

GLOVER V. JOHNSON: JUDICIAL CONSTRAINT AND THE ENFORCEMENT OF CONSTITUTIONAL RIGHTS IN PRISONS

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I. INTRODUCTION

In 1977 a group of women in the Michigan prison system filed suit alleging that they were being offered substantially fewer educational and vocational programming opportunities than male prisoners. The district court found that the disparity in opportunities was violative of the Equal Protection Clause. The following twenty-two years were marked by exhaustive litigation as the defendants attempted to resist and circumvent the changes ordered by the district court.

The human and financial cost of the protracted litigation inevitably leads one to ask questions about the efficacy of litigation as a means for achieving institutional reform. By examining the *Glover v. Johnson* case it may be possible to identify some of the limitations of litigation as an instrument for achieving change in an organizational setting. This case study will examine the relationship between policy concerns which limit the ability of courts to engage in social policy making and legal doctrine in order to understand the reasons for the constraints on the courts' ability to intervene in

institutions. The *Glover* episode suggests that the limitations on the ability of courts' to intervene in the prison context may be undesirable.

II. *THE COURTS AND SOCIAL POLICY REVISITED*

Definition of the appropriate role for courts in the formulation of social policy is particularly important because of the nature of modern prison litigation cases. Modern institutional reform litigation in the prisons is characterized by the broad scope of the questions presented to the court. Since the emergence of these cases in the 1970s courts have been asked to measure the lawfulness or rationality of entire systems.¹ In addition to the remediation of grievances arising from discrete incidents the scrutiny of the courts has been extended to encompass the practices of entire institutions or correctional systems. The systemic focus of litigation has necessitated the adoption of wide-ranging remedies.

Definition of the appropriate role for the courts in formulating social policy has been the subject of vigorous debate. Without offering a conclusive answer to this question it is possible to identify some attributes of the adjudicatory process which bear on the decision. In a well-known study Donald Horowitz identified five such attributes.² (1) Adjudication is focused. The primary focus of adjudication is determining whether a particular party has a right. (2) Adjudication is piecemeal. The courts are constrained to decide only the matters that are before them. (3) Courts are responsive bodies. The judicial role commences when litigants bring matters before it. (4) Courts may be poorly equipped to determine "the recurrent patterns of behavior on which policy must be

¹ Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626, 640 (1981).

based.”³ Courts may have difficulty determining the relevant set of customs and usages which may affect the understandings of the litigants. (5) Courts often neglect to consider the costs of compliance which are associated with a remedy.

An understanding of the ability of courts to effect change is critical because of its relation to the question of the efficacy of the courts within the political system. Horowitz has observed that litigation intended to alter organizations are measured by a standard which differs from “conventional” cases.

The main question is whether the remedy is apt to bring about the intended result, whether the court can husband sufficient resources to compel or catalyze the desired change. In short, the focus is not on *rightness* alone but also on *effectiveness*. There has been a pronounced shift from moral to managerial criteria of evaluation of judicial decisions.⁴

Given the standard by which judicial intervention is evaluated it appears that questions of the legitimacy of the courts must take cognizance of their own limitations as agents of change.

One question that is suggested by Horowitz’s observations is whether a functional division of labor between the courts and other branches of government is desirable. Stated otherwise, should policy-making roles be assigned on the basis of the qualities of the different branches of government? The current structure of legal doctrine suggests that the policy-making role of courts is constrained by these considerations. For example,

² Donald L. Horowitz, *THE COURTS AND SOCIAL POLICY*, 33-56 (1977).

³ *Id.* at 45.

⁴ Donald Horowitz, *Decreeing Organization Change: Judicial Supervision of Public Institutions*, 1983 DUKE L. J. 1265, 1303 (1983).

Feeley and Rubin offer the following conclusion about the implementation of policies by the courts in prison litigation:

[I]f judges are able to deploy a wide variety of implementation techniques that we traditionally regard as administrative, they are also constrained by the institutional attributes of these techniques, attributes born of both intrinsic limits and shared understandings. A government can free itself from certain operational constraints by taking proprietary control of a given subject area, as the federal government has done with the armed forces, the national parks, the financial institution that controls the money supply, and the prisons that fall within its jurisdiction. Most often, however, American governments leave direct control in other hands and exercise their policy-making power through a regulatory process that remains subject to a wide range of limitations. Courts always follow this second approach...⁵

The judiciary may also have concerns relating to the management of the court system which militate in favor of limiting the use of the adjudicatory process for remedying grievances. For example, Richard Posner has suggested that “[c]reating a new right that generates many cases may, through the effect of caseload on the enforcement of rights, harm other rights holders.”⁶ Thus limitations that are inherent in the nature of adjudication, constraints created by the structure of the government and prudential concerns relating to docket management may limit the options that are available to judges when they are required to adjudicate wide-ranging institutional reform cases and implement remedies.

Legal doctrine restricting the federal courts’ ability to intervene in prisons appears to reflect these concerns. In *Procunier v. Martinez* the Supreme Court examined the

⁵ Malcolm M. Feeley and Edward L. Rubin, JUDICIAL POLICY MAKING AND THE MODERN STATE, 357 (1998).

⁶ Richard A. Posner, THE FEDERAL COURTS: CHALLENGE AND REFORM, 316 (1996).

question of whether courts are suitable agents for changing prison policies and reached the following conclusion:

Suffice it to say that the problems of prisons in America are complex and intractable, and more to the point, they not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.⁷

Cognizant of the complexity of corrections management, the Supreme Court has accorded “wide-ranging deference” to the decisions of prison administrators.⁸

Although it is widely accepted that convicted prisoners “do not forfeit all constitutional rights by reason of their conviction and confinement in prison,”⁹ there has been considerably less agreement about the extent to which prisoners lose the protections offered by the Constitution. The most recent articulation of the appropriate balance between protection of prisoners’ rights and the latitude to be accorded to prison administrators is the standard set forth in *Turner v. Safley*.¹⁰ In *Turner*, the Supreme Court held that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”¹¹ District courts have encountered difficulties because the deferential stance of the courts must be reconciled with their duty to protect constitutional rights.

⁷ *Procunier v. Martinez*, 416 U.S. 396, 405 (1973).

⁸ *See e.g.* *Jones v. North Carolina Prisoners’ Union* 433 U.S. 119 (1976).

⁹ *See e.g.* *Bell v. Wolfish*, 441 U.S. 520, 545 (1978)

¹⁰ *Turner v. Safley*, 482 U.S. 78 (1986).

¹¹ *Id.* at 89.

III. JUDICIAL INTERVENTION IN PRISONS – CONSTRAINED CHOICES

The question of whether court intervention in prisons can effect change has been vigorously debated by commentators. Empirical evidence suggests that the ability of courts to effect change is limited. Observers who have conducted cross-case studies have found that courts have enjoyed varying degrees of success.¹²

Commentators have attempted to identify the factors which tend to contribute to the success of court intervention. Susan Sturm has identified four factors which may account for the differences in success.¹³ First, the effectiveness of litigation may depend on the extent to which the manner in which a prison or corrections system is operated deviates from established professional and social norms. The degree of success and degree of variance appear to be positively correlated. Second, there is reason to believe that the likelihood of success increases when highly placed individuals within the targeted system support reform. Judicial strategy can influence the level of support that insiders are willing to provide.¹⁴ For example, administrators may support the measures required by the court if the reforms will increase their control over resources. Third, the degree of success appears to vary with the approach taken by the court. The strategy of judicial intervention may be an important factor which accounts for differences in the success of

¹² See e.g. Eileen B. Leonard, *Judicial Decisions and Prison Reform: The Impact of Litigation on Women Prisoners*, 31 SOCIAL PROBLEMS 45-58 (1983).

¹³ Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 683-86 (1993).

¹⁴ *Id.*; see also John J. DiIulio, Jr., NO ESCAPE: THE FUTURE OF AMERICAN CORRECTIONS, 176-79 (1991); Robert A. Katzmann, Note, *Judicial Intervention and Organizational Theory: Changing Bureaucratic Behavior and Policy*, 89 YALE L. J. 513 (1980); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43 (1979).

litigation. Sturm has suggested that the “the synthesis of traditional judicial sanctions and a deliberative remedial process enables the court to create sufficient pressure to induce prison officials to undertake compliance and yet defuse the resistance that sometimes follows coercive intervention.”¹⁵ Finally, the use of creative alternatives to litigation may increase the likelihood of success. Sturm observes that “[j]udges and litigators have developed more cooperative forms of fact-finding, remedial formulation, and monitoring that minimize the adverse effects of the adversary process and enhance the possibility of cooperative approaches to solving the problems identified through litigation or the threat of litigation.”¹⁶ It appears that the role of the court should be viewed as a variable in institutional reform litigation cases. Judges are presented with an array of options which influence the course of litigation. Different strategies of judicial intervention will influence the ability of a court to effect change in an institution.

Given the apparent relationship between the implementation strategy of a judge and the success of court intervention, it is important to determine whether the measures that are required for successful intervention in a prison case fall within the limits of judicial action that are created by the inherent and self-imposed limitations on the role of the judiciary.

IV. PROGRAMMING IN WOMEN’S PRISONS

¹⁵ Susan P. Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 891 (1990).

¹⁶ Sturm, *Legacy and Future*, at 685.

Social scientists have written extensively about the deficiencies in educational and vocational programming in women's prisons. The two principal deficiencies that have been identified are disparities in the availability of programming, and differences in programming content.

Female prisoners generally have access to fewer educational and vocational opportunities than male prisoners. This problem is attributable in part to the relatively small size of the female inmate population in the United States. In 1993, females comprised 5.8 percent of all sentenced prisoners in federal and state institutions.¹⁷ Correctional systems have found that the provision of educational and vocational programming for female prisoners is impracticable from an economic standpoint due to the absence of economies of scale.¹⁸ High cost per prisoner has discouraged states from offering female prisoners programming comparable at a level of that offered to male prisoners.

The small size of the female prisoner population limits programming in other ways. In some states all female prisoners are housed in a single facility. In these states opportunities for female prisoners are limited because they cannot be transferred to other facilities to take different educational and vocational programs. Male prisoners enjoy a decided advantage because they can be transferred among facilities within a state to take advantage of differences in programming.¹⁹

The quality of educational and vocational programming offered to female prisoners has also been the subject of a great deal of discussion. Programming decisions

¹⁷ U.S. Department of Justice, PRISONERS IN STATE AND FEDERAL INSTITUTIONS.

¹⁸ See Ralph R. Arditi, Frederick Goldberg Jr., M. Martha Hartle, John H. Peters & William R. Phelps, Note, *The Sexual Segregation of American Prisons*, 82 YALE L. J. 1229, 1241-42 (1973).

in correctional facilities for females have been influenced by outmoded conceptions of the role of women in society. During the 1970s and 1980s, social scientists found that the programming options that are available to female prisoners were usually based on sexual stereotyping.²⁰ In women's prisons "the roles of mother, homemaker and successful shopper are perpetuated in the few adult education courses available."²¹ Vocational training for women tended to be offered in fields such as domestic service, cosmetology, laundry and clerical work.²² Although training in these fields undoubtedly provides participants with valuable skills, gender stereotyping may deny female prisoners the opportunity to train for employment in 'non-traditional' fields. Jobs in non-traditional fields such as carpentry, meat cutting and welding generally offer higher wages than jobs in 'traditional' fields.²³ The absence vocational programs which offer women an opportunity to enter the non-traditional fields has been a salient concern in the social scientific literature in this area.

Programming plays an important role in the furtherance of the objectives of the correctional system. Although the efficacy of rehabilitative programs has been hotly contested there appears to be a prevailing belief among corrections administrators that rehabilitative programming is desirable. The administrators' position has been described as follows:

¹⁹ Clarice Feinman, *WOMEN IN THE CRIMINAL JUSTICE SYSTEM*, 3d Ed., 70 (1994).

²⁰ See Imogene L. Moyer, *Women's Prisons: Issues and Controversies*, *IT'S A CRIME: WOMEN AND JUSTICE*, 203 (R. Muraskin & T. Alleman) (1993); see also Merry Morash, Robin N. Haarr & Lila Rucker, *A Comparison of Programming for Women and Men in U.S. Prisons in the 1980s*, 40 *CRIME & DELINQUENCY* 197 (1994); Concetta C. Culliver, *Females Behind Prison Bars*, *FEMALE CRIMINALITY: THE STATE OF THE ART*, 397-404 (C. Culliver, ed.) (1993); Sharon L. Fabian, *Toward the Best Interests of Woman Prisoners: Is the System Working?*, 6 *NEW ENG. J. ON PRISON LAW* 1-60 (1979).

²¹ Coramae Richey Mann, *FEMALE CRIME AND DELINQUENCY*, 215 (1984).

²² Joycelyn M. Pollock-Bryne, *WOMEN, PRISON & CRIME*, 92 (1990).

Their common sense tells them that exposing offenders to life-enhancing, skills-imparting programs is likely to help keep at least some of them on the straight and narrow. And their experiences confirm that, under certain conditions, some types of programs do improve the post-release life prospects of some of the offenders who participate in them.²⁴

The availability of educational and vocational programming is particularly important in women's prisons because of the characteristics of the inmate population.

Social scientists have emphasized the relationship between criminal activity and economic factors. Studies have found that women who engage in criminal activity "tend to be low socioeconomic status, poorly educated, under- or unemployed, and disproportionately from minority groups, and often have dependents who rely on them for economic support."²⁵ The results of a recent American Correctional Association survey of female prisoners are telling. According to the ACA survey "[t]he average female offender is a high school dropout with one to two years of education and no GED (26 percent), or one to three years of education and a GED (24 percent)."²⁶

Observers have also looked at other indicia of achievement. Some commentators have noted that years of schooling may be an imperfect measure of the level of achievement of female prisoners. In a study of the female prisoner population in Michigan that was conducted during the 1970s researchers found that the number of years of education of newly incarcerated inmates increased between 1968 and 1978.

²³ Robert R. Ross and Elizabeth A. Fabiano, *FEMALE OFFENDERS: CORRECTIONAL AFTERTHOUGHTS*, 31 (1986).

²⁴ John J. DiIulio, Jr., *supra* note 14, 107.

²⁵ Darrell Steffensmeier & Cathy Streifel, *Trends in Female Crime, 1960-1990*, *FEMALE CRIMINALITY: THE STATE OF THE ART*, 72 (Concetta C. Culliver) (1993); *see also* Alida V. Merlo, *Female Criminality in the 1990s*, *WOMEN, LAW, & SOCIAL CONTROL*, 119-134 (A. Merlo & J. M. Pollock, eds.) (1995); Pollock-Bryne, *supra* note 23, at 56-59.

Nonetheless, performance measured in terms of reading level, grade rating and IQ did not increase during this time period.²⁷ Educational and vocational training may reduce recidivism by enabling women to achieve economic self-sufficiency upon release.

V. THE EQUAL PROTECTION CLAUSE AND PROGRAMMING

The Equal Protection claim presented in *Glover v. Johnson* is unusual because of the success enjoyed by the plaintiffs. Recently the Sixth Circuit observed that “[n]ot a single federal appellate court in the nation has ever held that a lack of parity with respect to educational or vocational opportunities between male and female inmates is a violation of the Equal Protection Clause of the Fourteenth Amendment – not before the case was filed in 1979 or ever since.”²⁸

(i) Equal Protection Analysis in *Glover v. Johnson*

In 1979 Judge John Feikens found that the Michigan Department of Corrections officials were bound to provide female prisoners with treatment and facilities that are “substantially equivalent” to those provided to male prisoners.²⁹ The standard applied by Feikens was enunciated by the Supreme Court in *Craig v. Boren*. In order to withstand constitutional challenge “classifications by gender must serve important government

²⁶ American Correctional Association, *THE FEMALE OFFENDER: WHAT DOES THE FUTURE HOLD?*, 7 (1990).

²⁷ Alfreda Iglehart, *Personal and Social Characteristics of Female Offenders*, FEMALES IN PRISON IN MICHIGAN, 1968-1978: A STUDY OF COMMITMENT PATTERNS, 41 (1981).

²⁸ *Glover v. Johnson*, 135 F.3d 229, 253 (6th Cir. 1998).

²⁹ *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979).

objectives and must be substantially related to achievement of these objectives.”³⁰ In *Glover* Feikens found that “given the existing schedule of educational and vocational programming ... the alleged practical effect of the otherwise justifiable legislative decision to house the sexes separately is to deny the women access to programs of a range and quality comparable to those offered the men.”³¹ After finding this disparity the Feikens directed the Court’s inquiry to the questions that follow from the *Craig* standard. He addressed two questions: “first, whether the practices ... achieve in any way the goals and purposes of the corrections system; and second, whether the relationship between the practice and the legislative purpose is sufficiently substantial to justify the dissimilar treatment of the State’s female prisoners.”³² He found that both questions were answered in the negative.

Although the level of review for classifications by gender has been heightened since Feikens’ ruling³³ considerable hurdles remain for those who seek to assert Equal Protection claims in prison civil rights litigation.

(ii) Similarity in the Situation of Female and Male Prisoners

Courts have taken differing approaches to the conceptualization of Equal Protection claims by female prisoners alleging disparities in educational and vocational programming. Some courts have noted that the *Glover* court’s analysis proceeded under

³⁰ *Craig v. Boren*, 429 U.S. 190, 197 (1976).

³¹ *Glover*, 478 F. Supp. at 1080.

³² *Id.*

³³ See e.g. *Mississippi University for Women v. Hogan*, 458 U.S. 102 (1982); *United States v. Virginia*, 518 U.S. 515 (1996).

the presumption that female and male prisoners were similarly situated for the purposes of an Equal Protection analysis.³⁴ The *Glover* court's presumption was based on the legislative intent of the State of Michigan. Feikens found evidence of legislative intent to implement the policies governing the operation of the corrections system on a "system-wide, uniform basis."³⁵

Courts have generally demonstrated a reluctance to proceed under this presumption.³⁶ Recent cases have held that the plaintiffs must make a threshold showing that they are similarly situated to those who have allegedly received favorable treatment. This showing typically requires a comparison between female and male correctional facilities. For example, in *Klinger v. Department of Corrections* the Eighth Circuit compared prison population size, average length of sentence, security classification, types of crimes and the different needs of female and male prisoners.³⁷ After finding significant differences in these areas the court held that female and male prisoners were not similarly situated for purposes of prison programs and services. This finding proved to be fatal to the plaintiffs' Equal Protection claim because "[d]issimilar treatment of dissimilarly situated persons does not violate equal protection."³⁸

This approach is undoubtedly motivated by concerns of policy. A strict test of equivalence comparing the opportunities afforded to female and male inmates would reduce the Equal Protection analysis to an absurdity. The Eighth Circuit presented this concern as follows:

³⁴ See e.g. *Pargo v. Elliot*, 894 F. Supp. 1243, 1253, n.3 (S.D. Iowa, 1995).

³⁵ *Glover*, 478 F. Supp. at 1082.

³⁶ See generally Sonja A. Soehnel, *Sex Discrimination in Treatment of Jail or Prison Inmates*, 12 ALR 4th 1219-41 (1982); see also Supplement (1998).

³⁷ *Klinger v. Department of Corrections*, 31 F.3d 727, 731-32 (8th. Cir. 1994).

Assuming that all prisons start with adequate yet limited funding ... officials will calibrate programming differently in each prison, emphasizing in one prison programs that they de-emphasize in others. Thus, female inmates can always point out certain ways in which male prisons are "better" than theirs, just as male inmates can always point out *other* ways in which female prisons are "better" than theirs.³⁹

It appears that the crux of the problem is defining parity in a manner which avoids the complications that would arise under a program-by-program comparison.

The *Klinger* court's approach is not without problems. The threshold showing requirement may be an insurmountable obstacle for plaintiffs. The problem that is presented can best be illustrated with an example. The presence of economies of scale reduces the cost per prisoner of educational and vocational programming in institutions where there is a large inmate population. All else being equal it is more efficient to provide programming at a prison with a relatively large population than a prison with a relatively small population. Female prisoners are usually housed in facilities with a smaller inmate population than facilities housing male prisoners. In a number of Equal Protection cases defendants have argued that they were unable to provide women inmates with the same level of programming as male inmates because of the prohibitive cost of doing so.⁴⁰ Some courts have suggested that the difference in population size is a factor related to the threshold question of whether female prisoners are similarly situated with their male counterparts. For example, in *Women Prisoners of the District of Columbia*

³⁸ *Id.* at 731.

³⁹ *Id.*; see also *Women Prisoners of District of Columbia Department of Corrections v. District of Columbia*, 93 F.3d 910, 926 (D.C. Cir. 1996). ("Under the program-by-program method of comparison ... any divergence from an identity of programs gives rise to equal protection liability.")

⁴⁰ See e.g. *Glover*, 478 F. Supp. at 1078; *Women Prisoners*, 93 F.3d 910.

the District of Columbia Circuit observed that “[i]t is hardly surprising, let alone evidence of discrimination, that the smaller correctional facility offered fewer programs than the larger one.”⁴¹

This approach has faced considerable criticism. In *Glover* Judge Feikens was unwilling to accept this line of argumentation, characterizing it as “not a justification but an excuse for the kind of treatment afforded women prisoners.”⁴² Other judges have suggested that this approach eviscerates the protections offered by the Equal Protection Clause. In the dissenting opinion in *Keevan v. Smith* Judge Gerald W. Heaney observed that “[i]f our equal protection inquiry ended every time a plaintiff fell short of showing different treatment at a mirror-image facility ... *Klinger* would ‘stand for the proposition that women and men prison inmates can never be similarly situated for purposes of equal protection analysis.’”⁴³

Disagreement about the scope of prison administrators’ constitutional duties is attributable in part to differing conceptions of the role of the correctional system. For example, writing in dissent in *Klinger*, Judge Theodore McMillian observed that “[i]rrespective of gender, the prison system strives to prevent revolving-door recidivism,” and that a “close and critical nexus exists between inmate rehabilitation and the provision of recreational opportunities and educational and vocational training programs and services to inmates within the prison system.”⁴⁴ In McMillian’s view female and male prisoners are similarly situated with respect to the objective of rehabilitation, and that disparities in programming could provide a basis for an Equal Protection claim.

⁴¹ *Women Prisoners*, 93 F.3d at 925.

⁴² *Glover*, 478 F. Supp. at 1078.

⁴³ *Keevan v. Smith*, 100 F.3d 644, 653 (8th Cir. 1996) (citations omitted).

The contending viewpoints demonstrate the difficulty of developing a feasible conception of the constitutional duties of prison administrators. Courts have been forced to balance the need to extend the protections offered by the Equal Protection clause to prisoners whilst balancing a host of prudential concerns. This conceptual challenge provides the backdrop for the *Glover v. Johnson* litigation.

VI. CASE STUDY

A. GLOVER V. JOHNSON, 1977-1979

On May 19, 1977 five named and several unnamed women inmates incarcerated at the Huron Valley Women's Facility in Ypsilanti, Michigan filed a civil rights suit on behalf of all women inmates in Michigan against various Michigan Department of Correction officials seeking declaratory and injunctive relief.⁴⁵ The plaintiffs alleged that the defendants had failed to provide educational and vocational opportunities to female inmates equal to those provided to male inmates. The suit was described as a "broad-based, institutional attack on the adequacy of the Department's current educational policies and programs for women inmates."⁴⁶ Plaintiffs stated claims under 42 U.S.C. §1983 and Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq. seeking (1) a judgment declaring that the Department of Corrections' policies and

⁴⁴ Klinger, 93 F.3d at 734-35.

⁴⁵ The five named plaintiffs were Mary Glover, Lynda Gates, Jimmie Ann Brown, Manetta Gant, and Jacalyn M. Settles.

programs were a denial of Equal Protection, and (2) a permanent injunction compelling the Department to improve its treatment programs for women. The claims under Title IX were subsequently dropped by the plaintiffs.

At the time the Michigan corrections system contained approximately 420 female prisoners. These prisoners were housed at the Detroit House of Corrections. Shortly after the commencement of legal proceedings the prisoners were transferred to Huron Valley and the Kalamazoo County Jail.⁴⁷ Approximately 380 of these inmates were housed at the Huron Valley facility. The remaining women were housed on a temporary and rotating basis in the Kalamazoo County Jail. The Department transferred inmates to the Kalamazoo facility on a rotating basis in order to alleviate overcrowding at Huron Valley.

The suit was filed as a class action on behalf of all female inmates in Michigan. Plaintiffs sought to define the class as “all female penal inmates who are now, or may be in the future, incarcerated at the Huron Valley Women’s Facility and at the Kalamazoo County Jail.”⁴⁸ Plaintiffs also sought certification of a subclass composed of all present and future felons incarcerated at the Kalamazoo County Jail.

The plaintiffs also amended their complaint to add the Kalamazoo County Sheriff as defendant, alleging inadequacies in the educational and treatment programs available at the Kalamazoo County Jail. Plaintiffs also alleged a number of other civil rights

⁴⁶ *Glover v. Johnson*, 85 F.R.D. 1, 2 (E.D. Mich. 1977). The plaintiffs subsequently amended their complaint to include a claim that their right of access to the courts had been violated by the defendants’ failure to provide an adequate law library. This aspect of the case lies beyond the scope of this case study.

⁴⁷ *Glover*, 85 F.R.D. at 3.

⁴⁸ *Id.*

violations at the County facility including overly restrictive mailing and visitation privileges, an inadequate law library and denial of religious services.

In an opinion filed on December 23, 1977 the district court certified the class over the objections of the defendants, "constru[ing] the requested inclusion of future female inmates as a provision which merely recognizes that the state's population of female felons will change over time and that female felons who come within the jurisdiction of the Department of Corrections following Rule 23 certification must, at that point, become members of the plaintiff class as well."⁴⁹ The Court also certified the subclass under Rule 23(c)(4), noting that the creation of a subclass was appropriate whenever a distinct segment of the class presents special factual circumstances.⁵⁰

The suit was filed because the class representatives felt that there was no other means of obtaining improvements in programming and conditions of confinement. Judith Magid, counsel for the plaintiffs, described the position of the class members at the time of trial as follows:

The bringing of this lawsuit was necessitated by the simple truth that prison officials do not take women prisoners seriously. This is because most prison officials are white males who hold certain sexist and racist attitudes about women prisoners. These include that incarcerated women do not possess the same competency levels as men, with which to handle vocational and academic training. Prison officials feel proper programs should make women "ladylike," as if somehow learning 19th Century manners would keep a person from a life of crime. They hold the stereotypic belief that when these women are released from prison they will not want to have control over their own lives, they would rather be dependent on a man or the welfare system.⁵¹

⁴⁹ *Id.* at 4.

⁵⁰ *Id.* at 7.

⁵¹ Judith Magid, *Glover v. Johnson: Totality Litigation Against Women's Institutions*, 2 PRISON LAW MONITOR 89, 91 (1979).

From the vantage point of the plaintiffs litigation appeared to be the only approach that could remedy the perceived disparities in the conditions of confinement.

At trial the district court applied the Equal Protection analysis to the areas challenged by the plaintiffs: educational and vocational programming, adequacy of institutional facilities, prison industry and wage rates, and work pass programs.

1. Standard of Review

Once the trial commenced Feikens was presented with a difficult problem – the plaintiffs’ claim of facial gender discrimination was novel. Feikens’ research uncovered only one case presenting similar questions.⁵² The sole case was an unpublished district court opinion decided in 1974. In *Barefield v. Leach*, two plaintiffs women’s prison in New Mexico filed suit to challenge the legality of the conditions of their confinement. The opinion concluded that the Equal Protection clause required *parity* of treatment, a concept distinct from *identity* of treatment.⁵³ The court added that disparities could only be justified if the state could demonstrate a fair and substantial relationship to the purposes of incarceration.⁵⁴

Feikens applied the *Barefield* court’s standard in *Glover*. He concluded that the defendants were “bound to provide women inmates with treatment and facilities that are substantially equivalent to those provided the men i.e., equivalent in substance if not in

⁵² See *Glover v. Johnson*, -- F. Supp. 2d --, 1999 WL 80290 at *2 (1999).

⁵³ *Barefield v. Leach*, No. 10282 (D. N.M. 1974). See also

form unless their actions, though failing to do so, nonetheless bear a fair and substantial relationship to achievement of the State's correctional objectives."⁵⁵

Feikens observed that the notion of parity of treatment was consistent with the Equal Protection principles set forth by the Supreme Court in 1976 in *Craig v. Boren*. Under *Craig* classifications by gender must serve important governmental objectives and must be substantially related to achievement of these objectives in order to withstand constitutional challenge.⁵⁶ Feikens concluded that any deviation from the parity in treatment required by the Equal Protection Clause was subject to the scrutiny required by *Craig*.

Feikens found that the classification of inmates on the basis of gender was conducted by the Department pursuant to state statutes which authorized the practice of confining male and female inmates separately. Although male and female prisoners were confined separately the aims of the correctional system were to be implemented uniformly regardless of gender.⁵⁷

Feikens found that the practices at Huron Valley did not promote the goals and purposes of the corrections system. He found that the objectives of the state's treatment of its prisoners were rehabilitation and reintegration. The objective of rehabilitation consisted of providing prisoners with "educational and vocational skills in order to

⁵⁴ See Ruth Diane Lown and Charlene Snow, *Women, The Forgotten Prisoners: Glover v. Johnson*, LEGAL RIGHTS OF PRISONERS (G. P. Alpert, ed.), 203 (1981).

⁵⁵ *Glover*, 478 F. Supp. at 1079. This opinion consisted of two cases that were consolidated. In March 1978 Feikens consolidated *Charmaine Cornish, et. al. v. Perry Johnson, et. al.*, Civil Action No. 77-72557 with *Glover*. The principal issue in *Cornish* was the adequacy of the law library available to women inmates at Huron Valley. Since the issue was also raised by the plaintiffs in *Glover*, Feikens consolidated the cases with the approval of the plaintiffs in both cases. This aspect of the case falls beyond the ambit of this case study.

⁵⁶ *Craig*, 429 U.S. at 197.

⁵⁷ *Glover*, 478 F. Supp. at 1082.

enhance the likelihood of their stable, productive participation in society after release.”⁵⁸ Reintegration emphasized additional preparation for re-entry into society after an extended period of incarceration.

Feikens concluded that given the educational and vocational programs available to women inmates at the time of the lawsuit, the “practical effect of the otherwise justifiable legislative decision to house the sexes separately is to deny the women access to programs of a range and quality comparable to those offered the men.”⁵⁹ The situation was deemed to be at variance with the legislative intent to implement the state’s programming goals for prisoners uniformly throughout the system.⁶⁰

The defendants argued that the disparities were not unconstitutional because the smaller number of women inmates made programming at Huron Valley impractical from an economic standpoint. The defendants also claimed that as an institution in the Michigan State correctional system, Huron Valley fared as well as, or better than, male institutions of the same size in terms of the programs offered to inmates.⁶¹ Feikens rejected both arguments. He reasoned that women as a group were limited to the opportunities available at Huron Valley. Male inmates had access to more program opportunities than female inmates because they could be transferred to other prison facilities in Michigan. Testimony at trial also revealed disparities in the quality of programming.

⁵⁸ *Id.* at 1081.

⁵⁹ *Id.* at 1080.

⁶⁰ *Id.* at 1082; *see also* Magid, *supra* note 51, at 91.

⁶¹ *Id.* at 1078.

2. Remedy

In addition to the objectives of rehabilitation and reintegration the Court identified other principles that were developed at trial and accepted as desirable in the creation of vocational and educational programming. A great deal of emphasis was placed on the utility of programming and prisoner choice.⁶² In the selection of educational and vocational programs the marketability of skills was deemed to be an important consideration. The Court also required that the selection of offerings reflect prisoners' interests.

Feikens found that there was "significant discrimination" in several areas of programming at Huron Valley in violation of the Fourteenth Amendment. He set forth the following findings and requirements in his opinion.

(a) Educational Programs

Feikens found that the educational programs offered at Huron Valley were adequate. At the time of the trial the State emphasized the acquisition of sixth grade reading skills and attainment of GED equivalency. The state also offered community college programs at Huron Valley which culminated in an Associate's Degree. Feikens stressed that "the State has a continuing duty to its women inmates to ensure that substantial equivalence in community college programming is maintained."⁶³

⁶² *Id.*

⁶³ *Id.* at 1084.

The plaintiffs also alleged that the absence of a four-year degree program at Huron Valley constituted a violation of equal protection because they were offered to male prisoners elsewhere in Michigan.⁶⁴ Feikens was unwilling to compel the State to adopt a four-year program at Huron Valley because Perry Johnson, Director of the Michigan Department of Corrections, testified that the budget proposal at the time of trial included a reduction that would eliminate educational programs above the community college level in Michigan prisons. Feikens concluded that “the State’s announced decision to withdraw this element of its educational programming across the board cannot be said to prejudice unfairly any particular group or segment of the inmate population.”⁶⁵

The Court also found that the defendants “may not impede the access of women inmates to the courses they desire by abdicating its responsibilities to the college, nor by raising unnecessary barriers in the form of scheduling conflicts, inadequate facilities, or restrictions on inmate movement not directly related to institutional security.”⁶⁶

(b) Vocational Training

The objective of the career development and counseling program was to provide women inmates with the skills and employment attitudes that would allow them to be placed in Community Treatment Centers (CTC) with sufficient ability to secure employment in accordance with the requirements of the CTC program. Although Feikens found these objectives suitable for the general population at Huron Valley he thought “it

⁶⁴ Spring Arbor College had provided a four-year baccalaureate degree program at Jackson Prison since 1979. The program was funded by federal grants. *Glover v. Johnson*, 855 F.2d 277, 279 (6th Cir. 1988).

⁶⁵ *Glover*, 478 F. Supp. at 1085.

essential that Defendants begin immediately a comprehensive survey and analysis of the vocational needs and interests of the women at Huron Valley.”⁶⁷ The survey was to be preceded by employment counseling and testing sessions in order to determine each inmate’s needs and capabilities. The rationale for requiring the survey was ensuring that programming reflected the inmates’ interests.

At the time of trial vocational training was offered in five occupational categories: office occupations, food service, graphic arts, building maintenance, and general shop. Male prisoners had access to roughly twenty different vocational programs. In most cases the “male” versions of programs offered to male and female inmates were more extensive and useful than the “female” version.⁶⁸ Feikens found that the range and quality of programming was not substantially equivalent to the programming offered to male inmates. He also concluded that the state of vocational training undermined the two principal objectives of the correctional system. Feikens suggested that the prospect of rehabilitation was lessened because the vocational programs became “an active source of frustration.”⁶⁹ He added that efforts at reintegrating prisoners were undermined because the job related skills failed to prepare prisoners for “placement above menial status on the outside.”⁷⁰

Feikens required the defendants to supplement the existing vocational programs with additional opportunities that met the interests and needs of female inmates. More

⁶⁶ *Id.* at 1084.

⁶⁷ *Id.* at 1086.

⁶⁸ *Id.* at 1087. For example, the food service program at Huron Valley taught “non-commercial, short-order cooking skills.” By contrast, the program at State Prison of Southern Michigan was “designed for full commercial use.” Other examples of shortcomings in vocational programming are also provided in Magid, *supra* note 51, at 90-91; see also Lown and Snow, *supra* note 54, at 198.

⁶⁹ *Id.* at 1087-88.

⁷⁰ *Id.*

specifically, he indicated that the “programs should be based on the interests and needs of the female inmates rather than short-sighted efforts to duplicate the programs offered at male institutions.”⁷¹

(c) Apprenticeships and Prison Industries

Women inmates were also found to be disadvantaged by the lack of apprenticeships and prison industries. Male inmates in Michigan prisons had access to apprenticeships in a number of different trades including draftsman, industrial maintenance electrician, machine repair, machinist, millwright, tool and die designer, and tool and die maker.⁷²

Michigan also failed to implement a prison industry program at Huron Valley. Feikens found that prison industry plays an important role in the furtherance of the objectives of the correctional system by providing inmates with training. He remarked that the Correctional Industries Act, M.C.L.A. § 800.327, required the creation of opportunities “as fully as practicable for the employment of inmates in tasks consistent with the penal and rehabilitative purposes of their imprisonment and with the public economy.”⁷³ Feikens also noted that the state statutes establishing prison industries laid stress on selecting prison industries that were relevant to the inmates.

⁷¹ *Id.* at 1087.

⁷² *Id.* at 1089.

⁷³ *Id.* at 1090.

Feikens required the defendants to offer apprenticeships and prison industries to the women inmates at Huron Valley. The programs were to be selected on the basis of inmate interest following the completion of career counseling.

The plaintiffs also alleged that women inmates with work assignments earned less than male inmates assigned to similar functions. Although the wage scale used to determine inmate wages was standardized throughout the corrections system female inmates generally earned less than their male counterparts. Feikens found that this result was attributable to the imbalance in the range of opportunities available to female and male inmates. The lower level of programming at Huron Valley meant that inmate work assignments tended to be less challenging or involved the assumption of fewer responsibilities. He concluded that a determination of whether the difference in wage was attributable to discrimination could only be made once changes in programming and funding had been made by the defendants.⁷⁴

(d) Off-Grounds Programming

Another area of concern for the plaintiffs was the availability of employment opportunities outside of the prison setting. Male inmates could work outside of the prison setting in one of two programs. The work pass program allowed male inmates to leave the prison during the day to work for a private employer at the wage prevailing outside of prison. Male inmates in the last phase of their incarceration could also secure

⁷⁴ *Id.* at 1092.

employment at a CTC. Inmate assigned to a CTC were permitted to locate employment on their own and work at the prevailing market wage.

The work pass program was unavailable to women inmates. Many women inmates were unwilling to accept an opportunity to transfer to a CTC. They preferred a work pass that would require them to return to the prison in the evenings because some of the treatment centers were located in “poorer, unsafe neighborhoods requiring them to return to the environment that fostered their criminal behavior in the first place.”⁷⁵ Concluding that the work pass “is a desirable program with substantial rehabilitative possibilities” Feikens found that female prisoners were entitled to participate in the program.⁷⁶ He noted that the denial of the work pass actually hindered the rehabilitation of women inmates who could not adjust successfully to life in the treatment centers.

3. Kalamazoo County Jail

Feikens did not reach the Equal Protection claims based on the conditions of confinement at Kalamazoo County Jail. The conditions at the prison were so poor that they failed to satisfy even the State’s self-imposed requirements for the confinement of female prisoners.⁷⁷ Use of the Kalamazoo County Jail ceased shortly after the decision.

4. Feikens’ 1979 Order

⁷⁵ *Id.* at 1093.

⁷⁶ *Id.*

⁷⁷ *See id.* at 1098-1100.

Based on these findings Feikens entered an order directing the defendants to remedy the violations of the Equal Protection Clause of the Fourteenth Amendment. The order contained four elements which related to the Equal Protection Clause: (a) provision of post-secondary programs comparable to that available to male inmates; (b) vocational programming; implementation of a vocational counseling and testing program; (c) implementation of apprenticeship and prison industry programs; (d) off-grounds programming. The defendants were ordered to submit a schedule for the implementation of the changes required by the order by January 1, 1980. The State's plans would not be effective until they were approved by the Court. Feikens also indicated that the Court would retain jurisdiction until it was satisfied that the terms of the Opinion and Order had been complied with in all respects.⁷⁸

B. THE FINAL ORDER, 1981

Following the submission of the State's plan on January 2, 1980 the parties to the case engaged in lengthy negotiations. In April 1981 the Court issued a Final Order addressing some of the Equal Protection issues that were the subject of the October 1979 opinion.⁷⁹ The Final Order did not cover the vocational testing and counseling, or the work pass program. Feikens indicated that these components of the opinion were in the process of development and would be incorporated as part of a supplemental final order.

⁷⁸ *Id.* at 1103.

⁷⁹ *Glover v. Johnson*, 510 F. Supp. 1019 (E.D. Mich. 1981). See Appendix 1 for text.

For reasons that are unclear Feikens did not enter a supplementary order specifying the defendants' obligations in these areas.⁸⁰

The Final Order established the following requirements.

(a) Educational Programming

The Final Order required the State provide a post-secondary education program comparable to the programming available to male inmates at the State Prison of Southern Michigan (SPSM). The program would culminate in an Associate's Degree that would enable entry into a four-year college program.

Feikens placed a great deal of emphasis on the removal of potential impediments to participation. Programming was to be offered to all women who sought to participate. The defendants were also required to make efforts to minimize conflicts, to provide all required course materials and furnish transportation for inmates attending courses taught at educational institutions outside of the prison to the extent that such measures were consistent with reasonable requirements of security and cost. The order also required the defendants to transport inmates to a local community college in cases where several students had an interest in taking a course that was only offered at the community college or where a student could not obtain an associate's degree after completing all of the relevant courses that were offered at the women's prison.

Although the Final Order did not require four-year degree programming Feikens included a proviso which limited the defendants' freedom to make policy decisions. The

⁸⁰ *Id.* at 1020.

defendants were ordered to "assist and cooperate in the establishment and operation (including provision of space) of a baccalaureate program which any four-year college desires to offer women inmates; and in no way shall that assistance be less than that provided to colleges offering baccalaureate programs at men's prisons."⁸¹ The Final Order ensured that disparity in baccalaureate programming could not result from preferential treatment of male prisoners by the State.

(b) Apprenticeships and Prison Industry

The defendants were required to establish five apprenticeship programs for female prisoners. The standards for this program were developed by the Huron Valley Women's Facility Multi-crafts Joint Apprenticeship and Training Committee. The committee comprised of local and regional representatives from labor and management. Any apprenticeship program would have to be approved by the United States Department of Labor. The Committee was responsible for overseeing the operation of the apprenticeship program for a period of five years, or until a date when the defendants were in compliance with the April 1981 Order. Feikens ordered the defendants to implement an apprenticeship program taking "whatever steps are necessary to ensure compliance with the apprenticeship standard adopted" within six months of the Order.⁸²

In the segments dealing with prison industries Feikens incorporated an interim order issued on April 8, 1980 into the Final Order. The interim order required the defendants to establish two prison industries at Huron Valley by January 1982. The two

⁸¹ *Id.* at 1021.

industries identified by Feikens were manufacture of license plate tabs and chair cushions.

Feikens also required the defendants to contribute to a fund established for the benefit of women inmates in Michigan. The defendants were required to contribute a sum equal to the wages that would have been earned by thirty prisoners if an industry program had been operating at Huron Valley. The Final Order stipulated that the payments would be retroactive to January 1980 and continue for at least eight quarters, or until such time as a full industry program was operating at Huron Valley.⁸³

C. IMPLEMENTATION OF THE FINAL ORDER, 1981-1987

Efforts to secure compliance with the terms of the Final Order encountered little success. In 1987 Feikens would remark “despite my best efforts to prod and cajole the defendants into compliance, and despite several contempt proceedings, defendants persist through bureaucratic inertia, bureaucratic intransigence, and resistance in denying female inmates educational opportunities.”⁸⁴ The years following the adoption of the Final Order proved to be particularly litigious.

In April 1985, the Department of Corrections opened a new facility for women prisoners. In the following months approximately 340 women were transferred to the Florence Crane Women’s Facility from Huron Valley in order to alleviate overcrowding

⁸² *Id.* at 1022.

⁸³ *Id.*

⁸⁴ *Glover v. Johnson*, 659 F. Supp. 621, 622 (E.D. Mich. 1987).

at the older facility. The scope of the litigation was broadened to include the availability of adequate programming at the new facility.⁸⁵

On January 22, 1986 the plaintiffs submitted a motion for contempt requesting that the Court find the defendants in contempt for failing to comply with the terms of the Final Order. In response to the petition Feikens conducted hearings and initiated negotiations in an attempt to ensure compliance with the 1981 Order. Feikens took the plaintiffs' motion under advisement.

In Feikens' view the post-secondary educational programming that was offered by the defendants was inadequate. He concluded that the course sequences did not lead to a meaningful Associate Degree that improved inmates' prospects for securing employment or pursuing further educational options.

Feikens also expressed dismay at the disparity in opportunities to enroll in four-year degree programs. Although Feikens' 1981 Order did not require the State to provide female inmates with baccalaureate programming the premise for this decision was undermined by subsequent developments. Contrary to the earlier testimony of the defendants⁸⁶ four-year degree programming for male inmates at SPSM was not phased out; male inmates at SPSM continued to receive baccalaureate programming from Spring Arbor College. Approximately forty male inmates received degrees each year.⁸⁷ After 1984 programming for inmates at SPSM was funded by the State.⁸⁸ Despite the entry of two court orders in 1984 which directed the defendants to provide comparable

⁸⁵ Note that the plaintiff class was defined to include all present and future women prisoners in Michigan. See Glover, 85 F.R.D. at 3.

⁸⁶ See Glover, 478 F. Supp. at 1085.

⁸⁷ Glover, 855 F.2d at 279.

educational programming for female inmates the defendants had yet to comply with the requirements of the Final Order in 1986.⁸⁹

Although the defendants agreed to offer two baccalaureate courses in October 1986 the plaintiffs complained that the defendants only intended to offer these courses at Huron Valley. Although baccalaureate programming was offered at Huron Valley in 1986 only four qualified inmates at Crane expressed an interest in participating in a four-year degree program.⁹⁰ The defendants felt that it was necessary to transfer the four inmates to Huron Valley due to the impracticality of offering programming to a small number of inmates. The four inmates declined to be transferred, and the plaintiffs filed a motion for a temporary restraining order requesting that the court enjoin the defendants from transferring the four inmates and require that they offer baccalaureate programming at Crane.⁹¹

On October 20 1986, Feikens granted preliminary relief ordering the defendants to provide the courses at Huron Valley and Crane beginning October 21, 1986 (Order 86-2125). As a part of this Order the defendants were enjoined from transferring the four inmates from Crane to Huron Valley. Despite Feikens' order the defendants did not offer baccalaureate courses at Crane. On October 22, 1986 the plaintiffs filed another motion to hold the defendants in contempt. Feikens took the motion for contempt under advisement. In response to the motion he conducted a series of hearings. During the

⁸⁸ Spring Arbor College initially received funding from the Michigan Department of Education. Eventually the State of Michigan granted an annual appropriation of \$120,000 for programming at SPSM. The funding was intended to be reimbursement for degrees granted to SPSM inmates.

⁸⁹ Glover, 659 F. Supp. at 622; *see also* Glover, 855 F.2d at 280-81. Judge Ryan found that "[f]or one reason or another no college or university has ever offered a regular four-year degree program at the Huron Valley Women's Facility."

⁹⁰ *See* Glover, 855 F.2d at 280.

⁹¹ *Id.*

course of these hearings Feikens expressed his intent to appoint an “administrator of education” who would be responsible for securing compliance with the terms of the Final Order.⁹² Under Feikens’ plan the administrator would be under the supervision of the district court. Although no order was entered appointing a search committee the district court “appointed” a committee consisting of administrative and academic officials from the University of Michigan to recommend a candidate.

By April 1987 a candidate had been selected by the committee. In the opinion entering the order which appointed the administrator Feikens professed his belief that ordinary contempt penalties would fail to ensure compliance.⁹³ Observing that “when the usual remedies are inadequate, a court of equity is justified, particularly in aid of an outstanding injunction, in turning to less common ones, such as a receivership, to get the job done,”⁹⁴ he appointed Dr. Richard Meisler of the University of Michigan. (Order 87-1466) Feikens subsequently described Dr. Meisler as “a temporary consultant with special authority to implement the judgment and orders of this Court.”⁹⁵

The principal problem that emerged following the implementation of the 1981 Order was agency. The parties responsible for implementing the requirements of the order demonstrated little interest in complying with the Courts’ orders. The appointment of an administrator supervised by the court was an attempt to minimize these problems of agency. Feikens took additional measures to ensure that his efforts would not be

⁹² The details of this stage in the litigation are somewhat unclear. See *Glover*, 855 F.2d 281.

⁹³ *Glover*, 659 F. Supp. at 623.

⁹⁴ *Id.* at 623, citing *Morgan v. McDonough*, 540 F.2d 527, 533 (1st Cir. 1976). Feikens’ conception of the appropriate role of the federal courts was also informed by the growth of the federal courts’ role in civil rights litigation in school boards and prisons. Feikens cites to cases including *Brown v. Board of Education*, 349 U.S. 294 (1955), *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and *Hutto v. Finney*, 437 U.S. 678 (1978).

⁹⁵ *Glover v. Johnson*, 662 F. Supp. 820, 821 (E.D. Mich. 1987)

undermined. He ordered the defendants not to circumvent the requirements of the Order by reducing educational opportunities available to male inmates. He also required the defendants to bear the cost of the plans designed and implemented by the administrator, and ordered “any State officers necessary to provide complete relief pursuant to this order be joined as party defendants.”⁹⁶

The entry of this order was the high-water mark of the district court’s involvement in policy making for women’s prisons. The powers that were conferred upon the administrator were considerable – the district court had assumed many of the duties that were formerly in the ambit of the state. State prison administrators’ decisions regarding funding and management of the entire Michigan corrections system were constrained by the district court’s orders in *Glover*.

D. ABUSE OF DISCRETION? 1987-1988

The defendants successfully appealed both orders to the Sixth Circuit. The Court of Appeals vacated both orders. The preliminary injunction requiring the state to offer baccalaureate courses at Crane was vacated because “it is not supported by minimally sufficient findings of fact.”⁹⁷ The Court of Appeals also set aside the order appointing the administrator finding that “we are not presented with an evidentiary record demonstrating sufficiently compelling justification, given considerations of comity and federalism, for

⁹⁶ *Glover*, 659 F. Supp. at 624.

⁹⁷ *Glover*, 855 F.2d at 278.

the extreme intrusiveness into the constitutional prerogatives of a state agency that results from the order appointing an administrator.”⁹⁸ The appeals will be examined in turn.

(i) Four-year Degree Programming at Crane (Order 86-2125)

In their appeal of Order 86-2125 the defendants claimed that they had been unable to elicit any interest from educational institutions in offering a four-year baccalaureate program at Crane despite their best efforts. The defendants also maintained that the state would cease to fund the program for male inmates at Jackson thereby eliminating the legal basis for providing baccalaureate programming to female inmates.⁹⁹

The Court of Appeals found that the district court’s decision to issue a preliminary injunction appeared to be unsupported because of the absence of specific factual findings.¹⁰⁰ For example, the Court observed that Feikens’ injunctive order was unsupported by a memorandum opinion or transcript of a bench opinion.¹⁰¹ Specific findings of fact were required by the Federal Rules of Civil Procedure. Rule 52(a) stipulates *inter alia* that “[i]n all actions tried upon the facts without a jury ... the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58.” Stated otherwise the Court of Appeals

⁹⁸ *Id.*

⁹⁹ *Id.* at 280-81.

¹⁰⁰ *Id.* at 284.

¹⁰¹ *Id.* at 283-84.

was unable determine whether Feikens' Order satisfied the standard for granting a preliminary injunction.¹⁰²

The Court of Appeals vacated the district court's injunctive order and remanded the matter to the district court for the specific findings of fact required by Rule 52(a). Writing for the majority Judge James L. Ryan included a list of possible criteria that could be used for determining whether parity existed on remand.¹⁰³ In a concurring opinion Judge Albert J. Engel wrote separately to emphasize that evidence of comparable per capita expenditure "is not an end in itself but may be one consideration – by no means controlling – in the ... difficult task of determining first whether equal protection of the law has been denied and, if so, in determining how most effectively that deprivation can be cured."¹⁰⁴

(ii) Appointment of the Administrator (Order 87-1466)

Although the order appointing Dr. Meisler included a "detailed chronology to explain [Feikens'] conclusion that ordinary contempt penalties will not bring compliance"¹⁰⁵ the Court of Appeals found that the factual findings were inadequate to support the appointment of an administrator. Writing for the majority, Judge Ryan indicated that "[a]lthough the record is unclear, it appears that no evidentiary findings

¹⁰² Under the prevailing standard the four factors to be considered in determining whether to grant or deny a preliminary injunction were (a) the likelihood of success on the merits of the action, (b) the irreparable harm which could result without the relief requested, (c) the impact on the public interest, and (d) the possibility of substantial harm to others. *See Christian Schmidt Brewing Co. v. Heileman Brewing Co.*, 753 F.2d 1354, 1356 (6th Cir. 1985).

¹⁰³ *See* Appendix 2.

¹⁰⁴ *Glover*, 855 F.2d at 288.

¹⁰⁵ *Glover*, 659 F. Supp. at 623.

were ever held primarily for the purpose of making factual findings on the necessity or desirability of appointing an administrator.”¹⁰⁶ Ryan reasoned that given the close connection between Orders 86-2125 and 87-1466 “it is plain that the appointment of the administrator is, in essence, an effort, in lieu of contempt proceedings, to enforce the injunctive order.”¹⁰⁷ Since it had already set aside Order 86-2125 the Court of Appeals had little choice but to invalidate order 87-1466.

Ryan also concluded that an independent ground for invalidating Order 87-1466 existed. In Ryan’s view the appointment of an administrator “is an excessively intrusive interference in the prerogatives of a state agency that is not supported by evidence of the quality and quantity required for the exercise of such extraordinary federal judicial power.”¹⁰⁸ Feikens was particularly critical of the fact that Feikens’ opinion did not examine the possibility that a less intrusive method of ensuring compliance was available.¹⁰⁹

In light of the defendants’ claim that they have made good faith efforts to comply with the terms of Feikens’ orders to provide educational parity for female and male inmates, and the absence of an evidentiary basis for Feikens’ legal conclusions Ryan concluded that Feikens abused his discretion in appointing the administrator.¹¹⁰

In addition to the problems identified by the Court of Appeals there is reason to ask whether the appointment of an administrator was an effective solution to the problem of noncompliance. In hindsight Dr. Meisler admits that he had been tasked with an

¹⁰⁶ Glover, 855 F.2d at 284-85.

¹⁰⁷ *Id.* at 285.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 286.

¹¹⁰ *Id.* at 287.

impossible responsibility.¹¹¹ In light of the defendants' record of recalcitrance and obstreperousness he suggests that most disagreements between the defendants and the administrator would have been resolved before the court. The toll in terms of effort, time and legal expense would have been prohibitive.

E. A NEW APPROACH, 1989-1991

On remand Feikens prepared a lengthy opinion in which he discussed the defendants' failure to comply with the Final Order.¹¹² The analysis was structured along the lines of the list of criteria included in the Court of Appeals' opinion setting aside Order 86-2125. Feikens divided his opinion into two sections. The first part of his opinion examined the defendants' compliance as of April 17, 1987. The second part of the opinion dealt with subsequent developments.

(a) Compliance as of April 17, 1987

Feikens selected April 17, 1987 for two reasons. First, as of April 1987 he had yet to rule on the plaintiffs' 1986 contempt motion. Second, since the Court of Appeals did not reach the merits of the defendants' challenges to his orders none of his proposed remedies had been ruled out as options. Not surprisingly Feikens found abundant support for his earlier decisions. He provided an extensive description of the shortcomings of the

¹¹¹ Interview with Dr. Richard Meisler, Program Director, Great Lakes Colleges Association (Mar. 12, 1999).

¹¹² See *Glover v. Johnson*, 721 F. Supp. 808 (E.D. Mich. 1989).

defendants' response as of April 1987 in the areas of associate's degree programming, baccalaureate programming, and off-grounds privileges.

(i) Educational Programming

Feikens found that poor planning and reduction of course offerings by the defendants meant that the associate's degree program lacked coherence.¹¹³ He noted that students found that they were unable to obtain an associate's degree in a particular field due to the paucity of course offerings. He attributed the incoherence of associate's degree programming to the defendants. For example, Feikens found that the absolute number of course offerings had declined markedly since 1981.

In the area of baccalaureate programming, female prisoners did not have access to comparable programming in April 1987. Although the 1981 Final Order did not require the defendants to provide four-year degree programming it required that they "assist and cooperate in the establishment and operation (including provision of space) of a baccalaureate program which any four-year college desires to offer women inmates; and in no way shall that assistance be less than that provided to colleges offering baccalaureate programs at men's prisons."¹¹⁴ Although male prisoners at SPSM continued to receive baccalaureate programming female prisoners did not have access to such programming.

Feikens was unwilling to accept the defendants' contention that the provision of four-year degree programming at Crane was impracticable. Feikens appeared to be troubled by the contrast between the defendants' claim and the testimony of an official

¹¹³ *Id.* at 816.

from a nearby college. During the January 1986 hearings a representative from Spring Arbor College testified that courses could begin at Crane by January 12, 1987.¹¹⁵ Although this information had been elicited in 1986 Feikens had not used it to support his order requiring baccalaureate programming at Crane.

In his discussion of post-secondary programming Feikens also discussed the nature of the duty owed by the defendant under the terms of the Final Order. Without citing any precedent, he stipulated that “[i]f impossibility can ever be a defense in a case such as this, it must be impossibilities in the strictest sense – that no one in the world can perform the required acts.”¹¹⁶

(ii) Vocational Programming

In the area of vocational programming Feikens set forth a litany of deficiencies.¹¹⁷ By April 1987 female inmates at Huron Valley and Crane had fewer vocational programs than 1981. The remaining vocational programs were substandard. The programs that were offered also failed to meet the needs of the female inmates because the defendants had ignored the results of the survey gauging inmate interest. Feikens also found that the disparities in opportunities available at women’s prisons in Michigan also contributed to the ineffectiveness of the vocational programming. For example, although male and female prisoners were offered courses in food service the equipment at Huron Valley was

¹¹⁴ See Glover, 510 F. Supp. at 1021.

¹¹⁵ Glover, 721 F. Supp. at 812, 818.

¹¹⁶ *Id.* at 819.

¹¹⁷ See *id.* at 819-22.

not commercial grade.¹¹⁸ Finally, Feikens found that the Crane facility offered virtually no vocational programming. Inmates participating in vocational programming who were transferred from Huron Valley to Crane were usually forced to conclude their training prematurely.

(iii) Apprenticeships

Feikens' identified a number of shortcomings in the apprenticeship program for female prisoners.¹¹⁹ As of April 1987 the defendants offered only three out of the five apprenticeships that were required by the Final Order. Furthermore the apprenticeships that were place in April 1987 were deficient when measured by the standards that were adopted at the time of the Final Order.

(iv) Off-grounds Programming

Feikens also noted that as of April 1987 female inmates had not been afforded any off-grounds privileges.

(b) Compliance after April 17, 1987

¹¹⁸ *Id.* at 821.

¹¹⁹ *See id.* at 820-25.

Feikens found that few steps toward compliance had been taken after April 1987. His discussion of compliance subsequent to 1987 included a number of additional findings of fact.

(i) Educational Programming

Feikens found that little progress had been made with regard to the selection and quality of associate's degree programming. The Court remarked that an average of forty male prisoners have received bachelors degrees each year since 1979. By contract the first women prisoners were scheduled to receive bachelors degrees in 1989.¹²⁰

The defendants claimed that they should not be held accountable for the shortcomings in associate's degree programming because they had little control over funding decisions. Their contention was based on the method of funding prisoner education in Michigan. Before 1988 the named defendants did not control funding for educational programming. Funding was provided by the State of Michigan through its annual budget. Colleges received a fixed sum each year regardless of enrollment. Under this system the principal source of funding for prison education became federal grants to students. The State adopted this system in order to provide an incentive for colleges to require their students to apply for federal grants. However this arrangement eliminated incentives for colleges to provide courses to classes with fewer than ten students.¹²¹ This

¹²⁰ *Id.* at 836.

¹²¹ *Id.* at 834.

system of funding provided no incentive for colleges to provide services to smaller state prisons such as the women's prisons in Michigan.¹²²

A new method of financing prisoners' education was established in 1988. Under Public Act 324 (1988) the Department of Corrections gained control over the funding of prisoner educational programs. The Act provided four million dollars to be allocated on the basis of \$3.25 per contact hour. The defendants maintained that this funding system assured parity since the level of expenditure per student was determined independently of gender.¹²³ Female prisoners were without baccalaureate programming because colleges had no financial incentive to offer instruction in women's prisons under the system of funding in place in 1989; colleges had a greater financial incentive to offer courses in male prisons where classes were larger. The defendants argued that the Department of Corrections should not be required to further subsidize educational programming for female prisoners. In their view the parity requirement had been satisfied by equality of per capita funding of students.

Feikens was unpersuaded by the defendants' claims about the economic impracticality of offering the post-secondary educational opportunities required by his Final Order. In Feikens' view the appropriate benchmark for parity was adequacy of programming.¹²⁴ He was unwilling to accept equality of expenditure per prisoner as the measure of parity.

¹²² During the 1970s, college funding was based on enrollment. In 1984-85, a new method of funding was adopted. Under this system, colleges had no incentive to offer instruction in prisons. *See Id.* at 834, 846.

¹²³ *Id.*

¹²⁴ *Id.* ("The fact that the colleges may be paid the same regardless of a prisoner's sex does not assure minimally adequate programming for the female prisoners.")

Feikens also responded to the defendants' claim that the Department should not be required to subsidize the education of female prisoners. He noted that the state specifically provided funding for associate's degree programming at two male prisons in Public Act 324. Based on the testimony of witnesses Feikens concluded that "these prisons, like so many of the institutions that have declined to serve the female inmates, were unwilling to provide service to [the prisons] without a guaranteed return."¹²⁵ Feikens' was led ask why the state was unwilling to make a similar guarantee to the community colleges servicing the women's prisons in Michigan.

Feikens also found that baccalaureate degree programming was not offered at Crane. Again, he refused to accept the defendants' contention that equality in per capita expenditure was the appropriate measure of parity.

(ii) Vocational Programming

Although the number of vocational programs available to women had risen to five by 1989 Feikens was unwilling to "accept the premise that parity can be proved solely by a 'body count' of programs or by statistical comparisons."¹²⁶ Again, Feikens found that the programs that were available to women prisoners were inferior to the "male" versions of the programs. The male prisoners also had access to vocational training that prepared them for employment in fields which required a high level of skill and offered the prospect of high levels of pay. Women prisoners were without comparable opportunities

¹²⁵ *Id.* at 835, n.20. The two prisons were Marquette and Kinross. Public Act 324 provided appropriations of \$319,000 and \$235,000 respectively.

¹²⁶ *Id.* at 837.

– they were relegated to programs which offered the prospect of employment in low paying fields which required few skills.

In his opinion Feikens raised a concern that had hitherto been absent in his discussion of the defendants' response to his orders. In an earlier opinion Feikens expressed dismay with the vocational programming offered to female prisoners because they did not offer prospects for anything other than menial positions.¹²⁷ In 1989 the defendants attempted to circumvent the requirements of Feikens' order by drawing semantic distinctions. Arguing that menial "pertains to household and describes servile and low tasks" the defendants maintained that the vocational programming available to female prisoners offers hope of non-menial employment because the training did not pertain exclusively to the household.¹²⁸ Feikens ascribed the defendants' position to "dated paternalism." Dismissing the defendants' argument, he suggested that the defendants were guided by the belief that "women cannot survive in a competitive market and thus need to set their sights on menial but abundant jobs."¹²⁹

(iii) Apprenticeships

The state of apprenticeship programs deteriorated between 1987 and 1989. By 1989 only two apprenticeships remained operational. Both programs failed to comply with the standards that had been adopted in 1981.

¹²⁷ See Glover, 478 F. Supp. at 1088.

¹²⁸ Glover 721 F. Supp. at 837, n.22.

¹²⁹ *Id.* at 837-38.

Although the defendants offered three prison industries and submitted evidence demonstrating that female prisoners had a greater opportunity to participate in prison industry than their male counterparts, Feikens found that they were not in compliance due to disparity in wages earned. Women prisoners continued to receive less pay because they commenced employment without prior experience. Male prisoners often had an opportunity to participate in an apprenticeship program related to the prison industry prior to the commencement of employment. The additional training enabled them to start at a higher wage classification than prisoners without any prior experience. Feikens concluded that “[a]s in 1987, I have seen no evidence that the quality of programming has improved sufficiently to justify the inference that women now have the opportunity to earn equal wages for comparable work.”¹³⁰

(iv) Off-Grounds Programming

No evidence was introduced by the defendants which suggested that off-grounds programming had commenced.

(c) Remedy

¹³⁰ *Id.* at 840.

Feikens had taken the plaintiffs' 1986 contempt motions under advisement. These motions were renewed by the plaintiffs. Feikens found that the burden for finding the defendants in contempt had been satisfied and granted the motions.¹³¹

Instead of appointing an administrator supervised by the court Feikens directed the Michigan Corrections Commission to appoint a Special Administrator to design and implement a remedy to correct the constitutional violations that had been found. Feikens also appointed a monitor who would report on the progress of the Commission and the Special Administrator.¹³² The monitor's powers were limited to inspection of the facilities, interviewing inmates, and inspection of institutional records.¹³³

Chastened by the earlier disapproval of the Court of Appeals Feikens took great pains to emphasize that his proposed remedy was the "least intrusive effective remedy."¹³⁴ The new remedy differed in two significant respects from the previous orders. First, the task of devising a remedial plan would be the responsibility of the Commission. This opinion represented a shift in Feikens' approach to the management of the litigation. Unlike the 1981 Final Order he declined to specify the steps that would have to be taken to achieve parity. In this order the defendants were required to play a

¹³¹ Plaintiffs were required to establish by clear and convincing evidence that the defendants had disobeyed the extant orders of the Court. *Id.* at 849, citing *NLRB v. Blevins Popcorn Co.*, 659 F.2d 1173, 1183 (D.C. Cir. 1981).

¹³² The Michigan Corrections Commission was an appointed body responsible for overseeing the operation of the Michigan prison system. One of the Commission's responsibilities was appointing the director of the Michigan Department of Corrections. The Commission was abolished by Governor John Engler in 1991 in an effort to increase the accountability of the Director. After 1991 the Director was appointed by the Governor. See Sarah Kellogg, *Engler Appoints 4, then abolishes panel*, GRAND RAPIDS PRESS, Feb. 22, 1991, C3.

¹³³ See Appendix 3.

¹³⁴ *Id.* at 850.

much greater role in the development of a remedy.¹³⁵ Second, the Special Administrator would operate under the direction of the defendants.

The defendants appealed Feikens' order. The Court of Appeals found Feikens' finding of contempt and the appointment of an administrator to be permissible in most of the areas covered by the litigation. The two exceptions were vocational programming and prison industry.

Although Feikens found the defendants in contempt for failing to provide adequate vocational programming for female inmates his decision was found to be without a sound legal footing. As noted above, Feikens' 1981 Final Order did not cover vocational programming. Although he had indicated that a supplemental order would be entered at a later date, the Court of Appeals found that Feikens never entered an order specifying a remedy for the disparities in vocational programming. The Court of Appeals concluded that the defendants could not be found in contempt for violating the 1981 Final Order for the deficiencies in vocational programming.

The Court of Appeals also overturned the portions of Feikens' opinion that dealt with wage disparities in prison industries. In the Court of Appeal's view wage disparity alone could not support a contempt finding. The contempt finding was not supported by evidence "suggesting that female inmates have job functions comparable to male inmates at similarly-sized institutions or that the departmental wage policy is being applied unfairly."¹³⁶

¹³⁵ See *Glover v. Johnson*, 934 F.2d 703, 714 (6th Cir. 1991).

¹³⁶ *Id.* at 712-13.

The Court of Appeals upheld the remaining findings of contempt.¹³⁷ In doing so, the Court observed that “[d]efendants simply did not convince the [district] court that they took all reasonable steps to comply, and they do not convince us.”¹³⁸ The Court of Appeals also affirmed the appointment of the administrator. Although the dissent viewed the appointment of an administrator as an overly intrusive measure,¹³⁹ Judge Ryan, writing for the majority, defended Feikens’ decision:

The history of this case shows a consistent and persistent pattern of obfuscation, hyper-technical objections, delay, and litigation by exhaustion on the part of the defendants to avoid compliance with the letter and the spirit of the district court’s orders... In our judgment, the appointment of a special administrator by the defendants is, in the second decade of this litigation, a valid and reasonable means to ensure the dual goals of prompt, meaningful, and full compliance with the district court’s orders and the early extrication of the federal judiciary from the management of state governmental function.¹⁴⁰

In August 1991, the district court appointed Nancy L. Zang to serve as the Special Administrator of Female Offender Programs, and Dr. Rosemary Sarri to serve as the Compliance Monitor. Zang had a great deal of experience developing programs for inmates. She managed probation training for the Illinois Supreme Court Administrative Office, and developed and implemented Indiana’s first occupational system which connected inmate education and training with institutional job assignments. Sarri was a professor at the University of Michigan who had written extensively about the needs of the prison population.

¹³⁷ Senior Judge Edwards dissented, arguing that the finding of contempt should have been upheld in its entirety. *See id.* at 718.

¹³⁸ *Id.* at 708.

¹³⁹ *See id.* at 717-18 (J. Kennedy, dissenting).

¹⁴⁰ *Id.* at 715.

F. SUBSEQUENT DEVELOPMENTS, 1991-1997

(a) The Plans

The entry of Feikens' order changed the terms of the litigation. The defendants submitted a Remedial Plan and a vocational program plan entitled "A Plan for Vocational Programs and Work Pass" (referred to collectively as the Plans) in December 1991. Both plans were approved by Dr. Sarri. Prior to the development of these plans there were no comparable examples that the litigants could draw on for guidance.¹⁴¹ The Remedial Plan proposed changes for the education of female prisoners as well as a timeline for the implementation of the changes. Many of the components of the Plans were based on state and federal standards.¹⁴² For example, the standards for programming were based on the United States Department of Labor standards for apprenticeships and vocational training.¹⁴³ In addition to the obligations created by the Remedial Plan the defendants "committed to offer vocational programs in the specific subjects of institutional maintenance, graphic arts, and food services," as well as "development of additional vocational programs pending a survey of the prisoner population."¹⁴⁴

The Remedial Plan laid stress upon the need to gauge the interest, preferences and needs of the female prisoners. In the section dealing with post-secondary educational

¹⁴¹ Interview with Dr. Rosemary C. Sarri (Mar. 16, 1999).

¹⁴² *Id.*

¹⁴³ See Michigan Department of Corrections, A REMEDIAL PLAN AS REQUIRED BY THE 1989 COURT ORDER ISSUED IN GLOVER, ET AL V. JOHNSON, ET AL, 4-3 (1991).

¹⁴⁴ *Glover v. Johnson*, 931 F. Supp. 1360, 1374 (E.D. Mich. 1996).

programming the Plan emphasized the need for individualization of program goals. The Plan required the administrators to develop an Individualized Program Plan (IPP) for each female prisoner enrolled in post-secondary programming.¹⁴⁵ The Plan also required the defendants to establish a Jobs, Education and Training (JETS) Council at each female prisoner. The objective of JETS councils was promoting the exchange of information about educational programming between prison administrators and female prisoners. The Plan envisioned that JETS councils would provide the Michigan Department of Corrections with information and suggestions that could be used to "refine programming opportunities."¹⁴⁶ The Plan for Vocational Programs also required the defendants to prepare a study the interests of the female prisoner population.¹⁴⁷ The defendants were also required to prepare an IPP for each female prisoner enrolled in vocational programming. Through these measures the Plan attempted to ensure a greater degree of congruence between programming and inmates' needs.

Entry of the Plans did not lead to the amelioration of the unconstitutional conditions of confinement. Between the date of the filing of the Plans and August 25, 1994, at least nine orders were entered to compel compliance with the Court's Orders and the Plans.¹⁴⁸ The plaintiffs were frustrated by the defendants' repeated failure to comply with remedial plans of their own design.¹⁴⁹

¹⁴⁵ Michigan Department of Corrections, A REMEDIAL PLAN, 3-2.

¹⁴⁶ *Id.*, 3-4.

¹⁴⁷ Michigan Department of Corrections, A PLAN FOR VOCATIONAL PROGRAMS AND WORK PASS, 3-4 (1991).

¹⁴⁸ *Glover v. Johnson*, 879 F. Supp. 752, 754, n.3 (E.D. Mich. 1996).

¹⁴⁹ Interview with Deborah LaBelle (Apr. 20, 1999).

(b) Opening of Scott Correctional Facility

In 1992, the Huron Valley facility was closed by Michigan. The women prisoners were transferred to Scott Correctional Facility. Scott was originally constructed as a prison for male inmates in 1986. It was converted into a prison for women in 1991.

The plaintiffs filed a motion to enjoin the closing of Huron Valley. One of the concerns evinced by the plaintiffs was the potential for disruption or termination of vocational programming. In May 1992 Feikens entered an order ruling against the plaintiffs. Feikens' declined to enjoin the closing after he received a letter from Director McGinnis of the Michigan Department of Corrections. McGinnis indicated that six vocational programs would be offered to prisoners incarcerated at Scott by June 9, 1992.¹⁵⁰ In Feikens' view "[w]ith this order, Defendants had finally committed, however nominally, to increase vocational programming from the five programs offered in 1979."¹⁵¹

(c) Modification of the Plans

In 1994 the defendants moved to modify the Remedial Plan. The Remedial Plan required that the defendants implement the Plans within two years of approval by the district court. The defendants were required to provide a final monitor report within 120 days of the expiration of the two year period describing the compliance status of each

¹⁵⁰ Glover, 931 F. Supp. at 1375. The six programs were business occupations, food service technology, graphic arts, auto mechanics, buildings trades, and institutional maintenance. Female prisoners would be transported from Scott to other facilities to participate in auto mechanics and building trades courses.

provision of the Plans. Copies were to be submitted to the district court, the district court's Monitor and plaintiffs' counsel. The defendants were required to be in substantial compliance with the plans before the district court's oversight would terminate. Substantial compliance was defined as compliance with 75% of the binding provisions in each program area set forth in the remedial plan.¹⁵²

The defendants moved to modify the portions of the Plans that dealt with the compliance monitor and termination pursuant to Federal Rules of Civil Procedure 60(b)(5) and 60(b)(6).¹⁵³ The *de facto* result of the defendants' proposed modifications would be termination of the Plans and conclusion of the role of the Court Monitor. Feikens viewed this as an attempt to terminate the case.¹⁵⁴

The defendants made a number of arguments in support of their position. They argued that the court's participation in the implementation and monitoring of their compliance with the Plans constituted a changed factual circumstance which made compliance more burdensome. The Supreme Court had held that "[m]odification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more onerous."¹⁵⁵ The defendants also indicated that a number of unanticipated events occurred prior to the approval of the Plans. First, the court gave permission to implement the Plans while indefinitely delaying approval. Second, the

¹⁵¹ *Id.*

¹⁵² See Glover, 879 F. Supp. at 756-57; see also Michigan Department of Corrections, A REMEDIAL PLAN, 5-1, 5-2.

¹⁵³ FED. R. CIV. PRO. 60(b) provides that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (5) the judgment has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

¹⁵⁴ Glover, 879 F. Supp. at 755.

¹⁵⁵ *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992).

defendants were required to submit status reports and respond to queries from plaintiffs' counsel. Third, the district court was involved in the implementation and monitoring of the Plans.¹⁵⁶ The defendants argued that the proposed modifications to the Plans were appropriate in light of these unanticipated changes.

Although the defendants filed their motion pursuant to Rule 60(b) Feikens concluded that the rule did not apply to the Plans because the rule could only be applied to final judgments and orders. Instead Feikens devised a standard to evaluate the defendants' motion: "assuming that the Plans had been de facto approved, I [seek] to determine if defendants are currently in compliance with the Plans."¹⁵⁷ The level of compliance was set at 75%, the compliance level specified by the Plans. Feikens found that the defendants had yet to achieve the substantial compliance required by the Plans and denied the defendants' motion.

(d) New Approaches to Encouraging Compliance

As of 1995 the defendants had yet to comply with the terms of their own Plans. In July 1995 Feikens established a special committee in an attempt to resolve the problem of noncompliance. The Compliance Committee was an attempt to use a novel non-adversarial procedure to attain the desired end. The Committee consisted of representatives from the parties involved in the litigation as well as representatives from the Court. Lawyers were not included in the Committee. The defendants appealed the

¹⁵⁶ Glover, 879 F. Supp. at 756.

¹⁵⁷ *Id.*

order establishing the committee and vehemently opposed the use of this innovation. This experiment was concluded by Feikens in a January 1996 order.¹⁵⁸

In July 1995 the plaintiffs filed three motions alleging continued non-compliance with the terms of the Plans. The need for recourse to litigation to address non-compliance was indicative of the ineffectiveness of the Compliance Committee. Shortly after the Compliance Committee was dissolved, the plaintiffs filed a fourth motion alleging violations of court orders relating to apprenticeship programming. Feikens addressed these motions in 1996.

Again Feikens found the defendants in contempt for failing to comply with the provisions of the Court's orders. After a series of hearings Feikens granted in part the plaintiffs' motion.¹⁵⁹ He found that the defendants had failed to take adequate measures to provide vocational programming at Scott, off-grounds programming at Camp Branch, and apprenticeships at Crane in accordance with the numerous court orders.¹⁶⁰ Feikens concluded that "[b]ased upon the testimony and exhibits presented in the evidentiary hearings, no other conclusion can be drawn but that Defendants have clearly, positively, and repeatedly violated orders of this court."¹⁶¹ He imposed fines with the "hope that monetary sanctions will provide the impetus for compliance and finality that my other approaches have not."¹⁶² Effective July 1996, the defendants would be assessed a fine of \$500 per day until compliance with all court orders regarding programming was achieved at Scott. The fine would be increased to \$5,000 on October 1, 1996. Similar fines were

¹⁵⁸ See Glover, 931 F. Supp. at 1363.

¹⁵⁹ Feikens did not grant all of the plaintiffs' motions. For example the Court was unable to find evidence supporting the plaintiffs' claim that Camp Branch is overcrowded. *Id.* at 1376.

¹⁶⁰ *Id.* at 1371-78. Camp Branch was a facility adjacent to Crane that used to house women prisoners.

¹⁶¹ *Id.* at 1384.

imposed for non-compliance with the court orders regarding apprenticeship programming at Crane. Feikens also ordered the defendants to maintain a work pass program at Camp Branch.

The defendants appealed the district court's judgments denying the defendants' motion to terminate the district court's oversight of the educational and vocational programming available to women prisoners (879 F. Supp. 752) and granting in part the plaintiffs' motion to impose contempt sanctions against the defendants (931 F. Supp. 1360).

In early 1997, the defendants also moved for immediate termination of the Plans and court orders pursuant to the Prison Litigation Reform Act (PLRA). The motion was filed under 18 U.S.C. § 3626(b)(1), (2), and (3). The defendants argued that the automatic stay provision of the PLRA was triggered by their motion. Under subsection (e)(2) of the PLRA any motion to terminate prospective relief made under subsection (b)(1) or (b)(2) operates as a stay beginning on the thirtieth day after the motion is filed. The stay would be in effect until the court had decided the defendants' motion.

Feikens refused to stay the prospective relief that had been awarded to the plaintiffs, arguing that the automatic stay provision of the PLRA was unconstitutional. Feikens characterized the proceedings to date as "not a negotiated settlement, but rather court-ordered relief based ... on judicial findings of constitutional violation."¹⁶³ He concluded that "[b]ecause the automatic stay provision of the PLRA would have the effect of overturning a judgment of court established under Article III of the United States

¹⁶² *Id.* at 1385.

¹⁶³ *Glover v. Johnson*, 957 F. Supp. 110, 111-12 (E.D. Mich. 1997).

Constitution, that provision clearly violates constitutional separation of power principles.”¹⁶⁴

G. A RETURN TO FUNDAMENTALS, 1998-1999

The Court of Appeals’ response to the defendants’ appeal marked a departure in their approach to the litigation. The Court of Appeals was critical of Feikens’ approach to the management of the litigation. Writing for the majority Judge Ryan remarked that the failure experienced by the district court was attributable to “the court’s loss of proper perception regarding its role.”¹⁶⁵ The district court’s role to date was described as follows:

Very substantially because of unfocused and misdirected advocacy by both sides in this litigation, and particularly because of the recalcitrant defendants’ foot-dragging, the district court has been preoccupied with attempting to force the defendants to comply with the details, even the minutiae, of the intermediate methodologies the court has devised for remedying the constitutional deficiencies it found in 1979. The court has lost sight of the forest for its long-time attention to the trees.¹⁶⁶

The Court of Appeals took a critical view of the district court’s conceptualization of the appropriate remedy. The Court of Appeals observed that “it is unclear whether the remedies for the unconstitutional conditions of confinement the district court found have been set forth in (1) a consent decree or in (2) a court-imposed judgment following full

¹⁶⁴ *Id.* at 112.

¹⁶⁵ *Glover v. Johnson*, 138 F.3d 229, 233 (6th Cir. 1998).

¹⁶⁶ *Id.*

litigation.”¹⁶⁷ The Court of Appeals felt the necessity of drawing this distinction because the standards for termination of the district court’s supervision would differ under the alternative remedies.

Based on its review of the history of the case, the Court of Appeals concluded that “in no event is any of the underlying documents a ‘consent decree’ that could hold the defendants to a higher compliance standard than what is otherwise constitutionally mandated.”¹⁶⁸ The Court of Appeals proceeded to discuss the various remedies that had been employed by the district court during the course of the litigation. The 1981 Final Order was imposed on the defendants following their defeat in litigation – there was no consensual agreement. The Court of Appeals found that neither of the Plans were consent decrees because they were objected to by the plaintiffs, and they were never adopted by the district court as its own order. On the basis of these conclusions, the Court of Appeals proceeded from “the premise that the defendants’ actions are not constrained by a consent decree, but rather by an order of the district court to which the defendants have never consented.”¹⁶⁹

In the absence of a consent decree the standard of review for the district court’s decision to deny the defendants’ motion to terminate judicial oversight became “whether the constitutional violations the district court found in 1979, denial of ‘parity of treatment ... of female prisoners’ ... continue to exist today.”¹⁷⁰ The Court of Appeals found that

¹⁶⁷ *Id.* at 241.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 242.

¹⁷⁰ *Id.*

this question had been overlooked by the district court' throughout the prolonged litigation – in sum, “[g]etting there has obscured where there is.”¹⁷¹

The Court of Appeals' opinion specified that the decision to terminate judicial oversight would turn on a determination of whether educational and vocational programming for female inmates satisfied the requirements of the Equal Protection Clause. The Court of Appeals required that the district court determine whether the educational and vocational opportunities available to male and female inmates in the Michigan correctional system, and whether the opportunities were “sufficiently comparable ... as to satisfy the requirements of the Equal Protection Clause of the Fourteenth Amendment.”¹⁷² The district court was required to take account of factors such as “the *present* conditions of custody and population size at various institutions; any differences in educational and vocational interests between male and female inmates; available educational and vocational training resources; and such other considerations as the district court may deem appropriate.”¹⁷³ The district court was also required to provide explanations for any unconstitutional disparities, and identify the remedial measures it deems necessary. The Court of Appeals vacated Feikens' judgment denying the defendants' motion to terminate district court jurisdiction and remanded the matter.

In its review of the contempt proceedings, the Court of Appeals overturned most the district court's findings.¹⁷⁴ The Court of Appeals found that the contempt finding with regards to apprenticeship programs was based on the Remedial Plan. As indicated above, the Remedial Plan could not be a proper basis for a contempt finding. The Court

¹⁷¹ *Id.* Internal quotations omitted.

¹⁷² *Id.* at 243.

¹⁷³ *Id.* Emphasis added.

of Appeals also found that the defendants were not obligated under any order to provide off-grounds programming for the inmates at Camp Branch. The only contempt finding that was affirmed related to vocational programming.¹⁷⁵ The Court of Appeals affirmed in part and reversed in part Feikens' judgment finding the defendants in contempt of court, and remanded the matter.¹⁷⁶

The Court of Appeals critical position was somewhat surprising. In many respects the Court of Appeals stance in 1998 marked a dramatic change from its earlier position. In earlier opinions the Court of Appeals expressed its frustration with the defendants unwillingness to comply with the remedies required by the district court.¹⁷⁷ Some observers have suggested that the Court of Appeals was simply exasperated with the *Glover* litigation.¹⁷⁸

On remand Feikens re-examined the question of whether female and male prisoners were accorded "parity of treatment" as required by the Equal Protection Clause. Feikens' opinion included a lengthy discussion of the deference that was to be accorded prison administrators under *Turner v. Safley*. In *Turner*, the Supreme Court held that

¹⁷⁴ See *Id.* at 244-245 for the Court of Appeals' discussion of the contempt findings.

¹⁷⁵ The Court of Appeals upheld the district court's contempt finding for failure to provide adequate vocational programs, observing that "[t]he district court was repeatedly explicit that it required six separate vocational programs for female inmates." *Id.* at 244. This requirement stems from the letter sent by Director McGinnis to the district court in 1992 in which he committed to offering six vocational programs at Scott. When Feikens made the contempt finding, the defendants offered only four vocational programs at Scott. See *Glover*, 931 F. Supp. at 1374-75. Fines were imposed in July 1998 after the plaintiffs filed a motion for the imposition of sanctions for noncompliance. See *Glover v. Johnson*, 9 F. Supp.2d 799 (E.D. Mich. 1998).

¹⁷⁶ Circuit Judge Wellford disagreed with the affirmance of Feikens' finding of contempt. In his dissent Wellford indicated that "[t]aking into account geographic differences in locations, demonstrated interest, work experience, and financial burdens involved in maintaining a small program for women prisoners, I would conclude that there was no reasonable basis for a contempt finding on this issue." *Glover*, 138 F.3d at 256.

¹⁷⁷ See e.g. *Glover*, 934 F.2d at 714.

¹⁷⁸ Interview with Deborah LaBelle (Apr. 20, 1999). The *Glover* generated a succession of appeals. LaBelle observed that almost every district court order after 1991 was appealed by the defendants.

“[w]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”¹⁷⁹ Feikens read *Turner* “to govern, at minimum, judicial review of any prison administrative decision, whether a policy directive or security regulation, that has been challenged as an improper restriction on a prisoner’s constitutional protections.”¹⁸⁰ The difficult question that confronted Feikens was balancing deference to the state administrators with the duty to enforce the protections required by the Equal Protection Clause.

Counsel for the plaintiffs urged Feikens to apply the standard of review for gender classifications that was set forth in *United States v. Virginia*. Under *Virginia* “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”¹⁸¹ The standard of review favored by the plaintiffs was more exacting than the *Craig* standard that was applied in 1979. The *Virginia* opinion approached permitted courts to consider historical and social factors directly related to gender when presented with an Equal Protection claim.¹⁸² Under the intermediate scrutiny required by *Virginia* the defendants would be pressed to justify the continued disparity in programming.

Once again, the plaintiffs argued that the disparities were unconstitutional given the objectives of the correctional system. They observed that “[t]he point is that absent the separation of male and female prisoners into different institutions based on sex, women prisoners would have the same range of opportunities provided to male

¹⁷⁹ *Turner*, 482 U.S. at 89.

¹⁸⁰ Glover, 1999 WL 80920 at *4.

¹⁸¹ See *Virginia*, 518 U.S. at 532-33.

¹⁸² *Id.* at 533-34. The Supreme Court indicated that “[s]ex classifications may be used to compensate women for particular economic disabilities [they have] suffered, to promot[e] equal employment

prisoners.”¹⁸³ The plaintiffs also suggested that the position of women in society necessitated a broader conception of equality than mere statistical parity in programming options.¹⁸⁴

Characterizing his task as examining the “intricacies of administrative judgments made by prison officials,” Feikens concluded that “the deferential concerns of *Turner* necessarily hold primary sway over the scope of ... constitutional review.”¹⁸⁵ Feikens did so despite the plaintiffs’ protest that disparities between male and female prisoners would only be subject to a rational basis standard under *Turner*.¹⁸⁶ It should be noted that Feikens was faced with a similar choice in 1979. Although Feikens was cognizant of the importance of judicial restraint at the time,¹⁸⁷ he concluded that the court was bound to uphold the constitutional claims presented by the plaintiffs.

As directed by the Sixth Circuit, Feikens examined the conditions of female and male educational, vocational, apprenticeship and work-pass opportunities as they stood in 1998.

As a threshold matter, the male and female prisoner populations at the time of comparison were 35,296 and 1,394 respectively.¹⁸⁸

opportunity, to advance full development of the talent and capacities of our Nation’s people.” (Citations and quotations omitted)

¹⁸³ Plaintiffs’ Amended Findings of Fact and Conclusions of Law for Remand Hearing on Parity of Programming at 25, *Glover v. Johnson*, -- F. Supp.2d --, 1999 WL 80920 (E.D. Mich. 1999) (No. 77-CV-71229-DT).

¹⁸⁴ Interview with Deborah LaBelle (Apr. 20, 1999); *see also* Plaintiffs’ Amended Findings of Fact at 23-24, 26.

¹⁸⁵ *Glover*, 1999 WL 80290 at *5.

¹⁸⁶ Interview with Deborah LaBelle (Apr. 20, 1999).

¹⁸⁷ *See Glover*, 478 F. Supp. at 1079.

¹⁸⁸ Defendants’ Proposed Findings of Facts and Conclusions of Law at 1-2, *Glover v. Johnson*, -- F. Supp.2d --, 1999 WL 80920 (E.D. Mich. 1999) (No. 77-CV-71229-DT).

(i) Educational Programming

In 1998 female and male prisoners were permitted to pursue college education through correspondence courses at their own expense. The state had ceased to fund college programs for inmates of both genders unless it was required to do so by court order. In 1998 only three state prisons offered college programming. Two out of the three prisons (Crane and Scott) housed female prisoners.

Feikens found that the evidence before the court was strongly suggestive of parity. As of October 31, 1998, 245 female inmates were enrolled in associate degree programming, and 120 female inmates were enrolled in baccalaureate degree programming. By contrast only 142 male inmates were enrolled in associate degree programming, and 43 male inmates were enrolled in baccalaureate degree programming. Furthermore, the Michigan Department of Corrections spent over 80% more on college programming for women prisoners over the course of the 1998 fiscal year.¹⁸⁹

Although the plaintiffs requested that Feikens examine the quality of programming he felt that he could not do so given the deferential posture required by *Turner* and the Sixth Circuit's directions. Feikens indicated that the plaintiffs would have to set forth specific allegations that the course offerings for female prisoners were "sham" courses.¹⁹⁰ On the basis of his findings, Feikens concluded that the substantial parity in opportunity required by the Equal Protection Clause was satisfied.

¹⁸⁹ Glover, 1999 WL 80920 at *8.

¹⁹⁰ *Id.*

(ii) Vocational Programming

Feikens found that substantial parity in vocational programming had been achieved. The plaintiffs argued that substantial parity had yet to be achieved because male prisoners had a greater choice of programs. In October 1998 male prisoners were offered seventeen programs; female prisoners were offered seven programs. Feikens indicated that “[w]hile the literal number of vocational programs offered varies ... this crude fact alone cannot be dispositive.”¹⁹¹ Feikens found that among the seven programs offered to women prisons, six were the vocational programs that were most frequently offered to male prisoners. He concluded that the availability of a choice among these six ‘core’ programs satisfied the demands of the Equal Protection clause.¹⁹²

Concerns about the relative quality of programming were set aside once again since there were no allegations that women were being offered “sham” programs.¹⁹³

(c) Apprenticeship Programs

As of October 1998 female prisoners who satisfied the Michigan Department of Corrections eligibility requirements had an opportunity to enroll in seven different apprenticeship programs. By comparison male prisoners were offered twelve

¹⁹¹ *Id.* at *10.

¹⁹² The six ‘core’ programs were institutional maintenance, horticulture, building trades/restoration, food service/management, technology, and auto-mechanics.

¹⁹³ The plaintiffs’ findings of fact gave examples of disparities between male and female vocational programs. For example, the plaintiffs submitted evidence that the auto mechanics course available to male prisoners at Handlon facility included coverage of air conditioning, starters and charging systems, transaxles, wheel alignment and balancing, feedback carburetors, fuel injection systems, and electronic

apprenticeships. Although male prisoners were offered a greater selection of programs Feikens found that only a small portion of qualified male inmates had an opportunity to do so. Feikens found the disparity in the number of offerings to be constitutional observing that “*Turner* affords prison administrators the discretion to develop these prison programs within the constraints of legitimate penological interest.”¹⁹⁴

The plaintiffs also argued that unconstitutional disparities existed in the opportunities provided by prison industries. In September 1998 only sixty-two out of 1,192 prisoners employed by Michigan State Industries (MSI) were female. Furthermore, female prisoners were limited to a five different MSI programs. In contrast, male prisoners had an opportunity to participate in twenty different MSI programs.

Feikens found that these apparent disparities were constitutional. The disparity in the number of female and male participants was justified by examining relative levels of participation. He observed that the employment rate of female prisoners was higher than the employment rate of male prisoners.¹⁹⁵ Feikens also found that the difference in the number of program offerings was not unconstitutional given the constraints created by the relatively small number of female inmates, the disparity in the number of program offerings was justified under *Turner*.

(d) Work-Pass Programs

engine controls. The auto mechanics course offered to female prisoners did not cover any of these topics. Plaintiffs’ Amended Findings of Fact at 7, *supra* note 183.

¹⁹⁴ Glover, 1999 WL 80920 at *13.

¹⁹⁵ As of September 1998, 3.6% of female prisoners and 2.8% of male prisoners were employed. *Id.*

The plaintiffs admitted that substantial parity of opportunity existed in work-pass opportunities.

The tenor of Feikens' 1999 opinion differed considerably from the earlier district court opinions. The question facing Feikens in 1999 was identical to the question that faced him in 1977. He was being asked to determine whether substantial parity in programming opportunities existed for female and male prisons in the State of Michigan. When faced with apparent disparities Feikens was required to balance the interests of the women prisoners against the prison administrators' interest in operating a correctional system. Unlike earlier opinions Feikens laid greater stress on the latter interest than the former. The reasons for the shift in Feikens' position are unclear. Some observers have suggested that Feikens was simply fatigued by the exhaustive litigation.¹⁹⁶ It would come as no surprise that twenty years of combative litigation had taken their toll on the patience and energy of the judge. Others have suggested that the shift was attributable in part to a concession to the public will.¹⁹⁷ Public unconcern for prisoners' rights and programming can be gauged from events such as the re-election a governor who had gained notoriety as a staunch advocate of hard-line measures against crime.¹⁹⁸

On the basis of these findings Feikens granted the defendants' motion to terminate the district court's jurisdiction over the case. The Court of Appeals has retained

¹⁹⁶ Interview with Dr. Rosemary C. Sarri (Mar. 16, 1999); interview with Dr. Richard Meisler (Mar. 12, 1999).

¹⁹⁷ Interview with Leo H. Friedman, Assistant-in-charge, Corrections Division, Department of the Attorney General, State of Michigan (Mar. 19, 1999).

¹⁹⁸ On Governor Engler's hard-line stance against criminals and prisoners, *see e.g.* Kathy Barks Hoffman, *Engler, Fiegler disagree on prisons, handling crime*, GRAND RAPIDS PRESS, Sept. 14, 1998, at B3; George Weeks, *Engler will delight in beating Wolpe, getting rid of state's 'liberal judges'*, DETROIT NEWS, Oct. 4, 1994.

jurisdiction over the matter for the immediate future. It is scheduled to conduct additional hearings in April 1999.

VII. CONCLUSIONS

The outcome of *Glover v. Johnson* may offer some insights into the question that was raised in Section III: are the measures that are required for successful intervention in a prison case fall within the limits of judicial action that are created by the inherent and self-imposed limitations on the role of the judiciary?

The *Glover* episode suggests that this question should be answered in the negative. The history of the case suggests that recalcitrance and obstreperousness are viable strategies for a corrections system in an encounter with a federal court tasked with the enforcement of constitutional rights. The seemingly inexhaustible capacity of the Michigan Department of Corrections to counter the district court's orders suggests that the prospects for reform in Michigan prisons through litigation are limited. The successes that were enjoyed by the plaintiff appear to be attributable in large measure to the tenacity of the plaintiffs and their legal counsel.

When viewed in light of the conclusions reached by Sturm it is evident that many of the factors which contribute to the success of court intervention were absent in *Glover*.¹⁹⁹ The principal obstacle in this case appears to be the absence of insiders who supported the proposed reforms. This problem was compounded by vehement disagreement about the appropriate standard for programming in women's prisons. From

¹⁹⁹ See Sturm, *The Legacy and Future*, at 683-86.

the defendants' viewpoint it was unclear that their practices deviated from widely recognized professional or social norm. Nor was it clear that the Constitution required them to provide substantially equivalent programming to female and male prisoners irrespective of the costs of doing so.²⁰⁰ The district court had to contend with defendants who were unwilling to accept a finding that their practices were at variance with the demands of the Equal Protection Clause.

In the face of vehement opposition to the objectives of the litigation the district court was forced to resort to sanctions in an effort to secure compliance. Although Sturm suggests that a "synthesis of traditional judicial sanctions and a deliberative remedial process enables the court to create sufficient pressure to induce prison officials to undertake compliance and yet defuse the resistance that sometimes follows coercive intervention,"²⁰¹ it appears that the sanctions available to federal courts may be insufficient to secure compliance in some cases.

The tension between legal doctrine limiting the courts' ability to intervene in prisons, and the role of the federal courts as upholder of constitutional rights is unsatisfactory because it creates undesirable incentives for defendants. If the defendants view the ongoing litigation as a war of attrition they may increase their chances of prevailing. Institutional defendants such as state prison system enjoy a number of advantages in protracted litigation. Defendants are favored by the great expense associated with legal proceedings because they will generally have fewer financial

²⁰⁰ Interview with Leo H. Friedman (Mar. 19, 1999).

²⁰¹ Sturm, *Resolving the Remedial Dilemma*, at 89.

constraints than plaintiffs.²⁰² Defendants may also delay legal proceedings in an effort to discourage or exhaust the plaintiffs. State institutions are entities which have an eternal life. Plaintiff classes may change or disappear over a long period of time. Limitations on the ability of federal courts to impose sanctions create incentives to delay compliance when defendants are unwilling to comply with the terms of orders and decisions.

Although many of the prudential concerns that underlie doctrinal constraints on judicial intervention are intended to preserve the legitimacy of the courts there is reason to believe that they may be counterproductive when they are applied. If plaintiffs find that they are unable to secure compliance with the results of judicial determinations faith in the efficacy of the judiciary will be undermined.

A challenge that is present in all prison litigation cases is the difficult task of weighing the contending interest of prison administrators in achieving "legitimate penological objectives" and the plaintiffs' interest in enforcement of constitutional rights. The current limitations on the ability of federal courts to effect change in prisons may be undesirable because they accord excessive weight to the former interest. In *Glover Feikens* felt constrained to defer to the interests of the State despite the changes that had taken place in Equal Protection jurisprudence between 1977 and 1999. Throughout this period federal courts were required to defer to prison administrators when prison regulations which infringe upon prisoners' constitutional rights are "reasonably related to legitimate penological interests" due to the restrictions set forth in the line of cases

²⁰² Awarding legal fees is an imperfect remedy. Since the awards are contingent upon success at trial risk averse plaintiffs' counsel may be unwilling to litigate matters to the same extent as the defendants. Estimated recovery of litigation costs will be discounted to account for the possibility of non-recovery.

following *Procunier v. Martinez*.²⁰³ During the same period the level of scrutiny in gender based Equal Protection cases was heightened. The Supreme Court's latest pronouncement in this area required the defendant offer an "exceedingly persuasive justification" for gender classifications.²⁰⁴ Furthermore, the *mode of analysis* in *Virginia* differed from earlier Supreme Court inquiries into the constitutionality of gender-based classifications.²⁰⁵ The extension of the protections offered by the Equal Protection Clause may be desirable given the disadvantages suffered by female prisoners relative to their male counterparts that were discussed in Section IV. It is unclear whether doctrine which enables or requires courts to ignore these changes in the conceptualization and effectuation of rights promotes the legitimacy of the judiciary.

There is reason to believe that the courts' concern with "effectiveness" has led it to overlook the "rightness" of its approach to prison litigation. Constitutional scholars have suggested that the courts play an important role precisely because of their focus on the "rightness" of decisions as defined by the Constitution. For example Richard Fallon has argued that "[r]ecognizing that reasonable people differ [in their viewpoints], we can still vest responsibility for relatively nondeferential constitutional decisionmaking in a nonmajoritarian institution, with rational hope of getting better determinations of constitutional principle and more successful constitutional implementation than we would get from the not necessarily unreasonable judgements of other, more politically

²⁰³ See *Turner*, 482 U.S. at 89.

²⁰⁴ *Virginia*, 518 U.S. at 533.

²⁰⁵ See *Leading Cases*, 110 HARV. L. REV. 135, 181-83 (1997). The commentary argues that the *Virginia* case is unique among Equal Protection cases because the Supreme Court deemed the defendant's asserted important interest a mere rationalization even though the gender-based classification advanced the proffered interest.

accountable institutions.”²⁰⁶ The arguments in favor of a functional division of labor between different branches of government are unsatisfactory when it is evident that those who are contesting the soundness and legality of policies can exert little political leverage in the executive and legislature.

²⁰⁶ Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 143 (1997).

Postscript

Although the plaintiffs suffered a setback in February 1999 they may appeal Feikens' decision to terminate district court oversight.

Appendix 1.

Feikens entered the following order in 1981. See *Glover v. Johnson*, 510 F. Supp. 1019, 1020-25 (E.D. Mich. 1981). This order was subsequently referred to as the Final Order.

FINAL ORDER

I. Associate Degree Program

(1) IT IS ORDERED that the State provide a post-secondary education program comparable to that available to male inmates to as many of the qualified inmates at the Huron Valley Women's Facility (Huron Valley) as desire to participate;

that the course selection be made by officials of the Department of Corrections and representatives of the cooperating educational institutions in order to provide a systematic and coherent course package which, when successfully completed, culminates in the receipt of an Associate's Degree;

that the Associate Degree be such that it will enable entry into a four-year college program;

that the State make such efforts as are required to eliminate scheduling conflicts between courses, provide all required course materials, including textbooks, reference books and any other materials necessary to fulfill the course requirements in cooperation with the educational institution involved, and furnish transportation for qualified inmates attending courses taught at cooperating educational institutions, consistent with the reasonable requirements of security and cost; and otherwise to take such action as will promote the achievement of the goal of parity of educational programming offered male and female prisoners;

that if any course deficiencies remain after a student, during her residence at Huron Valley Women's Facility, has completed all other courses available at the facility towards one of the Associate degrees offered, the Department will transport women who meet the qualifications in the Huron Valley Women's Facility Policy Directive for "off-grounds privileges," which are set forth at Section VIII, *infra*, to the campus of Washtenaw Community College for the purpose of taking required courses not available at the facility; and further, that if several students indicate to the College Coordinator at Huron Valley Women's Facility an interest in taking a particular course available only at the campus of Washtenaw Community College, and the scheduling of that course is compatible with the availability of security personnel, then those women will also be transported to the campus of Washtenaw Community College, provided they meet the above-stated requisite security classification;

that defendants will be responsible for assuring that an academic counselor from Washtenaw Community College, or any other community college providing classes at Huron Valley, be available to inmates several days prior to registration for each semester. At the beginning of each new term, defendants will be responsible for assuring that Washtenaw Community College formalize and publish a list of the courses necessary to obtain an Associate's degree in the areas of study which are available to the women at Huron Valley Women's Facility.

II. Bachelor Degree

(2) IT IS ORDERED that the State, while not obligated to provide a four-year baccalaureate program at Huron Valley Women's Facility, shall assist and cooperate in the establishment and operation (including the provision of space) of a baccalaureate program which any four-year college desires to offer women inmates; and in no way shall that assistance be less than that provided to colleges offering baccalaureate programs at men's prisons.

III. Apprenticeship

The Standards of Apprenticeship compiled by the Huron Valley Women's Facility Multi-Crafts Joint Apprenticeship and Training Committee ("Committee"), which were put into written form and agreed to on October 2, 1980, are hereby incorporated. This document is to be registered with the United States Department of Labor Bureau of Apprenticeship and Training within three months of the signing of this Order.

IT IS FURTHER ORDERED that quarterly progress reports on the activities of the Committee are to be submitted to the Court and counsel for plaintiffs for five years from the entry of this Order or until such time as the Court finds defendants are in compliance with this Order, and that an apprenticeship program with women inmates apprenticed to each of the five crafts set forth in the above-mentioned document shall be operational within six months of this Order.

IT IS FURTHER ORDERED that defendants shall take whatever steps are necessary to ensure compliance with the apprenticeship standards adopted.

IT IS FURTHER ORDERED that the Department immediately undertake the responsibility of informing prisoners of the nature of apprenticeship, how to become involved in the Apprenticeship Program at Huron Valley Women's Facility, and what trades are being apprenticed at the prison. This effort is to be done in conjunction with the Joint Apprenticeship Committee.

IV. Prison Industry

(3) A. The Interim Order of this Court regarding prison industries, issued April 8, 1980, is

hereby incorporated. It requires that:

1. The Department of Corrections shall establish a prison industry at Huron Valley Women's Facility by January 1982.
 - a. Such industry shall include the manufacture of license plate tabs and chair cushions.
 - b. Development of these two industries is not to preclude the expansion of prison industry at Huron Valley Women's Facility into other areas which include apprenticeable trades.
 - c. The establishment of these two prison industries shall not affect the implementation of an apprenticeship program at Huron Valley Women's Facility.

(4) B. The Interim Order of this Court on the subject of interim industry wages, issued September 8, 1980, is hereby incorporated. It requires that:

1. As interim relief, the Defendants will pay a sum of money, designated as interim industry wages, into a trust fund to be established for the benefit of women prisoners in Michigan.
2. The use of the trust is to be outlined in a future Order to this Court.
3. The formula for determining the amount of money paid into the trust will be as follows:
 - a. A base wage of \$2.85 per day will be used. That is derived from subtracting the average prison wage of 65 cents per day from the \$3.50 per day wage paid to workers in the license plate tab industry.
 - b. Payments are to be retroactive to January 1980, and continue at least 8 quarters, or until such time as a full industry program is operating at Huron Valley.
 - c. Payments are to be based on the wages that would have been earned by thirty (30) women prisoners if an industry program had been operating at Huron Valley.
 - d. The amount per quarter equals five thousand five hundred and fifty-seven dollars and fifty cents. (\$5,557.50).
 - e. In addition to this base amount, bonuses shall be paid for the thirty positions in the same manner as they are paid to men in the industry program.
 - f. Defendants are to make a payment covering 3 quarters so that the trust fund can be established.

C. The Interim Order of this Court establishing a trust fund for women prisoners in Michigan, issued September 29, 1980, is hereby incorporated. It requires that:

1. A trust fund for the benefit of women prisoners in Michigan is to be established as set forth in the attached instrument. (Appendix A).

2. Defendants are to make payments into the trust fund in the manner designated in the Interim Order of this Court, dated September 5, 1980.

V. Wages

(5) IT IS ORDERED that the wage scale currently in effect throughout the Department of Corrections be reviewed to ensure that departmental wage policy is applied fairly to women inmates whose job functions are comparable to those performed by male prisoners at similarly-sized institutions; and

IT IS FURTHER ORDERED that defendants' method of standardization, as set forth in the job evaluation document prepared for this case, is adopted, and that such wage standardization be completed within three months of this Order.

... [Section VI dealt with the plaintiffs' Access to the Courts claims]

VII. Camp Pontiac and Kalamazoo County Jail

(8) A. The Interim Order of this Court entered March 7, 1980, with modifications, is hereby incorporated. It required that:

1. As interim relief, Defendants will transfer all women at Kalamazoo County Jail to Camp Pontiac or Huron Valley within one hundred twenty-five (125) days from the date of entry of this Order.
2. Within one hundred twenty (120) days from the date of entry of this Order, Defendants will clean, paint, refurbish and open the camp, and install single beds to replace the existing bunk beds.
3. The female prisoners to be housed at Camp Pontiac will not exceed seventy- one (71) and will be selected in the following manner:
 - a. First priority is women who are employees or trainees at the Plymouth Center for Human Development.
 - b. Second priority is for those 10-15 women who will make up the camp crew, that is, those who perform various routine clerical and maintenance functions for the camp.
 - c. All of those not occupied as in a. and b. above would be assigned to conservation crews for the Department of Natural Resources, Department of Corrections, or to similar work for other state agencies, such as the Department of Transportation, should such work become available.
4. The women at Huron Valley will be advised of the availability of transfer to Camp Pontiac, and slots will be filled with volunteers as much as possible, giving priority to those who volunteer and are involved in the Plymouth Center project. If sufficient qualified volunteers cannot be found to fill the seventy-one (71) beds available, the classification committee at Huron Valley will select

others who are eligible for camp residency, and they will be required to transfer to Camp Pontiac.

5. The Defendants will return all state prisoners residing at the Kalamazoo County Jail to Huron Valley Women's Facility within five (5) days after the women prisoners have been moved into the present Camp Pontiac, that is, within one hundred twenty-five (125) days from the entry of this Order, and will not thereafter make use of Kalamazoo County Jail.
6. Once the new Camp Pontiac, to be located adjacent to the existing one, has been constructed and is ready for occupancy, which will be on or before July 10, 1981, the female prisoners in the present Camp Pontiac will be moved to the new camp.

B. IT IS FURTHER ORDERED that women inmates shall be eligible for transfer to Camp Pontiac according to the applicable Department of Corrections Policy Directives regarding inmate classifications;

that educational programs shall be available to women inmates at Camp Pontiac on the same basis as available at camps housing male inmates;

that when the new Camp Pontiac, to be located adjacent to the existing one, has been constructed and is ready for occupancy, which will be on or before July 10, 1981, female prisoners in the present Camp Pontiac will be moved to the new camp.

VIII. Off-Grounds Privileges

(9) IT IS ORDERED that to effectuate the terms of the Opinion regarding educational and vocational programs, with a recognition that the most cost-efficient means of doing this is by providing programs off-grounds, inmates at Huron Valley Women's Facility be permitted to participate in off-grounds programs in accordance with the following criteria:

- A. An inmate who is serving a non-mandatory life sentence for other than first-degree murder, or a sentence with a mandatory calendar minimum term of years less than 15, shall be eligible to participate in an off-grounds educational or vocational program under custodial escort if she meets the following qualifications:
 1. has been incarcerated for a period of two years;
 2. has no charges pending for sexual assault or attempted sexual assault by force or threat of force, robbery, kidnapping or murder;
 3. has not been found guilty of misconduct designated by policy as non-bondable during the preceding year. (Misconduct while in community status may be excepted);
 4. has not been found guilty of a major misconduct during the preceding ninety days; and

5. is not serving an escape sentence and has not escaped within the past three years from a county jail or an adult or youth facility.
- B. An inmate who is serving a mandatory life sentence, or a sentence with a minimum calendar term in excess of 15 years, shall be eligible to participate in off-grounds educational or vocational programs under custodial escort if she meets the following qualifications:
1. has been incarcerated for a period of five years; and
 2. meets the qualifications of A., (2-5).
- C. An inmate not within the sentence classification listed in "A." or "B." shall be eligible to participate in an off-grounds educational or vocational program under custodial escort if she meets the following qualifications:
1. has not been found guilty of misconduct designated by policy as non-bondable during the past one year. (Misconduct while in community status may be excepted);
 2. has not been found guilty of a major misconduct during the preceding ninety days;
 3. is not serving an escape sentence and has not escaped within the past three years from a county jail or an adult or youth facility; and
 4. has no detainer (for felony prosecution or felony sentence) with release date later than her current SGT minimum date.

Appendix 2.

In *Glover v. Johnson*, 855 F.2d 277 (6th Cir. 1988) the Court of Appeals suggested the following criteria for determining whether parity had been established.

1. Making findings of fact specifically detailing

- (a) The history of educational offerings at all Michigan correctional institutions since the [district] court's 1981 "Final Order."
- (b) The current state of educational programs at all Michigan correctional institutions.
- (c) The identity of the public and private colleges and universities now providing educational programs to Michigan prison inmates, and the identity of the specific correctional facilities in which such programs are being offered.
- (d) The per capita amount now being expended for two-year and four-year degree programs for women and for men at such institutions, and the source of those funds.
- (e) The efforts expended by the defendants to comply with the [district] court's 1981 order.
- (f) The specific manner in which the defendants have not complied.
- (g) The estimated total cost and per capita cost of educational programs leading to two and four-year degrees.

2. Developing a detailed plan for remedying the equal protection violation through ordering expenditures for educational programs for women inmates on a parity with those already being offered to men, if any, on a per capita, not a total expenditure, basis, i.e., an educational program based on parity of expenditures rather than a plan requiring the same degrees, courses and subjects for both men and women.

Appendix 3.

The order appointing the administrator was entered by Feikens on September 14, 1989. See *Glover v. Johnson*, 721 F. Supp. 808 (E.D. Mich. 1989).

ORDER

In conformity with the accompanying Order dated September 14, 1989:

1. The members of the Michigan Corrections Commission, Thomas K. Eardley, Jr., Robert Axford, Conrad Mallett, Jr., James H. Lincoln, and Duane L. Waters ("Commission"), have a non-delegable duty to cure the constitutional violations I have found;
2. Within sixty days of the entry of this Order, the Commission shall bring before this court the name of a proposed Special Administrator having the qualifications set forth in paragraph three of this Order;
3. The Special Administrator shall have the following qualifications:
 - (a) Advanced training and experience in the provision, administration and finance of vocational and post-secondary educational programming for prisoner or non-traditional students;
 - (b) Advanced training and experience in penology and prison administration;
 - (c) A demonstrated commitment to the provision of rehabilitative programs to prison inmates;
 - (d) Demonstrated ability to lead complex, multi-party negotiations;
 - (e) An ability to interact with and understand the needs and interests of the women inmates;
 - (f) The Special Administrator may not be a present employee of the Department;
 - (g) The Special Administrator must not be encumbered by conflicting duties or obligations to any educational institution or state agency;
 - (h) The Special Administrator must make a minimum time commitment of two years to carry out these tasks.
4. The Special Administrator shall become a full-time employee of, and subject to direction by, the Commission;
5. The Special Administrator shall report only to the Commission;
6. The Special Administrator shall receive compensation to be paid by the Commission commensurate with the Special Administrator's skill and training;
7. If the Commission does not act as provided herein within the sixty days from the date of the entry of this Order, a fine of Five Thousand and 00/100 Dollars (\$5,000)

a day will be levied against the Commissioners as persons acting in their official capacities or as individuals;

8. The Commission shall have sixty days from the time I approve the appointment of the Special Administrator to develop a remedial plan;
9. If the Commission does not act as provided herein within sixty days from the time I approve the appointment of the Special Administrator to develop a remedial plan, a fine of Five Thousand and 00/100 (\$5,000) a day will be levied against the Commissioners as persons acting in their official capacities or as individuals;
10. The Commission shall assign the Special Administrator chief responsibility for implementation of the plan vis-à-vis all other Department employees or Commission appointees;
11. In the interests of justice (Federal Rule of Civil Procedure 21) and to carry out the remedies herein provided, current Michigan Corrections Commission members Robert Axford, Conrad Mallet, Jr. and James H. Lincoln are hereby added as parties to this suit. The court notes that Thomas K. Eardley, Jr. and Duane L. Waters are existing parties to this suit;
12. The Department shall make payment (overdue) to the Judith Magid Trust for the months of January, February and March, 1985 in the amount of Five Thousand Five Hundred and Fifty-seven Dollars and 50/100 (\$5,557.50);
13. Plaintiffs' Motion for Entry of Judgment to Enforce Order is DENIED WITHOUT PREJUDICE; and
14. Plaintiffs' Motion to Certify a Question to the U.S. Court of Appeals for the Sixth Circuit is DISMISSED WITHOUT PREJUDICE.

IT IS SO ORDERED.

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Deborah Labelle, April 20, 1999.

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