

# KEEPING MEN “MEN” AND WOMEN DOWN: SEX SEGREGATION, ANTI-ESSENTIALISM, AND MASCULINITY

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## INTRODUCTION

Sex segregation is everywhere. In *The Stubborn Persistence of Sex Segregation*,<sup>2</sup> as part of a larger project, I introduce the variety of ways that sex segregation<sup>3</sup> currently exists in American law and society. Despite the

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<sup>2</sup> David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 COLUM. J. GENDER & L. (forthcoming 2011).

<sup>3</sup> Throughout this project, I am using a very strict and particular definition of sex segregation. See *id.* at Part I (setting forth this definition in detail). To summarize, by using the word “sex,” I am referring to segregation that occurs based on a person’s per-

first statutory protections against sex discrimination in American law appearing almost five decades ago and the revolution with respect to sex discrimination in constitutional law occurring almost four decades ago,<sup>4</sup> sex segregation is alive and well. It persists in mandatory, administrative, permissive, and voluntary forms in almost every walk of life: employment, education, criminal justice, the military, restrooms, social organizations, athletics, religion, and more.<sup>5</sup> In the introductory article to this project, I describe different theoretical approaches to understanding the way that law should address sex segregation but do not develop my own position on which of those approaches is best.<sup>6</sup>

Here, I begin that endeavor by adopting an antiessentialist framework to investigate sex segregation and what it means for masculinity. Though in the future I intend to study the varied impact sex segregation has on women, transgendered and intersexed individuals, people of color, and others, here I focus my efforts on the effect the current regime of sex segregation has on masculinity.

The study of law and masculinity is a burgeoning field. It has been useful in critically evaluating important aspects of work,<sup>7</sup> the presidency,<sup>8</sup>

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ceived status as a man or a woman. “Sex” is a term that refers to perceived biology, not to characteristics, personality, or traits commonly associated with people who share particular genitalia. Thus, “sex” is in contrast to “gender,” as is clear when thinking about particular forms of segregation. For instance, people are not required to register for the military draft based on whether they exhibit masculine or feminine characteristics (their “gender”) but rather based on their genitalia, their biology (their “sex”). Masculine women are not required to register for the draft; effeminate men are.

By “segregation,” I am referring to complete separation or exclusion by rule. I am not merely referring to a classification in which people are treated differently based on sex. Moreover, I am not referring to non-rule-based segregation, in which there is no rule that requires separation or exclusion but complete separation or exclusion may result for reasons aside from a rule requiring it. Sex-based classifications and disproportionate representation without an exclusivity rule are both significant antidiscrimination concerns, but they are not the focus of this project. This project, instead, is focused on rule-based separation or exclusion based on sex that is complete and without exceptions.

<sup>4</sup> See discussion *infra* notes 19–24 and accompanying text.

<sup>5</sup> See discussion *infra* Part I.

<sup>6</sup> Cohen, *supra* note 2, at Part V.

<sup>7</sup> See, e.g., Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment “Because of Sex,”* 79 U. COLO. L. REV. 1151 (2008) (discussing masculinity and bullying in the workplace); Ann C. McGinley, *Harassing “Girls” at the Hard Rock: Masculinities in Sexualized Environments*, 2007 U. ILL. L. REV. 1229 (applying masculinity theory to analyze the operation of Title VII in highly sexualized workplaces); Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359 (2004) (arguing that masculinity theory illuminates structures and practices that may support sex discrimination claims at work).

<sup>8</sup> See, e.g., Larry Catá Backer, *Gendering the President Male: Executive Authority Beyond Rule-of-Law Constitutionalism in the American Context*, 3 FLA. INT’L U. L. REV. 341 (2008) (discussing rule of law, gender, and the presidency); Frank Rudy Cooper, *Our First Unisex President?: Black Masculinity and Obama’s Feminine Side*, 86 DENV. U. L. REV. 633 (2009) (discussing Barack Obama’s campaign and stereotypes of black masculinity).

the Constitution,<sup>9</sup> education,<sup>10</sup> crime,<sup>11</sup> family,<sup>12</sup> feminist theory,<sup>13</sup> and other areas of law. Scholars, particularly feminist scholars, have investigated the way law affects men and masculinity to challenge the notion that the male and the masculine are natural and fixed and should serve as the basis for understanding equality.<sup>14</sup> These scholars believe that, without disrupting these notions about men and masculinity, the work of feminist legal theory can never be complete, as women and femininity might see changes, but the problems of men and masculinity will remain the same. Without investigating the way law affects and constructs men and masculinity, equality will be illusive.

Understanding sex segregation is a vital part of the study of law and masculinity. In fact, as I will argue, current-day sex segregation is one of the central ways that law and society define and construct who is a man and what it means to be a man. When law or society tells people that a place or activity is reserved for men alone, or, conversely, that men are excluded from a particular place or activity, two important messages are sent: one, that there are distinct categories of people based on reproductive anatomy and that these anatomical distinctions are a legitimate way of organizing and sorting people; and two, that people with the reproductive anatomy labeled “male” are supposed to behave in a certain way. As I have argued in the past,<sup>15</sup> these messages produce distinct harms for women, who are often subordinated to men based on these differences and characteristics, as well as

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<sup>9</sup> See, e.g., John M. Kang, *Manliness and the Constitution*, 32 HARV. J.L. & PUB. POL'Y 261 (2009) (investigating the role of male identity in the formation of the Constitution).

<sup>10</sup> See, e.g., David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135 (2009) (evaluating the essentialist myth of masculinity underlying single-sex education reform); Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L.J. 68 (2002) (examining how masculinity infuses institutional structure such that formal equality does not lead to gender neutrality).

<sup>11</sup> See, e.g., Frank Rudy Cooper, “Who’s the Man?”: *Masculinities Studies*, Terry Stops, and Police Training, 18 COLUM. J. GENDER & L. 671 (2009) (investigating the role of masculinity in Terry stops); Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853 (2006) (exploring intersectionality theory and its implications for black male identity); Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777 (2000) (examining the connection between violence, masculinity, and race).

<sup>12</sup> See, e.g., Nancy E. Dowd, *Rethinking Fatherhood*, 48 FLA. L. REV. 523 (1996) (discussing masculinity norms and fatherhood).

<sup>13</sup> See, e.g., Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201 (2008) (giving an overview of masculinities theory and its uses in feminist legal theory); Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037 (1996) (arguing that feminist theory has overlooked men).

<sup>14</sup> See generally Michael Kimmel, *Integrating Men Into the Curriculum*, 4 DUKE J. GENDER L. & POL'Y 181 (1997) (arguing that feminist theory in the classroom needs to investigate men and masculinity).

<sup>15</sup> Cohen, *supra* note 10, at 170–73.

for men, both those who conform and those who do not conform to the expected notions of masculine behavior.

In looking at sex segregation and masculinity, I focus on two separate theoretical concepts: hegemonic masculinity and the hegemony of men. Ultimately, I argue here that the various forms of sex segregation still existing in the United States help create and perpetuate a particular form of idealized masculinity—what theorists call hegemonic masculinity—that exerts normative power over men to conform.<sup>16</sup> Sex segregation also substantially contributes to the dominance of men over women and non-hegemonically masculine men, what other theorists call the hegemony of men.<sup>17</sup> In both ways, sex segregation contributes to an essentialized view of what it means to be a man—both in the attributes associated with an idealized manhood and in the power ascribed and available to men.

To make these arguments, this Article will proceed in four parts. First, I will provide a brief summary of the various types of sex segregation that I detail in depth in *The Stubborn Persistence of Sex Segregation*, the article introducing this project.<sup>18</sup> Understanding the scope and variety of sex segregation that currently exists in the United States is essential to analyzing how present-day sex segregation affects masculinity.

Next, I set forth the general theoretical framework that I will use to analyze sex segregation and masculinity. Two concepts are central: gender antiessentialism and multiple masculinities. Antiessentialism, as applied to sex and gender, is the notion that there is no essential set of characteristics that can be used to describe all men or all women. Antiessentialism rejects the notion that men are, or should be, masculine and that women are, or should be, feminine. Applied to the study of masculinity, antiessentialism leads to the notion that instead of one masculinity to which men must strive, there are multiple masculinities. Both of these concepts, antiessentialism and multiple masculinities, will drive the rest of the analysis in this piece.

After providing this theoretical framework, in the third part, I analyze how sex segregation contributes to a dominant form of masculinity known as hegemonic masculinity. Hegemonic masculinity is a concept that has been developed by masculinity scholars to explain the dominant ideal of masculinity that exists within a particular culture at a particular point in time. Sex segregation in all of its forms both contributes to and reinforces particular aspects of hegemonic masculinity. In this part, I describe three characteristics that sex segregation connects with masculinity: that men are not feminine, are heterosexual, and are physically aggressive. I argue that in doing so, sex segregation essentializes masculinity in a way that creates and reinforces a dominant view of what a man is supposed to be.

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<sup>16</sup> See discussion *infra* Part III.

<sup>17</sup> See discussion *infra* Part IV.

<sup>18</sup> See Cohen, *supra* note 2, at Part III.

Finally, in the fourth part, I argue that sex segregation not only helps to maintain hegemonic masculinity but also contributes to the hegemony of men. The hegemony of men refers to men’s dominant position in the gender hierarchy. By differentiating men and women and requiring compliance with that differentiation, sex segregation furthers men’s access to socially valued knowledge and power as well as the maintenance of stereotyped and subordinating views about both women and non-hegemonically masculine men.

These effects of sex segregation on masculinity represent one reason that modern law and society should be much more skeptical toward sex segregation than they currently are. However, I cannot definitively reach that conclusion until I have studied all of the issues related to sex segregation, not just its effect on masculinity. Thus, there will be points when the reader of this Article will intuitively desire an acknowledgment of the reasons in favor of sex segregation and an explanation of how the world could possibly work without it. After all, many of the forms of sex segregation discussed here seem natural and noncontroversial. However, that is not the point of this Article. This Article instead focuses on sex segregation’s important role in keeping men “men” and women subordinated.

## I. THE STUBBORN PERSISTENCE OF SEX SEGREGATION

In 1963, Congress passed the first federal civil rights law covering women, the Equal Pay Act, which required that men and women receive the same pay for the same job.<sup>19</sup> Title VII’s prohibition on discrimination in employment based on sex, among other categories, came a year later.<sup>20</sup> The 1970s brought Title IX and its prohibition on discrimination based on sex in educational institutions that receive federal funding<sup>21</sup> as well as an expansion of the Fair Housing Act of 1968 to include a prohibition on sex discrimination.<sup>22</sup> The Supreme Court also took up the mantle of nondiscrimination based on sex during the 1970s, finally expanding the coverage of the Fourteenth Amendment’s Equal Protection Clause in 1976 to prohibit most forms of government discrimination based on sex.<sup>23</sup> Thus, over the course of thir-

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<sup>19</sup> 29 U.S.C. § 206 (2006).

<sup>20</sup> 42 U.S.C. § 2000(e) (2006).

<sup>21</sup> 20 U.S.C. §§ 1681–88 (2006).

<sup>22</sup> 42 U.S.C. §§ 3604–05 (2006).

<sup>23</sup> See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”). The Court first struck down a law that discriminated against women in *Reed v. Reed*, 404 U.S. 71 (1971), and came one Justice away from analyzing classifications based on sex under the highest level of constitutional scrutiny in *Frontiero v. Richardson*, 411 U.S. 677 (1973). The standard the Court ultimately adopted in *Craig* has since been termed “intermediate scrutiny” because it is more forgiving of government classifications than the highest standard, strict scrutiny, but still more exacting than base-level rational basis review. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (using, for the

teen years, women's status under federal law drastically changed, and the elimination of some of the most severe forms of sex discrimination followed.<sup>24</sup>

Yet, here we are almost four decades later, and sex segregation is alive and well. In fact, it has persisted in ways that affect most people throughout their lives. In the first article in this project, I extensively detail the various forms of sex segregation that continue to exist. Here, I will only briefly summarize these forms of sex segregation and the various areas of life that are segregated.<sup>25</sup> Doing so will set the stage for the analysis of sex segregation and masculinity that comes later in this Article.

Sex segregation in this country exists in four different categories: mandatory, administrative, permissive, and voluntary. Mandatory sex segregation is sex segregation that is required by law. It can be required in public or private settings. Administrative sex segregation is segregation that the government undertakes in its administrative capacity, though not required by law to do so. Permissive sex segregation occurs when law explicitly permits sex segregation in a particular context. Like mandatory sex segregation, permissive sex segregation can occur in public or private settings. Finally, voluntary sex segregation is undertaken by nongovernmental institutions and organizations without explicit permission from the law to do so.

Each of these types of sex segregation occurs in a wide variety of contexts within American life. Mandatory sex segregation has one of its most visible examples in the context of the military. By Department of Defense policy, women are excluded from "assignments to units below the brigade level whose primary mission is direct ground combat."<sup>26</sup> Under federal law, only men are required to register for the draft, and only men are subject to the penalties that come from failing to do so.<sup>27</sup> On the state level, many statutes and constitutions provide that the state militia shall consist of all "able-bodied male citizens."<sup>28</sup>

Mandatory sex segregation occurs in contexts outside the military as well. Within the criminal justice system, prison and jail populations are frequently required by law to be segregated based on sex.<sup>29</sup> State laws also sometimes require transportation, searches, and employment within prisons,

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first time in Supreme Court case law, the term "intermediate scrutiny" to describe the level of scrutiny for classifications based on "sex or illegitimacy").

<sup>24</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (finding Virginia's single-sex public military college unconstitutional); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (holding that excluding women from juries is unconstitutional).

<sup>25</sup> The authority for the summary that follows can be found in Cohen, *supra* note 2, at Part III.

<sup>26</sup> U.S. GEN. ACCOUNTING OFFICE, GENDER ISSUES: INFORMATION ON DOD'S ASSIGNMENT POLICY AND DIRECT GROUND COMBAT 3 (1998).

<sup>27</sup> 50 U.S.C. app. § 453 (2000). The Supreme Court upheld this provision against a constitutional challenge in *Rostker v. Goldberg*, 453 U.S. 57 (1981).

<sup>28</sup> See, e.g., CAL. MIL. & VET. CODE § 122 (1988); MISS. CONST. art. IX, § 214.

<sup>29</sup> See, e.g., CONN. GEN. STAT. § 18-81g (2009); OKL. STAT. § 504.7 (2004).

jails, and criminal courts to be segregated based on sex.<sup>30</sup> Restrooms, locker rooms, showers, and the like constitute other areas of mandatory sex segregation with which people come into contact on a regular basis. Various state laws segregate restrooms based on the restroom’s location, the presence of men and women in a particular location, and the presence of women alone in a particular location.<sup>31</sup> Many states also have laws that segregate based on sex in the medical context, either segregating those who receive treatment or requiring those who provide treatment to be of the same sex as the patient.<sup>32</sup> Other contexts in which state law mandates sex segregation include outdoor youth programs, elections, drug and alcohol testing in the private sector, honors, housing, identification card photography, jury sequestration, massage parlors, nudism, schools, and sexual violence programs.<sup>33</sup>

Administrative sex segregation occurs when government-run institutions are not required to sex segregate by law but nonetheless do so in their operating capacity. For instance, government buildings of all types, whether open to the public or not, are likely to have sex-segregated bathrooms and, if within the building’s purpose, sex-segregated locker rooms, dressing rooms, or showers, whether for employees or for the public. Correctional facilities also administratively sex segregate, as most separate men and women despite the absence of a state statutory requirement.<sup>34</sup> Public schools, from elementary and secondary to undergraduate and graduate institutions, also segregate based on sex in bathrooms and locker rooms, as well as living arrangements, such as dorms and dorm rooms, or fraternity and sorority houses.

Permissive sex segregation is sex segregation that occurs with the explicit permission of the law. Two federal laws and their state analogs provide the opportunity to segregate in employment and education. Title VII prohibits employment discrimination based on sex but permits employers to sex segregate positions if there “is a bona fide occupational qualification [“BFOQ”] reasonably necessary to the normal operation of that particular business or enterprise.”<sup>35</sup> Courts have approved BFOQs in strength-related jobs such as prison guards, privacy-related jobs such as spa, restroom, and health club attendants, and authenticity-related jobs such as acting.<sup>36</sup> Title

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<sup>30</sup> See, e.g., IOWA CODE § 901.7 (2003); MO. REV. STAT. § 544.193 (2002); R.I. GEN. LAWS § 13-5-5 (2009).

<sup>31</sup> See, e.g., ALA. CODE § 16-8-43 (2009); NEV. REV. STAT. § 618.720 (2007).

<sup>32</sup> See, e.g., LA. CHILD. CODE ANN. art. 1409 (2009); N.D. CENT. CODE § 25-01.2-03 (2009).

<sup>33</sup> See, e.g., ARK. CODE ANN. § 5-68-204 (2005); MINN. STAT. ANN. § 518B.02 (2006).

<sup>34</sup> See COED PRISON (John Ortiz Smykla ed., 1980).

<sup>35</sup> 42 U.S.C. § 2000e-2(e) (2006). Several states have BFOQ provisions in their own antidiscrimination laws. See, e.g., IND. CODE ANN. § 22-9-1-3(q) (2005) (excluding “those certain instances where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise”).

<sup>36</sup> See Amy Kapczynski, *Same-Sex Privacy and the Limits of Antidiscrimination Law*, 112 YALE L.J. 1257, 1259–60 (2003) (collecting and citing cases); Melissa K. Stull, An-

IX prohibits sex discrimination in federally funded educational institutions,<sup>37</sup> but the statute itself, as well as its implementing regulations, has several exceptions that make it clear when sex segregation in education is permitted. These exceptions permit, in particular contexts and with some limitations, single-sex schools and classes as well as sex-segregated athletics, housing, scholarships, extracurricular activities, and restrooms.<sup>38</sup> Beyond Title VII and Title IX, state laws permit sex segregation in health clubs, athletic programs, housing, medical facilities, prisons, and more.<sup>39</sup>

Finally, there is the vast category of voluntary sex segregation, a category that broadly affects people's lives but is mostly outside the realm of the law or government. Private institutions and organizations voluntarily sex segregate in membership, participation, and distribution of honors. These organizations are as numerous as they are diffuse. They include national membership organizations such as the Fraternal Order of Eagles, the General Federation of Women's Clubs, and the Boy Scouts of America and the Girl Scouts of the USA. They also include more local organizations such as golf clubs, health clubs, and support groups. Sports competitions also sex segregate, from the international, such as Olympic teams, to the national, such as the Association of Tennis Professionals or the Women's National Basketball Association, to the local, such as recreational and youth leagues. Religious institutions also fall into this category by sex segregating who can ascend to respected positions, such as a priest, sex segregating worship, such as separating men and women in conservative strands of Judaism or Islam, or sex segregating religious schools and housing. A highly visible form of voluntary sex segregation also occurs in performing arts award ceremonies, such as the Academy Awards' best actor and actress categories. Finally, there are endless examples of much more micro and informal forms of voluntary sex segregation from groups organized around a particular hobby, interest, or affiliation, such as a gathering of mothers or a men's knitting club, to informal social gatherings, such as a bachelor party or "girls' night out."

Although this list does not paint a picture anywhere near as pervasive and subordinating as race segregation in this country's history or current sex segregation in some other countries, it does illustrate that sex segregation continues despite advances in sex discrimination law. And sex segregation

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notation, *Permissible Sex Discrimination in Employment Based on Bona Fide Occupational Qualifications (BFOQ) Under § 703(e)(1) of Title VII of Civil Rights Act of 1964* (42 U.S.C.A. § 2000e-2(e)(1)), 110 A.L.R. FED. 28 (1992) (collecting and citing cases); Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147, 184–191 (2004) (discussing relevant case law).

<sup>37</sup> 20 U.S.C. § 1681(a) (2006).

<sup>38</sup> See 20 U.S.C. §§ 1681–88 (2006); 34 C.F.R. §§ 106.1–71 (2009). Several states have their own versions of Title IX with similar exceptions. See, e.g., TENN. CODE ANN. § 49-2-108 (2002) (giving local school boards authority to provide sex-segregated schools); WASH. REV. CODE ANN. § 28A.640.020 (2002) (allowing sex-segregated sex education, gym class, and sports teams).

<sup>39</sup> See, e.g., GA. CODE ANN. § 15-12-142 (2009); WASH. REV. CODE ANN. § 49.60.400 (2002).

continues in almost all walks of life, from requirements imposed by law to everyday choices made by individuals in how to organize their own affairs. Sex segregation affects people in a number of ways; the effect on men and masculinity is the subject of the remainder of this Article.

## II. GENDER, ANTI-ESSENTIALISM, AND MASCULINITIES

To critically evaluate the various forms of sex segregation laid out above and explore what they mean for men and masculinity, I argue in this section that two important theoretical frameworks are the most useful for this project: antiessentialism and multiple masculinities. In fact, as I will discuss below, multiple masculinities is a concept that is really antiessentialism theory applied to the study of masculinity. Both of these theories are valuable because they help to understand masculinity as a socially constructed, yet powerfully influential, concept.

### A. *Gender and Antiessentialism*

There are countless theories of gender.<sup>40</sup> On one extreme is the generally held notion that gender and sex are fixed notions that are inherently linked: men are, or should be, masculine, and women are, or should be, feminine.<sup>41</sup> Under this theory, both sex and gender consist of binaries. Your sex is biologically determined and is either male or female. And, based on which sex you are, your gender is the set of behavioral and psychological characteristics associated with that sex. Thus, your biological sex predetermines that you are or should be either masculine or feminine; if your gender does not match your sex—in other words, if you are an effeminate male or a masculine female—you need to change how you behave.<sup>42</sup> Because male/masculinity and female/femininity are inherently linked under this theory, the concepts of sex and gender are virtually indistinguishable. Discrimination against people based on their gender is identical to discrimination based on their sex because if an entity discriminates against masculinity (or femininity), it is by definition discriminating against males (or females).

At the other end of the spectrum of theories on gender lies the notion that sex and gender are fluid and have no fixed content. Most famously associated with Judith Butler, this theory argues that what we think of as

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<sup>40</sup> See generally RAEWYN CONNELL, *GENDER: IN WORLD PERSPECTIVE* 31–49 (2d ed. 2009) (providing an overview of gender theory and gender theorists).

<sup>41</sup> See Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities and Employment Discrimination*, U. MICH. J.L. REFORM 713, 717 (2010) (making the same point about popular conceptions of gender).

<sup>42</sup> R.W. CONNELL, *MASCULINITIES* 21–27 (2d ed. 2005) (describing these commonly held positions about sex and gender under the concept of “sex roles”).

gender is really performance.<sup>43</sup> In other words, there is no preexisting set of characteristics that are masculine or feminine, and what we think of as masculinity or femininity are just the performances of those whom we label as such. This theory is not just that men and women can be masculine or feminine or some mix of both. Rather, it goes further, saying that men and women cannot be truly “masculine” or “feminine”. Instead, those are words that we use to describe the performances of men and women. Through performing gender, men and women create gender.<sup>44</sup> To Butler, gender also produces the perceived biologically distinct sexes, which in reality are not naturally distinct categories but become so because of gender performance and labels.<sup>45</sup> Under this theory, “it makes little sense to speak of women [or men] as a social group; instead, the focus is on ‘discursive practices’ that give meaning to the idea of woman [or man] . . . .”<sup>46</sup> Once those performances create socially identifiable meaning, people are constantly performing or doing gender at the risk of being assessed by others in accordance with the normative standards.<sup>47</sup>

Somewhat less extreme is the theory that gender is the constructed social practice that operates on bodies based on their reproductive capacity. Raewyn Connell puts forth this theory as a way to ground gender in bodies and the way society addresses bodies. She defines gender as the “structure of social relations that centres on the reproductive arena, and the set of practices that bring reproductive distinctions between bodies into social processes.”<sup>48</sup> According to this theory, gender appears unchanging because of the societal structures that define and maintain reproductive difference, but in actuality gender is constantly in flux as societal structures develop and change. The creation of gender “involves a vast and complicated institutional and cultural order. It is this whole order that comes into relation with bodies, and gives them gender meanings.”<sup>49</sup> Connell’s theory shares the social constructivism of Butler’s, but insists that bodies and their reproductive capacity are central to thinking about gender.

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<sup>43</sup> JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND SUBVERSION OF IDENTITY* 33 (2d ed. 1999).

<sup>44</sup> *Id.* (“In this sense, *gender* is not a noun, but neither is it a set of free-floating attributes, for we have seen that the substantive effect of gender is performatively produced and compelled by the regulatory practices of gender coherence. . . . In this sense, gender is always a doing, though not a doing by a subject who might be said to preexist the deed.”).

<sup>45</sup> *Id.* at 11 (“As a result, gender is not to culture as sex is to nature; gender is also the discursive/cultural means by which ‘sexed nature’ or ‘a natural sex’ is produced and established as ‘prediscursive,’ prior to culture, a politically neutral surface *on which* culture acts.”).

<sup>46</sup> MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 95 (2d ed. 2003).

<sup>47</sup> Candace West & Don H. Zimmerman, *Doing Gender*, 1 *GENDER & SOC’Y* 125, 136–37 (1987) (“[T]o ‘do’ gender is not always to live up to normative conceptions of femininity or masculinity; it is to engage in behavior *at the risk of gender assessment*.”).

<sup>48</sup> CONNELL, *supra* note 40, at 11; *see also id.* at 66–71.

<sup>49</sup> West & Zimmerman, *supra* note 47, at 56.

Antiessentialism is a broad umbrella term that I use to describe these latter two theories about gender, which I believe are the most useful for analyzing sex segregation generally and its effects on men and masculinity specifically. Antiessentialism relies on the observation that *within* the socially-determined categories “men” and “women,” more variation exists than *between* the two societally-determined categories.<sup>50</sup> Antiessentialist theory argues that the ordinary binary sex and gender categories fail to take account of this complexity and the multiplicity of human identity and difference. In fact, the existence and imposition of sex and gender categories work to construct identity and difference, rather than merely to reflect difference.

In this sense, antiessentialism is a key component of postmodern<sup>51</sup> and poststructuralist<sup>52</sup> feminist legal theories,<sup>53</sup> closely related theories that recognize the socially-constructed nature of identity and difference. Applied to legal theory, antiessentialism thus challenges the structures in law and society that create and reinforce identity and difference with respect to sex and gender.<sup>54</sup> By confining people to essentialist categories, societal institutions and discourses constrain identity and limit freedom. The value of antiessentialism is that it challenges us to question the structures in law and society that ordinarily seem natural. In this way, antiessentialism is a valuable tool in evaluating sex segregation, as the sex segregation that has survived the feminist legal reforms of the past several decades has been woven into the fabric of society and thus has become less controversial.

Pushing deeper, antiessentialism is a theory not merely about identity but also about challenging the societal forces that impose identity upon people in ways that further hierarchy. Through subtle forms of differentiation in society and law, sex and gender hierarchies are created, perpetuated, and

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<sup>50</sup> See Janet Shibley Hyde, *The Gender Similarities Hypothesis*, 60 AM. PSYCHOLOGIST 581 (2005).

<sup>51</sup> MARY J. FRUG, POSTMODERN LEGAL FEMINISM 18 (1992) (discussing how identity is “multiplicitous, shifting, socially constructed”); Levit, *supra* note 13, at 1050 (“Feminists drawing on postmodernism want to avoid unitary truths and acknowledge multiple identities.”).

<sup>52</sup> See Kathryn Abrams, *Afterword: Critical Strategy and the Judicial Evasion of Difference*, 85 CORNELL L. REV. 1426, 1437 n.52 (2000); Marie Ashe, *Mind’s Opportunity: Birthing a Poststructuralist Feminist Jurisprudence*, 38 SYRACUSE L. REV. 1129, 1169–70 (1987) (explaining poststructuralism’s focus on antiessentialism); Joan C. Williams, *Feminism and Post-Structuralism*, 88 MICH. L. REV. 1776, 1777–79 (1990) (reviewing ZILLAH R. EISENSTEIN, *THE FEMALE BODY AND THE LAW* (1998)).

<sup>53</sup> Antiessentialism is also often associated with critical race feminism, as critical race feminism challenges the notion that there is one idea of gender (whether masculinity or femininity), without taking into account differences based on race, class, sexual orientation, or other identity factors. See Adrien Katherine Wing, *Introduction to CRITICAL RACE FEMINISM: A READER* 1, 7 (Adrien Katherine Wing ed., 2d ed. 2003). Although this type of antiessentialism is important to understanding sex segregation, see Cohen, *supra* note 2, at Part V.E., and I discuss related elements throughout this Article, the antiessentialism I use is broader and goes deeper into challenging universalized notions of identity altogether, even if broken down based on particular identity characteristics.

<sup>54</sup> Ashe, *supra* note 52, at 1171–72.

normalized. These essentialist conceptions of gender tend to reinforce power differentials between men and women as well as “patriarchal assumptions about women as a group.”<sup>55</sup> They also work to reinforce power differentials among men, so that certain types of men—those that hew to a dominant form of masculinity—are empowered, and other men—those who challenge or fail to conform to this dominant masculinity—are pressured into conforming or, if they do not, ostracized or persecuted.<sup>56</sup>

Disaggregating the concepts of sex and gender is key to an antiessentialist legal theory.<sup>57</sup> Under the essentialist view of sex and gender described above, men are or should be masculine and women are or should be feminine. Biology determines behavior, so the link is required. Antiessentialism disentangles the concepts, even going so far as to challenge the idea that there should be any concept of masculinity or femininity.<sup>58</sup> Antiessentialism views characteristics of individuals as just that: individual characteristics, which should not be labeled as more appropriate for one sex than the other.<sup>59</sup> In this sense, antiessentialism might sound very similar to equal treatment theory and the quest to break down sex-based stereotypes.<sup>60</sup> However, unlike equal treatment theory, which accepts some differences between men and women,<sup>61</sup> antiessentialism calls into question virtually all stereotypes

<sup>55</sup> Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN'S L.J. 89, 99 (1996).

<sup>56</sup> See Cohen, *supra* note 10, at 168–74.

<sup>57</sup> See Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CAL. L. REV. 1 (1995).

<sup>58</sup> Mary Anne Case, *Unpacking Package Deals: Separate Spheres Are Not the Answer*, 75 DENV. U. L. REV. 1305, 1317 (1998) (“Separate gendered spheres, however open to persons of both sexes, increase the risk of reifying current definitions of masculine and feminine, which I would prefer had more room to develop, even to disappear.”).

<sup>59</sup> Cohen, *supra* note 10, at 174 (“Particular characteristics, personality traits, and likes or dislikes would not have any connection to the presumed reproductive biology of a boy or a girl. Such traits and preferences would be evaluated as positives or negatives on their own, without the additional loaded baggage of whether they are appropriate for a boy or a girl.”).

<sup>60</sup> Antiessentialism has been criticized in this vein as having “no limiting principles to prevent minority groups from being deconstructed until all that remains are disunited and atomized individuals themselves.” Sumi Cho & Robert Westley, *Critical Race Coalitions: Key Moments that Performed the Theory*, 33 U.C. DAVIS L. REV. 1377, 1416 (2000); see also Maxine Eichner, *On Postmodern Feminist Legal Theory*, 36 HARV. C.R.-C.L. L. REV. 1, 42 (2001) (stating that a “feminist theory that destabilizes the category of women until it has become entirely indeterminate in theory sacrifices the ability to locate and contest existing societal standards adapted to fit the profile of men”). To escape this problem, Maxine Eichner recommends a legal theory that, instead of denying that a socially understood category of “women” exists, focuses “on both reducing the import of gender and on creating the legal conditions that ensure that people are offered an array of identities that depart from dominant gender images.” *Id.* at 47.

<sup>61</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996) (stating that there are “physical differences between men and women [that] are enduring” and that these “inherent differences” are “cause for celebration” and can be the basis for certain types of government action).

and groupings associated with sex and gender as the product of socially imposed categorization.<sup>62</sup> And it is this socially imposed categorization that results in the furtherance of hierarchy. As argued below, sex segregation is an important and powerful form of this categorization.

### B. *Multiple Masculinities*

Antiessentialism applied to masculinity results in the concept of masculinities. As Nancy Dowd has described it, "[a]nti-essentialism means exposing affirmative differences among men that challenge dominant definitions of masculinity."<sup>63</sup> Doing so would be impossible without understanding that there is no such thing as "masculinity" (singular); instead, there are multiple "masculinities" (plural).

Raewyn Connell and Michael Kimmel have extensively investigated how masculinities are varied and contingent. In a cultural history of masculinity, Kimmel surveys how conceptions of masculinity have changed and continue to change throughout American history.<sup>64</sup> Developing a theory and history of masculinities, Connell presents a similar review of different types of masculinities, but focuses on the life histories of four Australian men.<sup>65</sup> Both of these works challenge the notion that there is or has ever been one masculinity.

Thus, attaching substantive content to the term "masculinity" in the form of a definitive listing of particular traits is problematic, as it is clear that masculinity is more complicated, contingent, and multiplicitous than just a simple description of what men do or how they are. Because of these difficulties, I agree with the sociologists who find it more useful to use the concept of "multiple masculinities." "Multiple masculinities" is the antiessentialist notion that different people experience and live masculinity differently.<sup>66</sup> Stated otherwise, there is no single masculinity that all men, or even most men, live. As Rob Gilbert and Pam Gilbert write in an analysis of masculinity in Australian schools, "masculinity is diverse, dynamic and changing, and we need to think of multiple masculinities rather than some singular [masculinity]."<sup>67</sup> These multiple masculinities can be based on the

<sup>62</sup> See Cohen, *supra* note 2, at Part V.F.

<sup>63</sup> Dowd, *supra* note 13, at 228.

<sup>64</sup> MICHAEL KIMMEL, *MANHOOD IN AMERICA: A CULTURAL HISTORY* (1996).

<sup>65</sup> CONNELL, *supra* note 42, at 87–181.

<sup>66</sup> R.W. Connell, *Teaching the Boys: New Research on Masculinity, and Gender Strategies for Schools*, 98 TCHRS. C. REC. 206, 208 (1996) ("[I]n multicultural societies such as the contemporary United States there are likely to be multiple definitions of masculinity.").

<sup>67</sup> ROB GILBERT & PAM GILBERT, *MASCULINITY GOES TO SCHOOL* 49 (1998); CONNELL, *supra* note 40, at 106–07 ("There is considerable diversity between societies in their constructions of gender for men. This can readily be seen by comparing descriptions of masculinities in Latin America, the Middle East, southern Africa and east Asia. There is also considerable evidence that there are multiple masculinities within the same society, even within the same institution, peer group or workplace." (citation omitted)).

“interplay of gender, class and ethnicity”<sup>68</sup> as well as other identity factors such as sexual orientation, disability, and national origin. Furthermore, individual men and women can also access and perform different masculinities at different points and sites in their lives, as individual masculine identity is not static over time or within different contexts.<sup>69</sup>

Just because masculinities are varied and culturally contingent does not mean that discussing them means avoiding discussion of men’s power. Jeff Hearn has been critical of some masculinities scholarship as being too focused on describing masculinity without paying enough attention to critically assessing how, within a patriarchal society, men and masculinity attain and keep power over women as well as other men.<sup>70</sup> Looking at gender and power is, as I argued above, an important part of the antiessentialist project, as essentialist notions of gender reinforce power structures. For masculinities, essentialist notions of who is a man and what is masculinity work to reinforce the dominance of men over women, as well as over men who do not fit within the essentialist notion. This understanding of power and masculinity is also an important part of masculinities studies.

These theoretical frameworks about masculinities are useful for the study of sex segregation. Importantly, though these theorists have conclusively shown that there is no one masculinity, they have also convincingly argued that there is such a thing as hegemonic masculinity as well as the hegemony of men. In other words, though masculinities are varied, there are still important ways that masculinity and men shape identity and wield power. These two concepts—hegemonic masculinity and the hegemony of men—that are drawn from the theories of gender, antiessentialism, and masculinities described here form the framework for the rest of this Article’s analysis of sex segregation and will be described and analyzed in the two sections that follow.

### III. HEGEMONIC MASCULINITY

The various forms of sex segregation I have identified in this project are an important part of the construction of hegemonic masculinity in this country. These forms of sex segregation contribute to the construction of three important characteristics of such a hegemonic masculinity—that men are not feminine, are heterosexual, and are physically aggressive. Certainly, there are other structures and institutions that powerfully contribute to this dominant form of masculinity, such as family, work, media, social networks, and

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<sup>68</sup> CONNELL, *supra* note 40, at 106–07.

<sup>69</sup> See, e.g., R.W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 GENDER & SOC’Y 829, 841 (2005) (“Men can dodge among multiple meanings according to their interactional needs.”); Kimmel, *supra* note 14, at 187–89.

<sup>70</sup> Jeff Hearn, *From Hegemonic Masculinity to the Hegemony of Men*, 5 FEMINIST THEORY 49, 59–61 (2004).

school, as well as cultural practices and symbols that do the same.<sup>71</sup> However, law and its relationship to sex segregation, whether mandatory, administrative, permissive, or voluntary, are an important part of the social structures creating and maintaining this hegemonic masculinity as well.

Hegemonic masculinity is a key concept in the study of masculinities. Though masculinities scholars have convincingly demonstrated there is no single masculinity, many have argued that there is a contextually contingent idealized masculinity that exerts normative power over men to conform. The theory behind this dominant masculinity, labeled “hegemonic masculinity,” was first developed by Connell<sup>72</sup> and has most recently been defined by her as “the configuration of gender practice which embodies the currently accepted answer to the problem of the legitimacy of patriarchy, which guarantees (or is taken to guarantee) the dominant position of men and the subordination of women.”<sup>73</sup> Stated slightly differently, hegemonic masculinity is “the currently most honored way of being a man[. I]t require[s] all other men to position themselves in relation to it, and it ideologically legitimate[s] the global subordination of women to men.”<sup>74</sup>

Unpacking this term makes clear that this concept is rooted in notions of power and is contextual, dynamic, and idealized. Thus, although boys and girls, men and women, live and experience different forms of masculinity within particular contexts, one form of masculinity often exerts the most pressure to conform to it. Hegemonic masculinity is that masculinity and it works to subordinate both women and non-hegemonically masculine men.<sup>75</sup> It subordinates women by definition, as hegemonic masculinity is associated with the characteristics that allow men to subordinate women; it subordinates other men, non-hegemonically masculine men, by labeling their expressions of personhood as inferior to “true” manhood.

Without understanding context, though, it is impossible to say exactly what characteristics are associated with hegemonic masculinity. These characteristics change over time<sup>76</sup> and vary depending on culture and other iden-

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<sup>71</sup> See MICHAEL A. MESSNER, *TAKING THE FIELD: WOMEN, MEN, AND SPORTS* 22–26 (2002) (outlining interrelationship among performance, social structures, and cultural symbols in constructing gender).

<sup>72</sup> See R.W. Connell, *Men's Bodies*, in R.W. CONNELL, *WHICH WAY IS UP? ESSAYS ON SEX, CLASS AND CULTURE* 17–32 (1983).

<sup>73</sup> CONNELL, *supra* note 42, at 77.

<sup>74</sup> Connell & Messerschmidt, *supra* note 69, at 832.

<sup>75</sup> Emma Renold claims that this “culturally exalted” masculinity relies on “the domination of other men and the subordination of women, femininity and Other (non-hetero) sexualities.” EMMA RENOLD, *GIRLS, BOYS AND JUNIOR SEXUALITIES: EXPLORING CHILDREN'S GENDER AND SEXUAL RELATIONS IN THE PRIMARY SCHOOL* 66 (2005) (citing R.W. CONNELL, *MASCULINITIES: KNOWLEDGE, POWER, AND SOCIAL CHANGE* 76 (1995)); see also McGinley, *supra* note 7, at 1230 (defining masculinity as “a structure that reinforces the superiority of men over women and a series of practices, associated with masculine behavior, performed by men or women that maintain men's superior position over women”).

<sup>76</sup> CONNELL, *supra* note 42, at 77 (“When conditions for the defence of patriarchy change, the bases for the dominance of a particular masculinity are eroded. New groups

tity characteristics.<sup>77</sup> But, in traditionally male-dominated societies, such as the United States, there are certain characteristics that are more likely to be associated with hegemonic masculinity than others.<sup>78</sup> These characteristics are understood, in part, based on cultural practices that have institutional power behind them in forcing the cultural ideal upon people.<sup>79</sup> Sex segregation, and the role of the law in ensuring or allowing it, is one such cultural practice that must be explored in its relation to hegemonic masculinity.

Important to this definition of hegemonic masculinity is the notion of hegemony itself. Hegemony in this context refers to an ideology of masculinity that exerts power over others through “everyday, taken-for-granted ideas and practice performed ‘with consent’ [and] ‘without coercion.’”<sup>80</sup> In such a system, there are other types of masculinities that work in conjunction with the hegemonic form. Connell identifies subordinated, complicit, and marginalized masculinities. Subordinated masculinities are those that are dominated and made inferior by hegemonic masculinity.<sup>81</sup> Complicit masculinities are those practiced by men who do not exhibit hegemonic masculinity but benefit from its existence in its establishment of an overall pattern of subordination of women.<sup>82</sup> Marginalized masculinities are those exhibited by people who differ in race or class from the dominant form of masculinity. These marginalized masculinities may be consistent in some ways with hegemonic masculinity, such as, in the example Connell uses, the famous black

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may challenge old solutions and construct a new hegemony. The dominance of *any* group of men may be challenged by women. Hegemony, then, is a historically mobile relation.”).

<sup>77</sup> See, e.g., Marlon Riggs, *Black Macho Revisited: Reflections of a SNAP! Queen*, in BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER 306, 311 (Devon W. Carbado ed., 1999) (describing dominant “Afrocentric” black men who “don’t flinch, don’t weaken, don’t take blame or shit, take charge, step-to when challenged, and defend themselves without pause for self-doubt”).

<sup>78</sup> See, e.g., GILBERT & GILBERT, *supra* note 67, at 48 (identifying traditional masculinity as “more rational than emotional, more callous than empathetic, more competitive than cooperative, more aggressive than submissive, more individualistic than collectivist”); Emma Renold, ‘Other’ Boys: *Negotiating Non-Hegemonic Masculinities in the Primary School*, 16 GENDER & EDUC. 247, 251 (2004) (describing dominant masculinity as characterized by football, fighting, hardness, competitiveness, and compulsory heterosexuality).

<sup>79</sup> CONNELL, *supra* note 42, at 77 (“[H]egemony is likely to be established only if there is some correspondence between cultural ideal and institutional power, collective if not individual.”).

<sup>80</sup> Hearn, *supra* note 70, at 53. Hearn draws this description from a range of literature, see *id.* at 53–55, but most importantly from ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOK (1971). Connell also draws on Gramsci in crafting the term “hegemonic masculinity.” See CONNELL, *supra* note 42, at 77.

<sup>81</sup> CONNELL, *supra* note 42, at 78–79 (identifying gay masculinity as the “most conspicuous” of such masculinities but also listing others).

<sup>82</sup> *Id.* at 79–80 (“Masculinities constructed in ways that realize the patriarchal dividend, without the tensions or risks of being the frontline troops of patriarchy, are complicit in this sense.”).

male athlete, but will always be marginalized because of other identity characteristics.<sup>83</sup>

Theorists have criticized the concept of hegemonic masculinity in various ways, including claiming that it is unclear in its substance.<sup>84</sup> However, my working premise is that the notion is nonetheless useful in understanding what conceptions of masculinity exist that exert normative force on people to conform. Though it may be impossible to fully describe such a masculinity because of the wide variety of forces that influence its nature, some understanding of it can come from looking at the forces, such as law, that create and reinforce its hegemony. Sex segregation, with the power or permission of law, in the ways identified in this project, is one such force. Particularly following the feminist legal reforms of the past several decades that were supposed to eliminate invidious sex discrimination in our society, the sex segregation that remains is one of the “taken-for-granted ideas and practices” described by Hearn that is “performed with consent [and] without coercion.”<sup>85</sup> In that way, it is one of the important contributors to hegemonic masculinity.

Thus, when law segregates or allows for segregation across all the different areas described in this project, we can see some of the ways that law, government institutions, and cultural practices help to associate and maintain the association of particular characteristics with hegemonic masculinity. And, not surprisingly, when law segregates or allows segregation of men and women in the ways described in this project, it helps to essentialize masculinity in a way that aligns with characteristics frequently associated with men in a society in which women and non-hegemonically masculine men are subordinated. Here, I demonstrate that sex segregation contributes to and perpetuates the association of three important characteristics to hegemonic masculinity: that men are not feminine, are heterosexual, and are physically aggressive.

#### A. *Not Feminine*

Probably the most important aspect of most conceptions of hegemonic masculinity is that masculinity is defined as that which is not feminine, or that which is not associated with girls or women.<sup>86</sup> In an early feminist writing, Nancy Chodorow described how society places immense pressure on

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<sup>83</sup> *Id.* at 80–81.

<sup>84</sup> *See* Hearn, *supra* note 70, at 58–59.

<sup>85</sup> *Id.* at 53.

<sup>86</sup> This feature of hegemonic masculinity is closely associated with the feature of the hegemony of men that I will discuss later, that man is a category defined as separate and distinct from woman. However, here, I focus on the traits associated with masculinity, in particular its distinction from the traits associated with femininity. In this sense, I am referring to character attributes. In the later section, I focus not on character attributes but rather on the essentialized dichotomy that there are two sexes and that the person who is a “man” is distinct in his existence from the person who is a “woman.”

boys from an early age “to reject identification with or participation in anything that seems ‘feminine.’”<sup>87</sup> Some theorists, like Chodorow, attribute this need for differentiation to the Freudian need of young boys to separate from their mother;<sup>88</sup> others attribute it to the desire to associate with the more dominant part of a patriarchal society rather than the subordinated;<sup>89</sup> still others attribute it to fear among men to look frail in the eyes of other men.<sup>90</sup> Regardless of the origin of this need, most gender theorists acknowledge the simple fact that the dominant societal notion of being masculine means “doing things that cannot and should not be done by women.”<sup>91</sup> Ultimately, masculinity requires men to “make it clear—eternally, compulsively, decidedly—that they are not ‘like’ women.”<sup>92</sup>

Sex segregation in law and society is one of the basic ways that men are differentiated from what is feminine and thereby defined by that which is not feminine. In previous work on masculinity and single-sex education, I described how the current push to expand sex-segregated education for boys has been driven in large part by an essentialist view of masculinity that includes the notion that boys occupy almost completely different worlds than girls.<sup>93</sup> The advocates for sex-segregated education for boys push for different examples to be used in class (for example, sports instead of shopping) and different books for the students to read.<sup>94</sup> They also believe that boys need to learn from male teachers rather than female teachers so that young boys are not “feminized” and instead have male role models to become appropriately masculine.<sup>95</sup> Now that the law has been changed to allow for

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<sup>87</sup> Nancy Chodorow, *Being and Doing: A Cross-Cultural Examination of the Socialization of Males and Females*, in *WOMAN IN SEXIST SOCIETY: STUDIES IN POWER AND POWERLESSNESS* 173, 186 (Vivian Gornick & Barbara K. Moran eds., 1971). She also writes that boys, so concerned with defining themselves as masculine, are troubled because “there is no sure definition of masculinity, no way for the little boy to know if he has really made it, except insofar as he manages to differentiate himself from what he somehow vaguely defines as femininity.” *Id.* at 189.

<sup>88</sup> *Id.* at 184–89; see also CONNELL, *supra* note 40, at 17–22.

<sup>89</sup> Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 *UCLA L. REV.* 499, 503–04 (1991) (“Although masculinity is defined against its polar opposite, the identification with competence and power in a male-dominated world has made it seem to be society’s norm for being fully human.”).

<sup>90</sup> Dowd, *supra* note 13, at 232.

<sup>91</sup> Ellen Jordan, *Fighting Boys and Fantasy Play: The Construction of Masculinity in the Early Years of School*, 7 *GENDER & EDUC.* 69, 75 (1995); see also Sharon R. Bird, *Welcome to the Men’s Club: Homosociality and the Maintenance of Hegemonic Masculinity*, 10 *GENDER & SOC’Y* 120, 125 (1996) (describing an interview with one man who explained that as a young boy “[y]ou just don’t hang out with females because you don’t want to be a wuss, you don’t play with dolls, you don’t whine, you don’t cry . . . you do boy things, you know, guy stuff.”).

<sup>92</sup> Michael S. Kimmel, *Introduction*, in *THE GENDERED SOCIETY READER* 1, 4 (Michael S. Kimmel & Amy Aronson eds., 3d ed. 2008).

<sup>93</sup> Cohen, *supra* note 10, at 165–68.

<sup>94</sup> *Id.* at 166–67 (detailing the different proposed readings for boys in comparison to girls).

<sup>95</sup> *Id.* at 167–68.

more single-sex educational opportunities,<sup>96</sup> boys will have even further differentiation from the feminine than already exists in coeducational schooling opportunities.

One aspect of this part of hegemonic masculinity is protecting important segments of public life for men alone. Chodorow has written about this feature of hegemonic masculinity as follows: “It also becomes necessary to reserve many [socially important] activities for men, to believe that women are unable to do many of the ‘important’ things that contribute to society . . . .”<sup>97</sup> Certainly, the changes in the law in the 1960s and 1970s, both statutory and constitutional, opened up most activities in this country to women, at least in form if not in reality. However, excluded from the important barriers that have been broken is the exclusion of women from direct ground combat roles within the military.<sup>98</sup> This exception is the purported reason that only men are required to fulfill the patriotic duty of registering for the draft at the age of eighteen.<sup>99</sup> In reserving registration and ground combat to men alone, the law keeps what some argue is the most important part of military service from women and leaves it in the hands of men.<sup>100</sup> This is true both in the message this exclusion sends (that, literally, men are full citizens in their military eligibility as compared to women, who are limited) and in the effects of this exclusion (that men have more opportunities for leadership than women because of their ability to participate fully in the military).<sup>101</sup>

In hearings before Congress about whether to expand women’s roles in the military, this aspect of masculinity was made eminently clear. Valorie Vojdik has described the testimony that was elicited in these hearings as “reflect[ing] the underlying belief that a warrior is valuable precisely because women cannot do it.”<sup>102</sup> Two examples are representative. One fe-

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<sup>96</sup> See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,529–30 (Oct. 25, 2006) (codified at 34 C.F.R. Part 106) (allowing schools greater leeway in pursuing sex-segregated educational options under Title IX).

<sup>97</sup> Chodorow, *supra* note 87, at 185. This essay was written before the development of the concept of hegemonic masculinity, but what Chodorow discusses is essentially the same idea.

<sup>98</sup> See U.S. GEN. ACCOUNTING OFFICE, GENDER ISSUES, *supra* note 26 (1998). Women can also be excluded from units that must live with ground combat units, positions for which providing separate living arrangements is too expensive, special operations forces missions or long-range reconnaissance, and units whose physical requirements would exclude the vast majority of women. See *id.*

<sup>99</sup> See *Rostker v. Goldberg*, 453 U.S. 57, 68–69 (1981) (explaining Congress’s perception that registration should be linked to military readiness); *id.* at 76 (“Congress determined that any future draft, which would be facilitated by the registration scheme, would be characterized by a need for combat troops.”).

<sup>100</sup> See Karst, *supra* note 89, at 524–28 (explaining importance of eligibility for combat roles to full citizenship status because being able to defend one’s country with arms has historically been linked with fulfilling core duties of citizenship).

<sup>101</sup> *Id.*

<sup>102</sup> Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women From Combat*, 57 ALA. L. REV. 303, 343 (2005).

male Air Force pilot testified that a male test pilot said to her, "Look, I can handle anything, but I can't handle being worse than you."<sup>103</sup> Likewise, a Special Operations sergeant testified that "the warrior mentality will crumble if women are placed in combat positions . . . . There needs to be that belief that 'I can do this because nobody else can.'"<sup>104</sup> Basic to these notions of what it means to be a man is that men can do something that is decidedly valued and equally unfeminine. Law's continued sex segregation of part of the military helps perpetuate this part of masculinity.<sup>105</sup>

This differentiation from women and femininity is also a key part of men's clubs that have exclusive membership policies. Although such sentiments may not be openly stated as frequently today, Dixon Wecter stated in 1937 that what lies behind many men's decisions to join an all-male club is that Man wants "his peculiar asylum from the pandemonium of commerce, the bumptiousness of democracy, and the feminism of his own household."<sup>106</sup> Likewise, Deborah Rhode has described these sex-segregated clubs as "retreats from work or wives."<sup>107</sup>

The result of men "retreating" from women is that men police each other to avoid exhibiting behaviors that would appear to be feminine. In one study of male-only interactions, a researcher concluded that when men are around other men to the exclusion of women they believe that "the emotions and behaviors typically associated with women were inappropriate within the male homosocial group."<sup>108</sup> This finding is hardly surprising, as the same thread is at work here that is at work in the examples of schools and military already discussed. Sex-segregated institutions, whether segregated by mandate of law or voluntarily on the part of a private organization, contribute to the hegemonic notion of masculinity that defines being a man as not being feminine.

### B. *Heterosexual*

Another important feature of hegemonic masculinity in this culture is that being masculine means being heterosexual. Catharine MacKinnon has argued that compulsory heterosexuality is an important part of hegemonic masculinity because it "keep[s] women sexually for men and men sexually

<sup>103</sup> *Id.* (quoting LINDA BIRD FRANCKE, *GROUND ZERO: THE GENDER WARS IN THE MILITARY* 260 (1997)).

<sup>104</sup> *Id.*

<sup>105</sup> Vojdik convincingly demonstrates that other aspects of the military's treatment of women beyond the combat exclusion also have this effect. *Id.* at 343-49. However, none of these features, such as dress codes, hostility, harassment, and rape, fits the definition of sex segregation that this project covers.

<sup>106</sup> DIXON WECTER, *THE SAGA OF AMERICAN SOCIETY* 253 (1937), quoted in Michael M. Burns, *The Exclusion of Women From Influential Men's Clubs: The Inner Sanctum and the Myth of Full Equality*, 18 *HARV. C.R.-C.L. L. REV.* 321, 343 (1983).

<sup>107</sup> Deborah Rhode, *Association and Assimilation*, 81 *Nw. U. L. REV.* 106, 113 (1986).

<sup>108</sup> Bird, *supra* note 91, at 125.

inviolable.”<sup>109</sup> In rejecting homosexuality and requiring heterosexuality, hegemonic masculinity again defines itself by what it is not.<sup>110</sup> Homophobia is an important part of this hegemonic masculinity and men, fearing that they will be perceived as gay by other men and thus “not a real man,” will “exaggerate[e] all the traditional rules of masculinity, including sexual predation with women. Homophobia and sexism go hand in hand.”<sup>111</sup> Taken to an extreme, this aspect of hegemonic masculinity can lead to violence against men who do not exhibit outward heterosexuality, from those who exhibit too much (or even any) femininity to those who are openly gay.<sup>112</sup>

Assumed heterosexuality underlies many forms of sex segregation described in this project, and this assumption pushes men to conform to this norm of masculine behavior.<sup>113</sup> As an example, assumed heterosexuality is one of the basic reasons behind the sex segregation of prisons, as men must be kept from women because men are heterosexual and will seek out sex with women, either consensually or non-consensually. This assumption of heterosexuality also plays an important role in laws and administrative policies that prohibit men from being guards in women’s prisons or conducting searches of women in criminal justice settings.<sup>114</sup> One such policy with respect to prisons was challenged in *Everson v. Michigan Department of Corrections*.<sup>115</sup> In upholding the restriction, the Sixth Circuit wrote that when a male guard observes a female inmate engaged in activities such as using the toilet, showering, dressing, brushing her teeth, requesting sanitary napkins, sleeping, and waking up, he is violating her “special sense of privacy in [her] genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.”<sup>116</sup> In relying on this “special sense of privacy” that exists with respect to men but not women, the court is not relying on notions of safety from guards’ aggression<sup>117</sup> but rather referring to male guards’ assumed heterosexuality and the harm inherently imposed on women when assumed heterosexual men see

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<sup>109</sup> Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081, 1087 (2004).

<sup>110</sup> CONNELL, *supra* note 42, at 40.

<sup>111</sup> Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in *THEORIZING MASCULINITIES* 119, 133 (Harry Brod & Michael Kaufman eds., 1994).

<sup>112</sup> CONNELL, *supra* note 42, at 154–57 (describing the connection between hegemonic masculinity and violence against gays and providing some examples).

<sup>113</sup> See Dowd, *supra* note 13, at 222–25 (explaining the importance of heteronormativity to hegemonic masculinity and how “the need to conform affects all men”).

<sup>114</sup> See, e.g., CAL. PENAL CODE § 4021 (2000); 29 DEL. C. § 8903 (2009); MINN. STAT. ANN. § 642.08 (2006); N.C. GEN. STAT. ANN. § 14-208 (2009); N.J. STAT. ANN. § 30:8-12 (2009).

<sup>115</sup> 391 F.3d 737 (6th Cir. 2004).

<sup>116</sup> *Id.* at 757 (quoting *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1981)).

<sup>117</sup> The court does discuss fear from male aggression elsewhere in the opinion, which I will address below *infra* Part III.C.

women's genitalia.<sup>118</sup> Of course, this harm is not the only reason behind these policies, as safety is part of the concern as well, but this assumption of heterosexuality is a major reason behind much of the sex segregation in the criminal justice system, both for prisoners and guards, as well as arrestees and police officers.

A similar dynamic is at work in restroom segregation. Although, like the prison discussion above, fear of violence is certainly part of the reason for sex segregating restrooms, fear of heterosexual sexual interaction is another one of the reasons, whether the segregation is mandatory, administrative, permissive, or voluntary.<sup>119</sup> Society assumes heterosexuality; thus, men and women cannot be together in a setting involving the exposure of their genitalia. Legal philosopher Richard A. Wasserstrom has written that the reason for sex-segregated bathrooms is heterosexual mystery: "The case against [sex-segregated bathrooms] now would rest on the ground that they are, perhaps, one small part of that scheme of sex-role differentiation which uses the mystery of sexual anatomy, among other things, to maintain the primacy of heterosexual sexual attraction central to [patriarchy]."<sup>120</sup>

Many of the other forms of sex segregation described in this project have a similar association of heterosexuality with masculinity lying behind them. The move toward single-sex education in recent years is premised on the idea that without girls in classes with them, boys will not be "distracted" because they will avoid the objects of their heterosexual desire.<sup>121</sup> Sex-segregated sports rely upon the stereotype of the heterosexual male athlete to bring men close to one another, close enough that they form a family-like team, without a concern that they will be labeled gay.<sup>122</sup> All forms of sex-segregated living quarters, again whether mandatory, administrative, permissive, or voluntary, assume heterosexuality. Sex-segregated health clubs, often permitted by law but frequently voluntarily formed for women, also assume heterosexual male desire.<sup>123</sup>

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<sup>118</sup> See Jami Anderson, *Bodily Privacy, Toilets, and Sex Discrimination: The Problem of 'Manhood' in a Women's Prison*, in *LADIES AND GENTS: PUBLIC TOILETS AND GENDER* 90, 100–01 (Olga Gershenson & Barbara Penner eds., 2009).

<sup>119</sup> See Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness"*, 98 *COLUM. L. REV.* 1642, 1712 (1998) ("We do not, as a society, expect or wish for people to express themselves sexually in the public restroom. If we did, then bathrooms would generally be unisex (thereby facilitating, for example, the protected heterosexual married couple's access to each other).").

<sup>120</sup> Richard A. Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 *UCLA L. REV.* 581, 594 (1977).

<sup>121</sup> See Cohen, *supra* note 10, at 153–55.

<sup>122</sup> See MICHAEL A. MESSNER, *POWER AT PLAY: SPORTS AND THE PROBLEM OF MASCULINITY* 96, 106–07 (1992) (describing how homophobia and assumed heterosexuality neutralize any seeming "erotic bond" between men on a sports team).

<sup>123</sup> See David E. Bernstein, *Sex Discrimination Laws Versus Civil Liberties*, 1999 *U. CHI. LEGAL F.* 133, 189 (1999) ("Women frequently join women-only health clubs to avoid unwanted male attention, such as ogling, while they exercise.").

The message delivered about masculinity<sup>124</sup> in separating men in all of these environments is that men are heterosexual and do not have sex with other men. Furthermore, to preserve heterosexuality, men must be prohibited from being exposed to women in private moments. The norm is heterosexuality; the aberration is homosexuality. Laws or policies that segregate based on sex out of fear of heterosexual sexual relationships contribute to and perpetuate the construction of hegemonic masculinity as heterosexual.

Of course, the irony is that, despite heterosexuality being an important component of the construction of hegemonic masculinity, by segregating based on sex, law and society create more opportunities for same-sex sexual interaction. As one queer theorist has written:

It is possible to argue that the social organization of Western society promotes homosexuality, or at least makes such activity possible. Most social, political and educational institutions (with the exception of the family) have been organized along strict division of the sexes. . . . If one wanted to design a system better calculated to promote opportunities to foster homosexual affection and activity, it would be difficult to improve upon the system which has operated in the West across many centuries.<sup>125</sup>

Familiar examples abound that prove this point about sex segregation. Sex-segregated bathrooms provided the opportunity for Senator Larry Craig to allegedly proposition another man in the Minneapolis airport in 2007.<sup>126</sup> In the context of sex-segregated men’s prisons, the occurrence of prison rape is widely known, but there are other forms of sexual contact that also take place between men in prison, with a variety of complications and complexities.<sup>127</sup> Researchers have looked at “pseudo-consensual” sex between men in prison and determined that sex segregation is an important part of producing an environment in prison in which same-sex sexual behavior occurs.<sup>128</sup>

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<sup>124</sup> In sex segregation that applies to both men and women, the same message is also delivered about femininity and heterosexuality.

<sup>125</sup> PATRICK HIGGINS, *Introduction: The Power Behind the Mask*, in *A QUEER READER* 1, 13 (1993).

<sup>126</sup> See David Alan Sklansky, “One Train May Hide Another”: *Katz, Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 880 (2008). Craig pleaded guilty to disorderly conduct but maintained his innocence. See Patti Murphy & David Stout, *Idaho Senator Says He Regrets Guilty Plea in Restroom Incident*, N.Y. TIMES, Aug. 29, 2007, at A19.

<sup>127</sup> See Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 201–25 (2006) (describing the various factors behind prison sex—pleasure, trade, freedom, transgression, procreation, safety, and love).

<sup>128</sup> See Mary Koscheski, Christopher Hensley, Jeremy Wright & Richard Tewksbury, *Consensual Sexual Behavior*, in *PRISON SEX: PRACTICE AND POLICY* 111, 113 (Christopher Hensley ed., 2002). In referring to other forms of sex in prison, neither I nor presumably these researchers want to downplay the seriousness of prison rape as an issue and occurrence in single-sex men’s prisons. See Julie Kunselman, Richard Tewksbury, Robert W. Dumond & Doris A. Dumond, *Nonconsensual Sexual Behavior*, in *PRISON SEX*, *supra*, at 27–47.

Thus, the irony of sex segregation is that it not only assumes heterosexuality as a part of hegemonic masculinity, but it also uniquely creates opportunities for deviations from that assumed heterosexuality.

### C. *Physically Aggressive*

Certainly one of the most prominent stereotypes associated with hegemonic masculinity is that men are physically aggressive. Most believers in a “true” form of masculinity associate men with being more aggressive than women. Connell calls this belief part of the “modern gender ideology, in the English-speaking world at least.”<sup>129</sup> For African American men, this stereotype is particularly prominent, as society views one dominant conception of being a black man as being overly aggressive.<sup>130</sup> And, while it is certainly true that men do exhibit aggression in a variety of ways,<sup>131</sup> it is important to understand the way that institutions and social practices contribute to the stereotype and its instantiation in reality.<sup>132</sup> For scholars of masculinities, one of the reasons for the realities of male aggression is that “being violent is one socially recognized way of being a man.”<sup>133</sup>

Sex segregation is one of the ways that the association between hegemonic masculinity and aggression is created and perpetuated. The Supreme Court has twice, in the context of sex segregation, approved the association of men with aggression. In *Rostker v. Goldberg*, the Court found that women could be excluded from registering for the draft because women were not eligible for combat roles in the military.<sup>134</sup> In approving the segregation of the draft, the Court left unquestioned the sex segregation of combat roles. By reserving this aspect of warfare to men and men alone, the Court implicitly approved this association of aggression as a key part of masculinity.<sup>135</sup> Although the specifics of the exclusion of women from combat have

<sup>129</sup> CONNELL, *supra* note 42, at 45.

<sup>130</sup> Cooper, *supra* note 11, at 876–80 (describing the stereotype of the “Bad Black Man”); Harris, *supra* note 11, at 783–84 (describing the complexities of stereotypes of black masculinity as a reaction to white male dominance); Dorothy E. Roberts, *Deviance, Resistance, and Love*, 1994 UTAH. L. REV. 179, 188 (discussing “[t]he stereotype of the aggressive, ‘macho’ Black male”).

<sup>131</sup> See FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT, CRIME IN THE UNITED STATES TBL.33, TEN-YEAR ARREST TRENDS BY SEX, 1999–2008 (2008); JAMES W. MESSERSCHMIDT, MASCULINITIES AND CRIME: CRITIQUE AND RECONCEPTUALIZATION OF THEORY 1 (1993) (“It is no secret who commits the vast majority of crime. Arrest, self-report and victimization data all reflect that men and boys both perpetrate more conventional crimes and the more serious of these crimes than do women and girls.”); Hyde, *supra* note 50, at 586 (“Across several meta-analyses, aggression has repeatedly shown gender differences that are moderate in magnitude . . .”).

<sup>132</sup> See Levit, *supra* note 13, at 1056 (discussing the ways that scholars have “direct[ed] attention toward the ways in which legal doctrines and constructs may reinscribe stereotypes of male aggression”).

<sup>133</sup> Harris, *supra* note 11, at 782.

<sup>134</sup> *Rostker*, 453 U.S. 57, 78–79 (1981).

<sup>135</sup> See Levit, *supra* note 13, at 1060.

changed since *Rostker*,<sup>136</sup> the basic prohibition remains, and therefore, the basic connection between men and aggression does as well. With the requirement for men and men alone to register for the draft subject to various penalties, “[t]he civic obligation of men is clear: The concept of citizenship for men is intricately tied to fighting.”<sup>137</sup>

Likewise, in *Dothard v. Rawlinson*,<sup>138</sup> the Supreme Court more explicitly relied on this stereotype about men. In *Dothard*, the Court found that Alabama’s prohibition on women serving as guards in a maximum-security men’s prison was permissible under Title VII’s scheme that permits sex segregation in employment.<sup>139</sup> The Court’s justification was that the men in the prison were naturally aggressive, which would be activated by women’s presence.<sup>140</sup>

The same assumption about men’s natural aggression underlies decisions from various courts that have allowed women’s prisons to exclude men from positions as guards. In those cases, the courts view the relationship between prisoner and guard completely opposite of the situation in *Dothard*. In these cases, the prisoners are not seen as aggressive but rather the guards are. The difference is that the prisoners are the women and the guards are the men, thus the aggression flows from the men to the women, not from prisoner to guard as it did in *Dothard*.<sup>141</sup> In these decisions, “men are by nature sexual predators,”<sup>142</sup> and sex segregation in prison employment is required. The same stereotype of hegemonic masculinity as aggressive that underlies these employment cases is at the heart of the various prohibitions on cross-sex searches in criminal justice environments as well as the basic sex segregation of prison populations.<sup>143</sup>

Sex-segregated school is another example. In previously analyzing the current trend toward single-sex education and its focus on the needs of boys, I concluded that one of the central features of this push to sex segregate boys

<sup>136</sup> See U.S. GEN. ACCOUNTING OFFICE, *supra* note 26 (discussing evolution of policy).

<sup>137</sup> Nancy Levit, *Male Prisoners: Privacy, Suffering, and the Legal Construction of Masculinity*, in PRISON MASCULINITIES 93, 95 (Don Sabo, Terry A. Kupers & Willie London eds., 2001).

<sup>138</sup> 433 U.S. 321 (1977).

<sup>139</sup> *Id.* at 334. Title VII allows sex segregation when sex 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) (2006). For a discussion of this exception, see Cohen, *supra* note 2, at Part III.C.

<sup>140</sup> *Dothard*, 433 U.S. at 335–37.

<sup>141</sup> See Levit, *supra* note 137, at 95–97 (summarizing the women’s prison cases).

<sup>142</sup> Anderson, *supra* note 118, at 101.

<sup>143</sup> See, e.g., Barry Ruback, *The Sexually Integrated Prison: A Legal and Policy Evaluation*, 3 AM. J. CRIM. L. 301, 301 (1975) (describing as one of the reasons for the move to sex segregation the fear of being mixed “with hard-core male offenders”). Certainly other considerations, such as privacy, form the basis for these forms of segregation. However, as discussed, the privacy concerns have different bases for men and women, almost always focusing on the invasion against women, whether women are the searchers or the searched, the guards or the prisoners, that will occur when aggressive men are present.

is the belief that boys need to be taught in a way that matches their natural aggression, something girls do not possess.<sup>144</sup> Verna Williams has similarly looked at the rhetoric of single-sex education as being rooted in a perceived need to address the problems associated with the aggression of black males.<sup>145</sup> In fact, the stereotype of the aggressive black male was one of the reasons sex segregation in schools expanded after *Brown v. Board of Education*<sup>146</sup> and the fall of Jim Crow. Because white parents feared this stereotype, they pushed to keep their daughters separate from African-American boys the only way law would allow once race discrimination was unlawful—through sex segregation.<sup>147</sup>

Beyond the military, prisons, and schools, the stereotype of male aggression forms the basis of much of the sex segregation discussed in this project. For instance, after looking into the history of the sex segregation of bathrooms, Terry Kogan concluded that “[s]eparate public restrooms for men and women foster subtle social understandings that women are inherently vulnerable and in need of protection when in public, while men are inherently predatory.”<sup>148</sup> Also, in the context of sport, part of the justification for sex segregation is to protect women from injury if they were to compete against the natural aggression of men.<sup>149</sup>

Associating hegemonic masculinity with physical aggression, as with not being feminine and being heterosexual, is not the work of sex segregation alone. Other powerful forces in American life do this as well. That sex segregation does not create the content of hegemonic masculinity by itself is immaterial, as no one institution can claim credit for such a dominant force. However, sex segregation in its taken-for-granted forms that persist today is one important vehicle for hegemonic masculinity to gain and reinforce this content.

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<sup>144</sup> Cohen, *supra* note 10, at 155–58. This trope has not died down since I wrote about it two years ago. See, e.g., Nicholas D. Kristof, *The Boys Have Fallen Behind*, N.Y. TIMES, Mar. 27, 2010, at WK12.

<sup>145</sup> Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 15–23 (2004).

<sup>146</sup> 347 U.S. 483 (1954).

<sup>147</sup> See Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 YALE J.L. & HUMAN. 187 (2006).

<sup>148</sup> Terry S. Kogan, *Sex-Separation in Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 56 (2007).

<sup>149</sup> Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM. 13, 142 (2001) (“The contact sports exemption marginalizes and stigmatizes female athletes as fragile, delicate, and vulnerable, at the same time that it defines male athleticism as aggressive and physically powerful.”); Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 421–30 (2000) (cataloging the courts that have justified sex segregation based on the “fragile female” and the need for her to be protected from contact sports with aggressive males). Although, as Sangree describes, most courts have rejected this rationale, the rationale continues to be offered by schools and sports teams.

## IV. THE HEGEMONY OF MEN

As I discussed earlier,<sup>150</sup> challenging socially constructed notions of identity is one key part of an antiessentialist view of gender. The previous section’s focus on hegemonic masculinity, along with its analysis of the harms that flow from such a hegemonic notion of masculinity, falls within this part of the antiessentialist project.

However, the multiplicity of identity is not the only element of antiessentialism; another key part is focusing on equality issues and how power relates to the construction of a seemingly essential identity. In critiquing some of the shortcomings of the concept of hegemonic masculinity, Jeff Hearn has argued that attention should be focused less on that identity concept and more on the way that men, as constructed within society, use power to subordinate women and other men. He calls this an investigation into “the hegemony of men.”<sup>151</sup>

Hearn argues that any critical feminist analysis of men must be concerned about this power that men use to subordinate women and other men. By focusing on hegemonic masculinity alone, scholars are right to look to the way that men are “a social category formed by the gender system,” but they should also look at how men are “dominant collective and individual agents of social practices.”<sup>152</sup> “In this view,” according to Hearn, “there is a greater need to look critically at the ordinary, taken-for-granted accepted dominant constructions, powers and authorities of men—in relation to women, children and other men, both men who are subordinate and those who are superordinate.”<sup>153</sup> As another scholar who has written about the hegemony of men has said, beyond looking at the “complex, fluid and contradictory” nature of identity, which is the heart of the inquiry into hegemonic masculinity, “it is imperative not to ignore the asymmetrical relationship between men and women and between masculinities and femininities in western societies.”<sup>154</sup>

A project looking into the hegemony of men has several components, with power at the heart of each of them. One of the components Hearn identified that is relevant to this project on sex segregation is focusing on the ways that the concept of “men” becomes hegemonic, with its “taken-for-granted domination . . . through consent.”<sup>155</sup> Scholars must look to “the formation of the social category of men” and the social processes by which the category is accepted.<sup>156</sup> Hearn asks the question: “[W]hat are the vari-

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<sup>150</sup> See *supra* notes 38–60 and accompanying text.

<sup>151</sup> Hearn, *supra* note 70, at 59.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> Maria Lohan, *How Might We Understand Men’s Health Better? Integrating Explanations From Critical Studies on Men and Inequalities in Health*, 65 *SOC. SCI. & MED.* 493, 494 (2007).

<sup>155</sup> Hearn, *supra* note 70, at 59.

<sup>156</sup> *Id.*

ous dominant ways that there are for governmentally categorizing men—by the state, the law, medical sciences, social sciences, religion, business, and so on—and how [do] these intersect with, complement and contradict one another”<sup>157</sup> Answering this question requires looking into “the mass of . . . organizational and institutional ways in which particular men are placed within the social category of men,”<sup>158</sup> an inquiry at the heart of Judith Butler’s argument that there is no “natural sex” but rather culturally-created categories of men and women.<sup>159</sup>

A second component Hearn has identified as a central part of this project is understanding and analyzing “the system of distinctions and categorizations between different forms of men and men’s practices to women, children, and other men.”<sup>160</sup> In other words, Hearn is suggesting that scholars must study how men have differentiated themselves in ways that allow them to exercise power over women, children, and other men. The social structures and systems that perform this function are an important part of the hegemony of men. These social structures and systems might be, as Hearn describes them in a related portion of his agenda for studying the “hegemony of men,” men’s most “natural(ized), ordinary, normal and most taken-for-granted practices.”<sup>161</sup> These practices, including, as I argue below, various forms of sex segregation, help us understand men’s dominance over women and non-hegemonically masculine men.

Although Hearn sets forth this concept of hegemony of men as mostly an alternative to studying hegemonic masculinity, I find the two useful to discuss in tandem. As the previous section argued, the forms of sex segregation that continue to exist work together to create hegemonic notions of masculinity. In other words, there are common threads that run through the forms of sex segregation that create a powerful message of what it means to be a man. The harms associated with it cascade to women, non-hegemonically masculine men, and ultimately all men, in the sense that behavior and personality for everyone is constricted by masculinity norms. Although there are indeed theoretical problems with the notion of hegemonic mascu-

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<sup>157</sup> *Id.* at 60.

<sup>158</sup> *Id.* Hearn suggests that religious and educational institutions as well as gender-specific restrictions on toilets and within the military are part of this answer. *Id.* As the various forms of sex segregation studied in this project and discussed later in this section make clear, Hearn was on the right track with these suggestions. *See infra* notes 160–162 and accompanying text.

<sup>159</sup> *See* BUTLER, *supra* note 43, at 11.

<sup>160</sup> Hearn, *supra* note 70, at 60.

<sup>161</sup> *Id.* at 61. The three different aspects of the “hegemony of men” agenda I discuss in the text are Hearn’s first, second, and fifth items. Hearn also has four other parts of the “hegemony of men” agenda that are less relevant to the study of sex segregation I undertake here. *See id.* at 60–61.

linity,<sup>162</sup> understanding the existence of a patterned idealized masculinity, or at least some semblance of an ideal, is important.

However, as Hearn argues, that is not enough. Understanding this hegemony of men, as described by Hearn, is important as well. By looking to how sex segregation creates opportunities for men to build or maintain power over women and other men, we can see part of the social structures that contribute to patriarchy. The extent that these structures are less controversial at this point in time, particularly given that these forms of sex segregation have continued to exist even after the feminist legal reforms of the past several decades, shows that present-day sex segregation is just the type of taken-for-granted practice that Hearn contemplates in his discussion of hegemony.<sup>163</sup> And, to the extent that these practices effectively use power to promote an essentialist view of masculinity, investigating them within the lens of hegemony is an important part of an antiessentialist project.

Based on these forms of sex segregation and working from Hearn’s agenda for investigating the hegemony of men, I will discuss four forms of hegemonic practices that involve sex segregation. First, I will demonstrate that sex segregation contributes to the social acceptance of the category “men.” Second, I will argue that sex-segregated space occupied by men restricts the transfer of socially valued knowledge to other men and keeps it from women. Third, I argue that sex segregation gives men an opportunity to foster and grow negative attitudes about women that contribute to the oppression of women. Fourth, I will also argue that sex segregation is a site for policing gender conformity and punishing those men who do not exhibit hegemonic masculinity. In each of these important ways, sex segregation contributes to not only a hegemonic form of masculinity that harms individual identity formation, but also to the hegemony of men that subordinates women and non-hegemonically masculine men.

#### A. *The Category of “Men”*

Hearn’s first charge in investigating the hegemony of men is looking to “organizational and institutional ways in which particular men are placed within the social category of men.”<sup>164</sup> By doing so, we can unmask how society creates the category “men” as separate from the category “women.”<sup>165</sup> At its most basic level, this is exactly what sex segregation in all its forms does. In particular, when law mandates segregation of men and

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<sup>162</sup> See Connell & Messerschmidt, *supra* note 69, at 836–45 (reviewing the various critiques); see also Christine Beasley, *Rethinking Hegemonic Masculinity in a Globalizing World*, 11 MEN & MASCULINITIES 86 (2008).

<sup>163</sup> Hearn, *supra* note 70, at 61.

<sup>164</sup> *Id.* at 60.

<sup>165</sup> See also BUTLER, *supra* note 43, at 11 (“As a result, gender is not to culture as sex is to nature; gender is also the discursive/cultural means by which ‘sexed nature’ or ‘a natural sex’ is produced and established as ‘prediscursive,’ prior to culture, a politically neutral surface *on which* culture acts.”).

women, it is making this basic distinction through which people understand that the categorization matters and that deviating from the categorization has consequences. Through mandatory and other forms of sex segregation that weave their ways through our lives, we come to accept the seemingly natural distinction that is created each time we see the word “men” or the word “women.” The categories are set up as oppositional and as a legitimate way of thinking about people. The categories are also established as having no gray areas on the margins—a person is either a man or a woman.

The various forms of sex segregation discussed in this project accomplish this categorization of men throughout men’s lives. At an early age, boys encounter the issue when they have to enter a public restroom. If a father accompanies his son, sex segregation poses no problem. However, if a mother accompanies her son, the sex-segregated world of bathrooms poses a problem: does the mother take her son into the women’s room or does she send her young son into the men’s room unattended?<sup>166</sup> However the mother resolves the issue, the lesson from sex segregation comes through to the son. This lesson of categorization continues throughout life and is what Jacques Lacan calls “urinary segregation.”<sup>167</sup> Urinary segregation, according to Lacan, teaches children and adults that sexual difference is eternal, uncompromising, and based in notions of superiority.<sup>168</sup> Basic human similarity between men and women, in the sense that everyone must eliminate waste and that everyone does so in quite similar ways, becomes a site of constructed difference masquerading as natural.<sup>169</sup>

Architectural theorist Joel Sanders expands upon Lacan’s theory of language as the differentiator to include the arrangement of space in sex segregating bathrooms. He argues that sex segregation of the “public bathroom assigns sex and gender identity. The architecture of the public bathroom, where physical walls literally segregate the sexes, naturalizes gender by separating ‘men’ and ‘women’ according to the biology of bodily functions.”<sup>170</sup> Not only does this segregation reinforce the opposition of the categories of “men” and “women,” it also reinforces the notion that sex is binary without room for transsexual, transgendered, or intersexed people.<sup>171</sup>

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<sup>166</sup> Kogan, *supra* note 148, at 4–5 (quoting Ann Landers column in which this problem was posed and Landers answered that the easiest resolution is the “family rest room” in which there is no sex segregation).

<sup>167</sup> JACQUES LACAN, *ECRITS: A SELECTION* 151 (Alan Sheridan trans., 1977).

<sup>168</sup> *Id.* at 152. “For these children, Ladies and Gentlemen will be henceforth two countries towards which each of their souls will strive on divergent wings, and between which a truce will be the more impossible since they are actually the same country and neither can compromise on its own superiority without detracting from the glory of the other.” *Id.*

<sup>169</sup> See Erving Goffman, *The Arrangement Between the Sexes*, 4 *THEORY & SOC’Y* 301, 315–16 (1977).

<sup>170</sup> Joel Sanders, *Introduction*, in *STUD: ARCHITECTURES OF MASCULINITY* 10, 17 (Joel Sanders ed. 1996).

<sup>171</sup> See Terry S. Kogan, *Transsexuals in Public Restrooms: Law, Cultural Geography and Etsitty v. Utah Transit Authority*, 18 *TEMP. POL. & CIV. RTS. L. REV.* 674, 686 (2009);

Sex-segregated sport produces the same effect from an early age. Children participating in youth sports leagues are often segregated by sex. Even though at early ages children’s athletic ability usually does not vary based on sex, leagues grouped by sex tell children that sex is a salient characteristic that matters in how children are treated and reaffirm for parents that sex differences are a naturally occurring method of differentiating children.<sup>172</sup> “The result [is] an apparently ‘natural’ split based on apparently ‘natural’ sex differences. What we already believed—that boys and girls are categorically different—became what we saw . . . .”<sup>173</sup>

This emphasis on binary difference and categorization, with its concomitant creation of the social category “man,” also comes through in sex-segregated school settings. In one of the studies following California’s experiment with single-sex academies, the researchers found that sex segregation “heightened awareness of gender as a category to define students.”<sup>174</sup> The students understood that sex was the organizing basis for the schools, and thus internalized the message that it was a binary distinction central to understanding people. Delivering this understanding of who is male and who is female is an essential part of single-sex education.

The particular message of sex segregation and the hegemony of men as a category also comes through in the military context. At the age of eighteen, every man has to register for the military draft<sup>175</sup> and is subject to penalties if he does not.<sup>176</sup> Each man who does so (or men who understand that they must do so but choose not to) is once again confronted, through the power of a mandate backed with serious penalties, with being categorized as a man and being considered, because of being a man, a potential part of a fighting force that would serve the country. Along with this message comes the message that there is a separate category “woman” who is different and does not fit this description.

This message comes through in other areas as well. In sex-segregated prisons, prisoners are classified based on what level of security they need and based on their sex, suggesting that sex is an important characteristic that by itself defines people. In sex-segregated voluntary groupings or clubs based on hobbies or interests, the message delivered from the act of sex

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Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled “Other,”* 48 HASTINGS L.J. 1223, 1248 (1997).

<sup>172</sup> See MESSNER, *supra* note 71, at 11–12 (discussing the role sex segregation in sport plays in, among other variables, creating dichotomous view of gender among young children).

<sup>173</sup> *Id.* at 23.

<sup>174</sup> AMANDA DATNOW, LEA HUBBARD & ELISABETH WOODY, ONT. INST. FOR STUDIES IN EDUC., IS SINGLE GENDER SCHOOLING VIABLE IN THE PUBLIC SECTOR? LESSONS FROM CALIFORNIA’S PILOT PROGRAM 51 (2001).

<sup>175</sup> 50 App. U.S.C. § 453 (2000).

<sup>176</sup> 5 U.S.C. § 3328(a)(2) (2006) (draft registration is prerequisite to most federal jobs); 50 App. U.S.C. § 462(a) (2000) (criminal penalties for failure to register for the draft); 50 App. U.S.C. § 462(f) (2000) (draft registration is prerequisite to receiving federal educational financial aid).

segregation is that sex is a legitimate way to classify people beyond their shared interest or commitment. This message, that genitalia matter in classifying and categorizing, is at the heart of most sex segregation.

### B. Knowledge

In her discussion of masculinities studies and its intersection with law, Nancy Dowd talks about the way geographers and architectural theorists have described how “space supports dominance,” particularly in spaces associated with one sex.<sup>177</sup> In this way, space is another site of the social construction of sex and gender.<sup>178</sup> Architectural theorist Daphne Spain has written about the way men expand power through the use of space exclusively reserved for men. Spain argues that when sex segregation in a space is pronounced, men occupy a higher, more powerful status than women do.<sup>179</sup>

Spain makes this argument by studying dwellings, schools, and workplaces both cross-culturally and historically.<sup>180</sup> What she finds is that “the physical separation of women and men [ ] contributes to and perpetuates gender stratification by reducing women’s access to socially valued knowledge.”<sup>181</sup> In a patriarchal society, this effect of sex segregation is even more pronounced, as the most socially valued knowledge is in the possession of men.<sup>182</sup> Spain writes that “[i]nsofar as men have an initial advantage . . . and insofar as women and men are separated in places where they live, learn, and work, women’s status will be lower than men’s because they have less access to knowledge.”<sup>183</sup>

Spain argues that “[w]hen gender segregation is imposed by custom or law . . . it typically operates to maintain the privileges of those with the highest status.”<sup>184</sup> Particularly relevant to Hearn’s theory of the hegemony of men, Spain calls these gendered spaces “taken for granted” because society comes to accept them as natural.<sup>185</sup> Modifying these gendered spaces can

<sup>177</sup> Dowd, *supra* note 13, at 221.

<sup>178</sup> LESLIE KANES WEISMAN, *DISCRIMINATION BY DESIGN: A FEMINIST CRITIQUE OF THE MAN-MADE ENVIRONMENT 2* (1992) (“Space, like language, is socially constructed . . . . The uses of both language and space contribute to the power of some groups over others and the maintenance of human inequality.”).

<sup>179</sup> Daphne Spain, *Gendered Spaces and Women’s Status*, 11 *SOCIOLOGICAL THEORY* 137, 137 (1993).

<sup>180</sup> *Id.* at 141–46.

<sup>181</sup> *Id.* at 137.

<sup>182</sup> *Id.* at 140 (“Spatial arrangements might not be associated with gender stratification if all resources were distributed equally between masculine and feminine places. Yet that rarely is the case. The ‘masculine knowledge’ conveyed in schools and workplaces is typically granted higher status than the ‘feminine knowledge’ associated with the dwelling.”).

<sup>183</sup> *Id.* at 139.

<sup>184</sup> Spain, *supra* note 179, at 141.

<sup>185</sup> *Id.* Spain elaborates in a way that directly connects her enterprise with Hearn’s discussion of hegemony as power that is perceived as natural and thus consented to:

work to improve women’s status in society because, in comparison with sex segregation’s effect of limiting the transmission of knowledge, sex integration in physical arrangements can facilitate the exchange of valuable information from those with power to those without power, in other words, from men to women.<sup>186</sup>

Many of the forms of sex segregation I have identified in this project are examples of this type of gendered space. The most obvious environment in which Spain’s argument has traction is in the context of single-sex education, as schools are, by definition, the space in which knowledge is transferred. And, in fact, the way that knowledge transfer is unequal in sex-segregated spaces within a patriarchal society played a major role in the litigation of two of the high profile single-sex education cases. In the litigation surrounding Philadelphia’s single-sex academic high schools in the 1970s and early 1980s,<sup>187</sup> the courts and litigants focused heavily on the ways that the all-boys academic high school provided greater access to knowledge than the all-girls academic high school. Even though both graduated students to college at similarly high rates,<sup>188</sup> the evidence showed that the boys’ school gave students more opportunity to access knowledge than the girls’ school did. For instance, boys learned from teachers with greater knowledge-bases in the subjects they taught,<sup>189</sup> boys had access to almost twice as many books in their library,<sup>190</sup> boys had opportunities to take a wider range of courses,<sup>191</sup> and boys had an alumni network that was much more extensive, accomplished, and active in networking with the students.<sup>192</sup> Almost directly evidencing the knowledge differential associated with sex segregation, the boys’ school alumni network featured annual gatherings that attracted prominent guests in a variety of fields, including: the President of the United Nations General Assembly, the Vice-President of the United States, the Attorney General of the United States, and a former Supreme

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“Spatial arrangements typically fall into the category of things we do not think about. Therein lies their power; they have the ability to sustain the status quo without encountering resistance.” *Id.* at 147.

<sup>186</sup> *Id.* at 137, 147. Spain concludes that this observation “creates an avenue for action.” *Id.* at 147.

<sup>187</sup> For a good overview of these cases, see ROSEMARY C. SALOMONE, *SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING* 121–29 (2003).

<sup>188</sup> “For the years 1977–1981, Central High students’ average rate of acceptance to colleges was 91.8 percent and for Girls High students the average rate was 87.8 percent.” *Newberg v. Bd. of Pub. Educ.*, 26 Pa. D. & C.3d 682, 692 (Pa. Comm. Pl. 1983).

<sup>189</sup> *Id.* at 686 (comparing the percentage of teachers with Ph.D.’s—the boys’ school had 5.86% more—and teachers with twenty-one years or more teaching experience—the boys’ school had 17.64% more).

<sup>190</sup> *Id.* at 687 (50,000 compared to 26,300).

<sup>191</sup> *Id.* at 688–89 (comparing courses in the two schools and showing that, in most subjects, the boys’ school had more offerings).

<sup>192</sup> *Id.* at 698–99 (comparing alumni network of both schools).

Court Justice.<sup>193</sup> The girls' school had no comparable list of speakers for its alumnae or students.<sup>194</sup>

This aspect of sex segregation was also a key part of the Supreme Court's decision in the challenge to Virginia's sex-segregated public military academy, the Virginia Military Institute.<sup>195</sup> In that case, Virginia proposed an all-women's school, the Virginia Women's Institute for Leadership, to remedy any possible constitutional violation that existed in having an all-men's military academy.<sup>196</sup> However, like the girls' school in Philadelphia, the site of the proposed women's military school, Mary Baldwin College, had a less-credentialed faculty and fewer opportunities for degrees.<sup>197</sup> In finding the proposed school insufficient to remedy the constitutional violation, the Court also focused on the alumni network that the men's school would have access to that the women's school would not.<sup>198</sup> The Court concluded that the men's school "beyond question, 'possesses to a far greater degree' than the [proposed women's school] 'those qualities which are incapable of objective measurement but which make for greatness in a school . . . .'"<sup>199</sup> What the Court refers to here, which is the same thing that was at the heart of the Philadelphia litigation, is that sex segregation in education gives men more access to socially valued knowledge than women, which in turn gives men greater access to more powerful positions in society.

The school cases illustrate the power of this argument about sex segregation restricting access to socially valued knowledge; however, both of the highlighted cases involved sex segregation that was clearly unequal, as both female-only schools provided markedly inferior benefits to their students than the male-only schools. Nonetheless, this argument about sex segregation and socially valued knowledge has as much purchase in other, more superficially equal, environments as well.

Restrooms, both private and public, can also serve this function. Restrooms are an important part of women's equality, as the unequal provision of public restrooms has limited women's participation in the public sphere.<sup>200</sup> However, even if women's restrooms are sufficient and equal to

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<sup>193</sup> *Newberg*, 26 Pa. D. & C. at 698–99 (listing the prominent guests).

<sup>194</sup> *Id.* at 699. The best the court could do in comparing the schools in this area was to note that the girls' school had a luncheon in 1971 featuring the first woman president of the American Medical Association and in 1972 featuring the Secretary of the Commonwealth of Pennsylvania. *Id.*

<sup>195</sup> *U.S. v. Virginia*, 518 U.S. 515 (1996).

<sup>196</sup> *Id.* at 526–27 (describing the proposed Virginia Women's Institute for Leadership).

<sup>197</sup> *Id.* at 526, 551–52 (comparing the two schools).

<sup>198</sup> *Id.* at 552–53.

<sup>199</sup> *Id.* at 557 (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

<sup>200</sup> *See, e.g.*, Kathryn H. Anthony & Meghan Dufresne, *Potty Privilege in Perspective: Gender and Family Issues in Toilet Design*, in *LADIES AND GENTS*, *supra* note 118, at 48, 50–53 (describing four different ways that restroom inequality affects women: unequal restrooms, inadequate women's restrooms, missing women's restrooms, and no restrooms at all).

men's, the mere fact of segregating restrooms can increase sex stratification. Although certainly not their primary purpose, non-single restrooms provide an opportunity for people to talk with one another. In an extensive study of behavior in public restrooms, one researcher found that "[w]hereas some [interactions in the public spaces of restrooms] may consist of no more than a brief exchange of smiles, others may involve lengthy conversations that reaffirm the participants' shared biography."<sup>201</sup> These interactions can occur in the open space of the restroom at the sinks, where individuals congregate,<sup>202</sup> as well as in men's restrooms, when men are close to one another without visual separators while using urinals.<sup>203</sup> In the less open space of a restroom, both men and women are separated from each other when they use stalls, which form a barrier to face-to-face conversation, although not to conversation entirely.<sup>204</sup>

With restrooms largely sex-segregated across all the forms of sex segregation described in this project, they provide an important arena for men to engage with other men and exchange socially valued knowledge. The conversations that occur in the restroom can be anything from a brief exchange acknowledging someone's presence to a lengthy conversation about the two individuals' connection. This conversational opportunity is reserved for people of the same sex only. In an environment in which men hold power, for example, a work environment where men hold the positions of authority, other men, and not women, have this added opportunity to converse with men in authority. Conversation can be as simple as what the individuals did over the weekend or as engaged as a continuation of a substantive conversation that was started outside the restroom. This kind of conversation, from the trivial to the substantive, performs, at a minimum, the job of creating greater familiarity between the two individuals; taken further, especially if the conversations recur on a regular basis as they would, for instance, in a regularly shared bathroom, they give the individuals more of a substantive connection with one another that can be drawn upon in the future, either consciously or subconsciously, in the work environment. In a world in which more men have positions of power than women, this sex segregation of bathrooms is exactly the type of opportunity for an exchange of socially valued information that can lead to maintaining or furthering the subordination of women, as these conversations and opportunities for interaction occur in a space from which women are excluded.

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<sup>201</sup> Spencer E. Cahill, *The Interaction Order of Public Bathrooms*, in *INSIDE SOCIAL LIFE: READINGS IN SOCIOLOGICAL PSYCHOLOGY AND MICROSOCIOLOGY* 123, 126 (Spencer E. Cahill ed., 5th ed. 2007).

<sup>202</sup> Alex Schweder, *Stalls Between Walls: Segregated Sexed Spaces*, in *LADIES AND GENTS*, *supra* note 118, at 184, 184.

<sup>203</sup> See Cahill, *supra* note 201, at 126 ("It is not uncommon, however, for previously acquainted males to engage in conversation while using adjacent urinals.").

<sup>204</sup> See *id.* at 124 ("[A]cquainted individuals may sometimes carry on a conversation through the walls of a toilet stall if they believe the bathroom is not otherwise occupied.").

The same logic holds for many of the other sex-segregated areas studied here. Sex-segregated athletics, such as local recreational leagues or pick-up games, provide the opportunity for men to be with other men, to the exclusion of women. While playing most sports, there are opportunities to have a conversation, whether during the activity itself, at a break, or before or after the sport. Sex segregation in golf courses in particular has come under attack because of the important role golf has in networking in American law and business worlds.<sup>205</sup> With women excluded from some courses entirely, from particular tee times, or from particular areas of clubs, men retain opportunities to network and pass on important socially valued knowledge to other men to the exclusion of women.<sup>206</sup> Social clubs, such as the voluntarily sex-segregated membership organizations described in this project, provide similar opportunities for men to engage with other men, often in leadership positions.<sup>207</sup> Sex segregation in religious institutions creates additional opportunities for networking and the transmission of socially valued knowledge for men who share a religion.

In all of these institutions, as with the restrooms discussed above, even if the separate opportunities are equal in quality for men and women, the opportunities provided for men to interact with other men to the exclusion of women provide the exact environment that Daphne Spain described: women will have less access to knowledge, and men will have the ability to share socially valued knowledge among themselves. As a result, these mostly taken-for-granted forms of sex segregation perpetuate gender stratification in society and are a part of the hegemony of men.

### C. *Negative Attitudes About Women*

Another feature of the hegemony of men to which sex segregation contributes is men's negative attitudes about women. Simply put, when men are in sex-segregated environments, they often engage in behavior that creates, reinforces, and exacerbates negative attitudes about women that contribute to men's oppression of women. This occurs in a variety of ways, such as perceiving women as inferior, as sex objects, or as threats to male privilege. When these attitudes are created, reinforced, or exacerbated, men further their dominance over women.

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<sup>205</sup> See generally MARCIA CHAMBERS, *THE UNPLAYABLE LIE: THE UNTOLD STORY OF WOMEN AND DISCRIMINATION IN AMERICAN GOLF* (1995) (describing discrimination women face in golf); SUZANNE WOO, *ON COURSE FOR BUSINESS: WOMEN AND GOLF* (2002) (linking women's success in business to knowing the ways of golf).

<sup>206</sup> See generally Carolyn M. Janiak, Note, *The "Links" Among Golf, Networking, and Women's Professional Advancement*, 8 *STAN. J. L. BUS. & FINANCE* 317 (2003) (discussing how golf is an important networking tool in the fields of business and law).

<sup>207</sup> Such claims of access to information and networking are a common feature of claims that these voluntarily sex-segregated clubs should be considered public accommodations. See, e.g., *Maine Human Rights Comm'n v. Le Club Calumet*, 609 A.2d 285 (Me. 1992).

Sociologist and masculinities scholar Michael Kimmel has identified three basic psychological processes that link male sex segregation to negative attitudes about women.<sup>208</sup> First, the “outgroup homogeneity effect” is the belief that all members of a group of people not in the “ingroup” are the same.<sup>209</sup> Thus, a group of men who exclude women would believe that all women are the same. Second, the “ingroup superiority effect” is the belief that members of the ingroup are superior to the people who are not part of the ingroup.<sup>210</sup> In the sex segregation context, this effect would mean that a group of men who exclude women would believe that men are superior to women. Finally, “groupthink” occurs when a particularly cohesive group strives for unanimity which overrides the group’s motivation to evaluate any dissenting thought within the group.<sup>211</sup> For segregation based on sex, groupthink would mean that men who might feel that women are not inferior would “forego or dismiss their own independent thinking.”<sup>212</sup>

The flipside of these effects is that people are less prejudiced and less subject to groupthink regarding the outgroup’s inferiority when they have contact with people from the outgroup.<sup>213</sup> This contact works to break down stereotypes and increase positive perceptions of the other group. Of course, there is a deep and nuanced literature about when these effects are more or less likely to be present within a group,<sup>214</sup> but they are nonetheless basic psychological phenomena that have important implications for sex-segregated groups of men.

Studies of men’s peer groups have shown how these effects contribute to attitudes of male dominance. In particular, sociologist Miriam Johnson has observed that “males tend to be more concerned than females with pre-

<sup>208</sup> This analysis is derived from an expert report that Kimmel is submitting in a lawsuit against the Breckinridge County Middle School in Harned, Kentucky. See *A.N.A. v. Breckinridge County Bd. of Educ.*, No. 3:08-cv-00004-CRS (W.D. Ky. filed May 19, 2008). The school is proposing single-sex educational classes in its middle school. Kimmel is an expert for the plaintiffs who are challenging the single-sex classes. The report is unavailable for dissemination to the public but is on file with the author.

<sup>209</sup> See George A. Quattrone & Edward E. Jones, *The Perception of Variability Within In-Groups and Out-Groups: Implications for the Law of Small Numbers*, 38 J. PERSONALITY & SOC. PSYCHOL. 141, 142 (1980).

<sup>210</sup> See Cynthia L. Pickett & Marilynn B. Brewer, *The Role of Exclusion in Maintaining Ingroup Inclusion*, in *THE SOCIAL PSYCHOLOGY OF INCLUSION AND EXCLUSION* 89, 100–01 (Dominic Abrams et al. eds. 2005); Brian Mullen, Rupert Brown & Colleen Smith, *Ingroup Bias as a Function of Salience, Relevance, and Status: An Integration*, 22 EUR. J. SOC. PSYCHOL. 103, 116–19 (1992).

<sup>211</sup> See, e.g., IRVING L. JANIS, *VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES* 9 (1972).

<sup>212</sup> Eric E. Johnson, *The Black Hole Case: The Injunction Against the End of the World*, 76 TENN. L. REV. 819, 901 (2009) (discussing “groupthink”).

<sup>213</sup> Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751, 751 (2006) (conducting a meta-analysis of 515 studies about intergroup contact).

<sup>214</sup> See generally Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 22–29 (providing an overview of the scientific work about intergroup relations).

erving gender distinctions and male superiority [and that] these tendencies are more likely to develop in separate male groupings than in any direct early interactions with females.”<sup>215</sup> She cites a variety of evidence to support her argument. For instance, studies of sex segregation of young children’s peer groups show that boys have a “greater need to consolidate a new gender identity, which in turn is shored up by denigrating girls.”<sup>216</sup> She also discusses the tendency of men, when interacting in the absence of women, to talk of women as sex objects, to use demeaning sexual language to describe women, and to see heterosexuality as the equivalent of male domination over women.<sup>217</sup> One study of such interactions looked at men joking with other men while women were not present. The study found that when women are not present, men tell jokes about women that are sexual, aggressive, and hostile.<sup>218</sup> A large-scale study of Oregon youth found that this kind of talk about women can increase the likelihood of aggression toward women.<sup>219</sup>

In its most severe form, this type of thinking about women that is partly created and perpetuated by sex segregation of men manifests itself in sexual violence. A study of almost 3,000 male students at 32 American colleges found that serious sexual aggression by men was linked to male “involvement in peer groups that reinforce highly sexualized views of women.”<sup>220</sup> Summarizing the extensive work that she has done comparing different cultures and the relationship between sex segregation and rape, Peggy Sanday writes:

Cross-cultural research demonstrates that whenever men build and give allegiance to a mystical, enduring, all-male social group, the disparagement of women is, invariably, an important ingredient of the mystical bond, and sexual aggression the means by which the bond is renewed. As long as exclusive male clubs exist in a society that privileges men as a social category, we must recognize

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<sup>215</sup> MIRIAM M. JOHNSON, *STRONG MOTHERS, WEAK WIVES: THE SEARCH FOR GENDER EQUALITY* 4 (1988).

<sup>216</sup> *Id.* at 111. Johnson is clear that this “is not an absolute distinction, because young girls tend to disdain boys too, but putting down the other gender operates more strongly with boys.” *Id.*

<sup>217</sup> *Id.* at 118–19.

<sup>218</sup> Peter Lyman, *The Fraternal Bond as a Joking Relationship: A Case Study of the Role of Sexist Jokes in Male Group Bonding*, in *CHANGING MEN: NEW DIRECTIONS IN RESEARCH ON MEN AND MASCULINITY* 148, 151 (Michael S. Kimmel ed. 1987).

<sup>219</sup> Deborah M. Capaldi, Thomas J. Dishion, Mike Stoolmiller & Karen Yoerger, *Aggression Toward Female Partners by At-Risk Young Men: The Contribution of Male Adolescent Friendships*, 37 *DEVELOPMENTAL PSYCHOL.* 61, 70 (2001) (“Findings for the present study supported the hypothesis that men’s aggression toward women can be accounted for, in part, by their engagement in hostile talk about women with male peers.”).

<sup>220</sup> Mary P. Koss & Thomas E. Dinero, *Predictors of Sexual Aggression Among a National Sample of Male College Students*, 528 *ANNALS N.Y. ACAD. SCI.* 133, 144 (1988) (also mentioning “frequent use of alcohol” and “violent and degrading pornography” as other linked factors).

that collective sexual aggression provides a ready stage on which some men represent their social privilege and introduce adolescent boys to their future place in the status hierarchy.<sup>221</sup>

Michael Kimmel, in his study of adolescent males, also attributes the high incidence of sexual entitlement and rape among men in all-male organizations to the fact that most of these men are members of organizations that have an elite status.<sup>222</sup> The evidence certainly does not lead to the conclusion that all men who are in sex-segregated environments will engage in sexual aggression; however, sex segregation of men in the context of a male dominated society, particularly when that sex segregation leads to viewing women as sexualized objects, will increase its likelihood.

The group dynamics that lead men to have destructive views of women have been found to occur in several of the sex-segregated contexts discussed in this project. For instance, sex segregation of schools has been linked to negative views about girls and women among boys and men. As Elisabeth Woody has summarized, “single-sex education for boys is often conceived as an opportunity to restore traditional sex roles.”<sup>223</sup> In a report summarizing California’s experience with single-sex education in its public school system,<sup>224</sup> the researchers found that most of the boys’ teachers, if they even had a discussion about gender, discussed “traditional conceptions of gender roles.”<sup>225</sup> These traditional conceptions of gender included “the assumption that men are stronger than women.”<sup>226</sup> Another report on the experiment found that “[s]eparating girls and boys heightened students’ sense of boys as a unified group in opposition to girls . . . .”<sup>227</sup> Research on single-sex educational programs for boys generally finds that such programs reinforce traditional notions of gender hierarchy and the belief that girls are inferior.<sup>228</sup>

<sup>221</sup> PEGGY REEVES SANDAY, FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS 19–20 (1990); see also Peggy Reeves Sanday, *The Socio-Cultural Context of Rape: A Cross-Cultural Study*, 37 J. SOC. ISSUES 5, 15 (1981) (describing “rape prone” societies as all having a gender configuration in which “men are posed as a social group against women”).

<sup>222</sup> MICHAEL KIMMEL, GUYLAND: THE PERILOUS WORLD WHERE BOYS BECOME MEN 233–40 (2008).

<sup>223</sup> Elisabeth L. Woody, *Constructions of Masculinity in California’s Single-Gender Academies*, in GENDER IN POLICY AND PRACTICE: PERSPECTIVES ON SINGLE-SEX AND COEDUCATIONAL SCHOOLING 280, 285 (Amanda Datnow & Lee Hubbard eds., 2002).

<sup>224</sup> Cal. Educ. Code § 58521 (establishing single-sex pilot academies program).

<sup>225</sup> AMANDA DATNOW, LEA HUBBARD & ELISABETH WOODY, ONT. INST. FOR STUDIES IN EDUC., IS SINGLE GENDER SCHOOLING VIABLE IN THE PUBLIC SECTOR? LESSONS FROM CALIFORNIA’S PILOT PROGRAM 50 (2001).

<sup>226</sup> *Id.* at 52.

<sup>227</sup> Woody, *supra* note 223, at 291.

<sup>228</sup> CHRISTOPHER JENCKS & DAVID RIESMAN, THE ACADEMIC REVOLUTION 297–300 (1977); Carolyn Jackson, *Can Single-Sex Classes in Co-Educational Schools Enhance the Learning Experiences of Girls and/or Boys? An Exploration of Pupils’ Perceptions*, 28 BRITISH EDUC. RES. J. 37, 44–46 (2002) (finding increase in macho masculinity as well as likely effect of increase in stereotypes about females, and citing research to this effect); Valerie E. Lee, Helen M. Marks & Tina Byrd, *Single-Sex and Coeducational Independent Secondary School Classrooms*, 67 SOC. OF EDUC. 92, 92, 103–04 (1994) (finding that

These findings are consistent with studies about childhood sex segregation which show that sex segregation in childhood play groups “may also form the basis for the perpetuation of male dominance.”<sup>229</sup>

Sport is another area where men who are sex-segregated often develop negative attitudes about women. In one study of sex-segregated men’s rugby teams, the researcher concluded that the men on the teams “continually and simultaneously construct relationally contrasting, often quite misogynistic, images of femininity.”<sup>230</sup> Specifically, the men engaged in sexually harassing women who walked by practice, making derogatory comments at other players that associated them with being female, holding after match parties at which women were treated like sex objects, and singing “rugby songs” that had misogynistic, often violently so, lyrics.<sup>231</sup> In a different context, a survey of male athletes’ autobiographies found that the sex-segregated environment allowed “misogyny . . . to ferment.”<sup>232</sup> In the sex-segregated locker rooms and buses, the talk among the men “includes insults directed at players’ wives, sisters, mothers, or girlfriends.”<sup>233</sup> Michael Messner, a leading sociologist of sport and masculinities, describes the way that locker room banter among male athletes (who are not in the presence of women) involves sexually aggressive talk about dominating women.<sup>234</sup> This type of behavior is present in environments from Little League Baseball<sup>235</sup> to college men’s locker rooms.<sup>236</sup> Messner also focuses on empathy for women and concludes

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single-sex boys schools had higher incidence than co-educational schools of the “severest form of sexism” as well as gender and sex-role stereotyping); *see also* Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 494–96 (1999) (summarizing research and stating that “[t]he majority of researchers, though, have found results suggesting that coeducation may better prepare students for adult occupational and interpersonal roles, including the understanding of how to maintain long-term relationships with members of the opposite sex and how to avoid falling unthinkingly into traditional or stereotypic roles.”); *cf.* Rebecca S. Bigler, Christia Spears Brown & Marc Markell, *When Groups Are not Created Equal: Effects of Group Status on the Formation of Intergroup Attitudes in Children*, 72 CHILD DEV. 1151 (2001) (finding that students grouped in high-status group formed biases against low-status group).

<sup>229</sup> Campbell Leaper, *Exploring the Consequences of Gender Segregation in Social Relationships*, in CHILDHOOD GENDER SEGREGATION: CAUSES AND CONSEQUENCES 67, 72 (Campbell Leaper ed. 1994).

<sup>230</sup> Steven P. Schacht, *Misogyny On and Off the “Pitch,”* 10 GENDER & SOC’Y 550, 551 (1996).

<sup>231</sup> *Id.* at 558–59.

<sup>232</sup> STEVEN J. OVERMAN, *LIVING OUT OF BOUNDS: THE MALE ATHLETE’S EVERYDAY LIFE* 96 (2009).

<sup>233</sup> *Id.*

<sup>234</sup> Michael A. Messner & Mark Stevens, *Scoring Without Consent: Confronting Male Athletes’ Sexual Violence Against Women*, in OUT OF PLAY: CRITICAL ESSAYS ON GENDER AND SPORT 107, 112 (Michael A. Messner ed. 2007); *see also* MESSNER, *supra* note 122, at 96–102 (describing use of perception of “women as objects of sexual conquest” in friendships among male athletes).

<sup>235</sup> GARY ALAN FINE, *WITH THE BOYS: LITTLE LEAGUE BASEBALL AND PREADOLESCENT CULTURE* 103–23 (1987).

<sup>236</sup> Timothy J. Curry, *Fraternal Bonding in the Locker Room: A Profeminist Analysis of Talk About Competition and Women*, 8 SOCIOLOGY OF SPORT J. 119, 127–32 (1991).

that “[h]omosocial bonding among men, especially when the bond is the sort of sexualized dominance bonding [discussed in the locker room context], is a very poor environment for the development of empathy for women.”<sup>237</sup>

Perhaps the most obvious sex-segregated environment in which men develop negative attitudes about women is fraternities. Quantitative analysis has found the following about men in fraternities:

[They] have more traditional attitudes toward women and are more likely than other men to believe that women enjoy being physically “roughed up,” that women pretend not to want sex but want to be forced into sex, that men should be controllers of relationships, that sexually liberated women are promiscuous and will probably have sex with anyone, and that women secretly desire to be raped.<sup>238</sup>

Similarly, more qualitative anthropological analysis has found that fraternity rituals and male bonding work together to develop misogynist attitudes toward women.<sup>239</sup> These attitudes include the belief that men must be sexually dominant, that sexual harassment of women is necessary to male bonding, and that women must be available for sex with men.<sup>240</sup>

Johnson is very clear in her analysis about men in sex-segregated environments that this type of thinking is not “typical of all males nor of all of the thinking about women of even some males”;<sup>241</sup> however, men who do not partake in this type of “sex-objectifying” of women can be shunned, punished, or worse.<sup>242</sup> This type of thinking, she argues, is nonetheless a common part of “male-peer-group thinking, and it is most evident when women are not around to counteract it . . . .”<sup>243</sup> The examples of sex segregation described here are evidence of this effect.

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Curry found that “[c]onversations that affirm a traditional masculine identity dominate, and these include talk about women as objects, homophobic talk, and talk that is very aggressive and hostile toward women—essentially talk that promotes rape culture.” *Id.* at 128.

<sup>237</sup> Messner & Stevens, *supra* note 234, at 114.

<sup>238</sup> John D. Foubert, Dallas N. Garner & Peter J. Thaxter, *An Exploration of Fraternity Culture: Implications for Programs to Address Alcohol-Related Sexual Assault*, 40 *COLL. STUDENT J.* 361, 362 (2006) (citing S.B. Boeringer, *Associations of Rape-supportive Attitudes with Fraternity and Athletic Participation*, 5 *VIOLENCE AGAINST WOMEN* 81 (1999); A.M. Schaffer & E.S. Nelson, *Rape-Supportive Attitudes: Effects of On-Campus Residence and Education*, 34 *J. COLL. STUDENT DEV.* 175 (1993)).

<sup>239</sup> SANDAY, *FRATERNITY GANG RAPE*, *supra* note 221, at 113–34, 174–93.

<sup>240</sup> *Id.* at 124–25.

<sup>241</sup> JOHNSON, *supra* note 215, at 119.

<sup>242</sup> *Id.* at 118. Johnson writes, “Consider the man whose human empathy renders him impotent in a gang rape of a woman; he may be punished for his impotence by being raped himself by his peers.” *Id.*

<sup>243</sup> *Id.* at 119.

D. *Negative Attitudes About Non-Hegemonically Masculine Men*

An almost necessary component of the development of negative and dominating attitudes about women in sex-segregated groups of men is the development of similar attitudes about men who do not conform to the hegemonic masculinity expected of them. Male peer groups actively work to police the boundaries of acceptable behavior for boys and men.<sup>244</sup> This boundary policing occurs more frequently within groups of men and boys than does similar boundary policing within groups of women and girls because men and boys, as the higher status group in society, are more invested in maintaining the group identity.<sup>245</sup> Moreover, males crossing gender boundaries threaten perceptions of ingroup cohesiveness and outgroup inferiority; in other words, if gender-nonconforming males were accepted by their male peer groups, they would call into question the cohesive identity of the group of males and risk making women look less inferior.<sup>246</sup> When men display negative and dominating attitudes toward gender-nonconforming males, they also demonstrate to themselves and others that they are not feminine or gay and that they are indeed men and masculine.<sup>247</sup>

This development of negative and dominating attitudes toward gender-nonconforming males is evident in many of the sex-segregated settings described in this project. With respect to sex-segregated schooling, one of the studies of California's pilot single-sex educational institutions found that boys in the all-boys schools "set the rules of masculinity" by demeaning boys who crossed gender lines with homophobic teasing.<sup>248</sup> Surveying the research on this issue in the context of sex-segregated schools, Wayne Martino and Bob Meyenn write that "regardless of sexual orientation, those boys who fail to match the expectations of hegemonic heterosexual masculinity are more at risk from the harassing behaviours of other boys as opposed to their female peers."<sup>249</sup>

Sex-segregated sport is another area in which this gender policing occurs to the detriment of nonconforming men. The rugby study discussed above found that men on the sex-segregated teams used the same demeaning practices against gender-nonconforming men that they used against wo-

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<sup>244</sup> C. Haywood & M. Mac an Ghail, *Schooling Masculinities*, in UNDERSTANDING MASCULINITIES: SOCIAL RELATIONS AND CULTURAL ARENAS 50, 54–55 (M. Mac an Ghail ed. 1996).

<sup>245</sup> See Leaper, *supra* note 229, at 73.

<sup>246</sup> *Id.*

<sup>247</sup> Curry, *supra* note 236, at 129.

<sup>248</sup> Woody, *supra* note 223, at 296–97. Woody concludes: "Any efforts to challenge expectations of masculinity were constrained by students' adherence to a strict set of rules for boys' behavior and expression." *Id.* at 298.

<sup>249</sup> Wayne Martino & Bob Meyenn, 'War, Guns and Cool, Tough Things': *Interrogating Single-Sex Classes as a Strategy for Engaging Boys in English*, 32 CAMBRIDGE J. OF EDUC. 303, 313 (2002).

men.<sup>250</sup> Messner found that gender nonconforming behavior was policed in all-male locker rooms through derogatory homophobic targeting of individuals who revealed less traditionally masculine sides of their personalities.<sup>251</sup> As an example of the severity of the punishment for gender nonconformity, he highlights the way a closeted gay male athlete would join his peers in the locker room in engaging in aggressive sexual banter about women.<sup>252</sup> A study of college men’s locker rooms found violent comments and derogatory jokes about gay men to occur “because it helps distance the athletes from being categorized as gay themselves.”<sup>253</sup>

Sex-segregated bathrooms for men also provide a space for gender policing. Men who do not conform to hegemonic masculinity, especially adolescents in schools, are subject to harassment and violence in sex-segregated bathrooms.<sup>254</sup> Moreover, antigay graffiti is a regular occurrence in men’s bathrooms.<sup>255</sup> One researcher describes such bathroom graffiti as follows: “The graffiti assume an antigay, even homophobic, audience, and aim to mobilize its homophobia, at once coordinating and displaying the social relations in which the graffiti are embedded and that they activate.”<sup>256</sup> Gender policing also occurs in the form of the unwritten rules of bathroom etiquette that are premised on heterosexuality and avoiding appearance of homosexuality.<sup>257</sup> Gender policing in bathrooms also involves the state, as there is a long history of police arrests for perceived sexual activity that is, because of the sex-segregated bathroom, by definition homosexual.<sup>258</sup>

Non-hegemonically masculine men are also treated poorly in sex-segregated prisons. Some correctional institutions have protective custody for

<sup>250</sup> Schacht, *supra* note 230, at 558 (“While most of these practices are applied to women, they also are used in a homophobic fashion on males who do not measure up to rugby players’ images of being a ‘man.’ Such actions enable the players to relationally define what masculinity is and, perhaps more important, what it is not.”).

<sup>251</sup> Messner & Stevens, *supra* note 234, at 112–13.

<sup>252</sup> *Id.* at 113.

<sup>253</sup> Curry, *supra* note 236, at 130. Curry speculates that “[p]erhaps male athletes are especially defensive because of the physical closeness and nudity in the locker room and the contact between males in sport itself.” *Id.*; see also MESSNER, *supra* note 122, at 106–07 (discussing role of homophobia in relationships among male athletes as way to “discount[] the possible existence of erotic desire between men”).

<sup>254</sup> See JEFF PERROTTI & KIM WESTHEIMER, WHEN THE DRAMA CLUB IS NOT ENOUGH: LESSONS FROM THE SAFE SCHOOLS PROGRAM FOR GAY AND LESBIAN STUDENTS 62 (2001) (“Safety is often a primary concern [for transgender students] because students who defy gender norms are often targeted for harassment. Use of the boys’ or girls’ bathroom is almost always a point of contention.”); TRANSGENDER LAW CENTER, PEERING IN PEACE: A RESOURCE GUIDE FOR TRANSGENDER ACTIVISTS AND ALLIES 3–4 (2005) (discussing the problem of safe bathroom access for transgender people).

<sup>255</sup> George W. Smith, *The Ideology of “Fag”: The School Experience of Gay Students*, 39 SOC. Q. 309, 320–21 (1998).

<sup>256</sup> *Id.* at 321.

<sup>257</sup> Olga Gershenson & Barbara Penner, *Introduction: The Private Life of Public Conveniences*, in LADIES AND GENTS, *supra* note 118, at 1, 18–19 (“While the genitals are exposed at the urinal, other men should never look at them.”).

<sup>258</sup> *Id.*

such men who are threatened in the general population.<sup>259</sup> One study of men who had taken advantage of such protective custody found that gay and bisexual prisoners were more likely than heterosexual men to feel as if they were being treated poorly by other prisoners and guards.<sup>260</sup> Another study summarized and confirmed decades of findings that men who did not exhibit hegemonic masculinity within the prison context were abused or raped.<sup>261</sup>

As with sex segregation's relationship to hegemonic masculinity, sex segregation is a powerful force in furthering the hegemony of men. Other parts of life have similar effect, as sex segregation is certainly not alone in creating social acceptance of the category "men" or restricting the transfer of socially valued knowledge to other men and keeping it from women. Sex segregation is also not alone in giving men an opportunity to foster and grow negative attitudes about women and existing as a site for policing gender conformity and punishing those men who do not exhibit hegemonic masculinity. But sex segregation's contribution to these aspects of the hegemony of men must be understood and addressed as well.

#### CONCLUSION

The two aspects of sex segregation's impact on masculinity and men discussed here, its construction of hegemonic masculinity and its perpetuation of the hegemony of men, are important components of fully understanding modern sex segregation. The characteristics that sex segregation associates with hegemonic masculinity that I have identified—that men are not feminine, that men are heterosexual, and that men are physically aggressive—constrict male identity in a way that harms women and men, albeit differently. Such hegemonic masculinity harms women, as they are subject to the discrimination and abuse that stems from men who struggle to achieve dominant conceptions of masculinity.<sup>262</sup> Hegemonic masculinity also harms men who do not exhibit it, as they too are subject to violence for challenging or ignoring gender norms.<sup>263</sup> More broadly, hegemonic masculinity, constructed in part from the instances of sex segregation described in this pro-

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<sup>259</sup> Leanne Fiftal Alarid, *Sexual Orientation Perspectives of Incarcerated Bisexual and Gay Men: The County Jail Protective Custody Experience*, 80 PRISON J. 80, 93 (2000).

<sup>260</sup> *Id.* at 89, 92–93.

<sup>261</sup> Christopher Hensley, Jeremy Wright, Richard Tewksbury & Tammy Castle, *The Evolving Nature of Prison Argot and Sexual Hierarchies*, 83 PRISON J. 289, 292–95 (2003). Even though the prison rapist is engaging in what seems like non-hegemonically masculine behavior, namely, sex with another man, the goal of such sex within the prison environment was both physical release and the enhancement of masculine identity through aggression and dominance. *Id.* at 292.

<sup>262</sup> See CONNELL, *supra* note 40, at 1–4.

<sup>263</sup> *Id.* at 4; CONNELL, *supra* note 42, at 78. Two vivid examples of this violence are the deaths of Brandon Teena and Matthew Shepard, which are just a small portion of the high rate of antigay violence that occurs. See Nancy Levit, *A Different Kind of Sameness: Beyond Formal Equality and Antisubordination Strategies in Gay Legal Theory*, 61

ject, harms all men, regardless of how close they come to the hegemonic ideal, who feel the pressure to shape their identities based on this ideal that may or may not correspond to their felt identities. In this sense, institutions such as sex segregation force men to “do gender” or “perform gender” in the way that postmodern and antiessentialist gender theorists have described.

But this inhibiting impact on identity and liberty is not the only import of sex segregation with respect to men and masculinity. Sex segregation also contributes to the hegemony of men in the sense that it is a taken-for-granted institution that helps to create and perpetuate men’s dominance over women and other men. As antiessentialism teaches us, this dominance is hardly a natural phenomenon; rather, it is constructed and becomes part of what is perceived as an essential part of masculinity and men. Unmasking the construction of this hegemony is part of any antiessentialist project. As detailed above, sex segregation is part of the construction of this hegemony in two important ways. First, it helps to create a seemingly naturalized dichotomy between “man” and “woman.” Second, it helps to create environments in which men’s relationship to women and other non-hegemonically masculine men is one of dominance. This occurs through restricting the transfer of socially valued knowledge to other men as well as through the fostering of negative attitudes about women and non-hegemonically masculine men.

It may seem that the logical conclusion of this analysis is that sex segregation should be banned. After all, governmental practices and societal institutions that restrict masculine identity at the expense of women and non-hegemonically masculine men are inconsistent with antidiscrimination norms. Moreover, sex segregation threatens the important constitutional values of liberty, in its creation and perpetuation of restricted identity for men, and equality, in its furtherance of the domination of particular men over women and other men. And, as I hint in the introduction to this project,<sup>264</sup> the ultimate position I am working toward is one that is much less accepting of sex segregation than current laws and norms.

Yet these concerns about sex segregation’s impact on hegemonic masculinity and the hegemony of men cannot alone form a conclusive argument in this direction. Other pieces of the puzzle need to be considered as well, such as sex segregation’s implications for transgendered and intersexed individuals, women, people of color, and others. I hope to delve into these topics in the future as part of this larger project investigating the modern persistence of sex segregation. But, in the meantime, the harms of sex segregation described here with respect to masculinity and men are severe and must be accounted for by anyone who attempts to justify the modern state of sex segregation in law and society.

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OHIO ST. L.J. 867, 874–75 & n.29 (2000) (describing their deaths as well as statistics for antigay violence).

<sup>264</sup> See Cohen, *supra* note 2, at Introduction.

