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# A New Approach to Juvenile Justice: An Analysis of the Constitutional and Statutory Issues Raised by Gender-Segregated Juvenile Courts

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# A New Approach to Juvenile Justice: An Analysis of the Constitutional and Statutory Issues Raised by Gender-Segregated Juvenile Courts

Katherine M. Harrison\*

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## INTRODUCTION

Around a large table in the Orange County Superior Courthouse sits a group of important women discussing difficult juvenile court cases. Commissioner Jane Shade, the presiding judge of the Orange County Girls Court, leads the meeting. Five cases are on calendar for the afternoon, and those around the table listen intently as one of the social workers talks about the first girl's week. The Department of Health representative then discusses the girl's mental health status. Next, the Department of Education representative talks about the girl's recent performance in school. These women clearly know the girl well and they discuss her situation in detail. Commissioner Shade draws the discussion on this first case to a close, noting how well the girl is doing and what progress she has made since her last court date. Only then do they move on to the second girl on calendar. The attention to detail and enthusiasm with which the girls are discussed at the meeting make clear that these women take seriously their roles as mentors.

During the summer of 2010, I had the privilege of working at the Orange County Juvenile Court. While there, I observed the proceedings in delinquency courtrooms, dependency courtrooms, and the Girls Court. I also observed the creation of the Boys Court. The Boys and Girls Courts are gender-segregated<sup>1</sup> collaborative courts, which serve to focus attention on the individual boys and girls in the juvenile dependency system.<sup>2</sup> Throughout the summer, I was able to observe the enthusiasm and dedication of the people who work at the Orange County Juvenile Court, and I saw how those sentiments transferred to the creation and implementation of their Girls and Boys Courts.

The juvenile justice system has evolved in recent years. For instance, the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative ("JDAI")

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1. While the terms sex and gender are often used interchangeably in the literature regarding gender segregation, the term gender is used to refer to gender and sex segregation in the context of the Boys and Girls Courts. This is because, presumably, if a male individual identifies as a female and lives life as a female, she will be grouped in the Girls Court rather than the Boys Court, thus segregating by the cultural notion of gender. Similarly, a sex-typical male will be grouped in the Boys Court, thus segregating by sex. These two examples illustrate that Boys and Girls Courts allow for classifications based on both gender and sex. This Note uses the word gender to refer to these classifications in the Boys and Girls Courts because ultimately, the classification is based on gender if it takes into account an individual's gender identity when classifying that individual, whether or not that gender identity is consistent with his or her sex. However, the word sex is used instead of the word gender when addressing the biological arguments that arise in this context. For a discussion of the biological and cultural differences between the terms, see Leslie Bender, *Sex Discrimination or Gender Inequality?*, 57 *FORDHAM L. REV.* 941, 945-46 (1989).

2. See Collaborative Courts, OCCOURTS, <http://www.occourts.org/directory/collaborative-courts> (last visited Mar. 30, 2012) (Collaborative courts "are specialized court tracks that address underlying issues that may be present in the lives of persons who come before the court on criminal, juvenile, or dependency matters. These life-changing programs involve active judicial monitoring, a team approach to decision making, and include the participation of a variety of different agencies, such as Probation and health treatment providers.").

strives to find alternatives to incarceration for juveniles.<sup>3</sup> Some counties have developed programs centered on the individual needs of boys and girls in juvenile detention centers.<sup>4</sup> Hawaii has developed a Girls Court to help girls navigate the delinquency system,<sup>5</sup> focusing not on the detention aspects of the system, but rather on structuring the girls' court visits and other activities in ways conducive to their rehabilitation. Similarly, on the dependency side, the Orange County Superior Court has developed collaborative Boys and Girls Courts to help dependent youths navigate the court system and learn to cope with the various issues they face.

While these programs have made a valuable contribution to the innovation of the juvenile justice system, gender-segregated courts raise several equal protection concerns. The gender-segregated court programs serve admirable purposes, but many of them are arguably unrelated to gender segregation. For that reason, they are unlikely to meet intermediate scrutiny, the standard applied to analyze an equal protection challenge on the basis of gender, and are therefore likely to violate the Equal Protection Clause of the Fourteenth Amendment. In addition, the hiring of all-female staffs in the Girls Court programs is likely an act of impermissible employment discrimination under the Equal Protection Clause and Title VII of the Civil Rights Act.

This Note focuses on two questions related to Equal Protection. First, it analyzes the issues raised by gender-segregated juvenile courts in both the dependency and delinquency systems. Second, it addresses the equal protection and statutory issues raised by the hiring of all-female staffs for the Girls Courts. This Note discusses three collaborative courts—Orange County's Girls and Boys Courts, which are dependency courts, and Hawaii's Girls Court, which is a delinquency court.<sup>6</sup> Part I describes the juvenile justice system in general and the Orange County and Hawaii collaborative courts in particular. Part II discusses the intermediate scrutiny standard, determines whether these courts satisfy that standard, and discusses possible alternatives that will more likely satisfy the standard. Part III examines the employment discrimination concerns raised by the

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3. Juvenile Detention Alternatives Initiative, ANNIE E. CASEY FOUND., <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative.aspx> (last visited Mar. 30, 2012) (JDAI "was designed to support the Casey Foundation's vision that all youth involved in the juvenile justice system have opportunities to develop into healthy, productive adults. . . . JDAI focuses on the juvenile detention component of the juvenile justice system because youth are often unnecessarily or inappropriately detained at great expense, with long-lasting negative consequences for both public safety and youth development.").

4. Thomas Carroll, *Gender and Juvenile Justice: New Courts, Programs Address Needs of Girls*, YOUTH L. NEWS (July–Sept. 2009), [http://www.youthlaw.org/publications/yln/2009/july\\_september\\_2009/gender\\_and\\_juvenile\\_justice\\_new\\_courts\\_programs\\_address\\_needs\\_of\\_girls](http://www.youthlaw.org/publications/yln/2009/july_september_2009/gender_and_juvenile_justice_new_courts_programs_address_needs_of_girls).

5. *Welcome to Hawai'i Girls Court*, HAW. GIRLS CT., <http://www.girlscourt.org> (last visited Mar. 30, 2012).

6. These are court programs, rather than detention facilities, which raise other constitutional issues.

all-female staff of the Girls Courts in order to determine the feasibility of implementing or maintaining these structures from an employment standpoint.

## I. UNDERSTANDING THE JUVENILE JUSTICE SYSTEM AND THE INDIVIDUAL COLLABORATIVE COURTS

This Part provides background information on the juvenile justice system, as well as a specific look at each collaborative court at issue in this Note. Section A discusses the juvenile justice system. Section B discusses the different circumstances of boys and girls in relation to this system, providing context for why individual attention to the distinct situations of male and female offenders is necessary. Section C describes the Orange County collaborative dependency courts. Finally, Section D provides an overview of Hawaii's collaborative delinquency court.

### *A. Description of the Juvenile Justice System*

The juvenile justice system has two separate components: delinquency and dependency. The delinquency system determines whether a minor has broken the law and how he or she should be punished or rehabilitated.<sup>7</sup> The dependency system, on the other hand, protects children who have been abused or neglected, physically, emotionally, or both, by their primary caregivers.<sup>8</sup> The dependency system takes children out of harmful family situations and plays a temporary role until a child can be placed in a permanent home, whether with the child's family, a legal guardian, or an adoptive family.<sup>9</sup> The goal of the dependency system is to place children in the best possible familial environment.<sup>10</sup> The delinquency and dependency systems are necessarily linked; children who have been abused or neglected "are at greater risk for delinquency, violence, self-destructive behaviors," and other negative outcomes than children who have not been abused or neglected.<sup>11</sup>

Gender-segregated collaborative courts exist in both the dependency and the delinquency systems. Orange County's programs are dependency courts, addressing the needs of youths when they have been neglected or abused. Hawaii's Girls Court program is a delinquency court, dealing with the retribution and rehabilitation of juveniles who have committed crimes. While there is a difference

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7. LaShanda Taylor, *A Lawyer for Every Child: Client-Directed Representation in Dependency Cases*, 47 FAM. CT. REV. 605, 613 (2009) (quoting MICHAEL D. GRIMES, PATCHING UP THE CRACKS: A CASE STUDY OF JUVENILE COURT REFORM 12 (2005)).

8. *Id.*

9. THE 15TH ANNUAL REPORT ON THE CONDITIONS OF CHILDREN IN ORANGE COUNTY 119 (2009), available at <http://ochealthinfo.com/docs/occp/report2009/index.htm> [hereinafter CONDITIONS OF CHILDREN].

10. *Id.*

11. *Id.* at 117.

between dependency and delinquency court proceedings, the line between the two is very thin. Research has shown that children who have been abused or neglected, often resulting in their entrance into the dependency system, “are at greater risk for delinquency . . . .”<sup>12</sup> Later, when children turn eighteen and leave the dependency system, they typically lack “adequate independent living skills.”<sup>13</sup> The consequence is that many experience “incarceration, homelessness, poverty, and under/unemployment.”<sup>14</sup> Thus, young adults previously in the dependency system often become involved in the adult criminal system. For this reason, both delinquency and dependency collaborative courts focus on many of the same issues.

These collaborative courts differ from traditional juvenile courts, where meetings about the boys and girls happen only in the courtroom. In traditional delinquency courtrooms, the only people present are the child, the child’s parent or guardian in some cases, the child’s attorney, the District Attorney, a court clerk, a court reporter, and the judge. In traditional dependency courtrooms, attorneys are generally present for all parties, including the child, the parents, and the Department of Social Services. Many of the same parties are involved in both traditional proceedings and in collaborative court meetings. Rather than acting as adversaries as they would in traditional court proceedings, however, these individuals work together in the collaborative courts to reach the best solution for each child. Of course, the goal of all juvenile court proceedings is to achieve the best outcome for each child. Arguably, though, the collaborative courts are more effective at reaching the goal because all parties strive to work together. The ultimate focus of the juvenile justice system is rehabilitation,<sup>15</sup> and a nonadversarial conversation among various parties working together facilitates that outcome.

Other counties have implemented collaborative juvenile courts of varying structures. The Middle School Education Court (MSEC) in Santa Clara County, for example, strives “to help foster children attain academic success through

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12. *Id.*

13. *Id.* at 121.

14. *Id.* For a study on the transition from foster care into adulthood focusing on a sample of young people from Iowa, Wisconsin, and Illinois, see *Midwest Evaluation of the Adult Functioning of Former Foster Youth*, CHAPINHALL, <http://www.chapinhall.org/research/report/midwest-evaluation-adult-functioning-former-foster-youth> (last visited Mar. 30, 2012). The study found that forty-five percent of young men and eighteen percent of young women reported that they had been incarcerated when the study followed up on the participants at age twenty-three or twenty-four. See MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 23 AND 24, at 7 (2010), available at [http://www.chapinhall.org/sites/default/files/Midwest\\_Study\\_ES\\_Age\\_23\\_24.pdf](http://www.chapinhall.org/sites/default/files/Midwest_Study_ES_Age_23_24.pdf). Participants of the study earned a median income of \$8,000 per year, compared to a median of \$18,300 for their peers who were not a part of the foster care system. *Id.* at 5.

15. Brenda Gordon, Note, *A Criminal’s Justice or a Child’s Injustice? Trends in the Waiver of Juvenile Court Jurisdiction and the Flaws in the Arizona Response*, 41 ARIZ. L. REV. 193, 197 (1999).

appropriate educational placements and support.”<sup>16</sup> Various child welfare advocates collaborate to help the approximately twenty-four youths in this program.<sup>17</sup> Santa Clara County also has a Girls Drug Court, with a treatment program that serves as an alternative to incarceration.<sup>18</sup> San Mateo County has a delinquency Girls Court, where the treatment program at the detention facility, known as the Margaret Kemp Camp for girls, provides counseling, speakers, yoga classes for anger management, and other programs specifically focused on successfully rehabilitating the girls.<sup>19</sup> Alameda County has a treatment program for girls convicted of prostitution offenses that allows girls to avoid detention at juvenile hall and instead attend treatment programs while remaining in their communities.<sup>20</sup> This Note focuses on and compares Orange County’s dependency Boys and Girls Courts and Hawaii’s delinquency Girls Court because they are gender-segregated court systems rather than gender-segregated detention facilities, and because they have similar structures despite their differences.

### *B. Boys and Girls in the Juvenile Justice System*

Male delinquents outnumber female delinquents in the juvenile court system.<sup>21</sup> “In 2006, arrests of boys represented more than [seventy percent] of all juvenile arrests.”<sup>22</sup> Even so, the number of girls entering the system over the past ten years has significantly increased.<sup>23</sup> In 1980, girls accounted for twenty percent of juvenile arrests. That number jumped to twenty-nine percent in 2002 and 2003, and stayed there in 2006.<sup>24</sup> Although the number of female arrests continues to rise, girls are still considered the “forgotten few” in the juvenile justice system.<sup>25</sup> A limited number of studies focus “specifically on girls’ court processing, and many important studies do not include girls in their samples or do not analyze the data separately” from the boys’ data.<sup>26</sup>

Both boys and girls in the dependency system are often victims of abuse and neglect, which can potentially lead to delinquency, violence, self-destructive

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16. Kristy Luk, *New Juvenile Dependency Court Focuses on Foster Youth Education*, YOUTH L. NEWS (Oct.–Dec. 2011), [http://www.youthlaw.org/publications/yln/2011/winter\\_2011\\_2012/new\\_juvenile\\_dependency\\_court\\_focuses\\_on\\_foster\\_youth\\_education](http://www.youthlaw.org/publications/yln/2011/winter_2011_2012/new_juvenile_dependency_court_focuses_on_foster_youth_education).

17. *Id.*

18. Carroll, *supra* note 4.

19. *Id.*

20. *Id.*

21. Anne Bowen Poulin, *Female Delinquents: Defining Their Place in the Justice System*, 1996 WIS. L. REV. 541, 541 (1996).

22. *Fact Sheet: Juvenile Delinquency*, U.S. DEP’T HEALTH & HUM. SERVICES, <http://aspe.hhs.gov/hsp/08/boys/FactSheets/jd/report.pdf> (last visited Mar. 30, 2012).

23. Alison S. Burke, *Girls and the Juvenile Court: An Historical Examination of the Treatment of Girls*, 47 CRIM. L. BULL. 117, 117 (2011).

24. *Id.* at 117–18.

25. *Id.* at 118 (quoting Ilene R. Bergsmann, *The Forgotten Few: Juvenile Female Offenders*, 53 FED. PROBATION 73 (1989)).

26. *Id.*

behaviors, and substance abuse.<sup>27</sup> Youths in the dependency system also “experience emotional trauma resulting from [the] chronic rejection, loss of affection, [and] betrayal” they have experienced as a result of the neglect they have suffered.<sup>28</sup>

Girls are more likely to be arrested for status or moral offenses, a tendency that juvenile courts, at their inception, were designed to address.<sup>29</sup> Status offenses are offenses related to conduct that would be legal for an adult but illegal for a child.<sup>30</sup> Examples of such conduct are truancy, running away, and possession of alcohol.<sup>31</sup> In the early twentieth century, eighty percent of girls brought into the juvenile justice system were charged with offenses associated with immorality rather than criminal offenses.<sup>32</sup> Today, girls continue to be arrested for status offenses at higher rates than boys.<sup>33</sup> Females “account for the majority of arrests for certain types of offenses such as running away—fifty-nine percent—and prostitution and commercialized vice—sixty-nine percent.”<sup>34</sup> The fact that girls are arrested and jailed for these moral offenses is a problem because the delinquency system is more punitive now than it was in the past.<sup>35</sup> Although girls “are generally brought into the system for lesser offenses than most male offenders, their case dispositions are often as severe or more severe than their male counterparts.”<sup>36</sup>

Generally, the triggering events that lead to boys’ involvement in the juvenile justice system are different than those affecting girls. This generalization may highlight “natural” distinctions between boys’ and girls’ delinquency even before arrest.<sup>37</sup> Victimization is a risk factor for boys and girls, but it seems to be a “stronger predictor among females.”<sup>38</sup> Ninety-two percent of girls in the California juvenile justice system “report some form of emotional, physical, or sexual abuse.”<sup>39</sup> Self-reported abuse is significantly lower in boys, although boys

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27. CONDITIONS OF CHILDREN, *supra* note 9, at 117.

28. *Id.*

29. Poulin, *supra* note 22, at 546.

30. Laura A. Barnickol, Note, *The Disparate Treatment of Males and Females Within the Juvenile Justice System*, 2 WASH. U. J.L. & POL’Y 429, 430 (2000).

31. Governor’s Juvenile Justice Advisory Comm., *At-Risk and Delinquent Girls in the Juvenile Justice System*, WASH. ST. DEP’T SOC. & HEALTH SERVICES 3 (2008), [www.dshs.wa.gov/word/ojj/GirlsPolicyBriefFinalMarch08.doc](http://www.dshs.wa.gov/word/ojj/GirlsPolicyBriefFinalMarch08.doc).

32. Burke, *supra* note 23, at 119.

33. See Poulin, *supra* note 21, at 546; *Girls and Boys in the Juvenile Justice System: Are There Differences That Warrant Policy Changes in the Juvenile Justice System?*, FUTURE CHILD. (2008), [http://www.princeton.edu/futureofchildren/publications/highlights/18\\_02\\_Highlights\\_08.pdf](http://www.princeton.edu/futureofchildren/publications/highlights/18_02_Highlights_08.pdf) [hereinafter *Girls and Boys*].

34. *Girls and Boys*, *supra* note 33.

35. Poulin, *supra* note 21, at 542.

36. Barnickol, *supra* note 30, at 446.

37. Governor’s Juvenile Justice Advisory Comm., *supra* note 31, at 2.

38. Elizabeth Cauffman, *Understanding the Female Offender*, 18 FUTURE CHILD. 119, 129–30 (2008).

39. *Id.* at 130.

may be more likely to underreport.<sup>40</sup> Family discord is also a risk factor for both genders, but “[p]oor emotional ties to family are more strongly associated with violence in girls than in boys.”<sup>41</sup> For both males and females, drug and alcohol abuse and failure in school can lead to involvement in criminal activity.<sup>42</sup> However, as noted by Lorri Caprista, the supervising probation officer in an all-girl San Mateo County detention program, when girls get into trouble with the law, they tend to blame themselves rather than others.<sup>43</sup> As a result, girls are more likely to engage in self-harm than boys.<sup>44</sup>

The separation of girls’ and boys’ programs acknowledges that girls generally react differently than boys do to traumatic events, even when the actual events may be identical.<sup>45</sup> Addressing the differences in the ways girls and boys respond to the difficult events in their lives is a primary focus of gender-segregated court programs. The importance of addressing these differences has increased with the growth in the number of girls in the juvenile justice system.<sup>46</sup> In sum, gender-segregated courts arose to provide individual attention to the often distinct needs of boys and girls because girls have historically received harsher punishments for status offenses, because girls react differently to external stimuli and tend to enter the delinquency and dependency systems for different reasons than boys, and because girls and boys tend to react differently to traumatic events.

### C. Orange County’s Dependency Courts

Each of Orange County’s dependency Boys and Girls Courts has about thirty youths—a miniscule percentage of the total number of youths in the Orange County dependency system. On average, 3,500 children in Orange County are removed from abusive home environments each year.<sup>47</sup>

Judge Carolyn Kirkwood, the presiding judge of the Juvenile Court from 2008 through 2010, found teenage girls to be a population that was both generally underserved and also particularly at-risk in Orange County.<sup>48</sup> Commissioner Jane Shade hears all Girls Court cases, and every member of the Girls Court staff is female. The collaborators include the judge, attorneys, court staff, and representatives from probation, the Department of Education, the Department of Health, and Court Appointed Special Advocates (CASA).<sup>49</sup> The thin line between

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40. *Id.*

41. *Id.*

42. Carroll, *supra* note 4.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *About Orangewood Children’s Foundation*, ORANGEWOOD CHILD. FOUND., <http://www.orangewoodfoundation.org/about.asp> (last visited Mar. 30, 2012).

48. Carroll, *supra* note 4.

49. CASA volunteers advocate for abused and neglected children in the dependency system.

the juvenile dependency and delinquency systems is apparent at these meetings; probation officers often attend because the girls in this dependency court are also often involved in the delinquency system.

Orange County's Boys Court program aims to "give the youth most at risk some dedicated, specialized attention that helps them finish high school, learn life skills, live in a more stable environment and develop confidence."<sup>50</sup> Judge Maria Hernandez hears all cases in this court, which has many of the same staff members as the Girls Court. (Unlike Girls Court, which has an all-female staff, Boys Court does not have an all-male staff.) Judge Hernandez brings in male law enforcement officers to act as mentors for the boys.<sup>51</sup>

Each week, the members of the Girls and Boys Court staff meet to talk in depth about each juvenile they have on calendar for the week. The juveniles do not attend these meetings, but the members of the court teams get to know the children through their discussions at these meetings, through their interactions with the children in the courtroom, and during other visits the staff members have with the juveniles. After the team meetings, the juveniles come to court for their sessions.

The structure of the Orange County Girls and Boys Courts fosters genuine connections between the court staff and the youths in the programs. At meetings, the social workers show photos of the girls and boys and tell stories about them. Whenever one of the youths does well in school or succeeds in some way, the members of the court staff seem genuinely proud. Conversely, when a juvenile gets into trouble that leads to a delinquency proceeding, each member of the court staff seems to feel a heightened duty to help get him or her back on track. These courts strive to embody the notion of a collaborative effort to help the participating juvenile; the staff's dedication to the programs and to the participating youths is worthy of recognition.

One of the goals of the Orange County Girls and Boys Courts is to expose the youths to positive experiences. Many of the youths in the program have never left Orange County and have little conception of what the world beyond their locale has to offer. Through field trips to the planetarium, the Getty Museum, and Rogers Gardens, and activities such as rock climbing, surfing, and day hikes to local wilderness areas, the Orange County Girls and Boys Courts strive to show the youths in their courts the variety of experiences open to them.

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Their role is to help these children navigate through the system and to act as positive role models for the children they are assigned to. *About Us*, CASA FOR CHILD., [http://www.casaforchildren.org/site/c.mtJSJ7MPisE/b.5301303/k.6FB1/About\\_Us\\_\\_CASA\\_for\\_Children.htm](http://www.casaforchildren.org/site/c.mtJSJ7MPisE/b.5301303/k.6FB1/About_Us__CASA_for_Children.htm). (last visited Mar. 30, 2012).

50. Don J. DeBenedictis, *O.C. to Start Teen Foster Boys' Court*, DAILY J., Aug. 12, 2010, at 4, available at <http://www.courts.ca.gov/documents/ocfoster-boyscourt.pdf>.

51. *Id.*

*D. Hawaii Delinquency Court*

There are two main differences between the Orange County programs and the Hawaii program. First, Hawaii has only a Girls Court, with no separate counterpart for boys. Second, the Orange County programs are dependency courts, while the Hawaii program is a delinquency court. Like Orange County, the Hawaii Girls Court has an all-female staff and gender-specific programming. The programming “seeks to recognize the fundamental differences between male and female juvenile offenders as well as their different pathways to delinquency . . . .”<sup>52</sup>

Probation officers in Hawaii’s mainstream system refer girls to the Girls Court.<sup>53</sup> Participation in the Girls Court is voluntary; there are weekly activities that involve a high level of engagement and commitment not only from the participating girl, but also from her parent or guardian, as well as program staff. If either the girl or her family members are not willing to participate in the program, the mainstream delinquency system remains available as an option.<sup>54</sup>

The Hawaii Girls Court convenes once every four weeks in an open court setting, in contrast to the dependency courts’ closed sessions. All of the girls in the court program, along with their families, attorneys, and probation officers, are present. The girls are able to learn from each others’ experiences and share with one another. Unlike Orange County’s dependency courts, where the bulk of these discussions are held in private, sensitive issues are addressed in a group setting, with all of the girls present. As discussed in Section II.C.2 of this Note, the structure of the Hawaii court may make it more difficult to mix boys and girls than in Orange County’s model.

The Hawaii Girls Court program is structured “to address the unique needs of girls.”<sup>55</sup> There is a focus on building relationships because “relationships are central in girl[s]’ lives and . . . healthy connections are essential to their mental health and well-being.”<sup>56</sup> The program also provides “service opportunities for girls to foster positive community involvement while instilling value on helping others.”<sup>57</sup> Perhaps most importantly, the program adopts a holistic view, addressing “the whole girl in the context within which she lives and the influences that shape her life. This involves examining her physical and emotional/mental health, educational, and cultural domains.”<sup>58</sup> In particular, the Hawaii Girls Court

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52. *Welcome to Hawai‘i Girls Court*, HAW. GIRLS CT., <http://www.girlscourt.org> (last visited Mar. 30, 2012).

53. Telephone Interview with Leah M. Nahale, Program Coordinator, Hawaii Girls Court (Dec. 29, 2011).

54. *Id.*

55. *Our Mission & Program Values*, HAW. GIRLS CT., <http://www.girlscourt.org/mission.html> (last visited Mar. 30, 2012).

56. *Id.*

57. *Id.*

58. *Id.*

addresses trauma treatment, mental health treatment, domestic violence prevention, teen pregnancy prevention, and substance abuse treatment.<sup>59</sup>

## II. EQUAL PROTECTION ANALYSIS OF GENDER-SEGREGATED COURTS

Segregation by gender is inherently an equal protection issue, which means such segregation will be legal only if it meets intermediate scrutiny. Section A of this Part discusses why the existence of gender-segregated courts is an equal protection issue. Section B discusses the intermediate scrutiny standard applicable to the equal protection issues raised by gender-segregated courts. After the framework for the analysis is described, Section C discusses various arguments as to whether these courts meet equal protection analysis.

### *A. Maintaining Gender-Segregated Courts Is Inherently an Equal Protection Issue*

The Equal Protection Clause of the Fourteenth Amendment says: “No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>60</sup> In *Frontiero v. Richardson*, the Supreme Court explicitly held that dividing girls and boys into separate courts raises equal protection concerns. The *Frontiero* Court held that “classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny.”<sup>61</sup> The Court reaffirmed this holding in *Mississippi University for Women v. Hogan*,<sup>62</sup> acknowledging that an express separation of the sexes triggers equal protection analysis. The Court determined that “[b]ecause the challenged policy expressly discriminate[d] among applicants on the basis of sex, it [was] subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.”<sup>63</sup> *Mississippi University for Women* involved a nursing school located at the all-female Mississippi University for Women.<sup>64</sup> A male prospective student sought to enroll in the program, and although he was fully qualified, he was denied admission solely because of his gender.<sup>65</sup> The school in *Mississippi University for Women* expressly discriminated based on gender, as do the gender-segregated juvenile courts discussed here. Therefore, this practice in the juvenile justice context should automatically raise an equal protection issue.

The argument against the notion that the separation of individuals by gender is inherently an equal protection issue arises from the fact that, as a society, we

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59. *Services & Partnering Agencies*, HAW. GIRLS CT., <http://www.girlscourt.org/partners.html> (last visited Mar. 30, 2012).

60. U.S. Const. amend. XIV, § 1.

61. *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (footnotes omitted).

62. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

63. *Id.* at 723.

64. *Id.* at 720.

65. *Id.* at 720–21.

tolerate gender segregation in many contexts where we would not tolerate racial segregation, such as in bathrooms, locker rooms,<sup>66</sup> and dressing rooms. This argument has two weaknesses. First, gender segregation in these contexts is still an equal protection issue; it is permitted because it arguably meets intermediate scrutiny.<sup>67</sup> There are, however, strong arguments that gender segregation in the context of bathrooms, locker rooms, and dressing rooms does not always meet intermediate scrutiny, as in the case of transgendered individuals, who cannot comfortably use gender-segregated bathrooms.<sup>68</sup> The second weakness, relevant in this situation, is that segregation by gender has different implications in different contexts. Gender segregation in the context of court programs is different from gender segregation in locker rooms. There are actual physical and biological differences between the sexes that give rise to privacy concerns that may justify segregation of bathrooms and dressing rooms. Separation by sex in any area that does not involve such privacy concerns, however, such as schools and court programs, runs a greater risk of being based on factors that may not survive even deferential levels of scrutiny, such as when based on assumptions of one gender's inherent inferiority. Notions of inherent inferiority were the concern with racial segregation as well. For these reasons, separation on the basis of sex in all situations is an equal protection issue, and while it may meet intermediate scrutiny in some contexts, it may not in others.

Further support for treating gender segregation as an equal protection issue is found in the equal protection analysis of racial segregation. In *Johnson v. California*, the Supreme Court considered the California Department of Corrections' unwritten policy of segregating prisoners entering prison facilities by race for up to sixty days.<sup>69</sup> The state's purpose was to prevent violence involving racial gangs.<sup>70</sup> Although the Court left it to the lower courts to determine whether the state's policy of segregating based on race was permissible, the Court determined that all racial classifications must be analyzed using strict scrutiny,

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66. *Sullivan v. City of Cleveland Heights*, 869 F.2d 961, 964 (6th Cir. 1989) (holding that a young female hockey player on an otherwise all-male team was not denied equal protection, despite the fact that she was not allowed to change in the team locker room and instead had to change in the women's restroom down the hall).

67. *See, e.g., Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010) ("Just as the law tolerates same-sex restrooms or same-sex dressing rooms, but not white-only rooms, to accommodate privacy needs, Title VII allows an employer to respect a preference for same-sex health providers, but not same-race providers."); *see also Ludke v. Kuhn*, 461 F.Supp. 86, 97 (S.D.N.Y. 1978) (recognizing protection of the privacy right as an important objective, but in the case of excluding a reporter from the Yankee locker room, the policy of excluding female sports reporters was not substantially related to the privacy of players. Thus, the sex segregation of the locker room was analyzed as an equal protection issue and, in this unique case, did not meet intermediate scrutiny.).

68. *See generally* Alex More, Note, *Coming out of the Water Closet: The Case Against Sex Segregated Bathrooms*, 17 TEX. J. WOMEN & L. 297 (2008).

69. *Johnson v. California*, 543 U.S. 499, 502 (2005).

70. *Id.*

even if they are “benign” classifications.<sup>71</sup> Thus, regardless of the context, racial segregation is an inherent equal protection issue. This is because of the fear that racial classifications “are motivated by an invidious purpose.”<sup>72</sup> Therefore, pursuant to *Johnson v. California*, racial separation always requires equal protection analysis.

In light of *Johnson*, the separation of boys and girls into different court programs should be viewed as inherently raising equal protection concerns. Sex, like race, is an immutable characteristic, and our society has historically discriminated on the basis of sex. Additionally, like race, sex is often a visible characteristic. Situations exist, of course, in which a person’s particular race or sex is not obvious, but they are nevertheless both visible characteristics. The risk of motivation by an invidious purpose with regard to sex segregation is similar to that presented in the context of racial segregation; the history of sex discrimination gives credence to the idea that separation by sex should be considered an inherent equal protection issue. While the context of segregation of court programs is different than that of detention facilities—the situation in *Johnson*—the comparison is relevant because *Johnson* declared racial segregation an inherent equal protection issue regardless of the context.<sup>73</sup> The argument here is that gender segregation should also be viewed as an inherent equal protection issue regardless of the context.

Even if separation of the genders is not inherently an equal protection issue, it is nevertheless an equal protection issue in this context because boys and girls are treated differently as a result of the separation. These differences will be discussed further in Section C.

#### *B. The Level of Scrutiny for Gender-Based Classifications*

In an equal protection analysis, the first step is to identify the government’s classification and determine how the government draws a distinction among individuals.<sup>74</sup> In this instance, the distinction is based on gender. The second step of the analysis is to determine the appropriate level of scrutiny.<sup>75</sup> For gender classifications, the appropriate level of scrutiny is intermediate scrutiny.<sup>76</sup>

When intermediate scrutiny applies, “a law is upheld if it is substantially related to an important government purpose . . . . The means used need not be necessary, but must have a ‘substantial relationship’ to the end being sought.”<sup>77</sup> The Court in *United States v. Virginia* reiterated the rule that “[p]arties who seek to

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71. *Id.* at 505.

72. *Id.* at 506.

73. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 718 (3d ed. 2009).

74. *Id.*

75. *Id.* at 719.

76. *Id.*

77. *Id.*

defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”<sup>78</sup>

The government purpose, or 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.”<sup>79</sup> In discussions of gender discrimination, often the focus is on discrimination against women. However, “[t]he fact that the classification expressly discriminates against men rather than women does not protect it from scrutiny.”<sup>80</sup>

Gender segregation may also meet intermediate scrutiny if the segregated facilities are “separate but substantially equal.” The Supreme Court in *United States v. Virginia* used the standard articulated in the lower court’s dissent, namely that an arrangement “that ‘could survive equal protection scrutiny’” is “single-sex schools with ‘substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, . . . faculty[,] and library resources.’”<sup>81</sup> This suggests that two separate gender-segregated programs, one for boys and the other for girls, could meet intermediate scrutiny if they are substantially equal.

The doctrine of “separate but equal” arose in the Supreme Court’s equal protection analysis of racial segregation in schools.<sup>82</sup> The Court in *Plessy v. Ferguson* expressly approved racial segregation in the education context, stating that “[i]f the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically.”<sup>83</sup> Over fifty years later, the Court in *Sweatt v. Painter* found that a separate law school for African American students was not “substantially equal.”<sup>84</sup> The Court did not overrule “separate but equal,” but it required that the two establishments be substantially equal.<sup>85</sup> Four years later, the Court famously held “separate but equal” impermissible with regard to racial segregation in public schools in *Brown v. Board of Education*.<sup>86</sup>

Although the doctrine of “separate but equal” has been overruled in the context of racial segregation, it continues to be used in the context of gender segregation. The Supreme Court in *United States v. Virginia* used the “substantially equal” language from *Sweatt v. Painter* and altogether neglected to mention *Brown*’s

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78. *United States v. Virginia*, 518 U.S. 515, 531 (1996) (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136–37 (1994), and *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

79. *Id.* at 533.

80. *Orr v. Orr*, 440 U.S. 268, 279 (1979) (citing *Craig v. Boren*, 429 U.S. 190, 218 (1979)).

81. *Virginia*, 518 U.S. at 547 n.17 (alteration in original) (quoting *United States v. Virginia*, 44 F.3d 1229, 1250 (4th Cir. 1995) (Phillips, J., dissenting)).

82. *Plessy v. Ferguson*, 163 U.S. 537 (1897).

83. *Id.* at 551–52.

84. *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

85. *Id.* at 635.

86. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

absolute prohibition of racial segregation.<sup>87</sup> Because “substantially equal” is an equal protection analysis for gender-segregated programs, the standard is still intermediate scrutiny.

As evidenced by the use of the “substantially equal” standard for gender segregation, once an equal protection issue is raised, the courts view gender differently than race. This discussion goes beyond the determination of whether there is an equal protection issue to whether the Equal Protection Clause has been violated, but it is interesting to compare the analyses for racial and gender segregation. For example, racial integration facilitates racial equality. With regard to gender equality, however, some argue that separation facilitates equality by helping females come out of their shells and by potentially closing the gender gap.<sup>88</sup> In addition, there are actual differences between the genders, both physiological and psychological.<sup>89</sup> As discussed in Section II.C.4, attributes that are unique to one sex may justify government action that segregates by sex, as long as the attributes are not based on stereotypes.<sup>90</sup>

### C. Do the Courts at Issue Meet Intermediate Scrutiny?

There may be various government purposes at work in maintaining gender segregation in collaborative courts. This Section analyzes whether such segregation is substantially related to such purposes. Subsection 1 discusses remedying past discrimination as an important purpose for the gender-segregated courts. Subsection 2 discusses the exclusivity of the programs as an important purpose. Subsection 3 addresses whether diversity of court programs available can serve as an important purpose for gender-segregated courts. Subsection 4 discusses whether addressing the individual needs of the juveniles is an important purpose substantially related to the gender segregation of these courts, and Subsection 5 analyzes whether the dependency Boys and Girls Courts are “separate but substantially equal.” Subsection 6 draws conclusions from the analysis, primarily that Orange County’s dependency courts are most likely to meet the intermediate scrutiny standard if they ensure their Boys and Girls Courts are substantially equal,

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87. United States v. Virginia, 518 U.S. 515, 547 n.17 (1996) (quoting United States v. Virginia, 44 F.3d 1229, 1250 (4th Cir. 1995) (Phillips, J., dissenting) (citing *Sweatt*, 339 U.S. at 634)).

88. Rebecca A. Kiselewich, Note, *In Defense of the 2006 Title IX Regulations for Single-Sex Public Education: How Separate Can Be Equal*, 49 B.C. L. REV. 217, 252 (2008).

89. *Id.* There is a blurring of the lines between biological and cultural differences between the sexes because of the cultural aspects of gender. Because this complex issue goes beyond the scope of this Note, it will not be discussed here. The purpose of this Note is to present the equal protection arguments as they have been made. For further discussion on this topic, see More, *supra* note 68, at 301–05; see also Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled “Other,”* 48 HASTINGS L.J. 1223, 1235–47 (1997); see also Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 87–92 (2008).

90. Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 893–900 (1971).

and that the best argument for the constitutionality of Hawaii's delinquency Girls Court is the exclusivity of the benefits afforded to the girls participating in the court.

### *1. Remedying Past Discrimination in Juvenile Court Programs*

The Supreme Court has allowed disparate treatment of genders when the purpose behind it is remedial.<sup>91</sup> For example, in *Califano v. Webster*, “the Court upheld a congressional scheme that used a more favorable formula for women” than men in calculating social security retirement benefits.<sup>92</sup> The Court reasoned that “[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as . . . an important governmental objective.”<sup>93</sup>

This analysis necessitates a look at the history of discrimination against girls in the delinquency system, the remedying of which may be an important purpose substantially related to the establishment of an all-girls court. Due to “the system’s focus on male offenders, gender bias has been a long-term problem within the juvenile justice system.”<sup>94</sup> As a result “of this gender bias, young delinquent females are less likely to receive the effective treatment upon which the juvenile justice system’s *parens patriae* principle is based.”<sup>95</sup> Because society typically views rebellious behavior among female adolescents as more deviant and less acceptable, girls are more likely to be arrested and to receive harsher sentences for status offenses, even though boys commit an equal number of such offenses.<sup>96</sup> Research shows that adolescent female offenders generally receive harsher sentences than young male offenders receive for the same crimes.<sup>97</sup> This is because girls are more often detained for status offenses, ostensibly in order to protect them.<sup>98</sup> Status offenses are seen as less serious when committed by males, arguably because of the societal norms that girls will be obedient and boys will inevitably misbehave.<sup>99</sup> These societal norms make it less socially acceptable for a girl to act out, so she is more likely to be punished than a boy who commits the same act.

The juvenile court was originally perceived as an entity charged with preventing girls from becoming “morally depraved,” which resulted in harsher sentencing for “moral” crimes.<sup>100</sup> Few studies of the delinquency courts focus on

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91. David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 COLUM. J. GENDER & L. 51, 105 (2011).

92. *Id.*

93. *Califano v. Webster*, 430 U.S. 313, 317 (1977).

94. Barnickol, *supra* note 30, at 441.

95. *Id.* at 442.

96. *Id.* at 438.

97. *Id.* at 446.

98. *Id.*

99. *Id.*

100. Burke, *supra* note 23, at 120.

girls' court processing, and "many important studies do not include girls in their samples or do not analyze the data separately."<sup>101</sup> Consequently, any changes made to the delinquency system as a result of these studies likely do not take into account the needs of females in the system. It is important to note, however, that this Subsection focuses only on the delinquency system. While the delinquency and dependency systems are closely related, this discrimination argument would be difficult to apply to the Orange County Boys and Girls Courts because of the lack of evidence of past discrimination in the dependency system.

The Supreme Court, "[i]n evaluating other affirmative action programs . . . has insisted upon a particularized showing of discrimination within the setting or institution in question, and has rejected generalized statistical data about the industry-wide discrimination. This requirement applies even under the 'relaxed' scrutiny of the intermediate test for gender discrimination," as in *Mississippi University for Women*.<sup>102</sup> *United States v. Virginia* established that a "particularized showing of disadvantage or exclusion" could justify a "remedial single-sex program."<sup>103</sup> As articulated in *Wygant v. Jackson Board of Education*, the Court has required "some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."<sup>104</sup> In *Mississippi University for Women*, the Court acknowledged that "[i]n limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened" by prior discrimination.<sup>105</sup> However, "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."<sup>106</sup> In *Mississippi University for Women*, the school "made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field."<sup>107</sup> For that reason, the Court did not uphold the compensatory purpose as a sufficiently important one.

Justifying gender segregation in these collaborative courts on the grounds of remedying past discrimination would require a particularized showing of discrimination on the part of the court in question. The delinquency Girls Court was created due to the influx of girls entering the delinquency system in Hawaii,

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101. *Id.* at 118.

102. Galen Sherwin, *Single-Sex Schools and the Antisegregation Principle*, 30 N.Y.U. REV. L. & SOC. CHANGE 35, 60 (2005).

103. *Id.* at 59.

104. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

105. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982) (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975)).

106. *Id.* (quoting *Weinberger*, 420 U.S. at 648) (internal quotation marks omitted).

107. *Id.* at 729.

not because of any cited discrimination in that system.<sup>108</sup> In order for the Girls Court to assert in court that its separate treatment of girls is justified, it would need to show that remedying past discrimination (such as harsher sentences for girls convicted of the same crime as boys)—not a demographic shift like the increase in girls entering delinquency—is the program’s purpose.

A showing of past discrimination in Orange County’s dependency system would also be necessary in order to justify the dependency Boys and Girls Courts on the basis of remedying past discrimination. One way that the Girls Court could demonstrate discrimination that might then justify remedial action could be a showing that girls were more often left in large group homes rather than in placements with foster families because group homes have more strict security and protect girls from their supposed tendencies to commit immoral acts. In the context of the Boys Court, past discrimination that may justify the Boys Court could be, for example, a showing that boys were left in group homes because of a stereotypical notion that they would not thrive amid the closer relationships formed in foster homes. Past discrimination of these types or others, if proven, would justify gender segregation in the Girls and Boys Courts.

## 2. *Exclusivity of Benefits Afforded Each Gender*

An argument for the constitutionality of gender-segregated courts is that certain programs benefitting one gender cannot be effectively provided if the other gender is present. In *United States v. Virginia*, the Supreme Court considered the argument that “[a]lterations to accommodate women would necessarily be ‘radical,’ so ‘drastic,’ . . . as to transform, indeed ‘destroy,’ [the Virginia Military Institute (VMI)]’s program” and that “[n]either sex would be favored by the transformation.”<sup>109</sup> Virginia argued that “[m]en would be deprived of the unique opportunity currently available to them; women would not gain that opportunity because their participation would ‘eliminat[e] the very aspects of [the] program that distinguish [VMI] from . . . other institutions of higher education in Virginia.”<sup>110</sup> Despite these arguments, the Court held that the separate male and female programs violated equal protection.

Similarly, such a justification would likely not be upheld with regard to the Orange County dependency courts. Each court has a different focus, and boys and girls have different needs when it comes to their delinquency and dependency issues. There is sufficient overlap between the two groups, however, that they could be combined without “eliminat[ing] the very aspects of [the] program that distinguish”<sup>111</sup> Girls Court from Boys Court, and both courts from every other

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108. *Why have a Girls Court?*, HAW. GIRLS CT., <http://www.girlscourt.org/faq.html#why>. (last visited Mar. 30, 2012).

109. *United States v. Virginia*, 518 U.S. 515, 540 (1996).

110. *Id.*

111. *Id.*

court program in the country. Although part of what distinguishes these courts is their gender-specific nature, the most significant characteristic of both the Boys and Girls Courts is the individual attention given to the participating youths. For this reason, the discussions that take place in Girls Court are often similar to those in Boys Court. These discussions occur in the out-of-court meetings with the Girls and Boys Court staffs, as well as in the confidential court sessions the youths attend individually. Thus, the only situations in which boys and girls would interact are during field trips and group activities. Integrating the Boys and Girls Courts would involve substantial changes only to the structure of the group activities. Changes to pre-court meetings would be minor, requiring discussions about boys and girls in the same meeting. Another change would be the presence of male staff members in these meetings and in court proceedings that now have only female staff members. Implementation of this change would be a minor administrative matter, easily accomplished, although such a change may be substantial in the eyes of a girl who may be uncomfortable discussing intimate details of her life with males in the courtroom. For these girls, it may be possible for all males to leave the courtroom temporarily. Additionally, the fact that all sensitive discussions about, or with, the youths are in meetings away from other youths would not change. Thus, any sensitive discussions would not be hindered by the presence of youths of the opposite gender. The only substantial change would be that group activities would include members of both genders, which would give boys and girls opportunities to interact with one another.

In contrast, with regard to the Hawaii delinquency court, gender integration may actually eliminate the aspects that make the court effective. Part of the Hawaii court's focus is to have the girls share their experiences in open court.<sup>112</sup> Unlike the Orange County courts, where each youth is discussed separately and has a confidential court appearance, the girls in the Hawaii court have court appearances as a group. This raises issues of how to have open discussions about gender-specific topics if boys and girls are in the conversation together. Youths may be hesitant to share sensitive information if they feel they will be judged by individuals of the other gender. For this reason, integrating the Hawaii Girls Court would eliminate some of the aspects that may make it effective. This is a strong argument for the constitutionality of the Hawaii Girls Court, but a court would be unlikely to find the Girls Court constitutional without a similar program for boys. Thus, the Hawaii court could create a "separate but substantially equal" court for boys. This concept will be further discussed in Subsection 5. Another possibility would be to keep the group court appearances gender-segregated while integrating all of the other activities involved in the court, such as field trips, job fairs, and community service activities. Integration during these programs may further the

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112. *What is Girls Court?*, HAW. GIRLS CT., <http://www.girlscourt.org/aboutus.html>. (last visited Mar. 30, 2012).

goals of these collaborative courts because it will give boys and girls a chance to interact with one another.

### 3. Diversity of Programs Available to Juveniles

Increasing the diversity of available court options is another possible justification for maintaining these gender-segregated courts. This type of diversity is different from racial, gender, or religious diversity, and poses an interesting argument to consider in this context. Most notably, this diversity justification has been used in the context of gender-segregated schools. The Office for Civil Rights of the U.S. Department of Education “specifically identifies diversity as one of the important governmental objectives being served through allowing the option of single-sex education.”<sup>113</sup> The Supreme Court in *United States v. Virginia* acknowledged that diversity in the types of educational atmosphere offered can serve the public good, but decided that it was not a sufficiently important purpose to meet intermediate scrutiny.<sup>114</sup> The Court affirmed that “[a] policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender.”<sup>115</sup> A justification for state action “must describe actual state purposes, not rationalizations for actions in fact differently grounded.”<sup>116</sup>

The diversity argument is strained in the context of the gender-segregated juvenile courts because these courts are not just one choice among many. In Orange County, boys and girls are chosen to participate based on their level of need for special assistance. They can opt out of the collaborative court, but the alternative is the mainstream dependency court system. The same is true for the Hawaii Girls Court.<sup>117</sup> In both cases, there is no alternative collaborative court that is gender-integrated. While the Boys and Girls Courts offer another path for some youths in the juvenile court system, the argument that this is just one choice among many choices cannot be sustained in this context. Similarly, in *United States v. Virginia*, the diversity justification was not upheld because Virginia failed to show that VMI was established or maintained with a view to diversifying the educational opportunities available.<sup>118</sup> The same is true here. The availability of these courts may be a stepping-stone on the way to having a diverse range of court options available to the youths, but it remains to be seen whether these courts are the first of many options.

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113. Kiselewich, *supra* note 88, at 241.

114. *Virginia*, 518 U.S. at 524.

115. *Id.* at 525 (quoting *United States v. Virginia*, 976 F.2d 890, 899 (4th Cir. 1992)) (internal quotation marks omitted).

116. *Id.* at 535–36.

117. Telephone Interview with Leah M. Nahale, Program Coordinator, Hawaii Girls Court (Dec. 29, 2011).

118. *Virginia*, 518 U.S. at 539.

In order for the diversity argument to be upheld in this context, there would need to be evidence of an effort to continue to diversify the range of court programs available in the juvenile justice system. This would show that establishing diversity in court programs is an actual state purpose, not a “rationalization[] for [an] action[] in fact differently grounded.”<sup>119</sup> Eventually, a gender-segregated collaborative court would need to be one option among many that youths could choose from. It would help if several other options were already available, but as long as there is evidence of a move toward such diversification, the argument may be offered as the purpose behind creation of these courts. In Orange County, the creation of an integrated collaborative court program in addition to the gender-segregated collaborative courts would be a move toward further diversification of the juvenile justice system. Creating a gender-integrated collaborative court would be helpful for the success of the diversity argument in Hawaii as well, but the creation of a program serving the individual needs of male offenders would be the first step. As highlighted in *United States v. Virginia*, a policy of diversity must do more than favor one gender.

#### 4. Individual Needs of the Juveniles

Another purpose of gender-segregated courts is to serve juveniles’ individual needs. It is unquestionably an important state objective to ensure that youth services are available where they are needed. To that end, each gender faces issues that are unique to that gender. While boys and girls may share some of the same risk factors, such as poverty, child abuse, and living in dangerous neighborhoods, these risk factors tend to impact boys and girls differently.<sup>120</sup> Young female offenders have higher rates of “‘internalizing’ mental disorders (e.g., depression and anxiety) while boys have higher rates of ‘externalizing’ disorders (e.g., ADHD, conduct disorder, and other behavioral problems).”<sup>121</sup> Delinquent girls also “report being exposed to child abuse at a much higher rate than boys.”<sup>122</sup> Ninety-two percent of girls in the California juvenile justice system “report some form of emotional, physical, or sexual abuse,” whereas some studies report abuse rates for boys at around twenty-five or thirty percent.<sup>123</sup> A potential reason for this discrepancy is the possibility that boys are less likely to report certain kinds of abuse.<sup>124</sup>

Due to the differences between boys and girls, the gender-segregated dependency courts in Orange County “are meant to be ‘gender-responsive not just

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119. *Id.* at 535–36.

120. *Girls and Boys*, *supra* note 33, at 2–3.

121. *Id.* at 2.

122. *Id.* at 3.

123. Cauffman, *supra* note 38, at 130.

124. *Id.*

gender-specific.”<sup>125</sup> In general, “girls respond well to the relationships they develop with the female social workers and mentors . . . while boys learn by doing.”<sup>126</sup> The girls’ delinquency court in Hawaii also recognizes that “[r]elationships are important and fundamental to girls’ lives. Girls need time to talk, process their feelings and develop healthy relationships of trust as well as interdependence with other females.”<sup>127</sup>

While these differences between boys and girls are important, it is difficult to distinguish the legitimate use of these differences from an impermissible reliance on stereotypes. A government action may not “ignore individual characteristics found in both sexes in favor of an average based on one sex.”<sup>128</sup> In other words, in order for the government to take into account gender-based characteristics in legislation or programs, the characteristics must be “found in all (or some) women but *no* men, or in all (or some) men but *no* women.”<sup>129</sup> Undoubtedly, boys and girls have biological differences, such as the marked effect of testosterone on the male brain.<sup>130</sup> It does not follow, however, that these biological differences are exclusively found in only one sex. “Exposure to high levels of testosterone before birth . . . has been linked with aggressive behavior in both males and females.”<sup>131</sup> The distinctions between boys and girls offered as justifications for their segregation, such as their distinct tendencies toward mental disorders, or their varying needs for interpersonal relationships, are not characteristics entirely unique to one sex. “Normative males and females tend to exhibit asymmetric frontal brain activation, with boys having greater right frontal activation and girls having greater left frontal activation.”<sup>132</sup> While this is evidence that a typical male brain works differently than a typical female brain, not all males and females have brains that function in the characteristic way. Antisocial females tend to exhibit more right frontal activation, and consequently do not often “exhibit the enhanced verbal abilities or emotion regulation associated with dominance of the left hemisphere, as is more commonly observed in normative girls.”<sup>133</sup> This potential for differences in brain function between and among the sexes blurs the lines of what is “typical” behavior for each sex. In fact, “so far as appears, it is only physical characteristics which can be said with any assurance to be unique to one

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125. DeBenedictis, *supra* note 50.

126. *Id.*; see Kiselewich, *supra* note 88, at 229–30.

127. *Activities and Community Service*, HAW. GIRLS CT., <http://www.girlscourt.org/activities.html> (last visited Mar. 30, 2012).

128. Brown et al., *supra* note 90, at 893.

129. *Id.*

130. Kiselewich, *supra* note 88, at 229–30.

131. Cauffman, *supra* note 38, at 129.

132. *Id.*

133. *Id.*

sex. So-called 'secondary' biological characteristics and cultural characteristics are found to some degree in both sexes."<sup>134</sup>

Nevertheless, there is a possibility that these gender-segregated courts could reduce gender stereotypes. To relate the issue to schools, "[i]n coed schools, it is often assumed that interests and talents are gendered."<sup>135</sup> Research shows that girls in coeducational settings are "more likely to hide their intelligence, lack self-confidence, and shy away from 'male' subjects like math and science."<sup>136</sup> Boys also struggle in coeducational settings, "especially in areas such as reading and writing, where studies show that girls tend to outperform them."<sup>137</sup> Boys and girls seem to avoid subjects stereotypically associated with the opposite gender when they are in a coeducational setting. This may also apply in the Orange County Boys and Girls Court setting when the youths attend job fairs or visit universities. If girls and boys were able to participate in these activities separately, possibly they would be more open-minded to hearing and inquiring about the various opportunities available to them. This is a minor exception, however, to the general assertion that integration of the Boys and Girls Court programs would be beneficial for boys and girls. Certain events could possibly be segregated, but the programs as a whole would be integrated. This structure would allow boys and girls to interact in positive settings, which would help with their socialization skills.

It is difficult to create a program designed around the differences between genders when there are some boys who have a greater need for the kinds of interpersonal relationships sought by girls, some boys who have internalizing disorders, and some girls who learn by doing rather than by cultivating relationships. A program focusing only on the general tendencies of the genders may not adequately serve a boy or girl who does not fit that general pattern. A program that recognizes these general differences between the genders and counsels youths with these tendencies in mind, but has the ability to recognize other tendencies, would better serve each individual juvenile. Further, a program that offers many programs to both boys and girls would give the youths the ability to pick the program that best serves their own particular interests and needs. For example, it would give a boy the opportunity to cultivate relationships and a girl the chance to learn by doing.

These considerations are true both for dependency and for delinquency. On the dependency side, Orange County already has a Girls and Boys Court, but these courts should be integrated. On the delinquency side, Hawaii has only a Girls

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134. Brown et al., *supra* note 90, at 893.

135. Lea Hubbard & Amanda Datnow, *Do Single-Sex Schools Improve the Education of Low-Income and Minority Students? An Investigation of California's Public Single-Gender Academies*, 36 ANTHROPOLOGY & EDUC. Q. 115, 123 (2005).

136. Kiselewich, *supra* note 88, 229–30.

137. *Id.*

Court, so the need is especially present for an integrated court, or a substantially equal Boys Court, that takes into account the special needs of both boys and girls.

In sum, programs should take into account the differences between boys and girls, as these differences exist and have a real impact on the lives of these juveniles. It is important also to recognize, however, that not every person fits into the typical gender roles, so programs that focus entirely on the traits that are generally true for each sex may not adequately serve those who do not fit traditional gender roles. An ideal program would be one where the staff members have gender-responsive training for both male and female issues and actually interact with both boys and girls. This way, staff members would have the resources to respond to juveniles who do not fit the traditional roles.

##### 5. “Separate but Substantially Equal”

The above discussions lead to the question of whether the creation of paired but separate boys’ and girls’ courts is less constitutionally objectionable than the creation of either a boys’ or a girls’ court alone. The answer is likely yes, as long as the separate programs are “substantially equal.”<sup>138</sup> As mentioned in Section II.B, the Supreme Court in *United States v. Virginia* acknowledged that “single-sex schools with ‘substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, . . . faculty[,] and library resources’” could survive equal protection scrutiny.<sup>139</sup> Thus, two separate gender-segregated programs will likely meet intermediate scrutiny if they are substantially equal.

An important counterargument is that the separation of the genders runs the risk of devolving into gender stereotypes, such as the assumptions that all girls thrive on relationships and that all boys prefer to do physical activities. To the extent that the Orange County and Hawaii collaborative courts are dominated by programs driven by stereotypical notions of boys and girls, separate may never truly be equal, nor even “substantially equal” as the law requires. If the Girls Court offers programming that some of the boys would benefit from but are not getting, or vice versa, some youths are deprived of what they truly need because their needs do not fall under common ideas of what each gender requires. It might be possible to avoid this kind of situation if each juvenile receives sufficient individual attention. In the case of the Orange County collaborative dependency courts, enough individual attention is given to each juvenile so that the court staff can recognize his or her individual needs. Because of this, separate may be capable of being equal in some circumstances. Assuming that “substantially equal” allows

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138. See *Sweatt v. Painter*, 339 U.S. 629, 634 (1950); *United States v. Virginia*, 518 U.S. 515, 547 n.17 (1996).

139. *Virginia*, 518 U.S. at 547 n.17 (alteration in original) (quoting *United States v. Virginia*, 44 F.3d 1229, 1250 (4th Cir. 1995) (Phillips, J., dissenting)).

for a certain level of inequality, this is a meaningful guideline for the constitutionality of these courts.

As currently constituted, the collaborative court programs offered for boys and girls in both the delinquency and the dependency contexts are not substantially equal. In the case of Orange County's two separate dependency court programs for the boys and the girls, this failing is related to the courts' different foci. For example, Boys Court focuses more on gang violence and less on teenage parenting, whereas Girls Court is the opposite. Gang violence, however, is also an important issue in girls' lives; anywhere from eight to thirty-eight percent of gang members are female.<sup>140</sup> Also, teen parenting is important for boys to learn about, as boys become parents too. If, as mentioned above, sufficient individual attention is given to each juvenile so that the court staff recognizes any unique needs, this problem could be substantially avoided.

A more important difference between the two courts is that girls have all same-sex role models, whereas boys do not. All members of the Girls Court are female, including the judge, a feature that the Girls Court staff members are very proud of.<sup>141</sup> In the Boys Court, however, the judge and many of the attorneys are female. Some may argue that having a choice between male and female role models is more beneficial, so girls are actually at a disadvantage by having same-sex role models. However, the relevant inquiry is not which gender is at an advantage, but rather whether the boys and girls are treated differently. Regardless of which role model structure is better, the courts are not substantially equal.

The situation in Orange County is directly comparable to one the Supreme Court considered in *United States v. Virginia*.<sup>142</sup> The Virginia Military Institute (VMI) was an all-male military academy that used specific types of "adversative" instruction.<sup>143</sup> In response to litigation that originated with a complaint from a high school female seeking to gain admission to VMI, Virginia created the all-female Virginia Women's Institute for Leadership (VWIL).<sup>144</sup> The Court analyzed the two programs and determined that the men's and women's programs were not substantially equal and the segregation was therefore unconstitutional.<sup>145</sup>

The Hawaii delinquency Girls Court clearly does not meet the separate but substantially equal standard. Boys and girls are obviously treated differently in this setting because boys do not have a court process tailored to their specific needs in the way that girls do. While the juvenile justice system has historically focused on

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140. Joan Moore & John Hagedorn, *Female Gangs: A Focus on Research*, JUV. JUST. BULL. (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, Rockville, MD), Mar. 2001, available at [http://www.west.asu.edu/ckatz/gangclass/Section\\_1/female.pdf](http://www.west.asu.edu/ckatz/gangclass/Section_1/female.pdf).

141. Carroll, *supra* note 4; see also *Welcome to Hawai'i Girls Court*, HAW. GIRLS CT., <http://www.girlscourt.org> (last visited Mar. 30, 2012).

142. *Virginia*, 518 U.S. at 520.

143. *Id.* at 515.

144. *Id.* at 526.

145. *Id.* at 534, 547 n.17.

boys in general,<sup>146</sup> boys do not have the same gender-responsive and individualized programming as girls do in Hawaii's delinquency system. Arguably, the fact that the delinquency system was traditionally geared toward boys has created resentment toward boys as the "favored" ones and has led to increased focus on the girls and less focus on addressing boys' issues. Christina Hoff Sommers, a former philosophy professor well-known for her critique of late twentieth-century feminism,<sup>147</sup> points out that in society, "boys are resented, being seen both as the unfairly privileged gender and as obstacles on the path to gender justice for girls."<sup>148</sup> Boys are not, however, privileged in the current system; society has changed in the century since the creation of the juvenile justice system,<sup>149</sup> and it follows that the issues boys face in society have also changed. This creation of an all-female court with no counterpart for males is similar to the facts of *Mississippi University for Women*, which involved an all-female nursing program with no male equivalent.<sup>150</sup> That program was deemed unconstitutional in violation of equal protection, even though males could audit courses at Mississippi University for Women or go to a different coeducational school to obtain nursing training.<sup>151</sup>

6. *Summary—An Overall Look at Whether the Delinquency or Dependency Courts Meet Intermediate Scrutiny*

The best argument for the constitutionality of Orange County's dependency Boys and Girls Courts is that they are separate but substantially equal. Presently, they do not meet this standard, primarily because the Girls Court has an all-female staff, whereas the Boys Court has a staff of men and women. Regardless of the good intentions that undoubtedly underlie the decision to structure the courts in this way, it cannot be considered equal to give same-sex role models to one group and not to the other. However, the other aspects of the courts are substantially equal. The structures of the programs are fundamentally the same, and many of the women on the Girls Court staff are also on the Boys Court staff. The programs have similar goals and implement them in similar ways. Each court is focused on achieving the best outcomes for the juvenile participants. Thus, in order to meet the separate but substantially equal standard, the Orange County Superior Court need only implement the same structure for its staffs, whether it chooses a same-sex model or a mixed-sex model. The decision to choose a structure involving an all-male staff for Boys Court and an all-female staff for Girls Court, however, will depend on the constitutionality of assigning staff

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146. Barnickol, *supra* note 30, at 441.

147. *Biography of Christina Hoff Sommers*, AM. ENTERPRISE INST. PUB. POL'Y RES., <http://www.aei.org/scholar/56> (last visited Mar. 30, 2012).

148. CHRISTINA HOFF SOMMERS, *THE WAR AGAINST BOYS* 23 (2000).

149. Burke, *supra* note 23, at 119 ("The first juvenile court was established in 1899 in Cook County, Illinois.").

150. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 720 (1982).

151. *Id.* at 719, 721, 723–24 n.8.

members to the courts on the basis of gender. This discussion is fleshed out below in Part III.

The argument with the greatest likelihood of success for the constitutionality of Hawaii's delinquency Girls Court involves the exclusivity of the benefits afforded to the girls in the program. Exclusivity acts as a justification for the court's segregation only if the benefits afforded the girls could not be provided if boys were present, which is arguably the case. Part of the court's focus is to foster open discussions about gender-specific topics in court. Girls are expected to share personal information in these group settings, and they would arguably feel uncomfortable doing so if boys were present. For this reason, a strong argument can be made that introducing boys into this program would eliminate the elements of the program that are beneficial to the girls. If this does not serve to justify maintaining an all-girls court with no counterpart for boys, Hawaii Court Judiciary could look into creating a separate but substantially equal program for boys, which would put Hawaii's program on the same constitutional footing as the Orange County dependency courts.

The other cited purposes, such as concern for the individual needs of the juveniles, remedying past discrimination, and diversity of court programs are likely not going to be as successful for establishing the constitutionality of either court. Remedying past discrimination and diversity of court programs are compelling reasons for maintaining Girls and Boys Courts, but they are not strong enough to withstand intermediate scrutiny in this context. Each court is focused on addressing the individual needs of the juveniles, which is arguably more effectively done if the genders are segregated because of the gender-focused nature of the guidance given. However, because of the fact that the individual needs of each juvenile do not necessarily map onto the trends for his or her particular gender, the division may be based more on stereotypes than actual differences between the genders. When a particular juvenile has needs different from those of her peers, these courts will ensure that her needs are addressed, because the courts' goal is to serve each juvenile. Thus, catering to the individual needs of the juveniles is ultimately served by the small, collaborative nature of these courts, rather than the gender segregation. Consequently, this important purpose is not substantially related to the gender segregation.

Ultimately, a court may deem these gender-segregated collaborative courts constitutional under the theories described above. If Orange County implements the same staff structure in its Boys and Girls Courts, the courts may well be deemed separate but substantially equal. If a court determines that the Hawaii program will be less effective if integrated, it may be constitutional without the establishment of a substantially equal boys' program. If not, Hawaii could consider establishing a boys' court, which could satisfy the separate but substantially equal standard.

### III. EMPLOYMENT DISCRIMINATION IN THE GENDER-SEGREGATED COURTS

Due to the fact that both of the Girls Courts discussed in this Note employ all-female staffs, another significant issue raised by these courts is whether they discriminate in employment in violation of Title VII of the Civil Rights Act of 1964 or the Equal Protection Clause, both of which forbid discrimination on the basis of gender in hiring and job assignment.<sup>152</sup> Because courts are government employers, equal protection applies in addition to Title VII. The analyses are closely related, and the two claims are often brought together.<sup>153</sup> They are discussed in turn.

#### A. Title VII

Title VII of the Civil Rights Act of 1964 makes clear that it is an unlawful employment practice for an employer to (1) “fail or refuse to hire or to discharge any individual” or (2) “to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee” on the basis of race, color, religion, sex, or national origin.<sup>154</sup> It shall not, however, be

an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of that particular business or enterprise.<sup>155</sup>

While the BFOQ exception applies explicitly only to hiring and firing, “its operation also implicitly applies to employment opportunities. Thus, if an employer restricted the activities of an employee because the same was ‘necessary to the normal operation of that particular business or enterprise,’ then the employer would be relieved of his statutory obligations under the act.”<sup>156</sup>

In the case of the Girls Courts, explicit gender discrimination occurs in the assignment of job opportunities rather than in hiring. Members of the Girls Courts’ staffs are not hired solely for the purposes of serving on the Girls Courts. The attorneys appear in the mainstream courts and the judges hear mainstream court cases. The social workers and probation officers work on many cases

152. See generally Daniel M. Le Vay, Annotation, *Sex Discrimination in Job Assignment or Transfer as Violation of Title VII of Civil Rights Act of 1964* (42 U.S.C.A. §§ 2000e et seq.), 123 A.L.R. Fed. 1 (1995).

153. See 1 SUSAN M. OMILIAN & JEAN P. KAMP, *SEX-BASED EMP. DISCRIMINATION* § 2:1 (2011).

154. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1)–(2) (2006).

155. *Id.* § 2000e-2(c)(1).

156. *Cianciolo v. Members of City Council*, 376 F.Supp. 719, 722 (E.D. Tenn. 1974); see also *Reed v. Cnty. of Casey*, 184 F.3d 597, 599 (6th Cir. 1999) (allowing a BFOQ defense when employer assigned a particular shift on the basis of gender and stating, “facial gender-based discrimination is permitted if gender” is a BFOQ).

outside of the Girls Courts. The Orange County Superior Court and the Hawaii State Judiciary employ court staff. Thus, individuals are not explicitly hired for the purpose of working solely in the Girls Courts, but rather gender is considered in job assignment. There are, however, questions regarding whether maintaining a Girls Court means the employer must effectively hire more women staff because their services are in greater demand. Consequently, it is important to think not only about discriminatory job assignment in this situation, but also the possibility of discriminatory hiring.

The BFOQ exception is interpreted narrowly.<sup>157</sup> The Supreme Court has read the “provision to mean that discrimination is permissible only if those aspects of a job that allegedly require discrimination fall within the ‘essence’ of the particular business.”<sup>158</sup> Another articulation of the Court’s interpretation is “that sex discrimination ‘is valid only when the essence of the business operation would be undermined’ if the business eliminated its discriminatory policy.”<sup>159</sup> A BFOQ may not be premised on “stereotyped characterizations of the sexes.”<sup>160</sup>

The first step in determining whether gender qualifies as a BFOQ is to determine the “essence” of the business.<sup>161</sup> The “essence” of the courts’ business is to address the needs of and rehabilitate youths in the dependency and delinquency systems. In the Girls Courts, role modeling is considered a very important aspect of the programs. In order to determine whether gender is a BFOQ in this instance, it is necessary to examine the treatment of gender as a BFOQ in other businesses focused on rehabilitation, counseling, and role modeling.

Several courts have examined whether role modeling can justify gender as a BFOQ in the context of role modeling and rehabilitation. The only cases that found rehabilitation or role modeling alone as a justification for gender as a BFOQ were those involving detention facilities.<sup>162</sup> Because of the substantial deference to detention facilities,<sup>163</sup> the standard is less stringent regarding what satisfies the requirement for BFOQ. Other cases that determined role modeling or rehabilitation to be a justification for gender as a BFOQ generally involved situations where an individual’s privacy interests were also at play. In *Healey v.*

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157. *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 132 (3d. Cir. 1996).

158. *Id.* (internal quotation marks omitted) (citing *Int’l Union, United Auto., Aerospace and Agr. Implement Workers of America, UAW v. Johnson Controls*, 499 U.S. 187, 201 (1991)).

159. *Healey*, 78 F.3d at 132 (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977)).

160. *Dothard*, 433 U.S. at 333.

161. *Torres v. Wis. Dep’t of Health and Soc. Servs.*, 859 F.2d 1523, 1528 (7th Cir. 1988).

162. *Id.* at 1524 (reversing the district court’s decision that rehabilitation in a detention facility alone cannot be a justification for a BFOQ).

163. *Id.* at 1531 (acknowledging that judgments of penal administrators “are entitled to substantial weight when they are the product of a reasoned decision-making process, based on available information and experience.”); *Henry v. Milwaukee Cnty.*, 539 F.3d 573, 580 (7th Cir. 2008) (citing *Torres* with approval but noting this discretion is not unlimited).

*Southwood Psychiatric Hospital*, the Third Circuit examined the essence of a psychiatric hospital's business to hold that gender was a BFOQ in that context. The court found the essence of Southwood's business to consist of treating "emotionally disturbed and sexually abused adolescents and children."<sup>164</sup> The court recognized that "[r]ole modeling,' including parental role modeling, is an important element of the staff's job, and a male is better able to serve as a male role model than a female and vice versa."<sup>165</sup> The essence of the Hospital's business in that case is very similar to the Girls Courts and Boys Court in that they all give guidance to adolescents with emotional issues, many of whom have been sexually abused. While the court in *Healey* recognized role modeling as an important element of that function, it treated role modeling as important for both males and females. For that reason, *Healey* does not directly map on to the Girls Courts and Boys Court, where same-sex role modeling is only emphasized for females. *Healey* suggests that gender may not be upheld as a BFOQ on the basis of role modeling unless role modeling is the essence of the business for both sexes.

The *Healey* court also discussed the role that staff play in the rehabilitation of children and emphasized that, "[a] balanced staff is . . . necessary because children who have been sexually abused will disclose their problems more easily to a member of a certain sex, depending on their sex and the sex of the abuser."<sup>166</sup> This argument works against maintaining an all-female staff because some of the girls may have suffered abuse by a female, in which case there would be only female staff members to turn to. In fact, statistics show that ninety percent of child sexual abuse is committed by males,<sup>167</sup> leaving a ten percent chance that a female will be abused by another female. This statistic also counsels against having an all-male staff for boys, because they are also more likely to be abused by a male. Thus, the *Healey* court's emphasis on a balanced staff and the importance of role modeling for both boys and girls indicates that Boys and Girls Courts should both have male and female staff members. Taking into consideration the argument that victims of sexual abuse may relate better with members of their own gender—for instance, because a victim may feel more comfortable talking about such things with someone who understands his or her perspective—a meaningful solution would still retain the possibility of same-gender interaction, while not requiring it in all cases.

*Healey* also discusses privacy issues related to hygiene, sexuality, and other concerns of adolescent hospital patients.<sup>168</sup> Child patients often must be

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164. *Healey*, 78 F.3d at 132.

165. *Id.* at 133.

166. *Id.*

167. David Finkelhor, *Current Information on the Scope and Nature of Child Sexual Abuse*, 18 FUTURE CHILD., 31, 31 (1994).

168. *Healey*, 78 F.3d at 133.

accompanied to the restroom, implicating clear privacy considerations.<sup>169</sup> The court considered these privacy elements of the business along with the therapeutic elements and found gender to be a BFOQ under the totality of the circumstances.<sup>170</sup> Other cases upholding privacy concerns in support of a BFOQ arise in the context of businesses that similarly involve the housing of patients and physical contact with people in treatment. For example, privacy concerns can justify a gender-specific BFOQ for the personal hygiene care of mental health patients<sup>171</sup> and the care of retirement home patients.<sup>172</sup> Nursing care of obstetrics patients also raises privacy concerns because of the intimate nature of the interaction between nurse and patient.<sup>173</sup>

The court in *City of Philadelphia v. Pennsylvania Human Relations Commission* found therapeutic purposes, where paired with privacy issues, to satisfy the BFOQ requirement.<sup>174</sup> There, staff of a youth study center served as counselors for youths who had emotional and social concerns.<sup>175</sup> In addition, the staff was required to perform physical body checks and observe the youths taking showers.<sup>176</sup> In yet another case, *Jatczak v. Ochburg*, the District Court of Michigan considered role modeling as a justification for gender as a BFOQ in the context of a childcare worker position that required teaching work skills and professional behavior.<sup>177</sup> The court compared the job to counseling the mentally handicapped, discussing a case where the Equal Employment Opportunity Commission found gender as a BFOQ because the counselors held sex education and individual counseling sessions divided by gender.<sup>178</sup> These counselors also helped clients with toilet training and dressing and served as role models.<sup>179</sup> The *Jatczak* court distinguished the situation before it by noting that counseling and therapy were not provided by the childcare worker, and that there was no intimate body contact between the childcare worker and the clients.<sup>180</sup> Again, role modeling and counseling were considered along with physical privacy concerns, and the *Jatczak*

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169. *Id.*

170. *Id.* at 134 (“We conclude that due to *both* therapeutic and privacy concerns, Southwood is an institution in which the sexual characteristics of the employee are crucial to the successful performance of the job of child care specialist.”) (emphasis added).

171. *Local 567 Am. Fed. v. Michigan Council 25*, 635 F. Supp 1010, 1013 (E.D. Mich. 1986).

172. *Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346, 1353 (D. Del. 1978), *aff’d mem.*, 591 F.2d 1334 (3d Cir. 1979).

173. *Backus v. Baptist Med. Ctr.*, 510 F. Supp. 1191, 1193 (E.D. Ark. 1981) (“There are few duties which a registered nurse can perform in relation to an obstetrical patient which are not sensitive or intimate.”), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982).

174. *Philadelphia v. Pa. Human Relations Comm’n*, 300 A.2d 97, 102–03 (Pa. Commw. Ct. 1973).

175. *Id.* at 103.

176. *Id.* at 101.

177. *Jatczak v. Ochburg*, 540 F. Supp. 698, 704 (E.D. Mich. 1982).

178. *Id.* at 704 n.4.

179. *Id.*

180. *Id.* at 704.

court found no BFOQ, partly because the privacy concerns were not involved. As these courts demonstrate, we must look at whether there are privacy considerations implicated in the Girls Courts.

Because the Girls Courts and Boys Court do not involve the housing of, or physical contact with, the youths, it is unlikely that privacy concerns would support gender as a BFOQ. While some of the girls involved in the Hawaii Girls Court are housed in juvenile detention facilities, the court process itself does not involve housing. Other than the sensitive issues discussed with the girls during court proceedings, there are few, if any, privacy concerns to consider. The privacy concerns that have supported gender as a BFOQ involve actual physical issues, generally with personal hygiene in situations where a person is housed in a facility.<sup>181</sup>

An argument can, however, be made that privacy concerns are at play in the Boys and Girls Courts even if housing and physical contact are not involved. Many of the girls in delinquency and dependency proceedings have suffered some form of abuse,<sup>182</sup> and part of the mission of the Girls Courts is to help rehabilitate these girls. While discussions of abuse do not involve physical contact, which is present in most cases where the Court finds a privacy concern, one could make the argument that the discussions necessary for rehabilitation after abuse, especially sexual abuse, are so personal and intimate that they deserve privacy protection. Sensitive issues arise during these interactions, and girls will arguably only feel comfortable in a rehabilitative setting if surrounded by women. Also, a girl's sexual abuser is significantly more likely to be male,<sup>183</sup> in which case she will very likely feel more comfortable telling a female her most intimate feelings about the situation. Further, the fact that boys experience sexual abuse at lower rates than girls<sup>184</sup> arguably supports maintaining same-gender staffs for girls only. If sexual abuse creates a need to talk to members of the same gender, and if boys experience less sexual abuse, boys may have less of a need to interact only with male staff.

While these arguments are persuasive, it is not clear that they justify gender as a BFOQ. First, courts seem to view privacy as a justification for gender as a BFOQ only when physical issues are involved,<sup>185</sup> so rehabilitation or role

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181. *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 133–34 (3rd Cir. 1996); *see also Fesel v. Masonic Home of Del., Inc.*, 447 F.Supp. 1346, 1353 (D. Del. 1978), *aff'd mem.*, 591 F.2d 1334 (3d Cir. 1979). *See generally* *Local 567 Am. Fed. v. Michigan Council 25*, 635 F. Supp 1010 (E.D. Mich. 1986).

182. Carroll, *supra* note 4; Governor's Juvenile Justice Advisory Comm., *supra* note 31, at 3 ("A national study found that 92 percent of incarcerated girls have experienced one or more forms of physical, sexual or emotional abuse before entering the juvenile justice system.").

183. Finkelhor, *supra* note 167, at 31 (ninety percent of child sexual abuse is committed by males).

184. Governor's Juvenile Justice Advisory Comm., *supra* note 31, at 2; Carroll, *supra* note 4.

185. *Healey*, 78 F.3d at 133–34; *see also Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp.

modeling will not likely justify gender as a BFOQ unless physical privacy issues are present. Second, even if physical privacy were not necessary for role modeling or rehabilitation to justify gender as a BFOQ, it may not apply to all staff members. Gender may be a BFOQ for a girl's therapist, lawyer, or social worker because those are the people with whom she discusses her most intimate thoughts. Other members of the court staff, however, are not generally involved as closely in the discussions with the girls, so the argument that they must be female is not as strong. For this reason, gender may be a BFOQ for particular individuals but perhaps not for the entire Girls Court staff.

### B. Equal Protection

Equal protection analysis of potential gender discrimination in employment is similar to the Title VII analysis. As stated by the Supreme Court in *Dothard v. Rawlinson*, “[i]n the case of a state employer, the [BFOQ] exception would have to be interpreted at the very least so as to conform to the Equal Protection Clause of the Fourteenth Amendment.”<sup>186</sup> This does not mean “that the Equal Protection Clause requires more rigorous scrutiny of a State’s sexually discriminatory employment policy than does Title VII.”<sup>187</sup> Thus, many of the same considerations relevant in Title VII considerations directly parallel the equal protection analysis, and the standard for the two is the same.

To make a claim of employment discrimination under the Equal Protection Clause, “the plaintiff must prove that she suffered purposeful or intentional discrimination on the basis of gender.”<sup>188</sup> Such discrimination will be tolerated only if it is substantially related to an important government purpose.

As recognized in *Schlesinger v. Ballard*,<sup>189</sup> affirmative action considerations may be important enough purposes to justify employment discrimination against males.<sup>190</sup> However, this would require a showing of past discrimination against women in employment in the juvenile courts.<sup>191</sup> Even if such discrimination did exist, these all-female staffs are not hired for the purpose of remedying past discrimination, but rather for role modeling and other such purposes. An

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1346, 1353 (D. Del. 1978), *aff’d mem.*, 591 F.2d 1334 (3d Cir. 1979). See generally *Local 567*, 635 F. Supp. 1010.

186. *Dothard v. Rawlinson*, 433 U.S. 321, 334 n.20 (1977).

187. *Id.*

188. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118 (2d Cir. 2004).

189. *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975) (“[T]he different treatment of men and women naval officers under §§ 6382 and 6401 reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service.”).

190. 1 SUSAN OMILIAN & JEAN KAMP, SEX-BASED EMP. DISCRIMINATION § 2:1 (2011).

191. *Schlesinger*, 419 U.S. at 506–07 (distinguishing *Frontiero v. Richardson* and *Reed v. Reed*, cases in which genders were treated differently because of administrative convenience rather than the fact men and women were dissimilarly situated).

important purpose in equal protection analysis must be the government's actual purpose, not a rationalization for an action "in fact differently grounded."<sup>192</sup>

Many of the same considerations for the Title VII BFOQ analysis apply here. For example, role modeling, discussed in the Title VII analysis as part of the essence of the Girls Courts, is an important purpose for equal protection analysis. Hiring only females for these positions, however, is likely not substantially related to that purpose. As discussed in the Title VII analysis, girls would benefit from having both male and female role models, especially if they suffered abuse by a female.<sup>193</sup> The fact that boys do not have all-male role models in Boys Court also arguably weakens this argument because if same-sex role modeling is an important government purpose, it should be viewed as such for both boys and girls in order for it to be seriously considered. One could challenge this by saying that girls respond more to the relationships they develop with their same-sex social workers and mentors than do boys, so it is not as important for boys to have same-sex role models.<sup>194</sup> While this may be true, such an argument runs the risk of employing stereotypes, which the Supreme Court is particularly concerned about.<sup>195</sup>

Rehabilitation is another important purpose that may ground the decision to maintain an all-female staff. Sensitive issues are discussed with the girls, and it is arguably important for them to be surrounded by females with whom they feel comfortable discussing the struggles they go through. But some girls may feel more comfortable talking to males about certain concerns, which limits the import of this argument. For example, if a girl has had a volatile relationship with her mother and was verbally attacked whenever she talked about boys, she may be more inclined to talk to a male about concerns she has about the opposite sex. Another girl may be more inclined to open up to a male if she has been sexually abused by a female. Thus, while creating the best possible environment for rehabilitation of the girls in Girls Court is an important purpose, it is arguably not substantially related to maintaining completely gender-segregated staffs. In addition, as indicated in the Title VII context, role modeling and rehabilitation likely cannot stand alone to justify a BFOQ, which means they likely are not important purposes that will satisfy intermediate scrutiny.<sup>196</sup>

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192. *United States v. Virginia*, 518 U.S. 515, 536 (1996) ("In cases of this genre, our precedent instructs that benign justifications proffered in defense of categorical exclusions will not be accepted automatically; a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.").

193. *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 133 (3d Cir. 1996).

194. *DeBenedictis*, *supra* note 50.

195. *Cohen*, *supra* note 91, at 105 ("Most commentators who have studied the Court's jurisprudence with respect to sex have similarly concluded that the Court is most concerned with 'the wrong of stereotyping.'").

196. *See Healey*, 78 F.3d at 133; *see also Jatzcak v. Ochburg*, 540 F. Supp. 698, 704 (E.D.C. Mich. 1982); *Philadelphia v. Pa. Human Relations Comm'n*, 300 A.2d 97, 103-04 (Pa. Commw. Ct. 1973).

*C. Employment Discrimination Conclusions*

While the creators and members of the Girls Courts' staffs strongly believe in the benefits of an all-female staff for girls, their stated purposes of role modeling and effective counseling are not likely to stand up to Title VII or equal protection scrutiny. The lack of same-sex role modeling for boys, together with the notion that a same-sex staff may not be beneficial at all if a juvenile would benefit from a mentor of the opposite sex, cut against role modeling as a BFOQ or important purpose. In addition, the fact that courts have not upheld counseling or therapeutic concerns alone as justifications for gender as a BFOQ in the Title VII context indicate that these concerns would likely not be upheld as important purposes in an equal protection analysis. Thus, the assignment of only females to positions in the Girls Courts likely violates Title VII's prohibition against gender discrimination in hiring and job assignment. For this reason, if Orange County decides to make changes in order to make the Boys and Girls Courts substantially equal, one of the first steps it should take is to establish mixed-gendered staffs for both of the courts. The Hawaii Girls Court should also consider hiring both male and female staff members for its court.

## CONCLUSION

Organizers and supporters of the Girls and Boys Courts celebrate their alternative approach to the court process, defined, as they see it, primarily by the courts' same-sex nature. The most important factor to the success of these courts, however, is the sincerity of those involved and their desire to improve the lives of the youths in their courts. This desire has led to the creation of programs that allow for attention to the specific needs of each juvenile involved in the courts. It is important to acknowledge the effectiveness of these programs and recognize that their success is due not to their gender segregation, but rather to their creation and operation with the goal of providing the best possible environment for the youths in the juvenile justice system.

The trend toward innovating the juvenile delinquency and dependency systems to focus more on the individual needs of the youths in these courts should be encouraged. My hope is that those who strive to make these changes can use this Note as a tool for the creation of courts that will serve their purpose of helping youths and will withstand constitutional scrutiny.