A STRATEGY FOR ADVOCACY ON BEHALF OF WOMEN OFFENDERS

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Julia[1] is a thirty-six-year-old African-American woman incarcerated at the minimum security facility in Lorton, Virginia. She is serving a six-to eighteen-year sentence for writing bad checks. This is her second offense; Julia spent six months in a halfway house for picking up her boyfriend after he robbed a bank. Julia has two boys, ages seven and thirteen. She has not seen them in two months. They are staying with Julia's mother.

Julia has little work experience. Her father raped her when she was in the sixth grade, so Julia left home and worked as a nude dancer to support herself. Julia works in the garment shop, an integrated prison industry. Julia would like to participate in work training, which permits prisoners to work in the community and return to prison in the evening. Julia complains that women are not told that they are eligible for work training; she learned about work training from a male prisoner in the garment shop.

Roxanne,[2] a twenty-seven-year-old African-American woman, was sentenced to a two-to six-year term for her first offense: distribution of narcotics. Roxanne completed two years of undergraduate work at Howard University before she became a drug addict.

Roxanne works as a clerk in prison. Women may only hold clerk or dormitory maintenance positions while men's jobs include painting, landscaping, plumbing, and carpentry. Like Julia, Roxanne wanted to participate in work training, but her caseworker said she was too close to her release date.

I. PROFILE OF THE FEMALE OFFENDER

Roxanne and Julia are not unlike most female offenders. A typical adult female prisoner is a thirty-one-year-old woman of color with at least

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[1] The facts regarding Julia reflect her situation when she was interviewed in February 1993.

[2] The facts regarding Roxanne reflect her situation when she was interviewed in January 1993.

one child.[3] Over half of the women in prison have survived physical abuse and more than one-third have been sexually abused.[4] A sizeable number have serious drug problems.[5] Most female offenders are high school dropouts and were unemployed at the time of their arrest.[6] The majority are imprisoned for nonviolent offenses such as drug offenses (thirty three percent) and property crimes (twenty-nine percent), and most have been convicted at least once before.[7]

The rate of increase of incarceration for women exceeds that of men. From 1986 to 1991, the male prison population increased by fifty-three percent while the female prison population increased by seventy-five percent.[8] At the end of 1993, there were 55,365 women prisoners, which is almost six percent of the total inmate population.[9]

II. OBJECTIVE

The stories of Julia and Roxanne reflect three common problems[10] among women in prison:[11] inadequate vocational skills, drug dependency, and lack of contact with their children. While male prisoners also suffer from these three problems, they have a disproportionate impact on women

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[3] Tracy L. Snell, U.S. Dep't of Justice, Women in Prison 1-2 (1994) [hereinafter BJS study].

[4] American Correctional Association, The Female Offender, What Does the Future Hold? 56-57 (1990) [hereinafter ACA study].

[5] Id. at 59-60.

[6] BJS study, supra note 3, at 2.

[7] Id. at 3.

[8] Id. at 2.

[9] Darrell K. Gilliard & Allen J. Beck, U.S. Dep't of Justice, Prisoners in 1993, at 4 (1994).

[10] It is beyond the scope of this Article to examine all of the crucial problems affecting women in prison. I have already mentioned that more than one-third of women in prison have been sexually abused. See supra text accompanying note 4. Inadequate reproductive health care and treatment for HIV infection/AIDS is yet another pressing problem. Nationwide, six percent of prison inmates were pregnant at intake. ACA study, supra note 4, at 32. At the end of 1993, 27% of the women incarcerated at Rikers Island in New York City were HIV-positive. Elisabeth Rosenthal, Doctors Behind Bars Balance Safety and Care, N.Y. Times, Jan. 1, 1994, at A1. Reducing drug dependency will reduce the number of health care problems facing women prisoners. For example, women who use drugs are at a higher risk for HIV infection because of their susceptibility to other sexually transmitted diseases. U.S. Dep't of Justice, Implications of the Drug Use Forecasting Data for TASC Programs: Female Arrestees viii (1991) [hereinafter TASC study].

[11] Often I will use "prison" to include both prisons and jails. Prisons house convicted offenders. While jails sometimes house short-term offenders, usually jails hold pre-trial detainees.

in prison.[12] Effective advocacy on behalf of women prisoners must acknowledge and even utilize gender distinctions in order to address these problems and to prevent the re-incarceration of women like Roxanne and Julia.

This Article begins with a brief discussion of feminist legal theories of gender and the law. I then use these theories to examine how effective litigation, legislation, and community-based programs are at remedying the three problems most affecting women prisoners. Ultimately, I argue that the gender-neutral requirements of the Equal Protection Clause limit the effectiveness of litigation. Thus, advocates for women prisoners should also focus their energy on legislative and community-based solutions. With this in mind, the Article concludes with an advocacy strategy on behalf of women prisoners where legislation and community-based advocacy are first used as a "carrot" to lead correctional officials in the right direction with the "stick" of litigation ready if these officials refuse to be led.

III. GENDER DIFFERENCES AND THE LAW

The value of incorporating differences between men and women into the law is the subject of a long-standing debate among feminist legal theorists. *Equality* feminists prefer the current sex-neutral equal protection doctrine, fearful that legislation which recognizes women's differences would perpetuate the stereotype of women needing special protection.[13] *Cultural* feminists, on the other hand, seek to improve the position of women by validating and glorifying women's differences from men; they believe a just society can recognize and encourage gender differences while still working against prejudice.[14]

A third approach, *radical* feminism, argues that emphasizing either sameness or difference merely reinforces male hegemony. Radical feminists criticize equality feminists for seeking an equality that is based on male rather than female standards.[15] They reproach cultural feminists for celebrating women's choices when these choices are really a product of patriarchal coercion.[16] That is, radical feminists contend that women have

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[12] See infra parts IV.A.1, IV.B.1, IV.C.1.

[13] E.g., Wendy Williams, The Equality Crisis: Some Reflections on Culture, Courts, and Feminism, 7 Women's Rts. L. Rep. 175 (1982).

[14] E.g., Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 Va. L. Rev. 543 (1986).

[15] Catharine MacKinnon, Difference and Dominance: On Sex Discrimination, in Women and the Law 122 (Mary J. Frug ed., 1992).

[16] Id. at 125. It is beyond the scope of this Article to discuss feminist

no free will to be different from what men want them to be because a history of subordination has left women indoctrinated to male privilege and unable to truly make their own choices.[17]

In the context of prison reform, the problems of family separation, drug dependency, and inadequate job skills must take gender into account. Because the majority of prison and community programs are sex-segregated[18] and will continue to be so,[19] equality theory will not be as effective as a gendered approach for two major reasons. First, the populations in women's prisons are usually much smaller than the populations in men's prisons;[20] therefore, providing equal opportunities for rehabilitation by using the same amount of funding per prisoner will be impossible.[21] Second, equality theory will be ineffectual because the needs of female prisoners are not the same as the needs of male prisoners.[22]

A gendered approach is limited by current legal and political realities. In litigation, the Constitution precludes a gendered approach. In legislation, there is a danger that alternative programs directed solely at women prisoners will be approved by primarily male legislatures only through promoting the "woman as victim" stereotype. Despite the cost of perpetuating this stereotype, it makes sense to utilize a gendered approach to legislation. First, since women are usually imprisoned for less violent crimes than men[23] and are thus better suited for community-based programs, sympathy gathering does not need to be overly emphasized in legislative strategy. Second, portraying prisoners as victims directly contrasts with another stereotype: portraying prisoners as vicious and subhuman. Perhaps this clash of stereotypes will force society to look at

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jurisprudence on equality theory in any detail. For a more complete explanation, see Deborah L. Rhode, Justice and Gender (1989).

[17] E.g., Mackinnon, supra note 15, at 120.

[18] Only 26.8% of adult state correctional facilities house both male and female prisoners. ACA study, supra note 4, at 95.

[19] Courts are reluctant to order the desegregation of prisons as a remedy for gender discrimination. See infra notes 66-67 and accompanying text. Also, in 1987, half of the jurisdictions in the country planned on building new or additional facilities for women during the next four years. ACA study, supra note 4, at 1, 92.

[20] Ralph R. Arditi et al., Note, The Sexual Segregation of American Prisons, 82 Yale L.J. 1229, 1232 n.11 (1973).

[21] For example, with 1,000 male prisoners and 200 female prisoners, spending $20,000 per prisoner means that "equal" treatment gives facilities for men five times the amount of money that facilities for women have to spend on programs. With this disparity in resources, it is impossible to provide the same variety of programs for men and women.

[22] See supra note 10.

[23] See infra note 144.

women prisoners based on their particular circumstances rather than as meek or cruel.

This Article will now examine three prison reform strategies: litigation, legislation, and community-based alternatives. These strategies will be examined in the context of their effectiveness at tackling the three major obstacles facing women prisoners: lack of vocational and educational training, drug abuse, and family separation.

IV. THE LITIGATION SOLUTION

A. Vocational and Educational Training

1. Factual Context

A Federal Bureau of Prisons study reveals that lack of access to vocational training and prison industry work thwarts prisoners' adjustment to incarceration and post-release success. Inmates in vocational programs are less likely to commit crimes after release, to receive a prison violation while incarcerated, and to quit jobs for reasons other than advancement to a better position.[24] While this is true for both male and female inmates, women prisoners have an even greater need for employment training than their male counterparts. First, women enter prison with less work experience and fewer skills than men. More than half of all female inmates (fifty-three percent) were unemployed at the time of their arrest compared to thirty-two percent of male inmates.[25] Prior to incarceration, most women worked in lower-paying, low-skilled, traditionally female jobs: service, clerical, and sales positions.[26] Two-thirds of women in prison never earned more than $6.50 an hour for their labor.[27] Also, when women are released, they are more likely to have a family to support. Seventy-six percent of women in prison have children, compared to sixty percent of men. A more telling statistic reveals that eighty-five percent of

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[24] National Criminal Justice Association, Inmates in Prison Vocational Programs Have Lower Recidivism Rates, BOP Says, Justice Research, Nov./Dec. 1991, at 3,6.

[25] BJS study, supra note 3, at 2.

[26] ACA study, supra note 4, at 64-65.

[27] See id. at 64. Women without the additional burden of ex-convict status face impediments in the workplace based on their gender, including lower pay, unequal share of homemaking responsibilities, and barriers to advancement. See Deborah L. Rhode, Occupational Inequality, 1988 Duke L.J. 1207 (1988).

women with children plan to live with their children after release from prison compared to fifty-two percent of men with children.[28]

Despite this need for job skills, women in prison do not receive equal access to educational and vocational opportunities. A 1971 survey of prisons found that the average number of vocational programs offered at men's prisons was 10.2 compared to 2.7 programs at women's prisons.[29] In a current example, at the minimum security facility in Lorton, Virginia, the men's prison offers various apprenticeships such as brick masonry, carpentry, auto mechanics and body repair, plumbing, and dental technology. These apprenticeships are superior in both number and quality to those offered at the women's facility. At the women's facility, prisoners assist in the support duties of the prison; they function as janitors, receptionists, and office clerks.[30]

The Department of Corrections cannot blame this disparity in programming on factors of scale. In other words, just because the women's prison is much smaller than the men's prisons does not account for the inferior quality of the programming. Only discrimination explains why male prisoners are assigned to apprenticeships that lead to well-paying and secure jobs outside of prison while female prisoners are relegated to those which require little to no training.[31] Nationwide, over eighty-eight percent of women with institutional work duties were assigned to laundry, groundskeeping, janitorial, food service, or clerical tasks.[32] This programming "reflect[s] general societal stereotypes concerning the appropriate work for women"[33] and will likely compel ex-prisoners to return to low-paying, traditionally female jobs.

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[28] Lawrence A. Greenfield & Stephanie Minor-Harper, U.S. Dep't of Justice, Women in Prison 6 (1991).

[29] Arditi, supra note 20, at 1243 n.80.

[30] Women Prisoners v. District of Columbia, No. 93-2052 (JLG), 1994 U.S. Dist. LEXIS 19222, at *67-68, 136 (D.D.C. Dec. 13, 1994). The men's facility is located less than a mile from the women's facility; thus, women could easily be transported to these programs. However, forced desegregation is not a remedy that judges feel comfortable utilizing. See infra text accompanying notes 66-67.

[31] The district court of the District of Columbia held that the failure to provide women prisoners with equivalent access in apprenticeship assignments violates Title IX of the Education Amendments of 1982, 20 U.S.C. §§1681-88. Id. at *136. See infra note 82.

[32] See ACA study, supra note 4, at 104.

[33] Arditi, supra note 20, at 1243.

2. Case Law

Disparities in educational and vocational training available to female inmates as compared to male inmates have been challenged under the Equal Protection Clause of the Fourteenth Amendment which states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[34] Supreme Court cases outline two different ways that government action can run afoul of the Equal Protection Clause. The first type, termed facial discrimination, arises when similarly situated individuals are classified based on impermissible criteria such as gender. Facial discrimination based on gender is subject to heightened scrutiny: the party seeking to uphold such a policy must show an "exceedingly persuasive justification."[35] This burden is met only when the classification serves both an important governmental objective and is substantially related to the achievement of that objective.[36] The second type of equal protection violation occurs when a neutral policy has a disparate impact "upon a group that has historically been the victim of discrimination."[37] Where a gender-neutral policy is challenged, a plaintiff must demonstrate that the policy was motivated, at least in some measure, by discriminatory intent.[38]

Most courts have found unequal prison conditions between male and female inmates to be a gender-based classification.[39] The one exception

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[34] U.S. Const. amend. XIV, § 1.

[35] Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 273 (1979); J.E.B. v. Alabama ex rel. T.B., 114 S.Ct. 1419, 1425 (1994).

[36] Craig v. Boren, 429 U.S. 190, 197 (1976).

[37] Feeney, 442 U.S. at 273.

[38] Id. at 276.

[39] The Courts of Appeal for the Fifth, Seventh, and the District of Columbia Circuits have adopted this analysis. Smith v. Bingham, 914 F.2d 740, 741 (5th Cir. 1990), cert. denied, 499 U.S. 910 (1991), see infra note 56; Madyun v. Franzen, 704 F.2d 954, 962 (7th Cir.), cert. denied, 464 U.S. 996 (1983), Pitts v. Thornburgh, 866 F.2d 1450, 1453 (D.C. Cir. 1989), see infra note 124. The Sixth Circuit has also tacitly approved of this analysis. Cornish v. Johnson, 774 F.2d 1161 (6th Cir. 1985), aff'd per curiam. See infra note 57, 69-71 and accompanying text. Furthermore, District Courts in the Fourth, Ninth, Tenth, and Eleventh Circuits have followed this interpretation of the Equal Protection Clause. Fourth Circuit: Bukhari v. Hutto, 487 F. Supp. 1162, 1171 (E.D. Va. 1980); Batton v. North Carolina, 501 F. Supp. 1173, 1176 (E.D.N.C. 1980); Dawson v. Kendrick, 527 F. Supp. 1252, 1317 (S.D. W. Va. 1981), West v. Virginia Dep't of Corrections, 847 F. Supp. 402, 406 (W.D. Va. 1994), see infra notes 94-98 and accompanying text. Ninth Circuit: McCoy v. Nevada Dep't of Prisons, 776 F. Supp. 521, 523 (D. Nev. 1991); Casey v. Lewis, 834 F. Supp. 1477, 1550 (D. Ariz. 1993). Tenth Circuit: Barefield v. Leach, No. 10282 Civ., slip op. at 18 (D.N.M. Dec. 18, 1974); Clayton v. Thurman, No. 79-C-723-BT, slip op. at 13 (N.D. Okla. Aug. 2, 1983). Eleventh Circuit: Mitchell v. Untreiner, 421 F. Supp. 886, 895 (N.D. Fla. 1976).

is a recent case in the Eighth Circuit: *Klinger v. Dep't of Corrections*.[40] In *Klinger*, inmates at the Nebraska Center for Women (NCW) maintained that the Nebraska Department of Corrections violated equal protection guarantees by providing inferior programs to female inmates at NCW as compared to male inmates at the Nebraska State Penitentiary (NSP). Plaintiffs alleged deficiencies in a wide range of programs and services, including vocational, educational, and employment programs.[41] The court held that the plaintiffs failed to show that they were similarly situated to male prisoners: NSP is larger and houses more violent criminals with longer sentences. Furthermore, the court noted that women inmates have different characteristics altogether: they are more likely to be primary caregivers and victims of physical or sexual abuse.[42] The *Klinger* majority concluded that prison priorities differed because of the size of the prison and characteristics of the inmates,[43] and "[d]issimilar treatment of dissimilarly situated persons does not violate equal protection."[44] Absent a threshold showing that plaintiffs were similarly situated to male prisoners —a burden created by the panel—*Klinger* held that plaintiffs had no viable equal protection claim.[45]

The *Klinger* majority also found the plaintiffs' claims inappropriate for facial discrimination analysis. Since the plaintiffs did not challenge the facially discriminatory policy of segregating male and female inmates, but rather, the differential treatment of male and female inmates, the court held that the plaintiffs did not challenge a facial classification. The court also noted that the Nebraska statutes related to prison programs are gender-neutral and thus could not be the basis of a facial discrimination claim.[46] Finally, the *Klinger* majority barred a disparate impact claim by the women prisoners because they had not met their burden of proving discriminatory intent.[47]

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[40] 31 F.3d 727 (8th Cir. 1994), cert denied, 115 S.Ct. 1177 (1995).

[41] Id. at 729.

[42] Id. at 731-32.

[43] Id. at 732.

[44] Klinger, 31 F.3d at 731 (citing Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp., 21 F.3d 237, 242 (8th Cir. 1994)).

[45] Id. at 733.

[46] Id. at 734.

[47] Id.

There are many reasons why the *Klinger* decision is incorrect.[48] Ironically, *Klinger* recognized that compared to male inmates, female inmates are more often victims of abuse, primary caregivers, and nonviolent offenders. The court then used these different characteristics to deny women prisoners equal access to educational and vocational training. A critical mistake was the court's failure to consider the facts of *Klinger* as gender-based facial discrimination. The *Klinger* majority incorrectly focused on the gender-neutrality of the prison programming statute and the plaintiffs' failure to challenge sex-segregated facilities and ignored the impact of gender on the programming available to women prisoners. As the *Klinger* dissent explained, women are incarcerated at NCW because of their gender and therefore, are provided with inferior programming at NCW because of their gender.[49]

The majority of cases that have examined disparities in training opportunities for men and women prisoners have found that these disparities exist because female prisoners are treated differently from male prisoners based on their gender.[50] These cases applied the heightened scrutiny test required by *Craig v. Boren*:[51] Is there an important governmental objective for the gender-based distinction, and if so, is the distinction substantially related to that objective? When making a program-by-program analysis, courts have required "parity of treatment, as contrasted with identity of treatment, between male and female inmates with respect to the conditions of their confinement and access to rehabilitative opportunities."[52]

Under this analysis, discrimination has been shown through statistical inequalities. For example, in *Canterino v. Wilson*,[53] the percentage of male inmates receiving full-time vocational training at the three men's

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[48] See National Women's Law Center et al., Brief of Amici Curiae for Rehearing En Banc (Sept. 6, 1994) (unpublished brief on file with the Colum. J. Gender & L.) (rehearing en banc was denied, Klinger v. Dep't of Corrections, No. 93-2928NEL, 1994 U.S. App. LEXIS 28084 (8th Cir. Oct. 7, 1994)).

[49] Klinger, 31 F.3d at 734-39 (McMillian, J., dissenting).

[50] See supra note 39.

[51] 429 U.S. 190, 197 (1976).

[52] E.g., Casey v. Lewis, 834 F. Supp. 1477, 1550 (D. Ariz. 1993).

[53] 546 F. Supp. 174 (W.D. Ky. 1982), supplemental op., 562 F. Supp. 106 (W.D. Ky. 1983) (women prisoners' access to legal resources), supplemental op. sub nom., Canterino v. Barber, 564 F. Supp. 711 (W.D. Ky. 1983) (liability of prison superintendent), supplemental op., 644 F. Supp. 738 (W.D. Ky. 1986) (appointing part-time attorney), aff'd without op., 875 F.2d 862 (6th Cir. 1989) (affirmed appointment of part-time attorney), vacated on other grounds, 869 F.2d 948 (6th Cir. 1989) (state statute classifying prisoners did not violate Equal Protection Clause), cert. denied, 493 U.S. 1991 (1989).

institutions was higher than the percentage of female inmates at the women's prison enrolled in half-time courses of inferior quality.[54] To be constitutional, continuation of this disparate treatment of female inmates had to be substantially related to an important government objective.[55] The state relied on security as an important government interest precluding parity of treatment, maintaining that unless the programs at the women's prison were substantially improved at significant expense, the programs at the nearby men's facility would have to be integrated. This would require hiring more security personnel. The court recognized this security argument as merely a reformulated lack of resources argument.[56] A previous court in *Glover v. Johnson*[57] had already recognized the economic burden placed on a state trying to provide equivalent programs to a smaller population. Nevertheless, *Glover* refused to allow limited resources to justify the operation of a prison in an unconstitutional manner.[58]

While several courts have held that inferior programming for women is unconstitutional, most findings of liability have not resulted in successful remedies. First, problems that often arise in impact litigation cases, such as inconsistent and arbitrary remedies, delay,[59] and limited solutions,[60]

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[54] Canterino, 546 F. Supp. at 190.

[55] Id. at 211.

[56] Although one might assume that security arguments are ultimately about lack of resources, courts have not always recognized this. In *Smith v. Bingham*, a male prisoner claimed his equal protection rights were violated when he was denied admission to an all-female class. 914 F.2d 740 (5th Cir. 1990), cert. denied, 111 S.Ct. 1116 (1991). Mississippi contended that allowing male prisoners to enroll in all-female vocational classes posed a security risk. To secure integrated vocational classes, additional guards would be necessary. The court held that the policy of excluding male prisoners had a substantial relationship to the state's important security interest. One could argue that Mississippi's actual interest was cost-saving. See also Bukhari v. Hutto, 487 F. Supp. 1162 (E.D. Va. 1980) (prison security is a valid concern).

[57] 478 F. Supp. 1075 (E.D. Mich. 1979), aff'g, 510 F. Supp. 1019 (E.D. Mich. 1981), aff'd without op. sub nom., Cornish v. Johnson, 774 F.2d 1161 (6th Cir. 1985), cert. denied sub nom., 478 U.S. 1020 (1986), later proceeding, 659 F. Supp. 621 (E.D. Mich. 1987) (appointing prison administrator), later proceeding, 662 F. Supp. 820 (E.D. Mich. 1987) (ordering compensation for administrator), vacated and remanded, 855 F.2d 277 (6th Cir. 1988) (factual findings insufficient for appointment of administrator), on remand, 721 F.Supp. 808 (E.D. Mich. 1989), aff'd in part and rev'd in part, 934 F.2d 703 (6th Cir. 1991), aff'd, 850 F. Supp. 592 (E.D. Mich. 1994) (funding for legal assistance in parental rights matters), aff'd, No. 77-CV-71229, 1994 U.S. Dist. LEXIS 12169 (E.D. Mich. Aug. 25, 1994)).

[58] Glover, 478 F. Supp. at 1078.

[59] In the District of Columbia, a consent decree requiring improvements of medical and mental health services at the D.C. jail has been in effect since 1971. More than twenty years later, attorneys for the inmates were in court for a compliance motion, where they described numerous incidences where poor medical care jeopardized the health and lives of prisoners. For example, when a women with AIDS and lung cancer

are compounded in the prison context. The Supreme Court has decreed that "courts should ordinarily defer to the expert judgement [of prison officials] in the adoption and execution of policies and practices" for prisons.[61] Lower courts have interpreted this holding as compelling courts "to impose the least intrusive remedy available."[62]

Thus, several courts left the actual plan to achieve parity in the hands of the defendants.[63] When this happened in *Canterino*, the court waited two years, and the defendants still failed to submit a comprehensive and structured reform plan.[64] Finally, the court ordered the women's prison to provide at least two additional vocational education programs, to complete the implementation of one prison industry, and to add another industry.[65] In this order, the judge made it clear that experts agreed that this was not the best long-term solution. Experts for both sides concurred that the best solution would be the construction of an integrated facility. Another more immediate solution would be to transport female inmates to nearby male institutions to participate in integrated or segregated programs. However, the court declined to order the development of a new integrated prison[66] or the transportation of women inmates to men's facilities because these remedies would be an excessive intrusion upon the state's administration of its prisons. Further, the court believed that these decisions are better left to the legislative and executive branches.[67] Ultimately, in a 1985 consent decree, the state agreed to spend $5.3 million

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collapsed in her cell, health service personnel took over two hours to respond. Keith A. Harriston, D.C. Told to Improve Care at Jail, Wash. Post, Mar. 6, 1993, at A15. See also Susan P. Sturm, The Legacy and Future of Corrections Litigation, 142 U. Pa. L. Rev. 639, 724 (1993) (many institutions sued in the 1970s and 1980s are still not in compliance with court orders).

[60] See generally The Nature and Limits of Court Intervention in Remedial Law: When Courts Become Administrators (Robert C. Wood, ed., 1990) (discussing the constraints of public law litigation).

[61] Bell v. Wolfish, 441 U.S. 520, 547-48 (1979).

[62] E.g., Kendrick v. Bland, 740 F.2d 432 (6th Cir. 1984).

[63] Clayton v. Thurman, No. 79-C-712-BT (N.D. Okla. Aug. 2, 1983); Dawson v. Kendrick, 527 F. Supp. 1252 (S.D. W. Va. 1981); Barefield v. Leach, No. 10282 (D.N.M. Dec. 18, 1974). See also Sturm, supra note 59, at 701 ("Deference to prison administrators has become the guiding principle to prisoners' rights cases.").

[64] Canterino v. Wilson, Civ. Action No. 80-0545-L(J) (Aug. 21, 1984) (unpublished opinion on file with the author).

[65] Id.

[66] I have located only one case in which the court ordered the integration of a jail: McMurry v. Phelps, 533 F. Supp. 742, 777 (W.D. La. 1982) (integration must be accomplished by either busing women to the men's facilities or by incarcerating men and women together).

[67] Canterino, Civ. Action No. 80-0545-L(J), at 12.

for construction and equipment in four new buildings for vocational training and living space for women prisoners.[68] In other words, two vocational training programs and two prison industries for women prisoners compared to fourteen vocational training programs and five prison industries for men prisoners met the requirements of the Equal Protection Clause.

This formal definition of "equal" disadvantages women prisoners because they are incarcerated in separate and smaller institutions with less resources for vocational and educational programs. While the same per-prisoner dollar amount can create fourteen programs for men and two programs for women, the training opportunities are not truly equal. *Glover* acknowledged that "per capita expenditure for female inmates will need to exceed the per capita expenditure for male inmates if they are to be afforded even a semblance of opportunity presently provided [to male inmates]."[69] Unfortunately, this opinion held little weight with the administrator appointed by the *Glover* defendants.[70] The plaintiffs' attorney in *Glover* reports some improvement,[71] but the vocational and educational training opportunities remain far from truly equal.

There are some who believe integrated facilities are the only remedy to unequal training opportunities for women in prison.[72] In integrated facilities, work training participation could be rationed based on level of skill and one's status as primary caregiver, rather than on gender. However, court-ordered creation of integrated prisons is not a likely solution.[73] Moreover, this solution may have even greater disadvantages for women and for society in general. Studies of integrated prisons in Illinois, Texas, and West Virginia revealed alarming rates of pregnancy attributable to sexual intercourse among inmates.[74] Prostitution and

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[68] Id. While this may have greatly improved vocational training at the prison, perhaps this money would have been better spent developing community-based programs. See infra part V.B.

[69] Glover v. Johnson, 721 F. Supp. 808, 848 (E.D. Mich. 1989).

[70] Telephone Interview with Deborah A. Labelle, plaintiffs' attorney in *Glover v. Johnson* (Feb. 17, 1993).

[71] As of February 1993, the women's prison had paralegal courses, six apprenticeship programs, and some limited vocational training. When the trial was held, male prisoners had access to twenty vocational programs and eight apprenticeships compared to five vocational programs and no apprenticeships for women. Id.

[72] Rosemary Herbert, Note, Women's Prisons: An Equal Protection Evaluation, 94 Yale L.J. 1182 (1985); Arditi, supra note 20.

[73] See supra notes 66-67 and accompanying text.

[74] Barry Ruback, The Sexually Integrated Prison: A Legal and Policy Evaluation, 3 Am. J. Crim. L. 301, 317-20 (1975) (at one time, 10 of 58 women in one unit were pregnant at a West Virginia facility); Elizabeth Von Cleve & Joseph G. Weis, Sentencing Alternatives for Female Offenders, in Female Offenders: Meeting the

pimping were also not uncommon.[75] One woman assigned to a prison industry at the minimum security prison in Lorton, Virginia, reported constant sexual harassment, including men exposing themselves and masturbating in front of women.[76] The constant fear of sexual violence and harassment coupled with the disproportionate ratio of men to women may perpetuate the subordinate role imposed on women not just in prison but in free society.[77] Finally, studies reveal that integrated facilities are more expensive because of the need for increased monitoring to prevent sexual activity.[78]

To actually provide equal opportunity for women prisoners in segregated facilities, formal equality is not enough; the special needs of prisoners as women must be taken into account.[79] However, current interpretations of the Equal Protection Clause preclude the incorporation of arguments of cultural or radical feminists.[80] For example, plaintiffs in *Canterino* argued that because women as a group are more often primary caregivers and usually possess fewer job skills than men, women prisoners actually need greater access to training.[81] Nevertheless, parity was the only remedy that the court would grant and could grant by law.

Thus, while advocates for women prisoners should be concerned that *Klinger* refused to find an equal protection violation, advocates should also realize the limits of successful litigation: the Equal Protection Clause only mandates that rehabilitative services for women be no worse than those for men.[82] For this reason, advocates for prisoners should seriously weigh the

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Needs of a Neglected Population 94, 98-99 (Am. Correctional Ass'n ed., 1993).

[75] Ruback, supra note 74, at 318-19.

[76] Interview with Julia, prisoner at the minimum security prison in Lorton, Virginia (Feb. 12, 1993).

[77] Von Cleve & Weis, supra note 74, at 99.

[78] Id. at 98; Ruback, supra note 74, at 320.

[79] Meda Chesney-Lind, Patriarchy, Prisons and Jails: A Critical Look at Trends in Women's Incarceration, 71 The Prison Journal 51 (1991).

[80] For a different approach to equal protection doctrine that takes into account culturally imposed sex roles and their perpetuation of the oppression of women, see Sylvia Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955 (1984).

[81] Plaintiffs' trial court brief at 5-7 (unpublished brief on file with the author).

[82] Two cases have recently held that "equality" rather than "parity" was required in prison educational programs subject to Title IX of the Education Amendments of 1982, 20 U.S.C. §§ 1681-1688. Jeldness v. Pearce, 30 F.3d 1220, 1228 (9th Cir. 1994); Women Prisoners, 1994 U.S. Dist. LEXIS 19222, at *126. "Although the programs need not be identical in number or content, women must have reasonable opportunities for similar studies and must have an equal opportunity to participate in programs of comparable quality." Jeldness, 30 F.3d at 1229; 1994 U.S. Dist. LEXIS at *121-22.

advantages and disadvantages of litigation before choosing it to improve the lives of women prisoners, especially if utilizing litigation comes at the expense of other alternatives for reform.

B. Drug Abuse

1. Factual Context

The chief reason for the large growth in the female prison population is the increase in drug-related convictions and mandatory sentencing for these convictions.[83] Both male and female drug-addicted offenders are more likely to recidivate without drug treatment.[84] Despite this need, only eleven percent of all inmates are in drug treatment programs. This leaves a sizeable number of drug dependent inmates without treatment.[85] Statistics show that women prisoners are particularly in need of treatment. Almost one in three female inmates were sentenced for drug offenses.[86] Moreover, prior to incarceration, female inmates used more drugs and used them more frequently than their male counterparts.[87]

2. Case Law

Two reported cases, *Dawson v. Kendrick*[88] and *McMurry v. Phelps*,[89] specifically address unequal access to substance abuse treatment

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Litigation that successfully utilizes Title IX instead of the Equal Protection Clause still fails to provide women prisoners with programs directed at their special needs. Moreover, claiming statutory rather than constitutional violations does not eliminate the problems of arbitrary, limited remedies and delay that are inherent to all impact litigation. See supra text accompanying notes 59–68.

[83] See Jean Wellisch et al., Numbers and Characteristics of Drug-Using Women in the Criminal Justice System: Implications for Treatment, 23(1) J. of Drug Issues 7, 8–9 (1993). For a discussion on mandatory minimums and women prisoners, see infra part VI.A.

[84] See U.S. General Accounting Office, Treatment Alternatives Program for Drug Offenders Needs Stronger Emphasis 8 (Feb. 1993). A 1992 study of 271 parolees in Colorado found that 29% of those involved in a drug treatment and monitoring program returned to prison after one year, compared to 42% of parolees without this treatment and supervision. Id.

[85] See Wellisch, supra note 83, at 9.

[86] See BJS study, supra note 3, at 3.

[87] See id. at 7.

[88] 527 F. Supp. 1252 (S.D. W. Va. 1981).

[89] 533 F. Supp. 742 (W.D. La. 1982).

for women in prison. In *Dawson*, women housed at the same local jail as men were not allowed to attend alcohol and drug discussion sessions.[90] The court ordered the defendants to submit a plan rectifying this and other disparities.[91] In *McMurry*, the court took a more forceful stance. In Louisiana, convicted women prisoners were housed only at the jail, while men serving equivalent sentences for similar crimes could be housed at the less restrictive prison farm. Among the benefits enjoyed at the farm that were not provided at the jail were programs for drug and alcohol abuse treatment.[92] The *McMurry* court ordered integration of the prison farm, either through busing women to the men's facility or through incarcerating men and women together.[93]

A third case, *West v. Virginia Dep't. of Corrections*,[94] indirectly addressed unequal access to drug abuse education for women offenders. Plaintiff complained that she was a victim of gender discrimination because she was not allowed to participate in the male-only prison boot camp program[95] that provided drug abuse education as well as military drill and strenuous physical training.[96] Successful completion of the boot camp program allows for much shorter sentences for participants as compared to non-participants.[97] The district judge held that failure to provide women offenders with this alternative sentence violated the Equal Protection Clause.[98]

As these cases demonstrate, under the parity of treatment standard of the Equal Protection Clause, segregated facilities must provide nearly equal opportunities for treatment for both men and women. Courts may not consider that a higher percentage of women are incarcerated for drug

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[90] 527 F. Supp. at 1280.

[91] Id. at 1317.

[92] 533 F. Supp. at 757–58. Those sentenced to the farm could also participate in a work release program and a high school education class. Prison farm inmates also enjoyed contact visitation, sports and exercise programs, better food, and the ability to be a trustee (inmate guard). Id.

[93] Id. at 767–68.

[94] 847 F. Supp. 402 (W.D. Va. 1994).

[95] Like the statute in *Klinger*, the boot camp statute was gender-neutral. Id. at 404. Unlike the *Klinger* majority, *West* found that women offenders' disparate sentencing alternatives were a sex-based classification. Id. at 405.

[96] Id. at 403, 404 n.3. Plaintiff pled guilty to possession of cocaine with intent to distribute, id. at 404, and might have benefited from drug education.

[97] Id. at 404. One male-female couple charged with the same crime and sentenced by the same judge had an 18-year disparity in their sentences due to the unavailability of a boot camp for women. Id. at 404 n.4.

[98] West v. Virginia Dep't of Corrections, 847 F. Supp. 402, 408 (W.D. Va. 1994).

offenses than men and that women have higher rates of addiction before entering prison than men. If prisons were not segregated, perhaps drug treatment could be rationed based on drug addiction or primary caregiver status, regardless of gender, allowing a greater percentage of women access to treatment. However, as discussed earlier,[99] integration can cause more problems than it solves.

The necessity to treat women offenders differently from their male counterparts is particularly imperative in the context of drug treatment. Studies have shown that successful treatment programs for female drug abusers should be different from programs for male drug abusers. A Treatment Alternatives to Street Crime (TASC)[100] study identified unique needs of women addicts. First, women are often initiated into drug use by their addicted male partners.[101] Unless the issue of breaking off a pathological relationship is addressed during treatment, the female addict could return to the relationship and return to drugs.[102] Second, some types of treatment programs developed for men do not work for women. For example, the more confrontational style of twelve-step programs is insensitive to women coming from physically or emotionally abusive relationships who need more nurturing environments.[103] Thus, even though *West* ensures that certain women offenders will be eligible for a boot camp program,[104] this type of program may not benefit many women.

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[99] See supra notes 74-78 and accompanying text.

[100] The TASC program was created in 1972 through the White House Special Action Office for Drug Abuse (now called the Office of National Drug Control Policy), the National Institute on Drug Abuse, and the Law Enforcement Assistance Administration. Drug Abuse Office and Treatment Act, Pub. L. No. 92-255, 86 Stat. 65 (1972). TASC matches drug-dependent offenders to treatment programs. To motivate offenders to enroll in treatment, TASC uses deferred prosecution, community sentencing, and pre-trial intervention.

[101] TASC study, supra note 10, at 1-2 (citing four studies finding that men often introduce women to drug use).

[102] Id. at 19.

[103] See Jean Wellisch et al., Drug Abuse Treatment for Women in the Criminal Justice System, a volume in the Drug Abuse Information and Monitoring Project White Paper Series prepared for the California Department of Alcohol and Drug Programs, UCLA Drug Abuse Research Group, 28-29 (1991).

[104] See supra text accompanying note 98.

C. Family Separation

1. Factual Context

The imprisonment of mothers is often more disruptive to families than the imprisonment of fathers. First, women in prison are more likely to have been caring for children before entering prison than men.[105] Second, while only twenty-six percent of incarcerated women's children remained with a continuous, primary caregiver, sixty-one percent of incarcerated men's children remained with their mother.[106] Caregivers of the children of women prisoners are usually relatives, with over a third of children of incarcerated mothers cared for by the maternal grandmother.[107] When an incarcerated parent is unable to find a caregiver whom the court considers adequate, the parent surrenders temporary custody to the state welfare department.[108] From the incarcerated parent's perspective, women usually have more difficulty maintaining relationships with their children than men. Men in prison have more frequent contact with their children than women: a 1983 survey found seventy percent of fathers, but only nineteen percent of mothers, received child visits during imprisonment.[109] One reason for this is that men rely on their children's mother to bring them for visits.[110] Additionally, since children of incarcerated fathers often remain with their mothers,[111] there is less need for state intervention. When a child is in state custody, the parent must rely on the state welfare department for visits. Most child welfare agencies do not provide reunification services to incarcerated parents and their children.[112] Even when reunification services are available, child welfare workers and foster parents are often reluctant to facilitate visitation between children and incarcerated parents

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[105] See supra text accompanying note 28.

[106] Linda A. Koban, Parents in Prison: A Comparative Analysis of the Effects of Incarceration on the Families of Men and Women, 5 Law, Deviance and Social Control 171, 175 (1983).

[107] Barbara Bloom & David Steinhart, Nat'l Council on Crime and Delinquency, Why Punish the Children? 24 (1993) [hereinafter NCCD study].

[108] Julie H. Jackson, Note, The Loss of Parental Rights as a Consequence of Conviction and Imprisonment: Unintended Punishment, 6 New Eng. J. on Prison L. 61, 66 (1979).

[109] Koban, supra note 106, at 178.

[110] Id. at 182.

[111] See supra text accompanying note 105.

[112] NCCD study, supra note 107, at 42.

because they believe parental contact is harmful to the children, or they blame the parents for their children's problems.[113] Another factor is distance: men are often not incarcerated as far from their homes as women.[114] Even though states try to incarcerate prisoners in the institution nearest to their families, women prisoners and their families are geographically disadvantaged to a greater degree than men because there is usually only one facility for women.[115]

Difficulty arranging child visits is not the only obstacle that disproportionately hinders incarcerated mothers' ability to preserve family ties as compared to imprisoned fathers. Courts may factor in ability to support the child upon release.[116] This ability would be enhanced by vocational and educational training in prison. As previously discussed, these programs are very limited in women's prisons.[117] The inability to learn marketable skills while in prison may adversely affect the chances of incarcerated mothers to retain custody of their children. Finally, one study of drug treatment providers suggests that society is less tolerant of female drug users than of male drug users.[118] This bias leads some to assume that drug-dependent women are neglectful, if not abusive, parents.[119] While this is sometimes the case, drug dependency alone should not be synonymous with neglect or abuse. The above factors mean that many

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[113] Id. at 32, 42-43. Many people incorrectly assume that incarcerated parents are per se bad parents. From the child's perspective, this is a very damaging conclusion to draw. Studies have consistently found that "even a damaged parent-child relationship is likely to be better [for the child] than no relationship." Philip M. Genty, Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis, 30 J. Fam. L. 757, 804 (1991-1992) (describing numerous studies).

Separation from incarcerated parents has devastating effects on children. Children often suffer from post-traumatic stress disorder, depression, aggression, and learning disabilities after a parent's arrest. Barbara Bloom, Incarcerated Mothers and Their Children: Maintaining Family Ties, in Female Offenders: Meeting Needs of a Neglected Population 60, 63 (Am. Correctional Ass'n ed., 1993) (citing several studies). Many children receive inadequate care due to extreme poverty; two-thirds of caregivers reported that the financial support they received did not meet the child's expenses. Id. at 63-64. Further, children of incarcerated parents are more likely to enter the criminal justice system. Id. at 63.

[114] E.g., Steven McPeek & Shau-Fai Tse, Bureau of Prisons Office of Research and Evaluation, Bureau of Prisons Parenting Programs: Use, Costs, and Benefits (1988) (study of federal prisons).

[115] Arditi, supra note 20, at 1232-33.

[116] Lawrence Bershad, Discriminatory Treatment of the Female Offender in the Criminal Justice System, 26 B.C. L. Rev. 389, 411 (1985).

[117] See supra text accompanying notes 29-32.

[118] TASC study, supra note 10, at 29.

[119] Id.

incarcerated mothers lose custody of their children for reasons that have nothing to do with whether or not they are capable parents.

2. Case Law

While the Equal Protection Clause is the cornerstone of constitutional challenges to the lack of training and drug treatment for women prisoners, constitutional attacks on women offenders' inadequate access to their children have been based on the freedom of association, substantive and procedural due process, cruel and unusual punishment, as well as equal protection. None of this litigation has successfully addressed the special needs of women prisoners.

Total bans on visits with children of both male and female prisoners have been held as violative of the First Amendment right to freedom of association.[120] Still, parental visits can be limited to as little as one half-hour per week.[121]

While visitation is allowed, the distance that families, foster parents, or child welfare workers have to travel deters the frequency of these visits.[122] This distance can be enormous when prisoners are placed out of state. Although most states now have at least one women's correctional institution,[123] jurisdictions lacking a women's facility may transfer convicted women out of state.[124] The Supreme Court has rejected equal protection arguments against intrastate transfers, holding that a prisoner has

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[120] E.g., Valentine v. Englehardt, 474 F. Supp. 294 (D.N.J. 1979).

[121] E.g., McMurry v. Phelps, 533 F. Supp. 742, 764 (W.D. La. 1982).

[122] This is especially true for women prisoners. See supra text accompanying notes 114-15.

[123] Bershad, supra note 116, at 403.

[124] Until a new facility was opened in 1992, female District of Columbia Code offenders serving terms greater than one year were sent to federal prisons in West Virginia, Texas, Kentucky, and California while similarly sentenced male inmates were housed in Lorton, Virginia. Women prisoners filed suit maintaining that their imprisonment at facilities so much farther from the District than male prisoners violated their right to equal protection. Pitts v. Meese, 684 F. Supp. 303 (D.D.C. 1987), aff'd sub. nom, Pitts v. Thornburgh, 866 F. 2d. 1450 (D.C. Cir. 1989). The D.C. Circuit upheld the sex-based classification, finding that it was substantially related to the achievement of the important government objective of reducing prison overcrowding. Pitts, 866 F.2d at 1455-57. According to the District of Columbia, the ability to house long-term women offenders in federal prisons eliminated the need to incarcerate women in overcrowded D.C. facilities or to build a new facility, and thus was substantially related to a reduction in prison overcrowding. Id.

Earlier decisions by lower courts have held out-of-state transfers based on gender violative of equal protection. Park v. Thompson, 356 F. Supp. 783 (D. Haw. 1973); State ex rel. Olson v. Maxwell, 259 N.W.2d 261 (N.D. 1977).

no right to be housed in a particular institution because it is more conducive to the prisoner's rehabilitation.[125]

Lack of contact with one's children may lead to the termination of the parental rights of the incarcerated parent. Many cases have held that incarceration cannot be the sole reason for terminating parental rights.[126] Still, the imprisoned parent is more likely than the average parent to fall within a statutory category leading to the termination of parental rights.[127] Under many state statutes and most case law, physical separation is grounds for termination.[128] Because incarceration is not the exclusive reason for the termination of parental rights, however, arguments that termination violates equal protection, substantive due process, and the Eighth Amendment ban against cruel and unusual punishment have been unsuccessful.[129]

Procedurally, the only safeguard provided to the parent is the requirement that the state support its allegations with clear and convincing evidence before completely revoking the rights of a birth parent.[130] Generally, the state does not have to provide the parent with an attorney, although in some states, such as New York (Family Court), the parent does have a right to an attorney.[131] In some states, incarcerated parents appear

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[125] Meachum v. Fano, 427 U.S. 215 (1976) (due process does not prevent transfer to less hospitable institution); Montayne v. Haymes, 427 U.S. 236 (1976) (transfers may occur without a hearing).

[126] Genty, supra note 113, at 764 n.22 (citing many cases).

[127] Jackson, supra note 108, at 67-68.

[128] Genty, supra note 113, at 805-25.

[129] See, e.g., Vance v. Lincoln County Dep't of Public Welfare, 582 So.2d 414 (Miss. 1991) (termination action was exercise of state's interest in welfare of the child and not cruel and unusual punishment); In re Mays, Appeal No. C-840068, Trial No. F-830285 (Ohio App. Unrep. Jan. 23, 1985) (termination of parent-child relationship was in the child's best interests and did not violate mother's right to privacy to select whom she lives with after prison); In the Matter of Ginnan, 422 N.Y.S.2d 1003 (1979) (substantive due process rights of parents may be balanced against the best interest of the child in custody cases; Equal Protection Clause does not prevent different classes of people to be treated differently). See also Jackson, supra note 108, at 83, 91 (discussing equal protection and substantive due process).

[130] Santosky v. Kramer, 455 U.S. 745 (1982) (due process clause requires clear and convincing evidence standard). In fact, whether or not the parent is imprisoned, "[w]hen a neglect case reaches the termination of parental rights stage, there is little hope of defeating the petition." Margaret Beyer & Wallace J. Mlyniec, Lifelines to Biological Parents: Their Effects on Termination of Parental Rights and Permanence, 20 Fam. L.Q. 233, 251 (1986). The Supreme Court has noted that a state's ability to mount a case dwarfs parents' ability to mount a defense, especially when the parent must disprove the past. Santosky, 455 U.S. at 763.

[131] Lassiter v. Dep't of Social Services, 452 U.S. 18 (1981). At the time *Lassiter* was handed down, thirty-three states required appointed counsel. Id. at 34. Without

in termination cases only through counsel and deposition, rather than in person.[132] Even states that give parents the right to appear in person often do nothing to ensure their presence, and courts may draw inferences against parents for their failure to appear.[133]

Although most litigation to protect parental rights has been unsuccessful, *Cardell v. Enomoto*[134] was effective in initiating institutional change. In *Cardell*, a mother's request to keep her child born in prison was denied despite § 3401 of the California Penal Code, which allowed women to have their children with them in prison until age two.[135] The mother failed in her attempt because the court interpreted the statute as permissive rather than mandatory.[136] However, publicity from this case prompted the legislature to repeal § 3401 and replace it with a statute allowing qualified mothers to live with their children in minimum security community residences.[137]

D. Conclusion

Constitutional litigation has had limited success in addressing the three critical problems plaguing women in prison: minimal job skills, drug addiction, and lack of family contact. However, litigation should not be abandoned, because it is particularly effective at generating publicity and forcing correctional officials to the bargaining table. Thus, litigation is a good "stick." The "carrot" to match the stick is community-based programs and legislative change.

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legal representation, contacting social workers, caregivers, child protection agencies, and others involved in parental rights matters can be much more difficult, since prisoners' telephone calls are often restricted. See Glover v. Johnson, 850 F. Supp. 592, 595-97 (E.D. Mich. 1994).

[132] E.g., Matter of Adoption of Quenette, 341 N.W.2d 619 (N.D. 1983); In the Interest of Darrow, 649 P.2d 858 (Wash. 1982).

[133] Philip M. Genty, Protecting the Parental Rights of Incarcerated Mothers Whose Children Are in Foster Care: Proposed Changes to New York's Termination of Parental Rights Law, 17 Fordham Urb. L.J. 1, 18, 19 n.100 (1989) (citing N.Y. Fam. Ct. Act § 1055(c) (McKinney 1983)).

[134] No. 701-094 (Super. Ct. Cal., San Francisco Co. 1976).

[135] Id., Cal Penal Code § 3401 (West 1995) (repealed 1978).

[136] Id.

[137] Sharon L. Fabian, Toward the Best Interests of Women Prisoners: Is the System Working? 6 New Eng. J. on Prison L. 1, 50 (1979). A woman who gives birth while in prison or who is the primary caregiver of a child under age six is eligible for the program if she has a probable release date of less than six years. Cal. Penal Code §§ 3410-3424 (West 1982).

V. COMMUNITY-BASED ALTERNATIVES

A. How Correctional Alternatives Are Created

As of early 1993, community corrections acts existed in twenty states.[138] Many states have statutes directed at women prisoners, particularly those with children. For example, Pennsylvania has a statute providing for the establishment of regional community treatment centers throughout the state for the treatment and rehabilitation of female offenders, making it easier for women to maintain contact with their family.[139] A California statute allows qualified mothers to live with their children in minimum security community residences.[140] Maryland allows the governor to parole, commute, or suspend a female prisoner's sentence when she is about to give birth.[141]

Community-based alternatives are also created by non-profit organizations which draft proposals and find funding, usually from foundations. For example, Tampa Crossroads Women's Program ("Crossroads") provides residential and outreach services for women sentenced to the program by the courts.[142] Crossroads was originally a male-only program. However, a Hillsborough County Task Force on Prostitution identified the need for alternatives for women and convinced judges to sentence women to the program. Crossroads operates on United Way funding, private foundation, and individual donations, and the Florida

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[138] Michael McWilliams & Neal Sonnett, Need New Strategy to Stop Violence, Chi. Trib., Jan. 10, 1993, at 2.

[139] Pa. Stat. Ann. tit. 61, § 460.11 (Supp. 1992).

[140] Cal. Penal Code §§ 3410-3424 (West 1982); see Fabian, supra note 137; Mary V. Deck, Note, Incarcerated Mothers and Their Infants: Separation or Legislation?, 29 B.C. L. Rev. 689 (1988) (advocating the placement of nonviolent convicted mothers and their infants in residential programs); see also Terri L. Shupak, Comment, Women and Children First: An Examination of the Unique Needs of Women in Prison, 16 Golden Gate U. L. Rev. 455 (1986) (examining three states' responses to custody problems of incarcerated mothers).

[141] Md. Ann. Code art. 27, §699 (1992). It could be argued that these programs discriminate against men based on their gender. These statutes were enacted in 1962 (Maryland), 1972 (Pennsylvania), and 1978 (California), however, I have not found complaints on this basis. If gender discrimination were found, the proper remedy would be to provide an opportunity for male primary caregivers to be incarcerated with their children. As I will explain, I am not opposed to community-based programs for men—I merely believe that starting with programs for women is a more successful strategy.

[142] Telephone Interview with Judge Barbara Fleischer, a member of the founding Board of Directors of Crossroads (Mar. 24, 1993).

Department of Corrections reimburses Crossroads for a certain number of beds.[143]

B. Why Women Offenders Should Have Alternatives

There are compelling reasons why alternatives for female offenders, as opposed to male offenders, should be a priority. First, women are imprisoned for far fewer violent offenses than men.[144] Second, community-based programs are better suited to meet women offenders' disproportionate need for drug treatment, contact with children, and job training. Drug treatment is often an essential component of community programs, while it is rarely available in prison.[145] Home-based[146] and community programs allow women offenders more opportunities to visit with their children, or perhaps remain with them, while serving their sentences.[147] Participation in job training, school, or work is encouraged or required by alternative programs[148] while prisons rarely provide women with truly marketable skills.[149]

Another reason to prioritize alternative sentencing for women is that it is more expensive to incarcerate women than men. Incarceration costs states an average of $52.38 per day per inmate, which is over $19,000 per

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[143] Another example of a community-based program that is self-funded is the Neil J. Houston House in Roxbury, Massachusetts. The Neil J. Houston House, a residential treatment program for pregnant offenders, receives some federal money from the Center for Substance Abuse Treatment within the Department of Health and Human Services. Telephone Interview with Marian L. Klausner, Attorney, Social Justice for Women (Apr. 2, 1993).

A multi-group reform effort in Delaware, which created a mentoring program to connect women in prison to people in the community and allotted spaces for women at the day reporting center, was funded entirely by the Edna McConnell Clark Foundation in New York City. Telephone Interview with Pat Watson, President, Corrections Alternatives and Concepts (Dec. 2, 1994).

[144] BJS study, supra note 3, at 3 (in 1991, 32% of incarcerated women were serving sentences for violent offenses compared to 47% of incarcerated men).

[145] See supra note 85 and accompanying text. See also supra part IV.B.1.

[146] It is beyond the scope of this Article to evaluate home-based alternatives for women offenders. However, studies of probation and home monitoring have shown that they are not as effective as community-based programs at helping women offenders lead law-abiding lives, primarily because they generally do not provide supportive services. E.g., Russ Immarigeon, Four States Study Policies Affecting Women Prisoners, The National Prison Project Journal, Spring 1989, at 5.

[147] NCCD study, supra note 107, at 76–83. The study has included a list of community-based programs for women offenders and their children. Id.

[148] Russ Immarigeon & Meda Chesney-Lind, National Council on Crime and Delinquency, Women's Prisons: Overcrowded and Overused 9 (1992).

[149] See supra text accompanying note 32.

year.[150] This does not include foster care for the children of an incarcerated parent, which is approximately $10,000 per year per child.[151] Since sixty-one percent of incarcerated men's children remain with their mother while only twenty-five percent of incarcerated women's children are in stable homes,[152] foster care expenses for children of incarcerated mothers are certainly higher than those for children of incarcerated fathers.

Alternatives to prison are twenty-five to fifty percent less expensive than incarceration.[153] In California, the average monthly cost of incarceration is $920—compared to $690 for in-house treatment, or $250 for methadone maintenance, or $50 for probation with urine testing.[154] In addition, the cost of treatment is largely offset by the reduction in crimes committed by individuals undergoing treatment.[155] The average heroin abuser generates economic consequences to society of almost $34,000 a year.[156] In one survey, twenty-one percent of women prisoners reported using heroin daily prior to incarceration.[157] Also, studies on the TASC program that refers drug-addicted offenders to treatment have found it to be a less costly alternative to incarceration.[158]

Furthermore, community-based programs have a proven deterrent effect against recidivism. For example, in 1988, The Program for Female Offenders, Inc. in Pennsylvania took a random sample of past participants and found nearly an eighteen percent recidivism rate.[159] Nationwide, seventy-one percent of women in state prisons have at least one prior conviction.[160] This program operates residential alternatives to prison and work release centers, as well as provides job training and supportive counseling for any woman who has had an experience with the criminal justice system.[161]

To summarize, women offenders are generally not violent offenders. Women prisoners usually have fewer job skills and a higher addiction rate

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[150] Camille G. Camp & George M. Camp, Criminal Justice Institute, The Corrections Yearbook 1994: Adult Corrections 50 (1994).

[151] Children's Defense Fund, The State of America's Children 1992, at xv (1992).

[152] See supra note 28 and accompanying text.

[153] Michael deCourcy Hinds, Feeling Prisons' Costs, Governors Look at Alternatives, N.Y. Times, Aug. 7, 1992, at A17.

[154] Wellisch, supra note 103, at 45.

[155] Id.

[156] Id. at 44–45.

[157] ACA study, supra note 4, at 59.

[158] Wellisch, supra note 103, at 40.

[159] Immarigeon & Chesney-Lind, supra note 148, at 9.

[160] BJS study, supra note 3, at 4.

[161] Immarigeon & Chesney-Lind, supra note 148, at 1, 9.

than men. Women prisoners are more often parents and thus are more expensive to incarcerate. All of these arguments could be utilized in a gender-neutral fashion: nonviolent offenders who are primary caregivers, drug-dependent, and poorly trained should have priority for community-based sentencing. In fact, most legislation should be drafted with gender-neutral language,[162] since gender neutrality cuts off the argument that women prisoners are getting special treatment, thus avoiding reverse discrimination challenges. Without gender-based rhetoric, however, I do not believe legislators will be as sympathetic. The sad truth is that portraying women as victims works.[163] Because of cultural stereotypes, it is easier for the public to accept that women criminals deserve another chance. In addition, it is easier for legislators to tell their constituents that women offenders rather than men offenders are coming to their backyard. Also, when non-profit organizations develop community-based programs on the local level, community support will probably be more forthcoming for women offenders than for their male counterparts. Reinforcing this gender stereotype is troubling. Yet, to empower women offenders by portraying them as victims is a worthwhile tradeoff. Perhaps this stereotype of victimhood is in such stark contrast with the stereotype of the brutish criminal that society will have to look beyond these entrenched images and evaluate women offenders based on their particular needs.

As of 1987, fifty percent of all jurisdictions planned on building additional facilities for women; only about eight percent of these facilities will be community centers.[164] Because alternative programs are more successful and less expensive than incarceration, legislators and governors should reconsider construction of new women's prisons and should instead invest in alternatives to incarceration. I will now examine legislation that will both pave the way for community-based alternative sentencing and improve the lives of women incarcerated in institutions.

VI. LEGISLATION

A. Mandatory Minimums

If community-based programs are going to be a real alternative, legislators and governors must have the courage to modify mandatory minimum sentencing for nonviolent offenders. At the federal level,

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[162] Statutes creating alternatives for pregnant prisoners are exceptions.

[163] Telephone Interview with Tracy Huling, Consultant, New York Correctional Ass'n (Mar. 24, 1993).

[164] See supra note 19.

mandatory minimums of five years to life in prison without parole for drug offenses were enacted in the 1986 Anti-Drug Abuse Act and the 1988 Omnibus Anti-Drug Abuse Act.[165] Mandatory minimum sentences are meted out based on the amount of drugs involved, without regard to whether the defendant is the head of a drug enterprise, a lookout, or a courier.[166] In fact, first offenders can receive higher sentences than career criminals willing to cooperate since only high level traffickers can offer the "substantial assistance"[167] necessary to impose a sentence below the statutory minimum.[168] Mandatory minimums remove judges' discretion in sentencing; prosecutors now determine sentences based on the charges they decide to bring.[169] The 1991 report of the United States Sentencing Commission found that a higher proportion of minority defendants were sentenced to the applicable mandatory minimums.[170] Furthermore, low-level drug offenders are taking up prison cells needed for violent offenders and forcing state spending on new prison construction to skyrocket.[171]

In the Violent Crime Control and Law Enforcement Act of 1994 ("the crime bill"), Congress reduced five-year mandatory minimum sentences for certain low-level drug offenders to two years.[172] A defendant with only minor previous offenses, whose crime was nonviolent, who had not been accused of being a ringleader, and who provided all information regarding the offense to prosecutors can take advantage of this new law.[173] This safety valve provision does not go nearly far enough. For example, it is

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[165] Pub. L. No. 99-570, 100 Stat. 3207 (1986); Pub. L. No. 100-690, 102 Stat. 4181 (1988).

[166] See 21 U.S.C.A. § 841(b) (Supp. 1994). See also United States Sentencing Commission, Mandatory Minimum Penalties in the Federal Criminal Justice System 28 (Aug. 1991).

[167] 18 U.S.C.A. § 3553(e) (West 1995).

[168] See, e.g., United States v. Severich, 676 F. Supp. 1209, 1213-14, aff'd without op., 872 F.2d 434 (11th Cir. 1989); see also United States Sentencing Commission, supra note 166, at 53, 65-69.

[169] See United States Sentencing Commission, supra note 166, at 32.

[170] Id. at 76, 80-82. In addition to the Sentencing Commission, the American Bar Association (ABA) is against mandatory minimums.

[171] deCourcy Hinds, supra note 153; see also Sturm, supra note 59, at 645 (corrections is the single largest budget item in many states).

[172] Pub. L. No. 103-322, § 80001(b)(1)(B), 108 Stat. 1796, 1986 (1994).

[173] Id. § 80001(a); see, e.g., United States v. Ekwunoh, No. 91-684 (JBW), 1994 U.S. Dist. LEXIS 17948 (E.D.N.Y. Dec. 9, 1994) (safety valve provision applied).

not retroactive;[174] thus, it will not release the 4,000 to 16,000 small-time drug offenders "needlessly cramming Federal prisons."[175]

While no additional changes in federal mandatory minimums seem likely, there might be hope for repeal efforts focused at the state level. The District of Columbia City Council recently voted to repeal mandatory minimum sentences for nonviolent drug offenders.[176] Florida cancelled twenty-three mandatory sentencing laws in 1993 after a series of assaults were committed by violent criminals who were released from prison to make room for drug offenders.[177] Governor George Pataki has proposed eliminating New York's mandatory minimum drug laws.[178] In the crime bill, fifty percent of federal dollars for state prison construction for fiscal years 1995–2000 was conditioned on longer sentences for violent offenders;[179] thus, state budget constraints might require more states to repeal mandatory minimums for nonviolent offenders. Again, the major cause for the growth in the female prison population is the increase in drug-related convictions and mandatory sentencing for these convictions.[180] Unless mandatory minimums are modified or repealed, offenders cannot be sentenced to alternative programs; therefore, women prisoners' advocates must make action against mandatory minimums a priority.

B. Drug Treatment

Advocates for prisoners must also demand more drug treatment dollars. Studies show that drug-addicted offenders who receive drug rehabilitation have lower recidivism rates than drug-abusing offenders without opportunities for treatment.[181] The groundwork has been laid to increase drug treatment opportunities in prison. In the crime bill, Congress authorized millions of dollars for substance abuse treatment in federal and

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[174] § 80001(c), 108 Stat. at 1986.

[175] Smarter, and Fairer, About Drug Crime, N.Y. Times, June 26, 1994, at D16.

[176] Matt Neufield, Minimum Terms' Demise Wins Praise But Prosecutors Say Bad Message Sent, The Wash. Times, Nov. 3, 1994, at C5.

[177] Jeffrey Rosen, Crime Bill Follies: Our Guide to the Clinton Plan, The New Republic, Mar. 21, 1994, at 22.

[178] Joseph B. Treaster, Drug Wars, Cont.: The Liberals' Unlikely Ally, N.Y. Times, Feb. 5, 1995, at E3. This article also mentions that Tennessee "has eased up on low-level drug offenders and begun offering more opportunities for rehabilitation." Id.

[179] Violent Crime Control and Law Enforcement Act of 1994 § 20102(a).

[180] See Wellisch et al., supra note 83.

[181] Id.

state prisons.[182] Proponents of substance abuse treatment for prisoners must now work to ensure that this money is actually appropriated in the federal budget for the coming fiscal years. Advocates for women offenders must then pressure state correctional representatives and substance abuse agencies to direct some of this funding to special programs for women offenders in order to address their unique treatment needs.[183]

C. Family Preservation

Because visitation is so crucial to maintaining family ties, increasing the resources of child welfare agencies and relative caregivers in order to facilitate more frequent visitation will help to prevent the unnecessary termination of parental rights of incarcerated parents. In August 1993, Congress enacted child welfare legislation as part of the Omnibus Budget Reconciliation Act.[184] The purpose of this legislation is to encourage and enable states to establish or expand family preservation and support services.[185] Family preservation and support services assist families with children in foster care or at risk of foster care placement and promote the stability of families not yet in crisis.[186] Examples of these services include intensive family preservation services to help children at risk of foster care placement to remain with their families[187] and respite care of children for parents and other caregivers.[188] In 1995, $150 million will be divided among state child welfare agencies based on the number of children receiving food stamp benefits in each state.[189] In order to receive their allotment for a particular year, states must include a description of the programs that they would provide and how these programs would achieve the purpose of the legislation.[190]

States should use some of this money for reunification services for families of women prisoners. While there is nothing to prevent states from using this funding for mothers in prison, there are no provisions specifically requiring the provision of services to these families.[191] Without such a

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[182] Violent Crime Control and Enforcement Act of 1994 §§ 32001, 32101.

[183] See supra text accompanying notes 100-03.

[184] Pub. L. No. 103-66, 107 Stat. 312 (1993).

[185] 42 U.S.C.A. §§ 629, 629a-e (Supp. 1994).

[186] Id. § 629a(a)(1),(2).

[187] Id. § 629a(a)(1)(B).

[188] Id. § 629a(a)(1)(D).

[189] Id. §§ 629(b)(2), 629c(c)(1). For fiscal year 1996, the budget authority increases to $225 million. Id. § 629(b)(3).

[190] Id. § 629b.

[191] Telephone Interview with Karen Spar, Specialist in Social Legislation,

requirement, advocates for women prisoners fear that child welfare workers, who are often intolerant of incarcerated parents,[192] will fail to include these parents' children in state plans.[193] Still, in developing their plans, states must consult non-profit organizations and relevant experts in service delivery to children and families.[194] Thus, advocates for women prisoners should make their participation in such planning a major goal.[195]

A more effective legislative idea would be to sentence qualified prisoners to community-based programs that allow them to live with their children. So far California is the only state with a statute utilizing this option.[196] However, the Family Unity Demonstration Project enacted in the crime bill[197] may encourage other states to create alternatives to incarceration. This legislation authorizes the Attorney General to make grants to states and to the federal Bureau of Prisons to allow eligible[198] incarcerated parents to serve their sentence in a community correctional facility with their children. While Congress authorized $3.6 million for this program in 1996,[199] advocates admit the chances of receiving this funding are "problematic."[200] Until more state and local governments expand alternative sentencing programs, and the benefits of the programs are publicized, funding on a national basis is unlikely.

Education and Public Welfare Division, Congressional Research Service (Sept. 14, 1993).

[192] See supra note 113 and accompanying text.

[193] Interview with Brenda V. Smith, Director, Women in Prison Project, National Women's Law Center (Mar. 25, 1993); Telephone Interview with Tracy Huling, supra note 163.

[194] 42 U.S.C.A. § 629b(b)(1).

[195] Creating special units within the state child welfare agency that only work with children of incarcerated parents is another tactic which was suggested by former Georgetown University Law Center student Martha Pollack. Funding from the family preservation entitlement could be employed to establish these units. Telephone Interview with Karen Spar, supra note 191.

[196] See Cal. Penal Code §§ 3410-3424 (West 1982).

[197] Pub. L. No. 103-322, §§ 31901-31922, 108 Stat. 1892-96 (1994).

[198] To be eligible, an offender must be the primary caregiver of a child and be sentenced or awaiting sentencing for a conviction punishable by a term of imprisonment of no more than seven years. Eligible offenders can not have a background of violent conduct, child abuse, or neglect. Id. at § 31903, 108 Stat. 1893. Despite gender-neutral language, the primary caregiver requirement means that most participants will be incarcerated mothers. See supra note 27.

[199] Family Unity Demonstration Project § 31904(a)(1).

[200] Interview with Brenda V. Smith, supra note 193.

VII. AN ADVOCACY STRATEGY

While several prisoners advocacy groups[201] did collaborate to write the Family Unity Demonstration Project Act, there is no national advocacy group dedicated to women offenders. Seven national roundtables about women in prison have been held to generate ideas for coalition building and to develop comprehensive strategies for women offenders. These roundtables could be the precursor to a national advocacy organization.[202] While a national legislative agenda for women in prison is limited without a strong advocacy group, much can and is being done on a local and state-wide level. Modification of mandatory minimums, increased drug treatment resources, and funding of family preservation services for incarcerated mothers are all achievable at the state level.

There are four essential components to a state-wide advocacy strategy: a good understanding of the politics surrounding criminal justice legislation,[203] a broad-based coalition, a well-researched plan of action, and a strong media campaign. In New York state, a group of over fifteen organizations including prison legal services providers, women's groups, the Puerto Rican Bar Association, and the New York Civil Liberties Union launched a campaign to develop community-based sanctions and to reconstruct minimum sentencing laws.[204] They have generated several news stories sympathetic to women prisoners and are currently advocating for a bill to abolish mandatory minimums for drug offenses.[205]

The first step of an advocacy strategy is forming a coalition. There are many advocacy groups to be tapped: general women's groups, domestic violence coalitions,[206] bar associations—including those for specific minority groups and women—children's advocacy organizations, public defenders, legal services providers, drug treatment providers, and

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[201] These groups were the Women in Prison Project of the National Women's Law Center, the ACLU National Prison Project, the ACLU National Chapter, and Prison M.A.T.C.H. (Mothers And Their Children).

[202] Ms. Smith believes one reason that a national organization has not been created is that the funding community is not ready to support a national center for women in prison. Furthermore, fundraising within the targeted constituency of currently incarcerated women is obviously limited; former women prisoners are also not a large source of funding. Interview with Brenda V. Smith, supra note 193.

[203] Telephone Interview with Tracy Huling, supra note 163. The author is responsible for the rest of the four-prong strategy.

[204] Press Release, New York Groups Call On State Lawmakers To Release Women in Prison (on file with the Colum. J. of Gender & L.).

[205] Telephone Interview with Tracy Huling, supra note 163.

[206] 11.1% of women prisoners are incarcerated for an offense involving domestic violence. ACA study, supra note 4, at 94.

others, depending on the state. After an umbrella group is formed, an in-depth assessment of the needs of women prisoners and their children should be made. Some state departments of corrections have already undertaken studies on women prisoners.[207] Gender bias studies also sometimes address the problems of women in prison. This assessment is the basis for a long-term action plan.

Legislation, litigation, and community sentencing should all be explored. While litigation has its limits, it can be effective in bringing correctional officials to the bargaining table or publicizing the treatment of women prisoners. Because of the preference for litigation in the legal community, many lawyers choose litigation as the first solution. Advocates should realize that lobbying and creating community programs are options worth trying in addition to, or even instead of, litigation. When these "carrots" are not viable based on one's assessment of the political atmosphere, the "stick" of litigation can be effective. Furthermore, there are many women who are ineligible for alternative programs, and litigation can at least force correctional facilities to be maintained at constitutional standards.

It is difficult to determine what should be included in action plans because each state will vary in its reliance on any of the aforesaid advocacy strategies. Still, major goals should include the following:

- Alternatives to incarceration should be developed to address the drug problems, parenting responsibilities, and job training deficits of women prisoners.

- Prisons should address the special needs of women inmates, especially regarding family contact, job skills, and drug abuse.

- Funds and services for family preservation should reach children of incarcerated parents and their caregivers.

- Mandatory minimums for nonviolent drug offenders should be modified.

Finally, advocates need to engender sympathy for their constituency. The value of an effective media strategy detailing the backgrounds of female offenders should not be underestimated.[208] Specific problems

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[207] Immarigeon & Chesney-Lind, supra note 148, at 7. These states include Delaware, Illinois, Maryland, and Massachusetts.

[208] See Sturm, supra note 59, at 730 (prisoners' rights advocacy groups recognize

should be examined at public hearings with state and city legislators. Op-Ed pieces, editorials, and documentary-style videotapes should be generated. Just as boot camps are being touted—and funded—for mostly male prisoners, community-based alternatives need to be highlighted for women offenders. A strong media campaign is a crucial component of any project for social change.

VIII. CONCLUSION

There is no shame in capitalizing on public sympathy for women prisoners based on their gender. There are equally powerful assumptions made about criminals in general, and relying on gender stereotypes might be the only way to overcome these beliefs. At best, gender-neutrality provides women offenders with approximately the same opportunities as men. This ultimately results in women's needs being marginalized or ignored. While highlighting the "woman as victim" stereotype might advance antiquated perceptions of women, the acknowledgement of women's differences is necessary in order to respond to reality and reform it.

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the important role of the media).