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Despair and Disparity in Florida's Prisons and Jails

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DESPAIR AND DISPARITY IN FLORIDA'S PRISONS AND JAILS

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THE FALL from grace is a long one. Listen to women in Florida's prisons and jails:

> There is no Law Library on our compound. We would like to have access to the Law Library at [the men's compound]. . . . The men have access to video equipment and tapes for their drug program. They also have 3 movies a day shown in their dorms. The women have access to none of this. . . . Local telephones are at [the men's compound]. . . . We cannot call bondsmen, the County Clerk's office, or drug programs[,] only to mention a few. . . . We are not allowed to sit in the shade even though it is within the fenced area we are in. So our recreation consists of sitting in the hot sun at a picnic table covered with red ants or standing at a fence on red ant hills, while we look at a full set of Nautilus Gym Equipment under an awning that is situated right outside our front door. But we are not allowed to use it. . . . We have been informed that the equipment is for the men's use only. . . . [T]he men have 3 rec days per week while we have 2 hours per week. . . . The women's canteen has nothing in it of nutritional value other than juices. Everything else for consumption is junkfood! The men have Instant Lunches (Beef & Chicken) Tea and Hot Cocoa. They also can buy Stamped Envelopes. The women have to have stamps mailed into them if they want to mail more than 2 letters per week. . . . The men may spend $50, we may only spend $30.[1]

In 1987, then-Chief Justice of the Florida Supreme Court Parker Lee McDonald established the Gender Bias Study Commission (the Commission) to study gender bias in Florida's legal system. In March 1990, the Commission reported the results of its two-year study on Gender Bias in the Dissolution of Marriage, Custody and Child Support; the Criminal Justice System (crime and incarceration, domestic violence, sexual battery, prostitution, and juvenile justice); and the Legal Profession. The Commission documented extensive disparity in

1. REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION 96-97 (March 1990) [hereinafter COMMISSION REPORT] (quoting a female inmate of one of Florida's jails).

Florida's treatment of female prisoners and detainees compared to the treatment of similarly situated male prisoners and detainees.[2]

The Florida constitution establishes the state's commitment to equal rights for all;[3] the United States Constitution establishes the United States' commitment to equal protection under the laws[4] through the mandate of the equal protection clause that "all persons similarly circumstanced shall be treated alike."[5]

Florida's Legislature must begin now to remedy disparities between male and female prisoners. Because the Commission's charge was so broad, the time and resources it devoted to each study area was necessarily limited. The 1991 Legislature should fund a comprehensive study of women in Florida's prisons and jails, designed to yield detailed information on Florida's female prisoners. In order to enable the Legislature to fashion an effective and rapid remedy to any disparities, the study should address, at a minimum:

> 1. the policies of the criminal justice system as they pertain to women;
> 2. the incarceration decision and alternatives to incarceration;
> 3. the facilities and conditions of confinement, including rules, regulations, programs, and services; and
> 4. the post-release programs.

In addressing only one aspect of the Commission's overall study—Gender Bias in the Criminal Justice System, Crime and Incarceration—this Article argues for a modest, but important, first step toward the Commission's "hope to ensure that our justice system abides by the Florida Constitution's goal of guaranteeing 'equal civil and political rights to all.'"[6] After the first step is completed, the State must rapidly implement the changes needed to remedy the disparities, then monitor the results. This Article first delineates the constitutional rights that must shape legislative policies and decisions, and second, provides the rationale for each element of the proposed study, including synopses of the results of the Commission's study.

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2. Pre-trial detainees are often distinguished from sentenced prisoners. Hereinafter, however, both pre-trial detainees and sentenced prisoners are referred to as prisoners, following FLA. STAT. § 944.02(5) (1989):

> "Prisoner" means any person who is under arrest and in the lawful custody of any law enforcement official, or any person convicted and sentenced by any court and committed to any municipal or county jail or state prison, prison farm, or penitentiary, or to the custody of the department, as provided by law.

3. FLA. CONST. art. I, § 2.
4. U.S. CONST. amend. XIV, § 1.
5. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).
6. COMMISSION REPORT, *supra* note 1, at cover letter from Chief Justice Raymond Ehrlich.

I. CONSTITUTIONAL RIGHTS

Women in prison retain their constitutional rights to equal protection,[7] and any statutory classification that discriminates between males and females is subject to review under the equal protection clauses of the United States and Florida Constitutions.[8] Discriminatory treatment based on gender classification is subject to an intermediate level of judicial review;[9] the government bears the burden of establishing that the gender classification serves some important governmental objective and that the classification is substantially related to achievement of that objective.[10] Gender discrimination cannot stand unless it substantially advances an important government interest.[11] Although the United States Supreme Court has not yet faced an equal protection suit on the inequities suffered by women prisoners,[12] in the context of education, the Court held that a state must show "exceedingly persuasive justification"[13] for a gender-based classification. Objectives or classifications based on old stereotypes[14] of gender

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7. Glover v. Johnson, 855 F.2d 277, 281 (6th Cir. 1988). *See also* Hudson v. Palmer, 468 U.S. 517, 523 (1984) ("We have repeatedly held that prisons are not beyond the reach of the Constitution."); Wolff v. McDonnell, 418 U.S. 539, 556 (1974) ("Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race."); Herbert, *Women's Prisons: An Equal Protection Evaluation*, 94 YALE L.J. 1182, 1185-89 (1985).

8. Craig v. Boren, 429 U.S. 190 (1976). In the 1980's Kentucky, Louisiana, New Jersey, and Virginia all faced equal protection suits from women prisoners.

9. *Id.* at 197.

10. *Id.*

11. *Id.*

12. In Dothard v. Rawlinson, 433 U.S. 321 (1977), the Supreme Court reviewed an employment sex-discrimination suit brought by women against the State of Alabama, Department of Corrections. The department's regulations prohibited women from being prison guards in male maximum security prisons. The Court did not independently address whether Alabama's discriminatory regulation violated the fourteenth amendment, *id.* at 334 n.20, because it held that, under Title VII of the Civil Rights Act, the regulation fell in the narrow exception to the general prohibition of sex-discrimination in employment. Because, in contrast to other maximum security prisons, *id.* at 336 n.23, Alabama's prisons were characterized by violence, disorganization, sex offenders scattered among the general prison population, and constitutionally intolerable conditions, *id.* at 334-35, the Court reasoned that a woman guard would be assaulted "because she was a woman," and that "the employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility." *Id.* at 336. Thus, being male was a bona-fide-occupational-qualification (BFOQ) to being a prison guard in Alabama's prisons. As a BFOQ, limiting the positions to men was not discriminatory under Title VII.

13. Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982) (citing Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981)).

14. A stereotype is a fixed mental impression. When gender roles are stereotyped, the set idea of how women should behave makes the stereotype exceedingly difficult to change. Treatment of female prisoners reflects the gender role stereotypes of society. Feinman, *Sex Role Stereotypes and Justice for Women*, in THE CRIMINAL JUSTICE SYSTEM AND WOMEN 131, 131-32 (B.R.

roles, or based on a presumed innate handicap or inferiority, are themselves illegitimate.[15] Thus, the "exceedingly persuasive justification" is tested "free of fixed notions concerning the roles and abilities of males and females."[16] A gender-based classification favoring one sex can be justified in the limited circumstances when it intentionally and directly assists members of the sex that is otherwise disproportionately burdened. A gender classification may be made for a compensatory purpose, but only if members of the gender supposedly benefitted by the classification actually suffer(ed) a disadvantage related to gender.[17] It is not clear that the state's prison gender classification that disadvantages women prisoners was made for any compensatory objective; certainly women in most ways have not been benefitted by the classification.

Constitutional rights of prisoners are subject to restrictions and limitations based on legitimate goals of the criminal justice system;[18] the United States Supreme Court recognizes that internal security and discipline are fundamental legitimate goals.[19] Although courts show judicial deference to policies and practices that prison officials adopt in order to achieve legitimate correctional goals,[20] judicial review assesses whether alternative means exist to achieve the same result and whether the policies and practices operate in a gender-neutral fashion.[21] If the court finds that the policies or practices are an exaggerated response to state asserted concerns,[22] it will intervene to protect a prisoner's constitutional rights. The courts have a duty to protect prisoners "from unlawful and onerous treatment of a nature that, of itself, adds punitive measures to those legally meted out."[23]

Price & N.J. Sokoloff eds. 1982). For example, in Glover v. Johnson, 721 F. Supp. 808, 837 n.22 (E.D. Mich. 1989), *on remand from* 855 F.2d 277 (6th Cir. 1988), *vacating and remanding* 478 F. Supp. 1075 (E.D. Mich. 1979), representatives of the Michigan corrections system claimed that at the time of the original trial ten years previously, the courses offered to the female prisoners were designed to train women to run their own households. Courses offered to male prisoners were designed to train them in income-producing skills. The court found that, a decade later, male prisoners were still offered training in highly skilled, potentially high-paying trades while female prisoners were offered training in unskilled, low-paying fields.

15. *Hogan*, 458 U.S. at 725.

16. *Id.* at 724-25.

17. *Id.* at 728.

18. Bell v. Wolfish, 441 U.S. 520, 545-46 (1979).

19. Hudson v. Palmer, 468 U.S. 517 (1984); Wolff v. McDonnell, 418 U.S. 539 (1974); Pell v. Procunier, 417 U.S. 817 (1974).

20. *Wolfish*, 441 U.S. at 547.

21. *Id.* at 551.

22. *Id.* at 548.

23. Miller v. Carson, 401 F. Supp. 835, 865 (M.D. Fla. 1975) (quoting Jackson v. Godwin, 400 F.2d 529, 532 (5th Cir. 1968)), *aff'd in part and modified in part*, 563 F.2d 741 (5th Cir. 1977). The standard of review of compelling necessity used by the *Miller* court was rejected by the United States Supreme Court in *Wolfish*, 441 U.S. at 520.

In gender-based prisoner equal protection litigation, the courts determine which gender disparities exist, what state purpose underlies the gender-based classification, and what relationship exists between that purpose and the disparity in the conditions of confinement.[24] States that have faced equal protection litigation proffered various reasons for the existing disparities, including administrative ease and convenience, the small size of the female prison population, lack of funds, economic inefficiencies, lack of interest, "proper" gender roles (training women to run a home rather than to learn income producing skills), prison rules (keeping women out of areas—both physical areas and program areas—where better opportunities are offered), and security risks.[25]

These "reasons" are often only excuses.[26] With the exception of security interests, they are not legally sufficient to justify the discrimination that seems an inevitable part of gender-based classifications.[27] Courts have strongly and consistently rejected lack of funds as an adequate justification for denying female—and male—prisoners their retained constitutional rights.[28] The United States District Court for the Middle District of Florida in *Miller v. Carson* stated compellingly:

> Inadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights. If the state cannot obtain the resources to detain persons awaiting trial in accordance with minimum constitutional standards, then the state simply will not be permitted to detain such persons. The final decision may, indeed, rest with the qualified voters of the governmental unit involved. This court, of course, cannot require the voters to make available the resources needed to meet constitutional standards, *but it can and must require the release of persons held under conditions which violate their constitutional rights, at least where the correction of such conditions is not brought about within a reasonable time.*[29] (Emphasis in original.)

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24. Bukhari v. Hutto, 487 F. Supp. 1162, 1171 (E.D. Va. 1980).

25. *See, e.g.*, COMMISSION REPORT, *supra* note 1; Glover v. Johnson, 721 F. Supp. 808, 837 (E.D. Mich. 1989); Monmouth County Correctional Inst. Inmates v. Lanzaro, 595 F. Supp 1417 (D.N.J. 1984).

26. *See Glover*, 721 F. Supp. at 808.

27. Craig v. Boren, 429 U.S. 190, 198 (1976).

28. Ancata v. Prison Health Serv., Inc., 769 F.2d 700 (11th Cir. 1985); McMurry v. Phelps, 533 F. Supp. 742 (W.D. La. 1982), *overruled on other grounds sub nom.* Thorne v. Jones, 765 F.2d 1270 (5th Cir. 1985); Mitchell v. Untreiner, 421 F. Supp. 886 (N.D. Fla. 1976); Miller v. Carson, 401 F. Supp. 835 (M.D. Fla. 1975), *aff'd in part and modified in part*, 563 F.2d 741 (5th Cir. 1977).

29. Miller v. Carson, 401 F. Supp. 835, 842-43 (M.D. Fla. 1975) (citing Hamilton v. Love, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971)), *aff'd in part and modified in part*, 563 F.2d 741 (5th

Stating that a "[s]hortage of funds is not a justification for continuing to deny citizens their constitutional rights," the United States Fifth Circuit Court of Appeals had already applied the same standard to the prison (post-trial) context.[30] Further, limited resources do not justify an *allocation* of those limited resources that unfairly denies women equal access to programs routinely available to men.[31] The proposed study by the Florida Legislature must be designed within the constitutional mandates of equal protection and without outmoded stereotypes that assist neither the female prisoners nor the society to which they will ultimately return.

II. Social Justice and the Goals of the Criminal Justice System

The criminal justice system reflects a state's balance between its goals to achieve criminal justice and to protect individual rights and freedoms established in the United States and the Florida Constitutions. Internal security,[32] public safety, and rehabilitation are recognized criminal justice goals and are incorporated in Florida's legislative purpose for its comprehensive correctional master plan:

> (a) To ensure that the penalties of the criminal justice system are completely and effectively administered to the convicted criminals

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Cir. 1977). For some constitutional analyses, pre-trial detainees and sentenced prisoners hold different statuses. The standard of review for pre-trial detainees is whether conditions amount to punishment or otherwise violate the constitution. Bell v. Wolfish, 441 U.S. 520, 535-37 (1979). For sentenced prisoners, the review is whether the conditions are cruel and unusual punishment. Ingraham v. Wright, 430 U.S. 651, 671-72 (1975). The distinction is not critical for gender-based equal protection analysis, however, because the United States Supreme Court jurisprudence makes clear that pre-trial detainees who have not been convicted of any crimes "retain at least those constitutional rights that convicted prisoners do." *Wolfish*, 441 U.S. at 545. Because female sentenced prisoners retain their constitutional right to equal protection, so too would female pre-trial detainees.

30. Gates v. Collier, 501 F.2d 1291, 1320 (5th Cir 1974). *See also Mitchell*, 421 F. Supp. at 896 ("Lack of funds is not an acceptable excuse for unconstitutional conditions of incarceration. . . . If the State chooses to run a prison it must do so without depriving inmates of the rights guaranteed to them by the federal constitution.") (emphasis deleted) (quoting Finney v. Arkansas Bd. Correction, 505 F.2d 194, 201 (8th Cir. 1974)).

31. *See, e.g.*, Canterino v. Wilson, 546 F. Supp. 174, 211 (W.D. Ky. 1982), *vacated and remanded*, 869 F.2d 948 (6th Cir.), *cert. denied*, 110 S. Ct. 539 (1989) (emphasis in original). Addressing the equal protection claim, the appeals court reasoned that female prisoners had "failed to prove that the denial of study and work release to members of their class is gender-based discrimination on its face, because both men and women are included in the class of people who may be denied study and work release." 869 F.2d at 954. Even though the lower court opinion contained extensive documentation of the disparate conditions in the women's prison compared to the men's prisons, the appeals court stated that the female prisoners' "allegations of unequal opportunities for vocational and study release are vague and conclusory and unsupported by the facts," and held that there was proof of neither discrimination nor injury. *Id.* The case on remand has not been published as of the date of publication of this Article.

32. Hudson v. Palmer, 468 U.S. 517 (1984).

> and, to the maximum extent possible, that the criminal is provided opportunities for self-improvement and returned to freedom as a productive member of society.
>
> (b) To the extent possible, to protect the public safety and the law-abiding citizens of this state and to carry out the laws protecting the rights of the victims of convicted criminals.
>
> (c) To develop and maintain a humane system of punishment providing prison inmates with proper housing, nourishment, and medical attention.
>
> . . . .
>
> (f) To provide that convicted criminals not be incarcerated for any longer period of time or in any more secure facility than is necessary to ensure adequate sanctions, rehabilitation of offenders, and protection of public safety.[33]

The goals of Florida's criminal justice system are well articulated, as are the goals of equal rights of Florida's citizens. The standard of justice against which the balance between these goals is struck, however, must be measured in terms of the actual consequences of the system's operation.[34] The relationship between the system's goals and its consequences must be made clear.[35] No assessment of how well a system works is complete without analysis of the impact of its methods. A study of actual consequences is necessary to reveal the collateral and perhaps unintended effects of the system; only then may the state determine whether those consequences are tolerable.[36]

III. THE IN/OUT DECISION

The judge's in/out decision determines whether a person's debt to society is paid in the community or in confinement.[37] The in/out decision is "pivotal to corrections' ability to manage fiscal resources, promote justice, and protect society."[38] The decision whether to incarcerate is perhaps the most important decision a judge makes.[39]

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33. FLA. STAT. § 944.023(3) (1989).

34. Renner & Warner, *The Standard of Social Justice Applied to an Evaluation of Criminal Cases Appearing Before the Halifax Court*, 1 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 62 (1981).

35. L. LANZA-KADUCE, N. HOLTEN, W. BLOUNT & W. TERRY, PRISON UTILIZATION STUDY: RISK ASSESSMENT TECHNIQUES AND FLORIDA'S INMATES VOL. I: APPLICATION TO MALES AND FEMALES 13 (1990)[hereinafter PRISON UTILIZATION](available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla).

36. Van Dine, *The In/Out Decision* 38 (unpublished and undated), reprinted in PRISON UTILIZATION, *supra* note 35.

37. *Id.* at 1.

38. *Id.* at 2.

39. Kruttschnitt & McCarthy, *Gender, Criminal Sentences and Sex Role Stereotypes*, 5 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 306, 312-13 (1985).

Sound, well-informed in/out decisions are impossible without clear policies and priorities.[40] Often, however, a "serious lack of clearly articulated policy . . . determines how jurisdictions use their most expensive and restrictive sanctions. . . . The resultant differences in human and economic costs, to say nothing of fairness and equity, [are] intolerable in a society that prides itself in its fairness and its accountability to its taxpayers."[41]

In/out decisions must conform to equitable principles; must apply valid, reliable factors; and must produce consequences that are neither arbitrary nor discriminatory.[42] A factor is equitable if it is fair, in that its use does not discriminate against subgroups in society, and it is justifiable if its use is consistent with broader social values.[43] The proposed study must address policies and priorities to support sound and well-informed in/out decisions. Women generally commit different types of crime than men commit.[44] Women are generally imprisoned for less serious offenses than men, but serve longer sentences for their lesser offenses.[45] Significantly, a recent study conducted for the Florida Legislature, designed to assess the most efficient and effective utilization of Florida's prisons based on the priority goal of public safety, determined that most of the women incarcerated in Florida pose little risk to public safety: more than sixty percent of the women currently incarcerated could be released with minimal risk.[46] Nonetheless, the Commission found that the correctional theories designed for men are imposed on women and fail to take into account the different nature of the crimes committed.[47] Even the application of male-oriented correctional theories to female prisoners is poorly done, because women despair through conditions inferior to those of male prisoners. The state should do no less for its female prisoners than it does for its male prisoners.[48]

Sound, well-informed in/out decisions must be made and must include the consequences of the decisions—the prisoner bears the individual impact, while the state accrues the aggregate results. The Commission, for example, found that because of sentencing guide-

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40. Van Dine, *supra* note 36, at 35.

41. *Id.* at 8-9.

42. *Id.* at 22-30.

43. *Id.* at 27.

44. COMMISSION REPORT, *supra* note 1, at 87; Kruttschnitt & McCarthy, *supra* note 39, at 313-14; PRISON UTILIZATION, *supra* note 35, at 68; Steffensmeier, *Trends in Female Crime: It's Still a Man's World*, in THE CRIMINAL JUSTICE SYSTEM AND WOMEN, *supra* note 14, at 117.

45. COMMISSION REPORT, *supra* note 1, at 99.

46. PRISON UTILIZATION, *supra* note 35, at 80, 94.

47. COMMISSION REPORT, *supra* note 1, at 92.

48. *See* Glover v. Johnson, 721 F. Supp. 808 (E.D. Mich. 1989).

lines, courts in Florida are gender-neutral in their sentencing patterns.[49] Gender-neutrality in sentencing affords little comfort to women, however, because the "existing structure of the criminal justice system thwarts any gender equality during the incarceration that follows. . . . Thus, the gender-neutral sentences mandated by the sentencing guidelines become gender-discriminatory in application."[50] Women sentenced to work-release, for example, are routinely incarcerated either because work release programs do not exist for women or the programs that do exist are full.[51] The Commission heard the following testimony:

> Consider two hypothetical cases, male and female. Each demonstrating similar backgrounds and prior histories, both with substance abuse as a factor in the instant offense. The judge feels both, in their current addicted state, are a threat to society. A residential drug program is a resource for the male, but not the female. Hence, the male receives probation with drug-related conditions. The female offender is sent to prison.[52]

Thus, even if the sentence and the in/out decision seem equitable, the outcome may still be unfair and inequitable to women. The proposed study should closely examine the actual consequences of the sentencing guidelines as applied to the in/out decision. The study should determine: 1) whether gender ought to be a factor in this decision, and 2) whether most women who are or would be incarcerated should in fact serve their sentence in the community.

IV. FACILITIES

Florida law uses a gender-based classification in requiring female prisoners to be separated from male prisoners.[53] The law, however, does not require that the separation be accomplished by separate facilities. At least one court has found the belief that women must be separated from men merely a chimerical argument and not justification for refusing to permit women to be trustees or to be assigned to the more attractive conditions available for the men at a prison farm.[54] The court rejected the state's asserted justification as merely a varia-

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49. COMMISSION REPORT, *supra* note 1, at 90.
50. *Id.* at 91.
51. *Id.* at 95.
52. *Id.* at 91.
53. FLA. STAT. §§ 944.09(1) (k), 950.051-.061 (1989).
54. McMurry v. Phelps, 533 F. Supp. 742, 767 (W.D. La. 1982), *overruled on other grounds sub nom.* Thorne v. Jones, 765 F.2d 1270 (5th Cir. 1985).

tion on the "lack of funds" theme previously proposed by the state, and held that with proper expenditures for modification of the facilities and hiring new personnel, facilities could be integrated.[55] Some federal prisons, state prisons,[56] and military prisons[57] are successfully integrated co-correctional facilities. The Legislature should undertake a feasibility study of co-correctional prisons as part of its study on women in Florida's prisons and jails.[58] The study should evaluate enhanced security provisions in other prison systems, and the cost of enhanced security, with a view toward providing female prisoners either better facilities or equal access to programs and services in co-correctional institutions.

County jails house both sentenced prisoners and detainees awaiting trial. Female prisoners are generally confined in older and less comfortable facilities:[59]

> When you are presumed innocent and are being held, a man is held at Metro Community Center. It has a lake. It has air conditioning. It is, very fairly, like summer camp. When a woman is being held, she is held at the Women's Detention Center. It is a dirt pit.[60]

Women are often housed in older jails that have inadequate and broken sanitary facilities; access to open space and fresh air is frequently severely restricted.[61]

Florida has two state prisons for women. In direct contrast to the men who are separated according to security classification, minimum security offenders in the women's prison must endure conditions designed for maximum security inmates.[62] Yet the legislatively articu-

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55. *Id.*

56. Herbert, *supra* note 7.

57. *McMurry*, 533 F. Supp. at 758.

58. The administrative concern about co-correctional facilities centers on sexual contact. Female prisoners share this concern, as many have been sexually assaulted before being imprisoned. *See* M. Baldwin, *Pornography and the Traffic in Women*, 1 YALE J. LAW & FEMINISM 111 (1989); P. LEVINE, PROSTITUTION IN FLORIDA: A REPORT PRESENTED TO THE GENDER BIAS STUDY COMMISSION OF THE SUPREME COURT OF FLORIDA (1988). Asking "What kind of choice?" former female prisoners spoke to the dilemma of the choice to either mix with men or to forego a whole range of work and recreational facilities—the choice currently being given women prisoners in England and Wales as well as elsewhere in the United States—with a recommendation that in integrated facilities women must retain their independence from men while sharing in the opportunities afforded their male counterparts. Integration should be introduced on a closely monitored and experimental basis and should be monitored by an equal opportunities' assessor. O'Dwyer, Wilson & Carlen, *Women's Imprisonment in England, Wales and Scotland: Recurring Issues*, in OFFENDING WOMEN 176, 186 (A. Worrall ed. 1990).

59. COMMISSION REPORT, *supra* note 1, at 94 n. 25.

60. *Id.* at 94.

61. *Id.* at 94.

62. *Id.* at 92.

lated purpose of the correctional system specifies that prisoners should not be incarcerated in any more secure facility than is necessary.[63]

Quality programs require adequate space.[64] In addition, small square footage per inmate is particularly egregious when coupled with a lack of privacy, inability to get away from other inmates, and enforced idleness.[65]

For both prisons and jails, the proposed study must address the actual condition of each facility, including the amount and use of space. The interaction among the rules, programs, and services and the amount and use of space should be carefully assessed.

V. CONDITIONS OF CONFINEMENT

Conditions of confinement determine the daily lives of Florida's female prisoners. The conditions of confinement must be measured against "the evolving standards of decency that mark the progress of a maturing society,"[66] and against the goals of the criminal justice system. The outer limits of the conditions of confinement are determined by the constitutional rights of prisoners. Each element of confinement, including the rules and regulations of the state and of the facility, the programs and services offered by the facility, and the facility itself, must fall within constitutionally permissible limits, as must their aggregate impact.

A. Prison Rules, Programs, and Services

Prison and jailhouse rules work to the detriment of the female prisoners.[67] Programs and services for female prisoners are inadequate and inferior compared to the programs and services offered for male prisoners.[68] Both inequitable rules and inferior programs and services represent continuing violations of female prisoners' constitutional rights to equal protection under the law.

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63. FLA. STAT. § 944.023(3) (f) (1989).

64. Glick & Neto, *National Study of Women's Correctional Programs*, in THE CRIMINAL JUSTICE SYSTEM AND WOMEN, *supra* note 14, at 147.

65. McMurry v. Phelps, 533 F. Supp. 742, 767 (W.D. La. 1982), *overruled on other grounds sub nom.* Thorne v. Jones, 765 F.2d 1270 (5th Cir. 1985).

66. Trop v. Dulles, 356 U.S. 86, 101 (1958).

67. COMMISSION REPORT, *supra* note 1; *see* cases cited *supra* note 28; THE CRIMINAL JUSTICE SYSTEM AND WOMEN, *supra* note 14; Herbert, *supra* note 7; *see generally* FEMALE OFFENDERS: CORRECTIONAL AFTERTHOUGHTS (R.R. Ross & E.A. Fabiano eds. 1986); A. WORRALL, OFFENDING WOMEN (1990); GENDER, CRIME AND JUSTICE (P. Carlen & A. Worral eds. 1987); B. BARDSLEY, FLOWERS IN HELL (1987).

68. COMMISSION REPORT, *supra* note 1; *see* cases cited *supra* note 28; THE CRIMINAL JUSTICE SYSTEM AND WOMEN, *supra* note 14; Herbert, *supra* note 7.

1. *Prison Rules*

Prison rules often operate to exclude women from the few advantageous positions available to prisoners, such as trusteeships. The Commission found that women are routinely excluded from being trustees.[69] More than a decade ago, the single case addressing equal protection in Florida's jails found that women were denied equal protection by being denied trusteeships.[70] Similar rules and regulations in other states have been also been found to be unconstitutional.[71] The Commission found that other rules also lead to the "inequitable distribution of reward-gaining opportunities."[72] As an example, women are unable to obtain one source of gain time available to men, for "[t]here is no provision at the prison farm for women to work outside the facility. Men get so many days off per month for working in fields, but there's no provision for women to do that."[73]

Visitation rules work a particular hardship, because women are sometimes incarcerated quite a distance from any city and off public transportation routes.[74] Remote locations make it difficult for children, friends, attorneys, and others to visit. No published data reveal how many of Florida's female prisoners are responsible for dependent children, but if they are similar to the rest of the nation,[75] over half of

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69. COMMISSION REPORT, *supra* note 1, at 95.

70. Mitchell v. Untreiner, 421 F. Supp. 886, 895 (N.D. Fla. 1976).

71. McMurry v. Phelps, 533 F. Supp. 742, 757-58 (W.D. La. 1982), *overruled on other grounds sub nom.* Thorne v. Jones, 765 F.2d 1270 (5th Cir. 1985).

72. COMMISSION REPORT, *supra* note 1, at 95.

73. *Id.* Early release credits have a substantial impact on the actual percentage of sentence the prisoner serves. Male and female prisoners serve approximately the same percentage of their sentence (35% for men and 33% for women in January 1989) and approximately the same percentage when both receive early release credit (33% for men and 31% for women in January 1989). There is some evidence of gender differentials in early release credits, however. State of Florida Department of Corrections data on released inmates show that in January of 1989 women without early release credit served 68% of their sentences, whereas male prisoners without early release credit served only 52% of their sentences. FLA. DEPARTMENT OF CORRECTIONS, PERCENT OF SENTENCE SERVED BY RELEASED INMATES (available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.). The percentages for females are based on small numbers and may not be reliable. Nonetheless, it is clear that the proposed study must look at the operation of statutory release mechanisms. The discrepancy between male and female prisoners' time served is not accounted for by mandatory sentences. Only 20% of the female prisoners are serving a mandatory sentence that restricts the amount of gain time and provisional release credits that may be earned. PERCENT OF SENTENCE FOR FEMALE RELEASES DURING JANUARY, 1989. Prepared by: Brian J. Plaimic, Fiscal and Statistics (January 20, 1990). The early release credits program is being replaced by the Control Release Program under the direction of the Florida Parole Commission. In order to ensure that the new program is equitable, the proposed study must provide guidance to the Parole Commission as it implements its new duties.

74. COMMISSION REPORT, *supra* note 1, at 96.

75. Florida's female prisoners seem to share the same characteristics as the nation's female prisoners. *See, e.g.*, Glick & Neto, *supra* note 64, at 151-52. A comparison between the national

the female prisoners have children for whom they are responsible, but with whom they often cannot visit. Even seemingly neutral rules, such as visitation rules, often have a discriminatory impact when coupled with other seemingly neutral circumstances, such as facility location.

The legislative study should determine the differential negative impact that rules have on female prisoners and should determine if legitimate state objectives underlie the rules. A prison regulation that infringes on prisoners' constitutional rights may still be valid, but only if it is reasonably related to legitimate correctional goals.[76] As stated previously, any discriminatory treatment must have a substantial relationship to a legitimate state purpose in order to meet the constitutional standard.[77] Rules that deny women access to trusteeships because they are denied access to the areas in which trustees serve—ironically, the kitchen and the laundry[78]—operate to deny women equal access to opportunities given to men. The state cannot legitimately offer one discriminatory rule as justification for another discriminatory rule. Even the legitimate goal of internal security, an oft-cited reason for disparate treatment, may be achieved through enhanced security rather than denial of equal access to opportunities.[79] Denying women the same opportunities offered to men in order to keep men and women apart is an "exaggerated response" to valid considerations of security.[80]

2. *Programs and Services*

The programs and services the State offers female prisoners are either inferior or nonexistent compared to those offered male prisoners.

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statistics and the profile of Florida's female prisoners released by the Florida Department of Corrections (Annual Report, 1988/89 at 37) shows a great similarity. Over half the female prisoners were black; most were never married; most were under 30-35 years of age; and 40% of the national sample had worked during the two months prior to arrest, while 45% of Florida's female prisoners were working either full- or part-time at the time of their arrest.

76. Turner v. Safley, 482 U.S. 78, 80 (1987). To determine whether a regulation is reasonable, the court looks at (1) the relationship between the regulation and the governmental interest said to justify it, (2) alternative means available to exercise the asserted right, (3) the impact on prison resources to accommodate the asserted right, and (4) the existence of alternatives to accommodate the asserted right at *de minimis* cost to legitimate corrections interests. *Id.*

77. Craig v. Boren, 429 U.S. 190, 198 (1976).

78. *See, e.g.*, Canterino v. Wilson, 546 F. Supp. 174, 209 (W.D. Ky. 1982), *vacated and remanded*, 869 F.2d 948 (6th Cir.), *cert. denied*, 110 S. Ct. 539 (1989).

79. In McMurry v. Phelps, the court addressed the state's rule that women could not be trustees because the jail administration believed that would allow opportunities for sexual contact between inmates. The court stated that that problem could be eliminated by proper supervision. 533 F. Supp. 742, 758 (W.D. La. 1982), *overruled on other grounds sub nom.* Thorne v. Jones, 765 F.2d 1270 (5th Cir. 1958).

80. *See* Pell v. Procunier, 417 U.S. 817, 827 (1974).

For example, the Commission found that the average number of prison industries available to men is 3.2; to women, 1.2.[81] Work release programs for women are either nonexistent or full.[82] Rehabilitation programs routinely available for small numbers of male prisoners are unavailable for women, even when there were more women than men in need of the programs:

> I was a probation officer. . . . and I remember going to Lowell. . . . All the women in the State were sent over there. There was a small unit for men across the street that had something like maybe 150 men compared to probably close to 3,000 women. We went around and we were with the director of education who was showing us his hotel management program, the horticulture program, their cosmetology program. And the women were doing something like 2,000 hours of cosmetology. . . . We said, "What's the sense of having a woman go through a 2,000 hour program if when they get out they can't get a license. You have a beautiful electronics class here," and he said, "well, only the men are allowed in that. . . . Men are going to have families when they get out and they're going to have to support themselves. They need good jobs."[83]

Most equal protection litigation in the prison context has been focused on the provision of programs and services. States' correctional practices have repeatedly been found to violate the constitutional rights of female prisoners. Addressing equal protection for all the inmates of the Escambia County jail in Pensacola, Florida, the United States District Court for the Northern District of Florida noted that:

> By the mere coincidence of their location or their sex they are denied contact visitation and regular outdoor exercise, the opportunity to subscribe to a newspaper, to watch television, and to contribute to their educational advancement, all of which are provided to convicted male prisoners at the Escambia County Road Camp. . . . Female inmates are doubly denied equal protection of the laws by not being permitted to be trustees even if they are convicted and by not being permitted to serve their sentences in a less severe facility as is available to male prisoners at the Escambia County Road Prison.[84]

After a decade of litigation, the Michigan Department of Corrections is under a court order to remedy the inequities in educational

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81. COMMISSION REPORT, *supra* note 1, at 93.

82. *Id.* at 99.

83. *Id.* at 93-94.

84. Mitchell v. Untreiner, 421 F. Supp. 886, 895 (N.D. Fla. 1976). Only convicted male prisoners were permitted to be trustees. Pre-trial detainees of either sex could not be trustees.

opportunities, vocational and apprenticeship training, prison industries and wages, and library facilities for female prisoners.[85] The United States District Court for the Eastern District of Michigan reasoned that the state's responsibility to care for its female prisoners must be defined by the goals of the department as applied to the inmate population generally.[86] The state's articulated goals were not being achieved by the programs offered to its female prisoners because the programs offered too few opportunities and were of insufficient quality to meet these goals or the standards set by the department at its facilities for male prisoners.[87] The women's programs were found to be inferior in design, execution, or both, compared to the programs for men.[88]

The court further found that the concerns about security and the number of interested inmates are relevant factors in offering programs and services, but may not be used "wilfully to deny qualified female inmates their right to an education substantially similar to that available to male inmates."[89] The court would not accept the state's argument that the differences between its treatment of female prisoners and male prisoners were functions of size and economic efficiency because "these considerations alone cannot justify official inaction or legislative unwillingness to operate a prison system in a constitutional manner."[90]

Services offered to prisoners include legal support, recreational facilities, and medical treatment. Prisoners have a constitutional right to meaningful access to the courts.[91] Almost a decade ago Florida's requirement that inmates request specific legal material from their cells was not sufficient to ensure meaningful access.[92] Today, law libraries, inmates trained as paralegals or experienced as writ writers, and prison attorneys are among the services that have been provided by various facilities to help give male prisoners, at least, meaningful access to the courts. Today, in contrast to the access to law libraries generally available to men, women prisoners in Florida have no access, or are required to request specific materials, or must obtain a

85. Glover v. Johnson, 721 F. Supp. 808 (E.D. Mich. 1989).

86. *Id.*

87. *Id.*

88. *Id.* at 837.

89. Glover v. Johnson, 478 F. Supp. 1075, 1084-85 (E.D. Mich. 1979), *vacated and remanded*, 855 F.2d 277 (6th Cir. 1988), *on remand*, 721 F. Supp. 808 (E.D. Mich. 1989).

90. *Id.* at 1078.

91. Bounds v. Smith, 430 U.S. 817, 821 (1977).

92. Hooks v. Wainwright, 536 F. Supp. 1330 (M.D. Fla. 1982), *rev'd on other grounds*, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 479 U.S. 913 (1986).

court order permitting use of the library.[93] Other states, on the other hand, have justified providing an attorney for female prisoners because historically limited access to adequate legal resources has left women with neither a history of self-help nor any experienced writ writers.[94]

In addition to ensuring access to legal services, state and local governments must provide medical care to prisoners.[95] In cases of serious medical need, failure to provide medical care or provision of only cursory care may violate the Fourteenth Amendment to the United States Constitution.[96] Prisons and jails are generally required to provide services for pregnant inmates.[97] State law allows a pregnant inmate to be taken to a hospital outside the institution to have her child; the institution must pay for hospital and medical care, and must provide care for the child until the child is placed outside the prison system.[98] Given that the state must pick up the tab directly for inmates who give birth during their imprisonment, it would behoove the state to ensure, as much as possible, a healthy mother and a healthy baby. Several jurisdictions do offer pre-natal care and diets designed for pregnant inmates. Other jurisdictions look to local health departments to provide pre-natal and pregnancy services and require a doctor's order for pregnancy-related diets. In one facility, however, pregnant women are treated the same as those who are not pregnant and are not permitted appropriate diets or vitamin supplements. In another facility, a female prisoner may see her own physician, but only if she pays for the transportation.[99]

Prescription drugs are used extensively in women's prisons. The results of one national study indicate that "tranquilizers are used instead of programs to help maintain control in an institutional

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93. COMMISSION REPORT, *supra* note 1, at 97; M. GEORGE, REPORT TO GENDER BIAS COMMISSION: ISSUE OF PARITY FOR FEMALE OFFENDERS IN COUNTY DETENTION FACILITIES 5 (June 16, 1988).

94. Glover v. Johnson, 721 F. Supp. 808 (E.D. Mich. 1989).

95. Ancata v. Prison Health Serv., 769 F.2d 700, 705 (11th Cir. 1985); FLA. STAT. §§ 944.24, 951.032 (1989).

96. *Ancata*, 769 F.2d at 704.

97. *See, e.g.*, Monmouth County Correctional Inst. Inmates v. Lanzaro, 834 F.2d 326, 328 n.3 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988). Monmouth County agreed to provide the following services to pregnant inmates: (1) establish and implement procedures for pregnancy testing of all female inmates upon admission to the institution; (2) ensure prenatal care at an appropriate maternity clinic outside the correctional facility; (3) provide all treatment and medication prescribed by the treating clinic; (4) provide all female inmates twenty-four hour access to toilet facilities; and (5) provide vitamins, milk, and juice to all pregnant inmates upon request. *Id.*

98. FLA. STAT. § 944.24(2) (1989).

99. M. GEORGE, *supra* note 93.

setting."[100] Although the Commission did not address this issue, the legislative study must assess the extent of prescription drug use and overuse in Florida's prisons and jails.

Recreational services must also be provided to prisoners. Courts routinely recognize the importance of regular exercise and recreation to the prisoners' physical and mental health.[101] Female prisoners, however, are routinely denied access to recreation and physical activity—often because of the presence of male prisoners.[102] Men in the most restrictive settings have more access to the outdoors in one day than all women have in a normal week.[103] One court found it necessary to tell the state that "access to showers, beauty culture, sewing, and laundry rooms to engage in passive activities is not . . . meaningful recreation" for female prisoners.[104]

The proposed legislative study must examine the programs and services offered women, and must address the perspectives of the female prisoners themselves.[105] The study should assess the number, type, and quality of the programs and services offered, viewed against Florida's criminal justice system's goals and the realistic—not stereotypical—needs of the female prisoners. It bears repeating that the decisional law of Florida holds that "[l]ack of funds is not an acceptable excuse for unconstitutional conditions of incarceration."[106]

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100. Glick & Neto, *supra* note 64, at 149. *See also* Genders & Plager, *Women in Prison: The Treatment, the Control and the Experience*, in GENDER, CRIME AND JUSTICE, *supra* note 67, at 161, 162, 165, 170 (Pat Carlen & Anne Worrall eds. 1987).

101. *See, e.g.*, Monmouth County Correctional Inst. Inmates v. Lanzaro, 595 F. Supp. 1417, 1431 (D.N.J. 1984); Miller v. Carson, 401 F. Supp. 835 (M.D. Fla. 1975), *aff'd in part and modified in part*, 563 F.2d 741 (5th Cir. 1977).

102. In Kentucky, the entire female population was denied access to the exercise and recreation area during the day because five to seven men prisoners on the maintenance crew were not supervised. At the same time, Kentucky excluded women from the maintenance jobs, justifying the exclusion by pointing to the women's lack of maintenance skills. However, they did not provide maintenance training to the women to enable them to develop the required skills. *See* Canterino v. Wilson, 546 F. Supp. 174, 194-95 (W.D. Ky. 1982), *vacated and remanded*, 869 F.2d 948 (6th Cir.), *cert. denied*, 110 S. Ct. 539 (1989).

103. *Id.*; M. GEORGE, *supra* note 93.

104. *Monmouth*, 695 F. Supp. at 773. In response to an earlier court order, men were provided an opportunity for two hours per day of recreation. Although at the time of the earlier order women had had access to a universal weight room, by the later court review that weight room had been changed into an admissions room for new women prisoners. The state offered the mentioned activities as satisfying the court's earlier order. *Id.* at 775.

105. The trial judge in *Glover* required the department to ask the women what they wanted to learn and required that they be counseled about traditional and non-traditional occupational opportunities. 478 F. Supp. 1075, 1086 (E.D. Mich. 1979), *vacated and remanded*, 855 F.2d 277 (6th Cir. 1988), *on remand*, 721 F. Supp. 808 (E.D. Mich. 1989). Overall, there is little evidence that policy or program development has been based on any kind of systematic investigation of female prisoners' needs. FEMALE OFFENDERS: CORRECTIONAL AFTERTHOUGHTS, *supra* note 67, at 12.

106. Mitchell v. Untreiner, 421 F. Supp. 886, 896 (N.D. Fla. 1976) (citing Finey v. Arkansas

VI. POST-RELEASE PROGRAMS

Because Florida's female prisoners have limited opportunities for rehabilitation, training and treatment, they are not adequately prepared to return to society. The Commission found that the inequities faced by women in prison continue upon their release from prison.[107] Florida offers virtually no post-incarceration treatment facilities for women.[108] One study concluded that:

> [W]omen emerge from their incarceration no better prepared to cope with the world than when they entered prison, and with less of a chance than the male inmate who has been released. Not only has the woman in prison had less opportunity to receive job training, educational programs or counseling, but the socializing that she does receive is inappropriate. It is designed to convince her that her proper role is only that of "good" housewife, mother, and homemaker—roles that she can only fill if she succeeds in learning how to support herself (and any children she may have since 80% of all incarcerated women are unmarried).[109]

Job market data are readily available from the United States Department of Labor and Employment Security, Division of Labor and Employment Training, but few jurisdictions provide training based on current and projected market demand for jobs.[110] Employment with an adequate salary is a critical determinant of successful rehabilitation,[111] but the jobs for which women are trained do not pay well enough to meet basic financial obligations—if these women can find employment at all.[112] In Michigan, for example, female prisoners were

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Bd. of Corrections, 505 F.2d 194, 201 (8th Cir. 1974)); Ancata v. Prison Health Serv., 769 F.2d 700 (11th Cir. 1985) ("lack of funds for facilities cannot justify an unconstitutional lack of competent medical care and treatment for inmates"). In *McMurry*, the court strongly rejected a "lack of funds" justification proffered by the State:

> [T]he state advances a chimerical argument that women must be kept separate from men. Consequently, they cannot be made trustees nor transferred to the more attractive conditions enjoyed at the farm. This justification is tantamount to no justification—merely a new version of the often repeated "lack of funds" refrain—by proper expenditures for modifications of facilities and hiring new personnel, the facilities could be integrated.

533 F. Supp. 742, 767 (W.D. La. 1982), *overruled on other grounds sub nom.* Thorne v. Jones, 765 F.2d 1270 (5th Cir. 1985).

107. COMMISSION REPORT, *supra* note 1, at 98.

108. *Id.*

109. Price & Sokoloff, *Introduction*, in THE CRIMINAL JUSTICE SYSTEM AND WOMEN, *supra* note 14, at 6.

110. FEMALE OFFENDERS: CORRECTIONAL AFTERTHOUGHTS, *supra* note 67, at 26.

111. *Id.*

112. *Id.* at 31.

trained in fields that paid minimum wage, while male prisoners were trained in fields that commanded much greater salaries.[113] The end result is a low earning capacity among women released from prison.[114] The lack of training or training in stereotypical "women's work" during incarceration flies in the face of reason: most female prisoners are responsible for dependent children, and the state does itself no favor by denying these women meaningful training opportunities while they are in prison.

The proposed legislative study must address the interaction between the conditions of confinement and the final stage of incarceration: release back to the community. The study should document existing and needed coordination among the Departments of Corrections, Health and Rehabilitative Services, Education, and Labor and Employment Security, and should document whether programs are available to help released women find jobs or educational opportunities, housing, child care, and medical care.

VII. CONCLUSION

The Gender Bias Study Commission made important inroads in closing significant gaps in information about Florida's female prisoners and the conditions of their confinement. The Commission documented extensive inequities in Florida's treatment of its female prisoners compared to its male prisoners. Yet more comprehensive information is needed before the Legislature can act in a fully-informed manner to protect the constitutionally guaranteed rights of female prisoners to equal protection under the law. Florida's Legislature, as the state's policy-making body, must direct a study of our state's female prisoners. Legislative guidance must clearly establish the goals of the criminal justice system as they relate to women and must establish priorities among those goals.[115] Further, the Legislature must emphasize a study approach designed to assess the relationship between the goals and the consequences of Florida's criminal justice system.

Florida can no longer exercise selective ignorance of the consequences of its criminal justice system,[116] because the consequences are

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113. Glover v. Johnson, 721 F. Supp. 808, 837 (E.D. Mich. 1989). One study showed that women trained in non-traditional work had an average entry yearly income of $10,547 compared to $3,924 for women trained in traditional occupations. *See* FEMALE OFFENDERS: CORRECTIONAL AFTERTHOUGHTS, *supra* note 67, at 31.

114. *Glover*, 721 F. Supp. at 837-40.

115. *See* Van Dine, *supra* note 36.

116. *See, e.g.*, D.L. RHODE, JUSTICE AND GENDER (1989). Rhode advances a disadvantage paradigm, built on a commitment to gender equality, that provides an analytic tool for assessing the outcome of various social and economic practices.

continuing violations of the constitutional rights of its female prisoners. When the actual consequences of Florida's criminal justice practices reveal such disparate treatment between Florida's male and female prisoners—when a man in jail may make free phone calls while a woman in the same jail must pay to make even a local call[117]—a profound argument exists for determining the fit between the legislative purpose and the end result.[118] If the constitutional commitment to equal justice is to be more than a hollow promise,[119] the Legislature must become fully aware of the disparities between Florida's female and male prisoners and then implement all necessary changes to achieve equal civil and political rights for all.

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117. COMMISSION REPORT, *supra* note 1, at 97.

118. *See, e.g.*, Glover v. Johnson, 721 F. Supp. 808 (E.D. Mich. 1989). The protracted litigation in Canterino v. Wilson, 546 F. Supp. 174 (W.D. Ky. 1982), *vacated and remanded*, 869 F.2d 948 (6th Cir.), *cert. denied*, 110 S. Ct. 539 (1989), paints a not-so-pretty picture of the conditions that female prisoners often endure, both in confinement and in bringing an equal protection suit.

119. Herbert, *supra* note 7, at 1193.