the District of Columbia. The court's order provides that its requirements will stay in effect "until the Defendants have complied with all provisions for 5 years," 877 F.Supp. at 690.

The Georgia Department of Corrections faced similar allegations of sexual abuse of female inmates in the early 1990s. Six states—Georgia, Idaho, Iowa, Louisiana, Nevada, and North Dakota—have specific statutes making sex between correctional officers or DOC staff and inmates illegal. At least two persons entered guilty pleas to charges under the Georgia act. One person was acquitted and other criminal charges remain pending. These allegations of sexual abuse became part of a long running conditions case, *Cason v. Seckinger*, 84-313-1-MAC.[35] A consent order also has been entered under which the Department adopted an operating procedure for responding to inmate complaints of sexual abuse.

Sexual abuse of female inmates can occur and, in some situations, can become a pattern of behavior.

The disturbing events chronicled in *Hovater, Women Prisoners,* and the Georgia litigation demonstrate that sexual abuse of female inmates can occur and, in some situations, can become a pattern of behavior. The author of this report is not aware of any comparable problems arising around female officers supervising male inmates. An agency concerned about liability, quality of management, and, indeed, its own self-respect, must make serious efforts to prevent sexual abuse of female inmates.

Access to the Courts

In 1977, the Supreme Court affirmed the proposition that inmates have a right of access to the courts that correctional facilities may not impede. The Court held further that institutions have an affirmative duty to provide legal resources to inmates that allow a "meaningful" exercise of the right, *Bounds v. Smith,* 430 U.S. 817 (1977). This affirmative duty can be met by providing assistance from persons trained in the law (lawyers, paralegals, law students) or by providing adequate law libraries.

The general principle from *Bounds*, a prison case, applies to the jail setting, although there is some continuing question whether the jail must always provide legal resources for its inmates to the same extent as must a prison. The existence and extent of any such differences need not be explored here. Suffice it to say that legal resources available to inmates generally in many, many jails are probably inadequate under whatever legal test might be applied. These inadequacies typically become even more acute for female inmates.

The access to the courts issue has two ramifications for women. The first is basic access to legal materials. Once again, the relatively small number of women in the jail works against them. The jail that tries to meet its obligations under *Bounds* through the provision of some form of law library will not have a separate library for women. The hours the library is available to women will typically be far less than for men, raising a question as to whether the jail meets its *Bounds* obligations, which include not only providing the basic resource, but also providing adequate access to that resource. Dealing with the access to resources issue may become doubly difficult for the jail manager because historically female inmates have not demanded access to legal resources to the same extent as their male counterparts.

The second issue relates to whether the right material is in the law library, although here the caselaw does not run in favor of female inmates. The focus of most correctional institution law libraries has been on materials related to the criminal law and to "inmate rights" issues, which may not be the most pressing legal concerns for many female inmates. A very high percentage of women in prison had children living with them before incarceration [36] and are likely to be more concerned about parental rights issues.

Must a jail then provide legal materials related to parental rights and other family law issues? Courts have only recently begun to consider this question, but the trend appears to be to exclude such materials from the constitutionally mandated sorts of materials a law library must provide for inmates. In reversing a lower court decision that required the Michigan Department of Corrections to provide assistance in child custody matters, the Sixth Circuit emphasized that the state's affirmative duties under *Bounds* extend only to assistance in post-conviction matters, habeas corpus, and inmate civil rights, *Glover v. Johnson*, 75 F.3d 264 (6th Cir., 1996).

Section 3. Trends

Although litigated less often than issues regarding male inmates, legal issues regarding female inmates remain potentially significant for the jail. These issues range from the comparative quality and quantity of programs and facilities, and several unique medical issues, to the normal wide range of legal issues that apply equally to male and female inmates. Some of these issues are purely operational, while some need to be anticipated and addressed in the planning and design of a new jail.

The trend in litigation regarding female inmates is similar to that involving male inmates. Led by the conservative direction of the Supreme Court, courts are not taking the strong activist role they did in years past.

Marked by decisions such as *Turner v. Safely* 482 U.S. 78 (1987) and *Sandin v. Conner*, 115 S.Ct. 2293 (1995), the Supreme Court has reduced the scope of potential court oversight over corrections with regard to issues arising under the Due Process Clause of the Fourteenth Amendment (including inmate disciplinary hearings) as well as other issues in which legitimate interests of the jail compete with the rights of inmates. For example, First Amendment rights to correspondence or publications are limited by legitimate security concerns of the institution.

In *Turner* and *Sandin*, as well as other decisions in recent years, the Supreme Court has emphasized that federal courts must defer to the judgment of correctional administrators in all but the most extreme cases. This message has been heard by district and circuit appeals court judges. For instance, the Religious Freedom Restoration Act, initially thought to be the source of renewed court oversight in the area of religion, has been given a narrow, limited construction by most courts called upon to apply its terms in the prison or jail context, *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir., 1996).

This generally conservative trend becomes specific in at least two major decisions directly involving women in custody: the *Klinger* and *Pargo* decisions discussed at length earlier in these pages. If the approach taken by the Eighth Circuit in these cases is adopted by other courts of appeal, or ultimately by the Supreme Court, the Equal Protection Clause may lose much of its force for compelling improvements for female inmates.

Another general trend that may reduce the threat of litigation regarding female inmates is simply the apparent decrease in the number of lawyers or law firms willing to take on major corrections reform cases, particularly when those cases involve only a jail. Public or private funding for public service law firms is decreasing, and with it the number of organizations that might be willing to litigate on behalf of female inmates. Unless the inmates themselves reverse the historic trend of being much less litigious than male inmates (something which may happen in the prison setting, but is less likely to occur in jails, where most inmates come and go rather quickly), there probably will continue to be relatively few civil rights cases filed by or on behalf of female inmates.

Congress and various state legislatures have passed, or are considering passage of, bills intended to reduce the power of the federal courts over state and local correctional agencies. Some of these

efforts may succeed in cutting down the number of meritless lawsuits filed by inmates. Others, which purport to directly limit the powers of the federal courts, raise fundamental constitutional questions regarding the concept of the Separation of Powers.

Not all of the trends in today's law erode the role of the courts in defining and protecting the rights of inmates generally and female inmates in particular. For instance, the Title IX cases, exemplified by *Jeldness* and *Women Prisoners*, may have a substantial impact at least in those jurisdictions which, because of the receipt of federal financial assistance for education, are subject to the provisions of Title IX. The *Jeldness* case also indicates this will be an area of considerable confusion, as courts try to determine what the idea of no discrimination on the basis of sex means in a setting where such discrimination (separation of male and female inmates) remains an unchallenged reality.

Courts also continue to protect rights previously identified by the Supreme Court, even when those may have been watered down somewhat in recent years. Adequacy of medical care will continue to be an issue of concern to the courts and one of considerable importance to female inmates. Conditions of confinement claims, often triggered by problems caused by crowding, also remain viable, despite some tightening of the requirements of such claims by the Supreme Court.

In the not-so-distant past, litigation or the threat of litigation served as a major prod for jail administrators and county governments to address and correct problems in their jails. More than one jail administrator has both grumbled about court intervention with jail operations and blessed the same intervention as the only effective means of requiring major problems to be addressed.

To some extent, the litigation prod does not carry the strength it once did. To some, this reflects a step in the right direction toward restoring a "proper" balance between the courts and the legislative and executive branches of government. The risk that such steps create is that without the threat of being held accountable before a federal court, the quality of jail and prison operations may begin to deteriorate. The public's attitude toward offenders is harsher today than in decades past. In some circles, it seems that almost anything more than bread and water is seen as a frill, an unnecessary perk, part of a "country club" facility. While this is an exaggeration, the "get tough on inmates" mood, combined with decreasing levels of accountability for maintaining some level of minimum standards, raises the specter of decreased funding for jails, corresponding cutbacks in staff and training, and the rebirth of the sorts of very brutal, barbaric, and often dangerous conditions that led to the initial wave of court intervention in the early 1970s.

Endnotes

1. Gilliard, Darrell K. and Allen J. Beck (January 1997). *Prison and Jail Inmates at Midyear 1996*. Bureau of Justice Statistics Bulletin. Washington, DC: U.S. Department of Justice, p. 6.

2. Ibid., p. 4.

3. Snell, Tracy L. (1992). *Special Report: Women in Jail 1989*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics, p. 3.

4. Ibid., p. 3.

5. Ibid., p 10.

6. Morash, Merry, Robin N. Haarr, and Lila Rucker (1994). "A Comparison of Programming for Women and Men in U.S. Prisons in the 1980s." *Crime and Delinquency, Vol. 40*, No. 1, p. 198.

7. *Women in Jail 1989*, op. cit., p. 6.

8. Ibid., p. 4.

9. Ibid., p. 7.

10. Ibid., p. 7.

11. Maguire, Kathleen and Ann L. Pastore, eds. (1994). *Bureau of Justice Statistics Sourcebook of Criminal Justice Statistics 1994*. Albany, NY: State University of New York, Hindelang Criminal Justice Research Center, p. 415.

12. *Women in Jail 1989*, op. cit., p. 7.

13. Ibid., p. 9.

14. Beal, Glenda J., ed. (1993). *ACA National Jail and Adult Detention Directory*. Laurel, MD: American Correctional Association, p. xiv.

15. Ibid., p. 277.

16. American Correctional Association (1990). *The Female Offender: What Does the Future Hold?* Laurel, MD, p. 2.

17. Florida Supreme Court (1990). *Report of the Florida Supreme Court Gender Bias Study Commission*. Tallahassee, FL, p. 94.

18. Ibid., p. 94.

19. *Women in Jail 1989*, op. cit., p. 8.

20. Ibid., p. 9.

21. *Florida Supreme Court Gender Bias Study*, op. cit., p. 95.

22. Ibid., p. 95.

23. *The Female Offender*, op. cit., p. 16.

24. Ibid., p. 16.

25. Ibid., p. 17.

26. *Women in Jail 1989*, op. cit., p. 9.

27. Ibid., p. 9.

28. *The Female Offender*, op. cit., p. 16.

29. *A Comparison of Programming for Women and Men*, op. cit., p. 199.

30. "Status Report: State Prisons and the Courts (Winter 1993/1994)." *National Prison Project Journal*, p. 14.

31. Rafter, Nicole (1990). "Equal Protection Forcing Changes in Women's Prisons." *II Correctional Law Reporter, 52.*

32. O'Brien, David G. (Spring 1996). "*Jeldness v. Pearce:* Will the Requirements of Title IX Handcuff Prison Administrators?" *New England Journal on Criminal and Civil Confinement, 22*, p. 73.

33. Ibid., p. 84.

34. *The Female Offender*, op. cit., p. 17.

35. *State Prisons and the Courts*, op. cit.

36. *A Comparison of Programming for Women and Men*, op. cit., p. 198.

Bibliography

All Too Familiar Sexual Abuse of Women in U.S. State Prisons (1996). New York: Women's Rights Project of Human Rights Watch.

American Correctional Association (1990). *The Female Offender: What Does the Future Hold?* Laurel, MD.

Beal, Glenda J., ed. (1993). *ACA National Jail and Adult Detention Directory*. Laurel, MD: American Correctional Association.

Bureau of Justice Statistics (December 3, 1995). Press Release. Washington, DC: U.S. Department of Justice.

Florida Supreme Court (1990). *Report of the Florida Supreme Court Gender Bias Study Commission*. Tallahassee, FL.

Gilliard, Darrell K. and Allen J. Beck (January 1997). *Prison and Jail Inmates at Midyear 1996*. Bureau of Justice Statistics Bulletin. Washington, DC: U.S. Department of Justice.

Maguire, Kathleen and Ann L. Pastore, eds. (1994). *Bureau of Justice Statistics Sourcebook of Criminal Justice Statistics 1993*. Albany, NY: State University of New York, Hindelang Criminal Justice Research Center.

Morash, Merry, Robin N. Haarr, and Lila Rucker (1994). "A Comparison of Programming for Women and Men in U.S. Prisons in the 1980s." *Crime and Delinquency, Vol. 40*, No. 1.

O'Brien, David G. (Spring 1996). "*Jeldness v. Pearce*: Will the Requirements of Title IX Handcuff Prison Administrators?" *New England Journal on Criminal and Civil Confinement, 22.*

Pontell, Henry N. and Wayne N. Walsh (1994). "Incarceration as a Deviant Form of Social Control: Jail Overcrowding in California." *Crime and Delinquency, Vol. 40*, No. 1, p. 18, 19.

Rafter, Nicole (1990). "Equal Protection Forcing Changes in Women's Prisons." *II Correctional Law Reporter, 52.*

Snell, Tracy L. (1992). *Correctional Populations in the United States, 1992*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics.

Snell, Tracy L. (1992). *Special Report: Women in Jail 1989*. Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics.

"Status Report: State Prisons and the Courts (Winter 1993/94)." *National Prison Project Journal.*

"Status Report: State Prisons and the Courts (Winter 1994/95)." *National Prison Project Journal.*

Appendix

An Overview of the Courts and Corrections

Time Was Once That . . . .

Plunging into a detailed discussion of legal issues for female inmates may be confusing for those not familiar with the history of courts and corrections. This Appendix provides a short general background on the courts' involvement with corrections. Much of the history of corrections in America in the last third of the 20th Century is that of the inmates' rights movement and the involvement of federal courts with the operation of jails and prisons.

Persons unfamiliar with the inmates' rights movement, which has waned somewhat in recent years, may be surprised to learn how many current correctional practices and concerns are the product of court decision or at least the fear of litigation and liability. If one looks hard enough, it is possible to find one or more court decisions from somewhere in the country that touch on virtually every aspect of inmate life in the institution. This is not to say that what one court in one jurisdiction said in one case 15 years ago still reflects good law today. However, it highlights the very influential role courts have played in defining legally binding expectations for jails and prisons in the United States.

Another indicator of the extent of court involvement is simply the number of jurisdictions that are, or have been, under court order in a major conditions of confinement case, i.e., a case in which various living conditions and practices in the institution have been found to amount to cruel and unusual punishment in violation of the Eighth Amendment. As of January 1995, only three states had never been involved in major litigation dealing with crowding or conditions in their prisons (Minnesota, New Jersey, and North Dakota). Thirty-three states have at least one major institution under court order, and major litigation is pending in at least 11 others.* By 1989, nearly one of every three large American jails were under court order in conditions of confinement cases.†

Hundreds, if not thousands, of other court orders deal with relatively discrete practices or procedures (e.g., arrestee strip searches, or types of publications an inmate may receive, or how an inmate may practice his/her religion, or inmate discipline, among many potential areas).

Most of these lawsuits as well as the tens of thousands of less serious, often frivolous, civil rights cases inmates file in the federal courts every year deal with male inmates. However, 23 major cases dealing with female offenders are pending in some form among the states and the District of

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*"Status Report: State Prisons and the Courts (Winter 1994/1995)." *National Prison Project Journal.*

†Pontell, Henry N. and Wayne N. Walsh (1994). "Incarceration as a Deviant Form of Social Control: Jail Overcrowding in California. *Crime and Delinquency, Vol. 40*, No. 1.

Columbia.* Almost half of the cases deal with medical/mental health issues, while most of the rest deal with more general conditions issues.

Courts Used to Keep Hands Off

Courts have not always been concerned with conditions and practices in jails and prisons. Before the late 1960s, courts maintained what was known as a "hands-off" approach, deferring to the judgment of institution administrators. However, that gradually changed. What spawned the beginning of court involvement was a series of cases with very shocking facts, such as inmate trusties having authority over other inmates and the basic power to run the prison, even deliver medical care, *Holt v. Sarver,* 309 F. Supp. 361 (E.D. Ark., 1970), *Newman v. Alabama,* 503 F.2d 1320 (5th Cir., 1974). In *Newman*, a bedsore-ridden quadriplegic, with wounds infested with maggots, waited nearly three weeks between the time the maggots were discovered and his wound was cleaned.

If the government is going to operate a jail system, "it is going to have to be a system that is countenanced by the Constitution of the United States,"* Holt v. Sarver, *(Ark., 1970).

That was then. Inmates and inmate advocates brought these conditions, practices, and customs to the courts' attention. These types of facts **shocked the conscience** of judges, convinced them that no one or no organization was holding jail and prison administrators **accountable** for the ways in which they ran their institutions. Beginning in the late 1960s, in light of many claims with similar sorts of appalling facts, the hands-off era ended and a period of "hands-on" involvement of the courts began.

Since then, courts have recognized that if the government is going to operate a jail system, "it is going to have to be a system that is countenanced by the Constitution of the United States," *Holt v. Sarver* (Ark., 1970). Echoing the meaning of these words, the Supreme Court in 1974 stated that "there is no iron curtain drawn between the Constitution and the prisons of this country," *Wolff v. McDonnell,* 418 U.S. 539 (1974). The protections of the Constitution extend into correctional facilities, the only question being the extent of those protections.

Life After the Hands-On Era

Very active court involvement with correctional facilities marked the 1970s, as the extent of problems in America's correctional institutions came to the attention of the courts. This "hands-on" period reached its zenith in 1979 with a Supreme Court decision in a case that came from a jail operated by the federal government, *Bell v. Wolfish,* 441 U.S. 520 (1979). *Bell* included several issues, but the most important was the question of whether double-celling inmates—putting two persons in a space designed for one—was unconstitutional. The Supreme Court declared it was not, saying there was no "one man, one cell principle lurking" in the Constitution, 441 U.S. at 542. With this holding and the general statement that lower courts were becoming too "enmeshed in the minutiae of prison operations," 441 U.S. at 562, *Bell* marked the end of the hands-on era and introduced a period of court retreat from the very active role courts played in the 1970s.

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*State Prisons and the Courts, op. cit.

The Supreme Court has decided a substantial number of cases dealing with inmate rights since *Bell.* Consistently those cases have followed a relatively conservative line, recognizing that inmates still enjoy the protections of the Constitution but that those protections are not as extensive as lower courts often found them to be.

Conditions in America's jails and prisons no longer approach the horrors that led to court intervention nearly three decades ago. Although the courts have retreated from the extreme activism of the 1970s, court decisions and the threat of litigation still play a major role in the operation of a correctional facility.

Scope of Court Involvement: You Name It!

There are few areas of jail operation that have not been the subject of at least one (if not many) lawsuits over the years. Some of the issues the courts have addressed (with varying results) include:

- Inmate safety and classification;
- Access to and the quality of medical care;
- Searches of inmates, visitors, and staff;
- Religious practices;
- Cross-gender staffing: observation and searches of one sex by the other;
- Diet and nutrition, including medical and religious diets;
- Access to or limitations on what inmates can read;
- Access to the courts and legal materials;
- Basic facility sanitation;
- Personal hygiene, e.g., from toilet paper to toothbrushes to hot water;
- Out-of-cell time and exercise;
- Disciplinary procedures;
- Administrative segregation: procedures for entry and conditions in segregation units;
- Censorship of incoming and outgoing mail, handling of legal mail;
- Clothing;
- Overall physical environment, including such things as lighting, heating, cooling, ventilation, and noise levels;
- Comparison of programs and facilities available to male vs. female inmates;
- Protection against suicide;
- Use of force: when, how much;
- Smoking and smoke-free jails;
- Abortions;
- HIV: disclosure, treatment, segregation;
- Employee training and qualifications;
- And so forth.

Progress in American corrections remains bolstered by the thousands of court decisions of the last 25 years, which have touched nearly every aspect of correctional facility operation. While comparatively few of these cases have dealt directly with female inmates, the rules from many of those cases apply in theory equally to both men and women.

The quality of jail and prison management and operation is typically far more advanced than 20 years ago. However, sometimes the advancement in management and operational practices has not extended as far for female inmates as it has for male inmates.

Understanding Section 1983 Lawsuits

Inmates file most of their lawsuits in federal court under a law passed by Congress during post-Civil War Reconstruction. That law appears at Title 42 of the United States Code, in Section 1983. Some understanding of "Sec. 1983 actions" may help foster an understanding of some of the important mechanics of civil rights litigation: who gets sued, and why, and what the court has the power to do. Section 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This statute, which was largely ignored until the birth of the civil rights movement in the middle of the 20th Century, conveys no rights itself, other than providing a means of raising a civil rights claim in federal court.

In summary, Sec. 1983 permits suits against persons acting on behalf of state or local governments (acting "under color of state law") to be sued by someone who claims the person acted or failed to act in a way that caused the violation of the plaintiff's rights under either the federal Constitution or federal statute. The great majority of Sec. 1983 actions that affect corrections deal with constitutional, not statutory, issues. Municipal corporations such as counties and cities may be sued directly under Sec. 1983.

The Court's Relief Powers

Section 1983 gives the court a variety of relief powers it may exercise to correct constitutional violations it may find. The most important are damages and injunctive relief.

Damages. Damages may be awarded against individual defendants in a Sec. 1983 action only if the right that was violated was "clearly established." This protects government officials from being monetarily liable for failing to predict the future course of constitutional law. The "qualified immunity" defense is *not* available to government agencies, such as counties.

Injunctive relief. Injunctions respond to past and present problems, but focus on the future: what must be done to *correct* this problem and *prevent* its reoccurrence. Having found a constitutional violation (or violations) AND having decided there is a continuing problem, the court may enter an order requiring the defendant to correct the problem by addressing its cause. For instance:

- **Constitutional problem**: Excess levels of violence.

- **Cause**: Gross overcrowding, causing the breakdown of the classification system. An additional cause might be inadequate staffing.

- **Cure**: A population cap and population reduction order.

- **Impact**: Compliance with a population reduction order affects the entire criminal justice system, from police to prosecutors to courts to the jail and prison since all of these agencies help determine who is incarcerated and for how long.

Relief orders will start at the least-intrusive level needed to bring a facility up to constitutional levels, *Stone v. San Francisco,* 968 F.2d 850 (9th Cir., 1992). But if the defendants do not comply with the relief order, more court orders are entered that become more intrusive and more demanding until the defendants come into compliance.

The principle to remember about the court's relief power is that the **court has the power necessary to require defendants to correct the problems**. The amount of power used grows in direct proportion to the court's view of the defendants' inability or reluctance to remedy the problem.

Attorneys' Fees

As a means of encouraging litigation to vindicate civil rights violations, Congress passed a law that allows the "prevailing party" in a civil rights case to be awarded attorneys' fees, 42 USC Sec. 1997.

"Prevail" includes more than winning the lawsuit after a trial. Winning only a portion of the case will support a fee award. Settling the case through a consent decree supports a fee award, making the fee a proper question in settlement negotiations. Courts have awarded fees even where the lawsuit becomes a "catalyst" for improvements.

Computation of fees. Fees are computed by multiplying the hours the lawyer spent on the winning portions of the case by the hourly rate charged by similar lawyers in the community. This produces the "lodestar" fee figure, which may be adjusted slightly up or down depending upon circumstances. In a big case, with hundreds or thousands of hours and rates sometimes exceeding $300/hour, this formula can produce fees of six or even seven figures.

The size of the fee is not necessarily limited by the size of the relief the plaintiff receives, although after a 1993 Supreme Court decision, a nominal damage award of $1.00 generally will no longer support a fee award, *Farrar v. Hobby,* 113 S.Ct. 56 (1992).

One other point about attorneys' fees: they may not be covered by a county's insurance policy! Where a county's coverage paid for "damages," from "errors and omissions," it did not cover attorneys' fees, *Sullivan County, TN v. Home Indemnity Co.,* 925 F.2d 152 (6th Cir., 1992).

Prison Litigation Reform Act will reduce size of fees. In the spring of 1996, Congress passed the Prison Litigation Reform Act, which, among other things, imposed restrictions on the award of attorneys' fees in inmate cases. Among other limitations, the law puts a cap on the hourly rate a judge can use to determine the size of the fee as well as attempts to prevent fee awards under a "catalyst" theory.

Inmate Rights: What Are the Issues?

Even though court decisions touch on so many aspects of jail and prison operation, inmate lawsuits derive from only four constitutional amendments: the First, Fourth, Eighth, and Fourteenth.

First Amendment: To what extent may inmates exercise their rights of religion, speech, press, and, in general, the right to communicate with persons outside the jail? What justifies restricting those rights?

First Amendment issues, especially dealing with limitations on the practice of religion and the censorship or rejection of correspondence and publications, have been the subject of much litigation over the years. Although it took the courts a considerable period of time to decide how they would balance inmate claims about matters protected by the First Amendment against institution claims of competing, overriding interests (generally security), this question was resolved in 1987 with two decisions from the Supreme Court, *Turner v. Safely* 482 U.S. 78 (1987) and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). In these two cases, the Court said that when a prison regulation "impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests," *Turner*. "Legitimate penological interests" include security, order, safety, rehabilitation (for convicted persons), and perhaps equal opportunity.

The so-called "*Turner* Test" is a relatively easy one for institution administrators to meet because in both *Turner* and *O'Lone*, the Court emphasized that lower courts must give a great deal of deference to the judgment of correctional officials on matters such as security. This has made it very difficult for courts to second guess officials as to the need for a particular type of restriction.

As easy as the *Turner* test may be, officials still must be aware of when their actions restrict an area protected by the Constitution and must be able to articulate a legitimate reason for such actions.

Litigation over limitations on an inmate's ability to practice his or her religion while in jail or prison has increased since the passage of the Religious Freedom Restoration Act by Congress in 1994. This law made it more difficult for institution administrators to be able to justify restricting religious practices because, in it, Congress effectively overruled the *Turner* test regarding restrictions that impose a "substantial burden" on the practice of religion. To justify such restriction, officials must show the restriction furthers a "compelling governmental interest" and is the least-restrictive means of furthering such interest.

Fourth Amendment: What types of **searches** are reasonable/unreasonable for inmates, visitors, and staff? What privacy protections do persons retain upon entering the jail?

Courts have been cautious about limiting the ability of prison or jail staff to search inmates. For instance, the Supreme Court has said that inmates have absolutely no privacy rights regarding their cells and therefore staff may search a cell any time, and for any reason, *Block v. Rutherford*, 468 U.S. 576 (1984). The Court also said that inmates may be strip searched any time they return from somewhere outside the secure perimeter of the facility where they might have been able to obtain contraband, *Bell v. Wolfish*, 441 U.S. 520 (1979).

The increase in female officers working with male inmates and, to a somewhat lesser degree, male officers working with female inmates has raised questions about whether there are certain functions a staff member may not do with an inmate of the opposite sex. In general, strip searches remain a same-sex task. Whether pat searches may be done by a member of the opposite sex remains unsettled. Where cross-gender supervision exists (which is virtually everywhere, to at least some degree), courts expect jails and prisons to make at least some efforts to accommodate inmate privacy concerns and limit situations where staff of one sex observe inmates of the other sex naked, showering, using the toilet, etc.

Eighth Amendment: What conduct, such as the use of force, and/or conditions amount to cruel and unusual punishment?

The Eighth Amendment has been the source of some of the most significant litigation dealing with corrections facilities through what is known as the **conditions of confinement** lawsuit. These suits look at two separate issues:

1. Objective issue: Are conditions that affect the basic human needs of the inmates, including medical care, personal safety, shelter, sanitation, food, clothing, and exercise so bad as to harm the inmates or present an unreasonable risk of serious harm to them? *Wilson v. Seiter*, 111 S.Ct. 2321 (1991), *Helling v. McKinney*, 113 S.Ct. 2475)1993).

2. Subjective issue: Are institution officials "deliberately indifferent" to those bad conditions?

Conditions of confinement cases can be very expensive and complicated to try, sorely taxing the resources of an affluent jurisdiction. However, these cases have their real impact in the relief phase.

If a court finds that officials are deliberately indifferent to one or more conditions that are bad enough to meet the objective test from *Wilson* and *Helling*, the court will begin to exercise its relief powers described earlier. This means the court will try to determine what the *causes* of the problems are and tailor a relief order that tries to address the causes of the problem. If the cause of the problem is crowding, as it often is in a conditions case, then the court may direct the defendants to reduce the levels of crowding in the institution. This can lead to population caps and, in the case of a county, affect the jurisdiction's entire criminal justice system.

Not all lawsuits related to conditions of confinement are class actions involving the entire institution. Suits brought by individual inmates over individual problems are common, particularly in the area of medical care. Here the legal question is whether the medical care was so bad as to show "deliberate indifference to a serious medical need," *Estelle v. Gamble*, 429 U.S. 97 (1976). Medical suits do not always just involve medical staff. When non-medical staff, such as correctional officers, impede an inmate's access to medical care or interfere with the delivery of prescribed treatment, they also may become defendants in a medical case.

The other major area of Eighth Amendment litigation relates to the **use of force**. Here also, the limits set by the Supreme Court do not impose a tremendous burden on the jail and prison administrator. Staff are permitted to use force in many circumstances, but when the force involves "the wanton and unnecessary infliction of pain" or is used "maliciously or sadistically for the very purpose of causing

harm," it violates the Eighth Amendment,* *Hudson v. McMillian*, 112 S.Ct. 995 (1992).

In deciding whether force meets the *Hudson* test, the Supreme Court said lower courts should consider five factors:

1. The need for the use of any force,
2. The amount of force actually used,
3. The extent of any injuries sustained by the inmate,
4. The threat perceived by the reasonable correctional official, and
5. Efforts made to temper the use of force.

Fourteenth Amendment: Due process and equal protection. Several unrelated issues are included under the Fourteenth Amendment:

1. Due process:
   - What process is due to assure fairness in inmate discipline? At least when a release date is at risk in a disciplinary proceeding, the Fourteenth Amendment requires notice, a hearing, and various other procedural rights, *Sandin v. Conner*, 115 S.Ct. 2293 (1995), *Wolff v. McDonnell*, 418 U.S. 539 (1974).
   - What other types of decisions require some form of due process, and what form must that process take?
   - Due process also protects/regulates conditions of confinement and use of force for pre-trial detainees, who are not protected by the cruel and unusual punishment clause of the Eighth Amendment.

2. Access to the courts: Since 1977, jails and prisons have had affirmative duties to provide resources (law libraries or persons trained in the law) to assist inmates in exercising their right of access to the courts, *Bounds v. Smith*, 430 U.S. 817 (1977). Bounds dealt with the prison setting. The principles announced in *Bounds* apply to jails, but courts are still struggling with the extent to which the precise demands of the right of access to the courts may differ between the jail and prison setting.

3. Equal protection: This Clause, which generally requires that similar groups be treated alike by government unless sound reasons exist for treating them differently, provides the basis for some of the most important litigation on behalf of women. These so-called "parity" cases were described in detail earlier.

This short summary of the potential constitutional issues in running a jail belies the complexity of those issues, but demonstrates the potential consequences of a jail failing to meet the requirements of the Constitution.

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*Technically, the Eighth Amendment does not protect pre-trial detainees. Instead, this group is protected by the Fourteenth Amendment. The legal test for evaluating use of force under the Fourteenth Amendment is essentially the same as that applied to sentenced offenders.

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