

# No Boy Left Behind?<sup>†</sup> Single-Sex Education and the Essentialist Myth of Masculinity

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## INTRODUCTION

Single-sex public education is in the midst of drastic expansion. Despite Justice Scalia calling it “functionally dead” in 1996,<sup>1</sup> ten years later single-sex education has received the blessing of the Department of Education. Responding to language in the No Child Left Behind Act that encouraged states to experiment with single-sex education,<sup>2</sup> the Department changed its Title IX regulations to permit single-sex

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<sup>†</sup> Despite this phrase’s appropriateness for this Article, I cannot claim it as my own. The first use of it that I could find is from a news report of a satirical t-shirt worn in 2004 at West Aurora High School in Illinois. See Kurt Gessler, *It’s Only Natural That Residents Want to Protect Their Properties*, DAILY HERALD (Arlington Heights, Ill.), Apr. 11, 2004, at 14.

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1. United States v. Virginia, 518 U.S. 515, 596 (1996) (Scalia, J., dissenting).

2. See 20 U.S.C. § 7215(a)(23) (2006) (identifying “same-gender schools and classrooms” as “innovative assistance programs”). Some of the literature uses “same-gender” or “single-gender,” rather than “same-sex” or “single-sex,” to describe schools or classrooms with only boys or only girls. Throughout this Article, I will follow the distinction between “sex” and “gender” that is common in much feminist writing: “sex” refers to apparent biological distinctions (e.g., boy versus girl), whereas “gender” refers to traits society generally associates

education in much broader circumstances than had previously been allowed.<sup>3</sup> Public schools have responded en masse, with 442 schools providing single-sex educational opportunities for the 2008–09 school year.<sup>4</sup>

Amidst this expansion, calls for single-sex education of boys have been a major impetus for this change in educational policy. While girls and women were the impetus for enacting Title IX in 1972, the current drumbeat for increased single-sex educational opportunities has included a substantial amount of rhetoric about treating boys' problems seriously.<sup>5</sup> And the reported problems are legion: Boys are dropping out of school more than girls.<sup>6</sup> Boys are more likely to repeat a grade than girls.<sup>7</sup> Boys are

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with the different sexes (e.g., masculine versus feminine). 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, 2–4, 9–13 (1995). Clearly illustrating this difference, schools encouraged by No Child Left Behind or discussed by this Article are definitely not “single-gender,” as they do not group all masculine or feminine children together. For instance, tomboy girls would not be in a single-gender class with masculine boys. Rather, the grouping contemplated by No Child Left Behind and the advocates described here is purely by sex; thus, I will use the terms “single-sex” or “sex-segregated.”

In doing so, I do not want to convey that sex is a simple binary, man versus woman, as there is a portion of the population that is intersex. See generally Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999). As the narrative for single-sex education discussed in this Article does not address how single-sex schools would address intersex children, I do not address them either. But, they are further evidence that essentialist views of gender are flawed. See, e.g., Melanie Blackless, Anthony Charuvastra, Amanda Derryck, Anne Fausto-Sterling, Karl Lauzanne & Ellen Lee, *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOLOGY 151, 151 (2000) (“If, however, one relinquishes an a priori belief in complete genital dimorphism, one can examine sexual development with an eye toward variability rather than bimodality.”).

3. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,529, 62,530 (Oct. 25, 2006) (to be codified at 34 C.F.R. pt. 106) [hereinafter Single-Sex Rules Final Notice].

4. Nat'l Ass'n for Single Sex Pub. Educ., Single-Sex Schools, <http://www.singlesexschools.org/schools-schools.htm>. Ninety-seven of the 442 schools were completely sex-segregated in all school activities, including lunch, for the 2008–09 school year. *Id.* These numbers compare with just three single-sex public education opportunities anywhere in the country in 1995. Nat'l Ass'n for Single Sex Pub. Educ., Single-Sex Schools, <http://web.archive.org/web/20070708035544/http://www.singlesexschools.org/schools-schools.htm>.

5. See, e.g., Nat'l Ass'n for Single Sex Pub. Educ., Advantages for Boys, <http://www.singlesexschools.org/advantages-forboys.htm>. The desire to expand single-sex education has by no means been solely about boys' problems. See *infra* notes 98–100 and accompanying text.

6. See, e.g., JENNIFER LAIRD, STEPHEN LEW, MATTHEW DEBELL & CHRIS CHAPMAN, NAT'L CTR. FOR EDUC. STATISTICS, PUB. NO. 062, DROPOUT RATES IN THE UNITED STATES: 2002 AND 2003, at 6 (2006), available at <http://nces.ed.gov/pubs2006/2006062.pdf> (“Males ages 16–24 were more likely than females to be high school dropouts in 2003 (11.3 percent compared with 8.4 percent).”). But see *id.* at 4 (noting that when dropout rate, as opposed to dropout status, is compared, there is “no measurable difference in the 2003 event dropout rates for males and females, a pattern generally found over the last 30 years” with exceptions being “1974, 1976, 1978, and 2000—when males were more likely than females to drop out”).

7. See, e.g., CATHERINE E. FREEMAN, NAT'L CTR. FOR EDUC. STATISTICS, PUB. NO. 016, TRENDS IN EDUCATIONAL EQUITY OF GIRLS & WOMEN: 2004, at 2 (2005), available at

going to and completing college in smaller numbers than girls.<sup>8</sup> Boys are disciplinary problems more than girls.<sup>9</sup> Boys use more drugs and alcohol than girls.<sup>10</sup> Boys constitute a higher percentage of developmentally-disabled and learning-disabled students than girls.<sup>11</sup> To be sure, some experts disagree with the story about boys that emerges from these numbers,<sup>12</sup> but most reform efforts that have focused on boys have relied on the trends that show boys suffering.

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<http://nces.ed.gov/pubs2005/2005016.pdf> (“In 1999, females ages 5 to 12 years old were less likely than males of the same age to have repeated a grade: approximately 8 percent of males compared to 5 percent of females had repeated a grade since starting school . . .”).

8. *See, e.g.*, KATHARIN PETER, LAURA HORN & C. DENNIS CARROLL, NAT’L CTR. FOR EDUC. STATISTICS, PUB. NO. 169, GENDER DIFFERENCES IN PARTICIPATION AND COMPLETION OF UNDERGRADUATE EDUCATION AND HOW THEY HAVE CHANGED OVER TIME 7 (2005), *available at* <http://nces.ed.gov/pubs2005/2005169.pdf> (finding that from 1980 to 2001 “the number of women enrolled in degree-granting institutions increased by 41 percent (from roughly 5.5 million in 1980 to 7.7 million in 2001), while the number of men enrolled increased by 20 percent (from about 5 million to 6 million)”); *id.* at 30 (stating that “women were more likely than men to complete each type of degree and less likely to be not enrolled without a degree”); *see also* FED. INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, AMERICA’S CHILDREN: KEY NAT’L INDICATORS OF WELL-BEING 2007, at 57, 162 (2007), *available at* [http://www.childstats.gov/pdf/ac2007/ac\\_07.pdf](http://www.childstats.gov/pdf/ac2007/ac_07.pdf) (finding that in 2005, 66.5% of boys enrolled in college immediately after completing high school, compared to 70.4% of girls).

9. *See, e.g.*, RACHEL DINKES, EMILY F. CATALDI, GRACE KENA, KATRINA BAUM & THOMAS D. SNYDER, NAT’L CTR. FOR EDUC. STATISTICS, PUB. NO. 003, INDICATORS OF SCHOOL CRIME AND SAFETY: 2006, at 40 (2007), *available at* <http://nces.ed.gov/pubs2007/2007003.pdf> (“In [2005], 18 percent of males said they had been in a fight on school property, compared with 9 percent of females.”); *see also* FREEMAN, *supra* note 7, at 3, 52 (“[H]igher percentages of males than females reported being in a physical fight in the previous 12 months (18 percent versus 7 percent) and carrying a weapon to school in the previous 30 days (10 percent versus 3 percent).”).

10. *See, e.g.*, FREEMAN, *supra* note 7, at 54 (“Males are more likely than females in high school to use cigarettes, alcohol, and marijuana on school property and to have been offered or given an illegal drug on school property.”).

11. *See* Emily W. Holt, Daniel J. McGrath & William L. Herring, *Timing and Duration of Student Participation in Special Education in the Primary Grades*, ISSUE BRIEF (Nat’l Ctr. for Educ. Statistics, Jessup, Md.), Mar. 2007, at 1, *available at* <http://nces.ed.gov/pubs2007/2007043.pdf> (“Males were more likely than females to receive special education in at least one grade (16 vs. 8 percent).”); *see also* FREEMAN, *supra* note 7, at 42 (“In both 1996 and 1999, males were more likely than females to be identified as having a disability (24 percent versus 17 percent in 1996 and 21 percent versus 14 percent in 1999).”).

12. A comprehensive 2006 study from the education think tank Education Sector showed that long-term educational trends point to boys improving in most measures. SARA MEAD, EDUC. SECTOR, THE EVIDENCE SUGGESTS OTHERWISE: THE TRUTH ABOUT BOYS AND GIRLS (2006), *available at* [http://www.educationsector.org/usr\\_doc/ESO\\_BoysAndGirls.pdf](http://www.educationsector.org/usr_doc/ESO_BoysAndGirls.pdf) (looking at the National Assessment of Education Reports since their inception in the early 1970s). The report concludes that the popular notion of a “boy crisis” has come about because, in some important measures, girls have improved at a greater rate than boys, despite both groups improving overall. *See, e.g., id.* at 6 (looking at math, reading, and other subjects); *id.* at 10 (analyzing high school graduation rates); *id.* at 11 (looking at college enrollment data). As with others who have closely studied the matter, the report does find a big problem for certain subgroups of boys, particularly “poor, black, and Hispanic boys.” *Id.* at 9. But the overall picture painted by the concerning statistics about boys’ achievement might not be as bleak as often is claimed. *See*

The troubling part of this growing concern is that a narrative about boys and masculinity has emerged that relies upon what I call the essentialist myth of masculinity. Because of all of their problems, what boys need, part of this narrative says, is to be separated from girls so they can learn on their own, in their own boy-friendly environment. Why do boys need this? Because, the essentialist myth of masculinity explains, by nature, boys are different from girls. And they are different from girls in ways that make educating both of them fairly and effectively in the same room difficult, if not impossible. Boys are distracted by the presence of girls. Boys are aggressive yet stoic. They learn best through competition and sports. They need firm men, not women, teaching them. Ultimately, they are completely different from girls. In order to teach boys and address these unique needs (but without doing anything to change them), advocates and proponents of the essentialist myth of masculinity maintain that, in schools, the sexes need to be segregated. In other words, we need single-sex education.<sup>13</sup>

This Article describes, dissects, and critically analyzes this narrative about boys, masculinity, and single-sex education. Understood from within the burgeoning sociological study of masculinities, a field that legal scholars are just beginning to utilize, the essentialist myth of masculinity that has accompanied single-sex education reforms produces distinct harms for boys and girls. With the strong anti-essentialist reading of Title IX and the Equal Protection Clause set forth here, I argue that the essentialist myth of masculinity is incompatible with sex equality. Ultimately, I conclude that legal protections should broadly prohibit schools from perpetuating gender essentialism and sex stereotyping, which is what schools do when they act in accordance with the essentialist myth.

Exploring this narrative, the essentialist myth, and the legal implications of both is important for several reasons. First, the legality, both constitutional and statutory, of single-sex education is unsettled.<sup>14</sup> As the law develops in the future, fully understanding the origins of the changes that have spurred the increase in single-sex classrooms and schools is important. Furthermore, understanding this narrative helps conceptualize the proper way that the law should address these changes.

Second, the way that schools shape boys' gender identity is vastly important to how boys will construct their gender identity for the rest of their lives, as well as to how boys will interact with girls and women. Michael Kimmel, a leading sociologist of masculinity, has likened schools to "factories [that] produce . . . gendered individuals."<sup>15</sup> Educational research shows that both boys and girls usually come to school with a sense of their own sexual identity (whether they are a boy or a girl) but that they do not have the same sense of gendered identity (what characteristics are associated with being a boy or a girl).<sup>16</sup> Thus, schools have a powerful role in

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also David Von Drehle, *The Boys Are All Right*, TIME, Aug. 6, 2007, at 38 (surveying the data and finding that boys are doing better now than they had been in the 80s and 90s).

13. See *infra* Part III for a full elaboration of these themes and this narrative.

14. See *infra* Part II.

15. Michael S. Kimmel, *Senior Editor's Foreword* to MASCULINITIES AT SCHOOL, at vii (Nancy Lesko ed., 2000).

16. ROB GILBERT & PAM GILBERT, MASCULINITY GOES TO SCHOOL 113 (1998) ("[E]vidence is that, while boys and girls beginning school clearly recognise themselves as boys or girls in terms of the group they play with, they are still not clear on all the characteristics which adults attribute as appropriate to that identity. They still have to learn what it means to be a boy or a

constructing masculinity for their students from a very young age.<sup>17</sup> Moreover, what students learn about gender in school can affect how they think about sex equality throughout life.<sup>18</sup>

Third, understanding this narrative and the way the law can and should react to it can help to explain law's relationship to masculinity, that is, how law has constructed masculinity and how and if law *should* construct masculinity. A large volume of legal literature exists about gender construction in all areas of the law.<sup>19</sup> Some of that literature, particularly queer legal theory, also talks about the construction of masculinity, but this literature tends to focus on women and their role in the law, or sexuality and its role in the law. Outside of the law, a burgeoning movement of masculinity studies has existed for at least the last two decades.<sup>20</sup> But, particularly in the United States, that literature has only very recently translated into the beginnings of a study of how American law shapes masculinity.<sup>21</sup>

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girl, and the school is therefore a powerful site for the elaboration of that identity from the earliest years."); Ellen Jordan, *Fighting Boys and Fantasy Play: The Construction of Masculinity in the Early Years of School*, 7 GENDER & EDUC. 69, 72 (1995) ("Though they regard themselves as irrevocably members of a particular gender group, they are still unsure of what sorts of behaviour are appropriate to membership of that group."). See generally BARBARA LLOYD & GERALD DUVEEN, GENDER IDENTITIES AND EDUCATION: THE IMPACT OF STARTING SCHOOL (1992) (describing ways in which school influences gender identities, particularly at the age of starting school). Some research even indicates that boys arrive at school with less of a sense of gender than girls do, making them even more susceptible to peer pressure in their struggles to determine what being "male" means. See MICHAEL W. SMITH & JEFFREY D. WILHELM, "READING DON'T FIX NO CHEVYS": LITERACY IN THE LIVES OF YOUNG MEN 12 (2002).

17. GILBERT & GILBERT, *supra* note 16, at 114 (stating that schools actively shape gender); R.W. Connell, *Teaching the Boys: New Research on Masculinity, and Gender Strategies for Schools*, 98 TCHRS. C. REC. 206, 211–13 (1996). Connell notes that other institutions, such as media and the family, also play a large role in structuring masculinity for young boys. *Id.* at 211. But, based on reviewing the educational research as well as research into masculinity generally, she concludes that "[t]hrough we will never have a simple way of measuring the relative influence of different institutions, there seems to be good warrant for considering schools one of the major sites of masculinity formation." *Id.* at 212. Cf. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (stating that education is "the principal instrument in awakening the child to cultural values").

18. DEBORAH L. RHODE, SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY 56 (1997) (finding that schools can "reinforce[] inequalities that persist well beyond childhood").

19. See, e.g., ANNAMARIE JAGOSE, QUEER THEORY: AN INTRODUCTION (1996); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Naomi R. Cahn, *Gendered Identities: Women and Household Work*, 44 VILL. L. REV. 525 (1999); Gila Stopler, *Gender Construction and the Limits of Liberal Equality*, 15 TEX. J. WOMEN & L. 43 (2005); 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); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989).

20. See, e.g., R.W. CONNELL, MASCULINITIES (2d ed. 2005); HANDBOOK OF STUDIES ON MEN & MASCULINITIES (Michael S. Kimmel et al. eds., 2004); THE MASCULINITIES READER (Stephen M. Whitehead & Frank J. Barrett eds., 2001); MASCULINITY STUDIES & FEMINIST THEORY: NEW DIRECTIONS (Judith Kegan Gardiner ed., 2002).

21. See, e.g., NANCY LEVIT, THE GENDER LINE (1998); Case, *supra* note 2; Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853 (2006); Nancy Levit, *Male Prisoners: Privacy, Suffering, and the Legal Construction of Masculinity*, in PRISON MASCULINITIES 93–

This Article contributes to this growing body of literature by focusing on and critiquing the essentialist myth of masculinity that was part of the impetus for the recent single-sex education changes. Part I of this Article argues for an anti-essentialist understanding of masculinity that helps frame the rest of the analysis. Part II establishes the legal setting by recounting the federal law—constitutional, statutory, and regulatory—regarding single-sex education. Part III describes and analyzes the public narrative about boys that both influenced and resulted from these changes and then argues that the narrative’s essentialized notion of dominant masculinity is harmful to both girls and boys. Ultimately, Part III concludes that, instead of privileging this essentialist myth, the law and schools should make room for multiple and varied masculinities for boys (and girls).

Part IV takes up this task and explores how the law relating to single-sex education could use this broader notion of masculinity. First, the Part argues that the Title IX regulatory change that allows for the expansion of single-sex schooling can actually work to further empower and entrench the essentialist myth of masculinity, thus violating its own prohibition on sex stereotyping. Next, the Part argues for strong interpretations of already existing jurisprudence about gender stereotyping from both Title IX and constitutional law and concludes that de-essentializing masculinity in the law about single-sex schooling is both possible and preferable. Ultimately, I conclude that schools that implement single-sex education must do so for reasons other than promoting the essentialist myth of masculinity and that the law must be vigilant in ensuring that schools’ implementation not further reify dominant conceptions of what it means to be a boy.

A last introductory word about a few things this Article is not. First, this Article is not a general overview of the arguments for or against single-sex education. Rather, it attempts to develop an understanding of an extremely important and generally overlooked harm of single-sex education—its role in creating and reflecting harmful male stereotypes. Second, this Article is not about best educational practices. I do cite to some studies about educational practices to support modest claims about alternatives in education, but best educational practices are obviously outside the scope of a legal article, as well as my expertise. Further, this Article is not about the science of male and female brain differences. Rather, this Article looks, in part, to the story that the media and single-sex education advocates are telling about boys and how the law should address schools that act according to that story. Certainly, some of that story is rooted in interpretations of science, and where that is so, I have tried to note it (as well as provide opposite interpretations, where they exist).<sup>22</sup> Again, I do not have the

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102 (Don Sabo, Terry A. Kupers & Willie London eds., 2001); Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLAL. REV. 1037 (1996); Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment “Because of Sex,”* 79 U. COLO. L. REV. (forthcoming 2008); Ann C. McGinley, *Harassing “Girls” at the Hard Rock: Masculinities in Sexualized Environments*, 2007 U. ILL. L. REV. 1229; Ann C. McGinley, *Masculinities at Work*, 83 OR. L. REV. 359 (2004).

22. Skeptics of the brain difference literature referenced in this Article abound. See Janet Shibley Hyde, *The Gender Similarities Hypothesis*, 60 AM. PSYCHOLOGIST 581 (2005) (finding, in a comprehensive meta-study, support for the gender similarities hypothesis which states that “males and females are similar on most, but not all, psychological variables” and that the differences are greater among people of the same sex than between sexes); Rebecca M. Young & Evan Balaban, *Psychoneuroendocrinology*, NATURE, Oct. 2006, at 634 (“The melodrama [of the sex differences literature] obscures how biology matters; neither hormones nor brains are

expertise to evaluate the neuroscience of sex differences, but I can say with confidence that none of the science states that all boys uniformly possess a certain characteristic while all girls are the opposite. For this Article, that is all a reader has to know about the science of brain differences.<sup>23</sup> Finally, this Article does not attempt to address the serious problem of reification of male essentialism in coeducational settings. While coeducational school settings also are likely to make decisions based on the essentialist myth of masculinity, I focus here on single-sex boys' schooling because these schools and classrooms focus solely on male behavior, making them even more susceptible to the application of the essentialist vision of boys.

### I. ANTI-ESSENTIALISM AND MASCULINITIES

Men and masculinity have long been studied in feminist legal theory, but rarely have they been the central focus of the attention. This makes sense because, as Nancy Levit points out in her study of feminist legal theory and men, feminism's primary concern has been to end "the unjust subordination of women."<sup>24</sup> To that end, feminist legal theory has told the story of how women have been subordinated and argued for different approaches to ending that subordination and achieving equality. Part of that endeavor has been to dissect and deconstruct gender-based stereotypes, but feminist legal theory has "done little to examine the more sophisticated and subtle ways in which stereotypes, particularly those stereotypes that have been internalized, affect men."<sup>25</sup>

Examining these stereotypes of men and boys is an important task for feminism, feminist legal theory, and equality. In undertaking this task, I hope to accomplish the important feminist goal of "unmasking gendered biases or assumptions made by social groups and institutions, laws, and legal doctrines."<sup>26</sup> For the purposes of examining the stereotypes related to boys and education, I argue for the importance of understanding

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pink or blue."); *see also* Posting of Mark Liberman to Language Log, <http://itre.cis.upenn.edu/~myl/language-log/archives/003419.html> (Aug. 6, 2006, 07:13 EST) ("There certainly are psychological and neurological differences between men and women, sometimes big ones. But [authors who promote the gender difference hypothesis] use a set of rhetorical tricks that tend to make sex differences seem bigger and more consequential than they really are. You can do it too, if you want—just choose phenomena that emphasize differences, leaving out the ones where the sexes are more similar; pick studies that find stereotypic differences, leaving out the ones whose results disagree; and in all cases, talk and write as if (even relatively small) differences in group averages were essential characteristics of every member of each group."); MEAD, *supra* note 12, at 15 ("Just as correlation does not always signify causation in social science research, correlations between differences in brain structure and observed differences in male and female behavior do not necessarily mean that the former leads to the latter."); PAUL CONNOLLY, BOYS AND SCHOOLING IN THE EARLY YEARS 34–36 (2004) (noting that observed brain differences may be the result of differently socialized behavior for boys and girls and not inherent biological differences). For a general claim that neuroscience studies tend to unduly interfere with people's evaluations of arguments, see Deena Skolnick Weisberg, Frank C. Keil, Joshua Goodstein, Elizabeth Rawson & Jeremy R. Gray, *The Seductive Allure of Neuroscience Explanations*, 20 J. COGNITIVE NEUROSCIENCE 470 (2008).

23. *See infra* notes 298–301 and accompanying text for a discussion of "perfect proxies."

24. Levit, *Feminism for Men*, *supra* note 21, at 1041.

25. *Id.* at 1052.

26. *Id.* at 1054.

masculinity from the perspective of anti-essentialism. In other words, even though a dominant, or hegemonic, notion of masculinity may exist, it cannot account for the multiple masculinities lived by boys and men.

Analyzing masculinity from the perspective of the feminist anti-essentialist tradition is important for the same reasons it is important to analyze femininity from an anti-essentialist perspective. Catharine MacKinnon has defined essentialism as the biologically-determinist view that biological facts, such as being a woman or a man, determine “social outcomes and individual qualities.”<sup>27</sup> Relatedly, essentialism incorporates the notion that all women, as members of the group women, necessarily have certain characteristics in common and that all men, as members of the group men, necessarily have other characteristics in common. Angela Harris has critiqued feminist scholars for employing essentialism and ignoring differences among women based on race.<sup>28</sup> Differences also exist based on other identity factors, such as class, disability, and sexual orientation, as well as, to take anti-essentialism a step further, basic differences of individual personhood. For instance, not all women fit into Carol Gilligan’s mold of having a more caring moral foundation than men<sup>29</sup>; ascribing such a quality to all women is empirically inaccurate<sup>30</sup> in a world of “multiplicitous, shifting, socially constructed” identities.<sup>31</sup> Furthermore, essentialist conceptions of gender tend to reinforce power differentials between men and women as well as “patriarchal assumptions about women as a group.”<sup>32</sup> Feminist legal theorists have applied anti-essentialism to break down the concepts of women and femininity within the law; in

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27. CATHARINE A. MACKINNON, *WOMEN’S LIVES; MEN’S LIVES* 85 (2005) (defining essentialism and noting that it has “long been central to the ideology of racism and sexism in its most vicious forms”); *see also* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 585 (1990).

28. *See* Harris, *supra* note 27, at 589–90.

29. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* 69–71 (1982).

30. *See* Hyde, *supra* note 22, at 586 (“Gilligan has argued that males and females speak in a different moral ‘voice,’ yet meta-analyses show that gender differences in moral reasoning and moral orientation are small.”).

31. MARY J. FRUG, *POSTMODERN LEGAL FEMINISM* 18 (1992); Levit, *Feminism for Men*, *supra* note 21, at 1050 (“Feminists drawing on postmodernism want to avoid unitary truths and acknowledge multiple identities.”).

32. Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 *HARV. WOMEN’S L.J.* 89, 99 nn.47–48 (1996). Anti-essentialism is not uncontroversial, as some have criticized it 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 Wesley, *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 the identity category of ‘women,’” 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.



this Article, I undertake this task for men and masculinity in the law, particularly in the context of single-sex education.

Masculinity, seemingly an easy concept to understand in everyday parlance, has been difficult for theorists to define. As anti-essentialism teaches us, any definition of masculinity risks essentializing masculinity and men (and thus femininity and women).<sup>33</sup> Attaching substantive content to the term in the form of particular characteristics is thus problematic, as it is clear that masculinity is more complicated than just a description of what men do. The concept includes what those in power expect of men (or women) who want to access benefits and positions associated with men, and frequently those also associated with power.<sup>34</sup>

Because of these difficulties, I find it much more useful to use the sociological concept of “multiple masculinities.” “Multiple masculinities” is the anti-essentialist notion that different people experience and live masculinity differently. Stated otherwise, there is no one masculinity that all men, or even most men, live.<sup>35</sup> 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>36</sup> R.W. Connell, perhaps the most influential theorist on masculinity, posits multiple masculinities among and within cultures, institutions, workplaces, and peer groups.<sup>37</sup> 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>38</sup>

Although there is no one “true” or essential masculinity, there are certain types of masculinity that are more visible and influential than others. Again, these masculinities are contextual and dynamic and are impossible to infuse with substantive content in the abstract. However, some categories are helpful, especially the concept of “hegemonic masculinity.” Hegemonic masculinity, also theorized by Connell, is the dominant normative form of masculinity within any particular context:

33. R.W. Connell & James W. Messerschmidt, *Hegemonic Masculinity: Rethinking the Concept*, 19 GENDER & SOC'Y 829, 836 (2005) (stating that masculinity is “not a fixed entity” and is specific to “a particular social setting”).

34. C.J. PASCOE, DUDE, YOU'RE A FAG: MASCULINITY AND SEXUALITY IN HIGH SCHOOL 9 (2007) (“Recognizing that masculinizing discourses and practices extend beyond male bodies, this book traces the various ways masculinity is produced and manifested in relation to a multiplicity of bodies, spaces, and objects. That is, this book looks at masculinity as a variety of practices and discourses that can be *mobilized by and applied to* both boys and girls.”) (emphasis added); see also Emma Renold, ‘Other’ Boys: Negotiating Non-Hegemonic Masculinities in the Primary School, 16 GENDER & EDUC. 247, 248–49 (2004) (“[G]ender has been conceptualized not as something that is singularly possessed or something that ‘is,’ but something that is continually created through a series of repetitive acts and performances that give the illusion of a ‘fixed’ or ‘natural’ gender.”).

35. Connell, *supra* note 17, at 208 (“[I]n multicultural societies such as the contemporary United States there are likely to be multiple definitions of masculinity.”).

36. GILBERT & GILBERT, *supra* note 16, at 49.

37. R.W. CONNELL, GENDER 89 (2002).

38. See, e.g., Connell & Messerschmidt, *supra* note 33, at 841 (“Men can dodge among multiple meanings according to their interactional needs.”); Michael Kimmel, *Integrating Men Into the Curriculum*, 4 DUKE J. GENDER L. & POL'Y 181, 187–89 (1997).

Hegemonic masculinity was distinguished from other masculinities, especially subordinated masculinities. Hegemonic masculinity was not assumed to be normal in the statistical sense; only a minority of men might enact it. But it was certainly normative. It embodied the currently most honored way of being a man, it required all other men to position themselves in relation to it, and it ideologically legitimated the global subordination of women to men.<sup>39</sup>

Thus, although boys and girls, men and women, live and experience different forms of masculinity within particular contexts, often one form of masculinity exerts the most pressure to conform to it. Hegemonic masculinity is usually associated with power and the subordination of both women and non-hegemonically masculine men.<sup>40</sup> Without understanding context, it is impossible to say what characteristics are associated with hegemonic masculinity. But, in traditionally male-dominated societies and institutions, there are certain characteristics that are more likely to be associated with hegemonic masculinity than others.<sup>41</sup> Among those characteristics are the themes from the narrative about boys and the need for single-sex schooling that I identify below: heteronormativity, aggression, activity, sports-obsession, competitiveness, stoicism, and not being female or feminine. When schools act based on this narrative and expect boys to behave accordingly, they project the essentialist message that hegemonic masculinity is naturally a characteristic of all boys. This message is harmful and in opposition to how Title IX and the Equal Protection Clause should be read. Before describing this hegemonic masculinity and arguing for a strong anti-essentialist reading of anti-discrimination law, this next Part describes the legal setting in which the narrative about masculinity and single-sex education has arisen.

## II. THE FEDERAL LAW OF SINGLE-SEX EDUCATION

For those not familiar with this area of law, it may come as a surprise that the Supreme Court has not had a *Brown v. Board of Education*<sup>42</sup> “separate is inherently unequal” (or even the opposite, “separate is equal”) moment for single-sex education.

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39. Connell & Messerschmidt, *supra* note 33, at 832.

40. 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); *see also* McGinley, *Harassing “Girls,” supra* note 21, 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”).

41. *See, e.g.,* GILBERT & GILBERT, *supra* note 16, 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”); Renold, *supra* note 34, at 251 (describing dominant masculinity as characterized by football, fighting, hardness, competitiveness, and compulsory heterosexuality); 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”).

42. 347 U.S. 483 (1954).

After all, especially in the 1970s, the Court has addressed a wide variety of sex-based classifications challenged as unconstitutional. But, although the Court has addressed some aspects of single-sex education, it has not definitively stated one way or the other whether the Constitution forbids or allows public schools to separate students based on sex. Likewise, Title IX and its regulations have, until 2006, had an equivocal stance on single-sex education—allowing it, but only in very limited circumstances. This Part reviews the legal landscape of single-sex education, focusing most particularly on the recent Title IX regulatory change. This overview will serve as the backdrop for the narrative of masculinity described and analyzed later in this Article.<sup>43</sup>

### A. The Constitution and Single-Sex Education

It is now a familiar principle of constitutional law that government classifications based on sex are subject to a level of scrutiny lower than strict scrutiny but greater than rational basis analysis.<sup>44</sup> But, of course, that has not always been the case, and the first litigation involving the constitutionality of single-sex education arose as the Supreme Court was sorting out how to address sex discrimination under the Equal Protection Clause.<sup>45</sup> In that litigation, the Third Circuit found that Philadelphia's two sex-segregated "academic" high schools<sup>46</sup> posed no constitutional problems because both schools offered similarly excellent academic environments and enrollment was purely voluntary.<sup>47</sup> The Supreme Court took the case but, in the midst of the rapidly developing constitutional sex discrimination doctrine, affirmed by an equally divided

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43. For a more in-depth review of these legal developments (until 2003), see ROSEMARY C. SALOMONE, *SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING* 116–75 (2003).

44. Whether that level of scrutiny is termed "intermediate scrutiny" and analyzed by determining if the classification is "substantially related" to an "important" government interest or is something stricter requiring "an exceedingly persuasive justification," is the subject of debate. *Compare* *Nguyen v. INS*, 533 U.S. 53, 60–61 (2001) (majority opinion focusing on traditional "intermediate scrutiny" test from *Craig v. Boren*, 429 U.S. 190 (1976)), *with id.* at 74–75 (O'Connor, J., dissenting) (focusing more on the "exceedingly persuasive justification" language from *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982)). *See, e.g.*, Martha Minow, *Should Religious Groups Be Exempt From Civil Rights Laws?*, 48 B.C. L. REV. 781, 818 n.226 (2007) (calling the standard after *Virginia* "less than clear"); David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J. L. & GENDER 217, 249 n.235 (2005) (noting dispute following *Virginia* decision).

45. From *Reed v. Reed*, 404 U.S. 71 (1971) (nominally applying rational basis analysis), to *Craig v. Boren*, 429 U.S. 190 (1976) (announcing intermediate scrutiny standard), lower courts and commentators were not clear as to what standard to apply in sex discrimination cases because there was much internal dissension among the Justices themselves. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality Justices advocating strict scrutiny; concurring Justices relying on rational basis analysis).

46. "Academic" high schools were high schools that were open to students from throughout the city that met high academic standards. *See Vorchheimer v. Sch. Dist.*, 400 F. Supp. 326, 327 (E.D. Pa. 1975).

47. *Vorchheimer v. Sch. Dist.*, 532 F.2d 880, 886 (3d Cir. 1976). The court rejected the application of *Brown v. Board of Education* to educational segregation based on sex rather than race, stating instead that "there are differences between the sexes which may, in limited circumstances, justify disparity in law." *Id.*

vote, resulting in no published opinion on the constitutionality of single-sex education.<sup>48</sup>

The Supreme Court has not heard any other cases that present the issue of the constitutionality of single-sex education in elementary or secondary schools.<sup>49</sup> But a high-profile Detroit case resulted in another constitutional ruling on the issue in the early 90s, albeit in the district court only. In that case, *Garrett v. Board of Education*, Detroit established three all-boys academies with an Afrocentric curriculum.<sup>50</sup> The district court found that the plaintiffs challenging the sex segregation were likely to succeed on the merits of their constitutional claim because the school, while having an important justification for the special academies,<sup>51</sup> could not justify excluding girls.<sup>52</sup> Limiting enrollment based on sex was both under-inclusive, because Detroit's girls had no special school but faced similar dire problems that needed attention,<sup>53</sup> and over-inclusive, because boys who were not at risk were admitted to the academies.<sup>54</sup>

48. *Vorchheimer v. Sch. Dist.*, 430 U.S. 703 (1977). Justice Rehnquist sat out the case because of back problems, and a plea from Chief Justice Burger to rehear the case with Justice Rehnquist was unsuccessful. See MARK TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT 1961–1991*, at 41 (1997) (noting that Burger called the other Justices “unregenerate unreconstructed ‘rebels’” for not agreeing to rehear the case with Justice Rehnquist). For a description of the Court's deliberations in *Vorchheimer* as cobbled together from various Justices' personal files, see Serena Mayeri, *The Strange Career of Jane Crow: Sex Segregation and the Transformation of Anti-Discrimination Discourse*, 18 YALE J.L. & HUMAN. 187, 261–63 (2006).

Eventually, Philadelphia was forced by court order to admit girls to the boys' high school, but that result came years later when a state court found that the boys' school's sex-segregation violated Pennsylvania's own constitution. See *Newberg v. Bd. of Pub. Educ.*, 26 Pa. D. & C. 682 (Pa. Comm. Pl. 1983). The girls high school remains a school of only girls and has not been legally challenged, perhaps because, despite its name, the school does not have an official policy requiring applicants to be girls. See SCHOOL REFORM COMMISSION, *SCHOOL DISTRICT OF PHILADELPHIA, A DIRECTORY OF HIGH SCHOOLS FOR 2006 ADMISSIONS: SCHOOL DISTRICT OF PHILADELPHIA SECONDARY EDUCATION PLANNING GUIDE FOR EIGHTH GRADE STUDENTS 15* (2005), available at [http://www.phila.k12.pa.us/offices/sem/seplan\\_2006.pdf](http://www.phila.k12.pa.us/offices/sem/seplan_2006.pdf).

49. *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982) and *United States v. Virginia*, 518 U.S. 515 (1996), discussed below, dealt with special higher education circumstances rather than a broad claim about all single-sex schooling in elementary or secondary schools.

50. See SALOMONE, *supra* note 43, at 131–32 (describing genesis of Detroit's all-boy academies).

51. *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004, 1008 (E.D. Mich. 1991) (stating that reducing the high unemployment, dropout, and homicide rates among Detroit's African-American males was an important objective).

52. *Id.* (“There is no evidence that the educational system is failing urban males because females attend schools with males.”).

53. *Id.* at 1007 (noting that in the resolution establishing the academies, the Detroit school board “acknowledged an ‘equally urgent and unique crisis facing . . . female students’”); see also Devon W. Carbado, *Introduction to BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER*, *supra* note 41, at 1, 7 (describing the ways in which these academies, by focusing on making “strong Black men” ignored “the degree to which Black girls are [similarly troubled]”).

54. *Garrett*, 775 F. Supp. at 1007 n.5 (“[A]dmission requirements specify a mix of students

*Garrett* was the last federal court decision regarding a single-sex elementary or secondary school,<sup>55</sup> but two other Supreme Court cases have raised important issues relating to single-sex education in very specific higher educational settings. The first was *Mississippi University for Women v. Hogan*, in which the Supreme Court found unconstitutional Mississippi's women-only nursing school.<sup>56</sup> The school was part of a women-only, state-run university that dated back to 1884.<sup>57</sup> On a challenge by a man seeking admission to the school, the Court found the school's admissions exclusion unconstitutional.<sup>58</sup> Focusing on the technical equal protection analysis, the Court rejected the claim that the exclusion of men was substantially related to the school's objective of educating women; after all, men attended classes that women attended without any negative effect on women and the classroom, so the school's insistence on excluding men rang hollow.<sup>59</sup> Thus, the state's arguments failed to meet the "exceedingly persuasive justification" for its sex-based classification that the Court demanded.<sup>60</sup> The Court declined to address the general issue of single-sex education.<sup>61</sup>

Fourteen years later, in *United States v. Virginia*,<sup>62</sup> the Court, again without addressing the general issue of single-sex education, found unconstitutional another single-sex educational institution of higher learning, this time a state-run, all-male military academy, the Virginia Military Institute (VMI). The Court rejected Virginia's claim that the rigorous training method used by VMI<sup>63</sup> was incompatible with women attending the school.<sup>64</sup> Taking what it called a "hard look" at generalized claims about the sexes,<sup>65</sup> the Court found that, for the subset of women who were willing to suffer

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with a wide range of achievement levels be included."). The case never reached a higher court because, nine days after the district court's ruling, Detroit settled the matter. *See SALOMONE, supra* note 43, at 135 (agreeing to allocate 136 of the 560 seats).

55. A 2006 lawsuit in the Middle District of Louisiana claiming that a school district's single-sex education plans were based on the types of gender stereotypes discussed in this Article settled before any ruling on the merits. *See* Complaint and Jury Demand, *Selden v. Livingston Parish Sch. Bd.*, No. 3:2006cv00553 (M.D. La. Aug. 2, 2006), *available at* <http://www.aclu.org/pdfs/womensrights/20060801seldencomplaint.pdf>. In May 2008, the ACLU filed suit against the Breckenridge County School District in Kentucky for segregating classes based on sex. *See* First Amended Complaint, *A.N.A. v. Breckinridge County Bd. of Educ.*, No. 3:08-CV-4-S, 2008 WL 4056228 (W.D. Ky. Aug. 22, 2008).

56. 458 U.S. 718 (1982).

57. The school was originally called the Mississippi Industrial Institute and College for Education of White Girls of the State of Mississippi. *Id.* at 719–20. The name was later changed to Mississippi University for Women, which it still is today even though it has admitted men since 1982. *Id.* at 720; *see* Mississippi University for Women, About the University, <http://www.muw.edu/misc/history.htm>.

58. *Hogan*, 458 U.S. at 727–31.

59. *Id.* at 731 ("[T]he record in this case is flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any of MUW's educational goals.").

60. *Id.*

61. *Id.* at 723 n.7. Justices Blackmun and Powell wrote separate dissents lamenting that the Court's opinion would signal the end of single-sex education in this country. *Id.* at 734–35 (Blackmun, J., dissenting); *id.* at 736–39, 744 (Powell, J., dissenting).

62. 518 U.S. 515 (1996).

63. *Id.* at 522 (describing the "adversative" method).

64. *Id.* (noting Virginia's argument that "[a]lterations to accommodate women would necessarily be 'radical,' so 'drastic,' . . . as to transform, indeed 'destroy,' VMI's program").

65. *Id.* at 541 (quoting Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546,

through the intense training, just like for the subset of men who made that choice, the school would not have to alter it.<sup>66</sup> The state's goal of educating "citizen soldiers" by excluding all women, "in total disregard for their individual merit," was also inconsistent with women's success in fields they had previously been excluded from.<sup>67</sup>

### B. Title IX and Single-Sex Education

Title IX prohibits sex discrimination in federally-funded educational programs.<sup>68</sup> The statute specifically exempts admissions from its ambit, except in vocational, professional, graduate, and public undergraduate schools.<sup>69</sup> Thus, preschools, elementary schools, secondary schools, and private undergraduate schools can, under the statute, have sex-segregated admissions.<sup>70</sup> Title IX's legislative history indicates that Congress exempted these institutions because of uncertainty in the early 1970s over how many of those institutions were actually sex segregated, whether those that were sex segregated were effective, and what the financial repercussions would be if they were covered.<sup>71</sup> Despite a Congressional promise at the time to study the issue more in depth,<sup>72</sup> Title IX's exemptions have never been amended.<sup>73</sup>

1551 (1991)).

66. *Id.*

67. *Id.* at 543–46 (noting past exclusion from law and medicine as well as successes in military academies and military forces).

68. 20 U.S.C. § 1681(a) (2006).

69. *Id.* § 1681(a)(1). Title IX also has a few other exceptions related to admissions, including certain religious institutions, *id.* § 1681(a)(3), military institutions, *id.* § 1681(a)(4), and public institutions with a history and tradition of being single-sex, *id.* § 1681(a)(5).

70. *See id.* § 1681(c) (defining "educational institution" as "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education").

71. *See* 118 CONG. REC. 5,804 (1972) (Senator Birch Bayh stating that an exemption is needed because "no one even knows how many single-sex schools exist on the elementary and secondary levels or what special qualities of the schools might argue for continued single-sex status"); *id.* at 5,807 (Senator Bayh stating that Congress needed to "allow time for a careful and specific study of the financial repercussions that [the private single-sex undergraduate schools] claim would occur if they were covered by" Title IX). *But see* Deborah Rhode, *Association and Assimilation*, 81 NW. U. L. REV. 106, 136–37 (1986) (claiming "the legislators' professed ignorance seemed largely self-imposed" because research on the topic existed or was the result of personal preferences for single-sex education).

72. *See* 118 CONG. REC. 5,807 (1972) (Senator Bayh stating that Congress needed to gather information to "make a fully informed decision on the question of which—if any—schools should be exempted").

73. Two years later, Congress did pass the Equal Educational Opportunity Act (EEOA). 20 U.S.C. §§ 1701–1758 (2006). Because this Article is concerned with the narrative of masculinity in the wake of changes to Title IX with respect to single-sex education, it will not address the peculiarities of the EEOA's varying statements about single-sex education. *Compare* *Vorchheimer v. Sch. Dist.*, 532 F.2d 880, 884–85 (3d Cir. 1876) (finding EEOA applicable only to schools desegregating based on race), *and* *Garrett v. Bd. of Educ.*, 775 F. Supp. 1004, 1010 (E.D. Mich. 1991) (finding EEOA unlikely to apply because the Detroit school system as a whole did not offer only single-sex options), *with* *United States v. Hinds County Sch. Bd.*, 560 F.2d 619, 624 (5th Cir. 1977) (finding that the EEOA bans single-sex schools as the only option within a district, particularly in light of a history of race-based

Title IX's regulations spell out the requirements for single-sex classes in elementary and secondary schools. Until the change in 2006, the regulations allowed segregation by sex in only a limited number of circumstances. Generally, the regulations prohibited a funding recipient from "provid[ing] any course or otherwise carry[ing] out any of its education program or activity separately on the basis of sex, or requir[ing] or refus[ing] participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses."<sup>74</sup> The regulations excepted a very limited class of single-sex offerings<sup>75</sup> and did not apply to the admissions policies of elementary and secondary schools or private undergraduate institutions.<sup>76</sup>

In 2001, the movement for single-sex education won a small victory that ultimately led to the changes in Title IX's single-sex regulation. That year, Senator Kay Bailey Hutchison of Texas, joined by Senator Hillary Clinton<sup>77</sup> and others, added a provision to the No Child Left Behind Act that encouraged experimentation with single-sex schools.<sup>78</sup> That provision distributed funds to local educational agencies for innovative programs, and the list of such programs included "[p]rograms to provide same-gender schools and classrooms (consistent with applicable law)."<sup>79</sup> The Act also required the Secretary of Education to issue guidelines for implementing this particular provision.<sup>80</sup>

Consistent with this new provision, in 2002, the Secretary of Education issued guidelines on single-sex education under Title IX<sup>81</sup> along with a notice of the Department's intent to change the regulations regarding single-sex education.<sup>82</sup> The notice signaled the Department's intent to expand single-sex opportunities, noting that even though there is a concern about "outdated notions regarding the limitations or

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segregation).

74. 34 C.F.R. § 106.34 (2005).

75. *Id.* § 106.34(c) (physical education classes involving bodily contact sports); *id.* § 106.34(e) (elementary and secondary school classes dealing exclusively with human sexuality); *id.* § 106.34(f) (choruses with vocal range or quality requirements that result in sex segregation).

76. *Id.* § 106.15(d). Nonetheless, the *Garrett* court did find that the regulations' general language, along with two opinion letters from the Office of Civil Rights rejecting schools' inquiries into experimenting with all-male schools, suggested that the regulations prohibited single-sex schools that were not in existence at the time Congress passed Title IX. *See Garrett*, 775 F. Supp. at 1009–10.

77. *See* 147 CONG. REC. S5907-08 (daily ed. June 7, 2001) (statement of Senator Clinton joining in support of Hutchison amendment).

78. In 1998, Senator Hutchison tried to amend the federal educational grant program to allow public schools to use federal funds on single-sex schools and classrooms, but President Bill Clinton ultimately vetoed the bill to which the amendment was attached. H.R. 2646, 104th Cong. (1st Sess. 1998). For a full account of the amendment, see Kay Bailey Hutchison, *The Lesson of Single-Sex Public Education: Both Successful and Constitutional*, 50 AM. U. L. REV. 1075, 1081–82 (2001). Hutchinson tried again, also unsuccessfully, in 1999. 145 CONG. REC. 12,071 (1999) (proposing, along with Senator Susan Collins, an amendment to allow single-sex classes or schools in public school districts but ultimately withdrawing it).

79. 20 U.S.C. § 7215(a)(23) (2006).

80. *Id.* § 7215(c).

81. Single-Sex Classes and Schools: Guidelines on Title IX Requirements, 67 Fed. Reg. 31, 101–03 (May 8, 2002).

82. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 67 Fed. Reg. 31,097–99 (proposed May 8, 2002) (to be codified at 34 C.F.R. pt. 106).

limited goals of members of one sex,” the “use of single-sex classes and schools can reflect important and legitimate efforts to improve educational outcomes for all students.”<sup>83</sup> The Department specifically stated that it wanted to permit single-sex classes so that schools would have the latitude to use “innovative efforts to help children learn” and “expand the choices parents have for their children’s education.”<sup>84</sup>

The Department of Education issued proposed rules in March 2004 that would allow for expanded single-sex educational opportunities<sup>85</sup> and ultimately released the final regulations in October 2006.<sup>86</sup> The new regulations require the school to have an “important objective” in separating the sexes.<sup>87</sup> The Department delineated only two objectives that qualify: a school district’s desire to improve educational achievement through an “overall established policy to provide diverse educational opportunities” or the district’s desire to “meet the particular, identified educational needs of its students.”<sup>88</sup> The school has to be “evenhanded” in implementing the objective, and the single-sex classes have to be “completely voluntary.”<sup>89</sup> For students of the other sex who are excluded from the single-sex class, the school does not have to provide a single-sex class, but rather must provide only a “substantially equal coeducational class . . . in the same subject . . . .”<sup>90</sup> The school district must periodically evaluate the single-sex classes to ensure that they “are based upon genuine justifications and do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex . . . .”<sup>91</sup> The new regulations for single-sex schools, rather than individual classes within schools, have virtually the same requirements.<sup>92</sup>

83. *Id.* at 31,098.

84. *Id.*

85. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 69 Fed. Reg. 11,275, 11,277–79 (proposed Mar. 9, 2004) (to be codified at 34 C.F.R. pt. 106).

86. Single-Sex Rules Final Notice, *supra* note 3; *see also* Press Release, Dep’t of Educ., Sec’y Spellings Announces More Choices in Single Sex Education: Amended Regulations Give Communities More Flexibility to Offer Single Sex Schools and Classes (Oct. 24, 2006), <http://www.ed.gov/news/pressreleases/2006/10/10242006.html>

87. 34 C.F.R. § 106.34(b)(1)(i) (2008).

88. *Id.* § 106.34(b)(1)(i)(A), (B). For both, separating by sex has to be “substantially related to achieving that objective.” *Id.*

89. *Id.* § 106.34(b)(1)(ii), (iii).

90. *Id.* § 106.34(b)(1)(iv). Although the next section continues by stating that in order to be “evenhanded” under § 106.34(b)(1)(ii), the school “may be required” to provide a single-sex class for the excluded sex. *Id.* § 106.34(b)(2). The regulation lists factors to consider in determining whether a class is “substantially equal,” including the “quality, range, and content of curriculum,” “the quality and availability of books, instructional materials, and technology,” “the qualifications of faculty and staff,” and “the quality, accessibility, and availability of facilities and resources provided to the class.” *Id.* § 106.34(b)(3). The list is explicitly not exclusive and includes “intangible features.” *Id.*

91. *Id.* § 106.34(b)(4)(i). “Preferences” was added to the list of overly-broad generalizations that had, in the original proposed regulations, included only “talents” and “capacities.” *See* Single-Sex Rules Final Notice, *supra* note 3, at 62,531. These evaluations must occur at least every two years. 34 C.F.R. § 106.34(b)(4)(ii).

92. *See* 34 C.F.R. § 106.34(c).



The Department's explanation of the new regulations provides insight into some of the important issues with respect to single-sex education.<sup>93</sup> Particularly relevant to this Article, some comments raised concerns that single-sex education would perpetuate sex-based stereotypes.<sup>94</sup> The Department responded, claiming the regulations had substantive and procedural safeguards in place to prevent such stereotyping. A move toward single-sex classes needed one of the two specified "important objective[s]" and "a recipient's use of overly broad sex-based generalizations in connection with offering single-sex education would be sex discrimination."<sup>95</sup> The Department reiterated the prohibition on stereotyping elsewhere with respect to determining which classes to offer on a single-sex basis<sup>96</sup> and periodically evaluating single-sex programs.<sup>97</sup>

### III. THE NARRATIVE OF ESSENTIALIZED MASCULINITY

While the above changes were taking place, people began to pay close attention to the issue of single-sex schooling. The justifications and explanations for single-sex education ran the gamut, from improving educational outcomes,<sup>98</sup> to increasing the diversity of options for parents,<sup>99</sup> to the need for girls to learn without boys' sexist attitudes.<sup>100</sup> These arguments have certainly been important aspects of the debate

93. See Single-Sex Rules Final Notice, *supra* note 3, at 62,529. In response to constitutional concerns about single-sex education evident in the comments, the Department stated that it was not attempting to "regulate or implement constitutional requirements or [give] advice about the U.S. Constitution." *Id.* at 62,533. The Department suggested that any school district concerned about constitutional issues regarding single-sex education "may wish to consult legal counsel." *Id.*

94. *Id.*

95. *Id.* at 62,533–34.

96. See *id.* at 62,535 ("Thus, recipients are prohibited from determining which classes to offer on a single-sex basis or providing single-sex classes on the basis of overly-broad generalizations about the different talents, capacities, or preferences of either sex.").

97. See *id.* at 62,539 ("We agree that under Title IX, single-sex classes cannot be based on overly-broad generalizations about the talents, capacities, or preferences of either sex. As discussed previously, recipients must make fact-specific determinations [in their periodic evaluations].").

98. See, e.g., FRED MAEL, ALEX ALONSO, DOUG GIBSON, KELLY ROGERS & MARK SMITH, SINGLE-SEX VERSUS COEDUCATIONAL SCHOOLING: A SYSTEMATIC REVIEW (2005), <http://www.ed.gov/rschstat/eval/other/single-sex/single-sex.pdf> (reviewing the literature on effectiveness of single-sex schooling).

99. See Nancy Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, 2005 U. ILL. L. REV. 455, 492–95 (describing the "choice" and "diversity" arguments for single-sex education). Freedom to choose was mentioned frequently in the comments to the Department of Education. See Single-Sex Education Comments, Dep't of Educ., Nos. 28, 29, 41, 210 (2004) (on file with the Department of Education) [hereinafter Single-Sex Comments]; *id.* No. 516 (Senator Kay Bailey Hutchison stating that parents and schools need "more choices").

100. Arguments about single-sex education being better for girls have a long history. See, e.g., JANICE STREITMATTER, FOR GIRLS ONLY: MAKING A CASE FOR SINGLE-SEX SCHOOLING (1999) (arguing in favor of girls-only schooling because of the continued domination of the co-ed classroom by boys). The groundbreaking publication detailing the ways that girls were

over single-sex education, but the public's attention to boys and their seemingly particular needs and concerns has played an important part as well.

In particular, while the Title IX regulatory change suggests that educational policy decisions based on gender stereotypes are discriminatory and prohibited, it is hard to find a coherent body of literature identifying and defining these stereotypes—particularly as they apply to males. With the development of all-male schooling opportunities under the blessing of the new regulations, the need to understand these damaging stereotypes is greatly increased. I thus describe the myth of essentialist masculinity that emerged from this narrative in an effort to fill that void.

#### *A. Methodology*

This section of the Article details this narrative by breaking it down into the main characteristics associated with boys and masculinity. In laying out the assumptions and arguments of the narrative, I reference stories about boys and single-sex education from the mass media that have appeared during and following the change in federal law, when the debate over single-sex education was at its peak in the United States.<sup>101</sup> I have also based the narrative on the popular books about boys that have contributed to this debate.<sup>102</sup> Finally, to a lesser extent, the narrative also draws on the comments submitted to the Department of Education in support of the recent Title IX regulatory change.<sup>103</sup>

These sources almost uniformly tell the same story: that school-aged boys naturally possess a dominant form of heterosexual masculinity and need to be taught differently as a result. Occasionally, the authors do mention that single-sex education can break

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disadvantaged in coeducational schools is AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, HOW SCHOOLS SHORTCHANGE GIRLS—THE AAUW REPORT (1992).

101. I chose the articles by searching the LEXIS database of United States newspapers and magazines for articles about single-sex education (also sometimes called “same sex,” “single gender,” or “same gender”) that had “boy” in the headline (which, in the LEXIS database, includes the main headline and any sub-headlines). I looked for articles from 2004, roughly the time when the Department of Education announced its proposed new rules and asked for comments, until the summer of 2007 (right before the start of the first school year in which single-sex education was being implemented under the new rules). I also included a small number of articles that did not fit these criteria if those articles were referenced in other works, such as some of the articles on the subject from major media outlets. Once I gathered these articles, I looked for the themes about boys and masculinity that appeared in the articles.

102. I chose books written by authors who appeared in the articles about single-sex education. The authors appeared sometimes as experts quoted in the articles and sometimes merely as references made by the journalist or an educator being interviewed by the journalist. Some of the authors, Leonard Sax, Michael Gurian, and Kathy Stevens in particular, also appeared in the news stories because they travel the country, advising educators about how to run single-sex classrooms and schools.

103. Along with my research assistants, on August 28, 2007, I reviewed all 5,860 of the comments submitted to the Department of Education. *See* Single-Sex Rules Final Notice, *supra* note 3, at 62,532. A large majority of them were form letters from campaigns organized by the National Organization for Women and the American Association of University Women. As a result, the overwhelming majority of the comments were against changing the Title IX regulations. The comments that were in favor of single-sex education and talked about boys contributed to the narrative I describe here.

down stereotypes;<sup>104</sup> however, statements about breaking down stereotypes are inevitably followed by or appear at the end of a long discussion of the stereotypes discussed here.<sup>105</sup> Also, the authors sometimes hedge their descriptions of boys with comments that indicate that most, but not all, boys are a certain way. That, indeed, is consistent with the overall point of this Article. What is problematic with these comments, regardless of any hedge, is that they appear within a dominant narrative about boys' separate needs and characteristics; thus, they contribute to the discourse described below about male and female essential differences and the resulting need for single-sex education.

### *B. Essentialized Masculinity in the Context of Single-Sex Education*

In explaining the problems boys face and the ways that single-sex education can address them, the narrative of masculinity that has emerged during and after the regulatory change is striking. The narrative tells the story that all boys possess a particular dominant kind of masculinity. Themes of heterosexism, aggression, activity, sports-obsession, competitiveness, stoicism, and being anything but female or feminine dominate this narrative. There is very little attention paid to individualized or alternative masculinities, with much of the discussion assuming that all boys fit into one essentialized masculinity.

#### 1. Heteronormativity

Feminist and queer theorists of all disciplines have long critiqued compulsory heterosexuality and heteronormativity, or when structures presume, normalize, or force heterosexuality over other sexual identities. Conversely, sexual identities other than heterosexuality are devalued, shamed, and forcefully resisted.<sup>106</sup> Particular to masculinity, boys are told that in order to be truly male they must be heterosexual because, in part, to be otherwise and to be attracted to males is something associated with being a girl.<sup>107</sup> Put more strongly, Catharine MacKinnon has argued that

104. For instance, Leonard Sax, one of the leading advocates for single-sex education in the United States, routinely states in his literature that single-sex classrooms “can break down gender stereotypes.” See Nat’l Ass’n for Single Sex Pub. Educ., Introduction, <http://www.singlesexschools.org>; accord LEONARD SAX, WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES 243 (2006) (“Here’s the paradox: coed schools tend to *reinforce* gender stereotypes, whereas single-sex schools can *break down* gender stereotypes.”) (emphasis in original); see also TERRY W. NEU & RICH WEINFELD, HELPING BOYS SUCCEED IN SCHOOL: A PRACTICAL GUIDE FOR PARENTS AND TEACHERS 79 (2007) (explaining the same).

105. See, e.g., WILLIAM POLLACK, REAL BOYS: RESCUING OUR SONS FROM THE MYTHS OF BOYHOOD 230–71 (1998) (critiquing the myth that boys are all the same, yet critiquing schools and teachers for not teaching in boy-friendly ways).

106. See Adrienne Rich, *Compulsory Heterosexuality and Lesbian Experience*, in BLOOD, BREAD, AND POETRY 23 (1986); see also Laurie Mandel & Carol Shakeshaft, *Heterosexism in Middle Schools*, in MASCULINITIES AT SCHOOL, *supra* note 15, at 98; PASCOE, *supra* note 34, at 22.

107. GILBERT & GILBERT, *supra* note 16, at 146 (noting that “all boys negotiate masculinity by addressing dominant assumptions of heterosexuality, the view that to be masculine is to be

homophobia and the institution of compulsory heterosexuality are essential parts of hegemonic masculinity because it “keep[s] women sexually for men and men sexually inviolable.”<sup>108</sup> Schools in particular have frequently been criticized along these lines.<sup>109</sup>

In the single-sex narrative, this phenomenon is embodied by the discussion of “distraction.”<sup>110</sup> In the literature reviewed here, it has two essential components: assuming that all boys are sexually attracted to girls, and assuming that all boys are not sexually attracted to other boys. Many of the comments to the Department of Education made both of these arguments, sometimes very forcefully.<sup>111</sup>

Journalists writing about single-sex education also overplayed this argument. For instance, the *Boston Globe* wrote about the benefits of being less distracted for boys, claiming that boys will stay more focused on academics “because there is no one to tease.”<sup>112</sup> Other journalists told a common tale: With girls in the classroom, boys are distracted and self-conscious; therefore, they lose interest in school,<sup>113</sup> they act out to

heterosexual”); Debbie Epstein, *Boyz’ Own Stories: Masculinities and Sexualities in Schools*, 9 GENDER & EDUC. 105 (1997) (studying how dominant masculinity in school is fed by homophobia and heterosexism).

108. Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081, 1087 (2004). Other authors agree that compulsory male heterosexuality may be traced to the desire to sexually dominate the female gender. PASCOE, *supra* note 34, at 86 (claiming that heterosexuality’s link to masculinity reveals “the centrality of the ability to exercise mastery and dominance literally or figuratively over girls’ bodies”).

109. See, e.g., Richard A. Friend, *Choices, Not Closets: Heterosexism and Homophobia in Schools*, in BEYOND SILENCED VOICES 209 (Loise Weis & Michell Fine eds., 1993) (explaining that schools are often criticized for establishing systematic exclusions of positive lesbian, gay, and bisexual images).

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

111. See, e.g., Single-Sex Comments, *supra* note 99, No. 3 (William Irving stating that boys would be better off “without the distraction of girls present”); *id.* No. 5 (Brian Milner stating he did better in a boys-only school because of the “lack of distraction”); *id.* No. 2696 (student stating that schools should be single-sex because there is “a lot of dating and they can’t concentrate”); *id.* No. 3767 (Ivan Taylor, a high school teacher, stating that his students “spend far too much of their time stressing over the presence of the opposite sex in class”); *id.* No. 4283 (Paul Morehead, academic director of a private school, stating that boys are “far less distracted” at his school); *id.* No. 4944 (Michael G. Walsh stating that school needs to be “de-sexualize[d]” for boys who see “the parade of exposed midriffs, body-hugging shirts, plunging necklines, etc.”); *id.* No. 5149 (Donna Jones Jimenez, a Milwaukee high school principal, stating that distraction from the opposite sex leads to pregnancies, promiscuity, and trancies).

112. Maria Sacchetti, *Charter School Puts Hope in Same-Sex Classes*, BOSTON GLOBE, Nov. 27, 2006, at A1; see also Nirvi Shah, *Gender-Separated Classes Discussed*, MIAMI HERALD, Nov. 6, 2006, at B1 (claiming boys have raging hormones that interfere with education if girls are in the room); Ian Shapira, *Pr. William Board Open to Single-Sex Education*, WASH. POST, Oct. 29, 2006, at T01 (describing a local school district experimenting with single-sex education so that “boys aren’t particularly distracted from their subject”).

113. See Wendy Libby, Op-Ed., *Single-Sex Education Worthy of Its Revival*, COLUMBIA TRIB., Apr. 15, 2007.

impress the girls,<sup>114</sup> and they compete with one another for the attention of the girls.<sup>115</sup> Without girls in the classroom, boys will no longer show off,<sup>116</sup> sexuality and hormones will be removed from learning,<sup>117</sup> and they will focus on academics.<sup>118</sup>

## 2. Aggression

Traditional notions of masculinity posit boys as aggressive and as needing aggression from others.<sup>119</sup> Nancy Levit has reasoned that, in its decisions that assumed “male sexual aggression” and approved of the “gendered construct” of war and military combat, the Supreme Court has given credence to this notion that masculinity is aggressive.<sup>120</sup> Within schools, the notion that boys are aggressive is powerful, as boys not seen as aggressive will be seen as “wimps” or “as either a girl or a homosexual.”<sup>121</sup>

The same-sex education masculinity narrative proclaims that boys are naturally aggressive and schools need to adapt to that by separating them from girls who, naturally, are not. Leonard Sax, the executive director of the National Association for Single Sex Public Education, an oft-cited voice in favor of single-sex education and the author of *Why Gender Matters: What Parents and Teachers Need to Know About the Emerging Science of Sex Differences*, writes that “[b]oys often employ aggressive behaviors playfully, as a way of making friends.”<sup>122</sup> Christina Hoff Sommers explains

114. See Matt Bach, *Same Sex Classes Get High Marks*, FLINT J. (Mich.), Jan. 8, 2006, at A1.

115. See Jason Wermers, *A Return to Roots: Isolating Boys in Single-Sex Programs Grows More Common*, RICHMOND TIMES DISPATCH, May 4, 2004, at B1.

116. See Antonio Planas, *Separating the Sexes*, LAS VEGAS REV. J., Jan. 8, 2007, at 1B; see also POLLACK, *supra* note 105, at 261–62 (telling story of Liam and Toby, two boys worried about impressing girls in a mixed-sex environment).

117. See Lori Higgins, *Legislators Push to Allow All-Boy, All-Girl Schools*, DETROIT FREE PRESS, June 15, 2006, at 1; see also Dan Wascoe, *Lesson in Letting Boys Be Boys, Girls Be Girls: Schools Try Single-Sex Classes to Close Gender Gaps in Education*, STAR TRIB. (Minneapolis, Minn.), May 15, 2006, at 1A. See generally Emily Gardner & Wayne Martin, *Needs of Boys Overwhelmed Experiment in Single-Gender Classes*, BIRMINGHAM NEWS, Aug. 3, 2005, at 1N.

118. Blanca Gonzalez, *Boys, Girls Separated in Poway*, S.D. UNION-TRIB., Sept. 18, 2004, at B3 (quoting a parent recalling from his school days that “[i]t’s easier to focus on what you’re trying to learn if you’re not distracted by hormones and the opposite sex”); see also Christine Flowers, *With No Boys to Ogle, We Had Time to Learn*, NEWSWEEK, Oct. 24, 2005, at 26; Amy Miller, *Reduced Distractions*, ALBUQUERQUE J., Nov. 7, 2006, at A1 (“That’s why the sixth-grader likes being in all-boy classes at Van Buren Middle School. He can focus on school work, not trying to impress girls.”).

119. See Levit, *Feminism for Men*, *supra* note 21, at 1056.

120. Levit, *Male Prisoners: Privacy, Suffering, and the Legal Construction of Masculinity*, *supra* note 21, at 93–95 (citing *Michael M. v. Superior Court*, 450 U.S. 464 (1981), and *Rostker v. Goldberg*, 453 U.S. 57 (1981)); see also Levit, *Feminism for Men*, *supra* note 21, at 1057–62 (“The United States Supreme Court has given official imprimatur to the stereotype that males are aggressive.”).

121. ABIGAIL NORFLEET JAMES, *TEACHING THE MALE BRAIN: HOW BOYS THINK, FEEL, AND LEARN IN SCHOOL* 126 (2007).

122. SAX, *supra* note 104, at 62–63. He contrasts boys’ tendencies with girls’: “Girls,

to educators that “natural male aggression is not something to be feared; it is normal and healthy.”<sup>123</sup> As a *Newsweek* commentary proclaimed, “boys bond bloody.”<sup>124</sup>

Aggression is also what boys need in the classroom, advocates of single-sex education claim. According to the narrative, boys need a classroom environment seemingly straight out of an instructional torture video: it has to be very loud, extremely cold, very bright, and highly confrontational.<sup>125</sup> For instance, Leonard Sax advocates speaking loudly to boys in the classroom because they have much worse hearing than girls.<sup>126</sup> He explains:

One simple example derives from innate differences in the ability to hear . . . . By the age of 12, the average girl has a sense of hearing at least seven times more sensitive than the average boy. We also know that girls are distracted by extraneous noise (another student tapping a pencil, for instance) at sound levels 10 times lower than those that distract boys . . . . Most girls learn best in a quiet classroom, free from distractions. That’s not true for many boys. If you’ve visited

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especially young girls, very seldom do that. The proverbial boy pulling on a girl’s pigtail is a boy who is trying to make friends with that girl. But his message is misunderstood.” *Id.* at 63.

123. CHRISTINA HOFF SOMMERS, *THE WAR AGAINST BOYS: HOW MISGUIDED FEMINISM IS HARMING OUR YOUNG MEN* 63 (2000). Other journalists agree with Sommers’ opinions. *See, e.g.*, Gary Coker, *Same-Sex Classrooms, Boys Learn Better in Motion*, ATLANTA J.-CONST., Oct. 27, 2006, at A11 (noting that higher levels of testosterone and dopamine result in a higher level of aggression among boys); *see also* Cathy Kightlinger, *Boys Rule This Classroom*, INDIANAPOLIS STAR, June 7, 2007, at 3 (“[N]ormal male behaviors are considered aggressive in a learning situation.”). One reporter noted how natural aggressive tendencies lead to completely different ways for boys to read and interpret a text: “Listen to Burnsville High School junior Matt Kiehn describe the Greek god Cronus: ‘He ate his own children and puked ‘em up. He killed his dad with a sickle.’” Emily Johns, *Literature Class: 32 Boys*, STAR TRIB. (Minneapolis, Minn.), Oct. 18, 2006, at 1S (comparing female reaction to the same text).

124. Flowers, *supra* note 118, at 26.

125. *See* Anne Marie Owens, *Teachers Who Yell Are Good for Boys: Expert*, NAT’L POST, Mar. 8, 2003, at A1 (quoting Sax as saying that “with boys, you raise your voice and you energize them” and “I can tell you that the classroom management problems would be solved in many schools if you were loud and confrontational with some of the boys”); *see also* Cathy Grimes, *Boys, Girls Classes May Spell Success*, DAILY PRESS (Newport News, Va.), Dec. 18, 2006, at A1 (“[The principal] said females on the staff used to say [that one male teacher] was ‘loud.’ But his deeper male voice and greater volume reached his male students.”); Erika Hobbs, *Classroom Trial Gets A*, ORLANDO SENTINEL, Sept. 30, 2005, at A1 (“Boys need loud environments . . . .”); Gil Klein & Dianne Owens, *At S.C. School, Rising Tide of Achievement*, RICHMOND TIMES DISPATCH, Apr. 9, 2006, at A8 (quoting one teacher saying, “With the boys when they get restless, if you raise your voice a little bit, it draws them back in . . .”).

126. SAX, *supra* note 104, at 18 (“The gender difference in hearing also suggests different strategies for the classroom . . . . Girls won’t learn as well in a loud, noisy classroom . . . [but] the rules are different when you’re teaching boys.”); *see* Rosalind C. Barnett & Caryl Rivers, Op-Ed., *The Coed Classroom*, BOSTON GLOBE, Oct. 26, 2006, at A11 (explaining Sax’s theory); *see also* Susan Snyder, *High School Reworked as Boys-Only*, PHILA. INQUIRER, Aug. 14, 2005, at B1 (describing Sax’s views that boys need “loud, firm instruction from a teacher who moves around the room”); Nat’l Ass’n for Single Sex Pub. Educ., *Learning Style Differences*, <http://www.singlesexschools.org/research-learning.htm>. Some educators support this idea, as well. *See, e.g.*, Jeff Swicord, *Survey Finds Young Boys Failing in Schools Across the US*, VOICE OF AM. NEWS, Apr. 13, 2006, <http://www.voanews.com/english/2006-04-13-voa4.cfm> (quoting a headmaster, “[f]or a boy to really hear the tone, the volume has to be louder”).

some of the schools where boys' academic achievement has risen after the introduction of the single-sex format, the first thing you'll notice is how *loud* those classrooms are.<sup>127</sup>

The natural learning environment for boys is a cool sixty-eight or sixty-nine degrees.<sup>128</sup> They need a well-lit classroom with direct sunlight or bright lights.<sup>129</sup> In the loud, cold, bright environment, boys need teachers getting "in your face" because they learn better in confrontational settings.<sup>130</sup> In other words, by their very nature, boys need an aggressive, stressful environment.<sup>131</sup>

127. Leonard Sax, *The Promise and Peril of Single-Sex Public Education*, EDUC. WK., Mar. 2, 2005, at 48 (emphasis in original). Some male students who are in single-sex classrooms agree with Sax's assertion. See, e.g., Richard Jerome, Lori Rozsa, Vickie Bane, Kate Klise & Champ Clark, *Should Boys and Girls Be Taught Separately?*, PEOPLE, Jan. 30, 2006, at 83 (quoting one boy saying "I like it loud"). Mark Liberman, a linguistics professor at the University of Pennsylvania, has a different explanation for the hearing sensitivity data:

It's been known for half a century that girls and women have more sensitive hearing, on average, than boys and men. But those two little words 'on average' are crucial. If you pick a man and a women [sic] (or a boy and a girl) at random, the chances are about 6 in 10 that the girl's hearing will be more sensitive—but about 4 in 10 that the boy's hearing will be more sensitive. Not only that, but the expected value of the sensitivity difference is extremely small.

Posting of Mark Liberman to Language Log, *supra* note 22. He has also investigated the specific studies behind Sax's claims and found that, at best, they do not support his claims and, at worst, they directly contradict them. Posting of Mark Liberman to Language Log, <http://itre.cis.upenn.edu/~myl/languagelog/archives/003487.html> (Aug. 22, 2006, 06:18 EST) ("[T]he differences between the sexes are so small relative to the within-sex variation that no possible conclusions can be drawn about sex-related educational policy—and, as it happens, the differences in thresholds are in the opposite direction from Sax's description.").

128. Bach, *supra* note 114, at 1; see also Scott Elliot, *Expert: Boys, Girls See the World Differently*, DAYTON DAILY NEWS (Ohio), July 28, 2006, at A1.

129. Vickie D. Ashwill, *School Tries Single-Sex Classes*, IDAHO STATESMAN, Dec. 24, 2006, at 1; see also Peg Tyre, *Boy Brains, Girl Brains; Are Separate Classrooms the Best Way to Teach Kids?*, NEWSWEEK, Sept. 19, 2005, at 59 (citing one expert as saying that educators "should light classrooms more brightly for boys"); *Ypsilanti Schools to Try Classroom for Boys Only*, ANN ARBOR NEWS, Sept. 2, 2006, at A3 ("When [the boys-only classroom] opens next week, the lights in [the] classroom will shine a little brighter than those in the other rooms [of the school]."). But see Posting of Mark Liberman to Language Log, <http://itre.cis.upenn.edu/~myl/languagelog/archives/003473.html> (Aug. 19, 2006, 22:13 EST) (finding Leonard Sax's claims of sight differences between boys and girls to be overinflated and not based in science).

130. SAX, *supra* note 104, at 113 ("You have to make boys realize that they're not as brilliant as they think they are and challenge them to do better."); see also Denise-Marie Balona, *Trend Puts More Students into Same-Sex Classes*, ORLANDO SENTINEL, May 5, 2004, at A1 (citing an expert saying that boys "learn better in confrontational settings"); Chris Kenning, *Single Sex Schools*, COURIER-J. (Ky.), Oct. 16, 2005, at 1A (listing as a trait of boys that they "[r]espond to 'in-your-face,' back-and-forth exchanges from teachers").

131. SAX, *supra* note 104, at 180 ("Boys responded well to strict and authoritarian discipline, which included an occasional spanking."); see also Vianna Davila, *Expert Says Boys, Girls Learn Differently*, SAN ANTONIO EXPRESS-NEWS, Jan. 21, 2004, at 2H (referring to Leonard Sax's advice); Nat'l Ass'n for Single Sex Pub. Educ., *supra* note 126 (noting that "confrontation

The theme of aggression is particularly present in descriptions of African-American boys and their needs. As evidenced by *Garrett*, a portion of the push for single-sex education has come from advocates for better schooling for African-American boys.<sup>132</sup> These advocates push for the equitable provision of education, but the stories about the educational reforms also play into the stereotype of the aggressive African-American male. Verna Williams has described some of the rhetoric of aggression and violence used in the media portrayals of young African-American men and their need for single-sex education.<sup>133</sup> As a result, news coverage focuses on structure in schools, such as an *Ebony* article that stressed the need for discipline and strict rules for African-American male students.<sup>134</sup> The *Chicago Sun-Times* indicated that African-American boys need stress in the form of “in-your-face, Socratic style” teaching.<sup>135</sup>

### 3. Activity

The masculinity narrative also portrays boys as active, in the sense that they are always moving and fidgeting. Along with their aggression, their constant activity is one of the most recurring features of the narrative driving the need for single-sex education. As Abigail Norfleet James—an educator who has written a book about sex differences and how to teach boys—wrote, “the activity level of boys is the stuff of legend.”<sup>136</sup>

The most common discussion of this trait comes in the form of criticizing regular coeducational schooling for keeping boys sitting still rather than playing outside during recess.<sup>137</sup> Michael Gurian and Kathy Stevens wrote in *The Minds of Boys: Saving Our Sons From Falling Behind in School and Life*, an important book in the single-sex education literature,<sup>138</sup> about the value of “boy energy,” which leads to risk taking and the need for movement.<sup>139</sup> They have attempted to provide a scientific explanation:

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works well with most boys”).

132. See, e.g., Catherine Gewertz, *Black Boys' Educational Plight Spurs Single-Gender Schools*, EDUC. WK., June 20, 2007, at 1; see also Tracy Robinson-English, *Saving Black Boys: Is Single-Sex Education the Answer?*, EBONY, Dec. 2006, at 52; Editorial, *Where the Boys Aren't: Local Schools Should Consider Single-Sex Options*, DAILY PRESS (Newport News, Va.), Dec. 11, 2006 (focusing on African-American males in particular).

133. Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 21 (2004).

134. Robinson-English, *supra* note 132.

135. Kate N. Grossman, *A Bold Plan to Set Black Boys Up for Success*, CHI. SUN-TIMES, Sept. 3, 2006, at A10 (“Tim King, the school’s president and driving force, says research suggests boys learn better under conditions of stress.”).

136. JAMES, *supra* note 121, at 49; see also SOMMERS, *supra* note 123, at 94 (criticizing schools for squashing “normal youthful male exuberance”).

137. See SOMMERS, *supra* note 123, at 95 (“Girls benefit from recess—but boys absolutely need it.”).

138. See Praise for Michael Gurian’s Work, [http://www.michaelgurian.com/critical\\_acclaim.html](http://www.michaelgurian.com/critical_acclaim.html) (describing the effect the book and Michael Gurian’s work have had on individual schools).

139. MICHAEL GURIAN & KATHY STEVENS, *THE MINDS OF BOYS: SAVING OUR SONS FROM FALLING BEHIND IN SCHOOL AND LIFE* 43–45 (2005). Gurian and Stevens, of the Gurian Institute, an educational corporation that promotes teaching boys and girls differently, write, “the boy, fueled by his boy energy, tends to learn by innovating in risk-taking ways . . . . This energy



“Boys not only have less serotonin than girls have, but they also have less oxytocin, the primary human bonding chemical. This makes it more likely that they will be physically impulsive and less likely that they will neurally combat their natural impulsiveness to sit still . . . .”<sup>140</sup> Terry Neu and Rich Weinfeld, two therapists with a book on helping boys in school, made a similar argument: “There is a biological need for boys to express themselves through motion and to find an outlet for competition . . . . Neurology tells us that the nervous system’s connections to boys’ brains are exclusively designed for motor function response.”<sup>141</sup>

The popular media has picked up on this theme repeatedly. As David Brooks, the *New York Times* columnist, wrote, “young boys are compelled to sit still in schools that have sacrificed recess for test prep[aration].”<sup>142</sup> The *Boston Globe* claims that “normal behavior by boys [includes] the need to move around frequently.”<sup>143</sup> One ABC story asked the question in its headline, *Can Boys Really Not Sit Still in School?*<sup>144</sup> The story explains that boys need five to seven recesses a day, have a biological imperative to move, and like to roll their chairs around the room.<sup>145</sup>

A related claim is that boys disrupt class because they are physically uncontrollable. The *Atlantic Monthly*, in an article titled “The Other Gender Gap: Maybe Boys Just Weren’t Meant for the Classroom,” describes how the educational system, from kindergarten on, “rewards self-control, obedience, and concentration—qualities that,

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involves a lot of physical movement and manipulation of physical objects.” *Id.* at 44.

140. Michael Gurian & Kathy Stevens, *With Boys and Girls in Mind*, 62 *EDUC. LEADERSHIP* 21, 23 (2004); *see also* GURIAN & STEVENS, *supra* note 139, at 46–52 (reviewing literature on biological differences in the brain); *id.* at 150–51 (“With more spinal fluid in the part of the brain that connects learning with physical movement, boys are ‘primed to move.’”). *But see* Posting of Mark Liberman to Language Log, <http://itre.cis.upenn.edu/~myl/language-log/archives/003551.html> (Sept. 6, 2006, 05:02 EST) (calling into question Gurian’s use of brain research to conclude that boys need more activity).

141. NEU & WEINFELD, *supra* note 104, at 134–35.

142. David Brooks, *The Gender Gap at School*, *N.Y. TIMES*, June 11, 2006, at 12.

143. Editorial, *Boy Trouble*, *BOSTON GLOBE*, Oct. 2, 2006, at A10. Leonard Sax told the Las Vegas Review-Journal that boys “are just not ready to sit still and be quiet at [kindergarten] age . . . . It’s not developmentally appropriate to ask a 5-year-old boy to sit still for hours at a time.” Planas, *supra* note 116.

144. Adrienne Mand Lewin, *Can Boys Really Not Sit Still in School?*, *ABC NEWS*, Jan. 26, 2006, <http://abcnews.go.com/US/story?id=1545271>.

145. *Id.* Other authors and journalists subscribe to the same views about boys and their uncontrollable need for activity. *See* Janine DeFao, *Single-Gender Education Gains Ground as Boys Lag*, *S.F. CHRON.*, June 18, 2007, at A1 (calling boys girls’ “ants-in-the-pants counterparts”); *see also* Tracy Jan, *A New Gender Divide*, *BOSTON GLOBE*, Apr. 9, 2005, at B1 (describing boys’ “rambunctious” nature); Sax, *supra* note 127, at 48 (“In a coed class, the boys have to sit, because boys jumping up and down will unfairly distract the girls. But in an all-boys class, the other boys seem unbothered by the boys who are jumping and twirling.”); Editorial, *Separating the Girls and Boys*, *CHI. TRIB.*, Nov. 18, 2006, at 24 (describing “a class of rambunctious 10-year-old boys”); Editorial, *Single-Sex Schools Can Work*, *USA TODAY*, Mar. 29, 2006, at A12 (telling of a teacher who used “cheers” to keep “antsy” boys focused). *See generally* Dan Thomasson, *Single-Sex Education Is Good Common Sense*, *DESERET MORNING NEWS (Utah)*, Oct. 31, 2006, at A11 (“Boys spend a lot of time each day bouncing around in between assignments . . . [a] part of every boy’s day is looking out the window.”).

any teacher can tell you, are much more common among girls than boys, particularly at young ages. Boys fidget, fool around, fight, and worse.”<sup>146</sup>

To address boys’ need for movement and their otherwise disruptive behavior, the single-sex education narrative tells how boys-only classrooms should encourage movement through the structure of the classroom. As one principal wrote in comments to the Department of Education, “young boys . . . generally do well in rooms that are more kinetic, active. Males are often noisy when in groups, and classically desirable school behavior is, in general, harder for boys to maintain.”<sup>147</sup> The *Chicago Tribune*, in supporting the Department of Education’s changed regulations, claimed that “[b]oys tend to learn better when they’re freer to roam about.”<sup>148</sup> In *Education Week*, Leonard Sax describes a boys-only classroom that resembled a “can of worms” as follows: “Some of the boys were standing, some were sitting; another boy was twirling in circles. But all of them were, in their own way, paying close attention . . . .”<sup>149</sup>

146. Marshall Poe, *The Other Gender Gap: Maybe Boys Just Weren't Meant for the Classroom*, ATLANTIC MONTHLY, Jan.–Feb. 2004, at 137.

147. Single-Sex Comments, *supra* note 99, No. 4730 (comments from Patrick Kelly, principal, Brighter Choice Charter Schools).

148. Editorial, *Separating the Girls and Boys*, *supra* note 145, at 24; Beth Quimby & Kevin Wack, *Boys Learn Better by Doing: Schools That Are Trying Alternate Teaching Styles Prove They Can Keep Boys' Interest and Show Results*, PORTLAND PRESS HERALD, Mar. 29, 2006, at A1 (describing a class where boys are allowed to eat and move whenever they want); *see* Grimes, *supra* note 125 (describing a boys-only classroom in which the boys “bustled around the room as they worked on book reports” and stating that boys “wiggle and need to move more than girls do”); Kightlinger, *supra* note 123, at 3 (describing a boys-only classroom with “boxes of balls” and free movement); Frederick Kunkle, *Boy 'Tribes' on Frontier in Reading: Md. School Segregates to Boost Achievement*, WASH. POST, Jan. 8, 2005, at B01; Clive McFarlane, *Scholastic Gender Gap Grows: In Classroom, Boys May Be the Weaker Sex*, TELEGRAM & GAZETTE (Mass.), Oct. 2, 2006, at B1 (“Most of the teachers at that level are females, and the environment rewards behaviors such as sitting still, doing neat work, coloring between the lines, raising your hands. Boys don’t typically do those things. They were once the hunters and the gatherers. They like to move around, and in a large classroom you cannot have a lot of movement.”).

149. Sax, *supra* note 127, at 50; *see also* Ashwill, *supra* note 129 (“About half of the 8-year-olds lie on the floor, looking at the ceiling or picking at the bottom side of a desk. One boy constantly moves his arms. Another leans back in his chair, attempting to balance until he falls.”); Stephanie Banchemo, *Boys in One Class, Girls in the Other*, CHI. TRIB., Nov. 5, 2006, at 1 (“[O]fficials built more movement into the class day by allowing children to write on the floor or sit in beanbag chairs while reading. They also gave some boys squeeze balls to keep their hands busy and their minds focused.”). Other reports describe classes in which teachers incorporate more “manipulatives” and “out of their seat” activities to accommodate boys’ activity levels. *See* Anne Constable, *Colorado School's Changes Boost Boys' Test Scores*, SANTA FE NEW MEXICAN, Dec. 10, 2006, at A7; Anne Constable, *Initiatives Target Innovative Strategies for Reaching Boys*, SANTA FE NEW MEXICAN, Dec. 10, 2006, at A1 (describing various hands-on boys-only school programs such as auto mechanics, guitar, welding, blacksmithing, and break dancing; and quoting a student saying, “You aren’t sitting in a classroom; you’re doing something”); Gurian & Stevens, *With Boys and Girls in Mind*, *supra* note 140 (boys need “beadwork” and “other manipulatives”); Quimby & Wack, *supra* note 148 (telling of a project where boys get hands-on experience studying cobblestone streets); Leonard Sax, *Reclaiming Kindergarten: Making Kindergarten Less Harmful to Boys*, 2 PSYCHOL. MEN &

Capturing the common thread here, a math teacher told the Associated Press that he achieves success because “I don’t expect them to sit still.”<sup>150</sup>

#### 4. Sports-Obsession

If there is any trait that most people would think is gendered, it would be obsession with sports. Masculinity and sports are often seen as inseparable,<sup>151</sup> especially in the context of competitive athletics in schools.<sup>152</sup> School sports “define[] a pattern of aggressive and dominating performance as the most admired form of masculinity.”<sup>153</sup> Sports culture has been linked with gender violence<sup>154</sup> and blamed for instilling sexist and heterosexist attitudes and behaviors in males.<sup>155</sup> Success at sports is almost seen as the equivalent to success at being masculine.<sup>156</sup> In the single-sex education narrative, sports-obsession is the basis for the argument that boys will learn better than girls when a class incorporates sports examples, sporting events, and sporting breaks; therefore, boys need to be separated from girls in order to benefit from this effective learning technique.

Based on the reporting about single-sex education, the examples of sport use in single-sex classes are bounded only by teachers’ imaginations. Some schools incorporate sports into the substance of the academic lessons. A teacher in San Francisco has the boys play “multiplication baseball.”<sup>157</sup> In New York, boys learned

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MASCULINITY 3, 9 (2001) (describing German program in which students, instead of reading about acorns, go outside to learn how acorns grow, where they are found, and how they turn into saplings).

150. Associated Press, *More Grade Schools Test Single-Sex Classrooms: Federal Change Expected that Will See Trend Grow Further*, MSNBC.COM, July 6, 2006, <http://www.msnbc.msn.com/id/13229488>; see also Alice Gomstyn, *24 Volunteer for Boys-Only Classes at Ramapo Freshman Center*, J. NEWS (N.Y.), May 30, 2007, at 1A (quoting a teacher who observed another school’s boys-only classroom and praised the fact that “[t]here was movement . . . Sometimes in a classroom we forget how much [boys] need to move around and how horrible it is to sit for 42 minutes eight times a day.”).

151. Andrew Parker, *The Construction of Masculinity Within Boys’ Physical Education*, 8 GENDER & EDUC. 141, 141 (1996) (stating that “a broad theoretical critique has emerged depicting sport as a fundamental gender structured institution, representing a bastion of male domination” and listing sources).

152. See Nancy Lesko, *Preparing to Teach Coach: Tracking the Gendered Relations of Dominance On and Off the Football Field*, in MASCULINITIES AT SCHOOL, *supra* note 15, at 187; PASCOE, *supra* note 34, at 154 (describing organized sports as “a practice associated with boys, masculinity, and dominance” and listing scholars who have studied the matter).

153. R.W. CONNELL, *THE MEN AND THE BOYS* 159 (2000).

154. *Id.* at 214–16 (citing research and scholarship on gendered violence and athletics).

155. Jackson Katz, *The Sounds of Silence: Notes on the Personal Politics of Men’s Leadership in Gender-Based Violence Prevention Education*, in MASCULINITIES AT SCHOOL, *supra* note 15, at 297 (“[S]ports, especially contact sports, train boys and men to assume macho characteristics like cut-throat competitiveness, domination of others, tendency toward violence, emotional stoicism, and arrogance toward women.”) (quoting MICHAEL A. MESSNER & DONALD F. SABO, *SEX, VIOLENCE & POWER IN SPORTS: RETHINKING MASCULINITY* (1994)).

156. RENOLD, *GIRLS, BOYS AND JUNIOR SEXUALITIES*, *supra* note 40, at 67–70, 124 (finding, in her study, that the “central route through which boys define their masculinity is through sport”).

157. See DeFao, *supra* note 145.

grammar by shooting a miniature basketball through a hoop each time they answered a question from their teacher.<sup>158</sup> In Portland, sports-based education combines ancient Greek gladiatorship with modern-day workout obsession:

Across the hall at Lyseth Elementary School in Portland, Paul MacDowell's fourth-grade boys are sprawled on the floor or standing at desks. They're putting finishing touches on cardboard shields that they will later emblazon with Greek letters. Soon the boys will take a quick break to do a few leg raises and squats before carrying on with their work.<sup>159</sup>

Other articles discuss the use of sports as a complement to the long school day. The *Chicago Tribune* describes a teacher who, "[w]hen it's time to change to a new lesson, . . . lets one boy either take a shot at the basketball hoop nailed to a cabinet or putt a golf ball."<sup>160</sup> At an all-boys school near Washington, D.C., the boys get frequent breaks "to play tackle football, throw snowballs and vent all of their pent-up energy."<sup>161</sup> And in a boys-only class in a private middle school in New York, the boys are "free to bang their fists into baseball mitts during class."<sup>162</sup>

### 5. Competitiveness

Related to boys' sports obsession in the single-sex narrative is their need to be competitive rather than cooperative. According to a 2007 book on helping boys in school, the best way to teach boys is to bring more competition into the classroom and not punish boys for being naturally competitive.<sup>163</sup> Michael Gurian and Kathy Stevens have a biological explanation for this competitiveness, saying that boys have a natural "team instinct" that teachers must use in the classroom.<sup>164</sup>

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158. Gomstyn, *supra* note 150; see also Patti Ghezzi, *Are Single-Sex Schools the Answer?*, ATLANTA J.-CONST., Apr. 30, 2006, at D1 (combining math with tossing a football in class); Peggy Walsh-Sarnecki, *Boys Can Make the Grade, If They're Not Bored*, DETROIT FREE PRESS, May 21, 2007, at 1 (using sport in English class).

159. Beth Quimby, *Single Sex Learning: A Portland Elementary School Experiments with All-Boy and All-Girl Classrooms to See if It Will Make Boys More Successful*, PORTLAND PRESS HERALD (Me.), Oct. 9, 2006, at A1.

160. Banchero, *supra* note 149.

161. Swicord, *supra* note 126; see also Betty Reid, *Middle School Has Plan to Engender Education; Splitting up Boys, Girls May Allow Both Sexes to Focus on Their Lessons*, ARIZ. REPUBLIC, Oct. 1, 2005, at 1B (also using football in class).

162. Jane Gross, *Dividing the Sexes, for the Tough Years; A Coed School Offers Boys and Girls Separate Classes in Grades 6-8*, N.Y. TIMES, May 31, 2004, at B1 (describing further that the girls are "unembarrassed to squeal at a spider in their midst").

163. NEU & WEINFELD, *supra* note 104, at 13 ("Perhaps even worse, the current school environment tends to punish boys for their natural tendencies to be active and competitive.").

164. GURIAN & STEVENS, *supra* note 139, at 149-50; see also NEU & WEINFELD, *supra* note 104, at 135-36 (reviewing neurological studies about boys and competition and stating that "for thousands of years, across many cultures, boys have been competitive"); JAMES, *supra* note 121, at 131 ("If you were to use one word to describe boys in general, competitive would be it."). James continues by advocating competition in boys' schools to make boys better communicators; although, she admits having "little corroborating evidence other than anecdotes for [her] belief." *Id.* at 132.

This message has thoroughly saturated the media coverage of single-sex education reforms. For instance, *USA Today* wrote that succeeding with boys requires “making learning competitive.”<sup>165</sup> Boys’ classrooms could, according to *Newsweek*, have “timed, multiple-choice tests” to accommodate their competitive streak.<sup>166</sup> And *Esquire*, in describing boys’ problems in the classroom, lists the various ways that boys compete with one another, along with the goal of such games:

Towel Battle. Leg Wrestling. King of the Buckets. Bloody Knuckles. Human Jousting. Six-Inch Punching. Indian Wrestling. Knee Football. Hand Slapper. Rock, Paper, Scissors. Slap Boxing. Pelts. . . . The point is always to make the other guy fall or hurt, bleed or flip over, lose. Boys do this. They knock one another down. They hurt one another. Then they laugh and shake it off.<sup>167</sup>

The Department of Education also heard this explanation in the comments. For instance, one principal who claimed to have researched the topic stated that boys learn best in a competitive environment: “When boys are asked to work in collaborative groups, they are more likely to get off-task and not do their best work.”<sup>168</sup>

#### 6. Stoicism

Traditional masculinity allows little room for boys or men to be emotional. The central premise of Dan Kindlon and Michael Thompson’s popular book *Raising Cain* is that “boys, beginning at a young age, are systematically steered away from their

165. Editorial, *Single-Sex Schools Can Work*, *supra* note 145; *see also* Melanie Ave, *Education Trends, Same-Sex Classes; Boys Only/Girls Only*, ST. PETERSBURG TIMES, Feb. 2, 2005, at 1B (describing one single-sex classroom that uses Jeopardy! simulations to teach boys); Denise-Marie Balona, *Trend Puts More Students Into Same-Sex Classes*, ORLANDO SENTINEL, May 5, 2004, at A1 (quoting Leonard Sax as saying that boys need “high-stakes competitions”); Gonzalez, *supra* note 118 (quoting a female student saying that “[b]oys are so much more competitive”); Gil Klein & Dianne Owens, *At S.C. School, A Rising Tide of Achievement Separating Female and Male Sixth-Graders Has Helped Boys Close Gap*, RICHMOND TIMES DISPATCH (Va.), Apr. 9, 2006, at A8 (quoting a math teacher as saying that “the guys . . . love the competition”); Chris Moran, *Benefits, Drawbacks Gender-Separate Classes: Half of Local School’s Students Participate*, SAN DIEGO UNION-TRIB., Dec. 20, 2004, at A1 (boys “thrive” on competition); Anna Scott, *Classes Could Be Single Sex: Some Parents Object to Murdock Middle Proposal, but It Might Raise Test Scores for Boys and Girls.*, SARASOTA HERALD-TRIB. (Fla.), Nov. 30, 2006, at A1 (“Also, a boys class might be more competitive . . .”).

166. Tyre, *Boy Brains*, *supra* note 129, at 59; *see also* Ashwill, *supra* note 129 (describing a classroom with sentence-writing competitions); Gross, *supra* note 162 (“The girls are in a tizzy because there is a test the next day on trinomials and quadratic equations. The boys don’t even mention it. . . . The boys race to the front of the room, grab a marker and push one another aside to be the first with a solution.”); Amy Hetzner, *Single-Gender Education a Hit at Arrowhead High: Boys- or Girls-Only Classes Offered Again*, MILWAUKEE J. SENTINEL, Sept. 4, 2006, at B3 (“For Gierach’s daily grammar assignment, for example, he will institute a competitive activity for the boys . . .”). *But see* Stephen Camarata & Richard Woodcock, *Sex Differences in Processing Speed: Developmental Effects in Males and Females*, 34 INTELLIGENCE 231 (2006) (finding boys do worse in timed tests than girls).

167. Tom Chiarella, *The Problem with Boys*, ESQUIRE, July 1, 2006, at 94.

168. Single-Sex Education Comments, Dep’t of Educ. (2002) (on file with Department of Education) (comment of Laurie Acker, principal, St. Therese School).

emotional lives toward silence, solitude, and distrust.”<sup>169</sup> In their book about teaching boys, Neu and Weinfeld describe the same: “As a whole, our society teaches boys to suppress their feelings. As a result, boys don’t have experience with and often don’t feel comfortable exploring their emotions . . . .”<sup>170</sup>

The single-sex narrative includes this idea that boys are not in touch with their emotions and that schools should teach them accordingly. In an editorial explaining the need for single-sex schooling, *USA Today* tells the following story about two boys, one in a mixed-sex school and the other in a single-sex school: “Emanuel’s teacher asks the class to do things that aren’t boy-friendly. His latest assignment: Build a ‘feelings chart’ for *Little Red Riding Hood* showing who’s happy or sad throughout the book. Anthony spends twice as much time on literacy skills, none of it describing ‘feelings.’”<sup>171</sup>

This area in particular is one in which supporters of single-sex education rely on brain science to support their claims that boys process emotion less efficiently than girls.<sup>172</sup> For instance, Leonard Sax writes that neuroscience shows that “[a]sking a seventeen-year-old boy to talk about why he’s feeling glum may be about as productive as asking a six-year-old boy the same question.”<sup>173</sup> The public narrative rarely questions the validity of the conclusions drawn from the scientific research,<sup>174</sup> instead stating that experts believe the “worst thing a teacher can do . . . is ask a male student how he feels about a subject.”<sup>175</sup>

169. DAN KINDLON & MICHAEL THOMPSON, *RAISING CAIN: PROTECTING THE EMOTIONAL LIFE OF BOYS*, at xv (1999); Levit, *Male Prisoners: Privacy, Suffering, and the Legal Construction of Masculinity*, *supra* note 21, at 97 (“From infancy, men learn to endure suffering silently and in private. Emotional stoicism is ingrained in many and varied ways.”).

170. NEU & WEINFELD, *supra* note 104, at 11–12; *see also* SOMMERS, *supra* note 123, at 151–52 (concluding that “male stoicism and reserve may well be traits to be encouraged”).

171. Editorial, *Single-Sex Schools Can Work*, *supra* note 145; *see also* Michelle Conlin, *The New Gender Gap*, *BUS. WK.*, May 26, 2003, at 74 (stating that boys would be better off “writ[ing] about aliens attacking a hospital rather than about how to care for people in the hospital”).

172. *See* Swicord, *supra* note 126; Nat’l Ass’n for Single Sex Pub. Educ., *supra* note 126; Nat’l Ass’n for Single Sex Pub. Educ., *Brain Differences*, <http://www.singlesexschools.org/research-brain.htm>.

173. SAX, *supra* note 104, at 29; *see also* JAMES, *supra* note 121, at 114.

174. Mark Liberman tracked down the scientific sources Sax used to support his claim about boys’ difficulty expressing their feelings and found that “the disproportion between the reported facts [in those articles] and Sax’s interpretation [of them] is spectacular.” Posting of Mark Liberman to Language Log, <http://158.130.17.5/~myl/language-log/archives/003284.html> (June 24, 2006, 06:19 EST). Liberman states that “in presenting this narrative of males as emotional children, Sax is not telling us about the established conclusions of scientific research . . . .” *Id.*; *see also* ROSALIND BARNETT & CARYL RIVERS, *SAME DIFFERENCE: HOW GENDER MYTHS ARE HURTING OUR RELATIONSHIPS, OUR CHILDREN, AND OUR JOBS* 189–90 (2004) (describing emotional development research showing that boys are capable of having complex emotions).

175. Vianna Davila, *Expert Says Boys, Girls Learn Differently*, *SAN ANTONIO EXPRESS-NEWS*, Jan. 21, 2004, at 02H (“Studies also show that the brain’s cerebral cortex controls a teenage female’s ability to think and feel. In males, these two abilities are located in completely different parts of the brain, perhaps explaining why boys are less inclined to talk about emotions.”).

## 7. Not Girls

In many ways, what is being described here is masculinity that is defined by that which is not female or feminine. Stated differently, this dominant masculinity requires the othering and subordination of femininity.<sup>176</sup> Sociologists have long understood that dominant masculinity is defined by that which is not female.<sup>177</sup> As Kenneth Karst has written, “[i]n the hierarchical and rigorously competitive society of other boys, one categorical imperative outranks all others: don’t be a girl.”<sup>178</sup> Boys often associate femininity with negative traits such as weakness, incompetency, inferiority, and disease.<sup>179</sup> Teachers sometimes reinforce this fear of the feminine when disciplining boys by saying they are “acting like a girl.”<sup>180</sup> Being separate from femininity is such an essential part of dominant masculinity that empirical studies have shown that even boys who do not follow dominant masculinity strive to retain some form of masculinity by denouncing girls and femininity, sometimes in even harsher ways than those who do adhere to the dominant forms.<sup>181</sup>

This part of the masculinity narrative is reminiscent of the feminist critique of “separate spheres.” According to that critique, society forced men and women to occupy “separate spheres” in life, spheres that do not overlap. Thus, men occupied the public, civil sphere, while women occupied the private, family sphere. In the discussion of single-sex education, the narrative indicates that the belief that boys and girls occupy completely separate worlds continues. William Pollack, in his book *Real Boys*, advocates for teachers to develop “boy-specific classroom materials.”<sup>182</sup> Leonard Sax states in his book, “many administrators and teachers don’t fully appreciate that girls and boys enter the classroom with different needs, different abilities, and different goals.”<sup>183</sup> Putting this belief into practice, one teacher of single-sex classrooms said, “[I]t is sometimes more effective posing problems for girls using shopping examples and for boys using sports.”<sup>184</sup>

176. Jordan, *supra* note 16, at 75 (describing this definition of masculinity as marking females as the “subordinate term” or, in other words, “that being male is primarily doing things that cannot and should not be done by women”); Connell & Messerschmidt, *supra* note 33, at 844 (“To sustain a given pattern of [dominant masculinity] requires the policing of men as well as the exclusion or discrediting of women.”).

177. See Jordan, *supra* note 16; Renold, *supra* note 34, at 249 (noting that boys define gender as against girls); Connolly, *supra* note 22, at 145 (stating that classical masculinity and femininity have been defined as oppositional terms).

178. Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 503 (1991); SUE ASKEW & CAROL ROSS, *BOYS DON’T CRY: BOYS AND SEXISM IN EDUCATION* 107 (Rosemary Deem & Gaby Weiner eds., 1988) (“Thus in schools, and particularly in boys’ schools, boys are at great pains to dissociate themselves from any traits regarded as female.”); see also Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 785 (2000) (“One of the great contributions of feminism has been to make plain that men achieve masculinity at the expense of women . . .”).

179. RENOLD, *supra* note 40, at 84.

180. CONNELL, *supra* note 153, at 158.

181. Renold, *supra* note 34, at 260; RENOLD, *supra* note 40, at 159.

182. POLLACK, *supra* note 105, at 232.

183. SAX, *supra* note 104, at 9.

184. Carla Rivera, *Single-sex Classes on a Forward Course: More Schools in L.A. and*

An excellent example of this separate spheres ideology is in the reading lists that the commentators advocate giving to boys as opposed to girls.<sup>185</sup> Boys are said to need action-oriented story lines;<sup>186</sup> “stories about superheroes, sports, wild animals, bugs, war and monsters, as well as gross or slapstick humor that appeals to boys”;<sup>187</sup> books about fantasy and hunting (and that are, of course, not “too ‘girly’”);<sup>188</sup> books about history and adventure;<sup>189</sup> stories about music, heavy equipment, cars, and trucks;<sup>190</sup> and books with graphics and visuals that contain “spatial-kinesthetic action” or are

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*Across the Nation Separate Boys and Girls. New Federal Guidelines Extend the Leeway*, L.A. TIMES, Nov. 20, 2006, at A1. In another Los Angeles school, the boys learned about heroes grabbing a wolf by its neck and fighting a bull while the girls made solar ovens in science class. *Id.*

185. “Materials—even the books assigned—can be chosen to appeal to their interests.” Editorial, *Where the Boys Aren’t: Local Schools Should Consider Single-Sex Options*, *supra* note 132; cf. Brooks, *supra* note 142, at 412 (“There are three gender-segregated sections in any airport: the restrooms, the security pat-down area and the bookstore. In the men’s sections of the bookstore, there are books describing masterly men conquering evil. In the women’s sections there are novels about well, I guess feelings and stuff.”).

186. Gewertz, *supra* note 132; Chris Kenning, *Single Sex Schools: Jefferson County Officials Think Teaching Boys and Girls Separately at a Pair of Middle Schools Would Reduce Distractions and Boost Achievement*, COURIER-J. (Ky.), Oct. 16, 2005, at 1A (describing research indicating that boys favor action stories); see also Banchemo, *supra* note 149 (stories with plot and action); Rick Montgomery, *Hard-Wired to Learn? New Findings on Gender Differences Lead to Classroom Changes for Boys*, KAN. CITY STAR, Dec. 5, 2005, at A1 (action and adventure stories).

187. Constable, *Colorado School’s Changes Boost Boys’ Test Scores*, *supra* note 149; see also JAMES, *supra* note 121, at 253–54 (listing categories for boys as “scary, gross, adventuresome, fantastic, real, or violent” and about “true crime, sports, animals, space, vehicles, computers, true facts, or other boys”); Nardy Baeza Bickel, *Kenowa Hills Program Separates Boys and Girls*, GRAND RAPIDS PRESS, June 6, 2006, at B4 (sports stories); DeFao, *supra* note 145 (books with “gross humor”); Katharine Goodloe, *Schools Nationwide Trying All-Boy Classes*, CHATTANOOGA TIMES FREE PRESS, June 23, 2006, at E1 (war and pirates); Jennifer Bingham Hull, *The Lost Boys*, PARENTING, Oct. 2003, at 144 (more adventure and sports stories); Beth Quimby, *Boys Need a Good Reason to Turn the Page: A School Librarian Finds a Simple Way to Get Boys to Read; Let Them Choose What Interests Them*, PORTLAND PRESS HERALD, Mar. 29, 2006, at A4 (stating that boys like “books with a strong plot, violence, off-color humor or filled with facts”); Richard Whitmire, *Boy Trouble*, NEW REPUBLIC, Jan. 23, 2006, at 15 (comic books and graphic novels); Nat’l Ass’n for Single Sex Pub. Educ., *supra* note 126 (stating that boys prefer tales of battles, adventures, spaceships, bombs, volcanoes, and things that are gross, slimy, dangerous, and poisonous).

188. Julia Sellers, *To Each, His or Her Own: More Schools Try Keeping Boys, Girls in Separate Classes*, AUGUSTA CHRON. (Ga.), Aug. 11, 2006, at B01.

189. Rebecca Mahoney, *Boys, Girls Divide, Conquer Lessons*, ORLANDO SENTINEL, June 20, 2006, at B1 (describing a book about a boy surviving in the wilderness for 54 days); see also Fran Hawk, *Put Strategies to Good Use for Boys*, POST & COURIER (S.C.), Apr. 20, 2006, at D2 (“Boys prefer nonfiction and nontraditional reading materials.”); Sheena McFarland, *Making Learning a Guy Thing: Researchers Seek Ways to Better Engage Boys in the Classroom; Boys Learn Differently in the Classroom*, SALT LAKE TRIB., Jan. 17, 2006, at A1 (real life stories, as opposed to fairy tales and fiction).

190. Mike Bowler, *School to Test All-Boy Classes Experiment: Teachers and Parents at Twin Ridge Elementary Hope that Allowing for Gender Differences Will Improve Learning*, BALTIMORE SUN, May 24, 2004, at 1A.



“technical and mechanical in content.”<sup>191</sup> Commentators also have included suggestions for a boy-specific reading list: *Johnny Tremain* (as opposed to *Gone With the Wind*),<sup>192</sup> *Stealing Home: The Story of Jackie Robinson* and *Dragons of Delta* (instead of *Great Gilly Hopkins* and *Chocolate Touch*),<sup>193</sup> *Macbeth* (because boys “love the gore”),<sup>194</sup> and *All Quiet on the Western Front* (as opposed to a book with a “feminist viewpoint”).<sup>195</sup>

Another common argument in the narrative is the claim that boys need to learn from men, not women, because they cannot relate to women within the “feminized” learning environment.<sup>196</sup> One comment to the Department of Education blamed boys’

191. GURIAN & STEVENS, *supra* note 139, at 138–39.

192. See Jan, *supra* note 145.

193. Editorial, *Single-Sex Classes Go Public*, USA TODAY, Aug. 16, 2006.

194. DeFao, *supra* note 145.

195. Amy Hetzner, *Splitting the Difference: In the First Year of a Pilot Program on Single-Sex Classes, Teachers Are Figuring Out How Boys and Girls Learn*, MILWAUKEE J. SENTINEL, April 9, 2007, at 1; see also Brooks, *supra* note 142, at 412 (Hemingway, Tolstoy, Homer, and Twain); Chiarella, *supra* note 167 (*Slaughterhouse-Five* instead of *Jane Eyre*); Conlin, *supra* note 171 (*Harry Potter* instead of *Little House on the Prairie*); Karen Gutierrez, *Erlanger High School Mulls All-Boy and All-Girl Classes*, CINCINNATI ENQUIRER, Mar. 20, 2005, at 1B (*Of Mice and Men*); Kunkle, *supra* note 148 (*Thresher Sharks* and the *Battle of the Bull Run*); cf. Richard Jerome et al., *Should Boys and Girls Be Taught Separately? Some Experts Say Girls Like an Orderly Classroom, While Boys Learn on the Run. The Debate Over Single-Gender Classes in Public Schools Is Heating Up*, PEOPLE, Jan. 30, 2006, at 83 (a shoot-em-up demonstration of the Alamo rather than a feelings-oriented discussion of the Holocaust); Courtney Lingle, *Girls Over Here, Boys There*, FORT COLLINS COLORADAN, Sept. 4, 2005, at 1B (*Star Wars* and *Lord of the Rings*).

196. Editorial, *Where the Boys Aren't: Local Schools Should Consider Single-Sex Options*, *supra* note 132 (need for “strong male teachers”); see also Editorial, *Boy Trouble*, BOSTON GLOBE, Oct. 2, 2006, at A10 (need to recruit more male teachers); Peg Tyre et al., *The Trouble With Boys: They're Kinetic, Maddening and Failing at School. Now Educators are Trying New Ways to Help Them Succeed*, NEWSWEEK, Jan. 30, 2006, at 44 (claiming that boys do not have leaders anymore because girls and women have taken over those positions in school); Tyre, *supra* note 129, at 59 (referring to an expert who claims that schools are girl-friendly because the teachers, who are primarily women, teach the way they learned, which is not how boys learn); Jason Wermers, *Boys Put on Road to Being Men: All-Male Class at School in Richmond Has Proven Popular and Resilient*, RICHMOND TIMES DISPATCH (Va.), June 14, 2004, at B1 (“‘In elementary school, a majority of the adults are female,’ said Greg Stallings, who teaches an all-boys class at Patrick Henry Elementary in South Richmond. ‘It has a girl flavor, but not necessarily a boy flavor.’”). Studies on this issue come to different conclusions. For instance, a Swarthmore professor studied data of over 21,000 eighth grade students and found that “learning from a teacher of the opposite gender has a detrimental effect on students’ academic progress and their engagement in school.” Thomas S. Dee, *The Why Chromosome: How a Teacher’s Gender Affects Boys and Girls*, EDUC. NEXT, Fall 2006, at 68, available at <http://www.hoover.org/publications/ednext/3853842.html>. However, a recent Canadian study found the opposite—that boys performed equally well for male and female teachers. Laura Sokal et al., *Good-Bye, Mr. Chips: Male Teacher Shortages and Boys’ Reading Achievement*, 56 SEX ROLES 651 (2007). An English study also found that male teachers risk teaching their male students traditional images of masculinity. Christine Skelton, *Male Primary Teachers and Perceptions of Masculinity*, 55 EDUC. REV. 195 (2003).

educational failure on their being taught by women.<sup>197</sup> One student candidly stated, “If we have a boy teacher, we can learn better. He is someone we can depend on.”<sup>198</sup>

Some stories about the need for single-sex education make this othering of girls more explicit than simple dual reading lists. One girl highlighted by the *Washington Post* clearly felt the sting of being excluded, stating that “I think if you ask the boys why they like the class, they’ll say it’s because there’s no girls in it. It’s kind of a slap in the face.”<sup>199</sup>

Commentators and articles have frequently put boys’ problems at the foot of a “feminized” academic environment.<sup>200</sup> An editorial in the *Salt Lake City Deseret News* described a “female world of academia” that boys get lost in.<sup>201</sup> *The War Against Boys* by Christina Hoff Sommers blames the feminization of school, among other institutions, for oppressing or even ignoring boys.<sup>202</sup> Gurian and Stevens claim that the American classroom—with its emphasis on reading, writing, and complex word making—is better suited for the female brain and “is set up for problems with a number of boys and young men.”<sup>203</sup>

### C. The Essentialist Myth of Masculinity’s Effect in School

As Title IX’s regulations changed to allow more opportunities for sex-segregated education, an essentialist myth of masculinity emerged. This myth equates boys with a form of masculinity that is heterosexual, aggressive, active, sports-obsessed, competitive, and stoic. At its root, masculinity and boys are completely different from femininity and girls. This essentialist myth of masculinity that supports expanded sex segregation in education corresponds with a dominant hegemonic notion of masculinity that is theoretically problematic and empirically harmful to boys and girls alike.

Schools can influence gender construction in many different ways. Educational gender theorists have identified different institutional components that make up a school’s “gender regime”: power relations, such as those between teachers and

197. Single-Sex Comments, *supra* note 99, No. 80 (comments from Alan Katz).

198. Quimby, *supra* note 159; *see also* Gurian & Stevens, *With Boys and Girls in Mind*, *supra* note 140, at 25 (stating boys need “male mentors and role models” in school).

199. Kunkle, *supra* note 148; *see also* Goodloe, *supra* note 187 (quoting a sixth-grade boy on why he did not like being in class with girls: “Girls talk a lot, they can get in the way on group projects, and he gets nervous helping out girls.”); Sellers, *supra* note 188 (quoting a boy who likes single-sex classes because girls are not staring at him); Snyder, *supra* note 126 (boy in all-boys school stating that “without girls probably it will help us learn better”).

200. *See, e.g.*, Editorial, *Where the Boys Aren’t: Local Schools Should Consider Single-Sex Options*, *supra* note 132 (“There’s the feminization of the environment inside the schools . . . .”). Verna Williams stresses this point about the single-sex narrative for African American males in particular: “The rhetoric suggests that sex segregation addresses [Black male] problems because it compensates for the primary deficiency of many Black males: the fact that they are being raised in female-headed households. According to this argument, because Black males are surrounded by women, they lack appropriate role models . . . .” Williams, *supra* note 133, at 21.

201. Thomasson, *supra* note 145.

202. SOMMERS, *supra* note 123, at 84–86, 158–70.

203. GURIAN & STEVENS, *supra* note 139, at 52.

students; the division of labor, or how boys and girls (or men and women) do different things within a school; patterns of emotion associated with different positions within the school, such as the tough principal, the feeling drama teacher, or the heterosexual homecoming king and queen; and symbolization through dress codes, language codes, and curricular areas.<sup>204</sup> As may be evident from these components, gender construction influences in the school can come from students, teachers, and administrators.<sup>205</sup> Outside influences, such as popular, media-based conceptions of boys' and girls' proper behavior, can influence these actors' conceptions of gender.<sup>206</sup> Thus, schools function in two different roles in the construction of masculinity: first, through the actors within the school, they exert a very powerful pressure on boys to conform; and second, they serve as an important site for popular discourse about gender to be played out.

These components of a school's gender regime are reflected in the different aspects of the essentialist myth of masculinity surrounding single-sex education. A school that acts according to the myth and expects boys to be aggressive toward each other and toward girls is constructing that school's power relations. A school that associates boys with sports and action-based reading preferences is setting up its division of labor. A school that either separates sexes because of heteronormativity or that focuses on activity and competition for boys as the best way for them to learn because of their innate biological differences is establishing a pattern of emotion within that institution. A school that expects boys to have difficulty expressing emotions and feelings also contributes to the school's pattern of emotion. And all of these components that schools might adopt as part of single-sex education, from sports-obsession to heteronormativity to "othering" females and femininity, contribute to a school's symbols. Combined throughout these components of a school's gender regime, a school adopting this masculinity narrative tells students that masculinity should be a certain way.<sup>207</sup> Even more powerfully, it tells boys that they must conform to this narrative in order to truly be a boy.<sup>208</sup>

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204. For a fuller account of these components of a school's "gender regime," see Connell, *supra* note 17, at 213–14; see also Marcus Weaver-Hightower, *The "Boy Turn" in Research on Gender and Education*, 73 REV. EDUC. RES. 471, 481 (2003) (noting ways institutions such as a school can produce masculinity).

205. See, e.g., JEANNE DRYSDALE WEILER, CODES AND CONTRADICTIONS: RACE, GENDER IDENTITY, AND SCHOOLING 170–77 (2000) (discussing the influence of a teacher's pedagogical style on gender construction); Patricia A. Adler et al., *Socialization to Gender Roles: Popularity Among Elementary School Boys and Girls*, 65 SOC. EDUC. 169, 169–70 (1992) (describing peer cultures where children "create their own norms, values, and styles within the school setting"); Angela Jacklin & Colin Lacey, *Gender Integration in the Infant Classroom: A Case Study*, 23 BRIT. EDUC. RES. J. 623, 629–36 (1997) (presenting a study of four different teachers' styles and their effect on gender in the classroom); see generally Ann C. Crouter et al., *Development of Gender Attitude Traditionality Across Middle Childhood and Adolescence*, 78 CHILD DEV. 911, 921 (2007) (noting the influence of the "confluence of the youth's personal characteristics and their family circumstances").

206. "Mass culture generates images and interpretations of masculinity that flow chaotically into school life and are reworked by the pupils through everyday conversation, ethnic tensions on the playground, sexual adventures, and so on." Connell, *supra* note 17, at 219.

207. It is important to understand that the narrative I have explored and described comes from a combination of various sources and not from any particular school. Thus, it is possible

Constructing this hegemonic masculinity, particularly one associated with dominant traditional masculinity,<sup>209</sup> harms several different groups of students in different ways. First, it harms those boys who do not perfectly fit within its constraints. Second, it harms girls and women. Third, it constrains all boys, whether or not they adopt the hegemonic masculinity. Each of these harms will be described in turn below.

Harm to boys who fail to fit within the constraints of hegemonic masculinity has been heavily theorized, studied, and catalogued by researchers. Put simply, those boys who do not exhibit hegemonically masculine traits “are subject to varying degrees of oppression from the hegemonic group.”<sup>210</sup> Even worse, those who actually adopt non-hegemonic or alternative masculinities “can incur high social and emotional costs” and are “subordinated and pathologized.”<sup>211</sup> Beyond the loss of self-esteem, this subordination and oppression can take the form of “verbal and physical teasing, bullying, and harassment of lower-status students [such as] not-sufficiently masculine boys.”<sup>212</sup> In fact, gender theorists have explained that hegemonic masculinity often relies on such a dichotomy and tension because hegemony requires domination over non-hegemonic forms of masculinity.<sup>213</sup>

The difficulties faced by boys who break the norm of heterosexuality and those who are physically disabled are particularly illustrative of the harms facing boys who do not exhibit traditional hegemonic masculinity. Many researchers have described the peculiar harm experienced by those who break the norm of heterosexuality, one of the

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that no one school that adopts single-sex education will implement or focus on each of the characteristics of the narrative of masculinity I have identified. However, the narrative as a whole can contribute to the individual school’s choices, and any school’s commitment to any part of the narrative raises the specter of that particular component or those components contributing to a hegemonic masculinity at the school.

208. As a result, the fact that the Title IX regulations require that single-sex schooling be entirely voluntary is irrelevant. When a school or school district creates an environment in which the message is that real boys are a certain way, even those boys not in the single-sex classes or school will get the message. *See Levit, supra* note 99, at 498–500.

209. The unique problems associated with traditional masculinity, such as stereotypical gender roles for women, might not be present with a different hegemonic masculinity. However, similar problems of forcing one view of masculinity onto a diverse group of boys and girls would still be raised under such circumstances. For example, if a school were to have as its hegemonic form of masculinity one that was gay, passive, and noncompetitive, it would still present the problem of forcing one form of masculinity onto its students who did not fit within it. Thus, many of the issues raised here would still be present.

210. Weaver-Hightower, *supra* note 204, at 480; *see also* RENOLD, *supra* note 40, at 86 (“Many studies have illustrated how boys who dare to deviate, stray, or repeatedly struggle to live up to the hegemonic masculine ideal . . . can incur high social and emotional costs . . .”); Mandel & Shakeshaft, *supra* note 106, at 100 (citing study drawing “attention to the construction of masculinity as a dominating and potentially sexist practice that results in the subordination of other boys”); Williams, *supra* note 133, at 76 (“[T]his vision of maleness excludes and alienates students who do not conform to the traditional gender stereotype, which typically leads to physical and psychological violence intended to force the boys to become *men*, for example.”) (footnotes omitted) (emphasis in original).

211. Renold, *supra* note 34, at 249.

212. Nancy Lesko, *Introduction to MASCULINITIES AT SCHOOL, supra* note 15, at xiv.

213. *See* RENOLD, *supra* note 40, at 86–87; *see generally* CONNELL, *supra* note 153, at 13, 31–32, 83–84, 102 (providing specific examples of the dichotomy between hegemonic and non-hegemonic versions of masculinity).

previously discussed components of the essentialist myth from single-sex education. “Studies consistently report that gay and lesbian youth who depart from traditional norms of masculinity and femininity are often targets of violence and harassment in school because they do not conform to cultural ideals of what is considered ‘appropriately’ male or female.”<sup>214</sup> Boys who do not exhibit stereotypically heterosexual traits—those who position themselves outside scripts of hegemonic masculinity—routinely report being teased, excluded, humiliated, or bullied.<sup>215</sup> Heteronormativity requires the stigmatization and oppression of homosexuality because homosexuality is perceived as threatening to young people’s emerging sexuality.<sup>216</sup> This stigma certainly exists in coeducational schools as well as single-sex schools. However, a school that switches to single-sex education by emphasizing heteronormativity can exacerbate the problem. This is true whether heteronormativity is emphasized directly or indirectly by acting in accord with the hegemonic masculinity narrative.

Along other lines, physically disabled boys are in a particularly difficult situation with respect to the narrative of masculinity described above. The essentialist myth’s association of masculinity with sports, activity, and aggression presupposes a certain type of able body. As a result, disabled boys who cannot participate in these activities are stigmatized and seen as not masculine.<sup>217</sup>

Second, in addition to harming boys who fail to display the hegemonic traits of heterosexuality and physical ability, this form of dominant hegemonic masculinity also harms girls and women. The hegemonic masculinity described here is consistent with traditional masculinity that relies on societal domination of women by men.<sup>218</sup> In the

214. Mandel & Shakeshaft, *supra* note 106, at 77–78 (citing, among others, GOVERNOR’S COMM’N ON GAY AND LESBIAN YOUTH, MAKING SCHOOLS SAFE FOR GAY AND LESBIAN YOUTH: BREAKING THE SILENCE IN SCHOOLS AND IN FAMILIES (1993); HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN (Gregory M. Herek & Kevin T. Berrill eds., 1992); E.S. Hetrick & A.D. Martin, *The Stigmatization of the Gay and Lesbian Adolescent*, 15 J. HOMOSEXUALITY 163 (1987); J. Hunter & R. Schaecher, *Stresses on Lesbian and Gay Adolescents in Schools*, 9 Soc. Work Educ. 180 (1987)).

215. RENOLD, *supra* note 40, at 149–50 (“Indeed, all of the children in this chapter [about boys and girls who resisted the hegemonic gender and sexuality roles] were subjected to a range of heterosexist practices (e.g. gender-based and sexualised bullying) . . . .”); *see also* Epstein, *supra* note 107, at 113 (concluding from her study that “super-heterosexual” masculinities make schools painful places for “boys who do not conform”); Weaver-Hightower, *supra* note 204, at 484 (noting the “severe oppression” suffered by students exhibiting nonheterosexuality or multiple gendering). One study of masculinity and sexuality in high school detailed the story of an effeminate gay boy who was accustomed to harassment and violence from other students and eventually dropped out as a result. PASCOE, *supra* note 34, at 67–71.

216. GILBERT & GILBERT, *supra* note 16, at 161–62 (“Homophobia seems a constant feature of dominant masculinity’s attempts to distance itself from the threat that homosexuality poses.”); Emma Renold, *‘Coming Out’: Gender, (Hetero)Sexuality and the Primary School*, 12 GENDER & EDUC. 309, 322–23 (2000) (explaining that teasing those who challenge heterosexuality confirms the teasers’ own heterosexuality by distancing themselves from the deviators).

217. GILBERT & GILBERT, *supra* note 16, at 145 (“[D]isabled boys are often stigmatised as weak, pitiful, passive and dependent.”).

218. *See id.* at 31 (“Masculinity rites in traditional male-dominated societies imposed

context of social inequality between males and females, schools can reinforce those roles when they fail to challenge sexist ideology and culturally stereotypical roles for boys that can affect girls.<sup>219</sup> As Mark Fajer summarized: “To be blunt, we can hardly expect that boys who learn that their peers who cry or play with dolls are sissies and faggots will grow into men interested in displaying sensitivity or in taking on child-care responsibilities.”<sup>220</sup> Moreover, the hegemonic masculinity described here can lead to emotional and physical harassment of and violence against girls, similar to that described above for boys exhibiting non-hegemonic masculinity.<sup>221</sup> The notion of femininity as the opposite of desirable hegemonic masculinity, one of the important traits of the single-sex narrative,<sup>222</sup> leads to a conception that to be a boy means to dominate and control female bodies.<sup>223</sup>

Third, as would be the case with the construction of any hegemonic masculinity, the masculinity narrative’s assumption that all boys are the same and that their masculinity is static constrains all boys—those who adopt the hegemonic masculinity,<sup>224</sup> those who actively and knowingly struggle against it, and everyone in between. When a particular notion of masculinity is presented as the model or assumed as universal, that notion “fosters limited expressions of identity” for all boys.<sup>225</sup> This constricted notion of gendered behavior is particularly problematic for boys because, unlike girls, they have

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conformity and control, and involved misogynist myths [and] the exclusion of women . . .”); Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL RTS. J. 89, 129 (1997) (stating that traditional gendered behavioral requirements, particularly heterosexuality, “imply that men ought to have power over women”); UNIFEM GENDER FACT SHEET NO. 5: MASCULINITY AND GENDER-BASED VIOLENCE 3–5 (2001), available at <http://www.unifem-eseasia.org/resources/factsheets/UNIFEMSheet5.pdf> (linking traditional notions of masculinity to violence against women).

219. Anne-Mette Kruse, “. . . *We Have Learnt Not Just to Sit Back, Twiddle Our Thumbs and Let Them Take Over.*” *Single-Sex Settings and the Development of a Pedagogy for Girls and a Pedagogy for Boys in Danish Schools*, 4 GENDER & EDUC. 81, 90 (1992) (“Boys are not personally responsible for [boys’ sexist behavior in schools], but they will be the unconscious propagators of a sexist ideology, if they are not confronted with this and supported and challenged in their attempt to find ways to change their culturally given roles. Research in education shows that schools generally are important agents in the reinforcement of social inequality.”).

220. Mark A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 633 (1992); see also Levit, *Feminism for Men*, *supra* note 21, at 1113 (noting that “stereotyping harms to one [sex] also rigidify role expectations of the other [sex]”).

221. See *supra* notes 210–16 and accompanying text.

222. See *supra* notes 176–203 and accompanying text.

223. See PASCOE, *supra* note 34, at 114 (stating that this dominance can occur through “symbolic or physical violence”).

224. Although it is certainly true that “those who adopt the masculinities that achieve hegemony are much better off, in terms of distribution of social goods and social status, than those who do not.” Weaver-Hightower, *supra* note 204, at 480.

225. Mandel & Shakeshaft, *supra* note 106, at 98; see also GILBERT & GILBERT, *supra* note 16, at 29 (“[G]iven the wide range of men’s interests, and of women’s, the argument that to be masculine means being involved in particular kinds of activities can only narrow rather than expand men’s opportunities to be human.”); Riggs, *supra* note 41, at 311 (noting that the dominant “black macho” masculinity prescribes an “inflexible ideal” that does not allow for “self-interrogation” or “multiple subjectivities”).

not seen an expansion in the acceptable forms of behavior associated with being a boy.<sup>226</sup> In fact, because it is virtually impossible for any one boy to always live consistently with any narrative of hegemonic masculinity,<sup>227</sup> most boys will struggle with living up to the ideal and may be teased, bullied, or worse for not doing so.<sup>228</sup> Moreover, schools that adopt or are aligned with a masculinity that is stoic and aggressive can harm boys who take that message with them into adulthood.<sup>229</sup>

When this story of “true” masculinity for boys is told in the context of a predominantly African-American school, the effects are more complex and more damaging. The dominant form of masculinity described here conforms in many ways with the historical construction of African-American masculinity outlined by Verna Williams in her review of the interrelatedness of sex and race segregation.<sup>230</sup> In line with the story of male aggression told above, African-American males have been viewed as oversexed, dangerous, and threatening.<sup>231</sup> Proclaiming that they need to be

226. See BARRIE THORNE, *GENDER PLAY: GIRLS AND BOYS IN SCHOOL* 111 (1993) (noting how boys have very little leeway in the construction of their gender identities, whereas girls have more); Epstein, *supra* note 107, at 109–10 (“[F]or a girl to be more like a boy can be interpreted positively, while for a boy to be more like a girl is, almost invariably, seen as problematic . . . .”); Mandel & Shakeshaft, *supra* note 106, at 87, 98 (comparing girls’ expanded gender options to boys’). Even one of the foremost contributors to the narrative described in this Article, Leonard Sax, recognizes this fact. See SAX, *supra* note 104, at 233 (“Boys with many feminine characteristics tend to be less popular and at higher risk for social maladjustment, especially in middle school and high school. By contrast, the anomalous girl appears *more* likely to be more popular and well adjusted than her peers.”). This difference is codified in the different treatment of gender identity disorder between boys and girls in the field of psychology. Boys are diagnosed with the disorder for merely engaging in traditionally feminine activities; girls must believe they are anatomically male to receive the diagnosis. See Sandi Farrell, *Reconsidering the Gender-Equality Perspective for Understanding LGBT Rights*, 13 L. & SEXUALITY 605, 621 n.43 (2004).

227. See RENOLD, *supra* note 40, at 78 (noting the “fine line” boys had to walk to conform to hegemonic masculinity and how “few boys reported much success at achieving” this goal); Connell & Messerschmidt, *supra* note 33, at 838 (“[H]egemonic masculinities can be constructed that do not correspond closely to the lives of any actual men. . . . [but they can] express widespread ideals, fantasies, and desires.”); Mike Donaldson, *What is Hegemonic Masculinity?*, 22 THEORY & SOC’Y 643 (1993) (suggesting that most men’s personalities do not closely correspond with the hegemonic masculine ideal, even among those groups most responsible for its formation and perpetuation).

228. RENOLD, *supra* note 40, at 171 (concluding from her ethnography that most boys “struggle in trying to make sense” of appropriate gender roles and that boys and girls who actively resisted the dominant hegemony “were the main recipients of . . . gendered and sexualised bullying and harassment”).

229. See BARNETT & RIVERS, *supra* note 174, at 42–43 (2004) (describing various studies showing that men suffer psychological and relationship harm from being detached from others, specifically their family); *id.* at 225–26 (“When we assume boys won’t play with the nurturing and house-care toys—even though research shows they will—we’re telling them that nurturing and domestic chores are not part of their future.”). See generally Hyde, *supra* note 22 (showing that males and females are similar on most psychological variables and discussing the negative impacts of overinflated claims of gender differences).

230. See Williams, *supra* note 133, at 37–45.

231. See Cooper, *supra* note 21, at 875–79; Williams, *supra* note 133, at 68–69.

sex segregated because of these characteristics furthers racial stereotypes and subordination for all African-American boys and men.<sup>232</sup>

Given that the fixed hegemonic masculinity associated with single-sex education can be harmful, a normatively preferable understanding of masculinity would be one that is fluid and multiple—accepting difference and experimentation—and not reliant on the domination of those who do not exhibit particular traits or linked to any particular expression of sexual identity. C.J. Pascoe has described such a notion of gender:

Identifying places and practices in which youth can try on different identities, explore varieties of gender practices, and mix them up opens possibilities for social change through a proliferation of gender identities, instead of locking girls and boys into strict gender identity practices that match up with their presumed genitalia.<sup>233</sup>

Boys trying to establish their gender identity within this broad notion of masculinity would be able to “draw on . . . ‘a full—and fully human—emotional palette.’”<sup>234</sup> Without fear of harassment, pressure, identity confusion, emotional torture, or physical violence, boys would be able to act and experiment in school according to their own desires without the need to conform to a masculinity that may or may not resonate with who they are.

Stated more broadly, this notion of masculinity and gender would divorce the concepts from biological sex. Both boys and girls would be free to draw on all forms of gendered identity rather than on merely the strict confines of masculinity and femininity. 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. Such “gender multiculturalism,”<sup>235</sup> would avoid the problems that result from a strict notion of masculinity to which boys have to adhere.

#### IV. ESSENTIALIZED VERSUS MULTIPLE MASCULINITIES: A BETTER WAY FOR THE LAW

The broad notion of masculinity I support is not only normatively preferable—particularly in comparison to the essentialist myth that has accompanied the expansion of single-sex education—but adherence to it should also be an important goal of the law. In this section, I will first consider the expressive effects that the regulation and the creation of all-boys educational opportunities may have on entrenching the essentialist myth. I will also suggest the safeguards that must be taken to guard against these expressive effects. A strong jurisprudence may be the most effective way to

232. See Williams, *supra* note 133, at 75 (concluding that “the proposed academies actually supported retrenchment of the very subordination that its proponents wanted to attack”).

233. PASCOE, *supra* note 34, at 165.

234. BARNETT & RIVERS, *supra* note 174, at 14 (quoting Michael Kimmel, *About a Boy*, VASSAR, Winter 2003, at 72).

235. See Connell, *supra* note 17, at 211–13.



excise policy decisions by school administrators that advance deeply essentialist ideas. Thus, I ultimately argue for strong interpretations of Title IX and the Equal Protection Clause, which will support a broad notion of masculinity and disfavor the hegemonic narrative described above.

*A. The Expressive Harms of Title IX's New Regulation*

Before looking at Title IX and the Constitution, it is important to be clear how the new Title IX regulation itself can work both to create and to entrench the essentialist myth of masculinity. A developed literature describes how a regulation that allows single-sex schooling and the actual creation of such schooling opportunities will increase the harmful application of the essentialist myth. In doing so, single-sex educational opportunities, especially those that employ the essentialist myth of masculinity in school policies and practices, may create serious problems under the regulation's prohibition of sex stereotyping.

Over the last decade, expressive law scholars have made great progress in explaining the ways in which law may reflect social norms in society.<sup>236</sup> While theories of the way in which law may affect norms are varied,<sup>237</sup> a core of expressive theory describes how law works by changing beliefs.<sup>238</sup> In line with these theories, the move to single-sex education for boys may significantly increase beliefs in the validity of the male stereotypes I described previously.<sup>239</sup> Validation of the essentialist myth, in turn, will increase its use by the general public with a similar increase in harms identified previously. Validation of the essentialist myth will also affect policy built on the myth in both co-educational and single-sex settings. However, because all-boys educational settings will require consistent consideration of the ways in which males learn, validation of the myth is likely to have a greater effect in the context of single-sex education.

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236. See generally Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35 (2002); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

237. See generally STEVEN A. HETCHER, *NORMS IN A WIRED WORLD* (2004) (developing a coherent, nonnormative theory of norms and applying this theory to areas of the law); ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000) (describing how norms reflect the equilibria that result from individuals signaling their discount rates); Geisinger, *supra* note 236 (describing how norms can arise from individuals adopting internal scripts reflecting stereotypical descriptions of the groups with which they self-identify); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997) (describing norms as reflecting a basic human preference for esteem).

238. Geisinger, *supra* note 236, at 63–65 (providing a detailed model of how law affects individual beliefs); Lessig, *supra* note 236, at 962–65 (describing generally how law affects social understandings of particular behaviors such as riding motorcycles without helmets); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 340–41 (2000) (describing the way in which the creation of a law may affect beliefs about majority sentiment); Richard H. McAdams & Dhammika Dharmapala, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law*, 5 AM. L. & ECON. REV. 1, 2–4 (2003) (describing how law may affect beliefs about the subject matter being regulated).

239. See *supra* Part III.

Both the new regulation and the subsequent creation of single-sex educational opportunities will affect what people believe about boys. In particular, both will likely increase individuals' certainty that the vision of boys that the essentialist myth promotes is objectively true.<sup>240</sup> This reification happens through the mechanisms by which law influences belief. For those people who know of the movement to single-sex schooling and believe that it is based in part on the need to educate boys differently because of their different essential characteristics, the regulation coupled with single-sex educational opportunities will validate this pre-existing belief. Put simply, if someone believes that sex segregation of boys is based on the fact that boys are inherently different and thus need to be educated differently, the legal support of such schools will act as proof of the truthfulness of that underlying belief.<sup>241</sup> Accordingly, a person with such beliefs would not be surprised if a school administrator designed a curriculum directly around the kinds of character traits the administrator believes make boys different, thus reifying the essentialist myth in curriculum development and education policy. Similarly, those who had not previously believed that boys are inherently different might assume such a belief based on the development of sex-segregated education.<sup>242</sup> The move to single-sex schooling is thus likely both to reflect and further entrench the essentialist vision of boys, with the resulting harms that accompany such a result.<sup>243</sup> To the extent that the essentialist myth described above was a primary motivator of the move to single-sex schools, the resulting expressive effect would likely be large.

The regulation drafters certainly recognized that the regulation and the resulting educational opportunities may influence beliefs in existing stereotypes. As a result, the drafters expressly made an effort to ensure that such stereotypes do not form the basis of curricular or educational decisions.<sup>244</sup> While traditional feminist concerns have claimed that separating women from men would negatively influence female stereotypes, I have already argued that such separation similarly affects male stereotypes to the detriment of all men and boys who do not conform to the essentialist myth. Thus, arguably the mere creation of single-sex schooling opportunities for boys—with the resulting increased acceptance of the essentialist myth of masculinity—violates Title IX's regulatory requirement prohibiting the promotion of sex stereotyping.<sup>245</sup> While this argument is admittedly tenuous, given that the purpose of the regulatory change was to allow the creation of single sex-educational opportunities, it is similarly clear that regulators are concerned about the effect the creation of such schooling opportunities will have on negative gender stereotypes.

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240. See Geisinger, *supra* note 236, at 65 (“Passage of a law will likely affect attitudes toward the behavior by increasing or decreasing the certainty with which beliefs regarding a behavior are held.”).

241. See *id.* at 68 (explaining that where individuals already hold a certain belief based on limited information “law can entrench a certain belief, leading to the establishment of a strong social norm”).

242. See *id.* at 66–67 (illustrating how laws can cause individuals to adopt new beliefs and preferences).

243. See *supra* notes 204–35 and accompanying text.

244. See *supra* notes 94–97 and accompanying text.

245. It is also possible that single-sex schools are constitutionally infirm. I address the constitutional arguments as they relate to the essentialist myth *infra* Part IV.C.

Thus, not all sex segregation in schools will be protected by the regulation. Educational policies, curricular developments, and any other element of single-sex educational opportunities that foster the essentialist myth of masculinity described previously would be subject to review as a violation of this regulatory restraint. As I will discuss in the next two sections, Title IX and the Equal Protection Clause also provide robust protection for individuals who claim that a specific school policy or curricula advances the essentialist myth.

*B. Title IX's Anti-Essentialism Thread*

Title IX is a powerful tool against sex discrimination in schools.<sup>246</sup> In several different ways, that power comes from its rejection of gender essentialism. In this section, I will sketch the basis for understanding Title IX as an anti-essentialist law and conclude that Title IX should provide strong grounds for rejecting educational practices that implement and further the essentialist myth of masculinity.

One of Title IX's overarching themes, from its enactment through its judicial applications today, is its rejection of essentialist gender roles. This theme was apparent at title IX's inception in its treatment of vocational education. At the time Title IX was enacted, there was widespread discrimination, both overt and subtle, in vocational education in the United States.<sup>247</sup> Women in vocational programs were channeled to "lower paying, sex-typed jobs," such as office clerical work, home economics, teaching, or childcare.<sup>248</sup> Aware of this problem, in the text of Title IX, Congress specifically prohibited discrimination in vocational admissions,<sup>249</sup> and the regulations mirrored that prohibition.<sup>250</sup> In the proposed and actual changes to the regulations in 2004 and 2006 for single-sex education, the Department of Education did not alter the prohibition on discrimination in vocational education.

Compared to the exception for admission to some other types of schools,<sup>251</sup> the strong protection against discrimination in admission to vocational schools reflects Congress's concern about sex stereotyping in vocational schooling. Senator Birch Bayh, the sponsor of Title IX, complained about vocational school admissions on the Senate floor, stating that the schools were sex segregated because of discrimination and "sex-role expectations" that guided women into stereotypical female careers and educational placements.<sup>252</sup> In strictly prohibiting discrimination in vocational education

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246. See Cohen, *supra* note 44, at 220–21 (arguing that Title IX provides protections against sex discrimination beyond that which the Equal Protection Clause guarantees).

247. See Dinah L. Shelton & Dorothy Berndt, *Sex Discrimination in Vocational Education: Title IX and Other Remedies*, 62 CAL. L. REV. 1121, 1125–35 (1974) (recounting the various ways vocational educational programs discriminated against women in the years prior to Title IX's enactment).

248. *Id.* at 1123; see also *id.* at 1126 ("The channeling of women into certain occupations no doubt has its roots in a socialization process which begins early in childhood.").

249. 20 U.S.C. § 1681(a)(1) (2006). In addition to prohibiting discrimination in vocational school admissions, Congress also prohibited admissions discrimination for graduate and professional schools and for public undergraduate schools. *Id.*

250. 34 C.F.R. § 106.35 (2007).

251. 20 U.S.C. § 1681(a)(1) (2006).

252. 118 CONG. REC. 3936–37 (1972) (statement of Sen. Bayh). Similar concerns were expressed about graduate education, such as medical and law schools, where women had been discriminated against in entering professions stereotypically thought of as male. See 118 CONG.

admissions and attempting to move beyond sex-role expectations in trade schooling,<sup>253</sup> Congress instilled a powerful anti-essentialist thread within Title IX's requirements.

Anti-essentialism is apparent in other aspects of the design of Title IX as well. In the area of professional education, in the early 1970s, girls and women had difficulty dreaming of going into professional careers because the educational opportunities required to go down those paths—at the time strongly associated with men and masculinity—were closed or minimally accessible to them.<sup>254</sup> Title IX has helped open these career paths to women<sup>255</sup> and today women are very close to outnumbering men in professional school enrollment.<sup>256</sup>

Title IX's application to athletic participation, one of the statute's biggest achievements, also demonstrates its anti-essentialist bearings. In the early 1970s, girls and women were not encouraged to play sports because it was not perceived to be a part of what it meant to be feminine. Title IX has radically changed that fundamental understanding of what it means to be a girl.<sup>257</sup> In fact, Title IX has so transformed the sports and female disconnect that, absent a high level of proof, courts will no longer accept the position, advanced by many schools in the face of a Title IX challenge, that they do not have sports for girls or young women because girls and young women are simply not interested in athletics.<sup>258</sup> Title IX has been a key part of moving toward the evisceration of that gender stereotype.<sup>259</sup>

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REC. 3936–38 (1972); 117 CONG. REC. 30,403–04 (1971).

253. This is one area in which Title IX has not made a huge difference as discrimination in vocational education stubbornly persists. See NAT'L WOMEN'S LAW CTR., TITLE IX AND EQUAL OPPORTUNITY IN VOCATIONAL AND TECHNICAL EDUCATION: A PROMISE STILL OWED TO THE NATION'S YOUNG WOMEN 6–7 (2002).

254. See, e.g., 118 CONG. REC. 274 (1972) (statement of Sen. McGovern) (“Today women make up about 37 percent of the labor force. But women hold only a small portion of the desirable positions. For example, in the United States, only 2 percent of dentists and 7 percent of physicians are women.”).

255. See, e.g., MARY ROTH WALSH, “DOCTORS WANTED: NO WOMEN NEED APPLY”: SEXUAL BARRIERS IN THE MEDICAL PROFESSION, 1835–1975, at 268 (1977) (finding upswing in medical school admissions due in part to federal requirements in the early 1970s).

256. See, e.g., NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 2007, at 30 (2007), available at <http://nces.ed.gov/pubs2007/2007064.pdf> (showing that in 2005, 167,000 women enrolled in first-professional programs compared with 170,000 men, with female enrollment projected to exceed male enrollment for the first time in 2006).

257. Compare NAT'L COLLEGIATE ATHLETIC ASS'N, 1981–82—2005–06: NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 201 (2007) (stating that in 1971–72, nearly 30,000 women participated in intercollegiate athletics compared with over 170,000 men), with *id.* at 57–58 (showing that in 2005–06, over 166,000 women participated in intercollegiate athletics compared to over 228,000 men).

258. See, e.g., *Neal v. Bd. of Trs. of Cal. State Univ.*, 198 F.3d 763, 769 (9th Cir. 1999) (“Title IX is a dynamic statute, not a static one. It envisions continuing progress toward the goal of equal opportunity for all athletes and recognizes that, where society has conditioned women to expect less than their fair share of the athletic opportunities, women's interest in participating in sports will not rise to a par with men's overnight.”); Cohen, *supra* note 44, at 263–65 (summarizing and theorizing cases addressing the “interest” analysis in Title IX athletic cases).

259. The stereotype is by no means completely destroyed. See Erin Buzuvis, *Survey Says . . . A Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821, 871–74 (2006) (describing how a 2005 change in Title IX's athletics regulations relies on a myth that boys are more interested in sports); Suzanne Sangree, *Title IX and the Contact Sports*

Another area where Title IX's strong anti-essentialist thread appears is in its protection against harassment based on gender nonconformity. Several fairly recent controversies involve students harassing another student for failure to display stereotypically masculine or feminine characteristics.<sup>260</sup> The Department of Education's guidance to schools reflects this anti-essentialism by specifically stating that claims of harassment "on the basis of the victim's failure to conform to stereotyped notions of masculinity and femininity" are covered under Title IX.<sup>261</sup>

When the cases have made it to court, judges have applied Title IX's anti-essentialism in their understanding of masculinity. In fact, in several of these cases, the courts specifically drew connections between the harassment the plaintiff experienced and stereotypical views of masculinity. For instance, the District Court for the District of Minnesota wrote:

Plaintiff contends that the students engaged in the offensive conduct at issue . . . because he did not meet their stereotyped expectations of masculinity. . . . It is . . . plausible that the students began tormenting him based on feminine personality traits that he exhibited and the perception that he did not engage in behaviors befitting a boy.<sup>262</sup>

Title IX, the court concluded, protects against "harassment based on the perception that [a student] did not fit his peers' stereotypes of masculinity."<sup>263</sup> The District Court for the District of Kansas formulated a claim similarly, concluding that the goal of the harassment at issue "appears to have been to disparage [the plaintiff's] perceived lack of masculinity."<sup>264</sup> In other words, the plaintiff was punished by the other students because "he did not act as a man should act."<sup>265</sup> The District Court for the Southern District of Indiana recently agreed, finding that a plaintiff alleges a Title IX claim if he demonstrates that he was harassed "because he was acting in a manner that did not adhere to the traditional male stereotypes."<sup>266</sup>

Scholars have written that these "gender nonconformity" Title IX claims reflect a concern with children being harassed because of "their failure to conform to the gender norms assigned to their sex (*i.e.*, their degree of masculinity if they are male or [of] femininity if they are female)."<sup>267</sup> In other words, Title IX prohibits schools from

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*Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 382–85 (2000) (criticizing the contact sports exemption, which allows contact sports to be sex-segregated, as promoting gender stereotypes).

260. *See, e.g.*, *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165, 1170 (N.D. Cal. 2000) (finding a valid Title IX claim for harassment that was based on the perception that the student was gay).

261. OFFICE FOR CIVIL RIGHTS, DEPT. OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 3 (2001).

262. *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000).

263. *Id.* at 1090–91.

264. *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 965 (D. Kan. 2005).

265. *Id.*; *see also id.* at 973 ("[T]he issue is . . . whether he was harassed on the grounds that he was perceived as failing to satisfy stereotypical gender expectations.").

266. *Seiwert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 953 (S.D. Ind. 2007).

267. Anthony E. Varona & Jeffrey M. Monks, *En/gendering Equality: Seeking Relief Under*

taking action against a student because that student fails to live up to what others believe it means to be a boy or a girl. This rejection of essentialism with respect to gender expression fits within the statute's general anti-essentialism and, as a result, would prohibit schools from placing boys who do not fit within one aspect of the hegemonic narrative of masculinity in any disadvantageous position.

Ultimately Title IX is, in substantial part, a statute about anti-essentialism. Just as Title IX does not allow schools to assume that girls and women are not interested in sports, vocational schooling, or professional careers, it should not tolerate schools experimenting with single-sex education based on the assumption that all boys possess the same characteristics or that all masculinity is the same.

### C. Constitutional Norm Against Sex Stereotyping

The guarantee of equality from the Equal Protection Clause can also be read, like Title IX, as strongly prohibiting essentialist notions of gender. Preventing sex-role stereotyping is a central basis of constitutional protections against sex discrimination. In the previously-discussed cases involving single-sex education,<sup>268</sup> much of the Court's concern was with overbroad stereotyping.

For instance, in *Mississippi University for Women v. Hogan*,<sup>269</sup> the case involving a male nurse attempting to gain admission to the all-female Mississippi University for Women, the Court wrote repeatedly that the Equal Protection Clause is concerned with the dangers of sex stereotyping. Justice O'Connor's opinion for the Court targeted policies that rely on "archaic and stereotypic notions" about "the roles and abilities of males and females" as unconstitutional.<sup>270</sup> Mississippi's enrollment restriction was based on such an archaic stereotype because it "perpetuate[d] the stereotyped view of nursing as an exclusively woman's job."<sup>271</sup> The Court noted that Mississippi's stated purpose in 1972 for establishing women-only colleges very clearly relied on "archaic and overbroad generalizations."<sup>272</sup> The school's charter stated that the school's purpose was to educate "the girls of the state" in the areas of, among other things, "school methods and kindergarten . . . bookkeeping, photography, stenography, telegraphy, and typewriting, and in designing, drawing, engraving, and painting, and their industrial application, and for their instruction in fancy, general and practical needlework . . . ."<sup>273</sup>

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*Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67, 67–68 (2000); see also Julie A. Baird, *Playing It Straight: An Analysis of Current Legal Protections to Combat Homophobia and Sexual Orientation Discrimination in Intercollegiate Athletics*, 17 BERKELEY WOMEN'S L.J. 31, 57 (2002) (labeling these "gender nonconformity" cases).

268. See *supra* Part II.A.

269. 458 U.S. 718 (1981).

270. *Id.* at 725; see also *id.* at 725 n.10 (identifying cases in which stereotypical gender roles, particularly that of women needing protection through exclusion from some benefit, had worked to the detriment of women).

271. *Id.* at 729.

272. *Id.* at 730 n.16; see also *id.* at 726 (discussing the invalidation of statutes that relied on "simplistic, outdated assumptions" about gender).

273. *Id.* at 720 n.1 (quoting MISS. CODE ANN. § 37-117-3 (1972)).

In the more recent *United States v. Virginia*<sup>274</sup> decision, which required the Virginia Military Institute (VMI) to admit women, Justice Ginsburg wrote extensively about sex-role stereotypes. She wrote that “supposed ‘inherent differences’” are prohibited as the basis of classification when they “create or perpetuate the legal, social, and economic inferiority of women.”<sup>275</sup> In response to Virginia’s argument that women would not choose to be educated according to VMI’s intense adversative method,<sup>276</sup> the Court accepted that most women, like most men, would not choose this method of education. The Court concluded, however, that Virginia was prohibited from excluding the women who would choose this method—those that buck the stereotype of what women (and men for that matter) want in education.<sup>277</sup> “Generalizations about ‘the way women are,’ estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description.”<sup>278</sup> In both *Virginia* and *Hogan*, essentialist stereotyping about women was found to be unconstitutional.

This concern about stereotyping permeates the other, noneducation equal protection cases as well. In 1977, when the Court adopted the “intermediate scrutiny” test for sex-based classifications in *Craig v. Boren*,<sup>279</sup> the Court described some of its past cases as forbidding sex-role stereotyping:

“[A]rchaic and overbroad” generalizations concerning the financial position of servicewomen and working women could not justify use of a gender line in determining eligibility for certain governmental entitlements. Similarly, increasingly outdated misconceptions concerning the role of females in the home rather than in the “marketplace and world of ideas” were rejected as loose-fitting characterizations incapable of supporting state statutory schemes that were premised upon their accuracy.<sup>280</sup>

Similarly, in *Orr v. Orr*,<sup>281</sup> in which the Court struck down a sex-based classification in a state alimony law, the Court wrote that classifications based on sex “carry the inherent risk of reinforcing stereotypes about the ‘proper place’ of women and their need for special protection.”<sup>282</sup> Further, when the Court struck down a Social Security policy awarding benefits to children of unemployed fathers but not mothers, it decried the “baggage of sexual stereotypes.”<sup>283</sup> More recently, the Court found that peremptory challenges excluding jurors based solely on their sex are unconstitutional because “[w]e have made abundantly clear in past cases that gender classifications that rest on

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274. 518 U.S. 515 (1996).

275. *Id.* at 533–34.

276. For a description of this adversative method, see *id.* at 522.

277. *Id.* at 542.

278. *Id.* at 550 (emphasis in original).

279. 429 U.S. 190 (1976). The intermediate scrutiny test, although not denominated as such at the time, requires that “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” *Id.* at 197.

280. *Id.* at 198–99 (citations omitted).

281. 440 U.S. 268 (1979).

282. *Id.* at 283.

283. *Califano v. Westcott*, 443 U.S. 76, 89 (1979) (quoting *Orr*, 440 U.S. at 283).

impermissible stereotypes violate the Equal Protection Clause . . . .”<sup>284</sup> Even in the cases maligned by sex-equality advocates as not sufficiently safeguarding against sex discrimination—*Rostker v. Goldberg*<sup>285</sup> and *Michael M. v. Superior Court*<sup>286</sup>—the Court still stated that it was concerned with sex-role stereotyping of women.<sup>287</sup>

The constitutional concern about sex-role stereotyping extends to classifications that stereotype men as well as women. *Stanley v. Illinois*<sup>288</sup> struck down a state statute that declared that children of unmarried fathers were automatically wards of the state upon the death of their mother.<sup>289</sup> The Court rejected the argument that “unmarried fathers are so seldom fit that [a state] need not undergo the administrative inconvenience of inquiry in any case,”<sup>290</sup> stating instead that “all unmarried fathers are not in this category; some are wholly suited to have custody of their children.”<sup>291</sup> In *Califano v. Westcott*,<sup>292</sup> the Court compared the stereotyping of men to the stereotyping of women in noting that the classification at issue there “presumes the father has the ‘primary responsibility to provide a home and its essentials,’ while the mother is the ‘center of home and family life.’”<sup>293</sup> Likewise, the law in *Stanton v. Stanton*<sup>294</sup> that declared women reach majority at eighteen while men reach it at twenty-one reflected the stereotype that “generally it is the man’s primary responsibility to provide a home and its essentials” so he needed more time to mature and to get education or training than women did.<sup>295</sup> The Court declared, “No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”<sup>296</sup> In *Hogan*, the Court noted that the

284. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994).

285. 453 U.S. 57 (1981).

286. 450 U.S. 464 (1981); *see also* Lucinda M. Finley, *Sex-Blind, Separate But Equal, or Anti-Subordination? The Uneasy Legacy of Plessy v. Ferguson for Sex and Gender Discrimination*, 12 GA. ST. U. L. REV. 1089, 1094–95 (1996) (criticizing *Rostker* and *Michael M.* for buying into sex essentialism).

287. *See Rostker*, 453 U.S. at 74 (concluding that the United States’ military draft restrictions were not based on a “traditional way of thinking about females”); *Michael M.*, 450 U.S. at 471 n.6 (concluding the same for California’s statutory rape law). *But see Rostker*, 453 U.S. at 86 (Marshall, J., dissenting) (“The Court today places its imprimatur on one of the most potent remaining public expressions of ‘ancient canards about the proper role of women.’” (quoting *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring))); *Michael M.*, 450 U.S. at 496 (Brennan, J., dissenting) (“[T]he gender classification in California’s statutory rape law was initially designed to further these outmoded sexual stereotypes, rather than to reduce the incidence of teenage pregnancies . . .”).

288. 405 U.S. 645 (1972).

289. *Id.* at 649, 658.

290. *Id.* at 656; *see also id.* at 653–54 nn.5–6 (quoting arguments from Illinois’s brief in defense of the statute).

291. *Id.* at 654.

292. *Califano v. Westcott*, 443 U.S. 76 (1979).

293. *Id.* at 89 (citations omitted).

294. 421 U.S. 7 (1975).

295. *Id.* at 10 (quoting *Stanton v. Stanton*, 517 P.2d 1010, 1012 (Utah 1974)).

296. *Id.* at 14–15.



exclusion of men reflected the stereotyped notion that nursing was an “exclusively woman’s job,” a notion that disadvantaged both men and women.<sup>297</sup>

This antistereotyping component of equal protection sex-discrimination jurisprudence has been closely studied by feminist legal theorists.<sup>298</sup> Mary Anne Case has argued that prohibiting stereotypes, rather than utilizing the formal analysis of intermediate scrutiny (that is, substantially related to an important governmental objective), has done the “bulk of the work” in the Court’s sex discrimination cases.<sup>299</sup> She claims that the Court requires a “perfect proxy” in order to sustain a sex classification: “That is to say, the assumption at the root of the sex-respecting rule must be true of either all women or no women or all men or no men; there must be a zero or a hundred on one side of the sex equation or the other.”<sup>300</sup> Justice Blackmun made this principle explicit in *J.E.B. v. Alabama ex rel T.B.*, stating that stereotyping would not be permissible even if there is statistical evidence supporting the conclusion that most women or men had a particular characteristic:

Even if a measure of truth can be found in some of the gender stereotypes used to justify gender-based preemptory challenges, that fact alone cannot support discrimination . . . . The Equal Protection Clause, as interpreted by decisions of this Court, acknowledges that a shred of truth may be contained in some stereotypes, but requires that state actors look beyond the surface before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination.<sup>301</sup>

This antistereotyping principle has been loudly critiqued as insufficient. In particular, antistatutory feminist theorists have argued that while the antistereotyping principle does the important work of making the government treat women fairly as individuals by preventing overbroad classifications, it overlooks the

297. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982).

298. See, e.g., Valorie K. Vojdik, *Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women From Combat*, 57 ALA. L. REV. 303, 307 (2005) (dividing the Court’s rejection of stereotypes into two categories: descriptive stereotypes, those that describe the “presumed abilities and interests of women,” and normative stereotypes, those that prescribe “the appropriate roles of men and women in our society”).

299. Mary Anne Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449 (2000) (“To determine whether there is unconstitutional sex discrimination, one need generally ask only two questions: 1) Is the rule or practice at issue sex-respecting, that is to say, does it distinguish on its face between males and females? and 2) Does the sex-respecting rule rely on a stereotype?”).

300. *Id.* at 1449–50. She continues:

Even a generalization demonstrably true of an overwhelming majority of one sex or the other does not suffice to overcome the presumption of unconstitutionality the Court has attached to sex-respecting rules: virtually every sex-respecting rule struck down by the Court in the last quarter century embodied a proxy that was overwhelmingly, though not perfectly, accurate.

*Id.* at 1450.

301. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994).

ways in which government actions beyond mere sex-role stereotyping perpetuate women's inferiority as a group.<sup>302</sup> Reva Seigel has explained the difference as follows:

For many, the belief that anticlassification commitments are fundamental entails the view that our tradition embraces a particular conception of equality, one that is committed to individuals rather than to groups. On this account, the tradition's embrace of the anticlassification principle signifies its repudiation of an alternative conception of equal protection, the antisubordination principle: the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups.<sup>303</sup>

Antistereotyping and formal equality, Ruthann Robson has argued, does nothing more than assimilate women into the dominant and idealized male world that remains unchanged.<sup>304</sup>

Yet, it seems that these criticisms do not fully appreciate the power of a strong reading of the antistereotyping principle from the Supreme Court's decisions, especially as applied to institutions that construct the identity of men and dominant masculinity. At a minimum, the antistereotyping theory furthers core equal protection values of treating people as individuals, but taken further, it can also help to dismantle "systemic gender hierarchy" and to reimagine a "society without [patriarchy]."<sup>305</sup> Cornelia Pillard describes how equal protection values are furthered:

Stereotyping makes patterns of inequality seem more natural, inevitable, and even invisible. A history of imaginations and opportunities circumscribed by perceptions of "average" or "typical" male versus female sex characteristics, and habits of exaggerating the relevance and scope of sex differences, are part of the architecture of patriarchal systems. Antistereotyping doctrine helps to break those habits to permit us to move beyond that history.<sup>306</sup>

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302. See, e.g., CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 117 (1979) (arguing that the key inquiry is "whether [a] policy or practice . . . integrally contributes to the maintenance of an underclass or a deprived position because of gender status"); Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. MICH. J.L. REFORM 13, 26–27 & n.53 (2001) ("For nearly two decades, critics of formal equality have questioned its capacity to secure meaningful equality for women, and have expressed concern that, in light of the different social and economic power of men and women, formal equality may legitimate or even exacerbate existing inequalities."). But see Ruth Colker, *Anti-Subordination Above All: Sex, Race and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (claiming that equal protection doctrine is better explained by antisubordination principles than anticlassification ones).

303. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1472–73 (2004).

304. Ruthann Robson, *Assimilation, Marriage, and Lesbian Liberation*, 75 TEMP. L. REV. 709, 715–17 (2002) ("[T]he notion of the dominant and idealized group . . . becomes the group to which outsiders such as women are to be assimilated.").

305. Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 949 (2007).

306. *Id.*

If all imperfect stereotyped notions of how men and women are to act and be treated by government are prohibited by the Constitution—no matter how close they approximate reality—gender essentialism, from the particular treatment of individuals to institution-wide construction of group identities,<sup>307</sup> would be constitutionally problematic. Rejecting gender essentialism as unconstitutional would work against heteronormativity, which is one of the important gender stereotypes in the single-sex narrative, and one stereotype that antistereotyping principles should, but frequently fail to, address.<sup>308</sup> With the Supreme Court’s repeated warnings that imperfect stereotypes are constitutionally suspect, it is not a difficult step to begin questioning how those stereotypes have emerged and how institutions have constructed them to seem natural. This endeavor, the central inquiry of this Article, has been linked to poststructuralism, a theory that “emphasizes the variety, complexity, and contingency of the discursive influences that shape subject formation.”<sup>309</sup>

The value of this poststructuralist approach is the way that it would deconstruct the institutional influences on men and masculinity, rather than simply reward women who do not fit stereotypes about femininity.<sup>310</sup> Traditional approaches toward antidiscrimination do not take the principle of antistereotyping far enough and leave the ideals of men and masculinity untouched:

The standard for assessing women’s relative difference is men; those institutional policies, practices, and structures that have been created for men are seen as the aspiration for women who can prove they are “really” just like men. Whether what has been established for men is beneficial for men or women—whether the norm is worth aspiring to or instead needs fundamental change—usually eludes the inquiry of the similarly situated model of equality.<sup>311</sup>

But adopting the strong antistereotyping approach suggested here, one that attacks essentialist notions of masculinity, would go beyond traditional antidiscrimination principles by examining the “underlying social norm” against which comparisons of

307. See Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN’S L.J. 68, 112–13 (2002) (advocating an approach to equal protection that dismantles the ways in which institutions create gender stereotypes and subordination).

308. See Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 484 (2007) (arguing that, despite not being recognized in federal or state courts, anti-sex stereotyping jurisprudence should reach heterosexist laws).

309. Kathryn Abrams, *Afterword: Critical Strategy and the Judicial Evasion of Difference*, 85 CORNELL L. REV. 1426, 1437 n.52 (2000); see also Marie Ashe, *Mind’s Opportunity: Birthing a Poststructuralist Feminist Jurisprudence*, 38 SYRACUSE L. REV. 1129, 1169–70 (1987) (explaining poststructuralism’s focus on anti-essentialism); 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)).

310. See Williams, *supra* note 19, at 839 (advocating “a systematic refusal to institutionalize gender in any form”).

311. Finley, *supra* note 286, at 1109; see also Levit, *Feminism for Men*, *supra* note 21, at 1042 (describing formal equality theory as using men as the “benchmark” and male experiences as the “accepted and unquestioned reference point”).

women have been made: men and dominant masculinity.<sup>312</sup> Katherine Franke has called this a “deeply radical move” that would separate masculinity from maleness and femininity from femaleness.<sup>313</sup> When the law complies with essentialist notions of how men and women should behave, desire, and feel and allows institutions to build and construct those notions, the law is furthering sex-role stereotyping of men and women. Furthermore, it perpetuates the association of power—which has been traditionally masculine—with men and, by proxy, enforces and furthers a certain type of manhood. Removing this association helps spread power to nonconforming men and to women.<sup>314</sup> This principle is consistent with a strong reading of the antistereotyping jurisprudence, one that understands how men’s roles are just as stereotyped and socially constructed as women’s.

Strongly interpreting this antistereotyping strand of equal protection doctrine, as suggested here, would call into question schools that adopt or further the essentialist myth of masculinity described above. As demonstrated earlier, the single-sex education narrative of what boys need stereotypes boys, and schools that participate in the discourse perpetuate a hegemonic masculinity that harms both boys and girls. This form of masculinity aligns with traditional masculinity that has oppressed girls and women and limited the identity construction of all boys and men. Because, as Katherine Franke has argued, the “wrong of sex discrimination must be understood to include all gender role stereotypes whether imposed upon men, women, or both men and women,”<sup>315</sup> the narrative’s construction of this masculinity is the essence of sex stereotyping and sex discrimination, and Title IX and the Constitution should prohibit schools from acting upon or implementing it.

#### CONCLUSION

Boys-only education is a risky proposition. If done poorly, it can reinforce stereotypes and be a “breeding ground” for sexism and misogyny.<sup>316</sup> When California experimented with single-sex education in the late 1990s, researchers found that the single-sex classrooms, particularly the boys-only classrooms, reinforced traditional notions of masculinity—portraying men and boys as “tough, ‘rowdy,’ and most

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312. Finley, *supra* note 286, at 1109.

313. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 87 (1995).

314. *Cf.* Karst, *supra* note 178, at 505 (“The heart of the ideology of masculinity is the belief that power rightfully belongs to the masculine—that is, to those who display the traits traditionally called masculine.”).

315. Franke, *supra* note 313, at 8.

316. *See, e.g.*, Finley, *supra* note 286, at 1119 & n.133 (noting studies that “document elevated incidents of sexism and expressions of derogatory attitudes about women in all-male educational settings”); Christie P. Karpiak, James P. Buchanan, Megan Hosey & Allison Smith, *University Students From Single-Sex and Coeducational High Schools: Differences in Majors and Attitudes at a Catholic University*, 31 PSYCH. WOMEN Q. 282, 282 (2007) (finding that “[m]en from single-sex schools were less likely to hold egalitarian attitudes about gender roles”); Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451, 499–500 (1999) (recounting studies showing that single-sex schools for boys lead to sexist attitudes).

importantly, not girls or women.”<sup>317</sup> But education experts have also devised and studied ways in which gender-conscious programs within single-sex schooling can have the effect of breaking down stereotypes.<sup>318</sup> Thus, implementation is key in determining whether single-sex education reifies or breaks down stereotypes of masculinity.

The climate surrounding the recent changes to Title IX’s regulations does not indicate that the expansion of single-sex education in this country is off to a good start in this regard. When the Department of Education announced that it planned to change its regulations concerning single-sex education, it touched a nerve in this country. Single-sex education proponents had long advocated for more opportunities on the basis of greater local control, increased diversity for parents, supposed better learning outcomes, and possibly a more equitable learning environment for girls, but a new justification was brewing when the changes were being considered. This justification, based on the increased attention to boys in the popular press, relied on traditional stereotypes about boys and masculinity. Because, as essential characteristics, boys were heterosexual, aggressive, active, obsessed with sports, competitive, stoic, and—above all else—not girls, schools needed to educate them apart from girls and to educate them differently.

This narrative of how boys are and what they need corresponds to a dominant hegemonic masculinity that harms both boys and girls, albeit in different ways. Boys who struggle with attaining the hegemonic version of masculinity suffer—from verbal taunts to emotional distress to physical abuse. Girls, especially in light of the masculinity narrative’s overlap with traditional patriarchal masculinity, suffer at the hands of boys who are taught that girls are weak, different, and alien. And all boys’ individuality is stifled when they are told that there is only one way to be masculine. Sex stereotyping in this form, especially with its reification of powerful forms of masculinity, runs counter to strong readings of Title IX’s antiessentialism thread and the Constitution’s protections against sex stereotyping.

Although there may be other reasons to reject single-sex education in its entirety, this Article does not make that argument. Rather, this Article argues that the essentialist myth of masculinity and its harmful effects should be a warning for schools

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317. 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 52, available at <http://www.oise.utoronto.ca/depts/tps/adatnow/final.pdf>; see also 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, *supra* note 110, at 280 (analyzing California’s initiative and concluding that “both boys and girls upheld hegemonic notions of masculinity through limited expectations of how boys should act”).

318. See, e.g., ASKEW & ROSS, *supra* note 178, at 72–92 (describing antisexist strategies for working with boys); Bronwyn Davies, *Working with Primary School Children to Deconstruct Gender*, in BOYS AND GIRLS IN THE PRIMARY CLASSROOM 134 (Christine Skelton & Becky Francis eds., 2003) (describing ways to openly discuss gender in classrooms to break down stereotypes); Kathy Sanford & Heather Blair, *Engendering Public Education: Single-Sex Schooling in Western Canada*, in GENDER IN POLICY AND PRACTICE: PERSPECTIVES ON SINGLE-SEX AND COEDUCATIONAL SCHOOLING, *supra* note 110, at 90 (describing an equal opportunity model of single-sex education); Kruse, *supra* note 219 (describing Dutch single-sex antisexist educational program).

that implement single-sex education. In implementing sex segregation, schools must vigilantly work against this myth, both in the way they talk about and teach to boys. If schools do not heed this warning, Title IX and the Constitution should prohibit this essentialization of masculinity.