Hawai'i Girls Court: Juveniles, Gender, and Justice

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ABSTRACT

At the Hawai'i Girls Court, everyone is female. The presiding judge is female, the probation officers are female, the program coordinators are female and, of course, the clientele is female. The Court, a diversionary program for juvenile females in Hawai'i, is just one gender-responsive program in the juvenile justice system—interest in and availability of such programming is increasing. But even though gender-responsive programs are promoted and funded by federal and local governments and the private sector, legal scholars have yet to undertake any searching examination of the programs' legal footing.

This Article makes two related claims. First, the Girls Court, which relies on a gender-based classification, is legal despite the heightened scrutiny usually accorded to gender-discriminatory programming. Second, though the Court is defensible as a special treatment for girls based on characteristics shared by many of their gender, this conception of the Court is unsatisfying. Instead, Girls Court should be thought of as an individualized program that seeks to fulfill the mandate of the juvenile justice system—the holistic rehabilitation and treatment of young offenders. Conceiving the Court

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in this way, however, obscures any reason not to make similarly individualized treatment available to boys, and suggests a duty to provide substantially equal gender-responsive programming to all juvenile offenders.

This paper proceeds in three parts. In Part I, I introduce the Girls Court, review the empirical justifications for the Court, and situate it within the larger alternatives-to-incarceration movement. Part II explores how the current legal regime, which tolerates some forms of sex discrimination but not others, applies to the Girls Court. In order to understand and evaluate the legality of Girls Court, I review the case law on gender discrimination; introduce a novel survey of statutes, regulations, and policies governing prison gender discrimination in all fifty states, the District of Columbia, and the federal government; and review the federal regulations that implement Title IX in schools. The final Part offers some answers to the legal questions highlighted in Part II and explores whether Girls Court is good public policy, identifying a few serious pitfalls but ultimately concluding that Girls Court is a step in the right direction.

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INTRODUCTION

At the Hawai'i Girls Court, everyone is female. The presiding judge is female, the probation officers are female, the program coordinators are female and, of course, the clientele is female. This all-female space is part of the vision the Court's founders have to "honor the female experience" by "creat[ing] an environment where girls receive services while feeling physically and emotionally safe."[1] On a typical day in court, such as one an evaluator attended in 2007, the judge sees thirteen girls and their parents (usually only the mother attends, but some fathers are also present).[2] The judge asks both the daughters and their parents about therapy, school, and job seeking; about how things are going at home, and about the surfing trip that some of the girls have gone on recently.[3] The purpose of the surfing trip is to help the girls "realize how decisions made during surfing are analogous to life decisions, tak[e] risks, learn[] how to deal with disappointment, and learn[] how to stay committed and not give up."[4] The judge gives a new mother a book to read to her child, and tells another girl who has not been showing up to art therapy that "merely doing what she needs to do to get by is not going to fly" and that if she disobeys more court orders, her probation will get revoked.[5] A girl faced with a motion to revoke probation admits that she has not been attending classes at the health center; she is ordered to spend 48 hours in juvenile detention.[6] After issuing the order, the judge says that she thinks the "girl wants to be

[1] HAW. GIRLS CT., http://www.girlscourt.org (last visited Mar. 3, 2012).
[2] JANET DAVIDSON, HAWAI'I GIRLS COURT: PROGRAM CHARACTERISTICS, OUTCOMES, AND RECOMMENDATIONS 11–14 (2007).
[3] *Id.*
[4] *Id.*
[5] *Id.* at 12.
[6] *Id.* at 13.

treated with dignity."[7] The judge tells her that "other people can treat each other this way and deserve to have decent relationships."[8] She asks the girl if she thinks she can work on this. The girl says yes.[9]

Founded in 2004, the Girls Court "seeks to recognize the fundamental differences between male and female juvenile offenders as well as their different pathways to delinquency and, in doing so, act efficiently, creatively, and innovatively to stem the quickly rising tide of female delinquency."[10] Hawai'i Girls Court is in many ways unique, and a recent search indicates that, as of 2012, it is the only females-only juvenile alternative court. But interest in gender-responsive programming[11] within the juvenile justice system is ascendant, and its availability continues to increase.[12] The recently reauthorized Juvenile Justice and Delinquency Prevention Act[13] requires state juvenile justice programming to contain a "plan for providing needed gender-specific services for the prevention and treatment of juvenile delinquency"[14] in order to receive certain grants. With this emerging trend, it is vital that those who design and implement gender-responsive programs understand their legal footing, as well as the basis of and threats to their legitimacy. The Girls Court is a small program that raises a large set of questions.

This paper makes two related claims. The first concerns the legality of the Girls Court. I argue that the Court should be conceptualized not as an ordinary "court," but rather as an institution that occupies the intersection of prisons and schools. In both of these domains, gender-based distinctions survive as a force of classification, bolstered by regulatory and statutory regimes. As a matter of positive law, Girls Court is likely valid. My second claim concerns the court's

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[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] HAW. GIRLS CT., *supra* note 1.
[11] Gender-responsive advocates consider the influence of gender on a person's life to be quite important, if not paramount, and thus gender-responsive programming addresses needs that are perceived to be unique to each gender. *See infra* Part I.C.
[12] In fact, at least three states—Oregon, Connecticut, and Minnesota—have passed statutes expressly providing for gender-responsive programming or equal access to programming for youth of both genders. Marsha L. Levick & Francine T. Sherman, *When Individual Differences Demand Equal Treatment: An Equal Rights Approach to the Special Needs of Girls in the Juvenile Justice System*, 18 WIS. WOMEN'S L.J. 9, 19 (2003).
[13] 42 U.S.C. §§ 5601–5785 (2006).
[14] 42 U.S.C. § 5633(b)(3) (2006).

legitimacy. The Court is defensible if conceived of primarily as special treatment for girls based on experiences and needs shared predominantly by other members of their gender. But I argue that the Court is best justified and most usefully understood as an individualized program that seeks to fulfill the mandate of the juvenile justice system: the holistic rehabilitation and treatment of young offenders.

In Part I, I introduce the Girls Court, review the empirical justifications for the Court, and situate it within the larger alternatives-to-incarceration movement. Part II explores how the current legal regime, which tolerates some forms of sex discrimination but not others, applies to the Girls Court. Girls Court integrates characteristics usually associated with the criminal justice system. Its predominant features include many familiar elements of this system, including probation, its attendant threat of sanction, and the presence of judges, prosecutors, and other officials. But Girls Court combines these elements with the organizing purpose of the education system—the mandate to foster the development of each individual child. Even if the Girls Court is not most obviously seen as an educational program, there is much to be learned by viewing the much thicker legal regime governing this other arena in which adolescents are sometimes segregated by gender in state-run programs.

Therefore, understanding and evaluating the legality of Girls Court requires a comprehensive assessment of both the educational and the criminal justice systems. I review the case law of gender discrimination in the areas of prisons and schools, introduce a novel multi-jurisdictional survey of statutes, regulations, and policies governing prison gender discrimination, and consider the federal regulations that implement Title IX in schools. The final Part offers some answers to the legal questions highlighted in Part II and explores whether Girls Court is good public policy. In this part, feminist legal theory sheds light on the most compelling justifications for the Girls Court: the distinctiveness of the experiences and challenges that female juvenile offenders face, as well as the need for affirmative action in many areas of women's lives. However, this exploration of feminist thought also illuminates two reasons for caution in approaching the Court—the danger that it reifies gender roles, and the possibility that there may be no substantially equal, gender-responsive alternative for boys, to which they are entitled.

I. Understanding the Girls Court

A. What Is the Girls Court?

Though it is called a "court," Girls Court is better understood as a post-adjudication form of supervised release that involves a judge at regular intervals, a model that is very common in other alternative "courts."[15] As Meda Chesney-Lind, a preeminent gender-responsive criminologist who works as a consultant for the Girls Court explains, "you're tailoring treatment, not the legal procedures—Girls Court is a misnomer. It's basically enhanced probation for girls . . . . It's more a program than court."[16]

The Girls Court is part of the Family Court of the First Circuit of Hawai'i. Girls who enter the Court have already been adjudicated delinquent in the regular juvenile court, meaning that they are all juveniles, and are on either probation or protective supervision (for status offenders).[17] The staff of the Girls Court receives referrals from probation officers in Family Court, which houses the juvenile justice system in Hawai'i. Most girls are referred at the onset of the probation, but girls have come in at different stages—some girls have been in the regular juvenile justice system for a number of years.[18] If the Girls Court's staff believes that a girl would be a good fit for the program, the girl can then choose to enroll in it (or not).[19]

Girls Court initiates a group (or "cohort") of around eight girls twice a year.[20] These girls remain with the program for a period of one

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[15] Allegra McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1605–1612 (2012) (describing a rise of various kinds of specialized criminal courts).

[16] Telephone Interview with Meda Chesney-Lind, Consultant, Haw. Girls Court (Mar. 7, 2011).

[17] Telephone Interview with Adriane Abe, Program Coordinator, Haw. Girls Court (Apr. 19, 2011). Status offenses are offenses that would not be considered crimes for adults, but can result in an adjudication as delinquent for a minor, including running away, truancy, curfew violations, and liquor violations. The rules of probation and protective supervision in Family Court are identical, but the consequences are different if a girl violates in the regular juvenile justice system because status offenders cannot be confined in a youth facility.

[18] *Id.*

[19] *Id.*

[20] JANET DAVIDSON, GIRLS COURT HAWAI'I: EVALUATION SUMMARY 7 (2010).

year.[21] Girls Court aims to provide life-skills training, alternative education and vocational training, mental health treatment, domestic violence prevention, medical services, health education, teen pregnancy prevention, substance abuse treatment, mentoring, and family strengthening through a number of programs and community partners.[22] The girls attend open court every four weeks with their families, the prosecutor, the public defender, and the rest of the cohort.[23] In these public sessions, they receive both praise and sanctions and are held accountable for their actions. The girls are also required to attend "Girls Group," in which they discuss issues such as HIV/STIs, domestic violence, sexual exploitation, and substance abuse. Parents must attend their own "quasi-therapeutic group" in which they explore family problems and how to form healthy parent-daughter relationships. In addition, the girls participate in a number of esteem-building and relationship-strengthening activities, including community service projects and various forms of creative expression, such as art therapy. Girls are required to return to school, enroll in alternative learning centers, or pursue a General Education Diploma (GED). In general, if a girl violates any of these conditions, the Girls Court handles it internally; of the eighty girls that have passed through the program, only one was returned to general probation.[24]

Girls Court lies at the intersection of two different phenomena that have arisen in the criminal justice field: alternative criminal courts and gender-responsive programming. The next two subsections explore each of these movements in order to explain the perceived needs addressed by Girls Court and help us evaluate its costs, benefits, and legality. An overview of alternatives to incarceration places Girls Court in the terrain of a broader trend that is presumably legal and almost ordinary. This juxtaposition highlights what is unusual about the Court: unlike other status-based alternatives to incarceration, such as veterans courts, Girls Court employs a gender-classification to define the boundaries of its reach.[25] The work of gender-responsive scholars

[21] DAVIDSON, *supra* note 2, at 1.

[22] *Services and Partnering Agencies*, HAW. GIRLS CT., http://www.girlscourt.org (last visited Mar. 3, 2012).

[23] DAVIDSON, *supra* note 20, at 2.

[24] Interview with Adriane Abe, *supra* note 17.

[25] Only female offenders are allowed to participate in Girls Court. *Our Mission*, HAW. GIRLS CT., http://www.girlscourt.org/mission.html (last visited Apr. 5, 2013) ("Our

provides some justification for why this classification is appropriate: it responds to the unique circumstances of girls in the juvenile justice system, and attempts to address systemic inequities that exist within that system.

B. Alternative Courts

Girls Court is a new iteration of a steadily growing phenomenon: specialized criminal courts. Insofar as the Court maps onto the procedures and practices of these courts, there is little reason to question the legality of the form the Girls Court employs. These courts are increasing rapidly in number, endorsed by legislatures and courts across the country.[26] Though many scholars criticize the use of alternatives to incarceration and a few raise due process concerns, [27] none of these courts have been found to be illegal.[28] For the purposes of this paper, I will assume that they are legal.

The specialized court movement began with a drug court in Dade County, Florida, that emerged in 1989 in response to soaring drug arrests and then-new social science on the pathology of addiction.[29] Today there are approximately 3,000 specialized criminal courts,[30] including mental health courts, veterans courts, drug courts, domestic violence courts, and reentry courts.

Mission is to clarify, facilitate and enhance the Family Court of the First Circuit's commitment to gender-responsive services for young women.").

[26] McLeod, *supra* note 15, at 1605–09.

[27] *See, e.g.*, Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 WASH. U. J.L. & POL'Y 57, 63–64 (2009) (questioning the "efficacy and propriety" of problem-solving courts); Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 786, 830–835 (2008) ("[Drug courts] provide the worst results to their target populations; and . . . produce[] particularly toxic consequences in the many drug courts that subject failing participants to alternative termination sentences that exceed customary plea prices."); Tamar M. Meekins, *"Specialized Justice": The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 1 (2006) (arguing that the role of defense lawyer as a "collaborator" in specialized courts is violative of the adversary system and raising other due process concerns).

[28] As of the writing of this paper, the author is not aware of any cases finding an alternative court illegal.

[29] Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1480 (2004).

[30] McLeod, *supra* note 15, at 1587.

While a uniform definition of what a specialized criminal court is may be difficult to articulate, it is useful to sketch the general contours of the alternative court movement. Most specialized courts attempt to reduce reliance on incarceration and usually "empower judges to adopt neo-realist problem-oriented roles, embrace less adversarial criminal procedures, and aspire to more effectively protect public safety and prevent crime."[31] Alternative courts are often called "problem-solving courts," whose aim is "not only [to] resolve disputed issues of fact, but also to attempt to solve a variety of human problems that are responsible for bringing the case to court . . . and to help the individuals before the court to effectively deal with the problem in ways that will prevent recurring court involvement."[32] Foundational techniques applied in many of these courts include assessment and treatment planning; regular status hearings to monitor progress; coordination of needed social services, including job training, housing, and substance abuse treatment; a system of graduated sanctions and rewards; and collaboration with community groups.[33] Advocates of this model believe that these techniques best address an individual's psychosocial motivation to offend, deter future crime, and enable the individual to function more successfully in society.[34] These techniques are all present in the Girls Court.

Like the Girls Court, other specialized criminal courts often gain jurisdiction over offenders after adjudication; fifty-eight percent of drug courts are designed on a post-plea model.[35] In one subset of this model, the record of the conviction stands, but participants can avoid incarceration or reduce their probation obligations by successfully completing their program.[36] Girls Court functions in much the same way, though the disposition is part of an offender's juvenile record and

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[31] *Id.* at 1590-91. *See also id.* at 1596. McCleod presents a typology of specialized criminal courts consisting of four primary models: (1) a therapeutic jurisprudence model; (2) a judicial monitoring model; (3) an order maintenance model; and (4) a decarceration model. *Id.* at 1594. The Girls Court seems to fit most squarely within the therapeutic jurisprudence and decarceration models. *See id.* at 1595–96.

[32] Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1056 (2003).

[33] Meekins, *supra* note 27, at 27.

[34] McLeod, *supra* note 15, at 1596-97.

[35] NAT'L DRUG COURT INST., PAINTING THE CURRENT PICTURE 24 (2011), *available at* http://www.ndci.org/sites/default/files/nadcp/PCP%20Report%20FINAL.PDF.

[36] *Id.*

not her adult criminal history. The ramifications of this distinction vary across jurisdictions.

Alternatives to incarceration are particularly appropriate in the juvenile justice system, given the system's historical focus on individual treatment and rehabilitation and de-emphasis on punishment.[37] Founded in Chicago in 1899, juvenile courts were an attempt to provide a rehabilitative approach to the problem of juvenile delinquency, rather than the punitive approach of the adult criminal court.[38] This individualized treatment mandate is apparent in state statutes enacting juvenile courts. Forty-eight states have statutes that include rehabilitation within their purpose clause: twenty speak of "treatment," seventeen include "the protection and the wholesome moral, mental and physical development of children," and eighteen speak of developing juveniles into productive citizens.[39] This history has led courts to "repeatedly reference the juvenile court's historic and continuing commitment to individualized treatment and rehabilitation, while highlighting the distinctions between the juvenile and adult justice systems."[40]

Procedurally, the Girls Court is not unusual. Nor is there anything unusual about choosing a certain group, be it veterans or drug users, to reap the benefits of an alternative to the general criminal justice system. Even more important, perhaps, is that children have been understood to need an alternative to the general criminal justice system since the beginning of the twentieth century. It is because Girls Court classifies on the basis of gender—a classification that has come to be viewed with suspicion by society and by the law—that it is noteworthy. The next section explores the justifications for the use of this suspect classification.

C. Justifying the Girls Court: Gender-Responsive Programming and Girls in the Juvenile Justice System

Gender-responsive programming in the juvenile justice system has risen in popularity over the last two decades, and is justified in a number of ways. Congress's 1992 reauthorization of the Juvenile Justice

[37] Casey, *supra* note 29, at 1471–72; Winick, *supra* note 32, at 1056.
[38] Winick, *supra* note 32, at 1056.
[39] Many states fit into more than one of these categories.
[40] Levick & Sherman, *supra* note 12, at 20.

and Delinquency Prevention Act,[41] which remains in force today, requires that in order to receive certain federal grants, state juvenile justice programming must contain a "plan for providing needed gender-specific services for the prevention and treatment of juvenile delinquency."[42] Despite this federal endorsement, gender-specific or gender-responsive services lack any uniform definition. A recurring constellation of characteristics have developed in the literature that together produce a basic image. One group of prominent scholars define gender-responsive programs as:

> Creating an environment through site selection, staff selection, program development, content, and material that reflect an understanding of the realities of women's lives and address the issues of the participants. Gender-responsive approaches are multidimensional and are based on theoretical perspectives that acknowledge women's pathways into the criminal justice system. These approaches address social (e.g., poverty, race, class, and gender) and cultural factors, as well as therapeutic interventions. These interventions address issues such as abuse, violence, family relationships, substance abuse, and co-occurring disorders. They provide a strengths-based approach to treatment and skills-building while emphasizing self-efficacy.[43]

This explanation fits with that offered by two other theorists who point to a few defining characteristics of gender-responsive programming: such programming is relationship-based, strengths-based, responsive to a history of trauma, and provides a safe treatment space removed from males.[44]

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[41] Twenty First Century Department of Justice Appropriations Authorization, Pub. L. 107–273, §§ 12201–12223, 116 Stat. 1869, 1869–1896 (2002).

[42] 42 U.S.C. § 5633 (2006).

[43] Barbara Bloom & Stephanie Covington, Gendered Justice: Programming for Women in Correctional Settings, Paper Presented at the American Society of Criminology 11 (Nov. 16, 2000).

[44] PAM PATTON & MARCIA MORGAN, OR. CRIMINAL JUSTICE COMM'N JUVENILE CRIME PREVENTION PROGRAM, HOW TO IMPLEMENT OREGON'S GUIDELINES FOR EFFECTIVE GENDER-RESPONSIVE PROGRAMMING FOR GIRLS (2002), *available at* http://www.oregon.gov/OCCF/Documents/JCP/GenderSpecific.pdf.

Gender-responsive programming rests on a body of research regarding the difference between boys' and girls' development generally, as well as disparities in how the sexes enter and experience the juvenile justice system in particular.[45] This research was spurred by a dramatic increase in the proportion of females in the juvenile justice system over the past few decades. According to the FBI, in 2009, 1,515,586 juveniles were arrested.[46] Of those, 460,927 were female—around 30.4%.[47] This is a 27% increase over 1992 levels, when female juveniles accounted for only 24% of juvenile arrests.[48] Between 1985 and 2007, the number of female delinquency cases increased at triple the rate of male delinquency cases (101% increase for females and 30% for males).[49] Though girls engage in far less crime and delinquency than boys for nearly every

[45] *See e.g.*, Carolyn S. Salisbury, *From Violence and Victimization to Voice and Validation: Incorporating Therapeutic Jurisprudence in a Children's Law Clinic*, 17 ST. THOMAS L. REV. 623 (2005); Paula Schaefer, *Girls in the Juvenile Justice System*, GPSOLO, Apr. – May 2008 at 16; Paul Mazerolle, *The Poverty of a Gender-Neutral Criminology: Introduction to the Special Issue on Current Approaches to Understanding Female Offending*, 41 AUSTL. & N.Z. J. CRIMINOLOGY 1 (2008); Melissa M. Beck et al., *Because Everybody Thought that I Wouldn't Be Able to Do It: Gender-Responsive Services for Court-Involved Girls and the First Year of the GirlRising Program*, 18 WIS. WOMEN'S L.J. 117 (2003); Marty Beyer et al., *A Better Way to Spend $500,000: How the Juvenile Justice System Fails Girls*, 18 WIS. WOMEN'S L.J. 51 (2003); Joseph R. Biden, Jr., *What About the Girls? The Role of the Federal Government in Addressing the Rise in Female Juvenile Offenders*, 14 STAN. L. & POL'Y REV. 29 (2003); Laurel A. Hoehn, *Double Standard: The Inequality of Treatment for Female Juvenile Offenders*, 24 J. JUV. L. 140 (2004); Alecia Humphrey, *Girls in the Juvenile Justice System: The Intersection of Gender, Age, and Crime*, 18 WIS. WOMEN'S L.J. 1 (2003); Levick & Sherman, *supra* note 12, at 9; AM. BAR ASS'N & NAT'L BAR ASS'N, JUSTICE BY GENDER (2001); Cindy S. Lederman & Eileen N. Brown, *Entangled in the Shadows: Girls in the Juvenile Justice System*, 48 BUFF. L. REV. 909 (2000).

[46] *Table 38 – Crime in the United States 2009: Arrests, by Age*, FBI (Sept. 2010), http://www2.fbi.gov/ucr/
cius2009/data/table_38.html.

[47] *Table 40 – Crime in the United States 2009: Arrests, Females, by Age*, FBI (Sept. 2010), http://www2.fbi.gov/ucr/
cius2009/data/table_40.html.

[48] EILEEN POE-YAMAGATA & JEFFREY A. BUTTS, U.S. DEP'T OF JUSTICE, FEMALE OFFENDERS IN THE JUVENILE JUSTICE SYSTEM: STATISTICS SUMMARY 3 (1996).

[49] CHARLES PUZZANCHERA ET AL., NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2006–2007, at 12 (2010), *available at* http://www.ncjj.org/PDF/jcsreports/jcs2007.pdf.

offense across all age groups,[50] the rates of person, drug, and public order offense cases increased for juvenile females, while male rates leveled off.[51] In 2007, approximately 65,000 girls were deemed delinquent for status offenses—16% for running away, 40% for truancy, 7% for curfew violations, and 19% for liquor violations.[52] While boys accounted for 57% of petitioned status offense cases in 2007, girls accounted for 59% of all runaway cases.[53]

Gender-responsive scholars point to studies indicating that girls in the juvenile justice system as a population possess characteristics distinct from boys in the same system. The predominant theme in this research is that although male and female delinquents have some characteristics and risk factors in common, girls confront additional problems unique to their gender. These problems include higher incidences of sexual abuse, battering, single parenthood, low self-esteem, increased mental health needs, teenage pregnancy, and disparity in educational, vocational, and employment opportunities.[54] Studies indicate that girls in the juvenile justice system are sexually and physically abused at higher rates than both boys in the system and girls outside of

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[50] OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, IN FOCUS: GIRLS' DELINQUENCY 2 (2010), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/228414.pdf.

[51] *See* PUZZANCHERA ET AL., *supra* note 49, at 12–15. Person offenses include criminal homicide, forcible rape and other violent sexual acts, unlawful restraint, reckless endangerment, harassment, robbery, aggravated assault, simple assault and attempts to commit any such acts. *Id.* at 102–03. Public order offenses include weapons offenses, sex offenses, some liquor offenses, disorderly conduct, obstruction of justice, and other offenses against government administration or regulation, such as bribery, violations of laws pertaining to fish and game, gambling, health, hitchhiking, immigration offenses, and false fire alarms. *Id.* at 104. Property offenses include burglary, larceny, motor vehicle theft, arson, shoplifting, vandalism, and trespassing. *Id.* at 103–04. Drug law violations include unlawful sale, purchase, distribution, manufacture, cultivation, transport, possession, or use of a controlled or prohibited substance or drug or drug paraphernalia. *Id.* at 104. Sniffing of glue, paint, gasoline, and other inhalants is included. *Id.*

[52] PUZZANCHERA ET AL., *supra* note 49, at 76–77.

[53] *Id.* at 77. This change could be due to changes in policing and other enforcement mechanisms or to changes in the underlying behavior.

[54] *See generally* Beck et al., *supra* note 45; Beyer et al., *supra* note 45; Biden, *supra* note 45; AM. BAR ASS'N & NAT'L BAR ASS'N, *supra* note 45; Hoehn, *supra* note 45; Humphrey, *supra* note 45; Salisbury, *supra* note 45; Schaefer, *supra* note 45; Levick & Sherman, *supra* note 12; MARGARET A. ZAHN ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, CAUSES AND CORRELATES OF GIRLS' DELINQUENCY (2010).

the system.[55] Other studies indicate that girls in the system have a greater need for mental health care,[56] display a higher incidence of anxiety issues[57] and mood disorders, and have higher rates of depression, attempted suicide, low self-esteem, negative body image, and self-mutilation.[58] Some studies indicate that girls in the criminal justice system experience higher rates of homelessness and home instability than boys in the system.[59] These scholars also point to evidence that qualitative differences exist in the way risk factors manifest in boys and girls, even when those risk factors are shared.[60] For instance, having antisocial associates is a risk factor for delinquency in both boys and girls.[61] But those associates tend to be peers for boys, while for girls they tend to be older men who may be romantically or sexually involved with them.[62] Gender-responsive theorists rely on these and other similar studies as evidence that girls in the juvenile justice system have needs and face challenges distinct from those of boys.

Gender-responsive theorists see the regular juvenile justice system as pathologizing girls' self-protective behavior. Girls tend to be arrested for offenses that are often connected to sexual abuse: running away, petty theft, and prostitution.[63] Legislation has provided for the deinstitutionalization of status offenders, meaning that girls will not be incarcerated simply for running away.[64] Many girls who have been deemed status offenders, however, run away again in an attempt to escape adverse circumstances at home; by violating their probation, the girls become eligible for institutionalization, usually through a finding of

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[55] Biden, *supra* note 45, at 36–37.
[56] *Id.* at 38.
[57] *Id.*
[58] Beck et al., *supra* note 45, at 136.
[59] *Id.* at 125.
[60] *See, e.g.*, Stacy Calhoun et al., *Implementing Gender-Responsive Treatment for Women in Prison: Client and Staff Perspectives*, FED. PROBATION, Dec. 2010, at 27; Biden, *supra* note 45, at 40.
[61] *See, e.g.*, Laura Simourd & D.A. Andrews, *Correlates of Delinquency: A Look at Gender Differences*, F. ON CORRECTIONS RES., Jan. 1994, at 26–31, *available at* http://www.csc-scc.gc.ca/text/pblct/forum/e061/e061g-eng.shtml (noting that antisocial peers were the most important risk factor for delinquency in boys and girls); ZAHN ET AL., *supra* note 54.
[62] *See* ZAHN, ET AL., *supra* note 54.
[63] Biden, *supra* note 45, at 37.
[64] *Id.* at 36.

contempt.[65] Some states have explicitly allowed this practice, known as "bootstrapping," by statute, while in others it has emerged through courts' interpretations of existing contempt statutes.[66] Some studies suggest that the harm of this approach may be compounded when courts' responses to girls' probation violations are harsher than those experienced by boys.[67]

Gender-responsive scholars also show concern over programmatic inequalities in the juvenile justice system. Of 443 delinquency program evaluations done since 1950, 34.8% of these programs served only boys and 42.4% served primarily boys. In comparison, 2.3% served only girls, and 5.9% served primarily girls.[68] From 1992-2002 in one jurisdiction, only boys had access to a juvenile drug court. The court opened to girls in 2002; by the end of the year four girls and 110 boys were enrolled.[69]

The smaller number of girls in coeducational programs means that girls' programming may be given short shrift. In another jurisdiction studied, one program had to expand in order to accommodate the increase of girls in the system as a whole. [70] The jurisdiction created a twenty-bed unit for girls within the secure boys' delinquency program, in space that had been used for administrative purposes. Because the number of girls was so small, the program decided not to add additional staff, which meant that girls received very little of the existing staff's time and attention for essentials such as sick calls, outdoor exercise, and use of the gym. The educational program was designed to meet the boys' education level, which averages below ninth grade. Many of the girls had higher levels of educational achievement, yet could not receive a GED or college preparation in the program.[71]

According to gender-responsive scholars, these studies indicate not only that the juvenile justice system is ill-equipped to address the unique problems of girls, but that it also lacks the capacity to make basic

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[65] Francine T. Sherman, *Promoting Justice for Girls in an Unjust System*, *in* WOMEN AND GIRLS IN THE CRIMINAL JUSTICE SYSTEM 9-1, 9-7 to -8 (Russ Immarigeon ed., 2006).
[66] *Id.* at 9-7.
[67] *See, e.g.*, Randall R. Beger & Harry Hoffman, *The Role of Gender in Detention Dispositioning of Juvenile Probation Violators*, 21 J. CRIME & JUST. 173 (1998).
[68] Meda Chesney-Lind et al., *Girls' Troubles, Girls' Delinquency, and Gender Responsive Programming: A Review*, 41 AUSTL. & N.Z. J. CRIMINOLOGY 162, 170 (2008).
[69] Levick & Sherman, *supra* note 12, at 9.
[70] *Id.*
[71] *Id.* at 10.

programming for boys available to girls on an equal basis.[72] Viewed with this problem in mind, gender-responsive programs resemble other affirmative action programs; they are an attempt to make up for the systemic disadvantages women in the juvenile justice system face.[73]

The views of gender-responsive scholars are not unchallenged. Another group of theorists argues that the relevance of gender difference in assessing the risk factors and needs of juveniles is unsupported by research.[74] This group's work focuses on identifying certain principles of intervention that are associated with reduction in recidivism in both girls and boys.[75] Although this work is important, given the attention and funding currently directed at gender-responsive programming, this paper focuses on the justifications for this programming, rather than the efficacy of individual programs.

Suppose that the Girls Court is procedurally sound, and that the founders of Girls Court are correct in their assumption that girls have special needs that have been systemically ignored and would be well-served by such an alternative court. Questions still remain regarding the court's legitimacy, because the Court still classifies on the basis of gender, a quasi-suspect classification. The next Part examines the jurisprudence surrounding gender classifications in order to analyze the legality of the Court's sex-based classification.

II. THE LEGAL REGIME GOVERNING GENDER CLASSIFICATIONS

Having established that Girls Court is almost unremarkable among juvenile delinquency programming in its goals and general framework, this section looks to the way in which it stands apart: it turns on a gender-based classification. Several broad themes arise in determining the constitutionality of gender-based classifications. First, the legality of gender discrimination depends highly on the context in

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[72] *Id.* at 50.

[73] *Id.*

[74] *See, e.g.*, Charlene Y. Taylor, Girls and Boys, Apples and Oranges? A Theoretically Informed Analysis of Gender-Specific Predictors of Delinquency 105–107 (July 21, 2009) (unpublished Ph.D. dissertation, University of Cincinnati), *available at* http://cech.uc.edu/criminaljustice/dissertations.html.

[75] Dana Jones Hubbard & Betsey Matthews, *Reconciling the Differences Between the "Gender-Responsive" and the "What Works" Literatures to Improve Services for Girls*, 54 CRIME & DELINQ. 225, 226 (2008).

which the state is discriminating. Gender jurisprudence in both prisons and schools allows for segregation of the sexes. This segregation is only permissible, however, to the point at which it runs afoul of constitutional and statutory commitments to equality. The viability of such segregation is especially sensitive to the presence of sex stereotyping. Additionally, courts facing claims of discrimination brought by women in the criminal justice system are caught in the tension between two trends that have emerged over the last three decades: greater deference to prison administrators and a more robust conception of sex equality. Finally, the central concern in the context of prisons is parity, an ill-defined concept that stands for something less than equality.[76] This touchstone notion seems to provide women with the negative right to be free from gross disparity, but it tolerates a significant range of inequality.[77] The educational context, free from the tension between deference and scrutiny, has enforced a more substantive view of equality. This view protects a substantive right to equal treatment and access to equal opportunities for girls and boys.

Girls Court is a specialized gender-based program within the criminal justice system. But it can also be situated as a special education initiative. Girls Court shares the same broad goal as the education system: the mandate to foster the development of each individual child.[78] In both systems the state is exercising its power over adolescents who are mandated to participate.[79] In both prisons and schools, gender-based distinctions have survived, and Girls Court as an institution can be conceptualized at their intersection. Below, I examine how the Supreme Court and lower courts have filled out the contours of gender classification jurisprudence and discuss cases that arise in the prison and educational contexts. Thereafter, I examine the statutory and regulatory apparatus created to fill the gaps left by the Supreme Court's relative silence on gender equality. Though the federal government has

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[76] *See* Glover v. Johnson (*Glover I*), 478 F. Supp. 1075, 1079 (E.D. Mich. 1979) (holding that the state should be held to a "parity of treatment" standard in assessing treatment of female prisoners).

[77] *See* Rosemary Herbert, Note, *Women's Prisons: An Equal Protection Evaluation*, 94 YALE L.J. 1182, 1195–97 (1985).

[78] *See* discussion of original purposes of juvenile court, *supra* notes 37–40 and accompanying text.

[79] *Compare* Wisconsin v. Yoder, 406 U.S. 205 (1972) (recognizing the state's interest in compulsory education) *with* In re Gault, 387 U.S. 1, 13 (1967) (recognizing the special "relationship of the juvenile and the state" in juvenile court proceedings).

regulations that enforce gender non-discrimination in education, there is no equivalent regulatory regime enforcing Title IX of the Civil Rights Act in prisons.[80] These isolated institutions are instead governed by a piecemeal combination of statutes, regulations, and internal correctional policies among the fifty states, the District of Columbia, and the federal government.[81] Gender-based distinctions are still very much in force as a permissible form of classification in both schools and prisons. This reality suggests that Girls Court is on strong legal footing.

A. Case Law

1. Equal Protection Challenges to Gender-Based Classifications

To explore the legality of the use of the gender classification in place in the Girls Court, a logical place to begin is constitutional challenges to gender-based classifications. *United States v. Virginia*[82] (*VMI*) contains the Court's most important articulation of the boundary between permissible and impermissible classification on the basis of sex. *VMI* represents the culmination of the Court's gender jurisprudence since 1971, when the Court first applied the Equal Protection Clause to differential treatment based on sex.[83] Justice Ginsburg, writing for the Court, emphasized the "volumes of history"[84] of invidious discrimination against women, and affirmed that classifications based on gender are subject to heightened scrutiny.[85] Just as importantly, as Cary Franklin writes, the decision championed the unacceptability of gender stereotyping even in the face of genuine biological differences between men and women, "mak[ing] clear that anti-stereotyping doctrine governs all instances of sex-based state action, whether or not 'real' differences are involved."[86]

The Court held that there is a "strong presumption that gender classifications are invalid."[87] To overcome this presumption, the state

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[80] *See infra* Part II.
[81] *Id.*
[82] United States v. Virginia (*VMI*), 518 U.S. 515 (1996).
[83] Reed v. Reed, 404 U.S. 71, 77 (1971).
[84] *VMI*, 518 U.S. at 531.
[85] *Id.* at 532–33.
[86] Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83, 87–88 (2010).
[87] *VMI*, 518 U.S. at 532.

must show that the classification serves an "important governmental objective and that the discriminatory means employed are substantially related to the achievement of those objectives."[88] The justification for the classification must be "exceedingly persuasive."[89] *VMI* enumerates what some legitimate objectives might be:

> Inherent differences between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women for particular economic disabilities [they have] suffered, to promot[e] equal employment opportunity, to advance full development of the talent and capacities of our Nation's people.[90]

Such a classification cannot lead to the "denigration"[91] of women or impose "artificial constraints"[92] on their opportunities. It cannot rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females."[93] This decision crafted into law a broad idea of what a gender-based classification cannot do—perpetuate traditional gender roles with the imprimatur of the state. It also set out an equally broad idea of what these classifications may accomplish—expanding individuals' opportunities and disrupting these traditional gender roles—though not through impermissible means.

The Court has expressed its distrust of gender-based classifications more recently in *Nevada Department of Human Resources v. Hibbs*.[94] In this case, a male employee sued the state when the Nevada Department of Human Services failed to comply with the Family and Medical Leave Act by denying him proper leave benefits to care for his ailing wife.[95] The Court found that Nevada was unconstitutionally

[88] *Id.* at 524.
[89] *Id.* at 531.
[90] *Id.* at 533 (citations omitted).
[91] *Id.* at 533 (citations omitted).
[92] *Id.*
[93] *Id.*
[94] 538 U.S. 721, 735 (2003).
[95] *Id.* at 725.

participating in and fostering gender-based discrimination, and that Congress had the power to remedy this violation by abrogating Nevada's sovereign immunity.[96] Justice Rehnquist, writing for the majority, warned not only about facial stereotypes about women, but about the way "parallel stereotypes" about men reinforced such discrimination.[97]

Apart from *VMI* and *Hibbs*, the Supreme Court's contemporary gender jurisprudence is sparse, and lower courts have filled in the gaps. There have been no reported lower court decisions[98] resolving Equal Protection challenges to single-sex schools on their merits since *VMI*,[99] though many suits have been brought. Single-sex classrooms were upheld in 2011 against an equal protection challenge in the Western District of Kentucky.[100] Because all students could choose to participate in coeducational classes and there was no evidence of a disparity in the subject matter or quality of education between single-sex and co-educational classes, the mere existence of sex-segregated classrooms was found to be constitutional.[101] In another recent case, however, a judge enjoined a school district's single-sex education program on the basis that

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[96] *Id.* at 726–27.

[97] *Id.* at 736.

[98] This is not to say that there has been no litigation or threats of litigation regarding single-sex schooling. In May 2012, the ACLU launched a campaign called "Teach Kids, Not Stereotypes" to put an end to single-sex schooling. As part of this campaign, it sent demand letters to school districts in Florida, Maine, Virginia, West Virginia, Mississippi and Alabama, insisting that they take steps to end single-sex education. Allie Bohm, *Teach Kids, Not Stereotypes*, ACLU (May 21, 2012, 10:23 AM), http://www.aclu.org/blog/womens-rights/teach-kids-not-stereotypes. Previously, the ACLU has settled with at least three school boards that had implemented or were considering the implementation of single-sex schooling. Sara Rose, *Following ACLU Demands, Pittsburgh Ditches Single-School Sex Plans*, ACLU (Nov. 11, 2011, 4:00 PM), http://www.aclu.org/blog/womens-rights/following-aclu-demands-pittsburgh-ditches-single-sex-school-plans.

[99] *See* RONNA GREFF SCHNEIDER, 1 EDUCATION LAW §4:8, at 600–31 (2012-13 Supp. vol. 1).

[100] A.N.A *ex rel.* S.F.A. v. Breckinridge Cnty. Bd. of Educ., 833 F. Supp. 2d 673, 682 (W.D. Ky. 2011). Compare that outcome with the outcome of the ACLU's legal battle with the Vermillion Parish School Board. After a two-year battle in court, the school district agreed to suspend offering sex-segregated classes until 2016. Consent Decree at 3, Doe *ex rel.* Doe v. Vermillion Parish Sch. Bd., No. 09-CV-1565 (W.D. La. 2011), *available at* http://www.aclu.org/files/assets/consent_decree_1.pdf, *on remand from* 421 F. App'x 366 (5th Cir. 2011).

[101] *A.N.A. ex rel. S.F.A.*, 833 F. Supp. 2d at 679.

it violated Title IX.[102] Though the judge held that not all single-sex education would violate Title IX, the programs at issue did because the plaintiffs had shown that their participation in single-sex classes was not "completely voluntary."[103]

More lower courts have addressed challenges to gender classifications in the prison context on constitutional and statutory grounds. Equal Protection challenges brought by adult female prisoners often involve unequal access to vocational and educational resources. A cluster of circuit courts addressed these challenges between 1977 and 1997, with no clear principle emerging. One court struck down significant gender disparities in facilities and opportunities.[104] Another held that differences in facilities implied that men and women were not similarly situated, so that the Equal Protection Clause did not apply as a threshold matter.[105] As the law became more protective of the prison officials' decisions, courts were less likely to find their policies unconstitutional.[106] District courts in the early 1990s, however, found discrimination in prisons on the basis of gender unconstitutional, despite this trend of extreme deference for prison administrators.[107]

Thus, the jurisprudence of gender discrimination in jails is caught between two countervailing legal trends. On the one hand, courts are increasingly deferential to the policies of correctional institutions, including policies that discriminate on the basis of gender. On the other,

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[102] Doe v. Wood Cnty. Bd. of Educ., 888 F. Supp. 2d 771, 776 (S.D. W. Va. 2012).

[103] *Id.* at 780.

[104] *Glover I*, 478 F. Supp. 1075, 1101 (E.D. Mich. 1979).

[105] Klinger v. Dep't of Corrs. (*Klinger I*), 31 F.3d 727, 728 (8th Cir. 1994) (holding that male and female prisoners were not similarly situated for the purposes of equal protection challenges), *rev'g* Klinger v. Dep't of Corrs., 824 F. Supp. 1374 (D. Neb. 1993) (finding violations of female prisoners' Equal Protection and Title IX rights). This holding, that female and male prisoners are not similarly situated, precludes any Equal Protection challenge. The question of when men and women are similarly situated and whether the goal of anti-discrimination law is only to protect them when they are is, of course, another central tension in the conversation about gender. This question is discussed further in Part III, *infra*. The court later decided the related Title IX issue, holding that the fact that male and female prisoners were not similarly situated precluded female prisoners' Title IX claim. Klinger v. Dep't of Corrs., 107 F.3d 609, 616 (*Klinger II*) (8th Cir. 1997).

[106] *See* Turner v. Safley, 482 U.S. 78, 89 (1987) (lowering standard for prisoner constitutional claims from strict scrutiny to "reasonably related" standard of penological interest).

[107] *See* cases cited *infra* notes 145–157.

as discussed above, the Court has taken a more robust view that gender discrimination is impermissible, and a more nuanced view of what constitutes gender discrimination. This tension is epitomized by the conflict over which standard of review applies to Equal Protection challenges brought by female prisoners. The more deferential rational basis review generally applies to challenges to prison policies, while the more exacting standard, intermediate scrutiny, governs challenges to policies that discriminate on the basis of sex.

While Equal Protection challenges brought by female prisoners have largely been unsuccessful, either at the threshold level or on the merits, they have defined the contours of what permissible gender-based classifications look like. "Parity" is the guiding principle that emerges from these cases.[108] Parity, the standard that Equal Protection requires, is distinguished from equality, which is required by Title IX. [109] Though it is unclear exactly what the difference is—none of the courts addressing this issue thoroughly explicated the difference—it is clear that equality requires something more. From these cases, it seems that the parity standard is triggered by stark differences in the range and kind of services being provided, while the more exacting equality standard requires equal access to substantive opportunities. To be in parity, programs, services, and accommodations provided to male and female prisoners need not be identical, but this variation is bounded. These elements must together demonstrate that the policies in place do not invidiously discriminate against women.

Before the Court's 1987 decision in *Turner v. Safley*,[110] which created a very deferential standard for analyzing prison policies,[111] challenges brought by female prisoners were met with some success. In 1977 in *Glover v. Johnson*,[112] ten years before *Turner*, female prisoners brought a challenge in the Eastern District of Michigan to four key areas of programming for male and female inmates—educational opportunities, vocational training, apprenticeship opportunities, and

[108] *See* discussion *infra* notes 110–154 and accompanying text.
[109] *See* discussions of *Canterino v. Wilson*, 546 F. Supp. 174 (W.D. Ky. 1982), *vacated* by 869 F.2d 948 (6th Cir. 1989), *infra* notes 118–128 and accompanying text, and *West v. Virginia Department of Corrections*, 847 F. Supp. 402 (W.D. Va. 1994), *infra* notes 150–153 and accompanying text.
[110] 482 U.S. 78 (1987).
[111] *Id.* at 89.
[112] *Glover I*, 478 F. Supp.1075, 1077 (E.D. Mich. 1979).

work-pass opportunities.[113] The court found that "while it is neither feasible nor wise to require identical treatment of male and female inmates,"[114] there must be a "greater degree of parity in rehabilitation programming."[115] The opportunities available to women were not simply fewer, but the quality and range of programming was so limited as to "deprive women inmates of valuable rehabilitative experience."[116] The court also took issue with the stereotyped vocational offerings that women prisoners had access to; women were taught "elemental skills appropriate to product of person or handcraft items," while men were taught skills related to construction and industrial trades.[117]

A district court in Kentucky largely adopted *Glover*'s reasoning three years later in *Canterino v. Wilson*,[118] also before *Turner* was decided.[119] The court held that Equal Protection requires "parity, not identity" of treatment in jobs, vocational training education, and training.[120] The court distinguished parity—substantially equivalent in "substance, if not in form"[121]—from equality—"equivalent programs in

[113] *Id.*
[114] *Id.* at 1101.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 1087. The litigation in *Glover*, however, began in 1977, before the Supreme Court or any circuit courts had spoken in regards to equal protection in a prison setting. In its most recent opinion, the district court held that the heightened scrutiny it had applied in its earlier decisions was no longer appropriate, and that the *Turner* reasonable relation test "governs the parity inquiry." Glover v. Johnson (*Glover II*), 35 F. Supp. 2d 1010, 1014 (E.D. Mich. 1999), *aff'd*, 198 F.3d 557 (6th Cir. 1999). The court declined to revisit its original holding that men and women prisoners are similarly situated, saying that though "*Women Prisoners* and *Klinger* are instructive in that they demonstrate the new spirit of judicial deference in the prison context, they do not re-open my earlier liability determination that the male and female inmates in Michigan are similarly situated." *Id.* at 1015 (citing Women Prisoners of the D.C. Dep't of Corrs. v. District of Columbia, 93 F.3d 910 (D.C. Cir. 1996); *Klinger I*, 31 F.3d 727, 728 (8th Cir. 1994)). Finally, the court found that "sufficient parity of treatment under the Equal Protection clause" had been achieved by the prison administrators. *Id.* at 1019.
[118] 546 F. Supp. 174 (W.D. Ky. 1982), *vacated* by 869 F.2d 948 (6th Cir. 1989). Though the district court's decision was overturned by the Sixth Circuit seven years later, the circuit court rejected the findings of the district court, not the Equal Protection holding itself. *See* 869 F.2d 948.
[119] *Canterino*, 546 F. Supp. at 206–207.
[120] *Id.* at 210.
[121] *Id.* (citing *Glover I*, 478 F. Supp. at 1079).

form as well as substance."[122] Women prisoners had access only to part-time vocational courses "of limited value in today's competitive job market."[123] Further, there was not a single prison industry available to women, though there were prison industries in every facility that held men.[124] The on-the-job training program available in the Department of Corrections entirely excluded women from industrial services, agricultural services, and maintenance services and instead "overclassified" them into cooking and cleaning chores.[125] Thus, the court in *Canterino* found that the gender classification had resulted in "*inferiority* in the areas of vocational education and training, jobs, and pay for women inmates."[126] The court also found a lack of parity in library resources provided to men and women, housing standards, and provision of personal hygiene supplies.[127] This decision was later overturned by the Sixth Circuit, which held that the female prisoners failed to prove the disparity in treatment was gender-based discrimination on its face, which the court held was required as a threshold matter.[128]

This heightened scrutiny of gross disparities changed in 1987 when the Court articulated a new test for judging prison policies in *Turner v. Safley*.[129] Specifically, the 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."[130] This "reasonably related" standard is much less exacting than the "substantially related" standard used in intermediate scrutiny; analogously, a legitimate penological interest is a much less demanding standard than the "important government objective" standard required to clear intermediate scrutiny.[131] Practically, this results in less protection of prisoners' constitutional rights, including their right to Equal Protection,

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[122] *Id.*
[123] *Id.* at 191.
[124] *Id.* at 191–192.
[125] *Id.* at 193.
[126] *Id.* at 211 (emphasis added).
[127] *Id.* at 188–202.
[128] *Canterino*, 869 F.2d at 948.
[129] *Turner*, 482 U.S. 78, 89 (1987).
[130] *Id.*
[131] *Id.* at 81. Though the lower court used strict scrutiny to evaluate the regulations in *Turner*, the Supreme Court found "that a lesser standard of scrutiny is appropriate in determining the constitutionality of the prison rules." *Id.*

than those outside prison when *Turner* is applied. The circuit courts that have reviewed the Equal Protection challenges of female prisoners have recognized this higher bar.[132] This jurisprudence of deference to officials within the criminal justice system suggests that it is quite unlikely that the Girls Court would be found to violate Equal Protection.

Turner's functionally see-no-evil approach to prison administration has evolved into an atmosphere of deference that has hobbled Equal Protection challenges at the threshold level. For instance, in 1994, the Eighth Circuit invoked *Turner* deference in holding that male and female prisoners were not similarly situated, thereby pulling the rug out from underneath female prisoners' Equal Protection claims.[133] In *Klinger v. Department of Corrections* (*Klinger I*),[134] women prisoners alleged that the Nebraska Department of Correctional Services provided female prisoners with inferior educational opportunities. The Eighth Circuit examined five factors distinguishing women's prisons from men's: population size of the prison, security level, types of crimes, length of sentence, and other special characteristics.[135] After this examination, the court concluded that male and female prisoners were not "similarly situated" in a way that could give rise to an equal protection claim: "Differences between challenged programs at the two prisons are virtually

[132] Courts have upheld a wide array of prison policies that restrict prisoners' rights under this deferential test. *See e.g.*, Overton v. Bazzetta, 539 U.S. 126, 136 (2003) (upholding regulations that precluded visits from certain categories of family members as to whom parental rights had been terminated, that prohibited inmates from visiting with former inmates, that required children to be accompanied by family member or legal guardian, and that subjected inmates with two substance-abuse violations to ban of at least two years on future visitation); O'Lone v. Estate of Shabazz, 482 U.S. 342, 345 (1987) (upholding policy precluding Islamic inmates from attending weekly Friday religious service); Washington v. Harper, 494 U.S. 210 (1990) (upholding policy permitting the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest); Riggins v. Clarke, 403 F. App'x 292 (9th Cir. 2010) (upholding prison policy requiring an inmate's committed name be placed first on all incoming and outgoing mail, before any other official or religious name); Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001) (upholding regulation allowing pastoral visits only when prisoner initiated request and only when clergy member was from inmate's faith group); Sheets v. Moore, 97 F.3d 164 (6th Cir. 1996) (upholding blanket prohibition against inmates receiving bulk mail).

[133] *Klinger I*, 31 F.3d 727, 730 (8th Cir. 1994).

[134] *Id.* at 727.

[135] *Id.* at 731–32.

irrelevant because so many variables affect the mix of programming that an institution has . . . . In short, comparing programs at [the men's prison to those at the women's prison] is like the proverbial comparison of apples to oranges."[136] The decision emphasized that courts "should accord a high degree of deference to prison authorities . . . [as] subjecting prison officials' decisions to close scrutiny 'distort[s] the decision-making process' and 'seriously hamper[s] [officials'] ability to . . . adopt innovative solutions to the intractable problems of prison administration.'"[137] Thus, the Eighth Circuit concluded that comparing the available programming at the men's and women's prisons "results in precisely the type of federal court interference with and 'micro-management' of prisons that *Turner* condemned."[138] This broad reading of *Turner* not only requires deference to the logic of prison officials when examining an Equal Protection challenge on its merits. It also dictates the depth of the threshold inquiry that would allow such a challenge to progress on its merits.[139]

Two years later, the D.C. Circuit applied *Klinger*'s reasoning and deployed its five factors to find that male and female prisoners were not similarly situated.[140] In *Women Prisoners v. District of Columbia*,[141] female prisoners alleged discrimination with respect to access to academic, vocational, work, recreational, and religious programs.[142] As the dissent notes, the court's application of the similarly-situated test

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[136] *Id*. at 733.

[137] *Id.* at 732 (quoting Turner v. Safely, 482 U.S. 78, 89 (1987)).

[138] *Id.* at 733. In *Pargo v. Elliott*, the court, rejecting an equal protection claim by female prisoners in Iowa, quoted this language from *Klinger I*. 894 F. Supp. 1243, 1252 (S.D. Iowa 1995), *aff'd*, 69 F.3d 280 (8th Cir. 1995). But see the Eighth Circuit's previous decision in *Pargo v. Elliott*, remanding back to district court for factual findings. 49 F.3d 1355, 1357 (8th Cir. 1995) ("*Turner* does not foreclose all heightened judicial review. Our cases also indicate that *Turner* does not render prison regulations immune from judicial review." (citation omitted)).

[139] The D.C. Circuit refused to apply *Turner's* rational basis test and instead used heightened scrutiny while reviewing a policy that resulted in incarcerating female offenders further from D.C. than male offenders. *Pitts v. Thornburgh*, 866 F.2d 1450, 1453 (D.C. Cir. 1989) ("[W]e believe that . . . *Turner* itself, [does not] suggest[] the appropriateness of a reasonableness standard in this particular case."). However, seven years later in *Women Prisoners of the D.C. Dep't of Corrs. v. District of Columbia*, the court did use the more deferential *Turner* standard. 93 F.3d 910 (D.C. Cir. 1996).

[140] *Women Prisoners*, 93 F.3d at 913, 924.

[141] *Women Prisoners*, 93 F.3d 910.

[142] *Id.* at 913.

seems to foreclose any comparison of programming available in men and women's prisons:

> The District consigns similarly situated men and women to separate facilities having different characteristics, acting expressly on the basis of their sex. The court relies on the different characteristics of *the facilities* to conclude that the otherwise identical men and women incarcerated therein are not similarly situated, and on that basis holds that there can be no judicial comparison of the differences in the treatment accorded to them. The anomalous result is that the more unequal the men's and women's prisons are, the less likely it is that this court will consider differences in the prison experiences of men and women unconstitutional.[143]

The circular reasoning that often emerges from the use of this test can effectively leave gender discrimination in prisons out of constitutional reach.

Though deference to correctional officials weighs in favor of Girls Court's legality, not all Equal Protection challenges brought by female prisoners after *Turner* have failed. Several district courts have found, explicitly or implicitly, that *Turner* does not apply to the gender-discrimination context, and their application of intermediate scrutiny has led to successful Equal Protection challenges.[144] Therefore, although it is clear that *Turner* created a new doctrinal obstacle to enforcing gender equality, it is important not to overstate its significance because of a dearth of case law that leaves much room for speculation. As the successful post-*Turner* cases that are discussed next demonstrate, even in this age of deference, some disparity is just too great. It is possible, then, that the gross disparity in programmatic offerings in both *Canterino* and *Glover* would be found to violate Equal Protection today.

In 1991, in *McCoy v. Nevada Dept. of Prisons*, female prisoners in Nevada alleged the lower quality of educational, vocational, and recreational training programs available to them violated Equal

[143] *Id.* at 951 (Rogers, J., concurring in part and dissenting in part).
[144] *See* cases cited *infra* notes 145–157

Protection.[145] The district court, in denying a motion for summary judgment by the Department of Corrections, applied heightened scrutiny to undertake a parity inquiry.[146] It held that the inquiry must examine "each prison condition which is claimed to violate the Equal Protection Clause as it affects the male inmates on the one hand and the female inmates on the other," as opposed to the totality of the correctional system.[147] The court held that the parity inquiry must ask "whether the adverse effect reflects invidious gender-based discrimination."[148] It also held that *Turner* did not apply to gender-based discrimination in prisons.[149]

In *West v. Virginia Department of Corrections*,[150] the Western District of Virginia applied intermediate scrutiny, holding that it violated Equal Protection to deny women a boot camp alternative to traditional incarceration when a similar alternative was available to men. The court held that parity was the appropriate standard when addressing such claims and that "[a] determination of parity will involve a review of the totality of prison conditions and rehabilitative opportunities at male prisons and at [female prisons]."[151] While acknowledging that parity is a lesser standard than equality, it held that "[d]ifferences unrelated to such valid concerns as prison security must be remedied."[152] Given that boot

[145] McCoy v. Nev. Dep't of Prisons, 776 F. Supp. 521, 523–24 (D. Nev. 1991).
[146] *Id.* at 523.
[147] *Id.*
[148] *Id.* at 523–524 (quoting Pers. Adm'r. v. Feeney, 442 U.S. 256, 274 (1979)).
[149] *Id.* at 523 n.2.
[150] 847 F. Supp. 402 (W.D. Va. 1994).
[151] *Id.* at 408 (quoting Bukhari v. Hutto, 487 F. Supp. 1162, 1171 (E.D. Va. 1980)) (internal quotations omitted). *Bukhari*, decided before *Turner*, held that parity was the appropriate standard but that the record before it was insufficient to compel a ruling. 487 F. Supp. 1162. *See also* Dawson v. Kendrick, 527 F. Supp. 1252, 1317 (S.D. W. Va. 1981) (holding that intermediate scrutiny applies and citing *Glover I* for the proposition that "parity" as opposed to "identity" is required in treatment between male and female prisoners); Batton v. State Gov't of N.C. Exec. Branch, 501 F. Supp. 1173, 1178 (E.D.N.C. 1980) ("[S]ummary judgment would be inappropriate and is denied because the record has not been developed on the question of parity of opportunity and because defendants have not effectively refuted the contention that the opportunities available to women are predominantly low-paying, low-skill jobs that are fairly characterized as traditionally female.").
[152] *West*, 847 F. Supp. at 408.

camp is an "extremely favorable" sentencing alternative,[153] the court found that the unavailability of boot camp for women violated Equal Protection. The court did not reference *Turner* in its decision.[154]

The Southern District of New York also applied intermediate scrutiny in *Clarkson v. Coughlin*,[155] holding that the denial of special services to female hearing-impaired inmates violated Equal Protection. It held that heightened scrutiny applied and that parity was the relevant inquiry.[156] Though the court did not fully discuss how these standards intersect, it found "no genuine issue of material fact as [to] whether members of the Female Sub-Class are receiving treatment comparable to that of the men" and granted summary judgment in favor of the women prisoners.[157] Like the court in *West*, the Southern District did not reference *Turner*.

The Supreme Court's gender jurisprudence has not fully elucidated the line between an impermissible stereotype and permissible responsive programming; this makes assessing the legality of Girls Court challenging. It is tempting, therefore, to look at the Court's race jurisprudence, which also centers on the delineation of permissible and impermissible uses of a suspect classification, for further insights. In fact, the feminist movement has a long history of "reasoning from race," as Serena Mayeri terms the movement's strategy of borrowing rhetoric and legal arguments from the civil rights movement.[158] This history is complicated, as Mayeri demonstrates, and the race-sex analogy did not

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[153] In fact, the plaintiff in this case was sentenced to eighteen more years of supervision than her boyfriend for the same offense. *Id.* at 404 n.4.

[154] *See also* Casey v. Lewis, 834 F. Supp. 1477, 1550 (D. Ariz. 1993) (holding that parity was the appropriate standard when assessing female inmates' equal protection challenge and not referencing *Turner* in its decision).

[155] 898 F. Supp. 1019, 1043 (S.D.N.Y. 1995).

[156] *Id.* at 1043.

[157] *Id.*

[158] SERENA MAYERI, REASONING FROM RACE 3 (2011). One temptation, for example, is to draw an analogy between sex-based and race-based segregation in prisons. In *Johnson v. California*, the Court rejected the California Department of Corrections' use of "race as a proxy for gang membership and violence." 543 U.S. 499, 511 (2005). This concern with using suspect classifications as proxies dovetails with the Court's misgivings about gender stereotypes—policies such as the CDC's make gross generalizations about a social group based on inappropriate assumptions about its members. As I will discuss in Part III, the risks of stereotyping and essentialism pose a significant danger to the Girls Court's legitimacy. But Mayeri's treatment suggests the need for caution about where and how this analogy applies.

carry opponents of sex-segregated education as far as the analogy carried other feminist causes.[159] Thus, the analogy is also of limited usefulness as a tool with which to analyze the legality of the Girls Court.

Early challenges to single-sex education reasoned from race explicitly, but no court fully accepted the analogy.[160] One failed attempt to draw this analogy illustrated that "[m]any judges simply did not see single-sex education—or even the exclusion of girls and women from prestigious schools—in the same light as Jim Crow."[161] In 1976, the Third Circuit held in *Vorcheimer v. School District of Philadelphia* that the exclusion of girls from a prestigious all-male high school was constitutional.[162] The briefing on behalf of the class of girls challenging their exclusion relied heavily on *Brown*.[163] The threat this analogy posed is perhaps most clearly shown by how the court framed the issue: whether "the Constitution and laws of the United States require that every public school, in every public school system in the Nation, be coeducational?"[164] The court explicitly rejected the race-sex analogy, holding that there are "no fundamental difference between races . . . [b]ut there are differences between the sexes which may, in limited circumstances, justify disparity in the law."[165] This case may have predated *VMI*, but no judge before or after has endorsed the race-sex analogy in this context.[166]

Race and sex segregation in schools do not merely run parallel to each other. When facing forced racial integration of schools, districts in the South turned to sex segregation to separate black boys from white girls.[167] Much like single-sex correctional institutions, the history of single-sex education raises new questions regarding the motivations for and the legitimacy of its contemporary forms. As predominately black, all-boys schools begin to capture national attention,[168] this history is a

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[159] *See* MAYERI, *supra* note 158, at 58–60, 97–102, 167–172, 209–214.
[160] *See id.* at 97.
[161] *Id.*
[162] 532 F.2d 880, 881 (3d Cir. 1976), *aff'd*, 430 U.S. 703 (1977).
[163] Brief for Petitioners, *id.* (No. 76-37), 1976 WL 181263, at *24–25. *See also* MAYERI, *supra* note 158, at 100 (noting that the petitioner's brief in *Vorchheimer* quoted extensively from *Brown*).
[164] *Vorchheimer*, 532 F.2d at 881.
[165] *Id.* at 887.
[166] MAYERI, *supra* note 158, at 99.
[167] *Id.* at 167–172.
[168] The complicated history of single-sex schooling and its relationship to race does not end with desegregation. One scholar argues that "[t]he story of gender in education is

reminder that women are in fact not the only ones harmed by sex discrimination, and that these intersectionalities must not be forgotten. Not minding these issues—the harm that gender discrimination does to males and the importance of intersectionalities in identity formation—is the main pitfall of the Girls Court; this is discussed further in Part III.

2. Title IX Challenges to Sex-Based Classifications

Given the sparsity of constitutional jurisprudence regarding gender classifications, it is necessary to turn to the statutory regime governing sex discrimination, Title IX, in order to assess Girl Court's legality. Title IX reads: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[169] Title IX suits brought by prisoners are important, because they present an intersection of prison and education law.[170] Title IX challenges brought by female prisoners

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also one of race. . . . [W]hen race-linked programs became a political and legal non-starter in the late 1980s and early 1990s, gender-linked programs emerged as a dubious substitute to improve achievement." Andrew J. McCreary, *Public Single-Sex K-12 Education: The Renewal of Sex-Based Policy by Post-Race Politics, 1986-2006*, 40 J.L. & EDUC. 461, 462-63 (2011). One all-male, predominantly black public charter school, Urban Prep in Chicago, made headlines in 2010 and again in 2011 when it sent 100% of its graduating class to four-year college and university programs. *Urban Prep: 100 Percent of Graduates College- Bound for Second Straight Year*, HUFFINGTON POST, http://www.huffingtonpost.com/2011/02/16/urban-prep-100-percent-of_n_824286.html (last updated May 25, 2011). While there is scholarship that addresses the link between gender segregation and race segregation in schooling, the law, which has barely addressed the legality of single-sex schooling, has not addressed this intersectionality. *See, e.g.*, Rosemary C. Salomone, *Feminist Voices in the Debate over Single-Sex Schooling: Finding Common Ground*, 11 MICH. J. GENDER & L. 63, 91 (2004); Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 HARV. L. REV. 1741 (1992); Pamela J. Smith, *All-Male Black Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003, 2016 (1992).

[169] 20 U.S.C. § 1681 (2006).

[170] As of July 2012, there has only been one reported decision on the merits issued regarding single-sex education in elementary and secondary schools since the 2006 changes to the federal regulations implementing Title IX. *See A.N.A. ex rel. S.F.A.* v. Breckinridge Cnty. Bd. of Educ., 833 F. Supp. 2d 673, 682 (W.D. Ky. 2011) (holding that middle school program offering students option to participate in single-sex classes was not discriminatory and granting school board motion for summary judgment). The implementing regulations are the heart of the Title IX enforcement regime in school. *See infra* Section II.B.

have met no greater success than Equal Protection challenges, though they have failed at different stages.[171] The only court to analyze a Title IX challenge in a reported opinion held that equality, not parity, was required in programming available to male and female prisoners.[172] These cases support the central theme that emerges from the equal protection cases: parity allows for a range of differential treatment, while equality is a substantive concept that is more exacting.[173]

In *Jeldness v. Pearce*,[174] the Ninth Circuit held that Title IX applied to women prisoners' claims of unequal prison programming, though with the caveat that "the application of those regulations must be consistent with the basic needs of prisons and the *bona fide* reasons for segregation of the genders in prisons."[175] The court found that Title IX requires "equality" rather than mere "parity" in prison educational programs.[176] It held that this mandate of equality required prisons to "make reasonable efforts to offer the same educational opportunities to women as to men. Although the programs need not be identical in number or content, women must have reasonable opportunities for similar studies and must have an equal opportunity to participate in programs of comparable quality."[177] This more substantive test demands more than parity—it requires women and men to enjoy the same set of opportunities, rather than setting some upper limit on how much these opportunities can vary. The court remanded the case so that findings could be made according to this standard.[178]

Other circuit courts have been reluctant to compare men's and women's prison programming. In 1996, the D.C. Circuit considered the application of Title IX to female prisoners in *Women Prisoners v. District of Columbia*.[179] The court decided that Title IX cases must begin with the same threshold inquiry as Equal Protection cases—whether the person

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[171] *See* cases cited *infra* notes 172–182.

[172] *See Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir. 1994) *infra* notes 174–178, and accompanying text.

[173] *See supra* notes 112–129, 145–150, and discussion of the use of parity versus equality in equal protection cases.

[174] 30 F.3d 1220.

[175] *Id.* at 1226.

[176] *Id.* at 1228.

[177] *Id.* at 1229.

[178] *Id.*

[179] Women Prisoners of the D.C. Dep't of Corrs. v. District of Columbia, 93 F.3d 910, 924 (D.C. Cir. 1996).

bringing the challenge is similarly situated to those allegedly receiving favorable treatment.[180] The court found that male and female prisoners were not similarly situated and thus that the female prisoners' Title IX claims, as well as their Equal Protection claims, failed.[181]

In *Klinger II*, the Eighth Circuit did not question the district court's holding that Title IX was applicable to prisons.[182] Further, it affirmatively relieved the female prisoners from the burden of showing that they are similarly situated to male prisoners because "female and male participants within a given federally-funded education program or activity are presumed similarly situated for purposes of being entitled to equal educational opportunities within that program or activity."[183] However, the court held that the "program or activity" subject to Title IX was the entirety of the Department of Correctional Services.[184] The relevant comparison for Title IX purposes, therefore, was of the educational opportunities for male and female inmates "within the *entire* system of institutions operated by a state's federally-funded correctional department or agency, taking into account the objective differences between the male and female prison populations and such penological and security considerations as are necessary to accommodate in this unique context."[185] Therefore, the challenge brought by the female prisoners, which alleged unequal programming between the only women's prison in the state and one of three male prisons, "was not sufficiently relevant or persuasive to prove a violation of Title IX."[186] Though the court in this case did not reach the issue of choosing a framework to evaluate the discrimination claim, it suggested that it would use an equality standard rather than a parity standard.[187]

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[180] *Id.* at 925.

[181] *Id.* at 924–25.

[182] 107 F.3d 609, 613 (8th Cir. 1997). For the procedural history of *Klinger* and its predecessors, see *supra* note 105.

[183] *Id.* at 614. The *Klinger* courts analyzed the alleged Title IX and Equal Protection violations separately. For a discussion of the court's Equal Protection analysis see *supra* note 105 and accompanying text.

[184] *Id.* at 615.

[185] *Id.* at 616 (emphasis added).

[186] *Id.*

[187] *Id.* at 614 ("Title IX standard is 'equality' as compared with the equal protection standard of 'parity.'") (citing Jeldness v. Pearce, 30 F.3d 1220, 1226–27 (9th Cir. 1994)).

These cases flesh out the framework that the Supreme Court's gender cases began to construct. Because many Title IX and Equal Protection challenges have been defeated by a showing that men and women prisoners are not similarly situated, parity emerges as a theme. It is clear that some sort of comparability between the facilities and programming available to men and women is required, though there is still a margin for difference. While any gross disparity is likely a violation of Equal Protection or Title IX—such as no vocational programs at all for female prisoners but a number of programs in highly desirable vocations for male prisoners—the use of gender classifications and a certain range of unequal treatment between male and female prisoners is permissible. This survey brings us closer to being able to assess the legality of the Girls Court as an institution that relies on a gender classification; in the next section, the final pieces of the regulatory regime will be described, completing an arsenal with which to evaluate the Girls Court.

B. Statutes, Regulations, and Policies in Prisons and Schools

Cases raising constitutional and federal statutory challenges to employing gender classifications help us understand the legal footing of the Girls Court. In addition, uncovering the regime of statutes, regulations, and policies regarding gender classifications, both at the state and federal level, is an important final step in clarifying how these classifications are currently being used. The regulatory regime governing gender discrimination in prisons and schools is thick and complex. Some regulations condone and even encourage gender-based classifications, at times with or without caveats. There is more tolerance for sex discrimination in prisons, within a certain range of parity, and more concern regarding an affirmative right of substantive equality in schools—this highlights the importance of choosing whether to look at Girls Court through a criminal justice or educational lens. This subsection first presents the results of my national survey of regulations governing sex discrimination in prisons and then reviews the regulations governing single-sex schools and classrooms.

1. The History of Gender Discrimination in Prisons

Neither the section of the United States Code governing prisons[188] nor the equivalent chapter of Code of Federal Regulations[189] addresses gender. But statutes, regulations, and internal correctional policies of the fifty states, the District of Columbia, and the federal government govern gender classifications in correctional facilities.[190] This body of law and policy directly contemplates and oftentimes provides for the segregation of men and women. In addition, in twenty-five states, District of Columbia, and the federal government, various provisions require some sort of parity between male and female inmates, promote gender-responsive programming, or both. That is, some of these state-level regulatory regimes require both equality and segregation. To understand why the law demands some form of equality in prison programming but allows gender segregation, one must understand the historical roots of women's prisons.

Prisons in America are segregated on the basis of sex; this axiom seems to be foundational to the management of the prison system. Segregation is unquestioningly accepted by the courts and is often enforced by statutory mandate.[191] It is unclear currently how many co-correctional institutions exist in the United States, but estimates are low, peaking at thirty to forty co-correctional prisons and detention centers.[192]

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[188] 18 U.S.C. §§ 4001–4352 (2006).

[189] 28 C.F.R. §§ 500–572 (2012).

[190] *See* Appendix A for chart with all twenty-six jurisdictions studied and their relevant statutory, regulatory, or policy provisions.

[191] *See, e.g.*, GA. CODE ANN. § 42-5-52(c) (West, Westlaw through 2012 Reg. Sess.) ("Female inmates shall be removed from proximity to the place of detention for males and shall not be confined in a county correctional institution or other county facility except with the express written approval of the department."); IDAHO CODE ANN. § 20-602(1) (West, Westlaw through 2013) ("Each county jail shall house male and female prisoners separately."); MISS. CODE ANN. § 47-1-23 (West, Westlaw through 2012 Reg. Sess.) ("It shall be unlawful for convicts of different sexes to be confined or worked together.").

[192] The American Correctional Association Directory lists nineteen state co-correctional prisons, and zero federal co-correctional prisons; thirteen federal co-correctional detention facilities, one Cook County co-correctional detention facility, and forty-one other co-correctional facilities (community residential, work study release, medical, mental health, substance-abuse treatment, geriatric centers, boot camp, and other). AMERICAN CORRECTIONAL ASSOCATION DIRECTORY 35 (2009). It lists a total of 1,256 adult correctional facilities in the United States, 717 of which are prisons. *Id.* Thirteen states did not reply. *Id.* at 34-35. The Directory further lists two private co-

It is odd that the very oddity of gender-segregated prisons goes virtually unnoticed. Decisions like *Brown* and *VMI*, when taken together with *Johnson v. California*, which maintained strict scrutiny for the use of racial classifications even in the penal system,[193] would logically lead to heightened scrutiny for gender segregation in prisons. And yet courts take this segregation as a baseline assumption in challenges brought by female prisoners.[194] Perhaps this acquiescence is motivated by a mistaken belief that the practice of gender segregation is as old as incarceration itself.

Prior to the eighteenth century, all offenders were housed in the same institutions, though in separate areas within them—men, women, children, and the mentally ill alike.[195] Since the beginning of the imprisonment of women, however, female prisoners and patterns of female offending were viewed differently than those of male prisoners. These differences resonate with the dynamics apparent in today's correctional institutions. Estelle B. Freidman, in a history of women's prisons and their reform, notes that in the early eighteenth century women's offenses were defined sexually; certain public order offenses, called crimes against chastity or decency, were applied almost exclusively to women.[196] As women began to serve in penal institutions that had been built for and were overwhelmingly filled by men, women lacked adequate accommodations, access to rehabilitation, and productive labor activities.[197] Freidman's assessment of the situation of female prisoners back then sounds startlingly like the assessment of gender-responsive theorists today: "The difficulty of housing and supervising women

correctional prisons (of fifty-six private prisons total), and eighty-one other private co-correctional facilities or centers. *Id.* at 37. Another source states that there are "no more than thirty co-correctional facilities," all at the state level. ENCYCLOPEDIA OF AMERICAN PRISONS 156 (Marilyn D. McShane & Frank P. Williams III eds., 1996). Yet another says there are twenty-one co-correctional facilities. ROBERT M. REGOLI & JOHN D. HEWITT, EXPLORING CRIMINAL JUSTICE 270 (2009).

[193] Johnson v. California, 543 U.S. 499, 509 (2005).

[194] *Klinger II*, 107 F.3d at 615 ("It is beyond controversy that male and female prisoners may lawfully be segregated into separate institutions within a prison system. Gender-based prisoner segregation and segregation based upon prisoners' security levels are common and necessary practices."); Women Prisoners of the D.C. Dep't of Corrs. v. District of Columbia, 93 F.3d 910, 926 (D.C. Cir. 1996) ("As an initial matter, we note that the segregation of inmates by sex is unquestionably constitutional.").

[195] Russ Immarigeon, *Classification and Community Corrections*, *in* WOMEN AND GIRLS IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 65, at 27-1, 27-5.

[196] ESTELLE B. FREEDMAN, THEIR SISTERS' KEEPERS, 1830–1930, at 13 (1981).

[197] *Id.* at 15–16.

prisoners in institutions that had not been designed for them produced wretched conditions."[198] In this early chapter in the history of the incarceration of women, the woman was considered more depraved than male prisoners because "she had denied her own pure nature."[199] The female prisoner was feared and blamed for male crime; insofar as the structure separated men and women, the design was to shield men from their corrupting influence.[200]

In the mid to late nineteenth century, a group of women took up the mantle of prison reform, guided by the principle that these women were in fact victims who could be redeemed.[201] But this redemption was possible only through their separation from men, "the provision of differential, feminine care," and control over women's prisons by female staff.[202] Separation supposedly facilitated a more accurate classification among offenders (as opposed to lumping all women together), removed "sexual distractions,"[203] and "expunge[d] malevolent male influences."[204] These reformers sought to reach the "true woman" within each offender.[205] The commitment to traditional definitions of womanhood meant that women in these prisons were socialized to recognizing their innate femininity and the virtues of their sex—purity, piety, domesticity, and submissiveness.[206]

Though the Progressive Era reformers of the early twentieth century rejected traditional gender roles and gendered explanations for women's crime, these reformers failed to change the basic institution of the women's prison.[207] Correctional institutions continue to reinforce

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[198] FREEDMAN, *supra* note 196, at 16. Even if segregated prisons and segregated facilities continue to receive deference from courts, there may be other avenues for constitutional challenge. If, for example, conditions in women's prisons are objectively worse, it may be possible to challenge them under an absolute, rather than a relative standard—under the Eighth Amendment. If men faced these same conditions, their confinement would violate the Constitution as well. *See e.g.*, Laube v. Haley, 234 F. Supp. 2d 1227 (M.D. Ala. 2002) (granting preliminary injunction to women prisoners bringing Eighth Amendment challenge to conditions of their confinement).

[199] FREEDMAN, *supra* note 196, at 17.

[200] *Id.* at 17–19.

[201] *Id.* at 46.

[202] *Id.* at 46.

[203] *Id.* at 51.

[204] *Id.* at 52.

[205] *Id.* at 55.

[206] *Id.* at 54.

[207] *Id.* ch. 7, at 126–142.

sexual difference, though with different purported rationales. Many of these historical justifications for sex segregation have eroded, but their contemporary replacements may be just as unfounded in need or reason. Indeed, they may simply function as extensions of an inherited practice that began two hundred years ago.[208] Modern arguments for gender-segregated prisons focus on the cost of co-correctional facilities, the special needs of women inmates, the privacy rights of incarcerated women, and prison security.[209] However, some argue that "there is no tangible evidence of [co-correctional facilities'] effectiveness in terms of cost, diversion programs, or recidivism."[210] In other words, the modern arguments in favor of segregation may rest on a series of assumptions about co-correctional facilities that are not supported by evidence. Nonetheless, women's prisons often have inferior programs, facilities, and conditions of confinement as compared to prisons housing men.[211] Further, because most states only have one or two prisons to house the relatively small number of female offenders in the system, women cannot be assigned to a prison on the basis of a meaningful classification of their needs and the risks they pose.[212]

2. Regulating Gender Discrimination in Prisons

Sex segregation is the norm in correctional institutions and is rarely questioned, even by litigants who challenge unequal access to

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[208] *Compare* State v. Heitman, 181 P. 630, 634 (Kan. 1919) ("The female offender not merely requires, but deserves, on account of matters touching the perpetuation and virility of the human species, correctional treatment different from the male offender, both in kind and in degree.") *with* Commonwealth v. Daniel, 243 A.2d 400, 404 (Pa. 1968) (holding that differential sentencing provision which gave a judge discretion in setting a man's maximum sentence but not when setting a women's maximum sentence violated the equal protection clause). *See also* A. v. City of New York, 286 N.E.2d 432 (N.Y. 1972) (holding unconstitutional statute which gave family court jurisdiction over boys until age 16 and females until age 18). "[L]urking behind the discrimination is the imputation that females who engage in misconduct, sexual or otherwise, ought more to be censured, and their conduct subject to greater control and regulation, than males." *Id.* at 88–89.

[209] Christine M. Safarik, *Constitutional Law – Separate but Equal:* Jeldness v. Pearce – *an Analysis of Title IX Within the Confines of Correctional Facilities*, 18 W. NEW ENG. L. REV. 337, 337–38 (1996).

[210] ENCYCLOPEDIA OF AMERICAN PRISONS, *supra* note 192, at 156.

[211] *See supra* Section II.A.

[212] Rosemary Herbert, *Women's Prisons: An Equal Protection Evaluation*, 94 YALE L.J. 1182, 1183 (1985); Safarik, *supra* note 209, at 364.

programming, services, and facilities for male and female prisoners. In half of the jurisdictions in this country these other aspects of prison life are controlled not just by Title IX and the Equal Protection Clause, but also by statute, regulation, or policy. These extra pieces of the governing apparatus enshrine equal access to the training, education, treatment, and facilities necessary to create equal opportunities for men and women both inside and outside correctional institutions. It is unlikely that this regulatory framework provides a more robust set of rights for female prisoners than federal courts' thin readings of Title IX and the Equal Protection Clause in the prison context. The language of some regulations, such as Nebraska's,[213] suggests that prisoners might possess a private right of action that they could vindicate through the prison's administrative process. In light of the ineffective nature of many such systems[214] and the Prison Litigation Reform Act's (PLRA) requirement that prisoners exhaust all administrative remedies before bringing suit in federal court,[215] such cases rarely reach the courthouse door. In fact, there seem to be no reported cases brought under any of these state regulations. As part of the Civil Rights of Institutionalized Persons Act (CRIPA), the United States can bring suit[216] or intervene in a suit[217] on behalf of an institutionalized person whose rights are being violated. However, the PLRA, which amends CRIPA, specifically provides that "[t]he failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action"[218] under those sections of CRIPA.

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[213] NEB. CORR. SERVS., ADMIN. REG. NO. 116.01, INMATE RIGHTS § III(D), (F), at 3 (2011) ("Inmates shall have the right to . . . [b]e free of discrimination on the basis of race, nationality, color, creed, religion, sex, age, political belief of physical disability with regard to program access, work assignments, and administrative decisions. . . . Where male and female inmates are housed in the same institution, there shall be equal access to all available services and programs and separate sleeping quarters. Neither sex shall be denied opportunities solely on the basis of their number in the population.").

[214] *See* HUMAN RIGHTS WATCH, NO EQUAL JUSTICE 12 (2009), *available at* http://www.hrw.org/sites/default/files/reports/us0609web.pdf ("Prison officials themselves . . . typically design the grievance system that prisoners must exhaust before filing suit. This creates obvious incentives for prison officials to design grievance systems with short deadlines, multiple steps, and numerous technical requirements. . . . Some grievance systems include requirements that seem designed to discourage, rather than facilitate, compliance by prisoners.").

[215] 42 U.S.C. § 1997e(a) (2006).

[216] *Id.*

[217] 42 U.S.C. § 1997e(c) (2006).

[218] 42 U.S.C. § 1997e(b) (2006).

This provision may limit the ability of the United States to intervene in circumstances in which rights granted by state administrative regulation, as opposed to statutory or constitutional rights, are being violated. Since 2000, the Department of Justice has not filed any complaints under CRIPA alleging unconstitutional gender discrimination in a correctional facility.[219]

Three broad principles emerge from an analysis of prison regulatory regimes at the state level. The first is nondiscrimination. Three states[220] have statutes providing for non-discrimination or equality in prisons and jails—largely recitations of broad non-discriminatory requirements covering all or some areas of prison life. Louisiana's statute, for instance, provides that "the department [of corrections] shall provide employment opportunities and vocational training for all inmates, regardless of gender, consistent with available resources, physical custody, and appropriate classification criteria."[221] Ten states[222] have non-discrimination regulations, though some only apply to certain facilities, and many have caveats that nondiscrimination is subject to the availability of funding. Departments of corrections in four states[223] and

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[219] *See* DEP'T OF JUSTICE, ATTORNEY GENERALS'S ANNUAL REPORT TO CONGRESS DESCRIBING THE DEPARTMENT'S ENFORCEMENT EFFORTS UNDER THE CIVIL RIGHTS OF INSTITUTIONALIZED PERSONS ACT (2011), *available at* http://www.justice.gov/crt/about/spl/documents/split_cripa11.pdf.

[220] LA. REV. STAT. ANN. § 15:832 (West, Westlaw through 2012 Reg. Sess.); N.D. CENT. CODE ANN. § 12-44.1-14 (West, Westlaw through 2011 Reg. & Spec. Sess.); OR. REV. STAT. ANN. § 179.750 (West, Westlaw through 2012 Reg. Sess.).

[221] LA. REV. STAT. ANN. § 15:832.

[222] 210 IND. ADMIN. CODE 3-1-15 (West, Westlaw through Feb. 20, 2012); IOWA ADMIN CODE r. 201-50.2 (West, Westlaw through Mar. 5, 2013); MD. CODE REGS. 12.14.03.06 (West, Westlaw through Jan. 25, 2013); 103 MASS. CODE REGS. 900.07 (West, Westlaw through Feb. 15, 2013); NEB. CORR. SERVS., *supra* note 213; N.J. ADMIN. CODE §§ 10A:31-14.3, -22.3 (West, Westlaw through Mar. 4, 2013); OR. ADMIN. R. 291-113-0005 (West, Westlaw through Jan. 1, 2013); 37 PA. CODE §§ 95.235, .243 (West, Westlaw through Mar. 2, 2013); 37 TEX. ADMIN. CODE § 269.4 (West, Westlaw through Feb. 28, 2013); W. VA. CODE R. § 95-1-15 (2012).

[223] IDAHO DEP'T OF CORR., NO. 607.26.01.012, EDUCATIONAL PRACTICES, PROCEDURES, AND PLACEMENTS (2006); DEP'T OF REHAB. & CORR., STATE OF OHIO, NO. 57-EDU-02, COMPREHENSIVE EDUCATION PROGRAMS (2012); DEP'T OF CORRS., STATE OF VT., POLICY NO. 361, MENTAL HEALTH SERVICES (1982); DEP'T OF CORRS., STATE OF VT., POLICY NO. 389, EDUCATION AND CORRECTIONS (1991); DEP'T OF CORRS., STATE OF VT., POLICY NO. 391, INMATE EMPLOYMENT POLICY (1986); WYO. DEP'T OF CORRS., POLICY & PROCEDURE NO. 3.403, INMATE RIGHTS (2012).

the District of Columbia have publicly available policies providing for non-discrimination on the basis of gender. Thirty-seven states and the federal government do not have a statute, regulation, or publicly-available policy online requiring non-discrimination between male and female prisoners.[224]

The next principle embodied in the regulations is equal access, which seems to be a more demanding requirement. These regulations require "equal access" to programs,[225] access to "programs and facilities comparable to those provided to male prisoners,"[226] use of facilities "of equal quality,"[227] or "similar to that provided to general population male inmates."[228] They mandate that facilities, programs, and services "shall be available on an equitable basis"[229] or follow a similar formulation. Three states have statutes[230] providing for equal access, seven have regulations,[231] and six states and District of Columbia. have policies.[232] Many of these statutes are limited, requiring equal access only in certain facets of prison life, such as recreation,[233] providing protections only in county

[224] *See* Appendix A.
[225] IDAHO DEP'T OF CORR., *supra* note 223.
[226] DEP'T OF CORRS., STATE OF ALASKA, NO. 808.06, REQUIREMENTS RELATING TO FEMALE PRISONERS (1995).
[227] CAL. PENAL CODE § 4029 (West 2012).
[228] D.C. DEP'T OF CORRS., PROGRAM STATEMENT NO. 4151.1D, INMATE RECREATION PROGRAM (2010).
[229] IOWA ADMIN. CODE r. 501 (West, Westlaw through Jan. 8, 2013).
[230] CAL. PENAL CODE § 4029; FLA. STAT. ANN. § 944.24 (West, Westlaw through 2012 Reg. & Extraordinary Apportionment Sess.); MINN. STAT. ANN. § 241.70 (West, Westlaw through 2012 Reg. Sess.). *See* Appendix A.
[231] IOWA ADMIN CODE r. 201-50.2 (West, Westlaw through Mar. 5, 2013); 103 MASS. CODE REGS. 900.07 (West, Westlaw through Feb. 15, 2013); NEB. CORR. SERVS., *supra* note 213; N.J. ADMIN. CODE §§ 10A:31-14.3, -22.3 (West, Westlaw through Mar. 4, 2013); 37 PA. CODE §§ 95.235, 243 (West, Westlaw through Mar. 2, 2013); W. VA. CODE R. §§ 95-1-21, -2-15 (West, Westlaw through Dec. 2012); WIS. ADMIN. CODE DOC § 313.16 (West, Westlaw through Jan. 31, 2013).
[232] DEP'T OF CORRS., *supra* note 226; D.C. DEP'T OF CORRS., *supra* note 228; IDAHO DEP'T OF CORR., *supra* note 223; KAN. DEP'T OF CORR., NO. 10-112, GENDER BASED VARIATIONS IN PROGRAMS AND/OR SERVICES (1995); N.M. CORRS. DEP'T, CD-080100, INSTITUTIONAL CLASSIFICATION, INMATE RISK ASSESSMENT AND CENTRAL OFFICE CLASSIFICATION (2012); OKLA. DEP'T. OF CORRS., P-090100, PROVISIONS OF PROGRAMS (2012); OKLA. DEP'T. OF CORRS., OP-090101, STANDARDS FOR OFFENDER PROGRAMS (2011); WYO. DEP'T OF CORRS., *supra* note 223.
[233] D.C. DEP'T OF CORRS., *supra* note 228.

facilities,[234] or leaving space for unequal access if inadequate resources require it.[235] Thirty-four states and the federal government do not have a statute, regulation, or publicly available policy online requiring any level of equal access for male and female prisoners.

The final principle is a belief in gender-responsive programming. Regulations mandating the availability of such programming range from broad declarations to concrete requirements. The Federal Bureau of Prisons announces a general aspiration that "all policies, programs, and services [shall] address and consider the different needs of female offenders."[236] In contrast, Minnesota's detailed statute specifically funds model programs for female offenders and prioritizes five different goals for gender-responsive programs.[237] Two states have statutes[238] requiring or recommending gender-responsive programming, one has a regulation,[239] and five states and the federal government have policies.[240]

Twenty-five states do not provide for non-discrimination, equal access, or gender-responsiveness in prison programming, at least in any formal medium that is available for the public to access online. Thirty-three jurisdictions, including the federal government, do not address gender equality in a legally binding way, by statute or regulation.[241] This survey of piecemeal and half-hearted legal regimes reveals the optional nature of accounting for gender equality in prisons. Most of these regimes, from statutes to policies, are thin, perfunctory statements of the requirements of Title IX or the Equal Protection Clause, offering no additional protection.

Given that the enforcement and enforceability of these rights are hazy, the best way to understand this regulatory apparatus is not as

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[234] 103 MASS. CODE REGS. 936.01 (West, Westlaw through Feb. 15, 2013).
[235] CAL. PENAL CODE § 4029 (West 2012).
[236] FED. BUREAU OF PRISONS, NO. 5200.01, MANAGEMENT OF FEMALE OFFENDERS (1997).
[237] MINN. STAT. ANN. § 241.70 (West, Westlaw through 2012 Reg. Sess.).
[238] IDAHO CODE ANN. § 20-209 (West, Westlaw through 2013); MINN. STAT. ANN. § 241.70.
[239] ALASKA ADMIN. CODE tit. 22, § 25.030 (West, Westlaw through Dec. 7, 2012).
[240] MASS. DEP'T. OF CORR., 103 DOC 425, FEMALE OFFENDER SERVICES (2008); MINN. DEP'T. OF CORR., POLICY 102.210, PARITY FOR FEMALE OFFENDERS (2010); N.M. CORRS. DEP'T, *supra* note 232; OHIO DEP'T. OF CORR., 71 SOC 04, FEMALE OFFENDER PROGRAMS AND SERVICES (2009); PENN. DEP'T. OF CORR., POLICY NO. 7.4.1, ALCOHOL AND OTHER DRUG TREATMENT PROGRAMS (2006).
[241] *See* Appendix A.

"creating" a set of rights at all. Rather, they are instances of hortatory language gesturing towards the aspirational goal of equality under the law. But it is every bit as noteworthy that half of the jurisdictions in this country fail to even articulate that aspiration. Further, the lack of cohesive, federal regulation of gender equality in prison stands in stark contrast to the very detailed and specifically tailored regulations governing single-sex schools, which I discuss in the next subsection. The validity of gender classifications depends on their context, and that is true of these regulatory regimes as much as it is the case law. We see more tolerance for gender discrimination in prison than schools. Therefore, if the Girls Court is conceived of as first and foremost a program within the criminal justice system, it seems unlikely that any reviewing court would take issue with its use of a gender classification.

3. Regulating Gender Discrimination in Schools

The use of gender classifications is regulated more much closely in schools than in prisons; in addition, unlike gender classifications in prisons, the use of these classifications in schools is regulated nationally. Single-sex educational institutions have existed before and after *VMI*. The Court's analysis in *VMI* explicitly maintained a space for single-sex schooling in two footnotes in the opinion, recognizing that "it is the mission of some single-sex schools 'to dissipate, rather than perpetuate, traditional gender classifications,'" and describing VMI's exclusion as distinctively problematic because its opportunities were "unique."[242] The doctrine enshrined in the body of the opinion allows for single-sex education that is not based on stereotypes, and such permissible education may even disrupt these stereotypes. But it remains unclear what that education would look like.

Title IX applies to both public and private actors who choose to accept federal funding, as opposed to the Equal Protection Clause, which only applies to state actors.[243] Subsection 106.34 of Title 34 of the Code of Federal Regulations implements Title IX in schools and classrooms. Title IX and 34 C.F.R. 106.34 may be relevant to the Girls Courts either directly or by analogy. There is a mandatory educational component to

[242] United States v. Virginia (*VMI*), 518 U.S. 515, 534 nn.7, 8 (1996).

[243] *Compare* U.S. CONST. amend. XIV, § 1 ("No state shall . . .") *with* 20 U.S.C. § 1681(a) (2006) ("No person in the United States shall, on the basis of sex, . . . be subjected to discrimination *under any education program or activity receiving Federal financial assistance*" (emphasis added)).

the Girls Court, and the juvenile justice system recognizes a juvenile's right to treatment, which "encompasses not only a right to rehabilitation, but also a right to education."[244] It is more likely, however, that Title IX applies only by analogy, since Girls Court is a nonresidential program and the participants are receiving their education outside the juvenile system. However, as the legislative standard for sex equality, Title IX's limitations and regulations might provide guidance for programs outside of the realm of education that implicate sex equality.

The Office of Civil Rights, through the Department of Education, officially blessed single-sex education when it amended the regulations implementing Title IX in 2006.[245] These regulations now expressly allow for single-sex classes and schools.[246] The preamble to the most recent changes to the Department of Education's Title IX regulations notes that "[i]f possible, the regulatory provisions of Title IX are informed by constitutional principles, but because the scope of the Title IX statute differs from the scope of the Equal Protection Clause, these regulations do not regulate or implement constitutional requirements or constitute advice about the U.S. Constitution."[247]

Classes and extracurricular activities may be single sex if they are based on the federal funds recipient's "important objective,"[248] if the "single-sex nature of the class . . . is substantially related to achieving that objective,"[249] and if enrollment is voluntary. Important objectives may include "provid[ing] diverse educational activities,"[250] or meeting the "particular, identified educational needs of its students."[251] A recipient of federal funds must provide a "substantially equal" coeducational class or activity and may have to provide a "substantially equal" single-sex class

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[244] Levick & Sherman, *supra* note 12, at 15.

[245] For the relationship to the 2006 Title IX regulation amendments and the 2001 amendments to the No Child Left Behind Act, which gave Title VI funding for single-sex programs "consistent with applicable law," see McCreary, *supra* note 168, at 491, and Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 27 (2004).

[246] 34 C.F.R § 106.34 (2012).

[247] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62530, 62533 (Oct. 25, 2006) (footnote omitted).

[248] 34 C.F.R § 106.34(b)(1)(i) (2012).

[249] §§ 106.34(b)(1)(i)(A)–(B).

[250] § 106.34(b)(1)(i)(A).

[251] § 106.34(b)(1)(i)(B).

for students of the excluded sex.[252] Similarly, single-sex schools are permitted, but the recipient "must provide students of the excluded sex a substantially equal single-sex school or coeducational school."[253] Charter schools are exempt from this requirement.[254]

Factors examined when assessing if classes or extracurricular activities are substantially equal include but are not limited to: Policies and criteria of admission, the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources provided to the class, and intangible features, such as reputation of faculty.[255]

The Federal Register cites *VMI* and *Mississippi University of Women v. Hogan*[256] to suggest that these restrictions are compatible with Supreme Court jurisprudence, though the Register notes that "the Supreme Court has not decided the issue of whether the particular, identified educational needs objective is an important governmental or educational objective for the purposes of justifying a sex-based classification under either Title IX or the Equal Protection Clause."[257]

Single-sex schooling is on the rise. According to the National Association for Single-Sex Schools, in 2002 there were about a dozen public schools offering single-gender classrooms, but in the 2011-2012 school year, 390 schools were offering single-sex classrooms, and 116 schools were single-sex.[258] Several of these are public charter schools, beneficiaries of the exception for charter schools in the new regulations.[259] A number of these schools are ordinary public schools.[260] According to the regulations discussed above, the districts they are in also provide a substantially equal coeducational or single-sex school, or may

[252] § 106.34(b)(2).
[253] § 106.34(c).
[254] § 106.34(c)(2).
[255] § 106.34(b)(3).
[256] 458 U.S. 718 (1982).
[257] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62530, 62525 (Oct. 25, 2006).
[258] *Single Sex Schools*, NAT'L ASS'N FOR SINGLE SEX PUB. EDUC., http://www.singlesex schools.org/schools-schools.htm (last visited Mar. 3, 2012).
[259] J. Shaw Vanze, *The Constitutionality of Single-Sex Public Education in Pennsylvania Elementary and Secondary Schools*, 12 U. PA. J. CONST. L. 1479, 1496 (2012).
[260] *Id.*

offer both. Though the issue of same-sex schooling often evokes concern regarding girls and women, "the current drumbeat for increased single-sex educational opportunities has included a substantial amount of rhetoric about treating boys' problems seriously."[261] Of the schools mentioned in NASSPE's website, 72 are all-girls and 42 are all-boys.[262]

These regulations present new questions to ask about Girls Court: is the purpose of the Girls Court the achievement of an important governmental or educational objective? Is its single-sex nature substantially related to the achievement of that objective? Does the Family Court of the First District of Hawai'i have an obligation to provide a substantially equal opportunity for boys? And if so, does it do so?

III. WHERE DOES GIRLS COURT FIT?

Under a legal regime that tolerates some forms of sex discrimination and not others, how does Girls Court fit? Taken together, the case law and regulatory apparatus surrounding gender classifications support the legality of the Girls Court. Some gender-based classifications unquestionably pass legal muster—separation is accepted as a matter of course in prisons and even promoted by some in schools. But, to be legal, gender-based classifications must rest on some legitimate justification, and the range of differential treatment must be bounded by certain limits. Even in prisons, there must be some parity in programming available to men and women.

Girls Court seems commonplace within a legal regime that promotes specialized criminal courts for specific populations, allows for strict gender segregation in prison, and justifies the separation between boys and girls in the classroom. The fact that there is a space for gender-responsive programming within prisons points to an important governmental purpose justifying these classifications: the effective treatment and rehabilitation of female offenders. Because it targets youth, Girls Court supports another important objective: preventing these girls

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[261] David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135, 136 (2009).

[262] *Schools*, NAT'L ASS'N. FOR SINGLE SEX PUB. EDUC., http://web.archive.org/web/20111031123408/http://www.singlesexschools.org/schools-schools.htm (Last visited May 16, 2013).

from becoming further involved in the criminal justice system.[263] As the Girls Court website explains, "it is our intention that empowering and building on our girls' strengths now will also stop them from becoming involved in the criminal justice system as adult women, appearing as victims in domestic abuse cases and restraining order proceedings, or as mothers in child protective services later in their lives."[264] The Girls Court is developed and run by women who believe deeply in the work of gender-responsive theorists, and who have created a program based around that literature and research.[265] It is also regularly assessed and adjusted in order to be a more effective program.[266]

There are two questions that stand out, however, regarding Girls Court's legality and legitimacy. First, is gender being used as a proxy for something else, and if so, is that appropriate? Related to the first question is the second: are there substantially equal opportunities for boys? Both questions are about stereotyping. Is Girls Court reinforcing stereotypes about girls and "parallel stereotypes" about boys? Does the Court, as a result of these stereotypes, provide a service to girls not needed by all girls, while denying a service to boys that many could benefit from? First, in this section I explore the risks of stereotyping that girls and boys face from the Girls Court, using feminist legal theory as a framework. Then, I will explore whether boys have substantially equal opportunities.

A. Stereotyping Girls and Boys

Being gender-responsive and gender-competent doesn't necessarily require a completely separate court for girls. Why then, was Hawai'i Girls Court established? Why did the advocates involved choose to create an entirely separate program instead of creating gender-responsive programming within a larger program that included both girls and boys?

One answer is that girls' needs simply cannot be met in a framework that includes both girls and boys. In this view, the needs of girls must be very distinct from those of boys, yet incredibly similar to

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[263] *Our Mission*, *supra* note 25 ("We believe experiencing meaningful and appropriate sanctions for legal violations and personal misconduct will increase a sense of responsibility and will decrease recidivism.").

[264] HAW. GIRLS CT., *supra* note 1.

[265] Telephone Interview with Meda Chesney-Lind, *supra* note 16; Telephone Interview with Adrianne Abe, *supra* note 17.

[266] *See* DAVIDSON, *supra* note 20.

each others'. Concerns about the unique risk of pregnancy, the reality of motherhood, and escalated rates of sexual victimization justify this perspective. Under this view, keeping boys and girls completely separate during programming is essential to creating a truly safe and productive space. This is the view of many gender-responsive theorists.

It is possible, however, that the Girls Court might be using gender as a proxy for something else—namely, sexual victimization and trauma. If responding to this need is what is doing the work in the creation of the Court, is a gender classification the best way to do this? What about the victimized boys? Why not a court dedicated to sexual victimization, the way there are adult courts dedicated to domestic violence and drug addiction? Is the way girls respond to this sort of trauma different enough that it should be engaged with in a gender-segregated setting? What about the girls who haven't been victimized or abused? Do they benefit from a court simply because the law of averages tells us they are more likely to benefit from such a court? A brief tour through the arc of feminist thought as it has developed may shed light on some answers.

The first wave of feminist legal theory and litigation was that of equal treatment theorists or liberal feminists.[267] These feminists, sometimes called "sameness" or assimiliationist feminists, advocated "the use of 'gender-neutral' categories that do not rely on gender stereotypes to differentiate between men and women." [268] These feminists focused on the similarities between men and women to argue that men and women are alike and thus should be treated alike. [269] This formal equality is the basic triumph of the litigation on behalf of women in the 1970s and 1980s.[270] In large part, this theory motivates much of the Supreme

[267] These categories are adapted from those delineated in MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 10 (1999) and Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037 (1996). With this adaptation, I embrace Levit's caveat that "[t]his classification comes with recognition that the categories are incomplete, overlapping, and populated with theorists who are not solidly unified." *Id.* at 1042 n.13.

[268] Joan C. Williams, *Deconstructing Gender*, *in* FEMINIST LEGAL THEORY 95, 110 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

[269] *See* KATHARINE T. BARTLETT & DEBORAH L. RHODE, GENDER AND LAW 1, 2 (2006).

[270] Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL'Y 2 (1994) ("Feminist litigators and academics advocated legal reform in the 1970s using primarily a formal equality model that emphasized the similarities between men and women and

Court's gender jurisprudence; the similarly situated threshold requirement is a touchstone of formal equality.[271] The legal embodiment of the "familiar principle" is that "individuals who are alike should be treated alike."[272] Thus, liberal feminists might worry that the Girls Court "others" girls by placing them outside of conventional juvenile proceedings, emphasizing girls' differences in a way that undermines their equal status. Additionally, formal equality only subjects certain institutions to gender-based constitutional scrutiny—those institutions that treat similarly situated persons differently. This threshold requirement leaves some very important institutions, like prisons, out of constitutional reach, because men and women are not similarly situated within those structures. This framework misses the basic intuitions of the gender-responsive theorists.

The next wave of feminist legal theorists responded to "sameness" feminists by emphasizing difference.[273] Difference feminists resist formalized conceptions of equality and insist that jurisprudence must "accommodat[e] the ways in which women are different from men."[274]

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the desirability of same-treatment solutions to legal problems."). For examples of legal challenges and decisions using this theory, see for example, *Hogan*, 458 U.S. 718, 733 (1982) (holding that the exclusion of men from enrollment in Mississippi University for Women's nursing school violated the Fourteenth Amendment); Rosker v. Goldberg, 453 U.S. 57 (1981) (holding that act requiring only men to register for the draft constitutional); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (holding that Louisiana statute giving husband the unilateral right to dispose of property jointly owned with his wife without her consent violated Equal Protection); Craig v. Boren, 429 U.S. 190 (1976) (holding that Oklahoma statutes prohibiting the sale of 3.2% beer to males under the age of 21 and females under the age of 18 violated Equal Protection); Stanton v. Stanton, 421 U.S. 7 (1975) (holding that Utah statute under which girls attained majority at 18 but boys did not attain majority until they were 21 years of age violated Equal Protection); Weinberger v. Weisenfeld, 420 U.S. 636 (1975) (holding that Social Security Act of 1935—which permitted widows but not widowers to collect special benefits while caring for minor children–violated Equal Protection); Frontiero v. Richardson, 411 U.S. 677 (1973) (holding that statutes providing that spouses of male members of the uniformed services are dependents for purposes of obtaining increased quarters allowances and medical and dental benefits but that spouses of female members are not dependents unless they are in fact dependent for over one-half of their support, violate due process).

[271] Bartlett, *supra* note 270, at 2.

[272] *Id.*

[273] *Id. See also* CHAMALLAS, *supra* note 267, at 57; Salomone, *supra* note 168, at 81.

[274] Levit, *supra* note 267, at 1044–45.

For these feminists, substantive equality is the lodestar.[275] Both biological differences between men and women and the differing "social norms and practices that disadvantage women" must be considered when determining if an outcome of a specific policy is substantively equal.[276] Associated with "difference" feminism are "special rights," "accommodation," "acceptance," and "empowerment" approaches.[277]

The Girls Court is propelled by difference theory. Treating girls and boys alike by putting them through the same juvenile justice system, according to those that founded the Girls Court and run it today, disadvantages girls.[278] Despite its formal equality, it does not take into account the way girls are different from boys.[279] The Girls Court focuses on both biological differences and the difference between the lived experiences of boys and girls. These differences include the higher incidence of sexual victimization, as well as a higher rate of eating disorders, lower self-esteem, and other disadvantages.[280] Even if some of these afflictions are arguably socially constructed, they remain incredibly difficult hurdles for girls to overcome as they pursue fulfilling lives.

Sometimes seen as part of difference feminism and sometimes seen a wave apart, dominance feminism, as championed by Catharine MacKinnon, focuses on the inequality in power relations between men and women.[281] Dominance feminism forces us to ask if the Girls Court perpetuates the subordination of women. Given the Girls Court's focus on empowerment, strength-based programming, and the greater amount of resources available in the Girls Court, at first blush it seems unlikely that it is reinforcing the inferior status of women in society. However, as discussed in Part I, the law pathologizes girls' behavior, often arresting them for defensive behavior engaged in to protect themselves from abuse at home. Many argue that the juvenile justice system subordinates girls as

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[275] *See, e.g.*, Bartlett, *supra* note 270, at 1 (explaining the philosophies of this wave of feminist thinkers); Levit, *supra* note 267, at 1044–1045 (also explaining these philosophies).

[276] Bartlett, *supra* note 270, at 1.

[277] Christine A. Littleton, *Reconstructing Sexual Equality*, *in* FEMINIST LEGAL THEORY, *supra* note 268, at 35, 36.

[278] *See* Telephone Interview with Meda Chesney-Lind, *supra* note 16; Telephone Interview with Adrianne Abe, *supra* note 17.

[279] *Id.*

[280] *See supra* Section I.C.

[281] CHAMALLAS, *supra* note 267, at 58; Levit, *supra* note 267, at 1048.

a class.[282] Though Girls Court attempts to do the opposite, it can only accept girls already adjudicated delinquent, thus sanctioning the damaging criminalization of the girls' behavior. Dominance feminism reminds us not only to focus on the procedure at play in the Girls Court, but also to pay attention to the underlying substantive law and how the criminal justice system operates as a whole.

The next wave of feminism—called (in)essentialism,[283] different voice,[284] or postmodern[285] feminism—warns us not to consider women as a monolithic class. Viewing women as such leads to essentialism, "the idea that there is some common, underlying attribute or experience shared by all women, independent of race, class, sexual orientation or other aspects of their particular situation."[286] It cautions us that "gender imperialism" or "gender primacy" "give[s] too much primacy to sex as a basis of discrimination and too little to other forms of oppression, such as those based on race, class, and sexual orientation."[287]

This is the pitfall that Girls Court seems to fall into. By grouping girls in one program, it assumes that all these girls share something in common—in this case, from the literature surveyed above, it seems that the commonality is sexual victimization.[288] By assuming that most, if not all, girls in the Court are victims of sexual violence, and not acknowledging the victimization of boys, the Girls Court may be "reducing women to victims."[289] Further, diversity theorists point out that diversity and agency are often seen as dichotomous.[290] Because of this false dichotomy, these girls, who have been recognized or assumed to

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[282] *See, e.g.*, Laura A. Barnickol, Note, *The Disparate Treatment of Males and Females Within the Juvenile Justice System*, 2 WASH. U. J.L. & POL'Y 429, 442 (2000); Levick & Sherman, *supra* note 12, at 10–12; John M. MacDonald & Meda Chesney-Lind, *Gender Bias and Juvenile Justice Revisited: A Multiyear Analysis*, 47 CRIME & DELINQ. 173, 189 (2001).

[283] Salomone, *supra* note 168, at 85–88.

[284] Bartlett, *supra* note 270, at 5.

[285] Levit, *supra* note 267, at 1046.

[286] CHAMALLAS, *supra* note 267, at 86.

[287] Bartlett, *supra* note 270, at 7.

[288] It is possible that Girls Court screens its participants to make sure that they all display certain characteristics. This information is not available. However, if the Girls Court selected only girls that were victims of sexual violence, the concerns of this section would not be assuaged.

[289] CHAMALLAS, *supra* note 267, at 103.

[290] *Id.* at 102.

be victims, may feel that they cannot also be free and responsible agents, and in control of their own lives.

Using gender as the salient classification in Girls Court renders invisible the important and different ways these girls are marginalized because of their race and class. As members of racial minorities and/or marginalized socioeconomic groups, these girls likely experience hardship and discrimination that may inform their experiences just as much as their gender does. Further, there is an assumption among many advocates of gender-responsive programming[291] and single-sex education[292] that girls and boys must be separated because of the possibility for "distraction" due to sexual attraction between them. This is an example of heterosexism, a term used to describe "the pervasive cultural presumption and prescription of heterosexual relationships."[293] It is very troubling that queer girls, who have already been marginalized because of their gender, might come to Girls Court and then have their sexual orientation rendered invisible because it fails to conform to traditional gender norms.

Lastly, the effect that institutions like Girls Court have on men must be addressed. Though the idea that gender stereotypes harm men is not new.[294] Some feminists point out that "the more sophisticated and subtle ways in which stereotypes . . . affect men" have been largely overlooked, but are very important.[295] Gender role stereotypes harm boys in much of the same way they harm girls; "[t]here's tremendous pressure on boys to fit into limited definitions of maleness. They're supposed to

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[291] Giovanna Taormina, founder of Girls Circle, said to me in an interview that in a coeducational context, "There is so much hormonal stuff, put them together, they're focused on each other, not as comfortable." Telephone Interview with Giovanna Taormina, Founder, Girls Circle (Aug. 12, 2011). Though, when asked, she said that they make an affirmative effort to address the needs of queer participants; the beginning assumption that participants are heterosexual is problematic. *Id.*

[292] Patricia B. Campbell & Jo Sanders, *Challenging the System: Assumptions and Data Behind the Push for Single-Sex Schooling*, *in* GENDER IN POLICY AND PRACTICE 31, 40–41 (Amanda Datnow & Lee Hubbard eds., 2002) (identifying the assumption of sexual tension between boys and girls as one of the basic explanations for single-sex education).

[293] Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 195 (1988).

[294] See, for example, Franklin's argument that Ruth Bader Ginsburg's strategy as head of the ACLU's Women's Rights Project was grounded in an awareness that "gender-bending men" are harmed by gender stereotypes and met with as much social disapproval, if not more, as women who defy gender roles. Franklin, *supra* note 86.

[295] Levit, *supra* note 267, at 1052–53.

be 'tough,' 'powerful,' and 'cool.' . . . So many stereotypes about being a girl/young woman and being a boy/young man affect youth in deep and life-shaping ways."[296] Perhaps most importantly in this context is that although more girls than boys are sexually abused, there are many boys who are abused as well.[297] As one scholar puts it, "abuse, neglect, and trauma are certainly not the sole province of girls."[298] The system harms boys if it views them only as "objects of analysis, as 'others,' as oppressors," or simply omits them.[299] Girls Court may harm girls by categorizing them as victims by default; it may harm boys by enforcing the cultural norm that they cannot be victims.

B. A Substantially Equal Opportunity for Boys

Given that gender stereotypes can harm boys as well as girls, an important point comes into focus: perhaps all children need gender-responsive programming. Though the gender-responsive literature often claims that the juvenile justice system was "designed for boys,"[300] the claim is rarely interrogated. The best explanation of this statement is the criminal justice system as a whole is "by default" designed for men—with more men in the prison system, the policies and procedures in place, and the assessment instruments they are based on, were created to measure and control men's behavior.[301] That the juvenile justice system was planned with boys in mind does not mean that it is serving the boys within it well. Many of Girls Court's distinctive elements would be beneficial to anyone in the criminal justice system, regardless of age or gender. Everyone in the criminal justice system would benefit from parole officers with smaller caseloads, high-intensity supervision with consistent sanctions, appearances in front of the same judge who has time to develop a relationship the individual, and more family involvement in court. Further, if gender matters, as the proponents of the Girls Court

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[296] *Frequently Asked Questions on Creating a Girls Circle*, GIRLS CIRCLE, http://web.archive.org/web/20111116152013/http://www.girlscircle.com/faqs.aspx (last visited Mar. 3, 2012).

[297] *See, e.g.*, Biden, *supra* note 45, at 36–37 (noting that 32% of boys in probation camps or detention centers in Los Angeles County had been sexually abused).

[298] Beck et al., *supra* note 45, at 123.

[299] Levit, *supra* note 267, at 1039–40.

[300] Bloom & Covington, *supra* note 43; Chesney-Lind et al., *supra* note 68.

[301] NAT'L INSTITUTE OF CORRS., GENDER RESPONSIVE STRATEGIES 43 (2003), *available at* http://static.nicic.gov/Library/018017.pdf.

believe, then surely programming responsive to boys would benefit them as well—as it would every child.

In recognition of these important points, the One Circle Association, a group that pioneered gender-responsive programming for girls, has also designed gender-responsive programming for boys.[302] The Girls Circle, an organization that provides training, materials, and consultation to other programs that are serving girls, works with the Girls Court as well as with other juvenile justice, education, and outreach programs country-wide. The Circle aims to "increase positive connection, personal and collective strengths, and competence in girls . . . by promoting an emotionally safe setting and structure within which girls can develop caring relationships and use authentic voices."[303] In 2006, nine years after it was founded, the Girls Circle launched the Council for Boys and Young Men.[304]

The Council, in a section tellingly entitled "justification" on its website, cites statistics about the victimization and trauma of boys and young men, stating that males ages twelve to twenty-four have the highest victimization rates for violence, robbery and assault with the exception of sexual assault and rape; that compared to females of the same age range, adolescent males are almost three times as likely as same age females to have ADHD, and more likely to have a learning disability; and that older teen males report higher levels of substance abuse, especially binge drinking, than their female peers.[305] Noting that boys have different coping mechanisms than girls, The Council's website lays out a vision of gender-responsive programming that "engages boys, acknowledging and incorporating male propensities while also offering stress reducing activities and thoughtful exploration of common attitudes, conditions, and behaviors."[306] The evolution of this organization may be a forerunner for a future evolution which ought to occur in the gender-responsive movement at large.

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[302] *About Us*, ONE CIRCLE FOUNDATION, http://onecirclefoundation.org/about_us.aspx (last visited Apr. 23, 2013).

[303] *How It Works*, GIRLS CIRCLE (2012), http://web.archive.org/web/20120421020808/http://www.girlscircle.com/how_it_works.aspx (last visited May 16, 2013).

[304] *See About Us*, *supra* note 302.

[305] *The Council for Boys and Young Men*, ONE CIRCLE FOUNDATION, onecirclefoundation.org/TC.aspx (last visited Mar. 5, 2013).

[306] *Id.*

In my conversations with individuals involved in the movement, no one argued that boys would not benefit from a similar program, while still maintaining that gender-responsive programming is very important to girls. Giovanna Taormina, executive director of Girls Circle, said that the group was spurred to found The Council for Boys and Young Men because they "found that there wasn't really new stuff for boys . . . the institutionalized mentality of the staff was the correctional mentality," which wasn't working for boys.[307] Adriane Abe, the program coordinator for the Girls Court, believes that:

> We in Hawai'i know that the boys come with very similar pathways—victimization, witnessing of violence, school failure, substance abuse. But what we also know is that girls respond differently to those elements. They have to be treated in a way that acknowledges that and doesn't re-victimize them and helps them feel safe in the healing process. So much of the services in existence are designed for boys.[308]

Does a substantially equal opportunity exist for boys? The boys in the First Judicial District of Hawai'i, as well as the girls who are not participating in the Girls Court,[309] are not part of a program as responsive to their individual and gendered needs as the Girls Court. Ideally, a solution to this disparity would be to offer more children such an opportunity, and more nuanced opportunities, focusing on race and class as well as gender, as opposed to eliminating the limited opportunities that now exist. The realities of resource allocation and the difficulties of raising money for such causes may make this ideal difficult to achieve.

CONCLUSION

[307] Telephone Interview with Giovanna Taormina, *supra* note 291.

[308] Telephone Interview with Adriane Abe, *supra* note 17.

[309] In 2009, 5,298 girls were arrested in Hawai'i. LYDIA SEUMANU FUATAGAVI & PAUL PERRONE, ATTORNEY GENERAL, STATE OF HAWAI'I, CRIME IN HAWAI'I 2009, at 103, 109 (2010), *available at* http://ag.hawaii.gov/cpja/files/2013/01/Crime_in_Hawaii_2009.pdf. Each year, 16 girls are accepted into the Girls Court. DAVIDSON, *supra* note 20.

Girls Court Hawai'i is animated by a search for equality for girls in the juvenile justice system, based on theory and research suggesting that girls have different needs than boys. As a specialized criminal court, it is unremarkable. As a gender-based classification, it seems safely tucked into a body of law—case law, statutes, regulations, and policy—that allows for such classifications. In prisons, all that is needed is parity, and courts often defer to legitimate penological interests. It is unlikely that a court would invalidate this specialized program that targets a subset of girls as a gross disparity. In schools there is a higher standard, a substantially equal opportunity for members of the opposite sex. But even single-sex schools are, at least within the current body of law, legally permissible. Girls Court lies at the intersection of prisons and schools. Regardless of how the Court is characterized, however, it is bound by the core value of equality under the law: to prevent stereotyping on the basis of gender and the unfair limitations that such stereotyping creates. If Girls Court's legal validity is an easy question, in the end, its legitimacy seems thornier—which leads us to consider the Girls Court as it ought to be.

Raising the profile of gender is one step towards bringing the juvenile justice system to a place where it can fulfill its ultimate mandate: treating each child as an individual. If the Girls Court—or the juvenile justice system as a whole—is really about treating each child as an individual, then such programs must become more granular and acknowledge differences in race, class, and sexual identity, among others. The juvenile justice system was founded on a rehabilitative model, with the aim of recognizing (and meeting) each child's needs. Gender is one facet of how we try to meet each child as he or she is as an individual. Hopefully, by recognizing and being responsive to gender difference, a broader process of disaggregation will occur, which will one day enable the system to realize and respond to additional differences and effectively meet the needs of all our children.

APPENDIX

Jurisdiction	Statute/Reg/ Policy	Type	Text
Alaska	Regulation	Gender-Responsive	(a) In the delivery of services, an approved program (1) must: (A) establish and implement a gender-specific written curriculum that incorporates the requirements set out in this chapter; (B) require a program participant to attend and participate in a minimum of 24 weeks of weekly gender-specific group counseling sessions; ALASKA ADMIN. CODE TIT. 22, § 25.030 (West, Westlaw through Dec. 7, 2012).
	Policy	Equal Access	All female prisoners will be housed separately and must be provided access to facility programs and facilities comparable to those provided to male prisoners and consistent with the mission of the institution. Female prisoners must be provided special programs about pregnancy, child care, and domestic violence. DEP'T OF CORRS., NO. 808.06, REQUIREMENTS RELATING TO FEMALE PRISONERS (1995)
California	Statute	Equal Access (with funding availability caveat)	(a) Whenever . . . any facility, including but not limited to any room or cell, vocational training facility, recreation area, rest area, dining room, store, or facility for the exercise of religious freedom, is provided for use by any prisoner for any purpose, *a separate facility of equal quality*, or separate use of the same facility, or joint use of the same facility where appropriate, shall be provided for prisoners of the opposite sex for such purpose. (b) Whenever . . . any program, service or privilege, including but not limited to any general or vocational education, physical education or recreation, work furlough program, psychological counseling, work within the

Jurisdiction	Statute/Reg/ Policy	Type	Text
			institution, visiting privileges, or medical treatment, is provided for any prisoner, such a program, service or privilege of equal quality shall be provided for prisoners of the opposite sex, except when the proportion of prisoners of one sex is so small that the cost of providing any program, service or privilege described in this subdivision, other than medical treatment or health maintenance, for such prisoners would not be justified in relation to the reduction in the level of any other program, service or privilege that would result from the diversion of funds for such purpose. CAL. PENAL CODE § 4029 (West 2012) (emphasis added)
District of Columbia	Policy	Equal Access – Recreation Only	The female general population shall have outdoor recreation, inside recreation, and leisure activities "similar to that provide to general population male inmates." DEP'T OF CORRS., PROGRAM STATEMENT NO. 4151.1D, INMATE RECREATION PROGRAM (2010).
Federal Government	Policy	Gender-Responsive	This Program Statement provide[s]… that all Bureau policies, programs, and services address and consider the different needs of female offenders. FED. BUREAU OF PRISONS, NO. 5200.01, MANAGEMENT OF FEMALE OFFENDERS (1997).
Florida	Statute	Equal Access	(3) Women inmates shall have access to programs of education, vocational training, rehabilitation, and substance abuse treatment that are equivalent to those programs which are provided for male inmates. The department shall ensure that women inmates are given opportunities for exercise, recreation, and visitation privileges according to the same standards as those privileges are provided for men. Women inmates shall be given opportunities to participate in work-release programs which are comparable to the opportunities provided for male inmates and shall be eligible for early release according to the same standards and procedures

Jurisdiction	Statute/Reg/ Policy	Type	Text
			under which male inmates are eligible for early release. CORRECTIONS EQUITY ACT, FLA. STAT. ANN. § 944.24 (West, Westlaw through 2012 Reg. & Extraordinary Apportionment Sess.)
Idaho	Statute	Gender-Responsive	(2) The state board of correction may provide or facilitate research-based rehabilitative services at the discretion of the Idaho department of correction and as resources permit for incarcerated and community-based offenders. The rehabilitative services may include programs for behavioral modification, education, vocational education, sexual offenders, substance abuse, gender-responsive programs and other programs that correctional research supports reduction of risk for offender populations. IDAHO CODE ANN. § 20-209 (West, Westlaw through 2013).
	Policy	Equal Access	The IDOC schools ensure equal access to traditional and nontraditional classes and labs regardless of race, disability, sex, age, color, national origin, creed, religion, sexual orientation, ancestry or any other legally protected classification. IDAHO DEP'T OF CORR., NO. 607.26.01.012, EDUCATIONAL PRACTICES, PROCEDURES, AND PLACEMENTS (2006).
Indiana	Regulation	Equal Access and Nondiscrimination	(b) Inmates shall not be subject to discrimination based on (1) race (2) national origin (3) color (4) creed (5) sex (6) economic status (7) political belief. There shall be equal access to programs or services for male and female inmates. 210 IND. ADMIN. CODE 3-1-15 (West, Westlaw through Feb. 20, 2012).

Jurisdiction	Statute/Reg/ Policy	Type	Text
	Policy	Equal Access and Nondiscrimination	All qualified offenders shall have equal access to education programs regardless of race, disability, sex, age, color, national origin or ancestry, creed, religion, marital or parental status, disabled Viet Nam era veteran status or any other legally protected classification. INDIANA DEP'T OF CORR., POLICIES AND ADMIN. PROCEDURES NO. 01-01-101, THE DEVELOPMENT AND DELIVERY OF ADULT ACADEMIC AND TECHNICAL PROCEDURES (2007). The Department's Substance Abuse Programs shall not discriminate against offenders based upon gender, sexual orientation, color, national origin, race, religion, ethnicity, age, handicap, political views, and/or criminal history. INDIANA DEP'T OF CORR., POLICIES AND ADMIN. NO. 01-02-106, THE DEVELOPMENT AND DELIVERY OF SUBSTANCE ABUSE SERVICES (2008).
Iowa	Regulation	Equal Access and Nondiscrimination	50.2(5) *Equal opportunity*. Facilities, programs, and services shall be available on an equitable basis to both males and females even though each standard does not specify that it applies to both males and females. 50.2(6) *Nondiscriminatory treatment*. Each jail administrator shall ensure that staff and prisoners are not subject to discriminatory treatment based upon race, religion, nationality, disability, sex or age absent compelling reason for said discriminatory treatment. Discrimination on the basis of a disability is prohibited in the provision of services, programs, and activities IOWA ADMIN CODE R. 201-50.2 (West, Westlaw through Mar. 5, 2013).
Kansas	Policy	Equal Access	A. Male and female inmates shall be afforded comparable

Jurisdiction	Statute/Reg/ Policy	Type	Text
			programs, services and activities. 1. Adjustments or modifications to reflect gender differences shall be carefully weighed and documented by each warden. 2. Acceptable gender differences may include, but are not restricted to: a. Privacy; b. Special health care needs; and, c. Other bona-fide differences related to the physical and/or psychological well being of the inmate population. 3. The convenience of the facility shall not be considered as a valid reason to modify or adjust programs, services and/or activities delivery between male and female populations. DEP'T OF CORR., NO. 10-112, GENDER BASED VARIATIONS IN PROGRAMS AND/OR SERVICES (1995).
Louisiana	Statute	Nondiscrimination - Vocational and Employment Only (with resource limitation caveat)	A. The department shall provide employment opportunities and vocational training for all inmates, regardless of gender, consistent with available resources, physical custody, and appropriate classification criteria. LA. REV. STAT. ANN. § 15:832 (West, Westlaw through 2012 Reg. Sess.).
Maryland	Regulation	Nondiscrimination	The managing official of a correctional facility is responsible for the following: A. A written policy stating that an inmate is not discriminated against with regard to programs, services, or activities on the basis of race, religion, national origin, sex, handicap, or political beliefs. MD. CODE REGS. 12.14.03.06 (West, Westlaw through Jan. 25, 2013).

Jurisdiction	Statute/Reg/ Policy	Type	Text
Massachu-setts	Regulation	Nondiscrimination (in county facilities only)	No person confined at any county correctional facility shall be denied the equal protection of the law nor shall be subject to discriminatory treatment on the basis of race, religion, creed, sex, sexual orientation, handicap or national origin 103 MASS. CODE REGS. 900.07 (West, Westlaw through Feb. 15, 2013).
		Equal Access (when in same facility)	(2) Written policy and procedure shall govern inmate services and programs, and shall include the following provisions: (e) when incarcerated within the same facility, males and females shall have equal opportunities for participation in programs and services. 103 MASS. CODE REGS. 936.01 (West, Westlaw through Feb. 15, 2013).
	Policy	Gender-Responsive	The mission of the Department's Female Offender Services division is to reinforce and develop innovative and comprehensive gender-responsive strategies to create a continuum of integrated trauma informed programs and services that address the multi-dimensional needs of female offenders. MASS. DEP'T. OF CORR., 103 DOC 425, FEMALE OFFENDER SERVICES (2008).

Jurisdiction	Statute/Reg/ Policy	Type	Text
Minnesota	Statute	Equal Access and Gender-Responsive	Subdivision 1. Type of programs. Adult women charged with or convicted of crimes . . . shall be provided a range and quality of programming substantially equivalent to programming offered male persons charged with or convicted of crimes or delinquencies. Programs for female offenders shall be based upon the special needs of female offenders. Subd. 2. Model programs. Within the limits of money appropriated, the commissioner of corrections shall provide model programs for female offenders which respond to statewide needs and geographical areas and shall award grants for the programs. Listed in the order of importance, the programs shall: (1) respond in a rehabilitative way to the type of offenses female offenders generally commit; (2) respond to the problems of female offenders with dependent children; (3) respond to the importance of developing independent living skills; (4) assist female offenders to overcome their own extreme degree of dependency; and (5) prepare to offer technical assistance and training toward the implementation of other similar programs when requested by local communities. MINN. STAT. ANN. § 241.70 (West, Westlaw through 2012 Reg. Sess.).

Jurisdiction	Statute/Reg/ Policy	Type	Text
	Policy	Gender-Responsive	PURPOSE: To ensure the range of gender specific services for female offenders exists in all communities of Minnesota and such services are substantially equivalent to the programming offered to male persons charged with or convicted of crimes or delinquencies. POLICY: The department will ensure programs for female offenders have a range and quality substantially equivalent to programming offered male persons charged with or convicted of crimes or delinquencies. MINN. DEP'T. OF CORR., POLICY 102.210, PARITY FOR FEMALE OFFENDERS (2010).
Nebraska	Regulation	Nondiscrimination, Equal Access	III. Inmates shall have the right to D. Be free of discrimination on the basis of race, nationality, color, creed, religion, sex, age, political belief of physical disability with regard to program access, work assignments, and administrative decision. F. Where male and female inmates are housed in the same institution, there shall be equal access to all available services and programs and separate sleeping quarters. Neither sex shall be denied opportunities solely on the basis of their small number in the population. NEB. CORR. SERVS., ADMIN. REG. NO. 116.01, INMATE RIGHTS (2011).
New Jersey	Regulation	Nondiscrimination, Equal Access – County Correctional Facilities	(a) There shall be no discrimination on the basis of race, creed, color, ancestry, gender identity or expression, national origin, religion, economic status, political belief, affectional or sexual orientation, marital status, nationality or disability (b) Care, custody and treatment services of inmates shall be provided equally to male and female inmates. N.J. ADMIN. CODE § 10A:31-14.3 (West, Westlaw through Mar. 4, 2013).

Jurisdiction	Statute/Reg/ Policy	Type	Text
			Male and female inmates, depending on their custody levels, shall have equal access to all programs and activities, but integrated participation by male and female inmates in programs and activities is not required. § 10A:31-22.3.
New Mexico	Policy	Equal access when in same facility, gender-responsive	D. The gender-responsive principles will be considered when developing and designing program assignments and classification plans for female offenders: - Acknowledge that gender makes a difference; - Create an environment based on safety, respect and dignity; - Develop policies, practices and programs that are relational and promote healthy connections to children, family, significant others and the community; - Address substance abuse, trauma and mental health issues through comprehensive, integrated, and culturally relevant services and appropriate supervision; - Provide women with opportunities to improve their socioeconomic conditions; and, - Establish a system of community supervision and reentry with comprehensive collaborative services. . . . . N. Male and female inmates, when housed in the same facility, will be provided separate sleeping quarters with equal access to all available services and programs shall be provided. Neither sex shall be denied opportunities solely on the basis of their smaller number in the population. N.M. CORRS. DEP'T, CD-080100, INSTITUTIONAL CLASSIFICATION, INMATE RISK ASSESSMENT AND CENTRAL OFFICE CLASSIFICATION (2012).
North Dakota	Statute	Nondiscrimination	Subject to reasonable safety, security, discipline, and correctional facility administration requirements, the administrator of each correctional facility shall: 2. Ensure that inmates are not subjected to discrimination

Jurisdiction	Statute/Reg/ Policy	Type	Text
			based on race, national origin, color, creed, sex, economic status, or political belief. N.D. CENT. CODE ANN. § 12-44.1-14 (West, Westlaw through 2011 Reg. & Spec. Sess.)
Ohio	Policy	Gender-Responsive	V. It is the policy of the Ohio Department of Rehabilitation and Correction to ensure that correction facilities housing females shall maintain gender specific programs and services that address special needs of female offenders. OHIO DEP'T. OF CORR., 71 SOC 04, FEMALE OFFENDER PROGRAMS AND SERVICES (2009).
		Nondiscrimination	In providing quality education programming to the inmate population, DRC shall ensure that all qualified students have access to the following classes and programs regardless of race, disability, sex, age, national origin, creed, religion, sexual orientation, ancestry, or any other legally protected classification, in conformance with eligibility and priority enrollment guidelines. DEP'T OF REHAB. & CORR., NO. 57-EDU-02, COMPREHENSIVE EDUCATION PROGRAMS (2012).
Oklahoma	Policy	Equal Access	The provision of programs will ensure gender parity and a standardized continuum of treatment based upon assessed needs and risk. Department of Corrections. Operation Memo 090101. Standards for Offender Programs. The provision of programs ensures gender parity and a standardized continuum of treatment based upon assessed needs and risk assessment. OKLA. DEP'T. OF CORRS., P-090100, PROVISIONS OF PROGRAMS (2012).

Jurisdiction	Statute/Reg/ Policy	Type	Text
Oregon	Statute	Nondiscrimination	(2) Discrimination may not be made in the provision of or access to educational facilities and services and recreational facilities and services to any person in . . . Department of Corrections institutions . . . on the basis of race, religion, sex, sexual orientation, national origin or marital status of the person. OR. REV. STAT. ANN. § 179.750 (West, Westlaw through 2012 Reg. Sess.).
	Regulation	Nondiscrimination	(3)(a)There will be no discrimination in the provision of education facilities and services in state institutions, including those administered by the Department of Corrections, on the basis of age, race, religion, gender, marital status, national origin, or disability. OR. ADMIN. R. 291-113-0005 (West, Westlaw through Jan. 1, 2013).
Pennsyl-vania	Regulation	Nondiscrimination, treatment and vocation; Equal access (in same prison)	(9) Written local policy must specify that there is no discrimination regarding treatment services access based on an inmate's race, religion, national origin, gender, or disability. If both genders are housed in the prison, all available services and programs shall be comparable. 37 PA. CODE § 95.243 (West, Westlaw through Mar. 2, 2013). (5) Written local policy must specify that there may be no discrimination regarding access to a work program based on an inmate's race, religion, national origin, gender or disability. § 95.235.
	Policy	Gender-Responsive	J. Gender Specific Treatment

Jurisdiction	Statute/Reg/ Policy	Type	Text
			1. Gender specific treatment programs are especially important in the treatment of women with . . . addiction and dual diagnoses. Gender specific issues shall be dealt with in [outpatient] and [therapeutic community] programs to include the following: a. trauma and safety issues associated with AOD use/abuse; b. relationship issues; c. violence (including incest, rape, or other abuse); d. sexuality; e. grief, guilt, shame; f. single parenting; g. anger cycle, conflict resolution; and h. assertiveness skills and problem solving skills. PENN. DEP'T. OF CORR., POLICY NO. 7.4.1, ALCOHOL AND OTHER DRUG TREATMENT PROGRAMS (2006).
Texas	Regulation	Nondiscrimination	Each Sheriff/operator shall have and implement a written procedure providing for equitable treatment regardless of race, religion, national origin, gender, age, or disabilities. 37 TEX. ADMIN. CODE § 269.4 (West, Westlaw through Feb. 28, 2013).
Vermont	Policy	Nondiscrimination	No discrimination in work assignments shall be permitted on the basis of race, creed, color or sex. DEP'T OF CORRS., POLICY NO. 391, INMATE EMPLOYMENT POLICY (1986). Those policies and procedures shall prohibit and not promote discrimination on the basis of race, color, national origin, sex or handicap condition. DEP'T OF CORRS., POLICY NO. 389, EDUCATION AND CORRECTIONS (1991). [Mental health s]ervices are available to all inmates without regard to race, color, creed, religion, national origin, age sex

Jurisdiction	Statute/Reg/ Policy	Type	Text
			or handicap. DEP'T OF CORRS., POLICY NO. 361, MENTAL HEALTH SERVICES (1982).
West Virginia	Regulation	Equal Access, Nondiscrimination	15.5. Equal Access. When male and female inmates are housed in the same correctional facility, there shall be separate sleeping quarters, but equal access to all available services and programs. Neither sex shall be denied opportunities solely on the basis of their smaller number in the population. W. VA. CODE R. § 95-2-15 (West, Westlaw through Dec. 2012). 21.4. Equal Opportunity. Male and female inmates will have equal opportunities to participate in programs and services. § 95-1-21. 20.2. Work assignments for women shall not be limited to traditional tasks assigned to women. § 95-2-20. 20.2. Discrimination in inmate work assignments based on sex, race, religion and national origin shall be prohibited. § 95-3-20. 15.8. Discrimination. Each inmate shall be free from discrimination based upon race, religion, national origin, sex, handicap, or political beliefs. Inmates shall have equal access to various programs and work assignments, and involvement in decisions concerning classification status. There shall be no discrimination in regard to the rights and privileges, restrictive housing, or any other amenities afforded to inmates. § 95-1-15.

Jurisdiction	Statute/Reg/ Policy	Type	Text
Wisconsin	Regulation	Equal Access, Employment	(3) Prison industries shall provide parity in employment opportunities for male and female inmates. WIS. ADMIN. CODE DOC § 313.16 (West, Westlaw through Jan. 31, 2013).
Wyoming	Policy	Equal Access, Nondiscrimination	i. No inmates under the jurisdiction of the WDOC will be subject to discrimination based on race, religion, national origin, gender, disability or political beliefs in making administrative decisions and in providing access to programs. . . . ii. Except as may be required for the security and orderly operation of the facility, no inmate shall be denied access to any program or service, or assigned or not assigned to a job, housing unit, classification status, or program solely on the basis of race, national origin, gender, religion, creed, physical handicap, political belief, or other statutory or regulatory proscribed category. iii. Female inmates shall be housed separately from male inmates, but all housing features and amenities shall be consistent with those provided male inmates in the same general security and supervision categories. Programs and services for female inmates shall otherwise be comparable in scope and content to those offered male inmates and will be related to the needs of the female inmate population. iv. Male and female inmates housed in the same institution shall be housed in separate units but shall have equal access to all available services and programs. Neither sex shall be denied opportunities solely on the basis of their smaller number in the population. . . . WYO. DEP'T OF CORR., POLICY AND PROCEDURE NO. 3.403, INMATE RIGHTS (2012).