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When Individual Differences Demand Equal Treatment: An Equal Rights Approach to the Special Needs of Girls in the Juvenile Justice System

By Marsha L. Levick and Francine T. Sherman¹

In 1998, jurisdiction “X,” like many jurisdictions at that time, developed a juvenile drug court as an alternative to formal court processing for juveniles charged with nonviolent, property or drug related offenses. Until the summer of 2002 the program was only available to boys, though the drug court manual refers to eligible juveniles in gender neutral terms such as “youth,” “client,” and “candidate.” Drug court was an alternative to detention for boys who were required to complete an intensive program of job training, GED preparation, and counseling with parents. Participants could avoid detention unless they violated probation or failed in the program. No similar program alternatives to detention were available for girls. The Baltimore City Juvenile Court offered no justification for excluding girls for four years, when they opened the court to girls in the summer of 2002. As of December 2002 there were four girls in the drug court program and 110 boys.

To accommodate the increase in girls in their justice system, jurisdiction “Y” added a 20 bed girls’ unit to their secure boys’ delinquency program. They did this by taking over space which had been set aside for administrative purposes. Staffing patterns were established in the existing male unit, as was scheduling of sick calls, outdoor exercise, programming and use of the gymnasium. Because the program was only adding 20 youth, the program administrators determined no additional staff were needed and continued the existing programming and schedules. This decision has plainly disadvantaged the girls in the program. They do not get a daily sick call, which is needed due to the increased medical complaints of girls and the way in which those complaints affect their attitudes and functioning. The failure to add staff does not allow girls the level of staff attention they require and also results in girls being confined to their unit throughout the weekend because they need to be supervised apart from the boys. Girls also receive less gross motor recreation than the boys, who are seen as “needing more exercise.” When the girls are in the yard, they are with boys who monopolize the basketball court. Finally, the school program is designed around the boys’ educational level, which is below 9th grade. This makes them ineligible for GED or college preparation. The girls, many of whom are runaways, have higher academic achievement, but they are held back by the boy’s academic limitations. Finally, with no new staff or programming, staff are untrained in gender responsive approaches so that girls’ mental health, trauma and family issues are not addressed.

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Introduction:

As girls have entered the juvenile justice system in ever increasing numbers,² the limitations of a system built on the profiles and characteristics of young male offenders have become manifest. The influx of girls has not only stretched the resources of this system, it challenges all who work in the juvenile justice system to pay heed to their special needs - needs that may or may not be addressed by programs focused on, and driven by, boys' experience and backgrounds. Girls deserve programs and services that allow them to flourish as individuals, freed from generalizations about what girls can or cannot, or should or should not, do.

The programmatic scenarios described above illustrate two of the ways in which girls are denied equality in the juvenile justice system. The story of the drug court in jurisdiction "X" exemplifies the problem of equal access, where girls are denied access to certain procedural or programmatic alternatives available to boys, and shows how such a denial can result in significant disadvantages for the girls affected. Typically, jurisdictions argue that 'boy-only' programs are pilots designed to gather data for later expansion to girls or that it is cost prohibitive to expand or develop alternatives for girls when they still comprise just a fraction of youth in the system. The second illustrates the lack of attention to the specific needs of girls in juvenile justice programming. Too often girls' units are simply added to programs designed for

² See, e.g., MELISSA SICKMUND, Presentation at the American Society of Criminology Conference, Atlanta Georgia, (November 7, 2001) in A PROFILE OF FEMALES IN THE JUVENILE JUSTICE SYSTEM (2002) (Stating that during the 1990s the volume of cases involving detention increased substantially more for girls than for boys. In 1999 juvenile courts detained 4% more boys than in 1990 compared with 50% more girls); HOWARD

boys with no thought given to what adjustments in programming or staffing may be required to meet the needs of this new population.³

As these examples show, the dilemma of gender in juvenile justice has two parts. On the one hand, research suggests that many young female offenders share a social/emotional/psychological profile different from their male peers – more laden with histories of childhood physical and sexual abuse, greater incidence of depression and related mental health disorders, and relationship-centered outbreaks of violence. These findings suggest that resources must be created and marshaled to meet these particular aspects of girls’ experience. On the other hand, girls have also suffered from timeworn stereotypes about their place in society. Even when “girl-only” resources are made available, they tend to offer more limited vocational and programming opportunities, and reflect “fixed notions concerning the roles and abilities of males and females.”⁴ Thus, girls’ vocational choices may be limited to fields like health, cosmetology and hair care, their recreational choices may exclude opportunities to play basketball, weight-lift, or engage in other ‘large-muscle’ forms of exercise typically made available to boys.⁵

This article argues that the disparities girls face in the juvenile justice system can be remedied by employing an equal rights analysis, including the federal Equal Protection Clause, state Equal Rights Amendments and Title IX of the Education Amendments of 1972.⁶ We note that in the adult prison context, the Equal Protection Clause has afforded adult women offenders

SNYDER, LAW ENFORCEMENT AND JUVENILE CRIME 11 (2002) (Stating that from 1983 through 1997 the juvenile arrests rate for girls increased 72% while increasing 30% for boys).

³ See, Georgia Department of Juvenile Justice, PAINTING IT PINK IS NOT ENOUGH (demonstrating aptly in title).

⁴ *Miss. Univ. for Women v. Hogan*, 458 U.S. 712, 725 (1982)

⁵ Girls in detention and residential programs complain of lack of access to basketball and other sports, as well as lack of training in trades like construction. Interviews with girls on file with Professor Sherman.

only mixed success in their challenges to discriminatory conditions and practices in the criminal justice system. This is based on the view of some courts that differences between adult male and female offenders bar a finding that they are similarly situated for the purposes of equal protection analysis. For girls, the juvenile justice system's historic commitment to individualized treatment and rehabilitation flips this concern on its head. A legal strategy that aims to ensure equally effective individualized treatment and rehabilitation opportunities for boys and girls does nothing more than ask the juvenile court to 'put its money where its mouth is.' Where differences between male and female adult offenders have undermined equal rights challenges in the adult arena, in the juvenile justice system, differences among individual youth are acknowledged, and dispositions are driven by these individual needs. Indeed, these historic – and prevailing -- purposes of the juvenile court are critical to each of the strategies we suggest. Just as the right to individualized treatment should lead to more favorable outcomes for girls under the Equal Protection Clause, this emphasis on the individual is also the foundation of challenges under state ERAs and Title IX. As we discuss each these options below, we suggest ways in which these constitutional and statutory provisions can be most effectively used on behalf of girls.

We begin with a look at who these girls are and the pathways they take into the justice system. We then review the longstanding purpose and philosophy of the juvenile justice system to promote individualized treatment and rehabilitation and show how this philosophy actually serves an equal rights approach to meeting the needs of individual girls. The article concludes with a discussion of the federal Equal Protection Clause, as well as state Equal Rights Amendments and Title IX, and explores how these legal strategies can be used to ensure equal access and advance gender-responsive programming for girls.

Girls in the Juvenile Justice System: Who Are They?

⁶ 20 U.S.C. § 1681(a) (2000)

Promoting the rights of girls in the juvenile justice system requires an understanding of who these girls are. While boys and girls entering the system share many characteristics, research confirms that girls overwhelmingly suffer from childhood histories of trauma and abuse, mental health disorders, and family separation. In addition, girls are more likely to be involved in prostitution or prostitution-related offenses. Finally, girls in the system, like boys, have experienced significant school failure.

Mental and Physical Health

Studies consistently show that adolescent girls in the justice system have higher rates of depression, Post-Traumatic Stress Disorder (“PTSD”) and other diagnosable mental health disorders than boys, resulting in significant distress and contributing to behavioral problems in custody.⁷ For example, a study of girls committed to the California Youth Authority revealed that 65% exhibited symptoms of PTSD at some point in their lives, and 49% were exhibiting those symptoms at the time of the study.⁸ In a study of girls in the Georgia Youth Detention Centers, 60% met criteria for anxiety disorders, and 59% for mood disorder.⁹ Similarly, delinquent girls studied by the Oregon Social Learning Center had more significant mental health problems than boys — over 75% of the girls in study met the criteria for three or more DSM IV Axis 1 diagnoses.¹⁰ And in a Pennsylvania study looking at data collected through the

⁷ See, Cauffman, E., Feldman, S., Steiner, H., and Waterman, J, *Posttraumatic stress disorder among female juvenile offenders*, 37 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1209-17 (1998).

⁸ See, Cauffman, E., Feldman, S., Steiner, H., and Waterman, J, *Posttraumatic stress disorder among female juvenile offenders*, 37 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1209-17 (1998).

⁹ See, National Mental Health Association, *Factsheet: Mental Health and Adolescent Girls in the Justice System* (1999) at <http://www.nmha.org/children.justjuv/girlsjj.cfm>.

¹⁰ PATRICIA CHAMBERLAIN & KEVIN MOORE, *CHAOS AND TRAUMA IN THE LIVES OF ADOLESCENT FEMALES WITH ANTISOCIAL BEHAVIOR AND DELINQUENCY* in RICKY GREENWALD et al. *TRAUMA AND JUVENILE DELINQUENCY: THEORY, RESEARCH AND INTERVENTIONS* 79 (Haworth Press., 2002).

Massachusetts Youth Screening Instrument (MAYSI),¹¹ preliminary results indicate that 32% of the girls had contemplated suicide and 72% said they were depressed -- approximately double the findings for boys.¹²

In addition to higher rates of emotional disorders, girls also engage in sexually risky behaviors and tend to have higher rates of STDs than girls in the community.¹³ Many girls in the justice system are currently involved in prostitution where they are subject to sexual violence from pimps and johns. 11.4% of girls detained in San Francisco in March of 2002 had a prostitution charge.¹⁴ In many jurisdictions, where substantial numbers of girls are arrested for prostitution-related offenses such as running away, drugs, or public order offenses, experts believe these arrest patterns mask high rates of underlying prostitution among detained girls. In Atlanta, for example, the juvenile court judges, prosecutors, and youth advocates all agree that prostitution is much more prevalent among detained girls than is apparent from their offenses.¹⁵ Girls detained in San Francisco and Atlanta talk of being robbed, beaten and kidnapped by pimps and johns, a level of significant and ongoing abuse which requires specialized attention and treatment.¹⁶

History of Childhood Trauma

A history of physical or sexual victimization is one of the most common characteristics of

¹¹ See Grisso, T. and Barnham, R., Manual for Use with Massachusetts Youth Screening Instrument. The MAYSI is a mental health screen developed in Massachusetts in the late 1990's for use with delinquent youth. It is currently being given to all youth entering detention in Pennsylvania. [more]?

¹² Steve Twedt, *Confined Teens' Troubles Run Deep: State finds over 50% suffer mental illness* PITTSBURGH POST GAZETTE, October 6, 2002.

¹³ Morris RE, Harrison EA, Knox GW, Tromanhauser E, Marquis DK, Watts LL, *Health Risk Behavioral Survey from 39 Juvenile Correctional Facilities in the US*, 17 J. ADOLESC. HEALTH 334-344 (1995).

¹⁴ San Francisco Juvenile Probation Department, City and County of San Francisco Juvenile Probation Department, *Girls Services Unit Statistics* (March, 2002) (reporting statistics based on a sample size of 105 girls detained at San Francisco's Youth Guidance Center).

¹⁵ See Roslyn M. Satchel, *Memorandum of Agreement Between the United States and the State of Georgia: Concerning Georgia Juvenile Justice Facilities for* Southern Center for Human Rights, Atlanta, Georgia (2002).

girls in the justice system, with significantly greater numbers of girls than boys reporting such incidents. Additionally, the severity of this victimization is staggering. For example, chronically delinquent girls studied by the Oregon Social Learning Center reported their first sexual encounters at an average age of 6.75.¹⁷ An overwhelming 92% of girls interviewed in four California counties in 1998 had suffered some form of abuse — 88% suffered emotional abuse, 81% reported physical abuse, and 56% report one or more form of sexual abuse; 40% reported at least once incident of forced sex and 17% reported more than five incidents of forced sex.¹⁸ Research from the Oregon Social Learning Center shows that while 3.0% of boys in their study had documented histories of physical abuse and family violence, 77.8% of the girls had histories of abuse and family violence.¹⁹ A longitudinal study involving 1575 cases found that girls and women with histories of childhood abuse or neglect were 73% more likely than females without abuse histories to be arrested for property, alcohol, drug and misdemeanor offenses such as disorderly conduct, curfew violations or loitering. Moreover, unlike boys, girls with childhood experiences of abuse and neglect were more likely to be arrested as a juvenile or adult for a violent offense than those who did not have abuse histories.²⁰

Finally, girls in detention and incarceration also report physical and sexual abuse by male staff.²¹ The power imbalance inherent in any custodial relationship, combined with the age difference between girls in custody and male staff, are coercive elements to which girls with

¹⁶ Id. See also, Sherman interviews

¹⁷ Patti Chamberlain, Presentation at the 2nd National Training Conference on Juvenile Detention Reform, *The Multidimensional Treatment Foster Care Model Research and Community-Based Services* 5 (January 24-26, 2002).

¹⁸ Leslie Acoca & Kelly Dedel *No Place to Hide: Understanding and Meeting the Needs of Girls in the California Juvenile Justice System*, for National Council on Crime and Delinquency, San Francisco, CA 60, 62 (1998).

¹⁹ Patti Chamberlain, *supra* n. 16 at 5.

²⁰ See, Cathy S. Widom & Michael G. Maxfield, *An Update on the "Cycle of Violence"*, in Brief, National Institute of Justice, U.S. Department of Justice, Office of Justice Programs 1,3,5 (February, 2001).

²¹ See Leslie Acoca & Kelly Dedel *supra* note 17, at 77

histories of victimization are particularly vulnerable.²² Likewise, while restraints and isolation are common mechanisms for controlling behavior in detention and other residential facilities, the use of such disciplinary measures can cause girls to relive the trauma of sexual abuse in these situations. The use of restraints is particularly problematic for pregnant girls. Additionally, isolation, which is known to increase the risk of suicide in adolescents generally,²³ poses particular dangers for girls who routinely report higher rates of suicide attempts.

Family Separation and Stress

Housing instability, family separation, and disrupted relationships also characterize the lives of girls in the justice system and are believed to contribute to their delinquency. Delinquent girls studied by the Oregon Social Learning Center had an average of 16 home transitions — more than 1 home transition for each year of their lives. Seventy three percent of the girls in the study came from a single-parent household as compared with 56% of boys; 35% of girls came from low income households as compared with 22% of boys.²⁴ 67% of the girls had fathers convicted of a crime and 48% had mothers convicted of a crime.²⁵ In Duval County, Florida, more than half of the girls interviewed in the juvenile system had parents who abused drugs and nearly a third had a parent who was currently incarcerated. One in five girls had a deceased parent.²⁶

This pattern of family separation is often repeated by the justice system itself, where many girls experience forced separation from their own children. Of girls studied in the California Youth Authority in 1998, 29% had been pregnant at least once, and 16% had been pregnant

²² See, Amnesty International, *Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women, A State-by-State Survey of Policies and Practices in the USA* 9 (2001) available at <http://www.amnestyusa.org/women/custody/abuseincustody.html>. (Finding that for example, forty-seven states have statutes aimed at protecting individuals in custody by imposing criminal penalties for sexual misconduct in custody, either explicitly or implicitly including minors in detention and other forms of custody).

²³ See, e.g., SK Goldsmith, TC Pellmar, AM Kleinman, WE Bunney, *Reducing Suicide: A National Imperative*, The National Academies Press, 2002, at pp. 331-374, (Identifying social isolation as a barrier to effective suicide reduction.)

²⁴ Patti Chamberlain, *supra* note 16 at 5.

²⁵ Id.

while in custody.²⁷ According to a survey of probation caseloads in Cook County, Illinois in September 2002, just over 20 % of all girls on probation were pregnant or parenting.²⁸ Recent changes in federal law unfortunately enhance the risk of permanent separation for these girls and their children. Under the Adoption and Safe Families Act²⁹ (ASFA), which imposes strict time frames for removal, placement and permanency for children separated from their parents, the chances of reunification are reduced once the child has been removed and placed in foster care.³⁰

School Failure

Even more than for boys, negative attitudes towards school and school failure are powerful predictors of delinquency in girls.³¹ In the study of girls in the juvenile justice system in Duval County, Florida, school failure — either in the form of truancy, suspension, poor grades, or expulsion — was found to be the most statistically significant risk factor for girls who were repeat offenders.³² 39% of girls whose case files were reviewed and 90% of girls interviewed had histories of school suspension. Twenty-five percent of girls interviewed needed special education services and 36% of the case files reviewed reflected special education needs.³³ Lastly, studies indicate that girls are particularly vulnerable to school failure during pre- and early adolescence.³⁴

²⁶ Leslie Acoca, *Educate or Incarcerate: Girls in the Florida and Duval County Juvenile Justice Systems* for National Council on Crime and Delinquency (2000).

²⁷ Leslie Acoca & Kelly Dedel, *supra* note 17, at 88.

²⁸ Ken Keller, Presentation to the American Society of Criminology Conference, *Juvenile Female Offenders in Cook County: Trends and Outcomes*. (November 14, 2002).

²⁹ Public Law 105-89, 42 U.S.C.A. § 670, et. seq..

³⁰ Gail Smith, Adoption and Safe Families Act of 1997 and Its Impact on Prisoner Mothers and their Children", *Women, Girls and Criminal Justice*, Vol. 1, No. 1, December/January 2000.

³¹ Phillip Harris, *The Female Delinquent. ProDES: The Program Development and Evaluation System. Philadelphia, PA: Crime and Justice Research Institute and the Division of Juvenile Justice Services*, for Department of Human Services.

³² Leslie Acoca, *supra* note 24, at .

³³ *Id.*

³⁴ *Id.*

This portrait of girls in the juvenile justice system shows a pattern of pre-delinquent trauma that runs deeper than that experienced by many of their male counterparts. Moreover, while there has been a marked increase in the arrest rates of girls for more violent crimes such as aggravated assault,³⁵ girls are still significantly more likely than boys to be arrested for status offenses such as running away, curfew violations, and underage drinking, as well as prostitution and related offenses.³⁶ As discussed below, differences in the personal and criminal histories of adult male and female offenders have caused some judges to reject challenges to gender-based disparities in the criminal justice system under the Equal Protection Clause. In the juvenile justice system, however, where dispositions must still be tailored in most states to meet individual needs, these individual differences between and among juvenile offenders are – or should be -- an essential component of dispositional planning if the mandate of the system is to be fulfilled.

The Right to Individualized Treatment: The Enduring Purpose and Philosophy of the Juvenile Justice System

"The hallmark of the [juvenile justice] system was its disposition, individually tailored to address the needs and abilities of the juvenile in question."³⁷ Treatment rather than punishment has been central to the philosophy of the juvenile court.³⁸ The United States Supreme Court has itself repeatedly recognized this essential feature of the court. In its landmark decision *In re*

³⁵ Melissa Sickmund & Wan, Y. *Census of Juveniles in Residential Placement Data Book* (2001), at <http://www.ojjdp.ncjrs.org/ojstatbb/cjrp>. (stating, from 1980 through 2000 arrests of girls for simple assault increased 257% and in 2000 the arrests rate of girls for aggravated assault was 88% above its 1987 level).

³⁶ MELISSA SICKMUND, Presentation at the American Society of Criminology Conference, Atlanta Georgia, (November 7, 2001) in A PROFILE OF FEMALES IN THE JUVENILE JUSTICE SYSTEM (2002) (stating for example, the female proportion of juvenile arrests was 28%, yet girls accounted for 59% of juvenile arrests for running away, 55% of juvenile arrests for prostitution, 37% of juvenile arrests for larceny/theft, 31% of juvenile arrests for curfew, 29% of juvenile arrests for alcohol related offenses, and 28 juvenile arrests for disorderly conduct).

³⁷ Janet E. Ainsworth, Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court, 69 N.C.L.Rev. 1083, 1099 (1991).

³⁸ See *Juvenile Delinquency*, Peter C. Kratcoski & Lucille D. Kratcoski (4th Ed., Prentice Hall 1996) 77

Gault,³⁹ the Court expressly noted the historical purpose of the court to treat and rehabilitate, rather than punish.⁴⁰ Justice White, in his oft-quoted concurrence in *McKeiver v.*

Pennsylvania,⁴¹ decided a few years after *Gault*, captured the fundamental differences between the juvenile and adult criminal justice systems:

Reprehensible acts by juveniles are not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control. Hence the state legislative judgment not to stigmatize the juvenile delinquent by branding him a criminal; his conduct is not deemed so blameworthy that punishment is required to deter him or others. Coercive measures, where employed, are considered neither retribution nor punishment. Supervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties. Nor is the purpose to make the juvenile delinquent an object lesson for others, whatever his own merits or demerits may be. A typical disposition in the juvenile court where delinquency is established may authorize confinement until age 21, but it will last no longer and within that period will last only so long as his behavior demonstrates that he remains an unacceptable risk if returned to his family. Nor is the authorization for custody until 21 any measure of the seriousness of the particular act that the juvenile has performed.⁴²

This philosophy of the juvenile court emanates from the belief that youth are less blameworthy and more capable of reform than adults. As well, it is believed that parents, society, and the state have a caretaking and custodial role to play with respect to minors that they do not have with adults. Unlike criminal courts, juvenile courts exercise jurisdiction as *parens patriae*.⁴³ A “medical model” has therefore predominated in which behavioral ills have been identified and diagnosed, with treatment and therapy the focus of disposition.⁴⁴ Even where

³⁹ 387 U. S. 1 (1967)

⁴⁰ *Id.* at 15 (Noting that the early reformers committed to the juvenile court model believed in the inherent good of children and worked to design a system to provide for the child’s “care and solitude,” preventing any “downward slide” in behavior).

⁴¹ 403 U.S. 528 (1971) (Rejecting the propositions that juveniles have a constitutional right to trial by jury in a plurality opinion)

⁴² *Id.* at 551-552 (White concurring).

⁴³ Paul Holland & Wallace J. Mlyniec, *Whatever Happened to the Right to Treatment? : The Modern Quest for A Historical Promise*, 68 Temp. L. Rev. 1791, 1813 (1995).

⁴⁴ *Id.* Most states treat youth who come under their custody, either as dependent or delinquent, in a different manner than adults in its custody. Whether as delinquent or dependent, youth in a custodial or supervisory relationship with

“punishment” has been included by some jurisdictions recently as a component of disposition, the juvenile court retains its obligation “to insure that manifest rehabilitation accompanies the inevitable punishment.”⁴⁵

Accordingly, forty-eight states include rehabilitation, in some form, within the purpose clause of their juvenile justice statutes.⁴⁶ Twenty-five states speak specifically of rehabilitation⁴⁷ as a goal. Some states are explicit in directing how rehabilitation should be achieved or what it should involve, such as Florida, Idaho, Hawaii, Illinois, South Carolina, and Texas.⁴⁸ Moreover,

the state are treated as wards to whom the state must care for and provide guidance for in addition to placing requirements or constraints on the youth. The state as *parens patriae* has this responsibility to the youth and society.

⁴⁵ Holland and Mlyniec, at 1813.

⁴⁶ See e.g., Idaho Code Title 20. State Prison and County Jails Chapter 5. Juvenile Corrections Act. Current through the 2000 Cumulative Supplement (2nd Regular Session of the 55th Legislature). 20-504-A. State juvenile corrections centers -- Purposes -- Powers and duties of the department and the director; Maine Revised Statutes Annotated Title 34-A. Corrections Chapter 3. Correctional Facilities Subchapter V. Southern Maine Juvenile Facility. Current through 1999 2nd regular session of 119th Legislature. § 3802. Purposes; North Dakota Century Code Title 27. Judicial Branch of Government Chapter 27-20. Uniform Juvenile Court Act. Current through 2001 regular session. 27-20-01 Interpretation;

⁴⁷ National Center for Juvenile Justice. 2002. State Juvenile Justice Profiles. Pittsburgh, PA: NCJJ. Online. Available: <http://www.ncjj.org/stateprofiles/>. (referred to as NCJJ further in notes); see also e.g., Tennessee Code Annotated Title 37 Juveniles Chapter 5 Department of Children's Services Part 1-- General Provisions. Current through end of 2000 regular session. 37-5-102. Purpose, (Consistent with the protection of the public interest, remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior and substitute therefor a program of treatment, training and rehabilitation); Purdon's Pennsylvania Statutes and Consolidated Statutes Annotated Purdon's Pennsylvania Statutes Annotated Title 62. Poor Persons and Public Welfare Chapter 1. Public Welfare Code Article III. State Institutions in the Department of Public Welfare (D) Youth Development Centers for Delinquent Juveniles. Current through Act 2001-77 § 341. Purpose, (...To provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community...); Hawaii Revised Statutes Annotated Division 1. Property; Government Title 20. Social Services Chapter 352D. Current through the 2000 Special Session (§ 352D-4). Establishment; purpose, (...to prevent delinquency, and to reduce the incidence of recidivism among juveniles through the provision of prevention, rehabilitation, and treatment services); West's Smith-Hurd Illinois Compiled Statutes Annotated Chapter 705. Courts Juvenile Courts Act 405. Juvenile Court Act of 1987 Article V. Delinquent Minors Part 1. General Provisions. Current through P.A. 92-11, apv. 6/11/2001. 405/5-101. Purpose and policy, (To provide an individualized assessment of each alleged and adjudicated delinquent juvenile, in order to rehabilitate and to prevent further delinquent behavior through the development of competency in the juvenile offender)

⁴⁸ NCJJ; see also e.g., West's Florida Statutes Annotated Title XLVII. Criminal Procedure and Corrections Chapter 985. Delinquency; Interstate Compact on Juveniles Part I. General Provisions. Current through end of 2000 second regular session. 985.01. Purposes and intent; personnel standards and screening. (To provide children ...with training in life skills, including career education); Idaho Code Title 20. State Prison and County Jails Chapter 5. Juvenile Corrections Act. Current through the 2000 Cumulative Supplement (2nd Regular Session of the 55th Legislature). 20-504-A. State juvenile corrections centers -- Purposes -- Powers and duties of the department and the director, (counseling juveniles regarding employment, education, courts, family, and life skills; treatment...programs would strengthen juvenile's relationship with family, engender commitment to school and employment, promote the development of competency and life skills and help juveniles generalize appropriate behavior into their environment; education and treatment...confronting eliminating delinquent norms, criminal

while the precise language of rehabilitation varies,⁴⁹ even states that do not mention rehabilitation explicitly do so implicitly by providing that youth develop the skills necessary to return to society as productive individuals. For example, “the protection and the wholesome moral, mental and physical development of children” as well as “personal and social growth” are recurring themes which appear in seventeen state purpose clauses.⁵⁰ Eighteen purpose clauses speak of developing juveniles into productive citizens.⁵¹ Many states provide that juveniles be given “care, guidance, and control.”⁵² “Treatment” appears in twenty of the purpose clauses.⁵³ In

thinking and antisocial behavior and making restitution programs); Idaho Code Title 20. State Prison and County Jails Chapter 5. Juvenile Corrections Act. Current through the 2000 Cumulative Supplement (2nd Regular Session of the 55th Legislature). 20-504-A. State juvenile corrections centers -- Purposes -- Powers and duties of the department and the director, (to provide for the care, the protection, and the wholesome moral, mental, and physical development of children; aimed at rehabilitation and reestablishment in society)

⁴⁹ See e.g., Alaska Statutes. Title 47. Welfare, Social Services and Institutions. Chapter 12. Delinquent Minors. Article 1. Juvenile Delinquency. Sec. 47.12.010. Goal and purposes of chapter. Current through Third Special Session of the Twenty-First Legislature (2000).; Revised Statutes Annotated of the State of Utah Code, 1953 Title 78. Judicial Code Part I. Courts Chapter 3a. Juvenile Courts Part 1. General Provisions. Current through the 2001 Supplement (2001 First Special Session). 78-3a-102. Establishment of juvenile court --Organization and status of court --Purpose; New Hampshire Title XII. Public Safety and Welfare Chapter 169-B. Delinquent Children. Current through Chapter 328 of the 2000 regular session. 169-B:1. Applicability of Chapter, Purpose;

⁵⁰ NCJJ; See also e.g., Wyoming Statutes 1977 Title 14. Children Chapter 6. Juveniles Article 2. Juvenile Justice Act. Current through end of 2001 regular session. § 14-6-201. Definitions; short title; statement of purpose and interpretation. New Jersey Statutes Annotated Title 2a. Administration of Civil and Criminal Justice Subtitle 1. The Courts Chapter 4a. Family Court Article 2. Code of Juvenile Justice. Current through L.2001, c. 100. 2A:4A-21. Purposes, (Care, protection, and wholesome mental and physical development of juveniles...); Minnesota Statutes Annotated Public Welfare and Related Activities Chapter 260B. Delinquency General Provisions. Current through end of 2000 regular session. 260B.001. Title, intent, and construction, (This purpose should be pursued through means that are fair and just, that recognize the unique characteristics and needs of children, and that give children access to opportunities for personal and social growth.)

⁵¹ NCJJ; See also, e.g., West's Wisconsin Statutes Annotated Crimes Chapter 938. Juvenile Justice Code Subchapter I. General Provisions. Current through 2001 Act 15, published 8/31/01. 938.01. Title, legislative intent and purposes, (The development of competency in the juvenile offender, so that he or she is more capable of living productively and responsibly in the community); West's Annotated Mississippi Code Title 43. Public Welfare Chapter 21. Youth Court Organization, Administration and Operation. Current through end of 2000 3rd executive session. § 43-21-103. Construction; statement of policy. (Each child coming within the jurisdiction of the youth court shall become a responsible, accountable and productive citizen)

⁵² See e.g., Iowa Code Annotated Title VI. Human Services Subtitle 5. Juveniles Chapter 232. Juvenile Justice Division I. Construction and Definitions. Current through end of 2000 regular session. 232.1. Rules of construction; Vernon's Annotated Missouri Statutes Title XII. Public Health and Welfare Chapter 211. Juvenile Courts. Current through end of 2000 2nd regular session 90th General Assembly. Purpose of law--how construed; General Laws of Rhode Island Annotated, 1956 Title 14. Delinquent and Dependent Children Chapter 1. Proceedings in Family Court. Current through end of 2000 regular session. 14-1-2. Purpose of chapter.

the Kentucky purpose clause, treatment is guaranteed to all juveniles who are brought before the juvenile court.⁵⁴

Even states that have more recently modeled their purpose clauses after the “balanced and restorative justice”⁵⁵ (“BARJ”) philosophy include rehabilitation language along with concepts of restitution.⁵⁶ The BARJ principles include developing the juvenile’s skills,⁵⁷ and are also based on individualized care.⁵⁸ In these states, rehabilitation encompasses both restoration of the juvenile as a productive member of society, as well as restitution to the victim and their

⁵³ NCJJ; See also, e.g., West's Colorado Revised Statutes. Annotated Title 19. Children's Code Article 2. The Colorado Juvenile Justice System. Part 1. General Provisions. § 19-2-102. Legislative declaration. Current through end of 2001 1st Regular Session, (Providing appropriate treatment to reduce the rate of recidivism... and to assist the juvenile in becoming a productive member of society); Delaware Code Annotated Title 29. State Government Part 8. Departments of Government Chapter 90. Department of Services for Children, Youth and Their Families. Current through 2000 Regular Session. § 9001. Intent and purpose, (Care, and treatment as will best service the interests of the public, the family, and the offender...) Annotated Code of Maryland Courts and Judicial Proceedings. Title 3. Courts of General Jurisdiction -- Jurisdiction/Special Causes of Action. Subtitle 8. Juvenile Causes. Current through the regular session of the 2000 General Assembly. § 3-802. Purposes and construction of subtitle. (To provide for the care, protection, and wholesome mental and physical development...a program of treatment, training and rehabilitation consistent with the child’s best interests...)

⁵⁴ NCJJ; Baldwin's Kentucky Revised Statutes Annotated Title LI. Unified Juvenile Code Chapter 600. Introductory Matters. Current through end of 2001 regular session. 600.010. Title and Internet of KRS Chapters 600 to 645.

⁵⁵ See e.g., Guide for Implementing the Balanced and Restorative Justice Model at <http://ojjdp.ncjrs.org/pubs/implementing/foreword.html> (explaining the three priorities of BARJ -- public safety, accountability, and competency development -- recognize both victim and offender restoration as critical goals of community justice); Balanced and Restorative Justice: Program Summary for Office of Juvenile Justice and Delinquency Prevention at <http://www.ncjrs.org/pdffiles/bal.pdf>, (explaining, as a concrete mission, the balanced approach allows juvenile justice systems and agencies to improve their capacity to protect the community and ensure accountability of the offender and the system. It enables offenders to become competent and productive citizens. Restorative justice, the guiding philosophical framework for this vision, promotes maximum involvement of the victim, the offender, and the community in the justice process and presents a clear alternative to sanctions and intervention based on retributive or traditional treatment assumptions. Within the context of the restorative justice philosophy, the balanced approach mission helps juvenile justice systems become more responsive to the needs of victims, offenders, and the community).

⁵⁶ See, www.mibarj.org/what/barjnot.html (explaining, not in terms of imposing punishment but in terms of tailoring an individualized response that does the best job of holding the young person accountable to the victims and the community.); see also e.g., 705 ILL. COMP. STAT. 405/1-2 (West 1992) (stating, to provide an individualized assessment of each alleged and adjudicated delinquent juvenile); WIS. STAT. ANN. §938.01 (2002) (stating, provide an individualized assessment of each alleged and adjudicated delinquent juvenile).

⁵⁷ See, WIS. STAT. ANN. §938.01 (2002) (stating, to equip juvenile offenders with competencies to live responsibly and productively)

⁵⁸ See, www.mibarj.org/what/barjnot.html (explaining, not in terms of imposing punishment but in terms of tailoring an individualized response that does the best job of holding the young person accountable to the victims and the community.); see also e.g., 705 ILL. COMP. STAT. 405/1-2 (West 1992) (stating, to provide an individualized assessment of each alleged and adjudicated delinquent juvenile); WIS. STAT. ANN. §938.01 (2002) (stating, provide an individualized assessment of each alleged and adjudicated delinquent juvenile).

family in the community.⁵⁹ For example, Oregon’s purpose clause states, “The system is founded on the principles of personal responsibility, accountability and reformation within the context of public safety and restitution to the victims and to the community.”⁶⁰ Notably, Illinois is the only state which currently uses BARJ philosophy in its purpose clause and also has an ERA.⁶¹ Illinois’s purpose clause uses both rehabilitative and individualized language.⁶²

Consistent with the juvenile justice system’s emphasis on individualized treatment, three states, Oregon,⁶³ Connecticut,⁶⁴ and Minnesota⁶⁵ have passed statutes providing expressly for gender responsive programming or equal access to programming for youth of both genders.⁶⁶

As a direct consequence of the juvenile justice system’s commitment to individualized treatment and rehabilitation, disposition is driven by the needs of the offender rather than the offense. Where the criminal justice system metes out punishment in accordance with statutory guidelines calibrated to the type and seriousness of the offense committed, a significant number of the juvenile justice statutes require that dispositions be based on the individual needs of the youth.⁶⁷ For example, Florida’s purpose clause requires that there be an assessment to determine consequences consistent with the seriousness of the act, public safety, and the prior record of the

⁵⁹ See e.g. *id.*

⁶⁰ OR. REV. STAT. §419C.001

⁶¹ See 705 ILL. COMP. STAT. 405/1-2 (West 1992).

⁶² See *id.*, (stating, to rehabilitate and to prevent further delinquent behavior through the development of competency in the juvenile offender), and (to provide an individualized assessment of each alleged and adjudicated delinquent juvenile).

⁶³ Or. Rev. Stat. § 471.270 (2001)

⁶⁴ Conn. Gen. Stat. Ann. § 46b-121h (2002)

⁶⁵ Minn. Stat. Ann. § 241.70 1992

⁶⁶ Both Oregon and Minnesota are also Barj states, so their statutes address gender responsiveness and individualized programming. See Conn. Gen. Stat. Ann. § 46b-121h (2002); Minn. Stat. Ann. § 241.70 1992

⁶⁷ See e.g., 705 ILL. COMP. STAT. 405/1-2 (West 1992) (stating, to provide an individualized assessment of each alleged and adjudicated delinquent juvenile); , IDAHO CODE §§ 20-504 (Michie 2000) (stating, these services and programs will individualize treatment and control of the juvenile offender for the benefit of the juvenile and the

child and specific rehabilitation needs of the child.⁶⁸ New Mexico lists several factors which should be considered in delinquency proceedings, including “the child’s age, education, mental and physical condition, background, and all other relevant factors.”⁶⁹ Alaska, Connecticut, Colorado, Hawaii, New Mexico, and Washington include language requiring that the youth be offered some individualized treatment.⁷⁰ Alaska’s purpose clause calls for “an early, individualized assessment and action plan for each juvenile offender... through the development of appropriate skills...so that the juvenile is more capable of living productively.”⁷¹

In the face of such overwhelming statutory authority, courts have repeatedly referenced the juvenile court’s historic and continuing commitment to individualized treatment and rehabilitation, while highlighting the distinctions between the juvenile and adult justice systems. For example, *In the Interest of J.F.*,⁷² where the court declined to extend to juveniles charged with certain felonies in Pennsylvania the right to a jury trial, the court stated that “[w]hile the principles and policies underlying our juvenile justice system have evolved, particular importance is still placed upon rehabilitating and protecting society’s youth.” The court continued that “the goal of developing juvenile offenders into responsible and productive members of the community...remains the cornerstone of our system of juvenile justice.”⁷³ While recent amendments to Pennsylvania’s Act imposed harsher consequences for some juveniles, the court held “the amendments to the Act do not undermine the goal of supervision, care and

protection of society...[and] provide for a diversity of innovative and effective programs through research on delinquent behavior and the continuous evaluation of correctional programs).

⁶⁸ See FLA. STAT. ANN. § 39.001 (West 1998).

⁶⁹ See N.M. STAT. ANN. 32A-2-2 (Michie 2000).

⁷⁰ NCJJ, *see also e.g.*, CONN. GEN. STAT. ANN. § 46b-121h. (West 2001); N.M. STAT. ANN. 32A-2-2 (Michie 2000); WASH. REV. STAT. § 13.40.010 (West Supp. 2001).

⁷¹ ALASKA STAT. § 47.10.082 (Michie 1996).

⁷² *In re J.F.* 714 A.2d 467, 471 (Pa. Super. 1998)

⁷³ *Id.*

rehabilitation of juvenile offenders and that the dispositional alternatives available to the court remain rehabilitative and are not punitive in nature."⁷⁴

In *State in the Interest of D.J.*,⁷⁵ where the Supreme Court of Louisiana likewise rejected a challenge to the denial of jury trials to juveniles, the Court echoed the Pennsylvania Superior Court. The court stated that "the unique nature of the juvenile system is manifested in its non-criminal, or 'civil,' nature, its focus on rehabilitation and individual treatment rather than retribution, and the state's role as *parens patriae* in managing the welfare of the juvenile in state custody."⁷⁶

Further underscoring the central rehabilitative purpose of the juvenile justice system, courts have also repeatedly recognized a "right to treatment" for juveniles who have been adjudicated delinquent, although the legal underpinnings of this right have evolved over the course of the last three decades. Early cases decided in the 1970's relied on the 8th and 14th Amendments to the U.S. Constitution to find a constitutional right to treatment for adjudicated youth.⁷⁷ In particular, these cases generally found the right to treatment in the due process

⁷⁴ *Id.* at 473.

⁷⁵ *State ex. rel. D.J.*, 817 So.2d 26 (La. 2002).

⁷⁶ *Id.*, quoting *In re C.B.*, 97-2783, 708 So.2d 391, 396-97 (La. 1998) ("rehabilitative treatment rather than mere punitive incarceration").

⁷⁷ See, e.g., *Morgan v. Sproat*, 432 F. Supp. 1130 (S.D. Miss. 1977) (challenging conditions of confinement of delinquents on Eighth Amendment grounds); *Pena v. Division of Youth*, 708 F.2d 877 (2d Cir. N.Y. 1983); *Santiago v. City of Philadelphia*, 72 F.R.D. 619 (E.D. Pa. 1976) (challenging conditions on First, Fourth, Fifth, Eighth, Thirteenth, and Fourteenth Amendment grounds); *McRedmond v. Wilson*, 402 F. Supp. 1087 (S.D.N.Y. 1975) (challenging conditions of confinement for "Persons in Need of Supervision" on 8th and 14th Amendment grounds), *aff'd in part, rev'd in part*, 533 F.2d 757 (2d Cir. 1976); *Swansey v. Elrod*, 386 F. Supp. 1138 (E.D. Ill. 1975) (challenging conditions of confining juveniles awaiting adult criminal prosecution based on the Fourteenth Amendment and Eighth Amendment); *Morales v. Turman*, 383 F. Supp. 53 (E.D. Tex. 1974) (challenging conditions on cruel and unusual punishment grounds under state and Federal Constitution), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd*, 430 U.S. 322 (1977); *Baker v. Hamilton*, 345 F. Supp. 345 (W.D. Ky. 1972) (challenging detention of juveniles prior to finding of criminal guilt on Fourteenth Amendment grounds because juveniles were deprived of rehabilitative care and treatment); *Inmates of Boys' Training Sch. v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972) (challenging confinement of juveniles in adult correctional facilities on Eighth and Fourteenth Amendment grounds); *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972) (challenging conditions of confinement of non-criminal juveniles based on 8th and 14th Amendment grounds); *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1972) (challenging conditions including corporal punishment, use of tranquilizers, solitary confinement, and mail censorship), *aff'd*, 491 F.2d 352 (7th Cir.); *Lollis v. Department*

guarantees of the Fourteenth Amendment. In *Pena v. Division of Youth*,⁷⁸ one of the earliest cases to recognize a constitutional right to treatment, the court wrote:

Because Goshen is an institution which is a part of the juvenile justice system of the State of New York, it is the conclusion of this court that the boys placed there have a constitutional right to rehabilitative treatment.

In the past few years, the United States Supreme Court has reviewed four cases arising out of the juvenile justice system to determine whether the Constitution requires that specific procedural due process rights be accorded juveniles subject to adjudication in that system. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971); In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). While none of these cases required the Court to address itself squarely to the question of the juvenile's right to rehabilitative treatment, the conclusion which this court draws from a reading of those cases is that such a right does exist. In declining to find that all procedural safeguards available to adult defendants are mandated for the juvenile, the Court made it clear that the constitutional justification for this procedural deprivation is the *parens patriae* underpinning of the juvenile justice system and its absolute proscription against punishment and retribution as permissible objectives. The premise relied upon by the Court in each case was that the objectives of the juvenile justice system "are to provide measures of guidance and rehabilitation for the child . . . not to fix criminal responsibility, guilt and punishment." Kent v. United States, supra at 554, 86 S.Ct. at 1054. . .

Thus, considering the underlying assumptions of the above cited Supreme Court cases and the outright assertions of those lower court cases cited, and considering, too, the recent Supreme Court decision regarding the right to treatment of persons civilly committed to mental health institutions, O'Connor v. Donaldson, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396, 43 U.S.L.W. 4929 (1975), this court finds that the detention of a youth under a juvenile justice system absent provision for the rehabilitative treatment of such youth is a violation of due process rights guaranteed under the Fourteenth Amendment.⁷⁹

Two cases decided by the Supreme Court in the 1980's, *Youngberg v. Romeo*⁸⁰ and

of Social Servs., 322 F. Supp. 473 (S.D.N.Y. 1970) (challenging conditions of confinement based on Eighth Amendment and Fourteenth Amendment Due Process grounds). See also, generally, Holland and Mlyniec, *supra* note 38

⁷⁸ 419 F. Supp. 203 (S.D.N.Y. 1976)

⁷⁹ Id. at 206-207

⁸⁰ 457 U.S. 307 (1982) (Holding that a mentally retarded person involuntarily committed to state care has a constitutionally protected liberty interests under the due process clause of the Fourteenth Amendment to reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and such minimally adequate training as reasonably might be required by these interests, but a state has good faith immunity from liability where professional judgment was exercised and lack of training was dictated by state budget concerns.)
need parenthetical summarizing holding)

DeShaney v. Winnebago County Dept. of Social Services,⁸¹ significantly limited the constitutional obligations that can be imposed on the State when individuals, including youth, are taken into their custody. In the wake of these decisions, more recent jurisprudence has grounded the juvenile's right to individualized treatment directly in the purpose clause of the particular State's juvenile act, still drawing on the Supreme Court's admonition thirty years ago in *Jackson v. Indiana*⁸² that, "[a]t least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."⁸³ *State of Louisiana in the Interest of S.D.*⁸⁴ is a recent example of this legal approach:

With respect to juveniles adjudicated delinquent under state laws, federal courts have repeatedly held that where 'the purpose of incarcerating juveniles in a state training school is treatment and rehabilitation, due process requires that the conditions and the program must be reasonably related to that purpose.' ... (citations omitted)...⁸⁵

The court in *S.D.* then determined that, because "the [statutory] goal was to take a young life and try to get it back on track--while there was still time and hope--so that he might come to live as a full member of society," lack of "individual rehabilitative treatment" was unconstitutional.⁸⁶ As Holland and Mlyniec have concluded, even in the face of legislative

⁸¹ 489 U.S. 189 (1989) (Finding that a state has no constitutional duty to protect a child from parental abuse even after receiving reports that abuse is occurring because the state is not constitutionally charged with the duty of protecting citizens from "private violence")

⁸² 406 U.S. 715 (1972)

⁸³ *Id.* at 738.

⁸⁴ *State ex rel S.D.* 2002 WL 31514414 at **1, 25 (La.App.4 Cir. Nov. 6, 2002).

⁸⁵ *Id.* at **25.

⁸⁶ *Id.* at **29. See also, *Gary H. v. Hegstrom*, 831 F.2d 1430, 1432 (9th Cir. 1987) (finding juvenile detainees protected by Fourteenth Amendment right to treatment); *Milonas v. Williams*, 691 F.2d 931, 942 (10th Cir. 1982) (holding that confined juveniles retain liberty interests protected by Fourteenth Amendment, including reasonably safe conditions, freedom from unreasonable bodily restraints, and adequate training), *cert. denied*, 460 U.S. 1069 (1983); *Alexander v. Boyd*, 876 F. Supp. 773, 797-98 (D.S.C. 1995); *B.H. v. Johnson*, 715 F. Supp. 1387, 1395 (N.D. Ill. 1989) (holding that juveniles have right to be provided with adequate food, shelter, medical care and minimally adequate training); *Hendrickson v. Griggs*, 672 F. Supp. 1126, 1134 (N.D. Iowa 1987) (finding that Iowa legislature intended to confer special benefits upon distinct class of detained juveniles); *Doe v. Strauss*, No. 84-C2315, 1986 WL 4108 at * 4 (N.D. Ill. March 28, 1986) (holding that juveniles have right to therapy reasonably designed to effect rehabilitation and proper development); *Stamps-Bey v. Thomas*, 618 F. Supp. 1122, 1125

trends toward a more punitive juvenile justice system, “state laws [have] preserve[d] their original rehabilitative goals and [these goals] form the heart of delinquent children’s right to receive such care and services. Simply put, states are obligated to serve as the substitute parents they promise to be. They are responsible, along with parents, for ensuring that children in their care master the identifiable skills needed to develop into responsible and productive adult citizens.”⁸⁷

Equal Rights Analysis on Behalf of Women and Girl Offenders: Comparing Apples and Oranges?

Having established that girls in the juvenile justice system often have distinct needs from boys, and that the juvenile court is statutorily required to meet the individual needs of all of the youth who appear before it, we turn to a discussion of equal rights strategies to enforce this mandate. The three strategies we discuss, the Equal Protection Clause of the Fourteenth Amendment, state Equal Rights Amendments and Title IX of the Education Amendments of 1972, all hold promise – and a note of caution. Litigation by adult women prisoners challenging gender-based disparate conditions, policies and practices under the Equal Protection Clause of the Fourteenth Amendment and Title IX has

(S.D.N.Y. 1985) (finding legitimate right to treatment under Due Process Clause), *aff'd*, 788 F.2d 5 (2d Cir. 1986); *State v. S.H.*, 877 P.2d 205, 216 (Wash. Ct. App. 1994) (holding that juvenile offenders have right to adequate treatment under Due Process Clause of Fourteenth Amendment). *But see*, *Santana v. Collazo*, 533 F. Supp. 966, 992 (D.P.R. 1982) (finding no constitutional obligation to provide rehabilitative treatment to juveniles), *aff'd in part, vacated in part*, 714 F.2d 1172 (1st Cir. 1983); *State of Washington v. S.H.*, 877 P.2d 205 (Wash. App. 1994) (finding a constitutional and statutory right to treatment).

⁸⁷ Holland and Mlyniec, *supra*, note 38 at 1794. (Stating that another theory that has supported a right to treatment is the “quid pro quo” theory, which holds that rehabilitation is due because the juvenile does not get the full due process and procedural protections of an adult criminal defendant. This theory expresses “a recognition of the concurrency between the state's exercise of sanctioning powers and its assumption of the duties of social responsibility. Effective treatment must be the quid pro quo for society's right to exercise its *parens patriae* controls); *Martarella*, 349 F. Supp. at 600. *See also*, *In re C.B.*, 708 So.2d 391 (La. 1998) (using similar analysis more recently).

met with mixed success.⁸⁸ Jurisprudence under state Equal Rights Amendments is quite limited with respect to prison conditions and practices. While it is beyond the scope of this article to provide a comprehensive review and critique of the case law involving women prisoners, these cases nevertheless lurk in the background of any discussion of an equal rights strategy on behalf of girls.

One cannot help but ask, why should equal rights challenges on behalf of girls fare any better? First, because whether or not adult women and men prisoners are similarly situated, the juvenile court's focus on the individual offender's needs minimizes the risk that individual differences will trump equality of treatment in challenges brought by girls. Second, the higher standard of review afforded sex-based classifications by most of the state equal rights provisions should elevate judicial review of sex-based claims in the juvenile system above the rational relationship test currently applied to most constitutional challenges in the adult prison context. Third, because the adoption of the rational relationship test for adult offenders was motivated by

⁸⁸ Because equal rights analysis in adult corrections arises, in part, due to the predominance of sex-segregated prisons and programming in adult corrections, see e.g., Merry Morash, Timothy S. Bynum, and Barbara A. Koons. 1998. *Women Offenders: Programming Needs and Promising Approaches*. National Institute of Justice Research in Brief. Washington, DC; U.S. Department of Justice (Elements deemed conducive to success in these programs included many that were gender specific: staff who provided strong female role models, the opportunity to form supportive peer networks, and attention to women's particular experiences as victims of abuse, as parents of children, and in negative relationships with men.); American Correctional Ass., 1995 Directory: Juvenile & Adult Correctional Departments., Institutions., Agencies & Paroling Authorities., (1995) (indicating that Alabama, Kansas, Maine, North Dakota, South Dakota, Vermont, and West Virginia operate no female facilities, and that besides Alabama, these states house their women in gender-integrated institutions), this ongoing debate is particularly relevant for our discussion of equal rights analysis for girls in the justice system. See See, Stephanie Fleischer Seldin, A Strategy for Advocacy on Behalf of Women Offenders, 5 Colum. J. Gender & L. 1 (1995). To date, there has been no study clearly supporting either approach as more beneficial to the development and rehabilitation of girls in the systems although the more current thinking favors single gender programming.

One reason offered for single gender programming is to provide girls with a safe place to address histories of victimization which are so prevalent among confined girls. Another persuasive reason for single gender programming is that historically coeducational programming has resulted in programming directed at boys, who comprise the majority, with no attention to the specific needs of girls.

Whether in the context of a co-educational or single gender program, the design and programming for girls should be gender-responsive – addressing the specific developmental issues presented by girls in the justice system and sensitive to the way in which society's expectations for girls impacts their development.

penological concerns that favor deference to prison administrators, the juvenile court's emphasis on rehabilitation makes these concerns less compelling in the face of similar claims by girls. Finally, Title IX's protection of equality in educational programming and activities is particularly applicable to alleged discrimination in juvenile justice programming and services, where juvenile residential programs must serve a dual role as residential schools for their school-age residents who retain their state-created rights to basic and special education even while in placement.

Each of these theories for distinguishing juvenile from adult offenders, and the juvenile from the adult criminal justice system, is discussed below.

Federal Equal Protection Analysis

The Equal Protection Clause of the Fourteenth Amendment “commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.”⁸⁹ When addressing equal protection claims, courts apply one of three standards of review: strict scrutiny, intermediate or heightened scrutiny, or rational relationship test.⁹⁰ Generally, a governmental policy “is presumed to be valid and will be sustained if the classification drawn by the statute [or policy] is rationally related to a legitimate state interest.”⁹¹ Where suspect or quasi-suspect classifications or fundamental rights are at issue, the court will apply “strict” scrutiny to the

⁸⁹ *City of Cleburne v. Cleburne Living Ctr.* 473 U.S. 432, 439 (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

⁹⁰ *See, e.g., id.* at 433; *See Washington v. Glucksberg*, 521 U.S. 702, 722 (1997); *Flemming v. Nestor*, 363 U.S. 603, 611 (1960) (inferring that rational basis test requires state action be rationally related to legitimate state interest); *Turner v. Glickman*, 207 F.3d 419, 424 (7th Cir. 2000) (holding that rational basis test requires rational relationship between regulation used and legitimate state interest). There is also a third type of test, an intermediate test that falls somewhere in between the strict scrutiny and rational basis tests. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988) (describing that intermediate scrutiny test requires state regulation be substantially related to an important governmental interest); *Watkins v. United States Army*, 875 F.2d 699, 712 (9th Cir. 1989) (Norris, J., concurring) (stating that equal protection analysis involves three-stage test).

classification, requiring that it be more narrowly tailored to meet a substantial or compelling governmental interest.⁹²

Up until 1971, gender-based classifications were subject to the rational relationship test.⁹³ In 1971, the Court decided *Reed v Reed*,⁹⁴ ruling for the first time in favor of a woman who charged that her State had denied her equal protection of the law in its statutory scheme regarding the administration of decedents' estates. Since *Reed*, "the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship stature – equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."⁹⁵

While the Court has declined to equate sex with race or national origin as a suspect classification, thus elevating the level of review to strict scrutiny, the Court has, since *Reed*, "carefully inspected official action that closes a door or denied opportunity to women (or to men.)"⁹⁶ The current standard was most recently articulated by the Court in *United States v. Virginia*,⁹⁷ where the Court held the Virginia Military Institute could not constitutionally deny women enrollment. Courts confronted with claims of differential treatment or denial of opportunity based on sex "must determine whether the proffered justification is 'exceedingly

⁹¹ *Cleburne*, 473 U.S. at 440

⁹² *Id.*; see *Plyler v. Doe*, 457 U.S. 202, 216-17 & n.14 (1982).

⁹³ *Goesaert v. Cleary*, 335 U.S. 464 (1948). (Upholding Michigan law prohibiting women from working behind a bar unless it was owned by their father or spouse by finding that the state had a rational interest in protecting women).

⁹⁴ *Reed v. Reed*, 404 U.S. 71 (1971)

⁹⁵ *U.S. v Virginia*, 518 U.S. 515, 532 (1996).

⁹⁶ *Id.*

⁹⁷ *Id.*

persuasive.”⁹⁸ The State, which bears the full burden, must show “at least that the [challenged] classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”⁹⁹ Significantly, “[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities or preferences of males and females.”¹⁰⁰

Despite this backdrop of substantial constitutional skepticism regarding official gender-based policies and practices, equal protection challenges under the Fourteenth Amendment to disparate treatment and conditions asserted by adult women offenders have faced significant obstacles. First, courts have not tended to view men and women prisoners as similarly situated. Thus, while adult men and women are theoretically incarcerated for similar purposes – punishment, public safety, deterrence, retribution and, lastly, rehabilitation -- the fact that women are most often incarcerated in different facilities for shorter time periods, with lower security ratings, for less serious or violent crimes, as well as the fact that they alone can get pregnant or are more likely to be parents, has led courts to conclude that men and women prisoners are not similarly situated for the purposes of equal protection analysis.¹⁰¹ While some dissenting judges have noted the circular reasoning of this analysis – the more disparate the treatment of men and women prisoners the less such disparities may be subjected to constitutional scrutiny¹⁰² -- the majority view remains that the inquiry fails at this threshold level.

⁹⁸ Id at 533.

⁹⁹ *Id.* (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

¹⁰⁰ *Virginia*, 518 U. S. at 533.

¹⁰¹ *See, e.g.*, *Women Prisoners of the Dist. of Columbia v. Dist. of Columbia*, 93 F. 3d 910, 951 (D.C. Cir. 1996); *Pargo v. Elliot*, 894 F.Supp. 1239 (S.D. Iowa 1994), *vacated*, *Pargo v. Elliot* 49 F.3d 1355 (8th Cir. 1995); *Klinger v. Dep’t of Corr.* 31 F. 3d 727 (8th Cir. 1994).

¹⁰² *Women Prisoners*, 93 F. 3d at 951 (Rogers, J.dissenting)

In *Klinger v. Department of Corrections*,¹⁰³ for example, the Eighth Circuit dismissed an equal protection challenge by women prisoners who claimed that the programs at the all-women's prison were vastly inferior to those available at the men's prison on the basis that the men and women prisoners were not similarly situated. The court focused on dissimilarities in prison size and inmate characteristics: the male prison was larger and housed more violent criminals with longer sentences; women inmates were more likely to be primary caregivers and to be victims of physical or sexual abuse.¹⁰⁴ Finding further that “[d]ifferences between the challenged programs at the two prisons are virtually irrelevant because so many variables effect the mix of programming that an institution has,”¹⁰⁵ the court concluded, “comparing programs at [the men's prison] to those at [the women 's prison] is like the proverbial comparison of apples to oranges.”¹⁰⁶

Following *Klinger*, in *Pargo v. Elliott*,¹⁰⁷ where a similar equal protection claim by women prisoners in Iowa was rejected for the same reasons, the district court stressed five areas of difference that defeated the women prisoners' claim: population size of the prisons in question, security level, types of crimes, length of sentence and special characteristics.¹⁰⁸ Most recently, and plainly adopting the reasoning of *Klinger* and *Pargo*, the District of Columbia Court of Appeals in *Women Prisoners of the District of Columbia v. District of Columbia*¹⁰⁹ likewise ruled the women prisoners were not similarly situated to their male counterparts in their challenge to unequal programming for women and men in the District. In reversing the district

¹⁰³ See *Klinger*, 31 F. 3d at 729

¹⁰⁴ Id. at 732.

¹⁰⁵ Id. at 733.

¹⁰⁶ Id.

¹⁰⁷ *Pargo*, 894 F. Supp. at 1259-61

¹⁰⁸ Id.

¹⁰⁹ See *Women Prisoners*, 93 F.3d. 910

court on this issue, the D.C. Court of Appeals specifically faulted the district court for failing to take into account “the striking disparities between the sizes of the prison populations that were being compared,”¹¹⁰ and for failing to make any findings, for comparison purposes, of the types of crimes committed by the male prisoners or other special characteristics of the male prisoners.¹¹¹ This ruling prompted a stinging dissent, which aptly observed,

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. Indeed, by maintaining drastically unequal prisons for the two sexes, the government could foreclose any comparison of the rehabilitative programs it provides for the benefit of men and women. This analysis stands the concept of equal protection on its head.¹¹²

The second stumbling block women prisoners have encountered is that despite contemporary equal protection jurisprudence requiring intermediate scrutiny of sex-based classifications, where courts have considered the equal protection challenge they have tended to apply a rational relationship, rather than heightened scrutiny test, to these challenges. In applying a lesser level of scrutiny to claims of gender-based discrimination by women prisoners, these courts have relied principally on the U.S. Supreme Court’s decisions in *Turner v. Safley*¹¹³ and *O’Lone v. Estate of Shabazz*,¹¹⁴ that prison regulations challenged as burdening or interfering with the exercise of constitutional rights are subject to only minimum constitutional scrutiny. As

¹¹⁰ *Id.* at 925.

¹¹¹ *Id.*; *See also*, *Keevan v. Smith*, 100 F. 3d 644 (8th Cir. 1996) (Finding male and female inmates were not similarly situated and thus dismissed claim. Female inmates housed at two Missouri penal institutions challenged Department of Correction’s policy for determining the placement of prison industry employment under the Equal Protection Clause.); *See generally*, Angie Baker, *Leapfrogging Over Equal Protection Analysis: The Eighth Circuit Sanctions Separate and Unequal For Males and Females in Klinger v. Department of Corrections*, 31 F. 3d 727 (8th Cir. 1994), 76 NEB. L. REV. 371 (1997).

¹¹² *D.C. Women’s Prisoners*, 93 F. 3d at 951 (emphasis in original)

¹¹³ *Turner v. Safley*, 482 U.S. 78 (1987)

¹¹⁴ *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987)

the Court wrote in *Turner*, “[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if ‘prison administrators..., and not the courts, [are] to make the difficult judgments concerning institutional operations.’”¹¹⁵ In applying *Turner*, courts have drawn a distinction between equal protection challenges that allege discrimination between prison programs themselves, and challenges to the process by which programming decisions are made. *Pargo* and *Klinger* held that challenges aimed at the programs themselves do not implicate a facial challenge to gender-based statutes, policies or procedures, and accordingly are both subject to only rational relationship scrutiny and require proof of invidious discrimination.¹¹⁶ On the other hand, prison policies may be subject to a heightened scrutiny review in an equal protection analysis of the decision making process. “[M]ale and female inmates are similarly situated for purposes of the *process* by which the Department makes programming decisions. That is, instead of alleging differences in programs between prisons, a proper equal protection claim may allege differences in the process by which program decisions were made at the prisons.”¹¹⁷ As a consequence, when courts have viewed the women’s prisoners’ challenges as targeting gender-neutral programming differences, the courts have upheld the challenged practices or policies as reasonable under the *Turner* test.¹¹⁸

¹¹⁵ *Turner*, 482 U.S. at 89; *see also*, *Washington v. Harper* 494 U.S. 210, 221-226 (1990); *Thornburgh v. Abbott*, 490 U.S. 401, 402, 404, 407 (1989).

¹¹⁶ *Pargo*, 894 F. Supp at 1241; *Klinger*, 31 F. 3d at 732.

¹¹⁷ *Pargo*, 849 F. 3d at 1241, 1242; *Klinger*, 31 F. 3d at 733.

¹¹⁸ *Turner*, 482 U.S. at 89; *Pargo*, 849 F. 3d at 1241, 1242; *Women Prisoners*. 93 F. 3d at 932; *but see*, *Pitts v. Thornburgh*, 866 F. 2d 1450, 1453, 1454 (D.C. Cir. 1989) (women prisoners challenging the policy of the District of Columbia to incarcerate women prisoners in distant and remote correctional facilities, while maintaining facilities in the District itself for male offenders. The Court declined the District’s invitation to apply *Turner*’s rational relationship test to the challenged policy: “*Turner* applies to cases involving regulations that govern the day-to-day operations of prisons and that restrict the exercise of prisoner’s individual rights within prisons. This case, in stark contrast, challenges general budgetary and policy choices made over decades in the give and take of city politics.

Nevertheless, while *Klinger* and *Women Prisoners* cloud the prospects for equal protection challenges to discriminatory prison practices based on gender, the landscape is not entirely bleak. There are decisions in other circuits that have found in favor of the women prisoners.

*Glover v. Johnson*¹¹⁹ is one of the earliest – and longest running – prison cases alleging disparities between men’s and women’s prisons. Spanning twenty years of litigation and court rulings, the case is also an example of the evolution of equal protection and constitutional analysis generally in prison litigation. Begun in the 1970’s, *Glover* involved, among other claims, an equal protection challenge to four key areas of programming for men and women: educational opportunities; vocational training; apprenticeship opportunities; and work-pass opportunities. Noting at the time the novelty of the women prisoner’s claims,¹²⁰ the district court found the men and women prisoners similarly situated under the Equal Protection Clause, applied heightened scrutiny to the women prisoner’s claims, and held the appropriate standard against which the disparate programs should be measured was “parity of treatment.” As the court then explained,

The term “parity of treatment” describes concisely the standard to which...the State ought to be held in its treatment of female prisoners. In other words, Defendants here are bound to provide women inmates with treatment and facilities that are substantially equivalent to those provided the men – i.e., equivalent in substance if not in form – unless their actions, though failing to do so, nonetheless bear a fair and substantial relationship to achievement of the state’s correctional objectives.¹²¹

Equally important, the basic policy decision whether to provide a local women’s prison facility does not directly implicate either prison security or control of inmate behavior, nor does it go to the prison environment and regime. In sharp distinction to our case, the Court in *Turner* stressed the discretion to be afforded prison officials in making the difficult judgments concerning institutional operations.”)

¹¹⁹ *Glover v. Johnson*, 478 F. Supp. 1075 (D. Mich. 1979), *remanded to*, 35 F. Supp. 2d 1010 (E.D. Mich. 1999).

¹²⁰ *Glover*, 35 F. Supp 2d at 1012 (1999) (district noting, it uncovered only one other unpublished decision involving gender disparities in prisons at the time *Glover* was originally filed).

¹²¹ *Glover*, 478 F. Supp. at 1079.

Although the district court’s original decision was unappealed, this standard of “parity” was upheld by the Sixth Circuit in subsequent proceedings, noting that the district court had “correctly identified the remedial goal to be achieved in this litigation – parity in the treatment of male and female prisoners.”¹²² Significantly, the district court has made clear this does not mean identical treatment. In finding parity among programs even where the offerings are not uniformly available to male and female prisoners, the district court stated, “It is important to observe at this point that the Equal Protection Clause does not require identical treatment; thus the mere fact that some of the fringe vocational programs are provided only to male inmates does not disturb well-established equal protection principles.”¹²³

While the *Glover* court declined in its most recent decision to revisit its original finding that the men and women were similarly situated, or that the case involved a facial classification in the availability and distribution of educational and work opportunities to the female inmates,¹²⁴ the court did feel bound to adopt the lesser rational relationship standard of review set forth in *Turner*. Because the court was being asked to evaluate the present parity of conditions, the court concluded that “an equal protection case involving gender-based classifications in a prison setting cannot be evaluated today without using the reasonable relation standard of *Turner*.”¹²⁵ Applying this standard of review to the current array of opportunities for the male and female inmates, the court found they met the parity standard.

¹²² *Glover* 138 F. 3d at 241 (emphasis in original); *See also, Bukhari v. Hutto*, 487 F. Supp 1162, 1172 (same).

¹²³ *Id.*; *Glover*, 478 F. Supp. at 1021(1979), (finding parity in vocational programming, the court relied on the fact that while 17 total vocational programs were offered to men and only 7 to women, the six vocational programs most frequently offered to men were also offered to women inmates).

¹²⁴ *Glover*, 478 F. Supp. at 1015

¹²⁵ *Id.* (district court expressly rejecting the reasoning of the D.C. Circuit in *Pitts v. Thornburgh*, 866 F. 2d. at 1453-1454).

In *West v. Virginia Department of Corrections*,¹²⁶ the District Court for the Western District of Virginia was presented with a claim by female offenders which demonstrated how lack of access to the same types of programming available to males can result in longer and more severe sentences for young women.¹²⁷ In *West*, the plaintiff claimed that though the Virginia statute authorizing boot camps as a sentencing option was facially neutral,¹²⁸ the Department of Corrections violated equal protection by establishing a boot camp program exclusively for men.¹²⁹ The evidence of sentencing disparity as a result of the unavailability of boot camps for women under twenty-four was striking: women denied access to the boot camp alternative could suffer an increased sentence of as much as 18 years.¹³⁰

Though decided after *Turner* and *O'Lone*, the court found the sentencing distinction “clearly drawn between male inmates and female inmates,” and applied intermediate scrutiny,¹³¹ requiring a finding that the gender classification was “substantially related to an important governmental objective.”¹³² Virginia sought to justify the male-only program as a pilot program established to address overcrowding and recidivism that was more pronounced among male

¹²⁶ *West v. Virginia Dep't. of Corr.*, 847 F. Supp. 402 (W.D. Va. 1994)

¹²⁷ See *In re Gwenette D.*, 237 Cal Rptr. 41 (Ct. App. 1st Dist. 1987) (a juvenile girls challenged her placement in a locked juvenile facility on equal protection grounds arguing that California's failure to maintain an intermediate unlocked facility for girls as it does for boys violated her right to equal protection. Though the court noted that such a clam was facially possible, it denied Gwenette's challenge on the grounds that the court's sentencing decision was supported in the record)

¹²⁸ There are also examples of equal protection or ERA challenges to juvenile justice related statutes, which discriminate by gender on their face. See e.g., *People v. Ellis*, 57 N.E. 2d 98, 100 (Ill. 1974) (Invalidating a juvenile code provision under the Illinois ERA, which allowed seventeen year old females to be tried in juvenile court while seventeen year old males were tried as adults); Similar statutes existed in Oklahoma and Texas, OKLA. STAT. tit. 10, § 1001 (1998) amended by OKLA. STAT. tit. 1. § 7001-1.3(2000); Tex. Civ. Code Ann. Art. 2338 – 1, § 3 (repealed 1973). See also, New York Family Court Act, N.Y. Family Law § 712(b) (McKinney 1998) (amended 2001) (New York amended its PINS status which defined jurisdiction for the status offenses for girls until eighteen and for boys until sixteen).

¹²⁹ *Virginia Dep't of Corr.*, 847 F. Supp. at 404.

¹³⁰ *Id.* at 404, n. 4.

¹³¹ *Id.* at 406. See also *Bukhari V. Hutto*, 487 F. Supp. at 1171

¹³² *Virginia Dep't of Corr.*, 847 F. Supp. at 406.

prisoners but that could subsequently be extended to young women,¹³³ and as an appropriate allocation of limited financial resources.¹³⁴ Rejecting the state’s justification as constitutionally inadequate under the Equal Protection Clause, the court stated “defendants ... cannot provide programs and favorable sentencing to male inmates solely on the basis that the problems are more pressing in male prisons and it is more cost effective to address those problems...(citations omitted)...If defendant’s argument were carried to its logical extension, then the same argument could be used to deny women inmates the opportunity for education, vocational training, or rehabilitation. Surely such an inequitable distribution of resources is not contemplated by the Fourteenth Amendment.”¹³⁵ Squarely presenting the issue of gender parity, the court found no compelling interest in presenting male and female offenders with such unequal sentencing options. Even conceding the significant deference accorded prison administrators, the court held “when an extremely favorable sentencing alternative is presented to one class of inmates and not another, and when that classification is based solely on the inmates’ gender, that line is crossed.”¹³⁶

¹³³ *West v. Virginia Dep’t. of Corr.*, 847 F. Supp. at 406, 407 (The court’s reservation about the extension of the program model as designed for men to the population of women applies as well to modeling girls’ programs after boys’ programs in the juvenile justice system, without actually evaluating the appropriateness of the model for girls); *see also*, Oregon’s Treatment Foster Care *at* http://www.strengtheningfamilies.org/html/model_programs_1997/mfp_pg4.html (describing one successful model, which has been closely tracking the features of the girls in the program, the way in which the program is implemented for girls, and the outcome measure)

¹³⁴ *See Bukhari*, 487 F. Supp. at 1171(court sympathizes with the Department of Corrections dilemma that the cost of providing programs in a small women’s prison is high but says that the fiscal issues cannot justify operating a prison system in an unconstitutional manner) (Commonly jurisdictions argue that the cost of providing specialized programming to a small number of girls is prohibitive. This complaint is behind the practice of sending girls out-of-state to specialized programs. Sex offender programming for girls is one example but many jurisdictions extend the practice to medium or high security programming; programs like the Brown School in Texas *at* <http://www.nationjob.com/brownschools/>, for example, are populated with girls from Illinois or Pennsylvania unable to visit with their families and increasing the probable difficulty they will have re-entering their communities.

¹³⁵ *Id.* at 407.

¹³⁶ *Id.* at 408.

Another recent example of more favorable treatment of women inmates' claims is *Clarkson v. Coughlin*.¹³⁷ In *Clarkson*, the federal district court for the Southern District of New York found an equal protection violation where deaf female inmates were denied the same access to a special unit accessible to deaf and hearing-impaired male inmates. As a consequence, the female inmates were generally not provided the same assistive devices and interpretive services in educational, counseling and medical settings that the male prisoners were. The plaintiffs, who included a class of deaf and hearing-impaired male prisoners as well, asserted claims under not only the Equal Protection Clause, but also under the Americans with Disabilities Act,¹³⁸ the Rehabilitation Act,¹³⁹ the Due Process Clause of the Fourteenth Amendment¹⁴⁰ and the Eighth Amendment.¹⁴¹

The only justification put forth by the New York State Department of Corrections for this gender disparity was that there were more deaf and hearing impaired male inmates requiring such services than females.¹⁴² Without specifically stating its standard of review, but implicitly finding the male and female deaf and hearing-impaired inmates were similarly situated, the court flatly rejected this as a basis for such flagrant differential treatment of female inmates.¹⁴³ The court also rejected claims of administrative convenience or savings of time, money and effort as acceptable justifications for the disparity.¹⁴⁴ The court held that the defendant was required to provide the female inmates with access to the same range of special services provided to the men.¹⁴⁵

¹³⁷ *Clarkson v. Coughlin*, 898 F. Supp. 1019 (S.D.N.Y. 1995)

¹³⁸ 42 U.S.C.A. § 12102, et. seq.

¹³⁹ 29 U.S.C.A. § 701 et seq.

¹⁴⁰ U.S. CONST. amend. XIV

¹⁴¹ U.S. CONST. amend. VIII.

¹⁴² *Id.* at 1051.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

Implications for litigation on behalf of girls

For lawyers looking to bring federal equal protection challenges to unequal conditions on behalf of girls in the juvenile justice system, what lessons can be drawn from the women prisoners' cases? Several questions are presented for consideration: Are the plaintiffs similarly situated to their male counterparts? What is the appropriate standard of review? What constitutes a facial, as compared to gender-neutral, classification? What governmental interests may be held to support the maintenance of disparate policies or practices?

With respect to the threshold question whether the litigants are similarly situated, the juvenile justice system's promise of individualized treatment and rehabilitation places girls on a stronger footing than adult women prisoners who are necessarily limited by the traditional criminal law objectives that drive the adult corrections system. As discussed at length above,¹⁴⁶ the juvenile justice system was built upon the philosophy that the individual needs and characteristics of adjudicated youth must be identified and met. Accordingly, their so-called dissimilarities as offenders or 'inmates' is precisely what makes them 'similar,' for the purpose of equal protection analysis. In other words, both male and female juvenile offenders are similarly situated in their shared right to an individualized disposition once adjudicated delinquent.

The standard of review of gender-based claims in the adult correctional context is clearly unsettled. Some of the more recent cases favor the rational relationship test applied in *Turner* and *O'Lone*. Even these cases however, have drawn a distinction between challenges to the process by which program decisions are made and challenges to differences in the programs

¹⁴⁶ see discussion supra, at .

themselves.¹⁴⁷ Thus, there remains the opportunity to frame challenges to disparities in the juvenile justice system to fit within the “process” exception noted by the Eighth Circuit in *Klinger*, which agreed that male and female inmates *are* similarly situated at the beginning of the decisionmaking process.¹⁴⁸ Claims that a court or agency has taken boys’, but not girls’ needs into account, for example, in designing or offering a particular program or service, may warrant the higher level of scrutiny under this rationale. Additionally, in those states where gender is accorded specific constitutional protection, discussed at length in the next section,¹⁴⁹ the higher standard of review afforded gender-based classifications under many of these state Equal Rights Amendments should elevate review of claims of disparate treatment above the minimal rational relationship of *Turner* and *O’Lone*. Moreover, because the purpose of the juvenile justice system remains avowedly non-punitive, we suggest that the penological concerns that drive the deference to prison administrators in the adult prison context are inapplicable in the juvenile justice system where rehabilitation, not punishment, is the driving force. Lastly, again in view of the rehabilitative purpose of the juvenile system, even under a rational relationship test, there is arguably no legitimate government interest that justifies affording girls a diminished opportunity for individualized treatment and rehabilitation.

Whether these discriminatory consequences flow from facially neutral, or facially discriminatory laws or practices, is an important consideration because, at least under the federal Equal Protection Clause, intentional discrimination must be proven by the plaintiffs if the disparity arises from a facially neutral law or practice.¹⁵⁰ Where statutes themselves draw

¹⁴⁷ See e.g., *Klinger*, 31 F. 3d at 733.

¹⁴⁸ *Id.*

¹⁴⁹ See *infra* at .

¹⁵⁰ See, *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979) (Holding that veterans preference in hiring for state civil service positions did not violate equal protection despite the strong statistical advantage that it provided to male applicants).. Under state Equal Rights Amendments, there is a developing body of caselaw that

gender-based distinctions, such as laws or regulations that expressly assign or allocate different vocational, educational or work opportunities to male and female inmates, the discrimination plainly flows from facially discriminatory laws and proof of intentional discrimination should be unnecessary. Similarly, even where laws or regulations are neutral on their face, but where administrative or other official action enforces the policy or practice in an overtly discriminatory way, such as the boot camp program challenged in *West*, or the initial implementation of the drug court described at the beginning of this article, the resulting discrimination should also be viewed as emanating from a facially discriminatory policy. Likewise, to the extent that girls are officially assigned to sex-segregated programs by executive or legislative policy, and those sex-segregated programs provide lesser rehabilitative opportunities or inadequate individualized treatment options for girls, any such discriminatory consequences should also be considered the result of facial discrimination.

Finally, regarding what constitutes a legitimate governmental interest, the answer will turn in part on the standard of scrutiny accorded the challenged classification or practice. Under intermediate or strict scrutiny, economic justifications based on conserving resources or allocating limited resources will not be acceptable.¹⁵¹ In *West*, even the argument that a program was being tested as a pilot with just the male class of inmates was rejected. Again, given the juvenile court's emphasis on rehabilitation, however, and the argument that boys and girls are similarly situated with respect to his purpose, it is hard to conceive of any governmental

has rejected the need to prove intentional discrimination where the challenged practice is facially neutral. See discussion *infra* at .

¹⁵¹ See, e.g., *United States v. Virginia*, 518 U.S. 515, 570-573 (1996) (Providing that economic justifications for excluding females are inadequate to overcome constitutional scrutiny.); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 450-460 (2002) (Holding that economic justifications do not meet intermediate government scrutiny of zoning provisions.)

objective, legitimate, substantial or compelling, that would justify disadvantaging girls with respect to this purpose.

State Equal Rights Amendments

Most state Equal Rights Amendments have been modeled after the proposed federal Equal Rights Amendment, and typically provide that “[E]quality of rights under the law shall not be denied or abridged....because of the sex of the individual.”¹⁵²

Nineteen states currently have equal rights amendments,¹⁵³ which were enacted in the late 1970s and early 1980s.¹⁵⁴ Though they are not used frequently, they present a potentially powerful litigation tool for girls. State ERAs often require a higher standard of review than the intermediate level of scrutiny favored under the federal Equal Protection Clause. As many as ten of the nineteen states subject gender based classifications to strict scrutiny;¹⁵⁵ some adopt an even higher “absolutist” standard, permitting no-sex-based classifications except those required

¹⁵² PA. CONST. ART. 1, § 28; See also, Alaska Const. art. I, § 3, (No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin); Colo. Const., art II, § 29; Conn. Const. art. I, § 20; Fla. Const. art. I, § 2, (all natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property...No person shall be deprived of any right because of race, religion, national origin, or physical disability); Haw. Const. art. I, §3; §5; Ill. Const. art. I, § 18; Iowa Const. art. I, § 1, (All men and women are equal by nature, free and equal, and certain inalienable rights—among which are those of enjoying life, liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness); La. Const. art. I, §3, (No person shall be denied the equal protection of the laws...no law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations); Md. Const., Declaration of Rights, art. 46 (1981); Mass. Const. pt. 1, art. 1. (added in 1976); Mont. Const. art II, § 4; N.H. Const. pt. 1, art 2; N.M. Const. art II, § 18; Tex. Const. art. I, § 3a; Utah Const. art IV, § 1, (The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges); Va. Const. art I, §11, (The right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination); Wash. Const. art. XXXI, §1; Wyo. Const. art. 6, § 1

¹⁵³ See generally, Paul Benjamin Linton, *Same-Sex “Marriage” Under State Equal Rights Amendments*, 46 ST.

LOUIS U. L. REV. 909 (2002) (discussing how each state might address same-sex “marriage” under its state ERA

¹⁵⁴ Florida and Iowa are exceptions, amending their constitutions in 1998 to include gender. FLA. CONST. art.I,§2; IOWA CONST. art. I, § 1.

¹⁵⁵ See CONN. CONST. art. I, § 20; HAW. CONST. art. I, §3, §5; ILL. CONST. art. I, §18; MD. CONST. DEC. OF RIGHTS art. 46; MASS. CONST. pt. 1, art. 1; N.H. CONST. pt. 1, art. 2; N.M. Const. art. II, § 18; TEX. CONST. art. I, §3a; WASH. CONST. art. 6, § 1.

by actual physical differences between men and women.¹⁵⁶

However, as with federal equal protection analysis there are hurdles to overcome. First, under state ERAs there must be a determination that the males and females in question are similarly situated,¹⁵⁷ and second, in applying state ERAs to prison regulations, at least two courts have adopted the reasoning from *Turner*¹⁵⁸ and *O'Lone*¹⁵⁹ that inmates' constitutional rights are limited in the prison environment.

For example, two courts applying the state ERA to an adult corrections case limited the ERA's application. In *Wise v. Department of Corrections*¹⁶⁰ and *Morris v. Collins*,¹⁶¹ courts in Pennsylvania and Texas upheld state prison regulations regarding hair length in the face of challenges under those states' ERAs. In both cases the courts upheld state correctional policies without going through traditional ERA analysis. Relying instead on *O'Lone*,¹⁶² both courts applied the rational basis test and upheld the prison grooming policies as reasonably related to valid penological objectives.

On the other hand, there have been two cases in which Massachusetts' courts used the state Equal Protection Clause and the ERA to address challenged prison policies without reducing the level of scrutiny. In *M.C. v. Commissioner of Correction*,¹⁶³ the Supreme Judicial Court applied equal protection and ERA analysis to a statutory scheme which gave "good time

¹⁵⁶ Caselaw from md and wash citing to absolute standard?

¹⁵⁷ See discussion supra at . . . , arguing that juvenile justice system's goal of individualized treatment and rehabilitation makes boys and girls similarly situated for that purpose in an equal rights analysis.

¹⁵⁸ *Turner v. Safley*, 482 U.S. 78 (1987).

¹⁵⁹ *O'Lone v. Estate of Shabbaz*, 482 U.S. 342 (1987).

¹⁶⁰ *Wise v. Dep't. of Corr.*, 690 A. 2d 846 (Comm. Ct. PA 1997)

¹⁶¹ *Morris v. Collins* 916 S.W. 2d 527 (Tex. App. 1995)

¹⁶² *O'Lone*, 482 U.S. 342 at 349.

¹⁶³ *M.C. v. Comm'n. of Corr.*, 507 N.E.2d. 253, 254, 255, 256 (Mass. 1987) (female inmate, who was denied a request to transfer to an all male forestry camp, seeking declaratory judgment that statutes according good time

credit” for time in prison camps which were only available to males. Ultimately the case was dismissed as moot because the woman prisoner was released. In *Todd v, Commissioner of Corrections*,¹⁶⁴ the Court reversed the trial court’s summary judgment for the defendant on equal protection and ERA grounds. The Court of Appeals struck prison disciplinary regulations which, while neutral on their face, were only being applied against male prisoners. The court found that the Department of Corrections did not provide sufficient justification for the unequal application of the policy.¹⁶⁵

Illinois, Montana, and Florida have considered state ERA challenges to juvenile justice statutes and judicial decisions. In Illinois, the state ERA was used successfully to challenge a statute which set the age of adult criminal jurisdiction at seventeen for males and eighteen for females.¹⁶⁶ The court struck down the statute as violating the state ERA and noted that under the state ERA gender was a suspect classification and the state justification must survive strict scrutiny.¹⁶⁷

In Florida and Montana, two states which have not settled on a standard of review under their state ERAs, courts considered challenges to sentencing brought by young women based on arguments that the harsher sentences they received resulted from lack of sufficient programming for girls in the juvenile justice system. Though these cases involved claims that mirror the types of claims suggested by this article, both cases were decided on different grounds and are therefore of limited value in assessing the prospects for other similar claims. For example, in

credit to forestry prison camp inmates violated ERA because only male prisoners occupied forestry camps. Court vacated and remanded as moot and did not address ERA issue).

¹⁶⁴ *Todd v. Comm’n. of Corr.*, 763 N.E.2d. 1112, 1114 (Mass. App. Ct. 2002) (examining the constitutionality of a prison disciplinary regulation that on its face applied to all prisoners but was only enforced as to male prisoners).

¹⁶⁵ *Id.* at 1119

¹⁶⁶ *People v. Ellis*, 311 N.E.2d 98 (Ill. 1974)

¹⁶⁷ *Id.* at 101, 102.

State v. Spina,¹⁶⁸ a girl who was transferred to adult criminal court challenged her transfer under the state ERA, arguing that it was driven by the lack of secure placements in the Montana juvenile justice system for girls.¹⁶⁹ The Montana Supreme Court, however, rejected her assertion that the lack of secure placements for girls in Montana was the primary reason for her transfer and upheld the transfer on other statutory grounds. In *Spina*, the court used general equal protection analysis and an intermediate standard, making it difficult to determine the role the state ERA played in the court's decision.

In *Benson v. Florida*,¹⁷⁰ the female defendant challenged her juvenile sentence on, among other grounds, the Florida equal protection clause, claiming that it was the result of the lack of "Level 10" programs for girls in Florida (there are Level 10 programs for boys in Florida.) While the court noted that her argument appeared to have merit "on its face," it found that the sentencing decision was based on factors other than the lack of Level 10 programs for girls, and that the court would not have sentenced her to one of these programs even if one existed.¹⁷¹ Both *Spina* and *Benson* illustrate a drawback to individualized sentencing, which allows courts to cast aside broad-based challenges to sentencing practices or policies by finding the particular sentence warranted by the individual youth's circumstances.

Another critical difference between federal equal protection analysis and analysis under state ERAs is the standard of review. While claims of unconstitutional gender discrimination are

¹⁶⁸ *State v. Spina*, 982 P.2d 421 (Mont. 199).

¹⁶⁹ *See id.*, (distinguished from *People v. Ellis* 311 N.E2d at 99, 100, which challenged the jurisdiction statute as facially discriminatory, while in *Spina* 982 P.2d at 437 the defendant's challenge focused on the application of the transfer law).

¹⁷⁰ *Benson v. Florida*, 763 So. 2d 1235, 1237 (Fla. Dist. Ct. App. 2nd District 2000)

¹⁷¹ *Id.* at 1237 (In Florida the basic rights provision of the Constitution was amended in 1998 to include a prohibition of discrimination by gender).

accorded, at best, an intermediate standard of review under federal equal protection law,¹⁷² at least ten of the nineteen ERA states require higher justification for gender-based classifications under the state ERA. Washington has applied absolute scrutiny to sex-based classifications, allowing no justification for gender-based classifications short of an actual physical difference between the sexes.¹⁷³ Maryland has also applied an absolute standard, holding in *Rand v. Rand*,¹⁷⁴ for example, that “the law will not impose different benefits or different burdens upon the members of society based on the fact that they may be man or woman.” More recently, in *Tyler v. State*,¹⁷⁵ the Maryland Supreme Court held that “sex, like race, is a suspect classification subject to strict scrutiny.”¹⁷⁶ There is some question, therefore, as to whether Maryland has reduced the standard of review from absolute to strict scrutiny, but in either case Maryland applies a higher standard than the federal standard..

Eight other states clearly apply a strict scrutiny standard to sex based classifications under their states’ ERAs. These are Connecticut, Hawaii, Illinois, Massachusetts, New Hampshire, New Mexico, and Texas.¹⁷⁷ As with the absolutist states, the courts in these states

¹⁷² Virginia, 518 U.S. at 533 (citing *Univ. of Miss v. Hogan*, See *supra* text accompanying note 120).

¹⁷³ See, *Turner*, 474 A. 2d at 1301 (stating Female Sitters law allowed males and not females to be employed as sitters and therefore violated the state ERA); *Rand v. Rand*, 374 A. 2d 900, 905 (Md. 1977); (affirming that following adoption of Equal Rights Amendment, parental obligation for child support is not primarily an obligation of father but is one to be shared by both parents and the sex of the parent in matters of child support cannot be a factor in allocating the responsibility to support the child); *Darin v. Gould*, 540 P.2d 882, 893 (Wash. 1975) (court held that the broad language of the ERA meant that citizens intended to do more than repeat the protection available under See *Darin v. Gould*, 540 P.2d 882 (Wash. 1975) (court held that the broad language of the ERA meant that citizens intended to do more than repeat the protection available under federal equal protection).

¹⁷⁴ 374 A. 2d 900 (Md. 1977)

¹⁷⁵ *Tyler v. State*, 623 A.2d 1297, 1301 (Md. 1984) (finding unconstitutional under Maryland’s ERA the state’s exercise of premonitory challenges based on gender, citing, *State v. Burning Tree Club, Inc.*, 315 Md. 254, 269, (Md. 1989))

¹⁷⁶ *Id.*

¹⁷⁷ See *Low-Income Women of Texas v. Bost*, 38 S.W.3d 689, 697 (Tex. App. 2000) (stating “The ERA elevates sex—along with race, color, creed, and national origin—to a suspect classification, and any law that classifies persons for different treatment on the basis of sex is subject to strict judicial scrutiny”); *New Mexico Right to Choose/ NARAL v. Johnson*, 975 P.2d 841, 853 (N.M. 1998) (“(T)he Equal Rights Amendment requires a searching judicial inquiry concerning state laws that employ gender-based classifications. This inquiry must begin from the premise that such classifications are presumptively unconstitutional, and it is the State’s burden to rebut this presumption.”); *Cheshire Medical Center v. Holbrook*, 663 A.2d 1344, 1346, 1347 (N.H. 1995) (finding that

have viewed their state's adoption of an ERA as an indication of legislative intent to afford a higher level of protection to gender-based discrimination than that afforded by federal equal protection analysis.¹⁷⁸ Under the strict scrutiny standard, sex-based classifications in statutes, regulations, policies, or practices are presumed invalid unless they serve a compelling state interest, are narrowly drawn to protect that interest, and the interest cannot be adequately protected by an alternative means.¹⁷⁹

In just five of the nineteen states, Alaska, Colorado, Iowa, Louisiana, Virginia, and Wyoming,¹⁸⁰ the standard applied is either rational basis – less than the federal standard – or the

common law doctrine of necessities must be read to include both genders in order to pass strict scrutiny); *Baer v. Lewin*, 852 P.2d 44, 47 (Hawaii, 1993) (holding that same sex marriage ban was subject to strict scrutiny pursuant to the state equal rights amendment); *Doe v. Maher*, 515 A.2d 134, 156 (Conn. Supp. 1986) (applying a strict scrutiny standard of review in invalidating provision forbidding Medicaid funding for medically necessary abortions); *Attorney Gen. v. Massachusetts Athletic Ass'n. Inc.*, 378 Mass. 342, 354 (1979) (providing that any standard less than strict scrutiny would make the amendment meaningless).

¹⁷⁸ See e.g., *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 851 (N.M. 1998) (stating, we address the Department's claim that Rule 766 does not warrant heightened judicial scrutiny because it is based on a physical characteristic unique to one sex, namely the ability to become pregnant and bear children. We conclude that this unique physical characteristic does not exempt Rule 766 from a searching judicial inquiry under New Mexico's Equal Rights Amendment); *People v. Ellis*, 311 N.E. 2d 98, 101 (Ill. 1974) (stating, we find inescapable the conclusion that [the ERA] was intended to supplement and expand the guaranties of the equal protection provision of the Bill of Rights and requires us to hold that a classification based on sex is a 'suspect classification' which, to be held valid, must withstand 'strict judicial scrutiny'); See also, Martin B. Marguiles, *A Lawyer's View of the Connecticut Constitution*, 15 CONN. L. REV. 107 (1982) (noting that “Dissimilar language in state provisions that have federal counterparts, supplies an even more compelling reason for expanding protection of individual rights. One of the most fundamental canons of constitutional interpretation is that no language is presumed to be without effect. Although mere legal fiction, the principle requires courts to assume that each word was included only after careful consideration by the drafters. Different language therefore must be interpreted to have different consequences).

¹⁷⁹ See e.g., *Baehr v. Lewin*, 852 P. 2d 44, 47 (Haw. 1993) (holding that statute restricting marriage to members of the opposite sex is a sex based classification subject to strict scrutiny under state constitution); *Holdman v. Olim*, 581 P.2d 1164 (Haw. 1978) (holding regulation that women visitors to an all-male prison wear brassiere withstands strict scrutiny under the ERA as necessary to protect a compelling state interest); See also, *O'Lone* 482 U.S. at 350.

¹⁸⁰ See *Dept. of Health and Human Serv. v. Planned Parenthood of Alaska*, 28 P.3d 903 (Ak. 2001) (Applying intermediate review to equal rights challenge of abortion funding law); *In re Detention of Morrow*, 616 N.W.2d 544, 547 (Iowa 2000) (Applying intermediate scrutiny to challenge of sexually violent predator act); *State v. Miller*, 663 So.2d 107, 109 (La. App. 1995) (Upholding statutory rape law that can only be used against young men under intermediate scrutiny standard); *Austin v. Livak*, 682 P.2d 41 (Colo. 1984) (Requiring only a rational relationship to a reasonable objective in challenge to statute of repose in medical malpractice action); *Archer v. Mayes*, 194 S.E.2d 707,711 (Va. 1973) (Rejecting challenge to law allowing women to opt out of jury duty to care from children, applying an intermediate level of scrutiny).

standard is unsettled. Within this group, Alaska and Virginia apply a rational basis test, upholding the sex-based classification if the court finds that the purpose of the statute or practice is legitimate and it is designed to accomplish that purpose in a fair and reasonable way.¹⁸¹

Finally, Florida, Montana, and Utah have not yet determined standards of review for cases under their ERAs.¹⁸²

Implications for litigation on behalf of girls

Though at least two courts have limited protection under state ERAs when the claim arose in a prison context, adopting the federal equal protection analysis, a similar limitation in the juvenile justice context is unlikely. As stressed above,¹⁸³ juvenile justice is sufficiently different from adult corrections in purpose and design, to merit the full protection of state ERAs. Moreover, the few state cases which have applied ERAs to challenged policies in the juvenile justice arena have shown no inclination to limit its application.

Assuming the application of state ERAs to girls' claims of lack of equal access or lack of gender responsive programming, courts will consider whether the parties are similarly situated, and whether the challenge involves an "explicitly established sex-based distinction"¹⁸⁴ on the face of the statute, rule, regulation or policy. With respect to whether the girls will be found to be similarly situated to boys in the juvenile system, the same arguments we suggest under the federal equal protection clause apply with equal force here. Adjudicated boys and girls are plainly similarly situated with respect to the purpose of the court's intervention – individualized rehabilitation and treatment.

Regarding whether the challenged practice is facially discriminatory or gender-neutral on

¹⁸¹ See, *Planned Parenthood of Alaska*, 28 P.3d at 905-908; *Archer*, S.E.2d at 711.

¹⁸² See, Paul Benjamin Linton, *Same-Sex "Marriage" Under State Equal Rights Amendments*, 46 St. Louis U. L. J. 909, 915, 931-934, 951-954 (2002)

¹⁸³ See *supra* at .

its face, the court applying the state ERA will examine a gender neutral practice to determine whether it is discriminatory in its application and impact. Unlike the federal Equal Protection Clause, state ERAs may not require a discriminatory motive or purpose, rather, they may protect against a discriminatory impact when a practice or policy, “visibly operates to a particular disadvantage of women.”¹⁸⁵

The availability of state ERA protection without proof of discriminatory intent when the policy or regulation appears neutral but has a disparate impact is particularly critical for our analysis. Both the problem of unequal access by girls to juvenile programming, and the lack of gender-responsive programming could be the result of gender-neutral policies which disadvantage girls in their operation and enforcement. For example, residential programs such as that described in jurisdiction “Y” at the beginning of this article which provide girls nothing more than participation in a juvenile justice program designed for boys, have a discriminatory impact on girls by failing to provide them individualized programming, yet there are likely no policies or procedures declaring that girls be denied such programming. Similarly, the drug

¹⁸⁴ *Buchanan v. Director of Div. of Employment Security*, 471 N.E.2d 345, 348 (Mass. 1984)

¹⁸⁵ *See, e.g., Nat’l Org. for Women v. Commonwealth of Pennsylvania Ins. Dept.*, A.2d 744 (Pa. 1989) (considering whether insurance commissioner’s approval of equal rates for men and women for automobile coverage created “de facto” discrimination against women.); *Commonwealth v. An Unnamed Defendant*, 492 N.E.2d 1184 (Mass. 1986) (Court found disparate impact in the selective enforcement of prostitution statute which was gender neutral on its face); *Burning Tree Club, Inc. v. Bainum*, 305 Md. 53 (Md. 1985) (The court affirmed the lower court’s finding that “While noting that § 19(e)(4) does not facially discriminate against either sex, or impose greater burdens, or provide greater benefits to a particular sex, the court held that the statute violated the E.R.A. because, notwithstanding its facial neutrality, it had a discriminatory effect”); *Buchanan v. Director of Div. for Employment Security*, 471 N.E.2d 34 (Mass 1984) (Found that although the base-earnings requirement for unemployment compensation is not violative on its face, it may violate the state ERA when applied to pregnant public school teachers taking an unpaid maternity leave); *Snider v. Thornburgh*, 436 A.2d 593 at 599 (Pa. 1981) (Found that facially neutral... policies which have the practical effect of perpetuating ... discriminatory practices constitute discrimination by sex); *Braintree v. Massachusetts Comm’n Against Discrimination*, 383 N.E.2d 1251, 1255 (Mass. 1979) (Found ERA violation in gender neutral policy denying accumulated sick leave to pregnancy related disability occurring at the beginning of maternity leaves).

court manual in jurisdiction “X” was written with gender neutral language, referring to eligibility of “clients,” “youth,” and “candidates,” yet it was understood that the program was available to boys only and no girls were referred. While an official decision to exclude girls solely on the basis of their sex should be treated as a facially discriminatory policy, the adoption of eligibility criteria that relied on a history of drug arrests accompanied by violence, for example, which might apply to many more boys than girls, would be an example of a gender-neutral criteria with disparate impact.

Title IX of the Education Amendments of 1972

Another potential tool for achieving equality in the programs and services offered to girls in the juvenile justice system is through Title IX of the Education Amendments of 1972.¹⁸⁶ Title IX provides, in relevant part, that “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.”¹⁸⁷ The harms that this article addresses -- laws, policies and practices that disadvantage girls in the juvenile justice system -- clearly fit within the intended objectives of Title IX as articulated by the United States Supreme Court: “to avoid the use of federal resources to support discriminatory practices,” and “to provide individual citizens effective protection against those practices.”¹⁸⁸

More importantly, because Title IX is aimed at gender equality in education, its use in addressing discrimination in juvenile programs is particularly promising. Virtually all youth in the juvenile justice system are school-age,¹⁸⁹ and many remain subject to state compulsory

¹⁸⁶ 20 U.S.C. §§ 1681-1688 (Title IX”), *see also*, 34 C.F.R. §§ 106.1- 106.71 (implementing regulations).

¹⁸⁷ 20 U.S.C.A. § 1681 (a). Juvenile justice systems and facilities may receive federal dollars through a variety of federal funding streams, including IDEA, 20 U.S.C. § 1400, et. seq., see, e.g., 20 U.S.C. § 1412 (outlining the requirements for state eligibility for federal funding); the Elementary and Secondary Education Act, 20 U.S.C.A. § 7100 et. seq.; and Medicaid, to provide for the care of medically needy children. See 42 U.S.C.A. § 1396.

¹⁸⁸ *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979).

¹⁸⁹

school attendance laws.¹⁹⁰ Accordingly, whatever state-created rights to basic and special education – the latter of which is also protected under federal law¹⁹¹ – youth in a given state possess, incarcerated youth possess the same rights.¹⁹² To the extent programming in juvenile justice facilities is provided in accordance with state educational requirements, discrimination on the basis of gender would be flatly prohibited by Title IX. In this respect, juvenile correctional facilities are more analogous to residential schools than they are to adult prisons. Additionally, the right to treatment recognized by many courts relies not only on the juvenile court’s focus on rehabilitation, but also encompasses a right to education for adjudicated youth.¹⁹³

As with the discussion of the federal Equal Protection Clause and State ERAs, the starting point of our discussion is to review how such claims have fared on behalf of adult women offenders.

¹⁹⁰ See, e.g., MGL tit 12 Ch 76 S 1 (1983) (stating Every child between the minimum and maximum ages established for school attendance by the board of education... shall, subject to section fifteen, attend a public day school in said town, or some other day school approved by the school committee, during the number of days required by the board of education in each school year...); PA St. Tit.24 Ch. 1 Art XIII S 13-1327 (1992) (stating every child of compulsory school age having a legal residence in this Commonwealth, as provided in this article, and every migratory child of compulsory school age, is required to attend a day school in which the subjects and activities prescribed by the standards of the State Board of Education are taught in the English language); IL St. Ch. 105 S 5/26-1 (stating Whoever has custody or control of any child between the ages of 7 and 16 years shall cause such child to attend some public school in the district wherein the child resides the entire time it is in session during the regular school term).

¹⁹¹ IDEA, 20 U.S.C. § 1400, et. seq., see, e.g., 20 U.S.C. § 1412 (outlining the requirements for state eligibility for federal funding). Because these dollars follow the individual special needs dollars, it is unclear is a systemic Title IX challenge may be successfully brought by a youth without special education needs. A small amount of money provided to the state pursuant to the Elementary and Secondary Education Act, 20 U.S.C.A. § 7100 et. seq., may be channeled to the facilities through the state. Some state facilities may also receive Medicaid dollars to provide for the care of medically needy children. See 42 U.S.C.A. § 1396.

¹⁹² See, e.g., CT ST § 10-253 (Connecticut law providing that school privileges apply to children in placement); NY EDUC § 4002 (Providing that “Each child between the ages of five and twenty-one who resides in a child care institution and who has not yet graduated from high school shall be entitled to receive a free and appropriate education in the least restrictive environment for that child); 10 Okl.St. Ann. § 7306-2.11 (Oklahoma Statute providing that children committed to the department of youth have a right to public education); AR ST § 9-28-205 (Providing that Arkansas youth study centers must meet the educational standards set by the department of education and that youth in placement have a right to education).

¹⁹³ See discussion supra at .

By definition, Title IX applies to all correctional facilities that receive federal assistance.¹⁹⁴ Women prisoners challenging discriminatory practices or conditions have therefore also looked to Title IX for relief. However, similar to challenges brought under the federal equal protection clause – and despite this clear statutory applicability -- Title IX challenges to discriminatory programming in adult prisons have found little success, and yielded contradictory analyses.

Jeldness v. Pearce was the first federal court of appeals examination of the applicability of Title IX to a challenge by women prisoners to unequal prison programming.¹⁹⁵ In *Jeldness*, the Ninth Circuit held that the language of Title IX, which does not explicitly exempt prisons from its reach as it does other organizations and activities, applies to all prisons receiving federal funding.¹⁹⁶ The court extended this analysis to the applicability of the implementing regulations, holding that, “it is clear that the regulations are not meant to apply only to traditional educational

¹⁹⁴ 45 C.F.R. § 106.2 (clarifying the definitions of the terms in the act, providing, in relevant part that:

Program or activity and program means all of the operations of--

- (1)(i) A department, agency, special purpose district, or other instrumentality of a State or local government; or
- (ii) The entity of a State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
- (2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or
- (ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;
- (3)(i) An entire corporation, partnership, other private organization, or an entire sole proprietorship--
 - (A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
 - (B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
- (ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or
- (4) Any other entity that is established by two or more of the entities described in paragraph (h)(1), (2), or (3) of this section; any part of which is extended Federal financial assistance).

¹⁹⁵ *Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir. 1994). (citing prior to *Jeldness*, two federal district courts had allowed Title IX suits against state prisons to go forward.) *See also*, *Canterino v. Wilson*, 546 F. Supp. 174 (W.D. Ky. 1982) vacated on other grounds, 869 F.2d 948 (6th Cir. 1989); *Beehler v. Jeffes*, 664 F. Supp. 931 (M.D. Pa. 1986). The analysis of the *Canterino* opinion is examined and in large part adopted by the court in *Jeldness*. *See Jeldness*, 30 F.3d at 1224-1228.

¹⁹⁶ *Jeldness* at 1225.

institutions.”¹⁹⁷ In applying both the Act and the regulations, the court held that the Oregon prison system failed to meet Title IX’s equality demands by its complete failure to provide “equal opportunity” for women prisoners to participate in educational and vocational programs of “comparable quality.”¹⁹⁸ The decision provided promise that Title IX would be an effective tool for challenging the vast programming inequities between men’s and women’s prisons.

Title IX’s applicability to alleged discriminatory prison programming was revisited by the Eighth Circuit in *Klinger v. Department of Corrections*.¹⁹⁹ In *Klinger*, the court recognized that Title IX was applicable to prison programming, potentially providing relief even when plaintiffs are unable to successfully advance a constitutional equal protection claim.²⁰⁰ The court further held that the plain language of the statute absolved plaintiffs from the requirement of demonstrating that they were “similarly situated to” male prisoners, reasoning that:

(i)n our opinion, Congress has indicated, by its enactment of § 1681(a) and by the specific language employed therein, that 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.²⁰¹

However, the court ultimately dismissed the plaintiffs’ claim, reasoning that Title IX analysis required a look at the entire “system of institutions operated by the state’s federally-funded agency.”²⁰² The court based this holding on the definition of “program or activity” provided in the statute, reasoning that because the definition covered “all of the operations of a government

¹⁹⁷ *Id* at 1226.

¹⁹⁸ *Id* at 1229.

¹⁹⁹ *Klinger*, 107 F.3d 609 (8th Cir. 1997).

²⁰⁰ *Id* at 614- 616.

²⁰¹ *Id.* at 614.

²⁰² *Id* at 616.

agency,” a look at all of the programs of that agency was required to determine whether the agency was Title IX compliant.²⁰³

In *D.C. Women Prisoners*, the D.C. Circuit rejected the approach of the *Klinger* court, holding that the plaintiffs were required to demonstrate that they were “similarly situated” to male prisoners in order to advance a successful claim under title IX.²⁰⁴ In determining whether they were “similarly situated” for the purposes of challenging the programming as discriminatory, the Court looked to a variety of factors, from security levels of prisoners to underlying offenses.²⁰⁵ The court held that the plaintiffs failed to show that they were similarly situated to the male prisoners, and therefore dismissed the Title IX claim without addressing it on the merits. However, in dicta the court expressed skepticism toward future Title IX claims in the adult prison context, stating: “. . . even though we do not address the scope of Title IX in the prison context, we admit to grave problems with the proposition that work details, prison industries, recreation, and religious services and counseling have anything in common with the equality of educational opportunities with which Title IX is concerned.”²⁰⁶

Implications for litigation on behalf of girls

These three decisions reflect the reported case law to date on the applicability of Title IX to the correctional context. Like the federal equal protection and state ERA cases, they suggest potential hurdles for girls looking to bring similar claims in the juvenile justice system, and

²⁰³ *Id.* at 615 (This reading is arguably not commanded by the language of the statute. The phrase “all of the operations of a department, agency...” could also be read to institute a no tolerance approach toward discrimination. That is, the entire entity must be void of gender discrimination or the agency can be held liable for the discrimination of any of its parts. The legislative history evoked by the court in order to support their contention is also in support of this alternate reading, as is the articulated overarching purpose of Title IX as articulated by the Supreme Court (providing bill summary language referring to liability of “the entire entity” to argue that an examination must occur system-wide); *See also Cannon*, 441 U.S. at 704.

²⁰⁴ *D.C. Women Prisoners*, 93 F.3d at 927 (1996).

²⁰⁵ *See id.* at 925. In deciding if the plaintiffs were “similarly situated” the court looked both at *Klinger* and at *Pargo v. Elliot* in determining the factors to apply in their analysis. *Pargo* articulated five factors for consideration: 1)

specifically leave some questions unresolved. Must plaintiffs demonstrate that they are “similarly situated” to male prisoners under equal protection standards in order to seek relief from discriminatory practices? What programs and activities fall within the commands of Title IX? And finally, when mounting a Title IX challenge, must plaintiffs allege that the discrimination occurs throughout the entire system, or may a claim be successfully pursued by comparing the programming at two individual facilities, or even one facility housing both men and women, or boys and girls?

Despite the contradictory and narrow decisions in the adult system, Title IX should be an effective tool for improving access to programs and services for girls in the juvenile justice system. Given the distinctions between adult and juvenile corrections highlighted in this article, the obstacles encountered by women prisoners should not discourage Title IX litigation on behalf of adjudicated girls. The strong wording and intent of the Act, coupled with its aggressive enforcement in the high school and college athletic context – where gender-segregated programming is common but inequality is not tolerated -- should provide a powerful litigation tool to challenge the injustices that girls experience.

Additionally, the fact that most juveniles are school-age and must be provided the opportunity to earn high school credits, a high school degree or a GED even while incarcerated makes Title IX particularly relevant to charges of gender-based discrimination in juvenile facilities’ programming. While courts may be hesitant to characterize discrimination in adult vocational, recreational or counseling programs, for example, as discrimination in educational

prison population, 2) level of security 3) types of crimes committed 4) length of sentence and 5) special characteristics. *See Pargo v. Elliot*, 894 F. Supp. 1243, 1254-62 (S.D. Iowa 1995).

²⁰⁶ *Id* at 927.

opportunities for Title IX purposes,²⁰⁷ these same services are an integral part of the educational program typically offered school-age youth, delinquent or otherwise. Discrimination in their availability to juvenile offenders should fall squarely within the parameters of Title IX.

A. Establishing that Male and Female Juvenile Offenders are “Similarly Situated”

The first central dispute in Title IX prison jurisprudence is whether women prisoners must demonstrate that they are similarly situated to male prisoners in order to demand equality in programming and services. While the analysis in *Klinger* that absolves women from such a showing arguably has more commanding logical force on its face, even the concerns highlighted by *D.C. Women Prisoners* are alleviated by the factual and legal realities of the juvenile system.

In imposing this requirement in *D.C. Women Prisoners*, the court looked to factors including underlying offense levels and the length of sentence. These factors are not applicable in the juvenile context where the underlying offense does not generally dictate the disposition received and the length of sentence is typically indeterminate, targeted toward effective treatment rather than a fixed period of incarceration/incapacitation. As argued above, juvenile offenders in placement are all similarly situated with respect to the central goal of this system: they were removed from home environments in order to best effectuate their successful treatment and eventual return to society. No juvenile in placement is, by the command of the law or justifications of the system, any less “deserving” of adequate programming or services that will allow them to achieve this goal. The only fact separating the girls in the juvenile justice system from their male counterparts is their gender- a fact triggering scrutiny under Title IX.

B. Establishing What Programs and Services are Covered by Title IX

The differences between the legal justifications of the juvenile and adult systems are also relevant to the question of the programmatic scope of Title IX. As noted above, most juveniles

²⁰⁷ See, e.g., *D.C. Women Prisoners*, 93 F. 3d at 927.

held in detention and/or placement facilities have a continued right to public education, a right that is consistent with the statutory goals of rehabilitation and treatment.²⁰⁸ This education must meet standards imposed by local and state educational authorities and must also be in compliance with the mandates of all applicable federal education laws. Accordingly, assessing the programmatic reach of Title IX to juvenile offenders is best accomplished by examining the reach it has on state and local educational agencies. This reach is dictated by the implementing regulations of Title IX as imposed by the Department of Health and Human Services, along with any interpretation of those regulations as provided by the courts.²⁰⁹

The enacting regulations of Title IX make explicit that the wide array of courses that may be offered by an educational institution receiving federal funding are all subject to the equality requirements of the Act. 34 C.F.R. § 106.34, entitled “Access to Course Offerings” provides, in relevant part:

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

While the corrections facilities may impose a necessary separation of genders, this separation can not be used to deny females access to equal opportunities to courses in any of the areas delineated in the regulation.²¹⁰ Significantly, the types of course offerings listed above are

²⁰⁸ See, e.g., KY. REV. STAT. ANN. § 15A.210; *Plyer v. Doe*, 457 U.S. 202 (1982); *Tommy P. v. Board of Comm'r*, 645 P.2d 697 (Wash. 1982); *State v. Rice*, 655 P.2d 1145 (Wash. Dec 22, 1982); *Inmates of Boys Training Sch. v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972).

²⁰⁹ See *Chevron v. Natural Resource Council*, 467 U.S. 837 (1984); See also, *Jeldness*, 30 F.3d at 1225 (holding that the implementing regulations of Title IX are applicable to the adult prison context); *Klinger* 107 F.3d at 615; *D.C. Women Prisoners*, 93 F.3d at 931 (both failing to reach the merits of the Title IX claims, precluding any discussion of the application of the regulations).

²¹⁰ See *Jeldness* 30 F.3d at 1225; *Tommy P. v. Board of Comm'r*, 645 P.2d at 702

precisely the types of educational programs and activities that are – or should be – made available to male and female youth in the juvenile justice system.

The implementing regulations of Title IX further require that a local educational agency may not exclude any person from admission to a vocational education program on the basis of sex unless the agency “otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.”²¹¹ Accordingly, even if the vocational program offered in the facility is not an official course offering of the local or state school authority administering the general education requirements, the program still falls within the reach of the regulations and must be offered in a manner consistent with gender equality.

This is particularly important for girls in the juvenile justice system, where it is not uncommon for jurisdictions to offer different or more limited vocational opportunities to girls than boys.²¹² And while the court’s interpretation of “parity of programming” in *Glover v. Johnson*, under the Equal Protection Clause, allowed acknowledged discrepancies in vocational offerings for men and women prisoners to remain in place, Title IX’s express requirement that equal access be provided to both genders, or access to “comparable programs” be provided, suggests a stricter standard of comparison than what may be tolerated under equal protection analysis.

Recipients of federal financial assistance that fall within the reach of Title IX and make employment available to any of its students must “assure itself that such employment is made

²¹¹ See, 34 C.F.R. § 106.35.

²¹² See, e.g., listing of Youthful Offender Programs in Florida, available at www.dc.state.fl.us/pub/youthful/index.html (Providing many more vocational programs for young male offenders as compared to their female counterparts.)

available without discrimination on the basis of sex.”²¹³ While employment *per se* may be less of an issue for youth, there are employment training and youth workforce programs that may be available to adjudicated youth.²¹⁴ Accordingly, these types of programs as well should be made equally available to both genders.

The applicability of Title IX to athletic programming provided by recipients of federal aid, particularly in educational contexts, has generated the most Title IX litigation. The regulations require equal opportunity to participate in and benefit from any interscholastic, intercollegiate, club, or intramural athletics offered by any federal aid recipient.²¹⁵ This requirement is applicable to detention facilities where boys are provided superior athletic facilities, more recreational opportunities, and/ more coaching or tutoring.²¹⁶

Indeed, judicial enforcement of the requirements of the athletic provisions of Title IX provides insight into how courts should address the application of Title IX to juvenile facilities. Like some facilities in the juvenile justice system, athletic teams are often gender separated, and Title IX allows such separation, provided that equality of opportunity remains.²¹⁷ In *Cohen v. Brown University*, the First Circuit explained that Title IX imposes a requirement that institutions receiving federal funding must effectively meet its students’ interest and abilities in athletics under 34 C.F.R. § 106.41(c)(1).²¹⁸ The Ninth Circuit elaborated on this requirement, noting that Title IX is also a tool for remedying past discrimination resulting from stereotyped notions of

²¹³ See, 34 C.F.R. § 106.38.

²¹⁴ See, e.g., FL ST § 985.315 (Outlining the Legislatures intent to provide technical and vocational work-related programs to youth in placement).

²¹⁵ See, 34 C.F.R. § 106.41.

²¹⁶ See 34 C.F.R. § 106.41(c).

²¹⁷ See, 34 C.F.R. § 105.41

²¹⁸ 101 F.3d 155, 161 (1st Cir. 1996).

women’s interests and abilities.²¹⁹ Accordingly, recipients supported by federal funding must take a proactive approach in ensuring that the foundational assumptions of their programming, as well as any effects of that programming, promote gender equality.²²⁰ Programming decisions that rely upon “archaic” gender assumptions amount to intentional discrimination in violation of Title IX.²²¹

C. The Scope of the Institutional Programs Subject to Comparison

The third area of dispute that surfaced in the adult prison cases is the institutional scope of the challenge that must be brought to come within the purview of Title IX.²²² Does the Act require courts to compare every program run by a state correctional agency in order to determine if the Act is being violated?

The strict language of the Act and regulations implies the opposite: that if any program run by a larger entity violates the Act the entire agency is subject to Title IX liability.²²³ This reading best promotes the purpose of Title IX -- to promote equality and increase opportunities for all women and girls. In a corrections context this is even more pronounced because, “(a) prisoner has no liberty interest in being housed in a particular facility.”²²⁴ Accordingly, the only way to insure the equality of educational opportunity mandated by Title IX to any individual girl

²¹⁹ Neal v. Bd. of Tr. of the California State Univ., 198 F.3d 763, 768-68 (9th Cir. 1999).

²²⁰ See, e.g., Communities for Equity v. Michigan High School Athletic Association, 178 F.Supp. 2d 805 (W.D. Mich. 2001).

²²¹ See Pederson v. Louisiana State University, 231 F.3d 858 (5th Cir. 2000).

²²² See *Jeldness* 30 F.3d at 1225, (allowing comparison of two facilities); *but see, Klinger* (requiring a system-wide look).

²²³ See 20 U.S.C. §§ 1681-1688 (Title IX”), and 45 C.F.R. § 106.2 (clarifying the definitions of the terms in the act). “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. 20 U.S.C § 1687(1)(A) provides that the term program or activity, as used in the language of the act applies to “all of the operations of ... a department, agency special purpose district, or other instrumentality of a state or of a local government.” In addressing individualized programming the regulations make it clear that exclusion from any part of a program or activity imposes liability. See, e.g, 34 C.F.R. § 106.34 (“A recipient shall not provide any course or otherwise carry out any of its educational program or activity separately on the basis of sex. . . .“

is to allow courts to look at individual boys' and girls' facilities side-by-side to determine if equal opportunity is available, or whether discrimination exists within a single facility where girls and boys reside together.

The scope of the programs to be examined in litigation will most likely be determined by considering what individual entity is the recipient of federal funds, be it a local or state agency. System-wide inquiries do not dilute the efficacy of Title IX in promoting equality of programming. Rather, litigation challenging entire juvenile systems of care may highlight the gross disparity of programming and opportunities between boys and girls in juvenile facilities.

Conclusion

Girls in the juvenile justice system are like unexpected guests who arrive too late to find a seat at the table. The door is wide open to them, but there is little to sustain them once they enter. The qualitative and quantitative deficiencies in gender appropriate services for adjudicated girls that we have described in this article require prompt and thoughtful attention from public officials, policymakers, administrators and providers, judges, and lawyers. In this article, we have offered a suggested blueprint for legal challenges that may be brought to remedy some of the disparities and disadvantages that girls face. But as lawyers, we occupy only a few seats at this table. We urge all of the individuals who share the responsibility of meeting the needs of these young women to also look behind them, and make room.

²²⁴ Olim v. Wakinekona, 461 U.S. 238, 244-45 (1983)