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CONSTITUTIONAL LAW—SEPARATE BUT EQUAL: JELDNESS v. PEARCE — AN ANALYSIS OF TITLE IX WITHIN THE CONFINES OF CORRECTIONAL FACILITIES

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CONSTITUTIONAL LAW—SEPARATE BUT EQUAL: *JELDNESS V. PEARCE*—AN ANALYSIS OF TITLE IX WITHIN THE CONFINES OF CORRECTIONAL FACILITIES

INTRODUCTION

Although society generally has attempted to eradicate the separation of persons on the basis of an immutable characteristic,[1] the segregation of prisoners on the basis of sex has withstood this societal evolution. Sexually segregated prisons are, in fact, the "norm" throughout the United States.[2]

Not surprisingly, the brunt of this segregation has fallen upon female prisoners as the minority group within the prison population. Similar to the status of blacks both prior and subsequent to *Plessy v. Ferguson*,[3] women prisoners often are provided with inferior programs, facilities, and conditions of confinement as compared to those afforded their male counterparts.[4] Though generally accepting of this separation, women prisoners have consistently argued for "separate but equal" treatment under the purview of the Equal Protection Clause.[5] The results of these claims, however,

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1. Brown v. Board of Educ., 347 U.S. 483, 494 (1954) (emphasizing that separating students "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

2. *See* Dothard v. Rawlinson, 433 U.S. 321, 326 (1977); Jeldness v. Pearce, 30 F.3d 1220, 1228 (9th Cir. 1994); Ralph R. Arditi et al., Note, *The Sexual Segregation of American Prisons*, 82 YALE L.J. 1229, 1246, 1250-51 (1973).

3. 163 U.S. 537 (1896).

4. *See generally* Arditi, *supra* note 2, at 1231-54; Rosemary Herbert, Note, *Women's Prisons: An Equal Protection Evaluation*, 94 YALE L.J. 1182, 1182-85, 1193-95 (1985).

5. *See* Pargo v. Elliott, 894 F. Supp. 1243, 1265-78 (S.D. Iowa 1995) (alleging disparities between male and female inmates in fifteen areas ranging from security classifications to visitation rights), *aff'd*, 69 F.3d 280 (8th Cir. 1995); West v. Virginia Dep't of Corrections, 847 F. Supp. 402, 404 (W.D. Va. 1994) (challenging ability of state to restrict participation in Boot Camp Incarceration Program to male prisoners); Batton v. North Carolina, 501 F. Supp. 1173, 1175 (E.D.N.C. 1980) (alleging disparities between male and female prisoners in work release, vocational training, recreational opportunities, wages, and access to medical care and law library); Bukhari v. Hutto, 487 F. Supp. 1162, 1165 (E.D. Va. 1980) (challenging disparity between conditions of "C" custody status at the men's and women's prison); Glover v. Johnson, 478 F. Supp. 1075, 1077 (E.D. Mich. 1979) (alleging inequalities in educational and vocational programming, adequacy of facilities, prison industry and wage rates, and work pass programs);

have been strikingly different in light of nearly identical factual allegations.[6]

Recently, aggrieved female inmates have turned to Title IX[7]—which prohibits sex discrimination in federally funded educational programs and activities—in addition to the Equal Protection Clause to rekindle their fight for equality.[8] In light of these new statutory challenges, courts will more frequently face the difficult task of reconciling entrenched and widely accepted penological practices with full effectuation of the congressional command to eliminate sex discrimination. This very dilemma was recently addressed by the United States Court of Appeals for the Ninth Circuit in *Jeldness v. Pearce*.[9] In that decision, the court of appeals concluded that Title IX is violated if there is a lack of equality of opportunity in prison educational programs.[10]

This Note will attempt to decipher the role Congress intended Title IX to play within the context of the prison environment, as well as the level of compliance to which prisons will be held in order to achieve consistency with this role. Specifically, this Note will seek to determine exactly how much "equality" Title IX affords fe-

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Barefield v. Leach, No. 10282 slip op. (D.N.M. Dec. 18, 1974) (alleging constitutional violations in educational programming, conditions of confinement, and the administration of prison regulations).

6. *Compare Pargo*, 894 F. Supp. at 1261 (holding that female inmates at the Iowa Correctional Institute for Women were not similarly situated to various categories of male inmates at selected institutions within Iowa, thereby denying plaintiffs relief under the Equal Protection Clause) *with Glover*, 478 F. Supp. at 1078, 1101 (holding that male and female prisoners were similarly situated, that differences in treatment were gender-related, and that declaratory and injunctive relief for the state's failure to provide substantially equivalent treatment to its female prison population was appropriate).

The one uniformity among courts in analyzing equal protection based claims brought by female prisoners has been the application of a rather ambiguous "parity of treatment" standard. *See, e.g.*, *Batton*, 501 F. Supp. at 1176-77; *Bukhari*, 487 F. Supp. at 1172; *Glover*, 478 F. Supp. at 1079. *But cf. Pargo*, 894 F. Supp. at 1263 (refusing to apply heightened scrutiny to plaintiffs' claims and instead applying only a rational basis standard of review). See *infra* notes 13-16 and accompanying text for a general discussion of the standards of review courts apply to equal protection claims and *infra* notes 17-22 and accompanying text for a general overview of parity of treatment.

7. Pub. L. No. 92-318, 86 Stat. 235 (codified as amended at 20 U.S.C. §§ 1681-88 (1988)).

8. *See* Jeldness v. Pearce, 30 F.3d 1220 (9th Cir. 1994); Women Prisoners v. District of Columbia, 877 F. Supp. 634 (D.D.C. 1994); Klinger v. Nebraska Dep't of Correctional Servs., 824 F. Supp. 1374 (D. Neb. 1993), *rev'd sub nom.* Klinger v. Department of Corrections, 31 F.3d 727 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1177 (1995); Canterino v. Wilson, 546 F. Supp. 174 (W.D. Ky. 1982), *vacated on other grounds*, 869 F.2d 948 (6th Cir. 1989).

9. 30 F.3d 1220 (9th Cir. 1994).

10. *Id.* at 1229.

male prisoners. Part I will give a brief overview of Equal Protection Clause claims. Part II will explore the congressional intent and evolution of Title IX. Part III will discuss the recent Ninth Circuit decision in *Jeldness*, including the district court opinion and the Ninth Circuit's majority and dissenting opinions. Part IV.A will briefly discuss the finding of sex discrimination as analyzed by both the majority and dissenting opinions. Part IV.B will evaluate whether female prisoners alleging unlawful disparate treatment in prison educational programs in fact fare better under Title IX than under the Equal Protection Clause. Part IV.B.2 will consider courts' treatment of sex segregation in public schools under traditional equal protection analysis and in intercollegiate athletic programs under Title IX. This section will propose that application of Title IX within the context of correctional facilities should parallel the manner in which the statute has been applied in intercollegiate athletics.

I. A Brief Overview of the Equal Protection Clause

In the past, female inmates have looked to the Equal Protection Clause of the Fourteenth Amendment for relief from alleged inequitable treatment in the prison environment.[11] In accordance with this clause, plaintiffs claim that they are being denied the equal protection of the law, as afforded similarly situated males, on the basis of their gender.[12]

Under traditional claims of equal protection, courts employ either strict scrutiny,[13] intermediate scrutiny,[14] or rational basis re-

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11. *See supra* note 5 and accompanying text. The Equal Protection Clause provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

12. For an analysis of equal protection claims brought by female inmates, see Herbert, *supra* note 4.

13. Racial classifications are reviewed with strict scrutiny, which requires that the classification be necessary to the accomplishment of a compelling state interest. *See* Palmore v. Sidoti, 466 U.S. 429, 432 (1984); Loving v. Virginia, 388 U.S. 1, 11 (1967). Classifications that burden a fundamental interest are, like racial classifications, also subject to strict scrutiny review. *See* Shapiro v. Thompson, 394 U.S. 618, 630-31, 634 (1969) (holding that right to travel constitutes a fundamental interest). Nevertheless, this facet of the Equal Protection Clause is denied to inmates seeking rehabilitation in prison because courts have ruled that there is no constitutional right to rehabilitation. *See, e.g.*, Newman v. Alabama, 559 F.2d 283, 291 (5th Cir. 1977), *rev'd on other grounds per curiam, sub nom.* Alabama v. Pugh, 438 U.S. 781 (1978). In addition, courts have ruled similarly with regard to education. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 221 (1982); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (holding that education is not a right created by the Constitution and therefore is not a fundamental interest).

view[15] to determine whether a plaintiff's Fourteenth Amendment rights have been violated. Generally, classifications based upon sex have been reviewed with intermediate scrutiny, thus requiring that the classification be substantially related to an important governmental interest.[16]

Courts faced with equal protection claims brought by female prisoners have adopted a variant of intermediate scrutiny review. According to these courts, "'what the Equal Protection Clause requires in a prison setting is parity of treatment . . . between male and female inmates.'"[17] In contrast to intermediate scrutiny, parity of treatment has a less fixed meaning. Though parity is defined as "the quality or state of being equal or equivalent,"[18] courts have consistently held that parity stands for something less than identity of treatment.[19] One court has held that in order to comply with the parity of treatment standard of compliance, prisons must "provide women inmates with treatment and facilities that are substantially equivalent to those provided the men—i.e., equivalent in substance if not in form—unless their actions, though failing to do so, nonetheless bear a fair and substantial relationship to achievement of the [s]tate's correctional objectives."[20]

Despite its promising language, the practical result of the par-

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14. *See infra* note 16 and accompanying text.

15. Classifications based on neutral factors are afforded the most leniency in terms of satisfying the mandates of equal protection. Subject to "rational basis" review, these classifications need only be reasonably related to a legitimate legislative purpose. *See, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568, 592-94 (1979) (holding that regulation prohibiting methadone users from working for transit authority was constitutional).

16. *See* Craig v. Boren, 429 U.S. 190, 197-98 (1976). In applying equal protection analysis, courts also distinguish between facial and non-facial discrimination. Facial discrimination is subject to intermediate scrutiny and occurs when similarly situated individuals are classified on the basis of an impermissible characteristic. Personnel Adm'r v. Feeney, 442 U.S. 256, 272-74 (1979). Non-facial discrimination arises when a neutral policy is at issue. Discrimination on the basis of a facially neutral policy will be subject to intermediate scrutiny only if the policy has a disparate impact on a protected group and was motivated by discriminatory intent. *Id.* at 273, 276.

17. Glover v. Johnson, 478 F. Supp. 1075, 1079 (E.D. Mich. 1979) (quoting Barefield v. Leach, No. 10282 slip op. at 37-38 (D.N.M. Dec. 18, 1974)). Significantly, the parity of treatment standard, so often applied to equal-protection based claims raised in the prison environment, originated in *Barefield*, an unpublished case from the District of New Mexico. For a brief overview of the factual setting of *Barefield*, see *Glover*, 478 F. Supp. at 1078-79.

18. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 856 (1988).

19. *See, e.g.*, Canterino v. Wilson, 546 F. Supp. 174, 210 (W.D. Ky. 1982), *vacated on other grounds*, 869 F.2d 948 (6th Cir. 1989); *Glover*, 478 F. Supp. at 1079, 1087.

20. *Glover*, 478 F. Supp. at 1079. *See also* Batton v. North Carolina, 501 F. Supp. 1173, 1176 (E.D.N.C. 1980) (quoting *Glover*, 478 F. Supp. at 1079).

ity of treatment standard is that, even in cases where a court finds that this standard has not been satisfied, proposed remedies are often too vague to effectuate any substantive changes in the female prisons.[21] The worst case scenario is that plaintiffs are wholly barred from relief because the legitimatized bases for differentiation of the sexes render male and female prisoners not similarly situated.[22] The question that will increasingly be asked, both by ag-

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21. In a class action that began on May 17, 1977, female inmates at Michigan's only women's prison brought an equal protection suit against the Department of Corrections. Glover v. Johnson, 478 F. Supp. 1075, 1076 (E.D. Mich. 1979). The plaintiffs alleged that they were not provided educational, vocational, and employment programs comparable to those offered to male inmates within the state. *Id.* In finding for the plaintiffs on a variety of issues, the United States District Court for the Eastern District of Michigan held that, "women [inmates] are entitled to a greater variety of programming than they are currently offered. . . . [They] have a right to a range and quality of programming substantially equivalent to that offered the men." *Id.* at 1087.

Eighteen years later, the plaintiffs are still struggling to achieve the objectives of equal protection. Glover v. Johnson, 879 F. Supp. 752, 754 & n.2 (D. Mich. 1995). This struggle is caused not only by the defendants' "persistent pattern of obfuscation," but, no doubt, by the ambiguity of the court's 1979 holding. *See also* Stephanie Fleischer Seldin, *A Strategy for Advocacy on Behalf of Women*, 5 COLUM. J. GENDER & L. 1, 10 (1995) ("[W]hile several courts have held that inferior programming for women is unconstitutional, most findings of liability have not resulted in successful remedies.").

22. *See* Klinger v. Nebraska Dep't of Correctional Servs., 824 F. Supp. 1374 (D. Neb. 1993), *rev'd sub nom.* Klinger v. Department of Corrections, 31 F.3d 727, 729 (8th Cir. 1994) (At the trial level, the plaintiffs' complaint alleged both Equal Protection Clause and Title IX violations. On appeal, however, the only relevant claim before the court was the plaintiffs' equal protection claim), *cert. denied*, 115 S. Ct. 1177 (1995). The United States Court of Appeals for the Eighth Circuit concluded that because of the differences in the varying physiological and emotional characteristics of male and female inmates, comparing interprison programs for purposes of equal protection analysis is a "futile exercise." Specifically, the Eighth Circuit stated that:

> [F]emale inmates as a class have special characteristics distinguishing them from male inmates, ranging from the fact that they are more likely to be single parents with primary responsibility for child rearing to the fact that they are more likely to be sexual or physical abuse victims. Male inmates, in contrast, are more likely to be violent and predatory than female inmates.
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> Thus, the programs at [male and female prisons] reflect separate sets of decisions based on entirely different circumstances. When determining programming at an individual prison under the restrictions of a limited budget, prison officials must make hard choices. They must balance many considerations, ranging from the characteristics of the inmates at that prison to the size of the institution, to determine the optimal mix of programs and services.

Id. at 731-32.

Ironically, the Eighth Circuit in *Klinger* intimated that the plaintiffs may have had a viable equal protection claim had they alleged "differences in the process by which program decisions were made at the prisons" as opposed to "differences in programs between prisons." *Id.* at 732 n.4. Thus, the Eighth Circuit concluded that "male and female inmates *are* similarly situated at the beginning of the decisionmaking process, where infinite intervening variables have not yet excessively tainted the comparison between prisons nor are officials' substantive administrative decisions yet at issue."

grieved female inmates and prison administrators, is whether women prisoners fare better under Title IX than they have previously fared under the Equal Protection Clause.

II. BACKGROUND OF TITLE IX

Title IX of the Education Amendments of 1972 provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[23] In accordance with the language of the statute, sex discrimination is a prerequisite to Title IX's application. Stated differently, Title IX applies only to sex discrimination and does not address any of the various forms of dis-

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Id. The Eighth Circuit, however, neither explained why differences rendering male and female inmates not similarly situated (i.e., different mental and emotional states and differences in the sizes of prisons) are *not* present at the decisionmaking stage, nor how differences in the psychological states of male and female inmates prohibit a comparison of programming. The incongruities in the Eighth Circuit's reasoning suggest that the "futility of comparison" of prison programs is attributable to procedural, not substantive, inequities. See Seldin, *supra* note 21, at 9 for further analysis as to why the Eighth Circuit's decision in *Klinger* was incorrect.

The reasoning espoused by *Klinger* is characteristic of the rationale traditionally relied upon by courts when faced with the difficult task of determining when segregation becomes sexually discriminatory and, therefore, unlawful. *See, e.g.*, Timm v. Gunter, 917 F.2d 1093, 1103 (8th Cir. 1990) (holding that a men's and women's state prison were not similarly situated for purposes of privacy rights because of different security concerns at the two institutions), *cert. denied*, 501 U.S. 1209 (1991); Wark v. Robbins, 458 F.2d 1295, 1298-99 (1st Cir. 1972) (upholding differential penalties for male and female escapees because separate facilities with different security characteristics render them not similarly situated); Pargo v. Elliott, 894 F. Supp. 1243, 1252, 1261-62 (S.D. Iowa 1995) (relying on *Klinger* to hold that male and female inmates are not similarly situated and that, therefore, female prisoners' equal protection based suit was without merit), *aff'd*, 69 F.3d 280 (8th Cir. 1995). *See generally* Arditi, *supra* note 2, at 1229-54.

When asked to declare prison protocol unlawful courts have also cited to the intricacies of prison administration and the lack of judicial expertise in the running of prisons. *See* Turner v. Safley, 482 U.S. 78, 84-85 (1987) ("Running a prison is an inordinately difficult undertaking . . . [and] [w]here a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities."); Bell v. Wolfish, 441 U.S. 520, 547 (1979) (noting that the judgment exercised by prison administrators in striking a balance between the rights of prisoners and the demands of institutional security is to be given great deference); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 127-28 (1977) (rejecting claims that restrictions on prison inmate labor union violated inmates' civil rights and recognizing that it is proper to defer to the professional expertise of corrections officials regarding penological objectives).

23. 20 U.S.C. § 1681(a) (1988).

crimination prohibited by other statutes.[24]

The intent with which Title IX was enacted, as well as the premise for its statutory construction, are useful in determining how to apply Title IX in the context of the prison environment.[25] Senator Birch Bayh, chief sponsor and floor manager of Title IX, spoke of the statute as "a strong and comprehensive measure [that] is needed to provide women with solid legal protection from persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women."[26] Thus, from its enactment, Title IX was envisioned to be a remedial tool for victims of sex discrimination.

Generally, Title IX defines educational institutions as "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education."[27] Thus, Title IX applies to both traditional and non-traditional educational institutions. The statute does, however, exempt certain institutions from its scope of coverage. Such exemptions include religious organizations, military training programs, single-sex public educational institutions, fraternities and sororities, boy or girl conferences, father-son or mother-daughter activities, and beauty pageant awards.[28] In light of the rather extensive list of exceptions, the absence of prisons among them is noteworthy.

Though Title IX was adopted in 1972, final implementing regulations did not become effective until July 21, 1975.[29] These regulations provide that Title IX was "designed to *eliminate* . . . discrimination on the basis of sex in any education program or activity receiving Federal financial assistance."[30] Title IX's imple-

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24. *See, e.g.*, Pub. L. No. 88-352, 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e (1988 & Supp. V 1993)). Title VII prohibits employers from discriminating against employees on the basis of "race, color, religion, sex, or national origin." § 2000e-2(a)(1). See also *infra* note 35 for the language of Title VI, 42 U.S.C. § 2000d (1988).

25. For a discussion of the statutory purpose and legislative history of Title IX, see Claudia S. Lewis, Note, *Title IX of the 1972 Education Amendments: Harmonizing Its Restrictive Language with Its Broad Remedial Purpose*, 51 FORDHAM L. REV. 1043 (1983).

26. 118 CONG. REC. 5804 (1972).

27. § 1681(c).

28. These exemptions correspond to §§ 1681(a)(3)-(9), respectively.

29. 34 C.F.R. § 106.1 (1995).

30. *Id.* (emphasis added). According to the Supreme Court in Cannon v. University of Chicago, 441 U.S. 677 (1979), Congress intended Title IX to accomplish this objective in two manners: (1) by prohibiting institutions engaging in discriminatory practices from receiving federal funds; or (2) by awarding individual relief to private

menting regulations, nevertheless, cite to specific instances in which complete "elimination" of discrimination is not mandated. Three areas in which Title IX permits recipients of federal funds to differentiate between the sexes are opportunities for foreign scholarship and study abroad,[31] housing,[32] and athletics.[33]

Title IX is a near mirror image of Title VI of the Civil Rights Act of 1964.[34] The only difference between the two statutes is the type of discrimination prohibited.[35] The similarity in language between Title VI and Title IX is no accident. Congress specifically used Title VI as a model in drafting Title IX.[36]

In the Civil Rights Restoration Act of 1987[37] (the "Act"), Congress explicitly recognized that the cohesiveness of Title IX and its sibling statute extends beyond mere similarity of language. The Act clarified that Title IX and Title VI have a broader scope than that previously assigned to them by the Supreme Court in *Grove City*

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litigants (e.g., "requiring an institution to accept an applicant who had been improperly excluded"). *Id.* at 704-05.

31. A recipient educational institution may administer foreign assistance and study abroad opportunities, though restricted to members of one sex, as long as the recipient "makes available reasonable opportunities for similar studies for members of the other sex." 734 C.F.R. § 106.31(c) (1995).

32. A recipient can provide separate housing on the basis of sex if, "when compared to that provided to students of the other sex, . . . [it is] (i) [p]roportionate in quantity to the number of students of that sex applying for such housing; and (ii) [c]omparable in quality and cost to the student." § 106.32(b)(2).

33. Pursuant to section 106.41(b),

> a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such teams for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport.

Id.

With regard to athletics, the regulations also provide that "[a] recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes." § 106.41(c).

34. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000d (1988)).

35. Section 601 of Title VI provides that "[n]o person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

36. *See* Cannon v. University of Chicago, 441 U.S. 677, 695-96 (1979).

37. Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at scattered sections of 20, 29, and 42 U.S.C.).

College v. Bell.[38] Under *Grove*, discriminatory practices were prohibited only in the particular "program or activity" receiving federal financial assistance.[39] The Act reversed this narrow construction by declaring that a recipient of federal funds must be free of discrimination institution-wide.[40]

With Congress' rejection of *Grove* has come an unprecedented movement towards equality between the sexes in college athletics. The Civil Rights Restoration Act of 1987, coupled with the 1979 Policy Interpretation of Title IX,[41] ("Policy Interpretation") issued by the Office for Civil Rights of the Department of Education ("OCR"), have had an enormous impact on colleges and universities nationwide.[42] The Policy Interpretation enumerates factors and standards to be assessed in determining whether an institution's intercollegiate athletics program complies with Title IX.[43] In accordance with this Policy Interpretation, the touchstone of Title IX compliance for intercollegiate athletic programs is equality of opportunity to participate.[44] Using this standard as leverage, female athletes increasingly are bringing suit against their universities seeking reinstatement of women's athletic programs eliminated due to budgetary restraints.[45] No longer shielded by the excuse that their athletic programs do not receive federal funds directly, many institutions have been forced to create level playing fields for their male and female athletes.[46]

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38. 465 U.S. 555 (1984).

39. *Id.* at 572-73.

40. 20 U.S.C. § 1687 (1988).

41. 44 Fed. Reg. 71,413 (1979).

42. For an analysis of Title IX compliance in intercollegiate athletics, see Jill K. Johnson, Note, *Title IX and Intercollegiate Athletics: Current Judicial Interpretation of the Standards for Compliance*, 74 B.U. L. REV. 553 (1994).

43. 44 Fed. Reg. 71,413.

44. *Id.* at 71,414.

45. *See* Roberts v. Colorado State Univ., 814 F. Supp. 1507 (D. Colo. 1993) (suing for reinstatement of varsity women's softball), *aff'd in part and rev'd in part sub nom.* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 580 (1993); Favia v. Indiana Univ., 812 F. Supp. 578 (W.D. Pa. 1993) (suing for reinstatement of women's varsity gymnastics and field hockey teams), *aff'd*, 7 F.3d 332 (3d Cir. 1993); Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992) (suing for reinstatement of women's varsity volleyball and gymnastics), *aff'd*, 991 F.2d 888 (1st Cir. 1993).

46. *See generally Roberts*, 998 F.2d at 834 (affirming district court's order that Colorado State University must reinstate varsity women's softball, hire a coach, and provide a field, equipment, and uniforms); *Favia*, 812 F. Supp. at 343-44 (affirming district court's order to reinstate women's gymnastics and field hockey teams and refusing to allow defendant to modify that order by replacing women's gymnastics with women's soccer); *Cohen*, 991 F.2d at 906 (holding that the district court did not abuse its discre-

Why this a Policy Interpretation was promulgated specifically for athletics and not for entities within the scope of Title IX universally may be explained by any number of reasons.[47] The more appropriate inquiry, in light of the advantageous results such an interpretation has had in effectuating Title IX, is whether similar success may be achieved by female prisoners. Women inmates in Oregon recently relied on Title IX in their suit against the Department of Corrections alleging discrimination in educational programs and activities offered at the state women's prison.[48] In comparison to intercollegiate athletics however, the influence Title IX has had to date within the confines of correctional facilities is been nominal. This is attributable in part to the lack of a clear mandate, such as OCR's Policy Interpretation, with which to apply Title IX.[49]

III. Discussion of *Jeldness v. Pearce*[50]

A. *Factual Setting*

In *Jeldness*, female inmates incarcerated in the state of Oregon brought a class action against the Oregon State Department of Corrections administration alleging sex discrimination in the educational and vocational programs offered to them.[51] The class sought declaratory and injunctive relief on behalf of themselves and all present and future inmates of the Oregon Women's Correctional Center ("OWCC") for alleged violations of Title IX and the Equal Protection Clause.[52] The following six educational and vocational training programs were claimed to be discriminatory: prison industries, apprenticeships, vocational programs, college courses, a farm annex, and a forest work camp.[53]

The structure of the Oregon state prison system is not unlike the majority of prison systems throughout the United States in that

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tion in temporarily reinstating the women's volleyball and gymnastics teams at Brown University).

47. The Policy Interpretation is attributable in large part to the overwhelming number of complaints alleging discrimination in athletics received by OCR by the end of July, 1978. 44 Fed. Reg. 71,413.

48. Jeldness v. Pearce, 30 F.3d 1220 (9th Cir. 1994).

49. *See generally id.* at 1226-30.

50. 30 F.3d 1220 (9th Cir. 1994).

51. *Id.* at 1222. For purposes of this Note, references to educational programs provided in the prison context include vocational programs.

52. *Id.*

53. *Id.*

it is segregated by sex.[54] It consists of six facilities. OWCC, a medium security prison housing approximately 200 female inmates, is the only one of the six facilities that houses women.[55] The remaining five facilities are exclusively male. The three largest of the male prisons are: (1) the Oregon State Penitentiary ("OSP"), a maximum security prison accommodating approximately 1,800 male prisoners; (2) the Eastern Oregon Corrections Institute ("EOCI"), a medium security prison accommodating approximately 1,200 male prisoners; and (3) the Oregon State Correctional Institution ("OSCI"), a medium security prison accommodating approximately 1,000 male prisoners.[56] The Oregon State prison system also runs a Farm Annex and a Forest Work Camp accommodating 225 and 110 male inmates, respectively.[57]

The plaintiff class did not challenge the right of the Oregon prison system to maintain sexually segregated prisons.[58] Rather, the class claim stemmed from the fact that, although some form of educational programs were offered in all facilities, the access to particular programs differed for male and female inmates.[59] Accordingly, the plaintiffs impliedly argued that they should be allowed to attend programs not available at the women's facility, at the men's prison, or, in the alternative, to be offered more of these programs at OWCC.

OWCC, the women's prison, offered two vocational classes, cosmetology and office administration, while OSP and OSCI, two of the men's facilities, each offered twelve vocational classes.[60] Although women were allowed to participate in the vocational classes at OSCI, they had to be transported and, therefore, were subjected to skin searches upon entering and exiting classes.[61] Consequently, women inmates who were allowed to take classes at OSCI were frequently late for class.[62] In addition, men were awarded merit pay for their participation in the vocational pro-

54. See Arditi, *supra* note 2, for an analysis of the constitutionality of sexually segregated prisons and a structural breakdown of fifteen state prison systems, including Oregon.

55. *Jeldness*, 30 F.3d at 1222.

56. *Id.*

57. *Id.*

58. *Id.* at 1224.

59. *Id.* at 1222.

60. *Id.* at 1222-24.

61. *Id.* at 1223.

62. *Id.*

grams, whereas women were not.[63] OWCC offered no apprenticeship programs.[64] Although female inmates had access to certain apprenticeships at OSCI, they were specifically excluded from the welding, painting, cabinet making, and plumbing programs.[65] Women were wholly precluded from participating in programs at the forest work camp and the farm annex.[66]

B. *The Opinion of the United States District Court for the District of Oregon*

In 1986, the plaintiffs' class action went before the United States District Court for the District of Oregon in a bench trial where the defendants prevailed on all but one issue.[67] After an appeal restricted to procedural issues,[68] the United States Court of Appeals for the Ninth Circuit remanded the case to the trial court.[69] The defendants motioned for summary judgment on remand. In its order, the district court drew the following legal conclusions relevant to the focus of this Note: (1) parity of treatment is all that is required in claims brought within the context of the prison setting under Title IX; and (2) "'penological necessity'" is a "'complete defense'" to Title IX disparate impact claims.[70]

Using these standards, the court entered partial summary judgment for the defendants on the plaintiffs' claims regarding the prison industries, forest work camp, and farm annex programs. The district court attributed job and work program disparities in the prison industries program to the "custody status," as opposed to the gender, of the female inmates.[71] With respect to the forest work camp, the court found that because the camp environment provided minimal supervision of the inmates, resultant "safety problems"

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63. *Id.* at 1224.

64. *Id.* at 1223.

65. *Id.* at 1224.

66. *Id.* at 1223.

67. *Id.*

68. On appeal, the plaintiff class argued that "the magistrate abused his discretion both by granting the prison administration's motion for modification of the pretrial order and by departing from the modified order at trial." Jeldness v. Watson, 857 F.2d 1478, 1988 WL 96600 at *1 (9th Cir. Sept. 8, 1988). The class also argued that the magistrate abused his discretion "by ignoring his decision to place the burden of proving the modified facts on the prison administration." *Id.* at *2.

69. *Id.* at *3.

70. *Jeldness*, 30 F.3d at 1223 (quoting unpublished 1986 decision by the United States District Court for the District of Oregon (Hogan, J.)).

71. *Id.*

mandated the exclusion of women.[72] Thus, Title IX was not violated because "safety problems" satisfied the "'substantial legitimate penological necessity'" requirement of the statute.[73] The court reached similar conclusions regarding the farm annex program. Because women were prohibited from residing at the farm annex, their low to non-existent participation levels in this program were "'justified by the substantial legitimate penological necessity of separately housing inmates on the basis of sex.'"[74]

The remaining disputed issues proceeded to a non-jury trial, subject to the same legal standards adopted by the court in its ruling on the defendants' motion for summary judgment. The district court found that the security and supervision problems posed by women's participation in the mechanical apprenticeships (i.e., welding, painting, cabinet making, and plumbing) constituted a legitimate penological necessity and thus did not violate Title IX.[75] As to vocational courses, the district court concluded that the programs were "'equal in substance and form.'"[76] Moreover, it held that the offering of cosmetology and office administration—the only two vocational courses offered at OWCC—"did not 'reflect gender based stereotypes' but was based on the size of the prisons."[77] Additionally, penological necessity was found to justify women inmates' late arrival at OSCI vocational classes, longer course completion times, and skin searches.[78] Lastly, the trial court found that although fewer lower-division college courses were offered to women in comparison to men, they had "equal access" to upper-division courses, and the class to inmate ratio was greater at OWCC.[79]

The only issue on which the district court found in favor of the plaintiff class was in connection with the compensatory aspect of vocational programs. The court held that the allowance of merit pay to men, but not women, for their vocational work violated Title IX.[80] On the basis of this finding, the district court awarded attor-

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72. *Id.*

73. *Id.*

74. *Id.* (quoting unpublished 1986 decision by the United States District Court for the District of Oregon (Hogan, J.)).

75. *Id.* at 1224.

76. *Id.* (quoting unpublished 1986 decision by the United States District Court for the District of Oregon (Hogan, J.)).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

ney's fees to the plaintiffs.[81]

C. *The Majority Opinion for the United States Court of Appeals for the Ninth Circuit*

The plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit on grounds that the district court had erred in reaching two of the legal conclusions that were applied to its findings of fact regarding Title IX. The plaintiffs claimed it was error for the trial court: (1) to interpret Title IX as requiring only parity, as opposed to equality, of treatment in the context of prison educational programs and activities; and (2) to allow penological necessity as a complete defense to Title IX claims.[82]

1. Title IX Applies to Prisons

Prior to addressing the issues raised by the plaintiffs on appeal, the Ninth Circuit first established the applicability of Title IX claims to educational programs and activities offered by correctional facilities. In a case of first impression before the Ninth Circuit, the majority in *Jeldness* rejected the defendants' various arguments that the scope of Title IX was limited to co-educational facilities or institutions in which participants had freedom of movement.[83] Instead, the majority concluded that the plain language of the statute, the absence of a specific exemption for prisons in light of five specifically enumerated exceptions, and the inclusion of correctional facilities in a congressional pronouncement regarding the need for the Civil Rights Restoration Act of 1987, mandated that prisons fall within the scope of Title IX.[84]

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81. *Id.* at 1223.

82. *Id.* at 1222. The plaintiffs also claimed on appeal that it was error for the district court to hold that the Equal Protection Clause immunizes discriminatory policies that are "reasonably related to legitimate penological interests." *Id.* at 1231. The majority stated, however, that it did not have to resolve this constitutional issue since Title IX sufficiently addressed all of the plaintiffs' claims. *Id.* In support of this conclusion, the majority cited to Hagans v. Lavine, 415 U.S. 528, 547 (1974), which held that "a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available." The United States District Court for the District of Columbia also recently resolved nearly identical claims solely on the basis of Title IX. *See* Women Prisoners v. District of Columbia, 877 F. Supp. 634, 678 (D.D.C. 1994) (holding that because "the remedial devices in Title IX sufficiently cover discrimination in educational programs," a review of those programs under the Equal Protection Clause was unnecessary).

83. *Jeldness*, 30 F.3d at 1226.

84. *Id.* at 1224-26. The defendants never contested that the Oregon prison system received federal funds. *Id.* at 1226.

Moreover, the Ninth Circuit cited to two district court cases which specifically recognized Title IX claims brought by state prisoners.[85] Although the majority ultimately concluded that it is the duty of the judiciary to analyze Title IX within the prison environment, it emphasized that "the application of [the statute's] regulations must be consistent with the basic needs of prisons and the *bona fide* reasons for segregation of the genders in prisons."[86]

2. The Majority's Analysis of Title IX's Standard of Compliance

The Ninth Circuit rejected the defendants' argument that parity of treatment, as opposed to equality of treatment, is the proper standard of compliance for Title IX.[87] In a two-tier analysis,[88] the

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85. *Id.* at 1224-25. The two cases cited by the court of appeals were: Canterino v. Wilson, 546 F. Supp. 174, 210 (W.D. Ky. 1982) (suggesting that Title IX, at least in the context of the prison environment, requires a more demanding level of compliance than the Equal Protection Clause), *vacated on other grounds*, 869 F.2d 948 (6th Cir. 1989) and Beehler v. Jeffes, 664 F. Supp. 931, 940, 943 (M.D. Pa. 1986) (holding that female prisoners had a cause of action for damages against state prison officials under Title IX in light of their allegations of intentional discrimination).

86. *Jeldness*, 30 F.3d at 1226.

87. *Id.* at 1228. This argument was derived from the defendants' contention that Title IX "requires only the level of protection offered by the Equal Protection Clause." *Id.* at 1226. According to the defendants, Title IX can be equated with the Equal Protection Clause because "Title VI is coextensive with the Constitution, and does not mandate more than what is required under [that clause]." *Id.* at 1227. In essence, the defendants argued that, in contrast to Title VI which prohibits racial discrimination, Title IX prohibits sex discrimination. See *supra* note 35 for the language of Title VI. Under the Equal Protection Clause, racial classifications are reviewed with strict scrutiny, while gender classifications are reviewed with only intermediate scrutiny. See *supra* notes 13-16 and accompanying text for the various levels of review employed by courts analyzing equal protection claims. Thus, by using Title VI as a thread to connect Title IX to the Equal Protection Clause, the defendants asserted that Title IX must be interpreted to require a level of compliance comparable to intermediate scrutiny as opposed to strict scrutiny. According to the defendants, this comparable level is parity of treatment in the prison context. *Jeldness*, 30 F.3d at 1227. See *supra* notes 17-22 and accompanying text for a general overview of parity of treatment.

88. In reaching its ultimate conclusion that Title IX demands more than parity of treatment, the majority emphasized the discrepancy of treatment between gender and race under the Equal Protection Clause. It then used this discrepancy to highlight the similarity in language between Title VI and Title IX. It is this similarity that led the court to conclude that Title IX and Title VI "should, as a matter of statutory interpretation, be read to require the same levels of protection and equality. They should not be read to require different levels of protection because the Equal Protection Clause is interpreted differently for race than for gender." *Jeldness*, 30 F.3d at 1227-28. In support of its reasoning, the Ninth Circuit cited *Canterino*, 546 F. Supp. at 174, in which Title IX was read as requiring more than parity of treatment.

The *Canterino* district court opinion, focusing largely on plaintiffs' equal protection claims, held that the Equal Protection Clause's requirement of parity of treatment "may

majority in *Jeldness* held that while "prison educational programs subject to Title IX must be 'equally' available to male and female inmates,"[89] equality does not mean "strict one-for-one identity."[90] The court reasoned that security concerns and the differing sizes and locations of the prisons in Oregon are extenuating factors that arise exclusively within the context of the prison setting.[91] Additionally, the majority recognized that Title IX's implementing regulations make provisions for certain entities in which strict identity of treatment is either inappropriate or infeasible.[92] It reasoned that because Title IX allows institutions to "'provide separate housing on the basis of sex'"[93] as long as it is proportionate in quantity and comparable in quality, Title IX does not require "gender-integrated classes in prisons."[94] The majority also emphasized the fact that under Title IX, athletic programs need only provide "'equal opportunities'" to athletes[95] and that institutions administering scholarships from sexually segregated foreign institutions need only provide "'reasonable opportunities for similar studies'"[96] in order to comply with the statute. Analogizing these sex-segregated entities to correctional facilities, the *Jeldness* court concluded that "women [inmates at OWCC] must have reasonable opportunities for similar studies and must have an equal opportunity to participate in programs of comparable quality."[97]

The majority refrained from adopting a black letter rule defining what satisfies this standard. Instead, it marked strict identity of

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be met in a number of different ways, as long as the opportunities available to women are substantially equivalent '*in substance if not in form*' to those accorded men." *Id.* at 210 (quoting Glover v. Johnson, 478 F. Supp. 1075, 1079 (E.D. Mich. 1979) (emphasis added)). Conversely, it interpreted Title IX as mandating "equivalent programs 'in *form* as well as in substance' to similarly situated women." *Id.* (quoting *Glover*, 478 F. Supp. at 1079). The court clarified that this "mean[s], at a minimum, that a consistent good faith effort must be made to include female inmates in the benefits of all programs funded in part with federal dollars." *Id.* Coupled with its plain language analysis, the majority in *Jeldness* seized upon this decision to hold "like the court in *Canterino*, . . . that prison educational programs subject to Title IX must be *equally* available to male and female inmates." *Jeldness*, 30 F.3d at 1228 (emphasis added).

89. *Jeldness*, 30 F.3d at 1228.

90. *Id.* at 1229.

91. *Id.* at 1228.

92. *Id.*

93. *Id.* (quoting 34 C.F.R. § 106.32(b)(1) (1995)).

94. *Id.*

95. *Id.* (quoting § 106.41(c)).

96. *Id.* (quoting § 106.31(c)).

97. *Id.* at 1229. For purposes of this Note, the standard of compliance adopted by the majority will be referred to as "equality of opportunity" or "equal opportunity."

treatment and the exclusion of women from one half of the apprenticeship programs as polar extremities on Title IX's continuum of compliance.[98] According to the majority, the former constituted absolute compliance and the latter noncompliance. Equality of opportunity impliedly lay somewhere in between. The court emphasized that while programs may differ depending on "interest and need," the number of programs and activities must be proportionate "not just to the total number of inmates, but to the number of inmates desiring to take educational programs."[99]

3. Penological Necessity Is Not a Complete Defense to Title IX

Although the majority held that Title IX does not mandate gender integration, it rejected the district court's finding that penological necessity was a complete defense to the disparities in Oregon's prison educational programs.[100] The district court had formulated the penological necessity defense "by analogy" to the business necessity defense available in Title VII's disparate impact cases.[101] The majority intimated that this analogy was remiss because the plaintiffs' claims in *Jeldness* were in the nature of disparate treatment, not disparate impact.[102] Nevertheless, the Ninth Circuit expressly refrained from resolving "whether the proper analysis for all of the educational programs in this case is disparate treatment or disparate impact."[103] Instead the court declared that it "need only restate [its] conclusion that penological necessity is not a *defense* in a Title IX case, but only a factor in *how* Title IX is applied in prisons."[104] According to the majority, this conclusion was based on the fact that Title IX, unlike Title VII, does not contain an

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98. *Id.*

99. *Id.*

100. *Id.* at 1229-30.

101. *Id.* at 1229.

102. *Id.* at 1230. In the context of Title VII discrimination suits, courts have developed three distinct theories of liability: individual disparate treatment, systemic disparate treatment, and disparate impact. Under each theory, plaintiffs have the initial burden of establishing a prima facie case of discrimination. The theory of liability alleged not only determines what plaintiffs must show in order to satisfy their burden, but also gauges whether defendants will have the burden of production or persuasion at trial. For an overview of the burden-shifting framework of each of these three theories of liability, see Tracy Anbinder Baron, Comment, *Keeping Women Out of the Executive Suite: The Courts' Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267, 284-87 (1994).

103. *Jeldness*, 30 F.3d at 1230.

104. *Id.* See Baron, *supra* note 102, for the various Title VII theories of liability.

explicit statutory defense to disparate treatment cases.[105]

In sum, in determining whether the plaintiffs had been discriminated against on the basis of sex, the majority avoided traditional discrimination law analysis[106] and premised its conclusion largely upon Title IX's implementing regulations. Nevertheless, the court emphasized that its role in interpreting Title IX was merely to "define the boundaries of what is required of the executive branch by Congress and by the [C]onstitution."[107] It left the district court the "difficult task" of determining how to balance security concerns unique to prisons with the requirements of Title IX.

D. *Judge Kleinfeld's Dissent*

Judge Andrew Kleinfeld dissented in *Jeldness*.[108] He agreed with the majority's conclusion that Title IX applied to prison educational programs and activities and with the majority's ruling that awarding merit pay to male inmates, but not to female inmates, violated Title IX.[109] Beyond this, Judge Kleinfeld and the majority parted company.

In contrast to the majority, the dissent reasoned that Title IX was inapplicable to the plaintiffs' case since the prerequisite discrimination was lacking. According to the dissent, the plaintiff class did not suffer *sex* discrimination by being denied access to certain programs, but rather, suffered discrimination on the basis of "location," "security concerns," and other penological necessities.[110] Thus, the dissent concluded that the plaintiffs may have suffered discrimination, but it was not the type proscribed by Title IX. Accordingly, they should have been denied relief under that statute.

Judge Kleinfeld also sharply criticized the majority's definition of equality, which in his opinion transformed state prison officials into judicial puppets, forcing them to mimic the policies of federal judges.[111] The dissent further accused the majority of gauging the

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105. *Jeldness*, 30 F.3d at 1230. Section 703(e) of Title VII permits disparate treatment of individuals "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (1988).

106. For a brief overview of the various discrimination law analyses, see *supra* note 102.

107. *Jeldness*, 30 F.3d at 1229.

108. *Id.* at 1231.

109. *Id.* at 1232.

110. *Id.* at 1234.

111. *Id.* at 1235. In Judge Kleinfeld's words, "[b]ecause of the amorphousness of the majority's 'equality' standard . . . Oregon prison administration will continue to be

definition of equality on inmates' desires.[112] According to the dissent, if the rehabilitative purpose of incarceration is to be achieved, administrative determinations should be made by prison officials, not by prisoners.

Moreover, the dissent asserted that even if Title IX requires equality of treatment, the only usable definition of this term is its ordinary meaning of "expenditure per prisoner, or course availability per prisoner."[113] According to the dissent, the Oregon state prison system satisfies both of these criteria. Ironically, the dissent concluded that it is, in fact, Oregon's male prisoners who are the victims of discrimination.[114] To illustrate his point, Judge Kleinfeld constructed the following chart based upon the district court's findings of facts:

	number of courses	number of inmates	inmates per course	courses per inmate
OWCC (women)	18	213	12	.084
OSCI (men)	34	1100	32	.031
OSP (men)	30	2093	70	.014
EOCI (men)	8	1300	163	.0062[115]

Translating these numbers into statistics, the dissent emphasized that while only "5% of Oregon's prisoners are female, . . . 25% of the courses offered are in the women's prison."[116] Similarly, OWCC "has almost 2 1/2 times as many courses per prisoner as the most generous male prison, OSCI, and over 13 times as many as EOCI, the least generous."[117] Accordingly, applying the majority's "equality of opportunity" standard would be "like saying that there should be as much opera in Ketchikan as in New York."[118]

IV. ANALYSIS

A. *The Finding of Sex Discrimination*

Whether the plaintiffs' Title IX claim in *Jeldness* warranted a

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subject to the power of federal courts, untrammeled by a usable legal standard, to assure that female prisoners obtain 'equality' of educational opportunities." *Id.*

112. *Id.* at 1233.
113. *Id.* at 1232.
114. *Id.* at 1233.
115. *Id.*
116. *Id.* at 1232.
117. *Id.* at 1233.
118. *Id.* at 1234.

finding of unlawful sex discrimination is complicated by the fact that prisons are segregated by sex for legitimate penological reasons. As noted by the majority, "[p]risons are different from other institutions to which Title IX applies. Security is an important concern. And sex segregation is the accepted norm."[119] This acknowledged segregation of the sexes was a point of contention and confusion for the district court, as well as for the majority and dissent in *Jeldness*, in determining whether female prisoners at OWCC had in fact been discriminated against on the basis of their sex.[120] This difficulty was compounded by the fact that, at the trial level, the plaintiffs did not limit their allegations of discriminatory treatment to one particular male institution. As such, the district court was forced to evaluate whether discrimination was present in six types of programming at five male facilities.[121]

The task of determining whether the prerequisite sex discrimination was present in *Jeldness* becomes much easier when analyzed strictly with respect to OSCI, the men's prison most similar to OWCC.[122] Because OWCC offered no apprenticeship programs, female prisoners had access to certain apprenticeships at OSCI but often arrived late for classes.[123] They were, however, expressly de-

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119. *Id.* at 1228.

120. The dissent explicitly recognized that "[t]he difficulty in applying the law against discrimination in educational programs to prisons arises from the separation of the sexes into separate male and female prisons." *Id.* at 1234.

Although the presence of "sex discrimination" was almost assumed by the majority, it is discussed here in some detail since the analysis of this question will have a serious impact on future applications of Title IX within the prison environment. Courts may use the absence of sex discrimination, as did the dissent in *Jeldness*, to wholly preclude the application of Title IX.

The Equal Protection Clause has been similarly applied to bar recovery. *See, e.g.*, Canterino v. Wilson, 869 F.2d 948, 954 (6th Cir. 1989) (holding that "[a] claim of sex discrimination under the Equal Protection Clause requires a finding of gender-based discrimination" and that the plaintiffs did not meet this standard of proof because "both men and women are included in the class of people who may be denied study and work release").

121. *See supra* parts III.A-B.

122. See *infra* part IV.B.2 for an analysis of why compliance with Title IX should be assessed solely with respect to "similarly situated" men and women prisoners. In Women Prisoners v. District of Columbia, 877 F. Supp. 634, 675-78 (D.D.C. 1994), the court compared "similarly situated" women at Lorton Minimum Security Annex with "similarly situated" males at the Minimum Facility, and "similarly situated" women at the Correctional Treatment Facility with "similarly situated" males at the Occoquan, Central, and Medium facilities. The court's determination that prisoners at these facilities were similarly situated was made on the basis of "similar custody levels, sentence structures and purposes of incarceration").

123. *Jeldness*, 30 F.3d at 1223. *See also supra* notes 61-62 and accompanying text.

nied access to four mechanical trade apprenticeships at OSCI.[124] The district court concluded that their exclusion from these programs was a "legitimate penological necessity," since co-educating the genders posed "supervision problems."[125] While the exact nature of these problems was not specified, it is probable that Oregon's prison administration denied females access to the four apprenticeships out of a fear that there would be fraternization between the genders. In other words, the rationale for their exclusion impliedly arose from a concern that female prisoners' "very womanhood would . . . directly undermine"[126] security at the male prison. This, according to the Ninth Circuit in *Jeldness* and according to the United States Supreme Court in *Dothard v. Rawlinson*,[127] is overt sex discrimination, since female prisoners are being treated differently on the basis of their gender,[128] not, as the dissent in *Jeldness* categorically argued, on the basis of some neutral factor like "custody status," "confinement," or "literacy."[129]

In *Dothard*, the plaintiff brought a class action against the Alabama Board of Corrections under Title VII and the Equal Protection Clause, alleging gender discrimination after her application for a prison guard position was rejected.[130] The plaintiff challenged, as

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124. *Jeldness*, 30 F.3d at 1223.

125. *Id.* at 1224.

126. Dothard v. Rawlinson, 433 U.S. 321, 336 (1977).

127. 433 U.S. 321 (1977).

128. *Id.* at 334.

129. *Jeldness*, 30 F.3d at 1234. With respect to the finding of sex discrimination, the dissent reasoned that denying female prisoners access to programs at the various male prisons was not (and impliedly could never be) gender discrimination, but merely discrimination on the basis of considerations like "location within the state, confinement, . . . [and] literacy." *Id.* Accordingly, the dissent concluded that Title IX did not apply to the plaintiffs' claims. *Id.*

The dissent was correct in reasoning that precluding women inmates from taking classes at male institutions is not necessarily sex discrimination. For example, it would be location discrimination to deny female prisoners at OWCC access to programs at a particular men's institution because the distance separating the female from the male prison made travel to and from impracticable. Nevertheless, the dissent would be hard pressed to reason that explicitly excluding women prisoners access to the mechanical trade apprenticeships at OSCI was anything other than gender-based discrimination. Specifically, their exclusion could not be "location" or "confinement" discrimination since women were already attending some classes at OSCI, nor could it be "literacy" discrimination since the programs were mechanical in nature. The dissent's conclusion then that the majority in *Jeldness* erred in finding sex discrimination stems from its *categorical* analysis of whether denying women prisoner's access to programs at all of the various men's prisons was discriminatory. The inherent weakness of that conclusion becomes obvious when the reasons for precluding female prisoners access to programs are examined with reference to the *particular* men's prison and program at issue.

130. *Dothard*, 433 U.S. at 323-24. See *supra* note 24 for the scope of Title VII.

sexually discriminatory, an Alabama regulation that prohibited the hiring of female prison guards in certain contact positions at all male prisons.[131] The Court determined that excluding female correctional officers from contact positions *was* sex discrimination. Nevertheless, the Court held that this discrimination was justified as a bona fide occupational qualification under section 703(e) of Title VII.[132] The Court thus permitted the exclusion of women from contact positions at male prisons.[133]

In contrast to Title VII, the majority in *Jeldness* emphasized that "Title IX contains no explicit statutory exemption such as [a bona fide occupational qualification]."[134] Accordingly, the majority concluded that because the sex discrimination inherent in providing disparate educational opportunities to similarly situated[135] male and female prisoners could not be justified under an affirmative defense, it necessarily violated Title IX.[136] In light of this finding, the majority further concluded that penological necessity could only be a factor in how Title IX is applied. Specifically, the court held that where the genders are educated separately, Title IX requires that a *balance* be maintained between similarly situated prisoners.[137]

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131. *Dothard*, 433 U.S. at 324-26. The Court described contact positions as those "positions requiring continual close physical proximity to inmates of the institution." *Id.* at 325.

132. *Id.* at 334. The Court cited the "rampant violence" and "jungle atmosphere" of Alabama's prisons, the scattering of sex offenders throughout prison facilities, understaffing, and dormitory-style living arrangements as factors that compromised a female's ability to safely and efficiently perform her job as a prison guard. *Id.* at 334-36. See *supra* note 105 for the language of § 703(e) of Title VII.

133. *Dothard*, 433 U.S. at 336.

134. *Jeldness*, 30 F.3d at 1230. *See also* 20 U.S.C. §§ 1681-1688 (1988); 44 Fed. Reg. 71,413 (1979).

135. *See infra* note 137.

136. *Jeldness*, 30 F.3d at 1230. See Seldin, *supra* note 21, at 7 n.39, for a list of courts holding, similar to *Jeldness*, that unequal prison conditions between the male and female prisoners is a gender-based classification.

137. *Jeldness*, 30 F.3d at 1229. When the majority in *Jeldness* defined the boundaries of Title IX compliance, it did so specifically with reference to apprenticeship programs at OSCI, the male institution most similar to OWCC in terms of size and security level. Specifically, in response to the district court's finding that it was lawful to deny women access to four mechanical apprenticeships at OSCI when they were allowed to participate in five vocational apprenticeships at that same prison, the majority stated that:

> Strict one-for-one identity of classes may not be required by the regulations. But there must be reasonable opportunities for similar studies at the women's prison and women must have an equal opportunity to participate in educational programs. . . . [T]otally denying women access to half the *apprenticeship opportunities* men have would seem to violate the regulations. In this case, women were denied access to all of the mechanical trade *apprenticeships*.

The majority's analysis in *Jeldness* suggests that when aggrieved female prisoners bring sex discrimination claims on the basis of Title IX, courts will no longer be able to hold categorically that the prerequisite sex discrimination is lacking[138] or that the lawful segregation of the sexes renders all male and female inmates not similarly situated, thereby justifying *all* disparate treatment.[139] Pursuant to Title IX, male and female inmates residing at similar facilities must be afforded equality of opportunity in educational programs.[140] Nevertheless, the majority did not clearly define how to achieve this standard of compliance. Instead, it merely delineated abstract "boundaries" of what constitutes Title IX compliance.[141]

The imminent threat posed by this analytical void is that it will be too vague to effectuate any substantive changes in female prisons.[142] At best, "prison administration will . . . be subject to the power of federal courts, untrammeled by a usable legal standard," to ensure that it complies with Title IX.[143] The void left by *Jeldness* was, however, unnecessary. The test promulgated by OCR in its Policy Interpretation to assess the provision of competitive opportunities in college athletics provides a forum for comparison of male and female prison educational programs. Adapting OCR's test to the prison environment will enable courts to fully effectuate the congressional intent with which Title IX was enacted, without compromising administrative concerns unique to prisons.

Id. (emphasis added).

The fact that the majority explicitly used OSCI to demonstrate the mandates of Title IX is significant. It evinces the Ninth Circuit's position that while the statute does not require that equality of opportunity be maintained between OWCC and *every* male institution within the state, Title IX, at a minimum, dictates that there be proportionality between *similarly situated* male and female prisoners. This holding stands in sharp contrast to contemporaneous decisions rendered by courts addressing nearly identical claims under the Equal Protection Clause. *See supra* note 22. According to these courts, *all* differential treatment between men's and women's educational programming is the product of the initial decision to separate the genders and is thus lawful. See *infra* part IV.B.2 for an analysis of why compliance with Title IX should be assessed solely with respect to "similarly situated" men and women prisoners.

138. *See supra* note 120.

139. *See supra* note 22 and accompanying text.

140. *Jeldness*, 30 F.3d at 1229.

141. *Id.*

142. See *supra* note 21 for an identical result arising within the context of the Equal Protection Clause.

143. *Jeldness*, 30 F.3d at 1235 (Kleinfeld, J., dissenting).

B. *Equality of Opportunity: A Standard of Compliance for Title IX Within the Prison Environment*

At the threshold of Title IX's enactment, one author poignantly foreshadowed that "it is unlikely that courts will hold unconstitutional every difference in treatment" between male and female prisoners.[144] Accordingly, the author proposed that courts would "have to develop standards for distinguishing permissible penological experimentation from illegal sex discrimination" if prisons continued to be separated by sex.[145] Though it has been asserted that "[c]olleges are poor and inexact models for prisons,"[146] Title IX's application within the context of college athletic programs provides a useful framework for distinguishing permissible differences from impermissible discrimination in correctional facilities.

Similarities in both "substance and form" between athletic programs and prison educational programs make the former an appropriate model for the latter in assessing Title IX compliance. Both college athletics and prison educational programs are generally segregated by sex. Moreover, both develop similar skills, namely leadership and teamwork, and build self-confidence and discipline.[147] Thus, just as the lessons learned on college playing fields will contribute to an athlete's success in life after graduation, so too will the lessons learned by prisoners in educational programs. In addition, both women athletes and women inmates are minorities within their respective spheres and thus often fall victim to institutional economies of scale.[148] Conversely, their male counterparts receive

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144. *See* Arditi, *supra* note 2, at 1251 n.119.

145. *Id.* The author proposed that in making such a determination, courts evaluate "whether a given differential carried with it a connotation of inferiority, whether it was systematic and pervasive, and whether the right at issue was so fundamental that the classifications affecting it deserve strict scrutiny." *Id.*

146. Judith Resnik, *Should Prisoners Be Classified by Sex?*, CRIMINAL CORRECTIONS: IDEALS AND REALITIES 109, 116 (J. Doig ed. 1982). The author asserts that the rationale that single-sex universities foster women's growth does not apply to female prisons. "Placement in universities occurs by voluntary and mutual selection, rather than involuntary, unwilling designation." *Id.*

147. *See* Cohen v. Brown Univ., 991 F.2d 888, 891 (1st Cir. 1993) ("For college students, athletics offers an opportunity to exacuate [sic] leadership skills, learn teamwork, build self-confidence, and perfect self-discipline."); Justin Brooks, *Addressing Recidivism: Legal Education in Correctional Settings*, 44 RUTGERS L. REV. 699, 718 (1992) ("Education is the key to rehabilitation because it gives inmates the tools to deal with personal and societal issues that often lead to criminal behavior.").

148. *See Cohen*, 991 F.2d at 892 ("[A]t most schools, women are a relatively inconspicuous part of the storied athletic past. Historically, colleges limited athletics to the male sphere, leaving those few women's teams that sprouted to scrounge for resources."); *see also* Arditi, *supra* note 2, at 1241-42, concluding that:

"the lion's share" of resources.[149] Lastly, the student first, athlete second order of colleges parallels that of inmate first, student second order in prisons.

1. Judicial Interpretation of Title IX Compliance Within Intercollegiate Athletics

In assessing Title IX compliance within the context of athletic programs, courts have consistently held that colleges and universities may maintain separate teams for males and females, but must provide both genders with equal opportunities to participate in varsity sports.[150] Judicial decisions have focused specifically on three benchmarks, which were propounded by OCR in its 1979 Policy Interpretation, to determine whether an institution satisfies this equality of opportunity standard.[151] These three benchmarks are collectively referred to by courts as the effective accommodation test.[152] Under this test, courts examine:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their prospective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented [sic] among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

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> Differences in academic education generally stem from factors of scale and tend to disadvantage female inmates. In a few states, the one women's institution is considered too small to justify any educational program at all . . . [or] a particular program will not be offered at the female institution but will be available at some of the state's male prisons.

Id. (footnotes omitted).

149. *See Cohen*, 991 F.2d at 893 (recognizing that men's athletics nationwide have traditionally "received the lion's share of dedicated resources"); Bukhari v. Hutto, 487 F. Supp. 1162, 1171 (E.D. Va. 1980) (noting that the advantages afforded by the smaller size of women's state prisons are balanced by disadvantages such as "limited opportunities for recreation and education compared to those for men").

150. *See, e.g.*, Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 828, 834 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 580 (1993); Favia v. Indiana Univ. of Pa., 7 F.3d 332, 343 (3d Cir. 1993); *Cohen*, 991 F.2d at 896.

151. The three benchmarks referred to were promulgated by OCR specifically to evaluate whether each sex in any given institution is being provided with competitive opportunities and schedules sufficient to reflect that sex's abilities. *See* Johnson, *supra* note 42, at 566.

152. The three benchmarks were coined as the effective accommodation test in Roberts v. Colorado State Univ., 814 F. Supp. 1507, 1511 (D. Colo. 1993), *aff'd in part and rev'd in part sub nom.* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 580 (1993).

> (3) Where the members of one sex are underrepresented [sic] among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of the underrepresented [sic] sex have been fully and effectively accommodated by the present program.[153]

A university need only satisfy one of the three benchmarks to pass the effective accommodation test.[154]

The first benchmark of the effective accommodation test, gender parity, is assessed by comparing the percentages of male and female undergraduates at the defendant university to the percentages of male and female athletes.[155] To pass this benchmark, a school must provide athletic opportunities in proportion to the gender composition of the student body. Thus, an institution whose undergraduate student body is fifty percent male and fifty percent female must provide "a roughly equal number of [athletic] slots for men and women, as the student body is equally divided."[156] Significantly, it is the institution's choice to equalize up or down. That is, if there is disparity, a school may either provide more slots to the under-represented class or fewer to the over-represented class.[157]

In evaluating the second benchmark of the effective accommo-

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153. 44 Fed. Reg. 71,418 (1979).

154. *See* Johnson, *supra* note 42, at 566-67. It is important to note that "passing muster under the three-part test does not mean that the university is in compliance with Title IX: It may be violating the statute in some other respect. Conversely, *failing* this test *is* by itself enough to be in noncompliance with Title IX." *Id.* at 567.

It should be clarified that the Policy Interpretation was specifically formulated to provide a framework for institutions to self-access compliance with Title IX. 44 Fed. Reg. 17,413. The three-part test therefore is couched in a manner that implies that an institution has the burden of proving compliance with one of three benchmarks. In fact, when female athletes bring suit under Title IX, they must prove, by a "fair preponderance of credible evidence," that the institution fails to provide gender parity (benchmark one) and full and effective accommodation (benchmark three). If the plaintiffs are able to meet this burden they have established their prima facie case. The defendant institution then has the opportunity of rebutting the plaintiffs' case "by adducing preponderant history-and-practice evidence." *Cohen*, 991 F.2d at 901-02.

155. *See* 44 Fed. Reg. 71,418; *Cohen*, 991 F.2d at 897-98.

156. *Cohen*, 991 F.2d at 899.

157. *Id.* at 898 n.15. OCR lists a number of justifiable exceptions to the gender parity requirement, including programs like football that require more resources because of the "unique aspect of the sport"; "special circumstances of a temporary nature," such as the influx of first-year athletes requiring an infusion of resources; special "event management" expenses, provided these needs are met for both sexes; and affirmative actions to account for historical limitations on athletic opportunities for one sex. 44 Fed. Reg. 71,415-71,416.

dation test, history and continuing practice, one court has stated that an institution "cannot show program expansion for women solely by pointing to increases in the percentage of women athletes caused by reducing the number of men athletes."[158] The same court held that a school must show either "actual expansion in women's athletic programming" or improvements in the status of women athletes at a time when the school had previously reduced its athletic program.[159] The second prong is measured from the point in time that an institution has notice arising from an OCR review that it has failed to achieve gender parity.[160]

With regard to the third benchmark of the three-part test, full and effective accommodation, courts have defined its boundaries in two significant respects. First, an institution need only provide a team if there are sufficient interested and able members of the under-represented sex to maintain one and a "reasonable expectation of intercollegiate competition for the prospective team."[161] Second, compliance with the third benchmark mandates both full and effective accommodation, as opposed to proportionate accommodation. Thus, if 500 men and 250 women are able and interested athletes, the institution must provide 250 slots for women.[162] An

158. Roberts v. Colorado State Univ., 814 F. Supp. 1507, 1514 (D. Colo. 1993), *aff'd in part and rev'd in part sub nom.* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 580 (1993).

159. *Id.*

160. *Id.* at 1515. In 1983, OCR found Colorado State University ("CSU") to be in violation of both the first and third benchmarks of Title IX's effective accommodation test following a Title IX compliance review. Nevertheless, an OCR official found the university "'to be presently fulfilling its obligations under 34 C.F.R. § 106.41(c) . . . based upon [the university's] written assurance that the remedial actions set forth in [its] submitted plan [were] being implemented.'" *Id.* (quoting Plaintiff's Exhibit 2 at 3-4) (citations omitted). In 1993, when female athletes challenged CSU's compliance with Title IX, the United States District Court for the District of Colorado determined that the relevant period from which to measure CSU's program expansion efforts was the day the college received notice that it did not satisfy either prong one or three of the effective accommodation test. *Id.*

161. *Cohen*, 991 F.2d at 898.

162. *Id.* at 899. Under this approach, an institution must provide at least as many slots for men as it does for women. However, as long as women are the under-represented gender whose athletic interests are "fully accommodated," an institution can add or subtract as many slots for men as it deems appropriate. *Id.* at 899 n.16.

Male athletes have challenged the validity of this approach on grounds that it transforms "'a statute which prohibits discrimination on the basis of sex into a statute that mandates discrimination against males.'" Kelley v. Board of Trustees, 35 F.3d 265, 270 (7th Cir. 1994) (quoting Appellees' Brief at 9), *cert. denied*, 115 S. Ct. 938 (1995) (citation omitted). The court in *Cohen* rejected this type of claim on three grounds. First, such an argument presumes that men are more likely to participate in sports than are women. Evidence, however, suggests that when provided with the opportunity, the

institution cannot satisfy the test by providing athletic slots to men and women in proportion to the ratio of interested men and women, that is, two to one, or 100 slots for men and 50 for women.[163] In determining whether female athletes have been fully and effectively accommodated, courts have looked to the previous success of a sport that was subsequently terminated, current popular club programs, and a sport's popularity, both nationwide and in the relevant high school level applicant pool.[164]

In light of the broad policy goals of Title IX, the clarity with which courts have assessed compliance with the statute in college athletics, and the overall similarities between intercollegiate athletic programs and prison educational programs, courts should use the OCR's effective accommodation test as a guide in quantifying the amount of "equality" to which female inmates are entitled.

2. A Proposed Framework of Title IX Compliance Within the Context of Correctional Facilities

Because Oregon, like most states, has only one female prison but several male facilities,[165] the initial difficulty with extending the effective accommodation test to correctional facilities is determining whether one or all male prisons should be used in assessing Title IX compliance at the female prison. The answer to this question is found by analogizing to case law that addresses a similar analytical problem in the sphere of equal protection in public education. Courts have declined to hold that the Equal Protection Clause requires traditionally single-sex institutions to admit members of the excluded gender when one or more facilities essentially equal in prestige and course selection to those at the prospective school are available within the state.[166] Thus, courts consider only comparable

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number of female athletes will equal the number of male athletes. *Cohen*, 991 F.2d at 900. Second, Title IX will "protect" men in those situations where men's athletic programs are underdeveloped, underfunded, or both. *Id.* at 900 n.17. Third, even assuming Title IX "favors" women, Congress has broad Fifth Amendment powers to remedy past discrimination. *Id.* at 901.

163. *Id.*

164. Roberts v. Colorado State Univ., 814 F. Supp. 1507, 1517 (D. Colo. 1993), *aff'd in part and rev'd in part sub nom.* Roberts v. Colorado State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 580 (1993).

165. Jeldness v. Pearce, 30 F.3d 1220, 1222 (9th Cir. 1994).

166. *See* Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880, 882 (3d Cir. 1976) (denying female plaintiff the opportunity to attend classes at all male public high school because all female high school with courses of "similar and . . . equal quality" to those at the male school existed), *aff'd by an equally divided Ct.*, 430 U.S. 703 (1977); Williams v. McNair, 316 F. Supp. 134, 138-39 (D.S.C. 1970) (rejecting male plaintiffs'

institutions in making this determination, as opposed to conducting a comprehensive comparison of all schools within the state.[167] Adapting this framework to the prison environment suggests that the men's prison most similar in security, size, and course selection to the women's prison should be used for Title IX comparison purposes. Because of the large discrepancies in size among male prisons within a single state, applying these objective factors will discourage manipulation by prison officials in choosing the appropriate men's prison with which to gauge gender parity.[168] Accordingly, because OSCI is the least populated of medium security prisons in Oregon,[169] and, therefore most like OWCC, it will be the prison used for illustrative purposes.

a. Gender parity

The first question a court should ask in determining whether a prison provides equal opportunities to participate in educational programs is whether participation opportunities for male and female inmates are provided in numbers substantially proportionate to their respective representations in their particular prisons. In tailoring the effective accommodation test to meet the needs of the prison environment, the first benchmark may be assessed in two ways. Similar to the assessment made in athletic programs,[170] courts should determine the number of on-site educational "slots" or openings available to male and female inmates. Since OSCI houses 1100 male inmates,[171] and OWCC houses 213 female inmates,[172] the ratio is five to one. Thus, the number of on-site educational slots available at OSCI and OWCC must roughly mirror the five to one ratio. In order to make this assessment, a court must

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requests to attend an all girls state college since the Citadel, a comparable all boys school, was accessible to them), *aff'd mem.*, 401 U.S. 951 (1971); Kirstein v. Rector & Visitors of Univ. of Va., 309 F. Supp. 184, 187 (E.D. Va. 1970) (approving plan to allow female plaintiffs to attend the traditionally all male University of Virginia since comparable state school was not available to plaintiffs).

167. *See Vorchheimer*, 532 F.2d at 882; *Williams*, 316 F. Supp. at 138; *Kirstein*, 309 F. Supp. at 186.

168. For example, if a state were allowed to subjectively choose which men's prison to compare to the women's prison, the state would tend to pick its largest men's prison. This is so because the sheer discrepancy in size between the largest male prison and the female prison would lend itself more easily to gender parity, the first benchmark of the effective accommodation test.

169. *Jeldness*, 30 F.3d at 1222.

170. *See, e.g.*, Cohen v. Brown Univ., 991 F.2d 888, 899 (1st Cir. 1993).

171. *Jeldness*, 30 F.3d at 1233.

172. *Id.*

determine the total number of slots in the two classes offered at OWCC and compare that figure to the total number of slots in the thirty-four classes offered at OSCI. If, for example, the average number of inmates per class in Oregon's correctional facilities is twenty, the state would have to add approximately ninety-six educational slots to its curriculum at OWCC or subtract approximately four-hundred eighty slots from OSCI's educational programming.

The chart provided by the dissent in *Jeldness*[173] would suggest that Oregon presently satisfies "gender parity," since there are as many, if not more, slots provided to females as there are female inmates.[174] Nevertheless, fairness and reason require that in assessing the number of slots available to women, those "female slots" provided at OSCI be excluded. Specifically, the dissent stated that female inmates at OWCC participate in eighteen courses, yet it failed to note that sixteen of the eighteen are taught at OSCI.[175] Accordingly, participants in those courses are subjected to skin searches and late arrivals as a result of having to be transported to OSCI.[176]

The rationale for excluding the courses taught at OSCI in determining compliance with Title IX is found in Title IX's implementing regulations and in the majority's opinion in *Jeldness*. Section 106.41 of Title IX's implementing regulations[177] creates an exception to the rule of equality of opportunity to participate. Essentially, the provision requires that where a women's team in a particular sport does not exist, females must be allowed to try-out for the men's team *unless* it is a contact sport.[178] Presumably, because men are generally physically stronger than women, precluding women from competing with men in contact sports eliminates the potential for frequent and severe injuries to females and pre-

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173. See *supra* note 115 and accompanying text for the dissent's chart.

174. Again assuming for illustrative purposes that there is an average of twenty inmates per class in Oregon's correctional facilities, the dissent would argue that since the number of courses available to inmates at OWCC (18) multiplied by 20 equals 360, and the number of courses at OSCI (34) multiplied by 20 equals 680, the five to one ratio requirement is not only satisfied, but exceeded. *Jeldness*, 30 F.3d at 1232-33.

175. This is deduced from the fact that only two courses, office administration and cosmetology, are offered at OWCC. *Id.* at 1224.

176. *Id.* at 1223 & n.1.

177. 34 C.F.R. § 106.1 (1995). See *supra* notes 29-33 and accompanying text for an overview of Title IX's implementing regulations. Additionally, see *supra* note 33 for the language of § 106.41.

178. For purposes of § 106.41, "contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact." 34 C.F.R. § 106.41(b).

serves the competitiveness of the game. The regulations, nevertheless, imply that, where women are allowed to participate with men, they must do so without restriction. It would be an anomaly to read Title IX's implementing regulations to say that, where women participate with men, their participation "slots" are counted, yet they must wear extra protective gear. While this condition likely would decrease women's chances of being injured, it also would hinder women's ability to compete to their fullest potential. Imposing such restrictions would contradict the essence of equality of opportunity to participate. A similar anomaly would result if those female inmates participating in programs at OSCI, and therefore subjected to skin searches and late arrivals, were factored into the gender parity analysis. Accordingly, gender parity in female prisons must be calculated solely on the basis of those on-site programs offered at OWCC.

In addition to evaluating equality of opportunity in terms of participation slots, the same analysis should be made for course availability. In accordance with this approach, Oregon would have to add four to five courses to its educational program at OWCC or subtract roughly twenty-four courses from OSCI's program to meet the gender parity benchmark.[179] Assessing gender parity in terms of course availability would prevent prisons from satisfying the first benchmark of the effective accommodation test merely by adding more participation slots to preexisting educational programs. To date, no university has been able to satisfy gender parity by simply recruiting more female athletes to its current teams or by creating two varsity teams of the same sport. Thus, since Title IX is aimed at equal opportunity in terms of both participation and variety, calculating gender parity in the prison environment based on both participation slots and course availability will ensure full compliance with the statute.

Critics of assessing equality of opportunity in terms of gender parity may argue that the tendency of all prisons will be to downgrade the men's programs, thus denying female prisoners any tangible improvements in their educational programs.[180] Though this is

179. This analysis is based upon the premise that the average class size in Oregon's correctional facilities is twenty. This number is used for illustrative purposes only and does not reflect the actual size of educational classes offered within Oregon's prison system.

180. *See* Wilson v. Kelley, 294 F. Supp. 1005, 1012-13 (N.D. Ga. 1968) ("Humane efforts to rehabilitate should not be discouraged by holding that every prisoner must be treated exactly alike.... To order the maximum for each and every person confined ...

an option available to prisons,[181] whether it will be exercised is questionable, given that male prisoners are likely to become more volatile if denied a substantial number of programs previously available to them.[182]

A second criticism of assessing Title IX in terms of gender parity is that women inmates actually may be disadvantaged by its application. Prior to plaintiffs' claims in *Jeldness*, women inmates were allowed to take sixteen classes at OSCI. Under the proposed analysis, though OWCC would be required to add four to five courses to its curriculum, Oregon would be able to terminate women's participation at OSCI without violating Title IX. Accordingly, female inmates may ultimately lose the opportunity to attend ten or eleven courses. This criticism, however, overlooks the fact that female inmates will be able to participate in a wider variety of classes *at OWCC* and, therefore, will not be subjected to skin searches and late arrivals as they had been at OSCI.[183]

b. History and continuing practice of program expansion

Even if female prisoners in a Title IX action were able to show that gender parity does not exist between their facility and a comparable male prison within the state, prison administrators would still be able to defeat their claims by showing a history and continuing practice of program expansion in the women's prison. In contrast to the first benchmark, which can be achieved by equalizing up or down, solely eliminating programs from the men's prison, or "equalizing down," will not satisfy this second benchmark.[184] Thus, a prison must show either, (1) "actual expansion" in women's prison educational programming, or (2) improvements in the programming at the women's prison at the time when the state's department of corrections had generally reduced its educational programming in one or more of the state prisons.[185]

There are two disadvantages inherent in this second benchmark. The first is that compliance with this benchmark may be measured from the point in time that a prison is put on notice by a third party, such as an OCR official, that it fails to achieve either

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could result in a reduction of rehabilitative efforts rather than an implementation."), *aff'd per curiam*, 393 U.S. 266 (1969).

181. *See supra* note 157 and accompanying text.

182. *See generally* Brooks, *supra* note 147, at 709, 718.

183. Jeldness v. Pearce, 30 F.3d 1220, 1223 & n.1 (9th Cir. 1994).

184. *See supra* note 158 and accompanying text.

185. *See supra* note 159 and accompanying text.

gender parity or full and effective accommodation.[186] The practical result of requiring notice to be given before a violation of Title IX is found is a potentially prolonged delay between implementation of an effective accommodation test and actionable claims. The second, but related, disadvantage is that even if prison administrators cannot show a history and continuing practice of program expansion, a written intention to do so will seemingly suffice,[187] thus further delaying realization of substantive changes in educational curricula at female prisons. Courts may lessen the impact of these delays by: (1) dispensing with the requirement of third party notice of noncompliance, simply deeming enactment of the test as sufficient warning; and (2) requiring more than mere "written assurances" that a facility intends to comply with the second benchmark.

c. Full and effective accommodation

The final way in which prisons can demonstrate compliance with Title IX is to show that the interests and abilities of female prisoners have been fully and effectively accommodated by the present programs. Assuming OWCC had fifty female prisoners interested in participating in educational programs, compliance with this benchmark would require OWCC to provide fifty educational slots. OWCC, however, would not be mandated to provide fifty different programs if each of the prisoners were interested in different courses. Rather, the prison need only provide a program if there are sufficient interested and able prisoners to support it.[188] What constitutes a "sufficient" number would depend largely on factors such as the average size of a particular program or whether the program required a great deal of individual attention between instructor and prisoner, thus justifying a small class.

This third benchmark highlights an important distinction between Title IX athletic claims and prison claims. Generally, female athletes who bring Title IX claims are seeking to reestablish a women's varsity sport.[189] In contrast, female prisoners often are requesting courts to provide first time programs at the women's prison. Therefore, as in the athletic sphere, "it remains an open question whether the courts will be convinced of sufficient interest and ability in situations in which women sue" their prisons for fail-

186. *See supra* note 160 and accompanying text.
187. *See supra* note 160 and accompanying text.
188. *See supra* note 161 and accompanying text.
189. *See supra* note 45 and accompanying text.

ing to *create* educational programs or to provide equity of opportunity.[190]

The dissent's query in *Jeldness* as to why more importance should be assigned to prisoners' desires in implementing programs, rather than to "administrative determinations of what vocational training for prisoners would benefit society when they get out,"[191] has particular relevance under this benchmark. Though the framework used to assess compliance with Title IX in correctional facilities is the same standard used in the context of college athletics, prisoners arguably should not be afforded the same luxury of choice as college athletes. Expanding upon the dissent's reasoning, it seems evident that, had prisoners been able to make the right choices or to pursue "desires" deemed appropriate by society, they would not be incarcerated today.

Although the dissent makes a forceful policy argument, a powerful countervailing argument lies in the fact that "[t]he more education inmates receive, the more likely it is that they will not commit further crimes."[192] Experience dictates that if inmates are provided with programs that interest them they are more likely to participate in such programs. Conversely, programs mechanically chosen by prison administrators, "whose concerns lie in security and not in education,"[193] will not be widely received by the inmate population and may lead to boredom, feelings of alienation, and increased violence. In light of the fact that many of these prisoners will someday reenter society, bringing with them these feelings of frustration, the ultimate benefit of ignoring prisoner's "desires" for the good of society is questionable.

In light of the difficulty courts have had in determining the degree of equality female prisoners should be afforded, they should rely on an adapted version of Title IX's effective accommodation test to assess compliance within the context of correctional facilities. Application of the three benchmarks will allow courts to continue to defer to prison administrators by placing compliance with Title IX in their control. Specifically, the test provides administrators with three opportunities to satisfy the statute, thus allowing ample flexibility to structure programs, without compromising ad-

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190. *See* Johnson, *supra* note 42, at 582-83.

191. Jeldness v. Pearce, 30 F.3d 1220, 1233 (9th Cir. 1994) (Kleinfeld, J., dissenting).

192. *See* Brooks, *supra* note 147, at 709.

193. *Id.* at 718.

ministrative concerns unique to prisons.[194] Similarly, it avoids the judicial micromanagement of prisons feared by the dissent in *Jeldness*[195] by enabling prisons to self-assess compliance with Title IX. Lastly, the test enables prisons to implement the requirements of Title IX objectively and uniformly, thus establishing a consistency in the "quality and structure" of educational programs currently lacking in today's prison system.[196]

CONCLUSION

Society, courts, and inmates in general have accepted the fact that prisons are and will continue to remain sexually segregated institutions.[197] Without challenging this segregation, female prisoners, as the minority group of the prison population, have consistently argued for "separate but equal" treatment under the Equal Protection Clause of the Fourteenth Amendment. Their diligent efforts, however, have produced unsatisfactory results. Courts have either summarily dismissed these claims on grounds that the prerequisite sex discrimination is lacking or that male and female inmates are not similarly situated. At best, courts have ordered remedies too vague to ameliorate the disparities between male and female prison conditions.

Perhaps in hope of realizing the success that female athletes have achieved using Title IX to create a more level playing field, women prisoners increasingly have cited to Title IX in their prayers for relief from sex discrimination arising from disparate educational opportunities available to male and female inmates. Title IX seemingly affords more protection to women prisoners from disparate treatment than the Equal Protection Clause by more clearly defining the line between permissible and impermissible sex discrimination. In contrast to the Equal Protection Clause, Title IX implores prison administrators and courts to compare interprison programs. As between similarly situated male and female inmates, the statute requires, at a minimum, that a balance be maintained between the quality and quantity of programming offered to these prisoners. Specifically, compliance with Title IX requires that there be "rea-

194. *See supra* note 22.

195. *Jeldness*, 30 F.3d at 1235.

196. *See* Brooks, *supra* note 147, at 715 (The lack of consistency in prison educational programs in terms of "participation, quality, or quantity . . . stems primarily from the absence of an umbrella authority regulating correctional education.").

197. *See supra* note 2 and accompanying text.

sonable opportunities for similar studies at the women's prison"[198] and that women have "an equal opportunity to participate in educational programs"[199] as compared to their male counterparts.

The standard for Title IX as articulated by the Ninth Circuit in *Jeldness*, however, falls far short of achieving women prisoners' prayers for separate but equal treatment. Notably, this standard nearly echoes the language employed by the court in *Glover v. Johnson*,[200] a case factually identical to *Jeldness*. In finding for the female prisoners on strictly equal protection grounds, the court in *Glover* held that "women [inmates] are entitled to a greater variety of programming substantially equivalent to that offered the men."[201] Despite this favorable order, nearly eighteen years later the plaintiffs in *Glover* are still struggling to achieve the objectives of equal protection. Accordingly, unless the effective accommodation test used to assess Title IX compliance in intercollegiate athletics is adapted to the prison environment, even favorable court-ordered remedies under Title IX will be too vague to effectuate any substantive changes in women's conditions of confinement. Moreover, the failure to develop a framework with which to apply Title IX will result in inconsistent and arbitrary remedies and create a need for continued judicial supervision of prison administration. Ironically, however, even if the effective accommodation test is applied within the confines of correctional facilities, the only hope female prisoners have of attaining true equality is if women commit more crimes and become a significantly larger percentage of the prison population.[202] Until then, female offenders must settle for proportionate equality in educational programming.

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198. *Jeldness*, 30 F.3d at 1229.
199. *Id.*
200. 478 F. Supp. 1075, 1087 (E.D. Mich. 1979).
201. *Id.* at 1087.
202. The rate of incarceration for women is increasing and, in fact, exceeds that of men. *See* Seldin, *supra* note 21, at 2 ("From 1986 to 1991, the male prison population increased by fifty-three percent while the female prison population increased by seventy-five percent.").