Title VII: A Remedy for Discrimination Against Women Prisoners

Kathryn Willcox Tate

Despite increasing societal awareness of the problems of women and of prisoners, very little attention or assistance has been given the woman prisoner, the person who encompasses both areas of concern. Women in all levels of the correctional system are largely ignored, both by the legal profession and the public.[1] A particularly serious facet of this neglect is the scarcity and limited nature of rehabilitative programs and in-prison employment opportunities available to women prisoners.

The nature and impact of the problem caused by this neglect becomes readily apparent when the female offender population is surveyed. Statistics show that most women in prisons and jails are undereducated, vocationally untrained, and heavily overrepresentative of minorities.[2] Notwithstanding these demographic realities, few correctional institutions offer meaningful education or employment opportunities for incarcerated women.[3] Even where vocational training is

1. This neglect has been explained by reference to the relatively small number of women prisoners, their lack of confrontation with the corrections system, and the apparent absence of overt mistreatment by authorities. *See* Haft, *Women in Prison: Discriminatory Practices and Some Legal Solutions*, 8 CLEARINGHOUSE REV. 1 (1974).

2. The reasons for these demographic characteristics are discussed in Singer, *Women and the Correctional Process*, 11 AM. CRIM. L. REV. 295, 295-97 (1973). *See also* Crowell, *The Federal Reformatory for Women*, 7 CIVIL RIGHTS DIGEST, Fall 1974, at 26; Velimesis, *Criminal Justice for the Female Offender*, 63 J. AM. ASS'N U. WOMEN 13, 14 (1969). Velimesis discusses a Pennsylvania study which found that 80 percent of the women incarcerated in that state were unemployed at the time of arrest and that their usual employment, even when working, was in the unskilled or semi-skilled categories. It also was determined that the average educational level of the women was 9th or 10th grade.

3. *See* M. HERMANN & M. HAFT, PRISONERS' RIGHTS SOURCEBOOK 345 (1973); Crowell, *supra* note 2, at 28-29; Note, *The Sexual Segregation of American Prisons*, 82 YALE L.J. 1229, 1269-73 (1973). It is acknowledged that correctional programs for male offenders also are often inadequate. It cannot be denied, however, that women offenders' opportunities for meaningful educational and vocational rehabilitation are significantly less than their male counterparts. *Id.* The disparity in male-female rehabili-

offered, the available programs are almost exclusively confined to training in clerical skills and personal services.[4] When the paucity of rehabilitation programs is combined with the penchant of most women's institutions for turning out "ladies" and "good housekeepers,"[5] ex-offenders face enormous employment handicaps upon release—as women,[6] as ex-offenders,[7] and frequently as minority members.[8]

---

tative programs often is premised on the belief that women offenders are not as dangerous and, therefore, do not require rehabilitation to the same extent as male prisoners. *See* State v. Chambers, 63 N.J. 287, 295, 307 A.2d 78, 82 (1973) (state's defense included a demonstration that female inmates were easier to control and required less security); Haft, *supra* note 1, at 3. Admittedly, women still account for a small proportion of the total criminal statistics. Only 686,068 arrests of adult females were made in 1973, compared with 3,695,870 arrests of adult males. 1974 FED. BUREAU OF INVESTIGATION UNIFORM CRIME REPS. 126, table 28. However, the trend underlying these statistics may be at variance with the traditional view of women as nonviolent. For instance, in the period from 1960 to 1973, arrests of women for carrying or possessing weapons increased 304 percent, compared with a 170 percent increase for men. *Id.* Further,

> [t]he five year arrest trends, 1968-1973, revealed that arrests for young females under 18 years of age increased 35 percent while arrests for young males under 18 rose 10 percent. When the serious crimes as a group are considered, arrests of males, 1968-1973, were up 8 percent and female arrests increased 52 percent.

Id. at 34. *See also* G. SHEEHY, HUSTLING 17-19 (1973). Thus, a major premise underlying the disparity in male-female rehabilitative programs may well need reexamining.

4. *See* M. HERMANN & M. HAFT, *supra* note 3, at 345; Note, *supra* note 3, at 1269-73. It is suggested that sexual stereotyping determines the choice of what few rehabilitative programs are offered. Thus, men are given training in occupations calling for mechanical skills and physical labor, and female offenders are offered job skills only in those employment areas traditionally occupied by women. *See* Note, *supra* note 3, at 1242-43. *See also* Comment, *Women's Prisons: Laboratories for Penal Reform*, 1973 WIS. L. REV. 210, 226. The *1974-75 Central Arizona College General Catalogue*, at 138-44, which lists the courses offered at the Arizona State Prison, bears out this analysis. Men may receive training in such occupations as refrigeration and air conditioning, building trades and maintenance, welding, and graphic communications. The courses offered for women at the prison are limited to office skills. There are, however, some innovative attempts to meet the rehabilitative needs of women offenders. *See* DISTRICT OF COLUMBIA COMM'N ON THE STATUS OF WOMEN, FROM CONVICT TO CITIZEN: PROGRAMS FOR THE WOMAN OFFENDER 14-16, 18-22 (1974).

5. *See* M. HERMANN & M. HAFT, *supra* note 3, at 345. *See also* Comment, *supra* note 4, at 222-23.

6. The Supreme Court recently acknowledged the inhospitable job market facing women. In Kahn v. Shevin, 416 U.S. 351, 353 (1974), the Court ruled that a Florida law giving widows a property tax exemption made a reasonable distinction between widows and widowers, since it was designed to cushion the financial loss of the spouse most likely to bear a disproportionate financial burden. *Id.* at 353-56.

7. Ex-offenders' employment problems are rooted in public uneasiness over contact with former criminals. Surveys have shown that 74 percent of the public would be uneasy working with a former armed robber. Harris, *Changing Public Attitudes Toward Crime and Corrections*, 32 FED. PROB., Dec. 1968, at 12. While the percentage declines when the conviction was for a less serious offense, survey respondents indicated that the best employment opportunity they would offer an ex-offender would be a janitorial or production line job, regardless of the offender's crime. *Id.* An earlier study found that "[o]f 475 potential employers interviewed in New York City, 312 stated unequivocally that they would never hire a released offender; 311 of the 312 said they would fire such a man if they inadvertently hired him and later learned of his past." Note, *Employment of Former Criminals*, 55 CORNELL L. REV. 306, 307 (1970). *See also Special Project—The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1001-18 (1970).

Of particular significance is the fact that the ex-offender is denied employment in the majority of regulated occupations by virtue of federal and state statutes and many municipal ordinances. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 32-101 to -2636 (1956), *as amended*, (Supp. 1974-75); CAL. BUS. & PROF. CODE §§ 1-6699 (West 1974), *as amended*, (Supp. 1975); *id.* §§ 6700-25762 (West 1964), *as amended*, (Supp. 1975);

The inadequate and restrictive nature of the available rehabilitation programs affects the female offender in two significant ways. Without access to the limited, but more varied, employment and training activities offered to male prisoners,[9] women inmates are often denied the benefits of higher prison pay, good-time opportunities,[10] and special privileges associated with certain trustee positions. Moreover, inadequate in-prison vocational rehabilitation directly affects women offenders' post-release employability and their ability to be self-supporting, contributing members of society.

Society also pays twice for the inadequate rehabilitation of female offenders. Untrained and having to support themselves and their families,[11] many women ex-offenders become welfare recipients at best, and at worst turn to prostitution or other crimes, becoming "revolving-door recidivists."[12] Society not only bears the costs of wel-

---

N.Y. EDUC. LAW §§ 6501-7805 (McKinney 1972), *as amended*, (Supp. 1974-75); TUCSON, ARIZ., CODE § 19-35(b) (1965); *cf.* Lykke, *Attitude of Bonding Companies Toward Prisoners and Parolees*, 21 FED. PROB., Dec. 1957, at 36. *See also Special Project, supra* at 1002-03 nn.478-80.

8. Discrimination against minorities is readily apparent from the number of complaints filed with the various offices of the Equal Employment Opportunity Commission [EEOC]. During the fiscal year 1972, of 47,331 actionable charges filed, 27,468 were based on some form of racial discrimination; 5,321 more alleged discrimination on the basis of national origin. Of the 28,337 charges recommended for investigation, 18,403 were racially-based claims and 2,580 concerned national origin. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, 7TH ANN. REP. 38, 43 (1973). This discrimination is often covert, as is evidenced by recent cases concerning discrimination in the context of screening employment applicants. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (proscribing requirement of high school diploma where not related to job performance requirement); Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970), *modified*, 472 F.2d 631 (9th Cir. 1972) (policy of refusing to employ persons with arrest records not leading to conviction unlawful because of foreseeably discriminatory effect on Black applicants); *accord*, Carter v. Gallagher, 452 F.2d 315, 320 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). *But cf.* Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972) (finding requirement of minimum flight hours lawful despite such standard acting as inherent discrimination against Black applicants). Two courts also have discussed the disproportionate effect on minorities of exclusion from employment on the basis of criminal conviction, and have held that such exclusion cannot be arbitrary. To be reasonable, the courts concluded, the nature of the crime must be related to the job requirements. *See* Carter v. Gallagher, *supra*; Commonwealth v. Glickman, 370 F. Supp. 724, 730-31 n.6 (W.D. Pa. 1974).

9. One distinct cause of this limited access is the practice in most state correctional systems of housing women in separate institutions. Every state requires that women be housed separately from men. *See* Singer, *supra* note 2, at 300.

10. Singer, *supra* note 2, at 305. Good-time is a deduction of time from the prisoner's sentence in return for work performed and conformance to rules. *See, e.g.*, ARIZ. REV. STAT. ANN. § 31-251 (Supp. 1974-75); CAL. PENAL CODE §§ 2920, 2942, 4018.1, 4019 (West 1970), *as amended*, (Supp. 1975); MICH. STAT. ANN. § 5.883(2) (1973); *id.* §§ 28.1403, 28.1514 (1972).

11. In both a Pennsylvania study and a survey of the Federal Reformatory for Women in Alderson, West Virginia, 80 percent of the women offenders on whom records were available had dependent children. Crowell, *supra* note 2, at 26; Velimesis, *supra* note 2, at 14. In a survey done by the Women's Bureau of the Department of Labor, 9 out of 10 women offenders expected to work to support themselves and often others when they were released. Statement of Elizabeth Koontz, Director, Women's Bureau, Department of Labor, before the District of Columbia Comm'n on the Status of Women, Nov. 4, 1971.

12. Haft, *supra* note 1, at 4.

fare and institutional care,[13] but also loses the tax income that could be generated and the productivity that would be engendered by a fully employed, self-supporting individual.[14]

Despite the need for special efforts to solve women offenders' employability problems,[15] there have been few challenges to the exacerbating effects of inadequate and unequal in-prison rehabilitation programs and work opportunities. Perhaps this is because female inmates generally have not participated in two of the primary initiators of correctional reform—rioting and lawsuits.[16] As a result, women offenders have not benefited greatly from the expanding body of law created by prisoners' rights litigation.[17] Such suits usually have taken the form of class actions on behalf of male prisoners who challenge confinement conditions in particular institutions.[18] Where these actions have been aimed solely at improvements in such conditions as family visits, access to library facilities, exercise time allowance, and opportunity for work-release programs, the benefits gained have not extended to women's separate facilities.[19] Moreover, even successful

13. Welfare assistance and institutional maintenance costs vary from state to state. Annual expense to the state of Arizona for a woman on welfare with two children is approximately $1,132. *See* ARIZ. DEP'T OF PUB. WELFARE, 1969-70 ANN. REP. 10 (1970). The average annual cost per woman inmate at the Arizona State Prison is $2,432. ARIZ. DEP'T OF CORRECTIONS, ARIZ. STATE PRISON ANN. REP. 1969-70, 18 (1970).

14. An interesting study prepared in North Carolina for the United States Department of Labor concluded that there was a 16.5 percent rate of return on society's investment in a post-high school technical education program. A. CARROLL & L. IHNEN, COSTS & RETURNS OF TECHNICAL EDUCATION: A PILOT STUDY 48 (1966).

15. It is fully recognized that the employability problem is not the only important issue for women in prison. The other problems of special concern include pregnancy, parental rights, remoteness of incarceration from home and family, unequal law enforcement, and sentencing discrimination. Men also are affected by some of these problems, but they have peculiar impact on women prisoners. *See* Dett, *Criminal Justice: A Crime Against Women?*, 9 TRIAL, Nov./Dec. 1973, at 24; Goldman, *Women's Crime in a Male Society*, 22 JUV. CT. JUDGES J. 33 (1971); Price, *Life in Prison*, 3 OFF OUR BACKS, A JOURNAL OF LIBERATION 36 (1973); Comment, *The Prisoner-Mother and Her Child*, 1 CAPITAL U.L. REV. 127 (1972); Comment, *Sex and Sentencing*, 26 SW. L.J. 890 (1972); Note, *supra* note 3, at 1232-33; "Do Bad Checks Make a Mother Unfit?," 13 ARIZ. L. REV. 313, 317 (1971).

16. Comment, *supra* note 4, at 227.

17. *See generally* M. HERMANN & M. HAFT, *supra* note 3; Wexler & Silverman, *Representing Prison Inmates: A Primer on an Emerging Dimension of Poverty Law Practice*, 11 ARIZ. L. REV. 385 (1969). Some of the gains realized by women, and all offenders generally, are discussed at note 19 *infra*.

18. Haft, *supra* note 1, at 4-5. That women also have the need to raise many of the same issues as male prisoners is illustrated by such cases as: Barefield v. Leach, No. 10282 (D.N.M., Dec. 18, 1974) (challenging conditions at the women's facilities of the New Mexico State Penitentiary); Inmates of Sybil Brand Institute for Women v. County of Los Angeles, No. C50506 (Super. Ct., Los Angeles County, Cal., filed Feb. 22, 1973) (class action on behalf of all women in the Los Angeles County jail); Garnes v. Taylor, No. 159-72 (D.D.C., filed Jan. 25, 1972) (challenging conditions in the District of Columbia Women's Detention Center).

19. Remedies achieved in individual institutions do not usually have a carry-over effect to other facilities. Women offenders, and all offenders generally, however, have benefited from gains in fundamental due process rights afforded by prisoners' rights litigation. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974) (granting hearing rights to individuals threatened with revocation of good-time credit); Gagnon v. Scarpelli, 411

challenges of confinement conditions of female prisoners[20] have not resulted in extension of the remedies to women similarly situated, but located in other correctional institutions.

Thus, the ramifications of a disparate rehabilitation policy become clear. The woman offender, in need of educational and vocational training, suffers doubly when it is denied, since both her in-prison and post-release job opportunities are affected. Her employability handicap also adversely impacts upon society at large. Focusing on these personal and societal ramifications and keeping in mind that attempts to rectify the policy, where successful at all, have heretofore brought only piecemeal relief, this Note will explore the legal remedies available to confront the problem at its source and suggest an alternative solution.

THE FOURTEENTH AMENDMENT REMEDY

The fourteenth amendment, one of the primary tools in prisoners' rights litigation,[21] has been used effectively to eliminate certain problems.[22] Traditional fourteenth amendment approaches, however, have not afforded adequate avenues of relief for challenging differential rehabilitation programs. Consideration of the two essential clauses of the fourteenth amendment, equal protection and due process, reveals the problems inherent in their use as a basis for remedying claims of unequal and inadequate work and rehabilitation opportunities.

At issue in any equal protection challenge is the degree of state interest which can justify disparate treatment between male and female offenders.[23] If differential treatment were perceived to be based on

---

U.S. 778 (1973) (same as to probation); Morrissey v. Brewer, 408 U.S. 471 (1972) (same as to parole).

20. *See* Barefield v. Leach, No. 10282 (D.N.M., Dec. 18, 1974) (court ordered correctional authorities to submit a comprehensive plan to rectify certain nonjustifiable disparities); Taylor v. MacDonald, No. C-73-0415 SC (N.D. Cal., Sept. 27, 1974) (suit dismissed without prejudice after defendants substantially cured the denial of equal protection by providing for a women's halfway house); Dawson v. Carberry, No. C-71-1916-OJC (N.D. Cal., filed Nov. 22, 1971) (temporary adjournment to give correctional officials opportunity to formulate a program which would provide women with work-furlough opportunities).

21. *See* R. GOLDFARB & L. SINGER, AFTER CONVICTION 443-59 (1973); M. HERMANN & M. HAFT, *supra* note 3, at 67-238.

22. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974); Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

23. *See* Wagner v. Holmes, 361 F. Supp. 895 (E.D. Ky. 1973).

> The Equal Protection Clause does not detract from the right of the State to segregate prisoners from society but it does require that: (1) classification of one group of prisoners from another group of prisoners must not be arbitrary, but based on a valid and substantial difference, (2) the state policy involved must be in furtherance of a legitimate objective of government, and (3) there must be a real and substantial nexus between the classification and the objective.

Id. at 896-97.

a suspect classification, it would, in the absence of a compelling state interest, be invalidated.[24] A majority of the Supreme Court, however, has yet to apply a strict scrutiny test to sex classifications, continuing to use the more lenient rational basis standard.[25] Nevertheless, the Court seems to be analyzing such issues more pragmatically, an approach that has the appearance of a more rigorous test than the traditional rational basis standard.[26]

Notwithstanding such apparent progress in judicial thinking, there have been very few reported cases in which the exclusion of women offenders from correctional rehabilitation programs has been successfully challenged on equal protection grounds.[27] The principle hurdle

24. *See* Saunders v. Sumner, 366 F. Supp. 217, 219 (W.D. Va. 1973) (summary judgment denied to prison authorities where prisoner-plaintiffs alleged arbitrary favoritism of white inmates). *See generally* "The State Equal Protection Clause: A New Development," 16 ARIZ. L. REV. 489, 566, 567 (1974).

25. Frontiero v. Richardson, 411 U.S. 677 (1973), which held that sex classifications are inherently suspect, was a plurality opinion and has not been found persuasive by many courts. A number of courts have continued to apply the rational basis test. *See, e.g.*, Harrigfeld v. District Court, 95 Idaho 540, 511 P.2d 822 (1973); Sumpter v. State, —Ind. App. —, 306 N.E.2d 95 (1974); *In re* J.D.G., 498 S.W.2d 786 (Mo. 1973); State v. Chambers, 63 N.J. 287, 307 A.2d 78 (1973); Smith v. Keator, 21 N.C. App. 102, 203 S.E.2d 411, *aff'd*, 285 N.C. 530, 206 S.E.2d 203 (1974); Bassett v. Bassett, 521 P.2d 434 (Okla. Ct. App. 1974); Warshafsky v. Journal Co., 63 Wis. 2d 130, 216 N.W.2d 197 (1974). The Supreme Court also appears to be continuing to use the rational basis standard in dealing with sex classifications. *See* Weinberger v. Wiesenfeld, 95 S. Ct. 1225 (1975); Kahn v. Shevin, 416 U.S. 351, 355-56 (1974). A minority of the Court, however, has been arguing for a strict standard. In *Kahn*, two dissenters outlined criteria for determining suspect categories. These criteria encompassed classifications which are based on "immutable characteristics over which individuals have little or no control" and which "too often have been inexcusably utilized to stereotype and stigmatize politically powerless segments of society." *Id.* at 357 (Brennan & Marshall, J.J., dissenting).

26. Thus, while the Court continues to use the language of the rational basis test, that a classification "must be reasonable, not arbitrary" and must bear "a fair and substantial relation to the object of the legislation," Reed v. Reed, 404 U.S. 71, 76 (1971), *quoting* Royster Gun Co. v. Virginia, 253 U.S. 412, 415 (1920), fewer classifications based on sex are found to meet this traditional standard. *Compare* Weinberger v. Wiesenfeld, 95 S. Ct. 1225 (1975), [and] Reed v. Reed, *supra, with* Kahn v. Shevin, 416 U.S. 351 (1974). Regardless of the label applied to the test, the practical result is that courts at all levels are finding more sex classifications to be irrational, especially when they perpetuate stereotypes or are enacted solely for administrative convenience. *See, e.g.*, Weinberger v. Wiesenfeld, *supra*; Reed v. Reed, *supra*; Brenden v. Independent School Dist. No. 742, 477 F.2d 1292 (8th Cir. 1973); Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973); Samuel v. University of Pittsburgh, 375 F. Supp. 1119 (W.D. Pa. 1974); Harrigfeld v. District Court, 95 Idaho 540, 511 P.2d 822 (1973); Bassett v. Bassett, 521 P.2d 434 (Okla. Ct. App. 1974). *See also* Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-20 (1972); Note, *supra* note 3, at 1246-48.

27. Three such cases are: Barefield v. Leach, No. 10282 (D.N.M., Dec. 18, 1974) (court found several areas in which treatment provided female inmates at New Mexico State Penitentiary lacked parity with the treatment accorded males); Taylor v. MacDonald, No. C-73-0415-SC (N.D. Cal., Sept. 27, 1974) (case dismissed after defendants substantially cured the denial of equal protection claimed against San Mateo County jail officials by providing a halfway house facilitity for women); Dawson v. Carberry, No. C-71-1916-OJC (N.D. Cal., filed Nov. 22, 1971) (temporary adjournment to give correctional officials an opportunity to formulate a work furlough program for women incarcerated in the San Francisco County jail). *See also* Inmates of Sybil Brand Institute for Women v. County of Los Angeles, No. 50506 (Super. Ct., Los Angeles County, Cal., filed Feb. 22, 1973). *Sybil Brand*, a broad prison conditions lawsuit, includes specific

which the complainants in such cases face is meeting the arduous burden of overcoming the rational basis standard. They must demonstrate that the alleged discriminatory practices are arbitrary and capricious and not based on a fair and substantial relationship to a legitimate objective of the defendant.[28]

Conversely, the state's defense to these suits need only factually demonstrate a rational basis for the practice. Thus, authorities might defend existing correctional programs as being merely reflective of the realistic job opportunities available to ex-offenders.[29] The disparity between men's and women's institutional rehabilitation programs also might be justified because of the state interest in fiscal economy: the relatively small number of women prisoners[30] makes rehabilitation expenses particularly burdensome because of the higher per capita costs.[31] Related to the fiscal economy argument might be a state allegation pointing to the physical limitations of available facilities.

Unfortunately for the equal protection litigant, these justifications might well be sufficient to meet even a "more rigorous" rational basis standard,[32] particularly since courts generally defer to institutional discretion in corrections programs.[33] Thus, the equal protection clause

---

claims of denial of equal opportunity for work-training, work-furlough, contact visits with family, and exercise privilege. The case is still in the process of discovery.

28. *See* Kahn v. Shevin, 416 U.S. 351, 355 (1974); Reed v. Reed, 404 U.S. 71, 76 (1971).

29. *See* Note, *supra* note 3, at 1252. Indeed, the court in Barefield v. Leach, No. 10282 (D.N.M., Dec. 18, 1974), did not discourage that defense when it only enjoined the defendants from maintaining disparity of treatment but did not disapprove of coordinating the available vocational programs with post-release job potentiality.

30. The inmate population in federal and state correctional institutions as of December 31, 1970, was 196,429 men and 5,635 women, a ratio of over 35 to 1. DEP'T OF JUSTICE, NATIONAL PRISONER STATISTICS BULLETIN NO. 47, PRISONERS IN STATE AND FEDERAL INSTITUTIONS FOR ADULT FELONS 8, table 5 (1972).

31. *See* Haft, *supra* note 1, at 3; Comment, *supra* note 4, at 219. *See generally* Note, *supra* note 3, at 1231-44. In 1972-73 the annual average cost per woman inmate at the Arizona State Prison was $4,979, compared to the institution's annual average cost per inmate of $3,832. It is not clear from the data whether the per inmate figure refers solely to men or is a combined cost average for both men and women. ARIZ. DEP'T OF CORRECTIONS, ARIZ. STATE PRISON ANN. REP. 1972-73, 1, 3 (1973). An argument against the fiscal-burden defense may be found in the language of Shapiro v. Thompson, 394 U.S. 618, 633 (1969):

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens.

32. *See* text & note 26 *supra*. In Barefield v. Leach, No. 10282 (D.N.M., Dec. 18, 1974), the court found that the state could justify a lack of parity of treatment in a prison setting where its actions had a fair and substantial relationship to the purpose of the inmates' incarceration. Similarly, in ruling that prisoner-plaintiffs have no right to rehabilitation training programs, another court has concluded: "Humane efforts to rehabilitate should not be discouraged by holding that every prisoner must be treated exactly alike in this respect." Wilson v. Kelley, 294 F. Supp. 1005, 1012-13 (N.D. Ga.), *aff'd per curiam*, 393 U.S. 266 (1968). *But see* Taylor v. Sterrett, 344 F. Supp. 411, 422 (N.D. Tex. 1972), *modified*, 499 F.2d 367 (5th Cir. 1974), *cert. denied*, 95 S. Ct. 1414 (1975).

33. Wilson v. Kelley, 294 F. Supp. 1005, 1012 (N.D. Ga.), *aff'd per curiam*, 393

may not provide a sufficient basis to challenge differences in rehabilitation opportunities available to men and women prisoners.[34]

Faced with the foregoing obstacles to an equal protection claim, the prisoner-plaintiff may consider challenging sexually disparate treatment under the due process clause, alleging that furnishing adequate rehabilitation opportunities to some prisoners but not to others is a substantial denial of due process. Such a challenge, however, must surmount the courts' recognition that incarceration necessarily brings about the withdrawal or curtailment of many privileges and rights.[35] Those courts which apply the vestiges of the right-privilege doctrine in determinations concerning prisoners' confinement conditions have ruled that due process protects only rights and not privileges.[36] Further, even where the claim alleges that there has been an excessive forfeiture or limitation of prisoners' rights, courts seem to view only certain rights as fundamental, thus warranting in-prison protection.[37] It is unlikely that vocational training would be among those rights accorded this fuller protection since rehabilitation opportunities have not been deemed to be a right, but have generally been termed a privilege.[38] As a result, the availability of such programs and access to them has been held to be within the discretionary authority of corrections officials, and challenges to such authority are often disallowed.[39] Thus, the

U.S. 266 (1968). *See* Shaw v. Beto, 318 F. Supp. 1215, 1216 (S.D. Tex. 1970); Mercer v. United States Medical Center for Fed. Prisoners, 312 F. Supp. 1077, 1079-80 (W.D. Mo. 1970).

34. *See* Note, *supra* note 3, at 1244-53. *But see* Note, *Denial of Work Release Programs to Women: A Violation of Equal Protection*, 47 S. CAL. L. REV. 1453 (1974).

35. *See, e.g.*, Barnett v. Rodgers, 410 F.2d 995, 1000 (D.C. Cir. 1969); Jackson v. Godwin, 400 F.2d 529, 532 (5th Cir. 1968); Sewell v. Pegelow, 291 F.2d 196, 198 (4th Cir. 1961), *overruled in part*, District of Columbia v. Carter, 409 U.S. 418, 421 n.5 (1973).

36. *See, e.g.*, Wagner v. Holmes, 361 F. Supp. 895, 897 (E.D. Ky. 1973); Shaw v. Beto, 318 F. Supp. 1215, 1216 (S.D. Tex. 1970); United States *ex rel.* Cleggett v. Pate, 229 F. Supp. 818, 819 (N.D. Ill. 1964).

37. Thus, the rights of privacy, travel, association, and confrontation and examination of witnesses are not accorded the same protection as such rights as freedom to exercise one's religion, personal security from another's invasion, or racial nondiscrimination. *Compare* Wolff v. McDonnell, 418 U.S. 539 (1974) (state prison officials have discretion to accord or withhold prisoners' right to confront and cross-examine witnesses), Rinehart v. Brewer, 491 F.2d 705 (8th Cir. 1974) (no right to decide own hair length while prisoner), Paka v. Manson, 387 F. Supp. 111 (D. Conn. 1974) (no right to organize), [*and*] Wagner v. Holmes, 361 F. Supp. 895 (E.D. Ky. 1973) (no right to leave prison and engage in outside employment), *with* Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969) (impact on religious exercise must be as small as possible), Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944) (right to personal security against unlawful invasion), [*and*] Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968) (racial segregation charge is within ambit of court protection).

38. *See* Green v. United States, 481 F.2d 1140 (D.C. Cir. 1973); Preston v. Ford, 378 F. Supp. 729, 730 (E.D. Ky. 1974); Wagner v. Holmes, 361 F. Supp. 895, 897 (E.D. Ky. 1973); Shaw v. Beto, 318 F. Supp. 1215, 1216 (S.D. Tex. 1970); United States *ex rel.* Cleggett v. Pate, 229 F. Supp. 818, 819 (N.D. Ill. 1964); *cf.* Lunsford v. Reynolds, 376 F. Supp. 526, 528 (W.D. Va. 1974); Mercer v. United States Medical Center for Fed. Prisoners, 312 F. Supp. 1077, 1079 (W.D. Mo. 1970).

39. *See* text accompanying note 33 *supra*. At least one court, however, has taken

prisoner-plaintiff's due process claim must overcome the hurdle of the right-privilege dichotomy.[40]

The privilege view is being counteracted, however, by a general erosion of the right-privilege doctrine.[41] Reflecting this trend, some courts, although acknowledging the doctrine, have limited its impact by affording legal protection to privileges on the grounds that constitutional principles of substantive and procedural fairness must be followed even in the denial of a privilege.[42] Thus, even though a state is under no duty to provide rehabilitation opportunities to prisoners, once it has elected to do so it would be bound to distribute such benefits fairly.[43] Additionally, there is a developing theory that there is a right to rehabilitation.[44] The complete effectiveness of a right to rehabilita-

---

the absence of rehabilitation programs into account in determining that the conditions and practices of an entire prison system were unconstituional. *See* Holt v. Sarver, 309 F. Supp. 362, 379 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); *cf.* Taylor v. Sterrett, 344 F. Supp. 411, 422 (N.D. Tex. 1972), *modified on other grounds*, 499 F.2d 367 (5th Cir. 1974), *cert. denied*, 95 S. Ct. 1414 (1975) (order for jail improvements included provision of facilities for educational programs); Jones v. Wittenberg, 330 F. Supp. 707, 717 (N.D. Ohio 1971), *aff'd*, 456 F.2d 854 (6th Cir. 1972) (court order called for submission of a proposal establishing inmate programs, including work or study release programs and a constructive work plan).

40. *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.14, at 187 (1972). Some authors suggest that the privilege doctrine is virtually eroded in most applications. *See* G. ROBINSON & E. GELLHORN, THE ADMINISTRATIVE PROCESS at xiv, 657-63 (1974); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

41. *See* K. DAVIS, *supra* note 40, at § 7.13; G. ROBINSON & E. GELLHORN, *supra* note 40, at xiv, 657-63. *See generally* Van Alstyne, *supra* note 40. Significiant to this trend in the context of prisoners' rights litigation are: Wolff v. McDonnell, 418 U.S. 539 (1974) (granting hearing rights to individuals threatened with revocation of good-time credit); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (same as to probation); Morrissey v. Brewer, 408 U.S. 471 (1972) (same as to parole).

42. *See, e.g.*, Jackson v. Godwin, 400 F.2d 529, 540 (5th Cir. 1968) (rights and privileges of access to newspapers cannot be denied or curtailed arbitrarily); Birnbaum v. Trussell, 371 F.2d 672, 677-78 (2d Cir. 1966) (due process clause protects against improper employee dismissal even though governmental employment is only a privilege); House of Tobacco, Inc. v. Calvert, 394 S.W.2d 654, 657 (Tex. 1965) (license privilege cannot be revoked without cause). The Supreme Court has stated that procedural protections no longer turn on a distinction between rights and privileges. *See, e.g.*, Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Schware v. Board of Bar Examiners, 353 U.S. 232, 239 n.5 (1957).

43. *See* Saunders v. Sumner, 366 F. Supp. 217, 219-20 (W.D. Va. 1973). *See also* Landman v. Royster, 333 F. Supp. 621, 644 (E.D. Va. 1971). Even where such protection is accorded, however, the prisoner still must demonstrate that the action of the corrections authorities is arbitrary and capricious. *See* Beatham v. Manson, 369 F. Supp. 783, 791-92 (D. Conn. 1973).

44. For further discussion on the right to rehabilitation, see R. GOLDFARB & L. SINGER, *supra* note 21, at 395-400; M. HERMANN & M. HAFT, *supra* note 3, at 189-93; Comment, *Beanpicking and Bars: Can Prisons Be Compelled to Rehabilitate?*, 4 CUMBER.-SAM. L. REV. 471, 477-84 (1974). This theory finds its support in the evolving right to treatment for institutionalized mental patients. *See* Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), *cert. granted*, 419 U.S. 894 (1974); Stachulak v. Coughlin, 364 F. Supp. 686 (N.D. Ill. 1973); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971); *cf. In re* Gault, 387 U.S. 1, 22-23 n.30 (1967) (acknowledging that some courts had indicated that appropriate treatment is an essential part of valid juvenile custody); Welsch v. Likins, 373 F. Supp. 487 (D. Minn. 1974) (right of treatment afforded to mentally retarded patients). *Contra*, Burnham v. Department of Pub. Health, 349 F. Supp. 1335 (N.D. Ga. 1972). *See generally Special Project—The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 228 (1971).

tion would appear to require that it be accorded fundamental status so that all incarcerated individuals could fully benefit.[45]

The foregoing discussion emphasizes that even with some positive trends in both equal protection and due process prisoners' rights litigation, the outcome of a fourteenth amendment challenge to disparate rehabilitative programs is presently unpredictable. In light of this uncertainty, the availability of a more secure avenue of relief is of great importance. Examination of the Civil Rights Act of 1964 reveals a potential remedy—Title VII.[46] The proposed use of this section of the Act as a statutory remedy for disparate vocational rehabilitation programs in prison is novel.[47] It is the object of this Note, therefore, to discuss the feasibility and advantages of Title VII as a legal tool in prisoners' rights litigation.

THE TITLE VII REMEDY FOR PRISONERS

Admittedly, the initial reaction to a suggestion that Title VII be used as a tool for prisoners' rights litigation is likely to be that prisoners are not employed and are certainly not employees. Review of the underlying purposes and objectives of Title VII will show, however, that the Act is intended to remedy all situations which might curtail employment opportunities, even those occurring outside the formalized employee-employer relationship. Further scrutiny of the specific provisions of Title VII, including the statutory exemptions, reveals that the woman offender may be encompassed within the Act's scope. Finally, this section will review the procedural advantages for the prisoner-plaintiff which are inherent in the use of Title VII.

The Supreme Court has recognized that the congressional objective in enacting Title VII was "to achieve equality of employment opportunities."[48] Another court has stated that the purpose is "to provide equal access to the job market for both men and women."[49] Several considerations substantiate these broad judicial interpretations of the remedial objectives of the Act. First, it is evident that Title VII is intended to go beyond mere formalized employer-employee relationships.[50] For example, an aggrieved person under Title VII need not

45. Thus, the right could be recognized by the courts even though the claimant was a prisoner. *See* text & notes 35-37 *supra*.

46. Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. II, 1973), *amending* Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e to 2000e-15 (1970).

47. Use of Title VII as a prisoners' litigation tool also was mentioned by Singer, *supra* note 2, at 305-06.

48. The Supreme Court has stated that this objective was "plain from the language of the statute." Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971).

49. Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. 1973).

50. Section 2000e-5(b) provides that a charge may be filed "by or on behalf of

have been an employee of the defendant[51] or even an applicant for employment:[52] the protections of the Act are extended to any "aggrieved person."[53] Additionally, the Act's prohibition of discrimination "against any individual" evidences its broad scope.[54] Concerning this language, the District of Columbia Circuit Court of Appeals has stated:

> [N]owhere are there words of limitation that restrict references in the Act to "any individual" as comprehending only an employee of an employer. Nor is there any good reason to confine the meaning of "any individual" to include only former employees and applicants for employment, in addition to present employees. Those words should, therefore, be given their ordinary meaning so long as that meaning does not conflict with the manifest policy of the Act.[55]

Also of considerable significance is the nature of the activity which Title VII proscribes. Not only does the Act set standards for employee-employer relationships, it goes beyond the traditional concepts of employment and prohibits any form of discrimination which might affect *access* to the job market and thus curtail an individual's employment opportunities.[56] These considerations are of particular

---

a person claiming to be aggrieved" by an unlawful employment practice. 42 U.S.C. § 2000e-5(b) (1970), *as amended*, (Supp. II, 1973). *See also* Hackett v. McGuire Bros., 445 F.2d 442, 445 (3d Cir. 1971) (ruling that "[a]n aggrieved person obviously is *any* person aggrieved by any of the forbidden practices" (emphasis added)); 42 U.S.C. §§ 2000e-5(b), -5(f)(1) (1970), *as amended*, (Supp. II, 1973); discussion note 56 *infra*. The *Hackett* court also stated: "The use in 42 U.S.C. § 2000e-5 of the language 'a person claiming to be aggrieved' shows a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." 445 F.2d at 446. In Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972), the Supreme Court approved the *Hackett* interpretation of standing and applied it to a suit under the Civil Rights Act of 1968.

51. Hackett v. McGuire Bros., 445 F.2d 442, 445 (3d Cir. 1971); *accord*, EEOC Decision No. 72-0679, CCH 1973 EEOC DEC. ¶ 6324, at 4579 (1971).

52. EEOC Decision, Case No. YNY 9-047, CCH 1973 EEOC DEC. ¶ 6010, at 4028 (1969).

53. 42 U.S.C. §§ 2000e-5(b), -5(f)(1) (1970), *as amended*, (Supp. II, 1973). *See* discussion note 50 *supra*.

54. All of the unlawful practice provisions proscribe discrimination against "any individual." 42 U.S.C. §§ 2000e-2(a) to -2(d) (1970), *as amended*, (Supp. II, 1973).

55. Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. 1973).

56. The breadth of the Act's prohibition is demonstrated by the protection afforded an individual in Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973). The Title VII complainant in *Sibley* was a male private duty nurse who, on two separate occasions, was referred by his registry for possible employment with female patients at Sibley Memorial Hospital. On both occasions floor duty nurses at the hospital allegedly refused to allow him to see his potential employer, on the basis of a hospital policy against male nurses attending female patients. The court noted:

> In prohibiting discrimination in employment on the basis of sex, "one of Congress' main goals was to provide equal access to the job market for both men and women." . . . Control over access to the job market may reside, depending upon the circumstances of the case, in a labor organization, an employment agency, or an employer as defined in Title VII; and it would appear that Congress has determined to prohibit each of these from exerting any power it may have to foreclose, on indivious [*sic*] grounds, access by any individual to employment opportunities otherwise available to him. To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with

importance to the prisoner-plaintiff since they indicate that Congress intended to create remedial legislation which would afford every individual a right to equal employment opportunities.[57] It also is significant that prisoners were not expressly excepted from Title VII's protection. To the contrary, the Equal Employment Opportunity Commission [EEOC] has concluded that prisoners are within the ambit of Title VII.[58] Since the correctional institution may adversely influence the woman offender's access to employment opportunities, both in prison and after release, Title VII may provide relief where an institutional practice has a discriminatory effect on employability.[59] While the prison context appears to be within the intended scope of Title VII, it must be established that the prisoner-plaintiff can meet the specific requirements of the Act.

Initially, in order for Title VII to be called into effect, there must be an unlawful employment practice by an employer or other person subject to the Act's standards. Application of Title VII requires a determination of whether a prison or jail falls within the Act's definition of employer.[60] Since the 1972 amendments extending the provisions

---

another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.

Id. at 1341.

57. The broad remedial purpose has been phrased in several ways. See H.R. 7152, 88th Cong., 2d Sess., 110 CONG. REC. 2804-05 (1964) (of particular significance is section 701, the Findings and Declaration of Policy for Title VII, as found at 110 CONG. REC. 2510 (1964)); 110 CONG. REC. 13079-80 (1964) (remarks of Senator Clark during the debate over the Dirksen amendment to H.R. 7152, which deleted the Findings and Declaration of Policy). *See also* Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1971); Warshafsky v. Journal Co., 63 Wis. 2d 130, 144, 216 N.W.2d 197, 203 (1974); Statement of Purpose of Equal Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, *amending* 42 U.S.C. §§ 2000e to 2000e-15 (1970) (codified at 42 U.S.C. §§ 2000e to 2000e-17 (Supp. II, 1973)).

58. Issie L. Jenkins, EEOC Associate General Counsel, has stated:

> Under Title VII of the Civil Rights Act of 1964, as amended, Section [2000e(f)] merely defines an employee as "an individual employed by an employer." There is no requirement that such employment be voluntary. Under Section [2000e(b)], the word employer is defined as an individual government, governmental agency, or political subdivision, etc. engaged in industry affecting commerce. . . . Therefore, it would appear that prisoners are protected under Title VII.

Letter from Issie L. Jenkins, Associate General Counsel, Equal Employment Opportunity Comm'n, Washington, D.C., to Kathryn W. Tate, Sept. 9, 1974, on file in the *Arizona Law Review* office. It is well settled that agency interpretations are given great weight by courts. *See* Udall v. Tallman, 380 U.S. 1, 16 (1965). In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Court gave its approval to the Commission's construction of 42 U.S.C. § 703(h) (1964) (now § 2000e-2(h)), acknowledging that: "The administrative interpretation of the Act by the enforcing agency is entitled to great deference." *Id.* at 433-34.

59. For a discussion of such possible effects, see text & notes 127-37 *infra*. The conclusion that Title VII should afford a remedy for a prisoner-plaintiff assumes that the state's action does not fall within either the bona fide occupational qualification or business necessity exceptions. *See* 42 U.S.C. § 2000e-2(e)(1) (1970); text & notes 85-102 *infra*.

60. "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such

of Title VII to state and local governments,[61] all state and local facilities having 15 or more full-time employees, such as guards, administrative personnel, and others, are considered employers within the definition of Title VII.[62] Thus, a prison or jail, as an employer, must comply with Title VII in dealing with its employees.

Applicability of the Act, however, also requires that the complainant be either an employee[63] or an individual aggrieved[64] by the practices of an employer. Whether an incarcerated individual can be considered an employee of the corrections institution is not entirely clear.[65] While Title VII defines employer with some specificity,[66] employee is merely defined as "an individual employed by an employer."[67] The precise status of the individual, therefore, appears unimportant so long as the criterion of employment by an employer can be established.[68] Although an employment relationship may not be present in the vocational training or educational classes offered in prisons and jails, the work-furlough programs and trustee and in-prison industry positions involve labor done under the direction and for the

---

a person . . . ." 42 U.S.C. § 2000e(b) (1970), *as amended*, (Supp. II, 1973). "The term 'person' includes . . . governments, governmental agencies, [and] political subdivisions . . . ." *Id.* § 2000e(a). "The term 'industry affecting commerce' . . . includes any governmental industry, business, or activity." *Id.* § 2000e(h).

61. 42 U.S.C. § 2000e(a) (1970), *as amended*, (Supp. II, 1973). *See* text & note 106 *infra*.

62. 42 U.S.C. § 2000e(b) (1970), *as amended*, (Supp. II, 1973). *See* discussion note 60 *supra*.

63. *See* text & notes 65-81 *infra*.

64. *See* text & notes 82-84 *infra*.

65. At least one court has stated that working prisoners are employees of the state prison. Huntley v. Gunn Furniture Co., 79 F. Supp. 110, 116 (W.D. Mich. 1948); *cf.* Sims v. Parke Davis & Co., 334 F. Supp. 774, 791 (E.D. Mich.), *aff'd per curiam*, 453 F.2d 1259 (6th Cir. 1971), *cert. denied*, 405 U.S. 978 (1972). *But see* Prisoners' Labor Union at Bedford Hills (Women's Div.) v. Helsby, 44 App. Div. 2d 707, 354 N.Y.S.2d 694 (1974) (prisoners are not "public employees" under N.Y. CIV. SERV. LAW § 201(7) (McKinney Supp. 1974-75)).

66. 42 U.S.C. § 2000e(b) (1970), *as amended*, (Supp. II, 1973).

67. *Id.* § 2000e(f).

68. Employment is not defined by Title VII. Employers, however, are proscribed from engaging in unlawful employment practices which could deprive individuals of equal employment opportunities. 42 U.S.C. §§ 2000e-2(a) to -2(d) (1970), *as amended*, (Supp. II, 1973). Thus, in order to determine whether a prisoner is employed and whether prison work is employment within the context of Title VII, a court would have to construe the words "employee" and "employment." The Supreme Court has often stated: "The words of a statute are to be read in their natural and ordinary sense, giving them a meaning to their full extent and capacity, unless some strong reason to the contrary appears." Miller v. Robertson, 266 U.S. 243, 250 (1924). *See also* Old Colony Trust Co. v. Commissioner, 301 U.S. 379, 383 (1937). The purpose of the statute was also pertinent to the *Miller* Court; thus, in ruling that "debt" within the Trading with the Enemy Act, § 9, ch. 106, 40 Stat. 411, 419 (1917), *as amended*, 50 App. U.S.C. § 9 (1970), included a claim for damages for breach of contract, the Court noted:

> This provision is highly remedial and should be liberally construed to effect the purposes of Congress and to give remedy in all cases intended to be covered. . . . The just purpose of the section is not to be defeated by a narrow interpretation or by unnecessarily restricting the meaning of the word within technical limitations.

266 U.S. at 248. See discussion note 50 *supra*, for an example of how the meaning of words within Title VII have already been afforded the same type construction.

benefit of the state or another employer in return for some form of compensation.[69] Such relationships have been granted employer-employee status by some courts,[70] and certain statutes even use language of "employment" in referring to activities involving prison labor programs.[71] In light of the remedial purpose of Title VII,[72] and the broad general use of the word "employment" in our language,[73] this employment requirement of the Act is likely to be given an expansive meaning.[74] It is also significant that Title VII does not require that employment be voluntary.[75]

The effect of state statutes which deny the status of employee to state prisoners must be considered, however.[76] Such statutes appear

69. Consideration passes to the prisoner in the form of good-time credit or payment of money or privileges. *Cf.* Johnson v. Industrial Comm'n, 88 Ariz. 354, 356 P.2d 1021 (1960); Pruitt v. Workmen's Compensation Appeals Bd., 261 Cal. App. 2d 546, 68 Cal. Rptr. 12 (Ct. App. 1968). Both courts held county jail prisoners were eligible for workmen's compensation benefits, all elements of contract for hire being present. In *Johnson*, the inmate received compensation in the form of extra cigarettes, lodging, and meals. In *Pruitt*, consideration was a carton of cigarettes per week.

70. *See* Huntley v. Gunn Furniture Co., 79 F. Supp. 110, 116 (W.D. Mich. 1948) (prisoners are employees of the state prison); Johnson v. Industrial Comm'n, 88 Ariz. 354, 356 P.2d 1021 (1960) (county jail inmate was employee of contract employer within terms of workmen's compensation act); *accord*, Pruitt v. Workmen's Compensation Appeals Bd., 261 Cal. App. 2d 546, 552-53, 68 Cal. Rptr. 12, 16 (Ct. App. 1968). *But see* Watson v. Industrial Comm'n, 100 Ariz. 327, 332, 414 P.2d 144, 148 (1966); Prisoners' Labor Union at Bedford Hills (Women's Div.) v. Helsby, 44 App. Div. 2d 707, 354 N.Y.S.2d 694 (1974).

71. *See, e.g.*, ARIZ. REV. STAT. ANN. § 31-233(A) (Supp. 1974-75) (authorizes short term releases from prison "for the purpose of *employing* such person in any work directly connected with the administration, management, or maintenance of the prison or institution in which he is confined . . . ."); CAL. PENAL CODE § 2701 (West Supp. 1975) (empowers corrections authorities to cause state prisoners "to be *employed* in the rendering of such services and in the production and manufacture of such articles, materials, and supplies" as is or may be needed by state and local governments); DEL. CODE ANN. tit. 11, § 6532(a) (1975) (directs the department of corrections to "provide opportunities for *employment*, work experiences, and training for all inmates." (emphasis added)). The use of such language in these statutes suggests a prisoner is employed when involved in the outlined activities.

72. *See* text & notes 48-57 *supra*.

73. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 743 (1961) defines "employment" as:

> 1: Use, purpose
> 2a: activity in which one engages and employs his time and energies . . . as (1): work . . . in which one's labor or services are paid for by an employer . . . (2): temporary or occasional work or service for pay . . . (3): occasional activity engaged in as an avocation, pastime, habit, or expedient
> b: an instance of such activity . . . .

74. For a discussion of the deference accorded agency interpretations, see note 58 *supra*. Note also the way in which other provisions of Title VII have been read expansively. *See* discussion note 50 *supra*.

75. Interpretation of section 2000e(f) (then section 701(f)). *See* letter from Issie L. Jenkins, *supra* note 57. *See also* McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972). In *McClure*, the court stated: "Because Title VII's definition of 'employee' is not restrictive, the existence of such a status for a certain individual must turn on the facts of each case." *Id.* at 557. The court then ruled that where the individual was selected, employed, controlled, trained, and paid by the employer, the individual was within the definition of employee for purposes of the Act. *Id.* The prisoner, as an individual selected, employed, controlled, trained, and paid by the prison, could also, therefore, be considered within the Act's definition.

76. *See, e.g.*, ARIZ. REV. STAT. ANN. § 31-254(E) (Supp. 1974-75); CAL. PENAL CODE § 2700 (West 1970); WASH. REV. CODE ANN. §§ 72.60.100, 72.65.120 (Supp.

inapplicable for two reasons. First, legislation of this type generally was enacted to codify and clarify case law interpreting workmen's compensation statutes as denying coverage to prisoners injured in prison labor activities.[77] Thus, since a cardinal principle of statutory interpretation is to ascertain and follow legislative intent,[78] a court could conclude that these provisions have a single specific purpose and were not intended to define the status of prison inmates for other purposes.[79] Second, even if the statutes were intended to have such an inclusive application, once a court determined that Title VII applied in a prison employment situation, the Act would likely be found, under the supremacy clause, to override any state legislation,[80] as it has other state laws which conflicted with Title VII.[81]

Irrespective of whether a woman offender can be considered an

1974). It should be noted, however, that the Arizona and California statutes relate to "work [done] *in* any *state* prison or institution" (emphasis added). ARIZ. REV. STAT. ANN. § 31-254(A) (Supp. 1974-75); CAL. PENAL CODE § 2700 (West 1970). Thus, neither work-release programs nor municipal or county jail activities are within those statutes' express scope. *Cf.* Pruitt v. Workmen's Compensation Appeals Bd., 261 Cal. App. 2d 546, 68 Cal. Rptr. 12 (Ct. App. 1968), *citing with approval* Johnson v. Industrial Comm'n, 88 Ariz. 354, 365 P.2d 1021 (1960).

77. For instance, *Arizona Revised Statutes Annotated* section 31-254 was enacted after the decision of Watson v. Industrial Comm'n, 100 Ariz. 327, 414 P.2d 144 (1966). *Watson* denied workmen's compensation benefits to a state prisoner injured while working on a prison farm. No contract for hire was found, as required by the governing statutory definition of employee, because the work was not voluntary. The Washington penal code no longer denies industrial insurance coverage to prisoners. *Compare* WASH. REV. CODE ANN. §§ 72.60.102, 72.64.065 (Supp. 1974), *with* ch. 28, § 72.60.100, [1959] Wash. Sess. Laws 323, *as amended*, WASH. REV. CODE ANN. § 72.60.100 (Supp. 1974). Therefore, the current Washington statutes denying employee status to prisoners, WASH. REV. CODE ANN. §§ 72.60.100, 72.65.120 (Supp. 1974), would seem to have a different purpose than the California and Arizona provisions. Such purpose could be to avoid prisoners' claims that they are entitled to retirement pensions or other such benefits normally accorded state employees.

78. *See* Mendelsohn v. Superior Court, 76 Ariz. 163, 169, 261 P.2d 983, 987 (1953). *See also* Arnold Constr. Co. v. Arizona Bd. of Regents, 109 Ariz. 495, 498, 512 P.2d 1229, 1232 (1973).

79. Prison labor activities are often referred to as "employment." See discussion note 7 *supra*. Even the Washington code, which most inclusively denies prisoners the status of employee, has a statute which refers to prison labor as employment. *See* WASH. REV. CODE ANN. § 72.60.110 (1962).

80. A state statute may not contravene the objectives of a constitutionally-based federal statute even if the state statute did not intend to conflict. Perez v. Campbell, 402 U.S. 637, 651-52 (1971). The preemptive provision of the Civil Rights Act of 1964 states: "[No] provision of this Act [shall] be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act . . . ." 42 U.S.C. § 2000h-4 (1970). For a discussion of the preemption doctrine under the supremacy clause, see Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51 (1973); Comment, *A Conceptual Refinement of the Doctrine of Federal Preemption*, 22 J. PUB. L. 391 (1973).

81. Title VII has a specific preemption provision which relieves liability, duty, penalty, or punishment under any state law which allows or requires the doing of what would be an unlawful employment practice under Title VII. 42 U.S.C. § 2000e-7 (1970). Courts have thereunder invalidated numerous maximum hours, weight limits, and job prohibition laws. *See, e.g.*, Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1226 (9th Cir. 1971) (weight and hours laws); Vogel v. Trans World Airlines, 346 F. Supp. 805, 819 (W.D. Mo. 1971) (hours law); Rinehart v. Westinghouse Elec. Corp., 3 FED. EMPLOYMENT PRAC. CASES 851, 854 (N.D. Ohio 1971) (job prohibition and weight laws); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 15, 485 P.2d 529, 538, 95 Cal. Rptr. 329, 338 (1971) (job prohibition law).

employee under Title VII, the female prisoner may invoke the Act's protection for "any individual" who is deprived of employment opportunities by illegal employment practices.[82] Since inadequate and unequal vocational rehabilitation in a correctional institution can affect a woman offender's employment opportunities on two levels—in-prison work and training experiences and post-release employability chances[83] —maintenance of such disparity "foreclose[s], on indivious [sic] grounds, access by an individual to employment opportunities otherwise available to [her]."[84] Thus, where an individual is deprived of employment opportunities which would be otherwise available and such deprivation is the result of proscribed practices, such as the discriminatory curtailment of training or work experiences under a prison's rehabilitation program, the institution as a Title VII employer would be in violation of the Act.

Therefore, considerable justification exists for finding that prisoners are within the ambit of Title VII's protection. Their status of coverage, either as an "individual" or as an "employee," will depend on the relationship claimed and the unlawful practice violated. Since Title VII apparently can be applied to prisoners affected by disparate correctional rehabilitation programs, there then are only two possible exceptions to the application of the Act:[85] the statutory defense of sex

82. 42 U.S.C. § 2000e-2(a) to -2(d) (1970), *as amended*, (Supp. II, 1973). *See* text & notes 54-56 *supra*.

83. *See* text & notes 9-10 *supra*.

84. Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338, 1341 (D.C. Cir. 1973). Just as in the *Sibley Memorial Hospital* situation, see discussion note 56 *supra*, the prison or jail, as an employer subject to the Act, cannot "exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service . . . ." *Id.*

85. The exceptions outlined in 42 U.S.C. §§ 2000e-2(f) to -2(j) (1970), should not be applicable in the case of a prisoner's discrimination complaint. A prison respondent might attempt to use the language of 42 U.S.C. § 2000e-2(h) (1970): "it shall not be an unlawful employment practice for an employer to apply . . . different terms, conditions, or privileges of employment . . . to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of . . . sex . . . ." In explaining the Senate addition of this provision to the House-passed version of Title VII, however, Senator Humphrey stated:

> A new subsection . . . has been added, providing that it is not an unlawful employment practice for an employer to maintain different terms, conditions, or privileges of employment . . . in different locations . . . provided the differences are not the result of an intention to discriminate on grounds of race, religion, or national origin. For example, if an employer has two plants in different locations, and one of the plants employs substantially more Negroes than the other, it is not unlawful discrimination if the pay, conditions, or facilities are better at one plant than at the other unless it is shown that the employer was intending to discriminate for or against one of the racial groups. Thus this provision makes clear that it is only discrimination on account of race, color, religion, sex, or national origin, that is forbidden by the title. The change does not narrow application of the title but merely clarifies its present intent and effect.

110 CONG. REC. 12723 (1964).

This provision, therefore, seems designed merely to give some flexibility to businesses operating in several different locations, recognizing that there may be variant cost-of-living indexes from region to region or differences in multiple facilities. *See also*

as a bona fide occupational qualification [BFOQ][86] or the judicial doctrine of business necessity.[87] Both of these exceptions, however, have been construed narrowly.

EEOC guidelines provide that only when bona fide sexual characteristics are, in the words of the statute, "reasonably necessary to the normal operation of that particular . . . enterprise"[88] can the BFOQ be a defense to an otherwise unlawful practice.[89] Thus, neither stereotyped characterizations of the sexes[90] nor preferences of coworkers, clients, and other parties[91] can serve as a defense to discriminatory exclusion of an individual from an employment opportunity. Further, both the EEOC guidelines and the courts have specifically disallowed invocation of the BFOQ exception based on financial considerations, either as to the provision of separate facilities[92] or the furnishing of

---

CCH LAB. L. REP. ¶ 515 (1974). Section 2000e-2(h) appears to be inapplicable as a justification for offering disparate rehabilitation programs within the sexually-segregated facilities of a state or local corrections system unless the governmental authority could meet the burden of showing there was no intention to discriminate because of sex. Intention within the meaning of the Act has been found to mean merely that the employer meant to do what he did. See discussion note 143 *infra.*

86. Notwithstanding any other provision of this subchapter . . . it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

42 U.S.C. § 2000e-2(e)(1) (1970). It should be noted that the words of the provision make the bona fide occupational qualification [BFOQ] exception applicable only to the initial hiring and employing stage. Thus, an employer should not be able to justify denial of benefits to women already employed on the basis of a BFOQ. For a general discussion of the exception, see Oldham, *Questions of Exclusion and Exception Under Title VII—"Sex Plus" and the BFOQ*, 23 HASTINGS L.J. 55 (1971); Note, *Employment Discrimination & Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1176-86 (1971).

87. Business necessity can be a defense in situations where a facially neutral rule, such as requiring applicants to have high school diplomas or to meet certain physical height and weight requirements, is relied on by the employer and is subsequently found to have a disparate effect on a Title VII protected class. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). *See also* Comment, *Title VII: Discriminatory Results and the Scope of Business Necessity*, 35 LA. L. REV. 146 (1974); Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98 (1974).

88. 42 U.S.C. § 2000e-2(e)(1) (1970).

89. 29 C.F.R. § 1604.2(a) (1974). Thus, according to the EEOC guidelines, if an employer has an explicit practice of excluding women from certain opportunities, the policy may be justified only if he demonstrates that being male is, in fact, essential to the operation of the particular enterprise. *Id.* § 1604.2(a)(2). For a discussion of the weight accorded agency interpretations, see note 58 *supra.* The courts have upheld the EEOC's narrow construction of the BFOQ exception. *See* Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971) (ruling that the word necessary in 42 U.S.C. § 2000e-2(e)(1) (1970), required application of a business necessity test, not a business convenience test); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232 & n.3 (5th Cir. 1969) (noting that the legislative history called for such a narrow interpretation).

90. Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1224-25 (9th Cir. 1971); Cheatwood v. South Cent. Bell Tel. & Tel. Co., 303 F. Supp. 754, 759-60 (M.D. Ala. 1969); EEOC Decision No. 72-1292, CCH 1973 EEOC DEC. ¶ 6356, at 4642 (1972); 29 C.F.R. § 1604.2(a)(1)(ii) (1974).

91. Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 389 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971); 29 C.F.R. § 1604.2(a)(1)(iii) (1974).

92. *See* EEOC Decision No. 72-1292, CCH 1973 EEOC DEC. ¶ 6356, at 4642

fringe benefits.[93] Thus, a correctional authority's defense of disparate rehabilitation programs[94] is unlikely to be encompassed in the BFOQ exception.

Similarly, the judicial doctrine of business necessity cannot serve as a justification for the prison or jail's practices of curtailing women offenders' access to employment opportunities. The doctrine, which can be invoked when a facially-neutral policy has a discriminatory effect,[95] vindicates that policy only if it promotes a valid and compelling business purpose. Mere business convenience is insufficient.[96] Safety and efficiency are the usually recognized elements of a compelling business necessity,[97] and the practice "must not only *foster* safety and efficiency, but must be *essential* to that goal."[98] Again, cost limitations will not validate an otherwise unlawful employment practice.[99] Correctional authorities might argue that a valid and compelling business purpose exists because prison discipline and safety considerations require segregation of the sexes and that foreclosure of women offenders' access to the more numerous and varied men's programs is merely a

(1972) (refusal of employer to provide female employees same housing conditions as were provided for male workers, or cost-of-living allowance in lieu of housing, was discriminatory and could not be justified on basis of cost to employer); EEOC Decision No. 70-558, CCH 1973 EEOC DEC. ¶ 6137, at 4236 (1970) (refusal to hire female welder because company had no shower and lockerroom facilities for women was discriminatory, especially where evidence showed installation cost would not be unreasonable); 29 C.F.R. § 1604.2(b)(5) (1974); *cf.* EEOC Decision No. 70-375, CCH 1973 EEOC DEC. ¶ 6081, at 4123-24 (1969); EEOC Decision, Case No. YNY 9-047, CCH 1973 EEOC DEC. ¶ 6010, at 4029-30 (1969). *See also* Note, *supra* note 86, at 1180.

93. *See* Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 206 (3d Cir. 1975); 29 C.F.R. § 1604.9(e) (1974).

94. *See* discussion note 3 and text & notes 29-31 *supra.*

95. *See* discussion note 87 *supra.* Since a prerequisite to the entitlement of using a business necessity defense is the existence of a facially neutral policy, it is conceivable that the practice of limiting women offenders to sex-tracked rehabilitation programs or curtailing their opportunities as compared to those of male prisoners might not be viewed as facially neutral. Even business necessity cannot justify overt discrimination. *See* Note, *supra* note 87, at 107.

96. The test is not met by a mere allegation that there is a business purpose justifying the practice. Rather, the test is that: (1) there is a sufficiently compelling business purpose to override any discriminatory impact, such as a practice necessary for safe and efficient business operation; (2) the practice effectively carries out the business purpose it is supposed to serve; and, (3) there is no equally effective alternative with a less discriminatory impact. *See* Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971). *See also* Moody v. Albermarle Paper Co., 474 F.2d 134, 140 (4th Cir. 1973), *cert. granted,* 414 U.S. 1141 (1974); Glus v. G.C. Murphy Co., 329 F. Supp. 563, 567 (W.D. Pa. 1971).

97. *See, e.g.,* United States v. St. Louis-S.F. Ry., 464 F.2d 301, 308 (8th Cir. 1972), *cert. denied,* 409 U.S. 1116 (1973); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971).

98. *See* United States v. St. Louis-S.F. Ry., 464 F.2d 301, 308 (8th Cir. 1972), *cert. denied,* 409 U.S. 1116 (1973); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971).

99. *See, e.g.,* United States v. N.L. Indus., Inc., 479 F.2d 354, 366 & n.11 (8th Cir. 1973); Robinson v. Lorillard Corp., 444 F.2d 791, 799 n.8, 800 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971); Bing v. Roadway Express, Inc., 444 F.2d 687, 690 (5th Cir. 1971); Jones v. Pike Corp., 332 F. Supp. 490, 495-96 (C.D. Cal. 1971). *But cf.* Comment, *supra* note 87, at 152-53.

consequence of this justifiable practice. To establish the invalidity of that business purpose and to demonstrate viable alternatives to the unlawful practice, the prisoner-plaintiff could, however, rely on both the statutory history of prisoner sexual segregation[100] and the successful integration of several correctional facilities.[101] Thus, the institution's defense would be insufficient unless it could prove that any suggested alternative would not be as efficient or safe as the challenged practice.[102]

Besides the existence of only these two exceptions to justify or excuse discriminatory practices, Title VII has several other distinct advantages for use in prisoners' rights litigation. Perhaps foremost of these is that the history of the Act provides a basis for exempting Title VII actions from the right-privilege dichotomy.[103] The original authority of Title VII to set employment standards for private employers and proscribe private employment discrimination[104] was upheld by resort to Congress' plenary powers under the commerce clause.[105] Additionally, the force of the fourteenth amendment became part of the Act when the 1972 amendments to Title VII enlarged the Act's applicability to include state and local government agencies and political subdivisions.[106] Thus, Title VII's prohibition of governmental acts of discrimination[107] frames the Act's coverage in the form of a civil right.[108] This interpretation has been substantiated by the EEOC

100. Provisions segregating women prisoners from men prisoners historically were based on considerations of propriety and decency, not safety. *See* Santa Barbara County v. Janssens, 177 Cal. 114, 117, 169 P. 1025, 1027 (1917); ARIZ. REV. STAT. ANN. § 31-124(A) (1956); CAL. PENAL CODE § 4002 (West 1970).

101. Correctional institutions at Framington, Massachusetts, Muncy, Pennsylvania, and Fort Worth, Texas are now operating on a sexually-integrated basis. The only facilities which remain segregated at those prisons are the sleeping, shower, and toilet facilities. *See* Note, *supra* note 3, at 1266-67 n.189.

102. *See* Note, *supra* note 87, at 114.

103. *See* text & notes 35-40 *supra.*

104. Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000(e) (1970), *as amended,* 42 U.S.C. § 2000e(a) (Supp. II, 1973).

105. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249-58 (1964).

106. 42 U.S.C. § 2000e(a) (1970), *as amended,* (Supp. II, 1973). For a detailed analysis of the amendments, see 118 CONG. REC. 7166-69, 7563-67 (1972). See also the statutory definition cited in note 60 *supra.* In discussing the addition of state and local governments to 42 U.S.C. § 2000e(a) (1970) (then § 701(a)), Senator Javits stated:

> [I]t is very important . . . that we recognize that of all the provisions in this bill, this has the most solemn congressional sanction, because it is based not on the commerce clause, which relates to the relationships between individuals as well as with governments, but is based on the 14th amendment. This is a paramount right which is created for all Americans.

118 CONG. REC. 1839 (1972).

107. Federal employers and those District of Columbia employers subject to the requirements of federal competitive service are not covered by the main provisions of Title VII. 42 U.S.C. § 2000e(b) (1970), *as amended,* (Supp. II, 1973). These employers, however, are subject to the procedures of 42 U.S.C. § 2000e-16 (1970), *as amended,* (Supp. II, 1973).

108. See Senator Javits' comment, note 106 *supra.*

which has indicated that it views the provisions of Title VII as conferring a civil right.[109] Since it has been held that correctional institutions cannot contravene inmates' civil rights,[110] and considering the remedial nature of the Act and the propensity of the courts to provide full protection to Title VII rights,[111] it is unlikely that a prisoner would lose her protected status merely because of incarceration.

Utilization of Title VII also provides some procedural advantages to the prisoner-plaintiff. Of great significance is the establishment of a discrimination standard that is stricter than the traditional reasonableness test applied in equal protection cases.[112] Thus, the task of proving sex discrimination is less difficult for the Title VII complainant—the prisoner-plaintiff need only establish a prima facie violation of an unlawful employment practice provision before the burden of proof shifts to the prison or jail. It is then the institution's burden to demonstrate a legitimate, nondiscriminatory basis for an otherwise illegal practice.[113]

Additionally, the 1972 amendments conferred broad investigative

109. Issie L. Jenkins, Equal Employment Opportunity Commission Associate General Counsel, has stated: "Title VII confers a civil right, not an employment benefit, and it is well established that a prison inmate may invoke the provisions of a civil rights statute where rights given him have been denied." Letter from Issie L. Jenkins, Associate General Counsel, Equal Employment Opportunity Comm'n, Washington, D.C., to David J. Berman, Center for Correctional Justice, Washington, D.C., November 20, 1972, copy on file in the *Arizona Law Review* office. *See also* Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971); Warshafsky v. Journal Co., 63 Wis. 2d 130, 145-46, 216 N.W.2d 197, 204 (1974).

110. *See* Cooper v. Pate, 378 U.S. 546 (1964); Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961), *overruled in part*, District of Columbia v. Carter, 409 U.S. 418, 421 n.5 (1973). While there is considerable controversy over which general rights are retained and which are forfeited by prisoners, civil rights statutes may be invoked when prisoners' rights have been denied because of confinement conditions. *See* Cooper v. Pate, *supra*; Sewell v. Pegelow, *supra*. The right to bring suit under the civil rights statutes has been afforded even in those states where there are civil death statutes. *See* Weller v. Dickson, 314 F.2d 598, 601 (9th Cir. 1963); Beyer v. Werner, 299 F. Supp. 967, 970 (E.D.N.Y. 1969). Civil death statutes are those blanket provisions which may revoke or suspend various civil rights of an offender while that person is imprisoned. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1653 (1956); CAL. PENAL CODE § 2600 (West 1970); N.Y. CIV. RIGHTS LAW §§ 79, 79(a) (McKinney Supp. 1974-75). *See also Special Project, supra* note 7, at 1018-27.

111. *See* Draper, *A Historical Sketch of the Major Labor Law Developments That Have Occurred as a Result of the Civil Rights Act of 1964 and the Activities of the Equal Employment Opportunity Commission*, 18 HOW. L.J. 29, 29-30 (1973).

112. *See* Satty v. Nashville Gas Co., 9 CCH EMPLOYMENT PRAC. DEC. ¶ 9919, at 6827 (M.D. Tenn., Nov. 4, 1974); Comment, *Sex Discrimination in Employment: What Has Title VII Accomplished for the Female?*, 9 U. RICHMOND L. REV. 149, 155 (1974). *See also* Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 203-04 (3d Cir. 1975); Hutchison v. Lake Oswego School Dist., 374 F. Supp. 1056, 1060 (D. Ore. 1974); Cheatwood v. South Central Bell Tel. & Tel. Co., 303 F. Supp. 754, 759 (M.D. Ala. 1969). Because of the presumption of validity accorded to state action, McGowan v. Maryland, 366 U.S. 420, 425-26 (1961), the rational basis standard places the burden upon the complainant to demonstrate that the practices in question are arbitrary and capricious and not based on a fair and substantial nexus to a legitimate governmental objective. Geduldig v. Aiello, 417 U.S. 484, 494-97 (1974); Reed v. Reed, 404 U.S. 71, 76 (1971).

113. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 232 (5th Cir. 1969).

powers on the EEOC.[114] Given the anticipated cost of a discovery investigation, these powers could be of great importance in developing the full extent and impact of the alleged discriminatory treatment.[115] Further, the Commission's power and responsibility to conciliate[116] could result in implementation of meaningful programs within a limited time because of the leverage and credibility inherent in the Commission's conciliation effort.[117] Not to be overlooked is the impact a single, well-publicized, Commission-negotiated consent decree or successful suit would have on all the jails and prisons in the nation.[118] Thus, the EEOC's power to bring suit[119] could have a highly persuasive effect on an institution. Such an effect would alleviate significantly the problem of multiple actions necessitated by the piecemeal relief afforded by the traditional grounds of litigation on prisoners' behalf.[120]

Provisions for attorney's fees,[121] injunctive relief, affirmative orders, and backpay[122] provide further incentive for both attorney and prisoner-plaintiff to file a Title VII charge.[123] The assurance[124] of at-

114. 42 U.S.C. §§ 2000e-8 to -9 (1970), *as amended*, (Supp. II, 1973).

115. *See generally* Gates v. Collier, 489 F.2d 298 (5th Cir. 1973). *Gates* discusses the extent of investigation required by one attorney to develop the plaintiffs' case: "[I]n preparation of plaintiffs' case, plaintiffs' attorney engaged in extensive pre-trial discovery, made numerous trips to [the state prison], interviewed hundreds of inmates, and submitted a plethora of motions and accompanying memoranda." *Id.* at 301.

116. 42 U.S.C. § 2000e-5(b) (1970), *as amended*, (Supp. II, 1973). "[T]he Commission shall endeavor to eliminate any . . . unlawful practice by informal methods of conference, conciliation, and persuasion." *Id.*

117. See text & notes 148-49 *infra.*

118. Following the signing of the $15 million consent order by American Telephone and Telegraph Company in early 1974, the head of the EEOC task force on AT&T stated: "All the major companies see the handwriting on the wall, and it's a big dollar sign. This case made it clear that the government can and will crack down on large companies that discriminate." See Wohl, *Liberating Ma Bell*, Ms., Nov. 1973, at 52, 92.

119. 42 U.S.C. § 2000e-5(f)(1) (1970), *as amended*, (Supp. II, 1973).

120. *See* text & notes 19-20 *supra.*

121. 42 U.S.C. § 2000e-5(k) (1970).

122. 42 U.S.C. § 2000e-5(g) (1970), *as amended*, (Supp. II, 1973). Backpay is thought to be a backbone of Title VII. It serves as a penalty for employer procrastination in eliminating unlawful practices. Liability, however, extends only 2 years prior to the lodging of the complaint with the Commission and is offset by interim earnings or amounts that would be earnable with reasonable diligence. *Id.* There is a split of authority as to whether a backpay award is appropriate where the employer has acted in good faith, such as having relied on state protective statutes for women. *Compare* Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973), *cert. granted*, 414 U.S. 1144 (1974), *[and]* Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971), *with* Kober v. Westinghouse Elec. Corp., 480 F.2d 240 (3d Cir. 1973), Manning v. General Motors Corp., 466 F.2d 812 (6th Cir. 1972), *cert. denied*, 410 U.S. 946 (1973), Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972), *[and]* LeBlanc v. Southern Bell Tel. & Tel. Co., 460 F.2d 1228 (5th Cir.), *cert. denied*, 409 U.S. 990 (1972), *aff'g per curiam*, 333 F. Supp. 602 (E.D. La. 1971).

123. There is also a possibility that punitive damages could be sought as a remedy in extreme cases. *See* Tooles v. Kellogg Co., 336 F. Supp. 14, 18 (D. Neb. 1972); Note, *supra* note 86, at 1259-69; *cf.* Humphrey v. Southwestern Portland Cement Co., 369 F. Supp. 832, 842-43 (W.D. Tex. 1973), *rev'd on other grounds*, 488 F.2d 691 (5th Cir. 1974) (allowing compensatory damages where plaintiff was disabled and unavailable for

torney's fees for the prevailing party will make prisoner representation possible, as a matter of practicality, by more than just the public interest bar. Since the prisoner-plaintiff is seeking injunctive relief as the most suitable remedy, the Act is particularly useful as it expressly sanctions injunctive relief, affirmative orders, and any other necessary equitable relief.[125] The backpay provision provides an additional, although nominal, benefit for the prisoner-plaintiff.[126]

INSTITUTIONAL PRACTICES POTENTIALLY VIOLATIVE OF TITLE VII

Even though the prisoner may be a protected class under Title VII, she must be able to demonstrate that the acts of the jail or prison constitute proscribed practices. Several correctional practices, however, do have a potentially adverse impact on women offenders' employment opportunities, and they may provide a basis for filing a Title VII charge.

First, section 2000e-2(d)[127] forbids discrimination against *any individual* by an employer controlling admission to or employment in training programs. Thus, it could be alleged that differential treatment between men and women offenders in placement and access to correctional work opportunities or training programs is sexually discriminatory. This claim would be founded on the contention that all correc-

reinstatement). *But see* Equal Employment Opportunity Comm'n v. Detroit Edison Co., 43 U.S.L.W. 2396 (6th Cir. Mar. 11, 1975); Loo v. Gerarge, 374 F. Supp. 1338, 1342 (D. Hawaii 1974); Van Hoomissen v. Xerox Corp., 368 F. Supp. 829, 838 (N.D. Cal. 1973); Guthrie v. Colonial Bakery Co., 6 FED. EMPLOYMENT PRAC. CASES 662, 664 (N.D. Ga. 1973).

124. Although the language of 42 U.S.C. § 2000e-5(k) (1970), provides: "the court, in its discretion, may allow . . . a reasonable attorney's fee . . . ," the Supreme Court in Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968), ruled that favorable decisions under the Civil Rights Act ordinarily should include such an award. Since Title VII specifically provides for attorney's fees, sovereign immunity should not bar such an award against a government defendant. *Cf.* Souza v. Travisono, 43 U.S.L.W. 2402 (1st Cir. Mar. 11, 1975); Gates v. Collier, 489 F.2d 298 (5th Cir. 1973).

125. 42 U.S.C. § 2000e-5(g) (1970), *as amended*, (Supp. II, 1973).

126. *See generally* United States *ex rel.* Motley v. Rundle, 340 F. Supp. 807 (E.D. Pa. 1972) (prisoner received back pay damages of $461.70 and additional nominal damages of $1000 for being unable to afford eyeglasses, dental plate, law books, and other items as a result of an alleged discriminatory demotion in his prison work position).

The right to backpay also has been held to include benefits which would have been received but for the discriminatory acts. *See* Tidwell v. American Oil Co., 332 F. Supp. 424, 437 (D. Utah 1971) (judgment included 6 percent interest on backpay award and contributions defendant would have made to group life insurance, retirement, and company savings plans); Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332, 366 (S.D. Ind. 1967), *modified*, 416 F.2d 711 (7th Cir. 1969) (vacation pay and gratuitous bonus allowable). A woman prisoner thus may be able to claim any loss of good-time credit related to the availability or unavailability of work opportunities. *See* text & note 10 *supra*.

127. "It shall be an unlawful employment practice for any employer . . . controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of . . . sex . . . in admission to, or employment in, any program established to provide apprenticeship or other training." 42 U.S.C. § 2000e-2(d) (1970).

tional work opportunities[128] are part of a comprehensive rehabilitative training scheme. Where state corrections statutes declare a rehabilitative purpose, the basis of the claim will be solidly grounded.[129] Even where there is no specific enunciation of a rehabilitative purpose, statutes which establish correctional programs arguably point out a legislative intent to provide comprehensive rehabilitation.[130]

Some corrections work opportunities, such as prison industry employment or trustee positions, are not likely to be considered training programs. In-prison job training classes and work-release or work-furlough opportunities, however, are clearly the type of activity governed by section 2000e-2(d). If the availability of such programs for women offenders is more limited than the opportunities afforded male prisoners, a basis for a Title VII unlawful employment charge would exist.

Of course, if the prisoner can establish employee status within the corrections institution, she can make a charge pursuant to section 2000e-2(a)(2),[131] which bars limitation, segregation, or classification of employees or applicants for employment "in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's . . . sex . . . ."[132] The woman offender would charge that the offering of limited correctional rehabilitation programs,[133] which are quantitatively and qualitatively different from the opportunities available to male prisoners, is an unlawful employment practice. As an employee, the woman offender also would be able to file a charge under section 2000e-2(a)(1).[134] This section,

128. Corrections work opportunities include prison industries, trustee positions, work-release or work-furlough programs, and in-prison job training classes. These rehabilitation training and work opportunities are generally viewed as being designed to encourage conforming behavior in the inmate and to prepare the offender for reentry into society.

129. *See, e.g.*, DEL. CODE ANN. tit. 11, §§ 6502, 6531 (1975); LA. REV. STAT. ANN. § 15-854 (West 1967); MO. ANN. STAT. § 216.090(1) (Vernon 1962); WASH. REV. CODE ANN. § 72.62.010 (Supp. 1974).

130. *See, e.g.*, ARIZ. REV. STAT. ANN. § 31-333 (Supp. 1974-75); CAL. PENAL CODE § 6254 (West 1970); MASS. ANN. LAWS ch. 127, §§ 48-49 (Supp. 1973). *See also* McGinnis v. Royster, 410 U.S. 263, 270-71 (1973) (recognition that New York state prisons have a rehabilitative purpose).

131. (a) It shall be an unlawful employment practice for an employer—

. . . .

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . .

42 U.S.C. § 2000e-2(a)(2) (1970), *as amended*, (Supp. II, 1973).

132. *Id.*

133. *See* text & notes 3-4 *supra.*

134. 42 U.S.C. § 2000e-2(a)(1) (1970). The woman offender also might be able to file a charge pursuant to 42 U.S.C. § 2000e-2(b) (1970): "It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of . . . sex . . . or to classify or refer for employment any individual on the basis of . . . sex . . . ." Such

with its proscription of discrimination as to compensation, terms, conditions, or privileges of employment because of an individual's sex,[135] would support a challenge to discrimination against women inmates in prison industry employment and trustee assignments.[136]

These provisions illustrate the claims available to a woman prisoner if it can be established that the prison or jail has restricted her employment opportunities, in either in-prison programs or after release. The prisoner-plaintiff has as great a need for Title VII protections as any other individual. Thus, unless a provable discriminatory practice can be justified through a valid Title VII exception,[137] the woman offender should be accorded relief under the Act.

PROCEDURAL USE OF TITLE VII

Although the procedures for seeking a remedy under Title VII have been analyzed elsewhere,[138] a few areas will be discussed here

---

a charge would be most plausible where the prisoner was referred by the correctional institution for employment on a work-release program. Use of this approach assumes that a jail or prison fits the definition of employment agency as stated by 42 U.S.C. § 2000e(c) (1970): "The term 'employment agency' means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person." The proposition also assumes that an inmate could be viewed as an employee either of the prison or of the business or agency to whom the prisoner is assigned for work release. For a discussion of the employee status of an offender, see text & notes 65-81 *supra*. *See also* Sims v. Parke Davis & Co., 334 F. Supp. 774, 787-88 (E.D. Mich.), *aff'd per curiam*, 453 F.2d 1259 (6th Cir. 1971), *cert. denied*, 405 U.S. 978 (1972). Interpreting the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1970), the *Sims* court held that prisoners are not employees of drug companies operating research clinics inside the prison, since the companies were without power to select, control, or dismiss the prisoners. *Compare* Sims v. Parke Davis & Co., *supra*, *with* Johnson v. Industrial Comm'n, 88 Ariz. 354, 356 P.2d 1021 (1960), *[and]* Pruitt v. Workmen's Compensation Appeals Bd., 261 Cal. App. 2d 546, 68 Cal. Rptr. 12 (Ct. App. 1968). Both the *Johnson* and *Pruitt* courts held that jail inmates are employees for workmen's compensation purposes where the inmates voluntarily did outside work for compensation with a nonjail employer.

135. The provision provides: "(a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1) (1970).

136. In actual practice the phrase "compensation, terms, conditions, and privileges of employment" has covered many subjects, such as insurance, seniority rights, job assignments, and other benefits. *See* Rogers v. Equal Employment Opportunity Comm'n, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (holding that the psychological environment of the place of work was included within the meaning). Thus, for a woman offender, the phrase would be inclusive of the prison wage scale, good-time benefits, and special privileges afforded trustees. *See* text & note 10 *supra*.

137. *See* text & notes 85-102 *supra*.

138. *See, e.g.*, B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 368-75 (1975); K. DAVIDSON, R. GINSBURG & H. KAY, SEX-BASED DISCRIMINATION 623-811 (1974); L. KANOWITZ, SEX ROLES IN LAW & SOCIETY 299-458 (1973 & Supp. 1974); L. KANOWITZ, WOMEN AND THE LAW 100-48 (1969); Carey, *Litigation Involving Sex Discrimination Under the Equal Employment Opportunity Act*, 60 WOMEN LAW. J. 21 (1974); Draper, *supra* note 111; Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

which are particularly pertinent to a prisoner's use of the Act. A woman offender may file a charge according to the provisions of section 2000e-5(b)[139] whenever prison employment or training programs are alleged to have been administered in a sexually discriminatory manner. This charge must be filed within 180 days of the occurrence of the unlawful practice.[140] Where the practice at issue is continuing in nature, however, many courts have been flexible and have recognized that the time limitation in such a case is of little practical effect.[141] Thus, if the institution has maintained the same policy, it may be possible to file the charge after release, once the full impact of the alleged discrimination has become apparent. Significantly, the complainant need not allege an actual intent to discriminate as a prerequisite for making a charge or later filing suit.[142] Intent becomes a necessary element only when injunctive relief is sought[143] or when a "pattern or practice of resistance" is charged in a suit brought by the attorney general.[144]

---

139. 42 U.S.C. § 2000e-5(b) (1970), *as amended*, (Supp. II, 1973). It is recognized that lay people generally draft the complaints; thus the charge itself need not be formally drafted. *See* 29 C.F.R. § 1601.11(b) (1974). The Commission will provide assistance when needed. *Id.* §§ 1601.5, 1601.8. It should be noted that a charge also may be filed by others on behalf of the inmate, *see* discussion note 50 *supra*, or the EEOC may file the charge. *See* 42 U.S.C. § 2000e-5(b) (1970), *as amended*, (Supp. II, 1973).

140. 42 U.S.C. § 2000e-5(e) (1970), *as amended*, (Supp. II, 1973). If the initial complaint was filed with a state or local agency, the charge also must be filed with the Commission, by or on behalf of the person aggrieved within 300 days after the occurrence of the practice or within 30 days after notice that the other agency has ceased action, whichever is earlier. *Id.*

141. *See, e.g.*, Bartmess v. Drewrys USA, Inc., 444 F.2d 1186, 1188 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971); Kohn v. Royall, Koegel, & Wells, 59 F.R.D. 515, 518 (S.D.N.Y. 1973), *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974); Tippet v. Liggett & Myers Tobacco Co., 316 F. Supp. 292, 295-96 (M.D.N.C. 1970); *cf.* Molybdenum Corp. v. Equal Employment Opportunity Comm'n, 457 F.2d 935 (10th Cir. 1972); Glus v. G.C. Murphy Co., 329 F. Supp. 563 (W.D. Pa. 1971).

142. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971); King v. Laborers Local 818, 443 F.2d 273, 278 (6th Cir. 1971). *See also* Williams v. General Foods Corp., 492 F.2d 399, 403-04 (7th Cir. 1974) (ruling that the standard of liability under Title VII is "engaging in unlawful employment practices," 42 U.S.C. § 2000e-2 (1970), *as amended*, (Supp. II, 1973), and that charges simply have to establish that the employer has been so engaged).

143. 42 U.S.C. § 2000e-5(g) (1970), *as amended*, (Supp. II, 1973). The intent requirement, however, has been broadly construed. Six circuit courts have viewed the term as inclusive of employment practices engaged in deliberately, as opposed to accidentally. Thus, the employer's lack of discriminatory intent is not a defense so long as there is evidence that the employer meant to do what he did. *See* Kober v. Westinghouse Elec. Corp., 480 F.2d 240, 245 (3d Cir. 1973); Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006 (9th Cir. 1972); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1201 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971); Robinson v. Lorillard Corp., 444 F.2d 791, 796 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); Papermakers Local 189 v. United States, 416 F.2d 980, 996 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

In Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Court stated: "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability. . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Id.* at 432.

144. King v. Laborers Local 818, 443 F.2d 273, 278 (6th Cir. 1971); 42 U.S.C. § 2000e-6 (1970), *as amended*, (Supp. II, 1973).

If a charge is filed in a locality which has a state or local agency with statutory authority to act on a discrimination complaint, the EEOC defers to the local agency.[145] Where such deferral has been made, the Commission is obliged to accord substantial weight to the state or local agency's final findings and orders.[146] The EEOC will not accord deferral status, however, to a state or local agency unless it has authority to enforce sanctions against essentially all of the practices prohibited by Title VII.[147]

Once the charge is within the jurisdiction of the EEOC, the Commission must attempt to end the alleged unlawful practice by conciliation.[148] Conciliation is commenced only if there is a sufficient foundation for the charge;[149] thus, conciliation attempts by the Commission are an important factor in efforts to end alleged discriminatory practices. If the conciliation is unsuccessful, the Commission must refer all cases involving government entities to the attorney general for prosecution.[150] After referral to the attorney general, if suit is not brought within the statutory period,[151] the aggrieved person will be notified, and she may bring suit within 90 days.[152]

145. 42 U.S.C. § 2000e-5(c) to -2(d) (1970), *as amended*, (Supp. II, 1973). Sixty or 120 days are allowed for the state or local agency to function, the longer period being granted agencies within their first year of operation. Commission deferral procedures are found in 29 C.F.R. § 1601.12 (1974); 39 Fed. Reg. 45235 (1974).

146. 42 U.S.C. § 2000e-5(b) (1970), *as amended*, (Supp. II, 1973). The Commission has defined the meaning of substantial weight and the effect of this obligation in 29 C.F.R. § 1601.19b(e) (1974). The EEOC has concluded that the giving of substantial weight to final findings and orders "does not include according weight, for purposes of applying Federal law, to that agency's conclusions of law." *Id.* Further, if the state or local agency has not yet received final approval as a deferral agency, *id.* § 1601.12(e), substantial weight will not be accorded its findings. *Id.* § 1601.12(c)(2); 39 Fed. Reg. 45235 (1974). *See also* Sape & Hart, *supra* note 144, at 866 & n.279, 868 & n.288, 869 & n.289.

147. 29 C.F.R. § 1601.12(f) (1974).

148. 42 U.S.C. § 2000e-5(b) (1970), *as amended*, (Supp. II, 1973); 29 C.F.R. § 1601.19b(a) (1974). This conciliation duty would seem to apply even for cases involving government entities which must later be referred to the attorney general for prosecution. 42 U.S.C. § 2000e-5(f)(1) (1970), *as amended*, (Supp. II, 1973). *But see* Letter from Milton C. Branch, Regional Attorney, Atlanta Regional Litigation, Equal Employment Opportunity Commission, to Sara Pratt, Arizona Public Law Advocates, Tucson, Ariz., June 26, 1974, copy on file in the *Arizona Law Review* office (stating that any and all charges alleging sex discrimination against county jails would be transmitted forthwith to the Justice Department). *See also* Equal Employment Opportunity Comm'n v. Westvaco Corp., 372 F. Supp. 985 (D. Md. 1974) (granting summary judgment to defendant corporation because the Commission did not provide an opportunity for conciliation). *Compare* Equal Employment Opportunity Comm'n v. Westvaco Corp., *supra*, *with* Johnson v. Seaboard Airline R.R., 405 F.2d 645 (4th Cir. 1968), *cert. denied*, 394 U.S. 918 (1969).

149. If the Commission finds no reasonable cause to believe the veracity of the charge, the complaint will be dismissed. A negative determination by the Commission does not, however, bar judicial review. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Fekete v. United States Steel Corp., 424 F.2d 331 (3d Cir. 1970).

150. 42 U.S.C. § 2000e-5(f)(1) (1970), *as amended*, (Supp. II, 1973).

151. A suit by the attorney general must be filed within 180 days from the filing or receipt of the charge. If the attorney general brings suit, the person aggrieved has a right to intervene. 42 U.S.C. § 2000e-5(f)(1) (1970), *as amended*, (Supp. II, 1973).

152. *Id.* Notification is ordinarily accomplished by a letter informing the aggrieved individual of the right to sue. Since the purpose of the notice is to inform the party that the EEOC administrative remedies have been exhausted, it has been held that the

Parties seeking to assert Title VII rights should realize that they are not foreclosed from bringing actions on other grounds.[153] Tactically, therefore, it may be desirable to pursue several avenues of relief simultaneously.[154] In addition to the traditional equal protection challenge,[155] the prisoner-plaintiff may be able to seek other remedies.[156]

CONCLUSION

Because of the adverse impact that inadequate employment rehabilitation opportunities may have on both the woman offender and society, litigation aimed at eliminating disparate treatment is highly desirable. While obtaining facilities equal to those provided to male prisoners will not provide adequate rehabilitation,[157] litigation initiated by women offenders will necessarily bring into focus the ineffectiveness of the entire corrections system. Thus, a conduit for implementation of alternatives to meet the rehabilitation needs of all offenders may well be provided.[158] The use of Title VII should prove an effective means for reaching that goal.

---

90 day period begins running as soon as the party receives notice that conciliation efforts by the Commission have failed. *See* Harris v. Sherwood Medical Indus., Inc., 386 F. Supp. 1149 (E.D. Mo. 1974); 42 U.S.C. § 2000e-5(f)(1) (1970), *as amended*, (Supp. II, 1973).

153. An amendment limiting the remedy for an individual aggrieved by employment discrimination to filing a charge with the Commission was rejected by the Senate in its deliberations of the 1972 amendments to Title VII. 118 CONG. REC. 3367, 3373 (1972). *See also* Larson, *Employment Discrimination in State and Local Government*, 7 CLEARINGHOUSE REV. 63, 77 (1973); Sape & Hart, *supra* note 138, at 884-86.

154. *Cf.* Ferrell, *Governmental Regulation of Sex Discrimination in Employment by State and Local Governments: Procedures and Remedies*, 5 URBAN LAW. 307, 326 (1973); Larson, *supra* note 153, at 77.

155. 42 U.S.C. § 1983 (1970), is the civil rights statute customarily used in prisoners' rights litigation. *See* authorities cited note 27 *supra*. *But see* text & notes 23-24 *supra*.

156. For example, a complaint could be lodged pursuant to the Law Enforcement Assistance Administration Act, 42 U.S.C.A. §§ 3750-93 (1973), which states in part: "No person in any state shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds available under this title." *Id.* § 3766(c)(1).

Another possible ground for litigation is demonstrated by Tipton v. Kelsay, No. S 74-358 (E.D. Cal., filed July 29, 1974), which contests, among other things, the construction of a male honor farm facility with revenue sharing funds as being in direct contravention of the sex discrimination ban in the Revenue Sharing Act. 31 U.S.C. § 1242(a) (Supp. II, 1973).

157. *See* Haft, *supra* note 1, at 5; Singer, *supra* note 2, at 306-07. *See generally* Morris & Hawkins, *Attica Revisited: The Prospect for Prison Reform*, 14 ARIZ. L. REV. 747 (1972).

158. One district court judge's view of a new corrections approach for nonviolent offenders is discussed in Pierce, *Rehabilitation in Corrections: A Reassessment*, 38 FED. PROB., June 1974, at 14.